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LAW CLERK Vol 1 of 3

IN THE

SUPREME COURT

OF THE

STATE OF IDAHO

CHRIS BELSTLER and DANA BELSTLER, husband and wife

Plaintiff / Respondent

vs.

KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife,

Defendant / Appellant

Appealed from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

Charles M. Dodson
1424 Sherman Ave., Ste 300
Coeur d'Alene, ID 83814
Attorney for Respondent

SEE AUGMENTATION RECORD

Arthur B. Macomber
408 E Sherman Ave., Ste 215
Coeur d'Alene, ID 83814
Attorney for Appellant

FILED - COPY
NOV - 9 2010
Supreme Court ____ Court of Appeals ____
Entered on ATS by ____

37893

IN THE SUPPREME COURT OF THE STATE OF IDAHO

CHRIS BELSTLER and DANA BELSTLER, husband and wife	)	
Petitioner/Plaintiff	)	**SUPREME COURT NO. 37893-2010**
vs	)	
KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife	)	
Respondents/Defendants	)	

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai.

HONORABLE LANSING L. HAYNES
District Judge

Arthur B. Macomber 408 E Sherman Ave., Ste 215 Coeur d'Alene, ID 83814	Charles M. Dodson 1424 Sherman Ave., Ste 300 Coeur d'Alene, ID 83814
Attorneys for Appellants	Attorneys for Respondents

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife	)	
	)	
Petitioner/Plaintiff	)	
	)	**SUPREME COURT NO.**
vs	)	**37893-2010**
	)	
KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife	)	
	)	

Attorney for Appellant

Arthur B. Macomber
408 E Sherman Ave., Ste 215
Coeur d'Alene, ID 83814

Attorneys for Respondents

Charles M. Dodson
1424 Sherman Ave., Ste 300
Coeur d'Alene, ID 83814

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 4th day of Nov, 2010

DANIEL J. ENGLISH
Clerk of the District Court

By: Debra D. Leu
Deputy Clerk

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Filed August 6, 2010.....242

First [illegible]icial District Court - Kootenai County

User: LEU

ROA Report

Case: CV-2007-0002523 Current Judge: Lansing L. Haynes

Chris Belstler, etal. vs. Karen Sheler, etal.

Chris Belstler, Dana Belstler vs. Karen Sheler, Howard Conine

Date	Code	User		Judge
4/9/2007	NCOC	LEPIRE	New Case Filed - Other Claims	Lansing L. Haynes
		LEPIRE	Filing: A1 - Civil Complaint, More Than $1000 No Prior Appearance Paid by: Layman, Layman, & Robinson Receipt number: 0739631 Dated: 4/9/2007 Amount: $88.00 (Check) For: [NONE]	Lansing L. Haynes
	COMP	CRAMER	Complaint And Demand For Jury Trial	Lansing L. Haynes
	SUMI	CRAMER	Summons Issued	Lansing L. Haynes
5/30/2007	HRSC	TAYLOR	Hearing Scheduled (Motion 07/17/2007 03:30 PM) Motion to Enlarge Time Dodson	Lansing L. Haynes
		PARKER	Filing: I1A - Civil Answer Or Appear. More Than $1000 No Prior Appearance Paid by: Charles M Dodson Receipt number: 0746495 Dated: 5/30/2007 Amount: $58.00 (Check) For: [NONE]	Lansing L. Haynes
	NOAP	PARKER	Notice Of Appearance/Charles M Dodson	Lansing L. Haynes
	ACKS	PARKER	Acknowledgement Of Service	Lansing L. Haynes
	MOTN	PARKER	Motion for Enlargement of Time and Notice of Hearing	Lansing L. Haynes
	AFFD	PARKER	Affidavit in Support of Motion for Enlargement of Time	Lansing L. Haynes
7/17/2007	CONT	TAYLOR	Hearing result for Motion held on 07/17/2007 03:30 PM: Continued Motion to Enlarge Time Dodson	Lansing L. Haynes
	HRSC	TAYLOR	Hearing Scheduled (Motion 07/19/2007 03:30 PM) Motion to Enlarge Time Dodson	Lansing L. Haynes
		TAYLOR	Amended Notice of Hearing	Lansing L. Haynes
7/19/2007	HRVC	TAYLOR	Hearing result for Motion held on 07/19/2007 03:30 PM: Hearing Vacated Motion to Enlarge Time Dodson	Lansing L. Haynes
7/23/2007	STIP	MCCOY	Stipulation to Extend Time For Defendants to Answer Complaint	Lansing L. Haynes
8/3/2007	MISC	HUFFMAN	Proof of Service	Lansing L. Haynes
8/8/2007		PARKER	Filing: J8B - Special Motions Counterclaim With Prior Appearance Paid by: Charles M Doson Receipt number: 0756710 Dated: 8/8/2007 Amount: $14.00 (Check) For: [NONE]	Lansing L. Haynes
	ANSW	PARKER	Answer, Affirmative Defenses and Counterclaim	Lansing L. Haynes
12/13/2007	HRSC	TAYLOR	Hearing Scheduled (Motion for Summary Judgment 02/20/2008 03:30 PM) Bistline 1 hr	Lansing L. Haynes
1/17/2008	HRVC	TAYLOR	Hearing result for Motion for Summary Judgment held on 02/20/2008 03:30 PM: Hearing Vacated Bistline 1 hr	Lansing L. Haynes

Chris Belstler, Dana Belstler vs. Karen Sheler, Howard Conine

Date	Code	User		Judge
1/17/2008	HRSC	TAYLOR	Hearing Scheduled (Motion for Summary Judgment 03/06/2008 03:30 PM) 1 hr, Bistline	Lansing L. Haynes
2/28/2008	HRVC	TAYLOR	Hearing result for Motion for Summary Judgment held on 03/06/2008 03:30 PM: Hearing Vacated 1 hr, Bistline	Lansing L. Haynes
	HRSC	TAYLOR	Hearing Scheduled (Motion for Summary Judgment 04/15/2008 03:30 PM) Bistline, 1 hr	Lansing L. Haynes
3/31/2008	HRVC	TAYLOR	Hearing result for Motion for Summary Judgment held on 04/15/2008 03:30 PM: Hearing Vacated Bistline, 1 hr	Lansing L. Haynes
	HRSC	TAYLOR	Hearing Scheduled (Motion for Summary Judgment 05/28/2008 03:30 PM) Bistline, 1 hr	Lansing L. Haynes
4/10/2008	NOTC	PARKER	Notice of Address Change	Lansing L. Haynes
4/29/2008	HRSC	TAYLOR	Hearing Scheduled (Status Conference 05/19/2008 03:30 PM)	Lansing L. Haynes
		TAYLOR	Notice of Hearing	Lansing L. Haynes
4/30/2008	AFFD	VICTORIN	Affidavit of Chris and Dana Belstler	Lansing L. Haynes
	MEMO	VICTORIN	Memorandum in Support of Motion for Summary Judgment	Lansing L. Haynes
	MNSJ	VICTORIN	Motion For Summary Judgment	Lansing L. Haynes
	NOHG	VICTORIN	Notice Of Hearing	Lansing L. Haynes
	AFFD	BAXLEY	Affidavit of Atrhur Bistline In Support of Summary Judgment	Lansing L. Haynes
5/5/2008	RSCN	MCCOY	Response to Status Conference Notice-Bistline	Lansing L. Haynes
5/19/2008	HRHD	TAYLOR	Hearing result for Status Conference held on 05/19/2008 03:30 PM: Hearing Held	Lansing L. Haynes
5/21/2008	HRSC	TAYLOR	Hearing Scheduled (Jury Trial Scheduled 01/20/2009 09:00 AM) 4 days	Lansing L. Haynes
		TAYLOR	Notice of Trial	Lansing L. Haynes
	FILE	MCCORD	New File Created ******************FILE 2******************************	Lansing L. Haynes
5/23/2008	HRVC	TAYLOR	Hearing result for Motion for Summary Judgment held on 05/28/2008 03:30 PM: Hearing Vacated Bistline, 1 hr	Lansing L. Haynes
	HRSC	TAYLOR	Hearing Scheduled (Motion for Summary Judgment 07/08/2008 03:30 PM) Bistline Dodson, 1 hr	Lansing L. Haynes
6/23/2008	AFFD	CANTU	Affidavit of Charles M. Dodson in Oppostion to Plaintiff's Motion for Summary Judgment	Lansing L. Haynes
	AFFD	MCCORD	Affidavit of Howard Conine in Opposition to pet's motion for summary judgement	Lansing L. Haynes
	AFFD	MCCORD	Affidavit of Karen Sheler (Conine) in Opposition to pet's motion for summary judgment	Lansing L. Haynes
	MEMO	MCCORD	Memorandum in opposition to pet's motion for summary judgment	Lansing L. Haynes

Chris Belstler, Dana Belstler vs. Karen Sheler, Howard Conine

Date	Code	User		Judge
6/23/2008	MOTN	MCCORD	Motion for a view of the premises	Lansing L. Haynes
6/30/2008	NOTH	MCCORD	Notice Of Hearing	Lansing L. Haynes
	FILE	SHEDLOCK	New File Created *****File #3*****	Lansing L. Haynes
7/8/2008	HRVC	TAYLOR	Hearing result for Motion for Summary Judgment held on 07/08/2008 03:30 PM: Hearing Vacated Bistline Dodson, 1 hr	Lansing L. Haynes
7/30/2008	MISC	CANTU	Plaintiffs' Expert Witness Disclosure	Lansing L. Haynes
9/21/2008	FILE	SHEDLOCK	New File Created *****File #4***** *****Expando - DF and PF Exhibits*****	Lansing L. Haynes
10/8/2008	STIP	HUFFMAN	Stipulation for Relief from Pretrial Order Concerning Plaintiff's Expert Witness Disclosure	Lansing L. Haynes
10/15/2008	STIP	MCCORD	Stipulation to Continue Trial	Lansing L. Haynes
	ORDR	HAMILTON	Order on Stipulation for Relief from PreTrial Order Concerning Plaintiff's Expert Witness Disclosure	Lansing L. Haynes
10/20/2008	REPT	CRUMPACKER	Report of Mediation	Lansing L. Haynes
10/22/2008	STIP	TAYLOR	Stipulation to Continue Trial	Lansing L. Haynes
10/31/2008	ORDR	TAYLOR	Order Continuing Trial	Lansing L. Haynes
	HRVC	TAYLOR	Hearing result for Jury Trial Scheduled held on 01/20/2009 09:00 AM: Hearing Vacated 4 days	Lansing L. Haynes
	HRSC	TAYLOR	Hearing Scheduled (Jury Trial Scheduled 04/20/2009 09:00 AM) 4 days	Lansing L. Haynes
		TAYLOR	AMENDED Notice of Trial	Lansing L. Haynes
11/4/2008	SUBC	PARKER	Substitution Of Counsel/Arthur A Macomber	Lansing L. Haynes
11/6/2008	STIP	CRUMPACKER	Stipulation to Continue Trial	Lansing L. Haynes
11/13/2008	ORDR	TAYLOR	Order Continuing Trial	Lansing L. Haynes
	HRVC	TAYLOR	Hearing result for Jury Trial Scheduled held on 04/20/2009 09:00 AM: Hearing Vacated 4 days	Lansing L. Haynes
	HRSC	TAYLOR	Hearing Scheduled (Jury Trial Scheduled 05/18/2009 09:00 AM) 4 days	Lansing L. Haynes
		TAYLOR	Notice of Trial	Lansing L. Haynes
1/30/2009	STIP	LEU	Stipulation For Plaintiffs To File An Amended Complaint And To Request The Court To Vacate Trial Date And Reset Trial Schedule	Lansing L. Haynes
2/3/2009	COMP	TAYLOR	Amended Complaint for Declaratory Judgment on Deeds, and Request for Quiet Title to Upper and Lower Roads	Lansing L. Haynes
	ORDR	TAYLOR	Proposed Judgment Approving Stipulation for Plaintiffs to File Amended Complaint, Vacating Trial Date and Rescheduling a New Trial Date	Lansing L. Haynes
	HRVC	TAYLOR	Hearing result for Jury Trial Scheduled held on 05/18/2009 09:00 AM: Hearing Vacated 4 days	Lansing L. Haynes

Chris Belstler, Dana Belstler vs. Karen Sheler, Howard Conine

Date	Code	User		Judge
2/3/2009	HRSC	TAYLOR	Hearing Scheduled (Jury Trial Scheduled 09/21/2009 09:00 AM) 4 day	Lansing L. Haynes
		TAYLOR	AMENDED Notice of Trial	Lansing L. Haynes
2/17/2009	MISC	HUFFMAN	Amended Answer, Affirmative Defenses, & Counterclaim	Lansing L. Haynes
3/18/2009	ANSW	PARKER	Counter Defendants Delstlers' Answer to Counterclaim	Lansing L. Haynes
3/25/2009	WITP	CRUMPACKER	Plaintiffs Disclosure of Expert Witnesses	Lansing L. Haynes
6/26/2009	WITD	BAXLEY	Defendants' Disclosure Of Potential expert Witness	Lansing L. Haynes
	NTSV	BAXLEY	Notice Of Service	Lansing L. Haynes
7/6/2009	NTSV	CRUMPACKER	Notice Of Service of Plaintiffs Responses to Defendants Request for Production of Documents	Lansing L. Haynes
7/20/2009	NTSV	COCHRAN	Notice Of Service of Plaintiffs' Request for Answers to Interrogatories, Set One	Lansing L. Haynes
7/21/2009	NTSV	CRUMPACKER	Notice Of Service of Plaintiffs Request for Answers to Interrogatories Set One Corrected	Lansing L. Haynes
7/28/2009	NOTD	BAXLEY	Notice Of Intent To Take Oral Deposition Of karen Sheler on 08/20/09 at 9:00 AM	Lansing L. Haynes
8/24/2009	NTSV	COCHRAN	Notice Of Service	Lansing L. Haynes
9/8/2009	RECT	COCHRAN	Receipt Of Transcript	Lansing L. Haynes
	PLWL	COCHRAN	Plaintiff's Witness List	Lansing L. Haynes
	NOTC	COCHRAN	Notice of Filing Plaintiff's List of Exhibits	Lansing L. Haynes
9/11/2009	STIP	JOKELA	Stipulated Waiver Jury Trial and Stipulation for View of the Premises by Presiding Judge	Lansing L. Haynes
9/14/2009	HRSC	TAYLOR	Hearing Scheduled (Court Trial Scheduled 09/21/2009 09:00 AM)	Lansing L. Haynes
	HRVC	TAYLOR	Hearing result for Jury Trial Scheduled held on 09/21/2009 09:00 AM: Hearing Vacated 4 day	Lansing L. Haynes
	LETR	HARPER	Letter/Please return the signed Orginial Cetrificate Of Witness and change Sheet to M & M Court Reporting Service, INC.	Lansing L. Haynes
	WITD	HARPER	Witness List - Defendant's	Lansing L. Haynes
	NOTC	HARPER	Notice of Defendnats List of Exhibits	Lansing L. Haynes
	STIP	HARPER	Stipulated Waivere of Jury Trial, and Stipulation for view of the Premises by Presiding judge	Lansing L. Haynes
9/15/2009		TAYLOR	AMENDED Notice of Trial	Lansing L. Haynes
9/16/2009	MISC	HARPER	Plaintiffs Trial Brief Reconveyance of Easement Ineffective Pursuant To Idaho Law	Lansing L. Haynes
9/17/2009	MISC	HARPER	Defendants Proposed Findings Of Fact And Conclusions Of Law	Lansing L. Haynes
	MISC	HARPER	Defendants Pretrial Memorandum	Lansing L. Haynes

Chris Belstler, Dana Belstler vs. Karen Sheler, Howard Conine

Date	Code	User		Judge
9/18/2009	WITP	HARPER	Plaintiffs Revised Witness List	Lansing L. Haynes
	NOTC	VICTORIN	Notice of Filing of Plaintiffs' Revised List of Exhibits with Revised List	Lansing L. Haynes
	MISC	SREED	Defendants' Amended Witness List	Lansing L. Haynes
	NOTC	SREED	Corrected Notice of Defendants' List of Exhibits	Lansing L. Haynes
9/21/2009	NOTC	HARPER	Plaintiffs Proposed Findings of Fact and Conclusions of Law	James R. Michaud
	DCHH	TAYLOR	District Court Hearing Held COURT TRIAL-DAY ONE Court Reporter: JOANNE SCHALLER Number of Transcript Pages for this hearing estimated:	James R. Michaud
	CTST	CARLSON	Hearing result for Court Trial Scheduled held on 09/21/2009 09:00 AM: Court Trial Started	James R. Michaud
	DCHH	CARLSON	District Court Hearing Held Court Reporter: Joann Schaller Number of Transcript Pages for this hearing estimated: 100	James R. Michaud
9/22/2009	DCHH	TAYLOR	District Court Hearing Held COURT TRIAL-DAY TWO Court Reporter: JOANNE SCHALLER Number of Transcript Pages for this hearing estimated:	James R. Michaud
	DCHH	CARLSON	District Court Hearing Held Court Reporter: Joann Schaller Number of Transcript Pages for this hearing estimated: 100	James R. Michaud
	FILE	SHEDLOCK	New File Created *****File #5*****	Lansing L. Haynes
9/23/2009	DCHH	CARLSON	District Court Hearing Held Court Reporter: Joann Schaller Number of Transcript Pages for this hearing estimated: 230	James R. Michaud
9/24/2009	DCHH	CARLSON	District Court Hearing Held Court Reporter: Joann Schaller Number of Transcript Pages for this hearing estimated: 139	James R. Michaud
9/28/2009	ESTI	VICTORIN	Estimate Of Transcript Costs/JoAnn Schaller	Lansing L. Haynes
10/29/2009	MISC	COCHRAN	Plaintiffs' Post-Trial Legal Arguments	Lansing L. Haynes
10/30/2009	MISC	HUFFMAN	Defendants/Counter Plaintiffs' Post Trial Memorandum	Lansing L. Haynes
11/23/2009	PBRF	CRUMPACKER	Defendants Conines Response to Plaintiff's Post Trial Brief	Lansing L. Haynes
	MEMO	CRUMPACKER	Plaintiffs reply to Defendants/Counter Plaintiffs Post-Trial Memorandum	Lansing L. Haynes
12/23/2009	MEMO	HUFFMAN	Memorandum Decision And Order For Judgment	Lansing L. Haynes

First Judicial District Court - Kootenai County

User: LEU

ROA Report

Case: CV-2007-0002523 Current Judge: Lansing L. Haynes

Chris Belstler, etal. vs. Karen Sheler, etal.

Chris Belstler, Dana Belstler vs. Karen Sheler, Howard Conine

Date	Code	User		Judge
12/23/2009	FILE	HARWOOD	***************FILE #6 CREATED***********************	Lansing L. Haynes
12/30/2009	ORDR	RICKARD	Order To Withdraw And Substitute Memorandum Decision And Order For Judgment	Lansing L. Haynes
	MEMO	RICKARD	Memorandum Decision And Order For Judgment	Lansing L. Haynes
1/4/2010	NOTR	CRUMPACKER	Notice Of Transcript Delivery Robert Lynn Stratton	Lansing L. Haynes
1/6/2010	HRSC	SVERDSTEN	Hearing Scheduled (Motion to Reconsider 02/12/2010 10:00 AM) MacComber	Lansing L. Haynes
	NOTC	CRUMPACKER	Notice of Motion & Motion for Reconsideration & Amendment of Memorandum Decision	Lansing L. Haynes
1/13/2010	HRSC	SVERDSTEN	Hearing Scheduled (Motion to Reconsider 03/16/2010 03:30 PM) MacComber	Lansing L. Haynes
	HRVC	SVERDSTEN	Hearing result for Motion to Reconsider held on 02/12/2010 10:00 AM: Hearing Vacated MacComber	Lansing L. Haynes
1/14/2010	NOTC	BAXLEY	AMENDED Notice Of Motion For Reconsideration and Amendment Of Memorandum Decision on 03/16/10 at 3:30 PM	Lansing L. Haynes
3/2/2010	BRIE	HARWOOD	Brief In Support Of Motion For Reconsideration And Amendment Of Memorandum Decision	Lansing L. Haynes
3/10/2010	BRIE	SREED	Defendants' Brief in Opposition to Motion for Reconsideration and Amendment of Memorandum Decision	Lansing L. Haynes
3/12/2010	MISC	HUFFMAN	Plaintiffs' Reply to Defendants' Brief in Opposition to Motion for Reconsideration & Amendment of Memoradum Decision-3/16/2010 3:30 PM	Lansing L. Haynes
3/16/2010	DCHH	SVERDSTEN	Hearing result for Motion to Reconsider held on 03/16/2010 03:30 PM: District Court Hearing Held TAKEN UNDER ADVISEMENT Court Reporter: LAURIE JOHNSON Number of Transcript Pages for this hearing estimated: MacComber	Lansing L. Haynes
4/21/2010	MEMO	SVERDSTEN	Memorandum Decision and Order RE: Plaintiffs' Motion to Reconsider	Lansing L. Haynes
4/29/2010	AFFD	BAXLEY	Affidavit Of Costs (Defendants)	Lansing L. Haynes
6/4/2010	CVDI	VICTORIN	Civil Disposition entered for: Conine, Howard, Defendant; Sheler, Karen, Defendant; Belstler, Chris, Plaintiff; Belstler, Dana, Plaintiff. Filing date: 6/4/2010	Lansing L. Haynes
	FJDE	VICTORIN	Judgment	Lansing L. Haynes
	STAT	VICTORIN	Case status changed: Closed	Lansing L. Haynes
7/14/2010	CVDI	LEU	Civil Disposition entered for: Conine, Howard, Defendant; Sheler, Karen, Defendant; Belstler, Chris, Plaintiff; Belstler, Dana, Plaintiff. Filing date: 7/14/2010	Lansing L. Haynes
	FJDE	LEU	Amended Judgment	Lansing L. Haynes

Chris Belstler, Dana Belstler vs. Karen Sheler, Howard Conine

Date	Code	User		Judge
7/16/2010		LEU	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Macomber, Arthur B (attorney for Belstler, Chris) Receipt number: 0031007 Dated: 7/16/2010 Amount: $101.00 (Check) For: Belstler, Chris (plaintiff) and Belstler, Dana (plaintiff)	Lansing L. Haynes
	APSC	LEU	Appealed To The Supreme Court	Lansing L. Haynes
	APDC	LEU	Appeal Filed In District Court	Lansing L. Haynes
	STAT	LEU	Case status changed: closed	Lansing L. Haynes
	BNDC	VICTORIN	Bond Posted - Cash (Receipt 31031 Dated 7/16/2010 for 100.00)	Lansing L. Haynes
	STAT	VICTORIN	Case status changed: Closed pending clerk action	Lansing L. Haynes
7/19/2010	MISC	LEU	Clerk's Certificate Of Appeal	Lansing L. Haynes
7/30/2010	BNDC	LEU	Bond Posted - Cash (Receipt 33401 Dated 7/30/2010 for 2164.50)	Lansing L. Haynes
8/6/2010		RICKARD	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Dodson, Charles M. (attorney for Sheler, Karen) Receipt number: 0034428 Dated: 8/6/2010 Amount: $101.00 (Check) For: Conine, Howard (defendant) and Sheler, Karen (defendant)	Lansing L. Haynes
10/6/2010	BNDV	RICKARD	Bond Converted (Transaction number 2315 dated 10/6/2010 amount 2,138.50)	Lansing L. Haynes
10/8/2010	BNDC	RICKARD	Bond Posted - Cash (Receipt 44070 Dated 10/8/2010 for 107.25)	Lansing L. Haynes
10/19/2010	BNDV	RICKARD	Bond Converted (Transaction number 2405 dated 10/19/2010 amount 107.25)	Lansing L. Haynes
	BNDV	RICKARD	Bond Converted (Transaction number 2406 dated 10/19/2010 amount 26.00)	Lansing L. Haynes

ARTHUR M. BISTLINE
LAYMAN, LAYMAN & ROBINSON, PLLP
110 Wallace Avenue
Coeur d'Alene, Idaho 83814
(208) 665-7270
(208) 665-7290 (fax)
ISB: 5216

Attorneys for Plaintiffs

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: 73 7631

2007 APR -9 PM 4:24

CLERK DISTRICT COURT
DEPUTY

SUMMONS ISSUED
APR 09 2007

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, Husband and Wife,

Plaintiffs,

vs.

KAREN SHELER and HOWARD CONINE, Husband and wife, and the marital community composed thereof,

Defendants.

Case No. 07- 2523

COMPLAINT AND DEMAND FOR JURY TRIAL

For a cause of action, Plaintiffs, allege as follows:

1) Plaintiffs DANA BELSTLER and CHRIS BELSTLER, at all times material hereto, were and are husband and wife, and reside in Kootenai County, Idaho, at 7316, W. Chandler Lane.

2) Defendants KAREN SHELER and HOWARD CONINE may or may not be husband and wife, but upon information and belief, at all times material hereto, said defendants did reside in the State of Washington, and were and are the owners of the real property located at 7200 W. Chandler Lane, in Kootenai County, Idaho.

3) Defendants presently utilize a portion of Plaintiffs' property to access their property.

4) Plaintiffs are entitled to an order allowing them to relocate the Defendants' access to their property in such a manner as to not unreasonably interfere with Defendants' use and enjoyment of their property.

ASSIGNED TO JUDGE HAYNES

5) Defendants presently have a gate located on Plaintiffs' property and Plaintiffs are entitled to an order directing that Defendants' remove the gate.

6) Plaintiffs have made demand on Defendants for the above and Defendants have unreasonably refused to acquiesce to the same. Plaintiffs are entitled to an order that Defendants reimburse them for their reasonable attorneys fees and costs incurred in prosecuting this action, with a reasonable sum being $1,500 in the event this matter proceeds by way of default for failure to answer the complaint and $100,000 being a reasonable sum in the event of default for any other reason, subject to Idaho Rule of Civil Procedure 54.

Wherefore, Plaintiffs pray that this Court enter an Order:

1) Allowing Plaintiffs to relocate Defendants' access;

2) Enjoining permanently Defendants from using the present access;

3) Allowing Plaintiffs to remove Defendants' gate and place it on Defendants' property;

4) Awarding Plaintiffs their reasonable attorneys fees and costs incurred in this action; and

5) Providing to Plaintiffs such other and further relief as the Court may deem fair and equitable.

A Jury Trial on all issues subject to trial by jury is requested.

DATED this 27th, day of March, 2007.

ARTHUR M. BISTLINE
Attorneys for Plaintiffs

VERIFICATION

STATE OF IDAHO)
) ss.
County of Kootenai)

DANA BELSTLER being first duly sworn, upon oath, deposes and says:

I am one of the Plaintiff in the above-entitled action and named in the foregoing instrument, and have read the contents thereof, and believe the same to be accurate and complete to the best of my knowledge, information and belief.
Dated this 27th Day of March 2007.

Dana Belstler

Subscribed and Sworn to before me this 27th, 2007.

Notary Public For Idaho
Residing at 110 Vallee, ID
Commission Expires

CHARLES M. DODSON
Attorney at Law
1424 Sherman Avenue, Suite 300
Coeur d'Alene ID 83814
(208) 664-1577
Facsimile (208) 666-9211
ISB #2134

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED: 756710
2007 AUG -8 PM 4: 04
CLERK DISTRICT COURT
Joanna Parker
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife, PLAINTIFFS, VS. KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, DEFENDANTS.	CASE NUMBER: CV-07-2523 ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM FEE CATEGORY: J 8b FEE: $14.00
KAREN SHELER CONINE and HOWARD CONINE, husband and wife, COUNTER PLAINTIFFS, VS. CHRIS BELSTLER and DANA BELSTLER, husband and wife, COUNTER DEFENDANTS.	

COMES NOW, the above named Defendants, CONINE, by and through their Attorney of Record, CHARLES M. DODSON, and by way of Answer, Affirmative Defenses, and Counterclaim, answer, admit, deny, affirmatively allege and counterclaim as follows:

ANSWER

I.

These Answering Defendants, except as specifically admitted herein, deny each and every allegation contained within the Plaintiffs' Complaint.

II.

These Answering Defendants are without sufficient knowledge to address the allegations contained within Paragraph 1. of Plaintiffs' Complaint, that the same appears to be true, and therefore admit the same.

III.

In response to Paragraph 2 of Plaintiffs' Complaint, these Answering Defendants admit that they are husband and wife, reside in the State of Washington, and are the owners or real property located at 7200 W. Chandler Lane in Kootenai County, Idaho.

IV.

In response to Paragraph 3 of Plaintiffs' Complaint, these Answering Defendants admit the same, and affirmative allege that these Answering Defendants are either entitled to (by document of record) the easement across the Plaintiffs' property, or have established the use of said easement by prescriptive use pursuant to Idaho Code Title 5, Chapter 2.

V.

In responding to Paragraph 4 of Plaintiffs' Complaint, these Answering Defendants deny the same.

VI.

In response to Paragraph 5 of Plaintiffs' Complaint, these Answering Defendants admit the existence of a gate, dispute whether or not the same is on the Plaintiffs' property, and deny that Plaintiffs are entitled to any Order directing the removal of the gate. Defendants further affirmatively allege that the location of a gate upon the easement of the Defendants upon the property of the Plaintiffs is authorized as a matter of law.

VII.

In responding to Paragraph 6 of Plaintiffs' Complaint, these Answering Defendants acknowledge the receipt of a demand, and deny each and every other allegation set forth therein.

AFFIRMATIVE DEFENSES

VIII.

These Answering Defendants raise the following Affirmative Defenses in response to Plaintiffs' Complaint:

A. Latches
B. Statute of Limitations
C. Easement by implication
D. Prescriptive Easement
E. Easement of Record

IX.

These Answering Defendant have been required to obtain the services of counsel for the defense of said matter, and, upon prevailing, are entitled to their reasonable attorneys fees and costs in an amount to be proven at the time of trial herein.

WHEREFORE, these Answering Defendants pray Judgment as follows:

1. That Plaintiffs' Complaint be dismissed;
2. That Defendants be awarded their attorneys fees and costs for the defense thereof.
3. For such other and further relief as the court deems just and equitable in the premises.

COUNTER CLAIM

COMES NOW the Defendants, and by way of Counterclaim, complaint and allege as against the Plaintiffs as follows:

I.

That the Defendants/Counter Plaintiffs KAREN SHELER CONINE and HOWARD CONINE (hereinafter referred to as CONINE), are residents of the State of Washington, and the owners of certain real property described on Exhibit "A" attached hereto and hereafter incorporated by reference as if fully set forth herein.

II.

That Plaintiff/Counter Defendants, DANA BELSTLER and DANA BELSTLER (hereafter referred to as BELSTLER) are believed to be husband and wife, residents of the County of Kootenai, and owners of adjacent property as the same lies immediately west of the property owned by CONINE described on Exhibit "A" attached hereto.

III.

That the court has jurisdiction over this matter pursuant to Idaho Code 5-401 et seq.

IV.

That CONINES have an easement located upon and across the northerly portion running east and west, of the property owned by BELSTLER commonly referred to as 7316 W. Chandler Lane, Kootenai County, Idaho.

V.

That CONINES and their predecessors in interest have used said road hereinabove referenced continuously, openly, notoriously, and without interruption for at least twenty (20) years for access to their property.

VI.

That in the alternative to the foregoing paragraph, CONINES have an Easement of Record, or by implication as the case may be, upon and across the property of BELSTLER.

VII.

That CONINE currently uses the road hereinabove referenced across the BELSTLER land for ingress and egress to the CONINE property.

VIII.

That BELSTLER seeks to unlawfully and unreasonably restrict CONINIE'S use of the road hereinabove described for access to the CONINE property, and as such CONINE'S have been damaged in an amount to be determined at the time of trial on the merits.

IX.

That CONINES have been required to obtain the services of counsel for the prosecution of this matter and are entitled to their reasonable attorneys fees and costs in an amount to be proven at the time of trial herein.

WHEREFORE, CONINES PRAY JUDGMENT on this Counterclaim as follows:

1. For a determination of the rights of the CONINES in the currently existing roadway located upon and across the property of BELSTLER, either as an Easement by prescription, an Implied Easement, or Express Easement created by recorded document;

2. For an award of CONINE'S attorney's fees and costs for the prosecution of this action;

3. For such other and further relief as the court deems just and equitable in the premises.

DATED this 8th day of August, 2007.

CHARLES M. DODSON
ATTORNEY AT LAW

I hereby certify that on the 8th day of August, 2007, a true and correct copy of the foregoing was:
transmitted, via facsimile:
to:

ARTHUR BISTLINE
ATTORNEY AT LAW
VIA FACSIMILE 208-665-7290

CHARLES M. DODSON
ATTORNEY AT LAW

ORDER NO. 34479

EXHIBIT "A"

That portion of the Northwest Quarter of the Northeast Quarter of Section 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County, Idaho, described as follows:

BEGINNING at the Northwest corner of the Northwest Quarter of the Northeast Quarter of said Section; thence

East along the North side of the Northwest Quarter of the Northeast Quarter, a distance of 510 feet; thence

South on a line parallel with the West line of the Northwest Quarter of the Northeast Quarter to the Northerly boundary of TERRACE ADDITION to Rockford Bay Summer Homes; thence

In a Westerly direction along the Northerly boundary line of said TERRACE ADDITION to the West line of the Northwest Quarter of the Northeast Quarter of Section 17; thence

North along said West line to the Northwest corner of the Northwest Quarter of the Northeast Quarter to the point of beginning.

EXCEPT any portion thereof lying within road right of way.

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 APR 30 PM 4:54

CLERK DISTRICT COURT

DEPUTY

ARTHUR M. BISTLINE
LAYMAN, LAYMAN & ROBINSON, PLLP
5431 N Government Way, Ste. 101A
Coeur d'Alene, Idaho 83815
(208) 665-7270
(208) 676-8680 (fax)
ISB: 5216

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, Husband and Wife, Plaintiffs, vs. KAREN SHELER and HOWARD CONINE, Husband and wife, and the marital community composed thereof, Defendants.	Case No. CV-07-2523 AFFIDAVIT OF CHRIS AND DANA BELSTLER

STATE OF IDAHO)
) ss.
County of Kootenai)

We, Chris Belstler and Dana Belstler having been first duly sworn, upon oath depose and state that:

1. We are over the age of eighteen (18) and residents of Kootenai County, State of Idaho.
2. We are familiar with the facts and circumstances surrounding this matter and are competent to testify as to the matters herein contained.

3. We are the owners of real property overlooking Rockford Bay, Lake Coeur d'Alene. We acquired our parcel from the Henry's and the Henry's from V.A. Sanders.
4. Defendants Howard Conine and Karen Sheler own the property immediately to the east of us.
5. Our property is crossed by three (3) different roads which the Conines have used to provide access to their property; the community road, Chandler Lane; a private drive, which diverges from Chandler Lane at approximately our property line; and the "lower road" located at the north end of our property. All three roads traverse the entire width of our property. These roads are drawn on Exhibit A to this Affidavit. Exhibit A is the merger of two (2) maps which is why some of the lines do not match up.
6. When we looked at the property, before we purchased it, we saw the private drive but did not think it went anywhere and that any use was made of that drive as it was narrow and not manicured. We did not see anyone use the private drive until a couple of months after we moved in. As the winter moved into spring and summer we met the Conines and noticed that when they were in town they used the private drive to access their property. We also noticed in the summer of 2006 that someone was driving trailers across the lower road and parking them on the Conine property.
7. In the summer of 2006 we approached the Conines and asked them to cease using the lower road and private drive. We offered to grant them an easement on the east side of our property that was sufficient to allow for an acceptable

grade into the Conine property off of Chandler Lane. We also offered to perform the work needed. The Conines ceased use of the lower road but never responded to our offer and stopped talking to us. The offer was conveyed again in November 2006 by our attorney and not responded to. That letter is attached as Exhibit B.

8. The only recorded documents pertaining to any easement across our property is Instrument Number 1119009, a true and correct copy of which is attached as Exhibit C. This instrument did show up on our title report, but was listed as an easement for the benefit of our parcel.

9. The Conines' use of the private drive impacts our property in the following ways:

    a. People driving across our drive can see into our home, again creating a very uncomfortable feeling for us. We cannot leave our large garage door open as we feel people are checking the contents out when they drive by. Simply put, the private drive causes traffic to come closer to our home than makes us feel comfortable.

    b. We are unable to make improvements on our property. An example is that we want to asphalt our drive and put up a retaining wall coming into our property.

    c. The road the Conines are using has a fairly decent sized seasonal creek. This is causing a problem for us as their usage and the overgrowth of brush is causing the creek to change its path. It now floods the road and is moving down towards the gate the Conines have

The creek flows from the road down the side of our yard. The Conines driving on this road has caused it to erode. There has been zero up-keep. They and their friends drive trucks and trailers with boats across this road to store their boats in the pole barn. It is not a properly constructed road and has soft soil.

d. Our well is only fifteen (15) feet from the drive, which is only ten (10) feet wide. Our well is placed too close road for the traffic it would get once the Conines move up here permanently. They come up infrequently now and only have two (2) pole barns, so the well placement, although a concern, is not yet an issue.

e. As of now the Conines pole barn and pole barn conversion are being used as a party place and side boat storage business. We have unknown people coming across our drive and too close to our home. We have experienced a lot of trash being thrown on our property and have had people walking across our drive at night for no reason.

f. Chandler Lane is properly constructed and is further from our house, giving us much more privacy. Chandler Lane (on our property) has gravel and is very wide. It has a proper culvert and drainage. It is a well built road. We have kept it up as far as landscaping. Due to the trees and bushes along the lane, people can not see into our home and garage with ease, as they do now.

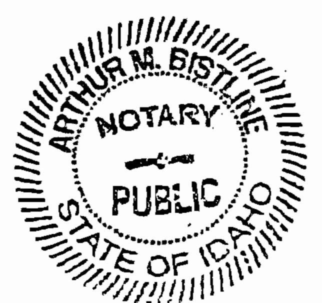
10. The existence of the lower road prevents us from making use of the only other flat part of our property. The property can be subdivided, but no residence can be constructed because of the location of the road.

Dated this 30 day of April, 2008.

DANA BELSTLER

CHRIS BELSTLER

SUBSCRIBED AND SWORN to before me this 30 day of April, 2008.



NOTARY PUBLIC in and for Idaho
Residing at: 514 S. 13th 83814
Commission Expires: 10-27-11

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2008, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

Charles M. Dodson
1424 Sherman Ave., Ste. 300
Coeur d'Alene, ID 83814
Fax: 666-9211

[ ] Hand-delivered
[ ] Regular mail
[ ] Certified mail
[ ] Overnight mail
[X] Facsimile
[ ] Interoffice Mail

BY: ______________________
JENNIFER HOSKINS

North
NW1/4 Sec.17 Twp. 48 N. R. 4 W B.M.
48N04W-17
Chandler Lane
Chandler Lane
Belster
Gonine
Private Drive
Lower Road
GOVT LOT 2
GOVT LOT 1
Sander's Rockford Bay Development 3rd Add
Terrace Add
GOVT LOT 3
GOVT LOT 4
Black Rock 1st Add
Sanders Rockford Development
Rockford Bay Summer Homes
Sanders Rockford Bay Development
Park Add
LAKE COEUR D'ALENE
LAKE COEUR D'ALENE
South
NW 1/4 Sec.17 Twp.48N.
E 1/2 Sec.17 Twp.48N. R.4W.B
EXHIBIT
A

LAW OFFICES

LAYMAN, LAYMAN & ROBINSON, PLLP

316 Occidental Avenue S.
Suite 500
Seattle, WA 98104
(206) 340-1314
Fax (206) 292-1790

601 South Division Street
Spokane, WA 99202-1335
(509) 455-8883
Fax (509) 624-2902 or
(509) 444-8290

Please reply to Coeur d'Alene

110 Wallace Avenue
Coeur d'Alene, ID 83814
(208) 665-7270
Fax (208) 665-7290

JOHN G. LAYMAN+
JOHN R. LAYMAN*
RICHARD C. ROBINSON+
PATTI JO FOSTER+
ASHLEY A. RICHARDS*
ANDREW A. SCHILLINGER+
ARTHUR M. BISTLINE*
AMIE L. ANDERSON°
AARON M. NACCARATO+

OF COUNSEL
*BRIAN C. BALCH

+Admitted in Washington
*Admitted in Washington and Idaho
°Admitted in Idaho

November 6, 2006

VIA CERTIFIED MAIL – RRR
7004 2510 0001 6830 6946

Howard and Karen Conine
20426 Damson Road
Lynnwood, WA 98036

Re: Belstler, Chris & Dana / Easement / Howard and Karen Conine
Our File: 27361

Dear Mr. and Mrs. Conine:

I represent Chris and Dana Belstler regarding various issues on their property.

The Belstlers approached you on August 5, 2006, with a request that you cease using an access to your property, going through their private driveway and begin using the actual easement on the upper road, which you have declined to do.

My initial impression is that the access you are presently using is not recited in any recorded document. As such, to continue your use of that driveway you will be required to expend thousands of dollars on attorneys' fees with no certainty of the outcome, or you can reconsider the Belstlers' very reasonable offer to excavate a driveway and provide an easement on their property to allow for a proper grade for that driveway. They, like you, would rather spend money on matters that add value, rather than attorneys' fees, and I can see no reason that their proposal will devalue your property. In addition, Mr. and Mrs. Belstler also recently had a property line survey done, to confirm encroachment of your gate, leading into your property. The gate you installed is approximately 2 feet onto the Belstlers' property. They are requesting that you move the gate onto your property, where it belongs. There is a legal marker, which is now a record of survey, showing the property line; your gate should be just behind the marker. If you agree to the Belstlers' proposal to build you a new driveway, the gate will not be necessary. If you do not, they will address it in the same suit as the driveway.

EXHIBIT
B

You have fifteen (15) days from receipt to respond to this letter. If I receive no response, I will schedule a court hearing on behalf of the Belstlers with regards to these two issues and the above offer will be rescinded. I have made equally clear to the Belstlers the potential costs to force the issue of the access, and they are committed to going forward if some resolution cannot be reached.

Our hope is to amicably resolve this situation privately. Mr. and Mrs. Belstler are open to dialog regarding this issue and hope to hear from you. If you are not interested in any sort of resolution of this matter, Mr. and Mrs. Belstler request that you attend mediation as soon as all schedules permit. Please contact me if you have any questions or comments.

Very truly yours,

LAYMAN, LAYMAN & ROBINSON, PLLP

ARTHUR M. BISTLINE

AMB/sld
cc: Chris and Dana Belstler

R6 Private Road/Drive

1119009

MUTUAL AGREEMENT FOR EASEMENT FOR INGRESS AND EGRESS

WITNESSETH:

WHEREAS, V. A. SANDERS and GERALDINE C. SANDERS, husband and wife, are the owners of the East 660.4 ft. of the NW¼ lying North of Rockford Bay Road #66C in Section 17, Township 48 North, Range 4 W.B.M., in Kootenai County, Idaho; and are selling the following described property to KENNETH L. HENRY, a single man:

> All that portion of Gov. Lot 1, Section 17, Township 48 N., Range 4 W.B.M., described as follows: Beginning at the Northeast corner of Gov. Lot 1; thence North 89°36' West along the North line of said Gov. Lot 1, 330.2 ft.; thence South 0°24' West to a point on the North line of Rockford Bay Road; thence Easterly along said North line of Rockford Bay Road to a point which bears South 0°24' West from the Point of beginning; thence North 0°24' East to the Point of Beginning.

WHEREAS, it is necessary to execute a joint easement for ingress and egress; NOW THEREFORE, V.A. SANDERS and GERALDINE C. SANDERS grant an easement to KENNETH L. HENRY over the Southerly portion of the Westerly 330.2' of Gov. Lot 1 of approximately 20 ft. in width North and South and 330.2' East and West, in an area adjacent to Rockford Bay Road and in front of the fire station located thereon.

KENNETH L. HENRY grants an easement continuing the existing road in the Southerly part of the property that he is purchasing from V. A. SANDERS and GERALDINE C. SANDERS and the Northerly part of the property that he is purchasing from V. A. SANDERS and GERALDINE C. SANDERS to LINDA MERWIN, who owns the property in the NE¼ of Section 17, Township 48 N., Range 4 W.B.M., Kootenai County, Idaho. Said easements are the continuation of the existing logging road running parallel to Rockford Bay Road on the South and the existing road from the community road on the North.

DATED this 6 day of June, 1988.

V. A. Sanders
V. A. SANDERS

Geraldine C. Sanders
GERALDINE C. SANDERS

Kenneth L. Henry
KENNETH L. HENRY

018

EXHIBIT

C

1119009

STATE OF WASHINGTON)
)ss.
County of Spokane)

On this day personally appeared before me V. A. SANDERS and GERALDINE C. SANDERS to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 6 day of June, 1988.

Notary Public in and for the State of Washington, residing at Spokane

STATE OF WASHINGTON)
)ss.
County of Spokane)

On this day personally appeared before me KENNETH L. HENRY to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 7 day of June, 1988.

Notary Public in and for the State of Washington, residing at Spokane

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
AT THE REQUEST OF R. Maurice Cooper
At 05 minutes past 10 o'clock A M
Shirley Deitz
JUN 8 1988
By Deputy
Fee $ 6.00
Return to P.O. 5472
Spokane, WA 99205

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2008 JUN 23 PM 3:50

CLERK DISTRICT COURT
DEPUTY

CHARLES M. DODSON
Attorney at Law
1424 Sherman Avenue, Suite 300
Coeur d'Alene ID 83814
(208) 664-1577
Facsimile (208) 666-9211
ISB #2134

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife, PLAINTIFFS, VS. KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, DEFENDANTS.	CASE NUMBER: CV-07-2523 AFFIDAVIT OF KAREN SHELER CONINE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
KAREN SHELER CONINE and HOWARD CONINE, husband and wife, COUNTER PLAINTIFFS, VS. CHRIS BELSTLER and DANA BELSTLER, husband and wife, COUNTER DEFENDANTS.	

STATE OF)
)ss.
County of)

KAREN SHELER CONINE being first duly sworn on oath deposes and states as follows:

1. Affiant makes this Affidavit on the basis of her own personal information, belief and knowledge, and facts to which she could testify if called to do so in a court of law.

2. Affiant, together with her husband, HOWARD CONINE, purchased property situate in the County of Kootenai, State of Idaho, more particularly described on Exhibit "A" attached hereto, which property was purchased on or about the 25th day of June, 1998 from GARY H. SOLOMON and JUDITH A. SOLOMON.

3. At the time of purchase there was a roadway extending from Sanders Lane across the property of the Plaintiffs for access to the property identified on Exhibit "A", which was the only physical means of access to the buildings located on the property described as Exhibit "A". I commonly refer to that as our private driveway, and it has been the only access to the property since it was subdivided by Mr. Sanders well over twenty years ago. That private driveway is the only physical access to our property, the upper portion of Sanders Lane being steep, and well elevated above the building site which we currently occupy on the property described as Exhibit "A".

4. There is no other access off of Sanders Lane, which is also known as Chandler Lane, onto our property other than the private driveway which traverses Belstlers property and to reconstruct a road from the extension of Chandler Lane/Sander Lane would be literally physically impossible based upon my observations, the elevations and the distances.

5. At the time of purchase of our property we were advised that the road referred to as the lower road by the Belstlers in their Motion for Summary Judgment and supporting documents that runs next to the Worley Fire Department, was an easement road to the lower half of our 8.9 acres. The Belstlers blocked the use of that road on occasion, although we have continued to use that road.

6. Until the Belstlers raised the issue of the use of our private drive to our buildings on our property, no one ever questioned our use of the private driveway, and apparently, according to the deposition of Jerry Ronald Evans, which I have reviewed, that private drive has been in existence well over twenty years.

7. Over the past ten years of ownership, my husband and I have maintained the road (private drive) which crosses the Belstlers property, almost every year by having it re-graveled. We have avoided doing so for the last two years to avoid unnecessary confrontations with the Belstlers. We are fully aware that when the Belstlers were examining the property for purchase, they could see clearly the private drive was newly graveled and well maintained.

8. We do not have any other physical access from Chandler Lane to our property, and to cut off the private drive would leave our property inaccessible for the purposes of accessing the buildings constructed upon our property. Subsequent to our purchase we also added a 36 X 110 pole building to our property, using the private drive for access for the construction materials and workmen. That building is not being used for any commercial purposes, and is used primarily by HOWARD CONINE for his boat and car collection. As of the date of making this Affidavit, stored within the building are a travel trailer, a Cadillac Aliante, a 1971 Mustang, a 1978 Lincoln, a 1972 Ford 4X4 pickup, a 1980 Bayliner Boat, a 1988 Welcraft Boat, a 1977 Eliminator Boat, a 1977 Tahiti Boat, a 1994 Jeep Cherokee, a 1985 Winebago Motor Home and a friend's travel trailer. Additionally, our neighbor stored two jet skis, without cost, over the winter in that building.

9. During the course of our ownership we used the lower access road and offered it to the neighboring resort to use to store empty boat trailers on the lower portion of our property which is out of sight of both our buildings, which we use when on site, and also out of sight of the Belstler house.

10. We have not at any time used our property for commercial purposes.

11. We did remove the storage of boat trailers after the Belstlers demanded they be removed.

12. The Belstlers' private home sits at least forty yards away from private drive we use to access our structures and property. The back of the Belstler house faces the private drive and only recently, after the Belstlers remodeled, did they install a floor to ceiling window and large glass wood door which allows them to see any vehicle travel on our private drive across the rear of their property.

13. Shortly after the Belstlers purchased their property they were invited to our residence for a barbeque, had the opportunity to walk down our private drive, and they raised no objection. It was

quite some time later, many months, the Belstlers raised the issue that they did not want my husband and I or our guests using the private drive.

14. After it became clear the Belstlers did not desire us to use our private drive, the Belstlers cleared and improved, what we now understand to be that portion of Chandler Lane/Sandler Lane which is raised significantly in elevation above our buildings and structures, and had never been used by us, and as we understand it, had not been used by the SOLOMONS, Mr. Kluss or Linda Merwin (our predecessors in interest). To our knowledge, that upper road (extension of Chandler Lane/Sanders Lane) has not been maintained or used for over twenty years. Further, it has been blocked at its end by a gate and fence at the Black Rock Golf Course.

15. To eliminate the private drive and force us to use the extension of Chandler Lane/Sanders Lane that has now been improved on our property by the Belstlers would be literally impossible in the winter time due to incline, assuming arguendo a road could actually be "cut" to the buildings on our property.

16. Over the course of ownership we have visited our Idaho property described on Exhibit "A" literally every other weekend, including the winter time, with one exception when the snow on Snoqualmie Pass was treacherous to get through (we live in Western Washington Coast).

17. The Belstlers, in their Affidavit, which I have read, are stating that my husband and I use the Idaho property as a party place. Mr. Conine is 61 years old and I am 56 years old. We do have barbeques with friends occasionally in the summer but we do not "party".

18. Early in our neighborly relationship with the Belstlers shortly after they purchased their property, Mrs. Belstler specifically advised me "we didn't even known when you were here", meaning they had not even noticed when we drove across the private drive.

19. The Belstlers in their Affidavit indicate the Road is close to their well. The private drive is also close to our well, and does not cause problems for either well to our knowledge.

20. As to the Belstlers proposal to relocate our road depending upon the proposed relocation, such a road would be a terribly steep incline, and in all likelihood run directly across our well location.

21. At the time of our purchase and taking of possession of our property, there was a boat stored in the building on our property, and we were required to contact the SOLOMONS, our predecessors in interest, through our realtor to have that boat removed. That boat is evidence the property was used by the SOLOMONS or one of their guests or invitees.

22. I have, through my attorney, obtained copies of documents that relate to our land. One of those documents is a Mutual Agreement for Easement for Ingress and Egress recorded as Instrument No. 1119009, a copy of which is attached as Exhibit "B". I understand that document to be an Agreement which allows for the use of our lower road next to the fire station.

23. I also obtained, through my attorney, a document which was signed by Linda L. Merwin and V.A. Sanders, a copy of which is attached as Exhibit "C". It is my understanding that document was memorialization of a verbal agreement between Linda L. Merwin and V.A. Sanders allowing for the access through the property owned by V. A. Sanders (which is now the Belstlers property and others). That document clearly shows Linda Merwin was aware of the status of the private drive and the benefits of access.

24. At the time of closing of our purchase we obtained a Title Report, a true and correct copy of which is attached as Exhibit "D". Referenced in that Title Report is a Joint Use and Maintenance Agreement, signed by our predecessor in interest, Mr. Kluss. That provides for a Joint Use and Maintenance Agreement upon the road that existed in 1991, and based upon our physical examination of the premises in 1998 the only road that could refer to is the private drive. A copy of that Joint Use and Maintenance Agreement is attached as Exhibit "E".

25. In Paragraph 9, Subsection c of their Affidavits, the Belstlers claim there is a "fairly descent sized seasonal creek" adjacent to our private drive. They also claim it is causing problems by causing the creek to change its path. To our knowledge, based upon our examination and presence at the property, that creek does not flood the road nor has our driving of the private drive caused it to erode. Notwithstanding the comments by the Belstlers, we have always provided upkeep to our private drive, with the exception of the last year or so in order not to be involved in a confrontation with the Belstlers.

FURTHER AFFIANT SAITH NOT.

DATED this 19 day of June, 2008.

KAREN SHELER CONINE

SUBSCRIBED AND SWORN TO before me this 19th day of June, 2008.

Notary Public
State of Washington
RICHELLE ANGELONE
My Appointment Expires Feb 15, 2011

NOTARY PUBLIC FOR:
RESIDING AT: Lynnwood Fedex Office
MY COMMISSION EXPIRES: 02-15-11

I hereby certify that on the 23 day of June, 2007, a true and correct copy of the foregoing was: ~~transmitted, via facsimile:~~ personally delivered to:

ARTHUR BISTLINE
ATTORNEY AT LAW
~~VIA FACSIMILE 208-665-7290~~

CHARLES M. DODSON
ATTORNEY AT LAW

ORDER NO. 34479

EXHIBIT "A"

That portion of the Northwest Quarter of the Northeast Quarter of Section 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County, Idaho, described as follows:

BEGINNING at the Northwest corner of the Northwest Quarter of the Northeast Quarter of said Section; thence

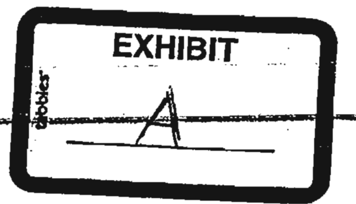
East along the North side of the Northwest Quarter of the Northeast Quarter, a distance of 510 feet; thence

South on a line parallel with the West line of the Northwest Quarter of the Northeast Quarter to the Northerly boundary of TERRACE ADDITION to Rockford Bay Summer Homes; thence

In a Westerly direction along the Northerly boundary line of said TERRACE ADDITION to the West line of the Northwest Quarter of the Northeast Quarter of Section 17; thence

North along said West line to the Northwest corner of the Northwest Quarter of the Northeast Quarter to the point of beginning.

EXCEPT any portion thereof lying within road right of way.



