

**July 19, 2006 Public Meeting** – Chairman Bill Carey called the meeting to order at 1:30 p.m. Also present were Commissioner Curtiss, Deputy County Attorney Colleen Dowdall and Assistant Director of Public Works Chuck Wright. Commissioner Evans was on vacation.

## **PLEDGE OF ALLEGIANCE**

**PUBLIC COMMENT** - none

## **ROUTINE ADMINISTRATIVE ACTIONS**

Commissioner Curtiss moved to approve Weekly Claims List in the amount of \$492,508.44. Commissioner Carey seconded. The motion carried on a vote of 2-0.

## **DECISION (from June 28, 2006)**

### **Petition to Abandon Unnamed Road within Sol Acreage Tracts**

Chuck Wright Assist. Dir. County Public Works: Jean and I went out and looked at this road yesterday morning and we found that this was an old road. They're asking to abandon a portion of that old road which is a half a mile long and goes straight through on Big Flat Road and we discussed it and thought maybe we should not vacate that particular road.

Commissioner Curtiss: I agree with Chuck. Our job is to look at the big picture and whether or not this road might be needed in the future. For those of you who have driven on the Big Flat Road, you know that it takes a couple real sharp 90 degree turns when close to the Kona Ranch area. The road originally was petitioned in late 1800's to go straight through and this will just be a portion of it. It doesn't...the County doesn't plan to build it, we don't usually build roads, but we like to keep the right-of-way of was if it's needed in the future. It doesn't really encumber the property even though one portion has been subdivided recently by the County or the subdivision was approved by the County, but this right-of-way on the edge won't bother that. So I would recommend that we not abandon it and we may want to see if there are people in the audience that want to comment on this.

Commissioner Carey: Is there anyone here that wishes to speak on this proposal. Seeing none, is there a motion?

Commissioner Curtiss moved to deny the request to abandon the Unnamed road from north right-of-way of Flora Drive at its intersection with the common section line of Section 7 and 8 to the north line of Lot 2 in the Sol Acreage Tracts Subdivision. Commissioner Carey seconded. The motion carried on a vote of 2-0.

## **HEARING (Certificate of Survey)**

### **Davis Family Transfer**

Commissioner Carey opened the hearing.

Colleen Dowdall: This is a request to consider creation of a family transfer parcel for that parcel described as a portion of Tract 6, COS #1465 in the NW ¼ of Section 30, Township 14 North, Range 20 West. Roger G. Davis has submitted a request to create four (4) additional parcels using the family transfer exemption to the Montana Subdivision and Platting Act. The current parcel is approximately 20 acres in size located to the west of Missoula, MT. Roger proposes to create two 2 acre parcels for transfer to two of his sons, Ted Jacob Davis & Scott Raymond Davis for residential purposes and transfer two 3 acre parcels to his other two sons, John Roger Davis & Timothy Lee Davis, for residential purposes and keep the remaining approximately nine (9) acre parcel for residential purposes as well. The history of this parcel is as follows: COS #1465 was filed in 1978 to create parcels of land 20 acres or greater in size. A Warranty Deed was filed in October 1991 deeding the property to Roger G. Davis. According to records kept by the Missoula County Surveyor, the applicant has not previously used exemptions to the Subdivision and Platting Act except in 1999 when he used a mortgage exemption: COS #4911 on 9/15/99, MOR, NW Section 30, T14N, R20W.

Commissioner Curtiss: Colleen, does that mean that the COS #4977 that's north of what we're looking at was created by the mortgage exemption maybe?

Colleen Dowdall: It would be...are you looking on a map?

Commissioner Curtiss: Yes, I'm looking on the map they submitted. There's that one piece between there and Barb Lane.

Colleen Dowdall: If it says COS #4977, then that would be the case.

Commissioner Curtiss: Okay. Thank you.

Commissioner Carey: Is Mr. Davis here? Could you please step forward and identify yourself.

I am Roger Davis.

Commissioner Carey: Mr. Davis, we ask our County Attorney to ask applicants for this exemption to respond to questions on the record in order satisfy us that there is not attempt to evade subdivision review which is a misdemeanor.

Roger Davis: Yes, I understand that.

Colleen Dowdall: Hi. I said that you've owned the property since 1991, is that the case?

Roger Davis: That's correct.

Colleen Dowdall: When you bought the property, did you intend to divide it?

Roger Davis: No.

Colleen Dowdall: Do you or your sons intend to transfer any of the property within the next year?

Roger Davis: No.

Colleen Dowdall: I understand your sons are all adults?

Roger Davis: Correct.

Colleen Dowdall: Are they going to develop the property?

Roger Davis: Well, two of them are getting married and they're going to build houses out there.

Colleen Dowdall: Okay, are they going to reside in the houses?

Roger Davis: Yes.

Colleen Dowdall: What about the other two?

Roger Davis: Well, I couldn't give two of them something and not the other ones. That's what I'm doing. Eventually the other two probably will get married and do the same thing, I would hope.

Colleen Dowdall: So where do those two sons live?

