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Flying "A" Ranch v. Board of County
Commissioners for Fremont County, Idaho
Appellant's Brief Dckt. 41584

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BOARD OF COUNTY COMMISSIONERS
FOR FREMONT COUNTY, IDAHO, a
political subdivision of the state of Idaho,
RONALD "SKIP" HURT, individually and in
his official capacity, and LEROY MILLER,
individually and in his official capacity,

Respondents - Appellants,

v.

FLYING "A" RANCH, INC., an Idaho
corporation, CLEN ATCHLEY, EMMA
ATCHLEY, LAURA PICKARD, CLAY
PICKARD, GEORGE TY NEDROW, and
DAVID TUK NEDROW,

Petitioners - Respondents.

Supreme Court Docket No. 41584-2013

Fremont County District Court No. 2012-580

APPELLANTS' BRIEF

APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF FREMONT

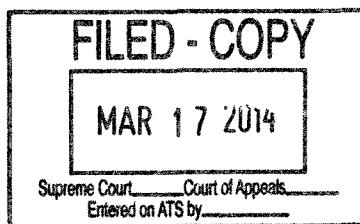
Honorable GREGORY MOELLER, District Judge, Presiding.

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III. STATEMENT OF CASE

(i) **Nature of the Case.**

Before this Honorable Court is an appeal taken from a Petition for Judicial Review of the Fremont County Commissioners (“Commissioners”) adoption of Ordinance No. 2013.01, which adopted the **initial** Official Road Map of Fremont County, Idaho. The adopted Ordinance was approved to designate highways and rights-of-way within the County as public roads for an Official County Map as required by Idaho Code § 40-202. The Commissioner’s review of the Ordinance No. 2013-01 concerned all of the roads (paved, gravel, or dirt) on the Official County map and their adoption of the initial map was not a legal determination of a specific road but was an attempt to identify **all** public highways and rights-of-way within the County. The initial Petition for Review concerned a public road that commences at 1425 North 3125 East (“Old Yellowstone Mail Route Road and Snow Creek Road” or the “North Road”), in Fremont County and travels one quarter of a mile north over the property of Respondents, George Ty Nedrow and David Tuk Nedrow (referred to collectively as “Nedrows”). The same road also proceeds north a quarter of a mile over property belonging to Respondents Flying “A” Ranch, Inc., Glen Atchley, Emma Atchley, Laura Picard and Clay Picard (referred to collectively as “Flying “A” Ranch”). For purposes of this briefing, the Nedrows and Flying “A” Ranch are referred to collectively as “Respondents.”

Consistent with Idaho law, the Fremont County Commissioners conducted public hearings pursuant to authority granted under Idaho Code § 40-202 for the purpose of adopting

the initial County road map. As required, the Commissioners conducted a hearing pursuant to notice (which the lower court determined was appropriate and is not being challenged) and ultimately determined that the subject road should be included on the initial County Road Map. The findings of the Commissioners were consistent with the information and evidence considered to place the roads on the Official County Map. The North road had previously been asserted as a public road (R.S. 2477 road), and therefore, the Commissioners' decision was neither arbitrary, capricious, or an abuse of discretion. On appeal to the district court, the court concluded that the Commissioners had properly noticed up the public hearing, but that the Commissioners had failed to make adequate factual determinations for the challenged road. The district court essentially read Idaho Code § 40-202 to include requirements of a road validation proceeding under Idaho Code § 40-203A. Such a reading of the statute was improper and an abuse of discretion.

(ii) Statement Of Facts.

The Fremont County Commissioners have jurisdiction of all county highways within the boundaries of Fremont County. Idaho Code § 40-202. Recognizing their duty to adopt an official county road map pursuant to Idaho Code § 40-202, the Fremont County Board of Commissioners commenced preparation of an official map to be provided to the public for comment and ultimately for adoption. Substantial efforts by the County went into researching and preparing a proposed official map. (R., p. 1). The Fremont County Public Works Department undertook to identifying the County maintained roads and rights-of-way to be

