



REGAN v. OWEN:

SUPREME COURT DOCKET NO. 43848
KOOTENAI COUNTY NO. CV-2011-2136

*FORECLOSURE OF EASEMENTS
VIA TAX DEEDS, OR . . .
AVOIDING A TAKINGS NIGHTMARE*

Macomber Law, PLLC
Presenter: Art Macomber
May 2, 2018

BACKSTORY

- An original subdivider miscalculated parcel configuration along a section border, and an “orphan parcel” was born.
- An east-west roadway was constructed through the orphan parcel along the north side of Owens’ deeded lands.
- The roadway led westerly from Bonnell Road to Regans’ parcels.
- Non-payment of property taxes sent the orphan parcel to tax sale, and Owen bought it. No notice was given to Regan, because the roadway easement was prescriptive.
- Owen then blocked Regan’s use with gates and various strategems. Regan sued to affirm his prescriptive rights to the roadway.

CLE PRESENTATION CONTENT

- What is an “encumbrance?”
- Idaho Code § 63-1009 (2014)
- What is “absolute title?”
- The 2014 Decision: Easements are encumbrances, and tax deeds erase encumbrances unless . . .
- 2016 Legislation amending Idaho Code § 63-1009
- The September 2016 State Supreme Court Decision
- The December 2017 Decision on Rehearing

WHAT IS AN ENCUMBRANCE ?

- Idaho Code § 55-613. ENCUMBRANCES DEFINED.

“The term ‘encumbrances’ includes taxes, assessments, and all liens upon real property.”

- Notice the word “**includes**” indicates things other than the items that appear on the list.
- Notice the **financial character** of the words on the list.
- Black’s states an “encumbrance” is “[a] claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage; any property right that is not an ownership interest.”

Black’s Law Dict., 10th Ed. at 644 (2014).

EFFECT OF A TAX DEED IN 2014

In 2014, Idaho Code § 63-1009 stated:

“The [tax] deed conveys to the grantee the **absolute title** to the land described therein, **free of all encumbrances** except mortgages of record to the holders of which notice has not been sent as provided in section 63-1005, Idaho Code, any lien for property taxes which may have attached subsequently to the assessment and any lien for special assessments.”

Regan v. Jeff D., 339 P.3d 1162, 1168 (2014) (Emphasis added).

What is “absolute title?”

- Neither the Idaho Constitution, nor its statutes or case law define “absolute title.” At oral argument in 2016, Regans argued “absolute title” was not the “bundle of sticks” as suggested by Justice Eismann, but temporal in nature.
- Regans argued **absolute title** is not the sum total of all property interests, including the right to cross over, but **perpetual title**, unthreatened by loss of title by reversions, remainders, or other defeasible interests, or title defeasible by third-party monetary claimants such as lienholders, foreclosure, or levies on judgments. This accords better with its common law origins. I.C. § 73-116.



COMMON LAW MEANING OF ABSOLUTE TITLE



“A fee therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have . . . and, when the term is used simply, without any other adjunct, or has the adjunct of simple annexed to it, (as, a fee, or, a fee-simple) it is used in contradistinction to a fee conditional at the common law, or a fee-tail by the statute; importing an **absolute inheritance**, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral.”

Blackstone’s Comm., Bk. 2, Chp. 7 (1768) (emphasis added).

THE 2014 DECISION:

REGAN v. JEFF D., 339 P.3D 1162 (2014)

THE HOLDING AND THE GUIDANCE

- Holding: (1) Owens' deed could not be reformed to include the orphan parcel with other Owen lands due to a mutual mistake of predecessor landowners, and (2) the district court did not find Regans had proven the prescriptive easement by clear and convincing evidence.
- Guidance on remand: Easements are encumbrances, and tax deed issuance eradicates encumbrances unless they are "essential to the enjoyment of the land and enhance the land's value."

Regan v. Jeff D., 339 P.3d 1162 (2014); citing I.C. § 63-1009.

THE 2014 DECISION: *REGAN v. JEFF D.*, 339 P.3D 1162 (2014)

EASEMENTS ARE ENCUMBRANCES . . .

“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.*”

Regan v. Jeff D., 339 P.3d 1162, 1169 (2014).

