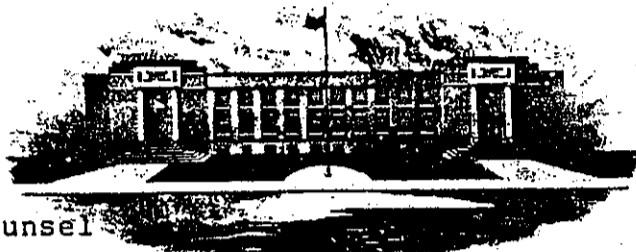


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*Tillamook County
Land of Cheese, Trees and Ocean Breeze*

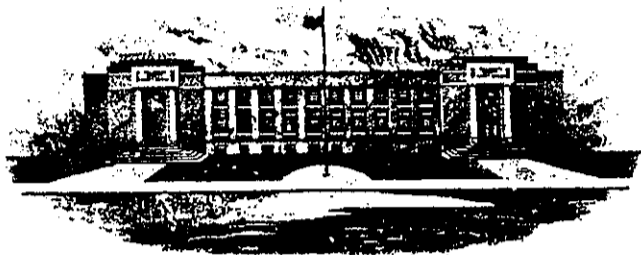
OFFICE OF LEGAL COUNSEL
Tillamook County Courthouse
201 Laurel Avenue, Tillamook, Oregon 97141

TO: Board of Commissioners
FROM: Neal Lemery *Neal*
DATE: November 3, 1987
RE: Eckloff County Road/Cavenham Gate

After examining the research to date (attached), and upon review of the applicable law, it is my opinion that the portion of road for which Cavenham has petitioned a gate is a duly established and legal county road, created by petition at least as early as 1876, but in any event, not later than September 1885. This county road remained the primary route to Netarts Bay until at least 1920.

Cavenham's claim of right appears to arise from their contention that this road may have thereafter experienced a period of non-user, followed by the substantial construction or reconstruction of a new roadway by Crown Zellerbach at its own expense. A review of overlays with aerial photographs shows that the Crown road was located substantially within the old county road alignments with some deviation. In as much as there is no record of any vacation and since the law disfavors adverse possession and common law abandonment against the county, it is also my opinion that the road in question still exists as a legal county road over which the county now has jurisdiction.

Nevertheless, any action by the county upon the petition for gate closure may be premature at this time. More specifically, Cavenham's claim to a private road with its purported discrepancies in location to the county road must necessarily be resolved prior to reaching the issue of whether to allow a gate. This may be done by a county governing body under the procedures found in ORS 368.201 - .221. These statutes allow the governing body to legalize a county road under certain conditions which include:



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- (2) If the location of the road cannot be accurately determined due to:
 - (a) Numerous alterations in the roador
- (3) If the road as traveled and used for 10 years or more does not conform to the location of a road described in county records.

There are a number of reasons why this procedure should be followed at this time. Under its present designation as a county road, the county could arguable be held liable for damages arising from a claimed defect in the county road. A legalization proceeding with specific findings could establish the subject road as a public highway, thereby reducing the county's potential liability for damages from injury. Moreover, this procedure affords Cavenham the opportunity to file any information that controverts any matter presented in the proceedings or alleging any new matter relevant to the proceedings, thereby providing the proper forum within which to establish their claim, if any.

Under this procedure the Board of Commissioners would first cause the road to be surveyed to determine its location and width. Upon completion of the survey and written report by the Surveyor, the Board would cause notice to be served on abutting owners and by posting. Hearings would then be held as to whether the road be legalized or abandoned, and whether damages should be paid. At that time, a decision could also be made as to whether to allow the petition for gate closure. This procedure would also allow the Board to determine through public testimony and affidavits, the extent of prescriptive use since the road was reconstructed.

NCL:ds

I. STATEMENT OF FACTS

1870 - Road Petition #10
J. H. Groff Road

The earliest proceeding for a road from South Prairie to Netarts Bay was initiated by petition of 21 citizens filed on July 5, 1870, and requested the Court Court:

"...to locate a proposed road Beginning at west end of south prairie Co. road, thence westward to Tillamook river, thence west to the North East corner of McCormics (sic) land claim..." (See Road Petition #10)

The following day, July 6, 1870, the County Court appointed Truman Harris, John M. Whitman and William St. John as viewers, and directed that they meet at the house of Henry St. John on the morning of July 20 to view out and plainly mark the proposed road. They were to then report their proceedings to the September, 1870 term of the County Court. (CCJ "B", p. 50)

A claim for damages was also filed by G. W. Elmore on July 6, 1870 "...in case the above road should be established." (CCJ "B", p. 50) The County Court then appointed three persons "...to assess the damages, if any...", claimed by Elmore. (CCJ "B", pp. 51-52)

On September 5, 1870 the viewer's report was filed (Peacock Book, p. 13) and presented to the County Court. The viewers report was read that day and pronounced the road to be "...practicable and of public utility." (CCJ "B", p. 55) At the same time the Court considered the report on damages of G. W. Elmore and ordered that the petitioners pay ten dollars to Elmore, "...otherwise the road to be null and void." (CCJ "B", p. 54) It has not been determined whether the ten dollars was ever paid to Elmore for damages. Nevertheless, the viewers report was given its second reading on the following day, September 6, 1870. (CCJ "B", p. 57) Since there were no remonstrances against the road, the County Court ordered: "...that said road be recorded and opened as prayed for." Id.

