

MINUTES
SENATE TRANSPORTATION COMMITTEE

DATE: Thursday, March 22, 2012

TIME: 1:00 P.M.

PLACE: Room WW53

MEMBERS PRESENT: Vice Chairman Brackett, Senators Keough, Corder, Winder, Bair, Rice, Werk, and Bilyeu

ABSENT/ EXCUSED: Chairman Hammond was excused.

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.

CONVENE: **Vice Chairman Brackett** called the meeting to order at 1:00 p.m in the absence of **Chairman Hammond**. He asked the secretary to take a silent roll.

APPROVAL OF MINUTES: **Senator Bair** moved, seconded by **Senator Winder**, to approve the minutes of February 21, 2012. The motion carried by a unanimous voice vote.

Senator Keogh moved, seconded by **Senator Bair**, to approve the minutes of March 6, 2012. The motion carried by a unanimous voice vote.

Senator Rice moved, seconded by **Senator Winder**, to approve the minutes of March 15, 2012. The motion carried by a unanimous voice vote.

DISCLOSURES: **Senator Winder** for the record, stated he was involved in preparing several bills that came up for discussion. He said some advanced and some did not, but this was a bill he actually took over to some House members. There had been some discussion about this bill being originated by some House members, specifically for their problem. He said he thought it was worthy of debate and discussion. They actually put it into a bill form and brought it forward. Also for the record, while he didn't think he needed to disclose, but because of the sensitivity of all of the things that were going on, he would disclose under rule 39H that at times he is called as an expert witness on this matter by the presenter on the bill.

Vice Chairman Brackett said he wanted to disclose he had served on the Highway District in his prior or former life. He has a brother and a son that are current members of districts. He is a landowner that could be impacted by this legislation, so he declared under rule 39H.

H628AA:

Vice Chairman Brackett said they had H628aa before them and he introduced the presenter, Don Copple, from Davison, Copple, Copple, and Copple. Mr. Copple said this bill dealt with Idaho Code 40-2312 and it was designed to address the Idaho Supreme Court's holding in *Halvorson v. North Latah County Highway District*, 151 Idaho 196 (2011), which held that prescriptive rights-of-way across private land were no less than 50 feet in width unless an owner could prove they were established prior to enactment of Idaho Code, Section 40-2312. Historically, the law had been that prescriptive easements were limited to the width actually used. There was no proper basis allowing governments to take 50 feet across private property when they had not paid any just compensation for that taking and had not actually used the ground for a roadway. He said this bill only applied to counties and not cities.

Mr. Copple gave a brief history and cited a 1908 Supreme Court case called the Meservey case that dealt with the width of a prescriptive road. He said a public prescriptive road was one that came into existence because it had five years of public use and public funds expended on it. At that point it became a public road. The issue was how wide was it going to be. This case created a presumption, based upon the statute that the road was to be 50 feet wide, unless one could show that a lesser amount was involved. He represented private property owners and they analyzed and looked to see if prescriptive rights-of-way were involved. In the Meservey case, the Idaho Supreme Court adopted the law of Utah and said that it would seem that the right acquired by prescriptive users carried with it such width as reasonably necessary for the reasonable convenience of the county or public. He said the statute fixed highways of not less than 50 feet. He said they wanted to know the actual use of the road by the traveling public and what was necessary to support on the site, such as water, runoff, snow and that sort of thing. He cited Chris Myers, who did a road report, and he said the Idaho Supreme Court held that with the highways established by public use, based on the separations of circumstances peculiar to each case, that was presumed to be 50 feet unless facts clearly indicated otherwise.

He said that in 1985, the legislature repealed the provisional law and reenacted the current version of the code we have now. He then cited February 2011 and the Halvorson Case, which established what the law was now. The Idaho Supreme Court said Section 40-2312, established a mandatory width of 50 feet for prescriptive highways and it was not limited to prescriptive highways. Mr. Copple gave an example of a one-lane forestry road going to people's property, which went to the national forest, and that road was not 50 feet wide and said the same thing could happen in rural counties and one could have a 20 foot road or a single main road. These roads, he said, were 50 feet wide and it ignored the historical use. He said the Halvorson case supported having every road 50 feet wide. He suggested this Committee look at this as a policy decision. He asked them if they wanted every public, descriptive road in Idaho to be 50 feet and if they did, then the Halvorson case supported that and they didn't have to pass this bill. However, if the Committee believed that a public prescriptive road should be limited to the actual use, with sufficient distance on each side to support it, then this bill would address that. What the bill stated was that it was trying to clarify the legislative intent and bring it forward to the presently existing language of 1985. He said it was a little convoluted and everyone had a different view on this. He gave an example of someone who had a 25-foot wide road, which was rarely used. He said they had fences that had been there forever, and no public money had ever been expended on it, and the highway district was claiming it. To make it 50 feet in width, they would have to give up another 25 feet of property. Mr. Copple stood for questions.

