10-20-2008

Backman v. Lawrence Respondent's Brief Dckt. 35151

IN THE SUPREME COURT OF THE STATE OF IDAHO

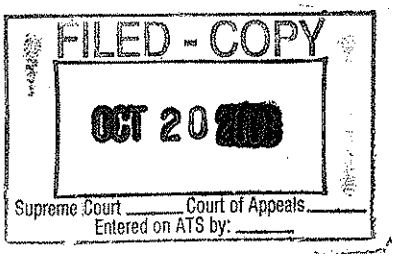
BOB BACKMAN and RHONDA BACKMAN, husband and wife,

Appellants,

v.

JAMES A. SPAGON and LINDA I. SPAGON, husband and wife; KENNETH G. LLOYD and PRISCILLA I. LLOYD, husband and wife; BRUCE JOHNSON and DEBORAH JOHNSON, husband and wife; THOMAS L. LAWRENCE and DEBRA A. LAWRENCE, husband and wife; KEVIN D. SCHRADER, a single person; WESTON SCOTT MILLWARD, a married man; and PEND OREILLE VIEW ESTATES OWNERS ASSOCIATION, INC, an Idaho non-profit corporation, GREGORY ZIRWES and THERESA ZIRWES, husband and wife; CHRISTOPHER BESSLER, an individual; PATRICK McKENNA and MICHELLE McKENNA, husband and wife, and CHRISTOPHER E. GRANT and SUSAN R. GRANT, husband and wife,

Respondents.



SUPREME COURT NO. 35151

BRIEF OF RESPONDENTS SPAGON, ET AL

Honorable Charles W. Hosack, District Court Judge, Presiding

Appeal from the District Court of the First Judicial District for Bonner County
Case No. CV-2008-365

IN THE SUPREME COURT OF THE STATE OF IDAHO

BOB BACKMAN and RHONDA BACKMAN, husband and wife, Appellants, v. JAMES A. SPAGON and LINDA I. SPAGON, husband and wife; KENNETH G. LLOYD and PRISCILLA I. LLOYD, husband and wife; BRUCE JOHNSON and DEBORAH JOHNSON, husband and wife; THOMAS L. LAWRENCE and DEBRA A. LAWRENCE, husband and wife; KEVIN D. SCHRADER, a single person; WESTON SCOTT MILLWARD, a married man; and PEND OREILLE VIEW ESTATES OWNERS ASSOCIATION, INC, an Idaho non-profit corporation, GREGORY ZIRWES and THERESA ZIRWES, husband and wife; CHRISTOPHER BESSLER, an individual; PATRICK McKENNA and MICHELLE McKENNA, husband and wife, and CHRISTOPHER E. GRANT and SUSAN R. GRANT, husband and wife, Respondents.	SUPREME COURT NO. 35151

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I. STATEMENT OF CASE

A. Nature of Case

The 100 acres purchased by Bob and Rhonda Backman in 2005 was a part of thousands of acres of timberland owned by Humbird Lumber Company in Bonner County between 1900 and 1948.[1] From its commencement, Humbird Lumber Company put its lands on the market for sale as soon as they were cut over. Tr., p. 680, L. 6 – 9.

The Backman 100 acres is steep, rocky and never had been used for any purpose other than logging. This case was initiated and has been carried on because the title insurance examiner in the Sandpoint office of Alliance Title misread two recorded easements as providing access to the 100 acres when they did not. Tr., p. 73, L. 20 –25; p. 74, L. 1 –7. Chicago Title Company issued a title insurance policy dated January 22, 2005 to the Backmans in the amount of $475,000 guaranteeing access by record to the 100 acres when there was no deeded access. Tr., p. 97, L. 20 – 23. Defendants Exhibit Q. Chicago Title Company had earlier issued a title insurance policy dated December 9, 2004 to the Powers in the amount of $420,000 similarly guaranteeing access. Defendants Exhibit D.

After finding that there was no access of record, title insurance counsel acting on behalf of the Backmans filed suit on February 24, 2006 seeking access upon other theories, all of which were rejected as lacking basis in fact and in law

[1] There are eight reported Idaho Supreme Court cases in which Humbird Lumber Company is a party. Vol. 10, Idaho Digest, Table of Cases, p. 293.

by Judge Charles W. Hosack in two opinions. R., Vol. II, pp. 258 –299 and 370 – 375.

As of the date of acquisition of the 100 acres in Section 8 by the Backmans, there were no recognizable roads in use to Section 8 from any of the properties in Section 7 owned by any of the named respondents.

B. Course of Proceedings

The course of proceedings set forth in the Appellants' Brief is chronologically accurate. Respondents Spagon, et al will supplement as follows.

Plaintiffs voluntarily dismissed Robert and Lynn Walsh as defendants on December 11, 2006. The Backmans filed a Second Amended Complaint on January 11, 2007 adding Christopher and Susan Grant who had purchased the Walsh property. R., Vol. I, pp. 113 – 122. Attorney Peter C. Erbland has represented the Grants.

Respondents Spagon, et al joined by the Grants answered the Second Amended Complaint asserting that none of the Backman theories were supported by facts or law. R., Vol. I, pp. 91 – 97. An amended counterclaim was filed on January 26, 2007 seeking to enjoin the Backmans from any entry upon any of the roads in Section 7 maintained and controlled by Pend Oreille View Estates Association, Inc. (POVE) R., Vol. I, pp. 130 –142.

Appellants Spagon, et al and Grants rejected each of the Backman theories.

1. The Backmans could not prove any road use by them or their predecessors which was open and notorious or continuous and uninterrupted or adverse under a claim of right or with actual or

imputed knowledge of the owners or for the five year period. None of the five required elements of prescriptive use could be proven.

2. In *Cohen v. Larson,* 123 Idaho 82, 867 P.2d 956 (1993), a unanimous Idaho Supreme Court held that development of private residences was not a public use so private condemnation was not allowable under the Idaho Constitution and statutes. The use sought by the Backmans was for private residences.

3. The three necessary elements of easement by necessity, unity of ownership, necessity at the time of severance and present great necessity did not exist and could not be proven.

4. There could not be any coupling of easements. The law does not allow for such. There, in fact, were no easements in Section 7 to Section 8 to couple on any theory.

R., Vol. II, Ex. Post Trial Brief of Spagon, et al, October 2, 2007, pp. 6 – 18.

Appellants' Brief accurately summarizes Judge Hosack's post-trial actions.

B. Statement of Facts

In 1890, when Idaho became a state, the human settlement in the Panhandle was concentrated in the mining district in Shoshone County which had been one of the first four counties created in the Washington Territory in 1861.[2] Kootenai County, which included what are now Bonner, Boundary and Benewah Counties, was created in 1881. The Northern Pacific Railroad reached to Pend Oreille Lake in 1882 with a branch to Coeur d'Alene described as "a city of 200 or 300" in 1886.[3]

[2] Arrington, Vol. 1, HISTORY OF IDAHO, (1994), p. 426.

[3] Id., pp. 325 and 333.

Leonard Arrington credits the continued expansion of the Northern Pacific through Bonners Ferry and Sandpoint to Spokane in 1893 with the gradual development of that area:

> **The railroad was responsible for much of the immigration into the area north of Sandpoint in the 1890's and early years of the twentieth century.** [4]

In 2006, Nancy Renk, one of the witnesses for respondents, had written a report for the U.S. Army Corps of Engineers.[5] Humbird Lumber Company was the early owner of the property acquired by the Backmans and the prior use of that land is relevant.

