

**PROPERTY TAX RULES
HEARING**

Tuesday, November 19, 2013

Idaho State Tax Commission
Room 1CR5 / Plaza IV / 800 Park Ave / Boise, Idaho

List of attachments:

Staff description of rules 205 and 626
Memo on personal property definition – legal staff

RULE 205. PERSONAL AND REAL PROPERTY -- DEFINITIONS AND GUIDELINES

Submitted Public Comments:

1. Hawley Troxell letter, 8/2/2013
2. Idaho Power letter, 8/2/2013
3. IACI letter, 8/6/2013
4. Hawley Troxell letter, 8/16/2013
5. Level (3) Communications letter, 8/27/2013
6. Micron Technology Email* (regarding both Rule 205 and Rule 626), 10/7/2013
7. Idaho Power letter, 10/22/2013
8. Hawley Troxell letter* (regarding both Rule 205 and Rule 626), 10/23/2013
9. Union Pacific letter, 10/23/2013

RULE 626. PROPERTY EXEMPT FROM TAXATION -- CERTAIN PERSONAL PROPERTY

Submitted Public Comments:

1. Micron Technology Email* (regarding both Rule 205 and Rule 626), 10/7/2013
2. Hawley Troxell letter* (regarding both Rule 205 and Rule 626), 10/23/2013

Rule 205 Text

Rule 626 Text

Property Tax Rules Committee Meeting Minutes 8/21/2013

M E M O R A N D U M

November 7, 2013

TO: Tax Commissioners

FROM: Alan Dornfest, Chair, Property Tax Rules Committee

RE: Rules 626 and 205

After considerable discussion at several property tax rules committee meetings, on August 21st, the property tax rules committee unanimously approved proposed permanent rules 626 and 205. Both of these rules relate to implementation of the partial personal property exemption passed by the 2013 legislature.

Rule 205

Rule 205 provides clarification of property that qualifies or does not qualify for the exemption. Specifically, this rule provides that items considered structures or buildings are improvements and, as improvements, must be defined as real property which is ineligible for the personal property exemption. This was based on analysis of section 63-201, Idaho Code. In this section, subsection 11 defines "improvements" as meaning *"...all buildings, structures,...erected upon or affixed to land..."* In the same code section, subsection (23) defines "improvements" as real property.

This rule also preserves the three factor test as the predominant test for determining what is a fixture. By definition, fixtures must be considered real property, so the determination provides one way of differentiating between real and personal property. For this determination, we were instructed to rely on the three factor test by Legislative Services on behalf of germane subcommittees of the Senate Local Government and Taxation Committee and the House Revenue and Taxation Committee. These committees called a special meeting in July, 2008 to review proposed tax commission rules on this issue. The rules were prepared to provide clarification of definitions following passage of House Bill 599, which amended section 63-201, Idaho Code, to provide the current definitions for real and personal property. The August 14, 2008 letter is attached. The current proposed rule follows this guidance and also provides examples of ineligible improvements, including cell towers, underground storage tanks, poles and towers, signposts, pipelines, and railroad track.

The designation of improvements as ineligible pertains, by rule, regardless of whether improvements are on exempt or federal land or on taxable land. The rule takes this position despite the provisions of section 63-309, Idaho Code, which requires such

improvements to be assessed and taxed as personal property. Section 63-309, Idaho Code, was implemented many years before the personal property exemption. The purpose of this section was to permit taxation of improvements that might otherwise have been considered exempt by reason of the status of the land on which they were located. Also, allowance of the exemption for such property would lead to the inevitable situation in which similar improvements would qualify or not qualify for the personal property exemption solely on the basis of the status of the land on which they were located, with a penalty, in terms of taxability, for improvements on private land. In addition, while the personal property exemption was intended to apply to commercial property, if improvements on exempt land are allowed to be exempt as personal property, then numerous homes used strictly for residential purposes, but located on government owned land, will also become exempt.

Rule 626

Rule 626 provides an administrative framework for ongoing implementation of the personal property exemption. It largely follows the temporary rule and contains the following major provisions:

- Locally assessed property owners must continue to file annually only if they own more than \$100,000 in otherwise taxable personal property. In determining this amount of value, items acquired since January 1, 2013 are not counted and such items are not included in any reported personal property.
- Taxpayers with \$100,000 or less in personal property value may certify such to the county in the fifth year following the year of initial exemption in lieu of a filing a complete declaration.
- Taxpayers with personal property at multiple locations within a county may elect different property or locations for the exemption in years following initial application.
- Centrally assessed property must file for the exemption each year and must file a complete report including all personal property except that which has been newly acquired for a per item cost of \$3,000 or less.
 - The location of the personal property must be specified in order to receive \$100,000 per county exemption.
 - The exemption is to be applied to the otherwise taxable value after apportionment to each county.
 - Railcar fleets with taxable value of \$500,000 or less are limited to \$100,000 per company unless proof of location in multiple counties is provided.
- For locally assessed property, no valuation notice is required after the year of initial eligibility provided that

the taxable value is zero. An assessment notice will be required again in the fifth year after initial eligibility.

- The tax commission and counties may correct the 2013 property tax reduction list until the fourth Monday in February, 2014. However, notice of additional amounts to be reimbursed must be received by the tax commission by January 30, 2014.
- Taxpayers may be eligible for other personal property exemptions in addition to the \$100,000 exemption.
- Consistent with rule 205, improvements designated to be assessed and taxed as personal property and other improvements are not eligible for the exemption. Structures such as cell towers are included as improvements and therefore are ineligible.

In addition, rule 626 provides illustrations of eligibility situations related to common enterprise and related ownerships. In some cases, where, for example, ownership entities are not in a relationship identified in Section 267 of the Internal Revenue Code, identical ownership may still permit multiple personal property exemptions, adding in total to more than \$100,000 in value. One illustration provides that this occurs when one person or company owns two dissimilar businesses (ie: a harvest equipment business and a used car business).

Finally, the rule addresses reductions in replacement money when taxing districts or revenue allocation areas of urban renewal districts dissolve and when state authorized plant facilities levies cease.

Staff Recommendation

Staff recognizes that the rules take some positions with which many taxpayers disagree. This is true for example with respect to the designation of cell towers and certain other improvements and structures as ineligible. We believe that the position taken by the proposed rule reflects the statutes to the greatest extent possible. We believe that further clarification or repudiation of the principles outlined in these rules should come from the legislature. We therefore recommend that the commission proceed to publish the proposed rules as submitted.

MEMORANDUM

TO: Alan Dornfest
Property Tax Rules Committee Chair
FROM: George Brown
DATE: August 15, 2013
RE: Proposed Rule 205

The purpose of this memo is to outline the Tax Commission legal staff's interpretation of what personal property consists of for purposes of the personal property tax exemption. This information will necessarily contrast the Commission's opinion with that of Richard G. Smith of Hawley Troxell Ennis and Hawley LLP, expressed in a letter of August, 2, 2013 to the Tax Commission's Property Tax Rules Committee, on behalf of CenturyLink, Northwest Pipeline and AT&T Mobility.

Personal property is defined in Idaho Code § 63-201 as "everything that is the subject of ownership and that is not included within the term "real property." Certain types of property can be identified as real property simply by reference to statutory definition of that term. Real property is defined in Idaho Code § 63-201 as:

(23) "Real property" means land and all rights and privileges thereto belonging or any way appertaining, all quarries and fossils in and under the land, and all other property which the law defines, or the courts may interpret, declare and hold to be real property under the letter, spirit, intent and meaning of the law, improvements and all standing timber thereon, including standing timber owned separately from the ownership of the land upon which the same may stand, except as modified in [chapter 17, title 63](#), Idaho Code. Timber, forest, forest land, and forest products shall be defined as provided in [chapter 17, title 63](#), Idaho Code.

Clearly, certain items like land, fossils and standing timber can be identified as real property with a cursory reading of Idaho Code.

Further analysis must be made to determine if property falls into the category of "improvements" and, therefore, real property. Improvements are also defined in Idaho Code § 63-201 as:

(11) "Improvements" means all buildings, structures, manufactured homes, as defined in section [39-4105](#)(8), Idaho Code, mobile homes as defined in section [39-4105](#)(9), Idaho Code, and modular buildings, as defined in section [39-4301](#)(7), Idaho Code, erected upon or affixed to land, fences, water ditches constructed for mining, manufacturing or irrigation purposes, fixtures, and floating homes, whether or not such improvements are owned separately from the ownership of the land upon or to which the same may be erected, affixed or attached. The term "improvements" also includes all fruit, nut-bearing and ornamental trees or vines not of natural growth, growing upon the land, except nursery stock.

Once again, Idaho Code makes certain types of property easily identifiable as real property, this time because they are specifically identified as improvements. Buildings, manufactured homes, fences, and floating homes are all specifically identified as improvements and, therefore, real property. But other items, like structures and fixtures, are identified only by the terms themselves.

The term “structure” is not defined in Idaho Code. The American Heritage Dictionary definition of “structure” is “Something constructed, such as a building.” Black’s Law Dictionary’s similar but more legalistic definition is “Any construction, production, or piece of work artificially built up or composed of parts purposefully joined together < a building is a structure >.” Even absent a statutory definition, it would be logical to conclude that most manmade items erected or built on land in a somewhat permanent manner would be commonly considered structures. The average person using their common knowledge would probably identify water towers, fuel depot storage tanks, and high tension power line towers as structures and, therefore, real property.

“Fixtures” on the other hand, are defined by Idaho Code § 63-201 as:

(9) "Fixtures" means those articles that, although once movable chattels, have become accessory to and a part of improvements to real property by having been physically incorporated therein or annexed or affixed thereto in such a manner that removing them would cause material injury or damage to the real property, the use or purpose of such articles is integral to the use of the real property to which it is affixed, and a person would reasonably be considered to intend to make the articles permanent additions to the real property. "Fixtures" includes systems for the heating, air conditioning, ventilation, sanitation, lighting and plumbing of such building. "Fixtures" does not include machinery, equipment or other articles that are affixed to real property to enable the proper utilization of such articles.

In essence, this definition of “fixture” allows for the annexation of items of personal property into improvements on real property.

The definition of “fixture” was added to Idaho Code § 63-201 by House Bill 599 in 2008 and is largely made up of wording from a similar Colorado statute. The Colorado statute read:

(4) “Fixtures” means those articles which, although once movable chattels, have become an accessory to and a part of real property by having been physically incorporated therein or annexed or affixed thereto. “Fixtures” includes systems for the heating, air conditioning, ventilation, sanitation, lighting, and plumbing of such building. “Fixtures” does not include machines, equipment, or other articles related to a commercial or industrial operation which are affixed to the real property for proper utilization of such articles. In addition, for property tax purposes only, “fixtures” does not include security devices and systems affixed to

any residential improvements, including but not limited to security doors, security bars, and alarm systems.

Colorado Statute §39-1-102.

The first part of Idaho's definition lays out a three factor test, not found in the Colorado statute, that is used in many states to determine whether a piece of personal property will be considered a fixture of the real property improvement to which it is attached. Articles of personal property will be considered a fixture if they meet the three parts of the following test:

1. The article is physically incorporated therein or annexed or affixed thereto in such a manner that removing it would cause material injury or damage to the real property,
2. The use or purpose of such article is integral to the use of the real property to which it is affixed, and
3. A person would reasonably be considered to intend to make the article a permanent addition to the real property.

There are two sentences after the three factor test found in Idaho Code § 63-201(9). The first of these says: "'Fixtures' includes systems for the heating, air conditioning, ventilation, sanitation, lighting and plumbing of such building." That sentence, taken verbatim from the Colorado statute, is not exclusive, many other items can fall into the category of "fixture" but, instead, merely identifies some articles of property commonly considered fixtures found in many buildings, items that are necessary for the operation of the building itself. The second sentence, however, consists of wording different from the Colorado statute, and is the focus of Mr. Smith's letter on the Tax Commission's proposed rule.

The second sentence says: "'Fixtures' does not include machinery, equipment or other articles that are affixed to real property to enable the proper utilization of such articles." This added clause ensures that items of personal property cannot be considered physically incorporated into an improvement simply because they require common means of attachment to operate properly. The second sentence also ensures things that are easily moveable but potentially unstable in use, like conveyor belts, washing machines, presses and vehicle lifts, are not annexed into real property only because they are attached to it.

What this clause does not do is automatically make all "machinery, equipment, and other articles" personal property. Idaho's version of the clause substantially differs from Colorado's because it does not include language regarding use of articles of property. Idaho specifically removed the language "related to a commercial or industrial operation" found in Colorado's corresponding language and added the traditional three factor test. So, while Colorado specifically excludes an article of property involved in a commercial or industrial operation from fixture status, Idaho relies on the article's connection to a real property improvement to determine whether it is a fixture or personal property, regardless of its commercial status. The residual Colorado language kept by Idaho simply ensures that attachment is not a single factor in determining whether an article is a fixture, so that the three factor analysis is used properly.

The second sentence also does not mean that the act of attaching an otherwise readily movable piece of machinery or equipment precludes it from being considered a fixture under the three factor test. If the act of attaching equipment results in an automatic determination that the equipment is personal property, then almost no equipment would be real property, even though it otherwise met the three factor test. Arguably, this interpretation would leave no reason for the existing three factor test to have been incorporated into the statute in the first place.

Colorado's definition of personal property highlights the differences in the two states' statutes and supports the conclusion that Idaho personal property law cannot be determined by interpretation of Colorado law. That definition is:

(11) "Personal property" means everything that is the subject of ownership and that is not included within the term "real property". "Personal property" includes machinery, equipment, and other articles related to a commercial or industrial operation that are either affixed or not affixed to the real property for proper utilization of such articles. . . . [A]ny pipeline, telecommunications line, utility line, cable television line, or other similar business asset or article installed through an easement, right-of-way, or leasehold for the purpose of commercial or industrial operation and not for the enhancement of real property shall be deemed to be personal property, including, without limitation, oil and gas distribution and transmission pipelines, gathering system pipelines, flow lines, process lines, and related water pipeline collection, transportation, and distribution systems. Structures and other buildings installed on an easement, right-of-way, or leasehold that are not specifically referenced in this subsection (11) shall be deemed to be improvements pursuant to subsection (7) of this section.

Colorado Statute §39-1-102. The definition above clearly indicates Colorado's intent to consider commercial and industrially related property as personal property and strongly suggests that the state's "fixtures" definitional wording is further reference of that intent. Idaho code contains no similar language, and no indications that the Idaho legislature intended to treat property in a similar manner to Colorado. Many of the articles of property specifically identified in Colorado's statute as personal property are at the center of the disagreement in Idaho that this memorandum addresses.

In Idaho, to determine if something is a fixture for purposes of property taxation, the three factor test must be utilized. Machinery and equipment that is attached to an improvement still may or may not be a fixture. An example of this is freezer cases at a supermarket. Most grocery stores have aisles made from freezer cases. These cases are necessarily bolted to the floor to keep them from tipping over when their doors are opened by customers. These cases are moved regularly throughout the store, as any shopper looking for frozen treats has surely experienced. While integral to the use of the store property, the cases are not intended to be permanent additions to the property. Empty supermarkets do not have these aisles left in place, and their removal does not cause significant damage to the property. Therefore, they are personal property because they do not meet the requirements of the three factor test. However, the exact same cases may meet the test when they are permanently installed in the back of the store in the

dairy section. The cases are built into a wall in the store that must sustain much damage to remove them, they are integral to the use of the store property, and they generally remain in the store until their useful life ends.

Reading the second sentence to be determinative of articles' property status leads Mr. Smith to incorporate a use provision for property into Idaho's statute that does not exist. On page 3 of his letter, Mr. Smith says:

[W]hen the "attached" property is used in the commercial operation, it is personal property; the last sentence of section 63-201(9) makes that clear. It provides that real property "does not include machinery, equipment or other articles that are affixed to real property to enable the proper utilization of such articles."

With these two sentences, the legislature signaled a clear intent to separate "building" functions from "operational" functions. The property that serves a building function is real property; the property used in the commercial operation is personal property, regardless of the manner of attachment.

Colorado's legislature signaled its intent to separate "building" functions from "operational" functions, but Idaho's legislature specifically excluded the Colorado language that signals that intent from Idaho's own statute. Idaho instead chose to focus specifically on the manner of an article's attachment to a property improvement through the three factor test. So, while Mr. Smith's opinion may be accurate under Colorado law, it does not reflect the legislative intent behind Idaho law that the three factor test be used.

Reading Idaho's fixtures definition to incorporate a separate use requirement to determine whether or not an article is personal property essentially nullifies the statutorily mandated three factor test. Many items traditionally identified as real property fixtures under the three factor test, like generators inside dams, settling tanks with buildings built around them, and freight elevators, would all be personal property because they are used for commercial or industrial purposes.

This mistaken reading is pervasive in Mr. Smith's argument of this subject. In a memorandum to an Idaho Association of Commerce and Industry work group dated September 6, 2011 attached to the letter to which this memo replies, Mr. Smith further asserted the opinion that the determination of personal property status lies in the business use of an article of property. In that memo, Mr. Smith said "[Idaho Code § 63-201(9)] is a mandate that machinery and equipment is not to be treated as a fixture, even if it is bolted down or otherwise attached." Mr. Smith's interpretation of Idaho Code § 63-201(9) in his September 6, 2011 memorandum is that no machinery or equipment can be considered a fixture, *even if* it is annexed or attached to an improvement. A proper interpretation of that code section is that machinery or equipment fails the three factor fixtures test if it is *only* attached to enable its proper utilization.

The discussion of what constitutes fixtures and personal property under Idaho law dates back to at least the timeframe in which the promulgation of rules under HB 599 was initially contemplated. An administrative rule meeting before pertinent legislative subcommittees was

held on July 17, 2008 to discuss rulemaking under HB 599, and resulted in objection to the Tax Commission's proposed rules by the committees specifically because the three factor test was not emphasized and because mobility of the items was not adequately considered. A copy of the minutes of that meeting has been attached to this memorandum to demonstrate some of the continuing discussion on personal property definitional issues.

Proposed Rule 205 is the Tax Commission's attempt to classify personal property in order to uniformly apply the newly enacted personal property exemption throughout the many counties in the state, as well as to properties assessed by the Tax Commission. The truncated timeframe to produce this memo did not allow for a more detailed legal analysis of each item of property identified in the proposed rule. I will generate such an analysis should the committee wish to move the rule forward.

In conclusion, I believe that Rule 205 is in conformity with current law found in Idaho Statutes, but acknowledge that the rule is highly contested by the stakeholders interested in the application and administration of the newly enacted personal property exemption found in HB 315 from 2013. An analysis of whether an item of property is personal or real property should start with the definitions of "real property" and "improvement" and an item must meet the requirements of the statutory three factor test to be identified as a "fixture" to an improvement.

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August 2, 2013

Mr. Alan Dornfest, Chairman
Mr. Rick Anderson
Property Tax Rules Committee
Idaho State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83712

Re: *Comments on Proposed Rule 205*

Dear Alan and Rick:

This letter will provide comments on the Tax Commission staff's draft of Rule 205, dated July 2, 2013. I submit these comments on behalf of the following taxpayers: CenturyLink, Northwest Pipeline, and AT&T Mobility.

The focus of my comments will be on new section 04. With respect to other provisions, I concur in the comments of Micron, IACI and Idaho Power that I have had the opportunity to review, and do not wish to repeat the concerns of those parties. Before addressing section 04, I would like to comment briefly on the definition of "improvements" in section 01(c). The draft rule recites, as part of that definition, that "improvements" include the categories of buildings, structures, and fences that are referenced in the statute, section 63-201(11). However, the draft rule fails to refer to other statutory categories such as modular buildings and fixtures. Then, after referring to buildings, structures and fences, it adds a "catch-all" for "similar property." We believe that additional reference adds confusion and uncertainty to the definition, and goes beyond the statute. The statute is clear in identifying specific types of property that constitute "improvements," and does not include a "catch-all" or even words like "include" or "including," when referring to these specific items.

With respect to section 04, there are some general problems with the approach of characterizing the examples in subsection (b) as improvements, and then some specific issues

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with each. First, some of these items, such as cell towers, have been treated in the past as personal property. There is nothing in the 2008 amendments to the definitions that would justify a change in the treatment of these items. For instance, “real property” was defined to include “improvements, which in turn included “structures,” but cell towers were nonetheless classified as personal property.

Second, I believe the Tax Commission has taken the position in materials submitted to the legislature that the types of property listed in section 04(b) would be considered personal property. In particular, statements of fiscal impact have shown high estimates of the fiscal impact of a complete personal property exemption, and I assume those estimates have included these categories of property. Another example relates to the bill that would have exempted, for each industry within the operating property group, a specified percentage that represented the personal property of each industry within that group. I recall that those percentages were either negotiated with the Commission, or were accepted by the Commission as a fair representation of the proportion of personal property owned by each type of taxpayer. Those percentages are consistent with the treatment of the listed items in subsection 04(b) as personal property, not real property.

Third, since at least 2007, in the many committee meetings, work group sessions and other discussions we have had regarding these types of operating property, the context has always been the issue of whether they represented fixtures. We believe this reflects an acknowledgement by the Commission that the proper framework for determining the characterization of this type of property is to examine whether it is a fixture. Indeed, that is approach used in the preceding draft of this rule, and now, for the first time in six years of dealing with this issue, we see an attempt to characterize many operating property items as “structures” rather than fixtures.

As noted above, the term “improvement” is defined to include specific items, including “buildings,” “structures” and “fixtures.” The current draft relies on the “buildings” and “structures” categories to support the listed examples. (“Some items may not be considered fixtures, but may be structures or buildings.”) Clearly none of the examples could be characterized as buildings. Nor is the “structures” category applicable. The term “structures” is defined in *Black’s Law Dictionary* (9th ed.) as “Any construction, production, or piece of work artificially built up or composed of parts joined together <a building is a structure>.” That definition is so broad that it would include virtually all items of personal property as well as buildings. Thus, in order to give the term some meaning, it must be limited to those structures that have the characteristics of real property, and that simply takes us back to the three-factor test.

The ordinary meaning of the term “structures” does not include the items in subsection 04(b). Pipeline and conduit, for example, cannot fit within a “structures” category according to

any reasonable understanding of the meaning of that term. The same can be said for the other examples.

The attempt to use the “structures” device as a way to resolve this issue also gives no guidance on how to handle the myriad of other types of property that are not listed as examples in section 04(b). If we are to question whether cable and wire, or a generator, or a crane, or like items are personal property, are we to evaluate whether they are “structures”? If so, by what standard? They don’t appear to be structures, but then neither do conduit or pipeline or the other items given as examples. Clearly some standard is necessary – some test by which to determine whether they are personal property. Fortunately, that test is already in the statute – the three-factor test contained in the definition of “fixtures.”

We do concede to one situation in which some of the listed items may be classified as real property. As we have pointed out in a number of meetings and memos (including most recently a memo dated September 6, 2011, copy attached), the 2008 amendments draw a clear distinction between (i) property that is used as part of a building or building system, to support the building’s function, and (ii) property that is used in the commercial or manufacturing operation or process.¹ Thus, the penultimate sentence of the fixtures definition (which is where this analysis should be conducted) provides that building systems are real property: “... systems for the heating, air conditioning, ventilation, sanitation, lighting and plumbing of such building.” Thus, pipe or conduit in a building that supports drinking or waste water systems, or the electrical systems used for light, heating or power, would properly be considered real property because they are essential parts of the building.

In contrast, when the “attached” property is used in the commercial operation, it is personal property; the last sentence of section 63-201(9) makes that clear. It provides that real property “does not include machinery, equipment or other articles that are affixed to real property to enable the proper utilization of such articles.”

