

11-23-2009

## Bratton v. Scott Clerk's Record v. 2 Dckt. 36275

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LAW CLERK

Vol. 2 of 9

VOLUME II  
IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF IDAHO**

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---

**CHARLES E. BRATTON and  
MARJORIE I. BRATTON, husband and  
wife,**

**Plaintiffs-Appellants,**

**-vs-**

**JOHN R. SCOTT and JACKIE G. SCOTT,  
husband and wife,**

**Defendants-Respondents.**

---

Appealed from the District of the Third Judicial District  
for the State of Idaho, in and for Canyon County

Honorable RENAE J. HOFF, District Judge

---

Nancy J. Garrett  
MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHTD  
P. O. Box 829  
Boise, Idaho 83701

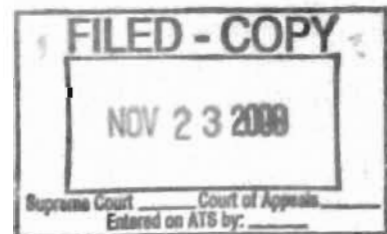
Attorney for Appellants

Shelly Cozakos Shannahan  
PERKINS COIE, LLP  
P. O. Box 737  
Boise, Idaho 83701-0737

Attorney for Respondents

---

---



36275

IN THE SUPREME COURT OF THE  
STATE OF IDAHO

CHARLES E. BRATTON and	)	
MARJORIE I. BRATTON, husband and wife,	)	
	)	
Plaintiffs-Appellants,	)	Supreme Court No. 36275
	)	
-vs-	)	
	)	
JOHN R. SCOTT and JACKIE G. SCOTT,	)	
husband and wife,	)	
	)	
Defendants-Respondents.	)	

Appeal from the Third Judicial District, Canyon County, Idaho.

HONORABLE RENAE J. HOFF, Presiding

Nancy J. Garrett, MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD.,  
P.O. Box 829, Boise, Idaho 83701

Attorney for Appellants

Shelly Cozacos Shannahan, PERKINS COIE, LLP., P.O. Box 737, Boise, Idaho 83701-0737

Attorney for Respondents

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Nancy Jo Garrett (ISB No. 4026)  
 Bradley S. Richardson (ISB No. 7008)  
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 203 W. Main Street  
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 Telephone: (208) 344-7300  
 Facsimile: (208) 344-7077

**F I L E D**  
 A.M. 1:30 P.M.

FEB 15 2008

CANYON COUNTY CLERK  
 D. BUTLER, DEPUTY

Attorneys for Plaintiffs Charles E. Bratton  
 and Marjorie I. Bratton

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CHARLES E. BRATTON AND  
 MARJORIE I. BRATTON (husband and  
 wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G.  
 SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

**SUPPLEMENTAL AFFIDAVIT OF  
 CHARLES BRATTON IN SUPPORT  
 OF PLAINTIFFS' MOTION FOR  
 PARTIAL SUMMARY JUDGMENT**

STATE OF IDAHO )  
 ) ss.  
 County of Ada )

Charles Bratton, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of 21 and am competent to make this Affidavit, and do so based upon my own personal and direct knowledge.



2. Before I purchased Lot 32 in the Fruitdale Farm Subdivision, Mr. Harold Ford assured me that he would dig an irrigation ditch on his own lot, Lot 40, for my use and benefit. Mr. Ford said he would utilize his own tractor to create the ditch.

3. The creation and use of the irrigation ditch on Lot 40 and its corresponding easement was an essential reason for why I purchased land from Mr. Harold Ford, who already had irrigation coming to his property.

4. In fact, prior to my purchase of Lot 32, there was a clear understanding between Mr. Ford and me that the irrigation ditch would be installed as soon as practical, and that it was intended at all times to be permanent in nature. Our discussions regarding the permanency of the irrigation ditch occurred well in advance of my purchase of Lot 32.

5. All of Mr. Ford's words and conduct before the sale of Lot 32 further assured and indicated that the easement was intended to be permanent.

6. As agreed, Mr. Ford dug the irrigation ditch in the Spring of 1973, doing so as soon as it was practical. As such, the ditch was created shortly after the conveyance of Lot 32 to me.

FURTHER YOUR AFFIANT SAITH NOT.

DATED this 15<sup>th</sup> day of February, 2008.

*Charles Bratton*

CHARLES BRATTON

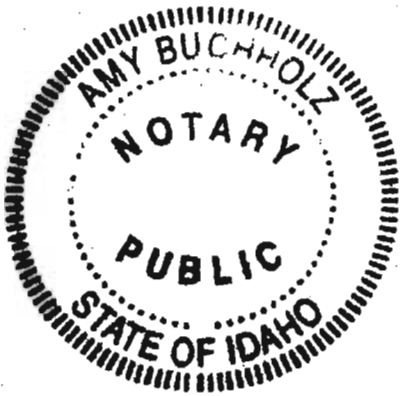
SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of February, 2008.

*Amy Buchholz*

Notary Public for Idaho

Residing at Boise, Idaho

Commission expires: 2013 Feb  
9-24-2013



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15<sup>th</sup> day of February, 2008, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozakos  
PERKINS COIE  
251 East Front Street, Suite 400  
P.O. Box 737  
Boise, Idaho 83701-0737

- U.S. Mail, postage prepaid
- Hand-Delivered
- Overnight Mail
- Facsimile

*Nancy Jo Garrett*  
Nancy Jo Garrett

Nancy Jo Garrett (ISB No. 4026)  
 Bradley S. Richardson (ISB No. 7008)  
 BRASSEY, WETHERELL, CRAWFORD & GARRETT  
 203 W. Main Street  
 P.O. Box 1009  
 Boise, Idaho 83701-1009  
 Telephone: (208) 344-7300  
 Facsimile: (208) 344-7077

Attorneys for Plaintiffs Charles E. Bratton  
 and Marjorie I. Bratton

**F I L E D**  
 A.M. *4:50* P.M.

FEB 15 2008

CANYON COUNTY CLERK  
 D. BUTLER, DEPUTY

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CHARLES E. BRATTON AND  
 MARJORIE I. BRATTON (husband and  
 wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G.  
 SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

**SUPPLEMENTAL AFFIDAVIT OF  
 HAROLD FORD IN SUPPORT OF  
 PLAINTIFFS' MOTION FOR  
 PARTIAL SUMMARY JUDGMENT**

STATE OF IDAHO )  
 ) ss.  
 County of Ada )

Harold Ford, being first duly sworn upon oath, deposes and states as follows:

1. I am over the age of 21 and am competent to make this Affidavit, and do so based upon my own personal and direct knowledge.

2. I owned Lots 32 and 40 in the Fruitdale Farm Subdivision prior to its development, which was part of one continuous piece of land. Prior to the subdivision involving these lots, I had irrigation for this land.

3. Prior to selling land to Mr. Bratton, he and I discussed the need for the irrigation ditch and his easement on Lot 40.

4. The creation and use of the irrigation ditch was an essential and paramount reason for why Mr. Bratton wanted to purchase land from me.

5. As such, I dug the irrigation ditch on Lot 40 as soon as practical in the Spring of 1973, which occurred shortly after the actual conveyance of Lot 32 to Mr. Bratton.

6. Throughout all of my discussions and interactions with Mr. Bratton, both prior to, and after the sell of property to him, I intended the irrigation ditch and easement to Mr. Bratton to be permanent in nature.

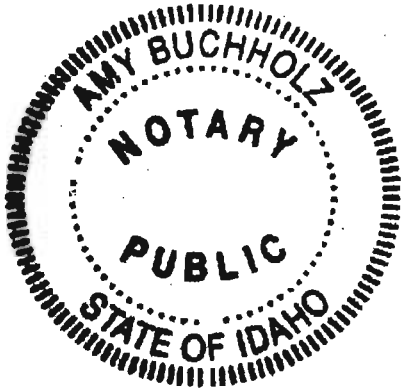
FURTHER YOUR AFFIANT SAITH NOT.

DATED this 15 day of February, 2008.

*Harold Ford*  
HAROLD FORD

SUBSCRIBED AND SWORN to before me this 15<sup>th</sup> day of February, 2008.

*Amy Buchholz*  
Notary Public for Idaho  
Residing at Boise, Idaho  
Commission expires: 9-24-2013



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15<sup>th</sup> day of February, 2008, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozacos  
PERKINS COIE  
251 East Front Street, Suite 400  
P.O. Box 737  
Boise, Idaho 83701-0737

- U.S. Mail, postage prepaid
- Hand-Delivered
- Overnight Mail
- Facsimile

  
\_\_\_\_\_  
Nancy Jo Garrett

Nancy Jo Garrett (ISB No. 4026)  
 Bradley S. Richardson (ISB No. 7008)  
 BRASSEY, WETHERELL, CRAWFORD & GARRETT  
 203 W. Main Street  
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 Telephone: (208) 344-7300  
 Facsimile: (208) 344-7077

**FILED**  
 A.M. 4:30 P.M.  
 FEB 15 2008  
 CANYON COUNTY CLERK  
 D. BUTLER, DEPUTY

Attorneys for Plaintiffs Charles E. Bratton  
 and Marjorie I. Bratton

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CHARLES E. BRATTON AND  
 MARJORIE I. BRATTON (husband and  
 wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G.  
 SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

**REPLY BRIEF TO PLAINTIFFS'  
 MOTION FOR PARTIAL  
 SUMMARY JUDGMENT**

**I.**  
**INTRODUCTION**

After the filing of Plaintiffs' Motion for Partial Summary Judgment, Defendants now admit that Plaintiffs have an express easement for access and use of the irrigation ditch located on Defendants' property. Nevertheless, Defendants argue that there is no implied easement by prior use and that there is a factual dispute regarding Defendants' infringement on Plaintiffs' easement rights. As shown below, the Court should grant Plaintiffs' Motion with respect to all issues. Most importantly, Plaintiffs have used their easements rights for more than 34 years. Further, the implied



easement in this matter clearly was intended to be permanent in nature. Accordingly, the Court should grant Plaintiffs' Motion for Partial Summary Judgment.

## II. ARGUMENT

### a. There is an Express Easement.

Defendants admit that there is an express easement on the property for both access and use of the irrigation ditch. *See* p. 5 of Defendants' Memorandum in Opposition; Exhibit "A" of the Affidavit of Charles Bratton in Support of Plaintiffs' Motion for Partial Summary Judgment, as previously filed with the Court. Therefore, the Court should recognize and hold as a matter of law that there is an express easement given to Plaintiffs on Defendants' property.

### b. There is an Implied Easement for the 12-Foot Easement Area.

#### 1. The Easement by Use Was Intended to be Permanent.

Defendants argue that Plaintiffs do not have an implied easement by use. In support of this argument, Defendants contend that use of an easement must occur prior to separation of the land to show that the use was "intended to be permanent." *See Thomas v. Madsen*, 142 Idaho 635, 638, 132 P.3d 392, 395 (2006). Nevertheless, Plaintiffs have shown that the implied easement was intended to be permanent.

Before the lot was conveyed, Mr. Harold Ford intended that the easement to Plaintiffs be permanent. In fact, Mr. Ford dug the ditch in the location that he himself chose. *See* ¶ 7 of the Affidavit of Harold Ford, as previously filed with the Court. This was done in accordance with prior discussions between Plaintiff and Mr. Ford regarding Plaintiffs' easement rights on Lot 40. *See* ¶ 3, 6 of Supplemental Affidavit of Harold Ford in Support of Plaintiffs' Motion for Partial Summary Judgment; ¶ 2 of Supplemental Affidavit of Charles Bratton in Support of Plaintiffs' Motion for Partial Summary Judgment, filed contemporaneously herewith. As such, there was an agreement

in advance of the conveyance of property that Mr. Ford would install the ditch as soon as practical. *See* ¶ 4 of Supplemental Affidavit of Charles Bratton; ¶ 5 of Supplemental Affidavit of Harold Ford. Accordingly, Mr. Ford dug the irrigation ditch shortly after the actual conveyance to Mr. Bratton. *See* ¶ 5 of the Supplemental Affidavit of Harold Ford.

As such, it is clear that the easement was intended to be “permanent in nature” both prior to, and after the sell of the property to Plaintiffs. *See* ¶ 6 of Supplemental Affidavit of Harold Ford.

Significantly, the fact that the ditch was located and dug by the servient property owner, and done for practical reasons just days after the conveyance, shows the permanency of the easement. *Id.* This particularly is true given that the ditch remained in the same location for more than 34 years. In sum, the easement was intended “to be permanent.” *See Thomas*, 142 Idaho at 638, 132 P.3d at 395.

## **2. There is Reasonable Necessity for the Implied Easement.**

Defendant essentially argue that there is no reasonable necessity for the irrigation ditch because Defendants built a new one that “works fine.” *See* ¶ 8 of Defendants’ Memorandum in Opposition. This argument, however, is misplaced because reasonable necessity is based upon the circumstances that existed during the time period of the conveyance. *See Thomas*, 142 Idaho at 638, 132 P.3d at 395.

During the time period of conveyance in this matter, the 12-foot width area for the easement by use was reasonably necessary. In fact, there is testimony that this 12-foot width was necessary to allow “a tractor to be driven over the ditch area for its maintenance,” and to provide “enough room to turn a tractor around within the easement area.” *See* ¶ 9 of the Affidavit of Harold Ford. Therefore, there is no issue of fact as there is reasonable necessity for the implied easement by use. *Thomas*, 142 Idaho at 638, 132 P.3d at 395.

**C. Defendants Infringed Upon Plaintiffs' Easement Rights.**

Defendants allege there is an issue of fact on the infringement of Plaintiffs' easement rights. In support of their argument, Defendants contend that Plaintiffs accessed their easement from different points on Defendants' property, and that Plaintiffs' alleged attitude somehow prevents summary judgment. Again, however, Defendants' argument is misconstrued because Defendants materially interfered with Plaintiffs' rights.

Under Idaho law, a servient estate cannot materially interfere with a dominant owners' use of its easement. *See Nampa and Meridian Irrigation District v. Mussell*, 139 Idaho 128, 33, 72 P.3d 868, 873 (2003).

It is undisputed that Defendants threatened Plaintiffs and demanded that Plaintiffs leave the easement property. *See* ¶ 11 of the Affidavit of Charles Bratton. Defendants also warned Mr. Bratton that he could not burn or spray the irrigation ditch without fear of harm by Mr. Scott. *See* ¶ 11 of the Affidavit of Charles Bratton. Likewise, Defendants even removed the concrete pipe culverts utilized in the irrigation ditch. *See* ¶ 14 and Exhibit "D" of the Affidavit of Charles Bratton. When Mr. Bratton again attempted to access his easement, he was unable to do so because Defendants continued to threaten and stock him. *See* ¶ 17 of the Affidavit of Charles Bratton.

Accordingly, Defendants materially interfered with the Brattons' use of their easement. The Court should rule as a matter of law that Defendants are liable for the resultant damages.

**III.  
CONCLUSION**

Based upon the foregoing, the Court should grant Plaintiffs' Motion for Partial Summary Judgment.

DATED this 15<sup>th</sup> day of February, 2008.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

By Bud Perkins, For  
Nancy Jo Garrett, Of the Firm  
Attorneys for Plaintiffs Charles E. Bratton and Marjorie  
I. Bratton

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15<sup>th</sup> day of February, 2008, I served a true and correct copy of the foregoing REPLY BRIEF TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozacos  
PERKINS COIE  
251 East Front Street, Suite 400  
P.O. Box 737  
Boise, Idaho 83701-0737

- U.S. Mail, postage prepaid
- Hand-Delivered
- Overnight Mail
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Bud Perkins, For  
Nancy Jo Garrett

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**F I L E D**  
 A.M. *J.S.J.* P.M.

FEB 15 2008

CANYON COUNTY CLERK  
 D. BUTLER, DEPUTY

Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and  
 MARJORIE I. BRATTON (husband and  
 wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT  
 (husband and wife),

Defendants.

Case No. CV 0706821C

**ERRATA TO DEFENDANTS'  
 MEMORANDUM IN OPPOSITION TO  
 PLAINTIFFS' MOTION TO AMEND THE  
 COMPLAINT TO ADD PUNITIVE  
 DAMAGES**

Defendants John R. Scott and Jackie G. Scott ("the Scotts"), by and through their attorney of record Perkins Coie LLP, submits the following errata in support of their Memorandum in Opposition to Plaintiff's Motion to Amend the Complaint to Add Punitive Damages. Defendants have discovered errors on page 3 of the Memorandum.

A corrected page 3 is attached hereto and Defendants respectfully request that it be substituted by the Clerk for page 3 of the Memorandum in Opposition to Plaintiff's Motion to Amend the Complaint to Add Punitive Damages filed February 14, 2008.

ERRATA TO DEFENDANTS' MEMORANDUM IN  
 OPPOSITION TO PLAINTIFFS' MOTION TO AMEND  
 THE COMPLAINT TO ADD PUNITIVE DAMAGES- 1  
 65685-0001/LEGAL13981277.1

000185

DATED: February 15, 2008.

PERKINS COIE LLP

By

*Shelly Cozakos*

Shelly H. Cozakos, Of the Firm  
Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on February 15, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Nancy Jo Garrett  
Bradley S. Richardson  
BRASSEY, WETHERELL, CRAWFORD &  
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203 W. Main St.  
P.O. Box 1009  
Boise, ID 83701-1009  
FAX: 344-7077

Hand Delivery  
U.S. Mail  
Facsimile  
Overnight Mail

      
  X    
      
    

*Shelly Cozakos*

Shelly H. Cozakos

discussed at that time with Mr. Bratton that Mr. Bratton believed he had an easement along the fenceline for a ditch to allow irrigation water to reach his pasture which adjoins his field. Mr. Bratton indicated that he had been spraying and burning over the years to keep the weeds down. (Scott Aff., ¶4.) Because the Scotts did not want Mr. Bratton spraying or burning on their property, Mr. Scott offered to fix and maintain the ditch and keep the weeds mowed. Mr. Bratton agreed. (Scott Aff., ¶5.)

On approximately April 7 2007, Mr. Scott was outside working in his yard and noticed that Mr. Bratton had set fire to his property along the ditchline. The flames were extending well beyond the boundaries of the easement and onto the Scotts' property. The Scotts were unhappy that Mr. Bratton was burning their property and made clear to him that they no longer wanted him to do this. At no time did they ever threaten Mr. Bratton or do anything to threaten him. (Scott Aff., ¶6.)

This exchange on April 7, 2007 was not hostile. Mr. Scott offered to fix the ditch given that from his perspective it was in a state of disarray and had not been kept up. In addition, the ditch had been torn up in some parts when Mr. Scott accidentally ran his tractor wheels into it. Mr. Bratton agreed to this. (Scott Aff., ¶7.) Mr. Bratton described the incident as follows:

- Q When Mr. Scott approached you in April of '07 when you were burning there on the property, did he try to stomp out some of the flames?
- A Well, he was running up and down the ditch like a mad dog, yelling at me. I don't know what he was doing, to be truthful with you.
- Q Did you see him try and stomp out the flames?
- A No. I didn't pay any attention to him because I figured, this guy is half nuts, and so I just wanted to burn my ditch and get out of there.
- Q Okay, did you know that he owned this property here when he approached you?

DEFENDANTS' MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS' MOTION TO AMEND THE COMPLAINT  
TO ADD PUNITIVE DAMAGES- 3

65685-0001/LEGAL13977860.1

000187





3. Exhibit "A," pages 22-24 include the testimony of Mr. Scott regarding his charge of reckless endangerment by discharging a firearm four times at persons intruding on his property.

4. Exhibit "A," pages 25-26 include the testimony of Mr. Scott regarding a physical bar fight in which he was involved.

5. Exhibit "A," pages 51-52 include the testimony of Mr. Scott in which he describes the firearms that he owns and has at his residence.

6. Exhibit "A," pages 61-63 include the testimony of Mr. Scott in which he admits removing the cement culverts from Mr. Bratton's ditch.

7. Exhibit "A," pages 71-72 include the testimony of Mr. Scott in which he describes injuring one of the neighbors pet cat(s).

8. Exhibit "A," pages 95-96 include the testimony of Mr. Scott in which he admits that he trespassed on Mr. Bratton's property.

9. Exhibit "A," pages 106-107 and 158-159 include the testimony of Mr. Scott in which he admits that in 2006 he knew that Mr. Bratton had an irrigation ditch right away on the Scott property.

10. Exhibit "A," pages 163-166 include the testimony of Mr. Scott in which he admits that he erected a yellow roped off area next to the fence and erected at least two no trespassing signs at the spot of Mr. Bratton's ingress to his right a way.

11. Exhibit "A," pages 166-168 include the testimony of Mr. Scott in which he admits that he researched the statutes having to do with water rights before he leveled Mr. Bratton's ditch.

12. Exhibit "A," pages 172-175 include the testimony of Mr. Scott in which he admits that he does not want any neighbor on his land.

13. Exhibit "A," page 176 includes the testimony of Mr. Scott in which he admits that it is permissible for someone to burn on their easement.

14. Exhibit "A," page 177 includes the testimony of Mr. Scott in which he admits he removed the culverts from Mr. Bratton's ditch, broke at least a couple of the culverts, is not a farmer, and did not see any risk that the culverts he rolled onto Bratton's land would pose to Bratton's horses.

15. Exhibit "A," page 182 includes the testimony of Mr. Scott in which he admits that it is against the law to prevent another from the rightful use of their water.

16. Exhibit "A," page 184 includes the testimony of Mr. Scott in which he admits that the first and only time he attempted construction a ditch was in April 2007.

17. Exhibit "B" is a true and correct copy of the excerpt of the deposition of Charles Bratton taken by Defendant on February 6, 2007.

18. Exhibit "B," page 27 includes testimony of Mr. Bratton that he first encountered Mr. Scott in 2006 when Scott was sneaking around in the tall weeds of the Scott property watching Mr. Bratton irrigate in his easement.

19. Exhibit "B," page 27 includes testimony of Mr. Bratton establishing the spot when Mr. Bratton accessed his easement for 34 years.

20. Exhibit "B," pages 47-51 includes testimony of Mr. Bratton describing the conduct of Mr. and Mrs. Scott in April 2007 first encounter.

21. Exhibit "B," pages 67-71 includes testimony of Mr. Bratton describing his fear of Mr. Scott and the reason for the fear, the erection of the No Trespassing Signs at the very point of Mr. Bratton's ingress for his easement, Mr. Scott's trespass onto the Bratton property, and the neighbors fight with Mr. Scott.

22. Exhibit "B," pages 68 and 88 includes testimony of Mr. Bratton describing the fact that Sheriff Smith advised Mr. Bratton not to go up onto his easement unless he had someone with him, but Bratton did not want to endanger anyone else.

23. Exhibit "B," pages 87-89 includes testimony of Mr. Bratton describing the No Trespassing Signs, Scott's reputation with the neighbors, fear of Scott by other neighbors, fear of Mr. Bratton of Scott.

24. Exhibit "B," pages 100-106 includes testimony of Mr. Bratton describing the confrontations with the Scotts, threatening conduct of the Scotts, continual worry of Mr. Bratton regarding future confrontations with the Scotts.

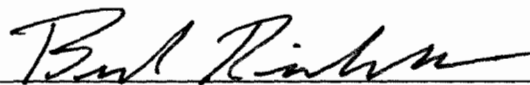
25. Exhibit "B," pages 111-119 includes testimony of Mr. Bratton describing Scotts conduct of running up and down the fence when Bratton went to access his easement after the first April confrontation, confrontation with neighbor Dan Lane, problems with Scott's other neighbor Steve, information Bratton received regarding Scott shooting a neighbors pet cat, fear of Scott shooting, difficulty sleeping and increase tremor due to stress caused by Scotts.

26. Exhibit "B," pages 121-122 includes testimony of Mr. Bratton describing the neighbor who is a professional ditch digger who will not perform the work unless the Sheriff is present and maintains his safety from Scott.

27. Exhibit "B," page 124 includes testimony of Mr. Bratton describing the statement by Scott that if Bratton did not like what Scott was doing, Bratton could get a lawyer.

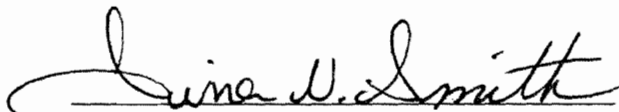
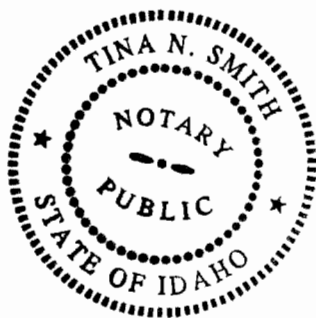
FURTHER YOUR AFFIANT SAITH NOT.

DATED this 20<sup>th</sup> day of February, 2008.



BRADLEY S. RICHARDSON

SUBSCRIBED AND SWORN to before me this 20<sup>th</sup> day of February, 2008.



Notary Public for Idaho

Residing at Boise, Idaho

Commission expires: 5/10/08

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20<sup>th</sup> day of February, 2008, I served a true and correct copy of the foregoing upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozacos  
PERKINS COIE  
251 East Front Street, Suite 400  
P.O. Box 737  
Boise, Idaho 83701-0737

U.S. Mail, postage prepaid  
 Hand-Delivered  
 Overnight Mail  
 Facsimile

*Burt Roberts, For*  
Nancy Jo Garrett

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and MARJORIE )  
I. BRATTON (husband and wife), )  
Plaintiffs, )  
vs. ) Case No. CV 0706821C  
JOHN R. SCOTT and JACKIE G. SCOTT )  
(husband and wife), )  
Defendants. )  
\_\_\_\_\_ )

DEPOSITION OF JOHN R. SCOTT

FEBRUARY 7, 2008

REPORTED BY:

TAUNA K. TONKS, CSR No. 276, RPR

Notary Public



1 A. Civil cases?  
 2 Q. Um-hmm.  
 3 A. No, not that I remember.  
 4 Q. Have you ever been divorced or child  
 5 custody cases?  
 6 A. No, ma'am.  
 7 Q. Okay. Now, any criminal cases?  
 8 A. Yes.  
 9 Q. Okay. Could you tell me those.  
 10 MS. YEE-WALLACE: And I'm just going to  
 11 object to the form as to relevance as well. You  
 12 can answer it.  
 13 THE WITNESS: And I couldn't even guess  
 14 about the date on this; it was a very long time  
 15 ago.  
 16 Q. (BY MS. GARRETT) Okay. Greater than  
 17 10 years ago?  
 18 A. Yes.  
 19 Q. Okay. What was it?  
 20 A. I'm trying to remember the -- could you  
 21 ask me specifically? I mean, you want to know  
 22 what it was about, or do you want to know the  
 23 actual charges? Could you just --  
 24 Q. Yeah, just tell me the circumstances  
 25 and maybe we can figure it out from there.

1 A. The outcome was a plea to reckless  
 2 endangerment.  
 3 Q. And what was the basis of that issue,  
 4 what happened?  
 5 A. Some people came at 2:30 in the morning  
 6 and was backing into one of my cars in the  
 7 driveway, smashing it. And I went outside and  
 8 they tried to run me down in the driveway.  
 9 Q. Did you do anything?  
 10 A. Yes.  
 11 Q. What did you do?  
 12 A. I fired a weapon into the engine of the  
 13 car.  
 14 Q. What kind of weapon?  
 15 A. A handgun.  
 16 Q. And then what happened?  
 17 A. The car was disabled, but they managed  
 18 to get down the street and get away.  
 19 Q. Did you shoot at them?  
 20 A. No.  
 21 Q. Did you only fire once?  
 22 A. Four times.  
 23 Q. Do you remember what you were charged  
 24 with?  
 25 A. Three counts of assault with a deadly

1 weapon.  
 2 Q. Okay. And where was that?  
 3 A. Alaska.  
 4 Q. Where in Alaska, sir?  
 5 A. The Kenai Peninsula.  
 6 Q. And what town?  
 7 A. Well, it was not really in town.  
 8 Q. Okay. What area then?  
 9 A. In between Soldotna and Kenai.  
 10 Q. Okay. Do you remember what county that  
 11 is, the county court?  
 12 A. They call them boroughs.  
 13 Q. Boroughs? Do you remember the borough?  
 14 A. I just told you Kenai Peninsula  
 15 Borough.  
 16 Q. Oh, the Kenai Peninsula Borough. Okay,  
 17 thank you. I'm sorry.  
 18 Any other criminal charges?  
 19 A. Any other charges?  
 20 Q. Oh, before I forget, did you spend any  
 21 time incarcerated because of this incident?  
 22 A. I was sentenced to ten days, and I  
 23 spent seven, got three off for good behavior.  
 24 Q. And then were you on probation?  
 25 A. Pardon me?

1 Q. Were you on probation?  
 2 A. No probation. Oh, that's correct.  
 3 Yeah, I believe -- yes. I don't  
 4 remember how long it was.  
 5 Q. But a probationary time?  
 6 A. Yes, ma'am.  
 7 Q. Did you ever violate your probation?  
 8 A. No, ma'am.  
 9 Q. Okay. Now, any other criminal charges?  
 10 A. One other time.  
 11 Q. Okay.  
 12 A. I was charged -- I don't remember the  
 13 exact charge, but it was about a fight.  
 14 Q. Okay. A fist fight?  
 15 A. Yes. Well, not really a fist fight.  
 16 Q. Was it a fight with a firearm?  
 17 A. No.  
 18 Q. So it was a physical fight?  
 19 A. Yeah.  
 20 Q. And what was the situation there, sir?  
 21 A. It was in a bar and, you know, some  
 22 drunks started swinging. And I managed to get  
 23 out of there without doing too much damage to  
 24 anyone.  
 25 Q. Okay. And what were you charged with?