In 1900, John P. Humbird, one of the partners of Frederick Weyerhaeuser, created the Humbird Lumber Company and purchased the only substantial sawmill in Sandpoint.[6] The company immediately set off to purchase in several separate transactions 159,051 acres mostly in what became Bonner County from the Northern Pacific Railroad.[7]

The company obtained other land in smaller parcels from individual owners.[8] One of these transactions was the purchase on August 20, 1908 by Humbird Lumber Company of the Backman 100 acres from Elmore McKenna who had obtained a patent from the United States on October 23, 1907.[9]

Renk wrote that in the 1900 to 1930 period of time, Humbird like other timber companies "was not designed to be a never-ending operative using

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[4] Id., p. 334.
[5] When the Lake Was A Millpond: Humbird Lumber Company and Its Sawmill at Sandpoint, Idaho 1900 – 1948 (Hereafter Renk Report.)
[6] Renk Report, pp. 5 – 6. Photocopies of pages cited are attached as Appendix A.
[7] Id., pp. 9 – 10.
[8] Id., p. 11.
[9] Defendants Exhibits B and C.

sustainable yield practice in its forests" but instead sold the lands as soon as the timber was cut.[10]

In the 1900's through the 1920's, roads in Bonner County were "fairly minimal" and public roads even fewer and needing to be created by petition to the county commissioners.[11] The timber companies entered into cooperative agreements for mutual uses of logging roads on their respective properties.[12]

Judge Hosack recognized this mutual permission in his Memorandum Opinion:

> **Given the number of land holdings in different ownerships throughout vast tracts of timberland, mutual consent and neighborly cooperation worked well. Logging operations pretty much was all there was, and objections to log trucks by owners of high-end residences located deep in the woods was not only unheard of, but entirely inconceivable. As Larry Moody testified, "nobody ever dreamed there would be homes up there ever."**
>
> R., Vol. II, pp. 277 – 278.

The Backman property ownership can be traced back of record to a grant from the United States to McKenna in 1907. Defendants Exhibit G. In 1908, Humbird Lumber Company acquired the Backman property in Section 8 and the property owned at the time of filing the complaint in Section 7 by Millward, Walsh, Lloyd, Johnson and Lawrence.

Humbird Lumber Company on December 22, 1943 executed a deed recorded January 8, 1945 to Lewis Modig to the SE 1/4 NE1/4 and E1/2 SE1/4 in Section 7, Twp 57 North, R.2 WBM. Defendants Exhibit H. That is the property

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[10] Renk Report, p. 46.
[11] Tr., p. 686, L. 14 – 19.
[12] Tr., p. 688, L. 1 – 25; p. 685, L. 1 – 23. Defendants Exhibit RR.

owned at the time of filing of the complaint by Millward, Walsh, Lloyd, Johnson and Lawrence.

On February 2, 1945, Humbird Lumber Company conveyed all of its property in Bonner County to Eva A. Wert.[13] Plaintiffs Exhibit 4. The deed included the 120 acres Humbird Lumber owned in Section 8 which later became the Backman 100 acres and the 20 acres purchased by respondent Kevin D. Schrader. Plaintiffs Exhibit 4. Also included in the conveyance was what was described as "All of fractional Section 7, Twp 57 North, Range 2 WBM." This description included the NE 1/4 NE 1/4 owned at the time this complaint was filed by Rogers, Schrader, Spagon and two others not parties to this lawsuit.

Combining the deed to Modig (SE 1/4 NE 1/4 and E 1/2 SE 1/4) with the deed to Wert (NE 1/4 NE 1/4) makes the total parcels conveyed away by Humbird Lumber Company in 1943 and 1945 to constitute the E1/2 NE1/4 and E1/2 SE1/4 in Section 7. This is the property starting with ownership by the Spagons to the north continuing south to ownership by the Lawrences.

In 1943 and 1945, there were no roads in existence on the Backman property or the Spagon to Lawrence properties. See 1939 Metsker Map, Defendants Exhibit D attached as Appendix B.

As can be seen from the 1939 Metsker Map and from the deed to Eva A. Wert, Humbird Lumber Company owned real property all over Bonner County on

[13] Eva Wert was the sister of Jim Brown who owned Long Lake Lumber Company. Tr., p. 685, L. 11 – 14. Long Lake Lumber Company later became Pack River Lumber Company. Tr., p. 685, L. 20 – 22.

some of which were public roads. The E 1/2 NE1/4 and the E1/2 SE1/4, Section 7 did not touch upon a public road or upon any road at all.

From 1907 through 1945 and for many years thereafter the hills and mountains in Bonner County had few houses. The state and federal lands and most of the private lands, not in farms, were timber country. Skid roads were adequate to remove the cut trees and haul them to the mills.

Randy Powers, who is a logger, acquired the 100 acres in Section 8 by deed from Shamrock Investment on December 8, 1993. *Defendants Exhibit G.*

The only roads proven of record to have ever been used as access from Section 7 into the Backman property in Section 8 were those punched through by Randy Powers during his logging operation on that land beginning in December of 1993 and lasting two years. Tr., p. 260, L. 4 – 13. Powers admitted that all the property before he purchased in 1993 was wild and unenclosed. Tr., p. 256, L. 19 – 21. Powers purchased his property as timber property. Tr., p. 257, L. 1 – 14.

The first road Powers made identified in trial as the lower road came off Turtle Rock Road across what is now the Lloyd property to Syringa Creek which had washed out whatever had passed for a road in a logging operation six years earlier. Tr., p. 257, L. 6 – 11; p. 268, . 2 – 12. Powers could not get to his property initially. Tr., p. 268, L. 14 – 16. Powers admitted that in 1993 the lower road was "not a road in use." Tr., p. 268, L. 24 – 25.

Powers bulldozed a road across the creek into Section 8 and logged his property from the lower road for a year into the winter of 1994. Tr., p. 269, L. 17 –

24. Powers began logging off the middle road into Section 8 in July 1994, then moved to the top. Tr., p. 226, L. 8 – 12; p. 294, L. 13 – 18.

Powers finished his logging in 1996 using the upper road and taking his logs out over Inspiration Way and Redtail Hawk Road. Tr., p. 279, L. 5 – 13. Powers' logging operation was completed in 1996. He did not log again. After Powers completed logging in 1996, he ". . . never was back with machinery." Tr., p. 281, L. 18-21.

The lower road was shut down by the Idaho Department of Lands in 1994 soon after it was opened. The middle road grew back and was not used by Powers or anybody else after 1995.

Yellowstone Basin Properties purchased the property owned by most of the respondents from Louisiana Pacific Corporation in 1994, had it surveyed, created Pend Oreille View Estates Owners Association, Inc. (POVE) and in July of 1996 recorded a Declaration of Covenants, Conditions and Restrictions making all roads private. Defendants Exhibits A, B and C.

The roads within the POVE controlled property were constructed by Yellowstone Basin Properties, Inc. and Bluegreen Corporation of Montana after the property was platted in 1994 into 20 + acre lots in a purchase from Louisiana Pacific Corporation. Record of Survey, Gordon E. Sorenson. Defendants Exhibit A.

The roads created by the developer were named Turtle Rock, Redtail Hawk and, leaving the POVE property, Inspiration Way. Turtle Rock Road starts at an intersection with Baldy Mountain Road going in an easterly direction

through properties owned by McKenna, Bessler and Lawrence and then turns north through Lloyd and Johnson to terminate on the Millward and Walsh (Grant) properties.

Redtail Hawk Road extends north from the intersection with Turtle Rock Road through the Harris property and then becoming Inspiration Way through the Spagon property.

The Spagons bought their property in April of 1999 and built a house. Tr., p. 265, L. 9 – 15. By that time, Turtle Rock Road as extended north into Inspiration Way had been abandoned, overgrown and was not passable by an automobile. Tr., p. 293, L. 24 – 256; p. 294, L. 1 – 25; p. 296, L. 1- 7.

The developers improved Redtail Hawk and Turtle Rock Road while dividing the POVE property into 20 acre parcels. The C. C. and R's were explicitly specific:

Zirwes A: **". . .Said rights of way are private roads, maintained for the use and benefit of the Tract Owners, their guests, and those others entitled by legal instrument to the use of the same."**

Reed Q: **And that private road situation, has that been regularly followed?**

Zirwes A: **Yes.**

Tr., p. 453, L. 17 – 23. Defendants Exhibit B.

The Powers/Backman 100 acres at its base is approximately 2,600 feet in elevation and at the top is approximately 3,600 feet. Plaintiffs Exhibit 43, p. 5. Baldy Mountain Road at the Sandpoint Shooting Range is about 2,600 feet. The horizontal difference between the north line of the Backman property and the

south line measures on the 1966 map as approximately 4,000 feet. This equates to a grade between 22° and 23°. The close contour lines confirm the steepness.

On February 8, 1994 Powers had quitclaimed his 100 acres to his mother, Kay McGhee, to protect against creditors. Plaintiffs Exhibit 12. Mrs. McGhee quitclaimed the 100 acres back to Randy Powers on May 10, 1995. Plaintiffs Exhibit 13.

