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IN THE SUPREME COURT OF THE STATE OF IDAHO

V. LEO CAMPBELL and KATHLEEN CAMPBELL,
Plaintiffs/Appellants/ Cross-Respondents,
vs.
JAMES C. KVAMME and DEBRA KVAMME,
Defendants/Respondents/ Cross-Appellants.

Case No. CV-2010-3879
Docket No. 39650
VOLUME III of IV

CLERK'S RECORD ON APPEAL

Appeal from the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville

HONORABLE JON J. SHINDURLING, District Judge.

Attorney for Appellant/Cross-Respondent
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b 111 *Manwaring*

BONNEVILLE COUNTY

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Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
Plaintiffs,)
)
vs.)
)
JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

**OBJECTION TO DEPOSITION OF
V. LEO CAMPBELL AND MOTION
TO STRIKE**

The Plaintiffs filed an AFFIDAVIT OF COUNSEL, dated May 17, 2011. The affidavit includes "select pages" from the deposition of V. Leo Campbell. The Defendants hereby object to the arguments of Kipp L. Manwaring and the following statements of V. Leo Campbell and respectfully move the court to strike them in accordance with I.R.C.P. 32(a) and (b) and I.R.E. 103(a)(1).

ARGUMENT OF COUNSEL	DEPO.	OBJECTION
"The N1/2 was given to the Killians for a place to live due to their poverty resulting from loss of their own farm property." See MEMO-	Vol. II, p. 159, ll. 18-21 and	1. Assumes facts that are not in evidence. 2. Lack of competency.

<p>RANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 2.</p>	<p>p. 160, ll. 16-19.</p>	<ol style="list-style-type: none"> 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay.
<p>"Leo H. Campbell and Phyllis B. Campbell partitioned the S1/2 of the NE1/4 of Section 17 and conveyed separate parcels to their <u>three</u> children." See MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 2.</p>		<ol style="list-style-type: none"> 1. Violates the best evidence rule. The best evidence of the "partition" and "conveyance" of the S1/2 of the NE1/4 is the deeds thereto. See I.R.E. 1002. In this regard, please note that Leo H. Campbell and Phyllis B. Campbell "partitioned" and "conveyed" the real property to their <u>four</u> children. 2. Assumes facts that are not in evidence. 3. Lack of competency. 4. Lack of foundation. 5. Not based on personal knowledge. 6. Based on speculation. 7. Based on hearsay.
<p>"By gift deed recorded as Instrument No. 774870 . . . Leo H. Campbell and Phyllis B. Campbell conveyed title to <u>22.3</u> acres to V. Leo Campbell." See MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 2.</p>		<ol style="list-style-type: none"> 1. Violates the best evidence rule. The best evidence of the "conveyance" to V. Leo Campbell is the deed thereto. See I.R.E. 1002. In this regard, please note that Leo H. Campbell and Phyllis B. Campbell "conveyed" 20.48 acres to V. Leo Campbell. 2. Assumes facts that are not in evidence.

		<ol style="list-style-type: none"> 3. Lack of competency. 4. Lack of foundation. 5. Not based on personal knowledge. 6. Based on speculation. 7. Based on hearsay.
<p>"The Campbells own two contiguous parcels of real property: A small parcel where the Campbell's home is situated and a larger 22-acre farm parcel." <u>See</u> MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 3.</p>		<ol style="list-style-type: none"> 1. Violates the best evidence rule. The best evidence of the "parcels" that the Plaintiffs "own" is the deeds thereto. <u>See</u> I.R.E. 1002. In this regard, please note that the Plaintiffs "own" a parcel of real property, which is approximately 1.14 acres, and that it is "included" or otherwise part of their 20.48 acre parcel of real property. 2. Assumes facts that are not in evidence. 3. Lack of competency. 4. Lack of foundation. 5. Not based on personal knowledge. 6. Based on speculation. 7. Based on hearsay.
<p>"Lying 15 feet south of the coterminous described boundary of the parties' respective parcels and entirely within the Campbells' land is a fence (disputed fence)." <u>See</u> MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 3.</p>		<ol style="list-style-type: none"> 1. Violates the best evidence rule. The best evidence of the "coterminous described boundary" is the original survey of 1877. <u>See</u> I.R.E. 1002; <u>see also</u> AFFIDAVIT OF KIM H. LEAVITT, dated June 7, 2011. In this regard, please note that the fence sits on the boundary between the

		<p>parties' respective parcels of real property.</p> <ol style="list-style-type: none"> 2. Assumes facts that are not in evidence. 3. Lack of competency. 4. Lack of foundation. 5. Not based on personal knowledge. 6. Based on speculation. 7. Based on hearsay. 8. Conclusory and argumentative. 9. The deponent is not an expert witness regarding the "coterminous described boundary" or the location of the fence.
<p>"A portion of the Kvammes' center pivot pad, together with a pump and mainline, encroach upon the Campbells' land." <u>See</u> MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 3.</p>		<ol style="list-style-type: none"> 1. Violates the best evidence rule. The best evidence of the location of the "pivot pad, together with the pump and mainline, is a survey thereof. <u>See</u> I.R.E. 1002. 2. Assumes facts that are not in evidence. 3. Lack of competency. 4. Lack of foundation. 5. Not based on personal knowledge. 6. Based on speculation. 7. Based on hearsay.

		<p>8. Conclusory and argumentative.</p> <p>9. The deponent is not an expert witness regarding the location of the "pivot pad, together with the pump and mainline."</p>
<p>"Either prior to or during Hyrum Campbell's ownership of the entire NE1/4 of Section 17, the disputed fence was erected." See MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 3.</p>	<p>Vol. III, p. 219, ll. 12-19.</p>	<p>1. Assumes facts that are not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p>
<p>"Several interior <u>convenience</u> fences were erected over the years in the S1/2 of the NE1/4 of Section 17." See MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 3.</p>	<p>Vol. III, p. 185, ll. 24-25 and p. 186, ll. 1-9.</p>	<p>1. Assumes facts that are not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p> <p>7. Conclusory and argumentative.</p>
<p>"While he was alive, Hyrum Campbell farmed, grazed cattle, and raised animals on the entire NE1/4 of Section 17." See MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 3.</p>	<p>Vol. II, p. 159, ll. 3-5 and p. 160, ll. 12-19.</p>	<p>1. Assumes facts that are not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p>

		<p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p>
<p>"Prior to the Killians occupying the N1/2 of the NE1/4 of Section 17, Leo H. Campbell farmed and kept animals on the entire NE1/4." <u>See</u> MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 3.</p>	<p>Vol. II, p. 158, ll. 1-11.</p>	<p>1. Assumes facts that are not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p>
<p>"The disputed fence was solely for <u>convenience</u> in controlling horses and livestock." <u>See</u> MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 3.</p>	<p>Vol. III, p. 191, ll. 22-24 and p. 220, ll. 23-25 and p. 221, ll. 1-6 and p. 222, ll. 23-25 and p. 223, ll. 23-25 and p. 224, ll. 1-3 and 228, ll. 4-7 and p. 229, ll. 7-8.</p>	<p>1. Assumes facts that are not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p> <p>7. Conclusory and argumentative.</p>

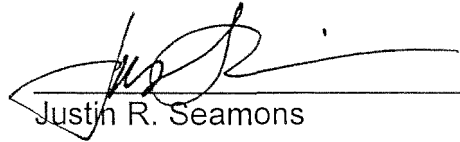
<p><u>"After Hyrum Campbell's death,</u> the NE1/4 was separated into two equal parcels and the N1/2 was conveyed to the Killians and the S1/2 was conveyed to Leo H. Campbell and Phyllis B. Campbell." See MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 4.</p>	<p>Vol. II, p. 159, l. 21 and p. 160, ll. 16-19.</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay.
<p>"After Hyrum Campbell's death, the disputed fence continued to stand, but the neighboring <u>family members</u> did not <u>treat</u> or <u>consider</u> that fence to be the <u>boundary</u> of their properties." See MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 4.</p>	<p>Vol. III, p. 225, ll. 4-6.</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative.
<p>"Because the <u>Killians and Leo and Phyllis Campbell were family, no one</u> objected to the disputed fence or its location or felt any need to move the fence." See MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 4.</p>	<p>Vol. III, p. 235, ll. 17-19.</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative.

<p>“Leo H. Campbell knew the fence was not on the <u>property line</u> and knew his <u>property boundary</u> was <u>some few feet</u> north of the fence.” <u>See</u> MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 4.</p>	<p>Vol. III, p. 239, ll. 8-11; <u>but see</u> Vol. III, p. 239, ll. 12-18.</p>	<ol style="list-style-type: none"> 1. Violates the best evidence rule. The best evidence of the “property line” and the “property boundary” is the original survey of 1877. <u>See</u> I.R.E. 1002; <u>see also</u> AFFIDAVIT OF KIM H. LEAVITT, dated June 7, 2011. In this regard, please note that the fence sits on the boundary between the parties’ respective parcels of real property. 2. Assumes facts that are not in evidence. 3. Lack of competency. 4. Lack of foundation. 5. Not based on personal knowledge. 6. Based on speculation. 7. Based on hearsay. 8. Conclusory and argumentative. 9. Leo H. Campbell was not an expert witness regarding the “property line,” the “property boundary,” the location of the fence, or the alleged “some few feet north of the fence.”
<p>“Leo H. Campbell had lived on his property for over 40 years.” <u>See</u> MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 4.</p>	<p>Vol. II, p. 130, ll. 11-13.</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge.

		<p>5. Based on speculation.</p> <p>6. Based on hearsay.</p>
<p>"V. Leo Campbell . . . has known of the disputed fence since he was <u>six</u> years of age." See MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 4.</p>	<p>Vol. I, p. 82, ll. 5-24.</p>	<p>1. Assumes facts that are not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p> <p>7. Conclusory and argumentative.</p> <p>8. The deponent is not an expert witness regarding the location of the fence.</p>
<p>"Since about age <u>six</u>, V. Leo Campbell has known the true boundary of the property was <u>several feet</u> north of the disputed fence." See MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 4.</p>	<p>Vol. I, p. 82, ll. 5-24 and p. 83, ll. 1-12 and p. 225, ll. 4-7.</p>	<p>1. Assumes facts that are not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p> <p>7. Conclusory and argumentative.</p> <p>8. The deponent is not an expert witness regarding the location of the fence or the "true boundary."</p>

<p>“As part of the Campbells’ plans to sell their property, they obtained a survey to confirm the dimensions of their land.” <u>See</u> MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 4.</p>		<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of foundation. 3. Conclusory and argumentative.
<p>“That survey confirmed the disputed fence lies within the Campbells’ property.” <u>See</u> MEMORANDUM IN SUPPORT OF PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 4.</p>	<p>Vol. III, p. 214, l. 2; <u>but see</u> p. 214, ll. 3-18.</p>	<ol style="list-style-type: none"> 1. Violates the best evidence rule. The best evidence of the location of the fence and the boundary of the “property” is the original survey of 1877. <u>See</u> I.R.E. 1002; <u>see also</u> AFFIDAVIT OF KIM H. LEAVITT, dated June 7, 2011. In this regard, please note that the fence sits on the boundary between the parties’ respective parcels of real property. 2. Assumes facts that are not in evidence. 3. Lack of competency. 4. Lack of foundation. 5. Not based on personal knowledge. 6. Based on speculation. 7. Based on hearsay. 8. The deponent is not an expert witness regarding the survey, the location of the fence, or the boundary.

Dated June 21, 2011.

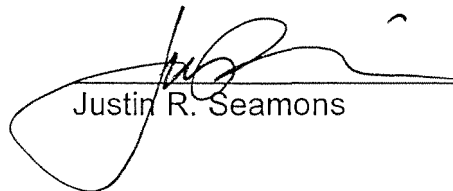


Justin R. Seamons

CERTIFICATE OF SERVICE

I served a copy of the foregoing OBJECTION TO DEPOSITION OF V. LEO CAMPBELL AND MOTION TO STRIKE on the following person on June 21, 2011:

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271



Justin R. Seamons

1 A. He did --
 2 Q. Why did --
 3 A. He did --
 4 Q. -- he move it --
 5 A. He did farm --
 6 Q. -- to what you allege is the true and
 7 correct boundary?
 8 MR. MANWARING: You have to wait --
 9 THE WITNESS: Okay.
 10 MR. MANWARING: -- until the question is
 11 asked --
 12 MR. SEAMONS: So since he never owned --
 13 MR. MANWARING: -- before you give your
 14 answer.
 15 Q. (BY MR. SEAMONS:) Since he never owned
 16 the entire one sixty, why didn't he move the fence
 17 to what you allege is the true and correct boundary
 18 in this case?
 19 MR. MANWARING: Objection as to form.
 20 You can try and answer that.
 21 THE WITNESS: It wasn't cost effective.
 22 Couldn't afford it.
 23 Q. (BY MR. SEAMONS:) And that would be
 24 speculation on your part.
 25 A. Yes. That would be speculation on my

1 MR. MANWARING: You're saying he didn't
 2 record anything that stated that. Is that what
 3 you're asking?
 4 Q. (BY MR. SEAMONS:) That he declared any
 5 kind of ownership interest in the land north of the
 6 fence, did he?
 7 MR. MANWARING: Object as to form.
 8 THE WITNESS: It didn't really matter
 9 where the fence was.
 10 It was his understanding he owned land
 11 the other side of the fence.
 12 Q. (BY MR. SEAMONS:) And that, again, goes
 13 back to the hearsay conversations, we'll go over
 14 those later.
 15 A. Okay.
 16 Q. That's what he allegedly told you,
 17 right?
 18 A. No. That's what he told me. Don't call
 19 me a liar. I'm not alleging anything.
 20 Q. Okay. But your father is not here to
 21 testify --
 22 A. No, he isn't.
 23 Q. -- and that, by definition, is hearsay,
 24 so we'll cover those later.
 25 A. Okay.

1 part as the kid that grew up with hand-me-down
 2 clothes and having damn little.
 3 Q. Also growing up with a father who owned
 4 eighty acres.
 5 A. Exactly.
 6 Q. Okay. What we do know is that he didn't
 7 move the fence ever, did he?
 8 A. No, he didn't.
 9 Q. And, again, in a phrase, he acquiesced
 10 in its location for a long period of time, didn't
 11 he?
 12 MR. MANWARING: Objection as to form.
 13 THE WITNESS: Acquiesced?
 14 MR. SEAMONS: Consented to right where
 15 it was.
 16 MR. MANWARING: Objection as to form.
 17 THE WITNESS: No, he didn't.
 18 Q. (BY MR. SEAMONS:) He never filed any
 19 kind of document --
 20 A. No, he didn't.
 21 Q. -- declaring or stating it was in the
 22 wrong location, did he?
 23 A. No.
 24 Q. Or that he claimed an interest in any of
 25 the property north of it, did he?

1 Q. We likewise know that Mary, Delbert,
 2 Delbert, Jr., and that entire side of the family
 3 never moved the fence to what you allege is the true
 4 and correct boundary, did they?
 5 A. No, they didn't.
 6 Q. Why?
 7 MR. MANWARING: Object as to form.
 8 THE WITNESS: I'm pretty sure it had
 9 something to do with money.
 10 Q. (BY MR. SEAMONS:) Again, speculation on
 11 your part.
 12 A. Oh, yeah. Yeah.
 13 Q. You entered upon this property in 1981,
 14 correct?
 15 A. Correct.
 16 Q. And you allege that your father told you
 17 that the land actually extended some distance beyond
 18 the fence as early as the age of six, true?
 19 A. True. Six to ten years old, somewhere
 20 in there.
 21 Q. Why didn't you move the fence to what
 22 you claim is the true and correct boundary?
 23 A. I didn't perceive it as a problem where
 24 the fence and the property boundary was. It was
 25 family on the other side of the fence.

1 why they built the fence, and I know that this is
 2 going to be a fertile ground for disagreement.
 3 A. Okay.
 4 Q. But I want to go through some
 5 preliminary questions where there may not be
 6 disagreement, but I'll find out.
 7 A. Okay.
 8 Q. And I want to get to the nuts and bolts
 9 of who, when, and why. But from a preliminary
 10 standpoint let me ask a few questions.
 11 Irrespective of the fences that we've
 12 been discussing, of your own personal knowledge, do
 13 you know the boundary, the line of separation, the
 14 boundary between the north half of the northeast
 15 quarter and the south half of the northeast quarter
 16 of Section 17?
 17 A. Yes.
 18 Q. How do you know that?
 19 A. Survey.
 20 Q. Okay. So, again, with reference to your
 21 personal knowledge, what I understand from your
 22 answer is you had a survey done at 2009 by Mr. Kevin
 23 Thompson, correct?
 24 A. Yes, sir.
 25 Q. And your allegation is that survey shows

1 that runs east and west across the property, does
 2 not mark the boundary, correct?
 3 A. Correct.
 4 Q. That's your allegation. That it does
 5 not fix the boundary?
 6 A. No.
 7 Q. And your contention is the true and
 8 correct boundary is somewhere north of that fence?
 9 A. Correct.
 10 Q. The basis or evidence that you would
 11 tender to me to support your allegation, would be
 12 the survey from Mr. Kevin Thompson, correct?
 13 A. Correct.
 14 Q. And with the exception of that survey,
 15 you have no other evidence of the boundary between
 16 the north half and the south half of the northeast
 17 quarter of Section 17, do you?
 18 MR. MANWARING: Object to the form. You
 19 can go ahead and answer.
 20 THE WITNESS: There's the survey done
 21 when I first occupied the land. There was the
 22 survey done before that when my dad occupied the
 23 land.
 24 Q. (BY MR. SEAMONS:) Yesterday we talked
 25 about those surveys as having been a possibility,

1 a boundary and a fence, correct?
 2 A. Correct.
 3 Q. All right. That's not your knowledge.
 4 Mr. Kevin Thompson did that survey. I'm talking
 5 about your personal knowledge.
 6 Of your own personal knowledge, do you
 7 know the boundary, the actual boundary, the true and
 8 correct boundary, between the north half of the
 9 northeast quarter and the south half of the
 10 southeast quarter of Section 17?
 11 A. Not the exact, no.
 12 Q. And when you say not the exact boundary,
 13 no, by that you would also agree that you're
 14 uncertain as to the true and correct boundary
 15 between the north half and the south half of the
 16 northeast quarter of Section 17?
 17 A. I agree. I would be uncertain, as would
 18 everybody else.
 19 Q. Now, notwithstanding the fact that you
 20 are uncertain about that boundary, your contention
 21 in this case is that the boundary is in dispute,
 22 correct?
 23 A. Correct.
 24 Q. And your claim is the fence that we have
 25 been discussing, the northernmost interior fence

1 but my understanding of your testimony was, of your
 2 own personal knowledge, whether your father did or
 3 did not ever get such a survey was speculative,
 4 correct?
 5 A. Correct.
 6 Q. And with reference to the one that you
 7 may have gotten in 1981, that, too, is speculative.
 8 You can't even remember, correct?
 9 A. It has been a few days, yes, but I don't
 10 think my mortgage holder would have loaned on it had
 11 it have been speculative.
 12 Q. But whether they would or would not have
 13 loaned on it, that too is speculative. You're not
 14 the mortgage guy, are you?
 15 A. No, I'm not the mortgage guy.
 16 Q. All right. So, really, Mr. Campbell,
 17 when you boil this thing down, and we'll get to the
 18 who, why, and when in just a moment, but when you
 19 boil this case down to some simple propositions,
 20 with exception to the survey by Mr. Kevin Thompson,
 21 you have no other evidence that the fence does not
 22 mark the boundary, do you?
 23 MR. MANWARING: Object as to form. Go
 24 ahead and answer.
 25 THE WITNESS: Well, in that light, I

BONNEVILLE COUNTY
11 JUN 21 11 4: 43

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Idaho Falls, ID 83402
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Idaho State Bar Number: 3903

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
Plaintiffs,)
)
vs.)
)
JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

**OBJECTION TO AFFIDAVIT OF
JO LE CAMPBELL AND MOTION
TO STRIKE**

The Defendants hereby object to the AFFIDAVIT OF JO LE CAMPBELL, dated March 28, 2011, and respectfully move the court to strike the affidavit in accordance with I.R.C.P. 56(e) and I.R.E. 103(a)(1). In this regard, the provisions of I.R.C.P. 56(e) are clear:

Supporting and opposing affidavits [1] shall be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein.

	STATEMENT	OBJECTION
¶ 5	"I grew up and worked on our <u>family's farm</u> in Bonneville County."	<ol style="list-style-type: none"> 1. Violates the best evidence rule. The best evidence of his "<u>family's farm</u>" is the deed thereto. See I.R.E. 1002. In this regard, his family <u>never</u> owned the NE1/4 of Section 17. 2. Assumes a fact that is not in evidence. 3. Lack of competency. 4. Lack of foundation. 5. Not based on personal knowledge. 6. Based on speculation. 7. Based on hearsay.
¶ 5	"When I was a young boy, the <u>family farm</u> was the <u>entire</u> NE1/4 of Section 17."	<ol style="list-style-type: none"> 1. Violates the best evidence rule. Again, the best evidence of his "<u>family's farm</u>" is the deed thereto. See I.R.E. 1002. In this regard, his family <u>never</u> owned the NE1/4 of Section 17. 2. Assumes a fact that is not in evidence. 3. Lack of competency. 4. Lack of foundation. 5. Not based on personal knowledge. 6. Based on speculation. 7. Based on hearsay.
¶ 6	"As I grew older, <u>I came to understand</u> that my Grandfather Campbell purchased that quarter section	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence.

	because of the varied types of soil on the land, some of it was prime for farming with horses, other of it was rocky and best suited for pasture.”	<ol style="list-style-type: none"> 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. The affiant is not an expert on “types of soil,” including the type of soil that is “prime for farming” or the type of soil that is “best suited for pasture.”
¶ 7	“During my childhood, there was in existence an east-west <i>pasture</i> fence running across the quarter section.”	<ol style="list-style-type: none"> 1. Assumes a fact that is not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative.
¶ 7	“ <i>I understood</i> that either my father or my grandfather erected and maintained that fence.”	<ol style="list-style-type: none"> 1. Assumes a fact that is not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay.

¶ 7	<p>"I recall that fence <i>was referred to</i> as the pasture fence because it separated the good farmland to the north from the rocky pasture ground on the south."</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative. 8. The affiant is not an expert on "good farmland" or "rocky pasture ground."
¶ 7	<p>"That <i>pasture</i> fence controlled our family's horses and other farm animals, preventing them from straying from the pasture to the farm ground."</p>	<ol style="list-style-type: none"> 1. Assumes a fact that is not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative.
¶ 8	<p>"I recall when my aunt and uncle, Mary Killian and Delbert Killian, <i>lost their farm.</i>"</p>	<ol style="list-style-type: none"> 1. Assumes a fact that is not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge.

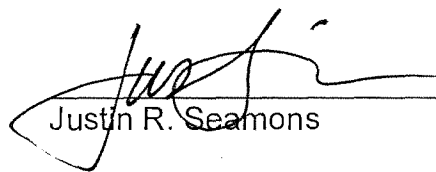
		<p>5. Based on speculation.</p> <p>6. Based on hearsay.</p>
¶ 8	<p>"Their situation <i>was of concern</i> to my parents and grandparents."</p>	<p>1. Assumes a fact that is not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p>
¶ 8	<p><i>As I recall</i>, my grandparents decided to have the Killians move onto the north part of the quarter section, while my parents and family remained in the home on the southern edge of the south part of the quarter section."</p>	<p>1. Assumes a fact that is not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p>
¶ 9	<p>"The Killians had livestock when they moved onto the north half."</p>	<p>1. Assumes a fact that is not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p>

¶ 9	“The <i>pasture</i> fence in existence <i>was left in place</i> for the <i>convenience</i> of both families.”	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative.
¶ 9	“Despite the location of the <i>pasture</i> fence, it <i>was never considered</i> the <i>boundary</i> because everyone was family and <i>we all</i> just got along without fretting over boundary lines.”	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative. 8. The affiant is not an expert witness on the “boundary” or “boundary lines.”
¶ 10	“ <i>I understand</i> the Kvammes contend the fence should be the <i>new</i> boundary line because they claim the fence had been or was now treated as the boundary.”	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation.

		<p>6. Based on hearsay.</p> <p>7. Conclusory and argumentative.</p> <p>8. Again, the affiant is not an expert witness on the "boundary" or "boundary line."</p>
¶ 10	"In all my years growing up on our family farm, I knew the fence was not the boundary."	<p>1. Assume a fact that is not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p> <p>7. Conclusory and argumentative.</p> <p>8. Again, the affiant is not an expert witness on the "boundary."</p>
¶ 10	"I knew the fence was <i>several feet</i> south of the legally described boundary line between the north and south halves of that quarter section."	<p>1. Assumes facts that are not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p> <p>7. Conclusory and argumentative.</p> <p>8. The affiant is not an expert witness on the "legally described boundary line between the north and south halves."</p>

<p>¶ 10</p>	<p><u>"From my recollection,</u> my parents and siblings and the Killian family members <u>had the same understanding.</u>"</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative. 8. The affiant's "parents, siblings, and the Killian family members" are not expert witnesses on the "legally described boundary line between the north and south halves."
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Dated June 21, 2011.




 Justin R. Seamons

CERTIFICATE OF SERVICE

I served a copy of the foregoing OBJECTION TO AFFIDAVIT OF JO LE CAMPBELL AND MOTION TO STRIKE on the following person on June 21, 2011:

Kipp L. Manwaring
 P.O. Box 50271
 Idaho Falls, ID 83405-0271



 Justin R. Seamons

BONNEVILLE COUNTY

11 JUN 21 PM 4:43

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Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
Plaintiffs,)
)
vs.)
)
JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

**OBJECTION TO AFFIDAVIT OF
MARGY SPRADLING AND MOTION
TO STRIKE**

The Defendants hereby object to the AFFIDAVIT OF MARGY SPRADLING, dated April 1, 2011, and respectfully move the court to strike the affidavit in accordance with I.R.C.P. 56(e) and I.R.E. 103(a)(1). In this regard, the provisions of I.R.C.P. 56(e) are clear:

Supporting and opposing affidavits **[1]** shall be made on personal knowledge, **[2]** shall set forth such facts as would be admissible in evidence, and **[3]** shall show affirmatively that the affiant is competent to testify to the matters stated therein.

	STATEMENT	OBJECTION
¶ 5	"I grew up on our <i>family's farm</i> in Bonneville County."	<ol style="list-style-type: none"> 1. Violates the best evidence rule. The best evidence of her "<i>family's farm</i>" is the deed thereto. <u>See</u> I.R.E. 1002. In this regard, his family <i>never</i> owned the NE1/4 of Section 17. 2. Assumes a fact that is not in evidence. 3. Lack of competency. 4. Lack of foundation. 5. Not based on personal knowledge. 6. Based on speculation. 7. Based on hearsay.
¶ 5	"I knew my Campbell grandparents and <i>was acquainted</i> with the land <i>I believed</i> they owned."	<ol style="list-style-type: none"> 1. Violates the best evidence rule. The best evidence of the "land" that her grandparents owned is the deed thereto. <u>See</u> I.R.E. 1002. 2. Assumes a fact that is not in evidence. 3. Lack of competency. 4. Lack of foundation. 5. Not based on personal knowledge. 6. Based on speculation. 7. Based on hearsay.
¶ 5	" <i>I believe</i> those grandparents owned an entire quarter section of land."	<ol style="list-style-type: none"> 1. Violates the best evidence rule. The best evidence of the "land" that her grandparents owned is the deed thereto. <u>See</u> I.R.E. 1002.

		<p>2. Assumes a fact that is not in evidence.</p> <p>3. Lack of competency.</p> <p>4. Lack of foundation.</p> <p>5. Not based on personal knowledge.</p> <p>6. Based on speculation.</p> <p>7. Based on hearsay.</p>
¶ 5	<p>“My grandfather Campbell died when I was <u>six</u> years old.”</p>	<p>1. Violates the best evidence rule. The best evidence of the date of her grandfather’s death is his death certificate. <u>See</u> I.R.E. 1002.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p>
¶ 6	<p>“My grandfather Campbell farmed and used draft horses for his farm work.”</p>	<p>1. Assumes a fact that is not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p>

¶ 6	<p>“<u>He</u> maintained corrals and fence lines to control his horses and other farm animals.”</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay.
¶ 6	<p>“For as long as I can remember, <u>my grandfather</u> maintained a fence on the northern edge of his corrals that extended east to west across the entire quarter section of land he owned.”</p>	<ol style="list-style-type: none"> 1. Assumes a fact that is not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay.
¶ 7	<p>“I always <u>understood</u> the east-west fence crossing the entire quarter section was merely a <u>convenience</u> fence for controlling livestock.”</p>	<ol style="list-style-type: none"> 1. Assumes a fact that is not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative.
¶ 8	<p>“The east-west fence across the quarter section <u>was to my knowledge</u> arbitrarily placed as a fence of <u>convenience</u>.”</p>	<ol style="list-style-type: none"> 1. Assumes a fact that is not in evidence. 2. Lack of competency.

		<ol style="list-style-type: none"> 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative.
¶ 8	<p>“During my lifetime, that fence <u>was</u> never observed as a <u>legal boundary line or boundary fence.</u>”</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. The affiant is not an expert witness on the “legal boundary line” or whether the fence marks the “boundary.”
¶ 9	<p>“<u>Sometime</u> in the early 1950s, my aunt, Mary Killian, and her husband, Delbert Killian, <u>lost their farm</u> in the Ririe area.”</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay.
¶ 9	<p>“<u>Family discussions</u> centered on helping the Killians have a place to live.”</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency.

		<ul style="list-style-type: none"> 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay.
¶ 9	<p>"I know my <i>grandfather Campbell</i> had the Killians come to live on the north half of the quarter section and help work the farm."</p>	<ul style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay.
¶ 10	<p>"As a family of Campbells and Killians, <i>I believe everyone knew and understood the situation surrounding the division of land</i> and that the east-west fence <i>was not considered the boundary</i> between the divided parcels."</p>	<ul style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. The affiant is not an expert witness on the "division of land" or whether the fence sits on the "boundary between the divided parcels."
¶ 11	<p>"The east-west fence line <i>was known to be several feet south of the actual described boundary line</i> between the north and south halves of the quarter section."</p>	<ul style="list-style-type: none"> 1. Assume facts that are not in evidence. 2. Lack of competency.

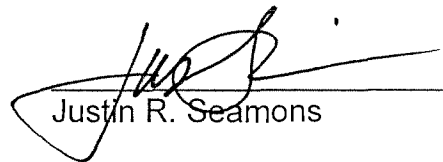
		<ul style="list-style-type: none"> 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative. 8. The affiant is not an expert witness on the "described boundary line."
¶ 11	"That fence was an <u><i>amusing family anecdote</i></u> over the years until the Killian property was purchased by the Kvammes."	<ul style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative.
¶ 11	" <u><i>From my understanding</i></u> , the Kvammes have ignored the <u><i>legal boundary</i></u> ."	<ul style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative. 8. The affiant is not an expert witness on the "legal boundary."

¶ 12	<p><u>"I understand</u> the Kvammes contend the fence should be the <u>new</u> boundary line because they claim the fence <u>was treated</u> as the <u>boundary.</u>"</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative. 8. The affiant is not an expert witness on the "legal boundary."
¶ 13	<p>"All the years I lived with my parents on the south half of the quarter section, <u>it was common knowledge to everyone in our family</u> that the east-west fence across the quarter section was not the <u>boundary.</u>"</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative. 8. The affiant is not an expert witness on the "boundary."
¶ 13	<p><u>"I believe</u> the same <u>understanding was held</u> by the Killians."</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge.

		<p>5. Based on speculation.</p> <p>6. Based on hearsay.</p> <p>7. Conclusory and argumentative.</p> <p>8. Again, the affiant is not an expert witness on the "boundary."</p>
¶ 14	At no time <i>to my knowledge</i> has <i>anyone</i> in the Campbell family and the Killian family ever agreed that the east-west fence was the <i>boundary</i> ."	<p>1. Assumes facts that are not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p> <p>7. Conclusory and argumentative.</p> <p>8. Again, the affiant is not an expert witness on the "boundary."</p>
¶ 14	"In fact, <i>no one in either family seemed</i> to have any <i>concerns</i> about the actual <i>boundary</i> between the properties; <i>we</i> were all family and <i>we</i> lived and worked together without worrying about a <i>boundary line</i> ."	<p>1. Assumes facts that are not in evidence.</p> <p>2. Lack of competency.</p> <p>3. Lack of foundation.</p> <p>4. Not based on personal knowledge.</p> <p>5. Based on speculation.</p> <p>6. Based on hearsay.</p> <p>7. Conclusory and argumentative.</p> <p>8. The affiant is not an expert witness on the "boundary line."</p>

¶ 16	<p>“Based upon knowledge of the history of the east-west fence, <i>I believe</i> my grandfather, Hyrum Campbell, erected and maintained that fence as a <i>convenience</i> fence for his horses and livestock.”</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative.
¶ 16	<p>“Where he was the owner of the entire quarter section at the time the east-west fence <i>was</i> constructed, <i>I believe</i> the fence was not <i>intended</i> to designate any <i>boundary</i>.”</p>	<ol style="list-style-type: none"> 1. Assumes facts that are not in evidence. 2. Lack of competency. 3. Lack of foundation. 4. Not based on personal knowledge. 5. Based on speculation. 6. Based on hearsay. 7. Conclusory and argumentative. 8. The affiant is not an expert witness on the “boundary” or whether the fence sits on or otherwise “designates” the boundary.

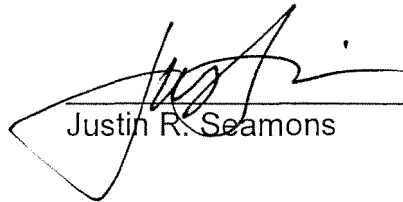
Dated June 21, 2011.


 Justin R. Seamons

CERTIFICATE OF SERVICE

I served a copy of the foregoing OBJECTION TO AFFIDAVIT OF MARGY SPRADLING AND MOTION TO STRIKE on the following person on June 21, 2011:

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271


Justin R. Seamons

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
 STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

7TH JUDICIAL DISTRICT COURT
 BONNEVILLE COUNTY, IDAHO

11 JUN 28 AM 11:54

V. LEO CAMPBELL, et al,)	
)	
Plaintiffs,)	Case No. CV-2010-3879
)	
-vs.-)	MINUTE ENTRY
)	
JAMES C. KVAMME, et al,)	
)	
Defendants.)	
_____)	

On June 28, 2011, at 10:55 AM, a Motion to Extend Time came on for hearing before the Honorable Jon J. Shindurling, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Nancy Marlow, Court Reporter, and Ms. Grace Walters, Deputy Court Clerk, were present. Mr. Kipp Manwaring appeared on behalf of the plaintiffs. Mr. Justin Seamons appeared on behalf of the defendants.

Mr. Manwaring presented argument on the plaintiffs' motion to extend time to respond to the defendants' cross-motion for summary judgment.

Mr. Seamons opposed the motion to extend time and requested the Court hear the motions for Summary Judgment next week as scheduled.

Mr. Manwaring rebutted the opposition argument


Mr. Seamons objected to Mr. Manwaring's argument.

Mr. Manwaring objected to the opposition argument and requested the motion be granted.

The Court continued both motions for summary judgment to September 12, 2011 at 11:00

AM.

Court was thus adjourned.



JON J. SHINDURLING
District Judge

c: Kipp Manwaring
Justin Seamons

SEVENTH JUDICIAL DISTRICT COURT, STATE OF IDAHO
IDaho Falls FOR THE COUNTY OF BONNER
605 NORTH CAPITAL AVE.
IDAHO FALLS, IDAHO 83402

V Leo Campbell, etal.

vs.

James C Kvamme, etal.

)
)
)
)
)

Case No: CV-2010-0003879

NOTICE OF RESETTING HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is set for:

Motions for Summary Judgment: Monday, September 12, 2011 at 11:00 AM

Judge: Jon J. Shindurling

Courtroom:

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on Tuesday, June 28, 2011.

JUSTIN R. SEAMONS
414 SHOUP AVENUE
IDAHO FALLS ID 83402


Mailed Hand Delivered Courthouse Box Fax

KIPP MANWARING
PO BOX 50271
381 SHOUP AVE, STE 211
IDAHO FALLS ID 83405

Mailed Hand Delivered Courthouse Box Fax

Dated: Tuesday, June 28, 2011

RONALD LONGMORE
Clerk of the District Court

By: 
Deputy Clerk

DOC22cv1 11/03

CHARLES C. JUST, ESQ. – ISB 1779
KIPP L. MANWARING, ESQ. – ISB 3817
JUST LAW OFFICE
381 Shoup Avenue
P.O. Box 50271
Idaho Falls, Idaho 83405
Telephone: (208) 523-9106
Facsimile: (208) 523-9146

Attorneys for the Campbells

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE**

V. LEO CAMPBELL and KATHLEEN
CAMPBELL, husband and wife;

Plaintiffs,

vs.

JAMES C. KVAMME and DEBRA
KVAMME, husband and wife; and JOHN
DOES I-X;

Defendants.

Case No. CV-2010-3879

**RESPONSE IN OPPOSITION TO
THE PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

For the reasons set forth below, the Campbells oppose the Kvammes' motion for summary judgment. Much of the Campbells' opposition is based upon their previously filed memorandum in support of their motion for summary judgment. This response gives specific reply to items raised in the Kvammes' motion.

Adverse Possession

There is no genuine dispute of material fact pertaining to payment of taxes. Despite the Kvammes' effort to obscure the testimony of Blake Mueller and Mark Hansen, the record remains clear on the following points.

The main thrust of the Kvammes' motion is based upon their claim that the disputed fence line is actually the boundary line. For support, they submitted the affidavit of Kim Leavitt. In turn, the Campbells deposed Leavitt.

Leavitt admits Section 17 does not contain 640 acres and, thus, is like most sections not a standard or nominal section. (*Affidavit of Counsel*, Exhibit A – Deposition of Kim Leavitt, p. 23, ll. 2-25). Leavitt admitted he has not surveyed the property. (*Affidavit of Counsel*, Exhibit A – Deposition of Kim Leavitt, p. 43, ll. 19-21; p. 75, ll. 4-25; p. 76, ll. 1-2). Leavitt admits that the survey performed by Thompson Engineering follows the survey standards required by Idaho law. (*Affidavit of Counsel*, Exhibit A – Deposition of Kim Leavitt, p. 66, ll. 24-25; p. 67, ll. 1-11; p. 71, ll. 21-25; p. 72, ll. 3-25; p. 73, ll. 1-25; p. 74, ll. 1-12). Leavitt has an opinion about certain corners pertaining to the section in question, but Leavitt has not performed a survey to determine any different boundary determination than that set forth by Thompson. (*Affidavit of Counsel*, Exhibit A – Deposition of Kim Leavitt, p. 59, ll. 12-25; p. 60, ll. 1-25; p. 61, ll. 1-4).

Accordingly, the Thompson survey is the sole evidence before the court on the surveyed boundaries of the parties' respective parcels. Additionally, the surveyed boundaries correspond to the boundaries set forth in the deeds of record for the parties' respective parcels.

Unquestionably, the Campbells' property has been assessed for real property taxes based upon the legal description contained in deeds of record. Likewise, the Kvammes' property has been assessed based upon the legal description contained in deeds of record. Those legal descriptions equate exactly with the survey performed by Thompson. The county treasurer has applied all of the Campbells' tax payments to their assessments. None of the Kvammes' tax payments were applied to the Campbells' property.

Consequently, neither the Kvammes nor their predecessors in interest paid any taxes on the Campbells' property. The Kvammes have failed to sustain their burden on summary judgment for establishing adverse possession. In contrast, the facts show no adverse possession. The Campbells are entitled to summary judgment on the Kvammes' claim of adverse possession.

Boundary by Agreement

To sustain their burden of proving boundary by agreement, the Kvammes submitted the affidavits of Revar Harris, Mary Jane Harris, and Arnold Gene Killian. If the court strikes the pertinent provisions of those affidavits, the Kvammes' have no evidence to support their claim for boundary by agreement. If the court finds those affidavits contain admissible testimony

concerning boundary by agreement, then there are genuine issues of material fact preventing summary judgment for either party on that issue.

Specifically, the affidavits all contain the noticeably exact language as follows, “However, contrary to the allegation of Margy and Jo Le, the fence was not a ‘pasture fence,’ a ‘convenience fence,’ or ‘arbitrarily placed.’ The fence was a division fence or boundary fence—that is, it sits on the boundary between the N1/2 of the NE1/4 and the S1/2 of the NE1/4 and it marks the boundary.”

Such allegations are without foundation and not within the competency of any of those witnesses. All of the Kvammes’ witnesses admit having no knowledge of when the fence was erected or who erected the fence. It is undisputed that the entire NE¼ was owned in its entirety by a sole owner and the common predecessor in interest to both the Campbells and the Kvammes. During that sole ownership, the fence was erected. There was no boundary to demarcate by a fence when the sole owner held the entire NE¼. Rather, such fact alone indicates the fence was a convenience fence.

Again, the boundary claim raised in those affidavits is based upon the affidavit of Leavitt. As already discussed, Leavitt has not performed any survey and agrees that the survey of Thompson meets required criteria. Thompson’s survey sets forth the correct proportional boundary line of the respective properties based upon the legal descriptions contained in deeds of record.

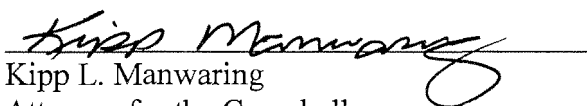
True Location of Fence

Relying upon Leavitt’s affidavit, the Kvammes argue of the true location of the fence. The fence’s location is not the issue. Everyone agrees where the fence has been located.

Leavitt admits he has no knowledge of who put the fences in Section 17. (*Affidavit of Counsel*, Exhibit A – Deposition of Kim Leavitt, p. 36, ll. 1-25; p. 37, ll. 1- 5).

The issue is whether the fence has ever been agreed to be the exact boundary between the N½ and the S½ of the NE¼ of Section 17. The Campbells submit the facts prove the absence of any agreement to treat the fence as the boundary.

DATED this 25 day of August 2011.


Kipp L. Manwaring
Attorney for the Campbells

CERTIFICATE OF MAILING

I **HEREBY CERTIFY** that on the 25th day of August 2011, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

Justin R. Seamons
Attorney at Law
414 Shoup Avenue
Idaho Falls, Idaho 83402

- Hand Delivered
- U.S. Mail, Postage Prepaid
- Facsimile
- Other _____



Leslie Northrup
Paralegal

2011 AUG 26 AM 11: 57

CHARLES C. JUST, ESQ. – ISB 1779
KIPP L. MANWARING, ESQ. – ISB 3817
JUST LAW OFFICE
381 Shoup Avenue
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Attorneys for the Campbells

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE**

V. LEO CAMPBELL and KATHLEEN
CAMPBELL, husband and wife;
Plaintiffs,

vs.

JAMES C. KVAMME and DEBRA
KVAMME, husband and wife; and JOHN
DOES I-X;
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Case No. CV-2010-3879

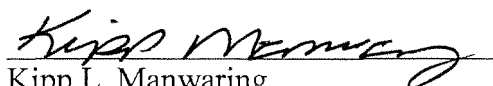
**AFFIDAVIT OF COUNSEL
Re: Defendant's Motion for
Summary Judgment**

STATE OF IDAHO)
 : ss
County of Bonneville)

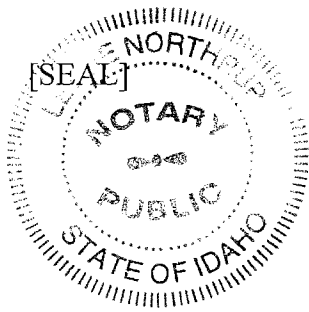
KIPP L. MANWARING, being first duly sworn under oath, deposes and states as follows:

1. I am a licensed attorney in the state of Idaho and represent the Plaintiffs in the above action.
2. Attached as Exhibit A and incorporated here by reference is a true and correct copy of pages 21-24, 33-36, 41-52, 57-60, and 65-76 of the deposition of Kim Leavitt.

Dated this 25 day of August 2011.


Kipp L. Manwaring
Attorney for the Campbells

SUBSCRIBED AND SWORN TO before me this 25th day of August 2011.



