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IN THE SUPREME COURT OF THE STATE OF IDAHO

BRENT REGAN AND MOURA REGAN, husband and wife, **Plaintiffs/Appellants,** **vs.** **JEFF D. OWEN and KAREN A. OWEN, husband and wife,** **Defendants/Respondents,**	**SUPREME COURT NO. 43848** **RESPONDENTS' BRIEF** **(Kootenai County Case CV-2011-2136)**

RESPONDENTS' BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN P. LUSTER, SENIOR DISTRICT JUDGE

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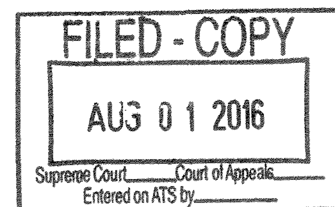

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INTRODUCTION

This is the second time the parties appear before this Court on appeal. In the first appeal, this Court vacated the trial court's judgment reforming Jeff and Karen Owen's ("Owens") deed to include the Orphan parcel (thereby relocating the express easement). *Regan v. Jeff D.,* 157 Idaho 758, 339 P.3d 1162 (2014). This Court also reversed the trial court's alternative basis for locating the easement on the Orphan Parcel, which stated that Brent and Moura Regan ("Regans") enjoyed a thirty-foot prescriptive easement across the Orphan Parcel in the same location of the easement after the reformation of the Owens' deed. *Id.* at 1169.

Following remand, the Owens moved for summary judgment on the basis that any claim the Regans had to a prescriptive easement across the Orphan Parcel was extinguished by the tax sale of that parcel to Kootenai County according to I.C. § 63-1009. The district court applied the plain language of the statute to the undisputed facts presented at summary judgment and entered judgment for the Owens.

In their appeal, Regans contend that the district court failed to read I.C. § 63-1009 *in pari materia* with other relevant Idaho real property statutes. Regans also claim the district court erred in failing to consider a multitude of issues never raised by Regans below. Regans again raise in this appeal the issue of deed reformation, which was rejected by this Court in the first appeal.

After Regans filed their notice of appeal, Senate Bill 1388, as amended, was signed into law by Governor Otter on March 30, 2016 which altered I.C. § 63-1009. This Court rejected a stipulation from the parties this legislation did not apply to the present appeal, and required Regans to file a supplemental brief. In their Supplemental Brief, Regans contend that Senate Bill 1388 either does not retroactively amend I.C. § 63-1009 or if the bill is retroactive, its applications to this case is unconstitutional.

STATEMENT OF THE CASE

A. Identification of Documents in the Record

On this second appeal, this Court ordered the appeal record be augmented to include the Clerk's Record, Reporter's Transcript and Exhibits, which were electronically filed in Supreme Court No. 40848. The record in Supreme Court No. 40848 was augmented by the appellant to include pleadings not included even though the entire electronic clerk's record was requested on appeal.[1] The Clerk's Record in No. 43848 only includes requested documents which duplicated no documents in the Clerk's Record in No. 40848. As an aid to the reader of this brief, the recitation to the various records will be as follows:

- The Clerk's Record in No. 40848 will be identified as "40848 R" followed by the page number;
- The Augmented Record in No. 40848 will be identified as "40848 AR" followed by the page number;
- The Clerk's Record in No. 43848 will be identified as "43848 R" followed by the page number.

B. Nature of the Case

Following remand, the remaining issue before the trial court was Regans claim of a prescriptive easement across the Orphan Parcel. The district court determined as a matter of law I.C. § 63-1009 was clear and unambiguous. 43848 R pp. 69-77. Applying the undisputed facts presented at summary judgment, the trial court entered judgment for the Owens and the prescriptive easement claim was dismissed. *Id.*

[1] Regans recited to the augmented record in their opening brief, but did not seek to have it included in the current appeal. It is anticipated that Regans will present an unopposed motion to include the augmented record in this appeal.

Regans appeal the summary judgment decision and resulting final judgment. However, the majority of the issues before this Court were not issues raised below and one issue was even decided by this Court in the first appeal. Moreover, there is no factual support in the record for many of the new issues presented on this appeal by the Regans.

The primary issue before this Court is statutory interpretation. The district court determined the statute was unambiguous as written. Regans ask this Court to vacate the district court's final judgment because they believe the result of such an approach was not intended by the legislature. However, the district court properly acted within its power and authority in deciding the summary judgment and entering its final judgment.

C. Course of Proceedings

The Regans provide this Court a creative rendition of the facts in the case. This response clarifies and supplements some of those aspects.

On March 11, 2011, Regans filed a complaint in Kootenai County alleging: (1) interference with express easement rights across the north 30' of the Owen's parcel claimed to benefit four separate parcels of property; (2) interference with an implied easement across the Orphan Parcel for the benefit of four parcels of property; (3) a request to reform the Owens' deed to adjust the north property boundary to encompass the Orphan Parcel for the benefit of four parcels of property owned by Regan, and (4) a claim that Regan established a prescriptive easement across a portion of the Orphan Parcel which benefitted the same four parcels of property. 40848 R pp. 14-22. On April 19, the Owens answered the complaint and admitted the existence of the express easement for the benefit of Parcel II only and denied the remaining claims. 40848 R. pp. 71-74; 40848 AR pp. 163-171.

On September 1, 2011, Regan moved for partial summary judgment, with supporting affidavits and memorandum, to declare the existence of the express easement across the Owen parcel and the right to develop it for road and utility purposes for the benefit of all four parcels identified in the complaint. 40848 AR pp. 142-162. The Owens filed a response to the Regans' motion on September 15, 2011, acknowledging Parcel II described in the complaint was benefitted by the express easement and alleging the remaining parcels were not entitled to the benefit of the express easement. 40848 AR pp. 163-171. The court entered an order on September 29, 2011, granting summary judgment regarding Parcel II only. 40848 R pp. 76-80. Thereafter, Regan engaged a contractor to develop a road across the north 30' of the Owens' parcel. The work done comprised grubbing and clearing the easement, widening it, removing at least four large trees and brush from the easement, and bringing in road base material. 40848 AR pp. 181, 243, 255, 301; 40848 5/31/12 Preliminary Hearing Tr p. 152, ll. 2-19, 158, ll. 9-15, 24-25; 159, ll. 1-6; p. 160, ll. 14-22; p. 102, l. 25, p. 163, p. 164, l. 1-4; 178, ll. 23-25, 179-180.

On October 27, 2011, the Regans moved for a preliminary injunction and for a finding of contempt against the Owens, with supporting affidavits and a notice of hearing of the contempt charge (which did not comply with I.R.C.P. 75). 40848 AR pp. 172-215. The contempt was based upon the Owens calling the sheriff when the Regans' contractor, upon direction by Brent Regan, dumped the debris from the road construction outside the easement in the Owens' front yard. *Id.*

On March 16, 2012, Owen moved for leave to amend their pleadings to add a counterclaim for trespass based upon the Regans' contractor dumping the construction debris outside the boundaries of the easement onto their front yard at Brent Regan's direction. 40848 AR pp. 326-336. Ultimately, the Regans dismissed their contempt claim and made an offer of judgment on the trespass claim, which was accepted. 40848 AR 686-687; 40848 R pp. 113-115.

Following remand, on August 7, 2015, Owens filed their third motion for summary judgment arguing that the Regans' claim for prescriptive easement was extinguished by issuance of the tax deed. 43848 R pp. 23-35. Regans opposed the motion based on foreign law, policy arguments, and evidence from the Kootenai County Treasurer targeted at material facts according to the foreign law they requested the trial court adopt. 43848 R pp. 36-60.

The district court heard oral argument on Owens' third motion for summary judgment on September 4, 2015. 43848 Tr. pp. 1-26. The district court issued a written decision on the motion for summary judgment on October 9, 2015, granting summary judgment for Owens based on the application of I.C. § 63-1009 to the undisputed material facts presented to the district court. 43848 R pp. 69-77. A final judgment, prepared by Regans' counsel, was entered on October 30, 2015, which included return of the Regans' preliminary injunction bond to them. 43848 R pp. 78-80. This judgment was followed by an amended final judgment entered December 17, 2015 which released the bond to the Owens. 43848 R pp. 86-88. The Regans appealed the original final judgment on December 10, 2015, and filed an amended notice of appeal on January 27, 2016. 43848 R. pp. 81-85, 90-94.

After the appeal was filed, and Regans submitted their opening brief, Senate Bill 1388, as amended, was signed into law by Governor Otter on March 30, 2016, amending I.C. § 63-1009 to specifically state that a conveyance by tax sale only conveys title free of liens and mortgages of a monetary nature if proper notice was sent to the party in interest. I.C. § 63-1009 (amended March 30, 2016).[2] This amendment removed the prior language of "encumbrances." On June 27, 2016, Regans filed a Supplemental Brief addressing whether the 2016 amendment had retroactive

[2] Unless otherwise specifically indicated herein, all references in this brief to I.C. § 63-1009 refer to the statute prior to its amendment in 2016.

application as applied to this case. Regans argue the 2016 amendment either does not retroactively amend I.C. § 63-1009 or if the bill is retroactive, its application to this case is unconstitutional.

