

**PROCEEDINGS COUNTY COMMISSIONERS**

**SHOSHONE COUNTY, IDAHO**

**BOOK 2019**

Monday, August 5, 2019

The Board met pursuant to recessing Wednesday, July 31, 2019.

Present:

Commissioners: Jay Huber

Mike Fitzgerald

John Hansen

Deputy Clerk: Susan K. Hendrixson

The following proceedings were had to-wit:

The Board convened at 10:00 a.m. for a 2019/2020 Budget Work Session. Also in attendance was Matt Beehner. The Board will individually review the expenses that were presented by the County Clerk, determine dates the budget is due to the County Clerk, and continue the Work Session after lunch.

The Board reconvened at 1:30 p.m. for the 2019/2020 Budget Work Session. The Board reviewed the current version of the Budget Expenses and offered the following changes to the County Clerk:


- 1) Across all funds, change Blue Cross insurance from 15% to 8%.
- 2) For Prosecuting Attorney (1-7-541-10), add \$50K for Deputy Prosecuting Attorney Contracted Services.
- 3) For Buildings & Grounds (1-10-405-1), change Custodian Salary from \$45k to \$28.7k. (This was a carryover error from last year.)
- 4) For Road & Bridges (2-516), reduce Administration from \$234k to \$200k and adjust the projected revenue for Current Expense.


These changes should get the Budget Expenses to an overall increase of about 2.5%.

Mike Gunderson, Sheriff of Shoshone County, State of Idaho, appointed Nathan Shulz, Detention Deputy in and for Shoshone County, Idaho effective August 1, 2019.

Thereafter, the meeting adjourned.

ATTEST Tamie J. Eberhard  
County Clerk

Approved:   
Chairman

By:   
Deputy Clerk

**PROCEEDINGS COUNTY COMMISSIONERS**

**SHOSHONE COUNTY, IDAHO**

**BOOK 2019**

Tuesday, August 6, 2019

The Board met pursuant to recessing Monday, August 5, 2019.

Present:

Commissioners:

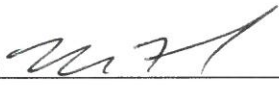
Deputy Clerk: Susan K. Hendrixson

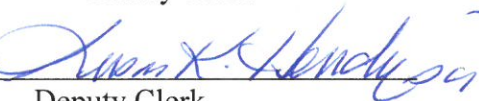
The following proceedings were had to-wit:

The Commissioners attended an Idaho Supreme Court Appeal Hearing on Peter Nemeth et.al. v. Shoshone County at 11:00 a.m. in Kootenai County.

Thereafter, the meeting adjourned.

ATTEST Tamie J. Eberhard  
County Clerk

Approved:   
Chairman

By:   
Deputy Clerk

# PROCEEDINGS COUNTY COMMISSIONERS

## SHOSHONE COUNTY, IDAHO

### BOOK 2019

Wednesday, August 7, 2019

The Board met pursuant to recessing Tuesday, August 6, 2019.

Present:

Commissioners: Jay Huber

Mike Fitzgerald

John Hansen

Deputy Clerk: Susan K. Hendrixson

The following proceedings were had to-wit:

The Board convened at 9:30 a.m. and the meeting was called to order. The consent agenda was reviewed for consideration as follows:

#### CHANGES TO AGENDA:

#### PUBLIC COMMENT:

#### OLD BUSINESS:

1. Consideration and Decision of the Minutes of the Commissioners' Public Agenda Session dated Monday, July 29 to Friday, August 2, 2019.

