2-22-2012

Ruddy-Lamarca v. Dalton Gardens Irrigation District Appellant's Brief Dckt. 39217

IN THE SUPREME COURT OF THE STATE OF IDAHO

DIANE RUDDY-LAMARCA

Respondent,

v.

DALTON GARDENS IRRIGATION DISTRICT,

Appellant.

DOCKET NO. 39217-2011

APPELLANT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho
The Nonorable John T. Mitchell, District Judge, Presiding

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ORIGINAL

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STATEMENT OF THE CASE

The Plaintiff/Respondent, Dianne Ruddy-Lamarca ("Ruddy-Lamarca") filed her *Complaint for Declaratory Relief* on June 11, 2010. R., p. 1. In her *Complaint*, Ruddy-Lamarca alleged that the appellant, Dalton Gardens Irrigation District ("the Irrigation District") came onto her property in about April., 2008, in order to replace an existing irrigation main with a ten-inch diameter irrigation line. R., p. 2, ¶2.2. Ruddy-Lamarca asked that the District Court determine the parties respective easement rights. R., p. 3. The Irrigation District filed its *Answer* on July 12, 2010, generally admitting the allegations set forth in the *Complaint*, and requesting that the District Court determine the parties' respective rights and obligations concerning the easement. R., pp. 4-5. Trial was held on June 15 and 16, 2011. The District Court found that an easement in favor of the Irrigation District existed on Ruddy-Lamarca's parcel but concluded that the easement decreased in width in order to minimize the impact upon Ruddy-Lamarca's parcel.

The *Judgment* was entered on August 19, 2011. The Irrigation District timely filed its *Notice of Appeal* on September 22, 2011.

STATEMENT OF FACTS

Ruddy-Lamarca owns the following parcel, as alleged in her *Complaint*, R., p. 2, ¶2.1, and admitted by the Defendant in its *Answer*, R., p. 4, ¶5.

> A tract of land located in Tract 48 of the DALTON GARDENS ADDITION to HAYDEN LAKE IRRIGATED LANDS, according to the plat thereof filed in Book "B" of Plats at page 151, records of Kootenai County, Idaho more particularly described as follows:
>
> BEGINNING at a point on the East line of said Tract 48; 135.15 feet South of the Northeast corner thereof; thence South 195.15 feet to the Southeast corner of said Tract 48; thence West along the South line of said Tract a distance of 649.6 feet to the Southwest comer of said Tract; thence North along the West line of said Tract 330.4 feet to the Northwest corner of said Tract 48; thence East along the North line of said Tract 390.3 feet to a point in said North line which lies 260.2 feet West of the Northeast corner of said Tract 48; then South a distance of 135.17 feet; thence Last a distance of 260.3 feet to the POINT OF BEGINNING.

Tract 48 is a rectangular five acre tract with its east boundary located along 16th Street in Dalton Gardens. (16th Street runs in a north-south direction.) Figure 1, on the following page, is a portion of Exhibit A, which is the 1907 Plat of Dalton Gardens, showing Tract 48, bounded on the east (to the right) by what is now named 16th Street.

