

MINUTES

RIGHT-OF-WAY TASK FORCE (Approved by the Task Force)

October 1, 2012

Capitol Building, Boise, Idaho
Committee Room, West Wing 53

In attendance were Co-chairs Senator Steve Bair and Representative Dell Raybould; Senators Jim Hammond, Chuck Winder; Representatives Joe Palmer, Vito Barbieri, and Grant Burgoyne. Senator Les Bock was absent and excused. Legislative Services Office staff: Eric Milstead and Charmi Arregui.

Also in attendance were Representative Scott Bedke, District 27; Stuart Davis, Idaho Association of Highway Districts; Heber Carpenter, Larry Henson and Gary Jones, Raft River Electric; Gordon Cruickshank, Valley County Commissioner; Heather Cunningham, Davis and Copple, representing herself; Daniel Chadwick and Kerry Ellen Elliott, Idaho Association of Counties; Laura Lantz and Chris Meyer, Idaho Association of Highway Districts; Bill Roden, CenturyLink; Bear Prairie, Idaho Falls Power; Neil Colwell, Avista Corp; Will Hart, Idaho Consumer-Owned Utilities; Kim Gourley, Idaho Power Company; Dennis Tanikuni, Idaho Farm Bureau; Elizabeth Criner, J. R. Simplot Co.; David Babbitt, Bingham County Commissioner; Jesse Taylor, Westerberg and Associates; Bruce Wong, Roger Seiber and Steve Price, Ada County Highway District; Jerry Deckard, CapitolWest; Russell Westerberg, Rocky Mountain Power; Lan Smith, Gem County Commissioner; Jerry Rigby, Upper Snake River Valley Canal Companies and Irrigation Districts; Norm Semanko, Idaho Water Users Association; and Teresa Molitor, Great Feeder Canal Company.

The meeting was called to order by **Co-chair Senator Bair** at 8:30 a.m. **Co-chair Bair** welcomed everyone and stated that this task force was commissioned by the Pro Tem and the Speaker as a result of a motion made in the Senate Transportation Committee during the 2012 legislative session. **Co-chair Raybould** said that the task force members had received information prior to this meeting and agreed that the meeting should proceed.

The first presenter was **Heather Cunningham** who said she had practiced law for sixteen years at Davison and Copple, and that she was here to speak on behalf of property owners. She stated that she was not being paid for this work, and it was her desire for task force members to hear her testimony, and not just from government entities. She believes that the best public policy comes from hearing both sides. The issue is whether or not roads, which came about by public use (rather than by deed or by specific dedication) but by the public using the property, should such roads be limited to their historic use and width or should the roads be 50 feet, regardless of how the roads came about. The reason this question comes up is due to Idaho Code, Section 40-2312, which sets out a presumption or assumption that all highways in the state are 50 feet. There is an exception so that one could challenge or rebut that assumption, but if less than 50 feet wide, that is the width that roads are. **Ms. Cunningham** shared an analogy from the NFL, saying that the fifty-foot presumption is like a reviewable call (until the *Halvorson* decision came out in 2011). Prior to that decision, evidence could be shown that the road was less than 50 feet. After *Halvorson*, it's become like a non-reviewable referee call of 50 feet. Even if facts show otherwise, there is nothing one can do about it. The rule itself, statute (40-2312) has not changed, and since 1887 the language says that there is that exception for roads of a lesser width presently existing. Until *Halvorson*, in practice, that was basically reviewable, a road was presumed to be 50 feet, but if it

could be shown that it was less, then the road was limited to whatever the public use had historically been. That public use wasn't just the travel way, but was also the area used to maintain the road, barrow pits, shoulders, etc. Historically, this did not include utilities; if utilities go in, they require their own prescriptive easement, not part of the highway right-of-way per se. The drafters of HB628aa last session included a significant concession to utilities to allay concerns and added language which included utilities, not only historic use of the highway. **Ms. Cunningham** said this comes up only if there is a physical action taken by the highway district or the county to widen or expand a road. Typically, travel lanes are twelve-foot wide, so most rural areas have roads about twenty-four feet wide with some area on each side for maintenance. If this road needed to be widened, in the past, prior to *Halvorson*, the difference would be paid between the existing public use and the new public use, up to 50 feet and/or beyond. **Ms. Cunningham** has represented a number of property owners around the state where that happened. She noted that after *Halvorson*, property owners get a free 50 feet basically, so if only using 20 or 30 feet, now the difference will not have to be paid to get to 50 feet. The reason this is very important for property owners is, if your front yard is on a road and your fences, irrigation structures, mail box and improvements on that land on which you had paid taxes, what if the government comes to that property owner and says they are widening the road and no compensation will be paid because they already own it. **Ms. Cunningham** also said that per statute, you can imagine that you might not think that is very fair. **Ms. Cunningham** said this is why she has put much time in bringing this issue to people's attention. The Legislature has not changed anything; the Idaho Supreme Court and the *Halvorson* case have caused this issue, which she believes was a bad decision. She noted that the Halvorsons didn't have attorneys. The Court ignored its prior decisions, more or less, and put a new spin on Section 40-2312 and said that the language that reads "*except those of a lesser width presently existing*" meant those roads existing in 1887 when the statute was first enacted. So the only way now, in today's world, post *Halvorson*, that we can review whether or not a road is 50 feet is if you could show the road existed before 1887, with very few aerial photos or witnesses left. As a practical matter, all highways are now 50 feet.

Ms. Cunningham referred to a one-page handout (available in LSO) summarizing this issue, as well as background definitions. She said it's important to know that prescriptive roads and common law dedication roads that don't specify width are really the only roads being dealt with, not RS 2477s, not roads that come about by some formal action creating them, but roads that come about by public use. Typically, the requirement is that roads have to be used for five years by the public and maintained at public expense or roads have to be offered by an owner who gives a road to the highway district with no width specified and then the public uses that road. If there is a ranch, as a good citizen, and you designate a one-lane road as public, running through your property, by doing that and trying to be a good citizen, you've now given up 50 feet of your property for free. She asked the task force: Is this what you want the policy to be or did the Idaho Supreme Court misinterpret legislative intent in *Halvorson*? That is the critical question, and she hoped that the members of this task force will look at this. She added that this is tricky because when you have a Supreme Court decision that says, "this is what you meant, Legislature." Legislators have the right to clarify what they meant, and that is why HB628aa was presented as a clarification statute. It doesn't trigger a retroactivity problem if done this way, but basically it would be saying that "no, when we said presently existing, we didn't mean 1887, we meant those that physically exist on the ground that are less than 50 feet." **Ms. Cunningham** said that if one looks at past decisions of the Court, and in practice at her firm, you were able to establish roads at less than 50 feet before *Halvorson*, and now you're not. Several specific examples were presented to the House and Senate Transportation Committees last session, one being Bob Barton Road, which was widened by the Jerome Highway District before *Halvorson*. There are many roads around the state that will be widened that are now prescriptive that are two lanes, and when they are widened, if the Legislature doesn't take action on something, addressing and clarifying your intent in Section 40-2312,

then nobody will be paid when those roads are widened. She personally thinks this is a problem, both in terms of the State Constitution, Article 1, Section 14, that says there is no taking without just compensation and in terms of the Federal Constitution. She said that everyone should be aware that inverse condemnation, whether federal or state, comes about when there is a road widening and a citizen claims that as a taking. A person could go to state court and claim it as a taking; after *Halvorson*, you'll lose, so don't bother going to state court, she said. She added that a person could still go to Federal Court so there is still the ability to sue, but it just means that all highway districts and county commissioners get dragged into Federal Court and citizens have to go to Federal Court instead of state court because of a bad state court decision, in her opinion. Although there may be fears that this would lead to litigation or claims, she pointed out that the only time there would be litigation or a claim is when there is a physical act to widen a road. The *Halvorson* decision came out February 2, 2011, and now on October 1, 2012, it has been less than two years. If no county or highway district has widened a prescriptive or common-law dedication road in that period of time, there is no problem. So when fears are expressed, **Ms. Cunningham** suggested that the question be asked whether any *prescriptive* roads have been widened in this time period. If not, it is a false concern. With regard to utilities, utilities get the right under state law to go in to public rights-of-way to install utilities at no charge, with no problem. The question is, if utilities go in along a prescriptive road, if that road is 20 feet wide and utility poles are put in at 50 feet, should they pay or not? If they are already in place, that's fine, they have acquired their own prescriptive easement, and under HB628aa, it was also fine because it included the rights-of-way to include historic use of utilities. She pointed out in the Jerome example she gave, under HB628aa, landowners still would not be paid because the power poles were at the 50 foot width, so if the power poles establish the right-of-way, it would be 50 feet and landowners would not get paid. It's a policy decision whether or not utilities are included, but **Ms. Cunningham** wanted to point this out as an issue.

Utilities have the right to give prescriptive easements on their own. Most people give easements for free in return for a power line. It's better to have your own easement as a utility than to be in the public right-of-way, because if you own the easement as a utility, when the road is widened, a utility gets paid by the highway district to move the poles. If in the public right-of-way, you have to pay to move poles. **Ms. Cunningham** said she wanted to provide a resource for the members as this issue is studied, since she learned last session that there are fears and permutations of the issue. She does represent property owners, but she comes before this task force to share information objectively and honestly about any legal question, and she volunteered herself as a resource to answer questions. **Ms. Cunningham** said she was often surprised at the cynicism she encounters at her doing this on a volunteer basis. She said that early in her career, she complained about the state of the law in Idaho and how stacked against property owners she believes it is, and she was asked what she was going to do about it. She realized that if she doesn't do anything about it, it won't get any better, so she has been coming before the Legislature for 15 years to try to make things better. She expressed her appreciation for being allowed to speak and stand for questions.

Senator Hammond asked about **Ms. Cunningham's** comment about a private property owner paying property taxes and yet property being seized by a party developing the road, and asked if the courts ignored the fact that the county saw it as a homeowner's property and were paying taxes on that property and the court ignored that. **Ms. Cunningham** replied that whether taxes are being paid or not isn't a factor when it comes to prescriptive roads, it's only a factor in adverse possession, which is between private property owners. In most situations concerning prescriptive roads, your deed and what you pay taxes on actually goes to the center line of the road and one would have to go to the assessor to have it moved, so in most cases she has handled, property owners have been paying taxes on the travel way for quite some time.

Representative Burgoyne asked **Ms. Cunningham** about his take on *Halvorson* which appeared to him in this case that the essential holding was a statute of limitations holding, that the plaintiffs had come to the case very late, having purchased the property with the easement at issue already in effect, and were unaware of the scope of this. Essentially the court said they were just too late and then got into extra language that had nothing to do with that essential statute of limitations issue, which has appeared to cause much concern. This raises questions, one being it wasn't clear to him reading the case when the 50-foot easement came into effect. Was it before or after Halvorson bought the property, and if it was before, how long before? The case suggested that the 50 feet were being used by the highway district prior to when Halvorson bought the property, which, in his estimation made the *Halvorson* case a very weak case. He asked for her take on this.

Ms. Cunningham answered that in the two-page background handout (available in LSO), an excerpt from *Halvorson* has three sentences she believes to be critical, and she believes that *Halvorson* is very bad law. Those critical sentences are as follows:

"The first question we must address, then, is whether I.C. 40-2312 establishes a mandatory width of fifty feet for prescriptive highways or whether the extent of the use remains a question of fact." (She said the court did not answer that question just based on the statute of limitations, they answered that question by saying the next sentence.)

"However, for highways created after the statute's enactment, the statute establishes a mandatory width." (She said that the date used was 1887, and where the court says that it is now non-reviewable.)

"Here, however, the plain language of I.C. 40-2312 prescribes a fifty-foot width to all highways and makes no distinction between highways established by prescription and highways laid out by the Highway District." (She said this is the problematic part of *Halvorson*.)

Ms. Cunningham stated that there are other discussions (dicta) and always a four-year statute of limitations and this makes no effect on the *Halvorson* case or how it would have come out. What she cares about are future cases where the court has interpreted that statute to say it's now mandatory and non-reviewable, even if by prescription.

Representative Burgoyne said that the case, even though he thinks a lot of it is just dicta, that doesn't mean it's not important to the policy because the next case gives us an indication of how they might decide it at the Supreme Court. He was confused about the development of the case law (and he believes the Supreme Court ignored *French* and some of the problematic language from *Meservy*.) As he understands it, when a governmental entity begins the maintenance of footage, be it 10, 20 or 50 feet, the prescription -- there is no fee simple title that transfers to the public entity -- it is an easement. That leads him to question whether or not there is a problem, whether constitutional or conceptual, but it struck him that if there is an easement on property owned for a highway and it's paved, striped, and being used, you're excluded from the land entirely except that as a member of the public, you get to use the highway, but not because you're an owner of that property. That's a lot different than an underground irrigation line, gas pipeline, or where planting could be on top or a building above that, making use of the land, despite the easement. Cases are pretty clear that you, as an owner, you've got this highway, you are the fee simple owner which he took to mean that property taxes are being paid on that land, and yet excluded from the land entirely, and he wondered what the problem with this is, and if that creates a constitutional taking without compensation, notwithstanding statute.

