

**OFFICE OF THE BOARD OF COUNTY COMMISSIONERS  
OF BLAINE COUNTY  
SPECIAL MEETING OF THE JULY 2020 SESSION**

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**Second Day**

**Wednesday, July 8, 2020**

Pursuant to Statutory Provisions, the Board of Blaine County Commissioners (BCC) met this day at 9:30 a.m. Present were Chairman Jacob Greenberg, Vice-Chair Angenie McCleary, and Commissioner Dick Fosbury; County Administrator Derek Voss; Blaine County Land Use and Building Services Director Tom Bergin; County Code Compliance Specialist Kristine Hilt; Land Use Zoning Specialist Nancy Cooley; County Road and Bridge Manager Steve Thompson; County Virtual Meeting Specialist Indie Landon; and Recording Secretary Sunny Grant; Stevens Historical consultant Jennifer Stevens and Project Manager Amalia Baldwin; Chase Gouley; Heather Johnston; Jim Phillips; Kiki Tidwell; Sunny Healey; Tim Olsen; Tom Blanchard; and Wendy Chase.

Due to the continuing COVID-19 pandemic, many participants in this meeting were by webconference or teleconference.

Chairman Greenberg called the meeting to order at 9:33 a.m.

**CONTINUED LEES GULCH ROAD VALIDATION HEARING:**

Pursuant to Idaho Code Section 40-203A, the Board of Blaine County Commissioners (BCC) continued a public hearing to consider the validation of a portion of Lees Gulch Road west of Bellevue from the intersection with Townsend Gulch Road to the western edge of Lot 2, Lees Gulch Subdivision in Government Lots 2 and 3 of Section 2, Township 1N, Range 18E, B.M. This validation proceeding will address only the portion of Lees Gulch Road crossing private property, not the portion on BLM land.

Materials relevant to this validation proceeding were available for inspection at the Commissioners' Office in the Blaine County Courthouse and at the Land Use Office in the Annex Building Monday thru Thursday between 8 a.m. and 6 p.m. These materials included documents submitted since the January 14th hearing and included a second supplement prepared at the direction of the BCC by Stevens Historical Research Associates. To the extent possible, those materials were posted to the County's website and made available on a special webpage.

Consistent with the time frame established at the January 14th hearing, the deadline for additional, written public comments and documentary evidence has passed. Verbal comments may be made at this July 8th hearing.

Bergin read public notice.

**Fosbury moved, seconded by McCleary, that notice is adequate for this hearing, as noted. Motion passed unanimously.**

Blaine County Attorney Tim Graves said the BCC had previously held hearings on this validation process October 15, 2019 and January 14, 2020. The hearing previously scheduled for April 7, 2020 was continued to today, due to the COVID-19 pandemic. Graves said a multitude of public comments, documents and exhibits was submitted into the record and made public.

In the January 14, 2020 hearing, the BCC granted time to public commenters and other interested parties to submit additional information. The public can now respond to information that has come in during the last few months, including work done by Stevens Historical.

**Questions for discussion in today's meeting:**

- Is Lees Gulch a public right-of-way under the various methods of road creation under state and federal law?
- Assuming Lees Gulch is a public right-of-way, is it in the public interest to validate Lees Gulch Road and declare it to be a public right of way?

Graves said this meeting was not intended to discuss road management issues, i.e. seasonal closures, road maintenance, non-motorized vs motorized vehicles., etc.

**Disclosures:**

- Greenberg said he had disclosed any contacts in prior meetings. Emails from Rich Gouley were forwarded to Land Use. He did not respond directly to them.  
Greenberg had driven to look at the structure of the road to see what shape it was in prior to the beginning of this validation road hearing process.
- McCleary was contacted twice in the last three months by Rich Gouley to do a site visit that (he said) would provide valuable information into the mines involved. McCleary did not have direct conversation with Gouley; and Land Use staff told Gouley they could not do a site visit.  
McCleary was contacted this week by Ben Bainbridge who wanted to make a public comment about Lees Gulch, but was informed that only oral comment would be allowed today.

- Fosbury talked to Rich Gouley, who asked when today's date uncertain hearing would be held. Gouley also asked Fosbury for a site visit, since vegetation was still emerging and the ground was visible. Fosbury referred Gouley to Blaine County Land Use Director Tom Bergin. Fosbury said Gouley also called in May to request enough time in today's meeting to present evidence he recently uncovered on the Chicago Mine claim. Fosbury suggested Gouley make the request through Land Use staff. Fosbury also received an email from Mr. Bainbridge, but didn't respond to it.