#### NEW BUSINESS:

1. **Consent Agenda** – (These items will be enacted by one motion unless requested by a Commissioner that one of more items be removed for separate discussion.)
  - Beer, Wine & Liquor Licenses – 1 Liquor License was presented
  - Shoshone County Pre-Pays
  - Agreement Between Shoshone County and Kootenai County for Housing Inmates in the Shoshone County Correctional Facility
  - Agreement Between Shoshone County and Kootenai County for Emergency Inmate Housing
  - Rural Idaho Economic Development Professional Grant State of Idaho – Idaho Department of Commerce – The amount awarded under the agreement is \$30,000. Shoshone County will provide a minimum of \$15,000 in matching funds. The term of the agreement is from July 1, 2019 until June 30, 2020.
  - Cancellation of Taxes on Parcel #48N02E-30-2075 for 2014 through 2018 – Tax Deed 2018 Transferred to Shoshone County/Was County Road
  - Cancellation of Taxes on Parcel #MC0234 for 2014 through 2018 – County surplus property
  - Draft Proposed Revised Nuisance (Blight) Ordinance

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2. Executive Session: Indigent Cases: Consideration and Decision. Executive Session ID Code 74-206(d) – Indigent Cases #2019-90, #2019-89, #2019-83, #2019-80/Denied

A motion was made by Commissioner Fitzgerald, seconded by Commissioner Huber to approve the consent agenda as presented with specific items addressed as indicated. The motion carried unanimously.

#### 2019 Beer, Wine & Liquor Licenses

#87	Olivers Mercantile LLC	Wallace	Beer/Wine By Drink
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#### 2014 Cancellation of Taxes on parcel #MC0234

County Tax	\$ .09
School Dist.	\$ .22
Forest Practices	\$2.50
Forest Assessment	\$14.99
Treas Cost	\$400.00
TOTAL:	\$417.80

#### 2015 Cancellation of Taxes on parcel #MC0234

County Tax	\$ .10
School Dist.	\$ .20
Forest Practices	\$2.50
Forest Assessment	\$15.00
TOTAL:	\$17.80

#### 2016 Cancellation of Taxes on parcel #MC0234

County Tax	\$ .10
School Dist.	\$ .18
Forest Practices	\$2.50
Forest Assessment	\$15.00
TOTAL:	\$17.78

#### 2017 Cancellation of Taxes on parcel #MC0234

County Tax	\$ .10
School Dist.	\$ .16
Forest Practices	\$2.50
Forest Assessment	\$15.00
TOTAL:	\$17.76

# PROCEEDINGS COUNTY COMMISSIONERS

## SHOSHONE COUNTY, IDAHO

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#### 2018 Cancellation of Taxes on parcel #MC0234

County Tax	\$ .10
School Dist.	\$ .16
Forest Practices	\$2.50
Forest Assessment	\$15.00
TOTAL:	\$17.76

#### 2014 Cancellation of Taxes on parcel #48N02E-30-2075

Forest Protection	\$2.50
Forest Admin.	\$15.00
Cost	\$400.00
TOTAL:	\$417.50

#### 2015 Cancellation of Taxes on parcel #48N02E-30-2075

Forest Protection	\$2.50
Forest Admin.	\$15.00
TOTAL:	\$17.50

#### 2016 Cancellation of Taxes on parcel #48N02E-30-2075

Forest Protection	\$2.50
Forest Admin.	\$15.00
TOTAL:	\$17.50

#### 2017 Cancellation of Taxes on parcel #48N02E-30-2075

Forest Protection	\$2.50
Forest Admin.	\$15.00
TOTAL:	\$17.50

#### 2018 Cancellation of Taxes on parcel #48N02E-30-2075

Forest Protection	\$2.50
Forest Admin.	\$15.00
TOTAL:	17.50

The Board met with Dan Martinsen, Shoshone County Planning & Zoning Administrator at 10:00 a.m. to discuss review and consider the following. Also in attendance was Monica Miller with Shoshone County Planning & Zoning, and Bill Drake.

