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Bratton v. Scott Clerk's Record v. 3 Dckt. 36275

VOLUME III

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

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

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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

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TABLE OF CONTENTS

TABLE OF CONTENTS, Continued

TABLE OF CONTENTS, Continued

TABLE OF CONTENTS, Continued

TABLE OF CONTENTS, Continued

TABLE OF CONTENTS, Continued

INDEX

INDEX, Continued

INDEX, Continued

INDEX, Continued

INDEX, Continued

INDEX, Continued

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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' MOTION FOR CLARIFICATION/MOTION IN LIMINE RE: PLAINTIFFS' DECLARATORY CLAIM FOR AN IMPLIED EASEMENT

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 Idaho Rule of Civil Procedure 52(a) and the authority cited in Defendants memorandum in support of this Motion filed contemporaneously herewith for the entry of 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 in light of the fact that Plaintiffs' implied easement claim is part of their equitable claim for a declaratory judgment.

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. Cozakos, Of the Firm
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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):

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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 **PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF IMPLIED EASEMENT**

COME NOW plaintiffs Charles E. Bratton and Marjorie I. Bratton (collectively "Brattons"), by and through undersigned counsel of record, and hereby submit this Supplemental Memorandum in Support of Implied Easement. Pursuant to this Court's requests, the following memorandum is submitted to demonstrate that the Brattons are able to establish a *prima facie* case of implied easement. As discussed more fully below, the implied easement is statutorily implied, as well as also complying with valid and controlling Idaho case law.

I. FACTUAL HISTORY AND USE OF DITCH AND EASEMENT

On April 19, 1973, Mr. Bratton purchased Lot 32, easement on Lot 40 as described above, and share of water rights. *See* ¶ 2 of the Affidavit of Charles Bratton. Mr. Ford conveyed Lot 32 to the Brattons by way of an executed Warranty Deed. *See* Exhibit "A" of the Affidavit of Charles Bratton in Support of Plaintiffs' Motion for Partial Summary Judgment. The property was purchased with an irrigation easement and water shares and an irrigation ditch was placed on Lot 40 soon after the purchase. See ¶ 5 of the Affidavit of Charles Bratton. The 1973 ditch was placed pursuant to the easement and supplied water to the Bratton property. See Affidavit of Charles Bratton.

The Warranty Deed from Ford to Bratton conveyed 4.83 acres of land, water rights, including a one-half share of water stock held in Canyon Hill Ditch Company and another one-half share in Middleton Mill Ditch Company. *See* Exhibit "A" of the Affidavit of Charles Bratton, *supra*. In addition, the Warranty Deed gave an express easement for the construction and maintenance of an irrigation ditch, with rights of ingress and egress. *See* Exhibit "A" of the Affidavit of Charles Bratton. Pursuant to the easement, in 1973 the ditch was dug on the irrigation easement, was three feet in width, and far away enough from the fence to turn a tractor around and traversed Lot 40. *See* ¶ 5 of the Affidavit of Charles Bratton and Harold Ford.

The irrigation ditch on Lot 40 was dug as soon as was practical in the spring of 1973, shortly following the conveyance of Lot 32 to the Brattons. *See* Affidavit of Charles Bratton. That spring, the Brattons began to use and maintain their easement and ditch on Lot 40. Following placement of the ditch, Bratton had his property tilled and Lot 32 was planted in pasture. He also built a fence and had ditches dug on Lot 32. The ditch was used to irrigate the Bratton property located on Lot 32. *See* ¶ 6 of the Affidavit of Charles Bratton. Since 1973, the

Brattons continually utilized and maintained the structure of the ditch as well as the easement area on either side of the ditch. *See* ¶ 7 of the Affidavit of Charles Bratton. From 1973 to 1978, the Brattons placed sections of concrete pipe intermittently in the lower part of the ditch to keep its walls from eroding and to control the volume of water. *See* ¶ 5 of the Affidavit of Charles Bratton. By 1978, Bratton had also placed a 20-foot galvanized pipe from the mid-point of the ditch down to where the cement pipe began.

The Brattons' use and maintenance of the ditch involved utilizing a tractor to clean out the upper portion of the ditch and also maintain both sides of the ditch. This maintenance was within a 12-foot area inclusive of the three-foot ditch. *See* ¶ 7 of the Affidavit of Charles Bratton. The Brattons accessed Lot 40 through an area adjacent to the ditch for tractors and other equipment needed to maintain the ditch. *See* ¶ 9 of the Affidavit of Charles Bratton. Every spring since 1973, Mr. Bratton sprayed and burned the ditch and ditch banks. *See* ¶ 7 of the Affidavit of Charles Bratton.

On September 13, 2005, Rawlinson gift deeded Lot 40 to the Scotts. This Gift Deed specifically states that the Scotts took their property:

> [T]ogether with all tenements, hereditaments, water, water rights, ditches, ditch rights, easements and appurtenances thereunto belonging or in anywise appertaining, and subject to any encumbrances or easements as appear of record or by use upon such property.

See Exhibit "A" and ¶ 2 of the Affidavit of Counsel in Support of Plaintiffs' Motion for Partial Summary Judgment.

In 2007, Mr. Bratton accessed his ditch in the usual and routine manner and proceeded to perform the usual maintenance, to include spraying and burning the ditch as well as spraying and burning the areas adjacent to the ditch in preparation to receive water during the

2007 irrigation season. See ¶ ¶ 7 and 11 of the Affidavit of Charles Bratton. This annual spring maintenance was needed, and was the customary practice by the Brattons for 34 years. *See* ¶ 11 of the Affidavit of Charles Bratton.

II. NOTICE PLEADING REQUIREMENTS

Importantly, the Idaho Rules of Civil Procedure establish a system of notice pleading. Under this system of pleading, a plaintiff does not need to include a great deal of particularity in a Complaint. Rather, a plaintiff only needs to allege facts and claims sufficient for a defendant to understand the claim that has been alleged against them. *See Cook v. Skyline Corp.*, 135 Idaho 26, 34, 13 P.3d 857, 865 (Idaho Ct. App. 2000). Discussing Idaho's notice pleading requirements, the court in *Cook, supra,* stated, "[n]otice pleading frees the parties from pleading particular issues or theories, and allows parties to get through the courthouse door by merely stating claims upon which relief can be granted." *Id.*

More recently, the Idaho Supreme Court in *Vendelin v. Costco Wholesale Corp.*, 104 Idaho 416, 427, 95 P.3d 34, 45 (2004), stated: "With the advent of notice pleading, a party is no longer slavishly bound to stating particular theories in its pleadings. Rather, a complaint need only state claims upon which relief may be granted. . . . The emphasis . . . is to insure that a just result is accomplished, rather than ***requiring strict adherence to rigid forms of pleading***."(emphasis added)

In this case, plaintiffs have appropriately satisfied the requirements under a notice pleading requirement that an express and/or implied easement was at issue. That is, the Amended Complaint and Demand for Jury Trial, filed with this Court on January 14, 2008, sets forth that an express easement was granted that required at least 12 feet to accommodate and that the Brattons continuously used such waterway since 1973. *See* Amended Complaint, ¶¶ 11, 13,

and 28. The property, when received by the Scotts, was encumbered by the easement as set forth in the Gift Deed. *See* Amended Complaint, ¶ 14. The Scotts interfered with Bratton's use and then ultimately destroyed the existing ditch. *See* Amended Complaint, ¶¶ 17 and 20. As supported by the evidence, defendants have had notice of these allegations and plaintiffs should be permitted to proceed to trial on the issue of whether an implied easement existed.

III. ALL IDAHO CODE APPLICABLE SECTIONS

Idaho recognizes the importance that water and irrigation plays by enacting specific legislation regarding water and irrigation rights. Various statutes set forth the applicable law in both the scope and governance of such rights.

The Idaho Legislature recognized that a ditch owner must be permitted to clean, maintain, and repair a ditch or canal.[1] *See* Idaho Code § 42-1102. As such, a ditch owner is granted an easement, i.e., a right-of-way, to enter land "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 reasonably adapted, to that work." *Id.* (emphasis added). Recognizing

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[1] Idaho law does not expressly define the term "ditch owner." However, Idaho case law implies that a ditch owner is an individual or entity with an interest in the water of a particular ditch or canal. *Camp v. East Fork Ditch Co.*, 137 Idaho 850, 857, 55 P.3d 304, 311 (2002) (citing *Reynolds Irrigation Dist. v. Sproat*, 69 Idaho 315, 206 P.2d 774 (1948). As a ditch owner, an individual or entity is entitled to an easement across the land of others to transport its irrigation water. *Ramseyer v. Jamerson*, 78 Idaho 504, 511, 305 P.2d 1088, 1093 (1957). The Supreme Court of Idaho has provided that "[i]t is well established in this jurisdiction that 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." *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 549-50, 808 P.2d 1289, 1294-95 (1991) (citing *Sinnett v. Werelus*, 83 Idaho 514, 365 P.2d 952 (1961)). A ditch owner also has a "secondary easement with rights of ingress and egress for the purpose of maintenance . . . and the regulation of his water." *Ramseyer*, 78 Idaho at 511, 305 P.2d at 1093. The "cleaning, maintaining, and repairing" of a canal or ditch to ensure the proper transportation of water is considered within the scope of a maintenance easement. *Nampa & Meridian Irrigation Dist. v. Wash. Fed. Sav.*, 135 Idaho 518, 20 P.3d 702 (2001); *see also* IDAHO CODE § 42-1102.

the importance of cleaning and maintaining a ditch, a ditch owner is permitted sufficient width to properly effect the necessary cleaning, maintenance, or repairs. *Id.* Idaho Code Section 42-1102 further states that:

> The ***existence of a visible ditch***, canal or conduit ***shall constitute notice to the owner, or any subsequent purchaser***, of the underlaying servient estate, that the owner of the ditch, canal or conduit ***has the right-of-way and incidental rights confirmed or granted by this section.***

(Emphasis added).

Idaho Code Sections 42-1202 and 42-1203 mandate maintenance of a ditch and ditch embankments. However, a ditch owner has the responsibility care for a ditch in such a manner so as to not injure another property. Idaho Code § 42-1204. The failure to properly do so may result in liability for the ditch owner for damage caused to others. *See id.* As such, **any** irrigation easement, i.e., express, implied, or prescriptive, implementing a ditch, canal, or conduit, must further comply with these state mandates.

Therefore, pursuant to Idaho Law, an easement for an irrigation ditch allows for enough room on each side of the ditch to maintain the ditch and allow ingress and egress of machinery necessary for maintenance. As such, the Bratton ditch was three feet in width, plus having enough room on either side for the ingress and egress of a six-foot tractor and ditcher without interference with the fence would allow for the inside edge of the ditch located at least four to five feet from the fence. Further, a tractor and ditcher cannot be turned around in an area less than 12 feet.

IV. 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 express easement, granting irrigation rights must further comply with Idaho law regarding maintenance, cleaning and the right-of-way granted to effect such cleaning.

V. IDAHO CODE 42-1207 – DESTRUCTION OF EXISTING DITCHES

It is important to note that Idaho Code Section 42-1207 specifically precludes the destruction of existing ditches. Indeed, where a change to the placement of a ditch is desired, "[t]he 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." IDAHO CODE § 42-1207 (emphasis added). Moreover, where changes to the ditch are desired, the costs are to be borne by the landowner, not the ditch owner:

> A landowner shall have the right to direct that the conduit be relocated to a different route than the route of the ditch, canal, lateral or drain, ***provided that the landowner shall agree in writing to be responsible for any increased construction or future maintenance costs necessitated by said relocation***.

Id. (emphasis added). As such, the Scotts violated Section 12-1207 by destroying the ditch without the Brattons' written permission. Further, Idaho Code Sections 42-1202 through 42-1204 specifically mandates that a ditch owner maintain "in good order and repair" the ditch and ditch embankments. The legislature recognized that sufficient space was necessary to properly

maintain and clean a ditch and ditch embankments. *See* IDAHO CODE § 42-1102. Accordingly, Idaho Code Section 42-1102 provides a right-of-way with sufficient width along the banks of the ditch to properly effect the necessary maintenance and cleaning.

VI. IMPLIED EASEMENT BY CASE LAW AND STATUTORY AUTHORITY

The ditch was constructed in the Spring of 1973. *See* Affidavit of Charles Bratton. A three-foot-wide irrigation ditch was placed at least six feet from the property line on Lot 40 with sufficient space on both sides of the ditch to maintain, clean and repair the irrigation ditch. *See* ¶ 7 of the Affidavit of Charles Bratton. The ditch has been in its present location for 34 years and has been continually used by the Brattons for that same period of time. *See* ¶¶ 7 and 9 of the Affidavit of Charles Bratton. Mr. Bratton accessed his easement and proceeded to perform the usual maintenance, to include spraying and burning the ditch as well as spraying and burning the areas adjacent to the ditch within the 12-foot-wide easement area, in the spring in preparation to receiving water during the 2007 irrigation season. *See* ¶¶ 7 and 11 of the Affidavit of Charles Bratton.

These facts are not in dispute. Idaho law recognizes that implied easements may be created by prior use. *See Davis v. Peacock*, 133 Idaho 637, 643, 991 P.2d 362, 368 (1999); *Phillips Indus., Inc. v. Firkins*, 121 Idaho 693, 699, 827 P.2d 706, 711 (Ct. App. 1992). Idaho recognizes two distinct methods for establishing an implied easement. The first is set forth in *Davis*, 133 Idaho at 643, 991 P.2d at 368, which requires:

> (1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate.

Id. at 642, 991 P.2d at 367.

The second method was first promulgated in *Davis v. Gowen*, 83 Idaho 204, 360 P.2d 403 (1961), and requires:

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

Id. at 210, 991 P.2d at 407 (emphasis added). **The *Davis* method was favorably cited in *Davis v. Peacock* and remains valid authority today.** *See Close v. Rensink*, 95 Idaho 72, 501 P.2d 1383 (1972); *Phillips Indus., Inc. v. Firkins*, 121 Idaho 693, 699, 827 P.2d 706, 711 (Ct. App. 1992). In fact, several courts have recognized the validity of the *Gowen* language in determining the existence of an implied easement. *Id.* In *Close*, the Idaho Supreme Court stated: "[e]ven though the phraseology of the requirements as set out in *Davis v. Gowen*, . . . is somewhat different . . . **the same principles are involved**." *Close*, 95 Idaho at 76, 501 P.2d at 1387. *See also Shultz v. Atkins*, 97 Idaho 770, 554 P.2d 948 (1976). (emphasis added)

As this Court has made clear, it is the second prong of the *Davis v. Peacock* holding: i.e., *(2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent*; that has caused the Court to question the basis of implied easement. However, under the *Gowen* method of determining an implied easement, the Brattons have continuously used the ditch and associated easement since 1973, shortly following the execution of the Warranty Deed. As such, the Brattons can establish an implied easement through the traditional elements set forth in *Gowen*.

Further, it is important to note one difference between an implied easement for irrigation systems and those for other reasons. In *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 808 P.2d 1289 (1991), the Idaho Supreme Court recognized that where a ditch easement necessarily includes applicable state law, such as the explicit requirement that a ditch

owner maintain and clean a ditch and ditch embankments. As such, when considering an irrigation easement, as here, regard for state law requirements must be given. Conversely, in *Peacock*, the case revolves around a road easement, not an irrigation system. The reason that the distinction is so important is because there are specific statutory protections for irrigation systems, which statutes do not apply to other easements. Due to the protection statutes for irrigation systems, reliance on the elements set forth in either *Gowen* or *Davis* is not required for the Brattons to demonstrate a valid implied easement. Based on *Gowen* and the facts as well as statutes set forth under §§ 1-4, Brattons have an implied easement by law.

VII. SCOTTS' GIFT DEED

Additionally, the Scotts Gift Deed comes into play. Idaho law has created a statutory implied easement where a purchaser of land has **notice** of a ditch:

> 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 confirmed or granted by this section.

IDAHO CODE § 42-1102.[2]

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[2] Idaho law does not expressly define the term "ditch owner." However, Idaho case law implies that a ditch owner is an individual or entity with an interest in the water of a particular ditch or canal. *Camp v. East Fork Ditch Co.*, 137 Idaho 850, 857, 55 P.3d 304, 311 (2002) (citing *Reynolds Irrigation Dist. v. Sproat*, 69 Idaho 315, 206 P.2d 774 (1948). As a ditch owner, an individual or entity is entitled to an easement across the land of others to transport its irrigation water. *Ramseyer v. Jamerson*, 78 Idaho 504, 511, 305 P.2d 1088, 1093 (1957). The Supreme Court of Idaho has provided that "[i]t is well established in this jurisdiction that 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." *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 549-50, 808 P.2d 1289, 1294-95 (1991) (citing *Sinnett v. Werelus*, 83 Idaho 514, 365 P.2d 952 (1961)). A ditch owner also has a "secondary easement with rights of ingress and egress for the purpose of maintenance . . . and the regulation of his water." *Ramseyer*, 78 Idaho at 511, 305 P.2d at 1093. The "cleaning, maintaining, and repairing" of a canal or ditch to ensure the proper transportation of water is considered within the scope of a maintenance easement. *Nampa &*

In 2005, when the Gift Deed was executed to the Scotts, the ditch was in plain, open and obvious use. *See* Plaintiffs' Trial Exhibit 9, Gift Deed dated September 13, 2005. This fact is uncontested. In fact, John Scott watched Mr. Bratton irrigate by use of the ditch. It was only in 2007 after the Scotts (1) threatened Mr. Bratton while he was cleaning and maintaining his ditch; (2) placed No Trespassing signs; (3) continued to threaten Mr. Bratton when he tried to irrigate; and (4) destroyed the ditch, that this litigation ensued. *See* ¶ 14 of the Affidavit of Charles Bratton.

Pursuant to Idaho Code Section 42-1102, where a subsequent purchaser can visibly identify the ditch, the visible nature of the ditch is sufficient notice to inform the purchaser of the implied easement. In this case, that ditch has been visible for 34 years and has been continuously used for that same period. Indeed, the Brattons have continually conducted cleaning and maintenance on the ditch, as well as clearing the ditch of debris pursuant to Idaho Code Sections 42-1102 and 42-1204. In fact, Idaho courts have recognized and confirmed the statutory right of a ditch owner to clean, maintain and repair a ditch as part of the easement rights. The ditch owner has a "secondary easement with rights of ingress and egress for the purpose of maintenance . . . and the regulation of his water." *Ramseyer v. Jamerson*, 78 Idaho 504, 511, 305 P.2d 1088, 1093 (1957). The "cleaning, maintaining, and repairing" of a ditch is to ensure the proper transportation of water and is considered within the scope of a maintenance easement. *Nampa & Meridian Irrigation Dist. v. Wash. Fed. Sav.*, 135 Idaho 518, 20 P.3d 702 (2001); *see also* IDAHO CODE § 42-1102. Based on the visible nature of the ditch, Scotts have been on notice of the ditch and all incidental rights set forth by the statutes cited above.

Meridian Irrigation Dist. v. Wash. Fed. Sav., 135 Idaho 518, 20 P.3d 702 (2001); *see also* IDAHO CODE § 42-1102.

