2-25-2010

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

DON HALVORSON, Plaintiff-Appellant and CHARLOTTE HALVORSON, Plaintiff v. 180 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-

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Second Judicial District for Latah County
Honorable Carl Kerrick, District Judge presiding

Don Halvorson
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Pro se Appellant

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STATEMENT OF THE CASE

Statement of the Case: As Defendants seem bent on answering a case they have made up initially in the District Court (that is, as opposed the actual case of the agency record), Plaintiffs restate their case for whatever reason that the Defendants' counsel does not hear. To wit: Plaintiffs challenge the constitutionality of Defendants' activities on Camps Canyon Road (hereafter CCR) in the SENE Section 15 T39N R3WBM.

Specifically, Plaintiffs claim Defendants' policies, customs, actions and/or failures to act on CCR work a deprivation of property—the envelopment of more of Plaintiffs' land—without due process of law by denying Plaintiffs an opportunity to be heard in a meaningful way at a meaningful time.

Plaintiffs have pled that Defendants have failed to circumscribe their broad authorities with statutory provisions of constitutional guarantees and remedies for erroneous deprivations. Their actions/failures to act, as manifestations of their final decisions under their policies/customs of maintenance and improvement (widening, straightening, altering of CCR and/or highways presently existing at a lesser width); determination of Plaintiffs' alleged encroachment on the easement and repeated damages to Plaintiffs' fence; issuance of, continuation of, and/or failure to timely revoke the first Wagner driveway access permit; and refusal to exhaust agency remedies, have prejudiced Plaintiffs' property interests.

Defendants have never acquired a legal "right of way" for their maintenance and improvement activities.

Defendants' issuance of the first Wagner driveway access permit for trespass on Plaintiffs' land and the repeated damage of Plaintiffs' fence without notice of encroachment are unlawful. Although the Wagners voluntarily quit the first driveway access after the Rimrock survey showed it to be trespassing, the Defendants have continued their claimed right to issue driveway access permits for third parties across Plaintiffs' land under their claimed 50 foot "right of way".

Defendants' have no authority or rational basis of a legitimate governmental interest to regulate Plaintiffs' use of their land, save for the legally established jurisdiction of the easement, CCR.

Plaintiffs assert that Defendants have violated Plaintiffs due process (substantive and procedural) and/or equal protection rights. Plaintiffs seek declaratory and injunctive relief and the cessation of Defendants' invalid policies, customs and activities and the return of their wrongfully taken land. If the Court determines that Plaintiffs' constitutional rights have been violated, as a matter of law, Plaintiffs seek full common law damages to be determined by a jury. In the event that the Court deems that due process was adequately afforded Plaintiffs, they seek action under tort, inverse condemnation, trespass and/or nuisance.

Defendants' maintenance and improvement activities, policies and/or customs are continuous and ongoing. Plaintiffs assert that the width of CCR is limited to the "surface of roadway" and was 15 feet wide in the SENE Section 15 T39N R3WBM or less prior to the late fall of 2005 and is now 21 feet and growing. Further, due to the numerous alterations on CCR Defendants are unable to accurately locate any prescriptive claim and have intentionally destroyed the evidence of that claim—that which had been used and maintained at the public expense for five years.

At cross summary judgment, after a year of delay, harassment and obfuscation related to Defendants' claim to a prescriptive 50 foot-25 feet from centerline "right of way", Defendants reformulated their claim to a 50 foot "right of way". It was obviously not established by use and maintenance at the public expense for 5 years. Rather

Defendants restated it to be a minimum 50 foot width mandated by Idaho law [I.C.§40-2312].

Further, Defendants claim that their authority under I.C.§40-2312 absolves them of any duty or discretion: to follow any statutory provisions for Plaintiffs' constitutional guarantees (5th and 14th Amendments US Constitution); to limit their jurisdiction to highways and public rights of way under I.C.§40-1310(1) (see *Appellants Brief Addendum,* pp. xvi-xvii) as set forth under I.C.§ 40-202(3) (see *Appellants Brief Addendum,* pp. v-vi); or to allow Plaintiffs to exhaust agency remedies or to challenge commissioners decisions, conclusions, findings or inferences which prejudice Plaintiffs' property rights.

Defendants have claimed Plaintiffs' fence encroaches on the "right of way" but have never served Plaintiffs notice and have repeatedly denied Plaintiffs a hearing regarding encroachment or validation of the legally established public rights in CCR. Plaintiffs have sought post deprivational hearings, formal and informal; validation of the legal establishment of the Defendants' claims of public rights in the easement, CCR in the SENE Section 15 T39N R3WBM; and/or evaluation of Defendants' actions under I.C.§ 67-8003 (see *Appellants Brief Addendum,* pp. xxi-xxii).

In a nutshell, Defendants state that their jurisdiction and their right to deny Plaintiffs' challenges to their jurisdiction rests under I.C.§40-2312. Plaintiffs assert that Defendants' jurisdiction rests in I.C.§40-202(3) and whether correct or incorrect, Plaintiffs' right to challenge Defendants' claims rests with the 14th Amendment of the US Constitution.

At best, Defendants assertions under I.C.§40-2312 are implying that the Idaho legislature has enacted an invalid statute and they were just following it and now simply seek an "advisory" opinion on their interpretations at the expense of Plaintiffs' time, money and effort.

Statement of the Facts

The undisputed material facts remain the same as in *Appellant's Brief*, at p. 15 L. 11 through p. 16, L.4. The disputed material facts also remain the same—the location, width, length and character of the easement of CCR which has been used and maintained at the public's expense remains disputed. See *Appellant's Brief*, at p. 16 L. 4 through p. 16, L.7

Plaintiffs reassert their depiction of the statement of the case and facts of the case in their *Appellants' Brief* as being factually correct and an honest and undistorted portrayal, and point out Defendants' counsel's distortions of the facts as follows.

Plaintiffs' Response to Defendants' Facts

To the extent that *Respondents' Brief* fails to state specifically where Respondents disagree with *Appellants' Brief* rendition of the facts of the case, and to the extent that the Respondents may intend to misconstrue any of the undisputed facts or to imply that some facts are not disputed, Plaintiffs offer the following clarification of the facts of the *Respondents' Brief* (*Respondents' Brief*, pp. 6-11, pars 1 through 20). Plaintiffs will speak to each listed fact of *Respondents' Brief*.

Facts #1 and #3: Plaintiffs dispute any implication that CCR has been legally established as a "public road". Whether CCR is a "public highway" is a legal conclusion, based on substantial evidence and findings of fact in the agency record to support such a

conclusion. Plaintiffs have requested and have not received any agency records of dedication of CCR to the public interest. Indeed, Defendants state no such dedication has taken place. Respondents' Brief misrepresents the Affidavit of Dan Carscallen. There is no validity to the inference that Dan Carscallen made affiance that "Camps Canyon Road was a public highway prior to adoption of the official map"[1].

Fact #4: Terms such as "the same approximate centerline" are undefined, ambiguous and oxymoronic and have no probative value. Plaintiffs dispute any implication that CCR has not been altered in width and location since the late fall of 2005 or in 1996. Mr. Hodge conducted no survey, and expressed no competency or foundation for his evidence other than his reading of the aerial photos for which he brought forth no evidence that the photos were orthogonally rectified or comparable by scale or in any reliable way as evidence of or non movement of the centerline of CCR. Mr. Hodge does not state CCR has not been altered in location or width.

Facts #5 and #11; See also Statement of the Case: Plaintiffs assert that this case concerns all manners by which Defendants have exerted their governmental authority to take and damage Plaintiffs' property—whether by improvement, maintenance, or issuance of driveway access permits. Plaintiffs dispute any implication that Plaintiffs' claims are restricted to or that "the only significant activities on Camps Canyon Road in the area of Halvorsons' real property are graveling, road grading and snow plowing".

Facts #6 and #10: The average width of the "surface of the roadway" in the SENE Section 15 T39N R3WBM after the 2006 improvements is 21 feet and growing as testified to by the Defendants. The addition of width in the 2005-2006 widening of CCR in SENE Section 15 T39N R3WBM is 6 to 8 feet, leaving the width prior to the widening

[1] R., Vol. IV, p. 642, par. 3.

process 13 to15 feet by Defendants' own admissions. Compare to Plaintiffs' *Complaint* (R., Vol. I, pp. 11, par. 8 ("In 1996 the usage width of the road was 10-12 feet before the alteration and was only 15 feet in a few places after the road had been moved). Defendants also state that they added 4feet to the NE side of CCR in 1996 in the vicinity of the 3+/- acre parcel making their claim to the "surface of the roadway to be 11 feet prior to 1996). The parties do not disagree on the width before the 2005 widening (15 feet) or before the 1996 alterations (11 feet). The parties also do not disagree on the location of the 2005 centerline of the road prior to the subsequent alterations in the narrowest part of Plaintiffs' buffer. Here the centerline was 15 feet from Plaintiffs' fence. As was previously stated the width of the used portion of the road was also 15 feet leaving 7 ½ feet from centerline of road usage and 7 ½ feet of buffer. Compare to Plaintiffs' testimony at R., Vol. V, p. 1095, L.13-22 ("5-10 feet of buffer was left in the narrowest part of the buffer). Plaintiffs dispute that the 6-8 feet of additional width of 2005-2006 have not impacted on Plaintiffs' buffer and fence (R., Vol. VII, pp. 1374, 1377, 1379, 1380, and 1381 (photos showing placement of dirt and gravel into Plaintiffs' buffer and onto Plaintiffs fence in 2006 and the plowing of snow onto Plaintiffs' fence beginning in the winter of 2006-7). These activities of maintenance and improvement have continued throughout the SENE Section 15 T39N R3WBM and throughout the course of this litigation. Further Plaintiffs continue to dispute Defendants' undocumented alterations of width and centerline location of CCR since 2005. Plaintiffs have received no notice of encroachment of their fence or hearing, yet Mr. Payne testifies that Plaintiffs' fence is within the Defendants' right of way (R., Vol. V, pp. 858-59, Defendant Payne's Response to Second Interrogatories 28 ("To the extent that any dirt

and gravel now lie on Plaintiffs' fence, such is a result of the Plaintiffs placing the fence within the NCLHD prescriptive right of way"). Defendants' Counsel states at cross summary judgment 3/3/09 that Plaintiffs' fence is encroaching on the NLCHD right of way (Tr., Vol. I, p. 131, L. 22 through p. 132, L. 1 ("...amounts to an encroachment on the Highway District's right of way").

