

4-23-2009

Flying Elk Investment, LLC v. Cornwall Clerk's Record v. 1 Dckt. 35853

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Vol. _____ of _____

IN THE SUPREME COURT OF THE STATE OF IDAHO

FLYING ELK INVESTMENT, LLC

Plaintiff-Appellant _____ and

vs. **LAW CLERK**

DAVID F. CORNWALL

Defendant-Respondent _____ and

Hon. Stephen A. Dunn _____ District Judge

Appealed from the District Court of the Sixth
Judicial District of the State of Idaho, in and for
Bannock _____ County.

F. Randall Kline

Attorney

Attorney For Appellant

Thomas J. Holmes

Jones, Chartered

Attorney For Respondent

Filed this
2008

FILED - COPY

APR 23 2009

Clerk
Deputy

Supreme Court _____ Court of Appeals
Entered on ATS by: _____

35853

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC)	
	)	Supreme Court No. 35853-2008
Plaintiff-Appellant)	
)	
vs.)	
)	
DAVID F. CORNWALL,)	
)	
Defendant-Respondent)	
_____)	

CLERK'S RECORD

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

Before **HONORABLE Stephen A. Dunn**, District Judge.

For Appellant:

F. Randall Kline
Attorney
P.O. Box 97
American Falls, Id 83211

For Respondent:

Thomas J. Holmes
Jones, Chartered
P.O. Box 967
Pocatello, Idaho 83201

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Flying Elk Investment vs. David F. Cornwall

Date	Code	User		Judge
7/26/2006	LOCT	MARLEA	Clerk's	Peter D. McDermott
	NCOC	MARLEA	New Case Filed-Other Claims	Peter D. McDermott
	SMIS	MARLEA	Summons Issued	Peter D. McDermott
		MARLEA	Filing: A1 - Civil Complaint, More Than \$1000 No Prior Appearance Paid by: f randall kline Receipt number: 0028297 Dated: 7/26/2006 Amount: \$88.00 (Check)	Peter D. McDermott
	ATTR	CAMILLE	Plaintiff: Flying Elk Investment Attorney Retained F Randall Kline	Peter D. McDermott
8/15/2006		ELLA	Filing: 11A - Civil Answer Or Appear. More Than \$1000 No Prior Appearance Paid by: Jones Chartered Receipt number: 0031248 Dated: 8/15/2006 Amount: \$58.00 (Check)	Peter D. McDermott
	ATTR	CAMILLE	Defendant: Cornwall, David F. Attorney Retained Thomas J Holmes	Peter D. McDermott
	NOAP	CAMILLE	Notice Of Appearance	Peter D. McDermott
	SMRT	CAMILLE	Summons Returned; srvd on Mrs David Cornwall, 7-31-06	Peter D. McDermott
	MOTN	CAMILLE	Motion to Disqualify; aty Randall Kline for plntf	Peter D. McDermott
	ORDR	CAMILLE	Order of Reference, this matter is referred to J Smith for reassignment: J Mcdermott 8-17-06	Peter D. McDermott
8/29/2006	ORDR	PATTI	Order (transferred to J. Bush); J. Smith	Ronald E Bush
11/15/2006	ANSW	DCANO	Answer; Thomas J. Holmes, atty for Dfdt, David F. Cornwall	Ronald E Bush
11/21/2006	HRSC	KARLA	Hearing Scheduled (Scheduling Conference 01/22/2007 03:00 PM)	Ronald E Bush
1/22/2007	CONT	KARLA	Continued (Scheduling Conference 02/26/2007 03:30 PM)	Ronald E Bush
2/2/2007	NOTC	LINDA	Notice of Service: Plaintiff's First Set of Interrogatories and REquest for Production of Documents; aty Randall Kline	Ronald E Bush
2/26/2007	HRHD	KARLA	Hearing result for Scheduling Conference held on 02/26/2007 03:30 PM: Hearing Held	Ronald E Bush
	HRSC	KARLA	Hearing Scheduled (Court Trial 10/04/2007 09:00 AM)	Ronald E Bush
	HRSC	KARLA	Hearing Scheduled (Pretrial Conference 09/17/2007 04:00 PM)	Ronald E Bush
4/23/2007	NOTC	CAMILLE	Notice of service - Defs Answers to Plntfs first set of Interrog. and req for production: aty Tom Holmes	Ronald E Bush
5/29/2007		CAMILLE	Plntfs witness List; aty Randy Kline	Ronald E Bush
6/2/2007		CAMILLE	Def's Witness List; aty Tom Holmes	Ronald E Bush
6/19/2007	MOTN	CAMILLE	Motion to amend pleadings; aty Tom Holmes	Ronald E Bush
	HRSC	CAMILLE	Hearing Scheduled (Hearing Scheduled 07/10/2007 04:00 PM)	Ronald E Bush

Flying Elk Investment vs. David F. Cornwall

Date	Code	User		Judge
7/10/2007	INHJ	CAMILLE	Interim Hearing Held; Minute Entry & Order, Defs motion to amend Pleadings is GRANTED : J Bush 7-11-07	Ronald E Bush
	GRNT	KARLA	Hearing result for Hearing Scheduled held on 07/10/2007 04:00 PM: Motion Granted (Min Ent & Ord-Mtn to Amend Pleadings GRANTED)	Ronald E Bush
7/30/2007	MOTN	CAMILLE	Motion for summary judgment by the def. David Cornwall ; aty Tom Holmes for Def.	Ronald E Bush
	BRFS	CAMILLE	Brief in support of defs motin for summary; aty Tom Holmes for Def.	Ronald E Bush
	AFFD	CAMILLE	Affidavit of David Cornwall; aty Tom Holmes for Def.	Ronald E Bush
	AFFD	CAMILLE	Affidavit of Max Whitworth; aty Tom Holmes for Def.	Ronald E Bush
	AFFD	CAMILLE	Affidavit of Duane Whitworth; aty Tom Holmes for Def.	Ronald E Bush
8/7/2007	HRSC	CAMILLE	Hearing Scheduled (Motion for Summary Judgment 09/06/2007 09:00 AM)	Ronald E Bush
8/23/2007	BRFS	CAMILLE	Brief in support of objection to motin for summary judgment, aty Randall Kline	Ronald E Bush
	OBJT	CAMILLE	Objection to motion for summary judgment, aty Randall Kline for plntfs	Ronald E Bush
	AFFD	CAMILLE	Affidavit of C Pat Whitworth; aty Randall Kline for plntf	Ronald E Bush
	AFFD	CAMILLE	Affidavit of Robert W Bohus; aty Randall Kline for Plntf	Ronald E Bush
	AFFD	CAMILLE	Affidavit of JE Burcham, Jr. ; aty Randall Kline for plntf	Ronald E Bush
	AFFD	CAMILLE	Affidavit of Daniel R Long; aty Randall Kline for plntf	Ronald E Bush
8/30/2007	ANSW	CINDYBF	Answer to Counterclaim- by pltf Flying Elk thru PA Kline.	Ronald E Bush
9/6/2007	HRVC	KARLA	Hearing result for Court Trial held on 10/04/2007 09:00 AM: Hearing Vacated	Ronald E Bush
9/7/2007	NODP	CINDYBF	Notice Of Taking Deposition of Pat Whitworth- by DA Holmes.	Ronald E Bush
9/13/2007	HELD	KARLA	ME&O- Hearing result for Motion for Summary Judgment held on 09/06/2007 09:00 AM: Motion Held (Min Ent & Ord-Summary Judgment not appropriate at this time; Mtn to Extend Discovery Deadling granted; deadline extended until 10/31/07; Trial date vacated; pretrial to be held as scheduled) J Bush 09/11/07	Ronald E Bush
9/17/2007	HRSC	KARLA	Hearing Scheduled (Court Trial 01/31/2008 09:00 AM)	Ronald E Bush
	HRSC	KARLA	Hearing Scheduled (Pretrial Conference 01/07/2008 03:00 PM)	Ronald E Bush

Sixth Judicial District Court - Bannock County

ROA Report

Case: CV-2006-0003298-OC Current Judge: Stephen S Dunn

Flying Elk Investment vs. David F. Cornwall

Flying Elk Investment vs. David F. Cornwall

Date	Code	User	Judge
9/19/2007	HRHD	KARLA	Ronald E Bush ME&O Hearing result for Pretrial Conference held on 09/17/2007 04:00 PM: Hearing Held (Min Ent & Ord-Court Trial reset; Pre-trial reset; Court set new deadlines) J Bush 09/18/07
12/13/2007	NOTC	CAMILLE	Ronald E Bush Notice of filing depo transcript of corwin pat whitworth; aty Tom Holmes
	MOTN	CAMILLE	Ronald E Bush Renewed motion for summary judgment by the def David F Cornwall; aty Tom Holmes for Def.
	BRFS	CAMILLE	Ronald E Bush Supplemental Brief in support of Defs Renewed motion for summary judgment, aty Tom Holmes
1/2/2008	HRVC	KARLA	Ronald E Bush Hearing result for Court Trial held on 01/31/2008 09:00 AM: Hearing Vacated (Case to be decided by cross summary judgment motions; hrg to be set)
	HRVC	KARLA	Ronald E Bush Hearing result for Pretrial Conference held on 01/07/2008 03:00 PM: Hearing Vacated
1/29/2008	NOTC	CAMILLE	Ronald E Bush Notice of filing depo of David Cornwall; aty Randall Kline
1/30/2008	HRSC	CINDYBF	Ronald E Bush Notice of Hearing- by DA Holmes- Hearing Scheduled (Motion for Summary Judgment 03/11/2008 02:00 PM) Dfdts Motion for Summary Judgment
2/26/2008	OBJT	CAMILLE	Ronald E Bush Renewed objection to motion for summary judgment, aty Randall Kline
	BRFS	CAMILLE	Ronald E Bush Supplemental Brief in support of objection to motion for summary judgment, aty Randall Kline
3/3/2008	AFFD	CAMILLE	Ronald E Bush Affidavit of Kellie Fernandez; aty Tom Holmes
3/7/2008	BRFS	CAMILLE	Ronald E Bush Reply Brief; aty Randall Kline
9/17/2008	GRNT	KARLA	Ronald E Bush Hearing result for Motion for Summary Judgment held on 03/11/2008 02:00 PM: Motion Granted Dfdts Motion for Summary Judgment; /s J Bush 09/17/08
10/14/2008	DPWO	CAMILLE	Stephen S Dunn Judgment, ag David Cornwall
	CSTS	CAMILLE	Stephen S Dunn Case Status Changed: Closed
10/21/2008	MEMO	CAMILLE	Stephen S Dunn Memorandum of costs and Attorney Fees; aty Tom Holmes for plntf
	AFFD	CAMILLE	Stephen S Dunn Affidavit in support of costs and attorney fees; aty Tom Holmes for plntf
11/5/2008	MOTN	CAMILLE	Stephen S Dunn Renewed Motion for Summary Judgment by the Def David F Cornwall for quiet Title; aty Tom Holmes for def
	AFFD	CAMILLE	Stephen S Dunn Second Affidavit of Daniel Long; aty Tom Holmes
	AFFD	CAMILLE	Stephen S Dunn Second Affidavit of J E Burcham Jr. aty Tom Holmes for plntf
	HRSC	CAMILLE	Stephen S Dunn Hearing Scheduled (Motion 01/05/2009 02:00 PM)

Flying Elk Investment vs. David F. Cornwall

Date	Code	User	Judge
11/5/2008	CSTS	CAMILLE	Case Status Changed: Closed pending clerk action
11/10/2008		DCANO	Filing: T - Civil Appeals To The Supreme Court (\$86.00 for the Supreme Court to be receipted via Misc. Payments. The \$15.00 County District Court fee to be inserted here.) Paid by: F. Randy Kline Receipt number: 0042177 Dated: 11/10/2008 Amount: \$15.00 (Check) For: Flying Elk Investment (plaintiff)
		DCANO	Miscellaneous Payment: Supreme Court Appeal Fee (Please insert case #) Paid by: Flying Elk Investment Receipt number: 0042179 Dated: 11/10/2008 Amount: \$86.00 (Check)
	APSC	DCANO	Appealed To The Supreme Court
	MISC	DCANO	NOTICE OF APPEAL; F. Randall Kline, Atty for Plaintiff.
	MISC	DCANO	Received Court Cost and \$86.00 to SC check # 1037 in the amount of \$101.00 and \$100.00 check # 1038 for Clerk's Record.
	OBJT	CAMILLE	Objection to request of Cost and Fees; aty Randall Kline for plntf
11/12/2008	MISC	DCANO	CLERK'S CERTIFICATE OF APPEAL; signed and mailed to SC and Counsel on 11-12-08.
11/25/2008	MISC	DCANO	NOTICE OF APPEAL received in SC on 11-14-08. Docket # 35853-2008. Clerk's Record and Transcript due in SC on 1-23-09.
	MISC	DCANO	IDAHO SUPREME COURT; Clerk's Certificated filed in SC on 11-14-08.
1/13/2009	ORDR	CAMILLE	Judgment for quiet Title; J Dunn 1-8-09
1/20/2009		CAMILLE	Supplemental Memorandum of costs; aty Tom Holmes
	AFFD	CAMILLE	Affidavit in Support of Supplemental Costs; aty Tom Holmes for plntf
2/2/2009	OBJT	CAMILLE	Objection to Request of Cost; aty Randall Kline for plntf
2/10/2009	MISC	DCANO	CLERK'S RECORD received in Court Records on 2-10-09.

