MINUTES

SENATE STATE AFFAIRS COMMITTEE

DATE:	Monday, March 19, 2012
TIME:	8:00 A.M.
PLACE:	Room WW55
MEMBERS PRESENT:	Chairman McKenzie, Senators Darrington, Davis, Hill, Fulcher, Winder, Lodge, Malepeai, and Stennett
ABSENT/ EXCUSED:	None
NOTE:	The sign-in sheet, testimonies, and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

Chairman McKenzie called the meeting to order at 8:02 a.m. with a quorum present.

H 591 RELATING TO UNCLAIMED PROPERTY to authorize the State Treasurer to establish rules for redemption procedures for certain unclaimed property.

Representative Luker explained that currently, unclaimed property escheats to the state after ten years without providing a method for the owner to reclaim the property. Idaho is only one of two states that, after a period of time, escheats unclaimed property to the state even if there could still be claim on it. This bill removes that escheat provision with two exceptions. (1) There is a constitutional provision for cases when the property is disposed of through the state but the owner was not identified, then the money goes to the school endowment fund. (2) Property coming from other avenues without owner identification would escheat to the state. Currently, some of that money goes to the endowment fund after five years. **H 591** expands the holding period to 10 years making it consistent. Those properties that would escheat would do so after ten years but the properties that can be identified stays on the unclaimed property rolls. The fiscal note shows that the requests decline over time but there are still people claiming property after the ten year period.

Representative Luker said this issue came up last year when they had a property bill on the House side and as they were discussing it, it became apparent that some property had escheated to the state and he inquired as to why property was being taken away when there were people still out there that had a claim on that property. **Senator Davis** said his understanding of the bill is that it increases the time period from five years to ten years. **Representative Luker** said that was half of the bill. The other half is if the funds have a name identified with them, then there was no time limit. After ten years, there would be a transfer to the general fund, but the people could still make a claim. The claims were estimated to be fairly small at about an average of $40,000/year out of the annual $2 million transfer. The balance would decline because most of those funds would have already been recovered.

Chairman McKenzie asked if this affected unclaimed property where the owner had been identified? **Representative Luker** said it did because it extended the claim right in perpetuity.

Senator Darrington wanted clarification that the money that transferred over to the General Fund could be redeemed out of that fund. **Representative Luker** said the claim would be redeemed out of the current transfer going into the General Fund reducing the amount of that transfer.

Senator Lodge asked **Chairman McKenzie** to restate what he said about conflict of interest if their names were on the list and he complied. **Senator Davis** commented that, in his case, the President of the Senate determined that he was a part of a class and as such, did not have a conflict of interest.

MOTION: **Senator Winder** moved, seconded by **Senator Fulcher**, to send **H 591** to the floor with a do pass recommendation.

VOTE: The motion carried by a voice vote. **Senator Fulcher** will be the floor sponsor.

H 635 RELATING TO ADMINISTRATIVE RULES to continue certain administrative rules in full force and effect until July 1, 2013.

Mike Nugent, Legislative Services Office, said **H 635**, better known as the "drop dead bill", continued certain administrative rules in full force and effect until July 1, 2013. He gave a brief history of this bill. **Mr. Nugent** cited a couple of court cases, one being a Supreme Court case, Holly Care Center versus the Department of Employment, where the Court commented that if it could, it would strike down the right of the legislature to control administrative rules. To ensure control over any administrative rules the leadership in the legislature came up with *Section 67-5292, Idaho Code*, which stated that all administrative rules would continue in temporary force and effect unless extended by statute. This is that statute and it basically just re-ups the current administrative rules for another year. Another landmark case that gave the legislature the ability to reject administrative rules was Knee versus Arnell in 1989. Control over the administrative rules maintains continuity and control over the variety of agencies that report to the legislature.

MOTION: **Senator Lodge** moved, seconded by **Senator Winder**, to send **H 635** to the floor with a do pass recommendation.

VOTE: The motion carried by a voice vote. **Senator Lodge** will be the floor sponsor.

H 572 RELATING TO CONSOLIDATION OF ELECTIONS to address changes to election procedures and clarifying candidate affiliation.