D. Statement of the Facts

This Court already knows of the underlying facts of this case from the first appeal and the additional relevant facts for this appeal are as follows:

On May 27, 2015, Owens' counsel deposed Brent Regan and asked him if his prescriptive easement enhanced the value of the Orphan Parcel:

> Q. Does the access road enhance the value of your property?
> A. Yes.
> Q. Does it enhance the value of the Owen's parcel?
> A. Couldn't say.
> Q. How does it enhance the value of your property?
> A. By giving me access to Bonnell Road.
> Q. And isn't it true you have an express easement across the Owen parcel that gives access to Bonnell Road?
> A. Yes.

43848 R p. 33, L. 11-20. Brent Regan did not claim the prescriptive easement added any value to the Orphan Parcel. By affidavit dated August 7, 2015, Jeff Owen testified that an easement across the Orphan Parcel: 1) is not essential to the Owens' use and enjoyment of the land; 2) detracted from the Owens' use and enjoyment because of increased traffic and prevented them from freely using their land; and 3) did not enhance the value of the land, but instead diminished it. 43848 R pp. 28-29.

ADDITIONAL ISSUE PRESENTED ON APPEAL

1. Whether Owens are entitled to an award of reasonable attorney fees on appeal.

ATTORNEY FEES ON APPEAL

The Owens request an award of reasonable attorney fees on appeal pursuant to I.C. §§ 12-121, 12-123(2)(a), and I.A.R. 41. Idaho statute provides this Court with discretion to award attorney fees to a prevailing party:

> In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees.

I.C. § 121. By rule the Idaho Supreme Court has limited the application of this discretionary award to instances where the Court finds "that the case was brought, pursued or defended frivolously, unreasonably or without foundation." IRCP 54(e)(1). An award of attorney fees under I.C. § 12-121 is appropriate when "the Court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation." *Chavez v. Barrus*, 146 Idaho 212, 225, 192 P.3d 1036, 1049 (2008). The Idaho Rules of Civil Procedure do not define or provide explanation of whether a case is "brought, pursued or defended frivolously, unreasonable or without foundation," but is within the broad and sound discretion of the Court. *Anderson v. Goodliffe*, 140 Idaho 446, 449, 95 P.3d 64, 67 (2004). Historically this Court has refused to exercise its discretion in awarding attorney fees under I.C. § 12-121 if the losing party has presented at least on legitimate issue, even when their other "factual or legal claims [were] frivolous, unreasonable, or without foundation." *Michalk v. Michalk*, 148 Idaho 224, 235, 220 P.3d 580, 591 (2009). However, recently this Court has held that "[a]pportionment of attorney fees is appropriate for those elements of the case that were frivolous, unreasonable, and without

foundation." *Idaho Military Historical Soc'y, Inc. v. Maslen*, 156 Idaho 624, 632, 329 P.3d 1072, 1080 (2014), *reh'g denied* (Aug. 6, 2014).

Besides I.C. § 12-121, this Court "may award reasonable attorney's fees to any party to that action adversely affected by frivolous conduct." I.C. § 12-123(2)(a). Frivolous conduct is defined as follows:

> "Frivolous conduct" means conduct of a party to a civil action or of his counsel of record that satisfies either of the following:
> (i) It obviously serves merely to harass or maliciously injure another party to the civil action;
> (ii) It is not supported in fact or warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

I.C. § 12-123(1)(b).

In this case, the Regans' claim of prescriptive easement was the only issue remaining after this Court's remand on the first appeal. Despite the narrow scope of the remand and the limited proceedings following the remand and leading up to this appeal, the Regans now present a litany of issues to this Court on appeal that were: 1) never raised below, 2) decided on the first appeal, or 3) are not supported by the record. The only issues the Regans properly raise before this Court are 1) whether the district court erred in interpreting and applying I.C. § 63-1009, 2) whether the 2016 amendment of I.C. § 63-1009 should be applied retroactively, and 3) whether Regans are entitled to costs and attorney fees if they prevail on appeal.

Regans agree on appeal that the amendment to I.C. § 63-1009 does not apply to this case, so this issue is not pursued by them on appeal. Regan's claims of error by the district court are frivolous and without foundation, mostly because they were never raised below. Because Regans' appeal is without merit, this Court should award Owens their reasonable attorney fees on appeal.

ARGUMENT

I. STANDARD OF REVIEW

This Court's review of a decision on summary judgment is the same standard used by the district court. *Ada Cty. Bd. of Equalization v. Highlands, Inc.*, 141 Idaho 202, 205-06, 108 P.3d 349, 352-53 (2005). "Summary judgment is appropriate if there are no genuine issues of material fact and the case can be decided as a matter of law." *Id.*; I.R.C.P. 56(c). Interpreting a statute is a question of law over which this Court exercises free review. *State v. Maidwell,* 137 Idaho 424, 426, 50 P.3d 439, 441 (2002). This Court also exercises free review over constitutional questions. *CDA Dairy Queen, Inc. v. State Ins. Fund*, 154 Idaho 379, 382, 299 P.3d 186, 189 (2013).

II. THE 2016 AMENDMENT OF I.C. § 63-1009 SHOULD NOT BE APPLIED RETROACTIVELY IN THIS CASE

After this appeal was filed, the legislature passed legislation intended to abrogate Owens' vested property rights acquired in the tax deed issued to them pursuant to I.C. § 63-1009. Since determination of this issue could be dispositive, it is addressed first in this response.

While it is uncommon for the Respondents to agree with Appellants' argument on appeal, Owens agree with Regans' conclusion that the 2016 amendment of I.C. § 63-1009 should not apply retroactively to the facts of this case. However, Owens arrives at their conclusion based on a different analysis of the applicable law.

Effective March 30, 2016, I.C. § 63-1009 was amended to read as follows:

> EFFECT OF TAX DEED AS CONVEYANCE. The deed conveys to the grantee the right, title, and interest held by the record owner or owners, provided that the title conveyed by the deed shall be free of any recorded purchase contract, mortgage, deed of trust, security interest, lien, or lease, so long as notice has been sent to the party in interest as provided in sections 63-201(17) and 63-1005, Idaho Code, and the lien for property taxes, assessments, charges, interest, and penalties for which the lien is foreclosed and in satisfaction of which the property is sold.

I.C. § 63-1009 (2016). The plain language of this amended statute clearly does not provide for the conveyance of real property by tax deed free and clear of the encumbrances that the prior statute contemplated. Under the plain language of the amended statute, a prescriptive easement would survive conveyance of the servient estate by tax deed. Regans contend this amended statute is not expressly intended to apply retroactively to past conveyances. Supplemental Brief, pp. 5-13. Owens respectfully disagree with Regans' analysis. However, Owens agree with Regans' ultimate conclusion that retroactive application of the amended statute would violate both the United States and Idaho Constitutions.

A. Senate Bill 1388 is Expressly Retroactive

A statute is retroactive when it "changes the legal effect of previous transactions or events." *Stuart v. State*, 149 Idaho 35, 43, 232 P.3d 813, 821 (2010) (citing *Engen v. James*, 92 Idaho 690, 695, 448 P.2d 977, 982 (1969)). The Idaho Supreme Court has held that purchasers of property from the county acquire vested rights to that property. *Washington County v. Paradis*, 38 Idaho 364, 369, 222 P. 775, 777 (1923). If the rights vested in a purchaser are subsequently changed by legislation, that legislation is retroactive.

Retroactive legislation in Idaho is prohibited unless there is express legislative intent for retroactive application: "No part of these compiled laws is retroactive, unless expressly so declared." I.C. § 73-101; *Hill v. Am. Family Mut. Ins. Co.*, 150 Idaho 619, 628, 249 P.3d 812, 821 (2011) (no statute is retroactive unless the Legislature expressly declares that it is); *Johnson v. Stoddard*, 96 Idaho 230, 234, 526 P.2d 835, 839 (1974) (no law in Idaho will be applied retroactively absent a clear legislative intent to that effect). Enacting language of the legislature that "clearly refers to the past as well as to the future" manifests a clear "intent to make the law retroactive." *Guzman v. Piercy*, 155 Idaho 928, 938, 318 P.3d 918, 928 (2014) *citing Peavy v.*

McCombs, 26 Idaho 143, 140 P. 965, 968 (1914).

