

IN SUPREME COURT  
STATE OF SOUTH DAKOTA

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Appeal No. 28085

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LAWRENCE COUNTY  
Respondent/Appellant

vs.

RAYMOND C. OYEN  
Petitioner/Appellee

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APPEAL FROM THE CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT  
LAWRENCE COUNTY, SOUTH DAKOTA

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HONORABLE MICHELLE K. PALMER-PERCY,  
CIRCUIT COURT JUDGE

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APPELLANT'S BRIEF

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## REFERENCES

Appellant Lawrence County shall be referred to as “Lawrence County” or “Appellant” respectively. Appellee Raymond C. Oyen shall be referred to as “Petitioner,” “Oyen,” or “Appellee.”

Reference to the Settled Record as set forth in the Clerk’s Register of Actions Index shall be by the initials “SR” followed by the assigned number(s). Reference to the trial transcript shall be by the initials “TT” followed by the pertinent page number(s) and line number(s). Reference to the Court’s Findings of Fact and Conclusions of Law shall be designated as “FOF” or “COL” followed by the assigned paragraph number(s). Reference to Deposition testimony shall be referred to by the Deponent’s initials followed by the assigned page number(s) and line number(s). Reference to USFS Road 231/South Rapid Creek Road shall be “231” or 231/SRCR.

## JURISDICTIONAL STATEMENT

Lawrence County appeals the Judgment and Writ of Mandamus entered by the Honorable Michelle K. Palmer-Percy, Circuit Court Judge, Fourth Judicial Circuit, Lawrence County, South Dakota. (SR Page 63) The Findings of Fact and Conclusions of Law were executed by the trial court on November 21, 2016 (SR Page 64), and the Judgment was executed by the trial court on November 28, 2016 (SR Page 69). The Findings of Fact and Conclusions of Law and Judgment were filed with the Lawrence County Clerk of Court on November 28, 2016 (SR Page 69). The Writ of Mandamus was filed with the Lawrence County Clerk of Court on November 28, 2016 (SR Page 70). The Notice of Entry of Findings of Fact and Conclusions of Law and the Judgment were

served by mail on December 15, 2016 (SR Page 465). The Judgment sought to be reviewed herein is appealable pursuant to SDCL 26A-3(1).

### LEGAL ISSUES

1. The trial court erred in concluding that acceptance of the 1930 easement from Miner's and Merchant's Bank and approval of subdivision plats were legally sufficient alone to add 231/SRCR to the County Highway Road System such that the County has a continuing ministerial duty to perform maintenance on 231/SRCR.

The trial court concluded that Lawrence County accepted the easement and by its own approval of plats agreed to hold the property in trust for the benefit of the petitioners and other members of the public and therefore had a fiduciary obligation to petitioners and other members of the public, which responsibility cannot simply be transferred to the United States Forest Service without insuring such obligations and responsibilities are protected and assured pursuant to SDCL 11-31-12. (COL Page 3 Line 2)

Most relevant case law and statutory authority:  
SDCL 11-3-12; 31-1-5(2) and (4); 31-12-26; 31-13-12  
*Kirlin v. Halverson*, 2009 SD 107, 758 NW2d 536  
*Fluet, et al v. McCabe*, 12 N.E.2d 89 (Mass. 1938)

2. The trial court erred in its determination that the US Forest Service was not an indispensable party.

The trial court concluded that the US Forest Service was not an indispensable party to this action because Lawrence County failed to provide proper notice when it attempted to transfer its duty to maintain 231/SRCR to the US Forest Service on December 30, 1992. (COL Page 4 Line 14)

Most relevant case law and statutory authority:  
SDCL 15-6-19(a)  
*Smith v. Albrecht*, 361 NW2d 626, 628 (SD 1985)

3. The Court erred when it held that the transfer of an existing roadway easement by the Lawrence County Commission at its regular meeting on December 30, 1992, was ineffective because it did not follow the public notice requirements for vacating, changing, or locating a secondary roadway according to SDCL 31-3-6 through 31-3-9.

The trial court concluded that the procedural requirements for vacating or changing a county secondary road as set forth in SDCL 31-3-6 through 31-3-9 applied to the transfer of an existing road easement from Lawrence County to the

US Forest Service and the failure of the County to adhere to these procedural requirements rendered the apparent attempt to transfer the easement procedurally and substantively defective (COL Page 4 ¶ 10, 11, 12).

Most relevant case law and statutory authority:

SDCL 31-3-6 through 31-3-9

SDCL 1-25-1.1

4. The trial court lacked subject matter jurisdiction to consider the matter of the 1992 easement transfer for failure to timely appeal that decision and lacked subject matter jurisdiction to consider Petitioner's appeal of the denial of his petition to now have Lawrence County maintain and plow snow on 231/SRCE because Petitioner is not an aggrieved party.

Most relevant case law and statutory authority:

SDCL 7-8-27 and 7-8-29

*Cable v. Union County Board of Cnty Comm'n 2009 SD 59*

5. The trial court erred in determining that Lawrence County failed to evaluate evidence provided by Petitioner and therefore they acted arbitrarily and capriciously.

The trial court concluded that Lawrence County's failure to even evaluate evidence provided it by Petitioner is an act of arbitrary and capricious denial of the Petitioner's request.

Most relevant case law and statutory authority:

*Tri County Landfill Association,, Inc., v. Brule County*

535 NW2d 760 (S.D. 1995)

### STATEMENT OF THE CASE

This is an appeal from the Judgment and issuance of a Writ of Mandamus, ordering Lawrence County to add a road to its County Highway System and to conduct maintenance and snow removal on the road, rendered by the Honorable Michelle K. Percy, Fourth Judicial Circuit, Lawrence County, South Dakota. A de novo trial to the Court began on October 17, 2016 and concluded on October 18, 2016. The Court entered Findings of Fact and Conclusions of Law on November 21, 2016 (SR Page 64) and issued its Order and Writ of Mandamus entered on November 28, 2016 (SR Page 69, 70).

Through various iterations, the Lawrence County Commission (“County”) has, over many years, approved and designated a system of primary and secondary roads in Lawrence County for purposes of allocating maintenance and snow removal services. USFS Road 231/SRCR has never been designated a primary or secondary road. Lawrence County has never performed any road maintenance or allocated any County funds to maintain 231/SRCR. Any maintenance on 231/SRCR has been under the supervision and control of the Forest Service and has been paid for by the Forest Service.

In August 2015 several landowners along 231/SRCR, by petition, requested that the County provide maintenance and snow removal services on the road. They did not petition to have the road added to the designated highway system. Upon investigation and due consideration, the County determined that the road was not part of the County Highway System, did not meet county specifications, and that the County would only provide those maintenance services it was required to perform as part of a written maintenance agreement with the Forest Service, and for which the Forest Service reimbursed the County. Petitioner appealed the decision by the County to the circuit court alleging the County acted arbitrarily and capriciously.

The trial court found that the County had accepted the road as part of its highway system by virtue of having received the grant of the road right-of-way easement and subsequently approval of subdivision plats. This in spite of the fact that no evidence was presented that the County ever intended to, or in fact did add the road to its highway system. Also, the trial court held even though there was no evidence that the County ever performed road maintenance other than what the federal government paid for on 231/SRCR in the ensuing 86 years, and the fact that 231/SRCR does not meet existing

county highway specifications, 231/SRCR was eligible to be on the County Highway System.

Further, the trial court found that the transfer of the easement in 1992 was invalid for want of proper notice issued to the public.

The County contends that acceptance of the 1930 easement was not sufficient alone to add the road to the County Highway System or mandate the County to perform maintenance on 231/SRCR. The County believes there must be some official action on the part of the county commission to designate 231/SRCR to its highway system (i.e. petition procedure). Additionally, the County maintains that it provided proper public notice of the regular county commission meeting held on December 30, 1992, and that the transfer of the right-of-way easement was a valid transfer of whatever supervisory or control rights over 231/SRCR Lawrence County may have had. The County also contends that the Forest Service is an indispensable party pursuant to SDCL 15-6-19(a) and that the court lacked subject matter jurisdiction to consider the validity of the 1992 transfer of the easement. The County further believes the Petitioner is not an “aggrieved party” such that the court is deprived of subject matter jurisdiction over the appeal of its decision to deny Petitioner’s petition requesting additional maintenance and snow removal on 231/SRCR.

#### STATEMENT OF FACTS

On August 14, 2015, Petitioner submitted a Petition on behalf of landowners owning property along 231/SRCR requesting Lawrence County conduct maintenance and snow removal on 231/SRCR. (Exhibit 1). A hearing on the Petition was held on September 1, 2015. A decision regarding the Petition was tabled pending further

investigation by County staff.

On October 13, 2015, the matter of the Petition was again taken up by the commission. Based upon the recommendation of staff, the county commission elected to simply continue to perform the maintenance work contemplated under a contractual agreement with the Forest Service for which the County is reimbursed with federal funds.

Representatives of the Forest Service were present at the hearings held in conjunction with the Petition. There is no evidence the Forest Service ever disputed the County's understanding and belief that maintenance of 231/SRCR was the Forest Service's responsibility, supervision and control over 231/SRCR.

Following the first hearing on the Petition, Allan Bonnema, Lawrence County Highway Superintendent, was asked to conduct an inspection of the road. Bonnema submitted a report of his inspection and finding regarding 231/SRCR to the county commission prior to the second hearing on the Petition. (Exhibit 2, Page 69) (AB Depo. Exhibit 6) The report noted that the road was a Forest Service road and in its present condition did not meet county road criteria to be eligible to be included on the County Highway System. *Id.* The report noted that the 3.85 mile road needed a number of improvements, including re-graveling, at a cost to the county taxpayers of \$198,623.50 alone. *Id.* The report also cited the fact that the road was listed on the USFS/county maintenance agreement. (Exhibit 2, Page 69) (AB Depo. Exhibit 6) Forest Service/county road maintenance agreements date back to the late 1970's (Exhibit 2, Page 58) (AB Depo. Exhibit 3)

In 1982, the County adopted an ordinance establishing "Criteria for Accepting Roads to the County Highway System or the County Secondary Highways Together

Herein After (sic) Referred To As County Roads." (Exhibit 6A) The Ordinance requires, as a prerequisite for consideration for addition to the highway system, that the request (Petition) "shall state that the road meets County specifications." Petitioner's Petition was for maintenance and snow removal and did not request that 231/SRCR be added to the County Highway System per the ordinance and did not certify the road meets county specifications. (Exhibit 1) Based on Superintendent Bonnema's inspection and subsequent report, the road clearly does not presently meet county road specifications, would cost the county taxpayers substantially to bring 231/SRCR up to specifications, and without bringing it up to specifications may expose the County to unnecessary potential liability.

Petitioner and his neighbors, like the County, have also long recognized the Forest Service's control, authority and supervision over 231/SRCR by securing permits from the Forest Service for snowplowing and maintaining a parking area immediately off US Highway 85, during the winter months. (Exhibits 23, 24, 53) As of 2016, the Petitioner, and many of the other landowners along the road, renewed those permits from the Forest Service, not the County, to plow snow through 2021. (Exhibit 53) At other times, when the road was used as a snowmobile trail, residents applied for and were granted permission from the Forest Service to park their cars just off Highway 85 on 231/SRCR. The Forest Service designated a parking area because wheeled access to residences was limited. (Exhibits 23, 24, 53)

Landowners along 231/SRCR have been on notice for over 30 years that 231/SRCR falls under Forest Service supervision, authority and control. By letter dated August 13, 1983, USFS District Ranger, Gary L. McCoy, advised Mr. Edward F. Braun,

father of Petitioner Lonnie Braun and one counsel for Petitioner, that the Forest Service was responsible for maintenance on the first 3.6 miles of the road. (Exhibit 2, Page 58) Ranger McCoy notes that Mr. Braun's concerns "seem to center around year long wheeled vehicle access to your cabin. Unless the road is plowed, you will not have winter access due to snow depths. *If you wish to plow the road, you must have my approval.*" (Exhibit 2, Page 58) (Emphasis added) Again, the Forest Service is clearly exercising and giving notice of its supervision, authority and control over 231/SRCR.

In the same letter, Ranger McCoy also discusses "long term plans for FDR ("Forest Development Road") 231/SRCR," noting that "[I]n approximately three to five years we plan to reconstruct and gravel about three miles of 231/SRCR from about FDR 117 east. The entire road will continue to serve as access for a variety of resource management needs. Unless there is winter logging in the area, I doubt that the road will be plowed in winter." (Exhibit 2, Page 58)

Ranger McCoy's letter further demonstrates the Forest Service believed it had continuing longstanding authority, control, and maintenance responsibilities on 231/SRCR. (Exhibit 2)

Charles "Chuck" Williams, was the Lawrence County Highway Superintendent for 27 years, from 1980-2007. (CW Depo Page 3 Line 22). According to Williams, 231/SRCR was never a County Highway System road. (CW Depo Page 11 Line 7). Additionally, he has no knowledge of the road being a part of the County Highway System at any time prior to his years of service. (CW Depo Page 6 Line 4). Any work done by the County on the road was pursuant to a contractual agreement with the Forest Service. All the maintenance has been paid for by federal funds through the Forest



Service, not the county taxpayers. (CW Depo Page 53 Line 6).

Williams' familiarity with the road, apart from these proceedings, is negligible as he had no reason to inspect the road as it was not part of the system he managed. (CW Depo Page 22 Line 20). Williams' understanding was that 231/SRCR was plowed by a private contractor in conjunction with a timber sale. (CW Depo Page 21 Line 13).

Otherwise, maintenance for the road was the Forest Service's responsibility. (CW Depo Page 54 Line 21). Williams' understanding was that Forest Service wanted to control the road for timber sales. (CW Depo Page 15 Line 3)

William "Bill" Locken works as a snowmobile trail groomer for the State of South Dakota. (WL Depo Page 9 Line 9). He remembers grooming 231/SRCR as far back as the mid 1990s when it was a snowmobile trail and winter motor vehicle traffic was restricted or not allowed on the road. (WL Depo Page 24 Line 7). Mr. Locken was one of the persons who circulated the Petitions presented to the county commission, although he is not a party in this action. (WL Depo Page 48 Line 5). Mr. Locken's familiarity with the road dates back to 1972 when he was a college student. (WL Depo Page 9 Line 24). He and his wife purchased property just off Forest Service 231/SRCR in 1977 (WL Depo Page 7 Line 9). At that time he described 231/SRCR as a two-track road (WL Depo Page 11 Line 20). Locken remembers accessing his property on foot in the wintertime because the road was not plowed. (WL Depo Page 35 Line 17) Mr. Locken resided in Spearfish for many years and only recently chose to move from Spearfish to his cabin in Creek Tower Subdivision to live fulltime. (WL TT Page 40 Line 2-4)

Lawrence County transferred the easement for 231/SRCR at a meeting of the then Lawrence County Commission and contemporaneously entered into an agreement with

the Forest Service for the continuing maintenance on 231/SRCR on December 30, 1992.  
(Exhibit 9A, 9B)

Mr. Locken was the main research person for Petitioner. He has spent many hours reading archived county commission meeting minutes and other documents searching for evidence that 231/SRCR was, or is, part of the County Highway System. He has never found any such evidence. (WL Depo Page 34 Line 20). In fact, official USFS maps, dating back to at least 1972 have consistently identified the road as a Forest Service road. (Exhibit 56) Official state highway maps provided by the SD Department of Transportation to Petitioner's co-counsel, Mr. Tieszen, also provided no evidence that 231/SRCR has ever been listed as a county system road. (Exhibits 61-70)

Aside from the snow removal permits issued by the Forest Service to Petitioner and others for many years for 231/SRCR, the Forest Service informed residents along the road that they could form a road district "where everyone shares financially in having the road plowed as needed." (Exhibit 25) However, a majority of the landowners along USFS 231/SRCR are unwilling to contribute to maintenance and snow removal costs associated with the road. (WL Depo Page 66 Line 1)

This Appeal followed.

#### STANDARD OF REVIEW

The determination of whether a party is indispensable is a conclusion of law and is reviewed by this Court *de novo*. *Titus v. Chapman*, 2004 SD 106, ¶ 15, 687 N.W.2d 918, 923 (citing *Thielman v. Bohman*, 2002 SD 52, ¶ 14, 645 N.W.2d 260, 262). "As such, a trial judge has no discretion whether to join an indispensable party, as the language of SDCL 15-6-19(a) is mandatory." *Id.* (citing *Smith v. Albrecht*, 361 N.W.2d 626, 628 (S.D. 1998) (citing *Kapp v. Hansen*, 79 S.D. 279, 286, 111 N.W.2d 333, 337 (1961))).

Our general scope of review of the trial court's factual findings is under the clearly erroneous standard. *Bryant v. Butte County*, 457 N.W.2d 467, 469 (S.D. 1990).

We review conclusions of law under the de novo standard “[a]nd, since the decision as to who should actually pay for and repair the bridges involves interpretation of statutes, we may review that portion of the trial court’s decision de novo.” *Id.* However, as the evidence consists entirely of affidavits, maps and printed material, “[u]nder our long-standing rule, when reviewing findings based on documentary evidence we do not apply the clearly erroneous rule set forth in SDCL 15-6-52(a), but review the matter de novo.” *First Nat. Bank v. Bank of Lemmon*, 535 N.W.2d 866, 871 (S.D.1995) (Miller, Chief Justice, writing the majority opinion w/respect to the issue of the correct standard of review).

### ARGUMENT AND AUTHORITIES

Legal Issue #1. *The trial court erred in concluding that acceptance of the 1930 easement from Miner’s and Merchant’s Bank and approval of subdivision plats were legally sufficient alone to add 231/SRCR to the County Highway Road System such that the County has a continuing ministerial duty to perform maintenance on 231/SRCR.*

The trial court concluded that Lawrence County accepted the easement and by its own approval of plats agreed to hold the property in trust for the benefit of the Petitioner and other members of the public and therefore had a fiduciary obligation to Petitioner and other members of the public, which responsibility cannot simply be transferred to the United States Forest Service without insuring such obligations and responsibilities are protected and assured pursuant to SDCL 11-3-12. (COL Page 3 Line 2)

Lawrence County asserts that the trial court erred in concluding that the acceptance of the 1930 easement from Miners’ and Merchants Bank operated, alone, to add the road to the County Highway System of primary and secondary roads. The County maintains that until such time as the County takes official action to designate the road to its highway system, either by its own action or properly petitioned by citizens to add the road to the County Highway System, no obligation exists on behalf of the County to perform maintenance or snow removal on the road.

The trial court held that, “Lawrence County accepted the easements and by its own approval of the Plats agreed to hold the property in trust for the benefit of the Petitioners and other members of the Public and therefore has a fiduciary obligation to petitioners and other members of the Public, which responsibility cannot simply be transferred to the United States Forest Service without ensuring such obligations and responsibilities are protected and assured pursuant to SDCL 11-3-12.” (COL Page 3 Line 2)

The approval of a plat does not require the County to maintain the roads illustrated on the approved plat under SDCL 11-3-12.

SDCL 11-3-12 provides:

When the plat or map shall have been made out, certified, acknowledged, and recorded as provided in this chapter, every donation or grant to the public, or any individual, religious society, corporation, or body politic, marked or noted as such on such plat or map, shall be deemed a sufficient conveyance to vest the fee simple title of all such parcel or parcels of land as are therein expressed, and shall be considered to all intents and purposes a general warranty against the donor, his heirs, and representatives, to the donee or grantee, his heirs or representatives, for the uses and purposes therein expressed and intended, and no other use and purpose whatever. The land intended to be used for the streets, alleys, ways, commons, or other public uses shall be held in trust to and for the uses and purposes expressed or intended. *No governing body shall be required to open, improve, or maintain any such dedicated streets, alleys, ways, commons, or other public ground solely by virtue of having approved a plat or having partially accepted any such dedication, donation or grant.* (Emphasis added).

The trial court wholly ignored that which is expressly stated in the statute.

It is manifestly clear from a reading of SDCL 11-3-12 in its entirety, that a body politic, like the County, assumes no road maintenance responsibility simply by virtue of approving a plat.

Moreover, SDCL 11-3-12 does not impose a maintenance responsibility with respect to 231/SRCR. For purposes of the statute, the grant of the easement to the

County in 1930 was a “donation or grant” of real property, which then would be considered “public ground” for which the County bears no requirement to open, improve, or maintain the road simply by approving a subdivision plat under SDCL 11-3-12.

The County does not contest the fact that the public has used the right-of-way since it was granted to Lawrence County in 1930. The County asserts that the right of public passage is not the same as creating a ministerial duty or obligation upon the county to provide maintenance and snow removal services on a road. The mere use of any route of travel along or across public or private land, or the right-of-way of any railroad company for any period, does not operate to establish a public highway and no right shall inure to the public or any person by such use thereof. SDCL 31-3-2. It would logically follow until the right-of-way has been officially designated by the Lawrence County Commission to be on its County Highway System as a primary or secondary road, no such obligation exists.

The trial court found that a duty to do road maintenance and snow removal was imposed upon the County pursuant to SDCL 31-1-5 and SDCL 31-12-26. (COL Page 3-4 ¶7, 15)

SDCL 31-1-5 governs the administration of highways in South Dakota. The trial court did not identify what subsection of SDCL 31-1-5 applied and also did not set forth its reasoning in concluding that a duty was created for road maintenance. SDCL 31-1-5(2) defines the “County Highway System,” as the highways designated by the board of county commissioners in organized counties under the supervision of these bodies and have been approved by the Department of Transportation. While SDCL 31-1-5 (4)

defines county secondary highways, “as the rural local highways in organized counties, excluding the approved county highway system that are under the *supervision* of a board of county commissioners.” (Emphasis added).

Petitioner failed to offer any evidence at trial that the road was ever added to the “approved” highway system for purposes of SDCL 31-1-5(2). Petitioner’s witness, Bill Locken, testified that despite extensive research he found no evidence that the road was ever officially made a part of the county road system. (WL TT Page 83 Line 23-25) Accordingly, this subsection is inapplicable. The Court’s attention should now turn to the interpretation and application of SDCL 31-1-5(4) and the question of who has supervision and control for maintenance and upkeep of 231/SRCR.

The question then has to be whether 231/SRCR is under the supervision of the board of county commissioners pursuant to SDCL 31-1-5(4). It is not. The County submits that the control, supervision and authority over 231/SRCR was formally transferred to the Forest Service in 1993. The Forest Service has continually and for over a quarter of a century, exercised supervision and control over all the work on USFS 231/SRCR. (Exhibit 50, 1985 Billing Statement for routine maintenance for roads in Lawrence County including 231/SRCR) Supervision means the act of managing, directing, or overseeing persons or projects. Kirlin v. Halvorson, 2009 SD 107, 758 NW2d 536; Footnote #13, pg. 457. Additionally, “Supervision’ is the act of one who supervises and to supervise is to oversee, to have oversight of, to superintend the execution of or performance of (a thing), or the movements or work of (a person); to inspect with authority; to inspect and direct the work of others. Fluet et al v. McCabe, 12 N.E. 2nd 89 (Mass. 1938).

The supervision and control by the Forest Service over 231/SRCR is also evidenced by numerous contracts between the Forest Service and Petitioner and others. The Petitioner and others have continually contracted with the USFS for snow removal and parking on 231/SRCR. Examples of those contracts/permits are as follows:

1. Special Use Permit. To plow USFS 231/SRCR.6a and USFS 231.5, South Rapid Creek Road, each winter with the duration of the permit until the residents determine that they can keep up with the snow. Contract between USFS and Priscilla Monday and Dale L. Monday with Petitioner Raymond Oyen, among others, identified as residents who will do the snowplowing. Permit valid November 28, 2007 and ending May 15, 2011. (Exhibit 23)
2. Special Use Permit to again plow FSR 231.6a and FSR 231.5 with permit expiring on midnight May 15, 2016. Signed by Dale L. Monday and Priscilla Monday. (Exhibit 24)
3. Special Use Permit for snow plowing issued to Ray Oyen through 2021. (Exhibit 53)

These permits are issued by the Forest Service, not the County, and dictate the terms and conditions under which the permit can be used. This is further evidence of the Forest Service's exercise of its authority and supervision over 231/SRCR.

Other examples of contracts between Lawrence County and Forest Service are as follows. (Exhibits 7, 8A, 17, 42) Again the Forest Service commands what work is to be done and when the work is to be done on 231/SRCR.

Exhibit 54 is the most recent solicitation for bids from the Forest Service for maintenance work. It evidences that the Forest Service will not contract with Lawrence County for the maintenance of 231/SRCR starting in 2016 through 2018. It has contracted through 2018 with Black Hills Transport, a private contractor, for the care and maintenance of 231/SRCR, awarding the contract on June 8, 2016 through 2018. (Exhibit 54) Lawrence County was never contacted, consulted or included in any negotiations as

to what maintenance or standards were to be required under the 2016 BH Transport road contract. (AB TT Page313 Line 13-21)

The Forest Service by its own action, including the unilateral contracting for road maintenance on 231/SRCR, has demonstrated and exercised its control, supervision and authority over 231/SRCR. It logically follows that lacking the supervision, control or authority over the road, that 231/SRCR is not a “secondary highway” within the meaning of SDCL 31-1-5(4).

It is worth noting in a letter dated September 18, 2007, Rhonda O’Byrne, the local District Ranger for the US Forest Service, in response to inquiries about snow removal from concerned citizens, including Petitioner, stated even if the landowners would enter into an agreement with Lawrence County to plow the snow on the road, the County would, nonetheless, have to secure a permit from the Forest Service to plow the road. (Exhibit 43) For purposes of the application of the statute, the exercise of supervisory control is a prerequisite. At trial, no proof was offered that the County ever exercised any supervisory control regarding road maintenance or snow removal. The responsibilities of plowing snow for those preferring to live in rural and remote areas in the Black Hills are obvious. If it snows it has to be plowed if you choose to use the road. Yet, despite these obvious responsibilities, Petitioner and his neighbors have voluntarily chosen to live in this rural and remote location; some seasonally and some, more recently, year round. Therefore, SDCL 31-1-5(4) is inapplicable, and generally SDCL 31-1-5 cannot be interpreted to impose a ministerial duty on the County for road maintenance.

The trial court also cited SDCL 31-12-26 as authority for creating a ministerial duty for road maintenance.



SDCL 31-12-26 provides:

Each board of county commissioners and county superintendent of highways in organized counties shall construct, repair, and maintain all secondary roads within the counties not included in any municipality, organized civil township, improvement district organized pursuant to chapter 7-25A, or county road district organized pursuant to chapter 31-12A.

However, this statute must be read in concert with SDCL 31-13-12.

SDCL 31-13-12 provides:

The board of county commissioners of each county is hereby empowered *to designate in its discretion township roads or roads in unorganized townships within the county, as it may deem advisable and in the public interest as "county aid roads,"* and to expend any funds available from the county highway funds for laying out, constructing, graveling, and maintaining such township roads or roads in unorganized townships so designated as "county aid roads." (Emphasis added).

SDCL 31-12-26 is a statute of general application while SDCL 31-13-12 is a statute of specific application. "The rules of statutory construction dictate that "statutes of specific application take precedence over statutes of general application." Cooperative Agronomy Services v. South Dakota Department of Revenue, 2003 SD 104, ¶ 19, 668 N.W.2d 718, 723.

SDCL 31-13-12 applies to the present facts as 231/SRCR is a road in an unorganized township within Lawrence County. (JA TT Page 208 Line 22-22) According to the clear meaning of SDCL 31-13-12, the Lawrence County Board of County Commissioners possesses within its *sole discretion* the power to designate roads in unorganized townships within the county as it may deem advisable and in the public interest as "county aid roads". (Emphasis added) Within this discretion is the ability to expend county highway funds for matters related to roads, e.g. graveling, maintenance and snow removal. Obviously, the Lawrence County Commission has never deemed it advisable and in the public interest to expend county highway funds, in place of federal

funds, for maintenance or snow removal on 231/SRCR. To do so would, in effect, result in Lawrence County taxpayers assuming unnecessary expense, obligations and liability exposure that does not now exist. For purposes of SDCL 31-12-26 a ministerial duty for road maintenance on 231 is created only upon the County Commission deeming it advisable and in the public interest – a decision the County has never elected to make.

