



For this year, the Company only intends to engage in vegetation removal on the south ditch depicted on the map up to the headgate (depicted with a green dot), and then remove vegetation on the north ditch downstream of the headgate. The Company does not intend to do other vegetation removal for other parts of its delivery system associated with Dry Creek this year, but may in the future as necessary.

Based on some of the communications we have received, the claim has been made that the ditches depicted on the above map is or are the natural channel(s) of Dry Creek. This is simply not the case. The blue line above depicts the approximate location of the original Dry Creek channel that existed in the early 1900s, but over time, has deteriorated and is no longer an active channel because of upstream diversion of Dry Creek water for irrigation, including by the Company pursuant to its water right from Dry Creek (Water Right No. 22-4140). Under Idaho law, Creek channels can lose their character as a natural watercourse. *See, Dayley v. City of Burley*, 96 Idaho 101, 103, 805 P.2d 1073, 1075 (1974) (Idaho Supreme Court affirmed a finding that a creek bed no longer constituted a natural watercourse in a circumstance where no regular, non-surface waters had flowed down the creek bed since construction of a dam years earlier, some portions of the creek bed been filled, and some portions of the creek bed were farmed or even had homes built on the creek bed).

The water channels where the Company is performing willow/tree removal (both the north channel and south channel) may appear to be natural channels, but they are not—they are ditches. This is also evident from the straight sections of the ditch as shown on the above map.

The purpose of this letter is to summarize Idaho law on the rights and obligations that an irrigation entity, such as the Company, has relative to its water delivery system, including the ditches associated with Dry Creek.

## **1. DITCH AND EASEMENT RIGHTS IN GENERAL**

Idaho's economy is very dependent on water. "The water of this arid state is an important resource. Not only farmers, but industry and residential users depend upon it." *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 904, 792 P.2d 926, 929 (1990). Furthermore, as stated by the Idaho Supreme Court, "[b]ecause Idaho receives little annual precipitation, Idahoans must make the most efficient use of this limited resource." *Id.*

The canals and ditches that deliver this important resource to farms, residences, and other facilities are just as important as the water itself. However, even though the right to use water and the right to deliver water are tied together, these rights are not the same. On many different occasions, the Idaho Supreme Court has been quite clear that easement matters and water rights matters are **separate**:

"In Idaho, ditch rights and water rights are separate and independent from one another."

*Zingiber Inv., LLC v. Hagerman Highway Dist.*, 150 Idaho 675, 249 P.3d 868 (2011); See also *Beach Lateral Water Users Ass'n v. Harrison*, 142 Idaho 600, 130 P.3d 1138 (2006) ("Although a

ditch easement typically concerns the conveyance of water, it is ‘a property right apart from and independent of questions of water rights.’) (quoting *Savage Lateral Ditch Water Users’ Ass’n. v. Pulley*, 125 Idaho 237, 242, 869 P.2d 554, 559 (1993)). Thus, the “right for the conveyance of water is recognized as a property right apart from and independent of the right to the use of the water conveyed therein” and “[e]ach may be owned, held and conveyed independently of the other.” *Simonson v. Moon*, 72 Idaho 39, 47, 237 P.2d 93, 98 (1951).

Canals and ditches exist either (1) through formal grant of an easement described in a legal instrument which is recorded in county records, or (2) more commonly by virtue of a “prescriptive easement” obtained through many years of unobjected-to use of the ditch. Most canals and ditches in Idaho exist by virtue of a prescriptive easement. But no matter how an easement came to exist, they are all equally valid and worthy of protection as a real property right. See Idaho Code § 55-101 (“Real property or real estate consists of: 1. . . . ditch and water rights.”).

An easement is a property right. Concerning these rights, Idaho Code § 42-1102 provides that “[t]he existence of a visible ditch, canal, or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate, that the owner of the ditch, canal, or conduit has the right-of-way and incidental rights confirmed or granted by this section.” This principle was articulated by the Idaho Supreme Court as follows:

The owner of an irrigation ditch has an easement right in land upon which the ditch is located. See I.C. § 42-1102. The owner of the ditch is the dominant estate holder, whereas the landowner where the ditch is located is the servient estate holder. See, e.g., *Abbott v. Nampa Sch. Dist. No. 131*, 119 Idaho 544, 549–50, 808 P.2d 1289, 1294–95 (1991).

*Bratton v. Scott*, 150 Idaho 530, 248 P.3d 1265 (2011).

The Company’s water rights have priority dates from as far back as 1892, which means that the Company has existed since 1892. This means that its canal system has been in place since that time—for over 130 years—to deliver water. The Company’s system exists by virtue of prescriptive easements. Because of these easements, the Company is entitled to legal protection as described herein.

## 2. THE OWNER OF A DITCH RIGHT

In the context of an irrigation system easement, it is important to understand how the Idaho Supreme Court have defined “ditch owner” and “landowner”:

Zingiber argues that it is both a ditch owner and a landowner under I.C. § 42-1207. “Where a statute is unambiguous, statutory construction is unnecessary and courts are free to apply the plain meaning.” *Hayden Lake Fire Prot. Dist. v. Alcorn*, 141 Idaho 307, 312, 109 P.3d 161, 166 (2005). Ambiguity exists where reasonable minds might differ as to interpretations of the statute. *State v. Doe*, 140 Idaho 271, 274, 92 P.3d 521, 524 (2004). While the district court found that the language of “ditch owner” and “landowner” in the statute was ambiguous, this Court holds that given the nature of a ditch right, the language of the statute is clear.