Despite the fact that road viewer William St. John was also appointed as County Surveyor on the same day, September 6, 1870,

no survey, field notes or other legal description has been located which describes the specific location of the Groff Road. Moreover, there is no record of affidavits of posting or other notice regarding the creation of this road.

1873-74 - Road Petition #16
Dickson Road

Almost three years after the petition for the Groff Road, another petition was filed with the County Court by 21 citizens, several of which had also signed the earlier Groff petition. Filed on July 9, 1873, the Dickson petition prayed for:

"...the location of a County Road 60 ft in width running from South Prairie to Netarts Bay Said road commencing on South Prairie on the County Road. Running thence west across Tillamook River on or near the line between D. St. John and T. Harris. Thence West up Sitton (sic) Creek on or near the trail to the Stake designated as the S. E. corner of William Dickson's land claim on Beaver Creek. Thence North up North Beaver Creek on or near the trail to Netarts Bay. The Road running to the Beach at or near Green Point. The road to be located on the nearest and best ground for a Road" (See Road Petition #16) (Emphasis added)

When this petition came before the County Court on July 9, 1873, the court journal contained the following:

"Wm. Dickson being duly sworn says to his certain knowledge legal notice has been given of the above proposed road and files his bond for the costs of said road if the report be not approved by the court of the viewers of said road." (CCJ "B", p. 107)

The County Court thereupon appointed A. D. Farmer, James Mansfield and Clark Bewley to view out and locate the road. (CCJ "B", p. 108) Upon completion of their task, A. D. Farmer then appeared before the County Court on September 3, 1873 to give their report, "...that said road be located by the Court." (CCJ "B", p. 111) Following a second reading of the viewers report the next day, the County Court ordered that the road be surveyed as laid out and marked by the viewers, and further ordered that the road be opened as prayed for by the petitioners. Courtney M. Walker was directed by the Court to survey the road and report back to the Court at its January, 1874 term. (CCJ "B", p. 112)

The Walker survey was apparently not accomplished and during the April 8, 1874 session, the County Court ordered Hiram Smith to survey the road and report his proceedings to the County Court at its July, 1874 term. (CCJ "B", p. 125)

Although Smith completed his "survey" on June 6, 1874 (See Road Bin File #16 - plat of road), and the County Court allowed claims for survey costs at its July 7, 1875 term (CCJ "B", p. 154) and at its January 5, 1876 term (CCJ "B" p. 165), this "survey" later proved to be inadequate. (See Road petition #31)

1876 - Road Petition #20
Josiah Biggs Road

Another petition for a road from South Prairie to Netarts was filed with the County Court on January 5, 1876 and was signed by 34 petitioners, including a number of those who had also signed earlier petitions. It should be noted that the chief petitioner, Josiah Biggs, was the homesteader who, four years later, came into title to the W $\frac{1}{2}$ SE $\frac{1}{4}$ of Section 2, T2S, R10W? W.M. (It is within this parcel of land that the present section of controverted roadway joins the present Netarts highway.) This petition prayed for a road:

"Beginning at the South East Corner of Truman Harris's Donation Claim Thence West to the Tillamook River Thence down Said Stream on the most favorable ground to the Section Line Between Sections 7 & 8 Thence North on Said Section Line to a Stake about 12 Rods South of Said Harris's Orchard Thence on a Westerly Course to the East Line of Isaac Quicks homestead Claim Thence South to Said Quicks South East Corner Thence on a Westerly Course as near as Practicable (sic) to The Present Trail to or near the South East Corner of Section 5 Range 2 South (sic) & 10 West thence to a Stake on the South west quarter Corner of the Northwest quarter of Said Section 5 at or near Greenpoint Said Road To be 40 feet wide. (See Road Petition #20) (Emphasis added)

When this matter was considered by the County Court on January 5, 1876, the journal entry indicates the petition was for "...locating a county road..." (CCJ "B", p. 164) At this time Josiah Biggs and Henry Griner also filed their \$200 bond which was approved by the County Court. Samuel Marrs, Thomas Ellis and

R. H. Renshaw were thereupon appointed as road viewers and directed to proceed with the County Surveyor to locate and survey the road and report to the April, 1876 term of the County Court. (See Road petition file #20)

The survey was completed on February 22, 1876 and a plat was made of the road. (See Road Bin File #20) On April 5, 1876 the viewers report was presented to the County Court, accepted and read the first time. (CCJ "B", p. 169) Following a second reading of the viewers report the next day, the court journals also indicate an affidavit of posting in three public places in the vicinity of the road and one on the court house door thirty days prior to presentation of the petition. (CCJ "B", p., 169-70) The County Court thereupon ordered that the road be opened "...and declared a public highway." (CCJ "B", p. 170) At that time claims were also allowed for the survey of the road. Id.