Legal Issue #2. *The trial court erred in its determination that the Forest Service was not an indispensable party.*

The trial court concluded that the Forest Service was not an indispensable party to this action because Lawrence County failed to provide proper notice when it attempted to transfer the 1930 easement to the Forest Service. (COL Page 4 Line 14)

An indispensable party is one “whose interest is such that a final decree cannot be entered without affecting that interest or in whose absence the controversy cannot be terminated.” Smith v. Albrecht, 361 NW2d 626, 628 (S.D. 1985) (citing Weitzel v. Falkner, 76 S.D 216, 76 NW2d 225 (S.D. 1956)) In *Smith*, the court concluded that Meade County either on its own as a party ultimately responsible for the road, or as the representative of county taxpayers, is an indispensable party to that action. *Smith* at 628.

The County strongly believes the Forest Service is an indispensable party as to this action because the Forest Service has long exercised its authority, supervision and control of the maintenance and care of 231/SRCR and paid Lawrence County for the maintenance work. The Petitioner has recognized the authority by the Forest Service by continuing to apply for permits to plow the road. Petitioner’s current snow plowing permit runs through June 15, 2021. (See Exhibits 23, 24, 53) Additionally, the Forest Service has stated its position that it intends to continue to exercise control over FSR

231/SRCR. (Exhibit 54) In its September 18, 2007, letter to Petitioner and other users of 231/SRCR, Ms. O'Byrne, Northern Hills District Ranger, advised Petitioner and others they must have permission from the Forest Service to do work on the road. (Exhibit 43 referring to 231/SRCR)

In pointing out several options for certain interested citizens, (some of the other Petitioners) including Petitioner Oyen, District Ranger O'Byrne advised that a road district could be formed to conduct maintenance, but that they would still need to obtain a permit to plow the road from the Forest Service (Emphasis added). See paragraph 1, Exhibit 43. Considering the September 18, 2007 letter, and the fact that the Forest Service continues to control and exercise supervision over 231/SRCR, leaves little doubt the Forest Service believes it alone is responsible for maintaining 231/SRCR. Therefore the Forest Service is an indispensable party and must be joined in this litigation because its interests in keeping the road in a condition that will allow them to continue to responsibly and feasibly manage their natural resources cannot be adequately protected. Thus a complete resolution of the issues related to who has responsibility for properly maintaining 231/SRCR to the standard they require cannot be insured.

Legal Issue #3. *The Court erred when it held that the transfer of an existing roadway easement by the Lawrence County Commission at its regular meeting on December 30, 1992, was ineffective because it did not follow the public notice requirements for vacating, changing, or locating a secondary highway according to SDCL 31-3-6 through 31-3-9.*

In its findings of fact and conclusions of law, the trial court found that the process of transferring the easement from the County to the USFS in 1992 triggered notice

requirement of SDCL 31-3-6 through 31-3-9 and specifically the notice provision found in SDCL 31-3-7. (COL 10) Further, that the Lawrence County Commission failed to adhere to the procedural requirements of transferring an existing easement, which was a procedural and substantive defect that renders its apparent attempt to transfer the duty to maintain and provide snow removal on SRCR ineffective.” (COL 10, 11, 12)

County contends that the notice requirements for proper notice in SDCL 31-3-6 through 9 were wholly inapplicable to the action taken by the County Commission taken at its regularly scheduled meeting on December 30, 1992, because the action taken had nothing to do with vacating, changing, or locating a highway.

SDCL 31-3-6 provides:

Upon receiving the petition of two or more voters of an organized civil township or of the number of voters equal to or greater than one percent of the ballots cast for the last gubernatorial election in the affected county, the board of supervisors of the township or the board of county commissioners wherein the highway is located or is proposed to be located may, except as provided in §§ 31-3-12 and 31-3-44, vacate, change, or locate any highway located or to be used within the township or county, if the public interest will be better served by the proposed vacating, changing, or locating of the highway. The petition of the voters shall set forth the beginning, course, and termination of the highway proposed to be located, changed, or vacated, together with the names of the owners of the land through which the highway may pass.

This statute is inapplicable to the 1992 transfer of the easement from the County to the Forest Service.

The transfer of the easement was not intended, nor did it operate to vacate, change or locate a highway. Petitioner’s witness, Bill Locken, verified that following the transfer of the easement, the road was not vacated nor did its location change. The road remained in its original location. (WL TT Page 112Line 16-23) Therefore the trial court erred in finding the applicability of SDCL 31-3-6.

Next, the trial court specifically referred to the notice requirement found in SDCL 31-3-7 and noted that the County failed to give proper notice of the transfer proceedings pursuant to the statute. Assuming arguendo that the easement transfer was subject to the requirements of SDCL 31-3-6, it is unclear why the trial court concluded that Petitioner was entitled to notice of the proceedings pursuant to SDCL 31-3-7.

SDCL 31-3-7 provides:

In case of the filing of a petition described in § 31-3-6, the board shall, after giving notice of a public hearing, hold a public hearing called for the purpose of receiving public testimony about the action proposed by the petition. The board shall give notice of the public hearing by publication in the official newspaper of said township, if any, otherwise in the nearest legal newspaper of said county, once each week for at least two consecutive weeks. The notice of the public hearing shall state the purpose, date, time, and location of the hearing and a legal description of the location of the highway and the action proposed by the petition and how information, opinions, and arguments may be presented by any person unable to attend the hearing. The board shall, by resolution, determine whether the public interest will be better served by such proposed vacating, changing, or locating of the highway in question, and upon resolution in the affirmative, shall make its order that such highway be vacated, changed, or located.

At trial, Petitioner testified that he and his wife did not purchase their property along 231 until 2002. (TT Page 178 Line 20). Moreover, there is no evidence that Petitioner was a resident of Lawrence County in 1992 or held any property interests in the County affected by the easement transfer. Accordingly, Petitioner was not entitled to any notice of the easement transfer proceeding pursuant to SDCL 31-3-7 and the Trial Court erred in so concluding.

With respect to SDCL 31-3-8, it is likewise inapplicable. No resolution purporting to vacate, change, or locate the subject road was offered as evidence nor was evidence produced that a resolution was recorded in the Office of the Register of Deeds. It also follows that because the procedure in 31-3-6 was inapplicable that there is

no evidence in the record of a resolution in the commission meeting minutes as required by SDCL 31-3-9.

The notice requirements that did apply to the County Commission meeting on December 30, 1992, when the easement was transferred are found in SDCL 1-25-

1.1. The notice requirements of the statute generally require posting a proposed agenda for the meeting at least 24 hours prior to the meeting.

Unfortunately, the agenda from the December 30, 1992, Commission meeting could not be located some 23 years after the fact. Marlene Barrett, a long-time county employee, was the commissioners' assistant in 1992. (MB TT Page 132 Line 15-16) Ms. Barrett testified that she was familiar with state law regarding providing notice of public meetings and the posting of agendas. (MB TT Page 133 Line 6-9). She described the procedure she followed in that regard. (MB TT Page 133 Line 10-23). This procedure included posting of an agenda on public bulletin boards and sending the agenda to the press and others who requested notification of Commission meetings. (MB TT Page 133 Line 10-23) Ms. Barrett further testified that if an item came up for discussion during a commission meeting that was not on the agenda, then, in that event, any such discussion or action would be postponed until a future meeting so that proper notice could be given. (MB TT Page 134 Line 1-6).

County contends that the procedural requirements for proper notice in SDCL 31-3-6 through 9 were wholly inapplicable to the action taken by the County Commission at its regularly scheduled meeting on December 30, 1992, because the action taken had nothing to do with vacating, changing, or locating a highway. Rather, the notice requirements of SDCL 1-25-1.1 did apply and were followed. Therefore, the action

transferring the easement pertaining to 231/SRCR from the County to the Forest Service properly before the Commission was valid.

Legal Issue # 4. *The trial court lacked subject matter jurisdiction to consider the matter of the 1992 easement transfer for failure to timely appeal that decision and lacked subject matter jurisdiction to consider Petitioner's appeal of the denial of his petition to now have Lawrence County maintain and plow snow on 231/SRCE because Petitioner is not an aggrieved party.*

Petitioner's appeal of the Lawrence County Commission's decision denying the Petition requesting maintenance and snow removal for 231/SRCR, was made pursuant to SDCL 7-8-27.

As part of that appeal, Petitioner was allowed to collaterally attack the 1992 county commission decision transferring the easement from the County to the Forest Service. The trial court found that the transfer was invalid because the County did not comply with the notice provisions set forth in SDCL 31-3-6 through 31-3-9, specifically SDCL 31-3-7. (COL Page 4 Line 10)

SDCL 7-8-29 governs the time frame for perfecting an appeal from a decision of the county commission and requires in relevant part, "Such appeal shall be taken within twenty days after the publication of the decision of the board . . ."

The minutes from the December 30, 1992, meeting were published in the Queen City newspaper on January 14, 1993. (MB TT Page 137 Line 12) (Trial Exhibit 15G) Applying the 20 day requirement from SDCL 7-8-29, Petitioner's time to appeal expired on February 3, 1993. No appeal was filed in that time frame.

In Upell v. Dewey Cnty. Comm’n, 880 NW2d 69 (SD 2016), this Court considered the issue of compliance with the requirements of SDCL 7-8-29 and confirmed that compliance with the statute authorizing an appeal was jurisdictional. *Id.* at ¶ 11 In *Upell* it was determined that one of the requirements of SDCL 7-8-29 was not fulfilled and the statute was not strictly followed. This Court held that because of this defect there was no subject matter jurisdiction. *Id.* at ¶ 12

In the present case, Petitioners failure to timely appeal the decision of the County Commission from December 30, 1992 in a timely manner. This is a defect that deprived the trial court of subject matter jurisdiction to embark on a review of the County’s 1992 decision transferring the easement and the trial court erred in doing so.

“Subject matter jurisdiction is the power of a court to act such that without subject matter jurisdiction any resulting judgement or order is void.” Cable v. Union County Board of Cnty Comm’n, 769 NW2d 817, 2009 SD 59, ¶ 20 (citing City of Sioux Falls v. Missouri Basin Mun. Power Agency, 2004 SD 14 ¶ 10)

The Court in *Cable* further explained that “a plaintiff must satisfy three elements in order to establish standing as a person aggrieved such that a court has subject matter jurisdiction. *Id.* at ¶ 21.

1. First, the plaintiff must establish that he suffered an injury in fact - “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not ‘conjectural’ or ‘hypothetical.’”
2. Second, the plaintiff must show that there exists a causal connection between the plaintiff’s injury and the conduct of which the plaintiff complains (citation omitted). The causal connection is satisfied when the injury is “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.” (citation omitted).
3. Finally, the plaintiff must show it is likely, and not speculative, that the injury will be redressed by a favorable decision (citation omitted).



1. An injury in fact

The right to appeal by a “person aggrieved” requires a showing that the person suffered “a personal and pecuniary loss not suffered by taxpayers in general, falling upon him in his individual capacity, and not merely in his capacity as a taxpayer and member of the body politic of the county. *Cable*, 2009 SD 59, 2009 at ¶ 26

At trial, Petitioner was keen to point out that “we have 47 residents on that 3-mile stretch of road,” (Oyen TT Page 172 Line 7-8) and further that “I don’t understand why us, with 47 residents, are not on that same list (referring to the approved listing of county primary and secondary roads).” This statement evidences that his presumed injury - lack of County road maintenance and snow removal - was of a nature affecting him not only in his individual or personal capacity, but in his capacity as a member of a larger group of adjacent landowners and the traveling public in general.

The Court in *Cable* further clarified that “[o]nly such persons as might be able affirmatively to show that they were aggrieved in the sense that by the decision of the board they suffered the denial of some claim of right, either of person or property, or the imposition of some burden or obligation in their personal or individual capacity, as distinguished from any grievance they might suffer in their capacities as members of the body public.” *Id.*

Petitioner has not established that he possesses a “right” to have the County perform road maintenance and snow removal on 231. Many landowners living in rural subdivisions throughout the County do not have roads maintained by the County. Presently, there are 47 road districts in Lawrence County. (CW TT Page 262 Line 9-13) Residents of such districts provide for their own road maintenance and snow removal. So,

Petitioner is not alone in this respect. However, unlike Petitioner, residents of these road districts have imposed upon themselves a burden in the form of an additional tax to support maintenance of their subdivision roads.

Not to be forgotten is the fact that the County has in place an ordinance allowing for roads to be added to the County Highway System. (Exhibit 6A) Petitioner has not availed himself to this opportunity.

Based upon the foregoing discussion, Petitioner is unable to demonstrate that he has suffered any injury much less any “personal” injury or denial of some right.

2. A causal connection exists between the Petitioner’s injury and the conduct of which the Petitioner complains.

Even assuming Petitioner can meet the first element of standing: a personal and unique injury, Petitioner’s claim fails to meet the second element of standing: causation.

Petitioner lacks standing as he is unable to articulate a causal connection between his alleged injuries and the conduct of which he complains. The conduct upon which his complaint is predicated, to-wit: a lack of County provided road maintenance and snow removal, is conduct of (or an omission) on the part of the Forest Service.

Forest Service 231/SRCR falls exclusively under the supervision, control and authority of the Forest Service. It must be concluded then that the conduct of the federal agency is the cause of any alleged injury incurred by Petitioner rather than conduct of the County.

Any grievance Petitioner may have concerning the lack of maintenance with respect to US Forest Service Road 231 can only be addressed in an action naming that agency as a party defendant.

3. Finally, the Petitioner must show it is likely, and not speculative, that the injury will be redressed by a favorable decision.

Petitioner has failed to meet the prior two elements to establish standing as a person aggrieved as required under *Cable*. Likewise, Petitioner fails to meet the final requirement: that it is likely that the injury will be redressed by a favorable decision.

Petitioner elected to name the County as the sole party defendant. This is true despite the certainty that the maintenance of 231/SRCR lies entirely under the supervision, control and authority of the Forest Service. It follows then that all discretion concerning maintenance of the road is vested in that agency. Petitioner's sole redress is through that agency and not the County.

Through the present action, the Court can offer no remedy to redress Petitioner's alleged injury. Accordingly, Petitioner is not an aggrieved party failing to meet the final prong of the three part test for standing. Therefore, Petitioner's claimed right of appeal is not available.

In distinguishing subject matter jurisdiction versus standing, this Court has found that standing is "a party's right to make a legal claim or seek judicial enforcement of a duty or right." *Cable* at ¶ 12 (quoting City of Rapid City v. Estes, 2001 SD 75, ¶ 9 n.6). Additionally, "[s]tanding is a jurisdictional component of a party's case, because only a party who has standing may invoke the jurisdiction of a court . . . . The defect of standing is a defect of subject matter jurisdiction. *Id* at ¶25 (Lake Hendricks, et al v. Brookings County, 2016 SD 48, ¶ 18) (quoting Reed v. State, Game & Parks Comm'n, 773 NW2d 349, 352 (Neb. 2009)). From the foregoing, it is clear that the Petitioner lacked standing and accordingly, the trial court erred in concluding it possessed subject matter jurisdiction.

Legal Issue #5. *The trial court erred in determining that Lawrence County failed to evaluate evidence provided by Petitioner and therefore they acted arbitrarily and capriciously. (COL 8)*

The Lawrence County Commission did in fact evaluate the evidence from Petitioner, continued its hearing on the matter, ordered Allan Bonnema to investigate the matters related to 231/SRCR, and report back to the county commission. Mr. Bonnema's report was evaluated and duly considered by the Lawrence County Commission before it made its decision to deny the Petition.

An action is arbitrary and capricious if it is based on personal, selfish, or fraudulent motives, or on false information, and is characterized by a lack of relevant and competent evidence to support the action taken. Tri County Landfill Association, Inc., v. Brule County, 535 NW2d 760 (S.D. 1995) (citing Hendricks v. Anderson, 522 NW2d 499 (S.D. 1994); Iverson v. Wall Board of Education, 522 NW2d 188 (S.D. 1994); Riter v. Woonsocket School District #4 55-4, 504 NW2d 572 (S.D. 1993))

On September 8, 2015, Petitioner sent a letter to the Lawrence County Commission, Highway Superintendent Allan Bonnema, and the county attorney, Bruce Outka. (Exhibit 2) Within the letter from Petitioner(s) raises issues about County liability, tax burden, conditions of the road, forest service maintenance on the road, etc. Included in that letter as an attachment is the 1983 letter from US Forest Service District Ranger Gary McCoy to Edward Braun. (Exhibit 2 Page 58) Ranger McCoy points out that the Forest Service is responsible for maintenance of 231/SRCR pursuant to a 1978 cooperative agreement. Also, Ranger McCoy cautions Mr. Braun that if no winter logging occurs, then the road will not be plowed. Ranger McCoy further states that

unless the road is plowed, you will not have winter access due to winter snow depth. If you wish to plow the road you must have my approval. McCoy then states that you would be required to meet the same requirements as any other person plowing snow on Forest Service roads. (Exhibit 2 Page 58)

Highway Superintendent Bonnema, as directed, investigated and reported back to the Lawrence County Commission on August 31, 2015, on 231/SRCR. (Exhibit 2 Page 069) Superintendent Bonnema found 231/SRCR did not meet existing required county specifications and that it would require significant expenditures of county funds to bring the road up to those specifications. (Exhibit 2 Page 069)

Commissioner Daryl Johnson testified under cross examination that he received and considered Petitioner's Exhibit 2 and the information therein. He also received and considered the report from Superintendent Bonnema, all prior to making the decision to deny Petitioner's request to do additional maintenance on 231/SRCR.

The action of the Lawrence County Commission to deny Petitioner's request to undertake additional maintenance or snow removal on 231/SRCR was not arbitrary and capricious because there is no evidence that the commission ever acted for personal, selfish, or fraudulent motives or on false information, or that the evidence was not relevant or incompetent to support their action.

### CONCLUSION

Lawrence County must take some official action other than approval of a subdivision plat, such as designating a road to its County Highway System, before it has a duty to maintain 231/SRCR. The mere acceptance and use of an easement by Lawrence County or the public and the subsequent approval of subdivision plats did not

create a duty on the County to maintain 231/SRCR. Lawrence County effectively, after proper notice to the public, transferred 231/SRCR to the US Forest Service, who has continuously exercised sole and independent supervision, control and authority over the maintenance of 231/SRCR through contracts for maintenance and the issuance of snow plowing permits and parking permits to Petitioner and others, for which it paid Lawrence County.

Forest Service Road 231/SRCR has never been vacated, located or changed so the public notice requirements the lower court mistakenly relied upon were inapplicable to the action taken by the commission on December 30, 1992.

Petitioner failed to timely appeal a 1992 County decision to transfer the easement from Lawrence County to the US Forest Service thereby depriving the court of subject matter jurisdiction to determine if the transfer was valid or not. Additionally, Petitioner lacks standing as a “person aggrieved” as he has lost no services, his road is still maintained and he still has a permit from the US Forest Service to plow 231/SRC. Additionally, Petitioner has failed to show any causal connection between an alleged injury and conduct of which he complains (lack of road maintenance by the County). It is the Forest Service, not the County, that has and continues to provide road maintenance on 231/SRCR.

The Lawrence County Commission did consider the evidence and arguments of Petitioner, ordered an investigation of issues regarding maintenance and potential costs to bring 231/SRCR up to county specification, received and considered input from county staff, all prior to taking action on Petitioner’s request that the County do additional maintenance on 231/SRCR, including snow removal. The County therefore

did not act on personal, selfish, or fraudulent motives or rely on false information that could be characterized by a lack of relevant and competent evidence. The County relied on reliable and sound information from its staff and in the best interests of Lawrence County taxpayers. The county commission's decision to deny Petitioner's petition was not arbitrary and capricious. This Court should find the commission acted properly and reverse the lower court's Judgment and quash the Writ of Mandamus requiring the County place the road on the County Highway System and provide additional maintenance and snow removal on the road.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I certify that Appellant's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 9,523 words and 58,969 characters. I have relied on the word and character count of our word procession system used to prepare this Brief. The original Appellant's Brief and all copies are in compliance with this rule.

Dated this 17<sup>th</sup> day of April, 2017.

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### **CERTIFICATE OF SERVICE AND MAILING**

The undersigned hereby certifies that he served by email a copy of Appellants' Brief upon the persons herein next designated, all on the date shown below, to-wit:

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The undersigned also certifies that he filed the Appellants' Brief by email to [SCClerkBriefs@ujs.state.sd.us](mailto:SCClerkBriefs@ujs.state.sd.us) and by mailing the original and two copies of Appellants' Brief by delivering them to at Shirley Jameson-Fergel, the Clerk of the South Dakota Supreme Court South Dakota Supreme Court Clerk, 500 East Capitol Avenue, Pierre, SD 57501-5070, on the date shown below, by first-class mail.

Dated this 17<sup>th</sup> day of April, 2017.

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## APPENDIX

TAB

Findings of Fact and Conclusions of Law

A-01

Judgment

A-02

Writ of Mandamus

A-03

STATE OF SOUTH DAKOTA )  
COUNTY OF LAWRENCE )SS.

IN CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT

RAYMOND C. OYEN,

Petitioner/Appellant,

-VS-

LAWRENCE COUNTY COMMISSION,

Respondent/Appellee.

Civ. No. 15-000361

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

A Petition requesting that Lawrence County acknowledge South Rapid Creek Road (SRCR) as a County Road and accept its duty to maintain and remove snow thereon was filed by fifty four landowners/taxpayers. The Lawrence County Commission denied the Petition. The landowners appealed. This matter came before the Court for trial de novo on October 17 and 18, 2016. The Court having considered the briefs and written submissions of the parties, the testimony of the witnesses and the exhibits introduced and the matters presented at trial and being fully advised on the matter, now enters the following.

**FINDINGS OF FACT**

1. Landowners along South Rapid Creek Road (SRCR) have sought a definitive answer from Lawrence County and the Forest Service since the 1970s regarding duty to maintain and removal of snow.

2. Petitioner filed petitions with the Lawrence County Commission seeking to have the County provide snow removal and maintenance to SRCR approximately 3.8 miles long which abuts Petitioners' properties and serves some 47 homes and cabins.

3. Petitioners (landowners) located a 1930 recorded easement and other written documentary evidence and presented it to the Lawrence County Commissioners requesting it be reviewed and asserted it was evidence that SRCR was owned by the County and the County had a responsibility to maintain SRCR.

4. The County did not review the easement or other documentary evidence provided prior to tabling petitioners' request for services.

5. The Commission took up the petition on September 15, 2015, tabled it, and thereafter took the matter up again at its meeting on October 13, 2015. The Commission denied the petition, denying the request for any service to SRCR because the Forest Service did not pay for it.

6. The County failed to review the easement or other evidence before ultimately denying petitioners' request for services.

7. Since the 1970s, three subdivisions have been platted and approved by the Commission along SRCR. The first, Crooks Tower Retreat, contains 22 lots, and was approved and filed in 1976. Its plat indicates that SRCR is a "County Road." The second is Rawhauser Subdivision, approved by the Commission and filed in December of 1991. The Rawhauser Subdivision plat identifies SRCR as a "county and forest service road." The third, Aspen Heights Subdivision, for which the Commission approved the plat and filed in September 1996, indicates SRCR as "county/forest service road."

8. Lawrence County witnesses' testimony and defense throughout the trial was that they always believed it to be a Forest Service Road and not a County Road which is inconsistent with the documentary evidence produced in the recorded easements and the County's own commission minutes evidencing County's joint ownership and responsibility for SRCR.

9. Lawrence County witnesses' testimony and Defendant's defense that they believed SRCR to be a Forest Service Road and not a County Road is inconsistent with their attempt to transfer the road easements to the United States Forest Service without prior notice to the public affected by such attempt and is therefore unbelievable.

10. Agreements between Lawrence County and the Forest Service indicate both parties admit SRCR is on the County and Forest Service road systems, including an agreement dated May 12, 1983, in which the County acknowledges that "the county is vitally interested in providing and operating a road system to provide adequate vehicular access for residents and commercial enterprises for both intra and inter-county travel" and indicating the segment at issue here known as SRCR.

11. SRCR has been open to and used by the public as a public roadway since the 1930s.

12. County attempted to transfer its duty to maintain SRCR to the U.S. Forest Service on or about December 30, 1992.

13. Minutes of a regular meeting of the Lawrence County Commission held on December 30, 1992, reflect a motion was made to "follow the recommendation of the Highway Superintendent and authorize the Chairman to sign a transfer of existing easements."



14. There is no credible evidence of any prior public notice of the Commission's intention to take action to transfer existing road easements, nor of a "public hearing" taking place regarding such an effort to transfer an existing road easement.

15. SRCR is a Lawrence County Road and eligible for maintenance and snow removal.

16. The evidence is conclusive that Lawrence County held title to the easements through all private land adjoining SRCR from 1930 to at least 1992 and that the road was utilized by the traveling public.

17. County's decision to deny the petition was based on false information and lack of relevant and competent evidence and the County's refusal to review documentary evidence of ownership by the County was therefore arbitrary and capricious.

18. Any Finding of Fact identified as a Conclusion of Law is hereby incorporated as a Finding of Fact.

### CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter and parties in the matter before it.

2. Lawrence County accepted the easements and by its own approval of the Plats agreed to hold the property in trust for the benefit of the Petitioners and other members of the Public and therefore has a fiduciary obligation to petitioners and other members of the Public, which responsibility cannot simply be transferred to the United States Forest Service without ensuring such obligations and responsibilities are protected and assured pursuant to SDCL 11-3-12, *Tinaglia v. Ittzes*, 257 N.W.2d 724 (S.D. 1977) citing *Larson v. Chicago M and St P Ry Co.*, 103 N.W. 35 (S.D. 1905).

3. "Each board of county commissioners and county highway superintendent of highways in organized counties shall construct repair and maintain all secondary roads within the counties." SDCL 31-12-26.

4. Lawrence County has a duty to maintain SRCR.

5. Once a highway is established, it "shall continue as established until changed or vacated in some manner provided by law." SDCL 31-1-3.

6. Lawrence County itself has identified SRCR as part of its own County highway system in contracts it entered with the Forest Service.

7. Lawrence County has the duty to maintain and remove snow on SRCR.

8. Lawrence County's failure to even evaluate evidence provided to it by Petitioners is an act of arbitrary capricious denial of the Petitioners' request.

9. Pursuant to SDCL 31-1-5 SRCR is either a primary or secondary road within the territorial boundaries of Lawrence County. SRCR is entitled to snow removal and maintenance irrespective of whether it is a primary or secondary road by virtue of Lawrence County having heretofore determined it provides snow removal for both. SDCL 31-12-26 and SDCL 34-5-4.

10. A specific procedure is set forth in SDCL 31-3-6 through 31-3-9 for vacating or changing a county secondary road. SDCL 31-3-7 requires that a board shall, "after giving notice of a public hearing, hold a public hearing called for the purpose of receiving public testimony about the action proposed...the board shall give notice of the public hearing by publication in the official newspaper...once each week for at least two consecutive weeks."

11. Because a specific process is established for transferring the existing easements, that procedure must be followed.

12. Lawrence County Commission failed to adhere to the procedural requirements of transferring an existing easement, which was a procedural and substantive defect that renders its apparent attempt to transfer the duty to maintain and provide snow removal on SRCR ineffective.

13. Lawrence County's attempt to transfer its duty was defective and failed to transfer its duty to maintain SRCR to the Forest Service.

14. Because Lawrence County failed to transfer its duty to maintain SRCR to the Forest Service, the Forest Service is not an indispensable party to this action.

15. Lawrence County has a duty to maintain and remove snow on SRCR.

16. Lawrence County has a duty to include SRCR on either its primary or secondary road list.


17. Lawrence County has a duty to count traffic on SRCR to determine whether SRCR is a primary or secondary road.

18. Petitioners are entitled to a writ of mandamus. Lawrence County shall designate SRCR as a Lawrence County primary or secondary road and maintain and remove snow from it accordingly.

