

BEFORE THE BOARD OF COUNTY COMMISSIONERS
BLAINE COUNTY, STATE OF IDAHO

A DECISION AND ORDER OF THE BLAINE COUNTY BOARD OF
COUNTY COMMISSIONERS VALIDATING LEE'S GULCH ROAD WITHIN
BLAINE COUNTY, IDAHO, AS A COUNTY ROAD AND PUBLIC HIGHWAY
PURSUANT TO SECTION 40-203A, IDAHO CODE.

THIS MATTER came before the Blaine County Board of County Commissioners ("Board") on October 15, 2019, January 14, 2020, and July 8, 2020, for public hearings to determine whether Lee's Gulch Road should be validated as a county road and public highway pursuant to Section 40-203A, Idaho Code. At the hearings, the Board accepted all evidence related to the proceedings and accepted testimony from persons having an interest in the proposed validation. Based upon the evidence and testimony presented, the Board finds that Lee's Gulch Road is a public road, that validation is in the public interest, and validates the same for the reasons that follow.

The Board first initiated this validation proceeding on June 5, 2012, by way of Blaine County Resolution 2012-21. The Board then reinitiated the validation proceedings on July 10, 2018, as memorialized by Blaine County Resolution 2018-12. A survey of Lee's Gulch Road was performed by Galena Engineering on October 11, 2018, and defines the area subject to this validation proceeding as the portion of Lee's Gulch Road that crosses private property between Townsend Gulch Road to the east and the BLM boundary to the west. The survey is attached to this Decision and Order as Exhibit A. The road generally travels in an east/west direction from the mouth of Lee's Gulch, across three parcels of private property, to the BLM boundary, and then traverses BLM land for several miles. The portion of Lee's Gulch Road under consideration here only involves the portion of Lee's Gulch Road that crosses private land up to the BLM boundary, and no portion of the Road as it crosses federal land. This section of road is approximately 750 feet in length.

Following the resolutions and survey, a report was prepared and submitted by Stevens Historical Research Associates (SHRA) entitled "Lee's Gulch Road History" on July 16, 2019. That report was subsequently revised on March 9, 2020 to respond to public submittals and comment, as well as Board requests for additional information. Additional research and a summary were also submitted by SHRA in December, 2019. In addition to the survey and SHRA reports, a legal memorandum analyzing various procedural, legal, and factual issues was prepared and submitted by Christopher Meyer of Givens Pursley, LLP on September 6, 2019. Mr. Meyer submitted subsequent legal memoranda analyzing the evidence and legal arguments raised at the hearings on January 11, 2020, and March 1, 2020. During the public hearings in this matter held on October 15, 2019,

January 14, 2020, and July 8, 2020, the Board considered additional public comment and opinion in the form of written and verbal testimony, historical evidence, affidavits, and memoranda.

The SHRA Reports and Meyer memoranda go to great lengths detailing the historical evidence and legal requirements for road creation under federal and state law, and the Board has relied heavily upon these documents in forming its decision. SHRA's historical documentation was comprehensive and compelling, and the Meyer memoranda provided the legal framework for reviewing the evidentiary record in determining whether Lee's Gulch is, or is not, a public road. The Board did not consider these materials in a vacuum, however, and it considered additional evidence provided by numerous commenters, neighbors, local historians, and interested persons.

I. Lee's Gulch Road is a RS 2477 Road

Meyer's memoranda accurately explain the legal standards for validating a RS 2477 road. In short, the Board must find that it is more likely than not that Lee's Gulch Road was used by the public prior to an application for a patent filed by Thomas Hatfill in March of 1881, when land at the mouth of Lee's Gulch – the present day Gouley property - was withdrawn from the federal domain. This March, 1881 restriction, however, does not apply to the western portion of Lee's Gulch Road that crosses land presently owned by Wendy Chase. Even so, the March, 1881 date is convenient because state law at the time, which will also be analyzed in the next section, allowed for public roads to be created by use alone up until February 1, 1881. Thus, if it is more likely than not that Lee's Gulch Road was used by the public before February 1, 1881, it is a public road by operation of RS 2477.

