8-2-2012

Johnson v. Highway 101 Investments, LLC Respondent's Brief Dckt. 39160

IN THE SUPREME COURT OF THE STATE OF IDAHO

KENTON D. JOHNSON, a married man dealing with his sole and separate property and NEPHI H. ALLEN, a married man dealing with his sole and separate property, and REXBURG PLUMBING & HEATING, LLC, an Idaho limited liability company,

Plaintiffs/Appellants

v.

HIGHWAY 101 INVESTMENTS, LLC,

Defendant/Respondent

Supreme Court Docket No. 39160-2011

RESPONDENT'S REPLY BRIEF ON APPEAL

Appeal from the District Court of the Seventh Judicial District for Madison County.
Honorable Dane Watkins, Jr., District Judge, presiding.

Bryan D. Smith, Esq., residing at Idaho Falls, Idaho, for Defendant/Respondent,
Highway 101 Investments, LLC

Hyrum D. Erickson, Esq., residing at Rexburg, Idaho, for Plaintiffs/Appellants.
Kenton D. Johnson, Nephi H. Allen, and Rexburg Plumbing & Heating, LLC

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STATEMENT OF CASE

Plaintiffs/Appellants, Kenton D. Johnson, Nephi H. Allen, and Rexburg Plumbing & Heating, LLC, (hereinafter "Appellants") seek removal of a sign ***sitting on top of a post***, which measures about 16 inches in diameter, and two bollards on each side which measure about five inches in diameter. Defendant/Highway 101 Investments, LLC (hereinafter "Highway 101") erected the sign post and bollards in the northwest corner of a strip of property Highway 101 owns. The strip of property is 25 feet wide and 378 feet long, and Appellants have a right of way over the strip of property. The sign is positioned such that cars, trucks, and vans can drive under the sign which advertises Highway 101's storage facility business located on a landlocked property at the end of the strip of property over which Appellants have the right-of-way. The District Court ruled on summary judgment that Highway 101's use of its servient estate by placing the sign post and bollards on the northwest corner of the strip of property does not unreasonably interfere with Appellants' right to use the strip of property as a "right of way." Accordingly, the District Court granted Highway 101 summary judgment in its favor.

STATEMENT OF FACTS

Highway 101 agrees in large part with the Statement of Facts Appellants present to the Court. However, Highway 101 adds additional facts to bring clarity to the record on appeal.

1. The arial view that Appellants have attached to their Opening Brief is misleading because the view is of the top of the sign which is much larger than the sign post that the actual sign sits on top of. For this reason, Highway 101 has attached to this brief in Appendix A colored pictures found in the record at R Vol. II, pp. 327, 328, and 329 for ease of the Court to get a better perspective of the actual sign post and bollards in relation to the right of way.

2. The sign is 20' by 10' sitting on top of an approximately 16 inch diameter post about 14 feet above the ground.[1]

3. The City of Rexburg permitted Highway 101's use and location of the sign.[2]

4. The underlying property for the right-of-way is 25 feet wide, and the sign post and bollards are within five to six feet of the northern boundary line leaving at least 19 feet of space for use of the right of way.[3]

5. Appellants' property that abuts the easement gives Appellants another 40 feet of space to access their property.[4]

6. There is about 59 feet between the sign post and bollards and Appellants' building.[5]

7. The 19 feet of the easement for Appellants to use for ingress and egress is wide enough for two trucks to easily pass by each other.[6]

8. Highway 101 has had a plat prepared to identify the location of the sign on the right of way easement.[7] Highway 101 has attached to this brief in Appendix B the plat found in the record at R Vol. II, p. 294 for ease of the Court to get a better perspective of the dimensions of the sign post and bollards in relation to the right of way.

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[1] R Vol. II, p. 257.
[2] R Vol. II, p. 257.
[3] R Vol. II, p. 260.
[4] R Vol. II, p. 260.
[5] R Vol. II, p. 260.
[6] R Vol. II, p. 260.
[7] R Vol. II, p. 260.

9. Even with the sign post and bollards, there is sufficient room for Appellants' service trucks, vehicles, UPS vehicles, and Federal Express vehicles to access Appellants' property.[8]

10. Appellants have admitted that the sign post and bollards do not unreasonably interfere with their access to their property; nor do they unreasonably interfere with the access of Appellants' customers, suppliers, or delivery companies.[9]

11. Appellants have admitted that they have sustained no damages by virtue of the placement of the sign post and bollards.[10]

COURSE OF PROCEEDINGS

Highway 101 accepts Appellants' Course of Proceedings as substantially accurate and complete.

ADDITIONAL ISSUES ON APPEAL

1. Is Highway 101 entitled to costs and attorney's fees on appeal?

ARGUMENT

I.

STANDARD OF REVIEW

Appellants recite the applicable standard of review on appeal from summary judgment.

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[8] R Vol. II, p. 261.
[9] R Vol. II, p. 261.
[10] R Vol. II, p. 261.

II.

THE DISTRICT COURT PROPERLY CONCLUDED THAT HIGHWAY 101 MAY USE ITS SERVIENT ESTATE IN ANY WAY AS LONG AS IT DOES NOT UNREASONABLY INTERFERE WITH APPELLANTS' RIGHT OF WAY PRIVILEGE.