Ms. Cunningham said that it starts out as an easement, but it becomes a public highway, by statute, under 40-202(3) once the public has used it for five years and it's been maintained at public expense, but doesn't have to be maintained every year, or all along the road, for that to occur. It becomes something other than an easement at that point. The highway district essentially owns it and it becomes a public highway, and although she thought it might be theoretically possible to claim that it's a taking without just compensation, she said she was not aware of any case law she's come across of that ever successfully occurring. It's like adverse possession, since if you let something go on for a certain period of time, you lose your rights. If the public uses it for five years, the property owner is done and same thing if the road is widened and the owner doesn't do something within four years, too bad for the owner, since owners must protect their rights. The problem with *Halvorson* is that you no longer have the right to do that. Even though the highway districts have not come out to widen the road, too bad for the owner, you don't get the chance to do anything about it. The four-year period has been eliminated where an owner could complain, and most people don't complain. It's the ones who do who want to exercise their rights that she is concerned about being helped. The *Halvorson* case, although it might be dicta, she said that we could look to future cases, one being *Sopatyk v. Lemhi County*, again not a great case, the only important part was that the court reaffirmed *Halvorson* and found that you have to show the road was there before 1887 for it to be less than 50 feet wide. She said she didn't know who took a wrong turn, a law clerk or some creative argument, but that's a first in *Halvorson*. Before that, nobody ever said "presently existing" meant 1887.

Representative Burgoyne stated that it was his understanding that adverse possession is essentially a common law rule of statute of limitations that essentially says that after a given period of time in a state, whatever the common law or statute is, if there has been an encroachment such as a fence on another's property and has been there for a certain period of time, the courts are not going to hear the complaint, in the interest of finality. Our statute doesn't strike him as a statute of limitations, it looks more like a taking statute to him, and he asked her opinion on this and whether she sees a constitutional issue with respect to the statute itself and the way it operates. The Idaho courts have been very clear that this is not an adverse possession theory being used with regard to the highways.

Ms. Cunningham replied that she didn't see a constitutional problem with the 40-2312 statute, until *Halvorson*, because as long as you had the right to go and dispute what wasn't public use, it is common knowledge that prescriptive easements are limited by use, even if she gets a prescriptive easement across your property and she's been using it to haul her horses back and forth. She can't now do a commercial subdivision and use that same easement because it's limited to her using her horses on it. It is limited by use, when talking about prescription, no matter what. *Halvorson* says otherwise, which says that by statute we've decided it's 50 feet, and she thinks you would have a constitutional challenge to a new taking, if they came out and widened a road from 20 to 50 feet under both the state and federal constitutions. She doesn't think you would be successful in Idaho, because they'll ask if you've read *Halvorson*, and you'll get attorney's fees against you. You can go to the federal court and fight about it, but it would take someone willing to do that, and there is a problem, but the problem isn't with the statute, it is with the application of the statute, and you have to wait for your claim to be ripe, which means that you have to wait for the highway district or the county to come and do something, and then you have a claim. So, the first county or highway district that goes out under *Halvorson* and widens a prescriptive road, **Ms. Cunningham** said that she would be there asking if anyone wants to go to federal court. She doesn't want to do that, and she wants this fixed in the statute because the court interpreted legislative intent in a way that she cannot see being correct based on the Legislature she has worked with for the last 15 years and those before. She doesn't believe that the Legislature meant *presently existing* to be 1887. Otherwise, all the times they recodified the statute, why didn't they say that

presently existing meant 1887, by the way. Why did they keep that same language? She doesn't think there is a prima facie challenge to the statute on constitutionality, but she does think there is a challenge based on its application going forward.

Mr. Stuart Davis, Executive Director, Idaho Association of Highway Districts, was the next presenter. He represents the highways districts in the state of Idaho. He believes that the enormity of this situation needs to be examined as well as the consequences of what is being done here. The membership of the Idaho Association of Highway Districts and the Idaho Association of Counties are responsible for about 30,000 miles of road in Idaho. According to Tax Commission records, it's apparent that almost 27,000 miles of those 30,000 are prescriptive rights-of-way, which is a very huge issue. He said that HB628aa was defeated in this very meeting room last March, and he made a commitment to Chairman Hammond and to several others that highway districts would do whatever they could to facilitate an answer or a solution if there needed to be one. **Mr. Davis** said he'd organized several meetings of stakeholders and he'd come to the conclusion that the success of the meeting is inversely proportional to the number of lawyers present. Last week seven lawyers were in a meeting, and the seven could not agree on two words, which shows how complex this issue really is. **Mr. Davis** said that, like his colleague **Ms. Cunningham**, he'd had an epiphany by taking a page out of the company Apple, and he said he doesn't need to know how the iPad works, only its simplicity and that transfers to the issue of prescriptive right-of-ways because the Legislature never said all roads except prescriptive right-of-ways shall be 50 feet. They said that all roads shall be 50 feet, and there is no distinction between common law, deeded, or a prescriptive right-of-way.

If we wrap ourselves in a cloak of personal property rights, we have to understand that we're not talking about a road up to a national forest that nobody uses. There are three issues surrounding prescriptive right-of-ways: (1) It must have public use. (2) It must have money expended on it. (3) Most important, it must be validated. The road must be accepted into the system. If any of those three parts are "no," the issue is over, it is no longer considered to be a prescriptive right-of-way. So on county maps that the county commissioners and highway districts endeavor to put together, those are not public rights-of-way, those are identified as possible roads, but not public rights-of-way. **Mr. Davis** disagrees with the assumption that *Halvorson* was a huge departure from Idaho law. He thinks that we have been operating since 1863 under the premise that all roads in the state of Idaho are 50 feet wide. **Mr. Davis** said that **Ms. Cunningham** is incredibly good at what she does, but what he thinks she doesn't tell you is that you can't take this cloak of personal property rights and wrap yourself up in it and feel good. The issue here is to follow the money. If you're not being paid as a personal property rights advocate, we don't care. He said a case in point was the *Halvorson* case, and he wondered why **Ms. Cunningham** hadn't spent her donated time with the Halvorsons to argue that case for them. The reason is that she wasn't paid for it. That's what we have to talk about, and that has to be discussed, where the money is going. **Mr. Davis** expressed his appreciation for this task force and he believes this issue needs to be scrutinized, but in the end he thinks that the Idaho statute, *Halvorson*, and later *Sopatyk* were good decisions.

Representative Burgoyne asked **Mr. Davis** if the statute were changed so that its application was prospective only, and it was changed essentially to read that a road pre-existing, at a narrower width, doesn't mean pre-1887, have the highway districts quantified what they think this would cost? **Mr. Davis** answered that cost had not been quantified, adding that if the statute is changed to reverse *Halvorson*, the memo that **Mr. Davis** sent out (to members) should be looked at. Are we talking about this date forward from July 1, 2013, and if so, the cost containments become readily available, or are we making it retroactive, which is where the problems would begin.

Mr. Dan Chadwick, Executive Director, Idaho Association of Counties, spoke next and expressed his appreciation for this task force. He said that an agreement had not been reached with regard to HB628aa. He believes that **Mr. Davis** had laid that out clearly to the task force, adding that in looking at the law, he thinks that the law and finding is consistent and when the recodification occurred in 1985, there was no reset to the law. The 50 foot prescriptive right-of-way was carried forward as that law was adopted. He said he was concerned that HB628aa and any genesis from that would create a property right that does not exist and would require counties to compensate for rights-of-way that they presently do not possess, and is a problem area. He believes that the real world is different from the world that **Ms. Cunningham** described. He believes that there have been only 4 cases over the 125-year history of this law and the facts are what make the determination here. He thought it would be a serious problem to take those cases with weak facts and say that there is a problem with the right-of-way statute and try to change that, just to accommodate one or two factual problem areas. He said that two county commissioners were to speak at this meeting who would be addressing the members about what the real world is like in the counties in dealing with this issue. **Mr. Chadwick** reiterated the amount of road miles involved in these rights-of-way, said that an impossible task would be placed on the highway districts and counties to inventory roads based on width, and such an inventory does not exist and the question could not be answered as to cost. **Mr. Chadwick** encouraged the task force to proceed cautiously and to listen carefully to the county commissioners, since this issue could be very problematic in the future. He said that most issues are resolved by agreement at the local level through encroachment and expansion agreements of rights-of-way constantly and it doesn't require a change in legislation to make that happen.

Senator Bair said that in 2009, dealing with the Bob Barton Road that goes from Malad Gorge east to the far side of Twin Falls, the Jerome County district sent out a letter claiming that they owned all that extra ten feet as the Bob Barton Road was improved. Under that presumption of rebuttal, 19 citizens took that to court and in the end, the court ruled that the transportation district did have to pay those individuals for that extra ten feet of their property to improve that road. How do you explain that, if all roads are automatically 50 feet and have been since 1887?

Mr. Chadwick answered that perhaps that relates to the issue of the statute that talks about *presently existing*, although he was not sure, having not read that decision, but he thought it turned on its facts just like the *Halvorson* case turned on its facts, and that is what the court was looking at in that instance.

Senator Bair asked if it was **Mr. Chadwick's** opinion that there should be rebuttable presumption available to citizens if a road is to be widened. **Mr. Chadwick** responded "perhaps, but again I'm not sure that is lost in the *Halvorson* case." **Senator Bair** replied that you couldn't have it both ways, either you've got to say that all roads are 50 feet or there is a process by which, before a taking occurs, those citizens have a right to appeal. **Mr. Chadwick** thought that the statute does leave a bit of wiggle room for that determination, and he doesn't think that is lost. **Senator Bair** asked if *Halvorson* takes that right away. **Mr. Chadwick** said he did not think that it does entirely.

Representative Raybould inquired about a narrow country road that has been in existence for years, and due to development further down the road, the road needs to be improved and widened -- would the counties be adversely affected if the law required the county to pay for the relocation of a fence, canal, irrigation structures, etc. if they chose to widen the road and utilize the 50 foot right-of-way that you're claiming? Would they object to the county bearing the expense for this relocation and the cost of the land that it would take to relocate it onto the farmer's present land, outside the right-of-way? **Mr. Chadwick** answered that was a good point, one discussed internally, and that may be a solution to

part of this problem, and the counties would not rule that out at this point. This might be an answer at some future point.

Mr. Neil Colwell, representing Avista Corporation, spoke next and Avista is a natural gas and electric supplier in northern Idaho and serves primarily in urban and suburban areas in their service territory. As it becomes more rural, those areas are usually taken over by cooperatives to provide service in the more rural areas, but Avista does face this situation like other utilities do. Avista recognizes the significance of this issue to everyone and the conflict between private property and transition to public use, and he believes that the task force needs to proceed very cautiously here to determine the right course, if there is a policy change or not. Avista, during session, did not request HB628aa and were not sponsors of it, but Avista agreed to support it after it was amended because Avista thought it protected utility installations and maintenance and that it closed the door for any retroactive applications. Avista did recognize that it did inject some uncertainty and concern going forward to future installations. As the situation was reviewed, Avista thought that would be a relatively small universe of affected parties and that resolution could be sought, although Avista might be uniquely situated in that regard. Avista has examined this issue and, at the present time, they are flummoxed but are willing to present guidelines, and he wanted it clear that utilities do seek consistency in the width of these highway rights-of-way for a multitude of purposes. Avista sees value in seeking consistency of application for transitioning private lands to public uses and with regard to the current issue, it appears to be unclear for how its applied. Avista thinks that if there can be consistency to avoid conflicts in the future, and that should be a primary goal. Private property rights need to be respected, but valued public uses that benefit the public also need to be respected. Avista is willing to participate in any way they can and are open to discussion.

Representative Barbieri said that the issue was raised during discussions that utilities are sometimes sued for placement of facility cables within the private property away from the public use, and he asked if that was something that Avista sees very often. **Mr. Colwell** asked for clarification, wondering if **Rep. Barbieri** was saying that the facility would be outside of the 50 foot roadway easement and then were on private property. **Representative Barbieri** said that whether 50 feet or 25 feet, yes, on private property, but in a minor amount, say one foot, and if that had credence. **Mr. Colwell** answered that he could not be definitive, not sure how often that comes up, adding that Avista would seek to address that as they arise to resolve whatever issue is presented. When facilities are being placed initially, Avista goes out, and if there is uncertainty, obviously it's to everyone's advantage to know that, but if there is uncertainty about who owns that, there are negotiations with the owners to get an easement put there, and oftentimes those are given at no cost due to landowners along that road who may be looking for electric service. The obvious trade is to bring in power, and owners allow poles to be put in to get that done.

Gem County Commissioner **Lan Smith** spoke next and said Gem County was the fifth smallest county in Idaho, so it is very rural and under 17,000 in population, and they deal with these rural issues often. He commented on the property owner wanting power, asking what if there is a property owner between the property owner who wants power and another property owner won't let them put in power poles? The property owner beyond is essentially held hostage by the owner in front, which can be a problem. **Mr. Smith** said that quite often issues arise between parties wanting to exercise property rights in a manner that may be adverse to someone else. There is a comprehensive plan that is mandated by the Land Use Planning Act, and much of the plan is dictated by transportation ways. Planning is based on a transportation plan believed to be in place, so if we now say that we don't have that plan that was planned around all this time, it really throws things into a real mess, and comprehensive plans can be a real disaster. People come to his community to become a part of what is seen in that plan. Quite often,

people say that they don't want something next to their property and when it shows this on the plan, they often ask why people didn't know, and the county thinks that people should look at the plan when property is purchased. These arguments arise, and **Mr. Smith** said that he is a huge property-rights advocate, but when plans are in place for 100 years people should know what is in those plans.

