

11-23-2009

Bratton v. Scott Clerk's Record v. 4 Dckt. 36275

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LAW CLERK

Vol. 21 of 9

VOLUME IV

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

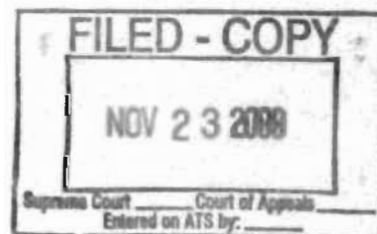
Honorable RENAE J. HOFF, District Judge

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

Attorney for Appellants

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

Attorney for Respondents



36275

IN THE SUPREME COURT OF THE
STATE OF IDAHO

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

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

HONORABLE RENAE J. HOFF, Presiding

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

Attorney for Appellants

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

Attorney for Respondents

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DEC 03 2008 ✓

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Attorneys for Defendants

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

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

Plaintiffs,

v.

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

Defendants.

Case No. CV 0706821C

**AFFIDAVIT OF SHELLY H. COZAKOS IN
SUPPORT OF DEFENDANTS'
MEMORANDUM OF COSTS AND FEES**

STATE OF IDAHO)
: ss.
County of Ada)

Shelly H. Cozakos, being first duly sworn on oath, deposes and says:

1. I am one of the attorneys of record for John R. Scott and Jackie G. Scott ("Defendants"), and as such I am familiar with all aspects of this case. The following information is based on my personal knowledge.

2. To the best of my knowledge, the items of costs set forth in Defendants' Memorandum of Costs and Fees are correct and were necessarily and reasonably incurred in the defense of Plaintiffs' claims and were incurred in accordance with I.R.C.P. 54(d) and should, in the

interest of justice, be assessed against Charles E. Bratton and Marjorie I. Bratton pursuant to Rule 54(d)(1)(D).

3. As a Partner of Perkins Coie LLP and as attorney of record for Defendants, I am familiar with the time records and methods of billing and timekeeping by the law firm of Perkins Coie LLP. The hourly rates of each attorney, paralegal and assistant at Perkins Coie LLP are set based on experience and the prevailing market in Boise. The hourly rates during 2007 and 2008 for each attorney, paralegal and assistant who worked on this case are as follows:

	2007	2008
Shelly H. Cozakos	\$250.00	\$260.00
Cynthia Yee-Wallace		\$225.00
Dean B. Arnold		\$225.00
Eric R. Bjorkman		\$255.00
Kimberly L. Sampo	\$120.00	\$130.00
Margaret O. Marlatt		\$150.00
Aaron Bushor	\$60.00	

4. I have reviewed the time records maintained and kept by Perkins Coie for this case a true and correct copy of which are attached hereto and incorporated herein by reference as Exhibit A, which records indicate that the total fees incurred by Defendants through November 13, 2008 are as set forth in the Memorandum of Costs and Fees in the amount of \$89,152.30.

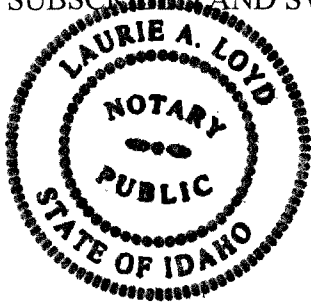
5. These fees are reasonable in amount, were necessarily and justifiably incurred, and are consistent with comparable services and rates in the State of Idaho, resulting in total attorneys' fee of \$89,152.30. The agreement between Defendants and Perkins Coie LLP required Defendants to pay all of the listed costs and attorneys' fees at an hourly rate. Defendants should be awarded these attorney's fees as set forth in the Memorandum of Costs and Fees previously filed.

6. Additionally, attached hereto marked Exhibit B are true and correct copies of a printout maintained by Perkins Coie LLP outlining the costs incurred by Defendants in the above matter, along with supporting invoices for many of the costs sought by Defendants herein. Additional invoice copies in connection with the costs sought by Defendants are being obtained and can be supplied to the Court upon receipt.

DATED this 2 day of December, 2008.

Shelly H. Cozakos
Shelly H. Cozakos

SUBSCRIBED AND SWORN TO before me this 2 day of December, 2008.



Laurie A. Loyd
Notary Public for Idaho
Residing at Boise
My Commission Expires 9/19/2010

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):

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 Cozakos



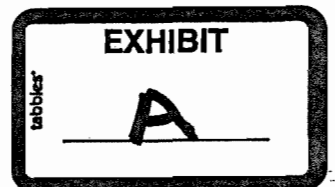
Time Detail

CSL: Cozacos, Shelly H.

Client/Matter: 65685 John and Jackie Scott 0001 Charles Bratton Easement Dispute

Time ID	Tkpr ID	Tkpr Name	Date	Base Hours	Billed Hours	Status	Invoice	Base Amount	Billed Amount	Phase/ Task
15365594	09161	Cozacos, Shelly H.	5/1/2007	1.80	1.80	B	3563198	\$450.00	\$405.00	
<i>Narrative: Meet with client to review opposing attorney. ; prepare correspondence to</i>										
15365595	09161	Cozacos, Shelly H.	5/4/2007	0.50	0.50	B	3563198	\$125.00	\$112.50	
<i>Narrative: Review and revise correspondence to opposing attorney.</i>										
15365593	09161	Cozacos, Shelly H.	5/18/2007	0.30	0.30	B	3563198	\$75.00	\$67.50	
<i>Narrative: Review correspondence from opposing counsel; prepare reply.</i>										
15365596	09161	Cozacos, Shelly H.	6/19/2007	1.80	1.80	B	3563198	\$450.00	\$405.00	
<i>Narrative: Arrange for viewing of property; conference with client regarding</i>										
15365597	09161	Cozacos, Shelly H.	6/20/2007	3.50	3.50	B	3563198	\$875.00	\$787.50	
<i>Narrative: Travel to Middleton; meet with client and opposing counsel.</i>										
15385954	09161	Cozacos, Shelly H.	7/12/2007	1.80	1.80	B	3563198	\$450.00	\$405.00	
<i>Narrative: Meet with client to Neville regarding ; analyze complaint; conference with C.</i>										
15570201	09161	Cozacos, Shelly H.	8/24/2007	3.20	3.20	B	3588839	\$800.00	\$720.00	
<i>Narrative: Review Brief in opposition to motion to dismiss tortious stalking claim; Prepare Reply Brief; review and revise same.</i>										
15659522	09161	Cozacos, Shelly H.	9/4/2007	1.50	1.50	B	3598913	\$375.00	\$375.00	
<i>Narrative: Prepare for hearing on motion to dismiss stalking claims.</i>										
15574717	09161	Cozacos, Shelly H.	9/5/2007	4.10	4.10	B	3598913	\$1,025.00	\$1,025.00	
<i>Narrative: Prepare for and attend hearing in Caldwell on motion to dismiss claim for tortious stalking.</i>										
15591444	09970	Sampo, Kimberly L.	9/5/2007	0.40	0.40	B	3598913	\$48.00	\$0.00	
<i>Narrative: Locate case law regarding invasion of property; email to S. Cozacos;</i>										

000510



15613717 09970 Sampo, 9/11/2007 1.00 1.00 B 3598913 \$120.00 \$0.00
Kimberly L.

Narrative: Review discovery responses and witness lists in Ford v. Rawlinson for Bratton; report to S. Cozakos regarding

15899167 09161 Cozakos, 11/2/2007 1.30 1.30 B 3653105 \$325.00 \$325.00
Shelly H.

Narrative: Prepare motion to move trial date; review and revise and prepare for filing.

15897598 09970 Sampo, 11/26/2007 4.10 4.10 B 3653105 \$492.00 \$492.00
Kimberly L.

Narrative: Review complaint and other documents in file to understand issues in the case; review discovery requests from opposing counsel; conduct online research regarding property and water rights; begin drafting responses to Request for Admissions; telephone call to Assessor's office to verify parcel number for water right;

15897597 09970 Sampo, 11/27/2007 1.90 1.90 B 3653105 \$228.00 \$228.00
Kimberly L.

Narrative: Conference with E. Malmen regarding continue research on property and drafting responses to Admissions;

15897600 09970 Sampo, 11/28/2007 3.20 3.20 B 3653105 \$384.00 \$384.00
Kimberly L.

Narrative: Telephone conference with client regarding begin drafting responses to Interrogatories; forward copy of discovery requests to client;

15890752 00616 Bushor, 11/29/2007 1.00 1.00 B 3653105 \$60.00 \$60.00
Aaron J.

Narrative: Review Idaho Dept. of Water Resources website to

15897599 09970 Sampo, 11/29/2007 5.80 5.80 B 3653105 \$696.00 \$696.00
Kimberly L.

Narrative: Telephone conference with client; continue drafting discovery responses; instruction to A. Bushor regarding ; review telephone calls to Ditch Company representatives to confirm Bratton's ownership of water shares;

15897596 09970 Sampo, 11/30/2007 0.70 0.70 B 3653105 \$84.00 \$84.00
Kimberly L.

Narrative: Draft cover letter to clients

15922340 09970 Sampo, 12/3/2007 5.10 5.10 B 3653105 \$612.00 \$612.00
Kimberly L.

Narrative: Continue drafting and revising discovery responses; conference with S. Cozakos regarding telephone conference with client;

15986580 09161 Cozakos, 12/3/2007 3.40 3.40 B 3653105 \$850.00 \$850.00
Shelly H.

Narrative: Revise discovery responses and prepare for service.

15922339 09970 Sampo, 12/4/2007 0.30 0.30 B 3653105 \$36.00 \$36.00
Kimberly L.

Narrative: Receive and review photographs and comments

16117074 09161 Cozakos, 1/9/2008 3.50 3.50 B 3694158 \$910.00 \$819.00
Shelly H.

Narrative: Prepare for and attend status conference and hearing on motion to move trial date and motion to dismiss; conferences with Judge and opposing counsel.

16016741 09161 Cozakos, 1/11/2008 0.50 0.50 B 3694158 \$130.00 \$117.00

000511

Shelly H.

Narrative: Prepare Court order regarding motion to dismiss; review and execute stipulation to change trial date; review motion for partial summary judgment.

16035093 09970 Sampo, 1/11/2008 0.50 0.50 B 3694158 \$65.00 \$58.50
Kimberly L.

Narrative: Telephone conference (2) with J. Scott regarding

16071995 09970 Sampo, 1/24/2008 3.80 3.80 B 3694158 \$494.00 \$444.60
Kimberly L.

Narrative: Review allegations in Amended Complaint; begin drafting discovery requests to opposing counsel; telephone conference with J. Scott regarding

16071994 09970 Sampo, 1/25/2008 2.10 2.10 B 3694158 \$273.00 \$245.70
Kimberly L.

Narrative: Continue drafting discovery requests for attorney review;

16111359 09970 Sampo, 1/28/2008 2.40 2.40 B 3694158 \$312.00 \$280.80
Kimberly L.

Narrative: Telephone call to local surveyors regarding expertise and assistance with lawsuit; prepare and send email with background information of property;

16111360 09970 Sampo, 1/29/2008 0.40 0.40 B 3694158 \$52.00 \$46.80
Kimberly L.

Narrative: Receive and review email and attachments from potential surveyor; conference with S. Cozacos regarding

16113052 09161 Cozacos, 1/29/2008 1.80 1.80 B 3694158 \$468.00 \$421.20
Shelly H.

Narrative: Prepare correspondence regarding deposition dates; review amended complaint for summary judgment potential; email correspondence regarding place of deposition; prepare amended deposition notice for C. Bratton.

16111361 09970 Sampo, 1/30/2008 1.10 1.10 B 3694158 \$143.00 \$128.70
Kimberly L.

Narrative: Prepare supplemental discovery response with name and details of expert;

16111362 09970 Sampo, 1/31/2008 0.70 0.70 B 3694158 \$91.00 \$81.90
Kimberly L.

Narrative: Review deposition notices from opposing counsel and Rule 45; work with local vendor to convert video to color prints for deposition exhibits;

16227993 09161 Cozacos, 2/1/2008 1.50 1.50 B 3731946 \$390.00 \$351.00
Shelly H.

Narrative: Prepare mediation statement.

16147438 09970 Sampo, 2/4/2008 2.70 2.70 B 3731946 \$351.00 \$315.90
Kimberly L.

Narrative: Conference with S. Cozacos regarding ; begin draft of mediation statement and answer to complaint;

16147440 09970 Sampo, 2/5/2008 2.30 2.30 B 3731946 \$299.00 \$269.10
Kimberly L.

Narrative: Continue drafting answer to complaint; prepare CD with video taken by client; prepare for meeting with client; telephone conference with client regarding

16227994 09161 Cozacos, 2/5/2008 4.40 4.40 B 3731946 \$1,144.00 \$1,029.60
Shelly H.

Narrative: Meet with client to ; prepare to take deposition of C. Bratton.

000512

16147437	09970 Sampo, Kimberly L.	2/6/2008	2.90	2.90	B	3731946	\$377.00	\$339.30
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Narrative: Forward correspondence by email to client; telephone conference regarding ; prepare exhibits for deposition and provide assistance during same;

16227995	09161 Cozakos, Shelly H.	2/6/2008	5.60	5.60	B	3731946	\$1,456.00	\$1,310.40
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Narrative: Conduct deposition of C. Bratton; conference with K. Sampo regarding

16128895	00743 Bjorkman, Eric R.	2/7/2008	0.20	0.20	B	3731946	\$51.00	\$45.90
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Narrative: Conference with S. Cozakos regarding

16145585	02388 Yee- Wallace, Cynthia L.	2/7/2008	6.10	6.10	B	3731946	\$1,372.50	\$1,235.25
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Narrative: Meeting w/ S. Cozakos regarding ; appear and attend deposition of J. Scott; meet with clients regarding

16228000	09161 Cozakos, Shelly H.	2/7/2008	2.50	2.50	B	3731946	\$650.00	\$585.00
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Narrative: Conferences with C. Wallace regarding ; begin preparation of affidavits in opposition to motion for summary judgment.

16147436	09970 Sampo, Kimberly L.	2/8/2008	0.30	0.30	B	3731946	\$39.00	\$35.10
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Narrative: Conference with S. Cozakos regarding

16227999	09161 Cozakos, Shelly H.	2/8/2008	6.50	6.50	B	3731946	\$1,690.00	\$1,521.00
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Narrative: Travel to and from Caldwell; attend mediation; conferences with client; begin preparation of memo in opposition to motion for summary judgment.

16147439	09970 Sampo, Kimberly L.	2/11/2008	3.70	3.70	B	3731946	\$481.00	\$432.90
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Narrative: Prepare responses to Plaintiffs' Request for Production of Documents; prepare documents for production; meet with J. Scott to

16227992	09161 Cozakos, Shelly H.	2/11/2008	6.70	6.70	B	3731946	\$1,742.00	\$1,567.80
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Narrative: Prepare brief in opposition to motion for summary judgment; review affidavit of J. Scott; prepare motion and affidavits for filing.

16173599	09970 Sampo, Kimberly L.	2/12/2008	2.70	2.70	B	3731946	\$351.00	\$315.90
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Narrative: Review email correspondence from client; online research for local soil scientist consultant; telephone calls to potential experts/consultants to evaluate Bratton's field for damage claims; conference with S. Cozakos regarding

16227998	09161 Cozakos, Shelly H.	2/14/2008	3.50	3.50	B	3731946	\$910.00	\$819.00
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Narrative: Prepare brief in opposition to motion for punitive damages; review and revise same and prepare for filing.

16194186	09970 Sampo, Kimberly L.	2/20/2008	1.80	1.80	B	3731946	\$234.00	\$210.60
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Narrative: Telephone call and email communications with potential Ecology expert regarding case background and site visit;

000513

16227996 09161 Cozacos, 2/20/2008 2.40 2.40 B 3731946 \$624.00 \$561.60
Shelly H.

Narrative: Review new affidavits filed by opposing counsel; prepare for hearing on motion for summary judgment and punitive damages.

16194185 09970 Sampo, 2/21/2008 3.10 3.10 B 3731946 \$403.00 \$362.70
Kimberly L.

Narrative: Conference with S. Cozacos regarding review deposition transcript of C. Bratton for testimony regarding the pasture; prepare same for Ecology expert; receive and review CVs for experts;

16227997 09161 Cozacos, 2/21/2008 5.70 5.70 B 3731946 \$1,482.00 \$1,333.80
Shelly H.

Narrative: Finish preparation for hearing; travel to and from Caldwell; attend hearing on motion for summary judgment and punitive damages; conference with K. Sampo regarding

16194187 09970 Sampo, 2/22/2008 0.40 0.40 B 3731946 \$52.00 \$46.80
Kimberly L.

Narrative: Conference with S. Cozacos regarding ; telephone call to clients regarding

16227991 09161 Cozacos, 2/22/2008 0.70 0.70 B 3731946 \$182.00 \$163.80
Shelly H.

Narrative: Conferences with opposing counsel regarding testing of soil; conference with K. Sampo regarding

16227041 09970 Sampo, 2/25/2008 3.60 3.60 B 3731946 \$468.00 \$421.20
Kimberly L.

Narrative: Meeting with Ecology expert to discuss case background; attend site visit of Bratton's pasture with clients and expert; draft supplemental discovery responses and prepare document attachments; draft second set of discovery requests to Plaintiffs;

16228001 09161 Cozacos, 2/25/2008 1.10 1.10 B 3731946 \$286.00 \$257.40
Shelly H.

Narrative: Email correspondence with opposing counsel regarding testing of ground; conference with K. Sampo regarding ; phone conference with client.

16225861 09161 Cozacos, 2/28/2008 1.20 1.20 B 3731946 \$312.00 \$280.80
Shelly H.

Narrative: Review letter from expert witness; conference with K. Sampo regarding begin drafting motion to vacate trial.

16242858 02388 Yee- 3/4/2008 3.20 3.20 B 3793846 \$720.00 \$612.00
Wallace,
Cynthia L.

Narrative: Appear and attend deposition of J. Scott with opposing counsel; meeting with S. Cozacos regarding analyze and review summary judgment and pleadings in preparation for same; meeting with clients regarding

16244224 09970 Sampo, 3/4/2008 0.40 0.40 B 3793846 \$52.00 \$44.20
Kimberly L.

Narrative: Receive and review email and attachment from S. Murray; telephone call regarding same;

16242860 02388 Yee- 3/5/2008 0.90 0.90 B 3793846 \$202.50 \$172.12
Wallace,
Cynthia L.

Narrative: Plan and prepare for deposition of M. Bratton by reviewing all pleadings and discovery; outline questions for deposition;

16242859 02388 Yee- 3/6/2008 4.10 4.10 B 3793846 \$922.50 \$784.12
Wallace,
Cynthia L.

Narrative: Analyze and review prior deposition transcripts and exhibits and discovery; appear and attend deposition of M. Bratton;

16244223 09970 Sampo, 3/6/2008 0.40 0.40 B 3793846 \$52.00 \$44.20
Kimberly L.

Narrative: Assist C. Wallace with deposition preparation of M. Bratton;

16337916 09161 Cozakos, 3/24/2008 4.40 4.40 B 3793846 \$1,144.00 \$972.40
Shelly H.

Narrative: Prepare for and attend hearing regarding motion to vacate trial and motion for reconsideration; conferences with opposing counsel regarding appointment of receiver.

16337915 09161 Cozakos, 3/25/2008 0.80 0.80 B 3793846 \$208.00 \$176.80
Shelly H.

Narrative: Prepare order regarding vacation of trial and motion for reconsideration; review special master statute.

16474698 09161 Cozakos, 4/17/2008 1.70 1.70 B 3793846 \$442.00 \$375.70
Shelly H.

Narrative: Prepare brief in opposition to motion to set aside judgment.

16462247 09970 Sampo, 4/28/2008 0.50 0.50 B 3793846 \$65.00 \$55.25
Kimberly L.

Narrative: Conference with J. Hall regarding video of ditch and cost; report to S. Cozakos regarding telephone and email communications with J. Scott regarding

16462248 09970 Sampo, 4/29/2008 0.30 0.30 B 3793846 \$39.00 \$33.15
Kimberly L.

Narrative: Telephone call from J. Scott; email communications with S. Cozakos regarding

16474952 09970 Sampo, 5/1/2008 0.30 0.30 B 3793846 \$39.00 \$33.15
Kimberly L.

Narrative: Telephone conference with J. Scott regarding email communications with S. Cozakos regarding

16474953 09970 Sampo, 5/2/2008 0.30 0.30 B 3793846 \$39.00 \$33.15
Kimberly L.

Narrative: Email communications with J. Hall regarding video of ditch;

16496936 09970 Sampo, 5/6/2008 0.20 0.20 B 3793846 \$26.00 \$22.10
Kimberly L.

Narrative: Email communications with J. Hall regarding video logistics and directions to client's house;

16514957 09970 Sampo, 5/12/2008 1.70 1.70 B 3793846 \$221.00 \$187.85
Kimberly L.

Narrative: Telephone and email communications with R. Garnys regarding video of ditch; attend meeting at client's house to video tape water flow in ditch;

16588735 09970 Sampo, 6/2/2008 0.30 0.30 B 3793846 \$39.00 \$33.15
Kimberly L.

Narrative: Telephone conference with expert regarding availability to test Bratton's field for damage; telephone call to opposing counsel regarding same;

16588734 09970 Sampo, 6/4/2008 0.20 0.20 B 3793846 \$26.00 \$22.10
Kimberly L.

Narrative: Telephone conference with opposing counsel and expert regarding available dates for field samples;

16598687 09970 Sampo, 6/9/2008 2.80 2.80 B 3793846 \$364.00 \$309.40
Kimberly L.

000515

Narrative: Telephone call with expert and client regarding

meet expert at client's property for testing;

16619051 01437 Marlatt, 6/9/2008 0.30 0.30 B 3793846 \$45.00 \$38.25
Margaret
O.

Narrative: Conference with K. Sampo regarding

16686677 09161 Cozacos, 6/17/2008 0.50 0.50 B 3793846 \$130.00 \$110.50
Shelly H.

Narrative: Telephone conference with client.

16686676 09161 Cozacos, 6/23/2008 0.40 0.40 B 3793846 \$104.00 \$88.40
Shelly H.

Narrative: Prepare correspondence to opposing counsel regarding irrigation water.

16719297 02388 Yee- 7/10/2008 0.90 0.90 B 3793846 \$202.50 \$172.12
Wallace,
Cynthia L.

Narrative: Analyze and review Plaintiff's motion to exclude and supplemental witness disclosure;

16719298 02388 Yee- 7/11/2008 1.50 1.50 B 3793846 \$337.50 \$286.87
Wallace,
Cynthia L.

Narrative: Meeting with S. Cozacos regarding ; draft and revise Defendant's supplemental responses to Plaintiff's first requests for production;

16773459 02388 Yee- 7/21/2008 6.60 6.60 B 3793846 \$1,485.00 \$1,262.25
Wallace,
Cynthia L.

Narrative: Draft and revise motion in limine, memorandum in support and in response to plaintiffs' motion to exclude, affidavit of C. Yee-Wallace in support of same, and motion to shorten time and proposed order;

16773460 02388 Yee- 7/28/2008 3.30 3.30 B 3793846 \$742.50 \$631.12
Wallace,
Cynthia L.

Narrative: Analyze and review file in preparation for oral argument on Plaintiff's motion to exclude; travel to Canyon County for same; appear and attend oral argument for same;

16782642 02388 Yee- 7/29/2008 0.70 0.70 B 3793846 \$157.50 \$133.87
Wallace,
Cynthia L.

Narrative: Revise Defendants' supplemental responses to Plaintiff's first set of interrogatories and requests for production;

16782643 02388 Yee- 7/30/2008 1.20 1.20 B 3793846 \$270.00 \$229.53
Wallace,
Cynthia L.

Narrative: Draft and revise reply to opposition to Defendants' motion in limine and affidavit in support;

16807554 02388 Yee- 8/1/2008 1.60 1.60 B 3814255 \$360.00 \$360.00
Wallace,
Cynthia L.

Narrative: Draft and revise Defendants' second motion in limine and affidavit in support; analyze and review transcript in preparation for same;

16829493 02388 Yee- 8/4/2008 3.30 2.50 B 3814255 \$742.50 \$562.50
Wallace,
Cynthia L.

Narrative: Plan and prepare for hearing; appear and attend pre-trial conference and hearing on motion in limine and motion to exclude in Canyon County; draft and revise correspondence to client regarding

000516

16829492 02388 Yee- 8/5/2008 2.30 1.50 B 3814255 \$517.50 \$337.50
Wallace,
Cynthia L.

Narrative: Draft and revise proposed Order regarding Motion in Limine and Motion to Exclude and amending pre-trial deadlines; draft and revise correspondence to opposing counsel regarding discovery; analyze and review file;

16831362 09161 Cozakos, 8/5/2008 0.80 0.80 B 3814255 \$208.00 \$208.00
Shelly H.

Narrative: Conference with C. Yee-Wallace regarding ; review pretrial order;

16829491 02388 Yee- 8/7/2008 0.20 0.00 B 3814255 \$45.00 \$0.00
Wallace,
Cynthia L.

Narrative: Draft and revise correspondence to opposing counsel; revise proposed order;

16829489 02388 Yee- 8/10/2008 1.60 1.60 B 3814255 \$360.00 \$360.00
Wallace,
Cynthia L.

Narrative: Conference with S. Murray; analyze and review file in preparation for same;

16829490 02388 Yee- 8/11/2008 4.10 2.00 B 3814255 \$922.50 \$450.00
Wallace,
Cynthia L.

Narrative: Conference with R. Garnys; conference with S. Murray; appear and attend deposition of R. Garnys; appear and attend deposition of S. Murray; revise notices of deposition;

16855711 09161 Cozakos, 8/11/2008 1.40 1.40 B 3814255 \$364.00 \$364.00
Shelly H.

Narrative: Conference with C. Wallace regarding ; review deposition documents;

16844929 02388 Yee- 8/12/2008 5.60 3.50 B 3814255 \$1,260.00 \$787.50
Wallace,
Cynthia L.

Narrative: Appear and attend the deposition of Stuart Murray; preparation for deposition with Mr. Murray regarding same; prepare for deposition of M. Vis; appear and attend deposition of M. Vis;

16855712 09161 Cozakos, 8/12/2008 2.30 2.30 B 3814255 \$598.00 \$598.00
Shelly H.

