

## PUBLIC ROAD CREATION

### David E. Wynkoop, Attorney at Law

David E. Wynkoop has actively practiced as an Idaho attorney for 36 years. He represents numerous Idaho local highway agencies as well as the Local Highway Technical Assistance Council. Mr. Wynkoop previously served as General Counsel and Commissioner for the Ada County Highway District. He is past Chairman of the Government Attorneys Section of the Idaho State Bar. Mr. Wynkoop is a partner in the firm of SHERER & WYNKOOP, LLP, 730 N. Main St., Meridian, Idaho 83642, phone 208-887-4800.

### Must be willing to do historical research

### Records are critical

### Statute in effect at time of creation is critical

### Public rights-of-way are different from private easements

- 1) Road Width – Presumed to be fifty feet – Idaho Code §40-2312  
- *Halverson v. North Latah Highway Dist.*, 151 Idaho 196, 254 P.3d 497 (2011)
- 2) Dedication
  - a) Plat
  - b) Petitions & Road Books – *Trunnel v. Fergel*, 153 Idaho 68, 278 P.3d 938 (2012)
  - c) Deed
  - d) Reservation in a Deed
  - e) Common Law Dedication
- 3) Condemnation
- 4) Creation by Order of Board of Commissioners
  - a) Roads laid out and recorded as highways, by order of a board of commissioners, and all roads...located and recorded by order of the board of commissioners, are highways.  
  
1893 Idaho Sess. Laws at p. 12, §1 (then codified at Rev. Stat. of Idaho Terr §851; codified today as amended at Idaho Code §40-109(5) and §40-202(3)).
  - b) Takings – Inverse Condemnation

- 5) Prescription
  - a) ...roads used as such for a period of five years, provided the latter shall have been worked and kept up at the expenses of the public...are highways.
 

1893 Idaho Sess. Laws at p. 12, §1 (then codified at Rev. Stat. of Idaho Terr §851; codified today as amended at Idaho Code §40-109(5) and §40-202(3)).
  - b) Five years public maintenance and use
  - c) Burden of Proof re: creation
6. Roads Created prior to 1881
7. Federal Lands – BLM, Forest Service, other
8. Indian Lands
  - a) Bureau of Indian Affairs procedures
  - b) Trust Land
  - c) Tribal Land
  - d) Individual Land
9. RS 2477
  - a) *And be it further enacted*, that the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.
  - b) Enacted 1866
  - c) Repealed 1976
  - d) Repeal not retroactive
10. Public ROW v. Public Highway
 

Declare unopened Public ROW with no maintenance responsibilities.  
Idaho Code §40-202.
11. Validation of Public Roads – Idaho Code §40-203A
12. Vacation of Public ROW – Idaho Code §40-203(1)
  - a) Formal procedures must be strictly adhered to. *See* I.C. §40-203
  - b) Informal Abandonment – probably applies only to prescriptive ROWs and if abandoned prior to 1986

## HIGHWAYS CREATED BY ROAD PETITIONS

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The Idaho Supreme Court recently clarified and reaffirmed Idaho law relating to the creation of public highways by road petition. In *Trunnell v. Fergel*, Idaho's highest court held that an unopened, unmaintained public right-of-way created in 1908 remains a dedicated public right-of-way, even though a buyer purchased the land with no knowledge of the right-of-way.

Creation of public highways by the road petition process was common in Idaho in the late 1800's and early 1900's. If property owners wanted a new road, they petitioned the county or highway district commissioners. The commissioners appointed viewers to research the proposed right-of-way and investigate the need for the road. The commissioners received the viewers' report, and if they agreed with the findings, declared the proposed right-of-way to be a public highway. The right-of-way was then recorded in a county road book kept in the county recorder's office.

There is usually no issue if the road was opened and maintained. However, if the road was never opened or maintained there had been some question whether the right-of-way retained its status as an unopened public right-of-way; particularly as against a buyer who purchased land with no knowledge of the road petition.

In the *Trunnell* case, County Road 32 was declared to be a public road in 1908 by the Bonner County Board of Commissioners. The declaration was based upon a road petition presented to the County. The road petition was entered into Bonner County's Road Book. County Road 32 was never opened or maintained at public expense.

In 1991, Fergel bought ten acres of land to build a home. Fergel had no knowledge of County Road 32. When she bought her property she observed "two wheel tracks" which ran north-south along the eastern edge of her property eventually reaching Trunnell's property. Trunnell purchased his property in 2001 and got into a dispute with Fergel whether he could use the two wheel track on Fergel's property. Litigation ensued.

