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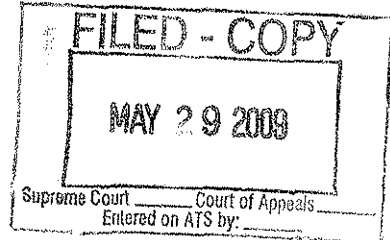
IN THE SUPREME COURT OF THE STATE OF IDAHO

FLYING ELK INVESTMENT, LLC	)	
	)	
Plaintiff-Appellant,	)	Case No. CV-2006-3298-OC
	)	
vs.	)	Supreme Court No. 35853-2008
	)	
DAVID F. CORNWALL,	)	
	)	
Defendants-Respondent.	)	
	)	



BRIEF OF APPELLANT

Appeal from the District Court of the Sixth Judicial District of
The State of Idaho, in and for the County of Franklin

HONORABLE RONALD E. BUSH
District Judge

HONORABLE STEPHEN A. DUNN
District Judge

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FLYING ELK

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ATTORNEY FOR DEFENDANT/RESPONDENT
CORNWALL

BRIEF OF APPELLANT
FLYING ELK INVESTMENT, LLC

Appeal from the District Court of the Sixth Judicial District of
The State of Idaho, in and for the County of Bannock

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ATTORNEY FOR DEFENDANT/RESPONDENT
CORNWALL

FILED THIS _____ DAY OF ________________, 2009

STEPHEN W. KENYON, Clerk

BY: ________________________________
Deputy Clerk

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STATEMENT OF THE CASE

On a motion for Summary Judgment the District Judge in a boundary dispute case had evidence presented that no agreement was ever made regarding the fence location being an agreed boundary the court weighed the evidence that if no agreement existed apposed to the fence being in existence for many years (because no one wanted to pay for a survey) then determined by the court's own "common sense" that acquiesce is enough to settle the boundary dispute and give 15.85 acres of agricultural land to the adjacent property owner more land than is in his deed and shorting the rightful owner 15.85 acres in his deed.

COURSE OF PROCEEDINGS

Flying Elk filed a complaint for quite title after a survey disclosed a fence line was not on the line described in the deed. Cornwall, the defendant, adjacent property owner answered and moved for summary judgment pursuant to Rule 56 IRCP. Affidavits and dispositions were submitted, the case was argued. The District Court determined "there is no clear and direct evidence as to the nature and purpose of the original location of the fence." After weighing the conflicting statements regarding the various parties understandings of the nature and purpose of the fence, the court determined that the subsequent treatment of the fence boundary between the two properties presents clear and convincing evidence that the fence has been treated as the boundary.

While Pat Whitworth disputes this idea, the Court finds it significant that the boundary has not moved since 1972 or 1979, a time period of thirty years or more. Even if Pat disagreed

with the notion of the fence as the boundary, he acquiesced in such treatment while he owned the property. Further, Pat informed Bohus that the fence was not on the deeded property line when he sold the property. Bohus also acquiesced in the treatment of the fence as the boundary until 2003, when he surveyed the property and began a dialogue with Cornwall about the discrepancy between the fence and the deeded property line.

Appeal was taken from the court's decision.

Hearings were held regarding costs, fees and the survey done to describe the approximately 15.85 acres of disputed land.

This appeal focuses on the presumptions made by the Court not supported in the record or the law.

CONCISE STATEMENTS OF FACTS

A dispute arose between adjoining agricultural property owners of land in Bannock County. A survey revealed an approximate 250 foot discrepancy from a fence line to the deeded property line. Pat Whitworth had moved the fence from time to time, knew the fence was not on the deeded property boundary line and knew the history of the fence going back approximately 70 years.

Pat Whitworth was the predecessor to Bohus and ultimately, Flying Elk.

The defendant David Cornworth asserts an ownership interest in the 15.85 acres. The defended claims on the basis that the fence had been in existence for many years and he assumed the fence to be the boundary. The defendant was not aware of any agreement creating the fence line as boundary.