"'[A]n easement is the right to use the land of another for a *specific* purpose that is not inconsistent with the general use of the property by the owner.'" *Drew v. Sorensen*, 133 Idaho 534, 540 (1999) (quoting *Abbott v. Nampa Sch. Dist. No. 131,* 119 Idaho 544, 548 (1991)) (emphasis in original). "The law is well settled with respect to the correlative rights of dominant and servient owners of easements. The owner of the servient estate is entitled to use the estate in any manner not inconsistent with, or which does not materially interfere with, the use of the easement by the owner of the dominant estate." *Nampa & Meridian Irr. Dist. v. Washington Federal Sav.*, 135 Idaho 518, 522 (2001). "'The possessor of land subject to an easement created by conveyance is privileged to make such uses of the servient tenement as are not inconsistent with the provisions of the creating conveyance.'" *Carson v. Elliott*, 111 Idaho 889, 779 (Ct.Ap.1986) quoting from the Restatement of Property §486 (1944).

Stated differently, "[t]he owner of the servient estate is entitled to make uses of the property that do not ***unreasonably*** interfere with the dominant estate owner's enjoyment of the easement." *Nampa & Meridian Irr. Dist. v. Washington Federal Sav., supra*, 135 Idaho at 522 (emphasis added); See also *Carson v. Elliott, supra*, 111 Idaho at 890 ("[T]he landowner is entitled to make other uses of the property that do not unreasonably interfere with enjoyment of the easement.") (citing R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 8.9 (1984)). The Restatement (Third) of Property, Servitudes § 4.9 (2000) is in line with these authorities. It states that "[e]xcept as limited by the terms of the servitude . . . the

holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude." As long as the easement holder is able to use the easement for access to his land for the specific purpose for which the easement was granted, without unreasonable interference, he has received everything to which he is legally entitled. *Drew v. Sorensen*, *supra*, 133 Idaho at 540.

This law is consistent with common sense and property rights. An easement holder does not own the property underlying the easement (i.e., the servient estate)—he simply has a right to use the property he does not own for a limited and specific purpose. By giving the easement holder a right to use the property for a limited and specific purpose, the owner of the servient estate does not give up his right to use his property for any purpose as long as the owner's use does not *unreasonably* interfere with the limited and specific purpose of the easement. Otherwise, the easement holder (who has a limited right to use the property) could prevent the property owner from using his property thereby gaining an equal right to the servient estate in which the easement holder has no ownership interest but an interest only for a limited and specific purpose.

The first Idaho case ever to apply the "reasonableness test" is *Boydstun Beach Association v. Allen*, 111 Idaho 370, 723 P.2d 914 (Ct.App.1986). In *Boydstun Beach*, a deed created a beach easement (access was granted along a twenty-five foot strip) together with boating and bathing privileges, and parking privileges along a 200 foot length of lakefront property 75 feet wide. The Allens bought a lakefront lot burdened by the easement and nearly all of their yard including grass, landscaping and sprinkler system were on the lakefront easement. The Association sought an injunction prohibiting any further interference with the

easement and an order directing the Allens to remove the obstructions (trees, rocks, bushes, railroad ties, and lawn sprinklers).

The Court of Appeals began its analysis with 5 Restatement of Property, Servitudes §486 (1944). That section provides:

> The possessor land subject to an easement created by conveyance is privileged to make such uses of the servient tenement as are not inconsistent with the provisions of the creating conveyance.
>
> Comment:
>
> a. Uses not inconsistent with conveyance. So far as the language of the conveyance creating an easement precisely defines the privileges of the owner of it, the privileges of use of the owner of the servient tenement are also precisely defined. As the precision of definition decreases, the application of the principle that the owner of the easement and the possessor of the servient tenement must be ***reasonable*** in the exercise of their respective privileges becomes more pronounced. Under this principle, the privilege of use of the possessor of the servient tenement may vary as the respective needs of himself and the owner of the easement vary.

Boydstun Beach Association v. Allen, *supra,* 111 Idaho at 376 (emphasis added).

The court noted that "[u]nder §486 it is necessary to determine the precision of the granting language. ***To the degree privileges are expressly granted*** the easement owner's rights are paramount to those of the servient owner. These respective rights are correlative and where the grant is ***general*** in nature the owner of the servient estate is entitled to use the estate in any manner not inconsistent with, or which does not materially interfere with, the use of the easement by the owner of the dominant estate. Thus, we begin by ***isolating the privileges specifically granted*** by the easement." *Boydstun Beach Association v. Allen*, *supra,* 111 Idaho at 376-377 (emphasis added). "An easement owner is entitled to relief upon a

showing that he is obstructed from exercising ***privileges*** granted by an easement." *Id.* (emphasis added).

Within this framework, the court looked first to the written conveyance and found that "the easement prohibits structures on the beach or parking space, but otherwise does not limit the allowed privileges in location or time of use." Therefore, the court precluded a fence erected through the 75 foot easement that obstructed parking but allowed the fence and even a gate on the easement where they did not obstruct parking and were not on the beach because these were "sensible," i.e., reasonable. Similarly, the court found that the trial court's open fire prohibition was ***reasonable*** because there was no express language in the deed on this privilege:

> The rule is that, absent language in the easement to the contrary, the uses made by the servient and dominant owners may be adjusted consistent with the normal development of their respective lands. . . . Mandating the use of roasting devices is a reasonable balance between the easement owner's interest in picnicking and the protection and enjoyment of the servient estate.

Boydstun Beach Association v. Allen, *supra,* 111 Idaho at 378.

But where the easement granted a privilege in express and specific rather than general terms, the trial court could not apply the "reasonableness test" because to do so would bypass the legal rights of the easement owners and go directly to the equitable resolution of the parties' conflicting interests. Therefore, the trial court could not prohibit parking on the Allens' lawn even though it created a nuisance because the easement expressly created a privilege to park on the entire 200 by 75 foot strip. Similarly, the trial court could not restrict use of the easement between the hours of

12:00 midnight and 6:00 a.m. because the easement expressly granted a privilege for ingress and egress without such limitations.