19. Any Conclusion of Law identified as Finding of Fact is hereby incorporated as a Conclusion of Law.

Dated this 21 day of November, 2016.

BY THE COURT:

  
The Honorable Michelle K. Palmer Percy  
Circuit Court Judge

ATTEST  
  
Carol Gatusch  
Clerk of Court (SEAL)  


**FILED**

NOV 21 2016

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM  
4TH CIRCUIT CLERK OF COURT

By \_\_\_\_\_



STATE OF SOUTH DAKOTA )  
 )SS.  
COUNTY OF LAWRENCE )

IN CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT

RAYMOND C. OYEN,

Petitioner/Appellant,

-VS-

LAWRENCE COUNTY COMMISSION,

Respondent/Appellee.

Civ. No. 15-000361

**JUDGMENT**

Petitioners/Appellants petitioned Lawrence County to provide maintenance and snow removal on the approximately 3.8 miles of South Rapid Creek Road, FS 231, between Highway 85 and Boles Canyon Road, FS117 (SRCR). This is an appeal of Lawrence County's denial of any responsibility or service on SRCR. The issues were tried to the Court on October 17 and 18, 2016. The Court issued its Findings of Fact and Conclusions of Law on November 21, 2016 finding Lawrence County's denial of responsibility and duty to maintain is arbitrary and capricious. Based on the evidence, and this Court's Findings of Fact and Conclusions of Law, now therefore:

IT IS ORDERED AND ADJUDGED that a writ of mandamus is hereby entered. Lawrence County shall place SRCR on either its primary or secondary road list and provide maintenance and snow removal accordingly.

IT IS FURTHER ORDERED AND ADJUDGED that Petitioners bond shall be released and Petitioners recover their costs incurred in the amount of \$\_\_\_\_\_.

BY THE COURT:

*Carl Gustafson*  
*Kristen G. G. G.*

*[Signature]*  
The Honorable Michelle K. Palmer-Percy  
Circuit Court Judge

**FILED**

NOV 28 2016

STATE OF SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM  
FOURTH JUDICIAL CIRCUIT CLERK OF COURT

by \_\_\_\_\_

STATE OF SOUTH DAKOTA )  
 )SS.  
COUNTY OF LAWRENCE )

IN CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT

RAYMOND C. OYEN,  
Petitioner/Appellant,  
-VS-  
LAWRENCE COUNTY COMMISSION,  
Respondent/Appellee.

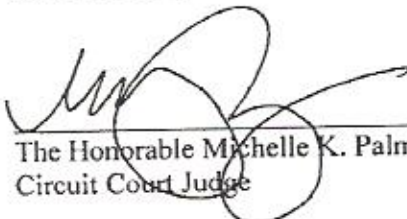
Civ. No. 15-000361


**WRIT OF MANDAMUS**

The Court having entered its Findings of Fact and Conclusions of Law and its Judgment,  
now therefore it is hereby

ORDERED that Lawrence County shall place South Rapid Creek Road on its primary or  
secondary road list and provide maintenance and snow removal accordingly.

BY THE COURT:

  
The Honorable Michelle K. Palmer-Percy  
Circuit Court Judge

  
Carol Saturech  
Kristi Gibbons

**FILED**

NOV 28 2016

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM  
4TH CIRCUIT CLERK OF COURT

By \_\_\_\_\_



**IN THE SUPREME COURT  
STATE OF SOUTH DAKOTA**

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**No. 28085**

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**LAWRENCE COUNTY,  
Respondent/Appellant,**

**vs.**

**RAYMOND C. OYEN,  
Petitioner/Appellee.**

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**APPEAL FROM THE CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT  
LAWRENCE COUNTY, SOUTH DAKOTA**

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**HONORABLE MICHELLE K. PALMER-PERCY,  
CIRCUIT COURT JUDGE**

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**APPELLEE'S BRIEF**

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**Attorneys for Appellee**

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**NOTICE OF APPEAL WAS FILED JANUARY 9, 2017**

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## **REFERENCES**

Appellant Lawrence County will be referred to as **“County.”**

Appellee Raymond C. Oyen will be referred to as **“R. Oyen.”**

South Rapid Creek Road, a/k/a FS231 will be referred to as **“SRCR”**.

The Trial Transcript will be referred to as **“TT”** followed by the page number and line number in subscript. The respective witness in such references will be referred to by first initial and last name.

Trial Exhibits will be referred to as **“Exhibit”** followed by the applicable Exhibit number.

The Trial Court’s November 21, 2016, Findings of Fact and Conclusions of Law will be referred to respectively as **“FOF”** and **“COL.”**

## LEGAL ISSUES

1. Whether the trial court correctly concluded that SRCR is a joint County/Forest Service road after finding the County accepted easements in the 1930's and provided maintenance and negotiated access pursuant to contracts with the Forest Service?

### Most relevant cases and statutes:

*Tinaglia v. Ittzes*, 257 N.W. 2d 724 (S.D. 1977)  
*Larson v. Chicago M. & St. P. Ry. Co.*, 103 N.W. 35 (S.D. 1905)  
*Bland v. Davidson County*, 1997 S.D. 92, 566 N.W.2d 452  
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SDCL 11-3-12  
SDCL  
SDCL 31-1-5  
SDCL 31-12-26

2. Whether the trial court correctly concluded that the Forest Service was not an indispensable party to determine County's duty?

### Most relevant cases and statutes:

*Titus v. Chapman*, 2004 S.D. 106, 687 N.W.2d 918  
*Casper Lodging, LLC v. Akers*, 2015 S.D. 80, 871 N.W.2d 477  
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SDCL 31-1-4  
SDCL 31-1-7

3. Whether the trial court correctly concluded that County's procedurally deficient December 3, 1992 deed transfer failed to relieve the County of its duty to maintain SRCR.

### Most relevant cases and statutes:

*Schafer v. Deuel County Bd. of Commissioners*, 2006 S.D. 106, 725 N.W.2d 241  
*Matters v. Custer Cty.*, 538 N.W.2d 533 (S.D. 1995)  
SDCL 31-1-3  
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4. Whether the trial court had subject matter jurisdiction and whether R. Oyen, representative of 55 aggrieved petitioners, whose home is on SRCR, and who was denied maintenance and snow removal by County, is an aggrieved party with standing to appeal County's Petition denial.



Most relevant cases and statutes:

*Lake Hendricks Imp. Ass'n v. Brookings Cty. Planning & Zoning Comm'n*, 2016 S.D. 48, 882 N.W.2d 307

*City of Rapid City v. Estes*, 2011 S.D. 75, 805 N.W.2d 714

*Cable v. Union County Board*, 2009 S.D. 59, 769 N.W.2d 817

*Sorensen v. Sommervold*, 2005 SD 33, 694 N.W.2d 266

SDCL 31-3-1

SDCL 7-8-29

SDCL 31-1-5

SDCL 31-12-26

5. Whether after two days of trial the trial court correctly found County arbitrarily, capriciously and contrary to the evidence denied the petition for service.

Most relevant cases and statutes:

*Black Hills Central R.R. Co. v. City of Hill City*, 2003 S.D. 152, 674 N.W.2d 31

*Asper v. Nelson*, 2017 S.D. 29, \_\_\_ N.W.2d \_\_\_

**JURISDICTIONAL STATEMENT**

Lawrence County appeals the Findings of Fact and Conclusions of Law, Judgment and Writ of Mandamus granted to Petitioner following a two day bench trial on October 17 and 18, 2016. Notice of entry of the Findings of Fact and Conclusions of Law, Judgment and Writ of Mandamus were served on December 15, 2016. This matter is properly appealed per SDCL 15-26A-3(1).

**STANDARD OF REVIEW**

“The Circuit Court has discretion in granting or denying a writ of mandamus. Consequently, the standard of review on appeal is abuse of discretion.” *Black Hills Centennial Railroad Co. v. City of Hill City*, 2003 S.D. 152, ¶ 9, 674 N.W.2d 31, 34 (citing *Douville v. Christensen*, 2002 S.D. 33 ¶ 5, 641 N.W.2d 651, 653).

The standard of review for statutory interpretation is de novo. *Id.* at ¶ 10, 674 N.W.2d at 34. The standard of review for findings of fact is clearly erroneous. *Id.* (citing SDCL 15-6-52(a); *R&S Construction Co. v. BDL Enter.*, 500 N.W.2d 628, 630 (S.D. 1993)).

## **STATEMENT OF THE CASE**

County appeals the Findings of Fact, Conclusions of Law, Judgment and Writ of Mandamus granted to Petitioner and Appellee by the Honorable Michelle K. Palmer-Percy, Fourth Judicial Circuit, Lawrence County, South Dakota following a two day court trial.

Petitioner R. Oyen and fifty-four property owners along 3.8 miles of SRCR petitioned County asking County to accept its responsibility to maintain and plow SRCR. *Exhibit 1.* On September 1, 2015, the Commission tabled the Petition “to allow more time for discussion and review.”

On September 8, 2015, Petitioner counsel provided County voluminous materials and an explanation letter supporting the Petition. *Exhibit 2.* On October 13, 2015, Commission took up the Petition and denied Petitioners any relief. *Exhibit 2B.*

R. Oyen, representative of Petitioners, appealed to circuit court pursuant to SDCL 7-8-27 by Notice of Appeal dated October 28, 2015. The case was tried before the Honorable Judge Palmer-Percy on October 17 and 18, 2016. From Judgment and Writ of Mandamus for Petitioner Oyen, County appeals.

Lawrence County maintains and plows roads within the County that in some cases amount to driveways to a single or a few structures; often not even occupied. Petitioners own forty-seven homes/cabins in three County platted contiguous subdivisions on a public road segment of South Rapid Creek Road, a/k/a FS231 (“SRCR”), for which public ingress and egress easements were largely owned by Lawrence County since the 1930’s. Petitioners paid in excess of \$107,000 in property taxes for 2016, and seek reasonable maintenance and plowing from Lawrence County per petition. On September

1, 2015, the Commission tabled the petition “to allow more time for discussion and review.” On September 8, 2015, Petitioner’s counsel provided County materials supporting the Petition. On October 13, 2015, the Commission unanimously rejected the Petition with no stated legal reason. Petitioner appealed to Circuit Court, seeking to reverse the Commission decision as arbitrary and capricious, and seeking a writ of mandamus directing County to provide maintenance and snow plowing commensurate with the County secondary roads. Following a two day Court trial, the Honorable Michelle Palmer Percy entered Judgment for Petitioner finding that SRCR is a Lawrence County road and that Lawrence County was obligated to maintain SRCR and remove snow from it. County appeals.

## **STATEMENT OF FACTS**

### **A. SRCR**

SRCR is a roughly 3.8 mile road segment in southwestern Lawrence County running from U.S. Highway 85 on O’Neil Pass to Boles Canyon Road, a/k/a FS 117. TT – W. Locken 23<sub>19-25</sub>. It is signed as South Rapid Creek Road and FS 231. *Exhibit 28a* and *28b*. SRCR traverses mostly private property, but also some forest service property. TT – W. Locken 15<sub>24-16</sub><sub>17</sub>. It is a segment of a major thoroughfare going from Highway 85 to Rochford. TT – R. Oyen 16<sub>7-14</sub>.

In the early 1930’s, Miners and Merchants Bank granted to County “a right-of-way of the customary width for highway purposes...to carry with it all the attendant burdens and easements of a public highway.” *Exhibit 32*<sub>55-56</sub>; *Exhibit 52*. County accepted the easements. *Exhibit 2*<sub>56</sub>; *Exhibit 52*. In November, 1972, Bill Locken, then college student and future owner of property along SRCR, drove the road. TT – W.

Locken 11<sub>4-23</sub>. In 1972, there were no occupied structures in the area. TT – W. Locken 11<sub>24-127</sub>.

In 1976, County approved the plat for Crook Tower Retreat, the first of what became three consecutive developments on SRCR. *Exhibit 3*. That plat describes the portion of road traversing private property as “County Road” and the portion traversing Forest Service land as “Existing County Road and Forest Service Road #231.” *Exhibit 3*.

In 1978, Locken, by then a Masters in Engineering and Air Force Officer, and his dad bought two lots in Crook Tower Retreat. TT – W. Locken 12<sub>8-20</sub>. Locken looked at lots in the May/June 1978 time frame and observed the road to be “gravel,” “nothing special,” and “gravel road”. TT – W. Locken 13<sub>4-10</sub>. The plat for the property he purchased stated that SRCR was “County Road” through Crook Tower Retreat. TT – W. Locken 14<sub>20-158</sub>. By the time he started to build, “somebody...was doing major reconstruction of that road.” TT – W. Locken 13<sub>10-14</sub>. SRCR was improved to “22-24 feet wide,” with “good drainage” and “4 to 6 inches of new gravel.” “It was a very nice road.” TT – W. Locken 14<sub>16-19</sub>.

Over the years, property owners have asked the County who controls the road. The Minutes of the October 5, 1982, Lawrence County Commission meeting reflect that the Forest Service and County were discussing roads that both Forest Service and County had interests in. *Exhibit 5A*. The Highway Superintendent at that meeting admitted that SRCR “has joint County/Forest Service jurisdiction[.]”

In March 1982, County created an ordinance for accepting or retaining roads on the County Highway System. *Exhibit 6A*. It defined County Secondary Highways as “The rural local highways in the unorganized townships, excluding the approved County

Highway System that are under the supervision of the Board of County Commissioners.”

*Exhibit 6A p. 1.* However, not a single road has been added to the County’s “highway system” pursuant to the ordinance. TT – J. Apa 222<sub>6-12</sub>.

On May 12, 1983, the entire County Commission signed a contract with the Forest Service which became the “Master Agreement” referred to over the years. The Forest Road “Master Agreement” provides the following:

*Exhibit 7, p. 1:*

“This Forest Road Agreement...sets forth the responsibilities of each party with respect to the development and operation of those roads that are part of both the Forest Development and County road systems...

Whereas, the County is vitally interested in providing and operating a road system to provide adequate vehicular access for residents and commercial enterprises both for intra – and inter – county travel; and

Whereas, the Forest Service is vitally interested in providing and operating a road system for vehicular access that will integrate with other transportation systems and facilities and which provide access for the use and enjoyment of National Forest resources; and

Whereas, many of these...roads...will benefit and provide for the needs of the County and the Forest Service; and

Whereas, it is mutually beneficial; to establish the responsibilities of each Agency for those roads that are part of both the County and Forest Development road systems....”

*At Exhibit 7, p. 1:*

Joint system is defined as “roads declared to be both a County System road and a Forest Development road.”

*At Exhibit 7, p. 8:*

“Easements...acquired by either party shall be adequate to serve the road needs of both parties.”

*At Exhibit 7, p. 9:*

6. “The Schedule A and the map showing the joint system are attached and made part of this Agreement.” Item 34 of Schedule A (on “sheet 4 of 5”) is SRCR and describes jurisdiction as “Co/FS” or County and Forest Service ownership.

Over time, discussion between County and Forest Service continued. On April 22, 1991, the Commission agreed to add roads to its secondary system and “put on Schedule A of the Forest Service agreement.” On September 11, 1991, the County Commission executed a Project Agreement incorporating the Master Agreement and agreeing that “The County shall: Be the designated maintaining party.” *Exhibit 8A*.

Thus County has known and acknowledged for decades that it has duties and responsibilities for maintenance of SRCR. In the early years, after 1930, there was little or no development and no one was asking for service on what was a joint County - Forest Service road. But by 1992, people were questioning County’s lack of services on a road it jointly owned. Further, County hasn’t added a road to its secondary road system list, referred to as its “magic list,” since at least 1980. TT – J. Apa 244<sub>14-18</sub>; C. Williams 261<sub>1-3</sub>; A. Bonnema 342<sub>10-15</sub>, 350<sub>23-25</sub>. Similarly, even though County Highway Superintendent in 2014 published intent to remove from the list 24 County roads that are nothing but private driveways, sometimes to abandoned buildings, not one has been removed. TT – A. Bonnema 343<sub>12-21</sub>; *Exhibit 4, p. 3-4*.

## **B. THE LIST**

Mr. Allan Bonnema is Lawrence County Highway Superintendent. *Exhibit 4*. The Highway Department website indicates: “The Highway Department is responsible for the maintenance of all County roads, to include snow removal and sanding, grading and road repair.” *Exhibit 4, p. 2*. “Lawrence County has two road classifications, Primary and Secondary Roads...Secondary Roads do receive a lower level of service....”

However, “All Secondary roads receive the same level of snow plowing as do the Primary Roads in the County.” *Exhibit 4, p. 3*. Page 3 and 4 of Exhibit 4 shows the 2014 list containing road segments which are nothing more than private driveways, but remain on County’s list of secondary roads. The County Highway Superintendent has a list of roads on the County’s “system” and a map showing the roads on that list. TT – A. Bonnema 338<sub>19</sub>-339<sub>6</sub>. If a road is on this “magic list” it gets service. TT – A. Bonnema 338<sub>25</sub>-339<sub>4</sub>. If not, County provides nothing. TT – A. Bonnema 339<sub>5-6</sub>. County can’t explain how and why the roads on the list are there. TT – A. Bonnema 348<sub>8-14</sub>.

One road on County’s list and receiving services is McInerney Road. Exhibit 20 shows McInerney Road is close to SRCR. McInerney Road is a two-track trail in the grass leading to an abandoned homestead. Exhibit 30; TT – W. Locken 37<sub>9-22</sub>. Yet it is on County’s service list. The only reason it is not plowed and maintained is because the McInerney’s requested it stop. TT – W. Locken 68<sub>3-7</sub>. When winter storm Atlas hit in 2013, McInerneys requested and County plowed the road. TT – 339<sub>14-20</sub>. Yet if the taxpayer residents on SRCR, a mere .4 miles away, request plowing, County would refuse, “because it’s not on the system.” TT – A. Bonnema 341<sub>5-8</sub>. County published a new 10 year plan which calls for resurfacing McInerney. TT – W. Locken 63<sub>1-5</sub>. Nothing, however, is in the plan for SRCR.

Another road on County’s list is Frosty Meadows, located as Highway 85 goes by the back side of Terry Peak. *Exhibit 21*. Frosty Meadows leaves the highway, traverses both private and Forest Service property, and dead ends at a residence marked “no trespassing.” TT – W. Locken 63<sub>13</sub> – 64<sub>11</sub>; 68<sub>14</sub> – 69<sub>18</sub>. *See Exhibits 29A, B, C and D*,

photos taken on Frosty Meadows. County maintains and plows snow on Frosty Meadows. TT – W. Locken 64<sub>4-7</sub>.

When pressed at trial, the Highway Superintendent could not identify another section of through-road under four miles long with 40-plus housing structures that the County refuses to service. TT – A. Bonnema 337<sub>19</sub>-338<sub>2</sub>. SRCR is singularly denied services by County.

The latest contract in evidence between County and Forest Service is dated January 31, 2007, called Forest Road Agreement. *Exhibit 49*. It was executed by the County Commissioners on February 13, 2007, long after it claims it gave SRCR away. *Exhibit 49, p. 5*. In it, Lawrence County agrees to “set forth the general terms...for the cooperative planning...improvement and maintenance of certain Forest Development Roads...” *Exhibit 49, p. 1*. The County also agrees:

- a. ...certain roads under the jurisdiction of the [County] or the Forest Service which serve the National Forest and also carry traffic which is properly the responsibility of [the County] should be maintained and, if necessary, improved to a standard adequate to accommodate safely and economically all traffic which uses such roads. *Exhibit 49, p. 2*.

The contract provides,

Maintenance shall include preserving and keeping the roads...as nearly as possible in their original condition...to provide satisfactory and safe road service. *Exhibit 49, p. 2*.

Finally,

Easements...acquired by either party shall be adequate to serve the road needs of both parties. *Exhibit 49, p. 3*.

The Forest Service suggested in a 2007 “Dear Interested Citizens” letter to Petitioners that they could petition the County for plowing. *Exhibit 25, option 2*. The County had a Forest Service representative at the second County Commissioner meeting



discussing this Petition, on October 13, 2015. TT – A. Bonnema 346<sub>6-9</sub>. Forest Service’s position was that it will not do more than it pays for. County admits that the Forest Service made no objection to County plowing and maintenance. TT – A. Bonnema 346<sub>6-9</sub>. County currently plows several roads owned by the Forest Service but shared with County. *Exhibit 11*; TT – W. Locken 52<sub>18-53</sub><sub>15</sub>. County designates those roads as Secondary County roads. TT – W. Locken 52<sub>18-53</sub><sub>15</sub>.

This matter came to a head after County’s action on a County road called Crow Creek became public. *Exhibit 2A*. Crow Creek is on County’s secondary road list. TT – A. Bonnema 329<sub>3-6</sub>. It is 1.25 miles long with four families along it. TT – A. Bonnema 329<sub>11-15</sub>. By May of 2015, County bladed the road five times and plowed it when it snowed. TT – A. Bonnema 329<sub>16-18</sub>. Crow Creek owners petitioned County to improve the road by adding gravel. *Exhibit 2A*. County offered to spread and haul the gravel if the petitioners paid for the gravel. TT – A. Bonnema 330<sub>12-21</sub>. The Crow Creek folks said “we’re taxpayers and not paying.” TT – A. Bonnema 331<sub>10-16</sub>. Regraveling was not in County’s budget, yet the Commission voted to spend \$35,000 to upgrade that road. TT – A. Bonnema 331<sub>21-22</sub>; 332<sub>5-9</sub>.

It should be noted that at no time have Petitioners here sought to improve SRCR. TT – W. Locken 26<sub>12-15</sub>. Petitioners asked that County acknowledge its interest in SRCR and accept its responsibility for routine maintenance and snow removal. Petitioners seek the services every other County road gets. Petitioners seek entry to the “list.” *Exhibit 2*.

### **ARGUMENT**

As a threshold matter, Petitioner objects to County’s improper references to deposition transcripts. Depositions are not contained in the settled record, and the

witness' depositions which County cites testified at the court trial. Accordingly, deposition references are improperly brought before this Court pursuant to SDCL 15-6-32(a) (use of depositions), SDCL 15-6-43(a) (testimony of witnesses shall be taken orally in open court), SDCL 15-6-5(g) (depositions to be offered as evidence in trial to be filed with clerk), and SDCL 19-19-804(b) (hearsay). *See Spenner v. City of Sioux Falls*, 1998 S.D. 56 ¶ 9. 580 N.W.2d 606, 610 (rejecting deposition testimony and noting this Court has "consistently held that it will not consider facts outside the settled record") (citing *Nauman v. Nauman*, 336 N.W.2d 662, 664 (S.D. 1983)).

**I. Whether the Trial Court Correctly Concluded that SRCR is a Joint County/Forest Service Road After Finding the County Accepted Easements in the 1930's and Provided Maintenance Pursuant to Contracts with the Forest Service.**

**a. SRCR is a dedicated Lawrence County Road.**

County argues the trial court erred in concluding that SRCR is a Lawrence County Road and that County has a duty to maintain SRCR. County argues that the trial court determination was based solely on the County's acceptance of the 1930 easement and approval of subdivision plats. While those facts are significant, the record reveals the lower court's decision is supported by many other facts as well which support the ruling that SRCR is, in fact, a County road, which the County has a duty to maintain.

In the 1930's, Miners & Merchants Savings Bank, who owned the property along SRCR, granted an exclusive highway easement to Lawrence County along an old railroad grade. *See Exhibit 2*, pp. 55-57; TT – W. Locken 28<sub>5</sub> – 30<sub>10</sub>. The 1930 dedication from Miners and Merchants Bank to Lawrence County granted "a right-of-way of the customary width, for highway purposes...to carry *with it all the attendant burdens and easements of a public highway.*" (emphasis added) *Exhibit 2*, pp. 55 -57.

County admits that SRCR was open to and used by the public since it was granted to Lawrence County in 1930. *County Appellant Brief* at p. 12. Yet County argues it took no formal or “official” action to designate the road to its highway system, and therefore it avoided any obligation to maintain it. County’s position is wrong as a matter of law.

By executing and entering into the 1930 Agreement for Right-of-Way, County accepted the highway easement granted to it; but even if County did not expressly “accept” the highway easement, County should not be heard to disclaim its acceptance. This Court has held that public use of a dedicated easement is proof that the dedication was accepted. *Tinaglia v. Ittzes*, 257 N.W. 2d 724 (S.D. 1977) (citing *Larson v. Chicago M. & St. P. Ry. Co.*, 103 N.W. 35 (S.D. 1905)).

The *Larson* Court held,

...no particular formality is essential to an implied dedication or acceptance of land for a public use. Conduct on the part of the owner that is clearly expressive of an intention to dedicate usually amounts to dedication, if acted upon by the public in a manner which clearly justifies the inference of an acceptance.

*Larson*, 103 N.W. at 37.

The *Larson* Court went on to hold:

When the dedication is beneficial to the public, an acceptance will usually be implied from the slight circumstances, or from user by the public for the purposes for which dedicated. No formal action of any particular body or individuals is necessary, but the acceptance may be implied from any acts of the public, generally, showing an intent to appropriate and use the property dedicated.

*Id.* As County admits, upon the 1930 dedication to County, the roadway was open and used by the public as a roadway. *County Appellant Brief* at p. 12. By allowing this use, County indicated a clear intent to appropriate and use the property consistent with and in

the manner dedicated to County. County accepted the dedication from Miners' and Merchants' Bank, and the trial court did not err in so ruling.

Other facts also support this ruling. SRCR is roughly 3.8 miles long. It runs from Highway 85 on O'Neil Pass to Boles Canyon Road, a/k/a F.S. 117. It is signed as South Rapid Creek Road and F.S. 231. *Exhibit 28A & 28B*. It traverses both Forest Service and private land. TT – W. Locken 15<sub>24</sub>-16<sub>17</sub>. Since the 1970s, three subdivisions were platted along SRCR, and Lawrence County approved each of those plats. *See, e.g., Exhibit 3*. The plats were filed and are public records upon which the people rely. The first subdivision is Crooks Tower Retreat, which contains 22 lots. This plat was approved by Lawrence County and filed in 1976. The plat indicates that SRCR, as it runs through the subdivision, is a "county road." *See Exhibit 3*. The plat contains the resolution of the County Commission approving it on April 14, 1976. At the west boundary, the legend for the road says "existing county road forest service road #231." *Exhibit 2, p. 57*. In the ensuing years, County approved plats for two more subdivisions on SRCR. *Exhibit 20*. Today there are 47 housing structures in the various subdivisions, with 10 of those being year round residences. FOF 2, TT – W. Locken 24<sub>1-4</sub>.

By accepting the plats, Lawrence County assumed its duty to hold the dedicated property in trust – for Lawrence County residents. SDCL 11-3-12 provides:

When the plat...shall have been made out, certified, acknowledged and recorded...every donation or grant to the public...or body politic...shall be deemed a sufficient conveyance to vest the fee simple title...for the uses and purposes therein expressed and intended and no other...***The land intended to be used...shall be held in trust to and for the uses and purposes expressed***...(Emphasis Added)

Further evidence that SRCR is a County road is that SRCR was a subject of multiple agreements between the Forest Service and Lawrence County where both parties

admitted County's interest in the road. An agreement referred to repeatedly in later agreements, dated May 12, 1983, is a primary example and was identified as the "Master Agreement" at trial. TT – W. Locken 38-39, 45. *See Exhibit 7.*

The Master Agreement, at page one, acknowledges:

Whereas, the County is vitally interested in providing and operating a road system to provide adequate vehicular access for residents and commercial enterprises both for intra and inter – county travel...

Whereas, many of these planned and existing roads, both adjoining and within the National Forests...will benefit and provide for the needs of the County and the Forest Service...

