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BY [signature]

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

CLIFFORD GALLI AND PAM GALLI, Petitioners/Plaintiffs, vs. IDAHO COUNTY, IDAHO, A POLITICAL SUBDIVISION OF THE STATE OF IDAHO Respondent/Defendant.	Case No. CV 36692 OPINION
N.A. DEGERSTROM, INC. Intervenor.	

This case comes before me on appeal. In March 2005 Michael Jutte filed an application with the Idaho County Board of Commissioners pursuant to United States Revised Statute 2477 and Idaho Code § 40-204A. Mr. Jutte asked the County to validate the existence of a public right of way along Forest Service Road 410 (FS 410), also known as the Race Creek and Kessler Creek roads. FS 410 extends from Forest Service Road 241 (FS 241) in Idaho County into the Nez Perce National Forest and crosses the property of Clifford and Pam Galli. Mr. Jutte wanted to use the road to get to his unpatented mining claims within the national forest so he could do some exploratory drilling. The Gallis maintained that the road through their property was private and

refused to grant access. After an evidentiary hearing the Board declared that a public right of way existed and validated FS 410 as a public road.

The Gallis appeal this decision. N.A. Degerstrom, Inc., the successor in interest to Mr. Jutte, has intervened in the appeal and seeks affirmance of the Board's decision.

FACTS & PROCEEDINGS[1]

The Race Creek and Kessler Roads

FS 410 begins a short distance north of Riggins, Idaho. Leaving Riggins traveling north towards Grangeville on state highway 95, one first encounters FS 241 on the west after approximately one mile.[2] FS 241 continues in a nothwesterly direction, following the contour of Race Creek. After about two miles, there is a fork in the road. The northern fork is the continuation of FS 241; it follows the creek up to the juncture of the West Fork of Race Creek and Bean Creek. The western fork is FS 410, known as Race Creek Road. It follows Race Creek west for about two miles to the juncture of the South Fork of Race Creek and the tributary Kessler Creek. The western fork of FS 410 continues on following the South Fork of Race Creek to Graves Creek. The northern fork is Kessler Creek Road. It follows Kessler Creek and continues northerly for several miles, where it enters the Nez Perce National Forest, eventually joining FS 2052. FS 2052 leads to the Spotted Horse Mine, the unpatented mining claim inside the national forest that is now held by N.A. Degerstrom, Inc. Tr. May 16 at 6-7; Tr. July 13 Hr'g at 9, 46; R. at 57 (Exhibit E), R. at 195 (Ex. J).

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[1] Except where noted, all facts are contained in the administrative record.

[2] It is not clear whether Forest Service Road 241 is recognized as a county road or public right of way. Like a portion of FS 410, it is listed on the Idaho county map of public rights of way. R. 57 (Exhibit E), R. 195 (Ex. J). The 1934 deed of Stewart Aitken refers to FS 241 as a "county road." R. at 150. Mr. Galli referred to FS 241 at the hearing as a county road. Tr. May 16 Hr'g at 34-35.

Both Race Creek Road and Kessler Creek Road follow the natural contours of deep ravines in mountainous country. They closely follow the creeks for which they are named and there are steep ascents on both sides. R. at 142 (topograagphical map). From the juncture with FS 241 to border of the national forest along Kessler Creek, FS 410 crosses in sequence through sections 4,5,8,7, and 6 of Township 24 North, Range 1 East, Boise Meridian, and section 1 of Township 24 North, Range 1 West, Boise Meridian.

The present condition of the road is disputed. Mr. Jutte said that any car can make the drive although one with a higher than normal clearance was advisable. Ray Payton, a neighbor of Mr. Galli who lives on FS 241, said that the road had washed out the preceding fall in six to eight places and that not even an ATV could reach the mining claims until serious road maintenance had been performed. Tr. May 16 at 16, 41.[3]

History of the Roads

From its juncture with FS 241 until its entrance into the national forest, FS 410 crosses private property. Most of this property is owned by the Gallis. Their property reaches to the juncture of FS 410 and FS 241 and follows FS 241 to the North. They own the property on both sides of Race Creek Road and most of the property on both sides of Kessler Creek Road. Their house is situated about a mile west of the juncture of FS 410 with FS 241, along Race Creek Road. A northern portion of Kessler Creek Road adjacent to the national forest is owned by Susan O'Leary. Her ex-husband purchased the O'Leary ranch property from the Gallis in 1991. Ray Ralls also owns a ranch behind

[3] In an affidavit submitted after the Board's decision, Mr. Galli describes both Race Creek Road and Kessler Creek Road as unimproved dirt roads just wide enough to permit a single vehicle to pass. He says they are subject to serious erosion during the rain and snow seasons. Aff. Galli at 2.

the Galli property along the South Fork of Race Creek. These three landowners use FS 410 to reach their real property. Tr May 16 Hr'g at 34-39. Tr. July 13 Hr'g at 46-47.

The Gallis purchased their property, as well as what is now the O'Leary ranch, in 1980. Tr July 13 Hr'g at 36. They have always treated the road as a private road and have placed a gate where FS 410 joins FS 241. In 1988 Mr. Galli placed a locked gate on Race Creek Road. When he sold the O'Learys their ranch property he granted them an easement allowing them access by means of the Race Creek and Kessler Creek Roads. Earlier in the 1980's he permitted Idaho County to use the Race Creek road to obtain gravel from a pit located on the then Gill property on the western end of the South Fork of Race Creek. In return the county made several improvements to Race Creek Road, installed several culverts by Kessler Creek, graded in turnabouts, and replaced a gate with a cattle guard supplied by the Forest Service. R. at 114-16, 183; Tr. July 13 Hr'g at 52-53.

In the past the Forest Service has told Mr. Galli of its desire for public use of the Race Creek and Kessler Creek roads so that the public can reach the national forest in the Kessler Creek drainage. Currently and for some time the Forest Service has treated those portions of the Race Creek Road and Kessler Creek Road that lie outside of the national forest as private roads. It has consistently asked Mr. Galli for permission to use the roads, and Mr. Galli has apparently always granted it.

In the mid-nineteen-nineties the Forest Service attempted to obtain a right-of-way over Kessler and Race Creek roads and considered acquisition by eminent domain. But after doing an environmental and cost-benefit analysis of various alternatives, the Forest Service decided to provide public access to the Kessler Creek drainage by a more

northerly route. The Forest Service has adopted a plan under which it would purchase a right of way over other private property near the West Fork of Race Creek and build a short stretch of new road to connect the existing FS 9093 and FS 410 at a point inside the national forest. The stretch of FS 410 which leads onto the Kessler Creek Road and over the O'Leary/Galli properties would then be obliterated.

If this plan were carried out there would be public access to the Spotted Horse Mine without using the Race Creek or Kessler Creek roads. The plan has not yet been implemented. Therefore, access to the mine is still possible only over those two roads. R. at 57, 102-11, 195; Tr. July 13 Hr'g at 50-52.

Prior Litigation

The status of the Race Creek road section where it crosses the Galli's property was challenged in 1995. At that time Pat Armstrong filed a statement with Idaho County asserting that Race Creek Road, from the junction with FS 241 to the end of the road along the South Fork of Race Creek, was a public right of way by virtue of Revised Statute 2477 (R.S. 2477), the 1866 statute by which the United States Congress recognized the right of the public to establish rights of way over federal lands. Mr. Armstrong owned property behind the Galli's property along the South Fork and had been charged in a complaint by Mr. Galli with criminal trespass when he moved his livestock to graze there. R. at 116, 183.

Mr. Armstrong's claimed that Race Creek Road had been a public right of way before the area was homesteaded and became private property, and that it remained a valid public right of way pursuant to R.S. 2477. Idaho County was named as a defendant because it had not acted on the request to validate Race Creek Road as an R.S. 2477

public right of way pursuant to I.C. 40-204A. R. at 118-133. There is no indication that the county ever initiated the validation procedure. Instead, the claim was settled when the Gallis granted an easement to Mr. Armstrong. The suit against both Mr. Galli and Idaho County was then dismissed without prejudice. R. at 151-55.

Idaho County also states in its brief that it "certified" the Race Creek Road- from FS 241 to the South Fork of Race Creek - as a R.S. 2477 public right of way in 2004 by including it on a county map labeled as such. The county notes that the Gallis did not object at the time to this action. Br. of Idaho County at 1-2. The Galli's respond that no notice of any such impending action was given as required by law and that they could not object to an action of which they had no notice. Reply Br. of Gallis at 6-7. It is not clear whether Idaho County is claiming to have done anything beyond simply make a notation on a map without the opportunity for public input as required by law for an effective validation.[4]

The Present Litigation

The present dispute began in 2004, when Mr. Galli discovered Mr. Jutte or an associate using Race Creek and Kessler Creek road to get to the Spotted Horse Mine. Mr. Jutte wanted to drill so that he could determine the value of the claim. Mr. Galli confronted the person and told him to stop trespassing over his land. N.A. Degerstrom, Inc. then contacted Mr. Galli by letter and tried to purchase a temporary right of access. The negotiations failed. R. at 156-162; Tr. May 16 Hr'g at 26, 33.