The SHRA reports detail the historical evidence of early mining activity in Lee's Gulch and the surrounding area beginning in 1879 before concluding that "Lee's Gulch Road was developed as a trail and regularly used by the public by 1881". The Board will not restate all of the evidence of these mining activities put forward in the SHRA Report, but they are detailed and comprehensive, and make clear that Lee's Gulch was busy with mining activity during this period. According to SHRA's research, numerous claims in Lee's Gulch were filed during the years 1879-1880 and

the fact that so many existed – and SHRA almost certainly did not gather all claims filed in 1879 and 1880 as they are not filed geographically but by locator and claim name – indicates wide use of the route. The logical route of travel for prospectors to access Lee's Gulch for at least some of these men would have been along the creek at the bottom of the gulch, the route the road takes today.

SHRA opines that a road, and likely roads, as that term was legally defined in 1879-1880, were constructed and used by these early prospectors to provide access from the mouth of the Gulch, up the draw of the Gulch in a similar location as is presently found before branching off up the hillsides to the north and south of Lee's Gulch to access the mine sites. The sheer number of mining claims located on the north and south sides of Lee's Gulch would have necessitated access along the simplest and most direct route from the mouth of the Gulch. As stated by Jim Koonce, former County Engineer and mining historian,

I am certain that when the first mining discoveries were made in Lee's Gulch in 1879 and 1880, the miners quickly constructed roads throughout Lee's Gulch to bring heavy equipment to the mines by wagon and to extract material out of the mines before it was transported out of the Gulch and sold.

Evidence of the hillside scars caused by this road network are still plainly visible in the aerial photos from 1943 and 1957, as well as depicting the primary route travelling from the mouth of Lee's Gulch, up the draw, to the spur roads.

The intense mineral exploration during this early period involved more than mere casual wandering, and necessitated roads that were passable by wagons carrying heavy equipment and material. As stated in the SHRA Report,

To access the vein, locators would have had to transport in men, tools, and food. Depending on how far under the surface the vein lay, the locators may have had to bring in timber to shore up tunnels, and drills to access the vein with the rock.

Jim Koonce also explained that,

I am certain that in order to locate and develop a mining claim during the early days of mineral exploration, primitive roads were necessary to bring heavy and sophisticated equipment to the mine workings by wagon. This heavy equipment included mine cars, mine track, drilling equipment, necessary mine timbers (heavy green Douglas Fir), pipe, possibly compressors, pumps, and other gear. The idea that miners were solitary wanderers combing the hills on foot with a pickaxe on their shoulders is absurd. Picks, shovels and donkeys do not work well driving tunnels and sinking shafts in solid rock.

In addition, the development of these claims required water, and the documentation of numerous claims for water rights in Lee's Gulch submitted by Sunny Healey provides further circumstantial evidence of extensive development in this area that would necessitate a road network, as well as further public use of that road network.

The SHRA Report also notes that several of these early claims (Morton, Silver Bell, Gold Finch) used the Lee residence at the mouth of Lee's Gulch as a point of reference, providing additional circumstantial evidence that access to these claims was made via a road at the mouth of Lee's Gulch. The first such reference to the Lee's house was made by Mary Lee in locating the Morton claim in June of 1880. Further circumstantial evidence exists that the Lee family located several mining claims in Lee's Gulch beginning in 1879 (Morning Star, Last Chance, Morton, Cucomunga), meaning that the Lees were actively exploring Lee's Gulch during this period. Since the Lees' house was located at the mouth of Lee's Gulch, the Board believes it is fair to infer that the Lees regularly accessed their claims using a road that travelled from the mouth of Lee's Gulch, where the Lee house was located, to their mining claims to the west.