The legislation at issue in this case is Senate Bill 1388, signed into law on March 30, 2016. 2016 Idaho Sess. Laws, ch. 273 § 8 at 758, eff. Mar. 30, 2016 (hereinafter cited as "Senate Bill 1388"). Section 8 of Senate Bill 1388, which deals with application of the act, states: "Being a clarification of existing law, the Legislature does not view the application of this amendment to prior conveyances as retroactive legislation." Senate Bill 1388, § 8. Relying solely on this sentence alone it would appear that the Legislature did not intend the amendment of I.C. § 63-1009 (also referred to as "the amended statute") to apply retroactively. However, that sentence is at odds with the next sentence of Section 8, which states: "In any event, the Legislature expressly intends that these amendments shall be interpreted to apply to any and all conveyances by tax deed, *past or future*." *Id.* (emphasis added). Apparently the first sentence was an expression by the Legislature on how it would rule upon the statute were it a court.

A review of the statutory language in its totality leads to the conclusion that the Idaho Legislature did intend the amended statute to apply retroactively. "In any event" is similar to saying "regardless" or "nevertheless." *In any event*, OXFORD DICTIONARY, http://www.oxforddictionaries.com/definition/english/in-any-event (last visited 11 July, 2016). By using the words "in any event," the Legislature meant to disregard the first sentence of Section 8 of the Bill exclaiming its view that the legislation was not meant to be retroactive, and say instead that the legislation applied retroactively, to past conveyances.

The effect of applying the statute retroactively would be retroactive legislation because it would change the vested rights of Owens as purchasers from the county. When the Orphan Parcel was conveyed to Owens in 2005 by tax deed, Owens obtained a vested right to the real property, free of the claim of a prescriptive easement. 43848 R pp. 73-76. Now with the passage of

subsequent legislation, that vested right is purportedly changed to ownership subject to a claim of a prescriptive easement. Application of the amended statute to the title vested in Owens by the tax deed conveyance retroactively changes the Owens' vested rights and imposes new legal obligations and duties on them (i.e. those of a servient estate) that were not in effect under the previous legislation. Because application of the amended statute to the title held by Owens changes their vested rights in the Orphan it is retroactive legislation. *Stuart*, 149 Idaho at 43, 232 P.3d at 821. Having found the amended statute is retroactive legislation, this Court should then find the amended version of § 63-1009 impermissibly violates both the United States and the Idaho Constitutions when applied to this case.

B. Retroactive Application of the Amended Statute is Unconstitutional

Retroactively applying the amended statute to the tax deed conveyance of the Orphan Parcel is unconstitutional because it impairs the vested rights that contract conveyed to Owens without serving an important public purpose. Article I, § 10, cl. 1 of the United States Constitution states: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. CONST. art. I, § 10, cl. 1. Article I § 16 of the Idaho Constitution similarly states: "No...law impairing the obligation of contracts shall ever be passed." IDAHO CONST. art. I, § 16.

In *Aberdeen-Springfield Canal Co. v. Bashor*, 36 Idaho 818, 822, 214 P. 209, 213 (1923), the Idaho Supreme Court defined what it meant for a law to impair the obligations of contracts: "The obligation of a contract is impaired by a statute which alters its terms, by imposing new conditions or dispensing with existing conditions, or which adds new duties or releases or lessens any part of the contractual obligation or substantially defeats its ends." *Id.*

Statutory interference with contract is not a per se violation of the constitutions, but must

first be evaluated under a three-step framework applicable to both the United States and Idaho constitutions:

> The first step is to determine whether the challenged legislative enactment "has operated as a substantial impairment of a contractual relationship." This threshold inquiry also has three parts: 1) whether a contractual relationship exists, 2) whether the challenged legislative enactment impairs that relationship, and 3) whether that impairment is substantial . . . If the challenged legislative action is found to substantially impair a contract, the analysis then proceeds to the remaining two steps: whether the act serves "an important public purpose," and whether the act is "reasonable and necessary" to advance that purpose.

CDA Dairy Queen, Inc. v. State Ins. Fund, 154 Idaho 379, 383-88, 299 P.3d 186, 190-95 (2013).

1. Retroactive Application of the Amended Statute is a Substantial Impairment of the Contractual Relationship

Retroactive application of the amended statute is a substantial impairment of the contract between Owens and Kootenai County because there was a contract promising Owens absolute title free and clear of all encumbrances. The new legislation creates an encumbrance on the property[3] which decreases the value of the Orphan Parcel. There is no question in Idaho that the law in effect when property is conveyed by tax deed becomes contractual terms between the county and the purchaser:

> Questions concerning the effect of a tax sale as a transfer of title, or the rights of the purchaser and the validity of his title, are to be determined by the law in force at the time the sale was made, which law indeed constitutes a contract between the county and the purchaser, the terms of which cannot be impaired by subsequent legislation.

Larson v. Gilderoy, 45 Idaho 764, 267 P. 234, 235 (1928). "The laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it." *CDA Dairy Queen*, 154 Idaho at 388, 299 P.3d at 195 (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 188 (1992)). Indeed, conveyance of real property by tax deed is a "contract which cannot be impaired by

[3] Assuming *arguendo* that Regans can prove the necessary elements of a prescriptive easement claim.

legislative enactment, the purchaser from the county having acquired a vested right." *Paradis*, 38 Idaho at 369, 222 P. at 777. Accordingly, when Owens purchased the Orphan Parcel, the terms of that contract with the county included the law of I.C. § 63-1009 as it then existed, which said that Owens received absolute title free of all encumbrances.

The next question is whether the challenged legislative act impairs the contractual relationship. *Id.* at 387, 299 P.3d at 194. "To impair a contract is to 'diminish the value of' the contract." *Id.* at 388, 299 P.3d at 195 (quoting *Black's Law Dictionary* 819 (Bryan A. Gardner ed., 9th ed., West 2009)). As noted in the statement of facts, Owens testified by affidavit that a prescriptive easement across the Orphan Parcel would diminish its value.

Lastly:

> If the court determines that a legislative act has impaired a contract, the final step in the threshold inquiry is to decide whether the contractual impairment is substantial. In making this determination, courts consider several factors, such as whether the impairment eliminates an important contractual right, defeats an expectation of the parties, or creates a significant financial hardship for one party.

CDA Dairy Queen, 154 Idaho at 388-89, 299 P.3d at 195-96. In United States Trust Co. of New York v. New Jersey, 431 U.S. 1, 9-10, 18-19 (1977), the United States Supreme Court determined the repeal of a statute which protected the interests of bondholders constituted a substantial impairment to the contract between bondholders and the states, holding the retroactive repeal eliminated an important security provision. A case decided by the United States Court of Appeals for the Ninth Circuit explained "when considering substantial impairment, we focus on the importance of the term which is impaired, not the dollar amount." S. Cal. Gas Co. v. City of Santa Ana, 336 F.3d 885, 892 (9th Cir. 2003). The fees charged under the amended statute in S. Cal Gas Co. "impair[ed] a right at the heart of the [contract]." Id.

There is no question that the quality of the title conveyed to Owens by tax deed is an

important right of that contract. Whether Owens receive an unencumbered piece of real property versus property subject to an easement is "an important contractual right." Similar to the contractual provision in S. Cal. Gas Co., which was at the heart of the contract, the right to take title free of all encumbrances is at the heart of the conveyance between the Owens and Kootenai County. Moreover, retroactively burdening that property with an easement substantially impairs the value of the contract to the Owens. 43848 R p. 29. Retroactive application also creates new duties restricting the Owens free use of their property, and casting them in the position of a servient estate. These are substantial impairments of their contractual rights.

2. Retroactive Application of the Amended Statute in this Case does not Serve an Important Public Purpose

Because the challenged legislative action substantially impairs the Owens' contract, the analysis must turn to the remaining stops outlined in *CDA Dairy Queen, Inc. v. State Ins. Fund, supra.* In determining "whether the act serves an important public purpose" this Court has explained "substantial impairment may be permissible where there is a 'significant and legitimate public purpose behind the regulation, such as the remedying of a broad and general social or economic problem.'" *CDA Dairy Queen*, 154 Idaho at 388, 299 P.3d at 195 (quoting *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983)).

This Court should find there was not a legitimate and important public purpose behind the broad retroactive application of the amended statute. The Senate claimed allowing the original I.C. § 63-1009 to pass absolute title to the land free of all encumbrances would "result in the elimination of public utility easements, ditch rights, public highways and rights-of-way, conservation easements, and all manner of third-party rights in the land." Senate Bill 1388, § 1. This is not only an overstatement of the supposed public policy problem, it is inaccurate.