F. Randall Kline
 F. RANDALL KLINE, CHARTERED
 427 N. Main Street, Ste. L
 P.O. Box 397
 Pocatello, Idaho 83204-0397
 Telephone: (208) 232-9007
 Facsimile: (208) 234-4654

FILED
 BANNOCK COUNTY
 DISTRICT COURT
 2005 JUN 26 AM 11:34
 BY *[Signature]*
 DEPUTY CLERK

PETER D. McDERMOTT

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, L.L.C,	)	Case No. <u>CW DW 3298 DC</u>
)	
Plaintiff,)	
)	
vs.	)	COMPLAINT FOR QUITE TITLE
)	
DAVID F. CORNWALL,	)	Fee: \$82.00
	)	Fee Category: A1
Defendants.)	
_____)	

COMES NOW, Flying Elk Investment, L.L.C, by and through their attorney of record, F. Randall Kline of F. Randall Kline, Chartered, and for cause of action against the Defendant, alleges and states as follows:

JURISDICTION

1. This is a Complaint for Quiet Title for property located within Bannock County, State of Idaho.
2. The Plaintiff, Flying Elk Investment, L.L.C, is a limited liability company authorized to do business within the State of Idaho with it's principal place of business located in Bannock County, State of Idaho.

[Handwritten marks: a large 'S' and a smaller 'S' with a horizontal line through it]

3. The Defendant, David F. Cornwall, is the owner of property located in Bannock County, State of Idaho.

4. Flying Elk Investments, L.L.C. owns approximately 235 acres located in Bannock County, State of Idaho more particularly described in Exhibit A.

5. A survey was conducted by J.E. Burcham Jr., License Land Surveyor, filed and recorded as Instrument No. 20405705 in the Bannock County Records. That record of survey discloses a fence line that encroaches upon the Plaintiff's property, consisting of 15.85 acres. The fence line is not now, nor was intended to be the boundary line, but was placed as a matter of convenience and is not in a straight line as per the description.

6. David Cornwall, the Defendant, owns property on a portion of the western boundary and has verbally asserted a claimed interest in the area west of the fence.

COUNT I.

7. Plaintiff reasserts the allegations set forth in all prior paragraphs and incorporates the same by reference as if set forth fully herein.

8. Under common law, there was no acquiescence, and to the best of the Plaintiff's knowledge, the fence line was never intended to be a boundary line that separates the properties.

9. It is therefore requested that the fence be removed and the boundary be established as per the property description.

COUNT II.

10. Plaintiff reasserts the allegations set forth in all prior paragraphs and incorporates the same by reference as if set forth fully herein.

11. Pursuant to I.C. §35-110, a person who builds a fence but by mistake and in good faith, has the fence placed on the land of another, after procuring the services of a professional land

surveyor to establish the boundary between the respective lands and the line so establishes sufficient notice to the party making the mistake so as to require him to remove such fence within one year thereafter. A letter was forwarded to Mr. Cornwall on or about December 16, 2005, advising him of the survey and requesting that the fence be relocated in conformance with the survey. On January 6, 2006, Mr. Cornwall advised opposition to removal of the fence.

12. Whereas doubt has risen about the location of the fence, and the Plaintiff had the land surveyed by a professional land surveyor, and said survey was recorded as Instrument No. 20405705 in the Bannock County Real Estate Records and is attached hereto and incorporated herein as Exhibit B. It is requested that the court determine and fix the boundary in accordance with the survey conducted in compliance with I.C. §35-110.

13. As to all counts, the court should issue an order quieting title and enjoining the Defendant from interfering with the Plaintiff's right title or interest in the quiet enjoyment of its described property.

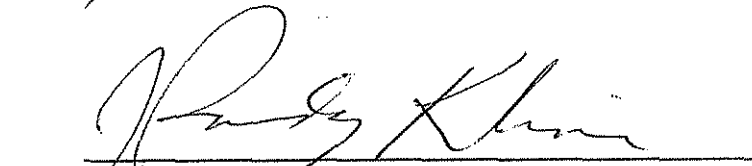
14. The Plaintiff has incurred costs and attorneys fees in its effort to protect its property interest therefore, costs and attorneys fees, pursuant to I.C. §12-120, I.C. §12-121, and I.R.C.P. Rule 54 (e).

WHEREFORE, it is requested that the Plaintiff be granted relief as follows:

1. That the court quiet title in the Plaintiff.
2. That the court enjoin the Defendant from interference in the peaceful enjoyment of the Plaintiff in the land described as set forth in the description, attached hereto is Exhibit A.
3. That the boundary line be established consistent with the survey, attached as Exhibit B.

4. That the Defendants and each of them and all persons claiming under them be required to set forth the nature of their claims in the described real property.
5. That all adverse claims of such real property be determined by a decree of this court.
6. That the decree declare and adjudge that the Plaintiff owns in fee simple free and clear of all claims of the Defendant and all persons claiming under them, and that the Defendants have no right, title, claim, interest, or lien in the real property or any part thereof.
7. That the Plaintiff be awarded costs and fees incurred in this action pursuant to I.C. §12-120, I.C. §12-121, and I.R.C.P. Rule 54 (e).
8. The court grants such other and further relief as deemed appropriate under the facts and circumstances set forth in this matter.

DATED this 25th day of July, 2006.



F. Randall Kline
F. RANDALL KLINE, CHARTERED

Parcel 1

Lots 2 and 3; Southeast 1/4 Northwest 1/4; North 1/2 Southwest 1/4; Southwest 1/4 Northeast 1/4; all in Section 3, Township 7 South, Range 36 East, Boise Meridian, Bannock County, Idaho.

Parcel 2

An undivided one-third of that parcel of land on which is located that certain well defined dirt road, more particularly described as follows:

All that portion of land lying 25 feet on each side of the following described centerline in the Southeast quarter, Southwest quarter and in the Northeast quarter, Southwest quarter of Section 34, Township 6 South, Range 36 East, Boise Meridian, Bannock County, Idaho, more particularly described as follows:

Commencing at the West 1/16th corner on the South line of said Section 34, said corner being marked by a 1/2-inch iron pin stamped L.S. 968; thence South 89°44'52" East, along said South line 25 feet to the true point of beginning; thence North 0°21'02" West, 131.96 feet; thence North 53°44'28" East, 512.65 feet; thence North 21°25'59" East 351.62 feet; thence North 33°43'49" East, 124.34 feet; thence North 16°01'49" East 241.25 feet; thence North 17°14'25" East 273.82 feet, more or less to its intersection with the Southerly right of way line of Rapid Creek Road, the point of terminus.

Basis of bearing for the above described centerline is South 89°44'52" East-South line of Section 34, Township 6 South, Range 34 East, Boise Meridian, Bannock County, Idaho.

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Facsimile: (208) 234-4654

FILED
BANNOCK COUNTY
CLERK
2006 AUG 15 PM 9:32
OK

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, L.L.C.,)
)
Plaintiff,)
)
vs.)
)
DAVID F. CORNWALL,)
)
Defendants.)
_____)

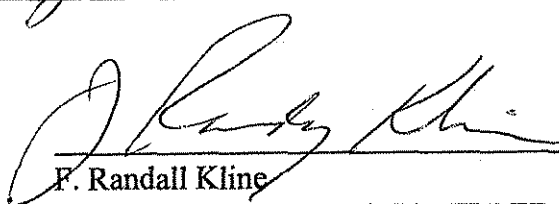
Case No. CV-06-3298-OC

MOTION TO DISQUALIFY

COMES NOW, Flying Elk Investment, L.L.C., by and through the attorney of record, F. Randall Kline of F. Randall Kline, Chartered, and respectfully moves this Court for an Order disqualifying the Honorable Peter D. McDermott without cause, pursuant to Idaho Rules of Civil Procedure 40(d)(1).

This Motion is filed within 21 days of notice specifying who the presiding judge in the action will be. It is respectfully requested that another judge be appointed to preside over the above-entitled matter.

DATED this 9 day of August, 2006.



F. Randall Kline
F. RANDALL KLINE, CHARTERED

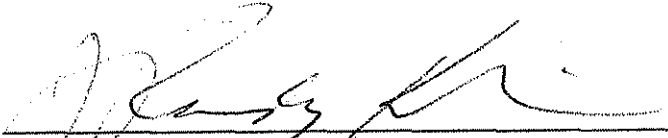
5

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14 day of August, 2006 I served a true and correct copy of the foregoing document to the following parties, postage prepaid thereon, in the manner indicated below:

Thomas J. Holmes
JONES, CHARTERED
203 S. Garfield
P.O. Box 967
Pocatello, ID 83204


- U.S. Mail
- Express Mail
- Hand Deliver
- Fax



F. Randall Kline
F. RANDALL KLINE, CHARTERED

FILED
BANNOCK COUNTY
CLERK OF THE COURT

2006 AUG 17 PM 3:12

BY  DEPUTY CLERK

**IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
IN AND FOR THE STATE OF IDAHO, COUNTY OF BANNOCK**

FLYING ELK INVESTMENT, L.L.C,)
)
 Plaintiff,)
)
 vs.)
)
 DAVID F. CORNWALL,)
)
 Defendant.)
 _____)

**CASE NO. CV2006-3298-OC
ORDER OF REFERENCE**

Plaintiff's counsel having filed a Motion to Disqualify this Court pursuant to Idaho Rules of Civil Procedure 40(d)(1);

NOW, THEREFORE, IT IS HEREWITH ORDERED this matter is REFERRED to Honorable N. Randy Smith, Administrative District Judge, for reassignment to another district judge to preside over the case.

IT IS SO ORDERED.


DATED this 17th day of August, 2006.


PETER D. McDERMOTT
District Judge

Copies to:

Honorable N. Randy Smith, Administrative District Judge
F. Randall Kline
Thomas J. Holmes
Trial Court Administrator

5

FILED
JUN 29 2006
CLERK OF DISTRICT COURT
BONNICK COUNTY, IDAHO


IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

Register #CV2006-0003298-OC
FLYING ELK INVESTMENT, L.L.C.)
)
Plaintiff,)
)
-vs-)
)
DAVID F. CORNWALL,)
)
Defendants.)
_____)

ADMINISTRATIVE ORDER
OF REFERENCE

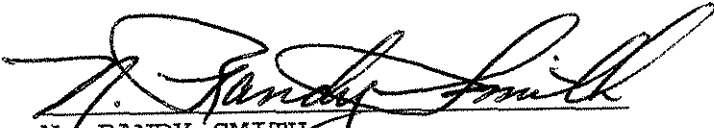
The Honorable Peter D. McDermott, District Judge, having been disqualified and it appearing that the above entitled matter, for good and sufficient cause, should be referred to some other District Judge of the State of Idaho,

NOW, THEREFORE, IT IS HEREBY ORDERED that the above entitled matter be and the same is hereby REFERRED to the Honorable Ronald E. Bush, District Judge for full, final and complete determination in this matter.

5

IT IS SO ORDERED.

DATED August 23, 2006.


N. RANDY SMITH
ADMINISTRATIVE DISTRICT JUDGE

Copies to:

F. Randall Kline

Thomas J. Holmes

Honorable Peter D. McDermott

Honorable Ronald E. Bush

FILED
BANNOCK COUNTY
CLERK OF THE COURT

2006 NOV 15 AM 11:36

BY _____
DEPUTY CLERK

Thomas J. Holmes (ISB#2448)
JONES, CHARTERED
Attorneys at Law
203 South Garfield
P. O. Box 967
Pocatello, Idaho 83204
(208) 232-5911
ISB#2448

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC	)	Case No. CV-06-3298-OC
)	
Plaintiff,	)	ANSWER
)	
vs.)	
)	
DAVID F. CORNWALL,)	
)	
Defendant.)	
_____)	

COMES NOW the Defendant for his answer for Plaintiff's complaint and states:

1. Admits paragraphs 1, 2, 3, and 6 of Plaintiff's complaint.
2. Defendant is without sufficient knowledge to admit or deny paragraph 4 of said complaint and therefore denies the same.
3. Plaintiff admits with respect to paragraph five (5) of the complaint that James E. Burcham, Jr. conducted a survey recorded as Instrument No. 20405705 in the records of Bannock County, Idaho but denies each and every other allegation of said paragraph.
4. Defendant denies paragraph 7, 8, 9, 10, 11, 12, 13, and 14 of said complaint.