On January 3, 1877 the County Clerk was ordered to issue \$6.00 to J. Biggs to purchase spikes for the construction of a bridge across Tillamook River. (CCJ "B", p. 182) The construction of this bridge may have taken more than two years to complete as noted by an entry in the court journals on April 9, 1879 stating:

It is hereby ordered that B. C. Waren Supervisor of Road Dist No. 2 proceed forthwith to Open the road leading from South Prairie to Netarts or so much as may be in said Dist. No. 2 by completing a bridge now in construction across Tillamook River and by completing said road from near Truman Harris's Barn to said bridge." (CCJ "B", p. 226-27)

Again four years later on April 4, 1883, another entry in the county court journal states:

It is hereby ordered that the Supervisors in road Districts Nos. 2 and 6 open the road leading from South Prairie to Netarts and to have said road open by the first day of July, 1883. And the Clerk to give said Supervisors notice of this order. (CCJ "B", p. 328)

1883 - Netarts Road
Petition #31

Josiah Biggs was also apparently the chief petitioner on this petition signed by fifteen householders of Districts 2 and 6 in the vicinity of the road. Many of the signatures had also appeared on earlier petitions described above. Filed on July 5, 1883, petition #31 states in part:

"... to have the road from South Prairie to Netarts Bay relocated as the Survey made by Hiram Smith seven years ago is entirely Impractable for a good road Ever to be made in various localities on said survey by the present amount of labor & tax belonging to said districts. Beginning at the South East Corner of Truman Harris, donation claim on Said South Prairie Thence west & westerly on the survey made by Hiram Smith about seven years ago to the north East End of the bridge across the Tillamook river. Thence on the present traveled road with some slight changes till it strikes a divide on the prairie on J. Biggs place Thence on said divide to said Biggs west line thence to the bridge across a branch near Henry Griners house Thence on the present traveled road to Wm. C. Ohara East Line that crosses said road thence along said Line to a quarter corner where the said O'Hara will have a good passable wagon road opened around to the South East corner of Patrick Moores land on said Road. Thense (sic) west on the line dividing the Lands of the said Moore & O'Hara to or within forty feet of the bluff of pine creek & follow down On said bluff to the present traveled road onto the beach at Greenpoint the terminus of said road & further ask your Honors to Exempt Truman Harris From opening said road till April 1st 1884..." (See Petition #31) (CCJ "B", p. 337-38)

Josiah Biggs also filed his affidavit of posting (See Road Petition File #31) as well as his bond required by law (CCJ "B", p. 338). The County Court granted the petition at its July 5, 1883 session and appointed A. W. Hall, Joseph McCann and J. E. McCubbins as road viewers. Id.

On the appointed day for viewing and surveying the road, however, only Hall and McCann met County Surveyor Newcomb at the south prairie school house. Since road viewer McCubbins was not present, only the two other viewers were administered the oath and accompanied the County Surveyor. (See Viewer Report filed Sept 5, 1883)

The viewers report, field notes, and corrected plat of survey were filed on September 5, 1883. Their report found "... the Road practiable (sic) and nessary (sic) for the convenience of the public and wood (sic) Recommend your Hon. body to declair (sic) the same a public highway and order the Supervisors to open the same according to law" (Viewers Report - Road Bin File #31) At the September 5, 1883 County Court session the viewers report was read the first time. Claims for making the survey were also allowed by the Court at that time. (CCJ "B", p. 346)

After reading the viewers report in open court for the second time the following day, and there being no remonstrances or claims for damages, the County Court ordered that the report and plat be recorded and that the Supervisors of road districts 2 and 6 be notified to open the road. (CCJ "B", p. 348-49) The viewers report, survey and plat were recorded on September 11, 1883 (Peacock Book, pp. 62-67)

In the two years following the establishment of this road, the county court journals contain a number of entries directing various road Supervisors to open the road. On April 9, 1884 Supervisor McCann was ordered to open that portion of the county road lying within road district No. 2. (CCJ "B", p. 379) A similar order was also entered in the journals on July 9, 1884 with directions that the Clerk provide McCann with notice of this order. (CCJ "B", p. 393) Almost two months later, after replacing Supervisor McCann with B. V. Daniel, the County Court again ordered the road Supervisor of district No. 2 to proceed forthwith to open all that part of the county road leading from South Prairie to Netarts Bay that lay within the district. (CCJ "A", p. 14) The following year on April 9, 1885 an order of the County Court again directs that the road be opened and "... to remove the obstructions of said road and the gates and fences that are now across said road." (CCJ "A", p. 43) Although the record does not refer to the location of these obstructions, gates and fences, an entry in the court journals on July 8, 1885 appears to indicate that the failure to open the road may be related to a controverted portion of the survey. At that time the County

