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Idaho Dept of Transportation v. Grathol Appellant's Reply Brief Dckt. 38511

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IN THE SUPREME COURT OF THE STATE OF IDAHO

THE STATE OF IDAHO, IDAHO
TRANSPORTATION BOARD,

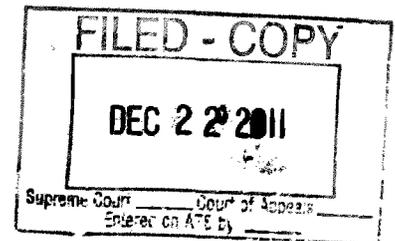
Plaintiff-Respondent,

vs.

HJ GRATHOL, a California general
partnership;

Defendant-Appellant.

Supreme Court No. 38511
District Court No. CV-2010-10095



APPELLANT'S REPLY BRIEF

Appeal from the District Court of the First Judicial District for Kootenai County

The Honorable Lansing Hanes, District Judge, Presiding

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ARGUMENT

1. The Order of Condemnation does not comply with Idaho Code § 7-707(6).

On appeal, plaintiff, the Idaho Transportation Board (“Board) argues that its “primary function is to decide what state highway projects will be built, when, and in what order of priority.” *Respondent ITD’s Brief on Appeal*, at p. 2. While it is not debatable that one of the duties of the Board is to determine which highways shall be designated and accepted as part of the state highway system (*I.C. § 40-310*), the Board also has other duties enumerated in *I.C. § 40-311* (the power and duty to condemn private property), *I.C. § 40-312* (the power and duty to prescribe regulations), *I.C. § 40-313* (the power and duty to erect traffic control devices), *I.C. § 40-314* (the power and duty to establish internal departmental structures), *I.C. § 40-315* (the power to recommend highway projects for financing) *I.C. § 40-316* (the duty to make an annual reports) and *I.C. § 40-317* (the power to contract and cooperate with public entities). While the Board characterizes those powers and duties enumerated under *I.C. § 40-310* as “*primary*,” there is no statutory support for arguments that the remaining powers designated under Title 40, Chapter 30 are secondary, tertiary or of any less importance.

The Board argues that it has already authorized and approved “the Project,” specifically the “Athol Segment of the Project,” identified as ITD Project No. A009(791) Key No. 9791 through annual STIP approvals from as early as 2005. (“The Board’s approval of the condemnation of the Grathol property occurred long before the administrative order of condemnation was executed by the Director of ITD.” (*Respondent ITD’s Brief on Appeal*, at p. 6.)). The Board’s argument boils down to a position that annual approvals of “the Project,” under *I.C. § 40-310*, effectively excuse it

from compliance with Idaho's statutory Eminent Domain provisions, contained in Title 7, Chapter 7, Idaho Code. Specifically I.C. § 7-707 (6) requiring "an order of condemnation ... entered by the plaintiff" setting forth and clearly identifying all property rights to be acquired. *I.C. § 7-707(6)*.

The Board's arguments must fail for two separate reasons: 1) if true, they would completely eviscerate Idaho's specific statutory provisions governing the exercise of eminent domain; and 2) there is nothing in the record on appeal to demonstrate that the Board satisfied its "primary function" of I.C. § 40-310(1).

A. Approval of "the Project" does not substitute for the statutory requirement of Idaho Code § 7-707(6) that the Board approve the take.

The Board contends that it has repeatedly approved the Project since as early as 2005 and such approval excuses the Board from having to decide whether or not to condemn Grathol's property through approval and issuance of an Order of Condemnation. Indeed, the crux of the Board's argument is encapsulated in the following sentence: "In claiming that the Board did not approve the condemnation of its property, Grathol points to the wrong date, at the wrong stage in the US-95 Project, and the wrong documents." *Respondent ITD's Brief on Appeal*, at p. 16.

The Board claims that it has annually approved the Project and has held public hearings for input and objection on the same. The Board relies exclusively on I.C. § 40-310(1), a statute that guides the Board in determining which highways shall be designated and accepted as part of the state highway system through a STIP. The Board simply cites to its annual approval of STIP, notwithstanding the fact that each successive STIP identified by the Board since 2006 has

incrementally altered the scope and location of Project Key No. 09791.¹ There is also nothing in the record identifying the Grathol parcel as lying between any of the milepost markers identified.

The Board would have this Court hold that annual approval of a Project as part of the STIP, in which funding has not been identified or secured, the exact scope and route of a Project remains undefined, and the timeline for actual acquisition of private property is unknown, substitutes for the requirements of a reasoned and deliberate evaluation of the propriety of a condemnation action. The Board's argument is that approval could occur years, even decades, before any acquisition of private property occurs and that the Board need not be bothered with the specifics of a condemnation action in spite of the requirements of Title 7, Chapter 7.

To demonstrate the fallacy of the Board's position, it is noteworthy to point out that the Board fails to identify in its *Brief*, when exactly it decided to acquire the Grathol property. Was it 2005? Perhaps 2007? Perhaps 2009? Perhaps not at all. The Board is unable to identify in any of its voluminous submissions, when the Grathol property was actually identified as being within "the Project" and when the Board made a determination to condemn Grathol's property. Instead, the Board can only vaguely state that approval of "the Project" is all that was needed at whatever time such action occurred. The Board's argument is akin to saying that it could simply announce that it intended to construct a north-south highway through Camas Valley under I.C. § 40-310, without identifying any specific parcels to be acquired or identifying the location of such construction. According to the Board's logic, such an action equates to a decision to condemn and it need not be

¹ FY 2006-2010 STIP listed Project Key No. 09791 as mileposts 438.9-469.8. FY 2007-2011, 2008-2011, and 2009-2013 STIPs listed Project Key no. 09791 as mileposts 445-451.3. FY 2010-2013 STIP listed Project Key No. 09791 as mileposts 448-449.8. (R. Vol. I, pp. 97, 211, 20; Vol. II, pp. 48, 60.)

concerned with the details. Indeed the Board even implies that the burden is thus placed on the landowners to bring an action for inverse condemnation.

