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An Agricultural Law Research Article

**The Laws of Nuisance and Trespass as
They Impact Animal Containment
Operations in Idaho**

by

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THE LAWS OF NUISANCE AND TRESPASS AS THEY IMPACT ANIMAL CONTAINMENT OPERATIONS IN IDAHO

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I. INTRODUCTION

In Idaho, if one contains or intends to contain any number of animals, especially in large numbers such as in the context of a cattle feedlot or a dairy, the published rules and regulations dealing with zoning,¹ environmental protection,² water quality³ and other rules⁴

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1. See IDAHO CODE § 67-6529 (1989).

2. See Federal Water Pollution Prevention and Control Act, 33 U.S.C. §§

will most likely not be your most threatening obstacle. The nebulous and highly subjective law of nuisance may be the hardest hurdle to identify objectively, or to be able to determine how to satisfy, while the hypersensitive and unyielding law of trespass may be the most difficult hurdle to avoid. If a neighbor does not like the odor, dust or other conditions created by a Concentrated Animal Feeding Operation (CAFO), he/she may ask the court to enjoin the practices causing the objectionable condition(s), irrespective of the fact that your CAFO complies with all known laws, rules and regulations, other than nuisance and/or trespass. In most cases, an objection based on nuisance and/or trespass will be a request for a permanent injunction, closing down the CAFO totally. One might objectively believe that some method of alternative management system might be undertaken to rectify any conditions of which there are complaints. While that may be theoretically possible, the reality of the majority of these cases is that once the complaining party(s) decides to take action, it becomes a situation where no odor, dust or noise, no matter how minor, is acceptable.

In Idaho, anyone wishing to contain any animals has to meet certain federal, state and local laws or regulations.⁵ With larger numbers of animals, there are often more laws and regulations that apply, depending on the number of animals at a location.⁶ However, this article assumes that local, state and federal laws, ordinances and regulations, have been satisfied, except for the laws of nuisance and/or trespass. This would include, but not necessarily be limited to, all zoning laws and regulations, all EPA and Department of Environmental Quality (DEQ) rules and regulations,⁷ except the laws of nuisance and/or trespass. Furthermore, this article will only discuss the application of the laws of nuisance and trespass regarding their

1251-1387 (1988 & Supp. IV 1992); The National Pollutant Discharge Elimination System, 40 C.F.R. § 122 (1992); IDAHO CODE §§ 39-3601 to -3621 (1993).

3. See, e.g., Federal Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251-1387 (1988 & Supp. IV 1992); IDAHO CODE §§ 39-3601 to -3621 (1993); The National Pollutant Discharge Elimination System, 40 C.F.R. § 122 (1992);

4. See IDAHO CODE §§ 37-301 to -343 (1977 & Supp. 1993).

5. See *supra* notes 1-4.

6. The Environmental Protection Agency (EPA) is issuing a general permit that will apply to CAFOs with more than 300 animal units, and may apply to CAFOs with less than 300 animal units if they are significant contributors of pollution as determined by EPA. DIVISION OF ENVIRONMENT, WATER QUALITY BUREAU, IDAHO DEPARTMENT OF HEALTH & WELFARE, WATER QUALITY REPORT, IDAHO WATER MANAGEMENT GUIDELINES FOR CONCENTRATED ANIMAL FEEDING OPERATIONS, vi (1987).

7. See IDAHO CODE § 67-6529 (1989)

unique application to CAFO's, with an emphasis on large CAFOs, such as feedlots and dairies. Many of the principles being discussed would be equally applicable to almost any CAFO, at least to some degree.

II. THE LAW OF NUISANCE

The law of nuisance in Idaho is set forth in Idaho Code Title 52 section 101.⁸ There is both a Private Nuisance statute⁹ and a Public Nuisance statute.¹⁰ Note, however, that pursuant to Idaho Code section 52-204,

a private person can bring an action for a public nuisance "if it is specially injurious to himself."¹¹ The term "specially injurious" has been defined in Idaho to mean "[the plaintiff] will be specially injured in a different way from the public generally or *deprived from the free use of his own private property.*"¹² In the CAFO context, this only eliminates those parties unaffected by a nuisance from bringing a public action. In literally all nuisance actions the party alleges an interference with the enjoyment of their property, so they have both a private and public cause of action.

The existence of two causes of action may not be terribly significant, however, because the focus of both the private and public nuisance statutes are the same, anything "offensive to the senses."¹³

8. IDAHO CODE §§ 52-101 to -417 (1988).

9. IDAHO CODE § 52-111. Section § 52-111 states:

Anything which is injurious to health or morals, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. In the case of a moral nuisance, the action may be brought by any resident citizen of the county; in all other cases the action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered.

Id.

10. IDAHO CODE § 52-102. "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." *Id.*

11. IDAHO CODE § 52-204(2). Section § 52-204(2) states: "A private person may maintain an action: 1. For a moral nuisance, if he be a resident citizen of the county, whether the nuisance complained of is specially injurious to him or not. For any other public nuisance, if it is specially injurious to himself." *Id.*

12. *Stricker v. Hillis*, 15 Idaho 709, 714, 99 P. 831, 832 (1909) (emphasis added).