The Board finds the arguments of some commenters who questioned whether access was achieved by travelling over the ridges of the Minnie Moore Gulch to the north and Townsend Gulch to the south, are unpersuasive. These commenters accept that mineral exploration and development in Lee's Gulch was widespread during this period, but they ignore the most likely route for access into and out of Lee's Gulch, choosing instead to hypothesize that these early miners chose the far more difficult routes over the ridgetops to the north (Minnie Moore) and south (Townsend). In considering this theory, the Board asked SHRA to research whether there was a smelter in Minnie Moore Gulch that would have created an incentive to go "over the ridge" to the north. SHRA found no evidence of a smelter in Minnie Moore Gulch. There is also a complete lack of evidence (legal, topographical, geographical, or otherwise) to suggest a reason why the clear and obvious route along the bottom of the Gulch would be left in a pristine, undeveloped condition by these early prospectors in favor of a far more arduous and costly alternative.

The Board accepts the assertions of other commenters that early prospectors, including several members of the Lee family living at the mouth of the Gulch, took the "path of least resistance" to head up Lee's Gulch to access their claims and haul material down valley, and that the primary access into and out of Lee's Gulch was Lee's Gulch Road as it presently exists. This common sense inference is supported by the evidence discussed above as well as the claims on the northern side of Lee's Gulch that used the Modoc Chief Road to travel south down the hill into Lee's Gulch before connecting with Lee's Gulch Road. There is also an abundance of modern evidence depicting Lee's Gulch Road in its present location.

The Board finds that extensive mineral exploration and extraction existed in Lee's Gulch between 1879 and February 1, 1881, and that it is more likely than not that a road, or series of roads, existed in Lee's Gulch to serve these mining activities. The Board further finds that it is more likely than not that this road network included a road at the mouth of Lee's Gulch that headed west into the gulch in a similar location to that surveyed in this validation proceeding. Finally, the Board finds this it is more likely than not that this road was used by the public prior to February 1, 1881, and was therefore established as a public road by operation of RS 2477.

II. Lee's Gulch Road is a Public Road Under State Law

a. Established by First Use Alone prior to February 1, 1881

Closely related to the RS 2477 analysis is a similar question of whether the public has acquired a right across Lee's Gulch Road by application of Idaho law. Under Idaho law, any road used by the public prior to February 1, 1881, was declared a public road. Thus, the above factual findings pertaining to RS 2477 also apply here with the exception that the withdrawal of land from the federal domain is irrelevant.¹ Based upon the analysis above, the Board finds that it is more likely than not that the road beginning at the mouth of Lee's Gulch and heading west into the Gulch in a similar location to that surveyed in this validation proceeding, was in use by the public prior to February 1, 1881, and was therefore established as a public road by operation of Idaho law.

b. Established by Five Years of Use Between 1881 and 1893

In addition to evidence of extensive mining activities and a road network existing in Lee's Gulch during the early period between 1879 and February 1, 1881, there is extensive evidence that these uses continued for more than five years between February 1, 1881 and 1893. While this five year use requirement represents a conservative approach to reading these early statutes, the Board will proceed with this conservative approach, and review whether there is evidence of five years of public use during this period. After 1893, maintenance was an additional requirement.

The SHRA Reports detail intense mining activity in Lee's Gulch throughout the 1880s and continuing through 1893. This evidence includes many new mineral location notices, at least eight paying mines, multiple shipments of ore from Lee's Gulch mines to the Bellevue and Hailey smelters, and proofs of labor showing the extent of work taking place in the mines. All of these activities required access into and out of Lee's Gulch via Lee's Gulch Road during this period, and demonstrate a continuing and essential need for a road into and out of Lee's Gulch.