Whereas, it is mutually beneficial to establish the responsibilities of each Agency for those roads that are part of both the County and Forest Development road systems... (emphasis added)

At page 2, the following definition is stated:

8. Joint System. Those roads declared to be both a County System road and a Forest Development road. (emphasis added)

This Master Agreement, at page 9 then indicates:

6. The schedule A and the map showing the joint system are attached and made part of this Agreement.

SRCR is specifically included in this 1983 Master Agreement as part of the joint system. *See Exhibit 7, p. 4, item 34.* On May 12, 1983, the entire Lawrence County Commission executed the Master Agreement, and affirmed the County's interest in SRCR. *Exhibit 7, p. 10.* County should not be heard to state its inconsistent position of how it could claim an interest in the road in 1983 for the benefits provided by the Forest Service, and yet here attempt to disclaim any responsibility to the public in the very subdivisions it approved.

Other facts reveal County itself understood it retained jurisdiction and obligation

over SRCR long after 1992. For example, Exhibit 49 is an agreement between Lawrence County (called “cooperator” in the agreement) and Forest Service, dated January 31, 2007, years after County claims it deeded both title and duty to Forest Service. The purpose is to “set forth the general terms...for the cooperative planning ...and maintenance of certain Forest Service roads in Lawrence County....” In it, County agrees:

- 1a. that certain roads under the jurisdiction of the [County] or the Forest Service which serve the National Forest and also carry traffic which is properly the responsibility of the [County] should be maintained...
3. to the extent practical [that]...responsibility for maintenance shall be assigned in proportion to use for which each party is properly responsible... Maintenance shall include preserving and keeping the roads...as nearly as possible in their original condition...to provide satisfactory and safe road service.

In addition, County demonstrated ownership when it approved plats for subdivisions along the road, attempted to transfer the easements by deed to Forest Service, and entered into agreements with Forest Service where both claimed and therefore admitted that SRCR was on the County system. Also over the years, County provided maintenance on SRCR, even though Forest Service paid the County for doing so. As this Court has stated, “Dedication is a term of art. It is a ‘devotion of property to a public use by an unequivocal act of the owner of the property and an acceptance of that dedication by the public.’” *Niemi v. Fredlund Township*, 2015 S.D. 62 ¶ 3, 867 N.W.2d 725, 733.

Although County now claims it never accepted SRCR and therefore it never was a County road, County signed a deed in December of 1992 purporting to transfer the easements to the Forest Service, and by doing so admitted and displayed its own belief

that County owned and was responsible for SRCR from 1930 to 1992. *Exhibit 96*.

County certainly cannot escape the fact that it, year after year, entered into agreements with the Forest Service acknowledging that SRCR was part of its system of roads. *See, e.g., Exhibit 7, Exhibit 49.*

“[I]f principals have, by their conduct, accepted the dedication, it is of no great importance that the agents have taken no action in the matter.” *Tonsager v. Laqua*, 2008 S.D. 54, ¶ 10, 753 N.W.2d 394, 398. The simple fact that County failed, and now refuses, to list the road on its road system does not alter or overcome the facts: (1) the road was dedicated to Lawrence County for a public highway; (2) the grant was accepted by the County and the roadway used for some 60 years as a public way, for which the County provided maintenance; (3) the County itself recognized and labeled it as a County road on Plats which it approved and recorded; (4) the County year after year acknowledged in contracts with Forest Service that SRCR was on the County system; and (5) County publically claimed an ownership interest by its act of attempting to convey easements to Forest Service (even though County’s attempt violated state statute by depriving Petitioner and other members of the public an opportunity to be heard).

**b. Lawrence County has a duty to provide snow removal and maintenance on SRCR**

While the lower court did not determine which definition SRCR falls under, it concluded correctly that SRCR is either a primary or secondary county road pursuant to the definitions of SDCL 31-1-5.<sup>1</sup> As such, The Court directed Lawrence County to

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<sup>1</sup> SDCL 31-1-5 provides in part:

“For the purposes of clarifying the duties and powers of the various governmental agencies charged with the administration of the highways in South Dakota, the following definitions of highway systems shall be applicable...”

designate SRCR as a Lawrence County primary or secondary road and maintain and remove snow from it accordingly. *See* COL 18; Writ of Mandamus.

This Court explains that “‘Highway’ is a generic term in South Dakota law defined to include ‘[e]very way or place of whatever nature open to the public, as a matter of right, for purposes of vehicular travel.’” *Hohm v. City of Rapid City*, 2008 S.D. 65, fn 2, 753 N.W.2d 895, fn 2 (declined to follow on other grounds by *Siers v. Weber*, 2014 S.D. 52, 851 N.W.2d 731 (citing SDCL 31-1-1) (alteration in original)). As a dedication of “a right of way of the customary width, for highway purposes...to carry with it all the attendant burdens and easements of a public highway,” SRCR meets the definition of a “highway.” “The county highway system shall be permanently constructed and improved, and shall be maintained and repaired at the expense of the whole county[.]” SDCL 31-12-6.

SDCL 31-12-26 provides that “Each board of county commissioners and county highway superintendent in organized counties *shall* construct, repair and maintain all secondary roads within the counties [exceptions not applicable].” (emphasis added). SDCL 31-1-5 does not require a road segment to be on a County list approved by the Department of Transportation. It only requires that the road be “under the supervision of the County Commissioners.”

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- (2) County highway system ‘the highways designated by the board of county commissioners...that have been approved by the Department of Transportation...

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- (4) ‘County secondary highways’ the rural local highways in organized counties, excluding the approved county highway system, that are under the supervision of a board of county commissioners.



Snow removal is also addressed in statute. SDCL 34-5-4 allows discretion of the county commission “with decisions relative” to snow removal. However, although this Court held that even though County may have discretion, “We cannot infer from the statutes that county has permission to idly stand by while hazards knowingly exist on its roads.” *Bland v. Davidson County*, 1997 S.D. 92, ¶ 27, 566 N.W.2d 452, 460 (citing *Bland v. Davison County*, 507 N.W.2d 80, 81 (S.D. 1993)). Lawrence County routinely blades secondary roads and plows snow on them. TT – A. Bonnema 317<sub>1-11</sub>, 336<sub>2-10</sub>. SDCL 34-5-3 further authorizes use of the county special emergency fund for “snow removal operations on county roads.” Here, County exercised its discretion and created a policy. See County Highway Department Website, *Exhibit 2*, p. 67 and 68. Lawrence County “has two road classifications, Primary and Secondary Roads....Secondary Roads do receive a lower level of service than Primary Roads such as magging, blading, graveling, culvert maintenance and mowing. The one exception to the level of service is the snow removal. All Secondary Roads receive the same level of snow plowing as do the Primary Roads in the County.” *Exhibit 2*, p. 67.

At trial, the Highway Superintendent was unable to identify any other segment of Lawrence County road that served 47 residences where the road was between a County road and a state highway that County refuses to service. TT – A. Bonnema 337<sub>19-338</sub><sub>15</sub>. County arbitrarily refuses to maintain SRCR, and the trial court correctly directed County to designate SRCR as a Lawrence County primary or secondary road and maintain and remove snow from it accordingly.

## **II. Whether the Trial Court Correctly Concluded That Forest Service is Not an Indispensable Party to Determine County’s Duties.**

County asserts that the trial court wrongly determined that the Forest Service was

not an indispensable party. Following a Motions Hearing on June 20, 2016, the lower court determined that “Because Lawrence County failed to transfer its duty to maintain SRCR to the Forest Service, the Forest Service is not an indispensable party to this action.” COL 14.

This issue is closely tied to County’s third issue on appeal, whether County’s attempt to transfer its duty to maintain SRCR was ineffective. Arguments addressing the failure of County to transfer any duty to the Forest Service will accordingly be addressed more fully in that issue, below.

County argues that Forest Service is indispensable. County fails to cite any authority for its argument that the case should be dismissed.

SDCL 15-6-19(a) states in relevant part:

A person who is subject to service of process shall be joined as a party in the action if:

- (1) In his absence complete relief cannot be accorded among those already parties; or
- (2) He claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

None of the enumerated prerequisites for joinder are satisfied. Complete relief can be granted in the absence of the Forest Service. The court may make a determination of the legal duties of County without joinder of Forest Service. Second, there is no indication that the absence of Forest Service causes any additional liability. The factors for the Court to consider before it dismisses are in SDCL 15-6-19(b). However, there is no cause to consider dismissal as neither of the prerequisites of SDCL 15-6-19(a) exist.

“[W]hether or not a person is an indispensable party is [a decision] which must be made on a case-by-case basis and is dependent upon the facts and circumstances of each case.” *Titus v. Chapman*, 2004 S.D. 106, ¶ 36, 687 N.W.2d 918, 927 (citing *Provident Tradesmens Bank Tr. Co. v. Patterson*, 390 U.S. 102, 119 (1968)). However, simply because a person might have an interest in the outcome of litigation does not make the person indispensable. *Id.* (citing *Kapp v. Hansen*, 111 N.W.2d 333, 337 (S.D. 1961) (noting that “persons who might conceivably have an interest in the outcome of litigation are not to be considered indispensable parties.”); *Casper Lodging, LLC v. Akers*, 2015 S.D. 80, ¶ 82, 871 N.W.2d 477, 501 (abrogated on other grounds by *Magner v. Brinkman*, 2016 S.D. 50, ¶ 82, 883 N.W.2d 74).

County relies exclusively on *Smith v. Albrecht*, 361 N.W.2d (S.D. 1985), for its argument that Forest Service is an indispensable party. *Smith* is not controlling, nor does it support County’s position because the facts are distinguishable. In *Smith*, the property owner sought a declaratory ruling that a roadway was a public road. Although Meade County was not a party to the action, a ruling would result in Meade County being declared responsible for road maintenance. *Id.* at 627. This Court determined that because the ruling being sought would result in county responsibility, Meade County was an indispensable party. *Id.* at 628.

In *Smith*, the county was found indispensable because the ruling sought would cause Meade County to be responsible for maintaining the road, and without Meade County as a party, the Court could not issue an order directing Meade County to do so, and therefore complete relief could not be given. *Id.* at 628. Here, in contrast, Forest Service is at no risk of being declared responsible for maintenance of SRCR. Petitioner

didn't ask for Forest Service to be found responsible for SRCR maintenance. The Forest Service has acknowledged that Petitioners, "as a group could petition the County to plow the road." *Exhibit 45, option 2*. Forest Service agreed to work with the County...if the petition is successful. *Exhibit 43*. Lawrence County Highway Superintendent, Bonnema, admitted at trial that he does not know of any reason why the Forest Service would interfere with County maintenance of SRCR. TT – A. Bonnema 346<sub>6-14</sub>. Bonnema acknowledged that a Forest Service representative was present at the second hearing on the petition and did not disagree with County maintaining SRCR. TT – A. Bonnema 346<sub>6-14</sub>. Finally, it is Lawrence County, and not the Forest Service, that collected \$107,000 in property tax in 2016 from the taxpayers on SRCR. The duty to plow and maintain is the County's. Any services provided by the Forest Service are provided to the County solely under an agreement between the two entities. Such an agreement does not abrogate or even affect the County's duty to maintain. Complete relief can be achieved, and was achieved, by the trial court's ruling and Writ of Mandamus. Thus, reviewing the facts and circumstances, Forest Service is not an indispensable party.

**III. Whether the Trial Court Correctly Concluded that County's Procedurally Defective December 3, 1992, Deed Transfer Failed to Relieve County of its Duty to Maintain SRCR.**

County next contends the trial court incorrectly ruled that County's 1992 attempt to transfer existing easements to Forest Service did not relieve County of its duty because statutory procedural requirements were not followed, and that therefore County's attempt to abandon its duty to maintain SRCR failed. Although County now argues its 1992 action had nothing to do with vacating, changing or locating a highway, County's attempted transfer, if effective, would have effectively vacated the public highway which

County and only County has a duty to maintain. That County itself believes this to be the case is evident because County argues the “transfer” to Forest Service caused it to not have a duty to maintain SRCR. Contrary to County’s assertions, upon accepting the grant in 1930, County obtained a perpetual duty to maintain the public highway known as SRCR, and County may not, as a matter of law, relieve itself of that duty without going through the steps carefully crafted by the Legislature.

As discussed above, SRCR is a “highway.” Once a highway is established, it “shall continue as established until changed or vacated in some manner provided by law. SDCL 31-1-3. *See Matters v. Custer County*, 538 N.W.2d 533, 536 (S.D. 1995) (interpreting SDCL 31-1-3 and holding the county road in question accepted as a public road and never legally vacated). “The highways of this state consist of...the county highway system of the several counties and all other highways denominated secondary highways.” SDCL 31-1-4. A specific, detailed procedure is provided in SDCL 31-3-6 through 31-3-9 for vacating or changing a county secondary road.

County argues the sole public notice required was in SDCL 1-25-1.1, which addresses posting of a proposed agenda prior to any public body meeting, and that therefore the action taken by the Commission to transfer this public roadway easement was valid. The argument ignores the more rigorous notice required where, as here, public rights are affected. “The rules of statutory construction dictate that ‘statutes of specific application take precedence over statutes of general application.’” *Schafer v. Deuel County Board of Commissioners*, 2006 S.D. 106, ¶ 10, 725 N.W.2d 241, 245 (quoting *Cooperative Agronomy Services v. South Dakota Department of Revenue*, 2003 S.D. 104, ¶ 19, 668 N.W.2d 718, 723).

SDCL 31-3-7 specifically requires that the county commission shall “*after giving notice of a public hearing*, hold a public hearing called for the purpose of receiving public testimony about the action proposed...The board shall give notice of the public hearing by publication in the official newspaper...once each week for at least two consecutive weeks.” (Emphasis added.) Although not binding upon this Court, “Opinions of the attorney general construing statutes are entitled to weight in gleanings of the legislature’s intention.” *Application of Farmers State Bank of Viborg*, 466 N.W.2d 158, 163 (S.D. 1991). The protections of public notice, public hearing, and a de novo appeal to circuit court as required by SDCL 31-3-7 was addressed by the S.D. Attorney General. “These are significant procedural rights that the Legislature provides individual citizens to protect their interests in the maintenance, use, continuation, and location of public highways. If the county commission were permitted to locate, vacate, or change public highways without following these procedures, citizens would be deprived of significant participation in the process, participation that has been specifically granted to them by the Legislature.” 1989 S.D. Op. Att’y Gen. 17 (1989). “It is a well established rule that powers of counties and other state subdivisions are viewed restrictively absent a specific constitutional or statutory authorization. Dillon’s Rule provides that only such powers as are specifically granted may be exercised by a municipal corporation, and then those powers may be exercised only in the manner provided by the Legislature. In addition, authority necessarily implied may be exercised, but again only in the manner provided.” 1989 S.D. Op. Att’y Gen. 17 (1989) (citing *Sioux Falls Employees v. City of Sioux Falls*, 233 N.W.2d 306 (S.D.1975); *Schryver v. Schirmer*, 171 N.W.2d 634 (S.D.1969)). “Under the rules of these cases, if a manner for exercising the power is

provided by statute, that procedure must be followed...The county may not, therefore, use another procedure if it is not found in the statute.” *Id.* See also *Schafer v. Deuel County Board of Commissioners*, 2006 S.D. 106, ¶ 15, 725 N.W.2d 241, 248 (“Counties are creatures of statute and have no inherent authority. They have ‘only such powers as are expressly conferred by statute and such as may be reasonably implied from those expressly granted.’”) (further citations omitted). See *Meadowridge Indus. Center Ltd. Partnership v. Howard County*, 675 A.2d 138, 146 (Md. 1996) (noting that where the state legislature mandated that a plan may be enacted only after specific notice is afforded to the public and a hearing is held, where the notice and hearing specified is not afforded, passage of the plan is invalid.)

Here, however, County wholly failed to follow the statutorily required process.

A document titled “Existing Road Easement,” dated December 30, 1992, and signed by three Commissioners includes all the SRCR easements owned by Lawrence County, and purports to transfer the easements to Forest Service. *Exhibit 9B*. Yet County failed to produce any evidence that it provided notice to the public or landowners affected by this erred transfer attempt. *Exhibit 9A* which is the portion of the December 30, 1992, Lawrence County Commission meeting minutes concerning this “transfer.” The minutes made no mention of any prior notice. They simply reflect a motion to “follow the recommendation of the Highway Superintendent and authorize the Chairman to sign a transfer of existing road easements...” Importantly, elsewhere in the minutes of this same Commission meeting, on another issue, it is noted that “Notice of Hearing was posted according to law.” The absence of a similar notation pertaining to Commission’s intent to transfer SRCR easements indicates no such public notice was provided of

Commission's intent to give away property held in trust for Lawrence County citizens. Pursuant to the adverse inference rule, since the minutes are wholly under the control of County, an inference favorable to Petitioner must be drawn from the absence of minute notation of adherence to statutory requirements. *See Matters v. Custer Cty.*, 538 N.W.2d 533, 536 (S.D. 1995). As further support, SDCL 31-3-7 requires two notices of public hearing be given by publication for "two successive weeks." County's only evidence of any publication whatsoever consisted of a post-hearing publication of meeting minutes. *Exhibit 15G*. At trial, County called former employee Marlene Barrett as a witness. Barrett was the Commissioner's assistant in December of 1992, and was responsible for publishing the Commission's notices. However, County could produce no document indicating the issue was even placed on a Commission agenda let alone properly noticed. TT – M. Barrett 133 – 135; 136<sub>6-14</sub>; TT 137<sub>8-24</sub>; TT 140<sub>9-19</sub>; TT 140<sub>24-141</sub><sub>23</sub>.

Although both procedurally and substantively defective, the County's execution of this attempted transfer confirms beyond any reasonable dispute that Lawrence County acknowledged it owned SRCR from the 1930's to at least 1992 – a period of some 62 years. Otherwise, the County had nothing to transfer. This attempt to rid itself of what it held in trust for the public is significant because it is an admission that the County itself acknowledged its ownership interest and, accordingly, its obligation to hold the public road for the benefit of the public for whom it was originally dedicated.

**IV. Whether the Trial Court had Subject Matter Jurisdiction and Whether R. Oyen, Representative of 55 Aggrieved Petitioners, Whose Home is on SRCR, who had been Denied Maintenance and Snow Removal by County is an Aggrieved Party.**

Next, County asserts Petitioner lacked subject matter jurisdiction, arguing first that the appeal to Circuit Court was not timely, and second that Petitioner R. Oyen is not



an aggrieved party and thus lacks standing. Both of County's arguments fail.

**a) Petitioner did not fail to timely appeal.**

County argues that Petitioner's appeal is untimely, claiming that it is an appeal of the 1992 County Commission decision, which, County argues, must have been appealed within 90 days of the 1992 action pursuant to SDCL 7-8-29. County is wrong that County's 1992 action is being appealed. Let there be no doubt: Petitioner's appeal County's denial on October 13, 2015, of Petitioner's request for maintenance of SRCR. Appeal of that decision was timely appealed by Notice of Appeal dated October 28, 2015, well within the 90-day period. Further, if County's argument is accepted, any act by a county, including those in total disregard of procedural protections and notice requirements, would be deemed valid and unchallengeable after the 90-day appeal window had closed. Such a position is untenable.

County cites *Upell v. Dewey County Commissioners*, 2016 S.D. 42, 880 N.W.2d. In *Upell*, this Court held that plaintiff's failure to serve notice of appeal on a member of the board of county commissioners in strict compliance with SDCL 7-8-29 deprived the lower court of jurisdiction. *Id.* at ¶ 17, 880 N.W.2d at 75. However, *Upell* does not support County's argument that Petitioner is somehow precluded from asserting, in his appeal of Lawrence County's denial of the Petition for maintenance of SRCR, that County retained its duty to maintain that road despite its effort to escape it. The lower court had subject matter jurisdiction to consider all aspects of this appeal.

**b) Petitioner R. Oyen has standing.**

County next argues Petitioner lacks standing to appeal the County's denial of the petition based on *Cable v. Union County Board*, 2009 S.D. 59, 769 N.W.2d 817.

Standing is “a party's right to make a legal claim or seek judicial enforcement of a duty or right.” *Lake Hendricks Imp. Ass'n v. Brookings Cty. Planning & Zoning Comm'n*, 2016 S.D. 48, ¶ 12, 882 N.W.2d 307, 312 (quoting *City of Rapid City v. Estes*, 2011 S.D. 75, ¶ 9 n. 6, 805 N.W.2d 714, 717 n. 6 (quoting Black's Law Dictionary 1442 (8th ed.2004))). “Determining lack of standing or lack of subject matter jurisdiction are separate arguments that require separate analyses.” *Estes*, 2011 S.D. 75, ¶ 9 n. 6, 805 N.W.2d at 717 n. 6. The three elements necessary to establish standing as an aggrieved person are satisfied here: (1) Petitioner R. Oyen suffered an injury in fact; (2) a causal connection exists between Petitioner R. Oyen's injury and County's wrongful conduct; and (3) Petitioner R. Oyen's injury will be redressed by a favorable decision. *See Cable v. Union County Board*, 2009 S.D. 59, ¶ 21, 769 N.W.2d at 825-826.

County argues that Petitioner R. Oyen is not a “person aggrieved,” and that there is no right to have the County perform road maintenance and snow removal, and thus there is no injury in fact. County challenges Petitioner R. Oyen's standing, claiming he suffered no unique injury not being imposed on all the Lawrence County taxpayers. County relies on *Cable*, but the facts are easily distinguishable. In *Cable*, this Court noted that the plaintiff merely claimed he might be injured by the construction of an oil refinery; that he feared worsening of health conditions and feared pollution would upset his lifestyle. *Cable*, 2009 S.D. 59, at ¶ 27, 769 N.W.2d at 827. This Court found that the plaintiff did not show any facts to support that he suffered harm different than what all taxpayers in Union County had in common. *Id.* at ¶ 33, 769 N.W.2d at 829. Here, in contrast, Petitioner R. Oyen is a homeowner on SRCR and has been since 2006. TT 166<sub>11-20</sub>. He represents the petitioners who respectfully requested the County to comply

with its duty to maintain the road as required by SDCL 31-12-6. TT 171<sup>17-23</sup>. Petitioner R. Oyen performs plowing on SRCR, the maintenance and plowing which should be done by the County. TT 162<sup>19-163</sup><sub>3</sub>. He uses his own equipment and fuel to perform what the County should do. There have been issues getting ambulances and emergency vehicles to SRCR. TT 170<sup>7-15</sup>. His is not merely a loss “different in amount” from other Lawrence County residents. His loss caused by County’s failure to perform its duty to maintain SRCR is personal and not shared in common with the public in general and taxpayers of Lawrence County as was the case in *Cable*. To argue otherwise ignores the facts and jurisprudence regarding a county’s duties to maintain its roads.

c) **Petitioner R. Oyen has a right to County road maintenance.**

The County next contends Petitioner R. Oyen did not suffer any injury because County had no duty to perform maintenance. Again, County is wrong. Pursuant to the 1930 right of way agreement, *Exhibit 2 pp 55-56*, the County accepted the road conditioned on SRCR being used for highway purposes. Thereafter, for at least six decades, it remained a roadway used for highway purposes. Pursuant to SDCL 31-3-1:

[w]henver any road shall have been used, worked, and kept in repair as a public highway continuously for twenty years, the same shall be deemed to have been legally located or dedicated to the public, and shall be and remain a public highway until changed or vacated in some manner provided by law.

South Dakota law mandates that each county shall “construct, repair, and maintain all secondary roads within the counties.” SDCL 31-1-5 and 31-12-26. In *Sorensen v. Sommervold*, the Court held that the general duties of a county to maintain roads are ministerial and that a county may be compelled to perform those duties. *Sorensen v. Sommervold*, 2005 S.D. 33, ¶ 9, 694 N.W.2d 266, 269.

This Court found that it is a county's *duty* to maintain its roads, and that it is a ministerial duty which is the proper subject of mandamus. *Matters v. Custer County*, 538 N.W.2d 533, 534 (S.D. 1995); *Willoughby v. Grim*, 1998 S.D. 68, ¶ 9, 581 N.W.2d 165, 168. The South Dakota Legislature enacted statutes dictating that counties *shall* maintain highways. SDCL 31-12-26. As such, it is beyond question that Petitioner R. Oyen suffered the denial of a claim of right by the County's refusal to provide SRCR maintenance.

Petitioner does not dispute that County has some discretion as to the manner in which roadways are maintained. But the County is not permitted to simply shirk its duty to maintain. Therefore, any argument County may raise that its maintenance of SRCR is discretionary or quasi-legislative must fail.

County also argues that Petitioner failed to utilize Lawrence County's ordinances to request to have the road placed on the County Highway System. County's argument fails because as a matter of law SRCR was already on the County Highway System, and County has a duty to maintain it. Petitioner is not required to apply to be placed on a system it is already a part of. Petitioner meets the first prong, injury in fact.

Second, County argues there is no causal connection between R. Oyen's injuries and County's conduct. The argument that County does not have a duty to maintain the road, is mistaken. As indicated above, the record reflects that Petitioner has suffered injury by County's failure to maintain SRCR. Those damages are directly related to and caused by County's failure to perform its duty to maintain the road, thereby causing Petitioner to sustain the particular loss of having to do the work to access his home, and sustaining the cost personally to do so. Petitioner clearly meets the second prong.

Petitioner sought a trial court ruling that County is responsible for maintenance of SRCR. As discussed, maintenance is County's duty despite County's mistaken position that the County transferred its duty to Forest Service. County's attempt to transfer the duty to Forest Service failed, and County remains responsible for the maintenance sought by Petitioner R. Oyen.

**V. Whether After Two Days of Trial, Judge Percy Correctly Found County Arbitrarily, Capriciously, and Contrary to the Evidence Denied the Petition for Service.**

County finally argues the trial court failed to recognize County's investigation before denying the Petition. To the contrary, before making her findings and conclusions, the Honorable Judge Percy sat for two days and evaluated the evidence and testimony brought before her. She heard about the County's shifting positions.

Evidence at trial established that the County did not apply any criteria in determining whether SRCR would be provided services as a secondary County road. As the Highway Superintendent testified after being presented with the Petition and Exhibit 2 with its supporting documents, "if you're on the map and the list...the County will provide services. If you're not on the list the answer is No." TT – A. Bonnema 338<sup>19</sup>-339<sup>6</sup>. The Highway Superintendent could not identify another road segment in Lawrence County, open to the public, with 40 housing structures for which the County does not provide service. TT – A. Bonnema 337<sup>19</sup>-338<sup>2</sup>. County knows of a road segment about .4 miles from SRCR – 2 tracks through the grass to an abandoned homestead – on the "list" and which the County maintains. TT – A. Bonnema 339<sup>7-12</sup>; *Exhibit 30*. County admits in contracts with the Forest Service that SRCR is on the County system, yet

professed here, in complete contradiction, that it believes it is the Forest Service's to maintain.

The arbitrariness of County's decision is further evident from the lack of any standard being applied. County does not know why roads are on its secondary road list, yet it refused the Petitioner's request to be maintained simply because it is not on the list. Despite evidence presented to County of the number of residences on SRCR and the fact that many make this their permanent home, County refused Petitioner's request for maintenance, while dead-end roads to no residence are on the "list" and continue to be maintained. County decided to deny SRCR maintenance, despite proof that SRCR is a main thoroughfare from U.S. Highway 85 to Rochford. Roads are on County's secondary road list that lead to abandoned sites, and yet they are maintained solely because they are on the secondary road list.

County's decision was based upon false information. The lower court recognized in its findings of fact that County failed to review the 1930 easement granting the roadway to the County or other evidence before it ultimately denied Petitioners service request. FOF 6. Although County denied the service request to SRCR because the Forest Service did not pay for it, County's positions are inconsistent in that it claims that it always believed it to be a Forest Service road, yet attempted to transfer the road easements to Forest Service in 1992, after six decades of treating it as an open, public County roadway. FOF 6, 8, 11. This matter is distinguishable from this Court's recent ruling in *Asper v. Nelson*, 2007 S.D. 29 (opinion filed 05/24/17). In *Asper*, this Court recognized that SDCL 31-13-1 imposes a duty on the township to repair and maintain the secondary roads within that township, and that the plaintiff had a right to the performance

of that duty. *Id.* ¶¶ 2, 12. However, because the Township proved it was unable to fund the repair and maintenance, the lower court did not abuse its discretion when it denied the writ of mandamus. *Id.* ¶¶ 12, 15. Here, in contrast, Lawrence County neither asserted nor produced evidence that it could not provide maintenance on SRCR.