[4] I.C. §§ 40-203A(2) and 40-203(1)(f), require abutting or adjoining landowners to be mailed notice of any validation proceeding initiated by the Board at least thirty days before any such proceeding.

On March 8, 2005 Mr. Jutte filed in the Idaho County Clerk's Office an Assertion of Right of Way Under R.S. 2477. The filing asserted that the Race Creek and Kessler Creek roads were public rights of way under R.S. 2477 and asked Idaho County to validate them as rights of way as provided for by I.C. § 40-204A. R. at 3, 172.

I.C. § 40-204A Proceedings

A public hearing was held on May 16, 2005, at which Mr. Jutte, Mr. Galli, Susan O'Leary, Ray Ralls, neighbor Ray Payton, and Pat Holmberg, who at the time was the President of the Independent Miners Association, spoke. Ms. O'Leary, Mr. Ralls, and Mr. Payton all asserted that Race Creek and Kessler Creek roads were private roads. Both Mr. Jutte and Mr. Galli submitted documentary materials to the Board in support of their positions. Mr. Jutte submitted copies of the historical record of FS 410, showing that the Forest Service and also the Civilian Conservation Corp. had engaged in road construction and improvements from the nineteen thirties to the nineteen sixties. This record described FS 410's original history as that of a private road in 1921. R. at 47-50; Tr. May 16 Hr'g at 11.

Mr. Jutte also submitted an affidavit from Mrs. Stewart Aitken dated April 4, 1989. The Aitkens had resided along the South Fork of the Race Creek Road beginning in the late nineteen-twenties. Mrs. Aitken, who resided there for fifty-five years, said that Race Creek Road was a wagon road when she and her husband first arrived and was sometimes rough to travel on. She said that the CCC had improved the road in the thirties and had also constructed a new road, the Kessler Creek Road, in 1937. Mrs. Aitken said that as long as they lived there the road was always open and that they used it

with their motor vehicle. The Aitken's considered it a public road. R. ar 54; Tr. May 16 Hr'g at 15.

Finally, Mr. Jutte offered to produce evidence from the ninety-year old daughter of a previous holder of the unpatented mining claim. He said she would state that the road was used to access the mine for thirty to forty years starting in the nineteen-fifties, and that some mechanical equipment was hauled over the roads to be used at the mine Tr. May 16 Hr'g at 13-14.

Mr. Galli submitted copies of his chain of title and copies of correspondence with the Forest Service evincing its acknowledgment of Race Creek and Kessler Creek Roads as private roads and its earlier attempts to obtain a right of way over his property.[5] R. at 78-111. His other submissions included the same historical record of road works recognizing Race Creek Road as a private road in the nineteen-twenties and nineteen-sixties, a nineteen-ninety affidavit from Ernest Chase of Idaho County stating that permission was obtained from Mr. Galli to haul gravel out via the Race Creek Road, a quitclaim deed showing that the Aitkens had acquired an easement over Race Creek Road in 1934, and evidence of the prior litigation with Mr. Armstrong in 1995. R. at 112-155.

Mr. Jutte also submitted records of the 1902 resurvey of townships in the area by Albert Oliver.[6] R. at 10-36. He maintained that the resurvey records showed there was already a road in 1902 over what is now Race Creek Road. He noted that the

[5] For example, in a 2003 letter responding to Mr. Galli's request that FS 410 be temporarily closed, District Ranger Jack Carlson responded, "The road is presently not accessible to the public, because the Nez Perce National Forest does not possess right-of-way for the public to cross your private property. . . . As a property owner, the people crossing your property are controlled by you. Present public access to Forest Road 410 is restricted to those who obtain our permission to cross your land." R. at 104.

[6] The original survey was done by L and M. Thompson in either 1867 or 1887. Tr. July 13 Hr'g at 22, 36

mountainous terrain ensured that the present location of FS 410 was substantially the same as that of the roads and trails existing at the time of the survey. Submitting evidence of homestead patents in the area occurring later in the nineteen-twenties, Mr. Jutte contended that the 1902 survey demonstrated that a valid R.S. 2477 public right of way was established when the land was still owned by the federal government and prior to any homestead entries or reservations. Tr. May 16 Hr'g at 11-15. The Gallis contended that a review of the original patents for Mr. Galli's property suggested otherwise. *Id.* at 22-23. The Board's counsel stated that "to the extent that you have interior property that is served by historic trail and you prove that it's been served by historic trail prior to the time that it was withdrawn or the patents started being granted, . . . then you probably have an R.S. 2477 road, trail, or byway . . . and . . . the 1902 map controls." *Id.* at 46.

<u>The Albert Oliver Survey</u>

The Board took the matter under advisement but found that additional evidence was required. It scheduled a second hearing, which was held on July 13, 2005. R. at 204-05. Dolly Gill testified that she lived in the rear of the South Fork of Race Creek on its tributary Graves Creek during the nineteen-sixties. She said that her family had a grazing permit in the national forest and they used the Kessler Creek Road. She said that the Forest Service maintained the road then, gravelling it, grading it, and installing culverts to permit logging trucks to haul logs out of the national forest. She said the owner of the land now owned by Mr. Galli, Circle C Ranches, would put a wire gate in places when cattle were grazing in the area but that the roads were otherwise open for use

by the public. She said there was evidence of old homesteads up along Kessler Creek. Tr. July 13 Hr'g at 6-18.

The July hearing focused on the 1902 Oliver resurvey and the issue of whether public roads and trails were established along Race and Kessler Creek at the time the survey was made[7]. Hunter Edwards, a professional land surveyor and employee of Geomatic Professional Services in Grangeville, testified. Mr. Edwards had examined the original land survey, the Oliver resurvey, and a subsequent resurvey. He explained that that Mr. Oliver's notes reflected what Mr. Oliver and his party saw as they traversed the section lines north, south, east and west within Township 24 North, Range 1 East Boise Meridian, and Range One West, looking for the earlier survey stones and setting new stones at section corners and quarter-section corners. Tr. July 13 Hr'g at 21-44. He also said that the original survey revealed no sign of any public rights of way along the two creeks. *Id.* at 34.

The notes refer to various physical features or artifacts which either crossed the section lines walked or were visible and located nearby, such as creeks and brooks, timber stands and dense brush, roads and trails, fences and irrigation ditches, and houses visible near to the line. The features are generally given in the number of chains from the starting point.[8] R. at 10-36; Tr. July 13 Hr'g at 21-44. Mr. Edwards explained that the notes did not detail the full extent of any fence lines, or the entire route of any trail, road,

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[7] From Mr. Jutte the Board had requested "additional information explaining the importance [of the submitted documents] . . . to the proponents' claim that this is in fact an RS 2477 road." The Gallis were 'invited to explain why the Race Creek Road, or more particularly the Kessler Creek Road, was not part of the historical access to the upstream ends of Race Creek." R. at 206.

[8] A chain is sixty-six feet or four rods. There are 80 chains in a mile, so the notes made while traversing one section line of one mile's length would locate features within 80 chains of the starting point.

or creek, because the Oliver team only surveyed the section lines. Tr. July 13 Hr'g at 35. The notations did indicate that, as Mr. Oliver stated, there were "a number of settlers in both tps. [townships]." R. at 22

Race Creek

Mr. Edwards prepared and submitted a map to make the physical location of the features identified by the Oliver notes easier to comprehend. He superimposed the section lines onto an aerial photo of the area obtained from the state, locating in type and markings the features identified in the Oliver survey, citing to the appropriate section of the Oliver notes. R. at 58 (Ex. D).

For example, when traveling south between sections 4 and 5, Oliver noted as follows:

40.1 [chains]	Set a basalt stone. . .
59.1	An irrigation ditch 2 lks. [links][9] wide flows E.
59.75	A road bears E and W.
60.7	Race Creek 20 lks. wide 500 ft. below spur flows N. 70° E Ascend steep slope
61.4	A fence bears N. 75° and S. 75° W.
62.2	A fence bears N. 10° W. and S. 10° E.
67.6	A fence bears N 15° W and S 15° E.
80.1	The cos. [corners] of secs. [sections] 4,5,8, and 9 800 ft. above creek. . .

R. at 28. Reference to the map reveals that these notes referred to an existing road near to the juncture of FS 241 and Race Creek road alongside Race Creek, and also to signs that the nearby land had been settled. R. at 58 (Ex. D).