Mr. Smith said he had property with a prescriptive easement through it, and the prior testimony was talking about people paying property tax on this 50 foot right-of-way, and he showed on his assessment notice that he is paying zero on that 50 foot easement (Category 19 on his assessment description). (This handout is available in LSO.) **Mr. Smith** said he'd never paid property tax on that piece of property. Most assessors say that it is the same in other counties, but those property owners with prescriptive easements on their property have been notified every year of this on their tax assessment notice. If they are questioning this, why aren't they asking the question? He said there is a process if 50 feet of prescriptive easement is not wanted and there is no reason. There is a process in statute that allows them to come to commissioners and state that they don't want it to ever be 50 feet, and commissioners will discuss that. There may not be property beyond that owner of developable property that would impact the property rights of others. This is best handled at the local level. The width of roads in counties is not inventoried; they are calculated at 50 feet, and for a county to do differently, one can only imagine what the cost would be to a county. If an assessor would have to go out and do surveys to determine historic use, this would touch every parcel that a prescriptive right goes through state-wide, and would take years. The public has been paying for making up the difference of the property tax that would rightly be charged to that prescriptive easement, so they are paying zero tax, have been for all these years, and in most cases was already identified when the property was purchased as a prescriptive easement.

With regard to the task force's request for a compromise, **Mr. Smith** suggested that they don't develop land that way anymore, and they no longer will allow a development to put in a 26-foot wide road to the development; we require them to provide a roadway needed for that development and give the county the right-of-way (not an easement) for that development. The county, for every highway district and city, gets highway allocation money distributed by the formula based on number of miles within your jurisdiction. To get that money, the road has to be paved and graded for drainage. **Mr. Smith** said he was willing to say that anything identified on that highway allocation map, along with areas that have been roadway validated by the commissioners (by a public process) and if either has occurred, that is what the county does. He thinks that is a compromise that he would be willing to live with. **Mr. Smith** is not in favor of taking citizens' property or taking a two-lane road and saying it's now a 50-foot road just because a few cars drive on it. **Mr. Smith** thinks a line needs to be drawn, since counties cannot go back and reduce what has always been assumed and planned for, which he believes would be detrimental. He said he could anticipate many dire consequences from that and many unanticipated consequences of such an action.

Representative Raybould commented that most surveys done in Idaho were done in the late 1800s and were not totally accurate and new surveys are done to the true section line of a property. When a farm deed has that section line description, supposing that an accurate survey showed that the center line of a road that needs to be widened or improved is 25 feet to one side of the section line, 25 feet is on one property already. So, does the county take the widening of the road to the other side of the section line where the new survey shows where the right-of-way really is? He asked if the county ever had to do that or did the county assume that the center of the road is where it's at and there is 25 feet on each side of that center line of the road? How does that work for the property owner who is already giving up 25 feet of his property, half of that easement for the road, and the other property owner isn't giving up anything? **Mr. Smith** answered that this situation has occurred several times, and the county works

very closely with property owners, recognizing their property is their home. The county moves fences for citizens, if it's in the county prescriptive, since the owners have invested in the property. **Mr. Smith** did not know what all counties do, but Gem County has been very successful in every case he knows of in coming to conclusion where that line needs to be, and in most cases it will go to the side not impacted by the existing roadway.

Mr. Kim Gourley, an attorney for Idaho Power, was next on the agenda and he said that he'd testified last spring before the Senate Transportation Committee regarding HB628aa on behalf of Idaho Power Company, and was here today on their behalf as well. He handed out "Chronology on Public Highway Law" (available in LSO) which addressed questions brought up in the Senate Transportation Committee during the past session regarding the history of statutes relating to the width of highways and whether the law had changed. The initial statute was in 1887 and thereafter there were a series of name changes to the statute as the Idaho Code evolved, so in 1911 a new number was assigned, again in 1933, 1966, and ultimately in 1985. He inserted a column on his handout for abandonment of highways since Idaho also has laws about ceasing to use roads for a period of five years, after which roads can be abandoned. The third column on his handout related to case law that interpreted these statutes, 1908, *Meservy* decision; 1983, *Bentel* decision; 2011 *Halvorson* and *Sopatyk* decisions. **Mr. Gourley** said that the way he understands what the Supreme Court decided in *Halvorson* was that he looked at it as if there was only one statute enacted by the Legislature in 1887. That 1887 Legislature decided they didn't want to impact landowners who didn't know that there would be a 50-foot prescriptive right-of-way or common law dedicated highway, so anything that existed prior to 1887 was not bound by the 50 feet. Upon enacting the statute, all roads going forward would be a minimum of 50 feet in width, which is what *Halvorson* ultimately decided. If a road was created prior to 1887, that road is going to be whatever the historical use was. If the road was created after 1887, that road is going to be a minimum of 50 feet wide. He believes that the Supreme Court looked at the statutes, even though some testimony has stated that there is brand new statute in 1985 or 1966, but this is not the way the Supreme Court looked at it. This is simply a renumbering or renaming of the same statute enacted clear back to 1887 and it rolls forward. If one reads the *Halvorson* decision, he believes that is the conclusion one would come to.

Mr. Gourley stated that Idaho Power has concerns about what is being contemplated by HB628aa or any versions of that, recognizing that the crucial part for all utility companies is that they have a legal right to be within the right-of-way. It makes absolute practical sense to have them there, so for predictability of all utility companies, the width of highways is crucial and they must know where to put their facilities. It costs hundreds of thousands of dollars to install power facilities, so what has traditionally occurred is that power facilities go in and measure 25 feet from the center line of the road to install power poles about 1 foot inside that 25 foot line, so about 24 feet out from the road's center line. This is based upon statute enacted by the Legislature and this is true for all utility companies, so predictability is key. The other thing that is important is safety, since what is being proposed in some testimony is to put power poles into a more narrow width, of 25 or 30 feet, excluding the barrow pits.

Mr. Gourley proposed to the task force that this is a huge safety issue. He clarified questions that arose in the spring committee testimony by showing photographs of Bob Barton Road in Jerome County (pages 2-5 of his handouts, available in LSO). He said that he represented the Jerome Highway District in cases, and has direct knowledge about what occurred. In looking at practical width of highways, one should look at not only the paved, travel surface area but also the barrow pit or storm drainage area since all highway districts have to deal with this as well as snow removal, maintenance and shoulders, all of which make up parts of the road. **Mr. Gourley** doesn't believe that there is a big issue about whether highways are less than 50 feet wide, and that's why most case decisions hold that, as a practical matter,

all highways are 50 feet wide, recognizing that statute says that not that all highways are 50 feet wide, but are a *minimum* of 50 feet wide. On behalf of Idaho Power, he resisted the passing of HB628aa because of the predictability problem and the huge cost that would be involved for utility companies if there were suddenly variable roads. You can't have power lines jogging back and forth depending on property owners and what they are willing to do. There has been testimony that power companies can easily get easements, and he said they can negotiate for easements, but companies can't always get them. The true risk would be where an inverse condemnation case is filed against the utility company saying that they have been trespassing and now have to pay just compensation, and attorney fees and costs are mandatory as being awarded to the landowner, so the cost is huge. This doesn't make sense economically or from a safety point of view. **Mr. Gourley** believes that the *Halvorson* decision is a correct interpretation of the law and he doesn't have a problem with it. There could be a situation where a road could be abandoned and if someone asserts no public use or maintenance, the road goes away, so the defense is that the road was never created or was abandoned, but if the road is there, the 50 foot width makes sense for the state of Idaho. **Mr. Gourley** said that he was respectfully requesting that this task force not take what he called "bad facts" and create "bad law" to create something that needs to be fixed with the current state of the law.

Senator Winder asked about the comment that the law requires a *minimum* of 50 feet and whether **Mr. Gourley** thought that the counties or jurisdictions could make a case that more than 50 feet is deserved. **Mr. Gourley** said "yes" and that the *minimum* is 50 feet, giving the example of a six-lane road plus barrow pits, etc. and it could end up to be 75 or 80 feet, so that argument could be made. As a practical matter, none of the highway districts that he has represented ever have asserted anything over the 50 feet for just compensation to negotiate just resolution with landowners; they assume a 50 foot right-of-way, but it could actually be 60 feet. They assume 50 feet, and they pay based on it only being 50 feet because it makes practical sense for them, as well for the appraisers, to go through that analysis.

Representative Burgoyne asked **Mr. Gourley** to help him with the statute itself, asking about 40-2312 and the exception clause because he believes there are potentially two ways to read it as follows:

"All highways, except bridges and those located within cities, shall be not less than fifty (50) feet wide, except those of a lesser width presently existing ..."

Representative Burgoyne said that since **Mr. Gourley** believes that the *Halvorson* decision was correct, he asked if **Mr. Gourley** would interpret the clause to mean "except those of a lesser width existing" (prior to the 1887 statute), asking if that was correct. **Mr. Gourley** answered "yes" adding that he believes that is the way the Supreme Court read it and that's the way he reads it, because to read it otherwise would essentially render the 50 feet meaningless. If every road is subject to factual determination on a lot-by-lot basis, then there would be no 50 foot width, since presumptions do not mean a lot in court, since they are so readily overcome. **Mr. Gourley** believes that to be the correct interpretation of 40-2312.

Representative Burgoyne commented that is the way he had read 40-2312 to begin with, but then he read *Meservy* and *French* and that he persuaded himself for a while that there might be two ways to read the exception. His question was, after having practiced in this area for a long time, how as a practical matter, out in the field, has this statute been read over the period from the time *Meservy* was decided, up to the present time. Has this been working, on the ground, the way the *Halvorson* court indicates it ought to work, or has it been getting applied in different ways? **Mr. Gourley** replied that what has occurred is, for utility companies to assume 50 feet, which is where power lines are placed. To date there haven't been many problems with people asserting trespass by utility companies. He thinks

the statute has been interpreted that way in relation to utilities. With the highway districts, there are periodic assertions that a small strip of land may be not subject to a full 50 foot prescriptive easement, so demands are made and then the highway district must decide whether to fight it for a ruling or pay some small amount in order to eliminate the issue. Economics usually win out and money is paid since that is more practical. When appraisals are done, they always assume 50 feet and that is what is negotiated, on behalf of highway districts. The practical side is that 50 feet has always been there, then it's a question of whether a landowner will request additional money on the theory that improvements were located within that 50 foot prescriptive area.

Senator Bair said that he assumed that **Mr. Gourley** supported *Halvorson*, and would it be a fair presumption that he would not have settled out of court and paid individuals money with the *Halvorson* case in his back pocket? **Mr. Gourley** answered that with the *Halvorson* case, the Supreme Court decision is on point that helps to eliminate the issue, from his perspective. He said there was a risk on prescriptive issues, and that case helped to eliminate a fair amount of that risk, if not all of it, but still there is the practical problem if someone wants \$1000, it would cost more than that to go to court, so highway districts would still have to look at economic decisions about paying, but would be willing to pay a lesser sum due to the *Halvorson* decision.

Mr. Bill Roden testified next, representing CenturyLink Telephone Company, stating that he had spoken during the Senate Transportation Committee during the session on HB628aa, adding that in the minutes from these hearings it indicated that he was neutral on HB628aa. He thinks that was not quite accurate; what he did say was that CenturyLink would live with whatever decision the Legislature made and if it cost more money to comply with acquiring rights-of-way in a different manner than what he believed the law to be, CenturyLink would do so, but the unintended consequences of that may well be that those costs will ultimately be borne by constituents in terms of increased rates and fees. Those unintended consequences should be carefully considered. He thinks that the *Halvorson* case right now stands for a proposition, whether popular or not, and he believes that predictability is desirable. *Halvorson* basically says that since 1887, going forward, the roads by prescriptive easement at least would be considered to be 50 foot right-of-way and that has been carried forward. The Legislature has long recognized the desirability of utility companies and has encouraged utility companies to use the public rights-of-way, whether by prescriptive easement or for other purposes, and that has accommodated the extension of needed utility services throughout the state. Reading HB628aa, he said it was hard to tell whether it is intended to have retroactive application and, if intended, he thinks there are unintended consequences described previously by others.

Mr. Roden submitted written testimony (available in LSO). He thinks that the present law needs to be examined and how these prescriptive easements come about. If private property rights want to be preserved, the statute really provides great protection to the establishment of a road by prescription. It takes a period of five years of continuous use of that property by members of the public generally and at any point in that five years the property owner could have objected to the use by the public of that right-of-way or that landowner's property. Failure to do so, and to then come in later questioning the statute, seems somewhat problematic to him. In addition, the use must be general, continuous use and the statute provides that the road must have been maintained during that period of time at public expense. If a landowner is going to allow use during that time, continuous use by the public with the landowner's permission, and maintenance paid by the public, the landowner is being compensated. If any change is applied retroactively, it needs to be considered that the property owners have the right during that period of time to object, to bring a halt to the use of that road at any time, and the *Halvorson* decision says that even as you approach the end of the five-year period of time there is still a four-year statute of limitations on top of that, which surprised him. **Mr. Roden** believes that the

Legislature, historically, has preserved property rights, provided vehicles for validating those roads, for vacating roads if necessary and those laws are still on the books and should be considered by the task force as decisions are made. He believes that *Halvorson* was decided correctly, although the owner should have inquired what was on the property. Predictability is vitally important to everyone involved in extending services to the public.