Roger Davis: One lives in Potomac and the other still lives at my house.

Colleen Dowdall: Okay. Have you talked to anyone at the County about going through subdivision review as opposed to doing exemptions?

Roger Davis: At Missoula County? No.

Colleen Dowdall: Are you in the business of building houses or subdividing land?

Roger Davis: No.

Colleen Dowdall: Are you attempting to evade subdivision review?

Roger Davis: No.

Colleen Dowdall: You understand we are not reviewing this to make sure that you have adequate access or that the roads are good or anything like that. We're just reviewing the division of land.

Roger Davis: Yes.

Colleen Dowdall: This may not be the only approval you need. You'll need to get sanitation restrictions lifted and zoning compliance, review for floodplain. So if the Commissioners say yes you can divide these parcels in this way, it doesn't mean that some other place along the way....

Roger Davis: Yes, I understand that.

Commissioner Curtiss: One question, on the paperwork that you submitted you show a utility access easement along the side, do you propose to put that on the plat so they can access the property?

Roger Davis: Yes. You need an easement down there to....yeah.

Commissioner Curtiss: To get from one place to the next, right?

Roger Davis: Yeah.

Commissioner Carey: Okay sir, thank you. Does anyone else wish to comment on this? Seeing no one I'll close the hearing.

Commissioner Curtiss moved that the Board of County Commissioners approve the request by Roger G. Davis to create four additional parcels by use of the family transfer exemption based on the fact that there does not appear to be an attempt to evade subdivision review. Commissioner Carey seconded. The motion carried on a vote of 2-0.

## **HEARINGS**

### **Petition to Abandon a Portion of Mullan Road through East Missoula (from I-90 to Highway 10 West)**

Commissioner Carey opened the hearing.

Chuck Wright: I have a little presentation to show on power point on this particular petition. It's a petition to abandon Mullan Rd.

Commissioner Curtiss: Chuck, could you please orient people as to where we are on the map.

Chuck Wright: Yes. I-90 is at the bottom of this map with East Missoula to the west and Mullan Road runs from highway 200 south down to I-90. This is the old road and we're not exactly sure where that road is, we think it's close to this computer rendering. I want to preface that right off the bat. Now, we had a meeting in East Missoula and there were several different people who spoke and Mr. Bert Somers, he owns this large parcel to the east of the road. He said he does not want to abandon the portion of the road that abuts his property. Okay, so I have three scenarios and you have to realize that these are just proposals because

somebody has to go out and take a look at it and when that happens you might come up with two or three different ideas. In all three scenarios the right-of-way in front of the Somers' property is always going to remain there. The first scenario may be a little expensive, but it is taking the upper portion of the road from highway 200 to the edge of the Somers property and abandoning that, then moving it down to the southern edge of the Somers' property parallel to I-90. Now, granted you can't do that at this meeting because no one has petitioned to do anything like that, I'm just bringing up options for you to think of what can be done with this situation. That's the first option. The land owned by Mr. Somers will be damaged if we go with this option and someone will have to compensate him for that damage. The second option is to abandon the road in the same area as option one, but instead of moving the road down to the Somers' property, you would take a right at the northern edge of that property and go up to Old Deer Creek road behind the Ainsworth property. And as with the first option, you have nothing before you today that says you can do anything like that at this meeting. The third option is just to alter the road and leave the road unabandoned in front of the Somers' property. You'll have to go to a new proposal to get the road altered to find out the actual location because as of now we think it touches a couple of houses in their on the Somers property and we don't want that. So we would have to do a separate petition to alter that, but that way you could come in to this property. These are Mr. Ainsworth's property. Granted it will only go to the edge of the Somers property, but then the developers could do whatever they wanted to with that particular road after that. With this scenario, leaving the portion in front of the Somers property and abandoning this portion from there up would suffice with your petition before you today. You have a petition before you to abandon the road from highway 200 to I-90, well since Mr. Somers says he doesn't want his portion abandoned, you could just go from highway 200 to the edge of his property and that would meet the statutes of whatever you need to do. The other thing is we have to go out there and look at that and I've had people express that they'd like to go with us, so when we go we need to make sure someone gets to go with us and take a look at this thing because you can never really tell. You might be out there and someone could come up with a better idea. Is there anything else you want to know about this property in this area? Because Doug has zoning and everything else that you can think of on this computer presentation. He can show you any kind of option if you want to check other ideas.

Commissioner Curtiss: Charlie, wouldn't it also make sense to abandon the little piece that's there where it hits the freeway right-of-way?

Chuck Wright: Yes, it would. That would make sense.

Commissioner Carey: Is there any public comment on this?