included on a County road map by researching the archived Idaho Transportation Department (“ITD”) inventory maps, Forest Service and BLM road maps, Fremont County Road and Bridge records, official minutes of the Fremont County Board of Commissioners, and all other available resources. (R., p. 72, ¶ 5). Important considerations in determining County roads were (a) the roads were routinely maintained by the Fremont County Road and Bridge Department (“Road Department”); (b) documentation demonstrated that roads had been maintained in the past by the Road Department; (c) current or past employees of the Road Department testified they had performed authorized maintenance on the road; (d) the roads were identified on recorded plats of subdivision as having been dedicated to the public; (e) the road were shown on government maps (such as Forest Service, BLM, State of Idaho) as being public roads; or (f) the roads had been asserted under Federal Law R.S. 2477 and Idaho Code § 40-204 and § 40-107 or are the sole or essential connection roads asserted as R.S. -2477 roads. (R., pp. 72-73, ¶ 6).

Upon completion of a proposed official map, the Commissioners then sought public input on the proposed official map and notified the public of three “Official Road Map Public Information Meetings.” (*Id.*). Three meetings were held at different locations throughout the County during July 2012 to ensure public input from the entirety of the County. (*Id.*). All identified County roads were presented at all three public information hearings and at the public hearing. (R., p. 73, ¶ 7). To enhance clarity, the identified County roads were presented on nine (9) maps that showed nine (9) different areas of the County. (*Id.*). This allowed roads to be viewed in a larger scale than if viewed on a single map. (*Id.*). The County further requested

public comment from the public. Ultimately, the County received significant public participation and comment during the July “Information Meetings.” (R., pp. 2-16; 73, Ex. A). Following the public “Information Meetings,” the Public Works Department reviewed the comments for validity and applicability and made some changes to the proposed official county road map. (R., pp. 17-18; 73). A final proposed official county map was prepared and the County set a public hearing to take comments and adopt the final map. The purpose of the public hearing was to “take public comments on the proposed official County Road Map.” (R., p. 21). Copies of the proposed map were available for public inspection prior to the public hearing. The public hearing was set for September 27, 2012. Consistent with Idaho law, appropriate notice of the meeting was accomplished by publishing a notice in the *Standard Journal*, the local newspaper of record, on September 11 and 18, 2012. (R., p. 22).

On September 27, 2012, a public hearing was held in the Fremont County Annex Building and public comments and questions were addressed. The ultimate goal was to ensure that County roads were initially designated correctly. (R., p. 53, *Public Hearing Transcript* (September 27, 2012), p. 4:18-24). In attendance at the public hearing were, *inter alia*, Ty and Tuk Nedrow, some of the Respondents here. (R., pp. 23-24). During the public comments, Ty Nedrow stated that two roads on the proposed County map were incorrectly designated as county roads. (R., p. 53, *Public Hearing Transcript*, 4:18-20). He referred to these roads as the “East Road” and the “North Road.” Tuk Nedrow stated that no County equipment had ever been on either road and that the County had never maintained the North Road. (*Id.* at 21:16-18; 21:25-

22:1; 22:13-14). Tuk and Ty Nedrow claimed that both roads lead to nowhere. (*Id.* at 15:19-20; 21:16-18; 21:25-22:3). Concerning the East Road, Ty Nedrow said that it went through his field and that fishermen occasionally got stuck in it while attempting to get to a nearby reservoir. (*Id.* at 15:16-21). Concerning the North Road, Tuk Nedrow explained, “It goes through a quarter mile of our property and a quarter mile of Mr. [Achtley's] and **it goes through a half a mile of BLM and then hits the Forest Service [road]**” (*Id.* at 22:3-10 (emphasis added)). A discussion arose during the Public Hearing as to whether the North Road was an R.S. 2477 road, which was explained to be a road in use before 1975 that could not be taken from the public. (*Id.* at 18:22-19:23). Recognizing that certain roads might be R.S. 2477 roads, Chairman Hurt indicated that the Commissioners had “60 days after this hearing to make a decision, and . . . we may have to collect more information. We may have to have another public hearing” (*Id.* at 20:7-20:17).