Facts #13, #14, #15, #16 and #17: Plaintiffs dispute any implied or inferred evidence by any Defendant that he did not have constructive knowledge that the centerline of CCR had not been altered from its earliest recorded history—the description of Plaintiffs' and the Wagners' deeds.

(a) CCR forms the NE boundary of the 3+/- acre parcel (R., Vol. VI, p. 1149 Wagner Deed description ("thence in a northwesterly direction...along the County Road...")). At cross summary judgment Defendants' counsel states incorrectly that CCR forms the east boundary of the 3+/- acre parcel. See Tr., Vol. I, p. 118, LL. 10-14 ("[a]nd it's pursuant to this 1911 deed, which in several places references its description as being—the easterly description being the centerline of CCR"). The Defendants' shift of the compass point, whether intentional as to deceive or not, is obviously incorrect and of no probative value as it simply leads to obfuscation of the issues.

(b) *Respondents' Brief*, p. 9, par. 13, *Fact #13* ("Highway District foreman Dan Payne met with Mr. Wagner who showed Mr. Payne a post next to the road which Mr. Wagner said represented his southern property line. North of that post was an old driveway that used to lead to a home and outbuildings on Mr. Wagner's property. At least 50 feet further north of that driveway, Mr. Wagner

had begun construction of a driveway which he wanted to be the location for his approach permit. Mr. Payne approved his approach permit application for that location. Payne Second Affidavit, par. 6, R., Vol. VI, p. 1211 ("fifty feet further north" of *any* post placed at the edge of CCR in the SENE Section 15 is wholly on Plaintiffs' land. Whether or not Mr. Payne shifts the compass point direction of the historic driveway intentionally, as to deceive—the historic driveway was 50 feet to the west of Mr. Wagner's post and not 50 feet to the north of that post; Mr. Payne's description is implausible and of no probative value and only leads to obfuscation of the issues. Mr. Payne's statement is material only if the post was placed west of the 3+/- acre parcel's east property line as it is the east property line which was trespassed upon by the first Wagner driveway access permit. See R., Vol. VII, pp. 1383 (photo taken after Mr. Wagner "removed" the rocks from his first driveway and constructed a second; Mr. Wagner's post, at D, is next to CCR 50 feet east of the east property line, at B (as laid out by Rimrock Consultants survey), and which runs North and South).

(c) *Respondents' Brief*, p. 9, par. 14, *Fact #14* ("Mr. Wagner told Mr. Payne that Halvorson had complained that the driveway approach was on the Halvorsons' real property., Mr. Payne reviewed Wagners' Deed to Wagners' real property, and verified by inspection that the approach for which the permit had been issued was located well within Wagner's property. Payne Second Affidavit, par. 7, R, Vol. VI, pp.1211-1212). Mr. Payne stated he physically inspected the permit location. Plaintiffs hold fee in all lands east of the east property line abutting to or underlying CCR in the SENE section 15. See R., Vol. V, p. 854,

Defendant Payne's Response to Plaintiffs' Second Interrogatories 18 ("Check it. If you [Mr. Wagner] are within the prescriptive right of way, your driveway access permit is okay"). See R., Vol. V, p. 852, Defendant Payne's Response to Plaintiffs' Second Interrogatories 12 (Dan Payne measured a distance of 699 feet along CCR, which measurement was part of Wagner's deed...Dan Payne determined based upon these observations that the location of the Wagners' first driveway was within Wagners' property"). Defendants' knew or had constructive knowledge of the alterations in the centerline of CCR in 1996 (see *Appellants' Brief*, Statement of the Case) and the Wagner deed description was no longer accurate nor could the location of the east property line be determined by the location of the centerline of CCR at the time. See R., Vol. V, p. 793 Defendant Arneberg's Response to Plaintiffs' First Request for Admissions No. 27, subpart c 16 (Defendant Arneberg admits that CCR has been moved—"minor movement"). Mr. Arneberg states minor movement means straightening of curves and widening of CCR (R., Vol. V, p. 867-868, Defendant Arneberg's Response to Plaintiffs' Second Interrogatories 16 ("Minor movement includes some straightening of curves and the widening of approximately 4 feet...").

(d) *Respondents' Brief*, p. 9, par. 14, *Fact #15* ("Mr. Wagner told Mr. Payne that Halvorson had obtained a survey of the area and, based on that survey, that he wanted Mr. Wagner to move his driveway. Mr. Wagner filled out a new application and showed Mr. Payne the location, which was at least one hundred feet north of the original, permitted approach. Mr. Payne approved this second application on June 9, 2006. R, Vol. VI, pp.1215-1216 (Wagner 6/9/06 permit).

Dan Payne revoked the first permit and threw it away as it was no longer valid. Payne Second Affidavit, par. 9, R, Vol. VI, p. 1212. What Mr. Payne states Mr. Wagner states is hearsay and is inadmissible. Mr. Wagner approached Plaintiff, Don Halvorson, seeking resolution to the obvious trespass after Rimrock Consultants drove the stakes for the survey. Plaintiffs informed Bob Wagner that they would cooperate with the Wagners in trying to resolve the matters with the NLCHD if he could get the Defendants to agree (R., Vol. VI, p. 1355, par. 15). Mr. Payne incorrectly states the direction of the second permitted approach—that is where the 2nd driveway accessed the road—relative to the first. Any access 100 feet north of the first is wholly on Plaintiffs' land—100 feet north of the south side of CCR in the SENE Section 15 T39N R3WBM is wholly on Plaintiffs' land and at least 50 feet north of any claimed 50 foot right of way, legally claimed or not (R., Vol. VI, p. 1156 (Amended Rimrock Survey). Further, Defendant Payne had signed off on the Wagners' Latah County Building Permit (R., Vol. V, p. 873) that valid road access had been obtained by the Wagners on 3/21/06. Whether Defendants were misstating the obvious compass direction, intentionally or inadvertently, they provide no rational basis for their decision to either issue the first Wagner permit or to continue it or not revoke it.

(e) *Respondents' Brief*, p. 9, par. 14, *Fact* #16 ("Mr. Wagner proceeded over the next weekend to construct the new driveway and he had the rock used in construction of the first driveway pulled onto his property and filled in the cut that was made for the first driveway with soil. Payne Second Affidavit, par. 10, R, Vol. VI, pp. 1212"). There is no indication that Mr. Wagner agreed with the

Defendants that his first driveway access was not wholly on Plaintiffs' land or that it was lawfully permitted. Nor is there any indication that the Wagners would construct a driveway access to CCR without a lawful permit. The Wagners obtained their 2nd permit on 6/9/06 (R., Vol. V, p. 875), a Friday. The NLCHD works 4-10 hour shifts in the summer, Monday through Thursday. The Wagners would have to have to gone out of their way and made special arrangements to obtain a permit that day.

(f) *Respondents' Brief*, p. 9, par. 14, *Fact #17* Defendants acknowledge that the issuance of the first Wagner driveway access permit was a matter of NLCHD policy. The issuance of the permit was approved by the NLCHD policy makers. See R., Vol. V, p. 880, Defendant Hansen's Response to Plaintiffs' Second Interrogatories 24 ("Hansen believes that the first Wagner driveway access permit was lawfully issued").

Fact #18: Plaintiffs requested repeatedly that if the Defendants were claiming public rights to a prescriptive, "public road", 50 foot-25 feet from centerline width as it was then located to validate the legal establishment of their claims under I.C.§40-203a under their own resolution. Plaintiffs filed Requests for Regulatory Taking Analysis under the IRTA. Plaintiffs repeatedly requested post deprivation hearings as the policies/customs of maintenance and improvement and determining of encroachments to CCR are ongoing and continuous. All attempts to resolve the issues were summarily refused by Defendants and denied applicability by Defendants' counsel (R., Vol. V, p. 821-823 ("Landick said it was not the Highway District's responsibility to initiate the validation proceedings...there would be no official response to those filings [Plaintiffs'

requests for Regulatory Taking Analysis] as they do not technically pertain to the proceedings...").

Procedurally

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 the centerline was located approximately the same as it was in 1974.

