RESPECTFULLY, I DISSENT: *EASTERLING V. HAL PAC PROPERTIES, L.P.* AND MAKING A MESS OF IDAHO REAL PROPERTY LAW

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INTRODUCTION

On January 25, 2023, the Idaho Supreme Court reissued its decision in *Easterling v. HAL Pac Properties, L.P.*[1], establishing that easement-by-necessity claims are governed by the four-year statute of limitations in Idaho Code §5-224. Unfortunately, the decision is poorly reasoned, ignores decades of Idaho case law, misstates or confuses fundamental property law concepts, and creates far more uncertainty than it resolves. Because the Court *did not* overturn the decades of relevant case law that preceded the *Easterling* case, the Court created two parallel, but incompatible, pathways for disputing easements. Given those failings, *Easterling* creates the potential for confusion and inequity in Idaho easement law. Therefore, the Court should expressly revisit and reject its *Easterling* legal analysis at the first opportunity.

The basic facts of the case are relatively simple.[2] The Easterling's parcel was severed from, and landlocked by, a larger parcel many decades ago.[3] Although an easement by necessity providing access would have been created at severance, access apparently consisted of trespassing on a neighboring railroad right-of-way until 1999. At some point after 1999, a dispute arose about the

[1] *Easterling v. HAL Pac. Properties, L.P.*, 522 P.3d 1258 (Idaho 2023). The Court originally released a decision on Dec. 21, 2021, but granted a rehearing to consider whether the affirmative defense of the statute of limitations had been raised properly. The Court subsequently determined that the rehearing was "improvidently granted" and so reissued the original decision.

[2] The facts of the case are unsurprisingly somewhat more complicated than this summary suggests, but this simplification is adequate for the purposes of this article. There were multiple parcels severed from the original parcel at different times, but parcels are all now owned by the Easterlings.

[3] Because there are multiple parcels, severance occurred multiple times: in at least 1914 and 1954. *Easterling* at 1264.

easement by necessity, and in 2018 the Easterlings initiated an action to affirm its existence.

Thus the relevant legal question was as follows: where the facts support the creation of an easement by necessity many years ago, but that easement was not used in fact until recently, should a statute of limitations apply to the assertion of that easement by necessity? And, if so, what is the correct statute of limitations? The majority determined that a statute of limitations should apply, and then without explanation, the majority determined that the appropriate statute of limitations would be the "catch all" four-years from Idaho Code §5-224.[4]

The majority further determined that the statute of limitations would not run upon severance of the original parcel and creation of the easement, but would instead start whenever a dominant estate owner or predecessor in interest "knew, or reasonably should have known, that another made a claim 'adverse to' the parcel's right to an easement by necessity."[5] In doing so, the majority ignored long-standing caselaw in Idaho that applies to precisely this factual scenario, and which provides a more robust, straightforward standard for determining when the relevant claims accrue.

In reaching its conclusions, the majority also relied on a fundamentally erroneous assertion about its role. Because that assertion contradicted basic understandings of jurisprudence and real property law, the majority forced itself into a logical and conceptual minefield that it found impossible to navigate safely. This article will identify the error in the majority's initial assertion and explain why that error led it to rewrite decades of real property law. This article will conclude by describing the much simpler approach the court should have taken and had already taken in prior cases.

FUNDAMENTAL PROPERTY PRINCIPLES

Several fundamental property law concepts are relevant, or should have been relevant, to the majority's reasoning. First, the

[4] The majority's justification for selecting the "catch all" provision is that "Easement by necessity claims are not otherwise provided for in another statute." *Easterling* at 1269. This claim simply begs the question and ignores the multiple other real property specific sections of Idaho Code that have been used where disputes arise regarding easements.

[5] *Easterling* at 1268.

easement, which Black's defines as a "right to use or control land[.]"[6] According to the First Restatement of Property, a "right" is a "legally enforceable claim of one person against another, that the other shall do a given act or shall not do a given act."[7] Thus, as relevant here, a "right to an easement" is a legally-enforceable ability to use or not use the land of another in a given way.