The trial court held in favor of Fergel. The lower court ruled that because Fergel bought her land with no knowledge of County Road 32, she purchased her land free and clear of the County Road 32 right-of-way. The Idaho Supreme Court reversed, holding that County Road 32 remained a public right-of-way since it was validly created by the road petition statutes and had not been formally vacated by the County pursuant to Idaho Code Section 40-203(1). There can be no informal abandonment of a public road based upon the lack of opening or maintenance of the road.

The courts had to decide between the two competing legal principles. Generally, a buyer of land purchases the land free of any encumbrances if the buyer has no actual or constructive knowledge of the encumbrance. Constructive knowledge is imputed to the buyer if documentation of the encumbrance is recorded in the records of the county recorder.

The problem is that county and title company employees are not always aware of the road petitions or the county road books. It is not uncommon for a property buyer to purchase a title report which fails to reference the public right-of-way created by a road petition. Fergel argued that because she was not actually aware of the road petition when she purchased her land, she took her land free from the public right-of-way. The more difficult issue is whether Fergel had constructive knowledge of County Road 32 based upon the road petition and/or the county road book. Fergel produced testimony from a title company manager that a prudent person would not know to search for the road petition or the county road book. Apparently, Fergel purchased a title report which did not disclose the County Road 32 right-of-way.

The Supreme Court rejected Fergel's arguments, holding that since County Road 32 was properly created and was not formally vacated, it remained a public right-of-way.

### Lessons Learned

1. Highway agencies should locate the applicable road petitions and road books and make copies. These documents should be located in the county recorder's or assessor's records but may have been placed in cold storage. County employees may not be aware of the significance of the documents. There is a risk that they could be disposed of.
2. Identify the road petition rights-of-way on your official map. If a right-of-way has never been opened or maintained, identify it on the map as an unopened public right-of-way.
3. Consider re-recording the road petitions in the county recorder's records to improve the odds that county and title company employees are made aware of the road petitions.
4. If a road is to be widened or relocated, check to see whether the new location is the subject of a road petition.

The importance of road petitions can be demonstrated with an example. An Idaho local highway agency decided to re-locate and widen a collector road. The agency purchased title reports and appraisals and began right-of-way acquisition negotiations with the appropriate land owners. Several of the land owners hired an attorney and demanded payments far in excess of the appraised valuation. Further research found a road petition from 1907 not disclosed by the title report which overlapped with the location of the new road.

After a copy of the road petition and the *Trunnell* case was supplied to the property owners' attorney, his clients became much more reasonable and quickly settled. The taxpayers were saved many tens of thousands of dollars because the road petition was located.

Idaho courts have treated road petition rights-of-way as dedicated public rights-of-way. This puts roads created by petition in the same category as roads created by subdivision plat. Such roads cannot be adversely possessed. Even if the road was never opened or maintained by a public agency, it remains a public right-of-way unless and until the statutory vacation procedures are followed.

## **IDAHO COURT CLARIFIES THE WIDTH OF PRESCRIPTIVE RIGHTS-OF-WAY**

By David E. Wynkoop, Attorney at Law\*

The Idaho Supreme Court has recently issued a decision of great importance to Idaho highway agencies. In the case of *Halvorson v. North Latah Highway District*, the Court ruled that the width of Idaho prescriptive rights-of-way is a minimum of fifty feet. Charlotte and Don Halvorson (the Halvorsons) sued the North Latah Highway District and its Commissioners and Foreman (collectively, NLHD) for numerous claims including a wrongful taking of the Halvorson's property by NLHD.

Camps Canyon Road (the Road) runs through property owned by the Halvorsons and in one area serves as the boundary between the Halvorson's property and another property. Where the Road runs between the Halvorsons and neighboring properties, the centerline of the Road constitutes the boundary line between the properties. The Road has been open to and used by the public since the 1930s. The Road has been maintained by NLHD since at least 1974. The Road was not deeded or dedicated to the NLHD.

Until 1996 the Road was a narrow, single track road. In 1996 NLHD widened the Road with the permission of the Halvorson's predecessors. Later in 1996 the Halvorsons purchased the property on which the Road is located. The Halvorsons built a fence on the north side of the Road about fifteen feet from the centerline. The Halvorsons complained to NLHD of recurring damage caused to the fence by NLHD's maintenance and snow removal activities.

