

WASHINGTON COUNTY BOARD OF COUNTY COMMISSIONERS

In the Matter of:

Road Abandonment and/or Validation
Proceeding for Cow Creek Road in
Washington County, Idaho

**HISTORIAN'S REPORT:
THE HISTORY OF COW CREEK ROAD
AND DEVELOPMENT OF THE
SURROUNDING AREA, 1870 TO
PRESENT**

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INTRODUCTION

I am a historian with expertise in historical research related to public access, mineral development, water rights, and public lands. A copy of my resume is attached as Exhibit F to this report.

I was retained by the Washington County Board of County Commissioners (“Board”) to conduct research with respect to a road known as Cow Creek Road located in Washington and Adams Counties. Cow Creek Road is located northwest of Cambridge, Idaho in T15N R3W, T16N R3W, and T16N R2W. Its current location is depicted on the map attached as Exhibit A.

For purposes of brevity, I refer to locations by township and range with the abbreviations “T” and “R,” and I employ “N,” “S,” “E,” and “W” to refer to north, south, east, and west. For example, I refer to Township 16 North, Range 3 West as T16N R3W.

Cow Creek Road has been the subject of controversy for a number of years resulting in litigation and administrative proceedings over whether it is or should be a public road. I was retained in connection with anticipated validation/vacation proceedings in connection with Cow Creek Road. The Board instructed me to undertake a neutral and unbiased examination of all the available evidence that may bear on the public or private road status of Cow Creek Road. I was specifically directed to examine and disclose all pertinent historical information bearing on either side of this controversy. I have followed the Board’s direction in that regard. This report summarizes the results of that effort.

Washington County, of course, has jurisdiction only over that portion of the road lying in Washington County. Only a portion of the road lying within Washington County is disputed. This validation/vacation proceeding is limited to certain portions of the road lying within Washington County. In order to provide a comprehensive historical understanding of the road, my research addresses the road as a whole in both Washington and Adams County.

In undertaking this research, I have conducted research in multiple record collections, including county, state, and federal records.

First, I examined the county records located in Washington County. The work included a thorough reading of the County Commission minutes from the 19th Century through the middle of the 20th Century. I also examined legal case files from the 1970s, road books, maps, and anything else with historic value in the clerk’s office. I also examined the commissioner minute books and surviving road books for Adams County for the years 1911 (the founding of the county) to 1942. In addition to the records that are still maintained at the respective county seats, these two counties have also sent many of their records to the Research Center of the Idaho State Archives (located in Boise), whose records (including deeds and deed indexes) we also examined.

Federal records were a rich source of additional documentation. I gathered all of the original federal homestead patents and their corresponding patent files from the National Archives facility in Washington, D.C. to examine whether those provided any descriptions of the land in question and/or access to that land. The National Archives in Washington, D.C. and Seattle, Washington were also utilized for research in the records of the U.S. Forest Service, in the hope that old records and maps would provide some information on access to the land considered for the original Weiser Forest withdrawal which lay just to the north of the road in question. Federal records including original survey plats and the corresponding field notes from the General Land Office (or “GLO,” now the Bureau of Land Management) were an additional source of critical information, as well as U.S. Post Office location records. Finally, thanks to a reference I found, I examined the possibility that a New Deal agency (either the Works Progress Administration or the Civilian Conservation Corps) performed road work in the area. In spite of inquiries to National Archives archivists, the search did not turn up any information related to that history.

Finally, I examined a series of miscellaneous records to fill in some of the research holes. The miscellaneous tasks included searching the *Idaho Statesman* (and its predecessor, the *Idaho Tri-Weekly Statesman*) digital archive through 1922 (when the digital version ends), reading through old issues of the *Salubria Citizen*, the *Cambridge News*, and the *Weiser Signal*, examining Sanborn Maps for the town of Cambridge in the hope of finding references to the mills, examining historic maps at the Research Center and state deeds for the lands in the school section (section 36 of T16N R3W), and reading local histories such as *Saga of Salubria*.

The facts presented in this report are organized in a way that corresponds to each of the methods of road creation under Idaho law. The outline and summary of legal issues contained in this report was prepared in collaboration with Washington County’s outside counsel on this matter, Christopher Meyer of Givens Pursley LLP in Boise, Idaho. The discussion of legal issues relies on and is consistent with the *Idaho Road Law Handbook*, authored by Mr. Meyer. However, I take responsibility for the historical research and analysis contained in this report.

PRIOR LITIGATION

At the outset of these proceedings, the County issued a *Notice of Hearing, Rules of Procedure, and Summary of Applicable Law* (“*Notice*”). That *Notice* contains a detailed explanation of three prior lawsuits involving Cow Creek Road, as well as three prior decisions by the County denying petitions to abandon Cow Creek Road.

The *Notice* concluded that Idaho District Court’s December 29, 1976 decision in *Idaho v. Bilbao* (Civil No. 7429) remains in effect and is binding on the County. That decision concluded that Cow Creek Road is a public road within T16N R3W, section 25, but it made no determination as to the public status of the Road outside of section 25.

PRIOR VACATION PROCEEDINGS

On three occasions landowners have petitioned the County to abandon or vacate portions of Cow Creek Road. I am advised that these were denied by the County on March 26, 1984, December 11, 2000, and June 5, 2006. As of this writing, I have not reviewed the records of those proceedings.

OVERVIEW OF COW CREEK ROAD AND ITS PRECURSORS

The course of Cow Creek Road has changed over the years. Its history is intertwined with that of another road, old Salubria Road, and the history of travel from the towns of Salubria and Cambridge up to the forested land skirting what is known today as the Payette National Forest.

The earliest white settlers began arriving in the region in approximately 1870, some 15 years before the founding of Salubria. They were attracted to the mild climate and the availability of timber, water, and grazing land. These early settlers constructed wagon roads in the area as early as the 1870s to take advantage of the natural resources of the area.

The history of Cuddy's Mills is important to an understanding of travel routes in the area. John Cuddy settled in the Rush Creek area (southeast quarter of section 10, T15N R3W)¹ around 1870 and set up two mills with his business partner Ed Tyne: a flour mill and a saw mill. Residents in the area built their homes with wood and shingles from Cuddy's saw mill. His saw and flour mills were referred to as "Cuddy's Mills" or "the Weiser Mills," (see Exhibit C) and locals often referred to the location of the mills as "the cove."² Local historical records report that it was not surprising to see fifty or sixty horses waiting outside the mills for flour or lumber, and that Cuddy and his wife were renowned for their hospitality to visitors from afar.³ The United States government granted Cuddy's homestead patent in 1874.⁴

Prior to the founding of Cambridge in the late 19th century, Salubria had been the primary trading town in the Upper Weiser Valley. The town, which no longer exists, was

¹ Both Cow Creek and Rush Creek flow roughly northwest to southeast and empty into the Weiser River, which then flows to the southwest. See Exhibit A.

² Written sources such as the surveyor's 1870 field notes of Township 15 North, Range 3 West, refer to "Wagon Road to Cuddy and Tyne's Mill." (pp. 1, 3) The same surveyor also noted that: "sections 3, 10, and 15 is [sic] a fine grove of excellent pine timber in which messgs. Cuddy and Tyne are erecting a saw mill and flouring mill." (21) Field Notes of the Survey of Subdivision Lines of T15N of R3W of the Boise Meridian, by Darius Baker, under Contract No. 18, Feb. 26, 1870. Survey commenced June 20, 1870. Records of the General Land Office, www.glorerecords.blm.gov, accessed Oct. 25, 2011. The Salubria Post Office sketch refers to the same mills as the "Weiser Mills" in the 1871 sketch that accompanied the post office location application. Salubria, Washington County, Idaho. Microcopy M1126, Roll 133, Reports of Site Locations, Idaho, Teton - Washington Counties, Records of the Post Office Department, National Archives Record Group 28 (Copies located at the Research Center, Idaho State Archives). *Idaho Tri-Daily Statesman*, June 10, 1876.

³ *Saga of Salubria*, 7.

⁴ Cash Entry Patent IDIDAA016037, John Cuddy, May 20, 1874.

officially founded in 1885 when the town plat was filed with the County and the first store was built.⁵ Salubria was located at the corner of sections 11, 12, 13, and 14 of T14N R3W, southeast of modern Cambridge and south of the Little Weiser River. [See Exhibit A.]