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- File: MS-133-19, Applicant Joanne Keesee – Requesting Approval of Major Subdivision (replat) allowing the creation of two (2) lots in the Natural Resource Zone, located at 11942 Old River Rd., Kingston. Dan reviewed the Findings of Fact, Applicable Legal Standards, Conclusions of Law, Recommended Conditions of Approval and Order of Recommendation. Following review and discussion, a motion was made by Commissioner Huber, seconded by Commissioner Fitzgerald that based on the Findings of Fact and Conclusions of law set forth in the documents presented, to approve the application for a Major Subdivision (replat), Case #MS-133-19, as requested by Joanne Keesee with proposed conditions. The motion carried unanimously.

The Commission reviewed and approved the following report as presented. The following bills or claims against the County were examined and allowed; and in payment of the same the County Auditor is hereby authorized and directed to issue warrants/checks on the following viz:

### CHECKS

001	Current Expense	\$60,511.49
002	Road	\$287,462.39
004	Ambulance/EMS	\$6,500.00
006	District Court	\$6,147.57
011	Public Health District	\$14,826.25
016	Indigent	\$16,628.70
018	Park	\$876.36
020	Appraisal	\$28.19
023	Solid Waste	\$11,470.63
027	Weed	\$87.98
038	Waterways	\$140.00
052	Airport	\$21,191.47
055	Fish Hatchery	\$113.18
056	Emergency 911	\$5,651.23
9101	Auditor's Trust	\$6.03
9110	Title III Trust – New 2009	\$15,703.08
9183	Support Trust	\$1,570.68

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9186	Motor Vehicle Trust	\$17,191.18
9219	Drug Court Program	\$445.23
9220	Stop Grant	\$1,536.99
9230	50 Basin-Road Funds	\$1,143,270.58
9235	ITD Express Bus	\$15,572.10
9247	Silver Mountain Legal	\$9,917.83
	TOTAL:	\$1,636,849.14

STATE OF IDAHO                    )  
  ) ss.  
County of Shoshone                )

We, the Shoshone County Commissioners, being duly sworn do hereby certify and declare that we have reviewed the demands enumerated and referred to in the foregoing register and that the same are to the best of our knowledge accurate and are just claims against the County and that there are funds available for payment thereof in the County Treasury.

APPROVED for distribution as of 08/07/2019

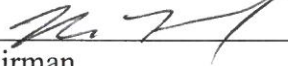
s/Mike Fitzgerald  
Commissioner

s/John Hansen  
Commissioner

s/Jay Huber  
Commissioner

Thereafter, the meeting adjourned.

ATTEST Tamie J. Eberhard  
County Clerk

Approved:   
Chairman

By:   
Deputy Clerk



# PROCEEDINGS COUNTY COMMISSIONERS

## SHOSHONE COUNTY, IDAHO

### BOOK 2019

Thursday, August 8, 2019

The Board met pursuant to recessing Wednesday, August 7, 2019.

Present:

Commissioners: Jay Huber

Mike Fitzgerald

John Hansen

Deputy Clerk: Susan K. Hendrixson

The following proceedings were had to-wit:

The Board convened at 10:00 a.m. for a decision on a Petition Requesting the Board of Commissioners to Validate Trapper Creek Right of Way Pursuant to ID Code §40-230A and §40-204A. Several members of the public were in attendance. Commissioner Fitzgerald presided and read portions of the Findings of Fact, Conclusions and Decision into the record. At the Conclusions section of the Findings of Fact, Conclusions and Decision, three (3) questions were asked individual of each Commissioner as follows:

- The Evidence is or is not sufficient to support the County's recognition and/or acceptance of Trapper Creek Road as a public road and/or right of way: Commissioner Hansen – is sufficient evidence; Commissioner Fitzgerald – is sufficient evidence; Commissioner Huber – is sufficient evidence.
- The Evidence is or is not sufficient to support that Trapper Creek Road has been used as a public road and/or right of way: Commissioner Fitzgerald – is sufficient evidence; Commissioner Huber – is sufficient evidence; Commissioner Hansen – is sufficient evidence.
- The Evidence is or is not sufficient to support that validation of Trapper Creek Road a public road and/or right-of-way is in the public interest: Commissioner Huber – is sufficient evidence; Commissioner Hansen – is sufficient evidence; Commissioner Fitzgerald – is sufficient evidence.