Dick Ainsworth w/PCI: I'm here wearing several hats today. I'm representing myself and my wife as owners of three properties in the area. I'm also here representing Bill Watkins, who has a buy/sell agreement to buy the piece of property along the river that has been the Shaw-Todd property, John Shaw and his sister Lonnie Todd. We probably started this can of worms or uncovered in maybe. We feel and Bill Watkins hired Dusty Deschamps to investigate the situation out in East Missoula with regards to public and county road access to the lower properties. Dusty determined, and you folks have a copy of his opinion that he issued before he was appointed judge, so he can't be here today obviously – he's sort of taken himself out of the mix. But Dusty was of the opinion and he was the one quite frankly, we started out talking about access from Speedway down...there's an old railroad grade that doesn't show very well on this map, but that went across the river and it's obvious on the ground...well the old right-of-way went through what is now a house and there's still a couple of mounds of fill where it was. There used to be bridge there years ago and once upon a time it was a railroad right-of-way, then it was a toll road that Mr. Bandmann ran. The old GLO notes, when the surveyors ran this section line, called for this road crossing here....and we started out dealing with what we felt was an old, and Dusty felt was, and old County road right-of-way that went generally across the river. In talking with Dusty he brought up this old Mullan Road right-of-way which is really the topic of the hearing you're holding right now, although there's a couple of other hearings on your agenda that are associated with that that deal with this road. Dusty suggested that we should bring up the Mullan Road issue because it was a can of worms that needs to be resolved and so we did and I'm not sure we're glad we did, but....we are because it makes sense to get it straightened out. Our desire is really, again we feel that there's historic and there's documentation of historic public access in some alignment from here down through this property. This property here is my wives and mine and the property to the east of that has been

the Todd-Shaw property, that's the property that Watkins is trying to purchase and then there's another parcel up above that my wife and I own as well. We feel that there's historic access from Speedway down through these properties and we would like to maintain that in some alignment. We're not hung up on where that might be. We'd obviously like to do as little disruption and damage to other folks out there as we could. Chuck Wrights proposals, all three of those, although the don't deal specifically with this road, deal with Mullan road and any of those options would provide for public or County road access down to my property. My upper property actually touches on Deer Creek Road up here, so I have access off of that road, but....and I think part of Charlie's thinking here and I think it's a good idea, is to...thinking ahead toward the future. This property (the Shaw-Todd property) will all get developed and from a long range planning point of view it makes sense to have some sort of a road in some location that would go probably from Deer Creek Road down through these properties in some manner and come back out into East Missoula. Where it might go, I don't know. Maybe ideally it would go clear through and come out down here and there would be some middle connection and Charlie's proposals, I think all provide a way to make that happen and we could live with really any of those. With that I'll end and I'll be available for questions if you've got any. Thank you.

Delaney: I practice law here in Missoula and I provided the Commission with a letter indicating I represent Mr. & Mrs. Bert Somers who are the owners of a parcel of property...their property is to the west of Watkins property, it's almost 20 acres. It lies apparently adjacent to the old Mullan Road and the only access to that property that Bert and Gladys have is on Somers street which is right about here. Bert has lived on this property all of his life and he's nearly 90 years old, so he's an old timer in East Missoula. The position that they take is that the Mullan Road, at least as it abuts their property should not be abandoned. They're not taking the position that other portions of the road shouldn't be abandoned, but at least that portion should not be because it might materially impair the access that they've always had to their property. The reason for that is twofold, first of all no one really knows where the Mullan Road is. The Mullan Road and the old old documents which Dusty Deschamps, now Judge Deschamps, researched indicates that it's the right-of-way of about 60 feet in width, but it doesn't say in any of the documents that I've ever seen where the centerline is. So it's awfully hard to locate that with any degree of precision which means we don't exactly know where the Mullan Road actually sits as it traverses the more or less westerly side of the Somers property. Secondly the Somers property was deeded many many many years ago by a general property description...that's not a meats and bones description so we don't really know where the precise westerly edge of the Somers property is and if it should be somehow determined that the Somers property is not immediately adjacent to wherever the Mullan Road is, we would have a hiatus – a no man's land – in between the Somers property and Somers street which is their only access. This in effect could impair their legal right to enter and leave their property. So that's the basic reason why they oppose vacating the Mullan Road as a public road as it goes by their property. There are a couple of other comments I would like to make. The County Surveyor indicated that one of his proposals is essentially to punch a roadway along what I'm going to call the southerly boundary of the Somers property to service the property behind them along the river which is apparently purchased by a developer. That would create very substantial problems for the County on at least two levels. The first is that the County would have to condemn a portion of the Somers property. That would mean that the property would be condemned for a private purpose that is to give access to this developer's property. As I'm sure the Commissioners are aware, the Supreme Court of the United States recently in a 5-4 decision permitted the condemnation of private property for a private use in a city back east and that has been the source of a tremendous amount of upheaval in both the legal profession and in the judiciary as to whether or not that's an appropriate constitutional approach. That's been challenged in virtually every state in the country and I would really think that Missoula County might not want to become involved in that sort of an issue. The second issue that would be implicit in that is the County would have to compensate Somers for whatever right-of-way that would be. That could get to be rather costly of County funds considering that this is not for a public purpose, but rather for a private purpose. The other various options which the County Surveyor's Office has mentioned vacating portions of the right-of-way to the Deer Creek bridge down to the northerly edge of the Somers property we take no particular position on that, it obviously doesn't affect the Somers property. But to impair or risk the impairment of access of Bert and Gladys to their property would be a catastrophic problem for them and of course would inevitably have to be contested. So for those reasons, we would respectfully ask you to consider not vacating the old Mullan Road as it traverses the western edge of the Somers property. Thank you.