Salubria Road originated in the Salubria Valley (in area of the former community of Salubria). The road provided access for residents and travelers desiring to get to Cuddy's Mill via connecting roads known as the "Road to Cuddy's Mill" and the "Lower Route." It also continued north into timber country providing direct public access for logging and other purposes. The road began in the vicinity of what became the town of Salubria, then headed east near the boundary of section 12 and 13 of T14N R3W, then turned to the northeast and crossed the Little Weiser River in section 12, T14N R3W, then jogged due east and traveled through section 7, T14N R2W, and then turned back northwest to cross the Weiser River in section 6, T14N R2W. Here, it connected to the road popularly known as "Road to Cuddy's Mill," which traveled northwest through sections 36, 26, 23, 22, and 15 before it reached the mills in section 10. The upper portion of the Road to Cuddy's Mill (through sections 22 and 15, T15N R3W) runs roughly parallel but to the east of today's Rush Creek Road.⁶ We know that the Road to Cuddy's Mill was in existence by 1870 because it appears on Darius Baker's 1870 GLO Survey plats of T15N R3W, T14N R3W, and T14N R2W.⁷

There is evidence that Salubria Road was soon extended from its junction with the Road to Cuddy's Mill. [1871 Post Office sketch, the 1876 *Idaho Tri-Weekly Statesman* editorial, the 1893 GLO survey plat for T15N R2W,⁸ and the 1900 GLO survey plat for T16N R3SW.] This extension of Salubria Road continued further north so that travelers could reach the forested lands in section 25 of T16N R3W. The extension followed a course past the Road to Cuddy's Mill and up the north side of the Weiser River for approximately 3 ½ miles through sections 31, 30, 19 and 20 of T15N R2W (shown as "Approximate Old Salubria Rd" on Exhibits A and B). It then turned northwest at the confluence of Cow Creek and the Weiser River in section 20, T15N R2W and continued up Cow Creek through sections 17, 8, 7 and 6, T15N R2W. As the road exited from the northwest corner of this Township, it crossed briefly into section 1 of T15N R3W (shown as "Likely Connection" on Exhibits A and B). From section 1 of T15N R3W, residents at some point continued the road in a northerly direction into sections 36 and 25 of T16N R3W (shown as "Old Salubria Rd (now Cow Creek Rd)" on Exhibits A and B). By the turn of the 20th Century, the old Salubria road ended somewhere in the forested area of

⁵ Town of Salubria Plat, filed April 7, 1885, Washington County; Heartland Geneologists, *Saga of Salubria and History of Washington County Revisited* (Cambridge: Cambridge Litho Incorporated, no date), 33.

⁶ The road from the Weiser Bridge to Cuddy and Tyne's mill was declared a County Road by Ada County (predecessor to Washington County) on October 12, 1881. *Saga of Salubria*, 5.

⁷ See Exhibit B, and Survey Plat, Township 15 North, Range 3 West, accepted by the General Land Office on July 28, 1870, surveyed by Darius Baker in May-June, 1870; Survey Plat, Township 14 North, Range 3 West, accepted by the General Land Office on July 28, 1870, surveyed by Darius Baker in May 1870; Survey Plat, Township 14 North, Range 2 West, accepted by the General Land Office on July 28, 1870, surveyed by Darius Baker in April 1870. www.glorerecords.blm.gov, accessed Oct. 25, 2011.

⁸ The 1892 survey of this Township (T15N R2W), which resulted in a plat dated 1893, included only lands in the northwest quarter of the Township, and therefore the route of old Salubria Road through the southwest portion of the Township must be reconstructed based on logic and other written documentation.

section 25.⁹ Sometime later, the road was extended to the east into section 30 of T16N R2W to the county line and beyond into Adams County where it joined up with Goodrich Creek Road. [See Exhibits A and B.] As noted above, the road was used by the early settlers of Salubria Valley (part of the larger area known as the Upper Weiser valley and specifically referring to the valley containing the Little Weiser River) to access the forested areas to the north for timber. Some of this timber land became part of the Weiser Forest Reserve in 1905 and later the Payette National Forest. Early government surveyors praised the timber in the general vicinity of the Upper Weiser Valley.¹⁰

In order to provide timber to keep Cuddy's saw mill busy in the period between 1870 and 1887 (when he sold his lumber mill and it was moved to another location), we must assume that there was also road access from Cuddy's Mill in section 10, T15N R3W to the timber lands in section 25 of T16N R3W. In fact, written records indicate that there was. [See 1871 Post Office Sketch, Exhibit C.] Other than the timber on the patented land, the timber in T16N R3W was the only timber land accessible by road during this period. We know that a road (see "Approximate Lower Route" on Exhibit A) reached into this timbered area at least by 1871 (based on its depiction in the sketch accompanying the post office location discussed below, see Exhibit C) or 1876 (as shown by the article in the *Idaho Tri-Weekly Statesman* discussed below). We do not know exactly what path that road from the mill took, but it is reasonable to assume that it eventually joined old Salubria Road in section 1, T15N R3W.¹¹ [See Exhibit A, "Approximate Lower Route."] There is no evidence of any other historic road into the timber lands. Consequently, it is sensible that Cuddy and others would have eventually accessed those lands via a connection from Cuddy's sawmill to Salubria Road. We refer to this connection on the attached exhibits and elsewhere as the "Approximate Lower Route."

The "Approximate Lower Route" depicted on Exhibit A shows the connection between the Road to Cuddy's Mill in section 10 of T15N R3W to Salubria Road in section 6 of T15N R2W. After intersecting with Salubria Road, the Lower Route eventually continued east all the way to Goodrich Road in Adams County and beyond ("Lower Route"). Eventually, this Lower Route was formally abandoned and the road is no longer a County road today.¹²

⁹ Based on the Survey Plat, Township 16 North, Range 3 West, accepted by the General Land Office on March 27, 1900. www.glorerecords.blm.gov, accessed Oct. 25, 2011. See Exhibit B.

¹⁰ "A fine body of pine timber is situated on both sides of Rush Creek." Field Notes of the Survey of Exterior Lines of Townships 14 and 15 North of Ranges 1, 2 and 3 West of the Boise Meridian, by Darius Baker, under Contract No. 18, Feb. 26, 1870. Survey commenced June 20, 1870, p. 103. Records of the General Land Office, www.glorerecords.blm.gov, accessed Oct. 25, 2011.

¹¹ Although plats for any given Township typically depict only the landmarks within the exterior Township boundaries, the 1893 GLO Plat for T15N R2W actually portrays Salubria Road crossing into section 1 of T15N R3W, giving us an idea of the path cut by the Lower Route. When overlaid with aerial photography, the road's path is clearly laid out.

¹² Idaho Highway Maps from 1951 and 1971 show the Lower Route still in existence on the Adams County side, suggesting that the road was taken over by the State of Idaho. However, because it lacks direct impact on the validity of Cow Creek Road, no further research was conducted to determine the Lower Route's modern status.

The northern portion of old Salubria Road in section 1 of T15N R3W and section 36 and 25 of T16N R3W remains in place today where it was in the 1870s. This portion of the old road constitutes the upper portion of what is known today as Cow Creek Road. The lower portion of old Salubria Road (following Cow Creek upstream from its confluence with the Weiser through T15N R2W) no longer exists.

1899 proved to be an important year for the area. Although Salubria had been the hub of activity in the Upper Weiser Valley, the Pacific Idaho Northern Railroad's decision in 1899 to build a rail route up the north side of the Weiser River and a depot at what is now the town of Cambridge spurred the decline of the little town of Salubria. As Cambridge ascended in importance, the federal government patented more lands to private citizens north and west of Cambridge – near Cuddy's Mills – primarily through the 1862 Homestead Act. Additionally, Cuddy died in 1899. He had already sold his saw mill in 1887, and the new owner moved it to a different location. He had also moved his grist mill to a location on the Weiser River. By time of these transactions, however, the Road to Cuddy's Mill, Salubria Road, and the Lower Route were well established wagon roads. They remained in regular public use for a variety of purposes by the many new residents settling around that area. Nevertheless, some routes changed over the years.

The establishment of Cambridge caused settlement as well as travel routes to shift in the direction of the new city. As the settlement continued, travel route modifications were common. The County Commissioners' minutes demonstrate that the road supervisors for Road District No. 10 – the district in which these various travel routes were located – kept busy in the thirty years spanning 1890-1920. For example, in 1905, the Washington County Commission heard a petition from local residents asking for a "change of road on Rush Creek and Cow Creek."¹³ This is further evidence that a "Lower Route" existed by this time between the general location of Cuddy's Mill on Rush Creek and Salubria Road on Cow Creek. The Commissioners denied the petition "for the reason that said petition does not meet the requirements nor conform to law and for the further reason that a remonstrance [an objection] has been filed against the granting of the same." In spite of the scant details, the minutes make clear the presence and use of a route between the two creeks.¹⁴ This first route connecting Cuddy's Mills and Salubria Road is the one referred to as the Lower Route (and which appears on Exhibit A as the "Approximate Lower Route," since its exact meanderings are not known).

