

exhibit 1
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RECEIVED

AUG 25 2022

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**SHOSHONE COUNTY
COMMISSIONERS**

August 25, 2022

Shoshone County Board of Commissioners
700 Bank Street, Suite 120
Wallace, Idaho 83873

Commissioner Jay Huber
Commissioner John Hansen

Via email to commsec@co.shoshone.id.us and facsimile to 1-208-752-4304 and hand delivery

***Re: Validation of Public Right-of-Way for West Pine Creek Road
Idaho Code §40-203A***

Dear Commissioners:

I write on behalf of John Hancock Life Insurance Company (USA) ("Hancock"). My March 28th, 2022, letter was delivered to you as part of the original validation hearing and considered by you as part of the Findings of Fact, Conclusions, and Decision dated June 21st, 2022 ("Decision"). A request for reconsideration from David P. Claiborne at Sawtooth Law (counsel for Paul Loutzenhiser, Robert Jutila, and North Idaho Trail Blazers Incorporated) was delivered to you on July 19th, 2022 ("Reconsideration Request").

Hancock submits that your Decision was well reasoned and came to the correct conclusion, and that the Reconsideration Request should be denied for the following reasons:

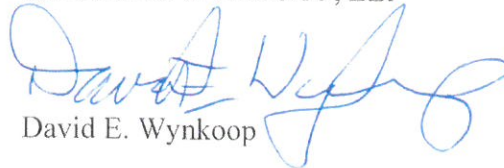
1. A public right-of-way was never created on the Hancock parcel, by dedication, by prescription, or otherwise. This was fully addressed in my letter of March 28th, 2022, which is incorporated herein by reference. As you found in your Decision there was never a continuous five-year period where any right-of-way on the Hancock parcel was built or maintained by the County at public expense. AT MOST any right-of-way was private, NOT public. The County has no jurisdiction to convert a private road to a public road using a validation proceeding. Paul Loutzenhiser ("Petitioner") did not meet his burden to prove by clear and convincing evidence that a public right-of-way was ever created on the Hancock parcel.
2. A validation proceeding cannot create a new public right-of-way but can ONLY validate public right-of-way which already exists. The Idaho State Supreme Court has repeatedly held that a validation proceeding can only be used to validate a pre-existing public right-of-way, NOT create a new public right-of-way. See *Galvin v. Canyon Highway District No. 4* 134 Idaho 376, 6 P. 3d 826 (2000). Note that in *Galvin* the highway agency was

held liable for a taking. For a public right-of-way to be created by prescriptive use and maintenance, the use and maintenance must have been regular and continuous, not occasional or sporadic. Idaho Courts have reversed several Idaho Counties' attempts to create public roads where there was not adequate evidence of public maintenance and public use. See e.g., *Homestead Farms, Inc. v. Board of Commissioners* 141 Idaho 855, 119 p.3d 630 (2005) and *Flying "A" Ranch v. County Commissioners of Fremont County* 157 Idaho 937, 342 p. 3d 649 (2015).

3. Any attempt by the County to create a new public right-of-way on or across the Hancock property will be a taking. The County will likely be liable for all damages, court costs, and attorney's fees.
4. Only Petitioner can request reconsideration. Robert Jutilo and the North Idaho Trail Blazers Incorporated were not original petitioners and so have no standing to request reconsideration of the Decision.
5. The usual procedure for reconsideration is that the request will only be considered if material new information is presented. Here, NO material new information has been offered and so the original Decision should stand and the Reconsideration Request should be denied.
6. Apparently, there is a Shoshone County Commissioner vacancy. If a new Commissioner did not participate in the original hearing, that Commissioner should not participate in any reconsideration proceeding since that Commissioner did not have an opportunity to hear the original evidence and observe the demeanor of the witnesses.

In conclusion, with respect to the Hancock parcel there is no basis for reconsideration of the Decision. No material new information has been offered. The Reconsideration Request should be denied and the original Decision should be affirmed. I urge you to continue to support Hancock's private property rights.

SHERER & WYNKOOP, LLP



David E. Wynkoop

DEW/tmw
Enclosure:

Letter of March 28, 2022.