On the advice of Doug Ward, a broker operating Sundance Realty, a warranty deed was prepared which Mrs. McGhee signed on December 3, 2004. Plaintiffs Exhibit 14. Parcel 1 on the deed describes the 100 acres. Parcel 2 identifies certain recorded easements in Section 7.

Again on the advice of Doug Ward, Randy Powers presented the warranty deed to Alliance Title and Escrow Company and asked for a title insurance policy in the amount of $420,000 for property he had in fact owned since at least May 5, 1995. Tr., p. 404, L. 17 – 25; in 405, L. 1 – 18.

The title examiner was perhaps misled by the easements described as Parcel 2 on the December 3, 2004 deed from Powers' mother, Kay McGhee. The policy for $420,000 was issued on December 9, 2004. Defendants Exhibit O.

On December 27, 2004, Bob and Rhonda Backman signed a contract to buy the Powers' property upon the representation by real estate salesman Doug Ward that the title insurance would guarantee access and that in a hot real estate market Bob Backman could turn the property over quickly at a much higher price. Defendants Exhibit P. Tr., p. 67, L. 14 – 25.

On February 11, 2005, Alliance Title and Escrow Company issued its title policy in the amount of $475,000 which, by silence, guaranteed access and within a month Bob Backman had two offers from buyers willing to pay in excess of one million dollars. Tr., p. 80, L. 17 – 24.

In the summer of 2004 after he had decided to sell his property, Powers in a one day operation clandestinely hauled in a bulldozer and cleared out the middle road. When respondent Bruce Johnson discovered the trespass across his property, he reported it to the sheriff and soon thereafter blocked off the newly cut clearing. Tr., p. 622, L. 12 – 25; p. 623, L. 1 – 9; p. 625, L. 1 – 12. On August 19, 2004 on behalf of POVE, a letter was sent to Powers charging him with trespass. Defendants Exhibit U.

On April 18, 2005 at the request of POVE, undersigned counsel Reed wrote a letter to Doug Ward, the Backmans and the Powers advising that there was no right to use the POVE roads. Defendants Exhibits V and W. Thereafter, Backman quit paying Powers. Tr., p. 70, L. 12 – 17.

Respondent Greg Zirwes testified that he was road supervisor for POVE, a part-time job involving a couple of hundred hours a year contracting and doing work on the two roads. Tr., p. 454, L. 3 – 4, p. 456, L. 9 – 12. That task included stopping strangers and advising them that they were on a private road. Tr., p. 465, L. 18 – 25.

Greg Zirwes gave several reasons why POVE opposed the Backman development: invasion of community property, 16% grades which were twice

county fire standards; necessary widening that would cost $450,000. Tr, p. 463, L. 9 – 19; p. 464, L. 8 – 23; p. 465, L. 2-9.

Theresa Zirwes, Secretary-Treasurer of POVE, confirmed the continuing surveillance, and documented their enforcement to keep non-members including Randy Powers off the roads. Tr., p. 562, L. 21 – 25; p. 563, L. 1 – 25; p. 564, L. 1-2.

In her testimony, Theresa Zirwes went through a series of photographs depicting the two roads starting with the "private road" sign at the entrance to POVE controlled land. Tr., p. 565, L. 13 – 18. Defendants Exhibit EE.

Theresa described her opposition to the Backman intrusion: preservation of the community; the very difficult, steep, narrow and difficult to handle roads. Tr., p. 581, L. 1 – 25; p. 582, L. 1- 7.

Dr. Michael Folsom, expert witness for appellants, used blow up aerial photos to speculate that there had been roads which he called "tracks" from Section 7 into Section 8. Plaintiffs Exhibits 41, 42, 43 and 44.

Richard Creed, P.E., who had worked for the Forest Service in the Sandpoint area for 26 years and testified as an expert witness for respondents, distinguished between "tracks" and "roads."

Erbland Q: Okay. The term "track" as it applies to road management, are you familiar with that?

Creed A: It is not a term that normally used in my experience in roads. Tracks imply a couple of wheel marks or animal tracks, whatever you would. A road is constructed as a road prism, it has cut slope, back slope, fill slope. It has drainage.

Tr., p. 500, L. 9 –14.

Based on his long-time experience with timber companies, Richard Creed corroborated the testimony of historian Nancy Renk that when the timber properties were privately owned, the timber companies would allow access to each others properties without actual recorded easements. Tr., p. 503, L. 21 – 25; p. 504, L. 1- 11. It was Mr. Creed's opinion after travelling over all the roads in issue that these roads would not meet applicable Bonner County road and fire standards for the type of residential development that the Backmans and their real estate agent, Doug Ward, had sought and advertised. Tr., p. 507, L. 21 – 25; p. 508, L. 1- 16. Defendants Exhibits T and GG.

Mr. Creed identified certain portions of the Turtle Rock Road, Redtail Hawk Road and Inspiration Way Road as being too steep or too narrow or both in violation of Bonner County fire codes and road standards for residential construction. Tr., p. 507, L. 5 – 25; p. 508, L. 1- 16.

Respondents' expert witness, Graydon Johnson, had been given copies of Dr. Folsom aerial photos and exhibits and then obtained duplicate originals from the United States Geological Service Office in Sioux Falls, South Dakota. Tr., p. 636, L. 13 – 25; p. 637, L. 1- 9. Mr. Johnson's opinion, from viewing all the photographs which he had obtained being most of those used by Dr. Folsom, was that there was no support for the distinction Dr. Folsom had made between "tracks" and "roads." Tr., p. 662, L. 22 – 25; p. 603, L. 1- 3:

> **. . .the information you can gather off of these photographs is too ambiguous to really reach any concrete decisions on conclusions.**
>
> Tr., p. 663, L. 2 – 4.

Judge Hosack made an interesting observation in overruling the objection of attorney Featherston to Mr. Johnson's opinions:

> **The Court: . . . but it** (Google aerial photo) **shows this road or this track or that everybody agrees is completely overgrown and washed out and totally obliterated, and it is just as obvious on a Google site as the road into the gun range. And having used Google before, I don't trust it any further than you can throw it. So I don't think he is telling us anything that is not readily obvious by looking at the documents he has put in. And that's all he has really done. So I think it just does to the weight. And for that reason I would overrule the objection.**
>
> Tr., p. 668, L. 7 – 14.

Lannie Moody, testifying for respondents, had been a logger for 35 years. Tr., p. 536, L. 2 – 3. Louis Modig, the grantee from Humbird Lumber Company in 1943, was Lannie Moody's grandfather.[14]

Lannie Moody and his family had logged the Backman property in 1975. Tr., p. 546, L. 2 – 22. What was created and used was:

> **Just a one-lane logging access only, steep, narrow, rocky, rough.**
>
> Tr., p. 542, L. 15 – 16.

Based on personal experience and clear recollection, Lannie Moody dismissed the idea that any usable roads had ever been constructed, much less used going from Section 7 into Section 8:

Reed Q: **And the road as it was originally located back in the 1970's was straight up through here?**

Moody A: **Straight up through here. It was not – just a logging access. Back in those days, roads were all built for the course of least resistance, get in as cheap as you can and you know.**

[14] The rest of the family changed names to "Moody," but Louis stuck with the Swedish "Modig." Tr., p. 536, L. 20 – 24.

Reed Q: **So all the area that you are talking about and all the roads that were there were logging roads and nothing more than that?**

Moody A: **Nothing more. Nobody ever dreamed there would be homes up there ever, you know.**

Tr., p. 543, L. 5 – 14.

II. ISSUES PRESENTED ON APPEAL

1. Are the Memorandum Order, the oral ruling from the bench and subsequent Order denying motion to amend and the Judgment entered by District Judge Charles W. Hosack supported by substantial and competent evidence and by statutory and appellate case authority?

III. ARGUMENT

A. Unity of Title cannot be Traced to United States.

The Brief of Appellants Backman leads in with an invitation to overrule *Roberts v. Swim,* 117 Idaho 9, 784 P.2d 339 (App. 1989). The prominence given to this argument (pp. 10 – 17) reflects the weakness and lack of legal and factual support for the remaining arguments.

Refusal to recognize common ownership in the original grantor, the sovereign United States or the state, is solidly supported in the cases around the country and in the texts:

> **The fact that all of the land was originally part of the public domain and hence owned by a common grantor cannot confer the right from which a way of necessity arises. Similarly, the doctrine of implied reservation of a right-of-way by necessity is not applicable where the unity of title on which it rests can be found only in the state.**
>
> 25 AM. JUR.2d., Easements and Licenses, §33, p. 531.