About two weeks later, on October 15, 2012, the Commissioners held a work meeting where it considered the content of the proposed County map in light of the public comments. (R., pp. 57-58). The Commissioners brought up the Nedrows’ objections concerning the East Road and the North Road and agreed that the East Road should be closed to the public, recognizing the issues Ty Nedrow had raised during the Public Hearing. (R., p. 59 (audio recording at 5:09-9:53)). However, it decided to leave the North Road designated as a public road. (*Id.*). During the work meeting, the Commissioners considered Nedrow’s comments, as well as “an old Shell Oil map” that demonstrated that people were being directed down the North

Road as far back as 1956. (*Id.*). The Commissioners then concluded that “any roads [used] prior to [1976] cannot be closed because they fall under this RS-2477 and that if they were ever used as public roads then public domain takes precedence.” (*Id.*). In other words, the Commissioners concluded that because the North Road had been “ascertained a 2477 road,” it would be designated on the Official Road Map as a public road. (*Id.*).

At an October 29, 2012 meeting, the Commissioners voted and approved by a two-to-one vote the Official Road Map (R., p. 64), which was published as Ordinance No. 2013-01. (R., p. 66). The Official Road Map lists the East Road as one of various “Private Roads” and the North Road as a “County Dirt Road.” (R., p. 93). The Commissioner’s findings of fact state that the “[r]oads [in the Official Road Map] were identified as Fremont County roads based on” several criteria, one of which was that “[t]he roads had been asserted under Federal Law R.S.-2477 and Idaho Code 40-204 and 40-107 or are the sole essential connection roads asserted as R.S.-2477 roads.” (R., pp. 72-73, ¶ 6). In its conclusions of law, the Commissioners stated that “[a]ll roads identified in (the Official Road Map) are determined by the Fremont County Board of Commissioners to be County roads, either paved, gravel or unimproved (dirt); and are not recorded in the Board of Commissioners’ official minutes as vacated or abandoned; and are routinely maintained by the County.” (R., p. 74). The Commissioners more specifically stated that “[a]ll roads identified in [the Official Road Map] as being R.S.-2477 roads are determined by the Fremont County Board of Commissioners as having been asserted under Federal Law R.S. 2477 and Idaho Code 40-204 and 40-107. The same are identified in official records in the

Fremont County Public Works office.” (*Id.*). The Commissioners specifically clarified, “[i]nclusion of roads on the Official Fremont County Road Map **does not constitute validation or abandonment** of any road.” (R., pp. 74-75, ¶ 9 (emphasis added)).

IV. ISSUES PRESENTED ON APPEAL

- (i) Whether the district court erred in its application of Idaho Code § 40-202?
- (ii) Whether the district court erred in requiring Appellants to make factual determinations and gather evidence that would be required under a road validation proceeding under Idaho Code § 40-203A where the County was merely attempting to adopt the initial official county roadmap pursuant to Idaho Code § 40-202?
- (iii) Whether the Court erred in declaring that the Appellants acted in an arbitrary and capricious manner in designating a single road (a RS 2477 road) as a public road when the County was not attempting to make a legal determination of that road but was adopting its initial county roadmap under Idaho Code § 40-202?

V. ARGUMENT

A. Legal Standard On Appeal

In an appeal from a district court’s decision where the district court was acting in its appellate capacity under the Idaho Administrative Procedure Act (APA), this Court reviews the agency record independently of the district court’s decision. *Black Labrador Investing, LLC v. Kuna City Council*, 147 Idaho 92, 95, 205 P.3d 1228, 1231 (2009); *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). This Court should defer to the agency’s

findings of fact unless those findings are clearly erroneous. *Id.* Factual findings are not erroneous when supported by competent and substantial evidence even though conflicting evidence exists. *Wulff v. Sun Valley Co.*, 127 Idaho 71,73-74, 896 P.2d 979, 981-82 (1995). “Substantial and competent evidence is ‘relevant evidence that a reasonable mind might accept to support a conclusion.’” *Huff v. Singleton*, 143 Idaho 498, 500, 148 P.3d 1244, 1246 (2006) (quoting *Jensen v. City of Pocatello*, 135 Idaho 406, 412, 18 P.3d 211, 217 (2000)). When supported by evidence in the record, the agency’s factual determinations are binding on the reviewing court even when there is conflicting evidence before the agency. *Black Labrador Investing*, 147 Idaho at 95, 205 P.3d at 1231; *Castaneda*, 130 Idaho at 926, 950 P.2d at 1265.