Idaho Code § 7-707 requires specific actions to be taken in exercising the power of eminent domain. Idaho Code § 7-707(6) requires that an Order of Condemnation, entered by the Board, to be attached to the Complaint. Using basic *reasoned* logic, it follows that the entry of the Order of Condemnation by the Board is a *prerequisite* to the filing of an action for condemnation and failing to attach such an Order renders the Complaint statutorily deficient. Here, the Board did not enter an Order of Condemnation, but instead the Director of the Idaho Transportation Department (“ITD”) did.

The Board’s arguments are circular, contradictory and nonsensical. On the one hand, the Board argues that “[p]rior to filing the condemnation Complaint, no power of eminent domain had been exercised by ITD and no attempt to acquire the Grathol property by eminent domain had occurred.” *See, Respondent ITD’s Brief on Appeal*, at p. 7. On the other hand, the Board argues that it had already decided to condemn the Grathol property via annual STIP approvals at some time prior to the Order (perhaps as far back as 2005).

If the Board’s position is correct, then any and all certainty about when a taking has occurred would be eliminated and would lead to the absurd result of forcing a landowner to file an action for inverse condemnation years before any property was identified, projects described, routes finalized or financing for acquisition and construction approved. Such a holding would result in utter chaos in identifying property rights affected and runs directly contrary to the very specific statutory scheme for the exercise of eminent domain.

Much of the remaining arguments presented by the Board concern themselves with the practicality of having the “citizen” Board actually deliberate and approve a specific Order of Condemnation. The Board argues that requiring it to actually take action to consider and execute an Order of Condemnation will render it ineffective. These arguments are meritless. In a sense, the Board contends that it shouldn’t be required to do what the legislature requires because that would be an onerous burden. However, the Board continues to follow statutory procedure for the exercise of its statutory powers in other areas.

For example, Title 40, Chapter 9, Idaho Code allows the Idaho Transportation Department (“ITD”) to contract for work to be performed on the state highway system. This is usually done through a sealed bid process. Idaho Code § 40-904 allows ITD to select design-build firms as opposed to the preferred method of contracting under the regular procedure of advertising for sealed bids (I.C. § 40-902). Idaho Code § 40-904 provides:

The preferred contracting method of the department shall be as described in section 40-902, Idaho Code. The department may select design-build firms and award contracts for design-build projects if **the board** determines that the projects are of appropriate size and scope, that awarding a design-build contract will serve the public interest, and that the method is superior to that described in section 40-902, Idaho Code.

I.C. § 40-904(1) (emphasis added). The language of I.C. § 40-904(1) provides in unequivocal terms that the Board must make a determination to select the design-build process. Very recently, the

Board held a regular public meeting in Pocatello, Idaho, on October 27, 2011.² During the course of its ordinary business, the Board considered the recommendation of its construction engineer that proposed improvements at the intersection of State Highway 44 and North Linder Road would be a candidate to utilize the design-build method of construction due to its size and the early stages of development. The Board then motioned and unanimously approved a resolution approving the use of the design-build method to award a contract under I.C. § 40-904. *See, Minutes* at pp. 4-5 of 6. The text of the resolution is included in the meeting minutes available to the public.

It is apparent from these submissions and that the Board, does in fact, acts in accordance with *some* of its statutorily required duties in *some* instances, such as the approval of the design-build process. It is also apparent from the Board's arguments here that it chooses to disregard other equally (or more) important duties, such as the issuance of condemnation orders. Why does the Board treat some duties as more important than others? Using the Board's logic, could it not simply adopt an internal policy that delegates to ITD's Director the authority to contract through the use of the design-build process? If it is important enough to have the Board deliberate, act on and approve design-build construction projects, then why is it not equally important to have the Board consider, act on and approve an Order of Condemnation for the taking of private property? The answer, it seems, is because it has always been done this way.

The Board cites to two Idaho cases for the proposition that no Idaho courts have questioned the authority of ITD's Director. The Board relies on *State ex rel. Winder v. Canyon Vista Family*

² Attached hereto as **Appendix A** is a copy of the meeting minutes of the regular meeting of the Idaho Transportation Board for October 26-27, 2011. This material was obtained from the Idaho Transportation Department website at <http://itd.idaho.gov/Board/minutes/brd.min.htm> for October, 2011.

Ltd. P'ship, 148 Idaho 718, 228 P.3d 985 (2010) and *Vickers v. Lowe*, 150 Idaho 439, 247 P.3d 666 (2011), to argue that the authority of ITD's Director is somehow unquestionable. These arguments are without merit. The Board concedes that neither the parties nor the Court in these two cases raised the issue of the ability of the Director to approve orders of condemnation under I.C. § 7-707(6). The *Winder* case was decided on the basis of I.C. § 7-707 as it existed at the time the condemnation action was filed, in that case; December 28, 2004. Idaho Code § 7-707(6) was added by the Idaho Legislature on July 1, 2006 via Senate Bill No. 1243. (R. Vol. I, pp. 126-130.)

The Board attempts to argue that the separate powers and duties provided to the Board and to the Department are one and the same; in essence claiming that the separate statutory provisions for each do not matter. Even in its Brief on Appeal, the Board continually refers to Plaintiff as "ITD," and substitutes the terms "Board" and "ITD" interchangeably. ITD is not the Plaintiff in this case. The Board is. The Board's powers and duties are separate and distinct from those of ITD, as evidenced in the Idaho Code provisions separately addressing them. While undoubtedly ITD would like to possess the power to condemn real property, the Idaho Legislature has explicitly reserved that power to the Board, and the Board alone. While the Board protests that the burden of exercising such power by a "citizen" Board is too burdensome, perhaps the Legislature recognized that granting such power only to the "citizens" instead of to ITD would achieve some checks and balance in the exercise of such power. Imparting "citizen" knowledge into the process allows some perspective into the impacts of condemnation actions which are clearly lacking in ITD.