1 A. Actually, I wasn't charged criminally.  
 2 I don't remember -- I ended up in court, but I  
 3 don't remember why. I don't remember being  
 4 charged criminally for it --  
 5 Q. Okay.  
 6 A. -- but I do remember being in court.  
 7 That's all I can remember about it.  
 8 Q. Do you remember having to pay a fine?  
 9 A. I don't remember anything else.  
 10 Q. Okay. And where did this occur, sir?  
 11 A. Kenai.  
 12 Q. Same place? Okay.  
 13 What was your address when you were  
 14 involved in the, you know, firearm incident in  
 15 the Kenai Borough? What was your address then?  
 16 A. I don't remember the exact address.  
 17 Q. Do you remember the location?  
 18 A. Well, yeah, it was off of Poppy Lane.  
 19 Q. Off of Poppy?  
 20 A. Poppy Lane, like Poppy the flower.  
 21 Q. P-O-P-P --  
 22 A. I don't know how to spell it.  
 23 Q. Okay. We'll make it up. And who were  
 24 you living with at the time?  
 25 A. We had a little cabin on the back of my

1 A. I wouldn't put it that way.  
 2 Q. I'm sorry, I didn't want to put words  
 3 in your mouth. How would you put it, generally?  
 4 A. I would like to make this brief.  
 5 Q. Okay, do.  
 6 A. I'll use my sister's words.  
 7 Q. Okay.  
 8 A. He worked us like slaves, he beat us  
 9 like dogs, and he raped us for fun.  
 10 Q. Have you finished?  
 11 A. Pardon me?  
 12 Q. Have you finished?  
 13 A. Yes, ma'am.  
 14 Q. Okay. Well, that's a good reason.  
 15 Now, is your mother still alive?  
 16 A. Yes.  
 17 Q. And where does she live?  
 18 A. With my father.  
 19 Q. Are you still in contact with your  
 20 mother?  
 21 A. She writes from time to time.  
 22 Q. So by letters from her?  
 23 A. Pardon me?  
 24 Q. So you receive letters from her from  
 25 time to time?

1 father's place.  
 2 Q. And were you living with someone at the  
 3 time?  
 4 A. My wife.  
 5 Q. And who was your wife?  
 6 A. Right here, Jackie --  
 7 Q. Jackie Scott? Okay.  
 8 And what is your father's name?  
 9 A. Pardon me?  
 10 Q. What is your father's name?  
 11 A. David Scott.  
 12 Q. Okay. Does he still live there?  
 13 A. No.  
 14 Q. Where does Mr. David Scott live?  
 15 A. I believe it's called Delta Junction.  
 16 Q. And where, what state?  
 17 A. Alaska.  
 18 Q. Okay. Are you still in contact with  
 19 Mr. David Scott?  
 20 A. No.  
 21 Q. Why?  
 22 A. It would probably take a long time to  
 23 tell you all the reasons.  
 24 Q. Okay. Have you had a falling-out with  
 25 your father?

1 A. More like notes.  
 2 Q. Okay. Do you contact her at all?  
 3 A. No, ma'am.  
 4 Q. Now, you've mentioned a sister. How  
 5 many siblings do you have?  
 6 A. I have two younger sisters.  
 7 MS. GARRETT: Do you want to take a  
 8 little break?  
 9 MS. YEE-WALLACE: Yeah, let's take a  
 10 break.  
 11 (A brief recess was taken.)  
 12 MS. GARRETT: So, Ms. Wallace, are we  
 13 ready to continue?  
 14 MS. YEE-WALLACE: Yes.  
 15 Q. (BY MS. GARRETT) After a short break,  
 16 I want to ask you a couple more questions  
 17 about -- not about your father, but about the  
 18 incident in which you pled to reckless  
 19 endangerment; okay?  
 20 Was that a felony?  
 21 A. The reckless endangerment charge?  
 22 Q. Yes.  
 23 A. No. Misdemeanor.  
 24 Q. Misdemeanor. Okay. Were you  
 25 represented by counsel, by an attorney at that



1 Q. But you haven't renewed it or anything?  
 2 A. No, no. I've had a -- other than that  
 3 little spot of time, my last license is all I've  
 4 had.  
 5 Q. Okay. And do you have a driver's  
 6 license in Idaho?  
 7 A. Yes.  
 8 Q. Do you have any -- are you certified or  
 9 licensed by any state agency or governmental  
 10 agency?  
 11 A. No, ma'am.  
 12 Q. Have you ever had your license in any  
 13 state revoked or limited?  
 14 A. Yes.  
 15 Q. When was that?  
 16 A. I don't know the exact date. It was my  
 17 early -- late teens, early 20's.  
 18 Q. In Alaska?  
 19 A. Yes.  
 20 Q. And what was the reason for that?  
 21 A. Too many points.  
 22 Q. Too many tickets?  
 23 A. Yes.  
 24 Q. They do that up there, too, huh? Get  
 25 too many points, you lose your license?

1 A. A handgun in a presentation case is a  
 2 limited edition, one that you would not fire  
 3 because it would devalue it. It's like a  
 4 collector thing.  
 5 Q. It's just something you would put up on  
 6 your mantel or something?  
 7 A. They actually come in a box with the  
 8 little insignia and all the...  
 9 Q. And your mother-in-law gave you that,  
 10 too?  
 11 A. Yes, it was a gift from my  
 12 mother-in-law.  
 13 Q. What kind is it?  
 14 A. A Sig Sauer, I think.  
 15 Q. Okay.  
 16 A. I don't know if I'm pronouncing that  
 17 right.  
 18 Q. Okay. Any other firearms that you own?  
 19 A. No.  
 20 Q. Do you have any other firearms, other  
 21 than these two, in your home?  
 22 A. No.  
 23 Q. If you know, does Jackie own any  
 24 firearms?  
 25 A. No.

1 A. Yes.  
 2 Q. How long did you lose it for,  
 3 Mr. Scott?  
 4 A. I don't remember.  
 5 Q. Okay. Now, were the tickets, if you  
 6 remember, speeding tickets, or were they some  
 7 other type of ticket?  
 8 A. I don't remember.  
 9 Q. Okay.  
 10 A. I'm sure some of them were speeding.  
 11 Q. Okay. Have you ever had a foreclosure  
 12 action brought against you?  
 13 A. No, ma'am.  
 14 Q. Ever been evicted?  
 15 A. No, ma'am.  
 16 Q. Do you possess any firearms now?  
 17 A. Pardon me?  
 18 Q. Do you own any firearms now?  
 19 A. My mother-in-law has given me two.  
 20 Q. And what are they?  
 21 A. One is an antique muzzle loader, and  
 22 the other one is a presentation -- it's a  
 23 handgun, you know, in a presentation case.  
 24 Q. I don't know what you mean by that.  
 25 Could you explain to me what you mean?

1 Q. Are you a bow hunter?  
 2 A. No.  
 3 Q. Have you ever been restricted by any  
 4 type of governmental agency from purchasing  
 5 firearms?  
 6 A. No.  
 7 Q. Okay. Why did you guys decide to move  
 8 from Alaska down here?  
 9 A. Mostly my mother-in-law. My wife takes  
 10 care of her.  
 11 Q. Oh. How old is she?  
 12 A. I don't remember, 71 or '2.  
 13 Q. Does she live with you?  
 14 A. No.  
 15 Q. Where does she live?  
 16 A. In Washington County.  
 17 Q. Is that Weiser or -- I don't know --  
 18 A. Oh, Midvale.  
 19 Q. Midvale. Okay, sorry.  
 20 A. I believe that's Midvale, yes.  
 21 Q. So does your wife live up there with  
 22 your mother-in-law?  
 23 A. No. She commutes back and forth every  
 24 week.  
 25 Q. How long does she go up there for every

1 A. My mother-in-law gifted us the  
2 property.  
3 Q. Was that part of the incentive to get  
4 you guys to move down here?  
5 A. Excuse me?  
6 Q. Was that part of the carrot that she  
7 put out, so to speak, to get you guys to move  
8 down here?  
9 A. I don't understand the question.  
10 Q. Okay, I'll try to rephrase it.  
11 Did she say: I'll give you this  
12 property if you guys will move down here and help  
13 me?  
14 A. Not like that.  
15 Q. Okay. How did she propose the move, if  
16 she did?  
17 A. When she got the house back, or during  
18 the lawsuit, she offered to give it to my wife  
19 and I if we moved down here, yes.  
20 Q. That's kind of what I was wondering.  
21 Now, what lawsuit are you talking  
22 about?  
23 A. The one between my mother-in-law and  
24 Harold Ford.  
25 Q. Were you involved in that lawsuit at

1 all?  
2 A. No.  
3 Q. Do you know if your wife was involved  
4 in the lawsuit?  
5 A. My wife -- the property was in a trust  
6 at the time, and my wife was a trustee.  
7 Q. Oh, I see. Was she named in the  
8 lawsuit, too? If you know.  
9 A. I know she had to go to court with my  
10 mother-in-law.  
11 Q. Okay. When we take her depo, I'll ask  
12 her; okay?  
13 A. Pardon me?  
14 Q. I'm going to take her deposition, so  
15 I'll ask her all about that.  
16 A. Who?  
17 Q. Jackie.  
18 A. Oh, okay.  
19 Q. Yeah. But you didn't have to go to  
20 court, though, for it?  
21 A. No, ma'am.  
22 Q. Okay. Do you know a person by the name  
23 of Deputy Lancaster?  
24 A. Yes.  
25 Q. And how do you know of him?

1 A. He was the officer that came out and  
2 talked to me when Charlie made a complaint about  
3 me dumping garbage on his property.  
4 Q. Do you remember when that was, that he  
5 came and talked to you?  
6 A. I don't remember the exact date at this  
7 time.  
8 Q. Was it in the spring of 2007?  
9 A. Yes, I believe so.  
10 Q. Okay. And what did you discuss with  
11 Deputy Lancaster?  
12 A. He said that had he a complaint that I  
13 had dumped some garbage on Mr. Bratton's  
14 property, and he came out to talk to me about it.  
15 Q. Okay. And what did you say to him?  
16 A. He told me that it was a civil matter,  
17 and I took him down there and I showed him -- you  
18 know, we looked at what he was out there for.  
19 Q. Where did you take him?  
20 A. Down on the lower property.  
21 Q. Your property?  
22 A. Yes.  
23 Q. And what did you show him?  
24 A. Mr. Bratton was claiming that the  
25 concrete culverts that I had placed on the edge

1 of his property were my garbage and that he  
2 wanted them removed.  
3 Q. How did you place those concrete  
4 culverts onto Mr. Bratton's property?  
5 A. I scooped them up with the loader  
6 bucket and just rolled them under the fence.  
7 Q. And why did you do that?  
8 A. I assumed that he would want them.  
9 Q. Why did you remove them from where they  
10 were?  
11 A. They were in the way for mowing.  
12 Q. In your way?  
13 A. Yes. When Mr. -- when I talked -- when  
14 Mr. Bratton and I agreed that I would fix the  
15 ditch, I removed them so that I could fix the  
16 ditch, because I couldn't mow that area.  
17 Q. So they were in the way for fixing the  
18 ditch and they were in the way for mowing?  
19 A. Well, the -- yes. Basically, yes.  
20 Q. Okay. How many pieces of cement  
21 culvert did you remove?  
22 A. I don't have that information in front  
23 of me. It's been awhile since I counted them.  
24 Q. So more than three, though?  
25 A. More than three?

1 Q. Yes.  
 2 A. Yes, I believe so.  
 3 Q. Okay. So you took Deputy Lancaster  
 4 down to the lower part of your property and  
 5 showed him the culverts that you had rolled  
 6 underneath the fence?  
 7 A. Yeah.  
 8 Q. And what else did you discuss with  
 9 Deputy Lancaster?  
 10 A. He told me that the culverts were on  
 11 the property when I got it, that they were mine,  
 12 and that he couldn't make me remove them from  
 13 Mr. Bratton's property, but he suggested that  
 14 would be the best thing.  
 15 Q. He told you that the culverts were  
 16 yours?  
 17 A. Yes.  
 18 Q. And that he couldn't make you remove  
 19 them from Mr. Bratton's property, but he  
 20 suggested that you should?  
 21 A. Yes.  
 22 Q. Okay. Anything else that he told you?  
 23 A. That it was a civil matter.  
 24 Q. Okay.  
 25 A. And that he wasn't even going to bother

1 to write a report because it was a non-event, I  
 2 believe is the way he put it, to the best of my  
 3 memory.  
 4 Q. Anything else that you showed him or  
 5 discussed with him at that time?  
 6 A. I don't remember at this time.  
 7 Q. Did you show him the Bratton ditch that  
 8 you had removed the culverts out of?  
 9 MS. YEE-WALLACE: I'll just object to  
 10 the form of the question. You can answer it.  
 11 THE WITNESS: I don't understand the  
 12 question.  
 13 Q. (BY MS. GARRETT) Where did you get the  
 14 culverts?  
 15 A. From the ditch on our property.  
 16 Q. Right. Did you show him that ditch?  
 17 A. Yes.  
 18 Q. Okay. Did you have a discussion with  
 19 Deputy Lancaster about the ditch, the ditch that  
 20 you removed the culverts from?  
 21 A. I don't remember if we discussed it or  
 22 not.  
 23 Q. Okay.  
 24 A. I don't remember everything that we  
 25 discussed.

1 Q. Sure.  
 2 A. But he was aware of the situation.  
 3 Q. Aware of what situation?  
 4 A. Of the -- he never did explain to me  
 5 what exactly all the complaint was other than  
 6 the --  
 7 Q. Culverts?  
 8 A. Yeah, the garbage that I dumped onto  
 9 Mr. Bratton's property, is the way he put it.  
 10 Q. How long were you with Deputy  
 11 Lancaster?  
 12 A. Pardon me?  
 13 Q. How long were you with Deputy  
 14 Lancaster?  
 15 A. I don't remember.  
 16 Q. Hours?  
 17 A. No, not more than an hour, I wouldn't  
 18 say.  
 19 Q. Okay. And was it daylight when you  
 20 were with him?  
 21 A. Yes.  
 22 Q. Was Mr. Bratton there?  
 23 A. No.  
 24 Q. Was Mr. Bratton's car on his property?  
 25 A. Not that I remember.

1 Q. Did you ever speak to Sheriff Smith?  
 2 A. Pardon me?  
 3 Q. Did you ever speak at any time to  
 4 Sheriff Smith?  
 5 A. No.  
 6 Q. Other than this one time with Deputy  
 7 Lancaster, have you spoke to Deputy Lancaster  
 8 again?  
 9 A. Two other occasions.  
 10 Q. Okay. Tell me about those.  
 11 A. He came back out to -- I don't know how  
 12 many days it was, and said that they wanted to --  
 13 more information on me personally and asked me my  
 14 name and stuff. And whatever they do with that  
 15 information, he did that.  
 16 Q. Okay. What kind of things did he ask  
 17 you, just your name? What else?  
 18 A. The only thing that I remember was he  
 19 asked me if I was a terrorist.  
 20 Q. Okay.  
 21 A. That's the only thing I remember, other  
 22 than the personal information.  
 23 Q. And what did you say when he asked you  
 24 if you were a terrorist?  
 25 A. No.

1 Q. She's to the north of you? Would that  
2 be north?  
3 A. Yes.  
4 Q. Okay.  
5 A. And I don't even know who they were.  
6 Some guy that lives down the road someplace just  
7 stopped and talked to me about my posthole digger  
8 one day, but I don't know his name.  
9 Q. Did he want to borrow it?  
10 A. I think he was wanting free postholes.  
11 Q. And what did you say?  
12 A. What?  
13 Q. What did you say?  
14 A. Well, he didn't actually ask for free  
15 postholes. He just hinted, I think, if I  
16 remember correctly.  
17 Q. Did you offer to dig him some  
18 postholes?  
19 A. Pardon me?  
20 Q. Did you offer to dig --  
21 A. No, ma'am.  
22 Q. -- him some postholes? Okay.  
23 Any other neighbors?  
24 A. Not that I recall at this time.  
25 Q. Do you socialize with any neighbor?

1 A. What do you mean by "socialize"?  
2 Q. Go over to their house for dinner and  
3 go over and watch TV together.  
4 A. No, ma'am.  
5 Q. Do you guys have any pets?  
6 A. No, ma'am.  
7 Q. Now, you mentioned that Steve had  
8 dumped his cat box. I guess that's cat litter  
9 box?  
10 A. Oh, I don't know that he did it.  
11 Q. Someone dumped --  
12 A. There was cat litter over the fence,  
13 yeah, on the lower property that I made note of.  
14 I don't know who did it or when it was done.  
15 Q. Was there a big pile of it, or just  
16 one?  
17 A. I don't remember.  
18 Q. Okay. Did you ever see a cat from  
19 Steve's property?  
20 A. What do you mean?  
21 Q. Did you ever see his cat? If he had a  
22 cat, did you ever see a cat?  
23 A. I don't know if they were his cats or  
24 not. I don't -- I didn't look at their tags or  
25 anything.

1 Q. So are there cats on your property?  
2 A. We don't have any cats.  
3 Q. Do you see cats on your property?  
4 A. Sometimes.  
5 Q. Have you injured any cats on your  
6 property?  
7 A. What do you mean?  
8 Q. Have you ever injured any cat that came  
9 onto your property?  
10 A. Yes.  
11 Q. What happened?  
12 A. Well, I don't know if I actually  
13 injured him. I've shot a couple of them in the  
14 behind with a slingshot for defecating on the  
15 lawn.  
16 Q. And what did you use in the slingshot?  
17 Just a rock or a BB or what?  
18 A. No, they have little pellets.  
19 Q. Okay. Have you looked at any of the  
20 paperwork that has been filed in this case? Have  
21 you looked at any of the affidavits that have  
22 been filed in this case?  
23 A. I've probably looked over most of them.  
24 Q. Okay.  
25 A. Although there's so many, I don't...

1 Q. Okay. Sure.  
2 MS. GARRETT: I'm going to start down  
3 through the deeds and stuff. We can either take  
4 a break now or --  
5 MS. YEE-WALLACE: What time is it?  
6 MRS. SCOTT: It's time for a break.  
7 (A discussion was held off the record.)  
8 (A lunch recess was taken at 12:45  
9 p.m., and the deposition was  
10 reconvened at 1:45 p.m.)  
11 MS. GARRETT: Let's take up the  
12 deposition, again, of Mr. Scott after our lunch  
13 break, and it's now about a quarter to 2:00.  
14 And could you hand Mr. Scott what  
15 you've premarked as Exhibit No. 2 for me, please.  
16 Q. (BY MS. GARRETT) Could you take a  
17 moment and look at that, Mr. Scott.  
18 A. (Witness complied.)  
19 Q. Mr. Scott, what is your mother-in-law's  
20 name?  
21 A. Lois Genice Rawlinson.  
22 Q. Have you seen this document that's been  
23 marked as Exhibit No. 2 before?  
24 A. Yes.  
25 Q. And just for the record, it's a

1 A. It appears so.  
 2 Q. Okay. And if you read the first  
 3 sentence, it says: "This firm represents John  
 4 and Jackie Scott with respect to your  
 5 correspondence of April 25th, 2007 and the  
 6 dispute with Mr. Bratton."  
 7 Have I read that correctly?  
 8 A. You're on the first page and the first  
 9 paragraph?  
 10 Q. Yeah, the first sentence.  
 11 A. The first sentence?  
 12 Q. First sentence, yeah.  
 13 A. It appears so.  
 14 Q. And this is addressed to Adelle Doty of  
 15 Huntley Park law firm; correct?  
 16 A. "Dear Ms. Doty"?  
 17 Q. Yes.  
 18 A. Yes.  
 19 Q. All right. If you'll turn to the  
 20 second page, the last sentence of the first full  
 21 paragraph of the second page --  
 22 A. Wait a minute now.  
 23 Q. Okay. Go to the second page.  
 24 A. Yes.  
 25 Q. First paragraph, last sentence.

1 yourself --  
 2 A. Yes.  
 3 Q. -- and pulled them back through? And  
 4 you did that with each culvert?  
 5 A. Pardon me?  
 6 Q. Did you do that with each culvert?  
 7 A. Yes. I was removing the trash.  
 8 Q. And was Mr. Bratton present when you  
 9 did that?  
 10 A. No.  
 11 Q. Did you ask Mr. Bratton's permission to  
 12 do that?  
 13 A. No. He --  
 14 Q. That's the answer.  
 15 A. Okay.  
 16 Q. Now, if you'll look at the second to  
 17 last paragraph on the same page, second page, it  
 18 says: "Finally, please advise Mr. Bratton that,  
 19 while he does have a right to maintain the  
 20 easement, his maintenance rights apply only to  
 21 the ditch within the boundary lines set forth in  
 22 the deed and he has no right to burn or spray  
 23 upon the Scott property. If he continues to do  
 24 so, the Scotts will need to take legal action."  
 25 Did I read that correctly?

1 A. Okay.  
 2 Q. Okay? "Mr. Scott then took back the  
 3 pieces of concrete culvert." Do you see that  
 4 sentence?  
 5 A. "Then took back the pieces of  
 6 concrete," yes, I do.  
 7 Q. How did you take them back?  
 8 A. I ran a chain through the culverts and  
 9 drug them back onto my property.  
 10 Q. How did you get the chain through the  
 11 culverts?  
 12 A. What do you mean?  
 13 Q. How did you put the chain through the  
 14 culverts?  
 15 A. I just slid it, you know, through them  
 16 like threading a needle.  
 17 Q. So you walked onto Mr. Bratton's  
 18 property and put the chains through the culverts?  
 19 A. Yes.  
 20 Q. And did you take your tractor onto his  
 21 property?  
 22 A. Never.  
 23 Q. So you ran the chain under the fence?  
 24 A. Right.  
 25 Q. And you went through the fence

1 A. That's what it says.  
 2 Q. Okay. And so if I understand  
 3 correctly, this letter does not recognize the  
 4 location of Mr. Bratton's ditch that had been  
 5 there since 1973. You only recognize the --  
 6 A. I don't understand what you're asking  
 7 me.  
 8 Q. Let me finish. It says -- I'll read it  
 9 again -- "within the boundary lines set forth in  
 10 the deed."  
 11 So it recognizes the boundary lines set  
 12 forth in the 1973 deed; correct?  
 13 A. I'm no expert, but -- I'm not sure what  
 14 you're asking, actually.  
 15 Q. Does it recognize the 12-foot easement  
 16 that Mr. Bratton has?  
 17 A. I'm not aware of any 12-foot easement.  
 18 Q. Okay. So are you saying, then, that  
 19 you are not aware of any easement by use for  
 20 Mr. Bratton?  
 21 A. I said I was not aware of a 12-foot  
 22 easement.  
 23 Q. Okay. "And that he has no right to  
 24 burn or spray upon the Scott property." What  
 25 does that mean?

1 mowed the easement -- or I mean, the property.  
 2 Q. When was that? When was the first time  
 3 you talked to him?  
 4 A. The first time I remember talking to  
 5 him was the fall of 2006.  
 6 Q. Okay. And you had already mowed?  
 7 A. Yes. Because I wasn't even aware he  
 8 was down there until then.  
 9 Q. What do you mean "he was down there"?  
 10 A. I didn't know any of this was down  
 11 there until after I mowed, is what I'm saying.  
 12 Q. Okay. So you mowed. And then was  
 13 Mr. Bratton on his easement when you talked to  
 14 him in the fall of 2006?  
 15 A. He was not in the three feet.  
 16 Q. No. No. Was he by his ditch that he  
 17 said he usually burns?  
 18 A. I remember him being 20 or 30 feet away  
 19 from the fence.  
 20 Q. Was he talking to you about a ditch  
 21 that he usually burned when the weeds were  
 22 overgrown?  
 23 A. Yes.  
 24 Q. And did he say that he had to do that  
 25 to keep it maintained?

1 A. Right.  
 2 Q. Okay. So in the fall of 2006, you knew  
 3 Mr. Bratton had a ditch that ran through your  
 4 property.  
 5 MS. YEE-WALLACE: I'll object to the  
 6 form of the question.  
 7 Q. (BY MS. GARRETT) Correct?  
 8 A. I discovered the ditch when I was  
 9 mowing. And I ran into it with the tractor and  
 10 got stuck, is actually when I was aware of the  
 11 ditch the first time.  
 12 Q. In the fall of 2006?  
 13 A. Yes.  
 14 Q. Okay. Great. So from the fall of 2006  
 15 until present day, you knew -- if you didn't read  
 16 anything else that you were given, or didn't go  
 17 out and there try to look around on the property,  
 18 you knew there was a ditch there that Mr. Bratton  
 19 used for irrigation?  
 20 A. Yes. Although, I was not aware that he  
 21 had the right to.  
 22 Q. Okay. You didn't think he had a right  
 23 to the ditch?  
 24 A. That's not what I said.  
 25 Q. Okay. What did you not think he had a

1 right to do?  
 2 A. I just took his word for it that he had  
 3 an easement. And I asked him if he had  
 4 paperwork, and he's never, to this day, presented  
 5 any to me.  
 6 Q. Have you ever gone to look at the  
 7 recorder's office if there's easements on your  
 8 property?  
 9 A. I did after all of this started.  
 10 Q. When did you go and get that?  
 11 A. After the sheriff came out.  
 12 Q. So that would be the spring of 2007?  
 13 A. Yes.  
 14 Q. And that would be after you plowed up  
 15 the ditch?  
 16 A. After I repaired the ditch?  
 17 Q. Well, why don't you tell me what you  
 18 did. You say you repaired it?  
 19 A. Well, when we were down there, where I  
 20 had gotten stuck in the ditch --  
 21 Q. In the fall.  
 22 A. -- I tore it up pretty good. You could  
 23 still use it, but while we were down there --  
 24 this is actually in the spring of 2007.  
 25 Q. Okay. Did you ruin the ditch in the --

1 did you get stuck --  
 2 A. I ran into the ditch in the fall of  
 3 2006.  
 4 Q. Okay.  
 5 A. Okay? But in the spring of 2007, when  
 6 he was down there burning and I went down, the  
 7 ditch was still torn up, of course. He said that  
 8 I tore it up, that I should fix it, and I agreed,  
 9 because I did tear it up by driving into it and  
 10 getting stuck.  
 11 MS. YEE-WALLACE: Can I take this phone  
 12 call? It says it's urgent.  
 13 MS. GARRETT: Sure, absolutely.  
 14 MS. YEE-WALLACE: Sorry, I don't mean  
 15 to interrupt.  
 16 MS. GARRETT: That's all right. Let's  
 17 just go off the record.  
 18 (A brief recess was taken.)  
 19 Q. (BY MS. GARRETT) Let me ask a new  
 20 question, so we can start off in a fairly  
 21 organized manner here.  
 22 In 2006 and -- in the fall of 2006 and  
 23 in the spring of 2007, you knew that Mr. Bratton  
 24 had a ditch that he used on your property;  
 25 correct?

1 want to --

2 Q. Okay. And you observed Mr. Bratton  
3 irrigating his property in 2006?

4 A. I don't remember. I've seen him  
5 irrigate, but I don't remember when it was.

6 Q. But you've seen him irrigate?

7 A. I've seen him use the water, yes.

8 Q. Well, he hasn't used it in 2007, so it  
9 would have to be 2006.

10 Okay. In 2006 you knew there were  
11 cement culverts in the ditch that Mr. Bratton was  
12 using; correct?

13 A. Some of them.

14 Q. Okay.

15 A. I mean, some of them were in the ditch,  
16 one of them was not.

17 Q. Okay. In 2006 you had the opportunity  
18 to see Mr. Bratton enter onto your property to  
19 use his ditch; correct?

20 A. Only after I mowed. I was completely  
21 unaware before.

22 Q. And in 2006 you were aware of  
23 Mr. Bratton's headgate?

24 A. After I mowed, I know that he used that  
25 gate to get water, yes.

1 his property to feed his horses?

2 A. I've seen him down there sometimes,  
3 yes.

4 Q. Okay. And in April of 2007, you  
5 observed Mr. Bratton burning his weeds in his  
6 ditch?

7 A. I observed him burning down there.

8 Q. And in April of 2007, while Mr. Bratton  
9 was burning his ditch or, as you say, burning  
10 down there, you approached him?

11 MS. YEE-WALLACE: I'm going to object  
12 to the form of the question.

13 MS. GARRETT: I'm just using his words.  
14 Go ahead.

15 Q. (BY MS. GARRETT) Did you approach him?

16 A. That's correct.

17 Q. Okay. And did you tell Mr. Bratton  
18 that he could not burn as he was burning; that  
19 you didn't want him to burn in that manner?

20 A. No. All I remember saying to him at  
21 that time -- I mean, we talked for a half hour or  
22 more, but all I remember saying when I went down  
23 there was, I said: "I thought we had an  
24 agreement," because I thought that the fall  
25 before we had agreed that I would go ahead and

1 Q. Okay. And you can see the Bratton  
2 property from your land, when you're standing on  
3 your land; correct?

4 A. Yes.

5 Q. You knew that Mr. Bratton had horses on  
6 his property in 2006; correct?

7 A. Yes.

8 Q. And you knew the horses were pastured  
9 on his property; correct?

10 A. Pastured?

11 Q. Yes. They ate the grass on his  
12 property in 2006.

13 A. You're asking me if I saw his horses  
14 eat grass on his property, that's correct.

15 Q. Okay. And you knew from 2006, when you  
16 resided there, until present, that Mr. Bratton  
17 did not live on that property; correct?