ARGUMENT

Introduction:

There is no set of admissible material facts which would release Defendants from liability in this case, as Defendants have not obtained a legally established "right of way" for their admitted to activities. Even their invalid claim of a 50 foot right of way mandated by law fails as a simple matter that it is located by the centerline of CCR which they admit to altering. As a matter of law, Plaintiffs have a valid 42 USC § 1983 claim as Defendants, under the color of state law, have deprive Plaintiffs of their property interests without due process (procedural and substantive) and/or equal protection of the law.

Defendants' Counsel stated his confusion with the issues of this case and complaints of the voluminous material (Respondents' Brief, at p. 12 LL.10-11). Plaintiffs assert that his complaints are a direct result of his failure to bring forth an accurate factual foundation and a plausible legal analysis of the problems the Plaintiffs face with their specific situation on CCR—the continual invasions of their land without a legally established "right of way" and without allowing Plaintiffs an opportunity to

challenge the Defendants' decisions in a meaningful way at a meaningful time. The volume of material in this case is a result of Defendants' counsel trying to circumvent the issues rather than deal with them.

This is a simple matter of Defendants making alterations to an unrecorded prescriptive easement without first obtaining a legal "right of way". Compounding and complicating this matter is Defendants' refusal to allow Plaintiffs to challenge their discretionary and operational decisions concerning Plaintiffs' land and fence—property interests protected by the 14th Amendment by their deliberate indifference displayed by their refusal to exhaust agency remedies in deliberate indifference and callous disregard for the force of the law.

Reply to Respondents' Brief:

I. The Defendants, Defendants' counsel, and the District Court Judge have wasted Plaintiffs' time, money, and effort.

I.R.C.P. Rule 1(a) reads in part as follows.

> ...These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding.

I.R.C.P. Rule 1(a).

Not only is Defendants' motion for summary judgment without foundation or legal merit; it is too unreasonable to be considered plausible. It is beyond frivolous; it totally contradicts case law and itself—an utterance of something reasonable and/or a communication of any attempt at a coherent justiciable decision. It is inane. Anthony D'Amato, Leighton Professor of Law, Northwestern School of Law in Public Law and Legal Theory Research Paper Series, *A Quick Primer on Logic and Rationality,* offered insight into such contradictions, thusly.

> Gottlob Frege in 1879 provided an answer to the charge that the validation of logic involves circular reasoning. He said that the rules of logic "neither need nor admit of proof" because they are part of what it means to be rational. There is no sense in asking whether logic itself is justified, Frege claimed, because logic tells us what "justification" is. Frege's idea that logic is foundational for rational thought as well as for intelligible communication was expressed in a quite different way by Strawson when he said that a man who contradicts himself "may have succeeded in exercising his vocal chords," but has not communicated with anyone: "He utters words, but does not say anything.". Accordingly, we could answer Judge Jones not by arguing that she is bound in some normative or moral sense to obey the rules of logic, but rather that if she chooses to violate those rules she has simply defeated her own attempt to communicate her decision to the parties and to the public. Similarly, when a person deliberately utters an illogical string of words, our inward response is not that he's doing something immoral like lying but rather that he is wasting our time and insulting our intelligence.

Id., at 8.[2] [3]. The mathematician, Bertrand Russell, referred to such inane antics as simply "noise without meaning"[4].

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[2] In conclusion to his review cites .Gottlob Frege, *The Foundations of Arithmetic* 4 (2d ed.1980). "[W]hat are things independent of the reason?" he asked rhetorically, at 36; and P.F. Strawson, Introduction to Logical Theory 2 (1952).

[3] See also Russel's Paradox The set of all sets which are not elements of themselves (which includes, and therefore does not, and therefore does include itself); as it appears in van Heijenoort's commentary at van Heijenoort 1967:124-125, "There is just one point where I have encountered a difficulty. You state (p. 17 [p. 23 above]) that a function too, can act as the indeterminate element. This I formerly believed, but now this view seems doubtful to me because of the following contradiction. Let *w* be the predicate: to be a predicate that cannot be predicated of itself. Can *w* be predicated of itself? From each answer its opposite flows. Therefore we must conclude that *w* is not a predicate. Likewise there is no class (as a totality) of those classes which, each taken as a totality, do not belong to themselves. From this I conclude that under certain circumstances a definable collection [Menge] does not form a totality. Jean van Heijenoort (1967, 3rd printing 1976), *From Frege to Gödel: A Source Book in Mathematical Logic, 1979-1931*, Harvard University Press, Cambridge MA.

[4] That contradiction [Russell's paradox] is extremely interesting. You can modify its form; some forms of modification are valid and some are not. I once had a form suggested to me which was not valid, namely the question whether the barber shaves himself or not. You can define the barber as "one who shaves all those, and those only, who do not shave themselves." The question is, does the barber shave himself? In this form the contradiction is not very difficult to solve. But in our previous form I think it is clear that you can only get around it by observing that the whole question whether a class is or is not a member of itself is nonsense, i.e. that no class either is or is not a member of

Plaintiffs will outline their assertions why such a simple matter as a two step analysis of Plaintiffs' 42 USC §1983 action for due process (procedural and substantive) and equal protection of the law has become a convoluted voluminous mess. The crux of the mess rests with Defendants' counsel's failure to bring forth any cogent legal analysis of the issues—he arbitrarily bases Defendants' claims of public rights to a 50 foot-25 feet from centerline "right of way" solely on an invalid interpretation of I.C. § 40-2312. The volumes of material[5] speak to the weakness of the Defendants' claim that I.C. § 40-2312 sustains their burden of proof of their jurisdiction and counsel's evasive techniques to avoid a simple legal analysis of the problem. Where it may take a few pages of paper to state Plaintiffs' case that they have a right to challenge Defendants decisions, conclusions, findings and inferences as their actions/failures to act have prejudiced Plaintiffs' property rights protected by the 14th Amendment of the US Constitution; it takes a forest of trees to answer Defendants' childish antics of maneuvering to circumvent the problems Plaintiffs face on CCR—how to stop Defendants continued onslaughts on Plaintiffs' land and fence.

These volumes of material represent the extent to which Defendants' counsel will go to avoid the examination of Defendants' claims—the validity of the legally established public rights in CCR under I.C. § 40-2312. It is this very avoidance which has necessitated this matter to be a federal case. And even at this late date, Defendants' counsel would rather distort the facts than settle the matters on their legal merits—

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itself, and that it is not even true to say that, because the whole form of words is just noise without meaning. Bertrand Russell, *The Philosophy of Logical Atomism*

[5] 2500 years ago Plato did place a moral judgment on activities such as displayed by Defendants and their counsel by saying the good need no rules to act responsibly and the bad will simply look for a way around the rules.

whether Defendants have a lawful claim to public right in a 50 foot—25 feet from centerline adjudicated by I.C.§40-2312. The District Court has erroneously granted Defendants summary judgment on all Plaintiffs' *Complaint* based on a short phrase, "[a]ll highways …shall not be less than 50 (fifty) feet wide, except those of a lesser width presently existing…", which does not adjudicate public rights to a "right of way".

Whereas, Idaho law allows for the lawful taking of private property for a "right of way", Defendants have not circumscribed their broad authorities to do so with statutory provisions containing constitutional guarantees or with statutory provisions for erroneous deprivations.

Plaintiffs have presented a simple two step analysis for their claims, as outlined in *Maresh v. State of Idaho, Dept. of Health and Welfare*, 132 Idaho221, 970 P.2d 14 (1999). The matter is simple and straight forward. Plaintiffs have protected property rights in their land and fence. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) the US Supreme Court states that Plaintiffs have a right to expect to be relatively undisturbed by Defendants and when Defendants allow a third party to invade Plaintiffs' land it is particularly egregious.

> As 458 U. S. supra, indicates, property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv.L.Rev. 1165, 1228, and n. 110 (1967). Furthermore, such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

Id., at 435-436 (1982).

In comparison, Plaintiffs will reply to Defendants' convoluted and unreasonable case.

II. Plaintiffs' Complaint

Plaintiffs brought forth action under 42 USC § 1983 as Defendants, under the color of state law, in their individual and in their official capacities, have deprived Plaintiffs of their property and liberty rights without due process (procedural and substantive) and equal protection of the law without a rational basis of a legitimate government interest to do so. In the alternative Plaintiffs seek action under tort, trespass, nuisance, and/or inverse condemnation. The 2nd Judicial District of the State of Idaho has subject matter jurisdiction for 42 USC §1983, et seq. claims. See *Howlett v. Rose*, 496 U.S. 356 (1990).

A. Standard of Review:

> A final decision or order of the district court on judicial review of an agency decision is appealable as a matter of right. I.A.R. 11(f). In a subsequent appeal from a district court's decision in which the district court was acting in its appellate capacity under the Administrative Procedure Act (APA), the Supreme Court reviews the agency record independently of the district Court's decision. *Floyd v. Board of Com'rs of Bonneville County,* 137 Idaho 718, 52 P.3d 863 (2002). Decisions made by a board of county or highway district commissioners in an abandonment, vacation or validation proceeding are subject to judicial review pursuant to I.C.§ 40-208. In such a case, the review is conducted by the court without a jury and is confined to the record. I.C.§ 40-208(6). The court may also 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 also 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.

Homestead Farms, Inc. v. B'rd of County Comm'rs of Teton County, 141 Idaho 855, 858-59, 119 P.3d 630, 633-34 (2005).