Narrative: Conference with C. Yee-Wallace regarding ; review discovery disclosures; review, revise motions in limine;

16844928 02388 Yee- 8/13/2008 5.10 2.50 B 3814255 \$1,147.50 \$562.50
Wallace,
Cynthia L.

Narrative: Draft and revise motion to bifurcate trial and memorandum in support; research Idaho case law regarding same and in preparation for drafting memorandum; draft and revise second motion in limine and memorandum in support;

16855710 09161 Cozakos, 8/13/2008 1.70 1.70 B 3814255 \$442.00 \$442.00
Shelly H.

Narrative: Conference with C. Yee-Wallace regarding ; review motion filed by opposing counsel; begin preparing for deposition of S. Wielang;

16855709 09161 Cozakos, 8/14/2008 1.50 1.50 B 3814255 \$390.00 \$390.00
Shelly H.

Narrative: Prepare for trial deposition of S. Murray;

16844930 02388 Yee- 8/15/2008 3.60 2.50 B 3814255 \$810.00 \$562.50

000517

Wallace,
Cynthia L.

Narrative: Draft and revise discovery supplementation in preparation for trial; draft and revise Answer to Amended Complaint; conference with S. Murray; prepare all for filing and submission;

16855708 09161 Cozakos, 8/15/2008 5.80 5.80 B 3814255 \$1,508.00 \$1,508.00
Shelly H.

Narrative: Depose S. Wielang; prepare S. Murray for trial deposition; take trial deposition of S. Murray;

16873909 02388 Yee- 8/18/2008 3.40 2.00 B 3814255 \$765.00 \$450.00
Wallace,
Cynthia L.

Narrative: Plan and prepare for deposition of C. Vassar; appear and attend deposition of C. Vassar;

16875970 09970 Sampo, 8/19/2008 1.70 1.70 B 3814255 \$221.00 \$221.00
Kimberly L.

Narrative: Review and update Case Management Notebooks in preparation for trial; instruction to A. Bushor regarding

16873908 02388 Yee- 8/20/2008 2.30 2.30 B 3814255 \$517.50 \$517.50
Wallace,
Cynthia L.

Narrative: Conference with client to discuss ; analyze and review deposition transcript of M. Vis;

16875968 09970 Sampo, 8/20/2008 4.30 4.30 B 3814255 \$559.00 \$559.00
Kimberly L.

Narrative: Locate information throughout discover responses regarding each trial witness; update witness notebooks with same; prepare collection of all documents produced by the parties and deposition exhibits;

16875969 09970 Sampo, 8/21/2008 0.70 0.70 B 3814255 \$91.00 \$91.00
Kimberly L.

Narrative: Telephone call to court reporter regarding color photos; continue working on collection of deposition exhibits for potential trial exhibits;

16873907 02388 Yee- 8/22/2008 5.10 3.50 B 3814255 \$1,147.50 \$787.50
Wallace,
Cynthia L.

Narrative: Draft and revise Reply to Plaintiffs' Opposition to Defendants' Second Motion in Limine; analyze and review cases previously cited by Plaintiffs; analyze and review submissions from client;

16875967 09970 Sampo, 8/22/2008 0.90 0.90 B 3814255 \$117.00 \$117.00
Kimberly L.

Narrative: Draft witness and exhibit list for trial;

16910259 09161 Cozakos, 8/22/2008 1.50 1.50 B 3814255 \$390.00 \$390.00
Shelly H.

Narrative: Review briefs filed by opposing counsel; review case law regarding implied easement; conference with C. Yee-Wallace regarding

16896946 02388 Yee- 8/25/2008 7.30 3.50 B 3814255 \$1,642.50 \$787.50
Wallace,
Cynthia L.

Narrative: Draft and revise Reply to Plaintiffs' Opposition to Defendants' Motion to Bifurcate Trial; draft and revise Affidavit of C. Yee-Wallace in support of same; revise Reply to opposition to Defendants' Second Motion in Limine; revise exhibit list; draft and revise litigation outline and list for trial;

16899091 09970 Sampo, 8/25/2008 0.80 0.00 B 3814255 \$104.00 \$0.00
Kimberly L.

000518

Narrative: Revise witness and exhibit list; update document collection with additional deposition exhibits;

16896945 02388 Yee- 8/26/2008 7.60 3.00 B 3814255 \$1,710.00 \$675.00
Wallace,
Cynthia L.

Narrative: Draft and revise jury instructions, analyze and review cases in preparation for same; draft and revise Trial Memorandum; revise exhibit and witness list;

16899095 09970 Sampo, 8/26/2008 1.60 1.60 B 3814255 \$208.00 \$208.00
Kimberly L.

Narrative: Locate document camera for use at trial; revise exhibit list for trial; continue update to trial notebooks;

16906041 01437 Marlatt, 8/26/2008 1.00 1.00 B 3814255 \$150.00 \$150.00
Margaret
O.

Narrative: Assist in preparing defendants' proposed jury instructions;

16910256 09161 Cozacos, 8/26/2008 1.90 1.90 B 3814255 \$494.00 \$494.00
Shelly H.

Narrative: Review responses to motions in limine; conference with C. Yee-Wallace regarding ; review motions filed by plaintiffs;

16885212 00616 Bushor, 8/27/2008 0.50 0.00 B 3814255 \$32.50 \$0.00
Aaron J.

Narrative: Copy contents of CD to another CD to be produced to opposing counsel;

16896943 02388 Yee- 8/27/2008 6.80 2.00 B 3814255 \$1,530.00 \$450.00
Wallace,
Cynthia L.

Narrative: Revise Trial Memorandum and Jury Instructions; research cases regarding same; analyze and review submissions from Plaintiffs; plan and prepare for oral argument;

16899094 09970 Sampo, 8/27/2008 0.40 0.00 B 3814255 \$52.00 \$0.00
Kimberly L.

Narrative: Review plaintiffs' exhibit list for new information not previously disclosed;

16906044 01437 Marlatt, 8/27/2008 2.40 2.40 B 3814255 \$360.00 \$360.00
Margaret
O.

Narrative: Receive direction from C. Yee-Wallace regarding ; draft trial subpoenas to H. Ford, R. Lancaster and C. Smith and draft instructions to Tri County Process Serving regarding service of same;

16910255 09161 Cozacos, 8/27/2008 2.80 2.80 B 3814255 \$728.00 \$728.00
Shelly H.

Narrative: Review and revise jury instructions, trial brief and witness/exhibit list;

16894914 00616 Bushor, 8/28/2008 0.50 0.00 B 3814255 \$32.50 \$0.00
Aaron J.

Narrative: Edit and make changes to the trial witness notebook;

16896944 02388 Yee- 8/28/2008 7.80 3.00 B 3814255 \$1,755.00 \$675.00
Wallace,
Cynthia L.

Narrative: Appear and attend hearing on Defendants' Second Motion in Limine and Motion to Bifurcate Trial; conference with client and inspection of property in preparation for trial; draft and revise Defendants' Third Motion in Limine and memorandum in support;

16899093 09970 Sampo, 8/28/2008 1.60 1.60 B 3814255 \$208.00 \$208.00

000519

Kimberly L.

Narrative: Begin compiling exhibits for use at trial; instruction to A. Bushor regarding

16906042	01437 Marlatt, Margaret O.	8/28/2008	0.60	0.60	B	3814255	\$90.00	\$90.00
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Narrative: Follow up on service of three trial subpoenas and relate status of same to C. Yee-Wallace; assist with trial preparations;

16910258	09161 Cozakos, Shelly H.	8/28/2008	4.60	4.60	B	3814255	\$1,196.00	\$1,196.00
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Narrative: Attend hearing on pending motions; conference with C. Yee-Wallace regarding

16915047	09786 Salmi, Christine M.	8/28/2008	0.40	0.40	B	3869384	\$98.00	\$0.00
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Narrative: Conference with C. Yee-Wallace regarding ; research Idaho cases regarding same;

16894913	00616 Bushor, Aaron J.	8/29/2008	5.50	0.00	B	3814255	\$357.50	\$0.00
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Narrative: Copy various affidavits and file in trial witness notebooks; Review documents that need to be included in the trial notebooks, and add material; Make seven copies of various CD's;

16896942	02388 Yee- Wallace, Cynthia L.	8/29/2008	7.90	3.00	B	3814255	\$1,777.50	\$675.00
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Narrative: Draft and revise Motion for Clarification and memorandum in support; draft and revise Defendants' Fourth Motion in Limine and memorandum in support; draft and revise Motion to Strike and Exclude testimony of M. Vis and memorandum and affidavit of C. Yee-Wallace in Support; revise Defendants' Third Motion in Limine and memorandum in support;

16899092	09970 Sampo, Kimberly L.	8/29/2008	4.50	2.00	B	3814255	\$585.00	\$260.00
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Narrative: Continue compiling exhibits for use at trial; perform various tasks related to trial preparation including: witness contact list; prepare letter to opposing counsel regarding verification page to discovery responses; email and telephone communications with Pioneer Title Co. regarding irrigation easements for Wielang, Lane and Memmelaar [2.5 hrs - NO CHARGE];

16906043	01437 Marlatt, Margaret O.	8/29/2008	0.80	0.80	B	3814255	\$120.00	\$120.00
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Narrative: Export final requested jury instructions for submission to court; assist C. Yee-Wallace with trial preparations;

16910257	09161 Cozakos, Shelly H.	8/29/2008	2.50	2.50	B	3814255	\$650.00	\$650.00
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Narrative: Review and revise motions in limine; conference with C. Yee-Wallace, trial preparation;

16915046	09786 Salmi, Christine M.	8/29/2008	3.30	3.30	B	3869384	\$808.50	\$0.00
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Narrative: Continue research regarding right to jury trial on declaratory judgment claim; conference with C. Yee-Wallace regarding ; draft email to C. Yee-Wallace outlining research results;

16930674	02388 Yee- Wallace, Cynthia L.	9/1/2008	3.00	3.00	B	3869384	\$675.09	\$607.25
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Narrative: Analyze and review deposition testimony of J. Scott and J. Scott and C. Vassar in preparation for trial;

000520

meeting with clients ; plan and prepare for oral argument on pre-trial motions;

16929700 01437 Marlatt, 9/2/2008 0.40 0.40 B 3869384 \$60.00 \$0.00
Margaret
O.

Narrative: Assist in drafting supplemental defendants' jury instructions and export same for submission to court;

16930673 02388 Yee- 9/2/2008 4.87 4.87 B 3869384 \$1,095.64 \$985.74
Wallace,
Cynthia L.

Narrative: Appear and attend hearing on Defendants' Third Motion in Limine, Third Motion in Limine, Motion to Strike M. Vis, and Motion for Clarification; conference with clients ; draft and revise questions for trial; draft and revise voir dire questions; appear and attend deposition of C. Smith;

16932807 09970 Sampo, 9/2/2008 8.10 8.10 B 3869384 \$1,053.00 \$947.70
Kimberly L.

Narrative: Revise supplemental jury instructions and prepare pleading; instruction to staff regarding ; perform various trial preparation tasks; conference with S. Cozakos regarding ; prepare and label same;

16934311 00616 Bushor, 9/2/2008 2.70 2.70 B 3869384 \$175.50 \$0.00
Aaron J.

Narrative: Make up boxes and create labels for material going to trial; review and create jury information sheets (2 each), listing name, age and occupation for each prospective juror;

17029582 09161 Cozakos, 9/2/2008 12.50 12.50 B 3869384 \$3,250.00 \$2,924.99
Shelly H.

Narrative: Attend hearing in Caldwell on trial motions; meet with client; prepare for first day of trial.

16929701 01437 Marlatt, 9/3/2008 0.60 0.60 B 3869384 \$90.00 \$0.00
Margaret
O.

Narrative: Conference with K. Sampo and vendor regarding and assist with other jury trial logistics;

16930670 02388 Yee- 9/3/2008 4.43 4.43 B 3869384 \$996.04 \$896.70
Wallace,
Cynthia L.

Narrative: Appear and attend trial;

16931156 03103 Arnold, 9/3/2008 3.00 3.00 B 3869384 \$675.00 \$607.50
Dean B.

Narrative: Telephone conference with S. Cozakos regarding conduct legal research regarding implied easements, ownership of land in relation to same, ditch and canal easements, rights-of-way, and relevant Idaho statutes regarding same; draft summary of same and email to S. Cozakos; telephone conference with S. Cozakos regarding ; draft additional jury instructions and forward to S. Cozakos for review;

16932808 09970 Sampo, 9/3/2008 9.20 9.20 B 3869384 \$1,196.00 \$0.00
Kimberly L.

Narrative: Prepare for and attend trial at Canyon County Courthouse; assist with various tasks during trial; (NO CHARGE)

16982180 09161 Cozakos, 9/3/2008 10.50 10.50 B 3869384 \$2,730.00 \$2,456.99
Shelly H.

Narrative: Travel to and from Caldwell; prepare for and attend trial;

16930672 02388 Yee- 9/4/2008 4.43 4.45 B 3869384 \$996.04 \$900.77
Wallace,
Cynthia L.

Narrative: Appear and attend trial;

16931157 03103 Arnold, 9/4/2008 0.90 0.90 B 3869384 \$202.50 \$182.25
Dean B.

Narrative: Review email from C. Yee-Wallace regarding ; telephone conference with C. Yee-Wallace regarding ; conduct legal research regarding obligations and duties surrounding easements; draft supplemental jury instructions and forward to L. Loyd for filing;

16932810 09970 Sampo, 9/4/2008 9.90 0.00 B 3869384 \$1,287.00 \$0.00
Kimberly L.

Narrative: Prepare for and attend trial at Canyon County Courthouse; assist with various tasks during trial; (NO CHARGE)

16982181 09161 Cozakos, 9/4/2008 10.80 10.80 B 3869384 \$2,808.00 \$2,527.19
Shelly H.

Narrative: Travel to and from Caldwell; prepare for and attend trial; waiting for verdict;

16930671 02388 Yee- 9/5/2008 4.43 4.45 B 3869384 \$996.04 \$900.77
Wallace,
Cynthia L.

Narrative: Appear and attend trial;

16932809 09970 Sampo, 9/5/2008 7.10 0.00 B 3869384 \$923.00 \$0.00
Kimberly L.

Narrative: Prepare for and attend trial at Canyon County Courthouse; assist with various tasks during trial; (NO CHARGE)

17029581 09161 Cozakos, 9/5/2008 8.50 8.50 B 3869384 \$2,210.00 \$1,988.99
Shelly H.

Narrative: Attend Day 3 of Trial.

16956144 09970 Sampo, 9/8/2008 0.90 0.90 B 3869384 \$117.00 \$105.30
Kimberly L.

Narrative: Prepare trial subpoena and cover letter to H. Foote;

16958666 02388 Yee- 9/8/2008 2.71 2.71 B 3869384 \$608.69 \$548.55
Wallace,
Cynthia L.

Narrative: Research Idaho law on changing of ditches; draft and revise 3rd Supplemental Jury Instructions; meeting with clients to ; plan and prepare for cross examination and direct examination of witnesses;

17029583 09161 Cozakos, 9/8/2008 7.30 7.30 B 3869384 \$1,898.00 \$1,708.20
Shelly H.

Narrative: Prepare for fourth day of trial; prepare briefs in support of motions; prepare for opening statement.

16953924 03103 Arnold, 9/9/2008 2.80 2.80 B 3869384 \$630.00 \$567.00
Dean B.

Narrative: Personal conference with C. Yee-Wallace regarding , conduct legal research regarding trespass, abandonment, mislaid property, and rights of fee simple owner of real property to remove third party's personal property; draft proposed jury instructions regarding trespass and abandonment and forward to S. Cozakos for review; telephone conference with S. Cozakos regarding ; conduct legal research regarding statement of party opponent, agency relationship of attorney and client, and hearsay rules regarding same; draft and send summary email to S. Cozakos regarding forward proposed jury instructions to K. Graham for filing;

16956145 09970 Sampo, 9/9/2008 5.10 0.00 B 3869384 \$663.00 \$0.00
Kimberly L.

Narrative: Prepare for and attend trial; update list of admitted exhibits; coordinate printing of video pictures with courthouse personnel; (NO CHARGE)

000522

16958664	02388 Yee- Wallace, Cynthia L.	9/9/2008	4.43	4.43	B	3869384	\$996.04	\$896.70
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Narrative: Appear and attend trial;

16982183	09161 Cozakos, Shelly H.	9/9/2008	10.00	10.00	B	3869384	\$2,600.00	\$2,339.99
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Narrative: Travel to and from Caldwell; prepare for and attend trial;

16953923	03103 Arnold, Dean B.	9/10/2008	0.50	0.50	B	3869384	\$112.50	\$101.25
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Narrative: Conference with K. Sampo regarding ; conduct research regarding same; draft proposed jury instructions and forward to trial team for review; telephone conference with S. Cozakos regarding ; conference with K. Sampo regarding

16956143	09970 Sampo, Kimberly L.	9/10/2008	3.60	3.60	B	3869384	\$468.00	\$421.20
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Narrative: Prepare files for trial; telephone communications with witnesses; draft and revise supplemental jury instructions; instruction to vendor regarding color photographs; prepare and label additional exhibits; telephone call to vendor regarding document camera;

16958665	02388 Yee- Wallace, Cynthia L.	9/10/2008	6.05	6.05	B	3869384	\$1,361.25	\$1,224.62
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Narrative: Appear and attend trial in Canyon County; prepare closing argument; prepare for direct examination of R. Lancaster; draft and revise 5th Supplemental Jury Instructions;

16982178	09161 Cozakos, Shelly H.	9/10/2008	10.00	10.00	B	3869384	\$2,600.00	\$2,339.99
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Narrative: Travel to and from Caldwell; prepare for and attend trial;

16956142	09970 Sampo, Kimberly L.	9/11/2008	1.40	1.40	B	3869384	\$182.00	\$163.80
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Narrative: Prepare file for trial; continue communications with witnesses; instruction to vendor regarding additional color photographs; prepare and label color photographs;

16958663	02388 Yee- Wallace, Cynthia L.	9/11/2008	6.94	6.94	B	3869384	\$1,560.46	\$1,404.77
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Narrative: Appear and attend trial in Canyon County; meeting with client; plan and prepare closing; obtain jury verdict;

16982182	09161 Cozakos, Shelly H.	9/11/2008	10.50	10.50	B	3869384	\$2,730.00	\$2,456.99
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Narrative: Travel to and from Caldwell; prepare for and attend trial;

16956146	09970 Sampo, Kimberly L.	9/12/2008	1.20	0.00	B	3869384	\$156.00	\$0.00
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Narrative: Download most recent docket and verify missing documents with pleading index; telephone conference with S. Murray regarding availability; (NO CHARGE)

16980377	02388 Yee- Wallace, Cynthia L.	9/15/2008	1.87	1.85	B	3869384	\$420.55	\$374.48
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Narrative: Research Idaho cases on damages and liability for negligence in ditch cases; research injury to land cases; draft and revise 6th supplemental jury instructions; conference calls to and from opposing counsel; analyze and review jury instructions to supplement same;

16982683	09970 Sampo, Kimberly L.	9/15/2008	1.40	1.40	B	3869384	\$182.00	\$163.80
<i>Narrative: Review discovery responses, witness disclosures and deposition transcripts for damage claims by Plaintiff; prepare package of information for attorney review;</i>								
17029584	09161 Cozacos, Shelly H.	9/15/2008	6.50	6.50	B	3869384	\$1,690.00	\$1,521.00
<i>Narrative: Preparation for final day of trial; conferences with client regarding</i>								
16980376	02388 Yee- Wallace, Cynthia L.	9/16/2008	4.67	4.67	B	3869384	\$1,051.37	\$945.29
<i>Narrative: Appear and attend trial in Canyon County; await jury verdict;</i>								
16982179	09161 Cozacos, Shelly H.	9/16/2008	10.20	10.20	B	3869384	\$2,652.00	\$2,386.79
<i>Narrative: Travel to and from Caldwell, prepare for and attend trial;</i>								
16982681	09970 Sampo, Kimberly L.	9/16/2008	0.20	0.00	B	3869384	\$26.00	\$0.00
<i>Narrative: Instruction to staff regarding</i>								
16982682	09970 Sampo, Kimberly L.	9/17/2008	2.30	2.30	B	3869384	\$299.00	\$269.10
<i>Narrative: Organize attorney notes and documents from trial; work with staff to obtain missing documents from court file and locate contact information on jurors;</i>								
17001490	02388 Yee- Wallace, Cynthia L.	9/23/2008	0.59	0.55	B	3869384	\$132.75	\$111.33
<i>Narrative: Telephone conference with jurors regarding jury decision in case;</i>								
17029585	09161 Cozacos, Shelly H.	9/23/2008	1.50	1.50	B	3869384	\$390.00	\$351.01
<i>Narrative: Receive and review proposed judgment from Plaintiffs; draft objection to entry of judgment and affidavit in support.</i>								
17041877	02388 Yee- Wallace, Cynthia L.	10/2/2008	1.80	1.80	P	3860671	\$405.00	\$405.00
<i>Narrative: Research additional cases on motion for judgment notwithstanding the verdict and sufficiency of damages; draft and revise argument section of memorandum in support of motion notwithstanding the verdict; research legislative history;</i>								
17049164	09161 Cozacos, Shelly H.	10/2/2008	3.70	3.70	P	3860671	\$962.00	\$962.00
<i>Narrative: Prepare memorandum in support of motion for JNOV and directed verdict; review and revise same and prepare for filing.</i>								
17094269	09161 Cozacos, Shelly H.	10/15/2008	1.00	1.00	P	3860671	\$260.00	\$260.00
<i>Narrative: Begin preparation for hearing on motion for directed verdict, mistrial and JNOV.</i>								
17094271	09161 Cozacos, Shelly H.	10/16/2008	4.50	4.50	P	3860671	\$1,170.00	\$1,170.00
<i>Narrative: Finish preparation for hearing on motion for JNOV, directed verdict and motion for mistrial; travel to and from Caldwell to attend hearing; attend hearing; conference with client regarding (no charge).</i>								
17094270	09161 Cozacos,	10/17/2008	0.50	0.50	P	3860671	\$130.00	\$130.00

000524

Shelly H.

Narrative: Prepare Judgment granting motions for JNOV and Directed Verdict.

17152361 09161 Cozacos, 10/21/2008 0.60 0.60 P 3860671 \$156.00 \$156.00
 Shelly H.

Narrative: Prepare proposed Order; prepare correspondence to opposing counsel.

17175277 09161 Cozacos, 11/4/2008 0.30 0.00 W \$78.00 \$0.00
 Shelly H.

Narrative: Revise Order;

17198128 02388 Yee- 11/10/2008 0.30 0.00 W \$67.50 \$0.00
 Wallace,
 Cynthia L.

Narrative: Revise order on Defendants' post-trial motions;

17209840 09161 Cozacos, 11/11/2008 0.40 0.00 W \$104.00 \$0.00
 Shelly H.

Narrative: Revise proposed Judgment; conference with C. Wallace regarding

17198129 02388 Yee- 11/13/2008 0.80 0.00 W \$180.00 \$0.00
 Wallace,
 Cynthia L.