**Because a ditch right acts as an easement, the “ditch owner” the statute refers to is the owner of the dominant estate, and the “landowner” the statute refers to is the owner of the servient estate.** *See also* Act of March 22, 1994, ch. 151, 1994 Idaho Sess. Laws 345, 345 (1994) (stating the purpose of I.C. § 42–1207 is “to allow a ditch owner to bury his ditch on the property of a landowner servient estate to such ditch easement so long as the construction is at standard specifications”). With this clarification in mind, the language of the statute is clear.

*Zingiber Inv., LLC v. Hagerman Highway Dist.*, 150 Idaho 675, 682, 249 P.3d 868, 875 (2011), partially overruled on attorney fees issue only by *City of Osburn v. Randel*, 152 Idaho 906, 277 P.3d 353 (2012).

Accordingly, the Company is the “ditch owner” and possesses the “dominant estate” because it owns the easement, and the underlying landowner possesses the “servient estate”. Because the Company is owner of an easement that crosses private property, the Company has legal rights that must be understood and respected, as further described below.

### **3. DITCH OWNER’S RIGHTS**

Idaho Code § 42-1102 states very clearly that in addition to the easement rights associated with a ditch, canal, or other conduit, ditch owners have what are often referred to as “secondary easements,” which are the rights to enter the lands across which the right-of-way extends for purposes of cleaning, maintaining, and repairing the canal or ditch. It also includes the right to deposit debris or other matter on the banks of the ditch to properly clean and maintain it, as necessary. Like the primary ditch easement, the secondary access easement rights are also protected.

The reason Idaho law provides for secondary easements is also explained in Idaho Code § 42-1102, which states very clearly that the canal or ditch owner is liable to underlying landowners for the damages associated with negligence in maintaining the delivery system, such as property damage from a ditch breach that floods property (not associated with an act of God or circumstance under which the canal owner does not have control). This principle is also articulated in Idaho Code § 42-1204, which again states very clearly that ditch owners are obligated to maintain their ditches and canals to ensure that there is no injury to the property or premises of another.

There is no standard statutory width or other size description of the scope of secondary easements. Idaho Code §§ 42-1102 and 42-1204 explain what types of equipment the canal owner is entitled to use within the secondary easement and what maintenance work may be done on a canal. The specific portion of Idaho Code § 42-1102 is quoted, with our emphasis, here:

- (2) The right-of-way for a ditch, canal, or other conduit shall include but is not limited to the reasonable exercise of the following rights:
  - (a) The right to enter the land across which the right-of-way extends for the purposes of accessing, inspecting, operating, cleaning, maintaining, and repairing the ditch, canal, conduit, embankments, and irrigation structures, and to occupy such width of the land along the ditch, canal,

conduit, and embankments as is necessary to properly perform such work with personnel and with such equipment as is commonly used or is reasonably adapted to that work.

(b) The right to **remove** from the ditch, canal, conduit, embankments, and irrigation structures the debris, soil, **vegetation**, and other material the ditch, canal, or conduit owner or operator reasonably deems necessary to properly access, inspect, operate, clean, maintain, and repair them. The owner or operator has the right and discretion to transport the material from the right-of-way, to utilize the material for reconstruction, repair, or maintenance of the ditch, canal, conduit, embankments, irrigation structures, and related roads and access areas, and to deposit and leave the material within the right-of-way, provided that the deposits occupy no greater width of land along the ditch, canal, conduit, and embankments than is reasonably necessary.

(c) The right to occupy the right-of-way during any season of the year to perform the work of operating, cleaning, maintaining, and repairing the ditch, canal, conduit, embankments, and irrigation structures, without prior notice to the owner or occupant of the land across which the right-of-way extends.

(d) The owner or operator of the ditch, canal, or conduit is not obligated to maintain or control the right-of-way or vegetation for the benefit of the owners or claimants of lands of others.

As expressly stated, the Company has the right to remove vegetation from its ditches. Further, as to the extent of the Company's rights, the width of the secondary easement depends on the circumstances surrounding each canal. Most canal companies believe that a width of approximately 15-20 feet is appropriate. This is because a track hoe has a swing radius of 14 feet, and other maintenance equipment may require some additional space. A recent case that arose locally was upheld on appeal before the Idaho Supreme Court and provides guidance as to what amount of space is generally needed for secondary easement rights for another commonly-used piece of equipment for canal maintenance—mowing equipment. In *Morgan v. New Sweden Irrigation District*, 156 Idaho 247 (2014), the Idaho Supreme Court upheld the district court's determination that **sixteen (16) feet** was an appropriate secondary easement width on each side of New Sweden's canal as that was the width of the mower. Material interference may also entitle Company to damages should it pursue an action to recover them. See *Bratton v. Scott*, 150 Idaho 530, 537-38, 248 P.3d 1265, 1272-73 (Idaho 2011).

### ANALYSIS

The ditches where the Company is performing vegetation removal are, in fact, ditches, and not the natural channel or natural channels of Dry Creek. The Company has the statutory right to remove vegetation on these ditches and deposit the removed vegetation on the ditch bank as is deemed necessary. Accordingly, we request that you do not interfere with the Company's lawful actions as it appropriately and legally maintains its ditches.

If you have any questions concerning the contents of this letter, you can contact us at 208-523-0620 or [rharris@holdenlegal.com](mailto:rharris@holdenlegal.com).

Best Regards,



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