

MINUTES  
**SENATE TRANSPORTATION COMMITTEE**

**DATE:** Tuesday, March 27, 2012

**TIME:** 1:00 P.M.

**PLACE:** Room WW53

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

**ABSENT/ EXCUSED:** all present

**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:** **Chairman Hammond** called the meeting to order at 1:05 p.m. and asked the secretary to take a silent roll. With a quorum present, **Chairman Hammond** asked for motions to approve meeting minutes.

**MINUTES:** **Senator Bair** moved that the minutes of the meeting of Thursday, February 23, 2012 be approved. **Vice Chairman Brackett** seconded the motion. The motion was approved by a unanimous voice vote.

**Senator Corder** moved that the minutes of the meeting of Thursday, March 8, 2012 be approved. **Senator Winder** seconded the motion. The motion was approved by a unanimous voice vote.

**Senator Bilyeu** moved that the minutes of the meeting of Wednesday, March 21, 2012 be approved. **Vice Chairman Brackett** seconded the motion. The motion was approved by a unanimous voice vote.

**Chairman Hammond** stated that today's meeting was a continuation of the Committee's last hearing held on Thursday, March 22, 2012. The Committee will continue to hear testimony on H628aa. However, the Chairman began the meeting by having Deputy Attorney General, Chris Kronberg, present clarifying information regarding H628aa. With that, **Chairman Hammond** asked Mr. Kronberg to take the podium.

**COMMENTS ON H628AA:** Mr. Kronberg stated that he did work for the Office of the Attorney General, however, the Attorney General has not taken a position on this legislation. He also said he was not here speaking on behalf of the Idaho Transportation Department (ITD). He said the Committee had asked several questions regarding H638aa of the Attorney General, and he was asked to respond.

The first question was: When was the 50' easement for prescriptive highways statutorily enacted in Idaho and what was the law prior to its enactment? The law stating that all highways shall be 50' wide was passed in 1887 as section 932, Rev. St. 1887, and stated that all highways, except alleys and bridges, must be at least 50 feet wide, excepting those consisting of a less width at the date of the enactment of section 932. That is the language that is essentially found in the current version of Section 40-2312, Idaho Code. Section 851, Rev. St. 1887, defined highways as roads laid out and recorded by county commissioners, and all roads used and maintained by the public for five years (prescriptive easement). That is the language that is essentially now found in Section 40-202(3), Idaho Code. In 1908, the Idaho Supreme Court made clear that once a highway is found to exist by prescriptive easement, it is 50 feet wide. See, *Meservey v. Gulliford*, 14 Idaho 133 (1908). Prior to the enactment of Section 932 in 1887, the common law applied to the width of a highway established by prescriptive easement in Idaho. The common law stated that the width of a highway created by prescriptive easement was the width actually used for traveling, plus an additional width needed to maintain the traveled width.

The second question was: When Section 40-701, Idaho Code, was recodified as Section 40-2312, Idaho Code, in 1985, were there substantive changes made to the law itself that altered its intent, meaning or reset the "preexisting" date in any way that changed the application of the 50 foot prescriptive easement? No substantive changes were made to Section 40-701, Idaho Code, (it may have been Section 40-904, Idaho Code) when it was recodified in 1985 as Section 40-2312, Idaho Code. Chapter 253 of the Idaho Session Laws for 1985 simply indicates that the former Title 40, Idaho Code, was repealed and recodified in a newly entitled Title 40, Idaho Code. Because the language of the statute itself was not amended, there is no basis upon which to assert that mere recodification "altered its intent, meaning or reset the preexisting date in any way that changed the application of the 50 foot prescriptive easement."

The third question was: Did the decision in *Halverson v. North Latah County Highway District* change the law regarding prescriptive highway easements? No. The Halverson decision affirmed what has been the law at least as far back as 1908 when the Meservey decision was issued, and essentially as far back as 1887 when the Idaho Legislature changed the common law by passing section 932, Rev. St. 1887.

The fourth, and final, question was: Would the passage of H628aa affect other statutory provisions of Chapter 2, Title 40, Idaho Code? With the caveat that the question is broad in scope, Mr. Kronberg believes that there are two provisions in Chapter 2, Title 40, Idaho Code, that may be affected by the passage of H628aa. One such statute is the savings clause found at Section 40-205, Idaho Code, which states, in part, as follows: "This act shall not affect any act done, ratified or confirmed, or any right accrued, or established, or any action or proceeding had or commenced in a civil or criminal cause prior to July 1, 1985....." Under the law as it has existed since 1908, or perhaps 1887, rights have accrued to the public for 50 feet rights-of-way. The legislative intent expressed in H628aa appears to conflict with the savings clause because of the language in H628aa attempting to limit prescriptive easement highways in existence in 1985 to widths reflecting historic usage as opposed to 50 feet. H628aa may also conflict with the intent expressed in Section 40-210, Idaho Code, which indicates that "highways are lawfully used in connection with uses associated with utility purposes necessary to provide utility services to the public." Utilities are located in highway rights-of-way, and if those rights-of-way are limited to their historic traveled way, the utilities may be outside that width.