> 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). In response to a motion for summary judgment, the opposing party must set forth "specific facts" showing a genuine issue. I.R.C.P. 45(e). See *Verbillis v. Dependable Appliance Co*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984)

B. Defendants, under the color of state law, have deprived Plaintiffs of their property without due process (substantive and procedural) of law and equal treatment of the law; Plaintiffs have a right to challenge Defendants' final decisions which prejudice their substantial rights. In *Maresh v. State of Idaho, Dept. of Health and Welfare*, 132 Idaho221, 970 P.2d 14 (1999) the Idaho Supreme Court outlined the steps to determine whether a plaintiff's 14th Amendment constitutional guarantees have been violated.

> To determine whether an individual's due process rights under the Fourteenth Amendment have been violated, a court must engage in a two-step analysis. It must first decide whether the individual's threatened interest is a liberty or property interest under the Fourteenth Amendment" *Schevers v. State*, 129 Idaho 573, 575, 930 P.2d 603, 605 (1996) (citing *Smith v. Meridian Joint Sch. Dist. No.2*, 128 Idaho 714, 722, 918 P.2d 583, 591 (1966).

Id. at 226, 970 P.2d, at 19. As *Maresh* states the first step of the two step analysis is to determine if Plaintiffs have property rights covered by the 14th Amendment.

1. Plaintiffs' land and fence are property rights protected by the 14th Amendment.

> The United States Supreme court has noted that property interests are "created...by existing rules,...such as state law." *Id.* Likewise, this Court has indicated that "determination of whether a particular right or privilege is a property interest is a matter of state law." *Ferguson v. Bd. of Trustees of Bonner Cty. Sch.*, 98 Idaho 359, 564 P.2d 971, 975 (1977) (citing *Bishop v., Wood*, 426 U.S. 351, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976)).

Id. at 226, 970 P.2d, at 19.

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, 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. 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. Plaintiffs' property rights are indisputable.

2. Defendants' jurisdiction is limited to what has been used and maintained at the public expense for five years—the "surface area of the roadway"—15 feet; as located prior to the late fall of 2005; as determined by a jury. Defendants jurisdiction is found under I.C§40-1310(1) ("The commissioners of a highway district have exclusive general supervision and jurisdiction over all highways and public rights-of-way within

their highway system,..."). What is part of the highway system, highways and public rights of way, is found under I.C.§40-202(3) (see *Appellants' Brief*, Addendum, at iv).

Plaintiffs have not said I.C§40-202(3) is unconstitutional (see *Respondents' Brief*, at 23, LL. 8-16). As unambiguously read I.C§§40-202(3), 605, 1310(1), 2312, 2317, 2319, 5-224, 203 are not in conflict with I.C§§40-202(3). The Annotated Idaho Code §40-2312 reads as follows.

> Width of highways established by prescription or public use had to be determined from a consideration of circumstances peculiar to each case, and was presumed to be 50 feet, unless facts clearly indicated that owner limited width of said road prior to time it became a highway by user. *Meservey v Gulliford*, 14 Idaho 133, 93 P.780 (1908). Collateral References: 39 Am Jur 2d Highways, streets and bridges §§ 51-55.

Idaho Code § 40-2312 Highways by prescription (emphasis added). The evidence in this case—*the agency record—is replete with Plaintiffs simply saying* no to Defendants intrusions into their land "prior to time it became a highway by user"—since the late fall of 2005[6].

3. Defendants have deprived Plaintiffs of their property interests: The undisputed material evidence supports a conclusion that CCR has no "right of way" which has been located and recorded by order of a board of commissioners. The undisputed evidence is that Defendants admit to altering the width and location of

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[6] E.g. Minutes from the NLCHD meeting 4/12/06, R., Vol. V, p. 842, LL. 8-24 (Plaintiff gave defendants fair warning that their activities on CCR were prohibited by law); Plaintiffs letter to the Defendants prior to the 3/21/07 NLCHD meeting, R., Vol. V, p. 806-814 (Plaintiffs describe the alterations and problems on CCR and ask Defendants to validate the public rights they were claiming); Minutes from the NLCHD meeting 8/8/2007, R., Vol. V, p. 839, LL. 29-41 (Defendants refuse to allow Plaintiffs to represent themselves as Plaintiffs would "not have to pay a lawyer"). Minutes from the NLCHD meeting 9/12/2007, R., Vol. V, p. 823, LL. 2-36 and LL. 20-33 (Defendants refuse to respond to Plaintiffs' Requests for Regulatory Taking Analysis and request that the commissioners validate the legally established public rights in CCR under their own resolution and tell Plaintiffs if they didn't want to pay $750 for a hearing that they should get a lawyer).

CCR—that which was used and maintained at the public expense for five years prior to their alteration—both in 1996 and since 2005-2006 and that the public record (the Wagner and Plaintiffs' deed descriptions as compared to the Rimrock survey) shows CCR has been altered since its earliest beginnings. Further, Plaintiffs assert and Defendants testify that they are unable to accurately locate the centerline of CCR.

Defendants' counsel, at cross summary judgment declared that it is difficult, if not impossible, for him to identify the identical strip of land or the centerline of CCR, whether the width of CCR is what has been used for a period of five (5) years, and have been worked and kept up at the expense of the public, or is 50 feet wide (the centerline of CCR being the identifying characteristic).

> I guess it could be argued that that centerline may not be the historic centerline, but it's darn close, by Mr. Payne's reckoning, If that widening was four feet on one side and four feet on another, then the centerline is dead center,. If we give an inference that the road had adjusted a foot or two when the gravel was laid on it, then we might have up to a foot of adjustment to make in terms of that centerline. But there's really no survey that would be able to disclose that. I mean, there's no way that anyone would ever be able to go out there; that we could just adjust that survey by up to a foot, should the Court infer that that -- that that would be the most—or the best evidence of the centerline.

Tr. Vol. I, p. 133, L. 21 through p. 134, L. 9. Defendants have not only altered the "surface area of the roadway" but they also can't accurately identify what has been used and maintained at the public expense for five years.

4. Alterations in width and location result in envelopment of more land. The Idaho Supreme Court has indicated that alterations of width and/or locations of an easement are envelopment of more land.

> There is a difference, however, between the enlargement in the use permitted by the owner of the dominant estate and the enlargement of the physical dimensions of the easement. As this Court stated in *Aztec Ltd., Ind. V. Creekside Investment Co.*, 100 Idaho 566, 569, 602 P.2d 6, 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."

Argosy Trust Through Its Trustee, Alan Andrews v. Wininger, 141 Idaho570, 573, 114 P.3d 128, 131, (2005). See *Bruce Byron Bedke v. Pickett Ranch And Sheep Co., an Idaho Corporation*, 143 Idaho 36, 39, 137 P.3d 423, 426 (2006) ("[t]he same is true [enveloping additional land] with respect to the change in the location of an easement").

Defendants admitted that activities on CCR—both their maintenance and improvement activities since the late fall of 2005 and their issuance, continuation of, and/or failure to revoke the first Wagner Driveway access permit have resulted in the envelopment of more of Plaintiffs' land. The extensions of width at cross summary judgment exceeded 6-8 feet and are growing as Defendants have not abated the nuisance and continue their policies of maintenance and improvement based on I.C.§40-2312. The Wagners voluntarily abated the first driveway access and applied for a second driveway. Defendants destroyed the permit. Defendants signed off on the Wagners' road access on their Latah County building permit and continued their authorization uninterrupted and continue to claim that they have the legal authority under their claimed easement to issue driveway access permits across Plaintiffs' land. Plaintiffs assert that Defendants don't have that authority even if they had a legal 50 foot—25 feet from centerline right of way existed.

> The recording of a plat is equivalent to a deed in fee simple, but it is not a deed in fee simple: "While the acknowledgement and recording is equivalent to a deed in fee simple, it is not a deed in fee simple, and does not give the public the same right to sell or dispose of the same that a private party has to land for which he holds the title in fee simple." *Shaw v. Johnson*, 17 Idaho 676, 682, 107 P.399, 399-01 (1910). When land is dedicated as a street for public use, the landowner owns to the center of the street and the public acquires an easement, not a title in fee simple. *Id.* at 682-83, 107 P. at 400-01 (citing Idaho Rev. Code § 3091 (1908) (current version with amendments at Idaho Code § 55-309 (2002)).

Neider v. Shaw, 138 Idaho 503, 507, 65 P.3d 525, 529 (2003). The Highway District has no possessory rights to CCR. Defendants have not attempted to show the allowed invasion of Plaintiffs' land for the first Wagner driveway access permit to be for "public use".

5. Defendants have violated Plaintiffs' constitutional rights—enveloped more of Plaintiffs' land and damaged Plaintiffs' property without due process (procedural and substantive) and equal protection of the law:

See *Zinermon v. Burch*, 494 U.S. 113, 125-27 (1990) (there are three kinds of § 1983 claims that may be brought against the State under the Due Process Clause of the Fourteenth Amendment). The Idaho State legislature has provided Defendants with statutory provisions containing constitutional guarantees to acquire any necessary "right of way" Defendants might need for their maintenance and improvement activities. See I.C.§§40-605 and 1310, Title 40-Chapter 20, Title 7-Chapter 7 (Eminent Domain), amongst others. The activities of altering a highway and issuing, continuing and/or not revoking driveway access permits are discretionary and are "not unauthorized" and a time for a notice and hearing are predictable and foreseeable when the agency plans its maintenance and improvement activities or when Plaintiffs arrive at the NLCHD meeting to complain of Defendants' operating out of their jurisdiction. See *Zinermon*, at 132-139 (post deprivation remedy is not adequate when the activity is foreseeable, predictable and "not unauthorized"). Defendants have unlawfully taken Plaintiffs' land and continue to do so. Damage of Plaintiffs' fence without prior notice of encroachment is proscribed by law as is the issuance, continuation of and failure to revoke the trespass of the first Wagner driveway access permit. The undisputed evidence shows Plaintiffs having given

Defendants fair warning repeatedly of the invasion of Plaintiffs' buffer and damages to their fence and Defendants justifying their actions on grounds that the fence was within the "right of way" while refusing to give Plaintiffs a notice of encroachment, refusing to allow Plaintiffs an opportunity to speak in a meaningful way at a meaningful time, and refusing to validate the Defendants' claimed "right of way" or evaluate their actions for possible due process violations under Plaintiffs' submittal of Requests for Regulatory Taking Analysis under I.C.§67-8003.