S


5. Defendant asserts as an affirmative defense to said complaint the doctrine of acquiescence whereby the conduct of the Plaintiff's predecessors in interest and the conduct of the Defendant and the Defendant's predecessors in interest have resulted in the existing fence line referenced in Plaintiff's complaint being established as the boundary line separating the property of the Plaintiff from the property of the Defendant.

6. Defendant asserts as a further affirmative defense that the Plaintiff is estopped disputing for alleging a boundary other than the fence.

7. This defendant has been required to obtain legal counsel to defend its interest in this action and is entitled to Defendant's costs and attorney's fees as allowed by Idaho law.

WHEREFORE THIS Defendant prays that Plaintiff's complaint be dismissed, at Plaintiff's costs, with prejudice, and that this Defendant be awarded his costs and reasonable attorney's fees as allowed by Idaho law.

Dated: November 14, 2006.

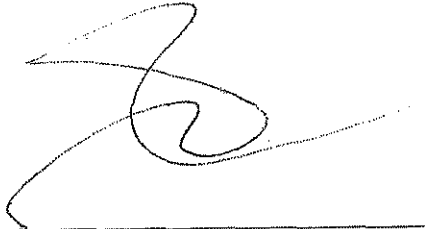


Thomas J. Holmes, attorney for Defendant,
David F. Cornwall

CERTIFICATE OF SERVICE

14 I HEREBY CERTIFY that a true and correct copy of the foregoing Answer was mailed this 9th day of November, 2006, in an envelope with sufficient first-class postage prepaid thereon to the following:

Randy Kline
P.O. Box 397
Pocatello, ID 83204



Thomas J. Holmes

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2007 JUN 19 AM 10:44
BY *[Signature]*
DEPUTY CLERK

Thomas J. Holmes (ISB#2448)
JONES, CHARTERED
Attorneys at Law
203 South Garfield
P. O. Box 967
Pocatello, Idaho 83204
(208) 232-5911

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC,)
)
Plaintiff,)
)
vs.)
)
DAVID F. CORNWALL,)
)
Defendant.)
_____)

Case No. CV-2006-3298-OC

MOTION TO AMEND
PLEADINGS

COMES NOW THE DEFENDANT, David F. Cornwall, pursuant to Rule 15(a), Idaho Rules of Civil Procedure, does herewith move the Court for an Order Allowing the Defendant's Answer to be amended to include the counterclaim attached for quiet title of the property that is in dispute.

This Motion is made pursuant to Rule 15(a), Idaho Rules of Civil Procedure.

DATED this 18 day of June, 2007.

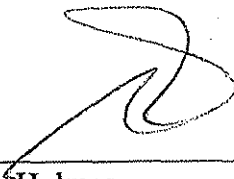
[Signature]
Thomas J. Holmes, attorney for defendant

S

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Motion to Amend Pleadings** was mailed this 18 day of June, 2007, in an envelope with sufficient first-class postage prepaid thereon to the following:

F. Randall Kline
P.O. Box 397
Pocatello, ID 83204-0397



Thomas J. Holmes

Thomas J. Holmes (ISB#2448)
JONES, CHARTERED
Attorneys at Law
203 South Garfield
P. O. Box 967
Pocatello, Idaho 83204
(208) 232-5911

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC,	)	Case No. CV-2006-3298-OC
)	
Plaintiff,	)	DEFENDANT'S COUNTERCLAIM
	)	AGAINST THE PLAINTIFF
vs.)	
)	
DAVID F. CORNWALL,)	
)	
Defendant.)	
)	

THE DEFENDANT, David F. Cornwall, does herewith for his counterclaim against the plaintiff state:

1. Incorporates the defendants answer previously filed in this case as though fully set forth herein.
2. Defendant owns property described as Lot 4 and SW 1/4 NW 1/4 of Section 3, Township 7 South, Range 36 EBM in Bannock County, Idaho.
3. Plaintiff owns Lots 2 and 3, the north half of the SW 1/4 and the SE 1/4 NW 1/4 of said Section 3 in addition to other properties.
4. There is a fence that separates the defendant's property from the plaintiff's property.

S

5. Said fence has been regarded as the boundary line between the defendant and the defendant's predecessors in interest and the plaintiff and the plaintiff's predecessors in interest for a number of years.

6. Defendant believes the fence constitutes a boundary by acquiescence and accordingly requests the court to quiet title to the real estate between the boundary line as surveyed by the plaintiff and the boundary line as established by the fence the legal description of which shall be established at trial or through an affidavit of the surveyors of either the plaintiff or the defendant.

7. Defendant has been forced to retain legal counsel to pursue this counterclaim and prays for defendant's costs and attorney fees to the extent allowed by Idaho law.

WHEREFORE DEFENDANT prays for a judgment of this court quieting title in favor of the defendant and against the plaintiff to the real estate lying between the defendant's fence line and the surveyed line of the plaintiff's property plus this defendant's costs and attorney fees as allowed by Idaho law.

DATED this ____ day of _____, 2007.

Thomas J. Holmes, attorney for defendant

2007 JUL 13 PM 4:42
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

Register No. CV-2006-03298-OC

FLYING ELK INVESTMENT, L.L.C.,)

Plaintiff,)

-vs-)

DAVID F. CORNWALL,)

Defendant.)

MINUTE ENTRY & ORDER

On July 10, 2007, the above entitled matter came before the Court for the purpose of a hearing on Defendant's Motion to Amend Pleadings. F. Randall Kline, appeared on behalf of the Plaintiff and Thomas J. Holmes, appeared for the Defendant.

Sheila Fish performed as Court Reporter for this proceeding.

At the outset, counsel for the Plaintiff advised the Court that he had no objection to the Motion, based upon the liberal amendment policy of Rule 15.

IT IS HEREBY ORDERED that the Defendant's Motion to Amend Pleadings is **GRANTED.**

S

DATED July 11, 2007.

Ronald E. Bush

RONALD E. BUSH
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of July, 2007, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

F. Randall Kline
F. Randall Kline, Chartered
PO Box 397
Pocatello, ID 83204-0397

- U.S. Mail
- Overnight Delivery
- Hand Deliver
- Facsimile

Thomas J. Holmes
Jones Chartered
PO Box 967
Pocatello, ID 83204

- U.S. Mail
- Overnight Delivery
- Hand Deliver
- Facsimile

DATED this 13 day of July, 2007.

Kelley Holm
Deputy Clerk

S

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2007 JUL 30 AM 10:16
BY *[Signature]*
DEPUTY CLERK

Thomas J. Holmes (ISB#2448)
JONES, CHARTERED
Attorneys at Law
203 South Garfield
P. O. Box 967
Pocatello, Idaho 83204
(208) 232-5911

Attorney for the Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC,)
)
Plaintiff,)
)
vs.)
)
DAVID F. CORNWALL,)
)
Defendant.)
_____)

Case No. CV-2006-3298-OC

MOTION FOR SUMMARY JUDGMENT
BY THE DEFENDANT
DAVID F. CORNWALL

COMES NOW THE DEFENDANT, David F. Cornwall and does herewith, pursuant to Rule 56(b), Idaho Rules of Civil Procedure, move for summary judgment in favor of the defendant and against the plaintiffs finding that the fence line between the property owned by the defendant and the property owned by the plaintiff is the boundary line between the properties and to quiet title to said real estate to Defendant Cornwall.

This Motion is based upon the pleadings on file herewith and the Affidavits of David F. Cornwall, Max Whitworth and Duane Whitworth filed concurrently with this Motion. This defendant asserts there are no material issues of fact which would preclude entry of summary

judgment in favor of the Defendant on these issues.

Oral argument is requested upon this Motion.

Dated this 27 day of July, 2007.

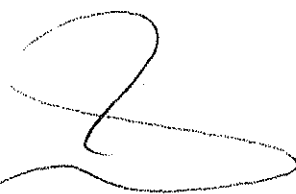


Thomas J. Holmes, attorney for defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Motion for Summary Judgment by the Defendant David F. Cornwall** was mailed this 27 day of July, 2007, in an envelope with sufficient first-class postage prepaid thereon to the following:

F. Randall Kline, Esq.
P.O. Box 397
Pocatello, ID 83204-0397



Thomas J. Holmes

FILED
 - BANNOCK COUNTY
 CLERK OF THE COURT
 2007 AUG 23 PM 5:00
 BY *[Signature]*
 DEPUTY CLERK

F. Randall Kline (ISB#2787)
 F. RANDALL KLINE, CHARTERED
 427 N. Main St., Suite L
 P.O. Box 397
 Pocatello, Idaho 83204-0397
 Telephone: (208) 232-9007
 Facsimile: (208) 234-4654

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC,)
)
 Plaintiff,)
)
 v.)
)
 DAVID F. CORNWALL,)
)
)
 Defendant.)
 _____)

Case No. CV-2006-3298-OC

**OBJECTION TO MOTION FOR
 SUMMARY JUDGMENT**

COMES NOW, the Defendant, FLYING ELK INVESTMENT, LLC, through its authorized agent Robert Bohus, by and through their attorney of record, F. Randall Kline of F. Randall Kline, Chartered and hereby objects to the entry of Summary Judgment in this matter.

It is submitted that neither the facts nor the law support the Defendant's motion or requested relief.

This objection is based upon the pleadings, the affidavits of Corwin "Pat" Whitworth, Robert Bohus, J.E. Burcham, and David Long.

Idaho Code §35-110 provides the statutory authority for surveys to determine boundary lines. The court need not resort to doctrines in equity as a remedy at law exists. The legal fictions of boundary by acquiescence are rebutted by the fact that no "agreed to" boundary exists.

Oral argument is requested.

DATED this 23rd day of August, 2007.



F. RANDALL KLINE
Attorney for Flying Elk Investment, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of August, 2007, I served a true and correct copy of the Objection to Motion for Summary Judgment on the person(s) listed below, in the manner listed below:

Thomas J. Holmes
JONES, CHARTERED
203 S. Garfield
P.O. Box 967
Pocatello, ID 83204

- U.S. Mail (postage prepaid)
- Express Mail
- Hand Delivery
- Fax



F. RANDALL KLINE
Attorney for Flying Elk Investment, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of August, 2007, I served a true and correct copy of the **Affidavit of C. Pat Whitworth** on the person(s) listed below, in the manner listed below:

Thomas J. Holmes
JONES, CHARTERED
203 S. Garfield
P.O. Box 967
Pocatello, ID 83204

- U.S. Mail (postage prepaid)
- Express Mail
- Hand Delivery
- Fax



F. RANDALL KLINE
Attorney for Plaintiff

F. Randall Kline
F. RANDALL KLINE, CHARTERED
427 N. Main Street, Ste. L
P.O. Box 397
Pocatello, Idaho 83204-0397
Telephone: (208) 232-9007
Facsimile: (208) 234-4654

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2007 AUG 30 AM 10:31
BY CA
DEPUTY CLERK

Attorney for Plaintiff

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, L.L.C,)
)
Plaintiff,)
)
vs.)
)
DAVID F. CORNWALL,)
)
Defendants.)
_____)

Case No. CV-2006-3298-OC

ANSWER TO COUNTER CLAIM

COMES NOW, Flying Elk Investment, L.L.C, by and through their attorney of record, F. Randall Kline of F. Randall Kline, Chartered, answers the Counter Claim as filed by the Defendant as follows:

ANSWERS TO COUNTER CLAIM

1. The Counter Claim fails to state a cause of action upon which relief can be granted.
2. The Plaintiff, Flying Elk, denies each and every allegation not specifically admitted herein.
3. A. In response to paragraph one (1), the same is denied.
B. In response to paragraphs two (2) and three (3), the same is admitted.

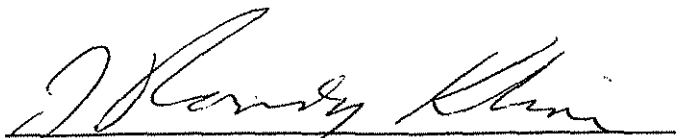
C. In response to paragraph four (4), it is admitted a fence exists that is on the Plaintiff's property, but was never intended to be a boundary fence, or to be the boundary for the separation of the two properties.

4. In response to paragraphs five (5), six (6) and seven (7), the plaintiff denies each and every allegation contained herein.