Mr. Gordon Cruickshank, Valley County Commissioner, spoke next and said that he had worked for the Valley County Road Department for 16 years, 10 of which he was the road superintendent, prior to becoming a commissioner. He stated that the 50-foot width requirement has been around a long time, and in 1887 the Legislature enacted a law stating that all highways, except alleys and bridges, must be 50 feet wide except those now existing of a lesser width. This statute is still on the books as Idaho Code, Section 40-2312 and HB628aa being discussed today would change the way things have been done in Idaho for 125 years. He doesn't think this course should be reversed. He said that people don't understand that there is more than the bare width of a road surface involved in maintenance of a roadway. He passed out a handout (available in LSO) showing the road standard used in Valley County with 24-foot wide paved surface, 2-foot wide shoulders, plus room for snow removal and drainage. Even with a 50 foot right-of-way for local roads, there could be encroachment on private property. If a stop sign gets knocked down, under new guidelines it must be moved farther back from the road, installed at a higher level so more visible, so is an easement necessary to move that sign? Accidents can happen during that time, so who is responsible for the local jurisdiction because the sign is not replaced? If the sign is put back where it was originally, the county is in violation of federal law. If moved, encroachment could result. If HB628aa moves forward, it may cause Valley County to not maintain roads in the winter, due to not having room for snow storage. Many of the county's prescriptive roads lead to major areas of the county, so what will happen when roads are not maintained? There will be costs to purchase rights-of-way, and where will the funding come from, since many road jurisdictions are struggling to maintain the roads currently and will add more burden to the taxpayers.

The proposed HB628aa states that there is no fiscal impact to the state; **Mr. Cruickshank** disagrees, since Joint Rule 18 states that you must note the fiscal impact to local government, and he asked the task force to review their own rules and follow them, since there will be considerable financial burden to the counties and will impact taxpayers. Valley County has 235 miles of prescriptive roads; at \$4,000 per acre, the cost to Valley County to purchase just the additional 20 feet (with 30 to start with) would be \$2.28 million, half of the entire 2012 budget for the Valley County Road Department. The U.S. Forest Service and BLM roads could also be impacted; much of Idaho is public land with administration by federal government agencies. Many counties have a small measure of control over public lands access due to the RS 2477 routes critical to providing access for recreation, tourism, mining, timber, livestock and much of Idaho's economy. If HB628aa moves forward, there is no authority by a local jurisdiction over a federal agency to make improvements to a roadway and would give the federal government absolute veto power over any such road improvement. Not even eminent domain would work against the federal government. Thus, the federal agencies may use HB628aa to deny access to make any improvements when a public county road is involved. What would happen if trucks could not travel the roadway due to a road not being improved? What about the private property rights of the person who wants to access their property? Is it okay for one to claim their property right to deny another property owner their right? All agencies have backlogs for maintenance, so why add another burden to those same agencies with HB628aa? The 50 foot prescriptive right-of-way should be the base standard, as it has been for more than 100 years. When the Governor's Transportation Task Force discussed funding, the goal was for counties to use funding for maintenance of roads and improving safety across Idaho. HB628aa would defeat the purpose of getting the best bang for the buck for everyone across Idaho.

Local government and state government are in the business of protecting the transportation network to promote growth, safety and prosperity in Idaho. **Mr. Cruickshank** believes there would be a fiscal impact to state and local government if HB628aa passes and would impact the very citizens claiming to be protected. In summary, he believes that the opportunity is already in state statutes for folks to negotiate with local jurisdictions regarding rights-of-way, to create and maintain roadways safe for citizens. The system works and there is no need to change the way it's done today if the process on the books today is utilized.

Representative Burgoyne said that these issues seldom arise in urban districts, like his, and he asked if **Mr. Cruickshank's** county is involved in roads involved in that five to nine-year window discussed in *Halvorson*. **Mr. Cruickshank** answered that he didn't believe there were any roads like that being described.

Senator Winder asked if there were existing roadways where improvements are 36 feet with the improved roadway, barrow pit, etc. and what if someone has put a head gate, home, barn or improvement in an area within 50 feet and how is that dealt with, if it really doesn't interfere with maintaining the roadway or for snow removal? **Mr. Cruickshank** said that a head gate is considered part of utilities, but the county works with the irrigation district so as to not impede snow removal. It's the same with utilities -- well marked for snow removal. Encroachments into a right-of-way occur and the county asks for those people to come in to ask for a variance and an agreement is entered into such as when that building is destroyed by 50% or more, the county asks for the homeowner to adhere to current standards. Encroachments have been allowed into easements and sometimes rights-of-way are moved. Steps are taken, always at the local level, working with landowners to make it work.

Mr. Dennis Tanikuni spoke next, as Assistant Director, Governmental Affairs, Idaho Farm Bureau (IFB), and he said he had no legal insight into this issue, but he wanted to inform the task force that the IFB did support HB628 and HB628aa during the session. IFB is concerned about the 50 foot minimum right-of-way which is either established or reinforced by the *Halvorson* decision. Most of IFB's 68,000 members live in rural Idaho and their primary issues of concern are takings of private property by potential expansion of prescriptive rights-of-way and also other things like water delivery issues. *Halvorson* can affect any landowner but IFB's members will probably be asking if the world prior to the *Halvorson* decision functioned well, why can't the law be changed back?

Mr. Jerry Rigby, an attorney with Rigby, Anderson, & Rigby in Rexburg, Idaho presented next. For many years his firm has practiced water rights and dealt with irrigation companies and districts and canal companies. His firm currently represents the committee of nine which is the water guru in eastern Idaho. He said he was here because his firm represents about 90 canal companies and that knowledge and concern is why he was at this meeting. He said he'd testified before the Senate Transportation Committee during the session on HB628aa; he said that some issues had become more defined and clear since spring. **Mr. Rigby** thought that nobody could dispute that the *Halvorson* decision changed the status quo and makes it clear that the status quo will no longer be the *Meservy*. **Mr. Rigby** said that as **Rep. Burgoyne** had addressed, under the *Meservy* law and under 40-2312 itself, it was a different world. He respectfully disagreed with odds makers giving it 95-5% risk, believing it to be much lower than that. He was not here to say that the 50-foot easement is necessary in many cases, but the potential of all these roads having the potential of costing millions of dollars -- that is not going to happen, and wasn't happening. One needs to look at the Idaho Code annotated under the statute to find how few cases have been brought, and the reason is that it was working in the real world. **Mr. Rigby** shared his concern about irrigation companies, ditches and canals along most roads. He believes that war is being waged against irrigation companies in this urbanized society and canal companies

constantly have to defend their rights. People who move in to areas believe they have a right to the edge of that canal and can do anything they want with it, such as taking away a bank, not realizing it will actually hurt them. **Mr. Rigby** said that in the past the Legislature had helped canal companies and made changes to laws to make sure that rights are protected. Chapters 11 and 12 of Title 42 are the two rights most impacted by the *Halvorson* change. “No person or entity shall cause or permit any encroachment onto the easement or right-of-way **including any public or private roads** or utilities without written permission in order to ensure that any such encroachment will not unreasonably or materially interfere with the right-of-way.” It goes on to say that if that does occur, then that entity, private or public **must pay** to have it removed.

Mr. Rigby then asked the task force to consider *Halvorson* where it is an absolute 50-foot easement. He asked if the members didn’t see that conflict. Any modifications in the right of maintenance that canal companies have and upgrading systems makes them subject to the *Halvorson* case, so who is going to prevail? He sees an absolute conflict with this. Under *Meservy*, it said 50 feet since 1887, but that is not how it has been practiced. Under *Meservy*, common experience shows no more footage is used than is sufficient for the proper keeping up and repair of roads generally. This is how county roads, canal companies and irrigation districts have been getting along and haven’t been in court, because problems got worked out. Now with the *Halvorson* sledge hammer in hand and owing to their shareholders, one could argue, they shouldn’t be working with the canal companies or they are giving up their rights of their shareholders. **Mr. Rigby’s** concern was putting it back to status quo which worked. He believes the *Halvorson* decision was unfortunate and thinks that there were no arguments to bring it in the first place. He wants to go back to the way it has worked, and to do so is important to canal companies, because they don’t want that showdown. In a county next to **Mr. Rigby’s**, the county put a bridge too low and if the canal company asserted diversionary rights, water would have hit the bottom of the new beam of the bridge. This was an error. Something had to be worked out. That impeded water flow would cause problems and his county is working this out, but with the *Halvorson* sledge hammer which says they have this right, the canal company no longer has the right they had before, and it harms canal companies. Users of the water, the county roads, the taxpayers are all the same and it has been working. He hasn’t heard any suggestions about what should be modified in HB628aa. He understands the need for counties and utilities to have easements, but he didn’t want that to change the status quo. He asked the members to remember why this is such a big change, since prescription law, as opposed to right-of-way, is different. Under common law prescription, width is measured by the character of the user for the easement and cannot be broader than the user, meaning that the prescription you get can only be what you have used, if you go to court. The *Halvorson* decision very clearly stated that even though you’ve acquired this by prescription, it gets 50 feet. That is very contrary to the normal way of dealing with this and that is why since 1887 that people have dealt with this differently, until *Halvorson*. This is wrong, in his opinion. Canal companies have been given statutory rights-of-way, but footage was not spelled out. Companies have the right for maintenance but it’s no more than absolutely necessary, and it’s worked out on a case-by-case basis. There are as many canal miles as road miles, but problems are worked out. HB628aa puts it back to what is really needed.

Mr. Will Hart, Executive Director of the Idaho Consumer-Owned Utilities Association (ICUA), presented next. He said that ICUA represents 21 rural electric cooperative utilities and municipal power companies across Idaho and serves 168,000 members. ICUA prides itself on the positive relationship with its members, they respect property rights and work with member customers regularly to find mutually beneficial solutions on right-of-way issues and other issues of property rights. Access to right-of-way is critical for his utilities, not only to maintain infrastructure in place, but even more critical for ability to provide for future growth. Based on the several months of study and discussion of HB628aa, ICUA has come to the conclusion that the legislation is written in a way that could have adverse consequences to

ICUA's utilities and ability to provide for present and future needs. ICUA recognizes there are unique circumstances in disputes of right-of-way issues. ICUA believes that the majority of these unique and rare disputes can and should be negotiated and solved at the local level. In the event a legislative fix is still called for, ICUA is committed to working with the Legislature moving forward.

Mr. Steve Price, General Counsel, Ada County Highway District was asked to speak next. **Mr. Price** addressed the task force by saying that he also testified before the Senate Transportation Committee during the session on HB628aa, believing this to be a really big topic for all constituents as well Ada County Highway constituents. He stated that one important thing that he thought Mr. Copple recognized during the session is that this is a policy change for the state of Idaho, and really isn't a law change. The sooner that everyone gets past what the *Halvorson* decision does or doesn't do, one must focus on what is the right public policy for the state of Idaho. To help with that, one must understand the history which is that the federal government, when opening up the West, created legislation that established right-of-way on section-line roads, RS 2477. **Mr. Price** said this is basically a federal grant that said that the West must develop but we don't want infrastructure or transportation to be an impediment to the development of the West, so many roads today in urban and rural areas are section-line roads. That policy was carried on until about 1976. At that time it was repealed only going forward, which is helpful when thinking about prospectively or retroactivity. Look to the federal rule as a guide on what is fair to both the property owners as well as to the people that have relied upon them. He said that federal law didn't specify width in federal rule. They basically deferred that decision to all states, and in Idaho a statute was developed of 50 feet. Different states have different widths. These laws follow the presumption basically in *Meservy* stating that access is important, so instead of fighting over right-of-way, barrow ditch, drainage, safety lane, etc. a presumption was created of 50 feet, and that is good public policy to say 50 feet. There is a huge difference in easement law between a private prescriptive easement and a public prescriptive easement. Even the *Meservy* and the *Bentel* cases talk about that distinction, which say in a private prescriptive easement, it's only that area used, that's it.

Because of the public benefit and necessity, **Mr. Price** believes that it should be reasonable that one can use that area for public purposes. With the law, instead of everyone litigating over what was the reasonable area, the Legislature at that time wanted to open up the West and just said in corridor preservation that it is 50 feet. We've been living by that 50 feet for a long time and utilities have put poles at 50 feet, 25 feet from center lines, and it has worked. If this is changed, the real debate is whether it is going to be 50 feet or is it going to be litigated as to what is a reasonable width for prescriptive easement? If there is an inadvertent taking of inches by snow removal, doing maintenance, that is a taking and is litigated, and the property owner, under Idaho law, would be entitled to attorney fees. That several inches then suddenly become really expensive. Do members want to declare, like many states have, that Idaho is going to say a reasonable amount in terms of road widths and not get into litigating cases on what's reasonable and have a set policy. If members want to change that, fine, but it hasn't been the law, it hasn't been relied upon; if there is a change, do so prospectively. He believes there is a fear that some county commissioners or highway districts would put lines on maps and call them roads and that those lines would somehow create a public right-of-way, but he said this is not the case and doesn't comply with 40-202. He said that **Ms. Cunningham** was very accurate about what it takes to create a prescriptive right-of-way and that there is case law against Teton County Commissioners that says just because a road is on an official map, that doesn't make it a public right-of-way. The burden is still on the government to establish that the prescriptive easement is met. To create a prescriptive easement, it must be validated, and it has been discussed about changing the validation statute. He doesn't believe that needs to be done, but thinks the focus should be what is going to be the policy going forward in terms of how width is to be determined, the way it has been at 50 feet, or do you want everybody on a case-by-case basis to litigate what that means?

Co-chair Raybould talked about the late 1800s and early 1900s, saying that ten miles out of town was far and roads coming from farms and ranches were wide enough for horses and buggies. Then the land became irrigated and canals built along the roads. That canal could very well be on that 50 foot right-of-way from the center of the road, perhaps encroaching on the 25-foot part of that. As farms got developed, there are now bigger farms, bigger trucks, roads need to be widened, and there are irrigation structures, canals and bridges. How is this handled and what would **Mr. Price** recommend be done in adjusting statutes to allow for that canal company to maintain itself, the bridges and still talk about this 50 foot right-of-way, since there is a problem there that he thinks the Legislature is trying to solve and HB628aa tried to do that? On the other hand, the Legislature doesn't want to limit the counties' ability to maintain roadways that serve the public. How is this problem to be solved?