ISSUES ON APPEAL

1. Did the District Court err on Summary Judgment granting to the defendant 15.85 acres of the plaintiffs deeded land where the plaintiff's predecessor in interest knew the history of the present fence and testified that no agreement existed creating a boundary.

2. Should the Idaho fence law I.C. §35-110 be applied to boundary/fence line disputes.

STANDARD OF REVIEW

When reviewing a motion for summary judgment, this Court employs the same standard as the trial court. *Robison v. Bateman-Hall, Inc.,* 139 Idaho 207, 209, 76 P.3d 951, 953 (2003). Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (citing I.R.C.P. 56(c)). The facts are construed liberally in favor of the non-moving party. *Id.*

Teton Peaks Investment v. Ohme, 8.22, ISCR, 1085, (Oct. 2008)

LEGAL FRAMEWORK

The holder of title to property is the presumed legal owner of that property. *Hettinga v. Sybrandy,* 126 Idaho 467, 469, 886 P.2d 772, 774 (1994); therefore, if someone else claims ownership of such property, be must establish his claim by clear, satisfactory, and convincing evidence. *Russ Ballard & Family Achievement Inst. V. Lava Hot Springs Resort, Inc.,* 97 Idaho 572, 579, 548 P.2d 72, 79 (1985).

Boundary by agreement consists of two elements; the boundary is disputed or uncertain, and there was a subsequent agreement fixing the boundary. *Cox v. Clanton,* 137 Idaho 492, 494-95, 50 P.3d 987, 989-90 (2002). The "agreement" element of "boundary by agreement" can be implied by the surrounding circumstances and the landowners' conduct. *Id.* at 495, 50 P.3 at 990. The "long existence and recognition of a fence as a boundary, in the absence of any evidence as to the manner or circumstances of its original location, strongly suggests that the fence was located as a boundary by agreement." *Id.* (internal quotations omitted). But, acquiescence is "merely regarded as competent evidence of the agreement," and an agreement therefore "is essential to a claim of boundary by acquiescence." *Id.* (internal quotations omitted).

Though our cases often use the phrase "boundary by acquiescence" interchangeably with "boundary by agreement," the latter phrase more accurately describes the doctrine. This is so because not every situation that invokes the doctrine involves an acquiescence. In some instances, the parties my simply agree, orally or in writing, to treat a certain line as the boundary, without either party passively submitting or "acquiescing" to the agreement. *See, e.g., Duff v. Seubert,* 110 Idaho 865, 719 P.2d 1125 (1986). In situations where no express agreement has been made, our cases have viewed a long period of acquiescence by one party to another party's use of the disputed property merely as a factual basis from which an agreement can be inferred. As we stated in *Downing v. Boehringer,* 82 Idaho 52, 349 P.2d 306 (1960), *quoting Clapp v. Churchill,* 164 Cal. 741, 130 P. 1061 (1913), "Acquiescence is merely evidence of the agreement and can property be considered as evidence of an agreement..." 82 Idaho at 57, 349 P.2d at 308. We also noted in *Paurley v. Harris,* 75 Idaho 112, 268 P.2d 351 (1954), that the period of

acquiescence "is merely regarded as competent evidence of the agreement…" 75 Idaho at 117, 268 P.2d at 353.

"Boundary by agreement or acquiescence has two elements: (1) there must be an uncertain or disputed boundary and (2) a subsequent agreement fixing the boundary." *Luce v. Marble,* 142 Idaho 264, 271, 127 P.3d 167, 174 (2005). "Idaho case law demonstrates that an agreement, either expressed or implied, must exist to establish a boundary by agreement or acquiescence." *Cox v. Clanton,* 137 Idaho 492, 495, 50 P.3d 987, 990 (2002), "A long period of acquiescence by one party to another party's use of the disputed property provides a factual basis from which an agreement can be inferred. *Griffel v. Reynolds,* 136 Idaho 397, 400, 34 P.3d 1080, 1083 (2001). The period of acquiescence need not continue for the amount of time necessary to establish adverse possession because acquiescence is merely competent evidence of the agreement. *Stafford v. Weaver,* 136 Idaho 223, 225, 31 P.3d 245, 247 (2001).