13. IDAHO CODE § 52-111. Section §52-111 states: "Anything which is injuri-

Query: What does "offensive to the senses" mean? As opined by Dr. Ronald Miner, an Agricultural Engineer for the Bioresource Department at Oregon State University, Corvallis, Oregon, smell is in the opinion of the recipient.¹⁴ That which is pleasant to one, may be obnoxious to another. That which is expected and ordinary to one, may be unacceptable to another. That which one may identify as an ordinary country smell, another may find intolerable. So, how does one who wishes to operate a CAFO determine what is acceptable? Due to the subjective nature of odor, it is probably fair to say that if one is near many (another hard to define term) neighbors, one will eventually find some who believe that any odor produced is unacceptable. So, as an animal producer/feeder/milker or dairyman, what does one do? From a practical view point, if one is attempting to establish a CAFO, it is best to look for a location with few, if any, close neighbors, and the further away from neighbors the better. If there is an established CAFO, then one must look to Idaho case law, with assistance from those other states which have similar animal confinement situations.

A. Nuisance: Public Policy

In 1985, the Idaho Supreme Court wrestled with the issue of defining the nuisance law in *Carpenter v. Double R Cattle Co.*¹⁵ The Idaho Supreme Court expressly rejected the Idaho Appellate Court's position, as well as the Restatement (Second) of Torts and held that *McNichols v. J.R. Simplot Co.*¹⁶ was still the law in Idaho concerning nuisance. The Idaho Supreme Court set forth its rationale and the public purpose behind its decision:

The State of Idaho is sparsely populated and its economy depends largely upon the benefits of agriculture, lumber, mining and industrial development. To eliminate the utility of conduct and other factors listed by the trial court from the criteria to be considered in determining whether a nuisance exists, . . . would place an unreasonable burden upon these industries. We see no policy reasons which should compel this

ous to health . . . or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance" *Id.*

14. Telephone Interview with Dr. Ronald Miner, Bioresource Department, School of Agriculture, Oregon State University (additional information on file with author).

15. 108 Idaho 602, 701 P.2d 222 (1985).

16. 74 Idaho 321, 262 P.2d 1012 (1953).

Court to . . . depart from our present law.¹⁷

The determination of whether a nuisance exists is a question of equity; therefore, it is a question for the judge.¹⁸ A jury may be requested to render a verdict on the issue of the existence of a nuisance, for there will most likely be a jury if any damages are requested (damages being a factual matter for a jury to decide), but any verdict rendered by the jury will be strictly advisory.¹⁹ In addition, as experienced litigators know, a judge, like any other human being, is susceptible to subjective influence. The law in Idaho is clear that the party complaining of the existence of a nuisance and requesting an injunction has the burden of proving a right to the injunction.²⁰ Yet, in most nuisance cases, there will be several plaintiffs, possibly even a municipality or other public entity, against a single business. The mere weight of the five, ten, twenty or more people coming in and testifying that the odor is "offensive to the senses," and therefore interfering with the free use of their property is difficult to objectively rebut. Having five, ten or twenty others testify that they do not believe the odor, noise and/or dust is offensive does not really rebut the prior testimony, for even if it is not offensive to some, that does not mean that it is not offensive to the others. So, how does one disprove a nuisance? In absolute terms, it cannot be done!

To prevail in a nuisance case, one must to look to the other factors of the law set forth in *McNichols* and *Carpenter* and try to persuade the court to follow the principles and factors forming Idaho's law and public policy. The essence of the nuisance standard in Idaho is that each case must be decided on its own merits and the guiding criterion is "[w]hat is reasonable under all circumstances" ²¹

Whether a nuisance exists consists of two basic facets. First, there is the appropriate standard by which to weigh the testimony and evidence, and second there is the type of testimony and evidence to be considered. Therefore, it is first imperative to identify the appropriate standard for the court to apply in evaluating whether a nuisance exists, as opposed to whether odor, noise and/or dust exist.

17. *Carpenter*, 108 Idaho at 608, 701 P.2d at 228.

18. *Id.* at 606, 701 P.2d at 226.

19. *Id.*; see also IDAHO R. OF CIV. P. 339 (IRCP) 52(a). IRCP 52(a) reads in part: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment" *Id.*

20. *Harris v. Cassia County*, 106 Idaho 513, 518, 681 P.2d 988, 993 (1984); *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389, 398, 405 P.2d 634, 639 (1965).

21. *McNichols*, 74 Idaho at 325, 262 P.2d at 1014.

B. Standard for Nuisance

Whether a nuisance exists depends upon whether the CAFO is "reasonable under all circumstances,"²² which, leaves the weighing process up to the Judge.²³ The court must consider the following factors in his/her evaluations:

1. The location of the properties of all parties;
2. Whether the CAFO's acts are in accordance with the standards and practices in its business;
3. Their respective dates of occupancy, if a complaining party moved into an agricultural neighborhood when the CAFO was in operation (even if the CAFO was later enlarged);
4. If the complaining party had knowledge of the situation at the time he/she moved into the area:
5. The locality, character and type of neighborhood;
6. The nature of the thing or wrong complained of;
7. The frequency or continuity; and,
8. The nature and extent or gravity of the injury, damage or annoyance resulting, if any; and,
9. The utility and social value of the CAFO.²⁴

Furthermore, these circumstances are to be judged by common sense, not by some "super-sensitive standard."²⁵ What is reasonable under all circumstances is the guiding criterion.