B. The Board of County Commissioners Complied With Idaho Code § 40-202(1).

The Decision of Review specifically recognized that Fremont County had a statutory obligation to adopt an initial Official County Map that identified the general location of the highways and rights-of-way located within the County. The district court acknowledged that the County had given proper notice of its intent to adopt the initial Official County Map. Rather than recognizing the Commissioners had satisfied the requirements imposed by § 40-202 in adopting the initial Official County Map, the Court improperly required the Commissioners to, in effect, conduct a validation proceeding for the challenged road.

Specifically, the district court erred in holding that the Commissioners were required to make “adequate factual determinations before adopting the Official Road Map.” Making an adequate factual determination for each road placed on a map is not required by § 40-202. As

recognized by this Court, and the Commissioners, placement of a road on the initial Official County Map is not a legal adjudication of the public status of a given road. The determination of the legal status of a road is appropriately effected through a validation or abandonment proceeding and not through a § 40-202 proceeding adopting the initial county map. In adopting Fremont County Ordinance No. 2013-01, the Commissioners were not conducting a validation proceeding that would determine the legal status of a road, but were acting in a legislative capacity to comply with the requirements for adoption of an official county map. Considerations of evidence in determining the legal status of a road are not required in the adoption of an initial county map. When conducting a validation or abandonment proceeding, the Commissioners are acting in a quasi-judicial capacity, evaluating all of the evidence and record presented on a given highway. In the evaluation of a highway for purposes of declaring it to be public or private, the evidence will be much more complete. Because the Commissioners were acting in a legislative capacity in compliance with the statutory requirement of adopting an official county road map, they were not required to make the type of “factual determinations” required by the lower court.

As noted, pursuant to Idaho Code §40-202, Fremont County has an obligation to publish a map showing the general location of all highways and rights-of-ways within the County. Prior to 2013, Fremont County had not adopted an official map designating highways and public rights-of-way. A “highway” is defined as

[R]oads, streets, alleys and bridges laid out or established for the public or dedicated or abandoned to the public. Highways shall include necessary culverts, sluices, drains, ditches, waterways,

embankments, retaining walls, bridges, tunnels, grade separation structures, roadside improvements, adjacent lands or interests lawfully acquired, pedestrian facilities, and any other structures, works or fixtures incidental to the preservation or improvement of the highways. Roads laid out and recorded as highways, by order of a board of commissioners, and all roads used as such for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways.

I.C. 40-109(5). The definition of a highway is broad. Section 40-202(1) specifically addresses the “initial selection of the county highway system” and the manner in which the initial map is to be prepared and adopted. When initially adopting the official highway map, the County Commissions are required to “cause a map to be prepared showing the general location of each highway and public right-of-way in their jurisdiction. . .” I.C. § 40-202(1)(a). Once the map has been prepared, the Commissioners “shall cause notice to be given of intention to adopt the map as the official map of that system, and shall specify the time and place at which all interested persons may be heard.” I.C. § 40-202(1)(a). Upon appropriate public notice, the Commissioners are required to “adopt the map, with any changes or revisions **considered by them to be advisable in the public interest**, as the official map of the respective highway system.” I.C. § 40-202(1)(b)(emphasis added). The statutory requirements for the adoption of the initial county map are minimal and the final decision is rendered based on what is advisable in the public interest, not an actual adjudication of a given road.