Court directed County Surveyor McPherson to resurvey the road from its 5th mile post to its terminus. (CCJ "A", p. 44-45) When McPherson completed the resurvey on July 13, 1885, his plat and filed notes cover only that portion of the road from angle 8 in Mile 6 to angle 3 in mile 7, "...this being the disputed part of the road" (See Plat of resurvey, Road Bin File #31)

Based on this latter entry it appears that the disputed portion of the road at that time did not even traverse any of the lands over which Cavenham now claims a private forest road, but rather involved portions of road petition #31 lying westerly thereof. The County Court allowed McPherson's claim for this survey at its September 19, 1885 session. (CCJ "A", p. 59)

1887-88 Alteration
Netarts Road Petition #51

This change in the Netarts Road is not material to any of the lands over which Cavenham now claims a private forest road. Instead, this alteration affected only that portion of the road from the west end of the Tillamook River bridge to a point about 100 yards southeasterly of the Beaver Creek bridge. This change essentially eliminated the "mountain" upon which the county landfill is now located by traversing about 1-3/4 miles of the level ground on the northerly side. (It moved the road closer to what is presently Olie Hallstrom's place). (Road Bin File #51; Road Book 2, pgs. 32-38, 44-47; CCJ "A", pgs. 212, 226, 235, 251-253, 262, 266, 338)

1889 - State Road
Road Petition #60

As a result of local efforts, a bill was enacted in the 1889 session of the Oregon legislature entitled, "An Act to appropriate Ten Thousand Dollars to aid Tillamook County in the construction of a wagon road from Nehalem River in the north end of the county to the Fuqua Toll Road in the South end of the county, and to use One Thousand Dollars of said appropriation on a branch

road from South Prairie to Netarts Bay, and to create a Board of Commissioners to construct said work." (Special Laws of Oregon, 1889, pgs. 169-170)

Fred Scherinzinger, A. L. Alderman and E. W. Mills were appointed under this act as Commissioner and road viewers, and charged with the supervision of construction. Id. Section 2. This act also stated in part:

When said road or roads are located and run through the lands of any person or persons who may feel themselves aggrieved thereby they shall have the same recourse at law as is now provided for county roads, but this latter provision shall not apply to any part of said road or roads that are now already located. When said road or roads are located and surveyed and a plat thereof recorded in the County Clerk's office, said road or roads shall not be changed or vacated except upon a petition to the County Court signed by a majority of the freeholders of the district where said change is desired. Id. Section 2

County Surveyor H. P. Wilson, accompanied by the road viewers, completed the survey April 3, 1889 (See Road Bin File #60) According to the viewers report, "...We find such route practicable for a good wagon road and such road to be of great public utility. We therefore recommend that the road be established as a county road." (Viewers Report, Road Bin File #60) No portions of any other alignment were to be vacated as part of these proceedings. Id. The viewers report was read in open court for the first time on May 28, 1889. (CCJ "A", pgs. 358-59) After a second reading the following day with no remonstrances the County Court made the following entry in its journals:

"It is therefore hereby ordered that said report be accepted and that said road be established as a County road." (CCJ "A", p. 363)

"Although there were claims for damages, (CCJ "A", p. 364) one of which was approved, (CCJ "A", p. 372) none involved lands over which Cavenham now claims a private forest road. This was presumably due to the fact that there was already an existing road at this location. The Commissioners report on the state appropriations road was filed on November 18, 1889, including a statement of expenditures. Their report concluded by stating:

We further report that both of said roads have been constructed so as to be fit for travel by suitable gates and fillings wherever the same were required by graveling, crosslaying and by building small bridges or culverts where the same were necessary that said roads are now being traveled and are in first class order from the Nehalem River to the Fuqua Toll Road and also from South Prairie to Netarts Bay. (Road Record 2, p. 299)

Alternate Roads to Netarts
1892 - John Hodgdon Road #70
1912 - James A. Biggs Road #225

On March 9, 1892 a petition was filed with the County Court for a road from the west boundary of Tillamook City limits at the terminus of Third Street to Netarts Bay. The viewers report was a standard printed form, but the completed form crossed out all language relative the vacating parts of other roads. This alternate route was opened as a public highway on May 8, 1892. (CCJ 3, p. 383) Likewise, when the 1912 James A. Biggs Road #225 was ordered opened on May 2, 1912, there was no mention of any vacation for any other road alignment.

1959 Vacation Proceedings

Apparently at the urgings of Crown Zellerbach Corporation, the County Court adopted by resolution on April 29, 1959 a declaration that proceedings be held for the vacation of Cape Meares Road #75 established in 1892, Charley Hodgdon Road #135 established in 1901 and Netarts Road #31, established in 1883. (CCJ 2, p. 192) The County Surveyor was directed to make his report in writing as to whether they should be vacated.

A public notice for these proceedings was also executed by the County Court on April 29, 1959, (CCJ 2, p. 191) and the proof of posting was filed by the County Engineer on May 5, 1959. (See Proof of Posting No. 514) Although the County Surveyor's report recommended that all three roads be vacated, the County Court continued the matter on June 5, 1959 stating:

"Hearing was had in the matter of the vacation of portions of the Old Netarts Road, the Cape Meares Road and the Charley Hodgdon Road. There being objections to the vacation of the Old Netarts Road,

the matter was continued till ten a.m. Wednesday, June 10, 1959."