Leslie Northrup
Notary Public for Idaho
Residing at: Moore, Idaho
My commission expires: 09/29/2015

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 25th day of August 2011, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

Justin R. Seamons
Attorney at Law
414 Shoup Avenue
Idaho Falls, Idaho 83402

Hand Delivered
 U.S. Mail, Postage Prepaid
 Facsimile
 Other _____

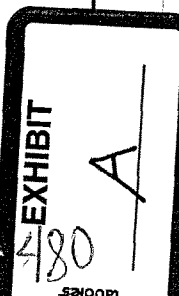
Leslie Northrup
Leslie Northrup
Paralegal

1 A. Uh-huh.
 2 Q. – you talk about a standard section of
 3 land under the U.S. Public Land Survey System –
 4 A. Uh-huh.
 5 Q. – nominally contain six hundred and
 6 forty acres.
 7 A. That's correct.
 8 Q. What do you mean by "nominally"?
 9 A. Most often.
 10 Q. Is that always the case?
 11 A. If you look at – if you look at the
 12 original – look at exhibit – the original survey
 13 on Exhibit D, if you would.
 14 Q. D. This one? Okay.
 15 A. On the original survey –
 16 Q. Just a moment, I think we actually have
 17 that one.
 18 A. – of Exhibit D –
 19 Q. Just a minute, Kim.
 20 A. Okay.
 21 (Discussion off the record.)
 22 Q. (BY MR. MANWARING:) Now, just so the
 23 record's clear, and we'll mark this as an exhibit,
 24 this is a larger print of the original survey.
 25 Would you agree with that,

1 was just the way they showed it.
 2 So there's a misunderstanding with the
 3 layman, and there always has been, that every
 4 section has six hundred and forty acres in it,
 5 because that is the way it was intended to be, the
 6 way it was attempted to be laid out to be, but
 7 because of measurement and because of the way
 8 calculations are made easily now with mathematics
 9 and things like that, you'll never find one that's
 10 exactly six hundred and forty acres.
 11 Q. Okay. So we'll agree that Section 17
 12 does not contain six hundred and forty acres?
 13 A. Correct.
 14 Q. It can't.
 15 A. Right.
 16 Q. Okay.
 17 A. That's true.
 18 Q. So in your affidavit, when you say
 19 standard section of land has the following nominal
 20 measurements, and that's mile by mile, is that what
 21 you're looking at?
 22 A. That's really what that was prepared for
 23 is just a diagram one mile square, six hundred and
 24 forty acres relating back to the nominal section or
 25 the normal section.

1 Mr. Leavitt?
 2 A. It is.
 3 Q. All right.
 4 A. Uh-huh. This is 3 North, Range 38
 5 surveyed by John B. David in 1877. We're talking
 6 about Section 17, and if you notice Section 17, it
 7 shows six hundred and forty acres.
 8 But if you calculate out the acreage in
 9 Section 17 with the original measurements, it won't
 10 be six hundred and forty acres. And the same with
 11 sixteen, fifteen, fourteen, all of the interior
 12 sections are always shown to be six hundred and
 13 forty acres, which they are not. And wherever we
 14 find the monuments makes it even different.
 15 But that's what they did. That is why
 16 the entrymen that came into this land always thought
 17 they owned three hundred and sixty acres because it
 18 shows on the map that there were six hundred and
 19 forty acres on the section.
 20 And if you'll notice on Section 17, he
 21 measured that at 80.56 chains on the east/west
 22 boundary, on the south boundary, and 80.68 on the
 23 north. That could only be six hundred and forty
 24 acres if that was eighty, this was eighty, this was
 25 eighty, and this was eighty. And so that's – that

1 Q. Okay. And I think you mentioned that
 2 the north boundary of Section 17 was 44.88 longer
 3 than a nominal section.
 4 A. That's correct. And it shows right
 5 there 80.68, so the six eight is multiplied by
 6 point – or by sixty-six, tells you how many feet it
 7 is longer than the normal fifty-two hundred and
 8 eighty feet.
 9 Q. Okay. And do you find that to occur
 10 with some regularity in your survey determination?
 11 A. You do. And, in fact, you find it on
 12 this township, let's see over here in Section 23, is
 13 79.89 chains.
 14 And so what they were doing, like I
 15 said, they were laying this one out, this one out,
 16 this one out, they were going up there, but they
 17 were checking because he went up here and put these
 18 points in before he ever got there that he was
 19 checking back, and because of the line that he was
 20 running, this shows that that's a little bit longer,
 21 and that was his measurement. So it was –
 22 Q. All right.
 23 A. But by finding this measurement, you'll
 24 notice that they never change the acreage on any of
 25 them either. So that was just the way that they did



1 quite closely.
2 And so I wondered whether or not the
3 placement of these corners, these original corners,
4 were the original corners of this section because
5 the fences were off, because that immediately is an
6 evidence, one of the corroborative or collateral
7 evidences that we may use to replace a corner, and
8 that we have to exhaust all of that before we can
9 ever use measurement. Before we ever apportion
10 anything, we have to use all of this evidence to
11 replace corners.

12 And so immediately, that's what I
13 thought, and – and by just using Kevin's survey, if
14 you add the distances along the east side of that
15 section from the southeast corner, the oldest corner
16 in the section, that you find that the fences at all
17 of the petition lines between the quarters and the
18 south quarter, the north quarter, and things like
19 that, are all the fences are all too far south of
20 those lines –

21 **Q. Is that based –**

22 **A.** – according to the – based on his
23 measurements of corners today, the fences in that
24 section are all too far south.

25 **Q. Okay. And then your determination of**

1 four feet off.
2 So if you add those up, someone measured
3 to those fences and put those fences in where they
4 were trying to determine the petition line between
5 quarters, and I believe that's where that fence line
6 came from.

7 **Q. That's your best guess as to how those**
8 **fences got –**

9 **MR. SEAMONS:** I'll object to the form of
10 the question.

11 **THE WITNESS:** Yeah. It's my opinion –
12 it's my opinion that the measurement cannot be just
13 magic. And it works out that those fences were off
14 proportionately suggesting to the evidence that the
15 southeast corner, those fences were measured from
16 the southeast corner and the fence line is
17 delineating that measurement.

18 And so I call it a boundary line because
19 in survey terms, we juggle between boundary lines,
20 property lines, deed lines, title lines. And a
21 boundary lien to me is the boundary line which is a
22 physical boundary, an enclosure or something to that
23 effect.

24 So that's why I – my affidavit states
25 that I think that's the boundary line.

1 **where the fences should be, is that based on**
2 **assumption of what your experience has been with**
3 **fences?**

4 **A.** The experience that I'm placing this on
5 is the experience that I was taught. You know, I've
6 been surveying for thirty-five years, and/or longer
7 but an old surveyor that had been surveying since
8 the '40's taught me this, that you don't ever walk
9 by a fence line in our valley and not measure to it
10 and use it for evidence.

11 And so there were different philosophies
12 by some surveyors about the evidence of corner, and
13 because he taught me that, then we – we watch and
14 are very careful when we see these type of things.
15 But this one was just bold because it sticks out
16 that the proportioned distance between the fence
17 line is in question, and the fence line at the
18 center of the section are proportionate.

19 One of them is fifteen feet off, the
20 other one is only eight. So I just looked at that
21 immediately and thought, Something's wrong, and then
22 I found record of surveys on the southwest corner
23 that are showing the fence line at the petition
24 between the other halves of the southwest quarter,
25 and they're proportionately different. It's only

1 **Q. I understand. What I'm asking,**
2 **Mr. Leavitt, is you don't know who put those fences**
3 **there.**

4 **A.** I don't. I reviewed the record of the
5 other affidavits of where the fence came from.
6 Timewise, it fits with the experience that I've had
7 in the valley that fences were placed by a lot of
8 the original deeded owners on properties, and those
9 were probably in time where one piece passed out of
10 the family to another piece or something like
11 that.

12 And it looks like it's been there for a
13 number of years along with the other fences in that
14 section. They all look like they've been there for
15 quite a while.

16 **Q. So back to the question, you're not sure**
17 **why those fences were placed where they were?**

18 **A.** It's my opinion they were measured in.

19 **Q. I understand that. But you don't know,**
20 **other than just your experience?**

21 **A.** I don't know.

22 **Q. You don't know who put the fences in?**

23 **A.** I have no knowledge of who put the fence
24 there.

25 **Q. And you don't know why they put the**

1 of us back in those days because the BLM notes
2 weren't on line. So it was harder for us to find
3 the information, or we had to order the notes from
4 Boise, basically.

5 **Q. When Harper Leavitt Engineering helped
6 prepare the Idaho Falls plat that we just looked
7 at –**

8 A. Uh-huh.

9 **Q. – did it find the original corner?**

10 A. No. We weren't contracted to find the
11 original corners.

12 **Q. Oh.**

13 A. And we were not – We didn't have the
14 County's authority, our own authority, anyone's
15 authority to displace two corners in the
16 intersection. We located both of them. The city
17 was the ones that decided to put one coordinate on
18 each corner, not us.

19 **Q. I'm just asking you, did you find the
20 original corner in that work you were doing?**

21 MR. SEAMONS: The original marker in the
22 original corner?

23 MR. MANWARING: Yes.

24 THE WITNESS: No. I think that we only
25 found – we had a copy of the – this Exhibit M

1 question you're asking me?

2 **Q. Yes.**

3 A. In this situation, I have not relied on
4 his corner because I haven't performed a survey from
5 that corner. I checked that out, and so I have not
6 relied on that particular corner.

7 **Q. If you were going to perform a survey,
8 would you have relied on that corner?**

9 A. Not without doing the research that I've
10 done already.

11 If I was to go perform a survey on this
12 section now, with the research that I've done about
13 these corners, I would be very, very cautious to use
14 seven of the eight corners. There's enough
15 evidence, just in the record, that leads me to
16 believe that there may be some misplacement, grossly
17 misplaced, in this particular section. And so I
18 would be cautious, honestly.

19 **Q. Have you performed a survey of this
20 section?**

21 A. Not that I know of.

22 **Q. Now, back to Exhibit J –**

23 A. Uh-huh.

24 **Q. – this, again, are corner perpetuation
25 records. You've already discussed these. It's a**

1 when – if this was a corner that we located, I – I
2 don't think I was contracted in this area actually.

3 I think Mountain River probably did this
4 area, but they may or they should have had a copy of
5 these perpetuated ties. And if the corner wasn't
6 easily found, they could have crossed those ties and
7 marked it out. But they didn't place anything. We
8 only located what was existing.

9 **Q. Okay. And in paragraph three of
10 Exhibit M that we've been looking at, Mr. Jones says
11 the corner is a one-half inch iron rod?**

12 A. Uh-huh.

13 **Q. Is that something he's placed or he
14 found?**

15 A. He found.

16 **Q. And would that have been something that
17 you would have relied upon as a surveyor?**

18 A. Oh, yeah. I've – I've probably used
19 some of these corners. We rely on each other's
20 corners often unless there's a reason not to rely on
21 the corner, and – and reasons that are easily
22 found, like double corners, if you go out and find
23 two corners out there, then you're going to try to
24 figure out which one goes back to the original, and
25 so would I have relied on his corner? Is that the

1 **two-page exhibit.**

2 A. Oops. I passed one. Just a second.
3 Okay.

4 **Q. Now, the first page is – you've already
5 identified the corner perpetuation record from Garth
6 Cunningham –**

7 A. Uh-huh.

8 **Q. – and that was done in 1979?**

9 A. Uh-huh.

10 **Q. Is that yes?**

11 A. Yes. Sorry.

12 **Q. And this is for the southeast corner of
13 Section 17.**

14 A. That's correct.

15 **Q. Do you find the southeast corner to be a
16 reliable corner from a surveyor's standpoint?**

17 A. After the research that I've done, I do.
18 And one of the reasons that I do is because it
19 matches the fence lines. And we're very cautious as
20 surveyors to try to adhere to bona fide rights that
21 are pointed out in the manual, and so we make sure
22 that there isn't anything more important in this one
23 than there is in the other one except that
24 possession lines fit this one, and so I think it
25 gives some credence to this corner.

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1 Q. So the description of the monument, the
2 one-half-inch iron rod from old ties, you would find
3 that a reliable record for perpetuating that
4 corner?

5 MR. SEAMONS: Well, there's more than
6 one page here.

7 MR. MANWARING: I understand. I'm
8 talking about the first page.

9 MR. SEAMONS: All right.

10 THE WITNESS: Yeah. The first one,
11 which was -- the first page in 1979, Garth
12 Cunningham found a half-inch iron rod from old ties,
13 and if you go to the next page, which is the exact
14 same corner, the old ties are shown that were
15 recorded by Donald M. Ellsworth.

16 Donald Ellsworth was Garth's boss. He
17 was Ellsworth Engineering. Garth Cunningham was
18 working for Ellsworth Engineering until the time
19 they turned into Mountain River Engineering, but
20 Garth was working as a surveyor for Donald Ellsworth
21 in 1979 so they had record of all these corners that
22 he had found or placed and where it came from. He
23 doesn't explain where it came from, but in 1969, he
24 perpetuated what he thought was the corner.

25 Q. And do you have any problem with what

1 One of the things that exhibit -- the
2 difference between those two exhibits, Donald
3 Ellsworth does not show a distance to the north from
4 that corner, and Mr. Jones does. And he shows a
5 distance to the south that is twenty feet short of
6 fifty-two hundred and eighty feet Donald Ellsworth
7 does. And Dennis Jones shows a distance twenty feet
8 long to the north, fifty-three hundred.

9 So those distances, you know, I know
10 that those are the same corners that were found here
11 because on the county control map, those distance
12 are perpetuated. They're the same distances.

13 Q. Same distances?

14 A. Uh-huh. Same distances on the record
15 surveys.

16 Q. Okay. Now, in the manual of surveying,
17 what does it tell you or instruct you as it relates
18 to fences?

19 MR. SEAMONS: The question is vague.

20 MR. MANWARING: Okay.

21 THE WITNESS: Yeah. I don't know that I
22 have any particular memory of what it talks about as
23 fences, but it talks about evidence of ownership and
24 evidence of, you know, those type of evidences, but
25 I can't remember specifically anything about a fence

1 Donald Ellsworth has written here in this corner
2 record?

3 A. No, no.

4 Q. Was this the same Ellsworth Engineering
5 that was relied upon by Dennis Jones in making the
6 northeast corner --

7 A. Yes.

8 Q. -- calculation.

9 A. Yes.

10 Q. Now, if you turn back again to
11 Exhibit M -- go the other way.

12 A. This way? Going the wrong way. We're
13 talking M. Actually, it's a couple more pages.

14 Q. (BY MR. MANWARING:) So when you're --
15 in paragraph one, where it talks about found using
16 ties from Ellsworth Engineering --

17 A. Uh-huh.

18 Q. -- would that be the same Ellsworth
19 Engineering that we just talked about?

20 A. It is.

21 Q. So Mr. Jones apparently would have had
22 some notes or information that he relied upon in
23 making that northeast corner determination?

24 A. He did. He had ties from Ellsworth
25 Engineering.

1 line or fences.

2 Q. (BY MR. MANWARING:) Can you find in the
3 manual what it describes as far as evidences of
4 ownership or use that you're talking about that
5 you're relying upon?

6 A. It talks about -- I can find places in
7 the manual where it talks about evidences of the
8 original corner, which would be tied to the original
9 notes like topography, you know, crossings, things
10 like that, or bearing trees or line trees or those
11 type of things.

12 And then there are also evidences of
13 testimony of the original placement of a corner. If
14 there's testimony that the corner was right here,
15 and it's refutable testimony, then a surveyor can
16 accept that testimony as that being the corner.

17 And the evidences that we use in the
18 industry that we talked about, are evidences that
19 would not have been pointed out in the manual.
20 Those are evidences of ownership, evidence of deeds,
21 a written record. All of those are evidences of a
22 maybe a previous survey in a previous time, before
23 there were corner perpetuations, before there were
24 records of survey, filing at -- all of that
25 information relates back to where the original

1 corner could be placed.
 2 And if you could testify in a court of
 3 law that I used this as evidence to replace that
 4 corner, then you've got a really good understanding
 5 that that could be where the corner came from. So
 6 as far as specific, you know, references to fence
 7 lines, no, I don't have a specific reference to a
 8 fence line.

9 **Q. And what you're saying is the manual**
 10 **doesn't have a specific reference to fence lines?**

11 A. No. Because fence lines came. These
 12 were instructions for original surveyors to lay out
 13 pints. There wasn't fence lines there.

14 On the retracement surveys, it talks
 15 about in retracement and in relocation of lost
 16 corners, a lost corner is a corner that can only be
 17 placed by measurement from existent monuments, and
 18 there are double proportioning to do at section
 19 corners, and single proportioning at quarter
 20 corners, but that still is the last thing that you
 21 use. After all of the evidence is exhausted, then
 22 you use that.

23 And in my experience, we have used many,
 24 many fences in this valley to place especially
 25 quarter corners. The quarter corner that is the

1 so he placed it by double proportion. And, by the
 2 way, those double proportions were not correct – I
 3 can prove that – which then displaces three other
 4 corners because they were set by single proportion.

5 And so, yes, there were a lot of lost
 6 corners in Section 17, and there were fences that
 7 were not used on any of them. There was no – in
 8 fact, the corners on the west side of the section
 9 are in the Lewisville Highway.

10 The Lewisville Highway plans from the
 11 1930's or '40's, whenever it was done, have
 12 references to corners, so those corners over there
 13 were not lost, so they shouldn't have been
 14 proportioned.

15 If the original record shows or doesn't
 16 have enough information to replace them, then you
 17 could call them lost, but the double proportioning
 18 that was done was not done properly.

19 So knowing all this now, I would be very
 20 cautious to use seven of eight corners in that
 21 section.

22 **Q. The southeast corner is acceptable.**

23 A. I think it is because of the location of
 24 the fences.

25 **Q. Northeast corner?**

1 boundary line or the dividing line between the north
 2 and south quarters of the section, quite often in
 3 our valley, the quarter corner has been placed.

4 These are corners that I have either
 5 placed or I have either accepted as being placed in
 6 line with fence lines at the quarter corner, and
 7 that's because it – it holds the – it holds the
 8 bona fide rights of owners that may have already
 9 measured in properties. And we find that, you know,
 10 the fences are going to be closer.

11 In our valley, however, irrigation came
 12 before fences, and sometimes you'll find that a
 13 ditch was the dividing line between two parcels
 14 rather than the fence. And so all of that
 15 information is valuable when placing these
 16 corners.

17 **Q. Has any of that information been relied**
 18 **upon to, to your knowledge, in placing corners in**
 19 **Section 17 that we've been discussing?**

20 A. No. I don't feel like, after looking at
 21 this, no, because the northwest corner was said to
 22 be a double proportioned corner, so that means that
 23 he thought it was lost. This would have been Garth
 24 Cunningham placing it.

25 The southwest corner he said was lost,

1 A. The northeast corner is – I wouldn't
 2 feel really bad about dividing that distance there
 3 that's twenty feet and, you know, the proper
 4 division of that is to spread that out the full way.
 5 The problem is, if you use the evidence to place
 6 that corner, then you're disregarding evidence at
 7 the east quarter corner that you could place that
 8 corner by other evidence actually.

9 There's fence lines and there's –
 10 there's a deed line that goes – the Ucon Cemetery
 11 Road takes off from there, so makes you wonder whose
 12 deed the Cemetery Road came out of. Did that come
 13 out of two deeds or one deed? There's another
 14 corner shown on the perpetuation sheet there,
 15 twenty-seven feet north of the corner that Kevin
 16 used.

17 So there's confusion on the east side,
 18 there's confusion on the west side, which makes
 19 confusion on the south side and the north side.

20 **Q. Based upon the corner perpetuation**
 21 **records we've seen for the northeast corner, that**
 22 **corner has been perpetuated?**

23 A. It's been perpetuated as far as the
 24 monument goes. No one has said that's the corner.
 25 There's no pedigree going back to the original

1 proportioning from existent corners meaning the
 2 original corner has to be known at those other
 3 distances.
 4 One of the fallacies that surveyors, and
 5 myself included, with all the surveyors that are
 6 private surveyors, sometimes when they drop back to
 7 these proportioning distances and things like that,
 8 they assume that the other corners were original
 9 corners.
 10 And if you go back to the pedigrees of
 11 these other corners and you're just accepting
 12 someone's corner doesn't mean that it's the original
 13 corner. And that's what's happened here. The
 14 corners of 1980 were surveyed out, proportioned and
 15 petitioned, and that's – that's the record of
 16 survey showing correct distances, showing correct
 17 methodology, showing all of the things correctly,
 18 and showing the fences off.
 19 **Q. Correct.**
 20 A. Showing the fences are not coincident
 21 with the lines of the 1980 corners. That's all that
 22 is.
 23 And when Kevin Thompson went out there,
 24 he had a deed that didn't reference the north
 25 quarter, the north half of that section, or the

1 '80's.
 2 MR. SEAMONS: That were perpetuated
 3 corners.
 4 THE WITNESS: The perpetuated corners,
 5 exactly.
 6 MR. MANWARING: Well, that brings us to
 7 the next set of questions dealing with Exhibit 3,
 8 and that's this record of survey we've been talking
 9 about from Thompson Engineering.
 10 (Deposition Exhibit 3 was marked for
 11 identification.)
 12 **Q. (BY MR. MANWARING:) This survey was**
 13 **performed in September of 2009; is that correct?**
 14 A. Uh-huh, yes.
 15 **Q. And you didn't do anything in relation**
 16 **to the survey?**
 17 A. No.
 18 **Q. Okay. And the process that you believe**
 19 **Mr. Thompson had used in preparing this record of**
 20 **survey, I think you've mentioned, corresponds with**
 21 **what has been found, at least in the section corners**
 22 **as we know them today; is that correct?**
 23 A. That's correct. The monuments that he
 24 based this survey on were the '80's monuments and
 25 the '69 monument that were perpetuated, and in the

1 south half of that section. His survey is a
 2 relocation of corners placed by John P. Barnes,
 3 license 856, which are shown on his survey. He
 4 found his corners.
 5 The legal descriptions were written by
 6 John P. Barnes on this parcel of property. And he
 7 went out and relocated those corners. There's no
 8 reference until his survey that it's a petition line
 9 between the north quarter, the north half, and the
 10 south half of that northeast quarter.
 11 The first time it even comes into record
 12 is on his survey where he mentions that in his legal
 13 descriptions that are not recorded, these legal
 14 descriptions basically don't mean anything yet until
 15 they're recorded, and this record of survey does not
 16 transfer the title to any of these parcels. It's
 17 only a picture of the measurements that he
 18 performed.
 19 I have no reason to believe that his
 20 measurements are wrong. In fact, comparing them to
 21 other record of surveys, county maps and things like
 22 that, his county section breakdown is identical to
 23 the county map, and I have no reason to believe that
 24 he hasn't done anything other than measure to the
 25 original – or the corners that were found in the

1 perpetuated corners and in 2004 section map that the
 2 county control shows.
 3 **Q. Okay. And is there any aspect of this**
 4 **record of survey that you can point to and say this**
 5 **survey was done incorrectly?**
 6 A. From the corners that he used, I think
 7 it was – there's no reason to believe it was done
 8 incorrectly from the corners that he used.
 9 **Q. Okay.**
 10 A. I may not agree with the corners that he
 11 used, but all of his measurements and the way that
 12 he broke the section down seems to be correct.
 13 **Q. Is it correct in the manual of surveying**
 14 **that what you're doing in surveying is proportioning**
 15 **out the actual land than you're looking at?**
 16 A. Yeah, it's particular. The one-quarter
 17 corners of the section, wherever they are found, if
 18 you intersect the north/south one-quarter corners
 19 and east/west one-quarter corner, that becomes the
 20 center of the section.
 21 **Q. Okay.**
 22 A. Then you move to each one of those
 23 quarters doing the same thing.
 24 **Q. And is that type of proportioning, is**
 25 **that how the survey manual describes that you**

1 A. Sure. The Kevin Thompson survey shows
2 the approximately fifty-three hundred and some feet
3 on that north mile there, and so dividing that down
4 into the proportional measurements because the
5 quarter corner was placed on a proportion as well,
6 so that was already split.

7 So he took the distance between the
8 found quarter corner, the found northeast corner, he
9 split that distance, and he found the point already
10 existing at 1325.26 feet, which was placed by John
11 P. Barnes who did not report a record of survey, and
12 he found a point there.

13 Q. Now, who's John P. Barnes?

14 A. He's the surveyor from Rexburg area,
15 from Madison County.

16 Q. And he apparently didn't perform any
17 kind of record of survey for that particular
18 point?

19 A. I think he has one in his records. It
20 was not recorded. But I think he has one because he
21 prepared legal descriptions from that, and it would
22 be pretty hard to not have a diagram of some kind
23 when writing a legal description.

24 Q. They probably have some notes.

25 A. I'm sure, uh-huh.

1 north half and a south half, how would you do that
2 under the manual of survey?

3 A. The way that I explained before, you
4 would proportion those distances on the east side,
5 proportion the distances from the center section to
6 the north quarter corner and then run a line between
7 those two corners, that would be the title line
8 basically between the north one-quarter corner and
9 the south one-quarter quarter or the - I'm sorry.
10 The north half of the northeast quarter and the
11 south half of the northeast quarter.

12 Q. And from your understanding, from the
13 title that you've seen of record, that division was
14 made sometime on this northeast corner?

15 A. No. Actually, the legal descriptions
16 that are recorded of that are four legal
17 descriptions in this half of the quarter that are
18 described from this quarter corner, and they go up
19 using these distances, yes.

20 The - that legal description is there.
21 The legal description when it comes to this point,
22 does not mention the sixteenth corner, nor does it
23 mention that it's the petition line between two
24 quarters.

25 Q. And you're pointing to the point on the

1 Q. And - but John Barnes is the one that
2 put the iron rod with the cap in it that you have
3 referred to as cap number 826?

4 A. Correct.

5 Q. And that's a quarter corner?

6 A. No. It's a sixteenth corner.

7 Q. Okay. And according to this record of
8 survey, Mr. Thompson found that iron rod.

9 A. Uh-huh, yes, he did.

10 Q. And it was proportioned in the location
11 that would be what we would say is the line between
12 the south half and the north half of that northeast
13 corner.

14 A. Yes.

15 MR. SEAMONS: I'll object to that
16 question, but you will go ahead and answer if you
17 understand it.

18 THE WITNESS: I understand what you're
19 saying, and I will refer back to according to his
20 survey, yes.

21 Q. (BY MR. MANWARING:) Right.

22 A. According to the 1980 corners in his
23 survey, yes.

24 Q. So if we were going to divide this
25 northeast quarter of Section 17, so you'd have a

1 record of survey that references the iron cap number
2 826; is that correct?

3 A. There - yeah, there happens to be two
4 others of those as well, so this one is the
5 northeast one.

6 Q. Okay. And when you say two others,
7 you're referenced over on the -

8 A. Northwest corner.

9 Q. - northwest corner. -

10 A. Yes.

11 Q. - the iron rod cap number 826, and the
12 southwest corner iron rod cap number 826; is that
13 correct?

14 A. That's correct. And this corner right
15 here, could -

16 Q. The southwest corner?

17 A. - the southwest corner, could actually
18 be called, or should be called, the center of the
19 section according to the survey that was performed.
20 It could be called the center of the section.

21 Q. Sure. Now, if you'd look at Exhibit G
22 of your exhibit to your affidavit -

23 A. Uh-huh.

24 Q. - where it identifies this property as
25 the northeast quarter of Section 17 -

1 A. Correct.
 2 **Q. – at what corner would that be?**
 3 A. It's a quarter, so on this diagram on
 4 Mr. Thompson's survey, it would be this whole one
 5 quarter.
 6 **Q. It would be the entire –**
 7 A. The northeast quarter.
 8 **Q. The entire corner of the northeast**
 9 **quarter, is that right?**
 10 A. The northeast quarter representing a
 11 hundred and eighty – or yeah, a hundred and eighty
 12 acres.
 13 MR. SEAMONS: I might add, Kipp, and
 14 perhaps you've already deciphered this that the
 15 significance –
 16 THE WITNESS: Sorry.
 17 MR. SEAMONS: I might add that the
 18 reason that we added this as an exhibit was for the
 19 full legal description which goes on to state
 20 containing one hundred and sixty acres, more or
 21 less, according to the government survey.
 22 MR. MANWARING: Right.
 23 MR. SEAMONS: Okay.
 24 **Q. (BY MR. MANWARING:) What – in fact, if**
 25 **you know, Mr. Leavitt, why do deeds say more or less**

1 surveyors measure different – differently between
 2 two found corners. I mean, it's just not an exact
 3 science.
 4 **Q. Okay. Now, back to Exhibit 3, which is**
 5 **the record of survey, based upon the information and**
 6 **relied upon by Thompson Engineering, did it properly**
 7 **identify on this record of survey the property as**
 8 **described with what we would describe as the south**
 9 **half of the northeast corner of Section 17?**
 10 MR. SEAMONS: I'll object to the form of
 11 the question.
 12 If you understand what he's asking, you
 13 can answer that one though.
 14 THE WITNESS: I do understand. From the
 15 corners that Mr. Thompson found on this exhibit, he
 16 breaks that down mathematically and properly
 17 according to statutes and reasonable surveying. And
 18 then, for the first time, calls out that line as
 19 being the north line of the south half of the
 20 northeast quarter.
 21 **Q. (BY MR. MANWARING:) That process that**
 22 **you see at least utilized by Mr. Thompson in this**
 23 **record of survey, does it comply with how they would**
 24 **direct a survey to be done under the manual of**
 25 **survey?**

1 **when it describes acreage?**
 2 A. It's an accepted practice. Basically,
 3 we actually do the same thing today even though we
 4 may have good computers and a lot of calculations,
 5 but more or less distances on acreage because
 6 warranty deeds usually do not ensure acreage. And I
 7 guess that's held as kind of law, so to speak.
 8 I'm not sure where it ever came from,
 9 but they don't – unless there's a specific court
 10 case that may ensure acreage, but I'm not aware of
 11 how that came about. But it's a – it's kind of a
 12 standard practice in our industry.
 13 **Q. And the more or less meaning what?**
 14 A. You know, acreage more or less, you
 15 know, an acre. I mean, it's hard to calculate an
 16 acre anyway. If you had a square acre, it's two
 17 hundred and – what is it? Two hundred and seven
 18 feet by .6 or something, by 207.6.
 19 I mean, forty-three thousand, five
 20 hundred and sixty square feet is an acre, and
 21 acreage with – computers now days, you can
 22 extrapolate that out to the thousandth place, but it
 23 doesn't necessarily mean measurement is not always
 24 exact science, and we see that on record of surveys
 25 in this case that sometimes the two different

1 MR. SEAMONS: I'll object to the
 2 question.
 3 THE WITNESS: Yeah. The very first –
 4 the very first item that the manual describes is
 5 replacement, relocation, of the lost or obliterated
 6 corners. If he thinks that he did that, then this
 7 survey is proper, according to the monuments that he
 8 used.
 9 But the manual of instructions is very
 10 specific that you go back to the original survey,
 11 the original corners. If you can't find those
 12 original corners, then you proportion from found
 13 corners.
 14 **Q. (BY MR. MANWARING:) Does that appear to**
 15 **be what was done here?**
 16 A. No.
 17 **Q. What found corners didn't he use?**
 18 A. Found original corners. Okay? I don't
 19 see any posts out there anyplace. Charge stakes. I
 20 don't see any pits. I don't see any – any
 21 evidence, zero evidence, of the original corners.
 22 **Q. What evidence of original corners are**
 23 **you aware of that could have been relied upon in**
 24 **making this survey?**
 25 A. There could have been –

1 **Q. I'm asking what you are aware of. What**
 2 **do you know exists as far as original comers that**
 3 **should have been relied upon?**

4 MR. SEAMONS: What evidence of original
 5 comers?

6 MR. MANWARING: Yeah.

7 MR. SEAMONS: Other than fence line?

8 MR. MANWARING: Yes.

9 MR. SEAMONS: Okay.

10 THE WITNESS: There – the center line
 11 of the road, intersections sometimes have been used
 12 in Bonneville County throughout, and the center line
 13 of a road is held as the exact same evidence as a
 14 fence line.

15 **Q. (BY MR. MANWARING:) Is that here? Do**
 16 **you know whether that exists here?**

17 A. I don't know than it exists here. There
 18 is no record in the comer perpetuations as to how
 19 any of these comers came about except the double
 20 proportioned comers, which I know were not double
 21 proportioned. And single proportioned comers,
 22 which came from wrong double proportioned comers.

23 So the only two comers that were found
 24 is the northeast and the southeast, and there's no
 25 pedigree that goes back to being the original

1 southeast corner received as much property as they
 2 were supposed to as far as north and south
 3 distances.

4 **Q. I understand that, your position.**
 5 **Have you gone out and tried to find the**
 6 **original comers in Section 17?**

7 A. I have been on the property there, and I
 8 went around that section, and I reviewed the comer
 9 perpetuations and kind of looked and, yes, I have
 10 not found the original comers.

11 **Q. What would that mean, then, to use this**
 12 **if you can't find the original comers, what do you**
 13 **do?**

14 A. Then you start into this research like I
 15 have, and research all of the evidence. When all of
 16 the evidence is exhausted, and you don't feel that
 17 any of the evidence points to an original comer,
 18 then you start proportionately measuring from
 19 existent comers that were original comers, and so
 20 that may mean that your survey just quadrupled or
 21 whatever in size and scope.

22 **Q. But you haven't done that?**

23 A. No. I wasn't – I wasn't retained to
 24 resurvey, only to review this record and things, and
 25 give my opinion on the record, and the existence of

1 comer. There's nothing.

2 **Q. For either one?**

3 A. For either one.

4 **Q. But based on the evidence that**
 5 **apparently Mr. Thompson found, it was proper for him**
 6 **to rely upon those comers as perpetuated?**

7 A. Yeah. That's a question that only he
 8 can answer. The manual of instructions and the laws
 9 of the state of Idaho leave it up to each one of us
 10 individually to perform a survey. A survey isn't a
 11 survey if it doesn't begin from the original
 12 comers, so that's a question that he has to answer.

13 Knowing what I see here, there's some
 14 problems with some comers. The easy thing to do
 15 for all of us is to accept each others' comers and
 16 get on with life. That's the easy thing to do.

17 The hard thing to do is to stand up and
 18 say there's some problems, and this survey, because
 19 of the evidence that I see, of the fences on the
 20 east side of this section, there's some problems,
 21 and it's my opinion that you could – I can a show
 22 measurement – he shows a measurement on his survey
 23 that we're talking about that those fence lines are
 24 at the statutory distances.

25 So that means that everyone from the

1 the fence being the boundary line between those two
 2 parcels, the parcels in question.

3 MR. MANWARING: Okay. I don't have any
 4 other questions.

5 MR. SEAMONS: I'll throw one thing out
 6 here because you may have some questions on this.
 7 It just didn't come out during the dialogue, but in
 8 terms of evidence that he reviewed and considered,
 9 he also – I mean, he's been to the property several
 10 times, but the direction of the – the point of
 11 entry and direction of the irrigation ditch and its
 12 engineering and the dike that runs across the field
 13 where the fence itself sits, he's also considered
 14 that in forming his opinion. If you don't want to
 15 explore that, that's fine.

16 MR. MANWARING: I think he already
 17 explained that ditches sometimes –

18 THE WITNESS: Ditches, yeah.

19 MR. SEAMONS: Okay.

20 MR. MANWARING: I accepted that. I
 21 didn't understand his opinion, and I think we
 22 explored that.

23 MR. SEAMONS: Very good.

24 MR. MANWARING: Very good. Thank you.

25 THE COURT REPORTER: Did you want to

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BONNEVILLE COUNTY
IDAHO

2011 SEP -6 PM 4:35

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
Plaintiffs,)
)
vs.)
)
JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

REPLY MEMORANDUM

(Motion for Summary Judgment)

The Defendants heretofore filed a motion for summary judgment, dated June 7, 2011. The motion addresses the following three issues:

1. The true and correct location of the fence.
2. The doctrine of adverse possession.
3. The doctrine of boundary by agreement or acquiescence.

The foregoing three issues are separate and stand alone; they have different elements of proof; they have different burdens of proof; and they have different facts in support thereof. Thus, any one of the foregoing three issues is a sufficient and proper basis upon which to grant the Defendants' motion for summary judgment.

The Plaintiffs have carefully, but disingenuously scrambled the foregoing three issues together, hoping to garner a victory by confusion. The Defendants will not allow them to do so.

I.

TRUE AND CORRECT LOCATION OF THE FENCE

This issue is a watershed issue. According to the Plaintiffs, the fence in this case does not sit on the boundary between the parties' respective parcels of real property; instead, the Plaintiffs allege that the fence sits on their parcel of real property and is off by 15 feet. The Plaintiffs carry the burden of proof on this issue.

In order to carry their burden of proof, the Plaintiffs filed the AFFIDAVIT OF COUNSEL of Kipp L. Manwaring, dated May 17, 2011. In this regard, please note that Mr. Manwaring simply attached a copy of a RECORD OF SURVEY to his affidavit.

Mr. Manwaring is not a witness in this case, lay, expert, or otherwise. He did not prepare the RECORD OF SURVEY. He cannot identify it. He cannot authenticate it. He is not competent to testify regarding it. He cannot lay a proper foundation for it. It is not based on his personal knowledge. It is not admissible. His arguments regarding it are speculative, based on hearsay, and conclusory.

Nonetheless, according to the Plaintiffs, the RECORD OF SURVEY "confirms the disputed fence lies within the Campbells' property." See MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, p. 4.

The Defendants disagree with the Plaintiffs; however, rather than merely arguing with them, the Defendants filed the AFFIDAVIT OF KIM LEAVITT, dated June 7, 2011.

Mr. Leavitt is a professional land surveyor, duly licensed to practice professional land surveying in the state of Idaho. During the course of his education and practice, he has learned and acquired the education, knowledge, skill, experience, and training to determine the true and correct boundaries of real property, including, without limitation, the true and correct location of fences and other improvements thereon, and to locate and establish, or relocate and re-establish, and mark and perpetuate survey corners.

In addition, he possesses the scientific, technical, and specialized knowledge that are necessary and requisite to do the foregoing. Thus, Mr. Leavitt is competent to testify regarding the true and correct location of the fence in this case. See I.R.E. 702.

Mr. Leavitt duly submitted his affidavit to the court so that the court can understand the evidence in this case and determine the facts and issues herein. See I.R.E. 702.

With respect to the facts and data upon which he formed his opinions and based his findings and conclusions, please note that the facts and data are of the type that are customarily and reasonably relied upon by experts in the field of professional land surveying. See I.R.E. 703.

The AFFIDAVIT OF KIM LEAVITT duly evidences or otherwise shows that the fence does **not** sit on the Plaintiffs' parcel of real property and it is **not** off by 15 feet, notwithstanding the Plaintiffs' **allegation** to the contrary.

Instead, the fence sits on the boundary between the Plaintiffs' parcel of real property and the Defendants' parcel of real property. It is exactly 3,960 feet from the SE corner of Section 17. The fence marks the boundary between the Plaintiffs' parcel of real property and the Defendants' parcel of real property.

Thus, the Plaintiffs have ***not*** carried their burden of proof on this issue; allegations in pleadings and arguments of counsel are ***not*** sufficient:

. . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment . . . shall be entered against him.

See I.R.C.P. 56(e).

II.

ADVERSE POSSESSION

If the court concludes that the Plaintiffs have carried their burden of proof, above, then the court needs to address the other two issues—namely, the doctrine of adverse possession and the doctrine of boundary by agreement or acquiescence.

In this regard, please note that the AFFIDAVIT OF KIM LEAVITT is ***not*** directed to the other two issues, notwithstanding the Plaintiffs' effort to scramble them together in order to garner a victory by confusion.

The AFFIDAVIT OF KIM LEAVITT is directed to the true and correct location of the fence. Again, it shows that the fence does ***not*** sit on the Plaintiffs' parcel of real property and that it is ***not*** off by 15 feet; instead, it shows that the fence sits on the boundary between the parties' respective parcels of real property and that it marks the boundary between them.

Thus, if the court agrees with the Plaintiffs—that is, if the court concludes that the fence sits on the Plaintiffs' parcel of real property and is off by 15 feet, then the court needs to address the doctrine of adverse possession and the doctrine of boundary by

agreement or acquiescence, and the AFFIDAVIT OF KIM LEAVITT is not directed thereto.

With respect to the doctrine of adverse possession, the Defendants have exhaustively detailed the facts in support thereof. The Plaintiffs have candidly admitted to each and every element of proof. In simple terms, “there is no genuine issue as to any material fact.” See I.R.C.P. 56(c).

Nonetheless, in their memorandum in opposition, the Plaintiffs make the singular argument that “[t]here is no genuine dispute of material fact pertaining to payment of taxes . . . [d]espite the Kvammes’ effort to obscure the testimony of Blake Mueller and Mark Hansen.” See RESPONSE IN OPPOSITION TO THE [DEFENDANTS’] MOTION FOR SUMMARY JUDGMENT, p. 1.

The Defendants take issue with the assertion that they have attempted to “obscure” anything in this case, let alone the testimony of Mr. Mueller and Mr. Hansen.

The element of proof is simple and straightforward:

. . . [I]n no case shall adverse possession be considered established . . . unless it shall be shown that . . . the party or persons, their predecessors and grantors, have paid all the taxes, state, county, or municipal, which have been levied and assessed upon such land according to law.

Idaho Code Section 5-210.

Since 2003, the Defendants have “paid all the taxes” that have been “levied and assessed” against their parcel of real property—that is, Parcel No. RP03N38E170008, whether state, county, or municipal. The Plaintiffs admit so.

Of course, before 2003, and going back to at least 1950, the Defendants’ predecessor in interest “paid all the taxes” that were “levied and assessed” against their

parcel of real property, whether state, county, or municipal. Again, the Plaintiffs admit so.

The taxes on Parcel No. RP03N38E170008 are current. No taxes are outstanding, past due, or otherwise in default or arrears. Again, the Plaintiffs admit so.

The “payment of taxes on the lot within which the disputed tract is enclosed satisfies the tax payment requirement of the statute.” See Standall v. Teater, 96 Idaho 152, 156, 525 P.2d 347, 351 (1974). **Of course, the “disputed tract” in this case is located “within” the real property that lies north of the fence, which is the Defendants’ parcel of real property.**

Thus, the Defendants have carried their burden of proof of this issue and they have not “obscured” anything.

III.

BOUNDARY BY AGREEMENT OR ACQUIESCENCE

Again, the AFFIDAVIT OF KIM LEAVITT is **not** directed to the doctrine of adverse possession or the doctrine of boundary by agreement or acquiescence, notwithstanding the Plaintiffs’ effort to scramble them together in order to garner a victory by confusion. For example, the Plaintiffs assert that “the boundary claim raised in those affidavits is based upon the affidavit of Leavitt.” See RESPONSE IN OPPOSITION TO [DEFENDANTS’] MOTION FOR SUMMARY JUDGMENT, p. 3.

Not so.

The AFFIDAVIT OF KIM LEAVITT is directed to the true and correct location of the fence. Again, it shows that the fence does **not** sit on the Plaintiffs’ parcel of real property and that it is **not** off by 15 feet; instead, it shows that the fence sits on the

boundary between the parties' respective parcels of real property and that it marks the boundary between them.

Thus, if the court agrees with the Plaintiffs—that is, if the court concludes that the fence sits on the Plaintiffs' parcel of real property and is off by 15 feet, then the court needs to address the doctrine of adverse possession and the doctrine of boundary by agreement or acquiescence, and the AFFIDAVIT OF KIM LEAVITT is not directed thereto.

With respect to the doctrine of boundary by agreement or acquiescence, the Defendants have exhaustively detailed the facts in support thereof. The Plaintiffs have candidly admitted to each and every element of proof. In simple terms, “there is no genuine issue as to any material fact.” See I.R.C.P. 56(c).

Nonetheless, in their memorandum in opposition, the Plaintiffs make the bald assertion that “the facts prove the absence of any agreement to treat the fence as the boundary.” See RESPONSE IN OPPOSITION TO THE [DEFENDANTS'] MOTION FOR SUMMARY JUDGMENT, p. 3.

In order to support their conclusory assertion, the Plaintiffs argue that the NE1/4 of Section 17 “was owned in its entirety by a sole owner,” that the fence “was erected during that sole ownership,” and that “such fact alone indicates the fence was a convenience fence.” See Id.

Wrong.

The following quote summarizes the elements of proof of boundary by agreement or acquiescence:

Boundary by agreement or acquiescence has two elements: (1) There must be an uncertain or disputed boundary, and (2) a subsequent agreement fixing the boundary. . . . A subsequent agreement may be inferred from the conduct of parties or their predecessors, including acquiescence to the location and maintenance of a fence for a long period of time.

Weitz v. Green, 148 Idaho 851, 860, 230 P.3d 743, 752 (2010).