18 A. I wouldn't say from the time I was  
19 there. It was pretty overgrown, so I didn't  
20 really pay much attention down there until after  
21 I mowed where you could see.

22 Q. In 2006?

23 A. Yes.

24 Q. Okay. And from 2006 until present,  
25 you've observed Mr. Bratton coming and going onto

1 maintain and mow the ditch so he wouldn't have to  
2 burn and spray anywhere.

3 Q. Did you tell him in April of 2007 that  
4 you didn't want him burning?

5 A. I don't remember that specifically.

6 Q. In April of 2007 did you not want him  
7 burning?

8 A. I did not want him burning my property  
9 outside --

10 Q. Did you --

11 A. You know, the field was on fire.

12 Q. Did you want him to burn his ditch?

13 MS. YEE-WALLACE: Object to the form of  
14 the question.

15 Q. (BY MS. GARRETT) Did you want  
16 Mr. Bratton to burn his ditch in April of 2007?

17 MS. YEE-WALLACE: Same objection.

18 THE WITNESS: I didn't really have a  
19 choice. It was almost done when I got there,  
20 actually.

21 Q. (BY MS. GARRETT) Did you tell him that  
22 you did not want him to spray?

23 A. I asked him not to spray outside of  
24 what he was using there, yes.

25 Q. Okay. So he could spray inside of his

1 easement?

2 A. I never told Charlie he couldn't do  
3 anything. I just told him that I would prefer if  
4 he didn't, and that I would take care of it and  
5 mow it if he would not do it anymore. But I was  
6 more worried about the rest of my property than  
7 that area right there.

8 Q. After that encounter with Mr. Bratton  
9 in April of 2007, did you then plow a new ditch?

10 A. I repaired the ditch, as we discussed,  
11 the very next day, just like I told him I would.

12 Q. And at that point you located the  
13 ditch, as you have drawn -- somewhere in the  
14 close region, as you've drawn on Exhibit 9, the  
15 very next day?

16 MS. YEE-WALLACE: I'm going to object  
17 to the form of the question, and it has been  
18 asked and answered. You can answer it one more  
19 time.

20 THE WITNESS: I'm sorry?

21 MS. YEE-WALLACE: I said I object  
22 because it has been asked and answered, but you  
23 can answer it one more time.

24 THE WITNESS: Okay. What was the  
25 question again?

1 A. On where?

2 Q. On your property.

3 A. I don't remember how many I put up at  
4 that time.

5 Q. More than one?

6 A. Yes.

7 Q. How many No Trespassing signs do you  
8 have on now?

9 A. I don't have any on the lower property,  
10 only -- I have three on the upper property.

11 Q. Why do you find it necessary to place  
12 No Trespassing signs on your property?

13 A. Because people were coming and going  
14 out of there like it was a vacant lot.

15 Q. Now, if someone trespasses on your  
16 property, what is your intent if they do  
17 trespass, what will you do?

18 A. Actually, I just go out and talk to  
19 them. I've actually had that happen several  
20 times now.

21 Q. Like you talked to Mr. Bratton in April  
22 of 2007?

23 A. What do you mean?

24 Q. I mean, would you describe it in the  
25 same manner as you've described your encounter

1 Q. (BY MS. GARRETT) Okay. The day after  
2 your encounter with Mr. Bratton when he was  
3 burning the weeds in his easement --

4 A. Yes.

5 Q. -- was that the next day that you dug  
6 the ditch that you have drawn on Exhibit 9?

7 A. Yes, just like we agreed.

8 Q. Okay. And I know you allege that you  
9 agreed to.

10 Now, when did you place the No  
11 Trespassing sign?

12 A. The day I talked to Mr. Bratton, the  
13 very next day I repaired the ditch as we agreed.  
14 Then the day after that, the sheriff showed up  
15 saying that Mr. Bratton had called them and said  
16 I was dumping my trash on his property.

17 Q. That wasn't my question. When did you  
18 place the No Trespassing sign?

19 A. Oh, I wasn't finished.

20 Q. Oh, okay. Sorry.

21 A. And then after the sheriff left, it  
22 would have been the day after -- within a couple  
23 days after that.

24 Q. How many No Trespassing signs did you  
25 place?

1 with Mr. Bratton in April of 2007?

2 A. I usually just go out and I usually say  
3 the same thing all the time: "Is there something  
4 I can do for you?"

5 Q. Okay.

6 A. I mean, that's my request of why  
7 they're there.

8 Q. Do you have any written agreement with  
9 Mr. Bratton that you could level his ditch and  
10 redig it?

11 A. No.

12 Q. Do you have any documentation at all  
13 that he agreed that you could do that?

14 A. No.

15 Q. Do you have any documentation at all  
16 that he agreed that you could remove his concrete  
17 culverts from the ditch?

18 A. I don't have any documentation at all  
19 of our agreement on repairing the ditch.

20 Q. Okay.

21 A. Located on this property.

22 Q. Now, I've seen some pictures where you  
23 erected some yellow rope tape? I think there  
24 might be one more picture there. Can you see,  
25 Exhibit 11?



1 A. Is this it?  
 2 Q. Yes.  
 3 A. Yes.  
 4 Q. Now, why did you do that?  
 5 A. I was trying to mark the boundaries of  
 6 the three-foot easement that I had looked up at  
 7 the courthouse.  
 8 Q. So did you take a tape measure out  
 9 there and measure it?  
 10 A. Yes.  
 11 Q. So you did measure it at some point;  
 12 correct?  
 13 A. Yes. I meant -- well, I didn't want  
 14 to -- you know, I wanted to get the boundary  
 15 marker on the three-foot --  
 16 Q. Why?  
 17 A. -- mark there, yes.  
 18 Q. Why?  
 19 A. Because I wanted Mr. Bratton to be  
 20 aware of where his -- the easement on the  
 21 document was located.  
 22 Q. And you're relying on the written  
 23 recorded easement of April of 1973, are you not?  
 24 A. I believe so, yes.  
 25 Q. And you didn't investigate on whether

1 A. Because I was trying to get the water  
 2 rights -- my own water rights with the big ditch.  
 3 So when I was looking that stuff up, I read the  
 4 statutes --  
 5 Q. Okay. When was that?  
 6 A. -- that I could find.  
 7 Q. Okay. When was that, about?  
 8 A. I don't recall.  
 9 Q. Before April of 2007?  
 10 A. Oh, yes. I'm sure it was, yes.  
 11 Q. Okay. How long did you leave this  
 12 yellow rope fence up?  
 13 A. I don't remember the exact day I put it  
 14 up, the exact date, but I took it down sometime  
 15 in July.  
 16 Q. Why?  
 17 A. Because, through you, I understood that  
 18 Charlie thought I was trying to prevent him from  
 19 using his easement and it was making him unhappy,  
 20 so I took it down.  
 21 Q. What did I say to you?  
 22 A. Well, it's this whole -- you know, the  
 23 whole thing here.  
 24 Q. Oh, the complaint?  
 25 A. Yes.

1 or not that easement was still in force, did you?  
 2 A. What I did do, before I ever even  
 3 talked to Mr. Bratton, or before I even knew for  
 4 sure he had an easement other than his word, was  
 5 I spent the time to look up all the statutes on  
 6 all of this, because I didn't want to, you know,  
 7 break any laws or anything like that.  
 8 Q. So you did look at all the statutes on  
 9 ditches and easements?  
 10 A. Yes.  
 11 Q. Okay. Did you look at a statute on  
 12 prescriptive or permissive easements? Did you  
 13 see one like that?  
 14 A. I don't --  
 15 Q. It's right there with the rest.  
 16 A. I don't remember.  
 17 Q. But you did look at all of them, huh,  
 18 before you ever did this?  
 19 A. Well, I don't -- I guess I don't know  
 20 for sure I looked at all of them.  
 21 Q. But you wanted to inform yourself of  
 22 easements?  
 23 A. Well, actually, it was before this ever  
 24 happened.  
 25 Q. Okay.

1 Q. Okay. Because I don't remember talking  
 2 to you.  
 3 A. I don't know whether it was actually  
 4 the complaint or the stuff before that.  
 5 Q. Okay. Do you know if anybody owned the  
 6 property from the time that Mr. -- other than  
 7 Mr. Ford, from the time he awarded Mr. Bratton  
 8 the easement until he conveyed it to your  
 9 mother-in-law? Do you think he was the  
 10 continuous owner, Mr. Ford?  
 11 A. I have no idea.  
 12 Q. You don't know?  
 13 A. No. I've never -- I don't know.  
 14 Q. Okay. What relationship did Mr. Ford  
 15 have with your mother-in-law?  
 16 A. I don't know all -- what their -- all  
 17 their relationship entitled. I don't know.  
 18 Q. Did they live together?  
 19 A. Yes, at one point.  
 20 Q. Do you know how long?  
 21 A. I'd have to guess. I don't know for  
 22 sure.  
 23 Q. Before you arrived in Idaho? Was that  
 24 before you arrived in Idaho that they lived  
 25 together?

1 A. Before I moved here, you mean?  
 2 Q. Yes.  
 3 A. Yes.  
 4 Q. Okay. Have you turned this lawsuit and  
 5 this claim in to your insurance company?  
 6 A. What?  
 7 Q. Have you notified your insurance  
 8 company that you have, your homeowners insurance,  
 9 that there's a lawsuit against you by the  
 10 Brattons?  
 11 A. No.  
 12 Q. Who has your homeowners insurance?  
 13 A. I do not have homeowners insurance.  
 14 Q. Oh, you don't have any insurance?  
 15 A. No.  
 16 Q. Have you had any conflicts with your  
 17 neighbors called the Stufflebeams --  
 18 A. Who?  
 19 Q. -- across the road? Stufflebeams?  
 20 A. Stufflebeams?  
 21 Q. Yeah, I know, I had trouble with that,  
 22 too.  
 23 A. I don't even know who that is.  
 24 Q. Do you know the neighbors across the  
 25 road from you?

1 neighbors off your property?  
 2 A. Not that I remember.  
 3 Q. Well, it's kind of an important thing.  
 4 Don't you think you would remember if you ordered  
 5 somebody off your property?  
 6 A. I haven't ordered somebody off my  
 7 property.  
 8 Q. Have you asked anybody to get off your  
 9 property?  
 10 A. Just the gentleman that I talked about  
 11 previously is the only one I remember.  
 12 Q. That's the only one you remember?  
 13 A. Of asking -- you mean in their physical  
 14 presence asking them to leave my property?  
 15 Q. Yes.  
 16 A. That's the only one I remember, yes.  
 17 Q. Have you ever told anyone, any of your  
 18 neighbors, not to come on your property?  
 19 A. Yes, I have.  
 20 Q. Who is that?  
 21 A. Herman Memmelaar.  
 22 Q. Anybody else?  
 23 A. Not that I remember.  
 24 Q. Why did you tell Herm that?  
 25 A. Well, actually, I wasn't even here at

1 A. Actually, it's a field right across the  
 2 street from me.  
 3 Q. Well, they live across the street kind  
 4 of from you. But you don't know them?  
 5 A. I don't -- there -- it's just a field  
 6 right directly across the street from me.  
 7 Q. Did you have an incident with anybody  
 8 that was plowing the snow recently and you told  
 9 them that you didn't want the snow onto your  
 10 property?  
 11 A. No.  
 12 Q. Okay. Since you've moved to Idaho,  
 13 have you ever been in any kind of physical fight?  
 14 A. No.  
 15 Q. Other than shooting your slingshot at  
 16 the cats that come on your property, have you  
 17 shot at anything else?  
 18 A. What do you mean? You mean have I used  
 19 the slingshot? Not that I remember.  
 20 Q. Okay. Is it your testimony -- well,  
 21 strike that.  
 22 Have you ever threatened any of your  
 23 neighbors with bodily harm?  
 24 A. No.  
 25 Q. Have you ever ordered any of your

1 that time. My wife called me on the phone and  
 2 said that Herman had come over to the house and  
 3 was complaining about the weeds, and that he  
 4 wanted to come on our property and -- I believe  
 5 he wanted to make one pass down the fence on our  
 6 side or something. I don't remember exactly what  
 7 it was he wanted to do.  
 8 And that if we didn't -- and see, he  
 9 hasn't said anything of this to me. My wife  
 10 called me on the phone and she talked to him,  
 11 so...  
 12 Q. He wanted to make one pass down the  
 13 fence to cut the weeds?  
 14 A. That's what my wife told me, not  
 15 Mr. Memmelaar.  
 16 Q. Okay. You believe your wife?  
 17 A. The only thing I said -- the only  
 18 time I -- when I talked to Mr. Memmelaar about  
 19 it, I called him from Alaska. And I asked him  
 20 not to bother my wife anymore, or to come on my  
 21 property and bother my wife anymore, is what I  
 22 asked him not to do.  
 23 Q. So you told Mr. Memmelaar you didn't  
 24 want him to come and cut down your weeds on your  
 25 property?

1 A. I told him I didn't want him to bother  
 2 my wife anymore, is actually what I told him, and  
 3 that he should stay off my property.  
 4 Q. Now, if you're in Alaska and your wife  
 5 is there, and there's big weeds growing in your  
 6 field and your neighbor volunteers to cut them  
 7 down, do you see something wrong with that?  
 8 A. He didn't volunteer. I don't know,  
 9 actually, what he volunteered because he talked  
 10 to my wife.  
 11 Q. You believe what your wife told you,  
 12 though, don't you?  
 13 A. Yeah. I believe my wife, yeah. She  
 14 wouldn't lie to me, I don't think.  
 15 Q. And she told you that Herm wanted to  
 16 come on the property and make one pass down the  
 17 fence line?  
 18 A. To the best of my recollection, yes.  
 19 Q. Now, why wouldn't you want him to do  
 20 that?  
 21 A. Because he upset my wife, telling her  
 22 if she didn't let him do it, he would call the  
 23 weed control man. That's how I remember it, yes.  
 24 Q. So you called him from Alaska --  
 25 A. Yes.

1 Q. Do you think burning or spraying a  
 2 ditch is against the law in Idaho?  
 3 A. I think -- I don't actually know for  
 4 sure, but I would assume you couldn't do it on  
 5 somebody else's property.  
 6 Q. What if it's your ditch and you have a  
 7 right-of-way and an easement; do you think it's  
 8 against the law to burn and spray on that  
 9 easement?  
 10 A. Within the easement, I would say no.  
 11 Q. Okay. Are you athletic; do you do  
 12 anything athletic?  
 13 A. What do you mean?  
 14 Q. Well, play basketball, football,  
 15 soccer?  
 16 A. No.  
 17 Q. No?  
 18 THE WITNESS: I'm going to have to take  
 19 a break.  
 20 MS. YEE-WALLACE: Okay.  
 21 MS. GARRETT: Yeah, let's do. Anytime  
 22 you want to take a break, even with a question  
 23 pending, you can take a break.  
 24 (A discussion was held off the record,  
 25 and a brief recess was taken.)

1 Q. -- after talking to your wife and told  
 2 him not to bother your wife anymore --  
 3 A. Yes.  
 4 Q. -- and not to come on your property?  
 5 A. I asked him not to do either one of  
 6 those, yes.  
 7 Q. Do you have a good relationship with  
 8 any neighbor that you have?  
 9 A. I don't really know any of the  
 10 neighbors.  
 11 Q. Are you and Mrs. Scott the only ones  
 12 that live in the home?  
 13 A. Yes.  
 14 Q. How many total acres are on your  
 15 property?  
 16 A. I believe -- I don't remember exactly,  
 17 but I believe the deeded acreage is  
 18 five-and-a-quarter. It's probably right here,  
 19 actually.  
 20 Q. Probably on one of those, yeah.  
 21 Do you plan to do anything with your  
 22 property, with your field, now that you know you  
 23 have water?  
 24 A. I haven't actually decided. Like I  
 25 say, I'm still in the cleanup process.

1 Q. (BY MS. GARRETT) When you removed the  
 2 culverts from Mr. Bratton's ditch, did you break  
 3 any of the culverts when you removed them?  
 4 A. I think two of them. There's two that  
 5 were longer than the others were, a different  
 6 kind, yeah.  
 7 Q. Okay. And do you know the purpose of  
 8 the culverts in Mr. Bratton's ditch? Why were  
 9 they placed there by Mr. Bratton; do you know?  
 10 What kind of ditching purpose they were?  
 11 A. No.  
 12 Q. Would you call yourself a farmer?  
 13 A. No.  
 14 Q. Do you believe that the culverts, that  
 15 you placed on Mr. Bratton's land after taking  
 16 them out of his ditch, caused any risk to his  
 17 horses at all?  
 18 A. No.  
 19 Q. No. Okay. Did you ever speak to  
 20 Sheriff Smith? I probably asked you that. I  
 21 think I might have asked you that.  
 22 A. You did, and, no, I have not.  
 23 Q. Okay. Other than Deputy Lancaster,  
 24 have you spoke to any other police officers in  
 25 Canyon County about anything?

1 remember reading.  
 2 Q. (BY MS. GARRETT) Do you think it's  
 3 against the law to block someone from using their  
 4 water rights?  
 5 A. Preventing them from using them?  
 6 Q. Yes.  
 7 A. I don't know. You know, you're asking  
 8 what I think --  
 9 Q. Right.  
 10 A. -- or what I know?  
 11 Q. Right. What you think.  
 12 A. Probably not.  
 13 Q. You don't think it's against the law to  
 14 keep somebody from using their rightful water --  
 15 A. No, I'm sorry. Yes, it probably would  
 16 be. Sorry, I got confused.  
 17 Q. That's all right. Do you think it's  
 18 against the law to intentionally destroy another  
 19 person's property, whatever it is?  
 20 A. Yes.  
 21 Q. Do you think it's wrong to  
 22 intentionally threaten or frighten another  
 23 person, that person who is not causing you any  
 24 distress? Do you think it's wrong to do that?  
 25 MS. YEE-WALLACE: I'll object to the

1 form of the question.  
 2 Q. (BY MS. GARRETT) Do you understand my  
 3 question?  
 4 A. Could you repeat it?  
 5 Q. Sure. Do you think it's wrong to  
 6 intentionally threaten or frighten another  
 7 person?  
 8 A. For no reason?  
 9 Q. Yeah, for no reason?  
 10 A. Yes.  
 11 Q. How many ditches are on your land? I  
 12 never did ask you that.  
 13 A. I only know of two, the one we're  
 14 discussing and the ditch company's -- the main --  
 15 Q. The main ditch?  
 16 A. Yeah.  
 17 Q. So you don't have your own ditch on  
 18 your property?  
 19 A. Oh. Well, yeah, I guess you could call  
 20 that a water ditch. It runs along the back side  
 21 of the main ditch.  
 22 Q. Does it run parallel to the main ditch  
 23 on the lower part of your property?  
 24 A. Yes. Yes. Yeah, absolutely.  
 25 Q. Okay. This ditch that you say you

1 created along the fence line, is that the first  
 2 ditch you've ever dug?  
 3 MS. YEE-WALLACE: I'm going to object  
 4 to the form of the question.  
 5 Q. (BY MS. GARRETT) Go ahead.  
 6 A. I've never claimed to create anything.  
 7 Q. Did you dig that ditch?  
 8 A. I wouldn't classify it as digging it.  
 9 I would just say I tried to make repairs on what  
 10 was there.  
 11 Q. Is that the first time you've ever done  
 12 that to a ditch?  
 13 A. For water purposes like that? Yeah,  
 14 probably. Yes.  
 15 I mean, I've used the backhoe before,  
 16 you know, to bury, you know, water lines and, you  
 17 know, sewer lines and stuff like that, but that's  
 18 something you covered back up, so I don't think  
 19 it -- is that what you mean?  
 20 Q. Yeah, I was just wondering if you had  
 21 ever done this on an open-air ditch before.  
 22 A. Oh, we don't have them up there.  
 23 Q. So this would be the first time?  
 24 A. That I remember, yes.  
 25 Q. If you know, when water runs down a

1 ditch, does it erode the sides of the ditch onto  
 2 the property that's abutting it?  
 3 A. That would probably depend on the  
 4 quantity and the level and all that.  
 5 Q. Does it make the abutment of the ditch,  
 6 when water is running down it, wet?  
 7 A. Well, it would depend on the ditch, I  
 8 would imagine.  
 9 Q. If it's a dirt ditch and water is  
 10 running down the dirt ditch for, let's say, a  
 11 day, would the abutments or the sides of the  
 12 ditch become wet?  
 13 A. Up to whatever the water level was,  
 14 probably.  
 15 Q. And would the areas around the ditch  
 16 that are dry absorb the water?  
 17 A. Could you repeat the question?  
 18 Q. The areas around that are in contact  
 19 with the ditch, the abutments or the sides of the  
 20 ditch that were dry, would they absorb water that  
 21 was in the ditch, in a dirt ditch?  
 22 A. Probably.  
 23 Q. And if you know, if it's a dirt ditch  
 24 and you run water down a dirt ditch that has  
 25 no -- that is newly plowed or newly created, do

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

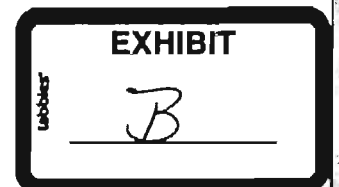
CHARLES E. BRATTON and MARJORIE )  
I. BRATTON (husband and wife), )  
Plaintiffs, )  
vs. ) Case No. CV 0706821C  
JOHN R. SCOTT and JACKIE G. SCOTT )  
(husband and wife), )  
Defendants. )  
\_\_\_\_\_ )

DEPOSITION OF CHARLES E. BRATTON

FEBRUARY 6, 2008

REPORTED BY:

TAUNA K. TONKS, CSR No. 276, RPR  
Notary Public



1 MS. GARRETT: Object to the form of the  
2 question; foundation. Can we say the outer edge  
3 is the edge closest to the Scotts' property? The  
4 outer edge is the edge farthest away from the  
5 fence?

6 MS. COZAKOS: Right.

7 MS. GARRETT: Okay. Outer edge is the  
8 edge farthest away from the fence.

9 THE WITNESS: The farthest it's been  
10 from the fence?

11 MS. GARRETT: No. When she says "outer  
12 edge," that's the edge farthest -- of the ditch,  
13 farthest away from the fence. How far have you  
14 burned going into that way?

15 THE WITNESS: I never measured, so I  
16 don't know, but it wouldn't be over a couple  
17 feet.

18 Q. (BY MS. COZAKOS) And what means have  
19 you been using over the years to maintain the  
20 fire, so that it doesn't extend onto -- further  
21 onto the Scotts' or Mr. Ford's property?

22 A. I usually take a shovel with me, have  
23 the wind in the right direction, and do it when  
24 it's damp.

25 Q. Were you aware, Mr. Bratton, when the

1 Memmelaars' property over here -- and your  
2 property is right here; correct?

3 A. (Witness nodding head.)

4 Q. You have to say "yes" for the --

5 A. Yes.

6 Q. Okay.

7 MS. GARRETT: We probably should mark  
8 it.

9 MS. COZAKOS: I'll do that in a second.

10 Q. (BY MS. COZAKOS) Tell me how you've  
11 been getting to the ditch. Because the spot  
12 where you turn the water on would be over here  
13 somewhere; correct?

14 A. Yes.

15 Q. So show me the path that you've been  
16 taking.

17 A. (Marking) Somewhere in there. And  
18 that's probably 40 feet probably.

19 Q. Okay. So you've been going under or  
20 over the fence around here?

21 A. Under, over, in between, just depends.

22 Q. And walking along this boundary line  
23 here?

24 A. No.

25 Q. No? How do you get to it?

1 Scotts moved onto the property?

2 A. No.

3 Q. When did you find out they had moved  
4 onto the property?

5 A. One time when I went up to turn my  
6 water on, the weeds were quite high, and I saw  
7 this guy sneaking through the weeds watching,  
8 seeing what I was doing. And I didn't pay any  
9 attention to him because I was just doing --  
10 turning my irrigation water on and that. And  
11 that's the first time I knew somebody else was on  
12 the property.

13 Q. Did you have a conversation with  
14 Mr. Scott at that point?

15 A. No. He was sneaking through the weeds  
16 looking at me, no. Nothing was said.

17 Q. How have you typically accessed the  
18 ditch?

19 A. Just go through the fence about 20 feet  
20 from the -- where the fence goes up along my  
21 fence here, about 20 feet there's a place I can  
22 slide under and go up there.

23 Q. Okay. Let me just draw a picture.

24 (Drawing) So if this were the fence  
25 post between the Scotts' property and the

1 A. (Marking.)

2 Q. Okay. So you've been essentially  
3 walking right over the Scotts' property or the  
4 Ford's property to turn on the water; is that  
5 correct?

6 A. Yes.

7 Q. When Mr. Scott first saw you at the  
8 time, you were on his property, you were walking  
9 through his property; is that correct?

10 MS. GARRETT: Object to the form of the  
11 question --

12 THE WITNESS: Not to my knowledge.

13 MS. GARRETT: Just a second. Object to  
14 form of the question; calls for a legal  
15 conclusion.

16 Q. (BY MS. COZAKOS) Well, you know where  
17 the Scotts' property is and your property is;  
18 correct?

19 MS. GARRETT: Object to the form of the  
20 question; calls for a legal conclusion.

21 Q. (BY MS. COZAKOS) Do you know where  
22 your property is?

23 A. Yes. But I didn't know that was  
24 Mr. Scott's property.

25 Q. Okay. Well, it wasn't your property;

1 A. I don't know, because he yelled at me  
2 and said: "You can't burn and you can't do this.  
3 And this is my property and I know the Idaho law,  
4 and if you don't like it, go get a lawyer." So  
5 that's what I did.

6 Q. So you don't remember -- do you think  
7 it's possible that he offered to clean up and fix  
8 the ditch?

9 A. I don't think so.

10 Q. Okay. Did you see him, at some point  
11 after that, with a tractor out there along the  
12 ditch?

13 A. No.

14 Q. Have you ever seen him with a tractor  
15 along the ditch?

16 A. No.

17 Q. At some point did you notice that there  
18 had been con- -- the concrete culverts had been  
19 placed on your property that were in the ditch?

20 A. Yes, I did.

21 Q. And what did you do then?

22 A. I walked up there to see what happened,  
23 and that's when I first saw that he had plowed  
24 the ditch up.

25 Q. What do you mean when you say "plowed

1 it up"?

2 A. Taken the ditch out from the original  
3 position where it was at and made kind of a flat  
4 spot out of it.

5 Q. Can you tell me what you mean by that,  
6 a flat spot?

7 A. Ditch goes down in the ground. A flat  
8 spot runs along the ground.

9 Q. Did he cover up the ditch? I don't  
10 know what you mean.

11 A. He just took it out.

12 Q. He took it out. How do you mean "took  
13 it out"?

14 A. It disappeared.

15 Q. The ditch disappeared?

16 A. Yeah.

17 Q. So he had to cover it with dirt to make  
18 it disappear; right?

19 A. No, he didn't. He just plowed it out.

20 Q. Okay.

21 A. He took a blade and just plowed all the  
22 dirt out. Just plowed the ditch out, leveled it  
23 off.

24 Q. Okay.

25 MS. GARRETT: And I think we have given

1 you pictures of that, Shelly.

2 We've been going about an hour. Can we  
3 take a break?

4 MS. COZAKOS: You bet. And I actually  
5 need to take a lunch break.

6 MS. GARRETT: Right now? Well, it's  
7 almost noon, so...

8 MS. COZAKOS: Yeah, I think we probably  
9 only have an hour or so left, but I need to take  
10 a lunch break, so why don't you come back about  
11 1 o'clock.

12 (The lunch recess was taken at 11:45  
13 a.m., and the deposition was  
14 reconvened at 1:15 p.m.)

15 Q. (BY MS. COZAKOS) So before the break,  
16 Mr. Bratton, you said that Mr. Scott had leveled  
17 off the ditch; is that correct? After you had  
18 the encounter when you were burning the weeds,  
19 then at some point after that Mr. Scott leveled  
20 off the ditch?

21 A. Yes.

22 Q. And how long after -- well, when,  
23 approximately, was that; do you remember?

24 MS. GARRETT: The ditch leveling?

25 Q. (BY MS. COZAKOS) Yeah. When he

1 leveled it off, assuming that happened.

2 A. A day or two. I don't remember exact  
3 date, but fairly soon.

4 Q. And did you notice that the pieces of  
5 concrete culvert had been placed on your  
6 property?

7 A. That's how I noticed the ditch had been  
8 done, because I saw all those pieces of pipe  
9 laying up on my property. So I walked up there,  
10 and that's when I noticed that the other had been  
11 done.

12 Q. I see. Did you call the sheriff's  
13 office about the concrete pipes being left on  
14 your property?

15 A. No. I went to the sheriff -- after I  
16 had the encounter, I went and talked to the  
17 sheriff about what had happened up there because  
18 I was a little bit afraid of what might happen.

19 He was pretty scary. You know, in this  
20 crazy world, people do things, and I just didn't  
21 want to get shot over my water, so I went and  
22 talked to the sheriff about it.