The Scotts' Gift Deed further confirms the existence of the implied easement. As mentioned, the deed contains the following language informing the Scotts that their property was subjected to certain encumbrances and easements:

> The following described premises, to-wit:
>
> . . . .
>
> together with all tenements, hereditaments, water, ***water rights, ditches, ditch rights, easements*** and appurtenances thereunto belonging or in anywise appertaining, and ***subject to any encumbrances or easements*** as appear of ***record or by use upon such property.***

See Plaintiffs' Trial Exhibit 9, Gift Deed dated September 13, 2005 (emphasis added). The Scotts have had notice of the existing ditch easement by way of its visible nature, but also the Gift Deed contained explicit language confirming said ditch and easement and that the property was subject to that ditch easement. Accordingly, the Gift Deed also confirms the statutorily implied easement.

VIII. CONCLUSION

Based on the aforementioned, plaintiffs respectfully submit that they can establish a *prima facie* case of an implied easement, statutorily implied easement, express easement with statutory protection, statutory easement by use and destruction of existing ditch. Accordingly, plaintiffs respectfully request that the Court permit them to present their case to the jury without bifurcation as required by IRCP Rule 38, Idaho Constitution, and as demanded by Plaintiffs in their Amended Complaint of January 14, 2008.

DATED this 1st day of September, 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 18 day of September, 2008, I caused a true and correct copy of the foregoing **PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF IMPLIED EASEMENT** to be served by the method indicated below, and addressed to the following:

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Attorneys for Defendants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
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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' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL MEMORANDUM RE: 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 response to Plaintiffs' Supplemental Memorandum in Support of Implied Easement filed with the Court on September 2, 2008.

Plaintiffs argue they can admit evidence regarding their use of the easement and use of Defendants'' property surrounding the easement at trial. Plaintiffs' further argue that this Court should disregard the Idaho Supreme Court's most recent instructions and case law with respect to

the requisite elements for an implied easement based upon prior use. Plaintiffs' argument is misguided. The *Thomas v. Madsen* opinion gives this Court and the parties' clear directions on what Plaintiffs must prove in order to establish an implied easement based upon prior use. This opinion cannot be ignored in order to allow Plaintiffs to admit evidence that is improper.

Plaintiffs further argue that the intent of the parties, namely Harold Ford and the Brattons, is somehow relevant to their claim for an implied easement. However, in *Phillips Industries, Inc. v. Firkins*, 121 Idaho 693, 827 P.2d 706 (1992), the Idaho Supreme Court made clear that the scope of inquiry into the parties intent is limited by the general; rule that if a deed is plain and unambiguous, the parties intent must be ascertained only from the deed itself. Pirol evidence is therefore inadmissible. *Id.*, 121 Idaho at 697.

Likewise, in *Benninger v. Derifield*, 142 Idaho 486, 129 P.3d 1235 (2006), the court stated as follows, "If the language of the deed is plain and unambiguous, the intention of the parties must be ascertained from the deed itself and extrinsic evidence is not admissible." *Id.*, 142 Idaho at 489.

The warranty deed at issue in this case is clear and unambiguous. It precisely sets forth the parameters of the expressed easement present on the Scotts' property. As such, Plaintiffs should not be allowed to present any evidence regarding intent of Harold Ford and the Brattons, of the scope, location and measurements of the easement.

DATED: September 2, 2008.

PERKINS COIE LLP

By _____
for Shelly H. Cozakos, 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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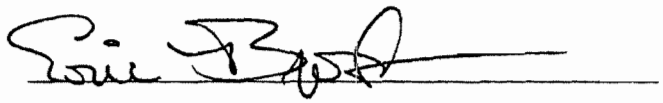

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Attorneys for Defendants

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

ORDER RE: DEFENDANTS' THIRD MOTION IN LIMINE RE: IRRELEVANT AND PROHIBITED PROPENSITY EVIDENCE

This matter, having come regularly before the Court on September 2, 2008 for oral argument upon Defendants' Third Motion in Limine Re: Irrelevant and Prohibited Propensity Evidence, the parties appearing through their counsel of record, and the Court having considered the arguments by the parties, the authorities cited in the Defendants' memorandum in support of the motion, and the authority, reasons and grounds set forth and cited in open court on September 2, 2008, and good cause appearing therefore;

IT IS HEREBY ORDERED THAT Defendants' Third Motion in Limine Re: Irrelevant and Prohibited Propensity Evidence is hereby GRANTED. Plaintiffs, their counsel, representatives and witnesses are hereby ordered to refrain from introducing, making, or eliciting any evidence, testimony, arguments, objections, or mention at trial regarding any alleged or

actual altercations or confrontations between either Defendant, John or Jackie Scott, and any third-party other than Plaintiffs, including the following:

1. Steve Wielong: 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." Testimony 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 (other than the Brattons), extreme hostility toward all neighbors, threats when Mr. Scott evicted prior owner and hostility toward Wielong pets. 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;

2. Dane Lane: 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;

3. Mike Memmelaar: Testimony that the Scotts "stare at him whenever he is out in his field;"

4. Ryan Finney: Testimony that "he feels very sad that every time he goes out onto the property he feels like he is being watched and cannot enjoy any privacy on the property;" and

5. Any prior crimes, convictions, criminal charges, pleas, citations, or admissions of criminal violations by either Defendant.

Plaintiffs shall refrain from introducing, making, or eliciting any evidence, testimony, arguments, objections, or mention of the matters described herein directly or indirectly, during *voir dire*, opening statement, interrogation of witnesses, closing statements, or in any other manner at trial.

DATED: September 3, 2008.

Renae Hoff
District Judge

CLERK'S CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 3, 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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Deputy Clerk

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,	CASE NO. CV-2007-6821-C
-vs-	**VERDICT FORM**
JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife), Defendants.	

We, the Jury, answer the following question:

Question No. 1: Have the Plaintiffs met their burden of proof by establishing that they have a 12 foot wide implied easement?

Answer to Question No. 1:

Yes _____ No X

As soon as nine or more of you have agreed on the answer, sign and date this Verdict Form and notify the Bailiff. If your answer is unanimous, your foreman alone shall sign and date this Verdict Form; but if nine or more but less than the entire jury agree, then those so agreeing shall sign this Verdict Form.

DATED :

Foreperson

Tiffany Caraghay 555

Connie L. Bergato 548

Chris J Gidy 559

Debra Cash 557

Christa Larent 534

Jon Albertson 574

572

540

Mark Maddrip 538

8/4/08

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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

MOTION FOR RECONSIDERATION

COME NOW Plaintiffs Charles E. Bratton and Marjorie I. Bratton (collectively "Bratton"), by and through undersigned counsel of record, and hereby files this motion seeking reconsideration of the Court's September 4, 2008 ruling from the bench that Idaho Code Section 42-1102 does not apply to the consideration of the case at bar. This motion is supported by the argument that follows herein.

I.
BACKGROUND

Earlier this morning, September 4, 2008, the Court heard oral argument from the parties concerning the applicability of Idaho Code Section 42-1102, 42-1204; and 42-1207. At the outset, and prior to argument by counsel, the Court stated that it did not believe that Idaho Code Section 42-1102 applied to the consideration of the case at bar. The Court stated that the express language of the statute (given its use of the term "stream") provides that it only applies to situations in which riparian landowners (landowners with frontage on a natural stream or other natural body of water) lack sufficient stream frontage to allow the construction of a gravity-based irrigation system. The Court reasoned that Idaho Code Section 42-1102 affords those unfortunately situated riparian landowners the opportunity to enter the lands of another (such as their immediate neighbor) in order to build a satisfactory irrigation ditch that they could not otherwise build on their own property. The Court reasoned that because this case does not present a scenario involving the direct conveyance of water from a natural stream, or otherwise involve riparian property, Idaho Code Section 42-1102 does not apply. The Court also stated that it fails to see how such a decision would prejudice the Brattons because some of the concepts encompassed in Idaho Code Section 42-1102 are also encompassed in Idaho Code Sections 42-1204 and 42-1207—statutory provisions that the Court does view as applicable in this matter.

Not surprisingly, the Defendants agreed with the Court's rationale, agreeing that the plain, unambiguous language of Idaho Code Section 42-1102 contemplates only riparian/stream frontage situations, a factual scenario that is not before the Court in the case at bar. The Defendants asserted that the Brattons failed to point to any case law interpreting that the statute provides otherwise. The Defendants citing to *Nampa & Meridian Irr. Dist. v.*

Washington Federal Sav., 135 Idaho 518 (2001) and *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544 (1991) further argued that the express three (3) foot easement granted to the Brattons by Mr. Ford governs the scope and purpose of the irrigaiton easement in this matter, and that any expansion of that easement would impermissibly and unduly expand the burdens placed upon the Defendants' land.

For the reasons discussed below, the Brattons respectfully disagree with the Court's holding that Idaho Code Section 42-1102 does not apply to the consideration of the case at bar. The Brattons also contend that failing to apply Idaho Code Section 42-1102 in this matter will prejudice their case because while it is true that Idaho Code Sections 42-1204 and 42-1207 do encompass some of the concepts discussed by Idaho Code Section 42-1102, the Chapter 12 statutes do not incorporate all of the Chapter 11 concepts that are germane to the Court's and the jury's consideration of this matter.

II.
ARGUMENT

A. Idaho Code Section 42-1102 Applies More Broadly Than the Court Holds

First, the plain language of Idaho Code Section 42-1102 makes clear that the statute provides a right of private eminent domain for irrigation purposes beyond those factual scenarios involving only riparian parcels abutting natural streams. Idaho Code Section 42-1102 provides, in pertinent part:

> When any such owners or claimants to land have not sufficient length of frontage on a stream to afford the requisite fall for a ditch . . . on their own premises for the proper irrigation thereof, ***or where the land proposed to be irrigated is back from the banks of such stream***, and convenient facilities otherwise for the watering of said lands cannot be had, such owners or claimants are entitled to a right-of-way through the lands of others, for the purposes of irrigation.

See, IDAHO CODE § 42-1102 (emphasis added). Thus, Idaho Code Section 42-1102 applies to at least two different scenarios as illustrated by the statute's use of the disjunctive term "or." The statute applies when (1) riparian property owners lack sufficient stream frontage, and (2) when the land proposed to be irrigated is back from the banks of such stream. While the Brattons' readily concede that the first scenario is not present in this case (as they are not riparian land owners with frontage on a natural stream), they do clearly irrigate lands that are set back from the nearest natural stream (the Boise River in this instance), and consequently require the necessary irrigation easement and right-of-way across the Defendants' property to access that Boise River water that is delivered to them through the nearby Canyon Hill Lateral or Canal.

Despite Defendants' assertions otherwise, the Brattons' interpretation of Idaho Code Section 42-1102, and its application to the factual scenario presented in their Complaint, does comport with Idaho Supreme Court authority that interprets the statute in the very same manner. *See, e.g., Canyon View Irr. Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 607 (1980) ("In order to assist owners of water rights whose lands are remote from the water source, the state has partially delgated its powers of eminent domain to private individuals . . . [I.C. §§ 42-1102 and - 1106] permit landlocked individuals to condemn a right-of-way through the lands of others for purposes of irrigation."). In the case at bar, the Brattons are the very "landlocked" individuals that, according to the Idaho Supreme Court, are expressly assisted by the irrigation easement and right-of way provided by Idaho Code Section 42-1102. The *Canyon View Irr. Co.* court in no way restricts the application of the statute to only those situations involving riparian landowners without sufficient stream frontage to construct a suitable ditch, nor would it given that Idaho common law abolished the riparian rights doctrine (with respect to irrigation rights) nearly a century ago. *See, e.g., Hutchinson v. Watson Slough Ditch Co.*, 16

Idaho 484, 491 (1909). Instead, Idaho Code Section 42-1102 applies both to: (1) such unfortunately situated riparian landowners, as well as to (2) "landlocked" individuals "whose lands are remote from the water source." *Canyon View Irr. Co.*, 101 Idaho at 607. Consequently, Idaho Code Section 42-1102 squarely applies to the consideration of the irrigation easement and right-of-way at issue in this matter.

B. *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518 (2001) Is Not Dispositive Regarding the Application of Idaho Code Section 42-1102

The Defendants argue, in part, that *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518 (2001) is dispositive in this matter because it involved the interpretation and the application of an express written easement and its juxtaposition and competition with the provisions of Idaho Code Section 42-1102. In exceedingly short shrift, and as the Defendants point out, in *Nampa & Meridian Irr. Dist.*, the Idaho Supreme Court held that the express written easement was not trumped by the application of Idaho Code Section 42-1102. This does not mean, however, that the converse was true, and that that the express easement agreement trumped application of the statute. The Idaho Supreme Court's decision was not predicated upon a general finding that the written express easement trumped the application of Idaho Code Section 42-1102, rather the Supreme Court declined to apply the statute in the overly expansive manner in which the Nampa and Meridian Irrigation District argued.

In *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518 (2001), Nampa and Meridian Irrigation District attempted to prohibit Washington Federal Bank's construction of a fence and a sidewalk within the easement and right of way for the Finch Lateral. *Id.* at 521. Rather than holding that the Channel Change Easement agreement trumped the application of Idaho Code Section 42-1102 for purposes of defining the scope of the Finch

Lateral easement, the Idaho Supreme Court instead held that neither the provisions of the express easement agreement nor the language of 42-1102 created a greater right in the irrigation district to the exclusion of the other. *Id.* at 522. In other words, the irrigation district had its well settled easement and right-of-way rights as confirmed by Idaho Code Section 42-1102, but the servient landowner (Washington Federal) also had its underlying rights to use its property in any manner that did not interfere with the purposes and scope of the dominant irrigation easement. *Id.* In short, the irrigation district attempted to use Idaho Code Section 42-1102 in an impermissibly expansive manner, a manner that would have required the Court to find that the district's irrigation easement and right-of-way was exclusive, and that the statute also operated to bar Washington Federal's fence and sidewalk for public safety reasons. Understandably, the Court was not willing to reach that result because the express terms of Idaho Code Section 42-1102 does not give rise to an "exclusive" irrigation easement or right-of-way, nor does it contemplate the prohibition of encroachments for public safety reasons. *Id.* at 523-24.

In the case at bar, the Brattons are seeking nothing more than the irrigation easement and right-of-way that Idaho Code Section 42-1102 provides. The Brattons are not claiming that their irrigation easement and right-of-way is exclusive, and they are not trying to expand the purposes for which the easement exists. Instead, the Brattons are merely seeking the necessary irrigation easement and right-of-way that allows them to operate and maintain the ditch in the same reasonable and customary manner that they have done for over the last 33 years, namely with a tractor and a V-ditcher—equipment commonly used and reasonably adapted for those operation and maintenance purposes. The *Nampa & Meridian Irr. Dist.* court confirmed Nampa and Meridian Irrigation District's rights under Idaho Code 42-1102. It did not abrogate them in favor of the strict application of the express Channel Change Easement

Agreement. However, the Court was unwilling to expand the irrigation district's rights provided under the statute as the irrigation district desired. The bottom line for consideration in this matter is that the Bratton's irrigation easement and right-of-way preexisted the Defendants' ownership of their property. The Defendants took ownership of their property subject to that preexisting irrigation easement and right-of-way. While the Defendants are free to use their property in any manner that does not interfere with the purposes and scope for which the Brattons' irrigation easement and right-of-way was created, the Defendants absolutely may not obliterate the ditch and the easement altogether. The express easement agreement on record in this matter gives the Defendants no more rights than Idaho Code Section 42-1102 affords the Brattons.

The Brattons have only those rights expressly afforded to them under Idaho Code Section 42-1102, and those are the only rights they seek. Idaho Code Section 42-1102 grants them a reasonable width of land for their operation and maintenance of their ditch. The Defendants are not permitted to interfere with the ditch or the underlying irrigation easement and right-of-way without first receiving the express, written permission of the Brattons (the ditch owners). *See* IDAHO CODE § 42-1207. The Brattons are not seeking to increase any burden upon the servient estate in this matter. They are simply seeking to restore the irrigation easement and right-of way rights expressly granted to them by operation of Idaho Code Section 42-1102. The Defendants' property has been "burdened" by the use of a 12 foot irrigation easement and right-of-way for over the past 33 years. That "burden" was accepted and acknowledged by the Defendants' predecessors-in-interest, including the unified parcel owner (Ford) who built the ditch in the first place. The Brattons are still seeking the same 12 foot easement. They are seeking to maintain the status quo, a status quo that the Defendants had no right to obliterate no

matter what the express easement on file provided. *See* IDAHO CODE § 42-1102; *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518 (2001); and Amended Complaint And Demand for Jury Trial at Ex. C (wherein the Gift Deed that conveyed the subject property to the Defendants expressly provided that the Defendants were taking ownership of the property "subject to any encumbrances or easements as appear of record ***or by use upon such property***." (emphasis added)).

C. Omitting Idaho Code Section 42-1102 From Consideration in This Matter is Prejudicial

While the Court is correct that some of the concepts encompassed within Idaho Code Section 42-1102 are also found within Idaho Code Sections 42-1204 and/or 42-1207, not all of the concepts set forth within Idaho Code Section 42-1102 that are germane to the consideration of this matter are so incorporated. Consequently, barring the application of Idaho Code Section 42-1102 to the consideration of this matter will prejudice the Bratton's case.

For example, Idaho Code Sections 42-1204 and 42-1207 speak only in terms of the existing irrigation easement or right-of way, and the protection of that easement and right-of-way and the corresponding facility which the underlying easement and right-of way serves. Those statutes do not speak in terms of the initial creation and necessity of the irrigation easement and right-of-way in the first place. Idaho Code Section 42-1102 not only contemplates the operation and maintenance needs for a facility's corresponding irrigation easement and right-of-way, but also sets out the reasons for which the easement and right-of-way are created to begin with. The requisite irrigation easement and right-of way is created in order to assist those landowners in conveying their water rights to their landlocked properties. This is a factual element which is central to the consideration of this case. If the Brattons cannot satisfy the requisite needs for the irrigation easement and right-of way under 42-1102, then there is no

reason to consider the further protections that Idaho Code Sections 42-1204 and 42-1207 provide. Idaho Code Section 42-1102 informs why the Brattons need an irrigation easement and right-of-way in the first place, and further informs what rights they possess in relation to servient landowners for the operation and maintenance of the ditch they possess.

Additionally, another key component to this case, and a concept that is only provided for in Idaho Code Section 42-1102, is the "notice concept"—the fact that the mere existence of an open ditch on the surface of the ground puts the Defendants on notice that the ditch possesses a corresponding irrigation easement and right-of-way across the Defendants' property. The visibility of the surface ditch puts the Defendants on notice that others have the right to operate and maintain the surface ditch on the Defendants' property, that others have the requisite rights for ingress and egress from the property, and that others have the right to use a reasonable width of the property for irrigation conveyance purposes. Moreover, Idaho Code Section 42-1102 puts the Defendants on notice that they are not permitted to interfere with the use and enjoyment of that dominant irrigation easement and right-of-way. In this matter, given the existence of the open and notorious surface ditch, the Defendants were fully aware that their actions in obliterating the existing ditch, and attempting to relocate it elsewhere on their property, interfered with the longstanding rights of others, and that they knowingly performed their tortious acts with a total disregard for the open and obvious rights of others.

III.
CONCLUSION

For the foregoing, the Plaintiffs respectfully request that the Court reconsider its prior ruling that Idaho Code Section 42-1102 does not apply to the consideration of the case at bar. The express language of the statute, and the statutory interpretation of the Idaho Supreme

Court in *Canyon View Irr. Co. v. Twin Falls Canal Co.*, 101 Idaho 604, 607 (1980) mandate otherwise.