Plaintiffs assert that Defendants' policies/customs based solely on their interpretation of I.C.§40-2312 are invalid; system wide (facially invalid) in the NLCHD or as applied to Plaintiffs and Plaintiffs' specific situation in relation to CCR in the SENE Section 15 T39NR3WBM. In the case of the latter, as applied, Plaintiffs assert that Defendants have supplied no rational basis of a legitimate governmental interest to treat Plaintiffs differently than similarly situated persons. Further the violation Plaintiffs assert is a violation of the "Bill of Rights"—the 5th Amendment to the US Constitution, and requires strict scrutiny.

> Our cases have recognized successful equal protection claims brought by a "class of one," where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. See *Sioux City Bridge Co. v. Dakota County*, 260 U. S. 441 (1923); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U. S. 336 (1989).

Village of Willowbrook v. Olech 528 U.S. 562 (2000).

6. Plaintiffs seek the return of their wrongfully taken lands, a permanent injunction preventing Defendants intrusions into their land and the cessation of Defendants' invalid policies, facially and/or as applied to Plaintiffs in their specific situation relating to CCR, and full common law damages to be determined by a jury

with sanctions against the Defendants for spoliation of the evidence of the location and width of CCR and preparing affidavits in bad faith and the right to amend Plaintiffs' Complaint with further damages and involved parties if necessary.

Inverse condemnation is unavailable when no due process has been given. Plaintiffs seek the return of their wrongfully taken land and a permanent injunction against Defendants' invalid policies/customs.

> The Clause expressly requires compensation where government takes private property "for public use." It does not bar government from interfering with property rights, but rather requires compensation "in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church*, 482 U. S., at 315 (emphasis added). Conversely, if a government action is found to be impermissible — for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process — that is the end of the inquiry. No amount of compensation can authorize such action.

Lingle v. Chevron, USA Inc., 544 U.S. 528, 543 (2005).

II. Juxtaposed to Plaintiffs' Complaint is the Defendants' case and Judge Kerrick's "adeptly organized" Opinion (*Respondents' Brief*, at 12, par. A.).

A. The District Court had no subject matter jurisdiction to grant Defendants' motion for summary judgment; Defendants failed to supply the District Court with subject matter jurisdiction for which they bore the burden of proof—a valid, legally established jurisdiction, easement for their "not unauthorized" activities under their policies/customs based on I.C.§40-2312; in the alternative, the District Court abused its discretion when it did not review the commissioners decisions of jurisdiction and validation of the legally established public rights in CCR and limit its review to the agency record or remand the validation back to the NLCHD. See I.C§40-208(6). Plaintiffs have a right to challenge Commissioners decisions, conclusions,

findings, and inferences in final decisions under I.C.§§ 40-203a and202 prejudicing their substantial rights, property.

> Although there is no applicable standard of review previously articulated by the Court for such a situation, since I.C.§40-202 is contained in the section of the Code relating to general provisions for the establishment and maintenance of the state and county highway system, including procedures required for abandonment, vacation or validation of highways, it is logical that the statutorily mandated standard of review under I.C.§ 40-208 should apply to §40-202 decisions.

Homestead Farms, Inc., at 858-59, 119 P.3d 630, at 633-634. See I.A.R. Rule 11(f).

Plaintiffs sought and the Defendants denied Plaintiffs exhaustion of agency remedies. Action under 42 USC §1983 does not require exhaustion of agency remedies. 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).

> This Court has held generally the exhaustion doctrine implicates subject matter jurisdiction because a "district court does not acquire subject matter jurisdiction until all the administrative remedies have been exhausted". *Fairway Development v. Bannock County*, 119 Idaho 121, 125, 804 P.2d 294, 298 (1990).

Owsley v. Idaho Industrial Commission, 141 Idaho 129, 135, 106 P.3d 455, 461 (2005).

Plaintiffs assert that the District Court only gains subject matter jurisdiction of Defendants' motion for summary judgment if the factual question of Defendants' legally established public rights claimed by Defendants is true, as established in the agency and public record, in its entirety—i.e. CCR is a public highway, established by user to a minimum 50 foot-25 feet from centerline width mandated by I.C§40-2312, The burden of proof is on Defendants to show they have legally established the public rights they claim.

> The highway district has the burden of proving by a preponderance of the evidence that public rights were established. *See Floyd*, 137 Idaho at 724, 52 P.3d at 869.

Ada County Highway District v. Total Success Investments, LLC, 145 Idaho 360, 365-66,179 P.3d 323, 328-29.

B. Defendants have no reasonableness, foundation, or legal merit to their motion for summary judgment. The District Court's approach to Plaintiffs' *Complaint* is unreasonable. It has essentially said there are cases which contain Plaintiffs' 14th Amendment protections (*Maresh*, supra) and cases which don't—Defendants' motion for summary judgment—and the District Court will only look at the latter. See *Bertrand Russell Paradox*, supra (such maneuvers are simply "noise"). Plaintiffs' property rights can not be taken by reducing due process to a tautology under state law.

> The point is straightforward: the Due Process Clause provides that certain substantive rights -- life, liberty, and property -- cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. 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. "Arnett v. Kennedy, supra, at 416 U. S. 167 (POWELL, J., concurring in part and concurring in result in part); see id. at 416 U. S. 185 (WHITE, J., concurring in part and dissenting in part).

Cleveland Brd. Of Ed. V. Loudermill, 470 U.S. 532, 541 (1985). Defendants have the burden of proof of a legally established easement.

The degree of accuracy of Defendants' burden of proof is "minuteness". See *The City of Coeur D' Alene v. Simpson*, 142 Idaho 839, 847, 136 P.3d 310, 318, footnote n.5 (2006) (the regulatory takings tests, expressed in *Loretto* (regulation approving of physical invasion, however minute, is a taking)). See also *Roberts v. Swim*, 117 Idaho 9,

15, 784 P.2d 339, 345 (Ct. App. 1989) (An easement by prescription requires a showing by claimant of the line of travel without material change or variation). Plaintiffs assert the difference between "approximately the same" and minuteness is infinitely large and Defendants' actions require a degree of exactness which is unsustainable by their lack of accurate records. Their findings and conclusions are arbitrary and capricious. 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). Defendants also have the evidentiary burden to show they have substantial evidence in the agency record to support their legal conclusions, i.e., that CCR is a public road.

> Public Status of the roadway can be established by proof of regular maintenance and extensive public use. Citing *Floyd v. Bd. of Comm'rs*, 137 Idaho 718, 727, 52 P.3d 863, 872.

Ada County Highway District, at 365-66,179 P.3d 323, 328-29. Defendants and the District Court share the burden that the court has subject matter jurisdiction for Defendants' Case—summary judgment based on Defendants' legally established easement.

C. Defendants have not supplied material evidence, agency or public record, to either support their motion for summary judgment (that the CCR easement they claim is <u>without dispute</u> legally established) or to deny Plaintiffs' motion for partial summary judgment on the liability of Defendants in their individual and official capacities (that the CCR easement Defendants claim is <u>without dispute</u> legally established): The legal establishment of the width, location and length of what has been used and maintained at the public expense for five years prior to the late fall of 2005 is in hot dispute by Plaintiffs. Mr. Landeck obfuscates the facts of this case. Whether

intentional or simply careless, he misstates several facts, most notably: **(i)** the centerline of CCR "which remains the same since 1974"[7] as establishing the midpoint of CCR, (*Respondents' Brief*, p. 19 LL. 11-16) and **(ii)** *Respondents' Brief Fact # 3*, at p. 6 "...Camps Canyon Road was a public highway prior to adoption of the official map...". In both instances, Mr. Landeck places an affidavit citation disconnected from what was said. In the former both Mr. Payne and Mr. Arneberg said the CCR centerline was "approximately the same". No Defendant has said that the CCR centerline is the same now as it was in 1974 or before the late fall of 2005. Any claim that the location, width, or length of CCR is unchanged over any five year period is not substantiated in the evidence and runs contrary to the record initially made in District Court, as well as in the agency record and the public record. In the latter, Mr. Carscallen made no reference to Camps Canyon Road becoming a public highway prior to it being put on the highway map even though citation to his affidavit appears at the end of the paragraph.

Defendants' conclusions of law are arbitrary and capricious, illegal, or an abuse of their discretion. See *Enterprise,* supra.