Minutes of the County Court June 5, 1959

Although the above minutes do not indicate the number or the nature of the objections involved over the Netarts Road vacation, this matter was dropped when the Court convened on June 10 (minutes June 10, 1959) and only the Hodgdon Road and Cape Meares Road were thereupon vacated. (CCJ Z, p. 263-64)

Recent Prescriptive Use

There has been no research conducted on recent prescriptive use as part of the present issue of gating the road. It may be necessary, however, for the Board of Commissioners to conduct hearings and determine the extent of recent prescriptive use under ORS 368.201 (3), before making any determination on the present petition for a gate.

II. EXISTENCE OF A COUNTY ROAD By Statutory Establishment

As noted above, road establishment proceedings were conducted by the county court as early as 1870 involving lands over which Cavenham now claims a private road. Proceedings were initiated by petition for the 1870 Groff Road, the 1873 Dickson Road, the 1876 Josiah Biggs Road and the 1883 Netarts Road. The procedures used in each of these proceedings were the statutory procedures for establishing a county road by petition. Additionally, the 1883 alignment was modified by the 1889 state appropriation. This evolution of county road alignments served as the main road to Netarts until at least 1920.

A review of road establishment laws since 1860 reveals that the two earliest road establishment proceedings contain jurisdictional defects sufficient to render them ineffective. More specifically, the proceedings in the 1870 Groff Road do not indicate the existence of any proof of posting notice of petition for the road. Failure to post proper notice of petition to

establish the road may be fatal to the validity of the proceedings. Lauderback v. Multnomah County, 111 Or 681, 226 P 697 (1924). The 1873 Dickson road proceedings contain the entry, "Wm. Dickson being duly sworn says to his certain knowledge legal notice has been given of the above proposed road..." As such, this too may constitute a fatal jurisdictional defect based on the holding in State v. Officer, 4 Or 181, P (), where a record of the County Court which read, "the bond and proof of posting notices having been made to the satisfaction of the court," was insufficient to show that the court had acquired jurisdiction of the person whose rights might be affected by the location of such road. If the jurisdictional recitation by the County Court in State v. Officer was ineffective, then the similar statement of petitioner Dickson for the 1873 Dickson road must also be fatal to those proceedings.

County Court records relating to the 1876 Josiah Biggs Road contain a number of entries between January 3, 1877 and April 3, 1883 that appear to indicate that portions of the road may not have been opened during that period. Thus, although this county road alignment may have been legally established, it is arguable that those unopened portions were vacated by the operation of law. County road proceedings initiated under the law as it stood prior to February 24, 1903, were susceptible to the provisions of Sec. 4821 B. and C. Comp., which provided:

"If any part of any road in this state shall not be opened for four years after or from the time of its location, the same shall become vacated."

The above quoted Sec. 4821 B. and C. Comp., was repealed by the General Laws of Oregon, 1903, which became effective February 24, 1903. (The 1903 act and the law of vacation is discussed elsewhere in this memo.) However, there is also evidence in the 1883 Netarts road proceedings and elsewhere that the unopened portions of the 1876 Biggs road initially involved the bridge over Tillamook River but in later years may have related to disputed survey west of the subject property. As such the unopened portions of the 1876 road do not appear to involve the lands over which Cavenham now claims a private road, and it is

arguable that there already existed a legally located and established 40 foot county road at that location by the time the 1883 petition was filed for the Netarts Road #31.

Even if one assumes for the sake of argument that the 1876 county road alignment, as it relates to the subject Cavenham property, was also vacated by the operation of law, it is apparent that the proceedings which began in 1883, legally established a county road at this location.

The 1883 Netarts Road involved a petition for a "relocation" of the 1876 Josiah Biggs county road. In as much as the Biggs road had been established at a forty foot width, the 1883 "relocation" would also arguably be 40 feet wide since no width was stated anywhere in the 1883 proceedings. Only "slight changes" to the "present traveled road" were petitioned in 1883 as it related to the subject Cavenham property. Once established, there followed a two year period where an unrelated portion of the 1883 alignment remained obstructed and unopened. The available evidence suggests this may have been due to a disputed portion of the 1883 survey in the area around Netarts Bay that was being subjected to development. This disputed portion of the survey, however, was resolved by a subsequent resurvey filed with the September 1885 term of court. In any event, this dispute apparently occurred westerly of the subject property and did not involve any lands over which Cavenham now claims a private road. Based on these facts, it can be said that there was a legally established county road over the subject Cavenham property at least as early as 1876, but certainly no later than September, 1885.

The later proceedings in 1889 were apparently initiated by the legislature under the act appropriating the \$1,000 for the branch road from South Prairie to Netarts Bay. (Special Laws of Oregon, 1889, p. 169) This act appointed the viewers and otherwise created procedures for establishing the road and receiving state reimbursement. The subsequent viewers report recommended the road be established as a county road, which was accomplished by the County Court on May 29, 1889. Five months later the state

road commissioners report found the road "...now being traveled and in first class order." (Road Record 2, p. 299)

This county road apparently continued to be used as the main road to Netarts until at least 1920.