Mr. Price replied that **Mr. Norm Semanko** had just arrived at the meeting, and he complimented **Mr. Semanko** on doing a very good job in existing law to protect that. He said that in 42-1209 it is the obligation of the road department if anything is done that affects a structure, the consent must be obtained from the irrigation company. In many instances, the highway department has to pay, and in some ways the county makes them pay more in improving the facility. There has been a recent Supreme Court decision involving *Pioneer Irrigation District v. the City of Caldwell* where the court upheld that requirement that if there is any road or highway district that is going to encroach or impact the operation and maintenance of those irrigation facilities, then it's their obligation to pay for that.

Co-chair Raybould then asked if that supersedes the *Halvorson* decision, saying that it looked to him like that decision may have intruded on these other laws regarding irrigation structures and he wondered if something needs to be done now, since the *Halvorson* decision, to clarify exactly what the state means when they say those irrigation structures are inviolate.

Mr. Price said he did not believe that something needs to be done now, but he was not trying to discourage clarification. He added that when it comes to irrigation law, the laws are very clear and protective of their interests, thus his compliment to **Mr. Semanko**, since they have made it very clear about obligations to make them whole. Just because there is a right-of-way doesn't mean that they don't have a 100% right to be there, and if anything impacts their facility, we have to pay.

Rep. Burgoyne questioned that reasoning with respect to irrigation districts, asking if it would also make sense if a 50 foot width impacts a landowner's fences, outbuildings and other structures? As a matter of policy, not statute, does it make sense to have counties and highway districts, etc. compensate the landowner in those situations, if it makes sense to the irrigation facilities?

Mr. Price answered that they look at it as a prescriptive easement, and that gives them a right to use it for roadway purposes. The underlying fee owner obviously has rights too, and whenever the highway district goes in to affect any facilities on their fee ground, **Mr. Price** believes under real property law there is an obligation to compensate. As a practical matter, the highway districts do pay for the relocation. He believes this is the correct interpretation of the law.

Rep. Burgoyne assumed that the Ada County Highway District was in communication with other road agencies throughout the state, and he asked if **Mr. Price** had any understanding whether or not the Ada County Highway District approach is uniform throughout Idaho or not. **Mr. Price** answered that he did not know the answer to that question.

Mr. Norm Semanko, Executive Director of the Idaho Water Users Association (IWUA), presented next. He said he thought the goal at this meeting was to try to identify potential solutions, and what the perceived problems might be. He said he would take his time to highlight from his world in the irrigation district canal company sector what he sees as probably the unintended consequences of the *Halvorson* decision. These consequences, both statutory based, present a substantial conflict as follow:

- (1) The potential for encroachments on existing irrigation rights-of-ways under Idaho Code Section 42-1102, which has been massaged, changed and amended often and frequently, is a very up-to-date statute. Section 42-1102 says that no person or entity (includes highway districts) shall cause or permit any encroachments onto the irrigation easements or rights-of-ways including any public or private roads **without written permission**. **Mr. Semanko** said they cooperate on these kinds of things all the time. This provision anticipates and was written such that enlargement of existing roads will be done in cooperation with irrigation entities so that there is no unreasonable interference with that easement which is the easement for existing irrigation and delivery operations. If prescriptive or historic use highway easements are allowed to expand to 50 feet and have already been extended onto irrigation rights-of-ways by judicial fiat, this provision could be rendered meaningless or greatly compromised. At a minimum, it sets up a considerable conflict. Do the 50 foot highway easements supersede existing irrigation rights-of-ways regardless of the impact on irrigation and drainage facilities? Section 42-1102 makes clear that there is no impact on the existing rights of eminent domain under those specific provisions of code, but it does not create a new right and he hopes that a conflict can be written around.
- (2) The need and the ability to relocate existing irrigation and drainage facilities becomes very important when you have roadways that need to expand, pursuant to these written agreements. Under Section 42-1207, the owner of a ditch, canal, lateral drain or buried irrigation conduit (that would be the irrigation district) shall have no right to relocate it on the property of another without **written permission**. IWUA has an interface with the underlying landowner too, but in most cases IWUA has a right-of-way or easement for IWUA's facilities just like the roads have a right-of-way or easement for their roads. IWUA has no right to dictate relocation of IWUA's facilities without their permission; they are the underlying landowner, but IWUA is not allowed to expand that burden on the landowner without their **written permission**. IWUA can bury it on the existing line, which is in code, but if moved, **written permission** is needed. If existing prescriptive and historic use roads are allowed to expand to 50 feet, where will the existing canals, ditches and drains be located, even if the private landowner agrees, which is not a certainty, and who will bear the cost of the relocation? What happens if they don't agree to move that facility? If it is feasible to bury the ditch or canal within the existing right-of-way, which is not always the case, who will bear that cost? Section 42-1207 says that the irrigation entity bears the cost when it does the burying; likewise, the private landowner must pay the cost if the landowner chooses to bury an existing ditch or canal. If the burying is necessitated instead by the expansion of a roadway, will the highway entity bear the cost? The statute does not address that issue. So, where does that leave us?

Mr. Semanko said that this all sounds vaguely familiar to him, since in the 1990s there was a situation where folks wanted to plant trees and do things along canals in this valley and the historic way that IWUA looked at it was a right-of-way was on either side of the canal and that it is IWUA's right-of-way and nobody can be in there, not even the underlying landowner, and it's 50 feet on each side or whatever the custom was in that area. There wasn't always a written agreement that said exactly how wide that was and people may have wanted to do things that may or may not be an encroachment. Idaho Code was amended to make it clear in 42-1102 that when there is not a sufficient right-of-way, the irrigation entity has a right to occupy such width of the lands along the banks of the ditch, canal or

conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and such equipment as is commonly used or is reasonably adapted to do that work. This is not what IWUA wanted; they wanted 50 feet, but IWUA knows there was an underlying landowner there, that this had to get through the Legislature, and IWUA knew that compromise was necessary. So, in the late 1990s, that is the language agreed upon that whatever was necessary to do the cleaning, maintaining and repairing, that is the width they would be able to occupy next to the ditch. He thinks there is an example there to look to, perhaps not a perfect fit for the situation the task force is looking at, but it's perhaps not going to always be an exact 20, 25 or 50 feet and IWUA would be happy to assist in looking at any draft language or participating in drafting with negotiating groups. IWUA is all about making things work to move forward together and this task force has been presented with an enormous issue. **Mr. Semanko** thanked the task force for inviting him to speak and stood for questions.

Co-chair Raybould said that the task force was dealing with two separate titles in law -- Title 40, highways and bridges, and Title 42 dealing with irrigation statutes in the state. This task force was asked for solutions to this problem that seem to exist not only between highways, bridges and irrigation but also private property. In working with this and looking at HB628aa, he asked if **Mr. Semanko** had any recommendations of something that may need to be modified in 40-2312 that would answer this problem on the difference between the 50 foot right-of-way and irrigation canals and structures. **Mr. Semanko** replied that IWUA did support HB628aa and did think that it was reasonable to provide the language in that bill with regard to needing to have an additional width necessary to do utilities and other kinds of things. He said there is an underlying issue; he said he couldn't answer one way or another, but he said he'd be willing to sit down with other interests to come up with language. In addition to the physical road that exists now, is there additional right-of-way that exists now? It's a much more complicated issue than when you have a canal, a road, and you know there's an easement for at least that much. IWUA knows they are not going to be expanding a canal, and if so, they are going to need a right-of-way or easement for that. IWUA always knows that on sides of canals they have sufficient width to clean and maintain, which is a secondary issue, but one that he said he thought they could look at the existing 42-1102 for advice. He reiterated that he'd be happy to work on language to run it through IWUA to make sure they are okay with it. HB628aa was vetted through a legislative committee and **Mr. Semanko** said that IWUA supported it, but that doesn't mean that is the only thing they can support, but is it all that had been done through their formal process. No alternative language has been requested from IWUA members. **Mr. Semanko** said he did want to share with the task force his idea from 42-1102 that has worked in the irrigation world, albeit with some uncertainty and controversy.

Co-chair Raybould said that it seemed to him that the morning testimony dealt a lot with the *Halvorson* decision that said in 40-2312 *except those of a lesser width presently existing*, adding that he thought the *Halvorson* decision said those roads *presently existing prior to 1887*. **Co-chair Raybould** asked if this were modified to say *except those of a lesser width presently existing as of the date of the proposed expansion*, something like that, to clarify and get around predating this clear back to 1887, would this solve our problem with private property and irrigation districts to clarify this Title 40 with Title 42? **Mr. Semanko** said he believed that is the kind of proposal to be run through IWUA's legislative committee. He said there is no guarantee, but that is the kind of thing he thinks has promise. He couldn't say that IWUA would support something 100%.

Mr. Bruce Wong, Director, Ada County Highway District (ACHD), spoke next and said this was his first presentation to a legislative task force, and that it was truly an honor to speak to the members today and thanked them for their service to Idaho. Specifically, he was here today to offer an operator's insight on the financial, safety and operational challenges that HB628aa places on ACHD and their

mission, which the Legislature has entrusted them with, namely safety, effectively and efficiently maintaining Ada County's 2,200 and growing road miles of transportation infrastructure for the last 40 years and into the future, and also based on ACHD's 400,000 customers. He said that ACHD endorses many of the concerns and testimony previously heard in opposition to the intent of HB628aa. As with all highway districts, ACHD is facing enormous challenges in its effort to maintain Ada County's road system due to stagnate sources of funding, increasing federal unfunded mandates in storm water requirements and historical preservation proposals at the local level, as well as rising construction and maintenance costs ACHD has witnessed. Although Ada County enjoys a good to better rating on 80% of its roads and 99% of its bridges, this has been achieved and maintained by ACHD's ability to strategically focus scarce dollars for maintenance that has been shifted from other scarce resources originally targeted to support new capital projects. This bill or any such hybrid hampers ACHD's efforts by restricting operations. Specifically, HB628aa would limit ACHD's ability to adequately maintain their existing infrastructure because it will restrict ACHD's operations to only maintaining actual surfaces of the roads, which is merely one part of an integrated strategy supporting Idaho's complex road structure. If the proposed HB628aa is enacted, ACHD will not be able to maintain much of the supporting infrastructure such as drainage and shoulders that are currently in ACHD's right-of-way and already paid for by the taxpayer.

All of this is critical to extending the life cycle of ACHD's road structure for the best return on investment for ACHD's 400,000 customers at the least cost to these customers. Why? The efficient and effective maintenance of a safe highway is dependent not only on the specific surfaces but upon ACHD's ability to maintain the supporting infrastructure which includes road shoulders for safety and drainage systems. **Mr. Wong** handed out three pictures of roads (available in LSO) that showed a maintenance project recently completed on Linder Road between Chinden and State Street. This project involved a shoulder road rehabilitation that was necessary to provide safe shoulders for motorists and these pictures illustrate key points. The pictures clearly demonstrate property owner's acknowledgement of the 120 year old law of 50 foot highway widths. The property owners placed their fences based on this road width as did Idaho Power with their power poles. The pictures also clearly depict the new challenges to all highway districts regarding signage placement, snow removal and pedestrian and bicycle safety, all of which are growing concerns. HB628aa represents a reversal of a 120 year old law and departure from proven, safe maintenance practices for all the transportation agencies across Idaho which have been upheld by the Idaho Supreme Court both in 1908, 1983 and in 2011. HB628aa, if passed, would deliver a huge blow to ACHD's efforts to provide a safe and efficient transportation system for all its customers which is already under siege. Moreover, if this statute is applied retroactively, it would invalidate every county's and highway district's official maps which have been required by statute since 1998. Idaho Code 40-202 requires that these official maps depict the location of each highway within their jurisdiction. ACHD has adopted and updated official maps every year since 1998 and the highway widths for many prescriptive roads have been mapped for 50 feet in accordance with existing Idaho law. From a practical perspective, ACHD and its customers have relied upon our official maps to complete numerous maintenance and reconstruction projects since 1998. Not only would HB628aa turn every adopted highway and highway district's official map upside down, it would also expose every transportation agency to a lawsuit for past activities within this historic width. **Mr. Wong** said he did not believe this was the intent, nor would this best serve the taxpayer in potentially having them pay twice for the same piece of real estate.

On a final note, he asked the task force to consider what it is they were really trying to solve with this proposed HB628aa. Although he has been told this is a very complex issue, it seemed to him when boiled down to ground truth, this is really about two or three local issues. He wondered if a better solution is to address the local challenges locally. He reminded the task force that we, as a country,

have seen what happens when the federal government legislates massive national solutions to remedy perceived local challenges. The former ITD Chairman of the Board has consistently stated and the Legislature has consistently embraced Idaho's transportation system as critical to commerce. HB628aa would be an additional burden to the taxpayer. It would not afford ACHD the best opportunity or ability to continue to ensure an outstanding road infrastructure and will, from ACHD's perspective, deteriorate safe and effective transportation in Ada County. **Mr. Wong** thanked the task force for allowing him to speak at this meeting.

