2-1-2010

Halvorson v. North Latah County Highway Respondent's Brief Dckt. 36825

IN THE SUPREME COURT OF THE STATE OF IDAHO

DON HALVORSON, Plaintiff-Appellant and CHARLOTTE HALVORSON, Plaintiff v. NORTH LATAH COUNTY HIGHWAY DISTRICT, BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT, ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity, Defendants-Respondents.	)	Supreme Court Docket No. 36825-2009

RESPONDENTS' BRIEF

Appeal from the District Court of the Second Judicial District for Latah County
Honorable Carl B. Kerrick, District Judge presiding

Don Halvorson
1290 American Ridge Road, Kendrick, Idaho 83537
Pro Se Appellant

Ronald J. Landeck
Ronald J. Landeck, P.C.
693 Styner Avenue, Suite 9, P.O. Box 9344, Moscow, Idaho 83843
Attorneys for Respondents

IN THE SUPREME COURT OF THE STATE OF IDAHO

DON HALVORSON, Plaintiff-Appellant and CHARLOTTE HALVORSON, Plaintiff v. NORTH LATAH COUNTY HIGHWAY DISTRICT, BOARD OF COMMISSIONERS FOR THE NORTH LATAH COUNTY HIGHWAY DISTRICT, ORLAND ARNEBERG, RICHARD HANSEN, SHERMAN CLYDE, in their individual capacities; DAN PAYNE, in his official capacity and in his individual capacity, Defendants-Respondents.	)	Supreme Court Docket No. 36825-2009

RESPONDENTS' BRIEF

Appeal from the District Court of the Second Judicial District for Latah County
Honorable Carl B. Kerrick, District Judge presiding

Don Halvorson
1290 American Ridge Road, Kendrick, Idaho 83537
Pro Se Appellant

Ronald J. Landeck
Ronald J. Landeck, P.C.
693 Styner Avenue, Suite 9, P.O. Box 9344, Moscow, Idaho 83843
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes and Rules

Other Authorities

STATEMENT OF THE CASE

Statement of the case .

This case concerns claims for damages by property owners, Appellant Don Halvorson ("Halvorson") and his wife Charlotte (collectively "Halvorsons"), against Respondent North Latah County Highway District (the "Highway District") resulting from the Highway District's activities on a segment of Camps Canyon Road, a public highway under Highway District jurisdiction. Halvorsons assert that the width of Camps Canyon Road is limited to the actual surface of the roadway and that the Highway District's placement of gravel on the road in 2006, which widened the road surface between six inches and two feet, the Highway District's routine road grading and snow plowing and the Highway District's issuance of an approach permit to a neighbor violated Halvorsons' constitutionally protected property rights. The District Court determined that Camps Canyon Road is a public road established by public use with a minimum fifty foot width pursuant to Idaho Code § 40-2312. In its *Opinion and Order on Plaintiffs' Motions for Partial Summary Judgment and Defendants' Motion for Summary Judgment*, the District Court concluded that the "Highway District has acted within its authority to maintain Camps Canyon Road." R, Vol. VII, pp.1454-1484. The *Opinion and Order* granted Respondents' summary judgment motion and dismissed all of Halvorsons' claims. Halvorsons' numerous constitutional claims, including takings claims, procedural due process claims, Fourteenth Amendment due process and equal protection claims, were dismissed primarily because the Highway District acted at all times within its legal authority. The District Court

found that Halvorsons did not request a validation hearing under I.C. § 40-203A(1) and concluded that the Highway District may, but is not required to, initiate validation hearings when no validation hearing is requested. The District Court also concluded that the Highway District's issuance of a driveway permit to Halvorsons' neighbor's did not affect Halvorsons' property interests, fell within exceptions to liability under I.C. § 6-904 B and did not require a due process hearing. The District Court dismissed Halvorsons' tort claims that allegedly arose prior to May 8, 2007 for failure to timely file a notice of tort claim under I.C. § 6-905, dismissed Halvorsons' claims against Respondent Highway District commissioners and employee Dan Payne pursuant to exceptions to governmental liability under I.C. § 6-904 and I.C. § 6-904 B and dismissed Halvorsons' remaining claims for failing to establish a prima facie case, for failing to state any cognizable claim and for prosecuting criminal offenses Halvorsons have no authority to prosecute. The District Court found without basis or merit and denied Halvorsons' various other motions, including those from the extensive list found in *Plaintiffs' Motions for Partial Summary Judgments and Other Motions Submitted January 24, 2009, and Brief* and/or from other rulings by the District Court on Halvorsons' earlier motions for declaratory judgment and summary judgment, and denied Halvorsons' motions for reconsideration.

Course of proceedings.

Halvorsons filed suit against Respondents on March 3, 2008. Numerous preliminary motions were filed by the parties and decided by the District Court. Halvorsons filed a motion for partial summary judgment with other motions on January 26, 2009. Respondents filed a motion for summary judgment on February 3, 2009. A hearing on all outstanding motions took

place on March 3, 2009. The District Court issued the Opinion and Order on May 11, 2009 on all motions, granting Respondents' motion for summary judgment dismissing all of Halvorsons' claims. The District Court awarded attorney fees and costs to Respondents on August 3, 2009. Halvorson appealed on June 19, 2009.

Statement of facts.

1. Camps Canyon Road has been continually used by the public at least since the 1930's. Affidavit of Orland Arneberg ("Arneberg Affidavit"), par. 5 and 7, R, Vol. IV, p. 645.

2. At least since 1974, the Highway District has maintained Camps Canyon Road as needed for safe travel by grading and/or adding gravel. Affidavit of Dan Payne ("Payne Affidavit"), par. 2 and 4, R, Vol. IV, p. 637.

3. Following notice and public hearing, and pursuant to Idaho Code § 40-202(1), the Highway District adopted the official map of the highway system under its jurisdiction and recorded that official map under Instrument No. 35617, records of Latah County, Idaho on November 18, 1986. Camps Canyon Road was a public highway prior to adoption of the official map and has been listed on the Highway District's official map from its adoption in 1986 to the present as a public highway under jurisdiction of the Highway District. Carscallen Affidavit, R, Vol. IV, p. 642.

4. Although improved over the years, Camps Canyon Road follows the same approximate centerline now that it has since the early 1930's, by Orland Arneberg's personal observation, and since 1974, by Dan Payne's personal observation. Arneberg Affidavit, par. 8, R, Vol. IV, p. 645; Payne Affidavit, par. 8,R, Vol. IV, p.638. Larry Hodge, licensed Idaho

surveyor, opines that based upon a comparison of historic aerial maps that the location and course of Camps Canyon Road has not been changed between 1940 and 2004. Affidavit of Larry Hodge ("Hodge Affidavit"), par. 5,R, Vol. VI, p. 1144.

5. In 2005 and 2006, to improve road safety for increased public vehicular traffic, the Highway District widened the traveled surface of Camps Canyon Road on its southerly side (the side owned by the Wagners opposite the real property owned by Halvorsons) by drilling and blasting bedrock, adding gravel to level the road surface, sloping and seeding the banks on that side, extending the culvert under the road by approximately four feet (4') and improving the ditch on that southerly side of the road. Payne Affidavit, par. 6, R, Vol. IV, p. 637. After the improvements to Wagners' side were complete, Camps Canyon Road was widened slightly in 2006, meaning less than a foot or two, on the Halvorsons' side of the road when the Highway District spread gravel over the traveled portion of the roadway. Payne Second Affidavit, par. 4, R, Vol. VI, p. 1210.

6. After the Highway District improvements in 2006, the traveled surface of Camps Canyon Road did not exceed approximately 23 ½ feet in width in the general vicinity of Halvorsons'property and averaged approximately 21 feet in width in that same stretch. Payne Affidavit, par. 7, R, Vol. IV, p. 638.