R6 Private Road/Drive

1119009

MUTUAL AGREEMENT FOR EASEMENT FOR INGRESS AND EGRESS

WITNESSETH:

WHEREAS, V. A. SANDERS and GERALDINE C. SANDERS, husband and wife, are the owners of the East 660.4 ft. of the NW¼ lying North of Rockford Bay Road #66C in Section 17, Township 48 North, Range 4 W.B.M., in Kootenai County, Idaho; and are selling the following described property to KENNETH L. HENRY, a single man:

> All that portion of Gov. Lot 1, Section 17, Township 48 N., Range 4 W.B.M., described as follows:
> Beginning at the Northeast corner of Gov. Lot 1; thence North 89°36' West along the North line of said Gov. Lot 1, 330.2 ft.; thence South 0°24' West to a point on the North line of Rockford Bay Road; thence Easterly along said North line of Rockford Bay Road to a point which bears South 0°24' West from the Point of beginning; thence North 0°24' East to the Point of Beginning.

WHEREAS, it is necessary to execute a joint easement for ingress and egress; NOW THEREFORE, V.A. SANDERS and GERALDINE C. SANDERS grant an easement to KENNETH L. HENRY over the Southerly portion of the Westerly 330.2' of Gov. Lot 1 of approximately 20 ft. in width North and South and 330.2' East and West, in an area adjacent to Rockford Bay Road and in front of the fire station located thereon.

KENNETH L. HENRY grants an easement continuing the existing road in the Southerly part of the property that he is purchasing from V. A. SANDERS and GERALDINE C. SANDERS and the Northerly part of the property that he is purchasing from V. A. SANDERS and GERALDINE C. SANDERS to LINDA MERWIN, who owns the property in the NE¼ of Section 17, Township 48 N., Range 4 W.B.M., Kootenai County, Idaho. Said easements are the continuation of the existing logging road running parallel to Rockford Bay Road on the South and the existing road from the community road on the North.

DATED this 6 day of June, 1988.

V.A. Sanders
V. A. SANDERS

Geraldine C. Sanders
GERALDINE C. SANDERS

Kenneth L. Henry
KENNETH L. HENRY

EXHIBIT
B

1119009

STATE OF WASHINGTON)
)ss.
County of Spokane)

On this day personally appeared before me V. A. SANDERS and GERALDINE C. SANDERS to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 6 day of June, 1988.

[signature]
Notary Public in and for the State of Washington, residing at Spokane

STATE OF WASHINGTON)
)ss.
County of Spokane)

On this day personally appeared before me KENNETH L. HENRY to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 7 day of June, 1988.

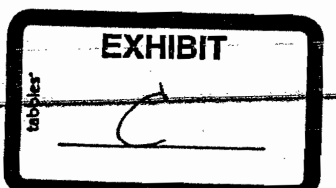
[signature]
Notary Public in and for the State of Washington, residing at Spokane

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
AT THE REQUEST OF R. Maurice Cooper
At 05 minutes past 10 o'clock A M
Shirley Deitz
JUN 8, 1988
By Marion Griffith
Deputy
Fee $ 6.00
Return to P.O. 5432
Spokane, WA. 99205

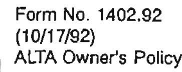
According to a verbal agreement between the undersigned parties, an easement on the northwest corner of the property owned by Linda L. Merwin was granted in exchange for access from the county road thorough property owned by V. A. Sanders. Further, any additional access thorough the Merwin property had to be mutually agreed to by both undersigned parties.

This verbal agreement was made to provide Mr. Sanders with the authority to complete the present road and provide him access to his other property. This agreement was clearly beneficial to both parties.

Linda L. Merwin　　　　V A Sanders



FIRST AMERICAN
First American Title Insurance Company
POLICY
OF
TITLE
INSURANCE
FIRST AMERICAN TITLE INSURANCE COMPANY
INCORPORATED
SEPTEMBER 24, 1968
CALIFORNIA
EXHIBIT
D


Form No. 1402.92
(10/17/92)
ALTA Owner's Policy

POLICY OF TITLE INSURANCE

ISSUED BY

First American Title Insurance Company

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B AND THE CONDITIONS AND STIPULATIONS, FIRST AMERICAN TITLE INSURANCE COMPANY, a California corporation, herein called the Company, insures, as of Date of Policy shown in Schedule A, against loss or damage, not exceeding the Amount of Insurance stated in Schedule A, sustained or incurred by the insured by reason of:

1. Title to the estate or interest described in Schedule A being vested other than as stated therein;
2. Any defect in or lien or encumbrance on the title;
3. Unmarketability of the title;
4. Lack of a right of access to and from the land.

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of the title, as insured, but only to the extent provided in the Conditions and Stipulations.

First American Title Insurance Company

BY *Parker S. Kennedy* PRESIDENT

980326 ATTEST *Mark R Arnesen* SECRETARY

J

estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT.

The insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 4(a) below, (ii) in case knowledge shall come to an insured hereunder of any claim of title or interest which is adverse to the title to the estate or interest, as insured, and which might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if title to the estate or interest, as insured, is rejected as unmarketable. If prompt notice shall not be given to the Company, then as to the insured all liability of the Company shall terminate with regard to the matter or matters for which prompt notice is required; provided, however, that failure to notify the Company shall in no case prejudice the rights of any insured under this policy unless the Company shall be prejudiced by the failure and then only to the extent of the prejudice.

4. DEFENSE AND PROSECUTION OF ACTIONS; DUTY OF INSURED CLAIMANT TO COOPERATE.

(a) Upon written request by the insured and subject to the options contained in Section 6 of these Conditions and Stipulations, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an insured in litigation in which any third party asserts a claim adverse to the title or interest as insured, but only as to those stated causes of action alleging a defect, lien or encumbrance or other matter insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the insured to object for reasonable cause) to represent the insured as to those stated causes of action and shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs or expenses incurred by the insured in the defense of those causes of action which allege matters not insured against by this policy.

(b) The Company shall have the right, at its own cost, to institute and prosecute any action or proceeding or to do any other act which in its opinion may be necessary or desirable to establish the title to the estate or interest, as insured, or to prevent or reduce loss or damage to the insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable hereunder, and shall not thereby concede liability or waive any provision of this policy. If the Company shall exercise its rights under this paragraph, it shall do so diligently.

(c) Whenever the Company shall have brought an action or interposed a defense as required or permitted by the provisions of this policy, the Company may pursue any litigation to final determination by a court of competent jurisdiction and expressly reserves the right, in its sole discretion, to appeal from any adverse judgment or order.

(d) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding, the insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, and all appeals therein, and permit the Company to use, at its option, the name of the insured for this purpose. Whenever requested by the Company, the insured, at the Company's expense, shall give the Company all reasonable aid (i) in any action or proceeding, securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act which in the opinion of the Company may be necessary or desirable to establish the title to the estate or interest as insured. If the Company is prejudiced by the failure of the insured to furnish the required cooperation, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

5. PROOF OF LOSS OR DAMAGE.

In addition to and after the notices required under Section 3 of these Conditions and Stipulations have been provided the Company, a proof of loss or damage signed and sworn to by the insured claimant shall be furnished to the Company within 90 days after the insured claimant shall ascertain the facts giving rise to the loss or damage. The proof of loss or damage shall describe the defect in, or lien or encumbrance on the title, or other matter insured against ...

(b) To Pay or Otherwise Settle With Parties Other than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an insured claimant any claim insured against under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay; or

(ii) to pay or otherwise settle with the insured claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees and expenses incurred by the insured claimant which were authorized by the Company up to the time of payment and which the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in paragraphs (b)(i) or (ii), the Company's obligations to the insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute or continue any litigation.

7. DETERMINATION, EXTENT OF LIABILITY AND COINSURANCE.

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the insured claimant who has suffered loss or damage by reason of matters insured against by this policy and only to the extent herein described.

(a) The liability of the Company under this policy shall not exceed the least of:

(i) the Amount of Insurance stated in Schedule A; or

(ii) the difference between the value of the insured estate or interest as insured and the value of the insured estate or interest subject to the defect, lien or encumbrance insured against by this policy.

(b) In the event the Amount of Insurance stated in Schedule A at the Date of Policy is less than 80 percent of the value of the insured estate or interest or the full consideration paid for the land, whichever is less, or if subsequent to the Date of Policy an improvement is erected on the land which increases the value of the insured estate or interest by at least 20 percent over the Amount of Insurance stated in Schedule A, then this Policy is subject to the following:

(i) where no subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that the Amount of Insurance at Date of Policy bears to the total value of the insured estate or interest at Date of Policy; or (ii) where a subsequent improvement has been made, as to any partial loss, the Company shall only pay the loss pro rata in the proportion that 120 percent of the Amount of Insurance stated in Schedule A bears to the sum of the Amount of Insurance stated in Schedule A and the amount expended for the improvement.

The provisions of this paragraph shall not apply to costs, attorneys' fees and expenses for which the Company is liable under this policy, and shall only apply to that portion of any loss which exceeds, in the aggregate, 10 percent of the Amount of Insurance stated in Schedule A.

(c) The Company will pay only those costs, attorneys' fees and expenses incurred in accordance with Section 4 of these Conditions and Stipulations.

8. APPORTIONMENT.

If the land described in Schedule (A)(C) consists of two or more parcels which are not used as a single site, and a loss is established affecting one or more of the parcels but not all, the loss shall be computed and settled on a pro rata basis as if the Amount of Insurance under this policy was divided pro rata as to the value on Date of Policy of each separate parcel to the whole, exclusive of any improvements made subsequent to Date of Policy, unless a liability or value has otherwise been agreed upon as to each parcel by the Company and the insured at the time of the issuance of this policy and shown by an express statement or by an endorsement attached to this policy.

9. LIMITATION OF LIABILITY.

(a) If the Company establishes the title, or removes the alleged defect, lien or encumbrance, or cures the lack of a right of access to or from the land, or cures the claim of unmarketability of title, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals therefrom, it shall have fully performed its obligations ...

the insured claimant shall transfer to the Company all rights and remedies against any person or property necessary in order to perfect this right of subrogation. The insured claimant shall permit the Company to sue, compromise or settle in the name of the insured claimant and to use the name of the insured claimant in any transaction or litigation involving these rights or remedies.

If a payment on account of a claim does not fully cover the loss of the insured claimant, the Company shall be subrogated to these rights and remedies in the proportion which the Company's payment bears to the whole amount of the loss.

If loss should result from any act of the insured claimant, as stated above, that act shall not void this policy, but the Company, in that event, shall be required to pay only that part of any losses insured against by this policy which shall exceed the amount, if any, lost to the Company by reason of the impairment by the insured claimant of the Company's right of subrogation.

(b) **The Company's Rights Against non-insured Obligors.**

The Company's right of subrogation against non-insured obligors shall exist and shall include, without limitation, the rights of the insured to indemnities, guaranties, other policies of insurance or bonds, notwithstanding any terms or conditions contained in those instruments which provide for subrogation rights by reason of this policy.

14. ARBITRATION.

Unless prohibited by applicable law, either the Company or the insured may demand arbitration pursuant to the Title Insurance Arbitration Rules of the American Arbitration Association. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the insured arising out of or relating to this policy, any service of the Company in connection with its issuance or the breach of a policy provision or other obligation. All arbitrable matters when the Amount of Insurance is $1,000,000 or less shall be arbitrated at the option of either the Company or the insured. All arbitrable matters when the Amount of Insurance is in excess of $1,000,000 shall be arbitrated only when agreed to by both the Company and the insured. Arbitration pursuant to this policy and under the Rules in effect on the date the demand for arbitration is made or, at the option of the insured, the Rules in effect at Date of Policy shall be binding upon the parties. The award may include attorneys' fees only if the laws of the state in which the land is located permit a court to award attorneys' fees to a prevailing party. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof.

The law of the situs of the land shall apply to an arbitration under the Title Insurance Arbitration Rules.

A copy of the Rules may be obtained from the Company upon request.

15. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT.

(a) This policy together with all endorsements, if any, attached hereto by the Company is the entire policy and contract between the insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage, whether or not based on negligence, and which arises out of the status of the title to the estate or interest covered hereby or by any action asserting such claim, shall be restricted to this policy.

(c) No amendment of or endorsement to this policy can be made except by a writing endorsed hereon or attached hereto signed by either the President, a Vice President, the Secretary, an Assistant Secretary, or validating officer or authorized signatory of the Company.

16. SEVERABILITY.

In the event any provision of the policy is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision and all other provisions shall remain in full force and effect.

17. NOTICES, WHERE SENT.

All notices required to be given the Company and any statement in writing required to be furnished the Company shall include the number of this policy and shall be addressed to the Company at 114 East Fifth Street, Santa Ana, California ...

EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from coverage of this policy and the Company will not pay lo or damage, costs, attorneys' fees or expenses whicl arise by reason of:

1. (a) Any law, ordinance or governmental regulation (including but not limited to building and zoning laws, ordinances, or regulations) restricting, regulating, prohibitin or relating to (i) the occupancy, use, or enjoyment of the land; (ii) the character, dimensions or location of any improvement now or hereafter erected on th land; (iii) a separation in ownership or a change in the dimensions or area of the land or any parcel of which the land is or was a part; or (iv) environmenta protection, or the effect of any violation of these laws, ordinances or governmental regulations, except to the extent that a notice of the enforcement thereo or a notice of a defect, lien or encumbrance resulting from a violation or alleged violation affecting the land has been recorded in the public records at Dat of Policy.

   (b) Any governmental police power not excluded by (a) above, except to the extent that a notice of the exercise thereof or a notice of a defect, lien or encumbranc resulting from a violation or alleged violation affecting the land has been recorded in the public records at Date of Policy.

2. Rights of eminent domain unless notice of the exercise thereof has been recorded in the public records at Date of Policy, but not excluding from coverage an taking which has occurred prior to Date of Policy which would be binding on the rights of a purchaser for value without knowledge.

3. Defects, liens, encumbrances, adverse claims or other matters:
   (a) created, suffered, assumed or agreed to by the insured claimant;
   (b) not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy;
   (c) resulting in no loss or damage to the insured claimant;
   (d) attaching or created subsequent to Date of Policy; or
   (e) resulting in loss or damage which would not have been sustained if the insured claimant had paid value for the estate or interest insured by this policy.

4. Any claim, which arises out of the transaction vesting in the Insured the estate or interest insured by this policy, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that is based on:
   (i) the transaction creating the estate or interest insured by this policy being deemed a fraudulent conveyance or fraudulent transfer; or
   (ii) the transaction creating the estate or interest insured by this policy being deemed a preferential transfer except where the preferential transfer results from the failure:
      (a) to timely record the instrument of transfer; or
      (b) of such recordation to impart notice to a purchaser for value or a judgment or lien creditor.

CONDITIONS AND STIPULATIONS

1. DEFINITION OF TERMS.

The following terms when used in this policy mean:

(a) "insured": the insured named in Schedule A, and, subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.

(b) "insured claimant": an insured claiming loss or damage.

(c) "knowledge" or "known": actual knowledge, not constructive knowledge or notice which may be imputed to an insured by reason of the public records as defined in this policy or any other records which impart constructive notice of matters affecting the land.

(d) "land": the land described or referred to in Schedule (A), and improvements affixed thereto which by law constitute real property. The term "land" does not include any property beyond the lines of the area described or referred to in Schedule (A), nor any right, title, interest, estate or easement in abutting streets, roads, avenues, alleys, lanes, ways or waterways, but nothing herein shall modify or limit the extent to which a right of access to and from the land is insured by this policy.

(e) "mortgage": mortgage, deed of trust, trust deed, or other security instrument.

(f) "public records": records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without knowledge. With respect to Section 1(a)(iv) of the Exclusions From Coverage, "public records" shall also incude environmental protection liens filed in the records of the clerk of the United States district court for the district in which the land is located.

(g) "unmarketability of the title": an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

2. CONTINUATION OF INSURANCE AFTER CONVEYANCE OF TITLE

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an

by this policy which constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage. If the Company is prejudiced by the failure of the insured claimant to provide the required proof of loss or damage, the Company's obligations to the insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such proof of loss or damage.

In addition, the insured claimant may reasonably be required to submit to examination under oath by any authorized representative of the Company and shall produce for examination, inspection and copying, at such reasonable times and places as may be designated by any authorized representative of the Company, all records, books, ledgers, checks, correspondence and memoranda, whether bearing a date before or after Date of Policy, which reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the insured claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect and copy all records, books, ledgers, checks, correspondence and memoranda in the custody or control of a third party, which reasonably pertain to the loss or damage. All information designated as confidential by the insured claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the insured claimant to submit for examination under oath, produce other reasonably requested information or grant permission to secure reasonably necessary information from third parties as required in this paragraph, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

6. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY.

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance.

To pay or tender payment of the amount of insurance under this policy together with any costs, attorneys' fees and expenses incurred by the insured claimant, which were authorized by the Company, up to the time of payment or tender of payment and which the Company is obligated to pay.

Upon the exercise by the Company of this option, all liability and obligations to the insured under this policy, other

for any loss or damage caused thereby.

(b) In the event of any litigation, including litigation b the Company or with the Company's consent, the Compar shall have no liability for loss or damage until there has bee a final determination by a court of competent jurisdictio and disposition of all appeals therefrom, adverse to the titl as insured.

(c) The Company shall not be liable for loss c damage to any insured for liability voluntarily assumed by th insured in settling any claim or suit without the prior writte consent of the Company.

10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY.

All payments under this policy, except payments mad for costs, attorneys' fees and expenses, shall reduce th amount of the insurance pro tanto.

11. LIABILITY NONCUMULATIVE.

It is expressly understood that the Amount of In surance under this policy shall be reduced by any amount th Company may pay under any policy insuring a mortgage t which exception is taken in Schedule B or to which th insured has agreed, assumed, or taken subject, or which i hereafter executed by an insured and which is a charge o lien on the estate or interest described or referred to i Schedule A, and the amount so paid shall be deemed a payment under this policy to the insured owner.

12. PAYMENT OF LOSS.

(a) No payment shall be made without producing this policy for endorsement of the payment unless the policy has been lost or destroyed, in which case proof of loss or destruction shall be furnished to the satisfaction of the Company.

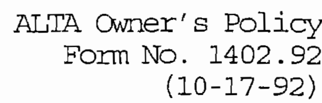
(b) When liability and the extent of loss or damage has been definitely fixed in accordance with these Conditions and Stipulations, the loss or damage shall be payable within 30 days thereafter.

13. SUBROGATION UPON PAYMENT OR SETTLEMENT.

033

(a) **The Company's Right of Subrogation.**

Whenever the Company shall have settled and paid a claim under this policy, all right of subrogation shall vest in



ALTA Owner's Policy
Form No. 1402.92
(10-17-92)

SCHEDULE A

Order No. 34479-MM

Policy No. J 980326

Amount of Insurance $75,000.00

Premium $467.50

Date of Policy: July 2, 1998 AT 2:44 P.M.

1. Name of Insured:

   KAREN SHELER CONINE, A MARRIED WOMAN

2. The estate or interest in the land which is covered by this policy is:

   FEE SIMPLE

3. Title to the estate or interest in the land is vested in:

   KAREN SHELER CONINE, A MARRIED WOMAN

4. The land referred to in this policy is described as follows:

   SEE ATTACHED EXHIBIT "A"

EXHIBIT "A"

That portion of the Northwest Quarter of the Northeast Quarter of Section 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County, Idaho, described as follows:

BEGINNING at the Northwest corner of the Northwest Quarter of the Northeast Quarter of said Section; thence

East along the North side of the Northwest Quarter of the Northeast Quarter, a distance of 510 feet; thence

South on a line parallel with the West line of the Northwest Quarter of the Northeast Quarter to the Northerly boundary of TERRACE ADDITION to Rockford Bay Summer Homes; thence

In a Westerly direction along the Northerly boundary line of said TERRACE ADDITION to the West line of the Northwest Quarter of the Northeast Quarter of Section 17; thence

North along said West line to the Northwest corner of the Northwest Quarter of the Northeast Quarter to the point of beginning.

EXCEPT any portion thereof lying within road right of way.

ALTA Owner's Policy
Form No. 1402.92
(10-17-92)
Schedule B

SCHEDULE B

Order No. 34479 Policy No. J 980326

EXCEPTIONS FROM COVERAGE

This policy does not insure against loss or damage (and the Company will not pay costs, attorneys' fees or expenses) which arise by reason of:

PART I
SECTION 1

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

2. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of said land or by making inquiry of persons in possession thereof.

3. Easements, claims or easement or encumbrances which are not shown by the public records.

4. Discrepancies, conflicts in boundary lines, shortage in area, encroachments, or any other facts which a correct survey would disclose, and which are not shown by public records.

5. (a) Unpatented mining claims; (b) reservations or exceptions in patents or in Acts authorizing the issuance thereof; (c) water rights, claims or title to water whether or not the matters excepted under (a), (b), or (c) are shown by the public records.

6. Any lien, or right to a lien, for services, labor or material theretofore or hereafter furnished, imposed by law and not shown by the public records.

SECTION 2

1. General taxes for the year 1998, a lien in the process of assessment not yet due or payable.

2. Reservations contained in Deed:

From:	Kathryn L. Anstadt
To:	Richard R. Anstadt
Dated:	April 9, 1974
Recorded:	April 10, 1974
Instrument No.:	646091

EXCEPTIONS FROM COVERAGE CONTINUED

3. An easement containing certain terms, conditions and provisions affecting a portion of said premises and for the purposes stated herein:

For:	An electric transmission and/or distribution line or system
In Favor of:	Kootenai Electric Cooperative, Inc.
Recorded:	April 3, 1991
Instrument No.:	1213469
Affects:	W. 510' of NW NE ex. Pl. Ptn., 17-48-4

4. Joint Use and Maintenance Agreement:

Dated:	July 12, 1991
Recorded:	July 12, 1991
Instrument No.:	1224548

5. Any law, ordinance or regulation of an Indian tribe or nation including but not limited to building and zoning ordinances, restricting or regulating or prohibiting the occupancy, use or enjoyment of the land, or regulating the character, dimensions or location of any improvement now or hereafter erected on the land, or prohibiting a separation in ownership or a reduction in the dimensions or area of the land, or the effect of any violation of any such law, ordinance or regulation.

Rights of eminent domain or rights of police power exercised by an Indian tribe or nation unless notice of the exercise of such rights appears in the public records at Date of Policy.

The policy excepts from coverage any matter relating to any easements, rights of way, encumbrances or defects in title which may be found in any records other than those matters which directly appear within the official records of Kootenai County, Idaho.

6. Deed of Trust to secure an indebtedness in the principal sum of $35,000.00, and any other amounts and/or obligations secured thereby:

Dated:	June 25, 1998
Recorded:	July 2, 1998
Instrument No.:	1544699
Grantor:	Karen Sheler Conine, a married woman
Trustee:	First American Title Company of Kootenai County, Inc., an Idaho Corporation
Beneficiary:	Gary H. Solomon and Judith A. Solomon, husband and wife

END OF SCHEDULE "B" EXCEPTIONS

EH

1224548

JOINT USE AND MAINTENANCE AGREEMENT

This agreement is entered into by and between the various owners of the tracts of land described as:

OWNERS NAME	LAND DESCRIPTION
Robert P. Kluss	48N 4W-17-0825 W510' of NW-NE EX PL PT
Kenneth L. Henry	48N04W-17-2450 LT1 EX Tax #5 & EX PL PT & EXW 293.21

It is necessary for the parties hereto to enter into an agreement for maintenance and repair of the following described roadway:

NE 1/4 of NW 1/4 Sec. 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County Idaho. Particularly, Sanders Lane, Rockford Bay, Coeur d'Alene, Idaho.

And the parties hereto agree as follows:

I. That each party hereto shall contribute equally, according to each lot owned, to the maintenance and repair of above described roadway;

2. That above described roadway will be constructed to be passable year-round and that no party hereto is authorized to or shall expect any other party to contribute to improvement by placing gravel or asphalt on the roadway without prior written agreement of all other parties;

3. The parties hereto agree to use said roadway for normal ingress and egress and utilities purposes relating to the property they own adjacent. Any party making use of the roadway in such a manner or such equipment that does significant damage shall be responsible for repairing such damage at their expense;

4. The parties hereto agree to share equally to the expense to the drainage ditches, conduits, titles or culverts required in order to assume safe, passable condition of roadway for indicated lots;

5. It is stated, however, that only the actual users of the above described roadway shall contribute to its maintenance and repair.

6. This agreement shall be binding on the heirs, successors and assigns of the parties hereto.

COUNTY OF KOOTENAI } SS
STATE OF
Kenneth L. Henry
JUL 12 12 49 PM '91
S. Weiss DEPUTY
FEES 6.00

(more)

EXHIBIT
E

1224548

Dated this 12th day of July, 1991.

Robert P. Kluss

Kenneth L. Henry

Georgia D. Henry

STATE OF WASHINGTON

County of Spokane

On this 12th day of July, 1991, Robert P. Kluss, Kenneth L. Henry and Georgia D. Henry appeared before me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 12th day of July, 1991.

Notary Public in and for the state of Washington residing at Spokane, WA.

Expiration date 10/92

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2009 FEB -3 PM 3:47

CLERK DISTRICT COURT
DEPUTY

Arthur B. Macomber, Attorney at Law
408 E. Sherman Avenue, Suite 215
Coeur d'Alene, ID 83814
Telephone: 208-664-4700
Facsimile: 208-664-9933
State Bar No. 7370
Attorney for Plaintiffs

ORIGINAL

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife;	)	Case No: **CV-07-2523**
Plaintiffs,	)	**AMENDED COMPLAINT FOR DECLARATORY JUDGMENT ON DEEDS, AND REQUEST FOR QUIET TITLE TO UPPER AND LOWER ROADS**
v.	)	
KAREN SHELER and HOWARD CONINE, husband and wife, and the marital community composed thereof; Defendants.	)	

INTRODUCTION

COMES NOW Plaintiffs CHRIS BELSTLER and DANA BELSTLER, husband and wife (hereinafter "BELSTLER"); by and through their attorney of record, Arthur B. Macomber, pursuant to the Idaho Uniform Declaratory Judgment Act at Idaho Code section 10-1201 et. seq., with an Amended Complaint for Declaratory Judgment on Deeds and to Quiet Title to certain Upper and Lower Roads against Defendants, KAREN SHELER and HOWARD CONINE, husband and wife (hereinafter "CONINE"), regarding interpretation and validity of certain recorded documents, and for quiet title to Belstlers' lands.

JURISDICTION

Plaintiffs BELSTER are title owners of Kootenai County real property. Defendants CONINE are title owners of Kootenai County real property, which parcel abuts the BELSTLER land. The alleged easements at issue are located on the Kootenai County real property of Plaintiffs BELSTLER whereupon they reside. This action concerns real property located in Kootenai County, Idaho; therefore, this Court has jurisdiction over the matter pursuant to Idaho Code Section 5-401.

JURY TRIAL

Plaintiffs voluntarily and knowingly waive their rights to jury trial.

STATEMENT OF FACTS

1. V.A. Sanders and Geraldine Sanders owned Government Lot 1 of Section 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County, Idaho and split the property into parcels.

2. On October 7, 1983, V.A. Sanders granted a 60-foot easement to Rockford Bay, Inc. recorded in Kootenai County as Instrument No. 953685 and which easement is now known as Chandler Lane. (Exhibit "A.")

3. On June 6, 1988, Sanders sold the Northeast 1/4 of the Northwest 1/4 of Section 17 to Kenneth Henry. Conditioned on fulfillment of that installment purchase contract recorded in Kootenai County as Instrument Number: 1119008. (Exhibit "B"). Henry granted certain easements in gross to a Linda Merwin, the former owner of Defendants' property recorded in Kootenai County as Instrument Number: 1119009. (Exhibit "C.")

4. On October 14, 2005, Plaintiffs BELSTLER purchased the real property from Kenneth Henry.

5. Plaintiffs BELSTLER are the title owners of that parcel of real property, which is located in the Northeast 1/4 of the Northwest 1/4 of Section 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County, Idaho.

6. Roy T. Smythe and Thelma Smythe owned the Northwest 1/4 of the Northeast 1/4 of Government Lots 3 and 4 of Section 17, Township 48 North, Range 4 West of the Boise Meridian and later split the property into parcels.

7. On October 21, 1961, Thelma Smythe sold the Northwest Quarter of the real property to Richard and Kathryn Andstadt.

8. On September 10, 1974, Richard Andstadt sold the real property to Linda Merwin.

9. On September 11, 1990, Linda Merwin sold the real property to Robert Peter Kluss.

10. On July 12, 1991, Robert Peter Kluss entered into a Road Maintenance Agreement with Kenneth Henry, see Exhibit "D," recorded in Kootenai County as Instrument No. 1224548. This agreement was later corrected to add specificity and was re-recorded in Kootenai County as Instrument No. 1224896, see Exhibit "E." This agreement confirmed that access to Defendants' property was to be by Sanders Lane, which is now Chandler Lane.

11. On November 26, 1993 Robert Peter Kluss sold the real property to Gary and Judith Solomon.

12. On July 2, 1998, Gary and Judith Solomon sold the real property to Defendants CONINE.

13. Defendants CONINE are the title owners of that parcel of real property, which is located in the Northeast 1/4 of the Northwest 1/4 of Section 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County, Idaho.

14. Plaintiffs BELSTLER and Defendants CONINE both use Chandler Lane to access their properties from Rockford Bay Road. Defendants CONINE claim the right

to use a driveway which diverges from Chandler Lane in a southerly direction at approximately Plaintiffs' property line, based on CONINES' claims about the meaning of language in Exhibit "C." The driveway (Upper Road) traverses the entire width of Plaintiffs' property.

15. Defendants also claim the right to access their property by way of a road which traverses the south end of Plaintiffs property, (Lower Road), based on language in Exhibit "C."

16. Defendants have installed a gate on Plaintiffs' property at the end of the driveway on the Upper road just before the driveway enters Defendants' property.

17. Plaintiffs are entitled to quiet title of the areas Upper and Lower roads, and a declaration Defendants are without any right to use the driveway (Upper Road) or the road at the south end (Lower Road) of Plaintiffs' property due to said easements being created in gross for Linda Merwin only.

18. In the alternative, Plaintiff's believe the Kluss-Henry Joint Use and Maintenance Agreement found in Instrument Number 1124896, see Exhibit "E", supersedes the alleged Henry-Merwin grant in Instrument Number 1119009, see Exhibit "C."

19. Plaintiffs are entitled to a judgment requiring Defendants to remove the gate on Plaintiffs' property.

20. Plaintiffs have expended attorney's fees and costs in an amount to be determined, which are attributable to Defendants' unlawful use of Plaintiffs' property.

WHEREFORE, Plaintiffs, pray for judgment as follows:

1. That the Court declare a judgment interpreting various recorded documents attached as Exhibits hereto;

2. Plaintiffs are entitled to Quiet Title to Upper and Lower roads.

3. Defendants are without any right to use the Upper and Lower roads. If Defendants are found to have a right to use the Upper or Lower roads, the roads shall be surveyed and located on the ground prior to inclusion any final judgment.

4. A mandatory injunction against Defendants CONINE from using the Upper or Lower roads on Plaintiffs' property.

5. Attorney's fees and costs in an amount to be determined at a later date.

6. Such other relief as this Court deems just and proper.

DATED this 29th day of January, 2009.

Arthur B. Macomber
Attorney at Law

VERIFICATION

STATE OF IDAHO)
) ss.
County of Kootenai)

I, DANA BELSTLER, being sworn, having read the foregoing, say the facts set forth herein are accurate and complete to the best of her knowledge and belief.

DANA BELSTLER

SUBSCRIBED AND SWORN to me this 29th day of January 2009.

(SEAL)

JUDY L. PARMER
NOTARY PUBLIC
STATE OF IDAHO

Judy L. Parmer
NOTARY PUBLIC FOR IDAHO
Residing at: Oldtown
My Commission Expires: 08/23/2014

Mail to: Rockford Bay, Inc
Box 14558
Spokane, Wash - 99214

Order #N/O 83-314

BOOK 326 PAGE 516

953685

EASEMENT

THE GRANTORS, V. A. SANDERS and GERALDINE C. SANDERS, husband and wife, for good and valuable consideration, receipt of which is hereby acknowledged, hereby conveys and quit claims to ROCKFORD BAY, INC., a Washington corporation, the Grantee, a Sixty (60) foot wide easement for ingress and egress, the centerline of said easement being also centerline of an existing road across the East 660.4 feet of Government Lot 1, (referred to on the Record of Survey by Webb Engineering in Book 1 of Surveys, page 284) in Government Lot 1 of Section 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County, Idaho, and said centerline being described as follows:

Commencing at a point on the centerline of Rockford Bay Road (No. 66-C) from which the North Quarter corner of Section 17 bears North 26°14'40" East, 997.42 feet; thence

North 1°54'14" East, 30 feet, more or less, to the Northerly right-of-way line of said Rockford Bay Road and the centerline of the herein described easement and the true point of beginning for this description; thence

Northerly and Westerly along said centerline as follows:

North 1°54'14" East, 25.0 feet, more or less, to point from which the aforesaid point bears South 1°54'14" West, 54.28 feet; thence

North 15°13'32" West, 49.43 feet; thence

North 47°37'08" West, 50.72 feet; thence

South 79°38'30" West, 52.83 feet; thence

South 68°54'13" West, 51.82 feet; thence

South 59°36'44" West, 51.07 feet; thence

North 79°23'09" West, 20 feet, more or less, to the West line of the East 660.4 feet of Government Lot 1, and the point of terminus for this segment of the herein described easement;

AND

Beginning at the West line of the East 660.4 feet of Government Lot 1 and the centerline of the herein described easement from which the aforesaid point of terminus bears South 265 feet, more or less; thence

Northeasterly along said centerline as follows:

North 79°49'30" East, 75 feet, more or less, to a point from which the North Quarter corner of Section 17 bears North 49°3?'36" East, 776.9? feet; thence

3/33/02

Exhibit "A"

North 74°36'48" East, 38.77 feet; thence

North 53°48'09" East, 74.82 feet; thence

North 46°35'52" East, 49.41 feet; thence

North 55°47'56" East, 44.93 feet; thence

North 58°25'58" East, 76.97 feet; thence

North 53°46'31" East, 46.62 feet; thence

North 46°14'36" East, 47.16 feet; thence

North 49°27'12" East, 66.63 feet; thence

North 66°12'[illegible]" East, 63.94 feet; thence

North 84°42'55" East, 53.24 feet; thence

South 89°[illegible]'18" East, 54.63 feet; thence

South 8[illegible]°[illegible]4'00" East, 51.96 feet to a point from which th[illegible] North Quarter corner of Section 17 bears North 2°[illegible]'[illegible]4" East, 218.69 feet; thence

North [illegible]°[illegible]5'14" East, 10 feet, more or less, to the East [illegible] of Government Lot 2 and the point of termin[illegible] of this segment of the herein described ease[illegible].

Said Easement shall be perpetual and shall run with the land, and shall inure to the benefit of the Grantee, its successors, or assigns, and shall serve and benefit the following described real property:

> The Southeast Quarter of the Southwest Quarter and the Southwest Quarter of the Southeast Quarter, the Southeast Quarter of the Southeast Quarter and the Southeast Quarter of the Northeast Quarter of the Southeast Quarter all in Section 8; the Southwest Quarter of the Northwest Quarter of the Southwest Quarter, the South Half of the Southwest Quarter, the Northeast Quarter of the Southwest Quarter, and Government Lot 6 (except the North 880 feet thereof), all in Section 9; the North half of the Northwest Quarter (except any portion within Indian Bay Subdivision), and the portion of Government Lots 2 and 3, lying North of Rockford Bay Road, all in Section 16, all in Township 48 North, Range 4 W.B.M., Kootenai County, Idaho.

DATED this 7th day of October, 1983.

"GRANTORS":

V. A. Sanders

Geraldine C. Sanders

STATE OF)
) ss.
County of)

On this day before me personally appeared V. A. SANDERS and GERALDINE C. SANDERS, husband and wife, to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 2nd day of October, 1983.

John [illegible]
Notary Public in and for the State of Washington, residing at Spokane

STATE OF IDAHO
COUNTY OF KOOTENAI } ss
AT THE REQUEST OF
KOOTENAI COUNTY TITLE CO
At __ minutes past __ o'clock __M
OCT 21 1983
CAROL DEITZ
By [illegible]
Deputy
Fee $6.00
Return to

Escrow No.........................

1119008 SALE AGREEMENT

THIS AGREEMENT made and entered into this 1st day of June , 1988

by and between V. A. SANDERS and GERALDINE C. SANDERS, husband and wife, as vendors,

and KENNETH L. HENRY, a single man, as purchaser,

witnesseth:

That the vendors agree to sell to the purchaser and the purchaser agrees to purchase of the vendors upon the terms and conditions hereinafter set forth, the following real estate situate in ~~Spokane~~ Kootenai County, State of ~~Washington~~ Idaho, to-wit:

All that portion of Government Lot 1, Section 17, Township 48 North, Range 4 West Boise Meridian described as follows:
Beginning at the northeast corner of said Gov. Lot 1; thence North 89°36' West along the North line of said Gov. Lot 1, 330.2 feet; thence South 0°24' West to a point on the North line of Rockford Bay Road; thence Easterly along said North line of Rockford Bay Road to a point which bears South 0°24 feet West from the point of beginning; thence North 0°24 feet East to the point of beginning.

SUBJECT TO: Any and all easements, conditions and restrictions of record and easements for ingress and egress.

The purchase price of the above described property which the purchaser agrees to pay to the vendors is $30,000.00, of which the sum of $10,000.00 has been paid, receipt whereof is hereby acknowledged, and the balance of $20,000.00 shall be paid in the following manner:

$20,000.00 on or before the 1st day of June, 1989, with interest on all unpaid balances at the rate of 9% per annum from June 1, 1988, shall have been paid.

STATE OF IDAHO }
COUNTY OF KOOTENAI } SS
AT THE REQUEST OF R. Maurice Cooper
At 05 minutes past 10 o'clock A M
Shirley Deitz
JUN 8 1988
By Marion Griffith Deputy
Fee $ 6.00
Return to P.O. 5438 Spokane, Wa. 99205

The purchaser agrees to keep the premises in good repair, to commit no waste, and to pay all taxes and assessments hereafter on said property before the same shall become delinquent and to immediately procure and keep the buildings on said premises continuously insured for not less than $ 000.00 in a standard fire insurance company, with loss, if any, payable to the parties in interest as their interests may appear, and to pay the premiums on all such insurance before delinquency and to deliver the insurance policies, renewals and premium receipts to the escrow holder herein named except those required to be delivered to a mortgagee or prior vendor. If at any time the purchasers shall allow insurance to expire the vendors or their assigns shall have right to procure the necessary insurance on the premises and the cost of such insurance shall be added to the unpaid balance of the contract.

Exhibit "B"

048

0617Z09007

1119008

The purchaser shall have possession of said property June 15, 1988, and shall continue in such possession so long as the terms of this agreement are fully complied with.

In case any action shall be brought to enforce any of the terms of this contract, or to forfeit the same, the prevailing party in any such suit or action shall be entitled to a reasonable sum for attorney fees as well as costs and disbursements provided by law in any such suit or action.

In case the purchaser shall be delinquent in his payments more than ten days and the seller shall give a Notice Of Forfeiture as provided herein, the purchaser shall pay a reasonable sum for the preparation and service of the said notice not to exceed $100.00 for each notice, and the same shall be paid to the escrow holder as a condition precedent to the reinstatement of this contract. Any payments falling due during period of forfeiture as required by Notice of Forfeiture must be paid in addition to the sums required in said forfeiture in order to comply with the terms of the Notice.

Should the purchaser fail to make the payments or to keep and perform any of the covenants and agreements herein mentioned, the same shall constitute a forfeiture of this agreement and thereupon the seller at his option, may declare such forfeiture by written notice to the purchaser, and at the expiration of thirty days, the terms of this agreement still not having been complied with and any payments becoming due during said thirty day period not having been paid, the seller may enter into said premises and take possession of them, and this agreement shall be at an end and null and void, and the purchaser shall forfeit to the seller as liquidated damages all payments made hereunder, and immediately surrender possession of said premises, but the failure of the seller to declare a forfeiture at any time upon violation of any of the terms of this contract by the purchaser shall be deemed only an indulgence by the seller for that particular time and shall not be construed as a waiver of any rights of the seller specified herein. Any notice, demand or communication to be given by either party to this contract to the other party shall be in writing and transmitted to the other party by personal service, registered mail or certified mail addressed to the seller at 9512 E. Nora, Spokane, WA 99206 and to the purchaser at 2501 Sherman Ave. #91, Coeur d'Alene, ID 83814 provided that either party may change his place of address by notice to the other party given as herein provided. The mailing and registering of any such notice, demand or communication, as herein provided shall be a sufficient service thereof. Service shall be complete when such notice is registered in the United States post office. Personal Service shall be sufficient in the same manner as Service of Process in other civil actions.

After a Notice of Forfeiture has been given in the manner above provided, and after the thirty day period has expired, in the event the purchaser shall not have vacated the premises he shall be deemed a tenant at sufferance, and shall be subject to all of the provisions of the unlawful detainer statute and laws of the State of Washington, and may be dispossessed in the manner provided under said laws. This shall be cumulative and shall not bar any other remedy which the seller shall have.

The purchaser hereunder assumes all risk of loss or damage to the property covered hereby from any cause and such loss or damage shall not affect any of the obligations of the purchaser under this contract.

The seller agrees to furnish (title insurance waived) certified to the date thereof, showing title free from incumbrance, except

it being understood, however, that for the purpose of this instrument, the following shall not be considered as incumbrances: Reservations contained in any of the forms of patent or deed commonly used by the United States of America, the State in which the property is located, the Northern Pacific Railroad Company or the Northern Pacific Railway Company; building restrictions common to the platted tract in which the property is situate; easements for public driveways in city limits or public roads actually in use as such; easments for telephone, sewer, gas, water or electric service; contracts common to the tract in which the property is situate with reference to supply water and electricity to the premises and the operation of irrigation and electric systems.

The seller has made a good and sufficient deed conveying said premises to the purchaser free and clear of all liens and incumbrances except any and all easements, conditions and restrictions of record and easements for ingress and egress.

It is agreed that said deed, together with a copy of this agreement, shall be placed in escrow with the Adept Escrow Services, P.O. Box 18038, Spokane, WA 99208 which is hereby appointed escrow agent hereunder. Said escrow agent is hereby authorized to receive monies under the terms of this agreement and to issue the seller's receipt therefor, and when the terms of this agreement are fully complied with, to deliver said deed and escrow papers to the purchaser. Each of the parties hereto agree to pay one-half of the escrow fee charged by the Escrow Agent.

Time is the essence of this agreement.

Seller	Purchaser
V. A. Sanders (signature)	Kenneth L. Henry (signature)
Geraldine C. Sanders (signature)	

STATE OF WASHINGTON, } ss.
County of Spokane

On this day personally appeared before me V. A. Sanders and Geraldine Sanders to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 6 day of June, 1988

R. Maurice Cooper (signature)
Notary Public in and for the State of Washington, residing at Spokane

STATE OF WASHINGTON, } ss.
County of Spokane

On this day personally appeared before me Kenneth L. Henry to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 6 day of June, 1988

R. Maurice Cooper (signature)
Notary Public in and for the State of Washington, residing at Spokane

From the office of R. MAURICE COOPER
ATTORNEYS AT LAW
NORTH 1522 WASHINGTON
P.O. BOX 5497
SPOKANE, WASHINGTON 99205

1119009

MUTUAL AGREEMENT FOR EASEMENT FOR INGRESS AND EGRESS

WITNESSETH:

WHEREAS, V. A. SANDERS and GERALDINE C. SANDERS, husband and wife, are the owners of the East 660.4 ft. of the NW¼ lying North of Rockford Bay Road #66C in Section 17, Township 48 North, Range 4 W.B.M., in Kootenai County, Idaho; and are selling the following described property to KENNETH L. HENRY, a single man:

> All that portion of Gov. Lot 1, Section 17, Township 48 N., Range 4 W.B.M., described as follows:
> Beginning at the Northeast corner of Gov. Lot 1; thence North 89°36' West along the North line of said Gov. Lot 1, 330.2 ft.; thence South 0°24' West to a point on the North line of Rockford Bay Road; thence Easterly along said North line of Rockford Bay Road to a point which bears South 0°24' West from the Point of beginning; thence North 0°24' East to the Point of Beginning.

WHEREAS, it is necessary to execute a joint easement for ingress and egress; NOW THEREFORE, V.A. SANDERS and GERALDINE C. SANDERS grant an easement to KENNETH L. HENRY over the Southerly portion of the Westerly 330.2' of Gov. Lot 1 of approximately 20 ft. in width North and South and 330.2' East and West, in an area adjacent to Rockford Bay Road and in front of the fire station located thereon.

KENNETH L. HENRY grants an easement continuing the existing road in the Southerly part of the property that he is purchasing from V. A. SANDERS and GERALDINE C. SANDERS and the Northerly part of the property that he is purchasing from V. A. SANDERS and GERALDINE C. SANDERS to LINDA MERWIN, who owns the property in the NE¼ of Section 17, Township 48 N., Range 4 W.B.M., Kootenai County, Idaho. Said easements are the continuation of the existing logging road running parallel to Rockford Bay Road on the South and the existing road from the community road on the North.

DATED this 8 day of June, 1988.

V. A. Sanders
V. A. SANDERS

Geraldine C. Sanders
GERALDINE C. SANDERS

Kenneth L. Henry
KENNETH L. HENRY

Exhibit "C"

1119009

STATE OF WASHINGTON)
)ss.
County of Spokane)

On this day personally appeared before me V. A. SANDERS and GERALDINE C. SANDERS to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 6 day of June, 1988.

Notary Public in and for the State of Washington, residing at Spokane

STATE OF WASHINGTON)
)ss.
County of Spokane)

On this day personally appeared before me KENNETH L. HENRY to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 7 day of June, 1988.

Notary Public in and for the State of Washington, residing at Spokane

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
AT THE REQUEST OF R. Maurice Cooper
At 05 minutes past 10 o'clock A M
Shirley Deitz
JUN 8, 1988
By Marion Griffith
Deputy
Fee $ 6.00
Return to P.O. 5432
Spokane, WA 99205

1224548

JOINT USE AND MAINTENANCE AGREEMENT

This agreement is entered into by and between the various owners of the tracts of land described as:

OWNERS NAME	LAND DESCRIPTION
Robert P. Kluss	48N 4W-17-0825 W510' of NW-NE EX PL PT
Kenneth S. Henry	48N D4W-17-2450 LT1 EX Tax #5 & EX PL PT & EX W 993.21

It is necessary for the parties hereto to enter into an agreement for maintenance and repair of the following described roadway:

NE 1/4 of NW 1/4 Sec. 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County Idaho. Particularly, Sanders Lane, Rockford Bay, Coeur d'Alene, Idaho.

And the parties hereto agree as follows:

1. That each party hereto shall contribute equally, according to each lot owned, to the maintenance and repair of above described roadway;

2. That above described roadway will be constructed to be passable year-round and that no party hereto is authorized to or shall expect any other party to contribute to improvement by placing gravel or asphalt on the roadway without prior written agreement of all other parties;

3. The parties hereto agree to use said roadway for normal ingress and egress and utilities purposes relating to the paoperty they own adjacent. Any party making use of the roadway in such a manner or such equipment that does significant damage shall be responsible for repairing such damage at their expense;

4. The parties hereto agree to share equally to the expense to the drainage ditches, conduits, titles or culverts required in order to assume safe, passable condition of roadway for indicated lots;

5. It is stated, however, that only the actual users of the above described roadway shall contribute to its maintenance and repair.

6. This agreement shall be binding on the heirs, successors and assigns of the parties hereto.

KOOTENAI } SS

Kenneth L. Henry

JUL 12 12 49 PM '91

S Weiss

FEES 6.00

(more)

Exhibit "D" 052

1224548

Dated this 12th day of July, 1991.

	Robert P. Kluss — Robert P. Kluss
	Kenneth L. Henry — Kenneth L. Henry
	Georgia D. Henry — Georgia D. Henry

STATE OF WASHINGTON

County of Spokane

On this 12th day of July, 1991, Robert P. Kluss, Kenneth L. Henry and Georgia D. Henry appeared before me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 12th day of July, 1991.

Barbara D. [illegible]

Notary Public in and for the state of Washington
residing at Spokane, WA

Expiration date 10/92

Corrected Legal

1224548

1224896

JOINT USE AND MAINTENANCE AGREEMENT

This agreement is entered into by and between the various owners of the tracts of land described as:

OWNERS NAME	LAND DESCRIPTION
Robert P. Kluss	48N 4W-17-0825 W510' of NW-NE EX PL PT
Kenneth L. Henry	48N04W-17-2450 LT1 EX Tax #5 & EX PL PT & EXW293.21
Georgia D. Henry	" " "

It is necessary for the parties hereto to enter into an agreement for maintenance and repair of the following described roadway:

NE 1/4 of NW 1/4 Sec. 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County Idaho. Particularly, Sanders Lane, Rockford Bay, Coeur d'Alene, Idaho. Approximately four tenths of a mile, starting at Rockford Bay Road.

And the parties hereto agree as follows:

1. That each party hereto shall contribute equally, according to each lot owned, to the maintenance and repair of above described roadway;

2. That above described roadway will be constructed to be passable year-round and that no party hereto is authorized to or shall expect any other party to contribute to improvement by placing gravel or asphalt on the roadway without prior written agreement of all other parties;

3. The parties hereto agree to use said roadway for normal ingress and egress and utilities purposes relating to the paoperty they own adjacent. Any party making use of the roadway in such a manner or such equipment that does significant damage shall be responsible for repairing such damage at their expense;

4. The parties hereto agree to share equally to the expense to the drainage ditches, conduits, titles or culverts required in order to assume safe, passable condition of roadway for indicated lots;

5. It is stated, however, that only the actual users of the above described roadway shall contribute to its maintenance and repair.

6. This agreement shall be binding on the heirs, successors and assigns of the parties hereto.

(more)

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
AT THE REQUEST OF
Kenneth Henry
JUL 10 12 46 PM '91
Linda Haynes
FEES 6.00

STATE OF IDAHO } SS
COUNTY OF KOOTENAI }
AT THE REQUEST OF
Kenneth L. Henry
JUL 12 12 49 PM '91
S Weiss
FEES 6.00

Exhibit "E" #54

1224548 1224896

Dated this 12th day of July, 1991.

Robert P. Kluss — Robert P. Kluss

Kenneth L. Henry — Kenneth L. Henry

Georgia D. Henry — Georgia D. Henry

STATE OF WASHINGTON

County of Spokane

On this 12th day of July, 1991, Robert P. Kluss, Kenneth L. Henry and Georgia D. Henry appeared before me known to be the individuals described in and who executed the within and foregoing instrument, and acknowledged that they signed the same as their free and voluntary act and deed, for the uses and purposes therein mentioned.

GIVEN under my hand and official seal this 12th day of July, 1991.

Barbara D. [illegible]

Notary Public in and for the state of Washington residing at Spokane, WA.

Expiration date 10/92

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of January, 2009, at or about 1:58 p.m., I caused to be served a true and correct copy of the foregoing:

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT ON DEEDS, AND REQUEST FOR QUIET TITLE TO UPPER AND LOWER ROADS

CHARLES M. DODSON	[ ]	U.S. Mail, Postage Prepaid
1424 Sherman Ave., Ste. 300	[X]	Hand Delivered
Coeur d'Alene, ID 83814	[ ]	Overnight Mail
Telephone: 208-664-1577	[ ]	Facsimile: **666-9211**
Facsimile: 208-666-9211		

DATED this 30th day of January, 2009.

Judy Parmer

Judy Parmer
Paralegal

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2009 FEB 17 AM 11:03

CLERK DISTRICT COURT
DEPUTY

CHARLES M. DODSON
Attorney at Law
1424 Sherman Avenue, Suite 300
Coeur d'Alene ID 83814
(208) 664-1577
Facsimile (208) 666-9211
ISB #2134

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife, PLAINTIFFS, VS. KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, DEFENDANTS.	CASE NUMBER: CV-07-2523 AMENDED ANSWER, AFFIRMATIVE DEFENSES, AND COUNTERCLAIM
KAREN SHELER CONINE and HOWARD CONINE, husband and wife, COUNTER PLAINTIFFS, VS. CHRIS BELSTLER and DANA BELSTLER, husband and wife, COUNTER DEFENDANTS.	

COMES NOW, the above named Defendants/Counter Plaintiffs, CONINE, by and through their Attorney of Record, CHARLES M. DODSON, and by way of Amended Answer, Affirmative Defenses, and Counterclaim, answer, admit, deny, affirmatively allege and counterclaim as follows:

ANSWER

I.

These Answering Defendants, except as specifically admitted herein, deny each and every allegation contained within the Plaintiffs' Amended Complaint.

II.

These Answering Defendants admit Paragraphs 1, 2, 4, 6, 7, 8, 11, 12, 13, 15, and 16, of Plaintiffs' Amended Complaint.

III.

In response to Paragraph 3 Plaintiffs' Amended Complaint Defendants admit that easements were granted and deny that they were in gross and affirmatively allege that the easements granted were appurtenant to the land of the Defendants/Counter Plaintiffs.

IV.

In response to Paragraph 9 of Plaintiffs' Amended Complaint, these Answering Defendants admit the same, and affirmative allege that the easements passed with the property.

V.

In response to Paragraph 10 of Plaintiffs' Amended Complaint, these Answering Defendants admit the existence of Exhibit "D", later to corrected to Exhibit "E" and that the same is of record with Kootenai County, and deny that the Agreement (Exhibit "D" and Exhibit "E") confirmed access to the Defendant/Counter Plaintiffs property was by Sanders Lane which is now Chandler Lane. Defendant/Counter Plaintiffs further affirmatively allege that the easement for driveway claimed by these Answering Defendants/Counter Plaintiffs as set forth in the Amended Counterclaim herein attached is an easement appurtenant as set forth in the last full paragraph of page 1 of Exhibit "C" attached to Plaintiff's Complaint.

VI.

In responding to Paragraph 14 Plaintiffs' Amended Complaint, these Answering Defendants

admit the same and affirmatively allege that in the alternative the Defendants/Counter Plaintiffs have a prescriptive right on the "driveway easement".

VII.

In response to Paragraph 17, 18, 19, and 20 of Plaintiffs' Amended Complaint, these Answering Defendants deny the same.

AFFIRMATIVE DEFENSES

VIII.

These Answering Defendants raise the following Affirmative Defenses in response to Plaintiffs' Complaint:

A. Latches

B. Statute of Limitations

C. Easement by implication

D. Prescriptive Easement

E. Easement of Record

IX.

These Answering Defendants have been required to obtain the services of counsel for the defense of said matter, and, upon prevailing, are entitled to their reasonable attorneys fees and costs in an amount to be proven at the time of trial herein.

WHEREFORE, these Answering Defendants pray Judgment as follows:

1. That Plaintiffs' Complaint be dismissed;
2. That Defendants be awarded their attorneys fees and costs for the defense thereof.
3. For such other and further relief as the court deems just and equitable in the premises.

COUNTER CLAIM

COMES NOW the Defendants/Counter Plaintiffs, and by way of Counterclaim, complaint and allege as against the Plaintiffs as follows:

I.