Narrative: Draft and revise judgment in accordance with court rulings and verdict forms; analyze and review rulings and verdicts in preparation for same;

Total for Matter: **528.82 457.70** **\$111,549.46 \$89,152.30**

Total for Client: **528.82 457.70** **\$111,549.46 \$89,152.30**

Report Total: **528.82 457.70** **\$111,549.46 \$89,152.30**

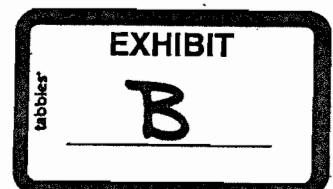


Disbursement Summary

Client/Matter: 65685 John and Jackie Scott 0001 Charles Bratton Easement Dispute

Code	Description	Base Amount	Billed Amount
1001	Outside copying expenses	\$42.34	\$42.34
1003	Photocopies and printing	\$713.40	\$488.70
1007	Photocopies and printing-color 8X11	\$4.00	\$4.00
1505	Messenger service	\$27.16	\$0.00
1509	Special postage	\$4.14	\$3.73
1510	Special supplies	\$106.00	\$106.00
1512	CD-Processing	\$375.00	\$375.00
2003	Telephone conference calls	\$2.99	\$0.00
2502	Computer research - Westlaw	\$602.71	\$582.00
3003	Court reporter fee -	\$2,599.30	\$3,022.13
3004	Transcript copy expense	\$1,348.29	\$1,348.29
3504	Filing fees	\$58.00	\$58.00
3510	Service of subpoena fees	\$261.00	\$261.00
4089	Professional services -	\$2,880.07	\$2,880.07
4501	Staff overtime assistance	\$175.00	\$175.00
5006	Local travel expense	\$1,506.89	\$1,011.24
5009	Mileage charge for use of firm car	\$28.28	\$0.00
9003	Conference meals -	\$49.71	\$0.00
9500	Other -	\$675.82	\$675.82
Total for Matter:		\$11,460.10	\$11,033.32
Total for Client:		\$11,460.10	\$11,033.32

000526



12/2/2008



Billed to : Cynthia L. Yee-Wallace
Perkins Coie LLP
251 East Front Street, Ste. 400
P.O. Box 737
Boise ID 83701-0737

Boise, Idaho
421 W. Franklin Street
P.O. Box 2636 83701-2636
208 345-9611
208 345-8800 (fax)
email m-and-m@qwest.net

JOB INFORMATION (18227B4)

Invoice # 24723B5

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1 800 234-9611

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Ontario, Oregon
541 881-1700

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1 800 879-1700

Coeur d'Alene, Idaho
208 765-1700
Spokane, Washington
509 455-4515

Case: Bratton v. Scott
Taken: 9/2/2008
Witness : Chris Smith (*Copy*)
Location : Canyon County Sheriff's Office
1115 Albany Street
Caldwell, ID 83708

Vendor # _____ **Due** _____

C/M # 65685-0001

Office Code _____ **Dish Code** _____

G/L # _____

Amount Due: \$45.74

Description Depo - C. Smith

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Invoice Date

Tuesday, September 02, 2008

Invoice #

24723B5

Cynthia L. Yee-Wallace
 Perkins Coie LLP
 251 East Front Street, Ste. 400
 P.O. Box 737
 Boise, ID 83701-0737

Phone: (208) 343-3434 Fax: (208) 343-3232

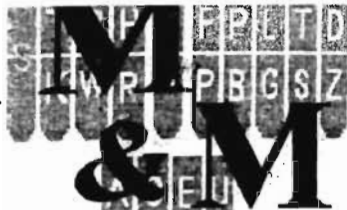
Witness:	Chris Smith
Case:	Bratton v. Scott
Venue:	Canyon County, Idaho
Case #:	CV 0706821C
Date:	9/2/2008
Start Time:	10:30 AM
End Time:	11:01 AM
Reporter:	Kottraba, Diana Durland
Claim #:	
File #:	18227B4

Item	Description	Each	Quan	Total
SW	Signature waived	\$0.00	1	\$0.00
EA	Exhibits Attached to Transcript	\$0.25	1	\$0.25
C	Transcript Fee for Copy of Deposition	\$1.95	22	\$42.90
SalesTax	6% sales tax	\$2.59	1	\$2.59
			Sub Total	\$45.74
			Payments	\$0.00
			Balance Due	\$45.74

Fed. I.D. # 82-0298125

We Accept VISA and MasterCard

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Boise ID 83701-0737

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208 345-9611
208 345-8800 (fax)
email m-and-m@qwest.net

JOB INFORMATION (18256B4)

Invoice # 24526B5

SOUTHERN OFFICES
1 800 234-9611

Twin Falls, Idaho
208 734-1700
Pocatello, Idaho
208 232-5581
Ontario, Oregon
541 881-1700

Case: Bratton v. Scott
Taken: 8/12/2008
Witness : Stuart Murray – Volume II (Copy)
Location : Perkins Coie LLP
251 East Front Street, Ste. 400
P.O. Box 737
Boise, ID 83701-0737

NORTHERN OFFICES
1 800 879-1700

Coeur d'Alene, Idaho
208 765-1700
Spokane, Wash
509 455-4511

Vendor # _____
C/M # 65685-0001 **Due** _____
Office Code _____ Dish Code _____
G/L # _____
Description Depo-S. Murray
Approval [Signature]

Amount Due: \$215.02

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Invoice # 24526B5
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Amount Due: \$215.02

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Phone: (208) 345-9611

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Invoice Date

Monday, August 18, 2008

Invoice #

24526B5

Cynthia L. Yee-Wallace
 Perkins Coie LLP
 251 East Front Street, Ste. 400
 P.O. Box 737
 Boise, ID 83701-0737

Phone: (208) 343-3434 Fax: (208) 343-3232

Witness:	Stuart Murray
Case:	Bratton v. Scott
Venue:	Canyon County, Idaho
Case #:	CV 0706821C
Date:	8/12/2008
Start Time:	11:00 AM
End Time:	12:54 PM
Reporter:	Diana Durland
Claim #:	
File #:	18256B4

Item	Description	Each	Quan	Total
SM	M&M to obtain signature	\$0.00	1	\$0.00
CX	Copies of Color Exhibits	\$1.00	17	\$17.00
COR	Copy; rough draft provided	\$2.95	63	\$185.85
SalesTax	6% sales tax	\$12.17	1	\$12.17
			Sub Total	\$215.02
			Payments	\$0.00
			Balance Due	\$215.02

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Fed Id No. 82-0298125

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Boise, Idaho
421 W. Franklin Street
P.O. Box 2636 83701-2636
208 345-9611
208 345-8800 (fax)
email m-and-m@qwest.net

JOB INFORMATION (18218B4) **Invoice # 24524B5**

SOUTHERN OFFICES
1 800 234-9611

Twin Falls, Idaho
208 734-1700
Pocatello, Idaho
208 232-5581
Ontario, Oregon
541 881-1700

Case: Bratton v. Scott
Taken: 8/11/2008
Witness : Stuart Murray - Volume I (Copy)
Location : Perkins Coie LLP
251 East Front Street, Ste. 400
P.O. Box 737
Boise, ID 83701-0737

NORTHERN OFFICES
1 800 879-1700

Coeur d'Alene, Idaho
208 765-1700
Spokane, Wash
509 455-4511

Vendor # _____
C/M # 65685-0001
Office Code _____ **Dish Code** _____
GL # _____
Description Depo - S. Murray
Approval JAC

Amount Due: \$242.69

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Invoice # 24524B5
Billed: 8/18/2008
Amount Due: \$242.69

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Boise, ID 83701-2636

Phone: (208) 345-9611

Fax: (208) 345-8800

Invoice Date	Invoice #
Monday, August 18, 2008	24524B5

Cynthia L. Yee-Wallace
 Perkins Coie LLP
 251 East Front Street, Ste. 400
 P.O. Box 737
 Boise, ID 83701-0737

Phone: (208) 343-3434 Fax: (208) 343-3232

Witness:	Stuart Murray
Case:	Bratton v. Scott
Venue:	Canyon County, Idaho
Case #:	CV 0706821C
Date:	8/11/2008
Start Time:	10:10 AM
End Time:	12:01 PM
Reporter:	Diana Durland
Claim #:	
File #:	18218B4

Item	Description	Each	Quan	Total
SM	M&M to obtain signature	\$0.00	1	\$0.00
CX	Copies of Color Exhibits	\$1.00	5	\$5.00
EA	Exhibits Attached to Transcript	\$0.25	58	\$14.50
COR	Copy; rough draft provided	\$2.95	71	\$209.45
SalesTax	6% sales tax	\$13.74	1	\$13.74
			Sub Total	\$242.69
			Payments	\$0.00
			Balance Due	\$242.69

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**Court Reporting
Service, Inc.**
Fed Id No. 82-0298125

Billed to : Cynthia L. Yee-Wallace
Perkins Coie LLP
251 East Front Street, Ste. 400
P.O. Box 737
Boise ID 83701-0737

Boise, Idaho
421 W. Franklin Street
P.O. Box 2636 83701-2636
208 345-9611
208 345-8800 (fax)
email m-and-m@gwest.net

JOB INFORMATION (16858B4)

Invoice # 22587B5

SOUTHERN OFFICES
1 800 234-9611

Twin Falls, Idaho
208 734-1700
Pocatello, Idaho
208 232-5581
Ontario, Oregon
541 881-1700

Case: Bratton v. Scott
Taken: 3/4/2008
Witness : Jackie G. Scott (Copy)

NORTHERN OFFICES
1 800 879-1700

Location : Brassey Wetherell Crawford & Garrett, LLP
203 West Main Street
P.O. Box 1009
Boise, ID 83701-1009

Coeur d'Alene, Idaho
208 765-1700
Spokane, Washington
509 455-1700

Vendor # _____ **Due** _____

CM # 65685-0001

Office Code _____ **Dish Code** _____

G/L # _____

Description Depo - Jackie Scott

Approval JWC

Amount Due: \$246.87

(Return bottom portion with check)

Billed To: Cynthia L. Yee-Wallace
Invoice # 22587B5
Billed: 3/18/2008
Amount Due: \$246.87



Court Reporting Service, Inc.
Fed Id No. 82-0298125

Billed to : Shelly H. Cozakos
Perkins Coie LLP
251 East Front Street, Ste. 400
P.O. Box 737
Boise ID 83701-0737

Boise, Idaho
421 W. Franklin Street
P.O. Box 2636 83701-2636
208 345-9611
208 345-8800 (fax)
email m-and-m@qwest.net

JOB INFORMATION (11846B4)

Invoice # 22609B5

SOUTHERN OFFICES
1 800 234-9611

Twin Falls, Idaho
208 734-1700
Pocatello, Idaho
208 232-5581
Ontario, Oregon
541 881-1700

Case: Bratton v. Scott
Taken: 3/6/2008
Witness : Marjorie I. Bratton (*Orig. & 1 copy*)

NORTHERN OFFICES
1 800 879-1700

Location : Perkins Coie LLP
251 East Front Street, Ste. 400
P.O. Box 737
Boise ID 83701-0737

Coeur d'Alene, Idaho
208 765-1700
Spokane, Washington
509 455-4515

Vendor # _____

C/M # 65685-0001

Office Code _____ **Dish Code** _____

G/L # _____

Description Depo - Mr Bratton

Approval [Signature]

Amount Due: \$470.27

(Return bottom portion with check)

Billed To: Shelly H. Cozakos
Invoice # 22609B5
Billed: 3/18/2008
Amount Due: \$470.27

Billed: 2/20/2008

M & M

Court Reporting Service, Inc.
Fed Id No. 82-0298125

Billed to : Cynthia L. Yee-Wallace
Perkins Coie LLP
251 East Front Street, Ste. 400
P.O. Box 737
Boise ID 83701-0737

2/18
HAND DELIVERED
FEB 20 2008
PERKINS COIE LLP - BOISE 2-15

Boise, Idaho
421 W. Franklin Street
P.O. Box 2636 83701-2636
208 345-9611
208 345-8800 (fax)
email m-and-m@qwest.net

JOB INFORMATION (16857B4)

Invoice # 22231B5

SOUTHERN OFFICES
1 800 234-9611

Twin Falls, Idaho
208 734-1700
Pocatello, Idaho
208 232-5581
Ontario, Oregon
541 881-1700

Case: Bratton v. Scott

Taken: 2/7/2008

Witness : John R. Scott (*Copy*)

Location : Brassey Wetherell Crawford & Garrett, LLP
203 West Main Street
P.O. Box 1009
Boise, ID 83701-1009

NORTHERN OFFICES
1 800 879-1700

Coeur d'Alene
208 765-1700
Spokane, Washington
509 455-4600

Vendor # _____ **Due** _____

CM # 65685-0001

Office Code _____ **Dish Code** _____

G/L # _____

Description Depo - John Scott

Approval JAE

Amount Due: \$397.24

(Return bottom portion with check)

Billed To: Cynthia L. Yee-Wallace
Invoice # 22231B5
Billed: 2/20/2008
Amount Due: \$397.24

M & M

Court Reporting Service, Inc.
Fed Id No. 82-0298125

Billed: 2/14/20

Billed to : Shelly H. Cozakos
Perkins Coie LLP
251 East Front Street, Ste. 400
P.O. Box 737
Boise ID 83701-0737

Boise, Idaho
421 W. Franklin Street
P.O. Box 2636 83701-2636
208 345-9611
208 345-8800 (fax)
email m-and-m@qwest.net

JOB INFORMATION (11820B4)

Invoice # 22202B5

SOUTHERN OFFICES
1 800 234-9611

Twin Falls, Idaho
208 734-1700
Pocatello, Idaho
208 232-5581
Ontario, Oregon
541 881-1700

Case: Bratton v. Scott
Taken: 2/6/2008
Witness : Charles E. Bratton (*Orig. & 1 copy*)
Location : Perkins Coie LLP
251 East Front Street, Ste. 400
P.O. Box 737
Boise, ID 83701-0737

NORTHERN OFFICES
1 800 879-1700

Coeur d'Alene, Idaho
208 765-1700
Spokane, Washington
509 455-4515

Vendor # _____ **Due** _____
C/M # 65685-0001
Office Code _____ **Dish Code** _____
G/L # _____
Description Depo - C. Bratton
Approval JAC

Amount Due: \$742.79

(Return bottom portion with check)

Billed To: Shelly H. Cozakos
Invoice # 22202B5
Billed: 2/14/2008
Amount Due: \$742.79

000536

August 29, 2008

TRI-COUNTY PROCESS SERVING L.L.C.

P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #69709

Attn: Shelly H. Cozakos
PERKINS COIE LLP
251 E. FRONT ST., 4TH FLOOR
BOISE ID 83702
(208) 343-3434 Business
(208) 343-3232 Fax

Reference Job #69709 when remitting.

Charles E. Bratton vs John R. Scott
Case Number: CV 0706821C
Documents: Trial Subpoena Duces Tecum

Chris Smith Served by leaving with Debbie McRae

on August 28, 2008
at 3:40 PM, at Canyon County Sheriff's Office, 1115 Albany Street, Caldwell, ID 83605
by Mike Ridgeway

Mileage Fee \$54.00
Service Fee \$38.00
Rush \$30.00

Total: \$122.00

DUE ON RECEIPT: \$122.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING!

Vendor # _____ Due _____

C/M # 65685-0001

Office Code _____ Dish Code _____

G/L # _____

Description Service Fee Trial Subpoena

Approval [Signature]

000537

August 28, 2008

TRI-COUNTY PROCESS SERVING L.L.C.

P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #6970

Attn: Shelly H. Cozakos
PERKINS COIE LLP
251 E. FRONT ST., 4TH FLOOR
BOISE ID 83702
(208) 343-3434 Business
(208) 343-3232 Fax

Reference Job #69708 when remitting.

Charles E. Bratton vs John R. Scott
Case Number: CV 0706821C
Documents: Trial Subpoena Duces Tecum

Service Upon: Harold Ford

Personal Service to Harold Ford on August 27, 2008 at 8:45 PM,
at: 4210 St. Andrews Drive, Boise, ID 83705
by Michael J. Devries

Mileage Fee \$9.00
Service Fee \$38.00

Total: \$47.00

DUE ON RECEIPT: \$47.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING!

Vendor # _____ Due _____
C/M # 65685-0001
Office Code _____ Dish Code _____
G/L # _____
Description Service Fee-Trial Subpoena
Approval [Signature]
000538

September 3, 2008

TRI-COUNTY PROCESS SERVING

P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax

Invoice #69707

Attn: Shelly H. Cozakos
PERKINS COIE LLP
251 E. FRONT ST., 4TH FLOOR
BOISE ID 83702
(208) 343-3434 Business
(208) 343-3232 Fax

Reference Job #69707 when remitting.

Charles E. Bratton vs John R. Scott
Case Number: CV 0706821C
Documents: Trial Subpoena Duces Tecum, Letter

Service Upon: Rick Lancaster

Personal Service to Rick Lancaster on September 1, 2008 at 1:55 PM,
at: Canyon County Sheriff's Office, 1115 Albany Street, Caldwell, ID 83605
by Mike Ridgeway

Mileage Fee \$54.00
Service Fee \$38.00

Total: \$92.00

DUE ON RECEIPT: \$92.00

Thank You for Choosing
TRI-COUNTY PROCESS SERVING!

Vendor # _____ Due _____

C/M # 65685-0001

Office Code _____ Dish Code _____

G/L # _____

Description Service Fee - trial Subpoena

Approval [Signature]

000539

September 9, 2008

TRI-COUNTY PROCESS SERVING L.L.C.

P.O. Box 1224
Boise, ID, 83701
(208) 344-4132 Business
(208) 338-1530 Fax
Federal Tax ID: 82-0348092

Invoice #701

Attn: Shelly H. Cozakos
PERKINS COIE LLP
251 E. FRONT ST., 4TH FLOOR
BOISE ID 83702
(208) 343-3434 Business
(208) 343-3232 Fax

Reference Job #70291 when remitting.

Charles E. Bratton vs John R. Scott
Case Number: CV 0706821C
Documents: Trial Subpoena Duces Tecum, Letter

Service Upon: Harold R. Foote

Personal Service to Harold R. Foote on September 8, 2008 at 7:28 PM,
at: 304 N. Dewey, Middleton, ID 83644
by Antonio Roque

Mileage Fee \$40
Service Fee \$30
Rush \$30

Total: \$110

DUE ON RECEIPT: \$113

Thank You for Choosing
TRI-COUNTY PROCESS SERVING!

Vendor # _____ Due _____

C/M # 65685-0001

Office Code _____ Dish Code _____

G/L # _____

Description Service Fee Subpoena H. Foote
Approval [Signature]

000540

Received of: Perkins Coie

\$ 58.00

Fifty-Eight and 00/100 Dollars

Case: CV-2007-0006821-C	Defendant: Charles E Bratton, etal. vs. John R Scott, etal.	Amount
11A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance		58.00
Total:		58.00

Check: 2085

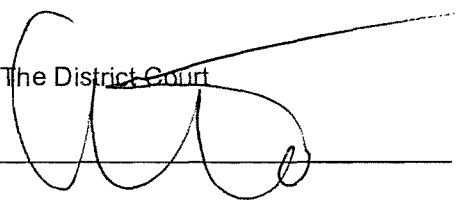
Payment Method: Check

Clerk: CRAWFORD

Duplicate Reprinted: 7/20/2007 by OLAN

William H. Hurst, Clerk Of The District Court

By: _____
Deputy Clerk



000541

John Glenn Hall Company

Litigation Technology

PO Box 2683

Boise ID 83701-2683

(208) 345-4120 voice • (208) 345-5629 fax • www.jghco.com
Federal Tax ID: 92-6007976 • Form W-9 at www.jghco.com/formW9.pdf

00014496

Invoice

5/12/08

Kimberly L. Sampo
Perkins Coie LLP
251 E Front St # 400
Boise, ID 83702

RECEIVED

JUN 09 2008

Customer Fax
(208) 343-3232
PERKINS COIE LLP - BOISE

Description

Taxable

Time & Expenses (please see itemization pages)

\$352.00 X

Vendor # _____ Due _____
C/M # 65685-0001
Office Code _____ Dish Code _____
G/L # _____
Description Fees for Video
Approval

Thank you for letting me serve you!

For customers outside of Idaho this document may arrive by US Mail and by fax. Please report errors and omissions right away. Thanks.

Sale; Sampo, Kimberly L.; Case: Ditch water video; Task:
Record water flowing through ditch and into pasture;
Videographer: Ron Garnys; Video Lab Tech: John G. Hall.

Invoice
00014496

Ship Via: Delivered by John
Your Order #: DitchWater

Freight: \$0.00
Sales Tax: \$21.12
Total Amount: \$373.12
Amount Applied: \$0.00

My shipping address: 1017 N 23rd St • Boise ID 83702

Balance Due. Please Pay This Amount >

\$373.12

000542

Time & Expense Compilation

Sampo / Ditch Water Case

	Amount	% Rates
Expenses	35.00	
Markup on expenses	0.00	0
Expenses Total	35.00	
Time	317.00	
Expenses + Time	\$352.00	

000543

Time & Expense Itemization

Sampo / Ditch Water Case

Date	Who	Quant	Activity or Item Description	Start	Finish	Time Total	Rate	Unit Cost	Invoice Number	Time Total	Expense Total
05/12/08	RonG		Video of ditch water, pasture.	2:20 PM	4:45 PM	2.42	175/100			317.00	
0604/08	JGH	1	DVD copy of field tape (not edited)					35.00			35.00
Totals						<u>2.42</u>				<u>317.00</u>	<u>35.00</u>

000544

John Glenn Hall Company

Litigation Technology

PO Box 2683

Boise ID 83701-2683

(208) 345-4120 voice • (208) 345-5629 fax • www.jghco.com
Federal Tax ID: 92-6007976 • Form W-9 at www.jghco.com/formW9.pdf

00014552

Invoice

7/28/08

Laurie Lloyd
Perkins Coie LLP
251 E Front St # 400
Boise, ID 83702-7310

RECEIVED

JUL 30 2008

PERKINS COIE LLP - BOISE

Customer Fax
208-343-3232

Description

Taxable

1 - DVD copy of the Canal Water in Ditch video (05/12/08)

\$35.00 X

Vendor # _____ Due _____
 C/M # 65685-0001
 Office Code _____ Dish Code _____
 G/L # _____
 Description DVD Copy
 Approval [Signature]

Thank you for letting me serve you!

For customers outside of Idaho this document may arrive by US Mail and by fax. Please report errors and omissions right away. Thanks.

Sale; Lloyd, Laurie; Task: DVD copy of "Canal Water in Ditch";
Video Lab Tech: John G. Hall.

Invoice
00014552

Ship Via: Delivered by John
Your Order #: CanalWater

Freight:	\$0.00
Sales Tax:	\$2.10
Total Amount:	\$37.10
Amount Applied:	\$0.00

My shipping address: 1017 N 23rd St • Boise ID 83702

Balance Due. Please Pay This Amount >

\$37.10

000545



200 N. 4th, Ste. 102
 Boise, Idaho 83702
 208.429.1905
 208.429.1973

Invoice

Date	Invoice #
9/12/2008	B2359

Bill To

Perkins Coie
 251 E. Front Street
 Suite #400
 Boise, ID 83702

Ordered By	Terms	Due Date	Acct. Manag...	Fed ID#	Job Number	Client\Matter#
Kim	Net 15	9/27/2008	AF	93-1282108	AF 09-08-015	
Description				Quantity	Price Each	Amount
Color Prints of Video and Still Shots (21 + 18)				39	1.00	39.00
Thanks for your business Kim! Idaho Sales Tax					6.00%	0.00
Vendor # _____ Due _____ C/M # <u>65685-0001</u> Office Code _____ Dish Code _____ G/L # _____ Description <u>Color Prints</u> Approval <u>[Signature]</u>						
REMITTANCE ADDRESS: BRIDGE CITY LEGAL, INC. 708 SW 3RD AVE., STE. 200 PORTLAND, OR 97204-3151 503-796-0881						
Please pay from this invoice. Thank you.					Total	\$39.00

High Desert Ecology
1301 N 18th St.
Boise, ID 83702

RECEIVED
MAR 26 2008
PERKINS COIE LLP-BOISE

Invoice

Date 3/24/2008
Invoice # 18

Bill To

Perkins Coie
251 East Front Street
Suite 400
Boise, ID 83702

Ship To

P.O. #
Terms

Ship Date 3/24/2008
Due Date 4/4/2008
Other

Item	Description	Qty	Price	Amount
Consulting	Bratton v Scott	4.25	80.00	340.00
Mileage		62	0.485	30.07

Vendor # _____
C/M # 65685-0001
Office Code _____
Dish Code _____
GL # _____
Description Expert Fees
Approval *[Signature]*

EIN 20-5136250

High Desert Ecology
smurray@highdesertecology.com

208-409-7428

Subtotal \$370.07
Sales Tax (0.0%) \$0.00
Total \$370.07
Payments/Credits \$0.00
Balance Due \$370.07

000547

High Desert Ecology
1301 N 18th St.
Boise, ID 83702

RECEIVED

JUL 01 2008

PERKINS COIE LLP - BOISE

Invo

Date 6/30/08

Invoice # 26

Bill To

Perkins Coie
251 East Front Street
Suite 400
Boise, ID 83702

Ship To

P.O. #
Terms

Ship Date 6/30/2008
Due Date 6/30/2008
Other

Item	Description	Qty	Price
Field Work	Field data collection of Bratton property	4.5	80.00
Data Analysis	Analysis of data from field work	3	80.00
Report	Discussion of results, preparation of report	3	80.00
Mileage	Round trip mileage to Bratton property	67	0.485

Vendor # _____	Due _____
C/M # <u>65685-0001</u>	
Office Code _____	Dish Code _____
G/L # _____	
Description <u>Expert Fees</u>	
Approval <u>[Signature]</u>	

Subtotal	=
Sales Tax (0.0%)	
Total	=

High Desert Ecology
smurray@highdesertecology.com

208-409-7428

Payments/Credits
Balance Due

000548

High Desert Ecology
1301 N 18th St.
Boise, ID 83702

Date 8/25/2008
Invoice # 30

Bill To
Perkins Coie
251 East Front Street
Suite 400
Boise, ID 83702

Ship To

P.O. # _____ Ship Date 8/25/2008
Terms _____ Due Date 8/25/2008
Other _____

Item	Description	Qty	Price	Amount
Deposition	Deposition preparation, deposition, court deposition August 10-15	11.5	125.00	1,437.50

Vendor # _____ Due _____
C/M # 65685-0001
Office Code _____ Dish Code _____
G/L # _____
Description Expert Fees
Approval [Signature]

Bratton v Scott CV 2007-06821 *C

Subtotal \$1,437.50
Sales Tax (0.0%) \$0.00
Total \$1,437.50
Payments/Credits \$0.00
Balance Due \$1,437.50

High Desert Ecology
smurray@highdesertecology.com

208-409-7428

000549

RECEIVED

Invoice

SEP 03 2008

PERKINS COIE LLP - BOISE

DATE	INVOICE #
9/2/08	114

BILL TO	SHIP TO
Perkins Coie, LLP 251 E. Front St., Suite 400 Boise, Idaho 83702-7310	

DUE DATE	P.O. NUMBER
10/2/08	

ITEM	DESCRIPTION	QTY	RATE	AMOUNT
Deposition	August 11, 2008 at Perkins Coie Law Office Boise, Idaho Bratton v. Scott Scheduled 9 AM Arrived 8 AM as requested. (2 hr)	2	100.00	200.00

Vendor # _____ Due _____
 C/M # 65685-0001
 Office Code _____ Dish Code _____
 G/L # _____
 Description Expert Fee for Depo
Approval *[Signature]*

Check can be made to Ron Gamys or Plexus Media.
 462 N. Echo Creek Place
 Eagle, Idaho 83616

Thank You

Subtotal	200.00
0% Tax	
Total	200.00

000550

ORIGINAL

Shelly H. Cozacos, Bar No. 5374
S~~C~~ozacos@perkinscoie.com
Cynthia L. Yee-Wallace, Bar No. 6793
C~~Y~~eeWallace@perkinscoie.com
PERKINS COIE LLP
251 East Front Street, Suite 400
P.O. Box 737
Boise, ID 83701-0737
Telephone: 208.343.3434
Facsimile: 208.343.3232

Attorneys for Defendants

9 3 0 1 L E D
A.M. P.M.

DEC 11 2008
CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

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

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

Plaintiffs,

v.

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

Defendants.

Case No. CV 0706821C

JUDGMENT

This matter came before the Court for a jury trial on September 3, 4, 5, 9, 12 and 15. The trial was bifurcated into three phases, and the jury issued three separate jury verdict forms. The Plaintiffs sought both declaratory relief and money damages in their Amended Complaint and Demand for Jury Trial filed on January 14, 2008 ("Amended Complaint"). Following the trial, the Court granted Defendants' motion for judgment notwithstanding the verdict on the third phase of the trial regarding damages.

In accordance with the special verdicts of the Jury as well as the Court's Order Re: Motion for Partial Summary Judgment entered on March 4, 2008, and the Court's order on

Defendants' Motion for Judgment Notwithstanding the Verdict entered on November 17, 2008,
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered as follows
on all claims set forth in the Amended Complaint as follows:

1. With respect to Plaintiffs' declaratory relief claim seeking a declaration that they are entitled to an express easement, judgment is hereby confirmed in favor of Plaintiffs in accordance with the Court's Order Re: Motion for Partial Summary Judgment entered on March 4, 2008;

2. With respect to Plaintiffs' declaratory relief claim seeking a declaration that they are entitled to an implied easement, judgment is hereby entered in favor of Defendants;

3. With respect to Plaintiffs' negligence claim, which includes Plaintiffs' common law claim for negligent interference with easement and statutory claims pursuant to section 42-1207 of the Idaho Code, judgment is hereby entered in favor of Plaintiffs in the amount of \$0.00;

4. With respect to Plaintiffs' claim for tortious interference with right of privacy, judgment is hereby entered in favor of Defendants.