With these two sentences, the legislature signaled a clear intent to separate “building” functions from “operational” functions. The property that serves a building function is real property; the property used in the commercial operation is personal property, regardless of the manner of attachment.

Just as the individual items listed in subsection 04(b) cannot reasonably be considered “structures,” so also they cannot be considered part of the support systems for buildings or other real estate. For instance, the sprinkler systems involved in the *Rayl* case discussed in the attached memo arguably relate directly to the function of the farm land they irrigate. But the pipeline,

¹ Other analyses I have provided on this issue include memos dated July 18, 2007 and September 11, 2007, and a letter dated September 22, 2008.

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conduit, railroad track, cell towers and the other items do not support or relate to the farming or other business operation of the real estate to which they are “attached.” They are “machinery, equipment or other articles affixed to the real property to enable the proper utilization of such articles.”

In the previous draft of the changes in this Rule 205, there were comments to the effect that the last sentence of the fixtures definition is inconsistent with the three-factor test, and should be ignored. We strenuously disagree with that position. It cannot be assumed the legislature drafted legislation that would not have a substantive effect, and the intent to clarify the definitions of fixtures and real property to exclude these types of “trade fixtures” is clear from the language used in the 2008 amendment.

All the foregoing analysis supports personal property treatment of all the items listed in subsection 04(b). However, I will make some specific observations with respect to certain of the items:

Cell towers. The last sentence of the fixtures definition provides guidance in classifying property, where it recognizes the distinction between commercial functions and building or real estate supporting systems, as discussed above. When that language is consistently applied for all types of property, cell towers must fall in the personal property category. I am aware that in a recent sales tax case, the Commission determined that cell towers were considered real property. However, the sales tax statute does not contain the specific definitions for real property, personal property and fixtures that are set out in section 63-201, including the last two key sentences of the fixtures definition discussed above. It is also noteworthy that until recently, I understand the counties were treating cell towers as personal property. This position is supported by the Commission’s Personal Property Valuation Schedules, in which towers for both cable and wireless companies are listed.

It should also be noted that cell companies have various types of cell sites and devices for sending and receiving signals. Not all of them have a cell tower (traditional 4-sided lattice tower). Some are just a mono pole (literally a single pole bolted to a concrete pad and sometimes with guyed wires attached for stability). Some sites simply lease space on a building to attach antennas. A rule that cell “towers” constitute real property while mono poles or antennas on buildings would be personal property would ignore the function of the property, and intention of the owner of both the real property and the cell site equipment that the attachments are not permanent additions to the real property.

Underground Storage Tanks. Although my clients do not own such tanks, they are of the same character as pipelines and related property. Unless the storage is for systems-support of the building with which they are associated, they should be considered personal property. Where the function of the tanks is for the business operation, it should not matter whether tanks are above

ground or below ground; in any event, they are attached to real estate only to enable their proper utilization in the business.

Poles and Towers. As with the other property discussed here, poles cannot reasonably be considered “structures.” Nor do they fit in the “fixtures” category. Telephone or other utility poles do not serve or support the land on which they are placed; instead, they are an integral part of the transmission system that includes other personal property – cable and wire. They are part of the business operation of transmitting signals, not part of a system that serves a building or real property. Poles are only affixed to the ground because they cannot stand up on their own. They need to be buried into the ground to make them stand upright, and so are affixed only to ensure their proper utilization. Finally, telephone and electric poles are routinely replaced due to being hit by vehicles, damaged by weather and fire, etc. Many telephone companies replace thousands of poles every year.

Pipelines and conduit. Terry Accordino’s comments address this property in a persuasive manner. The personal property characterization is also supported by the recent case authority, such as the *Colonial Pipeline* case discussed in the attached memo, and it is consistent with Idaho law, such as the *Rayl* case where the irrigation system was real property in part because of how it is adapted to the use of the land, as farmland. As the court noted in *Colonial Pipeline*, a pipeline runs under roads, farm fields, rivers, and cities, with the goal not of operating as part of the accompanying real estate and adapted to it, but instead to be as invisible as possible to the land owner. Because pipeline and conduit are not adapted to the other uses of the land, they need be as unobtrusive as possible.

Segments of pipelines and conduits are removed from time to time, and owners have legal obligations to restore the land at the termination of the lease or easement so there is no damage to the real estate. Indeed, generally accepted accounting principles require the accrual of reserves to reflect the liability for such restoration expenses.

Railroad track. Examples abound of railroad track and ties being replaced, repaired, and re-used somewhere else. Railroad ties that have been replaced are a common tool of landscape architects. It is often necessary to replace and update segments of track, for safety and other reasons. Railroad track and ties are easily removed, with little to attach them to the real estate. And railroad track, ties and ballast are even less adaptable to the land than other types of operating property; they have no connection with or relevance to the operation of the adjoining or underlying land – whether it is farmland or commercial property – and in fact they are a burden to other uses of the land since they divide parcels on either side of the track and provide a barrier to access.

In summary, the draft rule is not consistent with the relevant statutes, or with the statutes’ guidance on the limited categories of property that are classified as real property. It is worth

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noting that the Commission has once before adopted a restrictive definition of personal property, only to have the legislative committees reject that interpretation in 2008.²

The taxpayers do offer an alternative approach for drafting the rule, since we understand the interest in providing guidance to assessors in implementing the personal property exemption. The starting point would be for the Commission to identify those items of operating property for each industry that are consistent with the percentages used for that industry in the legislation that used the percentage concept. (In 2013, that was House Bill 276.) The general categories of personal property for each industry were presumably used by the Commission in the calculation of the fiscal impact of that legislation.³

If you should have any questions concerning the matters discussed in this letter, please feel free to contact me.

Sincerely,

HAWLEY TROXELL ENNIS & HAWLEY LLP



Richard G. Smith

RGS: Client representatives

² That action occurred by letter dated August 14, 2008, from Mike Nugent of the Legislative Services Office.

³ For example, for the telecommunications industry, the percentage used in the bill for the proportion of personal property value to the total property value was 90%. The Commission developed fiscal impact figures for that amount of property, and in doing so must have identified categories of telecommunications property that represented personal property at that percentage level. Presumably, that was all property except land and buildings.

MEMORANDUM

TO: IACI Personal Property Tax Implementation Work Group

FROM: Rick Smith, Hawley Troxell Ennis & Hawley

DATE: September 6, 2011

SUBJECT: Preliminary Comments for September 6 Meeting

I have reviewed Rick Anderson's memo dated August 29, 2011, and thought it would be helpful to respond with some comments and additional points that I think are relevant to further discussions by this Work Group.

1. ***“The Clear/Not Clear” Listing – Commercial and Industrial Property***

At the last meeting of the Work Group, it was suggested that the Tax Commission representatives review the “Version B” listing of property and identify the items with which they still agree to the Version B classification of property as personal or real property. (This Version B was one of two options presented to the Tax Commissioners in 2007, and was the preferred choice.)

Rick Anderson's memo responds to this request, and notes those items the staff apparently now believes are “clear” as either personal property or real property – as initially classified in the Version B list – and also those items which the staff now believes are “not clear” and with respect to which they no longer can agree should be classified as proposed in Version B.

I believe Rick's listing of items as “not clear” is overly conservative, in leaving with this ambiguous label some types of property that should be “clearly” personal property under Idaho law. I will discuss first those items that relate to a commercial enterprise or industrial operation. I will then address the concept of “constructive annexation” that has been suggested as being relevant to these issues. Finally, I will discuss the proper treatment of some utility-type property, such as the pipelines we have been discussing as a proxy for the property of centrally

assessed taxpayers with similar types of property (such as transmission lines, telecommunications cable and wire, etc.).

There are many items marked as “Not Clear” in the August 29 memo that are machinery and equipment used in a commercial operation or industrial process. The machinery and equipment may be similar to other property that might be included in any building simply to make the building usable for general purposes. An example is a boiler, referred to on page 11 of Rick’s memo. If a certain type of boiler is used in an industrial process, it ought to be personal property. If a different type of boiler is a normal feature of a building – to provide heating for the occupants, for instance – that boiler ought to be considered real property. That distinction is made in Version B. In the August 29 memo, this proposed treatment for all boilers is now shown as being in the “Not Clear” category.

There are many more items similar to this one – at least 18 by my count – where the property is used in a commercial or manufacturing process but is now shown as “Not Clear.” The apparent reason for this position is stated at page 11 of the August 29 memo, where there is a discussion of the argument that equipment that provides “creature comforts” for a building is real property, while equipment used for manufacturing is personal property. The memo concludes that “I do not believe the Idaho property tax statutes have ever put forth such a theory” and that “to address this theory in rule would in my opinion take an inappropriate authority leap.” This position apparently is the reason for changing the classification of many of these items of machinery and equipment from personal property to “Not Clear.”

This distinction – treating equipment that provides “creature comforts” as real property, while similar types of equipment used in manufacturing is considered personal property – is very common. The New York statute discussed in the August 29 memo refers to real property classification for property used for heat, light, power, gases and liquids, but only for such property that is common to all manufacturing structures “and not to those present exclusively because of the particular manufacturing process involved.” (Aug. 29 memo, p. 9, ¶ 4, emphasis added.) Colorado also has a statute providing that real property fixtures do not include items affixed to the building that relate to the commercial or industrial operation of the building. C.R.S. § 39-1-102(4). Thus, there is a distinction between (i) the property related to the operation of the building and (ii) the

property related to the operation of the business in the building. *See Del Mesa Farms v. Montrose CBOE*, 956 P.2d 661 (Colo. App. 1998).

As discussed below, this issue is related to the “adaptability” part of the three-part test for determining the proper classification of property. However, the important point to observe here is that the Idaho statutes are similar to the Colorado rule just mentioned, and this fact is overlooked in the August 29 memo. Section 63-201(9) of the Idaho Code defines “fixtures” as follows:

9) "Fixtures" means those articles that, although once movable chattels, have become accessory to and a part of improvements to real property by having been physically incorporated therein or annexed or affixed thereto in such a manner that removing them would cause material injury or damage to the real property, the use or purpose of such articles is integral to the use of the real property to which it is affixed, and a person would reasonably be considered to intend to make the articles permanent additions to the real property. "Fixtures" includes systems for the heating, air conditioning, ventilation, sanitation, lighting and plumbing **of such building**. "Fixtures" does not include machinery, equipment or other articles that are affixed to real property to enable the proper utilization of such articles. (Emphasis added.)

The last sentence of this provision gives the statutory support the August 29 memo states is needed to differentiate building functions from manufacturing functions. Indeed, statute is a mandate that machinery and equipment is not to be treated as a fixture, even if it is bolted down or otherwise attached. The preceding sentence in the statute discusses the “creature comfort” systems relating to property that is placed in almost every building, but all other types of machinery are not to be treated as real property even if they are affixed.

The distinction between “creature comfort” property in a building and other machinery and equipment comes from the application of the three-factor test. Those factors, as stated in this statutory definition of “fixtures,” are (i) whether the property is affixed to the real property in a way that would cause damage to the property if removed; (ii) whether the property is integral to the real property, and (iii) whether a person would reasonably consider the property to be a permanent

addition to the real property. The second factor examines whether the equipment is an integral and necessary part of the land or building, and so would include as real property the normal heating, lighting, power and related items noted in the statute. It would not include equipment that is used for the manufacturing process itself, even if bolted down.

It is respectfully submitted that the August 29 memo's listing of property types as "Not Clear" fails to recognize the importance of this final sentence of Section 63-201(9). It includes such items as motors and refrigeration and freezing equipment in the "Not Clear" category, where such property should clearly be considered personal property.

2. *The "Constructive Annexation" Concept.*

The August 29 memo was accompanied by a one-page excerpt of quotes from an Idaho case dealing with the "constructive annexation" concept. *Rayl v. Shull Enterprises*, 108 Idaho 524 (1984). This concept relates to the first factor – whether property is physically annexed to the real property. This concept allows the annexation test to be satisfied even where there is a limited degree of attachment. For instance, even though a furnace could be unbolted and removed without causing damage to a building, it is a fixture because it is a "necessary, integral or working part of some other object which is attached." *Rayl*, 108 Idaho at 528, quoting *Seatrains Terminals of California v. County of Alameda*, 147 Cal. Rptr. 578, 582 (1978).

This issue is resolved by the analysis in the previous section. The final sentence of section 63-201(9) clearly indicates that regardless of how a property item is attached – whether it is actual or "constructive" – it will not be considered real property if the equipment is attached to the real estate to allow its proper operation. Thus, all machinery and equipment used in a commercial or industrial process or application would be considered personal property under Idaho law.

3. *Utility Property.*

The Version B list included many categories of utility property as personal property. In summary, the buildings and structures of electric, telephone, pipeline and related companies were classified as real property (i.e., railroad stations, pipeline compressor stations). Property that typically is buried under or constructed on farmland or public roads (i.e., rail track and roadbed, gas pipelines,

electric transmission lines, telephone cable), and that can be repaired, replaced, and moved, was properly classified as personal property. Version B also included telephone central office equipment, which consists of computers that would be considered personal property under any reasonable definition of that term; and electrical generation equipment, which consists simply of very large motors and machines that differ from other types of machinery only by their size and cost (factors that should not change their classification).

The August 29 memo changes the Version B classification of this type of property from personal property to “Not clear,” presumably requiring legislative clarification. However, the proper classification of this property is as personal property, for many of the same reasons discussed earlier in this memorandum.

First, with respect to the annexation requirement, the last sentence of section 63-201(9) makes it clear that even if a pipeline, for instance, were considered “affixed” to the land, it still would be considered personal property if used in the business as opposed to supporting the real estate with which it is associated. As the Colorado court noted in interpreting identical language under that state’s laws, “regardless of whether a particular item is affixed to a building and may otherwise constitute a fixture system, the item constitutes personal property if its use is primarily tied to a business operation.” *Del Mesa Farms, supra*, 956 P.2d at 664.

Second, with respect to the adaptability factor, this type of property is not integral to the operation of the property with which it is associated. Here, it is useful to refer to the case relied on by the Tax Commission, *Rayl v. Shull Enterprises*. The irrigation system was adapted to and integrated with the land on which it was used. The land was farm land; the irrigation system was necessary to the operation of the farm. That is not the case with respect to a gas pipeline or similar types of property. The property is located under (or in the case of transmission lines, over) property that is used for an entirely different purpose – farmland, for instance. In no way can the pipeline be considered integral to the operation of the farmland or other property.

Perhaps for this reason as much as any other, most of the cases we have located have held that this type of property is personal property. See *Colonial Pipeline Co. v. State Dep’t of Assessments and Taxation*, 806 A.2d 648 (Md. 2002); *Yellowstone Pipeline Co. v. State Board of Equalization*, 358 P.2d 55 (Mont. 1960), *cert. denied*, 366 U.S. 917; *Northern Natural Gas Co. v. State Board of Equalization*, 443 N.W.2d 249 (Neb. 1989). The courts in *Colonial*

Pipeline and *Northern Natural Gas* reviewed cases from other jurisdictions and found other cases supporting the personal property classification and only one case holding that such property represents real property.

Third, the intention of the owner in these situations is clearly not to add the pipeline or cable or generators to improve the value of the real property or to make these additions permanent fixtures. As the court stated in *Colonial Pipeline*, the pipeline owner “clearly was motivated by a single factor in installing the pipeline system: to operate its business for profit.... The pipeline, buried beneath the surface of the land, adds nothing to the enjoyment or utility of the land, and would not have been constructed by the landowners in the ordinary use of their land. 806 A.2d at 661-62.

We are aware, of course, that in some states this result has been changed by statute. The August 29 memo refers, for instance, to New York law, and New York has enacted a statute requiring all of these categories of utility property to be classified as real property. This is perhaps one reason why New York is consistently shown in tax burden studies to be near the top of the list in taxes assessed per capita. We must question whether Idaho wants to use New York as a model. It should also be noted that to the extent a different standard is advocated for utility taxpayers than for all other taxpayers, there would be serious constitutional problems. The Idaho Supreme Court held in 1967 that it is unconstitutional to tax utilities in a different manner than other commercial taxpayers. *Idaho Telephone Company v. Baird*, 91 Idaho 425.

In summary, I believe the August 29 memo overlooks a very important provision of the Idaho statute. The only way to interpret section 63-201(9) is to recognize the difference between generic building-related fixtures on the one hand, and equipment used in the operation of the business. The Colorado case of *Del Mesa Farms* expresses this concept very well in applying an identical provision: does the equipment relate to the operation of a building, as a generic “building,” or does it relate to the operation of the business? If it is the latter, then the property is personal property. And this analysis flows directly into the classification of utility property – a straightforward application of the three-factor test leads to the conclusion that the pipelines and related property should be considered personal property.

August 2, 2013

Katrina M Basye
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kbasye@idahopower.com

Alan Dornfest, Chairman
Property Tax Rules Committee
Idaho State Tax Commission
PO Box 36
Boise, ID 83707

Subject: Proposed Rule Change Comments
Rule 205 –

Dear Mr. Dornfest and Committee Members:

The following are Idaho Power's comments regarding Rule 205.

Rule 205.01.c

As proposed:

Improvements. Improvements are buildings, structures, fences, and similar property that are built upon land. Improvements are real property regardless of whether or not such improvement is owned separately from the ownership of the land upon or to which the same may be erected, affixed or attached.

Comments:

The definition of improvements should include fixture which will then replicate the language in the statute.

Improvements. Improvements are buildings, structures, fences, similar property that is built upon land, **and fixtures**. Improvements are real property regardless of whether or not such improvements are owned separately from the ownership of the land upon or to which the same may be erected, affixed or attached.

Rule 205.04(a)

As proposed:

04. Property eligible for the exemption in 63-602KK. ()

a. ~~The three factor test will be the predominant determinant of eligibility when considering whether items are exempt per Section 63-602KK, Idaho Code. When Subsection 03. b. of this rule and the three factor test create a conflict in determining whether an item is eligible, the three factor test shall resolve the conflict.~~ Improvements! Some items may not be considered fixtures, but may be structures or buildings. In this case the items are improvements which are real property and therefore not eligible for the exemption found in section 63-602KK, Idaho Code. ()

Comments:

In the statute under the definition of improvements it is clear that there are different types of improvements. It is not necessary to repeat the language in rule 04(a) because it is already stated in Rule 205.01(c).

Rule 205.04(a)

As proposed:

b. Examples. The following items are examples of improvements that shall are not be considered eligible for the exemption: ()

i. Cell towers and similar structures; ()

ii. Underground storage tanks; ()

iii. Poles and towers; ()

iv. Signposts; ()

v. Pipelines and conduit; ()

vi. Railroad track; ()

vii. ~~Affixed boilers, generators, and similar equipment;~~ ()

Comments:

- 1) By including the property listed above ((b)i. – (b)vi.) as real property this contradicts what was reported to the Idaho legislature. In a tax commission report “Revised 1/3/2013 Analysis of 2012 Personal Property Tax in Idaho” (Attachment A) assigned percentages to operating property to reflect their best estimate of the amount of personal property and real property in Idaho (Attachment A pg 6). The proposed rule will inappropriately and dramatically reduce those personal property percentages.

- 2) Legal analysis from the Tax Commission inappropriately eliminates part of the definition of a fixture thereby shifting property that should be classified as personal property to real property.

“Our legal staff believes that analysis should be based primarily on the three factor test and not the last sentence of Idaho Code 63-201(9).”(Attachment B)

In determining if an asset is personal property or real property statute language must be examined in its entirety. The legislature purposefully added the last sentence for clarification.

“Fixtures” means those articles that, although once movable chattels, have become accessory to and a part of improvements to real property by having been physically incorporated therein or annexed or affixed thereto in such a manner that removing them would cause material injury or damage to the real property, the use or purpose of such articles is integral to the use of the real property to which it is affixed, and a person would reasonably be considered to intend to make the articles permanent additions to the real property.

“Fixtures” do not include machinery, equipment or other articles that are affixed to real property to enable the proper utilization of such articles”

- 3) There appears to be misunderstanding that if property is erected upon or affixed to land than it becomes real property. That is simply not true. Supports/towers, etc. that service personal property should be categorized as personal property because the property services the personal property not the realty. (Fixtures do not include equipment that are affixed to real property to enable the property utilization of such articles.)

For example; the cellular equipment cannot operate unless it is a certain distance in the air which requires a tower. Real property does not include the “article” that enables the proper utilization of the cellular equipment. It wouldn’t matter if the supports are outside buried in the ground or inside bolted to a floor.

Also, the classification of property does not change if the property is above or below ground or floats on water.

For example the classification of an above ground tank resting on the ground classified as personal property would not change if it were buried, resting on a tower, or floating.

- 4) There was extensive legal analysis by Erick Shanner (Tax Commission) and Rick Smith (Hawley Troxel) and a list of property was determined to be real or personal property. This list was unanimously approved by the rules committee back in 2007. Perhaps the list should be utilized by this committee (Attachment C).

Sincerely,



Katrina Basye, Property Tax Manager
Idaho Power Company



PO Box 36 • Boise ID 83722-0410
800 Park Blvd., Plaza IV • Boise ID 83712-7742

December 18, 2012 Revised: 1/15/2013

Memo

From: Alan Dornfest, Property Tax Policy Supervisor

Re: Revised 1/3/2013 Analysis of 2012 Personal Property Tax in Idaho

The following document represents the Tax Commission's current analysis of the amount of property tax revenue each taxing district and urban renewal agency currently derives from personal property. To do this analysis, we used taxable values for property assigned by county assessors to categories typically considered to be personal property, as opposed to real property, which typically consists of land and improvements (ie: buildings and similar structures). In addition, tax commission staff assigned percentages to operating property of public utilities and railroads designed to reflect their best estimate of the amount that could be construed to be personal property. For most industry groups within operating property, most property other than land and buildings was considered to be personal property. For electric utilities, land, buildings, generators, and dams were considered real property.

The percentages and categories identified as personal property in this analysis should not be construed as any type of policy statement. In other words, the Tax Commission does not advocate the use of these particular percentages for operating property or, necessarily, the assignment of each category listed in the report to be personal property. As policy makers consider the effects of personal property tax revenue on local taxing districts and urban renewal agencies, any changes in the percentages or assumptions will affect the results reported in this analysis and could increase or decrease the amounts shown.

Similarly, neither the report nor the Commission has any position regarding the advisability of providing replacement money should the legislature decide to exempt all or a portion of personal property.

Questions about this report should be referred to one of the following staff of the Property Tax Division:

Steve Fiscus, Property Tax Division Administrator – 208-334-7730
Alan Dornfest, Property Tax Policy Supervisor – 208-334-7742
Rick Anderson, Tax Policy Specialist – 208-332-6624

Table - 2

Below are the percentages used to compute the Operating Property personal property.	
Electrics	55%
Local Exchange Telecommunications (Regulated)	90%
Water Distribution	90%
Petroleum Pipelines	90%
Gas Distribution	95%
Railroads	80%
Private Railcar Fleets Over 500,000	100%
Long Distance Telecomm. (Unregulated)	90%
Water Transportation	100%
Gas Transmission	90%
Non-Utility Generators (NUGs)	70%

Operating Property was computed assuming that Electrics @55%.

MEMORANDUM

May 3, 2013

TO: All County Assessors

FROM: Alan Dornfest, Property Tax Policy Supervisor

RE: Clarification of personal property exemption issues

Since the enactment of the personal property exemption statute and temporary rule 626, which gave general guidance on the administration of this exemption, several questions have been raised by multiple counties. We have been meeting with tax commissioners and legal staff and, although we can't offer complete, definitive resolution at this time, we would like you to be aware of our consensus and general recommendations.