Downey v. Vavold, 144 Idaho 592, 596, 166 P.3d 382, 386 (2007)

ARGUMENT

Flying Elk owns a tract of land adjacent to Cornwall property. The fence in place has been moved several times, including in the 1940's and again in 1972. Pat Whitworth knows the entire history of the new fence.

FACTS

No Agreement

Corwin "Pat" Whitworth testified in his deposition to the following:

Q. With regard to the fence line as you last recall it, was it ever intended to be a boundary line fence?

A. No.

Q. Was it placed on the boundary as you knew it?

A. I don't understand. It was not on the boundary.

Q. Did you have any discussion with Peoples, the folds that used to won the land, did you ever have an agreement with them that the fence line would be the boundary line?

A. No.

Q. Are you aware of any agreements that ever existed that the fence line that's running north and south would be the boundary line between the properties?

A. No.

Q. With any of your family members, with Max Whitworth or any of his kids, was there ever an agreement that the fence line would be the boundary line?

A. No.

Q. As far as you knew, the fence line was not the boundary line; is that correct?

A. It was not the boundary line.

Whitworth deposition, page 33, lines 20-25, page 34, lines 1-17.

Q. I understand. Now, you indicate in your affidavit, this Deposition Exhibit No. 2, that you know for a fact that the fence was not the boundary.

A. Yes.

Q. Can you just tell me what you know about that statement?

A. My father from the time I was a kid said the fence is not on the line, it should go west 260 feet or – I'm not sure how many fee; it was a ways.

Whitworth deposition, page 24, lines 7-15

David Cornwall testified in his deposition to the following:

Q. Do you have any direct information that there was an express agreement that this (indicating) would be the boundary?

A. I don't.

Q. Do you have any information that would be contrary to Pat Whitworth's assertion that there was never an agreement that would be the boundary?

A. I don't, I don't know of any.

Cornwall deposition, Page 28, lines 10-17.

Q. I guess I need for you to explain to me why you think you are entitled to land that wasn't deeded to you.

A. Well, I'll tell you just like I told you before, I bought what I saw; I bought what I saw. I mean I should have had it surveyed, that would have been the sensible thing to do, but I bought what I was and Bohus didn't have it surveyed when he bought what he saw.

Cornwall deposition, Page 26, lines 24-25, page 27, lines 1-7.

Q. Did you ever reach an agreement with him that that would be the boundary?

A. Well, when we changed – when he told me that we was working on the wrong side of the fence, it's always been that way, that he would take the left-hand side, and then he come up and put a new fence in there, I figured, you know, that must be the boundary.

Q. So you made an assumption?

A. When the new fence went in on the same line, I figured that was the boundary.

Cornwall deposition, Page 17, lines 7-16.

THE DESCRIBED BOUNDARY IS STRAIGHT;

THE FENCE IS NOT

David Cornwall testified in his deposition to the following:

Q. And in this area where the fence first comes down and connects, it takes a jog; isn't that correct?

A. Right out there (indicating) it takes a little jog.

Q. So would you with the red marker put a dashed line approximately where that fence is sitting as best as you can recall, just use a dotted line.

A. I don't know how far it comes but something like that (indicating).

Q. And then continue on where you believe the fence line is, just take the dotted line and take it all the way to the south.

A. (Witness complied.) I think, something of that nature.

Q. So the fence line isn't straight.

A. No, it's not.

Q. So the fence line bends here and then it takes another jog down here at the south (indicating)?

A. I think so. But this corner maintains the same, the corner is always there, runs right straight along this field (indicating).

Q. Have you had your land surveyed?

A. No.

Q. Is there a particular reason why you haven't had it surveyed?

A. I'm like Pat, lack of money. If I thought is was going to be off, I would have had it surveyed – I wish I would have had it surveyed, I wouldn't have had this deal with Pat.

Q. The area that shows this blue line, is that your deeded line, is that what you understand to be your deeded line?

A. Well, I guess that's what it says.

Q. And the deeded line is what's described in the deed when you purchased the property?

A. Yes.

Cornwell deposition, Page 13 line 3-25, Page 14 lines 1-13.