DATED this 4th day of September, 2008.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

By _____
Andrew J. Waldera – Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of September, 2008, I caused a true and correct copy of the foregoing **MOTION FOR RECONSIDERATION** to be served by the method indicated below, and addressed to the following:

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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

MOTION TO RECONSIDER THE SEPTEMBER 4, 2008 RULING OR ALTERNATIVELY, FOR INTERLOCUTORY APPEAL

COMES NOW plaintiffs Charles E. Bratton and Marjorie I. Bratton (collectively "Brattons"), pursuant to IRCP 7(b)(1), IRCP 11(a)(2)(B) and Idaho Appellate Rule 12(b), moves this Court for its order reconsidering its order of September 4, 2008 or alternatively to grant permission to appeal from the Court 's ruling on September 4, 2008, finding that Idaho Code Section 42-1102 does not apply to the consideration of the case at bar. This motion is based

upon the Motion for Reconsideration, pleadings, other matters filed herein, and the memorandum submitted herewith.

DATED this 5th day of September, 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 5th day of September, 2008, I caused a true and correct copy of the foregoing **MOTION TO RECONSIDER THE SEPTEMBER 4, 2008 RULING OR ALTERNATIVELY, FOR INTERLOCUTORY APPEAL** to be served by the method indicated below, and addressed to the following:

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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 **MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER THE SEPTEMBER 4, 2008 RULING OR ALTERNATIVELY, FOR INTERLOCUTORY APPEAL**

Plaintiffs are concerned about the Courts finding that Idaho Code Section 42-1102 does not apply to the consideration of the case at bar. Rather, the Brattons contend that failing to apply Idaho Code Section 42-1102 in this matter will prejudice their case because, while it is true that Idaho Code Sections 42-1204 and 42-1207 do encompass some of the concepts discussed by

Idaho Code Section 42-1102, the Chapter 12 statutes do not incorporate all of the Chapter 11 concepts that are germane to the Court's and the jury's consideration of this matter.

"Under I.A.R. 12, a party may seek permission to appeal from an interlocutory order which is not otherwise appealable as a matter of right under I.A.R. 11(d)." *Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 149, 795 P.2d 309, 311 (1990). The "criteria for permission to appeal" are whether the order "involves a controlling question of law as to which there is substantial grounds for difference of opinion and in which an immediate appeal from the order or decree may materially advance the orderly resolution of the litigation." I.A.R. 12(a). "Generally, an appeal under I.A.R. 12 will be permitted when the order involves a controlling question of law as to which there is substantial grounds for difference of opinion and that an immediate appeal may materially advance the orderly resolution of the litigation. *Kindred v. Amalgamated Sugar Co.*, 118 Idaho at 149, 795 P.2d at 311. *See also Budell v. Todd*, 105 Idaho 2, 4, 665 P.2d 701, 703 (1983). In this matter, all those considerations are fulfilled.

As is more fully set forth in the Motion for Reconsideration, in this case, great prejudice will result if the Court does not reconsider its September 4 order, or grant an immediate appeal of the order. The irrigation statutes are controlling issues of law in this case. No adequate remedy at law exists in this matter as plaintiffs have been foreclosed the opportunity to present complete factual and legal details to the jury regarding the irrigation easement. Further, the jury instructions are deficient by failing to permit the inclusion of Idaho Code Section 42-1102. Plaintiffs have been deprived of an opportunity to present evidence on the irrigation easement and permanent and irreparable harm will result in plaintiffs' case. An immediate appeal would advance orderly resolution of the litigation, and an immediate appeal

would enable the parties to avoid the burden of unnecessary trial preparations and trial if the Brattons prevail.

For the reasons stated above and more specifically supported in the Motion for Reconsideration, plaintiffs respectfully requests that this Court issue its order granting an interlocutory appeal pursuant to Idaho Appellate Rule 12.

DATED this 5th day of September, 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 5th day of September, 2008, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER THE SEPTEMBER 4, 2008 RULING OR ALTERNATIVELY, FOR INTERLOCUTORY APPEAL** to be served by the method indicated below, and addressed to the following:

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_____
Nancy J. Garrett

CV07-6821

PLAINTIFFS' SECOND SUPPLEMENTAL REQUESTED

INSTRUCTION NO. 1

There was a certain statute in force in the state of Idaho at the time of the occurrence in question which provided that if a landowner changes a ditch, canal, lateral or drain or buried irrigation conduit:

> Such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal, lateral or drain or buried irrigation conduit. Any increased operation and maintenance shall be the responsibility of the landowner who makes the change.

A violation of the statute is negligence per se.

Idaho Code § 42-1207

Allen v. Burggraf Construction Co., 106 Idaho 451 (Ct. App. 1984)

Simonson v. Moon, 72 Idaho 39 (1951).

IDJI2d 2.22 (modified)

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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 **PLAINTIFFS' THIRD SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS**

COME NOW plaintiffs Charles E. Bratton and Marjorie I. Bratton (collectively "Brattons"), by and through undersigned counsel of record, submit the attached Supplemental Proposed Jury Instructions and Special Verdict Form.

DATED this 10th day of September, 2008.

MOFFATT, THOMAS, BARRETT, ROCK & FIELDS, CHARTERED

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September, 2008, I caused a true and correct copy of the foregoing **PLAINTIFFS' THIRD SUPPLEMENTAL PROPOSED JURY INSTRUCTIONS** to be served by the method indicated below, and addressed to the following:

Shelly H. Cozakos
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Facsimile (208) 343-3232

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(X) Hand Delivered
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for Nancy J. Garrett

INSTRUCTION NO. _____

A ditch easement is a property right separate and apart from the water right associated with the ditch. The water right is also an independent property right.

Savage Lateral Ditch Water Users Assoc. v. Pulley, 125 Idaho 237, 242, 869 P.2d 554, 559 (1993).

INSTRUCTION NO. _____

You have found that the Brattons hold an express easement of three-feet. Associated with that primary easement is a "secondary easement" used for the express purpose of repairing and maintaining the primary easement. The secondary easement permits the Brattons to reasonably and necessarily expand the primary easement for the sole purpose of repair and maintenance.

Abbott v. Nampa School Dist. No. 131, 119 Idaho 544, 549, 808 P.2d 1289, 1294 (1991).

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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 **MOTION FOR RECONSIDERATION**

COME NOW Plaintiffs Charles E. Bratton and Marjorie I. Bratton (collectively "Bratton"), by and through undersigned counsel of record, and hereby files this motion seeking reconsideration of the Court's September 10, 2008 ruling from the bench that newly discovered evidence of Mr. Scotts invasion of the Brattons' property and privacy rights was inadmissible.

On September 10, 2008, Mr. Bratton was sworn and testified regarding his interactions with Mr. Scott. On direct exam, Mr. Bratton's counsel questioned him about an incident that occurred the previous night following trial. As Mr. Bratton began to recount his experience from the night before, defendants objected and the Court sustained said objection and further admonished plaintiffs' counsel that such testimony was outside the permissible scope of the rules. In admonishing plaintiffs' counsel, the Court further stated that such alleged misconduct might serve as grounds for a mistrial and the assessment of costs and fees.

However, with all due respect, the evidence of the previous nights interactions are precisely the type of conduct that Mr. Bratton alleged in the Amended Complaint filed with the Court on January 16, 2008. More specifically, Count V and VI deal with the tortious conduct of Mr. Scott and his interference with the Brattons' property and privacy rights. Moreover, the acts observed by Mr. Bratton of Mr. Scott jumping on the fence between the Scotts' property and that of the Brattons and attempting to videotape the Brattons is objective evidence supporting the contentions initially raised in the Brattons' complaint. This evidence was not a "surprise" as Characterized by the Court, as Scotts' counsel admitted that she requested Mr. Scott to videotape the easement. Counsel was aware that Mr. Scott would be on or near the easement. Unfortunately, Mr. Scott was unable to control himself and again harassed and invaded Mr. Bratton's privacy and property. Such evidence is relevant to the allegations raised in the Brattons' complaint and is therefore admissible.

Further, the Idaho Supreme Court has recognized that testimony of prior acts that are in conformity with those alleged can be admissible evidence, especially where credibility is at issue. In *State v. Tolman*, 121 Idaho 899, 828 P.2d 1304 (1992), the Court recognized that "the jury was better able to compare patterns and methods, details and generalities, consistencies

and discrepancies, and thereby made a more meaningful and accurate assessment of the parties' credibility." *Id.* at 905, 828 P.2d at 1310.

In this case, allegations of whether Mr. Scott has invaded the Brattons' property and privacy rights involve a credibility assessment by the jury. That is, the jury must decide whether they believe Mr. Scott's version of his actions or the Brattons. Additional testimony of Mr. Bratton regarding Mr. Scott's continued conduct only serves to confirm the allegations that Mr. Scott has and continues to act unreasonably and in violation of the Brattons' privacy and property rights.

Given the claims lodged against Mr. Scott, this evidence is relevant, and permissible. Furthermore, it serves as further confirmation of Mr. Brattons testimony of Mr. Scott's conduct and that such conduct continues. Accordingly, plaintiffs respectfully request the Court to reconsider and permit testimony regarding Mr. Scotts conduct on the evening of September 9, 2008 as relevant and admissible evidence.

DATED this 11th day of September, 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 11th day of September, 2008, I caused a true and correct copy of the foregoing **MOTION FOR RECONSIDERATION** to be served by the method indicated below, and addressed to the following:

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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 **SUPPLEMENTAL TRIAL BRIEF**

COME NOW Plaintiffs Charles E. Bratton and Marjorie I. Bratton (collectively "Bratton"), by and through undersigned counsel of record, and hereby files this supplemental trial brief setting forth the additional legal authority regarding establishing proximate cause.

Proximate cause "focuses upon legal policy in terms of whether responsibility will be extended to the consequences of conduct which has occurred." *Newberry v. Martens*,

142 Idaho 284, 288, 127 P.3d 187, 191 (2005) (quoting *Munson v. State, Dept. of Highways*, 96 Idaho 529, 531, 531 P.2d 1174, 1176 (1975)). Phrased differently, it is the defendant's conduct (actual cause) that inflicts the harm, but it is the law (legal cause or true proximate cause) that determines whether liability for that conduct attaches. *Id.*

The Idaho Supreme Court made clear in *Sheridan v. St. Luke's Regional Medical Center*, 135 Idaho 775, 25 P.3d 88 (2001), that expert testimony regarding causation in a medical malpractice case was not required. In *Sheridan*, a newborn who went untreated for jaundice, and his hyperbilirubinaemia eventually led to cerebral palsy. In that case, there was a direct chain formed, linking the nurses' negligence, the child's untreated jaundice (which was untreated for various reasons) and his development of cerebral palsy. Specifically, the nurses did not notify the child's pediatrician during the first 24 hours of life that the child was jaundiced, nor that bilirubin tests had not been conducted; did not chart indicia that could have been used to trace the jaundice's progress, and did not note the possible blood incompatibility between mother and child. Moreover, nursing staff failed to warn the child's parents, upon discharge, that the jaundice he had might not be normal.

The Idaho Supreme Court, in determining whether an expert was required to testify regarding proximate cause held "proximate cause can be shown from a 'chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable.'" *Id.* at 785, 25 P.3d at 98. The Court further bolstered this point through discussion of *Formont v. Kircher*, 91 Idaho 290, 420 P.2d 661 (1966). In *Formont*, the plaintiff suffered a compound fracture in his leg which ultimately led to amputation due to an untreatable infection. The trial court found that the defendant had been negligent but stated that the plaintiff had failed to prove proximate cause. On appeal, the Idaho Supreme Court found that ample evidence

existed to demonstrate that the defendant had been negligent. *Id.* at 297, 420 P.2d at 668. The Court further held that proximate cause was established because the plaintiff lost his leg and there were no intervening causes. *Id.* In reversing the trial court, the Idaho Supreme Court stated the rule:

> Respondent was not required to prove his case beyond a reasonable doubt, nor by direct and positive evidence. It was only necessary that he show a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable. *Helland v. Bridenstine*, 55 Wash. 470, 104 P. 626. As is said in *Dimock v. Miller*, 202 Cal. 668, 262 P. 311:
>
> "If the rule of law is as contended for by defendant and appellant, and it is necessary to demonstrate conclusively and beyond the possibility of doubt that the negligence resulted in the injury, it would never be possible to recover in a case of negligence in the practice of a profession which is not an exact science." (Citations omitted).

Id. at 296, 420 P.2d at 667.

In this case, plaintiffs have testified that their medical conditions were caused by the harassment and invasion of privacy by Mr. Scott. Mr. and Mrs. Bratton can testify to how they felt, that the medical conditions they are suffering were not present prior to the incidents with Mr. Scott. Further, the Brattons have testified that the medical conditions were not caused by any intervening factor, such as in *Formont*. The Brattons are not required to present expert testimony regarding medical conditions that are not beyond the ken of a layperson. In this case, the Brattons have presented direct testimony of their conditions and the "'chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable.'" *Sheridan*, 135 Idaho at 785, 25 P.3d at 98.

Based upon clear Idaho law, the Brattons are not required to prove proximate cause through an expert. The Brattons must only present evidence that establishes a reasonable

and naturally inferable cause, which they have done. As such, the jury should determine whether the medical conditions suffered by the Brattons were proximately cause by Mr. Scott.

DATED this 11th day of September, 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 11th day of September, 2008, I caused a true and correct copy of the foregoing **SUPPLEMENTAL TRIAL BRIEF** to be served by the method indicated below, and addressed to the following:

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Nancy J. 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,	CASE NO. CV-2007-6821-C
-vs-	**SPECIAL VERDICT FORM**
JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife), Defendants.	

We, the Jury, answer the questions submitted to us in the special verdict as follows:

Question No. 1: Did the Scotts negligently interfere with the Brattons' easement?

Answer to Question No. 1:

Yes X No_____

If you answered Yes to Question No. 1, proceed to answer Question No. 2. If you answered No to Question No. 1, skip Questions 2, 3, 4, 5, and 6 and proceed to Question No. 7.

Question No. 2: Was the Scotts' negligence a proximate cause of harm to the Brattons?

Answer to Question No. 2:

Yes X No_____

If you answered Yes to Question No. 2, proceed to answer Question No. 3. If you answered No, proceed to Question No. 7.

Question No. 3: Did the Scotts change the irrigation ditch?

Answer to Question No. 3:

Yes X No_____

If you answered Yes to Question No. 3, proceed to answer Question No. 4. If you answered No to Question No. 3, skip Questions 4 and 5 and proceed to Question No. 6.

Question No. 4: Did the Scotts have written permission to change the irrigation ditch?

Answer to Question No. 4:

Yes _____ No X

If you answered Question No. 4, proceed to answer Question No. 5.

Question No. 5: Did changing the irrigation ditch result in a diminished flow of water to the Brattons' property?

Answer to Question No. 5:

Yes _____ No X

Proceed to answer Question No. 6.

Question No. 6: Did the Scotts interfere with the Brattons' easement by threat of harm?

Answer to Question No. 6:

Yes _____ No X

Please proceed to answer Question No. 7.

Question No. 7: Did the Scotts interfere with the Brattons' right to privacy?

Answer to Question No. 7

Yes _____ No X

If you answered Yes to Question No. 7, please proceed to answer Question No. 8. If you answered No to Question No. 7, please do not answer Question No. 8 and sign and date this Special Verdict Form.

Question No. 8: Was the Scotts' interference with the Brattons' right to privacy a proximate cause of harm to the Brattons?

Answer to Question No. 8

Yes _____ No_____

As soon as nine or more of you have agreed on the answers to the questions, sign and date this Verdict Form and notify the Bailiff. If your answer is unanimous, your foreman alone shall sign and date this Verdict Form; but if nine or more but less than the entire jury agree, then those so agreeing shall sign this Verdict Form. Please sign your name and list your juror number on the lines provided below.

DATED :

538 Mark Mallory 9/11/08
Foreperson

_____

_____

_____

_____

_____

_____

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,	CASE NO. CV-2007-6821-C
-vs-	**INSTRUCTIONS TO THE JURY**
JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife), Defendants.	

INSTRUCTION NO. 1

Good morning, ladies and gentlemen of the jury. We are now taking up Bratton v Scott, Canyon County case number CV-2007-6821. I am Judge Hoff. You have been summoned as prospective jurors in the lawsuit now before us. The first thing we do in a trial is to select 12 jurors and two alternate jurors from among you.

I now want to introduce you to the court personnel who will be assisting me throughout the trial. Seated on my right is my deputy clerk, Sue Maund. The deputy clerk of court marks the trial exhibits and administers oaths to you jurors and the witnesses. Next, I want to introduce the bailiff, Ken Fisher. The bailiff will assist me in maintaining courtroom order and will arrange for your meals after this case has been submitted to you for decision. Seated directly in front of me is my court reporter, Carol Bull. The court reporter will keep a verbatim account of all matters of record during the trial. Carol is a certified short hand reporter, and with the machine she is using she will take down every word that is said during this trial. Next, I want to introduce Jennifer Brown. Jennifer is a lawyer who will also be assisting me in this trial.

The party who brings a lawsuit is called the "plaintiff." In this suit the plaintiffs are Charles and Marjorie Bratton. The plaintiffs are represented by

their lawyers Nancy Jo Garrett and Richard C. Fields of the law firm Moffatt, Thomas, Barrett, Rock & Fields . The party against whom a lawsuit is brought is called the "defendant." The defendants in this suit are John and Jackie Scott. The defendants are represented by their lawyers Shelly Cozakos and Cynthia Yee-Wallace of the law firm Perkins Coie.

This is a civil case involving an easement dispute. An easement is the right to use the land of another for a specific purpose. Since 1973, the Brattons have owned 4.83 acres of pasture land in Canyon County. When the Brattons purchased their property in 1973, the prior owner deeded a 3 foot wide, written irrigation ditch easement across his property to the Brattons. The Scotts now own the property where the easement is located. The Brattons' pasture land is located next to the Scotts' residence and property. This easement allows the Brattons to access, use, and maintain a ditch located on the Scotts' property for irrigation purposes.

The following are the general allegations and defenses in this case. The Brattons allege that they have a 12 foot wide easement. The Brattons further allege that in 2007, the Scotts interfered with their easement rights, by destroying a ditch and interfering with their right of privacy in connection with the easement. The Scotts deny the easement is more than 3 feet wide and allege that they have continually allowed Plaintiffs to access and

maintain the easement. The Scotts further deny that they have destroyed the ditch and further allege the Brattons have suffered no harm as a result of any actions by the Scotts.

A trial starts with the selection of a fair, impartial jury. To that end the court and the lawyers will ask each of you questions to discover whether you have any information concerning the case or any opinions or attitudes which either of the lawyers believes might cause you to favor or disfavor some part of the evidence or one side or the other. The questions may probe deeply into your attitudes, beliefs and experiences, but they are not intended to embarrass you. If you do not hear or understand a question, you should say so. If you do understand the question, you should answer it freely. The clerk of the court will now swear you for the jury examination.