While it is true the original I.C. § 63-1009 could eliminate certain third party property

rights, it only did so if the third party rights were an "encumbrance" to the land. An easement is only an encumbrance if it impairs the value and usefulness of the land. Typically, public right-of-way and utility easements are not encumbrances because they benefit the land over which they cross. *See Hunt v. Bremer*, 47 Idaho 490, 276 P. 964, 965 (1929) (public easements, public rights of way, and irrigation canals are not encumbrances). *See also Newmeyer v. Roush*, 21 Idaho 106, 120 P. 464 (1912) (a public right of way is not an encumbrance); *Schurger v. Moorman*, 20 Idaho 97, 117 P. 122 (1911) (an irrigation canal is not an encumbrance); *Campagna v. Parker,* 116 Idaho 734, 779 P.2d 409 (1989) (public easements, or easements beneficially affecting the land, do not constitute encumbrances within the meaning of the covenant against encumbrances). Seemingly the legislature was unaware of this long standing case law when expressing its fears.

The United States Supreme Court has held that the public is best served by predictability and stability regarding their contractual rights and responsibilities: "The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, **matters in which predictability and stability are of prime importance**. *Landgraf v. USI Film Products*, 511 U.S. 244, 271 (1994). Indeed, with respect to the amended statute before the Court, the public would be better served by application of the amended statute prospectively only and not altering prior contractual rights. Thus, there is no important public purpose in interfering with private contractual rights since the public easements the Senate expressed concern about losing were already safe under the existing case law.

3. The Amended Statute is Not Reasonable and Necessary to Advance an Important Public Purpose

With the final step of analysis "the Court must still determine whether the act is based 'upon reasonable conditions and [is] of a character appropriate to the public purpose justifying its adoption.'" *CDA Dairy Queen*, 154 Idaho at 388, 299 P.3d at 195 (quoting *United States Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977)). The amended statute is too broad, and instead of protecting only those important public rights it seeks to preserve, it also interferes with private contractual rights.

To be a reasonable and necessary retroactive legislation, the amended statute should simply have limited its retroactive application to public easements or rights benefitting the public, rather than all non-monetary interests in land, including private easements. There is a strong public policy against interference with contracts that requires those private contractual rights not be tampered with retroactively.

As United States Supreme Court Justice Scalia stated in *Landgraf*, "the largest category of cases in which we have 'applied the presumption against statutory retroactivity . . . involved new provisions effecting contractual or property rights, matters in which predictability and stability are of prime importance.'" *Landgraf*, 511 U.S. at 271. It is much more important for this Court to recognize a policy of encouraging stability and predictability in the execution of contractual and property rights, rather than upset the longstanding presumption that the laws in existence at the time of the execution of the contract enter into the contract itself. To apply the amended version of I.C. § 63-1009 retroactively would upset the vested rights of persons who have acquired property in the State of Idaho through tax deed conveyances, including the Owens. Most importantly, it was not reasonable or necessary for the Legislature to interfere with these private contractual rights to protect the public rights over which it was concerned. The amended statute

is too broad and should have been more narrowly tailored to address the important public purpose if such a need really existed. The more appropriate resolution of the Legislature's supposed public policy emergency would be for the amended I.C. § 63-1009 to apply prospectively to future transactions by tax deed. This would allow the Legislature's intentions to shape the future of tax deed conveyances without destroying the vested and bargained-for rights of current property owners like the Owens.

The act as written was not reasonable and necessary to advance its stated purpose. To prevent the Owens from being deprived of their vested rights under the version of I.C. § 63-1009 by which they took title, the Court must interpret the amended I.C. § 63-1009 as impermissibly retroactive legislation under the facts and circumstances of the present case. The contractual tax deed conveyance from Kootenai County to the Owens must be governed by the former version of I.C. § 63-1009, the law in force at the time of the contract. To hold otherwise would violate the Idaho Constitution and the United States Constitution.

III. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT THE REGANS' PRESCRIPTIVE EASEMENT WAS AN ENCUMBRANCE EXTINGUISHED BY TAX SALE OF THE ORPHAN PARCEL

The district court properly applied I.C. § 63-1009 when it determined "[i]t is undisputed that the Regans' claim of a prescriptive easement would constitute an encumbrance upon Owens' land they received from the county after it was acquired by tax deed" and dismissed the Regans' claim for a prescriptive easement. 43848 R pp. 75-76, 86-87. Idaho Code Section 63-1009 states the grantee of real property by tax deed receives "absolute title to the land described therein, free of all encumbrances," with exception for mortgages, subsequent property tax liens, and liens for special assessments, none of which are relevant to the issue before the Court. I.C. § 63-1009. The

district court correctly interpreted "encumbrances" to include the Regans' alleged prescriptive easement across the Orphan Parcel.

The interpretation of a statute is a question of law over which this Court exercises free review. *Maidwell,* 137 Idaho at 426, 50 P.3d at 441. The goal of statutory interpretation is to ascertain legislative intent. *State v. Schulz,* 151 Idaho 863, 866, 264 P.3d 970, 973 (2011). Therefore, interpretation of a statute begins with the literal words of the statute. *State v. Burnight,* 132 Idaho 654, 659, 978 P.2d 214, 219 (1999). The words of the statute should be given their plain, usual, and ordinary meanings, giving effect to all the words and provisions of the statute. *Id.*; I.C. § 73-113(1). "When the statutory language is unambiguous, courts **must** give effect to the legislature's clearly expressed intent without engaging in statutory construction." *Saint Alphonsus Reg'l Med. Ctr. v. Gooding Cty.*, 159 Idaho 84, 356 P.3d 377, 379-80 (2015) (emphasis added); I.C. § 73-113(1). Where a statute is unambiguous, its plain language controls and this Court will not engage in statutory construction. *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011). This Court does not have the authority to revise a statute that is unambiguous as written "on the ground that it is patently absurd or would produce absurd results when construed as written." *Id.* at 896, 265 P.3d at 509.

A statute is only ambiguous where the language is capable of more than one reasonable construction. *Porter v. Bd. of Trs., Preston Sch. Dist. No. 201,* 141 Idaho 11, 14, 105 P.3d 671, 674 (2004). "Ambiguity is not established merely because differing interpretations are presented to a court; otherwise, all statutes subject to litigation would be considered ambiguous." *Id.* If a statute is not ambiguous, "this Court does not construe it, but simply follows the law as written." *State v. Thiel*, 158 Idaho 103, 108, 343 P.3d 1110, 1115 (2015) (internal quotations omitted). When a statute is unambiguous, there is no reason to consult legislative history or other extrinsic

evidence "for the purpose of altering the clearly expressed intent of the legislature." *City of Sun Valley v. Sun Valley Co.,* 123 Idaho 665, 667, 851 P.2d 961, 963 (1993).

In this case, the district court correctly held that I.C. § 63-1009 is clear and unambiguous. The district court correctly applied the statute as written when it held that the Owens took title to the Orphan Parcel free of the Regans' prescriptive easement claim. The district court also correctly rejected argument that the statute should be applied contrary to its plain language.

A. Idaho Code Section 63-1009 is Not Ambiguous

Neither below, nor on appeal, have the Regans attempted to argue that the language of I.C. § 63-1009 is ambiguous. The Regans conceded to the trial court that the statute is unambiguous: "The statute is problematic, we admit that. It says what it says, that a tax deed conveys absolute title fee of all encumbrances with certain specific exceptions." 43848 Summary Judgment Tr pp. 11, L. 21-24.

On appeal, the Regans simply argue this Court should interpret the terms "absolute title" and "encumbrances" differently because the result would be more favorable to them and perhaps others. Appellant's Opening Brief, 16-17, 30. However, Regans' requests ignore the plain, usual, and ordinary meanings of these terms and violate the rules of statutory interpretation. Idaho Code Section 63-1009 is not ambiguous and was correctly applied by the district court.

According to Section 63-1009, a conveyance of real property by tax deed "conveys to the grantee the *absolute title* to the land therein; free of all *encumbrances*..." I.C. § 63-1009 does not define "absolute title" or "encumbrances," nor does Title 63 of the Idaho Code. Since absolute title and encumbrances are not specifically defined they should be given their "plain, usual, and ordinary meaning[s]." *Burnight,* 132 Idaho at 659, 978 P.2d at 219. The Court can ascertain a word's plain, usual, and ordinary meaning by reference to a legal dictionary. *See Hayes v. City of*

Plummer, 159 Idaho 168, 357 P.3d 1276, 1279 (2015) (The Court's use of *Black's Law Dictionary* provided the Court with the plain, usual, and ordinary meaning of undefined statutory terms).

1. The Plain, Usual, and Ordinary Meaning of "Absolute Title" Means a Fee Simple Interest

Absolute title is defined as "[a]n exclusive title to land; a title that excludes all others not compatible with it. See *fee simple absolute* under FEE SIMPLE." *Black's Law Dictionary* 1622 (Bryan A. Gardner ed., 9th ed., West 2009). Fee simple absolute is defined as "[a]n estate of indefinite or potentially infinite duration" and a fee simple is defined as "the broadest property interest allowed by law." *Black's Law Dictionary* 691 (Bryan A. Gardner ed., 9th ed., West 2009). Absolute title is not defined in Idaho statute. However, absolute title is synonymous in Idaho case law with fee simple or fee simple absolute title in real property. *See Argyle v. Slemaker*, 99 Idaho 544, 548, 585 P.2d 954, 958 (1978) (ownership of real property redundantly described as "absolute title in fee simple"). Absolute title is often used in Idaho case law to contrast fee simple ownership with title held merely as a security for an obligation. *See State v. Snyder*, 71 Idaho 454, 460, 233 P.2d 802, 806 (1951) (court determined that execution and delivery of bill of sale was not conveyance of absolute title but a form of security for a loan).