ELEMENT NO. 1: "UNCERTAIN OR DISPUTED BOUNDARY"

The Defendants purchased the N1/2 of the NE1/4 on July 29, 2003. They paid good and valuable consideration for it. They did so upon the belief that their predecessor in interest had good and marketable title to the N1/2 of the NE1/4 and that her title thereto was valid, including the real property that lies north of the fence; and, with specific reference to the real property that lies north of the fence, they did so upon the belief that it was part of the N1/2 of the NE1/4.

The Defendants did ***not*** have any notice, whether actual or constructive, that the Plaintiffs claimed any right, title, or interest in the real property that lies north of the fence; and, with specific reference to the real property that lies north of the fence, they did ***not*** have any notice, whether actual or constructive, of any outstanding and/or adverse rights of another, including, without limitation, the Plaintiffs.

The Defendants farm the N1/2 of the NE1/4. They are not professional land surveyors and they are not licensed to practice professional land surveying.

Thus, from that standpoint, they do not know the boundary between their parcel of real property and the Plaintiffs' parcel of real property. The boundary is "uncertain or disputed."

Likewise, the Plaintiffs do not know the boundary between the parties' respective parcels of real property; again, the boundary is "uncertain or disputed":

Q. Of your own personal knowledge, do you know the boundary, the actual boundary, the true and correct boundary, between the north half of the northeast quarter and the south half of the northeast quarter of Section 17?

A. Not the exact, no.

Q. And when you say not the exact boundary, no, by that you would also agree that you're uncertain as to the true and correct boundary between the north half and the south half of the northeast quarter of Section 17?

A. I agree. I would be uncertain, as would everybody else.

Q. Now, notwithstanding the fact that you are uncertain about that boundary, your contention in this case is that the boundary is in dispute, correct?

A. Correct.

See DEPOSITION OF V. LEO CAMPBELL, vol. III, p. 214, ll. 6-23.

ELEMENT NO. 2: "SUBSEQUENT AGREEMENT FIXING THE BOUNDARY, WHICH MAY BE INFERRED FROM THE CONDUCT OF THE PARTIES OR THEIR PREDECESSORS, INCLUDING ACQUIESCENCE TO THE LOCATION AND MAINTENANCE OF A FENCE FOR A LONG PERIOD OF TIME"

With respect to the location of the fence, it has been in its current location since time immemorial. During his deposition, V. Leo Campbell testified that he "believes the fence was there before the Davises bought the property." They purchased the NE1/4 on March 3, 1919.

Notwithstanding his "belief," please note that the Plaintiffs do not know the following:

1. The Plaintiffs do not know who constructed the fence.
2. The Plaintiffs do not know when it was constructed.
3. The Plaintiffs do not know why it was constructed, whether as a "convenience" fence or otherwise.

Nonetheless, the parties have "acquiesced to the location of the fence for a long period of time."

In addition, the parties have "maintained of the fence for a long period of time."

Finally, the "conduct of the parties and their predecessors" evidences and confirms the following:

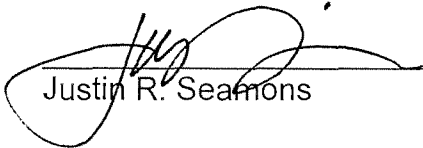
On the one hand, the Plaintiffs and their predecessors in interest have never enclosed the real property that lies north of the fence; they have never cultivated it, improved it, used it, irrigated it, or put it in production; they have never received rental income from it; they have never received a share crop from it; they have never posted it for sale; and they have never notified any third party, whether by way of actual notice or constructive notice, that the fence allegedly does not sit on the boundary between the parties' respective parcels of real property.

On the other hand, the Defendants and their predecessors in interest have always enclosed the real property that lies north of the fence; they have always cultivated it, improved it, used it, irrigated it, and put it in production; and they have now installed a pivot, mainline, and motor on the N1/2 of the NE1/4, which further improved it.

CONCLUSION

The Defendants respectfully move the court to grant their MOTION FOR SUMMARY JUDGMENT. In this regard, "there is no genuine issue as to any material fact" and they are "entitled to a judgment as a matter of law." See I.R.C.P. 56(c).


Dated September 6, 2011.


Justin R. Seamons

CERTIFICATE OF SERVICE

I served a copy of the foregoing REPLY MEMORANDUM on the following person on September 6, 2011:

Kipp L. Manwaring
HAND DELIVERED


Justin R. Seamons

1/1 Shindurlix g L7A

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BONNEVILLE COUNTY
IDAHO

2011 SEP -6 PM 4:35

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
Plaintiffs,)
)
vs.)
)
JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

**REPLY AFFIDAVIT OF
KIM H. LEAVITT**

(Motion for Summary Judgment)

State of Idaho)
) ss.
County of Bonneville)

I, Kim H. Leavitt, state and declare the following under oath:

INTRODUCTION

1. I have reviewed the Plaintiffs' RESPONSE IN OPPOSITION TO THE [DEFENDANTS'] MOTION FOR SUMMARY JUDGMENT, dated August 25, 2011, including the arguments of counsel therein.

2. I have prepared this REPLY AFFIDAVIT to address and correct the arguments of counsel and, just as importantly, to “assist the court in understanding the evidence [and] determining a fact in issue” in this case. See I.R.E. 702.

3. With respect to the arguments of counsel, please note that Mr. Manwaring is not an expert witness; he is not a professional land surveyor; he is not duly licensed to practice professional land surveying; he does not have the education, knowledge, skill, experience, and training to determine the true and correct boundaries of real property; he does not have the education, knowledge, skill, experience, and training to determine the true and correct location of fences and other improvements thereon; he does not have the education, knowledge, skill, experience, and training to locate and establish, or relocate and re-establish, and mark and perpetuate survey corners; and he does not possess the scientific, technical, and specialized knowledge that are necessary and requisite to do the foregoing.

4. Thus, Mr. Manwaring is not competent to testify regarding the issues in this case, including the location of the fence and the boundary between the parties' respective parcels of real property.

5. His arguments are not based on personal knowledge; instead, his arguments are based on speculation or conjecture and are conclusory. See I.R.C.P. 56(e).

6. I, on the other hand, am a professional land surveyor.

7. I am duly licensed to practice professional land surveying in the state of Idaho in accordance with Chapter 12, Title 54, of the Idaho Code. See License No. L-4563, issued June 11, 1982.

8. During the course of my education and practice, I have learned and acquired the education, knowledge, skill, experience, and training to determine the true and correct boundaries thereof, including, without limitation, the true and correct location of fences and other improvements thereon, and to locate and establish, or relocate and re-establish, and mark and perpetuate survey corners.

9. I possess the scientific, technical, and specialized knowledge that are necessary and requisite to do the foregoing. See I.R.E. 702.

10. Thus, I am competent to testify regarding the issues in this case, including the location of the fence and the boundary between the parties' respective parcels of real property.

11. With respect to the facts and data upon which I have formed my opinions, inferences, and other conclusions herein, please note that the facts and data are of the type that are customarily and reasonably relied upon by experts in the field of professional land surveying in forming opinions, inferences, and other conclusions. See I.R.E. 703.

12. I will now address and correct the arguments of counsel in the same order that Mr. Manwaring made them in the Plaintiffs' RESPONSE IN OPPOSITION TO THE [DEFENDANTS'] MOTION FOR SUMMARY JUDGMENT; again, I will address and correct the arguments of counsel so that the court can duly understand the evidence in this case and determine the facts and issues herein. See I.R.E. 702.

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ARGUMENT OF COUNSEL	REPLY
<p>“Leavitt admitted he has not surveyed the property.” <u>See</u> RESPONSE, p. 2.</p>	<p>Mr. Manwaring is correct: I have not performed a survey of the parties’ respective parcels of real property in this case; however, a survey is <i>not</i> necessary or requisite to determine the location of the fence in this case or the boundary between the parties’ respective parcels of real property. In this regard, please note that I have used and relied upon facts and data that are customarily and reasonably used and relied upon by experts in the field of professional land surveying in forming opinions, inferences, and other conclusions. <u>See</u> I.R.E. 703. For example, I have personally viewed the parties’ respective parcels of real property, including, without limitation, the grade or slope thereof, the location and direction of ditches and dikes, and the location and placement of the fence; I have reviewed the pleadings and other documents in this case, including, without limitation, the affidavits herein; I have reviewed the deeds and other documents in the chain of title; and I have reviewed the original survey of 1877, the survey notes, corner perpetuations, and other documents that relate or otherwise pertain thereto.</p>
<p>“Leavitt admits that the survey performed by Thompson Engineering follows the survey standards required by Idaho law.” <u>See</u> RESPONSE, p. 2.</p>	<p>Not true. Kevin L. Thompson of Thompson Engineering, Inc. prepared a RECORD OF SURVEY, dated September 17, 2009. The stated purpose of the RECORD OF SURVEY was to “combine 6 deeds”—specifically, the deeds of record to the Plaintiffs and his siblings. The purpose of the survey was <i>not</i> to determine if the fence marks the boundary between the parties’ respective parcels of real property. Mr. Thompson did <i>not</i> survey the Defendants’ parcel of real</p>

property; he did ***not*** locate or relocate the original corners of Section 17; and he did ***not*** mark or otherwise perpetuate the corners of Section 17. Instead, he used the Control Map of 2004 and corner perpetuations of record and possibly made measurements. In this limited sense only, the RECORD OF SURVEY “follows the survey standards required by Idaho law”—that is, it “follows” or uses the Control Map of 2004 and corner perpetuations of record. Nonetheless, Mr. Thompson did ***not*** follow or otherwise use the original survey of Section 17; and he did ***not*** find or otherwise locate the original corners of Section 17. In addition, Bonneville County, Idaho, has ***not*** approved or otherwise authorized the “combining” of the foregoing six deeds—that is, the deeds or record to the Plaintiffs and his siblings. In sum, the RECORD OF SURVEY ***illustrates*** the ***possible*** “combining” of the foregoing six deeds, but it does ***not*** fix or otherwise establish boundary lines, including, without limitation, the true and correct boundary line between the Plaintiffs’ parcel of real property and the Defendants’ parcel of real property. Finally, the RECORD OF SURVEY only “follows” the “standards required by Idaho law” ***if*** it is based on the original corners; in this regard, please note that the RECORD OF SURVEY was based on points found, marking the combined deeds. Mr. Thompson used the perpetuated corners as ***if*** they were the original corners; however, they are ***not*** the original corners. Moreover, there are duplicate corners perpetuated and he has ***not*** reconciled the differences or shown that they are original corners.

"Leavitt has an opinion about certain corners pertaining to the section in question, but Leavitt has not performed a survey to determine any different boundary determination than that set forth by Thompson." See RESPONSE, p. 2.

Mr. Manwaring is correct, but only in part: I have an "opinion" about the corners of Section 17 and I have not performed a survey of the parties' respective parcels of real property in this case. Again, however, a survey is not necessary or requisite to determine the location of the fence or the boundary between the parties' respective parcels of real property. A survey of any parcel of real property begins with research. I have performed hours of research regarding Section 17. This research is the basis for my opinions. I have been to each of the corners shown on the RECORD OF SURVEY. Seven of the eight corners used by Mr. Thompson are not original corners. The RECORD OF SURVEY was based solely on the surveys of others. The Control Map of 2004 is a tool for mapping; however, surveyors must make sure that they are using the originals corners or the prescribed method of re-establishment. Based on the original survey of 1877, the east boundary of Section 17 is a nominal or standard boundary, measuring 5,280 feet. Based on a nominal or standard boundary, the distance from the SE corner of Section 17 to the northeast corner of the S1/2 of the NE1/4 is 3,960 feet. The fence, being exactly 3,960 feet from the SE corner of Section 17, appears to be on the boundary between the Plaintiffs' parcel of real property and the Defendants' parcel of real property. Of course, it is for the court to determine if the fence sits on the boundary between the parties' respective parcels of real property; nonetheless, because the fence is exactly 3,960 feet, it appears that the fence was measured to that distance, as were the fences to the south at 2,640

	<p>feet and 1,320 feet, respectively. The RECORD OF SURVEY does not address the fence line evidence as it pertains to the corners that were used on the RECORD OF SURVEY. The Manual of Survey Instructions specifically states that evidence needs to be exhausted before proportion measurement is applied. The distance from the SE corner of Section 17 to the fence is mathematically certain, easily checked, and indisputable. In this regard, the date of the oldest corner perpetuation of Section 17 is March 19, 1969. It is for the SE corner of Section 17. According to the foregoing corner perpetuation, the original corner was located and duly marked with "an iron rod ½" diam. and 2' long flush with road surface." Again, the fence is exactly 3,960 feet from the SE corner of Section 17.</p>
<p>"Accordingly, the Thompson survey is the sole evidence before the court on the surveyed boundaries of the parties' respective parcels." <u>See</u> RESPONSE, p. 2.</p>	<p>Not true. Again, the stated purpose of the RECORD OF SURVEY was to "combine 6 deeds"—specifically, the deeds of record to the Plaintiffs and his siblings. The purpose of the survey was <i>not</i> to determine the location of the fence in this case or the boundary between the parties' respective parcels of real property. In this regard, please note that the RECORD OF SURVEY does <i>not</i> legally fix or otherwise establish boundary lines, including, without limitation, the true and correct boundary between the parties' respective parcels of real property. Again, Mr. Thompson did <i>not</i> survey the Defendants' parcel of real property; he did <i>not</i> locate or re-locate the corners of Section 17; and he did <i>not</i> mark or otherwise perpetuate the corners of Section 17. He simply used the</p>

	<p>Control Map of 2004 and corner perpetuations to <i>illustrate</i> the <i>possible</i> “combining” of the foregoing six deeds. The RECORD OF SURVEY is <i>not</i> based on the original survey and Mr. Thompson did <i>not</i> find or otherwise locate the original corners of Section 17.</p>
<p>“Additionally, the surveyed boundaries correspond to the boundaries set forth in the deeds of record for the parties’ respective parcels.” <u>See</u> RESPONSE, p. 2.</p>	<p>Not true. With respect to the Defendants’ parcel of real property, again, Mr. Thompson did <i>not</i> survey the Defendants’ parcel of real property; he did <i>not</i> locate or re-locate the originals corners of Section 17; and he did <i>not</i> mark or otherwise perpetuate the corners of Section 17. He found points already marking the outside boundary of the parcels and used them. With respect to the Plaintiffs’ parcel of real property, Mr. Thompson simply used the Control Map of 2004 and corner perpetuations to <i>illustrate</i> the <i>possible</i> “combining” of the foregoing six deeds. In this regard, please note that the legal descriptions in the foregoing six deeds are <i>not</i> the same as the RECORD OF SURVEY. The RECORD OF SURVEY specifically and expressly calls out the differences.</p>
<p>“Those legal descriptions equate exactly with the survey performed by Thompson.” <u>See</u> RESPONSE, p. 2.</p>	<p>Not true. Again, the legal descriptions in the foregoing six deeds are <i>not</i> the same as the RECORD OF SURVEY. The RECORD OF SURVEY specifically and expressly calls out the differences.</p>
<p>“As already discussed, Leavitt has not performed a survey and agrees that the survey of Thompson meets required criteria.” <u>See</u> RESPONSE, p. 3.</p>	<p>Again, with respect to a survey, I have not performed a survey of the parties’ respective parcels of real property. A survey is <i>not</i> necessary or requisite to determine the location of the fence or the boundary between the parties’ respective parcels of real property. With respect to Mr. Thompson’s RECORD OF SURVEY, it only “meets criteria” in the limited sense that it “follows” or uses the Control Map</p>

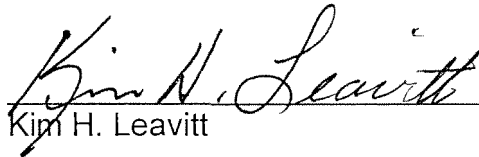
	<p>of 2004 and corner perpetuations; however, it is <i>not</i> based on the original survey of 1877 and Mr. Thompson did <i>not</i> find or otherwise locate the original corners of Section 17. As already discussed, the RECORD OF SURVEY “meets the criteria,” but only from the corners he used; he did <i>not</i> research or establish or determine the reason that the fences are all off in this section.</p>
<p>“Thompson’s survey sets forth the correct proportional boundary line of the respective properties upon the legal descriptions contained in deeds of record.” <u>See</u> RESPONSE, p. 3.</p>	<p>Not true. Again, Mr. Thompson simply used the Control Map of 2004 and corner perpetuations to <i>illustrate</i> the <i>possible</i> “combining” of the foregoing six deeds. In addition, the legal descriptions in the foregoing six deeds are <i>not</i> the same as the RECORD OF SURVEY. The RECORD OF SURVEY specifically and expressly calls out the differences. Finally, the RECORD OF SURVEY is <i>not</i> based on the original survey of 1877 and Mr. Thompson did <i>not</i> find or otherwise locate the original corners of Section 17. Again, the RECORD OF SURVEY “meets the criteria,” but only from the corners he used. Again, Mr. Thompson did <i>not</i> locate or otherwise use the original corners.</p>
<p>“The fence’s location is not the issue.” <u>See</u> RESPONSE, p. 3.</p>	<p>With all due respect, Mr. Manwaring is wrong. Again, he is <i>not</i> a professional land surveyor and he is <i>not</i> licensed to practice professional land surveying. The location of the fence is an “issue”—that is, it is relevant to “understanding the evidence and determining a fact in issue.” <u>See</u> I.R.E. 702. In this regard, please note that the fence is exactly 3,960 feet from the SE corner of Section 17; in other words, the fence sits on the boundary between the Plaintiffs’ parcel of real property and the Defendants’ parcel of</p>

	<p>real property; it does <u>not</u> sit on the Plaintiffs' parcel of real property and it is <u>not</u> off by 15 feet. In addition, the water to irrigate the NE1/4 of Section 17 enters Section 17 near the Ucon Cemetery Road—that is, near the southeast corner of the S1/2 of the NE1/4. The grade or slope of the land is south—that is, running from north to south. In order to get the water from the southeast corner to the northeast corner, the ditch was built up and the entire elevation of the ditch was raised from south to north. Thus, the ditch delivers water along the east boundary of the NE1/4, running from southeast corner to northeast corner. For purposes of irrigation, the water flows toward the Snake River—that is, from east to west. In order to irrigate the N1/2 of the NE1/4 and apply and keep the water thereon, a dike was built. The fence sits directly on top of the dike. The fence and the dike are straight, level, and run across the entire NE1/4 of Section 17.</p>
<p>“Leavitt admits he has no knowledge of who put the fences in Section 17.” <u>See</u> RESPONSE, p. 3.</p>	<p>True; no one knows, including the Plaintiffs. In this regard, please note that I have used and relied upon facts and data that are customarily and reasonably used and relief upon by experts in the field of professional land surveying in forming opinions, inferences, and other conclusions. <u>See</u> I.R.E. 703. For example, I have reviewed the Plaintiffs' deposition and the affidavits herein. In addition, I have personally viewed the parties' respective parcels of real property, including, without limitation, the grade or slope thereof, the location and direction of ditches and dikes, and the location and placement of the fence. The bottom line is this: The fence is there. It is exactly 3,960 from the SE corner of</p>

	Section 17. The fence was placed by measurement at 3,960 feet to delineate this property line, just as were the fences at 2,640 feet and 1,320 feet along the east side of Section 17.
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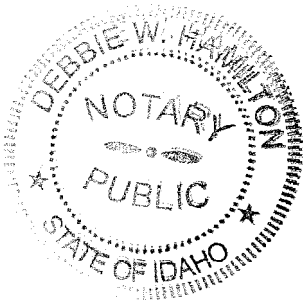
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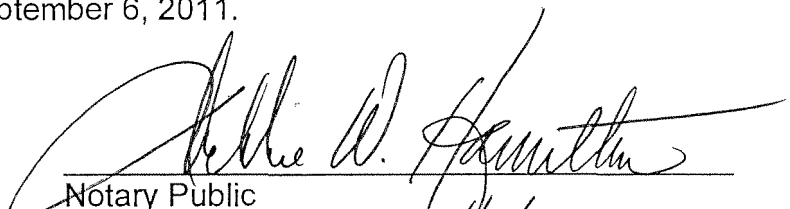
Dated September 6, 2011.



Kim H. Leavitt

Subscribed and sworn on September 6, 2011.



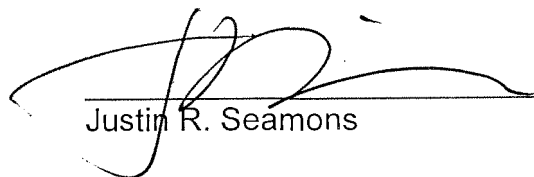


Notary Public
Commission expires: 04/11/2017
Residing at: Paulo Hills, Idaho

CERTIFICATE OF SERVICE

I served a copy of the foregoing REPLY AFFIDAVIT OF KIM H. LEAVITT on the following person on September 6, 2011:

Kipp L. Manwaring
HAND DELIVERED



Justin R. Seamons

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL, et al,)	
)	
Plaintiffs,)	Case No. CV-2010-3879
)	
-vs.-)	MINUTE ENTRY
)	
JAMES C. KVAMME, et al,)	
)	
Defendants.)	

On September 12, 2011, at 11:00 AM, several motions came on for hearing before the Honorable Jon J. Shindurling, District Judge, sitting in open court at Idaho Falls, Idaho.

Ms. Grace Walters, Deputy Court Clerk, was present. Mr. Kipp Manwaring appeared on behalf of the plaintiffs. Mr. Justin Seamons appeared on behalf of the defendants.

Mr. Manwaring presented argument on the plaintiffs' motion for summary judgment.

Mr. Seamons presented argument on the defendants' motion for summary judgment.

Mr. Manwaring opposed the defendants' motion and rebutted the opposition to the plaintiffs' motion for summary judgment.

Mr. Seamons opposed the plaintiffs' motion and rebutted the opposition to the defendants' motion for summary judgment.

The Court will take this matter under advisement and issue a ruling in due time.

Court was thus adjourned.



JON J. SHINDURLING
District Judge

c: Kipp Manwaring
Justin Seamons

11 Summary JB

BONNEVILLE COUNTY
IDAHO
2011 SEP 22 AM 9:23

Justin R. Seamons
414 Shoup Avenue
Idaho Falls, ID 83402
Telephone Number: (208) 542-0600
Facsimile Number: (208) 529-4166
Idaho State Bar Number: 3903

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

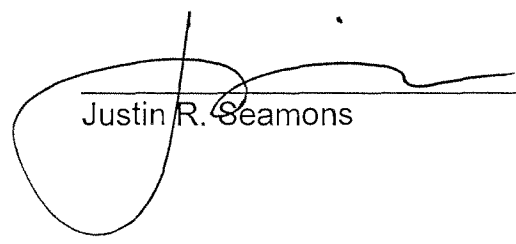
V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
Plaintiffs,)
)
vs.)
)
JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

NOTICE OF AUGMENTATION

The Defendants duly submitted a copy of the DEPOSITION OF KIM LEAVITT to the court on September 12, 2011, in order to augment the record herein in accordance with the court's request.

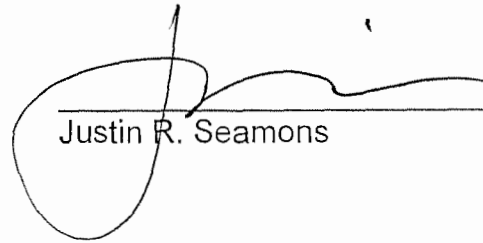
Dated September 21, 2011.


Justin R. Seamons

CERTIFICATE OF SERVICE

I served a copy of the foregoing NOTICE OF AUGMENTATION on the following person on September 21, 2011:

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271


Justin R. Seamons

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE

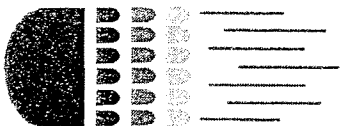
* * * * *

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL, husband and wife,)
)
) Plaintiffs,)
)
) vs.)
)
) JAMES C. KVAMME and DEBRA)
) KVAMME, husband and wife, and)
) JOHN DOES I-X,)
)
) Defendants.)
)
)

CASE NO. :
CV-2010-3879

DEPOSITION OF KIM HENRY LEAVITT, PLS

Wednesday, July 27, 2011; 1:30 o'clock p.m.
381 Shoup Avenue, Suite 210, Idaho Falls, Idaho



T&T REPORTING

CERTIFIED SHORTHAND REPORTERS

COPY

REPORTED BY:

DiAnn E. Prock

CSR SRL 963

PREPARED FOR:

The Witness

514

Post Office Box 51020
IDAHO FALLS, IDAHO 83405

208.529.5491 • FAX 208.529.5496 • 1.800.529.5491

DEPOSITION OF KIM HENRY LEAVITT, PLS

SHEET 1 PAGE 1

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN CAMPBELL, husband and wife, Plaintiffs, vs. JAMES C. KVAMME and DEBRA KVAMME, husband and wife, and JOHN DOES I-X, Defendants.

CASE NO.: CV-2010-3879

DEPOSITION OF KIM HENRY LEAVITT, PLS

Wednesday, July 27, 2011; 1:30 o'clock p.m. 381 Shoup Avenue, Suite 210, Idaho Falls, Idaho

DiAnn Erdman Prock CSR SRL 963, CCR, RPR

PAGE 3

INDEX EXAMINATION

Table with columns: WITNESS, NAME, PAGE. Includes KIM HENRY LEAVITT, PLS Examination by Mr. Manwaring 4

INDEX EXHIBITS

Table with columns: NUMBER, NAME, PAGE. Includes 1 Map 30, 2 Map 30, 3 Map 59

Page 3

PAGE 2

DEPOSITION OF KIM HENRY LEAVITT, PLS

BE IT REMEMBERED that the deposition of KIM HENRY LEAVITT, PLS, was taken by the attorney for the plaintiffs at the Just Law Office, 381 Shoup Avenue, Idaho Falls, Idaho, before DiAnn Erdman Prock, Court Reporter and Notary Public, in and for the State of Idaho, on Wednesday, July 27, 2011, commencing at the hour of 1:30 o'clock p.m., in the above-entitled matter.

A P P E A R A N C E S

For the Plaintiff: JUST LAW OFFICE BY: KIPP L. MANWARING 381 Shoup Avenue Suite 210 P.O. Box 50271 Idaho Falls, Idaho 83405 (208) 523-9106 E-mail: kipp@manwaringlaw.com

For the Defendant: SEAMONS LAW OFFICE BY: JUSTIN R. SEAMONS 414 Shoup Avenue Idaho Falls, Idaho 83402 (208) 542-0600 E-mail: justin01@cableone.net

Page 2

PAGE 4

1 (The deposition proceeded at 1:30 p.m. 2 as follows:) 3 4 WHEREUPON, 5 KIM HENRY LEAVITT, PLS, having been first 6 duly sworn to tell the truth, the whole truth and 7 nothing but the truth, testified as follows: 8 ***** 9 EXAMINATION 10 BY MR. MANWARING: 11 Q. If you'd state your full name for the 12 record. 13 A. Kim Henry Leavitt. 14 Q. This is the time set for taking the 15 deposition of Kim Leavitt pursuant to Notice. 16 MR. SEAMONS: You can go ahead. 17 Q. (BY MR. MANWARING:) This is Wednesday, 18 July 27th, 2011. We're at the Just Law Office in 19 Idaho Falls. 20 Present is Kim Leavitt, who's just been 21 sworn, and Justin Seamons, the attorney for the 22 Kvammes, and I'm Kipp Manwaring, the attorney for 23 the Campbells. 24 Mr. Leavitt, I believe you've had your 25 deposition taken before.

515

1 A. Yes, I have.
 2 Q. And you've been in trial before?
 3 A. Yes, I have.
 4 Q. I remember that. I remember seeing you
 5 in those places before.
 6 A. Yeah.
 7 Q. One of the first things I just want to
 8 make sure we're clear on as we're discussing matters
 9 in this deposition today is to be careful that each
 10 of us avoid talking over the top of the other.
 11 And I know Miss Prock, she's very good,
 12 but she still can't do two at once.
 13 Is that right?
 14 THE COURT REPORTER: (Nods head.)
 15 Q. (BY MR. MANWARING:) Is that acceptable
 16 for you?
 17 A. Yes.
 18 Q. If there's a question that I ask that
 19 you don't understand, which is probably because I'm
 20 a lawyer and I'm asking questions, just tell you you
 21 don't understand, and I'll rephrase that for you.
 22 A. Okay.
 23 Q. Now, you've previously provided in this
 24 action, which is Kvamme versus Campbell, an
 25 affidavit?

1 Q. And you had opportunity to review it?
 2 A. I did.
 3 Q. Okay.
 4 A. We -
 5 Q. Go ahead.
 6 A. We reviewed, made some changes in
 7 wording to the affidavit as well.
 8 Q. Okay. Now, in addition, there were
 9 exhibits that were provided in support of your
 10 affidavit.
 11 Do you remember that list of exhibits?
 12 A. Yes, I do.
 13 Q. And did you prepare those exhibits, or
 14 were they already prepared that you reviewed?
 15 A. Some of the exhibits were prepared.
 16 Some of the exhibits were researched and found by
 17 myself.
 18 Q. And if you can look at this first page,
 19 and this is simply a copy of the exhibits in support
 20 of your affidavit -
 21 A. Uh-huh.
 22 Q. - it lists the exhibits on that page.
 23 If you'd identify the ones that were already
 24 prepared and then the ones you prepared yourself.
 25 MR. SEAMONS: By "prepared," do you mean

1 A. Yes.
 2 Q. Did you prepare that affidavit on your
 3 own?
 4 A. No.
 5 Q. How was that affidavit prepared?
 6 A. With the assistance of Mr. Seamons.
 7 Q. Do you recall when you first started
 8 preparing that affidavit?
 9 A. I don't know exactly when we started
 10 preparing the affidavit. I was retained to look at
 11 this information and things in 2010, so probably the
 12 later part of 2010 in the summer and maybe the fall
 13 of 2010, and then since that time, the affidavit has
 14 come about.
 15 Q. Did you have several discussions with
 16 Mr. Seamons concerning the contents of the
 17 affidavit?
 18 A. Yes.
 19 Q. Were those in person, by telephone, or
 20 both?
 21 A. In person, usually, and by telephone
 22 probably less than in person.
 23 Q. Okay. The affidavit itself was drafted
 24 by Mr. Seamons?
 25 A. Correct.

1 like the deed to Leo Campbell, that's a public
 2 record.
 3 MR. MANWARING: Right.
 4 MR. SEAMONS: What do you mean by
 5 prepared?
 6 MR. MANWARING: Well, let's explain
 7 that.
 8 Q. (BY MR. MANWARING:) By prepared,
 9 something that you either found or generated or you
 10 obtained a copy of from public record. If you found
 11 or generated or obtained a copy of it, then tell me
 12 which ones those were.
 13 If it was provided to you by Mr. Seamons
 14 or someone else, tell me which ones those were.
 15 A. Exhibit A, the deed of gift to Leo
 16 Campbell was provided.
 17 Exhibit B, the personal representative
 18 deed to James Kvamme was provided.
 19 Exhibit C was a record of survey by
 20 Kevin L. Thompson, which was provided. My exhibit,
 21 however, probably has my hand scratching on
 22 Exhibit C.
 23 Q. Okay.
 24 A. Exhibit D was the original survey of
 25 John B. David. I provided that.

1 Exhibit E is a report book and notes of
 2 John B. David, which I provided.
 3 Exhibit F, the warranty deed or patent,
 4 is this talking about the only the warranty deed of
 5 this property? I believe there's more warranty
 6 deeds than that. And the only reason I'm asking
 7 that question is on Exhibit F, there was one
 8 warranty deed that was missing that was not part of
 9 what was provided, and we retained a copy of that
 10 ourselves, and then Mr. Seamons provided a copy of
 11 that as well.

12 Exhibit G, quitclaim deed record.
 13 MR. SEAMONS: Do you want to look at
 14 those to make sure you're –

15 THE WITNESS: Yeah. The quitclaim deed
 16 record, if I could, I'll pull up.

17 Q. (BY MR. MANWARING:) Do you have those
 18 with you?

19 A. I believe I do. Everything has a
 20 package here. The exhibit, the quitclaim deed,
 21 let's see, those are the affidavits so the – all of
 22 the exhibits should be back here.

23 Now, none of these are marked as
 24 exhibits. These are information that was given to
 25 me prior to having exhibits marked; is that correct?

1 corner was provided at that time and compared to our
 2 records.

3 The record of survey of the southeast
 4 quarter of Section 17, I need to review that a
 5 moment. Yes, was provided, and also compared to our
 6 records of the recorded.

7 Q. (BY MR. MANWARING:) Okay. Thank you.
 8 Now, you've also brought with you and
 9 survey manual; is that correct?

10 A. Yes, yes.

11 Q. Now, describe for me what that book
 12 represents.

13 A. The survey manual, this happens to be
 14 the survey manual of 1973, there's a new one that's
 15 been produced, 2009, manual, but where this survey
 16 was completed in the '80's and at least the corners
 17 that were found and the corners that were
 18 perpetuated and things like that were in the '80's,
 19 so I brought the '73 manual. They're identical
 20 other than new and more information in 2009.

21 But the manual of surveying instructions
 22 is a manual to instruct the original surveyors that
 23 laid out the public lands. So it's an instruction
 24 for them to place corners, and so – and then there
 25 are instructions to retrace the original surveys

1 MR. SEAMONS: Well, I think you've
 2 actually got a copy of one of just the exhibits
 3 right here.

4 THE WITNESS: Oh, here's Exhibit B right
 5 here.

6 MR. SEAMONS: Here you go. Here's the
 7 exhibits so G. There you go.

8 THE WITNESS: That's the one I needed.
 9 Okay. Let's see, Exhibit G was provided. Was that
 10 G?

11 MR. SEAMONS: Uh-huh.

12 THE WITNESS: Exhibit H, I provided.

13 Exhibit I that was provided. Corner
 14 perpetuations and filing record for the southeast
 15 corner was provided. There are – I actually went
 16 to our file that day to compare ours to what was
 17 provided, and it was provided.

18 Exhibit K was provided.

19 Exhibit L, the official map of
 20 Bonneville County, I'd like to review that. That is
 21 the assessor's map. I would have called it the
 22 assessor's map. That was provided. So L was
 23 provided.

24 Okay. M, which was the corner
 25 perpetuation and filing record of the northeast

1 that are there. There's instructions about
 2 monumentation.

3 There's instructions about how to
 4 replace a lost corner or an obliterated corner, how
 5 to accept evidence, how to accept oral evidence. So
 6 basically, what it is, is the instructions to the
 7 original surveyors to place the original surveys and
 8 to do retracing.

9 We used the survey of manual
 10 instructions as professional surveyors in the state
 11 of Idaho. A lot of the survey rules, laws, and
 12 things have come from this manual, as far as the
 13 regulation of how to do things, how to retrace
 14 things, and how to replace things.

15 So we, as surveyors, survey under the
 16 auspices of the manual. We try to do things that
 17 are laid out by the manual.

18 Q. Is it fair to say that the manual is the
 19 direction that must be followed by the surveyors in
 20 the state of Idaho?

21 A. There are – that's true on the type of
 22 surveys they're talking about.

23 And then there are other – many other
 24 regulations and things, platting, for example, isn't
 25 talked about. There's – there's a lot of other

517

1 things. There never was anything known about a
2 record of survey or anything like that in the manual
3 of instructions, so those laws and rules have come
4 after.

5 So there's a lot more that we do than
6 just survey by the manual.

7 **Q. Okay. The development of surveying has**
8 **changed over the years, as I understand.**

9 A. The technology of it has. The
10 development of the original survey and how things
11 were laid out cannot be changed. So the – but the
12 development, the technology and things that we use,
13 the different tools that we use have changed a
14 lot.

15 **Q. The original survey is done by**
16 **determination of corners; is that correct?**

17 MR. SEAMONS: By the termination of
18 corners?

19 **Q. (BY MR. MANWARING:) By the**
20 **determination of corners. You try to determine**
21 **corners based on what the original surveyor found.**

22 A. Are you asking the original – about the
23 original survey, Mr. Manwaring?

24 **Q. Yes.**

25 A. Okay. The original survey is the

1 contracted by township. So you've got thirty-six
2 sections in a township, and it was a contract. So,
3 you know, they may have been in a hurry to do it,
4 like all contractors, but there was a specific way.

5 They were to start at the southeast
6 corner of the township and build up the north line
7 of that township, or the east line of that township,
8 and then they would go back to the next mile over
9 and build, which would be section thirty-five and
10 build that one and then build the next tier and the
11 next tier so that they would push the error in a
12 township to the west line and to the north line.

13 **Q. Right.**

14 A. And then there were fractional sections
15 where it would be lauded and the proper survey
16 method will take care of the township by squaring it
17 up.

18 So theoretically the township corner
19 should have been in by measuring clear over to the
20 township corner and up to the next township corner
21 of things before they laid out the sections. And
22 then they would go inside and lay those sections
23 out, and running north and south, normal – normally
24 they would lay out sections by fifty-two eighty, or
25 one mile sections, running east and west because of

1 placement of monuments at corners. Those are two
2 specific items in the manual that cannot be
3 interchanged.

4 Corners are theoretical positions of
5 title, and those are theoretic. And monuments are
6 the position that is – or the item that is supposed
7 to be placed at that position called the corner. So
8 there are corners and there are monuments.

9 The original survey is – it's held that
10 our surveys are only based or can only be based on
11 those original corners.

12 **Q. Is that part of the reason for the**
13 **corner perpetuation laws in the state of Idaho?**

14 A. It is. It's one reason to rectify
15 double corners and those type of things between two
16 surveyors.

17 **Q. And with the original survey, do you**
18 **recall when that was done here in eastern Idaho?**

19 A. It was. It was done in 1877 as – and I
20 think we showed that as exhibit – Exhibit D by John
21 B. David. It's performed by him, and the notes
22 reflect that.

23 **Q. And describe for me just briefly how you**
24 **understand the original survey was performed.**

25 A. Okay. The original surveyors were

1 the convergence or the divergence of our – what
2 would those be? – the longitudes running north and
3 south.

4 They would make different measurements
5 sometimes on sections east and west, but most of the
6 time north and south they were always running
7 fifty-two eighty.

8 **Q. When you say fifty-two eighty what do**
9 **you mean by that?**

10 A. One mile.

11 **Q. One mile?**

12 A. Yeah. Fifty-two hundred and eighty
13 feet.

14 **Q. That's for the townships or for the**
15 **sections?**

16 A. That's a section inside the township.

17 **Q. And how would they measure that back in**
18 **that original survey?**

19 A. They measured it with Gunter's chains.
20 And Gunter's chains were made up of one hundred
21 links, each link being sixty-six hundredths of a
22 foot.

23 So one hundred links would be a chain,
24 and so those chains would be sixty-six – or I'm
25 sorry. They were sixty-six feet long with one

1 hundred links.

2 Q. Right

3 A. And so eighty of those chains would
4 equal one mile, forty of those chains would equal a
5 half mile and twenty of those chains a quarter of a
6 mile.

7 Q. Okay.

8 A. And they had sighting instruments as
9 well. They had transits, mountain transits. They
10 had compasses, those type of things, poles and
11 staffs to get their line.

12 They worked with the astronomical
13 polaris to find the true north, sometimes they used
14 sun shops to find true north, and those types of
15 things, but that was what they were trying to do.

16 Q. Okay. Now, you mentioned that they
17 would go out and identify the township and then go
18 back and do the sections; is that correct?

19 A. That's correct, uh-huh.

20 Q. And you mentioned that after they got
21 the section identified, they would, by the
22 measurement of the chains – is that how they were
23 doing that?

24 A. Uh-huh.

25 Q. Is that yes?

1 twelve, and one. And they would lay out those
2 sections to the north.

3 Then they would go back to the corner
4 that they had placed at the southwest corner,
5 section thirty-six, they'd go over another mile and
6 place the southwest corner of section thirty-five,
7 and then they would do the same thing going north
8 again, and they would check back and put in the
9 quarter corners, which would be the north and the
10 south quarter corners of these sections which
11 would – is a half a mile.

12 So they would place eight corners in
13 every section. They placed the northeast corner,
14 the east quarter corner, the southeast corner, the
15 south quarter corner, the southwest quarter – or
16 the southwest corner, the west quarter corner, the
17 northwest corner, and the north one-quarter corner.

18 So they placed eight monuments in every
19 section.

20 Q. Okay. I think that better explains what
21 we were talking about. I thank you for that.

22 A. Okay.

23 Q. Now, in making these measurements from
24 the original survey, has it been your experience to
25 find that they're not always exact?

1 A. (Nods head.)

2 Q. That's a yes?

3 A. Yes. Sorry.

4 Q. And then you mentioned that they'd go
5 back and do a survey method.

6 What's a survey method?

7 A. I'm not certain what the question is.
8 After they're laying out the one mile sections –

9 Q. Uh-huh.

10 A. – or are you asking what about the
11 method?

12 Q. Well, I'm trying to catch what you've
13 mentioned. You said that they lay out the sections,
14 and then they go back and do the survey?

15 MR. SEAMONS: They lay out the township
16 get the corners fixed.

17 THE WITNESS: Maybe I can reexplain
18 that.

19 MR. MANWARING: Okay. That would be
20 helpful.

21 THE WITNESS: They lay out the original
22 stones on the one mile section, section thirty-six,
23 which is the southeast corner of the township. They
24 would go north along that township line, they would
25 go to section twenty-five, twenty-four, thirteen,

1 A. The – Yes, it is.

2 Q. What's your experience with that?

3 A. The experience is that the BLM manual
4 points out that the original surveyors were placing
5 those corners at this theoretical point. If they
6 miss the theoretical point, the monument holds, and
7 so whatever the measurement is, is the measurement
8 that it should be.

9 Q. Okay.

10 A. It's the measurement that it is.

11 Q. That it is. Right.

12 A. Uh-huh.

13 Q. So you can't go back and change that
14 measurement. That's just the corner.

15 A. The original corners are where they are
16 found, the original corners. If you go back to the
17 record and find the original corner, it stays
18 original and then is subsequently perpetuated as the
19 original corner, and there should be a pedigree
20 following that original corner, and those original
21 corners are then used to break the section down.

22 Q. Okay.

23 A. We call it subdividing the section,
24 breaking – breaking down the section. 519

25 Q. Okay. Now, in your affidavit –

1 A. Uh-huh.
 2 **Q. – you talk about a standard section of**
 3 **land under the U.S. Public Land Survey System –**
 4 A. Uh-huh.
 5 **Q. – nominally contain six hundred and**
 6 **forty acres.**
 7 A. That's correct.
 8 **Q. What do you mean by "nominally"?**
 9 A. Most often.
 10 **Q. Is that always the case?**
 11 A. If you look at – if you look at the
 12 original – look at exhibit – the original survey
 13 on Exhibit D, if you would.
 14 **Q. D. This one? Okay.**
 15 A. On the original survey –
 16 **Q. Just a moment, I think we actually have**
 17 **that one.**
 18 A. – of Exhibit D –
 19 **Q. Just a minute, Kim.**
 20 A. Okay.
 21 (Discussion off the record.)
 22 **Q. (BY MR. MANWARING:) Now, just so the**
 23 **record's clear, and we'll mark this as an exhibit,**
 24 **this is a larger print of the original survey.**
 25 **Would you agree with that,**

1 was just the way they showed it.
 2 So there's a misunderstanding with the
 3 layman, and there always has been, that every
 4 section has six hundred and forty acres in it,
 5 because that is the way it was intended to be, the
 6 way it was attempted to be laid out to be, but
 7 because of measurement and because of the way
 8 calculations are made easily now with mathematics
 9 and things like that, you'll never find one that's
 10 exactly six hundred and forty acres.
 11 **Q. Okay. So we'll agree that Section 17**
 12 **does not contain six hundred and forty acres?**
 13 A. Correct.
 14 **Q. It can't.**
 15 A. Right.
 16 **Q. Okay.**
 17 A. That's true.
 18 **Q. So in your affidavit, when you say**
 19 **standard section of land has the following nominal**
 20 **measurements, and that's mile by mile, is that what**
 21 **you're looking at?**
 22 A. That's really what that was prepared for
 23 is just a diagram one mile square, six hundred and
 24 forty acres relating back to the nominal section or
 25 the normal section.