Eventually, an Upper Route replaced the original Lower Route, which had connected Cuddy's Mill with the forested areas to the north as well as providing a travel route between Washington and Adams Counties. The Upper Route, which bypassed Cuddy's Mill when constructed because the mill was no longer operational at its original site, may possibly be traced back as far as 1908 (based on Commissioners' actions on

¹³ The petition itself does not survive, but it is described in the Commission's minutes acting on the petition.

¹⁴ Washington County Commissioner Minute Book #4, Jan. 13, 1905, p. 318, Washington County Courthouse, Weiser, Idaho.

July 28, 1908 allocating \$300 to “complete road from Cambridge to Weiser Forest Reserve”),¹⁵ to 1925 (based on the testimony of Joe Wilson in a 1970s case), or 1934 (based on a petition filed in Washington County).¹⁶ The fact that Adams County approved a connection from Goodrich Road to Salubria Road in 1914 strongly suggests that the Upper Route was in place by 1914 or earlier, thus enabling a connection to Cambridge via the Upper Route. The new Upper Route constitutes the lower portion of what is known today as Cow Creek Road. Like the Lower Route, the Upper Route connected with old Salubria Road, but at a point above the “Likely Connection” shown on Exhibits A and B in section 1 of T15N R3W. The Upper Route and the portion of the old Salubria Road to the north of its intersection with the Upper Route constitute what is known today as Cow Creek Road.

As noted above, the northern extension of old Salubria Road (Cow Creek Road today) in sections 36 and 25 of T16N R3W can be traced back to an earlier road that stretched from Cuddy’s Mill in section 10, T15N R3W to the forest in T16N R3W, dating back to 1871 (based on the 1871 Post Office Sketch, Exhibit C) and 1876 (based on an article in the *Idaho Tri-Weekly Statesman*). This section of road is also depicted on the General Land Office survey plat for T16N R3W dated 1900 (discussed below). The lower portion of today’s Cow Creek Road (in sections 1, 10, 11, 12, 14 and 15 of T15N R3W) corresponds to what was once referred to as the Upper Route, which connected Cambridge with the old Salubria Road via what is known today as Rush Creek Road. [See Exhibit A.]

In addition, Adams County residents had their own road, known as Goodrich Road. Parts of Goodrich Road were in place as early as 1893 (as shown in the 1893 GLO survey plat for T15N R2W).⁸ Later, the road offered a continuous route between the settlement of Goodrich in section 10, T15N R2W (not to be confused with section 10 in the western neighboring Township where Cuddy’s Mills were located) and the timber lands by traveling northwest along Goodrich Creek into the forest. In the early days, Goodrich Road connected to Salubria Road via the Lower Route in sections 5 and 6 of T15N R2W. In later years, Goodrich Road was extended to the north so that it now connects all the way to the upper end of Salubria Road (now Cow Creek Road) in section 30 of T16N R2W. [See Exhibit A.] The upper connection, however, did not occur until the 20th century (as evidenced by the absence of the road connection in the 1900 GLO survey plat of T16N R3W).⁹ [See Exhibit B.]

¹⁵ Washington County Commissioner Minute Book #5, July 28, 1908, p. 38. Washington County Courthouse, Weiser, Idaho.

¹⁶ All discussed in detail below.

⁸ Survey Plat, Township 15 North of Range 2 West, accepted by the General Land Office on April 17, 1893, surveyed by John B. Hastings in 1892. www.glorerecords.blm.gov, accessed Oct. 25, 2011.

⁹ Survey Plat, Township 16 North of Range 3 West, accepted by the General Land Office on March 27, 1900, surveyed by Albinus Kimmell in 1899 Records of the General Land Office, www.glorerecords.blm.gov, accessed Oct. 25, 2011.

HISTORICAL EVIDENCE OF THE ROADS

The discussion above provides a brief overview of the history of Cow Creek Road and its predecessors. This section delves more deeply into the historical documentation.

Some of the clearest evidence of early roads in the Weiser Valley is found in historical government surveys. These surveys were undertaken by the General Land Office (GLO), a federal agency charged with surveying public lands in order for the federal government to dispose of them to the general public. This agency preceded the Bureau of Land Management.

It is important to bear in mind that the survey plats are drawn inferentially based on survey notes taken as the surveyor walked the section lines. Thus, we may determine with a high degree of accuracy where a particular road crossed the section line. The survey plats cannot be relied on, however, to determine the precise location of the road within the sections.

The GLO surveys for the multiple townships relevant to this report were not undertaken at the same time. Thus, the same road may appear in one survey but not in an earlier survey of an adjacent area. By piecing this “snapshot” evidence together, a relatively clear picture of the location of the roads emerges. However, evidence from other sources is necessary to determine the earliest use of the roads. [See Exhibit B.]

The first survey conducted in the area was prepared in 1870 for the eastern half of T15N R3W.¹⁷ For this survey, the GLO sent surveyor Darius Baker to survey the eastern half of the township’s subdivision lines, including land that was patented to Cuddy a few years later.¹⁸ In 1870, Cuddy was already living on the land and had already constructed his mills. The survey plat and corresponding field notes depict the Road to Cuddy’s Mill, describing it as a wagon road running northwest from section 36 in the far southeast corner of the Township up to section 10 where the mill was located. Piecing together the 1870 survey with the surveys for the adjacent townships to the east, south, and southeast (T15N R2W, T14N R3W, and T14N R2W respectively), you can see the entire route of this road all the way to Salubria. [See Exhibit B.]

Although this 1870 survey depicts the Road to Cuddy’s Mill, it does *not* show either Salubria Road (which would be in section 1, T15N R3W) or the Lower Route (running from Cuddy’s Mill to Salubria Road or north to the forest). Thus, it appears that these roads were not constructed as of 1870.

However, the Lower Route, which connected Cuddy’s Mill to Old Salubria Road and, from there, to the timber lands in section 25 of T16N R3W appears to have been

¹⁷ Field Notes of the Survey of Subdivision Lines of T15N of R3W of the Boise Meridian, by Darius Baker, under Contract No. 18, Feb. 26, 1870. Survey commenced June 20, 1870, p. 14. Records of the General Land Office, www.gloreCORDS.blm.gov, accessed Oct. 25, 2011.

¹⁸ That same year (1870), Baker was also contracted to survey portions of neighboring T15N R2W, but not the portions traversed by Salubria Road up Cow Creek. The area containing Salubria Road was not surveyed until 1893.

constructed and in use shortly thereafter, by 1871. U.S. Post Office records help us reconstruct the years between the 1870 GLO survey and the 1893 GLO survey of the adjacent township to the east, T15N R2W. An 1871 application to establish a post office in Salubria included a sketch map sent to the Post Office Department Topographer in Washington, D.C. The sketch showed a road stretching from Salubria up the Weiser River (labeled North Weiser River on the map, Exhibit C), then veering to the northwest to the “Weiser Mills” (Cuddy’s Mill) and beyond into the forest. This sketch provides additional evidence for the Road to Cuddy’s Mill as well as evidence of the road’s extension into the forested area in T16N R3W.¹⁹ Although it is difficult to tell from this rough schematic drawing, this extension beyond the mills was very likely the Lower Route, which provided a connection via old Salubria Road into the forest.

Further evidence of the early existence of Lower Route is found in an editorial published in June 1876 in the *Idaho Tri-Weekly Statesman*. The editorial describes the Upper Weiser Valley. It includes detailed descriptions of the travel route to Cuddy’s Mills, describing “the road from the valley” as a “gradual and easy ascent all the way, and as you reach this point [Cuddy’s Mills], the creek bottoms open out into a cove, nearly two miles wide, *extending up three or four miles to the very foot of heavily snow clad mountains, heavily fringed with timber.*”²⁰ [Emphasis added.] Therefore, this article suggests that by 1876 a road had been extended up from the mill in section 10 into the timbered area. It is a logical inference that the road extended northeast toward Cow Creek – in other words, the “Lower Route” – since there is no evidence of any other road extending into the timber lands from Cuddy’s mills. It also demonstrates how the Lower Route eventually connected to old Salubria Road and later extended up to the forested area in section 25 of T16N R3W.

The earliest GLO survey documentation of Salubria Road’s existence came in 1892, the year John Hastings conducted his field work for a survey of a portion of T15N R2W. By this time, the government recognized that the popularity of the area warranted additional surveys. Thus, the GLO hired survey parties to conduct more work. This resulted in a survey for portions of T15N R2W. Although the survey plat is labeled the 1893 survey, the fieldwork was completed in 1892.²¹ [See Exhibit B.] Specifically, the agency ordered a survey within the northwestern portion of T15N R2W around sections 4-9 and 17-20, an area of the Township that had not been surveyed when Darius Baker was hired in 1870.²² As surveyor John Hastings went out in 1892 and traversed the section line between sections 8 and 17 in this Township, he recorded in his field notes his

¹⁹ Salubria, Washington County, Idaho. Microcopy M1126, Roll 133, Reports of Site Locations, Idaho, Teton - Washington Counties, Records of the Post Office Department, National Archives Record Group 28 (Copies located at the Research Center, Idaho State Archives).