Rep. Burgoyne said that the Valley County Commissioner was able to provide quantification of what he thought the cost of HB628aa might be to his county, and he asked **Mr. Wong** if ACHD had done that. **Mr. Wong** replied "Not to his knowledge, at this point." He added that the majority of costs for ACHD to maintain the road structure are absorbed in right-of-way acquisition. Most recently, in constructing a very successful project, the cost was quite amazing when it came down to what Ada County does offer the taxpayer in lieu of putting that project on the taxpayer's property. **Mr. Wong** said in his experience in dealing with these issues, if ACHD had not had the right-of-way as established by Idaho law today, the cost, in his opinion, would potentially double, based on what has been seen on operations requiring right-of-way acquisition. ACHD does not have those dollars and today, of the percentage of FY2013 budget approved by the commissioners, 53% is going to maintenance of the system, ensuring that it maintains the status and 47% is going to capital projects. **Mr. Wong** said that with regard to federal mandates, he is concerned there will be a bigger shift going in the future, and any stress on that will impact ACHD's ability to maintain the road structure.

Rep. Burgoyne thought one option open to the Legislature is whatever bill may pass, whether retroactive or prospective, he wondered if ACHD anticipates, given the degree to which Ada County has grown over the last 100 years, is this issue of taking by prescription 50 feet, as opposed to some lesser amount, really an issue in the future. **Mr. Wong** answered that he recently sat through a presentation at the Boise Chamber of Commerce regarding Highway 16 expansion and saw a projection from COMPASS (Community Planning Association) regarding growth and it was incredible. Can he look into the future and say that there will be more challenges than now, he wasn't sure, but according to projections, there will be an amazing growth in this valley. As of last week, he thought there were 75,000 Californians who left for Idaho and an estimate from the Pentagon was that a massive amount of retired and disabled veterans are headed west to find a better quality of life. **Mr. Wong** has seen ACHD's maintenance budgets going up and the requirements for new infrastructure building.

Rep. Burgoyne then asked about residential streets in Boise and Garden City, and whether all of these streets were 50 feet wide. **Mr. Wong** replied: "No, they are not." **Rep. Burgoyne** wondered if it was the position of ACHD that they are entitled to make streets 50 feet wide at the expense of the property owners? **Mr. Wong** answered that he would not categorize "at the expense of the property owners" and asked if **Rep. Burgoyne** meant that ACHD takes property without fair market value in the best interest of the taxpayer, adding "No, we don't." He added that ACHD pays fair market value. **Mr. Wong** said it was somewhat of a distortion because ACHD doesn't take property. **Rep. Burgoyne** said that was the point of his question; if ACHD is not going to come and take property to make a street in front of a taxpayer's house, which isn't 50 feet, 50 feet wide without compensation, he was trying to quantify this issue of cost. He was having a hard time figuring out fiscal impact to ACHD with HB628aa. **Mr. Wong** said the impact is just this "access for what ACHD does." For the majority of road projects, ACHD places lots of equipment out in the right-of-way, based on that 50 foot access, and ACHD would not be able to do construction nor support the infrastructure without additional costs to that adjacent landowner if HB628aa went through. That is the issue from an ACHD perspective, which is very important. Also, **Mr.**

Wong said that if it was retroactive, he didn't think the taxpayers would like that burden that ACHD would place on them.

Co-chair Bair advised the attendees that public testimony was on the agenda for the afternoon session of this meeting, but he invited those in the audience who were present to testify at this time, since the task force was ahead of its planned agenda schedule.

The first public testimony was heard from **Mr. Heber Carpenter**, who said he was here testifying as a property owner and citizen, although he was also the Manager of Raft River Electric based in Malta, Idaho. He said he'd testified at the Senate Transportation Committee during session, and he expressed concern there were so few citizens here today to testify since this is an issue that can touch everyone. In rural areas in Cassia County there are many prescriptive easement roads that are much less than 50 feet, bounded by fences, irrigation infrastructure and many other sorts of installations. These are based on historical boundaries and utilities have used these to negotiate with property owners to install an electrical system which was believed to have then been outside the public easement or right-of-way. Also, irrigation districts have installed infrastructure along old, historical boundaries. Property owners have been willing to allow prescriptive easements to be perfected for roads in the past with no mention of the 50 foot mandatory right-of-way from the county when maintenance and operation commenced on those roads. Property owners will become unwilling to work with people for access to their property or the public lands if they believe that a county or road district can eventually assume a 50 foot right-of-way through their property without just compensation. He has always thought that public rights-of-way are different than prescriptive easements and failure of political subdivisions to obtain proper rights-of-way should not be corrected on the backs of private property owners. Utilities and water districts should not be required to modify their installations at great expense because the county or highway district wants to assert a 50 foot right-of-way. All of the testimony he'd heard during session and today all acknowledge the need for public rights-of-way in order to expand and grow as a state and we need them, but we should not as a state correct sloppy right-of-way practices of the past by using an unjust taking of personal property without compensation to get to the ultimate goal of adequate public rights-of-way. He urged the task force to clarify the statute with legislation so that the original intent of the historical statute is preserved and the *Halvorson* ruling does not lead to the taking of personal property without due process and compensation. He said that utility rights-of-way are not cheap or easy to obtain, but utilities would always prefer to secure private rights-of-way for electrical infrastructure avoiding public easements or rights-of-way when physically possible. It makes more sense, he said, to work with customers and deal with it locally than depend on courts and litigation to force something through. He thanked the task force for their time and consideration.

Mr. Bear Prairie, representing Idaho Falls Power, testified next and said he was the Assistant General Manager. He thought that HB628aa as proposed created many issues for municipal electric systems and one of his strong convictions was that good legislation should keep people out of the court system. The main problem he sees with HB628aa as proposed was how to maintain and build new infrastructure that goes outside current municipal boundaries. There was a recent federal court case in Pocatello where Judge Windmill ruled the utility did not have the ability to use or exercise eminent domain outside of their municipal boundaries. The City of Idaho Falls and Idaho Falls Power have a number of power lines/poles that traverse between the county and city limits and not in a straight line. Much utility infrastructure is located within the right-of-way and the problem that he foresees is what happens when a car hits a power pole or a storm knocks a structure down. When that historical easement and right-of-way has been reduced from 50 feet to just what was historical use, then the power pole needs to be relocated one or two feet away in a new hole, so the utility will possibly be stuck in negotiations with that landowner to get an easement. The utility is required by statute to serve customers, and when a

new subdivision or entity is annexed into the city and a utility must traverse in front of county property. There are certain property owners that will not sell an easement. It is preferable for utilities to negotiate and compensate people and to get out of a right-of-way and actually place it on their property and purchase that easement and be compensated fairly, but some landowners will not sell their land to give an easement to place structures. By restricting the 50 feet down to historical use, that takes away another way for utilities to extend out electric service to customers and adds a huge burden of cost and the physical ability to connect and serve customers.

Chris Meyer, an attorney with Givens Pursley, testified next. He said he was at this meeting on behalf of the Idaho Association of Highway Districts. After other speakers, he thought he could contribute something, adding that it strikes him that this task force has taken on a noble task, to try to find some areas of agreement, even though not too many had been heard yet. He wanted to identify some areas where perhaps everyone can agree. Over and over again this task force has heard about the difficulties of unintended consequences. The suggestion has been made, especially by proponents of HB628aa, that the *Halvorson* case had unintended consequences. He thought that everyone should be able to agree that if there were consequences that need to be corrected, that we not create additional unintended consequences by going too far in the other direction. **Mr. Meyer's** concern was that with the current draft of HB628aa that may, in fact, be the effect. However, if everyone continues down this very productive path of bringing people together and gathering facts, then perhaps there is an opportunity to find common ground that all parties can live with, even though all parties may not love the outcome.

He said there is one area that had barely been touched on in this meeting, except by **Commissioner Cruickshank**, who emphasized the point which **Mr. Meyer** believes to be critically important. This is the issue of RS 2477 roads on lands that remain in federal property today, and there is a great deal of confusion about what RS 2477 roads are. RS 2477 roads all were initially created on federal land, but perhaps half of them are on private property today and the other half on federal land. The public policy implications are different in those two contexts and people are going to disagree on RS 2477 roads when they are on private lands. Nobody in this meeting, he said, should disagree about RS 2477 roads that are on federal land and the reason for that is, if the rights of counties are not protected in the state of Idaho, acting through those counties to maintain the interest in public access on those federal lands, then as **Commissioner Cruickshank** said, we have given veto power to the federal government over public access on those federal lands. Why does this matter? He gave an example in Valley County where there are RS 2477 roads on federal national forest land on roads that are historically less than 50 feet, substantially less than 50 feet, but if economic development is to occur in those areas (timber and particularly mining) those roads are going to have to be expanded to some extent to get mining rigs and trucks into those federal lands to accomplish that. If talking about private lands, it comes down to money. Are we going to compensate the landowner or not? Is it the taxpayer that pays or is the private landowner that volunteers that property? When on federal land, the situation is fundamentally different. We can't negotiate with the federal government because the federal government, if we give up the right as Idaho citizens to maintain that 50 foot window, then the federal government has veto power and can say they don't like the mining and are not going to allow mining to occur. It's not a question of who pays for it because there is no inverse condemnation against the federal government. So, **Mr. Meyer** put as most important the following: Whatever legislation comes out of this Legislature needs to be limited to apply only to road widths on private lands today. If we give that up on federal lands, we have shot ourselves collectively in the foot. He hopes that everyone can agree on that point.

Mr. Meyer said that effective testimony had been heard at this meeting on protecting existing irrigation facilities that have been placed closer than 25 feet to the center line of a road. **Mr. Meyer** said he was

not enough of an expert on these matters to know how this would be resolved, but thought there were very effective questions by **Co-chair Raybould** about whether the *Halvorson* case has potentially reversed the protections that everyone thought were in place. **Mr. Meyer's** prediction was that the *Halvorson* case did not deal with the conflict between very clear statutes protecting irrigation facilities and the road statute. If those two statutes were read together, the irrigation facilities would continue to be protected, but **Mr. Meyer** fully understood that there are irrigators and members of the Legislature who don't want to rely on **Mr. Meyer's** prediction on how a case might come out. The task force has a right and an obligation to make it clear on those points, but those issues can be addressed without affecting other things, which gets into unintended consequences. There may be people who don't think that existing irrigation facilities should be protected that are closer than 25 feet to the center line, but **Mr. Meyer** did not hear anyone say that in this meeting. It seemed to him if that is a concern that can be identified, everyone could agree that the farmer or canal company owning those facilities ought to be compensated if those facilities need to be altered or moved. That is a legislative change that can be addressed specific to those irrigation facilities. If that is the problem, this should be focused on, and could be corrected both in Title 42, the irrigation title, and/or Title 40, adding a provision, either way saying that this is not overridden by Title 42 or vice versa, or do so in both titles. He urged the task force and ultimately the Legislature, if concerned about irrigation facilities, to stay focused on irrigation facilities.

Mr. Meyer said an interesting proposal he'd heard for the first time from Gem County Commissioner Smith that deserved some attention was in identifying a proposed compromise that would protect all roads today that have been validated or formally dedicated, or are identified on formal road maps adopted by local governments, and that legislation be limited to roads that are not so appearing. If people have not been put on that kind of notice, then the legitimacy of complaining about an expansion is quite a bit higher. He said that are constituents represented by the highways districts that don't want to give an inch, and others are willing to give a mile if that's what it takes. He thought this was a creative approach that perhaps could bear further attention. **Mr. Meyer** thought it important to understand all of the horror stories heard have been about roads that have been created through public use (often referred to as prescriptive roads). To the extent that we want to focus on those roads, particularly those with no public maintenance which are few and far between, he said that they do exist, but are very rare examples that have caused a lot of people much grief. He suggested that was some of the motivation for the legislation proposed last year. If the law is looked at as to how roads can be created through public use without prescription, one must go back well over 100 years for that to have happened, since the statute was changed in 1887, so there has been a public maintenance requirement ever since. **Mr. Meyer** said that would really be what is sticking in people's craw and he suggested focusing on that sort of thing, rather than roads where local governments have invested taxpayer dollars and expectations are perhaps more reasonable that the road will be wider. **Mr. Meyer** said that on RS 2477 roads, he wanted to make certain he emphasized how simple that concept is and there has been so much misinformation given out about RS 2477 roads, but all they are is a waiver of sovereign immunity by the federal government because ordinarily we couldn't create Idaho public roads on federal lands without the permission of the federal government, because that is the sovereign. Congress waived its sovereign immunity and said to create them on federal lands -- that is all it is, nothing beyond that. How do you create them? Idaho law controls, the same Idaho law that applies everywhere else. One little footnote and of virtually no consequence, he simply noted that there was a footnote. When thinking about RS 2477 roads, people say that's a special thing, and it's not; they are created in exactly the same way that all other roads are created, so that might be by a formal dedication, by a conveyance, by five years of public use and maintenance, but the rules are exactly the same. Where it really matters is if it's still on federal land because if the state of Idaho just once said "we give up our rights to expand to 50 feet," you can never get it back again. That would be the biggest

disaster that would potentially come out of legislation. Having called this to everyone's attention, he said he hopes that nobody wants to go there.

Co-chair Bair recessed the task force at 12:00 p.m. for lunch until 1:30.