In his testimony Mr. Edwards mentioned some of the survey notes made during the survey of the sections lines close to Race Creek as one followed the watercourse upstream from the east. Tr. July 13 Hr'g at 26-30. Travelling east on the section line

[9] A link is 7.92 inches.

between sections five and eight the team noted a road, a fence, and Race Creek all in close proximity. The house of J.W. Knox was seen to the northwest. R. at 27, 58 (Ex. D). Traveling north along the mile separating sections seven and eight, the survey team noted where Race Creek crossed the section line flowing east and observed that there was both a road bearing east and west and dense underbrush in close proximity to the creek R. at 30, 58 (Ex. D).. Travelling north between section lines seven and twelve the team noted where the South Fork of Race Creek Road crossed the section line flowing east and observed a road bearing east and west within a distance of two chains. Nearby a fence and an irrigation ditch also crossed the line, and R.W. McKinstry's house was seen to the west one-hundred chains distant. R. at 17-19, 58 (Ex. D).[10]

Continuing westerly and upstream, the survey along the southern and western lines of section six revealed two ditches, a brook, a road, a trail, a fence and a creek all in near proximity to the Graves Creek tributary of the South Fork of Race Creek. Further up on the western line of section one, the notes mention a creek, a trail near the creek, a brook, a log cabin near the trail, and another trail further north. R. at 58(Ex. D)[11] None of the references to a "road" or trail mention the width of the road or trail. Tr. July 13 Hr'g at 35.

In sum, there are references to a road starting at where Race Creek now flows out of the boundary of Mr. Galli's property by FS 241 all the way west along the South Fork of Race Creek. While Mr. Edwards said that wagon roads are sometimes described as such in the line survey notes, this road is described only as a road. It bears in the same

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[10] A fourth home is noted in section four east of where Race Creek heads north to Bean Creek. R. at 58 (Ex. D). This is not part of the land in dispute.

[11] The survey notes for these section lines do not appear to have been made a part of the administrative record. Their existence has not been contested

general direction as the creek itself. Mr. Jutte submitted a copy of a 1903 map which was prepared from Mr. Oliver's notes. This map drew upon these repeated references to a road in the vicinity of Race Creek and plotted a road which ran from the present junction with FS 241 all the way west along the South Fork of Race Creek to where it becomes Graves Creek. R. at 39 (Ex. 8). Mr. Edwards testified that the present Race Creek road is generally in the same location as the road in 1902. Tr. July 13 Hr'g at 33-34.

Kessler Creek

The 1903 map does not show any road along Kessler Creek, which flows northwesterly from its confluence with Race Creek in the southeast corner of section six to the northwest corner of section 6. R. at 58 (Ex. D). Nor do the survey notes mention any road along Kessler Creek. Rather, there is mention of a trail by the creek in one location upstream. Walking north and descending from the ridge along the western section line of section one, the survey team encountered Kessler creek, signs of settlement, and a trail in the proximity of the creek:

58.8 [chains]	A creek 8 lks. wide 400 feet below top of ridge flows S.E. Ascend
60.00	A trail bears E and W. Leave scattering timber and dense undergrowth bears N.W. and S.E.
60.50	A house bears N. 32° W 3.00 chs. dist. [chains distant][12]
63.50	A fence bears N. 32° E and S. 20° W.
64.00	Enter dense undergrowth bears N.W. and S.E.

R. at 20.

This trail was not noted in the only other place where a section line crossed the creek. Travelling east on the southern border of section one, the survey team descended to Kessler Creek close to where it joined Race Creek, crossed the creek, and reached the

[12] This house also appears on the 1903 map. R. at 39 (Ex. 8).

section corner. There is no mention of any road or trail in the proximity of the creek, even though the view from above is apparently unimpeded by trees:

47.5	. . . Ascend 75 ft. to
57.00	Top of spur bears S. 20° E. Descend 325 ft. to
68.00	A creek 5 lks. wide flows S.E. From this point a house bears South 5.00 chs. dist. Ascend 200 feet to
78.95	The cos. [corners] of secs. 5,6,7, and 8. Land mountainous. Soil sandy loam and stony. 2nd to 4th rate. No timber.

R. at 34, 58 (Ex. D).

Because the evidence of a public passageway along Kessler Creek was limited to the single trail encountered upstream in the northwest corner, the Board expressed interest in knowing whether this trail and the other trails scattered in the area appeared to lead to the more clearly established road in the vicinity of Race Creek:

> Mr. Rehder: . . . [D]id most of the trails look like they access[ed] into that road (inaudible)?
> Mr. Edwards: Uhm,. I really didn't look at whether they accessed into them. I just –
> Mr. Rehder: (Inaudible)
> Mr. Edwards: -- which direction they were headed. They do w[a]nder around here.

Tr. July 13 Hr'g at 34.

The BLM Patent Records

Because the 1902 survey notes clearly evinced the existence of settlements in the area, the question arose as to whether any patent entries had already been made. Mr. Edwards said he had not reviewed the patent records. *Id.* at 32. Ron Grant of the Bureau of Land Management (BLM) was present at the hearing and offered to search the public land records for the township in the area at the heart of the dispute. The Board asked him to do so. After the Board took the matter under advisement Mr. Grant submitted his

report to the Board.[13] This report said that the earliest withdrawal of land from the public domain in the area occurred on February 1, 1904, when sections four through thirty-two were temporarily withdrawn to form the Seven Devils Mountains Forest Reserve. Homestead entries on land within sections six, seven and eight were made in 1904 but were later abandoned. The first patent was issued on section 10 in 1905. Section 10 is outside of the area at issue here. The report stated that there was "no record of any earlier settlement entries or other actions affecting the status of the public lands along the present location of the roads along Race Creek, South Fork of Race Creek and Kessler Creek." R. at 61-65, 220-224. In sum, the report indicated that the settlements evidenced by the Oliver Survey of 1902 were still located on the public lands.

Factual Findings and Conclusions of Law

The Board scheduled August 15, 2005 for a decision on Mr. Jutte's application and met then to deliberate. R. at 211-212. Mr. Galli was present at the deliberation, at which the Board voted to approve Mr. Jutte's application and ordered written findings of fact and conclusions of law to be prepared. R. at 289. On September 6, 2005 they were issued. The Board found that the first withdrawal of lands from the public domain occurred on February 1, 1904, when the Seven Devils Mountain Reserve was temporarily established. Therefore, prior to that date the creation of a public right of way over federal lands under R.S. 2477 was still possible. The Board then addressed the issue of whether

[13] The Gallis do not contend that consideration of the BLM report was improper. The Board requested submission of the report at the hearing, neither party objected, and provision was made on the record for parties to receive copies of the report. R. at 70-72; *see Idaho Historic Preservation Council v. Boise*, 134 Idaho 651, 654 (2000)(when a governing body sits in a quasi-judicial capacity, it must confine its decision to the record produced at the public hearing to afford due process)

or not any public rights of way existed at the time of the Oliver Survey in 1902. R. at 213-15. The Board found from the evidence submitted that:

> [T]here appears to be a wagon road initially in Section 10, continuing into Section 3, Section 4, Section 5, Section 8, and Section 7, Township 24 North, Range 1 East, Boise Meridian. The road then forks at the mouth of Kessler Creek in Section 7, and then a trail continues up Kessler Creek. The surveys demonstrate that said trail up Kessler Creek starts in Sections 7 . . . and continues Northwesterly through Section 6 . . . and ultimately ends in Section one, Township 24 North, Range 1 West. That trail appears to have been constructed and in place prior to the withdrawal of any property from the public domain. . . . The trail up Kessler Creek . . . appears to have been the access route to cabins and residences further along and up Kessler Creek. The trail appears to have been constructed for first use prior to the homestead withdrawal shown in Exhibit A, and were used sufficiently to allow construction of cabins and residences and the transmission of materials upstream on Kessler Creek to allow the building that was reflected in the 1902 Oliver surveys and the 1903 map.

R. at 216

The Board found that there had been "active construction and first use" of both the Race Creek road and the Kessler Creek trail. It found that they were constructed for "wagon road purposes and horse passage purposes," that they were constructed "by means adequate to access the area," that they were in place in 1902, and was that "because of the difficulty of the terrain," the present Race

Creek and Kessler Creek roads constituting FS 410 were in essentially the same location as the wagon road and trail in 1902. R. at 215-17.

Finding sufficient evidence of construction and first use, the Board concluded that sufficient evidence had been introduced to demonstrate a "valid establishment" and "acceptance of the federal grant for purposes of the analysis under Revised Statute 2477 and the appropriate case law." R. at 216-17. It concluded that Mr. Jutte had met his burden of showing that FS 410 was a valid R.S. 2477 right of way along the Race Creek Road and the Kessler Creek Road. Therefore, the Board validated FS 410 as a public right of way under RS 2477 and Idaho law. *Id.*

Amended Findings

The Gallis filed a timely appeal on September 13, 2005. The Gallis alleged that the Board had failed to follow the procedures dictated by I.C. § 40-203A(3) because it did not make an explicit finding that validation would be in the public interest. On November 14, 2005 the Board met to amend its findings. Tr. Nov. 14 Hr'g at 49-62. Mr. Galli was present. The Board issued written supplementary findings of fact that the validation of FS 410 was in the public interest because: "(1) allowing the public greater access to the National Forest on roads that are in fact public is in the public interest;" (2) the use of the existing public roads will allow the public to "develop natural resources, . . . in this case mining properties;" and (3) 'the development of natural resources is in the best interests economically of the public."