1. Cell Towers. Idaho Code 63-201(11) defines "improvements" as meaning "...all buildings, structures, ...erected upon or affixed to land...." In the same code section, subsection (23) defines "improvements" as real property. We believe that cell towers are structures and therefore are real property. This makes them ineligible for the exemption found in section 63-602KK, Idaho Code. We are willing to listen to the possibility that, in some cases, mobile cell towers, subject to common or frequent re-location, may be an exception that could be considered to be personal property. However, if you report a cell tower on the property tax replacement report to be submitted in November, additional documentation will be needed to support the claim that it is personal property.

2. Equipment on Cell Towers. Equipment, such as satellite dishes, on cell towers may be considered personal property.

3. Exemption for items of taxable personal property. Section 63-602KK(1), Idaho Code provides a separate exemption for items of otherwise taxable personal property provided these items cost no more than \$3,000 and can perform their function: "...without being combined with other items of personal property." To us, this means that an add-on piece of equipment that enhances the functionality of another piece of equipment, but cannot function on its own, does not qualify. This could occur, for example, given a landscaping tractor for which the owner buys a \$2,000 attachment of no stand-alone use. The attachment would not be eligible for the exemption in 63-602KK(1). However, the attachment could be eligible for the \$100,000 exemption that applies to all of the otherwise taxable personal property owned by that taxpayer. So, continuing this example, if the taxpayer owned a total of \$50,000 worth of personal property, notwithstanding the new \$2,000 attachment, all \$52,000 would now be exempt. Provided the additional property did not cause the total value of the taxpayer's personal property to exceed \$100,000, unless needed to establish initial (first year) eligibility, there would be no requirement to report. Except that everything must still be defined as personal property, we view the limitations on what is an "item" as being specific to granting the exemption in 63-602KK(1) for up to \$3,000 cost per item only.

4. Taxpayer. There is a limitation on the \$100,000 exemption found in section 63-602KK(2). The exemption applies to the personal property of a “taxpayer” and the law defines a taxpayer as including: “...*(2) or more individuals using the property in a common enterprise or a related group of two (2) or more organizations when the individuals or organizations are within a relationship described in section 267 of the Internal Revenue Code....*” We view this clause as providing a two-step analysis:

- 1.) Does a “common enterprise” exist?
- 2.) Does the enterprise involve a group having a section 267 relationship?

This stepwise analysis is not intended to be provide an “either/or” determination. Decisions must be made on a case by case basis and we will be drafting examples to further illustrate the necessary principles. We plan to have these developed by the end of next week and will share these with you as soon as they are drafted. We plan to place examples in the permanent rule currently under development.

If you need further information or clarification, please call me (208) 334-7742.

Sincerely,

Alan S. Dornfest
Property Tax Policy Supervisor
Property Tax Division

cc. Steve Fiscus, Property Tax Division Administrator
Tom Katsilometes, Tax Commissioner
Rich Jackson, Chairman, Idaho State Tax Commission
Ken Roberts, Tax Commissioner
David Langhorst, Tax Commissioner
Matt Virgil, Managing Consulting Appraiser
George Brown, Deputy Attorney General
Erick Shaner, Deputy Attorney General

MEMORANDUM

May 22, 2013

TO: All County Assessors

FROM: Alan Dornfest, Property Tax Policy Supervisor

RE: Clarification of personal property definitional issues

There continue to be questions about the definition of personal property. Section 63-201(9) provides a statutory definition declaring “fixtures” to be real property and using the traditional three factor test (ie: annexation to the real property, use of such articles as integral to the use of the real property, like a key to a building lock, and reasonable intent to make the articles permanent additions to the real property). However, questions arise because of the last sentence in that subsection, indicating that “fixtures” are not: “...*machinery, equipment, or other articles that are affixed to real property to enable the proper utilization of such articles.*”

This language is wholly inconsistent with other Idaho related statutes and case law, as well as the three factor test on this subject. The Idaho legislature has repeatedly emphasized that the three factor test is the central concept of how to determine what is real and what is personal property. Our legal staff believes that analysis should be based primarily on the three factor test and not the last sentence of Idaho Code 63-201(9). It appears to us likely that the last sentence could apply under the scenario where machines are bolted to manufacturing plant floors so that the machines will for example not bounce around while in operation.

We hope this helps to clarify this issue and are planning to include some definitional language to this effect in the proposed permanent rule.

If you need further information or clarification, please call me (208) 334-7742.

Sincerely,

Alan S. Dornfest
Property Tax Policy Supervisor
Property Tax Division

cc. Steve Fiscus, Property Tax Division Administrator
Tom Katsilometes, Tax Commissioner
Rich Jackson, Chairman, Idaho State Tax Commission
Ken Roberts, Tax Commissioner
David Langhorst, Tax Commissioner
Matt Virgil, Managing Consulting Appraiser
George Brown, Deputy Attorney General
Erick Shaner, Deputy Attorney General

VERSION B - RULE 205

205. PERSONAL AND REAL PROPERTY - DEFINITIONS AND GUIDELINES (RULE 205)

Sections 63-201, 63-302 and 63-309, Idaho Code.

- 01. Real Property.** Real property means land, all buildings, structures and improvements, or other fixtures of whatsoever kind on land. The term improvements does not include the items identified in Section 63-309, Idaho Code, as personal property.
- 02. Personal Property.** Personal property includes all goods, chattels, stocks and bonds, equities in state lands, easements, reservations and leasehold real properties.
- 03. Improvements or Fixtures.** Improvements or fixtures to real property must meet both of the following criteria:
 - a. Property which is physically attached to the land or other improvements affixed to the land in such a manner that it may not be removed without materially damaging the real property or is of such a nature that it would normally be expected to be sold together with the land.
 - b. Property which increases the market value of the land or increases the ability of the possessor of the land to use it more productively on a relatively permanent basis.
- 04. Three Factor Test.** To clarify the definition in paragraph 03 above, a three factor test shall be applied to determine whether a particular article has become an improvement or fixture to real property. To be considered an improvement or fixture to real property a particular article must meet each of these three tests. The three tests to be applied are:
 - a. Annexation to the real property, either actual or constructive. If an item has been annexed in such a way that removing it would cause material injury or damage to the real property, then that fixture or improvement may be classified as real property.
 - b. Adoption or application. If the use or purpose of that item is integral to the use of the real property to which it is connected, then that fixture or improvement may be classified as real property.
 - c. Intention. If a reasonable person would intend to make the fixture or improvement a permanent addition to the real

C

VERSION B - RULE 205

property, then that fixture or improvement may be classified as real property.

05. Intent. For the purpose of determining whether there is intent to make the article a permanent addition to the real property the relevant inquiry is whether the objective circumstances manifest an intent that the item is to be made a permanent addition to the real property. The subjective intent of taxpayers and others is not the controlling factor. In evaluating the objective intent the following factors shall be considered:

- a. The nature of the article
- b. The manner of annexation to the real property
- c. The injury to the real property, if any, resulting from the removal of the article
- d. The completeness with which the article is integrated with the use to which the real property is being put
- e. The relation which the annexer has with the real property as licensee, tenant at will for years or for life or fee owner
- f. The relation which the annexer has with the article such as owner, bailee or converter
- g. The local custom respecting treating such an article as personal property or an improvement or fixture to real property
- h. The time, place and degree of social, economic and cultural development (e. g., a luxury in one generation is a necessity in another)
- i. All other relevant facts surrounding the article, the annexation and the real property.

06. Operating Property. For any purpose for which the distinction between personal property and real property is relevant or necessary for operating property, operating property will be characterized as personal or real based upon the criteria stated in this rule.

07. Leased Personal Property. The listing, as set forth in Idaho Code §63-306, of leased personal property shall also include the name and address of the other party to the lease and the terms of the lease.

08. Guidelines. The following are guidelines for applying this rule. The decision of the assessing authority as to whether property is real or personal property shall be presumed correct. The burden for overcoming the assessing authority's decision is by a preponderance of the evidence. These guidelines are not intended to be all inclusive.

VERSION B - RULE 205

- a. Equities in land purchased from the state under contract are personal property.
- b. Machinery, tools and equipment are not real property unless they meet the definition of an improvement or fixture to real property, as defined in this rule.
- c. Furniture, trade fixtures, library collections, art work and collectibles, including all such items held for rent or lease are personal property.
- d. Vehicles, aircraft and mobile equipment are personal property.
- e. Signs and signboards, their bases and supports are personal property.
- f. Manufactured housing is subject to the provision of Section 63-304, Idaho Code.
- g. Vault doors, drive in windows, automatic tellers and night depositories are real property when owned by the owner of the building.
- h. Air handling, heating ventilation air conditioning (HVAC) equipment, and humidifiers - (1) building air control systems, including refrigeration equipment, primarily used for the comfort of the occupants is real property. (2) Window and package unit air conditioners are personal property. (3) Air control systems for special processes to maintain controlled temperature and humidity and used primarily for purposes other than the comfort of occupants including air conditioning for electric rooms and vaults are personal property.
- i. Aluminum pot lines are personal property.
- j. Ash handling system, pit and superstructure (See Boilers)
- k. Asphalt mixing plant is personal property.
- l. Auto-Call and telephone system is personal property.
- m. Automobiles, recreational vehicles, and other vehicles are personal property.
- n. Beneficiation equipment, foundations and all machinery required to process ore including crushers, grinders and floatation equipment is personal property.
- o. Boilers including stacks and superstructure used primarily for service of real property are real; other boilers including stacks and superstructure are personal property.
- p. Booths for welding are personal property.
- q. Bucket elevators whether open or enclosed and including casing are personal property.
- r. Bulkheads and external walls that enclose additional land area within a building perimeter are real property, other bulkheads

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and walls are real property if they meet the criteria established in the general rule above.

- s. Buildings are real property.
- t. Cable whether above or below ground for transmission of information, data, power or other services is personal property.
- u. Coal handling systems (See Boilers)
- v. Cold storage—built-in cold storage rooms within building are real property, cold storage refrigeration equipment is personal property.
- w. Conduit and vaults used in telephonic services when underground are real property.
- x. Control booths are personal property.
- y. Conveyor, conveyor housing, structure, steel foundations that support conveyors or conveyor tunnels that meet the definition above are real property otherwise they are personal property. Conveyor units including belt, drives, motors and assets that don't meet the definition of real property above are personal property.
- z. Coolers -- portable walk-in coolers are personal property.
- aa. Cooling towers the primary use of which is the comfort of occupants within buildings or other real property are real property. Other cooling towers are personal property.
- bb. Cranes are personal property.
- cc. Crane runways including supporting columns or structure whether inside or outside of building that meet the definition of real property above are real property, otherwise they are personal property, crane runways that are bolted to or hung on tresses or can be moved are personal property.
- dd. Dock levelers are personal property.
- ee. Drying rooms that meet the definition above for real property are real property, drying room heating, cooling, environmental control systems, equipment and other assets are personal property.
- ff. Dust catchers or other filtration equipment are personal property.
- gg. Farm equipment is personal property.
- hh. Outside fencing other than railroad fencing, whether for security or decorative is real property.
- ii. Fire alarm systems are personal property.
- jj. Fire walls are real property.
- kk. Foundations for machinery and equipment including those made from steel and regardless of how they are attached to the building or other real property are personal property.

C

- ll. Greenhouse assets that meet the definition of real property are real property, greenhouse benches, heating, cooling, watering and other environmental systems are personal property.
- mm. Gravel plant machinery and equipment is personal property.
- nn. Kilns – structures used for lumber drying, concrete block drying and circular down draft (beehive) are real property, kiln systems including heating, drying and other equipment are personal property.
- oo. Laundry steam generating equipment is personal property.
- pp. Lighting --yard lighting is real property, special purpose lighting and illumination equipment is personal property.
- qq. Mixers are personal property.
- rr. Mobile homes are personal property.
- ss. Motors except those that are required for building occupant comfort are personal property.
- tt. Net profit of mines which is the amount of money or its equivalent received from the sale or trade of minerals or metals extracted from the Earth after deduction of allowable expenses as defined in Section 63-2802, Idaho Code, or by State Tax Commission rule is personal property.
- uu. Ore bridge foundations are real property.
- vv. Ovens used for processing are personal property.
- ww. Process piping including foundations and bridges whether above or below ground are personal property.
- xx. Pumps except those that are required for building occupant comfort are personal property.
- yy. Pump house including the sub-structure are real property.
- zz. Racks and shelving, portable or removable are personal property.
- aaa. Reservations and Easements including reserved mineral rights and divided ownership of property rights – personal (Easements convey use but not ownership.)
- bbb. Construction work in progress – Classification based on type of property
- ccc. Ready-mix concrete plant is personal property.
- ddd. Refrigeration and freezer equipment, but see air conditioning, is personal property.
- eee. Sanitary systems are real property.
- fff. Scale houses are real property.
- ggg. Scales – truck or railroad scales including pit are personal property.

VERSION B - RULE 205

- hhh.** Silos— storage silos are real property unless portable or movable, silos used during a manufacturing process are personal property.
- iii.** Spray Ponds— masonry reservoir is real property, spray pond piping and equipment is personal property.
- jjj.** Sprinkler system used for crop or landscape irrigation is real property if buried, above ground irrigations systems are personal property.
- kkk.** Stone crushing plant— machinery and equipment is personal property.
- lll.** Portable storage bins are personal property.
- mmm.** Substation building is real property.
- nnn.** Substation switchyard and control machinery and other electrical equipment are personal property.
- ooo.** Tanks— tanks used as part of a manufacturing process are personal property. Underground fuel tanks are personal property.
- ppp.** Tipple structure is personal property.
- qqq.** Unloader runways are real property.
- rrr.** Utility meters and auxiliary equipment are personal property.
- sss.** Water treatment and softening plant, water pumping buildings and structures are real property, water treatment and softening equipment is personal property, water lines used primarily for potable and sanitary water are real property, water lines for processing whether above or below ground are personal property, water pumps and motors are personal property.
- ttt.** Wells, pumps, motors and equipment are personal property
- uuu.** Wiring -- power wiring integral to machinery, equipment or for processing is personal property.
- vvv.** Inventory of spare parts and supplies is personal property.
- www.** Electric power plants - generators, associated prime mover and auxiliary equipment are personal property
- xxx.** Electrical power lines and auxiliary equipment whether above or below ground are personal property
- yyy.** Electrical towers and poles --transmission and distribution and associated fixtures are personal property
- zzz.** Switching equipment, circuit equipment and other central office equipment used by the telecommunications industry are personal property.
- aaaa.** Remote terminals and related equipment used in transmitting telecommunications signals are personal property.

VERSION B - RULE 205

- bbbb.** Wire and cable used in transmitting telecommunications signals, including aerial, buried, and underground wire and cable, are personal property.
- cccc.** Poles and towers used in the telecommunications industry are personal property.
- dddd.** Railroad track, including rail, ties, ballast, and other track material are personal property.
- eeee.** Railroad fences, snow sheds and signs are personal property.
- ffff.** Railroad stations and office buildings are real property.
- gggg.** Railroad building and miscellaneous structures are real property.
- hhhh.** Railroad shops and engine houses are real property
- iiii.** Railroad storage warehouses are real property.
- jjjj.** Railroad water stations and fuel station buildings are real property.
- kkkk.** Railroad water stations and fuel station equipment is personal property.
- llll.** Railroad trailer on flat car/container on flat car (TOFC/COFC) terminals, buildings and paving is real property.
- mmmm.** Equipment of railroad trailer on flat car/container on flat car (TOFC/COFC) terminals is personal property.
- nnnn.** Railroad communication systems, signals and interlockers are personal property.
- oooo.** Railroad power transmission systems, roadway machines and shop machinery are personal property.
- pppp.** Railroad rolling stock, including locomotives, freight cars, and work equipment are personal property.
- qqqq.** Railroad construction work in process is classified as real property or personal property based on type.
- rrrr.** Pipeline compressor station, measuring and regulating stations, communication and other structures, and associated components are real property.
- ssss.** Below and above ground pipelines other than water and gas mains, natural gas lines, and associated components of pipeline companies are personal property.
- tttt.** Measuring and regulating station equipment and associated components of pipeline companies are personal property.
- uuuu.** Communication equipment and associated components of pipeline companies are personal property.
- vvvv.** Purification, liquefaction and vaporizing equipment and associated components of pipeline companies are personal property.

VERSION B - RULE 205

www. Below and above ground water pipes other than water and gas mains, pumping equipment, measuring and regulating equipment and associated components of water companies are personal property.



Idaho Association of
Commerce & Industry
The Voice of Business in Idaho®

August 6, 2013

Mr. Alan Dornfest, Chairman
Mr. Rick Anderson
Property Tax Rules Committee
Idaho State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83712

RE: Comments on Proposed Rule 205

Dear Alan and Rick:

Thank you for the opportunity to comment on the proposed Rule 205. We hope you find the comments compelling and take our points into consideration as we move forward with a challenging effort to eliminate the personal property tax.

The statute is clear that improvements and fixtures are real property. The permissive nature of Rule 205 (4) is unacceptable. The application of the three-part test is appropriate in making such a determination, but we find the re-emergence of consideration of a “list” of examples disturbing when the focus should center on the appropriate application of the test by regulators and assessors. The list as it is contemplated in the rule is a clear violation of the structure and function of the statute that defines real property and the components thereof.

In addition, the use of such list would run afoul of other statutes, such as the exemption for pollution control equipment found in 63-602P. Clearly, if pipelines and conduit or even tanks are used in pollution control equipment, they would continue to qualify for an exemption. Therefore, to use those items as an “example” in the rule is not appropriate. A rule of this nature is not advisable, and we will oppose the rules in the germane committees if adopted by the commission.

While we are opposed to the idea of a list as contemplated in the draft rule, we understand the concern over providing a real world example of how the test may yield results in the classification of properties. Perhaps this could be handled through guidance, but our recommendation would be to revisit the law itself and insert the percentages on operating property as has been contemplated in several statutory drafts. We believe this would be the easier path to ensuring limited contention in areas in which there is some difficulty in providing a consistent application of the law.

In order to enhance the clarity of the application of the law in rule, we would recommend the following changes to rules that were previously adopted in 2009:

205. PERSONAL AND REAL PROPERTY -- DEFINITIONS AND GUIDELINES (RULE 205).

Sections 39-4105, 39-4301, 63-201, 63-302, 63-309, 63-602KK, 63-1703, 63-2801, Idaho Code. (5-8-09)

01. Real Property. Real property is defined in Section 63-201, Idaho Code. ~~Real property consists of land and improvements.~~ (5-8-09)

~~Comment: This definition is incomplete, as written, eg., it omits reference to “standing timber.” The stricken language includes statutory language, but is unnecessary, with the first sentence. Unless there is some reason for the rearrangement of language, leave the definition of real property as it is in the statute, and merely reference the applicable statute, except as referenced in subparagraph b.~~

~~a. — Land. Land is real property as well as all rights and privileges thereto belonging or any way appertaining to the land.~~ (5-8-09)

~~b. — Law and Courts. Real property also consists of all other property which the law defines, or the courts may interpret, declare, and hold to be real property under the letter, spirit, intent, and meaning of the law.~~

~~Comment: Although this language is in the statutory provision relating to the definition of “real property,” it is a clear invitation to courts to engage in legislating in the name of interpreting the “spirit, meaning, and intent of the law.” The courts of this state do not need such an invitation and will “interpret” without it. In addition, neither the rule nor the statute limits such interpretation to the laws of the state of Idaho or to decisions of Idaho courts. Endorsement of court-imposed legislation, or resorting to the “spirit and intent” of the law may have potential negative implications in other areas of the law as well. If a broader definition of “real property” is needed, it is better for the legislature, and use of the legislative process, to drive such a definition.~~

(5-8-09)

~~c. Improvements. Improvements are buildings, structures, and fences, and similar property erected or affixed to land, fixtures, fences, and water ditches for mining, manufacturing or irrigation, that is built upon land. Improvements are real property regardless of whether or not such improvements are owned separately from the ownership of the land upon or to which the same may be erected, affixed, or attached.~~

~~Comment: The definition of “improvements” needs to include “fixtures.” It is preferable to use the statutory definition, or at least, reference the statutory definition. (63-201(11), Idaho Code.)~~

(5-8-09)

02. Personal Property. Personal property is defined in Section 63-201, Idaho Code, as everything that is the subject of ownership that is not real property. (5-8-09)

03. Fixtures. Fixtures are defined in Section 63-201, Idaho Code. (5-8-09)

a. Three part ~~factor~~ test. ~~If an~~ ~~An item of property~~ article which satisfies ~~meets~~ all three of the following tests shall constitute a ~~, the item becomes~~ a fixture and therefore taxable as a part of the improvement to real property. (5-8-09)

i. Annexation. Although once moveable chattels, articles become accessory to and a part of improvements to real property by having been physically ~~or constructively~~ incorporated therein or annexed or affixed thereto in such a manner that removing them would ~~cause material injury or damage to the~~ materially reduce the value or functionality of the remaining real property ~~for its intended use~~; and

Comment: Without further definition, the meaning and intent of “constructively incorporated” is unclear. The statute requires a “fixture” to be “physically incorporated” or “annexed or affixed.” (63-201 (9), Idaho Code)

The reference to reduction in “value or functionality of the remaining real property for its intended use” is an attempt to quantify what is meant by “material injury or damage.” Removal of some articles that are part of the improvements to real property may cause “injury or damage” to the real property, but actually increase the overall value of the remaining property, or its removal may not have an effect on the functionality of the property for its intended use. The purpose of this suggestion is to encourage examination of what is meant by “material injury or damage to real property.”

(5-8-09)

ii. Adaptation. The use or purpose of ~~the article~~ ~~an item~~ is integral to the use of the ~~real property~~ improvement to which it is affixed ~~or attached~~; and (5-8-09)

iii. Intent. Items should be considered personal property unless a person would reasonably be considered to intend to make the articles, during their useful life, permanent additions to the real property. The intent depends on an objective standard and what a reasonable person would consider permanent and not the subjective intention of the owner of the property.

(5-8-09)

b. Fixtures does not include machinery, equipment, or other articles that are affixed to real property to enable the proper utilization of such articles. (5-8-09)

We appreciate the opportunity to comment on the proposed Rule 205. Please let us know if you have any questions about this input.

Sincerely,



Alex LaBeau
President

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August 16, 2013

Mr. Alan Dornfest, Chairman
Mr. Rick Anderson
Property Tax Rules Committee
Idaho State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83712

Re: *Follow-up to Comments on Proposed Rule 205*

Dear Alan and Rick:

This letter will supplement my letter of August 2, 2013, in which I provided comments on the Commission staff's draft of Rule 205, dated July 2, 2013. At the August 6 meeting, you deferred any action on this rule, pending an evaluation of all the comments submitted at that time. You scheduled another meeting for August 21 to consider this issue again. I will be out of town on a long-planned trip, and will be unable to attend that meeting or to review any new draft of the rule. However, I did want to address some of the comments made at the last meeting.

First, I wanted to reply to your response to comments I and others made about how the Commission's previous fiscal impact studies have included most of the "gray areas" of operating property in the personal property definition. I believe you said during the meeting that this was because you were assuming a "worst case" scenario for whether operating property would qualify for the exemption.¹ However, I think the position the Commission was presenting in

¹ Perhaps "worst case" is the wrong term; it is the scenario that has the most cost to the general fund. I should note that the estimates of the effect of exempting these types of operating property are sometimes misunderstood. My recollection is that of the \$130 million of fiscal impact of a full exemption, no more than \$40 million was for operating property, and that would include all personal property and just not the "gray areas" like pipeline, poles, track, etc.

those estimates was consistent with the approach it has taken since 2007 – that there is good reason to believe that these types of operating property do satisfy the ordinary understanding of what constitutes “personal property,” that it is fair and reasonable to include this property within that definition, and that the legislature ought to be aware of and include that cost in its analysis.