23 Q. Okay. And did you file some sort of  
24 complaint?

25 A. I didn't file a complaint, no.

1 Q. You didn't? Okay. Did you complain  
 2 about the pieces of concrete culvert being left  
 3 on your property?  
 4 A. Yeah, because they was dangerous to my  
 5 horses. If a horse had went out there and hit  
 6 one of those, it would break a leg. My horse is  
 7 worth quite a bit of money.  
 8 Q. Okay. So then Mr. Scott removed them  
 9 from your property; is that right?  
 10 A. Somebody removed them from my property.  
 11 Q. Okay. Did you want the concrete -- the  
 12 pieces of concrete culvert or not?  
 13 A. I didn't want them taken out of the  
 14 ditch, because that's what caused that ditch to  
 15 work right.  
 16 Q. Okay.  
 17 A. He maliciously destroyed my ditch, took  
 18 the concrete out. And it was intentional.  
 19 Q. Did the ditch work after the concrete  
 20 pieces had been removed?  
 21 A. No, because it was flattened out.  
 22 Q. All right. Well, at some point,  
 23 assuming it was flattened out, a ditch was then  
 24 dug again or whatever needed to happen, because  
 25 there is a ditch there now; correct?

1 would not work.  
 2 (A discussion was held off the record.)  
 3 (Numerous photos are displayed  
 4 consecutively on the computer.)  
 5 Q. (BY MS. COZAKOS) Does this look like  
 6 the area where the easement is?  
 7 A. Yes.  
 8 Q. Okay. And this picture is taken of the  
 9 ditch after April of '07. Does that look like  
 10 what it looks like now to you?  
 11 MS. GARRETT: So this would have been  
 12 in May of '07, you said?  
 13 MS. COZAKOS: Yes.  
 14 THE WITNESS: Yes, that's the place  
 15 where it's at.  
 16 Q. (BY MS. COZAKOS) Okay. Does it look  
 17 any different than that now?  
 18 A. I haven't been up there. I have never  
 19 been up there since I was there with you.  
 20 Q. Oh, okay. Does it look like here what  
 21 it looked like when we were all on the property?  
 22 And that would have been in June of '07.  
 23 A. Yes.  
 24 Q. Okay. So I guess, tell me what about  
 25 this -- it sort of looks like a ditch to me, and

1 A. No. I don't think there's a ditch  
 2 there.  
 3 Q. Well, when I was on the property the  
 4 day that we all met out there, I saw water  
 5 running through what looked to me to be a ditch  
 6 onto your property.  
 7 A. Well, it was water running through a  
 8 low spot. And that low spot was right next to  
 9 the fence. And if you had turned water on down  
 10 there, it would wash the big gully down there and  
 11 then wash the fence out, so you couldn't use it  
 12 because you would destroy their fence. Besides  
 13 that, you would have dug a deep gully and filled  
 14 my ditch down below with dirt.  
 15 Q. Okay. I have some photos that I want  
 16 to show you, but the computer locked up. Just a  
 17 minute.  
 18 (A discussion was held off the record.)  
 19 Q. (BY MS. COZAKOS) So your testimony is  
 20 that there is no ditch there now; is that right?  
 21 A. There's no ditch there where the ditch  
 22 was supposed to be.  
 23 Q. Is there a ditch there at all?  
 24 A. As far as I'm concerned, no. There's a  
 25 low spot there right next to the fence, which

1 you're saying that it's a low spot.  
 2 A. Yeah, it's a flat spot.  
 3 Q. Where?  
 4 A. Well, where you can see there.  
 5 Q. Okay.  
 6 A. From there to there is a flat spot  
 7 where they went down and dug the ditch out,  
 8 destroyed the ditch (pointing).  
 9 That ditch is right against -- as you  
 10 can see, it's right against those fence posts.  
 11 You can see the -- so if you let water run down  
 12 there, you would destroy that fence. And besides  
 13 that, you dig a great big trench down through  
 14 there. You couldn't use that to irrigate with.  
 15 Q. Okay. Water runs through here,  
 16 whatever you want to call this, onto your  
 17 property; correct?  
 18 A. Yes.  
 19 Q. And what's wrong with that, again?  
 20 It's not -- I mean, if water is getting to your  
 21 property, tell me, again, what the problem is.  
 22 I'm not sure I understand.  
 23 A. Well, that's a 200-foot fall. It falls  
 24 10 feet. You let water race down there, you  
 25 would have a great big ditch all the way down



1 MS. GARRETT: Asked and answered. You  
2 can answer one more time.

3 THE WITNESS: No, I told her that it  
4 wouldn't work because of the erosion.

5 Q. (BY MS. COZAKOS) I know. And that's  
6 why I said if the concrete pieces were put back  
7 in, which you're telling me prohibits -- or keeps  
8 it from eroding.

9 A. But they were put in over a period of  
10 years, and you couldn't put them back in so they  
11 would work. It would take you a period of years  
12 to get them to work like I had them working.

13 Q. How did you have them working?

14 A. Well, when I found a place that was  
15 eroding, I would put a piece of concrete in  
16 there. Pipe.

17 Q. Okay.

18 A. And I did that over a period of years.  
19 And this was agreeable to Mr. Ford.

20 My ditch was destroyed.

21 Q. I understand that's what your testimony  
22 is. I'm just -- so you're saying you wouldn't  
23 know the exact spots of where to put the concrete  
24 pieces?

25 A. No.

1 about it.

2 Q. And Mr. Memmelaar told you this?

3 A. Yes.

4 Q. What did he tell you happened?

5 A. He went over there and started -- asked  
6 about mowing those weeds down because he didn't  
7 want them around his property, and he jumped all  
8 over him and ran him off.

9 Q. Have you ever tried to go on the  
10 property to turn the water on after April of '07?

11 A. I never went on the property after you  
12 was there with Nancy and I. I never went back  
13 because I was afraid to go back.

14 Besides that, the sheriff came out  
15 there. He called me and said he wanted to come  
16 out and look at it. He came out there and looked  
17 at it, he went up and looked at it, and he told  
18 me, he said: "Mr. Bratton, I don't want you  
19 going up there turning that water on unless you  
20 take somebody with you. And when you turn it  
21 off, you take somebody with you."

22 And I figured if the sheriff thought it  
23 was that dangerous, I better not do it.

24 Q. Anything else to make you think that it  
25 was dangerous except for the incident that you

1 Q. Let's assume that water is  
2 running through -- water will run through the  
3 existing ditch that we just saw onto your  
4 property. Is there something that would preclude  
5 you from turning it on?

6 MS. GARRETT: I'll object to the form  
7 of the question; improper hypothetical. I'll  
8 tell you not to speculate, because the law won't  
9 allow you to do that, but answer if you can.

10 THE WITNESS: Yes, there would be  
11 something that would cause me to do that, because  
12 I'm afraid of that man and I'm afraid to go up  
13 there and turn that water on. He's dangerous.

14 Q. (BY MS. COZAKOS) And you think he's  
15 dangerous because of the incident that happened  
16 in April of '07 when you were burning on the  
17 property and he came out; is that right?

18 A. Among other things.

19 Q. What are the other things?

20 A. The problems he's had with the  
21 Memmelaars.

22 Q. And what are those that you're aware  
23 of?

24 A. Mr. Memmelaar wanted to mow the weeds  
25 down for him, and they got all bent out of shape

1 told me about in April of '07 and then this issue  
2 with the Memmelaars?

3 MS. GARRETT: And the sheriff.

4 THE WITNESS: And the sheriff.

5 And my neighbor went up there to turn  
6 his water on, and he had -- 20 years he's gone  
7 through Mr. Ford's property to turn his water on,  
8 and he had a big fight on the ditch bank with him  
9 about it; they about got into it there.

10 Q. What neighbor is that?

11 A. Dan -- oh, the last name slips me.  
12 Lane. Dan Lane.

13 Q. Mr. Lane was going onto the Scotts'  
14 property --

15 A. To turn his water on, yeah.

16 Q. -- when that happened?

17 A. Which he had been doing for 20 years.

18 Q. But the incident occurred on

19 Mr. Scott's property; correct?

20 A. On the ditch bank up there on the main  
21 canal.

22 Q. Do you recall a time when Mr. Scott  
23 offered to turn the water on for you?

24 A. I think I do, but I thought that was  
25 really a dumb idea because that would have never

1 worked.  
 2 Q. Why not?  
 3 A. Because you have to turn the water on  
 4 when you want it and turn it off when you want  
 5 it. And besides that, I would have to have  
 6 contact with him, and I didn't want contact with  
 7 him because I was afraid of him. He's scary.  
 8 Q. Has he ever threatened you with bodily  
 9 harm?  
 10 A. I consider he did when he was running  
 11 and yelling at me, yes.  
 12 Q. Okay. But did he threaten to hurt you?  
 13 A. Well, he told me to get off the  
 14 property.  
 15 Q. Okay.  
 16 A. And he put those No Trespassing signs  
 17 up all over the place, so I considered that, yes.  
 18 Q. You consider that a threat to your  
 19 bodily harm --  
 20 A. You bet.  
 21 Q. -- or of bodily harm?  
 22 A. Yes, I do.  
 23 Q. When he said to keep off his property?  
 24 A. Yes. Even though that was my easement.  
 25 Q. Did he ever use any sort of a weapon

1 were trash and you didn't want them on your  
 2 property; correct?  
 3 MS. GARRETT: Object to the form of the  
 4 question; argumentative.  
 5 THE WITNESS: I don't think that's  
 6 right.  
 7 Q. (BY MS. COZAKOS) Well, you complained  
 8 to the deputy sheriff about those concrete  
 9 culverts being on your property; am I right?  
 10 A. No, I didn't. I never talked to the  
 11 deputy sheriff. I talked to the sheriff.  
 12 Q. Is his name Lancaster?  
 13 A. Yeah. And I didn't talk to him. I  
 14 talked to Sheriff Smith. Chris Smith is the one  
 15 I talked to.  
 16 Q. And did you talk to Sheriff Smith about  
 17 the concrete culverts?  
 18 A. Pardon?  
 19 Q. Did you talk to Sheriff Smith about the  
 20 concrete culverts being on your property?  
 21 A. I don't think they were there when he  
 22 came out, but I don't remember for sure. We was  
 23 mainly talking about the ditch and the No  
 24 Trespassing signs and me going up there. So that  
 25 part I'm not sure of.

1 around you, ever threaten you with a weapon or  
 2 anything like that?  
 3 A. No. But when he ran at me, it scared  
 4 me. I considered that a threat.  
 5 Q. This is when he ran at you when you  
 6 were burning --  
 7 A. Yeah.  
 8 Q. -- on the property?  
 9 A. Yeah.  
 10 Q. Has he ever come onto your property?  
 11 A. I personally haven't seen him, but he  
 12 must have come on there to remove the cement  
 13 culverts that was on there. Somebody did.  
 14 Q. But you didn't want the cement culverts  
 15 on your property where they were; correct?  
 16 A. No, because it was dangerous to my  
 17 horses.  
 18 Q. You wanted them removed; right?  
 19 A. I didn't have anything to do with that.  
 20 I don't know why he removed them.  
 21 Q. You don't know why he removed them from  
 22 the ditch, or why he removed them from your  
 23 property?  
 24 A. Either one.  
 25 Q. Well, you told the sheriff that they

1 Q. Do you know whether Sheriff Lancaster  
 2 told Mr. Scott that you consider them to be trash  
 3 and didn't want them on your property?  
 4 A. I do not know that.  
 5 Q. Do you want the concrete -- pieces of  
 6 concrete culvert back?  
 7 A. Not now after he has done everything  
 8 he's done to them.  
 9 Q. What do you mean "done to them"?  
 10 A. I don't know what he's done to them.  
 11 Q. Okay. Well, if he hasn't done anything  
 12 to them, do you want them back?  
 13 A. I don't think so.  
 14 Q. Why not?  
 15 A. Because I don't know what I would do  
 16 with them now.  
 17 Q. When we were all out at the property in  
 18 June of '07, you did see water running through  
 19 the area that we were calling the ditch; correct?  
 20 A. Yes.  
 21 Q. And that water was reaching your  
 22 property; correct?  
 23 A. Yes.  
 24 Q. And then you chose, after June of '07,  
 25 not to go onto Mr. Scott's property to turn the

1 A. No.  
 2 Q. And who has told you that? Is that  
 3 Mr. Vassar?  
 4 A. That it won't come back?  
 5 Q. Yes.  
 6 A. I know that. I'm 75 years old, I've  
 7 been doing this all my life. 76.  
 8 Q. And the Scotts put up a No Trespassing  
 9 sign on their property at some point; correct?  
 10 A. Right after we had that altercation in  
 11 the field, they put signs all over the place,  
 12 both ends of the ditches.  
 13 Q. Okay. You said altercation, but nobody  
 14 touched anyone physically; correct?  
 15 A. I'm not sure that altercation means you  
 16 have to have physical contact.  
 17 Q. Well, I'm just asking you. Nobody  
 18 touched anyone physically; correct?  
 19 A. Nope.  
 20 Q. Is that correct?  
 21 A. Yes.  
 22 Q. Okay. How long was the No Trespassing  
 23 sign up?  
 24 MS. GARRETT: If you know.  
 25 THE WITNESS: I don't know exactly. It

1 while he was doing it. That's what he thought of  
 2 him.  
 3 Q. And you testified that the sheriff told  
 4 you you should take someone with you when you go  
 5 to turn the water on; correct?  
 6 A. Yes.  
 7 Q. Did you ever do that?  
 8 A. No, because I figured if I was going to  
 9 get shot, I didn't want to take somebody else up  
 10 there to get shot. And if this guy -- the rumor  
 11 around there is he shoots cats and stuff. It may  
 12 be a rumor, but in this day and age with all the  
 13 crazy people, I'm not taking the chance.  
 14 Q. You heard a rumor that he shoots cats?  
 15 A. Sure did.  
 16 Q. Who told you that?  
 17 A. Neighbor.  
 18 Q. Which neighbor?  
 19 A. Several of them.  
 20 Q. Which ones?  
 21 A. I think I first heard it from Sherry,  
 22 and then I think Dan mentioned it, and then  
 23 somebody else mentioned it. I know it's just a  
 24 rumor, but when people are shooting, that scares  
 25 me.

1 was there quite awhile, a long time. I don't  
 2 know when it came down.  
 3 Q. (BY MS. COZAKOS) It wasn't there when  
 4 I was on the property in June of '07. Would you  
 5 agree with that?  
 6 A. No, because I don't know that.  
 7 Q. So you don't know how long it was up.  
 8 You have no idea, it sounds like.  
 9 A. I have an idea it was up quite awhile.  
 10 In fact, they just came off the other end not too  
 11 long ago. They had No Trespassing signs on the  
 12 big ditch, too.  
 13 Q. And does that affect you?  
 14 A. No.  
 15 Q. Do you think there's a problem with  
 16 them putting a No Trespassing sign by the big  
 17 ditch? Does that cause a problem for you?  
 18 A. Kind of causes a problem for me that  
 19 they are probably pretty unfriendly and they  
 20 don't like their neighbors. They have trouble  
 21 with neighbors on all four sides of them.  
 22 In fact, the one neighbor that asked  
 23 him to see if he could put in underground pipe  
 24 for me said he wouldn't put it in unless the  
 25 deputy sheriff came up there and stayed up there

1 Q. Did you ever hear a gunshot go off on  
 2 the Scotts' property?  
 3 A. I'll tell what you I do see that  
 4 bothers me --  
 5 Q. Just answer my question. Did you ever  
 6 hear --  
 7 A. No.  
 8 Q. Okay. What bothers you?  
 9 A. My horses. Every once in a while they  
 10 take off and they run up to that property. Then  
 11 they look over at Scotts and they just stand  
 12 there with their ears up, looking there. Those  
 13 horses are seeing something. There's something  
 14 they don't like and they are telling me that.  
 15 Q. What do you think that is?  
 16 A. I don't know.  
 17 Q. Did you ever see them doing anything on  
 18 the property that your horses wouldn't like?  
 19 A. No. I just know horses, especially  
 20 when they leave their feed and their hay to do  
 21 that.  
 22 Q. How often do you see the Scotts out in  
 23 their field?  
 24 A. I never see them out there.  
 25 Q. Okay. So they are in their house most

1 A. No.  
 2 Q. Okay. Do you know whether they could  
 3 have just rolled it underneath the fence?  
 4 A. I don't know that.  
 5 Q. So you don't know that he entered your  
 6 property to place the cement culvert there; isn't  
 7 that true?  
 8 A. But I do know if he took it off, he had  
 9 to enter my property to take it off of there.  
 10 Q. You told the sheriff you didn't want it  
 11 there; right?  
 12 MS. GARRETT: Objection; asked and  
 13 answered and misstates his testimony.  
 14 Q. (BY MS. COZAKOS) Did you tell the  
 15 sheriff that?  
 16 MS. GARRETT: She asked you a question.  
 17 THE WITNESS: What did she ask me?  
 18 Q. (BY MS. COZAKOS) Did you tell the  
 19 sheriff you didn't want the cement culverts right  
 20 there?  
 21 A. Yeah, because I didn't want them  
 22 hurting my horses.  
 23 Q. Okay. So you wanted them removed;  
 24 right?  
 25 A. Yeah, I wanted them off of there.

1 this time, Defendants John and Jackie Scott  
 2 verbally threatened Plaintiff Charles Bratton."  
 3 Do you see that?  
 4 A. Yes.  
 5 MS. GARRETT: Let's figure out what  
 6 time. April of 2007.  
 7 MS. COZAKOS: Yeah.  
 8 Q. (BY MS. COZAKOS) Would that be the  
 9 time when you were burning weeds --  
 10 A. Yes.  
 11 Q. -- and they came out?  
 12 A. Yes. That's the only time I seen them.  
 13 Q. Did Jackie Scott verbally threaten you?  
 14 A. Yeah. She said: "Look at my -- you're  
 15 burning my pretty field. You're burning my fence  
 16 posts."  
 17 And I don't know what else she said. I  
 18 just shut her off then because I figured this one  
 19 is off her rocker, too.  
 20 Q. So her statements of: "You're burning  
 21 my pretty field and you're burning my fence  
 22 posts," you consider that to be a verbal threat;  
 23 is that right?  
 24 A. Right. You're doing damage, so I'm  
 25 going to get even with you.

1 Q. Well, how is anybody going to remove  
 2 them unless they came onto your property?  
 3 A. Maybe they should have asked  
 4 permission: This is what I'm going to do.  
 5 Q. Would you have denied that permission?  
 6 A. I don't know the answer to that.  
 7 (Exhibit 9 was marked.)  
 8 Q. (BY MS. COZAKOS) Would you turn to  
 9 paragraph 16 of the complaint that you've just  
 10 been handed that's Exhibit 9?  
 11 MS. GARRETT: Paragraph 16?  
 12 MS. COZAKOS: Yes, please.  
 13 Q. (BY MS. COZAKOS) Have you seen this  
 14 complaint before, Mr. Bratton?  
 15 MS. GARRETT: Let me let you look at  
 16 the front.  
 17 THE WITNESS: I've seen so many of  
 18 them, I don't know for sure, but I don't think  
 19 so.  
 20 Q. (BY MS. COZAKOS) Okay. Well, this is  
 21 what was filed in the court by your attorney.  
 22 Would you flip to paragraph 16?  
 23 MS. GARRETT: We're there.  
 24 MS. COZAKOS: Okay, thanks.  
 25 Q. (BY MS. COZAKOS) It says: "At or near

1 Q. Did she say "I'm going to get even with  
 2 you"?  
 3 A. She didn't have to say it. You could  
 4 hear it in her voice.  
 5 Q. She didn't say it; is that correct?  
 6 A. She didn't say those exact words, no.  
 7 Q. Did she say anything along the lines  
 8 of: I'm going to get even with you?  
 9 A. No.  
 10 Q. All you remember her saying is:  
 11 "You're burning my pretty field, you're burning  
 12 my fence posts"; correct?  
 13 A. Yeah, and they wanted me off the  
 14 property.  
 15 Q. And they wanted you off the property.  
 16 A. Yeah. Their property, yeah.  
 17 Q. Did Jackie say: "I want you off my  
 18 property"?  
 19 A. They both did. They were both yelling  
 20 so much I couldn't tell what they really were  
 21 saying, to be truthful with you. They were  
 22 almost incoherent.  
 23 And that's true, they told me I  
 24 couldn't burn or spray on the easement; in other  
 25 words, having access to the property. And they

1 put the No Trespassing signs up.  
 2 Q. Okay. Let's back up. After that comma  
 3 where I stopped reading, it says: "Jackie Scott  
 4 verbally threatened Plaintiff Charles Bratton,"  
 5 it says: "And shouted at him to get off 'their'  
 6 property or they would harm him."  
 7 Jackie Scott didn't tell you she would  
 8 harm you; isn't that right?  
 9 A. She implied it.  
 10 Q. But she didn't state it, did she?  
 11 A. She didn't state it in words, but she  
 12 implied it, so I knew what they meant.  
 13 Q. John Scott didn't tell you he was going  
 14 to harm you; isn't that right?  
 15 A. He did that by the way he kept running  
 16 at me and shouting, looking at me in the face,  
 17 bugging me.  
 18 Q. But he didn't tell you that he would --  
 19 A. You don't have to tell somebody that.  
 20 Q. Just answer my question. He didn't  
 21 tell you he was going to harm you; correct?  
 22 A. No.  
 23 Q. Yes, that's correct, or, no, he didn't  
 24 tell you that?  
 25 MS. GARRETT: You're going to have to

1 running up and down?  
 2 A. Yeah, running up and down. He'd run up  
 3 to me and shout stuff at me. I was trying to  
 4 burn my ditch up; I was trying to control the  
 5 fire. And I had this idiot pouncing on me all  
 6 the time. I was trying to get it burned up and  
 7 get out of there.  
 8 Q. How close did he get to you?  
 9 A. Closer than you and I.  
 10 Q. How long did he stay there?  
 11 A. Oh, God, seemed like days, but it's  
 12 probably 15, 20 minutes, a half hour, however  
 13 long it took me to burn that ditch.  
 14 Q. No. How long did he stay close to you?  
 15 A. Oh, he went back and forth like he was  
 16 on a yo-yo.  
 17 Q. Okay. Let's look at paragraph 17. It  
 18 says: "On or around April 15th, 2007, after the  
 19 Defendants had continually threatened Plaintiff  
 20 Charles Bratton." Do you see that?  
 21 A. Um-hmm.  
 22 Q. It says "continually threatened," and I  
 23 want to know what you mean by that.  
 24 A. By not letting me make me think that I  
 25 can't come up and turn my water on and take care

1 ask it again because it's a double negative for  
 2 him.  
 3 Q. (BY MS. COZAKOS) Okay. The question  
 4 was: Mr. Scott did not tell you he was going to  
 5 harm you; correct?  
 6 A. In so many words, no. But he  
 7 threatened --  
 8 Q. Meaning that is correct?  
 9 A. He threatened me to make me think that.  
 10 Q. I understand. But the question was,  
 11 and we're working a double negative: Did he tell  
 12 you verbally he was going to harm you?  
 13 Mr. Scott, that is.  
 14 A. He was shouting at me so much and  
 15 yelling at me and running up and down, I'm not  
 16 sure exactly what all he said to me.  
 17 Q. Do you remember him saying to you he  
 18 was going to harm you?  
 19 A. In so many words, no.  
 20 Q. Okay.  
 21 A. In actions, yes.  
 22 Q. And those were the actions of running  
 23 up and down?  
 24 A. Yeah. Intimidating me, bullying me.  
 25 Q. How was he bullying you? Was he

1 of my property.  
 2 Q. How did they make you think that?  
 3 A. By what they were yelling and saying to  
 4 me when we had that confrontation on the ditch.  
 5 That's the way I took that.  
 6 Q. Okay. It says "continually," so I want  
 7 to -- we're still -- it's still -- there's only  
 8 that one incident that we were talking about when  
 9 you were burning on the property; correct?  
 10 A. Yes. Continually means that I thought  
 11 about it all the time when I had stuff to do.  
 12 That I couldn't do it because continually -- this  
 13 had been on my mind for a whole year. I can't  
 14 sleep, stomach is upset, causing me all kinds of  
 15 problems.  
 16 So continually, yeah, I consider it a  
 17 threat.  
 18 Q. But did they do something overtly any  
 19 other time but that one time on the property you  
 20 told me about when you were burning the weeds?  
 21 A. Face-to-face?  
 22 Q. At any point, on the phone,  
 23 face-to-face?  
 24 A. No, I never talked to them on the  
 25 phone.

1 Q. Okay.  
 2 A. I only seen them two times, the time  
 3 that -- no, three times. The time that you was  
 4 with us and the time that they were on me about  
 5 burning.  
 6 The thing that really got me, though,  
 7 was those trespassing signs going up right after  
 8 we had that altercation. To me that was a direct  
 9 threat.  
 10 Q. You considered that to be a verbal  
 11 threat?  
 12 A. Yep. No Trespassing is pretty verbal  
 13 to me.  
 14 Q. A threat of what?  
 15 A. I don't want you on the property.  
 16 There's the sign that says No Trespassing, and it  
 17 was on both ends of the ditch.  
 18 Q. They didn't want you burning on the  
 19 property. You knew that; right?  
 20 A. I know they didn't want me to, but they  
 21 didn't have the right to keep me from it.  
 22 Q. Okay. Let's look at paragraph 21. It  
 23 says: "Since April 15th, 2007, whenever  
 24 Plaintiff, Charles Bratton, has tried to access  
 25 his easement..." And let's just stop right

1 there.  
 2 You testified you've never tried to  
 3 access the easement after April 15th of '07;  
 4 correct?  
 5 A. No. I just went up there and decided  
 6 that, hey, this is not a good idea.  
 7 Q. Okay. When did you go up there?  
 8 MS. GARRETT: Now, say where "up there"  
 9 is.  
 10 THE WITNESS: Up to where the water  
 11 comes onto my property.  
 12 Q. (BY MS. COZAKOS) You went up on your  
 13 own property?  
 14 A. Yeah, I stayed on my own property. I  
 15 didn't want to get on his.  
 16 Q. You never tried to get on the easement  
 17 after April 15th of '07; correct?  
 18 A. No.  
 19 Q. Yes, that is correct?  
 20 A. Yes, that's correct.  
 21 Q. Okay. Now, keep going. It says:  
 22 "Defendant John Scott comes out of his house and  
 23 yells at him, runs toward him, runs up and down  
 24 the adjoining fence line, and does so in a  
 25 verbally and physically threatening manner."

1 Do you see that?  
 2 A. Yes.  
 3 Q. Okay. Well, if you haven't gone on the  
 4 property since April 15th of '07 --  
 5 A. But he --  
 6 Q. Hang on, let me finish. -- when was it  
 7 that John Scott came out of his house and yelled  
 8 at you?  
 9 A. But anybody goes around there, they  
 10 come out and stare at them, yell at them.  
 11 Q. Okay. Did they do it to you?  
 12 MS. GARRETT: She's asking you about  
 13 this situation.  
 14 THE WITNESS: Well, that was the time  
 15 that I was burning the ditch.  
 16 Q. (BY MS. COZAKOS) Right. And that  
 17 happened on April 15th of '07. Or, I'm sorry, it  
 18 happened at or near the beginning of April of  
 19 '07; correct, that you were on the ditch burning?  
 20 MS. GARRETT: Let's just take a break a  
 21 minute. I think maybe Charles has been going for  
 22 quite awhile and I think he's a little mixed up.  
 23 MS. COZAKOS: Okay. I want him to  
 24 answer the question and then you can take a  
 25 break.

1 MS. GARRETT: We are going to take a  
 2 break anyway.  
 3 MS. COZAKOS: No, you can't take a  
 4 break while there's a pending question.  
 5 MS. GARRETT: Yes, we're going to.  
 6 MS. COZAKOS: Nancy, come on. You know  
 7 not to do that, not when there's a pending  
 8 question. That's just wrong.  
 9 MS. GARRETT: That's just your rule.  
 10 There's no rule that says --  
 11 MS. COZAKOS: No, it's not my rule.  
 12 Unbelievable.  
 13 (A brief recess was taken.)  
 14 MS. COZAKOS: I want to make a record  
 15 of what happened. I had a pending question with  
 16 Mr. Bratton. He was trying to answer the  
 17 question. His lawyer interrupted him and asked  
 18 him to leave with her because she said she  
 19 thought he was confused and would not allow him  
 20 to finish answering the question as he was trying  
 21 to do.  
 22 They since went out in the hall, she  
 23 talked to him, and now she says he's ready to  
 24 come in and answer the question. I object to the  
 25 whole process. We can take it up with the Court.

1 MS. GARRETT: And I'll just respond.  
 2 Mr. Bratton was becoming confused; I could tell  
 3 that. He's 76 years old. We have been going now  
 4 for a little over three hours, with the noon  
 5 break in between, and I did want to talk to him.

6 And after I talked to him, he said he  
 7 needed to use the rest room. And he's not in the  
 8 room right now, so he's not ready to answer any  
 9 more questions until after he's used the rest  
 10 room.

11 MS. COZAKOS: Well, he can certainly  
 12 use the rest room. That's not my problem. But  
 13 he didn't ask to use the rest room. He was  
 14 trying to answer my question.