Issues Presented on Appeal

The Gallis maintain that the Board had no statutory authority under I.C. § 40-204A to validate the existence of an R.S. 2477 right of way over what is now private land. In the alternative they claim that the conditions of construction and first use were not met and that the findings of the Board to the contrary are not supported by substantial evidence. They also claim that validation is not in the public interest and that the Board improperly amended its findings of fact and conclusions of law to that effect after the appeal was filed. In any event they contend that they should have received notice and an opportunity to respond.

If the validation of the roads is to be upheld, they assert that the scope of the easement does not permit the uses which N.A. Degerstrom intends. They also claim that due process rights were violated because the Board did not prepare a transcribable record of their deliberations and that their constitutional rights have been violated by the granting of access to their property without payment of just compensation. All of these issues were raised below. Lastly the Gallis ask for lawyer's fees.

STANDARD OF REVIEW

Idaho Code § 40-208 authorizes an aggrieved property holder to obtain judicial review of the decision of a board of county commissioners in a highway validation proceeding. *Homestead Farms v. Bd of Comm'rs of Teton* County, 141 Idaho 855, 858 (2005). My review is confined to the record. I may not substitute my judgment for that of the commissioners as to the weight of the evidence regarding questions of fact. *Id.*

I may affirm the decision or remand the case for further proceedings. I may reverse or modify the decision if substantial rights have been prejudiced because the commissioner's findings, inferences, conclusions, or decisions are:

(a) In violation of constitutional or statutory provisions, or

(b) In excess of the statutory authority of the commissioners, or

(c) Made upon unlawful procedure, or

(d) Affected by other error of law, or

(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). *Homestead Farms*, 141 Idaho at 858-59. Under the clear error standard, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985).

While my review is deferential, "it is not nugatory." *Indmar Products Inc. v. C.I.R.*, 2006 WL954183 at *5 (6th Cir., Apr. 14, 2006). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *State Dept. of Health and Welfare v. Roe*, 139 Idaho 18, 21 (2003) (quoting *United States Gypsum Co.*). Clear error does not occur if the findings are supported by substantial and competent evidence, even if the evidence is conflicting. *Roe*, 139 Idaho at 21; *Homestead Farms*, 141 Idaho at 859. Substantial evidence is the evidence that a reasonable mind would accept as adequate to support a conclusion. *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 260 (1986)

Erroneous conclusions of law made by an agency may be corrected on appeal. *Homestead Farms*, 141 Idaho at 859. The Board of Commissioners is treated as an agency for purposes of judicial review. *S. Fork Coalition v. Bd. of Comm'rs of Bonneville County*, 117 Idaho 857, 860 (1990).[14]

DISCUSSION

Revised Statute 2477

This case concerns the proper construction and application of a federal statute whose language has been described as "short, sweet, and enigmatic." *S. Utah Wilderness Alliance v. B.L.M.*, 425 F.3d 735, 761 (10th Cir. 2005). Revised Statute 2477 (R.S. 2477), passed by the Congress as part of the Mining Act of 1866, provided that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." The Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253, codified at 43 U.S.C. § 932, *repealed by* Federal Land Policy Management Act of 1976 (FLPMA), Pub.L. No. 94-579 § 706(a), 90 Stat. 2743. During the110 years that the statute was in effect, "most of the transportation routes of the West were established under its authority." *S. Utah Wilderness Alliance*, 425 F.3d at 740.

The purpose of the act was "pro-development"- it was to further the settlement and development of the federal lands and their passage into private productive hands. *S. Utah Wilderness Alliance*, 425 F.3d at 740-41; Bret C. Birdsong, *Road Rage, Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 Hastings L.J. 523, 527 [hereinafter *Road Rage*] (R.S. 2477 aimed to promote orderly

[14] The Gallis refer me to the general scope of review articulated in the Administrative Procedure Act, codified at I.C. § 67-5279. There is little difference in substance, but I must follow the standard of review statutorily provided for validation proceedings.

future settlement and to legitimate the occupancy of settlers whose presence had outpaced the law). As such, it was an "open-ended" grant, a "standing offer of a free right of way over the public domain," a generous grant of public property made available where a highway was constructed. *S. Utah Wilderness Alliance*, 425 F.3d at 740; *United States v. Garfield County*, 122 F.Supp.2d 1201, 1215 (D. Utah 2000); *Lindsay Land & Livestock Co. v. Churnos*, 285 P. 646, 648 (Utah 1929) (quoting *Streeter v. Stalnaker*, 85 N.W. 47, 48 (Neb. 1901). Rights created under it belonged to the public and not to those who constructed the highway. *S. Utah Wilderness Alliance*, 425 F.3d at 780.

The statute was repealed because the development it promoted lost public support. Congress adopted a new policy with the FLPMA that favors retention of federal ownership and an increased interest in conservation and preservation. But any R.S. 2477 rights which existed on the date of repeal – October 21, 1976 – were protected by the FLPMA and their status was preserved as they existed as of that date. *S. Utah Wilderness Alliance*, 425 F.3d at 741; *Sierra Club v. Hodel*, 848 F.2d 1068, 1084 (10th Cir. 2000) *overruled on other grounds by Village of Los Rancho De Albuquerque v. Marsh*, 956 F.2d 970, 971 (10th Cir. 1992) (en banc) (all established uses not terminated or surrendered before October 21, 1976 were preserved). As a result, the present dispute presents an actual controversy. If an R.S. 2477 right of way along Race Creek and Kessler Creek came into existence before 1976 in about the same location as the existing roads and was not abandoned or vacated before 1976, those roads are R.S. 2477 rights of way open to the public today.[15]

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[15] The Gallis do not contend that any right of way earlier established was surrendered or abandoned before 1976. Once a public road has been established, the burden shifts to the

The R.S. 2477 grant was "self-executing" - it gave rise to vested property rights when the factual conditions for the grant were met and a public road or highway was established across public land under the law of the state where the road was located. *Fitzgerald v. Puddicombe*, 918 P.2d 1017, 1019 (Alaska 1996); Birdsong, *Road Rage*, 56 Hastings L.J. at 531;Barbara G. Hjelle, *Ten Essential Points Concerning R.S. 2477 Rights-of-Way*, 14 J. Energy Nat. Resources & Envtl. L. 301 (1994) [hereinafter *Ten Points Concerning R.S. 2477*] (noting that R.S. 2477 has from inception been seen as an open offer from Congress that could be accepted by actions taken locally).

The establishment of an R.S. 2477 right of way required no action or approval on the part of the federal government. There were "no administrative formalities: no entry, no application, no license, no patent, and no deed on the federal side." *S. Utah Wilderness Alliance*, 425 F.3d at 741; *Sierra Club v. Hodel*, 848 F.2d at 1078. The offer was outstanding as long as the lands remained public lands not subject to a claim and were not otherwise withdrawn from the public domain or included within a reserve. *Barker v. Bd of County Comm'rs of the County of La Plata*. Colorado, 49 F.Supp.2d 1203, 1214-15 (D. Colo.1999) (citing case law defining withdrawals and reservations); *Humboldt County v. United States*, 684 F.2d 1276, 1281 (9th Cir. 1982) (public lands are those subject to sale or other disposal under general laws, excluding those to which any claims or rights of others have attached); *Hamerly v. Denton*, 359 P.2d 121, 123 (Alaska 1961) (highway cannot be established over a homestead claim).

For more than 130 years the statutory construction of the federal law has looked to and been guided by principles of state law. These laws varied somewhat in their

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one claiming the road was abandoned to prove it. *Floyd v. Bd. of Comm'rs*, 137 Idaho 718 (2002).

content but largely followed well-developed and accepted common law principles related to the creation of "highways." Often these state laws required no formal action on the part of local authorities. Public use alone could establish acceptance by the public of the federal offer of rights of way. *S Utah Wilderness Alliance*, 425 F.3d at 763-71; *Kirk v. Schultz*, 63 Idaho 278, 282-83 (1941); *Lindsay Land*, 285 P. at 648; Birdsong, *Road Rage*, 56 Hastings L.J. at 538. The Idaho County Board of Commissioners concluded that acceptance of a right of way along what is now FS 410 occurred under Idaho law near the time of the Oliver Survey in 1902. That is the conclusion I must review.

The Authority of the Board to Validate

The first question is whether the Board had authority to decide the issue. Mr. Jutte's filed his R.S. 2477 claim pursuant to I.C, § 40-204A, entitled "Federal land rights-of-way," in which the state of Idaho "recognizes that the act of construction and first use constitute the acceptance of the grant given to the public for federal land rights-of-way, and that once acceptance of the grant has been established, the grant shall be for the perpetual term granted by the congress of the United States." The statute empowers a member of the public or any political subdivision of the state to seek to validate rights of way by recourse to available state and federal processes.[16]

Asserted 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. Documentation may take the form of a map, an affidavit, surveys, books, or other historic information." I.C. § 40-

[16] R.S. 24777 rights of way may be validated by " a process set forth by the state . . . , . . . by any federal agency or by proclamation of user rights granted under the provision of the original act, Revised Statute 2477." I.C. § 40-204A(5).