Wherefore, it is requested:

1. That the counter claim be denied and held for naught.
2. That the relief requested in the complaint filed by the Plaintiff be granted.
3. That costs and attorney's fees be granted to the plaintiff.
4. The continuing common law and statutory trespass and encroachment upon the plaintiffs property.
5. That the court recognize and order that the surveyed line is the only and correct property boundary between the properties
6. That the court award to the plaintiff costs and attorney's fees.
7. That the court grant such other and further relief as merited by the facts and law of this case.

DATED this 28 day of August, 2007.

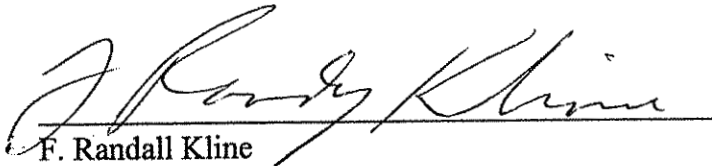

F. Randall Kline
F. RANDALL KLINE, CHARTERED

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of August, 2007, I served a true and correct copy of the Answer to Counter Claim on the person(s) listed below, postage prepaid thereon, in the manner indicated below:

Thomas J. Holmes, Esq.
203 S. Garfield
P.O. Box 967
Pocatello, ID 83204

- U.S. Mail
- Express Mail
- Hand Delivery
- Fax



F. Randall Kline
ATTORNEY AT LAW

FILED
BANNOCK COUNTY
CLERK OF THE COURT
2007 SEP 13 PM 3:16
BY AA
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

Register No. CV-2006-03298-OC

FLYING ELK INVESTMENT, LLC,)

Plaintiff,)

-vs-)

DAVID F. CORNWALL,)

Defendant.)

MINUTE ENTRY & ORDER

On September 6, 2007, the above entitled matter came before the Court for the purpose of a hearing on Defendant's Motion for Summary Judgment. F. Randall Kline, appeared on behalf of the Plaintiff and Thomas J. Holmes, appeared for the Defendant.

Sheila Fish performed as Court Reporter for this proceeding.

At the outset, the Court discussed with counsel the issue of whether the Defendant's Motion for Summary Judgment is appropriate at this time.

The Court advised that the Motion for Summary Judgment is not appropriate at this time.

Counsel for the Defendant requests an extension of the discovery deadline and provided

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argument. Counsel for the Plaintiff objected to the request and provided argument.

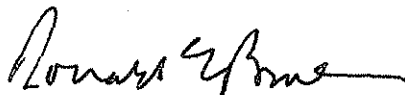
IT IS HEREBY ORDERED that the Motion to Extend Discovery Deadline is GRANTED.

The discovery deadline shall be extended until October 31, 2007.

IT IS FURTHER ORDERED that the pre-trial conference shall held as scheduled.

IT IS FURTHER ORDERED that the trial date shall be VACATED. A new trial date shall be set at the pre-trial conference.

DATED September 11, 2007.



RONALD E. BUSH
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of Sept, 2007, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

F. Randall Kline
F. Randall Kline, Chartered
PO Box 397
Pocatello, ID 83204-0397

- U.S. Mail
- Overnight Delivery
- Hand Deliver
- Facsimile

Thomas J. Holmes
Jones, Chartered
PO Box 967
Pocatello, ID 83204

- U.S. Mail
- Overnight Delivery
- Hand Deliver
- Facsimile

DATED this 13 day of September, 2007.

Karla Helm
Deputy Clerk

S

2008 AT THE HOUR OF 3 P.M. DISCOVERY CUTOFF shall be NOVEMBER 16, 2007.

Any renewed motions or new dispositive motions shall be filed and heard no later than
DECEMBER 14, 2007.

Pre-trial motions are to be filed and heard by **JANUARY 7, 2007.**

Any amendments to the pleadings or to add new parties shall be filed by **NOVEMBER 1,
2007.**

DATED September 18, 2007.



RONALD E. BUSH
District Judge

S

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19 day of Sept, 2007, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.

F. Randall Kline
F. Randall Kline, Chartered
PO Box 397
Pocatello, ID 83204-0397

- U.S. Mail
- Overnight Delivery
- Hand Deliver
- Facsimile

Thomas J. Holmes
Jones, Chartered
PO Box 967
Pocatello, ID 83204

- U.S. Mail
- Overnight Delivery
- Hand Deliver
- Facsimile

DATED this 19 day of Sept, 2007.

Kate Helm
Deputy Clerk

S

FILED
 BANNOCK COUNTY
 CLERK OF THE COURT
 2007 DEC 13 AM 11:40
 BY [Signature]
 DEPUTY CLERK

Thomas J. Holmes (ISB#2448)
 JONES, CHARTERED
 Attorneys at Law
 203 South Garfield
 P. O. Box 967
 Pocatello, Idaho 83204
 (208) 232-5911

Attorney for the Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC,	)	Case No. CV-2006-3298-OC
)	
Plaintiff,)	
	)	RENEWED MOTION FOR SUMMARY
vs.	)	JUDGMENT BY THE DEFENDANT
	)	DAVID F. CORNWALL
DAVID F. CORNWALL,)	
)	
Defendant.)	
)	

COMES NOW THE DEFENDANT, David F. Cornwall and does herewith, pursuant to Rule 56(b), Idaho Rules of Civil Procedure, move for summary judgment in favor of the defendant and against the plaintiffs finding that the fence line between the property owned by the defendant and the property owned by the plaintiff is the boundary line between the properties and to quiet title to said real estate to Defendant Cornwall.

This Motion is based upon the pleadings on file herewith and the Affidavits of David F. Cornwall, Max Whitworth and Duane Whitworth filed concurrently with this Motion. Additionally, this Motion is based upon the oral deposition of Corwin Pat Whitworth taken


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September 28, 2007 in supplement to the Affidavit of C. Pat Whitworth filed by the Plaintiff.

This defendant asserts there are no material issues of fact which would preclude entry of summary judgment in favor of the Defendant on these issues.

Oral argument is requested upon this Motion.

DATED this 12 day of Dec, 2007.



Thomas J. Holmes, Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Renewed Motion for Summary Judgment** was mailed this 12 day of Dec, 2007, in an envelope with sufficient first-class postage prepaid thereon to the following:

F. Randall Kline, Esq.
P.O. Box 397
Pocatello, ID 83204-0397



Thomas J. Holmes

FILED
 BANNOCK COUNTY
 CLERK OF THE COURT
 2008 FEB 25 PM 4:00
 BY [Signature]
 DEPUTY CLERK

F. Randall Kline (ISB#2787)
 F. RANDALL KLINE, CHARTERED
 427 N. Main St., Suite L
 P.O. Box 397
 Pocatello, Idaho 83204-0397
 Telephone: (208) 232-9007
 Facsimile: (208) 234-4654

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC,)
)
 Plaintiff,)
)
 v.)
)
 DAVID F. CORNWALL,)
)
)
 Defendant.)
)
)
)
)
)
)

Case No. CV-2006-3298-OC

**RENEWED OBJECTION TO
 MOTION FOR SUMMARY
 JUDGMENT**

COMES NOW, the Defendant, FLYING ELK INVESTMENT, LLC, through its authorized agent Robert Bohus, by and through their attorney of record, F. Randall Kline of F. Randall Kline, Chartered and hereby objects to the entry of Summary Judgment in this matter.

It is submitted that neither the facts nor the law support the Defendant's motion or requested relief.

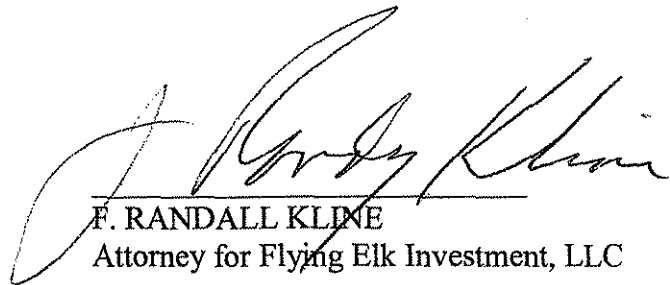
This objection is based upon the pleadings, the affidavits of Corwin "Pat" Whitworth, Robert Bohus, J.E. Burcham, and David Long, the filed depositions of Corwin "Pat" Whitworth, and David Cornwall together with the exhibits and maps pertaining thereto.

5

Idaho Code §35-110 provides the statutory authority for surveys to determine boundary lines. The court need not resort to doctrines in equity as a remedy at law exists. The legal fictions of boundary by acquiescence are rebutted by the fact that no “agreed to” boundary exists.

Oral argument is requested.

DATED this 26th day of February, 2008.

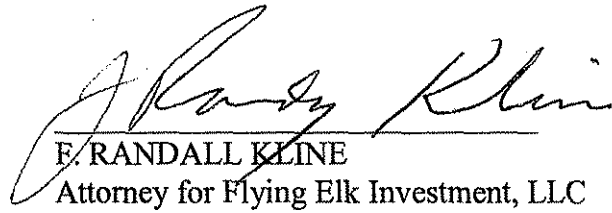

F. RANDALL KLINE
Attorney for Flying Elk Investment, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of February, 2008, I served a true and correct copy of the Renewed Objection to Motion for Summary Judgment on the person(s) listed below, in the manner listed below:

Thomas J. Holmes
JONES, CHARTERED
203 S. Garfield
P.O. Box 967
Pocatello, ID 83204

U.S. Mail (postage prepaid)
 Express Mail
 Hand Delivery
 Fax


E. RANDALL KLINE
Attorney for Flying Elk Investment, LLC

S

FILED
BANNOCK COUNTY
CLERK OF THE COURT

2008 SEP 17 PM 2:24

BY [Signature]
DEPUTY CLERK

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

Register # CV-2006-3298-OC

FLYING ELK INVESTMENT, L.L.C.,

Plaintiff,

-vs-

DAVID F. CORNWALL,

Defendant.

MEMORANDUM DECISION
ON DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

This boundary dispute between adjoining property owners in Inkom, Idaho evolved into an action to quiet title to a disputed strip of property between the Plaintiff, Flying Elk Investment L.L.C., ("Flying Elk") and David Cornwall ("Cornwall" or the Defendant). This issue came before the Court on September 6, 2007 for a hearing upon Defendant's Motion for Summary Judgment. At that hearing the parties discussed the genuine issues of material fact raised by the Affidavit of Pat Whitworth ("Pat"), Plaintiff's predecessor in interest in the real property at issue. The Court extended the discovery deadlines so that the Defendant could depose Pat and then determine whether a Motion for Summary Judgment was appropriate.

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Now, the Court has before it Defendant's Renewed Motion for Summary Judgment and a request to find that the existing fence line between the properties is the legal boundary, as well as a request to quiet title to the property between the fence line and the line described in the legal description in favor of the Defendant. The Court has reviewed Defendant's Motion for Summary Judgment, Defendant's Renewed Motion for Summary Judgment, Defendant's Brief in Support of Motion for Summary Judgment and Defendant's Supplemental Brief as well as the attached affidavits and the deposition testimony of Pat Whitworth and David Cornwall. The Court has also reviewed Plaintiff's Objection to Motion for Summary Judgment, Brief in Support of Objection to Summary Judgment, Plaintiff's Supplemental Brief in Support of Objection to Motion for Summary Judgment and the attached affidavits.

The Court heard oral argument on the matter and both parties asserted that the depositions of Pat Whitworth and David Cornwall, and the various affidavits filed in the matter, contained the entirety of the relevant evidence about the boundary between the two properties. While the evidence is conflicting about the location of the fence and the understanding of the parties that the fence was the boundary, both parties agreed that they knew of no additional witnesses, history or other evidence that would support one side or the other. The case is set to be tried to the Court, giving the Court has some greater latitude as the finder of fact. For the reasons set out below, the Court GRANTS Defendant's Motion for Summary Judgment.

BACKGROUND

Cornwall purchased the property described as Lot 4 and SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 3, Township 7 South, Range 36 EBM in Bannock County in 1972 from Joseph and Alta Whitworth. *Affidavit of David Cornwall* ("Cornwall Affidavit"), p. 1-2. Robert Bohus ("Bohus") purchased the property described as Lots 2 and 3; SE $\frac{1}{4}$ NW $\frac{1}{4}$; N $\frac{1}{2}$ SW $\frac{1}{4}$; SW $\frac{1}{4}$ NE $\frac{1}{4}$; all in Section Register CV-2006- 3298-OC MEMORANDUM DECISION & ORDER

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3, Township 7, South Range 36 EBM, Bannock County from Corwin Pat Whitworth ("Pat") in 1994. Bohus transferred the property to Flying Elk Investment, L.L.C. in 1999, an entity he controls. *Affidavit of Robert Bohus ("Bohus Affidavit")*, p. 1. In April, 2003, Bohus had the property surveyed to establish the deeded property lines. *Affidavit of Robert Bohus*, p. 2. The distance between the fence in dispute and the described property line varies from 240 to 275 feet off the surveyed boundary onto Flying Elk's deeded property along the north-south line between the eastern side of Cornwall's property and the western border of Flying Elk's. *Brief in Support of Motion for Summary Judgment, Exhibit B, aerial photo of properties; Affidavit of J.E. Burcham, Jr.*, p. 2. A substantially smaller section lies along the southern border of Cornwall's property and is set to the south of his surveyed boundary onto Flying Elk's deeded property creating a total amount of around 15.85 acres of property in dispute. *Id.*; see also *Burcham Affidavit*, p. 3.