INSTRUCTION NO. 2

Your duties are to determine the facts, to apply the law set forth in my instructions to those facts, and in this way to decide the case. In so doing, you must follow my instructions regardless of your own opinion of what the law is or should be, or what either side may state the law to be. You must consider them as a whole, not picking out one and disregarding others. The order in which the instructions are given has no significance as to their relative importance. The law requires that your decision be made solely upon the evidence before you. Neither sympathy nor prejudice should influence you in your deliberations. Faithful performance by you of these duties is vital to the administration of justice.

In determining the facts, you may consider only the evidence admitted in this trial. This evidence consists of the testimony of the witnesses, the exhibits offered and received, and any stipulated or admitted facts. The production of evidence in court is governed by rules of law. At times during the trial, an objection may be made to a question asked a witness, or to a witness' answer, or to an exhibit. This simply means that I am being asked to decide a particular rule of law. Arguments on the admissibility of evidence are designed to aid the Court and are not to be considered by you nor affect your deliberations. If I sustain an objection to a question or to an exhibit, the

witness may not answer the question or the exhibit may not be considered. Do not attempt to guess what the answer might have been or what the exhibit might have shown. Similarly, if I tell you not to consider a particular statement or exhibit you should put it out of your mind, and not refer to it or rely on it in your later deliberations.

During the trial I may have to talk with the parties about the rules of law which should apply in this case. Sometimes we will talk here at the bench. At other times I will excuse you from the courtroom so that you can be comfortable while we work out any problems. You are not to speculate about any such discussions. They are necessary from time to time and help the trial run more smoothly.

Some of you have probably heard the terms "circumstantial evidence," "direct evidence" and "hearsay evidence." Do not be concerned with these terms. You are to consider all the evidence admitted in this trial.

However, the law does not require you to believe all the evidence. As the sole judges of the facts, you must determine what evidence you believe and what weight you attach to it.

There is no magical formula by which one may evaluate testimony. You bring with you to this courtroom all of the experience and background of your lives. In your everyday affairs you determine for yourselves whom you

believe, what you believe, and how much weight you attach to what you are told. The same considerations that you use in your everyday dealings in making these decisions are the considerations which you should apply in your deliberations.

In deciding what you believe, do not make your decision simply because more witnesses may have testified one way than the other. Your role is to think about the testimony of each witness you heard and decide how much you believe of what the witness had to say.

A witness who has special knowledge in a particular matter may give an opinion on that matter. In determining the weight to be given such opinion, you should consider the qualifications and credibility of the witness and the reasons given for the opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.

INSTRUCTION NO. 3

There are certain things you must not do during this trial:

1. You must not associate in any way with the parties, any of the attorneys or their employees, or any of the witnesses.

2 You must not discuss the case with anyone, or permit anyone to discuss the case with you. If anyone attempts to discuss the case with you, or to influence your decision in the case, you must report it to me promptly.

3. You must not discuss the case with other jurors until you retire to the jury room to deliberate at the close of the entire case.

4. You must not make up your mind until you have heard all of the testimony and have received my instructions as to the law that applies to the case.

5. You must not contact anyone in an attempt to discuss or gain a greater understanding of the case.

6. Do not make any investigation of this case or inquiry outside of the courtroom on your own. Do not go any place mentioned in the testimony without an explicit order from me to do so. You must not consult any books, dictionaries, encyclopedias, the internet or any other source of information unless I specifically authorize you to do so.

7. Do not read about the case in the newspapers. Do not listen to radio or television broadcasts about the trial. You must base your verdict solely on what is presented in court and not upon any newspaper, radio, television or other account of what may have happened.

INSTRUCTION NO. 4

During your deliberations, you will be entitled to have with you my instructions concerning the law that applies to this case, the exhibits that have been admitted into evidence and any notes taken by you in the course of the trial proceedings.

If you take notes during the trial, be careful that your attention is not thereby diverted from the witness or his testimony; and you must keep your notes to yourself and not show them to other persons or jurors until the jury deliberations at the end of the trial.

INSTRUCTION NO. 5

Any statement by me identifying a claim of a party is not evidence in this case. I have advised you of the claims of the parties merely to acquaint you with the issues decided.

INSTRUCTION NO. 6

Any party who asserts that certain facts existed or exist has the burden of proving those facts. When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

INSTRUCTION NO. 7

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.

INSTRUCTION NO. 8

Plaintiffs claim that they have an implied easement over Defendants' property based upon prior use. In order to establish an implied easement by prior use, Plaintiffs must prove the following three elements:

(1) Unity of title or ownership and subsequent separation by grant of the dominant estate;

(2) Apparent continuous use long enough before conveyance of the dominant estate to show that the use was intended to be permanent; and

(3) That the easement is reasonably necessary to the proper enjoyment of the dominant estate.

INSTRUCTION NO. 9

The land that benefits from the easement is the dominant estate. The land which is burdened by the easement is the servient estate. The Brattons are the owners of the dominant estate. The Scotts are the owners of the servient estate.

INSTRUCTION NO. 10

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. The owners or constructors have 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. 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.

INSTRUCTION NO. 11

The right of an easement holder may not be enlarged and may not encompass more than is necessary to fulfill the easement.

INSTRUCTION NO. 12

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you; and then you will retire to the jury room for your deliberations.

The attitude and conduct of jurors at the beginning of their deliberations are important. It is rarely productive for a juror, at the outset, to make an emphatic expression of his or her opinion on the case or to state how he or she intends to vote. When one does that at the beginning, his or her sense of pride may be aroused; and he or she may hesitate to change his or her position, even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views; and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

INSTRUCTION NO. 13

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

A verdict form will be submitted to you with necessary instructions. A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon verdict, you should fill out the verdict form and have it signed. If your decision is unanimous, your foreman alone will sign the verdict; but if nine or more but less than the entire jury agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdict form, you will notify the bailiff, who will then return you into open court.

INSTRUCTION NO. 14

During your deliberation, you are never to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

INSTRUCTION NO. 15

In this case, you will be given a verdict form with a question. The verdict form consists of a question that you are to answer. I will read the verdict form to you now.

We, the Jury, answer the following question:

Question No. 1: Have the Plaintiffs met their burden of proof by establishing that they have a 12 foot wide implied easement?

Answer to Question No. 1:

Yes _____ No_____

As soon as nine or more of you have agreed on the answer, sign and date this Verdict Form and notify the Bailiff. If your answer is unanimous, your foreman alone shall sign and date this Verdict Form; but if nine or more but less than the entire jury agree, then those so agreeing shall sign this Verdict Form.

Dated 9/4/08

Foreman

Distr Ct Judge

INSTRUCTION NO. 16

Good morning, ladies and gentlemen of the jury. We are now taking up Day 3 of Bratton v Scott, Canyon County case number CV-2007-6821. Yesterday you jurors returned a verdict finding the Brattons do not have an implied easement of 12 feet. I will now acquaint you with the 2nd phase of the trial. As previously advised, the Brattons have a 3 foot irrigation easement across the Scotts' property. This easement allows the Brattons to access, use, and maintain a ditch located on the Scotts' property for irrigation purposes.

The following are the general allegations and defenses in this case. The Brattons allege that in 2007, the Scotts interfered with their easement rights, by destroying and moving the ditch and interfering with their right of privacy in connection with the easement. The Scotts allege that they have continually allowed Plaintiffs to access and maintain the easement. The Scotts deny that they have destroyed or moved the ditch or interfered with the Brattons' privacy. The Scotts further allege that the Brattons have suffered no harm as a result of any actions by the Scotts.

At this time we will proceed with opening statements of counsel.

INSTRUCTION NO. 17

Any party who asserts that certain facts existed or exist has the burden of proving those facts. When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

INSTRUCTION NO. 18

It was the duty of all parties, before and at the time of the occurrence, to use ordinary care for the safety of themselves and each other, and for their own and each other's property.

INSTRUCTION NO. 19

The plaintiffs have the burden of proof on each of the following propositions:

1. The defendants were negligent.

2. The plaintiffs were injured.

3. The negligence of the defendants was a proximate cause of the injury to the plaintiffs.

You will be asked the following question on the jury verdict form: Were the defendants negligent, and if so, was the negligence a proximate cause of the injuries to the plaintiffs?

INSTRUCTION NO. 20

When I use the word "negligence" in these instructions, I mean the failure to use ordinary care in the management of one's property or 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 failure to do something which a reasonably careful person would do, or 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.

INSTRUCTION NO. 21

When I use the expression "proximate cause," I mean a cause that, in natural or probable sequence, produced the injury, the loss or the damage complained of. It need not be the only cause. It is sufficient if it is a substantial factor in bringing about the injury, loss or damage. It is not a proximate cause if the injury, loss or damage likely would have occurred anyway.

INSTRUCTION NO. 22

A person who has been damaged must exercise ordinary care to minimize the damage and prevent further damage. Any loss that results from a failure to exercise such care cannot be recovered.

INSTRUCTION NO. 23

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. The owners or constructors have 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. 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.

INSTRUCTION NO 24

Idaho law provides, where any ditch, canal, lateral or drain or buried irrigation conduit has heretofore been, or may hereafter be, constructed across or beneath the lands of another, the person or persons owning or controlling said land shall have the right at their own expense to change said ditch, canal, lateral or drain or buried irrigation conduit to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such ditch, canal, lateral or drain or buried irrigation conduit. Any increased operation and maintenance shall be the responsibility of the landowner who makes the change.

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.

INSTRUCTION NO 25

A minor increase in the length of a ditch or other conditions which negligibly increase its maintenance are insufficient injuries by themselves to constitute a violation of the statute.

INSTRUCTION NO. 26

To prevail on a claim of invasion of privacy, the Brattons must prove each of the following propositions:

1. The Defendants intentionally intruded, physically or otherwise, upon the solitude or seclusion of the Brattons or into their private concerns or affairs; and

2. The intrusion was into a matter which the Brattons had a right to keep private; and

3. The methods used by the defendants in the invasion would be objectionable to a reasonable person.

Because the right of privacy is measured by the reasonable person standard, the right of privacy is relative to the customs of the time and place, and is determined by the norm of the ordinary person. Thus, in order to constitute an invasion of privacy, an act must be of such a nature as a reasonable person can see that it might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intellect, situated in like circumstances as the plaintiffs.

If you find from the consideration of all the evidence that each of these propositions has been proved, then your verdict on invasion of privacy should be for the Plaintiffs. But, if you find from your consideration of all

the evidence that any of these propositions has not been proved, then your verdict should be for the Defendants.

INSTRUCTION NO 27

Certain evidence was presented to you by deposition. A deposition is testimony taken under oath before the trial and preserved in writing and video tape. That evidence is entitled to the same consideration you would give had the witness testified from the witness stand.

You received this testimony in open court. Although there is a record of the testimony you heard, that record will not be available to you during your deliberations.

INSTRUCTION NO. 28

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. Quasi-estoppel applies to plaintiffs' claims if you find that

(1) plaintiffs took a different position than their original position; and

(2) either of the following:

(a) the plaintiffs gained an advantage; or

(b) caused a disadvantage to defendants; or

(c) it would be unconscionable or unfair to permit the plaintiffs to maintain an inconsistent position from one that they have already derived a benefit from or acquiesced in.

INSTRUCTION NO. 29

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether some of the instructions apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.

INSTRUCTION NO. 30

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you; and then you will retire to the jury room for your deliberations.

The attitude and conduct of jurors at the beginning of their deliberations are important. It is rarely productive for a juror, at the outset, to make an emphatic expression of his or her opinion on the case or to state how he or she intends to vote. When one does that at the beginning, his or her sense of pride may be aroused; and he or she may hesitate to change his or her position, even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views; and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

INSTRUCTION NO. 31

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

A verdict form will be submitted to you with necessary instructions. A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon verdict, you should fill out the verdict form and have it signed. If your decision is unanimous, your foreman alone will sign the verdict; but if nine or more but less than the entire jury agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdict form, you will notify the bailiff, who will then return you into open court.

INSTRUCTION NO. 32

During your deliberation, you are never to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

INSTRUCTION NO. 39

In this case, you will be given a special verdict form with questions. The verdict form consists of questions that you are to answer. I will read the special verdict form to you now.

We, the Jury, answer the questions submitted to us in the special verdict as follows:

Question No. 1: Did the Scotts negligently interfere with the Brattons' easement?

Answer to Question No. 1:

Yes _____ No_____

If you answered Yes to Question No. 1, proceed to answer Question No. 2. If you answered No to Question No. 1, skip Questions 2, 3, 4, 5, and 6 and proceed to Question No. 7.

Question No. 2: Was the Scotts' negligence a proximate cause of harm to the Brattons?

Answer to Question No. 2:

Yes _____ No_____

If you answered Yes to Question No. 2, proceed to answer Question No. 3. If you answered No, proceed to Question No. 7.

Question No. 3: Did the Scotts change the irrigation ditch?

Answer to Question No. 3:

Yes _____ No_____

If you answered Yes to Question No. 3, proceed to answer Question No. 4. If you answered No to Question No. 3, skip Questions 4 and 5 and proceed to Question No. 6.

Question No. 4: Did the Scotts have written permission to change the irrigation ditch?

Answer to Question No. 4:

Yes _____ No_____

If you answered Question No. 4, proceed to answer Question No. 5

Question No. 5: Did changing the irrigation ditch result in a diminished flow of water to the Brattons' property?

Answer to Question No. 5:

Yes _____ No_____

Proceed to answer Question No. 6.

Question No. 6: Did the Scotts interefere with the Brattons' easement by threat of harm?

Answer to Question No. 6:

Yes _____ No_____

Please proceed to answer Question No. 7.

Question No. 7: Did the Scotts interfere with the Brattons' right to privacy?

Answer to Question No. 7

Yes _____ No_____

If you answered Yes to Question No. 7, please proceed to answer Question No. 8. If you answered No to Question No. 7, please do not answer Question No. 8 and sign and date this Special Verdict Form.

Question No. 8: Was the Scotts' interference with the Brattons' right to privacy a proximate cause of harm to the Brattons?

Answer to Question No. 8

Yes _____ No_____

As soon as nine or more of you have agreed on the answers to the questions, sign and date this Verdict Form and notify the Bailiff. If your answer is unanimous, your foreman alone shall sign and date this Verdict Form; but if nine or more but less than the entire jury agree, then those so agreeing shall sign this Verdict Form.

Dated: 9/11/08

District Judge

INSTRUCTION NO. 34

Good afternoon, ladies and gentlemen of the jury. We are now taking up Day 7 of Bratton v Scott, Canyon County case number CV-2007-6821. Last week, you jurors concluded that there was no invasion of the Brattons' right to privacy. You further found that the Scotts did not interfere with the Brattons' easement by any threat of harm. You did find, through a special verdict, that the Scotts changed the irrigation ditch utilized by the Brattons. You further found that changing the ditch did not result in a diminished flow of irrigation water to the Brattons' property. You concluded, however, that no written permission was given to the Scotts by the Brattons to change the ditch.

I will now acquaint you with the third phase of the trial. As previously advised, the Brattons have a 3 foot wide irrigation easement across the Scotts' property. This easement allows the Brattons to access, use, and maintain a ditch located on the Scotts' property for irrigation purposes. Phase 3 of the trial will consist of testimony and evidence on the issue of damages. By giving you instructions on the subject of damages, I do not express any opinion as to whether the plaintiffs are entitled to damages.

At this time we will proceed with opening statements of counsel.

INSTRUCTION NO. 35

Any party who asserts that certain facts existed or exist has the burden of proving those facts. When I say that a party has the burden of proof on a proposition, or use the expression "if you find" or "if you decide," I mean you must be persuaded that the proposition is more probably true than not true.

INSTRUCTION NO. 36

To reacquaint you with the verdicts from the previous phases of this trial, I am attaching copies of the verdict forms. I have attached the Verdict Form from the First Phase and the Special Verdict Form from the Second Phase.

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-2007-6821-C

VERDICT FORM

We, the Jury, answer the following question:

Question No. 1: Have the Plaintiffs met their burden of proof by establishing that they have a 12 foot wide implied easement?

Answer to Question No. 1:

Yes _____ No X

As soon as nine or more of you have agreed on the answer, sign and date this Verdict Form and notify the Bailiff. If your answer is unanimous, your foreman alone shall sign and date this Verdict Form; but if nine or more but less than the entire jury agree, then those so agreeing shall sign this Verdict Form.

DATED :

Foreperson

Tiffany Caraboy 555

Connie D. Bergato 548

Chris J. Eddy 559

Debra Cash 557

Christa LaVerne 534

John A Watson 544

572

540

Mark Maddox 538

8/4/08

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,	CASE NO. CV-2007-6821-C
-vs-	**SPECIAL VERDICT FORM**
JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife), Defendants.	

We, the Jury, answer the questions submitted to us in the special verdict as follows:

Question No. 1: Did the Scotts negligently interfere with the Brattons' easement?

Answer to Question No. 1:

Yes X No_____

If you answered Yes to Question No. 1, proceed to answer Question No. 2. If you answered No to Question No. 1, skip Questions 2, 3, 4, 5, and 6 and proceed to Question No. 7.

Question No. 2: Was the Scotts' negligence a proximate cause of harm to the Brattons?

Answer to Question No. 2:

Yes X No_____

If you answered Yes to Question No. 2, proceed to answer Question No. 3. If you answered No, proceed to Question No. 7.

Question No. 3: Did the Scotts change the irrigation ditch?

Answer to Question No. 3:

Yes X No_____

If you answered Yes to Question No. 3, proceed to answer Question No. 4. If you answered No to Question No. 3, skip Questions 4 and 5 and proceed to Question No. 6.

Question No. 4: Did the Scotts have written permission to change the irrigation ditch?

Answer to Question No. 4:

Yes _____ No X

If you answered Question No. 4, proceed to answer Question No. 5.

Question No. 5: Did changing the irrigation ditch result in a diminished flow of water to the Brattons' property?

Answer to Question No. 5:

Yes _____ No X

Proceed to answer Question No. 6.

Question No. 6: Did the Scotts interfere with the Brattons' easement by threat of harm?

Answer to Question No. 6:

Yes _____ No X

Please proceed to answer Question No. 7.

Question No. 7: Did the Scotts interfere with the Brattons' right to privacy?

Answer to Question No. 7

Yes _____ No X

If you answered Yes to Question No. 7, please proceed to answer Question No. 8. If you answered No to Question No. 7, please do not answer Question No. 8 and sign and date this Special Verdict Form.

Question No. 8: Was the Scotts' interference with the Brattons' right to privacy a proximate cause of harm to the Brattons?

Answer to Question No. 8

Yes _____ No_____

As soon as nine or more of you have agreed on the answers to the questions, sign and date this Verdict Form and notify the Bailiff. If your answer is unanimous, your foreman alone shall sign and date this Verdict Form; but if nine or more but less than the entire jury agree, then those so agreeing shall sign this Verdict Form. Please sign your name and list your juror number on the lines provided below.

DATED :

[redacted]538 Mark Mallip 9/11/08
Foreperson

INSTRUCTION NO. 37

If the jury determines the plaintiffs are entitled to recover damages from the defendants, then the jury must determine the amount of money that will reasonably and fairly compensate the plaintiffs for any damages proved to be proximately caused by the defendants' negligence.

The damages to plaintiffs' property are the reasonable cost of necessary repairs to restore the ditch to the condition it was in prior to the change by the defendants.