The common law, including in Idaho, identifies multiple ways in which easements can be created, both explicitly and implicitly. At issue here is the implied easement by necessity. In 1987, the Idaho Court of Appeals provided perhaps the best description of the Idaho origins of the implied easement by necessity in *MacCaskill v. Ebbert*.[8] This easement arises whenever three elements are satisfied: "(1) unity of ownership prior to division of a tract; (2) necessity for an easement at the time of severance; and (3) great present necessity."[9] It is this factual scenario that creates the easement. Either the elements exist, and the easement exists; or they do not, and it does not.

Because the law presumes the existence of an easement by necessity whenever the elements are satisfied, the easement will exist *unless* the servient estate holder can demonstrate that the context of the grant clearly indicates the easement should not exist.[10] That is the fundamental nature of a legal presumption. Thus, to the extent that a statute of limitations might apply to an action about the

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[6] EASEMENT, Black's Law Dictionary (11th ed. 2019).

[7] Restatement (First) of Property § 1 (1936). Black's uses the same definition.

[8] 112 Idaho 1115, 739 P.2d 414, 417 (Ct. App. 1987). In this decision, Judge Burnett describes the history of the implied easement of necessity in Idaho up to that date.

[9] *Id.* Unfortunately, the Court has added confusion to the third of these elements, suggesting in *Machado v. Ryan* that the great present necessity of the third element is a greater necessity than that identified in the second element. This is incorrect and would result in the absurd outcome that an easement valid on day one might no longer be valid on day two. The third element was only meant as a requirement that the necessity continue, not that it be somehow now greater. That is not the focus of this particular article, but the Court should address and resolve this problem.

[10] According to the Restatement, once these elements are satisfied, the burden is on the servient estate holder to demonstrate that the parties did not intend the easement be created: "[The conveyance] implies the creation of a servitude granting or reserving such rights [of access], *unless* the language or circumstances of the conveyance *clearly indicate* that the parties intended to deprive the property of those rights." Restatement (Third) of Property (Servitudes) § 2.15 (2000) (emphasis added).

original creation of the implied easement by necessity, that statute of limitations can only apply to actions challenging the validity of the easement, not to actions verifying the easement's existence.[11] Given the presumption, the existence of the easement is the default.

Finally, an implied easement by necessity can be terminated whenever the necessity ceases, or in the same fashion as any other easement. Only one method of termination is relevant here. Idaho courts have long recognized that an easement can be terminated through adverse possession.[12] Because the right to an easement includes the right not to use an easement, mere nonuse of an easement does not threaten its validity.[13] In fact, where the dominant estate holder has not yet required the use of an easement, a servient estate holder's actions that might appear to block an easement are similarly irrelevant: "where the easement was created, but no occasion has arisen for its use, the owner of the servient tenement may plant trees, erect a fence, etc. and such use will not be deemed to be adverse[.]"[14]

Thus, a statute of limitations for an action to protect an easement does not begin to run until: "(1) the need for the right of way arises, (2) a demand is made by the owner of the dominant tenement that the easement be opened and (3) the owner of the servient tenement refuses to do so."[15] Idaho case law is very clear that the statute of limitations that applies in cases of adversity or prescription is the twenty-year statute of limitations found in Idaho Code §5-203.[16]

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[11] This is the one situation where the majority might be correct that the statute of limitations in Idaho Code §5-224 is relevant. But it would only apply to actions by the servient estate holder challenging the easement, and not to actions by the dominant estate holder protecting the easement. And the four years would begin running at severance.

[12] *Kolouch v. Kramer*, 120 Idaho 65, 813 P.2d 876 (1991); *Shelton v. Boydstun Beach Ass'n*, 102 Idaho 818, 641 P.2d 1005 (Ct. App. 1982); *Winn v. Eaton*, 128 Idaho 670, 917 P.2d 1310 (Ct. App. 1996).

[13] *Kolouch v. Kramer*, 120 Idaho 65, 813 P.2d 876 (1991); *Winn v. Eaton*, 128 Idaho 670, 673, 917 P.2d 1310, 1313 (Ct. App. 1996).

[14] *Kolouch v. Kramer*, 120 Idaho 65, 68, 813 P.2d 876, 879 (1991).

[15] *Winn v. Eaton*, 128 Idaho 670, 673, 917 P.2d 1310, 1313 (Ct. App. 1996).