DEC 10 2008

DATED: _____, 2008.



Honorable Renae J. Hoff
District Judge

CLERK'S CERTIFICATE OF SERVICE

I, the undersigned, certify that on 12-11-08, 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):

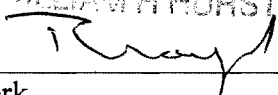
Nancy Jo Garrett
MOFFATT, THOMAS, BARRETT, ROCK
& FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Fl.
P.O. Box 829
Boise, ID 83701
FAX: 385-5384

Hand Delivery _____
U.S. Mail X _____
Facsimile _____
Overnight Mail _____

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

Hand Delivery _____
U.S. Mail X _____
Facsimile _____
Overnight Mail _____

WILLIAM H. HURST



Deputy Clerk

ORIGINAL

FILED
A.M. 445 P.M.

DEC 15 2008

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

Nancy J. Garrett, ISB No. 4026
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
Facsimile (208) 385-5384
njg@moffatt.com
23655.0000

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 TO DISALLOW AND
OBJECTION TO DEFENDANTS'
MEMORANDUM OF COSTS,
DISBURSEMENTS, AND ATTORNEY
FEES**

COME NOW the above-named Plaintiffs, by and through their undersigned counsel of record, and hereby object to Defendants' Memorandum of Costs, Disbursements, and Attorney Fees. Plaintiffs object, pursuant to Idaho Code §§ 10-1210, 12-121 and 12-120, the Idaho Rules of Civil Procedure 54(d)(6) and 54(e)(6), on the grounds that Defendants do not meet the requirements of the applicable statutes or rules governing fees and costs.

First, Defendants do not qualify as “prevailing parties.” Second, this case does not have to do with a commercial transaction between the parties. Further, there never was a declaration of judgment rendered by the Court, nor allowed by the Court regarding the equitable relief sought by Plaintiffs. Finally, Plaintiffs’ assertion of the claims at issue was not “frivolous, unreasonable, or without foundation.”

I.

INTRODUCTION

This matter concerns an easement ditch that delivers water to the Brattons’ property. The servient estate belongs to the Scotts. In April 2007, Scott destroyed Bratton’s ditch without permission, written or otherwise. Immediately following destruction of the Bratton’s irrigation ditch, Bratton began negotiations with Scott to have the ditch replaced. When negotiations failed and Scott refused to replace the ditch or even acknowledge that the ditch had been destroyed, on June 26, 2007, Bratton filed a Complaint. The complaint included a request for equitable relief, but the Court did not hear the equitable relief sought. The complaint was later Amended on January 14, 2008.

The trial commenced on September 3, 2008, utilizing a trifurcated format set forth by the Court. Verdicts were awarded on September 4, 2008, September 11, 2008, and September 16, 2008.

After Plaintiffs, at the completion of the third segment, received a verdict in their favor, the Defendants moved for Judgment Notwithstanding the Verdict only as to the verdict of segment 3. The Court granted Defendants Judgment Notwithstanding the Verdict as to segment 3. Now the Defendant moves for cost and attorney fees based on the judgment notwithstanding the verdict and verdicts as to all three segments.

II.

ANALYSIS

Defendants did not meet the requirements of the cited statutes and rules, and therefore, the Court should decline their request for costs and fees. Defendants cite Idaho Rules of Civil Procedure 54 as one of the required legal bases to support their request for costs and attorney fees in this matter. Since this is not a commercial transaction and since Defendants are not the prevailing party, that is not applicable to the case at bar.

As to attorney fees alone, Idaho courts follow the American Rule on the question of awards of attorney fees, which provides that "attorney fees are to be awarded only where they are authorized by statute or contract." *Hellar v. Cenarrusa*, 106 Idaho 571 (1984). Consequently, a party must provide legal authority supporting a fee request. *MDS Investments, L.L.C. v. State*, 138 Idaho 456 (2003). Rule 54 of the Idaho Rules of Civil Procedure, I.C. § 10-1210, § 12-120, and § 12-121 do not support the claim since the case was not brought frivolously, is not the subject of a commercial transaction, and there was never a hearing given to Plaintiffs on their equitable relief sought.

A. Defendants Are Not The Prevailing Party

Under Idaho Rule of Civil Procedure 54, costs as a matter of right may be awarded to the "prevailing party." Initially, it is important to note that legal proceedings often fail to yield a wholly prevailing party, and there should be no award if the court determines that neither side prevailed. *Owner-Operator Indep. Drivers Ass'n v. Idaho Pub. Util. Comm'n*, 125 Idaho 401, 407 (1984). Similarly, if both parties have prevailed in part, the court may exercise its discretion to decline the award of costs to either party. *Burnham v. Bray*, 104 Idaho 550, 554-55 (Ct. App. 1983). For its part, Rule 54 provides:

In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion consider the final judgment or result of the action in relation to relief sought by the respective parties. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained. (Emphasis added.)

I.R.C.P. 54(d)(1)(B).

A determination that a party has prevailed “is a matter committed to the sound discretion of the trial court.” *J.R. Simplot Co. v. Chemetics Int’l, Inc.*, 130 Idaho 255 (1997). However, the court of appeals has laid out a three-part inquiry to aid the trial court in its determination of the prevailing party: “The court must examine (1) the result obtained in relation to the relief sought; (2) whether there were multiple claims or issues; and (3) the extent to which either party prevailed on each issue or claim.” *Jerry J. Joseph C.L.U., Ins. Assocs., Inc. v. Vaught*, 117 Idaho 555, 557 (Ct. App. 1990).

See *Chenery v. Agri-Lines Corp.*, 106 Idaho 687, 692 (Id. App. 1984) (dismissal of a claim and when dismissal occurred were two of many factors considered in making a prevailing party determination).

Although the Court has the discretion to find that a party “prevailed in part and did not prevail in part,” it is also clear that the Court is not “compelled to make a discrete award of costs on each claim.” *Id.* at 693. Instead, applicable precedent instructs that “it is not appropriate to segregate . . . claims and defenses to determine which were or were not frivolously defended or pursued. The *total* defense of a party’s proceedings must be unreasonable or frivolous.” *Magic Valley v. Professional Business Services*, 119 Idaho 558, 563 (1991) (emphasis added). See also *Seiniger Law Office, P.A. v. North Pacific Ins. Co.*, 145 Idaho 241,

___, 178 P.3d 606, 616 (2008) (“I.C. § 12-121 applies to the case as a whole. Where there are multiple claims and defenses, it is not appropriate to segregate those claims and defenses for purposes of awarding costs and fees under I.C. § 12-121.”) (internal citations omitted). There was no overall prevailing party in the matter. *See Int’l Eng’g Co. v. Daum Indus. Inc.*, 102 Idaho 363, 367 (1984) (even where plaintiff prevailed on several counts and defendant prevailed on only one issue, trial court’s determination that there was not a prevailing party was not disturbed).

Given that this litigation was not “entirely favorable” to Defendants, Defendants are not the prevailing party and should not be awarded their claimed costs or attorney fees. At most, the Court can only find that Defendants “prevailed in part and did not prevail in part.” I.R.C.P. 54(d)(1)(B). Even if the Court does so find that both parties prevailed in part, an award of costs and attorney fees to Defendants is not appropriate in this matter because the results of the verdict were mixed.

B. Plaintiffs Action Was Not Frivolous, Unreasonable, Or Without Foundation

Under Idaho Code Section 12-121, Defendants may only recover their attorney fees if the Court determines that the Plaintiffs’ action was frivolous, unreasonable, or without foundation. Even if the Court is persuaded that Defendants were the prevailing party, Rule 54(e)(1) limits the award of attorney fees to a prevailing party pursuant to I.C. § 12-121 to circumstances where “the case was brought, pursued or defended frivolously, unreasonably or without foundation.” I.R.C.P. 54(e)(1); *Seiniger*, 145 Idaho at ___, 178 P.3d at 616 (2008).

In making such a determination, “[t]he sole question is whether the losing party’s position is so plainly fallacious as to be deemed frivolous, unreasonable or without foundation.” *Severson v. Hermann*, 116 Idaho 497, 498 (1989). Even though the trial court is afforded broad

discretion, it must make a “specific finding . . . supported by the record.” *Id. See also Black v. Young*, 122 Idaho 302, 310 (1992) (acknowledging discretion of the court to make an award, but noting that an award is improper “where the record itself discloses” the reasonableness of a claim or defense); *J.M.F. Trucking v. Carburetor & Electric of Lewiston*, 113 Idaho 797, 799 (1987) (overturning trial court’s award of fees as arbitrary and inconsistent because it denied a motion to dismiss a claim because of reasonable factual conflicts on the record and subsequently granted attorney fees on grounds that the same claim was frivolously or unreasonably pursued). In this case, the record very clearly discloses that Plaintiffs’ case was necessary and reasonable, it was not brought frivolously, unreasonably, or without foundation. Further, Plaintiffs prevailed in part, which remains undisturbed by the Court’s grant of Judgment Notwithstanding the Verdict to Defendants.

C. Plaintiffs Claim Was Based on Idaho Statutes

In light of the fact that Plaintiffs presented a position or argument to the Court that set forth a statutory basis, then Plaintiffs must necessarily have had some reasonable foundation in the law. Further, because the Court needed to resort to the canons of statutory construction to resolve the applicability of the statute as presented by the arguments of the parties, Plaintiffs’ complaint does not meet the threshold of unreasonableness required for the Court to justify an award of Defendants’ claimed attorney fees.

Although the Court is afforded broad discretion to award attorneys fees, it would be reversible error to do so in these circumstances because the record clearly indicates that Plaintiffs reasonably pursued this complaint, which was well founded and based on the statutes of the state of Idaho. The record shows that the jury found unanimously in favor of Plaintiffs as

to liability and injury and that Defendants violated the law in changing the ditch without written permission and that conduct caused harm to Plaintiffs.

D. This Case Did Not Involve a Commercial Transaction (12-120)

The case involved an irrigation easement that was not created by the parties but rather had been created in the distant past by the Plaintiff and another land owner.

E. The Equitable Relief Sought Was Never Heard (10-1210)

The Plaintiffs moved for equitable relief, but the motion was never heard by the Court. In fact, the Court stated a number of times just prior to and during the trial that the equitable relief sought by Plaintiffs was "moot."

III.

CONCLUSION

The Court should decline to award costs as a matter of right because Defendants are not the prevailing party in this action. For the same reason, the Court should decline to award Defendants attorney fees. The Court should also decline to award attorney fees because the record clearly demonstrates that Plaintiffs' action was not frivolous, unreasonable, or without foundation. Additionally, Plaintiffs will timely file their own cost bill for costs as a matter of right and for attorney fees based on the second segment unanimous verdict and the fact that Defendants altered the 34-year-old ditch in violation of Idaho Code. The jury also found that this violation of Idaho law caused harm to Plaintiffs. This was also an unanimous verdict in the second segment. Neither of these verdicts were a part of the Defendants Judgment Notwithstanding the Verdict motion, and both remain in force and are undisturbed by the court's grant of judgment notwithstanding the verdict to Defendants.

DATED this 15th day of December, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 

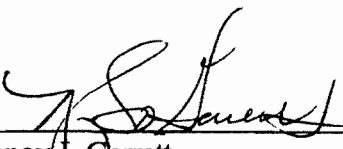
Nancy J. Garrett - Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of December, 2008, I caused a true and correct copy of the foregoing **MOTION TO DISALLOW AND OBJECTION TO DEFENDANTS' MEMORANDUM OF COSTS, DISBURSEMENTS, AND ATTORNEY FEES** to be served by the method indicated below, and addressed to the following:

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

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile



Nancy J. Garrett

Nancy J. Garrett, ISB No. 4026
 MOFFATT, THOMAS, BARRETT, ROCK &
 FIELDS, CHARTERED
 101 S. Capitol Blvd., 10th Floor
 Post Office Box 829
 Boise, Idaho 83701
 Telephone (208) 345-2000
 Facsimile (208) 385-5384
 njg@moffatt.com
 23655.0000

Attorneys for Plaintiffs

F I L E D
 A.M. 1:30 P.M.
 DEC 16 2008 ✓

CANYON COUNTY CLERK
 D. BUTLER, DEPUTY

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

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

Plaintiffs,

vs.

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

Defendants.

Case No. CV 0706821C

**PLAINTIFFS' MEMORANDUM OF
 COSTS and AFFIDAVIT OF
 ATTORNEY AFFIRMING COSTS**

Plaintiffs, as the prevailing party in this matter on the issues of express easement, liability and proximate cause, by and through their attorney of record, Nancy J. Garrett of MOFFATT THOMAS BARRETT ROCK & FIELDS, CHARTERED, hereby submit the following Memorandum of Costs pursuant to the Idaho Rules of Civil Procedure 54(d)(1) and 54(d)(5). Counsel does affirm that all costs, as set forth herein, are to the best of the undersigned

**PLAINTIFFS' MEMORANDUM OF COSTS and
 AFFIDAVIT OF ATTORNEY AFFIRMING COSTS - 1**

Client:1069297.1

counsel's knowledge and belief, are correct, reasonable, necessarily incurred, and are in compliance with I.R.C.P. 54(d)(5).

A. COSTS AS A MATTER OF RIGHT, I.R.C.P. 54(d)(1)(C).

1. **Court Filing Fees, I.R.C.P. 54(d)(1)(C)(1):**
Complaint, 6/27/07 \$ 88.00
2. **Service of Pleading or Document, I.R.C.P. 54(d)(1)(C)(2):**
Canyon County Sheriff Service Fee, Summons & Complaint, 6/29/07 \$ 80.00
3. **Witness Fees (other than party or expert) \$20/day, deposition or trial, I.R.C.P. 54(d)(1)(C)(3):**
Trial: Harold Ford, Ryan Finney, Ed Hoffer, Mike Memmelaar \$ 80.00
4. **Exhibits, admitted in evidence during hearing or trial (\$500.00 max.), I.R.C.P. 54(d)(1)(C)(6):**
Data One LLC, copy of exhibits for trial, 8/29/08 \$1,450.28
Ed Hoffer, copy of color prints for exhibits, 9/3/08 \$ 62.00
TOTAL Allowable Exhibit Costs \$ 500.00
5. **Expert Witness Fees (max. \$2,000.00 per expert), I.R.C.P. 54(d)(1)(C)(8):**
Cecil Vassar \$1,276.00
6. **Transcriptions of Depositions, I.R.C.P. 54(d)(1)(C)(9) and (10):**
M&M Ct. Reporting Service, depo. of Charles Bratton, 2/6/08 \$ 406.67
M&M Ct. Reporting Service, depo. of John Scott, 2/7/08 \$ 847.01
M&M Ct. Reporting Service, depo. of Jackie Scott, 3/4/08 \$ 508.79
M&M Ct. Reporting Service, depo. of Marjorie Bratton, 3/6/08 \$ 223.50
M&M Ct. Reporting Service, depo. of Ronald Garnys, 8/11/08 \$ 157.05
M&M Ct. Reporting Service, Vol. 1 depo. of S. Murray, 8/11/08 \$ 443.67
M&M Ct. Reporting Service, Vol. 2 depo. of S. Murray, 8/12/08 \$ 429.52
M&M Ct. Reporting Service, video-depo. of Mary Vis, 8/12/08 \$ 369.27
M&M Ct. Reporting Service, depo. of Mary L. Vis, 8/12/08 \$ 243.35
M&M Ct. Reporting Service, video-trial depo. of S. Murray, 8/15/08 \$ 179.94
M&M Ct. Reporting Service, depo. of Steve Wielang, 8/15/08 \$ 173.63
M&M Ct. Reporting Service, depo. of Cecil Vassar, 8/18/08 \$ 275.76

M&M Ct. Reporting Service, depo. of Sheriff Smith, 9/2/08	\$ 296.27
M&M Ct. Reporting Service, video-trial depo. of Sheriff Smith, 9/2/08	<u>\$ 228.00</u>
TOTAL COSTS AS A MATTER OF RIGHT	\$ 6,769.33

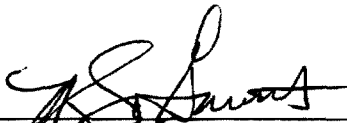
B. DISCRETIONARY COSTS, I.R.C.P. 54(d)(1)(D)

1. Photocopies/printing, in house expense	\$ 1,193.20
2. Photocopies/printing, vendor expense	\$ 2,162.95
3. Copy of S. Murray videotape	\$ 37.10
4. Computer Research - Westlaw	\$ 1,346.73
5. Delivery messenger services	\$ 134.75
6. Out of town travel/meal costs	\$ 477.51
7. Trial transcripts	\$ 227.00
8. Video equipment rental for trial and foam core boards for jury selection process at trial	\$ 366.45
9. Additional costs for exhibits beyond those costs claimed as a matter of right	<u>\$ 1,012.28</u>
TOTAL DISCRETIONARY COSTS	\$ 6,957.97

TOTAL Costs as a Matter of Right and Discretionary Costs **\$13,727.30**

DATED this 16th day of December, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

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

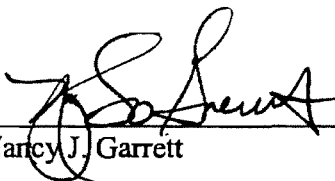
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AFFIDAVIT OF ATTORNEY AFFIRMING COSTS

STATE OF IDAHO)
) ss.
County of Ada)

NANCY J. GARRETT, being first duly sworn, deposes and says:

That she is counsel of record for the Plaintiffs in the above-entitled action and makes this affidavit for and on behalf of Plaintiffs; she has actual knowledge of the matters set forth herein; the costs described in the foregoing Memorandum of Costs are true and correct; and said costs are submitted in compliance with Rule 54 of the Idaho Rules of Civil Procedure.



Nancy J. Garrett

SUBSCRIBED AND SWORN to before me
this ____ day of December, 2008.

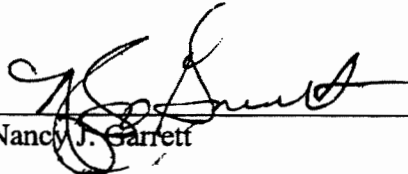
NOTARY PUBLIC FOR IDAHO
Residing at _____
My Commission Expires _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of December, 2008, I caused a true and correct copy of the foregoing PLAINTIFFS' MEMORANDUM OF COSTS and AFFIDAVIT OF ATTORNEY AFFIRMING COSTS, to be served by the method indicated below, and addressed to the following:

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

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile



Nancy J. Garrett

ORIGINAL

FILED
A.M. 4:20 P.M.

DEC 23 2008

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

Nancy J. Garrett, ISB No. 4026
MOFFATT, THOMAS, BARRETT, ROCK &
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njg@moffatt.com
23655.0000

Attorneys for Plaintiffs

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

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

Plaintiffs,

vs.

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

Defendants.

Case No. CV 0706821C

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR NEW TRIAL**

COME NOW Plaintiffs, Charles and Marjorie Bratton, by and through their undersigned counsel, and submit this memorandum in support of their Motion for New Trial. This motion is made on behalf of the Brattons as a result of the September 2008 trial they had before Judge Renae Hoff in the Third Judicial District in and for the County of Canyon.

I. LEGAL STANDARD

Idaho Rule of Civil Procedure 59(a) states:

A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:

1. **Irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.**
2. Misconduct of the jury.
3. Accident or surprise, which ordinary prudence could not have guarded against.
4. Newly discovered evidence, material for the party making the application, which the party could not, with reasonable diligence, have discovered and produced at the trial.
5. Excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice.
6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law.
7. **Error in law, occurring at the trial.**

Any motion for a new trial based upon any of the grounds set forth in subdivisions 1, 2, 3 or 4 must be accompanied by an affidavit stating in detail the facts relied upon in support of such motion for a new trial. Any motion based on subdivisions 6 or 7 must set forth the factual grounds therefor with particularity. (Emphasis added.)

A trial court may grant a new trial even though there is substantial evidence to support the jury's verdict. *Gillingham Constr., Inc. v. Newby-Wiggens Constr., Inc.*, 142 Idaho 15, 23, 121 P.3d 946, 954 (2005)(citing *Bott v. Idaho State Bldg. Auth.*, 122 Idaho 471, 475, 835 P.2d 1282, 1286 (1992)). The same result would obtain in the context of a court-awarded Judgment Notwithstanding the Verdict.

As discussed more fully below, the Brattons are entitled to a new trial pursuant to 59(a)(1), "Irregularity in the proceedings of the court," and 59(a)(7) "Error in law, occurring at the trial."

II. INTRODUCTION

Since 1973, and up until 2007, Plaintiffs Charles and Marjorie Bratton used their easement rights to irrigate pasture for their race horses. This was initially conveyed pursuant to an express easement but immediately took the form of an area about 12 feet wide or enough for a three-foot ditch and reasonable, customary use and maintenance. This width is consistent with the law of the state of Idaho pursuant to Idaho Code §§ 42-1102, 42-1204, and 42-1207. In 2005, Defendants obtained possession of the subject land encumbered by said easement, the servient estate. By the early spring of 2007 Defendants began causing interference with the Brattons' easement rights. At that time, Defendants denied Plaintiffs access to the subject easement, destroyed the 34-year-old irrigation ditch without permission to do so, refused to replace the ditch they destroyed, and barred Plaintiffs' access to their legal water rights. On September 3, 2008, a seven-day trial commenced. Right before the trial was held, the Court ordered the trial trifurcated with each of the three segments to be decided separately by a single twelve-person jury. Plaintiffs lodged a timely objection to the trifurcation and continued objecting to the trifurcated trial format throughout the proceedings.

III. BACKGROUND SPECIFIC TO MOTION

The record shows that in 1973, Harold and Janet Ford owned and subsequently divided a tract of land that became the Fruitdale Farm Subdivision in Canyon County, Idaho. In doing so, among other divisions, Mr. Ford created two adjoining lots, lots 32 and 40. On April 19, 1973, Mr. Ford conveyed lot 32 to the Brattons by way of an executed Warranty Deed (dominant estate). From 1973 forward the Brattons used the land for pasturing, feeding, and stalling of their race horses and other livestock.

The Warranty Deed from the Fords to the Brattons also provided water rights, including a one-half share of water stock held in Canyon Hill Ditch Company and another one-half share of stock held in Middleton Mill Ditch Company. In addition, the Warranty Deed gave an express easement for the construction and maintenance of a three-foot irrigation ditch, with rights of ingress and egress, as follows:

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

As a result of the warranty deed, Mr. Bratton had all rights of the deed as well as rights entitled by I.C. 42-1102. In fact, the express easement was consistent with I.C. § 42-1102. In 1973, Mr. Ford installed a three-foot-wide irrigation ditch for the Brattons that traversed the west side of Lot 40, (servient estate), and was located far enough way from the fence to protect the integrity of the fence and to allow for installation and maintenance of the ditch. Because of the drop and slope in the property from the headgate to Brattons' property, the Brattons placed sections of concrete and galvanized pipe intermittently in the ditch to keep its walls from eroding and to control the volume and flow direction of the water from the forces of gravity caused by the drop and slope.

In the spring of 1973, the Brattons began their irrigation use and maintenance of the ditch. Mr. Ford also used the Bratton ditch for irrigation of a portion of Lot 40. Since 1973, the Brattons continually utilized and maintained the structure of the ditch as well as the deposit area adjacent to the ditch. The Brattons' use and maintenance of the ditch involved utilizing a tractor to clean the ditch, deposit waste along the banks, and for ingress and egress of the

equipment and persons working on the ditch, which entailed about a 12-foot area to include the ditch. Every spring and summer, the Brattons regularly sprayed and burned the area, including and adjacent to the ditch, and regularly cleaned the inside of the ditch itself. Significantly, Mr. Ford always allowed the Brattons to access about a 12-foot-wide area on Lot 40 with tractors and other equipment needed to maintain the ditch. In fact, Mr. Ford knew of, and agreed with, the Brattons' use of that area for the easement and testified that he intended such use to be permanent. This use, intention, and maintenance is consistent with the express deed and I.C. § 42-1102.

On January 2, 1996, Mr. Ford signed a Quitclaim Deed on Lot 40 to Lois Rawlinson. After the time of this 1996 Quitclaim Deed, the Brattons continued to utilize their easement consistent with the manner set forth above.

On September 13, 2005, Ms. Genice Rawlinson gift deeded Lot 40 to Defendants. This gift deed specifically states that the Defendants took their property "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." (Emphasis ours.)

In April of 2007, as was his yearly routine, Mr. Bratton accessed his easement and began to burn the area adjacent to and including his ditch. Again, this had been done regularly by the Brattons for 34 years in preparation to receive water for the coming irrigation season. During the spring 2007 burning, the Scotts aggressively approached Mr. Bratton and verbally threatened him, demanding that Mr. Bratton stop burning, never burn again, and leave the servient property. The Defendants deny all of the above, although do agree that they approached

Mr. Bratton and did not want him to burn or spray the irrigation ditch or the area adjacent thereto.

Within days of the above encounter, Defendant Scott clearly demonstrated his intention of not allowing Bratton to have access to his easement by placing "No Trespassing" signs on the boundary line between Lot 32 and 40 where Mr. Bratton accessed his easement and also placed signs near Mr. Bratton's headgate. The Defendants also acted in a hostile manner on the first occasion after the burning encounter as Mr. Bratton approached the area in the fence where he would access the easement and headgate. Additionally, unbeknownst to Plaintiffs at this time, on or around April 15, 2007, Defendants destroyed the ditch and removed the pipe culverts utilized therein.

After the ditch was destroyed, Mr. Bratton attempted through an Equitable Motion to the Court and via negotiations to merely have the 34-year-old ditch replaced and to have the court order the Defendants to allow access to the easement and irrigation water. Neither of these actions were successful as the Court did not hear the Equitable Motion and Defendant would not replace the ditch or successfully negotiate a resolution. The Brattons have not had access to their easement for irrigation of their pasture property since the close of the 2006 irrigation season.