²⁰ *Idaho Tri-Daily Statesman*, June 10, 1876.

²¹ Survey Plat, Township 15 North of Range 2 West, accepted by the General Land Office on April 17, 1893. Although the plat is dated 1893, the survey work was completed in 1892. Field Notes for the Survey of Subdivision lines in T15N R3W, by John A. Hastings, Volume 103. Records of the General Land Office, www.glorerecords.blm.gov, accessed Oct. 25, 2011.

²² Baker surveyed many Townships in the Upper Weiser Valley in 1870, including portions of T15N R2W. However, because his 1870 survey is not relevant to the area discussed in this report, it is not included in Exhibit B or discussed at any length herein.

encounter with the “Road up Cow Creek.” He made additional references to the road each time he crossed it. The resulting survey plat (approved in 1893) labeled this the “Salubria Road” and showed it stretching up the entire length of Cow Creek and crossing west into section 1 of T15N R3W.²³

Additional evidence demonstrates that travel was taking place between Washington and Adams County at the turn of the century. In approximately 1905, residents of Goodrich, Idaho located a post office in their town in section 10, T15N R2W, located on the east side of the ridge separating Cow and Goodrich Creeks and Washington and Adams Counties. The location form noted that the nearest creek was Goodrich Creek, and the accompanying sketch (which was date-stamped June 23, 1901) shows a “wagon road” along the approximate location of the Lower Route, running from Cambridge up the approximate route of Rush Creek and then east over to Goodrich.²⁴ [See Exhibit D.]

As the area around Salubria and the forest to the north continued to attract settlers, the United States government sent still more surveyors to survey and then make it available for sale to private parties. The GLO sent surveyor Albinus Kimmel to survey T16N R3W in 1899. This Township was higher in elevation and more rugged than the previously surveyed townships. Nevertheless, sources allow us to infer that additional travel routes had been constructed by then, presumably to access the timber resources on the public lands.

In his survey notes, Kimmell noted the presence of a road crossing the line separating sections 25 and 36 of T16N R3W. This road is depicted on the survey plat traveling northerly across section 36 and ending in the forest midway through section 25. This road constitutes the upper portion of what was originally known as Salubria Road and is known today as the upper portion of Cow Creek Road. Of course, this road is drawn on the survey plat by inference based on the information in the survey notes taken as Kimmell walked the section lines. Thus, the exact location of the road *inside* the sections is unknown, although its placement on the section lines is exact. Consequently, it is unknown precisely how far north into section 25 the road continued. All that can be said for certain is that by 1899 – the year of the actual survey – the road did not extend all the way to the eastern edge of section 25. Thus, it is my opinion that the upper portion of Cow Creek Road was in existence at least by 1899 through sections 36 and 25 of T16N R3W, and that this was the same road that was recognized as Salubria Road in John Hastings’ 1893 survey plat of T15N R2W.

²³ As noted above in footnote 6, although plats for any given Township typically depict only the landmarks within the exterior Township boundaries, the 1893 GLO Plat for T15N R2W actually portrays Salubria Road crossing into section 1 of T15N R3W, giving us an idea of the path cut by the Lower Route. When overlaid with aerial photography, the road’s path is clearly laid out.

²⁴ Goodrich, Washington County, Idaho. Microcopy M1126, Roll 133, Reports of Site Locations, Idaho, Teton - Washington Counties, Records of the Post Office Department, National Archives Record Group 28 (Copies located at the Research Center, Idaho State Archives). This “Lower Route” was mentioned by Harold Wilson in his testimony during the 1976 lawsuit.

However, I believe that the road was present in sections 25 and 36 of T16N R3W even before the 1899 Kimmel survey (reflected in the 1900 GLO survey plat). The GLO's original survey plat of T15N R2W that is discussed above is dated 1893. Nevertheless, the survey itself was completed in November 1892.²⁵ Surveyor John Hastings' field notes recognize a "road up Cow Creek" that month.²⁶ On the 1893 plat, which is a pictorial representation of the 1892 field notes, said road is depicted as extending west into section 1 of T15N R3W. Thus it can be inferred that this "road up Cow Creek" road *very likely met up with the road in sections 36 and 25 shown on the 1899 original survey plat of Township 16 North, Range 3 West and which we now know as Cow Creek Road*. Therefore, it can be inferred that the road was in place in sections 25 and 36 of T16N R3W by 1892.

I have already noted the 1876 editorial in the *Idaho Tri-Weekly Statesman* in connection with the Lower Route. Since the purpose of the Lower Route, as described in the article, was to reach timber lands, the logical inference is that the portion of old Salubria Road depicted in the 1900 GLO plat for T16N R3W (Cow Creek Road today) was in place as early as 1876.

Tracing the road back even further, the 1871 Salubria Post Office application (Exhibit C) included a sketch depicting a road from Weiser Mills to the northeast and trailing off to the north into what was likely sections 36 and 25 of T16N R3W. Therefore, I believe that the road was most likely present in this Township even by the early 1870s.

The establishment and growth of the town of Cambridge after 1899 dictated that residents of that town would also need routes to the various locations and properties north and west of the town. As a result, Rush Creek Road was constructed sometime between 1906 and 1908 and likely replaced the Road to Cuddy's Mill as the primary route from Cambridge to Cuddy's Mill.²⁷

In 1908, the Washington County Commission allocated \$300 to "complete road from Cambridge to Weiser Forest Reserve."²⁸ By logical inference, based on the fact that there were no other direct routes between Cambridge and the forest, this extension was most likely the Upper Route which connected the top of Rush Creek Road near the old Cuddy's Mills to Salubria Road in section 1 of T15N R3W.

Reference is made at various points in the discussion above to the Lower Route, which connected Cuddy's Mill in section 10 in T15N R3W with Salubria Road in section 6 T15N R2W. (Recall that evidence of this Lower Route was found as early as the 1871

²⁵ Original General Land Office Field Notes for the survey of Subdivision Lines for T15N R2W of the Boise Meridian, by John B. Hastings, 1892, p. 6-8. Records of the General Land Office, www.glorerecords.blm.gov, accessed Oct. 25, 2011.

²⁶ *Ibid*, p. 6.

²⁷ Washington County Commissioner Minute Book #1, pp. 90, 91, 93; Washington County Road Book #1, pp. 97, 113, Washington County Courthouse, Weiser, Idaho.

²⁸ Washington County Commissioner Minute Book #5, July 28, 1908, p. 38. Washington County Courthouse, Weiser, Idaho.

sketch submitted in connection with the location of the Salubria Post Office.) Indeed, this Lower Route continued on to the east, providing connections to the towns of Goodrich and Council. On May 20, 1914 Washington County formally declared a portion of the Lower Route to be a public road.²⁹

In 1916, residents of the area filed a petition with the Washington County Commissioners to move “Salubria Road” to the *west* side of Cow Creek for its entire stretch, beginning in section 6 in T15N R2W and extending southeast to the railroad right-of-way along the Weiser River. The existing route (as identified on Hastings’ 1893 plat, see Exhibit B) traveled primarily down the east side of the Creek and ultimately to Salubria. The petition was denied and the existing route remained in place.³⁰ This event merely points to the rapid and frequent changes in area travel routes which occurred as automobiles and Washington County population both increased.

In September 1928, W.A. Schmid, a landowner in T15N R2W, gathered signatures and petitioned the Adams County Commissioners to abandon *part* of a road that stretched 1.5 miles from section 7 in T15N R2W to “the intersection of said road with the present road on Goodrich Creek.” Because there is evidence of a lower route traveling east out of both section 6 as well as section 7, and because of written evidence that the connection to Goodrich Road took place in section 5, it is likely that the “part” of the road these landowners wanted to abandon is the section connecting section 7 with section 6. This “Alternate Lower Route,” as seen on the Exhibit A, was yet another connection between landowners and the primary route over the rugged ridge separating Cow Creek from Goodrich Creek. In any event, no action was taken on the petition until the following month. In the interim, a remonstrance – or objection – was filed against the abandonment petition, and therefore the Commission voted to deny it.³¹ It is safe to infer that travel on this route continued.

As mentioned above, the Lower Route was eventually replaced by a new Upper Route connecting the area near Cuddy’s Mill to a point on Salubria Road somewhat higher up the road. As noted above, the first evidence of this Upper Route is the \$300 allocation by Washington County in 1908. The next evidence of this Upper Route is found on the Adams County side. When the Idaho Legislature created Adams County in 1911, the new Adams County Commission began examining travel routes in an effort to connect residents from the Adams County side of Cow Creek with those on the Washington County side.