Finally, the court reversed and remanded the case with respect to the retaining wall for "[f]urther findings . . . to determine if the wall obstructs the parking, boating or bathing privileges granted by the easement" with specific instructions that the trial court was to "indicate whether these findings are based on the specific language of the easement [in which case the "reasonableness test" would not apply] ***or on the principles applicable to easement granted in general terms***" in which case the "reasonableness test" would apply. *Boydstun Beach Association v. Allen*, *supra,* 111 Idaho at 379 (emphasis added).

The rules announced in *Boydstun Beach Association* are simple and straightforward. The court looks first to the written instrument itself to identify the privilege granted in the deed. If the deed grants the privilege in express and specific terms, the court cannot apply "equitable principles" or what is reasonable under the circumstances. But if the deed grants a privilege in general terms, the court allows the proposed use of the servient estate as long as the proposed use is reasonable in view of the privilege granted in the deed. Finally, none of these rules involves a "bright line test" like the one Appellants urge this Court to apply.

The next Idaho case to apply the "reasonableness test" was *Carson v. Elliott*, *supra*, 111 Idaho at 889 (Ct.App.1986). *Carson* involved an obstruction placed in a right of way easement. The court upheld the trial court's removal of a raised garden placed in the "eye" of the circular end of the single driveway providing access to two homes. In so doing, the court noted the following:

> Because an easement authorizes limited use of the strip of property, the landowner is entitled to make other uses of the property that do not

> unreasonably interfere with enjoyment of the easement. . . . Whether a particular use by the landowner is ***an unreasonable interference*** with enjoyment of the easement is a question of fact.

Carson v. Elliott, *supra*, 111 Idaho at 890 (emphasis added).

The record contained substantial evidence that "the operation of vehicles had been hindered by the garden. Carson's cars and a boat occasionally required the extra room in the circle's center to turn around. These vehicles sometimes struck the raised garden." *Carson v. Elliott*, *supra*, 111 Idaho at 891.

The court in *Carson* never identified whether the privilege the deed granted was express and specific or general. Instead, the court simply said that "Carson enjoys an easement to use the driveway." However, the reason the court found against allowing the continuation of the raised garden was that it unreasonably interfered with the plaintiff's use of her easement to use the driveway. The important point is that the court applied a "reasonableness test," not a "bright line test" on whether the raised garden would stay or go.

This Court has also applied the "reasonableness test" in *Nampa & Meridian Irrigation District. v. Washington Federal Savings*, *supra*, 135 Idaho at 518 to an express 40 foot easement. At issue in *Nampa* was whether Washington Federal Savings could erect a fence and sidewalk within an irrigation district's lateral maintenance easement. The irrigation district claimed that Washington Federal Savings could not install the fence and sidewalk within the easement.

This Court began its analysis by citing to *Carson* and *Boydstun Beach* as well-settled Idaho law on the issue:

> The law is well settled with respect to the correlative rights of dominant and servient owners of easements. The owner of the servient estate is entitled to use the estate in any manner ***not inconsistent with***, or ***which does not materially interfere with, the use of the easement*** by the owner of the dominant estate. In other words, the servient estate owner is entitled to make uses of the property that do not ***unreasonably interfere*** with the dominant estate owner's enjoyment of the easement. Thus, an easement owner is entitled to relief upon a showing that he is obstructed from exercising privileges granted in the easement."

Nampa & Meridian Irrigation District. V. Washington Federal Savings, supra, 135 Idaho at 522-523 (emphasis added).

The court then applied the law to the trial court's findings and conclusions agreeing with the trial court as follows:

> Because NMID failed to show that the sidewalk and proposed fence would ***unreasonably interfere*** with its easement, the district court denied NMID's injunction, holding that Washington Federal was entitled to construct the sidewalk and fence.

Nampa & Meridian Irrigation District. v. Washington Federal Savings, supra, 135 Idaho at 521 (emphasis added).

In short, this Court found that "*NMID's activity will be so infrequent that* ***its easement rights will not be unreasonably interfered with***" and affirmed the trial court's order allowing for the installation of the fence and sidewalk. *Nampa & Meridian Irrigation District. V. Washington Federal Savings, supra*, 135 Idaho at 522 (emphasis added).

Appellants cite to several cases from other jurisdictions to support their position against a reasonableness test. Appellants argue that this Court should overrule the district court and adopt a bright line/per se test to easements irrespective of whether they are specific. The District Court appropriately declined Appellants' similar invitation: "After reading the parties' briefs and conducting additional research, this Court finds it unnecessary to consult the laws of

foreign jurisdictions. . . . On numerous occasions subsequent to *Boydstun Beach*, the appellate courts of Idaho have addressed the rights and privileges of servient estate owners. This court, however, is not aware of ***any*** Idaho case that has applied something other than the reasonableness test."[11]

Instead, the District Court applied Idaho law and looked to the deed itself to determine whether the ***privilege*** granted in the conveying deed is express and specific or general in nature and properly concluded the following:

> Plaintiffs' are entitled to full enjoyment of the *privilege* granted them by their Easement, and Plaintiffs are entitled to relief upon showing they are obstructed from exercising that privilege.
>
> The *privilege* created by the Easement is 'a right-of-way,' or the right to use the Strip of property for ingress and egress. The legal description contained in the granting language precisely describes the *location* of the land upon which Plaintiffs can exercise that privilege. Thus, while the *location* of the Easement is precisely defined, the *privilege* is stated generally as a 'right-of-way.' This Court concludes Highwway 101 has the right to use its servient estate (the Strip of property) in a manner that does not unreasonably interfere with the Plaintffs' right to use the Strip of property as a 'right-of-way.'[12]

Accordingly, the District Court next considered whether Highway 101's use of its property unreasonably interfered with Appellants' right of way privilege.