On June 26, 2007, a Complaint was filed which included a prayer for equitable relief. As stated before, the equitable relief motion was never heard. An Amended Complaint was filed on January 14, 2008. A partial summary judgment was granted as to the Brattons' easement. The trial commenced on September 3, 2008. At the time of the trial, the court took judicial notice of Idaho Code §§ 42-110 and 42-1200, *et seq.*

IV. IRREGULARITY OF THE PROCEEDINGS

Rule 59(a)(1) allows in part for a new trial if it is found that there were irregularities of the proceeding of the Court, “[o]r any order of the Court or abuse of discretion by which the party was prevented from having a fair trial.” This Court conducted the trial in such a manner as to cause great hardship for the Plaintiffs including, but not limited to: entering burdensome evidentiary rulings; excluding substantial relevant evidence by advising the Plaintiffs and their counsel continually from the pretrial throughout the trial that if the Plaintiffs did not prevail, the Court would grant attorney fees to Defendants; by refusing to recognize and apply the applicable statutes; by trifurcating the trial, which caused an enormous cost to Plaintiffs and made rulings on the admission of evidence which made it very difficult to put on each of the three segments’ *prima facie* evidence; and by causing significant confusion as to the evidence allowed in each *prima facie* element. It was evident from the pretrial proceedings that the Court disfavored the Plaintiffs’ case.

When evaluating whether an irregularity in the proceedings merits a new trial, a district court takes into consideration whether the irregularity had any effect on the jury’s decision. *Gillingham*, 142 Idaho at 23, 121 P.3d at 954. Furthermore, when a jury is improperly instructed, and the effect of the improper instruction has the cumulative effect of causing the jury to reach a conclusion that is not justified, the only conclusion which may be drawn is that a fair and impartial trial was not had. *See Griffith v. Schmidt*, 110 Idaho 235, 237-38, 715 P.2d 905, 907-908 (1986).

A. Trifurcation

In the case at bar, over the continual objections of Plaintiffs and immediately before trial began, the Court divided the case into three segments (trifurcating the trial). The

same jury was to sit and render a verdict following completion of each segment. The three segments were vaguely set out from the Bench by the Court, and the parties were never provided a written order or format on the requirements of the segments.

The Court ruled that the trial would be trifurcated after all pre-trial preparation was completed. This ruling came as a complete surprise to Plaintiffs. Defendants had asked for the trial to be bifurcated, but it was Plaintiffs' counsel's understanding that the Court advised from the Bench that the trial would not be bifurcated if either party objected to such a procedural change. Plaintiffs objected when the Defendants suggested bifurcating and thereafter filed a motion for such. Over the Plaintiffs' objection, the Court not only bifurcated the trial, but added a third segment.

The Court had already ruled that the equitable relief requested by Plaintiffs was moot since it had not been heard when filed. At the time of the trifurcation, the Court then ruled that a portion of the equitable relief would be tried in segment number one. Segment number two would be liability and, if needed, segment number three would be damages. The only means to discover what evidence would be allowed in each segment was to continually seek direction from the Court or offer evidence until the Court ruled what was evidence for the next segment. Therefore, it was very difficult to discern the required *prima facie* evidence for each segment, plan witnesses, and all other matters that go into trial prior to resting for each segment. This confusing method of litigation sent the Plaintiffs' counsel on the eve of trial back to work to fully reorganize their case and to discern just how to prepare their *prima facie* case. This order caused the pre-trial preparation to go in a completely new direction and required that Plaintiffs' counsel reorganize the entire trial at a date when little time was left to prepare for such a trial method.

Further, trifurcation was not necessary in this matter. The Court continually stated that it trifurcated the case to save time. The case was set for three days. After trifurcation, the trial took seven days. It became clear that the trifurcation was substantially increasing the time necessary to try the case. The Court also stated that trifurcation was necessary because if the plaintiffs did not get a verdict on liability, then there would be no damage phase. The jury unanimously found in favor of Plaintiffs on liability and the third phase was required. There was no logical or judicial basis to require trifurcation of this trial. This action substantially burdened the Plaintiffs and was unfair.

B. Error of Law and Trifurcation

Segment number one of three was the segment in which the Court directed that Plaintiffs prove an implied easement. As stated prior, the Plaintiffs had an express easement, and the Court had taken judicial notice of Idaho Code §§ 42-1102, 42-1204, and 42-1207. In this segment, Plaintiffs had intended to prove that Idaho Code §42- 1102 allowed for an implied easement by operation of law. The Judge refused to apply the applicable law of the state of Idaho, however, in that the Court ruled that Idaho Code § 42-1102 applied only if the easement was based on riparian rights and, further, the Court found the statute did not apply because case law trumped I.C. 42-1102.

The Court based this ruling on case law cited by Defendant, *Thomas v. Madsen*, 142 Idaho 635, 132 P.3d 392, which the Court ruled stood for the premise that Plaintiffs must prove the elements of an implied easement even though they have an express easement and the rights afforded by Idaho Code § 42-1102, which gives the Brattons an implied easement of greater than three feet by operation of law. The *Madsen* case had nothing to do with irrigation or the irrigation statute but rather dealt with a driveway dispute. The statutes allow for an implied

easement by operation of law for ingress, egress, maintenance, and use. Plaintiffs argued that the case did not preempt application of Idaho Code § 42-1102 but rather was inapplicable because of the express easement and the irrigation statutes in force. Thus, the irrigation statutes set forth width needed, maintenance, and use provisions.

The jury instructions utilized the case law of the implied easement formula and did not set forth I.C. § 42-1102. The instruction was as follows:

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.

Therefore, the jury instructions did not instruct the jury as to the correct law of the state of Idaho for this matter. Of note, the same jury deciding segment one would be the same jury that would decide the remaining two segments. Because the jury was to take each segment into consideration when deciding all subsequent segments, the improper instructions in the first segment would impact the view of the state of the law for the jury in the first segment and each subsequent segment. The Idaho appellate courts have long held that the giving of an incorrect instruction constitutes "such irregularity and error in law as to bring the case within Rule 59(a)." *Walton v. Potlatch Corp.*, 116 Idaho 892, 897, 781 P.2d 229, 234 (1989). In fact, when a jury verdict is rendered "on the basis of incorrect instructions, the appropriate remedy is the granting

of a new trial.” *Walton*, 116 Idaho at 234. *See also*, *Corey v. Wilson*, 93 Idaho 54, 454 P.2d 951 (1969); *Walker v. Distler*, 78 Idaho 38, 296 P.2d 452 (1956). Finally, the Supreme Court of Idaho held some thirty years ago that “[t]he trial court is under a duty to instruct the jury on every reasonable theory recognized by law that is supported at trial.” *Everton v. Blair*, 99 Idaho 14, 576 P.2d 585 (1978) (citing *Hodge v. Borden*, 91 Idaho 125, 417 P.2d 75 (1966); *Domingo v. Phillips*, 87 Idaho 55, 390 P.2d 297 (1964); *Wurm v. Pulice*, 82 Idaho 359, 353 P.2d 1071 (1960)). In fact, the trial court “has a duty to grant a new trial where prejudicial errors of law have occurred at the trial, even though the verdict of the jury is supported by substantial evidence.” *Sherwood v. Carter*, 119 Idaho 246, 262, 805 P.2d 452, 468 (1991) (citing *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974)).

Instructing on Idaho Code § 42-1102 was fundamental to the Brattons’ lawsuit, and instructing the jury with an incorrect statement of the law was an unfair burden that Plaintiffs could not overcome. This irregularity of the Court permanently and unfairly led the jury to decide the full matter from an incorrect initial basis.

C. Plaintiff was Unclear as to Each Segment’s *Prima Facie* Case

Further, the Court ruled only from the Bench regarding the burden of proof for each trial segment and the jury instructions were never known or argued until the completion of the *prima facie* element. The Court would provide instructions on elements the Court thought should be proven in each segment, but only after Plaintiffs rested their *prima facie* case in that particular segment. It is true that the Court does not have to provide jury instructions at the outset, but since this was so confusing and since the trial was segmented, withholding the instructions until after the Plaintiffs rested led to further unfairness to Plaintiffs. An example of surprise is the issue of “impeding flow” of water. Plaintiffs were not aware that this element

would be a juror question on the special verdict of the second segment until immediately prior to the jury instruction conference. Impediment of flow was not a part of Plaintiffs' *prima facie* elements, because Plaintiffs interpreted the law to state that one could suffer harm or injury by a "change of the ditch or impediment of flow." *See* Idaho Code § 42-1207 (emphasis added). Injury did not require both elements to occur. The Plaintiffs met the burden on the change of the ditch. The Court nevertheless disagreed with the express language of the statute and refused to recognize the word "or" in the statute. Instead, the Court gave an instruction that required the jury to answer a question as to impediment of flow alone—with nothing said about the change of the ditch. The Court then utilized the answer of "no" to its special verdict question to deny the Plaintiffs most of their damage evidence. This action by the Court was an abuse of discretion and was instrumental in preventing a fair trial. As noted above, when a verdict is rendered on the basis of incorrect instructions, the appropriate remedy is the granting of a new trial. *See Walton, supra*. Furthermore, because of the replication of the fundamental error in the Court's jury instruction, there was a "cumulative effect" that certainly caused the jury to reach an unjustified conclusion. As such, "a fair and impartial trial was not had." *Griffiths*, 110 Idaho at 238.

D. Extended Trial Length

The length of the trial was significantly increased by use of this trifurcated method. The trial was initially set for three days, but due to trifurcation, lasted seven days. The Court stated that this would be a much more effective method because if the jury did not find liability, then the third segment would not occur. The Court gave every indication that it did not think the jury would find liability, and if it did, the damages would most likely be nothing or minimal. This method of trial was a clear waste of resources, caused confusion to Plaintiffs, caused great difficulty in preparing segmented evidence, caused many witnesses to be called

back over and over in all segments, tripled the litigation costs to the parties, and was an excessive waste of litigant, jury, and judicial resources.

The ruling on trifurcation would unfairly bias the juror's view of the matter through all three segments, which bias could not be overcome by Plaintiffs. There would be three *prima facie* cases, three openings, three closings, three jury instruction conferences, the same jury would be instructed three times, and the same jury would deliberate three times. Once a decision was made in one segment, the same jurors were required to deliberate again and again on subsequent segments. The jury's being misinstructed in all three segments and being instructed to take into consideration all instructions when answering for only one segment unfairly prejudiced Plaintiffs' case and was a clear abuse of the Court's discretion.

E. Warning of Plaintiffs' Award and Attorney Fees to be Assessed

The Court, both on the record, in chambers, and off the record, warned Plaintiffs and their attorneys that if they did not prevail or if the award was nominal, then the Court would award attorney fees to Defendants. The Court did not cite the basis of how the Court could award fees in this matter.

This case is not an attorney fee matter in that there is no statutory basis for fees, and the case certainly was not brought on a frivolous basis. The Court abused its discretion by continually warning that it would award attorney fees against the Plaintiffs and caused the Plaintiffs and their counsel to believe that the trial Court was biased against them for no legal basis.

F. The Court was Improperly Biased Against Plaintiffs and Plaintiffs' Attorney

The Court for some reason was not an impartial referee in this litigation. The rulings in almost every discretionary decision would be decided against the Plaintiffs. The Court

abused its discretion by weighing in on the litigation and doing all things within its power to cause the Plaintiffs hardship in proving their case in chief.

G. Exclusion of Plaintiff's Evidence

Over Plaintiffs' objections and based on the Court's misinterpretation of the law and bias against the Plaintiffs' cause of action, the Court excluded and limited a substantial portion of the Plaintiffs' case in chief. The list of exclusions set forth below is not meant to be a complete list but is set forth to show the substantial nature of Plaintiff's evidence that the Court ruled inadmissible.

1. The Court excluded any evidence of crop loss and consequences thereof.

Because the Court misinterpreted the Idaho statutes on easements, the Court decided that crop loss would not be an element of Plaintiffs' damage claim. Over objection of Plaintiffs, the Court excluded any and all evidence of crop loss and the consequences therefrom. The Court substantially based this decision on the fact that the jury found that the flow of water was not impeded. Again, Plaintiffs argued that the statute, Idaho Code § 42-1207, allowed for harm to Plaintiffs if the ditch was changed. The jury found that Defendants had violated the law by changing the ditch, and the jury also found that the change caused harm to Plaintiffs. Following this ruling, Plaintiffs made an offer of proof that included evidence of expert testimony, actual loss, and actual consequences of the negligence and injury proximately caused by Defendants.

The crop loss was Plaintiffs' largest element of damage, and by excluding all evidence pertaining thereto, the Court in effect denied Plaintiffs their right to a fair and impartial jury trial. The Court based all rulings on improper law, and that misconception caused numerous errors. Since the Court would not recognize that Idaho Code § 42-1102 was controlling in this

matter, and since the Court found that Idaho Code §§ 42-1204 and 1207 only allowed damage to the claimants' estate if flow was impeded, this ruling was fundamentally flawed. The Court clearly abused its discretion in the above-listed rulings against Plaintiff.

2. The Court excluded evidence on the cost to replace the ditch with underground irrigation pipe and then further excluded evidence as to the cost to replace an above-ground ditch.

The Court clearly and unfairly restricted Plaintiffs as to their damage evidence. First, the Court excluded all evidence as to the cost of placing an underground irrigation pipe. The Court based the ruling on the fact that the flow had not been impeded. The whole case had been pled and discovered with the intent of installing an underground piping system to avoid further problems among the litigants. The Court ruled that this evidence would not go to the jury. Then the Court ruled that since the cost of an above-ground ditch had not been disclosed or discovered, Plaintiffs would not be allowed to proffer any damage evidence as to the cost for replacement of the above-ground ditch.

Plaintiffs argued that pleadings should conform to the evidence, and since the Court excluded the evidence of below-ground piping during the trial, then the cost evidence for an above-ground ditch could easily be set forth by Plaintiffs to Defendants. Since the trial was already longer than it had been scheduled, there would be no reason why Defendants could not discover this evidence because installing above-ground ditches was common knowledge.

Thereafter, even with these limitations, the verdict in the third segment was delivered into open court in favor of Plaintiffs. The Court, in ruling on Defendants' Motion for Judgment Notwithstanding the Verdict, cited as one of the bases for granting the Defendants' motion was that the jury did not have evidence on the cost to replace an above-ground ditch. Even though the Court would not allow evidence on cost for replacing the ditch, it allowed the

jury to deliberate that very cost and reach a verdict on the cost. But, when the jury came back with a reasonable Plaintiff verdict awarding a monetary verdict for ditch replacement, the Court then granted a Judgment Notwithstanding the Verdict. It seemed the Court had anticipated that the verdict would be for the Defendants, and when it was for the Plaintiffs, the Judgment Notwithstanding the Verdict was granted.

The Court abused its discretion by excluding all evidence on cost to place an underground piped ditch, and then, after the jury found for Plaintiffs on a reasonable cost for an above-ground ditch, the Court vacated the monetary verdict rendered by the jury.

3. The Court excluded any and all evidence on the Defendant John Scott's propensity for aggression and violence toward others.

One of the allegations of Plaintiffs' complaint was that Defendant John R. Scott threatened Plaintiff Charles E. Bratton, and that threat caused Mr. Bratton to fear for his safety. Mr. Scott had been charged with a firearm injury to others. He had a history of physical injury to others along with current threats of violence to other neighbors similar to those lodged against Mr. Bratton. This conduct occurred in the same time frame as that against Plaintiff Charles Bratton and all pertained to neighbors' property rights, easements for water, headgate access, and the like.

The Court excluded all such evidence on the basis that, although relevant, such evidence would be more prejudicial than probative. Plaintiffs argued that even though the evidence was prejudicial, the issue of threat and violence toward others was consistent with that lodged against Plaintiff, which element was a separate count of Plaintiffs' complaint and was centrally necessary to proving Plaintiffs' *prima facie* case on the element of threat of harm.

In deciding the balancing test between probative relevant evidence and evidence that is relevant but more prejudicial than probative, the Court abused its discretion by excluding

John Scott's conduct toward other land adjoining neighbors or neighbors who had to access their headgate on or near Scott's land. The evidence on Mr. Scott's conduct was necessary to prove a separate element of the Plaintiffs' complaint. The Court in its ruling, seemed to be applying criminal case analogy rather than one for a civil matter.

All persuasive evidence is prejudicial to the other side. When deciding this matter, the Court did not seem to weigh the fact that Mr. Scott's behavior to other adjoining neighbors would buttress the Plaintiffs' case and show that the Defendant Scott was not acting within the law as it pertains to water irrigation easements. Neighbors let each other know what to "watch out for" and this neighborhood was no different. The evidence would also support the basis of Mr. Bratton's fear of Defendant Scott as well as support Bratton's reason for avoiding Scott to protect himself. This exclusion was unfair and an abuse of the Court's discretion.

V. ERRORS OF LAW

Rule 59(a)(7) allows for a new trial where there was an error at law that occurred at trial. (IRCP 59(a)(7)). See the facts set forth *supra* and the jury instructions given by the Court. The Court refused to instruct on the applicable statutes for the case at bar and also misinterpreted the easement statutes it did use for instruction.

A. **This Court Erred in Its Interpretation and Exclusion of I.C. § 42-1102**

The Court ruled that Idaho Code section 42-1102 did not apply to the Brattons' easement. The Court did so by finding that case law on implied easement controlled, and that case law supported the fact that the Brattons' easement was not an implied easement. See discussion *supra* and briefs on file.

Idaho Code 42-1102 covers all easements that were then in existence at the time of enactment or became in existence thereafter, no matter the language of the express easement.

I.C. § 42-1102 allowed for certain rights and responsibilities for easements use in irrigation. I.C. § 42-1102 allowed that the Brattons' easement was implied in fact or in law to allow for ingress, egress, maintenance, use and repair. The Court utilized the case law cited *supra* to validate the ruling which found 42-1102 inapplicable.

Additionally, the Court found that 42-1102 did not apply because the easement was not due to riparian rights. The plain language of Idaho Code section 42-1102 makes it 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).

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/or (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 landowners 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 Defendants' property to access that Boise River water that is delivered to them through the nearby Canyon Hill Lateral or Canal.

The Brattons' interpretation of Idaho Code section 42-1102 and its application to the factual scenario presented in their Complaint 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 delegated 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. (Emphasis added.) Consequently, Idaho Code section 42-1102 squarely applies to the consideration of the irrigation easement and right-of-way at issue in this matter. The Court clearly committed an error of law in not applying the correct law to this matter.

B. The Court did not recognize the rights of the Dominant Estate as set forth in Idaho Code Section 42-1102

In the case at Bar, the Brattons were and are seeking nothing more than the irrigation easement, right-of-way, and water right that Idaho Code section 42-1102 provides. The Brattons were and 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-plus years. This easement and right-of-way included the use of a tractor, a V-ditcher, burning, spraying, and other equipment commonly used and reasonably adapted for irrigation ditch operation and maintenance purposes. The *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518 (2001) Court confirmed Nampa and Meridian Irrigation District's rights under Idaho Code 42-1102 and did not abrogate them in favor of the strict application of the express Channel Change Easement Agreement.

The bottom line for consideration in this matter is that the Brattons' irrigation easement, water rights, and right-of-way pre-existed the Defendants' ownership of their property. The Defendants took ownership of their property subject to that preexisting irrigation easement and right-of-way. While 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 or interfere with access to water rights. The express easement agreement on record in this matter is consistent with Idaho Code section 42-1102.

The Brattons have only those rights expressly afforded to them pursuant to the express easement and 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 the 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 an irrigation easement and right-of-way for over the past 33-plus 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, and subsequent owner Rawlinson. The Brattons are still seeking the same easement. They are seeking to maintain the status quo, a status quo that the Defendants had no right to obliterate no matter what their interpretation was of the express easement. 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. The Rawlinson Gift Deed that conveyed the subject property directly 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.)

The Court refused to instruct on Idaho Code section 42-1102 due to the fact, as stated *supra*, the Court interpreted the case law to take the case out of the statute, that the statute applied only to riparian landowners and, further, that Idaho Code section 42-1102 did not afford rights to the Brattons. The Court refused to recognize the express language of the Statute and the mandate of the Idaho Supreme Court as set forth in *Canyon View Irr. Co. v. Twin Falls Land Co.*, 100 Id. 604, 607 (1980). This is a fundamental error of law that completely altered the course of the trial, unfairly misled or confused the jurors as to the law in the State of Idaho. This error by the Court was made at the outset of the trial, substantially limited evidence, and instructions in each phase were fundamentally impacted by the Court's misinterpretation of the

law. Because the Court's decision is directly counter to the controlling statutes, and because the error of law caused extreme and unfair prejudice to the Plaintiffs, this matter must be re-tried.

C. **The Court Omitted Substantial Evidence Based on Error of Law**

While 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 substantially limited the evidence the Court would allow the Plaintiffs to offer and admit and thus it was unfairly prejudicial to the Brattons' 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 property 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. Idaho Code section 42-1102 not only contemplates the operation and maintenance needs for one's corresponding irrigation easement and right-of-way but also sets out the fundamental reasons for which the easement and right-of-way were created--to assist those landowners in conveying irrigation water via their water rights to their landlocked properties.

This is a factual element which was central to the consideration of this case. If the Brattons cannot satisfy the requisite needs for the irrigation easement and right-of way under Idaho Code section 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 landowners like 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 and their property for the operation and maintenance of the ditch the dominant estate possesses.

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" and width of use for the easement. The fact that there is 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 and maintenance 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 surface ditch, the Defendants were fully aware that their actions in obliterating the existing ditch and attempting to relocate it elsewhere on their property directly interfered with the longstanding rights of the Brattons and that they knowingly performed their tortious acts with a total disregard for the open and obvious rights of the Brattons.

Failure to instruct the jury on Idaho Code section 42-1102 in this trial was an error of law and unfairly prejudiced the Plaintiffs' right to a fair trial.

D. The Court Required Impediment of Flow for a Claim of Damage

As set forth *supra*, the Court excluded substantial liability and damage evidence because the Court required that there be an impediment of flow before the Plaintiffs could put on

evidence of crop loss, any loss associated with crop loss, the need for underground pipe, and the loss of value to the Brattons' property.

The facts will show that there is a substantial drop in altitude from the headgate until the water enters onto Plaintiffs' land. Because Canyon County is located on a planet with gravity, water has to run downhill no matter the means by which it flows. The Court ignored the fact that the downhill flow was not channeled or controlled and would cause excessive damage to servient and dominant estates, as well as to third-party property, and is against the statutory mandate having to do with irrigation ditches.

The applicable statute regarding this issue of irrigation easements took into consideration gravity. The very language of the statute allows for damages due to impediment of flow -OR- by otherwise injuring person or persons using or interested in such ditch . . . (Idaho Code § 42-1207). (Emphasis added.) The Court refused to recognize the plain language of the statute, and because it would not recognize "or by otherwise injuring persons or persons interested in such ditch," the Court refused to allow substantial evidence associated with injuries due to the destruction of the ditch by Defendants.

During the second segment, and unbeknownst to Plaintiffs until after their *prima facie* case had been completed, the Court required that the jury answer a special verdict question regarding impediment of flow, and one on whether the conduct of the Scotts caused damage to Bratton. Because the dominant estate was geographically lower than the servient estate, the Plaintiff, Mr. Bratton, testified that the flow was not impeded and the jury so found no impediment. But as to the second element of the statute which allows for injuries from Defendants' conduct, the jury unanimously found that Defendant's conduct had caused injury to the Plaintiff. The Court based its rulings only on the fact that the jury found the flow was not

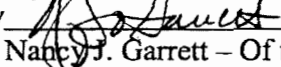
impeded. The Court ignored and continually did not base its rulings on the special verdict finding by the jury that the second element of the statute was present and thus caused damages to the Plaintiffs. The above Court ruling constitutes an error of law, which caused an unfair trial.

VI. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully request that the Court grant their Motion for New Trial.

DATED this 23rd day of December, 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 23rd day of December, 2008, I caused a true and correct copy of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL** to be served by the method indicated below, and addressed to the following:

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

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile



Nancy J. Garrett

1. That I am the attorney of record providing legal representation to Plaintiffs in the above-captioned matter and that in this capacity I have personal knowledge of the facts and circumstances set forth herein.

2. I was one of the attorneys of record who tried this case for the Plaintiffs.

3. I have set forth these facts based on my notes, co-counsel notes and paralegal notes taken contemporaneously prior and during trial.

4. A transcript was not ordered due to cost constraints.

5. During pretrial proceedings, the case was trifurcated immediately prior to trial in the following manner:

(a) Defendants suggested bifurcating damage.

(b) Plaintiffs objected.

(c) Without having read the transcript of the trial proceedings and to the best of my knowledge and recollection, the Court stated that if either party objected, then the Court would not bifurcate.

(d) Defendants filed a motion to bifurcate.

(e) The motion to bifurcate came as a surprise to Plaintiffs since it was their understanding that the Court had already ruled that if either party objected, then the Court would not divide the trial.

(f) The Court granted Defendants' motion and, in fact, added a third segment.

(g) The three segments were separated into (1) implied easement; (2) liability; and (3) damages.

(h) The Court ruled on an as-needed basis as to the manner in which this trifurcation process would be conducted and what evidence would be allowed in each..

(i) The Pretrial Order set the case for a three-day trial.

(j) During *voir dire* it was stated that the trial would be three days.

(k) The Court ruled that in all three segments the parties would have option for openings and closings; separate jury instructions; and exhibits could be used in subsequent segments once they were admitted in the applicable segment.

(l) Witnesses would have to be called for each applicable segment, and thus, if one witness had testimony relating to all three segments, they would have to be called three different times.

(m) If there was no liability, then the damage segment would not be necessary.

(n) The Court advised that trifurcation would save time because if the jury did not find liability, then no damage part would be needed.

(o) Time was taken for each party to do three openings and three closings; three jury instruction conferences; three jury instruction rulings; three sessions to instruct the jury; and three jury deliberations.

(p) The same jury would hear all segments.

(q) This Court had never conducted a trifurcated trial.

(r) The Court ruled in the midst of the second segment that all evidence would be submitted for use in each subsequent segment.