Here, because the **initial** county map was being prepared, the requirements of Idaho Code § 40-202(1) control. As noted, there is no dispute that a map was prepared showing the

general location of each highway and public right-of-way. Notice of a public information meeting was disseminated to the public requesting their review of the map and public comment. (R., p. 1). Three meeting dates were provided to the public to appear and comment on the proposed map. (R., p. 1). Various individuals provided comments and concerns about the map, which was considered by the Commissioners. (R., pp. 2-16). On August 20, 2012, the Fremont County Commission held a meeting allowing the public to comment on the Road Highway map. (R., p. 17). There were some comments on the public nature of some roads and changes to the map were made pursuant to a full Commission vote. (R., p. 18). The official minutes also reflect that a public hearing on the Official County Highway Map would be held on September 27, 2012. (R., p. 18). Notice of the public hearing was also provided. (R., pp. 21-22). Multiple citizens appeared at the September 27, 2012 hearing and provided comment to the Board of Commissioners. Approximately 15 citizens provided commentary at the hearing. (R., pp. 26-29). Written commentary was also received and read into the official record. (R., pp. 30-51, 53 (pp. 46-51)). In essence, the Commissioners unequivocally complied with the mandates of § 40-202(1).

In adopting the initial road map, the Commissioner's actions are intended to cover all highways and rights-of-way within the County and specific discussion and consideration on the validity of a road are not given, nor are they statutorily required. The standard for the adoption of the initial road map is a much different standard than is required for a road validation proceeding. In an October 15, 2012, County Commissioners work meeting, the public

comments were discussed and a determination was made regarding the status of the roads. During that meeting, the Commissioners adopted some changes via a unanimous vote. (R., p. 58). Following public hearing, the Commissioners voted to adopt Fremont County Ordinance 2013-01, the Official Road Map for Fremont County, Idaho. Commissioner Miller and Hurt voted “yes” for the Ordinance while Commissioner Stoddard voted “no.” (R., p. 64). Ordinance No. 2013-01 specifically stated that an official map of the County is required, that a map was prepared and that the “Board of County Commissioners deems it to be in the best interest of Fremont County, Idaho to adopt an Official Road Map for Fremont County, Idaho. Pursuant to Idaho Code § 40-202, the County complied with each of the express requirements to adopt a formal road map. Specifically, a map was prepared, public notice was provided, public commentary was heard, considered, and ultimately the Commissioners adopted the official map because it was in the best interest of the County. In sum, all of the requirements for adopting the official road map where satisfied.

Ultimately, the Commissioners complied with the express statutory requirements for the adoption of an initial Official County Map under Idaho Code § 40-202. The lower court deviated from the plain statutory requirements of § 40-202(1) when it required an “adequate factual determination” to be made for each of the roads placed on the initial Official County Map. The *Petition for Judicial Review* filed by Respondents was not the correct vehicle to challenge the public nature of the North Road. The Commissioners’ action did not involve consideration of a specific road but was for the adoption of the initial county map. The evidence

considered and the resulting record for action carried out pursuant to § 40-202 would drastically vary from an action pursued under § 40-203A. As such, it was error to hold that the Commissioners were required to consider more evidence than was statutorily required for the adoption of the initial Official County Map.

C. The Standard For Adopting the Initial County Map Under Idaho Code § 40-202 Is Significantly Different Than A Road Validation Proceeding Under Idaho Code § 40-203A.

Because the Commissioners complied with the plain language of § 40-202, no additional factual determinations as the lower court required were necessary. In articulating the basis for its decision, the lower court specifically recognized that the Commissioners were attempting to adopt the initial official county road map as required by Idaho Code § 40-202. However, despite its recognition of the applicable standard under § 40-202, the lower court then deviated from this standard and applied a heightened evidentiary standard as to one road of a validation proceeding under § 40-203A in addition to those imposed by § 40-202. The lower court misapplied the standard for the creation of the initial county road map under § 40-202.

As addressed above, the standards for adoption of the initial county road map are clearly articulated by § 40-202. Namely, the Commissioners are required to prepare a map identifying the general location of each highway and right-of-way. I.C. § 40-202(1)(a). Once that map is prepared, the Commissioners must then hold a public hearing to adopt the final version of the initial map. *Id.* When adopting the initial map, the Commissioners are making changes to the prepared map they consider to be in the “public interest.” I.C. § 40-202(1)(b). Absent from the

statute is the requirement that the Commissioners are to consider specific contradictory evidence or make any factual determination on the validity of a road. Rather, factual determinations for a given road, whether validated or abandoned, are specifically addressed by other statutory provisions of Title 40, Chapter 2. *See generally* Idaho Code §§ 40-203 and 40-203A. To comingle the standards of § 40-202 and 40-203 or 40-203A are in error.