1 **Mr. Leavitt?**
 2 A. It is.
 3 **Q. All right.**
 4 A. Uh-huh. This is 3 North, Range 38
 5 surveyed by John B. David in 1877. We're talking
 6 about Section 17, and if you notice Section 17, it
 7 shows six hundred and forty acres.
 8 But if you calculate out the acreage in
 9 Section 17 with the original measurements, it won't
 10 be six hundred and forty acres. And the same with
 11 sixteen, fifteen, fourteen, all of the interior
 12 sections are always shown to be six hundred and
 13 forty acres, which they are not. And wherever we
 14 find the monuments makes it even different.
 15 But that's what they did. That is why
 16 the entrymen that came into this land always thought
 17 they owned three hundred and sixty acres because it
 18 shows on the map that there were six hundred and
 19 forty acres on the section.
 20 And if you'll notice on Section 17, he
 21 measured that at 80.56 chains on the east/west
 22 boundary, on the south boundary, and 80.68 on the
 23 north. That could only be six hundred and forty
 24 acres if that was eighty, this was eighty, this was
 25 eighty, and this was eighty. And so that's – that

1 **Q. Okay. And I think you mentioned that**
 2 **the north boundary of Section 17 was 44.88 longer**
 3 **than a nominal section.**
 4 A. That's correct. And it shows right
 5 there 80.68, so the six eight is multiplied by
 6 point – or by sixty-six, tells you how many feet it
 7 is longer than the normal fifty-two hundred and
 8 eighty feet.
 9 **Q. Okay. And do you find that to occur**
 10 **with some regularity in your survey determination?**
 11 A. You do. And, in fact, you find it on
 12 this township, let's see over here in Section 23, is
 13 79.89 chains.
 14 And so what they were doing, like I
 15 said, they were laying this one out, this one out,
 16 this one out, they were going up there, but they
 17 were checking because he went up here and put these
 18 points in before he ever got there that he was
 19 checking back, and because of the line that he was
 20 running, this shows that that's a little bit longer,
 21 and that was his measurement. So it was –
 22 **Q. All right.**
 23 A. But by finding this measurement, you'll
 24 notice that they never change the acreage on any of
 25 them either. So that was just the way that they did

520

1 it.

2 **Q. And now you also state in your affidavit**
 3 **today, the boundaries of Section 17 are**
 4 **substantially and materially different than the**
 5 **boundaries of the original survey in 1877.**

6 A. Correct. If you compare the found
 7 monuments on some of the exhibits that we see, if
 8 you find – if you look at the monuments that have
 9 been utilized for surveys out there, you'll see that
 10 it's – it's a lot different, and a lot different in
 11 my mind because I have retraced John B. David many
 12 times, and I have found his monuments up on the
 13 foothills where there are stones.

14 And where he had slope measurements and
 15 things like that, his monuments are usually within
 16 four or five feet of being placed to the measurement
 17 he says they are. So I know that this is
 18 substantially different than where he laid it out on
 19 flat ground.

20 **Q. And you also mention – Well, before we**
 21 **get to that point, what significance is it that**
 22 **today the measurements that are in Section 17 are**
 23 **substantially and materially different than the**
 24 **original survey?**

25 A. Well, the significance would be that any

1 of the interior lines in that section, if they were
 2 subdivided and laid out, then there could be
 3 substantial overlaps or gaps between possession
 4 lines.

5 **Q. Okay. And how do we rectify that in**
 6 **current survey practice or in survey practice in the**
 7 **1980's?**

8 A. We rectify it – the courts rectify
 9 that. The surveyor does not have the statutory
 10 authority to place – the boundary line is only a –
 11 there are boundary lines, there are written – I'm
 12 trying to think of the word – deed lines or the
 13 written record, title line, basically, the written
 14 title line.

15 Surveyor's responsibility in private
 16 practice, when there are legal descriptions already
 17 written of record, and in this situation we'll refer
 18 to it later, the Kevin Thompson survey, was laying
 19 out the written record, and so he went to the
 20 written record and laid out written title lines, and
 21 the written title line is all that the surveyor can
 22 do, and then we show encroachments of possession and
 23 other things, and it's up to the courts to determine
 24 where the true – the true line is between those
 25 properties.

1 **Q. And you mentioned a Idaho Falls control**
 2 **in your affidavit.**

3 A. Uh-huh.

4 **Q. And I'm handing you – this will be**
 5 **Exhibit 2 when we get all these marked. That first**
 6 **one was Exhibit 1.**

7 A. This is not my exhibit, but my exhibit
 8 shows, you know, it has preliminary written across
 9 it that they left that preliminary on there for
 10 specific reasons, but – so it's not the exact same
 11 exhibit.

12 **Q. This is different than the one you had**
 13 **in your affidavit, correct?**

14 A. That's correct.

15 **Q. Explain to me what the city of Idaho**
 16 **Falls control is that's dated 2004.**

17 A. The control map was a location and
 18 NAD 83, Idaho East Zone is a state plane
 19 coordination system that Idaho has adopted.
 20 Idaho was surveyed using a Transverse
 21 Mercator System, which is normally used when you've
 22 got an elongated area where you would have Idaho is
 23 longer north and south than it is east and west.
 24 So they use that system, and because of
 25 the elevations, they had placed Idaho into the three

1 zones, so therefore were in the Idaho east zone
 2 which is based on a specific elevation.

3 So if you take the coordinate system
 4 that's based on the center of the earth, the radius
 5 of the center of the earth, that's why you need
 6 different zones is because of the elevation changes,
 7 distances. So the county and the city contracted
 8 surveyors, and myself included, to locate the
 9 existing perpetuated corner or the existing
 10 perpetuated monument, change my terminology.

11 Basically these were monuments that we
 12 were locating, not corners, and the monuments were
 13 located using this NAD 83 system, and that was
 14 devised into what they called the 2004 City of Idaho
 15 Falls control map, or the county. We call it the
 16 2004 county control or the City of Idaho Falls
 17 control.

18 **Q. And this is something you helped**
 19 **create –**

20 A. The –

21 **Q. – for Harper and Leavitt Engineering?**

22 A. Yeah. The location of the found
 23 monuments or the perpetuated monuments at that time,
 24 yes.

25 **Q. And I think the statement on the control**

1 says data was derived from the recent Bonneville
2 County GPS project with Mountain River Engineering
3 and Harper Leavitt Engineering GPS data; is that
4 correct?

5 A. That's correct.

6 Q. And does this also include the same
7 Section 17 we've been discussing?

8 A. It does, yes. Uh-huh.

9 Q. And so as of 2004, from the data you
10 had, you were able to identify the perpetuated
11 corners for Section 78?

12 A. The perpetuated corners, and the city
13 and the county was very, very cautious to make sure
14 that surveyors still knew that this was a data map
15 and not based on the original corners if – because
16 that's up to every surveyor to determine. This was
17 based on the found perpetuated corners of
18 nineteen – whatever this date on this map was,
19 which was about '80, something, I believe.

20 And so that's – that's what it was
21 based on. And it was told to all of us to be, you
22 know – I mean, actually, there's a statement on the
23 map that if there are any accuracies – okay, the
24 accuracies of one-tenth of a mile and John Smith,
25 the city surveyor, says: I would appreciate any

1 northward from the northeast corner of Section 17.

2 A. Uh-huh correct, yes.

3 Q. And, again, we're talking about a
4 nominal boundary being, assuming the section had six
5 hundred forty acres. Is that –

6 A. Yeah. The nominal measurement or the
7 nominal boundary measurement would be one mile. And
8 that's – the entrymen people that were there,
9 that's all they ever knew was a mile square.

10 So the normal measurement would be one
11 mile.

12 Q. Okay.

13 A. And, in fact, this section shows that it
14 should be one mile.

15 Q. And the statement you make is now to the
16 heart of the matter, the fence is exactly three
17 thousand, nine hundred and sixty feet from the
18 southeast corner of Section 17.

19 In other words, the fence sits on the
20 boundary between the plaintiff's parcel of real
21 property and the defendants' parcel of real
22 property.

23 A. Uh-huh. That really is my opinion. The
24 southeast corner is the oldest corner that was
25 perpetuated, if you look at the other exhibits on

1 input that will improve the accuracy of this grid.

2 And there have been corners that have
3 been rectified since that time, where we found
4 double corners and some areas. Section 17 has
5 double corners in it right now on the ground.
6 They're showing – I actually perpetuated, and Kevin
7 Thompson didn't use his dad's own corners, and all
8 of that information is of record. And so everyone
9 has to agree that they make sure that they get the
10 original corners.

11 And so that's what this map is. It's
12 used for surveying. It's also used for mapping, and
13 the county, at the time they were doing this, was
14 looking for a mapping tool so that they could plot
15 their parcels, and that's where that came from.

16 Q. Okay. So this is just another helpful
17 device?

18 A. It's a tool, uh-huh. Very helpful.
19 (Deposition Exhibit 1 and Deposition
20 Exhibit 2 were marked for
21 identification.)

22 Q. (BY MR. MANWARING:) Okay. Now, back to
23 your affidavit, starting on page 12, you say based
24 on a nominal boundary measuring five thousand, two
25 hundred eighty feet, the following distances extend

1 the corner of perpetuations. The earliest
2 perpetuation was the southeast corner that was based
3 on the 1969 record. And the corner perpetuation
4 record wasn't done until like '79, but it was based
5 on a record of another survey.

6 So I am looking at the records, what is
7 recorded today, and there isn't the pedigree from
8 any of those corners in this section back to the
9 original. But the very first thing that I looked at
10 was when Kevin Thompson's survey, which was
11 exhibit – I'll refer to that so we don't get mixed
12 up, Exhibit C, the Kevin Thompson record of survey,
13 one of the things that I looked at immediately is –
14 and this is because of my experience, is the fence
15 lines are off, and they're to the south of the
16 lines.

17 And the reason that I say that is
18 because then it takes me immediately to be suspect
19 whether these corner are original corners. When I
20 see fence lines if the valley in southeastern Idaho
21 not being on the lines, I'm always concerned.

22 And it's been my experience that in our
23 valley, one mile is measured relatively well because
24 it's flat ground. And so there's a lot of different
25 methods to measure that, but it's usually measured

1 quite closely.
 2 And so I wondered whether or not the
 3 placement of these corners, these original corners,
 4 were the original corners of this section because
 5 the fences were off, because that immediately is an
 6 evidence, one of the corroborative or collateral
 7 evidences that we may use to replace a corner, and
 8 that we have to exhaust all of that before we can
 9 ever use measurement. Before we ever apportion
 10 anything, we have to use all of this evidence to
 11 replace corners.

12 And so immediately, that's what I
 13 thought, and – and by just using Kevin's survey, if
 14 you add the distances along the east side of that
 15 section from the southeast corner, the oldest corner
 16 in the section, that you find that the fences at all
 17 of the petition lines between the quarters and the
 18 south quarter, the north quarter, and things like
 19 that, are all the fences are all too far south of
 20 those lines –

21 **Q. Is that based –**

22 A. – according to the – based on his
 23 measurements of corners today, the fences in that
 24 section are all too far south.

25 **Q. Okay. And then your determination of**

1 four feet off.
 2 So if you add those up, someone measured
 3 to those fences and put those fences in where they
 4 were trying to determine the petition line between
 5 quarters, and I believe that's where that fence line
 6 came from.

7 **Q. That's your best guess as to how those**
 8 **fences got –**

9 MR. SEAMONS: I'll object to the form of
 10 the question.

11 THE WITNESS: Yeah. It's my opinion –
 12 it's my opinion that the measurement cannot be just
 13 magic. And it works out that those fences were off
 14 proportionately suggesting to the evidence that the
 15 southeast corner, those fences were measured from
 16 the southeast corner and the fence line is
 17 delineating that measurement.

18 And so I call it a boundary line because
 19 in survey terms, we juggle between boundary lines,
 20 property lines, deed lines, title lines. And a
 21 boundary lien to me is the boundary line which is a
 22 physical boundary, an enclosure or something to that
 23 effect.

24 So that's why I – my affidavit states
 25 that I think that's the boundary line.

1 **where the fences should be, is that based on**
 2 **assumption of what your experience has been with**
 3 **fences?**

4 A. The experience that I'm placing this on
 5 is the experience that I was taught. You know, I've
 6 been surveying for thirty-five years, and/or longer
 7 but an old surveyor that had been surveying since
 8 the '40's taught me this, that you don't ever walk
 9 by a fence line in our valley and not measure to it
 10 and use it for evidence.

11 And so there were different philosophies
 12 by some surveyors about the evidence of corner, and
 13 because he taught me that, then we – we watch and
 14 are very careful when we see these type of things.
 15 But this one was just bold because it sticks out
 16 that the proportioned distance between the fence
 17 line is in question, and the fence line at the
 18 center of the section are proportionate.

19 One of them is fifteen feet off, the
 20 other one is only eight. So I just looked at that
 21 immediately and thought, Something's wrong, and then
 22 I found record of surveys on the southwest corner
 23 that are showing the fence line at the petition
 24 between the other halves of the southwest quarter,
 25 and they're proportionately different. It's only

1 **Q. I understand. What I'm asking,**
 2 **Mr. Leavitt, is you don't know who put those fences**
 3 **there.**

4 A. I don't. I reviewed the record of the
 5 other affidavits of where the fence came from.
 6 Timewise, it fits with the experience that I've had
 7 in the valley that fences were placed by a lot of
 8 the original deeded owners on properties, and those
 9 were probably in time where one piece passed out of
 10 the family to another piece or something like
 11 that.

12 And it looks like it's been there for a
 13 number of years along with the other fences in that
 14 section. They all look like they've been there for
 15 quite a while.

16 **Q. So back to the question, you're not sure**
 17 **why those fences were placed where they were?**

18 A. It's my opinion they were measured in.

19 **Q. I understand that. But you don't know,**
 20 **other than just your experience?**

21 A. I don't know.

22 **Q. You don't know who put the fences in?**

23 A. I have no knowledge of who put the fence
 24 there.

25 **Q. And you don't know why they put the**

1 fences in other than your experience that you're
2 talking about.

3 A. Yeah. I don't know why they put it in.
4 It's just my experience that it was placed as a
5 petition line between those two quarters.

6 **Q. Okay. And now, you also mentioned in
7 your affidavit a corner perpetuation matters that –
8 in identifying the corners in this particular
9 section.**

10 A. Uh-huh.

11 **Q. And you talk about Mr. Jones's survey,
12 and I think this is exhibit – let me make sure I
13 get the right exhibit.**

14 MR. SEAMONS: Let's turn to it.

15 MR. MANWARING: Exhibit M, it would
16 be –

17 MR. SEAMONS: The corner perpetuation?

18 MR. MANWARING: The corner perpetuation
19 from Dennis Jones.

20 MR. SEAMONS: Oh, okay. Okay.

21 Exhibit M.

22 THE WITNESS: Yeah. This would be at
23 the northeast corner of Section 17.

24 Is that what you're talking about?

25 **Q. (BY MR. MANWARING:) Right.**

1 who was Ellsworth Engineering back at this time.

2 And he updates the ties that were – so he's
3 updating his own corner because this was his corner,
4 and then he set his corner and then he goes back and
5 reties it and some of the points were taken out
6 around the intersection probably.

7 **Q. Okay. Let's make sure we're clear. On
8 Exhibit M –**

9 A. Uh-huh.

10 **Q. – this is the corner for the northeast
11 corner of Section 17.**

12 A. Correct.

13 **Q. And according to Dennis Jones, that
14 corner was found using ties from Ellsworth
15 Engineering?**

16 A. There is a monument found. It doesn't
17 say it was the original corner or the original
18 corner we're talking about, but it says found using
19 ties, and it says, the corner is a half-inch iron
20 rod twenty-four inches long.

21 So he found a corner there, doesn't say
22 it's the original.

23 **Q. Right. Do you have any issue with
24 Mr. Jones perpetuation record here?**

25 A. In this – at the surface of this, the

1 A. Okay.

2 **Q. Now, if you look at Exhibit M –**

3 A. Uh-huh.

4 **Q. – that first paragraph about
5 description of corner evidence found states: Found
6 using ties from Ellsworth Engineering.**

7 A. That's correct.

8 **Q. What does that tell you?**

9 A. There was a record – there was a record
10 of a corner being placed there prior to Dennis Jones
11 placing it, and he – he went to Ellsworth
12 Engineering, got those ties, and he replaced that
13 corner in nineteen – looks like 1979. Oh, wait a
14 minute. No. Let's back up a second.

15 J-9 is – there's two perpetuations on
16 that corner. Instrument number 577493, and
17 instrument number – well, let's see, that is the
18 same instrument number right there I'm looking at.
19 Okay. There's the next one.

20 In 1989 – okay. So Dennis Jones used
21 Ellsworth Engineering's ties to place a corner, and
22 he – he placed a corner there and then perpetuated
23 that, and then there's another perpetuation on top
24 of that, which would be 769345, instrument number
25 769345, and that was perpetuated by Garth Cunningham

1 only thing that he shows on this perpetuation that
2 would raise my eyebrow to make sure that I checked
3 it out really well, is the distance of 5300.32 feet
4 on that east line. I definitely, would gather every
5 evidence that I could to make sure this was the
6 original corner because of that distance.

7 **Q. Okay. Anything else than you would
8 question or challenge on that perpetuation?**

9 A. No.

10 MR. SEAMONS: Well, in what context?

11 **Q. (BY MR. MANWARING:) In the context of
12 the surveyor looking at it saying that I don't think
13 that's the corner.**

14 A. Oh, he found a corner in 1979 that
15 someone else had used, and he's accepting it, and
16 he's showing it as the corner. He's accepting that
17 as the corner.

18 So it's the – it becomes the corner of
19 1979, but it's not related to the original post that
20 was laid out there, which there's a place on the
21 corner of perpetuation form that says description of
22 corner, evidence found and original record, if
23 known.

24 Well, the original record is always
25 known, but it wasn't easily contracted by each one

1 of us back in those days because the BLM notes
2 weren't on line. So it was harder for us to find
3 the information, or we had to order the notes from
4 Boise, basically.

5 **Q. When Harper Leavitt Engineering helped**
6 **prepare the Idaho Falls plat that we just looked**
7 **at –**

8 A. Uh-huh.

9 **Q. – did it find the original corner?**

10 A. No. We weren't contracted to find the
11 original corners.

12 **Q. Oh.**

13 A. And we were not – We didn't have the
14 County's authority, our own authority, anyone's
15 authority to displace two corners in the
16 intersection. We located both of them. The city
17 was the ones that decided to put one coordinate on
18 each corner, not us.

19 **Q. I'm just asking you, did you find the**
20 **original corner in that work you were doing?**

21 MR. SEAMONS: The original marker in the
22 original corner?

23 MR. MANWARING: Yes.

24 THE WITNESS: No. I think that we only
25 found – we had a copy of the – this Exhibit M

1 question you're asking me?

2 **Q. Yes.**

3 A. In this situation, I have not relied on
4 his corner because I haven't performed a survey from
5 that corner. I checked that out, and so I have not
6 relied on that particular corner.

7 **Q. If you were going to perform a survey,**
8 **would you have relied on that corner?**

9 A. Not without doing the research that I've
10 done already.

11 If I was to go perform a survey on this
12 section now, with the research that I've done about
13 these corners, I would be very, very cautious to use
14 seven of the eight corners. There's enough
15 evidence, just in the record, that leads me to
16 believe that there may be some misplacement, grossly
17 misplaced, in this particular section. And so I
18 would be cautious, honestly.

19 **Q. Have you performed a survey of this**
20 **section?**

21 A. Not that I know of.

22 **Q. Now, back to Exhibit J –**

23 A. Uh-huh.

24 **Q. – this, again, are corner perpetuation**
25 **records. You've already discussed these. It's a**

1 when – if this was a corner that we located, I – I
2 don't think I was contracted in this area actually.

3 I think Mountain River probably did this
4 area, but they may or they should have had a copy of
5 these perpetuated ties. And if the corner wasn't
6 easily found, they could have crossed those ties and
7 marked it out. But they didn't place anything. We
8 only located what was existing.

9 **Q. Okay. And in paragraph three of**
10 **Exhibit M that we've been looking at, Mr. Jones says**
11 **the corner is a one-half inch iron rod?**

12 A. Uh-huh.

13 **Q. Is that something he's placed or he**
14 **found?**

15 A. He found.

16 **Q. And would that have been something that**
17 **you would have relied upon as a surveyor?**

18 A. Oh, yeah. I've – I've probably used
19 some of these comers. We rely on each other's
20 corners often unless there's a reason not to rely on
21 the corner, and – and reasons that are easily
22 found, like double corners, if you go out and find
23 two corners out there, then you're going to try to
24 figure out which one goes back to the original, and
25 so would I have relied on his corner? Is that the

1 **two-page exhibit.**

2 A. Oops. I passed one. Just a second.
3 Okay.

4 **Q. Now, the first page is – you've already**
5 **identified the corner perpetuation record from Garth**
6 **Cunningham –**

7 A. Uh-huh.

8 **Q. – and that was done in 1979?**

9 A. Uh-huh.

10 **Q. Is that yes?**

11 A. Yes. Sorry.

12 **Q. And this is for the southeast corner of**
13 **Section 17.**

14 A. That's correct.

15 **Q. Do you find the southeast corner to be a**
16 **reliable corner from a surveyor's standpoint?**

17 A. After the research that I've done, I do.
18 And one of the reasons that I do is because it
19 matches the fence lines. And we're very cautious as
20 surveyors to try to adhere to bona fide rights that
21 are pointed out in the manual, and so we make sure
22 that there isn't anything more important in this one
23 than there is in the other one except that
24 possession lines fit this one, and so I think it
25 gives some credence to this corner.

1 Q. So the description of the monument, the
2 one-half-inch iron rod from old ties, you would find
3 that a reliable record for perpetuating that
4 corner?

5 MR. SEAMONS: Well, there's more than
6 one page here.

7 MR. MANWARING: I understand. I'm
8 talking about the first page.

9 MR. SEAMONS: All right.

10 THE WITNESS: Yeah. The first one,
11 which was – the first page in 1979, Garth
12 Cunningham found a half-inch iron rod from old ties,
13 and if you go to the next page, which is the exact
14 same corner, the old ties are shown that were
15 recorded by Donald M. Ellsworth.

16 Donald Ellsworth was Garth's boss. He
17 was Ellsworth Engineering. Garth Cunningham was
18 working for Ellsworth Engineering until the time
19 they turned into Mountain River Engineering, but
20 Garth was working as a surveyor for Donald Ellsworth
21 in 1979 so they had record of all these corners that
22 he had found or placed and where it came from. He
23 doesn't explain where it came from, but in 1969, he
24 perpetuated what he thought was the corner.

25 Q. And do you have any problem with what

1 One of the things that exhibit – the
2 difference between those two exhibits, Donald
3 Ellsworth does not show a distance to the north from
4 that corner, and Mr. Jones does. And he shows a
5 distance to the south that is twenty feet short of
6 fifty-two hundred and eighty feet Donald Ellsworth
7 does. And Dennis Jones shows a distance twenty feet
8 long to the north, fifty-three hundred.

9 So those distances, you know, I know
10 that those are the same corners that were found here
11 because on the county control map, those distance
12 are perpetuated. They're the same distances.

13 Q. Same distances?

14 A. Uh-huh. Same distances on the record
15 surveys.

16 Q. Okay. Now, in the manual of surveying,
17 what does it tell you or instruct you as it relates
18 to fences?

19 MR. SEAMONS: The question is vague.

20 MR. MANWARING: Okay.

21 THE WITNESS: Yeah. I don't know that I
22 have any particular memory of what it talks about as
23 fences, but it talks about evidence of ownership and
24 evidence of, you know, those type of evidences, but
25 I can't remember specifically anything about a fence

1 Donald Ellsworth has written here in this corner
2 record?

3 A. No, no.

4 Q. Was this the same Ellsworth Engineering
5 that was relied upon by Dennis Jones in making the
6 northeast corner –

7 A. Yes.

8 Q. – calculation.

9 A. Yes.

10 Q. Now, if you turn back again to
11 Exhibit M – go the other way.

12 A. This way? Going the wrong way. We're
13 talking M. Actually, it's a couple more pages.

14 Q. (BY MR. MANWARING:) So when you're –
15 in paragraph one, where it talks about found using
16 ties from Ellsworth Engineering –

17 A. Uh-huh.

18 Q. – would that be the same Ellsworth
19 Engineering that we just talked about?

20 A. It is.

21 Q. So Mr. Jones apparently would have had
22 some notes or information that he relied upon in
23 making that northeast corner determination?

24 A. He did. He had ties from Ellsworth
25 Engineering.

1 line or fences.

2 Q. (BY MR. MANWARING:) Can you find in the
3 manual what it describes as far as evidences of
4 ownership or use that you're talking about that
5 you're relying upon?

6 A. It talks about – I can find places in
7 the manual where it talks about evidences of the
8 original corner, which would be tied to the original
9 notes like topography, you know, crossings, things
10 like that, or bearing trees or line trees or those
11 type of things.

12 And then there are also evidences of
13 testimony of the original placement of a corner. If
14 there's testimony that the corner was right here,
15 and it's refutable testimony, then a surveyor can
16 accept that testimony as that being the corner.

17 And the evidences that we use in the
18 industry that we talked about, are evidences that
19 would not have been pointed out in the manual.
20 Those are evidences of ownership, evidence of deeds,
21 a written record. All of those are evidences of a
22 maybe a previous survey in a previous time, before
23 there were corner perpetuations, before there were
24 records of survey, filing at – all of that
25 information relates back to where the original

1 corner could be placed.

2 And if you could testify in a court of
3 law that I used this as evidence to replace that
4 corner, then you've got a really good understanding
5 that that could be where the corner came from. So
6 as far as specific, you know, references to fence
7 lines, no, I don't have a specific reference to a
8 fence line.

9 **Q. And what you're saying is the manual
10 doesn't have a specific reference to fence lines?**

11 A. No. Because fence lines came. These
12 were instructions for original surveyors to lay out
13 pints. There wasn't fence lines there.

14 On the retracement surveys, it talks
15 about in retracement and in relocation of lost
16 corners, a lost corner is a corner that can only be
17 placed by measurement from existent monuments, and
18 there are double proportioning to do at section
19 corners, and single proportioning at quarter
20 corners, but that still is the last thing that you
21 use. After all of the evidence is exhausted, then
22 you use that.

23 And in my experience, we have used many,
24 many fences in this valley to place especially
25 quarter corners. The quarter corner that is the

1 so he placed it by double proportion. And, by the
2 way, those double proportions were not correct – I
3 can prove that – which then displaces three other
4 corners because they were set by single proportion.

5 And so, yes, there were a lot of lost
6 corners in Section 17, and there were fences that
7 were not used on any of them. There was no – in
8 fact, the corners on the west side of the section
9 are in the Lewisville Highway.

10 The Lewisville Highway plans from the
11 1930's or '40's, whenever it was done, have
12 references to corners, so those corners over there
13 were not lost, so they shouldn't have been
14 proportioned.

15 If the original record shows or doesn't
16 have enough information to replace them, then you
17 could call them lost, but the double proportioning
18 that was done was not done properly.

19 So knowing all this now, I would be very
20 cautious to use seven of eight corners in that
21 section.

22 **Q. The southeast corner is acceptable.**

23 A. I think it is because of the location of
24 the fences.

25 **Q. Northeast corner?**

1 boundary line or the dividing line between the north
2 and south quarters of the section, quite often in
3 our valley, the quarter corner has been placed.

4 These are corners that I have either
5 placed or I have either accepted as being placed in
6 line with fence lines at the quarter corner, and
7 that's because it – it holds the – it holds the
8 bona fide rights of owners that may have already
9 measured in properties. And we find that, you know,
10 the fences are going to be closer.

11 In our valley, however, irrigation came
12 before fences, and sometimes you'll find that a
13 ditch was the dividing line between two parcels
14 rather than the fence. And so all of that
15 information is valuable when placing these
16 corners.

17 **Q. Has any of that information been relied
18 upon to, to your knowledge, in placing corners in
19 Section 17 that we've been discussing?**

20 A. No. I don't feel like, after looking at
21 this, no, because the northwest corner was said to
22 be a double proportioned corner, so that means that
23 he thought it was lost. This would have been Garth
24 Cunningham placing it.

25 The southwest corner he said was lost,

1 A. The northeast corner is – I wouldn't
2 feel really bad about dividing that distance there
3 that's twenty feet and, you know, the proper
4 division of that is to spread that out the full way.
5 The problem is, if you use the evidence to place
6 that corner, then you're disregarding evidence at
7 the east quarter corner that you could place that
8 corner by other evidence actually.

9 There's fence lines and there's –
10 there's a deed line that goes – the Ucon Cemetery
11 Road takes off from there, so makes you wonder whose
12 deed the Cemetery Road came out of. Did that come
13 out of two deeds or one deed? There's another
14 corner shown on the perpetuation sheet there,
15 twenty-seven feet north of the corner that Kevin
16 used.

17 So there's confusion on the east side,
18 there's confusion on the west side, which makes
19 confusion on the south side and the north side.

20 **Q. Based upon the corner perpetuation
21 records we've seen for the northeast corner, that
22 corner has been perpetuated?**

23 A. It's been perpetuated as far as the
24 monument goes. No one has said that's the corner.
25 There's no pedigree going back to the original

1 corner. It could be a locally accepted corner, and
2 the perpetuation sometimes reflects that, but
3 locally accepted corners, people just start
4 accepting them.

5 But that's also happening on the west
6 side of the section where I found a blunder, so now
7 I'm trying to figure out what I need to do with the
8 blunder.

9 **Q. Okay. So back again to the northeast
10 corner, that corner, from a survey standpoint, has
11 been determined and perpetuated.**

12 A. It's been used. It's a 1980's corner
13 that has been used.

14 **Q. The 1969 corner?**

15 A. Southeast corner is '69. I think this
16 one was a 1979.

17 **Q. But it relied on Ellsworth Engineering's
18 eyes; is that correct?**

19 A. It has, uh-huh.

20 **Q. And Ellsworth Engineering had the
21 southwest corner perpetuated in '69; is that
22 correct?**

23 A. That's correct, uh-huh.

24 **Q. Now, in your manual survey, you've
25 already stated it does not address relying upon**

1 **do that proportionately; is that correct?**

2 A. That's correct.

3 **Q. So one section isn't going to end up
4 with all fifty-two feet.**

5 A. Fifty-two feet if that --

6 MR. SEAMONS: I'll object to the form of
7 the question.

8 Do you understand his question?

9 THE WITNESS: I understand his question,
10 but you may be misunderstanding a little bit. If
11 you are proportioning anything, it begins at found
12 original corners.

13 **Q. (BY MR. MANWARING:) I understand.**

14 A. Okay. If there are no found original
15 corners anyplace out there, you shouldn't be
16 proportioning anything.

17 **Q. I understand. So what do you do with
18 fifty-two feet?**

19 A. It is -- If there are lost corners in
20 that six miles with fifty-two feet, it's
21 proportioned north and south and east and west for
22 the section corners first only. It's proportioned.
23 It's called the double proportion, and a double
24 proportion is not a straight line.

25 A double proportion is proportioned in

1 fences. You're just looking at evidences --

2 A. Correct.

3 **Q. -- to try to establish a corner; is that
4 correct?**

5 A. That's correct.

6 MR. SEAMONS: I'll object to the form of
7 that question as well. It mischaracterizes the
8 witness' testimony regarding the purpose of the
9 manual for original surveyors, but go ahead.

10 **Q. (BY MR. MANWARING:) He's already
11 answered, but okay.**

12 **In making the survey, you've mentioned
13 that there's twenty feet off on the east side.**

14 A. Uh-huh.

15 **Q. In fact, in your affidavit you said it's
16 a whopping twenty feet.**

17 **Is that really a whopping twenty feet?**

18 A. It actually is. If you add up the
19 distance on either the west side or the east side of
20 this section, in six miles there's only a fifty foot
21 difference in six miles.

22 **Q. Okay.**

23 A. So why should twenty feet of it be in
24 one section. So, yeah, it is whopping.

25 **Q. So when they survey the situation, you**

1 two different directions. So you take the distance
2 that's actually measured in one direction, the
3 distance that's actually measured in the other
4 direction, you apply the prorated distances that it
5 should have been on the GLO map, and that gives you
6 two positions.

7 From those two positions, then, you move
8 the latitude and the longitude, north and south and
9 east and west, to a point, that becomes the corner.

10 Then from that corner, which is a double
11 proportioned corner at a section corner, then you
12 can proportion in the one-quarter corners between
13 those, which would be just splitting that if the
14 original -- if the original survey showed that it
15 was a split, and the original notes showed that they
16 put it halfway, then you split it.

17 Or if it isn't halfway, like the
18 sections on the north tier and things like that, it
19 has to be proportional to the distance of the
20 original measure and placed that way. And the
21 retracement, the BLM manual tells the original
22 surveyors when you're retracing these things and you
23 come across these gross areas of lost corners, that
24 there's absolutely no evidence, then you start this
25 process of double proportioning and single

1 proportioning from existent corners meaning the
2 original corner has to be known at those other
3 distances.
4 One of the fallacies that surveyors, and
5 myself included, with all the surveyors that are
6 private surveyors, sometimes when they drop back to
7 these proportioning distances and things like that,
8 they assume that the other corners were original
9 corners.

10 And if you go back to the pedigrees of
11 these other corners and you're just accepting
12 someone's corner doesn't mean that it's the original
13 corner. And that's what's happened here. The
14 corners of 1980 were surveyed out, proportioned and
15 petitioned, and that's – that's the record of
16 survey showing correct distances, showing correct
17 methodology, showing all of the things correctly,
18 and showing the fences off.

19 **Q. Correct.**

20 A. Showing the fences are not coincident
21 with the lines of the 1980 corners. That's all that
22 is.

23 And when Kevin Thompson went out there,
24 he had a deed that didn't reference the north
25 quarter, the north half of that section, or the

1 '80's.

2 MR. SEAMONS: That were perpetuated
3 corners.

4 THE WITNESS: The perpetuated corners,
5 exactly.

6 MR. MANWARING: Well, that brings us to
7 the next set of questions dealing with Exhibit 3,
8 and that's this record of survey we've been talking
9 about from Thompson Engineering.

10 (Deposition Exhibit 3 was marked for
11 identification.)

12 **Q. (BY MR. MANWARING:) This survey was
13 performed in September of 2009; is that correct?**

14 A. Uh-huh, yes.

15 **Q. And you didn't do anything in relation
16 to the survey?**

17 A. No.

18 **Q. Okay. And the process that you believe
19 Mr. Thompson had used in preparing this record of
20 survey, I think you've mentioned, corresponds with
21 what has been found, at least in the section corners
22 as we know them today; is that correct?**

23 A. That's correct. The monuments that he
24 based this survey on were the '80's monuments and
25 the '69 monument that were perpetuated, and in the

1 south half of that section. His survey is a
2 relocation of corners placed by John P. Barnes,
3 license 856, which are shown on his survey. He
4 found his corners.

5 The legal descriptions were written by
6 John P. Barnes on this parcel of property. And he
7 went out and relocated those corners. There's no
8 reference until his survey that it's a petition line
9 between the north quarter, the north half, and the
10 south half of that northeast quarter.

11 The first time it even comes into record
12 is on his survey where he mentions that in his legal
13 descriptions that are not recorded, these legal
14 descriptions basically don't mean anything yet until
15 they're recorded, and this record of survey does not
16 transfer the title to any of these parcels. It's
17 only a picture of the measurements that he
18 performed.

19 I have no reason to believe that his
20 measurements are wrong. In fact, comparing them to
21 other record of surveys, county maps and things like
22 that, his county section breakdown is identical to
23 the county map, and I have no reason to believe that
24 he hasn't done anything other than measure to the
25 original – or the corners that were found in the

1 perpetuated corners and in 2004 section map that the
2 county control shows.

3 **Q. Okay. And is there any aspect of this
4 record of survey that you can point to and say this
5 survey was done incorrectly?**

6 A. From the corners that he used, I think
7 it was – there's no reason to believe it was done
8 incorrectly from the corners that he used.

9 **Q. Okay.**

10 A. I may not agree with the corners that he
11 used, but all of his measurements and the way that
12 he broke the section down seems to be correct.

13 **Q. Is it correct in the manual of surveying
14 that what you're doing in surveying is proportioning
15 out the actual land than you're looking at?**

16 A. Yeah, it's particular. The one-quarter
17 corners of the section, wherever they are found, if
18 you intersect the north/south one-quarter corners
19 and east/west one-quarter corner, that becomes the
20 center of the section.

21 **Q. Okay.**

22 A. Then you move to each one of those
23 quarters doing the same thing.

24 **Q. And is that type of proportioning, is
25 that how the survey manual describes that you**

1 allocated this?

2 A. It is, yes.

3 Q. So that's common to all surveyors?

4 A. It is.

5 Q. You've seen already in the exhibits that
6 you have, the deeds to the parcels that are listed
7 here as parcels one, two, and three, and the deed to
8 the parcels that are the Kvammes' parcels.

9 MR. SEAMONS: Object to the form of the
10 question. There are no deeds to parcels one, two,
11 and three.

12 MR. MANWARING: I understand. The deed
13 to the property represented by parcels one, two, and
14 three.

15 Q. (BY MR. MANWARING:) You've seen the
16 history of those deeds?

17 A. I have, yes.

18 Q. And the history of the deeds for what is
19 now the Kvammes' parcel, correct?

20 A. Yes.

21 Q. Would we describe, if parcels one, two,
22 and three and the Kvammes' parcel, were all held by
23 the same person as the record of title shows, could
24 we describe that as being the northeast quarter of
25 the northeast corner of Section 17?

1 quarter of Section 17, how would we survey that
2 corner out?

3 A. The northeast corner of Section 17 would
4 be broken out from what we call a section breakdown
5 which would be intersecting the quarter corners, all
6 four of the quarter corners to find the center of
7 the section, and when you find the center of the
8 section then mathematically you split the distance
9 at the center of the section north and south and the
10 distance of the east line of the section in half and
11 then run a line between them.

12 Q. And now, if as is the case in
13 Section 17, it's not an exact distance, it's not
14 the - as we described earlier, the nominal
15 section -

16 A. Okay. Yeah. We put nominal there.
17 Sometimes I call it a statutory distance -

18 Q. Okay.

19 A. - only because everyone thought that
20 there were six hundred and forty acres, and so then
21 they thought it was thirteen twenty, and thirteen
22 twenty, and twenty-six forty, and fifty-two eighty,
23 so the normal distance that would you find a point
24 there, if it was laid out from the original survey,
25 and the original survey was correct on the ground,

1 MR. SEAMONS: Objection to the question,
2 vague.

3 THE WITNESS: No. It would be the - it
4 would be the northeast corner of the south half of
5 the northeast quarter.

6 This one that you're pointing to would
7 be the northeast corner of the south half of the
8 northeast quarter because the northeast quarter goes
9 all the way down to this quarter corner. So the
10 whole thing is the quarter, this is the north half,
11 this is the south half, this would be the northeast
12 corner according to his survey.

13 Q. (BY MR. MANWARING:) I understand what
14 you're saying. I didn't explain myself very well.

15 If we took this land that's represented
16 by parcels one, two, and three on this record of
17 survey, and we combine it with the Kvammes' parcel,
18 and I think that the deeds of record that you have
19 in your exhibits show that at one time that was a
20 single owner, is that what you recall?

21 A. That's correct. It was all the
22 northeast quarter of Section 17.

23 Q. Okay.

24 A. It was all that.

25 Q. So when we talk about the northeast

1 then, yes. It would be thirty-nine eighty from a
2 southeast corner or a thirteen twenty from a north
3 corner, depending on where it was measured from for
4 the north corner.

5 Q. And as we know in Section 17 that's not
6 the case.

7 MR. SEAMONS: I'll object to the
8 question. When you say "that is not the case," are
9 you referring to the north boundary or to the east
10 boundary? The east boundary is five thousand, two
11 hundred eighty feet. The north boundary was not.
12 So what are you asking about here, the north
13 boundary or the east boundary?

14 Q. (BY MR. MANWARING:) We're talking about
15 the east boundary of Section 17.

16 A. Okay. Could you ask me the question one
17 more time, then?

18 Q. Sure. From what you have gained, do you
19 know what the distance is of the east boundary of
20 Section 17?

21 MR. SEAMONS: At what point in time?
22 I'll object to the question.

23 THE WITNESS: Yeah.

24 Q. (BY MR. MANWARING:) Under the current
25 record of survey that we have.

1 A. Sure. The Kevin Thompson survey shows
2 the approximately fifty-three hundred and some feet
3 on that north mile there, and so dividing that down
4 into the proportional measurements because the
5 quarter corner was placed on a proportion as well,
6 so that was already split.

7 So he took the distance between the
8 found quarter corner, the found northeast corner, he
9 split that distance, and he found the point already
10 existing at 1325.26 feet, which was placed by John
11 P. Barnes who did not report a record of survey, and
12 he found a point there.

13 Q. Now, who's John P. Barnes?

14 A. He's the surveyor from Rexburg area,
15 from Madison County.

16 Q. And he apparently didn't perform any
17 kind of record of survey for that particular
18 point?

19 A. I think he has one in his records. It
20 was not recorded. But I think he has one because he
21 prepared legal descriptions from that, and it would
22 be pretty hard to not have a diagram of some kind
23 when writing a legal description.

24 Q. They probably have some notes.

25 A. I'm sure, uh-huh.

1 north half and a south half, how would you do that
2 under the manual of survey?

3 A. The way that I explained before, you
4 would proportion those distances on the east side,
5 proportion the distances from the center section to
6 the north quarter corner and then run a line between
7 those two corners, that would be the title line
8 basically between the north one-quarter corner and
9 the south one-quarter quarter or the - I'm sorry.
10 The north half of the northeast quarter and the
11 south half of the northeast quarter.

12 Q. And from your understanding, from the
13 title that you've seen of record, that division was
14 made sometime on this northeast corner?

15 A. No. Actually, the legal descriptions
16 that are recorded of that are four legal
17 descriptions in this half of the quarter that are
18 described from this quarter corner, and they go up
19 using these distances, yes.

20 The - that legal description is there.
21 The legal description when it comes to this point,
22 does not mention the sixteenth corner, nor does it
23 mention that it's the petition line between two
24 quarters.

25 Q. And you're pointing to the point on the

1 Q. And - but John Barnes is the one that
2 put the iron rod with the cap in it that you have
3 referred to as cap number 826?

4 A. Correct.

5 Q. And that's a quarter corner?

6 A. No. It's a sixteenth corner.

7 Q. Okay. And according to this record of
8 survey, Mr. Thompson found that iron rod.

9 A. Uh-huh, yes, he did.

10 Q. And it was proportioned in the location
11 that would be what we would say is the line between
12 the south half and the north half of that northeast
13 corner.

14 A. Yes.

15 MR. SEAMONS: I'll object to that
16 question, but you will go ahead and answer if you
17 understand it.

18 THE WITNESS: I understand what you're
19 saying, and I will refer back to according to his
20 survey, yes.

21 Q. (BY MR. MANWARING:) Right.

22 A. According to the 1980 corners in his
23 survey, yes.

24 Q. So if we were going to divide this
25 northeast quarter of Section 17, so you'd have a

1 record of survey that references the iron cap number
2 826; is that correct?

3 A. There - yeah, there happens to be two
4 others of those as well, so this one is the
5 northeast one.

6 Q. Okay. And when you say two others,
7 you're referenced over on the -

8 A. Northwest corner.

9 Q. - northwest corner. -

10 A. Yes.

11 Q. - the iron rod cap number 826, and the
12 southwest corner iron rod cap number 826; is that
13 correct?

14 A. That's correct. And this corner right
15 here, could -

16 Q. The southwest corner?

17 A. - the southwest corner, could actually
18 be called, or should be called, the center of the
19 section according to the survey that was performed.
20 It could be called the center of the section.