More specifically, General Land Office (GLO) Field Notes dated August 6, 1885 for the Overland Lode, which was first located in 1881, state: "There is a good wagon road to the dump by way of Lee's Gulch", providing direct evidence of a road down the hillside below the Overland claim, and out Lee's Gulch. As explained by Meyer's February 6, 2020 Memorandum,

The Field Notes do not say where the dump is located, but it hardly matters. The Overland Field Notes constitute direct evidence of a well-developed road in Lee's Gulch by 1885. One could infer that a good wagon road constructed

¹ Although road creation was possible upon first use up until at least 1881, the fact that Hatfill patent land was withdrawn from the federal domain is irrelevant under state law. See 2/6/2020 Meyer Memorandum at 8.

anywhere in the gulch would not exist in isolation but would continue to the mouth of the gulch....

Similarly, Meyer notes other GLO Field Notes for the Chicago Lode Claim dated December 26 and 27, 1882, which state as follows,

The Chicago Lode Mining Claim is situated 2 miles southwesterly of the town of Bellevue in Lees Gulch. A good wagon road is constructed from the town of Bellevue to the mine.

While Meyer surmises that these Chicago Lode field notes do not necessarily pertain to the portion of Lee's Gulch Road under consideration here, he does state that the reference to a road in Lee's Gulch "implicitly suggests that access was via a road in Lees Gulch", as well as a road network connecting the mines to the primary gulch outlet. Further "in Lee's Gulch" references are used in descriptions of the Morton, Joe Garrison, Moscow, Arrow, Lily, Joseph, Humbug, Comstock, Clipper, and Bellevue King mines. As discussed above, the idea that all of these mines "in Lee's Gulch" would exist without a corresponding road network leading down from the mines and out the gulch via Lee's Gulch Road are unpersuasive and unsupported by any evidence.

Lee's Gulch Road continued to experience widespread public use between 1881 and 1893, and the Board finds that it is more likely than not that the road was used by the public for at least five years during this period, rendering it a public road under Idaho law.

c. Established by Five Years of Use and Maintenance

During the hearings, evidence was also presented that, in more recent times, a public road was created by five years of public use and maintenance. See I.C. § 40-202(3); Ada County Highway Dist. v. Total Success Investments, LLC, 145 Idaho 360, 365, 179 P.3d 323, 328 (2008).

There was considerable evidence submitted by several individuals regarding widespread public use of Lee's Gulch Road dating back to the 1950s, and continuing until today. This frequent and continuous public use was detailed in the affidavits of Jim Koonce, Dennis Wright, and Dale Shappee, as well as the written and verbal comments of Annelle Williams, Don and Laurie Yaeger, Sharon Parker, Ben Bainbridge, Joanie Winkley, John D. and Mary Mills, Kim Neill and others. While Mr. Gouley claims that much of this use was by his permission, the Idaho Supreme Court recently determined that "hostility" of use was not a requirement when considering whether a prescriptive easement has been established under the historical use and maintenance requirements set forth in Idaho Law. See E. Side Highway Dist. v. Delavan, Docket No. 45553, 2019 WL 6724484, at 14 (Idaho Dec. 11, 2019). Thus, whether Mr. Gouley did or did not grant access is irrelevant – and any permissive use by the public over this seventy year period is sufficient to satisfy the public use requirement. The Board therefore finds that it is more likely than not that five years of public use has been established dating back to the 1950s.

As to maintenance, Dale Shappee explained in an affidavit that he personally recounted performing regular maintenance activities on Lee's Gulch Road during his tenure as Blaine County Road and Bridge Manager from 1996 until 2010. This maintenance was "regular and routine" and consisted of "yearly grading and minor repairs, if needed, to accommodate public recreational access to the BLM lands to the west, as that was the primary public purpose served by Lee's Gulch Road." In addition, Shappee recounted that he regularly observed people using Lee's Gulch Road for recreational purposes while he conducted road maintenance. Finally, Lee's Gulch Road was listed as a publicly maintained road on the Road Inventory Maps kept by Blaine County beginning in 1991 and continuing until Shappee's retirement in 2010. According to Shappee,

The Road Inventory Maps also served as the Official Highway Map, and were submitted every year to the Idaho Transportation Department in order to recover funds from the State and Federal Government for road maintenance. The Idaho Transportation Department would periodically inspect the roads listed on the Road Inventory Map and provide the County with a report of roads that were not in compliance.