INSTRUCTION NO. 38

I have outlined for you the rules of law applicable to this case and have told you of some of the matters which you may consider in weighing the evidence to determine the facts. In a few minutes counsel will present their closing remarks to you; and then you will retire to the jury room for your deliberations.

The attitude and conduct of jurors at the beginning of their deliberations are important. It is rarely productive for a juror, at the outset, to make an emphatic expression of his or her opinion on the case or to state how he or she intends to vote. When one does that at the beginning, his or her sense of pride may be aroused; and he or she may hesitate to change his or her position, even if shown that it is wrong. Remember that you are not partisans or advocates, but are judges. For you, as for me, there can be no triumph except in the ascertainment and declaration of the truth.

Consult with one another. Consider each other's views; and deliberate with the objective of reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself; but you should do so only after a discussion and consideration of the case with your fellow jurors.

INSTRUCTION NO. 39

On retiring to the jury room, select one of your number as a foreman, who will preside over your deliberations.

A verdict form will be submitted to you with necessary instructions. A verdict may be reached by three-fourths of your number, or nine of you. As soon as nine or more of you shall have agreed upon verdict, you should fill out the verdict form and have it signed. If your decision is unanimous, your foreman alone will sign the verdict; but if nine or more but less than the entire jury agree, then those so agreeing will sign the verdict.

As soon as you have completed and signed the verdict form, you will notify the bailiff, who will then return you into open court.

INSTRUCTION NO. 40

During your deliberation, you are never to reveal to anyone how the jury stands on any of the questions before you, numerically or otherwise, unless requested to do so by me.

INSTRUCTION NO. 41

In this phase, you will be given a damages verdict form with a question. The verdict form consists of a question that you are to answer by filling in the blanks of both parts. I will read the damages verdict form to you now.

We, the Jury, answer the following question:

Question No. 1: What is the total amount of damage sustained by the plaintiffs as a result of the change in the irrigation ditch that was made by the Scotts?

Answer to Question No. 1: We assess plaintiffs' damages as follows:

1. Money damages, if any, for changing the irrigation ditch without written permission:

   $_____

2. Money damages, if any, to restore the irrigation ditch to its original state:

   $_____

As soon as nine or more of you have agreed on the answer, sign and date this Verdict Form and notify the Bailiff. If your answer is unanimous,

your foreman alone shall sign and date this Verdict Form; but if nine or more but less than the entire jury agree, then those so agreeing shall sign this Verdict Form. Please sign your name and list your juror number on the lines provided below.

INSTRUCTION NO. 42

In deciding this case, you may not delegate any of your decisions to another or decide any question by chance, such as by the flip of a coin or drawing of straws. If money damages are to be awarded, you may not agree in advance to average the sum of each individual juror's estimate as the method of determining the amount of the damage award.

Dated: 9/16/08

District Judge

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,	CASE NO. CV-2007-6821-C
-vs-	**DAMAGES VERDICT FORM**
JOHN R. SCOTT and JACKIE G. SCOTT (husband and wife), Defendants.	

We, the Jury, answer the following question:

Question No. 1: What is the total amount of damage sustained by the plaintiffs as a result of the change in the irrigation ditch that was made by the Scotts?

Answer to Question No. 1: We assess plaintiffs' damages as follows:

1. Money damages, if any, for changing the irrigation ditch without written permission:

   $ [redacted] 4250

2. Money damages, if any, to restore the irrigation ditch to its original state:

   $ 2250

As soon as nine or more of you have agreed on the answer, sign and date this Verdict Form and notify the Bailiff. If your answer is unanimous, your foreman alone shall sign and date this Verdict Form; but if nine or more but less than the entire jury agree, then those so agreeing shall sign this Verdict Form. Please sign your name and list your juror number on the lines provided below.

DATED :

Foreperson

Tiffany Caughey 555

Gregg Jones 586

Jamie McGhee 539

Debra Cash 557

Chris Cody 559

Steven C. Bell 549

Jon A Gentson 544

Pat Mecom 540

Mark Maddox 538

9/16/08

ORIGINAL

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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

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants John R. Scott and Jackie G. Scott ("Defendants"), by and through their attorneys of record, Perkins Coie LLP, hereby move the Court, pursuant to Rule 50(b) of the Idaho Rules of Civil Procedure, to enter Judgment in the Defendants' favor notwithstanding the verdict, on the grounds that the jury's verdict rendered on September 16, 2008, is not supported by the evidence.

Defendants intend to file a Memorandum in support of this Motion within fourteen days pursuant to Rule 7(b)(3) of the Idaho Rules of Civil Procedure.

ORAL ARGUMENT IS REQUESTED.

DATED: September 18, 2008.

PERKINS COIE LLP

By _____
Shelly H. Cozakos, Of the Firm
Cynthia L. Yee-Wallace, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 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
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	X
Facsimile	____
Overnight Mail	____

_____

Shelly H. Cozakos, Bar No. 5374
SCozakos@perkinscoie.com
Cynthia L. Yee-Wallace, Bar No. 6793
CYeeWallace@perkinscoie.com
PERKINS COIE LLP
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Telephone: 208.343.3434
Facsimile: 208.343.3232

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' MOTION FOR DIRECTED VERDICT AND IN THE ALTERNATIVE IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

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 Defendants' Motion for Directed Verdict and in the alternative in support of Defendants' Motion for Judgment Notwithstanding the Verdict, both of which are pending before the Court.

I. BACKGROUND

At the close of Plaintiffs' evidence during each of the three phases of trial in this matter, Defendants moved for a directed verdict based upon Plaintiffs' failure to set forth sufficient

evidence to prove their cases of action. These motions were taken under advisement by the Court.

Following Phase III of the trial on damages, the jury returned a verdict in favor of the Plaintiffs, awarding them a combined total of $6,500.00. The jury awarded these damages despite the fact that Plaintiffs presented no evidence regarding the amount of damages that they has suffered.

Because the jury's verdict awarding an amount of damages is unsupported by the evidence, Defendants now request that the Court grant their Motion for Judgment Notwithstanding the Verdict, setting aside the jury's award of damages and entering judgment in their favor.

II. LEGAL STANDARD

Idaho Rule of Civil Procedure 50(a) governs motions for directed verdict and states that the motion may be made at the close of the evidence, and that an order of the court granting a motion for directed verdict is effective without any assent of the jury. *See* I.R.C.P. 50(a).

Motions for judgment notwithstanding the verdict are governed by Idaho Rule of Civil Procedure 50(b), which Rule gives the court the power to either order a new trial or direct the entry of judgment. I.R.C.P. 50(b). A motion for judgment notwithstanding the verdict should be granted where there is not substantial or competent evidence to support the verdict of the jury. *See Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 735, 518 P.2d 1194, 1195 (Idaho 1974). In this

case, the jury's verdict awarding damages in the amount of $6,500.00 to Plaintiffs is not supported by substantial or competent evidence and thus, Defendants' motion should be granted.

III. ARGUMENT

A. Defendants Are Entitled To A Directed Verdict Or JNOV On The Basis That Plaintiffs Failed To Meet Their Burden Of Proof of Damages.

1. Damages Must Be Proven To A Reasonable Certainty.

Idaho Courts have held that a person asserting a claim for damages has the burden of proving not only a right to damages, but also the *amount* of damages. *Martsch v. Nelson*, 109 Idaho 95, 100, 705 P.2d 1050, 1055 (Idaho Ct. App. 1985) (emphasis added); citing *Beare v. Stowe's Builders Supply, Inc.*, 104 Idaho 317, 321, 658 P.2d 988, 992 (Idaho Ct. App. 1983). Further, the amount of damages must be supported by substantial evidence and not based upon mere conjecture. *Id.*; citing *Alper v. Stillings*, 389 P.2d 239 (Nev. 1964). The evidence must be of sufficient quality and probative value that the trier of fact could reasonably conclude that an award of such amount was proper. *Id.* (citation omitted).

Where the only proof presented on the amount of damages requires that the trier of fact make a "blind guess" as to the amount of damages or loss involved, an award of damages is not proper. *See Beare*, 658 P.2d at 992; citing *Call v. Coiner*, 43 Idaho 320, 251 P. 617 (Idaho 1926); *see also e.g. Powell v. Sellers*, 130 Idaho 122, 937 P.2d 434 (Idaho Ct. App. 1997) (upholding the award of damages where the plaintiffs presented evidence of bids reflecting the amount to repair the ditch and the amount and value of trees that had been damaged). Similarly,

the amount of damages must be established to a reasonable degree of certainty. *See Sells v. Robinson*, 141 Idaho 767, 774, 772 P.3d 99, 106 (Idaho 2005).

2. Defendants Completely Failed To Meet Their Burden Of Proof At Trial Regarding Damages For Moving The Ditch.

The Jury awarded the Brattons the sum of $2,250.00 in damages to restore the ditch to its original state. Under well settled Idaho law, this award should be set aside. During the discovery phase of this case, Plaintiffs disclosed that their damages were for the cost of installing an underground ditch; re-seeding their pasture; diminution in value to their property; and intentional infliction of emotional distress. At no time during discovery did Plaintiffs present as a claim for damages the costs of "fixing" the ditch, or moving it back to the location they claimed it had been prior to the actions of the Scotts. While Plaintiffs referenced that this could be a possible remedy, they simply presented no evidence during discovery as to what it would cost to relocate the ditch, or in essence to repair the alleged injury to their easement.

However, following the second phase of the trial, the Jury found no liability on the part of the Scotts with respect to the Brattons' claim for breach of privacy and interference by threat of harm. The Jury found that the Scotts were negligent, but the negligence did not cause an impediment to the water flow in the ditch. Thus, the Brattons could not recover the items of damages outlined above, and were left with recovery of damages for repair of their property, or more specifically moving the ditch back to the location they claimed it was in. Because the Brattons had not disclosed in discovery what this would cost; nor hired an expert to opine on these costs or disclosed a lay witness to testify regarding the actual cost of repairing the alleged

injury to their property, they were precluded by the Court from presenting such evidence during the damages phase of the trial. Nonetheless, the Brattons proceeded with the damages phase of the trial and presented witnesses to testify that the ditch needed to be relocated, where the new location should be; and some physical attributes of the proposed new ditch.

However, the Brattons presented *no evidence* regarding what this would cost. The only way the Jury would be able to award a dollar amount to the Brattons would be through "guessing" or "speculating" what this might cost. This is improper. *See Beare*, 658 P.2d at 992. The Jury's verdict therefore cannot stand and judgment should be entered in favor of the Scotts.

3. Damages For Failure To Have Written Permission Should Be Set Aside.

The Jury also placed an arbitrary number of $4,250.00 in damages for the Scotts failure to obtain written permission prior to the alleged move to the ditch. This award is not supported by the law. This section was included in the Special Verdict Form by the Court pursuant to section 42-1207 of the Idaho Code, which requires written permission of ditch owners prior to moving or changing the ditch. Yet under *Allen v. Burggraff Construction Co.*, 106 Idaho 451, 452, 680 P.2d 873, 874 (1984), before recovery can be had based upon negligence or violation of section 42-1207, the landowners are "required to show that relocation of the ditch actually caused a diminished flow of water to their properties." The Court went on to state that "[p]roof of causation is essential to invoke the statute." *Id.* Thus, unless the Brattons were able to show an impeded water flow, they cannot establish *causation* as a matter of law. If unable to establish causation in a negligence action, or action under section 42-1207, no damages can be awarded – whether those damages are compensatory or nominal damages. Moreover, in *Weaver v. Stafford*,

134 Idaho 691, 700, 8 P.3d 1234, 1243 (2000), the Idaho Supreme Court held that the plaintiff could not recover any damages under section 42-1207 of the Idaho Code because he failed to introduce any evidence of the historic flow rate of water to his property before and after the changes to the lateral ditch. The Court noted that section 42-1207 prohibits altering an irrigation ditch "in a manner which impedes the flow of water." *Id.*

The Court indicated during previous argument that it would be proper for the Jury to award nominal damages under section 42-1207 in the absence of actual damages, if the Scotts failed to obtain written permission to change the ditch. The Court indicated that changes to the portion of section 42-1207 regarding obtaining written permission had been changed by the Legislature in 2002, and so *Allen* and *Weaver, supra,* did not apply. However, upon a review of the relevant legislative history of section 42-1207, the requirement of written permission was present in the statute at the time the *Allen* and *Weaver* decisions were issued. In the year 2002, the Legislature changed the sentence regarding written permission, however the change only related to the written permission of the irrigation entity versus the owner of the ditch. Thus, at the time the *Allen* and *Weaver* opinions were issued, section 42-1207 read as follows:

> In the event that the ditch, lateral, buried irrigation conduit, or canal is owned by an irrigation district, canal company, ditch association, or other irrigation entity, the written permission of the entity must first be obtained before a ditch, lateral, buried irrigation conduit, or canal is changed or placed in buried pipe by the landowner.

See, House Bill No. 566, attached hereto as Exhibit A. Following an amendment effective July 1, 2002, the relevant portion of section 42-1207 reads as follows:

> 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.

Id.

The Statement of Purpose attached to the House Bill states that is "to extend the current prohibition on interference with ditches and canals to laterals and drains." The Statement of Purpose goes on to state that it is to "provide for changes to ditches, canals, laterals and drains under certain circumstances." *Id.* The changes to the statute in 2002 therefore did nothing more than clarify who written permission must be obtained from. The stated purpose of the changes had nothing to do with providing additional burdens upon landowners who sought to change the location of, or bury, an irrigation ditch provided that there is no impediment to flow of water. The written permission requirement was in place when *Allen*, *Weaver*, and *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1994) were issued.

Thus, as a matter of law the Brattons could not satisfy the causation element of their negligence action unless they could show impeded water flow. Not only did they fail to do so, the Jury specifically found that the water flow had not been impeded. Thus, the damages award should be set aside and judgment entered in favor of the Scotts.

IV. CONCLUSION

Based on the foregoing, Defendants hereby request that the Court grant their Motion for Directed Verdict or in the alternative, that the Court grant Defendants' Motion for Judgment Notwithstanding the Verdict.

DATED: October 2, 2008.

PERKINS COIE LLP

By _____
Shelly H. Cozakos, Of the Firm
Cynthia L. Yee-Wallace, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on September 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
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	X
Overnight Mail	____

_____

EXHIBIT A

HOUSE BILL NO. 566

View Daily Data Tracking History
View Bill Text
View Amendment
View Engrossed Bill (Original Bill with Amendment(s) Incorporated)
View Statement of Purpose / Fiscal Impact

Text to be added within a bill has been marked with Bold and Underline. Text to be removed has been marked with Strikethrough and Italic. How these codes are actually displayed will vary based on the browser software you are using.
This sentence is marked with bold and underline to show added text.
~~*This sentence is marked with strikethrough and italic, indicating text to be removed.*~~

Daily Data Tracking History

H0566aaS.....by RESOURCES AND CONSERVATION
CANALS - LATERALS - DRAINS - Amends existing law relating to control of ditches to update terminology to include references to ditches, canals, laterals and drains; to prohibit interference, injuries or changes; and to permit burial of a conduit.

02/06 House intro - 1st rdg - to printing
02/07 Rpt prt - to Res/Con
02/12 Rpt out - rec d/p - to 2nd rdg
02/13 2nd rdg - to 3rd rdg
02/15 3rd rdg - PASSED - 61-0-9
AYES -- Aikele, Barraclough, Barrett, Bell, Bieter, Black, Block, Boe, Bolz, Bradford, Bruneel, Callister, Campbell, Clark, Collins, Cuddy, Deal, Denney, Ellis, Ellsworth, Eskridge, Field(13), Field(20), Gagner, Hadley, Hammond, Harwood, Henbest, Higgins, Hornbeck, Jaquet, Jones, Kellogg, Kunz, Langford, Loertscher, Mader, Martinez, McKague, Meyer, Montgomery, Mortensen, Moyle, Pearce, Pischner, Pomeroy, Raybould, Ridinger, Roberts, Robison, Sali, Schaefer, Shepherd, Smith(33), Smylie, Stevenson, Stone, Tilman, Trail, Wheeler, Young
NAYS -- None
Absent and excused -- Bedke, Crow, Gould, Kendell, Lake, Sellman, Smith(23), Wood, Mr. Speaker
Floor Sponsor - Campbell
Title apvd - to Senate
02/18 Senate intro - 1st rdg - to Res/Env
03/11 Rpt out - to 14th Ord
Rpt out amen - to 1st rdg as amen
03/12 1st rdg - to 2nd rdg as amen
03/13 2nd rdg - to 3rd rdg as amen
Rls susp - PASSED - 34-1-0
AYES -- Andreason, Boatright, Branch(Bartlett), Brandt, Bunderson, Burtenshaw, Cameron, Darrington, Davis, Deide, Dunklin, Frasure, Geddes, Goedde, Hawkins, Hill, Ipsen, Keough, King-Barrutia, Little, Lodge, Marley, Noh, Richardson, Risch, Sandy, Schroeder, Sims, Sorensen, Stegner, Stennett, Thorne, Wheeler, Williams
NAYS -- Ingram

Absent and excused -- None
Floor Sponsors - Burtenshaw & Stennett
Title apvd - to House
03/14 House concurred in Senate amens - to engros
03/15 Rpt engros - 1st rdg - to 2nd rdg as amen
Rls susp - PASSED - 66-0-4
AYES -- Aikele, Barraclough, Barrett, Bedke, Bell, Bieter, Black, Block, Boe, Bolz, Bradford, Bruneel, Callister, Campbell, Clark, Collins, Crow, Cuddy, Deal, Denney, Ellis, Ellsworth, Eskridge, Field(13), Field(20), Gould, Hadley, Harwood, Henbest, Higgins, Hornbeck, Jaquet, Jones, Kellogg, Kendell, Kunz, Lake, Langford, Loertscher, Mader, Martinez, McKague, Montgomery, Moyle, Pearce, Pischner, Pomeroy, Raybould, Ridinger, Roberts, Robison, Sali, Schaefer, Sellman, Shepherd, Smith(33), Smith(23), Smylie, Stevenson, Stone, Tilman, Trail, Wheeler, Wood, Young, Mr. Speaker
NAYS -- None
Absent and excused -- Gagner, Hammond, Meyer, Mortensen
Floor Sponsor - Campbell
Title apvd
To enrol - rpt enrol - Sp/Pres signed
03/15 To Governor
03/20 Governor signed
Session Law Chapter 115
Effective: 07/01/02

Bill Text

LEGISLATURE OF THE STATE OF IDAHO
Fifty-sixth Legislature Second Regular Session - 2002

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 566

BY RESOURCES AND CONSERVATION COMMITTEE

AN ACT

RELATING TO CONTROL OF DITCHES, CANALS, LATERALS AND DRAINS; AMENDING SECTIO 18-4301, IDAHO CODE, TO EXTEND PROHIBITION ON INTERFERENCE WITH DITCHE AND CANALS TO LATERALS AND DRAINS; AMENDING SECTION 18-4306, IDAHO CODE TO EXTEND PENALTIES FOR INJURIES TO CANALS, LATERALS AND DRAINS WHIC APPLY TO INJURIES TO DITCHES; AMENDING SECTION 18-4308, IDAHO CODE, T PROVIDE FOR CHANGE OR BURIAL OF CANALS, LATERALS, AND DRAINS; AND AMENDIN SECTION 42-1207, IDAHO CODE, TO PROVIDE FOR CHANGE OR BURIAL OF CANALS LATERALS AND DRAINS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 18-4301, Idaho Code, be, and the same is hereb amended to read as follows:

18-4301. INTERFERENCE WITH DITCHES, CANALS, **LATERALS, DRAINS** OR RESER VOIRS. Every person who shall, without authority of the owner or managin agent, and with intent to defraud, take water from any canal, ditch, **lateral drain,** flume or reservoir, used for the purpose of holding, **draining** or con veying water for manufacturing, agricultural, mining, or domestic uses, or wh

shall, without like authority, raise, lower, or otherwise disturb, any gate o other appurtenance thereof used for the control or measurement of water, o who shall empty or place, or cause to be emptied or placed, into any suc canal, ditch, **lateral, drain,** flume, or reservoir, any rubbish, filth, o obstruction to the free flow of water, is guilty of a misdemeanor.