As a result of the conclusions outlined above and the facts and law as applied, the Shoshone County Board of Commissioners hereby determines that the Petition for Validation of Trapper Creek Road as a public road and/or right-of-way is: Commissioner Hansen – granted; Commissioner Fitzgerald – granted; Commissioner Huber – granted. In a follow up to the decision, the Petitioners will be directed to commission a survey of Trapper Creek Road pursuant to Idaho Code §40-203A at their own expense and have the same recorded in the records of Shoshone County, State of Idaho. Any resident or property holder within a county of highway district system, including the State of Idaho or any of its subdivisions, or any agency of federal government, may appeal to the district court of the county in which the highway or public right-of-way is located pursuant to section 40-208, Idaho Code and the procedures outlined therein. The County has validated the road, and additional work needs to be determined. A meeting was scheduled on Monday, August 12<sup>th</sup> at 11:00 a.m. to discuss, review and consider the following items: 1) Road Survey; 2) Road Survey Recording; 3) Road Maintenance; and 4) Gate.



**PROCEEDINGS COUNTY COMMISSIONERS**

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**BOOK 2019**

BEFORE THE SHOSHONE COUNTY BOARD OF COUNTY COMMISSIONERS

In the matter of:  Petition for Validation of “ <i>TRAPPER CREEK ROAD</i> ” as a public road and/or right-of-way otherwise known and described pursuant to maps held in the records of Shoshone County located in Sections 28 and 33, Township 48 North, Range 2, B.M., and in Sections 3 and 4, Township 47 North, Range 2 East, B.M., Shoshone County, State of Idaho.	<b>FINDINGS OF FACT, CONCLUSIONS AND DECISION</b>
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A Petition for Validation dated October 15, 2018, was filed by Petitioners, GMC Logging, Inc., Chester Mining Company, Trapper Creek Land & Timber, LLC, and Jodi Haire, by and through their attorneys of record, Morrow & Fischer, PLLC, pursuant to Idaho Code § 40-203A and § 40-204A. A public hearing on that petition was held on July 16, 2019, with notice being provided pursuant to Idaho Code § 40-203.

**FINDINGS OF FACT AND CONCLUSION**

**FINDINGS OF FACT**

If any of these Findings of Fact are deemed Conclusions of Law, they are incorporated into the Conclusions of Law section. Further, the findings of fact consist of all facts and exhibits presented on the record at the public hearing herein and the Board of County Commissioners herein incorporate by reference all testimony, facts, and exhibits received and admitted at the time of the public hearing.

A. The Board finds the record is comprised of:

1. Petition for Validation filed by Petitioners and dated October 15, 2018;
2. Audio recording of public hearing dated July 16, 2019;

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3. Shoshone County Exhibits as follows:
  - i. BOCC Exhibit A – Shoshone County Road List excerpt;
  - ii. BOCC Exhibit B – Shoshone County Expenses 1/1/18 through 7/14/19 excerpt;
  - iii. BOCC Exhibit C – Email from Robert Tomczak to Mike Fitzgerald dated December 16, 2018, regarding Trapper Creek Road RS2477 Decision/Determination;
  - iv. BOCC Exhibit D – Email from Joanne Miller to Mike Fitzgerald dated July 10, 2019 re status of Trapper Creek Road;
  - v. BOCC Exhibit E – ALTA Commitment for Title Insurance Issued by First American Title Insurance Company;
  - vi. BOCC Exhibit F – Pride Resources, Susan Copeland Opinion RE: Trapper Creek Road Petition for Validation.
4. Petitioners' Brief in Support of Petition For Validation;
5. Petitioner Exhibits as follows:
  - i. Petitioner Exhibit A – Trapper Creek Road Creation;
  - ii. Petitioner Exhibit B - Plats and Maps evidencing historical existence of Trapper Creek Road;
  - iii. Petitioner Exhibit C – Annual report of the Mining Industry of Idaho 1907;
  - iv. Petitioner Exhibit D – 57 Quartz Location Notices filed and recorded between 1901 and 1913;
  - v. Petitioner Exhibit E – Articles from the Wallace miner detailing mining activity along Trapper Creek;
  - vi. Petitioner Exhibit F – Commissioner Minutes from 1916, 1917 and 1919 showing reimbursement for road improvements.