That the Defendants/Counter Plaintiffs KAREN SHELER CONINE and HOWARD CONINE (hereinafter referred to as CONINE), are residents of the State of Washington, and the

owners of certain real property described on Exhibit "A" attached hereto and hereafter incorporated by reference as if fully set forth herein.

II.

That Plaintiff/Counter Defendants, DANA BELSTLER and DANA BELSTLER (hereafter referred to as BELSTLER) are husband and wife, residents of the County of Kootenai, and owners of adjacent property as the same lies immediately west of the property owned by CONINE described on Exhibit "A" attached hereto.

III.

That the court has jurisdiction over this matter pursuant to Idaho Code 5-401 et seq.

IV.

That CONINES have two easements located upon and across the southerly and northerly portion running east and west, of the property owned by BELSTLER commonly referred to as 7316 W. Chandler Lane, Kootenai County, Idaho, as granted to CONINES predecessor in interest LINDA MERWIN as set forth on Exhibit "C" of Plaintiffs' Amended Complaint.

V.

That CONINES and their predecessors in interest have used said easement where Chandler Lane ends at the Belstler property and crosses the Belstler property as a driveway continuously , openly, notoriously, and without interruption for at least twenty (20) years for access to their property.

VI.

That in the alternative to the foregoing paragraph, CONINES have an Easement of Record, or by implication as the case may be, upon and across the property of BELSTLER for the easements referenced in Paragraph IV of this Amended Counterclaim.

VII.

That CONINE currently uses the northerly easement hereinabove referenced across the BELSTLER land for ingress and egress to the CONINE property.

VIII.

That BELSTLER seeks to unlawfully and unreasonably restrict CONINE'S use of the easements hereinabove described for access upon and across to the BELSTLER property, and as such

CONINE'S have been damaged in an amount to be determined at the time of trial on the merits.

IX.

That CONINES have been required to obtain the services of counsel for the prosecution of this matter and are entitled to their reasonable attorneys fees and costs in an amount to be proven at the time of trial herein.

WHEREFORE, CONINES PRAY JUDGMENT on this Counterclaim as follows:

1. For a determination of the rights of the CONINES in the easement referenced in Paragraph IV. above currently existing roadway located upon and across the property of BELSTLER, either as an Easement by prescription, an Implied Easement, or Express Easement created by recorded document;

2. For an award of CONINE'S attorney's fees and costs for the prosecution of this action;

3. For such other and further relief as the court deems just and equitable in the premises.

DATED this 9th day of Feb, 2009.

CHARLES M. DODSON
ATTORNEY AT LAW

I hereby certify that on the [illegible]th day of Feb, 2007, a true and correct copy of the foregoing was:
transmitted, via facsimile:
to:

ARTHUR B. MACOMBER
ATTORNEY AT LAW
VIA FACSIMILE 664-9933

CHARLES M. DODSON
ATTORNEY AT LAW

ORDER NO. 34479

EXHIBIT "A"

That portion of the Northwest Quarter of the Northeast Quarter of Section 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County, Idaho, described as follows:

BEGINNING at the Northwest corner of the Northwest Quarter of the Northeast Quarter of said Section; thence

East along the North side of the Northwest Quarter of the Northeast Quarter, a distance of 510 feet; thence

South on a line parallel with the West line of the Northwest Quarter of the Northeast Quarter to the Northerly boundary of TERRACE ADDITION to Rockford Bay Summer Homes; thence

In a Westerly direction along the Northerly boundary line of said TERRACE ADDITION to the West line of the Northwest Quarter of the Northeast Quarter of Section 17; thence

North along said West line to the Northwest corner of the Northwest Quarter of the Northeast Quarter to the point of beginning.

EXCEPT any portion thereof lying within road right of way.

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: 911
2009 MAR 18 PM 3:54
CLERK DISTRICT COURT
DEPUTY

Arthur B. Macomber, Attorney at Law
408 E. Sherman Avenue, Suite 215
Coeur d'Alene, ID 83814
Telephone: 208-664-4700
Facsimile: 208-664-9933
State Bar No. 7370
Attorney for Plaintiffs &
Counter Defendants BELSTLERS

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife, Plaintiffs; v. KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, Defendants.	Case No: **CV 2007-2523** **COUNTER DEFENDANTS BELSTLERS' ANSWER TO COUNTERCLAIMS**
KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, Counter Plaintiffs; v. CHRIS BELSTLER and DANA BELSTLER, husband and wife, Counter Defendants.	

COME NOW Counter Defendants CHRIS BELSTLER and DANA BELSTLER (hereinafter BELSTLERS), appearing by and through their counsel, Arthur B.

Macomber, and answering the Counterclaim of Counter Plaintiffs KAREN SHELER (CONINE) and HOWARD CONINE filed in this Court on February 17, 2009, to admit, deny and allege as follows:

ANSWER TO COUNTERCLAIM

1. Defendants BELSTLERS, except as specifically admitted herein, deny each and every allegation contained with Counter Plaintiffs' CONINE'S Counterclaim.

2. **As to Paragraph I** of Counterclaim, Defendants BELSTLERS admit to the truth of it.

3. **As to Paragraph II** of Counterclaim, Defendants BELSTLERS deny "DANA BELSTLER and DANA BELSTLER" are husband and wife, but admit "CHRIS BELSTLER and DANA BELSTLER" are husband and wife. Further, Belstlers are owners of real property abutting Conine's, and said property is not merely adjacent to Conine's.

4. **As to Paragraph III** of Counterclaim, Defendants BELSTLERS admit to the truth of it.

5. **As to Paragraph IV** of Counterclaim, Defendants BELSTLERS deny the truth of it.

6. **As to Paragraph V** of Counterclaim, Defendants BELSTLERS deny Chandler Lane ends at the Belstler property and deny that Conines or their predecessors have openly, notoriously, and without interruption "for at least twenty (20) years" used any driveway easement for access to their property.

7. **As to Paragraph VI** of Counterclaim, Defendants BELSTLERS admit Conines have an easement of record as shown at Exhibits D and E of the Amended Complaint, i.e., the Kluss easement, but deny easement locations exist as stated in Conine Counterclaim, or that any alleged former grantee named Merwin is a predecessor to Conines as described in Defendant/Counter Plaintiffs' Counterclaim at paragraph IV.

8. **As to Paragraph VII** of Counterclaim, Defendants BELSTLERS deny the truth of it, because Conines' reference to "the northerly easement" would describe the Kluss easement only, which lies upon Chandler Lane.

9. **As to Paragraphs VIII** of Counterclaim, Defendants BELSTLERS deny the truth of it.

10. **As to Paragraph IX** of Counterclaim, Defendants BELSTLERS have no knowledge as to whether Conines were required to hire legal counsel, and so Belstlers can neither admit nor deny.

AFFIRMATIVE DEFENSES TO COUNTERCLAIM

1. AS A **FIRST** SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE to Counter Plaintiffs' Counterclaim, Defendants BELSTLERS allege that the Counterclaim, and each cause of action therein, fails to state a cause of action.

2. AS A **SECOND** SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE to Counter Plaintiffs' Counterclaim, Defendants BELSTLERS allege that Counter Plaintiffs' claims are barred by license/permissive use.

3. AS A **THIRD** SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE to Counter Plaintiffs' Counterclaim, Defendants BELSTLERS allege that Counter Plaintiffs' claims are barred by the doctrine of collateral limitation.

4. AS A **FOURTH** SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE to Counter Plaintiffs' Counterclaim, Defendants BELSTLERS allege that Counter Plaintiffs' claims are barred by the doctrine of accord and satisfaction.

5. AS A **FIFTH** SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE to Counter Plaintiffs' Counterclaim, Defendants BELSTLERS allege that Counter Plaintiffs' claims are barred by the doctrine of estoppel.

6. AS A **SIXTH** SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE to Counter Plaintiffs' Counterclaim, Defendants BELSTLERS allege that Counter Plaintiffs' claims are barred by the doctrine of laches.

7. AS A **SEVENTH** SEPARATE AND DISTINCT AFFIRMATIVE DEFENSE to Counter Plaintiffs' Counterclaim, Defendants BELSTLERS allege that Counter Plaintiffs' claims are barred by the doctrine of contractual provision.

WHEREFORE, Counter Defendants BELSTLERS pray for judgment as hereinafter provided:

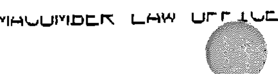
1. For Counter Defendants' costs, expenses, and attorney's fees incurred herein as allowed by Idaho Code §§ 12-120 and 12-121, in an amount to be determined;

2. For an Order from this Court dismissing Counter Plaintiffs' claims against Defendants BELSTLERS in their entirety and with prejudice;

3. For such other and further relief as the Court may deem just and equitable.

DATED this 18th day of March 2009.

Arthur B. Macomber
Attorney at Law



CERTIFICATE OF SERVICE

I am familiar with my firm's capability to hand-deliver and deliver by facsimile documents and its practice of placing its daily mail, with first-class postage prepaid thereon, in a designated area for deposit in a U.S. mailbox in the City of Coeur d'Alene, Idaho, after the close of the day's business. On the date shown below, I served:

COUNTER DEFENDANTS BELSTLERS' ANSWER TO COUNTERCLAIMS

Charles M. Dodson	[ ]	U.S. Mail, Postage Prepaid
Attorney at Law	[ ]	Hand Delivered
1424 Sherman Avenue, Suite 300	[ ]	Overnight Mail
Coeur d'Alene, ID 83814	[X]	Facsimile: 208-666-9211
Telephone: 208-664-1577		

I declare under penalty of perjury that the foregoing is true and correct. Executed on the 18th day of March, 2009.

Terri Boyd-Davis
Senior Paralegal

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED #621 det

2009 SEP 16 PM 3:00

CLERK DISTRICT COURT
DEPUTY

Arthur B. Macomber, Attorney at Law
Macomber Law, PLLC
408 E. Sherman Avenue, Suite 215
Coeur d'Alene, ID 83814
Telephone: 208-664-4700
Facsimile: 208-664-9933
State Bar No. 7370
Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife; Plaintiffs, KAREN SHELER and HOWARD CONINE, husband and wife, and the marital community composed thereof; Defendants.	)	Case No: **CV-07-2523** **PLAINTIFF'S TRIAL BRIEF RE CONVEYANCE OF EASEMENT INEFFECTIVE PURSUANT TO IDAHO LAW**

COMES NOW CHRIS BELSTLER and DANA BELSTLER, by and through their attorney of record, Arthur B. Macomber, to provide this Court a Trial Brief on Idaho law related to the question of whether certain easements from Henry to Merwin encumber the Belstler parcel for Conine's benefit, so this Court may properly consider and render judgment on issues presented in this case.

STATEMENT OF UNDISPUTED FACTS

Plaintiffs Chris and Dana Belstler are the owners of real property overlooking Rockford Bay at Lake Coeur d'Alene. Defendants Howard Conine and Karen Sheler own the property immediately to the east of the Belstler's. The Belstler's acquired their parcel from the Henry's and the Henry's from V.A. Sanders. The Conine's acquired their property from the Solomon's, who purchased it from Kluss who purchased it from Linda Merwin.

The Belstler property is crossed by three different roads that the Conine's or their predecessors used to access their property. The three roads are at issue in this case. The roads include 1) Chandler Lane (formerly Sanders Lane); 2) a private drive which diverges from Chandler Lane at approximately the Belstler west properly line; and 3) the "lower road" located at the south end of the Belstler property near the Worley Fire District building. All three roads traverse the entire width of the Belstler's property.

The Belstler's became acquainted with the Conine's during the spring and summer of 2006. The Belstlers noticed that when Conines visited from their western Washington home, they used the private drive to access their property. The Belstler's also noticed during the summer of 2006 that someone was driving trailers across the lower road and parking them on the Conine property.

In the summer of 2006, the Belstler's approached the Conines and asked them to cease their use of the lower road and the private drive. The Belstler's offered to grant the Conine's an easement on the east side of their property that was sufficient to allow for an acceptable grade into the Conine property off of Chandler Lane and offered to pay for and perform the work. Thereafter, the Conine's ceased their use of the lower road but never responded to the Belstler's offer regarding the private drive. Instead, they stopped talking to the Belstlers. The Belstlers renewed their offer to the Conines in early November 2006, but the Conines did not respond to that offer.

The Belstler's concede the existence of an easement on Chandler Lane and filed suit to enjoin Conine's use of the private drive and the lower road, and to require the

Conine's to access their property via Chandler Lane. The Conine's claim an express easement to use the private drive and the lower road and, if not, they have easements by prescription.

The document on which the Conine's rely, and on which much of this case depends, is instrument number 1119009. In that instrument number, the Grantor, Ken Henry, executed two easement conveyances to Linda Merwin prior to holding legal title to his future Belstler property he was then buying from V.A. Sanders by installment contract. The Conines argue that the Belstler property is now burdened by those easements. The parties differ as to how this document is to be construed, and Belstlers have procured an expert surveyor to give testimony regarding this and other documents.

LEGAL ELEMENTS OF VARIOUS DOCTRINES

1) Easements

An easement is an interest in real property. *Fajen v. Powlus*, 96 Idaho 625, 628 (1975). A transfer of real property passes all easements attached thereto. I.C. § 55-603.

2) Express Easements

An express easement is an interest in real property that must be in writing. *Capstar Radio Operating Co. v. Lawrence*, 2007 Idaho 32090 (2007). It is only necessary in an express easement that the parties make clear their intention to establish servitude. *Id., citing Benninger v. Derifield*, 142 Idaho 486, 489 (2006). An express easement may be created by a written agreement between the owner of the dominant estate and the owner of the servient estate. *Id.* It may also be created by a deed from the owner of the servient estate to the owner of the dominant estate. *Id.*

3) After-Acquired Title

"The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state." I.C. § 73-116. The Idaho legislature has the power to abolish or modify common law rights and remedies. *Olson v. J.A. Freeman Co.*, 117 Idaho 706 (1990). The legislature altered the common law in its

compiled laws at I.C. § 55-605, which provides "[w]here a person purports by *proper instrument* to convey or grant real property in *fee simple*, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors." (emphasis mine.) Therefore, in Idaho, the after-acquired title doctrine does not apply to each "stick" in a real property title owner's "bundle of sticks," including easements, but only to fee simple transfers conveyed by proper instrument.

4) Delivery

Delivery is the result of a contract and requires both the giving of the deed by the grantor and an accepting of that deed by the grantee. *The Estate of Skvorak v. Security Union Title Ins. Co.*, 140 Idaho 16, 20 (2003). There cannot be a unilateral transfer of interest in real estate without delivery and delivery requires the mutual assent of the parties. *Id.* Delivery includes surrender and acceptance, and both are necessary to its completion. *Bowers v. Cottrell*, 15 Idaho 221 (1908). The grantor must be willing and agree to deliver, and the grantee must be willing and consent to receive. (*Id.*) It is essential to the delivery of a deed that there be a giving of the deed by grantor and a receiving of the deed by the grantee, with a mutual intent to pass title from the one to the other. *Crenshaw v. Crenshaw*, 68 Idaho 470, 475 (1948).

5) Stranger to the Transaction

The generally accepted rule is that no estate or interest is created in a stranger to a deed by a reservation therein. If in a conveyance any reservation is made in the property conveyed, the part reserved remains in the grantors therein, and does not inure to the benefit of a stranger to the instrument. *Davis v. Gowen*, 83 Idaho 204, 209 (1961). Based on the rule that says a reservation to a stranger to the instrument is void for all purposes, current Idaho law provides the reservation of an easement in a deed reserves use of the easement property for grantor's benefit only. *Hodgins v. Sales*, 139 Idaho 225, 232 (2003).

LEGAL ANALYSIS

Instrument number 1119009 is an express easement that states in pertinent part:

> KENNETH L. HENRY grants an easement continuing the existing road in the Southerly part of the property that he is purchasing from V.A. SANDERS and GERALDINE C. SANDERS and the Northerly part of the property that he is purchasing from V.A. SANDERS and GERALDINE C. SANDERS to LINDA MERWIN, who owns the property in the NE 1/4 of Section 17, Township 48 N., Range 4 W.B.M., Kootenai County, Idaho. Said easements are the continuation of the existing logging road running parallel to Rockford Bay Road on the South and the existing road from the community on the North.

This document was prepared and executed as it states for property Kenneth L. Henry "is purchasing" from V.A. Sanders. The parties entered into this agreement before Henry acquired title to the property. The actual installment contract for the purchase of the property to be introduced at trial is instrument number 1119008.

Linda Merwin, the grantee of the purported easements, was not a party to instrument number 1119008, the Sanders-Henry installment sales contract. Neither was Linda Merwin a party to instrument number 1119009, the Sanders-Henry Mutual Agreement for Easement for Ingress and Egress. At the time of the creation of instrument numbers 1119008 and 1119009, V.A. Sanders held title to the future Henry property. The only parties to the two transaction documents were Sanders and Henry. Merwin was not a party to the transaction and, thus, the "granting" of the easement to her therein functioned as a reservation of an easement to her. However, in Idaho, a reservation of an estate of interest in land to a stranger is ineffective.

> Appellant's said contention poses a question as to what right, if any, did appellant (being a stranger to the conveyance) acquire under or by virtue of the reservation referred to in said deed of April 30, 1952? The answer to this question is found in the generally accepted rule that no estate or interest is created in a stranger to a deed by a reservation therein. If in a 210 conveyance any reservation is made in the property conveyed, the part reserved remains in the grantors therein, and does not inure to the benefit of a stranger to the instrument.

Davis v. Gowen, 83 Idaho 204, 209-210 (1961); 28 C.J.S. Easements § 30, p. 686; 16 Am. Jur. 609; 39 A.L.R. 126.

The rationale for this rule was explained by the Montana Supreme Court:

> Strangers to the deed are those who are not parties to it. 23 Am.Jr.2d Deeds § 88 91983); Black's Law Dictionary at p. 1433 (7th Ed. 1999).
>
> Transactions involving a stranger to the deed are disfavored for three reasons. First, the dominant estate, in this case the Loomis parcel [here, Merwin], does not have the opportunity to negotiate with the grantor on issues like location, width, extent of use, and allowable use. Second, the easement will fail to appear in the chain of title of the appurtenant parcel, which leaves bonafide purchasers without notice that the land benefits from an easement. Finally, the conveyance to a stranger to the deed allows for no acceptance by the would-be dominant estate, raising questions of unexpected taxes, environmental concerns, and potential litigation.

Loomis v. Luraski, 306 Mont. 478, 484-485 (Mont. 2001).

Delivery of an easement deed is essential to its completion. Delivery requires a meeting of two minds and the accord of two wills. However, Merwin was not involved in the transaction between Sanders and Henry. Therefore, she could not have accepted the easements or given her consent to receive them. Surrender alone is insufficient. Since Merwin was a stranger to the easement deed, the easements are invalid.

I.C. § 55-605 allows a fee simple interest in real property conveyed prior to the time the grantor acquired title in the property to pass to a grantee where a person purports by proper instrument to convey the property. In this case, because 1) the easement deed was not proper because grantee Merwin was not a party to it and it was thereby invalid, and because 2) the easement grant is not a fee simple interest, the easement also fails under the doctrine of after-acquired title.

CONCLUSION

The express easement document upon which Conines rely in their claim to have two express easements across the Belstler's property was a transaction solely between

Sanders and Henry. Although its wording reserves an easement to Merwin, Merwin was not a party to the easement. In Idaho, a reservation of an estate of interest in land to a stranger is ineffective. Henry never conveyed an easement to Merwin by a separate deed negotiated between the two of them after he acquired title upon fulfilling the installment contract terms with Sanders.

Instrument number 1119009 is thereby ineffective to create any easement for the Conine parcel, because there is no evidence that the grantee of the easement was a party to the contract that gave rise to the alleged easement. Further, the purported deed granting the easement is invalid because it was not delivered or accepted by Merwin and because the grantee Merwin was a stranger to the transaction. Finally, because the easement deed was not proper, and because it was not a fee simple deed, it fails to meet the standards required by Idaho statute which allow title to pass to a grantee under the after-acquired title doctrine.

DATED this 16th day of September, 2009.

Arthur B. Macomber
Attorney at Law

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 16th day of September 2009, I caused to be served a true and correct copy of the foregoing:

PLAINTIFF'S TRIAL BRIEF RE CONVEYANCE OF EASEMENT INEFFECTIVE PURSUANT TO IDAHO LAW

CHARLES M. DODSON	[ ]	U.S. Mail, Postage Prepaid
1424 Sherman Ave., Ste. 300	[ ]	Hand Delivered
Coeur d'Alene, ID 83814	[ ]	Overnight Mail
Telephone: 208-664-1577	[X]	Facsimile: **666-9211**
Facsimile: 208-666-9211		

DATED this 16th day of September, 2009.

Terri Boyd-Davis
Paralegal

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:

2009 OCT 29 PM 3:22

CLERK DISTRICT COURT
DEPUTY

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife; Plaintiffs, KAREN SHELER and HOWARD CONINE, husband and wife, and the marital community composed thereof; Defendants.	)	Case No: **CV-07-2523** **PLAINTIFFS' POST-TRIAL LEGAL ARGUMENTS**

COME NOW Plaintiffs CHRIS BELSTLER and DANA BELSTLER, by and through their attorney of record, Arthur B. Macomber, and hereby submit the following Post-Trial Brief on Legal Arguments for submission to this Court as requested thirty-five (35) days from September 24, 2009 for the Court's post-trial consideration toward its decision and judgment.

JURISDICTION AND VENUE

Pursuant to Idaho Code section 10-1201, et seq., this Court has the "power to declare rights, status, and other legal relations" of plaintiffs and defendants, thus personal jurisdiction over the parties for the purposes of plaintiffs' requested declaratory judgment is valid, and subject matter jurisdiction is proper in this Court to quiet title to plaintiffs' lands pursuant to Idaho Code section 6-401. Further, pursuant to Idaho Code section 5-401(1), Kootenai County is the proper venue for adjudication of this action.

STATEMENT OF FACTS

Plaintiffs Belstler own certain real property located in Kootenai County, Idaho that is described on plaintiffs' Exhibit 22. Their immediate predecessors in interest were Kenneth and Georgia Henry, who purchased the property from Mr. and Mrs. V. A. Sanders. The eastern border of the Belstler property abuts Defendant Conines' Property.

Defendants Conine own certain real property located in Kootenai County, Idaho as described on plaintiffs' Exhibit 21. The order of preceding owners in interest of the Conine real property is Gary and Judith Solomon, who purchased from Robert Kluss, who with his then wife Vicki purchased from Linda Merwin.

Mr. and Mrs. V. A. Sanders never owned what is now the Conine real property.

At an unknown date, but likely sometime around 1983 as argued herein, V.A. Sanders built a road partially on lands depicted on a survey by Webb Engineering dated August 20, 1979, on which survey parcel "A" shows the Belstler property. (Pls. Ex. 8.) The road was also build across lands to the east of the Belstler parcel, including across lands now owned by Conine, and through to what is now the Black Rock area, toward fulfillment of Mr. Sander's plan to provide access to his community development, the Rockford Bay Country Club. (Pls. Exs. 1-3, and 33.)

Kenneth Henry did not know Linda Merwin, and did not meet or negotiate with her about the purported easement grants in instrument number 1119009. (Henry Depo. Tr. pp. 6-7, lines 20-25 & 1-7, respectively.) In the normal course of deposition

examination without pressure, Mr. Henry stated instrument number 1119009 was "some type of formality" and that he lacked a clear understanding of why he signed it. (Id. at p. 8, lines 3-24.) Later, after approximately five pages of deposition questioning regarding which northern road Mr. Henry meant to grant an easement over with 1119009, defendants' counsel succeeded in gaining Henry's agreement that the disputed driveway was the northern easement intended in 1119009. Given Henry's conflicting deposition testimony under pressure, and other testimony given at trial, these facts are at issue.

Neither Conines nor any of their predecessors were granted easement rights across the Chandler Lane easement from Rockford Bay Road as the centerline of said Chandler Lane is referenced or depicted in plaintiff's exhibits 9, 10, 11, 12, or 23 to the western border of the Conine parcel. Further, even if Conine's were granted easement rights across the southern portion of Belstler's property due to a conveyance found in instrument number 1119009, Conine's ability to reach that southern portion across Worley Fire District lands located to the west of the Belstler parcel and described and depicted on plaintiff's exhibits 12 and 13, respectively, were not and never have been granted.

Further rendition of facts is provided below to support arguments that plaintiffs Belstler should prevail on their quiet title action.

QUESTIONS OF LAW BEFORE THIS COURT

Introduction

Plaintiffs filed their amended complaint on January 30, 2009, requesting this Court declare a judgment interpreting various recorded documents attached as exhibits thereto, the core document including a purported grant of two easements from Henry, a former owner of plaintiffs' land, to Merwin, a former owner of defendants' land. (Pls. Ex. 15.) Plaintiffs requested this Court quiet title to the purported easement areas, and enjoin defendants from their use. At issue, but not addressed in this brief, is the issue of

plaintiffs' request for fees and costs, which shall be argued following judgment. (I.R.C.P. 54(d)(5).)

Defendants' counterclaim requested this Court recognize and affirm the two alleged easements either by prescription or express recorded document, one of which purported easements became known at trial as the "disputed driveway." At trial, defendants dropped their claim of easement by implication.

LEGAL QUESTIONS

1. What is the legal status and effect of defendants' Exhibit O, the alleged verbal agreement between Sanders and Merwin, on plaintiffs' and defendants' claims?
2. What documents comprise the Sanders-Henry purchase agreement?
3. Is the Sanders-Henry purchase agreement ambiguous as a matter of law?
4. Did Sanders have the power to grant an easement to Henry on June 8, 1988?
5. Did Henry have the power to grant an easement in Sanders' property to Merwin on June 7, 1988?
6. If Henry had the power to grant an easement to Merwin on June 7, 1988, was the deed delivered to her?
7. Did Idaho's after-acquired property doctrine apply to the purported Henry-Merwin grant of easement?
8. Did the Henry-Merwin easement grants fail for lack of Merwin's consideration?
9. Did the Henry-Merwin easement grants fail for lack of Sanders' consideration?
10. Did the Sanders-Henry purchase agreement contract merge into the deed, and, if so, did the Henry to Merwin easements survive the contract by that deed?
11. Did the Henry-Merwin easement grants fail, because they cannot be located?
12. What is the legal effect on the Henry-Merwin easements of the two Kluss-Henry agreements found at instrument numbers 1224548 and 1224896?
13. Do the Conines enjoy a prescriptive easement across the lower road, or across the disputed driveway?

ARGUMENT

1. <u>The legal status and effect of defendants' Exhibit O, the writing allegedly evidencing a verbal agreement between Sanders and Merwin, is that it is void as between parties in this case, unless it is only used to evince Sanders' intent.</u>

Defendants' Exhibit O appears to be in the nature of a grant deed, because it states, "an easement on [location] was granted in exchange for access from the County Road . . .." Defendants' Exhibit O was likely meant to be a conveyance of an interest in real property. (I.C. § 55-813.) The Kootenai County Recorder must record deeds and grants. (I.C. § 31-2402(1)(a).) However, a recorder may refuse to record a document not authorized by law to be recorded. (I.C. § 31-2402(2).)

Defendants' Exhibit O is not authorized by law to be recorded, because neither the alleged grantor Sanders nor grantee Merwin acknowledged it. (I.C. §§ 55-805, 55-709, 55-710.) Without acknowledgment by a proper notary or officer, there is no way to verify whose signatures are actually on defendants' Exhibit O. Further, the document is undated, so the Kootenai County Recorder would not be able to index it properly. (I.C. § 31-2404(1).) Without a date, and without proper recordation, there is no way to give constructive notice to third parties whether either Merwin or Sanders, or, as here, their successors, may claim an interest in the other party's property. (I.C. § 55-811; *Matheson v. Harris*, 98 Idaho 758 (1977).)

Lacking constructive notice, neither Henry nor Belstlers through Sanders, or Kluss, Solomon, or Conine through Merwin could claim any right to use whatever easements were allegedly granted in defendants' Exhibit O. On the bases discussed herein, this Court could ignore that document as irrelevant due to its never providing constructive notice to subsequent bonafide good faith purchasers for value. (*Sun Valley Land and Minerals, Inc. v. Burt*, 123 Idaho 862, 866 (1993) ("[a] bona fide purchaser is one who takes real property by paying valuable consideration and in good faith, i.e., without knowing of adverse claims.") Lacking any chain of constructive notice in

Kootenai County records, Plaintiffs Belstler are "subsequent bonafide good faith purchasers for value" and cannot be a servient estate for the two easements.

A void deed is one that is invalid for any purpose, ineffective to convey legal title and unenforceable at law. (23 Am. Jur.2d Deeds § 137 (1965).) Since defendants' Exhibit O is unrecorded, this Court should also find it is void as against subsequent purchasers of the Sanders' and Merwin properties, wherever those property may be located, *if those purchases were recorded.* (I.C. § 55-812.) Thus, assuming this purported grant to Merwin was across Sanders' property that he eventually sold to Henry and that now belongs to Belstlers (which assumption cannot be made from the document's language), any claim by Merwin's successors, including Conines, is void, because defendants' Exhibit O is unrecorded, and Henry's deed was recorded in 1989, see plaintiffs' Exhibit 16, and Belstlers' deed from Henry was recorded in 2005. Due to this additional deficiency, this Court could ignore defendants' Exhibit O, because it is void as it relates to the subsequent purchasers involved in this lawsuit.

Further, defendants' Exhibit O is ambiguous and vague to the point of being nearly indecipherable. The document states, "an easement on the northwest corner of the property owned by Linda L. Merwin," but it does not say where on the northwest corner of that property the easement was to be located. Further, there is no way to know what "access from the County Road through property owned by V.A. Sanders" was to be granted to Merwin, specifically whether said access was to be on the south portion of the property now owned by Belstlers, the north portion of the property now owned by Belstlers, or access from Rockford Bay Road, presumably the named "County Road," through other property owned by V.A. Sanders to the north, south, or east of the Conine property and completely unrelated to the Belstler's land. As if this is not enough, there is no definition of what is referred to in the document as "the present road," or what constitutes Sanders' "other property." Finally, without a date, it is impossible to tell exactly when it was signed, which leads to an additional problem creating ambiguity, as to a definition of "the present road" and Sanders completion thereof.

Even if the assumption is allowed that the signatures were not forged, to which point no evidence was provided at trial, all that can be determined from the language in defendants' Exhibit O is that Sanders apparently intended to complete a road yet unfinished during the period of Linda Merwin's ownership, and that Merwin was to gain access to her property from the County Road through some unlocated property owned by Sanders. It would be helpful to determine the date of this purported agreement, or at least the timeframe during which it may have been executed, because if it is not a forgery, it may at least provide an indication of those two parties' intent within a given time period.

Since the document language is ambiguous, this Court may look to other circumstances available to try to determine the intent of the parties. (*Hoffman v. United Silver Mines, Inc.*, 116 Idaho 240, 245 (Ct.App.1989); "If a contract is ambiguous, its meaning turns on the underlying intent of the parties. Intent is a question of fact, to be determined by a jury in light of the language of the entire agreement, the parties' conduct, the course of prior negotiations, and other extrinsic information." (*Id.*, citing *Olmstead v. Heidelberg Inn, Inc.*, 105 Idaho 774 (Ct.App. 1983).)

In this case, it may be possible to isolate a general time frame within which defendants' Exhibit O was executed. Linda Merwin purchased the property from Anstadts in 1974. (Pls. Ex. 6.) Sixteen years later, Linda Merwin sold the property to Robert Kluss. (Pls. Ex. 17.) Thus, if Merwin is actually a party to defendants' Exhibit O, it would have been executed between 1974 and 1990 during Merwin's period of ownership. Evidence at trial shows we may be able to further narrow the range for the date of defendants' Exhibit O.

Plaintiffs' expert at trial testified that not all surveyors include prominent features like roads on their surveys. The Record of Survey by Webb Engineering appearing at Book 1 of Surveys at Page 284 and dated August 20, 1979 shows four parcels owned by Sanders with no roads on them. (Pls. Ex. 8.) However, it is unlikely there were no roads on the Webb-surveyed parcels, as Sanders "logged everything" including "some logging operations in [the Conine's] northern piece," and "was a logging freak." (Evans Depo. p.

21 at ll. 17-19.) Mr. Evans' deposition remarks regarding Sanders, and the possibility of a number of roads existing during the Webb Survey, are supported by plaintiffs' Exhibits 1-3, the 1987, 1992, and 1998 aerial photos from the USDA Farm Service Agency, because those photos show numerous indications of roads, as testified by plaintiffs' expert at trial. Plaintiffs' expert testified at trial that he identified no fewer than nine roadcuts extending off of Chandler Lane as he traveled from Rockford Bay Road to the Belstler property.

Since the 1987 aerial photo shows Chandler Lane quite clearly extending completely through the then Merwin property, defendants' Exhibit O was likely written before 1987, because Mr. Sanders needed "authority to complete the present road and provide him access to his other property." (Defs. Ex. O.) However, conflicting evidence at trial as to what road was installed where and when requires us to acknowledge it is also possible that the roads were not on the Webb Engineering Survey in 1979 because they did not then exist. This likelihood is evidenced by plaintiffs' Exhibit 9, 10, and 11.

Plaintiffs' Exhibit 9 is a grant deed from Sanders to Andrews Equipment Services of Washington, Inc. executed in March of 1983 wherein Sanders' grant by warranty deed a parcel of land identified by plaintiffs' expert as parcels C and D on the Webb survey. (Pls. Exs. 4, 8.) In that warranty deed, Sanders reserved a 60-foot easement for a road across that property, "said easement to be in the approximate location of the *existing road*, said location to be determined by the [Sanders]." (emphasis added.) The Sanders apparently determined the final location of that easement by October 7, 1983, when they quitclaimed an easement right to Rockford Bay, Inc., a company in which Mr. Sanders was a partner for the purpose of developing lands known today as Black Rock into a "high class . . . 660-acre" community for "1200 to 1500 condominium units," including "fancy condominiums, tennis courts, private security police, racquetball courts, paved road access, riding stables, a clubhouse and restaurant, an electric tram to carry residents from hilltop to lakeshore and an 18-hole championship golf course." (Pls. Exs. 10 (easement grant); and 32 (news articles re: planned Rockford Bay Country Club.) Today,

as then, these Rockford Bay/Black Rock properties are to the east of the then Merwin and now Conine parcel, and, according to plaintiff's expert testimony at trial, are located proximate to or in areas benefiting from the road easements granted by Sanders and Andrews Equipment Services of Washington, Inc. as shown in plaintiffs' Exhibits 10 and 11. (Pls. Ex. 4.) This evidence indicates the possibility, if not a probability that in 1979 when the Webb Survey was created Chandler Lane was not yet built. It may have been under construction in early 1983, and its location was finally determined by survey sometime between March and October of 1983. (Pls. Ex. 10.)

Since plaintiffs' expert's report and plaintiffs' expert at trial verified plaintiffs' Exhibits 9, 10, and 11 relate to roads labeled A, B, C, and D in his report, it is very likely, should defendants' Exhibit O not be a forgery, that Sanders' intent was to "complete the present road and provide him access to his other [planned Rockford Bay Country Club] property" from the easternmost point of road D in plaintiffs' expert's report, extending that road toward the east across "the northwest corner of the property owned by Linda L. Merwin."

Finally, plaintiffs' expert's report states he "did not find a recorded easement for a continuation of this [easement grant] road [labeled as roads A, B, C, and D] across parcel number 0825," which is defendant Conine's parcel directly to the east of the Belstler land. (Pls. Ex. 4.) This lack of evidence, coupled with evidence discussed herein above potentially narrows the time frame for the unrecorded purported grants between Sanders and Merwin to a time period as early as 1974 (if the Webb Survey did not show existing roads), to 1987, a period of 13 years, when we clearly see a road on the USDA map. (Pls. Ex. 1.) However, if the Webb Survey showed no roads because there were no roads in 1979, the time period during which the agreement may have been executed narrows to eight years, or 1979 to 1987. There is no evidence indicating when Sanders actually cut his road through the northwest portion of Merwin's land. Also, there is no evidence as to whether Sanders cut the road through Merwin's land sometime after 1979 without Merwin's permission. However, assuming some continuity of road construction, if the

road was surveyed and easements were conveyed during 1983, and Sanders needed to "complete the present road and provide him access to his other property" sometime thereafter, the date of defendants' Exhibit O could be a relatively short four-year time period between October 1983 and 1987, when plaintiffs' Exhibit 1 gives evidence of the road's existence across Merwin's land.

However, Sanders' purported grant to Merwin was "for access from the County Road thorough [sic] property owned by V.A. Sanders." There was little evidence at trial related to other parcels Sanders may have owned in the area, except in plaintiffs' Exhibits 9, 10, 11, and 32 related to his partnership in Rockford Bay Inc. for the community to be developed to the east, regarding parcels to the south, east, or north of Merwin's property, through which parcels Sanders may have intended to grant Merwin access "from the County Road." For example, there was no evidence offered at trial as to whether "the County Road" indicated in defendants' Exhibit O is actually Rockford Bay Road, instead of Loff's Bay Road from the northeast of Merwin's land. However, since evidence at trial showed the lands covered by the Webb survey were owned by Sanders, and that he subsequently or concurrently built and surveyed a road through those properties shown in plaintiffs' expert's report as roads A, B, C, and D, it is possible, if not probable that Sanders' grant to Merwin was across some portion of what is now Chandler Lane.

Unfortunately, no evidence was presented at trial related to defendants' Exhibit O as to whether Sanders intended Merwin to enter Chandler Lane from Rockford Bay Road and immediately turn right past what is now the Worley Fire Station to cross the southern portion of what is now the Belstlers' property, or whether he wanted her to use an extension from the eastern point of road D into the northwest portion of Merwin's land, or whether he intended access to be granted from either the western point of road D, or some location off road C leading to the disputed driveway to be that access.

Alternatively, by the naked language of defendants' Exhibit O, it may have been executed long after Merwin sold the property to Kluss, because it states it involves an easement on property "owned by" Merwin, without stating it was owned *when* the

document was executed; that it "was granted," without saying *when* it was granted; in sentence number two that additional access "had to be" mutually agreed to, as if speaking about something agreed to in the past; and in the second paragraph that the agreement "was made," without saying *when* it was made. In fact, the agreement was reportedly made "to complete the present road," as if the road is already completed by the time the agreement is executed; and finally that the agreement "was clearly beneficial," apparently referring to some unknown time in the past when it was allegedly executed and beneficial. Plaintiffs request this Court find defendants' Exhibit O completely and wholly indecipherable, and that it has no force or effect on the rights of the parties to this lawsuit.

Making any concrete determination regarding these matters from the evidence offered at trial would put the Court and the parties' interests far out on an unsustainable evidentiary limb. Therefore, this Court should determine that defendants' Exhibit O is completely void even if it is not forged, and is of no value whatsoever except to indicate that Sanders and Merwin had an intent at some unknown time to grant some undefined access to each other across their respective properties, Sanders' property in particular being unspecified by the document itself. If the Court uses this document merely as evidence of those parties' intent, and for nothing else, this singular evidence could be of assistance later in determining the meaning of the Sanders-Henry contract, and all three documents included therein, should the Court find those documents or portions thereof are ambiguous and require the court to look beyond them for their meaning.

Therefore, plaintiffs argue that defendants' Exhibit O should be found by the court to be void, but if it is to be used may only be used to show that A) Merwin and Sanders intended the other to gain access to their own lands across portions of the other's property, and B) Sanders was unable to negotiate a recordable mutual grant of easements with Merwin during the ten-year period from 1979 (Webb Survey) to 1989 (Sanders' deed to Henry) when Merwin and Sanders owned neighboring properties.

Finally, plaintiffs argue this Court should take note that the latter possibility above is supported by the very existence of the final difficult and ambiguous paragraph of plaintiffs' Exhibit 15, the now infamous instrument number 1119009, because it demonstrates that in June of 1988 Sanders was still unable to reach agreement with, or perhaps even have negotiations with Linda Merwin, and attempted to rely on Henry's grant to Merwin to do the job that Sanders was unable to accomplish directly with her. The very creation of that Mutual Agreement between Sanders and Henry implies Merwin may have rejected the defendants' Exhibit O; she remained unwilling to enter into a recordable mutual easement with Sanders, and in fact wanted to have nothing to do with him – any reasons for Merwin's feelings on the issue being starkly missing at trial. However, due to this Court's knowledge of human behavior, the implication remains.

Plaintiffs request this Court completely invalidate and find void any application whatsoever for or against the interests of either parties in this case, except to the extent it demonstrates Sanders' inability to contract with Merwin.

2. Two Documents are Included in the Sanders-Henry Purchase Agreement.

In the *Olmstead* case, the Idaho State Supreme Court found a contract of sale and a contract of employment executed concurrently between two parties "were intended to express the two couples' overall agreement." (*Olmstead v. Heidelberg Inn, Inc.*, 105 Idaho 774 (1983).) Along with those two agreements, the *Olmstead* Court found two other contracts between the parties that were also meant to express the parties' overall agreement, because "all four of the contracts shared a common nexus . . . [and] they defined or modified the rights of the [parties] regarding the motel operation." (*Olmstead*, 105 Idaho at 778.)

In this case, Mr. and Mrs. Sanders and Kenneth Henry entered into a land purchase Sale Agreement contract shown at plaintiff's Exhibit 14, which is instrument number 1119008, for Henry's purchase of the future Belstler property, which provided Henry possession only and not title. (Pls. Ex. 14 at 2.) On the date of execution of

instrument number 1119008, those parties also executed instrument numbers 1119009, a purported easement agreement, and 1151056, the Sanders to Henry Deed, found here at plaintiffs' Exhibits 15 and 16, respectively. The initial two documents share a common nexus by defining or modifying the Sanders' and Henry's rights and obligations related to the conveyance of property from the Sanders to Ken Henry. However, due to the doctrine of merger, discussed herein below, the third document is an outcome of the contract, but not part of it. (*Tower Asset Sub Inc. v. Lawrence*, 143 Idaho 710, 715 (2007).) The three documents were not recorded in numerical order, because Ken Henry needed to satisfy his obligations under instrument number 1119008 related to completion of the purchase price payments prior to the Warranty Deed, which is instrument number 1151056, being recorded in Kootenai County.

Specifically, plaintiff's Exhibit 14, the Sale Agreement, named the parties, Mr. and Mrs. Sanders and Ken Henry, described the property to be sold, provided a purchase price and terms for the installment payoff, stated Henry's obligations regarding maintenance, taxes, and insurance, allowed Henry's possession prior to deed deliverance, stated terms related to attorneys fees and costs in case of a potential dispute, provided a method of addressing payment delinquency, gave Sanders' remedy for Henry's total failure to pay installments, gave standard contract Notice provisions, and the parties' agreement to place the deed in escrow with the third-party payee of Henry's purchase monies, after full payment of which said escrow company was to deliver the deed to Henry. In plaintiffs' Exhibit 15, the Sanders are alleged to have granted an easement to Henry, as consideration for Henry's creation of two easements for Linda Merwin. These two documents constituted the Sales Agreement, and the deed was to be provided following the execution and performance of the terms of thereof.

This Court should find instrument numbers 1119008 and 1119009 are two documents evidencing one contractual agreement.

3. The Sanders-Henry Purchase Agreement is Ambiguous as a Matter of Law.

"A contract is ambiguous if it is reasonably subject to conflicting interpretations." (*Bauchman-Kingston Partnership, LP v. Haroldsen*, 2008-ID-1210.084 at 4; citing *Cristo Viene Pentecostal Church v. Paz*, 144 Idaho 304, 308 (2007).)

"Whether an agreement is ambiguous is a question of law." (*Hoffman v. United Silver Mines, Inc.*, 116 Idaho 240, 245 (Ct.App.1989); e.g., *DeLancey v. DeLancey*, 110 Idaho 63 (1986).) "If the contract is not ambiguous, its interpretation is another question of law, to be determined by the trial judge rather than by a jury." (*Id.*, citing *Luzar v. Western Surety Co.*, 107 Idaho 693 (1984). "Conversely, if a contract is ambiguous, its meaning turns on the underlying intent of the parties. Intent is a question of fact, to be determined by a jury in light of the language of the entire agreement, the parties' conduct, the course of prior negotiations, and other extrinsic information." (*Id.*, citing *Olmstead v. Heidelberg Inn, Inc.*, 105 Idaho 774 (Ct.App. 1983).

Specifically related to easement grants or deeds construed as contracts, an instrument granting an easement is to be construed in connection with the intention of the parties and circumstances in existence at the time the easement was given and carried out. (*Argosy Trust v. Wininger*, 141 Idaho 570, 572 (2005), rehrg. denied June 28, 2005.)

In this case, the core contract document at issue that allegedly granted express easements, instrument number 1119009, was fully discussed at trial, but further discussion is merited herein. (Pls. Ex. 15.) The other two documents, plaintiffs' Exhibits 14 and 16, were little discussed at trial.

In the first of the three contract documents, instrument number 1119008, the Sanders-Henry Sale Agreement, Henry is only granted immediate possession as of June 15, 1988, and not title. (Pls. Ex. 14 at 2.) Notably, there is no reference in that Sales Agreement, which is instrument number 1119008, to the document recorded as 1119009, plaintiffs Exhibit 15. (Pls. Ex. 14.) Further, plaintiffs' Exhibit 14 only references the Sanders-Henry deed, the third document arguably included in the contract, which is plaintiffs' Exhibit 16.

Therefore, the first of the three contract documents is ambiguous, in each of two places it uses the language "any and all easements, conditions and restrictions of record and easements for ingress and egress," because there is no way to tell if the deed is only referencing easements created prior to June 6, 1988, when the document was signed, or whether it is meant to be prospective to include the second document of the contract, instrument number 1119009, and all potential later-granted easements. (Pls. Ex. 14 at 1.)

Further, included with the second instance of the use of that language, it states, "[t]he seller has made a good and sufficient deed conveying said premises to the purchaser free and clear of all liens and incumbrances, except any and all easements, conditions and restrictions of record and easements for ingress and egress." (Pls. Ex. 14 at 2.) But, the deed gives absolutely no reference to the second document, instrument number 1119009, so it is impossible to tell whether the "subject to" language in the warranty deed was meant to include any easements purportedly granted in that document number two, plaintiffs Exhibit 15. In fact, the language on pages one and two of the first of the three contract documents is exactly the same as the language in the Sanders-Henry deed - and in neither is there a reference to document number two, instrument number 1119009. It is likely that the "good and sufficient deed" only referenced the easements existing in the Sales Agreement, i.e., the Rockford Bay, Inc. easement, here plaintiffs' Exhibit 10, because the language is identical, and neither the first nor the third contract document reference the second document.

To address these ambiguities, the Court should find the only easement existing across and burdening the Sanders' property they were selling to Henry on June 8, 1998 was located on what is exhibited as Road D in plaintiffs' expert's report. (Pls. Ex. 4.) That easement was granted to Rockford Bay, Inc., see plaintiffs' Exhibit 10. Thus, this Court should rule that plaintiffs' Exhibit 14 only referred to the Rockford Bay, Inc. easement previously granted by what is now plaintiffs' Exhibit 10.

Additional justification for this finding is that since the first two documents of the contract, plaintiffs' Exhibits 14 and 15, were recorded contemporaneously on June 8,

1988 at five minutes past ten in the morning, this Court should find that the granting language for any easements in plaintiffs' Exhibit 15, if they are not void with no effect whatsoever for other reasons, were not included in any easements referenced in plaintiffs' Exhibit 14, because plaintiffs' Exhibit 14 was recorded first. (I.C. § 55-811; *In Re Young*, 156 B.R. 282 (1993).)

In the second of the three contract documents, instrument number 1119009, the purported easement grants, evidence at trial indicates significant portions of that document are ambiguous.

Initially, it should be noted by the Court that in the first paragraph, the property description does not include the "subject to" language used to reference "any and all easements, conditions and restrictions of record and easements for ingress and egress" that is included in the sale agreement and the deed. (Pls. Exs. 14, 16.) Thus, the document is ambiguous because it is unclear from the face of plaintiffs' Exhibit 15 whether Sanders meant to transfer the property to Henry with only the known Rockford Bay easement, or only the easement Sanders allegedly granted Henry in plaintiffs' Exhibit 15, or some other combination.

As to other ambiguity and related to the purported **southern easement**, the terms "existing road," and "existing logging road" are undefined in the document. At trial, plaintiffs' expert stated he saw nine different roadcuts as he traveled from Rockford Bay Road to the Belstler's home on Chandler Lane in 2009. There is no telling what was meant by the terms at issue here when the document was created in 1988. Therefore, the Court should plumb parol evidence and the circumstances present in 1988.

"In construing an easement in a particular case, the instrument granting the easement is to be interpreted in connection with the intention of the parties, and the circumstances in existence at the time the easement was granted and utilized." (*Nelson v. Johnson*, 106 Idaho 385, 387 (1984); citing *Quinn v. Stone*, 75 Idaho 243 (1954).)

In this case, as discussed herein, on June 3, 2009 Sanders conveyed the Worley Fire District parcel over which Henry and or Merwin needed to pass over to reach the

soon-to-be Henry property. There is no evidence Worley Fire District granted any easement right to Sanders, Henry, or Merwin.

Sanders knew of the grant to the Fire District three days earlier, but Henry did not. We know Sanders did, because he and Geraldine signed the Fire District warranty deed. (Pls. Ex. 13.) We know Henry did not, because his unpressured statement regarding the 1119009 instrument was that it was "some type of formality." (Henry Depo. at p. 8, lines 3-24.) Further, we know from the evidence that Sanders did not explain this to Henry at the signing of the documents when Attorney R. Maurice Cooper notarized them, because Sanders appeared before that notary on June 6, and Henry did not appear until the following day. (Pls. Ex. 15.) Even if Sanders spoke to Henry prior to the signing, it is anomalous that Sanders would not have informed Henry there would be no way for Merwin to cross over The Worley Fire District to reach the easement Henry was to grant to Merwin. Even if Sanders was not being fraudulent, he was at least being sloppy, because there is no evidence he was suffering from dementia, and simply forgot what he conveyed to the Worley Fire District three days earlier.

As to the granting language specifying the location of the easement, in *Coulsen* the Idaho State Supreme Court stated:

> The use to which a right of way is devoted or for which it is created, determines the character of title with which the holder is invested. The character of the use or the necessity of complete dominion determines the extent to which [the holder] is entitled to possession. No greater title or right to possession passes under a general grant than reasonably necessary to enable the grantee to adequately and conveniently make the intended use of [the holder's] way.

(*Villager Condominium Assoc. v. Idaho Power Co.*, 121 Idaho 986, 988 (1992); citing *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544 (1991); citing *Coulsen v. Aberdeen-Springfield Canal Co.*, 47 Idaho 619, 626 (1929);

"Thus, the general rule concerning easements is that the right of an easement holder may not be enlarged and may not encompass more than is necessary to fulfill the easement." (*Id.*)

In court, Ron Evans testified that he built the road past the firehouse and graveled it up to a certain point for the express use by Henrys when they subdivided their parcel and built their retirement home. (Evans Depo. at p. 12, ll. 15-21; p. 13, ll. 6-9.) But, it is unlikely there were no roads on the Webb-surveyed parcels, as Sanders "logged everything" and "was a logging freak." (Evans Depo. p. 21 at l. 19.) At trial, Evans agreed that the flat areas on Belstler's and Conine's property could have been used as landing decks for logging. In his deposition Evans was more certain, testifying, "[c]ertainly, [Sanders] was," to the query "[s]o it was [Evans'] understanding that [Sanders] was also utilizing [the disputed driveway.] to get to [Conines'] piece of property." (Id. at p. 24, ll. 1-4.) Further, Evans testified that the now disputed southern road across the Belstlers parcel was put there for logging purposes. (Id. at pp. 29, ll. 2-8 and 22-25, and 30, ll. 1-12.) . Specifically, Evans recalled, "that's the reason they did this road like they did at the beginning, this little bottom piece was to[o] -- because this is all so steep right there." (Id., p. 30, ll. 8-9.) (indicating at deposition some unknown point on deposition exhibit C.)

Thus, since the "existing logging road" was used by loggers to reach the flat area on the southern portion of the Henry property for log storage prior to trucking them to the mill, then the terms "existing road" and "existing logging road" would logically be one and the same road. (Pls. Ex. 15.)

However, simply because the road existed and the ambiguity can be resolved as to their physical location does not mean a valid easement grant was or could be conveyed from Sanders, or from Henry to Merwin. If any easement was conveyed, even though the title of plaintiffs' Exhibit 15 states it is for "ingress and egress," which sounds like a general grant, the nature of the prior use was more likely a "logging road." (Pls. Ex. 15.) There is no evidence that Merwin needed any access across the southern portion of Henry's land for logging – or even for ingress or egress. The fact remains that even if the Henry-Merwin southern grant was valid, there was never any grant from Sanders or Worley Fire District to Merwin across the abutting parcel to the west of Henry's.

As to the purported **northern easement**, the two ambiguous terms allowing this Court to stray from the plain language of the document into parol evidence are the terms "existing road" and "community road." The evidence shows it is more likely than not the "existing road" is Road D coming from an easterly direction. (Pls. Ex. 4, 15.)

The document's plain language helps in this area. The final sentence of plaintiffs' Exhibit 15 states, in pertinent part, "[s]aid easement[is] . . . the existing road from the community road on the north." This wording provides a direction, which is "from . . . the north." This indicates the community road was, in fact, on the north, and that the easement was to be granted from the direction of Merwin's property toward Henry's on some road defined by its service to a community. Plaintiffs' expert at trial testified it was possible that the eastern terminus of Road C is located *south of every portion* of Road D. The question presents itself: is there a "community road" to the northeast of the eastern terminus of Road D? (Pls. Ex. 4, sketch.)

At trial, Conines presented evidence supporting their view that the "community" describing the road was merely Chandler Lane from Rockford Bay Road looping up through Sanders property to the disputed driveway. However, evidence shows that on June 6, 1988 Merwin had no buildings on her property, because the first building up there was Kluss'. There is no evidence Merwin even visited her own property, certainly she did not live there. (Henry Depo. at p. 7, ll. 3-7.) . It is more likely than not the future Conine property was simply an investment for Merwin and nothing else. Merwin lived in Spokane when she bought it in 1974. (Pls. Ex. 7.)

Judy Solomon's husband "told [her] there was a building on it." (Solomon Depo. at p. 11.) However, to the question, "[a]nd you made no use of the property at all?," Ms. Solomon answered, "[n]o." (Id.) The building was not the Solomon's. Also, Kluss, the predecessor to Solomons "was the first one [to move] up there." (Evans Depo. at p. 11, l. 8; p. 17, l. 22.) In deposition, Ron Evans was shown an aerial photo and he identified the smaller of the Conine buildings as "the one that Kluss built." (Id. at p. 19, ll. 12-13.) And,

Evans stated, "I never even seen [sic] this building that he had put up. That was before Ken . . . ever built a house on this piece." (Id. at ll. 3-5.)

Chandler Lane could not be the "community road," because there was no community at all on that vacant land. The evidentiary timeline shows Henry bought from Sanders in 1988, see plaintiffs' Exhibits 14-15, and that Kluss, "the first one up there," bought from Merwin in 1990. (Evans Depo. at p. 11, l. 8 ("first one"); Pls. Ex. 17 Merwin-Kluss deed.) It is notable the Merwin-Kluss deed granted no easements in the legal description of the property, which easements Merwin had been granted from Anstadt in 1974, and which Anstadt had been granted from Smythe in 1961. (Pls. Exs. 6, 7, 17.) This implies Merwin felt negatively about easements, perhaps from her experiences with Sanders, who was never able to procure one from her in the *fifteen years* between 1974 and 1989 when they each owned abutting properties.