²⁹ Washington County Commissioner Minute Book #6, May 20, 1914, p. 62, Washington County Courthouse, Weiser, Idaho. The road was described as follows: “Beginning at the South West corner of the NW1/4 of SW1/4 Tp 15 N R # W BM thence running East ½ mile, thence North ½ mile, thence in a North Easterly direction to the center of Sec. 12 Tp 15 N R 3 W, thence to the center of Section 6 Tp 15 N R 2 W to the Adams County line.”

³¹ Adams County Commissioners Minute Book #3, Sept. 10, 1928, p. 403; Sept. 10, 1928, p. 409. Importantly, the minutes describe the road as a “county” road, and describe it as: “commencing in Sec. 7, Twp. 15 N., 2W where said road intersects Cow Creek, and the dividing line between Adams and Washington Counties, and running thence north easterly to its intersection with the road on Goodrich Creek a distance of about one and one-half miles.” Adams County Courthouse, Council, Idaho.

In some instances, residents petitioned for such connections. On January 12, 1914, the Adams County Commission took up one such petition from resident Blaine Woods and others “for a County road connecting the Middle Fork Goodrich road with the Salubria Indian Valley Road.” The Adams County Commission granted the petition, “provided said road is opened and put in good condition and the right of way therefore granted without expense to the county.”³² Although the place names make tracing these routes difficult, *it is very likely that this declaration by the Adams County Commissioners extended Goodrich Creek Road to the north ultimately connecting it with the old Salubria Road in section 30 of T16N R2W.* (This inference is corroborated by the events of 1934 in Washington County, discussed below, in which reference is made to Washington County residents building an Upper Route at approximately the same time.) Thus, by 1914, travel between the Cambridge area in Washington County to the Goodrich Creek area in Adams County was possible via the “Upper Route” connecting to old Salubria Road which then continued all the way to northernmost part of Goodrich Road in section 30.

In 1934, a group of residents petitioned the Washington County Commissioners to vacate the Lower Route, described as beginning in section 11 of T15N R3W and continuing in an east and northerly direction about three miles to a point where it crossed Cow Creek on the west half of the southeast quarter of section 6 in T15N R2W. The petition admitted that the Lower Route road had been “declared a County road years ago” (referring to Washington County’s action on May 20, 1914). The petition asserted that this road had been mostly abandoned over the past 15 years because of a new road that had been built by the petitioners (likely referring to the Upper Route). This is further evidence that the Upper Route had been in place at least 15 years prior to 1934, that is, by 1919. This corroborates the conclusion that the Upper Route was authorized by the 1908 approval of \$300 in road funds and that the Upper Route was in place when Adams County extended Goodrich Road in 1914.

One citizen of the area opposed the 1934 vacation petition, arguing that the “old” road (“Lower Route”) was still used by residents to go from Rush Creek to Council, shortening the distance by 10-15 miles.³³ The letter of opposition suggests the Lower Route was still in regular use even if its use was diminished by the availability of the Upper Route. The new road described in the petition (the “Upper Route”) connected the above mentioned “abandoned” road at or near the south line of section 11 of T15N R3W and then ran in a sharper northeasterly direction past the A. Powell and Harold J. Wilson’s properties (these were the prior owners of Cecil Bilboa’s property; see Exhibit E for some of these historic ownership parcels). Both owned property in sections 25 and 36 of T16N R3W, and this road likely connected to the old route of the “Salubria Road” in these sections. This path of the Upper Route corresponds to the lower portion of what is known today as Cow Creek Road (before it joins the old Salubria Road). According to

³² Adams County Commissioners Minute Book #2, Jan. 12, 1914, p. 76-, Adams County Courthouse, Council, Idaho.

³³ Crystal Bays to County Court of Washington County, Sept. 14, 1934, Miscellaneous Road Petitions, c. 1915-1934, Drawer: Petitions, 9A, Washington County Records Washington County Courthouse, Weiser, Idaho.

the petitioners, the construction of this new, upper road had rendered the old, lower road useless, and they requested that the old route be declared abandoned so that “the adjoining owners can fence their respective lands and close the road.” In October 1934, the Washington County Commissioners granted the petition to vacate the Lower Route (which they been formally declared a county road in 1914). However, there is no indication that the County formally declared the new Upper Route on the Washington County side to be a county road in its stead. Thus, county road validation for the Upper Route will need to be based on public use and maintenance rather than formal declaration.

On the Adams County side in 1934, landowner R.E. Wilson brought forth a similar petition to close the “Lower Route” between the counties. His request was to close “a road established many years ago leading in an easterly direction from where the present county line crosses Section 6 in Township 15 North, Range 2 West B.M. and running thence easterly to a point on Goodrich Creek in the East Half of Southeast Quarter of Section 5, in said Township 15 North, Range 2 West, being about one and one-half miles.” The request was heard and granted by the Adams County Commission on October 10, 1934, but the Commission specified that “gates will be provided for use of local persons in hauling wood.”³⁴ Into the latter half of the 20th Century, the road continued to appear on Idaho State Highway maps for Adams County, depicted with a gate across it.³⁵

FACTS RELATING TO EACH ROAD CREATION METHOD

Methods of public road creation

At the outset, the Board must determine whether Cow Creek Road was properly created under Idaho law. Under Idaho law, a public road may be created by any of the following methods:

- (1) by blanket territorial declaration (for roads in public use prior to 1881),
- (2) by formal dedication by the county,
- (3) by five years of public use prior to 1893,
- (4) by five years of public use and maintenance subsequent to 1893,
- (5) by express conveyance or dedication through the platting process,
- (6) by common law dedication (including dedication by the federal government via land patents),

³⁴ Adams County Commissioners Minute Book #4, Oct. 10, 1934 , p. 162, Adams County Courthouse, Council, Idaho.

³⁵ General Highway Map, Adams County, Idaho, 1951 and 1971, Sheet 2 of 2, Map Room, Research Center, Idaho State Archives, Boise, Idaho.

(7) by “some positive act” of acceptance by local authorities (or any of the above) if the road was then located on the federal public domain (i.e., created pursuant to R.S. 2477), and

(8) by condemnation.

In order for the Road to have been created as a public record, it is sufficient to show road creation by any one of these methods.

In the discussion above, I briefly summarized the history of Cow Creek Road as it has evolved over the years. In the discussion below, I will discuss each of the road creation methods and identify the factual information (or lack thereof as the case may be) supporting that method.

Historical evidence of blanket territorial declaration (roads in public use prior to 1881)

Although the Lower Route is not shown on the 1870 GLO survey plat, there is evidence that the Lower Route was in existence as early as 1871 based on the Salubria post office location sketch available in the Post Office records of the National Archives (see Exhibit C) as well as the June 1876 article in the *Idaho Tri Weekly Statesman*. However, the Lower Route is not part of the modern Cow Creek Road, so this does not appear to be relevant to this validation/vacation proceeding.

The first evidence of the Upper Route (which is part of the modern Cow Creek Road) did not come until 1908 (Washington County’s approval of \$300 in funds), so it does not qualify under this road creation theory.

The depiction of the northern portion of modern Cow Creek Road (old Salubria Road) within sections 36 and 25 of T16N R3W found in the 1900 GLO survey comes too late to establish a legislative declaration in 1881. However, there is other evidence of earlier public use of this portion of the road found in the 1871 Post Office sketch and the 1876 *Idaho Tri-Weekly Statesman* editorial discussed above. It is unknown how far the road reached by 1881 into section 25, but in order to reach the forested lands it must have crossed through section 36 and reached into at least a portion of section 25.

This evidence would also be applicable to that portion of old Salubria Road (modern Cow Creek Road) that extends from the boundary of section 36 south into section 1 of T15N R3W above the junction with the Upper Route.³⁶ (The portion of old Salubria Road below this point appears to have been abandoned.)

³⁶ A quitclaim deed from 1921 describes a right of way for the point of connection between Cow Creek Road and the existing county road (the “Likely Connection”) this way: “commencing at a point on the south line of the N ½ SW ¼, Sec. one, township 15, north, of range three west B.M. where the present road being constructed intersects the said line, and running thence northerly along the road so constructed and crossing Grizzly creek at a point about one hundred feet north of where said creek intersects the west line of the SE ¼ of NW ¼, thence north to the northeast corner of said SE ¼ NW ¼, intersecting the present county road.” Quitclaim Deed, Instrument No. 39538, Ray R. Amens and Bessie J. Amens to Riel E.

Historical evidence of road creation by formal declaration

I am not aware of any such formal declaration with respect to Cow Creek Road in section 1 of T15N R3W, or sections 25 and 36 of T16N R3W.

