

IN THE SUPREME COURT OF THE STATE OF IDAHO
Supreme Court Docket No. 47296-2019

MATTHEW V. LATVALA and BONNIE A. LATVALA, husband and wife,

Plaintiffs-Respondents- Cross Appellants

vs.

GREEN ENTERPRISES, INC., an Idaho corporation; JAMES K. FRANK and JULIE B. FRANK, husband and wife; LARIMORE J. CUMMINS and KATHRYN CUMMINS; and all unknown persons claiming an interest in the road by the name of South Camp Bay Road, located in Bonner County, Idaho

Defendants-Appellants-Cross Respondents

and

GILL LIVING TRUST, acting through TRUSTEE DALE GILL; RUSSELL W. EDWARDS and JANET M. EDWARDS, husband and wife; CORAL MARIE EDWARDS; FRED GRUBB; CAMP BAY, LLC, an Idaho limited liability company; and MARION L. COX,

Defendants.

RESPONDENT/CROSS-APPELLANTS' REPLY BRIEF

Appeal from the District Court of the First Judicial District for Bonner County
Case No. CV-2017-1213
The Honorable Barbara Buchanan, District Judge

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I. REPLY ARGUMENT AS TO THE LATVALAS' ISSUES ON APPEAL

A. In the Event this Court Reverses the District Court's Decision, then the District Court's Finding that the Latvalas' Alternative Claims are Moot was in Error.

The Latvalas have identified only one issue on their cross-appeal, that being:

Did the District Court err by finding that the following of the Plaintiffs' claims are moot: (1) easement by necessity over Sulphide North; (2) declaration that South Camp Bay Road is public; and (3) condemnation of a right-of-way and utilities under Idaho Code §§ 7-701 *et. seq.*, 47-701 *et. seq.*, and/or 47-901.

(Notice of Cross Appeal, p. 2).

The District Court found that the Latvalas' claims for (1) easement by necessity over Sulphide North; (2) declaration that South Camp Bay Road is public; and (3) condemnation of a right-of-way and utilities under Idaho Code §§ 7-701 *et. seq.*, 47-701 *et. seq.*, and/or 47-901 *et. seq.* were moot. (R. 2071-2074). A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. *Hansen v. Denney*, 158 Idaho 304, 307, 346 P.3d 321, 324 (Ct. App. 2015).

As the Latvalas argued in their initial appeal brief in this matter, their claims are moot only if this Court upholds the decision of the District Court. (*App. Reply Brief*, pp. 38-41). In the event that this decision is reversed, then these claims are not moot, and the Latvalas are entitled to a decision on each of these claims.

The Appellants/Cross-Respondents point out that the claim for an easement by necessity over Sulphide North is only against Defendant Gill. (*App. Reply Brief*, pp. 38-39). As Mr. Gill has not appealed, this claim is settled. (*Id.*). This point is well taken. That claim is not an issue as Mr. Gill is not a party to this appeal.

However, the Latvalas' other two claims – that South Camp Bay Road is a public road and that the Latvalas are entitled to condemn an easement – should be remanded to the District Court for a decision in the event that the Court overturns the District Court's decision quieting title to a prescriptive easement over the Appellants' respective parcels.

B. In the Event this Court Reverses the District Court's Decision, then the Latvalas are Entitled to a Decision Regarding their Claim for Condemnation of an Easement.

The Appellants/Cross-Respondents argue that in the event they prevail on this appeal, this Court should not remand this case to the District Court for a decision on the Lavalas' condemnation claim because the Latvalas, "fail to state a claim as a matter of law." (*App. Reply Brief*, pp. 39-40). This is incorrect.

1. Idaho Law Provides the Holder of Mining Rights with the Right to Condemn a Right of Way Across Adjoining Land Owners' Property.

Idaho law provides a mechanism for claiming an easement related to mining claims. Idaho Code § 47-903 states the owner or occupant of a mining claim may have and acquire a right of way for ingress and egress over and across the lands or mining claims of others. Idaho Code § 47-903 provides a mechanism for the mine owner to claim a right of way through court proceedings in state district court. That statute reads as follows:

When the owner, claimant or occupant of any mine or mining claim desires to work the same, and it is necessary, to enable him to do so successfully and conveniently, that he have a right of way for any of the purposes mentioned in the foregoing sections, if such right of way cannot be acquired by agreement with the claimant or owner of the lands or claims over, under, through, across or upon which he seeks to acquire such right of way, he may commence an action in the district court in and for the county in which such right of way, or some part thereof, is situated, by filing a verified complaint containing a particular description of the character and extent of the right sought, a description of the mine or claim of the plaintiff, and of the mine or claim and lands to be affected by such right of way or privilege, with the name of the

occupant or owner thereof. He may also set forth any tender of compensation that he may have made, and the relief sought.