21 Q. Sure. Now, if you'd look at Exhibit G
22 of your exhibit to your affidavit -

23 A. Uh-huh.

24 Q. - where it identifies this property as
25 the northeast quarter of Section 17 -

1 A. Correct.
 2 **Q. – at what corner would that be?**
 3 A. It's a quarter, so on this diagram on
 4 Mr. Thompson's survey, it would be this whole one
 5 quarter.
 6 **Q. It would be the entire –**
 7 A. The northeast quarter.
 8 **Q. The entire corner of the northeast**
 9 **quarter; is that right?**
 10 A. The northeast quarter representing a
 11 hundred and eighty – or yeah, a hundred and eighty
 12 acres.
 13 MR. SEAMONS: I might add, Kipp, and
 14 perhaps you've already deciphered this that the
 15 significance –
 16 THE WITNESS: Sorry.
 17 MR. SEAMONS: I might add that the
 18 reason that we added this as an exhibit was for the
 19 full legal description which goes on to state
 20 containing one hundred and sixty acres, more or
 21 less, according to the government survey.
 22 MR. MANWARING: Right.
 23 MR. SEAMONS: Okay.
 24 **Q. (BY MR. MANWARING:) What – in fact, if**
 25 **you know, Mr. Leavitt, why do deeds say more or less**

1 **when it describes acreage?**
 2 A. It's an accepted practice. Basically,
 3 we actually do the same thing today even though we
 4 may have good computers and a lot of calculations,
 5 but more or less distances on acreage because
 6 warranty deeds usually do not ensure acreage. And I
 7 guess that's held as kind of law, so to speak.
 8 I'm not sure where it ever came from,
 9 but they don't – unless there's a specific court
 10 case that may ensure acreage, but I'm not aware of
 11 how that came about. But it's a – it's kind of a
 12 standard practice in our industry.
 13 **Q. And the more or less meaning what?**
 14 A. You know, acreage more or less, you
 15 know, an acre. I mean, it's hard to calculate an
 16 acre anyway. If you had a square acre, it's two
 17 hundred and – what is it? Two hundred and seven
 18 feet by .6 or something, by 207.6.
 19 I mean, forty-three thousand, five
 20 hundred and sixty square feet is an acre, and
 21 acreage with – computers now days, you can
 22 extrapolate that out to the thousandth place, but it
 23 doesn't necessarily mean measurement is not always
 24 exact science, and we see that on record of surveys
 25 in this case that sometimes the two different

1 surveyors measure different – differently between
 2 two found corners. I mean, it's just not an exact
 3 science.
 4 **Q. Okay. Now, back to Exhibit 3, which is**
 5 **the record of survey, based upon the information and**
 6 **relied upon by Thompson Engineering, did it properly**
 7 **identify on this record of survey the property as**
 8 **described with what we would describe as the south**
 9 **half of the northeast corner of Section 17?**
 10 MR. SEAMONS: I'll object to the form of
 11 the question.
 12 If you understand what he's asking, you
 13 can answer that one though.
 14 THE WITNESS: I do understand. From the
 15 corners that Mr. Thompson found on this exhibit, he
 16 breaks that down mathematically and properly
 17 according to statutes and reasonable surveying. And
 18 then, for the first time, calls out that line as
 19 being the north line of the south half of the
 20 northeast quarter.
 21 **Q. (BY MR. MANWARING:) That process that**
 22 **you see at least utilized by Mr. Thompson in this**
 23 **record of survey, does it comply with how they would**
 24 **direct a survey to be done under the manual of**
 25 **survey?**

1 MR. SEAMONS: I'll object to the
 2 question.
 3 THE WITNESS: Yeah. The very first –
 4 the very first item that the manual describes is
 5 replacement, relocation, of the lost or obliterated
 6 corners. If he thinks that he did that, then this
 7 survey is proper, according to the monuments that he
 8 used.
 9 But the manual of instructions is very
 10 specific that you go back to the original survey,
 11 the original corners. If you can't find those
 12 original corners, then you proportion from found
 13 corners.
 14 **Q. (BY MR. MANWARING:) Does that appear to**
 15 **be what was done here?**
 16 A. No.
 17 **Q. What found corners didn't he use?**
 18 A. Found original corners. Okay? I don't
 19 see any posts out there anyplace. Charge stakes. I
 20 don't see any pits. I don't see any – any
 21 evidence, zero evidence, of the original corners.
 22 **Q. What evidence of original corners are**
 23 **you aware of that could have been relied upon in**
 24 **making this survey?**
 25 A. There could have been –

1 Q. I'm asking what you are aware of. What
2 do you know exists as far as original corners that
3 should have been relied upon?

4 MR. SEAMONS: What evidence of original
5 corners?

6 MR. MANWARING: Yeah.

7 MR. SEAMONS: Other than fence line?

8 MR. MANWARING: Yes.

9 MR. SEAMONS: Okay.

10 THE WITNESS: There – the center line
11 of the road; intersections sometimes have been used
12 in Bonneville County throughout, and the center line
13 of a road is held as the exact same evidence as a
14 fence line.

15 Q. (BY MR. MANWARING:) Is that here? Do
16 you know whether that exists here?

17 A. I don't know than it exists here. There
18 is no record in the corner perpetuations as to how
19 any of these corners came about except the double
20 proportioned corners, which I know were not double
21 proportioned. And single proportioned corners,
22 which came from wrong double proportioned corners.

23 So the only two corners that were found
24 is the northeast and the southeast, and there's no
25 pedigree that goes back to being the original

1 southeast corner received as much property as they
2 were supposed to as far as north and south
3 distances.

4 Q. I understand that, your position.

5 Have you gone out and tried to find the
6 original corners in Section 17?

7 A. I have been on the property there, and I
8 went around that section, and I reviewed the corner
9 perpetuations and kind of looked and, yes, I have
10 not found the original corners.

11 Q. What would that mean, then, to use this
12 if you can't find the original corners, what do you
13 do?

14 A. Then you start into this research like I
15 have, and research all of the evidence. When all of
16 the evidence is exhausted, and you don't feel that
17 any of the evidence points to an original corner,
18 then you start proportionately measuring from
19 existent corners that were original corners, and so
20 that may mean that your survey just quadrupled or
21 whatever in size and scope.

22 Q. But you haven't done that?

23 A. No. I wasn't – I wasn't retained to
24 resurvey, only to review this record and things, and
25 give my opinion on the record, and the existence of

1 corner. There's nothing.

2 Q. For either one?

3 A. For either one.

4 Q. But based on the evidence that
5 apparently Mr. Thompson found, it was proper for him
6 to rely upon those corners as perpetuated?

7 A. Yeah. That's a question that only he
8 can answer. The manual of instructions and the laws
9 of the state of Idaho leave it up to each one of us
10 individually to perform a survey. A survey isn't a
11 survey if it doesn't begin from the original
12 corners, so that's a question that he has to answer.

13 Knowing what I see here, there's some
14 problems with some corners. The easy thing to do
15 for all of us is to accept each others' corners and
16 get on with life. That's the easy thing to do.

17 The hard thing to do is to stand up and
18 say there's some problems, and this survey, because
19 of the evidence that I see, of the fences on the
20 east side of this section, there's some problems,
21 and it's my opinion that you could – I can show
22 measurement – he shows a measurement on his survey
23 that we're talking about that those fence lines are
24 at the statutory distances.

25 So that means that everyone from the

1 the fence being the boundary line between those two
2 parcels, the parcels in question.

3 MR. MANWARING: Okay. I don't have any
4 other questions.

5 MR. SEAMONS: I'll throw one thing out
6 here because you may have some questions on this.
7 It just didn't come out during the dialogue, but in
8 terms of evidence that he reviewed and considered,
9 he also – I mean, he's been to the property several
10 times, but the direction of the – the point of
11 entry and direction of the irrigation ditch and its
12 engineering and the dike that runs across the field
13 where the fence itself sits, he's also considered
14 that in forming his opinion. If you don't want to
15 explore that, that's fine.

16 MR. MANWARING: I think he already
17 explained that ditches sometimes –

18 THE WITNESS: Ditches, yeah.

19 MR. SEAMONS: Okay.

20 MR. MANWARING: I accepted that. I
21 didn't understand his opinion, and I think we
22 explored that.

23 MR. SEAMONS: Very good.

24 MR. MANWARING: Very good. Thank you.

25 THE COURT REPORTER: Did you want to

BONNEVILLE COUNTY
IDAHO

2011 SEP 22 AM 9:24

Justin R. Seamons
414 Shoup Avenue
Idaho Falls, ID 83402
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Idaho State Bar Number: 3903

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
 Plaintiffs,)
)
 vs.)
)
 JAMES C. KVAMME and DEBRA)
KVAMME,)
)
 Defendants.)
_____)

Case No. CV 10-3879

**OBJECTION TO ARGUMENT OF THE
HONORABLE JON J. SHINDURLING
THAT THE ORIGINAL SURVEY IN
THIS CASE WAS NOT ACCURATE**

The Plaintiffs allege that the fence in this case does not sit on the boundary between the parties' respective parcels of real property; instead, the Plaintiffs allege that the fence sits on their parcel of real property and is off by 15 feet.

In an attempt to carry their burden of proof, the Plaintiffs attached a copy of a RECORD OF SURVEY to the affidavit of Kipp L. Manwaring. Mr. Manwaring is not a professional land surveyor. He is a lawyer.

Kevin L. Thompson prepared the RECORD OF SURVEY on September 17, 2009. The purpose of the survey was not to determine if the fence sits on the boundary

between the parties' respective parcels of real property; instead, the purpose of the survey was to illustrate the possible "combining" of six deeds.

Mr. Thompson did not survey the Defendants' parcel of real property; he did not find or otherwise locate the original corners of Section 17; and he did not mark or otherwise perpetuate the corners of Section 17.

In addition, Mr. Thompson did not follow or otherwise use the original survey of 1877; instead, he simply used the Control Map of 2004.

Nonetheless, at oral argument on September 12, 2011, the court stated the following:

If this section is a little out of shape, and most sections are, particularly in this part of the country. I think they did the original surveys in a high wind or something. I don't know what happened, but I don't think I've ever had a case where I had a true section. They just don't occur because of the way things were surveyed in very primitive times. . . . I don't know. I don't know the answer to that. This is something we're starting to encounter now in surveying because of GPS and other things that make the whole mechanism a lot simpler than it was a 100, 130 years ago, 140 year ago. We're starting to find these inequities, these differences.

With all due respect to the court, the foregoing statement is argumentative and conclusory; more importantly, it is not an adjudicative fact of which the court can take judicial notice. See I.R.E. 201(b). In this regard, please note the following:

1. The fact that "most sections are a little out of shape" is a red herring. John B. David performed the original survey in 1877. At that time, the east boundary of Section 17 was 5,280 feet. See AFFIDAVIT OF KIM LEAVITT, dated June 7, 2011. Again, Mr. Thompson did not follow or otherwise use the original survey of 1877 and he did not find or otherwise locate the original corners of Section 17.

2. With respect to the court's argument that "they did the original surveys in a high wind or something," please note that the court's argument is speculative.

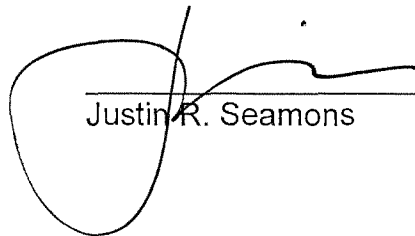
3. In addition, with respect to the court's argument that the original surveys were "surveyed in very primitive times," please note that the court's argument is speculative. In this regard, please note that 1877 was not a "primitive time" in professional land surveying. The scientific, technical, and specialized knowledge was known; the education, training, skill, and experience were available; and the instruments and tools of the trade were available.

4. Finally, with respect to the court's argument that "we're starting to find these inequities [and] differences" because of "GPS and other things that make the whole mechanism a lot simpler than it was a 100, 130 years ago, 140 year ago," please note that the court's argument is speculative. In this regard, please note that "GPS" is simply a tool—indeed, another tool—for measurement. The fact that GPS was not available "100, 130 years ago, 140 years ago" does **not** mean that the instruments and tools of the trade were inaccurate.

5. The Plaintiffs have **not** proffered any evidence, let alone admissible evidence, that John B. David performed the original survey in a "high wind or something"; that the original survey was "surveyed in very primitive times"; and that "we're starting to find these inequities [and] differences" because of GPS. Again, GPS is simply another tool for measurement. The fact that GPS was not available "100, 130 years ago, 140 years ago" does **not** mean that the instruments and tools of the trade were inaccurate.

6. Thus, if the court intends to take judicial notice of the foregoing—that is, that “they did the original surveys in a high wind or something,” that the original surveys were “surveyed in very primitive times,” and that “we’re starting to find these inequities [and] differences” because of GPS, then the Defendants respectfully request an opportunity to be heard in accordance with I.R.E. 201(e).

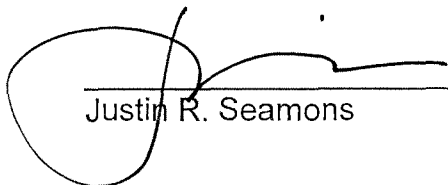
Dated September 20, 2011.


Justin R. Seamons

CERTIFICATE OF SERVICE

I served a copy of the foregoing OBJECTION TO ARGUMENT OF THE HONORABLE JON J. SHINDURLING THAT THE FENCE IN THIS CASE IS A “CONVENIENCE” FENCE on the following person on the 21st day of September, 2011:

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271


Justin R. Seamons

BONNEVILLE COUNTY
IDAHO
2011 SEP 22 AM 9:24

Justin R. Seamons
414 Shoup Avenue
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Telephone Number: (208) 542-0600
Facsimile Number: (208) 529-4166
Idaho State Bar Number: 3903

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
Plaintiffs,)
)
vs.)
)
JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

**AFFIDAVIT OF KIM H. LEAVITT RE
ARGUMENT OF THE HONORABLE
JON J. SHINDURLING THAT THE
ORIGINAL SURVEY IN THIS CASE
WAS NOT ACCURATE**

State of Idaho)
) ss.
County of Bonneville)

I, Kim H. Leavitt, state and declare the following under oath:

1. I am over the age of 18.
2. I am a professional land surveyor, duly licensed to practice professional land surveying in the state of Idaho.
3. I am competent to testify to the matters stated herein.

4. The Plaintiffs allege that the fence in this case does not sit on the boundary between the parties' respective parcels of real property; instead, the Plaintiffs allege that the fence sits on their parcel of real property and is off by 15 feet. In this regard, please note that I have reviewed the Plaintiffs' complaint, I have reviewed the Plaintiffs' memoranda, and I have reviewed the deposition of V. Leo Campbell.

5. In addition, I have reviewed the RECORD OF SURVEY, attached to the affidavit of Kipp L. Manwaring.

6. I know Mr. Manwaring. He is not a professional land surveyor. He is a lawyer.

7. Kevin L. Thompson prepared the RECORD OF SURVEY on September 17, 2009.

8. The stated purpose of the survey was not to determine if the fence sits on the boundary between the parties' respective parcels of real property; instead, the stated purpose of the survey was to illustrate the possible "combining" of six deeds.

9. The RECORD OF SURVEY relied on points used by others to mark the boundaries as shown on the RECORD OF SURVEY. Mr. Thompson assumed that the original corners had been found and was surveying the Plaintiff's parcel of real property according to deeds of record. The corners of the Plaintiffs' parcel of real property were found from a previous survey of John P. Barnes. The Plaintiffs' deeds of record were created from Mr. Barnes' survey. The Plaintiff had this knowledge prior to the Defendants' purchase of their parcel of real property.

10. In addition, Mr. Thompson did not use the original survey of 1877 to compare to the evidence of ownership and occupied properties; instead, he used the

Bonneville Control Map of 2004, which is simply a tool for assessor mapping and was not intended to be a map fixing all original corners in the County.

11. Nonetheless, I understand that the court stated the following at oral argument on September 12, 2011:

If this section is a little out of shape, and most sections are, particularly in this part of the country. I think they did the original surveys in a high wind or something. I don't know what happened, but I don't think I've ever had a case where I had a true section. They just don't occur because of the way things were surveyed in very primitive times. . . . I don't know. I don't know the answer to that. This is something we're starting to encounter now in surveying because of GPS and other things that make the whole mechanism a lot simpler than it was a 100, 130 years ago, 140 year ago. We're starting to find these inequities, these differences.

12. With all due respect to the court, the foregoing statement is not correct, at least in its entirety.

13. John B. David performed the original survey in this case in 1877.

14. The court is correct that "most sections are a little out of shape."

15. For example, Section 17 was a "little out of shape," but only on the north boundary and the south boundary. In 1877, the east boundary of Section 17 was 5,280 feet. Again, Mr. Thompson did not use the original survey of 1877 and he did not find or otherwise locate the original corners of Section 17.

16. However, whether John B. David performed the original survey in a "high wind" is not known or relevant. The instruments and tools of the trade in 1877 were reliable and accurate. The Manual of Surveying Instructions states in Section 4-2, "The law provides that the corners marked during the process of an original survey shall

forever remain fixed in position, even disregarding technical errors that may have passed undetected before acceptance of the survey.”

17. In addition, please note that 1877 was ***not*** a “primitive time” in the practice of professional land surveying. The scientific, technical, and specialized knowledge was known; the education, training, skill, and experience were available; and the instruments and tools of the trade were available.

18. In addition, with respect to the court’s statement that “we’re starting to find these inequities [and] differences” because of “GPS and other things that make the whole mechanism a lot simpler than it was a 100, 130 years ago, 140 year ago,” please note that GPS is simply a tool for measurement. The same rules and laws of surveying with respect to the original corners and evidence thereof have never changed.

19. The fact that GPS was not available “100, 130 years ago, 140 years ago” does ***not*** mean that the instruments and tools of the trade were inaccurate; again, the instruments and tools of the trade were reliable and accurate. In short, the practice of professional land surveying did not come stumbling into the modern era from some “primitive time” in the past because of the dawn of GPS. Again, GPS is simply another tool for measurement.

20. In addition, with respect to John B. David in particular, I have reviewed, studied, and used his professional notes, work product, and surveys for decades.

21. I have retraced his work many times and have found his original monuments to be in the correct proximity to his measurements.

22. In general terms, his work was accurate and his surveys were accurate, especially in areas, such as this case, that lie on the high desert plateau of the Snake River plain.

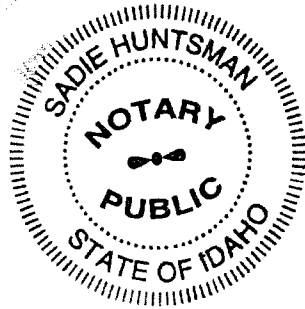
23. Finally, with respect to the facts and data upon which I have formed my opinions in this case, please note that the professional notes, work product, and surveys of John B. David, including the original survey of 1877 in this case, are of the type that are customarily and reasonably relied upon by experts in the field of professional land surveying in forming opinions. The Manual of Surveying Instructions specifies that all evidence of original corners has to be exhausted before proportion measurement is used. Fences, deeds, county road intersections, old surveys, highway maps are all of the type of evidence that professional land surveyors rely upon in performing their professional services.

(END)

Dated the 21 day of September, 2011.

Kim H. Leavitt
Kim H. Leavitt, P.L.S.

Subscribed and sworn on the 21 day of September, 2011.



Sadie Huntsman
Notary Public
Commission expires: 9-15-2017
Residing at: Idaho Falls

CERTIFICATE OF SERVICE

I served a copy of the foregoing AFFIDAVIT OF KIM H. LEAVITT RE ARGUMENT OF THE HONORABLE JON J. SHINDURLING THAT THE ORIGINAL SURVEY IN THIS CASE IS NOT ACCURATE on the following person on the 21st day of September, 2011:

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271

Justin R. Seamons
Justin R. Seamons

Justin R. Seamons
414 Shoup Avenue
Idaho Falls, ID 83402
Telephone Number: (208) 542-0600
Facsimile Number: (208) 529-4166
Idaho State Bar Number: 3903

BONNEVILLE COUNTY
IDAHO
2011 SEP 22 AM 9:24

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
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V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
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Plaintiffs,)
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vs.)
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JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

**OBJECTION TO ARGUMENT OF THE
HONORABLE JON J. SHINDURLING
THAT THE FENCE IN THIS CASE IS A
“CONVENIENCE” FENCE**

The Plaintiffs claim that the fence in this case is a “convenience” fence. The word “convenience” is not a word of art; it is not a legal term; and it is not defined by statute. It is simply argumentative and conclusory.

Nonetheless, at oral argument on September 12, 2011, the court stated the following:

We don't know the history of the property. We don't know why that dike was put where it was. We don't know why the fence was put where it was because it was a unified title and, as far as I know, some old guy got out there and looked down the line and said, “That's going to be the other end and we're going to put the dike here.” That's how farmers did it in those days. I lived on a farm. I know how they did it. You put things where they were, where it felt good to put it. You didn't go out there and

measure too much. You just put it there because that was a good place to put it.

With all due respect to the court, the foregoing statement is argumentative and conclusory; more importantly, it is **not** an adjudicative fact of which the court can take judicial notice. See I.R.E. 201(b). In this regard, please note the following:

1. The fact that the title to the NE1/4 of Section 17 was a “unified title” before 1950 is a red herring. The Plaintiffs have **not** proffered any evidence, let alone admissible evidence, that the person who built the fence did so as a matter of “convenience.” The Plaintiffs do **not** know who built it. The Plaintiffs do **not** know when it was built. The Plaintiffs do **not** why it was built.

2. The fact of the matter is this: The fence is a substantial fence. It is sturdy and strong. It includes metal posts, solid steel T-bars, wooden posts, and five strands of barbed wire. It is approximately 4.5 feet high and the bottom wire is less than 20 inches above the ground. The posts are less than 24 feet apart, evenly spaced, and solidly set in the ground. The barbed wire is tight, well-stretched, and securely fastened to the posts. It is a half mile long and runs straight across the entire NE1/4 of Section 17. See AFFIDAVIT OF JAMES C. KVAMME, dated June 7, 2011. Even the Plaintiffs admit that it would have taken a substantial amount of time, money, and effort to build it. See DEPOSITION OF V. LEO CAMPBELL.

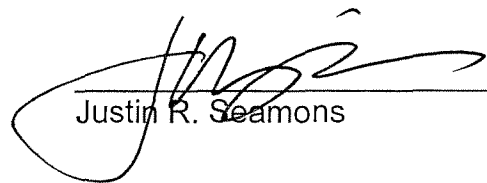
3. With respect to the court’s argument that, “as far as I know, some old guy got out there and looked down the line and said, that’s going to be the other end,” please note that the court’s argument is speculative. The more likely and far more reasonable scenario is that Hyrum Campbell built it in preparation for granting the S1/2

to his son, Leo Campbell, and the N1/2 to his daughter, Mary Killian. As the record in this case indicates, Mr. Campbell was alive until 1949 and the property was granted to his children in 1950.

4. The Plaintiffs have ***not*** proffered any evidence, let alone admissible evidence, that “farmers in those days” simply built fences “where it felt good”; that they “didn’t go out there and measure too much”; and that they just “put [fences] there because that was a good place to put them.”

5. Thus, if the court intends to take judicial notice of the foregoing—that is, that the fence in this case is a “convenience” fence because the title to the NE1/4 of Section 17 was a “unified title” before 1950, that “farmers in those days” simply built fences “where it felt good,” that they “didn’t go out there and measure too much,” and that they just “put [fences] there because that was a good place to put them,” then the Defendants respectfully request an opportunity to be heard in accordance with I.R.E. 201(e).

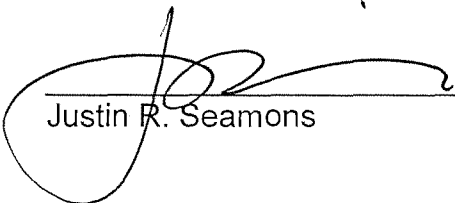
Dated September 20, 2011.


Justin R. Seamons

CERTIFICATE OF SERVICE

I served a copy of the foregoing OBJECTION TO ARGUMENT OF THE HONORABLE JON J. SHINDURLING THAT THE FENCE IN THIS CASE IS A "CONVENIENCE" FENCE on the following person on the 21st day of September, 2011:

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271


Justin R. Seamons

Justin R. Seamons
414 Shoup Avenue
Idaho Falls, ID 83402
Telephone Number: (208) 542-0600
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Idaho State Bar Number: 3903

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
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V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
Plaintiffs,)
)
vs.)
)
JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

**AFFIDAVIT OF JAMES C. KVAMME
RE ARGUMENT OF THE HONOR-
ABLE JON J. SHINDURLING THAT
THE FENCE IN THIS CASE IS A
"CONVENIENCE" FENCE**

State of Idaho)
) ss.
County of Bonneville)

I, James C. Kvamme, state and declare the following under oath:

1. I am over the age of 18.
2. I have personal knowledge of the facts in this case.
3. I am competent to testify to the matters stated herein.
4. The Plaintiffs argue that the fence in this case is a "convenience" fence.

In this regard, please note that I have read the Plaintiffs' memoranda, I have attended

the deposition of V. Leo Campbell, and I have listened to their oral argument in open court.

5. I attended the oral argument on September 12, 2011.

6. During oral argument, the court stated the following:

We don't know the history of the property. We don't know why that dike was put where it was. We don't know why the fence was put where it was because it was a unified title and, as far as I know, some old guy got out there and looked down the line and said, "That's going to be the other end and we're going to put the dike here." That's how farmers did it in those days. I lived on a farm. I know how they did it. You put things where they were, where it felt good to put it. You didn't go out there and measure too much. You just put it there because that was a good place to put it.

7. With all due respect to the court, I disagree.

8. The fence in this case is a substantial fence. It is sturdy and strong. It includes metal posts, solid steel T-bars, wooden posts, and five strands of barbed wire. It is approximately 4.5 feet high and the bottom wire is less than 20 inches above the ground. The posts are less than 24 feet apart, evenly spaced, and solidly set in the ground. The barbed wire is tight, well-stretched, and securely fastened to the posts. It is a half mile long and runs straight across the NE1/4 of Section 17.

9. The fence would have taken a substantial amount of time, money, and effort to build.

10. My wife and I farm and have done so since 1979.

11. I have built many fences.

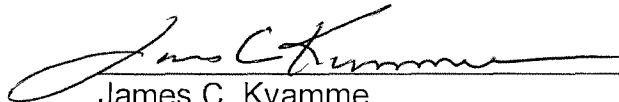
12. I have never built a fence like the fence in this case as a matter of "convenience." The time, money, and effort are far too substantial; again, the fence is a half mile long and runs straight across the NE1/4 of Section 17.

13. In addition, I have never seen a farmer build or even heard of farmer's building a fence like the fence in this case as a matter of "convenience."

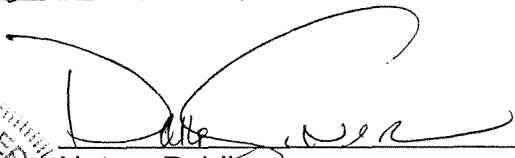
14. Based on my knowledge and experience, and in my opinion as a lay witness in this case, farmers do not simply build fences like the fence in this case "where it feels good"; they do, in fact, "go out there and measure"; and they do not just "put [them] there because that was a good place to put them."

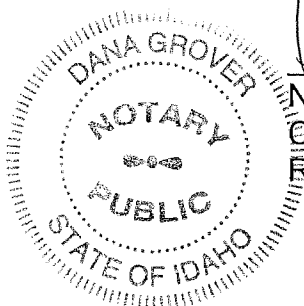
15. Again, the fence in this case is a substantial fence. It is a half mile long and runs straight across the NE1/4 of Section 17. It does not follow the natural contours of the land; it does not go around areas of rock or shallow outcroppings; it does not meander; it does not wind around areas of bad soil; and it does not go along field lines.

Dated the 20 day of September, 2011.


James C. Kvamme

Subscribed and sworn on the 20th day of September, 2011.

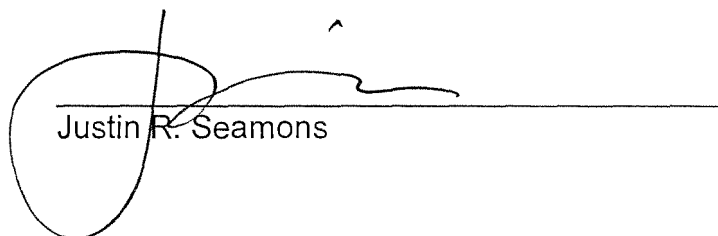

Notary Public
Commission expires: 10/10/12
Residing at: Idaho Falls, ID



CERTIFICATE OF SERVICE

I served a copy of the foregoing AFFIDAVIT OF JAMES C. KVAMME RE ARGUMENT OF THE HONORABLE JON J. SHINDURLING THAT THE FENCE IN THIS CASE IS A "CONVENIENCE" FENCE on the following person on the 21st day of September, 2011:

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271


Justin R. Seamons

2011 SEP 23 PM 2:36

CHARLES C. JUST, ESQ. – ISB 1779
KIPP L. MANWARING, ESQ. – ISB 3817
JUST LAW OFFICE
381 Shoup Avenue
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Idaho Falls, Idaho 83405
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Facsimile: (208) 523-9146

Attorneys for the Campbells

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE**

V. LEO CAMPBELL and KATHLEEN
CAMPBELL, husband and wife;

Plaintiffs,

vs.

JAMES C. KVAMME and DEBRA
KVAMME, husband and wife; and JOHN
DOES I-X;

Defendants.

Case No. CV-2010-3879

**AUGMENTED MEMORANDUM
OF ADDITIONAL POINTS AND
AUTHORITIES IN SUPPORT OF
THE CAMPBELLS' MOTION
FOR SUMMARY JUDGMENT**

At the hearing held September 12, 2011 on the cross motions for summary judgment the court allowed the record to be augmented by additional pleadings setting forth legal standards applied to surveys. This augment memorandum sets forth additional points and authorities and is supplemented with the Augmented Affidavit of Counsel filed simultaneously with this memorandum.

Idaho Code § 31-2709 provides, “No surveys or resurveys hereafter made shall be considered legal evidence in any court within the state, except such surveys as are made in accordance with the United States manual of surveying instructions, the circular on restoration of lost or obliterated corners and subdivisions of sections, issued by the general land office, or by the authority of the United States, the state of Idaho, or by mutual consent of the parties.”

The United States manual of surveying instructions referenced in the above statute is compiled and published by the United States Department of the Interior, Bureau of Land Management, Cadastral Survey. The manual is known as the Manual of Surveying Instructions (Manual)(*Augmented Affidavit of Counsel*, Exhibit A).

Under paragraph 3-133 of the Manual, the treatment of lost or obliterated original monuments is addressed.

Under paragraph 3-137 of the Manual, the principle of proportioning is explained where it states, "Then, if the boundaries of quarter-quarter sections, or lots, are to be run and marked, the boundaries of the quarter-section shall be measured, and the sixteenth-section corners fixed and marked in accordance with the proportional distances represented upon the approved plat."

Under the same paragraph 3-137 it states, "Thus will be produced in the field the figure represented upon the plat, as nearly as possible, every part of the former in true proportion to the latter, where the elements of absolute distance and area have given way to corresponding proportional units as defined by the running and marking of lines between fixed monuments established in the original or controlling survey. Examples are provided in figure 3-51."

Figure 3-51 is on page 75 of Exhibit A and illustrates how proportioning is used to establish boundaries.


In addition, the following law review article provides helpful direction on apportionment in surveying. Griffin, Robert J. "Retracement and Apportionment as Surveying Methods for Reestablishing Property Corners." *Marquette Law Review*, 43: 484-510. 1960.

In the above article Griffin states, "when a retracement fails to uncover satisfactory evidence of the exact, original location of a property corner, and detects discrepancies of course and distance of the original survey as compared with those derived in the process of retracement, the applicability of the surveying method of apportionment arises. Apportionment is the method of distributing the excess or deficiency between two existent corners in such a manner that the amount given to each increment along the line will bear the same proportion to the whole difference as the record length of the increment bears to the whole record distance." Griffin, *Marquette Law Review*, 43: 484-510.

Griffin observes in his concluding summary in the same article, "the proportionment of surplus or shortage over the whole line among the many units comprising the whole is the practical effect of the realization that surveying is the *art* of measurement and not an exact

science. Changes in nature generally as well as in human nature preclude exact duplication of original measurement, and insignificant unit differences soon accumulate to substantial discrepancies. This practical realization, or some sufficiently expressed intention of the grantor, may indicate that proportionment closely approximates the original work and distributes the excess or deficiency as equitably as possible. The limitations on the surveying method of apportionment are but particular instances of the applicability of the surveying method of retracement. In the final analysis, apportionment is but a rule of last resort; it is applied only in absence of any markings upon the ground of the division lines between parcels carved out of the same tract.”

DATED this 23 day of September 2011.


Kipp L. Manwaring
Attorney for the Campbells

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 23rd day of September 2011, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

Justin R. Seamons
Attorney at Law
414 Shoup Avenue
Idaho Falls, Idaho 83402

- Hand Delivered
- U.S. Mail, Postage Prepaid
- Facsimile
- Other _____



Leslie Northrup
Paralegal

Shindwring

BONNEVILLE COUNTY, IDAHO

2011 SEP 23 PM 2: 36

CHARLES C. JUST, ESQ. – ISB 1779
KIPP L. MANWARING, ESQ. – ISB 3817
JUST LAW OFFICE
381 Shoup Avenue
P.O. Box 50271
Idaho Falls, Idaho 83405
Telephone: (208) 523-9106
Facsimile: (208) 523-9146

Attorneys for the Campbells

**IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT
STATE OF IDAHO, COUNTY OF BONNEVILLE**

V. LEO CAMPBELL and KATHLEEN
CAMPBELL, husband and wife;

Plaintiffs,

vs.

JAMES C. KVAMME and DEBRA
KVAMME, husband and wife; and JOHN
DOES I-X;

Defendants.

Case No. CV-2010-3879

**AUGMENTED AFFIDAVIT OF
COUNSEL IN SUPPORT OF THE
CAMPBELLS' MOTION FOR
SUMMARY JUDGMENT**

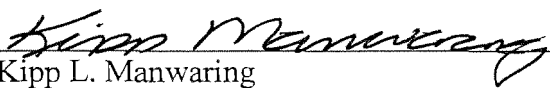
STATE OF IDAHO)
 : ss
County of Bonneville)

KIPP L. MANWARING, being first duly sworn under oath, deposes and states as follows:

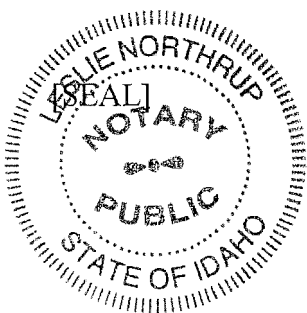
1. I am a licensed attorney in the state of Idaho and represent the Plaintiffs in the above action.
2. Attached as Exhibit A and incorporated here by reference is a copy of pertinent pages from Chapter III of the 2009 edition of the Manual.

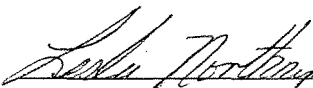
3. Attached as Exhibit B and incorporated here by reference is a copy of the original survey plat for Township 3 North, Range 38, East Boise Meridian showing the section in question. Exhibit B was Exhibit 1 to the deposition of Kim Leavitt.

Dated this 23 day of September 2011.


Kipp L. Manwaring
Attorney for the Campbells

SUBSCRIBED AND SWORN TO before me this 23rd day of September 2011.





Notary Public for Idaho
Residing at: Moore, Idaho
My commission expires: 09/29/2015

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 23rd day of September 2011, a true and correct copy of the foregoing document was served upon the person or persons named below, in the manner indicated.

Justin R. Seamons
Attorney at Law
414 Shoup Avenue
Idaho Falls, Idaho 83402

- Hand Delivered
- U.S. Mail, Postage Prepaid
- Facsimile
- Other _____



Leslie Northrup
Paralegal

Manual of Surveying Instructions

United States Department of the Interior
Bureau of Land Management
Cadastral Survey

2009

EXHIBIT

564
A

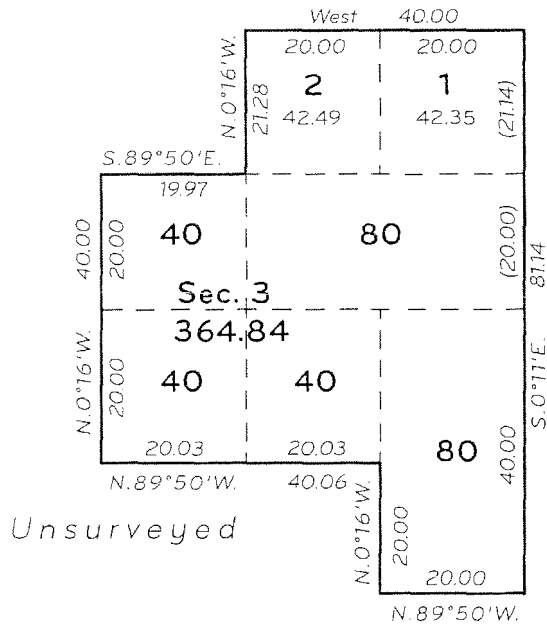


Figure 3-49. Rectangular boundaries of a partially surveyed irregular section adjoining the north boundary. Formerly protracted block 39 per the protraction diagram.

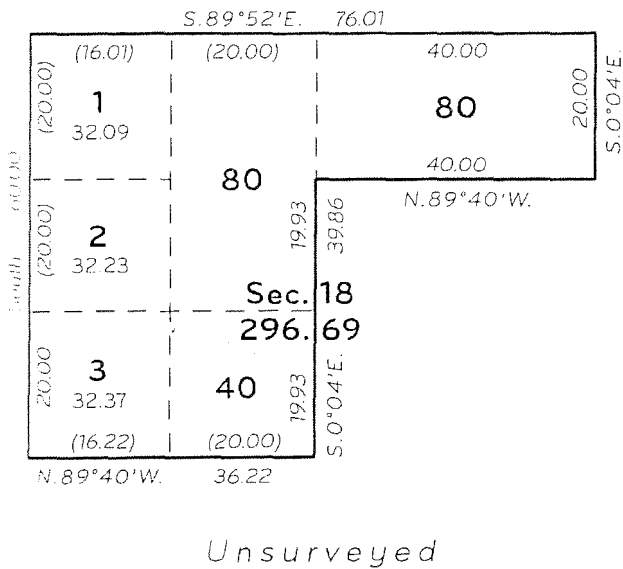


Figure 3-50. Rectangular boundaries of a partially surveyed irregular section adjoining the west boundary. Formerly protracted block 44 per the protraction diagram.

3-130. To subdivide a partially surveyed section, the remaining subdivision-of-section lines within the surveyed area are determined by running straight lines between the nearest fixed corners for the sectional center lines.

The remaining interior sixteenth-section corners on the sectional center lines are at midpoints between the exterior quarter-section corners and the center quarter-

section corner, except within the sections normally fractional. The center lines of the quarter-sections are completed on a similar plan. In all sections normally irregular, the excess or deficiency in measurement is incorporated in its normal position as shown on the protraction diagram.

Subdivision of Sections by Local Surveyors

3-131. The function of the local surveyor begins when employed as an expert to identify lands that have passed into private ownership. This may be a simple or a most complex problem, depending largely upon (1) the condition of the original monuments as affected principally by the lapse of time since the execution of the original survey, the inferior monumentation of many early surveys, or the workmanship of the original surveyor; (2) the degree of irrelation between original corners; (3) the use and occupancy of the land; (4) the degree to which local surveys conform with the law, methods, and the exercise of ordinary intelligence under existing conditions; and (5) the presence of nonofficial surveys administered by Federal agencies, their employees, or agents.

3-132. The work of the local surveyor usually includes the subdivision of the section into the legal subdivisions shown upon the approved plat. In this capacity, the local surveyor is performing a function contemplated by law. He or she cannot properly serve the client or the public unless familiar with the legal requirements concerning the subdivision of sections.

3-133. In the event that the original monuments have become obliterated or lost, the local surveyor cannot hope to effectively recover the corner positions without a full understanding of the record concerning their original establishment and other evidence of establishment, subsequent recovery, or reestablishment. Nor can the local surveyor hope to legally restore or weigh evidence of subsequent corner location, use, or occupancy, until he or she has mastered not only the principles observed in the execution of the original survey, and later local practices, but also the principles upon which the courts and authorized administrative officials having jurisdiction over such matters have based their rulings.

3-134. The cadastral surveyor is required to establish the official monuments so that a proper foundation is laid for the subdivision of the section, whereby the officially surveyed lines can be identified and the subdivision of the section controlled as contemplated by law.

The local surveyor, who may be employed by a claimant, entryman, or owner to run subdivision-of-section lines and mark said corners, shall correlate the conditions as found upon the ground with those shown upon the official plat.

3-135. The Bureau of Land Management assumes no control or direction over the acts of local and county surveyors in the matters of subdivision of sections, evaluation of evidence of corner locations, and reestablishment of lost corners of original surveys where the lands have passed into private ownership, nor will the Bureau of Land Management issue instructions in such cases. It follows the general rule that disputes arising from uncertain or erroneous location of marked or unmarked protracted corners originally fixed by the United States are to be settled by the proper local authorities or by amicable adjustment. The Bureau of Land Management desires that the rules controlling the acts of its own cadastral surveying service, and other surveyors under its direction and control, be considered by all other surveyors as merely advisory and explanatory of the principles that should prevail in performing such duties. The Bureau of Land Management does not assume control, direction over, or responsibility for the acts of Federal employees performing or administering surveys not authorized by the appropriate Chief Cadastral Surveyor.

3-136. The rules for subdivision of sections by survey are based on the laws governing the survey of the public lands. Some cases are not covered by these rules, and when inquiry is made, the Bureau of Land Management will offer advice. The letter of inquiry should contain a description of the particular tract or corner, with reference to principal meridian, township, range, and section of the public surveys, together with a diagram showing conditions found.

Summary

3-137. When any claimant, entryman, or owner has acquired bona fide rights as to location per 43 U.S.C. 772 to certain legal subdivisions, that claimant, entryman, or owner has rights as to the location of the identical ground location as represented by the same subdivisions upon the official plat, controlled by monuments on the ground. It is a matter of expert or technical procedure to mark out the legal subdivisions called for in an entry, claim, patent, selection, or order, and entrymen are advised that a competent surveyor should be employed.

In marking the corners of subdivisions-of-section, the surveyor shall identify the section boundaries, run and

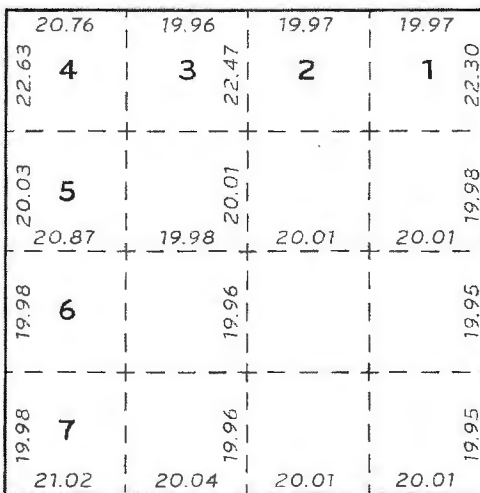
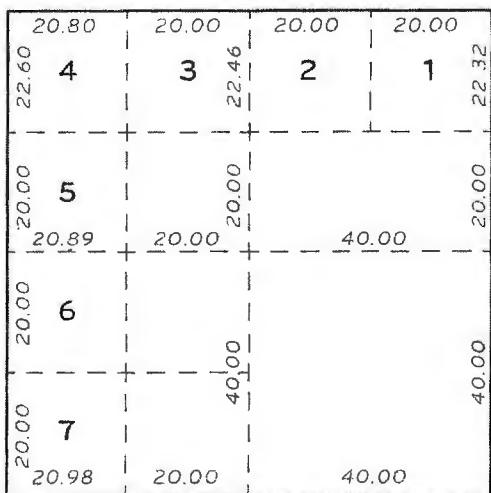
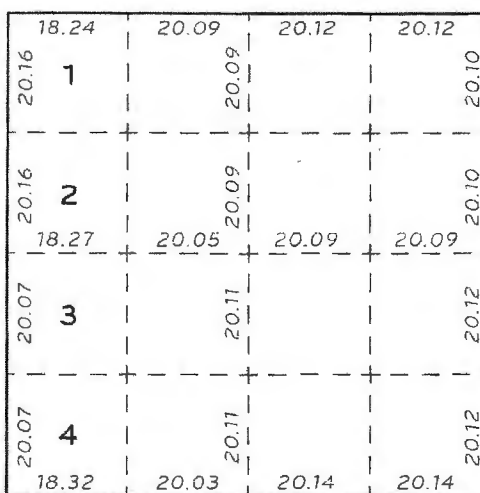
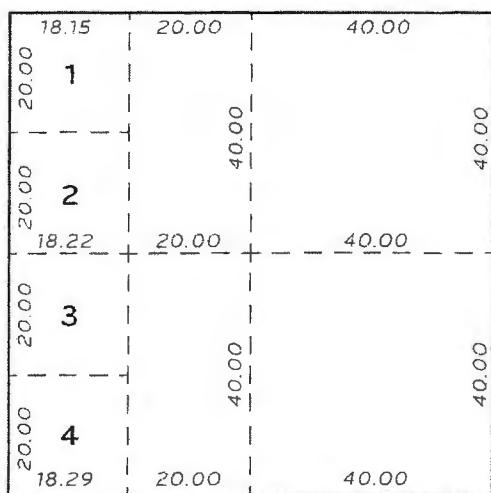
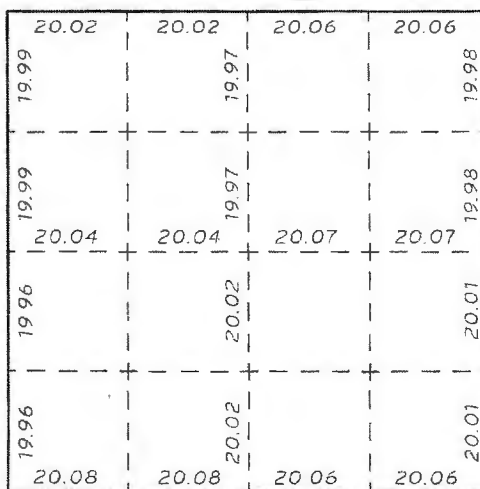
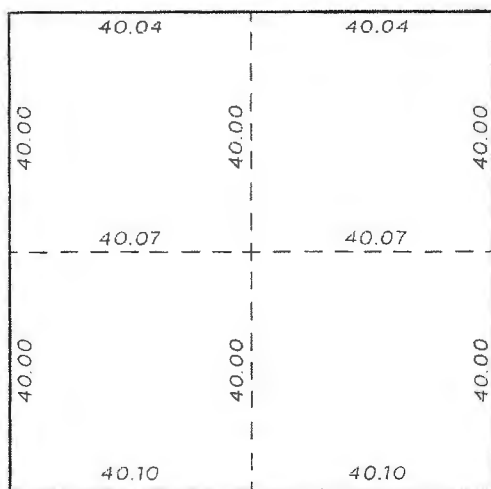
mark the section center lines, and fix the legal center of the section in common, in order to determine the boundaries of the affected quarter-sections. Then, if the boundaries of quarter-quarter sections, or lots, are to be run and marked, the boundaries of the quarter-section shall be measured, and the sixteenth-section corners fixed and marked in accordance with the proportional distances represented upon the approved plat. Finally, the quarter-section center lines are run and marked and the legal center of the quarter-section duly fixed.