There is no argument presented by Regans that absolute title means anything other than fee simple absolute ownership of real property. In fact, that is in essence the definition the Regans request this Court adopt: "the term 'absolute title' in Idaho Code section 63-1009 is most logically defined as a title to property that cannot be divested by the occurrence of a future event." Appellants' Opening Brief, 30 (emphasis added).

While recognizing the broadness of the definition of absolute title, the Regans fail to give effect to the remaining plain language of the statute and fail to recognize the "absolute title" conveyed by the statute is further modified as "free of all encumbrances." I.C. § 63-1009. That is

the language the district court focused on when it determined the quality of the fee simple ownership the Owens received when they were issued a tax deed from the County. The district court never defined "absolute title" in its memorandum decision or final judgment, so it is puzzling how the Regans can claim "the trial court erred in ruling that the phrase 'absolute title' in Idaho Code section 63-1009 means title free from a prescriptive easement." Appellants' Opening Brief, 32; *compare* 43848 R p. 69-76, 86-87. On appeal Regans never provide this Court with a citation to the record where the district court defined "absolute title" to mean something that is mutually exclusive of real property burdened by a prescriptive easement. The district court never made such a pronouncement.

The question before the district court was whether the conveyed fee simple ownership was burdened by a prescriptive easement claim which survived the issuance of the tax deed. The most important part of the statute for the case at hand is what constitutes an encumbrance, and whether the Regans' alleged prescriptive easement was an encumbrance under I.C. § 63-1009. As discussed below, the district court correctly determined that the Regans' prescriptive easement was an encumbrance because it was an interest in land that was not essential to Owens' enjoyment and did not increase the value of the Orphan Parcel.

2. The Term "Encumbrances" in I.C. § 67-1009 included the Regans' Claim of a Prescriptive Easement over the Orphan Parcel

The Regans invite this Court to limit the meaning of an encumbrance to only those which secure financial interests. Appellants' Opening Brief, p. 16. This Court has addressed the meaning of an encumbrance on more than one occasion in cases related to the warranty of title and covenant against encumbrances. As early as 1912, this Court held a reserved access easement in a deed was an encumbrance. *Newmyer v. Roush*, 21 Idaho 106, 116-117, 120 P. 464 (1912). The Court reasoned that such an easement is an encumbrance because it is a right that "clearly impair[s] the

value and usefulness of said tract, and the right to the use was not granted for the purpose of benefiting the land itself or increasing its value." *Id.*

Later in 1929, the Idaho Supreme Court addressed the definition of encumbrances found in C. S. § 5385, the statutory predecessor of I.C. § 55-613, with identical language as § 55-613 today, and held "[a]side from these statutory provisions [I.C. § 55-613], an incumbrance may otherwise be defined to be any right or interest in land to the diminution of its value, but consistent with the free transfer of the fee...[and] embraces all cases in which the owner does not acquire the complete dominion over the land which his grant apparently implies." *Hunt v. Bremer*, 47 Idaho 490, 276 P. 964, 965 (1929) (emphasis added). Simply put, an encumbrance is "a right or interest which diminishes the value of the land." *Id.* The *Hunt* Court qualified and narrowed its definition to exclude those rights that are essential to the land's enjoyment and enhance the land's value. *Id.* Examples of essential or value enhancing "encumbrances" include public easements, public rights of way, and irrigation canals. *Id.* The holding from *Hunt* is that any interest in real property less than a fee simple interest is an encumbrance unless the interest is essential to the enjoyment of the land and enhances the land's value. That general definition was applied to an easement as follows:

> It is apparent that, if an incumbrance is a right or interest which diminishes the value of the land, no easement or other right should be regarded as an incumbrance, which is essential to its enjoyment and by which its value is enhanced. The modern trend, now firmly established, is that the existence of certain public easements, or easements beneficially affecting the land, such as a public road right of way (*Newmyer v. Roush*, 21 Idaho, 106, 120 P. 464, Ann. Cas. 1913D, 433) or canal (*Schurger v. Moorman*, 20 Idaho, 97, 117 P. 122, 36 L. R. A. (N. S.) 313, Ann. Cas. 1912D, 1114), do not constitute incumbrances, within the meaning of covenants against incumbrances.

Id.

In *Hoffer v. Callister*, 137 Idaho 291, 47 P.3d 1261 (2002), the *Hoffer* Court specifically addressed I.C. § 55-613 and the meaning of the term "encumbrances" in the context of a zoning violation notice. The *Hoffer* Court held the statute is inclusive, rather than exclusive, in its

meaning and cited *Hunt v. Bremer*, 47 Idaho 490, 276 P. 964 (1929) as authority for the proposition there are other types of encumbrances that aren't listed in the statute. *Id.* at 294, 47 P.3d at 1264. The *Hoffer* Court also cited to *Koelker v. Turnbull*, 127 Idaho 262, 265-66, 899 P.2d 972, 975-76 (1995) (holding that the covenant of title is breached when there are hostile titles, superior in fact to those of the grantor.) *Id.* The *Hoffer* Court concluded "[a]s the language from these cases makes clear, an encumbrance that does not fit within one of the categories enumerated in I.C. § 55-613 must be a right, interest, or hostile title relating to the land." *Id.* The *Hoffer* Court also cited with approval the holding from *Hunt v. Bremer, supra*, that "an encumbrance may otherwise be defined by any right or interest in land to the diminution of its value, but consistent with the free transfer of the fee. It does not depend upon the extent or amount of diminution in value, but embraces all cases in which the owner does not acquire the complete dominion over the land which his grant apparently implies." *Id.* The prescriptive easement claimed by the Regans fits this definition. It is an interest in the land that diminishes its value.

Most recently in 2014, in the first appeal of this case, this Court again approved the definition of encumbrance found in *Hunt*:

> An encumbrance is "any right or interest in land to the diminution of its value, but consistent with the free transfer of the fee." *Hunt v. Bremer,* 47 Idaho 490, 494, 276 P. 964, 965 (1929). Whether something is an encumbrance does not depend upon the extent to which it diminishes the value of the land. An encumbrance "embraces all cases in which the owner does not acquire the complete dominion over the land which his grant apparently implies." *Id.* An easement is not an encumbrance if the easement is essential to the enjoyment of the land and it enhances the land's value. *Id.* There is no finding by the district court that the alleged prescriptive easement across the Orphan Parcel increased its value.

Regan v. Owen, 157 Idaho 758, 765, 339 P.3d 1162, 1169 (2014). The definition found in *Hunt* follows *Newmyer* and *Hoffer*, *supra,* and I.C. § 55-613. Therefore, the definition of encumbrances

as used in I.C. § 63-1009 includes easements that are not essential to the enjoyment of the land and do not enhance the land's value.

A statute is only ambiguous where the language is capable of more than one reasonable construction. *Porter*, 141 Idaho at 14, 105 P.3d at 674 (emphasis added). All constructions proposed by Regans conflict with the plain language of the statute and Idaho case law, and are unreasonable. When a statute is unambiguous, it must be followed as written. This Court has consistently declined invitations to disregard unambiguous statutory language to reach a desired outcome not supported by the language of the statute. Such is the case with the argument made by the Regans. Regans urge this Court, contrary to its clear holdings, to construe unambiguous language in I.C. § 63-1009 to avoid an outcome which they characterize as unjust.

Regans ask this Court to consider the legislative intent of the 2016 amendment to I.C. § 63-1009 to interpret the prior statute to conclude that an easement is not an encumbrance. Supplemental Brief, pp. 7-12. However, that approach ignores the proper steps of statutory interpretation, wherein the Court must give effect to unambiguous statutory language without further engaging in statutory construction. *Saint Alphonsus Reg'l Med. Ctr.*, 159 Idaho at 86-87, 356 P.3d at 379-80; I.C. § 73-113(1). The current legislature's explanation of its former body's historical intent cannot supplant the application and effect of the clear and unambiguous statutory language contained in the prior statute[4]. Therefore, the current statements of the legislature do not control the interpretation of I.C. § 63-1009. The plain language of the statute provides that the Orphan Parcel was conveyed free of encumbrances, which includes Regans' claimed prescriptive easement.

[4] When the former I.C. § 63-1009 was written, the legislature presumably knew of the Court's interpretation of encumbrances as such cases were decided long before the former version of I.C. § 63-1009 was adopted.