D. Plaintiffs assert that the District Court abused its discretion and/or erred in the following manners; when it defied the precedent set in *Maresh* and set the order of the

[7] The word "approximate" appears in Mr. Payne's affidavit R., Vol., IV, p. 638, [par. 8]. The word "approximate" appears in MrArneberg' Affidavit R., Vol., IV, p. 645, par. 8. The District Court in its *Opinion and Order on Plaintiffs' Motions for Partial Summary Judgment and Defendants' Motion for Summary Judgment*, R., Vol. VII, p. 1463, L. 4-23 briefly leaves out the word "approximate" for the purposes of ascertaining the location, width and length of CCR as a matter of 25 feet from centerline without citation of an affidavit. Both before and after this brief discussion Judge Kerrick returns the word "approximate" to the phrase with citation to an affidavit.

issues otherwise in this case[8], as simply ended in a convoluted error—that Plaintiffs do not have property interests protected by the 14th Amendment. The crux of the matter was Plaintiffs have a property right; not that CCR exists.

The District Court has simply said that behind "Door #1" lies Plaintiffs' property rights protected by the 14th Amendment and behind "Door #2" lies Defendants claimed and unverified easement, so we will look behind "Door #2" knowing that there we will not find any of Plaintiffs property interests covered by the 14th Amendment. See D'Amato and Bertrand Russell, supra. See also *Cleveland Brd. Of Ed.*, supra. Defendants have only an easement across Plaintiffs' land and do not gain adverse possession of it.

> All the right acquired by the public is an easement in the land consisting in a right to pass over the same and keep the road in repair. The legal title to said land remains in the owner of the adjoining land or the land over which the road runs.

Meservey v. Gullliford, 14 Idaho 133, 137, 93 P. 780, 783 (1908). The Highway District does not have title in fee simple to the easement. See also *Neider*, supra, at 26. Plaintiffs' property rights are created by state law. See *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). "Whether Judge Kerrick adeptly organized the Opinion...into 3 analytical parts"[9] or Defendants' counsel did the

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[8] Several issues are before this Court on summary judgment, with voluminous briefing filed in the matter. Due to the lengthy nature of the briefing presented to this Court, the issues will not be presented in the order of the parties' briefs. The Court will first address the issue which is the crux of this lawsuit, the fact that the roadway in question is a public highway established by public use. Based upon this uncontroverted fact, the width of Camps Canyon Road, as a public highway, can be determined based upon statutory authority. The remaining claims made by the Plaintiffs are resolved accordingly based upon the status of Camps Canyon Road.
Opinion and Order on Plaintiffs' Motions for Partial Summary Judgment and Defendants' Motion for Summary Judgment R., Vol. VII, p. 1457, Analysis.

[9] See *Respondents' Brief*, at pp. 12-21. The three analytical parts are crafted to ignore Plaintiffs' *Complaint*—that they have property rights protected by the 14th Amendment

outcome is the same; as the District Court abused its discretion and/or erred when it made the following choices:

1) it granted summary judgment and attorney fees to Defendants and/or denied Plaintiffs motion for partial summary judgment. There is no reasonableness or legal merit to Defendants' motions and Plaintiffs have a right to challenge Commissioners' final decisions prejudicing Plaintiffs' property rights. See I.A.R. Rule 11(f). See also *Homestead Farms, Inc.*, supra. I.C.§40-2312 does not adjudicate public rights. See *Cleveland Brd of Ed*, supra.

(2) it concluded that the width of CCR could be determined by Plaintiffs' failure to establish that the width of the highway was limited to the "surface of the roadway"[10], as the burden of proof rests on Defendants that as a matter of agency and/or public record they have evidence to support a finding that CCR is more than what has been used and maintained by the public for five years. See I.C§§40-1310(1) and 202(3). See *Ada County Highway District,* supra.

3) it concluded that the legally established location, width, length of CCR could be determined by its present centerline; as Defendants have no accurate

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underlying and abutting to CCR, in the undeveloped land next to the surface area of the roadway. The 3 part analysis essential says Plaintiffs owe Defendants due process for the public possessory rights in CCR; whereas no such subject matter exists—Defendants did not file a counter claim and even if they did it would fail to bring forth a cognizable claim. See Bertrand Russell at footnotes 4 and 5. There really is no valid argument—it is a jumble of words incoherently uttered.

[10] *Opinion and Order on Plaintiffs' Motions for Partial Summary Judgment and Defendants' Motion for Summary Judgment*, R., Vol. VII, p. 1462, L. 25-28 (Plaintiffs have established no basis for this Court to conclude that there is an exception to the fifty foot minimum width…"); pp. 1462-63, LL. 29-3 ("[t]he Plaintiffs fail to establish that the width of the highway easement is limited to the surface of the roadway.."); p. 1465, LL. 4-9 ("[i]n order to sustain an action against the Defendants for damage to their property, the Plaintiffs must set forth facts which establish that the Highway District' actions occurred beyond the purview of the right of way…").

determination of its whereabouts—"approximately the same" is insufficient for the necessary accuracy. See *The City of Coeur D' Alene,* supra. See also *Roberts*, supra. The District Court's "clarification"[11] is without any evidentiary support that the centerline has remained the same since 1974. See **1.B**. supra, Defendants must show there is no dispute of the legally established width, location, and length of CCR. See *Respondents' Brief*, at p. 6, par. 4 (Payne and Arneberg affidavits state "approximately the same")[12]. The Rimrock survey shows change in the intersection of CCR and the east and west property lines of the 3+/- acre parcel compared to the deed description.

> [I]t is well settled under Idaho law that any judgment determining the existence of an easement must also specify the character, width, length and location of the easement.

Schneider v. Howe, 142 Idaho 767, 774, 133 P.3d 1232, 1239 (2006).

4) it determined that CCR was a public highway[13], established by user, as there is no evidence of extensive public use of CCR (see *Ada County Highway District*, supra) in the public or agency record to support such a conclusion and as "established by user" requires a factual determination of what actually has been used and maintained at the public expense for 5 years. Whether Plaintiffs choose to dispute that CCR is a public highway/authenticate the users' of the road credentials as either "public" or private is not

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[11] The District Court's "clarification" (R., Vol. VII, p. 1463 LL. 14-18 ("for purposes of clarification, the centerline of the actual surface of the roadway, which has remained the same since 1974, establishes the midpoint of the fifty foot span. The fifty foot width of the roadway is easily ascertainable by measuring twenty five feet from centerline of the roadway to each side of the road")

[12] Mr. Hodge made no survey and has no foundation for his opinion.

[13] *Opinion and Order on Plaintiffs' Motions for Partial Summary Judgment and Defendants' Motion for Summary Judgment*, R., Vol. VII, pp. 1457-1460, section **A. par. 1 "Camps Canyon Road is a public highway..."**; p. 1463, L. 7-10 ("[t]he Court notes that Camps Canyon Road is located on the official map of the Highway District...").

a substitute for the necessary governmental action necessary to establish public rights in CCR in SENE Section 15 T39NR3WBM.

> Highways in the third category [prescriptive acquisitions] will require some evidence showing that the road was used for a period of five years and worked and kept up at the expense of the public.
>
> As the majority states, Idaho Code § 20-202 does not authorize a board of county commissioners to adjudicate the status of any road as public or private. The inclusion of a private road on the highway map does not constitute as adjudication that the road is public.

Homestead Farms, Inc. v. B'rd of County Comm'rs of Teton County, 141 Idaho 855, 119 P.3d 630 (2005) Justice Eismann specially concurring *Id.*, at 862, 119 P.3d 630, 637.

Also Commissioners can not use I.C. §40-203a to establish public rights in CCR. They are prohibited from doing so under their own resolution. 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").

Defendants' counsel obfuscation of the legal establishment of the public interest in CCR[14] is indicative of the weakness of Defendants' case. Defendants are without evidence of either of their apparent[15] antecedent claims—that CCR is public or that they can accurately identify the strip of land, as "established by user", that has been used and maintained for five years prior to the late fall of 2005; See D'Amato and Russell, supra.

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[14] Defendants claims are in contradiction to one another: CCR is a public road (*Respondents' Brief*, at p. 6, par. 3("Camps Canyon Road was a public road prior to adoption of the official map"); and CCR is not a public road (Tr., Vol. I, p. 118, LL. 17-22 (Defendants' counsel states there are no public records regarding the establishment of the road[CCR]).

[15] The District Court implies the antecedent conditions; the Defendants just list three public rights in CCR.

5) it concluded that I.C.§40-2312 adjudicates a 50 foot width for CCR[16].

I.C.§40-2312 has no provisions for constitutional guarantees to adjudicate public rights—to take land from Plaintiffs. There is no legal merit for Defendants' interpretation. See *Cleveland Brd. Of Ed.*, supra. There is no reasonableness to Defendants' interpretation of I.C.§40-2312. See D'Amato, supra. Defendants' policies/customs are invalid at their inception—a self contradiction of the constitutional set the law as a subset is contained in. See Russell.

6) it concluded that there is case law support of a conclusion that I.C.§40-2312 adjudicates a 50 foot width for CCR, for a public highway, for a highway established by user, or for a highway presently existing at a lesser width found in the citations of "*Meservey* [*Meservey v Gulliford,* 14 Idaho 133, 93 P.780 (1908)] and its progeny", as the Defendants call *Bentel v. Bannock County,* 104 Idaho 130, 656 P.2d 1383 (1983), as a legal authority of to a cogent connection to the District Court's conclusion that public highways in Idaho shall not be less than fifty feet wide, including CCR (see *Opinion and Order on Plaintiffs' Motions for Partial Summary Judgment and Defendants' Motion for Summary Judgment* R., Vol. VII, p. 1460-63, par.2). *Bentel* is about increases of use or scope of an easement and does not pertain to cases, as the present, which concern alterations in width, length, and location. See *Argosy Trust Through Its Trustee, Alan Andrews*, and *Bruce Byron Bedke*, supra.