[16] *Cook v. Van Orden*, 170 Idaho 46, 507 P.3d 119, 125 (2022); *Fuquay v. Low*, 162 Idaho 373, 397 P.3d 1132 (2017); *Machado v. Ryan*, 153 Idaho 212, 222, 280 P.3d 715, 725 (2012); *Winn v. Eaton*, 128 Idaho 670, 673, 917 P.2d 1310, 1313 (Ct. App. 1996); The older case law addresses a five-year statute of limitations. The statute of limitations was increased to twenty years from five years in 2006. See 2006 Idaho Laws Ch. 158 (S.B. 1311).

MAKING A MESS OF BASIC PROPERTY LAW

The *Easterling* majority's primary error regarding the above fundamental principles was its claim that the court creates the easement: "easements by necessity do not come into existence until a court order recognizes their existence."[17] This claim is inconsistent with our basic understandings of real property law. The claim is also inconsistent with the majority's own arguments. Although a court often must determine whether a given set of facts or circumstances give rise to a property right, it is those facts and circumstances that create the right, not the court's decision. The court simply recognizes and affirms what already existed.

For example, no one would seriously claim that when a court mediates a dispute regarding an express easement, including determining whether it was created properly or what its scope is, that the court created the easement at the moment of its decision. Nor would we claim that a court creates the rights that might inhere in a disputed contract, or any other legal arrangement, only when the court issues its decision. The rights arise with the facts of the particular case, which—either explicitly or implicitly—allocate rights and duties among the involved parties. The court simply finds these facts; the law then applies to the facts the court found.

And this is precisely the case with the implied easement by necessity. The easement by necessity doctrine presumes that the parties to a land transaction intended to grant or retain whatever was necessary—including access—for the beneficial use of the property: "the easement of necessity rests on the presumption that when a party conveys property, he conveys whatever is necessary for the beneficial use of that property."[18] Thus, when the elements of the implied easement by necessity are present, courts recognize the legal fiction that access *was in fact granted* at the time of severance, creating an enforceable easement. As should be clear, it is the facts of a given case that create the easement, so the easement is created whenever those facts exist. The court's role, as the *Easterling* dissent noted, is simply to "recognize and affirm the existence of the

[17] *Easterling* at 1273.

[18] *MacCaskill v. Ebbert*, 112 Idaho 1115, 1118, 739 P.2d 414, 417 (Ct. App. 1987).

easement."[19] The majority acknowledges this very point, noting that "whether the grant, or reservation, should be implied in fact depends upon the terms of the deed and the facts in each particular case."[20] Although the majority appears to agree that the easement depends not on the court, but on the facts of the particular case, the majority actually holds just the opposite: that the easement does not exist until a court says it does.

To sum up the majority's argument on this point: it is the facts on the ground at severance that create the easement by necessity, but the easement by necessity is not created until a court determines that the facts on the ground at severance satisfy the legal requirements of the easement by necessity, at which point the easement has existed since severance. Put another way, the majority claims that the easement doesn't exist until a court later determines that it has *always* existed.

To support its argument that the court creates the easement, the *Easterling* majority twisted three simple legal principles beyond recognition. The first of these legal principles is what was previously the relatively easily understood concept of a "right." The majority refers to a "*right* to an easement," repeatedly italicizing the word "right," and distinguishing it from an "easement *in fact*."[21] To the majority, an easement "in fact" is one that has "fully enforceable rights." The "*right* to an easement" by necessity is, in claimed contrast, a right to an easement that will only be fully enforceable once it is enforced in court. But in attempting to make this distinction, the majority acknowledges that the "*right* to an easement" in this case is, or at least could be, a fully enforceable easement: "we are addressing … whether the Easterlings' may now … enforce this right or whether the right *has been extinguished* in whole or part."[22] The majority's statement presumes the existence of the right to use the easement, otherwise there could be no right to be extinguished.

The majority's additional attempts to explain how the right to

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[19] *Easterling* at 1282 (Moeller dissent).

[20] *Id.* at 1272.

[21] The majority's use of "in fact" in this discussion could create additional confusion in other contexts. It does not appear to be using "in fact" here to refer to an easement in actual use on the ground, but rather an easement that has been recognized by a court, whether in use or not. The majority perhaps meant "in law," but that would have required it to explain the difference between rights and rights in law.