The next testimony was from **David Babbitt**, Public Works Director in Bingham County. He said he was representing Bingham County, but also was the Idaho representative for the Idaho Association of County Engineers and Road Supervisors and for the national association. He said there was a major difference between public and private roads, but that needs to be defined. There is also a difference between private and public funds, and if that distinction could be made, he sees this as very important. When the West was first organized, section lines were reserved for right-of-ways which would be 33 feet and each state was able to set their own rights-of-way, and the exact section line is not always the best location for a road, along with canals. Therefore, there have been modifications of fence lines, ditches and roads to where they best fit. Many times as rights-of-way and roads were established, they were put in by our ancestors upon mutual agreement and often compensated, and now those ancestors are gone. He said earlier today there was information about requirements for road right-of-ways specifically on the public segments, and he said that the state reviews county roads for adequacy of drainage, and also is important for maintenance of the road. There are also environmental concerns and other regulations that have not yet been addressed at this meeting, with regard to drainage, after roads are established. The next item he thought was important is that there is a 50 foot minimum established and there are exceptions to that due to cuts and slopes on roads which require more fill to maintain the roads. There are areas in the state where the road rights-of-way are steeper and flatter than others for safety. Sometimes rights-of-way need to exceed 50 feet where there is steep terrain and the shoulders are also important on the sides of roads also for safety and to protect citizens as they travel.

He emphasized the importance of snow removal and a place to dump snow. In Bingham County there are 565 miles of gravel roads and it is important to maintain shoulders in order to pull that gravel back onto roads since vehicles spread gravel wider than where it was placed. In Bingham County there are 1,210 miles of road and 53 miles are in subdivisions, 3 miles are county highway and the remaining 1,154 miles of road are in prescriptive easement. The county can often become a referee between an old survey and being able to establish where a real property line is, and his county has purchased a right-of-way in instances like this, one on a single-lane, two-way road that was well traveled, and it cost the county \$3,500 per mile to survey that property. The appraisals were \$3,200 so the value, going back retroactively, would cost the county in excess of \$20 million to reestablish the county rights-of-way if they went back to purchase these, which he strongly urged the task force and the Legislature not to do. If there is a way to distinguish between public roads maintained by public funds at public expense with utilities and other easements and private roads, **Mr. Babbitt** thought that this needs to be very specific in HB628aa if it goes forward. He thanked the task force for this opportunity.

Representative Scott Bedke testified next and he reiterated that the charge of this task force was to find a solution to this issue. He said that when testimony has been presented regarding retroactivity, he cannot find this anywhere in HB628aa, but broad discretion was given to all who gave testimony about what construction and maintenance looked like, whether from a highway district or a utility. In the spirit of going forward, **Rep. Bedke** said his testimony was similar to **Chris Meyer's** and he thought there needed to be a bright-line distinction between RS2477 roads on federally managed lands and RS 2477s that might be on private land. Those points are absolutely critical to all constituents. Elected officials who pass policy to do that will be short-lived in Idaho, he said.

Rep. Bedke said it needs to be made absolutely clear in Title 40 that provisions in Title 42 with regard to irrigation structures are inviolate. **Rep. Bedke** said it was interesting to him that nearly all the presenters had acknowledged that the status quo had changed with the *Halvorson* Supreme Court case. Whether they said it specifically or implied, the world has changed. He thinks this was done by judicial fiat. **Rep. Bedke** said that the testimony indicated that all roads in Idaho are 50 feet (period) and many presenters stopped at that point. The statutes, to him, say that all roads are 50 feet, (comma) except ...

Rep. Bedke said that we have brought that *except* language with us since territorial days and predecessors as late as 1985 recodified this. We were told it was a perfunctory recodification and the statute was 1887 standard and not a 1985 standard, which was the last time that legislative bodies recodified that. **Rep. Bedke** believes this has meaning; members brought that *except* language along because it fit. One would think that a highway could not have been built or widened or put in a utility line pre-*Halvorson*. The situation worked well under the case law of *Meservy* and *French*; it worked, and people were forced to work together. **Rep. Bedke** said he was particularly interested in Commissioner Smith's observations. He said it was never the drafter's intent of HB628aa to be retroactive or to have this apply to roads where public money was expended, etc. He said there are classes of roads in Idaho that are on the county maps, validated roads, but no public money has been expended on them. It was referenced in the *Teton* case, and he wanted to get more information on that case as a compromise is drafted, since that may be where to start. If there seems to be clear agreement on the RS 2477s, there seems to be agreement that *Halvorson* shouldn't apply to Title 42, and there seemed to be agreement that the roads being talked about are the roads where no public money has been expended, and there are many of those on maps. Many counties have not followed statute in 40-202; counties have been told to create a map. The statute requires that you must show general locations of each highway and public right-of-way in their jurisdiction, but many counties have not done that. When counties do get around to doing that, many roads will not have public money expended on them, but the public has used these roads to get to federal land or to a point beyond. This narrows the scope of where the "rub" is, at least from his perspective. That class of road that is acknowledged to be public, yet no public money expended, if a standard is created for those roads, it seemed to him that is an area not argued about, believing that to be a clear path forward.

Rep. Bedke said that we could go back to the *Meservy/French* standard on those types of roads where the public spent money on a road, where it's been okay with the landowner, then maybe they have abdicated their right to complain. He said he found it counter to other assertions made during testimony, that the highway district said they pay for encroachments or structures within the 30 feet when they are moved. He thinks this is a complicated issue, but he committed to this task force that as recommendations are made back to the Legislature, he offered to work in finding mutual ground, using the above three areas as a starting point: (1) the RS 2477s and the difference between federal and private RS2477s, (2) the irrigation issues (he was hesitant to make changes in Title 42) saying he would prefer to change Title 40 and reference Title 42 to keep those statutes separate and (3) narrowing it down to the types of roads, at least in his legislative district, which are mostly rural. There is a class of roads that the public assumes are public, yet no money expended on them, and if they continue to be public, then we should come back to the definitions of prescriptive roads under common laws that right-of-way is the width of the use. If we go past that, if the world changes, he thinks that when the greater society wants to do things for the greater societal good, then the greater society needs to foot the bill and not ask a private individual to donate land or right-of-way ever for the public's good. That's the basis of the rule of law, that the rule of the majority cannot trample the rights of the minority. With those principles for guidance, **Rep. Bedke** said he was optimistic there is a clear path forward to make progress on this issue.

Senator Hammond asked about a rural situation where there is a narrow traveled road maintained with public funds, and if a landowner assumes a certain width for a road and doesn't object to that, if that road needs to be widened, he thinks the landowner should be compensated. **Rep. Bedke** said he went one step further in HB628aa, as sponsor, to say: *"Highways may be as wide as required for historical construction and maintenance in the discretion of the authority in charge of the construction and maintenance ..."* If there was a question about what that maintenance looked like and how wide the road needed to be, then the tie went to the authority in charge of the maintenance and construction. **Senator Hammond** wanted to distinguish between rural and urban situations on a county road where commercial development causes the need for expanded capacity on that road. In his view, the commercial expansion causes the need for a higher road volume, so the general public should not buy that property, but should be given to the public for use, because the adjoining property is creating the need for that expansion. He wondered about this situation. **Rep. Bedke** used the following scenario: there is a 50 foot right-of-way upon which public funds have been used; if that road then narrows to 35 feet (17.5 feet from center), and within that width are utility poles and lines, irrigation structures, fences and other structures and this has been the situation for a long time with no controversy, then a commercial development causes this road to be widened. **Rep. Bedke** contended that property owners along such a road (similar to the Bob Barton Road), when the road goes from 35 to 50 feet in width, the greater society pays for that strip of land or movement and that burden should not be placed on the landowner. **Rep. Bedke** asked whether **Senator Hammond** was saying that property owners along that road need to foot the bill for moving everything back and **Senator Hammond** said that the property owners were not creating the need for the commercial development. It seemed to him that the commercial developer should pay for that additional property needed to widen the road for the business benefit, and not the general public. Moving forward, **Senator Hammond** hoped this would be a consideration. **Rep. Bedke** said that the commercial business would be taxed, but he couldn't think of any other precedent, adding that his scope of knowledge was narrow. What this boils down to is a policy decision that the Legislature must make. We, in part, have abdicated our policy setting abilities to the courts and he wasn't totally comfortable with that. **Rep. Bedke** said that **Senator Hammond's** point was valid, and **Rep. Bedke** said that policy must be set to address each of these points in a changing Idaho.

Senator Hammond asked if a road had to have public use and also public funds spent on that road to become a prescriptive use. **Rep. Bedke** said that he'd heard at this meeting that the use on a road had to be for five years **and** public money expended on it. He believes there could be exceptions found where the public has used a road for at least five years and no money spent on it and is acknowledged to be on a county map. **Senator Hammond** asked so that this would also be a consideration, going forward, since in his reading of the code, it doesn't say "and", so he believes that code needs to be clarified. **Rep. Bedke** said that another common theme, particularly from utility companies, is that they need predictability.

Co-chair Raybould said that both sides of the problem had been heard at this meeting, adding that perhaps what needs to be done is to take the minutes from this meeting and the sponsors of HB628aa should list the problems of both sides, the road districts that think they need expansion and the private property, irrigation, and utility rights listed to see if the law could be amended to give exceptions to those particular instances that are not covered presently, while still preserving the 50 foot right-of-way on roads that were built previous to the enactment of this legislation. He thinks there are issues on both sides that need to be taken into consideration. **Co-chair Raybould** pointed out that on his tax notice he pays tax on his usable acres, but if those acres are being used out to the road and then a right-of-way wants to be widened, there is a taking of acres that have been taxed. He thinks that the testimony from this meeting should be itemized before session and then exceptions put into the law to allow for entities

to be responsible for payment of that extra right-of-way that is a taking that hasn't been used for many years. He believes there are fairly legitimate reasons on both sides of the argument that need to be considered. **Rep. Bedke** agreed with that final statement. As the Legislature contemplates a policy statement, **Rep. Bedke** agreed that all sides of this issue need to be considered. He said that on tax bills, acreage on a statement is not accurate and a landowner pays taxes on 80 acres, for example. However, if they hired someone to do custom farming on that 80 acres, the federal government knows how many actual farmable acres are actually there (on FSA maps), and that farmable acreage would total about 74.3, so roads are in and a landowner pays taxes to the center of the road.

Rep. Bedke reminded the task force that **Mr. Semanko's** reference to code in Title 42 went way past the language in HB628aa about the historical use and how much room is needed to do maintenance and construction for all entities. There should be a limit to that and, if it is a road, then there should be a different set of rules if ever expanded. **Co-chair Raybould** said he was troubled whether the *Halvorson* decision put this clear back to 1887 as to the point of determination. He said he didn't like this since many roads being discussed were not even contemplated in 1887. Something must be done with the legislation that would cure that particular instance that brings this up-to-date, rather than have the court go back and say that the only road this doesn't apply to is one there before 1887. It should apply to roads constructed since that date as well, in his opinion. **Rep. Bedke** agreed and he said that was exactly his point. This section of code has been recodified at a minimum of four times and the assumption that all roads in Idaho *are 50 feet, except those of a lesser width presently existing ...* believing that language was left in for all these years and doesn't believe it was an oversight, and thinks this means something. There should be an "except standard" going forward, and it was always going to be presumed to be 50 feet, but was a rebuttable presumption. Under *Meservy* and *French*, the scope of rebuttals had to fall within a certain list, and if outside that list, it was 50 feet. Those conditions still exist today, and if a case can be made, then the road is narrower; otherwise, the road is 50 feet. **Rep. Bedke** disclosed that he did not have any of these types of roads on any of his property and was not working this for his own self interest. He does have many constituents who do have private property holdings that the public uses, and the landowner knows this road is not 50 feet, and nobody has ever improved it but the landowner.

Mr. Stuart Davis, Idaho Association of Highways, was given time to speak again and he pointed out that the impact of this HB628aa discussion on the Ada County Highway District is that they are not creating new roads by prescription. What this relates to is expansion of the width of roads going forward and the costs are significant, especially within an urban area, since real property values range from \$1 to \$14 per square foot. About \$8-9 million annually are spent on right-of-way acquisitions for development of about \$40 million worth of projects, or about 25%. **Mr. Davis** said that the point that **Chris Meyer** brought up is that we are really talking about prescriptive rights-of-way and how they are developed, and these RS 2477 roads were all developed through prescription. Common-law dedication was not being talked about or platted rights-of-way. One thing about *Meservy* which is confusing is that this case interprets a situation that existed pre-establishment of the act and many do not understand some of the statements within *Meservy*. It is very clear in that case that the court recognized the difference between public prescriptive easements and private prescriptive easements. In Idaho when the state was developing, the landowner was more than willing to give up land to have a road to access his property. Now people are not as excited about giving up land for development and landowners want to be compensated. **Mr. Davis** doesn't see *Halvorson* as a fundamental change to what the law has been, but the discussion is bringing about a huge change in the desire of public policy going forward. **Mr. Davis** said if the task force goes there, if this is not made retroactive in a fair way, all highway districts or counties would be opened up for any work done in the last four years under the assumption that they had 50 feet and they will be subject to legal claims of inverse condemnation. That is not good public

policy and much time would be spent litigating that. Four years is the statute of limitations on inverse condemnation. Other more urban states have changed the footage of roads to other widths. He believes that a change in public policy is what this task force's mission will be.

Senator Bair asked about retroactivity in proposed legislation that would open up highway districts for litigation; how many times in the last four years has ACHD condemned rights-of-ways to enlarge roads without compensation. **Mr. Davis** said that many times and on many projects where, within the 50 feet, ACHD has gone in and assumed based upon the law that there is a prescriptive right-of-way and ACHD has not compensated landowners for that. Sometimes ACHD buys the fee to clean up a title. ACHD also compensates landowners and within that 50 feet and the prescriptive area, the landowner could have a septic tank or other structures that ACHD pays to move, believing that to be the law, but there is no compensation within that 50 feet. If anything outside of 50 feet, then ACHD pays a landowner fair market value for that. **Senator Bair** asked if it was fair that ACHD gets to pick and choose who within 50 feet is compensated. **Mr. Davis** clarified that sometimes ACHD compensates a landowner to clean up the title and that is case-by-case, and the policy of ACHD is that if within 50 feet, ACHD does not pay a landowner because it is a prescriptive easement.