SECTION 2. That Section 18-4306, Idaho Code, be, and the same is hereb amended to read as follows:

18-4306. INJURIES TO DITCHES, **CANALS, LATERALS, DRAINS** AND APPURTENANCES Any person or persons, who shall cut, break, damage, or in any way interfer with any ditch, canal, **lateral, drain,** headgate, ~~or~~ any other works in o appurtenant thereto, **or cut, break, damage or in any way interfere with th bank of any ditch, canal, lateral or drain,** the property of another person **irrigation district, drainage district, canal company,** corporation, or associ ation of persons, and whereby water is conducted to any place for beneficia use or purposes, and when said canal, headgate, ditch, **lateral, drain,** dam, o appurtenance is being used or is to be used for said conduct **or drainage** o water, shall be guilty of a misdemeanor.

SECTION 3. That Section 18-4308, Idaho Code, be, and the same is hereb amended to read as follows:

18-4308. CHANGE OF ~~LATERAL~~ DITCH, **CANAL, LATERAL, DRAIN** OR BURIED IRRIGA TION CONDUIT. Where any ~~lateral~~ ditch, **canal, lateral or drain** has heretofor been, or may hereafter be, constructed across or beneath the lands of another

the person or persons owning or controlling the said land, shall have th right at his own expense to change said ~~lateral~~ ditch, **canal, lateral, drai** or buried irrigation conduit to any other part of said land, but such chang must be made in such a manner as not to impede the flow of the water therein or to otherwise injure any person or persons using or interested in such ~~lat eral~~ ditch, **canal, lateral, drain** or buried irrigation conduit. Any increase operation and maintenance shall be the responsibility of the landowner wh makes the change.

A landowner shall also have the right to bury the ditch, **canal, lateral o drain** of another in pipe on the landowner's property, provided that the pipe installation and backfill reasonably meet standard specifications for suc materials and construction, as set forth in the Idaho standards for publi works construction or other standards recognized by the city or county i which the burying is to be done. The right and responsibility for operatio and maintenance shall remain with the ~~ditch~~ owner **of the ditch, canal, latera or drain,** but the landowner shall be responsible for any increased operatio and maintenance costs, including rehabilitation and replacement, unless other wise agreed in writing with the ~~ditch~~ owner.

~~*In the event that the ditch, lateral, buried irrigation conduit, or cana is owned by an organized irrigation district, canal company, ditch associa tion, or other irrigation entity, t*~~The written permission of the ~~entity~~ **owne of a ditch, canal, lateral, drain or buried irrigation conduit** must first b obtained before ~~*a ditch, lateral, buried irrigation conduit, or canal*~~ **it** i changed or placed in buried pipe by the landowner.

While ~~*a ditch*~~ **the** owner **of a ditch, canal, lateral, drain or buried irri gation conduit** shall have no right to relocate ~~*his ditch*~~ **it** on the propert of another without permission, a ditch, **canal, lateral or drain** owner shal have the right to place ~~*his ditch*~~ **it** in a buried conduit within the easemen or right-of-way on the property of another in accordance with standard speci fications for pipe, materials, installation and backfill, as set forth in th Idaho standards for public works construction or other standards recognized b

the city or county in which the burying is to be done, and so long as the pip and the construction is accomplished in a manner that the surface of th owner's property and the owner's use thereof is not disrupted and is restore to the condition of adjacent property as expeditiously as possible, but not t exceed five (5) days after the start of construction. A landowner shall hav the right to direct that the conduit be relocated to a different route tha the route of the ditch, **canal, lateral or drain,** provided that the landowne shall agree in writing to be responsible for any increased construction o future maintenance costs necessitated by said relocation. Maintenance of th buried conduit shall be the responsibility of the ~~ditch~~ **conduit** owner.

No more than five (5) days after the start of construction, a landowner o ditch owner who buries a ditch**, canal, lateral or drain** in pipe shall recor the location and specifications of the buried irrigation **or drainage** conduit including primary and secondary easements, in the county in which the buryin is done, and shall provide the irrigation **or drainage** entity that ~~supplie water to~~ **owns** the ditch, **canal, lateral, or drain,** with a copy of such loca tion and specifications and the construction plans utilized. The irrigation **o drainage** entity shall keep and maintain such records and have them availabl for the public.

Any person or persons who relocate or bury a ~~lateral~~ ditch**, canal, latera or drain** contrary to the provisions of this section shall be guilty of a mis demeanor.

SECTION 4. That Section 42-1207, Idaho Code, be, and the same is hereb

amended to read as follows:

42-1207. CHANGE OF ~~LATERAL~~ DITCH**, CANAL, LATERAL, DRAIN** OR BURIED IRRIGA TION CONDUIT. Where any ~~lateral~~ ditch**, canal, lateral or drain** or buried irri gation conduit has heretofore been, or may hereafter be, constructed across o beneath the lands of another, the person or persons owning or controlling sai land shall have the right at their own expense to change said ~~lateral~~ ditch **canal, lateral or drain** or buried irrigation conduit to any other part of sai land, but such change must be made in such a manner as not to impede the flo of the water therein, or to otherwise injure any person or persons using o interested in such ~~lateral~~ ditch**, canal, lateral or drain** or buried irrigatio conduit. Any increased operation and maintenance shall be the responsibilit of the landowner who makes the change.

A landowner shall also have the right to bury the ditch**, canal, lateral o drain** of another in pipe on the landowner's property, provided that the pipe installation and backfill reasonably meet standard specifications for suc materials and construction, as set forth in the Idaho standards for publi works construction or other standards recognized by the city or county i which the burying is to be done. The right and responsibility for operatio and maintenance shall remain with the ~~ditch~~ owner **of the ditch, canal, latera or drain,** but the landowner shall be responsible for any increased operatio and maintenance costs, including rehabilitation and replacement, unless other wise agreed in writing with the ~~ditch~~ owner.

~~In the event that the ditch, lateral, buried irrigation conduit, or cana is owned by an organized irrigation district, canal company, ditch associa tion, or other irrigation entity, t~~The written permission of the ~~entity~~ **owne of a ditch, canal, lateral, drain or buried irrigation conduit** must first b obtained before ~~a ditch, lateral, buried irrigation conduit, or canal~~ **it** i changed or placed in buried pipe by the landowner.

While ~~a ditch~~ **the** owner **of a ditch, canal, lateral, drain or buried irri gation conduit** shall have no right to relocate ~~his ditch~~ **it** on the property o another without permission, a ditch**, canal, lateral or drain** owner shall hav the right to place ~~his ditch~~ **it** in a buried conduit within the easement o

right-of-way on the property of another in accordance with standard specifications for pipe, materials, installation and backfill, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done, and so long as the pipe and the construction is accomplished in a manner that the surface of the owner's property and the owner's use thereof is not disrupted and is restored to the condition of adjacent property as expeditiously as possible, but not to exceed five (5) days after the start of construction. A landowner shall have the right to direct that the conduit be relocated to a different route than the route of the ditch, **canal, lateral or drain,** provided that the landowner shall agree in writing to be responsible for any increased construction or future maintenance costs necessitated by said relocation. Maintenance of the buried conduit shall be the responsibility of the ~~ditch~~ **conduit** owner.

No more than five (5) days after the start of construction, a landowner or ditch owner who buries a ditch**, canal, lateral, or drain** in pipe shall record the location and specifications of the buried irrigation **or drainage** conduit including primary and secondary easements, in the county in which the burying is done, and shall provide the irrigation **or drainage** entity that ~~supplies water to~~ **owns** the ditch, **canal, lateral or drain,** with a copy of such locations and specifications and the construction plans utilized. The irrigation **or drainage** entity shall keep and maintain such records and have them available for the public.

Amendment

LEGISLATURE OF THE STATE OF IDAHO
Fifty-sixth Legislature Second Regular Session - 2002

Moved by **Burtenshaw**

Seconded by **Stennett**

IN THE SENATE
SENATE AMENDMENT TO H.B. NO. 566

AMENDMENTS TO SECTION 2

On page 1 of the printed bill, in line 26, following "shall" insert "**willfully**"; in line 27, delete "~~or~~" and insert: "or"; and in line 28, following "thereto," delete the remainder of the line and in line 29, delete "**bank of any ditch, canal, lateral or drain,**".

Engrossed Bill (Original Bill with Amendment(s) Incorporated)

LEGISLATURE OF THE STATE OF IDAHO
Fifty-sixth Legislature Second Regular Session - 2002

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 566, As Amended in the Senate

BY RESOURCES AND CONSERVATION COMMITTEE

AN ACT

RELATING TO CONTROL OF DITCHES, CANALS, LATERALS AND DRAINS; AMENDING SECTIO 18-4301, IDAHO CODE, TO EXTEND PROHIBITION ON INTERFERENCE WITH DITCHE AND CANALS TO LATERALS AND DRAINS; AMENDING SECTION 18-4306, IDAHO CODE TO EXTEND PENALTIES FOR INJURIES TO CANALS, LATERALS AND DRAINS WHIC APPLY TO INJURIES TO DITCHES; AMENDING SECTION 18-4308, IDAHO CODE, T PROVIDE FOR CHANGE OR BURIAL OF CANALS, LATERALS, AND DRAINS; AND AMENDIN SECTION 42-1207, IDAHO CODE, TO PROVIDE FOR CHANGE OR BURIAL OF CANALS LATERALS AND DRAINS.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 18-4301, Idaho Code, be, and the same is hereb amended to read as follows:

18-4301. INTERFERENCE WITH DITCHES, CANALS, **LATERALS, DRAINS** OR RESER VOIRS. Every person who shall, without authority of the owner or managin agent, and with intent to defraud, take water from any canal, ditch, **lateral drain,** flume or reservoir, used for the purpose of holding, **draining** or con veying water for manufacturing, agricultural, mining, or domestic uses, or wh shall, without like authority, raise, lower, or otherwise disturb, any gate o other appurtenance thereof used for the control or measurement of water, o who shall empty or place, or cause to be emptied or placed, into any suc canal, ditch, **lateral, drain,** flume, or reservoir, any rubbish, filth, o obstruction to the free flow of water, is guilty of a misdemeanor.

SECTION 2. That Section 18-4306, Idaho Code, be, and the same is hereb amended to read as follows:

18-4306. INJURIES TO DITCHES, **CANALS, LATERALS, DRAINS** AND APPURTENANCES Any person or persons, who shall **willfully** cut, break, damage, or in any wa interfere with any ditch, canal, **lateral, drain,** headgate, or any other work in or appurtenant thereto, the property of another person, **irrigation dis trict, drainage district, canal company,** corporation, or association of per sons, and whereby water is conducted to any place for beneficial use or pur poses, and when said canal, headgate, ditch, **lateral, drain,** dam, or appurte nance is being used or is to be used for said conduct **or drainage** of water shall be guilty of a misdemeanor.

SECTION 3. That Section 18-4308, Idaho Code, be, and the same is hereb amended to read as follows:

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A landowner shall also have the right to bury the ditch, **canal, lateral o drain** of another in pipe on the landowner's property, provided that the pipe

installation and backfill reasonably meet standard specifications for suc materials and construction, as set forth in the Idaho standards for publi works construction or other standards recognized by the city or county i which the burying is to be done. The right and responsibility for operatio and maintenance shall remain with the ~~ditch~~ owner **of the ditch, canal, latera or drain**, but the landowner shall be responsible for any increased operatio and maintenance costs, including rehabilitation and replacement, unless other wise agreed in writing with the ~~ditch~~ owner.

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While ~~a ditch~~ **the** owner **of a ditch, canal, lateral, drain or buried irri gation conduit** shall have no right to relocate ~~his ditch~~ **it** on the propert of another without permission, a ditch**, canal, lateral or drain** owner shal have the right to place ~~his ditch~~ **it** in a buried conduit within the easemen or right-of-way on the property of another in accordance with standard speci fications for pipe, materials, installation and backfill, as set forth in th Idaho standards for public works construction or other standards recognized b the city or county in which the burying is to be done, and so long as the pip and the construction is accomplished in a manner that the surface of th owner's property and the owner's use thereof is not disrupted and is restore to the condition of adjacent property as expeditiously as possible, but not t exceed five (5) days after the start of construction. A landowner shall hav the right to direct that the conduit be relocated to a different route tha the route of the ditch, **canal, lateral or drain,** provided that the landowne shall agree in writing to be responsible for any increased construction o future maintenance costs necessitated by said relocation. Maintenance of th buried conduit shall be the responsibility of the ~~ditch~~ **conduit** owner.

No more than five (5) days after the start of construction, a landowner o ditch owner who buries a ditch**, canal, lateral or drain** in pipe shall recor the location and specifications of the buried irrigation **or drainage** conduit including primary and secondary easements, in the county in which the buryin is done, and shall provide the irrigation **or drainage** entity that ~~supplie water to~~ **owns** the ditch, **canal, lateral, or drain,** with a copy of such loca tion and specifications and the construction plans utilized. The irrigation **o drainage** entity shall keep and maintain such records and have them availabl for the public.

Any person or persons who relocate or bury a ~~lateral~~ ditch**, canal, latera or drain** contrary to the provisions of this section shall be guilty of a mis demeanor.

SECTION 4. That Section 42-1207, Idaho Code, be, and the same is hereb amended to read as follows:

42-1207. CHANGE OF ~~LATERAL~~ DITCH**, CANAL, LATERAL, DRAIN** OR BURIED IRRIGA TION CONDUIT. Where any ~~lateral~~ ditch**, canal, lateral or drain** or buried irri gation conduit has heretofore been, or may hereafter be, constructed across o beneath the lands of another, the person or persons owning or controlling sai land shall have the right at their own expense to change said ~~lateral~~ ditch **canal, lateral or drain** or buried irrigation conduit to any other part of sai land, but such change must be made in such a manner as not to impede the flo of the water therein, or to otherwise injure any person or persons using o interested in such ~~lateral~~ ditch**, canal, lateral or drain** or buried irrigatio conduit. Any increased operation and maintenance shall be the responsibilit of the landowner who makes the change.

A landowner shall also have the right to bury the ditch, **canal, lateral o drain** of another in pipe on the landowner's property, provided that the pipe installation and backfill reasonably meet standard specifications for suc materials and construction, as set forth in the Idaho standards for publi works construction or other standards recognized by the city or county i which the burying is to be done. The right and responsibility for operatio and maintenance shall remain with the ~~ditch~~ owner **of the ditch, canal, latera or drain**, but the landowner shall be responsible for any increased operatio and maintenance costs, including rehabilitation and replacement, unless other wise agreed in writing with the ~~ditch~~ owner.

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While ~~a ditch~~ **the** owner **of a ditch, canal, lateral, drain or buried irri gation conduit** shall have no right to relocate ~~his ditch~~ **it** on the property o another without permission, a ditch, **canal, lateral or drain** owner shall hav the right to place ~~his ditch~~ **it** in a buried conduit within the easement o right-of-way on the property of another in accordance with standard specifica tions for pipe, materials, installation and backfill, as set forth in th Idaho standards for public works construction or other standards recognized b the city or county in which the burying is to be done, and so long as the pip and the construction is accomplished in a manner that the surface of th owner's property and the owner's use thereof is not disrupted and is restore to the condition of adjacent property as expeditiously as possible, but not t exceed five (5) days after the start of construction. A landowner shall hav the right to direct that the conduit be relocated to a different route tha the route of the ditch, **canal, lateral or drain,** provided that the landowne shall agree in writing to be responsible for any increased construction o future maintenance costs necessitated by said relocation. Maintenance of th buried conduit shall be the responsibility of the ~~ditch~~ **conduit** owner.

No more than five (5) days after the start of construction, a landowner o ditch owner who buries a ditch, **canal, lateral, or drain** in pipe shall recor the location and specifications of the buried irrigation **or drainage** conduit including primary and secondary easements, in the county in which the buryin is done, and shall provide the irrigation **or drainage** entity that ~~supplie water to~~ **owns** the ditch, **canal, lateral or drain,** with a copy of such locatio and specifications and the construction plans utilized. The irrigation **o drainage** entity shall keep and maintain such records and have them availabl for the public.

Statement of Purpose / Fiscal Impact

STATEMENT OF PURPOSE
RS 11837C1

This legislation would extend the current prohibition on interference with ditches and canals to laterals and drains. Finally, it would provide for changes to ditches, canals, laterals and drains under certain circumstances. Violation of the provisions would result in a misdemeanor.

FISCAL IMPACT

None.

Contact
Name: Norm Semanko, Idaho Water Users Association
Phone: (208) 344-6690

STATEMENT OF PURPOSE/FISCAL NOTE H 566

10-16 Hoff

FILED
10:10 A.M. P.M.

OCT 03 2008

CANYON COUNTY CLERK
JH DEPUTY

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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

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR DIRECTED VERDICT AND IN THE ALTERNATIVE IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

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 supplemental memorandum in support of Defendants' Motion for Directed Verdict and in the alternative in support of Defendants' Motion for Judgment Notwithstanding the Verdict, both of which are pending before the Court.

In Defendants' Memorandum in Support of Defendants' motions for directed verdict or, in the alternative, JNOV, Defendants referenced certain legislative history relating to section 42-1207 of the Idaho Code, which legislative history was obtained online by Defendants' counsel

and attached to the Memorandum. However, upon additional research, Plaintiffs obtained additional legislative history for the statute not available through the online services, which is attached hereto as Exhibit A.

Defendants argued that one of the bases to set aside the Jury's verdict of $4,250 for failure of the Scotts to obtain written permission was pursuant to *Allen v. Burggraff Construction Co.*, 106 Idaho 451, 452, 680 P.2d 873, 874 (1984), wherein the Idaho Supreme Court stated that a plaintiff must prevent proof of causation of harm under the statute via impeded water flow before recovery can be had. Defendants then argued that the written permission requirement with respect to irrigation district entities had been in place at the time the *Allen* decision was rendered in 1984. However, this was an incorrect statement. The additional legislative history attached hereto shows that the written permission requirement was added to section 42-1207 in 1994. This is also true of *Savage Lateral Ditch Water Users Ass'n v. Pulley*, 125 Idaho 237, 869 P.2d 554 (1994).