Second, Erick Shaner mentioned that one issue he had with our analysis relates to our reliance on the final sentence of the fixtures definition: “‘Fixtures’ does not include machinery, equipment or other articles that are affixed to real property to enable the proper utilization of such articles.” We have pointed out that this definition is at least a clarification of the three-factor test, and perhaps a modification of it. It shows the intent that machinery, equipment and other “articles” that are utilized in a commercial process or operation are personal property. Erick pointed out that this sentence is very similar to a Colorado statute that defines “personal property,” and that the Colorado statute goes on to list many of the types of operating property that are in the “gray area.”² Erick implied that the failure of our legislature to adopt this listing of personal property items shows the intent to exclude them. I think the opposite conclusion is necessary. The specific items listed in Colorado definition are consistent with the definition that precedes that listing – they are obviously items of machinery, equipment or “other articles” that are related to the commercial or industrial operation in which they are “utilized.” The specific items must have been listed to provide certainty that those items would be included in that definition. Although similar certainty would be desirable in this case, it is not necessary, because they do fall within that broad definition. In contrast, some states such as New York have, for policy reasons, taken the opposite approach – specifically including many types of operating property as taxable property, probably because of concern that otherwise they would be considered personal property not subject to tax. However, Idaho has long had a strong policy of

² The statute is Colo. Rev. Stat. § 39-1-102, and provides as follows:

(11) "Personal property" means everything that is the subject of ownership and that is not included within the term "real property". "Personal property" includes machinery, equipment, and other articles related to a commercial or industrial operation that are either affixed or not affixed to the real property for proper utilization of such articles. Except as otherwise specified in articles 1 to 13 of this title, any pipeline, telecommunications line, utility line, cable television line, or other similar business asset or article installed through an easement, right-of-way, or leasehold for the purpose of commercial or industrial operation and not for the enhancement of real property shall be deemed to be personal property, including, without limitation, oil and gas distribution and transmission pipelines, gathering system pipelines, flow lines, process lines, and related water pipeline collection, transportation, and distribution systems. Structures and other buildings installed on an easement, right-of-way, or leasehold that are not specifically referenced in this subsection (11) shall be deemed to be improvements pursuant to subsection (6.3) of this section. (Emphasis added, to show the provision similar to Idaho's definition.)

August 16, 2013
Page 3

uniformity, embedded in our Constitution, which would prevent the state from excluding operating property in this way. *See Idaho Telephone v. Baird*, 91 Idaho 425 (1967).

Third, Commissioner Roberts made the comment that we need to set a “marker” for determining what types of property should be personal property or real property. I don’t disagree that it would be helpful to set a “marker,” but that just begs the question of where the marker should be. We believe that the proper “marker” is the broad definition that includes these “gray areas” of operating property, and if it is something other than that, the legislature needs to be the body that makes that tax policy decision.

Finally, Commissioner Jackson made a similar comment that in setting the “marker,” everyone needs to be aware of a potential tax shift that could occur from commercial to residential property. However, we need to remember that the latest IACI bill for a complete exemption provided for replacement funding to the counties and other local taxing districts, so there would be no tax shift. In any event, this issue of whether it is appropriate to shift tax burdens is a tax policy choice beyond the scope of this committee’s charge, or even the Commission’s.

As I argued in my letter of August 2, we believe the best approach would be for the Commission to identify those items of operating property for each industry that are consistent with the percentages used for that industry in the legislation that used the percentage concept. (In 2013, that was House Bill 276.) This approach is more consistent both with applicable law and with the prevailing view of operating property over the last six years we have been discussing this issue.

If you should have any questions concerning the matters discussed in this letter, please feel free to contact me.

Sincerely,

HAWLEY TROXELL ENNIS & HAWLEY LLP

A handwritten signature in black ink that reads "Richard G. Smith" followed by a stylized "TS" monogram.

Richard G. Smith

cc: Client representatives



George Carr
Sr. Manager – Property Tax
720-888-3565
george.carr@level3.com

August 27, 2013

Alan Dornfest, Chairman
Property Tax Rules Committee
Idaho State Tax Commission
800 Park Blvd., Plaza IV
Boise, ID 83712

RE: Level 3 Communication's Comments on Proposed Rule 205

Dear Mr. Dornfest,

I have had an opportunity to review the written comments of Rick Smith, Idaho Power, Micron and IACI regarding the proposed changes to rule 205. Level 3 concurs with those comments. Level 3 also concurs with the percentages of operating property represented to the legislature for telecommunications firms regarding the proportions of real and personal property of centrally assessed telecommunications firms; and that the Tax Commission's has an obligation to implement and administer section 63-602KK according to those representations and not limit the scope of the legislators intent. The proposed addition of section 04 to rule 205 does the opposite. By arbitrarily assigning a real property classification to 6 discrete items that may in fact be personal property by application of the three factor test or other statutes.

Level 3's network is comprised of underground conduit, fiber optic cable and optical transmission and IP equipment. The underground conduit is located predominately in public right-of-way or rail road right-of-way and does not qualify as an improvement to real property as a building, structure or fixture when applying the three factor test. First, at the expiration of a right-of-way agreement, if not renewed, the conduit must be removed and the land restored. There is no material or permanent damage to the land and Level 3 is required financially to make a reserve for the anticipated remediation liability. Second, frequently in cities and municipalities the conduit needs to be relocated to accommodate highway and street improvements and is indicative of its lack of permanence as an addition to real property, is not intended to be a permanent addition to the real property or to be sold as part of the real property. Third, the conduit is not integral to the use of the right-of-way but rather the right-of-way is integral to the use of the conduit as part of an operating telecommunications system.

In addition to the three factor test, improvements or fixtures to real property must also increase the market value of the land or increases the ability of the possessor of the land to use it more productively on a relatively permanent basis. Conduit, as part of a broadband telecommunications network, does not do this. There is no increased productivity of the right-of-way and thus no increase in the market value of the right-of-way on a relatively permanent basis.

Beyond the three factor test, Idaho code Sec. 63-309(1) states "All taxable improvements on government, Indian, State, county, municipal or other lands exempt from taxation, and all improvements on all railroad rights-of-way owned separately from the ownership of the right-of-way upon which the same stands, or in which nonexempt persons have a possessory interest, shall be assessed and taxed as personal property." A significant portion of Level 3's investment in its broadband fiber optic network is comprised of underground conduit located predominately on highway or railroad right-of-way. The rule as proposed would specifically classify Level 3's conduit as real property contrary to section 63-309(1).

For the reasons noted above the proposed changes to rule 205 do not accomplish the goal of uniformity in determining real v personal property; to the contrary it confounds the issues even more by definitively classifying certain items as real property when facts, circumstances, property use and law indicated it could be otherwise.

Sincerely,

A handwritten signature in cursive script that reads "George Carr".

George Carr
Sr. Manager – Property Tax

Email – dated 10/7/2013

Alan

I have reviewed the October 2, 2013, issue of the Idaho Administrative Bulletin and would like to request a public hearing for two of the property tax rules published in Docket 35-0103-1302.

First, I would like a public hearing on Rule 205 in order to discuss the proposed changes under subsection 205.04.a. Specifically, I am troubled by the last sentence of that paragraph that starts with: “When Subsection 205.03.b. of this rule and the three (3) factor test create a conflict....”

Second, I would like a public hearing on Rule 626 in order to address the miss-placement of a few parts on the example pages. Specifically, on page 472 under 626.08 there is a diagram and a box containing text starting with “Here, the usual functions...” The box does not belong in this location but should be re-located to fall under the diagram at 626.08.a.i – further down the page. Additionally, on page 474 under 626.08.d.i there is a diagram, then a text box, then another diagram. The second diagram is miss-placed and should be located after the text at 626.08.d.ii.

Thank you,

Terry Accordino

Micron Technology, Inc.

Tax Manager

(208) 368-4670

October 22, 2013

Katrina M Basye
Property Tax Manager
(208) 388-2328
(208) 388-5460 (FAX)
kbasye@idahopower.com

Alan Dornfest
Tax Policy Supervisor
Idaho State Tax Commission
PO Box 36
Boise, ID 83722-0410

Subject: Proposed Rule 205 as published in the October 2, 2013 Administrative Bulletin – Vol. 13-10

Dear Mr. Dornfest:

Rules have the effect of law and therefore must have a comprehensive review and consideration before they are enacted. All issues regarding proposed rule 205 have not been thoroughly vetted therefore proposed rule 205 must be rejected.

Proposed rule 205 lists property that is to be classified as real property. Cell towers and similar structures is one of six items on the list. This real property classification contradicts the tax commission's position. A cell tower was determined by the tax commission in 2013 for sales tax purposes to be tangible personal property in which the tax commission cited the three factor test. The following discussion was also included by the commission to explain to the taxpayer why cell towers were classified as tangible personal property;

“A communication tower is used to raise an antenna to a specified height in order for an antenna to be effective., Therefore, the communication tower is not considered to be real property on the basis that it does not service the realty, but it services the business in itself for communication purposes.”

This contradiction within the tax commission confirms all issues have not been reviewed for proposed rule 205.

For the reasons stated above and the attached comments, I would ask the tax commission to REJECT proposed rule 205.

Sincerely,



Katrina Basye, Property Tax Manager
Idaho Power Company



August 2, 2013

Katrina M Basye
Property Tax Manager
(208) 388-2328
(208) 388-5460 (FAX)
kbasye@idahopower.com

Alan Dornfest, Chairman
Property Tax Rules Committee
Idaho State Tax Commission
PO Box 36
Boise, ID 83707

Subject: Proposed Rule Change Comments
Rule 205 –

Dear Mr. Dornfest and Committee Members:

The following are Idaho Power's comments regarding Rule 205.

Rule 205.01.c

As proposed:

Improvements. Improvements are buildings, structures, fences, and similar property that are built upon land. Improvements are real property regardless of whether or not such improvement is owned separately from the ownership of the land upon or to which the same may be erected, affixed or attached.

Comments:

The definition of improvements should include fixture which will then replicate the language in the statute.

Improvements. Improvements are buildings, structures, fences, similar property that is built upon land, and fixtures. Improvements are real property regardless of whether or not such improvements are owned separately from the ownership of the land upon or to which the same may be erected, affixed or attached.

Rule 205.04(a)

As proposed:

04. Property eligible for the exemption in 63-602KK. ()

~~a. The three factor test will be the predominant determinant of eligibility when considering whether items are exempt per Section 63-602KK, Idaho Code. When Subsection 03. b. of this rule and the three factor test create a conflict in determining whether an item is eligible, the three factor test shall resolve the conflict. Improvements! Some items may not be considered fixtures, but may be structures or buildings. In this case the items are improvements which are real property and therefore not eligible for the exemption found in section 63-602KK, Idaho Code.~~ ()

Comments:

In the statute under the definition of improvements it is clear that there are different types of improvements. It is not necessary to repeat the language in rule 04(a) because it is already stated in Rule 205.01(c).

Rule 205.04(a)

As proposed:

~~b. Examples. The following items **are examples of improvements that shall are** not be considered eligible for the exemption:~~ ()

~~i. Cell towers and similar structures; ()~~

~~ii. Underground storage tanks; ()~~

~~iii. Poles and towers; ()~~

~~iv. Signposts; ()~~

~~v. Pipelines and conduit; ()~~

~~vi. Railroad track; ()~~

~~vii. Affixed boilers, generators, and similar equipment; ()~~

Comments:

- 1) By including the property listed above ((b)i. – (b)vi.) as real property this contradicts what was reported to the Idaho legislature. In a tax commission report “Revised 1/3/2013 Analysis of 2012 Personal Property Tax in Idaho” (Attachment A) assigned percentages to operating property to reflect their best estimate of the amount of personal property and real property in Idaho (Attachment A pg 6). The proposed rule will inappropriately and dramatically reduce those personal property percentages.
- 2) Legal analysis from the Tax Commission inappropriately eliminates part of the definition of a fixture thereby shifting property that should be classified as personal property to real property.

“Our legal staff believes that analysis should be based primarily on the three factor test and not the last sentence of Idaho Code 63-201(9).”(Attachment B)

In determining if an asset is personal property or real property statute language must be examined in its entirety. The legislature purposefully added the last sentence for clarification.

“Fixtures” means those articles that, although once movable chattels, have become accessory to and a part of improvements to real property by having been physically incorporated therein or annexed or affixed thereto in such a manner that removing them would cause material injury or damage to the real property, the use or purpose of such articles is integral to the use of the real property to which it is affixed, and a person would reasonably be considered to intend to make the articles permanent additions to the real property. “Fixtures” do not include machinery, equipment or other articles that are affixed to real property to enable the proper utilization of such articles”

- 3) There appears to be misunderstanding that if property is erected upon or affixed to land than it becomes real property. That is simply not true. Supports/towers, etc. that service personal property should be categorized as personal property because the property services the personal property not the realty. (Fixtures do not include equipment that are affixed to real property to enable the property utilization of such articles.)

For example; the cellular equipment cannot operate unless it is a certain distance in the air which requires a tower. Real property does not include the “article” that enables the proper utilization of the cellular equipment. It wouldn’t matter if the supports are outside buried in the ground or inside bolted to a floor.

Also, the classification of property does not change if the property is above or below ground or floats on water.

For example the classification of an above ground tank resting on the ground classified as personal property would not change if it were buried, resting on a tower, or floating.

- 4) There was extensive legal analysis by Erick Shanner (Tax Commission) and Rick Smith (Hawley Troxel) and a list of property was determined to be real or personal property. This list was unanimously approved by the rules committee back in 2007. Perhaps the list should be utilized by this committee (Attachment C).

Sincerely,



Katrina Basye, Property Tax Manager
Idaho Power Company



PO Box 36 • Boise ID 83722-0410
800 Park Blvd., Plaza IV • Boise ID 83712-7742

December 18, 2012 Revised: 1/15/2013

Memo

From: Alan Dornfest, Property Tax Policy Supervisor

Re: Revised 1/3/2013 Analysis of 2012 Personal Property Tax in Idaho

The following document represents the Tax Commission's current analysis of the amount of property tax revenue each taxing district and urban renewal agency currently derives from personal property. To do this analysis, we used taxable values for property assigned by county assessors to categories typically considered to be personal property, as opposed to real property, which typically consists of land and improvements (ie: buildings and similar structures). In addition, tax commission staff assigned percentages to operating property of public utilities and railroads designed to reflect their best estimate of the amount that could be construed to be personal property. For most industry groups within operating property, most property other than land and buildings was considered to be personal property. For electric utilities, land, buildings, generators, and dams were considered real property.

The percentages and categories identified as personal property in this analysis should not be construed as any type of policy statement. In other words, the Tax Commission does not advocate the use of these particular percentages for operating property or, necessarily, the assignment of each category listed in the report to be personal property. As policy makers consider the effects of personal property tax revenue on local taxing districts and urban renewal agencies, any changes in the percentages or assumptions will affect the results reported in this analysis and could increase or decrease the amounts shown.

Similarly, neither the report nor the Commission has any position regarding the advisability of providing replacement money should the legislature decide to exempt all or a portion of personal property.

Questions about this report should be referred to one of the following staff of the Property Tax Division:

Steve Fiscus, Property Tax Division Administrator – 208-334-7730

Alan Dornfest, Property Tax Policy Supervisor – 208-334-7742

Rick Anderson, Tax Policy Specialist – 208-332-6624

Table - 2

Below are the percentages used to compute the Operating Property personal property.	
Electrics	55%
Local Exchange Telecommunications (Regulated)	90%
Water Distribution	90%
Petroleum Pipelines	90%
Gas Distribution	95%
Railroads	80%
Private Railcar Fleets Over 500,000	100%
Long Distance Telecomm. (Unregulated)	90%
Water Transportation	100%
Gas Transmission	90%
Non-Utility Generators (NUGs)	70%

Operating Property was computed assuming that Electrics @55%.

MEMORANDUM

May 3, 2013

TO: All County Assessors

FROM: Alan Dornfest, Property Tax Policy Supervisor

RE: Clarification of personal property exemption issues

Since the enactment of the personal property exemption statute and temporary rule 626, which gave general guidance on the administration of this exemption, several questions have been raised by multiple counties. We have been meeting with tax commissioners and legal staff and, although we can't offer complete, definitive resolution at this time, we would like you to be aware of our consensus and general recommendations.

1. Cell Towers. Idaho Code 63-201(11) defines "improvements" as meaning "...all buildings, structures, ...erected upon or affixed to land...." In the same code section, subsection (23) defines "improvements" as real property. We believe that cell towers are structures and therefore are real property. This makes them ineligible for the exemption found in section 63-602KK, Idaho Code. We are willing to listen to the possibility that, in some cases, mobile cell towers, subject to common or frequent re-location, may be an exception that could be considered to be personal property. However, if you report a cell tower on the property tax replacement report to be submitted in November, additional documentation will be needed to support the claim that it is personal property.

2. Equipment on Cell Towers. Equipment, such as satellite dishes, on cell towers may be considered personal property.

3. Exemption for items of taxable personal property. Section 63-602KK(1), Idaho Code provides a separate exemption for items of otherwise taxable personal property provided these items cost no more than \$3,000 and can perform their function: "...without being combined with other items of personal property." To us, this means that an add-on piece of equipment that enhances the functionality of another piece of equipment, but cannot function on its own, does not qualify. This could occur, for example, given a landscaping tractor for which the owner buys a \$2,000 attachment of no stand-alone use. The attachment would not be eligible for the exemption in 63-602KK(1). However, the attachment could be eligible for the \$100,000 exemption that applies to all of the otherwise taxable personal property owned by that taxpayer. So, continuing this example, if the taxpayer owned a total of \$50,000 worth of personal property, notwithstanding the new \$2,000 attachment, all \$52,000 would now be exempt. Provided the additional property did not cause the total value of the taxpayer's personal property to exceed \$100,000, unless needed to establish initial (first year) eligibility, there would be no requirement to report. Except that everything must still be defined as personal property, we view the limitations on what is an "item" as being specific to granting the exemption in 63-602KK(1) for up to \$3,000 cost per item only.

4. Taxpayer. There is a limitation on the \$100,000 exemption found in section 63-602KK(2). The exemption applies to the personal property of a “taxpayer” and the law defines a taxpayer as including: “... (2) or more individuals using the property in a common enterprise or a related group of two (2) or more organizations when the individuals or organizations are within a relationship described in section 267 of the Internal Revenue Code....” We view this clause as providing a two-step analysis:

- 1.) Does a “common enterprise” exist?
- 2.) Does the enterprise involve a group having a section 267 relationship?

This stepwise analysis is not intended to be provide an “either/or” determination. Decisions must be made on a case by case basis and we will be drafting examples to further illustrate the necessary principles. We plan to have these developed by the end of next week and will share these with you as soon as they are drafted. We plan to place examples in the permanent rule currently under development.

If you need further information or clarification, please call me (208) 334-7742.

Sincerely,

Alan S. Dornfest
Property Tax Policy Supervisor
Property Tax Division

cc. Steve Fiscus, Property Tax Division Administrator
Tom Katsilometes, Tax Commissioner
Rich Jackson, Chairman, Idaho State Tax Commission
Ken Roberts, Tax Commissioner
David Langhorst, Tax Commissioner
Matt Virgil, Managing Consulting Appraiser
George Brown, Deputy Attorney General
Erick Shaner, Deputy Attorney General



PO Box 36 • Boise ID 83722-0410
800 Park Blvd., Plaza IV • Boise ID 83712-7742

MEMORANDUM

May 22, 2013

TO: All County Assessors
FROM: Alan Dornfest, Property Tax Policy Supervisor
RE: Clarification of personal property definitional issues

There continue to be questions about the definition of personal property. Section 63-201(9) provides a statutory definition declaring “fixtures” to be real property and using the traditional three factor test (ie: annexation to the real property, use of such articles as integral to the use of the real property, like a key to a building lock, and reasonable intent to make the articles permanent additions to the real property). However, questions arise because of the last sentence in that subsection, indicating that “fixtures” are not: “...*machinery, equipment, or other articles that are affixed to real property to enable the proper utilization of such articles.*”

This language is wholly inconsistent with other Idaho related statutes and case law, as well as the three factor test on this subject. The Idaho legislature has repeatedly emphasized that the three factor test is the central concept of how to determine what is real and what is personal property. Our legal staff believes that analysis should be based primarily on the three factor test and not the last sentence of Idaho Code 63-201(9). It appears to us likely that the last sentence could apply under the scenario where machines are bolted to manufacturing plant floors so that the machines will for example not bounce around while in operation.

We hope this helps to clarify this issue and are planning to include some definitional language to this effect in the proposed permanent rule.

If you need further information or clarification, please call me (208) 334-7742.

Sincerely,

Alan S. Dornfest
Property Tax Policy Supervisor
Property Tax Division

cc. Steve Fiscus, Property Tax Division Administrator
Tom Katsilometes, Tax Commissioner
Rich Jackson, Chairman, Idaho State Tax Commission
Ken Roberts, Tax Commissioner
David Langhorst, Tax Commissioner
Matt Virgil, Managing Consulting Appraiser
George Brown, Deputy Attorney General
Erick Shaner, Deputy Attorney General

VERSION B - RULE 205

205. PERSONAL AND REAL PROPERTY - DEFINITIONS AND GUIDELINES (RULE 205)

Sections 63-201, 63-302 and 63-309, Idaho Code.

- 01. Real Property.** Real property means land, all buildings, structures and improvements, or other fixtures of whatsoever kind on land. The term improvements does not include the items identified in Section 63-309, Idaho Code, as personal property.
- 02. Personal Property.** Personal property includes all goods, chattels, stocks and bonds, equities in state lands, easements, reservations and leasehold real properties.
- 03. Improvements or Fixtures.** Improvements or fixtures to real property must meet both of the following criteria:
 - a. Property which is physically attached to the land or other improvements affixed to the land in such a manner that it may not be removed without materially damaging the real property or is of such a nature that it would normally be expected to be sold together with the land.
 - b. Property which increases the market value of the land or increases the ability of the possessor of the land to use it more productively on a relatively permanent basis.
- 04. Three Factor Test.** To clarify the definition in paragraph 03 above, a three factor test shall be applied to determine whether a particular article has become an improvement or fixture to real property. To be considered an improvement or fixture to real property a particular article must meet each of these three tests. The three tests to be applied are:
 - a. Annexation to the real property, either actual or constructive. If an item has been annexed in such a way that removing it would cause material injury or damage to the real property, then that fixture or improvement may be classified as real property.
 - b. Adoption or application. If the use or purpose of that item is integral to the use of the real property to which it is connected, then that fixture or improvement may be classified as real property.
 - c. Intention. If a reasonable person would intend to make the fixture or improvement a permanent addition to the real

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property, then that fixture or improvement may be classified as real property.

- 05. Intent.** For the purpose of determining whether there is intent to make the article a permanent addition to the real property the relevant inquiry is whether the objective circumstances manifest an intent that the item is to be made a permanent addition to the real property. The subjective intent of taxpayers and others is not the controlling factor. In evaluating the objective intent the following factors shall be considered:
- a. The nature of the article
 - b. The manner of annexation to the real property
 - c. The injury to the real property, if any, resulting from the removal of the article
 - d. The completeness with which the article is integrated with the use to which the real property is being put
 - e. The relation which the annexer has with the real property as licensee, tenant at will for years or for life or fee owner
 - f. The relation which the annexer has with the article such as owner, bailee or converter
 - g. The local custom respecting treating such an article as personal property or an improvement or fixture to real property
 - h. The time, place and degree of social, economic and cultural development (e. g., a luxury in one generation is a necessity in another)
 - i. All other relevant facts surrounding the article, the annexation and the real property.
- 06. Operating Property.** For any purpose for which the distinction between personal property and real property is relevant or necessary for operating property, operating property will be characterized as personal or real based upon the criteria stated in this rule.
- 07. Leased Personal Property.** The listing, as set forth in Idaho Code §63-306, of leased personal property shall also include the name and address of the other party to the lease and the terms of the lease.
- 08. Guidelines.** The following are guidelines for applying this rule. The decision of the assessing authority as to whether property is real or personal property shall be presumed correct. The burden for overcoming the assessing authority's decision is by a preponderance of the evidence. These guidelines are not intended to be all inclusive.