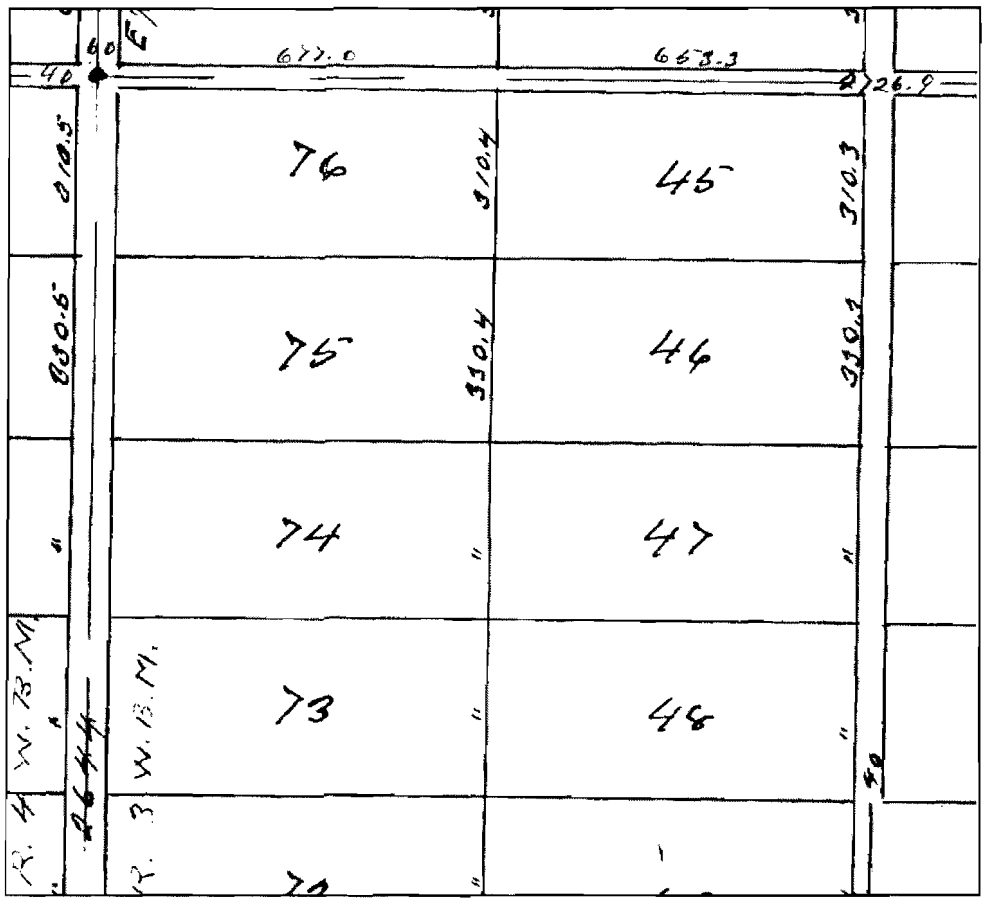

Figure 1

The street to the north is now named Wilbur Avenue. Based on the legal description stated above, the east and west boundaries of Tract 48 are approximately 330.4 feet in length. The north and south boundaries of Tract 48 are approximately 650 feet in length. Ms. Ruddy-Lamarca owns all of Tract 48 except for a portion in the northeast corner of the Tract. Figure 2, on the following page, is a enlarged portion of Exhibit 5, the Kootenai County Assessor's Map, which identifies Ms. Ruddy-Lamarca's parcel

as Parcel#5953 and Parcel #5885. Tr., p. 155, L. 15 - 22. The portion in the northeast corner of Tract 48 not owned by Ms. Ruddy-Lamarca is identified as Parcel # 5594.