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- vii. Petitioner Exhibit GG – Homestead applications along Trapper Creek;
- viii. Petitioner Exhibit H – Current Shoshone County Roadbook listing Trapper Creek and beginning .369 miles of the road recently maintained at public expense;
- ix. Petitioner Exhibit I – Miscellaneous documents;
- x. Petitioner Exhibit J – a written, signed comment from a member of the public in favor of validation;
- xi. Petitioner Exhibit K – Pine Creek Diary March 2018 The Trapper Creek Property aka The Cabin.

6. Exhibits from the Public:

- i. Public Exhibit 1 – Shoshone County Parcel Information Map;
- ii. Public Exhibit 2 – A variety of several documents regarding Trapper Creek.

B. As to procedural items, the Board finds the following:

- 1. The Petitioner for Validation was submitted to the Shoshone County Board of Commissioners seeking validation of Trapper Creek Road;
- 2. A Notice of Public Hearing on this application was issued with a hearing to be held on July 16, 2019, at 10:00 a.m., with a legal notice published in the Shoshone News Press June 12, and July 3, 2019.
- 3. On July 16, 2019, a public hearing was held where a verbal report was given on behalf of Shoshone County by Public Works Director Jim Cason. The Petitioner presented witnesses in aid of their petition. Testimonies were given in support, neutral, and opposition.
- 4. The matter was taken under advisement for a decision to occur on August 8, 2019, at 10:00 a.m.

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C. The Petitioner seeks validation of Trapper Creek Road for the following reasons:

1. Petitioners own real property in Shoshone County, State of Idaho, which properties are adjacent to Trapper Creek Road and Trapper Creek right-of-way;
2. Trapper Creek Road is a recognized public right-of-way to .369 miles from the East Fork Pinecreek Road, and alleges it should be recognized as a public road pursuant to Idaho Code § 40-117 and/or Idaho Code § 40-203A and/or Idaho Code § 40-204A.
3. Trapper Creek Road existed across unreserved federal property prior to 1912 and as such is subject to validation under RS 2477 authority.
4. Petitioners and/or their predecessors in interest have used Trapper Creek Road on a regular basis for a period far exceeding five (5) years, and/or Shoshone County has manifested an intent to accept Trapper Creek Road as a grant from the federal government;

D. The Board finds the following facts exist with respect to the property referred to as Trapper Creek Road:

1. The report prepared for and provided by the County at public hearing is sufficient to show that at least a portion of the property referred to as Trapper Creek Road is presently included on the Shoshone County Road list as outlined in BOCC Exhibit A, and the County has expended funds to maintain a portion of the road referred to as Trapper Creek Road as outlined in BOCC Exhibit B;
2. The United States Forest Service claims no rights to this road as outlined in BOCC Exhibit C;
3. The Bureau of Land Management does not have any ownership interest in Trapper Creek Road, nor are they aware of any R.S. 2477 claims on the

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portion of the road that passes through land belonging to the Bureau of Land Management as outlined in BOCC Exhibit D;