Tim Hurst, Chief Deputy, Secretary of State's Office, presented **H 572**. This legislation cleaned up various sections of the Idaho Code addressing changes that needed to be made in election procedures that became apparent during the first year of the election consolidation. The legislation also makes it clear that a candidate is required to be affiliated with a political party in order to file for a partisan office that is to be voted on at a primary election. A copy of his testimony is attached to the minutes. He indicated the bill addressed such areas as soil conservation district elections, how results were to be reported in non-partisan elections, recall elections, and recounts. **Mr. Hurst** said that Sections 4 and 5 of the bill clarified two statutes relating to party affiliation required by **HB 351** from last year. Currently, *Idaho Code, Section 34-411A*, says that an unaffiliated voter can select a party prior to voting in the primary election. This change tells how to make that selection prior to appearing at the polls on election day. Section 5 would make it clear that a candidate filing for a partisan office in the primary election would be required to be affiliated with the party at the time of filing.

Senator Lodge referred to page five regarding primary elections and was concerned whether the records could be accumulated and sent out before election day given that election day was the cut off date. **Mr. Hurst** said they had a cutoff date thirty days before the elections. However, they also had election registration which sets all of that aside. The statute allows them, in Section 2, line 39, an unaffiliated elector could select a political party affiliation only prior to voting in the primary election. **Senator Lodge** said that at 5:00 p.m., a person could come in and register for a party affiliation when the books were already closed and ready to go out to the precincts the next morning. **Mr. Hurst** said a person was already a registered voter. The books go out to the polls and it shows in the book which party they were affiliated with. If it was blank, that meant they were unaffiliated. **Senator Lodge** said that meant they could vote that day, even if they had put their affiliation in the night before. **Mr. Hurst** said that was correct.

Chairman McKenzie asked a question about the second page, lines twenty six-seven, where the line was removed that said the State Soil and Water Conservation Commission paid for these elections. Why was the language taken out? **Mr. Hurst** said that should have been done three years ago when the election consolidation bill was passed. The counties pay all expenses for elections from appropriate monies from the legislature. The only time the state agencies, such as the State Soil and Waster Conservation District, payes for an election was for the creation of the district.

Chairman McKenzie asked about the process for an affiliated elector to declare another party or to become unaffiliated. What is the time frame for someone who had already declared an affiliation to switch parties or become unaffiliated? **Mr. Hurst** said that would be the last date for filing for office.

MOTION: **Senator Hill** moved, seconded by **Senator Fulcher**, to send **H 572** to the floor with a do pass recommendation.

VOTE: The motion carried by a voice vote. **Senator Hill** will be the floor sponsor.

H 539 RELATING TO THE IDAHO VIDEO SERVICE ACT to establish a process for the issuance of a state franchise which will facilitate the entry of new providers of video services into the Idaho market.

Ed Lodge, representing Century Link, presented **H 539**. This proposal, the Idaho Video Service Act, established a process for the issuance of a state franchise which would facilitate the entry of new providers of video services into Idaho's video service market and encouraged new private capital investment in broadband infrastructure within the state. The current video service franchising process required that new entrants in the market negotiate with each individual city and county as a precondition to being able to provide video services within the individual local jurisdictions.

Mr. Lodge stated that Idahoans want faster, more ubiquitous high speed internet for a variety of reasons and advances in technology currently make it possible for both cable and telecommunications providers to offer voice, high speed internet and multi-channel video services over the broadband infrastructure. The ability for telecommunication and cable companies to provide television service over their broadband networks is a business reason for those companies to enhance their broadband infrastructure throughout the state. This proposal assured quality of treatment between incumbent cable providers and new entrants to the Idaho video service market and, at the same time, would preserve local control and regulation of local government public rights-of-way. This bill continues the rights of cities and counties to receive up to a 5% franchise fee for use of public rights-of-way and continues the opportunity for cities and counties to require video service providers to make dedicated video channels available to the city or county for public, educational, and government use. **Mr. Lodge** said **H 539** is supported

by the Idaho telecommunications industry, the Idaho Cable Telecommunications Association and the Association of Idaho Cities and has been approved by the highway districts and counties.