III.

APPELLANTS DO NOT HAVE A SPECIFIC 25 FOOT WIDE EASEMENT

Underpinning Appellants' entire argument is their position that they own an express and specific 25 foot wide easement. They argue that since they have an express and specific 25 foot wide easement, the District Court could not apply a reasonableness test and "shrink" the 25 feet to 19 feet. However, Appellants confuse the concept of "express" with "specific":

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[11] R Vol. III, pp. 423-424 (emphasis added).
[12] R Vol. III, pp. 426-427 (emphasis in original).

Although Appellants have an express right of way, ***Appellants do not have an express and specific 25 foot wide right of way.***

The deed by which Appellants acquired their property states:

> ALSO, A right-of-way to be used in common with others described as follows:
>
> > Beginning at the Southwest corner of Section 17, township 6 North, Range 40 East, Boise Meridian, Madison County, Idaho; thence East 140.90 feet; thence North 565.74 feet to the true point of beginning; and running thence North 89°49' 50" East 378.37 feet; thence South 25.00 feet; thence South 89°49' 50" West 394.40 feet; thence North 32°37' 44 East 29.74 feet to the point of beginning.[13]

Although the deed description does not specifically state "over the property described as follows," such language is implied because the description is a metes and bounds legal description of the property over which the easement runs and not a description of the easement itself. Moreover, it is the same description used in the fee simple transfer of the property to Highway 101.

Since the right of way was granted in writing it is "express." However, since it is merely describes a "right of way" and not a "25 foot wide easement," it is a general privilege and not a specific one. Significantly, the conveyance does not read a "25 foot wide right of way" nor does it contain any prohibitions in it to any other uses. Any other reading would give Appellants a fee simple interest in the property rather than a right to traverse the property at issue.

Since Appellants do not have an express and specific 25 foot wide easement, the District Court's decision did not ***shrink*** their easement. Appellants assert that "The district court ruled that the location of the right is more than is necessary - Johnson and Allen do not need the full

[13] R Vol. II, p. 256.

25 feet set out in their deeds."[14] The Memorandum Decision and Order in this case makes no such statement or findings. Appellants make that assertion only to liken this case to *Boydstun Beach Ass'n v. Allen*, *supra*, 111 Idaho at 370, and to support their argument that the District Court here—like the trial court in *Boydstun Beach*—committed reversible error by impinging upon their alleged express and specific 25 foot wide easement.

Were the deed meant to grant an express and specific 25 foot wide right of way, it would simply have said "a 25 foot wide right of way." To get around this point of fact, Appellants ***for the first time*** assert that "Johnson and Allen, and numerous prior owners of the parcels, purchased their property in reliance on the existence of the 25 foot right-of-way conveyed by their deeds."[15] Appellants raise this issue for the first time on appeal. Moreover, there is no evidence in the record to support it. The deed simply grants a ***general*** right of way to cross over the strip of property that is about 25 feet wide and 378 feet long to access abutting properties. Appellants argue that the right of way is not limited to ingress and egress or access to their property. However, Highway 101 submits that a right of way granted to an adjoining property owner serves no purpose other than to provide ingress and egress or access to his property. Additionally, in this case, such ***general*** right was granted ***to be used in common with others***. No other reasonable interpretation exists other than ingress and egress for a right of way privilege if it is to be in common with others.

If this Court were to take Appellants' argument to its logical conclusion, anyone else's use of the easement would amount to an obstruction to Appellants. In fact, Appellants themselves, by leaving vehicles parked on the easement for extended periods of time, would be

[14] See p.10 of Appellants' Brief dated May 24, 2012.
[15] See pp. 10-11 of Appellants' Brief dated May 24, 2012.

guilty of obstructing the easement because "the others" who share the right of way easement would be deprived of using the exact area under the parked vehicle even though they could use the easement for a right of way by going around the parked vehicle. The underlying premise of Appellants' argument, that Appellants own an express and specific 25 foot wide easement, is not grounded in either logic or fact.

At bottom, the conveyance does not read a "25 foot wide right of way" or expressly state that Appellants have the specific right to use the entire width of their easement as a right of way or any other restricting language. The deed simply gives Appellants a general privilege over the described property for a right of way. Therefore, although Appellants have an ***express*** easement, it is not an easement of a *specific* width or length, and therefore a *general* privilege for a right of way over the described property. When dealing with a general privilege, the law in Idaho requires the Court to look at whether the proposed use unreasonably interferes with the privilege granted in the deed conveying the easement.

IV.

THE SIGN POST AND BOLLARDS DO NOT *UNREASONABLY* INTERFERE WITH APPELLANTS' RIGHT OF WAY PRIVILEGE.

A. Appellants Admit That Highway 101's Sign Post And Bollards Do Not Unreasonably Interfere With Their Right Of Way Privilege.

Appellants were given a right of way easement that allows them to cross over the servient estate for access to their property. This means that as long as Appellants are able to use the servient estate for access to their land without *unreasonable interference*, they have received everything to which they are legally entitled. In other words, as the owner of the servient estate, Highway 101 has the right to use the property underlying the right of way

easement in any manner it sees fit so long as it does not *unreasonably* interfere with the Appellants' use of the right of way easement over the property.