In adopting Fremont County Ordinance No. 2013-01, the Commissioners recognized that the “[i]nclusion of roads on the Official Fremont County Road Map **does not constitute validation or abandonment** of any road.” (R., pp. 74-75, ¶ 9 (emphasis added)). The Commissioners recognized that a separate validation or abandonment proceeding was necessary for any individual road that may be contested and that a statutorily identified procedure was set out for such action.¹

In stark contrast to the requirements of § 40-202 adopting an initial county map, under § 40-203A any resident or property holder within a county may petition the Commissioners to go through a road validation proceeding under certain conditions:

(a) **If, through omission or defect, doubt exists as to the legal establishment or evidence of establishment of a highway or public right-of-way;**

¹ Of note, Idaho Code § 40-202 was amended in 2013 adding § 40-202(8), which states in relevant part: “[t]he inclusion or exclusion of a highway or public right-of-way from such map does not, in itself, constitute a legal determination of the public status of such highway or public right of way.” This amendment was merely a codification of existing case law created in *Homestead Farms, Inc. v. Board of Com’rs of Teton County*, 141 Idaho 855, 119 P.3d 630 (2005).

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

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

I.C. § 40-203A(1) (emphasis added). Thus, where the initial map contains some doubt as to the legal establishment of a highway, a challenge may be appropriately undertaken by a landowner or member of the public. Once a validation proceeding is initiated, all evidence as to the legal establishment of a particular highway will be considered by the Commissioners. I.C. § 40-203A(2)(e).

Under the statutory scheme that existed when this matter went before the Commissioners, a validation proceeding under Idaho Code §§ 40-203A and 40-208 should have been initiated by the Respondents if they disputed the public nature of the North Road. Had a validation proceeding been initiated, the Commissioners would have the opportunity to fully develop the record and make a factual determination as to whether or not the disputed road placed on the initial Official County Map was either public or private. When the lower court examined the record, he concluded that the record did not contain sufficient evidence to support a decision that the road was public or a R.S. 2477 road. This conclusion is accurate because the action to adopt the initial county map requires different considerations than in a validation proceeding.

Based on the clear standard articulated in § 40-202, the record contained sufficient evidence to support the Commissioners' initial adoption of the official map. The Commissioners did not endeavor to make a full and complete record for every County Highway placed on the Official Map because § 40-202 does not impose such a requirement. Conversely, had the matter been appropriately challenged through a validation proceeding under §§ 40-203A and 40-208, a full and complete record would have been prepared and considered. A review of the lower court's Amended Decision on Review evidences a comingling of statutory requirements. Nothing in § 40-202 suggests that a full record for each highway placed on the initial official map is required for the adoption of that initial official map. The lower court's requirement for a factual determination was in error because it contradicts the plain language of Idaho Code § 40-202(1).

D. The Board of County Commissioners' Findings of Fact and Conclusions of Law Satisfied the Requirements of Idaho Code § 40-208(7).

Notwithstanding the compliance with plain language of § 40-202, any suggestion that the Commissioners acted in an arbitrary, capricious manner or abused their discretion is incorrect. Rather, the record before this Court, in light of the standard imposed under § 40-202, confirms that the adoption of Fremont County Ordinance No. 2013-01 was not:

- (a) In violation of constitutional or statutory provisions;
- (b) In excess of the statutory authority of the commissioners;
- (c) Made upon unlawful procedure;
- (d) Affected by other error of law;

- (e) Clearly erroneous in view of the reliable, probative and substantial information on the whole record; or
- (f) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

I.C. § 40-208(7). The lower court erred in its conclusions that the Commissioners' adoption of Fremont County Ordinance No. 2013-01 violated this standard.