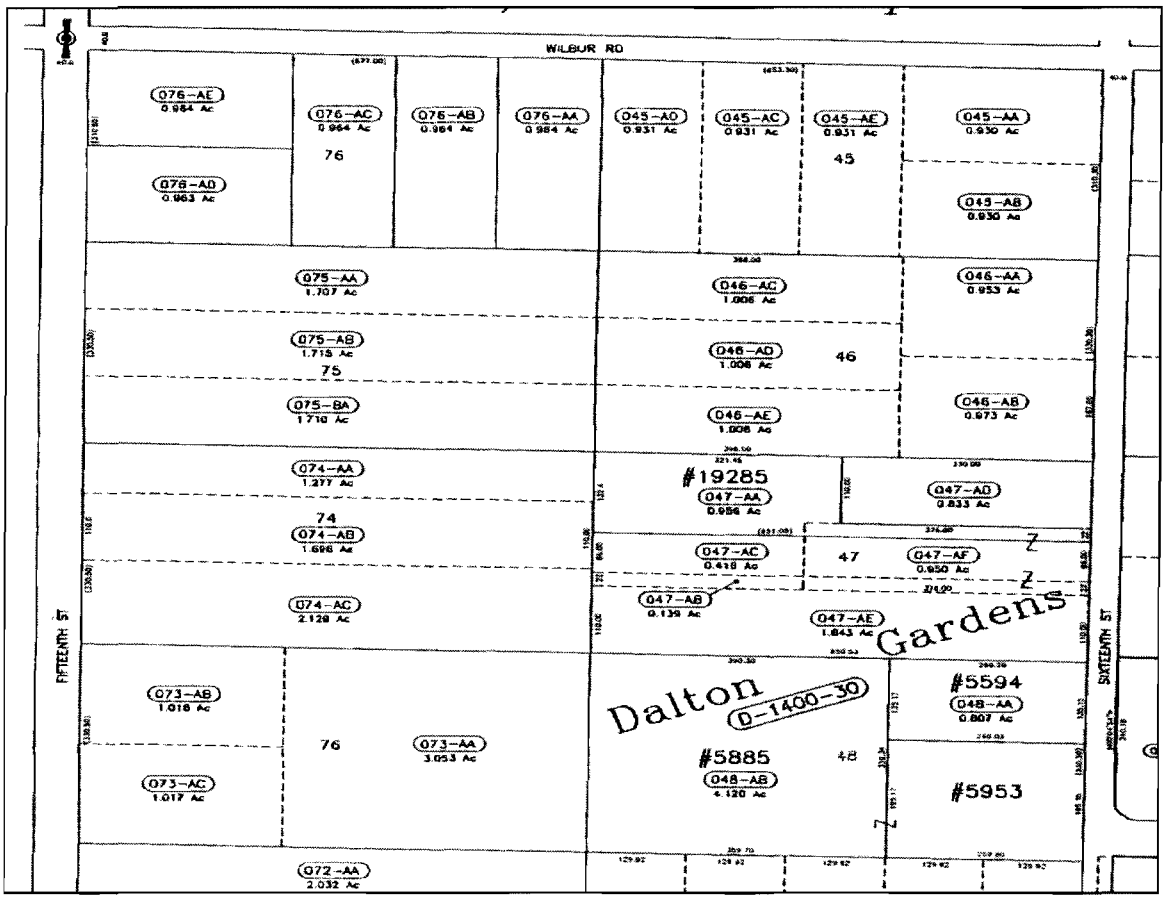

Figure 2

Wilbur (Road) Avenue is the street located at the top of Figure 2, and 16th Street is the street running north-south (top to bottom), located at the right side of Figure 2.

Prior to trial, the parties agreed that "[Ruddy-Lamarca's] property is

encumbered by an easement in favor of [the Irrigation District] for installation, construction, maintenance and repair of irrigation pipeline and appurtenances. " R., p. 41, ¶1. Ruddy-Lamarca conceded, and the District Court found, that there is an express easement in gross across her land in favor of the Irrigation District. R., p. 78, ¶8, R., p. 107 ¶8.

Trial was held on June 15 and 16, 2011. Tr., p. 2. At the commencement of the trial, the parties stipulated to the admission of all of the Exhibits. Tr., p. 9, L. 1-13. During the trial, only three witnesses testified. Ruddy-Lamarca testified on her behalf. Tr., pp. 10 - 31. Robert Wuest testified as the water master of the Irrigation District, Tr., p. 32, L. 8 - 21, and as the supervisor of the pipe replacement project for the Irrigation District. Tr., pp. 113 - 114. Gary Sterling testified as the expert for Ruddy-Lamarca. Tr., p. 54, L. 18 to p. 55, L. 24.

Exhibit T shows the general plan of the District's irrigation system as it was to be reconstructed by the Bureau of Reclamation in 1954. Tr., p. 36, L. 23, to p. 37, L. 3. Figure 3, on the following page, is an expanded portion of Exhibit T that shows how Loop A intersects with Line 7. North is to the top. Wilbur Avenue is the street located at the top of Figure 3.

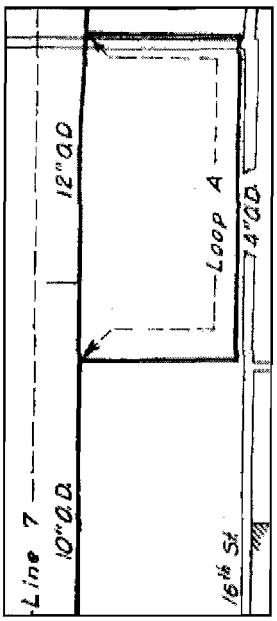

Figure 3

Mr. Wuest testified that in 1961 the Bureau of Reclamation replaced the irrigation lines that it had installed in 1954. Tr., p. 43, L. 19 to p. 44, L. 2. Loop A, from 1954, was renamed Lateral A in 1961 and Line 7 was renamed Lateral 7. Tr., p. 45, L. 5 - 8. Exhibit U is a construction drawing of Loop A. Exhibit W is a drawing of Lateral A. Neither Exhibit U nor Exhibit W specifically show the relationship of Loop/Lateral A to Tract 48. However, the *Stipulated Facts for Trial* state that a portion of Lateral A is located on Tract 48 near the south boundary of the Tract, and that another portion is located along the east, 16th Street, side. R., p. 42, ¶5. Referring to Figure 3, above, the lower portion of Loop A that runs east-west is the portion located on Tract 48 near the south boundary of Tract 48, and the north-

south section of Loop A on Figure 3 is located along16th Street, including the portion of Tract 48 that abuts 16th Street.