Bill Roden, representing Century Link, provided an overview of the bill addressing various terms including rights-of-way, franchising entity, governing body, and incumbent cable service provider. He talked about a system operator which meant any person or group of persons who provided video service directly, or through one or more affiliates, owned a significant interest in the system or facilities through which the video service was provided, and had been issued a certificate of franchise authority pursuant to the provisions of the chapter. **Mr. Roden** pointed out several ways in which video services could be provided under this act. Under this bill, the incumbent video service provider may, if it choses to do so, opt to get a certificate of franchise authority and continue its operation under the state franchise cancelling the local franchise.

Senator Davis said some providers allowed one to have service sent directly to them, such as IPads, IPhones and the like. Does this language restricted those cable network providers from marketing their service within the state of Idaho? **Mr. Roden** said no. The video service clause on page two included cable service but it excluded any video programming provided to persons in their capacity as subscribers to commercial mobile services or video programming provided as part of a service that enabled end users to access content, information, electronic mail or other services offered over the public internet.

Mr. Roden said the most popular way to get a franchise would be part (c) on page three where it stated that "no person shall act as a video service provider or operate a video service network within the state of Idaho unless such person had been granted a certificate of franchise authority to do business in the state of Idaho as a system operator by the Idaho Secretary of State as authorized by this chapter."

Senator Davis asked if there was a non-incumbent cable service provider who wanted to service Ada County, would they negotiate with Ada County or go to the Secretary of State? **Mr. Roden** said it was up to the applicant to designate an area in which they wanted to operate. **Senator Davis** said that when they negotiated with the Idaho Secretary of State, if they designated only one county, would the Secretary of State tell them they had to go talk to Ada County? **Mr. Roden** replied no, that would not be permitted under this legislation. **Senator Davis** asked why would a non-incumbent service provider elect to file with the Secretary of State versus the county and what would be some of the policy reasons?**Mr. Roden** said it was doubtful that would happen. To the best of his knowledge, most counties didn't have franchise agreements. He said they had a licensing statute which was considered, under federal law, to be a franchise.

Mr. Roden said there was a need for a central location to do all of the filing and to adequately cover the requirements that would normally be covered in a franchise. He said it was difficult to encourage new providers to come to the state, with over 100 cities in the state that could negotiate individual franchises with each of those locations.

Senator Davis said that if he were to ask the political subdivisions as defined in this act whether they support the legislation, would they say yes? **Mr. Roden** said it was his understanding they would say yes. He said the two major cities of Boise and Pocatello have worked out their differences and they were in support of this bill.

Senator Darrington asked if a non-incumbent operator came in, did the non-incumbent who received the opportunity, have the right to use the lines of the cable system of an incumbent operator in exchange for a fee? **Mr. Roden** said if **Senator Darrington** was talking about interconnection of the facilities that authorized and encouraged using the lines, the legislation did specifically reference and encourage it.

Mr. Roden talked about the filing fees, amending fees, notices, and fees regarding the use of public rights-of-way as outlined in the bill.

Senator Winder cited a "friendly" lawsuit between the Ada County Highway District and the City of Boise about who actually should receive the franchise fees, since in Ada County there was a broad jurisdiction of ownership under the highway district. The judge decided in favor of Boise City and said they could retain the rights to those franchise fees, even though the right-of-way was owned by ACHD. He said he assumed this did not change that ruling, since the City was showing their support. **Mr. Roden** said he was aware of those discussions. The franchise fees under this bill would go to the political subdivision, i.e., the city or the county that had regulation in that regard. This bill did provide for authority for the highway districts, the state of Idaho, and the county or cities that have the responsibility for maintenance of the streets. The bill specifically provides for additional fees and license fees to be paid to those jurisdictions in connection with any disturbance or work that is in the rights-of-ways. There is a provision ensuring those fees don't become a franchise fee that they should be reasonably related to the jurisdiction.

Mr. Roden said there was no state law existing at this time relating to franchises providing services to the State of Idaho. One issue they encountered was how do you define gross revenues related to advertising revenues? Several cities added in a definition of gross revenue and it included revenues from Home Shopping Network and other advertising revenues.

Senator Davis said when he looked at the video service provider fee, referring to the bottom of page seven, it said "for the purposes of this section, subscribers whose service address is within the jurisdictional limits of a city shall be deemed city subscribers and those subscribers whose service address is outside the jurisdictional limits of a city shall be deemed county subscribers." Was the building address where the service was actually received? **Mr. Roden** said the fees, in this case, were tied to the service address.