**Public comment:**

- Kiki Tidwell said County Attorney Tim Graves was violating Hailey and County (COVID-19) mask ordinances by removing his mask when he spoke. Tidwell said Greenberg had stated on October 15 that he made a site visit "yesterday", October 14. She said Fosbury should reiterate that he had disclosed in an earlier meeting that he had done the Lees Gulch Subdivision plat. Tidwell said she wrote the BCC on October 27, 2019, alerting them to the fact that she learned during a training session with consultant Christopher Meyer that two Commissioners had an unauthorized site visit.
- Heather Johnston said a BCC decision to validate the road through Gouley's property should not be made without a site visit or detailed review of available documents and maps.
- Tom Blanchard said there were significant errors in the original Stevens Historical report, and evidence had changed considerably since the report. He said the report demonstrated lack of understanding of geology and history of the Wood River Valley. Blanchard said Stevens' conclusions were based on conjecture and not supported by convincing evidence, which the second Stevens Report acknowledged.
- Chase Gouley said the County spent over \$125,000 on this validation process to determine if there is an easement. He felt the money would have been better spent using local resources. Gouley said the County should look at creating an easement or partnership to use this right-of-way
- Mark Bybee, associate of the landowners' attorney Bill Gigray, asked that the hearing be continued to allow development of additional evidence related to mining location or mining claims within Lees Gulch, including whether any of those mining claims were ever actually productive. Bybee said five minutes was inadequate time to present evidence or argument covering 141 years of history and law. Bybee said his clients were denied due process in this matter, with the County being a party in the matter and also the decision-maker. Bybee said there were two or three statutory elements that must be met in order to make this a public road by prescription.
  - The road must be wide enough for wagon or vehicular traffic, and regularly and continuously used for it to be a road; and foot traffic use does not satisfy statute.
  - After 1893, road maintenance at public expense became the third necessary element.
  - Bybee said surveys do not show the road; and newspapers and books refer to mines, but not the road.
  - First mention of a (nameless) road in Lees Gulch was in 1939 but not on the land in question. Bybee said the County's Land Use decisions have historically treated Lees Gulch Road as private, and nothing suggests the road is public now.
- Jim Laski, Townsend Gulch Road resident, lives adjacent to the proposed road. Even if the road existed, there is no clear evidence as to where it existed, or whether it historically crossed the Gouley property. Evidence in the record and aerial photography shows the road going directly over Laski property to the Wendy Chase property; and mining claims and other information may suggest the road may have been even farther south.
- Rich Gouley, Lees Gulch Road resident, said this validation is about more than public access. The public has been allowed to use his driveway for more than 30 years, with his permission. The recent restriction on motorized access is in direct response to the increased level of usage and subsequent deterioration of his private driveway. Gouley said the County had not made all the evidence from Stevens Historical consultant Jennifer Stevens and Project Manager Amalia Baldwin available on the County website until December 9, 2019, two months after the October hearing, and had consistently not allowed adequate time for public comment during public hearings.
  - Gouley said conjecture by Stevens Historical is not proof of a specific year a road was in existence in Lee's Gulch. The County does not have proof of the location of the original road, nor proof the road crossed what is now the Gouley property. The County will not consider new evidence, specifically, the discovery of a road into the Chicago Mining Claim from the Townsend Lees Ridge Road route, which was described in the December 1882 patent survey. The corner markers have been found and there are statements of the Townsend Lees Road being used for access into Lees Gulch in the last 50 years. This would contradict Chris Meyer's statement that the road did not exist.
  - Gouley said the BCC has refused to conduct an on-site visit to observe the lack of mine dumps that would have been associated with the level of activity the Stevens report claims existed. There is no documented evidence of the early existence of a road in Lees Gulch.

- Gouley suspected the BCC might be guilty of ex parte communications, according to standards consulting attorney Chris Meyer set forth on June 19.
- Gouley said the 2-track dirt road dead ends in Lees Gulch. He said the public would be best served to declare the road over the Gouley property to be private. The Gouleys continue to offer non-motorized only access with parking at Lees and Townsend Gulch Road.
- Gouley said an adverse decision will cost the County more money and extend the issue forward over the next five years.
- Wendy Chase said she is distressed by the County's attempt to secure public access through Gouley's property. The County hired attorney Meyer and consultant Stevens Historical, both from Boise, to provide evidence to provide access through the property at a cost to date of over \$125,000 of taxpayer money. Chase said Meyer and the Stevens group had spent less than two years studying mining claims in Lees Gulch, whereas several members of the local community had studied these claims for over 40 years. Chase questioned if the BCC or staff, other than Commissioner Fosbury, had ever stepped foot in Lees Gulch. Chase said attorney Meyer had dismissed materials submitted for evidence to rebut Stevens Historical findings as immaterial and inconsequential. Local experts question the claim that the road across the Gouley property today is the same road that accessed mining claims in the early 1880s.