Thus will be produced in the field the figure represented upon the plat, as nearly as possible, every part of the former in true proportion to the latter, where the elements of absolute distance and area have given way to corresponding proportional units as defined by the running and marking of lines between fixed monuments established in the original or controlling survey. Examples are provided in figure 3-51.

The law presupposes the fact taught by experience that measurements of lands cannot be repeated with absolute precision and that the work of no two surveyors will exactly agree. The governing law, 43 U.S.C. 752(2), states that "boundary lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners." The protracted position of the legal subdivision corner on the survey plat is merely the first step in fixing the position of a corner. The corner position is fixed by the running and marking of the lines.

A decision to set aside previously fixed local survey legal subdivision corners must be supported by evidence that goes beyond mere demonstration of technical error, reasonable discrepancies between former and new measurement, and less than strict adherence to restoration and subdivision rules. Were the Federal Government obliged to open the question as to the location of a particular tract or tracts over technical differences or reasonable discrepancies, controversies would constantly arise, and resurveys and readjudication would be interminable. The law gives these activities repose.

It is unlawful for the surveyor to impair bona fide rights as to location. Proof of impairment of bona fide rights as to location per 43 U.S.C. 772, when lines have been run and marked and corners marked and fixed by local survey, must be positive evidence of an intentional departure from the legal principles governing recovery of original corner location, reestablishment and establishment of corner location, or subdivision of a section. Where the evidence of an extant subdivision-of-



Official measurements.

Retracements.

Figure 3-51. Examples of subdivision by survey showing relation of official measurements and calculated distances to retracements and indicating proportional distribution of differences.

section survey indicates (1) a good faith attempt to relate it to the original controlling survey, (2) conformance as nearly as possible to legal subdivision principles, (3) reasonable accuracy standards for that time and place, (4) sufficiency for identification of the legal subdivisions, and (5) without fraud or gross error, the statutory intent of stability of boundaries and title to lands will have been met.

Cadastral surveyors conducting resurveys must recognize that they are responsible for locating the limits of Federal interest lands and protecting the interests of the United States and of the general public as well as protecting the bona fide rights of the private landowner. The surveyor must act in an impartial manner when evaluating the local survey evidence. A rule works in favor of and against all parties of interest equally. The final record should be transparent and complete.

Protraction Diagrams

Protraction Diagrams—Plan of Survey

3-138. Official protraction diagrams are intended to provide a basis for the administration and management of unsurveyed Federal lands for all purposes short of conveying title. Such protractions can become the basis of land location for leasing purposes and for various administrative boundaries, including wilderness, National Recreation Areas, special use areas, withdrawals, and selections. For further discussion on protraction diagrams and water boundaries see section 8-196. For further discussion on plats of protraction diagrams see section 9-114.

Protraction diagrams should not be treated as "protracted subdivision township surveys." The latter typically have run and marked exterior township lines and protracted section lines. The protracted section lines are represented as dashed lines indicating that they were not run and marked and the distances given are parenthetical distances.

3-139. The State of Alaska or an Alaska Native Corporation can elect to receive patent to certain lands in Alaska on the basis of protraction diagrams (43 U.S.C. 1635(c)(3) and 1637). In addition, protraction diagrams are used to describe certain lands selected by the State of Alaska. Upon tentative approval of such selection by the Secretary of the Interior, subject to valid existing rights, all right, title, and interest of the United States in and to such lands is deemed to have

vested in the State as of the date of tentative approval (43 U.S.C. 1635(c)(1)).

Protraction diagrams are also used to describe certain lands to be conveyed to an Alaska Native, Native Corporation, or Native group. Subject to valid existing rights and such conditions and reservations authorized by law as are imposed, the force and effect of such an interim conveyance shall be to convey to and vest in the recipients exactly the same right, title, and interest in and to the lands as the recipients received had they been issued a patent by the United States (43 U.S.C. 1621(j)(1)). In other words, an interim conveyance vests the same rights, title, and interests as would have been received if issued a United States patent.

Upon survey of lands covered by an interim conveyance, a patent is issued to the recipient. The boundaries of the lands as defined and conveyed by the interim conveyance cannot be altered but may be redescribed, if need be, in reference to the plat of survey. The Secretary shall make appropriate adjustments to assure that recipients receive their full entitlement.

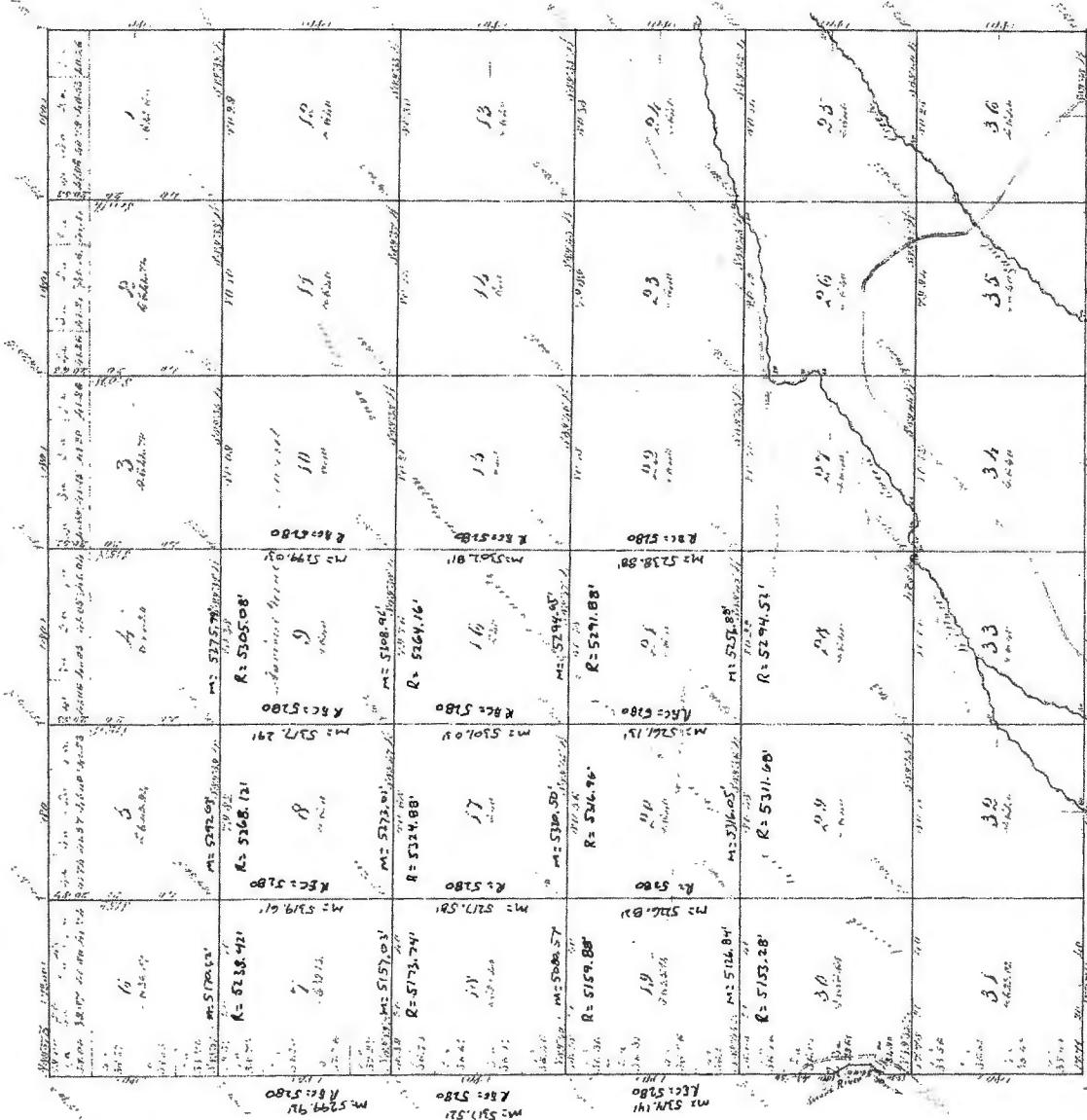
3-140. The locations depicted on the protraction diagrams are based on the best available evidence; however, the precise location for many claims and special surveys are uncertain. As a result, there are special survey parcels and leases described by legal subdivisions that are actually located miles from the location shown on the protraction diagram.

The process of surveying a protracted tract or legal subdivision while protecting its location based upon the protraction diagram can involve extensive work. First, all the corners on the exterior of the unsurveyed area controlling the corners to be established must be found or reestablished by dependent resurvey. Second, using the protraction diagram as the record, the protracted township corners must be located. Only then can the location and establishment of the needed township subdivision lines take place, followed by the needed monumentation.

Amended Protraction Diagrams

3-141. Protraction diagrams developed in two forms. Previous to 1993 corner positions were defined by bearing and distance with reference to the exterior boundary of the protraction. Subsequently, the process was amended and corner positions are now defined by geographic coordinates, defining all interior rectangular corners and corners necessary to protect prior existing rights and special areas. The revised procedure adds

Township N. 3 South Range N. 38 East Boise Meridian



Highlights filed in U. S. Land Office at Boise City Idaho Territory February 3rd 1878
at 3.30 P. M. under Register's receipt

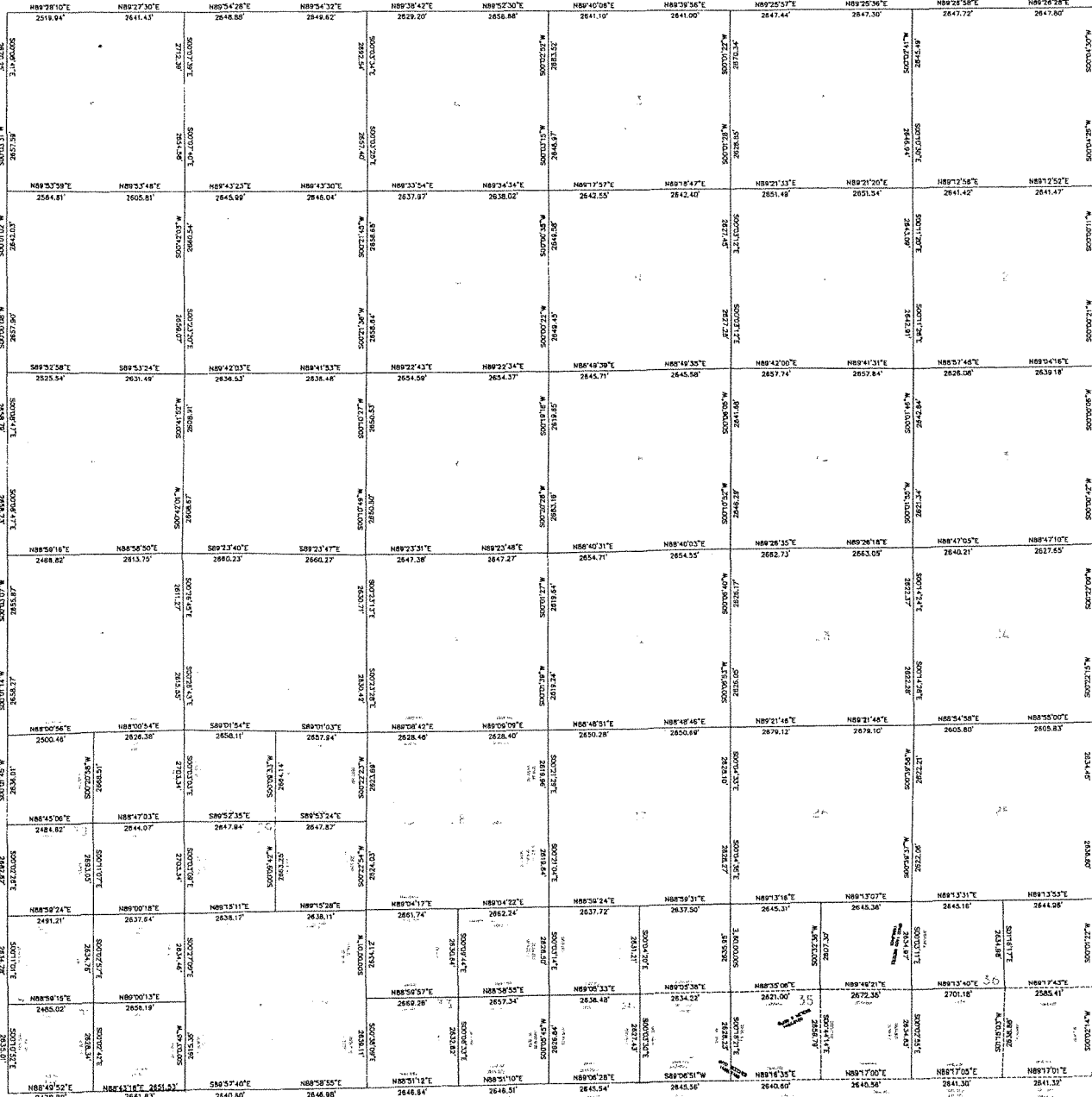
Scale: One inch = 40 rods
 Surveyed High at Township N. 3 South of Range N. 38
 East of the Boise Meridian Territory of Idaho as shown
 on the map to the field notes of the survey, shown on file
 in this office, which have been examined and approved
 by the Surveyor General, Office
 Boise City Idaho Territory
 January 28th 1878

Survey Designated	By whom Surveyed	Date of Survey	Area of Section	When measured	When completed	When reported to
Township Lines	John B. Sirel	August 1 st 1877	79 00	September 22 nd 1877	September 23 rd 1877	January 28 th 1878
Subdivisions			79 00	October 29 th 1877	November 30 th 1877	
Monitors			00 23	November 30 th 1877		
Total number of Acres			29,980.63			

Exhibit No. 1
 Que. J. B. Sirel
 T. & T. REPORTING

tabbles
 563
 B

2004 CITY OF IDAHO FALLS CONTROL



N.T.S.

2004 CITY OF IDAHO FALLS CONTROL
 NAD 83 IDAHO EAST ZONE
 C.A.F. 1.000277265 (4733.58") ("Ground")
 U.S. SURVEY FEET

- Legend:
- *3 classifications of lines in drawing.
 - "1st order"- Lines with accurate data. - Solid.
 - "2nd order"- Lines w/possible error in excess of 0.10 ft-Dashed.
 - "3rd order"- Lines lacking data to compare with GPS - Hidden
 - *Record/Dist layer for reference of old data.
 - *Elevations are not confirmed.
 - *The large Red Circles are areas that need data to complete.

- Notes:
1. Datum was derived from the recent Bonneville County GPS Project with Mountain River Engineering and Harper-Leavitt Engineering GPS data. Said GPS data was correlated with previous survey data from conventional methods. Points and distances were averaged and many, if adjusted, were only adjusted mere hundredths of a foot from supplied GPS data.
 2. This "Ground" grid seems to fit well with plotting present subdivisions, deeds, etc.
 3. Any surveyor using proper GPS methods should be within about one-tenth of a foot when using the locally accepted control, FAA IDA A, SW BASE, IDA15-107, IDA15-111, etc., and using our combined adjustment factor of 1.000277265.
 4. Idaho Falls City ordinances call for accuracies of one-tenth of a foot in the field and one-hundredth of a foot for mathematical calculations.
 5. I would appreciate any input that will improve the accuracy of this grid. Please report any errors you notice and supply new and improved survey data that has been confirmed and that will benefit a standard and basis we all can use. I will continue to work on this control for your benefit.
- John Smith - City Surveyor -
 612-8255 - jsmith@ci.idaho-falls.id.us

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566

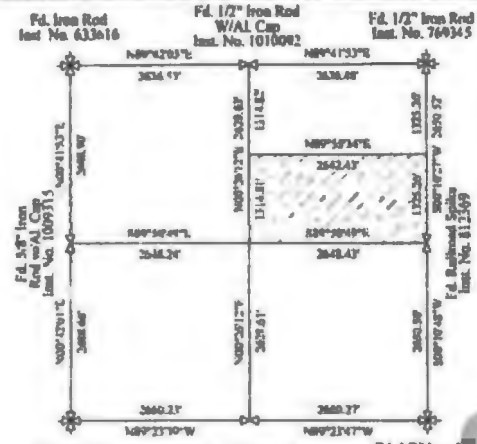
Exhibit No. 2
 Date: 7/2/04
 T&T REPORTING

R38E

Parcel 1
 A Parcel of Land Situated in Bonneville County, State of Idaho, Township 3 North, Range 38 East of the Boise Meridian, Section 17, More Particularly Described as Follows: Beginning at the Northeast Corner of Section 17, Township 3 North, Range 38 East, B.M.
 Thence S89°10'27"W along the East line of Section 17 for a Distance of 1325.26 feet to the Northeast Corner of the South Half (S 1/2) of the Northeast Quarter (NE 1/4), said point also being the True Point of Beginning.
 Thence S00°10'27"W (Revised - Really along the East line of Section 17 for a Distance of 418.85 feet;
 Thence S89°30'15"W for a Distance of 2644.37 feet to the West line of the South Half (S 1/2) of the Northeast Quarter (NE 1/4).
 Thence N00°28'12"E (Revised - S89°17'34"W) for a Distance of 412.00 feet to the Northeast Corner of said South Half (S 1/2).
 Thence N89°55'34"E (Revised - S89°45'38"W) along the north line of said South Half (S 1/2) for a Distance of 2644.43 (Revised - 2642.27) feet to the True Point of Beginning, Containing 26.30 Acres More or Less.
 Subject to Easements and Right-of-Ways for highway, roads, ditches, canals, power poles, and transmission lines as they exist.

Parcel 2
 A Parcel of Land Situated in Bonneville County, State of Idaho, Township 3 North, Range 38 East of the Boise Meridian, Section 17, More Particularly Described as Follows: Beginning at the Northwest Corner of Section 17, Township 3 North, Range 38 East, B.M.
 Thence S00°10'27"W along the East line of Section 17 for a Distance of 1763.91 feet to the True Point of Beginning.
 Thence S00°10'27"W (Revised - Really along the East line of Section 17 for a Distance of 423.89 feet;
 Thence N89°51'15"W for a Distance of 2646.39 feet to the West line of the South Half (S 1/2) of the Northeast Quarter (NE 1/4).
 Thence N00°28'12"E (Revised - N89°17'34"W) along said West line for a Distance of 423.89 feet;
 Thence S89°30'15"E for a Distance of 2644.37 feet to the True Point of Beginning, Containing 25.70 Acres More or Less.
 Subject to Easements and Right-of-Ways for highway, roads, ditches, canals, power poles, and transmission lines as they exist.

Parcel 3
 A Parcel of Land Situated in Bonneville County, State of Idaho, Township 3 North, Range 38 East of the Boise Meridian, Section 17, More Particularly Described as Follows: Beginning at the Northwest Corner of Section 17, Township 3 North, Range 38 East, B.M.
 Thence S89°10'27"W along the East line of Section 17 for a Distance of 2466.51 feet to the True Point of Beginning.
 Thence S29°18'27"W (Revised - Really along the East line of Section 17 for a Distance of 203.80 feet;
 Thence N89°40'48"W (Revised - S89°27'27"W) for a Distance of 455.42 feet;
 Thence N89°28'27"E (Revised - S89°28'24"W) for a Distance of 236.97 feet;
 Thence S89°28'24"E (Revised - S89°28'15"W) for a Distance of 452.88 feet to the East line of Section 17.
 Thence S89°10'27"W (Revised - Really along the East line of Section 17 for a Distance of 23.90 feet to the East Quarter Corner of Section 17.
 Thence N89°28'49"W (Revised - S89°28'23"W) for a Distance of 2648.43 (Revised - 2648.28) feet to the Northwest Corner of the South Half (S 1/2) of the Northeast Quarter (NE 1/4) of Section 17.
 Thence N89°28'12"E (Revised - N89°17'34"W) along the West line of said South Half (S 1/2) for a Distance of 663.31 feet;
 Thence S89°31'13"E for a Distance of 2646.39 feet to the True Point of Beginning, Containing 25.70 Acres More or Less.
 Subject to Easements and Right-of-Ways for highway, roads, ditches, canals, power poles, and transmission lines as they exist.



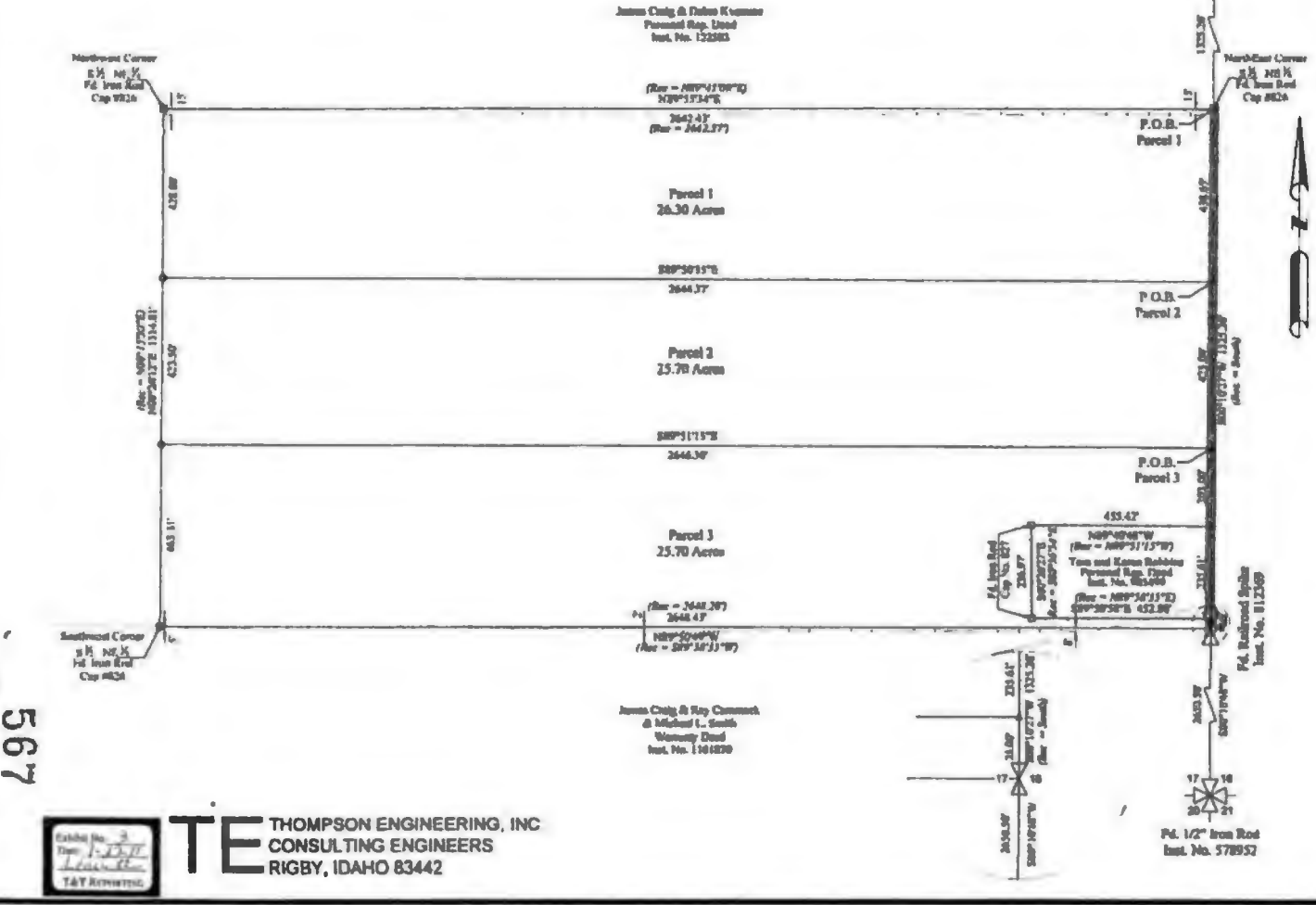
Narrative
 Kevin Thompson met with Leo Campbell and onsite on September 8, 2009. Leo stated that Kevin combines 6 Deeds as described in Instrument Numbers 924641, 1202459, 647849, 774872, and 1189846 into 3 parcels of land as shown on this Record of Survey. The boundaries of the property had previously been surveyed, although no Record of Survey's were found in the Courthouse.
 The Section Break-down was taken from the City of Idaho Falls Control Section.
 This Survey does not constitute a Title Search by Thompson Engineering, Inc. and may not show all Easements of Record.

- Legend**
- 1/2" x 3/8" Iron Rod with Cap Matched L.S. 10563
 - ▲ Set Mag Nail
 - Fd. Iron Rod with Cap as Monument
 - Fence line

CERTIFICATE OF SURVEY
 I, Kevin L. Thompson, do hereby Certify that I am a Registered Professional Land Surveyor in the State of Idaho, and that the attached plat was drawn from an actual Survey made on the ground under my direct supervision, and that this map is an accurate representation of said Survey.

PROFESSIONAL LAND SURVEYOR
 10563
 Kevin L. Thompson
 STATE OF IDAHO
 October 5, 2009 Date
 10561 License No.

RECORD OF SURVEY		
LOCATED IN THE NE 1/4 OF SECTION 17, TOWNSHIP 3 NORTH, RANGE 38 EAST, BONNEVILLE COUNTY, IDAHO		
Project Name: Campbell Family	Scale: 1" = 200'	
Job Number: 2009-101		
Call to File: CampbellLeo2009-101		
Date: September 17, 2009		
Surveyor: K.L.T.	Sheet: 1	Of: 1
Drawn By: J.W.T.		



567

TE THOMPSON ENGINEERING, INC
 CONSULTING ENGINEERS
 RIGBY, IDAHO 83442

Justin R. Seamons
414 Shoup Avenue
Idaho Falls, ID 83402
Telephone Number: (208) 542-0600
Facsimile Number: (208) 529-4166
Idaho State Bar Number: 3903

BONNEVILLE COUNTY, IDAHO

2011 SEP 29 PM 12:02

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
Plaintiffs,)
)
vs.)
)
JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

**OBJECTION TO "AUGMENTED
AFFIDAVIT OF COUNSEL"—THAT IS,
AUGMENTED AFFIDAVIT OF
KIPP L. MANWARING**

The Plaintiffs recently filed an affidavit, entitled "AUGMENTED AFFIDAVIT OF COUNSEL IN SUPPORT OF THE CAMPBELLS' MOTION FOR SUMMARY JUDGMENT," dated September 23, 2011. The Defendants will hereafter refer to the foregoing affidavit as the AUGMENTED AFFIDAVIT OF KIPP L. MANWARING.

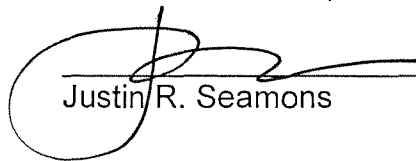
In order to make sure that the record on appeal is complete, the Defendants hereby object to the AUGMENTED AFFIDAVIT OF KIPP L. MANWARING and respectfully move the court to strike it in accordance with I.R.C.P. 56(e), I.R.E. 701, I.R.E. 702, I.R.E. 901, and I.R.E. 103(a)(1).

Mr. Manwaring is ***not*** a professional land surveyor. He is ***not*** duly licensed to practice professional land surveying. He is a lawyer.

ARGUMENT OF COUNSEL	OBJECTION
<p>“Attached as Exhibit A and incorporated here by reference is a copy of <i>pertinent</i> pages from Chapter III of the 2009 edition of the Manual.” See AUGMENTED AFFIDAVIT OF KIPP L. MANWARING, p. 1, Paragraph 2.</p>	<ol style="list-style-type: none"> 1. Lack of competency. 2. Lack of foundation. 3. Not based on personal knowledge. 4. Based on speculation. 5. Based on hearsay. 6. Conclusory and argumentative. 7. Assumes facts that are not in evidence. 8. Mr. Manwaring is <i>not</i> an expert witness. Again, he is a lawyer. He does <i>not</i> know what is or is not “<i>pertinent</i>” in the Manual of Surveying Instructions. He simply does <i>not</i> have the requisite “scientific, technical, or other specialized knowledge.” See I.R.E. 702. Argument of counsel is <i>not</i> evidence. Thus, if the court uses or otherwise bases its decision on the arguments of Mr. Manwaring, including what he claims is “<i>pertinent</i>” in the Manual, it is reversible error.
<p>“Attached as Exhibit B and incorporated here by reference is a copy of the original survey plat for Township 3 North, Range 38 East of the Boise Meridian showing the section in question. Exhibit B was Exhibit 1 to the deposition of Kim Leavitt.” See AUGMENTED AFFIDAVIT OF KIPP L. MANWARING, p. 2, Paragraph 3.</p>	<ol style="list-style-type: none"> 1. Lack of competency. 2. Lack of foundation. 3. Not based on personal knowledge. 4. Based on speculation. 5. Based on hearsay.

	<p>6. Based on speculation.</p> <p>7. Based on hearsay.</p> <p>8. Conclusory and argumentative.</p> <p>9. EXHIBIT B includes three pages, <i>not</i> one. The first page is, in fact, a copy of the "original survey plat for Township 3 North, Range 38 East of the Boise Meridian"; however, the handwriting thereon of distances and measurements is <i>not</i> original. Thus, it is not admissible and the Defendants object to it. The second page is a copy of the Control Map of 2004. The third page is the RECORD OF SURVEY of Kevin L. Thompson, dated September 17, 2009. Mr. Manwaring is welcome to staple the RECORD OF SURVEY to any and all documents in this case, but it is still <i>not</i> admissible and the Defendants object to it. <u>See</u> OBJECTION TO RECORD OF SURVEY, dated June 21, 2011.</p>
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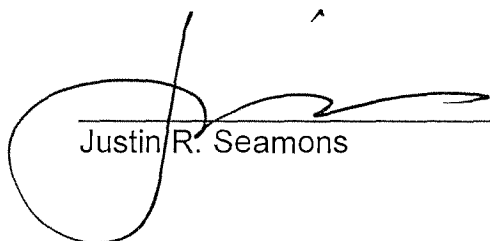
Dated September 28, 2011.


Justin R. Seamons

CERTIFICATE OF SERVICE

I served a copy of the foregoing OBJECTION TO "AUGMENTED AFFIDAVIT OF COUNSEL"—THAT IS, AUGMENTED AFFIDAVIT OF KIPP L. MANWARING on the following person on September 28, 2011:

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271


Justin R. Seamons

17 Manwaring

Justin R. Seamons
414 Shoup Avenue
Idaho Falls, ID 83402
Telephone Number: (208) 542-0600
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Idaho State Bar Number: 3903

BONNEVILLE COUNTY, IDAHO
2011 SEP 29 PM 12:02

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
Plaintiffs,)
)
vs.)
)
JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

**AFFIDAVIT OF KIM H. LEAVITT
IN OPPOSITION TO AUGMENTED
MEMORANDUM AND AUGMENTED
AFFIDAVIT OF KIPP L. MANWARING**

State of Idaho)
) ss.
County of Bonneville)

I, Kim H. Leavitt, state and declare the following under oath:

1. I am over the age of 18.
2. I am a professional land surveyor, duly licensed to practice professional land surveying in the state of Idaho.
3. I am competent to testify to the matters stated herein.

4. I have reviewed the AUGMENTED MEMORANDUM OF ADDITIONAL POINTS AND AUTHORITIES and the AUGMENTED AFFIDAVIT OF COUNSEL, dated September 23, 2011.

5. As the court knows, Mr. Manwaring is not a professional land surveyor. He is not duly licensed to practice land surveying in the state of Idaho. He is a lawyer.

6. The original surveyor in this case was John B. David.

7. John B. David did not mark the 16th corners of Section 17 and he did not include the 16th corners on the original survey of 1877.

8. This is important because a surveyor cannot simply measure in a 16th corner by proportioning; instead, a surveyor must locate or relocate the original corners, consider existent corners, and consider any and all other evidence.

9. With respect to the corners in this case, seven of the original eight corners were either obliterated or lost.

10. Obliterated corners can be measured back in from evidence.

11. Lost corners can be measured back in from existent corners.

12. In addition to obliterated and lost corners, this case also involves double corners.

13. Thus, a surveyor must look for evidence of the original corners, such as the original survey, the surveyor's notes, the location of fences, monuments, and other items, and the deeds.

14. In this regard, please note that the deeds in this case originated with alloquate part deeds in 1950.

15. All of the fences in the NE1/4 of Section 17 now appear to be located south of the alloquate part deeds.

16. Based on the evidence, including the corner perpetuation of 1969, the fence in this case bears the indicia of having been measured in from the SE corner; conversely, it does not bear the indicia of having been measured in from the NE corner.

17. In this regard, please note the grade or slope of the land, which runs from north to south; the engineering and planing of the ditch, which runs from south to north; the location and construction of the dike, which runs from east to west and is several feet high at the west end; the location and construction of the fence, which runs across the entire NE1/4.

18. A corner is simply a theoretical point.

19. Based on the evidence, a surveyor can locate, mark, and perpetuate a corner.

20. Based on the evidence in this case, the fence bears the indicia of having been measured in from the SE corner, which is the oldest corner perpetuation and the only original corner that was found; it is exactly 3,960 feet from the SE corner, which is consistent with the original boundary of 5,280 feet.

21. Based on the evidence in this case, the fence was measured in and constructed on the boundary between the parties' respective parcels of real property.

22. In sum, proportioning is the last option.

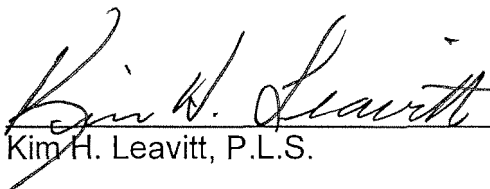
23. First and foremost, a surveyor should exhaust and consider any and all evidence before simply measuring in distances and points.

24. The **Manual of Surveying Instructions** includes specific sections that pertain to the gathering of evidence, retracement, and, lastly, proportioning. See e.g. Chapter 6 and Chapter 7.

25. Finally, I have attached a copy of a scholarly article for the court's review and convenience, entitled "ACQUIESCENCE." It has been highly published in peer review journals for professional land surveyors. See *Gem State Surveyor*, Issue 3, Fall 2011; *New Jersey Society of Professional Land Surveyors*, Summer 2011; *Maine Society of Land Surveyors*, vol. 18, no. 6, June 2011; and *Massachusetts Association of Land Surveyors and Civil Engineers*, vol. 3, no. 1, p. 10, Summer 2011.

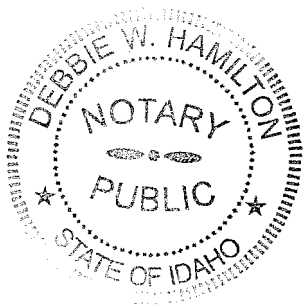
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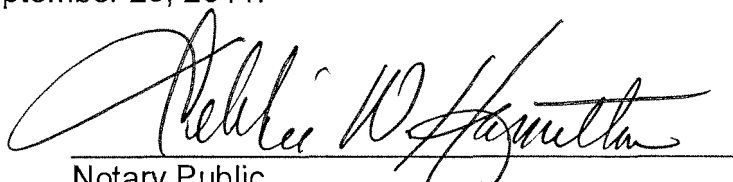
Dated September 29, 2011.



Kim H. Leavitt, P.L.S.

Subscribed and sworn on September 29, 2011.



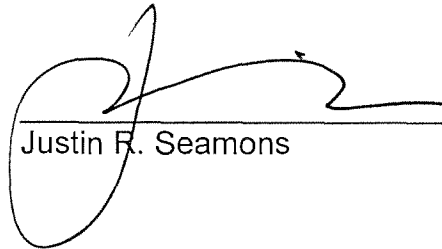


Notary Public
Commission expires: July 17
Residing at: Blackfoot, Idaho

CERTIFICATE OF SERVICE

I served a copy of the foregoing AFFIDAVIT OF KIM H. LEAVITT IN OPPOSITION TO AUGMENTED MEMORANDUM AND AUGMENTED AFFIDAVIT OF KIPP L. MANWARING on the following person on September 29, 2011:

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271



Justin R. Seamons

or engineers who may be employed by other branches of the Federal Government as such surveys were not conducted under the direction and control of the Chief Cadastral Surveyor.

On the other hand, it often falls to the county or other local surveyor to mark the corners of subdivisions of sections and the location of private property lines, and where a required corner is obliterated, the local surveyor may be called upon to recover the point. Thus it will be seen that local surveyors as well as cadastral surveyors of the BLM are constantly called upon to search for existing evidence of original monuments, and in this work the surveyors should be guided by the same general methods. The text that follows draws no distinction between these duties of the two classes of surveyors.

6-5. Although this guidance pertains especially to the dependent resurvey of an original survey, the same principles apply to the dependent resurvey of an official resurvey, and to the resurvey of a local survey. Official resurveys and local surveys subsequent to the original survey must be considered in context of the objectives of each Federal Government dependent resurvey. First, the adequate protection of the existing rights acquired under an original survey or resurvey and faithfully located by subsequent (re)survey as to location on the earth's surface, and second, the proper marking of the boundaries of the remaining Federal interest lands.

6-6. The function of the local surveyor begins when employed as an expert to identify lands that have passed into private ownership. The testimony or records of local surveyors who have identified the original monument prior to its destruction, or who have reasonably applied the good faith location rule, or who have marked the corners of legal subdivisions according to the prevailing law using the accuracy standards for the time and locale, is often considered reliable collateral evidence of the original surveyed and protracted lines and corners, particularly where those surveys are followed by use and occupancy by the landowners (section 3-132).

6-7. Where a corner marks the boundary between, or in any manner controls the location of the lines that form the boundary of privately-owned property, dissatisfaction on the part of or dispute between the private landowners may be brought before the local court of competent jurisdiction. The Secretary of the Interior will not be bound by a court decision purporting to affect Federal interest lands, if the United States is not a party to a suit, as least to the extent that valid evidence of the official survey was disregarded or there was some other departure from good surveying practice.

6-8. The terms "corner" and "monument" are not interchangeable. A "corner" is a point determined by the surveying process. A "monument" is the object or the physical structure that marks the corner.

6-9. The "corners" of the public land surveys are those points that determine the boundaries of the various subdivisions represented on the official plat—the township corner, the section corner, the quarter-section corner, the subdivision corner, or the meander corner.

The "mile corner" of a State, reservation, or grant boundary does not mark a point of a subdivision; it is a station along the line, although long usage has given acceptance to the term. An "angle point" of a boundary typically marks a change in the bearing, and in that sense it is a corner of the survey, as is a special survey corner, a townsite corner, and a tract corner.

6-10. "Monuments" of the public land surveys have included the deposit of some durable memorial, a marked wooden stake or post, a marked stone, an iron post having an inscribed cap, a marked tablet set in solid rock or in a concrete block, a marked tree, a rock in place marked with a cross (X) at the exact corner point, and other special types of markers, some of which are more substantial; any of these is termed a "monument." The several classes of accessories, such as bearing trees, bearing objects, reference monuments, mounds of stone, buried memorials and pits dug in the sod or soil are aids in identifying the corner position. In their broader significance the accessories are a part of the corner monument.

Not all corners of the Federal surveys are monumented. Many unmonumented corners were subsequently monumented during official resurveys, or by county or other local surveyors. The monuments set during the original survey represent the highest class of direct evidence of the position of the original lines. Monuments set after the original survey may provide evidence of the original survey if set using appropriate methods for the time and with due regard for the original corner positions.

Identification of Existent Corners

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6-11. An *existent corner* is one whose original position can be identified by substantial evidence of the monument or its accessories, by reference to the description in the field notes, or located by an acceptable supplemental survey record, some physical evidence, or reliable testimony.

A corner is existent (or found) if such conclusion is supported by substantial evidence. The substantial evidence standard of proof is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Substantial evidence is more than a scintilla of evidence but less than a preponderance of the evidence.

Even though its physical evidence may have entirely disappeared, a corner must not be regarded as lost, but as obliterated, if its position can be recovered through the reliable testimony of one or more witnesses who have dependable knowledge of the original position. Later marks or records that tied to the original monument or its accessories when still present, may identify the position of an obliterated corner. Such evidence should provide a direct relationship to some identifying feature described in the original survey record.

6-12. The process of identifying the physical evidence of an original monument is founded on the principle of intelligent search for the calls of the field notes of the original survey, guided by the controlling influence of known points. The recovery of previously established corners is simplified by projecting retracements from known points. The final search for a monument should cover the zone surrounding one, two, three, or four points determined by connection with known corners. These corners will ultimately control the relocation in case the corner being searched for is declared lost.

The search for the original monument must include a simultaneous search for its accessories. The evidence can be expected to range from that which is least conclusive to that which is unquestionable; the need for corroborative evidence is therefore in direct proportion to the uncertainty of any feature in doubt or dispute. The evidence should agree with the record in the field notes of the original survey subject to natural changes, which may vary depending upon local site conditions. Mounds of stone may have become embedded, pits may have filled until only a faint outline remains, blazes on bearing trees may have decayed or become overgrown.

6-13. After due allowance has been made for natural changes, there may still be material disagreement between the particular evidence in question and the record calls. The following considerations will prove useful in determining which features to eliminate as doubtful:

(1) The character and dimensions of the monument in evidence should not be widely different from the record.

(2) The markings in evidence should not be inconsistent with the record.

(3) The nature of the accessories in evidence, including size, position and markings, should not be greatly at variance with the record.

6-14. Allowance for ordinary discrepancies should be made in considering the evidence of a monument and its accessories taking note of any pattern of discrepancies that would indicate the recorded information is unreliable. Evidence of less than workmanlike care in the original survey in compiling the record thereof has resulted in the evidence not matching the record. Examples include erroneously recorded dimensions of stones and trees; transposed or interchanged directions and/or distances to corner accessories, misidentified tree species or rock type, and inconsistencies in reporting topographical features.

6-15. No set rules can be laid down as to what is sufficient evidence. Much must be left to the skill, fidelity, and good judgment of the surveyor, bearing in mind the relation of one monument to another and the relation of all to the recorded natural objects and items of topography.

6-16. No decision will be made in regard to the restoration of a corner until every means has been exercised that might aid in identifying its true original position. The retracements will indicate the probable position and will show what discrepancies are to be expected. Any supplemental survey record or testimony must then be considered in the light of the facts thus developed.

Identification of Obliterated Corners

6-17. An *obliterated corner* is an existent corner where, at the corner's original position, there are no remaining traces of the monument or its accessories but whose position has been perpetuated, or the point for which may be recovered, by substantial evidence from the acts or reliable testimony of the interested landowners, competent surveyors, other qualified local authorities, or witnesses, or by some acceptable record evidence.

An obliterated corner position can be proven by substantial direct or collateral evidence. When both categories of evidence exist, direct evidence will be given more weight than collateral evidence. A position that depends upon the use of collateral evidence can be accepted only

as duly supported, generally through proper relation to known corners, and agreement with the field notes regarding distances to natural objects, stream crossings, line trees, and off-line tree blazes, etc., or reliable testimony. Collateral evidence must include some component that relates to the position of the original survey corner, including measurement evidence, historical record, testimony, or any reasonable tie.

6-18. A corner is not considered as lost (section 7-2) if its position can be recovered satisfactorily by means of the reliable testimony and acts of witnesses having knowledge of the precise location of the original monument. The expert testimony of surveyors who may have identified the original monument prior to its destruction and recorded new accessories or connections is by far the most reliable, though landowners are often able to furnish valuable testimony. The greatest care is necessary in order to establish the bona fide character of the record intervening after the destruction of an original monument. Full inquiry may bring to light various records relating to the original corners and memoranda of private markings, and the surveyor must make use of all such sources of information. The matter of boundary disputes will be carefully examined as adverse claimants may base their contentions upon evidence of the original survey. If such disputes have resulted in a boundary suit, the record testimony and the court's decision must be carefully examined for information that may shed light upon the position of an original monument.