THE PURPOSE OF THE FENCE

Corwin "Pat" Whitworth testified in his deposition to the following:

Q. So the purpose of the fence up there is to keep the cattle out or in or whatever?

A. Correct.

Whitworth deposition, Page 32 lines 12-14.

Q. Do you recall after Cornwall purchased his property next to yours, was there ever a time when there wasn't a fence in place between the two of you?

A. We each had livestock or he had livestock, so there was always some kind of a livestock restraining thing between our two areas, yes.

Q. Now, as far as the people that owned it before Dave Cornwall, owned his ground before he bought it, the same thing, was there pretty much always a livestock restraining in place?

A. Yeah, there was.

Whitworth deposition, Page 27, lines 9-19.

THE FENCE HAD BEEN MOVED

FROM TIME TO TIME

Corwin "Pat" Whitworth testified in his deposition to the following:

Q. Now, I understand that there are little sections of the fence that got moved here and there, but as far as the big picture, the bulk of the fence was it pretty much in the same place through those years when Cornwall's predecessors owned it and when he owned it?

A. Well, it moved as much as a couple hundred feet back one way or the other, yeah, it was moved.

Q. And do you recall a specific part of the fence that would be moved?

A. Well, the north line was moved 200 feet or so; the section in the south was moved probably 60 feet during the area that I moved it.

Q. Can you just roughly depict this north part that was moved a couple hundred feet with this blue marker?

A. I didn't have a chain when I moved it so I am guessing.

Whitworth deposition, Page 27 lines 20-25, Page 28, lines 1-11.

Q. *And when you sold to Bohus, was that section of fence pretty much in the same place?*

A. Where we moved it to, yes.

Q. So it hadn't changed from when you dad and you had moved it, and your brothers?

A. Yeah. I don't think it moved that much, it might have moved a little bit but it never moved that much.

Q. You were going to show me another area.

A. Up where these trees are (indicating), these were thick trees and I dozed them out and moved the fence. The fence was down over there, and I dozed those trees out because it was always real hard to fix. I dozed those trees out, and up here the fence used to jog to the east and I took it out of the canyon and moved it up and dozed the top of the ridge off. Easy.

Q. Made it flat?

A. Made it flat so it was easy to fence.

Q. And the time frame?

A. Well, that had to be – I leased that place from my dad for quite a while; probably during the time I was leasing it before I bought it.

Q. Can you just somehow depict that area that you just described for me?

A. Do you want me to kind of circle this line and area where I dozed the trees?

Q. Yes.

A. This area was changed and then it was kind of flat along here with the sagebrush, and this area down where it used to run down there, I change that (indicating). I was constantly making it easy. I never asked anybody about doing it because it was my fence.

Q. And that was moved you thought about 60 feet?

A. Yes, probably, up out of the bottom of that draw, up to the top.

Whitworth deposition, Page 30 lines 1-25, Page 31 lines 1-12.

SURVEY ISSUE

Regarding the issue of the survey of the property lines when Dave Cornwall, the defendant was asked about the lack of survey of the property he stated:

Q. Is there a particular reason why you haven't had it surveyed?

A. I'm like Pat, lack of money. If I thought it was going to be off, I would have had it surveyed – I wish I would have had it surveyed, I wouldn't have had this deal with Pat.

D. Cornwall deposition, Page 14, lines 1-6.

A. Well, I'll tell you just like I told you before, I bought what I saw; I bought what I saw. I mean I should have had it surveyed, that would have been the sensible thing to do, but I bought what I saw and Bohus didn't have it surveyed when he bought it, he bought what he saw.

D. Cornwall deposition, Page 27, lines 2-7.

Dan Long, surveyor of the property stated:

It is my belief that because of the large error in the fence locations, the fences must have been built more convenience based on foliage and terrain and not by following any survey lines.

Dan Long Affidavit, Paragraph 9, August 21, 2007.