When Bohus purchased his property the description stated that the boundaries were in straight lines, but when he saw the fence it was apparent that it was not straight and had many deviations and jogs. *Bohus Affidavit*, p. 2. After having the property surveyed Flying Elk showed Cornwall where the deeded property lines lay and sought to move the fences to follow the deeded lines. *Id.* Flying Elk sued to quiet title to the disputed strip. Cornwall disputes Flying Elk's claims and asserts a counterclaim under the doctrine of boundary by acquiescence and seeks to quiet title in his name.

Cornwall states he did not know there was a discrepancy between the property description and the fence line, and at the time he purchased his property Cornwall thought the fence was the boundary. *Cornwall Affidavit*, p. 2. When Cornwall bought the property he assumed he purchased the entirety of the field as marked out by the fence line. *Id.* 24-25. Regarding the

property description, Cornwall stated, "I bought what I saw; I didn't go by deeds much. Naturally you just feel like that's the boundary, it's been there since Hector was a pup." *Id.* p.25. Cornwall asserts that the fence is in the same place as when he bought his property in 1972 and that he has used the property up to the fence line since that time. *Id.* Cornwall constructed a pond on the disputed strip about 20 years ago. *Deposition of David Cornwall*, p. 7-8, 36. He also improved the property by building smaller catch basins for watering livestock on the disputed strip. *Id.* at 16.

Cornwall acknowledges that there was no express agreement with either Pat Whitworth or Flying Elk to fix the boundary of the properties on the fence line. *Id.* at 17. Cornwall states that he did discuss maintenance of the fence with Pat Whitworth and when Cornwall and Pat replaced large sections of the fence they placed the new fence along the same line as the old fence. *Id.* Cornwall related that he and Pat agreed to change the manner in which they maintained the fence between their properties when it was time to replace a section of the fence. "[T]hen [Pat] came up and put a new fence in there ... when the new fence went in on the same line, I figured that was the boundary. *Id.* p. 17.

Ten or twenty years before Cornwall purchased his property from Joseph Whitworth, Cornwall said he had worked the land and observed the fence line to be in the same place. *Id.* at 27-28. Cornwall noted that there was a two-and-a-half to three foot bank where plowing and disking the field had created an edge along the fence line. He asserts that the creation of this ledge shows that the fence line along this edge, and his understood boundary of the property, had been in place for many years before he first saw the property.

Joseph Whitworth, Cornwall's predecessor in interest is no longer alive, but his son, Max Whitworth stated that the fence line had been in the same place for as long as he could

remember, sometime in the 1940's. *Affidavit of Max Whitworth*, p. 2. Max recalls grazing livestock "over to the fence" and farming the property up to the fence line on Cornwall's side. *Id.* Max noted that the fence line was in the same place when he visited the property 14 years ago, and it is in the same place today as it was in 1958. *Id.*

Another son of Joseph Whitworth, Duane Whitworth, stated that he is "familiar with the fence that separated the property now owned by David Cornwall from the property that was owned by my Uncle, Harold Whitworth (Pat Whitworth's and Flying Elk's predecessor in interest)." *Affidavit of Duane Whitworth*, p. 2. Duane did not know where the property line was, but remembers that his family used the property up to the fence line on the South of what is now the Cornwall property and the East of the Cornwall property. *Id.* "The fence has remained in the same place since when I was young and helped on the farm and it served as the boundary between my folks' place and Uncle Harold Whitworth's farm." *Id.*

Flying Elk's predecessor in interest, Pat Whitworth, states that "there has never been an agreement establishing that fence line as the boundary." *Affidavit of Pat Whitworth*, ¶ 7. Pat said he has been familiar with the property since he was a child, and purchased the property from his father, Harold Whitworth in 1979. *Deposition of Pat Whitworth*, p. 17-18. Pat testified that he has known for years that the fence that is in dispute was not on the boundary and asserts that "[i]t was never intended to be the boundary or represent the boundary." *Whitworth affidavit*, ¶ 5, 7. While other people may have assumed that it was the boundary, Pat contends that he knew it was not. *Id.* ¶ 7. Pat did not know exactly where the boundary was, rather, once an official survey was completed "then the boundary would be established." *Id.* ¶ 8.

Pat remembers the location of the fence line when he was a child, but had no direct knowledge of how it came to be in that location. Pat stated that "[the fence line] was never

intended as a boundary line fence but was placed there as a matter of convenience for maintaining the fence or segregating the lands.” *Id.* Pat testified that he moved the fence line several times “because of its location and proximity in relation to a chokecherry patch, to accommodate the snow, and ... to accommodate the use of the land and production.” *Id.* ¶ 6.

The specific instances Pat recalled when he had moved the fence demonstrate that the movement was **minor** and done as part of maintaining the fence line. “When it got too brushy, I moved [the fence] east. I got a dozer to take the brush out and I moved [the fence] west.” *Deposition of Pat Whitworth*, p. 18. “Where this [fence] went up and made this jog [referring to a deposition exhibit diagramming the land] was always bad to fix, so [we] just run them straight together (indicating). A matter of convenience.” *Id.* at 29. Pat stated that one section of the property had thick trees and “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.... Made it flat so it was easy to fence.” *Id.* at 30. Pat contended that the prior owners of both pieces of property--his father, Harold Whitworth, and his uncle, Joe Whitworth--had moved sections of the fence:

My dad and I done it [move the fence], and my brothers. And I’m not sure when it was done, but I know it was done. Joe was my dad’s brother, the fellow that owned [Cornwall’s] ground, and they talked of these things, they were a lot for convenience, so they moved the fence so it would be beneficial to everybody. *Id.* at 29.

Pat clarified that the southern fence line that ran east-west had moved very little if at all. *Id.* at 25. The largest section of the disputed boundary runs north-south along the eastern edge of Cornwall’s property. Pat was questioned about whether the fence had been moved significantly to his knowledge and he stated that “it moved as much as a couple hundred feet back one way or the other.” *Id.* p. 27-28. Pat guessed that a northern section of the fence had been moved “200

feet or so” and a southern section “was moved probably 60 feet.” *Id.* However, since his father, brothers, and he had last moved it Pat asserted that, “I don’t think it moved that much, it might have moved a little bit, but it never moved that much.” *Id.* p. 30. Pat agreed that the last time anyone had moved the fence at all was several years before 1979, and likely before 1972 when Cornwall bought his property. *Id.* at 17-18. Pat also admitted that “[o]n the other side, the family that ran the farm that was sold to Cornwall may have assumed that the fence was the boundary” but stated he did not view such an assumption as correct. *Whitworth Affidavit*, ¶ 9.

Pat agreed that he had farmed the land up to the fence line on his side and Cornwall had done the same on the other side. *Whitworth Deposition*, p. 27. Pat stated “I didn’t care; [about the use] he was my friend.” *Id.* When asked about this use of the property and whether it “worked” for both parties, Pat joked, “[b]oth of us went broke.” *Id.*

Pat showed strong feelings in opposition to the doctrine of boundary by agreement, “[i]t is my contention that you can get property by purchasing it or by inheriting it, but you shouldn’t be able to get it by stealing it.” *Whitworth Deposition*, ¶ 10. As the parties referenced photos and maps throughout the deposition, Pat made clear, “[t]hat map is wrong. The fence is in the wrong place.... The entire thing needs to go west.... I just want to get clear with you that I don’t agree that that map is right.” *Id.* at 5.

According to Flying Elk’s survey, the fence builders did not place the existing fence at or near the location of the true property lines. *Affidavit of J.E. Burcham, Jr.*, p. 3. The east-west fence line along the southern border of Cornwall’s field aligns with a witness corner, marked with a BLM brass cap and indicating the true corner lay 66 feet north of the witness corner. *Affidavit of Daniel Long*, p. 3. The surveyor speculated that the fence builder “had to have found the BLM monument near this corner as the fence goes right over top of this monument.” *Id.*

“What they didn’t realize is that this was not the correct corner, but the witness corner to the true ¼ corner which the BLM did not set in 1962 as this location fell in a cultivated field.” *Id.* The true corner lay inside the cultivated field of Cornwall’s predecessor in interest “so a brass cap was set to the south in the tree line, out of harm’s way.” *Id.*

This dispute first came before the Court for a Summary Judgment hearing on September 6, 2007 and at that time the Plaintiff presented additional evidence in the form of the Affidavit of Pat Whitworth, Plaintiff’s predecessor in interest. At that time, the parties agreed that the evidence in the affidavit presented questions of fact that obviated the need for a hearing upon the pending Motion for Summary Judgment. *Minute Entry & Order, September 13, 2007.* The hearing was continued and after depositions were taken of Pat Whitworth and Cornwall the Defendant renewed his motion for Summary Judgment.

STANDARD OF REVIEW

“Summary judgment is proper ‘if 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 a judgment as a matter of law.’” *Northwest Bec-Corp v. Home Living Service*, 136 Idaho 835, 838, 41 P.3d 263, 267 (2002) (quoting IRCP Rule 56 (c)). *See also, Cox v. Clanton*, 137 Idaho 492, 494, 50 P.3d 987, 989 (2002). When considering a motion for summary judgment, a court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party. *Id.* (citing *S. Griffin Contr., Inc. v. City of Lewiston*, 135 Idaho 181, 185, 16 P.3d 278, 282 (2000)).

Normally, summary judgment must be denied where reasonable persons could reach different conclusions or draw conflicting inferences from the evidence presented. *Id.* However,

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when an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences.

Shawver v. Huckleberry Estates, L.L.C., 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004). “If the evidentiary facts are not disputed, the trial court may grant summary judgment despite the possibility of conflicting inferences, because the court alone will be responsible for resolving the conflict between those inferences.” *Farnsworth v. Dairyman’s Creamery Ass’n.*, 125 Idaho 866, 868, 876 P.2d 148, 150 (Ct.App. 1994); see *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). “The test for reviewing the inferences drawn by the trial court is whether the record reasonably supports the inferences.” *Shawver*, at 361, 93 P.3d at 692.

The moving party has the burden of showing the lack of a genuine issue of material fact. *Northwest Bec-Corp*, 136 Idaho at 838, 41 P.3d at 267. To meet this burden, the moving party must challenge in its motion and establish through evidence that no issue of material facts exists for an element of the nonmoving party’s case. *Id.* If the moving party challenges an element of the nonmoving party’s case on the basis that no genuine issue of material fact exists, the burden then shifts to the nonmoving party to present evidence that is sufficient to establish a genuine issue of material fact. *Id.* The nonmoving party “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” *Id.* (quoting IRCP 56 (e)). Summary judgment is properly granted in favor of the moving party, when the nonmoving party fails to establish the existence of an element essential to that party’s case upon which that party bears the burden of proof at trial. *Smith v. Meridian Joint School Dist. No. 2*, 128 Idaho 714, 719, 918 P.2d 583, 588 (1996).

In determining whether a boundary by agreement exists, the conclusions of the trial court will not be disturbed on appeal when they are supported by substantial and competent evidence. *Griffin v. Anderson*, 144 Idaho 376, 162 P.3d 755 (2007). An appellate court will set aside a trial court's findings of fact only if they are clearly erroneous. *Id.* 162 P.3d at 756; *Neider v. Shaw*, 138 Idaho 503, 506, 65 P.3d 525, 528 (2003). The reviewing court determines whether the findings are supported by substantial, competent evidence. *Id.* at 757; citing *In re Williamson v. City of McCall*, 135 Idaho 452, 454, 19 P.3d 766, 768 (2001). Evidence is substantial if a reasonable trier of fact would accept it and rely on it. *Id.* Findings based on substantial, competent evidence, although conflicting, will not be disturbed on appeal. *Id.*, citing *Bolger v. Lance*, 137 Idaho 792, 794, 53 P.3d 1211, 1213 (2002). The findings of fact in a court-tried case will be liberally construed on appeal in favor of the judgment entered, in view of the trial court's role as trier of fact. *Johnson v. Newport*, 131 Idaho 521, 523, 960 P.2d 742, 744 (1998).