4. The report prepared by Susan Copeland outlined in BOCC Exhibit F shows, among other things, that the Batterton, Hundred & One, Tiger, Trapper and Washington M.S. 2621 patented mining claims located in Sections 3 and 4, Township 47 North, Range 2 East, B.M., Shoshone County, were patented in 1912 to Trapper Mining & Smelting.
5. Petitioner's Exhibit A including but not limited to Section 33 of the Plat outlined therein evidences an existence of Trapper Creek Road and its usage during early mining operations in that area;
6. Multiple private and public maps denote the existence of Trapper Creek Road by naming, labeling and depicting Trapper Creek Road;
7. The location of Trapper Creek Road has generally remained unchanged from the early historical references to its current day location beginning at the East Fork of Pinecreek Road following Trapper Creek southerly;
8. Petitioner's Exhibit D evidences quartz location notices between 1901 and 1913 along the area known as Trapper Creek Road, with mining claim notices evidencing mining activity in that area before patent in 1912;
9. Petitioner's Exhibit E evidences Shoshone County commissioner minutes which show that individuals were reimbursed for road maintenance in that area in 1916, 1917 and 1919, indicating an acceptance by the County of its interests in the property known as Trapper Creek Road;
10. Petitioner's Exhibit H also evidences inclusion of Trapper Creek Road on the County's road book;
11. Testimony from Jacklyn Fields indicates existence and use of Trapper Creek Road beginning to her recollection beginning in the early to mid 1960s and

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continuing thereafter by family;

12. Testimony from Judith Etherton indicating an existence and use of Trapper Creek Road beginning in the 1960s and continuing thereafter;
13. Testimony of Jody Haire that Trapper Creek Road has been used for over 50 years by her family, and she has filed a timber management plan associated with her property;
14. Testimony by Cindy Carlson of GMC Logging that property was purchased in 1996 and Trapper Creek Road was used to access their property when they purchased it, and thereafter. In addition, she testified that a flood resulted in their fixing and repairing the road at the direction of the State;
15. Testimony by Guy Carlson of GMC Logging that his property was purchased in 1996 and Trapper Creek Road was used to access the property;
16. Testimony from John Haire that Trapper Creek Road has been used to access their property;
17. Testimony from Bob Jones, real estate agent, that access to mining country and patented or unpatented mining claims were guaranteed and people should be able to access their property;
18. Public Comment was received from Steve Jordan, a property owner along Trapper Creek Road, who testified as follows:
  - i. He began coming to Idaho in 1995, and signed a mortgage note via a land contract with Glen Land in July 2000;
  - ii. West Valley Realty informed him Trapper Creek Road ended at "Burton's property" and an easement was needed across Burton's property;
  - iii. He eventually put up a gate to block access on the road, and a dispute ensued;



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- iv. He admits Trapper Creek Road existed, but as a dirt road which was not graded;
  - v. Opposes the validation on several grounds, including but not limited to: there is a pending lawsuit between the parties about the road and access, he will need to purchase a million-dollar liability policy for people travelling in this area, environmental impact, and an unconstitutional taking;
  - vi. He presently plows from his house to “The Burtons”;
  - vii. Admits Trapper Creek Road is the manner by which he has accessed his own property since first entering into the purchase;
19. Public Comment from Alan Johnson expressed opposition due to a concern over validation affecting his taxes and validation encourages more validation petitions;
20. Public Comment from Elizabeth Johnson expressed opposition due to a concern over tax consequences and environmental impacts;
21. Public Comment from Mr. Jordan’s attorney in litigation with the Petitioners advising that District Court litigation that is pending should be the forum for resolving the dispute, not road validation process;
22. Petitioners assert there is no testimony to rebut their evidence as presented at hearing that Trapper Creek Road has existed in its present location since the early 1900’s and has been used in that location since that time;
23. Trapper Creek Road historically provided and continues to provide direct and primary access for multiple property owners as well as for private, public, and tribal purposes;
24. Uses of Trapper Creek Road discussed and presented through testimony and evidence include but are not limited to: residential dwellings, mining, logging,