C. Pat Whitworth was asked:

Q. Is there any reason you never got a survey to establish where the line was?

A. Money.

C. Pat Whitworth Deposition, Page 25, lines 24-25, Page 26, line 1

Q. So when you talk about a boundary, you are talking about having the surveyed line.

A. That's right.

Q. And then you establish the fence along that line.

A. It fits the legal description that I pay taxes on. Now, we wasted a lot of time because I can tell you what I know in about three minutes, as a rule.

Q. So the reason that wasn't done here while you owned this property, go get the survey and move the fence on a line, was just simply cost?

A. I was not infringing on anybody else, so my concern did not exist. I used it merely as a fence to restrain stuff off the rest of my property. Had I been over on their property, I would have moved the fence.

Q. Over on whose property?

A. Well, had that been the reversal things, I would have moved that fence.

Q. You mean if you had been over here (indicating) when Joe Whitworth-

A. If that line had been over here, the fence would have been there now (indicating).

Judge Bush recited some of the history of the testimony and ultimately got the decision making part of the memorandum and stated:

Q. But you still would have had to buy a survey?

A. It's about the money. But I would have bought it. Now, the fence I am moving for the mile between these people, not one of them paid one dime on that survey, because the guy told me my line is out in your field. I said we'll correct that, it's your field. We will move the fence out to where it's supposed to be, and I paid

for the survey and I will build a fence, and I won't have horses in my grain anymore.

C. Pat Whitworth deposition, Page 36, lines 6-25, Page 37, lines 1-11.

On motion for Summary Judgment the District Court applied its "common-sense assessment of the historical context" in stating the following:

> In considering such evidence in its totality, the Court has attempted to apply a <u>common-sense assessment</u> of the historical context of the use of the respective parcels of the land and the persons using the land. Here, both parcels of land were previously owned and used by members of the same extended Whitworth family, a family with a lengthy history in Bannock County. The two branches of the family began their use of the land at a time when farming and ranching was much more of a marginal enterprise than exists today in the farming economy, when the family farm was just that – an enterprise that required the efforts of all family members and an enterprise that met the needs of each family member. It was not unusual, in the Court's understanding, for adjoining landowners at that time – particularly related landowners – to "work" their farms in the most convenient manner possible, which included at times a separation of the parts of the farm along sometimes meandering natural geographic lines and features, rather than a strict adherence to the lines of a property description based upon sections and quarter sections of government surveys. Surveys were expensive and unnecessary where neighboring farmers, particularly those related to each other, could agree that it made sense to all involved that their shared property boundary follows a particular course. Indeed, the very amount of acreage involved and the distances that at least some portions of fence vary from the actual section lines infer that there must have been some understanding about

where to share a boundary, rather than a mistake as to the same, because the differences are erratic and dramatic, not uniform and detrimental.

However, the District Court's "common sense" and "historical perspective" is neither fact nor reality based and is a product of "present analysis" not historic perspective.

The Court recognized that land was cheap, times hard and surveys expensive. Pat Whitworth in affidavit and deposition stated there was no agreement but a general understanding that once the land was surveyed the boundaries would be fixed to conform to the deeds.

Support for Pat Whitworth's statements can be found in the historic case in Idaho Law, *Brown v. Brown, 18 Idaho 345, 110 P. 269 (1910)*

> The history of Idaho shows that very few of the farmers in this state when they first build their fences procure a surveyor to establish the correct boundary lines, and where a live is established, as the evidence shows the division lines were established in this case, with the understanding that when a survey was made and a true line ascertained the parties would place their fences thereon, it would be most unjust and inequitable to hold that they had consented and agreed to make that line the true boundary line, when there was no evidence to that effect introduced on the trial.
>
> Counsel for respondents contend that all of the testimony shows that the division line fence has for more than twenty-five years – and perhaps thirty years – been acquiesced in as the boundary and division line between the respective

premises. We find no evidence in the record that would justify such a statement or conclusion. Rhodes testified positively that said line was not acquiesced in as the true line, but that the understanding was that the fence should be placed on the true line when it was ascertained by survey. *Brown, 18 Idaho at 355-56*

The District Courts historic context is simply contrary to what's contained in the record. The presumption and application of "common sense" should not be used to supplant Pat Whitworth's testimony.