C. Factors Re: Nuisance

In determining whether a CAFO "unreasonably" invades the complaining party(s)' interest in the use and enjoyment of their land, the court is supposed to make an objective determination:

Whether or not the defendant's course of conduct unreasonably interferes with the plaintiff's use and enjoyment of [life, his (interest in) land or the buildings (structures) on the land] is determined objectively; which is to say that the question is not whether the plaintiff or defendant would regard the interference as being unreasonably, but whether reasonable persons generally looking at all the circumstances impartially and objectively, would consider it unreasonable.

22. *Id.*

23. *See Carpenter*, 108 Idaho at 608, 701 P.2d at 228.

24. *Id.* at 324-25, 262 P.2d at 1014.

25. *Id.*

Determining whether defendant's course of conduct is an unreasonable interference thus is a weighing process, and your consideration must be given to the interests of the plaintiff, to the interests of the defendant and to the interests of the community as a whole.²⁶

Finally, in keeping with the public policy enunciated by the Idaho Supreme Court, for a nuisance to exist, the court must conclude that the social usefulness of the CAFO is outweighed by the harm to complaining party(s).²⁷

The Idaho Jury Instruction (IDJI) 490-1 states that the CAFO must breach all of the following elements in order for them to be a nuisance:

1. Unreasonably injurious to health, or unreasonable offensive to the senses, or obstructs free use of the complaining parties land;
2. Under all of the circumstances (considering the factors set forth above), the CAFO unreasonably interferes with the complaining parties' enjoyment of his property or the enjoyment of his life while using the property; and,
3. That there are damages resulting therefrom and the amount thereof.²⁸

26. IDAHO JURY INSTRUCTIONS (IDJI) 491; see IDAHO CODE § 52-101; *Carpenter*, 108 Idaho at 604, 607, 701 P.2d at 224, 227 (rejecting RESTATEMENT (SECOND) OF TORTS § 822, 826 (1977)); *McNichols*, 74 Idaho at 321, 262 P.2d at 1012.

27. See *Carpenter*, 108 Idaho at 608, 701 P.2d at 228.

28. IDJI 490-1 states:

The plaintiff has the burden of proving each of the following propositions:

1. That the plaintiff owns [an interest in] land [or the buildings (structures) on land];
 2. That the defendant has engaged in a course of conduct which
 - a. constitutes a violation of section ___ of the statutes of Idaho, which section defines the crime of (name of crime) as follows:

(here quote or paraphrase the essential portions of the statute); or
 - b. is unreasonably injurious to the health; or
 - c. is unreasonably offensive to the senses; or
 - d. obstructs plaintiff's free use of his land [or buildings (structures)];
 3. That, under all the circumstances, the defendant's course of conduct unreasonably interferes with the plaintiff's enjoyment of his property or with the enjoyment of his life while using the property;
 4. The nature and extent of the damages and the amount thereof.
- If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff;

If any of these requirements elements do not exist, then there is no nuisance.

D. Evidence for Nuisance

What are the objections that most complaining parties raise regarding a nuisance? In reviewing the reported cases, they are almost universally the same. First, the complaint is odor, then dust, followed by an increase in flies and other insects, and possibly other allegations of contamination of the aquifer and/or the air.

How does one quantify the number of flies and where they come from? The complaining party will testify that there are many more flies than before and that they are coming from the CAFO. How does one defend these types of complaints? One possible method is to ask for a Jury/Judge view of the premises, for a personal inspection. This is effective regarding any of the evidentiary issues; however, a view is totally discretionary with the court,²⁹ and in many cases may be refused, as it was in *Payne v. Skaar*.³⁰ A view is also usually a single view, with everyone taking the chance that a true and accurate impression will occur on that one occasion.

How does one defend against allegations of increased dust? There are instruments that measure the number of particulate matter in the air, and it is possible to do spot checks of the complaining parties' properties, the perimeter of the CAFO and neutral areas for a comparison, but that does not prove that when the complaining parties were objecting to the dust, that it was not there. So, again, the issue of nuisance comes to a subjective interpretation of the differing view points of the parties testifying. It is also possible to get the weather records to demonstrate that dust could not have been traveling in a certain direction at a certain time, but that is not much help unless the complaints that are time specific, which most of them are not. It

but, if you find from your consideration of all the evidence that any of these propositions has not been proved, then your verdict should be for the defendant.

IDJI 490-1.

29. IRCP 43(f) states:

During a trial, the court, in its discretion, may order that the court or jury shall have a view of, (1) the property which is the subject of the action, or (2) a place in which any material fact occurred or in which any material thing is located, or (3) any other item, thing or circumstance relevant to the action.

IDAHO R. CIV. P. 43(f) (emphasis added).