7. In addition to using and maintaining the traveled surface of Camps Canyon Road and in order to properly grade and drain the road for safe public travel, the Highway District must maintain the cut slope, ditch and culvert on the side opposite Halvorsons' property and the Highway District must utilize the fill slope adjacent to the traveled surface on Halvorsons' side

of Camps Canyon Road for structural support for the traveled surface and for snow removal and storage in winter months. Payne Affidavit, par. 9, R, Vol. IV, p. 638.

8. A minimum 50 foot width is reasonably necessary to properly maintain public highways in rural Latah County, including Camps Canyon Road, that are safe and reasonably convenient for public travel. Payne Affidavit, par. 10, R, Vol. IV, p. 638.

9. Halvorsons acquired property along Camps Canyon Road in 1996. Halvorsons' Deed, R, Vol. 5, p. 1105.

10. In 1997, Halvorsons constructed a fence on the steep fill slope of Camps Canyon Road which, in places, is within fifteen feet (15') of the centerline of Camps Canyon Road. The Highway District's essential maintenance activities, of road grading and snow plowing cannot, given the steepness of the slope on Halvorsons' property, be undertaken without some gravel or snow reaching Halvorsons' fence. The Highway District has been diligent in its efforts to avoid causing any damage to Halvorsons' fence or property. Payne Affidavit, par. 12, R, Vol. IV, p. 639.

11. Since 2005 and 2006, the only significant activities that have been undertaken by the Highway District on Camps Canyon Road in the area of Halvorsons' real property are graveling, road grading and snow plowing. These activities are essential to proper maintenance of all public roads. These activities and vehicular use contribute to the movement of gravel particularly toward the sides of a road. In the grading process, most gravel is brought back toward the road center, but inevitably some gravel moves outward, which serves to stabilize and

support the road but does result in minimal, necessary widening of the road over time. Payne Second Affidavit, par. 5, R, Vol. VI, pp. 1210-1211.

12. All public highway use and maintenance on Camps Canyon Road by the Highway District in the vicinity of Halvorsons' real property, including cut slope to fill slope, has occurred and lies within the Highway District's minimum 50 foot wide right-of-way. Payne Affidavit, par. 10 and 11, R, Vol. IV, p. 638.

13. On or about March, 2006, Robert Wagner, who was in the process of building a residence, applied to the Highway District, using the Highway District's standard form, to obtain a permit for an approach onto Camps Canyon Road from Wagners' real property. Highway District foreman Dan Payne met with Mr. Wagner who showed Mr. Payne a post next to the road which Mr. Wagner said represented his southern property line. North of that post was an old driveway that used to lead to a home and outbuildings on Mr. Wagner's property. At least 50 feet further north of that driveway, Mr. Wagner had begun construction of a driveway which he wanted to be the location for his approach permit. Mr. Payne approved his approach permit application for that location. Payne Second Affidavit, par. 6, R, Vol. VI, p. 1211.

14. On or about April, 2006, Mr. Wagner told Mr. Payne that Halvorson had complained that the driveway approach was on the Halvorsons' real property. Mr. Payne reviewed Wagners' Deed to Wagners' real property, and verified by inspection that the approach for which the permit had been issued was located well within Wagner's property. Payne Second Affidavit, par. 7, R, Vol. VI, pp. 1211-1212.

15. On or about June, 2006, Mr. Wagner told Mr. Payne that Halvorson had obtained a survey of the area and, based on that survey, that he wanted Mr. Wagner to move his driveway. Mr. Wagner filled out a new application and showed Mr. Payne the location, which was at least one hundred feet north of the original, permitted approach. Mr. Payne approved this second application on June 9, 2006. R, Vol. VI, pp. 1215-1216. Dan Payne revoked the first permit and threw it away as it was no longer valid. Payne Second Affidavit, par. 9, R, Vol. VI, p. 1212.

16. Mr. Wagner proceeded over the next weekend to construct the new driveway and he had the rock used in construction of the first driveway pulled onto his property and filled in the cut that was made for the first driveway with soil. Payne Second Affidavit, par. 10, R, Vol. VI, pp. 1212.

17. The Highway District has delegated to its foremen the responsibility to review and issue approach permits. Payne Second Affidavit, par. 12, R, Vol. VI, pp. 1212-1213; Second Affidavit of Dan Carscallen filed herein on February 2, 2009 ("Carscallen Second Affidavit"), par. 7, R, Vol. VI, p. 1159.

18. Halvorsons have not filed any petition with the Highway District to initiate a validation proceeding under Idaho Code section 40-203 A. Carscallen Second Affidavit, par. 8, R, Vol. VI, p.1159.

19. Halvorsons filed a Tort Claim Notice with the Highway District on November 6, 2007. This is the only tort claim notice that has been filed by Halvorsons with the Highway District. Carscallen Second Affidavit, par. 3, R, Vol. VI, p. 1158.

20. Key public records related to this case are the following:

a. Instrument No. 501677, records of Latah County, Idaho ("Wagners' Deed" to "Wagners' real property," as defined below).

b. Instrument No. 424411, records of Latah County, Idaho ("Halvorsons' Deed" to "Halvorsons' real property").

c. Instrument No. 57421, records of Latah County, Idaho ("1911 Deed").

d. 1940 aerial photo, with mapping annotations, records of Latah County, Idaho ("1940 aerial").

e. 2004 aerial photo, records of Latah County, Idaho ("2004 aerial").

f. Instrument No. 506484, records of Latah County, Idaho ("July, 2006 Survey").

g. Amended Record of Survey, Instrument No. 513819, records of Latah County, Idaho ("May, 2007 Survey"), which describes the boundaries of the Wagners' real property, being, for purposes of this Affidavit, the "2.78 AC±" parcel noted on the May, 2007 survey contiguous to Camps Canyon Road.

Defendants' Second Record Supplement in Support of Defendants' Motion for Summary Judgment, par. 2, R, Vol. V, pp. 1105, 1107-1115.

ADDITIONAL ISSUES PRESENTED ON APPEAL

Whether the District Court improperly granted Respondents' motion for summary judgment.

Whether Respondents are entitled to an award of attorney fees on appeal.

Respondents are claiming attorney fees on appeal based upon (i) Idaho Code § 12-121 I.R.C.P. 54(e)(1) and I.A.R. 41(a) for reasons that Halvorson has pursued all issues raised by the appeal either frivolously, unreasonably or without legal basis or without factual support and

Respondents will be prevailing parties on appeal; and (ii) Idaho Code § 12-117 and and I.A.R. 41(a) for the reason that Halvorson, as a party against whom judgment on this appeal will be entered, has acted in this appellate proceeding without a reasonable basis in fact or law and the Highway District, as a "taxing district" under Idaho law and as the prevailing party on all issues in this appeal will be entitled to receive an award of reasonable attorney fees. Applying Rule 54(e)(3) I.R.C.P. factors, Respondents will be entitled to the full amount of attorney fees incurred in this appeal.

ARGUMENT

A. Introduction.

Judge Kerrick adeptly organized the Opinion in this action by dividing Halvorsons' voluminous and confusing claims and arguments into three (3) analytical parts. The first part focused on issues dealing with status of Camps Canyon Road. The District Court's findings and conclusions on those issues provided the primary basis for analyzing the remaining two (2) parts, namely, Halvorsons' due process claims and a smattering of remaining claims. Respondents' briefing on the numerous motions before the District Court had employed a similar approach. To simplify review of the lower court judgment, this brief will address issues on appeal within the conceptual framework utilized by the District Court. In the event Respondents' Brief fails to address any issues raised by Halvorson, such failure or omission will have been inadvertent and likely attributable to an inability to understand Halvorson's argument(s). More particular briefings on issues raised prior to the summary judgment motions that are the subject of this

appeal have been made as part of the Clerk's Record On Appeal and are offered by this reference, if necessary, to set forth Respondents' argument(s) on any such issues.