DISCUSSION

A. Boundary By Agreement

The issue of boundary by agreement arises when a fence or boundary marker has been erected and two coterminous landowners have treated that line as the boundary "for such a length of time that neither ought to be allowed to deny the correctness of its location." *Luce*, 127 P.3d at 174, 142 Idaho at 271. Boundary by agreement or acquiescence has two elements: (1) there must be an uncertain or disputed boundary and (2) an express or implied agreement subsequently fixing the boundary. *Griffin v. Anderson*, 144 Idaho 376, 162 P.3d 755 (2007).

Such an agreement does not effect a conveyance of land from one party to the other. *Griffin*, at 768, 162 P.3d at 757; *see also Wells v. Williamson*, 118 Idaho 37, 41, 794 P.2d 626, 630 (1990). Instead it establishes the location of the respective existing estates and the common

boundary of each of the parties. *Id.* Once there is an agreed upon boundary, the parties to the agreement are no longer entitled to the amount of property provided for in their deeds and must absorb the effect of any increase or decrease in the amount of their property as a result of the new boundary. *Id.*; see also *Stafford v. Weaver*, 136 Idaho 223, 225, 31 P.3d 245, 247 (2001).

Either a dispute or uncertainty suffice to establish the first element, and ignorance of what is later deemed to be the true boundary suffices to show uncertainty. *Morrissey v. Haley*, 865 P.2d 961, 964, 124 Idaho 870, 873 (1993). Under the doctrine of boundary by agreement “the agreement need not be express, but may be implied by the surrounding circumstances and conduct of the parties. *Griffin*, at 757; see, *Cameron v. Neal*, 130 Idaho 898, 900, 950 P.2d 1237, 1240 (1997). An implied agreement between adjoining landowners may arise where property rights have been defined by the erection of a fence, followed by treatment of the fence by the adjoining owners as the boundary. *Id.* Where a court examines a purported boundary by agreement, “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 suggest that the fence was located as a boundary by agreement.” *Id.* The court may imply a boundary by agreement based on the behavior of the parties in treating the fence as a boundary for a length of time. *Id.*

The agreement can be implied from the surrounding circumstances and conduct of the parties. *Griffel v. Reynolds*, 34 P.3d 1080, 1083, 136 Idaho 397, 400 (2001). “A long period of acquiescence provides the factual basis from which to infer an agreement” especially “where property rights have been defined by the erection of a fence followed by treatment of the fence by the adjoining owner as the boundary.” *Luce*, 127 P.3d at 174, 142 Idaho at 271.

This implication arises in the absence of evidence showing the manner and circumstances of building the fence in its original location. Evidence that shows the fence was not placed there as a

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boundary or that its primary purpose was something other than to mark out a boundary line will overcome such a presumption and defeat the implication of agreement. *Cameron v. Neal*, 950 P.2d 1237, 1240, 130 Idaho 898, 900 (1997). Additionally, “[t]he mere act of erecting the fence inside [one’s own] boundary line did not constitute an abandonment of [one’s] land lying outside the fence, nor did it constitute an agreement that the adjoining landowners can have that land.” *Downey v. Vavold*, 166 P.3d 382, 385, 144 Idaho 592, 594 (2007).

Whether an agreement is express or implied, that agreement fixes the boundary from that point on. When “coterminous land owners have treated that fence line as fixing the boundary between their properties for such a length of time that neither ought to be allowed to deny the correctness of its location the law presumes an agreement fixing the fence line as the boundary.” *Luce v. Marble*, 142 Idaho 264, 271, 127 P.3d 167, 171 (2005); quoting, *Edgeller v. Johnson*, 74 Idaho 359, 365, 262 P.2d 1006, 1010 (1953); see also *Cox*, 137 Idaho at 494-95, 50 P.3d at 989-90; *Johnson v. Newport*, 131 Idaho 521, 523, 960 P.2d 742, 744 (1998); *Cameron*, 130 Idaho at 901, 950 P.2d at 1240; *Wells v. Williamson*, 118 Idaho 37, 41, 794 P.2d 626, 630 (1990); *Beneficial Life Ins. Co. v. Wakamatsu*, 75 Idaho 232, 241, 270 P.2d 830, 835 (1954); *Woll v. Costella*, 59 Idaho 569, 577, 85 P.2d 679, 682 (1938); *O’Malley v. Jones*, 46 Idaho 137, 141, 266 P. 797, 798 (1928); *Bayhouse v. Urquides*, 17 Idaho 286, 298-98 105 P. 1066, 1068-70 (1909). Our Supreme Court held in *Luce* that:

Once a boundary line has been fixed under the doctrine of agreed boundary that boundary is binding upon successors in interest who purchase with notice of the agreement. The general rule is that one purchasing property is put on notice as to any claim of title or right of possession which a reasonable investigation would reveal.

Luce, at 271, 127 P.3d 174. The agreed boundary binds successors in interest who purchase with either actual or constructive notice. *Neider v. Shaw*, 138 Idaho 503, 506, 65 P.3d 525, 528 (2003),

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In *Cox*, the defendant's predecessor in interest erected a fence to contain cattle and the parties thereafter believed the fence was the boundary. The parties treated the fence as the boundary between their properties until a survey revealed that the fence did not follow the correct property line. While the boundary was uncertain, the evidence showed that the fence was not based on an agreement or acquiescence to the demarcation of a boundary. There, the long acquiescence to the fence as the boundary, did not overcome clear evidence of a lack of agreement.

The facts in *Griffel* are analogous to those in the instant case. In *Griffel*, the parties' deeds described the boundaries in terms of section lines from the government survey, but none of the parties knew the true positions of the lines on the ground. There, the plaintiff had not discussed the boundaries with adjoining landowners and he had farmed the property up to the fence line assuming that it was his. The predecessor of the plaintiff also farmed up to the boundary as established by the fence. The fence had been caught and torn out by a disk some years before the parties sought to establish the boundary. The plaintiffs called a cadastral surveyor as an expert and he testified that aerial photographs of the property showed a three foot difference in elevation along the farming lines between the properties due to the long farming use. A series of aerial photos from 1978 to the present showed that the landowners adhered to these farming lines for at least the last 20 years. No dispute over the boundary existed until just prior to commencement of the lawsuit. Based upon the mutual recognition of the farming lines, and the occupation and cultivation by each party up to the lines, the trial court found the parties had acquiesced in treating the farming lines as the boundary.

In *Neider v. Shaw*, 138 Idaho 503, 65 P.3d 525 (2003), the plaintiff sought to quiet title to a disputed strip of property that was part of property plaintiff had purchased in 2001. Part of the plaintiff's property had been a Railroad right of way until 1994, when the Railroad abandoned the rail line. The plaintiff commissioned a survey which showed that a canal built in 1935 and a fence

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built by an unknown party between 1935 and 1945 encroached about 20 or 30 feet onto the eastern boundary of plaintiff's parcel. Each of the neighbors to the East of plaintiff believed the fence to be the western boundary of their property. Several neighbors had regularly allowed livestock to graze up to the fence line and drink from the canal located on the disputed strip.

The *Neider* plaintiff contended that the fence had been erected as a barrier to allow livestock to drink from the canal, but keep them off the railroad tracks. The plaintiff argued that the fence was never intended to mark the boundary but presented no evidence to support this theory. While no one knew who built the fence, or why, the evidence did establish that the fence had been in place for over 50 years. The neighbors considered the fence the boundary from the time each had acquired their property. In drawing inferences from the incomplete picture presented, the district court found that the evidence showed a boundary by agreement based on the long existence of the fence line and the lack of evidence to show it was erected as something other than a boundary.

Both parties in the instant case agree that the location of the deeded property line was unknown until Bohus commissioned a survey in 2003. Thus, the first element of a boundary by agreement is met. There is no evidence of an express agreement between the parties, and the parties who originally placed the fence have since died. While Cornwall and the children of the prior landowner, Joseph Whitworth, all assert that the fence formed the boundary between the properties, Flying Elk's predecessor in interest, Pat Whitworth, strongly contends that there has never been an agreement and all parties with an interest in the land knew that the fence was not the boundary. The testimony in the record shows that the fence acted as both a boundary and a barrier to contain cattle. Further, Pat testified that between the 1940's and the late 1960's, he personally moved sections of the fence when repairing them or for greater convenience in maintaining the fence line.

The Court has the task of sifting through the record in this case and balancing the presumptions that arise from the case law that comprises the doctrine of boundary by agreement against the call for summary judgment made by the Defendant in this case.

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. *Griffin*, at 757 (emphasis supplied). Here, the parties agree that a fence was first erected over 70 years ago. The parties dispute that the fence has remained in its original location, but the testimony presented shows that the fence has remained in essentially the same location as when the now living witnesses encountered it. Pat testified that he has moved the fence on several occasions; however, the details of these movements show that when the obstacles that prompted the change were removed, the fence was generally restored to align with its original location. Other movements included removing jogs in the fence to create a straighter fence line. Significantly, Pat testified that the last time he moved the fence line at all was prior to purchasing the land from his father in 1979, and likely prior to the date when Cornwall acquired his property in 1972. Thus the fence line stood completely unchanged for around 30 years.

Cornwall states that he thought the fence was the boundary, based, he says, upon discussions with his predecessor in interest, Joseph Whitworth. The testimony of Max and Duane Whitworth supports Cornwall's belief, as they also understood that the fence established the boundary between the fields of their father and their uncle, Harold Whitworth. Pat stated that Harold and Joseph "talked of these things ...so they moved the fence so it would be beneficial to everybody." This strengthens the presumption that the fence was located in its present position as part of an agreement upon the boundary line between the fields. At a minimum, such testimony supports the position that both prior property owners knew the fence marked out their respective

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fields and acquiesced in using the fence line as the boundary.

The physical evidence supports the theory of boundary by agreement. Both Pat and Cornwall farmed the land on their respective sides of the fence up to the fence line. Cornwall states that the two to three foot bank along the fence was formed by years of farming lines and establishes a physical monument to the long treatment of the fence line as a boundary. This evidence was not contested and like the farming lines in *Griffel v. Reynolds*, it supports the certainty and permanence of the fence line between the fields in this case.

Pat Whitworth states unequivocally that he never had an agreement with anyone that the fence was the boundary of his property. However, Pat admits that he was not alive when the fence was first erected and he has no knowledge of why it was erected or for what purpose. Pat states that he knew the true property line lay 260 feet into Cornwall's field, yet when he replaced large sections of the fence, he put them up in the same, or nearly the same location. The changes Pat did make to the fence line were not to reclaim property or establish the true property line, but to shift particular sections of the fence for ease of maintenance. Further, these shifts were not hostile to the ownership of what is now Cornwall's property, but rather seemed to continue the agreement between all parties that the fence established the boundary between the fields and should be placed to benefit everybody.

The two descendants of the adjoining property owner dispute Pat's statements. Max and Duane Whitworth both contend that the fence has been treated as the boundary between the properties since their respective parents farmed the land. Max and Duane further assert that the boundary has remained in essentially the same location for as long as they can recall, from 30 to 70 years. Pat acknowledges that "others may have assumed that the fence was the boundary" but contends they are incorrect. However, Pat has not taken action to dispel that assumption. Pat acted

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in a way that reinforced the assumption of an agreement when he replaced sections of the fence on the same line where it had sat for decades. Pat allowed Joseph Whitworth, and later Cornwall, to use the land up to the fence without objection.

As in *Downey*, the mere act of locating a fence inside one's property line does not mean the owner abandons the property located outside the fence. Pat asserts that the predecessors in interest on both his and Cornwall's property put the fence up where it was "as a matter of convenience for maintaining the fence or segregating the lands." To support his assertion that the fence was not meant to act as a boundary, Pat stated that he had moved the fence several times during his ownership of the property. He admitted, however, that he had not moved the fence since before 1972 and the fence today was in essentially the same spot it had been for 36 years. Further, some sections have been in the same location for the entirety of Pat's life, or over 70 years. Additionally, his statements that the fence was erected to "segregate the fields" and that his father and Joseph Whitworth had "talked of these things" and "moved the fence so it would be beneficial to everybody" counter his assertions that the fence was never intended to establish the boundary.

The more contemporaneous facts auger a similar conclusion. Robert Bohus acknowledges that he knew the fence did not follow the deeded property line. Pat testified that when he sold the ground to Bohus, he informed him that the fence was not on the surveyed lines and that a survey would be needed to establish the true property line. A survey could have been required at the time of that sale, but none was done and Bohus, and later Flying Elk, acquiesced in the placement of the fence made boundary for nine years before having the property surveyed. Even then, the reason for the survey was to settle the acreage of the Flying Elk property in order to place it in a conservation easement. Even though such actions or inaction are not dispositive alone of an agreement to the fence line as a boundary line, they do buttress the other evidence that the fence had been established

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as a boundary of the properties.