When adopting the official map of Fremont County, the Commissioners issued *Finding of Facts and Conclusions of Law Re: Official Road Map of Fremont County Idaho*. (R., pp. 72-75). The Commissioners address the statutory requirement for the adoption of the initial map and the facts that support their conclusions. Specifically, the Commissioners stated that the Fremont County Public Works Department identified the road and right-of-ways that were included on a County road map and researched ITD inventory maps, Forest Service and BLM road maps. (R., p. 72, ¶ 5). The Roads that were deemed to be Fremont County public highways and rights-of-way satisfied the following criteria:

- I. The roads are routinely maintained by the Fremont County Road & Bridge Department.
- II. Documentation showed the roads have been maintained in the past by the Fremont County Road & Bridge Department.
- III. Current or past employees of the Fremont County Road & Bridge Department testified that they had performed authorized maintenance on the road.
- IV. The roads were identified on recorded plats of subdivision as having been dedicated to the public.
- V. The roads were shown on government maps (such as Forest Service, BLM, State of Idaho) as being public roads.
- VI. **The roads had been asserted under Federal Law R.S.-2477 and Idaho Code 40-204 and 40-107 or are the sole or essential connection to roads asserted as R.S.-2477 roads.**

(R., pp. 72-73, ¶ 6 (emphasis added)). The Commissioners adopted these facts and applied them when making their Conclusions of Law.

There is little, if any, case law addressing the adoption of the **initial** Official County Map as required by Idaho Code § 40-202. However, in *Homestead Farms, Inc. v. Board of Com'rs of Teton County*, 141 Idaho 855, 119 P.3d 630 (2005), this Court discussed that there must be some evidentiary support for the Commissioners' determination. *Id.* at 861, 119 P.3d at 636. In *Homestead Farms* the Teton County Commissioners were not adopting an initial county map but were reviewing the official map pursuant to the statutory requirement that a review of the official map be performed every five years. *Id.* In conducting their review, Teton County simply used a commercially produced map of Teton County and used colored pens to designate various types of roadways. *Id.* at 857, 119 P.3d at 632. The public was then requested to identify objections to the highway designations. The appellants provided an objection and subsequently filed a petition for judicial review to have two roads deemed to be public removed from the official map because they had never been public. On appeal, this Court determined that the record was devoid of any evidence to support the decision to keep the road public. This Court found that neither of the initial 1991 or 1996 official maps had been included in the record and there was no evidence to support a conclusion that the road had ever been public. In so holding, this Court first confirmed that "[t]he process by which a county selects a highway system or creates an official highway map **does not also serve to adjudicate the public status of any roads** within

the county or creat new public highways or rights-of-way.” *Id.* at 859-60, 119 P.3d at 634-35 (emphasis added). In considering the record, this Court held that there were at least two earlier maps adopted pursuant to the statutory requirement but those maps were not in the record and there could be no comparison between the older maps and the map being considered. This Court went on to clarify that the road designation have “some basis through dedication, purchase, prescriptive use or some other accepted means of creating a public highway so there is some evidentiary support for the Commissioner’s determination to designate a road on the map.” *Id.* at 861, 119 P.3d at 636 (emphasis added). This Court did not require that there be a complete record only that there be “some basis” and “some evidentiary support” for the decision to include a road on the Official County Map.

In this case, it is important to recognize that there is “some basis” and “some evidentiary support” for the decision to maintain the initial County Map as adopted by Ordinance 2013-01. Contrary to the district court’s suggestion, the Commissioners did address Petitioners’ comments at the hearing during an October 15, 2012 work meeting. (See R., p. 59, CD recording: Discussion commencing at 5:09 through 9:53). The Commissioners did consider Nedrow’s comments and agreed that the East-West bound road should be closed. There is no challenge to the County’s determination on this issue. Rather, the specific challenge is that the North Road should be closed. When the Commissioners specifically reviewed this stretch of road, it was determined that the road was probably an R.S. 2477 road. In specifically considering the North road, the Commissioners reviewed an old Shell Oil map from approximately 1957 that identified

the road as access to Federal BLM land. Based on this map and research initially performed by the County Public Works Department, the North Road was determined to be the exclusive access to BLM land and roads and was likely appropriately classified as an RS 2477 road. As an R.S. 2477 road, the Commissioners were prohibited from closing the road. During the October 15, 2012 Commissioners' work meeting, there was significant discussion and consideration of the testimony provided by Respondents and whether the North road had been previously ascertained as a R.S. 2477 road. In so concluding, there is some evidence that the Commissioners considered the history of the road and the existing public nature of the road prior to 1976. (R., p. 59, CD: *October 15, 2012 Commissioners Work Meeting*). Moreover, in their Conclusions of Law, when addressing the roads that were identified as R.S. 2477 roads, the Commissions concluded:

Those roads identified in Exhibit "B" as being R.S.-2477 roads are determined by the Fremont County Board of County Commissioners as having been asserted under Federal Law R.S. 2477 and Idaho Code 40-204 and 40-107. The same are identified in official roads in the Fremont County Public Works office. The foregoing is supported by substantial and competent evidence submitted at the public hearing and is found to be in the public interest.