B. Standard of review of the summary judgment before this Court.

The standard of review of the summary judgment before this Court is as set forth in *Sprinkler Irrigation Company, Inc. v. John Deere Insurance Company, Inc.*, 139 Idaho 691, 85 P.3d 667 (2004), a case that shares certain, common issues with the instant appeal, as follows:

> The standard of review is the same standard used by the district court ruling on the summary judgment motion. *Baker v. Sullivan,* 132 Idaho 746, 748, 979 P.2d 619, 621 (1999). Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Thomson v. Idaho Ins. Agency, Inc.,* 126 Idaho 527, 529, 887 P.2d 1034, 1036 (1994). "I.R.C.P. 56(e) provides that the adverse party may not rest upon mere allegations in the pleadings, but must set forth by affidavit specific facts showing there is a genuine issue for trial." *Carnell v. Barker Mgmt., Inc.,* 137 Idaho 322, 327, 48 P.3d 651, 656 (2002) (citations omitted). "Affidavits supporting or opposing the motion for summary judgment 'shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.' " *Id.* "The admissibility of the evidence contained in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial." *Id.* "Summary judgment is appropriate where the nonmoving party bearing the burden of proof fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Id.*
>
> Evidentiary rulings shall be reviewed under an abuse of discretion standard. *Perry v. Magic Valley Reg'l. Med. Ctr.,* 134 Idaho 46, 50, 995 P.2d 816 (2000). Upon review to determine whether a trial court abused its discretion, this Court inquires: (1) whether it correctly perceived the issue as discretionary; (2) whether it acted within the boundaries of its discretion and consistently with applicable legal

> standards; and (3) whether it reached its decision by an exercise of reason. *Id; Swallow v. Emergency Med. of Idaho, P.A.*, 138 Idaho 589, 592, 67 P.3d 68, 71 (2003) (citing *State v. Merwin,* 131 Idaho 642, 962 P.2d 1026 (1998); *Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).
>
> . . .
>
> Upon moving for summary judgment, the moving party must show the absence of a genuine issue of material fact. *Quinlan v. Idaho Comm'n for Pardons and Parole,* 138 Idaho 726, 729, 69 P.3d 146, 149 (2003). The burden then shifts to the nonmoving party to show that a genuine issue of material fact does exist. *Id.* The nonmoving party must come forward and produce evidence to set forth specific facts showing a genuine issue of material fact. *Id.* The nonmoving party must present more than speculation or a mere scintilla of evidence to create a genuine issue. *G & M Farms v. Funk Irrigation Co.,* 119 Idaho 514, 517, 808 P.2d 851, 854 (1991). Failure to do so will result in an order granting summary judgment. *Quinlan,* 138 Idaho at 729, 69 P.3d at 149.

Sprinkler, 139 Idaho at 671-674, 85 P. 3d at 695-698.

C. Status of Camps Canyon Road.

Camps Canyon Road is a public highway established through public use.

The unrefuted facts on this record from Respondents' affidavits establish that Camps Canyon Road is a public highway established by prescription. Camps Canyon Road is referenced as a "County Road" in the 1911 Deed, and, beyond that, by Orland Arneberg's recollections of public use in the 1930's and, more recently by Highway District foreman Dan Payne's continuous observations and of the public use and public work since 1974. *Arneberg Affidavit*, R, Vol. IV, p. 645; *Payne Affidavit*, R, Vol. IV, p. 637, *Carscallen Affidavit*, R, Vol. IV, p. 642. The Highway District also conducted a public hearing under authority of Idaho Code § 40-202 prior to adopting the official map of the Highway District in 1986, which map lists

Camps Canyon Road as a public highway under jurisdiction of the Highway District. Carscallen Affidavit, R, Vol. IV, p. 642.

The District Court found that the Halvorsons "do not refute the fact that Camps Canyon Road is a public highway through public use" as established by Highway District affidavits. *Opinion and Order*, R, Vol. VII, p. 1549. Moreover, the District Court determined Halvorsons had "concurred that the road is a public highway established by prescription within the Plaintiffs' current motion for summary judgment." *Id.* at p. 1458, citing *Plaintiffs' Motion for Partial Summary judgments and Other Motions Submitted January 26, 2009, and Brief* at 29-31, R, Vol. V, pp. 946-948. Halvorsons have also confirmed their agreement in other briefing filed with the trial that Camps Canyon Road existed as a public highway by prescription, including by making this statement:

> Further, Plaintiffs do not dispute Camps Canyon Road was at some time used for a period of five years which may have coincided with being worked and dept up at the public expense. If as an element of the specific issue to be adjudicated and for this motion only, Plaintiffs do not dispute Camps Canyon Road existed as an unrecorded prescriptive road/highway/right of way, as is where is until the alterations in 1996.

Plaintiffs' Reply Brief to Defendants' Answering Brief to Plaintiffs' Motion for Partial Summary Judgment, R, Vol. IV, p. 714. see also R, Vol. V, p. 932 (wherein Halvorsons state: "Camps Canyon Road is an unrecorded prescriptive right of way").[1]

---

[1] The trial court also addressed Halvorsons' vain attempt to nullify these admissions and the public road's status in the following footnote of the *Opinion and Order*:

> The Plaintiffs set forth a novel argument that the original right-of-way was nullified based upon alterations made by the Highway District in 1996. The Plaintiffs relied on *District of Columbia v. Robinson*, 180 U.S. 92, 21 S.Ct. 283,

The record in this case also establishes the public has used the road for many years and that the Highway District has maintained the road at the expense of the public at least since 1974, Payne Affidavit, R, Vol. IV, p. 637. These facts alone satisfy the requirements for determining that Camps Canyon Road is a public highway. As set forth in *Ada County Highway District v. Total Success Investments, LLC*, 145 Idaho 360, 179 P.3d 323 (2008):

> The requirements for determining whether a public highway exists are set forth in I.C. § 40-202. According to the statute, a public road may be acquired: (1) if the public uses the road for a period of five years, and (2) the road is worked and kept up at the expense of the public. I.C. § 40-202(3); *Floyd v. Bd. of Comm'rs,* 137 Idaho 718, 724, 52 P.3d 863, 869 (2002). The highway district has the burden of proving by a preponderance of the evidence that public rights were established. *See Floyd,* 137 Idaho at 724, 52 P.3d at 869.
>
> Public status of the roadway can be established by proof of regular maintenance and extensive public use. *Id.* There is no intent requirement to create a public road pursuant to I.C. § 40-202(3). *Id.* at 727, 52 P.3d at 872. "[T]he primary factual questions are the frequency, nature and quality of the public's use and maintenance." *Id.* The public must use the road regularly, and the use must be more than only casual or desultory. *Burrup,* 114 Idaho at 53, 753 P.2d at 264.
>
> Maintenance need only be work and repairs that are reasonably necessary; it is not necessary maintenance be performed in each of the five consecutive years or through the entire length of the road. *Floyd,* 137 Idaho at 724, 52 P.3d at 869 (citing *Roberts v. Swim,* 117 Idaho 9, 16, 784 P.2d 339, 346 (Ct.App.1989); *State v. Nesbitt,* 79 Idaho 1, 6, 310 P.2d 787, 790 (1957), *overruled on other grounds by French v. Sorensen,* 113 Idaho 950, 751 P.2d 98 (1988)).

---

45 L.Ed. 440 (1901) in support of this theory. However, the facts of *District of Columbia v. Robinson* can be distinguished from the case at hand because the easement addressed in that case was of smaller proportion: specifically, the easement was limited to the width of the roadway surface. *[continued]* *Id.* at 108-09, 21 S.Ct. at 289. Nothing within the case supports the Plaintiffs' argument that the width of Camps Canyon Road is limited to the surface of the roadway. Further, nothing within *District of Columbia v. Robinson* supports the Plaintiffs' novel theory of nullification of the width of the original right of way.

Id. at 365-66, 179 P.3d at 328-29.

Camps Canyon Road shall not be less than fifty feet (50') wide.

Halvorsons' claims in this case and Halvorson's claims on appeal are rooted in the notion that the width of Camps Canyon Road is limited to the traveled surface of the roadway. This notion is contrary to law as applied to the facts of this case. Idaho Code § 40-2312 establishes that the minimum width of a public highway in Idaho is fifty feet.