Evidence indicates Attorney Maurice Cooper knew the Sanders and worked for them. (Pls. Exs. 9, 14, 15, 16.) If Cooper drafted the Sales Agreement, and the other two documents comprising the Sanders-Henry conveyance, Sanders probably created the language or gave it to Cooper for creation of those documents. Evidence is that Henry did not even know the purpose of instrument number 1119009, except a "some type of formality . . .." (Henry Depo. at p. 8, l. 11.) Further, Henry agreed 1119009 "was a document presented to [him] by Sanders'." (Id. at p. 8, ll. 13-14.) Henry had "no independent recollection of signing that instrument during the transaction." (Id. at ll. 18-20.) Finally, Henry did not have "any recollection of Mr. Sanders somehow indicating to [Henry that Sanders] had to establish some easements or roads for the benefit of [Merwin]." (Id. at ll. 21-24.) This last is supported by the fact that Sanders signed the day before Henry, which indicates Sanders and Henry did not discuss the document during a signing ceremony. (Pls. Ex. 15.)

Since it was Sanders' document language, what was his perspective and definition of the "community road?" This is a fair and proper parol evidentiary question.

In 1983, *five years before* Sanders' sales to Worley Fire District and Henry, Mr. Sanders was a partner for the purpose of developing lands known today as Black Rock into a "high class . . . 660-acre" community for "1200 to 1500 condominium units," including "fancy condominiums, tennis courts, private security police, racquetball courts, paved road access, riding stables, a clubhouse and restaurant, an electric tram to carry residents from hilltop to lakeshore and an 18-hole championship golf course." (Pls. Ex. 32 (news articles re: planned Rockford Bay Country Club.)

It is more likely than not that the language inserted by Sanders or his attorney, Cooper, into instrument number 1119009 used the words "community road from the north" to indicate the "community" Sanders was developing to the north and east of the Sanders property in partnership with John Pring through their firm Rockford Bay, Inc. This is the same firm Sanders granted an easement across Road D to in 1983. (Pls. Ex. 10.) This is most likely the reason Sanders' reserved the future Chandler Lane easement when in 1983 they conveyed the parcel labeled as 2600 in plaintiffs' expert's report sketch to Andrews Equipment Service of Washington, Inc. (Pls. Ex. 4, 9.) Later, in November 1983, Sanders, as a partner in Rockford Bay, Inc., negotiated with Andrews Equipment to provide the same easement access for Rockford Bay's planned community activities, which makes logical sense so that an entrance or exit from the "community" could be available as an additional lake access road for that planned "community" through Rockford Bay Road.

"[W]hen [Sanders] put the roads in, he was in cahoots at the time with the John Appleway Chevrolet people. . . . and [Sanders] had the only -- Pring didn't have any lake frontage, but [Sanders] did. So they were going to go in partners together on the golf course development thing, and [Sanders] would donate his lake front property. That's where the Black Rock office is now. . . . so when [Sanders] built around past the fire station up -- it was going to connect up into the golf course, which is just past Howard Conine's property right now." (Evans Depo., at pp. 7, ll. 16-25, and 8, ll. 1-6.)

The evidence shows, and this Court should find that the meaning of the words "community road from the north" is the extension of the road from what is now Black Rock coming down from the northeast of the Conine property and through it heading west toward Belstler's. This accords with evidence from defendants' Exhibit O, wherein Merwin granted an easement to Sanders "on the northwest corner of the property owned by [Merwin] . . . to provide Mr. Sanders with the authority to complete the present road and provide him access to his other property." If defendants Exhibit O has discernible meaning connected to other evidence, it is that Mr. Sanders needed access through Merwin's on her northwest corner to connect the "community road from the north," so he could "complete the present road," which was Road D and the lower portion of Chandler Lane going to Rockford Bay Road. (Pls. Ex. D, sketch.) With this interpretation all the evidence lines up smoothly.

Plaintiffs believe evidentiary analysis of the easements at issue has been burdened with the limiting and mistaken assumption that such analysis must begin at Rockford Bay Road and head up the hill. This misdirection is easily embarked upon, given the analytical concentration on plaintiffs' property and the existing directional access to it from Rockford Bay Road. However, burdened with this incorrect assumption, analysis of all the evidence together ends up in a very difficult mishmash. If the Court abandons that assumption and adopts an analysis from the opposite direction, so its analysis flows east to west, all the evidence for interpreting the documents to find the correct easement paths lines up smoothly straight downhill from Black Rock to Rockford Bay Road.

Plaintiffs thereby suggest this Court find the meaning of the words in the last sentence of plaintiffs' Exhibit 15 to be that the "existing road" is road segments A, B, C, and D, and that the "community road on the north" indicates the road from the east at Black Rock, which Sanders wanted to connect through the northwest corner of the Merwin property to the eastern terminus of Road D. (Pls. Ex. 4, sketch.)

Therefore, if this court substantiates the validity of the document, it should reach the above conclusions regarding the ambiguous terms, and thus the overall meaning of

the documents. However, substantiation of the document may fail, due to other circumstances before the Court through parol evidence and Idaho law.

4. Sanders Lacked Power to Grant Henry an Easement on June 8, 1988.

Regarding the Sanders-Henry grant in plaintiffs' Exhibit 15, plaintiffs' expert's report discusses that easement as "D6, 1st Easement," and shows two locations for that purported grant. (Pls. Ex. 4 at 3.) However, even if the Court finds the location of the easement to be where plaintiffs' expert shows it in his report's sketch as Road E, Sanders would not have had the power to grant this easement on June 6, 1988, because on June 3, 1988 Sanders conveyed the fire station parcel to the Worley Fire District, and thus did not own the real property upon which he would attempt to grant an easement to Henry in plaintiffs' Exhibit 15. (Pls. Ex. 13.)

Plaintiff's' Exhibit 13, the warranty deed from Sanders to the Worley Fire District (WFD), was executed by Vaughn and Geraldine Sanders on June 3, 1988, and the acknowledgment on that document maintains the June 3 date for when those parties appeared before the notary to sign. Thus, the property was sold on June 3, 1988.

At trial during plaintiffs' expert's testimony, and in that Sanders-WFD warranty deed, the evidence shows the WFD property legal description includes language stating, ". . . a plastic cap marked PE/LS 3451 on the north boundary of a 60 foot wide road right-of-way for Rockford Bay Road; thence, North 87°41'03" West, 75.01 feet along the north boundary of the Rockford Bay Road right-of-way, 60 feet north of and parallel with the north boundary of Sanders Rockford Bay Development Third Addition to an iron rod . . .." Therefore, because the parcel transferred to the Worley Fire District extended all the way to the public Rockford Bay Road, there was no land available between the road and the district property that Sanders owned upon which he could convey an easement to Henry.

Further supporting this point is that in plaintiffs' Exhibit 15, the Sanders-Henry grant purports to make that grant "in an area adjacent to Rockford Bay Road in front of

the fire station located thereon." The word adjacent means "[l]ying near or close to, but not necessarily touching." (Black's Law Dictionary, 8th Ed., 2004 at 44.) This means the purported easement grant was for an area away from the Rockford Bay Road right-of-way, because the word adjacent was used and not the word "abutting" which means "to join at a border or boundary; to share a common boundary with." (Id. at 11.) However, because the WFD deed describes property extending all the way to the Rockford Bay Road right-of-way, there was no area either "adjacent" or "abutting" that right-of-way for the Sanders-Henry easement allegedly granted by plaintiffs' Exhibit 15.

Therefore, Sanders *did not even own the property* alleged to be transferred by the Sanders-Henry easement grant in instrument number 1119009, even though the WFD warranty deed was not recorded until 4:25 o'clock in the afternoon of June 8, 1988, *after* the recordation of the Sanders-Henry Sale Agreement (Pls. Ex. 14), and the Mutual Agreement for Easement for Ingress and Egress (Pls. Ex. 15). This is because as between the Sanders and the Worley Fire District, the signed but then five days later recorded warranty deed was "valid as between [those] parties thereto and those who [had] notice thereof." (I.C. § 55-815.) Sanders had no legal power to convey the same property twice. Sanders certainly had notice of the conveyance to WFD. Therefore, the Sanders-Henry easement grant must fail.

5. Henry Lacked Power to Grant an Easement Interest in Sanders' Property to Merwin on June 7, 1988, thus the Merwin Easement Grants Must Fail.

"The possession of land is, *prima facie*, evidence of ownership, and where a third person is dealing with the record owner, who is not in possession of the premises, it is the duty of one about to purchase or become interested in the title of the record owner, to inquire of the one in possession." (*Spencer v. Steward*, 37 Idaho 610, 614-615 (1923).)

In this case, according to defendants Exhibit O, which document is argued above to be dated prior to June of 1988, Linda Merwin knew that Sanders owned the property to the west of hers, which is now owned by plaintiffs Belstler. No evidence at trial was

presented to show that Merwin knew Henry entered into a Sales Agreement to purchase the Sanders property to the west of Merwin's in June of 1988.

In *Lathrop*, the court said:

> A person being the equitable owner, and in the occupancy of land [here Henry], the record title being in the third party [here Sanders], [Henry] must refrain from all acts calculated to produce a false impression as to the state of the title, in order to hold a person dealing with such ostensible owner [here purportedly Merwin] to the duty of inquiring with respect to the interest of such occupier.

(*Spencer*, 37 Idaho at 616; citing *Lathrop v. Groton Savings Bank*, 31 N. J. Eq. 273; see Pomeroy's Equity Jurisprudence, sections 616, 623, and 624.)

In this case, the evidence shows Henry never had any dealings with Merwin. Henry did not know Linda Merwin, and did not meet or negotiate with her about the purported easement grants in instrument number 1119009. (Henry Depo. Tr. pp. 6-7, lines 20-25 & 1-7, respectively.) However, if defendants' Exhibit O has any meaning and is not a forgery, it is probable Merwin knew Sanders was the owner of the later-to-be Henry property.

Henry was in possession as of June 15, 1988, because that is when page 2 of the Sale Agreement indicates Sanders granted him possession. (Pls. Ex. 14 at 2.)

An easement is a non-possessory interest in land. (*Oakley Valley Stone, Inc. v. Alastra*, 110 Idaho 265, 268 (1985), re'hrg. denied Mar. 16, 1986.) If an easement was a possessory interest, Henry could have granted Merwin part of his possession on June 15. However, because it is not, Henry could not transfer what he did not own or possess. Since an easement is a non-possessory interest in property, only a title owner may grant an easement appurtenant, which the alleged Henry-Merwin easements are purported to be, due to the Merwin property description included in instrument number 1119009. (Pls. Ex. 15.)

On June 6, 1988, when Sanders and Henry signed the Sales Agreement at plaintiffs' Exhibit 14, Sanders retained title until Henry made the payments, and Henry did not have possession until June 15, 1988, nine days later. On June 7, 1988, when

Henry signed the Mutual Agreement for Easement for Ingress and Egress at plaintiffs' Exhibit 15, Henry enjoyed neither title nor possession. Therefore, on June 7, 1988, Henry had no power to grant an easement appurtenant to Merwin at all.

Further, the grants to Merwin in that document were present grants, not executory.

In the Virginia case of *Davis*, the court stated:

> There is nothing executory about this language. It is a present grant . . . The language is plain and susceptible to no other reasonable interpretation. Such an interpretation is consistent with the other provisions of the contract.
>
> Thus, we hold that the part of the contract that expressly granted a right-of-way was not executory but created a present right in land. Moreover, the contract of sale stands by itself and is in no way inconsistent with or merged in either the lease or the deed.

(*Davis v. Cleve Marsh Hunt Club*, 242 Va. 29, 34 (1991) (Seller's contract for parcel A grants buyer easement over seller's parcel B.)

Similarly, the Sanders-Henry Sales Agreement is executory, because it's wording includes "vendors agreed to sell," "purchaser agrees to purchase," "purchaser agrees to pay," "purchaser agrees to keep the premises in good repair," etc. (Pls. Ex. 14.) However, plaintiffs' Exhibit 15 includes a *present grant* to Merwin: "Henry grants an easement [upon] the property that he is purchasing . . . to Linda Merwin." However, Henry did not even have possession until June 15, and he made to present grant on June 7, 1988, when he had no power to make a present grant. Therefore, the Merwin grants should fail.

Idaho Code section 55-501 states, "[a] mere possibility not coupled with an interest cannot be transferred." Idaho Code section 55-110 states, "[a] mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind."

When Henry and the Sanders executed their installment purchase contract, there was only a "mere possibility," but no guarantee that Henry would fulfill his obligations under the agreement found at plaintiff's Exhibit 14. Linda Merwin was in the position of "the expectancy of an heir apparent," holding no interest whatsoever in the Sanders-

Henry installment purchase contract. Linda Merwin was not a signator to any of the three documents evidencing the Sanders-Henry contract, and there is no evidence she gave any consideration to Henry for the alleged grant in instrument number 1119009, thus Merwin had a mere possibility of acquiring the easement not coupled with a then-present interest. Therefore, pursuant to Idaho Code sections 55-110 and 55-501, no transfer from Henry to Merwin was effective through instrument number 1119009.

Plaintiffs argue this Court should find Henry lacked power to convey anything to Merwin on June 7, 1988, and that the easement grants to Merwin must fail, unless Idaho's doctrine of after-acquired title allows the easement conveyance to become effective when Henry takes title after completing the payments to Sanders sometime in 1989. (Pls. Ex. 16.) The after-acquired doctrine does not apply, see Argument 7 herein.

6. Merwin and Her Successors Cannot Benefit From 1119009, Because the Grant Was Not Delivered To Her, Pursuant to Idaho Law.

In Idaho, a deed "does not take effect as a deed *until delivery with intent that it shall operate*. The intent with which it is delivered is important. This restricts or enlarges the effect of the instrument." (*Barmore v. Perrone*, 2008-ID-R0219.005 at 3 (2008); citing *Bowers v. Cottrell*, 15 Idaho 221, 228 (1908) (emphasis added).)

"Acceptance of the conveyance by the grantee is as essential as the delivery by the grantor, and where acceptance is not proven, and the facts do not justify the presumption of law that the grantee has accepted, the title does not pass." (*Whitney v. Dewey*, 10 Idaho 633, 642 (1905).)

"It is beyond controversy that the evidence of delivery must come from without the deed. In other words, a deed never shows upon its face nor by the terms thereof a delivery, and parol evidence thereof must necessarily be admitted when the question of delivery arises." (*Id.* at 4; citing *Whitney v. Dewey*, 10 Idaho 633, 655 (1905).)

"Recordation of a deed creates a rebuttable presumption of delivery." (*Estate of Skvorak v. Security Union Title Ins. Co.*, 140 Idaho 16, 20 (2004).) However, "the

presumption of delivery is clearly rebutted [where] there was no mutual assent of the parties." (*Id.*)

In this case, both elements of 1) physical delivery and 2) Henry's intent that the easement grant should operate are missing. No factual evidence at trial was presented to support the idea that instrument number 1119009, the Henry-Merwin easement was ever physically delivered to Linda Merwin, or that she knew it existed, except the fact of its recordation, which only raises the presumption. However, the presumption is rebutted, because Henry did not intend to make any easement grant. Henry's deposition testimony was that instrument number 1119009 was "some type of formality" and that he lacked a clear understanding of why he signed it. (Henry Depo. at p. 8, ll. 3-24.) Without a clear understanding of why he signed it, there was no intent to have that easement grant operate on behalf of Merwin, or Merwin's successors, the Conines.

In Idaho, "an argument that a deed lacked the intent necessary to be effective is identical to an argument that delivery never occurred." (*Barmore v. Perrone*, 2008-ID-R0219.005 at 3 (2008).) This is because "the real test of the delivery of a deed is this: Did the grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered." (*Id.*; citing *Estate of Skvorak,* 140 Idaho at 21 (2004).)

Therefore, defendants Conine do not enjoy any easement across Belstler's property as purportedly conveyed by instrument number 1119009, because Henry did not deliver that instrument number to Merwin, either physically or with intent for it to benefit her. (*Estate of Skvorak*, 140 Idaho at 20; *Crenshaw v. Crenshaw*, 68 Idaho 470, 475 (1948); *Bowers v. Cottrell*, 15 Idaho 221 (1908).)

7. After-Acquired Doctrine Cannot Make Easements Appurtenant to Merwin's Land, Because the Legislature has Limited that Common Law Doctrine to Fee Simple Transfers.

Idaho Code section 73-116 states, "[t]he common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all

cases not provided for in these compiled laws, is the rule of decision in all courts of this state." "By the adoption of that section[, originally sec. 18 of our Revised Codes,] this [S]tate did not adopt the common law of England when such common law was inapplicable to the conditions of the state." (*Northern Pacific R. Co. v. Hirzel*, 29 Idaho 438, 453 (1916).)

The common law root of after-acquired title is in equity by estoppel, and originated in the law surrounding will devises:

> The principle deducible from these authorities seems to be, that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey; or, what is the same thing, if the seizin or possession of a particular estate is affirmed in the deed, either in express terms or by necessary implication, the grantor and all persons in privity with him shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title *as between parties and privies*.
>
> The reason is, that the estate thus affirmed to be in the party at the time of the conveyance must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be for ever thereafter precluded from gainsaying it.

(*Van Rensselaer v. Kearney*, 52 U.S. 297, 457, (1851) (pincite at original pages numbered 161-162) (emphasis added.)

In other words, the estoppel bars the grantor, because the grantee relied on grantor's deed. Also of note is that historically this has been a doctrine of title transfers, not transfers of other interests in real property, thus it did not apply to easement interests.

In this case, Sanders contracted to sell his title interest in the property to Henry. If Sanders did not actually have title to the property prior to selling it to Henry, and Sanders later became title owner of the property, the property would automatically transfer to Henry as a matter of law based on this doctrine.

Idaho's after-acquired *title* statute states:

> Where a person purports by proper instrument to convey or grant real property in *fee simple*, and subsequently acquires *any title or claim of title thereto*, the same passes by operation of law to the grantee or his successors.

(emphasis added.) Further, in Idaho, a quitclaim deed does not transfer after-acquired title, but a warranty deed does transfer such title. (*State Ex Rel. Moore v. Scroggie*, 109 Idaho 32 (1985).)

The Conines do not enjoy an easement across Belstler's property due to the purported conveyance by instrument number 1119009, because Idaho's after-acquired property rule has been limited by the Idaho Legislature to **fee simple transfers of title or claim of title by proper instrument**. (I.C. § 73-116; *Olson v. J.A. Freeman Co.*, 117 Idaho 706 (1990).) The Henry to Merwin attempted easement grant was not a fee simple transfer of title in fee simple, but an attempted transfer of a non-possessory appurtenant interest.

Additionally, the attempted transfer was not by proper instrument, because Merwin's "complete mailing address" did not appear on such instrument. (I.C. § 55-601.) Further, Idaho's statute of frauds requirements were not met, because the location of the Henry-Merwin easements is not identifiable using the locations described in the instrument number 1119009. (I.C. § 9-503.)

Thus, no easement was conveyed to Merwin upon Henry receiving delivery of the title through the Sanders-Henry deed shown at plaintiffs' Exhibit 16. (Pls. Ex. 15, 16; I.C. § 55-601.)

Upon this basis, plaintiffs request this Court find the purported Henry to Merwin easement grants invalid and void as to her and her successors, defendants Conine, and Belstlers, owners of the alleged servient estate.

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8. The Henry-Merwin easement grants failed, because a) Merwin gave no consideration, and b) Merwin was not a third-party beneficiary, thus, the failed easements are invalid and void as to Belstlers.

A) Merwin Gave No Consideration.

In the *Griffeth* case, an "easement must be construed against successors of the grantor, *since it was not gratuitous*, but one for which consideration was given and compensation paid." (*Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 667 (9th Cir. 1955) (Consideration paid for Idaho easement for flooding upon servient estate) (emphasis added.) This Court finds instrument number 1119009 was ineffective to transfer by express conveyance any easement interest from Henry to Merwin. I.C. § 55-101; Fajen v. Powlus ,96 Idaho 625, 628 (1975) (an easement appurtenant is an interest in real property); I.C. § 55-601; Griffeth v. Utah Power & Light, 226 F.2d 661 (1955) (gratuitous easement gift unsupported by consideration or compensation cannot be construed against grantor's successors).

In this case, there is no evidence that Henry received any consideration from Merwin for the easement grants to her in plaintiffs' Exhibit 15, thus those easements cannot be construed against successors Belstlers, because they were gratuitous.

Defendants Conine may argue that the Mutual Agreement in plaintiffs' Exhibit 15 evidences that Henry received consideration from Sanders in the form of the easement grant from Sanders to Henry, and that Merwin is thus a third-party beneficiary of plaintiffs' Exhibit 15.

B) Merwin was not a third-party beneficiary.

The Sanders-Henry three-document contract does not include any signature of Merwin, or mention of her or her land except in plaintiffs' Exhibit 15. In plaintiffs' Exhibit 15 portion of the contract, Sanders' are grantors to whom Henry makes a promise of a grant to Merwin, thus Sanders' are the grantor/promisee, and Henry is the grantee/promisor. If the alleged agreement in plaintiffs' Exhibit 15 is analyzed using

these terms, promisor Henry grants an easement to Merwin, the purported third-party beneficiary, in exchange for Sanders' grant of an easement to Henry.

"Whether the promisee may be held liable to a third-party beneficiary turns upon the beneficiary's status. A donee beneficiary, of course, has no rights against the promisee, except where the promisee has received consideration to discharge the promisor." (*Gilbert v. City of Caldwell*, 112 Idaho 386, 396 (1987); citing J. Calamari and J. Perillo, *The Law of Contracts* § 17-10, 2d. Ed. 1977.) Certainly where Sanders' are the promisees, they would have no liability to Merwin, because after the sale Sanders would have no property for Merwin to claim an interest in, and there is no evidence that Merwin gave Sanders any consideration, so Merwin would have been a donee beneficiary without remedy. Thus, the *Gilbert* case cannot define the situation here, where Henry the promisor is alleged to be liable to Merwin's successor beneficiaries, defendants Conine.

In the third-party beneficiary equation set up by plaintiffs' Exhibit 15, Sanders is the promisee, Henry is the promisor, and Merwin is the third-party beneficiary. This is because Sanders' granted an easement to Henry, conditioned upon Henry promising to give two easements to Merwin. The benefit of this equation flows to Sanders as vendor, and not 1) Henry as buyer whose land will be encumbered, or 2) Henry because the Sanders-Henry grant fails for lack of consideration due to the prior sale to Worley Fire District which invalidates the Sanders-Henry grant. Given the evidence, it appears that Sanders intended to benefit Merwin through his contract with Henry. (*Stewart v. Arrington Construction Co.*, 92 Idaho 526 (1968).)

The question remains, did Henry intend for Merwin to benefit too? That does not appear to be the case. First, Henry's testimony related to his recollection of plaintiffs' Exhibit 15 evinced no intent. Second, the document itself must expressly show promisor Henry's intent to benefit Merwin. (*Stewart v. Arrington Construction Co.*, 92 Idaho at 532.) There is no language in plaintiffs Exhibit 15 to show Henry intended to benefit Merwin by granting her the easements, or even that she needed the easements to access her land. The only intent found in the document is perhaps an implied intent by Henry,

because he signed the document granting easements to Merwin. The document clearly states "it is necessary to execute a joint easement for interest and egress," but that joint agreement would only be between Sanders and Henry, because Merwin did not execute anything.

The Sanders-Henry to Merwin contract is problematic, as was the Rice-Cannon Agreement in the Idaho case of *Cannon Builders, Inc. v. Rice*, 126 Idaho 616 (1995). In that case, "[t]he contract [did] not state that Rice [would] satisfy McCartan's creditors." (*Id.* at 623.) Similarly, the Henry to Merwin and easement grants did not say that any need of Merwin would be satisfied, and it would be error for this Court to assume that she even required the easements to access her land, because Merwin had access directly onto Rockford Bay Road, as do defendants Conine today, due to that road running through the southern portion of that parcel.

A further question is whether Merwin as third-party donee beneficiary, or her successors Conine may hold Henry, or his successors Belstler liable by claiming the easements purported to be granted by instrument number 1119009. (Pls. Ex. 15.)

Initially, the theoretical Merwin claim must be considered, because if Merwin had no claim, her successors Conine likely do not today. Idaho Code section 29-102 states, "[a] contract, made expressly for the benefit of the third person, may be enforced by him at any time before the parties thereto rescind it." There are no facts in evidence showing rescission of the Sanders-Henry contract.

It is not the case here that this contract was made *expressly*, as in *only for* the benefit of Merwin. The cases show that the word "expressly" in the statute refers to a person *named as* beneficiary, as opposed to an incidental unnamed beneficiary. (*Jones v. Adams*, 67 Idaho 402 (1947) (third party beneficiary may enforce contract even if had no knowledge of contract at formation); *Stewart v. Arrington Constr. Co.*, 92 Idaho 526 (1968) (not necessary for third party beneficiary to be named); *Baldwin v. Leach*, 115 Idaho 713 (1989) (incidental beneficiary).)

If the contract is two documents, Sanders expressly created it for the Sanders', Merwin, and Henry. If it is only one document, plaintiff's Exhibit 15, Sanders' created it expressly for at least Henry and Merwin, but probably not the Sanders. The problem with finding a benefit in plaintiffs' Exhibit 15 for Sanders is that Henry was not shown at trial to have had any intent related to plaintiffs' Exhibit 15, and Sanders had no power to convey the easement across the Worley Fire District property, thus that grant was invalid and any benefit would have to weighed in that light and found invalid too. Henry thought plaintiffs' Exhibit 15 was just a formality of sale, therefore the only possible intended benefit to the Sanders was extremely general in nature, and that is only if this Court finds both documents were included in the one contract.

In any case, "such a [third-party beneficiary] contract must be strictly construed in favor of the person against whom such liability is asserted," here Henry. (*Dawson v. Eldredge*, 84 Idaho 331 (1937); citing *Sachs v. Ohio Nat. Life Ins. Co.*, 148 F.2d 128 (C.C.A.7th); see also: I.C. § 29-102, identical with Cal.Civil Code, § 1559; 12 Cal.Jur.2d 500, Contracts § 268; 2 Williston on Contracts, 3rd Ed. § 356, 402, 403.)

In this particular case, Henry's deposition clearly states he thought plaintiffs' Exhibit 15 was a "formality." (Henry Depo. at p. 8, l. 11.) Further, Henry did not have a discussion with Sanders regarding the use of the lower road for Merwin's benefit. (Id. at p. 6, ll. 15-23.) Henry did not even know Merwin owned the neighboring property, and had never met her prior to signing the contract to purchase from Sanders. (Id. at pp. 6, ll. 20-25, and 7, ll. 1-7.) At his deposition, Henry did not have "any independent recollection of signing [plaintiffs' Exhibit 15] during the transaction." (Id. at p. 8, ll. 18-20.) Therefore, in favor of Henry, liability should not be found from plaintiff's Exhibit 15, and this Court should deny Merwin's successors' claim.

It is settled law in most jurisdictions that the rights of the beneficiary, here Merwin, against the promisor, here Henry, are subject to the defenses the promisor may have against the promisee, here Sanders. (17 Am. Jur. 2nd § 460.)

The rules stated in American Jurisprudence 2nd are:

> The right of a third person for whose benefit a promise is made is affected with all the infirmities of the contract as between the parties to the agreement. The beneficiary is subject to all the equities and defenses that would be available against the promisee, in the absence of an estoppel, as where the beneficiary has been introduced to alter his position by relying in good faith upon the contract made for his benefit, or unless a novation has been effected. Thus, generally, in an action by the beneficiary, the promisor may assert fraud on the part of the promisee, mistake, failure to comply with the statute of frauds, or want or failure of consideration. The promisor may also assert as against the beneficiary that the contract has been rescinded by the parties prior to acceptance or action in reliance thereon by the third person.

(cited cases omitted.)

In this case, it is not clear whether the successors of Henry or the successors of Merwin may utilize the third party beneficiary doctrine at all. This will be addressed shortly hereinafter Henry's defenses are articulated, but it is likely not the case.

C) Henry's Defenses Against Merwin: Fraud, Mistake, Lack of Consideration, and No Action By Merwin In Reliance Voids the Grants.

i. Sanders' Non-Disclosure Constituted Fraud Upon Henry.

Henry, the promisor, may have asserted fraud against Sanders, the promisee, if he had known Sanders had sold the property over which Henry needed to travel to reach Henry's property to Worley Fire District three days earlier. However, Henry would not have brought a case of fraud, because he did not even know the meaning of plaintiff's Exhibit 15, according to his own deposition. This does not mean Sanders lacked a duty to Henry.

"In this regard, it is established in [Idaho] that, regarding the sale of property, although one may not be required to make representations regarding his property, once undertaking to do so he must fully disclose." (*Russ v. Brown*, 96 Idaho 369, 370 (1976).)

The Idaho State Supreme Court cited with approval the following statements:

> The rule decisive of the issue is stated in Restatement of Contracts, sec. 472, Comment b (1932):
>
> ". . . if a fact known by one party and not the other is so vital that if the mistake were mutual the contract would be voidable, and the party

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> knowing the fact also knows that the other does not know it, non-disclosure is not privileged and is fraudulent."
>
> And in *Pashley v. Pacific Electric R. Co.*, 25 Cal.2d 226, 153 P.2d 325 (1944), quoting 12 R.C.L. § 71, p. 310, it is stated:
>
> "Even though one is under no obligation to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which will materially qualify those stated. If he speaks at all he must make a full and fair disclosure."

(*Janinda v. Lanning*, 87 Idaho 91, 96-97 (1964); see *Summers v. Martin*, 77 Idaho 469 (1956) (vendor charged with telling truth); *Fuchs v. Lloyd*, 80 Idaho 114 (1958) (purchaser entitled to rely on vendor's statements).)

In this case, Sanders created a whole separate document, plaintiffs' Exhibit 15, because he was apparently unable to negotiate a recordable instrument with Merwin directly, and apparently hoped that Henry's grant to Merwin would suffice. However, there is no evidence before this Court Sanders told Henry about the existence of defendants' Exhibit O. (Henry Depo. at p. 8, lines 3-24.) In that regard, this Court should note that on page two of the Sanders-Henry Sale Agreement Sanders and Henry agreed to *waive title insurance for Henry*, thus potentially subjecting Henry to conditions related to defendants' Exhibit O and Merwin, which Sanders had knowledge of but Henry did not.

No evidence presented showed Henry knew about Sanders relationship with Merwin, because in Henry's deposition, he stated instrument number 1119009 was "some type of formality" and that he lacked a clear understanding of why he signed it. (Id. at p. 8, lines 3-24.) Sanders knew that three days earlier he had conveyed the parcel to the Worley Fire District upon which he purported to grant an easement for Henry in instrument number 1119009. There is no evidence before this Court that Sanders made any disclosure whatsoever of his recent dealings with the Worley Fire District, or that Henry should have actually gotten the easement from Worley Fire District instead of Sanders. Thus, this Court should find that Sanders did not adequately disclose to Henry circumstances material to Henry's acceptance of instrument number 1119009, and that

thus it is a fraudulent document that should be struck from the Sanders-Henry Agreement having no force and effect on subsequent owners.

ii. Sanders' Unilateral Mistake That He Could Convey Easement to Henry Voids It.

Henry could have asserted a defense of mistake against Sanders, if benevolently Henry may have felt Sanders simply forgot that he had transferred the property to the Worley Fire District three days earlier. If Sanders forgot after three days, the Sanders-Henry easement in plaintiff's Exhibit 15 could have been a valid grant to Henry. However, given the Sanders-WFD deed, the proper grant of easement should have come directly from Worley Fire District.

iii. Henry Received No Consideration From Sanders For The Merwin Grants.

Henry could also have asserted a defense of failure of consideration, as discussed earlier herein. If Sanders' consideration for the Henry to Merwin easement grants was Sanders' grant of an easement to Henry, but that consideration failed because Sanders' had no power to convey an easement across Worley Fire District property, the Henry to Merwin easements should be found void.

iv. No Action In Reliance on Henry's Grant By Merwin.

Finally, Henry could have argued that there was no "action in reliance thereon" by Merwin, because there is no evidence before this Court that Merwin acted to rely on that grant of easement whatsoever. Evidence before this Court is that Merwin sold to Kluss in July of 1990, and sometime after that date Kluss built a building on the property. There is no evidence before the Court that Merwin even visited the property.

Plaintiffs Belstler assert that under any of these four defenses to the third-party beneficiary doctrine claims of Conines the easements must fail. However, it is prudent to determine whether Conines, as Merwin's successors, would even be able to assert such a third party claim.

Notably, the American Jurisprudence 2nd, at sections 435 through 464 discussing third-party beneficiaries *does not mention* the nature of the legal status of successors to the original named beneficiary, or *even whether third-party beneficiary claims can be*

transferred to a successor. This reflects the development of the third-party beneficiary concept as granting a one-time benefit without successors to the original beneficiary, such as the payment of a debt,[1] construction contracts,[2] lien enforcement,[3] and recovery under life insurance policies.[4] Further, there is nothing in Idaho law addressing the concept of successors to a third-party beneficiary, should that even be possible under Idaho law.

Therefore, if this Court does not invalidate and find void the purported Henry-Merwin easement grants under promissor Henry's defenses stated hereinabove, or other reasoning in this pleading's argument, plaintiffs Belstler request this Court find no applicability of the third-party beneficiary doctrine here, where no law supports the argument of a third-party beneficiary's benefits running with the land to bind future owners of a promissor's real property.

9. The Henry-Merwin Easement Grants Failed, Because Sanders' Consideration for Those Grants Failed, and The Easement Grant is Void as Against Belstlers.

The Sanders-Henry grant in plaintiffs' Exhibit 15 states, ". . . it is necessary to execute a joint easement for ingress and egress . . .." However, there is no evidence that any of the easements granted in plaintiffs' Exhibit 15 were for Sanders' benefit. Therefore, there is no "joint easement," because there was to be no use by Sanders of any easement granted in that document.

The Sale Agreement at plaintiffs' Exhibit 14 does not mention any consideration paid or otherwise made for any grant of easements to Merwin, nor does the deed at plaintiffs' Exhibit 16 cite consideration paid or otherwise transferred to Henry for third-party easements. The only conclusion is that Sanders was trying to use the grant to Henry near the firehouse as consideration for Henry making a grant of two easements to Linda

[1] *Lawrence v. Fox*, 20 N.Y. 268 (1859).
[2] *Stewart v. Arrington Const. Co.*, 92 Idaho 526 (1968).
[3] *Dawson v. Eldredge*, 84 Idaho 331, 372 P.2d 414 (1962);
[4] *Sachs v. Ohio Nat. Life Ins. Co.*, 148 F.2d 128 (7th Cir. 1945).

Merwin. However, this would indicate Sanders was either fraudulent or had less than a three-day-old memory. If Henry had understood the document as anything more than a "formality," he would have asked Sanders about it, because he was certainly on inquiry notice due to the language in the easement grant that it was located "in front of the fire station located thereon." (Pls. Ex. 15.) A real property buyer who thought that document had meaning for him would certainly have asked what the relationship was of the fire station to Sanders' property. How wide was the easement? Did it abut the Rockford Bay Road right-of-way? How far did it extend toward the firehouse? These are all questions a person put on inquiry notice by such language should have asked, if they had thought the document was more than a simple formality.

"A written instrument is presumptive evidence of a consideration." (I.C. § 29-103.) And, "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." (I.C. § 29-104.) "The presumption may be rebutted by any substantial evidence." (*McCandless v. Carpenter* 123 Idaho 386, 389 (1993).) "Where a deed contains recitals of fact purporting to evidence receipt or acknowledgement of payment, recitals may be challenged as untrue, and parol evidence is admissible for that purpose. The law uniformly allows the admission of parol evidence to prove that a recital of fact is untrue." (Id.; citing *Vanoski v. Thomson*, 114 Idaho 381, 383 (Ct.App.1988).)

Plaintiffs Belstler do not contend the recitals of consideration in the Sanders-Henry Sales Agreement at plaintiffs' Exhibit 14 are untrue, only that they did not reference that the consideration of $30,000 for the property included a requirement for Henry to grant easements to Merwin in a completely separate document that to Henry was merely "some type of formality" about which he lacked a clear understanding of why he signed it and what it meant to the sales transaction. (Henry Depo. at p. 8, lines 3-24.)

Further, Plaintiffs Belstler argued hereinabove that Sanders did not own the property upon which he wanted to use to grant an easement to Henry in plaintiffs' Exhibit 15. Therefore, this Court should find Sanders' consideration (the Sanders-Henry

easement grant in 1119009) they supposedly gave to Henry for the Merwin easements failed, because Sanders did not own the property, and the Sanders' grant was therefore an illusory promise. Further, plaintiffs argue this Court should find they have met their burden of proving a lack of consideration by substantial evidence, and thus neither Henry, nor his successors are bound by the alleged Merwin easement grants.

10. The Purchase Agreement Contract Merged Into The Deed, but the Henry to Merwin Easements Did Not Survive That Merger.

Pursuant to the doctrine of merger in Idaho, "any recitals in the real estate contract[is] merged into the deed." (*Tower Asset Sub Inc. v. Lawrence*, 143 Idaho 710, 715 (2007).) Further, "when the deed is delivered and accepted as performance of the contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, the deed alone must be looked to to [sic] determine the rights of the parties . . .." (*Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 382 (1966); quoting *Continental Life Ins. Co. v. Smith*, 41 N.M. 82 (1936).)

In this case, plaintiffs have argued elsewhere in this pleading that the alleged Mutual Agreement for Easement for Ingress and Egress found at plaintiffs' Exhibit 15, which was executed prior to delivery to Henry of the Sanders-Henry deed was never delivered to Merwin, nor accepted by her.

Even if it was, pursuant to the Sanders-Henry Warranty Deed, the only reference to easements in the deed states Henry's purchase is "[s]ubject to: any and all easements, conditions and restrictions of record and easements of ingress and egress." (Pls. Ex. 16.) There is no mention of instrument number 1119009, the gifted easements to third-party Merwin or the purported easement from Sanders to Henry. (Pls. Ex. 15.) There is no location stated in the deed of any purported easements to Merwin, even though they were allegedly granted by Henry less than a year previously, and concurrently with the execution of the deed.

It is more likely than not Henry, looking to his Warranty Deed, did not believe it included any easements to Merwin. This is highly probable, because Henry felt it necessary to clarify with his buddy Kluss that the parties would use Sanders Lane to access their respective properties. (Pls. Exs. 18, 19 at 3; Def. Ex. I at 3.) . Further, Henry did not believe that his Warranty Deed included any easements to Merwin, because his Building Permit Application never showed the disputed driveway, except as it went directly to Henry's house. (Pls. Ex. 29.) Finally, Henry's deposition shows no present intent on June 7, 1988 to grant easements to Merwin; he had no "recollection of Mr. Sanders somehow indicating to [Henry] he had to establish some easements or roads for the benefit of [Henry's] neighbor." (Ken Henry Depo., p. 8, lines 21-24.)

In *Jolley*, the Idaho State Supreme Court discussed an exception to that merger rule:

> . . . which is that the contract of conveyance is not merged upon execution of the deed where under the contract the rights are conferred collaterally and independent of the deed; there being no presumption that the party in accepting the deed intends to give up the covenants of which the deed is not a performance or satisfaction. Where the right claimed under the contract would vary, change, or alter the agreement in the deed itself, *or inheres in the very subject-matter with which the deed deals, a prior contract covering the same subject matter cannot be shown as against the provisions of the deed.*

(*Jolley*, 90 Idaho at 382-383; citing *Continental Life Ins. Co.*, 41 N.M. at [no pincite]) (emphasis in orig.)

That New Mexico State Supreme Court continued in the *Continental Life Insurance Co.* case:

> [i]n the absence of fraud, mistake, etc., the following stipulations in contracts for the sale of real estate are conclusively presumed to be merged in a subsequently delivered and accepted deed made in pursuant of such contract, to wit: (1) those that inhere in the very subject-matter of the deed, such as title, possession, emblements, etc.; (2) those carried into the deed and have the same effect; (3) those of which the subject-matter conflicts with the same subject-matter in the deed. In such cases, the deed alone must be looked to in determining the rights of the parties.

> But where there are stipulations in such preliminary contract to which the delivery and acceptance of the deed is not a performance, the question to be determined is whether the parties have intentionally surrendered or waived such stipulations. If such intention appears in the deed, it is decisive; if not, then resort maybe had other evidence.

(*Id.*, citations omitted.)

In this case, plaintiffs have argued that Sanders' easement to Henry in plaintiffs' Exhibit 15 likely failed due to fraud or mistake, and that said Exhibit was never delivered to or accepted by Merwin.

Plaintiffs argue here that the deed alone must be looked to in determining the rights of the parties to this case, because they inhere in the very subject-matter of the deed, and are contract stipulations in which the subject-matter conflicts with the same subject-matter in the deed. This is because the nature of appurtenant easements is as an interest in land, with "references to title, possession, quantity, and emblements of the land." (*Jolley*, 90 Idaho at 383; citing Annot: 84 A.L.R. 1008; 38 A.L.R.2d 1310; 8A Thompson on Real Property (1963 Replacement) 331 § 4458; 55 Am.Jur. 937, Vendor and Purchaser § 543; 26 C.J.S. Deeds § 91c, p. 842.)

As an example of the *Jolley* exception, the Idaho State Supreme Court has determined that an abstract of title "does not relate to the title, possession, quantity, or in moments of the land." (*Christiansen v. Intermountain Association of Credit Men*, 46 Idaho 394 (1928).)

Following this merger exception in another case, that Court also found a construction company's promise to assist a lot buyer in the construction of their house and receive reimbursement of its costs plus 5%, was incidental to that company's sale of said lot to that buyer, and thus the agreement to build the house was not merged with the deed. (*Sainsbury Constr. Co. v. Quinn*, 137 Idaho 269, 273 (2002), rev, denied.)

Finally, in its analysis in the *Sells* case related to that exception, the Idaho State Supreme Court found merger of the real estate purchase agreement's (REPSA) inclusion of "timber rights on said easement." (*Sells v. Robinson*, 141 Idaho 767, 772 (2005), re'hrg. denied, Aug. 24, 2005.) This was because the "RESPA and the deed discuss the

timber on the Sells' property . . . [and] the terms of the RESPA Robinsons [sought] to enforce 'inhere in the very subject-matter with which the deed deals' - the timber on the Sells' remaining property." (Id.) Thus "the timber language in the RESPA does not constitute a collateral agreement related to timber rights, independent of the terms of the deed." (Id.) Therefore, "only the deed's language should be considered by this Court . . .." (Id.)

In this case, the Sanders-Henry deed at plaintiffs' Exhibit 16 only carries general language related to easements, and does not reference the Merwin grants whatsoever. Due to this general language, this Court should find the deed ambiguous, because it is not necessarily inclusive of the purported grants to Merwin. Parol evidence on this point related to Henry's intent is that Henry does not remember any Merwin grants at all. (Ken Henry Depo., p. 8, lines 3-24.)

"In construing an ambiguous deed, the Court should give effect to the parties' intentions." (*Sells*, 141 Idaho at 773; citing *Daugharty v. Post Falls Hwy. Dist.*, 134 Idaho 731, 735 (2000).) "A grantee may accept the deed as full performance of a prior contact, even where it is not such; but whether a deed has been so accepted is, in the final analysis, a matter of intention." (*Sainsbury Const. Co.*, 137 Idaho at 273.)

In this case, it is clear that Henry intended no easements for Merwin, because he had no "independent recollection" of signing plaintiffs Exhibit 15, and thought it was "some sort of formality." (Ken Henry Depo., p. 8, lines 3-24.)

Defendants Conine will argue that Henry marked the disputed driveway on the 2005 Dahlman Survey at plaintiffs' Exhibit 23 with an "X" during deposition. (Ken Henry Depo., p. 15, l. 4-13.) However, this testimony should not be given weight, because the "X" mark was procured by Conines' counsel having Henry mark "the one [road] that the Conines used." (Id. at 14, ll. 22-25.) From that faulty bridge, Conine's counsel asked, "[i]f you signed [plaintiffs' Exhibit 15], is the road that's marked with an "X" the road that you thought was the road affected by that agreement?" (Id. at ll. 4-7.) To which a tired and sickly Ken Henry, after five pages of deposition questioning

accedes, "[w]ell, yes. I would, I would think that would be the only one that pertains that -- I mean at all." This pressure was exerted even though plaintiffs' counsel objected, stating Henry had "testified he has no independent recollection of that instrument or its contents." (Id. at 14-15, ll. 24-25, 1, respectively.) To which objection Ken Henry's wife breaks in and states, "[a]nd that's because of multiple sclerosis." (Id. at ll. 2-3.)

Therefore, this Court should reject defendants' contention that Henry's "X" marks the spot, either based on its lack of substantive evidentiary weight, or plaintiffs' counsel's objection at deposition.. Plaintiffs argue that *since Henry intended nothing related to Merwin* in the Sales Agreement or its attendant purported easement document, and was completely ignorant as to the contents of plaintiffs' Exhibit 15, that when he accepted the deed from Adept Escrow in June of 1989 he did not intend any easements to Merwin. (Pls. Ex. 16.)

Plaintiffs request this Court find the Sales Agreement was merged in the deed, but that Henry intended no easements to Merwin, and that thus those alleged Merwin grants are invalid and void as to Henry and his successors, plaintiffs Belstler.

11. <u>The Henry-Merwin Easement Grants Failed, Because They Cannot Be Located</u>.

This Court should find that instrument number 1119009 did not adequately identify the easement interest or its location sufficient to meet the requirements of Idaho's statute of frauds, and thus it is unenforceable against Belstlers. (I.C. § 9-503; *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 238 (2007) (at a minimum, land sale contracts must typically specify . . . the subject matter thereof, the price or consideration, a description of the property and all other essential terms of the agreement); *Hoffman v. S..V. Co.*, 102 Idaho 187, 190 (1981) (agreements for the sale of real property that fail to comply with the statute of frauds are unenforceable for obtaining specific performance or damages); *White v. Rehn*, 103 Idaho 1, 3 (1982) (a property description that does not allow the court to pinpoint exactly what acreage is to be transferred is inadequate).)

In this case, both the alleged southern and northern easements are very difficult to locate, and the paragraph in the document that supposedly would assist anyone in locating them is ambiguous at best. There was no way for a professional surveyor to find them on the ground. (Pls. Ex. 4.)

Further, this Court should rule the case of *Simons* does not allow it to consider parole evidence to clarify the ambiguous property description in instrument number 1119009, because Henry did not convey the easement to Merwin in exchange for specific consideration fully delivered. (*Simons v. Simons*, 134 Idaho 824, 827-28 (2000) (contract failing to meet the statute of frauds only because of an inadequate property description cannot be interpreted through parol evidence because the parties did not admit that 1) they agreed to the conveyance in exchange for specific consideration and 2) one of the parties fully delivered that consideration).)

Based on these deficiencies, this Court should find the easements are not located specifically enough in the deed for them to be enforced, and thus that they are invalid and completely void.

12. Regarding the two alleged easements, what is the legal effect of the two Kluss-Henry agreements found at instrument numbers 1224548 and 1224896?

Sometime "on or before the first day of June, 1989," Kenneth Henry apparently made the payments to Sanders as promised. (Pls. Ex. 14 at 1.) This must be true, because on June 9, 1989, Kenneth Henry submitted the Sanders-Henry warranty deed to Kootenai County for recordation. (Pls. Ex. 16.) Adept Escrow Services, the neutral third-party deed holder, would not have released the deed to Henry unless Henry had fulfilled the conditions of the Sale Agreement. (Pls. Ex. 14 at 2.)

In July of 1990, Linda Merwin sold the future Conine property to Robert ("Pete") and Vicki Kluss. (Pls. Ex. 17.) At that time, the Kluss couple lived in Coeur d'Alene, and not Rockford Bay. (Pls. Ex. 17.) There is no evidence that the Kluss' ever lived on their Rockford Bay property. The evidence before the Court is that the Kluss' never lived

there, because when the Solomons purchased from Pete Kluss, by then unmarried[5] in 1993, the Solomons wanted to buy the Kluss residence in Coeur d'Alene, and the Rockford Bay property was required by Kluss to be purchased for the sale of the Coeur d'Alene residence to proceed. (Pls. Ex. 20; Judith Solomon Depo., p. 7, ll. 16-25.) Also, Evans recalled Kluss "didn't have a house [up there]." (Evans Depo., p. 17, ll. 22-23.)

Sometime during the fall of 1990 after his purchase of the property from Merwin, Pete Kluss built a building on the now-Conine's land. (Judith Solomon Depo., p. 11, ll. 1-7.) Georgia Henry believed that Kluss' metal building, the smaller one existing on the land now, was already built when Ken Henry bought the property next door. (Geo. Henry Depo., p. 10, ll. 7-11.) But this further demonstrates the fragility of Ms. Henry's memory, because Kluss did not buy the property from Merwin until 1990, a full year after Henry recorded his deed from Sanders, and two full years from the date Henry took possession on June 15, 1988. (Pls. Exs. 17 (Merwin-Kluss), 16 (Sanders-Kluss), and 14 at 2 (Sales Agreement).) There is no evidence Merwin hired Kluss to build a building on her land prior to Kluss' purchase from her.

Kenneth Henry "grew up with Pete Kluss in Iowa." (Geo. Henry Depo., p. 10, ll. 23-24.) "Pete and Ken and all of those people knew each other." (Evans Depo., p. 27, l. 13.) "All those guys [were] from Iowa . . . there was three of them that moved in that [sic] Rockford Bay area from Iowa, and they all knew each other from college. Kluss was one of them and Curt Smith . . . and then they had another buddy . . . but there was about four of them that had moved to the Coeur d'Alene area from Iowa. I think they were from Clarion. That's where Ken was -- I guess Ken had a -- his family had a big farm in Iowa. They were from the 4-H country." (Id. at p. 18, ll. 13-23.)

Obviously, Henry and Kluss were good enough friends to not mind living next door to each other after moving 1,475 miles. Ken Henry's spouse, Georgia, testified at deposition initially that "[i]t was coincidence that [Kluss] had the property next to us." (Geo. Henry Depo., pp. 10, l. 25, and 11, l. 1.) However, being pressed on the point by

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[5] Judicial notice can be taken of *Robert P Kluss vs. Vicki L Kluss*, CV-1991-0084880 (1991), for divorce.

the questioner, she answers twice, "I don't remember." (Id., p. 11, ll. 2-9.) Later on, disclaiming personal knowledge of the existence of easements across the Henry property, Ms. Henry states, "[j]ust to make a point, back in those days, Ken handled everything. I was the new bride." (Id., p. 12, ll. 13-24.) It is more likely than not that Ms. Henry's testimony is shaky and unreliable at best, and that Ken Henry and Robert "Pete" Kluss purchased properties next door to each other on purpose, because they were old buddies, strangers in a strange land, who would then be able to maintain their lifelong friendship. There is no evidence before the Court that Henry and Kluss were partners in any criminal schemes.[6]

Sometime in 1991, Ken and Georgia Henry built their residence. (Geo. Henry, p. 10, ll. 2-3.)

On the 12th day of July, 1991, one year and two days after Kluss bought from Merwin, the Henrys and Kluss entered into the first of two Joint Use and Maintenance Agreements between them which were both recorded. (Pls. Exs. 18, 19.) The second agreement, plaintiff's Exhibit 19, is exactly the same as the first, except for the additional recording stamps, a handwritten note at the top stating "correted legal," [sic] and the addition of handwriting following the third line of the legal description stating, "[a]pproximately four-tenths of a mile, starting at Rockford Bay Road." Both documents were recorded at the request of Kenneth Henry. (Id.)

According to the terms of this agreement, Kluss and Henry agreed to maintain Sanders Lane, now Chandler Lane from Rockford Bay Road to their respective properties, and for that road to be the only road each would use to access their properties. (Pls. Exs. 18 and 19.) There is no evidence before the Court as to which party added the handwritten note regarding the distance from Rockford Bay Road upon which the maintenance would occur. There is no evidence as to whether Kluss ever saw the

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[6] *State v. Kluss*, 125 Idaho 14 (1993), rev. denied Feb. 7, 1994, re: Kluss' Rockford Bay marijuana operations.

alteration or the second document, although it is reasonable to assume that Henry did, because he recorded it. (Pls. Ex. 19.)

However, the plain language of the document indicates, and this Court should find, that Henry and Kluss intended to cancel and relinquish any easement grants to Kluss' parcel through instrument number 1119009. This is because in the Joint Use and Maintenance Agreement. The following language is found: "[t]he parties hereto agree to use *said roadway* for normal ingress and egress and utilities purposes relating to the property they own adjacent. (Pls. Ex. 18 at 3.) (emphasis added.) Further, those parties agreed "this agreement shall be binding on the heirs, successors and assigns of the parties hereto." (Id.)

Karen Conine agreed the Henry-Kluss agreement applied to both plaintiffs and defendants during her deposition. She was asked if it would "be fair . . . to say that [Karen] believe[d] [plaintiffs' Deposition Exhibit 14, here plaintiffs' Exhibit 18] would be binding on both [Conines] and the Belstlers." (Conine Depo., p. 131, ll.13-15.) She answered, "[y]es, I would think that. I think it would turn over to the next property owners." (Id. at ll. 16-17.)

As far as Kluss was concerned, the definition of "said roadway" was Sanders Lane, now Chandler Lane, all the way through Henry's property on what plaintiffs' expert labeled Road D. (Pls. Ex. 4, sketch.) Given the evidence, we don't know whether Kluss agreed to the handwritten changes of plaintiffs' Exhibit 19, but it makes sense that Henry would want to limit his maintenance responsibilities to what he actually used, which was Sanders Lane, now Chandler Lane, up to or near the western edge of Henry's property, after which his private driveway exited that road south toward the Henry residence. Henry would maintain his own driveway, while Kluss would be responsible for maintaining the Road D above, which today goes up to the third hole at Black Rock. (Pls. Ex. 1, 2, 3, and 4, sketch.)

As lifelong friends, Henry probably had little trouble giving permission to Kluss to use Henry's private driveway until Kluss could construct his own driveway off the

upper road. Further, as between friends, Kluss probably shared with Henry that Kluss' "building plans showed a storage area and office over a basement," where Kluss did not plan to reside. (*State*, 125 Idaho at 23.)

Since Kluss did not sign the second recordation of the Joint Use and Maintenance Agreement or acknowledge it as required when an instrument is recorded in Idaho, plaintiffs argue this Court should not find that Kluss agreed that Kluss' road maintenance would be limited to the handwritten distance information found in the second document, but that Henry believed Henry's maintenance responsibilities should stop at Henry's western property line. This would make sense as between the parties.

Finally, evidence of Henry's intent in this regard is shown by his Building Permit Application to Kootenai County dated May 23, 1995, for the garage pole barn on his property. (Pls. Ex. 19; Def. Ex. I.) The sketch attached and signed by Mr. Henry appearing on page 3 of that Application shows Sanders Lane, outlined horizontally straight across the page, while Henry's private drive exits Sanders Lane at his western property line and terminates at a square called "house." (Id.) There is no road on that sketch going through to the Kluss property in a location similar to that found today and called in this trial "the disputed driveway."