Indeed, the Idaho Legislature has only granted ITD a limited power to condemn "advertising displays," under the auspices of § 40-506(1). This limited grant of power implicitly recognizes that

ITD does not have the power to condemn for other purposes. The remaining powers of condemnation are reserved solely to the Board, and as such, the Board, and the Board only, may condemn real property and must be styled as the plaintiff in such a condemnation action. As the plaintiff, condemnor, the Board must also comply with I.C. § 7-707(6) and attach an Order of Condemnation issued by it, not by ITD, not by ITD's Director and not by some delegee. Here the Board simply failed to take any action to issue the Order of Condemnation, or to take any action to approve.

To further illustrate the Board's confusion of its own role, consider this argument in the Response Brief:

Second, the Director signed the administrative order of condemnation on behalf of the "Idaho Transportation Department." R. at 16 (signature page of the administrative order of condemnation). This makes clear that the Idaho Transportation Department will condemn the property, not the Director. ITD did not exercise its power of eminent domain until it filed the condemnation action. In addition, the suit was brought by and in the name of the Idaho Transportation Board.

Respondent ITD's Brief on Appeal, at p. 23.

Further still:

Thus, the Director of ITD is statutorily empowered to "execute the powers and discharge the duties vested by law in his department." *I.C. § 67-2403*. Obviously, the power of eminent domain is one of the powers and duties vested by law in the Idaho Transportation Department. See I.C. § 40-311(1).

Respondent ITD's Brief on Appeal p. 14, (emphasis added).

Contrary to the Board's argument, it is **not clear** that the Idaho Transportation Department will condemn the property, as it has no authority to do so. Indeed, such arguments seem to basically admit that the Order of Condemnation is not an order entered by the plaintiff (the Board), but instead is an order of ITD. The only thing that is clear from such convoluted and conflicting arguments is that the Board and ITD refuse to acknowledge the separate and distinct roles of each entity and the separate powers granted to each. Such arguments, while disappointing, are unsurprising, as the Board and ITD treat the explicit requirements of I.C. § 7-707 in the same dismissive and cavalier fashion.

Finally, the Board cites to several out of jurisdiction cases for the proposition that the Board need not exercise the power of eminent domain but may instead delegate such authority for **approval and execution** of the same to an administrative officer of ITD. In presenting such cases, the Board fails to describe whether any of the specific statutory schemes for eminent domain in those jurisdictions are similar in any respect to Idaho. Further, in presenting such broad propositions the Board fails to discuss such cases in light of Idaho's requirements under I.C. § 7-707(6) that the plaintiff (Board) enter an order of condemnation. While some of the cases cited by the Board may be instructive as to how grants of power are interpreted in other jurisdictions, they are not instructive in the least with respect to Idaho's statutory requirements.

The Board wishes to escape its statutory duties to condemn real property by delegating such authority to an administrative officer of ITD. Its argument basically boils down to a plea that compliance with the eminent domain provisions would be too burdensome. Further, it argues that it has always condemned real property in this fashion and no one has ever challenged its authority to

do so prior to Grathol. These arguments admit that the Board has not substantively modified or revised its policy since 1997, despite the 2006 legislative enactment of I.C. § 7-707(6) which was clearly intended to do something. The Board's position demonstrates a callous disregard for the very statutes that grant it authority to condemn in the first place and places the burden of ensuring compliance with Title 7, Chapter 7 solely on private landowners.

B. There is no evidence in the record to demonstrate compliance with Idaho Code § 40-310(1).

In support of its argument that the Board somehow ratified the Grathol condemnation through annual STIP approvals since 2005, the Board suggests that it complied with I.C. § 40-310(1).³ The Board argues that all it needed to do was approve "the Project," at some time, and such approval substitutes for an authorization to condemn.

The Board suggests that it satisfied the requirements of Idaho Code § 40-310(1), including holding public hearings in the nearest city affected by or within which a state highway project is

³ I.C. § 40-310(a) provides; ... In making a determination, the board must, before it can abandon, relocate, or replace by a new highway, any highway serving or traversing any city, or the area in which the city is located, specifically find and determine that the benefits to the state of Idaho are greater than the economic loss and damage to the city affected. No highway serving or traversing any city shall be abandoned, relocated or replaced by a new highway serving the area in which a city is located without the board first holding a public hearing in that city. Written notice setting forth the action proposed to be taken by the board shall be served upon the mayor of any city affected, and upon all property owners from which acquisition of right-of-way is necessary and from which that property must be purchased The notice shall contain a statement of any action contemplated by the board affecting the city or property owner, and shall specify the time and place of the hearing. At the hearing a property owner from which right-of-way is necessary to be acquired and from which that property must be purchased, and the governing body of any city affected may appear, voice objections to the action proposed to be taken by the board, and may present evidence and call witnesses in support of their objections. The board shall give consideration to the protests and objections and make a written decision determining whether or not the proposed action would be of greater benefit to the state of Idaho than the economic loss and damage resulting to the city. ...

proposed for construction. The Board argues that under I.C. § 40-310(1), ITD is required to serve written notice setting forth the action proposed to be taken by the Board on the mayor of such city and upon all property owners from which acquisition of right-of-way is necessary and from which the property must be purchased.

The Board apparently wants this Court to find that Grathol already had notice of the Board's "decision" to condemn its property at some time before the entry of the Order of Condemnation on November 17, 2010, because it notified the public agencies that it intended to improve Highway 95. What is completely absent from the Board's argument is any identification of a public hearing or notice sent to property owners. Instead, the Board simply cites to its annual STIP approval and asks this Court to assume that other un-identified public hearings occurred and that notices to property owners were actually sent out. There is nothing in the record to support the Board's arguments, as the record is completely devoid of any evidence of such facts. This is especially important in the context of *why* the Board is making such unsupported allegations. The Board implies that Grathol, or Grathol's predecessor in interest, was provided notice at some point that the Grathol property would be condemned and Grathol should now be precluded from challenging the take.