Dave McClain: I'm an attorney here in Missoula and I represent Lonnie Todd, who owns property along the river. Ms. Todd's position is that she is not opposed to any of the option proposed by Mr. Wright. I do take a little exception with one comment made by Mr. Delaney which deals with this option on the bottom serving a private purpose. As you get in to the discussion on the three petitions that are before you, I think Mr. Wright will ultimately get into a discussion about the fact that the County right-of-way on the old wagon road may have provided public access to the river. By selecting the option at the bottom that runs along the southerly edge of the Somers property next to the freeway, you may be able to maintain providing that public access. Ms. Todd does own the property that Mr. Watkins is interested in purchasing and the one thing that I would say to you is that without question the property along the Clark Fork River is going to be divided and developed. I think the question that we have at this point and time as we look at these options, and the question we have to keep in mind, is whether or not we want to be ahead of the curve in this development or behind it. So as you look at these options, I would ask that you keep that in mind and again, Ms. Todd is not opposed to any of those proposals submitted by Mr. Wright. Thank you.

Bill Watkins: I appreciate your consideration on this matter today. I do think that the right-of-ways that we're asking become both public and private as access to the river is very minimal to any resident of Missoula County and whatever access you would choose to grant would grant public because there will be a right-of-way or there'll be a walkway along the river that will go essentially from one end all the way out to Deer Creek. So, it does provide a very common public access to all County members. I think with that in mind that all proposals probably contribute to that public easement. I think the only other comment I'd like to make is that the old GLO/Wagon Road as it is depicted in the historical records also is that public right-of-way as it begins in the southern most portion of the map and would run up to...the discussion we were having earlier of the Bandmann's Flat and the bridge, of which those abutments still sit in the water. So there isn't any question in our mind as to where that public right-of-way went across the river. The only real debate is its exact location as it sits west of that bridge and as everyone says, we may not know its exact location, but certainly we are not sitting here and saying there are hundreds of feet difference. You can look at the map and pick that with reasonable certainty, so we might very well be only splitting hairs when we're talking about its exact location because the historical pictures and such information give us a fairly reasonable close proximity it's just that maybe it isn't to the foot, but it sure as heck doesn't sit there within hundreds of feet away. Thank you.

Commissioner Carey: Seeing no more comment, we'll have to recess the hearing and determine a time and date to investigate on the ground. I'll be going out with Charlie.

Chuck Wright: How much time are you going to give us?

Commissioner Carey: How much time do you need?

Chuck Wright: Well, we're going to have three petitions to look at all at the same time.

Commissioner Carey: Okay 1:00 on Monday July 24<sup>th</sup> and then we'll reopen the hearing on July 26<sup>th</sup>.

Colleen Dowdall: You might want to consider giving it an extra week on this one.

Commissioner Carey: Because of the complications?

Colleen Dowdall: Yes.

Commissioner Carey: That makes sense. August 2<sup>nd</sup> we'll reopen the hearing.

Dick Ainsworth: What time, Bill?

Commissioner Carey: 1:00, Dick and where's a good place to start? Charlie?

Chuck Wright: I would say down at Bert Somers place right down there at the corner of where you go into his place.

Commissioner Curtiss: Somers Street?

Chuck Wright: Yes.

Petition to Abandon a Portion of Old GLO/Wagon Road (965 Montana Avenue to 835 Speedway – Old Bandmann Toll Road)

Commissioner Carey opened the hearing

Chuck Wright: This is a particular area where I have two attorney's opinions. One says it's a county road, the other says no way. As far as I'm concerned, I'm not an attorney or a judge, and I would like to stay out of that. I don't want to get into that.

Colleen Dowdall: I think that I can at least tell you that...is this the first one to request to abandon it?

Commissioner Carey: To abandon a portion of it, yeah.

Colleen Dowdall: The position is that this is a County road by virtue of it having been a toll road at one time and when toll roads were abandoned they became County roads. The owner, or perspective owner of the property, Mr. Watkins had requested that his attorney, Dusty Deschamps prepare an opinion as to whether there was a...the road was a County road for its full extent. So, I think you have that opinion before you. Two of the land owners now have retained Greg Schultz who has also done an opinion. I haven't looked at both of these in detail. I have looked at Dusty's and I've looked at all the documents in the beginning and I am persuaded that at least for the extent of the toll road, there's a County road. I don't know and can't say about the rest of the road that's being petitioned. This is the one that runs towards the river.

Commissioner Curtiss: Who petitioned this? Is it the Olsen's? Charlie, who petitioned this to be abandoned?

Chuck Wright: I believe it's the Olsen's, isn't it?