> *As above stated, it is a well-recognized fact in this state that farmers in building their first division fences do not employ surveyors to establish the true lines, but build their fences with the understanding that when the true line is established, they will conform their fences to it. Such evidently was the understanding in this case as shown by the evidence. The evidence does not support the findings of the court to the effect that the line established by those division fences was understood and agreed to be the true line between said contiguous owners. Brown 18 Idaho at 357.*

The District Court allows for that possibility by stating:

Such scenario includes, as the Court recognizes, the possibility that such adjoining landowners could also agree, as Pat Whitworth's testimony suggests occurred, that even though the landowners fixed boundary for purposes of having a boundary, it was done with the further understanding that it was likely not the true boundary and that if a survey was

ever done at a later date, then the "real" boundary would be that fixed by such a survey. However, the Court must balance such a inference in this setting against all the inferences that can reasonably be drawn from the other evidence in the record, particularly so in a case such as this where the Court is the factfinder, with the additional latitude available to it in a summary judgment setting. Further, even if such an inference can reasonably be drawn it must nonetheless be weighed against the events of subsequent years where, as here, the landowners effectively adopt and apply the boundary as originally placed, regardless of whether there had ever been an initial understanding that it might be someplace else.

There is no clear and direct evidence as to the nature and purpose of the original location of the fence. After weighing the conflicting statements regarding the various parties, understandings of the nature and purpose of the fence, the Court determines that the subsequent treatment of the fence as a boundary between the two properties presents clear and convincing evidence that the fence has been treated as the boundary. While Pat disputes this idea, the Court finds it significant that the boundary has not moved since 1972 or 1979, a time period of thirty years or more. Even if Pat disagreed with the notion of the fence as the boundary, he acquiesced in such treatment while he owned the property. Further, Pat informed Bohus that the fence was not on the deeded property line when he sold the property. Bohus also acquiesced in the treatment of the fence as the boundary until 2003, when he surveyed the property and began dialogue with Cornwall about the discrepancy between the fence and the deeded property line.

The District Court, on Summary Judgment is applying a new rule, acquiescence can now be boot-strapped, even when evidence establishes no agreement.

As stated in *Downey v. Vavold:*

> Acquiescence, by itself, does not constitute a boundary by agreement. As we explained in *Wells v. Williamson,* 118 Idaho 37, 794 P.2d 626 (1990), "boundary by acquiescence" is simply another name attached to the doctrine of boundary by agreement; it is not a separate legal theory. "[T]here must be an uncertain or disputed boundary and a subsequent agreement fixing the boundary." *Id.* at 41, 794 P.2d at 630. The agreement can be express or implied. "In situations where no express agreement has been made, our cases have viewed a long period of acquiescence by one party to another party's use of the disputed property merely as a factual basis from which an agreement can be inferred." *Id.*
>
> *Vavold,* 144 Idaho at 595-96
>
> "Boundary by agreement or acquiescence has two elements: (1) there must be an uncertain or disputed boundary and (2) a subsequent agreement fixing the boundary." *Luce v. Marble,* 142 Idaho 264, 271, 127 P.3d 167, 174 (2005). "Idaho case law demonstrates that an agreement, either express or implied, must exist to establish a boundary by agreement or acquiescence." *Cox v. Clanton,* 137 Idaho 492, 495, 50 P.3d 987, 990 (2002). "A long period of acquiescence by one party to another party's use of the disputed property provides a factual basis from such an agreement can be inferred." *Griffel v. Reynolds,* 136 Idaho 397, 400 34 P.3d 1080, 1083 (2001). The period of acquiescence need not continue for the amount of time necessary to establish adverse possession because acquiescence is merely competent evidence of the agreement. *Stafford v. Weaver,* 136 Idaho 223, 225, 31 P.3d 245, 247 (2001).
>
> *Vavold,* 144 Idaho at 595

Fences, frauds and need for certainty

Idaho Law provides that certain agreements must be in writing. Idaho Code §9-505(4) states:

An agreement for the leasing, for longer period than on (1) year, or for the sale, of real property, or of an interest therein, and such agreement, if made by an agent of the party subscribed by the party sought to be charged.