Idaho Code § 47-903 (*emphasis added*).

2. ***The Latvalas Have the Statutory Right to an Easement Pursuant to Idaho Code § 47-903.***

It is undisputed that Sulphide South is part of a valid mining claim, that being the Sulphide Lode claim. (Ex. 1, 68). The Latvalas submitted evidence that they desire to work their mining claim and that they cannot reasonably do so without an easement over South Camp Bay Road and over Sulphide North. (T., Vol 1, pp. 332-338). This evidence was unrefuted at trial. As there is no other means of vehicular ingress or egress, it is axiomatic that such access is necessary to work the mining claim. For these reasons, the Latvalas are entitled to an easement pursuant to Idaho Code § 47-903.

Idaho Code § 47-903 does not require the party seeking the right of access to a mining claim to make any offer of compensation for the access. The statute merely states that the claimant, in his or her complaint, “may also set forth any tender of compensation that he may have made, and demand the relief sought.” Idaho Code § 47-903 (*emphasis added*). The statute cannot be read to require an offer of compensation as a prerequisite to seeking relief.

The Idaho Supreme Court has repeatedly recognized that it is in the public interest to promote mining by private individuals.

As to irrigation and mining, [Article 1, § 14 of the Idaho Constitution] itself shows, and similar provisions have been construed to mean, that it confers the right to condemn for individual use on the theory that the development of individual property tends to the complete development of the entire state. *Clark v. Nash*, 198 U. S. 361, 25 S. Ct. 676, 49 L. Ed. 1085, 4 Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527, 26 S. Ct. 301, 50 L. Ed. 581, 4 Ann. Cas. 1174; *Lake Koen Irrigation Co. v. Klein*, 63 Kan. 484, 65 P. 684. This court has previously held that, under the Constitution, the exercise of the right of eminent

domain did not impress irrigation or mining with the obligation of rendering service to the public as a public corporation. *Nampa & Meridian Irrigation District v. Briggs*, 27 Idaho, 84, 147 P. 75; *Marsh Mining Co. v. Inland Empire Co.*, 30 Idaho, 1, 165 P. 1128. Unless the [State constitutional] Convention intended by the last clause in the first paragraph to extend a similar right to any other use necessary to the complete development of the material resources of the state, such phrase is meaningless, inasmuch as the condemnation of property for a use recognized as public by the common law-that is, a use by the public or directly for the public-was specified by the second paragraph.

Codd v. McGoldrick Lumber Co., 48 Idaho 1, 279 P. 298, 300 (1929) (*emphasis added*).

3. *The Right to Condemn a Right-of-Way Under Idaho Code §§ 7-701 et. seq. and/or 47-901 et. seq. Does not Exclude the Ability to Construct a Residence.*

The Appellants/Cross-Respondents also contend that a right granted pursuant to Idaho Code §§ 47-901 *et. seq.* does not include the right to use the road to access a residence. (*App. Reply Brief*, p. 40). This, again, is incorrect.

Nothing in Idaho Code §§ 47-901 *et. seq.* sets forth a prohibition on the use of a road condemned for mining purposes from also using the road for the construction and subsequent access for residential use. Having a residence on a mining property will in fact facilitate the development of the property for mining purposes, as it would allow the owners or workers of the property additional time to work the mining claim, instead of commuting to and from the claim.

The eminent domain statutes include expansive language allowing for an owner of a mining claim to seek the easement for any purpose which will facilitate the mining activity. Idaho Code § 7-701(5) specifically allows for a right of eminent domain for “byroads, leading from highways to **residences** and farms.” The construction of a residence on the Latvala Property, and associated use of the easement for that purpose, would be useful in promoting the mining activities that are going to take place on the Latvala Property. Consequently, any easement granted by the Court on the basis that the Latvalas’ desire to work their mining claim should include ingress, egress, and

utilities, and should allow for the simultaneous use of the property for residential purposes. This is an issue for the trial court to resolve.