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- a. Equities in land purchased from the state under contract are personal property.
- b. Machinery, tools and equipment are not real property unless they meet the definition of an improvement or fixture to real property, as defined in this rule.
- c. Furniture, trade fixtures, library collections, art work and collectibles, including all such items held for rent or lease are personal property.
- d. Vehicles, aircraft and mobile equipment are personal property.
- e. Signs and signboards, their bases and supports are personal property.
- f. Manufactured housing is subject to the provision of Section 63-304, Idaho Code.
- g. Vault doors, drive in windows, automatic tellers and night depositories are real property when owned by the owner of the building.
- h. Air handling, heating ventilation air conditioning (HVAC)) equipment, and humidifiers - (1) building air control systems, including refrigeration equipment, primarily used for the comfort of the occupants is real property. (2) Window and package unit air conditioners are personal property. (3) Air control systems for special processes to maintain controlled temperature and humidity and used primarily for purposes other than the comfort of occupants including air conditioning for electric rooms and vaults are personal property.
- i. Aluminum pot lines are personal property.
- j. Ash handling system, pit and superstructure (See Boilers)
- k. Asphalt mixing plant is personal property.
- l. Auto-Call and telephone system is personal property.
- m. Automobiles, recreational vehicles, and other vehicles are personal property.
- n. Beneficiation equipment, foundations and all machinery required to process ore including crushers, grinders and floatation equipment is personal property.
- o. Boilers including stacks and superstructure used primarily for service of real property are real; other boilers including stacks and superstructure are personal property.
- p. Booths for welding are personal property.
- q. Bucket elevators whether open or enclosed and including casing are personal property.
- r. Bulkheads and external walls that enclose additional land area within a building perimeter are real property, other bulkheads



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- and walls are real property if they meet the criteria established in the general rule above.
- s. Buildings are real property.
 - t. Cable whether above or below ground for transmission of information, data, power or other services is personal property.
 - u. Coal handling systems (See Boilers)
 - v. Cold storage—built-in cold storage rooms within building are real property, cold storage refrigeration equipment is personal property.
 - w. Conduit and vaults used in telephonic services when underground are real property.
 - x. Control booths are personal property.
 - y. Conveyor, conveyor housing, structure, steel foundations that support conveyors or conveyor tunnels that meet the definition above are real property otherwise they are personal property. Conveyor units including belt, drives, motors and assets that don't meet the definition of real property above are personal property.
 - z. Coolers -- portable walk-in coolers are personal property.
 - aa. Cooling towers the primary use of which is the comfort of occupants within buildings or other real property are real property. Other cooling towers are personal property.
 - bb. Cranes are personal property.
 - cc. Crane runways including supporting columns or structure whether inside or outside of building that meet the definition of real property above are real property, otherwise they are personal property, crane runways that are bolted to or hung on tresses or can be moved are personal property.
 - dd. Dock levelers are personal property.
 - ee. Drying rooms that meet the definition above for real property are real property, drying room heating, cooling, environmental control systems, equipment and other assets are personal property.
 - ff. Dust catchers or other filtration equipment are personal property.
 - gg. Farm equipment is personal property.
 - hh. Outside fencing other than railroad fencing, whether for security or decorative is real property.
 - ii. Fire alarm systems are personal property.
 - jj. Fire walls are real property.
 - kk. Foundations for machinery and equipment including those made from steel and regardless of how they are attached to the building or other real property are personal property.

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- ll. Greenhouse assets that meet the definition of real property are real property, greenhouse benches, heating, cooling, watering and other environmental systems are personal property.
- mm. Gravel plant machinery and equipment is personal property.
- nn. Kilns – structures used for lumber drying, concrete block drying and circular down draft (beehive) are real property, kiln systems including heating, drying and other equipment are personal property.
- oo. Laundry steam generating equipment is personal property.
- pp. Lighting --yard lighting is real property, special purpose lighting and illumination equipment is personal property.
- qq. Mixers are personal property.
- rr. Mobile homes are personal property.
- ss. Motors except those that are required for building occupant comfort are personal property.
- tt. Net profit of mines which is the amount of money or its equivalent received from the sale or trade of minerals or metals extracted from the Earth after deduction of allowable expenses as defined in Section 63-2802, Idaho Code, or by State Tax Commission rule is personal property.
- uu. Ore bridge foundations are real property.
- vv. Ovens used for processing are personal property.
- ww. Process piping including foundations and bridges whether above or below ground are personal property.
- xx. Pumps except those that are required for building occupant comfort are personal property.
- yy. Pump house including the sub-structure are real property.
- zz. Racks and shelving, portable or removable are personal property.
- aaa. Reservations and Easements including reserved mineral rights and divided ownership of property rights - personal (Easements convey use but not ownership.)
- bbb. Construction work in progress - Classification based on type of property
- ccc. Ready-mix concrete plant is personal property.
- ddd. Refrigeration and freezer equipment, but see air conditioning, is personal property.
- eee. Sanitary systems are real property.
- fff. Scale houses are real property.
- ggg. Scales – truck or railroad scales including pit are personal property.

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- hhh.** Silos— storage silos are real property unless portable or movable, silos used during a manufacturing process are personal property.
- iii.** Spray Ponds— masonry reservoir is real property, spray pond piping and equipment is personal property.
- jjj.** Sprinkler system used for crop or landscape irrigation is real property if buried, above ground irrigations systems are personal property.
- kkk.** Stone crushing plant— machinery and equipment is personal property.
- lll.** Portable storage bins are personal property.
- mmm.** Substation building is real property.
- nnn.** Substation switchyard and control machinery and other electrical equipment are personal property.
- ooo.** Tanks— tanks used as part of a manufacturing process are personal property. Underground fuel tanks are personal property.
- ppp.** Tipple structure is personal property.
- qqq.** Unloader runways are real property.
- rrr.** Utility meters and auxiliary equipment are personal property.
- sss.** Water treatment and softening plant, water pumping buildings and structures are real property, water treatment and softening equipment is personal property, water lines used primarily for potable and sanitary water are real property, water lines for processing whether above or below ground are personal property, water pumps and motors are personal property.
- ttt.** Wells, pumps, motors and equipment are personal property
- uuu.** Wiring -- power wiring integral to machinery, equipment or for processing is personal property.
- vvv.** Inventory of spare parts and supplies is personal property.
- www.** Electric power plants - generators, associated prime mover and auxiliary equipment are personal property
- xxx.** Electrical power lines and auxiliary equipment whether above or below ground are personal property
- yyy.** Electrical towers and poles --transmission and distribution and associated fixtures are personal property
- zzz.** Switching equipment, circuit equipment and other central office equipment used by the telecommunications industry are personal property.
- aaaa.** Remote terminals and related equipment used in transmitting telecommunications signals are personal property.

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- bbbb.** Wire and cable used in transmitting telecommunications signals, including aerial, buried, and underground wire and cable, are personal property.
- cccc.** Poles and towers used in the telecommunications industry are personal property.
- dddd.** Railroad track, including rail, ties, ballast, and other track material are personal property.
- eeee.** Railroad fences, snow sheds and signs are personal property.
- ffff.** Railroad stations and office buildings are real property.
- gggg.** Railroad building and miscellaneous structures are real property.
- hhhh.** Railroad shops and engine houses are real property
- iiii.** Railroad storage warehouses are real property.
- jjjj.** Railroad water stations and fuel station buildings are real property.
- kkkk.** Railroad water stations and fuel station equipment is personal property.
- llll.** Railroad trailer on flat car/container on flat car (TOFC/COFC) terminals, buildings and paving is real property.
- mmmm.** Equipment of railroad trailer on flat car/container on flat car (TOFC/COFC) terminals is personal property.
- nnnn.** Railroad communication systems, signals and interlockers are personal property.
- oooo.** Railroad power transmission systems, roadway machines and shop machinery are personal property.
- pppp.** Railroad rolling stock, including locomotives, freight cars, and work equipment are personal property.
- qqqq.** Railroad construction work in process is classified as real property or personal property based on type.
- rrrr.** Pipeline compressor station, measuring and regulating stations, communication and other structures, and associated components are real property.
- ssss.** Below and above ground pipelines other than water and gas mains, natural gas lines, and associated components of pipeline companies are personal property.
- tttt.** Measuring and regulating station equipment and associated components of pipeline companies are personal property.
- uuuu.** Communication equipment and associated components of pipeline companies are personal property.
- vvvv.** Purification, liquefaction and vaporizing equipment and associated components of pipeline companies are personal property.

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www. Below and above ground water pipes other than water and gas mains, pumping equipment, measuring and regulating equipment and associated components of water companies are personal property.

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October 23, 2013

Mr. Alan Dornfest, Chairman
Tax Policy Supervisor
Idaho State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83712

Re: *Comments on Proposed Rules 205 and 626*

Dear Alan:

This letter is provided in response to the Notice of Rulemaking included in the Administrative Bulletin on October 2, 2013. The Notice invites comments on the Tax Commission's proposed changes to the property tax rules, including rules 205 and 626. This letter will provide such comments.

As you know, I have been actively involved in the process by which the proposed rules were drafted in the Property Tax Rules Committee, and have provided comments earlier. I will not repeat all the analysis I have provided in earlier submissions to the committee, but I do incorporate them by reference. For the record of this rulemaking proceeding, I attach copies of my letters of August 2, 2013 and August 16, 2013, in which I provided comments on the Commission staff's draft of Rule 205, dated July 2, 2013. In this letter, I will supplement the analysis provided in these earlier comments. I provide these comments on behalf of CenturyLink, Northwest Pipeline, and AT&T Mobility.

A primary purpose of an administrative rule is to provide guidance concerning the application of a statute, where its effect in certain situations might be uncertain. Thus, the rule must be consistent with the language and intent of the statute. The changes in Rules 205 and 626 as they relate to the definition of "personal property" do not give meaningful guidance, and are not consistent with the statute. Proposed Rule 205 begins by paraphrasing the definitions of "real property," "personal property," "improvements," and "fixtures" set forth in subsections 9,

11, 19 and 23 of I.C. § 63-201. This includes a description of the three-factor test for determining whether an item of property constitutes a fixture, based on annexation, adaptation and intent of the owner. From this harmless beginning, the rule then arbitrarily labels six types of property as real property, and adds a provision dealing with the following sentence in the statutory definition of fixtures, in I.C. § 63-201(9): “Fixtures does not include machinery, equipment or other articles that are affixed to real property to enable the proper utilization of such articles.” The draft rule states that when that provision and the three-factor test “create a conflict in determining whether an item is eligible [for the personal property exemption], the three (3) factor test shall resolve the conflict.” Our concerns with the six categories of property include our belief that these types of property are not, in fact, real property if the three-part test of annexation, adaptation and intent are properly applied. Our concerns with the “conflict-resolution” provision include the fact that it is confusing, unnecessary, and ineffective to contravene the statutory directive that the “annexation” prong of the three-part test will not be satisfied in certain circumstances.

The draft of Rule 626 covers many provisions necessary to implement the new personal property exemption, and our only comments are those consistent with our challenges to Rule 205. Specifically, subsection 07(d) is objectionable because it purports to mandate that cell towers are to be classified as real property for property tax purposes. In addition, it contravenes section 63-309, which provides that all improvements on publicly owned and certain other property shall be taxed as personal property. Subsection 07(d) provides that, notwithstanding this explicit language, such improvements would be considered real property for purposes of the personal property exemption.

The Six Categories of Real Property

The rule declares that six types of property are real property: cell towers; underground storage tanks; poles and towers; signposts; pipelines and conduit; and railroad track. This designation is objectionable for two reasons. First, under what we believe to be the prevailing and more current case law nationwide applying the three-factor test, these types of property are not real property but instead are personal property. Second, this approach of selectively identifying a small number of categories as real property gives no guidance on how the myriad of other property is to be classified. If the answer is that the three-factor test is sufficient guidance for all other property, then why is it not sufficient guidance for these six types of property? In other words, it appears we will have courts decide close questions regarding the classification of certain property as personal or real, so why not defer to the courts with respect to these types of property?

The statute provides that the real property classification includes improvements, structures and fixtures. To claim that these six categories of property are improvements or structures exceeds the limits of reasonable interpretation, as in trying to fit a square peg into a round hole. As I pointed out in my letter of August 2, a pipeline under a rancher’s property

simply does not meet the commonly understood meaning of the term “structure,” nor is it an improvement to land in a way that increases the value to the owner. Instead, the proper analysis of these types of property is whether they represent fixtures, and more specifically whether they are real property fixtures which meet the three-part test, or trade fixtures which do not.¹ For instance, in *Orange County-Poughkeepsie M.S.A. Partnership v. Bonte*, 754 N.Y.S.2d 312 (App. Div. 2003), the court addressed the issues using a fixture analysis. It held that a communications tower on leased property was a trade fixture that did not constitute real property because it was removable after the termination of the lease, and was solely used for the tenant’s business (as opposed to being “adapted” to the landowner’s use of his property). As Terry Accordino from Micron Technology has ably pointed out on many occasions, the 2008 definition of “fixtures” incorporates this “trade fixtures” concept by clarifying that machinery, equipment and related property may be attached to real property, but would still not be considered a real property fixture if the only purpose for the attachment is to enable its proper utilization.

Senator Brent Hill made an observation that is relevant to this question, in a hearing on a previous proposed version of this rule before a Germane Joint Subcommittee of members of the House and Senate tax committees, on July 18, 2008:

Senator Hill asked about the statute and the definition of 63-201 dealing with personal property, saying that Mr. LeBeau had stated in his comments that if considered real property, it becomes the burden of the taxpayer to show that it is personal. He said that the statute is certainly different than that, quoting that personal property is everything that is subject to ownership, unless included in the term real property, so it is presumed personal unless defined as real. He asked what Mr. LeBeau finds in these proposed rules that switches that around from statute itself, or does he? Mr. LeBeau answered that in part 05, 06 and 07 of the rules it states “generally considered real property” and the guidelines in part 06 are used for determining if real property or personal property . . . plants and systems . . . and he said that without the three-factor test, you have this presumption that they are generally considered real property and that creates a problem for the employer to say that a particular part of a system is not real property. Senator Hill said that he was not sure he agreed with that, but he did agree with the three-factor test. (Emphasis added.)

¹ As discussed further below, a trade fixture is specific to the business conducted on the property, and the term is somewhat of a misnomer, because it is not a “fixture” at all. Because such “fixtures” are not permanently attached to the real property, and can and generally are removed when the business ends, they would not satisfy the annexation or intent elements of the three-part test.

The relevance of this discussion is that, as Senator Hill noted, the presumption should be that property is personal property, and a taxpayer should not have the burden of proving it is real property. This policy in favor of personal property characterization is also clear from the three-part test itself; as the draft rule acknowledges, all three parts of the test must be satisfied before property is considered real property. Contrary to these principles, the Tax Commission has, with the six categories of property it considers to be close cases, decided the issue in favor of real property characterization.

Even if we acknowledge that these categories do represent close cases, a proper analysis shows the issue should be decided in favor of personal property characterization. Without repeating the analysis we have covered over the last six years we have been discussing this issue, I will highlight certain principles, and will use pipelines and railroad track as proxies for the types of property in this group.

First, our research shows that most court cases, particularly the more recent cases, hold that pipeline and railroad track are personal property. For pipelines, *see Colonial Pipeline Co. v. State Dep't of Assessments and Taxation*, 806 A.2d 648 (Md. 2002); *Northern Natural Gas Co. v. State Board of Equalization*, 443 N.W.2d 249 (Neb. 1989); *Yellowstone Pipeline Co. v. State Board of Equalization*, 358 P.2d 55 (Mont. 1960), *cert. denied*, 366 U.S. 917; *In re K & A Servicing*, 47 B.R. 807 (Bankr., N.D. Tex. 1985) (applying Texas law); *Waterford Energy, Inc. v. Oklahoma Tax Commission*, 845 P.2d 18 (Okla. App. 1992). The courts in *Colonial Pipeline* and *Northern Natural Gas* reviewed cases from other jurisdictions and found other cases supporting the personal property classification and only one case holding that such property represents real property. For railroad track, *see Matter of Chicago, M. St. P. and Pac. R. Co.*, 654 F.2d 1218 (7th Cir. 1981) (applying Montana law to rails, ties and bridges); *Matter of Boston and Maine Corp.*, 596 F.2d 2, 20 (1st Cir. 1979) (applying New Hampshire law to track and ties); *Irwin v. Smith*, 536 P.2d 415 (Okla. App. 1975)(ballast and wooden bridge are personal property).

An evaluation of the three factors supports the conclusion reached in these cases. Pipelines, railroad track, and other property like cell towers and conduit are not “annexed” to the real property in ways that make removal difficult.² In addition, removal at the end of the period of use is often contemplated. This is particularly the case where the property is installed on leased or public land. Leases, for instance, almost always require that the property be removed

² The difficulty of removal was one factor that led the Idaho Supreme Court to conclude that an irrigation system was a real property fixture, in *Rayl v. Shull Enterprises*, 108 Idaho 524 (1985). However, as the Court made clear in a recent case, the annexation factor is subordinate in importance to the intention of the owner. *Steel Farms, Inc. v. Croft & Reed, Inc.*, 297 P. 3d 222 (Idaho 2012). The Court noted that the difficulty of removal in *Rayl* was simply one factor that showed the intent of the owner was to make the irrigation system a permanent improvement to the land.

at the end of the lease term. As for public lands, section 63-309 acknowledges that the property used on such lands is to be considered personal property.

Similarly, the requirement of adaption is not met for these categories of property. In *Rayl v. Shull Enterprises*, 108 Idaho 524 (1985), the Idaho Supreme Court relied on a California case for the rule that “an object placed on the realty may become a fixture if it is a *necessary or at least a useful adjunct* to the realty, considering the purposes to which the latter is devoted.” *Id.* at 528 (emphasis in original), quoting *Seatrains Terminals of California v. County of Alameda*, 147 Cal Rptr. 578, 582 (1978). In *Rayl*, the property was an irrigation system, which obviously satisfied that test with respect to the farm property to which it was attached. However, with these six categories of property, there is no such adaption. As the court noted in *Colonial Pipeline*, a pipeline runs under roads, farm fields, rivers, and cities, with the goal not of operating as part of the accompanying real estate and adapted to it, but instead to be as invisible as possible to the land owner. Similarly, railroad track or cell towers have no connection with or relevance to the operation of the adjoining or underlying land – whether it is farmland or commercial property – and in fact they are a burden to other uses of the land since they divide parcels on either side or surrounding the track or cell tower, and provide a barrier to access to the other property.

The final factor is the intention of the owner. As noted above, the owners of pipelines, cell towers and similar property on leased or public land intend to remove the property upon termination of the lease or easement, and have an obligation to do so. Generally accepted accounting principles require the establishment of reserves to estimate the costs of removal. The useful life of such property is much shorter than that of buildings or other “structures” or “improvements.” See IRS Rev. Proc. 87-56, which prescribes depreciation lives pursuant to section 168 of the Internal Revenue Code, and sets a 7-year life for track, 15 years for pipeline, and 5 and 15 years for various towers, compared to 31.5 years for nonresidential real property. This reflects that the owner of such property does not contemplate that the property will be permanently part of the real property with which it is associated, and will need to be replaced. Indeed, railroad track, pipeline, and other types of property are installed in segments so as to allow their easy replacement when necessary for safety or operational reasons.

In summary, application of the three-factor test supports personal property characterization of these six categories of property. At a minimum, the designation of these types of property as types of real property should be stricken from the rule, and the issue should either be addressed by the legislature or resolved by the courts.

The “Conflict-Resolution” Provision

As noted above, the final sentence of section 63-201(9) states that machinery, equipment or other articles may be attached to the real property but will not be considered a real property fixture if the purpose of attachment is to enable the proper utilization of the property. Since all

three factors must be established in order to support real property classification, this provision is important. The draft Rule 205 provides that in case of conflict between this provision and the three-factor test, the three-factor test must be applied.

There is no need for this “conflict resolution” provision, since there should never be a conflict. If property is attached to real property in order to enable its proper utilization, then by statute the property does not satisfy the “attachment” prong of the three-factor test, and the property cannot be classified as real property. The final sentence of section 63-201(9) simply defines how the “attachment” part of the test is to be applied. The “conflict resolution” provision of the proposed rule, being unnecessary, adds confusion to the implementation of the law.

The effect of the final sentence of section 63-201(9) is obviously to clarify that what are commonly known as “trade fixtures” are not to be considered part of the real property, even when they are “attached.” Trade fixtures are specific types of fixtures that are installed for the operation of the business, such as freezers in a grocery store, and which would serve no purpose if the building were used for other purposes. *See* 35A AM. JUR. 2D, *Fixtures*, §§ 34-35. Trade fixtures do not constitute fixtures in the legal sense anyway, since the owner’s intent “of annexing a trade fixture to the land is to benefit the business of the party annexing the fixture to the land, not the land itself.” *Id.*, § 35.

Even if there were a conflict between this statutory provision and the three-factor test, the Tax Commission has no authority to provide, by rule, that the provision can be ignored. First, if there were a conflict, it would be because this statutory language modifies the result of the three-factor test, and that must be what the legislature intended. Otherwise, the language would be superfluous. A basic rule of statutory construction is a statute will be interpreted in a way that assumes the legislature did not intend a superfluous result. *See Richardson v. State Tax Commission*, 100 Idaho 705 (1979). *See also BHC Intermountain Hosp., Inc. v. Ada County*, 150 Idaho 93, 95 (2010): “In determining the ordinary meaning of the statute, ‘effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant.’” There is an obvious reason for this final sentence of section 63-201(9) regarding the effect of attachment of machinery and equipment. The preceding sentence specifies that real property does include systems needed for the operation of a building, such as heating and air conditioning. The final sentence clarifies that the definition does not include machinery, equipment, and other articles that are affixed to enable the proper utilization of that property. When read together, these two sentences show a clear demarcation between property used for operation of a building on the one hand, and equipment and related property used in the operation of the business on the other, with the latter excluded from the “fixtures” definition and thus classified as personal property.

The Commission’s counsel has pointed out that this language is similar to language in a Colorado statute, but omits terms in that statute providing that the utilization of the machinery, equipment or other articles is related to a “commercial and industrial operation.” Thus, the

argument is that not all machinery, equipment or related articles are personal property in Idaho, even if used in a commercial or industrial operation. It is unclear why this language was omitted in the Idaho statute, but it may be because it is unnecessary. Our statute does refer to “utilization” of the property, and if machinery or equipment is utilized, it would likely be in a commercial and industrial operation. (The personal property of non-commercial owners is not even subject to tax.) In any event, the omission of the terms “commercial or industrial operation” in Idaho makes our statute even broader than the Colorado statute.³ In other words, no machinery, equipment and other articles would be considered real property if they attached to the real property to enable their proper utilization, whether or not they are commercial or industrial property.

The differences between the Idaho and Colorado statutes are academic and irrelevant, since the final sentence regarding the effect of “attachment” of machinery and equipment does not create a conflict with the three-factor test, but simply defines how the attachment part of the test is to be applied.