Mr. Wuest testified that Lateral A, near the southwest corner of Tract 48, is about 10 to 15 feet north of an old fence at the south boundary of Tract 48. Tr., p. 131, L. 15 - 24, and p. 135, L. 23 - 24. Mr. Sterling testified, and Exhibits 15 and 16 show, that Lateral A is located 9 feet from the edge of the pavement of 16th Street. Tr., p. 70, L. 12 - 15. The *Stipulated Facts for Trial* provide that the platted right-of-way for 16th Street is 40 feet wide, and that the pavement is approximately 22 feet wide, which would place the center line of Lateral A at the edge of the 16th Street right-of-way. R., p. 41, ¶4.

Mr. Wuest testified that the proposed project is to excavate the existing 4-inch pipe which makes up Lateral A, which is located at a depth of approximately 4 feet. The 4-inch line will be disconnected from the system but left in place. The new 10-inch line will be placed immediately adjacent to the 4-inch line. Tr., p. 136, L. 6 - 13.

Mr. Wuest testified that, in preparation for the work, the new 10-inch pipe will be laid out adjacent to and along the area to be excavated. Tr., p. 114, L. 24 to p. 115, L. 1. Three pieces of heavy equipment would be used for the work. A track hoe (a back hoe with tracks instead of rubber tires) will be centered over the centerline of the 4-inch line and will excavate down to the level of the pipe, about 4 feet below

grade. The track hoe will move backwards over and along the run of the existing 4-inch pipe while it excavates and uncovers the 4-inch pipe. After about 25 feet of trench is excavated, the new 10-inch pipe will be placed immediately adjacent to the 4-inch line, which will be disconnected but left in place. After the 10-inch pipe is set in place and connected to the preceding 10-inch section, the second piece of heavy machinery will be used to place the excavated material back into the trench. The third piece of heavy machinery will then compact the excavated material as it is placed back into the trench. The third machine will also have a scraper blade attached to the opposite end and will rough grade the excavated area and the area upon which the excavated material was originally placed. Tr., p. 115, L. 22, to p. 122, L. 3.

The excavated material would be deposited on one side of the trench, opposite the 10-inch pipe, which has been laid out on the other side awaiting installation. Tr., p. 128, L. 12 - 15. However, soil and working conditions might require some of the excavated material to be deposited on the same side of the trench as the 10-inch pipe. Therefore, sufficient room must be provided on that side so that the pipe and excavated material will not interfere with the machine used to excavate. Tr., p. 129, L. 2 - 17.

The excavation would start near the southwest corner of the Plaintiff's parcel.

Tr., p. 115, L. 5-7. Only after the track hoe has excavated a sufficient length of trench from that starting point could the other two pieces of machinery then drive around the track hoe and the excavated materials in order to get into position to perform their functions. In doing so, those two pieces of equipment would have to maneuver more than eight feet from the center of the trench. Tr., p. 131, L. 12-16. Those two pieces of machinery will then remain to the west of the track hoe as it continues to excavate. The Irrigation District needs about 30 to 40 feet in width of easement to perform the project. Tr., p. 142, L. 2-7.

Excavation, placement of the 10-inch pipe, burial, compaction, and rough grading of all of Lateral A located along both the south boundary and the 16th Street side of the Plaintiff's parcel will be completed in one day. Tr., p. 124, L. 17, to p. 125, L. 6. The following day, the disturbed areas will be fine graded. A day or so later, the disturbed area will be hydro seeded. Tr., p. 125, L. 7 - 13.

Gary Sterling testified that he is an experienced excavation contractor, and that the project could be performed in a different manner using one piece of heavy machinery. Tr., p. 101, L. 9 - 11. A track hoe would be centered over the centerline of the 4-inch pipe and would excavate about 25 feet of trench down to the 4-inch pipe, at which time it would stop excavating. The track hoe would place a section of 10-inch pipe in the trench where manual workers would then connect it to the preceding

section. The track hoe would then drive forward, straddling the open trench, to where the excavation started, and then backfill the trench with the excavated materials. Tr., p. 103, L. 14 - 20. A hand compactor would be used to compact the backfilled material as it was being placed in the trench. Tr., p. 166, L. 18 - 21. Mr. Sterling testified that his proposed method would require a 16 foot wide easement. Tr., p. 104, L. 11-13. Mr. Sterling testified that the time required for excavation, placement, burial, and compaction, would be about one hour per 20 feet of pipe. Tr., p. 107, L. 2 - 17. Lateral A runs along almost all of the 16th Street side of the Plaintiff's parcel, and runs along all of the southern boundary. The legal description of the Plaintiff's parcel, above, shows that the 16th Street side of the parcel is 195 feet long. At 20 feet per hour, Mr. Sterling's method would take about 10 hours to complete the 16th Street section. The southern boundary of the parcel is about 650 feet long. At 20 feet per hour, Mr. Sterling's method would take about 33 hours to complete that section. The total job, not including the grading and hydro seeding, would take 43 hours, or over five working days, to complete.