However, the opinion of *Weaver v. Stafford*, 134 Idaho 691, 700, 8 P.3d 1234, 1243 (2000) was issued after the addition the statute that written permission of an irrigation district entity must be obtained before changing a ditch. In *Weaver*, the Court made clear that absent evidence of a reduction of the historic flow of water, there can be no recovery under section 42-1207. *Id.*

In addition, the Jury's verdict of $4,250 for failure of the Scotts to obtain written permission is arguably not nominal. It is $2,000 higher than the Jury's assessed damages for repairing the ditch, and therefore seems more punitive in nature, which is not allowed for under

the statute. The caselaw interpreting the statute make clear that causation must be proven before recovery can be obtained for violations of the statute. Without impeded water flow, there is no causation and no damages are recoverable. The Jury's verdict should therefore be set aside.

DATED: October 3, 2008.

PERKINS COIE LLP

By _____
Shelly H. Cozakos, Of the Firm
Cynthia L. Yee-Wallace, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on October 3, 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	X
Overnight Mail	____

_____

EXHIBIT A

7. This chapter shall not apply to juvenile violators of the provisions of section 18-3302D, Idaho Code, pertaining to the carrying of a concealed weapon on school property.

Approved March 22, 1994.

CHAPTER 151
(S.B. No. 1474)

AN ACT

RELATING TO MAINTENANCE AND REPAIR OF DITCHES; AMENDING SECTION 42-1207, IDAHO CODE, TO ALLOW A LANDOWNER TO BURY AS WELL AS MOVE A LATERAL DITCH OR BURIED IRRIGATION CONDUIT OF ANOTHER ON HIS OWN PROPERTY, TO REQUIRE CONSTRUCTION BE AT STANDARD SPECIFICATIONS AND THAT THE LANDOWNER ASSUME INCREASED OPERATION AND MAINTENANCE COSTS, TO PROVIDE THAT WRITTEN PERMISSION MUST FIRST BE OBTAINED FROM AN ORGANIZED IRRIGATION ENTITY; AND AMENDING SECTION 18-4308, IDAHO CODE, TO ALLOW A DITCH OWNER TO BURY HIS DITCH ON THE PROPERTY OF A LANDOWNER SERVIENT TO SUCH DITCH EASEMENT SO LONG AS THE CONSTRUCTION IS AT STANDARD SPECIFICATIONS AND THE PIPELINE IS ROUTED UNDERNEATH THE EXISTING DITCH, TO PROVIDE THAT THE LANDOWNER CAN REQUEST A REROUTING IF HE WILL AGREE IN WRITING TO PAY FOR ANY ADDITIONAL CONSTRUCTION AND INCREASED FUTURE MAINTENANCE COSTS, TO PROVIDE FOR RECORDING OF BURYING LOCATION AND SPECIFICATIONS, TO REQUIRE THAT THE LANDOWNER OR DITCH OWNER PROVIDE A COPY OF RECORDS TO THE SUPPLYING IRRIGATION ENTITY, AND TO REQUIRE IRRIGATION ENTITIES TO KEEP AND MAINTAIN SUCH RECORDS AND HAVE THEM AVAILABLE FOR THE PUBLIC.

Be it enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 42-1207, Idaho Code, be, and the same is hereby amended to read as follows:

42-1207. CHANGE OF LATERAL DITCH OR BURIED IRRIGATION CONDUIT. Where any lateral ditch or buried irrigation conduit has heretofore been or may hereafter be, constructed across or beneath the lands of another, the person or persons owning or controlling the said land shall have the right at their own expense to change said lateral ditch or buried irrigation conduit to any other part of said land, but such change must be made in such a manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such lateral ditch or buried irrigation conduit. Any increased operation and maintenance shall be the responsibility of the landowner who makes the change.

A landowner shall also have the right to bury the ditch of another on the landowner's property, provided that the pipe, installation and backfill reasonably meet standard specifications for such materials and construction, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done. The right and responsibil-

ity for operation and maintenance shall remain with the ditch owner, but the landowner shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the ditch owner.

In the event that the ditch, lateral, buried irrigation conduit, or canal is owned by an organized irrigation district, canal company, ditch association, or other irrigation entity, the written permission of the entity must first be obtained before a ditch, lateral, buried irrigation conduit, or canal is changed or placed in buried pipe by the landowner.

While a ditch owner shall have no right to relocate his ditch on the property of another without permission, a ditch owner shall have the right to place his ditch in a buried conduit within the easement or right-of-way on the property of another in accordance with standard specifications for pipe, materials, installation and backfill, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done, and so long as the pipe and the construction is accomplished in a manner that the surface of the owner's property and the owner's use thereof is not disrupted and is restored to the condition of adjacent property as expeditiously as possible, but not to exceed five (5) days after the start of construction. A landowner shall have the right to direct that the conduit be relocated to a different route than the route of the ditch, provided that the landowner shall agree in writing to be responsible for any increased construction or future maintenance costs necessitated by said relocation. Maintenance of the buried conduit shall be the responsibility of the ditch owner.

No more than five (5) days after the start of construction, a landowner or ditch owner who buries a ditch in pipe shall record the location and specifications of the buried irrigation conduit, including primary and secondary easements, in the county in which the burying is done, and shall provide the irrigation entity that supplies water to the ditch, with a copy of such location and specifications and the construction plans utilized. The irrigation entity shall keep and maintain such records and have them available for the public.

SECTION 2. That Section 18-4308, Idaho Code, be, and the same is hereby amended to read as follows:

18-4308. CHANGE OF LATERAL DITCH OR BURIED IRRIGATION CONDUIT. Where any lateral ditch has heretofore been, or may hereafter be, constructed across or beneath the lands of another, the person or persons owning or controlling the said land, shall have the right at his own expense to change said lateral ditch or buried irrigation conduit to any other part of said land, but such change must be made in such manner as not to impede the flow of the water therein, or to otherwise injure any person or persons using or interested in such lateral ditch or buried irrigation conduit. Any increased operation and maintenance shall be the responsibility of the landowner who makes the change.

A landowner shall also have the right to bury the ditch of another in pipe on the landowner's property, provided that the pipe, installation and backfill reasonably meet standard specifications for pipe, materials and construction, as set forth in the Idaho standards for

public works construction or other standards recognized by the city or county in which the burying is to be done. The right and responsibility for operation and maintenance shall remain with the ditch owner, but the landowner shall be responsible for any increased operation and maintenance costs, including rehabilitation and replacement, unless otherwise agreed in writing with the ditch owner.

In the event that the ditch, lateral, buried irrigation conduit, or canal is owned by an organized irrigation district, canal company, ditch association, or other irrigation entity, the written permission of the entity must first be obtained before a ditch, lateral, buried irrigation conduit, or canal is changed or placed in buried pipe by the landowner.

While a ditch owner shall have no right to relocate his ditch on the property of another without permission, a ditch owner shall have the right to place his ditch in a buried conduit within the easement or right-of-way on the property of another in accordance with standard specifications for pipe, materials, installation and backfill, as set forth in the Idaho standards for public works construction or other standards recognized by the city or county in which the burying is to be done, and so long as the pipe and the construction is accomplished in a manner that the surface of the owner's property and the owner's use thereof is not disrupted and is restored to the condition of adjacent property as expeditiously as possible, but not to exceed five (5) days after the start of construction. A landowner shall have the right to direct that the conduit be relocated to a different route than the route of the ditch, provided that the landowner shall agree in writing to be responsible for any increased construction or future maintenance costs necessitated by said relocation. Maintenance of the buried conduit shall be the responsibility of the ditch owner.

No more than five (5) days after the start of construction, a landowner or ditch owner who buries a ditch in pipe shall record the location and specifications of the buried irrigation conduit, including primary and secondary easements, in the county in which the burying is done, and shall provide the irrigation entity that supplies water to the ditch, with a copy of such location and specifications and the construction plans utilized. The irrigation entity shall keep and maintain such records and have them available for the public.

Approved March 22, 1994.

CHAPTER 152
(S.B. No. 1508, As Amended)

AN ACT

RELATING TO FUNDING FOR THE ADMINISTRATION OF THE FOREST PRACTICES ACT; AMENDING SECTION 38-122, IDAHO CODE, TO PROVIDE FOR A DEDUCTION FROM THE SLASH HAZARD BOND TO FUND FOREST PRACTICES ACT ADMINISTRATION AND TO MAKE TECHNICAL CORRECTIONS.

Be it Enacted by the Legislature of the State of Idaho:

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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

RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR DIRECTED VERDICT OR ALTERNATIVE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

COME NOW Plaintiffs Charles and Marjorie Bratton (collectively "Brattons"), by and through undersigned counsel of record and pursuant to Idaho Rules of Civil Procedure 7(b)(3), 50(a), and 50(b), and hereby file this response in opposition to the Defendants' (collectively "Scotts") Motion for a Directed Verdict, or alternative Motion for Judgment Notwithstanding the Verdict and corresponding memorandum (collectively "Motion")

filed with the Court on or about October 2, 2008.[1] Over the continual objections of the plaintiffs, this trial was divided into three segments after initially advising the parties that the Court would not segment or bifurcate the trial if there were an objection by either party. The Court later revised its position and, over the continual objection of plaintiffs, divided the trial into three segments. The first segment would deal with the size of the easement. The second segment would encompass liability. The third segment would address damages. At each segment the parties were allowed opening and closing statements and allowed to argue jury instructions. The same jury would return each segment's verdict.

It was difficult to discern just where evidence would start and stop in each segment. During the third segment, the Court *sua sponte* stopped plaintiffs' counsel in mid-examination of a witness. The Court determined that the specific evidence had already been admitted and asked the jury for a show of hands on whether they had heard the evidence. After the show of hands, the Court instructed plaintiffs' counsel to move to other evidence. This *sua sponte* advisement by the Court shows unequivocally that the Court allowed and actually required the jury to utilize all evidence offered in each segment. Therefore, when this jury made its final determination, it did so based on all the evidence from *all three* segments.

I.

BACKGROUND

This case began on September 3, 2008, and concluded on September 16 after seven trial days. There were three verdicts rendered. On September 4 and 11, 2008, and on or

[1] The Scotts also filed a supplemental memorandum in support with the Court on October 3, 2008. However, that supplemental memorandum does not substantively alter the arguments presented in the primary memorandum in support of their motions.

about September 16, 2008, the jury in this matter made several findings. More specifically, and with respect to the Brattons' irrigation ditch, the jury found:

- the Brattons did not prove the existence of a twelve (12) foot wide implied easement;
- the Scotts did change the Brattons' irrigation ditch;
- the Scotts' change of the irrigation ditch was without the requisite prior written permission of the Brattons pursuant to Idaho Code Section 41-1207;
- the Scotts' change of the irrigation ditch amounted to negligent interference with the Brattons' irrigation easement; and
- though the Scotts' negligent interference did not diminish the flow of water to the Brattons' property; and
- the Scotts' negligent interference was a proximate cause of harm to the Brattons.

See Verdict Form (filed September 4, 2008) and Special Verdict Form (filed September 11, 2008). After finding the Scotts liable for harming the Brattons as a direct result of their negligent interference with the Brattons' irrigation ditch and corresponding easement, as well as the Scotts' failure to secure the Brattons' written permission prior to changing the location of the Brattons' irrigation ditch pursuant to Idaho Code Section 42-1207, the jury awarded the Brattons the sum total of $6,500.00 in damages. *See* Damages Verdict Form (filed on or about September 16, 2008). The jury decided that it would cost $2,250.00 to restore the Brattons' irrigation ditch to its original state and location, and that the Brattons were further entitled to $4,250.00 of additional damages as recompense for the Scotts' failure to secure the Brattons' prior written

permission under Idaho Code Section 42-1207 and before unilaterally changing the Brattons' irrigation ditch. *Id.*

There was an abundance of evidence presented to the jury to justify verdicts 2 and 3. The plaintiffs presented factual and expert testimony as to each of the second and third segments to support the jury's respective verdicts. The defendants did not call any witnesses or offer any evidence in the final segment of the trial to rebut any of the plaintiffs' evidence.

The Scotts filed their Motion under Idaho Rules of Civil Procedure 50(a) and 50(b) asserting that the jury's damages award is not supported by the record evidence because the Brattons' alleged damages were not proven to a reasonable certainty. (Motion at 3-4.) More specifically, the Scotts contend that (1) the Brattons failed to introduce any evidence whatsoever as to what it would cost to restore the ditch to its original location and condition (Motion at 4-5), and (2) recovery of damages under either a negligence theory or under Idaho Code Section 42-1207 requires a showing of impeded or diminished water flow in the subject irrigation ditch as a condition precedent to recovery (Motion at 5-7).

Upon objection by defendants, the Court excluded any and all evidence as to the cost of replacing the Bratton ditch, cost or evidence on rehabilitating the pasture, or any other damage evidence or cost thereto. Therefore, the only damage evidence the plaintiffs could offer in the third segment was the evidence on reconstructing the ditch. But, by the Court's own direction, the jury could utilize all other evidence it had been offered in the first two segments, which included evidence of pasture death, anxiety, fear, and other damages of loss of food and nutrition for the horses.

II.

ARGUMENT

A. The Legal Standards Of Rules 50(a) And 50(b)

For all practical purposes, a Rule 50(a) motion for directed verdict and a Rule 50(b) motion for judgment not withstanding the verdict are one and the same given that they seek largely the same relief; the exception is timing. *See, e.g., Quick v. Crane*, 111 Idaho 759, 763 (1986), and *Smith v. Big Lost River Irr. Dist.*, 83 Idaho 374, 391 (1961). Consequently, the legal standards governing the consideration of both motions is the same. *Quick*, 111 Idaho at 763.

In making either motion, the movant admits the truth of the adversary's evidence and every legitimate inference that could be drawn therefrom in the light most favorable to the non-moving party. *Id.* (citations omitted). Therefore, the trial judge is **not permitted** to weight the evidence or pass on the credibility of the witnesses and make his or her own separate findings of fact for comparison with those of the jury. *Id.* at 763 (citation omitted, emphasis added). Moreover, the trial court should not take a case from the jury unless, as a matter of law, no recovery could be had upon any view which properly could be taken of the evidence. *Smith*, 83 Idaho at 391, *citing Stearns v. Graves*, 62 Idaho 312 (1941). **This is particularly true of motions implicating findings of proximate cause.** *Fouche v. Chrysler Motors Corp.*, 107 Idaho 701, 704 (1984) (citation omitted, emphasis added). As is of record, the verdict on proximate cause was a unanimous verdict of twelve jurors, which verdict led to the third segment of trial on damages.

B. The Jury Process, Common Knowledge, And Damage Awards

As the Idaho Supreme Court and the Idaho Court of Appeals both confirm, it is the very nature of the jury process for jurors to bring with them into the jury room their general life experiences, and a sense of what is and is not reasonable in light of those experiences and in light of the facts before them. *See Quick*, 111 Idaho at 765; *see also, Smith v. Praegitzer*, 113 Idaho 887, 890 (Ct. App. 1988). Consequently, when considering trial evidence and reaching a verdict, jurors are permitted and expected to take into account matters of common knowledge and experience. *State v. Espinoza*, 133 Idaho 618, 622 (Ct. App. 1999). In other words, the members of this jury, when reaching a verdict, are permitted to apply their own experience and their own common knowledge.

Damage awards, particularly damage awards in tort actions, are primarily a question for the jury. *See Gonzales v. Hodson*, 91 Idaho 330, 334 (1966); *see also, Bentzinger v. McMurtrey*, 100 Idaho 273, 274 (1979). This is because damages are oftentimes susceptible to proof **only with an approximation of certainty**. *See Shrum v. Wakimoto*, 70 Idaho 252, 256 (1950) (citation omitted, emphasis added); *see also, Gonzales and Bentzinger, supra.* As a result, it is solely for the jury to estimate damages as best they can by reasonable probabilities, and based upon their sound judgment as to what would be just and proper under all of the circumstances. *Shrum*, 70 Idaho at 256, *quoting Gorton v. Doty*, 57 Idaho 792 (1937). Jury verdicts are **not to be disturbed** absent a showing of bias or prejudice. *Id.* (Emphasis added.)

In this matter, the jury was very versed in water rights, ditches, pastures, hay, etc. Juror Number 540 had experience driving large equipment, digging ditches, and laying pipe. Juror Number 542 had experience with irrigation, driving large equipment, digging ditches, and laying pipe, experience with plants and weeds in Idaho, owns property, and had owned horses.

Juror Number 544 had experience driving large equipment and owns property. Juror Number 548 had experience driving large equipment and had owned horses. Juror Number 549 had experience with irrigation, pastures, and hay, owning acreage, driving large equipment, digging ditches, and laying pipe, and owns horses and livestock. Juror Number 555 had been verbally threatened and bullied. Juror Number 557 owns property. Juror Number 559 had experience driving large equipment and owns property. Juror Number 572 had experience driving large equipment, digging ditches, laying pipe, and owns property. Juror Number 586 had experience driving large equipment, had been involved in property disputes, and owns acreage and horses.

C. Idaho Code Section 42-1207

1. Impedence Of Flow Is Not The Sole Measure Of Damages Under Idaho Code Section 42-1207

The Scotts repeatedly assert that the Brattons are not entitled to any award of damages, particularly under Idaho Code Section 42-1207, unless the Brattons sufficiently prove an impedance of the flow of water through their irrigation ditch as a direct result of the Scotts' unilateral relocation and alteration of the ditch. (Motion at 5-7.) According to the Scotts, without a showing of "impeded water flow, [the Brattons] cannot establish causation as a matter of law." (Motion at 5.) The Scotts' assertion impermissibly ignores the plain language of the statute and ignores Idaho Supreme Court authority that amply provides that the impedance of flow of water in a ditch is not the only measure of damages to consider under Idaho Code Section 42-1207.

With respect to the plain language of Idaho Code Section 42-1207, said provision expressly provides that landowners (in this instance the Scotts) have the right, at their expense, to change the location or the configuration of a preexisting irrigation facility so long as the change

is made "in such a manner as not to impede the flow of water therein, **or to otherwise injure any person or persons using or interested in such ditch** . . ." *Id.* (emphasis added). Thus, the statute's use of the disjunctive "or," creates two separate forms of impermissible harm: (1) the impedence of water flows, **OR** (2) any other form of injury that might befall a water user as a result of a change in his ditch.

This is because the use and ownership of irrigation ditches implicates two overlapping, but separate and distinct rights: (1) the conveyance of one's own individual water rights and (2) a separate property interest in the integrity of the irrigation facility and its overall flows beyond one's own, individual water right (known as a "ditch right"). *See Savage Ditch Water Users v. Pulley*, 125 Idaho 237, 242-243 (1993) ("It is undeniable that water and ditch rights are tied together in that the ditch carries the water. But they are not the same."); *see also, Simonson v. Moon*, 72 Idaho 39, 47 (1951) ("[I]n this state a ditch right for the conveyance of water is recognized as a property right apart from and independent of the right to the use of water conveyed therein. Each may be owned, held and conveyed independently of the other."). Consequently, one can have an injury to his or her water rights (through impeded ditch flows), but one can also sustain a distinctly separate injury to their ditch rights as a result of a change in the ditch or irrigation facility. This is why Idaho Code Section 42-1207 contains the disjunctive "or," and why the statute contemplates legally cognizable injuries beyond the mere impedance of flow.