As noted by the map overlays, the 1889 state appropriation alignment substantially followed the existing 1883 alignment with some variations. However, it should also be noted that the 1889 proceedings specifically recited that no portions of any other alignment were to be vacated as part of those proceedings. (See viewers report) As a result, it may also be assumed that those portions of the 1883 alignment lying outside the 1889 alignment may also continue to exist today unless it can be shown that they were otherwise vacated by separate proceedings.

III. WIDTH OF THE COUNTY ROAD

This memo will not address the legal width of the existing county road or roads at this location as it is presently beyond the scope of the issue before the Board of Commissioners. Additionally, any determination of legal width would require additional research as well as a resolution of several issues already raised in this memo.

Preliminary research would indicate, however, the existence of a 60 foot wide road under the 1889 alignment as well as at least a 40 foot wide road for those portions of the 1883 road that lie outside the 1889 alignment.

IV. EXISTENCE OF A COUNTY ROAD BY PRESCRIPTIVE USE

As noted above, a county road had been legally established by statute over the subject Cavenham property at least by 1883, if not as early as 1876. Assuming for the sake of argument, however, that some fatal defect could also be found in each of these later (1883 and 1889) proceedings, there is sufficient evidence to suggest that a public thoroughfare had nevertheless been created at this location by prescription.

Outside of statute it has been repeatedly recognized by the Oregon Supreme Court that a public highway may be established by

prescription or common law dedication: Douglas County Road Co. v. Abraham, 5 Or 318, P (), Bayard v. Standard Oil Co., 38 Or 438, 63 P 614 (1901), McCoy v. Thompson, 84 Or 141, 164 P 589 (1917), Richardson v. Polk County, 92 Or 24, 179 P 664 (1919), Cole v. City of Seaside, 93 Or 65, 182 P 165 (1919).

In Ridings v. Marion County, Supra, the Court said at p. 33:

"...In this State a highway may be established by adverse user, and, 'where the length of time of such use by the public has been greater than the period prescribed by the statute of limitations for the recovery of real property, that will be regarded as sufficient evidence of the existence of a highway, independently of any supposed dedication.'"

No specific research on actual road usage has been conducted as part of the present project. Nevertheless, existing road establishment proceedings and other related road records by themselves provide evidence of use between 1857 and 1920 as it related to the subject Cavenham property as follows:

---A G.L.O. Plat filed by Samuel Snowden, September 1857 shows Netarts Road located through sections 2, 3 and 4, 2S10.

---The 1873 Dickson Road Petition #16 refers to "...thence up North Beaver Creek on or near the trail to Netarts Bay."

---The 1876 Josiah Biggs Road Petition #20 refers to "...thence on a westerly course as near as practicable (sic) to the present trail to or near the south east corner of Section 5."

---A G.L.O. Plat filed by Wm. P. Wright, September 1882 shows the location of "Netarts Wagon Road" in sections 2, 3 and 4, 2S10.

---The 1883 Netarts Road Petition #31 states "...thence on the present traveled road with some slight changes till it strikes a divide on the prairie (sic) on J. Biggs place."

---The state road commissioners report for 1889 states the "...roads are now being traveled and are in first class order."

---A G.L.O. Plat filed by A. P. Wilson in 1890 also shows the location of "Netarts Wagon Road" in sections 2, 3 and 4, 2S10.

---A 1920 Coates survey of the existing traveled route which became the present state road #131 to Netarts shows little travel on that alternate route until it was intersected by the terminus of the 1889 state road alignment, suggesting that the latter road continued to be the main road to Netarts until at least 1920.

This evidence suggests a period of use far in excess of that required for the creation of a public highway by prescription. Use by the public of a road under color of invalid road establishment proceedings is effective to make such road a public one by prescription. Bayard v. Standard Oil Co., 38 Or. 438, 63 p. 614 (1901)

In addition to the materials cited above, a news article in the July 19, 1889 Headlight gives the impression that the existing Netarts road had been in poor condition for a long time prior to the state appropriation, thereby also lending support to the prescriptive use argument:

The route from the bridge across the Tillamook river to Netarts Bay has been greatly improved. The new road on the north side of the mountain, west from the bridge, saves climbing over a high point and cutting off the timber on the south side of the road from Dailey's to Bigg's place, has let in the sun and dried up some fearful mud holes along the road which have heretofore been a great source of annoyance. It is wonderful what an improvement a little road work, when rightly directed, makes upon our Tillamook roads. The worst part of the road now is in getting from the bridge on Trask river to South Prairie and the worst part of that is not more than a half a mile south of Trask bridge. The large spruce trees along that part of the road shades it completely and preserves some formidable mud holes. It is a sad commentary upon the enterprise and public spirit of the people of this town in allowing the road there to remain so long in its present condition. Two good men at any time would in a month have cleared it of standing timber and rendered the road as good from the Trask to South Prairie as it is from the town to the crossing. The county built the bridge about two years ago, and its object in doing so might be construed as invitation to the traveling public to cross it and take a plunge into a dense forest where the rays of the sun were forever shut out and the mud to become deeper everytime the soil was agitated. Such supine indifference of a community to the conveniences of people who are obliged to pass over the route and to

its duty in such affairs, is criminal. As soon as the Trask river bridge was built the public should at once have taken hold of the matter and had the road way cleared of timber. The State has now generously appropriated a sum of money to open a road along a route which will include the section referred to, but the money should not have to be expended in doing what the people should long ago have done themselves.