On May 20, 1914 Washington County formally declared a portion of the Lower Route to be a public road. As noted before, the Lower Route is not part of the modern Cow Creek Road.

Although Washington County discussed the Upper Route in connection with a petition to vacate the Lower Route in 1934, they did not formally dedicate the Upper Route in that or any other proceeding that I have been able to locate.

On January 12, 1914, the Adams County Commission approved a petition to dedicate a road extending Goodrich Road up to connect with old Salubria Road in Washington County. This 1914 dedication, of course, was on the Adams County side and does not pertain directly to the pending validation/vacation proceeding in Washington County.

Historical evidence of cCreation by public use alone (prior to 1893)

The earliest GLO survey plat (the 1870 plat for T15N R3W) shows the Road to Cuddy's Mills, but it does not show the Lower Route or the portion of old Salubria Road that later crossed into section 1 of this township. However, there is evidence that those roads were in place very soon thereafter.

As shown above, the road connecting Cuddy's Mill to the forest (via the Lower Route and old Salubria Road) was in public use by 1871, according to the depiction of the Lower Route in the 1871 sketch accompanying the location of the Salubria post office as well as the 1876 article in the *Idaho Tri Weekly Statesman*. The sole purpose of these roads was for the public to access timber lands. Accordingly, it is safe to assume that the Lower Route and the extension of old Salubria Road into sections 36 and 25 of T16N R3W were in place and used by the public for more than five years before 1893. The Lower Route is not part of the modern Cow Creek Road, but the upper extension of old Salubria Road corresponds to modern Cow Creek Road in T16N R3W. Thus, these portions of old Salubria Road (modern Cow Creek Road) appear to qualify under this road creation theory. This would apply to the portions of the road in sections 25 and 36 of T16N R3W and that small portion of the road in section 1 of T15N R3W above the connection with the Upper Route (the lower portion having been subsequently abandoned).

The earliest evidence of the Upper Route is the 1908 allocation of \$300 for a road from Cambridge to the Weiser Forest, the Adams County petition in 1914, and the

Wilson and Rita Wilson, Nov. 3, 1921. Washington County Assessor Records, Washington County courthouse, Weiser, Idaho. See Exhibit A.

Washington County petition of 1934. Consequently, the Upper Route (which corresponds to Modern Cow Creek Road in sections 1, 12, 11, and 10 of T15N R3W) cannot be established by public use prior to 1893.

**Historical evidence of creation by public use and public maintenance
(1893 to present)**

The upper portion of modern Cow Creek Road in T16N R3W can be documented in 1871 (Post Office Sketch), 1876 (*Idaho Tri-Weekly Statesman*), and 1899 (the 1900 GLO survey plat). That survey plat shows that the road did not extend all the way through section 25 by the year 1899, but it was ultimately connected all the way to Adams County sometime around 1914. This is evident by the fact that Adams County approved an extension of Goodrich Road in 1914 to connect with the old Salubria Road. Likewise, the evidence shows that the Upper Route was in place as early as 1908. Further evidence of the Upper Route is found in the 1914 action by Adams County and the 1934 petition for abandonment of the Lower Route in Washington County. Thus, there is no doubt that what is today Cow Creek Road has been used by the public for more than five years.

There is a great deal of history demonstrating use and maintenance of the modern Cow Creek Road route, dating back to the first decade of the 20th century. Additionally, the issue of maintenance and use was litigated by the courts in the 1970s (with respect to section 25 of T16N R3W), when the Court concluded: “the Court is of the opinion that the evidence is overwhelmingly established that this is a public road by prescription and has been since the early 1920s and is being maintained at public expense and was being maintained at public expense in those early days.”³⁷ As described above, travel from Cuddy’s Mill northeast to Cow Creek and the forest extends back to the beginning of early settlement. This section of the report brings the road up to more recent history.

When the first lawsuit over this travel route began in the 1970s between the State of Idaho and Cecil Bilboa, some long-time residents were deposed and provided their memories of the area. Their depositions provide evidence of public maintenance through these sections throughout much of the 20th Century. Harold Wilson was an original patentee for land in section 25, T16N R3W³⁸ and also owned part of the Bilboa property in section 1, T15N R3W and section 36, T16NR3W. [See Exhibit E.] Wilson provided deposition testimony in February 1976, testifying that he had acquired the portion of the existing ranch that lies in section 36 in 1929 after leasing it for some years prior. Wilson and his wife lived on the property until approximately 1958-1960. Over the years, he purchased abandoned homesteads, including the John Nyquist property in the northwest quarter of section 25³⁹ and the Mark Peterson property in the south ½ of the northwest ¼

³⁷ Case No. 7429, Court Minutes, Dec. 6, 1976, Case No. 7429, State of Idaho, et al. v. Cecil Bilboa, 1976 in the District Court of the Third Judicial District, of the State of Idaho, in and for the County of Washington, Washington County Courthouse, Weiser, Idaho.

³⁸ Homestead Entry Stock Raising Patent No. 44173, Harold Wilson, July 24, 1939. www.glorerecords.blm.gov, accessed 10/25/2011.

³⁹ Homestead Entry Patent No. 310527, John Nyquist, Jan. 18, 1913. www.glorerecords.blm.gov, accessed 10/25/2011.

and the north ½ of the southwest quarter in section 25, T16N R3W⁴⁰ and eventually amassed approximately 4,000 acres.⁴¹ [See Exhibit E.]

Regarding various transportation routes in and around his property, Wilson recalled a great deal. His recollection was that the road from the former Cuddy's Mill up to his property was built by farmers in about 1925, before he moved up to the house. (This would correspond to the "Upper Route." Recall that other evidence traced the Upper Route back to 1908, 1914 or 1934.) Wilson recalled that the County continued to make improvements on that road - including grading work - into the early 1930s.

With regard to the extension of the northern portion of what is now called Cow Creek Road (old Salubria Road) into section 30 of T16N R2W to Goodrich Creek in Adams County, Wilson testified that a man by the name of Gordon MacGregor logged timber on the Nyquist and Peterson properties in section 25 and built a logging road from the Peterson land east toward Goodrich Creek Road in the 1950s. [See Exhibit E for the location of these properties.] According to Wilson, there had been no such road prior to that time. (Adams County records suggest that Wilson's memory is faulty on this point; see discussion above.) Once MacGregor built that road, the county did some maintenance on it, including work done at Cecil Bilboa's request in order to fix a wash-out. But the maintenance was not regular, and in fact, Wilson testified that the residents did their own road work such as filling up the ruts from horses. According to Wilson, before MacGregor built that road connecting modern Cow Creek Road with Goodrich Creek Road between section 25 in T16N R3W and section 30 in T16N R2W, residents used the route of the old Salubria Road to get from lands in the southeast quarter of T16N R3W south through section 1, T15N R3W and east into section 6, T15N R2W, across Cow Creek and over to Goodrich Creek Road. [See Exhibit A, "Old Salubria Road,"] Wilson testified that only high clearance vehicles could get over this route and that sightseers and people out for a drive used the road.⁴²

Gus Welker, an employee of Wilson's, was also deposed in the case in February 1976. Welker had lived in Washington County for approximately 72 years and had worked Wilson for more than 20 years. He had worked for Washington County sometime in the 1940s, and had actually graded the road leading to the Harold Wilson Ranch. He testified that once in the 1940s, while doing the grading work, he was told to turn around at Harold Wilson's barnyard because that was the end of the "County Road" (referring to Cow Creek Road, or the "Upper Route). He also testified that the road (Cow Creek) that went from Rush Creek to Harold Wilson's ranch became an unimproved road past the Wilson hayfield:⁴³ "somebody just went down through there and made tracks,

⁴⁰ Homestead Entry Patent No. 356790, Mark Peterson, Sept. 24, 1913. www.glorerecords.blm.gov, accessed 10/25/2011.

⁴¹ Deposition of Harold Wilson, Feb. 12, 1976, Case No. 7429, State of Idaho et al. v. Cecil Bilboa, Washington County Courthouse, Weiser, Idaho, pp. 7-11, 18.

⁴² Deposition of Harold Wilson, Feb. 12, 1976, Case No. 7429, *State of Idaho et al. v. Cecil Bilboa*, Washington County Courthouse, Weiser, Idaho, pp. 11-16.