This argument raises serious questions of due process as the Board also asserts that property owners are somehow provided an opportunity to appeal such determination. There is nothing in the record, below or on appeal, to demonstrate that any such hearings were held, much less that Grathol was provided notice of the decision to condemn its property. Without any support from the record, the Board is asking this Court to accept such assertions on blind faith. Absent any evidence in support of these contentions, the Board's arguments do not demand much consideration.

Further, a determination by the Board under I.C. § 40-310 does nothing to address private property to be acquired by condemnation. Indeed, I.C. § 40-310(1) grants the Board the power to “Determine which highways in the state, or sections of highways, shall be designated and accepted for the purposed of this title as a part of the state highway system.” In making such a determination, the Board must “specifically find and determine that the benefits to the state of Idaho are greater than the economic loss and damage to the city affected.” *I.C. § 40-310(1)(a)* (emphasis added). While the process requires the Board to serve notice to property owners affected by its decision to designate and accept a part of the state highway system, the Board’s ultimate decision is limited to a balancing of the economical impacts of such action against loss and damage resulting to the city. That is the decision from which an appeal lies, not a decision to condemn real property. A decision made to accept a highway under I.C. § 40-310(1) cannot supplant the specific statutory requirements for a condemnation. Indeed, I.C. § 40-310(1) does not contain any reference to eminent domain or condemnation whatsoever. Why? Because those powers are reserved to the Board under I.C. § 40-311.

2. The Order of Condemnation does not comply with Idaho Code § 7-707(6).

I.C. § 7-707(6) requires that an Order of Condemnation be included in the Complaint and that the Order “set[s] forth and clearly identifies all property rights to be acquired including rights to and from the public way, and permanent and temporary easements known or reasonably known to the condemning authority.” *I.C. § 7-707(6)* (emphasis added). Here, the Order attached to the Complaint contains a general recitation of authority to condemn and includes the following identification of property rights: “That the parcel so designated and shown on said project plans is

necessary to the construction of said project and the construction of said project is impossible without the acquisition of said parcel.” *R. Vol. I, p. 16*. The Order identifies the Grathol property as Parcel No. 19 which corresponds to the legal description attached to the Complaint, but the Order goes on to provide in paragraph 4 the following:

That the rights of access to and from the remaining property belonging to the record owners be as follows:

* * *

e. Rights of Access to and From Sylvan Road/Roberts Road Extension

In association with the Project, the Idaho Transportation Department is in the process of extending Sylvan Road to tie into Roberts Road. Upon the completion of the roadway extension, the record owners will have the opportunity to obtain additional access and access rights to and from the remaining property and Sylvan Road/Roberts Road that did not previously exist and was not otherwise available prior to the project. The additional access will be subject to the rules, regulations, policies, and permit requirements of the applicable government agency.

R. Vol. I, p. 17 (emphasis added).

While the Board asserts that the property to be condemned in the Complaint is identical to the property identified in the Order, a cursory comparison of the two easily reveals that the Order includes the identification of ITD’s plans to extend Sylvan Road to tie into Roberts Road as part of “the Project.” Sylvan Road terminates at S.H. 54 directly to the south of the Grathol property. Roberts Road lies directly in line to the north of the Grathol property. The only way Sylvan Road can be extended to “tie in” to Roberts Road is directly across the Grathol property. Indeed, ITD is even constructing as part of its project plans, a northern approach to Grathol’s property at the intersection of S.H. 54, directly across from Sylvan Road to the south. *R. Vol. I at 46*. When

questioned by the Board's counsel at the hearing on possession as to what that approach is, Jason Minzghor testified that the approach is for "pedestrian access" to cross 54. *Tr. at pp. 13-14, ll. 17-25, 1-12*. Such testimony is more than a little suspect, given the location of the approach, directly in line to the north and south of Sylvan and Roberts Roads and given to this "pedestrian" approach's considerable width.⁴

The legal description of property contained in the Complaint simply does not mirror the description of property rights being acquired, as described in the Order of Condemnation. While both reference the Project construction sheets, the Order includes the identification of the extension of Sylvan Road as part of the Project. Again, the Department considered the Sylvan Road extension of enough import to include it in the Order, yet not enough to consider in offering just compensation. The Board admits that no consideration for Sylvan Road is contained in its pre-litigation offers and instructed its appraiser to not consider it in his appraisal. Because these crucial documents authored by the Board (or ITD), are not identical, the Board has failed to make a good faith offer for the taking of all of Grathol's property impacted.

Despite claiming that the two descriptions are "identical," the Board argues that if a conflict exists, then the description contained in the Complaint must control. The Board continues to rely on *State ex rel. Winder v. Canyon Vista Family Ltd. Partnership*, 228 P.3d 985, 148 Idaho 718 (2010) in support of its arguments. The Board's reliance on *Winder* remains misplaced, as the *Winder*

⁴ Attached hereto for the Court's reference is **Appendix B**, a true and correct copy of ITD's Project Plans for construction improvements on S.H. 54 as part of "the Project." Said plans are dated January, 2011 and were produced by the Board in response to Grathol's discovery requests. Appendix B shows the width and scope of ITD's plans for the "pedestrian" access into Grathol's property which lies to the north of S.H 54.

case, though decided in 2010, concerns itself with a condemnation action brought in 2004. Idaho Code § 7-707(6) was added in July 2006. In *Winder*, the State of Idaho appealed the District Court's decision to admit an order of condemnation into evidence as misleading and unfairly prejudicial. *Winder* at 993, 148 Idaho 726. At the time the complaint for condemnation was filed, the Idaho Code did not require an Order of Condemnation to be attached to the Complaint. Assumedly in *Winder*, the order was not attached to the Complaint or there would not have been an argument as to its admissibility. The *Winder* Court, relying on *Ada County Highway Dist. v. Sharp*, 135 Idaho 888, 26 P.3d 1225 (Ct.App.2001), found that an order of condemnation was irrelevant "as the complaint defined the nature and scope of the take." *Winder* at 994, 148 Idaho 727. However, the *Winder* court also found that the admission of the order did not affect a substantial right of the State because there was no conflict between it and the complaint. *Id.*⁵