> All 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 in the discretion of the authority in charge of the construction and maintenance. Bridges located outside incorporated cities shall be the same width to and across the river, creek or stream as the highway leading to it.

I.C. § 40-2312. The District Court determined that "there is no evidence in the record before this Court that Camps Canyon Road existed prior to 1887" and concluded that the statute's exception to the fifty foot width requirement (..."except those of a lesser width presently existing....") was "inapplicable to the case at hand." *Opinion and Order*, R, Vol. VII, p. 1461.

> There is a long history in Idaho case law which explains and supports the purpose of a public highway being a minimum width of fifty feet. This purpose was set forth by the Idaho Supreme Court in *Meservey v. Gulliford*, 14 Idaho 133, 93 P. 780 (1908).
>
> > It would seem that the right acquired by prescription and user carries with it such width as is reasonably necessary for the reasonable convenience of the traveling public, and, where the public have acquired the easement, the land subject to it has passed under the jurisdiction of the public authorities for the purpose of

> keeping the same in proper condition for the enjoyment thereof by the public. See Whitesides v. Green, supra. And, where the right is so acquired, such width must be determined from a consideration of the facts and circumstances peculiar to each case. However, it must be borne in mind that the statute fixes the width of highways at not less than 50 feet, and common experience shows that width no more than sufficient for the proper keeping up and repair of roads generally.

Id. at 148, 93 P. at 785 While *Meservey* was decided in 1908, it was more recently discussed in 1983, in *Bentel v. Bannock County*, 104 Idaho 130, 656 P.2d 1383 (1983). In *Bentel*, the Idaho Supreme Court found that the fifty foot width of a public highway was necessary not only for proper upkeep and repair of roads, but also for foreseeable public uses, such as sewage systems, runoff, communications and other services.

> *Meservey* simply held that the state need not claim legal title to a highway in an action filed to protect the public interest in a prescriptive roadway easement. It did not address the scope of such easements, other than that one holding of the case is that as to width a 50 foot easement denied by the trial court, being in line with Sec. 932, Rev.Stat. (now I.C. § 40-904) will be upheld, because "common experience shows that width [is] no more than sufficient for the proper keeping up and repair of roads generally." In more contemporary decisions, other jurisdictions have held the scope of such easements comprehensive enough to include reasonably foreseeable public uses of such roadways, such as subsurface installations for sewage, runoff, communications and other services necessary to the increased quality of life which generally accompanies the growth of civilization. "[A] highway easement acquired by prescription is no less comprehensive than one acquired by grant, dedication or condemnation."

Id. at 133, 656 P.2d at 1386 (internal citations omitted)

Thus, statutory authority establishes that fifty feet is the minimum width of a public highway in Idaho. This minimum width encompasses the surface area of the roadway, as well as area that is commonly referred to as the right of way. The right of way is that area of undeveloped land next to the highway which is necessary for the proper upkeep and repair of the road.

Opinion and Order, R, Vol. VII, pp. 1461-62.

Halvorsons' position, that the width of a public highway should be limited to the actual surface of the roadway, is contrary to statutory authority, would defeat the purpose of that statute as upheld by Idaho courts throughout its long history and would result in the inability of governmental entities exercising jurisdiction over public highways to properly keep and improve public highways "for the reasonable convenience of the traveling public" and "as the increased travel and the exogenous of the public may require. *Id.* The District Court's determination that "Camps Canyon Road is a public highway which spans the width of fifty feet. . . encompasses the surface of the roadway, as well as right of way necessary for the proper upkeep and repair of the road" should be sustained. *Opinion and Order*, R, Vol. VII, p. 1463.

The District Court also properly determined the "character, width, length and location...." of Camps Canyon Road by reference to the official map of the Highway District's system and to the road's centerline, "which has remained the same since 1974" and "establishes the midpoint of the fifty foot span." *Id. See Schneider v. Howe*, 142 Idaho 767, 774, 133 P.3d 1232, 1239 (2006); *see also Kosanke v. Kopp*, 74 Idaho 302, 261 P.2d 815 (1953). Payne Affidavit, R, Vol. IV, p. 638.

The Highway District's maintenance of and improvements to Camps Canyon Road have occurred entirely within the legal width of Camps Canyon Road.

Halvorson variously contends that the Highway District has damaged the Halvorsons and their property by pushing gravel six inches to the northeast, plowing snow, pushing a wind-fallen tree and issuing a driveway permit to their neighbor. R, Vol. II, p. 322; *Id.* at 407-408; R, Vol.

VI, p. 1348-50. The Highway District, however, has established through the Payne Affidavit, Arneberg Affidavit, Third Affidavit of Dan Payne, and Hodge Affidavit that any such actions taken by the Highway District to improve and maintain Camps Canyon Road have occurred within the fifty foot width of the road, the location and centerline of which has not changed to any significant degree since at least 1940. R, Vol. IV, p. 637-638; R, Vol. VII, p. 1423; R, Vol. IV, p. 645; R, Vol. VI, p. 1144-46.

The principal damages claimed by Halvorsons are to a fence Halvorson constructed on his property in 1997. R, Vol VI, p. 1350-51. That fence, however, was constructed within the fifty foot width of Camps Canyon Road and, in places, within fifteen feet of the centerline of Camps Canyon Road. Payne Affidavit, R, Vol. IV, p. 639.

The District Court correctly concluded based on the record that Halvorsons:

> "...have failed to refute the facts presented by the Highway Department [sic] establishing that the centerline of the roadway has not substantially moved and that any repairs to the road have been done within the right of way of the road. In a response to a motion for summary judgment, the opposing party must set forth "specific facts" showing a genuine issue. I.R.C.P. 56(e);*Verbillis v. Dependable Appliance Co.*, 107 Idaho 335, 337, 689 P.2d 227, 229 (Ct. App. 1984).
>
> The Plaintiffs have presented evidence that their fence was damaged by the defendants in the course of maintaining the road. The Plaintiffs' belief that the width of the roadway is limited to the surface of the road, and the fact that their fence is near the surface of the roadway does not change the width of the entire public highway or create an issue of fact. The Plaintiffs cannot rely on the fact that their fence is located within the right of way to establish possession of property within the right of way.
>
> > Possession and use of an unused portion of a highway by an abutting owner is not adverse to the public and cannot ripen into a right or title by lapse of time no matter how long continued. Nor does such possession and use, even though by express permission

> of the public authority, work an estoppel against the public use. Even in the case of a highway established by user, all portions of the highway right of way need not be maintained and kept up at public expense. In *Boise City v. Sinsel, supra*,we held that an abutting owner who erected and maintained a building on a portion of a public street under a permit granted by the city council, for a period of 25 years, did not acquire a right to such occupancy, and that the city was not estopped to cancel the permit and require the removal of the building.
>
> *Rich v. Burdick*, 83 Idaho 335, 345, 362 P.2d 1088, 1094 (1961) internal citations omitted). The Plaintiffs have not obtained any possessory rights to land within the fifty foot width of the road, thus, the Plaintiffs' claims with regard to the fence fail.

Opinion and Order, R, Vol. VII, p. 1465-66. Photographs in this record further demonstrate the extent to which the Highway District has diligently attempted to avoid causing harm to Plaintiffs' fence. R. Vol VII, pp. 1376-7, 1381-2, 1387.

Halvorsons have offered no evidence on this record to show that the Highway District has done any act outside the minimum fifty foot width of Camps Canyon Road to damage Halvorsons or their property. Halvorson merely argues on appeal that the Highway District's authority is limited to a lesser width, which assertion is without legal basis.

Halvorson's takings claims fail because the Highway District has acted within its statutory authority.