Unlike the facts in *Griffin v. Anderson*, there is no clear evidence of a lack of an agreement in the original placement of the fence, or the subsequent treatment of the fence as a boundary until Pat's statements that he did not view the fence as the boundary. Significantly, neither party presents evidence conclusively establishing the circumstances and manner of placing the fence in its original location. The fence contained livestock on both sides. The fence roughly parallels the deeded property line with allowances for the contours of the land and natural obstacles. The current and prior owners of both parcels farmed and/or grazed their land up to the fence. Substantial and competent evidence supports the implication that the fence is the boundary between the properties, despite Pat Whitworth's steadfast assertions that it is not, nor was it ever intended to form the boundary. As noted, while Pat may not have expressly agreed that the fence was the boundary to the property, the placement and treatment of the fence as a boundary by his and Cornwall's predecessors in interest is binding upon him and future owners of the property.

In considering such evidence in its totality, the Court has attempted to apply a common-sense assessment 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

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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 follow 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 decremental.

Such a 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 a 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 an 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

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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 a dialogue with Cornwall about the discrepancy between the fence and the deeded property line.

Contrary to the Plaintiff's assertions that the doctrine of boundary by agreement or boundary by acquiescence are "legal myths" or "legal fictions," this doctrine is well established in Idaho law. If the sometimes vast reaches of Idaho's rural landscape had been surveyed in full details, then such a legal doctrine would play a minor part if any at all in resolving such property disputes. However, the high costs of obtaining a survey, the reliance upon natural boundary markers, and the historical factors implicated in dividing up family farms among many descendants have not surprisingly created a significant number of cases where deeded property lines do not follow the understood boundaries of the property. The task of allocating such disputed farmland, rangeland, and even lots within municipalities has given rise to the doctrine that has been used for over a century. *See, Brown v. Brown*, 110 P. 269, 18 Idaho 345 (1910); *Bayhouse v. Urquides*, 17 Idaho, 286, 105 Pac. 1066 (1909).

The dispute in this case involves a significant amount of acreage and it is unfortunate that the discrepancy between the fenced property line and the property line described in the deeds was not identified much earlier on. However, the Court must rule upon the entirety of the historical record. The Court finds the testimony of the various witnesses to be credible, but also recognizes

the inherent secondhand nature of much of the proof. The Court then must take such testimony, consider the facts established by such testimony, the inferences that can be fairly drawn and resolve the inconsistencies in the manner most sensible, in the manner described herein. In doing so, the Court concludes that the totality of the evidence in the case supports the position of the Defendant. The fence has acted as the boundary for an extended period of time, such that no party ought to be able to deny the correctness of locating the boundary as defined by the fence line.

C. I.C. § 35-110 Does Not Apply to these Facts.

Plaintiff asserts that the Idaho Code § 35-110 provides a straightforward legal remedy to the dispute. Section 35-110 states:

The person building such fence, or the occupant or owner of the land whereon the same is built, 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 one (1) year thereafter.

This statute is directed to those persons *building* a fence or for those instances where the doctrines of adverse possession or boundary by agreement have not been raised. The fence statute codified the duties of landowners to secure their property and owners of livestock in containing animals. The legal fence laws of the State of Idaho provide a remedy to the landowner whose property, although enclosed by a legal fence, is nonetheless damaged by roaming cattle. *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85, (1978). The actions brought under these provisions generally seek to delineate which lands constitute open range or allocate damages caused by livestock:

In an effort to provide a remedy for landowners whose property was damaged by roaming cattle, most western states including Idaho passed fence laws. Idaho Code § 35-101 and 35-102 define what constitutes a legal fence, prescribing standards relating to height, length, number of rails and materials. Idaho Code § 25-2202 provides that a landowner who encloses his property with a legal fence has a cause of action against the owner of animals that break the enclosure. The United States Supreme Court, commenting on a Texas fence

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law, in *Lazarus v. Phelps*, 152 U.S. at 85, 14 S.Ct. at 478, states the object of such fence statutes:

‘As there are, or were, in the state of Texas, as well as in the newer states of the west generally, vast areas of land, over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their land, or be held as trespassers by reason of their cattle accidentally straying upon the land of others.’

Id. at 832-833, 590 P.2d at 88-89. This statute provides a remedy when a mistake has been made in setting a fence, and allows that a party may demand a survey to determine the actual boundary.

Here, the fence in this case was first set over 70 years ago and the property rights have apparently been defined by the fence. The neighboring property owners have treated the fence line as a boundary, placing improvements on their respective sides of the fence and farming up to the fence line. In the absence of any evidence as to the manner and circumstances of its original location, the evidence strongly suggests the fence was located as a boundary by agreement. The statute provides no clear time line or set period of use, after which a boundary will be created, but the longer the conduct goes on, the greater the implication becomes.

D. The Record is Insufficient to Quiet Title in the Disputed Strip of Property.

Defendant has established that the fence line acts as the proper boundary between the two properties, however that decision does not avail the Defendant of quiet title that he sought in his counter-claim. The Court’s decision today only revises the parties’ common boundary by operation of law. *See, Morrissey v. Haley*, 124 Idaho 870, 873, 865 P.2d 961, 964 (1993) (oral agreement fixing boundary line between co-terminous owners where true boundary is unknown, uncertain or in dispute is not regarded as a conveyance but merely the location of the respective existing estates and the common boundary of each of the parties); *Edgeller*, 74 Idaho at 366, 262 P.2d at 1010 (holding that a finding, supported by substantial competent evidence, of an agreed boundary line

has the effect of extending or diminishing the limits of the respective deeds to include and exclude the parcel of land in dispute).

Accordingly, the boundary is as yet insufficiently defined for purposes of considering a request that title be quieted and the Court cannot do so based upon the current record, which provides a general description, through testimony and exhibits, of the location of the fence lines in relation to the deeded boundary lines. The parties can consider whether to seek further relief, particularly the Defendant in light of the ruling in this case, upon such matters.

CONCLUSION

It is this Court's duty to decide the issues presented and thereby end this dispute between the parties. For the reasons set out herein, the Court finds in favor of the Defendants and against the Plaintiff. Perhaps, having done so, there will be some trail of both content and discontent. However, both sides have had the opportunity to make their claims and proof known to the Court in an impartial forum. Hopefully the resolution of the lawsuit will allow both parties to move forward to other matters without any continuing unhappiness or regret.

Counsel for Defendants is to prepare an appropriate form of Judgment. .

SO ORDERED.

DATED September 17, 2008.



RONALD E. BUSH
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17 day of September, 2008, I served a true and correct copy of the foregoing document upon each of the following individuals in the manner indicated.


Randall Kline
Power County Courthouse
543 Bannock Avenue
American Falls, ID 83211

U.S. Mail
 Overnight Delivery
 Hand Deliver
 Facsimile

Thomas Holmes
Jones, Chartered
203 South Garfield
Pocatello ID, 83201

U.S. Mail
 Overnight Delivery
 Hand Deliver
 Facsimile


DATED this 17 day of September, 2008.



Deputy Clerk

FILED
BANNOCK COUNTY
CLERK OF THE COURT

2008 OCT 14 PM 3:42

BY 
DEPUTY CLERK

Thomas J. Holmes (ISB#2448)
JONES, CHARTERED
Attorneys at Law
203 South Garfield
P. O. Box 967
Pocatello, Idaho 83204
(208) 232-5911

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC,	)	Case No. CV-2006-3298-OC
)	
Plaintiff,	)	JUDGMENT
)	
vs.)	
)	
DAVID F. CORNWALL,)	
)	
Defendant.)	
)	


The Court having entered its Memorandum Decision on the Defendant's Motion for Summary Judgment, and good cause appearing thereon, the Court does find that the boundary dispute between the Plaintiff and the Defendant regarding the property owned by the Plaintiff and described as Lots 2 and 3; Southeast 1/4 Northwest 1/4; North 1/2 Southwest 1/4; Southwest 1/4 Northeast 1/4 of Section 3, Township 7, South Range 36 EBM in Bannock County, Idaho and the property owned by the Defendant described as Lot 4 in the Southwest 1/4 Northwest 1/4 of Section 3, Township 7, South Range 36 EBM in Bannock County, Idaho is not the boundary line

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as determined by a survey between the above-described adjoining properties but rather is the fence that lies between the properties. Title to said property is not quieted by this Judgment.

SO ORDERED.

DATED this 10th day of October, 2008.



Ronald E. Bush, District Judge
Stephen S. Dunn

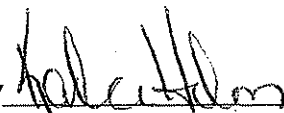
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Judgment** was mailed this 11 day of October, 2008, in an envelope with sufficient first-class postage prepaid thereon to the following:

Thomas J. Holmes
Jones, Chartered
P O Box 967
Pocatello, ID 83204

F. Randall Kline
P.O. Box 397
Pocatello, ID 83204-0397

CLERK OF THE COURT

By 

Deputy Clerk

S

FILED
 BANNOCK COUNTY
 CLERK
 2008 NOV -5 AM 9:10
 BY [Signature]
 DEPUTY CLERK

Thomas J. Holmes (ISB#2448)
 JONES, CHARTERED
 Attorneys at Law
 203 South Garfield
 P. O. Box 967
 Pocatello, Idaho 83204
 (208) 232-5911

Attorney for the Defendant

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC,	)	Case No. CV-2006-3298-OC
)	
Plaintiff,)	
)	
vs.	)	RENEWED MOTION FOR SUMMARY
	)	JUDGMENT BY THE DEFENDANT
DAVID F. CORNWALL,	)	DAVID F. CORNWALL FOR QUIET
	)	TITLE
)	
Defendant.)	
_____)	

COMES NOW THE DEFENDANT, David F. Cornwall and does herewith, pursuant to Rule 56(b), Idaho Rules of Civil Procedure, moves for summary judgment in favor of the defendant and against the plaintiff to quiet title to the real estate between the fence line that the Court in its Memorandum Decision and Order dated September 17, 2008 found to be the boundary and the property owned by the plaintiff, said real estate to be quieted to the Defendant Cornwall.

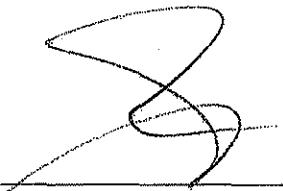
This Motion is based upon the pleadings on file herewith and the Second Affidavit of J.E. Burcham, Jr. and the Second Affidavit of Daniel R. Long filed concurrently with this Motion.

S

This defendant asserts there are no material issues of fact which would preclude entry of summary judgment in favor of the defendant on this quiet title issue. The Court, in its September 17, 2008 Memorandum Decision and Order, and specifically the first paragraph on page 23 of said decision, found the description in the record at that time to be inadequate to quiet title. The property has now been surveyed and described in the Second Affidavits of Burcham and Long.

Oral argument is requested upon this Motion.

DATED this 3 day of November, 2008.

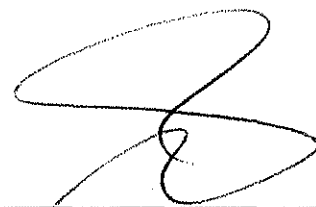


Thomas J. Holmes, Attorney for Defendant

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that a true and correct copy of the foregoing **Renewed Motion for Summary Judgment by the Defendant David F. Cornwall for Quiet Title** was mailed this 3 day of November, 2008, in an envelope with sufficient first-class postage prepaid thereon to the following:

F. Randall Kline, Esq.
P.O. Box 397
Pocatello, ID 83204-0397



Thomas J. Holmes

F. RANDALL KLINE (ISB#2787)
ATTORNEY
PO Box 97
American Falls, ID 83211
Telephone: 208-226-1230
Facsimile: 208-226-7612

FILED
 BANNOCK COUNTY
 2008 NOV 10 AM 11:43
 BY 
 DEPUTY CLERK

IN THE DISTRICT OF THE SIXTH JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC)	
)	
Plaintiff,	)	Case No. CV-2006-3298-OC
)	
)	
VS.	)	NOTICE OF APPEAL
	)	Fee Category: T
	)	Fee: \$101.00
DAVID F. CORNWALL,)	
)	
<u>Defendant.</u>)	

TO: THE ABOVE NAMED RESPONDENT, DAVID F. CORNWALL, AND THE PARTY'S ATTORNEYS, THOMAS J. HOLMES, PO BOX 967, POCATELLO, IDAHO 83204, AND THE CLERK OF THE ABOVE-ENTITLED COURT, BANNOCK COUNTY, 624 EAST CENTER, POCATELLO, IDAHO, 83201 .