204A(3). If a party requests that a "federal land right of way" be validated as a highway or public right of way as part of a county or highway official map system, the procedure for highway validation in § 40-203A must be followed. I.C. § 40-204A(5).[17]

The Gallis argue that this statute only extends to the validation of rights of way still located on federal land and that the Board therefore acted beyond its statutory authority when it validated the R.S. 24777 right-of-way over the Galli's private property. They acknowledge that courts from other jurisdictions have adjudicated R.S. 2477 rights over private property. They also concede that in *Farrell v. Bd. of Comm'rs of Lemhi County*, 138 Idaho 378 (2003), the Idaho Supreme Court reversed a district court ruling in a quiet title action and found that a R.S. 2477 right-of-way existed across private land because the federal grant had been accepted while the lands were still public a century ago. Despite this precedent, the Gallis maintain that an R.S 2477 right-of way across private property may not be recognized under the highway validation process.

The Gallis rely principally on the statutory definition of "federal land rights-of-way," which defines such rights as "rights of way *on federal land* within the context of Revised Statute 2477." I.C. § 40-107(5)(emphasis added). They further note that I.C. § 40-204A(5) provides that no right of way found to be granted by virtue of any state act is to 'be construed as a relinquishment of either federal ownership or management of the surface estate of the property." The Gallis infer from this that I.C. § 40-204A is expressly confined to R.S. 2477 rights of way which cross federal lands at the time of the

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[17] With one exception, the appropriate procedure called for by I.C. § 40-203A, which calls for public hearings and the reception of evidence, was followed by the Board.

request for validation and is not available to validate rights-of-way which were created earlier on public lands but that subsequently passed into private hands. Reply Br. at 3-6.

The county cites the statement of legislative intent that accompanied the enactment of I.C. § 40-204A. It states:

> The state of Idaho recognizes that existing federal land rights of way are extremely important to all of Idaho's citizens. Two-thirds of Idaho's land is under the control of the federal government and access to such federal lands is integral to public use. The Idaho State Legislature recognizes the necessity for establishing a procedure for identifying and confirming the existence of *previously established federal rights of way*, to protect those rights previously granted to and vested in, the citizens of Idaho.

1993 Idaho Sess. Laws, ch. 142, § 1 (emphasis added). The county argues that the phrase "previously established federal rights of way" refers to R.S. 2477 rights previously established without regard to whether they still traverse federal land. Resp. Br. at 7-8. The Gallis respond that this language merely acknowledges the fact that R.S. 2477 rights can no longer be *created* after October 21, 1976 even though they can still be *validated* if they existed as of that date. Reply Br. at 3-4.

I am persuaded that the plain meaning of the text resolves the issue. The definition of "federal land rights of way" as "rights of way on federal land within the context of Revised Statute 2477" is unambiguous in the context of the entire statute. I.C. § 40-1107(5). Section (3) of the statute makes abundantly clear that "federal land rights-of-way" include those that "predate the removal of land through which they transit from the public domain for other purposes." I.C. § 40-204A(3). The means to have those

preexisting rights-of-way validated is to "follow the procedure outlined in section 40-203A." I.C. § 40-204A(3).

I conclude that the phrase "federal land rights of way" refers to the origin of its creation– an acceptance of the R.S. 2477 offer of federal grant - and not to the ownership of the land it now traverses. Idaho Code § 40-204A therefore sanctions the use of validation proceedings to confirm the existence of R.S. 2477 rights of way now crossing private property. Until the recent litigation with federal agencies,[18] the most common litigation regarding R.S. 2477 rights of way has been the claim that now private lands are subject to R.S. 2477 rights of way established during earlier public ownership. *S. Utah Wilderness Alliance*, 425 F.3d at 741 (all pre-1976 litigation was of this type); Birdsong, *Road Rage*, 56 Hastings L. J. at 524 (same). The legislature has acted to provide an additional state forum in which to resolve such disputes.

My construction of the term "federal land rights of way" and the statutes that include the term gives the greatest assurance that R.S. 2477 roads may be identified and validated, which is the declared purpose of the statute. Mr. Jutte's petition sought to validate a "previously established federal right[] of way" which if recognized would

[18] For more than a century, the Land Department or the BLM maintained that the validity of an R.S. 2477 claim was a matter to be resolved by state courts and state law. Agency regulations from 1939 to 1984 disclaimed any federal role in determining the validity of an R.S. 2477 claim. *S. Utah Wilderness Alliance*, 425 F.3d at 752-758. In 1994 the BLM proposed a new administrative procedure by which the BLM would adjudicate the validity of R.S. 2477 claims, would no longer be bound by prevailing state law, and could interpret R.S. 2477 itself. *Id.*; Birdsong, *Road Rage*, 56 Hastings L. J. at 540-46; Hjelle, *Ten Points Concerning R.S. 2477*, 14 J. Energy Nat'l Resources & Envtl. L. 301. Congress responded by prohibiting the regulations from taking effect. They never have

"furnish public access to . . . federal public lands. . ." The Board had statutory authority to entertain that petition.[19]

Statutory Scheme

The issue thus becomes whether Board properly applied law in evaluating Mr. Jutte's petition and whether or not its findings are clearly erroneous. The Board correctly understood that any acceptance of the federal grant had to occur prior to the withdrawal of the traversed lands from the public domain, which in this case occurred with the reservation of the affected lands for the Seven Devils Mountains Reserve in February 1904. It therefore correctly focused its attention on whether acceptance of the grant had occurred by relying on the Oliver survey in 1902. However, the Board in its findings did not articulate its understanding of the applicable law regarding acceptance of the federal offer of grant beyond a reference to the "construction" and "first use" of the wagon road and trail that they found to exist. The parties now dispute both the law and its meaning. It is therefore necessary to resolve the issue of the applicable law.

While courts adjudicating the existence and scope of R.S. 2477 rights have traditionally looked to state law, Revised Statute 2477 was a federal law. As such, its construction has *always* been a question of federal law. *United States v. Oregon*, 295 U.S. 1, 28 (1935) ("the construction of grants by the United States is a federal and not a state question); *S. Utah Wilderness Alliance*, 425 F.3d at 762 (same). However, controversies governed by federal law "do not inevitably require resort to uniform federal

[19] I also note that the Board's authority to validate this R.S 2477 petition proceeding does not adversely affect the Galli's recourse to judicial review nor the standard of review which they are entitled to on appeal. *Neider v. Shaw*, 138 Idaho 503, 506 (2003) (findings of fact in a quiet title case are reviewed for clear error with free review for conclusions of law).

rules," and as a matter of federal law the United States may "impliedly adopt[] and assent[] to a state rule of construction as applicable to its conveyances." *United States v Oregon*, 295 U.S. at 28; *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 672 (1979). This has long been the case with R.S. 2477 grants.

It is important not to confuse the grant of a right of way, which is federally bestowed by R.S. 2477, and the acceptance of such a grant, which is not defined by the statute. That function has been left to the states and their subdivisions by default. Disputes involving the acceptance and the scope of R.S. 2477 rights of way have been resolved for more than a century by reference to state laws which were similar but non-uniform. *S. Utah Wilderness Alliance*, 425 F.3d at 762-71. In *S. Utah Wilderness Alliance*, the Court of Appeals rejected a call to adopt a more demanding and uniform national standard as to what comprised an acceptance of the R.S. 2477 offer of federal grant because Congress had enacted R.S. 2477 against a backdrop of well-developed common law regarding dedications, easements, rights of way, and highways. Since R.S. 2477 stated no intention to the contrary, the courts of the various states applied their laws to define what it takes to accept a R.S. 2477 grant of right of way. The court observed that there was no indication that the state laws previously deferred to were inconsistent with any federal principles or interests implicated by R.S. 2477. 425 F.3d at 762-71.[20]

The court therefore concluded that, while the interpretation of R.S. 2477 was a federal question, the law of Utah determined whether there was an acceptance of the grants, supplemented when appropriate by precedent from other states. *Id.* at 768; *see*

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[20] "[S]tate law was employed as a convenient and well-developed set of rules for resolving such issues as the length of time of public use necessary to establish a right of way, abandonment of a right of way, and priorities between competing private claims. *Id.* at 766.

also Hodel, 848 F.2d at 1068 (questions as to the scope of a R.S. 2477 right of way are to be resolved under state law); Hjelle, *Reply to Mr Lockhart: An Explanation of R.S. 2477 Precedent*, 14 J. Energy, Nat. Resources & Envtl. L. 349(the rule of construction is the law of the state where the real property is located).