Mr. Sterling testified that both he and the Irrigation District were professionals in pipe installation, and that neither the method proposed by him for replacing the pipe, nor the method proposed by the Irrigation District were wrong. Tr., p. 173, L. 16 - 21.

The District Court entered its *Memorandum Decision, Findings of Fact, Conclusions of Law, and Order Following Court Trial* on August 2, 2011. Its findings and conclusions included:

"That the cost of each method must be roughly equivalent, or at least dose enough to equivalent that neither side chose to make it an issue at trial. Thus, while the width of the easement is what is at issue, as the following shows, this Court finds the paramount issue in determining that width is which construction method is used." R., , p.96, ¶2.

"Considering the pipe stockpile, spoils pile, trench and equipment, this Court finds that at least thirty feet width of easement was used back in 1962, if not 40 feet." R. , p. 99, ¶2.

"Thus, in the past half-century the need to be more surgical in the placement of the water line has increased due to the conversion of the area from agricultural to suburban. The good news is, at the same time, the ability to be more "surgical in the placement of the water line has also improved." R., p. 100, ¶2.

"This Court finds for the following enumerated reasons, that the use of the easement for purposes of installing a new line is to be restricted to the least practicable interference with Ruddy-Lamarca's land, given the realities of modern-day equipment." R., p. 101, ¶2.

Tract 48 is a servient estate and subject to an easement in gross in favor of Dalton Irrigation District that traverses a portion of the parcel that is adjacent to the southern boundary of the parcel and that traverses a portion of the parcel that is adjacent to the public right of way on Sixteenth Street. R., p. 107, ¶8.

In 1955-1963, the United State Department of the Interior Bureau of Reclamation rehabilitated the irrigation works. ... Construction Rehabilitation of the irrigation works began June 11, 1954, and was completed on April 28, 1955. Emergency pipe rehabilitation work began in 1962 and was completed in 1964. R., p. 107, ¶10.

The Bureau used tracked equipment centered on the trench to excavate the trench for the pipeline. This practice imposed the least amount of burden on the property. R., p. 108, ¶12.

The width used by the Bureau south of the existing pipeline along the southern boundary of Ruddy-Lamarca's parcel is not capable of exact measurement based on the photographs, but was in excess of six (6) feet as claimed by Ruddy-Lamarca. Plaintiffs Proposed Findings, p. 4, 113. The width used north of the existing pipeline along the southern boundary of Ruddy-Lamarca's parcel 18 likewise not capable of exact measurement based on the photographs, but was in excess of the ten (10) feet claimed by Ruddy-Lamarca. R., p. 108, ¶14.

The width used by the Bureau as it traversed the eastern portion of Ruddy-Lamarca's parcel adjacent to the public night of way along Sixteenth Street is not capable of exact measurement based on the photographs, but was in excess of the six (6) feet claimed by Ruddy-Lamarca. ld., R., p. 108, ¶ 15.

The District allowed by acquiescence, Ruddy-Lamarca's predecessor to locate two trees along the fence line of the southern boundary that are within the its easement. The District has knowledge of approximately where its lines are located, and there was no testimony about any complaint by the District as to the location of Ruddy-Lamarca's trees. The District must take reasonable precautions during the installation of the pipeline to preserve these trees. R., p. 108, ¶16.

The District allowed by acquiescence, Ruddy-Lamarca to place a dram field north of the existing pipeline along the southern boundary. Ruddy-Lamarca testified she replaced her drainfield in about 1996 or 1997, and that her contractor, Bettis Excavating, called the District before doing so. Plaintiff's Exhibit 7. This testimony was uncontroverted. A portion of the drain field is within ten feet of the existing pipeline. Placing heavy equipment with tires on this drain field may cause it to fail, pursuant to the unrebutted testimony of Gary Sterling. This District shall make every effort to avoid damage to Ruddy-Lamarca's drain field and should only use track equipment over the drain field. R., p. 109, ¶17.