Cc: Benjamin Allen, Shoshone County Prosecutor, via email to prosecutor@co.shoshone.id.us
and via fax to 208-753-8351

Shoshone County Clerk, via email to commsec@co.shoshone.id.us
and via fax to 208-752-4304

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**SHOSHONE COUNTY
COMMISSIONERS**

Phone 208-887-4800
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March 28, 2022

Shoshone County Board of Commissioners
27 W. 420 N.
Shoshone, ID 83352

Commissioner Mike Fitzgerald
Commissioner Jay Huber
Commissioner John Jensen

*Via email to commsec@co.shoshone.id.us (with copies of referenced letters)
facsimile to 1-208-752-4304 (without referenced letters or exhibits)
and via hand delivery (with referenced letters and exhibits)*

***Re: Validation of Public Right-of-Way for West Pine Creek Road
Idaho Code Section 40-203A***

Dear Commissioners:

I write on behalf of John Hancock Life Insurance Company (USA) ("Hancock"). Please consider this letter part of Hancock's testimony in the upcoming validation hearing to consider a request to validate a public right-of-way ("ROW") across property a portion of which is owned by Hancock. It is our understanding this proceeding is being conducted pursuant to Idaho Code Section 40-203A. A Hancock representative plans to attend the March 29, 2022, hearing to provide further testimony and answer any questions you might have.

Hancock owns a parcel of land located in SE ½ SE ¼ of Section 1, Township 47 North, Range 01 East, Shoshone County, Idaho (the "Hancock Parcel"). The validation petition asks that you find that a public ROW exists on and across the Hancock Parcel. Based on the records and testimony, Hancock respectfully requests you find there is no public ROW on the Hancock Parcel.

The validation petition contains no support for the assertion that a public ROW was ever created on the Hancock Parcel. The petition suggests incorrectly that a "history of public use" results in the creation of a public ROW. The petition does not assert that a dedication of a public ROW was ever offered to or accepted by Shoshone County. Nor does the petition allege that Shoshone County ever maintained a public road on the Hancock Parcel. The only suggested basis for

creation of a public road is an attached snapshot of a map where someone drew a line across a depiction of the Hancock Parcel. The petition does not provide a source for the map, nor the identity of who drew the line on the map, or for what purpose. The Idaho Supreme Court has dealt with this same issue on several occasions. The Court has clearly stated that drawing a line on a map does not and cannot create a public ROW on private property. Rather, the statutes must be strictly followed. There must be proof that the ROW was dedicated to the public or there must be proof of five years of public maintenance. Here, there is neither.

Idaho law requires that a party asserting the existence of a public road has the burden of proof to prove that all of the elements for creation of a public road have been met. Here, it must be concluded that the petitioner has not met his burden of proof, at least with respect to the Hancock Parcel.

No Public ROW Exists By Dedication

Hancock has conducted a thorough review of publicly available records and has found no record of dedication of a public ROW on the Hancock Parcel. The Petitioner did not present even a shred of evidence in the petition to meet his burden of proof to establish that a public ROW was ever created on the Hancock Parcel.

In Idaho, a party asserting a public ROW was dedicated to the public must prove by clear and convincing evidence that an offer of dedication was made to a public agency and that the offer of dedication was accepted by the appropriate highway agency; in this case, Shoshone County.

The records contain no evidence of an offer of dedication of a public ROW. Hancock submitted a public records act request to the County on March 10, 2022 requesting a copy of any and all County records relevant to a public ROW on the Hancock parcel (copy enclosed). Pursuant to the Idaho Public Records Act, the County had a legal duty to provide copies of any such records. No response from the County was received nor was there any follow-up to an email or several telephone calls. Since it is assumed that the County follows the law, it must be concluded that the County does not possess any such records. Thus, there is no document which shows an offer of dedication of public ROW was made to Shoshone County with respect to the Hancock Parcel.

Likewise, there is no evidence that the County ever accepted an offer of dedication of a public ROW across the Hancock Parcel. There is no evidence that such a public ROW was ever included on the County's official road map as required by Idaho Code Section 40-202. Nor was any mileage for a public ROW ever included by the County on its maps submitted to the Idaho Transportation Department for purposes of highway distribution account funding. (See enclosed letters to Shoshone County dated 9-24-20 and 12-10-20 and an email from the Shoshone County Prosecutor dated November 6, 2020).

As noted, Idaho law mandates that any party asserting the existence of a public ROW has the burden to prove such a ROW exists. Here, the evidence is clear that there is no documentation that a dedication of a public ROW was ever offered to or accepted by the County. Unless there is clear documentation of an offer AND an acceptance, it must be concluded no public ROW was ever created or now exists. The Petitioner has the burden to prove both offer and acceptance. Here he has proved neither.

It must be emphasized that any evidence of a private right to travel across private property is very different from the creation of a public ROW. In Idaho, private roads and/or easements may have been granted for mine access or for use by a railroad. Any such rights were granted to private parties and those rights likely expired or were abandoned long ago. Any such private rights cannot be bootstrapped into the creation of a public ROW. Idaho law requires that for a public ROW to be created, there must be a clear dedication to the public. Based on the facts in the record, no dedication of a ROW to the public ever occurred with respect to the Hancock Parcel.