Rule 626

As noted above, our concerns with proposed Rule 626 are consistent with the issues we see with Rule 205. The reference to cell towers as real property in subsection 07(d) of the proposed rule is consistent with the reference in Rule 205, and is incorrect for the same reasons. Further, the Tax Commission cannot change section 63-309 to state that improvements on public or railroad land are real property for purposes of the personal property exemption, where that statute clearly classifies such property as personal property. As I have argued here, pipelines, conduit, cell towers and related property would not logically be considered “improvements” in the first place. But if they were so classified, section 63-309 provides they are to be considered personal property.

Conclusion

The identification of the six categories of property as real property, and the “conflict resolution” provision, should be removed from proposed Rule 205. If it is necessary to include a reference to these types of property, they should be listed as personal property. Alternatively, the Commission should defer to the legislature to add further guidance to the personal property definition, or to the courts to apply the three-factor test to these categories of property. Proposed Rule 626 should be revised to remove the reference to cell towers as a type of real property, and

³ The Colorado statute also specifically provides that property like pipelines is to be considered personal property. While that clarification would have been useful in the Idaho statute, it is unnecessary, because pipelines and related property easily fall within the language of the statutory provision that they are only attached to the real property for their proper utilization.

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to remove the statement that section 63-309 does not apply for purposes of the personal property exemption.

If you should have any questions concerning the matters discussed in this letter, please feel free to contact me.

Sincerely,

HAWLEY TROXELL ENNIS & HAWLEY LLP

A handwritten signature in cursive script, appearing to read "Rich. Smith".

Richard G. Smith

RGS: Client representatives



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August 16, 2013

Mr. Alan Dornfest, Chairman
Mr. Rick Anderson
Property Tax Rules Committee
Idaho State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83712

Re: *Follow-up to Comments on Proposed Rule 205*

Dear Alan and Rick:

This letter will supplement my letter of August 2, 2013, in which I provided comments on the Commission staff's draft of Rule 205, dated July 2, 2013. At the August 6 meeting, you deferred any action on this rule, pending an evaluation of all the comments submitted at that time. You scheduled another meeting for August 21 to consider this issue again. I will be out of town on a long-planned trip, and will be unable to attend that meeting or to review any new draft of the rule. However, I did want to address some of the comments made at the last meeting.

First, I wanted to reply to your response to comments I and others made about how the Commission's previous fiscal impact studies have included most of the "gray areas" of operating property in the personal property definition. I believe you said during the meeting that this was because you were assuming a "worst case" scenario for whether operating property would qualify for the exemption.¹ However, I think the position the Commission was presenting in

¹ Perhaps "worst case" is the wrong term; it is the scenario that has the most cost to the general fund. I should note that the estimates of the effect of exempting these types of operating property are sometimes misunderstood. My recollection is that of the \$130 million of fiscal impact of a full exemption, no more than \$40 million was for operating property, and that would include all personal property and just not the "gray areas" like pipeline, poles, track, etc.

those estimates was consistent with the approach it has taken since 2007 – that there is good reason to believe that these types of operating property do satisfy the ordinary understanding of what constitutes “personal property,” that it is fair and reasonable to include this property within that definition, and that the legislature ought to be aware of and include that cost in its analysis.

Second, Erick Shaner mentioned that one issue he had with our analysis relates to our reliance on the final sentence of the fixtures definition: “‘Fixtures’ does not include machinery, equipment or other articles that are affixed to real property to enable the proper utilization of such articles.” We have pointed out that this definition is at least a clarification of the three-factor test, and perhaps a modification of it. It shows the intent that machinery, equipment and other “articles” that are utilized in a commercial process or operation are personal property. Erick pointed out that this sentence is very similar to a Colorado statute that defines “personal property,” and that the Colorado statute goes on to list many of the types of operating property that are in the “gray area.”² Erick implied that the failure of our legislature to adopt this listing of personal property items shows the intent to exclude them. I think the opposite conclusion is necessary. The specific items listed in Colorado definition are consistent with the definition that precedes that listing – they are obviously items of machinery, equipment or “other articles” that are related to the commercial or industrial operation in which they are “utilized.” The specific items must have been listed to provide certainty that those items would be included in that definition. Although similar certainty would be desirable in this case, it is not necessary, because they do fall within that broad definition. In contrast, some states such as New York have, for policy reasons, taken the opposite approach – specifically including many types of operating property as taxable property, probably because of concern that otherwise they would be considered personal property not subject to tax. However, Idaho has long had a strong policy of

² The statute is Colo. Rev. Stat. § 39-1-102, and provides as follows:

(11) "Personal property" means everything that is the subject of ownership and that is not included within the term "real property". "Personal property" includes machinery, equipment, and other articles related to a commercial or industrial operation that are either affixed or not affixed to the real property for proper utilization of such articles. Except as otherwise specified in articles 1 to 13 of this title, any pipeline, telecommunications line, utility line, cable television line, or other similar business asset or article installed through an easement, right-of-way, or leasehold for the purpose of commercial or industrial operation and not for the enhancement of real property shall be deemed to be personal property, including, without limitation, oil and gas distribution and transmission pipelines, gathering system pipelines, flow lines, process lines, and related water pipeline collection, transportation, and distribution systems. Structures and other buildings installed on an easement, right-of-way, or leasehold that are not specifically referenced in this subsection (11) shall be deemed to be improvements pursuant to subsection (6.3) of this section. (Emphasis added, to show the provision similar to Idaho's definition.)

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uniformity, embedded in our Constitution, which would prevent the state from excluding operating property in this way. *See Idaho Telephone v. Baird*, 91 Idaho 425 (1967).

Third, Commissioner Roberts made the comment that we need to set a “marker” for determining what types of property should be personal property or real property. I don’t disagree that it would be helpful to set a “marker,” but that just begs the question of where the marker should be. We believe that the proper “marker” is the broad definition that includes these “gray areas” of operating property, and if it is something other than that, the legislature needs to be the body that makes that tax policy decision.

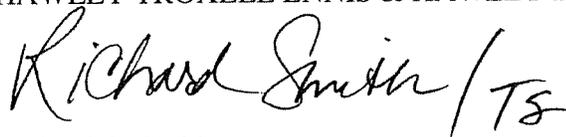
Finally, Commissioner Jackson made a similar comment that in setting the “marker,” everyone needs to be aware of a potential tax shift that could occur from commercial to residential property. However, we need to remember that the latest IACI bill for a complete exemption provided for replacement funding to the counties and other local taxing districts, so there would be no tax shift. In any event, this issue of whether it is appropriate to shift tax burdens is a tax policy choice beyond the scope of this committee’s charge, or even the Commission’s.

As I argued in my letter of August 2, we believe the best approach would be for the Commission to identify those items of operating property for each industry that are consistent with the percentages used for that industry in the legislation that used the percentage concept. (In 2013, that was House Bill 276.) This approach is more consistent both with applicable law and with the prevailing view of operating property over the last six years we have been discussing this issue.

If you should have any questions concerning the matters discussed in this letter, please feel free to contact me.

Sincerely,

HAWLEY TROXELL ENNIS & HAWLEY LLP

A handwritten signature in black ink that reads "Richard G. Smith / TS". The signature is written in a cursive style with a large initial 'R' and a stylized 'S' at the end.

Richard G. Smith

cc: Client representatives



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August 2, 2013

Mr. Alan Dornfest, Chairman
Mr. Rick Anderson
Property Tax Rules Committee
Idaho State Tax Commission
800 Park Blvd., Plaza IV
Boise, Idaho 83712

Re: *Comments on Proposed Rule 205*

Dear Alan and Rick:

This letter will provide comments on the Tax Commission staff's draft of Rule 205, dated July 2, 2013. I submit these comments on behalf of the following taxpayers: CenturyLink, Northwest Pipeline, and AT&T Mobility.

The focus of my comments will be on new section 04. With respect to other provisions, I concur in the comments of Micron, IACI and Idaho Power that I have had the opportunity to review, and do not wish to repeat the concerns of those parties. Before addressing section 04, I would like to comment briefly on the definition of "improvements" in section 01(c). The draft rule recites, as part of that definition, that "improvements" include the categories of buildings, structures, and fences that are referenced in the statute, section 63-201(11). However, the draft rule fails to refer to other statutory categories such as modular buildings and fixtures. Then, after referring to buildings, structures and fences, it adds a "catch-all" for "similar property." We believe that additional reference adds confusion and uncertainty to the definition, and goes beyond the statute. The statute is clear in identifying specific types of property that constitute "improvements," and does not include a "catch-all" or even words like "include" or "including," when referring to these specific items.

With respect to section 04, there are some general problems with the approach of characterizing the examples in subsection (b) as improvements, and then some specific issues

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with each. First, some of these items, such as cell towers, have been treated in the past as personal property. There is nothing in the 2008 amendments to the definitions that would justify a change in the treatment of these items. For instance, “real property” was defined to include “improvements, which in turn included “structures,” but cell towers were nonetheless classified as personal property.

Second, I believe the Tax Commission has taken the position in materials submitted to the legislature that the types of property listed in section 04(b) would be considered personal property. In particular, statements of fiscal impact have shown high estimates of the fiscal impact of a complete personal property exemption, and I assume those estimates have included these categories of property. Another example relates to the bill that would have exempted, for each industry within the operating property group, a specified percentage that represented the personal property of each industry within that group. I recall that those percentages were either negotiated with the Commission, or were accepted by the Commission as a fair representation of the proportion of personal property owned by each type of taxpayer. Those percentages are consistent with the treatment of the listed items in subsection 04(b) as personal property, not real property.

Third, since at least 2007, in the many committee meetings, work group sessions and other discussions we have had regarding these types of operating property, the context has always been the issue of whether they represented fixtures. We believe this reflects an acknowledgement by the Commission that the proper framework for determining the characterization of this type of property is to examine whether it is a fixture. Indeed, that is approach used in the preceding draft of this rule, and now, for the first time in six years of dealing with this issue, we see an attempt to characterize many operating property items as “structures” rather than fixtures.

As noted above, the term “improvement” is defined to include specific items, including “buildings,” “structures” and “fixtures.” The current draft relies on the “buildings” and “structures” categories to support the listed examples. (“Some items may not be considered fixtures, but may be structures or buildings.”) Clearly none of the examples could be characterized as buildings. Nor is the “structures” category applicable. The term “structures” is defined in *Black’s Law Dictionary* (9th ed.) as “Any construction, production, or piece of work artificially built up or composed of parts joined together <a building is a structure>.” That definition is so broad that it would include virtually all items of personal property as well as buildings. Thus, in order to give the term some meaning, it must be limited to those structures that have the characteristics of real property, and that simply takes us back to the three-factor test.

The ordinary meaning of the term “structures” does not include the items in subsection 04(b). Pipeline and conduit, for example, cannot fit within a “structures” category according to

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any reasonable understanding of the meaning of that term. The same can be said for the other examples.

The attempt to use the “structures” device as a way to resolve this issue also gives no guidance on how to handle the myriad of other types of property that are not listed as examples in section 04(b). If we are to question whether cable and wire, or a generator, or a crane, or like items are personal property, are we to evaluate whether they are “structures”? If so, by what standard? They don’t appear to be structures, but then neither do conduit or pipeline or the other items given as examples. Clearly some standard is necessary – some test by which to determine whether they are personal property. Fortunately, that test is already in the statute – the three-factor test contained in the definition of “fixtures.”

We do concede to one situation in which some of the listed items may be classified as real property. As we have pointed out in a number of meetings and memos (including most recently a memo dated September 6, 2011, copy attached), the 2008 amendments draw a clear distinction between (i) property that is used as part of a building or building system, to support the building’s function, and (ii) property that is used in the commercial or manufacturing operation or process.¹ Thus, the penultimate sentence of the fixtures definition (which is where this analysis should be conducted) provides that building systems are real property: “... systems for the heating, air conditioning, ventilation, sanitation, lighting and plumbing of such building.” Thus, pipe or conduit in a building that supports drinking or waste water systems, or the electrical systems used for light, heating or power, would properly be considered real property because they are essential parts of the building.

In contrast, when the “attached” property is used in the commercial operation, it is personal property; the last sentence of section 63-201(9) makes that clear. It provides that real property “does not include machinery, equipment or other articles that are affixed to real property to enable the proper utilization of such articles.”

With these two sentences, the legislature signaled a clear intent to separate “building” functions from “operational” functions. The property that serves a building function is real property; the property used in the commercial operation is personal property, regardless of the manner of attachment.

Just as the individual items listed in subsection 04(b) cannot reasonably be considered “structures,” so also they cannot be considered part of the support systems for buildings or other real estate. For instance, the sprinkler systems involved in the *Rayl* case discussed in the attached memo arguably relate directly to the function of the farm land they irrigate. But the pipeline,

¹ Other analyses I have provided on this issue include memos dated July 18, 2007 and September 11, 2007, and a letter dated September 22, 2008.

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conduit, railroad track, cell towers and the other items do not support or relate to the farming or other business operation of the real estate to which they are “attached.” They are “machinery, equipment or other articles affixed to the real property to enable the proper utilization of such articles.”

In the previous draft of the changes in this Rule 205, there were comments to the effect that the last sentence of the fixtures definition is inconsistent with the three-factor test, and should be ignored. We strenuously disagree with that position. It cannot be assumed the legislature drafted legislation that would not have a substantive effect, and the intent to clarify the definitions of fixtures and real property to exclude these types of “trade fixtures” is clear from the language used in the 2008 amendment.

All the foregoing analysis supports personal property treatment of all the items listed in subsection 04(b). However, I will make some specific observations with respect to certain of the items:

Cell towers. The last sentence of the fixtures definition provides guidance in classifying property, where it recognizes the distinction between commercial functions and building or real estate supporting systems, as discussed above. When that language is consistently applied for all types of property, cell towers must fall in the personal property category. I am aware that in a recent sales tax case, the Commission determined that cell towers were considered real property. However, the sales tax statute does not contain the specific definitions for real property, personal property and fixtures that are set out in section 63-201, including the last two key sentences of the fixtures definition discussed above. It is also noteworthy that until recently, I understand the counties were treating cell towers as personal property. This position is supported by the Commission’s Personal Property Valuation Schedules, in which towers for both cable and wireless companies are listed.

It should also be noted that cell companies have various types of cell sites and devices for sending and receiving signals. Not all of them have a cell tower (traditional 4-sided lattice tower). Some are just a mono pole (literally a single pole bolted to a concrete pad and sometimes with guyed wires attached for stability). Some sites simply lease space on a building to attach antennas. A rule that cell “towers” constitute real property while mono poles or antennas on buildings would be personal property would ignore the function of the property, and intention of the owner of both the real property and the cell site equipment that the attachments are not permanent additions to the real property.

Underground Storage Tanks. Although my clients do not own such tanks, they are of the same character as pipelines and related property. Unless the storage is for systems-support of the building with which they are associated, they should be considered personal property. Where the function of the tanks is for the business operation, it should not matter whether tanks are above

ground or below ground; in any event, they are attached to real estate only to enable their proper utilization in the business.

Poles and Towers. As with the other property discussed here, poles cannot reasonably be considered “structures.” Nor do they fit in the “fixtures” category. Telephone or other utility poles do not serve or support the land on which they are placed; instead, they are an integral part of the transmission system that includes other personal property – cable and wire. They are part of the business operation of transmitting signals, not part of a system that serves a building or real property. Poles are only affixed to the ground because they cannot stand up on their own. They need to be buried into the ground to make them stand upright, and so are affixed only to ensure their proper utilization. Finally, telephone and electric poles are routinely replaced due to being hit by vehicles, damaged by weather and fire, etc. Many telephone companies replace thousands of poles every year.

Pipelines and conduit. Terry Accordino’s comments address this property in a persuasive manner. The personal property characterization is also supported by the recent case authority, such as the *Colonial Pipeline* case discussed in the attached memo, and it is consistent with Idaho law, such as the *Rayl* case where the irrigation system was real property in part because of how it is adapted to the use of the land, as farmland. As the court noted in *Colonial Pipeline*, a pipeline runs under roads, farm fields, rivers, and cities, with the goal not of operating as part of the accompanying real estate and adapted to it, but instead to be as invisible as possible to the land owner. Because pipeline and conduit are not adapted to the other uses of the land, they need be as unobtrusive as possible.

Segments of pipelines and conduits are removed from time to time, and owners have legal obligations to restore the land at the termination of the lease or easement so there is no damage to the real estate. Indeed, generally accepted accounting principles require the accrual of reserves to reflect the liability for such restoration expenses.

Railroad track. Examples abound of railroad track and ties being replaced, repaired, and re-used somewhere else. Railroad ties that have been replaced are a common tool of landscape architects. It is often necessary to replace and update segments of track, for safety and other reasons. Railroad track and ties are easily removed, with little to attach them to the real estate. And railroad track, ties and ballast are even less adaptable to the land than other types of operating property; they have no connection with or relevance to the operation of the adjoining or underlying land – whether it is farmland or commercial property – and in fact they are a burden to other uses of the land since they divide parcels on either side of the track and provide a barrier to access.

In summary, the draft rule is not consistent with the relevant statutes, or with the statutes’ guidance on the limited categories of property that are classified as real property. It is worth

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noting that the Commission has once before adopted a restrictive definition of personal property, only to have the legislative committees reject that interpretation in 2008.²

The taxpayers do offer an alternative approach for drafting the rule, since we understand the interest in providing guidance to assessors in implementing the personal property exemption. The starting point would be for the Commission to identify those items of operating property for each industry that are consistent with the percentages used for that industry in the legislation that used the percentage concept. (In 2013, that was House Bill 276.) The general categories of personal property for each industry were presumably used by the Commission in the calculation of the fiscal impact of that legislation.³

If you should have any questions concerning the matters discussed in this letter, please feel free to contact me.

Sincerely,

HAWLEY TROXELL ENNIS & HAWLEY LLP



Richard G. Smith

RGS: Client representatives

² That action occurred by letter dated August 14, 2008, from Mike Nugent of the Legislative Services Office.

³ For example, for the telecommunications industry, the percentage used in the bill for the proportion of personal property value to the total property value was 90%. The Commission developed fiscal impact figures for that amount of property, and in doing so must have identified categories of telecommunications property that represented personal property at that percentage level. Presumably, that was all property except land and buildings.

MEMORANDUM

TO: IACI Personal Property Tax Implementation Work Group

FROM: Rick Smith, Hawley Troxell Ennis & Hawley

DATE: September 6, 2011

SUBJECT: Preliminary Comments for September 6 Meeting

I have reviewed Rick Anderson's memo dated August 29, 2011, and thought it would be helpful to respond with some comments and additional points that I think are relevant to further discussions by this Work Group.

1. ***“The Clear/Not Clear” Listing – Commercial and Industrial Property***

At the last meeting of the Work Group, it was suggested that the Tax Commission representatives review the “Version B” listing of property and identify the items with which they still agree to the Version B classification of property as personal or real property. (This Version B was one of two options presented to the Tax Commissioners in 2007, and was the preferred choice.)

Rick Anderson's memo responds to this request, and notes those items the staff apparently now believes are “clear” as either personal property or real property – as initially classified in the Version B list – and also those items which the staff now believes are “not clear” and with respect to which they no longer can agree should be classified as proposed in Version B.

I believe Rick's listing of items as “not clear” is overly conservative, in leaving with this ambiguous label some types of property that should be “clearly” personal property under Idaho law. I will discuss first those items that relate to a commercial enterprise or industrial operation. I will then address the concept of “constructive annexation” that has been suggested as being relevant to these issues. Finally, I will discuss the proper treatment of some utility-type property, such as the pipelines we have been discussing as a proxy for the property of centrally

assessed taxpayers with similar types of property (such as transmission lines, telecommunications cable and wire, etc.).

There are many items marked as “Not Clear” in the August 29 memo that are machinery and equipment used in a commercial operation or industrial process. The machinery and equipment may be similar to other property that might be included in any building simply to make the building usable for general purposes. An example is a boiler, referred to on page 11 of Rick’s memo. If a certain type of boiler is used in an industrial process, it ought to be personal property. If a different type of boiler is a normal feature of a building – to provide heating for the occupants, for instance – that boiler ought to be considered real property. That distinction is made in Version B. In the August 29 memo, this proposed treatment for all boilers is now shown as being in the “Not Clear” category.

There are many more items similar to this one – at least 18 by my count – where the property is used in a commercial or manufacturing process but is now shown as “Not Clear.” The apparent reason for this position is stated at page 11 of the August 29 memo, where there is a discussion of the argument that equipment that provides “creature comforts” for a building is real property, while equipment used for manufacturing is personal property. The memo concludes that “I do not believe the Idaho property tax statutes have ever put forth such a theory” and that “to address this theory in rule would in my opinion take an inappropriate authority leap.” This position apparently is the reason for changing the classification of many of these items of machinery and equipment from personal property to “Not Clear.”

This distinction – treating equipment that provides “creature comforts” as real property, while similar types of equipment used in manufacturing is considered personal property – is very common. The New York statute discussed in the August 29 memo refers to real property classification for property used for heat, light, power, gases and liquids, but only for such property that is common to all manufacturing structures “and not to those present exclusively because of the particular manufacturing process involved.” (Aug. 29 memo, p. 9, ¶ 4, emphasis added.) Colorado also has a statute providing that real property fixtures do not include items affixed to the building that relate to the commercial or industrial operation of the building. C.R.S. § 39-1-102(4). Thus, there is a distinction between (i) the property related to the operation of the building and (ii) the

property related to the operation of the business in the building. See *Del Mesa Farms v. Montrose CBOE*, 956 P.2d 661 (Colo. App. 1998).

As discussed below, this issue is related to the “adaptability” part of the three-part test for determining the proper classification of property. However, the important point to observe here is that the Idaho statutes are similar to the Colorado rule just mentioned, and this fact is overlooked in the August 29 memo. Section 63-201(9) of the Idaho Code defines “fixtures” as follows:

9) "Fixtures" means those articles that, although once movable chattels, have become accessory to and a part of improvements to real property by having been physically incorporated therein or annexed or affixed thereto in such a manner that removing them would cause material injury or damage to the real property, the use or purpose of such articles is integral to the use of the real property to which it is affixed, and a person would reasonably be considered to intend to make the articles permanent additions to the real property. "Fixtures" includes systems for the heating, air conditioning, ventilation, sanitation, lighting and plumbing **of such building**. "Fixtures" does not include machinery, equipment or other articles that are affixed to real property to enable the proper utilization of such articles. (Emphasis added.)

The last sentence of this provision gives the statutory support the August 29 memo states is needed to differentiate building functions from manufacturing functions. Indeed, statute is a mandate that machinery and equipment is not to be treated as a fixture, even if it is bolted down or otherwise attached. The preceding sentence in the statute discusses the “creature comfort” systems relating to property that is placed in almost every building, but all other types of machinery are not to be treated as real property even if they are affixed.

The distinction between “creature comfort” property in a building and other machinery and equipment comes from the application of the three-factor test. Those factors, as stated in this statutory definition of “fixtures,” are (i) whether the property is affixed to the real property in a way that would cause damage to the property if removed; (ii) whether the property is integral to the real property, and (iii) whether a person would reasonably consider the property to be a permanent

addition to the real property. The second factor examines whether the equipment is an integral and necessary part of the land or building, and so would include as real property the normal heating, lighting, power and related items noted in the statute. It would not include equipment that is used for the manufacturing process itself, even if bolted down.

It is respectfully submitted that the August 29 memo's listing of property types as "Not Clear" fails to recognize the importance of this final sentence of Section 63-201(9). It includes such items as motors and refrigeration and freezing equipment in the "Not Clear" category, where such property should clearly be considered personal property.