Dick Ainsworth: It's...and I realize you've got three separate petitions, one of which you've held the hearing on and closed. The other two, even though you've started discussion on one, I think the one you started discussion on is the one to abandon it which was submitted by some of the property owners out there. Mr. Olsen I believe and some neighbors. We also submitted one for the same piece of road with a request to realign it. So it's kind of hard to discuss one and not the other, so maybe some of my testimony will overlap that a little bit. Both of these petitions deal with a road that generally goes from somewhere down to the river. It's an old, well we feel, it's an old GLO or wagon road. Dusty Deschamps wrote an opinion that you folks have and then it was actually a toll road across the river. I don't believe it was ever a toll road on this side of the river, although I think Mr. Bandmann had his tollhouse right here, at least that's what the GLO notes made note of. I don't remember, but it was sometime in the late 1800's when they called out this wagon road that they crossed right here. When you measure down from this section corner to where the GLO called for the road crossing...if you're out there on the ground, you can look and see the fill that was the old bridge abutment and you can look right across the river and see others. It's real obvious that's where a bridge went at one point in time. We've asked to have that...well, it's obvious on one side and not so much on the other...and actually when I first bought this piece of property I went out there and wondered why in devil somebody had pushed up a couple of big piles of dirt there. When you're looking at them out on the ground they don't make any sense, when you look at them at an aerial photo they make all kinds of sense. But they're still there and they're still very apparent. So this old right-of-way went somewhere over here and to where it went, I don't know. Again we feel, and Dusty felt, that there is in fact an old public or County road right-of-way that went from the general location of Speedway...and Dusty's got, I think it's in the stuff we gave you if not I can certainly provide it....Dusty found a photograph that was taken from Mt. Sentinel I think the 1870's that shows a road that's just about in the location of Speedway. Unfortunately it's taken from back towards town and you can't see any detail when it gets to the river, but generally it followed Speedway and then went down and across the river. We've...in our petition to alter that road right-of-way, and I know the hearing you're having right now is really to abandon it, we're just asking that it be altered in some way to

provide access...or continue the access that we feel has always been there. From Speedway down to these properties, the old right-of-way probably went into my property but it goes over the top of the house here that belongs to the Hills and the Todd property, now that Bill Watkins is buying it, had accessed off of that also. We've got, unfortunately, the farthest back aerial photo that we have is in the 1930's and there was a road there then. But we feel that there's historic record of that being a public right-of-way and we would just like to maintain that in some location and again we'd like to do that in a location that wouldn't be as disruptive to the folks out there as possible.

Commissioner Curtiss: So what you're proposing...and I know we're looking at the abandoned one right now and not the altered, but on the altering on you're looking at trying to lay is some way so that it doesn't hit anyone's house.

Dick Ainsworth: Yes. There's a driveway down there and we're really proposing to follow that driveway instead of having the road go off and go through the Hill house. We think that driveway probably approximates, except right down where it used to go through the house and across the river, we think the driveway approximates the historic location of that road. And we proposed to follow the driveway obviously.

Gregory Schultz: I represent Richard and Linda Olsen and I've also been retained by Mr. Dodge. I think I can summarize legally our position on this. The fact that there was a road on the ground at some point in the past and the fact that the GLO survey notes depict that road does not make that road a public highway. It does not make that road a County road. I've submitted to you a very lengthy objection to the petition to relocate. I was retained by the Olsen's after they had already submitted a petition to abandon this so called GLO road. Had I represented them before they did that, I probably would have advised them not to do that because there's nothing to abandon. It's my opinion, having examined the title history of the area and the roads, that no County road was ever established there. I don't want to bore you with a recitation of all the legal reasons, I set them out at length in my objection. My reasoning, I think, will be incorporated by some of the other landowners in that area. To summarize the law, the only this wagon road, running on the west side of the river from what's now Speedway to the remnants of a bridge, and no one disputes at one point there was a road roughly in that area. The only way it could've been established is by public prescriptive use. Again the fact that the road is simply on the GLO plats is not a sufficient legal basis to find it a County road. You still have to go back to that point in time and determine if the road was created in accordance with the legal tests at that time. The petitioners, to relocate themselves can see, the only way this could've been established is by public use. It was never dedicated, never granted, never condemned, there's absolutely nothing in the public record establishing this road. On the west side of the river, this road does not even appear in the County road books. There's nothing in the chain of title for any parcel in the pathway of this road even mentioning this road. In 1895 the legislature changed the law to prohibit establishment of public roads by prescription, so for this road to have come into existence the petitioners are going to have to show that they satisfy this five year use period before 1895 and I think factually they simply can't do that. The window is too narrow. That's the first problem. The second problem is that this road supposedly runs on the pathway of the old Northern Pacific Railroad right-of-way. It is well established, now I'll admit it's a very archaic area of title law, but the U.S. Supreme Court has ruled that there could never have been adverse possession or prescriptive use of the Northern Pacific Railroad right-of-way and the pathway for this so called public road, if we take the petition at face value, runs right down the pathway of the old NP. When the NP was established in 1864 it came with a 400 foot right-of-way as I'm sure you know. As the railroad was built, historically people would start to encroach within the 400 foot right-of-way and the railroad sometimes would want to convey away portions of the right-of-way. So this came to a head after the turn of the century in federal court decisions and the law is clear that there can be no prescriptive use or adverse possession of ground within that right-of-way. So, from my perspective as a title lawyer, that's fatal to this whole argument. There's nothing to abandon because the roadway was never established and could not be established. There are other legal flaws, prescriptive use is adverse use. It's hostile to the underlying landowner. The underlying landowner would not want these people on his ground if he were aware of this use. Here, if this was a toll bridge which I think we know it was, Mr. Bandmann was inviting people on to the road. This was classic permissive or use by invitation to come on to his property to use his bridge, so the fundamental element of adverse use is missing here on this roadway. There are other legal problems, the pathway is undefined. We really don't know where this road ran. This is not the typical relocation petition you folks see where there's some reference in a survey or in a petition to the pathway of the road and the road has moved