Senator Davis asked if the legislation would serve as a barrier to technologies. **Mr. Roden** said he wanted to go back to the definition of video service which referred to a service that provided this type of communication, which was primarily within the public rights-of-way. He said it was not intended to cover anything related to the internet and referred tothe top of page nine 9. The intent was to provide reasonable financing for the pay channels.

Mr. Roden explained the issue of "red lining" which is a concept that a video service provider could determine which areas of political subdivision they were going to service based upon the income levels of the residents of those particular areas. **H 539** covers this issue extensively to ensure that all subdivisions would be treated equally by early involvement by the cities, opportunity for mediation, and court action if necessary. Customer service standards were addressed as well as issues related to PEG (public, educational or governmental) channels such as number of channels and fee amounts. Notices to the viewing audience are required when a channel relocates.

Mr. Roden thanked the Committee for the opportunity to make his presentation and he explained it had been a long labor. He said he was very pleased having the Committee work with him and the Cable Association and to bring all of the parties together.

Ron Williams, represented the Idaho Cable Telecommunications Association, testified in support of the legislation and said it had been a long and arduous process. The process made all competitors in this area neutral, equitable, and created a competitive market.

Jason Roak, Vice President of Data Research, testified in support of **H 539**. He said he believed this bill would encourage competition, streamline the process, and encourage further investment in the infrastructure.

MOTION: **Senator Winder** moved, seconded by **Senator Hill**, to send **H 539** to the floor with a do pass recommendation.

VOTE: The motion carried by a voice vote. **Chairman McKenzie** will be floor sponsor.

RS 21472 RELATING TO THE DEPARTMENT OF COMMERCE to provide that the Director is afforded some latitude in title for the purposes of international trade.

Tom Perry, Counsel to Governor Otter, presented **RS21472** stating that the RS dealt with the Department of Commerce and provided the Director of Commerce some latitude to use the title of Secretary for the purpose of international trade. He said it aligned and afforded the same latitude as the Director of the Department of Agriculture *(I.D. § 22-101(4)* when conducting business with foreign counterparts.

Senator Stennett said she wanted to make sure she understood that in some cultures, director was not a high enough status and secretary was more recognized as being the title that was more elevated. **Mr. Perry** said that was correct.

MOTION: **Senator Fulcher** moved, seconded by **Senator Stennett**, to send **RS 21472** to print.

Senator Davis said he didn't see the reason for this RS to come back for another Committee hearing and in the interest of time, was it possible for the motion to be amended to reflect that once it was printed, the Chairman had permission and authority to submit a Committee report with a recommendation that it "do pass" so it could get it to the House for consideration? **Senator Fulcher** said he understood the reason for the RS and he believed it was a justified reason. However, he wanted to amend his motion.

AMENDED MOTION: **Senator Fulcher** amended the motion, seconded by **Senator Stennett**, to send **RS21472** to print with the recommendation to send it directly to the floor with a do pass recommendation.

VOTE: The motion carried by a voice vote.

S 1383 RELATING TO THE MAINTENANCE AND REPAIR OF DITCHES, CANALS AND CONDUITS to codify existing law that the owner or operator of such aqueducts is not liable for wasting water or damage to others that is caused by the acts of third parties or acts of God.

Chairman McKenzie reminded the Committee they were going on the floor at 9:30 a.m. He said they would try to have the introduction, but they would have to defer debate until the next meeting. **Norm Semanko**, Executive Director and General Counsel of the Idaho Water Users Association, presented this bill.

Mr. Semanko stated that **S 1383** was a replacement for **H 398**. The Legislative Committee, composed of 33 individuals from around the state, reviewed this bill at length. This bill, he said, reaffirmed the responsibilities and obligations and clarified the applicable duty of care regarding certain waterways. The bill adopts the standard the courts had applied to avoid wasting of water in *Idaho Code, Section 42-1203* and to prevent damages to others in *Idaho Code, Section 42-1204*. It also made clear that wasting water and damage caused, not by an act or omission of the irrigation delivery entity, but by a third party or an act of God, did not constitute liability on the part of the delivery entity. This was consistent with the standard applied by the courts and as a matter of basic fairness. The bill makes clear that there are no impairments of existing defenses and the belief is, it would make things clear for the water delivery entities, attorneys, and those on the bench. This legislation clarified that the owner of a ditch or canal would not be liable for wasting water or damages caused by others or acts of God.