County's decision was also not based on competent evidence. Minutes of the October 13, 2015, County Commission meeting are silent on the basis for the County's decision except that it would "honor the existing maintenance agreement with the Forest Service." *Exhibit 2B*. In *Black Hills Central Railroad Co. v. City of Hill City*, this Court reviewed a grant of writ of mandamus concerning that city's denial of approval of a plat. 2003 S.D. 152, 674 N.W.2d 31. This Court observed that the council's minutes failed to refer to subdivision regulations, which was the City's purported reason for its decision, nor did the evidence support that City actually considered the regulations in denying the plat. 2003 S.D. 152, ¶ 20, 674 N.W.2d at 36. In determining that Hill City was properly compelled by a writ of mandamus to approve the plat, this Court stated:

[T]he governing body...has an independent nondelegable duty to exercise its considerable judgment whether to approve or disapprove a proposed plat. This discretionary authority is, of course not unfettered...[W]here refusal to approve...is withheld arbitrarily and capriciously, or is based upon invalid grounds or grounds not warranted by law, the governing body may be compelled to approve...by mandamus.

*Id.* 2003 S.D. 152, ¶ 16, 674 N.W.2d at 35-36 (quoting *Lohman v. City of Aberdeen*, 246 N.W.2d 781, 785 (S.D. 1976)). Here, the lack of competent evidence to support the County's decision, coupled with the arbitrariness of it, all support the trial court's determination that County acted arbitrarily and capriciously. This stands in stark contrast

with this Court's decision in *Coyote Flats, L.L.C. v. Sanborn County Comm'n*, 1999 S.D.87, ¶ 16, 596 N.W.2d 347, 351-352 (noting the "near total absence of evidence in the record that would allow the circuit court to label the commission's findings as arbitrary and capricious"). Further, "the right to a writ of mandamus may turn on equitable considerations[.]" *Asper*, 2017 S.D. 29, ¶ 15 (quoting *United States v. Helvering*, 301 U.S.540, 543 (1937)). Equitable considerations here weigh heavily in favor of Petitioner's request for County maintenance and snow removal on SRCR.

The record is replete with examples of the arbitrariness, capriciousness and lack legal basis for County's denial. Judge Percy's findings are far from clearly erroneous.

### **CONCLUSION**

Petitioner respectfully urges this Honorable Court to reject County's arguments for reversal. County cannot divest itself of its statutory duties to maintain the County's roads absent strict adherence to the appropriate procedure, which it failed to do. The lower court did not err in determining that Forest Service is not an indispensable party. Petitioner Oyen has standing and a statutory right to appeal County's action in October 2015. Petitioner and Appellant respectfully request that the County's Appeal be denied and Judge Percy's Judgment, Findings and Conclusions and Writ of Mandamus be affirmed in all respects.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2017.

By: \_\_\_\_\_  
LONNIE R. BRAUN  
RICHARD P. TIESZEN  
Attorneys for Petitioner/Appellee  
4200 Beach Drive – Suite 1  
Rapid City, SD 57702  
605-348-7516



### **REQUEST FOR ORAL ARGUMENT**

R. Oyen respectfully requests an opportunity to present oral argument before this Court.

### **CERTIFICATE OF COMPLIANCE**

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Appellee's Brief* complies with the type volume limitation provided for in SDCL 15-26A-66. *Appellee's Brief* contains 9,401 words and 48,263 characters. I have relied on the word and character count of our word processing system used to prepare *Appellee's Brief*. The original *Appellee's Brief* and all copies are in compliance with this rule.

### **CERTIFICATE OF SERVICE**

I, Lonnie R. Braun, attorney for Petitioner/Appellee, do hereby certify that a true and correct copy of the within and foregoing *Appellee's Brief* was mailed by first-class mail, postage prepaid thereon, to the following:

John R. Frederickson  
Frederickson Law Office, PC  
P.O. Box 583  
Deadwood, SD 57732

Bruce Outka  
Lawrence County States Attorney  
90 Sherman Street  
Deadwood, SD 57732

by depositing the same in the United States Post Office at Rapid City, South Dakota, this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

---

LONNIE R. BRAUN

## **APPENDIX**

|  |                 |
|--|-----------------|
| <i>1. Findings of Fact and Conclusions of Law.....</i> | <i>App. 001</i> |
| <i>2. Judgment of Dismissal.....</i>                   | <i>App. 006</i> |
| <i>3. Petition.....</i>                                | <i>App. 007</i> |
| <i>4. September 8, 2015 letter and exhibits .....</i>  | <i>App. 022</i> |

STATE OF SOUTH DAKOTA     )  
  )SS.  
COUNTY OF LAWRENCE        )

IN CIRCUIT COURT  
  
FOURTH JUDICIAL CIRCUIT

**RAYMOND C. OYEN,**

Petitioner/Appellant,

-vs-

**LAWRENCE COUNTY COMMISSION,**

Respondent/Appellee.

Civ. No. 15-000361

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

A Petition requesting that Lawrence County acknowledge South Rapid Creek Road (SRCR) as a County Road and accept its duty to maintain and remove snow thereon was filed by fifty four landowners/taxpayers. The Lawrence County Commission denied the Petition. The landowners appealed. This matter came before the Court for trial de novo on October 17 and 18, 2016. The Court having considered the briefs and written submissions of the parties, the testimony of the witnesses and the exhibits introduced and the matters presented at trial and being fully advised on the matter, now enters the following.

**FINDINGS OF FACT**

1. Landowners along South Rapid Creek Road (SRCR) have sought a definitive answer from Lawrence County and the Forest Service since the 1970s regarding duty to maintain and removal of snow.
2. Petitioner filed petitions with the Lawrence County Commission seeking to have the County provide snow removal and maintenance to SRCR approximately 3.8 miles long which abuts Petitioners' properties and serves some 47 homes and cabins.
3. Petitioners (landowners) located a 1930 recorded easement and other written documentary evidence and presented it to the Lawrence County Commissioners requesting it be reviewed and asserted it was evidence that SRCR was owned by the County and the County had a responsibility to maintain SRCR.

<sup>1</sup>  
**APP. 001**

**FILED**  
**NOV 21 2016**  
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM  
4TH CIRCUIT CLERK OF COURT  
by \_\_\_\_\_

4. The County did not review the easement or other documentary evidence provided prior to tabling petitioners' request for services.
5. The Commission took up the petition on September 15, 2015, tabled it, and thereafter took the matter up again at its meeting on October 13, 2015. The Commission denied the petition, denying the request for any service to SRCR because the Forest Service did not pay for it.
6. The County failed to review the easement or other evidence before ultimately denying petitioners' request for services.
7. Since the 1970s, three subdivisions have been platted and approved by the Commission along SRCR. The first, Crooks Tower Retreat, contains 22 lots, and was approved and filed in 1976. Its plat indicates that SRCR is a "County Road." The second is Rawhauser Subdivision, approved by the Commission and filed in December of 1991. The Rawhauser Subdivision plat identifies SRCR as a "county and forest service road." The third, Aspen Heights Subdivision, for which the Commission approved the plat and filed in September 1996, indicates SRCR as "county/forest service road."
8. Lawrence County witnesses' testimony and defense throughout the trial was that they always believed it to be a Forest Service Road and not a County Road which is inconsistent with the documentary evidence produced in the recorded easements and the County's own commission minutes evidencing County's joint ownership and responsibility for SRCR.
9. Lawrence County witnesses' testimony and Defendant's defense that they believed SRCR to be a Forest Service Road and not a County Road is inconsistent with their attempt to transfer the road easements to the United States Forest Service without prior notice to the public affected by such attempt and is therefore unbelievable.
10. Agreements between Lawrence County and the Forest Service indicate both parties admit SRCR is on the County and Forest Service road systems, including an agreement dated May 12, 1983, in which the County acknowledges that "the county is vitally interested in providing and operating a road system to provide adequate vehicular access for residents and commercial enterprises for both intra and inter-county travel" and indicating the segment at issue here known as SRCR.
11. SRCR has been open to and used by the public as a public roadway since the 1930s.
12. County attempted to transfer its duty to maintain SRCR to the U.S. Forest Service on or about December 30, 1992.
13. Minutes of a regular meeting of the Lawrence County Commission held on December 30, 1992, reflect a motion was made to "follow the recommendation of the Highway Superintendent and authorize the Chairman to sign a transfer of existing easements."

14. There is no credible evidence of any prior public notice of the Commission's intention to take action to transfer existing road easements, nor of a "public hearing" taking place regarding such an effort to transfer an existing road easement.
15. SRCR is a Lawrence County Road and eligible for maintenance and snow removal.
16. The evidence is conclusive that Lawrence County held title to the easements through all private land adjoining SRCR from 1930 to at least 1992 and that the road was utilized by the traveling public.
17. County's decision to deny the petition was based on false information and lack of relevant and competent evidence and the County's refusal to review documentary evidence of ownership by the County was therefore arbitrary and capricious.
18. Any Finding of Fact identified as a Conclusion of Law is hereby incorporated as a Finding of Fact.

#### **CONCLUSIONS OF LAW**

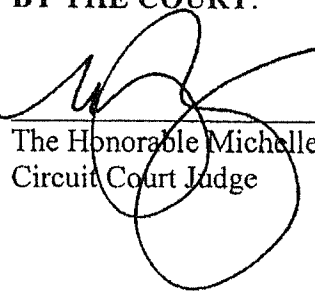
1. This Court has jurisdiction over the subject matter and parties in the matter before it.
2. Lawrence County accepted the easements and by its own approval of the Plats agreed to hold the property in trust for the benefit of the Petitioners and other members of the Public and therefore has a fiduciary obligation to petitioners and other members of the Public, which responsibility cannot simply be transferred to the United States Forest Service without ensuring such obligations and responsibilities are protected and assured pursuant to SDCL 11-3-12, *Tinaglia v. Ittzes*, 257 N.W.2d 724 (S.D. 1977) citing *Larson v. Chicago M and St P Ry Co.*, 103 N.W. 35 (S.D. 1905).
3. "Each board of county commissioners and county highway superintendent of highways in organized counties shall construct repair and maintain all secondary roads within the counties." SDCL 31-12-26.
4. Lawrence County has a duty to maintain SRCR.
5. Once a highway is established, it "shall continue as established until changed or vacated in some manner provided by law." SDCL 31-1-3.
6. Lawrence County itself has identified SRCR as part of its own County highway system in contracts it entered with the Forest Service.
7. Lawrence County has the duty to maintain and remove snow on SRCR.
8. Lawrence County's failure to even evaluate evidence provided to it by Petitioners is an act of arbitrary capricious denial of the Petitioners' request.

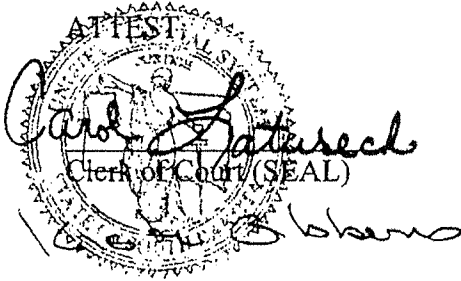
9. Pursuant to SDCL 31-1-5 SRCR is either a primary or secondary road within the territorial boundaries of Lawrence County. SRCR is entitled to snow removal and maintenance irrespective of whether it is a primary or secondary road by virtue of Lawrence County having heretofore determined it provides snow removal for both. SDCL 31-12-26 and SDCL 34-5-4.
10. A specific procedure is set forth in SDCL 31-3-6 through 31-3-9 for vacating or changing a county secondary road. SDCL 31-3-7 requires that a board shall, "after giving notice of a public hearing, hold a public hearing called for the purpose of receiving public testimony about the action proposed...the board shall give notice of the public hearing by publication in the official newspaper...once each week for at least two consecutive weeks."
11. Because a specific process is established for transferring the existing easements, that procedure must be followed.
12. Lawrence County Commission failed to adhere to the procedural requirements of transferring an existing easement, which was a procedural and substantive defect that renders its apparent attempt to transfer the duty to maintain and provide snow removal on SRCR ineffective.
13. Lawrence County's attempt to transfer its duty was defective and failed to transfer its duty to maintain SRCR to the Forest Service.
14. Because Lawrence County failed to transfer its duty to maintain SRCR to the Forest Service, the Forest Service is not an indispensable party to this action.
15. Lawrence County has a duty to maintain and remove snow on SRCR.
16. Lawrence County has a duty to include SRCR on either its primary or secondary road list.
17. Lawrence County has a duty to count traffic on SRCR to determine whether SRCR is a primary or secondary road.
18. Petitioners are entitled to a writ of mandamus. Lawrence County shall designate SRCR as a Lawrence County primary or secondary road and maintain and remove snow from it accordingly.

19. Any Conclusion of Law identified as Finding of Fact is hereby incorporated as a Conclusion of Law.

Dated this 21 day of November, 2016.

BY THE COURT:

  
The Honorable Michelle K. Palmer Percy  
Circuit Court Judge



**FILED**

NOV 21 2016

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM  
4TH CIRCUIT CLERK OF COURT

By \_\_\_\_\_

STATE OF SOUTH DAKOTA )  
 )SS.  
COUNTY OF LAWRENCE )

IN CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT

RAYMOND C. OYEN,  
Petitioner/Appellant,  
-vs-  
LAWRENCE COUNTY COMMISSION,  
Respondent/Appellee.

Civ. No. 15-000361

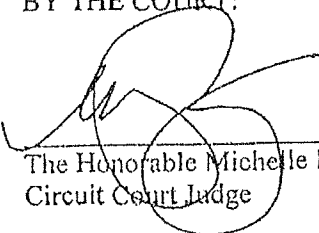
**JUDGMENT**

Petitioners/Appellants petitioned Lawrence County to provide maintenance and snow removal on the approximately 3.8 miles of South Rapid Creek Road, FS 231, between Highway 85 and Boles Canyon Road, FS117 (SRCR). This is an appeal of Lawrence County's denial of any responsibility or service on SRCR. The issues were tried to the Court on October 17 and 18, 2016. The Court issued its Findings of Fact and Conclusions of Law on November 21, 2016 finding Lawrence County's denial of responsibility and duty to maintain is arbitrary and capricious. Based on the evidence, and this Court's Findings of Fact and Conclusions of Law, now therefore:

IT IS ORDERED AND ADJUDGED that a writ of mandamus is hereby entered. Lawrence County shall place SRCR on either its primary or secondary road list and provide maintenance and snow removal accordingly.

IT IS FURTHER ORDERED AND ADJUDGED that Petitioners bond shall be released and Petitioners recover their costs incurred in the amount of \$\_\_\_\_\_.

BY THE COURT:


  
The Honorable Michelle K. Palmer-Percy  
Circuit Court Judge

**FILED**

NOV 28 2016

NOTA UNIFIED JUDICIAL SYSTEM  
CIRCUIT CLERK OF COURT  
by \_\_\_\_\_

**APP. 006**





Petition

[e-mail:lbrown@th3law.com]

August 14, 2015

Terry Weisenberg  
Chairman of the Lawrence County Commission  
90 Sherman St  
Deadwood, SD 57732

Allan Bonnema  
Lawrence County Highway Superintendent  
PO Box 514  
Deadwood, SD 57732

Bruce Outka  
Lawrence County States Attorney  
90 Sherman St  
Deadwood, SD 57732

Gentlemen:

Please find attached a petition by Lawrence County landowners who own real property along South Rapid Creek Road between Highway 85 and Forest Service 117. As you will see, there are now 47 structures generating tax revenue for Lawrence County. At least five of the structures are year round homes, with the balance being cabins with various uses. With the extent of the development in this area, the landowners respectively request that their only access road be maintained and plowed by Lawrence County.

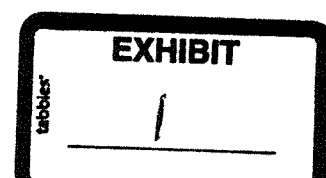
We look forward to discussing this issue with the Commission at its earliest convenience.

Sincerely yours,

Lonnie R. Braun  
Owner  
10281 S. Rapid Creek Road

LRB:wlp

**APP. 007**



[e-mail: lrb@rushmore.com]

August 18, 2015

Terry Weisenberg ✓  
Chairman of the Lawrence County Commission  
90 Sherman St  
Deadwood, SD 57732

Allan Bonnema  
Lawrence County Highway Superintendent  
PO Box 514  
Deadwood, SD 57732

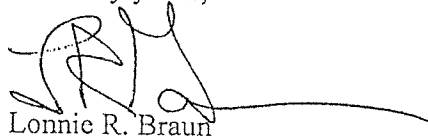
Bruce Outka  
Lawrence County States Attorney  
90 Sherman St  
Deadwood, SD 57732

Gentlemen:

Please find attached a petition by Lawrence County landowners who own real property along South Rapid Creek Road between Highway 85 and Forest Service 117. As you will see, there are now 47 structures generating tax revenue for Lawrence County. At least five of the structures are year round homes, with the balance being cabins with various uses. With the extent of the development in this area, the landowners respectively request that their only access road be maintained and plowed by Lawrence County.

We look forward to discussing this issue with the Commission at its earliest convenience.

Sincerely yours,



Lonnie R. Braun  
Owner  
10281 S. Rapid Creek Road

Contact information:

Lonnie Braun  
4736 Dornoch Ct  
Rapid City, SD 57702  
[lrb@rushmore.com](mailto:lrb@rushmore.com)  
cell – 605-391-5436  
office 605-348-7516

LRB:wlp

## PETITION

*Landowners on South Rapid Creek Road from Hwy. 85 to FS 117*

### *Need Road Maintenance*

Lawrence County has permitted at least 47 seasonal and year round structures in the approximately 3.85 miles between Hwy. 85 and Forest Services 117. At least ten of those are year round residences. Many of the others exist to provide winter access to the snowmobile trails maintained by the State of South Dakota. Three new residences are under construction and one is undergoing a major remodel which will increase the current assessed value of these properties to more than \$6.5 million. Records show that the County collects in excess of \$30,000 annually from its mill levy and the schools collect much more.

Lawrence County is collecting significant property taxes from the property owners and currently provides no services to the residents. In view of the extent of development, the significant year-round traffic and the need for resident and emergency vehicle traffic the undersigned property owners hereby petition Lawrence County to provide maintenance and snow removal for South Rapid Creek Road from Highway 85 to FS 117.

| NAME               | S. RAPID CREEK ADDRESS     | SIGNATURE        | DATE    |
|--------------------|----------------------------|------------------|---------|
| Craig Anderson     | 22156 Retreat Rd           | Craig Anderson   | 7/31/15 |
| Mary Anderson      | 22156 Retreat Rd           | Mary Anderson    | 7/31/15 |
| Darovan Williamson | 10419 South Rapid Creek Rd | Darovan W. Wom   | 8/1/15  |
| Jennifer Gruber    | 22137 Retreat Rd.          | Jennifer Gruber  | 8/1/15  |
| Jeery Krambeck     | 10343 South Rapid Creek Rd | Jeery A Krambeck | 8/1/15  |
| Russell Bandemer   | 10319 Rapid Creek Rd       | Russell Bandemer | 8/2/15  |
| Harmon Bandemer    | 10319 Rapid Creek Rd       | Harmon Bandemer  | 8/2/15  |
| Dorja Deblert      | 10309 S Rapid Creek Rd     | Dorja Deblert    | 8/3/15  |

## PETITION

*Landowners on South Rapid Creek Road from Hwy. 85 to FS 117*

*Need Road Maintenance*

Lawrence County has permitted at least 47 seasonal and year round structures in the approximately 3.85 miles between Hwy. 85 and Forest Services 117. At least ten of those are year round residences. Many of the others exist to provide winter access to the snowmobile trails maintained by the State of South Dakota. Three new residences are under construction and one is undergoing a major remodel which will increase the current assessed value of these properties to more than \$6.5 million. Records show that the County collects in excess of \$30,000 annually from its mill levy and the schools collect much more.

Lawrence County is collecting significant property taxes from the property owners and currently provides no services to the residents. In view of the extent of development, the significant year-round traffic and the need for resident and emergency vehicle traffic the undersigned property owners hereby petition Lawrence County to provide maintenance and snow removal for South Rapid Creek Road from Highway 85 to FS 117.

| NAME               | S. RAPID CREEK ADDRESS                             | SIGNATURE          | DATE   |
|--------------------|--|--------------------|--------|
| Helene E. Jones    | 22260 Scenic Hills Place                           | Helene E Jones     | 8/2/15 |
| Ray D. Jones       | 22260 Scenic Hills Place                           | Ray D Jones        | 8/2/15 |
| Lance Hertel       | 10433 Rapid Creek Rd                               | Lance Hertel       | 8/2/15 |
| Stacy Imus         | 22244 <del>Rapid Creek Rd</del> Scenic Hills Place | Stacy Imus         | 8/2/15 |
| Randy M. Alterud   | 10390 S. Rapid Creek Rd                            | Randy M Alterud    | 8/2/15 |
| Barry J. Schulz    | 10403 S. Rapid Creek Rd.                           | Barry J Schulz     | 8/2/15 |
| Roxanne R. Schulz  | 10403 S. Rapid Creek Rd                            | Roxanne R Schulz   | 8/2/15 |
| Colleen Williamson | 10425 S. Rapid Creek Rd                            | Colleen Williamson | 8/3/15 |

## PETITION

### *Landowners on South Rapid Creek Road from Hwy. 85 to FS 117*

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| NAME              | S. RAPID CREEK ADDRESS            | SIGNATURE         | DATE    |
|-------------------|-----------------------------------|-------------------|---------|
| Cindy Mattern     | 10390 S Rapid Creek Rd            | Cindy Mattern     | 7/30/15 |
| Cindy BERNARD     | 10289 S Rapid Creek Rd            | Cindy Bernard     | 7/31/15 |
| John E. Palmquist | 10307 S. Rapid Cr. Rd.<br>Box 503 | John E. Palmquist | 8-1-15  |
| Yvonne Fenenga    | 22221 Meadow View Pl              | Yvonne Fenenga    | 8-1-15  |
| Gary Fenenga      | 22221 Meadow View Pl              | Gary Fenenga      | 8-1-15  |
| Lori Thompson     | 10292 S. Rapid Creek Rd           | Lori Thompson     | 8-1-15  |
| Lonnie Brown      | 10281 S. Rapid Creek Rd           | Lonnie Brown      | 8-1-15  |
|                   |                                   |                   |         |

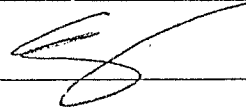
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*Landowners on South Rapid Creek Road from Hwy. 85 to FS 117*

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| NAME        | S. RAPID CREEK ADDRESS | SIGNATURE   | DATE   |
|-------------|------------------------|---|--------|
| K. Zindl 25 | 22143 Retreat Lane     |  | 8-8-15 |
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## PETITION

*Landowners on South Rapid Creek Road from Hwy. 85 to FS 117*

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| NAME               | S. RAPID CREEK ADDRESS   | SIGNATURE        | DATE     |
|--------------------|--------------------------|------------------|----------|
| Dave Gebhart       | 10309 S. Rapid Creek Rd. | Dave Gebhart     | 8-3-15   |
| Brian Block        | 22152 Retreat Rd         | Brian Block      | 8-3-15   |
| William J Locken   | 22151 Retreat Road       | William Locken   | 8-3-15   |
| PATRICIA A. LOCKEN | 22151 Retreat Road       | Patricia Locken  | 8-3-15   |
| Brenda L. Block    | 22152 Retreat Rd         | Brenda Block     | 8-3-15   |
| Jelly Blockway     | 22147 Retreat Rd         | Jelly Blockway   | 8-5-2015 |
| RAYMOND OYEN       | 10301 S. RAPID CREEK RD  | Raymond Oyen     | 8/5/2015 |
| Patricia E. Oyen   | 10301 S. Rapid Creek Rd  | Patricia E. Oyen | 8/5/2015 |

PETITION

*Landowners on South Rapid Creek Road from Hwy. 85 to FS 117*

*Need Road Maintenance*

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| NAME            | S. RAPID CREEK ADDRESS   | SIGNATURE       | DATE   |
|-----------------|--------------------------|-----------------|--------|
| Beverly Siefert | 22270 Scenic Hills Place | Beverly Siefert | 8/4/15 |
| Doug Clark      | 22271 Scenic Hills       | Doug Clark      | 8-8-15 |
| Leanne H. Clark | 22271 Scenic Hills Place | Leanne H. Clark | 8-8-15 |
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| NAME         | S. RAPID CREEK ADDRESS | SIGNATURE    | DATE   |
|--------------|------------------------|--------------|--------|
| Deb Bisgaard | 22231 Scenic Hills Pl  | Deb Bisgaard | 8/8/15 |
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| NAME           | S. RAPID CREEK ADDRESS | SIGNATURE   | DATE   |
|----------------|------------------------|-------------|--------|
| STEVE BISGAARD | 22231 Scenic Hills Pl. | [Signature] | 8/2/15 |
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| NAME               | S. RAPID CREEK ADDRESS                                     | SIGNATURE          | DATE      |
|--------------------|--|--------------------|-----------|
| Elizabeth Strong   | 10300 S. Rapid Creek                                       | Elizabeth Strong   | 8-5-2015  |
| Clarence Mashier   | 22137 Retreat Rd   | Clarence Mashier   | 8-8-2015  |
| Kathy A Stewart    | 10324 S Rapid Creek<br>PO Box 893 Leadss                   | K Stewart          | 8-9-2015  |
| Dorothy A. VINCENT | 10373 South Rapid Creek Rd<br>PO 898 Lead SD 57754         | Dorothy A. Vincent | 10 Aug 15 |
| Gary Vincent       | 10373 S. RAPID CR RD<br>PO 898 <sup>th</sup> Lead SD 57754 | Gary Vincent       | 10 Aug 15 |
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| NAME           | S. RAPID CREEK ADDRESS | SIGNATURE      | DATE     |
|----------------|------------------------|----------------|----------|
| Jerry Afdahl   | 10407                  | Jerry Afdahl   | 08/04/15 |
| Loretta Afdahl | 10407                  | Loretta Afdahl | 8/4/15   |
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| NAME                 | S. RAPID CREEK ADDRESS        | SIGNATURE            | DATE          |
|----------------------|-------------------------------|----------------------|---------------|
| <i>Cevin C. Imus</i> | <i>22244 Scenic Hills Pl.</i> | <i>Cevin C. Imus</i> | <i>8/3/15</i> |
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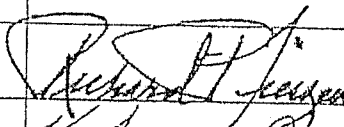
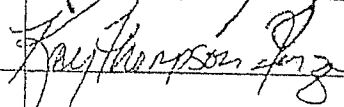
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Lawrence County is collecting property taxes from the 47 units and currently provides no services to the residents. With the extent of development, the undersigned property owners petition Lawrence County to provide maintenance and snow removal for South Rapid Creek Road from Highway 85 to FS 117.

| NAME                 | S. RAPID CREEK ADDRESS     | SIGNATURE  | DATE    |
|----------------------|----------------------------|--|---------|
| RICHARD TIESZEN      | 10327 So. Rapid Creek Road |  | 8/17/15 |
| Kay Thompson-Tieszen | 10327 S. Rapid Creek Road  |  | 8/17/15 |
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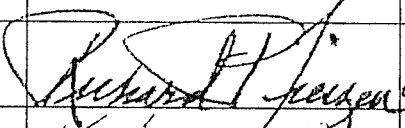
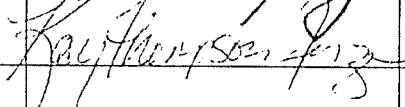
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|----------------------|----------------------------|--|-----------|
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| Kay Thompson-Tieszen | 10327 S Rapid Creek Road   |  | 8/17/15   |
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050  
TIMOTHY L. THOMAS  
LICENSED IN SD & WY

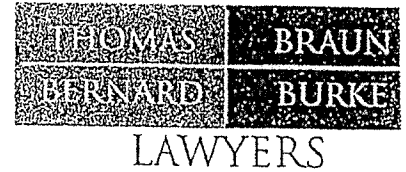
NIE R. BRAUN  
ED IN SD & NE

GREGORY J. BERNARD  
LICENSED IN SD

JOHN W. BURKE  
LICENSED IN SD, MN & WY

CATHERINE L.Z. CHICOINE  
LICENSED IN SD

[e-mail: lbrown@tb3law.com]



September 8, 2015

Terry Weisenberg  
Chairman of the Lawrence County Commission  
90 Sherman Street  
Deadwood, SD 57732

Allan Bonnema  
Lawrence County Highway Superintendent  
PO Box 514  
Deadwood, SD 57732

Bruce Outka  
Lawrence County States Attorney  
90 Sherman Street  
Deadwood, SD 57732

RECEIVED  
SEP 21 2015  
TIESZEN LAW OFFICE PROF, LLC

RE: South Rapid Creek Road from Hwy. 85 to FS 117

Dear Gentlemen:

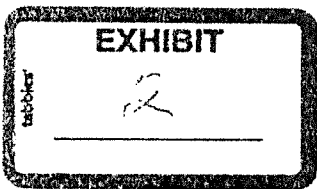
Thank you for placing our petition on the agenda so quickly. While we were disappointed to have our request tabled without a traffic count or detailed discussion, I understand that you wanted additional information. Hopefully, we can satisfy you so that we can have a full discussion of the County's responsibility to South Rapid Creek Road between Highway 85 and FS 117.