or existed in another place and so we want to relocate the road to where it exists. This is the reverse of that, but there's not actual existing road on the ground at this point. The County never asserted jurisdiction over this road, that element is missing. So, it's my legal opinion and I have the greatest respect for Mr. Ainsworth, I hope I can still go to his retirement party next month, but I disagree with him about this. I disagree with Mr. Deschamps about this. Also, even if this road exists, even if it were a public highway, it's not 60 feet wide. If it was established by prescription, its use could only be...its width can only be that established by historic use and there's been no showing here of how wide that road is, but I'm sure if it's a classic old wagon road, it was not 60 feet wide, so for the Commission to be moving around a 60 foot road at this point in time is really an act of eminent domain. It's condemnation of these people's properties that are unlucky enough to be in the pathway. Our position is that the road does not exist as a matter of law, as a public way. If it does, it sure as heck is not 60 feet wide. The landowners feel very strongly about this. Most of these landowners are now being represented by lawyers like me who have retained by title insurance companies, so I can tell you the title insurer's in town are against this and will fund the litigation to help these people prevent this. That's not brag, that's just fact as Walter Brennan used to say, that's the insurance companies obligation here. If this thing is imposed on these people, it's going to be resolved ultimately by a judge and not by Judge Deschamps. I thank you for your time.

Benjamin Hirsch: I represent Mr. Bruce Baxter. He is a resident who would be impacted by the petition that's been submitted. I realize we're doing things a bit out of order and it's the third petition, I know we're on the second, but I think it's appropriate to address it now. Mr. Baxter concurs with the objection that the Olsen's have submitted and he joins in it. I think he'd like to tell you a few things practically on the ground as to how this would impact him. There's some on the ground stuff that you may not be privy to.

Bruce Baxter: I'm an affected landowner on all three of the petitions that you're hearing on these roads, the Mullan Road and the supposed Wagon road. I've written a couple of letters of protest as the Commissioners invited letters of protest. I'm hoping you have received those. I'll point out a few of my objections. The reason I'm protesting and specifically protesting the petition to alter the wagon road, all legal definitions I have are that the road in question is currently a private access easement only. A private access easement is described as only 30 feet in width, not wide enough to qualify as a County road. A private access easement is also a 9% grade or slope and as such it's only accessible by a 4x4 vehicle in the winter. I have lived on this hill for 17 years and every winter I have to pull cars out of my fence that can't get up the hill. It's four wheel drive only when it snows. This defined 30 foot width was agreed to for three landowners only and the Olsen's have built a new house now, they leave no room for a 60 foot easement, putting this proposed 60 foot easement on my property, the Baxter property. It takes my entire front yard and half of my front porch. This private access easement also has not provided access to state lands, Clark Fork River banks, for several decades now. At the east end of the easement is the city of Missoula sewer pumping station which is fenced and locked, so there's not access to the river on any of these properties right now short of the Deer Creek Bridge. Thank you for your time.

Commissioner Carey: Mr. Baxter could you direct us to which properties on the map....

Bruce Baxter: I don't think my hands are steady enough to show....

Commissioner Carey: Just describe, please.

Bruce Baxter: Coming off Speedway Road the road to the south is Montana Avenue, the road going east is the 30 foot private access easement to approximately eight homes that go to the north from that point and it comes out onto Speedway road on the north, so there are two access easements for those eight homes.

Chuck Wright: So you're property is right out here to the right?

Bruce Baxter: I'm on the south end; I'm actually off Speedway and Montana Avenue, the very southerly and westerly property. I have a 30 foot easement coming down my front yard and there's not room for 60 feet there.

Commissioner Carey: Okay, thank you. Okay, this is a hearing on the petition to abandon a portion of the road, should we speak to that and then we'll have the third hearing on altering. I know some of it overlaps.