Here, both Nephi Allen (Allen)[16] and Kenton Johnson (Johnson) testified that the sign post and bollards do not *unreasonably* interfere with their use of the right-of-way easement:

> Q. The poles or those bollards, do they prevent you from accessing your property?
> A. No.
> Q. So you can still access the property where the Rexburg Plumbing and Heating is located?
> A. Yes.
> Q. Let's just talk generally about that. In terms of accessing your property, what kind of vehicles do you use to access your property? In other words, I'm assuming that you've got plumbing trucks, and HVAC trucks, and maybe a boom truck -- I don't know what you've got. So just tell me what do you use to access the property?
> A. We have service trucks, we have a forklift, we have delivery trucks, various UPS, Federal Express.
> Q. What was that last one?
> A. Federal Express. Just normal everyday usage.
> Q. And is there anything about the location of the pole and these bollards that prevent any of these service trucks, delivery trucks, forklifts, or any UPS or Federal Express vehicles from accessing your property?
> A. No.
> Q. Over the easement?
> A. No.
> Q. Okay. Would you then agree that notwithstanding the fact that there's a pole and two bollards, your equipment, your service vehicles can still access your property on the easement using the easement?
> A. Yeah.[17]
>
> * * *
>
> Q. Let's talk about how this placement the pole and the two bollards interfere with your ability to use the easement to access your property. Can we do that?
> A. It doesn't interfere with it.
> Q. It doesn't interfere, does it?
> A. Huh-uh.

[16] R Vol. II, p. 261.
[17] R Vol. II, pp. 304-305.

Q. Is that a --
A. No, sir.
Q. No interference, does it?
A. No interference.
Q. The fact is that --
A. It doesn't interfere with ability to get in and out of there. It doesn't interfere with the professional truck driver's ability to get in and out of there. . . .[18]

* * *

Q. Well, can you tell me when it was you tried driving a piece of equipment over the easement and didn't have enough room, 19.34 feet was not enough room to cross the easement --
A. No.
Q. Let me finish. To cross the easement to access your property?
A. No. I can't tell you when.
Q. It's never happened, has it?
A. No.
Q. In fact, given the Department of Transportation specifications on how wide vehicles can be, cars are really not much wider than our trucks. They're approximately eight, eight and a half feet, correct?
A. True.
Q. And so you could actually have two trucks passing in the 19.34 foot space and still be totally on the easement, correct?
A. Correct.
Q. And so there is sufficient room for you, and your service people, and delivery people, and customers to use the easement to access your property?
A. Yes, sir. There is today.[19]

In short, Appellants have admitted that the sign post and bollards do not *unreasonably* interfere with their access to their property; nor do they *unreasonably* interfere with the access of the Appellants' customers, suppliers, or delivery companies.

[18] R Vol. II, p.319.
[19] R Vol. II, p.320.

B. The Dimensions Of The Right Of Way Easement And Placement Of The Sign Post And Bollards Prove That Highway 101 Is Not *Unreasonably* Interfering With The Right Of Way Privilege.

The right of way easement is on property that is about 25 feet wide.[20] The sign post and bollards are within five or six feet of the northern boundary line leaving at least 19 feet of space for use of the right of way easement.[21] The Appellants' property that abuts the right of way easement gives the Appellants another 40 feet of space to access their property.[22] Thus, there is about 59 feet between the sign post and bollards and Appellants' building.[23] The 19 feet of the right of way easement for Appellants to use for ingress and egress is wide enough for two trucks to pass by each other.[24] Thus, there is sufficient room for the Appellants' vehicles, trailers, customers and delivery vehicles to access Appellants' property.[25]

C. Appellants Have Sustained No Damages By Virtue Of The Placement Of The Sign Post And Bollards.

As further evidence that the sign post and bollards do not *unreasonably* interfere with Appellants' right of way easement, neither Allen nor Johnson were able to identify a single customer or sale that they have lost due to the existence of the sign post and bollards. Thus, not only has Highway 101 not *unreasonably* interfered with Appellants' right of way easement, Appellants have sustained no damages. Allen and Johnson testified as follows:

> Q. All right. Can you identify one customer who has not engaged in a purchase or has not done business with Rexburg Plumbing because the sign and the bollards are located where they are?
> A. I cannot.[26]

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[20] R Vol. II, p. 260.
[21] R Vol. II, p. 260.
[22] R Vol. II, p. 260.
[23] R Vol. II, p. 260.
[24] R Vol. II, p. 260.
[25] R Vol. II, p. 261.
[26] R Vol. II, p. 308.

* * *

Q. And then it [the complaint] says, "If allowed to remain, the sign will injure plaintiff's business." What injury will the business suffer if the sign is allowed to remain?
A. Well, we believe that those customers that you alluded to earlier that we can't name, we believe that they don't come back and visit us ever again.
Q. Okay. Now, wouldn't you agree that that's based on speculation?
A. Sure. Certainly.[27]

* * *

Q. (By Mr. Smith) Okay. Well, are you claiming that the business in this case has been damaged because of the sign? Have you lost any sales?
A. I am not claiming that. I have no knowledge of that.
Q. What about you personally, are you claiming you have suffered any money damages as a result of the sign being placed on my client's property.
A. No, sir.[28]