There are, like many rules, exceptions that have been recognized by the Courts. One of those is boundary by oral agreement:

Where the location of true boundary line between coterminous owners is unknown to either party and is uncertain or in dispute, an oral agreement between them fixing the boundary line is not regarded as a conveyance of real property in violation of the statute of frauds, but merely as the location of respective existing estates and the common boundary of each of the parties. *Downing v. Boehringer, 82 Idaho 52, 349 P.2d 306 (1960).*

Where the location of a true boundary line between two coterminous owners is known to either of the parties, or is not uncertain and not in dispute, oral agreement between them purporting to establish another line between them as the boundary between their properties constitutes an attempt to convey real property in violation of statute of frauds and is invalid. *Downing v. Boehringer, 82 Idaho 52, 349 P.2d 306 (1960).*

Where the location of the true boundary line between conterminous owners is unknown, uncertain, or in dispute, the coterminous owners may orally agree upon a boundary line, and the agreement, when possession is taken under it, will be binding upon the owners and those

claiming under then and will not violate the statute of the frauds for lack of a writing because it is not a conveyance of land, but merely the locating and establishing of the common boundary. *Hyde v. Lawson, 94 Idaho 886, 499 P.2d 1242 (1972);* overruled on other grounds, *Nesbitt v. Wolfkiel, 100 Idaho 396, 598 P.2d 1046 (1979).* ***Does that really apply to 15.85 acres?***

In every case where a boundary by agreement is asserted, the underlying issue is whether such an agreement represents an oral conveyance of and in violation of the statute of frauds. The general rule of case law is that an agreement which arises from uncertainty or dispute over the location of a boundary is valid, and does not constitute oral conveyance of land. *Norwood v. Stevens, 104 Idaho 44, 655 P.2d 938 (Ct. App. 1982).*

Idaho case law, presently and historically, would permit application of the oral agreement doctrine where the location of the true line is unknown to both property owners, even though they may not entertain uncertain or disputatious feelings about it, because the doctrine of boundary by agreement promotes practical and stable boundaries, while concurrently preventing property owners from engaging in oral transactions to convey land. *Norwood v. Stevens, 104 Idaho 44, 655 P.2d 938 (Ct. App. 1982).*

Given the number of cases reported in Idaho regarding boundaries and fences it is certainly challenged that the doctrine of "boundary by agreement" promotes practical and stable boundaries. Surveys, in contrast, except in the most unusual circumstances would seem to do a better job of establishing "stability."

Fence Laws

The Idaho legislature seems to have created that certainty. In the Idaho Statutes are the "Fence Laws".

§35-110. Survey of line. – The person building such fence, or the occupant or owner of the land whereon the same is build, may, upon notice to the other party, whenever doubts arise about the location of such fence, procure the services of a professional land surveyor to establish the boundary line between their respective lands, and the line so established is sufficient notice to the party making the mistake, so as to require him to remove such fence within on (1) year thereafter. *[1885, p. 118, § 7; am. R.S., § 1309; reen. R.C. & C.L., § 1273; C.S., §1965; I.C.A., §34-110; am. 1963, ch. 87, § 1, p. 282; am. 2002, ch. 7, § 1, p. 10.]*

This statute appears to be applicable to boundary/fence line disputes. No Idaho Courts has interpreted the application of that statute.

Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction. *State v. Rhode, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999).* Where a statute is unambiguous, statutory construction is unnecessary and courts are free to apply the plain meaning. *Martin v. State Farm Mut. Auto. Ins. Co., 138 Idaho 244, 246, 61 P.3d 601, 603 (2002).* Ambiguity is not established merely because the parties present differing interpretations to the court. *Tim View Trout Co. v. Higginson, 121 Idaho 819, 823, 828 P.2d 848, 852 (1992).* In the case of ambiguous language, when the Court must engage in statutory construction, it has the duty to ascertain