2. *The "Constructive Annexation" Concept.*

The August 29 memo was accompanied by a one-page excerpt of quotes from an Idaho case dealing with the "constructive annexation" concept. *Rayl v. Shull Enterprises*, 108 Idaho 524 (1984). This concept relates to the first factor – whether property is physically annexed to the real property. This concept allows the annexation test to be satisfied even where there is a limited degree of attachment. For instance, even though a furnace could be unbolted and removed without causing damage to a building, it is a fixture because it is a "necessary, integral or working part of some other object which is attached." *Rayl*, 108 Idaho at 528, quoting *Seatrain Terminals of California v. County of Alameda*, 147 Cal. Rptr. 578, 582 (1978).

This issue is resolved by the analysis in the previous section. The final sentence of section 63-201(9) clearly indicates that regardless of how a property item is attached – whether it is actual or "constructive" – it will not be considered real property if the equipment is attached to the real estate to allow its proper operation. Thus, all machinery and equipment used in a commercial or industrial process or application would be considered personal property under Idaho law.

3. *Utility Property.*

The Version B list included many categories of utility property as personal property. In summary, the buildings and structures of electric, telephone, pipeline and related companies were classified as real property (i.e., railroad stations, pipeline compressor stations). Property that typically is buried under or constructed on farmland or public roads (i.e., rail track and roadbed, gas pipelines,

electric transmission lines, telephone cable), and that can be repaired, replaced, and moved, was properly classified as personal property. Version B also included telephone central office equipment, which consists of computers that would be considered personal property under any reasonable definition of that term; and electrical generation equipment, which consists simply of very large motors and machines that differ from other types of machinery only by their size and cost (factors that should not change their classification).

The August 29 memo changes the Version B classification of this type of property from personal property to “Not clear,” presumably requiring legislative clarification. However, the proper classification of this property is as personal property, for many of the same reasons discussed earlier in this memorandum.

First, with respect to the annexation requirement, the last sentence of section 63-201(9) makes it clear that even if a pipeline, for instance, were considered “affixed” to the land, it still would be considered personal property if used in the business as opposed to supporting the real estate with which it is associated. As the Colorado court noted in interpreting identical language under that state’s laws, “regardless of whether a particular item is affixed to a building and may otherwise constitute a fixture system, the item constitutes personal property if its use is primarily tied to a business operation.” *Del Mesa Farms, supra*, 956 P.2d at 664.

Second, with respect to the adaptability factor, this type of property is not integral to the operation of the property with which it is associated. Here, it is useful to refer to the case relied on by the Tax Commission, *Rayl v. Shull Enterprises*. The irrigation system was adapted to and integrated with the land on which it was used. The land was farm land; the irrigation system was necessary to the operation of the farm. That is not the case with respect to a gas pipeline or similar types of property. The property is located under (or in the case of transmission lines, over) property that is used for an entirely different purpose – farmland, for instance. In no way can the pipeline be considered integral to the operation of the farmland or other property.

Perhaps for this reason as much as any other, most of the cases we have located have held that this type of property is personal property. See *Colonial Pipeline Co. v. State Dep’t of Assessments and Taxation*, 806 A.2d 648 (Md. 2002); *Yellowstone Pipeline Co. v. State Board of Equalization*, 358 P.2d 55 (Mont. 1960), *cert. denied*, 366 U.S. 917; *Northern Natural Gas Co. v. State Board of Equalization*, 443 N.W.2d 249 (Neb. 1989). The courts in *Colonial*

Pipeline and *Northern Natural Gas* reviewed cases from other jurisdictions and found other cases supporting the personal property classification and only one case holding that such property represents real property.

Third, the intention of the owner in these situations is clearly not to add the pipeline or cable or generators to improve the value of the real property or to make these additions permanent fixtures. As the court stated in *Colonial Pipeline*, the pipeline owner “clearly was motivated by a single factor in installing the pipeline system: to operate its business for profit.... The pipeline, buried beneath the surface of the land, adds nothing to the enjoyment or utility of the land, and would not have been constructed by the landowners in the ordinary use of their land. 806 A.2d at 661-62.

We are aware, of course, that in some states this result has been changed by statute. The August 29 memo refers, for instance, to New York law, and New York has enacted a statute requiring all of these categories of utility property to be classified as real property. This is perhaps one reason why New York is consistently shown in tax burden studies to be near the top of the list in taxes assessed per capita. We must question whether Idaho wants to use New York as a model. It should also be noted that to the extent a different standard is advocated for utility taxpayers than for all other taxpayers, there would be serious constitutional problems. The Idaho Supreme Court held in 1967 that it is unconstitutional to tax utilities in a different manner than other commercial taxpayers. *Idaho Telephone Company v. Baird*, 91 Idaho 425.

In summary, I believe the August 29 memo overlooks a very important provision of the Idaho statute. The only way to interpret section 63-201(9) is to recognize the difference between generic building-related fixtures on the one hand, and equipment used in the operation of the business. The Colorado case of *Del Mesa Farms* expresses this concept very well in applying an identical provision: does the equipment relate to the operation of a building, as a generic “building,” or does it relate to the operation of the business? If it is the latter, then the property is personal property. And this analysis flows directly into the classification of utility property – a straightforward application of the three-factor test leads to the conclusion that the pipelines and related property should be considered personal property.



Phillip C. Christensen
Assistant Vice President State and Local Taxes
Tax Department

October 23, 2013

Alan Dornfest
Tax Policy Supervisor
State Tax Commission
P.O. Box 36
Boise, ID 83722-0410

RE: Comments on Proposed Rule 35.01.03.205 ("Proposed Rule 205")

Dear Mr. Dornfest:

Union Pacific Railroad Company ("Union Pacific") hereby submits its comments on Proposed Rule 205's classification of railroad track as real property. Because common law principles define railroad track as personal property used in a trade or business, these comments will focus on application of the statutory three-factor test. Despite requests by taxpayers, Tax Commission Staff have not provided detailed analysis as to their opinion why the select items of operating property listed in Proposed Rule 205, including railroad track, are real property; therefore, our comments are general in nature.

Section 4(b) of Proposed Rule 205 defines railroad track as "real property", notwithstanding either common law or the application of the statutory three-factor test. Interestingly, Proposed Rule 205 is in direct opposition to the treatment of railroad track in a fiscal estimate adopted by the Tax Commission earlier this year.¹

The arbitrary classification of railroad track as real property ignores both facts and Idaho law. Idaho's statutory three-factor test establishes when personal property becomes an improvement to real property. Each factor must be satisfied for the item to be real property. The first factor of Idaho's test requires annexation to such an extent that removal would cause material injury or damage to the real property. The components making up the track, i.e., rails, ties ballast, and other track materials, are not affixed to the underlying ground and are loosely connected to each other.

To illustrate, the following is intended as a high-level explanation of track installation and removal. To establish the track, crews grade the surface along the path of the desired rail network. For the purpose of drainage and stabilization, crushed stones, i.e., ballast, are deposited by railroad crews along the newly graded rail network. On top of the ballast, crews lay down, perpendicular to the direction of the track, a line of wooden (sometimes concrete or plastic) cross ties. Additional ballast is dumped over the cross ties to stabilize the materials. Next crews bring in hot rolled steel rails 39 feet long (sometimes 78 feet long) and lay them on top of the cross ties, end-to-end. The rail is then joined together by either bolting or welding them, end-to-end. Because of movement caused by heat expansion and contraction,

¹ Tax Commission assumed railroad track is personal property based on percentages adopted in a report published earlier this year titled "Revised 1/3/2013 Analysis of 2012 Personal Property Tax in Idaho."

the rails are not nailed or bolted to the ties. Instead, they are attached to the cross ties via anchors (plate and spikes) or clips, both of which hold the rail down but allow longitudinal movement to accommodate expansion and contraction. For large track projects, for the purpose of efficiency, the aforementioned work may also be completed by automated machinery. When installing track, nothing is permanently attached to the ground with a fixed connection.

Because rails, ties, ballast and other track materials are not affixed to the real property, removal of these items is a relatively simple process that does not disturb much less damage the underlying real estate. The spikes and bolts are first removed. For large projects, the spikes are removed with hydraulic spike pulling machines. The rail connectors are removed or the rail is cut, if continuously welded, and removed from the right-of-way. Ties are gathered and sorted based on condition and potential future use. Finally, the ballast is removed utilizing a front-end loader or motor grader disturbing the ground as little as possible. Items deemed useful are placed back into inventory for future use on Union Pacific's railroad network.

The track, i.e., rails, ties, ballast and other track materials, are capable of being moved and are indeed frequently moved by Union Pacific. None of the components are affixed to the real estate. They may be removed, relocated and reused with little or no damage to the track materials or real property. In fact, Union Pacific has thousands of employees whose job it is to maintain, remove, relocate, replace and reuse rails, ties, ballast and other track materials on a daily basis. Therefore, track is personal property because it is not annexed or affixed to the real property, i.e., it fails the first element of the three-factor test.

The second factor under Idaho's three-factor test is adaptation of the personal property to the use of the underlying real property. The purpose of this element of the three-factor test is to make a distinction between the business which is carried on at the premises and the premises themselves. The former is personal in nature, and articles that are merely accessory to the business, and have been placed on the premises for the purpose of engaging in the business, retain the personal characteristic of the principal to which they are subservient. But articles which have been annexed to the premises as accessory to it, whatever business may be carried on upon it, and not particular or unique to the benefit of a present business, become subservient to the realty, and acquire its legal character.

Union Pacific, when it lays its track upon an individual parcel, does so with a purpose entirely distinct from any use of the land as an isolated parcel. The railroad track, i.e., rails, ties, ballast and other track materials, is adapted to the single function of transporting property across the Western United States. All of these parts are merely accessories to Union Pacific's freight business, and were placed on the parcel for this single purpose, and not as accessories to a common use of any one parcel. Railroad track laid on any parcel, disconnected from other parts of the road, could not operate and would be useless as a railroad, nor could it serve any useful purpose to the parcel upon which it was laid. For example, for much of Union Pacific's network, the underlying land is devoted to an agricultural use. While the railroad track is in place, a farmer or rancher will be able to continue to conduct his or her normal operations. Even after the track is removed, the agriculture use will continue. For this reason, railroad

track is personal property because it is not adapted to the use of any parcel of real property, i.e., it fails the second element of the three-factor test.

The third and most important factor under Idaho's common law three-factor test is intent, i.e., whether the party installing the chattel, from an objective analysis, had the intent to permanently annex the item to the real estate. The other two factors, i.e., annexation and adaptation, are relevant primarily to the extent they show intent. In addition to the factors mentioned above, Union Pacific can show, given the nature of the track, its interests in the right-of-way, and its dealings with 3rd parties, Union Pacific does not have the requisite intent required by law for railroad track to be real property.

By categorically classifying railroad track as real property, notwithstanding application of the three-factor test, Proposed Rule 205 is carving out a significant portion of Union Pacific's property for unique, discriminatory treatment under Idaho's property tax code. This discriminatory treatment is bad tax policy and a violation of State and Federal law. Therefore, we request the removal of railroad track as a default item of real property from Proposed Rule 205.

Sincerely,

A handwritten signature in cursive script, appearing to read "Phillip C. Christensen".

Phillip C. Christensen

CC: Email to Sherry Briscoe; sherry.briscoe@tax.idaho.gov

205. PERSONAL AND REAL PROPERTY -- DEFINITIONS AND GUIDELINES (RULE 205).

Sections 39-4105, 39-4301, 63-201, 63-302, 63-309, 63-602KK, 63-1703, 63-2801, Idaho Code. (5-8-09)

01. Real Property. Real property is defined in Section 63-201, Idaho Code. Real property consists of land and improvements. (5-8-09)

a. Land. Land is real property as well as all rights and privileges thereto belonging or any way appertaining to the land. (5-8-09)

b. Law and Courts. Real property also consists of all other property which the law defines, or the courts may interpret, declare, and hold to be real property under the letter, spirit, intent, and meaning of the law. (5-8-09)

c. Improvements. Improvements are buildings, structures, fences, and similar property that is built upon land. Improvements are real property regardless of whether or not such improvements are owned separately from the ownership of the land upon or to which the same may be erected, affixed, or attached. (5-8-09)

02. Personal Property. Personal property is defined in Section 63-201, Idaho Code, as everything that is the subject of ownership that is not real property. (5-8-09)

03. Fixtures. Fixtures are defined in Section 63-201, Idaho Code. (5-8-09)

a. Three ~~part~~ factor test. If an item of property satisfies all three tests, the item becomes a fixture and therefore real property. (~~5-8-09~~)()

i. Annexation. Although once moveable chattels, articles become accessory to and a part of improvements to real property by having been physically or constructively incorporated therein or annexed or affixed thereto in such a manner that removing them would cause material injury or damage to the real property; and (5-8-09)

ii. Adaptation. The use or purpose of an item is integral to the use of the real property to which it is affixed; and (5-8-09)

iii. Intent. Items should be considered personal property unless a person would reasonably be considered to intend to make the articles, during their useful life, permanent additions to the real property. The intent depends on an objective standard and what a reasonable person would consider permanent and not the subjective intention of the owner of the property. (5-8-09)

b. Fixtures does not include machinery, equipment, or other articles that are affixed to real property to enable the proper utilization of such articles. (5-8-09)

04. Property Eligible For The Exemption in Section 63-602KK(2), Idaho Code. ()

a. Personal property means everything that is the subject of ownership and that is not included within the term real property. Real property means land and all rights and privileges thereto belonging or any way appertaining and all other property which the law defines, or the courts may interpret, declare and hold to be real property under the letter, spirit, intent and meaning of the law. Real property also includes improvements. Improvements means all buildings, structures, fences, water ditches constructed for mining, manufacturing or origination purposes, and fixtures, whether or not such improvements are owned separately from the ownership of the land upon or to which the same may be erected, affixed or attached. The three factor test is the predominant determinant when considering whether fixtures are real property. When Subsection 205.03.b. of this rule and the three (3) factor test create a conflict in determining whether an item is eligible, the three (3) factor test shall resolve the conflict. ()

b. Examples. Based upon the definitions of personal and real property in Subsection 250.04.a. of this rule the following items are real property and are not eligible for the exemption in 63-602KK(2), of Idaho Code:

- i. Cell towers and similar structures: ()
- ii. Underground storage tanks: ()
- iii. Poles and towers: ()
- iv. Signposts: ()
- v. Pipelines and conduit: ()
- vi. Railroad track: ()

-5. Operating Property. Operating Property is defined in Section 63-201, Idaho Code. For any purpose for which the distinction between personal property and real property is relevant or necessary for operating property, operating property will be characterized as personal or real based upon the criteria stated in this guideline and the rules of the State Tax Commission. (5-8-09)

(BREAK IN CONTINUITY OF SECTIONS)

626. PROPERTY EXEMPT FROM TAXATION -- CERTAIN PERSONAL PROPERTY (RULE 626).
Sections 63-105(A), 63-201, 63-302, 63-308, 63-313, 63-602Y, and 63-602KK, Idaho Code. (3-29-10)()

~~01. **Effective Date.** This exemption shall take effect on January 1 of the following tax year after the state controller certifies to the State Tax Commission that receipts to the General Fund for the fiscal year just ended have exceeded the receipts to the General Fund during fiscal year 2008 by five percent (5%) or more. For example, if the state controller certifies that the receipts to the General Fund for the fiscal year ending June 30, 2010, have exceeded the receipts for fiscal year 2008 by five percent (5%) or more, then this exemption would take effect on January 1, 2011. Once this exemption takes effect, it will remain in effect continuously.~~ (3-29-10)

~~021. **Locally Assessed Property - Application Required to Establish Initial Eligibility for Exemption.**~~ (3-29-10)

~~a. **In order to establish initial eligibility for this exemption,** the taxpayer must file one (1) or more of the lists of taxable personal property as required by Section 63-302, Section 63-313, or Section 63-602Y, Idaho Code, if the total market value of the property to be listed is greater than one hundred thousand dollars (\$100,000). The filing of said list(s) shall constitute the filing of an application for exemption. The application will be deemed valid provided the exemption provided in Section 63-602KK, Idaho Code, is granted and not later deemed improperly claimed. If the applicable list is not filed by the taxpayer to initiate the exemption, or if in any subsequent year the taxpayer fails to file either the applicable list(s) or, if permitted, the affidavit provided in Section 63-602KK(6), Idaho Code, the assessor may list and assess the items to be taxed based on his best judgment and information available. The items not listed by the taxpayer but listed and assessed by the assessor will be assessed without deduction of the exemption provided for in Section 63-602KK, Idaho Code. For purposes of reporting personal property, the value is to be based on market value, not book value.~~

~~b. **Taxpayers establishing initial eligibility for the exemption provided in Section 63-602KK(2), Idaho Code, may in lieu of a list, file only an application attesting to ownership of otherwise taxable personal property having a cost of one hundred thousand dollars (\$100,000) or less. In providing such cost, newly acquired personal property items acquired at a price of three thousand dollars (\$3,000) or less, that are exempt pursuant to Section 63-602KK(1), Idaho Code, shall not be included. The application must be filed no later than April 15th of the first year for which the exemption is claimed.**~~

~~bc. **Any taxpayer appealing his personal property listed on the property roll to the county board of**~~ ()

~~equalization shall qualify for the exemption provided eligible property is ultimately shown on the list received from the taxpayer. In addition, for taxpayers with personal property with a total market value less than or equal to one hundred thousand dollars (\$100,000) in a single Idaho county, in every fifth year following the first year in which the exemption in section 63-602KK(2) is granted for any property, the taxpayer must file an application for the exemption to continue. The application must include certification by the taxpayer that the total market value of all otherwise taxable personal property is less than or equal to one hundred thousand dollars (\$100,000), and must be filed with the county assessor no later than April 15 of the appropriate year.~~ (5-8-09)()

~~03. **Procedure During Years Following Year of Initial Eligibility for Exemption.**~~ (3-29-10)

~~a. **Unless the exemption has been deemed improper, for all years following the initial establishment of eligibility for the exemption, the taxpayer may continue to file the lists required by Sections 63-302, 63-313, and 63-602Y, Idaho Code, or, if applicable, for property otherwise reportable as required by Section 63-302, Idaho Code, may file the affidavit provided in Section 63-602KK(6), Idaho Code. If the taxpayer chooses to file the affidavit, such filing must conform to the filing date provided in Section 63-302, Idaho Code.**~~ (3-29-10)

~~b. **If, after receiving the exemption, the taxpayer fails in any subsequent year to timely file the required lists of personal property or, if applicable, the affidavit provided in Section 63-602KK(6), Idaho Code, the taxpayer can re-establish future eligibility for the exemption by means of filing the lists required by Sections 63-302, 63-313 and 63-602Y, Idaho Code.**~~ (3-29-10)

~~c. **For the duration of the period during which recapture could apply, the affidavit option shall not be available for taxpayers who elect to designate property to be included in the exemption provided for in Section 63-3029B, Idaho Code.**~~ (3-29-10)

042. Locally Assessed Property - Taxpayers' Election of Property Location. ()

a. Multiple Locations Within A County. In cases where the taxpayer has personal property located in multiple places within the county, the taxpayer may elect the location of the property to which the exemption will apply by filing the "Idaho Personal Property Exemption Location Application Form" available from the State Tax Commission (Commission) for this purpose. To make the election for property required to otherwise be listed as provided in Section 63-302, Idaho Code, the form must be filed with the county assessor by April 15. For taxpayers with personal property required to be listed as provided in Sections 63-602Y and 63-313, Idaho Code, any application

specifying the location of the property to which the exemption provided for in Section 63-602KK(2) will apply, must be filed by the dates specified for filing the lists required by these Sections. Should the taxpayer not make an election as to where to apply the exemption, the county shall have discretion regarding the property to which the exemption shall apply. ~~If a taxpayer with personal property located in multiple places within the county files one (1) affidavit provided in Section 63-602KK(6), and fails to elect where to apply the exemption, the county shall prorate the exemption to the last known locations of the eligible property based on last lists filed. However, to the extent possible and assuming the assessor is not aware of any changes in eligibility, the exemption will be first applied to the same property to which it applied in the immediate prior year.~~ (3-29-10)()

b. Multiple locations in different counties. The one hundred thousand dollar (\$100,000) limit on the exemption applies to a taxpayer's otherwise taxable personal property within any county. If the taxpayer owns qualifying personal property in more than one county, the limit is one hundred thousand dollars (\$100,000) in market value per county. ()

03. Centrally Assessed Property – Application Required. ()

a. Except for private railcar fleets, the taxpayer must file a list of personal property with the operator's statement filed pursuant to Rule 404 of these rules. The filing of such a list shall constitute the filing of an application for this exemption. Except as provided in Subsection 626.03.c. of this rule, for such personal property to be considered for the exemption, the operator's statement must include: ()

i. A description of the personal property, including any tax code area in which the personal property subject to assessment as situs property is located; ()

ii. Cost and depreciated cost of the personal property; ()

iii. The county in which the personal property is located, if the taxpayer wishes to receive the exemption on property located in more than one county. ()

b. For private railcar fleets subject to assessment by the Commission, and having an Idaho taxable market value of five hundred thousand dollars (\$500,000) or greater, the application procedure described in Subsection 626.03.a. of this rule shall apply. However, the requirements to show specific or county locations, found in Subsections 626.03.a.i. and 626.03.a.iii. shall not apply. Instead, the Commission shall, after using apportionment procedures described in Rule 413 of these rules to apportion the market value of these fleets, allow an exemption of up to one hundred thousand dollars (\$100,000) to be applied to the apportioned market value within each county. The remaining taxable and exempt market value is to be further apportioned to each taxing district and urban renewal revenue allocation area. ()

c. For private railcar fleets subject to assessment by the Commission, and having an Idaho taxable market value of less than five hundred thousand dollars (\$500,000), the application procedure described in Subsection 626.03.a. of this rule shall apply. However, the property of such fleets is never apportioned to counties, so the exemption amount is limited to one hundred thousand dollars (\$100,000) per company, unless the company provides proof showing the multiple counties in which the personal property is located for the entire tax year, in which case the one hundred thousand dollar (\$100,000) limit shall apply per company per county. ()

d. When operating property companies have locally assessed property, any exemption pursuant to Section 63-602KK(2), Idaho Code must be applied to the locally assessed property first. In this case, the county assessor must notify the Commission of the value of the exemption granted. ()

04. Centrally Assessed Property - Taxpayers' Election of Property Location. Except for private rail car fleets having an Idaho taxable value of five hundred thousand dollars (\$500,000) or greater, to which the procedures in Subsection 626.03.b. of this rule shall apply, the taxpayer owning personal property located in multiple counties may indicate the county in which the property is located. Should the taxpayer not make an election as to where to apply the exemption, the exemption shall be limited to one hundred thousand dollars (\$100,000) applied to the Idaho value of the taxpayer prior to apportionment. ()

05. Valuation Assessment Notice. The valuation assessment notice required by Section 63-308, Idaho

Code, must show the ~~gross value~~ taxable market value before granting the exemption provided in Section 63-602KK(2), Idaho Code, the exempt market value pursuant to the exemption provided in Section 63-602KK(2), Idaho Code, and the net taxable market value of the personal property. ~~The information shown on the valuation assessment notice may reflect the aggregate value reported by the taxpayer on an affidavit submitted in lieu of the lists required under Section 63-302, Idaho Code. If the items of personal property cannot be identified to the extent necessary to assign them to another of the categories provided in Rule 512 of these rules, the personal property shall be listed in secondary category 68. If the affidavit fails to provide an estimate of value, the assessor shall determine current market value of the property which shall not then be eligible for the exemption provided in Section 63-602KK, Idaho Code. After the year of initial eligibility, if the net taxable market value is zero, no valuation assessment notice is required until every fifth year following when the claimant must reapply.~~ (3-29-10)()

~~06. Preliminary and Final Personal Property Tax Reduction Lists. (5-8-09)~~

~~a. Except as provided in Paragraph 626.06.e. of this rule, the preliminary personal property tax reduction list shall include the following information pertaining to the personal property accounts to receive the exemption: (3-29-10)~~