To assist this discussion I enclose copies of the following:

- 1) Easement granted to Lawrence County by Miners and Merchants Bank filed on October 13, 1930. (The number 246 appears on a full sized copy of this document. I wrote it on this letter sized copy.)
- 2) 1976 County approved plat of Crooks Tower Retreat. My dad purchased Lots 21 and 22. The road is described as "Existing County Road and Forest Service Road #231." The road right of way is described as "County Road".
- 3) A letter from the District Ranger Gary McCoy to Edward Braun (my dad) dated August 13, 1983 and a map he attached showing the road in question to be Lawrence County. You will see in number 1 that the Forest Service position is that the road between Hwy. 85 and FS 117 is Lawrence County's jurisdiction. While he indicates that the easements owned by the County may be transferred to the Forest Service, I have

APP. 022

050



4200 BEACH DRIVE  
SUITE 1  
RAPID CITY, SD 57702

305.348.7516  
866.589.8265  
FAX: 605.348.5852

WWW.TB3LAW.COM



Page 2

seen no document actually making that transfer. Ranger McCoy writes in the dates each of the easements to the County were granted.

- 4) Project Agreement between the Forest Service and the Lawrence County Commissioners obtained in 2005. This was represented to be a current agreement at the time. The Agreement specifically acknowledges:
  - a) It concerns "roads that are part of both Forest development and County Road system..."
  - b) "... it is desirous for the County and Forest Service to cooperate for the purpose of maintaining those roads..."
  - c) "...the safe passage of area residents, forest visitors and commercial users are of utmost concern..."

In that Agreement, Lawrence County is the designated maintaining party. South Rapid Creek Road is included in the Agreement. See Exhibit B to Exhibit 3, p. 2.

- 5) 2014 Secondary Road Review Recommendations;

The County Highway Superintendent presented a list of roads which deserved redesignation in 2014 to the County Commission. Preceding his recommendations, the superintendent indicated that "Secondary Roads do receive a lower level of service..." The one exception to the level of service is the snow removal. All Secondary Roads receive the same level of snow plowing as do the Primary Roads in the County. What followed was a list of 25 roads being removed from the system for lack of traffic and three being upgraded from Secondary to Primary, again based on traffic.

- 6) A copy of Mr. Bonnema's memo of August 31, 2015, presented at the meeting;
- 7) Copy of the Lead Daily Call article from 06/21/2015 concerning the Crow Creek Road Petition; and
- 8) Petitions containing eight more signatures of property owners on South Rapid Creek Road, bringing the current signature total to 56 owners.

Page 3

### THE STATUTES AND CASES

The County's responsibility is clearly stated in SDCL 31-12-6.

The county highway system shall be permanently constructed and improved, and shall be maintained and repaired at the expense of the whole county...

SDCL 31-12-24 provides that the responsibility for "the actual direction and supervision of all maintenance work" rests with the county highway superintendent. SDCL 31-12-5 also plainly states that the construction, improvement, maintenance and repair of the county system...shall be under the supervision of the county highway superintendent.

SDCL 34-5-3 specifically states that the county snow removal and special emergency reserve fund is available for "(1) snow removal operations on county roads." SDCL 34-5-4 provides that the county commissioners and highway superintendent "shall exercise full discretion with decisions relative" to snow removal.

While that statute would seem to permit Lawrence County to simply decide for no good reason not to plow a road, it has not been so interpreted. The South Dakota Supreme Court held that a county "could be liable for allowing a dangerous condition arising from snow and ice, to continue for an unreasonable time." *Bland v. Davison County*, 507 N.W.2d 80, \_\_\_\_\_ (S.D. 1993). It was stated more clearly in *Bland II* quoting *Bland I*, "We cannot infer from the statutes that County has permission to idly stand by while hazards knowingly exist on its roads." 566 N.W.2d 452, \_\_\_\_\_, (1997). The same Court also recognized "County was not obligated to remove all snow and ice on its roads, and the question was for the jury whether County provided ordinary and reasonable maintenance."

Even assuming the Commission has broad discretion, which it does, it is not unfettered. A decision to ignore a known hazard on the County road system which "ordinary and reasonable maintenance." *Bland II* would remedy and that causes injury or damage exposes the County to potential liability.

### DISCUSSION

The County has approved three subdivisions in the road segment in question since the 1970's. There are now 47 structures which the County is collecting taxes for. The County is on notice that it has 10 structures which are permanent residences in the road segment. At least twice, in recent years, medical emergencies have arisen in the winter which placed lives at risk.

As the Commission is aware, you were confronted with a somewhat similar situation in June, 2015. See Lawrence County Meeting Minutes of June 16, 2015, under topic Crow Creek Road. According to the Lead Daily Call account, a petition with five signatures was presented requesting additional maintenance. See Exhibit 6, Lead Daily Call 06/21/2015. Those five residents asked for additional maintenance on 1.25 miles of road on which "four families...live...full time" and "four cabins above the end...of the road...use [it] frequently." Lead Daily Call 06/21/2015. The Highway Commissioner is quoted as saying "We've bladed it three times this spring and plow snow on it..." Lead Daily Call 06/20/2015. Interestingly, the cost estimate from the Highway Superintendent at the September 1 hearing of our petition for gravel for 3.85 miles was \$198,623.50. See Exhibit 5. The estimate for the 1.25 miles in June was reported as \$35,000.00.

Even though I point out this difference, the true fact is we did not petition the county to do a four inch gravel surface to its road. We asked for some maintenance and winter plowing. There is an area just off Hwy. 85 that has so many potholes they are almost impossible to miss.

The question was asked whether we bought and developed land knowing that it would not be maintained. The answer is no. My dad obtained his building permit in 1978 as did Petitioner Locken. In that year the road was completely surfaced, graveled, and was a very nice county road. We had no reason to believe that the County would fail to maintain what was then a newly refinished county road. We did note the Pioneer Time coverage of our request. Our only disagreement with the article was its statement that we requested a \$200,000 resurface. We did not. Mr. Bonnema calculated that number, we only requested maintenance for a reasonable surface and winter snow removal.

Another issue raised was taxes. I frankly did not understand the Auditor's statements that a vote was needed from all the county residents because granting our petition would raise taxes \$8.00 for every taxpayer in Lawrence County. I assume that was based on the Highway Superintendent's estimate provided to Mr. Outka for the almost \$200,000.00 in road reconstruction. As I read Mr. Bonnema's memo, it appears that his position

Page 5

is that this road is not a Lawrence County Road. ("I didn't have much time to do [sic] look at the condition of this road and what it would take to bring it up to some kind of standard that would be acceptable for us to take this road over as a Lawrence County Highway.") See Exhibit 5. It appears that since the 1930's it is a Lawrence County road, that it was dramatically improved in 1978, and the County has simply chosen to neglect it while over the decades it has approved three subdivisions, with 47 structures with 10 being utilized as year round residents.

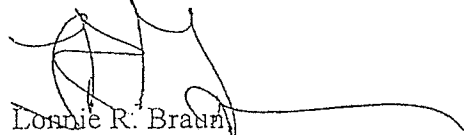
Please, it's time to resolve this issue. The residents have been paying taxes, some of us for decades and have received no services. Those of us who do not use our structure as a primary home even pay a premium for our bit of heaven since we don't get the primary residence deduction. At a minimum, we are entitled to get officially resolved that this is a Lawrence County road. The fact that the County contracts with the Forest Service to allow its traffic, including log trucks, to travel the road certainly doesn't eliminate the County's responsibility for its road.

Again, thanks to the Commission and staff for their work on this matter. On behalf of the property owners on South Rapid Creek Road between Hwy. 85 and FS 117, we respectfully request:

- 1) Bring this issue off the table, it needs to be resolved;
- 2) Acknowledge that the road is on the Lawrence County highway system;
- 3) Provide routine maintenance for this road; and
- 4) Provide snow removal, as the County does for every other road on its system.

Thank you for your ongoing attention.

Sincerely,

  
Lonnie R. Braun  
Owner 102881 S. Rapid Creek Road

LRB/rma  
Enclosures

#174665 ✓  
 AGREEMENT FOR  
 RIGHT OF WAY.

MINERS & MERCHANT'S SAVINGS  
 BANK, a corporation.

TO

LAWRENCE COUNTY, a  
 municipal corporation.

Filed for record this  
 13th day of October  
 1930 at 3:15 o'clock P.M.

Wm. A. Romer  
 Register of Deeds.

and,

WHEREAS, for the considerations hereinafter named, the party of the first part has agreed to grant to the party of the second part, a right of way, over said property.

NOW THIS INDENTURE WITNESSETH: That for valuable and lawful considerations and the sum of One Dollar (\$1.00) paid by the party of the second part to the party of the first part, receipt of which is hereby acknowledged, the party of the first part hereby grants unto the party of the second part, its heirs and assigns, free and uninterrupted use, liberty and privilege of a right of way of the customary width, for highway purposes, to follow the abandoned railroad grade of the old McLaughlin Tie and Timber Company, which is situated upon the aforesaid described real property, to carry with it all of the attendant burdens and easements of a public highway.

IN WITNESS WHEREOF, we have hereunto set our hands and signatures the day and year first above mentioned.

MINER'S & MERCHANTS SAVINGS BANK, LEAD, S.D.

V. A. Lussier,  
 a corporation,

By \_\_\_\_\_  
 President.

Attest:

J. A. Bertolero,  
 Secretary of Miner's &  
 Merchant's Savings Bank,  
 a corporation.

(SEAL)

LAWRENCE COUNTY, SOUTH DAKOTA,  
 a municipal corporation,

By W. R. Burchett  
 Chairman of Board of County  
 Commissioners, Lawrence  
 County, South Dakota.

Attest: Fred Harris  
 County Auditor.

(SEAL)

EXHIBIT

APP. 27

1

055

STATE OF SOUTH DAKOTA, )  
County of Lawrence ) SS.

On this 11th day of September, A.D. 1930, before me, James L. Curran, a Notary Public in and for said County and State, personally appeared, V.A. Lussier and J.A. Bertolero, known to me to be the President and Secretary, respectively, of the Miner's & Merchant's Savings Bank, a corporation, that is described in, and that executed the within instrument, and acknowledged to me that they executed the same.

James L. Curran  
Notary Public.

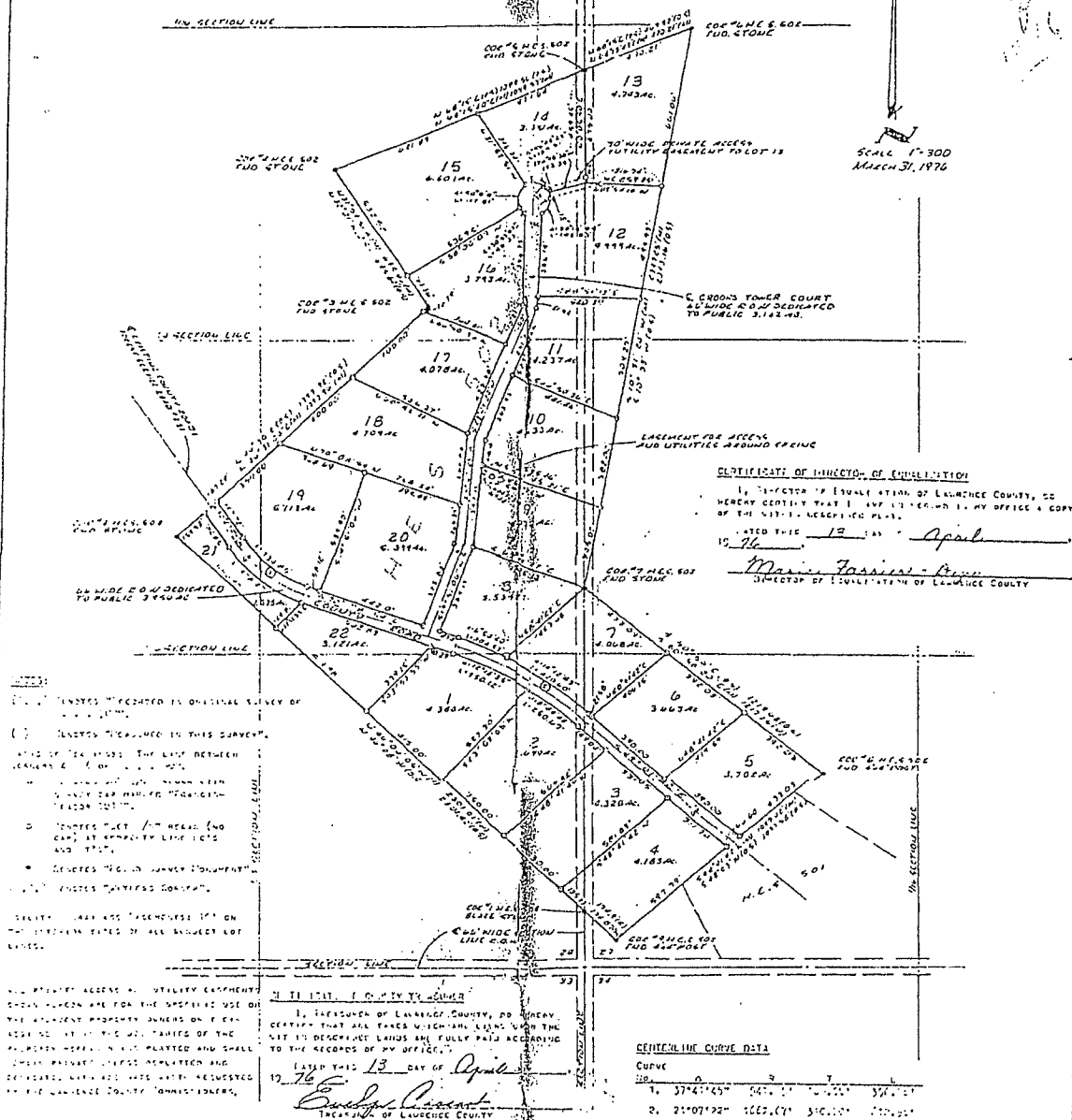
(SEAL)

STATE OF SOUTH DAKOTA, )  
County of Lawrence ) SS.

On this 5th day of August, A.D. 1930, before me, Theresa Colman, a Notary Public in and for said County and State, personally appeared, W.R. Burchett and Fred Harris, known to me to be the Chairman of the Board of County Commissioners of Lawrence County, South Dakota, and the Auditor of said County and State, respectively, of the municipal corporation, that is described in and that executed the within instrument, and acknowledged to me that they executed the same.

Theresa Colman  
Notary Public.

(SEAL)



THE COUNTY AGENTS & SURVEYOR CERTIFICATE  
THAT THERE ARE FOR THE SPECIFIED USE 40  
OF THE FOREGOING PROPERTY OWNERS OR RE-  
SIDENTS OF THE CITY & VILLAGES OF THE  
COUNTY, IN THE PLANTED AND SMALL  
CROWN PLANTS, THESE INFORMATION AND  
CERTIFICATE, WITH ALL DATA HEREIN REQUESTED  
BY THE LANDS AND SURVEYOR, COMMISSIONERS,

CENTRAL LINE CURVE DATA

| Curve | n         | Δ        | T       | L        |
|-------|-----------|----------|---------|----------|
| 1.    | 37°41'45" | 547.11'  | 100.00' | 396.22'  |
| 2.    | 21°07'22" | 1662.67' | 336.10' | 1290.47' |

STATE OF TEXAS  
COUNTY OF TARRANT  
S.E.  
We, GERALD M. RALSTON, J.C. SMITH and L.W. SMITHSON, of the Southern Bell Company, do hereby certify that the said Southern Bell Company is the owner of the land shown and described hereon, that we did at said date and do hereby approve the survey and within plat of said land and in full belief of Southern Bell Company.

Any land shown on the within plat as designated to public use or as is hereby designated to public use and public utility use as set forth herein, but such designation shall not be construed to be a dedication of a fee of said land.

IN WITNESS WHEREOF, WE HAVE HEREUNTO SET OUR HAND AND SEAL.  
OWNER: STANLEY TELEPHONE CO. E. D. Hirsch  
PRES: [Signature]  
[Signature] (Name of Officer)

[illegible]

BEFORE MEETINGS COMMENCING EARLY  
TWO OF THE THREE  
NUMBER OF LAWRENCE 645.

I, CLIFFORD L. LAWRENCE COUNTY, DO HEREBY CERTIFY THAT AT AN OFFICIAL MEETING, HELD  
ON March 14, 1976, THE COUNTY COMMISSIONERS BY RESOLUTION DID  
APPROVE THE PLAN AS SHOWN HEREIN.

Clifford L. Lawrence  
Lawrence County Union

APP. 029  
 (Rec'd. 1) 76  
 (Rosenberg)

EXHIBIT

2

UNITED STATES DEPARTMENT OF AGRICULTURE  
FOREST SERVICE  
Spearfish Ranger District  
Spearfish, SD 57783

7710  
August 13, 1983



Mr. Edward F. Braun  
708 Berry Street  
Lead, SD 57754

Dear Mr. Braun:

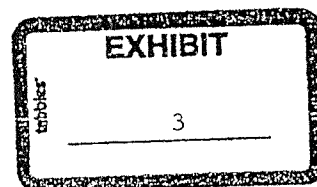
The following are the answers to your questions as per your letter of 8/10/82:

1. Ownership of FDR231. This road is on both the Forest Service and county road systems. It is included in a road cooperative agreement with Lawrence County signed in September of 1978. This agreement lists the first 3.6 miles of FDR231 from Highway 85 to FDR117 as county jurisdiction with the Forest Service responsible for maintenance and the county responsible for structures and signing. The remainder of FDR231 is Forest Service jurisdiction and maintenance. Current right-of-way ownership is shown on the attached map. The Forest Service and Lawrence County are in the process of updating the 1978 agreement. I expect that the county owned rights-of-way will be deeded to the Forest Service and we will accept total jurisdiction and maintenance on the road. I expect the agreement to be updated by the end of 1982.

2. Short term plans for road. We have one current timber sale and two proposed timber sales which will use parts or all of FDR231 for haul routes. Should any of the timber purchasers elect to winter log in the area, they will be responsible for plowing FDR231. If no winter logging occurs, then the road will not be plowed. If the road is plowed, then it would be closed to snowmobile traffic. If not plowed, it will be open to snowmobiles.

I cannot tell you the plans for winter logging or the snowmobile trails for the winter of 82-83 at this time. We will decide on the winter sports trail in late September. I will send you a copy of the trail system at that time.

APP. 030



6200-11 (1/69)

058



7710  
August 13, 1982  
Page 2

Long term plans for FDR231. In approximately three to five years we plan to reconstruct and gravel about three miles of 231 from about FDR117 east. The entire road will continue to serve as access for a variety of resource management needs. Unless there is winter logging in the area, I doubt that the road will be plowed in winter.

Your concerns seem to center around year long wheeled vehicle access to your cabin. Unless the road is plowed, you will not have winter access due to snow depths. If you wish to plow the road, you must have my approval. You would be required to meet the same requirements as any other person plowing snow on Forest Service roads. These requirements include the type of equipment used, method of plowing, providing proper drainage, and providing for public safety.

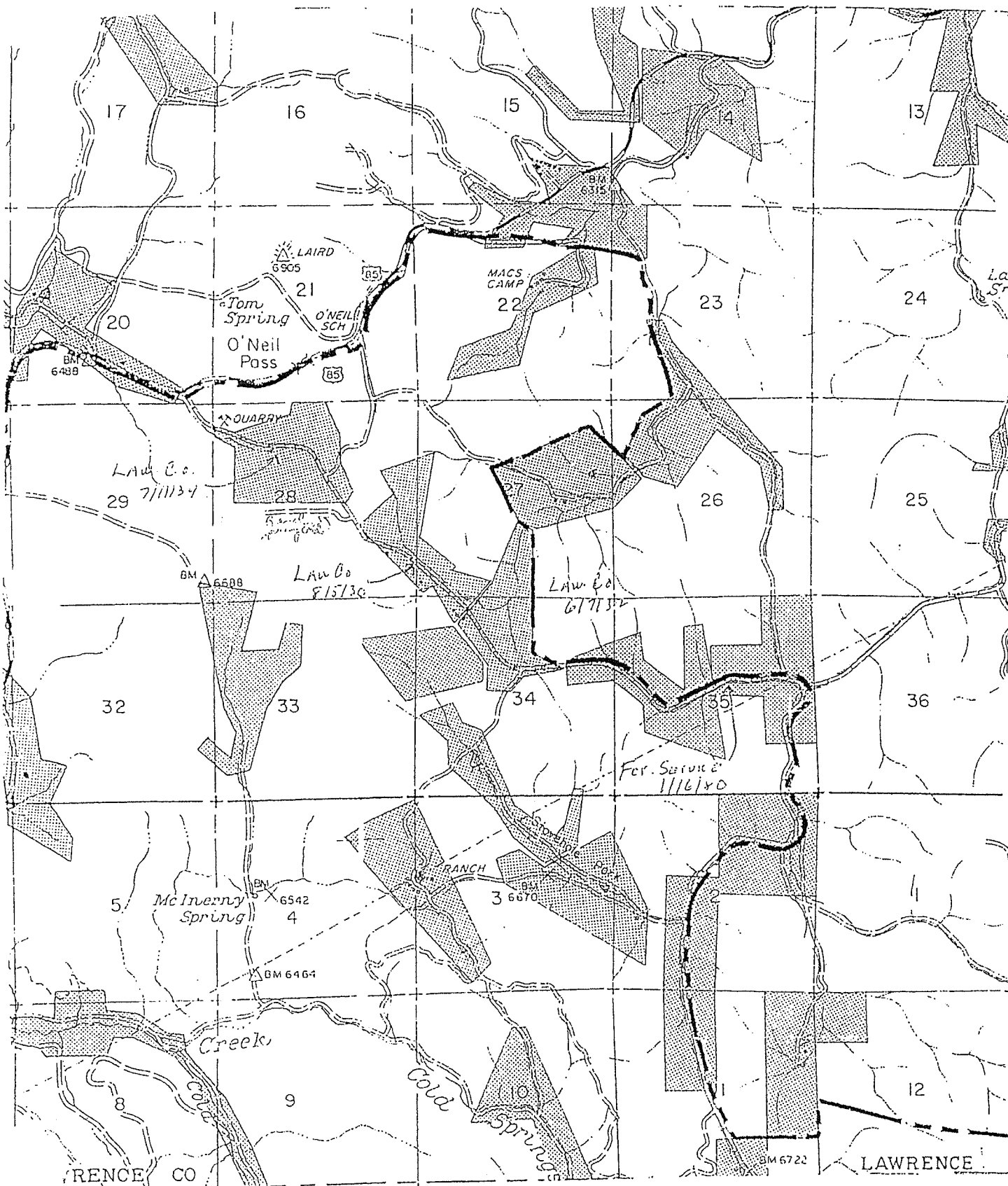
I hope this answers your questions on FDR231. If you have additional questions, feel free to contact me.

Sincerely,



Gary L. McCoy  
District Ranger

Attachment



0061

2004-1  
PROJECT AGREEMENT  
between

Lawrence County Commissioners,  
Lawrence County, South Dakota  
Black Hills National Forest,  
USDA Forest Service

THIS PROJECT AGREEMENT, made and entered into by and between the Lawrence County commissioners, Lawrence County, South Dakota, hereinafter referred to as the County, and the Forest Service, U.S. Department of Agriculture, hereinafter referred to as the Forest Service.

WITNESSETH:

*She met with County Foreman: Oct 5, 1983*

WHEREAS, the Forest Road Agreement, made and entered into by the county and the Forest Service on June 2, 1983, sets forth the responsibilities of each party with respect to the development and operation of those roads that are part of both Forest development and County road systems; and,

WHEREAS, it is desirous for the County and Forest Service to cooperate for the purpose of maintaining those roads shown on the attached Road Maintenance Location Maps (Exhibit A), and the Road Maintenance Schedule (Exhibit B); and,

WHEREAS, these identified roads are of mutual interest and economical benefit to both parties; and,

WHEREAS, the safe passage of area residents, forest visitors, and commercial users are of utmost concern; and,

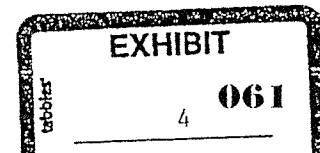
WHEREAS, it is intended that in no way shall this agreement alter the conditions of the existing Forest Road Agreement.

NOW, THEREFORE, in consideration of the above premises, the parties hereto agree as follows;

A. The County Shall:

1. Be the designated maintaining party. It shall take the necessary action to accomplish the road maintenance within the terms of the Forest Road Agreement, this Project Agreement and the attached Forest Service maintenance specifications.
2. Be responsible for providing the proper men and equipment to perform the work.
3. Be responsible for providing the necessary safety devices as described in Division 100.
4. Provide monthly itemized billings to the Forest Service for completed work.
5. Complete the spring road maintenance work by June 15 and the fall maintenance work by October 15.

APP. 033



B.. The Forest Service Shall:

1. Be responsible for the engineering of the project, including site identification, project administration and progress payment processing.
2. Be responsible for the project cost. The Forest Service's total cost in no case shall exceed \$\_\_\_\_\_.
3. Reimburse the County, upon receipt of itemized invoices, for the costs as described in Section B-2.

C. It is Mutually Agreed and Understood by and Between the Said Parties That:

1. Nothing herein shall be construed as obligating the Forest Service to expend or as involving the United States in any contract or other obligation for the future payment of money in excess of appropriations authorized by law and administrative allocated for this work.
2. No member of nor Delegate to, Congress nor Resident Commissioner shall be admitted to any share or part of this agreement, nor to any benefit that may arise therefrom; but this provision shall be construed to extend to this Agreement if made with a corporation for its general benefit.
3. This Agreement shall be effective upon execution by both parties hereto.
4. Either party may terminate the Agreement by providing 60 days' written notice: Provided that any funds on deposit shall be available for expenses incidental to closing out the work beyond the period of written notice. Unless terminated by written notice, this Agreement shall remain in force until September 30, 2004.

IN WITNESS WHEREOF, The parties hereto have executed this Agreement as of the last date written below. . . . .