6. The Court ruled that the equitable relief sought on the applicable complaint was moot.
7. The Court said this was the longest civil trial this Court had ever presided over, which was trial was seven days.
8. Jury instructions were not circulated until after the plaintiffs' *prima facie* case in each segment.
9. The Court advised in chambers, off and on the record, that it would award attorney fees to the party that prevailed, but did not cite the basis for a fee award.
10. The Court stopped plaintiffs' counsel in mid-question during the second or third segment and told counsel this evidence had already been proffered in a previous segment. The Court then asked the jurors to raise their hands if they agreed with the Court. After the vote of the jury, the Court asked plaintiffs' attorney to proceed to the next inquiry.
11. In the verdict for the second segment, the jury found by unanimous vote that the change of ditch by Defendant was without permission and that that change caused harm to plaintiffs. There was no limitation on the harm.
12. At one point, while the Court was ruling on an issue, the Court directed this counsel to stop looking at the Court in a certain manner. Plaintiffs' attorney responded that she did not know what she was doing with her face but had her head down and was writing as quickly as possible to document the ruling.
13. Although the Court allowed oral argument on major issues, it appeared that the Court's decision had already been written, because at the conclusion of the argument, the Court would immediately read off of a ruling.

14. That the Court advised more than once that even if the jury found liability, that it would probably only find nominal damages or no damages at all.

15. The Court asked plaintiffs' attorneys a number of times if they had advised their clients that the Court would award attorney fees to defendants if the plaintiffs did not prevail. This counsel and co-counsel advised the Court that their clients had been so advised. Thereafter, the Court called plaintiffs and defendants into court and advised both the parties that the fees would be awarded to the party that prevailed. These warnings were all given prior to the end of the three segments. The Court did not cite the basis of such an award.

16. The Court excluded all damage evidence as a result of crop loss, all property value loss, and all damage for replanting of the pasture to bring it back into its pre-dispute condition.

17. The Court excluded the above evidence presumably based on the fact that the jury had found no impediment of flow, that the water would flow from the headgate to Plaintiffs' property.

18. The Court excluded any and all evidence regarding the cost of installation of a below-ground or above-ground irrigation system. The court based this decision, in part, on the fact there was no impediment of flow.

19. The substantial majority of Defendants' objections to Plaintiffs' questions of witnesses were sustained on irrelevancy. It became apparent to Plaintiffs' counsel later that Defendant anticipated that the Court would exclude all damage evidence.

20. Plaintiffs made an offer of proof of substantial crop loss, property value, and irrigation system replacement damage that was excluded by the Court.

21. Even without allowing evidence on cost of replacing above and below-ground irrigation, the Court allowed evidence of damages to go to the jury.

22. The jury questions on damages allowed by the Court asked for the jury to award separate damage awards for (1) the unlawful change to the ditch and (2) cost to replace the ditch.

23. The Court excluded the following evidence: In the past, Mr. Scott had been charged with shooting a firearm multiple times into an occupied vehicle; he had been in bar fights; and since moving to the subject property, he had threatened neighbors who tried to access their headgates on his property.

24. Plaintiffs argued strenuously a number of times regarding the use of applicable Statute sections within 42-1100 and 42-1200.

Further your affiant sayeth naught.

Nancy Jo Garrett

Nancy Jo Garrett



DEPOSED AND SWORN to before me this 23rd day of December, 2008.

Carla I. Hoebrook

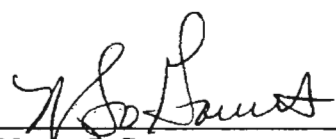
NOTARY PUBLIC FOR IDAHO
Residing at Boise, Idaho
My Commission Expires 11-23-2009

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2008, I caused a true and correct copy of the foregoing **AFFIDAVIT OF NANCY JO GARRETT IN SUPPORT OF MOTION FOR NEW TRIAL** to be served by the method indicated below, and addressed to the following:

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

- U.S. Mail, Postage Prepaid
- Hand Delivered
- Overnight Mail
- Facsimile



 Nancy J. Garrett

ORIGINAL

FILED
A.M. 4:55 P.M.

DEC 23 2008

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

Nancy J. Garrett, ISB No. 4026
MOFFATT, THOMAS, BARRETT, ROCK &
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Attorneys for Plaintiffs

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

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

Plaintiffs,

vs.

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

Defendants.

Case No. CV 0706821C

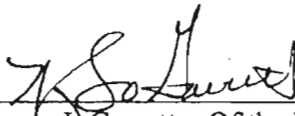
**PLAINTIFFS' MOTION FOR NEW
TRIAL**

COME NOW the Plaintiffs, by and through their undersigned counsel of record,
Nancy Jo Garrett, of the firm Moffatt, Thomas, Barrett, Rock & Fields, Chtd., and pursuant to
Rule 59(a)(1) and 59(a)(7), hereby move for a new trial.

This motion is supported by the pleadings and record on file, along with the
Plaintiffs' Memorandum in Support of Motion for New Trial, and Affidavit of Nancy Jo Garrett
in Support of Motion for New Trial filed contemporaneously herewith.

DATED this 23rd day of December, 2008.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

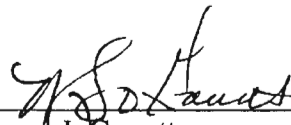
By  _____
Nancy J. Garrett – Of the Firm
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of December, 2008, I caused a true and correct copy of the foregoing **PLAINTIFFS' MOTION FOR NEW TRIAL** to be served by the method indicated below, and addressed to the following:

Shelly H. Cozakos
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 Nancy J. Garrett

ORIGINAL

FILED
11:46 A.M. P.M.

DEC 24 2008 ✓

CANYON COUNTY CLERK
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Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
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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' MEMORANDUM IN
SUPPORT OF MOTION FOR NEW TRIAL**

COME NOW Plaintiffs, Charles and Marjorie Bratton, by and through their undersigned counsel, and submit this memorandum in support of their Motion for New Trial. This motion is made on behalf of the Brattons as a result of the September 2008 trial they had before Judge Renae Hoff in the Third Judicial District in and for the County of Canyon.

I. LEGAL STANDARD

Idaho Rule of Civil Procedure 59(a) states:

**PLAINTIFFS' MEMORANDUM IN
SUPPORT OF MOTION FOR NEW TRIAL - 1**

Client:1047261.1

000601

A new trial may be granted to all or any of the parties and on all or part of the issues in an action for any of the following reasons:

1. **Irregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.**
2. Misconduct of the jury.
3. Accident or surprise, which ordinary prudence could not have guarded against.
4. Newly discovered evidence, material for the party making the application, which the party could not, with reasonable diligence, have discovered and produced at the trial.
5. Excessive damages or inadequate damages, appearing to have been given under the influence of passion or prejudice.
6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against the law.
7. **Error in law, occurring at the trial.**

Any motion for a new trial based upon any of the grounds set forth in subdivisions 1, 2, 3 or 4 must be accompanied by an affidavit stating in detail the facts relied upon in support of such motion for a new trial. Any motion based on subdivisions 6 or 7 must set forth the factual grounds therefor with particularity. (Emphasis added.)

A trial court may grant a new trial even though there is substantial evidence to support the jury's verdict. *Gillingham Constr., Inc. v. Newby-Wiggens Constr., Inc.*, 142 Idaho 15, 23, 121 P.3d 946, 954 (2005)(citing *Bott v. Idaho State Bldg. Auth.*, 122 Idaho 471, 475, 835 P.2d 1282, 1286 (1992)). The same result would obtain in the context of a court-awarded Judgment Notwithstanding the Verdict.

As discussed more fully below, the Brattons are entitled to a new trial pursuant to 59(a)(1), "Irregularity in the proceedings of the court," and 59(a)(7) "Error in law, occurring at the trial."

II. INTRODUCTION

Since 1973, and up until 2007, Plaintiffs Charles and Marjorie Bratton used their easement rights to irrigate pasture for their race horses. This was initially conveyed pursuant to an express easement but immediately took the form of an area about 12 feet wide or enough for a three-foot ditch and reasonable, customary use and maintenance. This width is consistent with the law of the state of Idaho pursuant to Idaho Code §§ 42-1102, 42-1204, and 42-1207. In 2005, Defendants obtained possession of the subject land encumbered by said easement, the servient estate. By the early spring of 2007 Defendants began causing interference with the Brattons' easement rights. At that time, Defendants denied Plaintiffs access to the subject easement, destroyed the 34-year-old irrigation ditch without permission to do so, refused to replace the ditch they destroyed, and barred Plaintiffs' access to their legal water rights. On September 3, 2008, a seven-day trial commenced. Right before the trial was held, the Court ordered the trial trifurcated with each of the three segments to be decided separately by a single twelve-person jury. Plaintiffs lodged a timely objection to the trifurcation and continued objecting to the trifurcated trial format throughout the proceedings.

III. BACKGROUND SPECIFIC TO MOTION

The record shows that in 1973, Harold and Janet Ford owned and subsequently divided a tract of land that became the Fruitdale Farm Subdivision in Canyon County, Idaho. In doing so, among other divisions, Mr. Ford created two adjoining lots, lots 32 and 40. On April 19, 1973, Mr. Ford conveyed lot 32 to the Brattons by way of an executed Warranty Deed (dominant estate). From 1973 forward the Brattons used the land for pasturing, feeding, and stalling of their race horses and other livestock.

The Warranty Deed from the Fords to the Brattons also provided water rights, including a one-half share of water stock held in Canyon Hill Ditch Company and another one-half share of stock held in Middleton Mill Ditch Company. In addition, the Warranty Deed gave an express easement for the construction and maintenance of a three-foot irrigation ditch, with rights of ingress and egress, as follows:

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

As a result of the warranty deed, Mr. Bratton had all rights of the deed as well as rights entitled by I.C. 42-1102. In fact, the express easement was consistent with I.C. § 42-1102. In 1973, Mr. Ford installed a three-foot-wide irrigation ditch for the Brattons that traversed the west side of Lot 40, (servient estate), and was located far enough way from the fence to protect the integrity of the fence and to allow for installation and maintenance of the ditch. Because of the drop and slope in the property from the headgate to Brattons' property, the Brattons placed sections of concrete and galvanized pipe intermittently in the ditch to keep its walls from eroding and to control the volume and flow direction of the water from the forces of gravity caused by the drop and slope.

In the spring of 1973, the Brattons began their irrigation use and maintenance of the ditch. Mr. Ford also used the Bratton ditch for irrigation of a portion of Lot 40. Since 1973, the Brattons continually utilized and maintained the structure of the ditch as well as the deposit area adjacent to the ditch. The Brattons' use and maintenance of the ditch involved utilizing a tractor to clean the ditch, deposit waste along the banks, and for ingress and egress of the

equipment and persons working on the ditch, which entailed about a 12-foot area to include the ditch. Every spring and summer, the Brattons regularly sprayed and burned the area, including and adjacent to the ditch, and regularly cleaned the inside of the ditch itself. Significantly, Mr. Ford always allowed the Brattons to access about a 12-foot-wide area on Lot 40 with tractors and other equipment needed to maintain the ditch. In fact, Mr. Ford knew of, and agreed with, the Brattons' use of that area for the easement and testified that he intended such use to be permanent. This use, intention, and maintenance is consistent with the express deed and I.C. § 42-1102.

On January 2, 1996, Mr. Ford signed a Quitclaim Deed on Lot 40 to Lois Rawlinson. After the time of this 1996 Quitclaim Deed, the Brattons continued to utilize their easement consistent with the manner set forth above.

On September 13, 2005, Ms. Genice Rawlinson gift deeded Lot 40 to Defendants. This gift deed specifically states that the Defendants took their property "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." (Emphasis ours.)

In April of 2007, as was his yearly routine, Mr. Bratton accessed his easement and began to burn the area adjacent to and including his ditch. Again, this had been done regularly by the Brattons for 34 years in preparation to receive water for the coming irrigation season. During the spring 2007 burning, the Scotts aggressively approached Mr. Bratton and verbally threatened him, demanding that Mr. Bratton stop burning, never burn again, and leave the servient property. The Defendants deny all of the above, although do agree that they approached

Mr. Bratton and did not want him to burn or spray the irrigation ditch or the area adjacent thereto.

Within days of the above encounter, Defendant Scott clearly demonstrated his intention of not allowing Bratton to have access to his easement by placing "No Trespassing" signs on the boundary line between Lot 32 and 40 where Mr. Bratton accessed his easement and also placed signs near Mr. Bratton's headgate. The Defendants also acted in a hostile manner on the first occasion after the burning encounter as Mr. Bratton approached the area in the fence where he would access the easement and headgate. Additionally, unbeknownst to Plaintiffs at this time, on or around April 15, 2007, Defendants destroyed the ditch and removed the pipe culverts utilized therein.

After the ditch was destroyed, Mr. Bratton attempted through an Equitable Motion to the Court and via negotiations to merely have the 34-year-old ditch replaced and to have the court order the Defendants to allow access to the easement and irrigation water. Neither of these actions were successful as the Court did not hear the Equitable Motion and Defendant would not replace the ditch or successfully negotiate a resolution. The Brattons have not had access to their easement for irrigation of their pasture property since the close of the 2006 irrigation season.

On June 26, 2007, a Complaint was filed which included a prayer for equitable relief. As stated before, the equitable relief motion was never heard. An Amended Complaint was filed on January 14, 2008. A partial summary judgment was granted as to the Brattons' easement. The trial commenced on September 3, 2008. At the time of the trial, the court took judicial notice of Idaho Code §§ 42-110 and 42-1200, *et seq.*

IV. IRREGULARITY OF THE PROCEEDINGS

Rule 59(a)(1) allows in part for a new trial if it is found that there were irregularities of the proceeding of the Court, “[o]r any order of the Court or abuse of discretion by which the party was prevented from having a fair trial.” This Court conducted the trial in such a manner as to cause great hardship for the Plaintiffs including, but not limited to: entering burdensome evidentiary rulings; excluding substantial relevant evidence by advising the Plaintiffs and their counsel continually from the pretrial throughout the trial that if the Plaintiffs did not prevail, the Court would grant attorney fees to Defendants; by refusing to recognize and apply the applicable statutes; by trifurcating the trial, which caused an enormous cost to Plaintiffs and made rulings on the admission of evidence which made it very difficult to put on each of the three segments’ *prima facie* evidence; and by causing significant confusion as to the evidence allowed in each *prima facie* element. It was evident from the pretrial proceedings that the Court disfavored the Plaintiffs’ case.

When evaluating whether an irregularity in the proceedings merits a new trial, a district court takes into consideration whether the irregularity had any effect on the jury’s decision. *Gillingham*, 142 Idaho at 23, 121 P.3d at 954. Furthermore, when a jury is improperly instructed, and the effect of the improper instruction has the cumulative effect of causing the jury to reach a conclusion that is not justified, the only conclusion which may be drawn is that a fair and impartial trial was not had. *See Griffith v. Schmidt*, 110 Idaho 235, 237-38, 715 P.2d 905, 907-908 (1986).

A. Trifurcation

In the case at bar, over the continual objections of Plaintiffs and immediately before trial began, the Court divided the case into three segments (trifurcating the trial). The

same jury was to sit and render a verdict following completion of each segment. The three segments were vaguely set out from the Bench by the Court, and the parties were never provided a written order or format on the requirements of the segments.

The Court ruled that the trial would be trifurcated after all pre-trial preparation was completed. This ruling came as a complete surprise to Plaintiffs. Defendants had asked for the trial to be bifurcated, but it was Plaintiffs' counsel's understanding that the Court advised from the Bench that the trial would not be bifurcated if either party objected to such a procedural change. Plaintiffs objected when the Defendants suggested bifurcating and thereafter filed a motion for such. Over the Plaintiffs' objection, the Court not only bifurcated the trial, but added a third segment.

The Court had already ruled that the equitable relief requested by Plaintiffs was moot since it had not been heard when filed. At the time of the trifurcation, the Court then ruled that a portion of the equitable relief would be tried in segment number one. Segment number two would be liability and, if needed, segment number three would be damages. The only means to discover what evidence would be allowed in each segment was to continually seek direction from the Court or offer evidence until the Court ruled what was evidence for the next segment. Therefore, it was very difficult to discern the required *prima facie* evidence for each segment, plan witnesses, and all other matters that go into trial prior to resting for each segment. This confusing method of litigation sent the Plaintiffs' counsel on the eve of trial back to work to fully reorganize their case and to discern just how to prepare their *prima facie* case. This order caused the pre-trial preparation to go in a completely new direction and required that Plaintiffs' counsel reorganize the entire trial at a date when little time was left to prepare for such a trial method.

Further, trifurcation was not necessary in this matter. The Court continually stated that it trifurcated the case to save time. The case was set for three days. After trifurcation, the trial took seven days. It became clear that the trifurcation was substantially increasing the time necessary to try the case. The Court also stated that trifurcation was necessary because if the plaintiffs did not get a verdict on liability, then there would be no damage phase. The jury unanimously found in favor of Plaintiffs on liability and the third phase was required. There was no logical or judicial basis to require trifurcation of this trial. This action substantially burdened the Plaintiffs and was unfair.

B. Error of Law and Trifurcation

Segment number one of three was the segment in which the Court directed that Plaintiffs prove an implied easement. As stated prior, the Plaintiffs had an express easement, and the Court had taken judicial notice of Idaho Code §§ 42-1102, 42-1204, and 42-1207. In this segment, Plaintiffs had intended to prove that Idaho Code §42- 1102 allowed for an implied easement by operation of law. The Judge refused to apply the applicable law of the state of Idaho, however, in that the Court ruled that Idaho Code § 42-1102 applied only if the easement was based on riparian rights and, further, the Court found the statute did not apply because case law trumped I.C. 42-1102.

The Court based this ruling on case law cited by Defendant, *Thomas v. Madsen*, 142 Idaho 635, 132 P.3d 392, which the Court ruled stood for the premise that Plaintiffs must prove the elements of an implied easement even though they have an express easement and the rights afforded by Idaho Code § 42-1102, which gives the Brattons an implied easement of greater than three feet by operation of law. The *Madsen* case had nothing to do with irrigation or the irrigation statute but rather dealt with a driveway dispute. The statutes allow for an implied

easement by operation of law for ingress, egress, maintenance, and use. Plaintiffs argued that the case did not preempt application of Idaho Code § 42-1102 but rather was inapplicable because of the express easement and the irrigation statutes in force. Thus, the irrigation statutes set forth width needed, maintenance, and use provisions.

The jury instructions utilized the case law of the implied easement formula and did not set forth I.C. § 42-1102. The instruction was as follows:

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.

Therefore, the jury instructions did not instruct the jury as to the correct law of the state of Idaho for this matter. Of note, the same jury deciding segment one would be the same jury that would decide the remaining two segments. Because the jury was to take each segment into consideration when deciding all subsequent segments, the improper instructions in the first segment would impact the view of the state of the law for the jury in the first segment and each subsequent segment. The Idaho appellate courts have long held that the giving of an incorrect instruction constitutes "such irregularity and error in law as to bring the case within Rule 59(a)." *Walton v. Potlatch Corp.*, 116 Idaho 892, 897, 781 P.2d 229, 234 (1989). In fact, when a jury verdict is rendered "on the basis of incorrect instructions, the appropriate remedy is the granting

of a new trial.” *Walton*, 116 Idaho at 234. *See also*, *Corey v. Wilson*, 93 Idaho 54, 454 P.2d 951 (1969); *Walker v. Distler*, 78 Idaho 38, 296 P.2d 452 (1956). Finally, the Supreme Court of Idaho held some thirty years ago that “[t]he trial court is under a duty to instruct the jury on every reasonable theory recognized by law that is supported at trial.” *Everton v. Blair*, 99 Idaho 14, 576 P.2d 585 (1978) (citing *Hodge v. Borden*, 91 Idaho 125, 417 P.2d 75 (1966); *Domingo v. Phillips*, 87 Idaho 55, 390 P.2d 297 (1964); *Wurm v. Pulice*, 82 Idaho 359, 353 P.2d 1071 (1960)). In fact, the trial court “has a duty to grant a new trial where prejudicial errors of law have occurred at the trial, even though the verdict of the jury is supported by substantial evidence.” *Sherwood v. Carter*, 119 Idaho 246, 262, 805 P.2d 452, 468 (1991) (citing *Mann v. Safeway Stores, Inc.*, 95 Idaho 732, 518 P.2d 1194 (1974)).

Instructing on Idaho Code § 42-1102 was fundamental to the Brattons’ lawsuit, and instructing the jury with an incorrect statement of the law was an unfair burden that Plaintiffs could not overcome. This irregularity of the Court permanently and unfairly led the jury to decide the full matter from an incorrect initial basis.

C. Plaintiff was Unclear as to Each Segment’s Prima Facie Case

Further, the Court ruled only from the Bench regarding the burden of proof for each trial segment and the jury instructions were never known or argued until the completion of the *prima facie* element. The Court would provide instructions on elements the Court thought should be proven in each segment, but only after Plaintiffs rested their *prima facie* case in that particular segment. It is true that the Court does not have to provide jury instructions at the outset, but since this was so confusing and since the trial was segmented, withholding the instructions until after the Plaintiffs rested led to further unfairness to Plaintiffs. An example of surprise is the issue of “impeding flow” of water. Plaintiffs were not aware that this element

would be a juror question on the special verdict of the second segment until immediately prior to the jury instruction conference. Impediment of flow was not a part of Plaintiffs' *prima facie* elements, because Plaintiffs interpreted the law to state that one could suffer harm or injury by a "change of the ditch or impediment of flow." *See* Idaho Code § 42-1207 (emphasis added). Injury did not require both elements to occur. The Plaintiffs met the burden on the change of the ditch. The Court nevertheless disagreed with the express language of the statute and refused to recognize the word "or" in the statute. Instead, the Court gave an instruction that required the jury to answer a question as to impediment of flow alone—with nothing said about the change of the ditch. The Court then utilized the answer of "no" to its special verdict question to deny the Plaintiffs most of their damage evidence. This action by the Court was an abuse of discretion and was instrumental in preventing a fair trial. As noted above, when a verdict is rendered on the basis of incorrect instructions, the appropriate remedy is the granting of a new trial. *See Walton, supra*. Furthermore, because of the replication of the fundamental error in the Court's jury instruction, there was a "cumulative effect" that certainly caused the jury to reach an unjustified conclusion. As such, "a fair and impartial trial was not had." *Griffiths*, 110 Idaho at 238.

D. Extended Trial Length

The length of the trial was significantly increased by use of this trifurcated method. The trial was initially set for three days, but due to trifurcation, lasted seven days. The Court stated that this would be a much more effective method because if the jury did not find liability, then the third segment would not occur. The Court gave every indication that it did not think the jury would find liability, and if it did, the damages would most likely be nothing or minimal. This method of trial was a clear waste of resources, caused confusion to Plaintiffs, caused great difficulty in preparing segmented evidence, caused many witnesses to be called

back over and over in all segments, tripled the litigation costs to the parties, and was an excessive waste of litigant, jury, and judicial resources.

The ruling on trifurcation would unfairly bias the juror's view of the matter through all three segments, which bias could not be overcome by Plaintiffs. There would be three *prima facie* cases, three openings, three closings, three jury instruction conferences, the same jury would be instructed three times, and the same jury would deliberate three times. Once a decision was made in one segment, the same jurors were required to deliberate again and again on subsequent segments. The jury's being misinstructed in all three segments and being instructed to take into consideration all instructions when answering for only one segment unfairly prejudiced Plaintiffs' case and was a clear abuse of the Court's discretion.

E. Warning of Plaintiffs' Award and Attorney Fees to be Assessed

The Court, both on the record, in chambers, and off the record, warned Plaintiffs and their attorneys that if they did not prevail or if the award was nominal, then the Court would award attorney fees to Defendants. The Court did not cite the basis of how the Court could award fees in this matter.

This case is not an attorney fee matter in that there is no statutory basis for fees, and the case certainly was not brought on a frivolous basis. The Court abused its discretion by continually warning that it would award attorney fees against the Plaintiffs and caused the Plaintiffs and their counsel to believe that the trial Court was biased against them for no legal basis.

F. The Court was Improperly Biased Against Plaintiffs and Plaintiffs' Attorney

The Court for some reason was not an impartial referee in this litigation. The rulings in almost every discretionary decision would be decided against the Plaintiffs. The Court

abused its discretion by weighing in on the litigation and doing all things within its power to cause the Plaintiffs hardship in proving their case in chief.

G. Exclusion of Plaintiff's Evidence

Over Plaintiffs' objections and based on the Court's misinterpretation of the law and bias against the Plaintiffs' cause of action, the Court excluded and limited a substantial portion of the Plaintiffs' case in chief. The list of exclusions set forth below is not meant to be a complete list but is set forth to show the substantial nature of Plaintiff's evidence that the Court ruled inadmissible.

1. The Court excluded any evidence of crop loss and consequences thereof.

Because the Court misinterpreted the Idaho statutes on easements, the Court decided that crop loss would not be an element of Plaintiffs' damage claim. Over objection of Plaintiffs, the Court excluded any and all evidence of crop loss and the consequences therefrom. The Court substantially based this decision on the fact that the jury found that the flow of water was not impeded. Again, Plaintiffs argued that the statute, Idaho Code § 42-1207, allowed for harm to Plaintiffs if the ditch was changed. The jury found that Defendants had violated the law by changing the ditch, and the jury also found that the change caused harm to Plaintiffs. Following this ruling, Plaintiffs made an offer of proof that included evidence of expert testimony, actual loss, and actual consequences of the negligence and injury proximately caused by Defendants.

The crop loss was Plaintiffs' largest element of damage, and by excluding all evidence pertaining thereto, the Court in effect denied Plaintiffs their right to a fair and impartial jury trial. The Court based all rulings on improper law, and that misconception caused numerous errors. Since the Court would not recognize that Idaho Code § 42-1102 was controlling in this

matter, and since the Court found that Idaho Code §§ 42-1204 and 1207 only allowed damage to the claimants' estate if flow was impeded, this ruling was fundamentally flawed. The Court clearly abused its discretion in the above-listed rulings against Plaintiff.

2. The Court excluded evidence on the cost to replace the ditch with underground irrigation pipe and then further excluded evidence as to the cost to replace an above-ground ditch.

The Court clearly and unfairly restricted Plaintiffs as to their damage evidence. First, the Court excluded all evidence as to the cost of placing an underground irrigation pipe. The Court based the ruling on the fact that the flow had not been impeded. The whole case had been pled and discovered with the intent of installing an underground piping system to avoid further problems among the litigants. The Court ruled that this evidence would not go to the jury. Then the Court ruled that since the cost of an above-ground ditch had not been disclosed or discovered, Plaintiffs would not be allowed to proffer any damage evidence as to the cost for replacement of the above-ground ditch.