This supports earlier contentions in this pleading that Henry saw plaintiffs' Exhibit 15 as merely a "formality," that he lacked "an independent recollection of signing," and that Henry had no "recollection of Mr. Sanders somehow indicating to [Henry] he had to establish some easements or roads for the benefit of [Henry's] neighbor." (Ken Henry Depo., p. 8, lines 3-24.) This testimony indicates that Henry was concerned about how his buddy Kluss was going to access Kluss' property, which is why the Henry-Kluss agreement was necessary for road maintenance, which, as to Kluss, would run all the way to the eastern terminus of Road D, and as to Henry would terminate at the western edge of Henry's property.

Plaintiffs argue, this Court should find that Kenneth Henry confirmed Chandler Lane (formerly Sanders Lane) ran from west to east through his property on the Road D

to Black Rock leading to the east of his property, and that his driveway was his private driveway. (Pls. Ex. 4, 29.) Further, this Court should find the Kluss-Henry Joint Use and Maintenance Agreement at plaintiffs' Exhibit 18 is the supervailing easement agreement applicable to the Conine land, because it explicitly was to "be binding on the heirs, successors and assigns of the parties hereto," including defendants Conine.

13. <u>Conines do not enjoy a prescriptive easement right across the disputed driveway, or across the lower road</u>.

"In order for a claimant to establish that he has acquired a private prescriptive easement by adverse use, he must submit reasonably clear and convincing proof of open, notorious, continuous, uninterrupted use, under a claim of right, with the knowledge of the owner of the servient tenement, for the prescriptive period. (*West v. Smith*, 95 Idaho 550, 557 (1973).) "A prescriptive right cannot be acquired if the use of the land is with the permission of its owner." (Id.) The list of elements clarifies that the evidentiary standard is not a preponderance of the evidence, but "clear and convincing evidence." (*Roberts v. Swim*, 117 Idaho 9, 17 fn. 2 (1989); citing *Last Chance Ditch Co. v. Sawyer*, 35 Idaho 61 (1922).) "Each element is essential to the claim, and the trial court must make findings relevant to each element in order to sustain a judgment on appeal." (*Backman v. Lawrence*, 2009-ID-0513.098 at 6; citing *Hodgins v. Sales*, 139 Idaho 225, 229 (2003).)

Prescriptive easement rights are non-possessory *rights to use* the land of another governed by the common law, while adverse possession-based rights are possessory rights *to possess or own* the land of another controlled by statute at Idaho Code section 5-203. (*Sinnett v. Werelus*, 83 Idaho 514, 520 (1961).) However, even though the common law governs prescriptive easement rights, "[t]he prescriptive period applicable to an easement . . . is as specified in Idaho Code section 5-203. (Id. at 523.)

However, in 2006 the Idaho legislature altered the prescriptive period from five to twenty years. (S.L. 2006, ch. 158, § 1, eff. Jul. 1, 2006.) Since plaintiffs filed this lawsuit

on April 9, 2007 to recover their real property, and defendants Conine filed their counterclaim for the prescriptive easement claim on August 8, 2007, the entire lawsuit should be governed by the twenty-year prescriptive period. By quadrupling the prescriptive period, it is clear the Idaho Legislature determined to make it more difficult for one to take a property interest in the land of another, and private easements by prescription have traditionally been "not favored under Idaho law." (*Backman*, 2009-ID-0513.098 at 7; citing *Elder v. N.W. Timber Co.*, 101 Idaho 356, 358 (1980).)

The *Backman* case is the only case to have reached the Idaho State Supreme Court's final judgment since the statutory change in 2006. (I.C. § 5-203, 2009 pocket part.) However, *Backman* was filed on February 24, 2006 as Bonner County Case Number CV-2006-0000365.[7] Therefore, Backman's five-year prescriptive period cannot be determinative here. Plaintiffs have found no subsequent Idaho case available to provide guidance.

However, it is clear to plaintiffs that if Conines could exercise a vested right in a five-year period they accrued prior to the statutory change, and could bring that claim after July 1, 2006, such a claim would essentially eviscerate the Legislature's intent, which was to quadruple the statutory time period for claims made after July 1, 2006.

The revised Idaho Code section 5-203 effective July 1, 2006 states:

> "[n]o action for the recovery of real property, . . . can be maintained, unless it appears that the plaintiff, his ancestor, predecessor or grantor, was seized or possessed of the property in question within twenty (20) years before the commencement of the action; and this section includes possessory rights to land and mining claims.

Conines brought their action on August 8, 2007, thus it cannot "be maintained" and must fail, unless the elements can be proven by clear and convincing evidence to have been exercised for the statutory period of twenty years. If Conines could bring a claim in 2009 based on an accrued pre-2006 prescriptive period, could they bring a claim

[7] Idaho State Court Case Repository, https://www.idcourts.us/repository/caseHistory.do?roaDetail=yes&schema=BONNER&county=Bonner&partySeq=61112&displayName=Backman%2C+Bobby+J, accessed 10-28-09.

within twenty years of June 26, 2003 on June 25, 2023, which is within the time when their counterclaim would have to be brought if all the elements were met during the five-year period after which they took ownership? (Pls. Ex. 21, Solomon Deed dated 6/25/98.) This does not make sense, because it would essentially delay enactment of the 2006 statute by setting its effective date aside for twenty years in favor of a theory of vested rights involving enforcement of a prescriptive right not favored under Idaho law.

Conines brought their counterclaim in August of 2007, which is over one year from the statutory change date of July 1, 2006. In order to give effect to the legislative intent and uphold the law in effect as of August 8, 2007, this Court should recognize the legislative intent, and require that Conines must have been "seized or possessed of the property in question within twenty (20) years before the commencement of the action," which would require them to prove the elements of prescriptive easement by clear and convincing evidence since August 8, 1987, twenty years from the filing of their counterclaim.

A) **Open and Notorious Use is Not Established.**

"A use must be sufficiently open and notorious said that a reasonable person would have discovered its occurrence." (*Backman*, 2009-ID-0513.098 at 7; citing 4 Powell on Real Property, § 34.10(2)(f)(2000).)

Evidence at trial is that Belstlers purchased their property in September of 2005. (Pls. Ex. 22.) The Belstlers moved on to the property November 15, 2005. (Dana Belstler Testimony, 9-22-09.) Howard Conine met Dana Belstler in the latter part of the spring of 2006, when she was outside doing some weeding and their new garden. (Id.) Dana testified that Howard's visit was the first time they had seen the Conines. Thus, there was no open and notorious use from mid-November 2005 to approximately mid-April of 2006.

At trial, Karen Conine was led through a series of dates during defendants' cross-examination, such dates including from June 1998 through the fall of 2007. (Karen Conine Testmony, 9-23-09.) The substance of the answers was that Karen claimed she

visited the property less in the winter and more in the summer, but generally every other weekend, or "at least twice per month." (Id.) However, on redirect, plaintiffs' counsel determined that Karen Conine works for a welfare office in Western Washington, and that she frequently has to work on Saturdays, which often precludes visiting the property. (Id.) Ms. Conines testimony is not reliable. At deposition, she stated that during the winter "we try to get over at least once a month, sometimes twice." (Conine Depo., p. 29, ll. 3-4, Oct. 20, 2009.)

Further, Howard Conine's unverified Affidavit submitted in opposition to plaintiff's motion for summary judgment on June 23, 2008, stated, "[o]ver the course of ownership we have visited our Idaho property . . . literally every other weekend, including the wintertime, with one exception when the snow on Snoqualmie Pass was treacherous to get through (we live in Western Washington)." (Howard Conine Aff. at 16, 6-23-08.) Mr. Conine's claims were mirrored identically by Karen Conine's unverified Affidavit submitted on the same date for the same purpose, even down to the paragraph in the same wording. (Karen Conine Af. at 16, 6-23-08.)

At best, the alleged open and notorious use of the disputed driveway by the Conines is spotty. Sometimes they visit, sometimes they don't; sometimes they visit "literally every other weekend, including the wintertime," (Howard and Karen in 2008), but other times they "try to get over at least once a month, sometimes twice." (Kaen Conine Depo., p. 29, ll. 3-4.) At still other times they visit "at least twice per month," but less in the winter. (Conine Tr. Testimony, 9-23-09.)

Therefore, the Conines cannot establish any open and notorious use during the period of their ownership, from 1998 to 2007, when they apparently stopped visiting with such frequency, whatever that frequency was, because it was "less, not much fun, . . . didn't feel comfortable," because the "lawsuit started." (Id.)

The Conines purchased from the Solomons on June 25, 1998. Judith Solomon answered the question in deposition "[a]nd you made no use of this property at all?, with a "[n]o." (Solomon Depo., p. 11, ll. 6-7.) Further, Judith Solomon had no memory of how

to get to the property. (Id. at 9, ll. 5-9.) She remembers visiting the property only one time. (Id. at 8, ll. 10-13.) She doesn't remember how she got to the property and was sure if she visited today that she "couldn't even find it." (Id. at 10, ll. 15-20.) Finally, she would have to visit the courthouse "and find out the length of time that we would have owned it. [She didn't] remember." (Id. at 12, ll. 1-6.)

The Solomons purchased the property from Pete Kluss in November of 1993, in tandem with Kluss' residence in Coeur d'Alene, which is the house that Solomons wanted to buy. Mr. Kluss required the Solomons to purchase his Rockford Bay property as a condition of the Coeur d'Alene purchase. However, Mr. Kluss was not interested in doing anything that was open and notorious.

To clarify why Kluss required the two properties to be sold together, this Court is allowed, and plaintiffs request it take judicial notice of Kootenai County District Court case *State of Idaho Dept. of Law Enforcement, etal. v. Real Property Located Within Kootenai County, etal.*, CV-1991-0087687, which was filed on October 17, 1991 and reached judgment[8] on March 30, 1993, eight months before Kluss sold the property to Solomon. (Pls. Ex. 20; *State v. Kluss*, 125 Idaho 14 (1993), rev. denied Feb. 7, 1994.)

In the criminal case, both Kluss' Coeur d'Alene and Rockford Bay properties were up for seizure by the Idaho Department of Law Enforcement ("IDLE"). (*IDLE v. Kluss*, Case Nos. 87687 (CdA land) & 87779 (Rockford Bay land), Memo. & Order, Oct. 1, 1992.) Final Summary Judgment in favor of Kluss was rendered February 3, 1993. (Id., Judgment, Feb. 3, 1993.) The Rockford Bay land was subject to seizure because on that "rural property owned by Kluss away from the City of Coeur d'Alene[,]" . . . "Kluss . . . was constructing a storage building . . . over a basement room where Kluss planned to put a marijuana growing operation." (*State*, 125 Idaho at 22-23.) The *State* Court found, along with other detailed information, that the police officer's "investigation provided . . .

[8] Related cases are 1) *State of Idaho vs. Robert Pete Kluss*, CR-1991-0073081, possession of controlled substance: manufacture and intent to deliver; appealed as State v. Kluss, 125 Idaho 14 (1993), rev. denied Feb. 7, 1994; 2) *Robert Pete Kluss v. State Of Idaho*, CV-1994-0004120, for post-conviction relief.

corroboration of the incriminating information furnished by the anonymous caller." (Id. at 23.)

Further, Georgia Henry remembers Kluss "got into some legal trouble, if I remember right," and that his land was purchased by "some attorneys," and then "the Conines purchased it from [those attorneys]." (Geo. Henry Depo., pp. 11, ll. 13-25, and 12, ll. 1.) Ron Evans recalled, "they caught up with [Kluss], because his electric bill was pretty high . . . [for his] big old green building with a dirt floor and it . . .." (Evans Depo., pp. 17, ll. 22-25, and 18, l. 1.) "[H]e got in trouble with -- he was -- had marijuana growing operation there and they busted him and put it [sic] in jail." (Id. at 11, ll. 3-5.)

There is no testimony before the court regarding Kluss' actual usage of his property or the disputed driveway between July of 1990, when he bought it from Merwin, and November 1993 when he sold it to Solomons. Therefore, there is a complete lack of evidence that there was any open and notorious use during Kluss' period of ownership.

Finally, as discussed earlier, Kluss built the first building on the Conine property, and there is no evidence Linda Merwin used the property at all.

Plaintiffs request this Court find that at no time since Merwin's purchased in 1974 has there been open and notorious use of the disputed driveway, or the alleged lower easement on Belstlers' property.

B) Continuous and Uninterrupted Use is Not Established.

There is no evidence that Linda Merwin ever used the property.

Pete Kluss used the property, built a building on it, and ran an illegal marijuana growing operation upon it, but there is no evidence he was continuously visiting the property or that there was any uninterrupted use, except possibly his illegal use. An illegal use cannot support a claim of prescriptive easement.

The Solomons did not use the property at all. Judith Solomon answered the question in deposition "[a]nd you made no use of this property at all?, with a "[n]o." (Solomon Depo., p. 11, ll. 6-7.) Further, Judith Solomon had no memory of how to get to

the property. (Id. at 9, ll. 5-9.) She remembers visiting the property only one time. (Id. at 8, ll. 10-13.) She doesn't remember how she got to the property and was sure if she visited today that she "couldn't even find it." (Id. at 10, ll. 15-20.) Finally, she would have to visit the courthouse. "And find out the length of time that we would have owned it. [She didn't] remember." (Id. at 12, ll. 1-6.)

The Conines purchased from the Solomons on June 25, 1998. The Conines have used the property only intermittently, and their testimony is suspect, because it appears to be calculated only to support their arguments in this case, and not their actual use.

Plaintiffs request this Court find no continuous and uninterrupted use has occurred across any easement on the Belstler land for a twenty-year period, and that thus the claim of prescriptive easement must fail.

C) Conines Claim of Right Fails, Because They Had Permissive Use.

In Idaho, "a prescriptive right can't be granted if the use of the servient tenement was by permission of its owner, because the use, by definition, was not adverse to the rights of the owner." (*Backman*, 2009-ID-0513.098; citing *Hughes v. Fisher*, 142 Idaho 474, 480 (2006).) "The use of the land must also constitute some actual invasion or infringement of the right of the landowner." (*Roberts v. Swim*, 117 Idaho 9, 13 (1989, rev. denied Jan. 16, 1990.) "A prescriptive right cannot be obtained if use of the servient estate is by permission of the landowner." (*Id.*; citing *State ex rel Haman v. Fox*, 100 Idaho 140 (1979).)

Here, it is clear that Henry gave permission to Kluss to use the disputed driveway, and there is no evidence Kluss ever used the alleged southern easement. Kenneth Henry "grew up with Pete Kluss in Iowa." (Geo. Henry Depo., p. 10, ll. 23-24.) "Pete and Ken and all of those people knew each other." (Evans Depo., p. 27, l. 13.) "All those guys [were] from Iowa . . . there was three of them that moved in that [sic] Rockford Bay area from Iowa, and they all knew each other from college. Kluss was one of them and Curt Smith . . . and then they had another buddy . . . but there was about four of them that had

moved to the Coeur d'Alene area from Iowa. I think they were from Clarion. That's where Ken was -- I guess Ken had a -- his family had a big farm in Iowa. They were from the 4-H country." (Id. at p. 18, ll. 13-23.)

As lifelong friends, Henry probably had little trouble giving permission to Kluss to use Henry's private driveway until Kluss could construct his own driveway off the upper Road D. Further, as between friends, Kluss probably shared with Henry that Kluss' "building plans showed a storage area and office over a basement," where Kluss did not plan to reside. (*State*, 125 Idaho at 23.)

The Solomons sold the property to the Conines on June 25, 1998. From June 1998 to November 2005, the Henry's lived next door to the Conines. At trial, Karen Conine stated she had visited the Henry's at their home on September 22, 2009, and gave Ken Henry a gift of pajamas. (Conine Testimony, 9-23-09.) More than four years later after the Henry's moved from Rockford Bay, their relationship with the Conines remains one of a strong friendship. Karen stated that when the two families lived next door they got along very well, and that she would have enjoyed having them live on the southern half of the parcel in Rockford Bay if Henry's multiple sclerosis did not prevent it. (Id.) Karen answered, "[n]o," to the question whether the Henry's ever objected to the Conines' use of the driveway. It is clear Conines' use was with Henry's permission.

The Solomons did not even use the property enough to have to ask permission of anyone. It appears they may have visited the property a handful of times within the five years they owned it. Judith Solomon answered the question in deposition "[a]nd you made no use of this property at all?, with a "[n]o." (Solomon Depo., p. 11, ll. 6-7.) Further, Judith Solomon had no memory of how to get to the property. (Id. at 9, ll. 5-9.) She remembers visiting the property only one time. (Id. at 8, ll. 10-13.) She doesn't remember how she got to the property and was sure if she visited today that she "couldn't even find it." (Id. at 10, ll. 15-20.) Finally, she would have to visit the courthouse "and find out the length of time that we would have owned it. [She didn't] remember." (Id. at 12, ll. 1-6.)

At trial, Karen Conine testified during her cross-examination that neither she nor her husband tried to remove the cable across the lower easement after the Belstlers strong a cable across it to block usage. (Conine Tr. Testimony, 9-23-09.) Further, she never asked for a key. (Id.) This indicates that she understood the Conines' use of the southern logging road across the Belstlers property was by permission. A person who thought they had a claim of right to use a road would protest the cable being put there, or at least ask for a key to the lock so they could access it while keeping strangers at bay. The Conines did neither of these, thus they acknowledged that their use was by permission.

Plaintiffs request this Court find that Conines' use of both the disputed driveway and the alleged southern easement were by permission, if and when they were used at all.

D) Belstlers Had No Knowledge of Conines' Use.

Belstlers had no knowledge of the Conines' intermittent use until the middle of the spring of 2006, five to six months after the Belstlers moved in. After that, the Conines continued their infrequent use, and the Belstlers protested by placing a cable across the alleged southern easement, and finally filing this lawsuit in April of 2007, a year after they first met the Conines.

The Henrys, prior owners of the Belstler land, knew the Conines were using the two alleged prescriptive easements, but these were clearly permissive uses as between old and dear friends. According to Karen Conine, the Henrys "were very good friends." (Conine Depo., p. 46, l. 6.) They were such good friends that when Conines "drove in one weekend, as a surprise, [Ken Henry] had put that gate up for us," speaking of a gate at the Conine side of the disputed driveway. (Id. at ll. 2-4.) Karen claims that Ken Henry took a gate off the upper road on Chandler Lane and brought it down to the disputed driveway as a gift to the Conines. (Id. at p. 123, ll. 2-15.) On the other hand, Ron Evans stated in his deposition "in fact, the gate was always there and there was a gate up here [on Chandler Lane, the upper road] and a gate here [indicating the Conine's end of the disputed driveway] on the property lines." (Ron Evans Depo., p. 23, ll. 11-16.) It is

difficult to tell whose testimony is credible, but it is clear that Henry knew of the Conines use.

E) Conines' Have Not Met Elements A-D for the prescriptive period.

Given the evidence of this case, plaintiffs request this Court find the Conines, neither alone nor in combination with their predecessors, have gained an easement prescriptively, because their use did not meet the elements, especially the use elements of being continuous and without permission. (I.C. § 5-203; *Oakley Valley Stone, Inc. v. Alastra*, 110 Idaho 265, 268 (1985); see R. Cunningham, W. Stoebuck and D. Whitman, The Law of Property §§ 8.7, 11.7 (1984) (elements); *Lindgren v. Martin*, 130 Idaho 854 (1997) (burden of proving all of the essential elements of adverse possession is upon the party seeking title and every element must be proven with clear and satisfactory evidence); *Berg v. Fairman*, 107 Idaho 441 (1984); *Loomis v. Union Pacific Railroad*, 97 Idaho 341 (1975).)

None of Conines' predecessor owners, beginning with Linda Merwin, either alone or in combination used any road crossing Belstlers' property, including purported easements described in instrument number 1119009, openly and notoriously, continuously and uninterruptedly, under a claim of right with the knowledge of the respective owners for the twenty-year prescriptive period.

Therefore, plaintiffs respectfully request this court granted judgment in their favor on their claims, and deny Conines counterclaim in its entirety.

RESPECTFULLY SUBMITTED this 29th day of October 2009.

Arthur B. Macomber
Attorney at Law

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of October 2009, I caused to be served a true and correct copy of the foregoing:

PLAINTIFFS' POST-TRIAL LEGAL ARGUMENTS

CHARLES M. DODSON	[ ]	U.S. Mail, Postage Prepaid
1424 Sherman Ave., Ste. 300	[X]	Hand Delivered
Coeur d'Alene, ID 83814	[ ]	Overnight Mail
Telephone: 208-664-1577	[ ]	Facsimile: **666-9211**
Facsimile: 208-666-9211		

DATED this 29th day of October 2009.

Terri Boyd-Davis, Paralegal
Macomber Law, PLLC

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:

2009 OCT 30 PM 12: 53

CLERK DISTRICT COURT
[signature]
DEPUTY

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ISB #2134

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife, PLAINTIFFS, VS. KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, DEFENDANTS.	CASE NUMBER: CV-07-2523 DEFENDANTS/COUNTER PLAINTIFFS' POST TRIAL MEMORANDUM
KAREN SHELER CONINE and HOWARD CONINE, husband and wife, COUNTER PLAINTIFFS, VS. CHRIS BELSTLER and DANA BELSTLER, husband and wife, COUNTER DEFENDANTS.	

COMES NOW, KAREN SHELER CONINE and HOWARD CONINE, the Defendants/Counter Plaintiffs in the above entitled matter, and hereby submit their Post Trial Brief pursuant to the Court's oral order entered on the 24th day of September, 2009 and as follows:

FACTS

The Plaintiffs, BELSTLER are the owners of real property located in the general Rockford Bay area of Kootenai County. The Defendants, CONINE own the property immediately east of the BELSTLERS (as defined on Defendants' Exhibit "S". BELSTLERS acquired their property from the Henrys (Defendants' Exhibit "R") and the Henrys from V. A. Sanders (Defendants' Exhibit "A"/Plaintiffs Exhibit "5"). The CONINES purchased their property from Solomon (Defendants' Exhibit "S") who purchased their property from Kluss (Plaintiffs' Exhibit "19"), who purchased that property from Linda Merwin (Plaintiffs' Exhibit "26"), who purchased the property from Anstadt (Plaintiffs' Exhibit "18"). V. A. Sanders was the owner of the BELSTLER property but did not own any interest in the CONINE property at any time based upon the facts educed at trial. V. A. Sanders apparently developed some parcels of property as identified in Plaintiffs' Exhibit No. 8, consisting of parcels A, B, C, and D identified on Plaintiffs' Exhibit No. 8, parcel A being the BELSTLER property. V. A. Sanders and Geraldine C. Sanders created a sixty (60) foot easement across the parcel A, B, C and D identified on Plaintiffs' Exhibit 8 as specifically referenced in Plaintiffs' Exhibits, 9, 10, and 14 (Plaintiffs' Exhibit 14 being the Sale Agreement from V. A. Sanders and Geraldine C. Sanders to Kenneth L. Henry) the BELSTLERS' predecessor in interest. The location of the road was identified at the time of trial by a yellow line on Plaintiffs' Exhibit 1.

On the 3rd of June, 1988 the Sanders conveyed to the Worley Fire District a certain portion of property for the benefit of the Fire District, over and upon which traverses what is referred to in this brief and at trial as the southern most easement referenced in Plaintiffs' Exhibit 15, the Mutual Agreement for Easement for Ingress and Egress. Also on the 1st day of June, 1988 the Sanders sold to Henry (BELSTLERS predecessor in interest) the BELSTLER property which was at that time "subject to any and all easements, conditions, restrictions of record, and easements for ingress and egress (see Plaintiffs' Exhibit 14). The sale was by way of title retaining contract, and at the time of the sale, Linda Merwin was the owner of the currently owned CONINE property. Apparently there was a disagreement between Sanders and Merwin regarding the continuation of the road which

commenced at Rockford Bay and continued through parcels A, B, and C as identified on Plaintiffs' Exhibit 8 through the Merwin property, Sanders never having the legal authority to grant such an easement through the Merwin property. That disagreement, and the necessity for access was referenced in Defendants' Exhibit O, the agreement between Merwin and Sanders which clearly establishes that Merwin had an interest in the resolution of the easement issue identified on Plaintiffs' Exhibit 15, which was dual grant of easement, first from Sanders to Henry, and second from Henry to Merwin.

At the time of purchase, the CONINE property was accessed by two easements of record, namely Chandler Lane/Sanders Road and the easement claimed by CONINE under that certain document recorded as Instrument No. 1119009, the Deed from Sanders to Henry and Henry to Merwin (Plaintiffs' Exhibit "5"/Defendants' Exhibit "A"); the access commonly referred to as the private drive being described in Plaintiff's Exhibit "15" and Defendants' Exhibit "A", which traverses some distance behind the BELSTLER residence to a gate at the approximate property line of the BELSTLER property and the CONINE property and thereafter directly, at the approximately same elevation, to a building that existed upon the CONINE property at the time of purchase, and a building that was later constructed by CONINES on the premises; and a lower road (reflected in Plaintiffs' Exhibit "15" Defendants' Exhibit "A"). The extension of Chandler Lane/ Sanders Road at the West edge of the BELSTLER property takes a steep upward incline, and dead ends at the Black Rock Golf Course. The elevation of Chandler Lane/Sanders Road is significantly above the structures located upon the CONINE property. Additionally, an easement exists past the "fire station" across the BELSTLER property to serve the CONINE property (the Southerly easement).

For all of the ten years the CONINES owned their property they traversed the "private drive" (see Affidavit of Karen Conine and Affidavit of Howard Conine lodged with the court June 23, 2008). That private road had been in existence since approximately 1985 or 1986 (see Deposition of Jerry Ronald Evans (Plaintiffs' Exhibit "12"/Defendants' Exhibit "F") and had been acquiesced in by the Henrys, who were predecessors in interest to the BELSTLERS (see Deposition of Kenneth Henry and Georgia Henry, Plaintiffs' Exhibits "13 and 14"/Defendants' Exhibits "G and H").

In approximately the summer of 2006, the BELSTLERS approached the CONINES to request they cease using the lower road and the private drive. The CONINES ceased using the lower

road due to it being cabled off, but refused to cease using the private drive. Notwithstanding discussions were had between the parties as to a possible resolution, those discussions are not admissible under Rule 408 of the Idaho Rules of Evidence. Thereafter the litigation ensued, which includes a claim for an express easement, prescriptive easement, and implied easement by the CONINES. The CONINES abandoned their claim for implied easement during the course of trial but maintain their claim for express easement and prescriptive easement.

Trial commended on the 21st of September, 2009 before the HONORABLE JAMES MICHAUD, DISTRICT COURT JUDGE, sitting in the place and stead of the HONORABLE LANSING HAYNES.

ARGUMENT

As to the prescriptive right, the only argument made by the Plaintiffs in contravention of the prescriptive right is the statement that "the Solomons, the Conines predecessor in interest, made no use of the Conine property". Every reasonable inference must be drawn from the Defendants' position, with particular reference to the Affidavits of the CONINES indicating that the property had been used, and in point of fact a vehicle was left on the property (in a building) which required contact to have the vehicle removed. (See affidavits of Howard and Karen Conine filed of record on June 23, 2008). That is evidence of use of the Solomon property by Solomons or their guests or invitees. The Plaintiffs also argue that Linda Merwin was a stranger to the transaction between Henry and Sanders which gave rise to Instrument No. 1119009. As exemplified by Exhibit "C" attached to the Affidavits of Conines (filed of record on June 23, 2008) and Defendants' Exhibit "O", Merwin was an integral part and beneficiary of the Agreement and the use of the "private drive". The Conines, by the verified Counterclaim, and the Affidavits (filed of record on June 23, 2008) in Opposition to the Motion for Summary Judgment and KAREN CONINE'S uncontested testimony have made a prima facie case of the elements of a prescriptive easement. Notwithstanding the Legislature changed the time period for prescriptive easement from the former five year statute in 2006, (see changes to Idaho Code 5-204, 206, 207, 210, 211 as well as 213) the CONINES rights were vested five years subsequent to their purchase, under the then existing statute, more particularly, those rights became vested in 2004, prior to the filing of the instant action. Further, the Idaho legislature, in the Session Laws of 1985, Chapter 252, Section1, passed, and the Governor

signed into law, Idaho Code 55-313. That Code Section clearly provides in the event the BELSTLERS were to move the private road, which is currently constructed across their private lands, they must, if they change such access, change it in such a manner as to not obstruct motor vehicle traffic or otherwise injure any person or persons using or interested in such access. To change the access in this case to a higher elevation would cause an obstruction to motor vehicle travel during certain periods of the year when snow fall was evident, ice, or even rainy conditions due to the increased elevation that would be in place should the road be moved (the injury that would be caused is exemplified by the work sheet prepared by Scott Rasor on behalf of the Plaintiffs, Defendants' Exhibit "T"). The BELSTLERS have a statutory obligation not to move the road unless they meet the requirements of Idaho Code 55-313.

The BELSTLERS further argue that any express easement created under Instrument No. 1119009 is ineffective because they believe there was no evidence that Linda Merwin, the Grantee of the Easement was a party to the contract. That instrument certainly created an easement and is states expressly in Plaintiffs' Exhibit "15", Defendants' Exhibit "A", (Linda Merwin the CONINES predecessor in interest, was fully aware of its intention, and the need to continue the use of the private driveway during Merwin's ownership). While Linda Merwin was not a party to the transaction between Henry and Sanders, she was a third party beneficiary of that transaction, and was aware of its existence and the import to her property, which is now the property of CONINES. As exemplified by Defendants' Exhibit O, Linda Merwin was not necessarily a party but certainly involved in the transaction which resulted in the easement across the Henry property, which is now the BELSTLER property to serve the CONINE property as exemplified in Plaintiffs' Exhibit 15. Particular attention must be paid to Plaintiffs' Exhibit 15, with regard to the grant of easement by Henry for the benefit of Merwin. The language contained within Plaintiffs' Exhibit 15 (Instrument No. 119009) and the last paragraph thereof specifically states "Kenneth L. Henry grants an easement continuing the existing road in the southerly portion of the property that he is purchasing from V. A. Sanders and Geraldine C. Sanders and *the Northerly part of the property he is purchasing from V. A. Sanders and Geraldine C. Sanders to Linda Merwin who owns the property in the Northeast Quarter of Section 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County, Idaho.* Said Easements are the continuation of the existing logging road running parallel to Rockford Bay

Road on the South and *the existing road from the community road on the North"* (not to centerline of the community road to the North of the "private driveway"). To the extent, if any, that grant of easement is ambiguous, it has been throughly explained by the evidence and the witnesses. No one has contested that the "Southerly Easement" is as demarked on Exhibit A, also as viewed by the court and the parties at the view of the premises. There remains then the dispute of the "continuation of the existing road from the community road on the North" and to what its meaning was. Based upon the uncontroverted testimony of Ronald Evans, an historical witness, uncontroverted, it is clear that the road referenced as "the existing road from the community road on the North" is what has commonly referred to during the course of trail as the private drive across the Northern portion of the BELSTLER property that is further proven by Kenneth Henry's deposition testimony (Plaintiffs' Exhibit 26, Defendants' Exhibit "G").

Further, as to prescriptive rights attention is directed to the Deposition of Jerry Ronald Evans where he clearly states that the private drive has been in existence since approximately 1985 or 1986, and based upon his knowledge of the area and continuous visits has been used since that time. (See Evans deposition Plaintiffs' Exhibit 12, page 15, lines 9 through 25; page 16, lines 1 through 25; page 17, lines 1 through 25; page 19, lines 10 through 25; page 20, lines 1 through 25; page 22, lines 17 through 25; page 23 lines 1 through 25; page 24, lines 1 through 25; page 25, lines 1 through 25; page 26, lines 1 through 25; page 27, lines 1 through 25; page 28, lines 1 through 25, page 29, lines 1 through 15 and exhibits and testimony at trial). It must further be pointed out in 1988 the Mutual Agreement and Easement for Ingress and Egress (Instrument No. 1119009) there is specific provision in the last paragraph that Ken Henry, the predecessor in interest of the BELSTLERS specifically granted rights to cross an existing road in the northerly part of the property that Henry was purchasing from the Sanders for the benefit of Linda Merwin who was the Successor In Interest to Sanders. Those easements are referenced as "a continuation of the existing logging road running parallel to Rockford Bay on the south and the existing road <u>from</u> the community road on the north". That reference can only be to the private drive. (See Deposition of Jerry Ronald Evans.)

The Supreme Court of the State of Idaho in *Checketti vs. Thompson* (65 Idaho 715 [at 721]) noted:

"One who purchases land expressly subject to an easement or with notice, actual or constructive, that it is burdened with an existing easement takes the land subject to the easement."

In this particular matter there was no question that the express easement on the North side of the BELSTLER property existed, as acknowledged by all of the parties in their testimony that at the time of purchase by the BELSTLERS, that BESTLERS had knowledge of the existence of the "private drive", although the BELSTLERS testimony was hedged to some degree, but when pressed acknowledged that the existence of the road was visible on the face of the earth. Further, the express easement created by Plaintiffs' Exhibit 15 further buttresses the argument of the CONINES that the easement not only was of record and an express easement, but also, based upon testimony, a prescriptive easement.

The Plaintiffs further argue that because Linda Merwin was a stranger to Plaintiffs' Exhibit 15, that it would have no effect and should be void and unenforceable. Webster's New Universal Unabridged Dictionary Second Edition describes "stranger" as "one not privy or party to an act, agreement or title". As noted from Defendants' Exhibit O, Linda Merwin was not a stranger to the transaction and was privy to the actions, the only reasonable inference which can be drawn is the Sanders, in order to make his peace with Merwin, and based upon the writing exemplified in Defendants' Exhibit O required Henry to grant an easement for the benefit of Merwin across Henrys' property (Plaintiffs' Exhibit 15).

One must review in detail, the current status of the pleadings to determine the nature of the relief requested and, based upon the evidence and the pleadings determine what relief may be granted. In the Plaintiffs' pleadings they request a judicial determination of the meaning of Plaintiffs' Exhibit 9, the Deed from Sanders to Andrews Equipment, Plaintiffs' Exhibit 10, the Deed from Sanders to Rockford Bay, and Plaintiffs' Exhibit 11, the Deed from Andrews to Rockford Bay. As to those exhibits, they speak for themselves, and the evidence educed at trial indicates that it was Sanders' intention to create a community road running through parcels A, B, C, and D as identified on Plaintiffs' Exhibit 8. That is uncontested by the Defendants CONINE. Further, the Plaintiffs have asked for judicial determination of the meaning of Plaintiffs' Exhibit 14, the Sale Agreement between V. A. Sanders and Geraldine Sanders as Sellers and Kenneth Henry as Buyer. The response

to that is quite simple. It is a title retaining contract executed at a time when a Warranty Deed was also executed (and subsequently recorded - see Plaintiffs' Exhibit 16). The Agreement, the Warranty Deed, and the easements created in Plaintiffs' Exhibit 15, the Deed from Sanders to Henry and Henry to Merwin creating the easements, was binding upon all parties thereto, including Linda Merwin who was a beneficiary thereof, as an express easement, and therefore binding upon all parties who purchased subsequent to either Henry or Merwin. The Supreme Court in *Jolly vs. Idaho Securities*, 414 P 2d 879, 90 Idaho 373 (1966) determined that an express easement is not merged in a Deed. Therefore the argument of the Plaintiffs that the easements created in Plaintiffs' Exhibit 15 merged with the Warranty Deed are not effective.

The Plaintiffs further requested judicial interpretation of Plaintiffs' Exhibits 18 and 19 (the Joint Use and Maintenance Agreement entered into between Kluss and Henry as modified by Henry and re-recorded. The documents speak for themselves, it is simply a Joint Use and Maintenance Agreement for a roadway, which has been identified in yellow marking on Plaintiffs' Exhibit 1. The testimony during the course of the trial indicated that both parties and their successors in interest have contributed to the maintenance of portions of the yellow marked roadway on Plaintiffs' Exhibit 1, and therefore any further interpretation is not necessary. That Joint Use and Maintenance Agreement does not supercede or extinguish the terms and conditions set forth in Plaintiffs' Exhibit 15, the document which created the easements for the benefit of Henry from Sanders, and from Henry to Merwin for the beneficial use of not only the "private drive" but also the Southern easement. Plaintiffs, however, further argue that Plaintiffs' Exhibit 15 is not effective regarding the CONINE property, formerly the Merwin property, because the document was not delivered. The Supreme Court of Idaho in the case of *Barmore vs. Perrone,* 179 P 3d 303, 145 Idaho 340 (2008) noted "the controlling element in the question of delivery is the intention of the Grantor and the Grantee. The question of delivery is one of intention and the rule is that delivery is complete when there is an intention manifest on the part of the Grantor to make the instrument his deed (page 308)". Therefore, it must be determined that the document creating the easement from Sander to Henry and the easements from Henry to Merwin (Plaintiffs' Exhibit 15) was indeed, <u>delivered</u>. The Defendant/Counter Plaintiffs conversely claim that there are two express easements on the BELSTLER property consisting of the Southern most easement (apparently capitulated to by the

Plaintiffs) and a Northern most easement. As set forth in the evidence at trial the question of where the Northerly easement lies was a question of fact to be determined by the court. It is the Defendant/Counter Plaintiffs, CONINES' position that the evidence clearly demonstrates (see testimony of Ronald Evans, and the deposition testimony of Kenneth Henry) that the easement in question granted on the Northerly portion of the then Henry property (now the BELSTLER property) was for the private drive. Ken Henry, when pushed to explain what easement was referenced in his deposition, indeed marked on his deposition Exhibit "3" an X on the private drive. The CONINES further allege that they have a prescriptive right on the private drive (if it is ultimately determined that the express easement is ambiguous and can not be determined). The terms and requirements of a prescriptive easement must be proved by clear and convincing evidence. Base upon the testimony of KAREN CONINE, there has been open, continuous and notorious use of the private driveway for the period of ownership of approximately ten years. That would vest the rights of the CONINES under prescriptive claims notwithstanding the legislature chose to modify the prescriptive claim statute (Title 5, Chapter 2 of Idaho Code) from the previously existing five year requirement to a twenty year requirement. The Defendants' rights were vested prior to the legislature changing the law, and the legislature cannot "take" without appropriate compensation (United States Constitution).

While not plead, there is another issue pending before the court. That is, if the court determines that the easements claimed by the CONINES are valid and subsisting easements, whether or not the Plaintiffs can change the location of the easements. Idaho Code 55-313 allows for a subservient estate to change the location of an easement that benefits the dominant estate. However, that statute requires that there be no injury, or more particularly that such change be made in a manner as to not obstruct motor vehicle traffic or otherwise injure any person or persons using or interested in such access. Further, the subservient estate must pay the cost of such a move. As exemplified by a view of the premises, and Defendants' Exhibit T, (the worksheet or road grades prepared by Scott Rasor) to change the location of the easement as referenced in the alternatives by Mr. Rasor (Defendants' Exhibit T) would create grave risk of injury and harm due to the topography, and the slope which by far exceeds any of the slopes upon the existing approach on the community road from Rockford Bay.

CONCLUSION

Based upon the foregoing, the evidence educed at trial, and the status of the pleadings, the court should order that the Northerly and Southerly easements created by Plaintiffs' Exhibit 15, as referenced on Plaintiffs' Exhibit 1, are express easements specifically created for the benefit of the CONINE property and impose an encumbrance upon the lands of the BELSTLERS, and that the Northerly easement is the "private drive". In the alternative the court should determine, if it cannot find an express easement as to the Northerly easement, that the CONINES have established a prescriptive easement upon the Northerly easement (the "private drive"). Further, should the court determine the existence of the easements in favor of the CONINES, under either theory as set forth herein, the court may further enter an order that in the event the BELSTLERS desire to change the location of either of the easements that they must do so at their own cost, and to a grade not to exceed the greatest grade upon the community road from its inception at Rockford Bay Road to its terminus at the Western boundary of the BELSTLER property, and at the BELSTLERS' expense.

RESPECTFULLY SUBMITTED this 29th day of October, 2009.

CHARLES M. DODSON
ATTORNEY FOR DEFENDANT/COUNTER PLAINTIFFS

I hereby certify that on the 29th day of October, 2009, a true and correct copy of the foregoing was transmitted via facsimile

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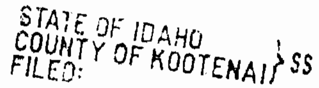

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife, PLAINTIFFS, VS. KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, DEFENDANTS.	CASE NUMBER: CV-07-2523 DEFENDANTS' CONINES RESPONSE TO PLAINTIFFS' POST TRIAL BRIEF
KAREN SHELER CONINE and HOWARD CONINE, husband and wife, COUNTER PLAINTIFFS, VS. CHRIS BELSTLER and DANA BELSTLER, husband and wife, COUNTER DEFENDANTS.	

COMES NOW, the above named Defendants, KAREN SHELER CONINE and HOWARD CONINE, husband and wife, by and through their Attorney of Record, CHARLES M. DODSON, and hereby submit the following response to Plaintiffs' Post Trial Brief pursuant to the Order of the court.

Defendants further acknowledge that Defendants, through counsel and counsel for the Plaintiffs, have stipulated to simultaneously file their Response Briefs on the 23rd day of November, 2009, notwithstanding the previously existing Order requiring the filing of the same on the 19th of November, 2009. Said Agreement to modify the submission date was agreed upon verbally between counsel for the parties on the 18th of November, 2009.

Plaintiffs raise a number of legal questions as set forth on page 4 of their Post Trial Brief. To the extent a response is necessary, the following is the response of the Defendants:

Question 1. What is the legal status and effect of Defendants' Exhibit "O"?

Plaintiffs devote a substantial portion of their Brief (page 5 through Page 12) arguing that there is no effect whatsoever of Exhibit "O". To the contrary, the Defendants stipulated for the admission of Exhibit "O", and the practical effect and meaning of Exhibit "O" is left to the sound discretion of the trier of fact. In this case, Exhibit "O" tends to verify that there was a dispute between Sanders and Merwin because Sanders had implaced a road (the upper extension of Sanders/Chandler Lane) upon the property of Merwin without authority. In order to effectuate a resolution Sander and Merwin agreed that Sanders would correct the problem (Exhibit "O") and accomplished the same through the sale to Henry and the requirement that Henry convey an easement to Merwin (Plaintiffs' Exhibit "15"). It is therefore again left in the sound discretion of the court to determine the weight of which Exhibit "O" will be given and the ultimate determination of the effect of Plaintiffs' Exhibit "15", which is one of the primary claims for declaratory relief of Plaintiffs. Exhibit "O" provides meaning to, explanation, and intent of Plaintiff' Exhibit "15".

Question 2. What documents comprise the Sanders/Henry Purchase Agreement?

As able counsel for the Plaintiffs clearly points out in *Olmstead v Heidelberg Inn, Inc.,* 105 Idaho 774 (1983), when there is a contract of sale it basically includes all elements of that contract, including the granting of rights by and between parties, including parties who are not either the seller or the buyer, as well as the ultimate Deed. Plaintiff does, however, misquote the *Jolley* case as

standing for the sole proposition that the Agreement of Sale and Purchase, and the grants of easement merge with the ultimate recording of the Sanders to Henry Deed, (*Jolley v Idaho Securities,* 90 Idaho 373, 414 P 2d 879) (1966). The Supreme Court in the *Jolley* (supra) case determined that an express easement is not merged in a Deed. Further, to the extent the Sanders/Henry Purchase Agreement is ambiguous, the clarification of the ambiguity is indeed left to the trier of fact with particular reference to the greatest impetus being placed upon the intention of the parties (*Olmstead v Heidelberg Inn, Inc.,* 105 Idaho 774 (1983) *Argosy Trust v Wininger*, 141 Idaho 570 (2005)). Counsel for the Plaintiffs further argues that Henrys' had no right to grant easements for the benefit of Merwin because they were not in legal title. The Supreme Court of the State of Idaho in *Clark v Olsen*, 110 Idaho 323, 715 P 2d 993 (1986) clearly acknowledged that property is indeed a bundle of rights. Further the Supreme Court in *Ellis vs Butterfield*, 98 Idaho 644, 570 P 2d 334 (1977) recognized the equitable rights of a contract for title purchaser who had not yet obtained the deed transferring legal title. This case, however, is somewhat different in that the Henrys did subsequently obtain the Deed from Sanders vesting full legal title in addition to the equitable title they obtained at the time of purchase (and the rights to and actual request by Sanders to grant an easement to Merwin).

3. In response to the third question raised by the Plaintiffs as to the ambiguity of the purchase agreement, the only ambiguous issue is what constitutes the community road (and based upon the evidence educed by the Plaintiff through their expert, as well as the testimony of Mr. Evans, the only "community" served would be the "community" that was put together with Sanders and Pring), therefore the only conclusion can be that the community road was referencing what is now referred to as Roads A, B, C, and D and the extension thereof eastwardly (see aerial photo attached to Plaintiffs' Exhibit "4"). Note that as Plaintiffs point out on page 21 of their brief, there was going to be "a high class 660 acre community for 1200 to 1500 condominium units" which could be the only "community" contemplated.

5. Plaintiffs argue that Henry lacked the power to grant an easement interest in Sanders property (then Henry's) to Merwin and therefore the easement must fail. As noted above, the entry into a title retaining executory contract provides some rights of ownership to the purchaser, which rights are ultimately vested in full upon conveyance of the Deed (generally related to the payment

in full of the debt). In this case it was clear that Sanders requested Henry, and Henry acquiesced (abet without fully understanding according to the testimony of Kenneth Henry in his deposition which has been admitted to evidence that he did not quiet understand the "formalities"). Notwithstanding the same, the Sanders/Henry documents (Plaintiffs' Exhibits "14, 15, and 16") when reviewed together make it clear that Sanders requested Henry, as a condition precedent to his purchase, to grant to Merwin an easement across the then Henry property. Counsel points out Idaho Code 55-505 regarding mere possibilities. In this instance, there is not a mere possibility but a factual reality (See Plaintiffs' Exhibits "14", "15", and "16").

Item 6, Plaintiffs argue that Merwin and her successors cannot benefit from the Grant of Easement because it was not delivered to her. Defendants simply point out to the court in Defendant/Coeur Plaintiffs' Post Trial Memorandum at page 8 the *Barmore vs. Perrone* case (179 P 3d 303, 145 Idaho 340 (2008)) notes that the controlling element in the question of delivery is the intention of the Grantor and Grantee. In this case the intentions of Sanders and Henry are clear, and the intentions regarding Merwin's desire to have a resolution of the easements upon her property were clear by Defendants' Exhibit "O", which was admitted by Stipulation.

In item 7 of Plaintiffs' Post Trial Brief, they attempt to torture the rule of law in Idaho. The *Olsen v J.A. Freeman Company* case, 117 Idaho 706, cited at Page 30 of Plaintiffs' Brief stands merely for the proposition that the legislature when exercising its authority appropriately may enact statutes. Plaintiff fails to recognize Idaho Code 55-603, which specifically states:

> "The transfer of real property passes all easements attached thereto **and creates in favor thereof an easement to use other property of the person whose estate is transferred, in the same manner and to the same extent as such property was obviously and permanently used by the person, whose estate is transferred. for the benefit thereof, at the time when the transfer was agreed upon or completed.**" (Emphasis added).

Secondarily, the Sale Agreement (Plaintiffs' Exhibit "14") meets the requirements of Idaho Code 55-818 as a summary of an instrument creating an interest in and affecting the title and possession of real property. As such, due to the fact that it was a recorded document, it constitutes "notice to the world" of the existence of the easements granted therein (Idaho Code 55-811).

Plaintiffs' counsel brings up the possibility of Henry's defenses against Merwin for fraud, mistake, and lack of consideration, none of which were plead nor issues to be determined in this litigation.

As noted by Plaintiffs' counsel on page 39 of their Brief "a written instrument is presumptive evidence of consideration" (noting Idaho Code 29-103). In the particular case at hand, the consideration passing from Sanders to Henry was the transference of an interest in real property from Sanders to Henry; from Henry to Sanders - monetary consideration; and from Sanders and Henry (Sanders requested document and Henry's execution thereof) a resolution of the dispute between Sanders and Merwin by the grant of an easement.

In item 10 of Plaintiffs' brief, they argue that the purchase agreement merged into the Deed and that therefore the easements did not survive that merger. Again, as pointed out in the Jolley v Idaho Securities, Inc., case, (90 Idaho 373, 414 P 2d 879 (1966), the Supreme Court of Idaho determined that an express easement is not merged in a Deed. In this case an express easement was created by the easement document (Plaintiffs' Exhibit "15).

As to item 11 of Plaintiffs Post Trial Brief, this writer finds it fascinating that the Amended Complaint in the matter requests a Judicial Determination of what Instrument No. 1119009 (Plaintiffs' Exhibit "15") means but then argues that parole evidence may not be introduced (abet it was introduced by both parties herein) as to what was intended. It must be also pointed out that Kenneth Henry, at his deposition, when pressed for a determination of where the easements were in place clearly identified what is referred to as the lower road, and the "disputed driveway".

Finally, Plaintiffs argue in Item 12 of the Post Trial Brief that the Kluss/Henry Agreements somehow negate the position of the Defendants, CONINE, regarding the disputed driveway as being the easement described in Plaintiffs' Exhibit "15". In support thereof, the Plaintiffs' argue at page 48 of their Brief "as far as Kluss was concerned the definition of said roadway was Sanders Lane, now Chandler Lane . . . ." That is a very far reach in terms of the evidence, Mr. Kluss never having been called to testify at court, and the parties being left solely with whatever the meaning is of Plaintiffs' Exhibits "18, and 19", which are not germane to the establishment of the easements granted in the Sanders/Henry/Merwin easement (Plaintiffs' Exhibit "15") but only an agreement to contribute for maintenance.

CONCLUSION

It is therefore respectfully requested that upon entry of appropriate findings and conclusions, that the court authorize the execution of a Judgment declaring the rights of the Defendants, CONINE, to traverse the southerly road as well the northerly road which is constituted by the disputed driveway.

RESPECTFULLY SUBMITTED this 23rd day of November, 2009.

CHARLES M. DODSON
ATTORNEY AT LAW

I hereby certify that on the 23rd day of November, 2009, a true and correct copy of the foregoing was:
transmitted, via facsimile:
to:

ARTHUR B. MACOMBER
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VIA FACSIMILE 664-9933

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STATE OF IDAHO
COUNTY OF KOOTENAI }SS
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Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife; Plaintiffs,	Case No: **CV-07-2523**
KAREN SHELER and HOWARD CONINE, husband and wife, and the marital community composed thereof; Defendants.	**PLAINTIFFS' REPLY TO DEFENDANTS/COUNTER PLAINTIFFS' POST-TRIAL MEMORANDUM**

COME NOW Plaintiffs CHRIS BELSTLER and DANA BELSTLER, by and through their attorney of record, Arthur B. Macomber, replying to Defendants/Counter Plaintiffs' Post-Trial Memorandum filed with this Court on October 27, 2009. Pursuant to an agreement in this Court's chambers at the end of trial, concurrent responses from the parties were due on November 19, 2009, but by telephonic agreement on November 18, 2009 plaintiffs' and defendants' counsel agreed to enlarge the time for submission of these responses until November 23, 2009, pursuant to I.R.C.P. 6(b).

INTRODUCTION

This case pertains to an easement dispute between Plaintiffs Belstler and Defendants Conine in regard to the subject property on Chandler Lane in Kootenai County. Defendants claim a right to use a disputed driveway and southern easement crossing the Belstlers' property under legal theories of express and prescriptive easement.

The facts of this case are known to the Court through the recent trial that ended on September 24, 2009, and Plaintiffs' Post-Trial Legal Arguments. Without taking the Court's time by reiterating all the relevant facts, Plaintiffs disagree with portions of Defendants' rendition of the facts in their Post-Trial Memorandum. Specifically, Defendants omit important dates and facts related to the chronology of events in the Sanders-Henry and Sanders-Worley Fire District sales in early June, 1988. (Def. Br., p.2, ll. 16-28). Through these omissions, Defendants improperly infer that Sanders had a legal basis to grant an express easement to Henry.

Plaintiffs herein reiterate that instrument number 1119009 has no legal bearing to the outcome of the instant case and should be set aside under basic rules of contract interpretation as discussed in detail in Plaintiff's Post-Trial Legal Arguments. Plaintiffs briefly refer to arguments made in their Post-Trial Legal Arguments to rebut the Defendants' argument that Merwin was a third party beneficiary, and that her associated rights should also vest with Defendants. Plaintiffs argue that Defendants have no legal right to use the southern access to their property by virtue of either an express easement or prescriptive easement. The facts demonstrate that Defendants did not have a legally recognizable express easement. The facts further demonstrate that defendants cannot prove the elements of easement by prescription by clear and convincing evidence.

Significantly, the Idaho Legislature changed the requisite prescriptive period from five years to twenty years in January 2006. Defendants' claim did not arise until 2007. To allow Defendants' claim to a five-year prescriptive period in a case brought in 2007 would wholly defeat the Legislature's intent and would open the floodgates of litigation.

Finally, this Court should not consider Defendants' argument that Idaho Code section 55-313 applies to the facts of the instant case fails because it was not pled before or during trial.

ARGUMENT

1. Defendants Mischaracterize And Misconstrue The Transactions That Occurred Between Sanders-Henry, Sanders-Worley Fire District, and Henry-Merwin In June, 1988, And Thereby Incorrectly Conclude That An Express Easement Was Created.

Defendants misstate facts and mischaracterize the purported "dual grant of easement, first from Sanders to Henry, and second from Henry to Merwin." (Def. Br., p.3, ll. 6-7). Defendants state on page two of their Post-Trial Memorandum that on the 3rd of June, 1988, Sanders conveyed the subject land to the Worley Fire District. Defendants subsequently state that "[a]lso on the 1st day of June, 1988 the Sanders sold to Henry … the Belstler property which was at that time 'subject to any and all easements, conditions, restrictions of record, and easements for ingress and egress.'" Defendants erred in construing the transactions in early June 1988 as a dual grant of easement from Sanders to Henry and Henry to Merwin. As Plaintiffs noted in their Post-Trial Legal Arguments, Sanders lacked power to grant Henry an easement on June 6, 1988. (Pl. Br., p. 23), because on June 3, 1998, Sanders conveyed the fire station parcel to the Worley Fire District, and thus did not own the real property upon which Defendants claim an easement was granted from Sanders to Henry. (*Id.*). The Sales Agreement was dated June 1, 1999, but was not signed until June 6, 1988; the Worley Fire District deed was signed on June 3, 1988. When the parties showed their agreement by their signatures, the Sanders had no ownership in the Worley Fire District parcel. Therefore, in Defendants' Post-Trial Memorandum, the assertion of an easement "over and upon" the Worley Fire District parcel is incorrect. There was never a valid grant from Sanders to Henry in Plaintiffs' Exhibit 15. This error is replicated on page three in

the last sentence of the first full paragraph of Defendants' Post-Trial Memorandum, where Defendants state, "an easement exists past the 'fire station' [then] across the Belstler property . . ." Regardless of when these instruments were recorded, however, Sanders had notice of both transactions (*see* I.C. § 55-815) and thereby had no legal power to convey the same property twice. (Pl. Br., p. 24).