The dimensions of the easement are eight feet either side of that centerline, for a total width of sixteen (16) feet. R., p. 110, ¶3.

The District's easement is not extinguished with respect to the two trees along the fence line and the drain field. However, the District shall make every effort to preserve these encroachments in any repair, maintenance, or replacement of its pipeline. R., p. 110, ¶4.

ISSUES PRESENTED ON APPEAL

1. Whether the court erred when it concluded that the use of the easement to replace the existing line is to be restricted to the least practicable interference with ruddy-lamarca's land, which it found to be sixteen feet in width, when the extent of the easement was fixed by the use under which it was acquired, which the court found to be at least thirty feet, if not forty feet, in width.

2. Whether the district court erred in concluding that the irrigation district must preserve the trees and the septic system drain field when those were placed upon the easement by ruddy-lamarca, or her predecessors, without the express written permission of the irrigation district.

3. Whether the trial judge erred when it expressed displeasure that the irrigation district did not completely settle this litigation prior to trial.

ARGUMENT

THE COURT ERRED WHEN IT CONCLUDED THAT THE USE OF THE EASEMENT TO REPLACE THE EXISTING LINE IS TO BE RESTRICTED TO THE LEAST PRACTICABLE INTERFERENCE WITH RUDDY-LAMARCA'S LAND, WHICH IT FOUND TO BE SIXTEEN FEET IN WIDTH, WHEN THE EXTENT OF THE EASEMENT WAS FIXED BY THE USE UNDER WHICH IT WAS ACQUIRED, WHICH THE COURT FOUND TO BE AT LEAST THIRTY FEET, IF NOT FORTY FEET, IN WIDTH.

The location and width of the Irrigation District's easement on Ruddy-Lamarca's parcel was fixed when the parcel was first used by the District for placement of its irrigation line. "The construction of the ditch by appellant as definitely fixed its location, its width, its course and the character of the means to be employed to convey the waste water from the ditch to the bottom land as if such matters had been specifically fixed by formal contract. The initial use measures appellant's rights under an indefinite grant. [Citations omitted.]" *Coulsen v. Aberdeen-Springfield Canal Company*, 47 Idaho 619, 629, 277 P. 542, 552 (1929). The District Court found that at least thirty feet width of easement, if not forty feet, was used by the Irrigation District to install the replacement pipes in 1962.

Therefore, the easement width was at least thirty feet in width, if not forty feet.

Once the location and width of the Irrigation District's easement was fixed by the initial use, they could not be changed by the District Court in order to lessen the impact of the easement upon Ruddy-Lamarca's parcel. In a decision made by the Idaho Supreme Court after the District Court entered its decision in this matter, *Manning v. Campbell*, ___ Idaho ___, ___ P.3d___, No. 37728 (January 25, 2012), the Supreme Court held that the servient estate owner could neither relocate the driveway easement nor decrease its width so that the driveway would only intrude onto the servient parcel a sufficient amount to allow the easement owner to access their property. Citing *Coulsen*, the Supreme Court again held that the initial use of an indefinite easement fixes its location and width.

The District Court appears, on one hand, to have failed to recognize at which point that the width of the easement was to be determined: when the pipe was initially installed, or at the present when the pipe was to be replaced. It stated: "[w]hile the width of the easement is what is at issue, as the following shows, this Court finds the paramount issue in determining that width is which construction method is used." (Emphasis added.) R., , p.96, ¶2. That is erroneous, as held in *Coulsen*. The sole issue is to determine the width by the use to which it was initially used. But, later, the District Court did recognize that the initial use of the easement

by the Irrigation District, to install the four inch diameter pipe, fixed the width of the easement, but concluded that the width, once established, could be decreased in light of the holding in *Coulsen* that the easement "impose no greater burden than is necessary." R., p. 100, ¶3. However, that restriction, to "impose no greater burden than is necessary", applies when the initial use, which fixes the location and width of the easement, is being made. That restriction cannot be used to decrease the width of the easement once the width has been fixed. "As against respondent, appellant had the right to continue the use of the right of way in the manner and to the extent that these rights were fixed by the original construction." *Coulsen*, 47 Idaho at 629, 277 P. at 552. Furthermore, there is no implication that the District Court was determining that the initial use of the easement by the Irrigation District imposed a greater burden than was necessary. To the contrary, the District Court discussed, without disapproval, the equipment and method used to initially install the pipe in 1962. R., p. 99, ¶2. And, the District Court found: "The Bureau used tracked equipment centered on the trench to excavate the trench for the pipeline. This practice imposed the least amount of burden on the property." R., p. 108, ¶12. Therefore, the District Court had to have appropriately found that the initial width of the easement was thirty to forty feet, and to have recognized that that width imposed no greater burden than was necessary. The District Court was not concluding that