~~i. The name of the owner, listed in alphabetical order unless the State Tax Commission grants permission for accounts to be listed in an alternate order; (5-8-09)~~

~~ii. The description of the property item(s) subject to exemption or partial exemption; (5-8-09)~~

~~iii. The location(s) of the property item(s) showing the tax code area; and (5-8-09)~~

~~iv. The assessed value of the property item(s) listed as equalized by the county board of equalization. (3-29-10)~~

~~b. This preliminary list shall be compiled by the assessor and shall be certified and sent to the county clerk and the Tax Commission by the fourth Monday in July. The list will be reviewed and, if necessary, corrected by the Tax Commission. The list will only include those taxpayers who have filed the list of taxable personal property as required by Section 63-302, Idaho Code, or the affidavit permitted by Section 63-602KK, Idaho Code. Transient personal property will not be listed on the preliminary list. (3-29-10)~~

~~e. Except as provided in Paragraph 626.06.e. of this rule, the final personal property tax reduction list shall include, in addition to the items listed in Paragraph 626.06.a. of this rule, the following information pertaining to the personal property accounts to receive the exemption: (3-29-10)~~

~~i. The tax levy applicable to the personal property; (5-8-09)~~

~~ii. The tax before the exemption; (5-8-09)~~

~~iii. The tax after the exemption; (5-8-09)~~

~~iv. The amount of the exemption; (5-8-09)~~

~~v. The aggregate total of the tax exempted; and (5-8-09)~~

~~vi. The aggregate total of the tax exempted within each taxing district and each revenue allocation area. (5-8-09)~~

~~d. This final personal property tax reduction list may include transient personal property and may include personal property otherwise assessable under Section 63-602Y, Idaho Code. This final list shall serve as the certification from the county clerk to the Tax Commission as required by Section 63-602KK(3), Idaho Code. The final certified list shall be filed with the Tax Commission not later than the third Monday of November of each year. (3-29-10)~~

~~e. If a taxpayer has filed the affidavit permitted by Section 63-602KK(6), Idaho Code, in lieu of the list required by Section 63-302, Idaho Code, some of the information otherwise required to be included on the preliminary and final personal property tax reduction lists may not be available. For any taxpayer for which complete information is not available because of the filing of such an affidavit, requirements found in Subparagraphs 626.06.a.ii., and 626.06.a.iv. for the description and value of items of property shall be waived. In lieu of these requirements, the preliminary and final personal property tax reduction lists must indicate the aggregate equalized value of the taxpayer's property in the county that is eligible for the exemption provided in Section 63-602KK, Idaho Code. For transient personal property and personal property subject to listing under Section 63-602Y, Idaho Code, the prorated value shall be used to fulfill the requirements of Subparagraph 626.06.a.iv. of this rule. (3-29-10)~~

076. Tax Commission's Review and Correction of the Personal Property Tax Reduction Lists. ()

a. If an entry on the preliminary or final personal property tax reduction list is found to be erroneous, the Tax Commission shall disapprove as much of the claim as necessary and so notify the county clerk. (5-8-09)()

b. If, after certifying the personal property tax reduction list, the county learns of any erroneous information included in said list, the county clerk will immediately, and not later than the fourth Monday in February, 2014, notify the Commission of the correction. If the county cancels the tax otherwise due, the county must notify the Commission of the cancellation, and the Commission will adjust the replacement money accordingly. In addition to any other errors, corrections may include market value and tax changes resulting from actions of the county board of equalization related to property listed and assessed as required in Sections 63-313 and 63-602Y, Idaho Code. Corrections may also include market value changes as a result of appeals to the state board of tax appeals or district court, provided however, that the Commission is notified by the county of such changes by the fourth Monday in February, 2014. Once notified of any correction, the Commission shall adjust the total certified personal property tax reduction amount for any applicable taxing district or urban renewal agency, and shall change any payment due to the county in accordance with the correction. ()

c. If a disapproval occurs after the Commission has certified the amount to be paid to the county in December, the Commission shall notify the county as soon as practicable and shall make all necessary adjustments in the amount to be paid in June of 2014. ()

d. If the amount of the disapproval exceeds the amount remaining to be paid to the county, the Commission shall adjust the payment to the county, and then the county shall begin proceedings to recover any remaining excessive amounts paid on behalf of any taxpayer, pursuant to the recovery procedures found in Section 63-602KK(7), Idaho Code. Any amount so recovered shall be remitted to the Commission. ()

e. Corrections may also be made to account for additional amounts of exemptions granted provided the Commission is so notified not later than January 30, 2014. Such additional amounts may be related to exemptions granted for transient personal property, or for other personal property listed on the subsequent or missed assessment rolls and shall be subject to review by the Commission. ()

07. Limitation on Eligibility for the Exemption. ()

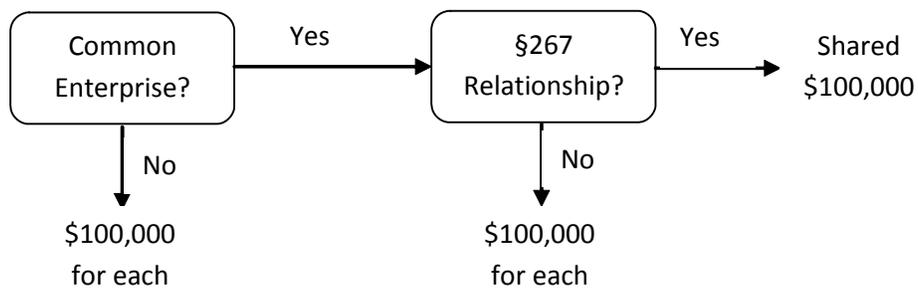
a. Except for taxpayers claiming and receiving the exemption provided for in Section 63-4502, Idaho Code, taxpayers receiving the personal property exemption provided in Section 63-602KK, Idaho Code, may be eligible for, and are not precluded from, other applicable exemptions. ()

b. Personal property exempt in accordance with statutes other than Section 63-602KK, Idaho Code, shall not be included in determining when the one hundred thousand dollar (\$100,000) limit provided in Section 63-602KK(2) is reached. ()

c. Taxpayers with requirements to annually apply for, or list personal property for, which other statutorily provided personal property exemptions are sought, must continue to comply with the requirements of these statutes. ()

d. Improvements, as defined or described in Sections 63-201 and 63-309, Idaho Code, shall not be eligible for the exemption provided in Section 63-602KK. Improvements shall be deemed to include mobile and manufactured homes and float homes, regardless of whether such property is considered personal property. Leasehold real properties and other leasehold improvements that are structures or buildings shall be considered improvements, and therefore ineligible for the exemption. Structures, such as cell towers, are improvements and therefore are not personal property eligible for the exemption. ()

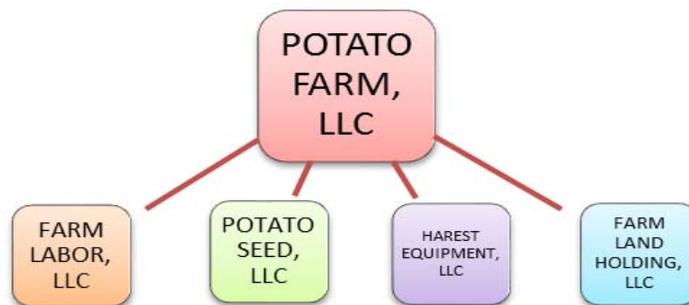
08. Illustrations of Eligibility Situations Related to Common Enterprise and Related Ownerships. If the taxpayer owns more than one (1) business within one (1) county, he may be entitled to more than one (1) one-hundred thousand dollar (\$100,000) exemption within the county. For purposes of this exemption, a taxpayer includes two or more individuals or organizations using the property in a common enterprise, and the individuals or organizations are within a relationship described in Section 267 of the Internal Revenue Code. This is illustrated in the following chart: ()



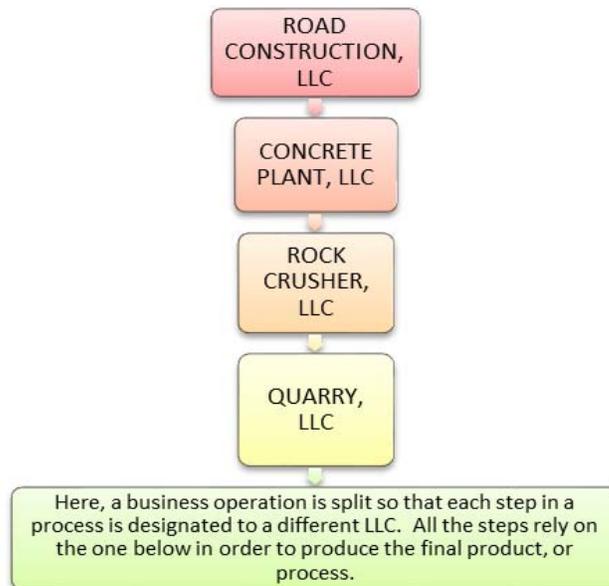
Here, the usual functions involved in a working potato farm are split between several LLCs, all of which own the property involved with the functions they perform. The operation of the business is no different than if all the functions were combined in just Potato Farm, LLC

a. First, an analysis must be made to determine if a common enterprise exists. If entities or individuals are organized to manage a common scheme of business, they would be in common enterprise. ()

i. Horizontal Commonality is explained by the following chart: ()



ii. Vertical Commonality is explained by the following chart: ()

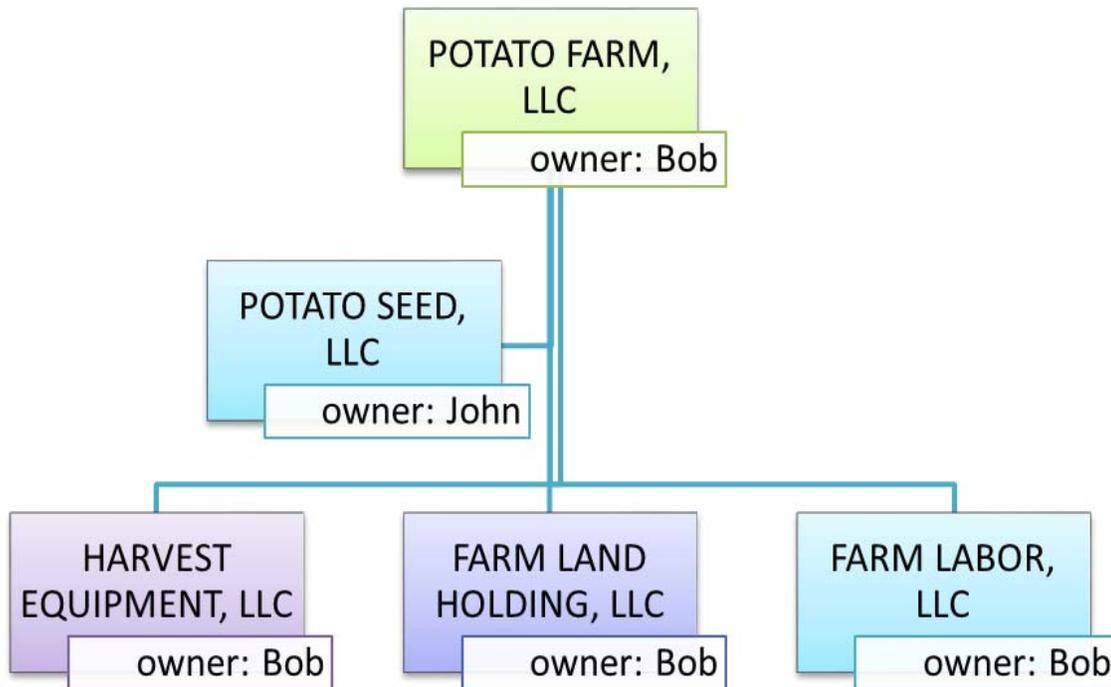


b. Second, an analysis would be made to determine whether the ownership between the entities are within the relationships identified in Section 267 of the Internal Revenue Code. If such a relationship is found to exist, the entities or individuals would be considered one (1) taxpayer for purposes of this exemption. ()

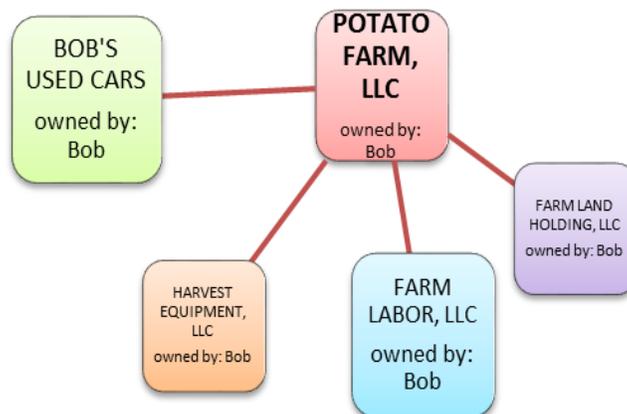
c. Ownership alone does not determine whether entities are considered one taxpayer for purposes of this exemption. Two (2) businesses can have identical ownership, and each receive the exemption, providing they do not operate as a common enterprise. In addition, entities in a common enterprise can receive separate exemptions, providing that their ownership does not consist of a relationship identified in Section 267 of the Internal Revenue Code. ()

d. The following examples are given to illustrate eligibility situations related to common enterprise and related ownerships: ()

i. Example 1. This is an example of common enterprise, but being entitled to two (2) exemptions because the owners are not related in a manner as described in Section 267 of the Internal Revenue Code. ()



So long as Bob and John are not related in a manner identified in IRC 267, two exemptions exist. One for Potato Seed, LLC. The other for all of Bob's businesses, because they are in a common enterprise and all owned by him.



ii. Example 2. This is an example of the same owner with multiple businesses not all united in a common enterprise. Bob's farm businesses are common enterprises, and therefore entitled to only one (1) exemption

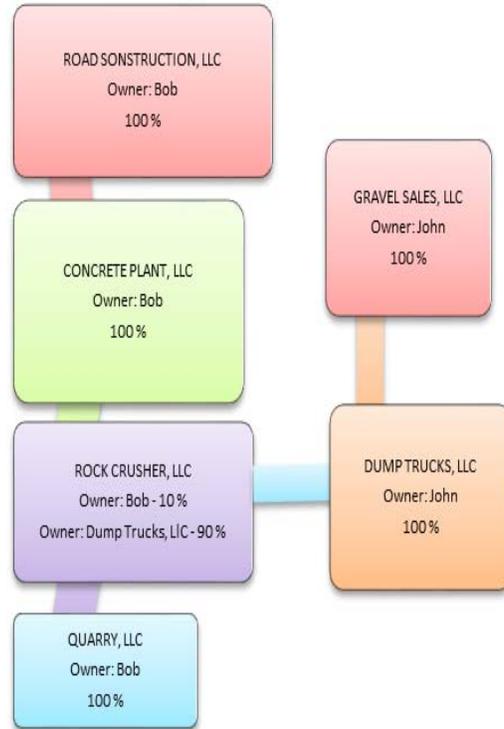
for all the farm businesses. Bob's used car business is not involved with Bob's farm businesses, so Bob is entitled to an additional exemption related to his used car business. ()

iii. Example 3. This is an example of multiple businesses being entitled to only one (1) exemption because common enterprise exists. ()



Here, one exemption exists for all of the entities because they are in a common enterprise, due to their vertical commonality, and are all constructively owned by Bob, pursuant to IRC 267.

iv. Example 4. This is an example showing how owners of common enterprises may intersect. ()



This is an example of how common enterprises can intersect with one another. The companies Bob owns completely receive one exemption; John's companies also receive one exemption, including Rock Crusher, LLC, because John's ownership interest in that company falls within IRC 267.

e. In cases of partial ownership as noted in example four wherein Bob owns ten percent (10%) and Dump Trucks, LLC owns ninety percent (90%) only the majority owner is eligible to receive this exemption. ()

09. Special Rules for the Exemption Provided in Section 63-602KK(1), Idaho Code. ()

a. Newly acquired items of personal property, exempt as provided in Section 63-602KK(1), are not to be reported on any list otherwise required pursuant to Sections 63-302, 63-602Y, and 63-313, Idaho Code. ()

b. The exemption provided in Section 63-602KK(1), Idaho Code, is in addition to the one hundred thousand dollar (\$100,000) per taxpayer, per county exemption provided in Section 63-602KK(2), Idaho Code. ()

c. No application for the exemption provided in Section 63-602KK(1), Idaho Code, is necessary. ()

d. The requirement in Section 63-602KK(6) requiring the assessor to provide the application by no later than March 1, applies only to taxpayers who have an obligation to file any application. ()

10. Limitation on Replacement Money. ()

a. Once the 2013 amount of replacement money for each taxing district, and unit, and for each urban renewal district revenue allocation area is made final, following corrections as provided in this rule, there shall be no additions. However, there may be changes and reductions as follow: ()

i. If a taxing district dissolves, the state will make no payment of the amount previously certified for that district, and when an urban renewal district revenue allocation area dissolves and is no longer receiving any allocation of property tax revenues, the state will discontinue payment of amounts previously certified for that revenue allocation area, beginning with the next scheduled distribution. ()

ii. If taxing districts or revenue allocation areas within urban renewal districts are consolidated, the amounts of replacement money attributed to each original district or revenue allocation area shall be summed and, in the future, distributed to the consolidated taxing or urban renewal district. ()

iii. No urban renewal district shall receive replacement money based on exempt personal property within any revenue allocation area (RAA) established on or after January 1, 2013, or within any area added to an existing RAA on or after January 1, 2013. ()

iv. Any payment made to the Idaho Department of Education, as provided in Subsection 11 of this rule shall be discontinued if the state authorized plant facilities levy is not certified in any year. Certification in subsequent years shall not cause any resumption of this payment. ()

b. If otherwise eligible personal property is exempt in 2013 by reason of any property tax exemption other than the exemption found in Section 63-602KK(2), Idaho Code, there shall be no personal property replacement money related to exempt taxes on this property nor shall the amount of replacement money be adjusted if this personal property receives the exemption in Section 63-602KK(2) in the future. ()

11. Special Provision For Replacement Money For State Authorized Plant Facilities Levy. The state authorized plant facilities levy will be applied to the exempt personal property, in any school district within which this levy has been certified in 2013, and the amount of tax calculated will be billed to the Commission as part of the property tax reduction list. The Commission shall remit any related funds directly to the Idaho Department of Education for deposit to the Public School Cooperative Fund. ()

12. Special Provision For Exempt Personal Property Within Urban Renewal Revenue Allocation Areas (RAAs). When personal property subject to the exemption in Section 63-602KK(2), Idaho Code, is within an RAA, any adjustment shall first be to the increment value, and there shall be no adjustment to the base value of the RAA unless the remaining taxable market value of the parcel is less than the most current base value of the parcel. In that case, the base value shall be reduced. The amount to be subtracted is to be determined on a parcel by parcel basis in accordance with procedures found in Rule 804 of these rules. ()

13. Special Provision For Reporting Exempt Value. Beginning in 2014, taxing district values submitted to the Commission as required in section 63-510, Idaho Code, shall indicate the otherwise taxable value exempt pursuant to section 63-602KK(2), in addition to the net taxable value of each district. In the absence of a more current value of the exemption, the value of the exemption may be estimated based on the last known value determined in 2013 by the county assessor, or in the case of centrally assessed property, the Commission. The Commission will include this exempt value in the total taxable valuation reported to the Idaho State Board of Education and the Idaho Department of Education for each school district, as required in Section 63-1312, Idaho Code. ()

~~0814.~~ **Cross Reference.** ~~For more information on the lists and affidavit option, see Rule 302 of these rules.~~ For information on transient personal property see Rule 313 of these rules and for information on the definition of personal property see Rule 205 of these rules. (3-29-10)()

DRAFT

Idaho State Tax Commission
PROPERTY TAX RULES COMMITTEE
Meeting Minutes
August 21, 2013 ~ 9:00 am – 12:00 pm ICR5

ATTENDEES:

Committee Members:	Alan Dornfest, Rick Anderson, Betty Dressen (via phone), Dwayne Hines, Gene Kuehn, Sharon Worley, Erin Brady, Glenna Young, Janet James, Kathlynn Ireland
Commissioners:	Ken Roberts, Tom Katsilometes, David Langhorst, Rich Jackson
Rules Coordinator:	Sherry Briscoe
State Tax Commission Staff:	Greg Heinrich, George Brown, Greg Heinrich
Guests:	Bob McQuade, Brad Vanderpool, Brent Adamson, June Fullmer, Katrina Basye, Ron Fisher, Terry Accordino, Patricia Agenbroad, Gary Collins, Ben Davenport, Alex LaBeau, Zach Hauge, Mike Reynoldson On the conference call: Gerry White, Union Pacific; David Uphaus and Judy Cummings, BNSF Railway; Norman Ross, Pacific Corps

MINUTES: The August 6, 2013 minutes were unanimously approved.

STATUS REPORT: Rick presented a brief status report on the rules, indicating that we are currently reviewing 11 rules, of which 7 are ready to be sent in to be published in the Administrative Bulletin, 3 are on the agenda for today, and we have added one new one – Rule 406.

006	Technical changes, not a negotiated rule
020	Combined use RV's
205	Focus on improvements
302	Complete – deletes entire rule
407	Hearing process for Appeals of Operating Property Assessments
626	Temporary rule completed, proposed rule Draft 4
632	Defines oil/gas well
700	Disclosure of PTR applicant info to state or federal elected officials
803	Budget certification
804	<i>Urban renewal- this hasn't started yet</i>
902	No need to send out zero balance tax notices

Committee Chairman Alan Dornfest reminded everyone that the purpose of this committee is to determine which drafts go to the next step for public comment. We do not have authority to finalize rules. Our decision to go forward is only for the purpose of publication in the Administrative Bulletin, which then begins the 21-day public comment period.

DRAFT

RULES DISCUSSION:

Rule 406: Rules Pertaining to Market Value of Operating Property of Rate Regulated Electric Utility Companies. This rule concerns operating property, specifically electric companies. This is an entire new rule, and Commissioner Jackson verified that the PARF has been approved on this rule. Katrina Bayse of Idaho Power commented that they are very pleased with the progression of this rule, and that this is a serious milestone. Norm Ross commented that he agreed with Katrina, approves of most of the rule, but suggested three minor changes with he gave. Dwayne made a motion to accept this draft as is and publish this version in the bulletin, giving the next three weeks to consider all the public comments. Gene seconded the motion and all were in favor.

Rule 626: Property Exempt From Taxation – Certain Personal Property. Administrative aspects of dealing with the ongoing personal property exemptions for locally and centrally assessed properties. Rick brought up three items for discussion, all of which required minor changes. Terry questioned a common enterprise test in the diagrams, which needed some minor clarification on situs properties. Gene motioned to accept as amended, Dwayne seconded to amend and publish. All committee members were in favor.

Rule 205: Personal and Real Property – Definitions and Guidelines. Gene talked with assessors and their legal staff about draft 2 of this rule. They felt this draft confused the issue, and they are not in favor of draft 2. The hang up with this version is the ‘fixtures’ definition. Looking at the current draft 3, Gene feels they would all be more in favor of this draft with its modifications. Gene motioned to move draft 3 forward, as is, and come back with comments in the next month. The motion was seconded and approved by all.

Rule 803: Budget Certification – Dollar Certification Form (L-2 Form). The issue here is to make sure that taxing districts don’t approve a budget higher than what they advertise in their hearing notice. And also to make sure that each taxing district is in fact publishing their budgets. Betty motioned to publish this rule as written. Gene seconded with two slight modifications, all approved.

Next Meeting Date: none set at this time

Alan Dornfest
Chairman

Sherry Briscoe
Rules Coordinator