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[16] *Opinion and Order on Plaintiffs' Motions for Partial Summary Judgment and Defendants' Motion for Summary Judgment*, R., Vol. VII, pp. 1460-1462, section **2. Public highways in Idaho shall not be less than fifty feet wide, including ...Camps Canyon Road)**; pp. 1463-1472 (the District Court concludes Defendants' activities are within the "right of way" and therefore grants defendants summary judgment as Plaintiffs have no possessory rights in the easement, at 1472, LL. 4-7.

Meservey is entirely consistent with the statutory authority of Defendants' jurisdiction under I.C.§§40-1310(1) which in part reads, "The commissioners of a highway district have exclusive general supervision and jurisdiction over all highways and public rights-of-way within their highway system,..") and 202(3), supra. What is part of the NLCHD highway system is limited in the case of a prescriptive easement, as CCR is claimed to be, and as CCR has not been laid out or located and recorded by orders of the commissioners, to be presumed to be 50 feet, unless that which has been used and maintained at the public expense has been limited by the owner, Plaintiffs, of said road, CCR, prior to time it became a highway by user for five years. The evidence of this case clearly supports the finding and conclusion that the Plaintiffs have sought to limit the width of CCR to that which had been used and maintained at the public expense for 5 years prior to the late fall of 2005 whether the Defendants would allow Plaintiffs an official hearing or not.

7) it concluded that there is a cogent or coherent connection between the District Court's apparent antecedent requirements of CCR is a "public highway" or CCR is "established by user" to conclusions of law based on I.C.§40-2312[17]. I.C.§40-2312 does not mention "public highways", "established by user" highways, or 25 feet from centerline widths. The District Court cites no authority to show "public highways" or "established by user" highways are other than simply "highways" or are given specialized treatment.

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[17] *Opinion and Order on Plaintiffs' Motions for Partial Summary Judgment and Defendants' Motion for Summary Judgment*, R., Vol. VII, pp. 1461, L. 13 ("[t]here is a long history in Idaho case law...") through p. 1462-63, L. 30- L. 3 ("[t]he fifty foot width of Camps Canyon Road...").

8) it interpreted I.C.§ 40-2314 ambiguously and under statutory construction when it was valid as unambiguously read. Where the statutory language is unambiguous, the clearly expressed intent of the legislature must be given effect and there is no occasion for this 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, 483 (1999). The District Court reads I.C.§ 40-2314 ambiguously and statutorily construes and:

a) Redefined the statutory construction of I.C.§40-202(3) to include a new category of "highways"—the "right of way" land which has neither been laid out and recorded nor used and maintained at the public expense for five years. That is "highways" are "highways" and not "highways". See Russell, supra.

b) added an encrypted statement known only to the Defendants' counsel and the District Court, "which existed prior to 1887": The District Court adds statutory construction to the phrase "except those of a lesser width presently existing"[18].

It is implausible to believe that over the last 100 years or so that the Idaho legislature had revised and reworded I.C.§40-2312 it would encrypt a hidden message within the clause, "except those [which existed prior to 1887] of a lesser width presently existing", simply to make possible the unconstitutional taking of private property, at the incompetence of

[18]This statute [I.C.§40-2312] made an exception to the fifty foot width requirement for highways which were of a lesser width at the time the statute was enacted in 1887. There is no evidence in the record before this Court that Camps Canyon Road existed prior to 1887, thus the exception is inapplicable to this case. *Opinion and Order on Plaintiffs' Motions for Partial Summary Judgment and Defendants' Motion for Summary Judgment* R., Vol. VII, p. 1461, LL. 7-10.

the elected official or his counsel or not, or to make the acquisition by user limited to 5 years before 1887;

c) interpreted "[a]ll highways...shall be not less than fifty (50) feet wide..." to mean mandated. That is, "shall" is meant to be read ambiguously and as statutorily construed as a mandate and not to be unambiguously read, "[a]ll, that is each and everyone—deeded as well as prescriptive, public as well as private—of the inanimate objects, "highways", at some future time may reach a state of being of 50 feet wide. Note there is no command of commissioners to widen all highways. It is almost universally held (or Defendants have not been shown to have supernatural powers), that even elected officials or authorities in charge of construction and maintenance can command an inanimate object to be anything it is not—as in this case, presently existing at a lesser width than 50 feet; and/or

d) interpreted "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" as not discretionary—that is any width is not discretionary, even though I.C.§40-2312 expressly says so..

9) it concluded that by statutory authority public highways in Idaho, including CCR shall not be less than fifty (50') feet wide. See I.C.§40-2312, "...except those of a lesser width presently existing...". By statutory authority, CCR, a highway, whether public or not, whether established by user or not, may exist at a lesser width than 50 feet. There is no well established law, at least that a reasonable person can understand which mandates a "highway" in Idaho be adjudicated to a minimum 50 feet without the statutory provisions of constitutional guarantees. Idaho Law since its earliest

beginnings (see Annotated Idaho Code § 40-2312, supra) has consistently adhered to the same principles.

> "Appellants had the burden of establishing the existence of the public road described in the petition. They failed 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."

Cox v. Cox, 84 Idaho 513, 518-519, 373 P.2d 929, 932 (1962), citing *Ross v. Swearingen*, 39 Idaho 35, 225 P. 1021. See also *District of Columbia v. Robinson*, 180 U.S. 92[19].

(x) it denied Plaintiffs relief as a matter of law on Plaintiffs' interlocutory partial summary judgment motions as there was no genuine issue of material fact as Defendants' claimed.

a) **Genuine issues of material fact** at Plaintiffs' motions for partial summary judgment in November 2008: (i) Plaintiffs have property rights protected by the 14th Amendment in their land and their fence; (ii) Defendants do not have a legally acquired "right of way" laid out and recorded by orders of the commissioners; (iii) Defendants have made alterations in location and width to the "surface area of the roadway"; (iv) permit for the first Wagner driveway access permit was for a trespass, (v) the Defendants have not given Plaintiffs notice of encroachment, and (vi) the location and width of the "surface area of the roadway" is disputed—the land used and maintained at the public expense for five years.

[19] 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. There are differences in the prescriptive period and the legislature required the 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, I.C. § 40-2312, and a statutory width may be acquired if the authorities choose to do so, I.C. § 40-605.

b) <u>As a matter of law</u>,

(i). Plaintiffs partial summary judgment for liability of Defendants under 42 USC §1983[20] is properly granted for constitutional due process and equal treatment violations as there is a genuine dispute of material fact over Plaintiffs' property rights covered by the 14th Amendment whether Defendants claim of public rights is for the prescriptive rights acquired by 5 years of use of the "surface area of the roadway" or for a 50 foot "right of way" mandated by Idaho law [I.C.§40-2312] as located by the centerline of "surface area of the roadway" of CCR. In either case a dispute exists which prejudice Plaintiffs' substantial property rights. Plaintiffs' right to due process is absolute. See *Piphus v. Carey*, 435 U.S. 247, 266-267 (1978). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law". See I.R.C.P. 56(c). Whether due process is due is a matter of law. Plaintiffs have a right to challenge Defendants final decisions of jurisdiction prejudicing Plaintiffs' substantial rights. See I.A.R. 11(f). See *Homestead Farms, Inc.*, supra.

Defendants bear the burden of proof that they have the public rights that they claim—room to expand the road it can not legally expand without. See *Ada County Highway District,* supra, citing *Floyd*, 137 Idaho at 724, 52 P.3d at 869. The moving party is entitled to a summary judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case

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[20] *Plaintiffs' Motion for Partial Summary6 Judgment/Adjudication of the Issue of the Cause for Action under 42-U.S.C. 1983*, aka filed (October 21, 2008), R., Vol. II, pp. 387-389.

on which that party will bear the burden of proof at trial. See *Badell v. Beeks*, 115 Idaho 101, 102, 765 P.2d 126, 127 (1988) citing *Celotex v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986). The degree of accuracy is not one of approximation or substantially unchanged but one of minuteness. See *The City of Coeur D' Alene,* supra. See also *Roberts*, supra. Even if Defendants were in November, 2008 claiming 50 foot "right of way" acquired by use and maintenance at the public expense for five years the conclusion of law at which the District Court denied Plaintiffs relief—that the width of the easement was disputed and needed to be factually determined—was sufficient finding to grant Plaintiffs partial summary judgment. The District Court simply denied Plaintiffs relief as a matter of law because as a matter of law they were correct. Plaintiffs simply said the width of the easement needed to be factually determined before Defendants activities of enveloping of more land took place.[21]. See D'Amato, supra.

(ii) Plaintiffs' motion[22] for partial summary judgment on the facial validity of Defendants' policy/custom for widening a prescriptive highway of less than fifty feet or highway presently existing at a lesser width than 50 feet was improperly denied on the grounds that the width of CCR (as applied) needed to be factually determined[23]. See *State v. Cobb*, 132 Idaho 195, 197 (1998) (a facial challenge to a statute or rule is purely a question of law).

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[21] See Opinion and Order (December 8, 2008), R., Vol. IV, pp.770-71, par. 3 ("[s]pecifically, the determination of the width of the right of way of Camps Canyon Road must be addressed").