the method proposed by the Irrigation District exceeded the scope of its easement as established by its original use. Rather, it found just the opposite. "If the 'use' for this easement is to *install* a water line (as opposed to the *presence* of the water line itself once installed), then the 'use' a half century ago has not changed to the present time, but the technology to execute that 'use', that is, the technology to install that water line, has changed in the interim." R., p. 99, ¶2. The error that the District Court made was that it concluded that it could now decrease the width of that easement, as reasonable as that width was at the time it was fixed, because it believed that modern technology obviated the necessity for that wide an easement.

The District Court does not have the authority to choose which method for replacing the pipe is to be used, as long as the methods that are used do not exceed the scope of the easement as fixed by the original use. *Coulsen*, 47 Idaho at 629, 277 P. at 552. The scope of the easement includes not only the location of the pipe, but sufficient space to maintain and manage that pipe. The scope of any such easement is set forth in I.C. §42-1102.

> 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. The right-of-way shall include, but is not limited to, the right to enter the land across

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

The Irrigation District did not propose to use exotic or ill-suited equipment to perform the pipe replacement project. Nor did it proposed to perform the work, in any other manner, that would exceed the scope of the easement. The District Court found that Gary Sterling was the more credible witness as compared to Robert Wuest. R., p. 96, ¶1. Yet, Mr. Sterling testified that both he and the Irrigation District were professionals in pipe installation, and that neither the method proposed by him for replacing the pipe, nor the method proposed by the Irrigation District, were wrong. Tr., p. 173, L. 16 - 21.

The District Court concluded that the method utilized was "to be restricted to the least practicable interference with Ruddy-Lamarca's land, given the realities of modern-day equipment." R., p. 101, ¶2. The District Court also found that the terms "commonly" as used in the phrase in I.C. §42-1102, "with such equipment as is commonly used" refers to present day equipment. R., p. 105, final line. I.C. §42-1102 does not restrict the Irrigation District to performing the work with modern-day equipment in that manner. If the intent of that Legislature was to restrict the easement owner to performing the work modern equipment with the least practicable

interference with the servient owner's land, it would have so stated that. Rather, that statute allows the easement owner to use the equipment of its choice, as is commonly used, or to use equipment that is reasonably adapted, to that work.

The Irrigation District, through its directors, has other factors to consider in selecting the method to properly perform the work, although those factors are not specifically set forth in I.C. 42-§1102, including, but not limited to: 1). financial costs; 2). allocation of labor; 3). allocation and availability of equipment; 4). impact of the project on other members of the District; and 5). Impact on the general public. Perhaps the length of time to perform the work is limited, or the personnel available to perform the work are limited in the time they can commit to the project. In this matter, the portion of the line to be replaced on the east side of Ruddy-Lamarca's parcel borders the 16th Street right-of-way. Placement of the excavated material and the pipe to be installed will have to occur on Tract 48, rather than on the right of way, so as to not interfere with the traffic on 16th Street. Tr., p. 129, L. 18 to p. 131, L. 4. The directors of the Irrigation District have to make a policy decision as to which of those factors are given greater weight. And certainly, part of that policy decision is determining whether and how the work can and should be performed to minimize the impact on Ruddy-Lamarca' parcel. However, it is axiomatic that the Court cannot substitute its judgment for the directors' decision in making that policy

decision unless the directors' decision exceeds the scope of the easement as established by its initial use of the easement.

The Court should order that the Irrigation District has an easement forty feet in width, and centered on the location of the existing four inch pipe. The Court should further order that the Irrigation District may use the full width of the easement, for the replacement, maintenance, cleaning, and repairing of the pipeline located in the easement.

II

THE DISTRICT COURT ERRED IN CONCLUDING THAT THE IRRIGATION DISTRICT MUST PRESERVE THE TREES AND THE SEPTIC SYSTEM DRAIN FIELD WHEN THOSE WERE PLACED UPON THE EASEMENT BY RUDDY-LAMARCA, OR HER PREDECESSORS, WITHOUT THE EXPRESS WRITTEN PERMISSION OF THE IRRIGATION DISTRICT.

There was no evidence that the Irrigation District gave Ruddy-Lamarca, or her predecessor, written approval to place the trees upon the easement. The Irrigation District did not give Ruddy-Lamarca written approval to place the septic system drain field upon the easement. Tr. P. 149, L. 14-17.