Neither of these cases informs as to the effect of I.C. § 7-707(6), as it presently exists. While the Board is correct in arguing that the legislature is presumed to know the law, it is equally true that when the legislature amends an existing statutory provision, it intends that such amendment have some legal force and effect. The Board's argument, if taken as true, renders the legislative enactment of subpart (6) a nullity and ignores the specific purpose for which the amendment was made. In the Bill's Statement of Purpose, the amendment was made to require the condemnor (the Board) to clearly identify all property rights:

⁵ In *Sharp*, the Idaho Court of Appeals reviewed the import of an order of condemnation entered by a highway district under I.C. § 40-1310(3). The *Sharp* court did not analyze current I.C. § 7-707(6) because it did not exist. Instead it found that if a conflict existed between an order under § 40-1310(3) and § 7-707, then 707 would control as being more specific. *Sharp* at 891, 26 P.3d 1228.

This amendment to existing code shall require condemnors to clearly set forth in the complaint a description of the property and property rights to be acquired. **This will remove any ambiguity about which rights are being acquired as part of the condemnation, and shall give the condemnor the right to make that decision, via an order or other resolution entered by the condemnor.** This will prevent any ambiguity or argument about what is or is not being taken via condemnation.

R. Vol. I, p. 130 (emphasis added). The Board's position in this appeal is in direct opposition to the stated legislative intent.

The order of condemnation is required to be attached to the complaint to clearly identify what property rights are to be acquired. *I.C. § 7-707(6)*. The Board's admitted treatment of orders of condemnation through delegation to ITD's Director is the same as it existed since 1998. After the 2006 statutory amendment, the only practice that appears to have changed is the attachment of ITD's order to its complaints, as if the attachment is a simple formality and the property rights identified in such Orders are meaningless. Under the Board's theory, a number of property rights identified in the Order, yet not appearing in the Complaint, are not entitled to any consideration by the property owners.

This argument speaks to the very purpose of having the Board act to issue the Order of Condemnation in the first place. The exercise of the power of eminent domain is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice. *McKenney v. Anselmo*, 91 Idaho 118 123, 416 P.2d 509, 514 (1966). Consider the Board's response on appeal, to Grathol's arguments:

Moreover, if Grathol truly believes that ITD is condemning additional property not identified in the Complaint, Grathol's

proper remedy is to file a counterclaim for inverse condemnation. Its remedy is not an interlocutory appeal of an order granting possession of property being acquired by direct condemnation.

Respondent ITD's Brief on Appeal, at p. 36. Such arguments demonstrate the very real and dangerous approach that the Board advocates for in its own exercise of power. Instead of clearly identifying the rights to be acquired, through a proper Order of Condemnation, the Board advocates that the burden of identifying such rights lies solely with the landowners. Such an approach is directly contradictory to the purpose of the 2006 amendments and is fundamentally unconstitutional. The Board's cavalier dismissal of the impact of its own self-proclaimed Order of Condemnation and the property identified therein shows an utter disregard for the rights of property owners and the Board's own legal duties. Aside from the Board's vaguely identified action of approving "the Project," sometime since 2005, there is nothing presented in any of the Board's materials to suggest that the Board has ever considered the condemnation of the Grathol property, or even that the Board is aware that Grathol exists.

The exercise of the power of eminent domain must be carefully considered and the impacts on private property owners specifically evaluated by the entity possessing the power to condemn, not an administrator, not ITD. Perhaps that is why the legislature reserved those powers to the "citizen" Board, not ITD, in order to avoid such abuses. The exercise of such power must be in strict compliance with the governing statutes, and "close enough" is not "good enough" in condemnation actions. The Board has the ability, resources and the personnel to make such carefully considered decisions, but chooses not to do so. Instead, it continues to delegate such authority to an administrator, and when conflicts arise in the identification of

property rights then the Board takes the position that it is the landowner's burden to correct such deficiencies. Respectfully, that is why this appeal has been taken.

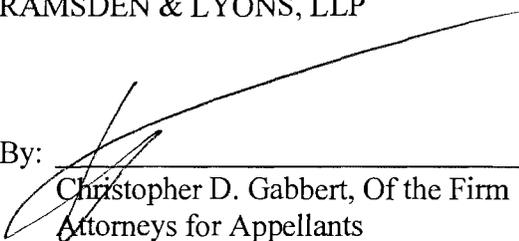
Because the "Board's" Order of Condemnation identifies property rights to be acquired as part of this Project, and those rights are not contained in the description of property included in the Complaint, the Board has failed to satisfy I.C. § 7-707. Further, the Board's failure to consider the imminent extension of Sylvan Road in its offer for just compensation cannot be considered "good faith" under I.C. § 7-721(2)(d) entitling it to early possession of the Grathol property.

CONCLUSION

For the foregoing reasons, Grathol respectfully requests the Court to reverse the Order Granting Possession of Real Property of the District Court and grant Grathol's request for costs and attorney's fees on appeal.

Respectfully submitted this 19th day of December, 2011.