* * *

Q. In your complaint, you say that "If allowed to remain, the sign will result in loss of property to the Plaintiff." Can you identify what the loss of property is that you will lose if the sign is allowed to remain?
A. For sure the spot the sign is on.
Q. All right. Anything else?
A. I feel at jeopardy.
Q. Okay. And let's go back to the spot the sign is on, okay?
A. Okay.
Q. You don't actually own that property, do you?
A. No, sir.
Q. You just have an easement to be able to use it to access your property, correct?
A. Correct.
Q. And you've already admitted that you don't have to drive over that spot to access your property, do you?
A. No, sir.
Q. So you really don't lose your right to access your property if the sign is allowed to remain, do you?
A. Not today.[29]

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[27] R Vol. II, p. 309.
[28] R Vol. II, p. 321

* * *

Q. Okay. What facts did they give you, besides their opinion, that you need to sue in this case to protect that 16 inches where the pipe is and the five inches each for the bollards or you will, on a more probable than not basis, suffer some property damage? What facts do you have?
A. I don't have any facts to that they didn't say you will, they said you could.
Q. Okay. So again, they're speculating, too, because they don't know.
A. That's probably true.
Q. So when it boils down to it, your biggest concern in this case is really based on the absence of facts, but on speculation.
A. Yeah.
Q. And as you sit here, you can't identify one customer who has not done business with your business, this Rexburg Plumbing, because of the location of the sign?
A. No, sir.[30]

In short, Appellants have failed to identify any damages resulting from the placement of the sign post and bollards. The only "damage" they could identify is that they cannot use the space occupied by the 16 inch sign post and the five inches for each of the bollards. However, Appellants do not own this property and have no right to occupy it because the space occupied by the 16 inch sign post and the five inches for each of the bollards does not *unreasonably* interfere with the Appellants' right of way easement.

V.

PURPOSE IS RELEVANT IN APPLYING THE REASONABLENESS TEST

Appellants claim that the purpose for their right of way easement is irrelevant. However, Idaho law requires that the Court determine whether Highway 101's use of its

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[29] R Vol. II, pp. 321-322.
[30] R Vol. II, p. 322.

property unreasonably interferes with Appellants' use. This necessarily requires that the Court consider the purpose for which Appellants have an easement. The Court cannot judge whether Highway 101's use of its property unreasonably interferes with Appellants' use unless the Court considers the purpose of Appellants' use. In *Nampa*, Appellant also argued that the sidewalk and fence would make any possible future cleaning out with heavy equipment difficult if not impossible. The Court responded by looking at how the repair and maintenance had ***actually*** been done, noting that within the past 20 years the maintenance and repair of the ditch had been limited to burning the grass and weeds on the ditch bank with the use of a pick-up truck and tank of propane. "While past use does not necessarily mean that NMID will never employ heavy equipment to clean or repair the lateral, it does suggest that NMID's activity will be so infrequent that its easement rights will not be unreasonably interfered with." *Nampa & Meridian Irr. Dist. v. Washington Federal Sav., supra*, 135 Idaho at 523.

VI.

THERE IS NO EVIDENCE OF UNREASONABLE INTERFERENCE ABSENT CARELESSNESS OR RECKLESS DISREGARD ON APPELLANTS' PART

There is ample evidence in this case that the sign post and bollards do not unreasonably interfere with access to Appellants' property or Appellants' use of the right of way. In an attempt to controvert this evidence, Appellants claim that "the sign is hit regularly, and particularly when drivers are attempting to turn around or back out of Rexburg Plumbing and Heating."[31] Appellants are trying to make their case like the circular driveway in *Carson* where the Idaho Court of Appeals held that the raised garden bed unreasonably interfered with the general easement because cars would hit the raised garden bed.

[31] See p. 16 of Appellants' Brief dated May 24, 2012.

The District Court properly concluded that "even if presumed true, that fact would not render the placement of the sign and bollards unreasonable when there is ample evidence that delivery trucks, service vehicles, and customers have all be [sic] able to access Appellants' property without unreasonable difficulty."[32] Moreover, in *Carson* the extra room in the circle's center was required to turn around. Drivers did not strike the raised garden just because they were not paying attention. They had no choice if they wanted to turn their vehicle. Here, according to Nephi Allen, drivers like himself have embarrassingly struck the sign post and bollards in plain sight not because they had to in order to turn their vehicles, but because they were not paying attention.

Q. So were you embarrassed when you hit the bollard?
A. I tried to get out of there pretty quick.
Q. But were you embarrassed?
A. Yeah. I looked around.
Q. So you were embarrassed?
A. Yeah.
Q. Why?
A. It's embarrassing.
Q. Is that because it's in such plain sight you shouldn't hit it?
A. Maybe[33]

* * *

Q. Shouldn't they be looking and not hit the sign?
A. They should.[34]

[32] R Vol. III, p. 429.
[33] R Vol. II, pp. 517-518
[34] R Vol. II, p. 518.

VII.

HIGHWAY 101 IS ENTITLED TO COSTS AND ATTORNEY'S FEES ON APPEAL

Highway 101 requests costs in accordance with I.A.R. 40(a) which provides that "[c]osts shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court." In addition, Highway 101 is entitled to attorney's fees on appeal because Appellants' appeal was brought frivolously, unreasonably and without foundation. This Court has stated:

> Idaho Code Section 12-121 provides that '[i]n any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties. . . .' Such an award is appropriate when this Court has the abiding belief that the appeal was brought or defended frivolously, unreasonably or without foundation. *Minich v. Gem State Developers, Inc.,* 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979). Where the issues raised on appeal involve well-settled principles of law, the appeal is frivolous and without foundation. *See Blaser v. Cameron,* 121 Idaho 1012, 1018, 829 P.2d 1361, 1367 (Ct.App.1991).