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellant, Flying Elk Investment, LLC, appeal against the above-named respondent to the Idaho Supreme Court from Judgment Granting Summary Judgment entered in the above-entitled action on the 10th day of October, Honorable Judge Ron Bush, presiding, superseded by Honorable Stephen A. Dunn.
2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Rule [e.g. (11(a)(2)) or (12(a))] I.A.R.
3. A preliminary statement of the issues on appeal which the appellant then intends to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal.

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4. Has an order been entered sealing all or any portion of the record? If so, what portion? No

5. (a) Is a reporter's transcript requested? No

6. The appellant requests the following documents to be included in the clerk's (agency's) record in addition to those automatically included under Rule 28, I.A.R.

All exhibits, all affidavits, all depositions and motions filed in the case, all briefing done regarding Summary Judgment.

7. I certify:

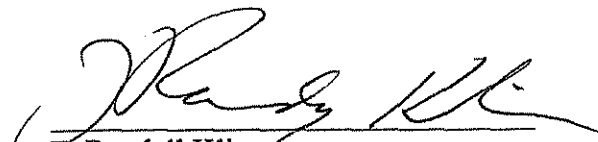
(a) that a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below: N/A

(c) (1) That the estimated fee for preparation of the clerk's or agency's record has been paid.

(d) (1) That the appellate filing fee has been paid.

(e) That service has been made upon all parties required to be served pursuant to Rule 20.

DATED THIS 10th day of November, 2008.

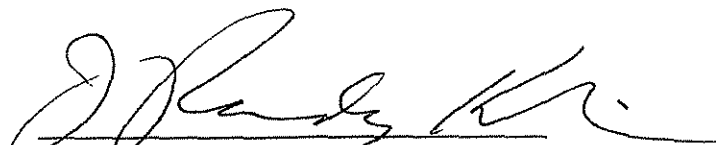

F. Randall Kline
Attorneys for the Appellant

5

CERTIFICATE OF SERVICE

I hereby certify that on this 10 day of November, 2008, I caused to be served a true and correct copy of the Notice of Appeal, by pre-postage paid U.S. Mail, and addressed to the following.

Thomas J. Holmes
JONES, CHARTERED
Attorneys at Law
203 South Garfield
PO Box 967
Pocatello, ID 83204


F. RANDALL KLINE

S

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC)	
)	
Plaintiff-Appellant	)	Supreme Court No.
)	
Vs.)	
	)	CLERK'S CERTIFICATE
DAVID F. CORNWALL,	)	OF
	)	APPEAL
Defendant-Respondent)	
)	
)	
)	

Appealed from: Sixth Judicial District, Bannock County

Honorable Stephen A. Dunn, presiding.

Bannock County Case No: CV-2006-3298-OC

Order of Judgment Appealed from: Judgment filed the 14th day of October, 2008.

Attorney for Appellant: F. Randall Kline, Attorney at Law, American Falls

Attorney for Respondent: Thomas J. Holmes, Jones, Chartered, Pocatello

Appealed by: Appellant

Appealed against: Respondent

Notice of Appeal filed: 11-10-08

Notice of Cross-Appeal filed: No

Appellate fee paid: Yes

Request for additional records filed: No

Request for additional reporter's transcript filed: No

5

Name of Reporter: Sheila Fish

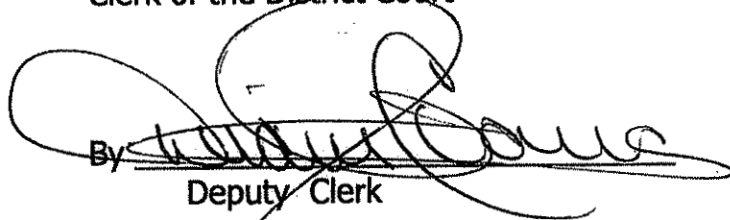
Was District Court Reporter's transcript requested? No

Estimated Number of Pages: N/A

Dated Nov. 12, 2008

DALE HATCH,
Clerk of the District Court


(Seal)

By 
Deputy Clerk

5

CLERK
BANNOCK COUNTY
CLERK OF THE COURT

2009 JAN -9 PM 1:45

BY  DEPUTY CLERK

Thomas J. Holmes (ISB#2448)
JONES, CHARTERED
Attorneys at Law
203 South Garfield
P. O. Box 967
Pocatello, Idaho 83204
(208) 232-5911

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK


FLYING ELK INVESTMENT, LLC,)
)
 Plaintiff,)
)
 vs.)
)
 DAVID F. CORNWALL,)
)
 Defendant.)
 _____)

Case No. CV-2006-3298-OC
JUDGMENT FOR QUIET TITLE

This matter came on for consideration of the Renewed Motion for Summary Judgment by the Defendant, David F. Cornwall, for quiet title. Counsel for the Plaintiff and the Defendant appeared and for good cause, the court does herewith quiet title to the real estate described on the attached exhibit in favor the Defendant, David F. Cornwall, thereby divesting the Plaintiff, Flying Elk Investment, LLC, of said property.

SO ORDERED.

DATED this 8th day of January, 2009.



Stephen S. Dunn, District Judge

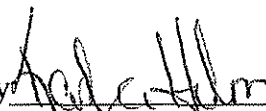
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **JUDGMENT FOR QUIET TITLE** was mailed this 9 day of January, 2009, in an envelope with sufficient first-class postage prepaid thereon to the following:

Thomas J. Holmes
Jones, Chartered
P O Box 967
Pocatello, ID 83204

F. Randall Kline
P.O. Box 97
American Falls, ID 83211

CLERK OF THE DISTRICT COURT

By 

Deputy Clerk

8
S

SNAK RIVER SURVEYING, IC.

460 Lincoln Street, Suite C
American Falls, Idaho 83211
Phone (208) 226-5764, Fax (208) 226-5767



28074

David Cornwall

18.88 Acres

Date: October 20, 2008

A parcel of land in the W $\frac{1}{2}$ of Section 3, Township 7 South, Range 36 East of the Boise Meridian, Bannock County, Idaho, described as follows:

Beginning at the W $\frac{1}{4}$ corner of said section 3, which is marked with a 5/8" rebar and aluminum cap stamped PLS 843;

Thence, N 88°29'31" E, along the East-West centerline of said section, 1349.19 feet to the center west 1/16 corner (southeast corner of the SW $\frac{1}{4}$ NW $\frac{1}{4}$), marked with a 5/8" rebar and aluminum cap stamped PLS 843;

Thence, N 00°52'30" E, along the West 1/16 line, 2588.98 feet to the west 1/16 corner on the north line of said section, said point being marked with a 5/8" rebar and aluminum cap stamped PLS 843;

Thence, S 89°37'50" E, along the north line of said section, 299.93 feet to a point in an existing North-South fence line and marked with a 1/2" rebar and plastic cap stamped PLS 843;

Thence, along said existing fence line the following courses:

S 16°42'46" W, leaving said north line and along said existing fence line, 55.40 feet to a 1/2" rebar and plastic cap stamped PLS 843;

S 12°49'24" W, 138.74 feet to a 1/2" rebar and plastic cap stamped PLS 843;

S 07°49'28" W, 55.39 feet to a 1/2" rebar and plastic cap stamped PLS 843;

S 03°51'54" W, 73.23 feet to a 1/2" rebar and plastic cap stamped PLS 843;

S 00°13'54" E, 736.29 feet to a 1/2" rebar and plastic cap stamped PLS 843;

S 00°41'12" E, 833.78 feet to a 1/2" rebar and plastic cap stamped PLS 843;

S 06°02'11" W, 325.77 feet to a 1/2" rebar and plastic cap stamped PLS 843;

S 06°36'58" E, 273.24 feet to a 1/2" rebar and plastic cap stamped PLS 843;

S 01°20'47" E, 196.27 feet to a 1/2" rebar and plastic cap stamped PLS 843;

S 89°38'25" W, 1644.98 feet to a 1962 BLM brass cap stamped WC 1.00 chains, said point being on the west line of said section 3;

Thence, N 01°00'26" E, along said west line, 66.00 feet to the TRUE POINT OF BEGINNING, said parcel containing 18.88 acres more or less.

EXHIBIT

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

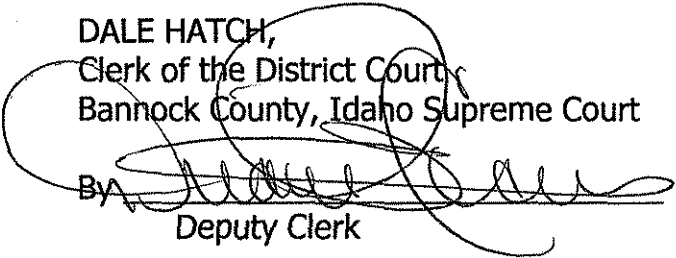
FLYING ELK INVESTMENT, LLC)	
	)	Supreme Court No. 35853-2008
Plaintiff-Appellant,)	
)	
vs.	)	CLERK'S CERTIFICATE
)	
DAVID F. CORNWALL,)	
)	
Defendant-Appellant.)	
_____)	

I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Bannock, do hereby certify that the above and foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true, full, and correct record of the pleadings and documents as are automatically required under Rule 28 of the Idaho appellate Rules.

I do further certify that there were no exhibits marked for identification or admitted into evidence during the course of this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Pocatello, Idaho, this 10 day of Feb, 2009.

(Seal)

DALE HATCH,
Clerk of the District Court,
Bannock County, Idaho Supreme Court
By 
Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC)	
	)	Supreme Court No. 35853-2008
Plaintiff-Appellant,)	
)	
vs.	)	CERTIFICATE OF AFFIDAVITS,
	)	BRIEFS, AND MEMORANDUMS
DAVID F. CORNWALL,)	
)	
Defendant-Respondent,)	
)	

I, DALE HATCH, the duly elected, qualified and acting Clerk of the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock, do hereby certify that there were no exhibits marked for identification and introduced into evidence at trial. The following affidavits, briefs, and memorandums will be treated as exhibits in the above and foregoing cause, to wit:

1. Affidavit of David F. Cornwall filed 7-30-07.
2. Affidavit of Max Whitworth filed 7-30-07.
3. Affidavit of Duane Whitworth filed 7-30-07.
4. Brief in Support of Defendant's Motion for Summary Judgment filed 7-30-07.
5. Affidavit of C. Pat Whitworth filed 8-23-07.
6. Affidavit of Robert W. Bohus filed 8-23-07.
7. Affidavit of J.E. Burcham, Jr. filed 8-23-07.
8. Affidavit of Daniel R. Long filed 8-23-07.
9. Brief in Support of Objection to Motion for Summary Judgment filed 8-23-07.
10. Supplemental Brief in Support of Defendant's Renewed Motion for Summary Judgment filed 12-13-07.
11. Supplemental Brief in Support of Objection to Motion for Summary Judgment filed 2-26-08.
12. Affidavit of Kellie Fernandez filed 5-3-08.

13. Reply Brief filed 3-7-08.
14. Affidavit in Support of Costs and Attorney Fees filed 10-21-08.
15. Second Affidavit of Daniel R. Long filed 11-5-08.
16. Second Affidavit of J.E. Burcham, Jr. filed 11-5-08.
17. Supplemental Memorandum of Costs filed 1-20-09.
18. Affidavit in Support of Supplemental Costs filed 1-20-09.
19. Oral Deposition of David Cornwall dated 9-28-07.
20. Oral Deposition to Corwin Pat Whitworth dated 9-28-07.
21. Photo Exhibits "E - J".

I FURTHER CERTIFY that the above exhibit is attached to, and made a part of, the original transcript on appeal in said cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this the 10 day of Feb, 2009.

(Seal)

DALE HATCH, Clerk of the District Court
Bannock County, State of Idaho

By: 
Deputy Clerk

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BANNOCK

FLYING ELK INVESTMENT, LLC)	
	)	Supreme Court No. 35853-2008
Plaintiff-Appellant,)	
)	
vs.	)	CERTIFICATE OF SERVICE
)	
DAVID F. CORNWALL,)	
)	
Defendant-Respondent,)	
_____)	

I, DALE HATCH, Clerk of the District Court of the Sixth Judicial District, of the State of Idaho, in and for the County of Bannock, do hereby certify that I have personally served or mailed, by United States mail, one copy of the CLERK'S RECORD to each of the Attorneys of Record in this cause as follows:

F. Randall Kline
Attorney
P.O. Box 97
American Falls, Id 83211

Thomas J. Holmes
Jones, Chartered
P.O. Box 967
Pocatello, Idaho 83201

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Pocatello, Idaho, this 10 day of Feb, 2009.

(Seal)

DALE HATCH,
Clerk of the District Court,
Bannock County, Idaho Supreme Court

By 
Deputy Clerk