Similarly, the purported grant of easement from Henry to Merwin should be held invalid. As Plaintiffs stated in their Post-Trial Legal Arguments, Henry had neither title nor possession of the subject property when he signed the Mutual Agreement for Easement for Ingress and Egress on June 7, 1988. Therefore, Henry did not have any legal power to grant an easement appurtenant to Merwin. (Pl. Br., p. 26).

Furthermore, as Plaintiffs stated on page 30 of their Post-Trial Legal Arguments, the Idaho Legislature has restricted Idaho's after-acquired property rule to **fee simple transfers of title or claim of title by proper instrument**. (I.C. § 73-116; *Olson v. J.A. Freeman Co.*, 117 Idaho 706 (1990).) The Henry to Merwin attempted easement grant was not a fee simple transfer of title in fee simple, but an attempted transfer of a non-possessory appurtenant interest. Therefore, no easement was conveyed to Merwin upon Henry receiving delivery of the title through the Sanders-Henry deed shown at plaintiffs' Exhibit 16 (Pls. Ex. 15, 16; I.C. § 55-601), and Defendants cannot claim that instrument number 1119009 grants a easement across Plaintiffs' property because Idaho's after-acquired property rule is inapplicable.

On page eight of Defendants' Post-Trial Memorandum, Defendants state "[t]he Supreme Court in *Jolly* (sic) *vs. Idaho Securities*, 414 P 2d 879, 90 Idaho 373 (1966) determined that an express easement is not merged in a Deed." In *Jolley*, the Court stated "If the stipulation has reference to title, possession, quantity, or emblements of the land, it is generally, but not always, held to inhere in the very subject-matter with which the deed deals, and is merged therein." Further, "when the deed is delivered and accepted as performance of the contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, the deed alone must be

looked to to [sic] determine the rights of the parties . . . ." (*Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 382 (1966); quoting *Continental Life Ins. Co. v. Smith*, 41 N.M. 82 (1936).) Plaintiffs argue that a non-possessory easement affects title to Belstlers' land because it turns it into a servient estate if the easement is upheld. Since such easement "inheres in the subject-matter with which the deed deals," it is merged with the deed. In *Sells v. Robinson*, 141 Idaho 767, 772 (2005), the Idaho State Supreme Court found merger of the real estate purchase agreement's (REPSA) inclusion of "timber rights on said easement." (Compare to *Sainsbury Constr. Co. v. Quinn*, 137 Idaho 269, 273 (2002) (Court finds that a construction company's promise to assist a lot buyer in the construction of their house and receive reimbursement of its costs plus 5%, was incidental to that company's sale of said lot to that buyer, and thus the agreement to build the house was not merged with the deed.)

II. **Defendants' Argument On Merwin's Third Party Beneficiary Status Fails Because Henry Never Intended To Benefit Merwin and Merwin Could, At Best, Be Considered Only a Donee Beneficiary Without Legal Recourse.**

Defendants argue on page five of their Post-Trial Memorandum that Merwin was a third party beneficiary of the transaction between Henry and Sanders, and that instrument number 1119009 expressly grants an easement from Henry to Merwin. Simply stated, Merwin was a donee beneficiary and had no enforceable legal rights against Henry or Sanders. "A donee beneficiary, of course, has no rights against the promisee except where the promisee has received consideration to discharge the promisor." (*Gilbert v. City of Caldwell*, 112 Idaho 386, 396 (1987); citing J. Calamari and J. Perillo, *The Law of Contracts* § 17-10, 2d. Ed. (1977).

Plaintiffs provided a careful analysis of the third party beneficiary argument on page 32 of their Post-Trial Legal Arguments. Even if Sanders intended to benefit Merwin through his contract with Henry, the question remains whether Henry intended Merwin to also benefit. There is no language in Plaintiffs' Exhibit 15 to show that Henry

intended to benefit Merwin by granting her the easements, or even that she needed the easements to access her land. (Pl. Br., p. 32). Again, Henry believed that the easement grant in instrument number 1119009 was merely "some type of formality" about which he lacked a clear understanding of why he signed it and what it meant to the sales transaction. (Henry Depo., at p. 8, ll. 3-24).

Even if this Court found that Henry did intend to benefit Merwin with an easement grant in instrument number 1119009, the Henry-Merwin easement grant would fail because the document did not adequately identify the easement interest or its location to satisfy Idaho's statute of frauds. As Plaintiffs stated in their Post-Trial Legal Arguments, the alleged southern and northern easements are very difficult to locate, and the language in instrument number 1119009 is ambiguous at best. A professional surveyor could not locate the purported easement granted in instrument number 1119009 based on the description in the document. (Pl. Br., p. 45). Thus, this Court should find that 1) Merwin was not a third party beneficiary; and 2) the easements are not located specifically enough in the deed for them to be enforceable under Idaho's statute of frauds.

III. Defendants Cannot Claim An Express Easement Under Instrument Number 1119009 Because It Was Not Delivered And It Does Not Satisfy Idaho's Statute of Frauds.

On page eight of Defendants' Post-Trial Memorandum, Defendants cite *Barmore v. Perrone*, 179 P. 3d 303, 145 Idaho 340 (2008) for the proposition that "[t]he question of delivery is one of intention and the rule is that delivery is complete when there is an intention manifest on the part of the Grantor to make the instrument his deed." From this rule statement, Defendants then simply conclude that the easements from Henry to Merwin were therefore delivered. Quoting from the same case, Plaintiffs argue that in Idaho, "an argument that a deed lacked the intent necessary to be effective is identical to an argument that delivery never occurred." (*Barmore v. Perrone*, 2008-ID-R0219.005 at 3 (2008).) This results because "the real test of the delivery of a deed is this: Did the

grantor by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered." (*Id.*; citing *Estate of Skvorak*, 140 Idaho at 21 (2004).) Even though Plaintiffs do not dispute that Henry signed instrument number 1119009, he believed that instrument number 1119009 was "some type of formality" and he lacked a clear understanding of why he signed it. (Henry Depo. at p. 8. ll. 3-24). Without a clear understanding of why he signed it, this Court should find that Henry lacks the requisite intent to have the easement grant operate in favor of Merwin, or Merwin's successors, the Conines. The Conines do not enjoy an easement across the Belstlers' property as purportedly conveyed by instrument number 1119009, because Henry did not deliver that instrument to Merwin, either physically or with intent for it to benefit her. (Pl. Br., p. 28).

Defendants have asserted in their Post-Trial Memorandum that the Conines are entitled to an express easement across the Belstlers' property. However, Defendants provide little factual support or evidence in support of this assertion. Defendants have essentially asked this Court to ignore the complexities in the transactions that occurred in early June, 1988 to find simply that Sanders granted Henry some easements and Henry then granted Merwin some easements. Plaintiffs have provided in their Post-Trial Legal Arguments a detailed account of what actually occurred. In summary and simply stated, 1) Sanders did not have legal authority to grant an easement to Henry; 2) Henry did not have legal authority to grant Merwin an easement; 3) Merwin could not be considered a third party beneficiary of any agreement between Sanders and Henry; 4) Henry lacked the requisite intent to benefit Merwin by grant of an easement; 5) instrument number 1119009 does not satisfy the statute of frauds because it does not provide an adequate description of the subject property; and 6) instrument number 1119009 is invalid because it was not delivered under Idaho law.

Furthermore, Merwin was a stranger to the transactions between Sanders and Henry. Defendants attempt to link Defendants' Exhibit "O" to Plaintiffs' Exhibits 14, 15, and 16 to argue that Merwin was not a stranger to the transaction. However, Defendants'

Exhibit "O" is undated, unrecorded, and unacknowledged, and thus could have as likely been written yesterday as in 1983. *See* page 30 of Plaintiffs' Post-Trial Legal Arguments.

On page six of Defendant's Post-Trial Memorandum, Defendants misquote Plaintiffs' Exhibit 15 by stating "There remains then the dispute of the 'continuation of the existing road from the community road on the North' and to what its meaning was." The actual text in Plaintiffs' Exhibit 15 states "Said easements are the continuation of the existing logging road running parallel to Rockford Bay Road on the South and the existing road from the community road on the North." Plaintiffs argue that the "community road on the North" must refer to the Black Rock community road from the east because there is no other portion of the community road that comes from the North. Roads A, B, and C are all south of Road D. (Pl. Exhibit 4).

IV. Defendants Cannot Claim An Easement By Prescription Because They Are Barred From Filing The Claim under Idaho Code section 5-203.

Defendants correctly state that the Idaho "Legislature changed the time period for prescriptive easement from the former five year statute in 2006." (Def. Br., p.4, ll. 23-25). By changing the time period for prescriptive easements from five years to twenty years, the Idaho Legislature clearly intended to make it much more difficult for claimants to bring adverse possession claims. Defendants, however, simply state that the Court should find that their rights vested in 2004, prior to the legislative change.

Under Idaho Code section 5-203, "[n]o action for the recovery of real property, or for the recovery of the possession thereof, can be maintained unless it appears that the plaintiff . . . possessed of the property in question within twenty (20) years before the commencement of the action…." Defendants commenced this action in 2007, and thereby did not possess "the property in question within twenty years (20) before the commencement of the action."

To reiterate from Plaintiffs' Post-Trial Legal Arguments, "if Conines could exercise a vested right in a five-year period they accrued prior to the statutory change,

and could bring that claim after July 1, 2006, such a claim would essentially eviscerate the Legislature's intent, which was to quadruple the statutory time period for claims made after July 1, 2006." (Pl. Br., p. 51). Defendants are inviting this Court to open the floodgates of litigation to allow claimants to argue simply that their claims vested at some convenient point prior to the Idaho Legislature's change of law. This rationale could be broadly applied to any change of law that the Idaho Legislature makes, and would vastly erode the general judicial protections of statutes of limitation.

Defendants later state that the "[d]efendants' rights were vested prior to the legislature changing the law." (Def. Br., p. 9, ll. 15-16). Ironically, Defendants cite the United State Constitution concluding that "the legislature cannot 'take' without appropriate compensation." Defendants did not offer any facts or legal substantiation of this conclusory takings argument. Plaintiffs argue, however, that private takings without compensation are exactly what the Idaho Legislature aims to prevent by increasing the prescriptive period from five years to twenty years. Plaintiffs again note that Defendants brought their action on August 8, 2007, almost a full year after the Idaho Legislature revised and made effective Idaho Code section 5-203. Since Defendants cannot claim possession for a period of or exceeding twenty years, their claim of prescriptive easement must fail.

V. Defendants Cannot Maintain A Claim For Easement By Prescription Because The Other Elements Of A Prescriptive Easement Have Not Been Met.

Even if this Court decided to apply the former five-year prescriptive period, Defendants have not proved by clear and convincing evidence any of the other requisite elements of a prescriptive easement. On page four of Defendants' Post-Trial Memorandum, Defendants incorrectly state, "[e]very reasonable inference must be drawn from the Defendants' position." Defendants repeat this error in the second full paragraph on page seven of their Post-Trial Memorandum. In Idaho, a claimant must prove the elements of a prescriptive easement by offering clear and convincing proof. (*West v.*

Smith, 95 Idaho 550, 557 (1973).) The evidentiary standard is not a preponderance of the evidence or as the Defendants assert "[e]very reasonable inference." Courts in Idaho require "clear and convincing evidence." (*Roberts v. Swim*, 117 Idaho 9, 17 fn. 2 (1989); citing *Last Chance Ditch Co. v. Sawyer*, 35 Idaho 61 (1922).) "Each element is essential to the claim, and the trial court must make findings relevant to each element in order to sustain a judgment on appeal." (*Backman v. Lawrence*, 2009-ID-0513.098 at 6 (2009); citing *Hodgins v. Sales*, 139 Idaho 225, 229 (2003).)

Without citing the record or providing any substantiation. Defendants claim that "[a]s to the prescriptive right, the only argument made by the Plaintiffs in contravention of the prescriptive right is the statement that 'the Solomons, the Conines (sic) predecessor in interest, made no use of the Conine property." (Def. Br., p. 4, ll. 10-11). However, Defendants' only proffered evidence of use is "in point of fact a vehicle was left on the property (in a building) which required contact to have the vehicle removed." (Def. Br. p. 4, ll. 13-15). As stated on page 50 of Plaintiff's Post-Trial Legal Arguments, "[i]n order for a claimant to establish that he has acquired a private prescriptive easement by adverse use, he must submit reasonably clear and convincing proof of open, notorious, continuous, uninterrupted use, under a claim of right, with the knowledge of the owner of the servient tenement, for the prescriptive period." (*West v. Smith*, 95 Idaho 550, 557 (1973).) Again, the requisite standard of proof is clear and convincing evidence. Plaintiffs argue that the alleged evidence of a vehicle left indefinitely in storage in one of the buildings on Defendants' property does not provide clear and convincing evidence of any of the requisite elements of a private prescriptive easement.

Defendants also state on page six their Post-Trial Memorandum that "[f]urther, as to prescriptive rights attention is directed to the Deposition of Jerry Ronald Evans where he clearly states that the private drive has been in existence since approximately 1985 or 1986, and based upon his knowledge of the area and continuous visits has been used since that time." Plaintiffs do not dispute Ronald Evans' testimony about the road's existence, but argue only that the extremely limited and non-continuous use was by

permission. Again, Defendants fail to provide any facts or evidence to support their claim of a private prescriptive easement by adverse use. While Defendants make numerous citations to Mr. Evan's deposition, his statement that the road existed and that it was used does not provide clear and convincing proof that the use met any of the elements of a private prescriptive easement. The evidence does not indicate who used the private drive, whether the Plaintiffs or their predecessors had any knowledge of the use, how frequently the private drive was used, or whether those using the private drive had permission. Clearly, Defendants have not met their strict burden of proof by providing clear and convincing evidence to support a claim of private prescriptive easement by adverse use.

On page nine of Defendants' Post-Trial Memorandum, Defendants claim once again "they have a prescriptive right on the private drive ... there has been open, continuous and notorious use of the private driveway for the period of approximately ten years." (Def. Br., p. 9, ll. 7-12). Defendants have stated in their Post-Trial Memorandum that they can claim "a prescriptive right on the private drive", but they have not yet provided any facts or evidence to support this bare claim.

Plaintiffs have provided ample evidence both at trial and in their Post-Trial Legal Arguments to show that Defendants have not met their evidentiary burden to prove a prescriptive easement.

First, Defendants' use was not open and notorious. As Plaintiffs stated in their Post-Trial Legal Arguments, the Belstlers moved to the property on November 15, 2005 (Dana Belstler Tr. Testimony, 9-22-09), and did not even see the Conines until mid-April 2006. (*Id.*). Plaintiffs provided substantial evidence that Defendants' use of the property was infrequent and inconsistent from 1998 to 2007 (Conine Tr. Testimony, 9-23-09). Plaintiffs demonstrated that Defendants' predecessors' use of the property was not open and notorious, because there is little evidence as to how Kluss used the property or the disputed driveway between July of 1990 and November 1993, Solomon did not use the

land except for storage of one boat at some unknown time, and there is no evidence that Merwin used the property at all. (Pl. Br., p. 55).

Second, Defendants have not proved continuous and uninterrupted use of the property or the disputed driveway. Again, the Conines only used their property intermittently from 1998 to 2007. (Pl. Br., p. 56). The Solomons did not use the property at all. Kluss used the property to run an illegal marijuana growing operation, and there is no evidence that Merwin ever used the property. (*Id.*). Clearly, Defendants cannot establish continuous and uninterrupted use of the property.

Third, Defendants' claim of right fails because it was permissive. As noted in Plaintiffs' Post-Trial Legal Arguments, "a prescriptive right can't be granted if the use of the servient tenement was by permission of its owner, because the use, by definition, was not adverse to the rights of the owner." (*Backman*, 2009-ID-0513.098; citing *Hughes v. Fisher*, 142 Idaho 474, 480 (2006).). As stated in Defendants' Post-Trial Memorandum, the Conines "ceased using the lower road due to its being cabled off ..." (Def. Br., p.3-4). As noted by Plaintiffs in their Post-Trial Legal Arguments, Defendants did not attempt to remove the cable across the lower easement or ask for a key. Defendants' response clearly demonstrates that they understood the access to the lower easement to be wholly permissive. The evidence adduced at trial shows 1) Solomon did not use the property; 2) Henry gave his buddy Kluss permission to use the disputed driveway; and there is no evidence that Kluss used the lower easement; and 3) Merwin also did not use the property. (Pl. Br., p. 58). Finally, all the elements must be proven clearly and convincingly to have existed together for the prescriptive period of twenty years, so if there was a period of permissive use, or use not open and notorious for period such as Kluss', the claim must fail.

VI. Defendants' Argument That Idaho Code Section 55-313 Applies Is Improper And Unwarranted Because It Requires An Entirely New Factual And Legal Analysis That Was Not Raised At Trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ~~19th~~ 23rd day of November 2009, I caused to be served a true and correct copy of the foregoing:

PLAINTIFFS' POST-TRIAL LEGAL ARGUMENTS

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DATED this ~~19th~~ 23rd day of November 2009.

Arthur B. Macomber, Attorney
Macomber Law, PLLC

Defendants argue on page nine of their Post-Trial Memorandum that "**while not plead**, there is another issue pending before this court ... whether or not the Plaintiffs can change the location of the easements" under Idaho Code section 55-313. Plaintiffs have not changed location of any alleged easement, and they do not believe any easements exist to change. Plaintiffs argue that Defendants' argument is improper at this stage of litigation.

In a case factually similar to the instant case, the Court stated, "Cold Springs neither plead nor addressed whether it was entitled to relocate the easement. Cold Springs waited until filing motions to clarify and amend the judgment to address the issue. As a result, the district court correctly declined to rule on whether the easement was open to relocation ... Similarly, Cold Springs is barred from making such an argument before this Court because it did not properly raise the issue below." (*Turner v. Cold Springs Canyon Ltd. Partnership*, 143 Idaho 227 (2006).) Plaintiffs argue that the decision in *Turner* applies to the facts of the instant case, and that Defendants' argument to apply Idaho Code section 55-313 should therefore be denied because it was not plead at or before trial.

CONCLUSION

For the above stated reasons, Plaintiffs respectfully request that this Court find Defendants are not entitled to an express easement through Plaintiffs' property, Defendants are not entitled to an easement by prescription, and that Idaho Code section 55-313 does not apply to Defendants' claims because it was not plead before or during trial.

Dated: 11-23-09

Arthur B. Macomber
Attorney at Law
Counsel for Plaintiffs

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
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CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife,

Plaintiffs,

vs.

KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife,

Defendants.

KAREN SHELER CONINE and HOWARD CONINE, husband and wife,

COUNTER PLAINTIFFS,

vs.

CHRIS BELSTLER and DANA BELSTLER, husband and wife,

COUNTER DEFENDANTS.

CASE NUMBER: CV-07-2523

MEMORANDUM DECISION

AND

ORDER FOR JUDGMENT

Arthur B. Macomber for Plaintiffs/Counter Defendants

Charles M. Dodson for Defendants/Counter Plaintiffs

I. PROCEDURAL AND FACTUAL HISTORY

Plaintiffs Chris and Dana Belstler ("BELSTLERS") requested this Court quiet title to the purported easement areas, and enjoin defendants from their use. Defendants Karen and Howard Conine ("CONINES") filed a counterclaim requesting this Court recognize and affirm the two alleged easements[1] either by prescription or express recorded document, one of which purported

[1] Defendants had also alleged that an easement by implication existed; however, they withdrew that claim at trial.

easements became known at trial as the "disputed private driveway." Plaintiffs filed their amended complaint on January 30, 2009, requesting this Court declare a judgment interpreting various recorded documents attached as exhibits thereto, the core document including a purported grant of two easements from Kenneth and Georgia Henry ("Henry"), a former owner of plaintiffs' land, to Linda Merwin ("Merwin"), a former owner of defendants' land. In the Plaintiffs' pleadings they request a judicial determination of the meaning of the Deed from Mr. and Mrs. V. A. Sanders ("Sanders") to Andrews Equipment (Plaintiffs' Exhibit 9); the Deed from Sanders to Rockford Bay (Plaintiffs' Exhibit 10) and the Deed from Andrews Equipment to Rockford Bay (Plaintiffs' Exhibit 11). Further, Plaintiffs requested this Court quiet title to the purported easement areas and enjoin defendants from their use.

A four day Court trial commenced on September 21, 2009. The Court requested the parties submit post-trial briefs and the final brief was filed with the Court on November 23, 2009.[2]

At trial, the parties agreed that the court should adjudicate whether the BELSTLERS may move the easement in accordance with I.C. § 55-313 to a location further north on their property as shown on Defendants' Exhibit T.

Any of the following findings of fact that should be denominated as a conclusion of law shall be deemed to be a conclusion of law. Any of the following conclusions of law that should be denominated a finding of fact shall be deemed a conclusion of law.

II. DISCUSSION

The BELSTLERS are the owners of real property located in the general Rockford Bay area of Kootenai County. The CONINES own the property immediately east of the BELSTLERS (as defined on Defendants' Exhibit "S"). The BELSTLERS acquired their property from Henry (Defendants' Exhibit "R") and Henry from Sanders (Defendants' Exhibit "A"/Plaintiffs Exhibit "5"). The CONINES purchased their property from Judith Solomon ("Solomon") (Defendants' Exhibit "S") who purchased their property from Robert "Pete" and

[2] The Court notes that during the trial, the Court made a physical site visit, with counsel and the parties present, where it viewed the properties at issue in this case; however, that site visit served an illustrative purpose only and does not constitute evidence considered by this Court in making its decision.

Vicki Kluss ("Kluss") (Plaintiffs' Exhibit "19"), who purchased that property from Merwin (Plaintiffs' Exhibit "26"), who purchased the property from Richard Anstadt (Defendants' Exhibit "K"). Sanders was the owner of the BELSTLERS' property but did not own any interest in the CONINES' property at any time based upon the facts educed at trial.

In 1979 Sanders subdivided some parcels of property (as identified in Plaintiffs' Exhibit No. 8) consisting of parcels A, B, C, and D, wherein parcel A is the BELSTLERS' property. Sanders created a sixty (60) foot roadway easement across parcels A, B, C and D (identified on Plaintiffs' Exhibit 8, as specifically referenced in Plaintiffs' Exhibits, 9, 10, and 14). Plaintiffs' Exhibit 14 is the Sale Agreement from Sanders to Kenneth L. Henry, the BELSTLERS predecessor in interest. The location of the road was identified at trial by a yellow line on Plaintiffs' Exhibit 1.

On the 3rd of June, 1988, Sanders conveyed to the Worley Fire District a certain portion of property for the benefit of the Fire District, over and upon which traverses what was referred to at trial as the southern most easement referenced in Plaintiffs' Exhibit 15, the Mutual Agreement for Easement for Ingress and Egress. Also on the 1st day of June, 1988, the Sanders sold to Henry the BELSTLERS property which was at that time "subject to any and all easements, conditions, restrictions of record, and easements for ingress and egress (Plaintiffs' Exhibit 14).

The sale from Sanders to Henry was by way of a title retaining contract (Exhibit 14), and at the time of the sale, Merwin was the owner of the currently owned CONINES' property. There was a disagreement between Sanders and Merwin regarding the continuation of the road which commenced at Rockford Bay and continued through parcels A, B, and C shown on Exhibit 8 through the Merwin property, Sanders never having the legal authority to grant such an easement through the Merwin property. That disagreement, and the necessity for access was referenced in Defendants' Exhibit O, the agreement between Merwin and Sanders which clearly establishes that Merwin had an interest in the resolution of the easement issue by Exhibit 15 which was a serial grant of easement, first from Sanders to Henry, and second from Henry to Merwin.

At the time of purchase by CONINES, the CONINES' property was accessed by two

easements of record described at trial as the upper or northerly easement and the lower or southerly easement. The upper or northerly easement was also referred to at trial as the "disputed private driveway. The upper or northerly easement extends from Chandler Lane/Sanders Road across the BELSTLERS' property to the CONINES' property. This northerly easement is set forth in that certain document recorded as Instrument No. 1119009, the Deed from Sanders to Henry and Henry to Merwin. (Exhibit 15). This easement is an access described in Plaintiff's Exhibit "15" and Defendants' Exhibit "A". This easement for access by CONINES across the BELSTLERS' property traverses some distance on the north side of the BELSTLERS' residence. It continues across the BELSTLERS' property to a gate at the approximate property line of the BELSTLERS' property and the CONINES' property. It continues at the approximately same elevation, to a building that existed upon the CONINES' property at the time of purchase, and a building that was later constructed by the CONINES on the premises. The second easement was referred to as the lower road and is also described in Plaintiffs' Exhibit "15" Defendants' Exhibit "A". This lower or southerly easement exists across what is now the Worley Fire District property past the "fire station" and then across the BELSTLERS' property to serve the lower portion of the CONINES' property.

While the upper and lower portion of the CONINES' property is fairly level there is a mid portion of the CONINES property which is quite steep making road access between the upper and lower portions practically impossible.

The extension of Chandler Lane/ Sanders Road at the West edge of the BELSTLERS' property is a steep upward incline, and dead-ends at the Black Rock Golf Course property. The elevation of Chandler Lane/Sanders Road is significantly above the structures located upon the CONINES' property.

For all of the ten years the CONINES owned their property they traversed the "disputed private driveway." They did so with intent, knowledge and belief that it was their rightful access under the express easement. Therefore they used the disputed private drive under a claim of rights. Their use was open and obvious. The private road had been in existence since sometime during the period 1983 to 1986 and its use by predecessors to the CONINES had been acquiesced in by Henry, who is the predecessor to the BELSTLERS. Henry had knowledge of

the use of the private road. He signed documents intended to provide easement access to the CONINES property when he purchased from Sanders. He confirmed in his deposition the location of the easement access as the disputed private driveway as being the easement described in the documents. The existence of the roadway was plainly visible upon the ground after its initial construction. Henry had knowledge of the use of the roadway by the BELSTLERS. He would have to have known of their use because of the proximity of the Henry residence to the disputed private driveway. Use by the BELSTLERS and their predecessor Henry simply could not go unnoticed.

During the summer of 2006, the BELSTLERS requested that the CONINES cease using the lower road and the upper private drive. The CONINES ceased using the lower road due to it being cabled and locked by the BELSTLERS, but refused to cease using the private drive. Discussions to resolve the dispute were had between the parties, but resolution was not reached and litigation ensued.

A. Express Easements

The BESTLERS have asked for judicial determination of the meaning of Plaintiffs' Exhibit 14, the sale agreement between V. A. Sanders and Geraldine Sanders as sellers and Kenneth Henry as buyer. The sale agreement is a title retaining contract executed at a time when a Warranty Deed was also executed (and subsequently recorded - see Plaintiffs' Exhibit 16).

CONINES in their counterclaim argue that there are two express easements on their property consisting of the southerly easement and a northerly easement. The BELSTERS contend that the CONINES do not have these easement rights. The CONINES contend that their easement emanates from The Sale Agreement (Exhibit 14) and the Mutual Agreement and Easement for Ingress and Egress (Exhibit 15). They further contend that Exhibit O together with other testimonial evidence shows an intent showing that the intent of the parties to the Mutual Agreement and Easement for Ingress and Egress (Exhibit 15) and that that intent was to create an easement benefiting what is now the CONINES' property.

The evidence at trial clearly demonstrates that the easement in question granted on the northerly portion of the then Henry property (now the BELSTLERS' property) was for the private drive. It is shown on Plaintiffs' Exhibit 23. Also Henry, at his deposition, marked on

Exhibit 3 the northerly easement with an "X" to show the private drive.

In the last paragraph of the Mutual Agreement and Easement for Ingress and Egress (Plaintiffs' Exhibit 15) Henry, the predecessor in interest of the BELSTLERS, specifically granted easement rights. It is specifically stated that "Kenneth L. Henry grants an easement continuing the existing road in the southerly portion of the property that he is purchasing from V. A. Sanders and Geraldine C. Sanders and *the Northerly part of the property he is purchasing from V. A. Sanders and Geraldine C. Sanders to Linda Merwin who owns the property in the Northeast Quarter of Section 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County, Idaho.* Those easements are referenced as "a continuation of the existing logging road running parallel to Rockford Bay on the south and the existing road <u>from</u> the community road on the north". That reference is to the private drive across the northern portion of the BELSTLERS' property that was intended, and does, provide access to the CONINES' property. The grant of that easement by Henry was for the benefit of Merwin.

The sale agreement, the warranty deed, and the express easements created in Plaintiffs' Exhibit 15, and the deed from Sanders to Henry and Henry to Merwin creating the easements form the basis for the express easement benefiting the CONINES. Linda Merwin was a beneficiary under the arrangements. The express easements therefore benefitted Merwin. The CONINES are a successor in interest to Linda Merwin and have easement rights of ingress and egress over the disputed private driveway.

The BELTLERS contend the sale agreement between Sanders and Henry is merged in the deed from Sanders to Henry and the easement agreement is an antecedent document with no effect which benefits the CONINES. The court disagrees. The Supreme Court in *Jolley vs. Idaho Securities, Inc.*, 90 Idaho 373, 414 P 2d 879 (1966) determined that an express easement is not merged in a Deed. The holding in *Jolley* is contrary to the argument of the Plaintiffs that the easements created in Exhibit 15 merged with the Warranty Deed.

In *Jolley* the Idaho Supreme Court stated, "the acceptance of a deed to premises generally is considered as a merger of the agreements of an antecedent contract into the terms of the deed, and any claim for relief must be based on the covenants or agreements contained in the deed, not the covenants or agreements as contained in the prior agreement. There is a generally recognized

exception to the foregoing rule which exception relates to collateral stipulations of the contract, which are not incorporated in the deed." *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 382, 414 P.2d 879, 884 (1966). The Court went on to explain, "[t]he authorities may perhaps be reconciled by a determination of what are 'collateral stipulations'. If the stipulation has reference to title, possession, quantity, or emblements of the land, it is generally, but not always, held to inhere in the very subject-matter with which the deed deals, and is merged therein.' *Id.* at 383 and 414 P.2d 879 at 885. In the present case Exhibit 15 was a collateral stipulation of the contract and is not merged with the deed.

The BESTLERS have requested judicial interpretation of Plaintiffs' Exhibits 18 and 19 (the Joint Use and Maintenance Agreement entered into between Kluss and Henry as modified by Henry and re-recorded). Those documents provide for joint use and maintenance for a roadway, which has been identified in yellow marking on Plaintiffs' Exhibit 1. The testimony during the course of the trial indicated that both parties and their successors in interest have contributed to the maintenance of portions of the yellow marked roadway on Plaintiffs' Exhibit 1. The Joint Use and Maintenance Agreement does not modify, supersede or extinguish the terms and conditions set forth in Plaintiffs' Exhibit 15. Exhibit 15 created the easements for the benefit of Henry from Sanders, and from Henry to Merwin. The beneficial use of the easement inuring to Linda Merwin and her successors is not altered in any way. This applies to both the northerly easement over the disputed private driveway and also the southern or lower roadway easement.

The BESTLERS argue that Plaintiffs' Exhibit 15 is not effective as providing an easement benefiting what is now the CONINES' property, formerly the Merwin property, because the document was not delivered. The Supreme Court of Idaho in the case of *Barmore vs. Perrone,* 145 Idaho 340, 179 P.3d 303 (2008) noted the controlling element in the question of delivery is the intention of the parties. The rule is that delivery is complete when there is an intention manifest on the part of the Grantor to make the instrument his deed. The document creating the easement from Sanders to Henry and the easements from Henry to Merwin (Plaintiffs' Exhibit 15) was indeed delivered. Both Sanders and Henry fully intended the result of the documentation of the transaction between them. There is no tenable claim that there was no delivery.

The BELSTLERS also argue that any express easement created under Instrument No. 1119009 (Exhibit 15) is ineffective because Merwin, the Grantee of the Easement was not a party to the contract. The BELSTLERS contend that Merwin was a stranger to the transaction between Henry and Sanders which gave rise to Instrument No. 1119009. The benefit to Merwin intended by Sanders and Henry was an integral part of their agreement. She is mentioned by name in the agreement. Merwin was therefore much more than an incidental beneficiary of the Agreement. She obtained legal access over and easement, specifically the use of the "private drive." BELSTLERS argue that there is no effect whatsoever of Exhibit "O"[3] in explaining Exhibit 15.

The Court finds that Exhibit "O" verifies that there was a dispute between Sanders and Merwin arising from the fact that Sanders had placed a road (the upper extension of Sanders/Chandler Lane, i.e. the private road) upon the property of Merwin without authority. In order to effectuate a resolution of the road placement Sanders and Merwin agreed that Sanders would correct the problem, as shown by Exhibit "O". They accomplished the same at the time of the sale to Henry by the requirement that Henry convey an easement to Merwin (Plaintiffs' Exhibit 15).

The court concludes Exhibit "O" provides meaning to, explanation of, and the intent of Plaintiff's Exhibit 15. Exhibit 15 created an easement favoring Merwin. Merwin, Sanders and Henry were fully aware of its intention, and the need to continue the use of the private driveway during Merwin's ownership. Specifically, they were all aware of the existence of the driveway access across the Henry property to the Merwin property. The easement was granted with intent to serve the Merwin property now owned by the CONINES.

In *Partout v. Harper*, 145 Idaho 683, 183 P.3d 771 (2008), the Court provided:

> "The test for determining a party's status as a third-party beneficiary . . . is whether the agreement reflects an intent to benefit the third party." *Idaho Power Co. v. Hulet,* 140 Idaho 110, 112, 90 P.3d 335, 337 (2004). The third party must show the contract was made primarily for his benefit; it is not

[3] The Court notes that the parties stipulated to the admission of Exhibit "O" and stipulated that the court consider that document, so as to interpret the meaning of Exhibit 15. The practical effect and meaning of the exhibit was left to the sound discretion of the trier of fact by stipulation of the parties.

> sufficient that the third party is a mere incidental beneficiary to the contract. *Id.* (quoting *Adkison Corp. v. Am. Bldg. Co.,* 107 Idaho 406, 409, 690 P.2d 341, 344 (1984)); *Fenwick v. Idaho Dep't of Lands,* 144 Idaho 318, 323, 160 P.3d 757, 762 (2007) (quoting *Dawson v. Eldredge,* 84 Idaho 331, 337, 372 P.2d 414, 418 (1962) (quoting *Sachs v. Ohio Nat'l Life Ins. Co.,* 148 F.2d 128, 131 (7th Cir.1945))). The intent to benefit the third party must be expressed in the contract itself. *Idaho Power Co.,* 140 Idaho at 112, 90 P.3d at 337 (quoting *Adkison Corp.,* 107 Idaho at 409, 690 P.2d at 344;) *Fenwick,* 144 Idaho at 323, 160 P.3d at 762 (quoting *Adkison Corp.,* 107 Idaho at 409, 690 P.2d at 344).

The Court observes that Merwin is not a party to this litigation and is not seeking to enforce Exhibit 15. As such, it may not be pertinent to determine whether she was a party who could assert rights under Exhibit 15; however, she would have standing to assert rights under Exhibit 15 should it have ever become necessary. The granting of the easement was certainly of pecuniary benefit to Merwin and Exhibit 15 clearly shows the intent and motivation of Sanders and Henry that part of their agreement was to confer the easement benefit on Merwin. She was no incidental beneficiary; she was an intended beneficiary because she was specifically named.

In *Crenshaw v. Crenshaw*, 68 Idaho 470, 199 P.2d 264 (1948) the court held that "before a deed can operate as a valid transfer of title, there must be a delivery of the instrument, and it must be effected during the life of the grantor."

However, in *Hinckley Estate Co., v. Gurry,* 53 Idaho 551, 26 P.2d 121 (1933) the court stated "proof of the recording of a deed by the grantor, without other circumstances, is not sufficient to bind the grantee or establish delivery or the grantee's acceptance thereof. [T]he grantee's acceptance of such a deed need not be by formal or express words to that effect, but may be shown by acts, conduct, or words of the parties showing an intention to accept. Thus, there may be an acceptance by an assertion of title in him, by his conveyance of the property or <u>by acts of ownership generally in respect to the property</u>." (emphasis added).

Therefore, the fact that Merwin is not a signer to Exhibit 15 will not preclude the

CONINES from being a successor to the easement rights of Merwin. The Court, guided by the above cited case law, finds that Merwin was a third party beneficiary of that transaction and accepted the easements by her acts described in Exhibit O.

The two roadway accesses in dispute in this case are express easements in favor of the CONINES. To the extent, if any, that grant of easements in Exhibit 15 is ambiguous; the purpose of the express easements has been thoroughly explained by the evidence. The CONINES are entitled to judgment declaring their easement rights and the BELSTLERS' claims of quiet title to those easement claims shall be denied.

B. Prescriptive Easement

The CONINES seek judgment against the BELSTLERS on the alternative ground of prescriptive easement rights. The evidence shows that the private drive has been in existence since approximately 1985 or 1986 and perhaps as early as 1983.

The Supreme Court of the State of Idaho in *Checketts vs. Thompson*, 65 Idaho 715, 721, 152 P.2d 585,591 (1944), noted:

> "One who purchases land expressly subject to an easement or with notice, actual or constructive, that it is burdened with an existing easement takes the land subject to the easement."

In this particular matter there was no question that the roadway access across the BELSTLERS' property to what is now the CONINES' property existed. It is, and was, plainly visible upon the ground as an obvious roadway access or driveway. The BESTLERS have had knowledge of the existence of the "private drive." Henry had that same knowledge. The CONINES contend that both easements were not only of record as express easements, but must also be recognized by the court as benefiting the CONINES as prescriptive easements.

An easement can also be obtained by prescription. A district court's determination that a claimant has or has not established a prescriptive easement involves entwined questions of law and fact. *Hughes v. Fisher*, 142 Idaho 474, 129 P.3d 1223 (2006). A prescriptive easement is established if the dominant landowner can show by clear and convincing proof that there has been an open, notorious, continuous, uninterrupted, adverse use under a claim of right with the

actual or imputed knowledge of the owner of the servient estate for the statutory period of five years. *Backman v. Lawrence*, 147 Idaho 390, 210 P.3d 75 (2009).

If a party can show proof of open, notorious, continuous, uninterrupted use of the property during the prescriptive period, but fail to prove how that use commenced, then the presumption is that the use is adverse and under a claim of right. The burden then shifts to the servient owner to show that the use was permissive. The one exception to the rule of prescriptive easements is where the use occurs on wild, unenclosed or unimproved land. In such an event, to protect the rights of the servient owner and avoid inequitable results, the presumption is that the use is permissive. *Hodgins v. Sales*, 139 Idaho 225, 76 P.3d 969 (2003). That exception is not applicable here as these lands are not wild, unenclosed or unimproved.

The CONINES have proved that they have used the disputed private drive where they claim a northerly easement by use that has been open, continuous and notorious for the period of their ownership of approximately ten (10) years. That would vest the prescriptive easement rights of CONINE.[4] This Court finds that the CONINES' rights accrued prior to the Legislature changing the law regarding the time period for prescriptive easement.[5]

The CONINES have proved entitlement to a prescriptive easement as to the disputed private driveway across the northerly portion of the BELSTLERS' property. They have proved by clear and convincing evidence that their use has been open, notorious, continuous, and uninterrupted use of the property during the prescriptive period of five years. They have the beneifit of the presumption that the use was adverse and under a claim of right. Moreover they have proved the claim of right through the existence of the express easement document Exhibit 15 and by being in the line of succession from Linda Merwin.

This Court finds that the use by the CONINES of the disputed private driveway across the northerly part of the BELSTLER property during the time Henry owned it not to be permissive as the BELSTLERS used it under a claim of right emanating from the easement

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[4] The Legislature modified the prescriptive claim statute, I.C. § 5-203, from the previously existing five (5) year requirement to a twenty (20) year requirement in 2006.

[5] Further, the changes to Idaho Code Sections 5-204, 206, 207, 210, 211 as well as 213 were made after CONINES' rights were vested, five (5) years subsequent to their purchase, under the then existing statute. More particularly, those rights became vested in 2004, prior to the filing of the instant action.

granting agreement (Plaintiffs' Exhibit 15). The fact that Henry may have acquiesced in the use by the BELTLERS is not permission because he knew the BELSTLERS, as successors to Merwin, had a right to use both the upper and lower roadways under the express easement he had granted to Merwin. The use by the BELSTLERS' of the disputed private driveway easement was continuous.

The CONINES purchased the property from Solomon on June 25, 1998. The CONINES visited the property generally every weekend in summer and less when Snoqualmie Pass presented snowy driving conditions. In winter, the CONINES generally visited their property two weekends per month. Solomon did not use the property at all. The CONINES have not established any open and notorious use of the lower easement during the period of their ownership, from 1998 to when this lawsuit commenced. The evidence does not establish use of the lower roadway by predecessors to the CONINES which could be described continuous. So, there is no evidence to support a claim of tacking. The CONINES are entitled to a ruling in their favor on the issue of prescriptive easement over the northerly roadway access described at trial as the disputed private drive. There is no showing of open and notorious use of the lower easement on BESTLERS' property.

The scope of a prescriptive easement is fixed by the use made during the prescriptive period. *Beckstead v. Price*, 146 Idaho 47, 190 P.3d 876 (2008)(rehearing denied). The scope of the CONINES' use based their claim of prescriptive rights over the private driveway is ingress and egress for motor vehicle and pedestrian travel for residential and recreational purposes. The width, length and location of the easement is as shown on Plaintiffs' Exhibit 23.

The CONINES are denied any claim to an easement by prescription as to the southerly easement claim across the lower road. The CONINES are entitled to judgment of prescriptive easement rights, as an alternative to their express easements claim recognized herein across the private driveway on the northerly portion of the BELSTLERS' property.

C. Easement Relocation Pursuant to I.C. § 55-313

The BELSTLERS, in their brief, contend that they do not seek to have the location of the northerly easement changed and argue that the CONINES cannot seek a ruling by the court as to the applicability of Idaho Code § 55-313. Neither evidence nor argument was provided as regards to relocation of the southerly easement. The BELSTLERS base their argument on their claim that they do not believe any easements exist to change. The parties did extensively litigate the relocation issue at trial and the pleadings are deemed amended to include a claim for relocation of the northerly easement. Throughout the trial the parties took the position that if the court should determine that the easements claimed by the CONINES are valid easements, the Court should then determine whether or not the BELSTLERS could, pursuant to I.C. § 55-313 change the location of the northerly easement. Therefore, that issue is ripe for determination at this time by this Court.

Idaho Code § 55-313 allows for a subservient estate to change the location of an easement that benefits the dominant estate. However, that statute requires that there be no injury, or more particularly that such change be made in a manner as to not obstruct motor vehicle traffic or otherwise injure any person or persons using or interested in such access. Further, the subservient estate must pay the cost of such a move.

The court concludes from the persuasive testimony of Scott Rasor, as illustrated by Exhibit T, that there would be injury to the CONINES in the form of unreasonably steep road grades which would create inconvenience and undue risk of harm to person and property due to steep road grades required by the existing topography. Winter weather, when snow fall and ice are evident, would further aggravate motor vehicle and pedestrian travel on such a steep roadway. The road grade slopes not only exceed any of the slopes upon the existing approach on the road from Rockford Bay but are so steep as to constitute injury within the meaning of Idaho Code § 55-313.

The proposed relocation of the northerly easement is not a reasonable alternative shown by the evidence due to the topography of the real property owned by both the BELSTLERS and the CONINES. Therefore, the CONINES are entitled to judgment against BELSTLERS for injunctive relief that they may not move the road to the location shown on Exhibit T.

III. ORDER

IT IS HEREBY ORDERED that the northerly ("private drive") and southerly easements granted to Merwin in Instrument No. 1119009 (Plaintiffs' Exhibit 15) and further referenced on Plaintiffs' Exhibit 1, are express easements specifically created for the benefit of the CONINES' property and impose an encumbrance upon the BELSTLERS' property. The judgment shall include the legal descriptions for the easements and shall be based as shown on Plaintiffs' Exhibit 23.

IT IS HEREBY FURTHER ORDERED that the judgment shall reflect that the CONINES have established a prescriptive easement upon the northerly easement, but have not established a prescriptive easement as to the southerly easement and shall specify the nature, length, width and location of the northerly easement over the private drive.

IT IS HEREBY FURTHER ORDERED that the judgment shall deny to the BELSTLERS any right to change the location of northerly easement to the location referred to on Exhibit T.

IT IS HEREBY FURTHER ORDERED that considering all claims and defenses presented that the CONINES are entitled to their costs but not attorney fees as this action was not frivolously or unreasonably pursued nor defended by the BELSTLERS.

IT IS HEREBY FURTHER ORDERED that the CONINES prepare a judgment consistent with this Memorandum Decision and present the same to Judge Lansing Haynes as James R. Michaud's service to the State of Idaho as a senior district judge is concluded upon the issuance of this memorandum decision.

Dated this 23rd day of December, 2009.

James R. Michaud
Senior District Judge

CERTIFICATE OF MAILING/DELIVERY

On this 23 day of December, 2009, a true and correct copy of the foregoing was mailed in the U.S. Mails, postage prepaid, sent via interoffice mail, or sent via facsimile, addressed to the following:

ARTHUR B. MACOMBER, ESQ.
MACOMBER LAW, PLLC
408 E. Sherman Avenue, Ste 215
Coeur d'Alene ID 83814
Facsimile: 208-664-9933

CHARLES M. DODSON, ESQ.
CHARLES M. DODSON, ATTORNEY AT LAW
1424 Sherman Ave., Ste. 300
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Facsimile: 208-666-9211

Daniel English
Clerk of the District Court

By ____________
Deputy Clerk

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY
CLERK OF COURT
STATE OF IDAHO

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

2009 DEC 30 AM 10: 22

CLERK DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife,

Plaintiffs,

vs.

KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife,

Defendants.

KAREN SHELER CONINE and HOWARD CONINE, husband and wife,

COUNTER PLAINTIFFS,

vs.

CHRIS BELSTLER and DANA BELSTLER, husband and wife,

COUNTER DEFENDANTS.

CASE NUMBER: CV-07-2523

ORDER TO WITHDRAW AND SUBSTITUTE MEMORANDUM DECISION AND ORDER FOR JUDGMENT

This Court's MEMORANDUM DECISION AND ORDER FOR JUDGMENT filed December 23, 2009 is withdrawn and shall be substituted with another decision issued this date to correct errors and omissions.

Dated this 30th day of December, 2009.

James R. Michaud
Senior District Judge

CERTIFICATE OF MAILING/DELIVERY

On this 30 day of December, 2009, a true and correct copy of the foregoing was mailed in the U.S. Mails, postage prepaid, sent via interoffice mail, or sent via facsimile, addressed to the following:

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Daniel English
Clerk of the District Court

By: ______________________
Deputy Clerk

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY
CLERK OF COURT
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STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

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CLERK DISTRICT COURT

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CHRIS BELSTLER and DANA BELSTLER, husband and wife,

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COUNTER DEFENDANTS.

CASE NUMBER: CV-07-2523

MEMORANDUM DECISION

AND

ORDER FOR JUDGMENT

Arthur B. Macomber for Plaintiffs/Counter Defendants

Charles M. Dodson for Defendants/Counter Plaintiffs

I. PROCEDURAL AND FACTUAL HISTORY

Plaintiffs Chris and Dana Belstler ("BELSTLERS") requested this Court quiet title to the purported easement areas, and enjoin defendants from their use. Defendants Karen and Howard Conine ("CONINES") filed a counterclaim requesting this Court recognize and affirm the two alleged easements[1] either by prescription or express recorded document, one of which purported

[1] Defendants had also alleged that an easement by implication existed; however, they withdrew that claim at trial.

easements became known at trial as the "disputed private driveway." Plaintiffs filed their amended complaint on January 30, 2009, requesting this Court declare a judgment interpreting various recorded documents attached as exhibits thereto, the core document including a purported grant of two easements from Kenneth and Georgia Henry ("Henry"), a former owner of plaintiffs' land, to Linda Merwin ("Merwin"), a former owner of defendants' land. In the Plaintiffs' pleadings they request a judicial determination of the meaning of the Deed from Mr. and Mrs. V. A. Sanders ("Sanders") to Andrews Equipment (Plaintiffs' Exhibit 9); the Deed from Sanders to Rockford Bay (Plaintiffs' Exhibit 10) and the Deed from Andrews Equipment to Rockford Bay (Plaintiffs' Exhibit 11). Further, Plaintiffs requested this Court quiet title to the purported easement areas and enjoin defendants from their use.

A four day Court trial commenced on September 21, 2009. The Court requested the parties submit post-trial briefs and the final brief was filed with the Court on November 23, 2009.[2]

At trial, the parties agreed that the court should adjudicate whether the BELSTLERS may move the easement in accordance with I.C. § 55-313 to a location further north on their property as shown on Defendants' Exhibit T.

II. DISCUSSION

The BELSTLERS are the owners of real property located in the general Rockford Bay area of Kootenai County. The CONINES own the property immediately east of the BELSTLERS (as defined on Defendants' Exhibit "S"). The BELSTLERS acquired their property from Henry (Defendants' Exhibit "R") and Henry from Sanders (Defendants' Exhibit "A"/Plaintiffs Exhibit "5"). The CONINES purchased their property from Judith Solomon ("Solomon") (Defendants' Exhibit "S") who purchased their property from Robert "Pete" and Vicki Kluss ("Kluss") (Plaintiffs' Exhibit "19"), who purchased that property from Merwin (Plaintiffs' Exhibit "26"), who purchased the property from Richard Anstadt (Defendants' Exhibit "K"). Sanders was a prior owner of the BELSTLERS' property but did not own any

[2] The Court notes that during the trial, the Court made a physical site visit, with counsel and the parties present, where it viewed the properties at issue in this case; however, that site visit served an illustrative purpose only and does not constitute evidence considered by this Court in making its decision.

interest in the CONINES' property at any time based upon the facts educed at trial.

In 1979 Sanders subdivided some parcels of property (as identified in Plaintiffs' Exhibit No. 8) consisting of parcels A, B, C, and D, wherein parcel A is the BELSTLERS' property. Sanders created a sixty (60) foot roadway easement across parcels A, B, C and D (identified on Plaintiffs' Exhibit 8, as specifically referenced in Plaintiffs' Exhibits, 9, 10, and 14). Plaintiffs' Exhibit 14 is the Sale Agreement from Sanders to Kenneth L. Henry, the BELSTLERS predecessor in interest. The location of the road was identified at trial by a yellow line on Plaintiffs' Exhibit 1.

On the 3rd of June, 1988, Sanders conveyed to the Worley Fire District a certain portion of property for the benefit of the Fire District, over and upon which traverses what was referred to at trial as the southern most easement referenced in Plaintiffs' Exhibit 15, the Mutual Agreement for Easement for Ingress and Egress. Also on the 1st day of June, 1988, the Sanders sold to Henry the BELSTLERS' property which was at that time "subject to any and all easements, conditions, restrictions of record, and easements for ingress and egress (Plaintiffs' Exhibit 14).

The sale from Sanders to Henry was by way of a title retaining contract (Exhibit 14), and at the time of the sale, Merwin was the owner of the currently owned CONINES' property. There was a disagreement between Sanders and Merwin regarding the continuation of the road which commenced at Rockford Bay and continued through parcels A, B, and C, shown on Exhibit 8, through the Merwin property; Sanders never having the legal authority to grant such an easement through the Merwin property. That disagreement, and the necessity for access was referenced in Defendants' Exhibit O, the agreement between Merwin and Sanders which clearly establishes that Merwin had an interest in the resolution of the easement issue by Exhibit 15 which was a serial grant of easement, first from Sanders to Henry, and second from Henry to Merwin.

At the time of purchase by CONINES, the CONINES' property was accessed by two easements of record described at trial as the upper or northerly easement and the lower or southerly easement. The upper or northerly easement was also referred to at trial as the "disputed private driveway. The upper or northerly easement extends from Chandler Lane/Sanders Road

across the BELSTLERS' property to the CONINES' property. This northerly easement is set forth in that certain document recorded as Instrument No. 1119009, the Deed from Sanders to Henry and Henry to Merwin (Exhibit 15). This easement is an access described in Plaintiff's Exhibit "15" and Defendants' Exhibit "A". This easement for access by CONINES across the BELSTLERS' property traverses some distance on the north side of the BELSTLERS' residence. It continues across the BELSTLERS' property to a gate at the approximate property line of the BELSTLERS' property and the CONINES' property. It continues at the approximately same elevation, to a building that existed upon the CONINES' property at the time of purchase, and a building that was later constructed by the CONINES on the premises. The second easement was referred to as the lower road and is also described in Plaintiffs' Exhibit "15" Defendants' Exhibit "A". This lower or southerly easement exists across what is now the Worley Fire District property past the "fire station" and then across the BELSTLERS' property to serve the lower portion of the CONINES' property.

While the upper and lower portion of the CONINES' property is fairly level there is a mid portion of the CONINES property which is quite steep making road access between the upper and lower portions practically impossible.

The extension of Chandler Lane/ Sanders Road at the West edge of the BELSTLERS' property is a steep upward incline, and dead-ends at the Black Rock Golf Course property. The elevation of Chandler Lane/Sanders Road is significantly above the structures located upon the CONINES' property.

For all of the ten years the CONINES owned their property they traversed the "disputed private driveway." They did so with intent, knowledge and belief that it was their rightful access under the express easement. Therefore they used the disputed private drive under a claim of rights. Their use was open and obvious. The private road had been in existence since sometime during the period 1983 to 1986 and its use by predecessors to the CONINES had been acquiesced in by Henry, who is the predecessor to the BELSTLERS. Henry had knowledge of the use of the private road. He signed documents intended to provide easement access to the CONINES property when he purchased from Sanders. He confirmed in his deposition the location of the easement access as the disputed private driveway as being the easement described

in the documents. The existence of the roadway was plainly visible upon the ground after its initial construction. Both Henry and BELSTLERS had knowledge of the use of the roadway by the CONINES. Henry acknowledged it. Moreover, Henry and BELSTLERS would have to have known of the use by CONINES because of the proximity of the house to the disputed private driveway. The use simply could not go unnoticed.

During the summer of 2006, the BELSTLERS requested that the CONINES cease using the lower road and the upper private drive. The CONINES ceased using the lower road due to it being cabled and locked by the BELSTLERS, but refused to cease using the private drive. Discussions to resolve the dispute were had between the parties, but resolution was not reached and litigation ensued.

A. Express Easements

The BELSTLERS have asked for judicial determination of the meaning of Plaintiffs' Exhibit 14, the sale agreement between V. A. Sanders and Geraldine Sanders as sellers and Kenneth Henry as buyer. The sale agreement is a title retaining contract executed at a time when a Warranty Deed was also executed (and subsequently recorded - see Plaintiffs' Exhibit 16).

CONINES in their counterclaim argue that there are two express easements on their property consisting of the southerly easement and a northerly easement. The BELSTLERS contend that the CONINES do not have these easement rights. The CONINES contend that their easements emanate from The Sale Agreement (Exhibit 14), the Mutual Agreement and Easement for Ingress and Egress (Exhibit 15) and the Warranty Deed (Exhibit 16). They further contend that Exhibit O together with other testimonial evidence shows an intent showing that the intent of the parties to the Mutual Agreement and Easement for Ingress and Egress (Exhibit 15) and that that intent was to create an easement benefiting what is now the CONINES' property.