Dave McClain: Again representing Lonnie Todd. You get a third lawyer up here, you'll get a third opinion, and so undoubtedly I'm sure Colleen, or Mike Sehestedt, is going to write a fourth opinion. In essence, I think that we believe at one time there was a County road there. We'd ask simply that it not be abandoned. Ms. Todd's property currently is the one that has the boundary along the river and we'd ask that the road not be abandoned. I'm sure you're going to get a comprehensive legal opinion from the County so I'll reserve that. I think you've heard enough today.

Bill Watkins: I think it depends on the title insurance company that you talk to because we've had discussions with several of them that say that there are...this is a problematic area that probably deserves to be resolved. I think the title insurance companies that have rendered opinions that this GLO right-of-way didn't exist, obviously have an issue with it because it did exist and those that have no exposure to an opinion feel it should be resolved just because every time a potential purchaser of real estate that would adjoin this right-of-way, the old GLO wagon road becomes problematic. There are title insurance companies that have not issued the opinion and then have written title insurers that might have some exposure. There are those title insurance companies that have not issued opinions that in reality agree that every time you do issue on it becomes problematic. So I guess I'm just saying that it still is an issue that should be resolved for the better of all just because it becomes a reoccurring problem.

Colleen Dowdall: I just wanted to clarify a couple of things that Mr. Shultz said about the law. The first one was the fact that he recited to that in 1895 the legislature did repeal the provision that allowed roads by prescription to be obtained...they reinstated that ability and to this day the public can, or the County can, acquire a public road by prescription. I'm not certain of the date that the legislature acted between Chuck and I we believe it's sometime between 1907 and 1927, so it was a very brief period of time when you could not obtain public prescriptive right-of-way. The other legal issue with regard to toll roads is that toll roads were franchises granted by the County and they had to be open to the public and there was a provision in state law that when toll roads were outlawed, they became County roads.

Greg Schultz: May I respond?

Commissioner Carey: Briefly Mr. Schultz, this isn't a court of law, so we....you can come up, sure.

Greg Schultz: The period in which public roads could not be established by prescription was from 1895 to 1913, so the relevance of this is that the bridge washed out in 1908. Again the petitioners had to have established a prescriptive roadway by 1895 because the washout was during that period when it could not have been established by prescription. The toll road history is interesting on this particular parcel. If you look in your own journals from the turn of the century the Commissioners tried to purchase the toll road from Bandmann and that effort went nowhere. Then the Big Blackfoot Mining Company moved to have it established as a County road and that petition was never acted on. So, all these facts are set forth in my objection. To me the toll road issue is essential in proving that it was not a prescriptive roadway.

Commissioner Carey: Thanks. Okay, we're still on the petition to abandon a portion of the road, does anyone else care to speak? Seeing no one we'll recess the hearing until 1:00 on the 24<sup>th</sup>?

Commissioner Curtiss: Just to clarify we're going to do all the inspections on all of the petitions on the same day at the same time.

### **Petition to Alter a Portion of Old GLO/Wagon Road in East Missoula**

Commissioner Carey opened the hearing.

Chuck Wright: One more time I'm going to tell you I've got two legal opinions on that particular thing and I don't want to get into that.

Dick Ainsworth: One comment that I want to make is, the City presently has a lift station that's located right down against the river and they have an access easement across my property. I don't know and I haven't researched this....but I granted them an easement across my property to get there. How they have legal access from Speedway to here, I don't know. I don't know if they have an easement or if they assumed that this was public access down to that point. But they do have a public easement that I gave them from the edge of my property down to the lift station along the river. Again, this petition is actually one that we submitted and we would like to have that...we would object to the proposal to abandon that road easement that goes down to the river and we'd ask you to realign it. We...in our petition, we did give you one option of where that might go and that's all that is. We're flexible. Again, we'd like to be as non disruptive as possible and we're not hung up on 60 feet of right-of-way. If something less than that could be approved without creating problems for Mr. Baxter and Mr. Olsen, some combination maybe, particularly if Chuck Wright's proposal of keeping the upper part of Mullan Road open, I know the Somers would like to do that, but then if either went down to the south or went this way, that would provide a link clear through the properties. I think for everyone's benefit, it would be beneficial if there was some kind of an emergency connection here and that could be certainly less than 60 feet. Mr. Baxter mentioned that it was quite steep, and it is. I think the grade of that could be improved some, certainly. But I think that would be an option to realign this and maybe make it narrower than the 60 feet, perhaps even to 30 feet, and it could be an emergency connection if there was some other way clear through the properties. That's just an option that I'm throwing out. Thank you.