4. *The Right to Condemn a Right-of-Way Under Idaho Code §§ 47-901 et. seq. Does not Require Proof of Mineral Potential or Prior Mining Activity.*

The Appellants contend that the “Latvalas have failed to state a claim under [Idaho Code § 47-901 *et. seq.*] as no evidence was introduced of any mineral potential of or any mining history of any kind or nature on the south half of the Sulphide Lode.” ((*App. Reply Brief*, p. 40). This purported requirement is not set forth in the text of Idaho Code § 47-901 *et. seq.* Nor do the Appellants cite to any case or other authority in support of this position. In fact, the Latvalas’ property is indisputably part of a mining claim that was patented by the United States. Merely because that mining claim was divided into two parcels does not somehow strip the parcel of its status as a patented mining claim. If its owners wish to explore its potential for mining purposes, then that is their right. There is no requirement under Idaho law that the Latvalas must first prove its economic potential before being able to apply for an easement pursuant to Idaho Code § 47-901 *et. seq.*

C. In the Event this Court Reverses the District Court’s Decision, then the Latvalas are Entitled to a Decision Regarding their Claim that South Camp Bay Road is a Public Roadway.

The Appellants/Cross-Respondents argue that in the event they prevail on this appeal, this Court should not remand this case to the District Court for a decision on the Lavalas’ claim in which they request that the District Court find that South Camp Bay Road is a public roadway. (*App. Reply Brief*, pp. 40-41). The Appellants/Cross-Respondents misconstrue this claim by asserting that it is based on a claim that the public has acquired a right by prescription. It is not.

Proof at trial also demonstrates that South Camp Bay Road is a public road. In 1908, Bonner County accepted Camp Bay Road as a public roadway. (*Ex. 65*). The Viewer's Report through which Camp Bay was dedicated to the public indicates that its purpose was to "secure an outlet for settlers on the shores of Camp Bay." (*Id.*). Proofs of labor admitted at trial prove that at the time the Viewers Report was approved by Bonner County, the Sulphide Lode property which is located on Camp Bay was being developed as a mine and toward patented ownership by the miners, thus demonstrating that the owners of that claim and resulting Patented property were among the settlers for which Camp Bay Road was dedicated. (*Ex. 64*).

At that same time, the lake level was much lower than it is today, due to the artificial increase in the lake level that occurred with the construction on the Albeni Falls Dam in the early 1950s. The 1908 Viewer's Report indicates that the termination point of Camp Bay Road (then referred to as Road 45) was located "at the High-Water Line." (*Ex. 65*). Consequently, Camp Bay Road is currently open to the public extending below the current summer pool level of Lake Pend Oreille.

At the time that Camp Bay was first being settled, those travelers wishing to reach the south shore of Camp Bay likely traveled along the beach, and to the extent that travel way was below the high-water line, it was open to the public.

Idaho law provides that "a riparian owner (on a navigable river or stream) or a littoral owner (on a navigable lake) takes title down to the natural high water mark." *In re Sanders Beach*, 143 Idaho 443, 453, 147 P.3d 75, 85 (2006) (*citing West v. Smith*, 95 Idaho 550, 554, 511 P.2d 1326, 1330 (1973)). The State of Idaho then owns, "in trust for the public title to the bed of the navigable water below the OHWM as it existed at the time the State was admitted into the Union." *Id.* (*citing Erickson v. State*, 132 Idaho 208, 210, 970 P.2d 1, 3 (1998)).

State v. Hudson, 162 Idaho 888, 892, 407 P.3d 202, 206 (2017).

Evidence of a roadway on the beach is evidenced by a 1928 Right-of-Way dedication granted by the Van Schravendyks which was amended to address the fact that “part of the designated right-of-way along the beach is subject to overflow during high water.” (*Ex. 69*). For this reason, the right-of-way was amended to allow the Van Schravendyks to “substitute another right-of-way parallel to, above, and adjoining the present one along the beach.” (*Id.*).

This relocated roadway is evident in a 1935 aerial photograph showing a road in the current location of South Camp Bay Road. (*Green Ex. D, p. 1*). Howard Thomason, who acquired the Sulphide property on September 12, 1939, recorded an Affidavit in which he testified that the road leading to the Sulphide was already in existence, and that in 1938 he helped to extend the road within the Sulphide property. (R. Vol. 1, p. 1642-1644; *Ex. 72*). The roadway, therefore, was clearly in existence and being utilized along the relocated route and is located on the current route of South Camp Bay Road as evidenced by the various maps admitted at trial in this action.

Evidence admitted at trial demonstrates that in 1944 the State of Idaho was actively funding construction projects for roads to mines. (*Ex. 71*). The historical mining records related to the Sulphide Lode property prove that shipments of ore were being made from the Sulphide mines over South Camp Bay Road from 1947 through 1959. (*Ex. 78-80*). The mining records also prove that the roadway, which was the only means of reaching the triangle of Forest Service land lying between what is now the Cummins Property and Sulphide North, was being used “by summer campers and fisherman.” (*Ex. 78, bates 1092*). By 1949, South Camp Bay Road had been sufficiently developed to appear on the USGS maps, and many maps thereafter including Forest Service Visitor Maps. (*Ex. 51-62*).

