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***EASEMENTS &
ENCROACHMENTS***

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**PARSONS
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The Basics

- An **easement** (whatever the **source**) is a right of use over the property of another.
- The **easement holder** has the right to use the easement for specific purposes (the **scope**).
- The **underlying landowner** has the right to continue to use the land for any purpose that does not interfere with the easement (no **encroachments**).

The Statutes: Idaho Code Title 42, Chapters 11 & 12

42-1102: Rights/duties for purposes of irrigation:

- 1) Cleaning, maintenance and repair;
- 2) Entrance upon the land;
- 3) Occupation necessary to properly do the work;
- 4) Personnel and equipment commonly used;
- 5) Remove & deposit vegetation/debris on banks, but only width absolutely necessary for deposits;
- 6) Remove/control vegetation in ditch/along banks.

The Statutes: Idaho Code Title 42, Chapters 11 & 12

42-1203 and 42-1204: Duties/rights:

- 1) Maintain embankments in good repair;
- 2) Maintain ditches and embankments in good repair and condition so as not to damage property;
- 3) Requires reasonable care, not strict liability;
- 4) Not responsible for acts/omissions of others;
- 5) Rights same as set forth in 42-1102.

The Statutes: Idaho Code Title 42, Chapters 11 & 12

42-1102: Limitations on landowners:

- 1) Existence of visible ditch, etc. is notice to landowner of the rights set forth in statute;
- 2) No encroachments without written permission (effective 2004);
- 3) May not unreasonably or materially interfere with use and enjoyment of rights;
- 4) Encroachments removed at violator's expense, upon request of right holder (includes self-help)

The Statutes: Idaho Code Title 42, Chapters 11 & 12

42-1209: Irrigation/Drainage Entities: Ditto 42-1102

42-1207: Change of Ditch (relocation/pipe):

- 1) Landowner needs written approval (1994/2002);
- 2) May not impede flow or injure users;
- 3) At landowner cost, plus increased OMRR;
- 4) Ditch owner may bury into pipe at own cost;
- 5) Pipe installation to meet recognized standards.

The Issues: Emerging Case Law Developments

Challenges regarding scope of easement:

- 1) Right to enter the land: Who decides where?
- 2) Width of land occupied: What is necessary to properly do the work with personnel/equipment?
- 3) Right to deposit debris/vegetation on banks: Do the materials need to be removed from the bank?
- 4) Right to maintain: Can a schedule be imposed?
Can advance notice to the landowner be required?
- 5) Maintenance of embankments: Scope?

The Issues: Emerging Case Law Developments

Encroachment questions:

- 1) What constitutes written permission?
- 2) Size of buried pipe/culverts: Who decides?
- 3) Fences: With gates and without gates.
- 4) Bridges: Does it matter if it is removable?
- 5) Trees: Remove early or when they interfere? Is tree removal maintenance/cleaning or removal of an encroachment - or both?

The Future

The role of the Courts and the State Legislature:

1) Idaho Supreme Court precedent and rulings.

2) Additional changes/updates to Idaho Code -

*42-1102, -1203, -1204, -1207 and -1209.

*Enacted in 1881, 1899, 1907 and 2004.

*Amended in 1994, 1996, 2002, 2004, 2005, 2011, 2012 and 2019.