RAMSDEN & LYONS, LLP

By: 

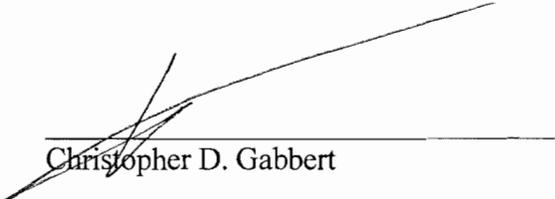
Christopher D. Gabbert, Of the Firm
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of December, 2011, I served two (2) true and correct copies of the foregoing by the method indicated below, and addressed to the following:

Mary V. York
Ted S. Tollefson
HOLLAND & HART, LLP
P.O. Box 2527
Boise, ID 83701-2527

- US Mail
- Overnight Mail
- Hand Delivered
- Facsimile (208) 343-8869



Christopher D. Gabbert

APPENDIX “A”



Idaho Transportation Department

ABOUT US | TRAVELER SERVICES | DMV | PROJECTS | NEWS & INFO

ITD HOME | DOING BUSINESS WITH ITD | CONTACT US



ADVISORY BOARDS AND COMMITTEES

BOARD HOME

BOARD MEMBERS

MEETING SCHEDULE & AGENDAS

MEETING MINUTES

DIRECTOR'S BOARD REPORT

SUBCOMMITTEE ON ADJUSTMENTS TO STATE HIGHWAY SYSTEM

SUBCOMMITTEE ON THE ENHANCEMENT PROGRAM

ITD EXECUTIVE TEAM

CONTACT INFORMATION

REGULAR MEETING AND DISTRICT FIVE TOUR
OF THE IDAHO TRANSPORTATION BOARD

October 26-27, 2011

The Idaho Transportation Board met at 10:00 AM, on Wednesday, October 26, 2011 in Pocatello, Idaho. The following principals were present:

Darrell V Manning, Chairman
 Gary Blick, Vice Chairman – District 4
 Jim Coleman, Member – District 1
 Janice B. Vassar, Member – District 2
 Jerry Whitehead, Member – District 3
 Dwight Horsch, Member – District 5
 Lee Gagner, Member – District 6
 Brian W. Ness, Director
 Scott Stokes, Chief Deputy
 Sue S. Higgins, Executive Assistant and Secretary to the Board

Representative Marc Gibbs was also present.

District 5 Tour. The Board traveled I-15 south and US-30 east. Staff summarized the projects in the US-30 GARVEE corridor, which are almost completed.

During lunch in Lava Hot Springs, Mark Lowe, Executive Director, Lava Hot Springs Foundation, elaborated on the Foundation's role. He noted the importance of a good, efficient transportation system and thanked the Board for the improvements to US-30. Mr. Lowe believes the speed limit approaching the city limits and through town is too high and requested it be lowered. He also expressed support for a bypass of Lava Hot Springs to address congestion and safety issues.

The Board traveled US-30 east and SH-34 south.

In Preston, the Board joined the Aeronautics Advisory Board (AAB) for a briefing of the Preston Airport. Airport Manager Craig Biggs and Franklin County Commissioner Dirk Bowles reported on the increased activity at the facility. Some of the planned projects are to extend the runway and improve the taxiway.

The Board returned to Pocatello via US-91 north and I-15 north.

WHEREUPON the tour recessed at 3:50 PM.

October 27, 2011

The Board reconvened at 8:30 AM on Thursday, October 27, 2011, at the Idaho Transportation Department, District 5 Office in Pocatello. All members

were present except Member Horsch. Deputy Attorney General Larry Allen was in attendance.

Board Minutes. Member Gagner made a motion to approve the minutes of the regular Board meeting held on September 21-22, 2011 as submitted. Vice Chairman Blick seconded the motion and it passed unopposed.

Board Meeting Dates. The following meeting dates and locations were scheduled:

November 15-16, 2011 - Boise

December 14-15, 2011 - Boise

January 18-19, 2012 - Boise

Member Horsch joined the meeting at this time.

Consent Calendar. Due to the limited funds available, Vice Chairman Blick questioned the use of consultants and asked if the Department could complete that work in-house. Director Ness replied that consultants are used because of the special expertise required on some projects and also due to workload issues. This topic will be discussed at the workshop next month.

Member Whitehead made a motion, seconded by Member Gagner, and passed unopposed, to approve the following resolution:

RES. NO. *NOW THEREFORE BE IT RESOLVED*, that the Idaho Transportation Board

ITB11-48 approves delaying STC-5780, Dufort Road Railroad Crossing, key #11556 and Northwest Bypass Road Railroad Crossing Near Mountain Home, key #11592 to FY12 of the Federal Railroad Crossing Program and to increase the federal group control totals accordingly, and repealing Board Policy B-01-18, Coordination with Traveler Services System Advisory Council, and has received and reviewed the contract award information, the professional services agreements and term agreement work task report, and the report of speed minute entry changes for August and September 2011.

1) Delay Dufort Road Railroad Crossing, Key #11556 and Northwest Bypass Road Railroad Crossing Near Mountain Home, Key #11592 to FY12 of the Federal Railroad Crossing Program. The above referenced projects were programmed for delivery in FY11 and entail non-bid actual cost agreements with the railroad companies for the construction of safety improvements at two rail-highway crossings. The agreements were not completed prior to close-out of FY11 with the Federal Highway Administration, so are currently unfunded. Current cost estimates are \$297,000 for Dufort Road and \$193,000 for Northwest Bypass Road. Staff requests delaying STC-5780, Dufort Road Railroad Crossing, Bonner County and Northwest Bypass Road Railroad Crossing Near Mountain Home to FY12 of the Federal Railroad Crossing Program and to increase the federal group control totals accordingly. Staff has identified offsetting funds from savings of other projects.

2) Repeal Board Policy B-01-18, Coordination with Traveler Services System Advisory Council. The Traveler Services Advisory Council was created in 2005 when ITD converted its phone-based road report system to an integrated Traveler Services System. The new system uses a single point of data entry to feed both a 511 phone system and a travel information web site. The Council helped guide development of the system, particularly in the early years when considerable expansion and numerous system enhancements were completed. The system is fully functional and mature now and is basically in a maintenance mode. There is very limited funding for additional projects. Staff believes the Council served its purpose but is no longer needed. It recommends deleting Board Policy B-01-18, Coordination with Traveler Services System Advisory Council, which will disband the Council.

3) Contract Awards. Key #11992 - Frontage Road, Junction SH-53 to Chilco, District 1. Low bidder: Scarsella Brothers, Inc. - \$3,405,405.

Key #7216 - West Fork Pine Creek Bridge, Shoshone County, District 1. Low bidder: Braun-Jensen, Inc. - \$1,074,000.

Key #9805 - Red Bridge, Whitebird Highway District, District 2. Low bidder: Concrete Placing Company, Inc. - \$698,543.