30. *Payne v. Skaar*, Civil Case No. 42660 7th Jud. Dist. Ct. Idaho (Aug. 9, 1991).

is also possible to look for other sources of dust, especially if the dust might be coming from one of the complaining parties.

The most prevalent objection is always odor. Odor has several factors, its existence, its strength and its offensiveness. These are interrelated, but not mutually exclusive. While the offensiveness of an odor is strictly subjective, the strength and existence is not necessarily subjective. By using the scentometer, an experienced professional can lend some objectivity to the measurement of the strength of an odor. However, unlike some states,³¹ Idaho has no acceptable threshold of odor to measure an odor against, which leaves the CAFO operator in a totally subjective situation.

One can also obtain the weather records. Specifically the wind and temperature records, to verify or disprove the possibility of an odor existing at a specific time, since odor, as dust, is carried by the wind and generally cannot travel up wind and will not occur in most cold, winter conditions. However, again, one needs time specific odor objections to make use of this objective evidence, and it is this attorney's experience that even with definitive evidence that several of the complaining parties objections are physically impossible, the court tends to dismiss that as human error and still accept the complaining parties' complaints as truthful.

This leaves the CAFO operator in the position of being totally dependant upon the mostly subjective opinion of the court as to whether a nuisance exists, despite what the conditions being complained of are. There are experts who specialize in odor control and CAFOs. These experts can testify if the CAFO is being operated as well as it can be, they can testify whether it meets all industry standards and whether it is using state of the art operating techniques, but the Judge can still find it to be a nuisance, even if the experts find no operational problems.

E. Enforcement Re: Nuisance

What does the Judge do if he finds a nuisance to exist? If there is any way to lessen or abate the nuisance, the court must attempt that before closing down the CAFO.³² If there are damages being alleged,

31. Colorado, Illinois, Kentucky, Missouri, North Dakota, Nevada, Oregon and Wyoming have regulations for ambient odor which can be measured in dilutions to threshold by a scentometer. The regulatory limits often differ for residential, commercial, industrial, and other categories. TEXAS AGRICULTURAL EXTENSION SERVICE, TEXAS A & M UNIVERSITY, CATTLE FEEDLOT WASTE MANAGEMENT PRACTICES FOR WATER AND AIR POLLUTION CONTROL 13 (1993).

32. Jonathan M. Purver, Annotation, *Modern Status of Rules as to Balance*

those are for the jury to consider. In addition, the court's judgment regarding an injunction and the jury's awarded damages is different for different types of nuisances.³³

1. Injunction

Under Idaho case law, if the court were to determine that a private (or public) nuisance did exist, the court should only close the feedlot as a last alternative.³⁴ The court has the power, and is supposed to try to effectuate a remedy to alleviate any nuisance conditions before ordering the absolute closure of the CAFO.

As an alternative to granting full injunctive relief, many courts have sought to minimize the objectionable features of the activities conducted by the defendant while at the same time permitting the defendant to continue his CAFO.³⁵ "In this regard, it has been pointed out that the powers of the trial court are broad and the means flexible to shape and to adjust the precise relief to the requirements of the particular situation,"³⁶ and that if by application of certain appliances or methods the offending activities can be mitigated, "the activity should not be enjoined but only the unreasonable features of the activity prevented."³⁷ If the harmful nature of the defendant's conduct can be mitigated short of a total injunctive order, then the court should in the exercise of its equitable discretion enjoin only the objectionable features of the defendant's activities.³⁸

2. Damages

A jury, if requested, decides the issue of damages, which has two separate considerations of its own.³⁹ As Professor Dobbs noted in his treatise, *Law of Remedies*,⁴⁰ what may be "permanent" for statute of

of Convenience or Social Utility as Affecting Relief From Nuisance, 40 A.L.R. 3D 601, 617 (1971).

33. *Id.*

34. *See Hansen v. Independent School District*, 61 Idaho 109, 98 P.2d 959 (1939).

35. Jonathan M. Purver, Annotation, *Modern Status of Rules as to Balance of Convenience or Social Utility as Affecting Relief From Nuisance*, 40 A.L.R. 3D 601, 617 (1971).

36. *Id.*

37. Purver, *supra* note 35, at 608.

38. *See Hansen v. Independent School District*, 61 Idaho 109, 98 P.2d 959 (1939).

39. DAN B. DOBBS, *LAW OF REMEDIES* § 5.4, at 335 (1973); *see Shaw v. City of Rupert*, 106 Idaho 526, 527-28, 681 P.2d 1001, 1002-03 (1984).

40. DOBBS, *supra* note 39.

limitation purposes,⁴¹ may not be permanent for “damages” purposes.⁴² To determine what type of damages are appropriate, one is required to determine whether the injury is temporary or permanent.⁴³ According to *Shaw v. City of Rupert*,⁴⁴ injury is temporary “if the cause of injury is abatable or preventable and the injury is capable of rectification by reasonable restoration.”⁴⁵ For an injury to be permanent, the “cause of the injury would most likely be unabatable, thus indicating . . . an injury that would not be temporary.”⁴⁶ According to *Shaw*, “it is not necessary to prove future *certainly* in order to show permanent injury, but rather only future *probability*.”⁴⁷

Once it is determined whether the injury is permanent or temporary, the task becomes one of applying the definition to the following measures of damage:

If land is taken or the value thereof totally destroyed, the owner is entitled to recover the actual cash value of the land at the time of the taking or destruction with legal interest thereon to the time of the trial.