15 MS. GARRETT: And I'll object to that.  
 16 He wasn't trying to answer; he was getting  
 17 confused.

18 Mr. Bratton, come in.

19 THE WITNESS: I've got to have some  
 20 more water.

21 MS. GARRETT: Okay. Let me get it for  
 22 you.

23 Q. (BY MS. COZAKOS) Mr. Bratton, do you  
 24 have some sort of physical condition that I  
 25 should know about that causes you to become

1 confused?

2 A. No, ma'am. I'm just as sharp as you  
 3 are, and probably the IQ is just as high as  
 4 yours, too.

5 Q. It probably is.  
 6 Would you look at paragraph 21.

7 A. Okay.

8 Q. After the incident that you've told me  
 9 about where Mr. Scott and Mrs. Scott were out on  
 10 their property and you were burning, was there  
 11 ever a time when Mr. Scott came out of his house  
 12 and yelled at you?

13 A. I went up there one time to start up  
 14 the fence and he was up on the ditch bank, and he  
 15 started yelling at me.

16 Q. Okay. Because all this time you've  
 17 said that's the only time you've ever seen him  
 18 there. Are you changing your testimony now?

19 I mean, you said to me over and over in  
 20 this whole deposition that that was the last time  
 21 you had seen him or talked to him.

22 A. I just said this time you're talking  
 23 about, I just now remembered that he was -- I  
 24 walked up there, and he came out on the ditch  
 25 bank and yelled something at me, and I turned

1 around and left.

2 Q. And what date was that?

3 A. I don't remember the dates. That's in  
 4 the spring, in April sometime.

5 Q. And where were you at when he yelled at  
 6 you?

7 A. I was up at the top of my pasture over  
 8 towards where the water comes through. I was  
 9 looking at it.

10 Q. And where was he?

11 A. He was up on that ditch bank up on the  
 12 canal.

13 Q. How far apart is that?

14 A. Probably 200 feet or so.

15 Q. And what did he say to you?

16 A. I don't know. He just started yelling,  
 17 and I decided, hey, this is a good time to get  
 18 out of here; I don't want anything to do with  
 19 him.

20 Q. So were you wrong before when you told  
 21 me that the last time you had ever had any sort  
 22 of dealings with him was when he was on your  
 23 property the day -- you were on his property  
 24 spraying?

25 A. Yeah, I was wrong, because I forgot

1 about this time here.

2 Q. I see. And if you couldn't hear what  
 3 he was saying, how do you know that he was  
 4 threatening you?

5 A. Well, why would he be talking to me,  
 6 otherwise, if he wasn't threatening me? What  
 7 would he have to want to say to me?

8 Q. You don't know what --

9 A. We're not friends.

10 Q. You don't know what he was saying;  
 11 right?

12 A. I don't know what he was saying. He  
 13 was yelling and I just decided, I'm getting out  
 14 of here. This guy is scary.

15 Q. What about paragraph 22? "Upon  
 16 information and belief, Defendant has verbally  
 17 and physically threatened the other neighbors who  
 18 also have irrigation ditch easements."

19 Do you see that?

20 A. Yes. That's Dan Lane, and Dan went up  
 21 to turn his water on.

22 Q. Okay. And you're stating that  
 23 Mr. Scott physically threatened him?

24 A. Yep.

25 Q. How did he do that, to your knowledge?

1 A. All I know is what Dan told me, because  
 2 Dan just told him: "Okay, buddy, let's get it  
 3 on."  
 4 Q. And what did Mr. Scott say to Mr. Lane  
 5 that was physically threatening?  
 6 A. Dan said he backed off.  
 7 Q. Okay. What did Mr. Scott say to Dan  
 8 that was physically threatening?  
 9 A. He just told him: "You can't -- this  
 10 is my property; you can't come up here and do  
 11 this." And Dan just says: "I've been doing this  
 12 for 25 years."  
 13 Q. Okay.  
 14 A. So I guess Mr. Scott said: "Well, I'll  
 15 just show you." And Dan said: "Well, let's get  
 16 it on then."  
 17 Q. Do you know if Mr. Scott said: "Well,  
 18 I'll just show you"?  
 19 A. That's what Dan told me. That's  
 20 hearsay, but that's Dan's story.  
 21 Q. Dan told you that Mr. Scott said to  
 22 him: "Well, let's just get it on"; is that  
 23 right?  
 24 A. No.  
 25 Q. Okay.

1 Q. What kind of pet was it?  
 2 A. Apparently it was a cat.  
 3 Q. Who told you that?  
 4 A. All the different people in the  
 5 neighborhood, that's what they have all said.  
 6 Q. Who told you? Who's the people in the  
 7 neighborhood that told you that?  
 8 A. I told you that once.  
 9 Q. Well, I don't remember. Who told you  
 10 that?  
 11 A. Sherry told me that.  
 12 Q. Sherry who?  
 13 A. I don't know her last name. She is a  
 14 neighbor.  
 15 Q. Sherry told you that Mr. Scott shot a  
 16 cat?  
 17 A. That the rumor was around that  
 18 Mr. Scott shot a cat on his property.  
 19 Q. So Sherry told you there was a rumor?  
 20 A. Yeah. And since that's a rumor, I  
 21 didn't want to take the chance that I would be  
 22 the next cat to be shot.  
 23 Q. You don't know if that rumor is true;  
 24 right?  
 25 A. I don't know. But you know what, you

1 A. Dan said that to Mr. Scott. "If that's  
 2 the way you feel about it, let's just get it on."  
 3 Q. Okay. So what did Mr. Scott say that  
 4 was physically threatening to Dan?  
 5 A. You would have to ask Dan about that.  
 6 I wasn't there.  
 7 Q. Any other neighbors that Mr. Scott  
 8 physically threatened, to your knowledge, besides  
 9 Dan?  
 10 A. He's had problems with Steve on the  
 11 south side, but I don't know exactly what all  
 12 that entails.  
 13 Q. Did he physically threaten Steve?  
 14 A. I don't know. You'd have to ask Steve.  
 15 Q. Okay. Look at paragraph 23. "Upon  
 16 information and belief, Defendant has utilized a  
 17 firearm to shoot a neighborhood pet that  
 18 inadvertently crossed over onto his property."  
 19 Do you see that?  
 20 A. Yes, I do.  
 21 Q. Whose neighbor? What neighbor owned  
 22 the pet that was shot?  
 23 A. I think Steve owned it.  
 24 Q. Steve who?  
 25 A. I don't know his last name.

1 see all kinds of crazy things in the paper about  
 2 people shooting things and going wild, so I'm not  
 3 taking the chance.  
 4 Q. Do you know whose cat it was?  
 5 A. I'm not positive. I think it was  
 6 Steve's, but I'm not positive.  
 7 Q. Oh, that's right. You said that, I'm  
 8 sorry. And where does Steve live?  
 9 A. He lives right there by him, on the  
 10 west side of him.  
 11 Q. Are you in fear of death? Are you in  
 12 fear that Mr. Scott may kill you?  
 13 A. It's in the back of my mind, yes.  
 14 People got killed over water a lot of times in  
 15 this life of ours. He's scary.  
 16 Q. Is there any reason, other than what  
 17 you've already told me here today, that you think  
 18 Mr. Scott may kill you?  
 19 A. No. But he's not going to get the  
 20 chance because I'm not going to get that near  
 21 him.  
 22 Q. The complaint says that the Scotts have  
 23 caused you substantial emotional distress; is  
 24 that correct?  
 25 A. Yep.



1 Q. Has Mrs. Scott caused you substantial  
2 emotional distress?

3 A. I consider them a pair. I consider  
4 they are both in on it.

5 Q. Okay. Has Mrs. Scott done anything or  
6 said anything to you other than what you've told  
7 me here today?

8 A. Nope.

9 Q. You think Mrs. Scott may kill you?

10 A. I don't know what either one of them  
11 will do. I consider them both dangerous. I  
12 don't think they are emotionally stable, from  
13 what I saw.

14 Q. What emotional distress have they  
15 caused you?

16 A. Well, I don't sleep very good anymore.  
17 I sleep a couple of hours and I'm up all night.  
18 I'm thinking about the horses. I'm thinking  
19 about the costs that this has caused me.

20 I'm thinking about maybe I won't be  
21 able to raise my horses anymore because I won't  
22 be able to afford to. I won't have a place to  
23 keep them if I don't have water on it. All these  
24 things weigh on my mind.

25 Q. Have you had physical problems as a

1 other questions. Do you have questions, Nancy?

2 MS. GARRETT: Yeah, I may. Why don't  
3 you step out with me, Charles.

4 (A brief recess was taken.)

5

6 EXAMINATION

7 QUESTIONS BY MS. GARRETT:

8 Q. Now, Mr. Bratton, I have a few  
9 questions. I want you to look at Exhibit 2;  
10 okay? And I want you to look at what I'm going  
11 to call B(3) of the exhibits to the summary  
12 judgment. And it's a picture of a No Trespassing  
13 sign and then a picture of your fence, is it not?

14 A. Yes.

15 Q. Okay. I want you to look at your  
16 Exhibit No. 2 that you drew, that you call the  
17 fine art, and I want you to take a red pen and  
18 put an X on Exhibit 2 where that No Trespassing  
19 sign exists on the Scott property.

20 A. (Marking.)

21 Q. Make a big one.

22 A. (Witness complied.)

23 Q. Okay. Now, is that X where you usually  
24 go in and out of --

25 A. Yes.

1 result of that?

2 A. The only physical problem is that I  
3 just find myself a little shaky.

4 Q. Have you seen a doctor about it?

5 A. Yeah.

6 Q. Who have you seen?

7 A. Dr. Gregg.

8 Q. And did Dr. Gregg diagnose your shaky  
9 hands?

10 A. He just saw them. He said that's just  
11 stress, because I told him what was going on.

12 Q. Any other physical problems besides the  
13 shaky hands?

14 MS. GARRETT: And the sleeping?

15 THE WITNESS: The sleeping. I don't  
16 eat very good. I only eat about two meals a day  
17 anymore. I just don't feel like it.

18 Q. (BY MS. COZAKOS) Any other emotional  
19 distress that you've been caused because of the  
20 Scotts?

21 A. No.

22 Q. Do you have any problems with your  
23 memory, Mr. Bratton?

24 A. No.

25 MS. COZAKOS: I don't think I have any

1 Q. -- the Scott property? Okay. Thank  
2 you.

3 A. There's a place under the fence where  
4 you can go there easy.

5 Q. Did you ask Mr. Wielong, who is one of  
6 the Scotts' neighbors, for a bid on redoing the  
7 ditch in its original spot?

8 A. Yes.

9 Q. Okay. And what did he -- and is he  
10 someone that is a professional ditch digger, so  
11 to speak?

12 A. That's his business. He has a backhoe  
13 and he does that work.

14 Q. Okay. And how much did he say it would  
15 cost -- now, this is in May of 2007 -- in May of  
16 2007 to redo your ditch above ground?

17 A. About \$500.

18 Q. Okay. And did you also ask him for an  
19 estimate of how much it would cost to redo the  
20 ditch if you put in an underground pipe?

21 A. Yes, I did.

22 Q. And how much did he say, about?

23 A. About \$5,000.

24 Q. Is there anyone else that's one of your  
25 neighbors that has an underground pipe ditch now?

1 A. Yes, the people to the west of me.  
 2 Q. Okay.  
 3 A. And Steve put that in, by the way.  
 4 Q. Did Mr. Wielong say that there were any  
 5 conditions for him to do the work?  
 6 A. Said the only way he would do the work  
 7 is if they'd have a deputy sheriff come out there  
 8 and stay with him while he dug it up.  
 9 Q. And did you understand why he wanted  
 10 that?  
 11 A. I assumed that he thought that he was  
 12 dangerous --  
 13 MS. COZAKOS: I'll just object as to  
 14 speculation and lack of foundation. Sorry to  
 15 interrupt you. Go ahead.  
 16 MS. GARRETT: I'll try to change it.  
 17 Q. (BY MS. GARRETT) Did he tell you why  
 18 he wanted the sheriff there?  
 19 A. Because he didn't trust him. He wanted  
 20 the sheriff there to make sure it was safe for  
 21 him to do it.  
 22 Q. Who didn't he trust?  
 23 A. Mr. Scott.  
 24 Q. Okay. When we were at the ditch in  
 25 June of 2007, and Ms. Cozakos was there and her

1 MS. COZAKOS: And who is "he"? I'm  
 2 sorry.  
 3 THE WITNESS: Mr. Ford.  
 4 Q. (BY MS. GARRETT) Mr. Ford. And when  
 5 was that?  
 6 A. April of '73.  
 7 Q. Okay, that's what I'm trying to get.  
 8 A. Okay.  
 9 Q. Before today, have you ever seen any of  
 10 the photographs that Ms. Cozakos showed you on  
 11 the disk on her computer?  
 12 A. I saw one.  
 13 Q. Is that it?  
 14 A. Yeah.  
 15 Q. Okay. When you had the incident with  
 16 Mr. and Mrs. Scott when you were burning the  
 17 weeds, did they tell you anything about any legal  
 18 issues?  
 19 A. Yeah, he run out there and he said to  
 20 me, he says: "I own this place. I got it fair  
 21 and square. I have the papers to show it. And I  
 22 know the Idaho law, and you can't burn and you  
 23 can't spray. And if you don't like what I'm  
 24 saying, you can get a lawyer."  
 25 MS. GARRETT: That's all the questions

1 clients were there, how long was the water turned  
 2 into that low spot?  
 3 A. Just a few minutes, like five minutes  
 4 or so, because I didn't want it to wash the ditch  
 5 out.  
 6 Q. Why didn't you want it to wash the  
 7 ditch out?  
 8 A. Because I didn't want them to wash --  
 9 washing all that stuff down in my field.  
 10 Q. Okay. When Mr. Ford and you first made  
 11 the ditch that had been sitting there since 1973,  
 12 when was that ditch dug and constructed?  
 13 A. Right after I bought the property.  
 14 Q. So you bought the property in April --  
 15 A. And -- bought the property in April,  
 16 and we had to have a ditch dug, so he did it  
 17 right away.  
 18 Q. Okay. And when was the time that he  
 19 afforded you that 12-foot easement?  
 20 A. He told me he'd have to have a tractor  
 21 to clean the ditch out and he'd have to have at  
 22 least 12 feet.  
 23 Q. When did he tell you that?  
 24 A. That time that we put the ditch in,  
 25 when he was working on the --

1 I have for him.  
 2 MS. COZAKOS: All right, thank you. I  
 3 don't have anything further.  
 4  
 5 (Deposition concluded at 3:30 p.m.)  
 6 (Signature requested.)  
 7  
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**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CHARLES E. BRATTON AND  
MARJORIE I. BRATTON (husband and  
wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G.  
SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

**REPLY TO PLAINTIFFS' MOTION  
TO AMEND THE COMPLAINT TO  
ADD PUNITIVE DAMAGES**

**I.**  
**INTRODUCTION**

Defendants argue that the instant motion should be denied for two reasons. First, Defendants alleged that they did not threaten Mr. Bratton. Second, Defendants contend that case law cited by Plaintiffs does not support a claim for punitive damages. The Court, however, should grant Plaintiffs' motion and allow these issues to be presented to the jury. As shown below, there is abundant evidence showing Defendants' intentional and outrageous conduct. Moreover, Idaho case law shows that the destruction, removal, and relocation of an irrigation ditch is sufficient conduct

to support an award of punitive damages. Accordingly, the Court should grant Plaintiffs' instant motion.

## II. ARGUMENT

### A. The Applicable Standard for Amending the Complaint Requires Merely a "Reasonable Likelihood."

Defendants contend that there must be clear and convincing evidence to support a punitive damage award at trial. *See* p. 10 of Defendants' Memorandum in Opposition to Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages. Defendants, however, fail to acknowledge the standard for amending a complaint to add punitive damages. At this stage of the litigation, Plaintiffs need merely show that there is "a reasonable likelihood" of proving facts to sustain a punitive damage award. *See* I.C. § 6-1604. Further, Rule 15(a) of the Idaho Rules of Civil Procedure provides great liberty in allowing the amending of a party's pleading. *See* I.R.C.P. 15(a). In sum, these issues should be presented to the jury as there is a "reasonable likelihood" that Plaintiffs will prove facts at trial sufficient to support a punitive damage award. *See* I.C. § 6-1604.

### B. Idaho Case Law Supports a Claim for Punitive Damages.

Defendants attempt to distinguish the holding in *Weaver v. Stafford*, 134 Idaho 691, 8 P.3d 1234 (2000), from the case at bar. *See* p. 12 of Defendants' Memorandum in Opposition. Specifically, Defendants aver that the holding in *Weaver* is not applicable because it involved a trespass action rather than an action for interference with water rights. *See id.* This distinction, however, is misplaced.

It is well established in Idaho that the conduct of a defendant, and not the specific cause of action, determines whether punitive damages are appropriate. *See Weaver*, 134 Idaho at 700, 8 P.3d at 1243 (analyzing the defendant's conduct); *Cheney v. Palos Verde Investment Corp.*, 104 Idaho

897, 905, 665 P.2d 661, 669 (1983) (stating that punitive damages will be sustained where there is an extreme deviation from reasonable standards of conduct); *Linscott v. Rainer National Life Insurance Co.*, 100 Idaho 854, 857, 606 P.2d 958, 961 (1980) (stating that punitive damages are awarded based on the defendant's conduct).

As set forth in prior briefing, the conduct of Defendants in this case is analogous to those of the defendant in *Weaver*. Significantly, the Idaho Supreme Court in that case recognized that the defendant's conduct was sufficient for an award of punitive damages where he had "removed the original fence and filled in the original ditch dirt located between the cement irrigation ditch" and a surveyed boundary line. *Id.* at 700, 8 P.3d at 1243. Further, the Court found that the defendant had made "no measurements or any documentary record regarding the location of the original fence and dirt ditch." *Id.* Finally, the defendant admitted at trial that the new dirt ditch was located on the property without the plaintiffs' permission. *Id.* As a result, the Court upheld the trial court's decision for punitive damages, stating that the defendant's conduct demonstrated a "wilful disregard of [plaintiff's] property rights." *Id.* at 700-01, 8 P.3d at 1243-44.

Thus, the awarding of punitive damages in *Weaver* shows that Defendants' conduct in this matter allows Plaintiffs to amend the Complaint to alleged punitive damages.<sup>1</sup> As such, there is at least a "reasonable likelihood" in this case that Plaintiffs will be able to prove facts at trial to support an award of punitive damages. *See* I.C. § 6-1604.

**C. Defendants' Conduct Establishes Criteria Allowing Plaintiffs to Amend Their Complaint.**

Defendants argue that Defendant Scott did not threaten Mr. Bratton. *See* p. 10 of Defendants' Memorandum in Opposition. Nevertheless, Defendants only cite two paragraphs from

---

<sup>1</sup>Implicit in the *Weaver* decision is the fact that the removal of the original ditch and the corresponding conduct was sufficient for the district judge to allow the complaint to be amended prior to trial.

Mr. Bratton's deposition in support of this argument. *See* p. 11 of Defendants' Memorandum in Opposition. Such evidence, however, does not prohibit Defendants' conduct from being presented to the jury.

More importantly, the record shows that Defendants' conduct was extreme, intentional and reckless. In Idaho, punitive damages may be sustained where there is extreme deviation from reasonable conduct, and where the act was performed with "an understanding of or disregard for its likely consequences." *Cheney*, 104 Idaho at 905, 665 P.2d at 669. Further, an award of punitive damages can be shown where the defendants violate another's legal right in a deliberate or grossly negligent manner. *See Linscott*, 100 Idaho at 858, 606 P.2d at 962.

The record shows that Defendant Scott threatened Mr. Bratton, screaming that he must leave the property and not return. *See* ¶ 11 of Affidavit of Charles Bratton in Support of Plaintiffs' Motion for Partial Summary Judgment, as previously filed with the Court. Mr. Bratton provided further explanation regarding this event:

Q. And they wanted you off the property.

A. Yeah. Their property, yeah.

Q. Did Jackie say: "I want you off my property"?

A. They both did. They were both yelling so much I couldn't tell what they really were saying, to be truthful with you. They were almost incoherent. And that's true, they told me I couldn't burn or spray on the easement; in other words, having access to the property. And they put the No Trespassing signs up.

*See* p. 101-102 of Exhibit "B" of the Affidavit of Counsel (emphasis added).

In addition, Defendant outrageously and unreasonably ran up and down the fence line screaming at Mr. Bratton. The relevant exchange between defense counsel and Mr. Bratton on this issue is as follows:

Q. And those were the actions of running up and down?

A. Yeah. Intimidating me, bullying me.

Q. How was he bullying you? Was he running up and down?

A. Yeah, running up and down. He'd run up to me and shout stuff at me. I was trying to burn my ditch up; I was trying to control the fire. And I had this idiot pouncing on me all the time. I was trying to get it burned up and get out of there.

Q. How close did he get to you?

A. Closer than you and I.

*See* p. 103-104 of Exhibit "B" of the Affidavit of Counsel (emphasis added).

Of equal importance is the fact that Defendants completely leveled and destroyed the irrigation ditch, and even attempted to create a new, smaller ditch outside the respective property line. *See* ¶ 14 of the Affidavit of Charles Bratton in Support of Plaintiffs' Motion for Partial Summary Judgment. This unreasonable and outrageous conduct by Defendant is well documented by photographs taken of the property. *See* ¶ 15-16 of the Affidavit of Charles Bratton in Support of Plaintiffs' Motion for Partial Summary Judgment; *see also* p. 47-49 of Exhibit "B" of the Affidavit of Counsel in Support of Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages. In fact, Mr. Scott's own testimony is that he fully intended his conduct, as he previously researched the statutes on easements before leveling the irrigation ditch. *See* p. 167 of Exhibit "A" of the Affidavit of Counsel.

Defendants' conduct was so extreme that it made Plaintiff fear for his life, and posed a danger to the livelihood and safety of his livestock. *See* ¶ 2 of the Affidavit of Charles Bratton in Support of Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages; *see also* p. 87-89 of Exhibit "B" of the Affidavit of Counsel in Support of Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages. Such fear clearly is reasonable given that Defendant Scott previously

plead to three counts of assault with a deadly weapon, and later went to court for fighting at a bar. *See* p. 22-26 of Exhibit "A" of the Affidavit of Counsel in Support of Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages. As such, a local sheriff advised Mr. Bratton not to go onto Defendants' property unless he had someone with him. *See* p. 68, 88 of Exhibit "B" of the Affidavit of Counsel in Support of Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages.

Moreover, there is no evidence that Defendants made any measurements or a documented record regarding the location of the original irrigation ditch. *See Weaver*, 134 Idaho at 700, 8 P.3d at 1243. This fact alone shows Defendants' intent to conceal the original location of the irrigation ditch, demonstrating a "wilful disregard for [Plaintiffs'] property rights." *Id.*

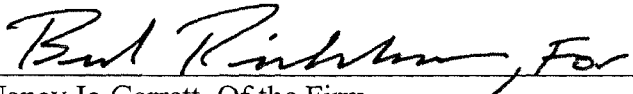
Accordingly, there is a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. *See* I.C. § 6-1604.

### III. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully ask the Court to grant their Motion to Amend the Complaint to Add Punitive Damages.

DATED this 20<sup>th</sup> day of February, 2008.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

By , For  
Nancy Jo Garrett, Of the Firm  
Attorneys for Plaintiffs Charles E. Bratton and Marjorie  
I. Bratton

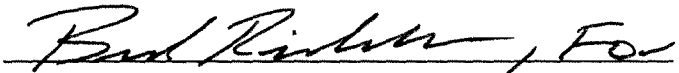


CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20<sup>th</sup> day of February, 2008, I served a true and correct copy of the foregoing REPLY TO PLAINTIFFS' MOTION TO AMEND THE COMPLAINT TO ADD PUNITIVE DAMAGES upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozakos  
PERKINS COIE  
251 East Front Street, Suite 400  
P.O. Box 737  
Boise, Idaho 83701-0737

U.S. Mail, postage prepaid  
 Hand-Delivered  
 Overnight Mail  
 Facsimile

  
\_\_\_\_\_  
Nancy Jo Garrett

ORIGINAL

Shelly H. Cozakos, Bar No. 5374  
SCozakos@perkinscoie.com  
PERKINS COIE LLP  
251 East Front Street, Suite 400  
Boise, ID 83702-7310  
Telephone: 208.343.3434  
Facsimile: 208.343.3232

Attorneys for Defendants

**F I L E D**  
A.M. 2 5 P.M.

MAR 05 2008

CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and  
MARJORIE I. BRATTON (husband and  
wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT  
(husband and wife),

Defendants.

Case No. CV 0706821C

**ORDER RE: MOTION TO AMEND THE  
COMPLAINT TO ADD PUNITIVE  
DAMAGES**

This matter came before the Court on February 21, 2008 on Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages. The Court, having reviewed the briefing submitted by the parties and considered oral argument and being fully advised in the premises, hereby ORDERS and this does ORDER that:

1. The Motion to Amend the Complaint to Add Punitive Damages is DENIED for the reasons set forth by the Court at the February 21, 2008 hearing.

MAR 4 2008

DATED: \_\_\_\_\_, 2008.



Renae Hoff  
District Judge

**CLERK'S CERTIFICATE OF SERVICE**

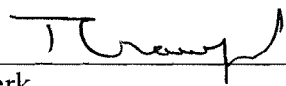
I, the undersigned, certify that on 3-5, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Nancy Jo Garrett  
Bradley S. Richardson  
BRASSEY, WETHERELL, CRAWFORD &  
GARRETT, LLP  
203 W. Main St.  
P.O. Box 1009  
Boise, ID 83701-1009  
FAX: 344-7077

Hand Delivery \_\_\_\_\_  
U.S. Mail X \_\_\_\_\_  
Facsimile \_\_\_\_\_  
Overnight Mail \_\_\_\_\_

Shelly H. Cozakos  
PERKINS COIE LLP  
251 E. Front St., Ste. 400  
P.O. Box 737  
Boise, ID 83701-0737  
FAX: 343-3232

Hand Delivery \_\_\_\_\_  
U.S. Mail X \_\_\_\_\_  
Facsimile \_\_\_\_\_  
Overnight Mail \_\_\_\_\_



Deputy Clerk

ORIGINAL

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Attorneys for Defendants

*5-5 Hwy*  
FILED  
A.M. 2:30 P.M.

MAR 05 2008

CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and  
MARJORIE I. BRATTON (husband and  
wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT  
(husband and wife),

Defendants.

Case No. CV 0706821C

**ORDER RE: MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

This matter came before the Court on February 21, 2008 on Plaintiffs' Motion for Partial Summary Judgment. The Court, having reviewed the briefing submitted by the parties and considered oral argument and being fully advised in the premises, hereby ORDERS and this does ORDER that:

1. The Motion for Partial Summary Judgment is DENIED for the reasons set forth by the Court at the February 21, 2008 hearing.

MAR 4 2008

DATED: \_\_\_\_\_, 2008.



Renae Hoff  
District Judge

**CLERK'S CERTIFICATE OF SERVICE**

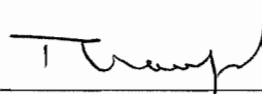
I, the undersigned, certify that on 3-5, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Nancy Jo Garrett  
Bradley S. Richardson  
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Hand Delivery \_\_\_\_\_  
U.S. Mail  \_\_\_\_\_  
Facsimile \_\_\_\_\_  
Overnight Mail \_\_\_\_\_

Shelly H. Cozakos  
PERKINS COIE LLP  
251 E. Front St., Ste. 400  
P.O. Box 737  
Boise, ID 83701-0737  
FAX: 343-3232

Hand Delivery \_\_\_\_\_  
U.S. Mail  \_\_\_\_\_  
Facsimile \_\_\_\_\_  
Overnight Mail \_\_\_\_\_



Deputy Clerk

Nancy Jo Garrett (ISB No. 4026)  
Bradley S. Richardson (ISB No. 7008)  
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203 W. Main Street  
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Boise, Idaho 83701-1009  
Telephone: (208) 344-7300  
Facsimile: (208) 344-7077

Attorneys for Plaintiffs Charles E. Bratton  
and Marjorie I. Bratton

**ORIGINAL**

**F I L E D**  
A.M. 3:10 P.M.

**MAR 10 2008**

**CANYON COUNTY CLERK  
T. CRAWFORD, DEPUTY**

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

CHARLES E. BRATTON AND  
MARJORIE I. BRATTON (husband and  
wife),

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G.  
SCOTT (husband and wife),

Defendants.

Case No. CV 0706821C

**SECOND AMENDED COMPLAINT  
AND DEMAND FOR JURY TRIAL**

COMES NOW, the above-referenced Plaintiffs, by and through their counsel of record, Brassey, Wetherell, Crawford & Garrett, and for a cause of action against Defendants, complains and alleges as follows:

**I. PARTIES, JURISDICTION, AND VENUE**

1. Plaintiffs Brattons are residents of Canyon County, Idaho.
2. Defendants Scotts are residents of Canyon County, Idaho.
3. The property in question is located in Canyon County, Idaho.

4. The Court has jurisdiction pursuant to Idaho Code § 1-705.
5. Damages meet the jurisdictional requirements and exceed \$10,000.
5. Venue is proper in Canyon County, Idaho, pursuant to Idaho Code § 5-401.