(R., p. 74, ¶ 8).

The district court improperly analyzed the steps necessary to create a R.S. 2477 road and whether there was sufficient evidence on the record to conclude the road was a R.S. 2477 road. Ultimately, this level of detail in the record, where an initial public map is being adopted is

unnecessary and contrary to the plain language of § 40-202. As more fully addressed above, the ultimate standard for adoption of the initial Official County Map is that any changes “be advisable in the public interest.” I.C. § 40-202(1)(b). Absent from the statute is that the Commissioners have a fully developed record as to each of the roads placed on the initial county map. Rather, the appropriate course of action would be for adoption of the initial map and once adopted, to pursue validation proceedings pursuant to Idaho Code §§ 40-203A and 40-208. Under a validation proceeding, the evidence discussed by the lower court would necessarily be included in the record. Under § 40-202, the full evidentiary record is not required because only “some evidentiary support” is required and any changes merely need to be in the “public interest.” *See Homestead Farms*, at 861, 119 P.3d at 636.

Under a validation proceeding, one would expect to see a full record developed, which would necessarily include the “Shell Oil Map” from 1957. However, where the standard for the adoption of the initial official map requires less evidence, a full record would not be required. For this very reason a validation proceeding is available. As this Court and the Commissioners recognized, the adoption of the initial Official County Map does not serve to adjudicate the public status of any road within the County. Such adjudications are appropriately addressed through the abandonment and validation proceedings codified at Idaho Code §§ 40-203 and 40-203A. The district court erred in suggesting that the Commissioners were required to provide a full record to support their decisions. The fact that they considered the Respondents’ position

and reviewed the materials available to them confirms that their decision was not arbitrary, capricious or an abuse of discretion.

Ultimately, the Commissioners decision of maintaining the disputed road as public is supported by substantial and competent evidence in the record in light of the § 40-202 standard. The Commissioners specifically declared that maintaining the road as open was in the public interest. Moreover, their decision of maintaining the North Road as open was not arbitrary, capricious, or an abuse of discretion because there was a clear and articulated basis for maintaining the road as open. Where this Court is not to substitute its judgment for that of the Commissioners on questions of fact, the Court should uphold the Board of County Commissioners' decision to declare the road in question as public R.S. 2477 road. *See Homestead Farms v. Bd. of Comm'rs of Teton County*, 141 Idaho 855, 858, 119 P.3d 630, 633 (2005). Should Respondents desire a hearing on the North Road, a validation proceeding can be initiated wherein a full evidentiary record on the North Road will be developed. Ultimately, however, there is "some evidentiary support" to include the North Road on the initial Official Fremont County Map. Therefore, the adoption of Fremont County Ordinance No. 2013-01 was not a violation of Idaho Code § 40-208(7) and the Ordinance should be upheld without modification.

VI. CONCLUSION

Based on the foregoing, Fremont County respectfully requests that this Court erred in finding that the Commissioners had not complied with the express statutory requirements of

Idaho Code § 40-202 in the adoption of the initial Official County Map. Further, that the Commissioners' adoption of Fremont County Ordinance No. 2013-01 was appropriate and not a violation of Idaho Code § 40-208. To the extent that Respondents believe that a validation proceeding is necessary for the North road, that they be directed to initiate a validation proceeding pursuant to Idaho Code §§ 40-203A and 40-208.

Submitted this 15 day of March, 2014.




Blake G. Hall
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing document upon the following this 15 day of March, 2014, by hand delivery, mailing with the necessary postage affixed thereto, facsimile, or overnight mail.

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