Mr. Semanko said that at the House hearing, the trial lawyers testified that this was existing law, and that irrigation districts and canal companies were not liable for problems caused outside of their control. Without this legislation, it would become more difficult for water managers to have their operations insured for the benefit of the water using public. **Mr. Semanko** further stated, the legislation would help make sure these canals and ditches could continue to deliver water to our farms and fields, subdivisions, schools, and parks. Acts of God, as stated in the bill, must be natural phenomenon, not man-made or artificial. As a result, floods caused by a failure to properly maintain canals as well as gophers and other rodents, would continue to be the responsibility of the canal managers. Liability would continue to be judged on a case-by-case basis under the reasonable care standard adopted by the courts. More importantly, there would be clarification that this would not be a strict liability standard on irrigation. However, the legislation does not provide blanket immunity or eliminate the ability to go to court.

Existing statutes clearly provide that canals must be kept in good repair, ready to deliver water and to avoid damage to others. This wouldn't change. Canal managers are responsible for the failure to do so. However, it would be clear in the statute that as the courts have found, problems caused by third parties and acts of God, were not the responsibility of the canal managers.

Senator Davis asked if before the word "caused by" could they put "solely caused by," then the protection would be there and that would do away with the strict liability. If there was a competing claim between the acts of omissions or the acts of a third party or the acts of God, then he would have the language needed to arrive at the comparison. The bill could be sent to the amending order this morning and we could try to hurry the amendments up, put it on the bill, and have it out of here by Wednesday or Thursday. He said he thought that could remove the opposition to the bill or at least soften it enough that instead of putting it off for another day or two, this bill would be done today. Would that be problematic?

Mr. Semanko said one concern about putting in the word "solely" was that if the third party or the act of God was responsible and if it was the sole cause. Their concern was what if it was only a contributing cause. The negative influence then would be they would be completely responsible because they hadn't met the threshold of being solely responsible. He said there was language that said that no defenses would be eliminated and contributory negligence was at least a partial defense for irrigation districts. He said on their initial read, the word "solely" could be problematic. If the underlying third party or the act of God clause was not the sole cause, but it was a contributing factor, would they be altering the common law to their detriment?

Senator Davis said the purpose was to suggest that one would not be liable for the acts of others and that made sense to him and to the Committee. He wanted to vote for that. **Mr. Semanko** cited a court case where the court found that, while storms caused the problem, it was also caused by the fact that the canal company failed to adequately maintain their dam to manage it correctly, so they were held liable, at least in part, for that dam. This bill encompasses that concept. The intent was not to change the foundation standard. The court would divvy up the various entities who were at fault. But if the word "solely" was put into the bill, then "under comparative negligence" arguably only existed if it was solely caused by an act of God or a third party and it still met the threshold of the word "solely" then they could be held completely responsible. That was the concern of the attorneys. He said unless he heard otherwise from his group, that word wouldn't work. He said he would suggest, because it didn't fundamentally alter the comparative negligence standard, to move the bill to the next session.

Senator Davis said that what he was hearing was that neither the proponents or the opponents disagreed as to what **Mr. Semanko** wanted to do. There was just a disagreement as to what the language did and he guessed they would revisit this on Wednesday. **Mr. Semanko** agreed.

Senator Darrington said a real-life example was when there was a big cloudburst in July when the canals were running, and the water came down and washed into the canals. Before they could cut it at the head several miles upstream, they had a problem downstream. This is exactly what is being talking about. **Mr. Semanko** said this was correct and it is a serious, important issue.

Senator Stennett commented there were some old canals and no matter what one tried to do to maintain those, they were probably a bit more compromised than they were when they were originally constructed. She said she was in complete agreement with **Senator Davis**. There was a combination of acts of God and weather, in addition to the responsibilities of maintaining these waterways, and she hoped they could come to some sort of compromise.

Chairman McKenzie announced that discussing on **S 1383** would be continued at the next meeting on March 21st.

MINUTES: The approval of the minutes of February 20, 29 and March 2, 2012 were postponed until the next meeting on March 21, 2012.

ADJOURNMENT: **Chairman McKenzie** adjourned the meeting at 9:32 a.m.

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Senator McKenzie
Chairman

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Twyla Melton
Secretary