## **II. ALLEGATIONS**

6. The Brattons received an executed Warranty Deed for their current property in Middleton, Idaho, from Harold E. Ford and Janet B. Ford, husband and wife. The Warranty Deed is dated April 19, 1973, a true and correct copy of which is attached as Exhibit "A". Specifically, in part, the Warranty Deed conveyed 3.83 acres of land to Plaintiffs as known as Lot 32 of the Fruitdale Farm Subdivision, in Middleton, Idaho. Plaintiffs have subsequently used this land in connection with agricultural use for the care, feeding and stalling of their horses or livestock.

7. The Warranty Deed from the Fords to Plaintiffs also included a one-half share of water stock held in Canyon Hill Ditch Company and a one-half share of stock in Middleton Mill Ditch Company (See Exhibit "A").

8. The Warranty Deed also provides an easement for construction and maintenance of an irrigation ditch and for ingress and egress as follows:

[A]long the boundary line between Lots 39 and 40 of FRUITDALE FARM SUBDIVISION, Section e, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, 3 feet in width and of a length of approximately 200 yards along said boundary line between Lots 39 and 40 for the construction and maintenance of an irrigation ditch and for ingress and egress along said ditch boundary line.

9. Pursuant to this easement, Harold Ford installed a 3-foot wide ditch for Plaintiffs that traversed Lot 40. At that time, sections of concrete pipe were laid intermittently in the ditch to keep its walls from eroding and to control the volume of water.

10. Subsequently, Harold Ford, deeded the Plaintiffs an additional 1 acre.

11. Since 1973, Plaintiffs, pursuant to the easement, have used the ditch for agricultural irrigation and have maintained the ditch, in which Plaintiffs regularly and continuously used a tractor to till the ground on both sides of the ditch, creating a total easement width area of 12 feet. In addition, Plaintiffs regularly sprayed or burned this 12 foot area every spring to keep the adjacent easement area in good condition, and also regularly burned and cleaned out the ditch itself. Further, Plaintiff was allowed to access and exit the area adjacent to the ditch with tractors and other equipment needed to maintain said ditch.

12. Harold Ford subsequently executed a Quit Claim Deed to Lot 40 at the Fruitdale Farm Subdivision to Lois Rawlinson. This deed is dated January 2, 1996, and contains the Instrument Number 9600007, a true and correct copy of which is attached hereto as Exhibit "B".

13. After the January 1996 conveyance, Plaintiffs continued to utilize and exercise their easement as set forth above in the same manner as they had previously since 1973.

14. Genice Rawlinson, heir to Lois Rawlinson, later gift deeded Lot 40 of the Fruitdale Farm Subdivision to Defendants. A true and correct copy of this gift deed, Instrument Number 200557645, dated September 13, 2005, is attached as Exhibit "C". This gift deed specifically states that the property described therein is "subject to any incumbrance or easements as appear of record or by use upon such property." (emphasis added).

15. At or near the beginning of April of 2007, Plaintiff Charles Bratton accessed his easement and proceeded to perform the usual maintenance to include burning the ditch as well as burning the areas adjacent to the ditch within the 12 foot easement. The maintenance was performed to clean out the ditch and adjacent area in preparation to receive water. This was done in accordance with Plaintiffs' customary practice.



16. At or near this time, Defendants John and Jackie Scott verbally threatened Plaintiff Charles Bratton, and shouted at him to get off "their" property or they would harm him. They also told him that he could not burn or spray anywhere on the easement, or otherwise access the property or utilize his easement rights. In connection with this action, Defendant Scott placed a "No Trespassing" sign on said property in the precise location where Plaintiff customarily accessed the easement.

17. On or around April 15, 2007, after the Defendants had continually threatened Plaintiff Charles Bratton, the Defendants then removed all or part of the concrete pipe culverts utilized by Plaintiffs in the ditch portion of the easement.

18. Based upon information received from the Defendants, Defendants have retained custody of the Plaintiffs' concrete pipe culverts.

19. On or about April 15, 2007, after the Defendants had continually threatened Plaintiff Charles Bratton, the Defendants destroyed the Bratton ditch by filling the ditch in and leveling the area.

20. On or about April 15, 2007, after the Defendants had continually threatened Plaintiff Charles Bratton, the Defendants attempted to create a new, smaller culvert type ditch, immediately adjacent to and which incorporates the fence line between Lot 40 and that of another landowner.

21. Since April 15, 2007, whenever Plaintiff, Charles Bratton, has tried to access his easement, Defendant John Scott comes out of his house and yells at him, runs toward him, runs up and down the adjoining fence line, and does so in a verbally and physically threatening manner.

22. Upon information and belief, Defendant has verbally and physically threatened the other neighbors who also have irrigation ditch easements.

23. Upon information and belief, Defendant has utilized a firearm to shoot a neighborhood pet that inadvertently crossed over onto his property.

24. Defendants' actions violated Plaintiff's easement rights, caused damages to Plaintiffs, violated the Plaintiff's right of privacy, prevented Plaintiffs from accessing their easement, prevented Plaintiffs from irrigating their property and general use of easement, and blocked Plaintiff's access to their easement and to obtain water for their agricultural property and commercial livestock. Among other things, Plaintiffs' pasture has died, Plaintiffs have been forced to take remedial steps to feed, care for, and water their livestock. Further, Defendant has cause Plaintiffs to fear for their safety and suffer severe emotional distress.

### **III. DECLARATORY RELIEF**

25. Plaintiffs incorporate and reallege all preceding paragraphs as if set forth herein.

26. An actual case and controversy exists between Plaintiffs and Defendants with respect to Plaintiffs' rights to access and utilize the 12-foot irrigation ditch easement, and the maintenance thereto.

27. Based upon information and belief, Defendants have taken the position that the 34 year old, 3 foot wide ditch was rightfully removed by Defendant Scott from its long-term location; and that the easement is only three feet in total width, running adjacent to and incorporates the fence which is located on the property line between Lot 40 and another neighbor.

28. Plaintiffs have a recorded and express easement as granted by Harold E. Ford and Jeannette B. Ford. Plaintiffs also have an easement by implication from prior use, for the remaining nine feet in width on the easement, as there was unity of title, subsequent separation, continuous and regular use, and such use was reasonably necessary to the proper enjoyment of the easement by

Plaintiffs. Further, Plaintiffs have a right of access to, maintenance and enjoyment of the easement by express terms and by implication.

#### IV. INJUNCTION

29. The Plaintiffs reincorporate and reallege all preceding paragraphs as if set forth herein.

30. As a direct and proximate result of Defendants' action, Plaintiffs have suffered and will continue to suffer immediate and irreparable harm, injury, loss, and damage, including, but not limited to, the foreclosure of access to the easement and water rights, and the wrongful interference with their right to exclusive use, enjoyment, and possession of their 12 foot easement on Lot 40 of the Fruitdale Farm Subdivision.

31. As a result, Defendants should be precluded from verbally and physically threatening Plaintiffs or otherwise interfering with Plaintiffs' access and use of their easement on Lot 40 of the Fruitdale Farm Subdivision.

32. Given Defendants' dangerous propensity, hostility, use of a firearm on the property, as well as verbal and physical threats, Defendant should be precluded from entering the 12-foot easement area or from coming within 600 feet from Plaintiffs when Plaintiffs are on the easement, without prior court approval.

33. In addition, the Court should take all steps necessary to restore Plaintiffs to full possession of their easement rights, pursuant to Rule 65 of the Idaho Rules of Civil Procedure. Because of the Defendants conduct and actions, Plaintiffs are fearful of contact with the Defendants. Contact will be decreased by placement of a covered pipe or culvert ditch, as this type of ditch requires minimal maintenance. Therefore, Plaintiffs request that the Court grant injunctive relief that

would allow the placement of a covered pipe or culvert system across the easement area with all costs thereto paid by the Defendants.

34. In the alternative, the Court should require Defendants to return the easement to its prior status.

**V. NEGLIGENCE AND/OR WILLFUL, WANTON, AND/OR INTENTIONAL CONDUCT, AND INTERFERENCE WITH PROPERTY RIGHTS**

35. The Plaintiffs incorporate and reallege all preceding paragraphs as set forth herein.

36. Defendants owed a duty to Plaintiffs.

37. Defendants breached that duty, whether negligently, willfully, or intentionally, to Plaintiffs by the removal of Plaintiffs' concrete culverts, the filling in and changing Plaintiffs' ditch location, denying access to the easement, and by making verbal and physical bodily threats to Plaintiffs.

38. Defendants' conduct caused direct and proximate damage to Plaintiffs.

**VI. TORTUOUS INTERFERENCE WITH RIGHT OF PRIVACY**

39. The Plaintiffs reincorporate and reallege all preceding paragraphs as if set forth herein.

40. Defendants knowingly, intentionally and maliciously engaged in a course of harassment that seriously alarmed, annoyed and frightened Plaintiffs, causing them substantial emotional distress and caused the Plaintiffs not to be able to access their easement and invaded the Plaintiffs' right of privacy.

41. Defendants intentionally intruded physically and verbally upon the solitude and seclusion of Plaintiffs' private concerns, as well as by physical destruction of Plaintiffs' real property, which is utilized for private and commercial concerns.

42. Defendants conduct caused Plaintiffs to be in reasonable fear of death or physical injury to Plaintiffs or their family member.

43. Defendants' conduct caused physical harm to Plaintiffs' real property.

44. Defendants' actions caused damages to Plaintiffs.

**VII. REFORMATION OF THE WARRANTY DEED  
BASED UPON MUTUAL MISTAKE**

45. In the alternative, Plaintiffs reincorporate and reallege all preceding paragraphs as if set forth herein.

46. The Warranty Deed from the Fords to Plaintiffs does not reflect the true intentions of these parties as to the actual easement and its location.

47. The limiting of the express easement to three feet in width as contained in the Warranty Deed is a product of a material and mutual mistake on the part of the Fords and Plaintiffs at the time the easement was established.

48. Mr. Ford and Plaintiffs believed, intended, and agreed that Mr. Ford would provide a 12-foot -wide easement. In fact, Mr. Ford determined the location for the easement, and dug and created the actual irrigation ditch in 1973 as part of their agreement.

49. Mr. Ford used a tractor to create the ditch, with the edge of the irrigation ditch closest to the property line, at least six feet in from said property line.

50. The express easement as described in the Warranty Deed does not reflect the location of the easement and ditch that Mr. Ford dug and created in 1973. As such, the express easement does not reflect the easement to which the Plaintiffs and Mr. Ford had agreed, and thus these individuals shared a misconception about a basic function of their agreement.

51. The Court should reform the Warranty Deed to reflect the true intention of the parties, thereby establishing a 12-foot-wide easement as set forth since 1973.

### VIII. ATTORNEYS FEES AND COSTS

52. As a result of Defendants' actions and conduct, Plaintiffs have been required to retain the law firm of Brassey, Wetherell, Crawford and Garrett, in the instant matter and Plaintiffs therefore are entitled to recover their attorneys fees and costs for said representation pursuant to Idaho Code §§12-120 and 12-121 and I.R.C.P. 54.

53. Plaintiff reserves the right to amend this complaint to include a claim for Punitive Damages

54. WHEREFORE, Plaintiffs pray for relief as follows:

A. For a judgment against Defendants for any and all general and special damages in an amount to be proven at trial.

B. For declaratory relief in a judgment against Defendants setting forth that Plaintiffs have an express easement for 3 feet as set in its' original location by Mr. Ford, that Plaintiffs have a 12-foot wide easement by implication and use, and that Plaintiffs possess legal rights to access and utilize their 12-foot easement on Lot 40, and take all reasonable steps for the maintenance thereof.

C. For injunctive relief precluding Defendants from verbally or physically threatening Plaintiffs or otherwise interfering with Plaintiffs' access and use of their 12-foot easement on Lot 40; that Defendants be denied access to the Plaintiffs' easement unless they obtain prior Court approval; that Defendant be required to stay at a distance from Plaintiff of at least 600 feet; that Defendant be ordered to not carry a firearm when Plaintiff is on or near the easement; that Defendants be stopped from making/voicing verbal or physical threats against Plaintiffs; that

Defendants be required to pay all costs for a covered pipe or culvert system to be placed the length of Plaintiffs' easement ditch; damage to the Plaintiffs' pasture; cost of hay and feed for livestock; rental cost to pasture the Plaintiffs livestock while the pasture is reseeded and re-established; and any and all other damages proven at trial.

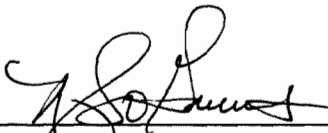
D. For attorneys fees and costs pursuant to Idaho Code §§ 12-120 and 12-121, and I.R.C.P. 54.

E. For such and other relief as the Court deems proper and equitable.

**PLAINTIFFS DEMAND A TRIAL BY JURY PURSUANT TO RULE 48 OF THE IRCP**

DATED this 6<sup>th</sup> day of March, 2008.

BRASSEY, WETHERELL, CRAWFORD & GARRETT

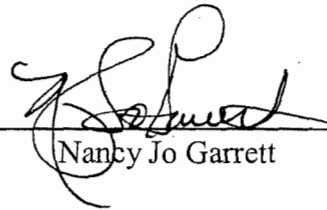
By   
\_\_\_\_\_  
Nancy Jo Garrett, Of the Firm  
Attorneys for Plaintiffs Charles E. Bratton and Marjorie  
I. Bratton

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 6<sup>th</sup> day of March, 2008, I served a true and correct copy of the foregoing SECOND AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL upon each of the following individuals by causing the same to be delivered by the method and to the addresses indicated below:

Shelly H. Cozacos  
PERKINS COIE  
251 East Front Street, Suite 400  
P.O. Box 737  
Boise, Idaho 83701-0737

- U.S. Mail, postage prepaid
- Hand-Delivered
- Overnight Mail
- Facsimile



---

Nancy Jo Garrett



8/28

Shelly H. Cozacos, Bar No. 5374  
S~~C~~ozacos@perkinscoie.com  
 Cynthia L. Yee-Wallace  
CyeeWallace@perkinscoie.com  
 PERKINS COIE LLP  
 251 East Front Street, Suite 400  
 Boise, ID 83702-7310  
 Telephone: 208.343.3434  
 Facsimile: 208.343.3232

Attorneys for Defendants

**FILED**  
 9:20 A.M. P.M.

AUG 18 2008 ✓

CANYON COUNTY CLERK  
 D. BUTLER, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and  
 MARJORIE I. BRATTON (husband and  
 wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT  
 (husband and wife),

Defendants.

Case No. CV 0706821C

ANSWER TO PLAINTIFFS' AMENDED  
 COMPLAINT AND DEMAND FOR JURY  
 TRIAL

Defendants John R. Scott and Jackie G. Scott, husband and wife, ("Defendants"), by and through their counsel of record, Perkins Coie LLP, submits the following Answer to Plaintiffs' Amended Complaint and Demand for Jury Trial ("the Complaint") filed on or about January 10, 2008.

**RESPONSE TO ALLEGATIONS**

Defendants deny each and every allegation of the Complaint unless specifically admitted herein. Defendants respond to the numerated paragraphs of the Complaint as follows:

1. Defendants admit the allegations contained in Paragraphs 1, 2, and 3 of the Complaint.
2. In response to paragraph 6 of the Complaint, Defendants admit that the Warranty Deed attached as Exhibit "A" conveys certain real property located in Fruitdale Farm Subdivision to Plaintiffs' Charles E. Bratton and Marjorie I. Bratton ("Plaintiffs"). Defendants do not have sufficient information or knowledge to either admit or deny the remaining allegations of paragraph 6 and, therefore, deny the same.
3. In response to paragraph 7 of the Complaint, Defendants admit the allegations contained therein.
4. In response to paragraphs 9 and 10 of the Complaint, Defendants do not have sufficient information or knowledge to either admit or deny the allegations and therefore, deny the same.
5. In response to paragraph 14, Defendants assert that the deed speaks for itself.
6. In response to paragraphs 4, 5 (both paragraphs 5), 8, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and the prayer for relief of the Complaint, Defendants deny all allegations contained therein. Defendants also deny that Plaintiffs are entitled to a jury trial.

**FIRST AFFIRMATIVE DEFENSE**

The Complaint fails to state a claim upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiffs are not entitled to declaratory relief or an injunction in this matter.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiffshave, and continue to have, the ability to mitigate their damages and have failed to mitigate their damages, and thus, their recovery, if any, are barred or reduced.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiffs' claims are barred by the doctrines of waiver, estoppel, and unclean hands.

**FIFTH AFFIRMATIVE DEFENSE**

Defendants are not the real party in interest and Defendants have failed to join indispensable parties and/or Plaintiffs lack standing to bring the claims asserted.

**SIXTH AFFIRMATIVE DEFENSE**

That the fault of Plaintiffs was equal to or greater than the fault of Defendants, if any, and that said Plaintiffs' fault was the sole, direct, and proximate cause of any damages and/or injuries suffered by Plaintiffs.

**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiffs' actions have prevented Defendants from performing any obligations that they may have been required to perform.

**EIGHTH AFFIRMATIVE DEFENSE**

Plaintiffs' damages are reduced or barred by their contributory and/or comparative negligence.

**NINTH AFFIRMATIVE DEFENSE**

Plaintiffs' assumed the risk and/or consented to the risk at issue in this matter.

**TENTH AFFIRMATIVE DEFENSE**

Defendants' conduct was not intentional and Plaintiffs are not entitled to keep the matters alleged to have been invaded, private.

**ELEVENTH AFFIRMATIVE DEFENSE**

Defendants' conduct is protected and/or privileged and/or permissible by law.

**TWELFTH AFFIRMATIVE DEFENSE**

Defendants' conduct was not objectionable to a reasonable person nor was it wanton, malicious, reckless, negligent or willful.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs have not suffered any damages and/or are subject to offset.

**FOURTEENTH AFFIRMATIVE DEFENSE**

Plaintiffs are not entitled to the damages that they seek, including general or special damages.

**ATTORNEY'S FEES**

Defendants have been required to retain the services of Perkins Coie LLP to defend against the Complaint. Defendants are entitled to recover their reasonable costs and attorney fees incurred in defending against the allegations in the Complaint pursuant to applicable Idaho laws, including I.C. §§ 12-120 and 12-121.

WHEREFORE Defendants pray for relief as follows:

1. That the Complaint be dismissed with prejudice and that Plaintiffs take nothing therefrom;
2. That the Defendants be awarded reasonable attorney fees and costs pursuant to statute; and
3. That the Court grant such further relief as it deems just and proper.

DATED: August 15, 2008.

PERKINS COIE LLP

By *Shelly H. Cozacos* for  
Shelly H. Cozacos, Of the Firm  
Attorneys for Defendants

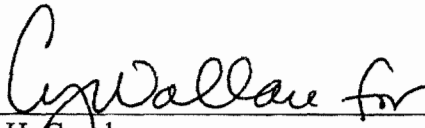
**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on August 15, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

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Shelly H. Cozakos

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and MARJORIE I.  
BRATTON, husband and wife,

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT,  
husband and wife,

Defendants.

Case No. CV 0706821C

**PLAINTIFFS' PRE-TRIAL  
MEMORANDUM**

Plaintiffs Charles E. and Marjorie I. Bratton (hereinafter referred to collectively as "plaintiffs"), by and through their counsel of record, MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., and in accordance with the Court's Order Setting Case for Trial and Pre-Trial Conference, hereby files its Pre-Trial Memorandum. The Court's Order provides that:

5. All parties must file with the Court at least seven (7) days before trial:

- A. A concise written statement of the theory of recovery or defense, the elements of that theory and supporting authorities.

Pursuant to the above-referenced Order, the plaintiffs' theories of recovery and their respective elements, with supporting authorities, are as follows:

### I. DECLARATORY RELIEF

Plaintiffs' first theory of recovery is a request for declaratory relief, seeking a judgment against defendants setting forth that since 1973, plaintiffs have an express easement on Lot 40 for a space of three (3) feet in accordance with the original boundary deeded by Harold E. Ford, and that since 1973, plaintiffs have a twelve (12) foot wide easement on Lot 40 by implication and/or prior use in accordance with the use to which Mr. Ford and the plaintiffs put the servient estate. Plaintiffs further claim that since 1973, they possess a right of entry and access to such easement for the use, maintenance and enjoyment thereof.

A key prerequisite to a declaratory judgment action is the existence of "an actual or justiciable controversy." *Idaho Schools for Equal Educational Opportunity v. Idaho State Bd. of Educ.*, 128 Idaho 276, 281, 912 P.2d 644, 650 (1996). The Supreme Court of Idaho elaborated on this concept as follows:

A "controversy" in this sense must be one that is appropriate for judicial determination. ... A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. ... The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests. ... It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

*Id.*, 128 Idaho at 281-82.



Here, there is a present controversy which meets the criteria required to constitute a justiciable controversy. Plaintiffs have asserted that they hold both an express and an implied and/or prior use easement appurtenant to certain real property adjacent to real property which they own in Canyon County. By seeking a declaratory judgment, plaintiffs are seeking a decree, conclusive in nature, establishing the legal relations of the parties vis-à-vis the disputed easement. Since the underlying basis for the declaratory action hinges upon final determination of the scope and location of the disputed easement, further analysis of the easement issue is required.

**A. Easements In General**

Generally speaking, an easement is “the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner.” *Lovitt v. Robideaux*, 139 Idaho 322, 328, 78 P.3d 389, 395 (2003). The land having the right of use as an appurtenance is known as the dominant tenement and the land which is subject to the easement is known as the servient tenement. *Black’s Law Dictionary*, 509 (6th Ed. 1990). An easement, whether express or implied, runs with the land and passes with any and all subsequent conveyances of either the dominant or the servient tenements. *See Davis v. Peacock*, 133 Idaho 637, 643, 991 P.2d 362, 368 (1999). While the owner of the servient estate may construct a gate across an easement to limit access, “use of a gate, or any other method of regulating an easement, by the owner of the servient estate must . . . be reasonable.” *Id.* Plaintiffs will show at trial that defendants’ actions in destroying the plaintiffs’ ditch which ran through the easement constitutes an unreasonable interference with the easement. Plaintiffs will also demonstrate that defendants systematically and without color of law prevented plaintiffs from accessing their easement, and

that such was an unreasonable (indeed, even a willful and malicious) restriction on the use of the easement.

**B. Express Easement**

An easement may arise by way of a written document, such as a provision contained within a warranty deed, whereby the grantor of property provides the owner of the dominant tenement a right of use benefitting the granted property and burdening the retained property. *See, e.g., Shultz v. Atkins*, 97 Idaho 770, 773, 554 P.2d 948, 952 (1976). The owner of such an easement is entitled to the full use and enjoyment of his or her easement. *See McKay v. Boise Project Board of Control*, 141 Idaho 463, 471, 111 P.3d 148, 156 (2005); *Carson v. Elliott*, 111 Idaho 889, 890, 728 P.2d 778, 779 (Ct.App. 1986). An easement owner's rights are paramount to those of the owner of the servient tenement. *See id.* (citing *Boydston Beach Assoc. v. Allen*, 111 Idaho 370, 376-77, 7213 P.2d 914, 920-21 (Ct.App. 1986)).

The plaintiffs will present evidence in this case of an express easement, granted by Mr. Ford in favor of the plaintiffs, and burdening the property still owned at the time by Mr. Ford. Plaintiffs will also present evidence that such easement was for the express purpose of constructing and maintaining an irrigation ditch, and that such easement was intended to allow ingress and egress along the boundary line of Lot 32 and 40 so as to allow full use and enjoyment of the easement, and to better maintain the ditch, which irrigated the Bratton's property.

**C. Implied Easement From Prior Use**

An easement may also arise by way of implication, whereby the law imposes an easement by inferring that the parties to a transaction intended that particular result, even though such was not expressly stated. In order to prove an implied easement, one must show:

(1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate.

*Phillips Industries, Inc. v. Firkins*, 121 Idaho 693, 699, 827 P.2d 706, 711 (Ct.App. 1992).

Plaintiffs will provide evidence establishing all three elements. Defendants have previously argued that there was no use prior to the separation of the dominant and servient tenements. In this matter, the parties agreed to the easement prior to the separation, but because of the weather conditions, said 12 foot easement could not be constructed until the soil was dry enough to accommodate a heavy tractor. Further, there is ample authority in Idaho which states that apparent continuous use *prior to* the separation of the estates is not required. *See, e.g., Phillips*, 121 Idaho at 699; *Schultz*, 97 Idaho at 773; *Davis v. Gowens*, 83 Idaho 204, 210, 360 P.2d 403, 407 (1961).

The reason for requiring apparent continuous use is to ensure that such use is “intended to be permanent.” *Thomas v. Madsen*, 142 Idaho 635, 658, 132 P.3d 392, 395 (2006). Accordingly, the creation of an implied easement may be inferred “through the presumed intent of the parties based upon the circumstances of separation of land formerly under one ownership ... or inferred often fictitiously through long continued use of the easement.” *Schulz*, 97 Idaho at 773 (citing Thompson on Real Property, § 351 (1961)).

The issues of permanency and necessity are furthermore intertwined in the context of an implied easement by prior use, and should not be confused with the element of necessity within the context of an easement by necessity. The Idaho Supreme Court addressed this issue when it noted as follows:

[I]t appears the well-established rule is that, unlike an easement by way of necessity, ***an implied easement by prior use is not later extinguished if the easement is no longer reasonably necessary.***

This long standing rule is based on the theory that when someone conveys property, they also intend to convey whatever is required for the beneficial use and enjoyment of that property, and intends to retain all that is required for the use and enjoyment of the land retained. Consequently, ***an easement implied by prior use is a true easement of a permanent duration***, rather than an easement which exists only as long as the necessity continues. [Citation omitted]. Additionally, an implied easement by prior use is appurtenant to the land and therefore passes with all subsequent conveyances of the dominant and servient estates.

*Davis v. Peacock*, 133 Idaho at 643 (emphasis added).

That is not to say that necessity is not an element of an implied easement by prior use: in order to establish an easement by prior use, there must be some necessity. However, the necessity is “reasonable necessity” rather than “great present necessity.” *Id.* Therefore, plaintiffs need only show that the easement by prior use was reasonably necessary ***at the time of severance***.

Even the location of an express easement depends upon the intention of the parties and the circumstances at the time the easement was given, and then carried out. *Bedke v. Pickett Ranch & Sheep Co.*, 143 Idaho 36, 39, 137 P.3d 423, 426 (2006). When the parties take affirmative steps to place appurtenances on the easement at the time it is granted or reserved, their actions in so doing constitute an expression of their intent with respect to the scope and location of that easement. *See Bedke*, 143 Idaho at 39; *Hughes v. Fisher*, 142 Idaho 474, 129 P.3d 1223 (2006).

Here, the plaintiffs will present evidence that at the time Mr. Ford expressly granted the three-foot easement, but his actions in physically placing the ditch and right of access manifested a different intent: an intent to convey a much wider (i.e., twelve-foot) easement. In addition, plaintiffs will present evidence that the full twelve-foot easement was continuously

used for a period of no less than thirty-four (34) years, and that use of the full twelve feet was reasonably necessary in order to allow plaintiffs to use and maintain the ditch and easement.

**D. Easement By Necessity**

Plaintiffs have also asserted that they have established an easement by necessity.

An easement by necessity is similar to an easement by prior use, but the standards for proving such an easement are slightly different:

To establish an easement by necessity, the claimant must prove the following elements: (1) that the dominant parcel and the servient parcel were once part of a larger tract under common ownership; (2) that the necessity for the easement claimed over the servient estate existed at the time of the severance; and (3) the present necessity for the claimed easement is great.

*B & J Dev. and Inv., Inc. v. Parsons*, 126 Idaho 504, 507, 887 P.2d 49, 52 (Ct. App. 1994).

Easements by necessity are driven by public policy, and the “[e]stablishment of an easement by necessity is not defeated by a contrary expectation harbored by one of the parties.” *Id.* That being said, a property owner cannot create the necessity by his or her own actions. *Id.* Here, it is undisputed, and plaintiffs will present evidence at trial that the dominant and servient tenements were once part of a larger tract under common ownership. In addition, plaintiffs will present testimony establishing that the irrigation easement was necessary at the time the two tenements were severed in order to provide irrigation water to the Plaintiffs’ property. The present necessity for the claimed easement is even greater now, since the wrongful destruction of the irrigation ditch has significantly damaged plaintiffs’ real property, and plaintiffs will remain unable to irrigate their full real property until their rights in the easement are restored.

## II. INJUNCTIVE RELIEF

Plaintiffs have also sought injunctive relief precluding defendants from verbally or physically threatening plaintiffs, or otherwise interfering with plaintiffs access to and use of the twelve (12) foot easement established by implication and/or prior use, that defendants be precluded from approaching within 600 feet of plaintiffs while plaintiffs are on the easement, that defendants be denied access to the plaintiffs' easement without prior court approval, and that defendant be ordered to not carry any firearm or other physically threatening device, or otherwise make verbal or physical threats against plaintiffs while plaintiffs are on or near the easement.

The elements which a party must establish in order to support a claim for injunctive relief are set forth at Rule 65, Idaho Rules of Civil Procedure. In summary, plaintiffs must show that defendants' continued actions in barring them from access to or use of their easement will result in significant and irreparable harm, injury, loss or damage. *See* Idaho R. Civ. P. 65(e).

Plaintiffs will present evidence at trial that defendants' wrongful foreclosure of access to the easement and water rights appurtenant thereto, and defendants' wrongful interference with their right to exclusive use, enjoyment and possession of the twelve-foot easement has caused, and will continue to cause, immediate and irreparable harm to their private and commercial concerns, including damage to their real property, and other damages to include personal.