⁴³ No evidence is available to indicate specifically where Wilson's barnyard or his hayfield was on his vast property.

you know...and that's the way they all went, right through Wilson's hayfield."⁴⁴ He stated that the road could handle a horse and a wagon but that it was a "horse-killing road," or in other words, "rough."⁴⁵ Welker corroborated Wilson's testimony that Gordon MacGregor had built some logging roads in the 1950s that went down Goodrich Creek, and that MacGregor did not come down the Cow Creek side of the divide. Welker testified that logging had been done on both private and public land during the 1950s.⁴⁶

Documents in the serial patent file of Donald Rich further support the conclusion that the public continued to utilize the Lower Route from the Goodrich Creek side to access the Likely Connection and the Upper Route of Cow Creek Road (see Exhibit A) in order to reach the National Forest, even after the County officially vacated the Lower Route. In 1963, Donald Rich received a homestead patent for land in section 6, T15N R2W, and the surviving documentation regarding his patent includes a land classification report dated 1952. The report discussed the land's accessibility, noting that the property was "about 9 miles northeasterly from Cambridge, Idaho, mainly by rough *County* roads." [Emphasis added.] In discussing improvements on the property, the report also pointed to "a dirt road to the applicant's home on the NE 1/4 SW 1/4, Sec. 6, traverses the land. From this road that of Earl Wilson branches off on the NW 1/4 SE 1/4."⁴⁷ Additionally, one local resident wrote to the Land Office with the concern that if a patent was granted on this land, it would interfere with the right of way between public range land and public forest land. The Boise Land Office responded to those concerns by stating that since the land in question was surrounded by other private lands, "any right of way existing across the private lands would necessarily have had to be obtained from the owners." But, he also explained that there "was nothing in the record that would indicate that the allowance of this entry would interfere with any access."⁴⁸

Continuing into the 1960s and early 1970s, records suggest that Washington County continued to be involved in the maintenance of Cow Creek Road, or the Upper Route (henceforth this will be known as Cow Creek Road since that is how locals referred to it in this era). For instance, old land owners on Cow Creek Road, Earl Armacost, Bert Vogel, Tom Ogle, and Harold Wilson, met with the Commission on March 25, 1963 to request some county improvement on the road. The Board stated that they would visit and "look the situation over." About six months later, the Commissioners examined the Cow Creek Road following their normal meeting on

⁴⁴ Deposition of Gus Welker, Case No. 7429, *State of Idaho et al. v. Cecil Bilboa*, Washington County Courthouse, Weiser, Idaho, pp. 7-8.

⁴⁵ Deposition of Gus Welker, Case No. 7429, *State of Idaho et al. v. Cecil Bilboa*, Washington County Courthouse, Weiser, Idaho, pp. 10-11.

⁴⁶ Deposition of Gus Welker, Case No. 7429, *State of Idaho et al. v. Cecil Bilboa*, Washington County Courthouse, Weiser, Idaho, pp. 17-18.

⁴⁷ Land Classification Report, Oct. 28, 1952, Donald E. Rich, Patent 1233396, Serial Patent Files, 1908 and later, Box 3407, Records of the Bureau of Land Management, R.G. 49, U.S. National Archives, Washington, D.C.

⁴⁸ Theodore Braun to Department of Interior, April 27, 1960 (1); Donald I. Bailey to Theodore Braun, May 4, 1960, Donald E. Rich patent file, 1233396, Serial Patent Files, 1908 and later, Box 3407, Records of the Bureau of Land Management, Record Group 49, U.S. National Archives, Washington, D.C.

October 28, 1963.⁴⁹ In November 1970, Cecil Bilboa – who had purchased Harold Wilson’s property – met with the Commission to request the County to lay some gravel on his road. He “stated the road near his place needs some gravel, that the road is very bad and his children can’t get out to school.” The Board agreed to talk with the Road Supervisor.⁵⁰ Cecil Bilboa again approached the Commission in August 1971 regarding Cow Creek Road. According to the minutes, he “stated they would be moving stock in large trucks and there is one corner which this semi cannot negotiate.” Ira Bledsoe - likely the road supervisor - agreed with the assessment and stated that he would “move a cat into this area this weekend to try to correct this situation.”⁵¹

Soon after Bilboa’s requests for work on Cow Creek road, complaints began to filter in that Mr. Bilboa had begun to obstruct the road. The first complaint to show up in the record came from Earl Armacost, a long-time landowner on Cow Creek Road, who met with the County Board of Commissioners on July 9, 1974 to complain that Cecil Bilboa was trying to close a road “which was a county road.”⁵² Local forest rangers came to one of the Commission’s meetings in November to discuss the road, as well.⁵³ Within a year, the State of Idaho had filed suit against Mr. Bilboa, alleging that he was unlawfully obstructing Cow Creek Road.⁵⁴ Bilboa’s response asserted that the road had not been maintained north of section 36 in T16N R3W in more than ten years, and that the road had therefore been abandoned by the County. He also asserted that any and all roads in section 25 were “old logging roads, in their original creation,” and had always been maintained privately. Finally, Bilboa asserted in the document that north of section 36’s north line through section 25, “there does and has existed a private, unmaintained, four-wheel-drive-vehicle road which is and has been for many years last past, a private road and not a public road.”⁵⁵

When the trial was held in December 1976, the court ruled against Mr. Bilboa’s obstructions. Following two days of testimony, during which a stipulation was made that “there is no recorded action by the County Commissioners anywhere in their Minutes of this particular road through section 25,” the judge made this decision: “the Court is of the opinion that the evidence is overwhelmingly established that this is a public road by prescription and has been since the early 1920s and is being maintained at public expense and was being maintained at public expense in those early days...it is the Court’s opinion

⁴⁹ Washington County Road Book #2, March 25, 1963, p. 126; Oct. 28, 1963, p. 132, Washington County Courthouse, Weiser, Idaho.

⁵⁰ Washington County Road Book #2, Nov. 9, 1970, p. 190, Washington County Courthouse, Weiser, Idaho.

⁵¹ Washington County Road Book #2, Aug. 9, 1971, p. 195, Washington County Courthouse, Weiser, Idaho.

⁵² Washington County Road Book #2, July 9, 1974, p. 217, Washington County Courthouse, Weiser, Idaho.

⁵³ Washington County Road Book #2, Nov. 25, 1974, p. 220, Washington County Courthouse, Weiser, Idaho.

⁵⁴ Case No. 7429, Complaint for Injunctive Relief and for Money Damages, Nov. 19, 1975, Case No. 7429, State of Idaho, et al. v. Cecil Bilboa, 1976 in the District Court of the Third Judicial District, of the State of Idaho, in and for the County of Washington, Washington County Courthouse, Weiser, Idaho.

⁵⁵ Case No. 7429, Answer to Amended Complaint, Dec. 1, 1976, Case No. 7429, State of Idaho, et al. v. Cecil Bilboa, 1976 in the District Court of the Third Judicial District, of the State of Idaho, in and for the County of Washington, Washington County Courthouse, Weiser, Idaho.

that the prescriptive right was established long before Mr. Bilboa bought the property and Mr. Bilboa has unlawfully obstructed this road.”⁵⁶ The Court’s Findings of Fact and Conclusions of Law and Order followed at the end of the month. They stated the following key facts:

- 1) Cow Creek Road through section 25 had not been recorded as a County Road;
- 2) Cow Creek Road through section 25 had been used openly and continuously by members of the general public between 1957 and 1973 and probably as far back as the 1920s for a variety of reasons, including travel between Cambridge and Goodrich, travel to cabins located near Cow Creek Road in Adams County, Fish and Game Management purposes, sightseeing, logging, and access to state land and the Payette National Forest;
- 3) Cow Creek Road through section 25 was maintained by Washington County between 1957 and 1973 and “to some extent” back to the 1920s.⁵⁷

The Court’s ruling was limited to section 25 of T16N R3W. However, in order to maintain the road through section 25, Washington County would have had to maintain it through section 36 in the same Township, as well as section 1 in T15N R3W. Therefore, it is my opinion that maintenance and public use of the Upper Route of Cow Creek Road continued for at least five years through section 1, T15N R3W, and sections 36 and 25, T16N R3W.

Historical evidence of conveyance by plat, deed, or otherwise (at any time)

I am not aware of any formal conveyance by plat or otherwise of Cow Creek Road to the County.

Historical evidence of common law dedication

The United States government disposed of the land in section 25 of T16N R3W, and in section 1 of T15N R3W through patents to private individuals. Patents to individuals were issued pursuant to the 1900 GLO survey plat for T16N R3W and the 1870 survey plat for T15N R3W.

Because the 1870 plat does not depict Cow Creek Road or its precursors (except the Road to Cuddy’s Mill, which is not part of the modern Cow Creek Road), no common law dedication occurred in this township.

⁵⁶ Case No. 7429, Court Minutes, Dec. 6, 1976, Case No. 7429, State of Idaho, et al. v. Cecil Bilboa, 1976 in the District Court of the Third Judicial District, of the State of Idaho, in and for the County of Washington, Washington County Courthouse, Weiser, Idaho.