> Rights-of-way provided by this section are essential for the operations of the ditches, canals and conduits. No person or entity shall cause or permit any encroachments onto the right-of-way, including public or private roads, utilities, fences, gates, pipelines, structures, or other construction or placement of objects, without the written permission of the owner of the right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the right-of-way. Encroachments of any kind placed in such right-of-way without express written permission of the owner of the right-of-way shall be removed at the expense of the person or entity causing or permitting such encroachment, upon the request of the owner of the right-of-way, in the event that any such encroachments unreasonably or materially interfere with the use and enjoyment of the right-of-way.

I.C. §42-1102. Even though I.C. §42-1102 requires written approval for placement of encroachments upon the easement, Ruddy-Lamarca has the right to cultivate the easement and to put it to use in any manner that would not interfere with the Irrigation District's "operation, maintenance or repair" of its easement. *Coulsen*, 47 Idaho at 631, 277 P. at 554. If the property owner wishes to place items on the easement that will interfere with the use of the easement, she must obtain written permission. She can cultivate the easement, or otherwise use it without written permission, if she does not interfere with the operation, maintenance, and repair of the easement. However, absent the written agreement, the easement holder has no duty to protect those items placed, or vegetation grown, within the easement, in performing its duties within the easement. Of course, as a matter of public policy,

the Irrigation District may take steps to try to protect, or minimize damage to, those encroachments that have been placed within the boundaries of the easement when the Irrigation District is performing maintenance and repair upon the easement. However, the Irrigation District should not be obligated to do so as, absent written authorization. The servient owner must bear the risk of locating encroachments upon the easement. The Court should hold that the Irrigation District does not have the duty to preserve the trees and drain field while performing any repair maintenance or replacement of its pipeline.

III

THE TRIAL JUDGE ERRED WHEN IT EXPRESSED DISPLEASURE THAT THE IRRIGATION DISTRICT DID NOT COMPLETELY SETTLE THIS LITIGATION PRIOR TO TRIAL.

In its *Memorandum Decision*, the District Court stated:

> The Court can appreciate that given the fact that the parties are more than 20 feet apart as to their position on the width of this easement, this case might not resolve short of trial. However, given the fact that a construction method was available to the District (which apparently would cost no more than the District's preferred method), which would have fit into the width proposed by Ruddy-Lamarca, it is perplexing that

> this case was not capable of resolution prior to trial. The cost of preparing and taking this matter to trial would have certainly offset any possible difference in cost between the two proposed methods (again, no difference in cost was shown).R., p. 97, ¶2.

This litigation originally involved not only the scope of the easement but also the issue of whether an easement existed. Tr., p. 13, L. 3 - 11. Defendant's Exhibits A to Q were various title documents, other recorded documents, and old Court documents concerning the Tract 48, the Irrigation District, and its predecessors. The Defendant submitted to the District Court its *Memorandum Concerning Creation of Easement*. R., pp. 7-22. Prior to trial, counsel for the Plaintiff and the Defendant met, drafted, and executed, their *Stipulated Facts for Trial*. R., pp. 41-42. Part of facts to which they stipulated was that there existed an easement on Ruddy-Lamarca's parcel in favor of the Irrigation District. R., p. 41, ¶1. At the commencement of trial, counsel for the parties agreed to the admission of all of their Exhibits. For the District Court to criticize the parties that the entire matter was not settled is improper, especially given that a major issue in this litigation was settled. For the District Court to put the blame for the failure to settle upon the Irrigation District is even worse, as it reasonably gives the perception that the District Judge was not impartial in deciding this matter, whether or not that perception is accurate. " A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably

be questioned ...." Section 3E(1), Idaho Code of Judicial Conduct. This matter will be remanded to the District Court, even if for nothing other than the ministerial entry of the order setting forth the legal description of the easement. Upon remand, this matter should be assigned to a different District Judge.

CONCLUSION

The Court should order that the Irrigation District has an easement forty feet in width, and centered on the location of the existing four inch pipe. The Court should further order that the Irrigation District may use the full width of the easement, for the replacement, maintenance, cleaning, and repairing of the pipeline located in the easement.

The Court should hold that the Irrigation District does not have the duty to preserve the trees and drain field while performing any repair maintenance or replacement of its pipeline.

Dated February 17, 2012.

MALCOLM DYMKOSKI

I hereby certify that a true and correct copy of this document was hand delivered on February 17, 2012, to:

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