If the land is permanently injured but not totally destroyed, the owner will be entitled to recover the difference between the actual cash value at a time immediately preceding the injury and the actual cash value of the land in the condition it was immediately after the injury, with legal interest thereon to the time of the trial.

If the land is temporarily but not permanently injured, the owner is entitled to recover the amount necessary to repair the injury and put the land in the condition it was at the time immediately preceding the injury, with legal interest thereon to the time of the trial.⁴⁸

So, the Jury decides what, if any, damages to award, based on the foregoing.

41. See *supra* text and accompanying notes 69 to 97.

42. DOBBS, *supra* note 39, at 343.

43. DOBBS, *supra* note 39, at 335.

44. 106 Idaho 526, 681 P.2d 1001 (1984).

45. *Id.* at 528, 681 P.2d at 1003 (quoting *Alesko v. Union Pac. R.R.*, 62 Idaho 235, 240, 109 P.2d 874, 876 (1941)).

46. *Id.*

47. *Id.*

48. *Id.* at 527-28, 681 P.2d at 1002-03 (quoting *Young v. Extension Ditch Co.*, 13 Idaho 174, 182, 89 P. 296, 298 (1907)).

F. The Relationship Between Nuisance and Trespass

Most parties complaining of a nuisance also assert that the CAFO is generating substances that are intruding upon their property, i.e., trespassing. Specifically they generally allege that the CAFO produces odor, flies and dust that drift over and upon the complaining parties' properties. In Idaho, there is both criminal and a civil trespass.⁴⁹ The elements of the two are slightly different, the damages addressed by each are different, but both could be used in a nuisance suit. However, the civil statute, section 6-202,⁵⁰ provides for the awarding of treble damages and attorney's fees to the "prevailing" party.⁵¹ This can lead to frightening results because the trespass portion of a nuisance suit may be insignificant, however, it could expose the CAFO operator to a significant claim for attorney's fees, and any damages could be trebled, which could make them significant. In addition, the trespass claim includes factors over which no one living in the county has control, i.e., flies and dust. Note, that trespass should not extend to odor. According to *American Jurisprudence*, it is generally held that in order for a trespass action to exist,

[T]he invasion of the property [must] be physical and accomplished by a tangible matter. Thus, in order to be liable for trespass, one must intentionally cause some "substance" or "thing" to enter upon another's land.

Generally, all intangible intrusions, such as noise, odor, or light alone, are dealt with as nuisance cases, not trespass.⁵²

There are several jurisdictions that have held similarly.⁵³

49. IDAHO CODE § 6-202 (1990); IDAHO CODE § 18-7008 (1987 & Supp. 1993).

50. IDAHO CODE § 6-202. Section § 6-202 states:

Any person who, without permission of the owner, or the owner's agent, enters upon the real property of another person which property is posted with "No Trespassing" signs or other notices of like meaning, spaced at intervals of not less than one (1) notice per six hundred sixty (660) feet along such real property; . . . without lawful authority, is liable to the owner of such land, . . . for treble the amount of damages which may be assessed therefor or fifty dollars (\$50.00), plus a reasonable attorney's fee which shall be taxed as costs, in any civil action brought to enforce the terms of this act if the plaintiff prevails.

Id.

51. *Id.*

52. 75 AM. JUR. 2D *Trespass* § 35 (1991).

53. *See id.*

In *Wilson v. Interlake Steel Co.*,⁵⁴ the California Supreme Court addressed a trespass claim for damages arising out of noise emanating from the property of the defendant.⁵⁵ Defendant operated a steel fabricating plant that was in operation twenty-four hours a day.⁵⁶ There were multiple noises generated at that CAFO, however, the noise had not caused physical damage to any of the adjacent properties.⁵⁷ In finding that no cause of action for trespass existed, the court discussed trespass law as follows:

The rule has evolved in California that trespass may be committed by consequential and indirect injury as well as by direct and forcible injury. However, a distinction is perceived between noise-caused vibrations resulting in damage or injury and noise waves that are merely bothersome and not damaging; the latter does not constitute a trespass, but must be dealt with as a nuisance.

Noise alone, without damage to the property, will not support a tort action for trespass. Recovery allowed in prior trespass actions predicated upon noise, gas emissions, or vibration intrusions has, in each instance, been predicated upon the deposit of particulate matter upon the plaintiffs' property or on actual physical damage thereto.

All intangible intrusions, such as noise, odor, or light alone, are dealt with as nuisance cases, not trespass.

.....
The emission of sound waves alone, while possibly constituting actionable nuisance, does not support the application of traditional trespass principles. The highly respected torts authority, Dean Prosser, has noted that: "The distinction which is now accepted is that trespass is an invasion of plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it. The difference is that between walking across his lawn and establishing a bawdy house next door; between felling a tree across his boundary line and *keeping him awake at night with the noise of a rolling mill.*" In similar fashion, the distinction is succinctly expressed in comment d to section 821D of the Restatement Second of Torts: "A trespass is an invasion of the interest in the exclusive possession of land, as by entry

54. 649 P.2d 922 (Cal. 1982).