Halvorson argues that the Highway District's actions in placing gravel on the roadway and issuing an approach permit to Mr. Wagner, the neighbor, have taken the Halvorsons' property through "encroachment," "deprivations," "use of our land," "misappropriations," "loss of right to exclude others," widening," "crossing property line," "seizure," "inverse condemnation" and other similar phrases. *Complaint*, R, Vol. I, pp. 10-33. However, as

discussed above, because the Highway District's actions occurred within the public right of way, there has been no taking of Halvorsons' property. Halvorson cannot maintain an inverse condemnation action "unless there has actually been a taking" of [Halvorsons'] property. *KMST, LLC v. County of Ada*, 138 Idaho 577, 579-560, 67 P.3d 56, 59-60 (2003). *See also Reisenauer v. State of Idaho, Department of Highways*, 120 Idaho 36, 40, 813 P.2d 375, 379 (Ct. App. 1991) ("...when the wrought portion of a highway is widened so as to include the whole of the original location... and the owner of the fee has no ground for complaint, even if he is deprived of privileges in the land taken which he had previously enjoyed....").

The threshold step in a takings inquiry, whether in a case of a regulatory or physical nature, "is to determine whether the Plaintiffs *ever* possessed the property interest they now claim has been taken by the challenged governmental action." See *Kim v. City of New York*, 681 N.E.2d 312, 314 (N.Y. Ct. App. 1997) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027, 112 S.Ct. 2886, 2899. The purpose of this "logically antecedent inquiry into the nature of the owners' estate" is to determine whether principles of the allegedly taken property was a "stick in the bundle of property rights" acquired by the owner. (*Lucas, supra,* 505 U.S. at 1027, 112 S.Ct. at 2899).

It is evident, applying Idaho highway law as discussed hereinabove, that Halvorsons' "bundle of property rights" when they acquired their property in 1996 was subject to the rights of the public to utilize the minimum 50-foot wide right-of-way of Camps Canyon Road for public highway purposes and to the statutory authority of the Highway District to maintain and improve that public right-of-way. As a result, Halvorsons cannot maintain an inverse condemnation

claim against the Highway District based upon this record of the Highway District's actions in the properly discharging its statutory responsibilities related to Camps Canyon Road.

Halvorson also argues, without proof of any kind, that there has been an abandonment or extinguishment of the public's rights in Camps Canyon Road, and that any widening constitutes an unlawful taking of their property. Halvorsons' argument that Camps Canyon Road "may be informally abandoned..." is unpersuasive, is unsupported in law and cannot be upheld. *Floyd v. Bonneville County*, 137 Idaho 718, 728, 52 P.3d 863, 873 (2002).

Halvorson has also challenged the constitutionality of Idaho Code section 40-202(3). That issue, however, was recently decided in *Ada County District v. Total Success Investments, LLC*, 145 Idaho 360, 179 P.3d 323 (2008), wherein the Court held the statute "not unconstitutional on its face" while acknowledging that the applicable limitations provision of Idaho Code § 5-224 to challenge another's possession of one's property was "four years from the accrual of the cause of action." *Id.* at 369, P.3d at 332. As the establishment of Camps Canyon Road as a public road occurred years before Halvorsons' acquired their property, Halvorsons are time barred from bringing any claim challenging the establishment of the public's rights in Camps Canyon Road.

In this case, Halvorsons' construction of a fence within the public right of way has provided the primary motivation for asserting his taking claims. However, his location of that fence does not vest private rights in contravention to the public's rights in Camps Canyon Road. In *Rich v. Burdick*, 83 Idaho 335, 362 P.2d 1088 (1961), the Idaho Supreme Court, ruling on a case involving a structure that had been placed in a public road, held:

> Even in the case of a highway established by user, all portions of the highway right of way need not be maintained and kept up at public expense. *Kosanke v. Kopp*, 74 Idaho 302, 261 P.2d 815. In *Boise City v. Sinsel, supra,* we held that an abutting owner who erected and maintained a building on a portion of a public street under a permit granted by the city council, for a period of 25 years, did not acquire a right to such occupancy, and that the city was not estopped to cancel the permit and require the removal of the building.

Id. at 345, 362 P.2d at 1094.

As to Halvorson's claim that the Highway District's issuance of access permit constituted a taking, the District Court found no evidence that the permit "encompassed property beyond the borders of the right of way of Camps Canyon Road." *Opinion and Order*, R, Vol. VII, p. 1468-69. Halvorson also asserts takings claims related to the issuance of the access permit under the United States and State of Idaho Constitutions and alleges damages to Halvorsons' property from the Wagners' construction of a driveway. Wagners abandoned that initial driveway by June, 2006, and filled in the area that had been excavated. *Payne Second Affidavit*, par. 10, R, Vol. VI, p. 1212. The Highway District issued a permit but did not occupy or undertake any construction activity on Halvorsons' property and, as a result, did not take Halvorsons' property or trespass upon Halvorsons' property. R, Vol. VI, pp. 1211-13.

To assert a claim against the Highway District for inverse condemnation, Halvorson "must establish that treatment under takings law, as opposed to tort law is appropriate under the circumstances." *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1355 (Fed. Cir. Ct. App. 3003). The *Ridge Line* Court described the "tort-taking inquiry" as requiring consideration of "whether the effects" the party "experienced were the predictable result of the government's

action and whether the government's actions were sufficiently substantial to justify a taking." *Id.*

Elaborating on this two-part analysis, the Court stated:

> 'Inverse condemnation law is tied to and parallels, tort law.' 9 *Patrick J. Rohan & Melvin A. Reskin, Nichols on Eminent Domain* § 34.03[1] (3d ed. 1980 & Supp. 2002). Thus, not every "invasion" of private property resulting from government activity amounts to an appropriation. *Id.* The line distinguishing potential physical takings from possible torts is drawn by a two-part inquiry. First, a property loss compensable as a taking only results when the government intends to invade a protected property interest or the asserted invasion is the "direct, natural, or probable result of an authorized activity and not the incidental or consequential injury inflicted by the action.'
>
> ...
>
> Second, the nature and magnitude of the government action must be considered. Even where the effects of the government action are predictable, to constitute a taking, an invasion must appropriate a benefit to the government at the expense of the property owner, or at least preempt the owners' right to enjoy his property for an extended period of time, rather than merely inflict an injury that reduces its value.

Id. at 1355-1356.

The Highway District's diligent issuance of an access permit followed established Highway District policies and procedures, including a thorough inspection by its foreman. *Second Payne Affidavit*, par. 10-11, R, Vol. VI, p. 1212. In no measure did the Highway District's action not "appropriate a benefit to the government at the expense of the property owner" or "preempt the owners' right to enjoy his property for an extended period of time." *Ridgeline, supra* at 1356. Courts are required to consider "whether the government's interference was substantial and frequent enough to rise to the level of a taking...'[i]solated invasions, such as one or two floodings..., do not make a taking..., but repeated invasions of the same type have often been held to result in an involuntary servitude." *Id.* (citations omitted).

The Highway District neither appropriated "a benefit to the government" nor did it preempt Halvorsons' "right to enjoy...for an extended period of time." Such conduct is not cognizable under takings law, rather, it may only be pursued under tort law principles, and as discussed later in this Brief, Halvorsons are barred from pursuing tort relief because of their failure to timely file a notice of tort claim in regard to this alleged conduct.

D. Halvorson's due process claims are without merit.

Halvorson's procedural due process claims are without merit.

Halvorson makes a variety of assertions regarding alleged violations of the Halvorsons' due process rights for lack of notice and the right to be heard prior to Highway District activities such as improving and maintaining Camps Canyon Road and issuing permits.

> Procedural due process "basically requires that a person, whose protected rights are being adjudicated, is afforded an opportunity to be heard in a timely manner." *Powers v. Canyon County*, 108 Idaho 967, 969, 703 P.2d 1342, 1344 (1985). There must be notice and the opportunity to be heard must "occur at a meaningful time and in a meaningful manner...." *Cowan v. Bd. of Comm'rs*, 143 Idaho 501, 512, 148 P.3d 1247, 1258 (2006) (quoting *Aberdeen-Springfield Canal co. v. Peiper*, 133 Idaho 82, 91, 982 P.2d 917, 926 (1999)) (internal quotations omitted.)