In 2005 NLHD further widened the Road by about four feet, without the permission of the Halvorsons. The widening involved blasting and drilling by NLHD. The Halvorsons complained to NLHD about alleged damage to their property. They filed a Notice of Tort claim with NLHD on November 6, 2007 and sued NLHD on March 3, 2008. The Halvorsons claimed damages based upon various legal theories, including inverse condemnation.

The district court ruled in favor of NLHD. The court found that a prescriptive public right-of-way existed for the Road based upon at least five years of public use and public maintenance. The court found that the width of the Road was fifty feet based upon Idaho Code §40-2312. Because all of the Halvorson's damages occurred within the fifty feet width of the Road, NLHD was acting within its statutory authority and thus had no liability to the Halvorsons. The Halvorsons then appealed to the Idaho Supreme Court.

The Supreme Court held that a prescriptive right-of-way was clearly established based upon Idaho Code §40-202(3) which provides "all highways used for a period of five (5) years, provided they shall have been worked and kept up at the expense of the public, or located and recorded by order of a board of commissioners, are highways". The court then addressed the Halvorsons taking claim and held that no taking had occurred since a prescriptive right-of-way was established prior to 1996 when the Halvorsons purchased their property. The Court noted that any takings or inverse condemnation claim must have been commenced within four years from the date of the alleged taking, that is from the date the Road was first established.

Next, the Supreme Court addressed the key issue of the case. What is the width of prescriptive rights-of-way in Idaho? The Court began its analysis with Idaho Code §40-2312 which provides: "[a]ll 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, and may be as wide as required for proper construction and maintenance...” This statute was first adopted in 1887, and no evidence was presented that the Road predated 1887. The Halvorsons argued that Idaho Code §40-2312 applies only to dedicated or deeded highways and not highways established by prescriptive use. Thus, according to the Halvorsons, the width of the Road was only what NLHD could prove was actually used and maintained. Since the Halvorson’s fence was fifteen feet from the centerline of the road, there could be no public use and maintenance inside of the fence.

The Court rejected the Halvorson’s argument and ruled that Idaho Code §40-2312 does indeed apply to prescriptive highways. Thus, once the elements for a prescriptive highway are established, i.e., five years of public use and public maintenance, the width of the highway is fifty feet. Because all of NLHD’s maintenance and construction activities occurred within the fifty foot right-of-way, there could be no successful taking or damages claim.

The holding in the Halvorson case provides a valuable tool to Idaho’s cities, counties and highway districts. Dealing with encroachments is an ongoing problem whether it be fences, landscaping, signs, etc. The facts in this case are a prime example of the problem highway agencies face. Shortly after the Halvorsons purchased the property in 1996, they built a fence fifteen feet from the centerline of the road; i.e. ten feet inside the fifty foot right-of-way. The Halvorsons complained and ultimately sued for damages claiming that NLHD damaged the fence during the course of maintenance and snow removal activities. The Halvorsons further argued that there could be no public right-of-way established on the property owners’ side of the fence line since there could not have been public maintenance and public use inside the fence line. They argued the right-of-way width was reduced based upon the permanent encroachment.

The Court ruled that the Halvorsons built their fence within the public right-of-way and could not complain about damages to the fence. Nor could the Halvorsons complain when NLHD widened the road since all construction occurred within the fifty foot width.

One result of the case is to place prescriptive rights-of-way on more of an even footing with dedicated or deeded rights-of-way. Idaho Courts have long ruled that there can be no permanent encroachments into dedicated or deeded rights-of-way.

While this case is favorable to highway agencies, some caution is in order. First, the Halvorsons represented themselves and made significant mistakes in arguing their case. Well-represented property owners may do a better job of presenting their cases to the courts. Second, there must be clear proof of five years of continual public use and public maintenance or other ownership prior to invoking the fifty foot width. Third, if a highway agency asserts the fifty foot width but loses the case for any reason, the agency may be held liable for a taking or an inverse condemnation. In such event, the agency will likely be ordered to pay the property owner’s attorney fees and court costs.

The best approach when widening a road is to communicate with the affected property owners and try to come to a mutually acceptable agreement. The Halvorson case should prove helpful in negotiating with property owners as well as in situations where an agreement cannot be achieved.

\*Mr. Wynkoop represents approximately forty Idaho highway agencies. He has practiced law in Idaho for 36 years. His address is 730 N. Main St., Meridian, Idaho 83642, telephone 208-887-4800.