I adopt this approach as fundamentally sound and justified by overwhelming and longstanding precedent. The law of Idaho determines whether the offer of grant along Race and Kessler Creek roads was accepted before the land was removed from the public domain in February of 1904. I may also look to precedent from other states to help me decide whether a grant has been accepted and, if so, what its scope is.[21] Furthermore, the burden of proof is on the party claiming the existence of the R.S. 2477 right of way. *S Utah Wilderness Alliance*, 425 F.3d at 768-69.

Pre-Repeal Precedent is the Applicable Law

The Gallis argue that there was no acceptance of the grant under Idaho law. They cite statutes in force at the time of the Oliver survey to support their position. They also claim that while the state law at the time of the Oliver survey is instructive, it is Idaho law *today* - I.C. §§ 40-203A and 40-204A specifically - which governs my analysis as to whether a valid R.S. 2477 right of way exists. Pet'r Br. at 11; Reply Br. at 8-10, nn. 3, 4. They refer to "construction" in I.C. 40-204A and argue that proof of actual construction is necessary to sustain validation of a R.S. 2477 right of way in a highway validation proceeding.

[21] The Gallis maintain that the law of other states is irrelevant to the issues at hand, but they quote to it selectively in their briefs, as they did before the Board, when they believe that it helps their legal position. Their positions shift depending on the content of that law. They claimed before the Board that other jurisdictions did not validate R.S. 2477 roads over private property and having found to the contrary they now argue that non-Idaho law does not apply. Tr. May 16 Hr'g at 28; Reply Br. at 5.

The use of the word "construction" in I.C. § 40-204A merely refers to the statutory language of R.S. 2477. But even if it is intended as more than that, the Gallis offer no explanation as to how a law passed in 1993 - seventeen years after a federal law *which preserved rights then extant* under R.S. 2477 - can govern the conditions under which a property right was established and became vested more than one hundred years ago. *See S. Utah Wilderness Alliance*, 425 F.3d at 760 (noting that the post-FLPMA discretion of an agency to redefine R.S. 2477 rights is hard to square with the concept of property rights which vested, if at all, on or before a date almost thirty years before). As the court did in *S. Utah Wilderness Alliance*, I decline the invitation to adopt a reformation and redefinition of a law which would alter or overrule over a century of judicial and administrative interpretation that would make it more difficult to recognize rights now frozen in place perpetually by federal law, rights which the public policy of the state also intends to protect. *S. Utah Wilderness Alliance*, 425 F.3d at 778-79.

By the same token, the state cannot lower the bar for pre-repeal acceptance by enacting a post-repeal statute. Certainly, where property rights are determined by recourse to state law those rights may be subject to change over time. Before the repeal of R.S. 2477, states had the power to *vacate* an already established R.S. 2477 right of way or to change the standard for acceptance prospectively. *Yeager v. Forbes*, 78 P.3d 241, 255 (WY 2003) (a 1919 state law requiring all public roads to be established under the terms of the statute was unambiguous and vacated existing R.S. 2477 rights of way which did not comply with the statute); *Lindsay Land & Livestock*, 285 P. at 648 (noting that Utah originally required five years of public use to constitute acceptance and later raised this to ten years).

However, the power to change the standard for acceptance was lost with the passage of the FLPMA. The FLPMA directs that R.S. 2477 rights existing on the date of repeal are to be preserved, not supplemented. The state has no power to legislate inconsistent with this federal mandate. *Hodel*, 848 F.2d at 1083 (Garfield County, Utah's R.S. 2477 rights on October 21, 1976 were the maximum rights it can exercise today). State law should remain paramount in the acceptance process, but a state cannot "bootstrap" rights with legislation passed after R.S. 2477's repeal in 1976. One must look only to the state law as it existed between 1866 and 1976, while the offer of grant was open. Henry R. Bader, *Potential Legal Standards for Resolving the R.S. 2477 Right of Way Crisis*, 11 Pace Envtl. L. Rev. 485, 503 (1994) (hereinafter *Potential Legal Standards for R.S. 2477)*.

Acceptance Requires Public Use Over Time

Thus the issue is what the law was and still is. Under the common law, establishment of a public right of way by dedication required a manifested intent to dedicate the property to the public for use as a right of way, and acceptance by the public. *S. Utah Wilderness Alliance*, 425 F.3d. at 769; *Farrell*, 138 Idaho at 384. In most of the western states, acceptance of the openly-declared federal offer of grant "required no governmental act, but could be manifested by *continuous public use* over a specified period of time. This was the common law rule. . . . In some states the required period was the same as that for easements by prescription, in some states it was some other specified period, often five to ten years and in some states it was simply a period long enough to indicate intention to accept." *S. Utah Wilderness Alliance*, 425 F.3d at 770-71 (emphasis added)(listing extensive case law in the footnotes). Even where a state

required some action on behalf of the authorities, "the appropriation of public funds for repair was generally deemed sufficient to manifest acceptance by the public body." *Id*

The common law treatises mentioned in *S. Utah Wilderness Alliance* are found in Idaho precedent at the turn of the century. *See Meservey*, 14 Idaho 133, 147 (1908) (citing *Angell on Highways and Elliot on Roads and Streets*); *Town of Juliaetta v. Smith*, 12 Idaho 288, 293-94 (1906) (citing *Angell on Highways*). More importantly, the Idaho Supreme Court in *Kirk* acknowledged the general rule that use alone could be sufficient to establish acceptance of the federal offer of grant. There the court cited to precedent in four other states and described the general rule of acceptance as requiring "either user by the public for such a 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 grant with respect to the particular highway in question." 63 Idaho at 282-83.[22]

The roadway statutes in force in Idaho near the turn of the nineteen century adopted the common law approach of acceptance by use. The Revised Statutes 1887 provided:

> Section 850: *What Are Highways* - Highways are roads, streets or alleys, and bridges, laid out or erected by the public, or if laid out or erected by the others, dedicated or abandoned to the public.
>
> Section 851: *Origin of Highways* - 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*, are highways. . . .

[22] *Kirk v. Schultz* has been cited as precedent in support of the view that public use alone can establish acceptance. *See Hamerly v. Denton*, 359 P.2d 121, 123 n.2 (Alaska 1961).

> Section 852: *Abandonment of Highways* - A road not worked or used for the period of five years ceases to be a highway for any purpose whatsoever.

R.S. §§ 850-852 (emphasis added); *Boise City v. Fails*, 94 Idaho 840, 843 n. 2 (1972); *Kirk*, 119 P.2d at 268; *Ross v. Swearingen*, 39 Idaho 35, 38 (1924). These statutes are virtually identical to those in effect in the state of Utah near the same time. Both states referred to roads "laid out or erected by the public," and both permitted establishment of a right of way by public use for five years without any formal action by authorities. *Lindsay Land & Livestock*, 285 P. at 648 (noting that the period of use in Utah was changed in 1886 to ten years from five). This equivalence is noteworthy, because the Gallis point to this same language of "laid out or erected" as establishing that Idaho requires proof of construction beyond mere evidence of sustained public use over time.

> Section 851 was amended by the state legislature in 1893 to read as follows: 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 that 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 (emphasis added).

Boise City, 94 Idaho at 843 n. 2 (1972); *Ross*, 39 Idaho at 38-39. This language is still found today in I.C. 40-202, which sets forth the standard for establishment of a public road by prescription. *Roberts v. Swim*, 117 Idaho 9, 17 (Ct. App. 1990); *Burrup v. Stanger*, 114 Idaho 50, 52-3 (Ct. App. 1988). On its face the requirement of maintenance at public expense appears to establish an additional requirement beyond that of public use

for a set period of time, but that is not how courts a century ago construed it.[23] In *State v. Berg*, the Idaho Supreme Court held that evidence of use alone was enough to establish a public road if no maintenance was necessary to permit the road's use. 28 Idaho 724, 726 (1916) ("It is not necessary for the county to do work upon a road that does not need work to keep in repair or to put it in condition for the public to travel.").[24] That decision involved a road allegedly established by prescription over *private* land, where there was no declared offer to dedicate as was the case with the federal government's open-ended offer of a grant.

I therefore doubt that more than public use for the statutory period was necessary for acceptance of the federal offer of grant. R.S. 2477 rights were important in a newly-established state. Thus, I agree with the Wyoming Supreme Court's reasoning that laws enacted to fix which roads would be maintained at public expense should not easily be found to abrogate the means of acceptance of the federal offer of grant by use alone:

> This dedication by Congress to the public of rights of way for highways over the public lands is a valuable right, and it is not presumed that the Legislature in this state, where distances are great, county funds from taxation are small and inadequate . . ., where roads in new and sparsely settled portions of the state of necessity have to be made and traveled by the public without the aid of the county

[23] The Revised Statutes of 1887 established a duty on the part of Road Overseers acting under the direction of the Board of Commissioners, to "take charge of the public highways within their respective districts . . . [and] keep them clear from obstructions." R.S. 1887 § 753; *Meservey v. Gulliford*, 14 Idaho at 142 (referring to § 873 as amended in 1899).