Ada County Highway Dist. v. Total Success Investments, LLC, 145 Idaho 360, 371, 179 P.3d 323, 334 (2008).

The Highway District is granted broad and exclusive authority to supervise public highways within its jurisdiction. This authority expressly provides the Highway District commissioners, including Respondents Arneberg, Clyde and Hansen, with "full power to construct, maintain, repair... and improve all highways within their system...." Idaho Code §

40-1310(1). There has been no showing by Halvorson that the Highway District is required by Idaho statute to conduct hearings before improving a public road or issuing access permits.

The Highway District is well within its legal rights to improve and widen a road without holding a public hearing when that improvement occurs within the Highway District's public right-of-way as is the record status of this case. Due process is not implicated when protected rights are not being adjudicated. *Id.* Road grading and snow plowing are not adjudications. Moreover, even if the District's actions resulted in the District making a claim to private property, such would not be a violation of Halvorsons' due process rights even if notice had been provided. *Total Success*, *supra* at 372, P.3d at 371. ("...[A]dequate notice is provided by "the statute itself, I.C. § 40-202(3), which provides that highways include those used and maintained by the public for five years.") *See also Powers v. Canyon County*, 108 Idaho 967, 970, 703 P.2d 1342, 1345 (1985).

Issuance of a driveway permit does not require a due process hearing. Idaho Code §40-1310 (8) expressly delegates to the Highway District full supervisory authority "to control access to said public highways...."; This exercise of authority is what occurred in connection with issuance of the access permit to Wagners. Title 40 of the Idaho Code does not require more.

Halvorsons' constitutional due process claims under the constitutions are without merit.

Halvorson brings due process claims pursuant to 42 U.S.C. § 1983, which provides for civil liability for any person who. under color of state law, subjects another "to the deprivation of any rights, privileges or immunities secured by the Constitution and bylaws." 42 U.S.C. § 1983. Section 1983 "does not create a cause of action," rather, it provides a vehicle for courts to review alleged violations of constitutional or statutory law. See *Aardvark Childcare and Learning*

Center, Inc. v. Township of Concord, 401 F. Supp. 2d 427, 444 (East. Dist. Pa. 2005). *See also BHA Investments, Inc. v. City of Boise*, 141 Idaho 168, 176, 108 P.3d 315, 323 (2004).

Halvorson's principal contentions in this regard are that Halvorsons' constitutionally protected property rights under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 13 of the Idaho Constitution as well as numerous Idaho statutes are violated by the Highway District's widening of Camps Canyon Road and by the Highway District's "custom and policy" in relying upon Idaho Code section 40-2312 and the Idaho Supreme Court's holdings in *Meservey* and its progeny to maintain and improve public prescriptive roadways within a 50-foot width. Halvorson also contends that these substantive due process rights were violated by the District's issuance of the Wagners' access permit.

Legal standards applicable to a § 1983 claim are set forth as follows:

> In order to prevail on a § 1983 claim, plaintiffs must establish that: 1) a deprivation of a constitutionally or federally secured right occurred, and 2) the alleged deprivation was committed by a person acting under color of state law.
> ...
> In order "to prevail on a non-legislative substantive due process claim, 'a plaintiff must establish as a threshold matter that he has a protected property interest to which the Fourteenth Amendment's due process protections applies.'"
> ...
> Real property ownership is indisputably a property interest protected by substantive due process.
> ...
> The subsequent inquiry is whether defendants' actions interfered with plaintiffs' use and enjoyment of their land to a degree that implicates substantive due process. In *United Artists Theatre Circuit v. Warrington*, 316 F.3d 392 (3d Cir. 2003), the third circuit held that in order to challenge a municipal land-use decision as a violation of substantive due process plaintiffs must show that the defendants' conduct "shocks the conscience." *Id.* at 400 (relying on standard set in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). The court noted that "[l]and use decisions are matters of local

> concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with improper motives.'" *Id.* at 402. In fact, only "conduct intended to injure in some way unjustifiable by any government interest" is the kind of action most likely to be deemed "conscience shocking." *County of Sacramento*, 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

Aardvark, supra at 444-445.

In *Maresh v. State Department of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 970 P.2d 14 (1988), the Idaho Supreme court further explained the state court's role in resolving substantive due process claims as follows:

> To determine whether an individual's due process rights under the Fourteenth Amendment have been violated, a court must engage in a two-step analysis. It must first decide whether the individual's threatened interest is a liberty or property interest under the Fourteenth Amendment." *Schevers v. State*, 129 Idaho 573, 575, 930 P.2d 603, 605 (1996) (citing *Smith v. Meridian Joint Sch. Dist. No. 2.*, 128 Idaho 714, 722, 918 P.2d 583, 591 (1996)); *see also*, *True v. Dep't of Health and Welfare*, 103 Idaho 151, 645 P.2d 891 (1982) (citing *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975)). Only after a court finds a liberty or property interest will it reach the next step of analysis, in which it determines what process is due. *Schevers v. State*, 129 Idaho 573, 575, 930 P.2d 603, 605.
>
> As stated by the United States Supreme Court, "[t]he requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972). Accordingly, the existence of [a party's] right to due process protections regarding her request to participate in the...depends on whether [the party's] interest...is within the scope of the liberty or property language of the Fourteenth Amendment.
>
> The United States Supreme court has noted that property interests are "created...by existing rules,...such as state law." *Id.* Likewise, this Court has indicated that "determination of whether a particular right or privilege is a property interest is a matter of state law." *Ferguson v. Bd. of Trustees of Bonner Cty. Sch.*, 98 Idaho 359, 564 P.2d 971, 975 (1977) (citing *Bishop v. Wood*, 426

> U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976)). Further determining the existence of a liberty or property interest depends on the "construction of the relevant statutes," and the "nature of the interest at stake." *True*, 103 Idaho at 154, 645 P.2d 891 (citing *Tribe, American Constitutional Law*, § 10-9, at 515-16 (1978)). Hence, whether a property interest exists can be determined only by an examination of the particular statute or ordinance in question. *Bishop*, U.S. 341, 96 S.Ct. 2074.

Id. at 226, P.2d at 19.

Applying these standards to Halvorson's motions for summary judgment and because the facts on this record establish that the District acted within its lawful statutory authority in managing Camps Canyon Road for public use, as those actions have been construed by Idaho courts throughout the State's history, the Highway District's actions have not "interfered" with Halvorsons' "use and enjoyment of their land" to any degree much less "to a degree that implicates substantive due process" or "shocks the conscience." *Aardvark, supra* at 445.

The United States Supreme Court has long viewed with disfavor "bare allegations of malice" such as are spewed forth against the Highway District in Halvorson's briefs and affidavits in this case and has held, under such circumstances, that

> governmental officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. See *Procunier v. Navarette*, 434 U.S. 555, 565, 98 S.Ct. 855, 861, 55 L.Ed.2d 24 (1978); *Wood v. Strickland*, 420 U.S., at 322, 95 S.Ct., at 1001.

Harlow v. Fitzgerald, 457 U.S. 800, 817-818, 102 S.Ct. 2727, 2738 (1982). The *Harlow* Court adopted a test designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment, that focuses on the "objective legal reasonableness of an official's conduct" in determining whether the official "could be expected

to know that certain conduct would violate statutory or constitutional rights." *Id.* at 2738 – 2739. The *Harlow* Court also opined that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Id.* at 2739 [citation omitted]. This doctrine applies directly to the circumstances of the instant case and this qualified immunity protects the individual Defendants in their performance of discretionary functions from civil damages and provides independent authority for the dismissal of all claims against individual Defendants, who, the record aptly demonstrates, acted in accordance with applicable law as known to them at the time of such actions. In addition, Halvorson has failed to establish as a threshold matter in the proof of a due process violation, any alleged arbitrary action by the individual Respondents' that "can properly be characterized as conscience-shocking in a constitutional sense." *United Artists, supra at 399,* citing *Collins v. Harker Heights*, 503 U.S. 115, 128, 112 S.Ct. 1061 (1992).