BHA Investments, Inc. v. State, 138 Idaho 348, 355 (2003). In *Blaser v. Cameron*, 121 Idaho 1012, 1018 (Ct.App.1991), the Idaho Court of Appeals awarded attorney's fees to respondents on appeal because appellants "made no substantial showing that the district court misapplied the law" and the area of law was "well-settled."

Appellants cite to several cases from other jurisdictions to support their position against a reasonableness test. However, the Appellants completely ignore the *Nampa* case and other well-settled Idaho law regarding the reasonableness test. The District Court correctly ruled that "After reading the parties' briefs and conducting additional research, this Court finds it unnecessary to consult the laws of foreign jurisdictions. . . . On numerous occasions subsequent to *Boydstun Beach*, the appellate courts of Idaho have addressed the rights and

privileges of servient estate owners. This court, however, is not aware of ***any*** Idaho case that has applied something other than the reasonableness test."[35]

Appellants' argument that it simply disagrees with the District Court's decision is without foundation, especially in light of the fact that the law in Idaho is well-settled regarding the reasonableness test. Thus, this Court should award attorney's fees and costs to Highway 101 on appeal because appellants made no substantial showing that the district court misapplied the law, and the "reasonableness test" is an area of law that is well-settled in Idaho. *See Nampa & Meridian Irrigation District. v. Washington Federal Savings, supra*, 135 Idaho at 518 where this court stated "The law is well settled with respect to the correlative rights of dominant and servient owners of easements. The owner of the servient estate is entitled to use the estate in any manner ***not inconsistent with***, or ***which does not materially interfere with, the use of the easement*** by the owner of the dominant estate (emphasis added.)

CONCLUSION

Appellants argue that this Court should not apply the reasonableness test that Idaho has applied uniformly. Appellants are asking this Court to turn a blind eye to whether Highway 101's use of its property is reasonable asking the Court instead to apply a bright line/per se test that Idaho does not follow and grant them more property rights than they have bargained for

[35] R Vol. III, p.423-424 (emphasis added).

and are entitled to. For all of the reasons set forth above, this Court should affirm the District Court's granting summary judgment and award Highway 101 its costs and attorney's fees.

RESPECTFULLY SUBMITTED this 24th day of July, 2012.

SMITH, DRISCOLL & ASSOCIATES, PLLC

By: _____
Bryan D. Smith
Attorneys for Highway 101 Investments, LLC

CERTIFICATE OF SERVICE

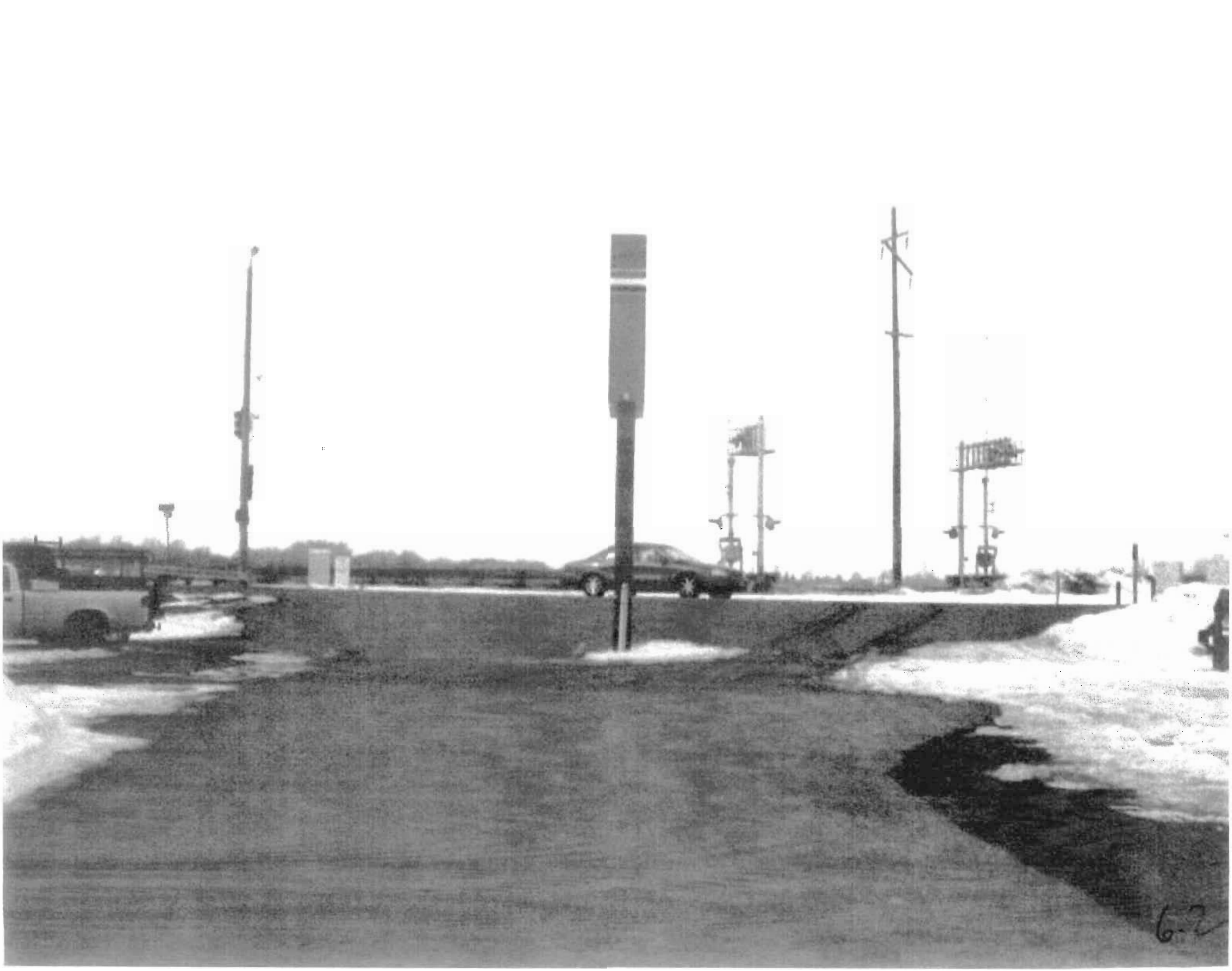
I HEREBY CERTIFY that on this 24th day of July, 2012, I caused a true and correct copy of the foregoing **RESPONDENT'S REPLY BRIEF ON APPEAL** to be served, by placing the same in a sealed envelope and depositing in the United States Mail, postage prepaid, or hand delivery, facsimile transmission or overnight delivery, addressed to the following:

Hyrum D. Erickson, Esq. RIGBY, ANDRUS & RIGBY, Chartered Attorneys at Law 25 North Second East Rexburg, Idaho 83440	[✓] U. S. Mail [ ] Fax [ ] Overnight Delivery [ ] Hand Delivery

Bryan D. Smith

APPENDIX A

Exhibit No. 6
Date: 1-25-11
T&T REPORTING

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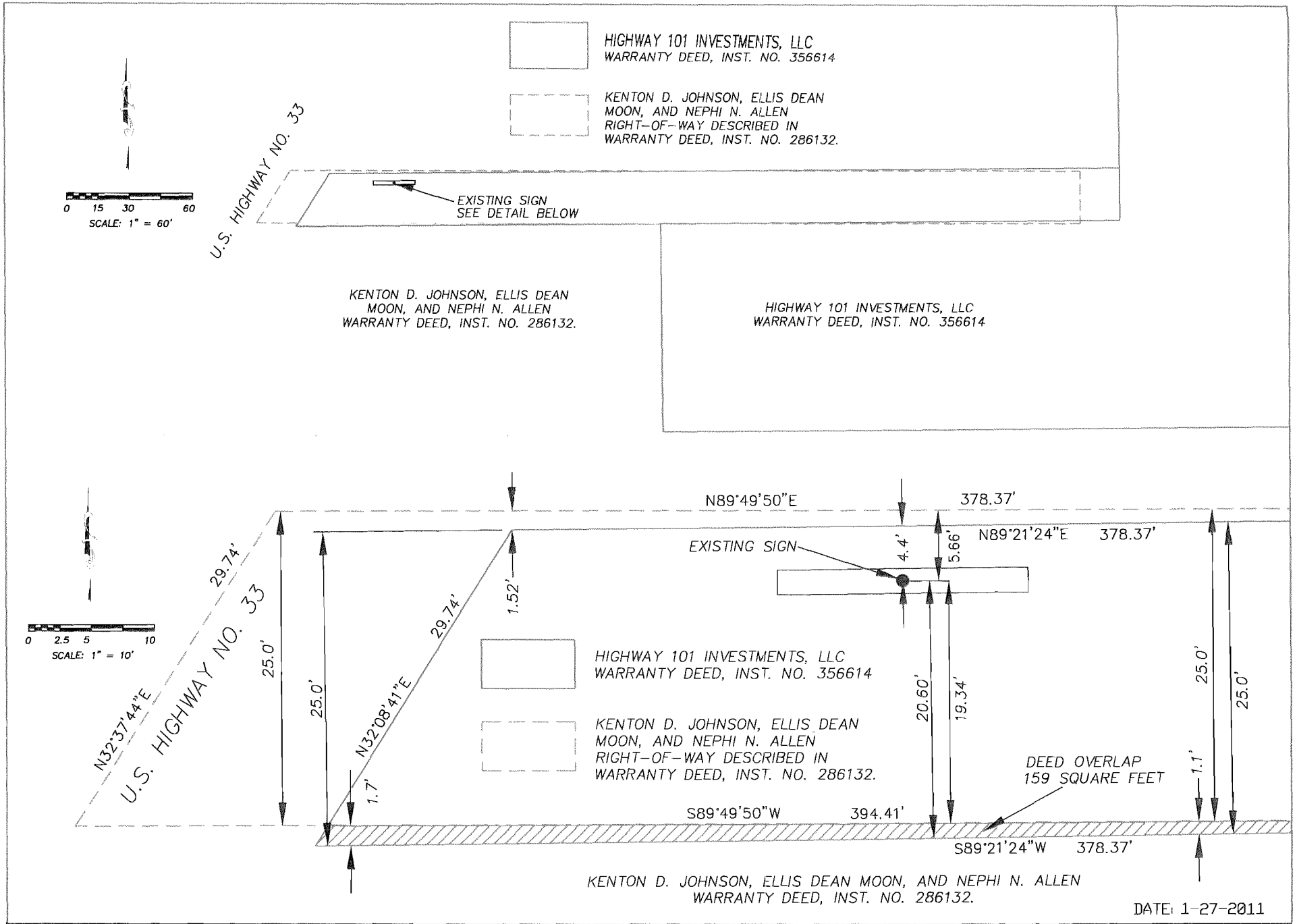
APPENDIX B



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