To the same effect see Vol. 25A, CORPUS JURIS SECONDUM, Easements, §112, Unity of Title, pp. 316 –317.

The annotation in "Unity of Title for Easement by Implication or Way of Necessity," 94 A.L.R. 3d 503, 517 –518 (1979) cited in *Roberts v. Swim*, supra, summarized the case law:

> **. . . the original ownership of lands by the public or state does not provide the necessary unity of ownership to support a subsequently arising way of necessity**.

The A.L.R. supplement to this date includes *Roberts v. Swim,* but no recent cases to the contrary.

In Idaho, all private property came originally from the United States. Going back to the original federal grants to find easements by necessity without any contemporary evidence would mean that every present day owner was entitled to an easement across his or her neighbors' property to the nearest present public road. There would be no need for a court ever to consider prescriptive use easements.

The cases cited in the annotation are in line with the lead note. One in particular, *Guess v. Azar,* 57 So.2d 443 (Fla. 1952), nailed the fundamental problem with going back to the original sovereign grantors quoting JONES ON EASEMENTS, page 247:

> **"It would be ruinous to establish the precedent contended for, since by it every grantee from the earliest history of the State, and those who succeed to his title, would have an implied right of way over all surrounding and adjacent lands held under junior grants, even to the utmost limits of the State."**
>
> 57 So.2d at 444 – 445.

There are other cases not mentioned in A.L.R. In *State v. Black Bros.,* 297 S.W. 213 (Tex. 1927), the Texas Supreme Court cited two of the cases in the annotation and then quoted from *United States v. Rindge* (D.C.), 208 F. 619*:*

> **"It is, in my judgment, very doubtful whether the doctrine of implied ways of necessity has any application to grants from the general government, under the public land laws. Pearne v. Coal Coke [Min. & Mfg.] Co., 90 Tenn. 619, 18 S.W. 402; Bully Hill C.M. & S. Co. v. Bruson, 4 Cal. App. 180, 87 P. 237. It it exists at all, it can be invoked against the government and its grantees as well as in their favor. Hence every grantee of a portion of the public domain from the time the land laws were extended over the same and those succeeding to his title would have an implied right of way over the surrounding and adjacent public lands, and a junior grant thereof if necessary to reach his own land, and a junior grantee and his successors in interest would have such a way over a prior grant under similar circumstances simply because they derive title from a common source."**
>
> 297 S.W. at 218.

Easement cases are site specific. It appears from a cursory reading of *Kellogg v. Garcia,* 102 Cal. App. 4th 796 (2002), cited by appellants, that the dominant property in question had been a patented mining claim and the title record made it evident that the original conveyance by the federal government of the mine left no access way for the mining products to be brought out.

The conclusion of the Court of Appeals guessing an intent 175 years ago and its attempted distinction of the founding anti-sovereign law in California relied on by the trial court, *Billy Hill Cooper Mining & Smelting Co. v. Broom*, 4 Cal. App. 180, 87 P. 233 (1906), is unconvincing. Suffice to say that there is no record in this case of any use being made of any roads in 1943 - 1945 comparable to the mining access found necessary in *Kellogg v. Garcia.*

The other cases cited in Appellants' Brief do not lend weight or are distinguishable. *Kinscherff v. United States*, 586 F.2d 159 (9th Cir. 1978) is a reversal of dismissal presumably on summary judgment on a claim based on necessity. The Court of Appeals found factual disputes and cautiously expressed ". . .no opinion as to whether such an easement here exists, nor its extent." 586 P.2d at 161.

One of the cases cited in the *Kinscherff* opinion illustrates the limitations on easement by necessity even where the claim is recognized against the sovereign. In *Superior Oil Company v. United States*, 353 F.2d 34 (9th Cir. 1965), the issue was whether the oil company could use a road across Indian country. The interpretation was of a patent from the federal government to the Women's American Baptist Home Mission Society in 1910 with no subsequent transfer.

The oil company wanted to move heavy equipment across the mission land to a drill site. The Court recognized that an easement of necessity had been granted but the use was not available for heavy construction equipment:

> **Certainly it cannot be said either that public policy demands or that the Indians' trustee impliedly intended a grant of a way of access across Indian lands greater in scope than was required for mission purposes and whose greater scope was necessary only in order to permit the granted lands to be used in a fashion adverse to the interests of the Indians.**
>
> 353 F.2d at 36.

State of Utah v. Andrus, 486 F.Supp. 995 (D.C. Utah, 1979) is the exception that proves the rule. Again the interpretation was of original government deed to property still held by the original grantee. The grant was

state trust land from the United States to the State of Utah made at statehood in 1894 with no subsequent change in ownership. The State leased the granted school land to a mining company.

The mining company was denied access by the federal government across adjoining federal laws. The Court recognized that the doctrine of easement by necessity ". . . might not ordinarily apply in the context of a federal land grant. . . ." 486 F.Supp. at 1005 (page 10). However an exception was found for state school land grants:

> **Unless a right of access is inferred, the very purpose of the school trust lands would fail. Without access the state could not develop the trust lands in any fashion and they would become economically worthless. This Congress did not intend.**
>
> 486 F.Supp. at 1005 (p. 10).

All of the lands in Section 7 and Section 8 in this case came from railroad grants, not school land grants.

1. U.S. Supreme Court Denies Easement by Necessity

In *Utah v. Andrus*, the Chief Judge Anderson noted the U.S. Supreme Court case of *Leo Sheep Co. v. United States*, 440 U.S. 668, 99 S.Ct. 103, 59 L.Ed.2d 677 (1979) and found it to be "not apposite." 486 F.Supp. 1005 (p. 10). That may or may not be an appropriate distinction.

However, *Leo Sheep Co.* is squarely supportive of Judge Hosack's determination that original federal ownership will not support common ownership to provide easement by necessity.

Easement by necessity was rejected even though it was sought by the original grantor, federal government. Just as in this case, private ownership

began with a grant to the railroad, the Union Pacific. Chief Justice Rehnquist opened his opinion with a learned discussion of the background to and the culminating actions that lead to the Civil War railroad grant acts, in that instance the Union Pacific Act of 1862. The following analysis which Chief Justice Rehnquist subsequently describes as affecting "property rights in 150 million acres of land in the Western United States. . ." begins:

> **This case is the modern legacy of these early grants. Petitioners, the Leo Sheep Co., and the Palm Livestock Co., are the Union Pacific Railroad's successors in fee to specific odd-numbered sections of land in Carbon County, Wyoming.**
>
> 59 L.3d 2d at 685.

In the present case, respondents Spagon et al and Grant, are successors in interest to Louisiana Pacific corporation which acquired the property from the Northern Pacific Railroad.

In *Leo Sheep Co.*, the United States controlled the Seminoe Reservoir which was used by the public for fishing and hunting. The railroad grants of alternate sections left checkerboard squares so that access to the reservoir crossed private properties used for livestock crossing. The federal government cleared a dirt road across the private land and posted signs inviting the public to use the road as a route to the reservoir. 59 L.Ed.2d at 685.

As here, there was no express easement. An 1878 opinion of Justice Field was cited as noting:

> **. . .that the intent of Congress in making the Union Pacific grants was clear: "It was to aid in the construction of the road by a gift of lands along its route, without reservation of rights, except such as were specifically mentioned. . . ."**

59 L.Ed.2d at 686.

Chief Justice Rehnquist then reviewed the doctrine of easement by necessity as claimed by the government. He found two problems in the government's assertion. The second is the distinction noted in the *Utah* case that the sovereign state has the power of condemnation not applicable here.