Moreover, apparent county maintenance of the "public" road during the 1800's may have been sufficient so as to create a legal county road. Although no specific research was conducted on early county maintenance of this road, a number of county court journal entries were noted relating to expenditures on the South Prairie to Netarts Road. When considered with the \$1,000 expenditure of county funds (later reimbursed by the 1889 state appropriation) it may be concluded that this road was maintained by the county at that time. The Oregon Supreme Court has held that subsequent survey and maintenance of a public road by the county would constitute an acceptance of the road as a county road. Huggett et ux v. Moran et ux, 201 Or 105, 226 P2d 692 (1954) See also Cole v. Seaside, 93 Or 65, 182 P 165 (1919); Hendrickson v. City of Astoria, 127 Or 1, 270 P 924 (1928).

The distinction between a public highway and a county road is only important in determining whether the county would be liable for its upkeep and repair or for damages resulting from the highway becoming out of repair. The distinction is not material to the county's clear authority to act on Cavenham's request or to remove the gate if deemed a nuisance. The county has authority over both matters whether the road in question is a public highway or county road. (This is discussed later in this memo.) The distinction between public road and county road is made here only for the purpose of establishing that, whether by statutory proceedings had under the petition method or by prescriptive user, the road of record was clearly established as a county road over the subject Cavenham lands.

The issues of subsequent non-use and the county's obligation for maintenance under present circumstances is also discussed later in this memo.

only arise under a specific vacation procedure or by abandonment by the county. These are each addressed below.

Following the amendment to the vacation laws in 1903, eliminating the automatic vacation provisions, the legislature in 1905 vested the County Court with authority to vacate a road which had remained unopened for a specified period of time and established specific procedures to be followed. (Oregon Laws 1905, C. 224) In fact, it is safe to say that 1905 Act and all the amendments to road vacation law that followed, essentially establish road vacation as a specific exercise of power by an official body with affirmative findings in the manner prescribed by statute. (See Oregon Laws 1917, C. 295; B. and C. Copm., Secs. 4565-4567; Hills Oregon Laws 44-1328 to 44-1331; Oregon Laws 1931 C. 63, Sec. 1; Oregon Laws 1939, C. 519, Secs. 1-3; OCLA 100-1231 to 100-1234; Oregon Laws 1963, C. 501, Secs. 2-4; Oregon Laws 1971, C. 287, Sec. 2; Oregon Laws 1981, C. 153, Secs. 34, 36, 37, 39-42, 48, 66, 79)

Aside from the Crown Zellerbach petition for vacation which was denied in 1959 (CCJ Z, p. 263-64), no specific vacation procedure has been located which involves the road in question. Neither of the proceedings for alternate routes to Netarts, (neither the Hodgdon Road petition #70 nor the James Biggs Road petition #225), make any reference to the vacation of the subject road. Even if they had requested such a vacation, the Oregon Supreme Court has held that the establishment of a new county road upon a petition for the establishment of such road, and also for the vacation of an old road, does not operate to vacate the latter, where the new road does not lie within the termini of the old one, and connects with it only at one end. Vedder v. Marion County, 28 Or 81, 36 P 535 (1895). Consequently, no proceeding has been located which vacates the county roads in question. (Netarts Roads #31 and #60)

The only remaining method by which Cavenham might now claim a private road would be under a common law abandonment of the county road by the county. Cavenham apparently contends that this may necessarily involve a consideration of the fact that the

county road may have been subjected to an extended period of non-user and the fact that Cavenham's predecessor, Crown Zellerbach, may have constructed the present road at its own expense, albeit substantially within the county road. However, in any case where a question of abandonment is involved, the important fact to be determined is the intent of the person whose rights are claimed to have been abandoned. In Bitney v. Grim, 73 Or 257, 155 P 490 (1914), the court held that in determining whether a road has been abandoned the acts of relinquishment must be accompanied by an intent to permanently part with the right of use. Id. When the Oregon Supreme Court again considered the issue of abandonment in Macleay Estate Co. v. Curry Co., 127 Or 356, 272 P 263 (1928) the Court stated:

The courts generally demand proof of intent to abandon in addition to evidence of non-user, and the intention to abandon must be established clearly and satisfactorily, because the proof to the contrary is aided by the presumption that a thing shown to exist is presumed to continue.

Supra 272 P at 263.