Direct Evidence of Existent and Obliterated Corners

6-19. A line tree, a witness point, or a definite connection to readily identified natural objects or improvements may fix a point of the original survey. The mean position of a blazed line, when identified as the original line, may help to fix a meridional line for departure, or a latitudinal line for latitude. Such blazed lines must be carefully checked, because corrections may have been made before final acceptance of the controlling survey or more than one line may have been blazed. Thus, the mean position of a fence line or other line of use or occupancy placed with due regard to the location of the original survey and plan of survey, or whose agreement is so close as to constitute the best available evidence, may help to fix a line in latitude, departure, or both.

Testimony of Individuals

6-20. The testimony of individuals may relate to the original monument or the accessories, prior to their

destruction, or to any other marks fixing the locus of the original survey. Weight will be given such testimony according to its completeness, its agreement with the original field notes, and the steps taken to preserve the location of the original marks. Such evidence must be tested by relating it to known original corners and other calls of the original field notes, particularly to line trees, blazed lines, and items of topography.

There is no clearly defined rule for the acceptance or nonacceptance of the testimony of individuals. It may be based upon unaided memory over a long period or upon definite notes and private marks. The witness may have come by his or her knowledge casually or may have had a specific reason for remembering. Corroborative evidence becomes necessary in direct proportion to the uncertainty of the statements advanced. The surveyor should bear in mind that conflicting statements and contrary views of interested parties to boundary disputes are potentially fruitful sources of information concerning the original position of a corner.

To be reliable, testimony will indicate some knowledge of the position of the original monument. Landowners' opinions of their boundaries may be based upon their understanding of common law principles of boundaries determined by occupation alone. Such testimony does not provide direct evidence of the position of an obliterated corner. In no case should such opinions or long term belief thereon be deferred to in the absence of some reliance and tie to the original survey. Occupation and long use do not act to deprive the United States of title to land.

6-21. The following information should be included when obtaining testimony or data from an individual concerning the true point for an original corner or related information:

- (1) Name, age, address;
- (2) How long at that address;
- (3) When knowledge of the corner position first acquired;
- (4) A photograph including the corner point and the witness, with the date, photographer's signature, and the witness' signature; and
- (5) An actual statement by the witness, which is complete and signed.

Each requires its unique solution, which will be presented in the special instructions.

International Boundary Monuments

6-33. The BLM has no general authority to survey or resurvey international boundaries. Prior to survey of Federal interest lands adjacent to or abutting an international boundary, the Department of State will be consulted and, particularly, the International Boundary Commission for the boundary with Canada or the International Boundary and Water Commission for the boundary with Mexico. Coordination will be established with governing authorities prior to approaching or surveying the international boundary.

Significance of Official Action

6-34. The GLO and BLM instructions and policies for proper usage of the monuments of the original survey have varied when used to (1) to control section alignment, (2) to control reestablishment of lost corners, establishment of minor subdivision corners or subdivision of sections, or (3) to determine the true point for the corner using witness corners and "half-mile posts" (section 7-36). Such changes in technical policies are prospective in application and generally are not applied retrospectively. It has long been held by competent authority that official resurveys and retracements, after acceptance and official filing, are presumed to be correct, surveyed consistent with the laws and policies in effect at that time, and shall not be disturbed except upon proof by a preponderance of the evidence that they are fraudulent or grossly erroneous.

Collateral Evidence of Obliterated Corners

Good Faith Locations

6-35. It may be held generally that the claimant, entryman, or owner of lands has located his or her lands by the good faith location rule if such care was used in determining the boundaries as might be expected by the exercise of ordinary intelligence under existing conditions. A good faith location is a satisfactory location of a claim or of a local point. It is one in which it is evident that the claimant's interpretation of the record of the original survey as related to the nearest corners existing at the time the lands were located is indicative of such a degree of care and diligence upon their part, or that of

their surveyor, in the ascertainment of their boundaries as might be expected for that time and place. This is referred to as the good faith location rule.

6-36. The relationship of the lands to the nearest corners existing at the time the lands were located is often defined by fencing, culture, or other improvements. In many parts of the country, county and other local survey monuments, which may consist of pipes or stones commonly used at the time, may be found at the apparent corners of the entryman's improvements including fencing. The possible existence of such local monuments demands a diligent search for any records from the old local survey, but even if the monuments are of unknown origin they must be analyzed for good faith location. Lack of good faith is not necessarily chargeable if the entryman has not located himself according to a rigid application of the rules laid down for the restoration of lost corners where:

- (1) complicated conditions involve a double set of corners, both of which may be regarded as authentic;
- (2) there are no existing corners in one or more directions for an excessive distance;
- (3) existing marks are improperly related to an extraordinary degree; or
- (4) all evidences of the original survey or prior resurvey that have been adopted by the entryman as a basis for his or her location have been lost before the resurvey is undertaken.

Furthermore, the extent of recognition given by neighboring claimants to a local point used for the control of the location of claims very often carries with it the necessity for a consideration of its influence in the matter of the acceptability of such locations under the good faith location rule.

6-37. The surveyor should neither rigidly apply the rules for restoration of lost corners or the rules for subdivision of sections without regard to effect on location of improvements nor accept the position of improvements without question regardless of their relation or irrelation to existing evidence of the original survey and the description contained in the entry. Between these extremes will be found the basis for the determination of whether improved lands have been located in good faith. No definite specific set of rules can be laid down in advance. The solution to the problem must be found

on the ground by the surveyor. The responsibility to resolve the question of good faith as to location rests primarily upon the surveyor's judgment.

6-38. The question is whether the position of the lands claimed, occupied or improved is to be adopted under the good faith location rule, and whether, if so adopted, the claims thus acceptably located can all be properly protected by the dependent plan of resurvey. If the position of any claim fails to qualify under the good faith location rule it should be disregarded as to the effect produced thereon by the plan of dependent resurvey. On the other hand, if these claims are held to be acceptably located under the same rule, they should be adopted as the determining factor in the position of the lost corner or corners, or establishment of new corners; and if the claims are in such concordant relation to each other and to the identified evidence of the original survey as to receive full protection by the dependent plan of resurvey, the surveyor will proceed with full assurance of the adequacy of the plan. Otherwise, the question of other processes analogous to those of an independent resurvey or to the correction of conveyance documents or the Quiet Title Act should be considered.

If two or more claims are acceptably located, but are discordantly related to each other to a considerable degree (by virtue of irregularities in the original survey), it will be clear that the general plan of dependent resurvey may not afford protection to such claims. In this case, as before stated, some other process must be adopted to protect the acceptably located claims.

6-39. In cases involving extensive obliteration at the date of entry or selection, the entryman or their successors in interest should understand that the boundaries of the claim will probably be subject to adjustment in the event of a dependent resurvey. A general control applied to the boundaries of groups of claims will be favored as far as possible in the interest of justice, of equal fairness to all and of simplicity of resurvey. A claim cannot generally be regarded as having been located in good faith if no attempts have been made to relate it in some manner to the original survey.

6-40. Cases will arise where lands have been occupied in good faith, but whose boundaries as occupied disagree with the position of the legal subdivision called for in the description. A landowner's bona fide belief concerning the boundary location is not the same as a bona fide right within the meaning of 43 U.S.C. 772. A bona fide right within the meaning of 43 U.S.C. 772 is based on good faith reliance on evidence of the original

survey. Obviously, under these facts the rule of good faith as to location cannot apply. This is not a survey issue but a title issue and relief must be sought through the process of amended entry, correction of conveyance document under 43 U.S.C. 1746, quiet title action, tentative approval relinquishment, or interim conveyance reconveyance or relinquishment to cover the legal subdivisions actually earned, rather than through an alteration of the position of established lines. This is a process of adjudication rather than one of resurvey. A case of this character should be regarded as erroneous location in precisely the same manner as if the question of resurvey were not involved. The amendment of entries is a matter for adjudication by the BLM after the resurvey has been accepted and the plats officially filed.

Satisfactory Local Conditions

6-41. It is not intended to disturb satisfactory local conditions with respect to roads, fences, and other evidence of use or occupancy. The surveyor has no authority to change a property right that has been acquired legally, nor accept the location of roads, fences and other use or occupancy as prima facie evidence of the original survey. Something is needed in support of these locations. This will come from whatever intervening record there may be, the testimony of individuals who may be acquainted with the facts, and the coupling of these things to the original survey.

In many cases due care has been exercised to place the property fences and other evidence of use or occupancy on the lines of legal subdivision and locate the public roads on the section or subdivision-of-section lines. These are matters of particular interest to the adjoining owners, and it is a reasonable presumption that care and good faith would be exercised with regard to the evidence of the original survey in existence at the time. Obviously, the burden of proof to the contrary must be borne by the party claiming differently. In many cases there are subsurface marks in roadways, such as deposits of a marked stone or other durable material, that are important evidence of the exact position of a corner if the proof can be verified. Also, knowledge regarding the construction of a purported property line fence, or other use or occupancy line can be obtained from long time landowners and community members and could provide positive evidence as to location in conformity with the good faith location rule.

6-42. A property corner or a use or occupancy position should exercise a regular control upon the retracement only when it was placed with due regard to the location

of the original survey, or agreement is so close as to constitute the best available evidence.

6-43. Other factors to be considered are the rules of the State law and the State court decisions, as distinguished from the rules laid down by the BLM (the latter applicable to the public land surveys created boundaries in all cases). Under State law in matters of agreement between owners, acquiescence, or adverse possession, property boundaries may be defined by roads, fences, use or occupancy lines, or survey marks, disregarding exact conformation with the original legal subdivision lines. These may limit the rights between adjoining owners, but generally have no effect on the boundaries of Federal interest lands.

6-44. In cases where the Federal Government has acquired land with a boundary created when the United States owned neither side of the boundary, the boundary may be defined by State law. For these boundaries, rights may have vested to a location disregarding exact conformation to the title lines or original legal subdivisions prior to the title being acquired by the Federal Government. The surveyor shall not impair such rights. The conflicting title lines and ownership lines are surveyed and monumented and the conflict area is returned upon the plat. Each intersection of conflicting boundaries is determined upon the ground and recorded in the field notes. The returns must describe and show the limits of the Federal ownership and the limits of the Federal title. The survey record will document the findings of fact, source of law (section 1-7), and conclusion at law supporting the determination. These cases require close collaboration with legal counsel and BLM Lands Staff.

Local Points of Control

6-45. Once a local point of control is accepted in an official survey it has all the authority and significance of an original corner. The influence of such points is combined with that of the previously identified original corners in making final adjustments of the temporary points.

The acceptance of duly qualified and locally recognized points of control should verify the public land surveys, simplify resurveys, and avoid conflicting lines that differ only slightly in location. In this manner flexibility will be introduced in the plan of the dependent resurvey, at least to the extent of protecting satisfactory local actions in reliance on evidence of the original survey.

6-46. The surveyor cannot abandon the record of the original survey in favor of an indiscriminate adoption

of points not reconcilable with it. However, many situations will arise where locally accepted lines are in substantial agreement with evidence of the original survey, although without testimony or record evidence relating to the original survey. Where this circumstance is found, it is often better to accept a position based upon local interpretation rather than to disturb satisfactory existing conditions. The surveyor will endeavor to avoid disturbing the position of locally recognized lines when such action may adversely affect improvements, again, provided that there is substantial agreement with the evidence of the original survey. At the same time the surveyor must use extreme caution in adopting local points of control. These may range from authentic perpetuations of original corners down to marks that were never intended to be more than approximations. The surveyor must consider all these factors.

Chief among this class of evidence forming the basis of recognized positions of land boundaries are; recorded monuments established by local surveyors and duly agreed upon by interested property owners; the position of boundary fences determined in the same manner; and the lines of public roads, drainage or irrigation ditches, and timber cutting lines; when intended to be located with reference to the original subdivisional lines. The local record in these cases, when available, may furnish evidence of the original survey. If a point qualifies for acceptance, having satisfied the requirement for substantial agreement with evidence of the original survey, the presumption is strong that its position bears satisfactory relation to the original survey and the burden of proof to the contrary must be borne by the party claiming differently. Points that so qualify must be accepted as the best available evidence of the true position of the original survey.

6-47. It is not to be assumed, however, that because a large number or all of the claims are consistently related among themselves to an arbitrary system of control, which is itself altogether unrelated to the original survey, that such system is necessarily to be adopted as the basis of a dependent resurvey.

6-48. The age, position, and degree to which a local corner has been relied on by all affected landowners may lead to its adoption as the best remaining evidence of the position of the original corner. When a local reestablishment of a lost corner or a local establishment of a legal subdivision corner has been made by proper methods without gross error, it will ordinarily be acceptable. Monuments of unknown origin must be judged on their own merits, but these monuments should never be rejected out of hand without careful study.

It is a recognized principle that the restoration of a corner may be influenced by the position of one or more existing claims. This principle warrants, within suitable limits, the acceptance of a local determination that does not exactly coincide with a rigid application of the rules for restoration of lost corners and subdivision of sections.

Thus where locations are found to have been established on good faith reliance on evidence of the original survey the position of which cannot otherwise be fully demonstrated by existing evidence of the original survey, the theoretical point determined by the primary control will be set aside in favor of a near-by duly qualified corresponding point, the position of which has been agreed upon by the adjoining property owners. Such a point will then be recognized as the best available evidence of the true position for the corner.

6-49. The field note record of the dependent resurvey must clearly set forth the reasons for the acceptance of a local point not identified by actual marks of the original survey, but by nonofficial determinations. Recognized and acceptable local marks will be preserved and described. Monuments must be fully described in the field notes and a full complement of the required accessories recorded, but without disturbing or re-marking the existing monument. New monuments are established if required for permanence or to provide unique marks to clearly identify the corner. The evidence of the local marks will not be destroyed, and if disturbed, the final disposition will be fully described in the field notes. When a local point is not accepted, the field note record of the resurvey must also clearly set forth the reasons.

Corner Positions Based on the Protection of Bona Fide Rights: 43 U.S.C. 772

6-50. The following sections describe the conditions that warrant the protection of bona fide rights as to location due to:

- (1) gross errors in the original survey;
- (2) inadequate original evidence such that the application of the normal methods for restoration of lost corners will impair bona fide rights; or
- (3) complicated conditions involving a double set of corners, both of which may be regarded

as authentic, which result (a) in irreconcilable conflicting evidence of the original corner positions, or (b) in conflicting positions when used for restoration of lost corners or subdivision of sections.

6-51. Bona fide rights as to location may vest to an official resurvey. This is in keeping with the principle of protecting bona fide rights based on an original survey, pursuant to 43 U.S.C. 772. As the Court said in *United States v. Reimann*, 504 F.2d 135, 139-140 (10th Cir. 1974):

It would be inequitable to permit the government . . . to accept a survey[,] . . . recording it with knowledge that it would be relied upon by patentees, and then grant the government the right to later correct its error, ex parte, to the detriment of those who did in fact, and in good faith, rely upon it.

6-52. An official resurvey shall not be overturned except upon clear proof of fraud or gross error amounting to fraud. This is especially true after a long lapse of time or good faith reliance. In some instances, to protect bona fide rights, the BLM has departed from a rigid application of dependent resurvey principles to ensure that long-accepted official survey lines are not disturbed, property boundaries are stabilized, and title as to location is secured. *Salt Wells Live Stock Co.*, A-26367 (May 9, 1952).

6-53. Bona fide rights as to location may also vest to local surveys that rely on evidence of the original survey. County and other local corners cannot be considered official United States corners unless and until they are accepted by the BLM in an official survey.

6-54. Corners established in an administrative survey by BLM employees, by other Federal departments and agencies, or by or for an Indian tribe, unless subject to special enactment, cannot be considered official United States corners unless and until they are accepted by the authorized officer of the BLM. In the absence of official acceptance by the BLM, users rely on such corners at their own peril. *Longview Fibre Co.*, 135 IBLA 170, 185 (1996).

Other Situations Involving Protection of Bona Fide Rights

6-55. In the execution of a dependent resurvey, there may arise cases where occupancy and valuable

non-Federal improvements have been placed onto lands under title to the United States based on reliance on evidence of a local survey that is so discordantly related to existing authentic evidence of the original survey that such local corners cannot qualify for adoption either as physical evidence of the original survey, as good faith reliance on evidence of the original survey, as demonstrating satisfactory local conditions, or as a local point of control. There is no legal authority to disregard the identified evidence of the original survey or to accept a fraudulent or grossly erroneous local corner position, in these cases.

No general title or survey remedy has been devised other than that of removal. Whether such trespass remedy method appears to be practicable or not, the surveyor will submit a detailed report of the conditions found. The report will recommend procedures suited to the particular case. The recommendations will be designed to protect the claimant's improvements and will not disturb those who have acquired legal rights through location consistent with the appropriate official survey. These cases are exceptional in any township where regular control has been developed by careful retracement and thorough search.

A metes-and-bounds survey of an erroneous location cannot have the effect of conveying title. No legal title to Federal interest land can be established by use or occupancy outside the subdivisions named in the entry, selection, or patent, except during the period when the land was alienated, as adverse possession does not run against land under title to the United States. Sooner or later, the claimant would find him or herself without a complete legal title to the lands upon which he or she had spent his or her labors. Removal of improvements or an appropriate conveyance document, when the occupancy and improvements do not conform to the lines and subdivisions of the original survey is the only safe course to remedy such title defects.

6-56. As official resurveys themselves grow in number, cases will arise where a patent issued under an original survey is located and valuable non-Federal improvements are made after the official resurvey, and the improvements were made under good faith reliance on the official resurvey's restoration of the original survey. Problems develop when evidence of the original survey corners is later discovered that differs materially in location from the official resurvey's restored corners. In some such instances, established non-Federal improvements will be found on lands under title to the United States. In such a case, the survey that controls

the conveyance document is the most recent officially filed survey before the valid entry, application, or selection that resulted in the issuance of the patent or other conveyance, not the subsequent resurvey. In such cases, however, questions may be raised of "good faith reliance" on an official resurvey and therefore of possible bona fide rights as to location, and the surveyor will seek specific instructions.

No general title or survey remedy has been devised other than that of removal of the non-Federal improvements, if the claimant can reasonably do so, or the issuance of an amended entry to describe the occupied legal subdivisions. Whether such trespass remedy methods appear practicable or not, the surveyor will submit a detailed report of the conditions found. The report will recommend procedures suited to the particular case. The recommendations will be designed to protect the claimant's improvements, if possible, and will not disturb those who have acquired actual legal or bona fide rights as to location through location consistent with the appropriate official (re)survey. These cases are exceptional in any township where regular control has been developed by careful retracement and thorough search.

It is difficult to particularize the exact nature of the relationship of bona fide rights as to location to an official resurvey that presents the original survey in a position in conflict with the actual location of the original survey. There must be some latitude for construction. As the Court said in *Knight v. United States Land Association*, 142 U.S. 161, 181 (1891):

It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice. *Williams v. United States*, 138 U.S. 514, 524 (1891).

A metes-and-bounds survey of an erroneous location cannot have the effect of conveying title. Equitable title to Federal interest land may be established by substantial and long term improvements outside of the subdivisions named in the entry, selection, or patent, when based on good faith reliance on evidence of an official resurvey. However, sooner or later, the claimant would find him or herself without a complete legal title to the lands upon

which he or she had spent his or her labors. Questions of title and ownership will be discussed with legal counsel and the appropriate agency official. Title remedies must be documented, monumented, and described in the official survey record.

6-57. Another case may arise in the execution of an official resurvey where Federal occupancy and valuable Federal improvements have been placed onto lands determined not to be under title to the United States based on good faith reliance on evidence of a local survey or on an official resurvey that is so discordantly related to existing authentic evidence of the original survey that such corner positions cannot qualify for adoption in an official resurvey. The United States cannot claim the benefit of the bona fide right statutes, which were enacted to protect the owners of alienated lands located and occupied in good faith from interference by subsequent official resurveys.

The appropriate treatment of this case, where possible of application, consists in the removal of the Federal improvements from the occupied alienated legal subdivisions. However, when it is determined that the United States wishes to retain and clear title to the land, it may seek to purchase or condemn the property upon payment of just compensation. If the landowner acts first, the United States may be subject to a claim for inverse condemnation, in which case just compensation is also the measure of Federal liability. If sufficient time passes to satisfy State law, the Federal Government can obtain legal title to lands established by the occupancy and improvements of lands inside the subdivisions named in an entry, selection, or patent, as adverse possession does run for the United States. Ultimately, however, the Federal Government would have to act to clear legal title to the lands upon which it had made improvements, and the just compensation provision of the Constitution for a "taking" may still apply. Such cases will also be exceptional, however, in any township where regular control has been developed by careful retracement and thorough search.

Regardless of which course is ultimately chosen by Federal officials, the surveyor will submit a detailed report of the conditions found, with recommendations designed for protection of the Federal interest improvements and will not disturb those who have acquired legal or bona fide rights as to location through location consistent with the appropriate official (re)survey.

In any event, a metes-and-bounds survey of an erroneous location cannot have the effect of conveying title.

A written or directed conveyance to the United States, either through purchase, condemnation, or vested unwritten rights is the only safe course to remedy such title defects when Federal occupancy and improvements are found not to conform to the lines and subdivisions of the original survey or title lines.

Special Case Dependent Resurveys— Fictitious, Fraudulent, or Grossly Erroneous Surveys

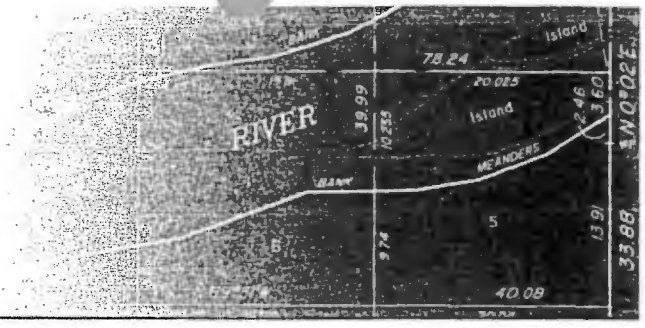
6-58. Special case conditions exist only in a township with use or occupancy lines or other improvements, and where the official record representing the original survey is fictitious, fraudulent, or grossly erroneous beyond any tolerable limit. The special case dependent resurvey is applicable when it has been determined:

- (1) not to identify the alienated lands by tract segregations;
- (2) there will be no projection of new subdivision lines; and
- (3) the original plat will not be cancelled.

6-59. Special case dependent resurveys provide methods adapted to areas with considerable amounts of alienated land or considerable amounts of Federal interest lands. Special case claim segregations are necessary only in those unusual cases where unrelated control prevents the reconstruction of sections and legal subdivisions by using existent corners and accepted local points of control that would adequately protect the alienated lands. It is applicable where the original survey cannot be identified with any degree of certainty in accordance with the representations of the approved plat and field notes, or where the prevailing conditions are such that strictly restorative processes, when applied as an inflexible rule between existing monuments or adopted local corner positions, are either inadequate or lead to unsatisfactory results. In effect this may employ the traces of the original survey, the good faith location rule or a combination of both in the same township. This type of dependent resurvey provides for the location of individual claims in conformance with the subdivisions of the resurvey.

These processes are found to be more flexible in their application than those of the strictly dependent type, but at the same time they are intended duly to protect all private rights that have been acquired upon the basis of the original survey and plat. The special case dependent

Resurveys and Restoration



Restoration of Lost Corners

7-1. When every means of identifying the original position of a corner has been exhausted, the surveyor will restore the lost corner by applying proportionate measurement, which harmonizes surveying practice with legal and equitable considerations involved in controversies concerning lost land boundaries.

7-2. A *lost corner* is one whose original position cannot be determined by substantial evidence, either from traces of the original marks or from acceptable evidence or reliable testimony that bears upon the original position, and whose location can be restored only by reference to one or more interdependent corners.

Thus, if substantial evidence of the position of the original corner exists, it is an existent or obliterated corner. This position shall be employed in preference to applying the rule that would be proper only in the case of a lost corner.

In addition, once a corner is considered lost, it is the surveyor's responsibility to assure that the restoration method and the restored position comply with the statutory protection of bona fide rights requirements delineated in 43 U.S.C. 772 and 773 and as described in this Manual.

7-3. Lost corners have been reestablished in official resurveys. These corners take on all the authority of an original corner except upon proof by a preponderance of the evidence that the resurvey was fraudulent or grossly erroneous. The surveyor must be aware that land may be conveyed or improvements made with reference to these reestablished corners.

7-4. The preliminary retracements show the discrepancies of courses and distances between the original record and the findings of the retracement. The restoration of the lost corners cannot proceed until the retracement of the original survey has been completed. The retracement is based upon the courses and distances of

the original survey record, initiated and closed upon known original corners.

7-5. Existing original corners shall not be disturbed. Consequently, discrepancies between the retracement measurements and the measurements shown in the record have no effect beyond the accepted corners. Generally, recovered line trees, witness corners, witness points, and other definitely identifiable original marks or regular corners established on the line and of record are original corners and part of the interdependent corners controlling the original survey. This restates the common law hierarchy of calls for monuments as controlling over calls for measurements. The differences in measurement are distributed proportionally within the several intervals along the line between the accepted corners.

The retracements will show various degrees of accuracy in the lengths of lines, where in every case it was intended to secure true horizontal distances. Prior to 1900 most of the lines were measured with the Gunter's link chain. Such a chain was difficult to keep at standard length, and inaccuracies often arose in measuring steep slopes by this method.

All discrepancies in measurement will be verified with the object of placing each difference where it properly belongs. Manifest blunders in measurement are removed from the general average difference and placed where the blunder was made. In cases where the proportioned position cannot be made to harmonize with all the calls of the original field notes, due to errors in description or to discrepancies in measurement made apparent by the retracement, it should be ascertained which of the calls are entitled to greater weight and which calls should be subordinate. The accumulated surplus or deficiency that remains is to be uniformly distributed by proportionate measurement.

7-6. Cases arise where the original survey record has been destroyed and the copies immediately available to the surveyor are transcribed copies of the duplicate

ACQUIESCENCE

Knud E. Hermansen and Robert A. Liimakka*

Acquiescence, similar to the doctrines of estoppel and practical location, is an equitable doctrine that will fix the location of a common boundary in a location that may differ from the location where a surveyor would place the common boundary based on the rules of construction.

The doctrine of acquiescence is known in some jurisdiction as a consentable boundary. Some states have equated it to a boundary by implied agreement. The motivation for a court recognizing a boundary different from the record is to let boundaries that appear to have been settled to be settled. A person that sleeps on their rights should not be allowed to demand with passion what they have for so long ignored with indifference.

The doctrine of acquiescence generally requires three conditions exist. First, the record boundary must be vague or unknown. The purpose for this element is to prevent persons from usurping the legal requirement that parties alter the location of their record boundaries by written instrument. By requiring the boundaries be vague or unknown, the legal fiction is created that the parties-in-interest have not altered the location of their deed boundaries. Rather, the parties-in-interest have fixed a definite location for the boundaries described in their respective deeds. This fiction survives even though a surveyor would place the boundary with some confidence in a different location than where the boundary location has been historically recognized.

A second condition requires one party act by fixing the boundary in a location by definite monumentation or occupation that appears and is accepted as marking the boundary. The boundary so fixed by the one party cannot be based on fraud or deceit. In other words, the party in placing the monuments or barriers must have reasonably believed the objects are placed on the common boundary.

The third condition requires that the non-acting party recognize the barriers or monuments as marking the

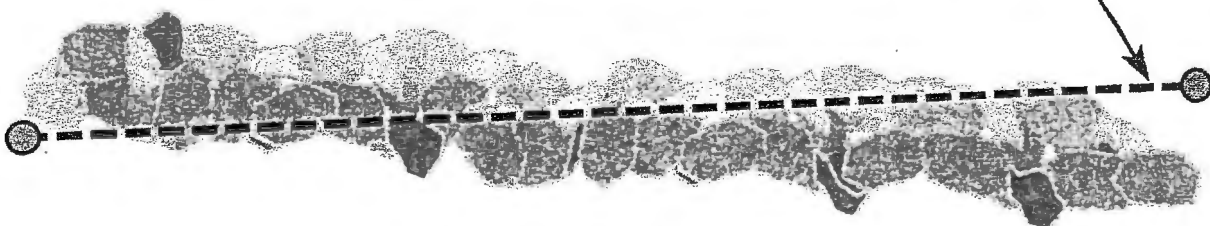
boundary. Recognition is sufficient if the individual does not contest the location.

The fourth and final condition is that the three conditions exist for some length of time that a reasonable person would have been expected to object or act had they disagreed. A long length of time is not crucial if the location of the record boundary is otherwise vague or difficult to locate and the location of the monuments or barrier is reasonable to the location of the record boundary.

The following situation may be give rise to a boundary by acquiescence:

Bill and Jane live next to each other in an old subdivision. Bill does his best to locate the common boundary he shares with Jane in order to build a rock wall. He makes measurements and sets stakes, eventually building the rock wall along a line between the stakes. Jane watches Bill make the measurements to locate the boundary and observes Bill construct the wall. For many years thereafter, Jane and Bill respect the wall as marking the common boundary. Twelve years later, Jane needs a survey of her property in order to build a garage. In performing the survey for Jane, the surveyor gathers considerable site and record information. Most of the original monuments have disappeared. The surveyor prorates the distances between found monuments that are located several hundred feet away with the following results shown in the diagram:

Boundary by Proration



590

monuments. It is not unusual to discover that the actual distance measuring in the field is different from the distance shown on the plan, especially given the age of the original survey. The current surveying technology and education of the surveyor far exceed those of the earlier surveyors.

My opinion places the common boundary in a location different from the wall that exists near this boundary. Although the method I have used to reestablish the common boundary was established by the court as a rule of construction, I feel compelled to warn you that the same court will often adopt occupation lines such as the wall to be the ownership boundary contrary to the record measurements. While I am confident in the methods I have employed in fixing your boundary I would be foolish to predetermine where a court would place the boundary if asked to choose between the boundary I have established and the existing stone wall. I believe you would be wise to consult with legal counsel before taking any action in regard to moving the wall or asking the neighbor to do so.

Acquiescence is similar to the equitable doctrine of practical location. The major difference is that practical location requires the parties-in-interest all participate, while acquiescence requires only one party act while the other parties-in-interest acquiesce to the acts of the one party.

*Knud is a professor in the Surveying Engineering Technology program at the University of Maine. He is also a consultant on boundary disputes, alternate dispute resolution, land development, real property law, and access law.

Rob is a professor in the Surveying Engineering Program at Michigan Technological University. He is a professional surveyor and holds a MS in Spatial Information Science and Engineering from the University of Maine, Orono and is currently working on a doctorate in civil engineering.


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BONNEVILLE COUNTY, IDAHO

2011 SEP 29 PM 12: 02

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
Plaintiffs,)
)
vs.)
)
JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

**OBJECTION TO AUGMENTED
MEMORANDUM OF ADDITIONAL
POINTS AND AUTHORITIES**

The Plaintiffs recently filed a memorandum, entitled "AUGMENTED MEMORANDUM OF ADDITIONAL POINTS AND AUTHORITIES IN SUPPORT OF THE CAMPBELLS' MOTION FOR SUMMARY JUDGMENT," dated September 23, 2011.

In order to make sure that the record on appeal is complete, the Defendants hereby object to the AUGMENTED MEMORANDUM OF ADDITIONAL POINTS AND AUTHORITIES and respectfully move the court to strike it in accordance with I.R.C.P. 56(e), I.R.E. 701, I.R.E. 702, I.R.E. 901, and I.R.E. 103(a)(1).

INTRODUCTION

The Plaintiffs allege that the fence in this case does not sit on the boundary between the parties' respective parcels of real property; instead, the Plaintiffs allege that the fence sits on their parcel of real property and is off by 15 feet.

The Plaintiffs carry the burden of proof on this issue, not the Defendants. In an attempt to carry their burden of proof, the Plaintiffs filed the AFFIDAVIT OF COUNSEL of Kipp L. Manwaring, dated May 17, 2011. As the court knows, Mr. Manwaring simply attached a copy of a RECORD OF SURVEY to his affidavit.

RECORD OF SURVEY

Mr. Manwaring did not prepare the RECORD OF SURVEY. He cannot identify it. He cannot authenticate it. He cannot lay a proper foundation for it. He is not competent to testify regarding it. It is not based on his personal knowledge. His arguments regarding it are speculative, based on hearsay, and conclusory.

In sum, the RECORD OF SURVEY is not admissible. See I.R.C.P. 56(e), I.R.E. 104(a), I.R.E. 802, and I.R.E. 901. Thus, the Defendants hereby object to the RECORD OF SURVEY and respectfully request the court to strike it. See I.R.E. 103(a).

KIPP L. MANWARING

Mr. Manwaring is not a professional land surveyor. He is not licensed to practice professional land surveying. He is a lawyer.

Notwithstanding the foregoing, Mr. Manwaring argues that the RECORD OF SURVEY "confirms that the disputed fence lies within the Campbells' property."

Of course, argument of counsel is not evidence. Thus, the Defendants hereby object to the arguments of Mr. Manwaring and respectfully request the court to strike them. See I.R.E. 103(a).

PURPOSE OF THE RECORD OF SURVEY

The purpose of the RECORD OF SURVEY is important. In this regard, please note the following:

Kevin L. Thompson prepared the RECORD OF SURVEY, not Mr. Manwaring. The stated purpose of the RECORD OF SURVEY was not to determine whether the fence sits on the boundary between the parties' respective parcels of real property; instead, the stated purpose of the RECORD OF SURVEY was to illustrate the possible "combining" of six deeds.

Mr. Thompson did not survey the Defendants' parcel of real property; he did not find or otherwise locate the original corners of Section 17; he did not use the original survey of 1877; and he did not mark or otherwise perpetuate the corners of Section 17. Again, he simply prepared the RECORD OF SURVEY to illustrate the possible "combining" of six deeds.

In sum, the RECORD OF SURVEY does not "confirm" that the fence sits on the Plaintiffs' parcel of real property and is off by 15 feet, notwithstanding Mr. Manwaring's argument to the contrary. Again, argument of counsel is not evidence.

BURDEN OF PROOF

The Plaintiffs have not carried their burden of proof in this case—that is, the Plaintiffs have not "set forth such facts as would be admissible in evidence" to prove that the fence sits on their parcel of real property and is off by 15 feet. In this regard,

please note that I.R.C.P. 56(e) states that a party cannot “rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided in this rule, ***must*** set forth specific facts showing that there is a genuine issue for trial” and, “if the party does not so respond, summary judgment . . . shall be entered against the party.”

CROSS MOTIONS FOR SUMMARY JUDGMENT

Even though the Plaintiffs have ***not*** carried their burden of proof in this case—that is, even though the Plaintiffs have ***not*** “set forth such facts as would be admissible in evidence” to prove that the fence sits on their parcel of real property and is off by 15 feet, the Defendants have specifically and expressly addressed this issue by and through the ***expert witness*** affidavits of Kim H. Leavitt.

Mr. Leavitt is a professional land surveyor. He is duly licensed to practice professional land surveying. He is competent to testify to the matters herein. He has the education, knowledge, skill, experience, and training to determine the true and correct boundaries of real property, including, without limitation, the true and correct location of fences and other improvements thereon; and he possesses the scientific, technical, and specialized knowledge that are necessary and requisite to do the foregoing. See I.R.E. 702.

The testimony and opinion of Mr. Leavitt are dispositive:

. . . Based on the original survey of John B. David in 1877 and the CORNER PERPETUATION AND FILING RECORD, dated March 19, 1969, the fence sits on the boundary between the Plaintiffs’ parcel of real property and the Defendants’ parcel of real property; it does ***not*** sit on the Plaintiffs’ parcel of real property and it is ***not*** off by 15 feet. Again, the fence is exactly 3,960 feet from the SE corner of Section 17. Thus, the

fence marks the boundary between the Plaintiffs' parcel of real property and the Defendants' parcel of real property.

See AFFIDAVIT OF KIM H. LEAVITT, p. 21, Paragraph 75, dated June 7, 2011.

Predictably, the Plaintiffs do not like the testimony and opinion of Mr. Leavitt; however, whether the Plaintiffs like it or not, is not relevant: The Plaintiffs did not file an opposing affidavit from a professional land surveyor; they did not "set forth such facts as would be admissible in evidence" in order to oppose the testimony and opinion of Mr. Leavitt; and they did not retain an "affiant who is competent to testify." See I.R.C.P. 56(e).

In sum:

1. Based on admissible evidence in the record, the testimony and opinion of Mr. Leavitt are unopposed.
2. Based on admissible evidence in the record, the testimony and opinion of Mr. Leavitt are undisputed.
3. Based on admissible evidence in the record, the testimony and opinion of Mr. Leavitt are uncontroverted.

As previously noted, the Plaintiffs cannot "rest upon mere allegations or denials"; instead, they "must set forth specific facts showing that there is a genuine issue for trial." See I.R.C.P. 56(e). The Plaintiffs have not done so, and argument of counsel is not sufficient.

ORAL ARGUMENT

The court heard the parties' oral arguments on September 12, 2011. During the course of oral argument, Mr. Manwaring offered to augment the record with

“copies from the surveyor’s manual on how you do this kind of thing.” Again, Mr. Manwaring is ***not*** a professional land surveyor. He is ***not*** licensed to practice professional land surveying. He is a lawyer.

Nonetheless, the court agreed. Thus, Mr. Manwaring filed the AUGMENTED MEMORANDUM OF ADDITIONAL POINTS AND AUTHORITIES IN SUPPORT OF THE CAMPBELLS’ MOTION FOR SUMMARY JUDGMENT, dated September 23, 2011.

In his memorandum, Mr. Manwaring cited two paragraphs from the **Manual of Surveying Instructions**—to wit, Paragraph 3-133 and Paragraph 3-137.

In addition, Mr. Manwaring included a quote from a law review article, published in 1960.

With respect to the two paragraphs—that is, Paragraph 3-133 and Paragraph 3-137, Mr. Manwaring simply hand-selected two paragraphs that, according to him, relate to “lost or obliterated original monuments” and “proportioning.”

Of course, Mr. Manwaring does ***not*** have the education, knowledge, skill, experience, and training to survey real property, to determine the true and correct boundaries thereof, including, without limitation, the true and correct location of fences and other improvements thereon, and to locate and establish, or relocate and re-establish, and mark and perpetuate survey corners in accordance with Chapter 16, Title 55, of the Idaho Code.

In addition, he does ***not*** have the scientific, technical, and specialized knowledge that are necessary and requisite to do the foregoing. See I.R.E. 702.

In sum, Mr. Manwaring does not, for lack of a better word, have the necessary and requisite arsenal to read the **Manual of Surveying Instructions** and thereby know “how you do this kind of thing.” That is the reason that the judicial system relies on expert witnesses, not argument of counsel:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence and determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

See I.R.E. 702.

The “fact in issue” in this case is the location of the fence and the boundary between the parties’ respective parcels of real property. The testimony and opinion of Mr. Leavitt show that the fence does not sit on the Plaintiffs’ parcel of real property and it is not off by 15 feet; instead, the fence sits on the boundary between the Plaintiffs’ parcel of real property and the Defendants’ parcel of real property.

Mr. Leavitt is an expert witness. Mr. Manwaring is not. The **Manual of Surveying Instructions** is 494 pages long. Thus, the Defendants respectfully object to Mr. Manwaring’s citing of Paragraph 3-133 and Paragraph 3-137 to show “how you do this kind of thing.” See I.R.E. 103(a). The undisputed testimony and opinion of Mr. Leavitt are competent, admissible, and sufficient. See I.R.C.P. 56(e).

With respect to the law review article, published in 1960, Mr. Manwaring does not understand the importance of the last sentence thereof:

. . . In the final analysis, apportionment is but a rule of last resort, it is applied only in the absence of any markings upon the ground of the division lines between parcels carved out of the same tract.

Mr. Leavitt understands it: The original surveyor did not mark the 16th corners of Section 17 and he did not include the 16th corners on the original survey of 1877.

That is the reason that Mr. Leavitt personally viewed the parties' respective parcels of real property; that is the reason that he considered the grade or slope of the land from north to south; that is the reason that he considered the engineering and planing of the ditch from south to north; that is the reason that he considered the location and construction of the dike from east to west; that is the reason that he considered the location and construction of the fence across the entire NE1/4; that is the reason that he reviewed and considered the pleadings and other documents in this case, including the affidavits; that is the reason that he reviewed and considered the deed and other documents in the chain of title, including the alloquate deeds in 1950; and that is the reason that he reviewed and considered the original survey of 1877, the survey notes, and the corner perpetuations. See REPLY AFFIDAVIT OF KIM H. LEAVITT, dated September 6, 2011.

In short, based on the history of the parties' respective parcels of real property and the evidence or "markings upon the ground," Mr. Leavitt formed his opinion; and he used and relied upon facts and data that are customarily and reasonably used and relied upon by experts in the field of professional land surveying in forming his opinion. See I.R.E. 703.

RED HERRING

The foregoing issue is a red herring. Let us assume, hypothetically, that the court concludes:

1. That the Plaintiffs are right—that is, the fence sits on their parcel of real property and is off by 15 feet; and/or
2. That Mr. Leavitt is wrong—that is, the fence does not mark the boundary between the parties' respective parcels of real property.

If the court so concludes, the Defendants have nonetheless established and proven that they now own the foregoing 15 feet and the fence has become the boundary between their respective parcels of real property, based on the doctrine of adverse possession and/or the doctrine of boundary by agreement or acquiescence.

With respect to the doctrine of adverse possession, the Defendants have exhaustively detailed the facts in support thereof. The Plaintiffs have candidly admitted to each and every element of proof. In simple terms, “there is no genuine issue as to any material fact.” See I.R.C.P. 56(c).

With respect to the doctrine of boundary by agreement or acquiescence, the Defendants have exhaustively detailed the facts in support thereof. The Plaintiffs have candidly admitted to each and every element of proof. In simple terms, “there is no genuine issue as to any material fact.” See I.R.C.P. 56(c).

The bottom line in this case is simple and straightforward:

1. The Plaintiffs do not know who constructed the fence.
2. The Plaintiffs do not know when it was constructed.
3. The Plaintiffs do not know why it was constructed.

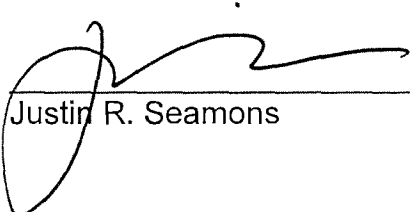
On the one hand, the Plaintiffs and their predecessors in interest have never enclosed the real property that lies north of the fence; they have never cultivated it, improved it, used it, irrigated it, or put it in production; they have never received rental income from it; they have never received a share crop from it; they have never posted it for sale; and they have never notified any third party, whether by way of actual notice or constructive notice, that the fence allegedly does not sit on the boundary between the parties' respective parcels of real property.

On the other hand, the Defendants and their predecessors in interest have always enclosed the real property that lies north of the fence; they have always cultivated it, improved it, used it, irrigated it, and put it in production; and they have now installed a pivot, mainline, and motor on the N1/2 of the NE1/4, which further improved it.

CONCLUSION

The Defendants respectfully move the court to grant their MOTION FOR SUMMARY JUDGMENT. In this regard, "there is no genuine issue as to any material fact" and they are "entitled to a judgment as a matter of law." See I.R.C.P. 56(c).

Dated September 28, 2011.

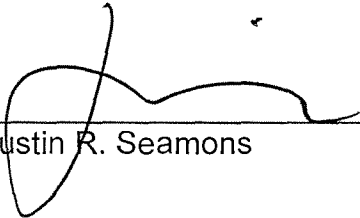


Justin R. Seamons

CERTIFICATE OF SERVICE

I served a copy of the foregoing OBJECTION TO AUGMENTED MEMORANDUM OF ADDITIONAL POINTS AND AUTHORITIES IN SUPPORT OF THE CAMPBELLS' MOTION FOR SUMMARY JUDGMENT on the following person on September 28, 2011:

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271


Justin R. Seamons

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

7TH JUDICIAL DISTRICT COURT
BONNEVILLE COUNTY, IDAHO

OCT 28 P 4:23

V. LEO CAMPBELL, et al,

Plaintiffs,

v.

JAMES C. KVAMME, et al,

Defendants.