Plaintiffs argued that pleadings should conform to the evidence, and since the Court excluded the evidence of below-ground piping during the trial, then the cost evidence for an above-ground ditch could easily be set forth by Plaintiffs to Defendants. Since the trial was already longer than it had been scheduled, there would be no reason why Defendants could not discover this evidence because installing above-ground ditches was common knowledge.

Thereafter, even with these limitations, the verdict in the third segment was delivered into open court in favor of Plaintiffs. The Court, in ruling on Defendants' Motion for Judgment Notwithstanding the Verdict, cited as one of the bases for granting the Defendants' motion was that the jury did not have evidence on the cost to replace an above-ground ditch. Even though the Court would not allow evidence on cost for replacing the ditch, it allowed the

jury to deliberate that very cost and reach a verdict on the cost. But, when the jury came back with a reasonable Plaintiff verdict awarding a monetary verdict for ditch replacement, the Court then granted a Judgment Notwithstanding the Verdict. It seemed the Court had anticipated that the verdict would be for the Defendants, and when it was for the Plaintiffs, the Judgment Notwithstanding the Verdict was granted.

The Court abused its discretion by excluding all evidence on cost to place an underground piped ditch, and then, after the jury found for Plaintiffs on a reasonable cost for an above-ground ditch, the Court vacated the monetary verdict rendered by the jury.

3. The Court excluded any and all evidence on the Defendant John Scott's propensity for aggression and violence toward others.

One of the allegations of Plaintiffs' complaint was that Defendant John R. Scott threatened Plaintiff Charles E. Bratton, and that threat caused Mr. Bratton to fear for his safety. Mr. Scott had been charged with a firearm injury to others. He had a history of physical injury to others along with current threats of violence to other neighbors similar to those lodged against Mr. Bratton. This conduct occurred in the same time frame as that against Plaintiff Charles Bratton and all pertained to neighbors' property rights, easements for water, headgate access, and the like.

The Court excluded all such evidence on the basis that, although relevant, such evidence would be more prejudicial than probative. Plaintiffs argued that even though the evidence was prejudicial, the issue of threat and violence toward others was consistent with that lodged against Plaintiff, which element was a separate count of Plaintiffs' complaint and was centrally necessary to proving Plaintiffs' *prima facie* case on the element of threat of harm.

In deciding the balancing test between probative relevant evidence and evidence that is relevant but more prejudicial than probative, the Court abused its discretion by excluding

John Scott's conduct toward other land adjoining neighbors or neighbors who had to access their headgate on or near Scott's land. The evidence on Mr. Scott's conduct was necessary to prove a separate element of the Plaintiffs' complaint. The Court in its ruling, seemed to be applying criminal case analogy rather than one for a civil matter.

All persuasive evidence is prejudicial to the other side. When deciding this matter, the Court did not seem to weigh the fact that Mr. Scott's behavior to other adjoining neighbors would buttress the Plaintiffs' case and show that the Defendant Scott was not acting within the law as it pertains to water irrigation easements. Neighbors let each other know what to "watch out for" and this neighborhood was no different. The evidence would also support the basis of Mr. Bratton's fear of Defendant Scott as well as support Bratton's reason for avoiding Scott to protect himself. This exclusion was unfair and an abuse of the Court's discretion.

V. ERRORS OF LAW

Rule 59(a)(7) allows for a new trial where there was an error at law that occurred at trial. (IRCP 59(a)(7)). See the facts set forth *supra* and the jury instructions given by the Court. The Court refused to instruct on the applicable statutes for the case at bar and also misinterpreted the easement statutes it did use for instruction.

A. This Court Erred in Its Interpretation and Exclusion of I.C. § 42-1102

The Court ruled that Idaho Code section 42-1102 did not apply to the Brattons' easement. The Court did so by finding that case law on implied easement controlled, and that case law supported the fact that the Brattons' easement was not an implied easement. *See* discussion *supra* and briefs on file.

Idaho Code 42-1102 covers all easements that were then in existence at the time of enactment or became in existence thereafter, no matter the language of the express easement.

I.C. § 42-1102 allowed for certain rights and responsibilities for easements use in irrigation. I.C. § 42-1102 allowed that the Brattons' easement was implied in fact or in law to allow for ingress, egress, maintenance, use and repair. The Court utilized the case law cited *supra* to validate the ruling which found 42-1102 inapplicable.

Additionally, the Court found that 42-1102 did not apply because the easement was not due to riparian rights. The plain language of Idaho Code section 42-1102 makes it 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).

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/or (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 landowners 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 Defendants' property to access that Boise River water that is delivered to them through the nearby Canyon Hill Lateral or Canal.

The Brattons' interpretation of Idaho Code section 42-1102 and its application to the factual scenario presented in their Complaint 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 delegated 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. (Emphasis added.) Consequently, Idaho Code section 42-1102 squarely applies to the consideration of the irrigation easement and right-of-way at issue in this matter. The Court clearly committed an error of law in not applying the correct law to this matter.

B. The Court did not recognize the rights of the Dominant Estate as set forth in Idaho Code Section 42-1102

In the case at Bar, the Brattons were and are seeking nothing more than the irrigation easement, right-of-way, and water right that Idaho Code section 42-1102 provides. The Brattons were and 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-plus years. This easement and right-of-way included the use of a tractor, a V-ditcher, burning, spraying, and other equipment commonly used and reasonably adapted for irrigation ditch operation and maintenance purposes. The *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518 (2001) Court confirmed Nampa and Meridian Irrigation District's rights under Idaho Code 42-1102 and did not abrogate them in favor of the strict application of the express Channel Change Easement Agreement.

The bottom line for consideration in this matter is that the Brattons' irrigation easement, water rights, and right-of-way pre-existed the Defendants' ownership of their property. The Defendants took ownership of their property subject to that preexisting irrigation easement and right-of-way. While 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 or interfere with access to water rights. The express easement agreement on record in this matter is consistent with Idaho Code section 42-1102.

The Brattons have only those rights expressly afforded to them pursuant to the express easement and 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 the 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 an irrigation easement and right-of-way for over the past 33-plus 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, and subsequent owner Rawlinson. The Brattons are still seeking the same easement. They are seeking to maintain the status quo, a status quo that the Defendants had no right to obliterate no matter what their interpretation was of the express easement. *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. The Rawlinson Gift Deed that conveyed the subject property directly 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.)

The Court refused to instruct on Idaho Code section 42-1102 due to the fact, as stated *supra*, the Court interpreted the case law to take the case out of the statute, that the statute applied only to riparian landowners and, further, that Idaho Code section 42-1102 did not afford rights to the Brattons. The Court refused to recognize the express language of the Statute and the mandate of the Idaho Supreme Court as set forth in *Canyon View Irr. Co. v. Twin Falls Land Co.*, 100 Id. 604, 607 (1980). This is a fundamental error of law that completely altered the course of the trial, unfairly misled or confused the jurors as to the law in the State of Idaho. This error by the Court was made at the outset of the trial, substantially limited evidence, and instructions in each phase were fundamentally impacted by the Court's misinterpretation of the

law. Because the Court's decision is directly counter to the controlling statutes, and because the error of law caused extreme and unfair prejudice to the Plaintiffs, this matter must be re-tried.

C. **The Court Omitted Substantial Evidence Based on Error of Law**

While 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 substantially limited the evidence the Court would allow the Plaintiffs to offer and admit and thus it was unfairly prejudicial to the Brattons' 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 property 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. Idaho Code section 42-1102 not only contemplates the operation and maintenance needs for one's corresponding irrigation easement and right-of-way but also sets out the fundamental reasons for which the easement and right-of-way were created--to assist those landowners in conveying irrigation water via their water rights to their landlocked properties.

This is a factual element which was central to the consideration of this case. If the Brattons cannot satisfy the requisite needs for the irrigation easement and right-of way under Idaho Code section 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 landowners like 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 and their property for the operation and maintenance of the ditch the dominant estate possesses.

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” and width of use for the easement. The fact that there is 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 and maintenance 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 surface ditch, the Defendants were fully aware that their actions in obliterating the existing ditch and attempting to relocate it elsewhere on their property directly interfered with the longstanding rights of the Brattons and that they knowingly performed their tortious acts with a total disregard for the open and obvious rights of the Brattons.

Failure to instruct the jury on Idaho Code section 42-1102 in this trial was an error of law and unfairly prejudiced the Plaintiffs’ right to a fair trial.

D. The Court Required Impediment of Flow for a Claim of Damage

As set forth *supra*, the Court excluded substantial liability and damage evidence because the Court required that there be an impediment of flow before the Plaintiffs could put on

evidence of crop loss, any loss associated with crop loss, the need for underground pipe, and the loss of value to the Brattons' property.

The facts will show that there is a substantial drop in altitude from the headgate until the water enters onto Plaintiffs' land. Because Canyon County is located on a planet with gravity, water has to run downhill no matter the means by which it flows. The Court ignored the fact that the downhill flow was not channeled or controlled and would cause excessive damage to servient and dominant estates, as well as to third-party property, and is against the statutory mandate having to do with irrigation ditches.

The applicable statute regarding this issue of irrigation easements took into consideration gravity. The very language of the statute allows for damages due to impediment of flow –OR- by otherwise injuring person or persons using or interested in such ditch . . . (Idaho Code § 42-1207). (Emphasis added.) The Court refused to recognize the plain language of the statute, and because it would not recognize “or by otherwise injuring persons or persons interested in such ditch,” the Court refused to allow substantial evidence associated with injuries due to the destruction of the ditch by Defendants.

During the second segment, and unbeknownst to Plaintiffs until after their *prima facie* case had been completed, the Court required that the jury answer a special verdict question regarding impediment of flow, and one on whether the conduct of the Scotts caused damage to Bratton. Because the dominant estate was geographically lower than the servient estate, the Plaintiff, Mr. Bratton, testified that the flow was not impeded and the jury so found no impediment. But as to the second element of the statute which allows for injuries from Defendants' conduct, the jury unanimously found that Defendant's conduct had caused injury to the Plaintiff. The Court based its rulings only on the fact that the jury found the flow was not

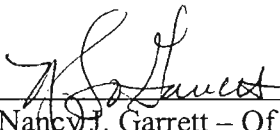
impeded. The Court ignored and continually did not base its rulings on the special verdict finding by the jury that the second element of the statute was present and thus caused damages to the Plaintiffs. The above Court ruling constitutes an error of law, which caused an unfair trial.

VI. CONCLUSION

Based upon the foregoing, Plaintiffs respectfully request that the Court grant their Motion for New Trial.

DATED this 23rd day of December, 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 23rd day of December, 2008, I caused a true and correct copy of the foregoing **PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL** to be served by the method indicated below, and addressed to the following:

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- Hand Delivered
- Overnight Mail
- Facsimile



Nancy J. Garrett

FILED
A.M. 230 P.M.

JAN 02 2009

CANYON COUNTY CLERK
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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 TO DISALLOW PLAINTIFFS'
COSTS**

Defendants John R. Scott and Jackie G. Scott ("Defendants"), by and through their attorneys of record, Perkins Coie LLP, hereby object to the claimed costs of the Plaintiffs and move this Court, pursuant to the Idaho Rules of Civil Procedure, including Rule 54(d)(6) to disallow all costs sought by Plaintiffs in this matter on the grounds and for the reasons set forth in Defendants' Memorandum in Support of Motion to Disallow Plaintiffs' Costs and in Response to Plaintiffs' Motion to Disallow and Objection to Defendants' Memorandum of Costs, Disbursements, and Attorney Fees, including that Plaintiffs are not the prevailing parties.

This motion is supported by the files and records herein.

Oral argument is requested on this motion.

DATED: January 2, 2009.

PERKINS COIE LLP

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

CERTIFICATE OF SERVICE

I, the undersigned, certify that on Jan. 2, 2009, 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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JAN 02 2009

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Attorneys for Defendants

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

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

Plaintiffs,

v.

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

Defendants.

Case No. CV 0706821C

**MEMORANDUM IN SUPPORT OF
 DEFENDANTS' MOTION TO DISALLOW
 PLAINTIFFS' COSTS AND IN RESPONSE
 TO PLAINTIFFS' MOTION TO
 DISALLOW AND OBJECTION TO
 DEFENDANTS' MEMORANDUM OF
 COSTS, DISBURSEMENTS, AND
 ATTORNEY FEES**

This Memorandum is submitted by Defendants John R. Scott and Jackie G. Scott ("Defendants"), by and through their attorneys of record, Perkins Coie LLP, in support of their Motion to Disallow Plaintiffs' Costs and in Response to Plaintiffs' Motion to Disallow and Objection to Defendants' Memorandum of Costs, Disbursements, and Attorney Fees.

I. STANDARD

Pursuant to Idaho Rule of Civil Procedure 54(d)(1), costs shall be allowed as a matter of right to the prevailing party, which is determined as follows:

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(B) Prevailing Party. In determining which party to an action is a prevailing party and entitled to costs, the trial court shall in its sound discretion *consider the final judgment or result of the action in relation to the relief sought by the respective parties*. The trial court in its sound discretion may determine that a party to an action prevailed in part and did not prevail in part, and upon so finding may apportion the costs between and among the parties in a fair and equitable manner after considering all of the issues and claims involved in the action and the resultant judgment or judgments obtained.

I.R.C.P. 54(d)(1)(A) and (B) (emphasis added). In addition, the Court may award reasonable attorney's fees to the prevailing party, as defined by Idaho Rule of Civil Procedure 54(d)(1)(B), when provide for by any statute or contract. I.R.C.P. 54(e)(1). Thus the determination of the prevailing party is a discretionary decision by the Court. *See* I.R.C.P. 54(d)(1)(B) and *Eighteen Mile Ranch, LLC v. Nord Excavation & Paving, Inc.*, 141 Idaho 716, 718-19, 117 P.3d 130, 132-33 (Idaho 2005).

II. DISCUSSION

To determine which party is the "prevailing party" the Court must consider the final judgment or result obtained in relation to the relief sought by the parties. I.R.C.P. 54(d)(1)(B). The Court is required to examine and determine the prevailing party from an overall view of the action, not on a claim-by-claim analysis, as has been presented by Plaintiffs. *See Eighteen Mile Ranch, LLC*, 141 Idaho at 719; 117 P.3d at 133. The Idaho Supreme Court has interpreted Rule 54(d)(1)(B) holding that a defendant is a prevailing party if he avoids all liability following a jury trial. *Id.* In *Eighteen Mile Ranch, LLC*, the Court stated:

Avoiding liability is a significant benefit to a defendant. In baseball, it is said that a walk is as good as a hit. The latter, of course, is more exciting. In litigation, avoiding liability is as good for a defendant as winning a money judgment is for a plaintiff.

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The point is, while a plaintiff with a large money judgment may be more exalted than a defendant who simply walks out of court no worse for the wear, courts must not ignore the value of a successful defense.

Id. 141 Idaho at 719, 117 P.3d at 133. Where a defendant escapes liability, and thus obtains "the most favorable outcome that could possibly be achieved," he is the prevailing party. *Id.*; *see also Daisy Manufacturing Co., Inc. v. Paintball Sports, Inc.*, 134 Idaho 259, 262, 999 P.2d 914, 917 (Idaho Ct. App. 2000) (holding that the defendant was the prevailing party where it received the most favorable outcome that could possibly be achieved when it received a dismissal of the case with prejudice and where the plaintiff gained no benefit as a consequence of the litigation).

A. PLAINTIFFS ARE NOT THE PREVAILING PARTIES IN THIS CASE.

Plaintiffs' contention that they are the prevailing parties in this matter is without merit. Plaintiffs appear to assert that they are the prevailing parties with respect to the issues of express easement, liability, and proximate cause and are thus entitled to their costs. *See* Pls.' Mem. of Costs and Aff. of Attorney Affirming Costs at 1. However, in determining who the prevailing party is in litigation, the Court must look at the case from an overall view, not on a claim-by-claim basis. In looking at the result obtained by Plaintiffs, they cannot be said to have prevailed.

Pursuant to the Amended Complaint and Demand for Jury Trial ("Amended Complaint"), the primary relief sought by Plaintiffs was a judgment for money damages and a declaratory judgment that they had a 3-foot express easement (as set in the original location by Harold Ford) and a 12-foot easement by implication and prior use. *See* Amended Compl. at 8, ¶ 47(A)(B).¹ Plaintiffs did not receive any damages nor did they receive a 12-foot implied easement. Instead, Plaintiffs walked away from this case with nothing more than a judgment confirming that they have an express 3-foot easement as set forth in the Warranty Deed at issue, which was not

¹ Plaintiffs also sought injunctive relief but did not bring any pre-trial motions to address this relief. Amended Compl. at 8, ¶ 47(C).

disputed by Defendants. Because Plaintiffs' claim for an express easement was not disputed by Defendants, the issue was not even in controversy in this case. *See* Defs.' Mem. in Opp. To Pls.' Mot. for Partial Summ. J. at 5; *see also* Aff. of Cynthia Yee-Wallace in Supp. of Defs.' Second Mot. in Limine filed on Aug. 14, 2008, Ex. 1, Court's Ruling on Pls.' Mot for Partial Summ. J. at 4:10-12. Thus, when looking at the result obtained by Plaintiffs in relation to the relief that they sought, it is clear that Plaintiffs are not the prevailing parties.

It similarly makes no difference that Plaintiffs received a jury verdict on the issues of negligence and proximate cause, because they ultimately gained no benefit from these verdicts. They were awarded absolutely no damages and took nothing from the verdicts. Plaintiffs left this case with nothing more than what they had when they started: an express 3-foot easement that Defendants did not contest. Accordingly, the Court should deny Plaintiffs' request for costs as they are not the prevailing parties in this matter.²

B. DEFENDANTS ARE THE PREVAILING PARTIES IN THIS CASE.

Defendants, on the other hand, are the prevailing parties in this case and are thus entitled to an award of their costs and reasonable attorney's fees. Defendants avoided all liability in this case and walked away with the most favorable outcome that they could obtain. The net result of the favorable decision on Defendants' motion for judgment notwithstanding the verdict meant that Defendants were not liable for any damages to Plaintiffs. Their defense was successful. In looking at the overall case in relation to the relief sought by Plaintiffs, it is clear that Defendants prevailed. Plaintiffs obtained no benefits as a consequence of this litigation and Defendants ultimately walked away from this matter no worse for the wear with no liability to Plaintiffs.

² Additionally, even if Plaintiffs were somehow deemed to be the prevailing party, they should not be awarded any discretionary costs as they have not demonstrated how such costs were necessary and exceptional costs reasonably incurred.

Accordingly, Defendants are the prevailing parties in this case.

1. Defendants should be awarded their Costs Incurred in Defending this Case.

Pursuant to Idaho Rule of Civil Procedure 54(d)(1) the prevailing party is entitled to certain costs as a matter of right. In this case, Defendants incurred \$7,251.64 in costs as a matter of right. *See* Defs.' Mem. of Costs and Fees. As the prevailing parties, Defendants should be awarded these costs.

Defendants also incurred \$2,501.77 in discretionary costs, which should also be awarded to Defendants. Discretionary costs should be assessed when they were necessary and exceptional, reasonably incurred, and when the interests of justice require. I.R.C.P. 54(d)(1)(D). In addition, pursuant to Idaho Code Section 10-1210, a court may make an award of costs as may be equitable and just in actions involving a claim for declaratory judgment. *See* I.C. § 10-1210.

In this case, the costs incurred for photocopies, printing, travel, a copy of a CD/DVD, postage, and Westlaw research were all necessary and exceptional costs reasonably incurred. Plaintiffs' claims in this matter were ever evolving and shifting. As set forth below, Plaintiffs continually advanced frivolous and baseless arguments and allegations against Defendants and even when it became apparent that their claims were baseless, Plaintiffs continued to pursue them at trial. Additionally, on almost the eve of trial, Plaintiffs injected numerous ditch and water law statutes into this case for seemingly the first time. This, in addition to Plaintiffs' other frivolous claims and allegations, caused Defendants to have to research, brief, respond to and argue various defenses, often in a very short amount of time, in response to Plaintiffs' ever evolving claims. The discretionary costs incurred by Defendants were necessary and exceptional costs reasonably incurred and should be assessed against Plaintiffs.

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Additionally, Plaintiffs' claim for declaratory judgment ultimately came down to a declaration of whether they were entitled to a 12-foot implied easement. Even when it became apparent that Plaintiffs could not meet 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), they continued to assert this claim through trial. The jury specifically found that Plaintiffs had not proven that they were entitled to a 12-foot easement, and this finding was also found by the Court. Thus, Plaintiffs novel and ever shifting claims forced Defendants to incur significant costs in defending this matter which in the interests of justice and equity, should be assessed against Plaintiffs.

C. DEFENDANTS SHOULD BE AWARDED THEIR ATTORNEY'S FEES IN THIS CASE.

1. Plaintiffs' Claims were Frivolously Pursued and Attorney's Fees are Warranted Under Idaho Code § 12-121.

Under Idaho Code Section 12-121, attorney's fee may be awarded to the prevailing party where the court finds from the facts presented that the case was brought or pursued frivolously, unreasonably or without foundation. See I.C. 12-121 and I.R.C.P. 54(e)(1). In this case, Plaintiffs brought and pursued this case frivolously, unreasonably, and without foundation and thus, Defendants should be awarded their attorney's fees.

In their original Complaint, Plaintiffs alleged that Defendants made "physical bodily threats to Plaintiffs" and alleged a cause of action for "tortious [sic] stalking" against them. See Compl. at 7. The tortious stalking claim was completely without merit and was dismissed upon motion made by Defendants as Idaho does not recognize a private right of action for such claim.

Thereafter, Plaintiffs amended their Complaint to again allege that Defendants had made "physical bodily threats to Plaintiffs." Amended Compl. at 5, 7. Counsel for Defendants then

MEMORANDUM IN SUPPORT OF DEFENDANTS'
MOTION TO DISALLOW PLAINTIFFS' COSTS AND IN
RESPONSE TO PLAINTIFFS' MOTION TO DISALLOW
AND OBJECTION TO DEFENDANTS' MEMORANDUM
OF COSTS, DISBURSEMENTS, AND ATTORNEY
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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 all the way through trial in this matter. This forced Defendants to have to continue to defend this meritless claim and to expend continued time and expense in fighting these admittedly baseless allegations. This claim was ultimately rejected by the jury but only after a costly trial in this case.

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 had an express three-foot easement as set forth in the Warranty Deed attached to the Amended Complaint and 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

MEMORANDUM IN SUPPORT OF DEFENDANTS'
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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. However, Defendants were still forced to respond to, defend, and ultimately go to trial on the issue incurring significant attorney's fees on yet another baseless claim asserted by Plaintiffs.

Similarly, Plaintiffs' invasion of privacy claim was frivolous and completely unsupported, as a matter of law, by the evidence at trial. Liability for a claim of invasion of privacy by intrusion requires: (1) an intentional intrusion by the defendant; (2) into a matter, which the plaintiff has a right to keep private; (3) by the use of a method, which is objectionable to the reasonable person. *Jensen v. State*, 139 Idaho 57, 62, 72 P.3d 897, 902 (Idaho 2003); citing *62A Am Jur 2d, Privacy § 48 (1990)* and *Uranga v. Federated Publications, Inc.*, 138 Idaho 550, 67 P.3d 29 (2003); *Hoskins v. Howard*, 132 Idaho 311, 317, 971 P.2d 1135, 1141 (Idaho 1999). In order to constitute an invasion of privacy, an act must be of such a nature as a reasonable person can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligences, situated in like circumstances as the plaintiff. *Id.* At trial, Plaintiffs presented little more evidence than the Defendants staring at them and installing video surveillance on their home. However, the evidence also showed that the video surveillance was installed on the Defendants' home so that they could protect themselves.

MEMORANDUM IN SUPPORT OF DEFENDANTS'
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Plaintiffs presented no evidence that the cameras reached their property and Plaintiffs do not even live at the property at issue, which is 10 acres away from Defendants' home. Again, this claim was completely unreasonable and not founded in law or fact.

Also 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 regarding any amount of damages, Plaintiffs continued to pursue its damage claims which forced Defendants to expend significant time and expense defending this matter. The damage portion alone took one day of trial.

Every claim asserted against Defendants, with the exception of the claim that Defendants did not dispute, failed. Plaintiffs' tortious stalking claim was dismissed because it was unsupported by law. Plaintiffs' claim for declaratory judgment for an implied 12-foot easement was baseless as they could never meet the legal elements for such claim. Plaintiffs further took nothing from its negligence claim, which was based in part on admittedly frivolous allegations that Defendants had physically threatened Plaintiffs. Finally, the jury rejected Plaintiffs tortious interference with privacy claim, which was based on allegations that were unsupported by the law.

Because Plaintiffs brought and pursued this matter frivolously, unreasonably, and without foundation, Defendants should be awarded their attorney's fees incurred herein.

III. CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiffs request for their costs incurred in this case as they are not the prevailing parties. Defendants further request that the Court find that Defendants are the prevailing parties in this matter and award them their costs, as well as grant Defendants their attorney's fees incurred in

MEMORANDUM IN SUPPORT OF DEFENDANTS'
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OF COSTS, DISBURSEMENTS, AND ATTORNEY
FEES - 9

65685-0001/LEGAL15098188.1

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defending against Plaintiffs' frivolous claims and allegations.

DATED: January 2, 2009.

PERKINS COIE LLP

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

CERTIFICATE OF SERVICE

I, the undersigned, certify that on Jan. 2, 2009, 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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Cy Wallace
Cynthia L. Yee-Wallace

MEMORANDUM IN SUPPORT OF DEFENDANTS'
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OF COSTS, DISBURSEMENTS, AND ATTORNEY
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 A.M. 4:30 P.M.

JAN 15 2009 ✓

CANYON COUNTY CLERK
 D. BUTLER, DEPUTY

Attorneys for Defendants

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

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

Plaintiffs,

v.

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

Defendants.

Case No. CV 0706821C

**DEFENDANTS' MEMORANDUM IN
 OPPOSITION TO PLAINTIFFS' MOTION
 FOR NEW TRIAL**

This memorandum is submitted by Defendants John R. Scott and Jackie G. Scott ("Defendants"), by and through their attorneys of record, Perkins Coie LLP, in opposition to Plaintiffs' Motion for New Trial. This memorandum is supported by the files and records in this case.