[22] *Plaintiffs' Motion* (October 6, 2008), R., Vol. II, pp. 324-334.

[23] See *Opinion and Order* (December 8, 2008), R., Vol. IV, pp.769-770, par. 2 ("[the underlying issue in this case requires a factual determination of the width of the right of way of Camps Canyon Road").

(iii) Plaintiffs' motion[24] for partial summary judgment that the width of CCR easement was equal to the width of the road, was in dispute as the previous owner had given permission for the alterations in the vicinity of the 3+/- acre parcel and therefore nullified Defendants' claim of prescription in that area and in any case the burden of proof was on the Defendants and/or the District Court needed to remand the matter to the NLCHD for validation of the legally established public rights in CCR was improperly denied as the width of the easement needed to be factually determined[25]. See *District of Columbia v. Robinson*, 180 U.S. 92[26]

(xi) it denied Plaintiffs declaratory relief[27] on Plaintiffs' initial interlocutory declaratory judgment motions [28] when there was no genuine issue of material fact— Plaintiffs had filed Requests for Regulatory Takings analysis and requested the Commissioners to validate the claimed public rights in CCR under their own resolution and Defendants had not responded. See I.C.§§40-203a and 67-8003(3). Plaintiffs' requests were not "advisory". See *Muskrat v. United States*, 219 U.S. 346, 31 S.Ct. 250, 55 L.Ed. 246 (the US Supreme Court said that the plaintiffs were seeking an "advisory" opinion when the US legislature passed an act giving Native Americans the right to sue

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[24] *Plaintiffs' Motion* filed (September 19, 2008) R., Vol. II, pp. 387-389

[25] *See Opinion and Order* (December 8, 2008), R., Vol. IV, pp.766-769, par. 1 ("[t]he width of the easement remains a question of material fact, thus, the Plaintiffs' motion for partial summary judgment is denied").

[26] See footnote no. 18

[27] *Opinion and Order on Plaintiffs' Motion for Declaratory Judgment of I.C. §40-203A and Plaintiffs' Motion for Declaratory Judgment Under §67-8003(3)* R., Vol. II, pp. 251-259

[28] *Plaintiffs' Motion)* (April 11, 2008) R., Vol. I, pp. 68-74; and *Plaintiffs' Motion* (April 24, 2008) R., Vol. I, pp. 176-183 (at p.258 "[t]he first motion requires the Court to issue an advisory opinion...[f]urther, both motions for declaratory judgment are appropriately addressed through the underlying civil action. For reasons of judicial economy, both motions for declaratory judgment are denied").

the US over previous acts which the legislature thought might be unconstitutional). There was no multiplicity of cases; judicial economy was to answer the constitutional question immediately. See *Scott v. Agricultural Products Corp, Inc.*, 102 Idaho 147, 149, 627 P.2d 326, 328 (1981). See *Maresh*, supra. Plaintiffs' alleged invasion of their land was a "final decision", as a physical invasion of land is a final decision by definition. See *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398, ___ (1988) (a physical invasion of land is by definition a final decision). Plaintiffs filed a tort claim notice within a month of Defendants "final decision" that they were not going to acknowledge any attempt by Plaintiffs to exhaust agency remedies.

12) it denied Plaintiffs motion for reconsideration[29] on the grounds that no additional facts had been added or err of Court noted[30]. Plaintiffs indicated to the Court the Defendants had not laid out and recorded a 'right of way", that the Defendants' policies and assaults on Plaintiffs' property were ongoing and the physical invasions were final decisions. Defendants refusal to exhaust agency remedies was also a final decision.

13) it stated that public rights in CCR can be legally established by or that Plaintiffs can loose their property rights by acknowledging the obvious—that an easement, CCR, exists across Plaintiffs' land or by not denying the obvious—that CCR exists; whereas CCR is an unrecorded prescriptive easement limited to what has been used and maintained for five years at the public expense[31].

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[29] *Plaintiffs' Motion and Brief to Reconsider Court's Opinion and Order on Plaintiffs' Motion for Declaratory Judgment of I.C. §40-203A and Plaintiffs' Motion for Declaratory Judgment under §67-8003(3)* R., Vol. II, pp. 262-293

[30] *Opinion and Order* (September 5, 2008) R., Vol. II, pp. 307-311.

[31] *Opinion and Order* (May 11, 2009) R., Vol. VII, pp. 1457-1460, par. **A. 1. Camps Canyon Road is a public highway established through public use.**

Plaintiffs have simply said that CCR exists and it has so from its earliest beginnings essentially unchanged in location, width and length until 1996 when it was altered. CCR existed again unchanged from that 1996 alteration until the late fall of 2005 when Defendants began again to alter the width, location and length of CCR. At any time, CCR is what had been used and maintained for five years whether prior to the start of the alterations from the late fall of 2005 or before 1996—what has been established by user. See I.C.§ 40-202(3). What had been "established by user" prior to 1996 (as it existed to the SE of where CCR was relocate in 1996 in the vicinity of the 3+/- acre parcel) was altered in 1996 at the permission of Mr. Swanson. The permission Mr. Swanson gave for the alterations (its relocated position after 1996) nullified any "establishment by user" in favor of a Common Law Dedication in the vicinity of the 3+/- acre parcel whether Defendants conveyed and recorded the gift or not[32]. That alteration also changed the position of the 3+/- acre parcel, as no survey was recorded with the purchase of the parcel in 1911 and altered the road frontage as is recorded on the Wagners' and Plaintiffs' deeds. Defendants have a duty to convey and record gift dedications (see I.C.§40-2302) and a duty to record commissioners orders to alter a highway (see I.C.§40-608).

Conclusion: Defendants' counsel attempts to downplay and distort Defendants' past and continued intrusions into Plaintiffs' land by implying that it (see *Respondents' Brief*, at pp. 8-9, par. 11) results in only "minimal, necessary widening over time", is indicative not only of his lack of a cogent assessment of the problems that Defendants' activities on

[32] *Whatever is, is and CCR remained stable until the late fall of 2005 and the onset of the present problems. If gifts are to go unrecorded at the expense of abutting landowners and allow Defendants to foment neighborly disputes as a matter of their own irresponsibility then Defendants need some adult leadership.*

CCR present for the Plaintiffs but also his confusion over the matters of law at hand. The US Supreme Court has long ago admonished the acts/omissions of a governmental agency in a policy of whittling away at a private asset. See *U. S. v. Dickinson,* 331 U.S. 745, 749 (1947) ("All that we are here holding is that when the Government chooses not to condemn land but to bring about a taking by a continuing process of physical events, the owner is not required to resort either to piecemeal or to premature litigation to ascertain the just compensation for what is really 'taken'"). See *Kaiser Aetna v. United States, 444 U.S. 164, 179-80, 100 S.Ct. 383, 392-93, 62 L.Ed.2d 323 (1979)* (A property owner's right to exclude others is "universally held to be a fundamental element of the property right"). See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005) ([t]he paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property). Nothing in the facts, or in Defendants' policy formulation, reveal anything about the *magnitude or character of the burden* Defendants activities impose upon Plaintiffs' property rights or the public's position on it—eminent domain. *Id.*, at 548. This case is void of any police powers issues. "[W]hat shocks the conscience" (see *Respondents' Brief*, at 28-30) is the deliberate indifference and callous disregard of the constitutional guarantees in Defendants' actions and failures to act, it is the constructive knowledge of the constitutional violations not the tragedy of the personal loss. See *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) citing *Daniels v. Williams,* 474 U. S., at 331 ("Historically, this guarantee of due process has been applied to deliberate decisions of government officials to deprive a person of life, liberty, or property").

Defendants have unlawfully occupied Plaintiffs' land for 4 going on 5 years now and have allowed third parties to do the same. At best, Defendants, Defendants' counsel,

and the 2nd Judicial District of the State of Idaho have wasted Plaintiffs' time, money and effort in their futile and useless attempts to resolve these matters. In sum Defendants have deprived Plaintiffs of their property rights without due process (substantive and procedural) and equal protection of the law. The Defendants and the Defendants' counsel have abused the process of litigation in this matter with their unreasonable claims without foundation or legal merit—their frivolous and childish antics. Defendants have sought an "advisory" opinion with their motion for summary judgment and avoidance of the expeditious use of a judicial review format to resolve these matters at Plaintiffs' expense when Defendants' counsel could have simply, at no cost, asked an opinion of the Idaho State's Attorney General. See I.C.§ 67-1401(2). Neither the Defendants nor Defendants' counsel really want the issues resolved.

Plaintiffs seek from this Court declaratory and injunctive relief, the return of their wrongfully taken land, and full common law damages for these wrongful takings to be determined by a jury. Further Plaintiffs seek granting of Plaintiffs' motions for evidentiary sanctions of Defendants for their spoliation of the evidence and preparing of affidavits in bad faith and to allow Plaintiffs to amend their *Complaint* to include additional parties if necessary and additional damages.

Dated this 23rd Day of February, 2010. Respectfully submitted, Don Halvorson

Don Halvorson, Pro se

CERTIFICATE OF SERVICE

I hereby certify that on this23rd day of February, 2010, I caused two true and correct copies of this document to be served by hand delivery to Ronald Landeck, Attorney for Respondents 693 Styner Avenue, Suite 9, Moscow, Idaho, 83843.

Don Halvorson

Don Halvorson