Case No. CV-2010-3879

OPINION AND ORDER ON
PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

I.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs and Defendants own parcels of real property located in Section 17, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho. The north boundary of the Plaintiffs' parcel is contiguous with the south boundary of the Defendants' parcel. Plaintiffs filed a complaint on June 30, 2010 and Defendants filed an answer and counterclaim on July 27, 2010. The issue now before the Court concerns the boundary line between Plaintiffs' and Defendants' parcels. Defendants allege that there is a fence on the boundary line between the two parcels and Plaintiffs allege that the actual boundary line is about 15 feet north of the fence.

Plaintiffs filed a motion for partial summary judgment on May 17, 2011. Defendants filed a motion for summary judgment on June 7, 2011. The motions for summary judgment came on for hearing before this Court on September 12, 2011.

OPINION AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

CV-2010-3879

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After considering the argument of counsel and the submitted briefs, the Court now renders its decision.

II.

STANDARD OF REVIEW

Rule 56(c), Idaho Rules of Civil Procedure, provides that “summary judgment shall be granted forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *DBSI/TRI V v. Bender*, 130 Idaho 796, 801, 948 P.2d 151, 156 (1997) (citing *Mutual of Enumclaw Ins. Co. v. Roberts*, 128 Idaho 232, 234, 912 P.2d 119, 121 (1996)).

When assessing the motion for summary judgment, all controverted facts are to be liberally construed in favor of the nonmoving party. Furthermore, the trial court must draw all reasonable inferences in favor of the party resisting the motion. *Litz v. Robinson*, 131 Idaho 282, 283, 955 P.2d 113, 114 (Ct. App. 1998) (citing *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991) and *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994)). However, where the evidentiary facts are not disputed and the trial court rather than a jury will be the finder of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences. *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519 (1982). If reasonable people could reach different conclusions based on the evidence, the motion must be denied. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 720, 791 P.2d 1285, 1299 (1990).

OPINION AND ORDER ON PLAINTIFFS’ MOTION FOR PARTIAL SUMMARY JUDGMENT AND
DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

CV-2010-3879

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The nonmoving party “may not rest upon the mere allegations or denials of that party’s pleadings, but the party’s response, by affidavits or as otherwise provided..., must set forth specific facts showing that there is a genuine issue for trial.” I.R.C.P. 56(e). In attempting to establish such facts, “a mere scintilla of evidence or only slight doubt as to the facts” is insufficient to create a genuine issue of material fact. *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 87, 996 P.2d 303, 306 (2000). In other words, “the party opposing the motion must present more than a conclusory assertion that an issue of fact exists.” *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999).

III.
ANALYSIS

Neither party knows when the fence at issue was erected. The parties agree that the fence has been in its present location since their predecessors in interest purchased their parcels of real property in 1950. V. Leo Campbell testified that he believes the fence was there since before the property was purchased in 1919 by the Davises.

Plaintiffs argue that the actual boundary between their parcel and Defendants’ parcel is located 15 feet north of the fence. In support of their argument regarding the boundary line, counsel for Plaintiffs provided his affidavit with a copy of a survey performed by Thompson Engineering attached. That survey, Plaintiffs argue, confirms that the fence lies within their property.

Defendants argue that the fence is located on the boundary line between the two parcels of real property. In support of their argument they have submitted the Affidavit of Kim H. Leavitt, a professional land surveyor licensed to practice in Idaho. His determination, based on the original survey of Section 17 in 1877 performed by John B. David and the location of the SE corner, is that

the fence, which is located exactly 3,960 from that SE corner, is the exact boundary line between the two parcels of land owned by Plaintiffs and Defendants.

Pursuant to Rule 56(e) of the Idaho Rules of Civil Procedure, the record of survey submitted as an exhibit to Plaintiffs' counsel's affidavit, lacks a proper foundation and is not properly before the Court. Therefore, the Plaintiffs have failed to "set forth specific facts showing that there is a genuine issue for trial." As such, and based on the evidence properly before the Court, it appears that the fence is the boundary line between the parcels owned by Plaintiffs and Defendants. The remaining issues argued by counsel regarding adverse possession and boundary by acquiescence do not need to be addressed.


IV.

CONCLUSION AND ORDER

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment is DENIED. Defendants' Motion for Summary Judgment is GRANTED. Title to the property as described in this opinion shall be quieted in Defendants' name. Counsel for Defendants shall prepare an Order consistent with this opinion.

IT IS SO ORDERED.

Dated this 20 day of October, 2011.



Jon J. Shindurling
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 28 day of October, 2011, the foregoing OPINION AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT was entered and a true and correct copy was served upon the parties listed below by mailing, with the correct postage thereon, or by causing the same to be delivered to their courthouse boxes.

Attorney for Plaintiff

Kipp Manwaring
Just Law Office
PO Box 50271
Idaho Falls, Idaho 83405

Attorney for Defendant

Justin Seamons
414 Shoup Avenue
Idaho Falls, ID 83402

Ronald Longmore
Clerk of the District Court
Bonneville County, Idaho

by JLW
Deputy Clerk

11 NOV -3 P3:31

Justin R. Seamons
414 Shoup Avenue
Idaho Falls, ID 83402
Telephone Number: (208) 542-0600
Facsimile Number: (208) 529-4166
Idaho State Bar Number: 3903

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
 Plaintiffs,)
)
 vs.)
)
 JAMES C. KVAMME and DEBRA)
KVAMME,)
)
 Defendants.)
_____)

Case No. CV 10-3879

**JUDGMENT AND DECREE OF QUIET
TITLE**

Whereas, the Plaintiffs duly filed the complaint in this case, dated June 30, 2010;
and

Whereas, the Defendants thereafter filed an answer and counterclaim in this
case, dated July 27, 2010; and

Whereas, the Plaintiffs then filed a motion for summary judgment, dated May 17,
2011; and

Whereas, the Defendants thereafter filed a motion for summary judgment, dated
June 7, 2011; and

JUDGMENT AND DECREE OF QUIET TITLE - 1

RECEIVED
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BY: _____

608

Whereas, the court heard the foregoing motions for summary judgment on September 12, 2011:

Now, therefore, based on the applicable law and good cause appearing therefor, the court hereby enters the following **JUDGMENT AND DECREE OF QUIET TITLE**:

1. The court hereby dismisses the Plaintiffs' complaint with prejudice, including, without limitation, any and all claims that relate or otherwise pertain thereto.

2. The Defendants own a parcel of real property (hereinafter called the "Real Property"), located in the N1/2 of the NE1/4 of Section 17, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho. See Instrument No. 1122583, Bonneville County, Idaho.

3. The court hereby declares and decrees that the above-referenced parcel of Real Property—that is, the Defendants' parcel of Real Property, located in the N1/2 of the NE1/4 of Section 17, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho—includes the following real property:

Any and all real property that lies north of a point or line, located 3,960.00 feet north of the SE corner of Section 17, based on a CORNER PERPETUATION AND FILING RECORD, dated March 19, 1969. See Instrument No. 578952, p. 2, Bonneville County, Idaho. The foregoing point or line—that is, the point or line, located 3,960.00 feet north of the SE corner of Section 17—is the true and correct boundary of the N1/2 of the NE1/4 of Section 17, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho.

4. The court hereby quiets title to the above-referenced parcel of Real Property in the Defendants; in this regard, the court hereby specifically quiets title to the following real property in the Defendants:

Any and all real property that lies north of a point or line, located 3,960.00 feet north of the SE corner of Section 17, based on a CORNER

PERPETUATION AND FILING RECORD, dated March 19, 1969. See Instrument No. 578952, p. 2, Bonneville County, Idaho. The foregoing point or line—that is, the point or line, located 3,960.00 feet north of the SE corner of Section 17—is the true and correct boundary of the N1/2 of the NE1/4 of Section 17, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho.

5. The court hereby declares and decrees that the Defendants, including their successors and assigns forever, are the owners of the above-referenced parcel of Real Property and that their title thereto is marketable and alienable; in this regard, the court hereby specifically declares and decrees that the Defendants, including their successors and assigns forever, are the owners of the following real property and that their title thereto is marketable and alienable:


Any and all real property that lies north of a point or line, located 3,960.00 feet north of the SE corner of Section 17, based on a CORNER PERPETUATION AND FILING RECORD, dated March 19, 1969. See Instrument No. 578952, p. 2, Bonneville County, Idaho. The foregoing point or line—that is, the point or line, located 3,960.00 feet north of the SE corner of Section 17—is the true and correct boundary of the N1/2 of the NE1/4 of Section 17, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho.

6. Finally, the court hereby declares and decrees that the Plaintiffs, including their successors and assigns forever, do not have any right, title, or interest in the above-referenced parcel of Real Property; in this regard, the court hereby specifically declares and decrees that the Plaintiffs, including their successors and assigns forever, do not have any right, title, or interest in the following real property:

Any and all real property that lies north of a point or line, located 3,960.00 feet north of the SE corner of Section 17, based on a CORNER PERPETUATION AND FILING RECORD, dated March 19, 1969. See Instrument No. 578952, p. 2, Bonneville County, Idaho. The foregoing point or line—that is, the point or line, located 3,960.00 feet north of the SE corner of Section 17—is the true and correct boundary of the N1/2 of

the NE1/4 of Section 17, Township 3 North, Range 38 East of the Boise Meridian, Bonneville County, Idaho.

Dated the 3 day of November, 2011.




District Judge

CERTIFICATE OF SERVICE

I served a copy of the foregoing JUDGMENT AND DECREE OF QUIET TITLE on the following people on the 3 day of November, 2011:

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271

Justin R. Seamons
COURT MAIL



Clerk

11 NOV -4 PM 4:46

Justin R. Seamons
414 Shoup Avenue
Idaho Falls, ID 83402
Telephone Number: (208) 542-0600
Facsimile Number: (208) 529-4166
Idaho State Bar Number: 3903

Attorney for Defendants

IN THE DISTRICT COURT OF THE SEVENTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNEVILLE

V. LEO CAMPBELL and KATHLEEN)
CAMPBELL,)
)
Plaintiffs,)
)
vs.)
)
JAMES C. KVAMME and DEBRA)
KVAMME,)
)
Defendants.)
_____)

Case No. CV 10-3879

MEMORANDUM OF COSTS

The Defendants hereby claim costs in this case in accordance with I.R.C.P. 54(d). In this regard, the Defendants respectfully submit the following MEMORANDUM OF COSTS in accordance with I.R.C.P. 54(d)(5).

COSTS AS A MATTER OF RIGHT

1. Filing Fee: \$58.00. See I.R.C.P. 54(d)(1)(C)(1).
2. Deposition Fee – Leo Campbell: \$1,275.00. See I.R.C.P. 54(d)(1)(C)(9).
3. Deposition Fee – Kim Leavitt: \$154.71. See I.R.C.P. 54(d)(1)(C)(10).

TOTAL: \$1,487.71

DISCRETIONARY COSTS

1. Photocopies: \$180.92. See I.R.C.P. 54(d)(1)(D).
2. Postage: \$80.40. See I.R.C.P. 54(d)(1)(D).
3. Title Report: \$150.00. See I.R.C.P. 54(d)(1)(D).
4. Copies of Recorded Documents: \$18.00. See I.R.C.P. 54(d)(1)(D).
5. Mediation Fee: \$270.00. See I.R.C.P. 54(d)(1)(D).
6. Certification Fee: \$1.00. See I.R.C.P. 54(d)(1)(D).
7. Recording Fees: \$29.00. See I.R.C.P. 54(d)(1)(D).

TOTAL: \$729.32

COSTS BY STATUTE

The Defendants also claim costs in this case in accordance with Idaho Code Section 6-402 (counterclaim for quiet title) and/or Idaho Code Section 10-1210.

ATTORNEY'S FEES

The Defendants hereby claim attorney's fees in this case in accordance with I.R.C.P. 54(e), Idaho Code Section 12-121, Idaho Code Section 12-123, and/or I.R.C.P. 11. The affidavit in support of this memorandum of costs states the basis and method of computation of the attorney's fees.

In this regard, please note the following:

1. The Plaintiffs did ***not*** negotiate in good faith. See EXHIBIT A, attached hereto.
2. The Plaintiffs did ***not*** mediate in good faith. See OBJECTION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, dated June 21, 2011.

3. The Plaintiffs resorted to self-help in this case and took action into their own hands—to wit, the Plaintiffs tore out a section of the fence in this case. See OBJECTION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, dated June 21, 2011.

4. The Plaintiffs did not comply with the rules of discovery. See OBJECTION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, dated June 21, 2011.

5. The Plaintiffs “misrepresented” the alleged medical conditions of V. Leo Campbell. See OBJECTION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, dated June 21, 2011.

CONCLUSION

The Defendants claim the foregoing costs and attorney's fees in compliance with I.R.C.P. 54(d)(5); they are, to the best of the Defendants' knowledge and belief, correct.

Dated November 4, 2011.


Justin R. Seamons

CERTIFICATE OF SERVICE

I served a copy of the foregoing MEMORANDUM OF COSTS on the following person on November 4, 2011:

Kipp L. Manwaring
HAND DELIVERED

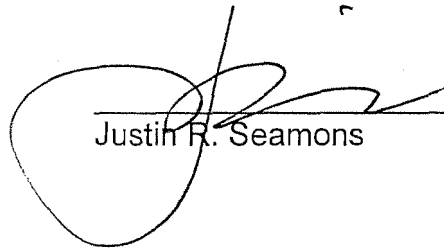

Justin R. Seamons

EXHIBIT A

JUSTIN R. SEAMONS

ATTORNEY AT LAW

SHOUP EXECUTIVE SUITES

414 Shoup Avenue
Idaho Falls, ID 83402

Office: (208) 542-0600
Facsimile: (208) 529-4166

June 2, 2010

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271

Re: Campbell v. Kvamme.

Dear Kipp:

I have prepared this letter to confirm the receipt of your correspondence, dated May 27, 2010. As a preliminary matter, please note that Just Law, by and through Steven W. Boyce, has represented and performed legal services for Mr. Kvamme. Thus, Mr. Kvamme does not waive any conflict of interest, the attorney-client privilege, or otherwise agree to your representing Mr. Campbell.

Now, with respect to the allegations and statements in your correspondence, please note that I have not prepared this letter to argue with you. Suffice it to say that our clients disagree.

1. Mr. Kvamme hereby declines Mr. Campbell's offer of settlement of "\$11,250.00 plus survey costs."

2. Mr. Kvamme purchased his real property for approximately \$2,000.00 per acre. He is willing to double that in full and complete settlement of this matter—that is, he is willing to pay \$4,000.00 to Mr. Campbell for and in consideration of a deed that conforms the purported boundary line with the fence line. As you know, Mr. Campbell has not used the sliver of ground, he does not need it, and he did not even know about it until the recent survey.

3. Contrary to Mr. Campbell's "understanding," he is welcome to talk with Mr. Kvamme, notwithstanding the purported "exclusive agency relationship." In fact,

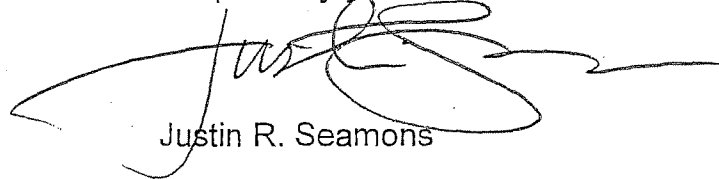
Kipp L. Manwaring
June 2, 2010
Page 2

Mr. Mickelsen has told both Mr. Kvamme and me that he does not want to be in the middle of this issue. Thus, please tell Mr. Campbell to man-up and talk with his neighbor.

4. Finally, if the foregoing offer of \$4,000.00 is not acceptable, please forward the complaint and summons to me for acceptance of service of process. Again, Mr. Kvamme does not waive any conflict of interest, the attorney-client privilege, or otherwise agree to your representing Mr. Campbell, and he hereby reserves any and all rights against you in this regard.

Thank you for your cooperation.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Justin R. Seamons", with a long horizontal flourish extending to the right.

Justin R. Seamons

cc: Mr. and Mrs. Kvamme

August 16, 2010

Justin R. Seamons
Attorney at Law
414 Shoup Avenue
Idaho Falls, Idaho 83402

Re: Kvamme / Campbell Property Boundary
Bonneville County Case No. CV-2010-3879

Dear Mr. Seamons:

With the Campbells, I have reviewed the issues you and I discussed by telephone concerning value of the property and the difference between our respective positions. The Campbells last offer of \$11,250 plus survey costs was their final minimum offer. That offer is now withdrawn.

While the action is pending, the Campbells hereby demand that your clients remove their wheel line and all other moveable personal property from the Campbells' land. Further, the Campbells hereby demand that your clients and their agents cease any use or entering upon the Campbells' land. Any entering upon the land will constitute a trespass.

In response to the counterclaim, the Campbells agree that your clients may remove all improvements from the Campbells' land. In accordance with I.C. § 6-405, your clients are obligated to provide sufficient surety to cover all damages to the land caused by removal of any improvements, including restoration of the land following removal. Should your clients elect such remedy, please contact me immediately to discuss the process, its timing, and required surety. Part of the restoration must include the reconstruction of a lateral ditch removed by your client and installation of a headgate removed by your client.

We await your reply.



Best Regards,

Kipp L. Manwaring
Attorney at Law
KLM/ln

cc: client
10504-CA

619

JUSTIN R. SEAMONS

ATTORNEY AT LAW

SHOUP EXECUTIVE SUITES

414 Shoup Avenue
Idaho Falls, ID 83402

Office: (208) 542-0600
Facsimile: (208) 529-4166

August 18, 2010

SENT VIA FACSIMILE

Kipp L. Manwaring
(208) 523-9146

Re: Campbell v. Kvamme, Case No. CV 10-3879.

Dear Mr. Manwaring:

I have prepared this letter to confirm the receipt of your correspondence, dated August 16, 2010. To be clear, Mr. and Mrs. Campbell are drawing the battle lines over a sliver of farm ground for \$5,750.00:

	\$11,250.00 (Mr. and Mrs. Campbell's "final minimum offer")
-	\$5,500.00 (Mr. and Mrs. Kvamme's offer of settlement)
	<hr/>
	\$5,750.00

Win, lose, or draw, I will notify the court of their decision so that the court can make an informed and proper decision regarding costs and attorney's fees.

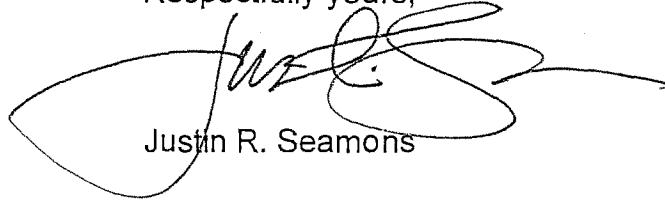
With respect to Mr. and Mrs. Campbell's "demand" that Mr. and Mrs. Kvamme "remove their wheel line and all other movable personal property from the Campbell's land," please notify Mr. and Mrs. Campbell that Mr. and Mrs. Kvamme will ***not*** move their wheel line or other personal property from the "land" because the land is ***not*** Mr. and Mrs. Campbell's land. As you know, the land belongs to Mr. and Mrs. Kvamme. Please notify Mr. and Mrs. Campbell accordingly.

In addition, please notify Mr. and Mrs. Campbell that they are welcome to call Mr. and Mrs. Kvamme's use of the land a "trespass," but, again, the land belongs to Mr. and Mrs. Kvamme. Please notify Mr. and Mrs. Campbell ***not*** to "take action into their own hands," but to follow the law and proceed through the court; otherwise, I will file an application against Mr. and Mrs. Campbell to maintain the 50-year-plus status quo pending the outcome of this case. Again, please notify Mr. and Mrs. Campbell accordingly.

Kipp L. Manwaring
August 18, 2010
Page 2

Finally, with respect to the "remedy" of removing the improvements, the parties will cross that bridge if and when the court concludes that the land is Mr. and Mrs. Campbell's land; however, in the meantime, the "process, timing, and required surety" are not an issue. Again, the land belongs to Mr. and Mrs. Kvamme.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Justin R. Seamons", written over a large, loopy flourish that extends to the left and right.

Justin R. Seamons

JUSTIN R. SEAMONS

ATTORNEY AT LAW

SHOUP EXECUTIVE SUITES

414 Shoup Avenue
Idaho Falls, ID 83402

Office: (208) 542-0600
Facsimile: (208) 529-4166

October 4, 2010

SENT VIA FACSIMILE

Kipp L. Manwaring
(208) 523-9146

Re: Campbell v. Kvamme, Case No. CV 10-3879.

Dear Mr. Manwaring:

I have prepared this letter to confirm the receipt of your correspondence, dated September 30, 2010. As you know, I immediately called your office, but you were not available. Since then, I have talked with Mr. Kvamme and carefully reviewed the history of this case. Please note the following:

With respect to your statement that Mr. Kvamme has been "reluctant to agree on a specific purchase amount," please recall that I called you on September 13 and 27, 2010, regarding the possibility of settling this case on a new basis. The key was a five year lease, thereby, in effect, enabling Mr. Kvamme to amortize the purchase amount. Thus, I asked you to confirm whether Mr. and Mrs. Campbell were willing to consider a five year lease; if so, the parties could then discuss the other terms and conditions. A simple "Yes" or "No" was all that was necessary; instead, you and your client twisted the issues, accused Mr. and Mrs. Kvamme of "not acting in good faith," and finally came clean about Mr. and Mrs. Campbell's inability to transfer the disputed real property in any event. Now Mr. Kvamme fully understands the reason that you and Mr. and Mrs. Campbell have been playing the game. Just so you know, if Mr. and Mrs. Campbell had been willing to consider a five year lease, Mr. Kvamme was willing to make an initial offer of settlement of \$10,000.00 for the disputed real property.

Kipp, I am sorry and disappointed about the history of this case. Your confrontational letters, twisting of issues, needless accusations, and non-disclosure of the true ability of your clients has hurt them in this case and will hereafter hurt your future

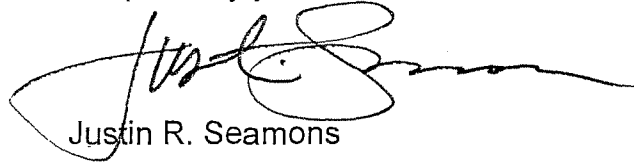
Kipp L. Manwaring
October 4, 2010
Page 2

clients in every case wherein I have to deal with you. In simple terms, "now I know what I'm dealing with." From here on, I will only communicate with you in writing. That way, there will always be a paper trail for the judge.

In closing, I will be in court tomorrow and Wednesday, October 5 and 6, 2010; nonetheless, I should be able to answer the outstanding interrogatories and respond to the outstanding requests for production by Friday, October 8, 2010.

In addition, I need to depose Mr. and Mrs. Campbell, as well as possibly two other people; however, before then, I need to research a few issues at the County. I fully understand Mr. and Mrs. Campbell's strategy of moving for summary judgment before Mr. Kvamme can research the issues in this case and discover the facts herein; nonetheless, this case is barely three months old. Thus, as I notified you before, if you file a motion for summary judgment before the completion of discovery, I will file a motion for an extension of time under I.R.C.P. 56(f).

Respectfully yours,



Justin R. Seamons

cc: Mr. and Mrs. Kvamme

JUSTIN R. SEAMONS

ATTORNEY AT LAW

SHOUP EXECUTIVE SUITES

414 Shoup Avenue
Idaho Falls, ID 83402

Office: (208) 542-0600
Facsimile: (208) 529-4166

October 11, 2010

Kipp L. Manwaring
P.O. Box 50271
Idaho Falls, ID 83405-0271

Re: Campbell v. Kvamme, Case No. CV 10-3879.

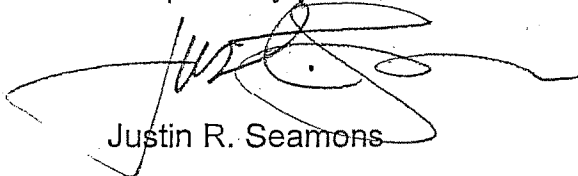
Dear Mr. Manwaring:

As you recall, I sent a letter to you on August 18, 2010, wherein I asked you to notify Mr. and Mrs. Campbell "**not** to take action into their own hands; otherwise, I will file an application against Mr. and Mrs. Campbell to maintain the 50-year-plus status quo pending the outcome of this case."

Notwithstanding the foregoing notice, Mr. and Mrs. Campbell thereafter removed a small section of the fence that runs between the parties' real properties. Please notify Mr. and Mrs. Campbell that they must repair or otherwise put the fence back on or before October 25, 2010; otherwise, Mr. and Mrs. Kvamme will immediately file an application with the court to maintain the status quo. In this regard, Mr. and Mrs. Kvamme will seek costs and attorney's fees. Finally, Mr. and Mrs. Kvamme hereby reserve any and all claims for relief against Mr. and Mrs. Campbell, including, without limitation, damages, interest, costs, and attorney's fees.

Thank you for your cooperation.

Respectfully yours,


Justin R. Seamons

cc: Mr. and Mrs. Kvamme

Justin Seamons

From: Justin Seamons [justin01@cableone.net]
Sent: Wednesday, December 01, 2010 4:51 PM
To: 'Kipp Manwaring'
Subject: Campbell v. Kvamme, Case No. CV 10-3879.

Dear Mr. Manwaring:

I received your e-mail, below. I am not trying to be confrontational or to create an air of hostility, but, as you can imagine, I am disappointed. However, I am not surprised.

The issue of the "mortgage holder requiring an application plus costs for a partial release" is a red herring. You and I both know that. For example, if the parties were to settle this case, the parties could file a stipulation for the entry of a decree of quiet title. The decree of quiet title would decree that the disputed real property is part of the N1/2NE1/4 and not part of the S1/2NE1/4.

In addition, I did not suggest or even infer that a lease was still necessary in order to discuss the possibility of settlement.

The bottom line, which you succinctly stated, is that Mr. Campbell is "fixed" in his position and "not interested in settlement." He never was interested.

I appreciate Mr. Campbell's "*I'm all in*" attitude, but please notify him: Win, lose, or draw, I will notify the court of Mr. Kvamme's repeated efforts to settle this case when it comes time to address the issue of costs and attorney's fees.

With respect to your motion to shorten time, I oppose it and I will appear at the hearing at 10:30 a.m. on December 2, 2010. If you do not produce Mr. Campbell, Mrs. Campbell, and Dr. Pertulla, you do so at your own risk. You have the burden to show cause, not me.

Finally, I reserve the right to re-schedule the date and time of Mr. Campbell's deposition. In this regard, please note the following:

1. In light of the fact that the court may grant your motion, I may have to re-schedule the deposition accordingly. The deposition may involve several continuances, several 1/2 day segments, and so on. Nonetheless, I will complete it.
2. The strategy of endlessly creating and raising issues during the closing hours before the deposition is not going to work. Depending on the time that I lose today and tomorrow, I will reassess my readiness to depose Mr. Campbell. In the meantime, I will continue preparing.

Justin

From: Kipp Manwaring [mailto:kmanwaring@justlawidaho.com]
Sent: Wednesday, December 01, 2010 3:35 PM
To: Justin Seamons
Cc: Leslie Northrup
Subject: Re: Campbell v. Kvamme, Case No. CV 10-3879.

I reviewed your proposal with my clients. As already explained in prior correspondence, the Campbells have a current lease on their land and cannot lease to the Kvammes. The Campbells further learned that their mortgage holder requires an application plus costs for a partial release. Consequently, they declined that offer. Presently, the Campbells are fixed in their position and are not interested in a settlement conference. Given the circumstances, I recommend we stipulate that the court withdraw its order of mediation.

625

12/1/2010

Meanwhile, Leo Campbell suffers from medical conditions limiting his ability to leave his home and participate in a deposition. Your position on that matter necessitates a hearing on our pending motion tomorrow at 10:30 a.m. before Judge Shindurling. You will receive the amended notice together with the motion shortening time.

If you feel compelled to examine Dr. Pertulla, it is up to you to subpoena him. I flatly disagree with your arguments concerning my affidavit and the pending motion.

Kipp L. Manwaring
JUST LAW OFFICE
381 Shoup Ave., Ste. 211
Idaho Falls, ID 83402
208-523-9106
800-923-9106

----- Original Message -----

From: Justin Seamons

To: 'Kipp Manwaring'

Sent: Wednesday, December 01, 2010 2:05 PM

Subject: Campbell v. Kvamme, Case No. CV 10-3879.

Dear Mr. Manwaring:

I met with Mr. Kvamme during lunch in preparation for the deposition on Friday, December 3, 2010. Mr. Kvamme is understandably skeptical about the possibility of settlement. As you recall, he has already made three offers of settlement: \$3,500.00, \$4,000.00, and \$5,500.00. In addition, he attempted to make a fourth offer of settlement, but was unable to do so because Mr. Campbell was unwilling to consider a lease of the real property and, in addition, he finally disclosed that he is unable to even transfer the disputed real property. The fourth offer of settlement would have involved a lease of the real property at fair market value, plus an initial offer of \$10,000.00.

In the meantime, Mr. Campbell has only made one offer of settlement: \$11,250.00, plus survey costs.

Notwithstanding the foregoing, Mr. Kvamme is still willing to give settlement a chance. To this end, he suggested that we postpone the deposition on Friday and the hearing on Monday, and meet. We are willing to meet at your office or mine. We are willing to meet on Friday, December 3, 2010, in the afternoon, anytime after 2:00 p.m.

If the parties are going to meaningfully discuss the possibility of settlement, now is the time. If we go forward with the deposition and hearing, which will include the cross-examination of Mr. Campbell, Mrs. Campbell, and Dr. Pertulla, the possibility of settlement is over. The "wedge" of costs and attorney's fees will push our clients too far apart.

I need a response as soon as possible; in the meantime, I am continuing to prepare for the deposition, and I would just as soon as save my client the money and use it toward settlement.

I guess the next move is up to you and Mr. Campbell.

Please confirm as soon as possible.

Justin

626

JUSTIN R. SEAMONS

ATTORNEY AT LAW

SHOUP EXECUTIVE SUITES

414 Shoup Avenue
Idaho Falls, ID 83402

Office: (208) 542-0600
Facsimile: (208) 529-4166

December 1, 2010

SENT VIA FACSIMILE

Kipp L. Manwaring
(208) 523-9146

Re: Campbell v. Kvamme, Case No. CV 10-3879.

Dear Mr. Manwaring:

I met with Mr. Kvamme during lunch in preparation for the deposition on Friday, December 3, 2010. Mr. Kvamme is understandably skeptical about the possibility of settlement. As you recall, he has already made three offers of settlement: \$3,500.00, \$4,000.00, and \$5,500.00. In addition, he attempted to make a fourth offer of settlement, but was unable to do so because Mr. Campbell was unwilling to consider a lease of the real property and, in addition, he finally disclosed that he is unable to even transfer the disputed real property. The fourth offer of settlement would have involved a lease of the real property at fair market value, plus an initial offer of \$10,000.00.

In the meantime, Mr. Campbell has only made one offer of settlement: \$11,250.00, plus survey costs.

Notwithstanding the foregoing, Mr. Kvamme is still willing to give settlement a chance. To this end, he suggested that we postpone the deposition on Friday and the hearing on Monday, and meet. We are willing to meet at your office or mine. We are willing to meet on Friday, December 3, 2010, in the afternoon, anytime after 2:00 p.m.

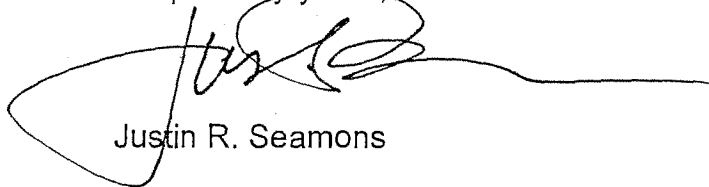
If the parties are going to meaningfully discuss the possibility of settlement, now is the time. If we go forward with the deposition and hearing, which will include the cross-examination of Mr. Campbell, Mrs. Campbell, and Dr. Pertulla, the possibility of settlement is over. The "wedge" of costs and attorney's fees will push our clients too far apart.

Kipp L. Manwaring
December 1, 2010
Page 2

I need a response as soon as possible; in the meantime, I am continuing to prepare for the deposition, and I would just as soon as save my client the money and use it toward settlement.

I guess the next move is up to you and Mr. Campbell. Please confirm as soon as possible.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Justin R. Seamons", with a long horizontal flourish extending to the right.

Justin R. Seamons

JUSTIN R. SEAMONS

ATTORNEY AT LAW

SHOUP EXECUTIVE SUITES

414 Shoup Avenue
Idaho Falls, ID 83402

Office: (208) 542-0600
Facsimile: (208) 529-4166

December 30, 2010

SENT VIA FACSIMILE

Kipp L. Manwaring
(208) 523-9146

Re: Campbell v. Kvamme, Case No. CV 10-3879.

Dear Mr. Manwaring:

As you recall, you and I attended a scheduling conference on October 12, 2010. You asked the court to order the parties to mediate. The court agreed and thereupon entered an ORDER REFERRING CASE TO MEDIATION on October 13, 2010.

You then sent an e-mail to me on December 1, 2010, stating that the Plaintiffs are "fixed in their position and not interested in settlement." You suggested that "we stipulate that the court withdraw its order."

I have conferred with Mr. Kvamme regarding the foregoing and he is not willing to "withdraw" or otherwise forego mediation. He believes, and has always believed, that the parties can and should settle this case. To this end, Mr. Kvamme hereby proposes the following three mediators:

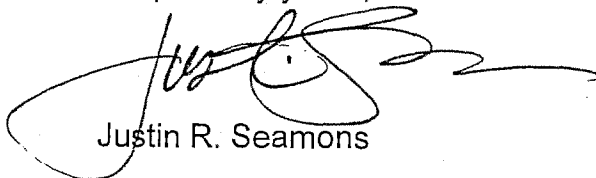
1. Reed W. Larsen of Cooper & Larsen
2. Daniel C. Hurlbutt, retired District Judge
3. Alan C. Stephens of Thomsen Stephens Law

Please confirm on or before Friday, January 7, 2011; otherwise, I will file a motion for the court to appoint a mediator in accordance with the ORDER REFERRING CASE TO MEDIATION.

Kipp L. Manwaring
December 30, 2010
Page 2

Thank you for your cooperation.

Respectfully yours,

A handwritten signature in black ink, appearing to read 'Justin R. Seamons', with a large, sweeping flourish extending to the right.

Justin R. Seamons

JST LAW

IDAHO ATTORNEYS AT LAW

381 SHOUP AVE., SUITE 211 • P.O. BOX 50271 • IDAHO FALLS, ID 83405-0271

PH: 208-523-9106 TOLL-FREE: 1-800-923-9106 • Fx: 208-523-9146 • E-MAIL: justlaw@justlawidaho.com

January 7, 2011

Sent via Facsimile and Regular Mail

Justin R. Seamons
Attorney at Law
414 Shoup Avenue
Idaho Falls, Idaho 83402
Fax No. 529-4166

Re: Kvamme / Campbell Property Boundary
Bonneville County Case No. CV-2010-3879

Dear Mr. Seamons:

We have received your latest notice of the continued deposition of Leo Campbell. Following the mediation, Mr. Campbell was hospitalized. What was believed to be a kidney stone was actually severe heart and lung reactions including infarctions. Consequently, Mr. Campbell remains hospitalized and is being treated for his lungs and heart condition.

Due to Mr. Campbell's condition, he will not be available for the schedule deposition. We ask that you vacate the deposition pending his medical treatment. Otherwise, we will need to file a motion.

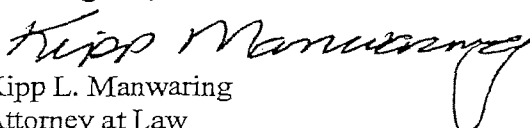
Meanwhile, the Campbells have authorized me to offer your clients the following terms for final resolution of the action. The Kvmammes will pay the Campbells the sum of \$10,000.00; payment in full to be made within 30 days of this offer and prior to any stipulation and judgment. Both parties will share equally the cost for a survey to obtain a legal description for the .9-acre of property. The Kvmammes will pay all costs to prepare and submit a stipulation for quiet title and judgment quieting title and any recording fees. Upon payment, the parties will execute a mutual release. The Campbells will pay for the cost of a mutual release.

This offer is the Campbells' final offer for settlement. They will not negotiate a lower payment amount. This offer remains open until 3:00 p.m., Friday, February 25, 2011.

If the offer is not accepted, I am directed to proceed with summary judgment.

We anticipate your reply.

Best Regards,


Kipp L. Manwaring
Attorney at Law

KLM/lm
cc: client
10504-C

JUSTIN R. SEAMONS

ATTORNEY AT LAW

SHOUP EXECUTIVE SUITES

414 Shoup Avenue
Idaho Falls, ID 83402

Office: (208) 542-0600
Facsimile: (208) 529-4166

February 28, 2011

SENT VIA FACSIMILE

Kipp L. Manwaring
(208) 523-9146

Re: Campbell v. Kvamme, Case No. CV 10-3879.

Dear Mr. Manwaring:

I have prepared this letter to follow up your correspondence, dated February 17, 2011. As you recall, Mr. Campbell made an offer of settlement of \$10,000.00, plus terms and conditions. Please thank Mr. Campbell for his offer of settlement, but Mr. Kvamme hereby declines it.

Mr. Kvamme is still willing to settle this case. In this regard, Mr. Kvamme has asked me to present the following two counteroffers of settlement:

1. On the one hand, Mr. Kvamme is willing to pay \$5,000.00 to Mr. Campbell in full and complete settlement of this case, including, without limitation, any and all claims that relate or otherwise pertain thereto. Again, this is a sliver of farm ground, less than one acre in size, and the fair market value of farm ground is \$4,500.00 per acre. In any event, I will prepare the Stipulation for Entry of Decree of Quiet Title, the Decree of Quiet Title, including the legal description, and the Settlement Agreement.

or

2. On the other hand, Mr. Kvamme is willing to pay \$8,000.00 to Mr. Campbell in full and complete settlement of this case, including, without limitation, any and all claims that relate or

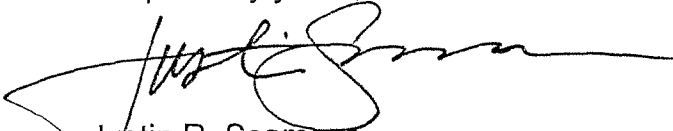
otherwise pertain thereto, subject to the following terms and conditions:

- a. Mr. Campbell and his siblings will rent their properties to Mr. Kvamme so that he can run his pivot for the entire circle. The rental agreement will begin for the next crop year—that is, 2012. Mr. Kvamme will have the right to work the ground this fall in order to prepare the ground for the next crop year. The rental agreement will run for five years—that is, 2012 through 2016. The rental agreement will run with the ground and bind successors and assigns. The parties will have to negotiate a mutually acceptable amount for cash rent. Mr. Kvamme will pay \$4,000.00 upon execution and \$1,000.00 on or before December 31, 2012, December 31, 2013, December 31, 2014, and December 31, 2015. Again, I will prepare the Stipulation for Entry of Decree of Quiet Title, the Decree of Quiet Title, including the legal description, the Settlement Agreement, and the rental agreement.

Like Mr. Campbell's offer of settlement, the foregoing two counteroffers of settlement will remain open for one week—that is, until 3:00 p.m. on Monday, March 7, 2011.

Please confirm.

Respectfully yours,



Justin R. Seamons

JUST LAW

IDAHO ATTORNEYS AT LAW

381 SHOUP AVE., SUITE 211 • P.O. BOX 50271 • IDAHO FALLS, ID 83405-0271

PH: 208-523-9106 TOLL-FREE: 1-800-923-9106 • FX: 208-523-9146 • E-MAIL: justlaw@justlawidaho.com

April 27, 2011

Sent via Facsimile

Justin R. Seamons
Attorney at Law
414 Shoup Avenue
Idaho Falls, Idaho 83402
Fax No. 529-4166

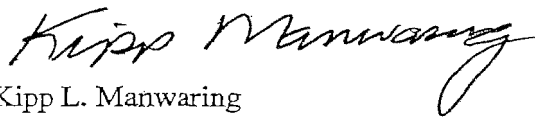
Re: Kvamme / Campbell Property Boundary
Bonneville County Case No. CV-2010-3879

Dear Mr. Seamons:

After considering the Kvammes' offer about the long-term lease, the Campbells have decided not to accept that offer. The offer does have merit in reaching a resolution to the dispute, but the Campbells are concerned about the potential adverse affect of a long-term lease on their ability to sell their property together with uncertainty of payment amount and terms.

Although Mr. Campbell is not currently able to sit for deposition or trial, the Campbells have asked me to proceed with a motion for summary judgment. I recognize you may want to extend time until you have opportunity to complete discovery. However, I am giving notice that I will be filing a motion for summary judgment.

Best Regards,



Kipp L. Manwaring
Attorney at Law
KLM/lm
cc: client
10504-CA

Justin Seamons

From: Justin Seamons [justin01@cableone.net]
Sent: Wednesday, April 27, 2011 2:51 PM
To: 'Kipp Manwaring'
Subject: Campbell v. Kvamme, Case No. CV 10-3879.

Dear Kipp:

I received your fax, dated April 27, 2011. I do not mind if Mr. and Mrs. Campbell want to decline the offer of settlement because of an alleged "concern about the potential adverse affect of a long-terms lease on their ability to sell their property"; however, I want to make it very clear that the purported "uncertainty of payment amount and terms" is nonsense. Mr. and Mrs. Campbell have repeatedly mischaracterized any and all issues in this case, making it appear that Mr. and Mrs. Kvamme have done something wrong, inappropriate, or incomplete. Please notify Mr. and Mrs. Campbell that Mr. and Mrs. Kvamme are ready, willing, and able to negotiate a fair and mutually acceptable "payment amount and terms." In this regard, I previously told you in very plain terms that Mr. and Mrs. Kvamme are willing to fair market value in advance. Thus, any purported "uncertainty" is simply a figment of Mr. and Mrs. Campbell's imagination.

In any event, you are welcome to file a motion for summary judgment. Again, Mr. and Mrs. Campbell have repeatedly threatened to file a motion for summary judgment before Mr. and Mrs. Kvamme can complete their discovery. Thus, if you file a motion for summary judgment, I will file a motion for an extention of time in accordance with I.R.C.P. 56(f). In addition, Mr. and Mrs. Kvamme hereby reserve the right to file a motion for sanction against Mr. and Mrs. Campbell and/or you in accordance with I.R.C.P. 11. In this regard, please recall the comments of Judge Shindurling during the hearing of Mr. and Mrs. Campbell's feigned motion for protective order--that is, that Mr. and Mrs. Kvamme will be allowed to depose Mr. and Mrs. Campbell.

Justin

635

4/27/2011

Justin Seamons

From: Kipp Manwaring [kmanwaring@justlawidaho.com]
Sent: Monday, May 23, 2011 5:06 PM
To: Justin Seamons
Cc: Leslie Northrup
Subject: Campbell v. Kvamme

Justin,

To keep record of settlement discussions for my clients, I am sending this email in lieu of a telephone call.

I was able to visit with my clients about settlement options. They are willing to settle the action by selling the strip of land to your clients. However, the Campbells are not willing to negotiate a price below \$12,000. At that price, your clients would need to furnish any required survey and complete necessary documents such as a deed and settlement agreement. We can prepare a stipulation and order of dismissal.

If your clients are willing to settle for that amount, we can finalize an agreement.

Mr. Campbell is going in for additional medical care this week and will likely remain unavailable for some time.

We await responses from Margy Spradling and Jo Campbell concerning their available dates. As directed by my clients, I will not personally attend either of those depositions, but will participate by telephone conference.

Kipp L. Manwaring
JUST LAW OFFICE
381 Shoup Ave., Ste. 211
Idaho Falls, ID 83402
208-523-9106

636

Justin Seamons

From: Justin Seamons [justin01@cableone.net]
Sent: Wednesday, August 31, 2011 9:07 AM
To: 'Kipp Manwaring'
Subject: Campbell v. Kvamme, Case No. CV 10-3879.

Dear Kipp:

I received your documents regarding the pending motions for summary judgment. That gave me an opportunity to discuss the status of the case with Mr. Kvamme.

To his credit, and to my surprise, he is still trying to think of ways to settle this case. Based on rough measurements, it appears to him that the power box, pump, mainline, and pivot all sit outside the disputed 15' of dirt. The concrete pad for the pivot is perhaps seven to eight feet. Mr. Kvamme is willing to bear the cost of surveying the exact line, but it appears (again, based on rough measurements) that the parties could split the 15' of dirt about 50/50.

Thus, please let me know if Mr. Campbell is willing to settle this case in full on the basis of a 50/50 split of the disputed 15' of dirt. Again, Mr. Kvamme is willing to bear the cost of surveying the exact line. As far as the fence goes, Mr. Campbell can move it to the new line if and when he pleases; in the meantime, the parties can simply leave it where it stands.

Justin

637

8/31/2011