⁵⁷ Case No. 7429, Findings of Fact and Conclusions of Law and Order, Dec. 29, 1976, Case No. 7429, State of Idaho, et al. v. Cecil Bilboa, 1976 in the District Court of the Third Judicial District, of the State of Idaho, in and for the County of Washington, Washington County Courthouse, Weiser, Idaho.

The 1900 GLO survey plat of T16N R3W depicts a portion what is now Cow Creek Road (formerly Salubria Road) in sections 25 and 36, and because the federal government did in fact issue patents through which Cow Creek Road travels and appears on the 1900 GLO survey plat, a common law dedication did occur for at least the road through section 25. The federal government issued two patents to private citizens in section 25 of T16N R3W where Cow Creek road (formerly Salubria Road) runs. The first was in 1913 to Mark Peterson.⁵⁸ This was followed by another in 1919 to Edward Edmundson.⁵⁹ The federal government issued additional patents in other portions of the Township as well, but they relate to areas where no road was represented on the 1900 GLO survey plat. Thus, it appears that common law dedications of Cow Creek Road occurred within section 25, but only with respect to that portion of the road depicted on the survey plat and not its extension into Adams County and T16N R2W.

Section 36 of T16N R3W presents a special situation with respect to common law dedication. This is because, upon admission to the union, sections 16 and 36 of each township were granted to the State of Idaho as “school lands” to provide income for education. Accordingly, all of section 36 of T16N R3W was granted to the State of Idaho upon statehood in 1890. Because the grant of section 36 to Idaho occurred in 1890, prior to the 1900 GLO survey plat, no common law dedication is associated with the grant upon admission.

However, the State of Idaho then issued a series of state deeds to private individuals in this section between 1908 and 1927. Cow Creek Road – and formerly, Salubria Road as shown on the 1900 survey plat – passes through some of the land in section 36 which was sold by the state. First, the state sold the 40 acres in the southeast ¼ of the southwest ¼ to A.J. Denney on June 2, 1911.⁶⁰ Then, the state sold the adjacent 40 acres in the northeast ¼ of the southwest ¼ to Charles A. Denney (L. Etta Wilson, assignee) on September 10, 1914.⁶¹ The remainder of the land through which the road extends to the north (that is, the land in the northwest ¼ of this section) remains in state hands.

Historical evidence of R.S. 2477 (prior the date surrounding land was reserved or patented)

Evaluating the status of a road as an R.S. 2477 road is a two-step process. The first step is to determine if the road even existed at the time the land left the public domain. In other words, the road was created on land that was held by a private party or the State of Idaho, it cannot be an R.S. 2477 road. Once it is determined that the road was created during the time the land was in the public domain, the next step is to see if it satisfied any of the road creation methods described above.

⁵⁸ Homestead Entry Patent No. 356790, Sept. 24, 1913.

⁵⁹ Homestead Entry Patent No. 12448, June 30, 1919.

⁶⁰ State Deed 2581, A.J. Denney, June 2, 1911.

⁶¹ State Deed 3718, Charles A. Denney, Sept. 10, 1914.

Because the passing of land from the federal public domain into private or state ownership occurred at different dates in each section of land under scrutiny, I will discuss them each separately. I describe them in order from south to north. I will address only those portions of roads that make up the modern Cow Creek road.

Note that just because a road is not an R.S. 2477 road does not mean that it is not a public road. R.S. 2477 roads are just one variety of public road.

Section 1, T15N R3W: The federal government issued the first patent in the section in 1900. (The earliest passage of land out of the public domain in this section lay in the east half. The land in the south half of the northeast $\frac{1}{4}$ and the northeast quarter of the southeast quarter was patented to John Morgan under the Desert Land Act in 1900.) The Upper Route can be traced back no earlier than 1908. In other words, the road was created after the land had left the public domain. Consequently, the Upper Route (now part of the modern Cow Creek Road) through section 1 does not qualify as an R.S. 2477 road. Any road creation test it might pass came too late for R.S. 2477 status.

Although the Upper Route was built too late to qualify as an R.S. 2477 road, the short portion of old Salubria Road (now Cow Creek Road) above the Upper Route in the northern part of section 1 was in existence well before 1900 and thus could qualify as an R.S. 2477 road for all of the reasons applicable to section 25 of T16N R3W discussed below.

Section 36, T16N R3W: This section passed out of the public domain when it was granted to the State of Idaho upon Statehood in 1890. The evidence discussed above shows that upper portion of old Salubria Road (now Cow Creek Road) was in public use as early as the 1870s and certainly in 1899 when the survey notes were taken for the 1900 GLO survey plat.

As discussed above, there is evidence that this portion of Cow Creek Road qualifies as an R.S. 2477 road based on either (1) the blanket legislative declaration in 1881 or (2) five years of public use prior to 1890. While it is possible that a common law dedication occurred based on deeds by the State to private individuals, no such deeds were issued prior to 1890. Thus, any common law dedication would come too late to create an R.S. 2477 road.

Section 25, T16N R3W: All of the land in this section remained part of the public domain until 1913, the year of the first patent. Thus, to be an R.S. 2477 road, it must be shown that the road qualified as a public road prior to 1913.

As noted above, there is evidence from 1871 that travel occurred between Cuddy's Mills in section 10, T15N R3W and the forest in T16N R3W. Therefore, the northern portion of old Salubria Road (modern Cow Creek Road) may have existed as early as 1871, based on the sketch of the post office location described above. [See Exhibit C.] Accordingly, for the reasons discussed above, this portion of the road appears to qualify as an R.S. 2477 road based on the following road creation methods:

(1) blanket territorial dedication in 1881, (2) five years of public use prior to 1893, (3) five years of public use and maintenance after 1893, and (4) common law dedication.

There is no hard evidence of how far north the forest road reached during this period. The GLO survey plat dated 1900 (based on field notes of 1899) shows the Salubria Road continuing somewhat more than halfway through section 25. Given that the purpose of the road was to access timber in this area, it appears reasonable to infer that the road had been constructed at least as far as shown on the GLO survey plat and in public use for five years prior to 1890.

It is possible that the road did not extend into Adams County and to the east boundary of this section until 1914. Therefore, the portion of Cow Creek Road in the northeast quarter of section 25 would not qualify under R.S. 2477, because said parcel was privatized in 1913.⁶²

Historical evidence of condemnation

To my knowledge, neither Washington nor Adams County has ever sought to condemn any part of Cow Creek Road.

CONCLUSION

I have found no evidence to support public road creation of Cow Creek Road under the following road creation methods:

- (1) by formal dedication by the county,
- (2) by express conveyance or dedication through the platting process,
- (3) by condemnation.

I have found some evidence that could support public road creation of the road (or portions thereof) under the following road creation methods:

- (1) by blanket territorial declaration (for roads in public use prior to 1881) for the part of Cow Creek Road that was once Salubria Road above the connection with the Upper Route,
- (2) by five years of public use prior to 1893 for the part of Cow Creek Road that was once Salubria Road above the connection with the Upper Route,
- (3) by five years of public use and maintenance subsequent to 1893 for all of Cow Creek Road,
- (4) by common law dedication for that portion of Cow Creek Road in section 25 of T16N R3W that is depicted on the 1900 GLO survey plat. Common law dedication

⁶² Homestead Entry Patent No. 3728, Jan. 18, 1913. www.glorerecords.blm.gov, accessed 10/25/2011.

could also be based on state deeds in section 36 for the portion of the road running through the southwest $\frac{1}{4}$ of the section.

(5) by creation of an R.S. 2477 road, for that portion of Cow Creek Road in section 25 of T16N R3W as depicted on the 1900 GLO survey plat as well as the portion located in section 1 of T15N R3W located above the junction with the Upper Route.

It is not my job to conclude whether that evidence is sufficient to support public road creation. The presentation of historical information provided in this report is intended to assist the public and the Board in preparing for and participating in this validation/vacation proceeding. I have endeavored to identify the evidence (or lack thereof) supporting each of the road creation methods recognized under Idaho law.

As is the case in most road validation/vacation proceedings, there is little if any direct evidence for any given road creation method. In such cases, I have identified the circumstantial evidence that might support each road creation method. Where appropriate, I have stated my assessment of the strength of the evidence based on my professional judgment. Ultimately, however, it is up to the Board to determine whether there is an adequate factual basis to support any of the road creation methods.

I have done my best in this report to disclose all pertinent facts, pro and con, that I have been able to discover. Interested landowners and members of the public will be invited to provide additional information that may be relevant to this road validation/vacation proceeding. One of the purposes of this study is to identify gaps in the knowledge base so that all participants may be aware of what information is available and what additional information is needed in order to make a proper determination of the status of Cow Creek Road.

Submitted this _____ day of _____, 2012.

Jennifer Stevens, Ph.D.
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