The Board finds Shappee's recollections of maintenance are corroborated by the inclusion Lee's Gulch Road on the road inventory maps, and that it is more likely than not that "regular and routine" maintenance was performed on Lee's Gulch Road from 1991 until 2010. The Board therefore finds that Lee's Gulch Road is a public right of way in accordance with Idaho Code Section 40-202(3) because it is more likely than not that Lee's Gulch Road was used by the public and publicly maintained for a period of at least five years between 1991 and 2010.

IV. A Portion of Lee's Gulch Road was Dedicated Through the Platting Process

Government Lot 3, which is currently owned by Wendy Chase, was subdivided into the two lot Lee's Gulch Subdivision in December, 1990, which includes roughly the western half of Lee's Gulch Road under consideration in this validation proceeding. During the subdivision process, the issue of public access across the proposed subdivision via Lee's Gulch Road was discussed, and a forty foot easement was eventually offered and dedicated for the public's use. This dedicated easement was memorialized in Note 3 on the final plat, which provides as follows

LEE'S GULCH ROAD IS TO BE A 40 FOOT PRIVATE DRIVEWAY EASEMENT CONSTRUCTED TO BLAINE COUNTY 40 FOOT PRIVATE DRIVEWAY STANDARDS; CENTERED ON THE EXISTING ROAD; AND SHALL BE RESERVED FOR PUBLIC ACCESS FOREVER.

The Lee's Gulch Subdivision Plat also depicts a "40' PRIVATE ROAD EASEMENT WITH PUBLIC ACCESS" across Lots 1 and 2 of Lee's Gulch Subdivision. Following the approval and signing of the final plat, this section of Lee's Gulch Road was then included in the Blaine County Highway Maps beginning in 1991, with the handwritten note "transferred into the system from private", meaning that this section of Lee's Gulch Road was considered a public road.

According to the survey that was commissioned as part of the validation process, the actual location of Lee's Gulch Road is not in perfect alignment with the subdivision plat. Despite this flaw, Note 3's statement that the easement was "CENTERED ON THE EXISTING ROAD" demonstrates that the intent of the dedication was to allow public access over the existing road, and not to reconstruct Lee's Gulch Road in a different location. Furthermore, this discrepancy between the actual and platted location of Lee's Gulch Road has no effect on the primary objective of this dedication, which was to provide public access across the subdivision to access BLM lands to the west. Thus, the Board finds that the western portion of Lee's Gulch Road, as it passes through the property of Wendy Chase, is burdened by a dedicated public easement.

V. An Easement Was Conveyed Over the Remaining Portion of Lee's Gulch Road to Serve Uses Associated with the Lee's Gulch Subdivision

The Gouley property, which is Tax Lot 7408, lies to the east of Lee's Gulch Subdivision and contains the eastern, approximate half of Lee's Gulch Road under consideration in this validation proceeding. In contemplation of the consideration of the Lee's Gulch Subdivision in June of 1990, Richard and Kathleen Gouley executed an easement agreement with Robert and Patricia Romanazzi as part of the Romanazzis' purchase of Government Lot 3 from the Gouleys. This easement agreement granted the Romanazzis an express, nonexclusive, thirty-foot wide easement for "ingress and egress", as well as for "uses associated with the present or future use or development of Government Lot 3". The Easement Agreement also provides that

The parties hereto acknowledge that Blaine County and/or other governmental authorities may require Romanazzi to place a sixty (60) foot right-a-way on the Access Easement to subdivide Government Lot 3 into two (2) to five (5) lots. In the event such a requirement is placed upon the subdivision of Government Lot 3 by a governmental agency, Gouley agrees to expand the Access Easement from thirty (30) to sixty (60) feet provided that Romanazzi pays all costs and expenses associated with such expansion.