3. The Regans' Prescriptive Easement is an Encumbrance

An easement is defined as a "right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner." *Abbott v. Nampa School Dist. 131*, 119 Idaho 544, 548, 808 P.2d 1289, 1293 (1991). An easement can be an encumbrance embraced in I.C. § 55-613 based upon the holding in *Hoffer* discussed above. An easement can be an encumbrance under the holding in *Hunt* discussed above when it diminishes the land's value. An easement can be an encumbrance under *Newmyer, supra,* if it impairs the value and usefulness of the land, and the right to the use was not granted for the purpose of benefiting the land itself or increasing its value.

The district court was correct when it concluded "[t]he plain language in Idaho Code Section 63-1009 is clear." 43848 R p. 75. The district court committed no error when it concluded the Regans' prescriptive easement claim was an encumbrance because it was not essential to the enjoyment of the Orphan Parcel and did not enhance the value of the land. 43848 R p. 75. Regan failed to present the district court with any evidence that the prescriptive easement was essential to the Owens' enjoyment of the Orphan Parcel or enhanced the Orphan Parcel's value. 43848 R pp. 45-47, 72. To the contrary, Jeff Owen testified that a prescriptive easement across the Orphan Parcel was not essential to the use and enjoyment of the Orphan Parcel, and detracted from the use and enjoyment of the Orphan Parcel because it increased traffic and prevented the Owens' complete and free use of the parcel. 43848 R pp. 28-29, 71. The district court was also provided deposition testimony from Brent Regan who "couldn't say" if the easement enhanced the value of the Orphan Parcel for the Owens. 43848 R pp. 33, 71.

At summary judgment, the district court was presented with undisputed facts and correctly applied I.C. § 63-1009 to those facts. Therefore, the district court's final judgment dismissing Regans' prescriptive easement claim should be affirmed.

B. The Trial Court Properly Rejected Regans' Policy Arguments Against Applying I.C. § 63-1009 as Written

The district court was correct in construing Idaho Code Section 63-1009 as written because the statute was unambiguous. "When the statutory language is unambiguous, courts **must** give effect to the legislature's clearly expressed intent without engaging in statutory construction." *Saint Alphonsus Reg'l Med. Ctr.*, 159 Idaho at 86-87, 356 P.3d at 379-80 (emphasis added).

When a statute is unambiguous, there is no reason to consult legislative history or other extrinsic evidence "for the purpose of altering the clearly expressed intent of the legislature." *City of Sun Valley*, 123 Idaho at 667, 851 P.2d at 963. If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial." *Verska v. Saint Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 892-93, 265 P.3d 502, 505-06 (2011) *citing In re Estate of Miller,* 143 Idaho 565, 567, 149 P.3d 840, 842 (2006). Even if this Court believes that an unambiguous statute as written is absurd or produces absurd results, this Court does not have authority to revise the statute or interpret it differently. *Verska*, 151 Idaho at 896, 265 P.3d at 509.

For instance, in *Sims v. ACI Nw., Inc.*, 157 Idaho 906, 342 P.3d 618, 625 (2015) in response to policy arguments from ACI Northwest and the Idaho Land Title Association to interpret a statute other than written, this Court stated "any change to the statutory procedure for mechanic's lien enforcement is best suited for the legislature." *Sims*, 157 Idaho at 906, 342 P.3d at 625. A harsh result for ACI, who lost its mechanic's lien, but that is the correct relationship between the judiciary and the legislature, and the relationship this Court should maintain on this appeal.

The district court recognized the proper branch of government to enact and modify legislation when it determined "[t]he rigid language of the statute may create inequitable or oppressive results, however, it is not the province of the trial court to rewrite or impose an application contrary to the clearly stated language." 43848 R p. 75. Despite the policy arguments raised by the Regans and the claim of inequitable results should the trial court be affirmed, this Court has made it clear that it will apply an unambiguous statute as written. This Court should reject Regans' policy arguments and affirm the district court's dismissal of Regans' prescriptive easement claim.

C. The Trial Court Correctly Rejected Argument Based on Foreign Law

The district court was correct in rejecting arguments based on foreign law to interpret I.C. § 63-1009 because the statute is clear and unambiguous. The goal of statutory interpretation is to ascertain legislative intent. *State v. Schulz,* 151 Idaho 863, 866, 264 P.3d 970, 973 (2011). "When the statutory language is unambiguous, courts **must** give effect to the legislature's clearly expressed intent without engaging in statutory construction." *Saint Alphonsus Reg'l Med. Ctr.*, 159 Idaho at 86-87, 356 P.3d at 379-80 (emphasis added). When a statute is unambiguous, there is no reason to consult legislative history or other extrinsic evidence "for the purpose of altering the clearly expressed intent of the legislature." *City of Sun Valley,* 123 Idaho at 667, 851 P.2d at 963.

Likewise, foreign law is not controlling in this state and should only be used when "confronted with matters of first impression involving Idaho statutes, this Court may glean insight from the interpretations of sister states concerning **similar or identical statutes**." *Curlee v. Kootenai Cty. Fire & Rescue*, 148 Idaho 391, 396, 224 P.3d 458, 463 (2008) (emphasis added). Even then, the foreign law is only persuasive and this Court may refuse to adopt the foreign construction. *Id.*

Regans argue that interpreting "encumbrances" to exclude easements would "place Idaho among the majority of courts in other jurisdictions holding that a tax sale does not extinguish prior vested easements." Appellants' Opening Brief, p. 17. However, because the language of I.C. § 63-1009 is plain and unambiguous as discussed above, there is no need to consult sources extrinsic to the statute. Furthermore, the foreign authority cited by Regans is not based on a similar or identical statute to I.C. § 63-1009, and therefore should not be considered by this Court in its analysis.

None of the foreign law cited by Regans is based on a statute similar or identical to I.C. § 63-1009. Appellant's Opening Brief, pp. 17-19; *compare Marshall v. Burker*, 162 H.H. 560, 34 A.3d 705 (H.H. 2011); *Hearn v. Autumn Woods Office Park Prop. Owners Ass'n*, 757 So.2d 155 (Miss. 1999); *Alvin v. Johnson*, 241 Minn. 257, 63 N.W.2d 22 (Minn. 1954). Those cases are not based on statute, but simply state common law. The district court recognized the same when it said "[i]t is well recognized that the law of foreign jurisdictions is not controlling and the Court is precluded from considering the foreign law where the law in Idaho is clear." 43848 R p. 74. This Court has no reason to consider the common law of foreign jurisdictions in applying a clear and unambiguous Idaho statute. This Court should reject Regans' invitation to apply foreign law, and should affirm the district court's final judgment dismissing the Regans' prescriptive easement claim.

IV. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO OWENS WITHOUT CONSIDERING IDAHO CODE SECTION 55-603 BECAUSE THAT ISSUE WAS NEVER RAISED TO THE DISTRICT COURT AND IDAHO CODE SECTION 63-1009 CONTROLS IN THE CASE OF CONFLICT

Regans claim error due to the district court's failure to consider I.C. § 55-603 in its decision to grant summary judgment. Application of I.C. § 55-603 was never raised to the district court.

Even if it had been raised, I.C. § 63-1009 controls over I.C. § 55-603 because it is a more specific and recent statute.

This Court has consistently held that it "will not consider issues that are raised for the first time on appeal." *Row v. State*, 135 Idaho 573, 580, 21 P.3d 895, 902 (2001); *State v. Fodge,* 121 Idaho 192, 824 P.2d 123 (1992). Whether the district court's application of I.C. § 63-1009 conflicts with and violates I.C. § 55-603 was never raised below. Regans admit the same in their Opening Brief: "the trial court did not receive argument on or address in its opinion whether the easement passed with the tax sale pursuant to Idaho Code section 55-603." Appellants' Opening Brief, p. 12. Since this Court does not consider issues raised for the first time on appeal, the Court should not consider whether the district court's final judgment violated or conflicted with I.C. § 55-603.

If this Court is inclined to entertain this new issue on appeal, the Court should uphold the district court's final judgment because it relied upon the appropriate controlling statute. There is a longstanding and foundational rule of statutory construction that when two statutes conflict, the more specific statute controls over the more general statute. *Ausman v. State*, 124 Idaho 839, 842, 864 P.2d 1126, 1129 (1993); *Estate of Collins v. Geist*, 143 Idaho 821, 827, 153 P.3d 1167, 1173 (2007); *Gooding Cty. v. Wybenga*, 137 Idaho 201, 204, 46 P.3d 18, 21 (2002); *Tuttle v. Wayment Farms, Inc.*, 131 Idaho 105, 108, 952 P.2d 1241, 1244 (1998); *Richardson v. One 1972 GMC Pickup,* 121 Idaho 599, 602, 826 P.2d 1311, 1314 (1992); *Walker v. Shoshone County,* 112 Idaho 991, 994, 739 P.2d 290, 293 (1987); *Mickelsen v. City of Rexburg,* 101 Idaho 305, 307, 612 P.2d 542, 544 (1980); *Guillard v. Department of Employment,* 100 Idaho 647, 650, 603 P.2d 981, 984 (1979); *State v. Roderick,* 85 Idaho 80, 84, 375 P.2d 1005, 1007 (1962); *John Hancock Mut. Life Ins. Co. v. Neill,* 79 Idaho 385, 396, 319 P.2d 195, 199 (1957).