Idaho Code Section 42-1207 operates to protect not only the conveyance of water, but also operates to protect one's property interest in the location, configuration, and integrity of the existing irrigation facility. *See Savage Ditch Water Users* and *Simonson, supra*. This is why the *Savage* court made the observation that while specific ditch flow (*i.e.*, flow impedance)

evidence would be "vital in a water rights controversy," such evidence was not the only acceptable evidence to establish a legally cognizable injury (injury to one's ditch rights) under the statute. *Id.* at 243. According to the court, other forms of injury contemplated under the statute included increased maintenance difficulty, forced use rotation, and other "inconvenience." *Id.* As this case does not present a "water rights controversy," but does present a ditch right controversy, the Brattons were not required to present evidence of impeded water flow. Moreover, the jury did not have to find that the Scotts' interference with the Brattons' irrigation ditch resulted in impeded water flow in order to award the Brattons damages as compensation for the separate and distinct ditch rights that the Scotts' unilaterally endeavored to obliterate. Under Idaho Code Section 42-1207, the Brattons could have been harmed either by an impedence in ditch flows **OR** "otherwise injured" by the Scotts' unlawful interference with their ditch rights—rights capable of being "owned, held and conveyed independently" of their underlying water rights. *See*, *Savage Ditch Water Users* and *Simonson*, *supra*.

2. Compliance With The Statute And The Corresponding Burden Of Proof

In addition to the fact that impedance of water flow is not the sole measure injury or damage under Idaho Code Section 42-1207, the jury was also equally entitled to award damages against the Scotts for their failure to secure the Brattons' written permission prior to changing the Brattons' irrigation ditch. The Scotts' unilateral actions amounted to negligence per se given that the terms of the statute (I.C. § 42-1207) "must be fully complied with by one seeking to exercise the right it confers." *Simonson*, 72 Idaho at 45; *see also, Savage Ditch Water Users*, 125 Idaho at 242-43. As a result, the evidentiary burden under Idaho Code Section 42-1207 fell to the Scotts and not the Brattons, and it was the Scotts who were required to prove that

they had the Brattons' prior written permission and also that they had provided the Brattons with a replacement ditch that did not impede the flow of water **OR** otherwise injure the Brattons. *Savage Ditch Water Users*, 125 Idaho at 242-43.

The Brattons were free to set forth a number of injuries suffered as a result of the Scotts' acts, injuries that go beyond the mere impedence of flow, and the jury was free to agree or disagree with those alleged injuries. Put simply, the Scotts violated the plain terms of Idaho Code Section 42-1207, and the jury found it appropriate to award general damages against the Scotts for that violation.

For some reason, the Scotts go to great lengths to argue the legislative history of Idaho Code Section 42-1207, particularly the 2002 amendments which changed the written permission requirement to include the written permission of any irrigation facility owner as opposed to the former condition requiring written permission only in those instances where the facility in question was owned by an organized irrigation entity. The Scotts contend that the 2002 amendments "did nothing more than clarify who written permission must be obtained from," and that the amendments "had nothing to do with providing additional burdens upon landowners who sought to change" an irrigation ditch. (Motion at 6-7.)

First, the Scotts' analysis of the 2002 amendments to Idaho Code Section 42-1207 does nothing to alter, excuse, or diminish the fact that they did not obtain the requisite prior written permission of the Brattons before changing the Brattons' irrigation ditch—an express obligation they owed under the statute at the time of their action to the ditch. Second, the Scotts' contention that the 2002 amendments did nothing to place additional burdens upon landowners burdened by existing irrigation facilities does not make sense. In 1994 the Idaho Legislature amended Idaho Code Section 42-1207 to require landowners to first obtain the written

permission of an organized irrigation entity (*i.e.*, a duly organized irrigation district, canal company, or lateral ditch water users association) before an entity-owned irrigation facility could be changed. Thus, the universe of required written permission was confined to facilities owned by organized irrigation entities only. Prior to 1994, if a subject irrigation facility was not owned by an organized irrigation entity, then a landowner had no duty to seek prior written permission.

The 2002 amendments then expanded the required written permission clause of the statute to include ***all irrigation facility owners***, whether they be duly organized or not. Thus, the number of irrigation facilities subject to the written permission requirement was no longer confined to only those facilities owned by organized irrigation entities. Instead, the 2002 amendments required landowners to seek prior written permission from any and all irrigation facility owners—a much bigger universe of covered facilities, thereby placing a much increased burden upon landowners seeking to change any irrigation facility burdening their land. While the Brattons fail to see the import of the Scotts' attempted legislative history-based distinction, the Brattons do find the Scotts' contention regarding the 2002 amendments to be surprisingly illogical.

D. The Propriety Of The Jury Verdict

The jury had a first-hand opportunity to view the evidence as set forth in *Smith v. Big Lost River*:

> The members of the jury having had the opportunity to see all the witnesses, observe the manner of their testimony, note their apparent candor and knowledge of the matter concerning which they were examined, were entitled to give such weight to the evidence introduced as in their judgment was proper.

Smith at 392.

In Idaho the jury may base its opinion on minimal evidence and matters of common experience if the evidence and experience is sufficient to allow for this verdict. *Fouche v. Chrysler Motors Corp.,* 107 Idaho 701, 692 P.2d 345 (1984). Therefore, in Idaho jurors have the right to apply their own common experience in rendering their verdict. The Idaho Supreme Court is firmly committed to the rule that a trial court should not take a case from the jury unless, as a matter of law, no recovery can be made upon any view . . . . *Iverson Point, Inc., v. Wirth Corp.,* 94 Idaho 43, 480 P.2d 889 (1971).

The motions filed by the Scotts demand that the Court grant their motions because the jury did not have a neat quantitative formula to determine a damage award. Because the jury unanimously held that the Scotts' unilateral and illegal acts were the proximate cause of harm to the Brattons, any an all damages flowing from that "harm" can reasonably be considered general damages for which there is no neat quantitative formula for the jury to apply. *See*, *Shrum*, *Gonzales*, and *Bentzinger*, *supra*. In viewing the evidence most favorable to the plaintiffs, the jury's award of $4,250.00 as damages for the Scotts' failure to comply with the express language of Idaho Code Section 42-1207 was reasonable based on the evidence, collective knowledge, and experience of the jury. To the extent that the Scotts argue that the $2,250.00 ditch restoration-related damage award qualifies as special or economic damages needing evidentiary support, it can be reasonably argued that the damage award was well within the purview and general life experience (*i.e.*, common knowledge) of this Canyon County, Idaho, jury. *See*, *Quick*, *Smith*, and *Espinoza*, *supra*. The Court will recall, as set forth *supra,* that during *voir dire* many members of the jury had actual experience with digging ditches, maintaining ditches, easements, irrigation, and the operation of large equipment.

It is common knowledge that Canyon County, Idaho remains largely agricultural and pastoral. As a result, many of the jurors had extensive first-hand knowledge of flood irrigation practices, surface water delivery facilities, and pastures. *See*, *Quick*, *Smith*, and *Espinoza*, *supra*. Because jurors bring with them their general life experiences, and a corresponding sense of what is and is not reasonable in light of those life experiences, they are qualified to estimate the costs of restoring the Brattons' irrigation ditch to its former condition and location.

The damage awards are reasonable, not nominal, and are not of such amount to shock the consciousness. In fact, the awards are very accurate and certainly support the fact that said awards were based on the evidence and the jury's collective knowledge and experience, and are well within the confines of the law.

Further, it is well established in Idaho that the Court should not disturb a verdict unless as a matter of law no recovery can be made upon *any* view . . . . *Iverson Point, Inc.* In ruling on a motion for judgment notwithstanding the verdict or a directed verdict, the Court may not weigh the evidence or resolve the conflict therein or determine what conclusion should have been drawn therefrom . . . . *Kaser v. Hornback,* 75 Idaho 24 at 27, 265 P.2d 788 at 989; *Ness v. West Coast, Inc.,* 90 Idaho 111 (1965).

III.

CONCLUSION

For the foregoing, the Brattons respectfully request that the Court deny the Scotts' Motion for a Directed Verdict and their alternative Motion for Judgment Notwithstanding the Verdict in their entirety.

DATED this 9th day of October, 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 9th day of October, 2008, I caused a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR DIRECTED VERDICT OR ALTERNATIVE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT** to be served by the method indicated below, and addressed to the following:

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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

ORDER RE: DEFENDANTS' MOTION FOR DIRECTED VERDICT, MOTION FOR MISTRIAL AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

This matter came before the Court on October 16, 2008 on Defendants' Motion for Directed Verdict, Motion for Mistrial and Motion for Judgment Notwithstanding the Verdict. 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. Defendants' Motion for Judgment Notwithstanding the Verdict is GRANTED for the reasons set forth by the Court at the October 16, 2008 hearing;

2. Defendants' Motion for Mistrial was withdrawn by Defendants' counsel based upon the Court's ruling on Defendants' Motion for Judgment Notwithstanding the Verdict and is therefore moot; and

3. Defendants' Motion for Directed Verdict is also moot based upon the Court's ruling on Defendants' Motion for Judgment Notwithstanding the Verdict.

DATED: NOV 17 2008 2008.

Renae J. Hoff
District Judge

CLERK'S CERTIFICATE OF SERVICE

I, the undersigned, certify that on 11-17-, 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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Defendants.

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DEFENDANTS' MEMORANDUM OF COSTS AND FEES

Defendants John R. Scott and Jackie G. Scott, ("Defendants"), by and through their attorneys of record, Perkins Coie LLP, submit the following Memorandum of Costs and Fees pursuant to Rule 54 of the Idaho Rules of Civil Procedure. This Memorandum is supported by the records and files herein and the Affidavit of Shelly H. Cozakos in Support of Defendants' Memorandum of Costs and Fees to be filed.

Defendants seek costs and fees pursuant to Rule 54 of the Idaho Rules of Civil Procedure, and Idaho Code §§ 12-120, 12-121 and 10-1210. Defendants are clearly the prevailing party in this litigation as evidenced by the jury verdict forms entered in this matter and the Court's Order

granting Defendants' Motion for Judgment Notwithstanding the Verdict. Additionally, as set forth below, Plaintiffs pursued this litigation frivolously and without foundation and an award of attorney's fees is appropriate against them in this matter.

A. Idaho Rules of Civil Procedure 54(d)(1)(C) and 54(d)(1)(D) Costs.

Defendants incurred the following items of cost:

I.R.C.P. 54(d)(1)(C) and I.C. § 10-1210 COSTS AS A MATTER OF RIGHT		
a.	Court Filing Fees	$58.00
b.	Fees for service of any pleading	$374.00
c.	Costs for trial exhibits	$449.22
d.	Expert witness fees	$2,000.00
e.	Depositions taken for trial	$3,022.13
f.	Charges for one copy of each deposition transcripts	$1,348.29
	Total Charges As A Matter of Right:	**$7,251.64**

I.R.C.P. 54(d)(1)(D) and I.C. § 10-1210 DISCRETIONARY COSTS		
g.	Photocopies and printing – in house expense	$492.70
h.	Travel costs	$1,011.24
i.	Copy of CD/DVD	$412.10
j.	Computer Research – Westlaw	$582.00
k.	Postage Expense	$3.73
	Total Discretionary Costs:	**$2,501.77**

TOTAL COSTS: **$9,753.41**

B. Attorney's Fees Requested by Defendants.

Defendants also incurred attorney and paralegal fees as set forth below:

FEES INCURRED THROUGH November 13, 2008

Attorney:	
Shelly H. Cozakos	$50,987.83
Cynthia Yee-Wallace	$24,721.22
Dean B. Arnold	$1,458.00
Eric R. Bjorkman	$45.90
Paralegal:	
Kimberly L. Sampo	$11,121.10
Margaret O. Marlatt	$758.25
Legal Assistant:	
Aaron J. Bushor	$60.00

TOTAL FEES: **$89,152.30**[1]

C. I.R.C.P. 54(e)(3) Factors - Amount of Attorney Fees.

1. Time and Labor Required.

The time and labor involved in the foregoing case was significant. Plaintiffs' claims were ever evolving and shifting and were frivolously pursued as set forth in various examples below. Plaintiffs' relentless pursuit of its baseless claims forced Defendants to incur substantial time and expense in preparing their defense for trial and in the actual trial in this matter.

For example, in the original verified Complaint and Demand for Jury Trial filed in this case on June 28, 2007, Plaintiffs alleged that they were entitled to an implied easement by prior use. Compl. at 5-6. Plaintiffs also claimed that Defendants made "physical bodily threats to Plaintiffs" and alleged a cause of action for "tortuous [sic] stalking" against them. *See* Compl. at 7. Defendants promptly filed a motion for partial dismissal seeking the dismissal of the tortious stalking claim on the grounds that Idaho does not recognize a private right of action for such

[1] This amount will be supplemented to add those fees incurred in preparing this Memorandum and any other costs by fees in obtaining an order for Defendants' costs and fees.

claim. *See* Defs.' Memo. in Supp. of Mot. for Partial Dismissal Pursuant to I.R.C.P. 12(b)(6). The Court granted Defendants' motion and dismissed Plaintiffs' tortious stalking claim. See Order Re: Partial Dismissal.

Plaintiff next filed their Amended Complaint and Demand for Jury Trial on January 14, 2008 ("Amended Complaint") alleging four causes of action: declaratory relief, injunction, negligence, and tortious interference with right of privacy. Plaintiffs once again alleged that they were entitled to an implied easement by prior use and that Defendants had made "physical bodily threats to Plaintiffs." Amended Compl. at 5, 7.

Thereafter, counsel for Defendants took the deposition of Charles Bratton on February 6, 2008. During his deposition, Mr. Bratton admitted that Mr. Scott did not threaten to harm him in any way. *See* Aff. of Shelly Cozakos in Opp'n to Pls.' Mot. to Amend Compl. to Add Punitive Damages, Ex. A. Mr. Bratton again admitted this at trial. However, despite these admissions by Mr. Bratton, Plaintiffs frivolously continued to advance their claim for negligence based upon physical threat by the Scotts, which forced the Scotts to have to continue to defend this meritless claim. This claim was ultimately rejected by the jury. However, Defendants still incurred considerable time and expense in defending this claim even after it became apparent that it was baseless.

Additionally, Plaintiffs moved for partial summary judgment on January 11, 2008 on the issues of whether they were entitled to an express three-foot express easement as well as a twelve-foot implied easement by prior use. *See* Memo. in Supp. of Pls.' Mot. for Partial Summ. J. Defendants did not dispute that Plaintiffs were entitled to an express three-foot easement as

set forth in the Warranty Deed attached to the Amended Complaint. However, Defendants established that Plaintiffs could not meet all of the elements set forth in *Thomas v. Madsen*, 142 Idaho 635, 638, 132 P.2d 392, 395 (Idaho 2006) and *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (Idaho 1999) for an implied easement. Specifically, Plaintiffs have never been able to show that there was "apparent continuous use long enough before conveyance of the dominant estate."

At the February 21, 2008 hearing on Plaintiffs' Motion for Partial Summary Judgment, the Court reviewed the pleadings and files and denied Plaintiffs' Motion, in part, ruling from the bench that Plaintiffs have no more than a three-foot express easement, and that Plaintiffs had not presented any evidence that they maintained a twelve foot easement prior to the separation of the dominant estate. *See* Aff. of Cynthia Yee-Wallace in Supp. of Defs.' Second Motion in Limine, Ex. 1 at 6.

However, despite Plaintiffs being unable to meet all of the elements for an implied easement as set forth in *Thomas v. Madsen*, 142 Idaho 635, 638, 132 P.2d 392, 395 (Idaho 2006) and *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (Idaho 1999), they continued to assert this claim through trial. Again, Defendants were forced to continue to defend a meritless claim by Plaintiffs. The jury ultimately found that Plaintiffs were not entitled to a twelve-foot implied easement and the Court also ruled as such following the trial on the issue.

At trial, Plaintiffs were precluded from presenting evidence regarding their damages because they failed to disclose the same in discovery. Thus, despite the fact that Plaintiffs did not present any evidence on any amount of damages, Plaintiffs continued to pursue its damage claims which completely lacked foundation. This again was another baseless action taken by

Plaintiffs which forced Defendants to expend significant time and expense defending in this matter.

2. The Novelty and Difficulty of the Questions.

Within a few of weeks before trial, Plaintiffs began presenting various ditch statutes to be advanced at trial and raised and/or argued various water law issues, which Defendants had to respond to and defend against within a very short time. Thus, the facts and procedural history of this case made the difficulty of the questions in this matter an ever evolving process.

3. The Skill Requisite to Perform the Legal Service Properly and the Experience and Ability of the Attorney in the Particular Field of Law.

The skill required to perform the legal services properly in this case necessitated having attorneys who are experienced in litigation and trial work perform services, as this matter proceeded to a six-day trial.

4. The Prevailing Charges for Like Work.

As set forth in the Affidavit of Shelly H. Cozakos filed concurrently herewith, the attorney's fees incurred by the Defendants are consistent with comparable services and rates in the State of Idaho for similar work.

5. Whether the Fee is Fixed or Contingent.

The fees charged in this matter were charged at an hourly rate.

6. The Time Limitations Imposed By the Client or Circumstances of the Case.

This case was originally set for trial in June of 2008. Defendants agreed to move the trial up to April of 2008 because it was believed that the issues were straightforward. *See* Aff. of Shelly Cozakos in Supp. of Mot. to Vacate Trial Setting filed on March 10, 2008. Defendants moved to vacate the trial in March of 2008 due to the Plaintiffs failure to accommodate

discovery and to test the accuracy of the Plaintiffs' assertion that they could not adequate water to the pasture, from which they were seeking extensive damages. The Court granted this Motion.

Almost immediately after the Court granted Defendants' motion to vacate the trial, Plaintiffs filed a second request for trial setting and set a status conference to set a new date for trial on May 20, 2008. The Court thereafter entered its Order Resetting Case for Trial and Pretrial on June 27, 2008, which Order was mailed to the parties on June 30, 2007. Again, this Order set the discovery cutoff approximately seven (7) days away and set the trial to begin in approximately two months. The Court extended the discovery cutoff through August 15, 2008 and trial began approximately two weeks later on September 3, 2008.

7. Remaining Relevant Factors Under I.R.C.P. 54(e)(3).

Essentially, Plaintiffs walked away from this case with nothing more than the express easement granted to them in the Warranty Deed at issue, which Defendants did not dispute. Defendants walked away in this case with no liability whatsoever to Plaintiffs. Plaintiffs were seeking well over $100,000.00 in damages in this case, but walked away with no money damages at all. Thus, given the allegations at issue and the results obtained, Defendants are clearly the prevailing parties in this litigation. Additionally, given the frivolous nature and pursuit of Plaintiffs' claims, attorney's fees and costs are also appropriate in this matter.

Defendants therefore seek an award of costs in the amount of $9,753.41 and attorney fees in the amount of $89,152.30.

Defendants will file a legal memorandum with additional authority should Plaintiffs file a motion to disallow Defendants' costs and attorney's fees consistent with Rules 54(d)(6) and 54(e)(6) of the Idaho Rules of Civil Procedure.

Oral argument is requested if this matter is contested by Plaintiffs.

DATED: December 1, 2008.

PERKINS COIE LLP

By _____
Shelly H. Cozakos, Of the Firm
Cynthia L. Yee-Wallace, Of the Firm
Attorneys for Defendants

To the best of my knowledge and belief the costs and attorney's fees set forth herein are correct and the costs claimed are in compliance with I.R.C.P. 54(d).

_____
Shelly H. Cozakos, Of the Firm
Cynthia L. Yee-Wallace, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on December 1, 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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Overnight Mail	____

Shelly Ozkan