55. *Id.* at 923.

56. *Id.*

57. *Id.* at 924.

upon it A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession.⁵⁸

In *Padilla v. Lawrence*,⁵⁹ adjacent property owners sued the defendant who owned a plant that processed bark and manure for the purpose of packaging soil conditioner.⁶⁰ The plaintiff asserted numerous causes of actions, one of which was trespass.⁶¹ After the conclusion of the evidence, the trial court held that no trespass was established.⁶² This issue was appealed.⁶³ The New Mexico Court of Appeals addressed the issue as follows:

Plaintiffs contend that the trial court erred in not awarding additional damages for trespass because the trial court found that undesirable odors, blowing particulate matter, and loud noises from the plant had entered onto plaintiffs' property and adversely affected the property. Plaintiffs' argument, however, blurs the traditionally accepted distinction between nuisance and trespass.

A trespass is a direct infringement of another's right of possession. Where there is no physical invasion of property, as with intangible intrusions such as noise and odor, the cause of action is for nuisance rather than for trespass. The noises and odors from the plant were properly treated as nuisance, for which plaintiffs were compensated. The entrance onto the property of blowing particulate matter also is not actionable as trespass in the absence of a finding that the matter settled upon and damaged plaintiffs' property. The trial court made no such finding, and its refusal is supported by substantial evidence in the record. Plaintiffs' expert was unable to measure dust from the plant on any plaintiffs' property and noted that the dust clouds were dispersed as they left the plant site.⁶⁴

In summary, no claim of trespass, strictly based on odor, should prevail. As to those claims asserting dust and flies, although the Idaho courts appear to recognize a claim,⁶⁵ not all courts do.⁶⁶ The

58. *Id.* at 924-25 (citations omitted).

59. 685 P.2d 964 (N.M. Ct. App. 1984).

60. *Padilla*, 685 P.2d at 966.

61. *Id.*

62. *Id.* at 967.

63. *Id.*

64. *Id.* at 970-71 (citations omitted).

65. *Carpenter*, 108 Idaho at 608, 701 P.2d at 228; *McNichols*, 74 Idaho at

real risk in finding the trespass theory applicable is not the damages that might be recoverable, for those types of claims in nuisance suits are generally not very significant, and may be recoverable under nuisance theory anyway. Rather, the big risk is that the trespass law opens up the issue of attorneys' fees that otherwise would probably not be a factor in most nuisance cases, based on the present rule for recovery of attorneys fees in Idaho⁶⁷ and the subjective nature of such claims.⁶⁸

G. Statute of Limitations and Appellate Review

As inferred above, the application of the statute of limitations to a nuisance case revolves around the type of nuisance with which one is dealing.⁶⁹ The applicable statute of limitations include, but are not necessarily limited to Idaho Code sections 5-218 and 5-224.⁷⁰

In *Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.*,⁷¹ the Idaho Supreme Court held that Idaho Code section 5-224 applies to nuisance actions.⁷² The provision provides: "An action for relief not hereinbefore provided for must be commenced within four (4) years after the cause of action [has] accrued."⁷³ This statute of limitation provision controls actions for both public and private nuisance.⁷⁴ The critical question presented is when does the plaintiff's cause of action for nuisance accrue. According to several cases, the determination is dependent upon whether the nuisance is permanent or temporary.⁷⁵ If a nuisance is permanent, a "cause of action must be commenced within four years from the date the permanent nui-

325, 262 P.2d at 1014 (1953).

66. *See id.*

67. *Soria v. Sierra Pacific Airlines, Inc.*, 111 Idaho 594, 615, 726 P.2d 706, 727 *appeal after remand* 114 Idaho 1, 752 P.2d 603 (1986); *Jensen v. Westberg*, 115 Idaho 1021, 1028, 772 P.2d 228, 235 (Ct. App. 1988); IDAHO R. CIV. P. 54(e)(1).

68. *See* IDAHO CODE § 6-202.

69. DOBBS, *supra* note 39, at 343.

70. *See* IDAHO CODE §§ 5-218, 5-224 (1990).

71. 52 Idaho 766, 22 P.2d 147 (1933).

72. *Id.* at 778-79, 22 P.2d at 151 (1933) (citing *Boise Development Co., v. Boise City*, 30 Idaho 675, 680, 167 P. 1032, 1033 (1917)); *see also* *Aetna Casualty & Surety Co. v. Gulf Resources & Chem. Corp.*, 600 F. Supp. 797, 799 (D. Idaho 1985).

73. IDAHO CODE § 5-224.

74. *Aetna*, 600 F. Supp. at 800 (D. Idaho 1985).