A related rule of statutory construction is that when two statutes conflict, the more recent statute will control. *Roe v. Harris,* 128 Idaho 569, 572, 917 P.2d 403, 406 (1996); *Tomich v. City of Pocatello,* 127 Idaho 394, 400, 901 P.2d 501, 507 (1995); *Mickelsen*, 101 Idaho at 307, 612 P.2d at 544; *Dana, Larson, Roubal & Assocs. v. Board of Comm'rs of Canyon County,* 124 Idaho 794, 801, 864 P.2d 632, 639 (Ct.App.1993).

I.C. § 55-603 and its predecessor statutes have existed unchanged since enacted in 1887. *See Russell v. Irish*, 20 Idaho 194, 118 P. 501, 503 (1911); Appellants' Opening Brief, p. 12. Idaho Code Section 55-603 relates to the continuing existence of existing easements following a transfer of real property. In contrast, I.C. § 63-1009 as it previously existed was enacted in 1996 and related only to transfers of real property by tax deed conveyance. It created a specific exception to the general rule in I.C. § 55-603. Idaho Code Section 63-1009 was limited to transfers of real property by tax deed for the previous 20 years. Because I.C. § 63-1009 was a more recent statute and more specific regarding the effect of conveyance by a tax deed on the continuing existence of an encumbrance, it was controlling over I.C. § 55-602.

Further, Regans recognize where two statutes on the same subject "can be reconciled and construed as to give effect to both, no repeal occurs, and it is the duty of the courts to so construe them." *State v. Roderick*, 85 Idaho 80, 84, 375 P.2d 1005, 1007 (1962). Regans also acknowledge that courts must interpret statutes "under the assumption the legislature knew of all legal precedent and other statutes in existence at the time the statutes were passed." *City of Sandpoint Indep. Highway Dist.,* 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994).

Following these established principles of statutory construction support the trial court's decision. Interpreting I.C. § 63-1009 to convey real property free of easements that are not essential to the enjoyment of the land or do not enhance the land's value does not implicitly repeal

I.C. § 55-603 as implied by Regans. Appellants' Opening Brief, 13-14. It simply created an exception to the general rule set forth in I.C. § 55-603 in the limited circumstances of a conveyance of real property by tax deed. Both statutes are still given effect and there is no nullification or repeal. Further, it follows the axiom that the legislature knew the meaning of encumbrances based upon prior case law when it passed I.C. § 63-1009. Therefore, the district court did not err in holding that the Regans' prescriptive easement on the Orphan was an encumbrance extinguished by tax deed and this Court should affirm the dismissal of Regans' claim for prescriptive easement.

V. THE DISTRICT COURT DID NOT ERR BY FAILING TO ADDRESS THE VALIDITY OF THE TAX DEED

Regans claim error below because the district court failed to find the tax deed invalid. The district court did not err in giving full effect and validity to the tax deed because its validity was never challenged. As previously argued, this Court has repeatedly held that it "will not consider issues that are raised for the first time on appeal." *Row*, 135 Idaho at 580, 21 P.3d at 902; *Fodge,* 121 Idaho at 192, 824 P.2d at 123. The validity of the tax deed conveying the Orphan Parcel to Kootenai County was not raised below. Therefore, this Court should not consider the issue on appeal.

Further, even if the tax deed issue was raised below, Regans argument lacks merit. Regans acknowledge I.C. § 63-1006(6)(c) provides that a tax dee can include the tax number. The Owens tax deed at the top contains the tax assessors number immediately below the Exhibit "A", and identifies it as Parcel # 50N03W-27-7160.

Further, the legal description does not reference "extrinsic evidence" as argued by Regans. Regans rely upon *Wasden v. Foell*, 63 Idaho 83, 89, 117 P.2d 465, 468 (1941) for the proposition that the legal description must not refer to other recorded documents because such references are extrinsic facts. This was not the holding of *Wasden v. Foell*. In *Wasden v. Foell, supra,* this Court

found a tax deed legal description was insufficient because it referenced a plat that did not exist. The Court in *Wasden v. Foell* examined the recorded plats to make its determination the legal description was insufficient. It was not critical of a deed that referenced recorded plats. It was critical of a deed that referenced no recorded plat.

In *Meneice v. The Blackstone Mining Company, Ltd.*, 22 Idaho 451, 121 P.2d 450 (1942), the Court again examined the sufficiency of a legal description. The Court found a legal description was insufficient if one could not examine the record and acquire sufficient data to enable him to locate the land taxed. *Id.* at 417-48, 121 P.2d at 451-452. Following this opinion, this Court issued the opinion that "[t]he applicable rule is that a description in an assessment, and tax proceedings based thereon, is sufficient if it contains enough information to enable one to locate the land taxed. *Wilson v. Jarron*, 23 Idaho 563, 131 P. 12; *Meneice v. Blackstone Mining Co.*, 63 Idaho 413, 121 P.2d 450." *Kelson v. Drainage Dist. No. 10 Boundary County*, 77 Idaho 320, 291 P.2d 867, 869 (1955).

In this matter, the record demonstrates a surveyor was able to examine the deed and record to create a survey of the parcel. 40848 R p. 283. Further, the calls in the deed all reference recorded instruments. 40848 R p. 70. The record shows information sufficient to enable one to located the Orphan Parcel as the land taxed.

VI. REGANS' DUE PROCESS ISSUE SHOULD NOT BE CONSIDERED BY THIS COURT

Another claim of error by Regans is the district court's failure to properly address their due process claim. Regans failed to develop a due process claim in their opposition memorandum to Owens' summary judgment other than a statement made in passing that termination of the alleged prescriptive easement would be inequitable and a taking of property without due process or just

compensation. It was merely mentioned in passing such a result would be inequitable. R 43848 p. 42.

Regans contend on appeal that their due process rights were violated because they were not given any notice of the tax sale of the Orphan Parcel. Appellants' Opening Brief, p. 26. Yet Regans provide this Court with no citation to evidence in the record to support their claim they did not receive notice of the tax sale. That is because the record is devoid of any such evidence. Accordingly, this Court must reject Regans' due process argument because it lacks factual support and was not properly raised below. For these reasons, this Court should affirm the district court's dismissal of the Regans' prescriptive easement claim.

VII. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO OWENS WITHOUT CONSIDERING RELOCATION OF THE EXPRESS EASEMENT

Regans assert the trial court erred by failing to consider relocation of the express easement to the Orphan Parcel on remand. The district court did not err in granting Owens' Third Motion for Summary Judgment without considering relocation of the express easement. The trial court previously relocated the easement based upon the deed reformation, which was reversed by this Court in the first appeal. *Regan,* 157 Idaho at 761-762, 339 P.3d at 1165-1166. Following remand, the Regans did not raise the issue again.

A. The Relocation of the Express Easement Resulting from Deed Reformation was Decided by this Court in its Prior Decision

One of the issues raised in the first appeal was whether the district court erred in reforming the Owens' deed, which resulted in relocating the express easement to the Orphan Parcel. *Regan*, 157 Idaho at 761-762, 339 P.3d at 1165-1166. The Court rejected the mutual mistake and deed reformation arguments for several reasons. *Id.* at 762-765, 339 P.3d at 1166-1169. This Court vacated the portion of the district court's amended judgment reforming the Owens' deed. *Id.* at

765, 339 P.3d at 1169. This Court remanded to the district court for further proceedings consistent with its decision. *Id.*

Regans' sole remaining claim raised in their complaint on remand was their claim to a prescriptive easement claim for the benefit of four parcels of land they owned. 43848 R p. 23. Following remand, Regans did not raise the issue of relocation of the easement to the district court, nor did they seek to amend their complaint to add such a cause of action.

One reason this Court rejected the Regans' deed reformation argument on the first appeal is because that claim was extinguished by the tax deed for the Orphan Parcel to Kootenai County:

> The tax deed conveyed absolute title to the County free of encumbrances...When the county received the tax deed to the Orphan Parcel, **that cut off any claim to reform the Owen Parcel so that it included the Orphan Parcel**. The county was at that point the absolute owner of the Orphan Parcel. When the Owens later purchased the Orphan Parcel, they received the title that the county had.

Regan, 157 Idaho at 764, 339 P.3d at (emphasis added). This Court has already held that all claims of Regans to reform the Orphan Parcel have been extinguished by tax sale. This issue has been decided and is inappropriate here on the second appeal.