James Hill: I live at 945 Montana Street with my wife Edna. Could we bring up the map that shows a little smaller view of the area? Thanks. The proposals as such to alter the road coming down....we've been in our house since 1979. We bought the land from Reinhart Anderson and at that time the only thing that was coming down there was a dirt road that went down to the Shaw's and it was John Shaw and his sister's mom and dad that lived there at that time. There was no other property when we bought our house. Continually since that time the County has always said that's a private road. We've had to maintain that road; we've had to plow that road ourselves. The County has never done anything as far as helping us to alleviate our situation. The only reason now that you even have a petition before you is because Mr. Watkins and Mr. Ainsworth want to buy that land...or Mr. Watkins wants to buy that land down there from the Shaw's. Nobody worried for 27 years whether in fact...one of their arguments was that you have to have access to the river...for 27 years that my wife and I have been there, nobody has worried about getting access down there. They did in fact put the lift station down there when they put the sewer in and we did in fact at that time give them access across our property to put the sewer in, which now goes across our property. But as far as the dirt pile, if you line that up it goes right directly through the middle of our house. As I say, for 27 years nobody has worried about the fact that road and taken care of it, but the people who owned it, myself, my wife, Bruce and Janet Baxter and Linda and Richard Olsen and Nick Madre has been, he lives right across the street, of course a lot of those other houses were put in after. In fact we purchased our house in 1979, so I'm opposed to the fact that they want to realign that road because if you can see....there's a little road that comes around by our house, that is our private driveway. Approximately right in the middle of that we have a scarlet hawthorn, we have an elm tree, a pine tree and a crab apple tree right along the drive. In fact the realignment of that road would take all four of those trees out of there. The pine tree is probably close to four feet in diameter. Both my wife and I are getting up in age and if they realign the road where they're proposing, then in fact they'd have to take all those trees out and that road would go approximately...well it would go 20 feet closer to our house or our bedroom and you'd have 16 some acres with quarter acre lots, so you'd have probably a hundred and some people. I'm surely would think that people wouldn't want something like that, but in fact, I say it's what their intentions are. I urge you to oppose this and to turn down their request to realign the road. Thank you.

Dick Ainsworth: I'd just like to add one more thing. Our intention is to not move that road closer to Mr. Hill's house. We would like to follow basically that driveway alignment where it is and not move it closer to him. The other thing I'd like to add...the Barrett home is the home that was on the property that I purchased, the old 1937, I think it is, aerial photo that I've got shows the road coming down and going into the Shaw house. It also shows a road that goes right about to the Barrett house...and then another that didn't go directly to their house. It probably went directly through what is now Mr. Hill's house and followed the old alignment and then it headed off toward the Barrett house. So there is record of an old road, that may have been a private road going to their house, but there was a road that went to the Barrett house. Thank you.

Brenda Croucher: I'm here representing Nick Madre. We feel that realignment of a road that we don't know where it is and that it is even stated in the maps in the Surveyor's Office could be as far as 100 feet off, either way. They have no idea where that old GLO road is and so before we have meetings of realignment or abandonment, perhaps we should resurvey it and come up with a conclusive location of where it is. I don't think it's right to....I think it's ludicrous to move a road that you don't even know where it is anyway. So I think the first order of business would be to do an actual survey of it. Thank you.

Dave McClain: Ms. Todd would be in favor of you realigning this road at a location that's appropriate. There isn't a specific proposal that she needs to go with. As I said at the beginning, I think what you've seen now is all three of these issues before you today are interrelated and there needs to come to be some resolution so that access along that river is ultimately addressed and however you determine to do that appropriately, Ms. Todd would be in favor of. Thank you.

Commissioner Carey: Seeing no further comment, I'll go ahead and recess this hearing until August 2, 2006. Meanwhile, we'll take a look at it on the 24<sup>th</sup> of July at 1:00 starting on Somers Road.

## **OTHER BUSINESS**

### **Fire Restriction Proclamation – Bob Reid, Director of Emergency Services**

Bob Reid: This is just a piece of semi-routine business asking you to impose some fire restrictions on private land in the County. This mirrors an action that was taken today by the state, federal and tribal agencies that manage forest lands in the County as well. It's in response to the fire season and the deteriorating fire conditions that are out in the world right now. The restrictions that we're asking for: this would on private land prohibit building, maintaining, attending or using a fire or campfire except within a developed recreation site or approved site, smoking except within an enclosed vehicle or building, a developed recreation site or while stopped in an area at least 3 feet in diameter that is barren or cleared of all flammable materials and finally the use of all fireworks on private lands.

Commissioner Carey: Okay, those are the three restrictions, thank you.

Commissioner Curtiss: Just to clarify, since Missoula County has more than one national forest within...we have the Lolo and the Flathead, has the Flathead taken this same precaution.

Bob Reid: To my knowledge, that is in a different restrictions area up there and I haven't consulted them today. I'm not aware that they have gone to this level of restrictions up there, so in at least the Flathead portions of the County, that may not be in place, however as I understand it this would apply to private land in that zone, since it's in Missoula County. So there is that dichotomy that always exists during fire season.

Commissioner Curtiss: This is stage one?

Bob Reid: Yes.

Commissioner Curtiss: And stage one doesn't put in to effect what we refer to as "hoot owl," yet, right?

Bob Reid: No, that comes with the stage two restrictions and those will likely follow, unless there's some dramatic improvement in the weather.

Commissioner Curtiss moved to adopt this fire restriction resolution as proposed in regard to fire hazards. Commissioner Carey seconded. The motion carried on a vote of 2-0.

Seeing no further business, Commissioner Carey recessed the hearing at 2:45 p.m.