the legislative intent and give effect to that intent. *Rhode*, 133 Idaho at 462, 988 P.2d at 688. To ascertain the intent of the legislature, not only must the literal words of the statute be examined, but also the content of those words, the public policy behind the statute, and its legislative history. Id. Courts must construe a statute "under the assumption that the legislature knew of all legal precedent and other statutes in existence at the time the statute was passed." *City of Sandpoint v. Sandpoint Indep. Highway Dist., 126 Idaho 145, 150, 879 P.2d 1078, 1083 (1994).* Finally, Idaho has recognized the rule of expression *unius est exclusion alterius* – "where a constitution or statute specifies certain things, the designation of such things excludes all others." *Local 1494 of the Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 639, 586 P.2d 1346, 1355 (1978).* It is asserted that the legislative has statutes dealing with boundary disputes and surveys. The language is consistent with the "history articulated in *Brown.* A partition fence was originally placed merely as a separation between the two tracts of land. Pat Whitworth provided affirmative testimony that at such time as the land was surveyed the true boundary would be determined. Neither party up to that point had had their respective properties surveyed. Pat Whitworth further testified that he had moved the fence line at various times as a matter of convenience lending further support for the proposition that the fence was never intended to be the actual fixed property boundary line. Mere acquiescence is not enough when there is testimony presented that affirmatively provides that no agreement ever existed fixing the fence as the boundary.

CONCLUSION

A boundary by acquiescence is just a sub-set of boundary by agreement. Here Pat Whitworth provided the history of the fence. It was never intended to be the boundary. No agreement regarding the fence as a boundary was ever reached. Assuming the fence to be a boundary is not an agreement. The historical approach utilized by court was not supported and is flawed.

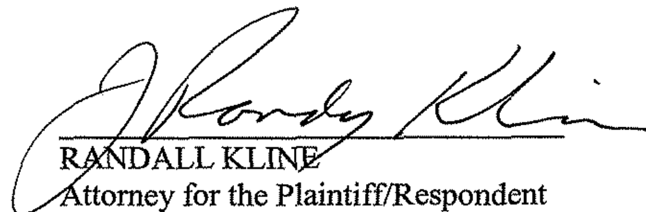
The historical of *Brown v. Brown* 18 Idaho 345, 110 P 269 (1910) provides a true historic context of fences and boundaries. The fence would be placed as a matter of convenience, not fixing the boundary line, until such time as a survey could be completed to determine the actual boundary between the properties. Pat Whitworth's testimony supported that true historical approach. There was no agreement. The fence was never intended to set the boundary line. There is no absence of information regarding the history of the fence. The District Court, in essence, balanced the conflicts to the defendant, yet it is the burden for the defendant to prove an agreement. The defendant provided NO PROOF if an agreement set the fence as a boundary. No testimony reflected Pat Whitworth's claim of no agreement.

In this case there is not "the absence of any evidence as to the manner or circumstances of its original location. The fence had been moved in the forties then again in the seventies. Pat Whitworth knew of an testified as to the history of the fence.

Further, the subsequent conduct of subsequent owners does not prove or disprove an implied agreement between the original parties. *Vavold* 144 Idaho at 596.

It is therefore submitted, that the District Court erred in weighing the evidence on a Motion for Summary Judgment filed by the Defendant. The District Court also erred in failing to consider the historic law as articulated in *Brown v. Brown* and failing to determine that the original fence was simply a partition or division fence and was never meant to fix or set the boundaries. The Court should have followed the only credible testimony as provided by Pat Whitworth that no agreement existed regarding the fence line as a boundary.

There is also the Idaho Fence Law which provides statutory authority for settling a dispute regarding a partition or division fence and having the property surveyed to resolve the dispute. The concept of boundary by agreement is a concept in equity. There is no reason to resort to an equitable remedy when there is a legal remedy in the form of the Idaho Statutory Fence Laws. It is therefore requested that the District Courts Memorandum Decision and Order be set aside and the case be remanded for further proceedings including a Trial.



RANDALL KLINE
Attorney for the Plaintiff/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28 th day of May, 2009, in accordance with the Idaho Rules of Civil Procedure and Appellant Rules, I mailed two true and correct copies of the foregoing Brief to the following by placing the same in the U.S. Mail, postage prepaid thereon:

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