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June 18, 1987

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THIS CORRESPONDENCE IS A LEGAL GUIDELINE OF THE  
ATTORNEY GENERAL SUBMITTED FOR YOUR GUIDANCE

Re: Idaho Code Title 40, Chapter 2

Dear Mayor Candler:

Your letter asked two questions:

1. May county roads be abandoned by not including them on the official map of the highway district system?
2. Who owns the right-of-way for roads not included on the official map?

CONCLUSIONS:

1. County roads cannot be abandoned simply by failing to include them on the official highway district system map. County roads can only be abandoned and vacated after full compliance with the procedures laid out in Idaho Code § 40-203.
2. Roads not included on the official map are not abandoned; therefore the public continues to own the right-of-way.

ANALYSIS:

The answer to your first question - whether county roads can be abandoned by not including them on the official highway district system map - is governed by Idaho Code §§ 40-202 and

Mr. Neal Candler, Mayor  
City of Potlatch  
June 18, 1987  
Page 2

40-203. No cases have been found interpreting these statutes as amended in 1986. Therefore, the meaning of the statutes must be drawn from the language of the sections and from rules of statutory construction.

Section 40-202 sets forth the procedure to be used in the initial selection of roads to be included in the highway district system. This selection is accomplished by the adoption of an official map by the highway commissioners following notice and hearing. However, the section is ambiguous as to whether existing highways can be abandoned by not including them on the official map.

The ambiguity in Idaho Code § 40-202 as to whether roads can be abandoned by non-inclusion on the official map is resolved by reference to Idaho Code § 40-203, which delineates the specific procedures that must be followed before any highway is abandoned and vacated. The commissioners must prepare a report stating the effects of the proposed abandonment and vacation on the public interest, notice must be published in a local newspaper, notice must be mailed to owners of land abutting the highway to be abandoned, and a hearing must be held to review the report and accept testimony from interested persons. Idaho Code § 40-203(1). Additionally, highways established by five years of maintenance at public expense (Idaho Code § 40-109(5)) can be abandoned if not maintained or used for five years, unless they are included on the official map. Idaho Code § 40-203(4)

Because Idaho Code § 40-203 provides specific procedures to be used when abandoning or vacating county roads, it can be inferred that in providing these procedures, the legislature intended to exclude other methods of abandonment or vacation. Poston v. Hollar, 64 Idaho 322, 132 P.2d 142 (1942). This interpretation of the statute conforms to the majority view in other jurisdictions that whenever a procedure for abandonment or vacation is provided for by statute, it is exclusive of all other methods of abandonment or vacation. 175 A.L.R. 760, § 2. Therefore, it must be concluded that highway district commissioners cannot abandon existing highways simply by failing to include them on the official map.

As to your second question, it is our opinion that the public continues to own the right-of-way for roads not included on the official map. The apparent purpose of the official map is to designate those highways which the county or highway district will have a duty to maintain. A road does not have to be included on the official map to be designated as a highway. Idaho Code § 40-203(3). However, there is no duty to maintain non-included highways until they are "designated as part of the county or highway district system by inclusion on the official

map." Idaho Code § 40-202(3). Nor is there an affirmative duty to include all existing highways on the official map. Section 40-202(4) states:

Nothing in this section shall limit the power of any board of commissioners to subsequently include or exclude any highway from the county or highway district system in the same manner provided for the selection of the initial highway system as provided by law.

The highway district is free to include or exclude highways from the official map at its discretion, once a public hearing is held in accordance with the provisions of § 40-202(1)(a). The only two instances in which the statutes delineate an affirmative duty to include highways on the official map are when a county or highway district acquires an interest in real property for highway purposes, or when it validates a highway. Idaho Code §§ 40-202(a) and 40-203A.

Non-included roads continue to be public highways, even if they are not maintained. A road is not abandoned merely because it is not maintained. Goedecke v. Viking Investment Corp., 70 Wash. 2d 507, 424 P.2d 307 (1967). When the county or highway district abandons or vacates a road, they cease to assert or exercise an interest, right, or title to the road, with the intent of never again asserting it. Mosman v. Mathison, 90 Idaho 76, 408 P.2d 450 (1965). A highway can only be abandoned or vacated in accordance with the provisions of section 40-203.

The right-of-way for a highway, once dedicated and gained by the public, can only be lost by the statutorily provided methods, Idaho Code § 40-203(4), Boise City v. Hon, 14 Idaho 272, 94 P. 167 (1908). The court stated in its own syllabus in that case, that:

[W]here the owner of land plats the same into lots, blocks, streets and alleys, and files such plat with the proper recorder of deeds, and sells lots therein with reference to such plat, he and his grantees are estopped from revoking the dedication of such streets and alleys.

A dedication of streets and alleys thus made is irrevocable, and the dedicator and his grantees are precluded from exercising any authority over or setting up any title to the same unless they are abandoned by the public; and that is true whether there has

Mr. Neal Candler, Mayor  
City of Potlatch  
June 18, 1987  
Page 4

been any formal acceptance of such streets  
and alleys by the public authorities or not.

The case also holds that acts of filing and recording and  
selling the lots are sufficient to establish the intent on the  
part of the owner to make the donation of the same for public  
use.

Sincerely,

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Analysis by:  
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DGC/mkf