The Gouleys therefore granted the Romanazzis a non-exclusive easement across their property to accommodate the subdivision development, and the Easement Agreement contemplated that a public "Access Easement" was a likely requirement of subdivision approval. When Lee's Gulch Subdivision was approved with the dedicated public easement

across Lee's Gulch Road, that triggered a similar right of public access across the Gouley property under the Easement Agreement as public access was clearly a "use associated with the development of Government Lot 3". This easterly section of Lee's Gulch Road across the Gouley property was then included in the Blaine County Highway Maps beginning in 1991, with the handwritten note "transferred into the system from private", meaning that this section of Lee's Gulch Road was considered a public road.

The Board finds that the dedicated public access easement on the Lee's Gulch Subdivision plat triggered a corresponding Access Easement for public access under the Easement Agreement between the Romanazzis and the Gouleys as a use associated with the development of Government Lot 3 (i.e. the Lee's Gulch Subdivision).

VI. Validation of Lee's Gulch Road as a Public Road is in the Public Interest

As set forth above, there was substantial testimony provided to the Board that Lee's Gulch Road has been used extensively by the public, with some of that public use dating back nearly 70 years. Lee's Gulch Road also provides public access to federal public lands, including lands managed by the United States Bureau of Land Management. In recent years, Mr. Gouley, believing the road to be private, has hindered the public's use of Lee's Gulch Road by erecting gates, signage, and verbally accosting road users. Parking along this portion of Lee's Gulch Road has also been an ongoing issue for dispute. These conflicts have, at times, required the involvement of the Blaine County Sheriff. The Board finds that validating Lee's Gulch Road as a public road will resolve these conflicts, promote public access to federal lands, and enhance recreational opportunities for the citizens of Blaine County, all of which are important public interests. The Board therefore finds that the validation of Lee's Gulch Road as a public road is in the public interest.

VII. Order

The Board finds and declares that Lee's Gulch Road, as described in Exhibit "A", is a County road, public highway and federal land right-of-way, and validates the same pursuant to Idaho Code Section 40-203A. This Decision and Order, and Exhibit "A" shall be recorded pursuant to law and Lee's Gulch Road shall be designated as an unimproved County road on the Blaine County Official Highway Map. The road shall be thirty feet in width to discourage parking along the portions of Lee's Gulch Road that cross private land. The Board further directs the Blaine County Road and Bridge Department to perform necessary maintenance and erect proper signage informing the public of its rights and obligations.

A significant amount of public comment from proponents and opponents of the road validation was directed towards use restrictions and seasonal closures for Lee's Gulch Road. While those issues are largely irrelevant in the validation process, except for

making a determination that validation is in the public interest, the Board will consider these important management issues in a separate meeting at a later date.

Any resident or property holder within Blaine County, including the state of Idaho or any of its subdivisions, and any agency of the federal government, may appeal this decision to the District Court in and for the County of Blaine, State of Idaho, pursuant to Idaho Code Section 40-208 within twenty-eight (28) days of the date of this Decision and Order.

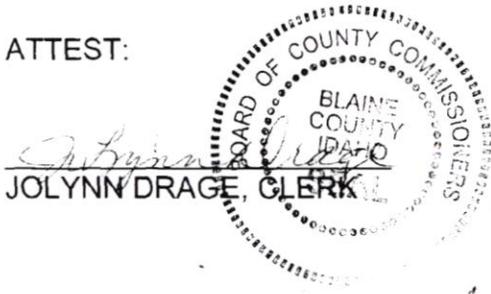
SO ORDERED by the Board of County Commissioners of Blaine County, Idaho, this 22nd day of September, 2020.

BOARD OF COUNTY COMMISSIONERS
BLAINE COUNTY, IDAHO



JACOB GREENBERG, CHAIRMAN

ATTEST:



JOLYNN DRAGE, CLERK


ANGENIE McCLEARY, VICE CHAIR
DICK FOSBURY, COMMISSIONER