[22] *Easterling* at 1272. (emphasis added).

an easement is not actually a right to an easement only confuse the issue further. The majority claims that the right to an easement by necessity is not in fact a property right, but rather is "a *right* to a 'presumption' implying evidence of the parties[']intent at severance to grant, or reserve, an easement notwithstanding its absence in the terms of the conveyance."[23] But the majority argues in its preceding paragraph that this presumption—that the parties intended there to be access to the landlocked parcel—is itself the "legal basis" for the easement by necessity.[24] Thus, according to the majority, the right to an easement by necessity is the right to the presumption that is the legal basis for the right to an easement by necessity—i.e., the thing is its own legal basis. This reasoning is illogical.[25]

Second, the majority argues that the "easement by necessity [is] a 'legal fiction' arising at severance that presumes an implied intent of the parties."[26] To be clear, an easement by necessity *is* a legal fiction. But it is not the legal fiction that *presumes* the intent to grant an easement, it is the legal fiction that *results from* that presumption. A legal fiction is the "assumption that something is true even though it may be untrue[.]"[27] Where the elements of the implied easement by necessity are satisfied, the presumption that the parties intended to provide access gives rise to the legal fiction that access was in fact granted—what isn't actually true is assumed and treated as true.

But the *Easterling* majority turns this concept on its head, using the notion that an easement by necessity is a "legal fiction" to argue that it is a *true* fiction until the Court says otherwise: "[the easement by necessity][28] is a right that remains a dormant legal fiction unless, or until, a judgment establishes its existence and enforceability in fact."[29] The majority thus takes something that the

[23] *Id.* (emphasis in original).

[24] *Id.* (quoting *Burley Brick and Sand Co.*, 102 Idaho 333, 335, 629 P.2d 1166, 1168 (1981)).

[25] Perhaps more precisely, it is the logical fallacy of circular reasoning.

[26] *Easterling* at 1272.

[27] LEGAL FICTION, Black's Law Dictionary (11th ed. 2019)

[28] The bracketed language here replaces "it" in the original sentence, but it is unclear if this is in fact what the court meant. The subject of the preceding sentence is "necessity," and normally we would expect the antecedent for "it" in the following sentence to be "necessity" from the preceding sentence. But since necessity is generally a factual condition on the ground, and so not a fiction of any kind, and because it seems odd to characterize necessity as a "right," it appears the Court meant to go back two sentences for its antecedent of "it."

[29] *Easterling* at 1273.

law assumes to be true and instead assumes just the opposite until the court later assumes what it should have assumed from the beginning.

Finally, the majority demonstrates similar confusion in discussing the fact that implied easements by necessity are, of necessity, *implied*. That is, of course, the whole point. The parties did not do something that the law presumes they meant to do, and so the easement was implied. That the easement was implied does not mean that the easement does not exist. That is precisely the point of the easement by necessity doctrine: to create something implicitly that was not created explicitly. Either way, the easement exists. But according to the *Easterling* majority, "The easement by necessity is not automatically implied in fact at severance as the dissent maintains. Instead, whether the grant, or reservation, should be implied in fact depends upon the terms of the deed and the facts in each particular case."[30]

This is at least the second instance of the majority arguing against itself.[31] Taken at face value, with this statement the majority admits that an easement by necessity is "implied in fact *at severance*" whenever the facts of the case indicate it should be implied in fact at severance.[32] And when would that occur? Whenever the elements of the implied easement by necessity are satisfied. Because no easement by necessity can exist if the elements of the easement by necessity are not satisfied, then *all* easements by necessity are, according to the court's reasoning, *implied in fact at severance*.

Therefore, wherever the elements of the easement by necessity are satisfied, a legally-enforceable right of access exists at severance. Unless a servient estate holder can demonstrate clearly that the parties did not intend a parcel to have access,[33] the court's only job is to recognize that the facts of the case created an easement. This is what legally enforceable means: the ability to call on the coercive power of the state (here, the judicial system) to enforce property rights. While the majority appears to claim that it is creating an

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[30] *Easterling* at 1272.

[31] In the first instance, the court acknowledged that the legal fiction of the easement by necessity—the thing that is not true that the court recognizes is true—"arises at severance." *Id*.