QUESTIONS:

Senator Rice asked Mr. Copple if he would consider the case of a prescriptive easement where the land owner was voluntarily allowing the use of his property? Mr. Copple responded and said it could be, but it made no difference if it was voluntary or involuntary, because if the public drove on the road and it was supported with public funds, it was a public highway.

Senator Corder said Mr. Copple was teaching them that after Halvorson, this addressed every road, but pre-Halvorson decision, these narrower roads were allowed. Mr. Copple said that prior to Halvorson, the public right-of-way was determined to be the actual user, plus enough on each side to support the road. He said that was the way he thought the law ought to be. But, he said, the Halvorson case said on page 10 that this did not apply to just prescriptive roads but it applied to all roads in Idaho. He said the court took it to the next step and made a public policy decision. **Senator Corder** said he knew Mr. Copple appreciated some of the subtleties that were in the law. The bill said the rights-of-way were 50 feet, but he was not clear on the decision. He said he knew the 1887 law had been repealed in 1985 and replaced with Idaho Code 40-2312. **Senator Corder** said Mr. Copple was asserting that the narrower road capacity preceded 1887 rather than 1985. Mr. Copple said the original 1887 act included the 50-foot width. The Meservey case said, basically, the presumption was the roads were 50 feet wide. The property owner could show there was less amount of ground being used and it was not 50 feet. The change was that they were now all 50 feet irrespective of the actual use. The State of Idaho wrote a memo on this stating this was not always that way. But, it was that way according to the Halvorson case. He did not read the case that way and he still didn't view it that way.

Senator Corder said that if he owned a piece of a narrow road used by the public and if that was a one-lane road, because it was way out in the middle of nowhere and occasionally there was room for vehicles to pass one another, then that road trumped. Even though in 1887 the law said it was 50 feet because it was assumed to be that way, it was only the width that was actually used. People would build their fences right up to the part that was being used and were infringing on what others may have considered a right-of-way. In 1985, that was correct. Mr. Copple said a lot of times owners would ask the highway district before they put their fences up as a common courtesy. Then something happened and they would want to widen the road, so the issue was how much did they own. In the 1887 law as it was read, roads were 50 feet unless the owner could show the County that it was not. That was the way the law was applied until February of 2011 when the Supreme Court said all roads would be 50 feet. He said the issue was whether that was the way the Committee wanted the law to be. If they did, then it was okay. Mr. Copple said that he believed if one owned property, then one should not have to donate or dedicate it. He gave an example of having a 20-foot road with 2-1/2 feet on each side, so there would be 25 feet. According to the Supreme Court, a person would have to give up another 25 feet. He didn't think we should have to fight about this with the courts. He said he thought this was what we thought in Idaho as to what private property rights should be. He said he thought the issue was clear-cut. He said it really got down to highway districts and counties were charged with the responsibility for wanting to widen the road and not pay whatever just compensation would be for the additional strips next to the highway. He said he believed this was where the dispute lay.

Senator Corder said he was sympathetic to what Mr. Copple said, but he was curious as to how the highway districts were going to pay for the easements. **Senator Corder** said that if this was to pass, their ability may be limited to maintain some of the things they already had or by expanding there would be a significant impact. Mr. Copple said the Committee had to decide what the public policy was. He said if the Committee thought the Halvorson case was good public policy then the Committee should vote no. He said he thought this was bad public policy. He said he thought the Committee could not ask the few to pay for the benefit of the whole as it should be the other way around. He said that was the philosophy of eminent domain.

Senator Keough said she noticed the Halvorson decision occurred in 2010 and the rehearing was denied about a year ago and she agreed with Mr. Copple's statements about private property rights. The question was whether or not any effort was made to get together with utility companies and highway districts, to work through some language that could balance and preserve private property rights. She asked if that occurred in the last year? Mr. Copple said he didn't think it did, but he was at a meeting where some of the people representing the highway district were there, but other than that he was not aware of any discussion.