[24] The modern interpretation requires maintenance work over the five years to be "more than occasional or sporadic, but as . . . necessary." *Burrup*, 114 Idaho at 53.

authorities, intended to abrogate and annul this right . . . unless such intention is so clearly expressed by the enactment that no other conclusion can be reached.

Hatch Brothers Co., v. Black, 171 P. 267, 268 (Wyo.1918).

In sum, I conclude that under Idaho law at the time relevant here public use of a right of way for a period of five years was necessary to accept the federal offer of grant at the time of the Oliver survey. As to the extent of any required construction, I agree with the court in *S. Utah Wilderness Alliance* that it would be unwise to project modern notions of construction onto an 1866 statute.[25] The amount of construction required under R.S. 851 (1893) is properly seen as the amount needed to allow the public to use the route for its intended purposes. Where there is evidence showing substantial use over the necessary period of time, then either that construction occurred or none was necessary. 425 F.3d at 780-82; *Nicolas v. Grassle*, 267 P.196, 197 (Colo. 1928).

Acceptance Requires Substantial Public Use

A more difficult question goes to the character of public use itself - what is *enough* public use to create a road or highway under Idaho law? The Idaho Supreme Court addressed this issue in *Kirk v. Schultz*, 63 Idaho 278 (1941). In *Kirk*, the Idaho Supreme Court affirmed the decision of a trial court rejecting the claim that a road or trail then crossing private property had become a R.S 2477 right of way while earlier in the public domain. Some degree of usage was shown to have occurred for 26 years before the public lands were withdrawn from the public domain. There was a well marked trail used for stock and by miners, hunters, fisherman and persons on horseback between 1882

[25] Revised Statutes 850 (1893) defines highways as "roads, streets or alleys and bridges, *laid out* or erected by others, dedicated or abandoned to the public." (emphasis added). The reasonable reading of that statute is that a highway can exist without erecting or constructing it, if it is not necessary to create it.

and 1891. Certain users then widened the road to accommodate wagons, the lands traversed later passed into private hands, and this road or trail passed over private property at the time of the suit in 1936. *Id.* at 282. The trial court found that the use of the road established was only casual and desultory. The Idaho Supreme Court adopted the legal standard that regular use was necessary and casual and desultory use was not enough to accept a grant of right of way under R.S. 2477. *Id.* at 283-84.

Other courts agree that occasional or desultory use is not sufficient to constitute public acceptance of a public right of way. *S. Utah Wilderness*, 425 F.3d at 771; *Hamerly v. Denton,* 359 P.2d 121, 125 (Alaska 1961) (infrequent and sporadic use of a dead-end trail running into the wild by hunters, trappers, and sightseers does not establish a public highway); *Moulton v. Irish*, 218 P. 1053 (Mont. 1923) (use of a trail along a creek by two people at most several times a year was not enough to constitute acceptance); *Luchetti v. Bandler*, 777 P.2d 1326 (N.M. Ct. App. 1989) (use to reach a single private residence or gather wood or reach a watering hole does not accept the government's offer to dedicate a public highway).

The difficulty is that what constitutes the type and frequency of use to establish acceptance inevitably depends upon context and "cannot . . . be captured by verbal formulas alone." *S. Utah Wilderness*, 425 F.3d at 772. This is partly because the term "highway" is broadly construed. Under common law it was any "way over which the public at large have a right of passage, whether it be a carriage way, a horse way, a foot way, or a navigable river." *Id* (citing several 19th century treatises). Under this broad construction, which courts and the agencies have accepted and which is reflected in the Idaho Code, the general right of user for passage on equal terms is the only constant

characteristic I.C. § 40-107(5) (federal land rights of way may include horse paths, cattle trails, logging roads, homestead roads, and mining roads); *Id* at 765; *Fitzgerald v Puddicombe*, 918 P.2d 1017, 1020 (Alaska 1996) (a rudimentary trail may qualify as a highway); Hjelle, *Ten Points Concerning R.S. 2477*, 14 J. Energy Nat'l Resources & Envtl. L. 301 (noting that even after passage of the FLPMA the BLM acknowledged that a pedestrian or pack animal trail could qualify as a R.S. 2477 public highway).

While different states have used various approaches to implement the salutary purpose of R.S. 2477, it is Idaho Revised Statutes 851 (1893) that governs whether or not there was an acceptance of a R.S. 2477 right of way on Race Creek and Kessler Creek before February of 1904. While what comprises substantial use may depend on the particular situation, I am satisfied that the law in Idaho requires that public use be regular rather than casual or desultory for a duration of five years to constitute acceptance of the federal grant. *Kirk*, 63 Idaho at 283-84.

<u>Analysis of the Board's Findings</u>

I now turn to whether the Board's findings are sustainable. The Board was certainly correct to conclude that none of the evidence presented at the hearing as to what became of FS 410 after 1904 was relevant. Acceptance either occurred or it did not prior to the reservation of lands in 1904. There is no evidence that the Race Creek and Kessler Creek roads were ever recorded by order of the county commissioners. Thus the only issue is whether Mr. Jutte met his burden to show that regular public use for a period of at least five years occurred before 1904, and whether the Board's finding that he did is supported by substantial evidence and is therefore not clearly erroneous.

The Board concluded from the 1902 survey and the 1903 map derived from it that a wagon road existed along Race Creek and a horse trail existed up Kessler Creek from where it joined Race Creek. It concluded that these passages had "undergone construction and first use to constitute an acceptance of the federal grant for purposes of the analysis under Revised Statute 2477 and the appropriate case law." R. at 278. That is, the Board concluded that by the time of the survey the rights of way it found to exist had been accepted by sufficient public use, both in time and in degree. The only evidence to support that conclusion was the survey.[26]

The survey revealed the presence of four homes in the immediate vicinity of Race Creek.[27] Fences, ditches, and irrigation ditches were sighted near to the homes and the creek, indicating that the land may have been worked in some fashion. From where the South Fork of Race Creek heads west of Race Creek, a road was sighted in five locations, always in close proximity to Race Creek. Further up Graves Creek to the west, before it joins the South Fork of Race Creek, a trail and a log cabin was sighted. As to Kessler Creek, one house is seen more than a mile from where that creek joins Race Creek. Some fencing is noted, as is a trail running east to west close to the creek, which is said to run southeast. A few trails are encountered crossing outlying section lines away from the creeks. The notes say "there are number of settlers in both townships surveyed"

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[26] The Board's conclusion that the two passages were located substantially in the same location where Race Creek Road and Kessler Creek Road are found today is reasonable. Consideration of the Edwards aerial overlay and the topographical map make evident the realities of this canyon ravine. R. at 58, 142.

[27] One of the homes is located off the along the Race creek east of where it heads north to Bean Creek. This is east of where Mr. Galli today has his gate and is outside the section now under dispute.

This case is completely unlike any of the cases discussed above. It is unlike any case which I have encountered where the issue of acceptance by public use of the federal right of way was decided. There are no eyewitnesses. There is no direct evidence at all of the type and frequency of use of the Race Creek road and the Kessler Creek trail. No testimony documenting the hundreds of herds of sheep that grazed in the area, the "seven herds a day going over the road," the mining camps with hundreds of people residing, or the sawmills with documented travel by those hauling logs to the mill and lumber to the cities. *Compare Lindsay Land & Live Stock Co.*, 285 P. at 647.

We don not know how many people lived in those houses, how extensive their enterprise was, and the degree to which their activity resulted in commerce or traffic with cities are not even identified. There is no evidence that the road was used as a necessity or a convenience by the public at large to reach destinations beyond where the few houses are located. There is not even evidence of "casual" and "desultory" use by stockmen driving their herds, or by miners, hunters, fisherman, and persons on horses, evidence found *insufficient* by the Idaho Supreme Idaho court in 1941. *See Kirk*, 63 Idaho at 284.

The Board offers to solve the dilemma facing this court by finding an "identifiable terminus" whose access by the public at large might have been necessary or convenient. It suggests that the very same destination sought to be accessed in this litigation, the Spotted Horse Mine, lies beyond Kessler Creek Road in the National Forest. But the reference to a *map printed in 2001* and the needs of a litigant in 2006 do not speak to the convenience or needs of the public in 1902. There is no evidence that this mining claim was worked or that it even existed at the time of the Oliver survey

A map can provide evidence that a public road existed. *Western Aggregates, Inc. v County of Yuba,* 101 Cal.App.4th 278, 298 (Cal. Ct. App. 2002). But a map alone is not sufficient to establish acceptance. *Whelan v Boyd*, 29 P.69 (Cal. 1892). Neither the Board nor the intervenor have cited to a *single case* where a court has concluded that acceptance was established on the basis of only a survey and a map. The survey and the map demonstrate the fact of some use but nothing as to the type, frequency, and duration of that use.