The first problem, an equal barrier to the government claim and directly in point, is this:

> **First of all, whatever right of passage a private landowner might have, it is not at all clear that it would include the right to construct a road for public access to a recreational area.**

59 L.Ed 2d at 686.

The opinion goes on to refuse to find an implied intent for a present day road use that could not possibly have been contemplated at the time of the original grant 100 years ago. 59 L.Ed 2d at 687. It was too far a reach for the fictional implied intent to find that Congress in 1862 meant to include the right to construct a road for public access to a recreational area a century later:

In footnote 15, the opinion discounts subsequent changes in the dominant estate quoting from a New Jersey opinion:

> **"Changes in the dominant parcel's use exert some, but not a great influence, in determining the scope of such easements." 3 Powell, supra n. 14, ¶416, pp. 34 – 203 to 34 –204 (footnotes omitted). See, e.g., Higbee Fishing Club v. Atlantic City Electric Co. 78 NJ Eq 434, 79 A 326 (1911) (footpath, not roadway, proper scope of easement where use of dominant estate as clubhouse could not have been contemplated by parties to original grant).**

59 L.Ed 2d at 686.

The exact same reasoning used by Chief Justice Rehnquist for a unanimous U.S. Supreme Court gives controlling guidance here to refuse to even consider easement by necessity on federal land granted to the railroad. Resource extraction, mining, lumber and farming, not residential development for high-end houses on steep ground, was the contemplated use for the 150 million acres of land in the Western United States granted to the railroads in the 1860's.

Judge Hosack quoted the testimony of Larry Moody speaking of the Backman property as late as the 1990's:

"Nobody ever dreamed there would be homes up there ever."

R., Vol. II, p. 278.

2. **Wisconsin: Grantor Gave Away Access to his Property**

In *Schwab v. Timmons*, 324 Wis. 2d 27, 589 N.W.2d 1 (Wis. 1999) the evidence established that the petitioners once had access to a public road on land which they had earlier sold off. Therefor the landlocking of their property did not result. ". . .from a grant of property to them but by their own acts in conveying away their highway access":

> **An easement by necessity only exists where an owner sells a *landlocked* parcel to another, in which case the law will recognize a way of necessity in the *grantee* over the land retained by the *grantor. Rock Lake Estates Unit Owners Ass'n v. Township of Lake Mills,* 195 Wis.2d 348, 372, 536 N.W.2d 415 (Ct. App. 1995) (citing *Ludke,* 87 Wis.2d at 229-30, 274 N.W.2d 641). The petitioners in this case are the grantors, not the grantees, and as in *Rock Lake Estates,* the conveyances which resulted in their landlocked property were made by the petitioners when they sold off the property above the bluff. We conclude that it would be contrary to this state's policy against encumbrances for this court to award an easement to the petitioners over parcels of unrelated third parties under these circumstances.**
>
> 589 N.W.2d at 7.

Although there were no adjoining public roads in 1943 and 1945, the deeds have the same pattern here. Humbird Lumber Company sold off the tract of land to Modig across which the Backmans are now seeking an easement by necessity while retaining the 100 acres now owned by the Backmans. Plaintiffs Exhibit 22. State policy in Idaho should be similar to Wisconsin in denying an award of an easement over parcels of the unrelated third parties, the eleven named respondents.

The Backmans acted prudently in obtaining title insurance and thereby imposed upon Chicago Title and its agent , Alliance Title, the duty of search as described in an earlier Wisconsin decision:

> **More recently in *Kordecki v. Rizzo*, 106 Wis.2d 713, 719 n. 5, 317 N.W.2d 479 (1982), this court reiterated that a purchaser of real estate has three sources of information from which to learn of rights to the land he or she is about to purchase: (1) reviewing the chain of title; (2) searching other public records that may reveal other non-recorded rights, such as judgments or liens; and (3) inspecting the land itself. These sources may be irrelevant under the petitioners' proposal if someone with a landlocked piece or property desired a right-of-way through another person's property "in the interest of development."**
>
> **The petitioners are effectively asking this court to sanction hidden easements. An easement which in this case was not created by, but was, according to petitioners, clearly intended by the United States at conveyance.**
>
> 589 N.W.2d at pp. 7 – 8.

The Backmans have quite properly waived any claim to use of Redtail Hawk Road under any theory. Appellants Brief, p. 22. The Backmans' claim is solely and only of access from Turtle Rock Road in Section 7 into the Beckmans' property in Section 8.

As set forth above, there can be no claim of easement by necessity based upon original ownership by the United States. The claim must be supported by all of the elements of easements by necessity existing at the time Humbird Lumber Company conveyed away its property.

3. **No Implied Easements in Logging Country**

Before and at the time of the conveyance on December 22, 1943 to Modig and on February 2, 1945 to Wert, no part of the Humbird Lumber Company property touched upon any public road nor upon any private road that connected to a public road.

By deed dated December 22, 1943, Humbird Lumber Company conveyed to Lewis Modig the SE ¼ NE ¼ (40 acres) and the E ½ SE ¼ (80 acres) in Section 7. Defendants Exhibit H. The 80 acres in Section 7 contiguous to the west is now in the ownership of respondents Millward, Lloyd, Johnson and Grant.

By deed dated February 2, 1945, Humbird Lumber Company conveyed to Eva A. Wert the S ½ NW ¼ and S ½ NW ¼ NW ¼ (100 acres) in Section 8 together with the rest of its property owned in Bonner County. Plaintiffs Exhibit 4. The 100 acres in Section 8 is now owned by appellants Backman.

From the time of the first patent from the United States to private ownership in 1907 until well into the 1990's all of the properties of plaintiffs and defendants were owned by lumber companies with the only use of the properties being logging. These logging companies did not need easements nor did they wish to grant easements. There was cooperation between the logging companies and also with the few non-company private owners.

Permission was freely granted to allow logs to be hauled by horse, by tractor, by skidder and finally by truck from the logging sites to the public road and to the sawmills. All the properties were exactly as described by the Court of Appeals in denying the plaintiffs' claim for an implied easement in *Cordwell v. Smith*, 105 Idaho 71, 665 P.2d 1081 (App. 1983):

> **The area where appellants' tracts are located in steep, mountainous, forested country. The evidence shows that, until appellants purchased their scattered tracts there was no asserted need for year-round access to the area. None of the old logging roads beyond Ole Ladd's dwelling were kept open in the winter. With the exception of the Roush tract – not at issue in this appeal – none of the tracts has been occupied nor improved.**
>
> 105 Idaho at 82.

Since there is absolutely no evidence of any road in apparent continuous use from Section 8 into Section 7 for a lengthy period prior to 1943, this type of implied easement needs no further discussion.

B. <u>Backmans did not Prove Easement by Necessity</u>

The elements of easement by necessity were set forth in *Bob Daniels & Sons v. Weaver*, 106 Idaho 535, 681 P.2d 1010 (App. 1984) as follows:

> **In contrast, an easement by necessity requires (1) unity of ownership prior to division of the tract; (2) necessity of an easement at the time of severance; and (3) great present necessity for the easement.**
>
> 106 Idaho at 542.

Repeated in *B & J Development & Investments, Inc. v. Parsons,* 126 Idaho 504, 507, 887 P.2d 49, ____ (App. 1994).

Implied easement by necessity may be established where ". . . a tract of

land is conveyed which is separated from the highway by other lands of the grantor . . ." *Burley Brick and Sand Company v. Cofer,* 102 Idaho 333, 335, 629 P.2d 1166, _____ (1981). The 120 acres in Section 8 did not touch upon a public road or any discernable private road at the time of conveyance in 1945.

The 80 acres in Section 7 did not in 1943 touch upon a public or private road nor does it now touch upon Baldy Mountain Road which is the nearest public road. Turtle Rock Road, leaves the Johnson/Lloyd property, crosses Lawrence, Bessler and Chitlender (not a party to this lawsuit) properties and then onto City of Sandpoint property. These constitute four parcels of land **never owned by Humbird Lumber Company.**

1. <u>No Easement Allowed Over Third Party</u>

The fiction of implied conveyance by necessity cannot be extended across property never conveyed. This obvious fact and law was set forth by the Montana Supreme Court in *Woods v. Houle;* 766 P.2D 250 (Mont. 1988).

> **In *Graham v. Mack, supra,* this Court, speaking of easements by way of necessity, said:**
>
> **There are two basic elements (1) unity of ownership; and, (2) strict necessity. The necessity must exist at the time the unified tracts are severed. (Citing authority.) The way granted must be over the grantor's land and never over the land of a third party or stranger to the title (citing authority) and finally there must be strict unity of ownership." 699 P.2d at 596.**
>
> **766 P.2d at 253.**

In Vol. 7, THOMPSON ON REAL PROPERTY, Second Edition (2006) elaboration is made upon these elements:

> ***Necessity.* There must be a reasonable necessity for the right of way sought by the creation of the easement by necessity. Most courts**

will be quite strict in the degree of necessity they will demand, stricter than with an easement implied by prior use. For an easement by necessity, there must be "a genuine necessity; mere convenience is not enough. "The easement must be "absolutely necessary;" it must exist "in fact and not as a mere convenience."

