

# RECENT DEVELOPMENTS IN IDAHO HIGHWAY LAW PUBLIC RIGHTS-OF-WAY AND CONDEMNATION

ISB Government & Public Sector Lawyers Section – January 2, 2020 – 12:00 p.m.

## David E. Wynkoop, Attorney at Law

David E. Wynkoop has actively practiced as an Idaho attorney for 40 years. He represents numerous Idaho local highway agencies, the Idaho Association of Highway Districts, and 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 ISB Government & Public Sector Lawyers Section. His telephone number is 208-887-4800.

### Idaho Highway Law is Unique – not the same as Idaho Real Estate Law

Must be willing to do historical research - Records are critical  
Statute in effect at time of creation is critical

### New Idaho Supreme Court Cases

- *Eller v. Idaho State Police* – Whistleblower Statute trumps Idaho Tort Claims Statute
- *Raymond v. Idaho State Police* – Spoilation of Evidence is now an independent tort which can be claimed against a non-party.
- *Eastside Highway District v. Delavan* – Hostility / Permission not an element in a prescriptive public right-of-way
- *Richel v. Worley Highway District* – Validation Case per I.C. §40-203A – Now on appeal to Idaho Supreme Court. Trial court affirmed that review is on the record. May be preferable to a quiet title action. Definitely preferable to an inverse condemnation action.

### 1) Official Maps

- a) Duty to Create
- b) Update at least every five years
- c) Include unmaintained public roads
- d) Teton County case
- e) How much detail to include?

### 2) Road Width

Presumed to be fifty feet – Idaho Code §40-2312 – Recent Amendments  
- *Halverson v. North Latah Highway Dist.*, 151 Idaho 196, 254 P.3d 497(2011)  
- See also I.C. §40-605

Now before Idaho Supreme Court / Shelter Rule for unrecorded deed.

- *Nampa Highway District v. Knight*

### 3) Dedication / Creation

- a) Plat
- b) Petitions & Road Books – *Trummel v. Fergel*  
153 Idaho 68, 278 P.3d 938 (2012)
- c) Deed
- d) Reservation in a Deed
- e) Common Law Dedication
- f) Prescription – *see below*

**4) Condemnation**

- |                            |                                 |
|----------------------------|---------------------------------|
| a) Public Need             | f) Payment of Fair Market Value |
| b) Work Plan               | g) Order of Condemnation        |
| c) Design                  | h) Litigation                   |
| d) Offer                   | i) Order of Possession          |
| e) Good Faith Negotiations | j) Attorney Fees and Costs      |

**5) Takings – Inverse Condemnation – C & G Case – Culverts – drainage/flooding**

**6) 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.
- b) 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)).

**7) Prescription – Different than private easement law**

- 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  
d) **Eastside Highway District – Hostility / Permission NOT RELEVANT**

**8) Roads Created prior to 1881**

**9) Federal Lands – BLM, Forest Service, State lands, other**

**10) Indian Lands**

- |  |                    |
|--|--------------------|
| a) Bureau of Indian Affairs procedures | c) Tribal Land     |
| b) Trust Land                          | d) Individual Land |

**11) 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

**12) Validation and Vacation of Public ROW – Idaho Code §40-203**

- a) Formal procedures must be strictly adhered to. *See* I.C. §40-203  
b) Informal Abandonment – probably applies only to prescriptive ROWs abandoned prior to 1986

**13) Encroachments – Idaho Code §40-2319 – Criminal Statutes**