## III. NEGLIGENCE AND/OR WILLFUL, WANTON, AND/OR INTENTIONAL CONDUCT, AND INTERFERENCE WITH PROPERTY RIGHTS

Plaintiffs' third theory of recovery is premised upon defendants' negligent and intentional interference with plaintiffs' property rights in the easement. Specifically, defendants

wrongfully and unreasonably denied plaintiffs access to the easement, and negligently and/or intentionally destroyed the ditch located upon plaintiffs' easement, which directly and proximately caused damage to the plaintiffs and their property.

Under Idaho law, a party is entitled to damages where access to an easement is denied. *See Harwood v. Talbert*, 136 Idaho 672, 679, 39 P.3d 612, 619 (2001). The owner of a servient estate is permitted to use his property only in a manner which is not inconsistent with, nor materially interferes with, plaintiffs' use of the easement. *Nampa & Meridian Irr. Dist. v. Mussell*, 139 Idaho 28, 33, 72 P.3d 868, 873 (2003). (Emphasis added) One owning an easement is entitled to relief upon a showing that the actions of the other parties unreasonably interfered with the dominant owner's easement. *Id.*

The converse is also true: an easement owner is entitled to full enjoyment of the easement. *Carson v. Elliot*, 111 Idaho 889, 890, 728 P.2d 778, 779 (1986). Before the owner of the servient estate may change, move, or alter in any way an irrigation ditch or buried irrigation conduit, he must first obtain the express, written permission of the owner of that ditch or conduit. IDAHO CODE, § 42-1207. (Emphasis added)

Plaintiffs have alleged that defendants wrongfully interfered with their ability to access, use and maintain the ditch located on their twelve foot easement by Mr. Scott's actions in, physically threatening the Plaintiff Mr. Bratton, by threatening Mr. Bratton if he did not leave the easement, by physically threatening Mr. Bratton if he did not cease maintaining his ditch and easement, by destroying, filling in, and leveling of plaintiffs' ditch which is located on the easement, by placing "no trespassing" signs on the easement, by placing "no trespassing" signs at point of ingress and egress, by denying plaintiffs use of the right-of-way onto the easement, and by intentional interference with plaintiffs' use of their water rights to irrigate their property..

Concerning the dominant owner's right of entry onto the servient estate, Idaho Code section 42-1204 provides:

The owners or constructors of ditches, canals, works or other aqueducts, and their successors in interest, using and employing the same to convey the waters of any stream or spring, whether the said ditches, canals, works or aqueducts be upon the lands owned or claimed by them, or upon other lands, . . . . *The owners or constructors have the right to enter the land across which the right-of-way extends, for the purposes of cleaning the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and with such equipment as is commonly used, or is reasonably adapted, to that work.* The right-of-way also includes the right to deposit on the banks of the ditch or canal the debris and other matter necessarily required to be taken from the ditch or canal to properly clean and maintain it, but no greater width of land along the banks of the canal or ditch than is absolutely necessary for such deposits shall be occupied by the removed debris or other matter.

I.C. § 42-1204 (emphasis added).

Here, plaintiffs will present evidence of over 34 years of continuous use of ingress and egress rights to the twelve foot easement, as well as continuous use and maintenance of the ditch which defendants wrongfully destroyed, filled and leveled. Furthermore, plaintiffs will present evidence of menacing and threatening conduct by defendants designed to prevent, intimidate and frighten plaintiffs from further use of their easement, as well as other affirmative steps taken by Mr. Scott designed to close the right of access to the easement. Such actions were not only intentional in nature, but a calculated clear denial of plaintiffs' property rights.

#### **IV. TORTIOUS INTERFERENCE WITH RIGHT OF PRIVACY**

Plaintiffs claim further that they suffered damages as a result of defendants' knowing, intentional and malicious conduct which was designed to harass, annoy and frighten plaintiffs, including physical destruction of plaintiffs' real property, menacing and/or threatening



conduct directed at plaintiffs which was intended to, and did, intimidate plaintiffs and cause them severe emotional distress and caused them to fear for their safety and for the safety of their private and commercial concerns, and which conduct by defendants caused actual harm to plaintiffs and their real property. Furthermore, defendants committed trespass upon the property owned by plaintiffs.

According to the Supreme Court of Idaho, an interference with one's right of privacy occurs when "one intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private concerns or affairs." *O'Neil v. Schuckardt*, 112 Idaho 472, 477, 733 P.2d 693, 698 (1987). Liability for such interference attaches if the underlying acts "would be highly offensive to a reasonable person." *Id.* In delineating the scope of a person's right of privacy, the *O'Neil* court further noted that the "rights so protected, whatever their exact nature, are not rights arising from contract or from special trust, but are rights as against the world. . . ." *Id.*, 112 Idaho at 478 (emphasis added). Thus, a person's "right of privacy encompasses various rights recognized to be inherent in our concept of ordered liberty. . . ." *Id.*

Willful and wanton misconduct is present if the defendant "intentionally does or fails to do an act, knowing or having reason to know facts which would lead a reasonable man to realize that his conduct not only creates unreasonable risk of harm to another, but involves a high degree of probability that such harm would result." *DeGraff v. Wight*, 130 Idaho 577, 579, 944 P.2d 712, 714 (1997).

Plaintiffs have alleged that defendants' conduct was willful, wanton and malicious, and that through such conduct, not only were their rights to privacy violated, but defendants also intentionally and negligently inflicted emotional distress upon plaintiffs. In order to establish a claim for intentional infliction of emotional distress, plaintiffs must establish

the following elements: “1) the conduct must be intentional or reckless; 2) the conduct must be extreme and outrageous; 3) there must be a causal connection between the wrongful conduct and the emotional distress; and 4) the emotional distress must be severe.” *Evans v. Twin Falls County*, 118 Idaho 210, 220, 796 P.2d 87, 97 (1990).

Plaintiffs will present evidence at trial that defendants continuously and with a calculated systematic approach, harassed, intimidated, and threatened them by precluding them from entering upon their easement, and by stalking Mr. Bratton when Mr. Bratton was on the easement or when Mr. Bratton approached that section of the fence where he had previously accessed the easement. Mr. Scott would continue to threaten Mr. Bratton, acting in a menacing manner until Mr. Bratton was forced to leave the area completely, even though Mr. Bratton was at all such times on his own property or easement. Plaintiffs will also present evidence that defendants’ menacing conduct included threats of grave physical harm, threats of harm to property, and similar conduct which caused plaintiffs to fear for not only their safety, but their very lives.

Defendants’ conduct also constituted a negligent infliction of emotional distress. Thus, in addition to proving the elements of negligence, namely duty, breach, causation, and damages, plaintiffs must also prove that they have suffered a physical injury, *i.e.*, a physical manifestation of an injury caused by the negligently inflicted emotional distress. *See Cook v. Skyline Corp.*, 135 Idaho 26, 34-35, 220, 13 P.3d 857, 865-66 (2000). *See also, Evans v. Twin Falls County*, 118 Idaho 210, 218, 796 P.2d 87, 95 (1990); *Czaplicki v. Gooding Joint Sch. Dist.*, 116 Idaho 326, 775 P.2d 640 (1989).

Here, plaintiffs will present evidence at trial that the actions of defendants described above (*i.e.*, menacing, stalking behavior, threats of physical and mortal harm, etc.), as

well as Mr. Scott's destruction of the ditch, the placement of "no trespassing" signs at ingress and egress of the easement as well as other locations, the removal of plaintiffs' cement irrigation culvert and the manner in which it was discarded in plaintiffs' pasture, not only caused plaintiffs severe emotional distress, but such conduct also caused them to suffer physical manifestations of that harm. For example, plaintiffs will present evidence that Mr. Bratton suffers from chest pain, anxiety, increased tremors and nightmares, and that Mrs. Bratton now suffers from anxiety and related sleeplessness.

Finally, "trespass is a tort against possession committed when one, without permission, interferes with another's exclusive right to possession of [real] property." *Walter E. Wilhite Revocable Living Trust v. Northwest Yearly Meeting Pension Fund*, 128 Idaho 539, 549, 916 P.2d 1264, 1274 (1996). Trespass consists of an actual physical invasion by tangible matter, and may thus occur when one wrongfully causes or allows someone or something to interfere with the owner's exclusive property right. *Moon v. North Idaho Farmers Ass'n*, 140 Idaho 536, 541 96 P.3d 637, 642 (2004). In a trespass action, the plaintiff is entitled to recover actual damages for a party's wrongful entry onto the plaintiff's property, even if the defendant's conduct was not willful or intentional. *See Bumgarner v. Bumgarner*, 124 Idaho 629, 639, 862 P.2d 321, 331 (Ct.App. 1993). The plaintiff must prove "a causal connection between the defendant's wrongful conduct and the plaintiff's injury, as well as the extent of the injury sustained." *Nelson v. Holdaway Land & Cattle Co.*, 107 Idaho 550, 552, 691 P.2d 796, 798 (Ct.App. 1984). Damages are "presumed to flow naturally from a wrongful entry upon land." *Aztec Ltd., Inc. v. Creekside Inv. Co.*, 100 Idaho 556, 570, 602 P.2d 64, 68 (1979).

The evidence presented at trial will show that defendants wrongfully encroached not only on the easement held by plaintiffs, but that when defendants wrongfully destroyed the

plaintiffs' ditch and cement culverts located on the easement, they surreptitiously and illegally dumped the broken concrete culverts onto plaintiffs' pasture. Furthermore, such conduct was done in a manner that created an unreasonable risk of harm to plaintiffs' livestock. Further, defendants once again trespassed onto plaintiffs' property when he, unbeknown to Mr. Bratton, came once again onto the Bratton property to return the cement culverts, and caused plaintiffs damages associated with remediation of the dangerous condition.

**V. REFORMATION OF WARRANTY DEED BASED UPON MUTUAL MISTAKE**

Finally, plaintiffs have asserted as a theory of recovery a claim for reformation of the Warranty Deed from Mr. Ford to plaintiffs, so as to cause such deed to conform to the true intentions of the parties and prior continual use in the creation of the subject easement. The limitations in the express easement were the product of mutual mistake, which mistake was material, and which mistake existed at the time the easement was established.

As noted above, in cases involving an implied easement, the intent of the parties is a central element, since the "apparent continuous use" requirement is designed to ensure that such use is "*intended* to be permanent." *Thomas*, 142 Idaho at 658 (emphasis added). Thus, the creation of an implied easement arises by determining "the presumed *intent* of the parties" based upon their actions both at the time the easement is created and the subsequent continuous use. *See Schulz*, 97 Idaho at 773.

In cases such as this, where the express easement substantially differs from the grantor's actual conduct in placing appurtenances thereon at the time the easement was created, the Idaho appellate courts have repeatedly given more effect to the *intent* of the parties than to the language contained within the warranty deed. *See Hughes v. Fisher*, 142 Idaho 474, 482, 129 P.3d 1223, 1231 (2006) (stating that the Court's goal is to carry out "the real intention of the

parties” in interpreting a warranty deed). The *Hughes* Court reformed an express easement in a deed in order to reflect the parties’ intent. Specifically, the *Hughes* case involved an express easement created in 1966 for a driveway, stating that the dominant owner was entitled to use of a “30 foot strip along north side of adjoining property.” *Id.* The grantor of the easement, however, then constructed the driveway diagonally across the land contrary to the language of the express easement. No one challenged the use of the driveway until August, 2000. Thus the driveway, though constructed in a manner directly contrary to the express easement, was continuously used as it was constructed by the grantor of the easement for a period of 34 years.

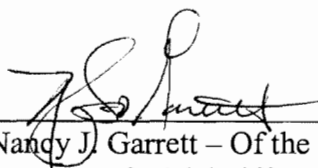
The Supreme Court of Idaho applied the doctrine of reformation due to mutual mistake. In applying this doctrine, the Court first noted that “[i]n interpreting a deed, the court’s goal is to carry out the *real* intention of the parties.” *Id.* (emphasis added). If the written instrument “does not reflect the *true intent* and actual conduct of the parties due to mutual mistake, then reformation of that instrument may be the proper remedy.” *Id.* (citing *Bilbao v. Krettinger*, 91 Idaho 69, 72-73, 415 P.2d 712, 715-16 (1966) (emphasis added). A mutual mistake occurs “when both parties, at the time of contracting, share a misconception regarding a basic assumption or vital fact upon which the bargain is based.” *Hines v. Hines*, 129 Idaho 847, 853, 934 P.2d 20, 26 (1997). The district court will be deemed to have acted properly “in reforming the instrument to reflect the agreement the parties would have or did make but for the mistake.” *Id.* (citing *Bailey v. Ewing*, 105 Idaho 636, 640-41, 671 P.2d 1099, 1103-04 (Ct.App. 1983)). What the parties actually intended *is a question of fact.*” *Id.* (Emphasis added).

Plaintiffs will present evidence to the jury that the express easement in this matter does not reflect the real intent or the actual conduct of Mr. Ford and Mr. Bratton. Plaintiffs will show that there was a mutual mistake at the time the express easement was written, in that the

conduct of both Mr. Ford and Mr. Bratton demonstrated an intent to and did create a twelve-foot wide easement, sufficient to allow Mr. Bratton to use and maintain the ditch. Furthermore, plaintiffs will show that it was Mr. Ford, the grantor of the easement, who placed the ditch in a half-moon configuration, with the inside border of the ditch at the closest point at least 4 1/2 feet from the fenceline, and in a location which was inconsistent with the express reservation in the warranty deed. Accordingly, there is evidence that both parties shared an intent to place the ditch, and did place the ditch where it was when Mr. Scott removed the irrigation ditch, removed above ground culverts, and filled in the ditch. Given this evidence, the agreement evidenced by the warranty deed constitutes a mutual mistake, and based upon the Supreme Court's actions in *Hughes, supra*, that mistake is sufficient for reformation of the warranty deed in order to reflect "the real intention and actual conduct of the parties."

DATED this 25th day of August, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED


By   
Nancy J. Garrett – Of the Firm  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 25th day of August, 2008, I caused a true and correct copy of the foregoing **PLAINTIFFS' PRE-TRIAL MEMORANDUM** to be served by the method indicated below, and addressed to the following:

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- Facsimile

  
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Nancy J. Garrett

**FILED**  
A.M. 2 P.M.

**ORIGINAL**

**AUG 25 2008**

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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and MARJORIE I.  
BRATTON, husband and wife,

Plaintiffs,

vs.

JOHN R. SCOTT and JACKIE G. SCOTT,  
husband and wife,

Defendants.

Case No. CV 0706821C

**PLAINTIFFS' REQUESTED JURY  
INSTRUCTIONS**

COME NOW the above-named plaintiffs, Charles E. and Marjorie I. Bratton, by and through their attorneys of record, MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHTD., and submit the following list and attached requested jury instructions. Plaintiffs reserve the right to add to, delete from, modify or otherwise supplement this list.



**PATTERN INSTRUCTIONS**

Plaintiffs submit the following Idaho Pattern Jury Instructions (2003):

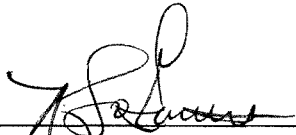
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2. IDJI 1.01;
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5. IDJI 1.13;
6. IDJI 1.15.1;
7. IDJI 1.17;
8. IDJI 1.20.1;
9. IDJI 1.20.2; and
10. Special Instructions (attached).

Plaintiffs reserve the right to amend, withdraw, or submit additions to any or all of these instructions. Further, plaintiffs reserve the right to submit a special verdict form.

DATED this 25th day of August, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &  
FIELDS, CHARTERED

By



---

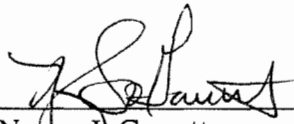
Nancy J. Garrett – Of the Firm  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 25th day of August, 2008, I caused a true and correct copy of the foregoing **PLAINTIFFS' REQUESTED JURY INSTRUCTIONS** to be served by the method indicated below, and addressed to the following:

Shelly H. Cozakos  
PERKINS, COIE, L.L.P.  
251 E. Front St., Suite 400  
P.O. Box 737  
Boise, ID 83701-0737  
Facsimile (208) 343-3232

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
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\_\_\_\_\_  
Nancy J. Garrett

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 1**

Generally speaking, an easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner.

*Lovitt v. Robideaux,*  
139 Idaho 322, 78 P.2d 389, 395 (2003)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000271**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 2**

The land having the right of use is known as the dominant estate, and the land which is subject to the easement is known as the servient estate.

*Black's Law Dictionary, 509 (6th ed. 1990)*

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000272**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 3**

An easement owner is entitled to the full use and enjoyment of the easement.

*Carson v. Elliott,*  
111 Idaho 889, 890, 728 P.2d 779 (1986)

*McKay v. Boise Project Board of Control,*  
141 Idaho 463, 471, 111 P.3d 148, 156 (2005)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000273**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 4**

An easement owner's rights are paramount to those of the servient estate.

*McKay v. Boise Project Board of Control,*  
141 Idaho 463, 471, 111 P.3d 148, 156 (2005)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000274**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 5**

As the owner of the servient estate, Mr. and Mrs. Scott are permitted to use their property only in a manner which is not inconsistent with, nor which materially interferes with, the Brattons' use of the easement. One owning an easement is entitled to relief upon a showing that the actions of the other parties unreasonably interfered with the dominant owner's easement.

*Nampa & Meridian Irr. Dist. v. Mussell,*  
139 Idaho 28, 33, 72 P.3d 868, 873 (2003)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000275**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 6**

The creation of an implied easement may be inferred through the presumed intent of the parties based upon the circumstances of separation of land formerly under one ownership, or inferred through long continued use of the easement.

*Schultz v. Atkins,*  
97 Idaho 770, 773, 554 P.2d 948, 952 (1976)

Thompson on Real Property § 351 (1961)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000276**



**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 7**

An easement implied by prior use is a true easement of a permanent duration, rather than an easement which exists only as long as the necessity continues. Additionally, an implied easement by prior use is appurtenant to the land and therefore passes with all subsequent conveyances of the dominant and servient estates.

*Davis v. Peacock,*  
133 Idaho 637, 643, 991 P.2d 362, 368 (1999)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000277**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 8**

The reason for requiring apparent continuous use is to ensure that such use was intended to be permanent.

*Thomas v. Madsen,*  
142 Idaho 635, 638, 132 P.2d 392, 395 (2006)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000278**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 9**

The location of the easement depends upon the intention of the parties and the circumstances in existence at the time the easement was given and carried out.

*Bedke v. Pickett Ranch & Sheep Co.,*  
143 Idaho 36, 39, 137 P.3d 423, 426 (2006)

*Argosy Trust ex rel. Its Trustee v. Winger,*  
141 Idaho 570, 114 P.3d 128 (2005)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 10**

Where an express easement substantially differs from the grantor's actual conduct in placing appurtenances thereon at the time the easement was created, the intent of the parties will take priority over the language contained in the warranty deed.

*Hughes v. Fisher,*  
142 Idaho 474, 482, 129 P.3d 1223, 1231 (2006)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000280**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 11**

When the parties to an original easement take affirmative steps to place appurtenances on the easement at the time it is granted or reserved, their actions in so doing constitute an expression of their intent with respect to the location of that easement.

*Bedke v. Pickett Ranch & Sheep Co.,*  
143 Idaho 36, 39, 137 P.3d 423, 426 (2006);

*Hughes v. Fisher,*  
142 Idaho 474, 482, 129 P.3d 1223, 1231 (2006)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000281**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 12**

Physical features existing on the ground and referred to in the deed must be considered when construing a deed.

*Akers v. D.L. White Constr. Co.,*  
142 Idaho 293, 299, 127 P.3d 196, 202 (2005)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000282**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 13**

Uncertainties in a conveyance of property rights should be treated as ambiguities, and such should be resolved by resort to the intention of the parties as gathered from the deed, as well as the circumstances leading up to its execution, and the subject matter and the situation of the parties as of that time.

*Phillips Indus., Inc. v. Firkins,*  
121 Idaho 693, 827 P.2d 706 (Ct. App. 1992)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000283**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 14**

An instrument granting an easement is to be construed in connection with the intention of the parties and the circumstances in existence at the time the easement was given and carried out.

*Quinn v. Stone,*  
75 Idaho 243, 250, 270 P.2d 825, 830 (1954)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000284**



**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 15**

A mutual mistake occurs when both parties, at the time an agreement is reached, share a misconception regarding a basic assumption or vital fact upon which the bargain is based.

*Hines v. Hines,*  
129 Idaho 847, 853, 934 P.2d 20, 26 (1997)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000285**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 16**

What the parties actually intended in conveying an easement is a question of fact. The party alleging a mutual mistake in the carrying out of that easement has the burden of proving the mistake by clear and convincing evidence.

*Hughes v. Fisher,*  
142 Idaho 474, 482, 129 Idaho 1223, 1231 (2006)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 17**

To establish an easement by necessity, the plaintiffs must establish the following elements: (1) that the dominant parcel and the servient parcel were once part of a larger tract under common ownership; (2) that the necessity for the easement claimed over the servient estate existed at the time of the severance; and (3) the present necessity for the claimed easement is great.

*B & J Devel. & Inv., Inc. v. Parsons,*  
126 Idaho 504, 507, 887 P.2d 49, 52 (Ct. App.  
1994)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000287**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 18**

One who purchases land expressly subject to an easement, or with notice, actual or constructive, that is burdened with an existing easement, takes the land subject to the easement.

*28 C.J.S. Easements § 48*

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000288**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 19**

There was a certain statute in force in the state of Idaho at the time of the occurrence in question which provided that:

The owners or constructors of ditches, canals, works or other aqueducts, and their successors in interest, using and employing the same to convey the waters of any stream or spring, whether the said ditches, canals, works or aqueducts be upon the lands owned or claimed by them, or upon other lands, must carefully keep and maintain the same, and the embankments, flumes or other conduits, by which such waters are or may be conducted, in good repair and condition, so as not to damage or in any way injure the property or premises of others.

In order for plaintiffs to fulfill the obligations set forth above, the statute further allows:

The owners or constructors have the right to enter the land across which the right-of-way extends, for the purposes of cleaning the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and with such equipment as is commonly used, or is reasonably adapted, to that work.

Idaho Code § 42-1204

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000289**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 20**

The right-of-way onto an irrigation easement shall include, but is not limited to, the right to enter the land across which the right-of-way extends, for the purposes of cleaning, maintaining and repairing the ditch, canal or conduit, and to occupy such width of the land along the banks of the ditch, canal or conduit as is necessary to properly do the work of cleaning, maintaining and repairing the ditch, canal or conduit with personnel and with such equipment as is commonly used, or is reasonably adapted, to that work.

Idaho Code § 42-1102

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000290**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 21**

The existence of a visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal or conduit has the right-of-way and incidental rights attending thereto.

Idaho Code § 42-1102

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000291**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 22**

There was a certain statute in force in the state of Idaho at the time of the occurrence in question which provided that:

No person or entity shall cause or permit any encroachments onto the right-of-way, including public or private roads, utilities, fences, gates, pipelines, structures, or other construction or placement of objects, without the written permission of the owner of the right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the right-of-way.

A violation of the statute is negligence per se.

Idaho Code § 42-1102

IDJI2d 2.22 (modified).

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000292**



**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 23**

Encroachments of any kind placed on an irrigation right-of-way without express written permission of the owner of the right-of-way shall be removed at the expense of the person or entity causing or permitting such encroachment, upon the request of the owner of the right-of-way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the right-of-way.

Idaho Code § 42-1102

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000293**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 24**

There was a certain statute in force in the state of Idaho at the time of the occurrence in question which provided that:

The written permission of the owner of a ditch, canal, lateral, drain or buried irrigation conduit must first be obtained before it is changed or placed in buried pipe by the landowner.

A violation of the statute is negligence per se.

Idaho Code § 42-1207

IDJI2d 2.22 (modified).

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 25**

One owning an easement is entitled to relief upon a showing that the actions of the other parties unreasonably interfered with the dominant owner's easement.

*Nampa & Meridian Irr. Dist. v. Mussell,*  
139 Idaho 28, 33, 72 P.3d 868, 873 (2003)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 26**

It was the duty of the defendants, before and at the time of the occurrence, to use ordinary care for the safety of the plaintiffs and the plaintiffs' property.

IDJI2d 2.00.1.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000296**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 27**

Trespass is committed when one, without permission, interferes with another's exclusive right to possession of real property, and consists of an actual physical invasion by tangible matter.

Trespass may thus occur when one wrongfully causes or allows someone or something to interfere with the owner's exclusive property right.

*Moon v. North Idaho Farmers Ass'n,*  
140 Idaho 536, 541 96 P.3d 637, 642 (2004)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

000297

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 28**

In order to prove their claims for trespass against defendants, the plaintiffs have the burden of proving the following propositions: (1) that the defendants went upon plaintiffs' land; (2) that the plaintiffs did not consent to defendants' entry upon plaintiffs' land; (3) the nature and extent of the damages to plaintiffs and the amount thereof.

IDJI2d 4.40.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000298**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 29**

The plaintiffs are entitled to recover damages for defendants' wrongful entry onto their property even if the defendants' conduct was not willful or intentional.

*Bumgarner v. Bumgarner,*  
124 Idaho 629, 639, 862 P.2d 321, 331 (Ct. App.  
1993)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 30**

Damages are presumed to flow naturally from a wrongful entry upon land.

*Aztec Ltd., Inc. v. Creekside Inv. Co.,*  
100 Idaho 556, 570, 602 P.2d 64, 68 (1979)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000300**



**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 31**

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's person. The words "ordinary care" mean the care a reasonably careful person would use under circumstances similar to those shown by the evidence. Negligence may thus consist of the doing of something a reasonably careful person would not do, under circumstances similar to those shown by the evidence. The law does not say how a reasonably careful person would act under those circumstances. That is for you to decide.

IDJI2d 2.20 (modified).

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000301**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 32**

When I use the expression "proximate cause," I mean a cause which, in natural or probable sequence, produced the claimed damage, and but for that cause the damage would not have occurred. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the damage.

IDJI2d 2.30.1 (modified).

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000302**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 33**

Willful and wanton misconduct is present if a party intentionally does or fails to do an act, knowing or having reason to know facts which would lead a reasonable person to realize that his or her conduct not only creates an unreasonable risk of harm to another, but also involves a high degree of probability that such harm would result.

*DeGraff v. Wight,*  
130 Idaho 577, 579, 944 P.2d 712, 714 (1997)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 34**

An interference with one's right of privacy occurs when one intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private concerns or affairs.

*O'Neil v. Schuckardt*,  
112 Idaho 472, 477, 733 P.2d 693, 698 (1987)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000304**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 35**

Liability for wrongful interference with one's right of privacy attaches if the underlying acts would be highly offensive to a reasonable person.

*O'Neil v. Schuckardt*,  
112 Idaho 472, 477, 733 P.2d 693, 698 (1987)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000305**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 36**

In order to establish a claim for intentional infliction of emotional distress, plaintiffs must establish the following elements: (1) the conduct complained of must be intentional or reckless; (2) the conduct complained of must be extreme and outrageous; (3) there must be a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress must be severe.

*Evans v. Twin Falls County,*  
118 Idaho 210, 220, 796 P.2d 87, 97 (1990)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000306**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 37**

In order to prove a claim for negligent infliction of emotional distress, the law requires that the emotional distress be accompanied by physical injury or physical manifestations of injury. There must also be evidence that the physical injury was caused by the underlying incident.

*Cook v. Skyline Corp.*  
135 Idaho 26, 34-35, 220, 13 P.3d 857, 865-66  
(2000)

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000307**

**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 38**

If you decide that the plaintiffs are entitled to recover from the defendants, you must determine the amount of money that will reasonably and fairly compensate them for any damages proved to be proximately caused by the defendants.

The elements of damage the jury may consider are:

A. Non-economic damages

1. The nature of the injuries; and
2. The physical and mental pain and suffering, past and future.

B. Damages to plaintiffs' property

1. The reasonable cost of necessary repairs to the damaged property, including damage to the plaintiffs' ditch and pasture, plus the difference between its fair market value before it was damaged and its fair market value after repairs; and
2. Any incidental or consequential damage suffered by plaintiffs that is within the foreseeable chain of proximate causation; in other words, the reasonable charges incurred by plaintiffs in connection with extra feed for livestock which they had to purchase because their pasture was destroyed, travel costs associated with these extra efforts, and the like.

IDJ12d 9.01 (modified).

IDJ12d 9.07 (modified).

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000308**



**PLAINTIFFS' REQUESTED**

**INSTRUCTION NO. 39**

When I use the term "value" or the phrase "fair market value" or "actual cash value" in these instructions as to any item of property, I mean the amount of money that a willing buyer would pay and a willing seller would accept for the item in question in an open marketplace, in the item's condition as it existed immediately prior to the occurrence in question.

IDJI2d 9.12.

GIVEN \_\_\_\_\_  
REFUSED \_\_\_\_\_  
MODIFIED \_\_\_\_\_  
COVERED \_\_\_\_\_  
OTHER \_\_\_\_\_

**000309**

8-28 Hoff  
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*Attorneys for Defendants*

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and  
 MARJORIE I. BRATTON (husband and  
 wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT  
 (husband and wife),

Defendants.