§60.03 (b) (5) (iii), p. 507.

The burden upon the one seeking easement by necessity is heavy:

***Severance Leading to Lack of Access.* For an easement by necessity to be implied, the severance creating the dominant and servient tenement must have created a situation in which there was no access for the dominant tenement to some public roadway.**

The lack of access must be "the result" of the severance. The necessity must exist at the time of the severance of the two estates; it cannot arise later. *Thus where landowners rendered their own property landlocked by selling off their access, they could not claim an easement by necessity over property from which their land was originally carved out*; their landlocked status resulted "not from a grant of property to them but by their own acts in conveying away their highway access." (Emphasis supplied).

THOMPSON §60.03 (b) (5) (iii), p. 507.

2. <u>No Necessity at Time of Conveyance</u>

There was no access from an established road across Section 7 into Section 8 in 1943 when Humbird conveyed to Modig, but even if there had been, Humbird in conveying away Section 7 would have landlocked Section 8. Subsequent owners of Section 8 cannot complain about what the common grantor did. See *Schwab v. Timmons*, supra.

At the time Humbird Lumber Company conveyed its Section 7 property, it was separated from the public road by property now owned by Ellis Smith and then owned by his father. Tr., p. 102, L. 17 – 25; p. 103, L. 1 –7. Ellis Smith described his property in the 1920's and 1930's as being wild country without any

fences and with all the logging being done with horses with no automobiles using the area until after World War II. Tr., p. 119, L. 14 – 25; p. 120, L. 1 – 16.

The same result based on similar facts - no access to a public road at the time of severance-- was the basis of denial of easement by necessity by the Montana Supreme Court in *Graham v. Mack*, 699 P.2d 590 (Mont. 1984). Special emphasis was given protecting the owners of property over which the easement by necessity is sought:

> **Though the doctrine is new to this state, one of the common threads running through the cases where it is at issue was stated most recently in *Goeres v. Lindeys, Inc.* (Mont. 1980), 619 P.2d 1194, 37 St. Rep. 1846, where we explained:**
>
> > **"[E]ach case must be examined after an examination of the particular facts and circumstances. Additionally, any implied negative easements as to a particular lot are to be considered with *extreme* caution since an action results in depriving a person of the use of his property by imposing a servitude through *mere* implication." (Emphasis in original.) 619 P.2d at 1197, 37 St. Rep. at 1850.**

699 P.2d at 596.

Prior to the conveyance by deed to Lewis Modig on December 22, 1943, Humbird Lumber Company did not have any direct access from the property to any public road. The Humbird Lumber Company property and all of the surrounding property was timberland. When logged, the access to the public road was by temporary trespass or more likely permission from a neighbor which was also logging its property.

In *Blackwell v. Mayes County Utility Services Authority*, 571 P.2d 435 (Okla. 1977), the Oklahoma Supreme Court affirmed trial court denial of easement by necessity:

We find that the court committed no error in so holding, for there was no evidence introduced to show that at the time of the conveyance by the remote grantor who severed the land into two parcels, there was a need for an easement across defendant's land. . . .

Also, see Tiffany on Real Property (Third Edition) Section 794 in which Professor Tiffany states:

"Since, we previously mentioned, the recognition of a way of necessity is based on the intention imputed to the parties at the time of the severance of the ownership, it follows that the existence of the privilege, and also its extent, is to be determined with reference to what is necessary for the use of the premises in the manner contemplated by the parties at the time of such severance." [Emphasis added and footnotes omitted].

See also, *Close v. Rensink,* 95 Idaho 72, 501 P.2d 1383 (1972) and *Hoover v. Smith*, 248 Ark. 443, 451 S.W.2d 877 (1970).

571 P.2d at 436.

The Nevada Supreme Court examined easement by necessity at length in *Jackson v. Nash,* 866 P.2d 262 (Nev. 1993) citing inter alia to *Bob Daniels & Sons v. Weaver, supra.*

The easement by necessity is created by a legal fiction -- that the intent of the grantor (never stated) was to convey or reserve an easement - but that legal fiction must be based on fact -- that at the time of the grant the parcel granted or retained had access upon a public roadway.

There should be a higher finding of necessity when the dominant estate is the portion of the property retained:

One justification of that distinction is that the seller will be the one with more sure knowledge of the existence of a pre-existing use and the one with the duty to inform the buyer that the property being purchased may be burdened with an easement. In order to burden the purchaser this way and lessen the value of the property, these courts will demand proof of strict necessity.

THOMPSON ON REAL PROPERTY, supra, §60.03 (b) (4) (i), pp. 494 - 495.

To sum up, unity of title in Humbird Lumber Company existed prior to and in 1943. However, there was no access directly to a public road or by any recognized easement in adjacent property to a public road on the entire property in Section 7 and in Section 8 conveyed by Humbird Lumber Company in 1943 and 1945. See Metzger Map, Appendix 3. There was no reasonable necessity at the times of conveyance. All of the property was timberland and access was freely granted by permission for lumbering.

C. Backmans Cannot Claim Private Condemnation

Bob Backman purchased the 100 acres from Randy Powers with the intention of selling the property in 20 acre parcels for "nice custom homes." Tr., p. 52, L. 5 – 23. The Backmans acquired title to the 100 acres by warranty deed on February 11, 2005. Plaintiffs Exhibit 16. On July 12, 2005 using five separate quitclaim deeds, the Backmans divided the property in five 20 acre parcels. Plaintiffs Exhibit 16.

Acting for the Backmans, realtor Doug Ward created an advertisement for sale of the property for $1,200,000 for residential purposes. Tr., p. 89, L. 21 – 25; p. 90, L. 1- 18. Defendants Exhibit T.

The availability of private eminent domain for residential houses under Idaho Code §§7-701 et seq has been barred since *Cohen v. Larson,* 125 Idaho 82, 867 P.2d 956 (1993) where the unanimous opinion concluded:

> **In light of this, we cannot accept the Cohen group's argument that slightly expanded development of their lake side lot benefits the**

public of this state. The Cohen group's proposed development would make available a maximum of seven new houses or condominiums to already-designated private purchasers. This is not something which is "necessary to the complete development of the material resources of the state" as required by the Constitution. Nor has such an activity ever been recognized as conferring a benefit on the public sufficient to entitle a land owner to invoke the power of eminent domain in order to facilitate its accomplishment.

125 Idaho at 85.

As it happened, undersigned counsel Reed was the attorney for the Cohens, et al and Judge Hosack was the attorney for Mae Larson. Judge Hosack in this case has expanded upon and added considerable weight to the Surpeme Court opinion of Justice Bistline. R., Vol. II, pp. 26 – 34.

All of the reported Idaho cases on private condemnation cited Appellants' Brief (pp. 18 – 22), *Cordwell v. Smith*, 104 Idaho 71, 665 P.2d 1081 (App. 1983). *Erickson v. Amoth*, 99 Idaho 907, 591 P.2d 1074 (1979), *McKenney v. Anselmo,* 91 Idaho 118, 416 P.2d 509 (1966), *MacCaskill v. Ebbert,* 112 Idaho 1115, 739 P.2d 414 (Ct. App. 1987) and *Eisenbarth v. Delp,* 70 Idaho 266, 215 P.2d 812 (1950) were cited by undersigned counsel in Respondents' Brief and Brief on Rehearing in *Cohen v. Larson,* supra. Justice Bistline for the Idaho Supreme Court ignored them all and effectively terminated that remedy for exactly the kind of residential development intended by the Backmans.

Appellants make no reference to *Cohen v. Larson* completely ignoring this dispositive opinion. In *Dengler v. Hazel Blessinger Family Trust,* 141 Idaho 123, 106 P. 3d 449 (2005), the Idaho Supreme Court, without citation to *Cohen v. Larson,* rejected the proposition of condemnation to a private residence as a

reasonable alternative noting that "condemnation has been called an extra-ordinary power." 141 Idaho at 129.