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logging camps, boarding housing, hunting, fishing, camping, outdoor recreation, commercial camping and outfitting, firewood gathering, seasonal family activities, firefighting, deliveries, road repair and road maintenance;

25. Historic and current Trapper Creek Road uses are consistent with the uses of roads of the same type for the region;

26. Evidence supports use of the road, despite testimony related to installation of gate on a portion of a road owned by the Jordans;

### **APPLICABLE LEGAL STANDARDS**

E. Idaho Code § 40-203A

I.C. § 40-203A provides that any resident or property holder within the county may petition the Board of Commissioners to validate a highway or public right-of-way if the legal existence of such highway or right-of-way is unknown or in dispute. Idaho Code § 40-203A goes on to define the standard for validating such roadway as follows:

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

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

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

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

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

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

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

The Board must follow the procedures set forth in Idaho Code § 40-203 (the statute used to determine abandonment of a public roadway), and must decide whether validation of the road or public right of way is in the public interest. I.C. § 40-203(1)(h).

#### F. Idaho Code § 40-204A

Idaho Code § 40-204A provides that R.S. 2477 rights-of-way are created automatically upon mere “construction and first use. Neither the mere passage of time nor the frequency of use shall be considered a justification for considering these rights-of-way to have been abandoned. I.C. § 40-204A(2). All of the said rights-of-way shall be shown by some form of documentation to have existed prior to the withdrawal of the federal grant in 1976 or to predate the removal of land through which they transit from the public domain for other public purposes. I.C. § 40-204A(3). Documentation may take the form of a map, an affidavit, surveys, books or other historic information. *Id.*

That section further provides that these rights-of-way shall not require maintenance for the passage of vehicular traffic, nor shall any liability be incurred for injury or damage through a failure to maintain the access or to maintain any highway sign. I.C. § 40-204A(4). These rights-of-way shall be traveled at the risk of the user and may be maintained by the public through usage by the public. *Id.*

#### G. R.S. 2477, section 8 of the Mining Act of 1866 (“RS 2477”) and related case law

Revised Statute 2477 was enacted in 1866, during a period when the federal government promoted settlement of the West. It was a primary authority under which many state and county highways were constructed over federal lands in the West. By its general wording: "The right-of-

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way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” The Idaho Supreme Court has long stated that R.S. 2477 rights-of-way may be accepted in either of two ways, by compliance with state statutes for road creation or by some positive act by local officials recognizing the road as public.

The general rule would seem to be that in order to constitute an acceptance of the congressional grant of right of way for public highways across public lands [under R.S. 2477], there must be either use by the public for such period of time, and under such conditions as to establish a highway under the laws of this State; or there must be some positive act or acts on the part of the proper public authorities clearly manifesting an intention to accept such a grant with respect to the particular highway in question.

*Kirk v. Schultz*, 63 Idaho 278, 282-83, 119 P.2d 266, 268 (1941) (Budge, J.) (emphasis supplied).

H. 1893 Idaho Sess. Laws, at p. 12, § 1 and related case law

Section 851. Roads laid out and recorded as highways, by order of the board of commissioners, and all roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expense of the public or located and recorded by order of the board of commissioners, are highways. *Id.* (currently codified as I.C. § 40-202(3)). “Where the public uses a highway or road for the statutory period of five years and it is worked and kept up at public expense, and a highway being established by prescription.” *State v. Nesbitt*, 79 Idaho 1, 6 (1957) (validating road that had been used by public (i.e. farmers, loggers and the U.S. Forest Service) since 1893, until being obstructed by defendant in 1955, that was periodically maintained at the county expense since 1931 yet was never considered a county road or laid out and recorded by the Board of the County Commissioners).

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In *State v. Nesbitt*, the majority found that there was sufficient public use notwithstanding that the testimony showed the road was “merely a trail that you could get over with a wagon.” Several Idaho cases have suggested that maintenance need not be for five years. See *State v. Berg*, 28 Idaho 724 (1916) (validation road based upon prescriptive use without any evidence of public maintenance); *Ada County Highway Dist. v. Total Success Invs., LLC*, 145 Idaho 360, 366 (2008) (“Maintenance need only be work and repairs that are reasonably necessary; it is not necessary maintenance be performed in each of the five consecutive years or through the entire length of the road.”).