Mr. Heather Cunningham was invited to speak again and she tried to clear up a few things heard in the meeting. She said it was important to not take her word for what she was saying, she wants to give evidence to see where in existing law there are concrete examples and answers to this conflicting testimony. First, county commissioners said that the area for road maintenance for snow removal, etc., might somehow go away under HB628aa or if something is done to respond to *Halvorson*. The definition of highways includes all areas for maintenance and both *Meservy* and *Bentel* specifically say that a prescriptive road is not just the travelway but also the public needs for maintenance of the road, so those are nonissues, only fears with no basis in fact. Nothing we do to clarify and restore the rebuttable presumption affects that at all. If the public has been maintaining for 5 feet or 50 feet, they can still do so. **Ms. Cunningham** passed out another handout (available in LSO). How did this work in the real world before *Halvorson*? Nobody has come here today saying that before *Halvorson* they never paid for widening the road when asked. It's true that before *Halvorson*, because of the presumption, there were situations where a 35 foot public use road was widened to 45 foot public use and the landowner wasn't paid. It's true that if nobody asked for payment in 4 years, that ship has sailed, but if a landowner did ask, they did get paid. Her handout included 3 cases in Idaho before *Halvorson* and she quoted them directly to show that before *Halvorson* the court never injected 1887 as the time period that limits those roads of a lesser width presently existing. After the last recodification in 1985, *French* says that it's not 50 feet, it's 20 feet, which means that in the real world all the way up to the Supreme Court level, they were treating it as a rebuttable presumption. **Ms. Cunningham** showed photos and said that **Mr. Gourley**, in error but not intentionally, did not accurately tell the task force what the pictures reflect and what the issue was. There was a roadway (the travel lane was about 10 feet) and about 5-7 feet next to the road was used to maintain it and that is the 15 feet that everyone conceded was publically used and maintained. Then there is another 10 feet. She asked the task force to use the evidence and the photo to see that there is no way this gets to 25 feet and that additional 10 feet is inside the landowner's front yard which includes his fence and 10 feet of his yard. Does the average citizen think that if there is a road out front and a fence and the landowner has always maintained that front yard that it belongs to the government if it's within 25 feet of a section line? If you don't, you should support some change in the law to clarify that the *Halvorson* case and the court went too far in saying that it's a mandatory minimum. It wasn't even the utility poles; they didn't put them 25 feet back. She showed cases she had argued for landowners and gave the task force her brief and the decision arguing an exception in statute and the court said that the width doesn't have to be decided

right now, but at the trial it was a live fact question. She showed checks showing prescriptive easement and her clients were paid. She said that will never happen again after *Halvorson* if you don't clarify it.

Ms. Cunningham pointed out in her handout an excerpt on clarification of laws and she included this because normally there can't be retroactive statute. Going back in time to change things causes problems. However, if there is a situation exactly like this where the court has gone off on what she called a wrong turn on legislative intent, legislators have the right to come in and clarify (not do a new statute) but it is important to understand that it be done in a way the law allows to clarify that the legislative intent in the words "those of a lesser width presently existing" presently didn't mean 1887 but presently means at the time that the issue arises, of widening etc. When the government has a prescriptive right-of-way for 25 feet based on public use, they can now use 50 feet for free and do nothing because this is the state of the law right now. If you want it to be that the public use including maintenance was 25 feet and is now going to go to 50 and landowners get paid, you must do some kind of clarification. That is what she was asking for. If done any other way, a legal nightmare will result, in her opinion. She asked the task force to simply focus on that exception "those of a lesser width presently existing" and if you don't mean 1887, say so. The way you say so is to add something in another section that becomes session law where it is clarified that it is not intended to create any claims for anything from the past that don't already exist. Anybody who has done anything in the last 4 years has liability and there is nothing to be done about that, and that liability is under the federal constitution as well as the state. However, *Halvorson* came out February 5, 2011, and if she is right and there is a rebuttable presumption until then, all you're doing is going back to that point in time to say that this is the way the world worked for over 100 years and let's do that since it works fine. Going forward, after *Halvorson*, would be the only area where there might be a problem. Nobody has brought any example of anyone who has widened a prescriptive right-of-way between February 5, 2011 and today. Make them do it, she said, because she doesn't think there is one. All this fear about paying money is unwarranted; you only have to pay money when you take new action and when someone wants to be paid and not all landowners want payment. Only 5% of cases go to lawyers, but she asked about that landowner who had to give up his front yard for free. She noted a point of confusion about 40-2312 which says "all highways except those located within cities" so what prescriptive roads within Ada County aren't in the city? This is not an urban problem, it is a rural problem and doesn't even apply to cities, and we're only talking about prescriptive rights-of-way. We are talking about common law dedications for one reason, and that is because it can come about by an intent to dedicate and use by the public. She agrees that RS 2477s come about a different way; section line roads come about a different way. She disagreed with the statement that it has to be validated to be public, adding that this was not true. The statute itself only says five years, public use, public maintenance and that's it and there is no requirement for validation. The validation problem is separate and with regard to **Senator Hammond's** question about the commercial development to pay for their impact, there is a well established body of law called an exaction and there are Supreme Court cases on point where the government can require from a private developer something that is necessitated by their development. There is no way to inject that circumstance with regard to what this task force is dealing with.

With regard to the fiscal impact that has been implied that could be disastrous, the real fiscal impact would be minor, according to **Ms. Cunningham**. She said the reason that the highway districts and counties are fighting so hard to convince this task force that this would be a disaster and that nothing should be done is because right now they get to widen 27,000 miles according to **Mr. Davis** for free. If only 30 feet is being used, that road gets to be widened to 50 feet under *Halvorson* for free, and they got a windfall with this decision, and it changed the game completely. The highway districts and counties are not going to come to the table and negotiate a way to give up what they already have, so the only way this is going to happen is if there is enough legislative will to solve the problem. Legislators

need to make it clear that a solution is coming and the highway districts and counties can participate in the solution or not, but at this time they are not willing to negotiate, in her opinion, because they have won. The only reason there aren't 10,000 citizens beating down doors is because the average citizen doesn't even know about this problem. The average Idaho citizen cares about their property rights and has no interest in having a two-lane road suddenly be 50 feet for free. She was here today because citizens do not know about this problem. She thinks that utilities have a valid concern that should be addressed, and she hoped that she would be invited to be part of the process to find a solution on this issue.

Rep. Burgoyne asked if HB628aa should include a statement of legislative intent outlining some history and stating it is curative and clarifying and an effort to take the law back to the way the Legislature originally understood it, notwithstanding *Halvorson*, and to perhaps cite *Halvorson*, and to clarify the intent to nullify *Halvorson*. He asked if this was the way to do this, from a technical point of view. **Ms. Cunningham** replied "yes." She said that she had worked with LSO's Analyst, Mr. Milstead, adding that there was a section of legislative intent in HB628aa and that is what they were trying to do. She said that if it went further, adding the case, she believes that must be done. A clarification must be done, and the more that it is made clear that what you are trying to clarify is the misunderstanding the court had in *Halvorson* and correct it to be what you believe the legislative intent was, the more likely it will hold up, if ever challenged.

Rep. Barbieri said that the term "presently" is what was sticking in his craw and he didn't get **Ms. Cunningham's** definition of that when he read it, so he went to that. She said it meant the time an issue arises, and he asked if that would be the legislative intent originally or is that in some court determination and why isn't it read as presently meaning the time the statute was enacted. **Ms. Cunningham** said she had no idea how in 1887 when they inserted "presently existing" whether they meant roads that exist to date, but every time it was recodified those words were included and nobody ever went back and said "1887." In her practice, in the real world, judges, lawyers, property owners and governments have always viewed "presently" to mean the day that the question is being answered. If a question doesn't come up until 2015, nothing already done is at issue. Whenever you look at the question and ask how wide the road is, the presumption is 50 feet and the burden is on the landowner to show that at that point, when the question comes up, presently, today. She thinks the focus should be on the problem of what the word "presently" means and how do we define it to mean "if the historic use has expanded, up until that day, then compensation is triggered."

Rep. Barbieri moved that the task force would forward the issues and the facts gathered here, the minutes of this meeting to the germane committee and specifically request that they deal with the existing 628aa to see if they can modify it appropriately to incorporate what we've learned today and see if they can't come up with something that addresses this case, the *Halvorson* case, and the issues that have been raised at this meeting.

Mr. Milstead repeated: "**Rep. Barbieri** moved that via letter, this task force would forward issues to the germane committee chairmen to deal with House Bill 628aa, to perhaps modify that bill, if necessary, and deal with *Halvorson* and other several issues that have been raised today."

Co-chair Senator Bair asked if **Rep. Barbieri** would be willing to slightly amend his motion so that this letter also be sent to the Speaker and Pro Tem and **Rep. Barbieri** agreed. **Rep. Burgoyne** seconded the motion.

Senator Bair asked for further discussion at this time. **Rep. Burgoyne** said that **Rep. Bedke** made a good point when he said when something is done for the greater good, the cost shouldn't fall on the individual, but on society generally, and that this observation comes up for him over and over again on legislative issues. In Idaho, he believes that we try to do too much without resources needed to do it, and often local government pays for that. Local government simply doesn't have the tools needed to generate the revenue that essentially the state is asking them to spend. He believes this issue is a classic case of this and several speakers at today's meeting from counties quantified what they felt the fiscal impact might be in Valley and Bingham counties. He said he recognized there are people who disagree on what those fiscal impacts would be, and he believes that we are being forced to choose between having the cost, as **Rep. Bedke** said, arbitrarily fall on a property owner for the greater public good, or fall on a county that is under-resourced. He thinks it is too bad that counties are under-resourced, he doesn't agree with counties being so, but that's where counties are. Between a county and an individual or a highway and an individual, if that cost is going to fall, it seems to him that it should not fall on the individual. He thinks that there is a constitutional right lurking out there, adding that property rights are very important, and it's very clear if the government wants to take property, it has to compensate when it exercises its power of eminent domain. He expressed concern, even though he said he was not one to question his predecessors or ancestors of highways by prescription, that the government can take something by prescription when it has the power of eminent domain.

Rep. Burgoyne continued, saying that government is doing something indirectly, through prescription, which it could not do directly through a taking, and when talking about a person's constitutional rights, he is going to have to go with constitutional rights as he perceives them, over what he thinks is probably putting local units of government in untenable positions. He also has a concern of putting the Idaho Transportation Department (ITD) in a potentially untenable position, which could have a negative effect on economic development at a time when we desperately need economic development. Testimony was provided today that this is all about money, and he believes that to be absolutely correct, and one of the ways we got here is by not owning up to the fact that living in a civilized society costs money. **Rep. Burgoyne** said he thought that one of the reasons that cases like *Halvorson* may come up is that people who own property affected by this statute don't really understand what is happening to them through that five-year or nine-year period. Citizens think that tracts are being maintained and then they find out that ten feet of their front yard is in addition to what they thought it was. Several ideas he had at the meeting were simple things that might be done to make it easier on the property owner to understand what is going on. Perhaps we could provide initial notice to the property owner when a county thinks it's going to be getting a prescriptive right under this statute, an annual notice for five or nine years, whichever it is thereafter. The road might be posted to make sure that everyone using the road and that the property owner understands what is going on with that road and what the claim is ultimately going to be. His understanding of adverse possession and prescription is that they are not recorded with the county recorder; therefore, a title company isn't going to pick them up when a title search is done, and Mr. Halvorson bought his property with the previous owner already having given up the property, in a sense, but no title company could have caught that if not recorded and warned him what he was getting into

Senator Bair called for a vote on the motion. Mr. Milstead repeated the motion as follows: **"Rep. Barbieri moved that this task force send a letter to the germane transportation committees, the Speaker and the Pro Tem, dealing with issues that have been raised during this meeting regarding House Bill 628aa and that the committees may consider modifying that bill and then deal with Halvorson and other issues that have been raised."** A voice vote passed unanimously.

Senator Bair stated that it is obvious and clear that HB628aa is not going to go away, nor are the tenants in HB628aa, and there is plenty of room for modification, clarification and working towards perfection of HB628aa or it's "child." He said he was not going to prescribe that anyone in this meeting get together, but he said, "If I were you, I would want to be at the table." He said if there was a way for people to get together to find language that is amenable both to the counties, to the highway districts, to the Legislature and those who represent private property rights, he thought that all parties ought to get together at the table to work on this issue, because there will be a bill, come January, he was quite confident. That being said, he invited **Co-chair Raybould's** thoughts and **Co-chair Raybould** suggested that those who have an interest in this issue meet with **Rep. Bedke** or look at the bill and come up with language that might be appropriate to modify HB628aa. If everyone did that, then it would give the sponsors of this bill the ability to take those suggestions, combine them together to come up with something that would be appropriate to everyone, or at least the majority voting body of the Legislature. Rather than waiting for someone to come up with an actual bill to present to the Legislature, he thought that everyone having an interest submit language which can be considered and then LSO combine the input into potential language to give the sponsors of the bill something to look at before session. He believes this would prevent lots of arguing back and forth.

Senator Bair expressed his appreciation to everyone attending this meeting, stating that each of them had added to the conversation and the legislators' knowledge had been increased, deepened and broadened concerning this issue.

Senator Bair adjourned the meeting at 2:55 p.m.