[32] *Id.*

[33] Again, this is the one situation where the four-year statute of limitations in Idaho Code §5-224 might apply—to actions *challenging* the existence of the easement by necessity.

enforceable right by enforcing the easement, the majority is in reality enforcing the preexisting right that was created the moment the property was severed so long as the elements of the implied easement by necessity were satisfied. While there may be a practical difference between an enforceable right that has yet to be enforced and one that has already been enforced, the law treats both the same.

The question in *Easterling v. Hal Properties* was thus not whether an easement by necessity existed. The majority admits, as it must, that it did. The question was whether the easement by necessity has since been terminated by the adverse actions of the servient estate holder. The majority admits this as well.[34]

TERMINATION OF THE EASEMENT

Framed appropriately, and ignoring the majority's confusing distinction between "*rights*" and rights and its inconsistency in stating that an easement by necessity arises at severance but also kind of doesn't arise at severance, the case is relatively simple. And the law that emerges—or better said, continues—easy to understand. Where the elements of the implied easement by necessity are satisfied, the easement is created and is enforceable at severance. This is consistent with our basic understandings of easements and of property rights more generally. There is no distinction between *"rights*" and rights. And the fact that an easement might go unused for years is irrelevant, as the Idaho Supreme Court has recognized previously.[35]

But that does not mean a statute of limitations does not apply to actions to protect an easement. If, after the initial creation of the easement, the servient estate owner engages in actions adverse to the easement, the twenty-year statute of limitations in Idaho Code §5-203 would begin to run. These adverse actions are not the adverse "claims" the majority seems to think are sufficient. Rather, they are the adverse actions required to terminate an easement, as described in well-developed case law in Idaho and elsewhere,[36] and discussed

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[34] *Easterling* at 1272 ("[W]e are addressing … whether the Easterlings' may now … enforce this right or whether the right has been extinguished in whole or part.")

[35] *Kolouch v. Kramer*, 120 Idaho 65, 813 P.2d 876 (1991); *Winn v. Eaton*, 128 Idaho 670, 673, 917 P.2d 1310, 1313 (Ct. App. 1996).

[36] *See, e.g., Kolouch v. Kramer*, 120 Idaho 65, 68, 813 P.2d 876, 879 (1991) ("[W]e may paraphrase this rule to read that where the easement was created, but no

above.[37]

There are several benefits of this approach over the majority's. First, this approach is consistent with basic property law concepts—specifically a "right" and an "easement." Second, this approach is supported by a voluminous preexisting case law establishing both the creation and termination of easements.[38] Third, this approach is much easier to implement on the ground. It does not rely on a vague "claim of an adverse right" articulated but not described by the majority, and which the majority itself admits will be difficult to identify. Rather, this approach relies on discrete, concrete, and readily knowable events: obstruction of the easement, demand to remove the obstruction, and refusal to do so.

CONCLUSION

The *Easterling* decision creates two inconsistent paths in Idaho real property law without providing any explanation for how the two paths differ nor when each should be used. Even though a well-developed case law providing robust standards applicable to the precise facts at issue in this case already existed in Idaho, the *Easterling* majority claimed it faced an issue of first impression.[39] Idaho lawyers are thus faced with two legal rules that both apply to disputed easements where adverse actions are claimed to have terminated the easement. Some rights can be terminated after four years, and some virtually identical rights can't be terminated until after twenty years. That is the definition of arbitrary and contrary to the rule of law.

We expect a lot of the Supreme Court. It plays a significant role in determining what our future will look like. And its mistakes have a far greater potential to cause harm than any other part of our society, including our legislature, which does not share the pretense that every decision is correct and must endure. The Court can and does make mistakes, and this was one of them. The Court should take

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occasion has arisen for its use, the owner of the servient tenement may plant trees, erect a fence, etc. and such use will not be deemed to be adverse (or inconsistent, to use *Shelton's* term), until the need to use the easement arises, etc."), *quoting and paraphrasing Castle Assocs. v. Schwartz,* 63 A.D.2d 481, 491 (N.Y. App. Div. 2d Dep't 1978); *see also* Restatement (Third) of Property (Servitudes) § 7.7 (2000).

[37] *See supra* section titled "Fundamental Property Principles."

[38] *See id.*

[39] *Easterling* at 1268.

the first advantage presented to it to reconsider its approach, recognize the case didn't present a matter of first impression, and apply the more coherent and useful law that already existed.