Key #9804 - Dent Road, Clearwater County, District 2. Low bidder: Valley Paving & Asphalt, Inc. - \$1,532,282.

Key #12062 - Franklin Road; Touchmark Way to Five Mile Road, District 3. Low bidder: Staker & Parson Companies dba Idaho Sand & Gravel - \$3,794,666.

Key #9987 - Reynolds Creek Bridge, Owyhee County, District 3. Low bidder: Concrete Placing Company, Inc. - \$377,613.

Key #9520 – Jordan Creek Bridge; Flint Creek Road, Owyhee County, District 3. Low bidder: Braun-Jensen, Inc. - \$298,000.

Keys #11112, #11113, #11114, #11120, and #12097 - Treasureton Road to Cleveland Bridge, Franklin County; Niter Bench Road to Junction US-30, Caribou County; Preston West City Limits to Junction US-91, Preston; Preston North City Limits to Downey North City Limits; Connector Road to Preston North City Limits; and Connector Road to Preston North City Limits, District 5. Low bidder: Intermountain Slurry Seal, Inc. - \$2,027,275.

Key #11247 - Garfield Street Idaho Canal Bridge, Idaho Falls, District 6. Low bidder: J M Concrete - \$596,759.

Key #11155 - John Adams Parkway Bridge, Idaho Falls, District 6. Low bidder: Cannon Builders, Inc. - \$826,970.

Key #12459 - SH-33 and US-20, FY12 District 6 Pavement Crack Sealing. Low bidder: Highstone Inc. - \$421,325.

4) Professional Services Agreements and Term Agreement Work Task Report. From September 1 through September 30, \$1,742,400 in new professional services agreements and work tasks were issued. Seven supplemental agreements to existing agreements were processed in the amount of \$219,451 during this period.

5) Report of Speed Minute Entry Changes for August and September 2011. The speed limit on US-93 near Mackay in District 6 was changed from 65 miles per hour (MPH) to 55 MPH from milepost 106.000 to 108.127. The speed limit was changed from 45 MPH to 55 MPH from milepost 108.127 to 108.450. The changes were due to activity from approaches.

Board Items. Chairman Manning thanked the Board members for their involvement in developing the new strategic plan. Member Whitehead and he met with Boise Mayor Dave Bieter to discuss the 30th Street extension project and its impacts to the Headquarters' campus. Chairman Manning asked for a volunteer to serve on the steering committee for the freight study.

Director's Report. Director Ness expressed condolences to the Scott Patrick family. Mr. Patrick passed away unexpectedly last month. He was a member of the AAB from 2000 until his recent death.

The Executive Team met with its counterpart from the Utah Department of Transportation (UDOT). Some of the discussions focused on ITD's reorganization and UDOT's technology and geographic information systems. Other recent activities included meetings on the strategic plan, which is progressing well, and Chief Human Resource Officer Mary Harker's participation at the Women's Day at the Capitol.

Director Ness attended the recent American Association of State Highway and Transportation Officials' meeting. ITD received the President's Award for the Wounded Warriors Job Training project, which was in partnership with the Department of Labor. There were also a number of ITD employees recognized for 25 years of service in the transportation industry.

Director Ness intends to complete his employee visits by the end of next month. Staff will also finalize plans for the legislative outreach meetings scheduled in the next two months.

Chief Deputy (CD) Stokes attended a recent Traffic Safety Commission meeting. Traffic control in construction zones was a focus area that will be addressed.

CD Stokes provided an update on performance measures. Noting the decline in the five-year fatality rate, Member Gagner asked if there is a specific activity that can be attributed to that decrease. CD Stokes believes it was a combination of things, including education and enforcement. Vice Chairman Blick expressed support for the installation of rumble strips, particularly on the centerline. He believes rumble strips are making a difference in accident prevention. CD Stokes concurred and added that staff is reviewing data to identify additional locations to install rumble strips.

Adopt-A-Highway (AAH) Presentation. District 5 AAH Coordinator Sharon Sharp recognized the Pocatello Unitarian Fellowship and the Blackfoot National Guard for their participation in the AAH Program.

Partnerships Related to School Transportation. Mobility Program Manager (MPM) John Krause reported that funding cuts to the Department of Education have impacted schools' transportation services. A number of alternatives are being offered, such as carpooling, public transportation, and walking groups.

Suzanne Seigneur, Rideshare Coordinator, Community Transportation Association of Idaho, elaborated on two grants received for pilot projects for Rideshare School Pool. This program offers assistance with identifying bicycling buddies, carpooling, and ride matching. These options alleviate traffic and congestion and reduce emissions. Ms. Seigneur worked with the Meridian School District to help parents find transportation solutions when mid-day bus service for kindergarten students was eliminated due to funding cuts.

MPM Krause elaborated on other partnerships in the state. Pocatello Regional Transit coordinates its scheduled service with schools' schedules and offers reduced fares for students. Mountain Rides has a financial agreement with the school district resulting in students and staff members riding free.

Safe Routes to School (SR2S) Coordinator Jo O'Connor summarized the SR2S Program's efforts to encourage students to walk or bicycle to school. Almost \$1 million is available annually to fund infrastructure projects and educational activities that promote and encourage walking and bicycling.

In conclusion, MPM Krause stated that these partnerships help provide affordable transportation alternatives and improve safety for students to travel to school. Additionally, a safe, cost effective transportation system improves economic viability.

Chairman Manning thanked the group for the presentation and for their efforts on this important topic.