I do not question that a road along Race Creek existed in 1902 in approximately the same location where the road is found today. If a mapmaker could reasonably infer the road's existence in 1903 from the notes made by Albert Oliver in 1902, the Board is entirely reasonable when it does the same. Given the era, it was also reasonable to infer the Race Creek road is a wagon road even though it is not described as such.

But if that inference is sustainable, the inference as to the Kessler Creek "trail" is another matter entirely. The Board states that from the juncture with Race Creek "the trail continues up Kessler Creek." Br. Idaho County at 3. The intervenor concurs in this assertion, stating that "Mr. Edwards explained that the surveyor, Albert Oliver, noted that the road continued up Kessler Creek." Br. Intervenor at 3. These assertions have no support in the record. A mile or so upstream the survey team encountered a trail by Kessler Creek bearing somewhat differently than the creek is described as bearing. R at 20; *see infra* pp. 13-14. Mr. Edwards said that he did could not confirm where the trails actually led, noted that the survey notes gave only a general bearing, and further noted that trails in the area tended to wander around. Tr. July 13 Hr'g at 34. So it is not even clear that the trail found in 1902 followed the contours of the Kessler Creek.

But even if the findings that both the wagon road and a horse trail existed are sustainable, there remains the issue of their acceptance by public use to make them *public* rights of way. The Board found that the Kessler Creek trail, and presumably the Race Creek wagon road, "were used sufficiently to allow construction of cabins and residences and the transmission of materials . . to allow the building that was reflected in the 1902 Oliver surveys and the 1903 map." R. at 216. In the case of Kessler Creek this would involve only *one house*.[28]

The Board argues that 'as years pass by, the ability to present direct evidence . . . becomes more difficult. The County Commissioners, as triers of fact, have the right to draw inferences . . . ." Br. Idaho County at 15. The Board opines that the single most important fact in the Oliver survey is the note that that "there are a number of settlers in both townships." *Id.* at 14-15. Under the standard apparently applied by the Board, the mere presence of human activity makes any natural passageway close to an early settlement a R.S. 2477 public right of way.

There is simply no evidence of the regular public use that *Kirk* requires. But even if one were to assume the presence of some settlers were enough, there is not a scintilla of evidence of regular use for a period of five years. The evidence of use covers only from 1902 to 1904. R.S. 851 (1893) requires five year years.

Although I am loath to reverse any board of commissioners, I am left with the firm conviction that the Board erred in this instance. There was no evidence that the road and trail were regularly used by the public for a period of five years, only inferences that

[28] The Board attempts to avoid this fact by suggesting that the logcabin on Graves Creek might also be accessed via the Kessler Creek "trail", apparently by taking the long way around back. Br. Idaho County at 5.

they were. That does not amount to substantial evidence. For findings to be sustained by circumstantial evidence, "that evidence . . . must be substantial, not speculative, nor derived from inferences upon inferences." *Brown & Root v. NLRB*, 333 F.3d 628, 639 (5th Cir. 2003); *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1581 (10th Cir. 1994)(evidence is not substantial if it constitutes mere conclusion). Additionally, the Board erred when it resorted to I.C. § 40-204A in devising the legal standard to create a highway in 1902, when it was R.S. 851 (1893) that should have been applied.

The validation of FS 410 as a federal right of way under R.S. 24767 was clear error and was not supported by substantial evidence. Furthermore, the right of a property owner to exclude others is perhaps the most fundamental of all property interests. *Lingle v. Chevron U.S.A, Inc.*, 544 U.S. 528, 125 S.Ct. 2074, 2082 (2005). Therefore, the substantial rights of the Galliswere impaired by the Board's findings and conclusions.

Remaining Issues

Because I conclude that no R.S. 2477 right of way was established, I do not reach the law pertaining to the scope of R.S. 2477 rights of way. Nor do I reach the Gallis' claim that the Board failed to determine in its August decision that validation was in the public interest, that the Board had no right to amend its findings after the appeal had been filed, and that they received insufficient notice of the meeting at which the findings were adopted. Pet'r Br. at 21-22.

Lawyer's Fees

Idaho Code § 12-117 provides that when a person is involved in any administrative or judicial proceeding with a "state agency, a city, a county or other taxing district . . . , the court shall award the prevailing party reasonable attorney's fees . . . , if

the court finds that the party against whom the judgment is rendered acted without a reasonable basis in fact or law." The Board correctly points out that the Idaho Supreme Court has held that a county is not a "state agency" within the context of this statute, and that the Supreme Court recently affirmed this holding of the Idaho Court of Appeals. *Gibson v. Ada County*, 2006 WL 299061 at *9; *IHC Hospitals Inc. v. Bd. of Comm'rs of Bonneville County*, 117 Idaho 207, 212 (Ct. App. 1990). The earlier court of appeals holding appears founded on the provision of the statute that a "state agency" is one that defined as such under § 67-5201(1) of the Idaho Administrative Procedure Act (IDAPA). Under IDAPA, a county board of commissioners is not a state agency. *Petersen v. Franklin County*, 130 Idaho 176, 182 (1997).

However, the Gallis correctly observe that the earlier court of appeals decision was rendered moot when the statute was subsequently amended to include counties. *See* 1984 Idaho Sess. Laws, ch. 204 § 1; 1994 Idaho Sess. Laws, ch. 36 § 1. That leaves the *Gibson* decision questionable as controlling authority. It is certainly not within my power to ignore a holding of the Idaho Supreme Court, but it does appear that I am not bound by the holding in *Gibson* that "a county is not a state agency within the meaning of this statute." *Gibson*, 2006 WL 299061 at *9.

The Gallis are the prevailing parties. The issue therefore is whether the Board acted without a reasonable basis in fact and law to validate the right of way in view of my decision that their findings were clearly erroneous because they were not supported by substantial evidence.

The purpose of the statute is to serve as a deterrent to groundless or arbitrary agency action and to provide a remedy for persons who have borne unfair and unjustified

financial burdens correcting mistakes agencies never should have made. *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 1091, 1098 (2005)(citing *Bogner v. State Sept of Revenue and Taxation*, 107 Idaho 854, 858-59 (1984)). The Idaho Supreme Court has stated that, because the statute refers to administrative as well as judicial proceedings, where a party loses at the administrative level but prevails upon an appeal to the district court, that lawyer's fees *may* be awarded for proceedings at the administrative level if the court finds the agency acted without a reasonable basis. *Stewart v. Dept. of Health and Welfare*, 115 Idaho 820, 822 (1990)(emphasis added).

The case for lawyer's fees incurred at the administrative level is much weaker when, as here, the agency is required under law to entertain the petition of a another party and has not acted on its own initiative. In this regard I agree with the Board that it should have considerable latitude when acting in a quasi-judicial proceeding. Br. Idaho County at 25. I therefore conclude that in such cases only the expenses of pursuing an appeal are recoverable.

In validating FS 410 as a R.S. 2477 right of way, the Board decided that if interior property was served by historic trail while the land not yet withdrawn from the public domain, that a R.S. 2477 right of way probably existed. Tr. May 16 Hr'g at 46. The Board also gave great weight to the statutory language of I.C. § 40-204A when it concluded that evidence of "first use" alone was sufficient to establish acceptance of the federal offer by public use.

Reliance on statutory language is not unreasonable when the construction of that language is not firmly established, as is the case with I.C. § 40-204A, which has generated little case law to date. The Gallis themselves attempted to give the statute a

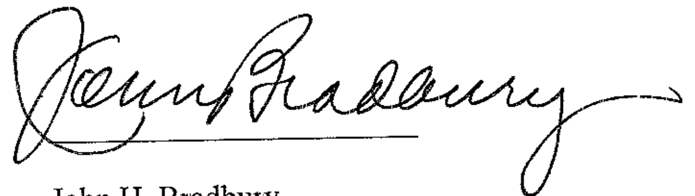
construction that it cannot bear. They took contradictory positions on the weight to be accorded to out-of-state law.

R.S. 2477 claims have resulted in a great deal of federal litigation since the enactment of the FLPMA and the repeal of the open offer of grant. Federal agencies and interested parties have argued in effect that the law of the past century need not be deferred to. This case involved a federal law and common law principles with varying applications under the laws of the several states, esoteric legal issues by any standard. Acting with the benefit of only *one* Idaho case on point, the Board did not apply the law I have concluded applies, but I find and conclude that it acted reasonably. On that note I commend all counsel for their spirited and able advocacy.

ORDER

Idaho County's validation of F.S. 410, known more generally as Race Creek Road and Kessler Creek Road, as a public right of way established under R.S. 2477, is hereby REVERSED, and the matter is remanded to the Board of Commissioners for further actions consistent with this opinion. The request for lawyer's fees is DENIED

It is so ordered this 2 day of June, 2006.



John H. Bradbury
District Judge

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER was mailed, postage prepaid, this 2ND day of June, 2006, to the following:

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