In the early 1950s, the Albeni Falls Dam was being constructed pursuant to a Master Plan for Development & Management of Reservoir Lands. (*Ex. 82*). This plan was not limited to the

development of the dam, but also includes the development of recreational areas on federal land. (*Id.*, bates 21, 34-36, 40) (“All forest resources of the project will be managed with the objective of maintaining or improving existing stands of timber for scenic, wildlife and recreational purposes.”). To this end, the Forest Service land laying between what is now the Cummins Parcel and Sulphide North was designated as part of the Master Plan as “Camp Bay” to be developed as a federal camp ground and for picnicking. (*Ex.* 82, bates 88).

As part of the Albeni Falls project the United States obtained “Warranty Easements” in 1952 and 1953 with the Van Schravendyks (then owners of the Green Property) and the Fosters and the Shaws (then owners of the Grubb Property and the Cedarside Lots). (*Ex.* 77). Through these warranty deeds, the owners of the land upon which South Camp Bay is located granted easements to the “United States and its assigns” the following: (1) the right to flood a portion of the lake front properties as a result of the Albeni Falls Dam; **and** (2) for access over all existing roads. (*Id.*).

36 CFR 212.7(b) provides for the acquisition of rights of way by the government through easements in expressly this manner:

(b) Acquisition of easements and rights of use. Except as otherwise provided in the regulations of this part, easements for road and trail construction across non-Federal lands and easements or rights of use over non-Federal roads and trails will be acquired in the name of the **United States of America and its assigns**. The easements or rights of use may be acquired by purchase, condemnation, donation, or as a reciprocal for permits or easements for roads or trails to be constructed or for **easements** over or permits to use existing roads or trails.

Accordingly, these easements granted by the Van Schravendyk’s, Fosters, and Shaws to the U.S. Government and its assigns allow the public to utilize South Camp Bay Road for any purpose, including, but not limited to, the proposed camp ground on the U.S.F.S. property over

which the Latvalas currently access their Sulphide parcel. South Camp Bay Road is a public roadway, albeit not maintained by the public, as are many public roads in Bonner County.

Based upon this evidence, the Latvalas respectfully submit that should this Court reverse the District Court's findings as to a prescriptive easement, then this Court should remand to the trial court for a decision regarding whether the public has a right of access over South Camp Bay Road.

II. ATTORNEYS' FEES AND COSTS ON APPEAL

Idaho Code § 12-121 and I.A.R. 41 permit the recovery of attorney fees to a prevailing party when an appeal is brought frivolously or without foundation. *Minich v. Gem State Developers, Inc.*, 99 Idaho 911, 918, 591 P.2d 1078, 1085 (1979). Where an appeal merely asks the Court to reweigh the evidence, it is brought without foundation. *Kelley v. Yadon*, 150 Idaho 334, 338, 247 P.3d 199, 203 (2011).

The Appellants advanced arguments not raised to the District Court and other arguments on appeal which amount to nothing more than a request that this Court reweigh the conflicting evidence and substitute its opinions about that evidence for that of the trial court. Where an appeal merely asks the Court to reweigh the evidence, it is brought without foundation and attorneys fees and costs should be awarded to the prevailing party.¹

¹ In *Pelayo v. Pelayo*, 154 Idaho 855, 866, 303 P.3d 214, 225 (2013), this court found: "In this case, Bertha is the prevailing party and we find that Pedro has pursued this appeal frivolously and without foundation. He has merely retreaded arguments made without success below. We are asked to second-guess decisions that were properly made by the magistrate judge and upheld by the district judge. Accordingly, Bertha is entitled to attorney fees under I.C. § 12-121"

III. CONCLUSION

The District Court's findings that the Latvalas' property is benefitted from an appurtenant easement by prescription for ingress, egress and utilities inclusive of access for residential purposes should be affirmed. The District Court's finding is not clearly erroneous as it is, in all respects, supported by substantial evidence. However, in the event that this Court reverses that decision, then the Lavalas ask that the Court remand this matter to the District Court for resolution of the issues of the Latvalas' claim for condemnation of a right-of-way to a patented mining claim including for residential purposes and for a declaratory ruling as to whether South Camp Bay Road is open to the public.

DATED this 1st day of July, 2020.

BERG, McLAUGHLIN & NELSON, CHTD.

/s/ Toby McLaughlin
TOBY McLAUGHLIN
Attorney for Plaintiffs