**QUESTIONS:** **Vice Chairman Brackett** quoted from Section 40-2312, Idaho Code, and asked if the language was in statute prior to 1887. Mr. Kroneburg indicated that it was.

**Senator Rice** asked if Mr. Kronberg had reviewed the cited law. Mr. Kronberg indicated he had not.

**TESTIMONY:** **Chairman Hammond** thanked Mr. Kronberg and asked if he would be willing to remain in the Committee in case there were issues needing clarification. The Chairman acknowledged that Mr. Kronberg's responses would be from a neutral perspective. Mr. Kronberg said he would be able to stay. The Chairman then laid out the ground rules to accommodate the many people signed up to testify. He asked that remarks be brief and provide information that had not previously been raised by others testifying. **Senator Werk** asked the Chairman to define the word "brief." The Chairman said testimony should be limited to three minutes or less.

**TESTIMONY IN SUPPORT OF H628AA:** The following individuals testified in support of H628aa: Alvin Carpenter, a property owner from Malta, Idaho; Gary Jones, a cattle rancher from Almo, Idaho; Dennis Tanikuni, a lobbyist and Assistant Director of the Idaho Farm Bureau; Jane Wittmeyer, a lobbyist representing Clearwater Paper Corporation; Heather Cunningham, an attorney with Davison Copple Copple and Copple; Elizabeth Criner, a lobbyist representing J.R. Simplot Co.; Neil Colwell, representing Avista Corporation; Jeremy Pisca, a lobbyist representing Potlatch Corporation; and Jerry Rigby, a Rexburg attorney, representing unique water rights organizations.

**QUESTIONS:** **Senator Corder** asked Mr. Carpenter what he thought of the historical context Mr. Kronberg shared. Mr. Carpenter said that he understood about prescriptive easement and that he is able to maintain what currently exists in his case but is not in a position to expand on it.

**Vice Chairman Brackett** asked Mr. Carpenter to explain when his land was taken. Mr. Carpenter said it was an ongoing issue that began in the 1990's. **Vice Chairman Brackett** asked what the outcome was. Mr. Carpenter said they have since left him alone.

**Senator Corder** asked Mr. Tanikuni his opinion of the testimony of Mr. Kronberg. Mr. Tanikuni said he is not an attorney but the Idaho Farm Bureau's attorney believes there is significant areas for discussion.

**Senator Keough** asked Ms. Cunningham how many cases have been filed since the Halvorson case in 2010. Ms. Cunningham said there has been one decided case but she didn't know if there are others. Everyone with a road to their property has only one course if this bill does not pass.

**Senator Rice** stated to Ms. Cunningham that the court didn't address French in the Halvorson case because no one brought it to their attention. Ms. Cunningham agreed.

**Vice Chairman Brackett** asked Mr. Pisca if all prescriptive roads were 50 feet wide. Mr. Pisca said he didn't understand that to be the case and there are a nebulous set of circumstances.

**Senator Rice** asked Mr. Pisca if he thought, under Article 1, Subsection 14, that just compensation should be paid. Mr. Pisca said it is core to the private property rights issue.

**Senator Corder** asked Mr. Pisca about the dilemma of having a poorly worded statute and a poorly worded court decision, how does one come to a resolution. Mr. Pisca said through the same process that is occurring today.

**TESTIMONY IN  
OPPOSITION  
TO H628AA:**

The following individuals testified in opposition to H628aa: Ladd Carter, Bingham County Commissioner; Kerry Ellen Elliott of the Idaho Association of Counties; Stuart Davis, Executive Director of Idaho Association of Highway Districts; Kelly Aberastri, Owyhee County Commission, but speaking as a private citizen; Bruce Wong, Executive Director of the Ada County Highway District; Steve Price, General Counsel for the Ada County Highway District; and Kim Gourley, an attorney with Idaho Power Company.

**QUESTIONS:**

**Senator Rice** asked Ms. Elliott about the provisions in Idaho Code that talks about takings with compensation. Ms. Elliott said that she is not an attorney but thought that no compensation is due within the 50 foot easement where there is not a deed. Senator Rice asked what she thought the meaning of prescriptive easement. Ms. Elliott said a prescriptive easement is 50 feet.

**Vice Chairman Brackett** asked Mr. Wong if Ada County has prescriptive easements. Mr. Wong deferred the question to the Ada County Highway District's legal counsel, Steve Price. Mr. Price explained the history of the issue.