Case No. CV 0706821C

**DEFENDANTS' TRIAL MEMORANDUM**

Defendants John and Jackie Scott submit this Trial Memorandum, by and through their counsel of record, Perkins Coie LLP.

**I. NATURE OF THE ACTION**

This case involves a dispute regarding an easement. Plaintiffs John and Jackie Scott, became owners of the property at 23231 Freezeout Road, Caldwell, Idaho on September 13, 2005. This express easement is set forth in the Warranty Deed attached as Exhibit A to the Amended Complaint, and provides an easement for ingress and egress and maintenance of an irrigation ditch so that the Brattons' can have access to irrigation water on their property. The

easement of record is three (3) feet in width and 20 yards in length.

In the summer of 2006, shortly after the Scotts moved into the property, Mr Scott was using a tractor to mow down the weeds in a field on his property and accidentally ran into what appeared to be an irrigation ditch. The ditch was covered in very tall weeds and therefore was not visible. That fall, in approximately October of 2006, Mr. Scott noticed a gentleman wandering on his property, who he later discovered to be Mr. Charles Bratton. Mr. Scott discussed at that time with Mr. Bratton that Mr. Bratton believed he had an easement along the fence line for a ditch to allow irrigation water to reach his pasture which adjoins his field. Mr. Bratton indicated that he had been spraying and burning over the years to keep the weeds down. Because the Scotts did not want Mr. Bratton spraying or burning on their property, Mr. Scott offered to fix and maintain the ditch and keep the weeds mowed. Mr. Bratton agreed.

On approximately April 7 2007, Mr. Scott was outside working in his yard and noticed that Mr. Bratton had set fire to his property along the ditch line. The flames were extending well beyond the boundaries of the easement and onto the Scotts' property. The Scotts were unhappy that Mr. Bratton was burning their property and made clear to him that they no longer wanted him to do this. At no time did they ever threaten Mr. Bratton or do anything to threaten him.

This exchange on April 7, 2007 was not hostile. Mr. Scott offered to fix the ditch given that from his perspective it was in a state of disarray and had not been kept up. In addition, the ditch had been torn up in some parts when Mr. Scott accidentally ran his tractor wheels into it. Mr. Bratton agreed to this.

Mr. Scott had also noticed that Mr. Bratton was not accessing the easement in the area that he was supposed to according to the Warranty Deed. He therefore placed a no trespassing sign on his property well away from the boundaries of the easement in order to keep Mr. Bratton

from accessing his property in any area he was not supposed to and for any purpose other than the purpose allowed for in the easement, which is to maintain the irrigation ditch. The sign was removed several weeks later.

On approximately April 9, 2007, Mr. Scott fixed the ditch by removing old and torn up concrete culvert pipes that were lying randomly in the ditch and then used a tractor to clean up the ditch and make it straighter. Mr. Scott did not destroy the ditch or alter it in any manner so that Mr. Bratton was unable to get his irrigation water. From Mr. Scott's perspective, the ditch looked much better after he fixed it than before.

After Mr. Scott fixed the irrigation ditch, it worked fine. When turned on, water ran through the ditch and on to Mr. Bratton's property. The irrigation ditch that exists now works properly and delivers sufficient water to Mr. Bratton's property. At no time did Mr. Scott tell Mr. Bratton that he could not access the easement to turn the water on. In fact, he made clear through his attorney that he was free to do so. The Scotts even offered to turn the water on for him, but he declined.

## II. PRIMA FACIE ELEMENTS OF THE CLAIMS SET FOR TRIAL

Plaintiffs have alleged four causes of action in their Amended Complaint and Demand for Jury Trial filed in this case on January 14, 2008 ("Amended Complaint"): (1) Declaratory Relief; (2) Injunction; (3) Negligence; and (4) Tortious Interference with Right of Privacy.

### A. Declaratory and Injunctive Relief.

Plaintiffs seek declaratory relief "in a judgment against Defendants setting forth that Plaintiffs have an express easement for 3 feet as set in its original location by Mr. Ford, that Plaintiffs have a 12-foot wide easement by implication and use, and that Plaintiffs possess legal

rights to access and utilize their 12-foot easement on Lot 40, and take all reasonable steps for the maintenance thereof." (Am. Compl. and Demand for Jury Trial, p. 8).

The Court has previously determined that Plaintiffs have not shown they are entitled to an implied 12-foot easement. It is similarly undisputed that Plaintiffs have an express 3 foot easement per the terms of the Warranty Deed attached to the Amended Complaint. Thus, Plaintiffs are not entitled to injunctive relief with respect to the location and boundaries of the easement, as this is set forth in the Warranty Deed and has been previously decided upon by the Court.

Plaintiffs also seek an injunction precluding Defendants from doing a variety of activities and requiring Defendants to do certain things, including that Defendants be denied access to the Plaintiffs' easement unless they obtain prior Court approval and that Defendants be required to stay at a distance from Plaintiffs of at least 600 feet, etc. (See Am. Compl. and Demand for Jury Trial, pp. 8-9). There is no basis in fact or law for this request. The property where the easement is located is undisputedly owned by the Scotts. Plaintiffs have admitted during discovery and affidavit testimony that the Scotts did not threaten them with bodily harm. At most, Plaintiffs have a subjective belief this could happen, based upon no objective evidence. It appears Plaintiffs are trying improperly to obtain a restraining order or a criminal no-contract against the Scotts and they should not be allowed to do so.

In addition, Plaintiffs are not entitled to a jury trial on their claims for Declaratory or Injunctive Relief. See I.C. §§ 10-1209, 6-401; see also *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 248-49, 869 P.2d 554, 565-66 (Idaho 1994); and e.g. *Ada County Highway Dist. v. Total Success Investments, LLC*, 145 Idaho 360, 179 P.3d 323, 332 (Idaho

2008). As such, their equitable claims are to be determined and concluded.

**B. Negligence.**

The elements of a cause of action based upon negligence can be summarized as (1) a duty, recognized by law, requiring a defendant to conform to a certain standard of conduct; (2) a breach of that duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage. *Baccus v. Ameripride Services, Inc.*, 145 Idaho 346, 179 P.3d 309, 312 (Idaho 2008) (quoting *Brizendine v. Nampa Meridian Irrigation Dist.*, 97 Idaho 580, 583, 548 P.2d 80, 83 (Idaho 1976)). In this case, Plaintiffs have alleged that Defendants breached a duty owed to Plaintiffs by removing concrete culverts in the ditch at issue, by filling in and changing Plaintiffs' ditch location, and by making verbal and physical bodily threats to Plaintiffs.

The evidence at trial will show that the Scott's actions of removing the concrete culverts and allegedly filling portions of the existing ditch do not constitute negligence. The current ditch located within the three (3) foot easement allows more than sufficient water to reach the Brattons' property and irrigate their pasture, if they so choose.

**C. Tortious Interference with Right to Privacy.**

Liability for a claim of invasion of privacy by intrusion must be based upon an intentional interference with the plaintiff's interest in solitude or seclusion, either as to his person or as to his private affairs or concerns. *Uranga v. Federated Publications, Inc.*, 138 Idaho 550, 553, 67 P.3d 29, 32 (Idaho 2003) citing *Hoskins v. Howard*, 132 Idaho 311, 971 P.2d 1135

(1999); RESTATEMENT (SECOND) OF TORTS § 652B cmt. a (1976). "To be actionable, the prying or intrusion into the plaintiff's private affairs must be of a type which is offensive to a reasonable person." *Id.* In this case, Plaintiffs allege that Defendants invaded their privacy both physically and verbally by destroying their real property. (Am. Compl. and Demand for Jury Trial, pp. 7-8).

As a matter of law, Plaintiffs did not have a reasonable expectation of privacy as alleged. Furthermore, the evidence at trial will show that the Defendants conduct of trying to protect and maintain their own property cannot be viewed as objectionable to a reasonable person.

### III. DEFENSES

In addition to denying the majority of the allegations contained in the Amended Complaint, Defendants have alleged a number of affirmative defenses.

#### A. Failure to Mitigate Damages.

Defendants have alleged that Plaintiffs have failed to mitigate their alleged damages. The duty to mitigate, also known as the "doctrine of avoidable consequences," provides that a plaintiff who is injured by actionable conduct of a defendant is ordinarily denied recovery for damages which could have been avoided by reasonable acts, including reasonable expenditures, after actionable conduct has taken place *Margaret H. Wayne Trust v. Lipsky*, 123 Idaho 253, 261, 846 P.2d 904, 912 (Idaho 1993) (citations omitted).

The evidence at trial will show that the Brattons failed to access the easement, and failed to water their pasture by their own choosing. Thus, the Brattons should be precluded from any recovery at trial for alleged damages to their pasture.

**B. Estoppel.**

The doctrine of quasi-estoppel prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken. *Allen v. Reynolds*, 145 Idaho 807, 186 P.3d 663, 668 (Idaho 2008). The doctrine applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced. *Id.*

The evidence at trial will show that the Brattons repeatedly failed to maintain the easement, and then allowed and acquiesced in the Scotts taking action to maintain the easement. Thus, under the doctrine of estoppel, the Brattons' claims are barred.

**C. The Doctrine of Unclean Hands.**

The Idaho Supreme Court has held that the clean hands doctrine, "stands for the proposition that 'a litigant may be denied relief by a court of equity on the ground that his conduct has been inequitable, unfair and dishonest, or fraudulent and deceitful as to the controversy in issue.'" It is a doctrine applied in the discretion of the Court. *Ada County Highway Dist., supra*, 179 P.3d at 333.

The evidence at trial will show that the Brattons are not acting in good faith. The Brattons have not been truthful in their allegations against the Scotts, and are purposely denying water to their pasture to inflate the alleged damages. Thus, the Brattons should be precluded from recovery at trial.

**D. Comparative Negligence.**

Idaho Code section 8-601 states:

6-801. COMPARATIVE NEGLIGENCE OR COMPARATIVE



**RESPONSIBILITY -- EFFECT OF CONTRIBUTORY NEGLIGENCE.** Contributory negligence or comparative responsibility shall not bar recovery in an action by any person or his legal representative to recover damages for negligence, gross negligence or comparative responsibility resulting in death or in injury to person or property, *if such negligence or comparative responsibility was not as great as the negligence, gross negligence or comparative responsibility of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence or comparative responsibility attributable to the person recovering.* Nothing contained herein shall create any new legal theory, cause of action, or legal defense.

I.C. § 8-601 (emphasis added). Thus, in this case, the Plaintiffs conduct and actions must be compared against that of the Defendants and then adjudged accordingly.

**E. Assumption of the Risk/Consent.**

The defense of "assumption of risk" presupposes that plaintiffs had some actual knowledge of the danger, and understood and appreciated the risk therefrom and voluntarily exposed themselves to such danger. *Fawcett v. Irby*, 92 Idaho 48, 436 P.2d 714 (Idaho 1968). In *Salinas v. Vierstra*, 107 Idaho 984, 989, 695 P.2d 369, 374 (Idaho 1985), the Idaho Supreme Court held that Idaho's comparative negligence statute (I.C. 6-801) covers any action in which the plaintiff is seeking to recover on grounds of negligence. The Court thus found that assumption of risk was a form of comparative negligence and that the correct terminology to use when asserting this defense is "consent" or something of a similar nature. *Id.* at 375. Accordingly, this defense is analyzed as a component of comparative negligence. In this case, Defendants allege that Plaintiffs were aware of the risk of danger to their property in not watering it, and proceeded with this course of action nonetheless. As a result, their damages, if any should be barred or reduced.

The evidence at trial will show that the Brattons are purposely denying water to their pasture to inflate the alleged damages. Thus, the Brattons should be precluded from recovery at trial.

**F. Plaintiff is Not Entitled to Keep the Matters Alleged to have been Invaded, Private.**

In *Swerdlick v. Koch*, 721 A.2d 849 (R.I. 1998), the court analyzed the plaintiffs invasion of privacy claim and upheld the trial court's denial of judgment as a matter of law with respect to said claim. In *Swerdlick*, the plaintiffs operated a business outside of their home and alleged that defendants invaded their privacy by repeatedly photographing activity outside of their residence, maintaining a log of the dates, times, and license-plate numbers of arriving delivery trucks, employees, and other vehicles, and repeatedly requesting town inspections for zoning violations on plaintiffs. *Id.* at 857. The court analyzed its state privacy statute which, protects an individual from unreasonable intrusion upon one's physical solitude or seclusion. *Id.* The court in that case held that because the conduct and activity at issue all occurred in full public view, there was no invasion of plaintiffs' privacy. *Id.*

The court in *Swerdlick*, cited the Restatement (Second) of Torts and found that because the evidence showed the photographs and recorded events taken by defendants were taking place outside of plaintiff's house, in full view of the neighbors and any other member of the public, plaintiffs were not entitled, nor could they have expected, to maintain privacy with respect to the activities at issue. *Id.*, see also e.g. *Peters v. Vinatieri*, 9 P.3d 909 (Wa. Ct. App. 2000) (holding that an owner of a recreational vehicle had no reasonable expectation of privacy in an access road that was open to the public and adjacent RV hookup areas that were visible from the road and also open to the public so as to preclude a plain view search of the RV hookups by county inspectors).

Plaintiffs in this case have alleged that Defendants have intruded on their privacy both physically and verbally. (Am. Compl. and Demand for Jury Trial, p. 7). Like the *Swerdlick* case, liability for this tort only attaches when there is an invasion into another's *private* affairs. See *Uranga v. Federated Publications, Inc.*, 138 Idaho 550, 553, 67 P.3d 29, 32 (Idaho 2003) (holding that liability for a claim of invasion of privacy by intrusion must be based upon an intentional interference with the plaintiff's interest in solitude or seclusion, either as to his person or as to his private affairs or concerns). Thus, Plaintiffs cannot maintain a claim for interference with right of privacy.

**G. Setoff.**

Offset is defined as "to balance or calculate against; to compensate for." BLACKS LAW DICTIONARY 1115 (7th ed. 1999); see also e.g. *Wing v. Hulet*, 106 Idaho 912, 684 P.2d 314 (Idaho Ct. App. 1984). Defendants have alleged that they are entitled to an offset to any alleged damages that Plaintiffs may receive, which offset will be reflected in the special verdict form to be submitted by Defendants prior to the close of trial.

**IV. CONCLUSION**

The foregoing is submitted in order to provide a general outline of the issues, claims, and defenses anticipated to be addressed at trial, whether that is a court trial or jury trial. There may be additional collateral issues that arise at trial that are not outlined herein, but by not addressing each of those issues here, the Scotts do not intend to waive, and hereby expressly preserves, the right to present those issues at trial. The Scotts also intend, and hereby expressly reserve the right, to submit amended and supplemental proposed jury instructions and a special verdict form that reflects the current state of the claims and defenses remaining for trial as outlined generally herein.

DATED: August 27, 2008.

PERKINS COIE LLP

By Cy Wallace  
Shelly H. Cozacos, Of the Firm  
Cynthia L. Yee-Wallace, Of the Firm  
*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on Aug. 27, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

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Shelly H. Cozacos  
Cynthia L. Yee-Wallace

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**FILED**  
A.M. P.M.

AUG 29 2008

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and  
MARJORIE I. BRATTON (husband and  
wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT  
(husband and wife),

Defendants.

Case No. CV 0706821C

**MEMORANDUM IN SUPPORT OF  
DEFENDANTS' THIRD MOTION IN  
LIMINE RE: IRRELEVANT AND  
PROHIBITED PROPENSITY EVIDENCE**

Defendants John R. Scott and Jackie G. Scott, (the "Scotts" or "Defendants"), by and through their attorneys of record, Perkins Coie LLP, submit the following memorandum in support of their Third Motion in Limine.

### I. RELIEF SOUGHT

Defendants seek and order from the Court precluding the Plaintiffs and their witnesses from introducing or eliciting any evidence, testimony, or argument that violates the Idaho Rules of Evidence 402, 403, and 404. Plaintiffs have already revealed their intention to offer

prohibited propensity evidence in this case, and it should not be permitted.

## II. STANDARD FOR MOTIONS IN LIMINE

A motion in limine is a request for a protective order to limit or exclude evidence at trial, and applies only prospectively, the purpose of this type of motion is to avoid injection into trial matters which are irrelevant, inadmissible and prejudicial. *See generally State v. Wallmuller*, 125 Idaho 196, 868 P.2d 524 (Idaho Ct. App. 1994) (citing BLACK'S LAW DICTIONARY 914 (6th ed. 1990)). A decision to grant or deny a motion in limine is left to the broad discretion of the trial court. *See Murphy v. Gunter's Lounge, LLC*, 141 Idaho 16, 25, 105 P.3d 676, 685 (Idaho 2005).

## III. DISCUSSION

### A. **The Presentation by Plaintiffs of Any and All Evidence, Argument, and Testimony in Violation of Idaho Rules of Evidence 402, 403, and 404 Should be Excluded at Trial.**

Idaho Rule of Evidence 402 sets forth the general rule on admissibility of relevant evidence and states that:

All relevant evidence is admissible *except* as otherwise provided by these rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

I.R.E. 402 (emphasis added). Idaho Rule of Evidence 403 sets forth one such exclusion discussed in Rule 402:

Although relevant, evidence may be excluded at trial if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

I.R.E. 403. Further, Idaho Rule of Evidence 404(b) states in relevant part that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith....

In this case, Plaintiffs should be precluded from introducing or eliciting any evidence, testimony, or argument that violates the above Rules, particularly that which seeks injection of impermissible propensity evidence. In order to admit evidence of other acts, crimes, or wrongs, the trial court must initially determine whether the evidence is relevant to a material issue other than propensity. *State v. Atkinson*, 124 Idaho 816, 864 P.2d 654 (Idaho Ct. App. 1993). If the evidence is deemed relevant, then the court must, in the exercise of its discretion, determine whether the probative value of the evidence is substantially outweighed by the danger of causing unfair prejudice. *Id.*

As set forth in their discovery responses, Plaintiffs have indicated that they intend to call the following witnesses at trial, who will offer testimony related to the following:

1. Steve Wielong: neighbor of Mr. and Mrs. Scott, alleges to have testimony about "his need for safety from Mr. Scott" and his knowledge about "adverse conduct and actions of the Scotts" toward "other neighbors with and without easements." (Aff. of Cynthia Yee-Wallace in Supp. of Defs.' Mot in Limine, Ex. 2). He also alleges to have knowledge of the following "conduct, behavior, and personality" of Mr. Scott: an altercation with Dane Lane, hostility toward the Wielong family, erection of cameras, lights, and motions detectors around exterior of house, erection of multiple no trespassing signs, installation of locked gates, use of binoculars to watch neighbors, extreme hostility toward all neighbors, threats when Mr. Scott evicted prior owner, hostility toward Wielong pets. (Aff. of Cynthia Yee-Wallace in Supp. of Reply to Pls.' Opp'n to Defs.' Mot to Bifurcate Trial, Ex. A). Plaintiffs also want to admit Mr. Wielong's testimony regarding how neighbors in the neighborhood used to walk through what is now the Scott property, but now refuse to do so due to "fear" of the Scotts. (*Id.*)
2. Dane Lane: neighbor of Mr. Bratton, alleges to have testimony that he owns an easement and that Mr. Scott has tried to keep Mr. Lane from turning on his head gate to

receive irrigation water and has had problems, "to include a verbal altercation" with Mr. Scott regarding use of an easement and access to a head gate. (Aff. of Cynthia Yee-Wallace in Supp. of Reply to Pls.' Opp'n to Defs.' Mot to Bifurcate Trial, Ex. A).

3. Mike Memmelaar: neighbor of Mr. Scott and Mr. Bratton, alleges to have testimony that the Scotts "stare at him whenever he is out in his field." (Aff. of Cynthia Yee-Wallace in Supp. of Reply to Pls.' Opp'n to Defs.' Mot to Bifurcate Trial, Ex. A).

4. Ryan Finney: grandson of Mr. and Mrs. Bratton, will purportedly seek to offer testimony that "he feels very sad that every time he goes out onto the property he feels like he is being watched and can not enjoy any privacy on the property." (Aff. of Cynthia Yee-Wallace in Supp. of Reply to Pls.' Opp'n to Defs.' Mot to Bifurcate Trial, Ex. A).

The above described categories of purported testimony that Plaintiffs seek to offer are irrelevant to any material issues in this case, and if allowed at trial, would create unfair prejudice to the Scotts. Based upon the Court's rulings, this case involves whether or not the Brattons have an implied easement. This case also involves Plaintiffs' allegations that the Scotts' were negligent by removing concrete culverts from a ditch, filling it in and changing the location of the ditch, and by "making verbal and physical bodily threats to plaintiffs." Am. Compl., p. 7. Plaintiffs also allege that Defendants interfered with Plaintiffs right of privacy by physically destroying Plaintiffs' real property. *Id.*

Testimony regarding any prior alleged "altercations" between Mr. Scott and other third-parties is not relevant to any material issues in this case and can only be sought to improperly imply that the Scotts must have acted badly toward the Brattons (or acted the way in which the Brattons allege) during the events in question, given previous alleged altercations with other third-parties. This type of evidence is precisely the type of evidence that Rule 404(b) prohibits. Similarly, evidence regarding how the Brattons' neighbors and family members feel about the



Scotts is similarly irrelevant and can only be sought to inject evidence that is unfairly prejudicial to the Scotts. Any such evidence, testimony, and arguments related to the disclosures made by Plaintiffs is simply not relevant.

As previously stated, Plaintiffs' evidence regarding their tort claims at issue is not sufficient on its own and, Plaintiffs will seek to inject improper propensity evidence into this trial so that the jury will find liability and decide this case based upon the same. Plaintiffs should be precluded at trial from offering any testimony regarding previous alleged altercations with other third-parties as well as how the Brattons' neighbors and family members feel about the Scotts because such evidence is not relevant and if allowed, creates the danger of unfair prejudice to the Scotts.

#### IV. CONCLUSION

Based on the foregoing, Defendants hereby request that the Court grant their Third Motion in Limine. Plaintiffs in this case wish to introduce evidence that is irrelevant and unfairly prejudicial to the Defendants. They should not be permitted to do so.

DATED: August 29, 2008.

PERKINS COIE LLP

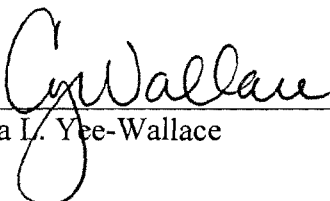
By Cy Wallace  
Cynthia L. Yee-Wallace, Of the Firm  
Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on August 29, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

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& FIELDS, CHARTERED  
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\_\_\_\_\_  
Cynthia L. Yee-Wallace

**ORIGINAL**

**FILED**  
A.M. 3 P.M.

AUG 29 2008

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CHARLES E. BRATTON and  
MARJORIE I. BRATTON (husband and  
wife),

Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT  
(husband and wife),

Defendants.

Case No. CV 0706821C

**DEFENDANTS' THIRD MOTION IN  
LIMINE RE: IRRELEVANT AND  
PROHIBITED PROPENSITY EVIDENCE**

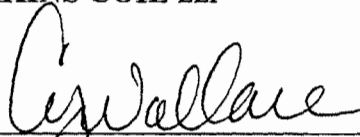
Defendants John R. Scott and Jackie G. Scott ("Defendants"), by and through their attorneys of record, Perkins Coie LLP, hereby move this Court, pursuant to the Idaho Rules of Civil Procedure and the Idaho Rules of Evidence 402, 403 and 404 for the entry of an order precluding Plaintiffs and their witnesses from introducing or eliciting any evidence, testimony, or argument that violates any of the Idaho Rules of Evidence 402, 403, and 404, including prohibited propensity evidence, evidence regarding alleged altercations between Defendants and other third-parties, and evidence regarding how the Brattons' neighbors and family members feel about Defendants.

This Motion is supported by the files and records herein and the memorandum in support filed concurrently herewith.

ORAL ARGUMENT IS REQUESTED.

DATED: August 29, 2008.

**PERKINS COIE LLP**


By   
\_\_\_\_\_  
Shelly H. Cozacos, Of the Firm  
Cynthia L. Yee-Wallace, Of the Firm  
*Attorneys for Defendants*

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\_\_\_\_\_  
Cynthia Yee-Wallace

**ORIGINAL**

**FILED**  
A.M. 5 P.M.

AUG 29 2008

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
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CHARLES E. BRATTON and  
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Plaintiffs,

v.

JOHN R. SCOTT and JACKIE G. SCOTT  
(husband and wife),

Defendants.

Case No. CV 0706821C

**MEMORANDUM IN SUPPORT OF  
DEFENDANTS' MOTION FOR  
CLARIFICATION/MOTION IN LIMINE  
RE: PLAINTIFFS' DECLARATORY  
CLAIM FOR AN IMPLIED EASEMENT**

Defendants John R. Scott and Jackie G. Scott, (the "Scotts" or "Defendants"), by and through their attorneys of record, Perkins Coie LLP, submit the following memorandum in support of their Motion for Clarification/Motion in Limine Re: Plaintiffs' Declaratory Claim for an Implied Easement.

**I. BACKGROUND**

At the hearing on August 28, 2008, the Court ruled that it viewed all of Plaintiffs' equitable claims as being moot and no longer at issue. The Court also stated that Plaintiffs' claim

as to whether or not they are entitled to an implied easement will be determined by the jury.

After the hearing, counsel for Defendants again reviewed Plaintiffs' First Amended Complaint. Whether or not Plaintiffs have an implied easement is part of Plaintiffs' request for Declaratory Relief. In their Amended Complaint and Demand for Jury Trial, Plaintiffs ask for a declaratory judgment that setting forth that "Plaintiffs have a 12-foot wide easement by implication and use, and that Plaintiffs possess legal rights to access and utilize their 12 foot easement on lot 40, and take all reasonable steps for the maintenance thereof." Am. Compl. and Demand for Jury Trial, p. 8. As such, a jury can hear evidence on the claim, but is prohibited from deciding the ultimate issue as to whether or not Plaintiffs have an implied easement. Again, Plaintiffs have no separate cause of action for an implied easement: it is merely a component of the equitable relief they seek through a declaratory judgment.

## II. ARGUMENT

### A. **Even if the Jury Hears Testimony on the Implied Easement, the Court is Required to Determine the Issue of Whether or Not Plaintiffs are Entitled to an Implied Easement, not the Jury .**

The trial court has the discretion to allow equitable claims to be tried ahead of legal ones, but because the right to a jury trial (that attaches to legal claims only) is a constitutional right, the court's discretion in this regard is narrowly limited and must, wherever possible, be exercised to preserve a jury trial. *David Steed & Assoc. v. Young*, 115 Idaho 247, 249-50, 766 P.2d 717, 719-20 (1988), impliedly overruled on other grounds by *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 824 P.2d 841 (1991). However, in cases where both legal and equitable issues/claims are present, the trial court may first decide the equitable issues and if the court's

findings and conclusions on the equitable issues do not also resolve the legal issues, a jury trial must be held to resolve the remaining, independent legal issues. *Savage Lateral Ditch Water Users Assoc. v. Sand Hollow Ditch Co., Ltd.*, 125 Idaho 237, 247-48, 869 P.2d 554, 564-65 (1993).

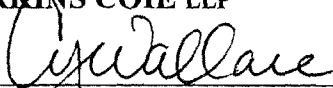
If a jury trial proceeds first on the legal claims in a case where equitable claims have been asserted, and hence, the court's equitable jurisdiction has been invoked, ***the jury's verdict is only advisory with respect to the equitable claims and under IRCP 52(a), the court is required to make its own findings and conclusions (based on its own observations of the evidence at trial) concerning the equitable claims.*** *Idaho First Nat'l Bank v. Bliss Valley Foods, Inc.*, 121 Idaho 266, 274, 824 P.2d 841, 849 (1991) (emphasis added). In this case, because Plaintiffs seek a declaration that they are entitled to an implied easement pursuant to their equitable claim for Declaratory Relief, the Court and not the jury, must decide this claim.

Based on the foregoing, Defendants request an order prohibiting Plaintiffs from making any argument or presenting any instructions to the jury that they jury is entitled to making any findings or conclusions on the ultimate issue of whether or not Plaintiffs are entitled to an implied easement. This issue must be determined by the Court and the Court alone in light of the fact that Plaintiffs' implied easement claim is part of their equitable claim for a declaratory judgment.

DATED: August 29, 2008.

PERKINS COIE LLP

By



Cynthia L. Yee-Wallace, Of the Firm  
Attorneys for Defendants

MEMORANDUM IN SUPPORT OF DEFENDANTS'  
MOTION FOR CLARIFICATION/MOTION IN LIMINE  
RE: PLAINTIFFS' DECLARATORY CLAIM FOR AN  
IMPLIED EASEMENT – 3  
65685-0001/LEGAL14626708.1

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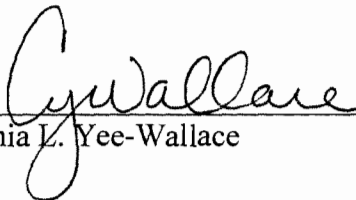
**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on August 29, 2008, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Nancy Jo Garrett  
MOFFATT, THOMAS, BARRETT, ROCK  
& FIELDS, CHARTERED  
101 S. Capitol Blvd., 10th Fl.  
P.O. Box 829  
Boise, ID 83701  
FAX: 385-5384

Hand Delivery  
U.S. Mail  
Facsimile  
Overnight Mail

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Cynthia L. Yee-Wallace