In Macleay Estate Co. v. Curry County, Supra, a right was claimed by the county on behalf of the public to continued use of a road by prescription. Despite the fact of little road use and the fact that the road was partially or completely obstructed in several locations and despite the further fact that the plaintiff had constructed a fence, which was shortly thereafter removed, the court in MacCleay Estate Co. had no difficulty in concluding that the evidence failed to show that the public had abandoned the road and also failed to show an intent to do so. The court also found that the plaintiff's repeated attempts to persuade the county court to vacate the road constituted an admission that the road had not been abandoned. Moreover, when the County Court rejected plaintiff's earlier requests for vacation it thereby signified a public need for the road and a purpose to retain it. The court in Macleay concluded with the old maxim of the common law which also seems applicable to the present circumstances, "Once a highway always a highway." Supra, 272 P at 265.

A more recent case of claimed abandonment was considered by the Oregon Court of Appeals in 1979. In Martin v. Klamath County, 39 Or App 455, 592 P2d 1037 (1979), the plaintiff brought suit against defendant Klamath County to quiet title to a strip of land which had previously been used by the public as a roadway. The county had treated it as a public road. A portion of the road involved a bridge that had been washed out by a flood and never replaced. As a result, there followed a two year period where there was very little use of that portion of the road, after which the plaintiff erected a fence across the road to prevent persons from driving down the road depositing trash. Some of the road had then become overgrown with sagebrush. It was apparently when the county considered constructing a boat launch at this location that the plaintiff brought suit. The court was essentially asked to decide whether ORS 368.620 (now ORS 368.326 - .366 as amended) for the statutory vacation of roads was the exclusive method for discontinuance of a public road. The county contended that the common law pertaining to abandonment, if it existed at all, did not apply to the case. In deciding this issue, the Martin court held that a duly established public road may not be lost to the public except pursuant to ORS 368.620 and that the doctrine of common law abandonment did not apply under the facts at bar, stating in part:

In enacting ORS 368.620, as amended, the legislature has provided the complete procedure for the vacation and discontinuance of a public road or highway in this state. It is necessary to adhere to this procedure in order that the vacation be effective. While this issue has apparently never been decided in this state, the majority rule in other jurisdictions is that when the legislature provides a method by which a county may abandon or vacate roads, that method is exclusive. See San Diego County v. Calif, Water & Tel. Co., 30 Cal 2d 817, 186 P2d 124 (1947), and authorities cited therein. The fact that the legislature provides a method whereby a county might abandon a road is a positive inhibition against other methods of termination. We are of the opinion that there can be no vacation of this road except under the provisions of ORS 368.620. See

also Hislop v. County of Lincoln, 249 Or 259, 437 P2d 847 (1968).

Supra, 39 Or App at 460.

The logical inference from the holding in Martin is that the common law doctrine of abandonment is available only as it applies to private roads and as such would certainly not be available to Cavenham under the present circumstances. Also see Wilkins v. Lane County, 65 Or App 494, 671 P2d 1178 (1983)

In summary, there has been no vacation and the law disfavors adverse possession or abandonment of public roads as against the county.

VI. COUNTY JURISDICTION OVER THE EXISTING ROAD

The paramount and primary control of highways in this state is vested in the legislature and any surrender or control thereof much come from the legislature. Willett v. City of West Linn, 142 Or 662, 664-65, 19 P2d 1098 (1933) A public road is defined in ORS 368.001(5) as a road over which the public has a right of use that is a matter of public record. The exercise of governmental authority over any road within a county is a matter of county concern and is limited only by the exceptions of ORS 368.016. This section essentially provides that a county has the same jurisdiction, power and authority over dedicated public highways or roads that it has over county roads. Therefore the only change in the status of a "public road" when it becomes a "county road" is that the county is responsible for maintenance and repair as provided in ORS Chapter 368. A road dedicated for public use and travel does not change its "public road" status when changing designation from a county, state, district or otherwise. Atty. Gen. Opinions. No. 7039, (1974) Therefore, the county has the same jurisdiction and authority over the petition for gating the road in question whether it is considered a county road, public road or state road (under the 1889 state appropriation). Moreover, should the county deny Cavenham's present application for a gate, the county has the authority to remove the gate as a nuisance. As noted earlier in this memo, the

Oregon Court of Appeals in 1979 considered the issue of fencing a previously used public roadway. In Martin v. Klamath County, Supra 39 Or App at 460, the Court stated:

"We conclude that defendant county was entitled to have plaintiff enjoined from interfering with the public's use of same unless and until this road is vacated under ORS 368.620. Plaintiff's fence across the right-of-way is a nuisance. See Sweet et al. v. Irrigation Canal Co., 198 Or 166, 254 P2d 700, 254 P2d 700, 256 P2d 252 (1953). As such, it was subject to immediate abatement and removal. City of Molalla v. Cooper et ux., 192 Or 233, 235 P2d 142 (1951). ORS 368.620 inhibits this method of acquiring title to lands in public roads. This has been the statutory law of this state since 1895. Sweet at 196.