UNITED STATES DEPARTMENT OF AGRICULTURE

FOREST SERVICE, BLACK HILL NATIONAL FOREST

BY: \_\_\_\_\_  
Forest Supervisor

Date:

LAWRENCE COUNTY, STATE OF SOUTH DAKOTA

By: \_\_\_\_\_  
Commissioner

By: \_\_\_\_\_  
Commissioner

By: \_\_\_\_\_  
Commissioner

By: \_\_\_\_\_  
Commissioner

By: \_\_\_\_\_  
Commissioner

\_\_\_\_\_  
Date

064

**"EXHIBIT B"**  
**Lawrence County - Forest Service**

| ROAD NAME<br>FOREST SERVICE (COUNTY) | ROAD<br>NUMBER<br>FS(CO) | ROAD<br>LGTH | TERMINI                                   | Frequency        |                 | Total<br>Miles | Computed Spring & Fall Miles | Clearing & Other |
|--------------------------------------|--------------------------|--------------|---|------------------|-----------------|----------------|------------------------------|------------------|
|                                      |                          |              |   | May 1 to June 15 | Sept 1 to Oct 1 |                |                              |                  |
| Boundary Gulch                       | 101.1 (192)              | 2.40         | FDR 222.1 to State Line                   | 1                | 0               | 2.40           |                              |                  |
| Boundary Gulch Branch                | 101.1A                   | 0.04         | FDR 101.1 to State Line                   | 0                | 0               | 0.00           |                              |                  |
| Rattlesnake                          | 104.1                    | 0.20         | FDR 105.1 to State Line                   | 1                | 0               | 0.20           |                              |                  |
| Wagon Canyon                         | 105.1                    | 4.14         | FDR 134.2 to State Line                   | 1                | 0               | 4.14           |                              |                  |
| Rifle Pit                            | 106.1                    | 5.03         | US Highway 85 to State Line               | 1                | 0               | 5.03           |                              |                  |
| Boles Canyon                         | 117.6                    | 1.40         | FDR 231.5 to S-35 & S-2 & 11 to CO Line   | 0                | 0               | 0.00           |                              |                  |
| Boles Canyon                         | 117.6                    | 1.40         | Pvt S-3 to Pvt S-2 & 11                   | 0                | 0               | 0.00           |                              |                  |
| Beaver Ridge                         | 130.1                    | 6.00         | FDR 214.1 to M.P. 6.50                    | 1                | 0               | 6.00           |                              |                  |
| Bear Gulch                           | 131.2                    | 1.10         | County Road to National Forest Boundary   | 1                | 0               | 1.10           |                              |                  |
| Limestone (Tinton)                   | 134.2 (188)              | 9.20         | National Forest Boundary to FDR 222.1     | 0                | 0               | 0.00           |                              |                  |
| Limestone Branch (Work Center)       | 134.2A                   | 0.70         | FDR 134.2 to Forest Service Work Center   | 0                | 0               | 0.00           |                              |                  |
| Limestone Tinton                     | 134.3 (188)              | 16.20        | FDR 222.1 to US Highway 85                | 0                | 0               | 0.00           |                              |                  |
| Kelly                                | 136.1                    | 0.80         | Forest Highway 26 to County Line          | 1                | 0               | 0.80           |                              |                  |
| Kelly                                | 136.2                    | 2.00         | County Line to County Line                | 1                | 0               | 2.00           |                              |                  |
| Kelly                                | 136.3                    | 1.50         | County Line to FDR 151.2                  | 1                | 0               | 1.50           |                              |                  |
| Nemo (Boxelder)                      | 140.1 (33)               | 0.54         | Nemo County Road to MP 0.6                | 0                | 0               | 0.00           |                              |                  |
| Nemo                                 | 140.2                    | 1.81         | MP 0.6 to Centennial Trail Head           | 1                | 0               | 1.81           |                              |                  |
| Piedmont                             | 144.1                    | 3.03         | Nemo County Road to Meade County Line     | 1                | 0               | 3.03           |                              |                  |
| Erskine (Schmidt)                    | 145.1 (34)               | 1.10         | Nemo County Road to Private Section 36    | 1                | 0               | 1.10           |                              |                  |
| Erskine (Schmidt)                    | 145.1 (34)               | 0.50         | Private Section 36 to County Line         | 0                | 0               | 0.00           |                              |                  |
| Boxelder Camp                        | 146.1                    | 0.60         | County Road to Sewer Plant Job Corp       | 0                | 0               | 0.00           |                              |                  |
| Boxelder Camp                        | 146.2                    | 0.40         | Job Corp Sewer Plant to RDR 146.1         | 0                | 0               | 0.00           |                              |                  |
| Vanhonen (Albert Hill)               | 151.1(18&28)             | 0.91         | FDR 534.2 to Private Drive                | 0                | 0               | 0.00           |                              |                  |
| Vanhonen (Albert Hill)               | 151.2 (18)               | 3.10         | MP 0.9 to Junction FDR 155.1              | 1                | 0               | 3.10           |                              |                  |
| Vanhonen (Albert Hill)               | 151.2 (18)               | 3.10         | MP 0.9 to Junction FDR 155.1              | 1                | 0               | 2.60           |                              |                  |
| Vanhonen (Albert Hill)               | 152.1 (31)               | 2.60         | FDR 153 to Private Land                   | 1                | 0               | 6.49           |                              |                  |
| Vanhonen (Albert Hill)               | 152.2 (31)               | 6.49         | Private Land to Cty Rd 414( Nemo Rd )     | 1                | 0               | 1.33           |                              |                  |
| Vanhonen (Albert Hill)               | 153.1 (31)               | 1.33         | FDR 198.1 to FDR 152.1                    | 1                | 0               | 0.00           |                              |                  |
| South Boxelder (Misty Meadows)       | 170.4 (5)                | 1.42         | County Line to FDR 180                    | 0                | 0               | 1.38           |                              |                  |
| Galena Vanocker (Gilt Edge)          | 170.5 (5)                | 1.38         | FDR 180 to FDR 170.5D                     | 1                | 0               | 0.00           |                              |                  |
| Galena Vanocker (Gilt Edge)          | 170.5 (5)                | 1.38         | FDR 306.1 to FDR 172.1H                   | 0                | 0               | 3.04           |                              |                  |
| Lost Gulch                           | 172.1                    | 3.00         | Crook City to Section 10                  | 1                | 0               | 0.00           |                              |                  |
| Crook City                           | 176.1                    | 3.04         | FDR 534.2 to FDR 170.5                    | 0                | 0               | 0.70           |                              |                  |
| Erickson                             | 180.1                    | 2.93         | FDR 180.1 to Private Land                 | 1                | 0               | 0.00           |                              |                  |
| Erickson Branch                      | 180.1D                   | 0.70         | FDR 195.2 to MP 1.0                       | 0                | 0               | 2.50           |                              |                  |
| Carbonate                            | 186.1                    | 1.00         | FDR 231.5 to Section 7                    | 1                | 0               | 3.47           |                              |                  |
| Flag Mountain                        | 189.4                    | 2.50         | US Highway 385 to Girlscout Camp          | 1                | 0               | 2.69           |                              | Clearing 2.69    |
| Girlscout                            | 193.1                    | 3.47         | US Highway 385 to Private Land Section 23 | 1                | 0               | 0.60           |                              | Clearing 0.60    |
| Benchmark                            | 198.1 (29)               | 2.69         | Private Land Section 23 to Private Drive  | 1                | 0               | 0.00           |                              |                  |
| Benchmark                            | 198.1 (29)               | 0.60         | US Highway 85 to National Forest Boundary | 0                | 0               | 1.70           |                              |                  |
| Cooper                               | 200.1                    | 0.02         | FDR 208 to Pennington County Line         | 1                | 0               | 1.70           |                              |                  |
| Bogus Jim                            | 201.1                    | 1.70         | FDR 204.2 to Section 2                    | 1                | 0               | 0.00           |                              |                  |
| Minnesota Ridge                      | 203.3                    | 1.70         | County Line to Private Land               | 0                | 0               | 0.00           |                              |                  |
| Boxelder Ridge (Silver Creek)        | 204.1                    | 0.20         | Private Land through Private Land         | 0                | 0               | 0.00           |                              |                  |
| Boxelder Ridge (Silver Creek)        | 204.1                    | 0.40         | FDR 203.1 to US Highway 385               | 0                | 0               | 1.81           |                              |                  |
| Boxelder Ridge                       | 204.2                    | 4.41         | Forest Highway 17 to Buskala Ranch        | 1                | 0               | 5.27           |                              |                  |
| Besant (Buskala)                     | 206.1 (84)               | 1.81         | Buskala Ranch to FDR 231.5                | 1                | 0               | 0.00           |                              |                  |
| Besant                               | 206.2                    | 5.27         | US Highway 385 to Nemo County Road        | 0                | 0               | 2.40           |                              |                  |
| Merritt Estes                        | 208.1 (62)               | 5.60         | FDR 196.1 to MP 2.4 FDR 211.1             | 1                | 0               | 3.00           |                              |                  |
| Long Draw                            | 209.1                    | 2.40         | FDR 211.1 M.P. 2.4 to FDR 209.2D          | 1                | 0               | 2.80           |                              |                  |
| Long Draw                            | 209.2                    | 3.00         | FDR 209.2D to FDR 231.5                   | 1                | 0               | 4.70           |                              |                  |
| Long Draw                            | 209.3                    | 2.80         | FDR 134.2 to Section 35                   | 1                | 0               | 1.60           |                              |                  |
| Higgins Gulch                        | 214.1 (187)              | 4.70         | FDR 214.1 to FDR 134.2                    | 1                | 0               | 2.87           |                              |                  |
| Higgins Gulch Branch                 | 214.1F                   | 1.60         | Section 35 to Section 24                  | 1                | 0               | 1.37           |                              |                  |
| Higgins Gulch                        | 214.2 (187)              | 2.87         | Section 24 to National Forest Boundary    | 1                | 0               | 1.17           |                              |                  |
| Higgins Gulch                        | 214.3 (187)              | 1.37         | National Forest Boundary to Private Land  | 1                | 0               | 0.87           |                              |                  |
| Higgins Gulch                        | 214.4 (187)              | 1.17         | Private Land to Section 7                 | 1                | 0               | 0.00           |                              |                  |
| Higgins Gulch                        | 214.4 (187)              | 0.87         | Section 7 to Homestake Road               | 0                | 0               | 0.00           |                              |                  |
| Higgins Gulch                        | 214.4 (187)              | 1.04         | US Highway 14A to Lost Camp               | 0                | 0               | 0.00           |                              |                  |
| Higgins Gulch                        | 215.1                    | 1.00         | US Highway 385 to MP 1.7                  | 0                | 0               | 9.40           |                              |                  |
| Annie Creek                          | 216.1                    | 2.23         | Roughlock Falls to FDR 134                | 1                | 1               | 3.60           |                              |                  |
| Custer Peak                          | 222.1 (191)              | 4.70         | FDR 134.2 to Private Land Section 30      | 1                | 0               |                |                              |                  |
| Savoy-Tinton                         | 222.1 (191)              | 3.60         |   |                  |                 |                |                              |                  |
| Savoy-Tinton                         | 222.1 (191)              |              |   |                  |                 |                |                              |                  |

**EXHIBIT "B"**  
**Lawrence County - Forest Service**

| ROAD NAME<br>FOREST SERVICE (COUNTY) | ROAD<br>NUMBER<br>FS(CO) | ROAD<br>LGTH | TERMINI                                    | Frequency        |                 |             | Computed Spring & Fall Miles | Clearing & Other |
|--------------------------------------|--------------------------|--------------|--|------------------|-----------------|-------------|------------------------------|------------------|
|                                      |                          |              |  | May 1 to June 15 | Sept 1 to Oct 1 | Total Miles |                              |                  |
| Savoy-Tinton                         | 222.1 (191)              | 1.70         | Private Section 30 to Private Section 19   | 1                | 0               | 1.70        |                              |                  |
| Savoy-Tinton                         | 222.1 (191)              | 3.00         | Private Land Section 19 to FDR 134.2       | 1                | 0               | 3.00        |                              |                  |
| Savoy-Tinton                         | 222.2                    | 1.80         | FDR 134.2 to Section 24                    | 1                | 0               | 1.80        |                              |                  |
| White Gates                          | 224.1                    | 3.40         | Forest Highway 26 to FDR 704               | 1                | 1               | 6.80        |                              |                  |
| White Gates                          | 224.1                    | 1.30         | Private Land Section 4, 3, & 11            | 1                | 1               | 2.60        |                              |                  |
| Waite Gulch                          | 226.1                    | 1.80         | FDR 224.1 to County Line                   | 1                | 0               | 1.80        |                              |                  |
| Waite Gulch                          | 226.2                    | 0.34         | County Line to 144.2                       | 1                | 0               | 0.34        |                              |                  |
| Brownsville                          | 227.1                    | 2.40         | US Highway 385 to Private Land Section 27  | 0                | 0               | 0.00        |                              |                  |
| Brownsville                          | 227.2                    | 1.10         | Private Section 27 to Private Section 28   | 0                | 0               | 0.00        |                              |                  |
| Brownsville                          | 227.3                    | 0.60         | Private Section 28 to Private Section 2    | 0                | 0               | 0.00        |                              |                  |
| Brownsville                          | 227.4                    | 1.70         | Private Section 28 to Private Section 20   | 0                | 0               | 0.00        |                              |                  |
| Brownsville                          | 227.5                    | 0.40         | Private Section 20 to Private Section 20   | 0                | 0               | 0.00        |                              |                  |
| Brownsville                          | 227.6                    | 0.30         | Private Section 20 to Private Section 20   | 0                | 0               | 0.00        |                              |                  |
| Brownsville                          | 227.7                    | 0.30         | Private Section 20 to Forest Highway 17    | 0                | 0               | 0.00        |                              |                  |
| Hall                                 | 228.1                    | 1.27         | FDR 227.4 to Section 32                    | 1                | 0               | 1.27        |                              |                  |
| Elk (Ringsrud)                       | 229.1 (47)               | 1.00         | FDR 227.1 to FDR 229.1A                    | 1                | 0               | 1.00        |                              |                  |
| South Rapid                          | 231.4 (77)               | 1.01         | County Line to MP 1.10                     | 1                | 0               | 1.01        |                              |                  |
| South Rapid                          | 231.4 (77)               | 4.67         | MP 1.10 to District Boundary               | 1                | 0               | 4.67        |                              |                  |
| South Rapid                          | 231.5 (77)               | 6.34         | District Boundary to FDR 117.6             | 1                | 0               | 6.34        |                              |                  |
| South Rapid                          | 231.6 (77)               | 3.85         | FDR 117.6 to US Highway 85                 | 1                | 0               | 3.85        |                              |                  |
| South Rapid Alternative              | 231.6A                   | 0.90         | FDR 231.6 to US Highway 85                 | 1                | 0               | 0.90        |                              |                  |
| Country Club (Fox)                   | 247.1 (6)                | 1.04         | US Highway 385 to Fox's Driveway           | 1                | 0               | 1.04        |                              |                  |
| Country Club (Fox)                   | 247.1 (6)                | 1.95         | Fox's Driveway to National Forest Boundary | 0                | 0               | 0.00        |                              |                  |
| Country Club Branch (Skvicalo)       | 247.3C                   | 0.60         | FDR 247.3 to Private Land                  | 1                | 0               | 0.60        |                              |                  |
| Road Grade (Harvey)                  | 248.1 (7)                | 1.09         | FDR 247.1 to Harvey's Driveway             | 1                | 0               | 1.09        |                              |                  |
| Road Grade (Harvey)                  | 248.1 (7)                | 0.90         | Harvey's Driveway to MP 1.8                | 0                | 0               | 0.00        |                              |                  |
| Roubaix Lake                         | 255.1                    | 0.30         | US Highway 385 to Private Driveway         | 0                | 0               | 0.00        |                              |                  |
| Custer Crossing Br. (Berk Ranch)     | 256.1L                   | 0.90         | FDR 266.1 to MP 0.7                        | 1                | 0               | 0.90        |                              |                  |
| Nahant                               | 259.2 (86)               | 2.86         | FDR 231 to Forest Highway 17               | 1                | 0               | 2.86        |                              |                  |
| Jenny Gulch                          | 261.3                    | 1.65         | FDR 237.2 to Section 2                     | 1                | 0               | 1.65        |                              | Clearing 1.65    |
| Butte Creek                          | 306.1 (100)              | 2.00         | US Highway 14A to Section 23               | 0                | 0               | 0.00        |                              |                  |
| Geranium                             | 393.1                    | 4.20         | FDR 134.2 to State Line                    | 0                | 0               | 0.00        |                              |                  |
| Steamboat Rock Picnic Ground         | 432.1                    | 0.20         | Nemo County Road to Nemo County Road       | 0                | 0               | 0.00        |                              |                  |
| Sunnyside Branch (Sigestad)          | 534.2A                   | 0.80         | County Road 21 to Private Land             | 1                | 0               | 0.80        |                              |                  |
| Sunnyside                            | 534.3 (21)               | 0.82         | Private Section 23 & 24 (PRESCR R-O-W)     | 0                | 0               | 0.00        |                              |                  |
| West Strawberry                      | 535 (73)                 | 1.60         | US Highway 385 to National Forest Boundary | 0                | 0               | 0.00        |                              |                  |
| Rockland                             | 539.1                    | 0.92         | US Highway 385 to Private Driveway         | 1                | 0               | 0.92        |                              |                  |
| Rockland                             | 539.1                    | 1.25         | Private Driveway to FDR 582.1              | 1                | 0               | 1.25        |                              |                  |
| Rockland                             | 539.2                    | 1.01         | FDR 582.1 to Private Land                  | 1                | 0               | 1.01        |                              |                  |
| Timon Camp Ground                    | 550.1                    | 0.10         | FDR 222.1 through Camp Ground              | 0                | 0               | 0.00        |                              |                  |
| Juso Ranch                           | 561.1                    | 1.40         | Forest Highway 17 to Juso Ranch            | 1                | 0               | 1.40        |                              |                  |
| Larson                               | 575.1                    | 1.94         | County Road to Private Land Section 28     | 1                | 0               | 1.94        |                              |                  |
| Carr                                 | 577.1                    | 0.78         | County Road to Private Land                | 1                | 0               | 0.78        |                              |                  |
| Lucky Strike                         | 582.2                    | 1.13         | FDR 539.2 to FDR 582.2L                    | 1                | 0               | 1.13        |                              |                  |
| Lucky Strike Branch                  | 582.2A                   | 0.30         | FDR 582.2 to Private Land                  | 1                | 0               | 0.30        |                              |                  |
| Hanna Camp Ground                    | 588.1                    | 0.20         | County Road 196 through Camp Ground        | 0                | 0               | 0.00        |                              |                  |
| Experimental                         | 616.1                    | 4.78         | FDR 237.2 to MP 4.4                        | 1                | 0               | 4.78        |                              | Clearing 2.0     |
| Experimental                         | 616.2                    | 0.32         | MP 4.4 to US Highway 385                   | 1                | 0               | 0.32        |                              |                  |
| Bristol                              | 627.1                    | 0.62         | US Highway 85 to National Forest Boundary  | 0                | 0               | 0.00        |                              |                  |
| Helper                               | 628.1                    | 2.11         | County Road 195 to FDR 220.1               | 1                | 0               | 2.11        |                              |                  |
| Upper Homestake                      | 678.1                    | 0.96         | FDR 140.1 to Nemo Dump                     | 1                | 0               | 0.96        |                              |                  |
| Rod and Gun Camp Ground              | 687.1                    | 0.10         | FDR 222.1 through Camp Ground              | 0                | 0               | 0.00        |                              |                  |
| Raskob                               | 688.1                    | 1.91         | FDR 256.1 to Junction 219.1                | 0                | 0               | 0.00        |                              | Clearing 1.91    |
| Timber Gulch                         | 733.1                    | 6.60         | FDR 134.3 to Section 17                    | 0                | 0               | 0.00        |                              |                  |
| Limestone North                      | 734.1                    | 2.86         | FDR 733.1 to Section 15                    | 0                | 0               | 0.00        |                              |                  |
|                                      |                          | 241.09       |  |                  |                 | 164.19      |                              | 8.85             |



## 2014 SECONDARY ROAD REVIEW RECOMMENDATIONS

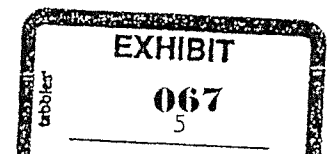
*Note  
roads used a lot  
removed from  
2 day to primary  
see 25-26-2*

Currently Lawrence County has two road classifications, Primary and Secondary Roads. The Secondary Highway System is comprised of 86 different roads within the County. Those 86 roads total up to 88.69 miles in total length. Most of those roads would ordinarily be considered Townships Roads in most instances, but because there is only one organized Township in Lawrence County, the majority of those roads have been listed as County Secondary Roads and have been maintained by the Lawrence County Highway Department for many years.

Secondary Roads do receive a lower level of service than the Primary Roads such as mowing, grading, graveling, culvert maintenance and mowing. The one exception to the level of service is the snow removal. All Secondary Roads receive the same level of snow plowing as do the Primary Roads in the County.

Upon review, the following is a list of recommendations adjusting the Secondary Road System in Lawrence County as prepared by the Highway Superintendent.

1. Remove Skivicalo Road No. 2471 from the secondary system (0.306 mile).
2. Remove Frosty Meadows Road No. 0780 from the secondary system (0.727 mile).
3. Remove Gudat Road No. 0670 from the secondary system (0.831 mile).
4. Remove Rocky Johnson Road No. 0650 from the secondary system (0.901 mile).
5. Remove Hann Place Road No. 4044 from the secondary system (0.344 mile).
6. Remove Tammi Place Road No. 5342 from the secondary system (0.22 mile).
7. Remove Hill Place Road No. 1510 from the secondary system (0.308 mile).
8. Remove Gibson Road No. 0441 from the secondary system (0.750 mile).
9. Remove the segment of Thompson Road No. 5343 starting at the intersection of Old Ridge Road to the east end from the secondary system (0.463 mile).
10. Remove the segment of Gold Dust Trail Road No. 4043 starting at the intersection of Legal Tender Trail proceeding to the east end from the secondary system (0.65 mile).
11. Remove the segment of Corral Creek Road No. 4042 from the Forest Service Boundary cattleguard to the south from the secondary system (1.235 miles).
12. Remove McInerney Road No. 0270 from the secondary system (1.20 miles).
13. Remove the east segment of Holso Road No. 0750 starting at the intersection of Billy Hill driveway proceeding east into the Holso Ranch Yard from the secondary system (0.460 mile).
14. Remove the segment of Beasant Park Road No. 2060 starting at the intersection of Forest Service Road 206-1A west to Buskala Ranch gate from the Secondary system (0.570 mile).
15. Remove the Evenson Branch of the Juso Road No. 0660 from the secondary system (0.498 mile).
16. Remove 100<sup>th</sup> Place Road from the secondary system (0.402 mile).
17. Remove 108<sup>th</sup> Ave. from the secondary system (0.323 mile).
18. Remove Dairy Lane Road No. 1051 from the secondary system (0.298 mile).
19. Remove Red Hill Place Road No. 0092 from the secondary system (0.472 mile).



20. Remove Amiotte Place Road No. 0011 from the secondary system (0.311 mile).
21. Remove 114<sup>th</sup> Ave. Road No. 114 from the secondary system (0.470 mile).
22. Remove the segment of North Sale Barn Road No. 0240 Starting at the intersection of 195th street proceeding north and then west to the junction of Crooked Oaks Road from the secondary system (1.250 miles).
23. Remove 200<sup>th</sup> Street Road No. 200 from the secondary system (0.652 mile).
24. Remove Auer Road No. 0600 from the secondary system (0.321 mile).
25. Remove Yellow Creek Road No. 2470 from the secondary system and add it to the Primary System (5.563 miles).
26. Remove Kirk Road No. 0420 from the secondary system and add it to the Primary System (3.199 miles).
27. Remove east 1.5 miles of Galena Road No. 5340 from the secondary system and add it to the Primary System (1.50 miles).



Bruce Outka &lt;boutka@lawrence.sd.us&gt;

## South Rapid Creek Road Request

1 messages

Mon, Aug 31, 2015 at 4:30 PM

Allan Bonnema &lt;abonnema@lawrence.sd.us&gt;

To: Terry Weisenberg <ilikeike@rushmore.com>, Bruce Outka <boutka@lawrence.sd.us>, Brandon Flanagan <bflanaga@lawrence.sd.us>, Daryl Johnson <djohnson@lawrence.sd.us>, Randall Rosenau <rrosenau@lawrence.sd.us>, Richard Sleep <rsleep@lawrence.sd.us>

Good afternoon Gentlemen,

Per Commission Chairman Terry's request of last week Thurs. I have come up with some information and cost estimates for the road in question. Since I didn't have much time to do look at the condition of this road and what it would take to bring it up to some kind of a standard that would be acceptable for us to take this road over as a Lawrence County Highway. I will try to provide you with just some basic information as to what I know about this road so far.

It currently is a Forest Service Road No. (231). According to one of the signing petitioners Bill Locken, he informed me that Lawrence County did at one time in the late 70's provide some level of maintenance on the road. This work might have been done on the Schedule A or Schedule B Forest Service Agreement between the County and the Forest Service but no one seems to remember for sure and I haven't found any documentation one way or the other.

When Chuck Williams arrived in Lawrence County back in the 80's he had the road dropped off any maintenance plowing by the County. I don't know if it was ever listed as an official County Road or not, just that the County ceased doing maintenance and snow removal on it.

Since this road is located in the far southwest corner of Lawrence County we currently have no other roads located nearby that we do actually maintain or plow snow on a daily basis. This will mean that we will have to travel or (dead head) a machine out to that road in order to plow or maintain it. Just to get a motor grader out there from the Deadwood shop will take at least an hour It is (22.75 miles) from our shop before it even gets there. Assuming that it will take at least an hour or more to plow the 3.85 mile of road, because the snow does get rather deep out there. So every time we have to go out to plow that road it will cost us at least \$400 to \$500 not to mention that plow will lose at least four hours from it's current route that it now has so someone else's road is not going to get plowed that day. So if we have to plow that road lets say two dozen times over the course of a winter at a cost of \$400 to \$500 per trip that would add up to be around \$9,600 - \$12,000 for snow plowing annually.

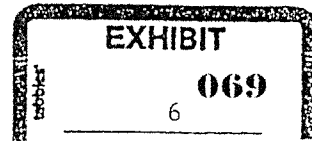
In their petition they claim to be paying in excess of \$ 30,000.00 annually in County taxes. Assuming that to be true, the Highway Department is funded by 22% of general fund tax dollars collected and that means that the Highway department will be getting have approximately \$ 6,600.00 of their tax dollars per year to put towards the maintenance and snow removal for that road. Note that my estimate above for only the snow plowing was for approximately \$ 9,600 to 12,000 per year.

The road also needs to be regaveled as well as many other things, but here is what I can estimate it would cost to put on a 4" lift of gravel on that road

Estimated Cost to Gravel:

3.85 miles x 2,738 ton per miles = 10,514 tons  
 10,514 tons x \$ 5.75 per ton = \$ 60,455.50 (This price comes from the gravel we are currently having crushed at Lead/Deadwood rubble site.) This gravel would have to be hauled a distance of 24 miles.  
 24 miles x 10,514 tons x .50 cents per ton mile = \$ 126,168.00 to haul it there.  
 Spreading, watering and compacting the gravel = \$ 12,000.00  
 Total Cost Estimate \$ 198,623.50.

APP. 041



070

Lawrence County Mail - South Rapid Creek Road Request

This estimate does not include any prep work that probably will be needed, such as shoulder work, road reshaping, culvert replacement and ditch cleaning. I don't feel comfortable in giving you an estimate on that work at this time because I don't know the extent of how much work needs to be done and thus how accurate an estimate would be.

I hope that you find this info to be of some use.