The evidence at trial clearly demonstrates that the easement in question granted on the northerly portion of the then Henry property (now the BELSTLERS' property) was for the private drive. It is shown on Plaintiffs' Exhibit 23. Also Henry, at his deposition, marked on Exhibit 3 the northerly easement with an "X" to show the private drive.

In the last paragraph of the Mutual Agreement and Easement for Ingress and Egress (Plaintiffs' Exhibit 15) Henry, the predecessor in interest of the BELSTLERS, specifically

granted easement rights. It is specifically stated that "Kenneth L. Henry grants an easement continuing the existing road in the southerly portion of the property that he is purchasing from V. A. Sanders and Geraldine C. Sanders and *the Northerly part of the property he is purchasing from V. A. Sanders and Geraldine C. Sanders to Linda Merwin who owns the property in the Northeast Quarter of Section 17, Township 48 North, Range 4 West, Boise Meridian, Kootenai County, Idaho.* Those easements are referenced as "a continuation of the existing logging road running parallel to Rockford Bay on the south and the existing road from the community road on the north". That reference is to the private drive across the northern portion of the BELSTLERS' property that was intended, and does, provide access to the CONINES' property. The grant of that easement by Henry was for the benefit of Merwin.

The sale agreement, the warranty deed, and the express easements created in Plaintiffs' Exhibit 15, and the deed from Sanders to Henry and Henry to Merwin creating the easements form the basis for the express easement benefiting the CONINES. Linda Merwin was a beneficiary under the arrangements. The express easements therefore benefitted Merwin. The CONINES are a successor in interest to Linda Merwin and have easement rights of ingress and egress over the disputed private driveway and the lower road across the southerly easement.

The BELSTLERS contend the sale agreement between Sanders and Henry is merged in the deed from Sanders to Henry and the easement agreement is an antecedent document with no effect which benefits the CONINES. The court disagrees. The Supreme Court in *Jolley vs. Idaho Securities, Inc.*, 90 Idaho 373, 414 P 2d 879 (1966) determined that an express easement is not merged in a Deed. The holding in *Jolley* is contrary to the argument of the Plaintiffs that the easements created in Exhibit 15 merged with the Warranty Deed.

In *Jolley* the Idaho Supreme Court stated, "the acceptance of a deed to premises generally is considered as a merger of the agreements of an antecedent contract into the terms of the deed, and any claim for relief must be based on the covenants or agreements contained in the deed, not the covenants or agreements as contained in the prior agreement. There is a generally recognized exception to the foregoing rule which exception relates to collateral stipulations of the contract, which are not incorporated in the deed." *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373, 382, 414 P.2d 879, 884 (1966). The Court went on to explain, "[t]he authorities may perhaps be

reconciled by a determination of what are 'collateral stipulations'. If the stipulation has reference to title, possession, quantity, or emblements of the land, it is generally, but not always, held to inhere in the very subject-matter with which the deed deals, and is merged therein.' *Id.* at 383 and 414 P.2d 879 at 885. In the present case Exhibit 15 was a collateral stipulation of the contract and is not merged with the deed.

The BELSTLERS have requested judicial interpretation of Plaintiffs' Exhibits 18 and 19 (the Joint Use and Maintenance Agreement entered into between Kluss and Henry as modified by Henry and re-recorded). Those documents provide for joint use and maintenance for a roadway, which has been identified in yellow marking on Plaintiffs' Exhibit 1. The testimony during the course of the trial indicated that both parties and their successors in interest have contributed to the maintenance of portions of the yellow marked roadway on Plaintiffs' Exhibit 1. The Joint Use and Maintenance Agreement does not modify, supersede or extinguish the terms and conditions set forth in Plaintiffs' Exhibit 15. Exhibit 15 created the easements for the benefit of Henry from Sanders, and from Henry to Merwin. The beneficial use of the easement inuring to Linda Merwin and her successors is not altered in any way. This applies to both the northerly easement over the disputed private driveway and also the southern or lower roadway easement.

The BELSTLERS argue that Plaintiffs' Exhibit 15 is not effective as providing an easement benefiting what is now the CONINES' property, formerly the Merwin property, because the document was not delivered. The Supreme Court of Idaho in the case of *Barmore vs. Perrone,* 145 Idaho 340, 179 P.3d 303 (2008) noted the controlling element in the question of delivery is the intention of the parties. The rule is that delivery is complete when there is an intention manifest on the part of the Grantor to make the instrument his deed. The document creating the easement from Sanders to Henry and the easements from Henry to Merwin (Plaintiffs' Exhibit 15) was indeed delivered and recorded. Both Sanders and Henry fully intended the result of the documentation of the transaction between them. There is no tenable claim that there was no delivery.

The BELSTLERS also argue that any express easement created under Instrument No. 1119009 (Exhibit 15) is ineffective because Merwin, the Grantee of the Easement was not a party to the contract. The BELSTLERS contend that Merwin was a stranger to the transaction

between Henry and Sanders which gave rise to Instrument No. 1119009. The benefit to Merwin intended by Sanders and Henry was an integral part of their agreement. She is mentioned by name in the agreement. Merwin was therefore much more than an incidental beneficiary of the Agreement. She obtained legal access over the easement, specifically the use of the "private drive." BELSTLERS argue that there is no effect whatsoever of Exhibit "O"[3] in explaining Exhibit 15.

The Court finds that Exhibit "O" verifies that there was a dispute between Sanders and Merwin arising from the fact that Sanders had placed a road (the upper extension of Sanders/Chandler Lane, i.e. the private road) upon the property of Merwin without authority. In order to effectuate a resolution of the road placement Sanders and Merwin agreed that Sanders would correct the problem, as shown by Exhibit "O". They accomplished the same at the time of the sale to Henry by the requirement that Henry convey an easement to Merwin (Plaintiffs' Exhibit 15).

The court concludes Exhibit "O" provides meaning to, explanation of, and the intent of Plaintiff's Exhibit 15. Exhibit 15 created an easement favoring Merwin. Merwin, Sanders and Henry were fully aware of its intention, and the need to continue the use of the private driveway during Merwin's ownership. Specifically, they were all aware of the existence of the driveway access across the Henry property to the Merwin property. Both the upper or northerly easement as well as the lower or southerly easement was granted with intent to serve the Merwin property now owned by the CONINES.

In *Partout v. Harper*, 145 Idaho 683, 183 P.3d 771 (2008), the Court provided:

> "The test for determining a party's status as a third-party beneficiary . . . is whether the agreement reflects an intent to benefit the third party." *Idaho Power Co. v. Hulet,* 140 Idaho 110, 112, 90 P.3d 335, 337 (2004). The third party must show the contract was made primarily for his benefit; it is not sufficient that the third party is a mere incidental beneficiary to the contract. *Id.* (quoting *Adkison Corp. v. Am. Bldg. Co.,* 107 Idaho 406, 409, 690 P.2d_341, 344 (1984)); *Fenwick v. Idaho Dep't of Lands,* 144 Idaho 318, 323, 160 P.3d 757, 762 (2007) (quoting *Dawson v. Eldredge,* 84 Idaho 331, 337, 372 P.2d 414, 418 (1962) (quoting *Sachs v. Ohio Nat'l Life Ins.*

[3] The Court notes that the parties stipulated to the admission of Exhibit "O" and stipulated that the court consider that document, so as to interpret the meaning of Exhibit 15. The practical effect and meaning of the exhibit was left to the sound discretion of the trier of fact by stipulation of the parties.

> *Co.,* 148 F.2d 128, 131 (7th Cir.1945))). The intent to benefit the third party must be expressed in the contract itself. *Idaho Power Co.,* 140 Idaho at 112, 90 P.3d at 337 (quoting *Adkison Corp.,* 107 Idaho at 409, 690 P.2d at 344;) *Fenwick,* 144 Idaho at 323, 160 P.3d at 762 (quoting *Adkison Corp.,* 107 Idaho at 409, 690 P.2d at 344).

The Court observes that Merwin is not a party to this litigation and is not seeking to enforce Exhibit 15. As such, it may not be pertinent to determine whether she was a party who could assert rights under Exhibit 15; however, she would have standing to assert rights under Exhibit 15 should it have ever become necessary. The granting of the easements was certainly of pecuniary benefit to Merwin and Exhibit 15 clearly shows the intent and motivation of Sanders and Henry that part of their agreement was to confer the easement benefits on Merwin. She was no incidental beneficiary; she was an intended beneficiary. She was specifically named as the beneficiary of the specifically described easements at issue in this case.

In *Crenshaw v. Crenshaw*, 68 Idaho 470, 199 P.2d 264 (1948) the court held that "before a deed can operate as a valid transfer of title, there must be a delivery of the instrument, and it must be effected during the life of the grantor."

However, in *Hinckley Estate Co., v. Gurry,* 53 Idaho 551, 26 P.2d 121 (1933) the court stated "proof of the recording of a deed by the grantor, without other circumstances, is not sufficient to bind the grantee or establish delivery or the grantee's acceptance thereof. [T]he grantee's acceptance of such a deed need not be by formal or express words to that effect, but may be shown by acts, conduct, or words of the parties showing an intention to accept. Thus, there may be an acceptance by an assertion of title in him, by his conveyance of the property or <u>by acts of ownership generally in respect to the property</u>" (emphasis added).

Therefore, the fact that Merwin is not a signer to Exhibit 15 will not preclude the CONINES from being a successor to the easement rights of Merwin. The Court, guided by the above cited case law, finds that Merwin was a third party beneficiary of that transaction and accepted the easements by her acts described in Exhibit O.

The BELSTLERS also argue that although the Worley Fire District Deed was recorded after the recordation of the Sanders-Henry Sale Agreement (Exhibit 14) and the Mutual Agreement for Easement for Ingress and Egress (Exhibit 15), it was valid as between those

parties thereto and those who had notice thereof, pursuant to I.C. § 55-815. Therefore, BELSTLERS conclude that Sanders had no legal power to convey the same property twice, because he had notice of the conveyance to Worley Fire District.

CONINES argue that the entry into a title retaining executory contract provides some rights of ownership to the purchaser, which rights are ultimately vested in full upon conveyance of the Deed. Therefore, CONINES argue it was clear that Sanders requested Henry, and Henry acquiesced, to provide Merwin an easement across the Henry property.

I.C. § 55-815 provides:

> An unrecorded instrument is valid as between the parties thereto and those who have notice thereof.

However, Idaho follows the race notice rule, or first in time, first in right. Under Idaho's established recording statutes that recording provides constructive notice of the contents of the recorded document to any subsequent purchaser or mortgagee from the time it is filed. *Kalange v. Rencher*, 136 Idaho 192, 30 P.3d 970 (2001).

The effect of recording an instrument is provided in I.C. 55-811 wherein it states:

> Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, from the time it is filed with the recorder for record, is constructive notice of the contents thereof to subsequent purchasers and mortgag(e)es.
> Every conveyance of real property acknowledged or proved, and certified, and recorded as prescribed by law, and which is executed by one who thereafter acquires an interest in said real property by a conveyance which is constructive notice as aforesaid, is, from the time such latter conveyance is filed with the recorder for record, constructive notice of the contents thereof to subsequent purchasers and mortgagees.

Further, I.C. § 55-813 states:

> The term "conveyance" as used in this chapter, embraces every instrument in writing by which any estate or interest in real property is created, alienated, mortgaged or encumbered, or by which the title to any real property may be affected, except wills.

As such, a conveyance under this statute includes every instrument by which any interest in real property is created or encumbered or by which title to any property may be affected. Therefore, under the Idaho Code recording statute, an easement which is properly recorded is an instrument which falls within the province of the recording statute and the priority created therein. The Sanders-Henry Sale Agreement and the Mutual Agreement for Easement for Ingress and Egress were recorded before the Worley Fire District Warranty Deed and they have priority. Additionally, I.C. § 55-815 would not apply because that statute applies to "unrecorded" instruments and these instruments were recorded. This Court finds that Sanders had the power to grant an easement to Henry on June 8, 1988.

The two roadway accesses in dispute in this case are express easements in favor of the CONINES. To the extent, if any, that grant of easements in Exhibit 15 is ambiguous; the purpose of the express easements has been thoroughly explained by the evidence. The CONINES are entitled to judgment declaring their easement rights and the BELSTLERS' claims of quiet title to those easement claims shall be denied.

B. Prescriptive Easement

The CONINES seek judgment against the BELSTLERS on the alternative ground of prescriptive easement rights. The evidence shows that the private drive has been in existence since approximately 1985 or 1986 and perhaps as early as 1983.

The Supreme Court of the State of Idaho in *Checketts vs. Thompson*, 65 Idaho 715, 721, 152 P.2d 585,591 (1944), noted:

> "One who purchases land expressly subject to an easement or with notice, actual or constructive, that it is burdened with an existing easement takes the land subject to the easement."

In this particular matter there was no question that the roadway access across the BELSTLERS' property to what is now the CONINES' property existed. It is, and was, plainly visible upon the ground as an obvious roadway access or driveway. The BELSTLERS have had knowledge of the existence of the "private drive." Henry had that same knowledge from when BELSTLERS first acquired the property from him. The CONINES contend that both easements were not only of record as express easements, but must also be recognized by the court as

benefiting the CONINES as prescriptive easements. The court agrees.

An easement can also be obtained by prescription. A district court's determination that a claimant has or has not established a prescriptive easement involves entwined questions of law and fact. *Hughes v. Fisher*, 142 Idaho 474, 129 P.3d 1223 (2006). A prescriptive easement is established if the dominant landowner can show by clear and convincing proof that there has been an open, notorious, continuous, uninterrupted, adverse use under a claim of right with the actual or imputed knowledge of the owner of the servient estate for the statutory period of five years. *Backman v. Lawrence*, 147 Idaho 390, 210 P.3d 75 (2009).

If a party can show proof of open, notorious, continuous, uninterrupted use of the property during the prescriptive period, but fail to prove how that use commenced, then the presumption is that the use is adverse and under a claim of right. The burden then shifts to the servient owner to show that the use was permissive. The one exception to the rule of prescriptive easements is where the use occurs on wild, unenclosed or unimproved land. In such an event, to protect the rights of the servient owner and avoid inequitable results, the presumption is that the use is permissive. *Hodgins v. Sales*, 139 Idaho 225, 76 P.3d 969 (2003). That exception is not applicable here as these lands are not wild, unenclosed or unimproved.

The CONINES have proved that they have used the disputed private drive where they claim a northerly easement by use that has been open, continuous and notorious for the period of their ownership of approximately ten (10) years. Their use was under a claim of right. The CONINES have proved entitlement to the prescriptive easement by clear and convincing evidence.[4] This Court finds that the CONINES' rights accrued prior to the Legislature changing the law regarding the time period for prescriptive easement.[5]

The CONINES have proved entitlement to a prescriptive easement as to the disputed private driveway across the northerly portion of the BELSTLERS' property. They have proved by clear and convincing evidence that their use has been open, notorious, continuous, and uninterrupted use of the property during the prescriptive period of five years. They have the

[4] The Legislature modified the prescriptive claim statute, I.C. § 5-203, from the previously existing five (5) year requirement to a twenty (20) year requirement in 2006.

[5] Further, the changes to Idaho Code Sections 5-204, 206, 207, 210, 211 as well as 213 were made after CONINES' rights were vested, five (5) years subsequent to their purchase, under the then existing statute. More particularly, those rights became vested in 2004, prior to the filing of the instant action.

benefit of the presumption that the use was adverse and under a claim of right. Moreover they have proved the claim of right through the existence of the express easement document Exhibit 15 and by being in the line of succession from Linda Merwin.

This Court finds that the use by the CONINES of the disputed private driveway across the northerly part of the BELSTLER property during the time Henry owned it was not permissive as the CONINES used it under a claim of right emanating from the easement granting agreement (Plaintiffs' Exhibit 15). The fact that Henry may have acquiesced in the use by the CONINES is not permission because he knew the CONINES, as successors to Merwin, had a right to use both the upper and lower roadways under the express easement he had granted to Merwin. The use by the CONINES of the disputed private driveway easement was continuous.

The CONINES purchased the property from Solomon on June 25, 1998. The CONINES visited the property generally every weekend in summer and less when Snoqualmie Pass presented snowy driving conditions. In winter, the CONINES generally visited their property two weekends per month. Solomon did not use the property at all. The CONINES have not established any open and notorious use of the lower easement during the period of their ownership, from 1998 to when this lawsuit commenced. The evidence does not establish use of the lower roadway by predecessors to the CONINES which could be described as continuous. So, there is no evidence to support a claim of tacking. The CONINES are entitled to a ruling in their favor on the issue of prescriptive easement over the northerly roadway access described at trial as the disputed private drive. There is no showing of open and notorious use of the lower easement on BELSTLERS' property.

The scope of a prescriptive easement is fixed by the use made during the prescriptive period. *Beckstead v. Price*, 146 Idaho 47, 190 P.3d 876 (2008)(rehearing denied). The scope of the CONINES' use based their claim of prescriptive rights over the private driveway is ingress and egress for motor vehicle and pedestrian travel for residential and recreational purposes. The width, length and location of the easement has been proven as shown on Plaintiffs' Exhibit 23.

The CONINES are denied any claim to an easement by prescription as to the southerly easement claim across the lower road. The CONINES are entitled to judgment of prescriptive

easement rights, as an alternative to their express easements claim recognized herein across the private driveway on the northerly portion of the BELSTLERS' property.

C. Easement Relocation Pursuant to I.C. § 55-313

The BELSTLERS, in their brief, contend that they do not seek to have the location of the northerly easement changed and argue that the CONINES cannot seek a ruling by the court as to the applicability of Idaho Code § 55-313. Neither evidence nor argument was provided as regards to relocation of the southerly easement. The BELSTLERS base their argument on their claim that they do not believe any easements exist to change. The parties did extensively litigate the relocation issue at trial and the pleadings are deemed amended to include a claim for relocation of the northerly easement. Throughout the trial the parties took the position that if the court should determine that the easements claimed by the CONINES are valid easements, the Court should then determine whether or not the BELSTLERS could, pursuant to I.C. § 55-313 change the location of the northerly easement. Therefore, that issue is ripe for determination at this time by this Court.

Idaho Code § 55-313 allows for a subservient estate to change the location of an easement that benefits the dominant estate. However, that statute requires that there be no injury, or more particularly that such change be made in a manner as to not obstruct motor vehicle traffic or otherwise injure any person or persons using or interested in such access. Further, the subservient estate must pay the cost of such a move.

The court concludes from the persuasive testimony of Scott Rasor, as illustrated by Exhibit T, that there would be injury to the CONINES in the form of unreasonably steep road grades which would create inconvenience and undue risk of harm to person and property due to steep road grades required by the existing topography. Winter weather, when snow fall and ice are evident, would further aggravate motor vehicle and pedestrian travel on such a steep roadway. The road grade slopes not only exceed any of the slopes upon the existing approach on the road from Rockford Bay but are so steep as to constitute injury within the meaning of Idaho Code § 55-313.

The proposed relocation of the northerly easement is not a reasonable alternative shown by the evidence due to the topography of the real property owned by both the BELSTLERS and

the CONINES. Therefore, the CONINES are entitled to judgment against BELSTLERS for injunctive relief that they may not move the road to the location shown on Exhibit T.

III. ORDER

IT IS HEREBY ORDERED that the northerly ("private drive") and southerly easements granted to Merwin in Instrument No. 1119009 (Plaintiffs' Exhibit 15) and further referenced on Plaintiffs' Exhibit 1, are express easements specifically created for the benefit of the CONINES' property and impose an encumbrance upon the BELSTLERS' property. The judgment shall include the legal descriptions for the easements and shall be based as shown on Plaintiffs' Exhibit 23.

IT IS HEREBY FURTHER ORDERED that the judgment shall reflect that the CONINES have established a prescriptive easement upon the northerly easement, but have not established a prescriptive easement as to the southerly easement. The judgment shall specify the nature, length, width and location of the northerly easement over the private drive. It shall also specify the legal description for the claimed southerly prescriptive easement which has not been proven.

IT IS HEREBY FURTHER ORDERED that the judgment shall reflect that the quiet title claims of BELSTLERS are dismissed and the CONINES claim for a southerly easement by prescription are dismissed.

IT IS HEREBY FURTHER ORDERED that the judgment shall deny to the BELSTLERS any right to change the location of northerly easement to the locations referred to on Exhibit T.

IT IS HEREBY FURTHER ORDERED that considering all claims and defenses presented that the CONINES are entitled to their costs but not attorney fees as this action was not frivolously or unreasonably pursued nor defended by the BELSTLERS.

IT IS HEREBY FURTHER ORDERED that the CONINES prepare a judgment consistent with this Memorandum Decision and present the same to Judge Lansing Haynes as James R. Michaud's service to the State of Idaho as a senior district judge is concluded upon the issuance of this memorandum decision.

Dated this 30th day of December, 2009.

James R. Michaud
Senior District Judge

CERTIFICATE OF MAILING/DELIVERY

On this 30 day of December, 2009, a true and correct copy of the foregoing was mailed in the U.S. Mails, postage prepaid, sent via interoffice mail, or sent via facsimile, addressed to the following:

ARTHUR B. MACOMBER, ESQ.
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Facsimile: 208-664-9933

CHARLES M. DODSON, ESQ.
CHARLES M. DODSON, ATTORNEY AT LAW
1424 Sherman Ave., Ste. 300
Coeur d'Alene, ID 83814
Facsimile: 208-666-9211

Daniel English
Clerk of the District Court

By: ______________
Deputy Clerk

FIRST JUDICIAL DISTRICT KOOTENAI COUNTY
CLERK OF COURT
STATE OF IDAHO

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
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CLERK DISTRICT COURT
DEPUTY

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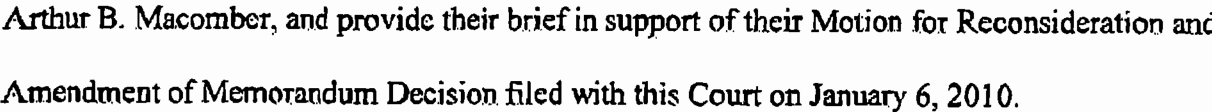
State Bar #7370
Attorney for Plaintiffs/Counter Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife, Plaintiffs, v. KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, Defendants.	Case No: **CV 2007-2523** **BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION AND AMENDMENT OF MEMORANDUM DECISION** **Date:** **March 16, 2010** **Time:** **3:30 P.M.** **Venue:** **Kootenai County Courthouse** **The Honorable Judge Haynes**
KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, Counter Plaintiffs, v. CHRIS BELSTLER and DANA BELSTLER, husband and wife, Counter Defendants.	

COME NOW, Plaintiffs and Counter Defendants, CHRIS BELSTLER and DANA BELSTLER, pursuant to I.R.C.P. Rules 52(b) and 7(b), by and through their attorney of record,



Arthur B. Macomber, and provide their brief in support of their Motion for Reconsideration and Amendment of Memorandum Decision filed with this Court on January 6, 2010.

INTRODUCTION

On December 23, 2009, this Court issued its Memorandum Decision and Order for Judgment. On December 30, 2009, this Court issued its Order to Withdraw and Substitute Memorandum Decision and Order for Judgment ("S.M.D."), in order to correct minor errors and omissions. In this Brief, Plaintiffs provide legal and factual support of their arguments that this Court should reassess facts found and law relied upon in that decision, and request a different decision be made based on said facts and law.

ARGUMENT

Under Idaho Code of Civil Procedure 7(b), "Any brief submitted in support of a motion shall be filed with the court and served so that it is received by the parties at least fourteen (14) days prior to the hearing." The hearing on Plaintiffs' Motion for Reconsideration and Amendment of Memorandum Decision is to be March 16, 2010, thus, Plaintiffs' brief in support of this Motion is herein timely filed on or before March 2, 2010.

A. <u>Easements in Instrument No. 1119009 Cannot Exist as a Matter of Law</u>.

Plaintiffs argue that this Court erroneously cited Defendants' Post Trial Memorandum for the legal proposition that the Supreme Court in *Jolley v. Idaho Securities, Inc.*, 90 Idaho 373 (1966), "determined that an express easement is not merged in a Deed." Consequently, this Court's conclusion that "[t]he holding in *Jolley* is contrary to the argument of the Plaintiffs that the easements created in Exhibit 15 merged with the Warranty Deed" was incorrect. The *Jolley* case does not address easements and the term "easement" does not appear anywhere in the *Jolley* opinion. On page 6 and 7 of this Court's Memorandum Decision and Order for Judgment ("Decision"), this Court properly cited the *Jolley* opinion for the rule on doctrine of merger and

the recognized exception that collateral stipulations of a contract are not incorporated in the deed. (citing *Jolley*, 90 Idaho at 382 and 414.) This Court further cited *Jolley* to explain that " [i]f the [collateral] stipulation has reference to title, possession, quantity, or emblements of the land, it is generally, but not always, held to inhere in the very subject-matter with which the deed deals, and is merged therein." (*Id.* at 383) On page 7 of its Decision, this Court simply concluded without any explanation that "[i]n the present case Exhibit 15 was a collateral stipulation of contract and is not merged with the deed."

This Court's conclusion that Exhibit 15 was a collateral stipulation and therefore did not merge with the deed was clearly erroneous. As discussed on page 42 of Plaintiffs' Post Trial Legal Arguments, "the nature of appurtenant easements is an interest in land, with 'reference to title, possession, quantity, and emblements of land.'" (*Jolley*, 90 Idaho at 383; citing Annot: 84 A.L.R. 1008; 38 A.L.R.2d 1310; 8A Thompson on Real Property (1963 Replacement) 331 § 4458; 55 Am.Jur. 937, Vendor and Purchaser § 543; 26 C.J.S. Deeds § 91c, p. 842.) In *Jolley*, the Idaho Supreme Court found that an abstract of title "does not relate to the title, possession, quantity, or in moments of land." (citing *Christiansen v. Intermountain Association of Credit Men*, 46 Idaho 394 (1928).) Clearly, there is a marked difference between an easement and an abstract of title. An abstract of title could reasonably be construed under Idaho Law as a collateral stipulation, but it would be wholly unreasonable to extend this reasoning to an appurtenant easement that affects title evidenced by a deed. Plaintiffs noted on page 42 of their Post Trial Legal Arguments that in *Sells v. Robinson*, 141 Idaho 767, 772 (2005), the Idaho Supreme Court found merger of the real estate purchase agreement's (REPSA) inclusion of "timber rights on said easement." The Court stated:

> "[b]oth the REPSA and the deed discuss the timber on the Sells' property. Applying the rule of law from *Jolley*, the district court determined that the terms of the REPSA merged

into the deed conveying the property to Robinson. The district court's determination is correct because the terms of the REPSA Robinson seeks to enforce 'inhere in the very subject-matter with which the deed deals' … [t]he timber language in the REPSA does not constitute a collateral agreement relating to timber rights, independent of the terms of the deed. Therefore, the terms of the REPSA merged into the deed …"

On page 8 of their Post Trial Memorandum, Defendants mistated the Court's findings in *Jolley* by asserting that the Supreme Court [in *Jolley*] "determined that an express easement is not merged in a Deed." Plaintiffs argue that this Court made its consequent decision as to whether Plaintiffs' Exhibit 15 merged with the deed based upon Defendants' faulty premise. Therefore, Plaintiffs respectfully request that this Court reconsider Plaintiffs' argument that Exhibit 15 was not a collateral stipulation, Idaho's doctrine of merger applies, and therefore Exhibit 15 merged with the deed. Not being mentioned or otherwise given a legal description in the deed, the easements at issue cannot exist due to the merger thereof of the alleged contractual conditions.

B. <u>The Court Erred When it Used a Five-year Time Period Instead of a Twenty-year Adverse Possession Time Period.</u>

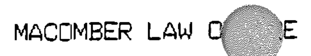
Plaintiffs further argue that this Court's application of a five-year statutory period for prescriptive easements versus the current twenty-year statutory period was clearly erroneous. On page 12 of its Decision, this Court cited *Backman v. Lawrence*, 147 Idaho 390 (2009) for the rule on prescriptive easements, that they are subject to a statutory period of five years. As Plaintiffs discussed on pages 50 - 52 of their Post-Trial Legal Arguments, in 2006 the Idaho legislature altered the prescriptive period from five to twenty years. (S.L. 2006, ch. 158, § 1, eff. Jul. 1, 2006.) Since Plaintiffs filed this lawsuit on April 9, 2007 to recover their real property, and Defendants Conine filed their counterclaim for the prescriptive easement claim on August 8, 2007, the entire lawsuit should be governed by the new twenty-year prescriptive period. To

Plaintiffs' knowledge, the *Backman* case is the only case to have reached the Idaho State Supreme Court's final judgment since the statutory change in 2006. (I.C. § 5-203, 2009 pocket part.) However, *Backman* was filed on February 24, 2006 as Bonner County Case Number CV-2006-0000365. Therefore, Backman's five-year prescriptive period cannot be determinative because the adverse possession statute at Idaho Code Section 5-203 states, in part, "No action ... can be maintained ... unless ... [it was] seized ... within twenty years before the commencement of the action ..." Plaintiffs have found no subsequent Idaho case available to provide guidance. However, it is clear to plaintiffs that if Conines could exercise a vested right in a five-year period they accrued prior to the statutory change, and could bring that claim after July 1, 2006, such a claim would essentially eviscerate the Legislature's intent, which was to quadruple the statutory time period for claims made after July 1, 2006.

Conines brought their counterclaim in August of 2007, which is over one year from the statutory change date of July 1, 2006. In order to give effect to the legislative intent and uphold the law in effect as of August 8, 2007, this Court should recognize the legislative intent, and require that Conines must have been "seized or possessed of the property in question within twenty (20) years before the commencement of the action," which would require them to prove the elements of prescriptive easement by clear and convincing evidence since August 8, 1987, twenty years from the filing of their counterclaim. Plaintiffs argue that on the evidence presented, Defendants' prescriptive easement claim must fail.

C. Plaintiffs Argue That This Court's Application of Idaho's Recording Statutes, I.C. § 55-815, § 55-811, and § 55-813, was Clearly Erroneous Under the Facts of This Case.

As Plaintiffs noted in their Post-Trial Legal Arguments, Sanders lacked power to grant Henry an easement on June 6, 1988. (Pl. Post-Trial Br., p. 23), because on June 3, ~~1998~~ 1988 L.H., Sanders



conveyed the fire station parcel to the Worley Fire District ("WFD"), and thus did not own the real property upon which Defendants claim an easement was granted from Sanders to Henry. (*Id.*) The Sales Agreement was dated June 1, 1988, but was not signed until June 6, 1988; the Worley Fire District deed was signed on June 3, 1988. When the parties signed their Sales Agreement, the Sanders had no ownership in the Worley Fire District parcel. The Sanders-Henry grant therefore fails for lack of consideration due to the prior sale to Worley Fire District which invalidates the Sanders-Henry grant in Instrument Number 1119009. (Pls. Ex. 15.)

As between the Sanders and the Worley Fire District, the signed but then five days later recorded warranty deed was "valid as between [those] parties thereto and those who [had] notice thereof." (I.C. § 55-815.) Sanders had no legal power to convey the same property twice. Sanders certainly had notice of the conveyance to WFD. Therefore, the Sanders-Henry easement grant must fail due to Sanders' wrongful and knowing attempt to convey interests in that property twice. This Court's application of the recording statutes appears to be convoluted. This Court acknowledged the substance of I.C. § 55-815, then stated that I.C.§ 55-811 overrides I.C. § 55-815, and concluded on page 11 of its Decision with the statement "I.C. § 55-815 would not apply because that statute applies to 'unrecorded' instruments and these instruments were recorded." Plaintiffs argue, first, that I.C. § 55-815 does apply in the instant case because Sanders was one of the "parties thereto" and had "notice" of his grant to the Worley Fire Department. Second, Sanders' transfer of the easement grant to Henry fails for lack of consideration – Sanders did not own the property he was attempting to transfer. (Pls. Ex. 15.) It would be illogical to conclude that the later recording would obliterate the substance of I.C. § 55-815. Sander's action was at best a misrepresentation and could likely be construed as a fraudulent conveyance to be voided by this Court.

D. Plaintiffs Argue That This Court Clearly Erred in its Discussion of the Elements of a Prescriptive Easement on Page 4 of its Decision.

This Court stated that "they used the disputed private drive under a claim of rights. Their use was open and obvious. The private road had been in existence since sometime during the period of 1983 to 1986 ..." The mere existence of a road is irrelevant to the elements of prescriptive easement. As Plaintiffs stated on page 50 of their Post Trial Legal Arguments, "In order for a claimant to establish that he has acquired a private prescriptive easement by adverse use, he must submit reasonably clear and convincing proof of open, notorious, continuous, uninterrupted use, under a claim of right, with the knowledge of the owner of the servient tenement, for the prescriptive period. (*West v. Smith*, 95 Idaho 550, 557 (1973).) Under Idaho Law, *when* the road was constructed has no bearing on whether a prescriptive easement has been obtained. Plaintiffs argue that this Court's reference to the 1983 to 1986 period was clearly erroneous and that this Court should find that there was no prescriptive easement as discussed herein and as discussed in detail on pages 50 – 59 of Plaintiffs' Post Trial Legal Arguments.

E. This Court's Characterization of Plaintiffs' Exhibit 15 as "a serial grant of easement, first from Sanders to Henry, and second from Henry to Merwin" on Page 3 of its Decision was Clearly Erroneous.

In its Decision, this Court apparently cut and pasted Defendants' arguments from page 3 of their Post Trial Memorandum, with the exception of referring to the easement as a "serial" versus a "dual" grant of easement. As argued in the preceding paragraph above and on page 3 of Plaintiffs' Reply to Post-Trial Memorandum, there was never a valid grant from Sanders to Henry in Plaintiffs' Exhibit 15 because Sanders did not possess the land upon which he purported to grant an easement. Similarly, the purported grant of easement from Henry to

Merwin should be held invalid. As Plaintiffs stated in their Post-Trial Legal Arguments, Henry had neither title nor possession of the subject property when he signed the Mutual Agreement for Easement for Ingress and Egress on June 7, 1988. Therefore, Henry did not have any legal power to grant an easement appurtenant to Merwin. (Pl. Post-Trial Br., p. 26).

F. Plaintiffs Argue That the Joint Use and Maintenance Agreement Controls Over Plaintiffs' Exhibit 15.

Plaintiffs argue that this Court's conclusion, found on page 7 of its decision, that "[t]he Joint Use and Maintenance Agreement does not modify, supersede or extinguish the terms and conditions set forth in Plaintiffs' Exhibit 15" was clearly erroneous. This Court did not provide any explanation as to how it reached this conclusion, and Plaintiffs argue that this statement contradicts the plain language found in the Joint Use and Maintenance Agreement (Pls. Exs. 18, 19.) As Plaintiffs discussed on page 48 of their Post-Trial Legal Arguments, the Joint Use and Maintenance Agreement states in pertinent part that "[t]he parties hereto agree to use said roadway for normal ingress and egress ..." and that "[t]his agreement shall be binding on the heirs, successors, and assigns of the parties hereto." Clearly, the Joint Use and Maintenance Agreement applies to the Conines and clearly the Joint Use and Maintenance Agreement did therefore "modify, supersede or extinguish the terms and conditions set forth in Plaintiffs' Exhibit 15."

G. This Courts' Failure to Address Trial Arguments and Evidence Related to the Term "community road" as Found in Plaintiffs' Exhibit 15 was Clearly Erroneous.

On page 4 of its Decision, this Court asserted that the northerly easement extended from Chandler Lane/Sanders Road across the Beslsters' property to the Conines property. This Court adopted Defendants' position that the northerly easement is simply found in Instrument No.

1119009 while ignoring the language in this Instrument that states "[s]aid easements are the continuation of the existing logging road running parallel to Rockford Bay Road on the South *and the existing road from the community road on the North.*" (Italics added.) Plaintiffs discussed in detail the probable meaning of "community road" on pages 20 – 22 of their Post-Trial Legal Arguments. As Plaintiffs noted therein, it would only make sense that the meaning of the words "community road from the north" is the extension of the road from what is now Black Rock coming down from the northeast of the Conine property and through it heading west toward Belstler's. This accords with evidence from defendants' Exhibit O, wherein Merwin granted an easement to Sanders "on the northwest corner of the property owned by [Merwin] . . . to provide Mr. Sanders with the authority to complete the present road and provide him access to his other property." Plaintiffs believe evidentiary analysis of the easements at issue has been burdened with the limiting and mistaken assumption that such analysis must begin at Rockford Bay Road and head up the hill. If this Court abandons that assumption and adopts an objective analysis, including analysis from the opposite direction, so its analysis flows east to west, all the evidence for interpreting the documents to find the correct easement paths lines up smoothly straight downhill from Black Rock to Rockford Bay Road. Therefore, Plaintiffs urge this Court to reexamine Plaintiffs' Exhibit 15 to carefully consider the meaning of "community road," because Plaintiffs believe that the specific verbiage found in Exhibit 15 wholly alters the meaning of the words "northerly easement."

H. Plaintiffs Argue that Defendants' Arguments Related to Idaho Code Section 55-313 are Improper at this Stage of the Case and That This Argument Was Not Properly Addressed at or Before Trial.

Plaintiffs disagree with this Court's statement on page 2 of its Decision that "the parties

agreed that the court should adjudicate whether the Belstlers may move the easement in accordance with I.C. § 55-313 ..." Plaintiffs also argue that this Court has misconstrued events at trial and in the pleadings as evidenced by its discussion of I.C. § 55-313 on page 14 of its Decision. Plaintiffs could only find reference to I.C. § 55-313 in Defendants' pretrial and post-trial memoranda. In those documents, Defendants simply referred to the statute and concluded that it applied. Plaintiffs were not given opportunity to fully address the legal implications of the statute, and, to the best of Plaintiffs' recollection, the parties did not in fact "extensively litigate the relocation issue at trial" as was stated on page 14 of this Court's decision. The absence of any reference to I.C. § 55-313 in Plaintiffs' detailed Post-Trial Legal Arguments supports this contention, as well as the absence of applicable case law in any pleading or at trial.

I. <u>Defendants Cannot Claim an Express Easement Under Instrument Number 1119009 Because it Was Not Delivered</u>.

Plaintiffs argue that this Court clearly erred in concluding on page 7 of its Decision that "[t]here is no tenable claim that there was no delivery" of easement grant from Henry to Merwin. In its explanation, this Court apparently cut and pasted language from Defendants' Post Trial Memorandum regarding the Supreme Court Case of *Barmore v. Perrone*, 179 P. 3d 303, 145 Idaho 340 (2008). As Plaintiffs asserted on page 6 of their Reply to Defendant's Post Trial Memorandum, to conclude that there was no delivery based on this rule statement alone would be clearly erroneous. Quoting from the same case, Plaintiffs argued that in Idaho, "an argument that a deed lacked the intent necessary to be effective is identical to an argument that delivery never occurred." (*Barmore v. Perrone*, 2008-ID-R0219.005 at 3 (2008).) This results because "the real test of the delivery of a deed is this: Did the grantor by his acts or words, or both, intend

to divest himself of title? If so, the deed is delivered."[1] (*Id.*; citing *Estate of Skvorak*, 140 Idaho at 21 (2004).) Even though Plaintiffs do not dispute that Henry signed instrument number 1119009, he believed that instrument number 1119009 was "some type of formality" and he lacked a clear understanding of why he signed it. (Henry Depo. at p. 8, ll. 3-24). Without a clear understanding of why he signed it, this Court should find that Henry lacks the requisite intent to have the easement grant operate in favor of Merwin, or Merwin's successors, the Conines. The Court should not overweight Defendants' counsel's five-page bullying that resulted in Henry's statement to the contrary. (*Id.* at p. 14-15, ll. 24, 25, 1). The Conines do not enjoy an easement across the Belstlers' property as purportedly conveyed by instrument number 1119009, because Henry did not deliver that instrument to Merwin, either physically or with intent for it to benefit her. (Pl. Post-Trial Br., p. 28).

CONCLUSION

Plaintiffs' argue this Court erred in its interpretation of the law and the facts in its December 30, 2009 Memorandum Decision and order for Judgment. Plaintiffs argue this Court should reconsider its entire Decision, focusing on the points discussed in this Brief. Plaintiffs urge this Court to reassess the facts and law it relied upon in that Decision, and to issue a different decision based on said facts and law in favor of findings that no easements exist, either expressly by grant or by prescription.

Plaintiffs also request attorneys fees and costs be awarded to them.

DATED this 2nd day of March, 2010.

ARTHUR B. MACOMBER
Attorney at Law

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[1] Plaintiffs note that this quote from *Barmore* also supports their contention in this Brief's Section C that Grantor Sanders fully intended to divest themselves of the Worley Fire District parcel, and that thus their alleged consideration in Plaintiffs' Exhibit 15 failed.

CERTIFICATE OF SERVICE

I am familiar with my firm's capability to hand-deliver and deliver by facsimile documents and its practice of placing its daily mail, with first-class postage prepaid thereon, in a designated area for deposit in a U.S. mailbox in the City of Coeur d'Alene, Idaho, after the close of the day's business. On the date shown below, I served:

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION AND AMENDMENT OF MEMORANDUM DECISION

Charles M. Dodson
Attorney at Law
1424 Sherman Avenue, Suite 300
Coeur d'Alene, ID 83814
Telephone: 208-664-1577

[ ] U.S. Mail, Postage Prepaid
[ ] Hand Delivered
[ ] Overnight Mail
[X] Facsimile: 208-666-9211

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 2nd day of March, 2010.

Terri Boyd-Davis
Paralegal, Macomber Law, PLLC

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

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CLERK DISTRICT COURT
[signature]
DEPUTY

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife, PLAINTIFFS, VS. KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, DEFENDANTS.	CASE NUMBER: CV-07-2523 DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR RECONSIDERATION AND AMENDMENT OF MEMORANDUM DECISION
KAREN SHELER CONINE and HOWARD CONINE, husband and wife, COUNTER PLAINTIFFS, VS. CHRIS BELSTLER and DANA BELSTLER, husband and wife, COUNTER DEFENDANTS.	

COMES NOW, the Defendants/Counter Plaintiffs, KAREN SHELER CONINE and HOWARD CONINE, husband and wife, by and through their Attorney of Record, and hereby submit the following Brief in Opposition to Plaintiffs' Motion for Reconsideration and Amendment of Memorandum Decision.

Plaintiffs are accurate in their introduction, that is on the 23rd of December,2009 the court issued its Memorandum Decision and corrected that Memorandum Decision on approximately the 30th of December, 2009. The matter is awaiting the submission of the proposed final Judgment to be provided to the court upon receipt by counsel from a surveyor (Gale Dahlman) of the center line description of one of the easements as required by the Court's Memorandum Decision. It is anticipated that Judgment will be filed within the next thirty (30) days. In the interim, the Plaintiffs have filed a Motion for Reconsideration and Amendment of the Memorandum Decision.

The conundrum faced by the court in this instance is that the trier effect (the court) was the Honorable James Michaud. The hearing Judge in this matter, Lansing Haynes, District Court Judge, did not have the opportunity to hear the trial in full, which trial lasted approximately four days. It appears that the Plaintiffs are requesting this court to overturn the findings of Judge Michaud, who was the trier of fact, took the evidence, observed the witnesses, and made his decision based upon the law, facts, evidence and his observations of the witnesses.

The Plaintiffs first argue the issue of merger as described in *Jolley vs. Idaho Securities, Inc.*, 90 Idaho 373 , 414P2d 879 (1966). Plaintiffs have misconstrued that case. The court in *Jolley* (Supra) at page 884, noted that the exception to the general rule of merger is "There is an exception to the rule stated, which is that the contract of conveyance is not merged upon execution of a deed where under the contract the rights are conferred collaterally and independent of the deed; there being no presumption that the party in accepting the deed intends to give up the covenants of which the deed is not a performance or satisfaction". In this case there was a contract for conveyance, and the execution of the deed simultaneously, which deed was later recorded. The terms set forth in the contract, (easements) which are in addition to the conveyance of the real property, survive in accordance with *Jolley*. In this case Judge Michaud found that the collateral stipulation regarding the easement was in addition to the deed, Exhibit 15 was of record, and put the world on notice.

The Plaintiffs then argue that the court erred in using the five year time period instead of the twenty year adverse possession time period. The court in its reasoning found that the rights vested prior to the legislature modifying the rights, and that those rights being vested could not otherwise be taken. This is an issue of first impression with the courts of the State of Idaho, there being no appellate court decision making that determination. Therefore the reasoned decision of Judge Michaud should stand.

Next, the Plaintiffs argue that the application of the recording statutes was erroneous under the facts of this case noting that they do not believe Sanders had the ability to grant an easement across the Worley Fire District portion. While Sanders may or may not have had such a right, he certainly had the right to grant an easement across the now Belstler property which was then the Henry property in terms of the agreements entered into between Sanders and Henry. It is important to note that Worley Fire District is not a party to this agreement, nor is there any evidence that they have objected to the easement as it crosses its property.

Next, the Plaintiffs argue that the court erred regarding the discussion of the elements of prescriptive easement on page 4 of its decision. The Plaintiff argue that the mere existence of a road is irrelevant to the elements of prescriptive easement. However, Plaintiffs fail to note that as to the requirement of open, notorious, continuous and interrupted use what lies on the face of the earth and the time period in which it lies on the fact of the earth goes directly to the issue of open and notorious. The facts are undisputed that the road in question was in place within the prescriptive time limit, and was used openly.

Next, the Plaintiffs argue that Judge Michaud's characterization of "Exhibit 15" was a serial grant of easement. That is a conclusion of law based upon the status of the law and the facts construed by Judge Michaud. It appears, again, that this is a collateral attack on the trier of fact in terms of interpretation of the documents ("Exhibit 15" which was admitted without objection by both parties).

Next, the Plaintiffs argue that the Joint Use and Maintenance Agreement controls over Plaintiffs "Exhibit 15". A close examination of the Joint Use and Maintenance Agreement, Plaintiffs' "Exhibit 18 and 19" clearly indicates it was simply an agreement for maintenance of a roadway, and

did not supercede any previously existing road, nor was there any surrender of any rights to the use of the road previously granted. Therefore Plaintiffs' argument that the Joint Use and Maintenance Agreement supercedes "Exhibit 15" must fail.

The Plaintiffs then argue that Judge Michaud failed to address the trial arguments and evidence related to the term "community road". Quite clearly, the term "community road" was some what ambiguous, and subject to interpretation based upon the facts introduced at trail. Again we see the Plaintiffs' attempt to have this court over rule the trier of fact, who reviewed all of the evidence and heard the testimony over a course of four days. The same is without merit.

The Plaintiffs then argue that the application of Idaho Code 55-313 is improper at this stage. The Plaintiffs, however, waived such argument because statements and argument were made, as well as a judicial recognition taken of Idaho Code 55-313 at the time of trial. Defendants also pointed out that issue in their pretrial brief and post trial memoranda. There was no objection at the time of trial for the court to examine that code section, which provides guidance to the court to prevent future legal disputes between the parties (judicial economy). Therefore the Plaintiffs' argument must fail.

Finally the Plaintiffs argue that there was no delivery of the Grant of Easement from Henry to Merwin. However, as Plaintiffs point out in their own brief, citing the *Estate of Skvorak*, 140 Idaho at 21, page 204 (apparently of the Pacific Reporter) that the real test of delivery of a deed is this: "Did the grantor by his acts or words or both intend to divest himself of title? If so, the deed is delivered." Judge Michaud, taking all of the facts and evidence into consideration, determined that it was Sanders intention to divest himself of title, both as to Henry and as to Merwin for the purpose of conveying easements. The facts are uncontroverted to that effect.

Therefore Defendants respectfully request that the court reject the Motion for Reconsideration and the Amendment of Memorandum Decision.

DATED this 10th day of March, 2010.

CHARLES M. DODSON
ATTORNEY AT LAW

I hereby certify that on the 16th day of

March, 2010, a true and correct copy
of the foregoing was:
transmitted, via facsimile:
to:

ARTHUR B. MACOMBER
ATTORNEY AT LAW
VIA FACSIMILE 664-9933

CHARLES M. DODSON
ATTORNEY AT LAW

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:

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CLERK DISTRICT COURT
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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife, Plaintiffs,	Case No: **CV 2007-2523**
v.	
KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, Defendants.	**PLAINTIFFS' REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR RECONSIDERATION AND AMENDMENT OF MEMORANDUM DECISION**
KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, Counter Plaintiffs,	**Date:** **March 16, 2010** **Time:** **3:30 P.M.** **Venue:** **Kootenai County Courthouse**
v.	**The Honorable Judge Haynes**
CHRIS BELSTLER and DANA BELSTLER, husband and wife, Counter Defendants.	

COME NOW, Plaintiffs and Counter Defendants, CHRIS BELSTLER and DANA BELSTLER, by and through their attorney of record, Arthur B. Macomber, and provide their Reply to Defendants' Brief in Opposition to Motion for Reconsideration and Amendment of Memorandum Decision filed late with this Court on March 10, 2010.

ARGUMENT

In reply to defendants' opposition, there should be no concern by this Court that the trier of fact was the Honorable James Michaud, now retired. It is not necessary for the current Judge Haynes to hear the trial in full, because this trial is primarily concerned with judicial analysis of documents and interpretation of those documents under law. The oral evidence presented at trial and the Judge's analysis of witnesses while testifying is almost completely irrelevant to the outcome of this case. If this Court simply reads the law, the exhibit documents, and the pleadings submitted by counsel, plaintiffs believe a proper and different decision would be rendered in plaintiffs' favor.

As far as defendants' and the Court's previous arguments related to merger and the *Jolley* case, 90 Idaho 373 (1966), there were no collateral rights conferred in the purported easement that is plaintiffs Exhibit 15. There is probably nothing more *non-collateral* in real property law than an easement that runs with the land and is appurtenant to title. A collateral matter would be, as in *Jolley*, the provision of an abstract of title, or, as in *Sainsbury Constr. Co. v. Quinn*, 137 Idaho 269, 273 (2002) (rev. denied), an agreement to construct a residence.

Strangely, in their argument regarding merger in the deed, defendants state on page 2, at paragraph 4 of their Brief in Opposition that the Sanders-Henry contract for conveyance and the execution of the Henry deed were done simultaneously, but that it is of no consequence that plaintiff's Exhibit 15 was executed later. Further, and confusedly, on page 3, at paragraph 2 of defendants' Brief in Opposition, defendants claim Sanders "had the right to grant an easement across the now Belstler property," *even though plaintiff's Exhibit 15 has no such easement.* The only purported Sanders' grant in Exhibit 15 is across Worley Fire District property Sanders' no longer owned! Judge Haynes can read these facts himself. The fact that Worley Fire District is

not a party to the case or may have never objected to anyone crossing its property is irrelevant to whether Sanders had power to convey an easement over property he no longer owned. It is black letter Idaho law that Sanders could not convey an easement to Henry across property that Sanders did not own, and thus Sanders' consideration to Henry for the purported Henry to Merwin grant in plaintiffs Exhibit 15 must fail. Defendants fail at articulating an argument around this conclusion given Idaho law and the documents in this case.

As to the purported "delivery" of plaintiffs' exhibit 15 to Merwin, Judge Haynes can read the Deposition of Mr. Henry, exhibit 26, related to his lack of knowledge of what he was signing, and then his acceptance after five deposition pages of coaxing and pressure. Henry, Sanders, and Merwin did not testify at trial, and Judge Michaud erred in this judgment regarding delivery, something Judge Haynes is perfectly capable of determining from documents in evidence when reconsidering the Memorandum Decision.

As far as the five-year time period for adverse possession defendants argued and Judge Michaud concluded to be previously vested and applicable here, as opposed to the use of the twenty-year adverse possession time period as passed by the Legislature in 2006, it should be clear to this Court that the current Idaho Code section 5-203 requires defendants for their counterclaim be "seized or possessed of the property in question within 20 years *before the commencement of the action*," and since their counterclaim did not commence until mid-2007 the twenty-year time period should apply. There is no law or reason behind defendants' claim that an issue of first impression incorrectly decided should stand, if the black letter of the statutory law calls for a different conclusion. This conclusion would unnecessarily encourage appeal.

Further, defendants err when they claim that the mere existence of the road is relevant to elements of prescriptive easement, because, as they argue, that fact "goes directly to the issue of

open and notorious." In fact, those elements of open and notorious are related to the *use* of the property by claimant/defendants, and not open and notorious *existence* of the road itself. Because defendants failed to show open and notorious use for the twenty-year period, prescriptive easements should not have been found by Judge Michaud. This finding was clear error.

Defendants claim plaintiffs make a "collateral attack on the trier of fact in terms of interpretation of the documents." This is absurd. Plaintiffs request reconsideration of the decision given the facts and documentation in the case, and this should not be mischaracterized as a collateral attack on Judge Michaud.

Plaintiffs pray Judge Haynes undertakes "a close examination" of the Joint Use and Maintenance Agreement at plaintiffs exhibits 18 and 19, because plaintiffs believe it is clear that said Agreement supersedes any purported grants made in plaintiffs Exhibit 15. There is no evidence before the Court that the parties to the Joint Use and Maintenance Agreement did not execute the provision at issue in that document in order to clear up confusion caused by plaintiffs' Exhibit 15.

Plaintiffs believe Judge Michaud ignored the clear documentary evidence at plaintiffs' exhibit 32 related to the term "community road." In fact, Judge Michaud did not consider in his Memorandum Decision at page 6 plaintiffs' exhibit 32 at all, and it does not appear in that decision, even though it should be determinative as to the definition of "community road" for its meaning in plaintiffs' exhibit 15, which is a document created by Sanders or his agent at Sanders' direction. It is clear that Sanders' designated road direction referenced in plaintiffs' exhibit 15 is east-to-west, not west-to-east up Chandler Lane from Rockford Bay Road.

Finally, Judge Michaud's decision to enjoin plaintiffs' potential future use of Idaho Code section 55-313 was not argued at trial. Was it mentioned in defendants' briefs? Yes. Were the

cases available under Idaho law related to servient estate movement of easements considered or argued? No. For example, while there is no case law under Idaho Code section 55-313, there was no discussion of case law under Idaho Code section 42-1207, which addresses servient estate relocation of irrigation ditches, such as *Savage Lateral Ditch Water Users Association v. Pulley*, 125 Idaho 237 (1993). Nor was the case of *Simonson v. Moon*, 72 Idaho 39 (1951) discussed, which includes discussion of how to arrive at whether "injury" has occurred due to a servient estate's acts to relocate. Nor was the significance argued of the fact that Idaho Code section 42-1207 requires consent of the dominant estate, whereas Idaho Code section 55-313 does not. No Court should enjoin based on facts and law not fully briefed and argued, and this Court should remove the injunction from the Memorandum Decision in this case.

DATED this 12th day of March, 2010.

ARTHUR B. MACOMBER
Attorney at Law

CERTIFICATE OF SERVICE

I am familiar with my firm's capability to hand-deliver and deliver by facsimile documents and its practice of placing its daily mail, with first-class postage prepaid thereon, in a designated area for deposit in a U.S. mailbox in the City of Coeur d'Alene, Idaho, after the close of the day's business. On the date shown below, I served:

PLAINTIFFS' REPLY TO DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR RECONSIDERATION AND AMENDMENT OF MEMORANDUM DECISION

Charles M. Dodson	[ ] U.S. Mail, Postage Prepaid
Attorney at Law	[ ] Hand Delivered
1424 Sherman Avenue, Suite 300	[ ] Overnight Mail
Coeur d'Alene, ID 83814	[X] Facsimile: 208-666-9211
Telephone: 208-664-1577	

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 12th day of March, 2010.