In the Idaho Constitutional Convention, a major dispute arose about giving those powers of eminent domain to private individuals and companies to obtain easements across neighboring properties for railways, irrigation ditches and roads. The debate is the subject of Chapter 4 "Eminent Domain and Private Property" in Professor Dennis C. Colson's book, THE IDAHO CONSTITUTION: THE TIE THAT BINDS, (1991), p. 62 – 72. The debate concludes with broad power given to the mining, agricultural and timber industries. Colson, p. 72.

Article 1, Section 14 of the Idaho Constitution gave the authority to take private property for public use for irrigation and mining purposes ". . or any other use necessary to the complete development of the material resources of the state." The Idaho Supreme Court quickly determined that private condemnation under the enabling statute, Idaho Code §§7-701 et seq. was available to timber companies. *Potlatch Lumber Co. v. Peterson*, 12 Idaho 769, 88 P. 426, 118 Am. St. R. 233 (1906). *Blackwell Lumber Co. v. Empire Mill Co.,* 28 Idaho 556, 155 P. 680, 1919 Ann. Cas. 189 (1916).

1. Private Residences are not Material Resources

For reasons often stated before and to be renewed, private condemnation is not available for private residences. However, the constitutional debate must be recognized with the enabling statute as providing a remedy for a landlocked parcel of land when public policy recognized that landlock parcels needed access

to develop industrial and agricultural resources of the state. In a footnote, Justice Bistline clearly drew the line:

> ***fn 3 . . .the construction of a few seasonal residences does not ensure the "complete development of the material resources of the state" as this phrase was meant. We believe this provision in the Constitution was meant to enable those seeking to develop valuable resources, such as timber, minerals, or other products of natural resources, from being thwarted by an inability to get access to these resources across the property of another. The framers of our Constitution could not have intended that private individuals wishing to facilitate access to their homes should be able to condemn the land of their neighbors for this purpose.***

125 Idaho at 85.

The remedy sought by the Backmans would require amending the Idaho Constitution.

In *Cohen v. Larson*, plaintiffs were seeking private condemnation of an existing road that had been in use for 32 years. The Larsons blocked the road in the belief that certain of the named plaintiffs were intending to build second custom homes for summertime residences on Coeur d'Alene Lakeshore.

In the first phase of the case, District Judge Haman had rejected plaintiffs claim of prescriptive use accepting the Larsons' testimony that the road had been constructed across their property with their permission which they now revoked. In the second phase under Idaho Code §7-701, the only burden to be imposed on the Larsons, if plaintiff were successful, would be to open the gate.

The private road the Backmans sought coming off Turtle Rock Road would be all new construction on respondents' property and, when finished, would have required improvements in the POVE road estimated by Greg Zirwes

to cost $450,000. Even then according to the engineer Creed, Turtle Rock Road would not meet Bonner County Road and fire standards.

D. Backmans Failed to Prove any of the Five Elements of their Prescriptive Easement Claim

In *Hughes v. Fisher*, 142 Idaho 474, 129 P. 3d. 1223 (2006)[15], this Court repeated the well established criteria for proving an easement by prescription:

> **In order to establish an easement by prescription, a claimant must prove by clear and convincing evidence use of the subject property that is (1) open and notorious, (2) continuous and uninterrupted, (3) adverse and under a claim of right, (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period of five years. *Hodgins,* 139 Idaho at 229, 76 P.3d at 973; see I.C. §5-203. A prescriptive right cannot be granted if the use of the servient tenement was by permission of its owner, because the use, by definition, was not adverse to the rights of the owner. *Marshall*, 130 Idaho at 680, 946 P.2d at 980. Indeed, the rule is well established that no use can be considered adverse or ripen into a prescriptive right unless it constitutes an actual invasion of or infringement on the rights of the owner. *Simmons*, 63 Idaho at 144, 118 P.2d at 744.**
>
> 142 Idaho at 480.

In *Hodgins v. Sales,* 135 Idaho 222, 76 P.3d 969 (2003), this Court stressed the necessity of establishing all five of the elements by clear and convincing evidence:

> **Each element is essential to the claim, and the trial court must make findings relevant to each element in order to sustain a judgment on appeal.**
>
> 139 Idaho at 229.

The Backmans have limited their claim to Turtle Rock Road. This eliminates the necessity of any discussion of use of Redtail Hawk and the upper road during Powers logging operation which lasted two years. Tr., p. 260,

[15] Cited in Appellants' Brief on seven different pages.

L. 4 – 6.

1) **Open and notorious; and**

2) **Continuous and Uninterrupted.**

Randy Powers described Turtle Rock Road when he was using it in 1995 as having "eight or ten inch grass" with ruts that he needed to grade. Tr. p. 252, L. 16-20; p. 257, L. 3—7. Powers agreed that the property up to the time he purchased it in 1993 ". . . was kind of wild, was unenclosed . . ." Tr., p. 256., L. 19-21.

Powers use of Turtle Rock Road to access the lower road and the middle road during his logging operation could be characterized as open and notorious. After 1996, any use by Powers of Turtle Rock Road was no different than any other member of the public.

After finishing logging, Powers ". . .never was back with equipment." Tr., p. 281, L. 20. For several years, Powers went up once a month for maybe eight or nine months of the year to monitor stream run-off. Tr., p. 264, L. 13 – 25; p. 265, L 1- 19. He drove a four wheeler recreational vehicle that was no different than the vehicles typically used by residents and members of the public. Tr., p. 272, L. 2 – 8.

Powers went hunting in the fall a couple of times a year, again, like so many other people in Bonner County. Tr., p. 282, L. 23 – 25; p. 284, L. 1 – 13. In all the years between 1996 and 2004, Powers went camping only once or twice. Tr., p. 262, L. 4 – 13.

3) **Adverse and Under a Claim of Right.**

Because others had used the road on timber production, Powers thought he had a prescriptive easement. Tr., p. 258, L. 1- 20. Attorney Erbland asked Powers if he knew the elements of a prescriptive easement and he answered only "just usage, continued usage." Tr., p. 259, L. 3.

Asked about adverse and under a claim of right, this was Powers response:

Erbland Q: **Well, if you had what you believed to be a right to use those roads by prescription, why didn't you push the issue?**

Powers A: **Well, the road was still usable, you know, when they put the rocks in. And I was just wanting to get along with everybody.**

***Erbland* Q:** **And that is typically what you do, isn't it? You ask landowners for permission and try to develop what I think you said was a rapport with them to access their property?**

Powers A: **Yes.**

Tr., p. 280, L. 17 – 25.

4) **With the actual or imputed knowledge of the owner of the servient tenement.**

Except for Dr. Lawrence who gave permission (Tr., p. 287, L. 1- - 14), there were no houses on the property crossed by Turtle Rock Road. Tr., p. 287, L. 15 – 17. Powers testified that he never saw anybody on the property during the entire two years when he was logging or at any time thereafter until he sold the property. Tr., p. 287, L. 1 – 25, p. 258, L. 1 – 13.

In all the time Powers logged his property, he had never talked to anyone on site:

Reed Q: **And there were no houses down here where we have the property of Christopher Bessler are listed right down in here. In other words, going from the intersection of Turtle Rock Road and Redtail to the Lawrence property, no one lived in this property?**

Powers A: **Correct.**

Reed Q: **Didn't see anyone there?**

Powers A: **No.**

Reed Q: **And there were no fences on the property?**

Powers A: **Correct.**

Tr., p. 288, L. 5 – 13.

The CC&Rs for POVE were created in 1996, but house building did not start until 1999. Tr., p. 448, L. 24-25; p. 450, L. 4-11.

5) For the statutory period.

Two years is not five years.

1. <u>Common Use Rule Properly Applied</u>

Judge Hosack determination that the use of Turtle Rock Road the occasional connection into Section 8 for logging purposes prior to Powers' purchase in 1994 was proper under the common use road theory.

All roads in Section 7 as shown on Plaintiffs Exhibit 41 derived from a pre-1994 U.S.G.S. aerial photo including the connections Turtle Rock Road to the north to Inspiration Way were for logging purposes.

All the relevant lands in both Sections 7 and Section 8 were owned by logging companies or loggers until Louisiana Pacific conveyed the POVE property to Yellowstone Basin Properties, Inc. in 1994 and Yellowstone Basin had the property surveyed. Defendants, Exhibit A. Plaintiffs Exhibits 26, 27 and 28.