75. *See id.*; *Beatty v. Washington Metro. Area Transit Auth.*, 860 F.2d 1117, 1125 (D.C. Cir. 1988); *Idaho v. Hanna Mining Co.*, 699 F. Supp. 827, 834 (D. Idaho 1987); DOBBS, *supra* note 39, at 343.

sance was created or [first] occurred."⁷⁶ If a nuisance is temporary, an action may be brought at any time to recover damages occurring within the previous four year period.⁷⁷ According to the court in *Idaho v. Hanna Mining Co.*,⁷⁸ whether a nuisance is temporary or permanent is a question for the trier of fact.⁷⁹ The cases however, purport to give definitions of the terms permanent and temporary from which a determination can be made.⁸⁰ However, Professor Dobbs' treatise, *Law of Remedies*, section 5.4 suggests that the terms are vague and ambiguous and that a determination is dependent upon several factors.⁸¹ According to Dobbs, "[t]he softness of the concept of permanent nuisance has led to uncertain application."⁸² Professor Dobbs suggests that what really is to be involved in the determination of permanency is a policy determination.⁸³ The policy determination is whether "the defendant ought to be permitted to continue the nuisance on a single payment of damages."⁸⁴ In applying this policy determination, courts have considered several factors:

- (1) is the source of the invasion physically permanent, i.e., is it likely, in the nature of things, to remain indefinitely?
- (2) is the source of the invasion the kind of thing an equity court would refuse to abate by injunction because of its value to the community or because of relations between the parties?
- (3) which party seeks the permanent or prospective measure of damages?⁸⁵

To confuse things even more, Professor Dobbs notes that:

Courts classify invasions as "permanent" for two purposes: one purpose is related to assessment of damages, and a distinct purpose is application of the statute of limitations . . . [W]hat is permanent for damages purposes is not necessarily permanent for statute of limitations purposes.⁸⁶

76. *Hanna Mining*, 699 F. Supp. at 834; *Aetna*, 600 F. Supp. at 801.

77. *Idaho v. Hanna Mining Co.*, 699 F. Supp. at 834.

78. *Id.* at 827.

79. *Id.* at 834.

80. *See id.*

81. DOBBS, *supra* note 39, at 337.

82. DOBBS, *supra* note 39, at 337.

83. DOBBS, *supra* note 39, at 337.

84. DOBBS, *supra* note 39, at 337.

85. DOBBS, *supra* note 39, at 338.

86. DOBBS, *supra* note 39, at 343.

*Aetna Casualty & Surety Co. v. Gulf Resources & Chem. Corp.*⁸⁷ avoided a summary judgment motion on the issue by finding that there were “a myriad of factual disputes relating to the exact nature and cause of the nuisance complained of.”⁸⁸ Thereafter, the court stated that it could not determine whether the claims were barred until certain factual disputes regarding the permanency or temporary nature of the nuisance had been resolved.⁸⁹ However, the court did rule that whether the nuisance was permanent or temporary all claims existing four years before the filing of the suit were barred.⁹⁰

In attempting to determine whether the alleged nuisance is permanent or temporary, one must look to the definitions recognized and adopted in Idaho. According to *Shaw v. City of Rupert*,⁹¹ a nuisance is temporary “if the cause of injury is abatable or preventable and the injury capable of rectification by reasonable restoration.”⁹² A nuisance is permanent if the “cause of the injury would most likely be unabatable, thus indicating . . . an injury that would not be temporary.”⁹³ In *Idaho v. Hanna Mining Co.*,⁹⁴ the court stated that in order to determine whether the nuisance was temporary or permanent, the court needed sufficient evidence concerning the potential for cleaning up the mining waste that constituted the nuisance in that action.⁹⁵ So again, each case must be determined upon its own facts, and some of the issues regarding the applicability of the statute of limitations may not be ascertainable until after the trial is completed and the jury has entered its findings by way of a special verdict as to certain factual determinations.

The cause of action for trespass is governed by Idaho Code section 5-218 which requires that within three years of the trespass upon real property, the complainant must file a lawsuit for the offense.⁹⁶ In the event that a particular complaining party has a viable trespass claim, all damages arising prior to three years are barred by this statute of limitations.⁹⁷

87. 600 F. Supp. 797 (D. Idaho 1985).

88. *Id.* at 801.

89. *Id.*

90. *Id.* at 801-02.

91. 106 Idaho 526, 681 P.2d 1001 (1984).

92. *Id.* at 528, 681 P.2d at 1003 (quoting *Alesko v. Union Pac. R.R.*, 62 Idaho 235, 240, 109 P.2d 874, 876 (1941)).

93. *Id.*

94. 699 F. Supp. 827 (D. Idaho 1987).

95. *Id.* at 834.