Senator Rice said he pulled up the Meservey case and he wanted to check the language which said it was presumed to be 50 feet unless the facts and circumstance of the case clearly indicated that the owner over whose land the road ran had limited the width of said road to within less than 50 feet prior to the time said road became a highway by users. He asked if that was correct. Mr. Copple said that was correct.

TESTIMONY:

Vice Chairman Brackett asked that all testimony be concise and to the point. He said they would try to alternate pro and con.

**SUPPORT
H628AA:**

The following people testified in **support** of H628aa: Patrick Dobie, a professional engineer licensed in Idaho who talked about the 50 foot right-of-way and how the bill needed to address this issue; Janice Kootstra, a resident of Jerome, who said she didn't think it was fair to have land taken without fair compensation; Dennis Tanikuni from the Idaho Farm Bureau, asked the Committee to look at his letter in their packet; Don Hite, a citizen from Jerome, told a story about how some of his parent's land was taken and the highway district did not acknowledge any responsibility for payment; Hebert Carpenter said he wanted to testify because he wanted people in Idaho to get along with their neighbors in the rural areas. Land owners have allowed people wishing to cross their property in the past with the ability to do so without fear there would be a prescriptive easement gained. Through that easement a county road would be placed there and a 50-foot right-of-way would be granted, which he considered a government taking of private property. Kerry Ellen Elliott said she did not need to testify and she had submitted a letter to the Committee. Heather Cunningham, Copple, Davison, Copple, Copple, and Copple, said she would testify at the next meeting.

**OPPOSE
H628AA:**

The following people testified in **opposition** to H628aa: Lan Smith, Gem County Commissioner and Chairman of the Idaho Association of Counties Transportation Committee. He said he wished the Committee would take some time to compare the 1887 law and the 1985 law because he said he thought they were identical. Gordon Cruickshank, a Valley County Commissioner, said there was a backlog of maintenance and asked why add another burden to the local jurisdiction; Bruce Wong, Ada County Highway District (ACHD), declined to testify; Steve Price, ACDH, declined to testify.

QUESTIONS: **Senator Rice** asked a question of Mr. Cruickshank about prescriptive easement. He asked if a landowner let the County use 20 feet wide to go across property and the County had maintained it, but that was all he let the County use, was it his position that after five years the County would own 50 feet wide across the property? Mr. Cruickshank said there were cases in his County where the property owners had recognized the 50 foot prescriptive right in the diagram he showed them. The County asked for 70 feet and they have purchased the additional right-of-way they needed at market value. They have never been challenged. He said they did have roads in Valley County that have only a 40 foot right-of-way. He said they recognized that and if they wanted to build more, they had paid for beyond the 40 feet. They had land owners who had fences that were close to the road, but who agreed that if the County paid for the cost of moving the fence back, they would relinquish the ground to the public enterprise. **Senator Rice** wanted to clarify and said that what had been used historically, such as 40 feet, and there was a fence there, the County was working with the owner and getting agreement. Mr. Cruickshank said that was correct. **Senator Rice** wanted to know what if the property owner didn't agree with the extra 10 feet? Mr. Cruickshank said they have had that in the past when there was a road the County didn't maintain in the winter time. Now it would be maintained during all weather. The road was narrow and they recognized that the usable roadway was 42 feet wide. They sat down with the land owner and came up with a plan where they paid for an additional right-of-way. **Senator Rice** said this bill, as he understood it, would not affect any of that. Mr. Cruickshank said he believed this bill didn't define this enough and he thought the Committee needed a lot more time to work on some of the issues he talked about.

CONTINUATION OF HEARING: **Vice Chairman Brackett** said due to time constraints, testimony would be continued to the next meeting.

COMMENTS: **Senator Werk** asked if there was a tax meeting at 2:00 p.m. **Senator Corder** indicated that there was a meeting. **Senator Winder** said they would have to post an agenda and time for the next meeting. **Vice Chairman Brackett** said he hoped they could meet at 1:00 p.m. on Friday, March 23, 2012.

ADJOURNMENT: **Vice Chairman Brackett** adjourned the meeting at 2:00 p.m.

Senator Hammond
Chairman

Gaye Bennett
Secretary

Linda Kambeitz
Transcriber