The Second Circuit Court of Appeals, in a New York land use case that dealt with similar snow plowing and road widening issues, reached the following decision and made the following observations:

> To establish a substantive due process violation, the [plaintiffs] must show that the Town's alleged acts against their land were "arbitrary," conscience-shocking," or "oppressive in the constitutional sense," not merely "incorrect or ill-advised." *Lowrance v. C.O.S. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994)
> ...
> ...although the snow plowing and paving may have been incorrect or ill-advised, such actions on the part of the Town were not so outrageous and arbitrary as to implicate the [Plaintiffs'] substantive due process rights. Rather, they constituted, at most, occasional unlawful encroachments on the "Reserved for

> Parking" parcel necessitated by the Town's performance of its municipal duties. An y dispute regarding such actions is best resolved in state court. *Zahra v. Town of Southold*, 48 F.3d 674, 680 (2d Cir.1995) ("[T]he Due Process Clause does not function as a general overseer of the arbitrariness in state and local land-use decisions; in our federal system, that is the province of the state courts.").

Ferran v. Town of Nassau, 471 F.3d 363, 369-370 (2006).

Likewise, Respondents' conduct has not been "conscience-shocking" in the least. Halvorson has totally failed to meet any required legal tests to establish a violation, and Halvorson's substantive due process claims must fail.

Halvorson's claim of being denied a hearing pursuant to I.C. § 40-203A is without merit.

Halvorsons failed and/or refused to request a validation hearing and to pay a reasonable fee under Idaho Code § 40-203A. Second Affidavit of Dan Carscallen, R, Vol. VI, p. 1159. The District Court determined that the Highway District is not required to initiate validation proceedings unless the property owner initiated the proceedings and paid the required fee, and "there is no evidence in this record" that such had occurred. *Opinion and Order*, R, Vol. VII, p. 1474. There is no due process violation under these circumstances.

E. Halvorson's remaining claims are without merit.

Halvorson's claims under the Idaho Tort Claims Act are without merit.

The Idaho Tort Claims Act, Idaho Code sections 6-901 et seq. ("ITCA") requires claimants against political subdivisions to submit a written "claim" to the clerk or secretary of the political subdivision within 180 days from the date the claim arose or reasonably should have been discovered. Idaho Code § 6-906. This 180-day period begins to run when the wrongful acts occur. *Mitchell v. Bingham Mem. Hosp.*, 130 Idaho 420 (1997). All ITCA claims must be written. Idaho

Code § 6-902(7). County highway district are political subdivisions for the purposes of the ITCA. *Curl v. Indian Springs Natatorium, Inc.*, 97 Idaho 637 (1976). Where the ITCA bars an action, summary judgment is appropriate. *Nelson v. Anderson Lumber Co.*, 140 Idaho 702 (Ct. App. 2004).

Halvorsons filed a Tort Claim Notice with the Highway District on November 6, 2007. Second Affidavit of Dan Carscallen, R, Vol. VI, pp. 1158, 1161-1164. All of Halvorsons' claims for damages against the Highway District under ITCA, prior to May 8, 2007, being 180 days prior to the Highway District's receipt of Halvorsons' Notice on November 6, 2007, and all Halvorsons' claims for which a notice of tort claim is required but which are not described in Halvorsons' Notice must be dismissed for failure to comply with the notice requirements mandated by Idaho Code sections 6-905, 907 and 908. *Overman v. Klein*, 103 Idaho 795, 797, 654 P2d 888, 890 (1982). Accordingly, the District Court dismissed all tort claims alleged by Halvorsons which arose prior to May 8, 2007.

The barred claims include claims described in Halvorsons' Notice for the reason that those claims arose more than 180 days prior to Halvorsons' filing, as follows: claims for damages to Plaintiffs' fence in 2004, 2005 and 2006 and claims for damages to Plaintiffs' real property, including from construction of the Wagners' driveway in 2006, and claims for damages from any alleged trespass, and/or nuisance from 1996 through May 8, 2007. *Second Affidavit of Dan Carscallen*, R, Vol. VI, pp. 1161-1164. § 11. E.

The barred claims also include claims not described at all in Halvorsons' Notice, as follows: claims that the Highway District failed to survey and record surveys in 1996, 2005 and 2006, claims that the Highway District failed to keep and/or maintain Highway District records

in 1996, 2005 and 2006, claims that the individual commissioners misrepresented information. Complaint, R. Vol I, pp. 8-34.See Idaho Code section 6-907; *Cook v. State of Idaho*, 133 Idaho 288, 298, 985 P.2d 1150, 1160 (1999).

Halvorsons' claims against individual commissioners and employee are without merit

The Highway District and the individual commissioners and employee are not liable for Halvorsons' claims arising out of alleged acts or omission of these individuals, exercising ordinary care, "in reliance upon or the execution or performance of a statutory...function...." Idaho Code section 6-904. Halvorson has alleged numerous violations by Respondents of such statutory functions, including those statutes referenced in the Complaint, namely Idaho Code sections 7-701 et seq., 40-203 A, 208, 604, 605, 608, 1307, 1310, 1311, 1312, 1336, 2012, 2302 and 2317, 67-5232 and 8001 et seq. R, Vol. I, pp. 8-34.

ITCA establishes a "rebuttable presumption that any act or omission of an employee within the terms and at the place of his employment is within the course and scope of his employment and without malice or criminal intent." Idaho Code section 6-903 (e). Halvorsons' Complaint does not set forth any facts that rebut the presumption that such conduct was within the course and scope of employment or that show any individual Respondents did not exercise ordinary care in the performance of these functions. To the contrary, Dan Payne's and Dan Carscallen's affidavits detail the District's due diligence in all operational matters related to this proceeding. Dismissal of claims of violation of statutory duties against the Highway District and all individual Respondents and should be affirmed.

Halvorson claims that the Highway District has abused its discretion by creating improper standards and policies regarding the Highway District's management of prescriptive right of ways. These claims against the Highway District's creation and implementation of policies likewise fail under the express language of Idaho Code § 60-904 which immunizes the Highway District and the individual foreman and commissioners for the "exercise...failure to exercise or perform a discretionary function or duty...whether or not the discretion be abused." *Id.* The legislature has provided such immunity from suit under the "discretionary function" exception to ITCA. The Idaho Supreme Court has set forth the "planning/operational" test for determining whether this immunity exists, and, under this test, a party is immune from activities involving "policy judgments and decision making." *United Pacific Railroad Company v. State of Idaho*, 654 F. Sup. 1236, 1242 (1987) (Dist. Ct. Idaho) (citing *Sterling v. Bloom*, 111 Idaho 211, 723 P2d 755 (1986). Accordingly, dismissal of Halvorsons' claims related to policy and standards issues should be affirmed.

Halvorson also claims that the Highway District commissioners' and employee's issuance of a driveway permit to the Wagners violates their duties to Halvorsons. Idaho Code § 6-904B(3), however, states, in part, as follows:

> A governmental entity and its employees while acting within the course and scope of their employment and without malice or criminal intent and without gross negligence or reckless, willful and wanton conduct as defined in section 6-904C, Idaho Code, shall not be liable for any claim which:
> ...
> 3. Arises out of the issuance...or revocation of...a permit...approval...or similar authorization.

Idaho Code § 6-904B(3).

The rebuttable prescription under Idaho Code § 6-903(e) is that the individual Respondents acted within the course and scope of employment and without malice or criminal intent applies to the issuance of a permit. While the immunity of section 6-904B(3) could be breached upon proof that rebuts the presumption or upon proof of "gross negligence or reckless, willful and wanton conduct," there is substantial evidence on this record that individual Respondents used ordinary care in the issuance and revocation. Halvorsons have set forth no admissible facts to the contrary. Dismissal of all of Halvorsons' claims as to issuance of this permit should be affirmed. Halvorson's other remaining claims are infirm and without merit.