THE 2014 DECISION:

REGAN v. JEFF D., 339 P.3D 1162 (IDAHO 2014)

. . . AND TAX DEEDS ERASE ENCUMBRANCES.

- “The tax deed conveyed to the county absolute title to the Orphan Parcel ‘free of all encumbrances except mortgages of record to the holders of which notice has not been sent . . .’” *Id.* at 1168; citing I.C. § 63-1009.
- “There is no finding by the district court that the alleged prescriptive easement across the Orphan Parcel increased its value.” *Id.*
- But the Court stated, “When the county received the tax deed to the Orphan Parcel, . . . [it] 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.” *Id.* at 1168. Remanded back to District Court.

2016 LEGISLATIVE CHANGES TO IDAHO CODE § 63-1009

- “On March 30, 2016, several months after Regans filed their appeal, Governor Otter signed Senate Bill 1388 into law. Section 1 of Senate Bill 1388 contains a lengthy statement of legislative intent wherein this Court's decision in *Regan I* [2014 Decision] is mentioned by name and the district court's subsequent determination that Idaho Code section 63-1009 extinguished the Regans' private access easement is expressly rejected. 2016 Idaho Sess. L. ch. 273, § 1, p. 750. Section 1 further declares: “[a]s its context should have made evident, the purpose of Section 63-1009, Idaho Code . . . has always been to convey title absolutely free and clear of liens and mortgages of a monetary nature.” *Id.* Senate Bill 1388 amended Idaho Code section 63-1009 to remove the reference to “encumbrances” and to more clearly state that the title conveyed by tax deed is the same as that of the ‘record owner.’”

Regan v. Owen, 2017 Op. No. 98 (Sept. 8, 2017)

2016 LEGISLATIVE CHANGES TO IDAHO CODE § 63-1009

Due to the emergency clause in Senate Bill 1388, the amended I.C. § 63-1009 took effect March 30, 2016. That statute now states:

“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.”

History: [63-1009 added 1996, ch. 98, sec. 11, p. 386; am. 2016, ch. 273, sec. 7, p. 758.]

Sept. 2016 Decision on Appeal After 2014 Remand Decision in District Court

Justice Horton: “This case presents the issue whether a prescriptive easement across a parcel of land was extinguished by operation of former Idaho Code section 63-1009[1] when that parcel was sold by tax deed.”

Regan v. Owen, 2017 Op. No. 98 (Sept. 8, 2017).

Holding #1: “[A]mendments to Section 63-1009 have only prospective effect.”

Id. at 4.

Holding #2: “The [2014] guidance we offered for resolution of the issues on remand is controlling for disposition of the issues in this case,” and “the district court correctly applied the more specific rule of Idaho Code section 63-1009,” thus “the district court correctly concluded that the easement was an encumbrance for purposes of Idaho Code section 63-1009 and was extinguished by issuance of the tax deed.”

Id. at 5.

2018 DECISION ON REHEARING

- Justice Brody: “This case addresses whether the issuance of a tax deed extinguishes a prescriptive easement across a parcel of land by operation of former Idaho Code section 63-1009.” *Regan v. Owen*, 2018 Op. No. 19 (Mar. 5, 2018).
- Decision #1: “The Court’s discussion of Idaho Code section 63-1009 and *Hunt v. Bremer* in *Regan I* [2014 Decision] was dicta—it was not necessary to the decision,’ thus it was not the law of the case. *Id.* at 4.
- Decision #2: “[T]he Legislature intended the term ‘encumbrance’ to be construed narrowly in the sense of a financial interest.” *Id.* at 10.
- Holding: “[I]t was error for the district court to enter summary judgment in favor of the Owens based on I.C. § 63-1009,” because “[a]n easement appurtenant to another lot, when created by conveyance, attaches to the possession of that other lot and ‘follows it into whosoever hands it may come.’ ***The owner of the dominant estate owns the easement.***” (Not the delinquent taxpayer!) (Emphasis). *Id.* at 9; citing *Engel v. Catucci*, 197 F.2d 597 (D.C. Cir. 1952).

2018 DECISION ON REHEARING

Action: “We vacate the judgment entered in favor of the Owens and remand this case for further proceedings.” *Id.* at 2.

QUESTIONS NOW?

QUESTIONS LATER:

Art Macomber

art@macomberlaw.com

208-664-4700