**Senator Winder** stated to Mr. Price that after 13 years on the highway commission there were only 50 foot easements on section-line roads. Mr. Price said that is what they have practiced, but this will change.

**NEUTRAL  
TESTIMONY:**

Bill Roden, a Boise attorney representing Century Link in Idaho, testified that Century Link would comply with whatever the decision is of this Committee and the legislature. There were no questions for Mr. Roden.

**CLOSING  
REMARKS:**

**Representative Bedke** said he is not an attorney, but he can read English and he can go back through these cases that go back to 1887. It says that everything is 50 feet except those that exist that are of a lesser width. The Representative agreed with others who stated this bill is not artfully crafted.

In 1985 this statute was last recodified that all highways are 50 feet except those of a lesser width presently existing. It is presumed that everything in Idaho is 50 feet, but that is a rebuttable presumption. It is being done in a very narrow case of prescriptive roads or those that have been dedicated out of the common law. He reminded the Committee that there were a number of people from Jerome and Spokane that testified on the first day of this hearing (March 22). They spoke of a prescriptive highway in Jerome. The Jerome County Highway District thought they had 50 feet and went to condemn the property along that road. The courts held that they had to pay for the strip. They paid 19 land owners along that strip. Now for us to come in and say it has always been 50 feet, period, does not consider the prima facie evidence that roads are not always 50 feet.

**Representative Bedke** is a property owner and declared, under House Rule 38, that he may have a conflict. This is a private property issue and many have allowed for this prescriptive use of their property. If every one of the two-tract roads in Idaho now have to be 50 feet, he is concerned there will be a cooling effect and the "good-neighbor policy" will be undone. He referred to all the testimony from government agencies who have benefited. There is a process to allow for the greater society to bear these costs. If that doesn't occur, then the individual property owner bears the costs. It is the legislature's job to make policy, and at some point it has to be decided on who is going to bear these societal costs. Is it going to be the property owner or is it going to be the government. The "except" language has been carried from 1887 to 1985; we have recognized there are roads that exist of a lesser width. This bill attempts to put that language back into law. There were no questions for **Representative Bedke**.

**DECLARATION  
OF CONFLICT  
OF INTEREST:**

**Senator Winder** reiterated his declaration of a 39h conflict from the March 22nd hearing. In his private business dealings he is often called as an expert witness in similar cases.

**Vice Chairman Brackett** reiterated his declaration of a 39h conflict from the March 22nd hearing. He is a private property owner, a former highway district commissioner, and has relatives who are presently with a highway district.

**MOTION:** **Senator Rice** moved to send H628aa to the floor with a do-pass recommendation. **Vice Chairman Brackett** seconded the motion.

**DISCUSSION ON THE MOTION:** **Senator Keough** said she saw this issue last Thursday (March 22) and has now spent two-and-a-half hours on a legal question that requires knowledge of laws passed over 100 years ago. She is certainly not anti-private property, but she believes this is too complex of an issue to make a reasoned decision at this time. She will vote "no" on the motion.

**Senator Rice** said he has doubts about the Constitutionality of prescriptive rights. He is willing to construe that the property used was voluntarily given, but will not go any further. These kinds of issues define the powers of government when it comes up against the rights of citizens. This bill addresses the problem of a 50 foot easement and whether it was voluntarily given; if it was not, then what should be compensated.

**Senator Corder** said he did not like the characterization that a "no" vote is a vote against private property rights. Half of the lawyers testifying today have taken the other side. He will be voting his conscience, but does not want it labeled as being against private property rights.

**SUBSTITUTE MOTION:** **Senator Corder** moved to hold H628aa in Committee in order to study the issues over the summer. **Senator Keough** seconded the motion.

**DISCUSSON ON THE SUBSTITUTE MOTION:** **Senator Winder** said that this legislation needs to be dealt with. If the substitute motion prevails, he will move to convene an Interim Task Force in order to deal with the issue. He stressed that the legislature needs to make a decision on this issue.

**Chairman Hammond** commented that this legislation has been framed in the context of private property owners vs. the government. He reminded the Committee that county government is working for its citizens and that citizens do have private property rights.

**VOTE ON SUBSTITUTE MOTION:** With no further discussion, the substitute motion passed by a voice vote, with three dissenting votes, thereby killing the original motion.

**MOTION:** **Senator Winder** moved that an Interim Task Force be formed, made up of Members of the Idaho Senate and the Idaho House of Representatives, to study the issues brought forward at today's hearing. **Senator Werk** seconded the motion. With no discussion, the motion passed by a unanimous voice vote.

**ADJOURNMENT:** With no further business before the Committee, **Chairman Hammond** adjourned the meeting at 2:45 p.m.

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Senator Hammond  
Chairman

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Gaye Bennett  
Secretary