Monthly Financial Statements and Highway Program Obligations. Controller Gordon Wilmoth said FHWA Indirect Cost Allocation revenue through August was \$8,190,000, which exceeded the projected amount by \$1,990,000. Miscellaneous state funded revenue of \$5,553,000 was \$28,800 above the forecast. Highway Distribution Account revenue, excluding ethanol exemption elimination, was \$28,654,000. The projected revenue was \$29,192,000. Revenue from the ethanol exemption elimination was \$2,565,300, which was 8.9% below the projected amount. Revenue to the State Aeronautics Fund from aviation fuels was \$122,100, or \$127,000 below projections. Controller Wilmoth noted that a large jet fuel distributor sent a report that grossly overpaid the jet fuel tax in April 2011. In FY12 there was a subsequent refund of the overpayment by the Tax Commission to the distributor. The overpayment that occurred in FY11 was included in the FY12 forecast calculation. The aviation fuel tax forecast will be reduced by \$200,000 for this fiscal year and subsequent years.

Total expenditures in the American Recovery and Reinvestment Act (ARRA) Title XII Fund for highway projects were \$164,118,700, while \$178,800,000 had been appropriated. Expenditures for public transportation were \$6,846,800 of the \$9,200,000 available. Of the \$17,400,000 Local Highway Technical Assistance Council-administered ARRA Title XIV funds, \$13,117,800 had been expended. Staff is confident those funds will be expended by the December 31, 2011 deadline.

Manager, Transportation Investments Dave Amick reported that over \$300 million had been obligated as of September 30, or 102% of the project costs in the current Statewide Transportation Improvement Program. At the same time last year, nearly \$425 million had been obligated, or 98% of the project costs.

Approval of a Design-Build Project: Design-Build Process Update. Design/Materials/ Construction Engineer (DMCE) Frances Hood said staff has been working with Ada County Highway District on improvements to the SH-44 and North Linder Road intersection. The high priority project will construct additional lanes and upgrade the traffic signal. It is scheduled in FY12 with state funds. ITD's share of the estimated \$6 million project is \$4 million. DMCE Hood believes this project is a good candidate to utilize the design-build method of construction, partly due to its size and because it is early in the development stage.

Member Coleman made a motion, seconded by Member Vassar, and passed unanimously, to approve the following resolution:

RES. NO. WHEREAS, it is the intent of the Idaho Transportation Board to effectively

ITB11-49 utilize all available appropriated highway funding; and

WHEREAS, the state legislature gave the Idaho Transportation Department the ability to use the design-build method to award contracts; and

WHEREAS, Section 40-902, Idaho Code requires the Idaho Transportation Board to authorize the use of the design-build method to award contracts; and

WHEREAS, the Intersection North Linder and SH-44/State Street, Ada County, Stage 1 project, key #13059, is of appropriate size and scope; and

WHEREAS, the project is suitable to using the design-build method of contracting; and

WHEREAS, there are design consultants and construction contractors that are available and have the capability and experience to design and construct a design-build project of this type; and

WHEREAS, the project has been designated by both the Department and the Ada County Highway District as a high priority, requiring expedient completion to improve efficiency and safety; and

WHEREAS, it will serve the public interest to complete this project as quickly as possible.

NOW THEREFORE BE IT RESOLVED, the request to design and construct this project using the design-build method of contracting is approved.

DMCE Hood provided an update on the process to implement design-build. A request for proposal template has been developed and guidelines to select the design-build team are in place.

Chairman Manning thanked DMCE Hood for the report.

Aquifer Recharge Inquiry. Chief Operations Officer (COO) Paul Steinman said the Department has previously executed agreements to utilize depleted gravel sources to recharge aquifers. He has some concerns with the recent request from Upper Snake Mitigation Solutions. The gravel source identified for this effort is near residential property, creating liability concerns. This is a for-profit entity, whereas the Department's previous agreements were with non-profit groups. Additionally, the Department of Environmental Quality needs to be involved.

Some discussion was held on the desire to dispose of surplus property. COO Steinman concurred. He asked staff to identify surplus property and make a concerted effort to dispose of those parcels, including depleted gravel sources.

Chairman Manning thanked COO for the update and asked him to continue working on the aquifer recharge project.

District 5 Report. District 5 Engineer (DE) Ed Bala reported on some of the District's activities. He noted the numerous construction projects this past year; however, there are no major construction projects scheduled. The focus will be on maintaining the current system. Although the District's performance measure goals of delivering projects on time and upgrading guardrail to be in compliance with federal standards were not achieved, DE Bala said they learned lessons. The goals for improving the winter level of service and the percent of pavement in good condition were exceeded.

DE Bala reported on some efficiencies implemented in purchasing, data collection to improve scheduling winter maintenance, and cross-utilization of employees. Future activities will include warranties on seal coat contracts, emphasizing the business plan, and maximizing investments while balancing risks.

Vice Chairman Blick believes the Districts are sharing more information. When an innovation is successful in one District, other District Engineers are implementing them. He commended the Districts for communicating and utilizing these best practices.

Member Horsch thanked DE Bala for his assistance. He said DE Bala has been responsive to constituent concerns, especially with agricultural issues.

Chairman Manning thanked DE Bala for the informative report.

Executive Session on Personnel and Legal Issues. Member Whitehead made a motion to meet in executive session at 11:10 AM to discuss personnel and legal issues as authorized in Idaho Code Section 67-2345(b), (d), and (f). Member Horsch seconded the motion and it passed 6-0 by individual roll call vote.

A discussion was held on legal matters exempt from public disclosure related to various contract negotiations, a potential settlement agreement, potential litigation related to the issuance of Division of Motor Vehicle permits, and the operation of the state highway system.

The Board also briefly discussed potential re-alignment with the Director.

The Board came out of executive session at 12:55 PM. No final actions or decisions were made.

Old Business. The Board briefly discussed the maintenance agreement with Cassia County related to the transfer of the City of Rocks Backcountry Byway to ITD. Vice Chairman Blick made a motion directing DE4 Devin Rigby to finalize the agreement with Cassia County. Member Vassar seconded the motion. It passed without objection.

WHEREUPON, the Idaho Transportation Board's regular monthly meeting officially adjourned at 1:00 PM.

signed

DARRELL V MANNING, Chairman

Idaho Transportation Board

Read and Approved

November 16, 2011

Boise, Idaho

Page Last Modified: 11/17/2011 9:14:29 AM

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APPENDIX “B”