Arthur B. Macomber
Plaintiffs' Attorney
Macomber Law, PLLC

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED

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CLERK DISTRICT COURT
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Attorney for Plaintiffs/Counter Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife, Plaintiffs, v. KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, Defendants.	Case No: **CV 2007-2523** **JUDGMENT**
KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, Counter Plaintiffs, v. CHRIS BELSTLER and DANA BELSTLER, husband and wife, Counter Defendants.	

JUDGMENT

This matter came before the Court, trial concluding on September 24, 2009, the Honorable James R. Michaud presiding. Plaintiffs/Counter Defendants Belstler's Motion for Reconsideration and Amendment of Memorandum Decision came on regularly for hearing before the Court on **March 16, 2010 at 3:30 p.m.**, the Honorable Lansing L. Haynes, District

Judge presiding. Arthur B. Macomber appeared for Plaintiffs/Counter Defendants. Charles M. Dodson appeared for Defendants/Counter Plaintiffs. This Court entered its Memorandum Decision and Order Re: Plaintiffs' Motion to Reconsider on April 21, 2010.

Based upon the Court record and Memorandum Decision, the Court does hereby,

ORDER, ADJUDGE, AND DECREE that,

1. Plaintiffs Belstler are the owners of that certain real property described as follows:

All that portion of Government Lot 1, Section 17, Township 48 North, Range 4 West, Boise Meridian, described as follows: Beginning at the Northeast corner of said Government Lot 1; thence North 89°36' West, along the North line of said Government Lot 1, 330.2 feet; thence South 0°24' West, to a point on the North line of Rockford Bay Road; thence Easterly along said North line of Rockford Bay Road to a point which bears South 0°24' West, from the Point of Beginning; thence North 0°24' East, to the Point of Beginning.

2. Defendants Conine are the owners of that certain real property described as follows:

That portion of the Northwest Quarter of the Northeast Quarter of Section 17, Township 48 North, Range 4 W.B.M., Kootenai County, State of Idaho, described as follows: Beginning at the Northwest corner of the Northwest Quarter of the Northeast Quarter; thence continuing along the North side of the Northwest Quarter of the Northeast Quarter, a distance of 510 feet; thence South on a line parallel with the West line of the Northwest Quarter of the Northeast Quarter to the Northerly boundary of Terrace Addition to Rockford Bay Summer Homes; thence in a Westerly direction along the Northerly boundary line of said Terrace Addition to the West line of the Northwest Quarter of the Northeast Quarter of Section 17; thence North along said West line to the Northwest corner of the Northwest Quarter of the Northeast Quarter to the point of beginning; EXCEPT therefrom as a right of way, the existing County Road, also reserving, if required, a 15 foot easement South of the County Road, for an entrance to Lots 3 and 4 in Terrace Addition;

3. No express easements exist across Belstler's real property benefitting Conine's real property;

4. No prescriptive easements exist across Plaintiff Belstler's property in the area depicted on the Survey recorded on November 25, 2005 as Instrument No. 1997493000 in Kootenai County, State of Idaho, as "Dirt Road C/L" or "Road Easement" abutting Belstler's southern border as identified at trial in Plaintiffs' Exhibit 23.

5. Defendants Conine's claim for a southerly easement by prescription is dismissed.

6. Title is ordered quieted for Plaintiffs Belstler in the area comprising both southerly easements on the Survey recorded on November 25, 2005 as Instrument No. 1997493000 in Kootenai County, State of Idaho.

7. Defendants Conine have established a prescriptive easement upon Belstler's real property in an area surveyed as shown in Exhibit "A" to this Judgment, which centerline is depicted on the Survey recorded on November 25, 2005 as Instrument No. 1997493000 in Kootenai County, State of Idaho within the area identified as "Private Access Road" on Plaintiffs' Exhibit 23.

8. The quiet title claims of Plaintiffs Belstler are dismissed with respect to the "Private Access Road" northerly easement depicted on the Survey recorded on November 25, 2005 as Instrument No. 1997493000 in Kootenai County, State of Idaho, but granted as to the most northern easement above said "Private Access Road," which most northern easement's centerline shows distances referenced as C12, L3, C11, and C10.

9. The nature, length, width and location of said prescriptive easement over the private drive benefitting Defendants Conine's property is as described and depicted on the survey attached hereto as Exhibit "A."

10. Plaintiffs Belstler are denied any right to change the location of the Conine's prescriptive easement to the locations referred to on "Worksheet of Road Grades dated August 12, 2008" evidenced at trial as Exhibit "T," a copy of which is attached hereto as Exhibit "B."

11. The use of Conine's prescriptive easement is for year-round residential use only.

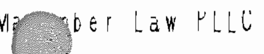
12. Defendants Conine are awarded their costs incurred in the defense of this action, but are denied an award of attorneys' fees. Plaintiffs Belstler shall pay their own fees and costs.

IT IS SO ORDERED and JUDGMENT is entered accordingly.

DATED this 3 day of June, 2010.

Lansing L. Haynes
Lansing L. Haynes
District Judge

225



CERTIFICATE OF SERVICE

I certify that I on the 4 day of June, 2010, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

JUDGMENT

Arthur B. Macomber
Law Office of Arthur B. Macomber
408 E. Sherman Avenue, Ste 215
Coeur d'Alene, ID 83814
FAX: 208-664-9933
Attorney for Plaintiffs

69

	Mailed Postage Prepaid
	Interoffice Mail
	Facsimile: 664-9933

Charles M. Dodson
Attorney at Law
1424 Sherman Ave., Suite 300
Coeur d'Alene, ID 83814
Telephone: 208-664-1577
FAX: 208-666-9211
Attorney for Defendants

70

	Mailed Postage Prepaid
	Interoffice Mail
	Facsimile: 666-9211

DANIEL J. ENGLISH
BY: Cathy Victorino
District Court Clerk

226

RECORD OF SURVEY

GOV'T LOT 1 OF SEC 17, T 48N, R 4W, BM

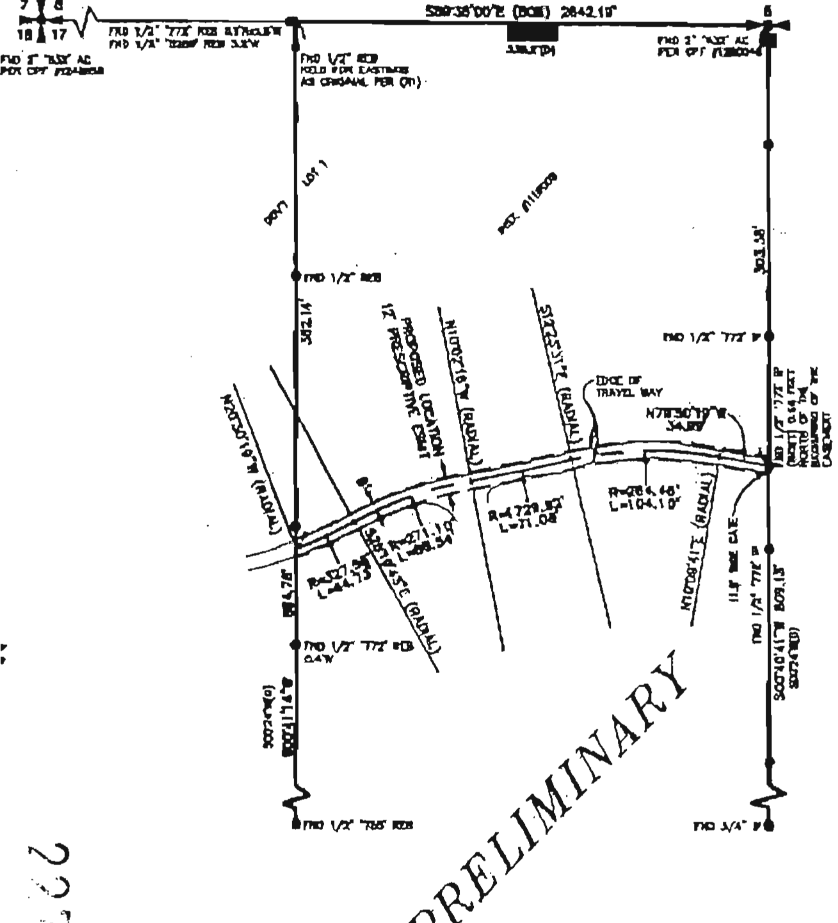
KOOTENAI COUNTY, IDAHO

BOOK ______ PAGE ______
INST # ______

Jun. 7. 2010 9:07AM Meyer Law PLLC No. 0031 P. 7

LEGEND

- ● =FOUND AS DESCRIBED
- ● =5/8"x24" REBAR W/STRATTON 10677' CAP SET FOR RS BK 28 PG 363
- (BOB)=BASIS OF BEARINGS
- (D) =DEED DIMENSION



SURVEYOR'S NARRATIVE:

THE PURPOSE OF THIS SURVEY WAS TO DOCUMENT THE LOCATION OF A PRESCRIPTIVE ACCESS EASEMENT AS DETERMINED BY THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI IN BELSTLER VS. CONINE, CASE #CV-07-2523. THIS SURVEY USED A RECORD OF SURVEY PREPARED BY STRATTON LAND SERVICES AND RECORDED IN BOOK 28, PAGE 388 TO SHOW THE EXTERIOR BOUNDARY AS DETERMINED BY THAT SURVEY. THE CENTERLINE OF THE PROPOSED EASEMENT IS BASED ON THE EXISTING TRAVEL WAY BASED ON VEGETATION GROWTH AND TIRE TRACKS AS LOCATED ON MAY 19TH, 2010.

ONLY SELECTED EASEMENTS AND IMPROVEMENTS ARE SHOWN ON THIS SURVEY. THIS SURVEY DOES NOT REFLECT ALL EASEMENTS OR IMPROVEMENTS THAT MAY AFFECT THIS PROPERTY.

DESCRIPTION (INST #1119008):

ALL THAT PORTION OF GOV. LOT 1, SECTION 17, TOWNSHIP 48 N., RANGE 4 W.B.M., DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST CORNER OF GOV. LOT 1; THENCE NORTH 89°38' WEST ALONG THE NORTH LINE OF SAID GOV. LOT 1, 330.2 FT.; THENCE SOUTH 0°24' WEST TO A POINT ON THE NORTH LINE OF ROCKFORD BAY ROAD; THENCE EASTERLY ALONG SAID NORTH LINE OF ROCKFORD BAY ROAD TO A POINT WHICH BEARS SOUTH 0°24' WEST FROM THE POINT OF BEGINNING; THENCE NORTH 0°24' EAST TO THE POINT OF BEGINNING.

SUBJECT TO: ANY AND ALL EASEMENTS, CONDITIONS AND RESTRICTIONS OF RECORD AND EASEMENTS FOR INGRESS AND EGRESS.

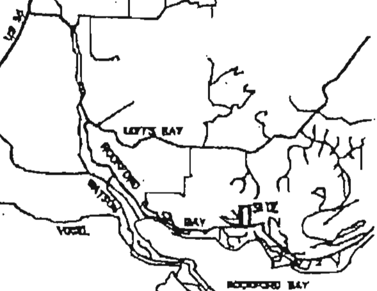
DESCRIPTION FOR PROPOSED EASEMENT:

A STRIP OF LAND, 12 FEET IN WIDTH, LYING WITHIN THAT PARCEL AS DESCRIBED IN A SALES AGREEMENT AS RECORDED WITH KOOTENAI COUNTY UNDER INST. #1119008 ON THE 8TH OF JUNE, 1988 AND LOCATED IN GOVERNMENT LOT 1 OF SECTION 17, TOWNSHIP 48 NORTH, RANGE 4 WEST OF THE BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO. SAID STRIP OF LAND LYING 6 FEET EITHER SIDE OF THE FOLLOWING DESCRIBED CENTERLINE:

COMMENCING AT THE NORTHEAST CORNER OF SAID GOVERNMENT LOT 1, SAID CORNER BEARS SOUTH 89° 38' 00" EAST 2642.19 FEET FROM THE NORTHWEST CORNER OF SAID SECTION;
THENCE SOUTH 0° 40' 41" WEST ALONG THE EASTERLY LINE OF SAID GOVERNMENT LOT 1 AND SAID PARCEL 303.38 FEET TO THE TRUE POINT OF BEGINNING FOR SAID CENTERLINE AND SAID STRIP OF LAND;

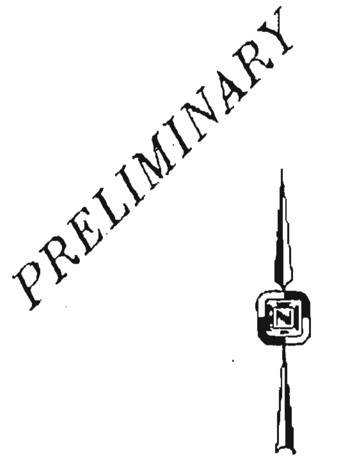
THENCE NORTH 78° 50' 19" WEST 34.99 FEET TO THE BEGINNING OF A 264.48 FOOT RADIUS TANGENT CURVE TO THE LEFT;
THENCE WESTERLY ALONG SAID CURVE 104.10 FEET TO THE BEGINNING OF A 1729.92 FOOT RADIUS TANGENT CURVE TO THE RIGHT;
THENCE SOUTHWESTERLY ALONG SAID CURVE 71.08 FEET TO THE BEGINNING OF A 271.10 FOOT RADIUS TANGENT CURVE TO THE LEFT;
THENCE SOUTHWESTERLY ALONG SAID CURVE 88.54 FEET TO THE BEGINNING OF A 327.58 FOOT RADIUS TANGENT CURVE TO THE RIGHT;
THENCE SOUTHWESTERLY ALONG SAID CURVE 44.73 FEET TO A POINT ON THE WESTERLY BOUNDARY OF SAID PARCEL, SAID POINT BEARS SOUTH 0° 41' 14" WEST 382.14 FEET FROM THE NORTHWEST CORNER OF SAID PARCEL AND IS THE END OF SAID CENTERLINE AND SAID STRIP OF LAND.

THE SIDELINES OF SAID STRIP OF LAND ARE LENGTHENED OR SHORTENED AS NECESSARY TO BE BOUND BY SAID PARCEL.



VICINITY SKETCH
NOT TO SCALE

PRELIMINARY



SCALE 1" = 60'

BASIS OF BEARINGS:
DEED-INST #1119008

EQUIPMENT USED:
RTK GPS
5" TOTAL STATION

SURVEYS REVIEWED:

- R1) RECORD OF SURVEY BY WEBB IN 1979 BK 1 PG 284
- R2) RECORD OF SURVEY BY MECKEL IN 1988 BK 7 PG 55
- R3) RECORD OF SURVEY BY DAHLMAN IN 2005 BK 24 PG 16
- R4) RECORD OF SURVEY BY STRATTON IN 2010 BK 28 PG 388

SURVEYOR'S CERTIFICATE:

I, ROBERT L. STRATTON, PROFESSIONAL LAND SURVEYOR #10677 OF THE STATE OF IDAHO, HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT SURVEY MADE UNDER MY DIRECT SUPERVISION IN ACCORDANCE WITH THE LAWS OF THE STATE OF IDAHO.

SURVEY FOR

BELSTLER

INDEX

1/4,1/4	SEC	T.	R.
	17	48N	4W

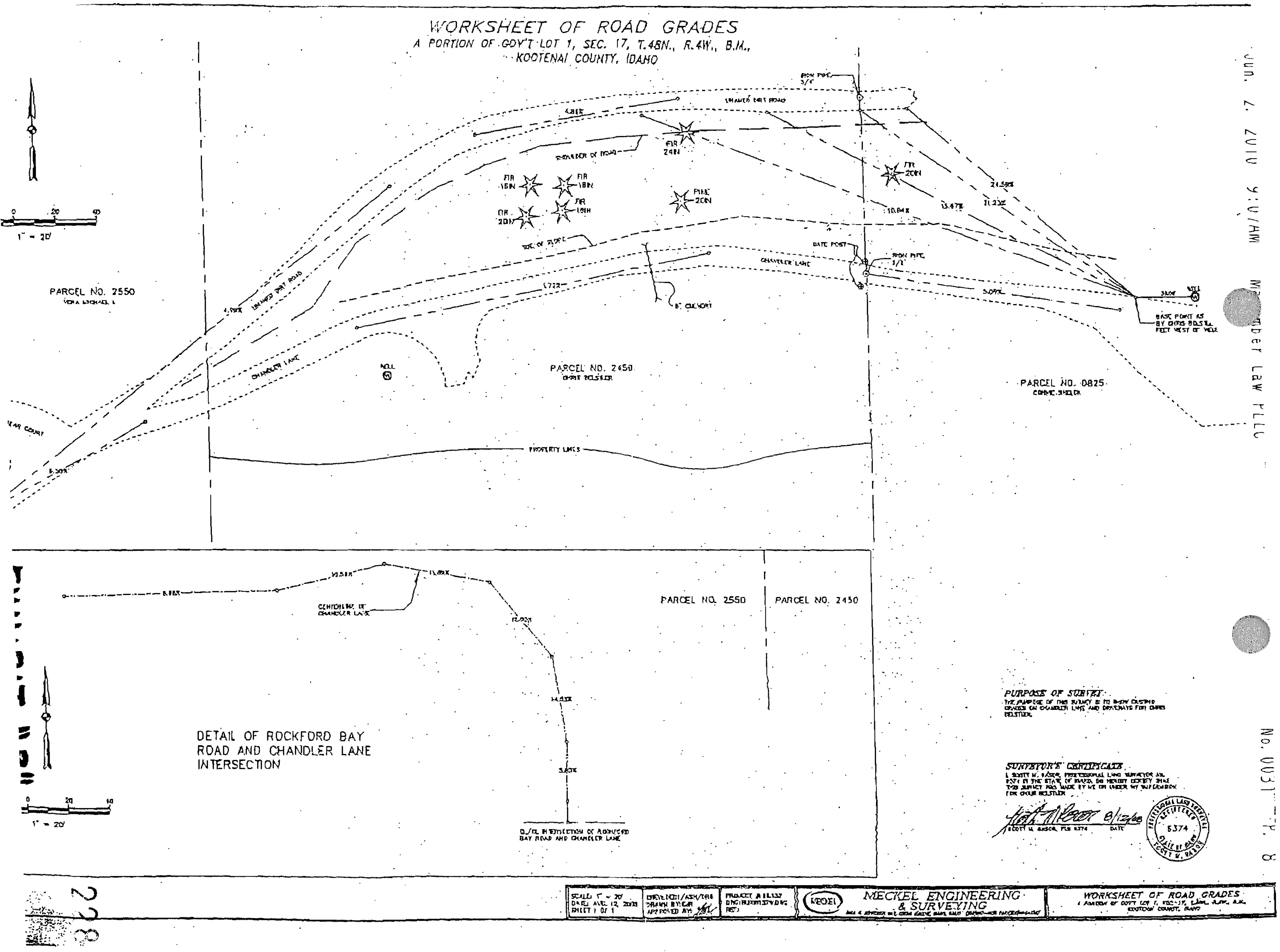
RECORDING CERTIFICATE

COUNTY OF KOOTENAI
STATE OF IDAHO
FILED FOR RECORD THIS ________ DAY OF ________, 2010 AT ____ . ____M. AND RECORDED IN BOOK ____ OF SURVEYS AT PAGE ______ AT THE REQUEST OF STRATTON LAND SERVICES, INC.

KOOTENAI COUNTY RECORDER ________ INST. NO. ________
BY ________ FEE ________

STRATTON LAND SERVICES, INC.

09005-S.DWG	
DATE: 5/28/10	SHT. 1 OF 1
DRAWN BY: RLS	PROJ # 09005



WORKSHEET OF ROAD GRADES
A PORTION OF GOV'T LOT 1, SEC. 17, T.48N., R.4W., B.M.,
KOOTENAI COUNTY, IDAHO
1" = 20'
PARCEL NO. 2550
PARCEL NO. 2450
PARCEL NO. 0825
PROPERTY LINES
DETAIL OF ROCKFORD BAY ROAD AND CHANDLER LANE INTERSECTION
PARCEL NO. 2550
PARCEL NO. 2450
1" = 20'
PURPOSE OF SURVEY:
SURVEYOR'S CERTIFICATE
6374
MECKEL ENGINEERING & SURVEYING
WORKSHEET OF ROAD GRADES
JUN. 7. 2010 9:07AM
No. 0031 P. 8

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED:

2010 JUL 14 PM 4:48

CLERK DISTRICT COURT
DEPUTY

ARTHUR B. MACOMBER, Attorney at Law
408 E. Sherman Avenue, Suite 215
Coeur d'Alene ID 83814
Telephone (208) 664-4700
Facsimile (208) 664-9933
State Bar #7370
Attorney for Plaintiffs/Counter Defendants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife, PLAINTIFFS, VS. KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, DEFENDANTS.	CASE NUMBER: CV-07-2523 AMENDED JUDGMENT
KAREN SHELER CONINE and HOWARD CONINE, husband and wife, COUNTER PLAINTIFFS, VS. CHRIS BELSTLER and DANA BELSTLER, husband and wife, COUNTER DEFENDANTS.	

AMENDED JUDGMENT

This matter came before the Court, trial concluding on September 24, 2009, the Honorable James R. Michaud presiding. Plaintiffs/Counter Defendants Belstler's Motion for Reconsideration and Amendment of Memorandum Decision came on regularly for hearing before the Court on **March 16, 2010 at 3:30 p.m.**, the Honorable Lansing L. Haynes, District Judge presiding. Arthur B. Macomber appeared for Plaintiffs/Counter Defendants. Charles M. Dodson appeared for Defendants/Counter Plaintiffs. This Court entered its Memorandum Decision and Order Re: Plaintiffs' Motion to Reconsider on April 21, 2010.

Based upon the Court record and Memorandum Decision, the Court does hereby,

ORDER, ADJUDGE, AND DECREE that,

1. Plaintiffs Belstler are the owners of that certain real property described as follows:

All that portion of Government Lot 1, Section 17, Township 48 North, Range 4 West, Boise Meridian, described as follows: Beginning at the Northeast corner of said Government Lot 1; thence North 89°36' West, along the North line of said Government Lot 1, 330.2 feet; thence South 0°24' West, to a point on the North line of Rockford Bay Road; thence Easterly along said North line of Rockford Bay Road to a point which bears South 0°24' West, from the Point of Beginning; thence North 0°24' East, to the Point of Beginning.

2. Defendants Conine are the owners of that certain real property described as follows:

That portion of the Northwest Quarter of the Northeast Quarter of Section 17, Township 48 North, Range 4 W.B.M., Kootenai County, State of Idaho, described as follows: Beginning at the Northwest corner of the Northwest Quarter of the Northeast Quarter; thence continuing along the North side of the Northwest

Quarter of the Northeast Quarter, a distance of 510 feet; thence South on a line parallel with the West line of the Northwest Quarter of the Northeast Quarter to the Northerly boundary of Terrace Addition to Rockford Bay Summer Homes; thence in a Westerly direction along the Northerly boundary line of said Terrace Addition to the West line of the Northwest Quarter of the Northeast Quarter of Section 17; thence North along said West line to the Northwest corner of the Northwest Quarter of the Northeast Quarter to the point of beginning; EXCEPT therefrom as a right of way, the existing County Road, also reserving, if required, a 15 foot easement South of the County Road, for an entrance to Lots 3 and 4 in Terrace Addition;

3. No express easements exist across Belstler's real property benefitting Conine's real property;

4. No prescriptive easements exist across Plaintiff Belstler's property in the area depicted on the Survey recorded on November 25, 2005 as Instrument No. 1997493000 in Kootenai County, State of Idaho, as "Dirt Road C/L" or "Road Easement" abutting Belstler's southern border as identified at trial in Plaintiffs' Exhibit 23.

5. Defendants Conine's claim for a southerly easement by prescription is dismissed.

6. Title is ordered quieted for Plaintiffs Belstler in the area comprising both southerly easements on the Survey recorded on November 25, 2005 as Instrument No. 1997493000 in Kootenai County, State of Idaho.

7. Defendants Conine have established a prescriptive easement upon Belstler's real property in an area surveyed as shown in Exhibit "A" to this Judgment, which centerline is depicted on the Survey recorded on November 25, 2005 as Instrument No. 1997493000 in Kootenai County, State of Idaho within the area identified as "Private Access Road" on Plaintiffs' Exhibit 23.

8. The quiet title claims of Plaintiffs Belstler are dismissed with respect to the "Private Access Road" northerly easement depicted on the Survey recorded on November 25, 2005 as Instrument No. 1997493000 in Kootenai County, State of Idaho, but granted as to the most northern easement above said "Private Access Road," which most northern easement's centerline shows distances referenced as C12, L3, C11, and C10.

9. The nature, length, width and location of said prescriptive easement over the private drive benefitting Defendants Conine's property is as described and depicted on the survey attached hereto as Exhibit "A."

10. Plaintiffs Belstler are denied any right to change the location of the Conine's prescriptive easement to the locations referred to on "Worksheet of Road Grades dated August 12, 2008" evidenced at trial as Exhibit "T," a copy of which is attached hereto as Exhibit "B."

11. The use of Conine's prescriptive easement is for year-round residential use only.

12. Defendants Conine are awarded their costs in the amount of TWO THOUSAND FIVE HUNDRED NINETY SEVEN DOLLARS AND FORTY SEVEN CENTS ($2,597.47), but are denied an award of attorneys' fees. Plaintiffs Belstler shall pay their own fees and costs.

IT IS SO ORDERED and JUDGMENT is entered accordingly, Nunc Pro TUNC to June 3rd, 2010.

DATED this 13 day of July, 2010.

Lansing L. Haynes
Lansing L. Haynes
District Judge

I hereby certify that on the 14 day of July, 2010, a true and correct copy of the foregoing was transmitted, via facsimile:
to:
ARTHUR B. MACOMBER #581
FACSIMILE 664-9933

CHARLES M. DODSON #582
FACSIMILE 666-9211

DANIEL J. ENGLISH

DEPUTY CLERK
Linda Sheldon

APPROVED AS TO FORM

DATED: July 6, 2010

ARTHUR B. MACOMBER
ATTORNEY FOR PLAINTIFFS

DATED: June 22 2010

CHARLES M. DODSON
ATTORNEY FOR DEFENDANTS

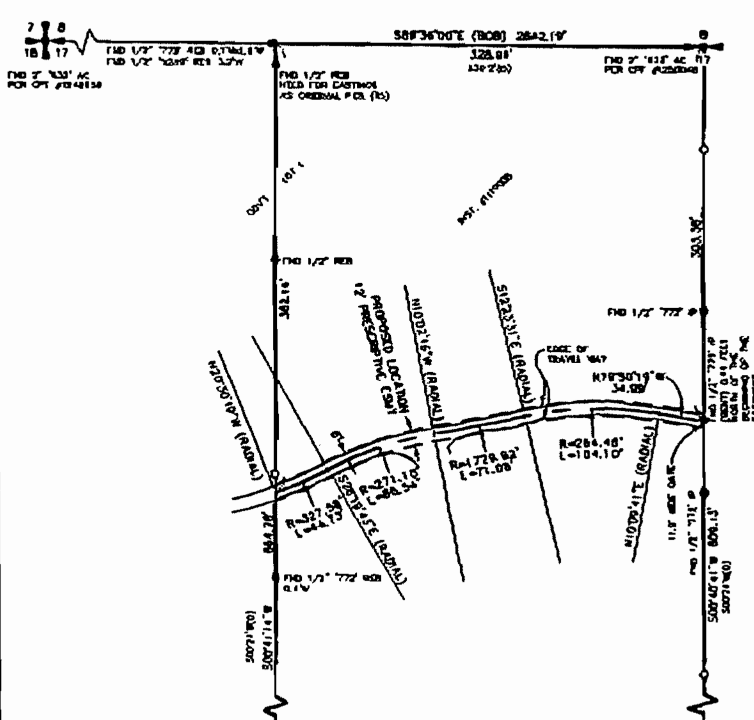
RECORD OF SURVEY

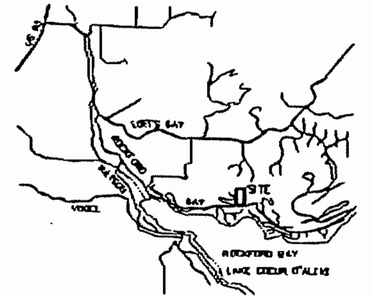
GOV'T LOT 1 OF SEC 17, T 48N, R 4W, BM
KOOTENAI COUNTY, IDAHO

BOOK 26 PAGE 388
INST # 2269019000

LEGEND

● –FOUND AS DESCRIBED
○ –5/8"x24" REBAR W/STRATTON 10877 CAP SET FOR RS BK 28 PG 385
(BOB)–BASIS OF BEARINGS
(D) –DEED DIMENSION





VICINITY SKETCH
NOT TO SCALE

SURVEYOR'S NARRATIVE:

THE PURPOSE OF THIS SURVEY WAS TO DOCUMENT THE LOCATION OF A PRESCRIPTIVE ACCESS EASEMENT AS DETERMINED BY THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI, IN BELSTLER VS. CONNE, CASE #CV-07-2323. THIS SURVEY USED A RECORD OF SURVEY PREPARED BY STRATTON LAND SERVICES AND RECORDED IN BOOK 28 PAGE 385 TO SHOW THE EXTERIOR BOUNDARY AS DETERMINED BY THAT SURVEY. THE CENTERLINE OF THE PROPOSED EASEMENT IS BASED ON THE EXISTING TRAVEL WAY BASED ON VEGETATION GROWTH AND TIRE TRACKS AS LOCATED ON MAY 19TH, 2010.

ONLY SELECTED EASEMENTS AND IMPROVEMENTS ARE SHOWN ON THIS SURVEY. THIS SURVEY DOES NOT REFLECT ALL EASEMENTS OR IMPROVEMENTS THAT MAY AFFECT THIS PROPERTY.

DESCRIPTION (INST #1119008):

ALL THAT PORTION OF GOV. LOT 1, SECTION 17, TOWNSHIP 48 N., RANGE 4 W.B.M. DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHEAST CORNER OF GOV. LOT 1; THENCE NORTH 89°36' WEST ALONG THE NORTH LINE OF SAID GOV. LOT 1, 330.2 FT.; THENCE SOUTH 0°24' WEST TO A POINT ON THE NORTH LINE OF ROCKFORD BAY ROAD; THENCE EASTERLY ALONG SAID NORTH LINE OF ROCKFORD BAY ROAD TO A POINT WHICH BEARS SOUTH 0°24' WEST FROM THE POINT OF BEGINNING, THENCE NORTH 0°24' EAST TO THE POINT OF BEGINNING.

SUBJECT TO: ANY AND ALL EASEMENTS, CONDITIONS AND RESTRICTIONS OF RECORD AND EASEMENTS FOR INGRESS AND EGRESS.

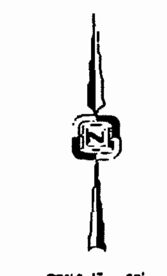
DESCRIPTION FOR PROPOSED EASEMENT:

A STRIP OF LAND, 12 FEET IN WIDTH, LYING WITHIN THAT PARCEL AS DESCRIBED IN A SALES AGREEMENT AS RECORDED WITH KOOTENAI COUNTY UNDER INST. #1119008 ON THE 8TH OF JUNE, 1988 AND LOCATED IN GOVERNMENT LOT 1 OF SECTION 17, TOWNSHIP 48 NORTH, RANGE 4 WEST OF THE BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, SAID STRIP OF LAND LYING 6 FEET EITHER SIDE OF THE FOLLOWING DESCRIBED CENTERLINE:

COMMENCING AT THE NORTHEAST CORNER OF SAID GOVERNMENT LOT 1, SAID CORNER BEARS SOUTH 89° 36' 00" EAST 2842.19 FEET FROM THE NORTHWEST CORNER OF SAID SECTION;
THENCE SOUTH 0° 40' 41" WEST ALONG THE EASTERLY LINE OF SAID GOVERNMENT LOT 1 AND SAID PARCEL 303.38 FEET TO THE TRUE POINT OF BEGINNING FOR SAID CENTERLINE AND SAID STRIP OF LAND;

THENCE NORTH 79° 50' 19" WEST 34.99 FEET TO THE BEGINNING OF A 264.48 FOOT RADIUS TANGENT CURVE TO THE LEFT;
THENCE WESTERLY ALONG SAID CURVE 104.10 FEET TO THE BEGINNING OF A 1729.92 FOOT RADIUS TANGENT CURVE TO THE RIGHT;
THENCE SOUTHWESTERLY ALONG SAID CURVE 71.08 FEET TO THE BEGINNING OF A 271.10 FOOT RADIUS TANGENT CURVE TO THE LEFT;
THENCE SOUTHWESTERLY ALONG SAID CURVE 86.34 FEET TO THE BEGINNING OF A 327.58 FOOT RADIUS TANGENT CURVE TO THE RIGHT;
THENCE SOUTHWESTERLY ALONG SAID CURVE 44.73 FEET TO A POINT ON THE WESTERLY BOUNDARY OF SAID PARCEL, SAID POINT BEARS SOUTH 0° 41' 14" WEST 382.14 FEET FROM THE NORTHWEST CORNER OF SAID PARCEL AND IS THE END OF SAID CENTERLINE AND SAID STRIP OF LAND.

THE SIDELINES OF SAID STRIP OF LAND ARE LENGTHENED OR SHORTENED AS NECESSARY TO BE BOUND BY SAID PARCEL.



SCALE 1" = 60'
0' 60' 120' 180'

BASIS OF BEARINGS:
DEED–INST #1119008

EQUIPMENT USED:
RTK GPS
5" TOTAL STATION

SURVEYS REVIEWED:

(R1) RECORD OF SURVEY BY WEBB IN 1979 BK 1 PG 284
(R2) RECORD OF SURVEY BY NECKEL IN 1988 BK 7 PG 53
(R3) RECORD OF SURVEY BY DAHLMAN IN 2005 BK 24 PG 18
(R4) RECORD OF SURVEY BY STRATTON IN 2010 BK 28 PG 385

SURVEYOR'S CERTIFICATE:

I, ROBERT L. STRATTON, PROFESSIONAL LAND SURVEYOR #10877 OF THE STATE OF IDAHO, HEREBY CERTIFY THAT THIS IS A TRUE AND CORRECT SURVEY MADE UNDER MY DIRECT SUPERVISION IN ACCORDANCE WITH THE LAWS OF THE STATE OF IDAHO.

SURVEY FOR

BELSTLER

INDEX

1/4,1/4	SEC	T.	R.
	17	48N	4W

RECORDING CERTIFICATE

COUNTY OF KOOTENAI
STATE OF IDAHO
FILED FOR RECORD THIS 14 DAY OF JUNE, 2010 AT 2:11 P.M. AND RECORDED IN BOOK 26 OF SURVEYS AT PAGE 388
AT THE REQUEST OF STRATTON LAND SERVICES, INC.
Daniel J. English — KOOTENAI COUNTY RECORDER
2269019000 — INST. NO.
BY Jessica Reid
$5.00 FEE

STRATTON LAND SERVICES, INC.

08005–3.DWG
DATE: 3/28/10 | SHT. 1 OF 1
DRAWN BY: RLS | PROJ # 09005

WORKSHEET OF ROAD GRADES

A PORTION OF GOV'T LOT 1, SEC. 17, T.48N., R.4W., B.M.,
KOOTENAI COUNTY, IDAHO

SHOULDER OF ROAD

FIR 24IN

FIR 18IN

FIR 16IN

FIR 20IN

FIR 16IN

PINE 20IN

FIR 20IN

TOE OF SLOPE

CHANDLER LANE

GATE POST

IRON PIPE

PARCEL NO. 2550

PARCEL NO. 2450

CHRIS BOLSTLER

WELL

PARCEL NO. 0825

PROPERTY LINES

DETAIL OF ROCKFORD BAY ROAD AND CHANDLER LANE INTERSECTION

PARCEL NO. 2550

PARCEL NO. 2450

CENTERLINE OF CHANDLER LANE

PURPOSE OF SURVEY

SURVEYOR'S CERTIFICATE

6374

MECKEL ENGINEERING & SURVEYING

WORKSHEET OF ROAD GRADES

Jul. 7. 2010 3:21PM M[illegible]er Law PLLC No. 0118 P. 8/8

STATE OF IDAHO } SS
COUNTY OF KOOTENAI
FILED: 31007 31031

2010 JUL 16 PM 2:58

CLERK DISTRICT COURT

DEPUTY

Arthur B. Macomber, Attorney at Law
408 E. Sherman Avenue, Suite 215
Coeur d'Alene, Idaho 83814
Telephone: (208) 664-4700
Facsimile (208) 664-9933
Email address: art@macomberlaw.com
State Bar #7370
Attorney for Appellants

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife, Plaintiffs/Appellants, v. KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, Defendants/Respondents. ______________________ KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, Counter Plaintiffs/Respondents, v. CHRIS BELSTLER and DANA BELSTLER, husband and wife, Counter Defendants/Appellants.	)	Supreme Court Docket # _________ Case No: **CV-2007-2523** NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENTS, KAREN SHELER (CONINE) AND HOWARD CONINE; AND THOSE PARTIES' ATTORNEY, CHARLES M. DODSON, 1424 SHERMAN AVE., SUITE 300, COEUR D'ALENE, IDAHO, 83814; AND THE CLERK OF THE ABOVE-ENTITLED COURT:

NOTICE IS HEREBY GIVEN THAT:

1. The above-named plaintiffs-appellants, CHRIS BELSTLER and DANA BELSTLER hereby appeal against the above named defendants-respondents CONINE to the Idaho State Supreme Court from the Amended Final Judgment (nunc pro tunc) entered in the above-entitled action on the 4th day of June 2010, Honorable Judge Lansing L. Haynes presiding.

2. That the parties hereby timely appeal to the Idaho Supreme Court pursuant to Appellate Rule 14(a), and the judgment described in paragraph one above is an appealable order pursuant to Idaho Appellate Rule 11(a)(1).

3. A preliminary statement of the issues on appeal which the appellants intend to assert in the appeal; provided, any such list of issues on appeal shall not prevent the appellants from asserting other issues on appeal:

(a) Whether the trial court erred in determining that the statutory period for plaintiffs to quiet their title against a prescriptive easement was five years, instead of the 20 years required by Idaho Code section 5-203 in effect when plaintiffs filed their quiet title action.

(b) Whether the trial court erred in determining the statutory period for defendants to establish a prescriptive easement was five years, instead of the 20 years required by Idaho Code section 5-203 in effect when defendants filed their counterclaim for prescriptive easement.

(c) Whether the trial court erred in deciding not to quiet title in favor of plaintiffs Belstler when it decided defendant's Conine had a prescriptive easement right to use Belstler's private driveway.

(d) Whether the trial court erred in exercising subject matter jurisdiction when it barred plaintiff Belstlers' future exercise of their statutory right pursuant to Idaho Code section 55-313 to relocate any Conine easement to locations referred to in paragraph 10 of and Exhibit B to the Amended Judgment.

(e) Whether the court erred in not deciding Belstler's were the prevailing party and that they are not entitled to their fees and costs from defendants, and in deciding Conine's were due their costs from Belstlers.

4. No Order has been entered sealing all or any portion of the record or transcript.

5. (a) A reporter's transcript is requested.

(b) Appellants request the preparation of the following reporters' transcript's in hard copy [ ], electronic format [ ] , or both [XX]: The entire reporter's Standard Transcript as defined in I.A.R. 25(c), for which the Trial Reporter was **Joann Schaller**, and supplemented by the following: Transcript of Hearing of Motion for Reconsideration held March 16, 2010 at 3:30PM before Judge Haynes with Reporter **Laurie Johnson** transcribing.

6. Appellants request the following documents be included in the clerk's record in addition to those automatically included under I.A.R. 28:

(a) 4/30/2008 Affidavit of Chris and Dana Belstler,

(b) 6/23/2008 Affidavit of Karen Sheler (Conine) in Opposition to pet's motion for summary judgment,

(c) 9/16/2009 Plaintiffs Trial Brief Reconveyance of Easement Ineffective Pursuant To Idaho Law,

(d) 10/29/2009 Plaintiffs' Post-Trial Legal Arguments,

(e) 10/30/2009 Defendants/Counter Plaintiffs' Post Trial Memorandum,

(f) 11/23/2009 Defendants Conines Response to Plaintiff's Post Trial Brief,

(g) 11/23/2009 Plaintiffs reply to Defendants/Counter Plaintiffs Post-Trial Memorandum,

(h) 3/02/2010 Brief In Support Of Motion For Reconsideration And Amendment Of Memorandum Decision,

(i) 3/10/2010 Defendants' Brief in Opposition to Motion for Reconsideration and Amendment of Memorandum Decision,

(j) 3/12/2010 Plaintiffs' Reply to Defendants' Brief in Opposition to Motion for Reconsideration & Amendment of Memoradum Decision.

7. Appellants request the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court: Three (3) USDA Farm Service Agency Aerial Photos, as listed on Notice of Filing Plaintiff's List of Exhibits dated 09/08/2009. Appellants request that these photos not be copied, due to the cost, but that the originals be transported to the Supreme Court on the appropriate schedule.

8. Plaintiffs' attorney signing below certifies:

(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:

Name and address: Joanne Schaller, P.O. Box 9000, Coeur d'Alene, Idaho, 83816-9000;

Name and address: Laurie Johnson, P.O. Box 9000, Coeur d'Alene, Idaho, 83816-9000.

(b) [XX] That the clerk of the district court has been paid the estimated fee for preparation of the reporter's transcript.

(c) [XX] That the estimated fee for preparation of the clerk's record has been paid.

(d) [XX] 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 16th day of July 2010.

Arthur B. Macomber
Attorney for Appellants

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing **NOTICE OF APPEAL** was served this 16 day of July 2010, upon the following people in the manner indicated:

Charles M. Dodson Attorney at Law 1424 Sherman Avenue, Suite 300 Coeur d'Alene, ID 83814 Telephone: 208-664-1577	[XX] U.S. Mail, Postage Prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile: 208-666-9211
Clerk of the District Court P.O. Box 9000 Coeur d'Alene, Idaho 83816-9000	[ ] U.S. Mail, Postage Prepaid [XX] Hand Delivered [ ] Overnight Mail [ ] Facsimile: 208-
Joanne Schaller P.O. Box 9000 Coeur d'Alene, Idaho 83816-9000	[XX] U.S. Mail, Postage Prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile: 208-
Laurie Johnson P.O. Box 9000 Coeur d'Alene, Idaho 83816-9000	[XX] U.S. Mail, Postage Prepaid [ ] Hand Delivered [ ] Overnight Mail [ ] Facsimile: 208-

Arthur B. Macomber
Attorney for Appellants

STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED: 34428

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CLERK DISTRICT COURT

DEPUTY

CHARLES M. DODSON
Attorney at Law
1424 Sherman Avenue, Suite 300
Coeur d'Alene ID 83814
(208) 664-1577
Facsimile (208) 666-9211
ISB #2134
ATTORNEY FOR RESPONDENT/CROSS APPELLANTS

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

SUPREME COURT DOCKET NUMBER 37893-2010

CHRIS BELSTLER and DANA BELSTLER, husband and wife, PLAINTIFFS/APPELLANTS/CROSS RESPONDENTS, VS. KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife, DEFENDANTS/RESPONDENTS/CROSS APPELLANTS,	CASE NUMBER: CV-07-2523 NOTICE OF CROSS APPEAL
KAREN SHELER CONINE and HOWARD CONINE, husband and wife, COUNTER PLAINTIFFS/RESPONDENTS/ CROSS APPELLANTS, VS.	

CHRIS BELSTLER and DANA
BELSTLER, husband and wife,

COUNTER DEFENDANTS/APPELLANTS/
CROSS RESPONDENTS.

TO: THE ABOVE NAMED PLAINTIFFS/APPELLANTS/CROSS RESPONDENTS, CHRIS BELSTLER and DANA BELSTLER, husband and wife, AND THEIR ATTORNEY ARTHUR B. MACOMBER, 408 SHERMAN AVENUE, SUITE 215, COEUR D'ALENE IDAHO 83814; AND THE CLERK OF THE ABOVE ENTITLED COURT:

Notice is hereby given, in accordance with Idaho Appellate Rules, Rule 15 and Rule 18 of the Cross Appeal of Defendants/Respondents/Cross Appellants, KAREN SHELER CONINE and HOWARD CONINE, and as follows:

A. The title of the action for proceeding is as set for in the heading hereof.

B. The title of the court which heard the trial is as hereinabove set forth, and the name of the presiding Judge at the trial was the HONORABLE JAMES MICHAUD, and the name of the Judge hearing the Motion for Reconsideration is the HONORABLE LANSING HAYNES.

C. The Case Number is as set forth hereinabove, including the docket assigned by the Supreme Court.

D. That the name of the parties Cross Appealing are KAREN SHELER CONINE and HOWARD CONINE, husband and wife, represented by CHARLES M. DODSON, ATTORNEY AT LAW, and the adverse parties are, CHRIS BELSTLER and DANA BELSTLER, husband and wife, represented by ARTHUR B. MACOMBER, ATTORNEY AT LAW. That the name, telephone number and e-mail address of counsel for the Cross Appellants, is:

CHARLES M. DODSON
ATTORNEY AT LAW
DODSON AND RAEON LAW OFFICES
1424 SHERMAN AVENUE, SUITE 300,
COEUR D'ALENE, IDAHO 83814
TELEPHONE 208-664-1577
FACSIMILE 208-666-9211
STATE BAR NUMBER2134
E-MAIL ADDRESS cmdodsonlaw@gmail.com;

and that name, telephone number and e-mail address for counsel for the Cross Respondents is:

ARTHUR B. MACOMBER
ATTORNEY AT LAW
MACOMBER LAW, PLLC
408 SHERMAN AVENUE, SUITE 215
COEUR D'ALENE, IDAHO 83814
TELEPHONE 208-664-4700
FACSIMILE 208-664-9933
STATE BAR NUMBER 7370
E-MAIL ADDRESS art@macomberlaw.com

E. The designation of the Judgment appealed from is the Judgment and Amended Judgment entered by the trial court in the above entitled matter as said original Judgment was entered June 3, 2010, and the Amended Judgment (to include costs) was entered on the 13th of July, 2010.

F. Statement of issues. The preliminary statement of issues on appeal are:

1. That the original trial Judge was correct on his analysis, pronouncement and Opinion; and,

2. the Judge hearing the Reconsideration (not the Judge participating in the trial) erred in excluding the findings and order of the Trial Judge that an express easement existed, both as to the "Northern Easement and Southern Easement"; and,

3.That based upon the decision of the Original Trial Judge Defendants/Respondents/Cross Appellants should have been awarded fees in addition to costs.

G. This matter is brought as an appeal as a matter of right pursuant to Rule 4 and Rule 14(a) as the same applies through Rules 15 and 18 Idaho Appellate Rules.

H. The transcript. The transcript has been designated by the Appellant.

I.. Record. The designation of the record documents has been identified by the Appellant, and prior to the approval of the transcript examination, will be made to determine whether or not it should be augmented.

J. Exhibit. Cross Appellant requests Defendants Exhibits O, P, T, U, V, and W, and Plaintiff's Exhibits 14, 15, and 16 admitted at trial be part of the record in addition to those requested by the Appellant.

K. Certification.

1. The undersigned hereby certifies that service of the Notice of Cross Appeal and any requests for additional transcript (there being none) have not been made upon the Reporter(s);

2. That the estimated Reporter's fees for the requested transcript, if any, have previously been paid by the Appellant, and that the Cross Appellant did not request such transcript;

3. That the estimated fees for any additional documents and the Clerk's Record (copies of Exhibits) have not been paid but will be paid upon presentation of an estimated cost;

4. That the Appellant Filing Fee is paid concurrent with the filing of this Notice.

5. I hereby certify that a copy of this Notice of Cross Appeal and any requests for additional transcript (none) has been served upon each Reporter of whom an additional transcript has been requested (none), and that service has been made upon all parties required to be served pursuant to Rule 20 IAR.

DATED this 6th day of August, 2010

CHARLES M. DODSON
ATTORNEY FOR CROSS APPELLANT

I hereby certify that on the 6th day of August, 2010, a true and correct copy of the foregoing was mailed, postage prepaid, to:

Arthur B. Macomber
Attorney at Law
Macomber Law, PLLC
408 Sherman Avenue, Suite 215
Coeur d'Alene ID 83814

and personally delivered to:

Clerk of the District Court
Kootenai County Courthouse
Coeur d'Alene ID 83814

Joanne Schaller
Kootenai County Courthouse
Coeur d'Alene ID 83814

Laurie Johnson
Kootenai County Courthouse
Coeur d'Alene ID 83814

CHARLES M. DODSON
ATTORNEY AT LAW

IN THE DIS[illegible]T COURT OF THE FIRST JUDICI[illegible]ISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

CHRIS BELSTLER and DANA BELSTLER, husband and wife	)	
	)	
Petitioner/Plaintiff	)	
	)	**SUPREME COURT NO.**
vs	)	**37893-2010**
	)	
KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife	)	
	)	

CLERK'S CERTIFICATE

I, Daniel J. English, Clerk of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, 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 under Rule 28 of the Idaho Appellate Rules.

I certify that the Attorneys for the Appellants and Respondents were notified that the Clerk's Record and Reporter's Transcript were complete and ready to be picked up, or if the attorney is out of town, the copies were mailed by U.S. mail, postage prepaid, on the 4th day of Nov, 2010.

I do further certify that the Clerk's Record and Reporter's Transcript will be duly lodged with the Clerk of the Supreme Court.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Kootenai, Idaho this 4th day of Nov, 2010.

DANIEL J. ENGLISH

Clerk of District Court

By: Debra D. Leu

Deputy Clerk

IN THE SUPREME COURT OF THE

STATE OF IDAHO

CHRIS BELSTLER and DANA BELSTLER, husband and wife Petitioner/Plaintiff vs KAREN SHELER (CONINE) and HOWARD CONINE, husband and wife Respondents/Defendants	CERTIFICATE OF EXHIBITS CASE # CV-07-2523 SUPREME COURT NO. 37893-2010

I, DANIEL J. ENGLISH, Clerk Of District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that the attached list of exhibits is a true and accurate copy of the exhibits being forward to the Supreme Court of Appeals.

I FURTHER CERTIFY that the following documents will be submitted as exhibits to the Record:

1. Defendant's Exhibit No. A (admitted 9/21/09) Mutual Agreement.
2. Defendant's Exhibit No. B-C (admitted 9/21/09) Joint Use Agreement.
3. Defendant's Exhibit No. D (admitted 9/21/09) Warranty Deed.
4. Defendant's Exhibit No. I (admitted 9/21/09) Building Permit Application.
5. Defendant's Exhibit No. J (admitted 9/21/09) Sale Agreement.
6. Defendant's Exhibit No. K (admitted 9/21/09) Statutory Warranty Deed.
7. Defendant's Exhibit No. M (admitted 9/21/09) Warranty Deed.
8. Defendant's Exhibit No. N (admitted 9/21/09) Warranty Deed.
9. Defendant's Exhibit No. O (admitted 9/21/09) Document – Verbal Agreement.
10. Defendant's Exhibit No. P (admitted 9/21/09) Document.
11. Defendant's Exhibit No. Q (admitted 9/21/09) Map.
12. Defendant's Exhibit No. R (admitted 9/21/09) Warranty Deed.
13. Defendant's Exhibit No. S (admitted 9/21/09) Warranty Deed.
14. Defendant's Exhibit No. T (admitted 9/21/09) Map.
15. Defendant's Exhibit No. U (admitted 9/21/09) Title Report.
16. Defendant's Exhibit No. V (admitted 9/21/09) Ernest Money Agreement.

17. Defendant's Exhibit No. W (admitted 9/21/09) Disclosure Document.
18. Plaintiff's Exhibit No. 1 (admitted 9/21/09) Map 1987.
19. Plaintiff's Exhibit No. 2 (admitted 9/21/09) Map.
20. Plaintiff's Exhibit No. 3 (admitted 9/21/09) Map.
21. Plaintiff's Exhibit No. 4 (admitted 9/21/09) Report.
22. Plaintiff's Exhibit No. 5 (admitted 9/21/09) Deed 6-3-1947.
23. Plaintiff's Exhibit No. 6 (admitted 9/21/09) Deed.
24. Plaintiff's Exhibit No. 7 (admitted 9/21/09) Deed.
25. Plaintiff's Exhibit No 8 (admitted 9/21/09) Map.
26. Plaintiff's Exhibit No. 9 (admitted 9/21/09) Warranty Deed.
27. Plaintiff's Exhibit No. 10 (admitted 9/21/09) Paperwork.
28. Plaintiff's Exhibit No. 11 (admitted 9/21/09) Easement.
29. Plaintiff's Exhibit No. 12 (admitted 9/21/09) Map.
30. Plaintiff's Exhibit No. 13 (admitted 9/21/09) Warranty Deed.
31. Plaintiff's Exhibit No. 14 (admitted 9/21/09) Sales Agreement
32. Plaintiff's Exhibit No. 15 (admitted 9/21/09) Agreement.
33. Plaintiff's Exhibit No. 16 (admitted 9/21/09) Warranty Deed.
34. Plaintiff's Exhibit No. 17 (admitted 9/21/09) Warranty Deed.
35. Plaintiff's Exhibit No. 18 (admitted 9/21/09) Agreement.
36. Plaintiff's Exhibit No. 19 (admitted 9/21/09) Agreement.
37. Plaintiff's Exhibit No. 20 (admitted 9/21/09) Warranty Deed.
38. Plaintiff's Exhibit No. 21 (admitted 9/21/09) Warranty Deed.
39. Plaintiff's Exhibit No. 22 (admitted 9/21/09) Warranty Deed.
40. Plaintiff's Exhibit No. 23 (admitted 9/21/09) Map.
41. Plaintiff's Exhibit No. 24 (admitted 9/21/09) Depo Of Karen Conine
42. Plaintiff's Exhibit No. 25 (admitted 9/21/09) Depo Of Henry G.
43. Plaintiff's Exhibit No. 26 (admitted 9/21/09) Depo Of Henry K.
44. Plaintiff's Exhibit No. 27 (admitted 9/21/09) Depo Solomons.
45. Plaintiff's Exhibit No. 28 (admitted 9/21/09) Depo Evans.
46. Plaintiff's Exhibit No. 29 (admitted 9/21/09) Building Permit.
47. Plaintiff's Exhibit No. 30 (admitted 9/21/09) App For Permit.
48. Plaintiff's Exhibit No. 31 (admitted 9/21/09) E-mail.
49. Plaintiff's Exhibit No. 32 (admitted 9/21/09) Newspaper Article.
50. Plaintiff's Exhibit No. 33 (admitted 9/21/09) Permit
51. Plaintiff's Exhibit No. 1-A (admitted 9/21/09) Map.
52. Plaintiff's Exhibit No. 3-A (admitted 9/21/09) Map.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court
At Kootenai County, Idaho this 4th day of Nov, 2010.

DANIEL J. ENGLISH
Clerk of the District Court

By: Debra D. Leu
Deputy Clerk