Allan

Mon, Aug 31, 2015 at 4:33 PM

ruce Outka <boutka@lawrence.sd.us>  
o: Connie Atkinson <catkinso@lawrence.sd.us>

[Quoted text hidden]

APP. 042

070

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14f85e21e53c13d158siml=14f85e21e53c13d158siml=14f85e522709dad2



# Crow Creek Road residents rally for \$35K in road improvements

6/21/15  
Lester Niles

By JACQUELYN PARSON  
Black Hills Pioneer

**SPEARHUSH** — The county's policy of having land owners pay for secondary road improvement materials, while the county applies it was put to the test Tuesday at the regular meeting of the Lawrence County Commission, as Crow Creek Road residents in attendance presented their case and ultimately secured more than \$35,000 in road improvements to be made and paid for by the county.

The incident is an ongoing issue with primary versus secondary roads in the county. While the county does pony up for all improvements on primary roads, secondary roads are a little bit different beast with owners generally petitioning the county for additional maintenance such as gravel, mags or stone, etc. per state statute, and paying for the materials themselves while the county fronts the labor of applying the materials.

The four residents along Crow Creek

Road said they didn't feel obliged to pay for the materials because they pay taxes to the county. They happened before the commission to ask for the county to pay for and maintain Crow Creek Lane. Some in all health also raised concerns that their mail service would be stopped and emergency medical services are not able to make 911 calls. Their residences, due to the condition of the road.

A petition to the Lawrence County Commission, filed last fall containing five signatures reads:

"The Lawrence County citizens or property owners who live along Crow Creek Road, consisting of approximately 1-2 miles, are requesting that the road be gravelled and properly maintained. There are four families that live along the road that have there are four cabins above the end of the road that use the road frequently. It is impossible when a service, emergency vehicles and general travel and mail delivery is impossible when a road is in such a condition."

A letter from Spearfish-based attorney Lester Niles, dated June 15, indicates that there may have been a misunderstanding regarding the petition filed last fall. It looks like the County Highway Superintendent interpreted the petition as one for "additional maintenance" under SDCL 31-12-27.1. However, that was not the intention of the petition. Instead, they were operating with the understanding that the petition would be presented to the county commission for action under the county's secondary road maintenance obligation in the statute.

An emergency condition exists there, Niles added. "Mail delivery service has been suspended until the matter is dealt with and as stated in the petition, emergency vehicles would have a difficult time accessing properties along this road in its current condition. It is my understanding this petition was not

GROW CREEK RD PG 23



# **CROW CREEK RD**

from page 3

intended for these residents to pay for more gravel. Instead, it was said as a request for the county to allocate funds emergency funds if necessary to repair the road.

Lawrence County Highway Superintendent Allan Bonnem said that Crow Creek Road is on toward the western edge of the county and in October it was contacted and asked for the road.

"The farther in you go, the narrower the road gets," Bonnem said. "There are a couple of major problems with this road. One is that it has drainage at some locations and it also has little or no gravel on most of it. I don't know the last time it's been gravelled on the secondary road policy is individuals request this work to be done, the county does the work, hauls the gravel in, people are willing to pay for the cost of the gravel. And it is quite evident these folks don't want to pay for the cost of gravel because they pay taxes."

Nick Johnson asked for a copy of the policy that sets forth the secondary road additional maintenance cost share. Outka stated the SDCL 31-12-274 addresses the issue of the taxpayers paying for the gravel.

The written request policy is in accordance with state statute requesting additional maintenance and has also been applied from a maintenance order request on secondary roads.

"We've used this policy because of the fact Lawrence County doesn't have a tax levy for secondary roads," Bonnem said.

"Most counties have a secondary road mill levy. When this was enacted, they probably figured it was cheaper to people instead of paying an annual levy. I keep finding back then gravel was probably only \$2 a ton and now we're talking \$9.50 a ton, so it's zero

up considerably over the years.

The estimated cost to purchase gravel for the Crow Creek Road projects is \$20,800. It made gravel projects of 600 truckloads of gravel is \$0.24 a yard, gravel is \$2400. Within the county is \$60 for a total job cost estimate of \$53,579.12.

At a point of clarification, several Lawrence County primary roads are gravel roads, such as Mountain Road, so the notion that all primary roads are paved and all secondary roads are gravel is false.

"Who decides what primary and what's secondary?" asked Clay Creek resident and neighbor Donavan Nicholas. "To me, the road I live on is primary and when this policy was decided, unbeknownst to all of us, we didn't find out about that as to whether the county stood we live on now is a different classification than the road right next to ours."

Commissioner Dan Johnson explained that primary versus secondary roads classification has to do with the amount of gravel the road receives.

"Discontinuation of what is going to be said, Don Nicholas, 'You can not discriminate on whose road you are going to keep up and the next guy right beside you, you keep up very nicely.' I've been a resident up there over 40 years, I don't know when was the last time I saw gravel on that road. We've been paying the citizens all these years and no one deserves to be thrown to the back of the bus and we're going to pay for your road and no one's one."

"I don't see gravel and maintenance on your road, on this property is going to go down," said Clay Creek resident and neighbor Nicholas Johnson.

"Listening to these people, it sounds like you can get an exemption on their places at all when it is already possible to get it's day and in this county that's 80 to 90 percent of

the days," Bonnem said. "We've bladed it three times this spring and plow the snow on it. So when the snow melts, it can't be maintained."

Outka asked Bonnem how the project would be paid for?

"What's the bottom line here? Do you have the money to do this or will you need to take money away from another project?" Outka asked.

"We have money to do this," Bonnem said. "I want to get this resolved because it does need gravel. What I'm wanting is clarification from the board because for some people we're putting gravel on roads and others we're not. How do we handle this when some are following the policy and some are not?"

Commissioners Randall Roseman, Richard Sleep and Dan Johnson voted in favor of paying for the full cost of the road improvements. Commissioners Brandon Flanagan and Jerry Weisenberg voted against paying the full cost of the road improvements.

Prior to the vote, Johnson asked the group if they would be willing to pay for any portion of the job cost estimate and the general consensus was no.

"The way I look at it, I'm elected to this board to represent every taxpayer in this county and I try to vote that way," Johnson said. "I said initially agree, the road needs to be repaired and improved, but I also believe when there's a problem and it's my problem and when you go over it every day, you find it's sometimes you have to pay some of your own money for the problem, you go away."

There are 36 roads in Lawrence County currently classified as secondary roads, for a total of 3,300 miles. There are 22 primary roads for a total of 245 miles.



PETITION

*Landowners on South Rapid Creek Road from Hwy. 85 to FS 117*  
*Need Road Maintenance*

Lawrence County has permitted at least 47 seasonal and year round structures in the approximately 3.85 miles between Hwy. 85 and Forest Services 117. At least ten of those are year round residences. Many of the others exist to provide winter access to the snowmobile trails maintained by the State of South Dakota. Three new residences are under construction and one is undergoing a major remodel which will increase the current assessed value of these properties to more than \$6.5 million. Records show that the County collects in excess of \$30,000 annually from its mill levy and the schools collect much more.

Lawrence County is collecting significant property taxes from the property owners and currently provides no services to the residents. In view of the extent of development, the significant year-round traffic and the need for resident and emergency vehicle traffic the undersigned property owners hereby petition Lawrence County to provide maintenance and snow removal for South Rapid Creek Road from Highway 85 to FS 117.

| NAME               | S. RAPID CREEK ADDRESS | SIGNATURE   | DATE    |
|--------------------|------------------------|-------------|---------|
| Donahoe Williamson | 10410 Rapid Creek Rd   | [Signature] | 8/10/15 |
| Teria Williamson   | 10410 Rapid Creek Rd   | [Signature] | 8/10/15 |
| Jana Williams      |                        |             |         |
|                    |                        |             |         |
|                    |                        |             |         |
|                    |                        |             |         |
|                    |                        |             |         |
|                    |                        |             |         |
|                    |                        |             |         |

APP. 045

EXHIBIT

073 8





PETITION*Landowners on South Rapid Creek Road from Hwy. 85 to FS 117**Need Road Maintenance*

Lawrence County has permitted at least 47 seasonal and year round structures in the approximately 3.85 miles between Hwy. 85 and Forest Services 117. At least ten of those are year round residences. Many of the others exist to provide winter access to the snowmobile trails maintained by the State of South Dakota. Three new residences are under construction and one is undergoing a major remodel which will increase the current assessed value of these properties to more than \$6.5 million. Records show that the County collects in excess of \$30,000 annually from its mill levy and the schools collect much more.

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| NAME          | S. RAPID CREEK ADDRESS  | SIGNATURE     | DATE    |
|---------------|-------------------------|---------------|---------|
| Janet Bertsch | 10304 S. Rapid Creek    | Janet Bertsch | 8-27-15 |
| Kent Bertsch  | 10304 South Rapid Creek | Kent Bertsch  | 8/27-15 |
|               |                         |               |         |
|               |                         |               |         |
|               |                         |               |         |
|               |                         |               |         |
|               |                         |               |         |
|               |                         |               |         |

PETITION

*Landowners on South Rapid Creek Road from Hwy. 85 to FS 117*  
*Need Road Maintenance*

Lawrence County has permitted at least 47 seasonal and year round structures in the approximately 3.85 miles between Hwy. 85 and Forest Services 117. At least ten of those are year round residences. Many of the others exist to provide winter access to the snowmobile trails maintained by the State of South Dakota. Three new residences are under construction and one is undergoing a major remodel which will increase the current assessed value of these properties to more than \$6.5 million. Records show that the County collects in excess of \$30,000 annually from its mill levy and the schools collect much more.

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| NAME                         | S. RAPID CREEK ADDRESS          | SIGNATURE                    | DATE               |
|------------------------------|---------------------------------|------------------------------|--------------------|
| Betty Guindon                | 10350 S. Rapid Cr Rd            | Betty Guindon                | 8/15/15            |
| <del>Johnnie J Guindon</del> | <del>10350 S. Rapid Cr Rd</del> | <del>Johnnie J Guindon</del> | <del>8-15-15</del> |
| JOHNNIE J GUINDON            | 10350 S. RAPID CR Rd            | Johnnie J Guindon            | 8-15-15            |
|                              |                                 |                              |                    |
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IN SUPREME COURT  
STATE OF SOUTH DAKOTA

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Appeal No. 28085

---

LAWRENCE COUNTY  
Respondent/Appellant

vs.

RAYMOND C. OYEN  
Petitioner/Appellee

---

APPEAL FROM THE CIRCUIT COURT  
FOURTH JUDICIAL CIRCUIT  
LAWRENCE COUNTY, SOUTH DAKOTA

---

HONORABLE MICHELLE K. PALMER-PERCY,  
CIRCUIT COURT JUDGE

---

APPELLANT'S REPLY BRIEF

---

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Attorneys for Appellee

NOTICE OF APPEAL WAS FILED JANUARY 9, 2017

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## **STATEMENT OF THE CASE IN REPLY**

This is a case involving a demand by a landowner that Lawrence County (“County”) perform maintenance and snow removal on a United States Forest Service Road 231 (“231” or “231/SRCR”). As it suits his purposes, Petitioner alternatively argues on the one hand that he is singularly affected by the absence of County road maintenance services regarding 231, and then at other times posits that he represents fifty-four adversely affected landowners owning property adjacent to the road.

There is very little in the Petitioner’s Reply Brief that weighs on the central issues in this appeal. The overarching theme presented by Petitioner is that the County’s refusal to maintain and remove snow from 231 is a denial based in arbitrariness, capriciousness and lacking in legal basis. However, in point of fact, Petitioner(s) offer no evidence whatsoever that the County’s decision to refuse maintenance was based on application of its statutory discretion and based on facts and sound reasoning.

Alternatively, Petitioner attempts to launch an impermissible collateral attack on the easement transfer from the County to the USFS. The collateral attack is impermissible as Petitioner failed to timely appeal the County’s decision from 1992.

Although not appealable now, Petitioner argues that the County failed to follow certain procedural requirements requiring notice to be given. Even if this issue were considered on the merits, it is clear that the procedural requirements Petitioner points to are wholly inapplicable to the easement transfer and that the transfer was in fact carried out in accordance with the applicable notice requirements.

Otherwise, Petitioner makes much ado about the road being available for use by the public for many decades. The County does not contest this fact and counters that the County has taken no action that has interfered with the adjacent landowner's ability to use the road and access their properties.

Petitioner glosses over the fact that there are many publicly dedicated roads in the County that receive no County road maintenance services. Such roads without County provided road maintenance or snow removal include roads that fall within the forty-seven road districts in Lawrence County. Petitioner and his neighbors obviously disagree with the County's decision; even so, such decisions are based on financial and resource allocation considerations, and the overall impact on all of the taxpayers of Lawrence County, similar to those the County must make routinely. The County's coffers are decidedly not unlimited.

### **STATEMENT OF FACTS IN REPLY**

The salient facts are straightforward. In 1930 the County received a road easement from Miners and Merchants Bank for a section of 231. Since at least that time, the public has been allowed to use the road, snow conditions allowing. In the past, the road was used as a snowmobile trail pursuant to an agreement between the USFS and the State of South Dakota. (Locken TT Page 38 Lines 14-18).

The County does not dispute the fact that the public has used the road and will continue to use the road in the future. However, aside from the easement grant from the bank, the County never added the road to its road system and has therefore never had any obligation or duty to perform maintenance work, to include snow removal, on the road.

In 1992, the County transferred whatever rights it possessed in the right-of-way easement to the USFS. This transfer was a housekeeping transaction at best clearing up any ambiguity that existed as to jurisdiction over the road. The USFS, since at least the 1960s (Exhibit 48), has identified the road as one of its own. Official maps, pre-1992, from the State of South Dakota also identify the road as a USFS road (Exhibits 56, 63, 66 and 67). In contrast, Petitioner has offered no proof whatsoever that the County had ever added the road to its system of roads nor has Petitioner ever even attempted to have 231 added to the County Highway System. Importantly, in a letter dated August 13, 1983 (Exhibit 2, Page 58) then District Ranger McCoy made it crystal clear that the federal agency did indeed have road maintenance jurisdiction and maintenance responsibilities concerning the road. So, long before the 1992 easement transfer, the question of road maintenance responsibilities had long been determined. Therefore, the 1992 easement transfer is best characterized as a housekeeping matter. Petitioner has offered no evidence that the 1992 easement transfer adversely affected his ability, or those of his neighbors, to access their property in the manner of which they were accustomed. The status quo was maintained. Most significant is the fact that the decision of the County Commission was not appealed at the time. Instead, now, Plaintiff attempts to litigate the 1992 transfer some twenty-six years after the fact.

While the County has historically entered into agreements with the USFS for maintenance on USFS roads, including 231, the County was never required to do so. Rather, the agreements simply recognize that the USFS, lacking road maintenance equipment, has roads on its road inventory that require periodic maintenance and the County, which does possess such equipment, has been willing to provide the services



pursuant to a road maintenance contract. Petitioner construes boilerplate language in these agreements as an acknowledgment by the County of a duty to maintain roads like 231. The fact is that the County has never had a duty to maintain 231.

In fact, Petitioners argument is logically inconsistent. Following the 1992 easement transfer, if the County did in fact have a duty to maintain 231, it would have been expected that the USFS would have required the County to contribute money towards the road's maintenance. Instead, the USFS continued to pay the County for maintenance work the County cooperatively agreed to perform. Of further note, the USFS has recently elected to contract with a third party (Exhibit 54) to perform road maintenance on 231, in particular. Such road work is paid for exclusively with USFS funds.

## **ARGUMENT IN REPLY**

### **ISSUE 1**

#### **COUNTY HAS NO OBLIGATION TO MAINTAIN 231/SRCR**

The County does not contest the fact that the road is a public right-of-way upon which the public has the right of passage. However, this right of public passage must be distinguished from creating a ministerial duty upon the county to provide maintenance and snow removal services on the road. The Trial Court erred in concluding a ministerial duty attached to the County.

SDCL 31-13-12 is controlling as to the issue of the County's responsibility for maintenance, and more importantly here, the lack of such responsibility, with the statute

clearly providing that it is the County's sole discretion as to what roads are included on the County road system and for which roads taxpayers monies are expended. At trial, no proof was offered by Petitioner that 231 was ever a part of the "approved county highway system" or that the County exercised supervision over 231.

According to SDCL 11-3-12, any roads dedicated by a plat shall simply be held in trust to and for the uses and purposes expressed or intended, to-wit: the road remains accessible for public travel. The evidence at trial demonstrated that since 1930, not only since subdivision plats were approved along the road, that the road has been open and accessible for public travel.

In practical effect the donation or grant of the easement to the County in 1930 operated as the equivalent of the dedication of a section line highway - "it is a passage or road which every citizen has the right to use." Douville v. Christensen, 2002 S.D. 33, ¶ 12.

Importantly, this Court has concluded that "the legislature has not imposed upon townships the duty to open, improve, and maintain sections lines for the purposes of vehicular travel." Id. at ¶13. Likewise, the legislature has never imposed a similar duty upon counties.

The Trial Court's reasoning begs the question as to why the legislature created the authority for formation of road districts in SDCL Ch. 31-12A. And, further, why would citizens living in rural areas ever agree to tax themselves for road maintenance? If the Trial Court's logic was accurate there would be no need for any such road districts - all

such road maintenance would be vested with the County and the County would be without discretion in the matter.

## **ISSUE 2**

### **INDISPENSABLE PARTY**

The USFS has, for more than twenty years, engineered, designed, bid, contracted for, installed cattle guards, inspected, approved, and paid for the road maintenance for USFS 231/SRCR. By virtue of its control over 231/SRCR, in the event of any litigation arising out of or in conjunction with the use of 231, the USFS must be named as a party in this action because it is responsible for the care and condition of 231/SRCR. This fact alone clearly shows the USFS is an indispensable party and is subject to substantial risk as a practical matter and their absence in this action would impair or prevent the USFS's ability to protect its liability interest.

The absence of an indispensable party is considered so significant a defect that most courts have indicated that it may be raised for the first time subsequent to the trial or an appeal. Busselman v. Egge, 2015 S.D. 38, 864 N.W.2d 786,789 (2015).

Appellant tries to dismiss this Court's clear ruling that Meade County was an indispensable party because Meade County was responsible for the maintenance of a road by arguing that Smith is not controlling. Appellant ignores the clear holding in Busselman that, as pronounced by the Court, a government entity responsible for the maintenance is an indispensable party. Busselman quoting Smith @ 789. This Court went on to state "[The governmental authority] either on its owns as the party ultimately

responsible for the road or as the representative of [governmental authority] taxpayers, is an indispensable party[.]” Busselman @ 789. (quoting Smith, 361 N.W.2d 629).

It is also worth noting that in 2016 through 2018, the USFS unilaterally, without input from Lawrence County, designed, speced, bid, contracted for, and awarded all of the future maintenance work for 231/SRCR to a third party (Exhibit 54). That party may now be named as an indispensable party who’s contractual and liability interests cannot be protected if it is not named as an indispensable party.

### **ISSUE 3**

#### **THE 1992 EASEMENT TRANSFER**

Petitioner failed to timely perfect an appeal pursuant to SDCL 7-8-27 through 7-8-31.

“Persons aggrieved of a decision of a board of county commissioners are entitled to appeal that decision pursuant to SDCL 7-8-27. The procedures for all such appeals are detailed in SDCL 7-8-27 through 7-8-31, inclusive. In 1983, the legislature added SDCL 7-8-32:

Appeal to the circuit court from decisions of the board of county commissioners, as provided in this chapter, is an exclusive remedy. Judicial review of county commission action shall be allowed only as provided in Secs. 7-8-27, 7-8-28, 7-8-29, 7-8-30 and 7-8-31.” Wold v. Lawrence County Com’n, 465 NW2d 622, 624 (S.D. 1991).

This court in Wold declared that, “the legislature has clearly and unequivocally spoken to this point. It is unnecessary for this court to engage in the often complex task

of statutory interpretation when the statute under consideration is clear and unambiguous. The word “exclusive” is defined in its ordinary sense to mean “sole” and “not including, admitting, or pertaining to any others.” Id. at 624.

In Wold, as in the present case, Petitioner’s sole remedy was to seek review of the 1992 decision transferring the easement by timely filing a direct appeal which Petitioner failed to do. To allow Petitioner to interject such a claim now would be an impermissible collateral attack on the County’s earlier decision. Gregoire v. Iverson, 551 N.W.2d 568 at ¶ 12 (SD 1996) (citing Wold at 624). Therefore, the Trial Court erred in considering the validity of the easement transfer.

Next, Petitioner argues in his Reply Brief that the transfer “effectively vacated” the public highway. First, it is unclear what Petitioner means by “effectively vacated the public highway?”

Vacation is synonymous with abandonment. Thormodsgard v. Wayne Tp. Bd. of Sup'rs, 310 N.W.2d 157, 159 (S.D., 1980). A road is either vacated/abandoned or it is not. In the present case, the road was clearly not vacated/abandoned. Oyen and the public’s ability to travel along the road remained the same following the 1992 easement transfer. (Oyen TT Page 179 Lines 1-22).

In 1992, the County simply transferred whatever easement rights it possessed, if any, to the USFS. Moreover, the 1930 “Agreement for Right of Way” contemplates that the easement was subject to assignment providing “. . . the party of the first part (Bank) hereby grants unto the party of the second part (County), its heirs and assigns . . .” (Exhibit 1) (Emphasis added).

Therefore, it must be concluded that the County was authorized to transfer the easement and did so according to the applicable procedural requirements.

#### **ISSUE 4**

#### **PETITIONER IS NOT AN AGGRIEVED PARTY**

The issue of the Trial Court's lack of subject matter jurisdiction to consider the matter of the 1992 easement transfer for failure to timely appeal that decision is incorporated in the discussion of Issue 3 above.

Accordingly, the discussion that remains is that of the Trial Court's lack of subject matter jurisdiction to consider Petitioner's appeal of the denial of his petition to now have Lawrence County maintain and plow snow on 231/SRCR because Petitioner is not an aggrieved party.

Petitioner acknowledges that the three part test announced in Cable v. Union County Board of Cnty Comm'n, 769 NW2d 817, 2009 SD 59, ¶ 20, is determinative as to whether the Trial Court possessed subject matter jurisdiction to consider the denial of his petition. Importantly, Petitioner failed to satisfy each of the required elements.

With respect to Part 1 of the test, Petitioner declared that he "represents the petitioners" who own property along the road. (Petitioner's Reply Brief Page 28). While the right to appeal by a "person aggrieved" requires a showing that the person suffered "a personal and pecuniary loss not suffered by taxpayers in general, falling upon him in his

individual capacity, and not merely in his capacity as a taxpayer and member of the body politic of the county. Cable, 2009 SD 59, 2009 at ¶ 26.

At trial (Oyen TT Page 171 Lines 20-23), and again in his Reply Brief (Appellee's Reply Brief at Pages 4 and 22), Petitioner asserts that *Petitioners* (Emphasis added) pay \$107,00 in property taxes and expect road maintenance and snow removal. Clearly, Petitioner lumps himself into a group of similarly situated taxpayers and not in his individual capacity with respect to any alleged injury.

Nonetheless, as it suits his purposes, Petitioner also attempts to distinguish himself apart from the other fifty-four landowners and the public in general, noting that "he uses his own equipment and fuel" to perform snow removal from the road. (Petitioner's Reply Brief at Page 29). Previously however, Petitioner acknowledged that he is not the only one performing snow removal stating, "and there's also other people that are using their equipment to help with the snow removal too." (Oyen TT Page 192 Lines 15-16). Petitioner further acknowledges that other neighbors contribute to the fuel costs for operating snow removal equipment. (Oyen TT Page 191 Lines 24-25).

In fact, Petitioner has not established that he has suffered any injury at all. No evidence has been offered that the County had ever removed snow from the road. Petitioner is claiming a loss or injury for a County provided service he and his neighbors have never had. Many landowners living in rural subdivisions throughout the County do not have road maintenance and snow removal services performed by the County as witnessed by the 47 resident-funded road districts in Lawrence County. (CW TT Page 262 Line 9-13).

For these reasons Petitioner fails to meet the requirements of part one of the three part test announced in Cable.

Regarding Part 2 of the test, that a causal connection exists between the Petitioner's injury and the injury of which he complains, in his Reply Brief, Petitioner again fails to offer the requisite causal connection to meet the standard. 231/SRCR falls under the supervision, control and authority of the USFS and not the County. The County has not caused Petitioner and his neighbors any injury. In reality, any injury incurred by Petitioner and his neighbors is self-inflicted by their voluntary choice to live along a road that was formerly a snowmobile trail.

Petitioner also fails the final part of the test in that he fails to show that it is likely, and not speculative, that the injury will be redressed by a favorable decision.

In his letter dated August 13, 1983, District Ranger McCoy left no doubt but that the Forest Service was singularly responsible for maintenance on 231 (Exhibit 2, Page 58). Further adding, "[u]nless the road is plowed, you will not have winter access due to snow depths. If you wish to plow the road, you must have *my approval*." (Emphasis added). Petitioner failed to include the party responsible for the road, the Forest Service, as a party in this action.

## **ISSUE 5**



**THE DECISION BY THE COUNTY COMMISSION TO DENY ROAD  
MAINTENANCE AND SNOW REMOVAL WAS NOT ARBITRARY AND  
CAPRICIOUS NOR CONTRARY TO THE EVIDENCE**

The decision by the County Commission to deny the Petition for road maintenance and snow removal was neither arbitrary, capricious nor contrary to the evidence.

Specifically, Petitioner argues that the County Commission lacked competent evidence in basing its decision to deny his request for road maintenance and snow removal.

The County Commission was very familiar with the designated County road system in 2015. In 2014, a year prior to Petitioner submitting his petition for road maintenance and snow removal, the County Commission, aided by the Highway Superintendent, undertook a review of the County road system in its entirety. (Johnson TT Page 394 Ln 15-18).

County Commission consideration of the Petition took place at two different meetings. (Johnson TT Page 380 Line 13-15). At both times the matter was discussed before the County Commission, Petitioner was represented by legal counsel. Discussion of the issue was tabled at the first meeting to allow for further investigation by County staff. (Johnson TT Page 380 Ln 6-14).

Prior to the second meeting, Petitioner's attorney, Mr. Braun, submitted a packet of information for the Commission's consideration (Exhibit 2). Included in the information presented to the County Commission was a cover letter dated September 8,

2015, from Mr. Braun. (Exhibit 2 Page 50). In the letter, Mr. Braun notes his legal memorandum and various enclosures are included so that, “we can have a *full discussion of the County’s responsibility* to South Rapid Creek Road between Highway 85 and FS 117.” (Emphasis added).

Petitioner argues that, “the lower court recognized in its findings of fact that County failed to review the 1930 easement granting the roadway to the County or other evidence before it ultimately denied Petitioners (sic) service request.” In this respect, Petitioner and the Trial Court are mistaken. A copy of the easement was included at part of the information submitted to the County Commission prior to the second meeting. (Exhibit 2 Page 55). At trial, Petitioner’s attorney specifically questioned Commissioner Johnson regarding the information contained in Exhibit 2, and confirmed that Commission Johnson had in fact received the information.

After two meetings, having heard Petitioner’s argument and the information presented, the County Commission disagreed that it had any obligation to perform maintenance or snow removal with respect to 231. Based upon the foregoing, it is impossible to conclude that the County lacked competent evidence upon which to base its decision. Simply because Petitioner disagreed with the County’s decision does not equate with a lack of competent evidence.

Dated this 16<sup>th</sup> day of June, 2017.

/s/ \_\_\_\_\_

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### **CERTIFICATE OF SERVICE AND MAILING**

The undersigned hereby certifies that he served by email a copy of Appellant's Reply Brief upon the persons herein next designated, all on the date shown below, to-wit:

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The undersigned also certifies that he filed the Appellant's Reply Brief by email to [SCClerkBriefs@ujs.state.sd.us](mailto:SCClerkBriefs@ujs.state.sd.us) and by mailing the original and two copies of Appellant's Reply Brief by delivering them to at Shirley Jameson-Fergel, the Clerk of the South Dakota Supreme Court South Dakota Supreme Court Clerk, 500 East Capitol Avenue, Pierre, SD 57501-5070, on the date shown below, by first-class mail.

Dated this 16<sup>th</sup> day of June, 2017.

/s/ \_\_\_\_\_

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