**County Comments:**

County Attorney Tim Graves said the amount of money and resources the BCC has spent on this issue was wholly irrelevant. This is an extensive detailed historical process requiring a level of expertise and experience that Blaine County employees did not have.

Graves said the Idaho Supreme Court says County Commissioner site visits are not allowed in land use matters unless they are a full public hearing and recorded. Graves said he has argued before the Supreme Court that fully disclosed site visits with a planning staff member present should be allowed, as long as the landowner is notified; but a small crowd of people around a microphone would not have been permitted during the early days of COVID-19.

Graves clarified that ex parte discussions must be disclosed prior to or during a public hearing to be sure everyone has equal information; but ex parte communications do not disqualify a Commissioner from participating in the decision. Graves said he had not seen any evidence that any Commissioner was leaning in a particular direction at this time.

Greenberg said this validation process was initiated by the County because people were confronting Gouley and calling the Sheriff about their right to use the road. The County hired a professional unbiased research firm to help the BCC make a decision.

Graves said the County initiated the validation process, pursuant to Idaho Code 40-203A, to determine if a road is public. The process requires a survey, report, extensive legal notice, and public hearings to receive and review evidence and public input. It is the County Commissioners' responsibility to determine if a preponderance of evidence indicates this is more likely than not a public road, under Idaho and federal laws; and must decide if it is in the public interest to validate the road as a public right-of-way. Graves added that Idaho Supreme Court Case Law states "there must be circumstantial evidence to support any inferences made in making the determination that a road is a public right-of-way or not." Case law has recognized that location can shift over time. The question is if there was a road in this general location dating back to a certain time.

**BCC Deliberations:**

- Fosbury said local historians Tom Blanchard and Heather Johnston were highly respected and he was intrigued by their personal memories and logical conclusions, such as "Go up with an empty wagon and down when it's full."
  - Fosbury said he read field notes and carefully examined aerial photos and surveys, Federal Resources and USGS maps, to determine the road only goes up to the Modoc Chief Mine from the valley floor. He was convinced there were no calls farther up the canyon.
  - Fosbury, a retired licensed land surveyor, mapper and civil engineer, said his professional opinion is that all the claims on the south-facing slope of Lees Gulch accessed through the bottom of the canyon and developed a road with enough use that it was a "public" road.
  - Fosbury disclosed that he had driven up Townsend Gulch, and hiked up the ridge between Lees Gulch and Townsend Gulch to get a good view of the area.
- McCleary asked how Fosbury felt about the location of the public road in Lees Gulch.
  - *Fosbury felt the road was about at the toe of the hill. Gouley's house is located above the bottom of the hill, and approximately in the same area. Fosbury said roads may be shifted for several reasons, but believes the road is in a convenient place for landowners and the public, and about in the same location for the last 50-60 years.*
- Greenberg concurred, and agreed that this road was in existence for at least five years prior to 1893 and therefore a public easement.

Graves said a trail by itself is not a road, but in the context of the statute that existed in 1879-1880s, a trail was definitely considered a public right-of-way. State Statute 40-104 was first enacted in 1887, and states “Highways, as defined, were originally, in many instances, merely paths or trails, that by use had been expanded to the point where they could be recognized as roads.”

In 1989-1990 County Commissioner meeting minutes, Lees Gulch plat was approved with standard notes, including Lees Gulch Road as a private road (for maintenance only) with public access through the parcel with a reserved easement. No gates would be allowed on the road, but a cow guard would be installed.

The BCC agreed there was evidence of public use prior to 1881 and five years of public use between 1881 and 1893, and that there has been public use and maintenance from 1893 to the last few years, when it was closed to vehicular traffic and county maintenance. The BCC agreed that it is in the public interest to validate roads that abut public lands.

**Fosbury moved, seconded by McCleary, to declare that Lees Gulch Road is a public right-of-way, and that such validation of Lees Gulch Road is in the public interest, and to direct staff to draft a Decision and Order to that effect.** In discussion, the BCC thanked Stevens Historical and attorney Chris Meyer for their professional information, and thanked local historians and residents for their extensive knowledge, documents, public comments and perspective. **Motion passed unanimously.**

The BCC clarified that the amount spent on this issue was about \$80,000.

**ADJOURN**

**At the hour of 11:47 a.m., with no more business before them, the County Commissioners adjourned.**

Attest: \_\_\_\_\_ Approved \_\_\_\_\_  
JoLynn Drage Jacob Greenberg  
County Clerk Chairman