96. IDAHO CODE § 5-218 (1990).

97. *See id.*

After going through the trial on the issue of nuisance, the opportunity for judicial review is extremely limited. The essence of the trial is that it is at best a mostly subjective process, dependent on the opinions and biases of the trial judge. Then, appellate review is limited so as to not interfere with the trial court's decision, absent a "manifest abuse" of the trial court's discretion.⁹⁸

H. Right to Farm Act

Idaho has a Right to Farm Act, Chapter 45 of the Idaho Code,⁹⁹ which is applicable, in theory, to CAFO cases, at least in the case of a feedlot.¹⁰⁰ Idaho Code section 22-4502¹⁰¹ defines "agricultural operation" to include "any facility for the growing, raising or production of . . . livestock . . ."¹⁰² In addition, the purported purpose of this statute is to protect the existing agricultural activities from "urbanization."¹⁰³ However, it is questionable whether the Right to Farm Act could apply to many, if any, nuisance cases as presently written. According to Idaho Code section 22-4503:

No agricultural operation . . . shall be or become a nuisance, private or public, by any changed conditions in or about the surrounding non-agricultural activities after the same has been in operation for more than one (1) year, when the operation was not a nuisance at the time the operation began; provided, that the provisions of this section shall not apply whenever a nuisance results from the improper or negligent opera-

98. *Harris v. Cassia County*, 106 Idaho 513, 517, 681 P.2d 988, 992 (1984), (citing *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 473, 406 P.2d 113, 118 (1965)); *Western Gas & Power, Inc. v. Nash*, 75 Idaho 327, 330-31, 272 P.2d 316, 318 (1954)).

99. IDAHO CODE § 22-4501 to -4504 (Supp. 1993).

100. *Id.* § 22-4501. The section states:

Legislative findings and intent. —The legislature finds that agricultural activities conducted on farmland in urbanizing areas are often subjected to nuisance lawsuits, and that such suits encourage and even force the premature removal of the lands from agricultural uses, and in some cases prohibit investments in agricultural improvements. It is the intent of the legislature to reduce the loss to the state of its agricultural resources by limiting the circumstances under which agricultural operations may be deemed to be a nuisance. The legislature also finds that the right to farm is a natural right and is recognized as a permitted use throughout the state of Idaho.

Id.

101. *Id.* § 22-4502.

102. *Id.* § 22-4502.

103. *See id.* § 22-4501.

tion of any agricultural operation¹⁰⁴

One problem with the application of the statute is the exception of any nuisance resulting from the "improper or negligent operation" of any agricultural operation.¹⁰⁵ This raises an almost unanswerable issue, since the complaining parties will usually argue that it is inherent that something must be "improper" for there to be a nuisance. So, again, we are governed by another subjective term for the court to define and apply. Furthermore, one wonders how many CAFOs can operate without some "changes" in the CAFO over time.¹⁰⁶ When a CAFO changes, i.e., a change in its feed ration or the addition of more animals, then the one year period starts over again. Furthermore, if there is any chance of the "nuisance" having existed prior to the one year, then the statute is not applicable. So, it would appear that the complaining party would simply have to assert that there was a nuisance before the last change, and there would not be the one year for the CAFO to gain the protection of the statute.¹⁰⁷ Furthermore, the statute does not require the suit for nuisance to be filed within the one year period. In addition, the statute refers to changes in the nonagricultural activities around the CAFO, which protects the CAFO if someone builds a new residence or business next to the CAFO.¹⁰⁸ It does not protect against someone new purchasing an existing house or business, even if the prior owner did not, or could not complain, but the new owner does.¹⁰⁹ There are simply too many arguments around applying the right to farm statute and, accordingly, with good legal counsel there should be few opportunities to apply the statute to a CAFO suit.

III. SUMMARY

In summary, a nuisance claim against a CAFO is a difficult suit to defend. The laws are broad and subjective, the evidence is difficult to rebut objectively, and there is no definable standard to be measured against. Few judges grew up on or around a CAFO and the public policy espoused by the Idaho Supreme Court, to protect our agri-businesses may or may not be adhered to by the trial court. The key to succeeding on a nuisance suit is the trial judge, the one person

104. *Id.* § 22-4503.

105. *See id.*

106. *Id.* § 22-4503.

107. *Id.*

108. *Id.*

109. At least that is the ruling of one District Court Judge in Idaho. *See supra* note 30.

the attorneys cannot voir dire to ascertain any inherent or unknown personal biases.

The best advice for any CAFO is to locate as far away from neighbors as possible, be as good an operator and neighbor as possible, and if the CAFO has been in operation for more than four (4) years, be very circumspect before making any changes. Nuisance litigation is extremely costly to all parties. The Idaho Legislature would do well to consider some objective standards that both operator and neighbor could rely upon to protect each of their interests.

Finally, in regards to the interests of the state, it is imperative for the continuation of the agricultural economy of Idaho that courts uphold the public policy espoused by the Idaho Supreme Court. The courts must recognize the importance and protect the existence of Idaho's farm economy. It is easy to assume that a CAFO can simply move to another location in Idaho and therefore retain the economic benefits of the CAFO, yet satisfy the complaints of the complaining neighbors. But this philosophy is very dangerous to Idaho's farm economy. It creates instability for the CAFO, which is likely to move those operations outside the state. It is extremely expensive, if not cost prohibitive, to relocate a CAFO. If CAFO's believe that the Idaho courts will allow them to be subject to this type of litigation and that the courts will not look out for their interests, not only will it affect Idaho's existing agricultural economy, but it sets forth a strong message to other CAFO's and agricultural business in general to stay out of Idaho. Idaho is an agricultural state, the courts must continue to recognize and protect that vital economic interest.