Dismissal of Halvorsons' other claims should be affirmed as a matter of law for various reasons. Halvorsons have sprinkled their Complaint and other writings with vague assertions that the District has violated their rights to equal protection of the law. These averments have been made without any offer of evidence that Halvorsons have been "singled out" by the Highway District for discriminatory treatment. The evidence on this record is to the contrary in that the Highway District officials testify that their road improvement policies are applied uniformly and, in fact, that this is the only lawsuit in institutional memory in which taking and due process claims have been made against the Highway District. *Arneberg Affidavit*, R, Vol. IV, pp. 645-646. Halvorsons have not produced any particularized evidence to support any equal protection claim and any such claims must fail and their dismissal affirmed. See *Aardvark, supra* at 446-448.

Halvorsons claim relief based on a number of theories that are not supported by law. Where the Halvorsons have failed to establish their prima facie case, summary judgment is appropriate. *See Garzee v. Barkley*, 121 Idaho 881, 828 P.2d 334 (Ct. App. 1992) .

> We note, however, that the existence of disputed facts will not defeat summary judgment when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. *See Jerome Thriftway Drug, Inc. v. Winslow*, 110 Idaho 615, 717 P.2d 1033 (1986);*see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Bennett v. Parker*, 898 F.2d 1530, 1532 (11th Cir. 1990), *cert. denied*, 498 U.S. 1103, 111 S.Ct. 1003, 112 L.Ed.2d 1085 (1991). Facts in dispute cease to be "material" facts when the plaintiff fails to establish a prima facie case. In such a situation, there can be "no genuine issue of material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Celotex*, 477 U.S. at 322-33, 106 S.Ct. at 2552-58. This rule facilitates the dismissal of factually unsupported claims prior to trial.

Id. at 774, 828 P.2d at 337.

A claim has been satisfactorily stated if it contains "a concise statement of the facts constituting the cause of action and a demand for relief." *Clark v. Olsen*, 110 Idaho 323, 715 P.2d 993 (1986) (citing I.R.C.P. 8(a)(1)(2)). The complaint must be phrased as a series of numbered paragraphs, each of which is limited to a single set of circumstances. *Id.* R. Civ. P. 10(b) Halvorsons' claims, when taken together, are not concise, as required by Rule 8(a)(1)(2). Halvorsons' Complaint's length, disorganization, repetitiveness and lack of factual support render Halvorsons' Complaint unsatisfactory as to claims that are difficult to ascertain.

Halvorsons complain of some conduct that does not support any cognizable claim – e.g., "the conduct of the defendants...has been deliberate, flagrant, arbitrary, and offensive to the sense of democracy and to the sense of good government...." (Complaint, R. Vol. I, pp. 8-35 at § II.U.),

"the lack of any agency structure and the arbitrary disregard to resolve disputes and violations, the fomenting of neighborly disputes...," (*Id.* at § E and *see also*, § E. 6., P., P.2, Q.f.xiii.(a), "negotiating in bad faith" (*Id.*), "misrepresentation of statements and legal views and rulings...and questionable applications of or statements...of standards (*Id* at § Q.f.xii; *see also*, § Q.f.xiii(b)), "violated the doctrine of quasi-estoppel" (*Id.* at §Q.f.xiii(c)) and "testimony...flagrantly intended to thwart any and all remedies..." (*Id.* at § R.(6).) .

Other of Halvorsons' claims fail to state any cause of action. Halvorsons' Complaint specifically alleges violation of at least three statutory criminal provisions: § 18-7001, malicious injury to property; § 18-7008, trespass; and, § 18-7012 destruction of fences. Halvorsons, as civil litigants, have no authority to prosecute criminal offenses, and so these allegations facially fail to state any claim. Other Halvorsons' claims fail for lack of any factual assertion and include those related to the Highway District's alleged failure to train and failure to supervise, the claim for punitive damages and other claims perhaps unmentioned as a result of the disorganization and complexity of Halvorson's Complaint and briefing and the difficulty in ascertaining claims. The District Court's dismissal of all thee claims should be affirmed.

F. Halvorsons' motions are without merit.

In addition to Halvorsons' motion for summary judgment, various other motions were made as part of *Plaintiffs' Motions for Partial Summary Judgments and Other Motions Submitted January 26, 2009, and Brief* and denied by the District Court in the *Opinion and Order*. These include a motion to amend the complaint, a motion to compel discovery, motions for reconsideration, and motions for sanctions against Respondents.

Denial of Halvorsons' motion to amend the complaint to encompass any claim that conforms to the evidence should be affirmed because the request is broad, encompassing a Complaint that is twenty-seven pages long. Denial is consistent with I.R.C.P. 8(e)(1) which requires pleadings to "be simple, precise, and direct."

Denial of Halvorsons' motion to compel discovery should be affirmed for the reasons that the District Court had previously issued a protection order due to Halvorsons' requests for discovery which far exceeded limitations of the rules of civil procedure. *Opinion and order on Plaintiffs' Motions for Summary Judgment and Defendants' Motion for Protective Orders, for Enlargement of Time and for Attorneys' Fees.* R, Vol. IV, pp. 771-772.

Dismissal of Halvorsons' motion for sanctions against Respondents and their counsel for claims of discovery abuse and spoliation of evidence should also be affirmed. *See Plaintiffs' Motions for Partial Summary Judgment and Other Motions Submitted January 26, 2009, and Brief,* (Section 1.12 and 1.18), R, Vol. V, pp. 929-30 and 1941. The District Court found these motions to be without basis or merit.

The District Court's denial of Halvorsons' motion to reconsider its previous rulings on the Plaintiffs' motions for partial summary judgment filed on September 19, October 6 and October 21 should also be affirmed. Opinion and Order, R. Vol. VII, p. 1483.

G. Respondents should be awarded attorney fees on appeal.

Respondents, as prevailing parties on appeal, will be entitled to attorney fees under Idaho Code § 12-121 , I.R.C.P. 54(e)(1) and I.A.R. 41(a) because Halvorson filed and pursued all causes of action on appeal unreasonably and without legal and factual foundation. Halvorson pursued

claims for relief that either were inconsistent with their position that Camps Canyon Road was a public highway established by public use or were not supported factually. Halvorsons did not place a reasonable construction on Idaho law. Halvorsons pursued tort claims for property damage not covered by a notice of tort claim filed with the Highway District as required by Idaho law. Halvorson also pursued relief for conduct that does not support any cognizable claim, for criminal matters Halvorsons have no authority to prosecute and for claims that lacked factual assertion in support. This record demonstrates that Halvorson did not bring the appeal in good faith, did not present genuine issues of law and brought and pursued the appeal frivolously, unreasonably and without foundation. These circumstances definitely merit an award of attorney fees. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979).

Respondents, as prevailing parties in an action on appeal involving a "taxing district," the Highway District, will be entitled, under Idaho Code § 12-117 and I.A.R. 41(a) to receive an award of reasonable attorney fees on appeal because Halvorson, as the party on appeal against whom judgment will be rendered, acted without a reasonable basis in fact or law. As asserted above, Halvorson did not bring this appeal in good faith and pursued all claims on appeal without a reasonable basis in both law and fact. These circumstances require an award of attorney fees. *Daw v. School District 91*, 136 Idaho 806, 41 P.3d 234 (2001).

CONCLUSION

Based upon the record on appeal and the foregoing analyses, the relief sought by Respondents is to have this Court (i) affirm the District Court's Opinion and Order and (ii) make an award of attorney fees and costs on appeal to Respondents against Halvorson.

Dated this 28th day of January, 2010.

RONALD J. LANDECK, P.C.

By: _____
Ronald J. Landeck
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2010, I caused two true and correct copies of this document to be served on the following individual in the manner indicated below:

DON HALVORSON
CHARLOTTE HALVORSON
1290 AMERICAN RIDGE ROAD
KENDRICK, IDAHO 83537

[X] U.S. Mail
[ ] Federal Express Standard Overnight Mail
[ ] FAX
[ ] Hand Delivery

_____
Ronald J. Landeck