#### I. Other Idaho Case Law

The Idaho Supreme Court addressed a case involving public use and acceptance of public roadway in *Trunnell v. Fergel*, 153 Idaho 68, 278 P.3d 938 (2012) (Burdick, C.J.), as cited in the *Road Law Handbook*, Christopher H. Meyer, Esq., June 21, 2019 ed. In that case, a road dispute developed between neighbors with the plaintiff contending that the road was public and that the neighbor was illegally preventing access to the road (which crossed the defendants’ property and led to plaintiff’s property). *Id.* The road was established by formal declaration of Bonner County in 1908, and the action was recorded in Bonner County’s “Road Book.” *Trunnell*, 153 Idaho at 70, 278 P.3d at 940. Thus, there was little doubt that it was a public road and, indeed, that issue was not appealed. The defendants contended, however, that when they bought their property in 1991 they were without actual or constructive knowledge of the public status of the road and were therefore “bona fide purchasers” (or BFPs) and, as such, were entitled to take the property not subject to any public easement. The trial court agreed, but the Idaho Supreme Court reversed.

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“Because I.C. § 40–203 establishes the only avenues through which a validly created public road may be abandoned, the bona fide purchaser defense is not available to Fergel.” *Trunnell*, 153 Idaho at 72, 278 P.3d at 942. Thus, the Idaho Supreme Court established the principle that the BFP defense applies only to private easements.

### **CONCLUSIONS**

The Board of Commissioners of Shoshone County hereby finds that the record as a whole including testimony and evidence produced at public hearing hereon, supports the following conclusions:

Evidence is sufficient to support the County’s recognition and/or acceptance of Trapper Creek Road as a public road and/or right-of-way;

Evidence is sufficient to support that Trapper Creek Road has been used as a public road and/or right-of-way;

Evidence is sufficient to support that validation of Trapper Creek Road a public road and/or right-of-way is in the public interest;

As a result of the conclusions outlined above and the facts and law as applied, the Shoshone County Board of Commissioners hereby determines that the Petition for Validation of Trapper Creek Road as a public road and/or right-of-way is:

**GRANTED;**

PETITIONERS are hereby directed to commission a survey of Trapper Creek Road pursuant to I.C. § 40-203A at their own expense and have the same recorded in the records of Shoshone County, State of Idaho.

YOU ARE FURTHER NOTIFIED THAT any resident or property holder within a county or highway district system, including the state of Idaho or any of its subdivisions, or any agency of the federal government, may appeal to the district court of the county in which the highway or



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public right-of-way is located pursuant to section 40-208, Idaho Code, and the procedures outlined therein.

DATED this 8<sup>th</sup> day of August 2019.

s/Mike Fitzgerald  
Mike Fitzgerald, Chairman

s/Jay Huber  
Jay Huber, Commissioner

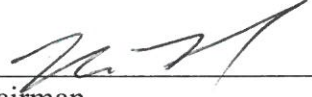
s/John Hansen  
John Hansen, Commissioner

Attested To By:

s/Susan K. Hendrixson  
Susan K. Hendrixson, Deputy Clerk  
to the Shoshone County Board of Commissioners

Thereafter, the meeting adjourned.

ATTEST Tamie J. Eberhard  
County Clerk

Approved:   
Chairman

By:   
Deputy Clerk

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Friday, August 9, 2019

Not a regular meeting day of the Board of Commissioners.

Present:

Commissioners:

Deputy Clerk:

The following proceedings were had to-wit:

ATTEST Tamie J. Eberhard  
County Clerk

Approved:   
Chairman

By:   
Deputy Clerk