B. The Issue of Easement Relocation was Not Raised Below Following Remand

Regans further complain the district court failed to consider relocation of the easement under I.C. § 55-605. The district court did not err in granting summary judgment for Owens without considering whether the express easement could be relocated pursuant to I.C. § 55-605 because that issue was never raised below. Again, this Court has repeatedly held that it "will not consider issues that are raised for the first time on appeal." *Row*, 135 Idaho at 580, 21 P.3d at 902; *Fodge,* 121 Idaho at 192, 824 P.2d at 123.

Following remand from the first appeal the sole remaining claim for trial was Regans' prescriptive easement claim. Regans never raised relocation of their express easement below, either through a motion to amend the complaint or in opposition to Owens' summary judgment.

Regans never mentioned I.C. § 55-605 as authority to support relocation of their express easement. Regans never mentioned I.C. § 55-313 as a basis for relocation of the express easement. Relocation of the express easement was not within the scope of remand and was not an issue raised below. Therefore, this Court should not consider that issue here on appeal.

C. Idaho Code Section 55-605 is Inapplicable to the Facts of this Case

If the Court is inclined to consider whether application of Idaho Code § 55-605 requires relocation of Regans' express easement, the Court will conclude that I.C. § 55-605 is inapplicable to the facts of this case. Idaho Code § 55-605 is the codification of the doctrine of after-acquired title: "Where a person purports by proper instrument to convey or grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors." *PHH Mortgage Servs. Corp. v. Perreira*, 146 Idaho 631, 638, 200 P.3d 1180, 1187 (2009). The key element to that doctrine is the presupposition that "the person giving the deed did not have title when purporting to convey the property." *Id.*

In this case, the doctrine of after-acquired title codified at I.C. § 55-605 is inapplicable because the record is devoid of any facts that a predecessor in interest to the Owens ever gave a deed for the property without having title at the time of conveyance. There is no evidence in the record that when the Original Grantors[5] deeded property to Harold and Jean Smart they did not hold title to the property at the time of conveyance. *See* 40848 R. pp. 30-32. Likewise, there is no evidence in the record that anyone in the subsequent chain of title for the Owen parcel deeded property without holding title at the time of conveyance. *See* 40848 R. pp. 30-32.

[5] "Original Grantors" refers to Alexander H. Hargis, John W. Acheson, Jr., and R.C. Collins (or the co-personal representatives if his estate, M. Eileen Acheson and /or John W. Acheson, Jr., after M. Eileen Acheson passed away) as referenced in this Court's first decision. *See Regan v. Jeff D.*, 157 Idaho 758, 760, 339 P.3d 1162, 1164 (2014).

Regans argue that the Original Grantors intended to convey a parcel to the Smarts that included the Orphan parcel, but due to a mistake in the legal description, failed to do so. Appellants' Opening Brief, p. 34. That argument is essentially an argument for deed reformation. It has absolutely no relationship to the doctrine of after-acquired title. The Original Grantors conveyed property they owned and there is no evidence in the record of a purported conveyance of property not actually owned by the grantor at the time of conveyance, that was later acquired by that grantor. Accordingly, had Regans raised Idaho Code Section 55-605 as an issue before the district court, it would not have changed the district court's analysis. Likewise, this Court should reject Regans' argument and affirm the district court's final judgment.

After acquiring the tax parcel, the Owens combined it with the parcel they previously owned for purposes of tax assessment only. A.R. 411. The form used for this purpose specifically informed Owens that the single tax assessment was not a zoning permit which altered the existence of the lot in any manner. *Id.* Despite this fact, Regans present a convoluted argument this action relocated the easement because it created one parcel. It did not. It merely created one tax bill. Further, it did not relocate the easement as a matter of law.

D. Idaho Code Section 55-313 is Inapplicable to the Facts of this Case

Although never raised below, Regans now argue the district court erred in ruling in favor of Owens because the district court never considered I.C. § 55-313 as a basis to relocate the express easement to the Orphan Parcel. If this Court is inclined to entertain this argument on appeal, it must conclude that it has no factual basis in this case.

Idaho Code Section 55-313 gives a *servient* estate owner the right to relocate an easement for motor vehicle access across the servient estate owner's property if the relocation does not injure or obstruct the use of the dominant estate(s):

> RELOCATION OF ACCESS. Where, for motor vehicle travel, any access which is less than a public dedication, has heretofore been or may hereafter be, constructed across private lands, the person or persons owning or controlling the private lands shall have the right at their own expense to change such access to any other part of the private lands, but such change must be made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access. (Emphasis added.)

I.C. § 55-313. This statute allows an affirmative action by the servient owner to change an existing easement and provide an alternate easement for the dominant estate at the choice and expense of the servient estate. It gives no rights to the dominant estate owner to alter the easement.

In this case, there is no evidence in the record that Owens, after acquiring the Orphan Parcel, relocated the express easement to the Orphan Parcel. Owens have consistently admitted in this case that their property is burdened by an express easement benefitting one of Regans' parcels. 40848 AR pp. 163-171. After Regans' received summary judgment on the express easement for the benefit of Parcel II, Regans developed this express easement for their use.

There is no evidence in the record that after acquiring the Orphan Parcel the Owens relocated the express easement to the Orphan Parcel. In fact, the contrary evidence exists in the record. Regans brought a preliminary injunction to force Owens to allow them to use the Orphan Parcel because following the Owens' acquisition of the Orphan Parcel, they fenced and gated the Orphan Parcel which prevented Regans' use. *See* 40848 5/31/12 Preliminary Hearing Transcript and 40845 6/4/12 Preliminary Hearing Transcript. Owens opposed the issuance of the preliminary injunction to Regans because they had an express easement which provided access. *Id.* Any use by Regans of the Orphan Parcel was pursuant to the trial court's issuance of a preliminary injunction. 40848 R pp. 92-94.

VIII. THE DISTRICT COURT DID NOT ERR IN DESCRIBING THE LOCATION OF THE EXPRESS EASEMENT IN THE FINAL JUDGMENT BECAUSE THERE WAS NO RELOCATION OF THE EXPRESS EASEMENT

Regans claim the trial court's final judgment improperly described the location of the express easement. The district court did not err in describing the location of the express easement in Paragraphs 1 and 3 of the final judgment. As addressed in Section VII above, this Court reversed the trial court's previous judgment which resulted in the express easement being relocated to the Orphan Parcel due to the deed reformation. It was not error for the trial court to exclude from its consideration on remand Regans' claims of mutual mistake and the intent of the original grantors, i.e. the deed reformation issues. It would have been error for the trial court to disregard the directive of this Court on remand.

Further, relocation of the easement was not within the scope of matters remanded to the district court. Regans' previous summary judgment, which was granted, requested entry of judgment that Regans' had an express easement across Owens' parcel Regans' only remaining claim following remand was their prescriptive easement claim. At no time following remand did Regans request to reform their pleadings to include a cause of action for relocation based on the statutes they now raise, nor did they raise the issue when Owens moved for summary judgment on remand.

Finally, none of Regans' new relocation arguments have merit. As previously discussed, had Regans raised these issues to the trial court, they would not have prevailed. This Court should affirm the district court's final judgment, including the location of the express easement.

IX. REGANS ARE NOT ENTITLED TO COSTS OR ATTORNEY FEES ON APPEAL

Regans cite to Idaho Code § 12-121 as a statutory basis for an award of attorney fees on appeal. Appellants' Opening Brief, pp. 38-39. As discussed above, an award of attorney fees under I.C. § 12-121 is only appropriate when "the Court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation." *Chavez*, 146 Idaho

at 225, 192 P.3d at 1049. Owens defense in this appeal is not frivolous. To the contrary, Owens provide the Court with vast amounts of case law, statute, and facts from the record that support this Court's affirmation of the district court's final decision. Accordingly, Regans are not entitled to their attorney fees on appeal.

CONCLUSION

Before this litigation commenced, in a letter to Owens' counsel, Regans' counsel claimed "... I am informed that Mr. Regan actually prefers the north 30 feet of parcel #3600 for the location of an access road. That location is several feet higher than the existing road and would therefore have better drainage in the winter." A.R. 266. Owens admitted in their answer Regans had an express easement in this location. Regans constructed a road in this location after receiving a summary judgment that their express easement was in that location. It defies logic and exemplifies frivolous and vexatious litigation for Regans to continue to pursue claims at this point that the easement should cross the Orphan Parcel.

For the reasons stated above the Owens respectfully request this Court affirm the final judgment of the district court and grant an award of reasonable attorney fees to Owens for the defense of the frivolous issues presented by Regans on this appeal.

SUBMITTED this 29th day of July, 2016.

JAMES, VERNON & WEEKS, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of July, 2016, I caused to be served a copy of the foregoing by the method stated below, and addressed to all counsel of record:

Arthur B. Macomber	☑	U.S. Mail
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Christine Elmose
____