No Public ROW exists by Prescriptive Use

Based on my experience representing Idaho public highway agencies, off-road users sometimes argue they have a right to use a road or trail on private property based on historic use. While this may have surface appeal, Idaho law does not support such an assertion. For a public prescriptive ROW to be created, there must be clear evidence of at least five years of continuous public maintenance.

The Hancock Parcel was first created on or about 1915. At that time, and to date, a prescriptive public ROW requires clear and convincing proof of both public maintenance and public use. Proof of five continuous years of maintenance at public expense is required. Since Shoshone County is the entity with jurisdiction over public roads in Shoshone County, there must be credible evidence in the record that Shoshone County continuously maintained the road in question for a block of time of at least five continuous years. Here, there is no such evidence. Without clear and unequivocal evidence of five years of maintenance at public expense, there can be no prescriptive public ROW. End of story. Indeed, there is no evidence on the ground of any maintenance. There are no cuts or fills, no evidence of grading, no culvert or bridge, no placement of imported gravel, no asphalt or oiling of a road. The soils and rocks are native and were deposited by a creek which overflows onto the Hancock Parcel for a significant portion of the year.

Here the petition asserts five years of public use alone. Such use is relevant only if it can first be proved that there was a simultaneous five years of public use and five years of public maintenance. Idaho statutes and case law are clear that public use alone without proof of five years of continuous public maintenance cannot create a public ROW. Sometimes even attorneys

are confused on this point. They may point to Idaho's law of private prescriptive easements to attempt to support their arguments. Do not accept any such incorrect arguments. Idaho law on private prescriptive easements is very different from and just plain irrelevant to the creation of a public prescriptive ROW.

It must be concluded that any historic use of the Hancock Parcel, without proof of five years of continuous maintenance by Shoshone County cannot have created a prescriptive public ROW.

Shoshone County Tax Deeds

Shoshone County came into title on the Hancock Parcel on at least two prior occasions. Both times, the County received the property for failure to pay property taxes. Twice during the 1930's and the 1940's Shoshone County sold the Hancock Parcel by issuance of tax deeds to private parties. On both occasions, Shoshone County made no reservation for a public ROW. Had the County maintained a public road on the Hancock Parcel, or considered the route to be a public road, the County would have reserved a public ROW in both deeds. The fact that the County did not do so strongly supports the proposition that there is no public road on the Hancock Parcel.

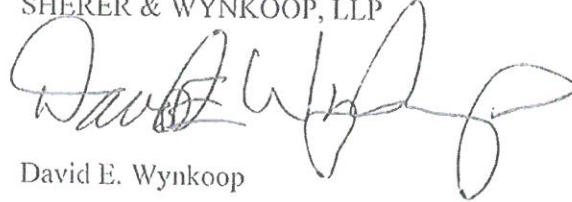
Cautionary Note

Idaho strongly supports private property rights. I am confident the Shoshone County Commissioners do as well. Asserting that a public ROW exists on private property is very risky indeed, unless there are strong facts in the record to support the creation of a public ROW. Without such facts, a "taking" will likely occur. Lawyers refer to this as inverse condemnation. If a taking occurs, the private property owners wronged will be entitled to damages as well as attorney fees. In my experience, most insurance companies, including Idaho Counties Risk Management Program (ICRMP), disclaim coverage for an inverse condemnation. Thus, the County must bear any liability resulting from a taking, including damages and attorney fees.

CONCLUSION

There is no evidence in the record to support a finding that a public ROW exists on the Hancock Parcel. Rather, the only lawful finding must be that no public ROW exists on the Hancock Parcel. Hancock requests that the County support Hancock's private property rights. Hancock's concern is not just theoretical. Unfortunately, there are unauthorized users who have caused considerable damages to Hancock's Shoshone County properties. Hancock implores the Commissioners for help monitoring any use of Hancock properties and protecting Hancock's private property from damage caused by irresponsible users.

SHERER & WYNKOOP, LLP



David E. Wynkoop

DEW/jlm

Enclosures:

Letter to Benjamin Allen, Shoshone County Prosecutor, dated March 10, 2022
Letter to Shoshone County dated September 24, 2020 from Attorney Heather Cunningham
Email dated November 6, 2020 from Shoshone County Prosecutor Keisha Oxendine
Letter to Shoshone County dated December 10, 2020 from Attorney Janna Davydova

Cc: Benjamin Allen, Shoshone County Prosecutor, via email to prosecutor@co.shoshone.id.us
(with referenced letters) and via fax to 208-753-8351 (without attachments)

Shoshone County Clerk, via email to commsec@co.shoshone.id.us (with referenced letters)
and via fax to 208-752-3331 (without attachments)