I. OPPOSITION

At the outset, Defendants object to the section entitled "Background Specific to Motion" set forth in Plaintiffs' Memorandum in Support of Motion for New Trial. Plaintiffs fail to make any citations to the record in reciting this "background" and Defendants will instead rely on and

incorporate herein the record before the Court with respect to any facts or background proceedings.¹

A. There are no Grounds that Justify Granting Plaintiffs a New Trial in this Matter.

1. Plaintiffs have not Shown how the Bifurcation of the Trial Deprived them of a Fair Trial.

Plaintiffs move for a new trial pursuant to Idaho Rule of Civil 59(a)(1) and 59(a)(7).

Plaintiffs first argue that there were irregularities in the proceedings and errors in the law, particularly with the Court's decision to bifurcate the trial. However, Plaintiffs have not shown how the decision to bifurcate the trial deprived them of a fair trial or was decided in error.

Under Idaho Rule of Civil Procedure 59(a)(1), the trial court must consider whether there has been any irregularity in the proceedings, or any order of the court or abuse of discretion, which has deprived either party of a fair trial such that a new trial would be justified. *O'Dell v. Basabe*, 119 Idaho 796, 804, 810 P.2d 1082, 1090 (Idaho 1991). Plaintiffs argue that the bifurcated² trial made "it very difficult to discern the required *prima facie* evidence" to present in each segment of trial and to plan its witnesses at trial. Pls.' Memo. in Supp. of Mot. for New Trial at 8. Plaintiffs also argue that they had to "go in a completely new direction" and reorganize the trial with little time to prepare. *Id.* Plaintiffs thus maintain that bifurcating the trial "burdened" the Plaintiffs and was "unfair." *Id.* at 9.

¹ In particular, Plaintiffs contend that they filed an "Equitable Motion" that the Court did not hear. Pls.' Memo. in Supp. of Mot. for New Trial at 6. Defendants can find no record of such motion. Similarly, Defendants dispute that the Plaintiffs "have not had access to their easement for irrigation of their pasture property" since 2006. *Id.* This statement is directly contradicted by the evidence at trial.

² Plaintiffs refer to the bifurcation as "trifurcation."

Plaintiffs' arguments are without merit. The Court's decision to bifurcate the trial was rendered equally to all parties. Defendants had to make the same pre-trial adjustments that Plaintiffs had to make in the same amount of time. Plaintiffs received favorable verdicts in Phase II and Phase III of the trial and they asked for and received direction from the Court, on more than one occasion, regarding the scope of evidence during the trial. Plaintiffs simply have not shown how the decision to bifurcate the trial deprived them of a fair trial. Plaintiffs have also failed to show how their alleged confusion about what evidence to present during the different phases of the trial deprived them of a fair trial, especially in light of the fact that Plaintiffs received direction from the Court throughout the trial regarding the scope of each segment. Plaintiffs' Motion for New Trial should be denied.

2. The was no Error of Law in the Court's Application of the Law on Implied Easement.

For the very first time, a mere day or so before trial, Plaintiffs cited and argued the applicability of Idaho Code Section 42-1102 in this case. *See* Pls.' Supplemental Memo. in Supp. of Implied Easement. Plaintiffs argue that Idaho Code Section 42-1102 somehow related to its claim for an implied twelve-foot easement in this case. Plaintiffs argue that because the jury was instructed on the standards for an implied easement as set forth in *Thomas v. Madsen*, 142 Idaho 635, 638, 132 P.2d 392, 395 (Idaho 2006) and not Idaho Code Section 42-1102, there was error in the trial warranting a new trial. Plaintiffs are incorrect.

It was not error to give the jury an instruction setting forth the elements of *Thomas v. Madsen*, 142 Idaho 635, 638, 132 P.2d 392, 395 (Idaho 2006) with respect to Plaintiffs' implied easement claim and a new trial is thus not warranted. *See also e.g. Beitzel v. Orton*, 121 Idaho

709, 827 P.2d 1160 (Idaho 1992). First, Plaintiffs Amended Complaint brings a claim for an implied easement. Plaintiffs even moved for summary judgment on their claim of implied easement, which was denied. Thus, throughout the duration of the lawsuit Plaintiffs sought to expand the scope of the undisputed written easement through the legal doctrine of implied easement. *Thomas v. Madsen* sets forth the current legal standard in Idaho for claims of implied easements. Thus, there was no legal error resulting from giving this jury instruction and no irregularity in law occurred necessitating a new trial.

Finally, Idaho Code Section 42-1102 is inapplicable in this case based upon the plain language of the statute. Section 42-1102 provides rights of way for irrigation rights and reads as follows:

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, canal or other conduit 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. . . .

I.C. § 42-1102. Under the statutory definitions, Plaintiffs are not claimants to land lacking sufficient length of frontage on a stream nor is Plaintiffs' land "back from the banks of a stream." The statute is therefore inapplicable and Plaintiffs' Motion for New Trial should thus be denied.

3. The Court did not Err in Excluding Certain of Plaintiffs' Evidence.

a. Crop Loss Evidence was Irrelevant because the Jury Found that there was no Impediment of Water Flow.

In the case of an incorrect ruling regarding evidence, a new trial is merited only if the error affects a substantial right of one of the parties. *Highland Enters., Inc. v. Barker*, 133 Idaho 330, 345, 986 P.2d 996, 1011 (Idaho 1999). In this case, the Court did not err in excluding

evidence relating to damages caused to "crop loss" because the jury in this case specifically found that there was no impediment of flow in Plaintiffs' irrigation water. *See* Jury Verdict, Phase II. Whether Plaintiffs' claims were based in negligence or in Idaho Code Section 42-1207, they may not invoke the statute or rely on such claims unless they prove causation. *See Allen v. Burggraf Const. Co.*, 106 Idaho 451, 453, 680 P.2d 873, 875 (Idaho Ct. App. 1984). There is no causation where Plaintiffs could not show that their water flow had been impeded. *Id.* The jury specifically found that Plaintiffs had not proven impeded water flow, and thus, any damages related to the same were thereafter irrelevant and inadmissible.

b. The Court did not Err in Excluding Evidence of an Underground Ditch.

In this case, Plaintiffs have never had an underground ditch. They presented no credible basis as to why they were entitled to put on damage evidence regarding an underground ditch in light of the fact that this case did not involve an underground ditch, and the jury found that there was no impediment to Plaintiffs' water flow. Accordingly, there is no error that resulting from the Court's decision to exclude evidence of the cost to construct an underground ditch.

c. The Court did not Err in Excluding John Scott's Alleged Prior Acts.

For purposes of brevity, Defendants' incorporate herein the authorities and arguments previously cited and made by them in their Memorandum in Support of Defendants' Third Motion in Limine Re: Irrelevant and Prohibited Propensity Evidence previously filed in this case. Plaintiffs sought to introduce evidence regarding prior alleged "altercations" that they claimed occurred between John Scott and other neighbors, as well as other prior alleged bad acts of John Scott. Plaintiffs sought to offer this evidence for the sole reason of attempting to show that the Defendant acted in conformity with these prior alleged bad acts in the case at bar. Such evidence

was not only irrelevant, but violates Idaho Rule of Evidence 403(b).

4. Plaintiffs' Remaining Arguments do not Implicate Grounds Warranting a New Trial.

Plaintiffs also argue that the Court warned Plaintiffs that attorney's fees would be awarded to Defendants if Plaintiffs did not prevail and that the Court was biased against Plaintiffs. Defendants recall that the Court informed *both* parties, outside the presence of the jury, that after the trial was over, the Court would likely be taking up the issue of attorney's fees. The Court did not relate this to one party more than the other, made no rulings, was not biased against Plaintiffs, and made such comments outside the presence of the jury. It is thus inconceivable how Plaintiffs can claim that they were prejudiced or deprived of a fair trial because of these comments. Plaintiffs' Motion for New Trial should be denied.

B. There Was No Indication That The Court Was Biased.

Plaintiffs argue the Court was improperly biased against Plaintiffs and Plaintiffs' counsel and state that "the rulings in almost every discretionary decision would be decided against the Plaintiffs." (Memorandum in Support, p. 13.) Plaintiffs make this assertion without any references to the records, and inaccurately insinuate that Plaintiffs lost on all motions, evidentiary challenges, etc. The record does not support this conclusion. The Court denied several of Defendants' motions, including its motion in limine on the implied easement claim, and deferred ruling on Defendants' motions for directed verdicts allowing the Jury an opportunity to decide the facts. For the most part Plaintiffs case did not have a basis in law, and the frivolousness of Plaintiffs' case became even more apparent during the trial. Nonetheless, the Court allowed Plaintiffs to present their case to the jury, deferring Defendants' motions for directed verdict, mistrial, etc. Moreover, although the Plaintiffs obviously did not agree with some of the Court's rulings that were unfavorable to Plaintiffs, they must show that these rulings

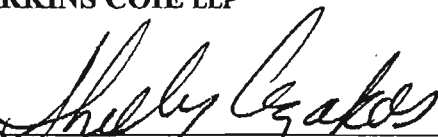
were legally incorrect, which they have not even come close to doing. It is therefore inappropriate for Plaintiffs to make this assertion, and it provides no grounds for a new trial.

II. CONCLUSION

For the reasons set forth herein, as well as the records in this matter, Plaintiffs' Motion for New Trial should be denied.

DATED: January 15, 2009.

PERKINS COIE LLP

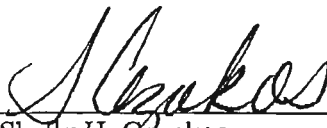
BY 
Shelly H. Cozacos, Of the Firm
Cynthia L. Yee-Wallace, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on January 15, 2009, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

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 Shelly H. Cozakos
 Cynthia L. Yee-Wallace

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Attorneys for Defendants

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FEB 02 2009

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

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

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

Plaintiffs,

v.

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

Defendants.

Case No. CV 0706821C

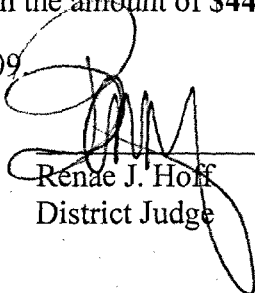
**ORDER RE: MEMORANDA OF COSTS
AND FEES**

This matter came before the Court on January 22, 2009 on both Plaintiffs' and Defendants' Memorandum of Costs and Fees. For the reasons set forth by the Court at the January 22, 2009 hearing, the Court, hereby issues the following order:

1. The Court finds that Defendants are the overall prevailing party in this action. Plaintiffs' Memorandum of Costs is therefore DENIED.
2. Defendants are awarded costs in the amount of **\$9,753.41**.

3. For the reasons set forth at the hearing on January 22, 2009, and having considered all the factors required under Rule 54(e)(3) of the Idaho Rules of Civil Procedure, the Court awards Defendants attorneys' fees in the amount of \$44,576.15.

DATED: FEB 02 2009, 2009



Renae J. Hoff
District Judge

CLERK'S CERTIFICATE OF SERVICE

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(husband and wife),

Defendants.

Case No. CV 0706821C

**ORDER RE: PLAINTIFFS' MOTION FOR
NEW TRIAL**

This matter came before the Court on January 22, 2009 on Plaintiffs' Motion for New Trial. 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. Plaintiffs' Motion for New Trial is DENIED for the reasons set forth by the Court at the January 22, 2009 hearing;

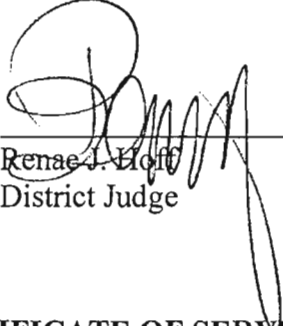
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A.M. 9:55 P.M.

FEB 02 2009

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

FEB 02 2009

DATED: _____, 2009.



Renae L. Hoff
District Judge

CLERK'S CERTIFICATE OF SERVICE

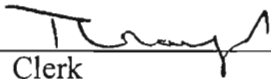
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Attorneys for Defendants

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FEB 02 2009

CANYON COUNTY CLERK
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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

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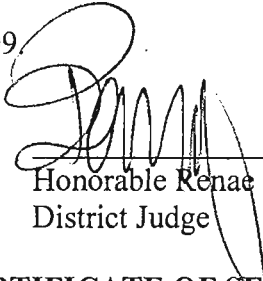
Case No. CV 0706821C

**JUDGMENT RE: COSTS AND
ATTORNEYS' FEES**

This matter came before the Court for a hearing on Defendants' Memorandum of Costs and Fees on January 2, 2009. In accordance with the Court's Order Re: Memoranda of Costs and Fees entered on FEB 02 2009, 2009, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered against Plaintiffs in favor of Defendants in the sum of **\$44,576.15** in attorneys fees and the sum of **\$9,753.41** for costs.

FEB 02 2009

DATED: _____, 2009.



Honorable Renae J. Hoff
District Judge

CLERK'S CERTIFICATE OF SERVICE

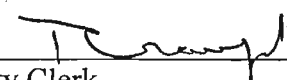
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A.M. 3:35 P.M.

MAR 12 2009

CANYON COUNTY CLERK
K CANNON, DEPUTY

Nancy J. Garrett, ISB No. 4026
MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Floor
Post Office Box 829
Boise, Idaho 83701
Telephone (208) 345-2000
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njg@moffatt.com
23655.0000

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/Appellants,

vs.

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

Defendants/Respondents.

Case No. CV 0706821C

**PLAINTIFFS'/APPELLANTS' NOTICE
OF APPEAL**

**TO: JOHN SCOTT AND JACKIE SCOTT AND THEIR ATTORNEY OF RECORD,
SHELLY COZAKOS. NOTICE IS HEREBY GIVEN THAT:**

1. The above-named Plaintiffs/Appellants, Charles Bratton and Marjorie Bratton,
appeal to the Idaho Supreme Court from:

a. Rulings of District Court denying Plaintiffs'/Appellants' Motions regarding Idaho Statutory law, specifically 42-1101 and 42-1201, regarding irrigation water right-of-way easements and the Jury Instruction thereto.

b. Irregularity of the District Court's Proceedings and abuse of discretion by trifurcating the trial, bias toward Plaintiffs/Appellants, and exclusion of evidence on crop loss and consequences thereof.

c. The Decision and Order of the District Court granting Defendants'/Respondents' Motion for Judgment Notwithstanding the Verdict filed November 17, 2008.

d. District Court's denial of Plaintiffs'/Appellants' Motion for New Trial.

e. The District Court's February 2, 2009, Judgment awarding costs and attorney fees to Defendants/Respondents.

2. Plaintiffs/Appellants have the right to appeal to the Idaho Supreme Court pursuant to I.A.R. 11(a)(1), I.A.R. 11(a)(5), and I.A.R. 11(a)(6).

3. The Plaintiffs/Appellants intend to assert on appeal that the aforesaid Decisions, Orders, Jury Instructions and resulting Judgment constitute irregularity of the proceedings and an abuse of discretion on the part of the District Court; that the above-listed Orders, Jury Instructions and Judgment should be reversed on appeal; and that a new trial should be awarded to Plaintiffs/Appellants.

4. A trial transcript has been requested by the Plaintiffs/Appellants from the Court Reporter Carole Bull. Requested was the preparation of the standard transcript and, in addition, all of the opening and closing statements of counsel, all pre-trial oral arguments of counsel for and against the controlling application of Idaho Code 42-1101, and 42-1201, which hearings

were held on September 5, 2007, September 13, 2007, January 24, 2008, February 21, 2008, March 24, 2008, July 28, 2008, August 4, 2008, August 25, 2008, August 28, 2008, and September 2, 2008; all arguments during trial; all arguments for and against Defendants'/Respondents' Motions for Judgment Notwithstanding the Verdict; and all Parties' arguments for and in opposition to Defendants' Motion for Costs and Attorney Fees. A transcript estimate has been prepared by Carole Bull and is \$4,000.00. The transcript estimate has been paid to Carole Bull at the time of this filing.

5. Documents to be included in the record in addition to those documents automatically included pursuant to I.A.R. 28 are:
 - a. all jury instructions requested by Plaintiffs/Appellants;
 - b. all jury instructions given by the District Court;
 - c. all Motions, Memoranda and Affidavits in support of and opposing Defendants'/Respondents' Motion for Directed Verdict;
 - d. all Motions, Memoranda and Affidavits for and against Plaintiffs'/Appellants' September 4, 2008, Motion for Reconsideration of the Court's September 4, 2008, ruling on the inapplicability of Idaho Code § 42-1102;
 - e. all Motions, Memoranda and Affidavits in support of or in opposition to Plaintiffs'/Appellants' September 5, 2008, Motion to Reconsider the September 4, 2008, Ruling or in the Alternative, for Interlocutory Appeal;
 - f. all Motions, Memoranda and Affidavits in support of or in opposition to Plaintiffs'/Appellants' September 11, 2008, Motion for Reconsideration;
 - g. Plaintiffs'/Appellants' August 25, 2008, Pre-Trial Memorandum;
 - h. Plaintiffs'/Appellants' September 11, 2008, Supplemental Trial Brief;

i. all Motions, Memoranda and Affidavits in support of and in opposition to Plaintiffs'/Appellants' September 11, 2008, Supplemental Memorandum in Support of Implied Easement;

j. all Affidavits filed either in support of or in opposition to Defendants'/Respondents' Directed Verdict or in the Alternative Motion for Directed Verdict;

k. all Motions, Memoranda and Affidavits submitted by counsel either supporting or opposing Defendants'/Respondents' Motions for Judgment Notwithstanding the Verdict;

l. all Motions, Memoranda and Affidavits submitted by counsel either supporting or resisting Plaintiffs'/Appellants' Motion for New Trial;

m. all Affidavits filed in support of or in opposition to Plaintiffs'/Appellants' Motion for New Trial; and

n. all Motions, Memoranda and Affidavits supporting or opposing both parties Motions for Costs and Attorney Fees.

6. The undersigned certifies:

a. that service of this Plaintiffs'/Appellants' Notice of Appeal has been made upon Carole Bull, the reporter of the trial at the Canyon County Courthouse, 1115 Albany Street, Caldwell, Idaho 83605;

b. that the estimated fee for the preparation of the reporter's trial transcript as required by I.A.R. 24(b), i.e., \$4,000.00, has been paid to Carole Bull in full;

c. that the deposit for the preparation of the clerk's record in the amount of \$100.00 has been paid to the Canyon County Clerk of the Third Judicial District Court, pursuant

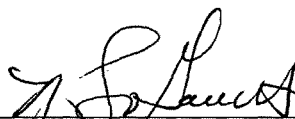
to I.A.R. 27(c), as well as the \$15.00 court filing fee and \$86.00 appellate filing fee, for a total of \$201.00 paid to the Canyon County Clerk;

d. service has been made on all parties required to be served pursuant to I.A.R. 20; and

e. status of Bond pending District Court decision.

DATED this 12th day of March, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

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

CERTIFICATE OF SERVICE

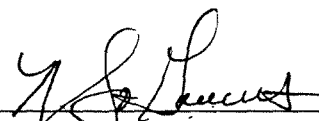
I HEREBY CERTIFY that on this 12th day of March, 2009, I caused a true and correct copy of the foregoing **PLAINTIFFS'/APPELLANTS' NOTICE OF APPEAL** to be served by the method indicated below, and addressed to the following:

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

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile

Carole Bull
Court Reporter to Judge Hoff
Canyon County Courthouse
1115 Albany St.
Caldwell, ID 83605

U.S. Mail, Postage Prepaid
 Hand Delivered
 Overnight Mail
 Facsimile


Nancy J. Garrett

FILED
A.M. 4:45 P.M.

APR 01 2009

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

Shelly Cozakos Shannahan, Bar No. 5374
Scozakos@perkinscoie.com
Cynthia L. Yee-Wallace, Bar No. 6793
CYeeWallace@perkinscoie.com
PERKINS COIE LLP
251 East Front Street, Suite 400
P.O. Box 737
Boise, ID 83701-0737
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

**DEFENDANTS'/RESPONDENTS'
REQUEST FOR ADDITIONAL
DOCUMENTS TO BE INCLUDED IN
APPELLATE RECORD**

Defendants/Appellants John and Jackie Scott, by and through their attorneys of record, Perkins Coie LLP, pursuant to Idaho Appellate Rule 28(c) hereby request that the following documents be included in the record on appeal:

1. Defendants' Motion for Partial Dismissal Pursuant to I.R.C.P. 12(b)(6);
2. Defendants' Memorandum in Support of Motion for Partial Dismissal Pursuant to I.R.C.P. 12(b)(6);
3. Plaintiffs' Response to Defendants' Motion for Partial Dismissal Pursuant to I.R.C.P. 12(b)(6);
4. Reply Memorandum in Support of Defendants' Motion for Partial Dismissal

DEFENDANTS'/RESPONDENTS' REQUEST FOR
ADDITIONAL DOCUMENTS TO BE INCLUDED IN
APPELLATE RECORD - 1
65685-0001/LEGAL15233016.1

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Pursuant to I.R.C.P. 12(b)(6);

5. Plaintiffs' Motion for Partial Summary Judgment;
6. Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment;
7. Affidavit of Counsel in Support of Plaintiffs' Motion for Partial Summary Judgment;
8. Affidavit of Charles Bratton in Support of Plaintiffs' Motion for Partial Summary Judgment;
9. Affidavit of Harold Ford in Support of Plaintiffs' Motion for Partial Summary Judgment;
10. Order Re: Partial Dismissal;
11. Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages;
12. Memorandum in Support of Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages;
13. Affidavit of Charles Bratton in Support of Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages;
14. Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment;
15. Affidavit of John R. Scott in Opposition to Plaintiffs' Motion for Summary Judgment;
16. Affidavit of Shelly H. Cozacos in Opposition to Plaintiffs' Motion for Summary Judgment;
17. Defendants Memorandum in Opposition to Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages;

18. Affidavit of Shelly H. Cozacos in Opposition to Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages;
19. Errata to Defendants' Memorandum in Opposition to Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages;
20. Reply to Plaintiffs' Motion for Partial Summary Judgment;
21. Supplemental Affidavit of Charles Bratton in Support of Plaintiffs' Motion for Partial Summary Judgment;
22. Supplemental Affidavit of Harold Ford in Support of Plaintiffs' Motion for Partial Summary Judgment;
23. Reply to Plaintiffs' Motion to Amend the Complaint to Add Punitive Damages;
24. Affidavit of Counsel in Support of Plaintiffs' Motion to Add Punitive Damages;
25. Order Re: Motion for Partial Summary Judgment;
26. Order Re: Motion to Amend the Complaint to Add Punitive Damages;
27. Defendants' Trial Memorandum;
28. Defendants' Third Motion in Limine Re: Irrelevant and Prohibited Propensity Evidence;
29. Memorandum in Support of Defendants' Third Motion in Limine Re: Irrelevant and Prohibited Propensity Evidence;
30. Defendants' Motion for Clarification/Motion in Limine Re: Plaintiffs' Declaratory Claim for an Implied Easement;
31. Memorandum in Support of Defendants' Motion for Clarification/Motion in Limine Re: Plaintiffs' Declaratory Claim for an Implied Easement;
32. Defendants' Response to Plaintiffs' Supplemental Memorandum Re: Implied

Easement;

33. Order Re: Defendants' Third Motion in Limine Re: Irrelevant and Prohibited

Propensity Evidence;

34. Transcript- 9/5/08 Phase I -- Trial;

35. Order Re: Defendants' Motion for Directed Verdict, Motion for Mistrial and Motion for Judgment Notwithstanding the Verdict.

DATED: ^{April 1} ~~March 31~~, 2009.

PERKINS COIE LLP

By Cy Wallace
Shelly Cozjakos Shannahan, Of the Firm
Cynthia L. Yee-Wallace, Of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on ^{April 1,} ~~March 31~~, 2009, I caused a true and correct copy of the foregoing to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Procedure, to the following person(s):

Nancy Jo Garrett
MOFFATT, THOMAS, BARRETT, ROCK
& FIELDS, CHARTERED
101 S. Capitol Blvd., 10th Fl.
P.O. Box 829
Boise, ID 83701
FAX: 385-5384

Hand Delivery _____
U.S. Mail _____
Facsimile ✓
Overnight Mail _____

Cy Wallace
Cynthia L. Yee-Wallace

DEFENDANTS'/RESPONDENTS' REQUEST FOR
ADDITIONAL DOCUMENTS TO BE INCLUDED IN
APPELLATE RECORD - 4
65685-0001/LEGAL15233016.1

000663

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

CHARLES E. BRATTON, etal.,)	
)	
Plaintiffs-)	
Appellants,)	Case No. CV-07-06821*C
)	
-vs-)	
)	CERTIFICATE OF EXHIBITS
JOHN R. SCOTT, etal.,)	
)	
Defendants-)	
Respondents.)	

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify the following exhibits were used at the Jury Trial:

Plaintiffs' Exhibits:

3	Business Card	Admitted	Sent
9	Gift Deed	Admitted	Sent
13	Aerial Photo of Properties	Admitted	Sent
15	Photos (1 - 4)	Admitted	Sent
16	Photos (12)	Admitted	Sent
35	Photos (8)	Admitted	Sent
42	Photo	Admitted	Sent
43	Drawing of Ditcher	Admitted	Sent
49	Photo	Admitted	Sent
50	Diagram of Ditch	Admitted	Sent

CERTIFICATE OF EXHIBITS


000664

Defendants' Exhibits:

A	Warranty Deed	Admitted	Sent
L – N	DVDs	Admitted	Sent
O	Photos (A – D)	Admitted	Sent

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 20 day of October, 2009.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By:  Deputy

CERTIFICATE OF EXHIBITS

000665

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

CHARLES E. BRATTON, etal.,)	
)	
Plaintiffs-Appellants,)	Case No. CV-07-06821*C
)	
-vs-)	CERTIFICATE OF CLERK
)	
JOHN R. SCOTT, etal.,)	
)	
Defendants-Respondents.)	

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules, including specific documents as requested.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 20 day of October, 2009.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By:  Deputy

CERTIFICATE OF CLERK

000666

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

CHARLES E. BRATTON, etal.,)
)
 Plaintiffs-Appellants,) Supreme Court No. 36275
)
 -vs-) CERTIFICATE OF SERVICE
)
 JOHN R. SCOTT, etal.,)
)
 Defendants-Respondents.)

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State's Mail, postage prepaid, one copy of the Clerk's Record and one copy of the Reporter's Transcript to the attorney of record to each party as follows:

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

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

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 20 day of October, 2009.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By: *J. Heideeman* Deputy

CERTIFICATE OF SERVICE

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