Appellants argument that there was no evidence of common use is contradicted by the testimony of Lannie Moody based on first hand knowledge as a logger and road builder in the area for 35 years. Tr., p. 536, L. 2 – 6. Mr. Moody with his family logged the Backman property for W. I. Forest Products Incorporated starting in 1975. Tr., p. 540, L. 4 – 9; p. 544, L. 13 – 15.

Mr. Moody testified to starting off Turtle Rock Road using an old spur road, crossing Syringa Creek with a "punching culvert" onto a "one lane logging access only, steep, narrow, rocky rough" trail into the Backman property. Tr., p. 540, L. 2 – 25; p. 5421, L. 13 – 16. Mr. Moody identified this as what in trial was the lower road. Tr., p. 541, l. 2 – 4.

Lannie Moody's father had built a cabin on the Modig property in 1945 when he came back from World War II and Turtle Rock Road was access to that cabin. Tr., p. 544, L. 16 – 23. p. 545, L. 7 – 12.

Dalyn Marley with her husband had acquired their property in 1991. Her father-in-law had earlier obtained an easement from Louisiana Pacific which owned all the property down to Baldy Mountain Road. Tr., p. 612, L. 21 – 28; p. 613 L. 1 – 5. The Marley access in 1991 and before was from the Baldy Mountain public road onto Turtle Rock Road through the City of Sandpoint

Shooting Range to the junction in the west she had named Redtail Hawk Road. Tr., p. 614, L. 21 – 25; p. 615, L. 1- 9.

Turtle Rock Road had been constructed by a logging company at least as early at 1975 and work that was done on Turtle Rock Road had been done by the logging company owner and not by any owner of property in Section 8.

The only evidence on the record of a road being constructed from Section 7 into Section 8 is that connected with Lannie Moody's logging operation starting in 1975. That operation was from property owned by the Moodys. The use of that road was into Section 8, one not three intrusions, was minimal with absolutely no impact or adverse effect on Turtle Rock Road on the Moody property.

Use of Turtle Rock Road for the logging operation into Section 8 in 1975 and at all other times must ". . . be presumed to be by way of license or permission." *Simmons v. Perkins,* 63 Idaho 136, 140, 118 P.2d 740, ____, (1941), *Melendez v. Nintz,* 111 Idaho 401, 404, 724 P.2d 137, ____ (App. 1986).

2) <u>Powers Property was Wild and Unenclosed</u>

Judge Hosack found that prior to the 1990's ". . .the relevant portions of the Syringa Creek drainage consisted of wild and unenclosed land" Vol. II, R. p. 278. Appellants' witness Ellis Smith, still living in the same house, affirmed that all of the property was wild and unenclosed. Tr., p. 120, L. 2 – 13.

Dalyn Marley testified that from the time they acquired their property in 1991 through moving into their house in 1997, Redtail Hawk Road was only a fire

access road. ". . .primitive, primitive not maintained by anyone." Tr., p. 612, L. 21 – 24.

Judge Hosack found and concluded as follows:

> **Where the alleged prescriptive easement is over wild and unenclosed land, there is a rebuttable presumption that the use of the land is permissive. *Hodgins v. Sales,* 139 Idaho 225 (2003). Because the land in question was essentially open to anyone, and was freely and openly used by members of the general public; and because a logging operation, in and of itself, and particularly in wild and unenclosed timberlands, does not establish an adverse use; there is insufficient evidence in this record of independent, decisive acts indicating separate and exclusive use of Syringa Creek Road by owners of the one-hundred twenty (120) acres in Section 8 sufficient to rebut the presumption of permissive use.**

R., Vol. II, p. 278.

The quotation from *Cordwell v. Smith*, 105 Idaho at 79, cited in Appellants' Brief at page 36 is followed by this law equally applicable in this case as it was in *Cordwell* in denying defendants claim of easement by necessity:

A way of necessity arises from public policy considerations. It is, literally, a creature of necessity. The necessity must exist at the time of the severance by the common owner, and the person claiming such an easement must also show there is present necessity for it

> **. . . The trial court made no finding of necessity at the time of severance.**
>
> . . .
>
> **When lands have been severed, the grantee – or his successors in interest – cannot, by subdividing, create a new and different "necessity" for rights-of-way, where no such necessity existed before the severance. *See 2 G.W. Thompson,* Real Property, §373, .398 (repl. 1980); *Gulotta v. Triano,* 125 Ariz. 144, 608 P.2d 81 (Ariz. App. 1980); *Lankin v. Terwilliger,* 22 Or. 97, 29 P. 268 (Or. 1982). A remote grantee cannot create the necessity upon which he relies.**

105 Idaho at 79 – 80.

Appellants have failed to establish that they have a right to an easement under four theories. Under easement by necessity or implied easement nor can they properly claim private condemnation. The attempt to combine or couple will not work because there is nothing to couple. To use the railroad analogy appropriate to railroad lands, there cannot be any coupling because appellants never put any easement cars on track. See Judge Hosack's disposition of the coupling claim. R., Vol. II, pp. 38 – 44.

E. Respondents Entitled to Attorney's Fees on Appeal

Attorneys' fees were not sought at the trial court level. However, respondents are entitled to recover attorney's fees incurred on appeal if the appeal only invites the appellate court to second guess the trial court. *Hogg v. Wolske,* 142 Idaho 549, 559, 130 P.3d 1087, ____ (2006). *Gibson v. Ada County*, 142 Idaho 746, 761, 133 P.3d 1211, ____ (2006).

In *Hughes v. Fisher*, supra, this Court repeated the accepted rule on appeal concerning facts found in trial:

> **On appeal, this Court will set aside findings of fact only if they are clearly erroneous. Id.; I.R.C.P. Rule 52 (a). Thus, if a district court's findings of fact are supported by substantial and competent, though conflicting, evidence, this Court will not disturb those findings. *Hodgins.* 139 Idaho at 229, 76 P.3d at 973. Also, this Court gives due regard to the district court's special opportunity to judge the credibility of the witnesses who personally appear before the court.**
>
> 142 Idaho at 179 – 180.

CONCLUSION

Unlike every reported appellate case in Idaho involving an easement issue, the complaint in this case was not precipitated by a property owners' good faith belief based upon on the ground observations and predecessors recollection that there was in fact a roadway or access to his or her property.

The complaint in this case was filed because Chicago Title Company had erroneously issued two title policies guaranteeing access thereby creating an exposure close to one million dollars. The named respondents, the Spagons, Lloyds, Johnsons, Zirwes, McKennas, Grants and Wes Millward, Chris Bessler and POVE were compelled to defend and counterclaim. These respondents all lived upon and used roads that were designated as private of record, posted as private and patrolled for privacy.

None of the named respondents had ever given any cause for the Beckmans nor the title insurance representatives to believe that any right to a road into Section 8 existed. To the contrary through POVE, written notice had been given to Randy Powers that he had no right to bulldoze his way across the Lloyd and Johnson properties across Syringa Creek into his property. Defendants Exhibit U. Ten months before the complaint was filed, POVE had notified Doug Ward and Bob Backman that there was no access and filed of record in Bonner Couny the Declaration of Non-Access.

Chicago Title Company brought suit upon legal theories that were explicitly excluded from coverage in the title insurance policies issued to Powers and Backman:

B. General Exceptions:

1. **Rights or claims of parties in possession not shown by the public records.**
2. **Encroachments, overlaps, boundary line dispute, and any other matters which would be disclosed by an accurate survey or inspection of the premises including, but not limited to, insufficient or impaired access or matters contradictory to any survey plat shown by the public records.**
3. **Easements, or claims of easements, not shown by the public records.**

. . .

Defendants Exhibits O and Q.

District Judge Hosack listened carefully and then prepared a thorough and detailed 41 page Memorandum Order. R., Vol. II, pp. 258 –299. Then Judge Hosack elaborated on points not fully covered after oral argument on plaintiffs' motion to amend. Tr., pp. 723 – 746. R., Vol. II, pp. 370 – 375.

The judgment entered on January 2, 2008 denying all claims made by appellants Backman and dismissing with prejudice the Second Amended Complaint of the Backmans and cross-claims of cross-claimant Schrader[16] must be affirmed, and respondents Spagon, et al and Grant be awarded their costs and attorney's fees as against appellants Backman.

Respectfully submitted, this 16th day of October, 2008.

Scott W. Reed
Attorney for Respondents
Spagon, et al

[16] Cross-claimant Schrader did not appeal.

APPENDIX A

RENK REPORT

When the Lake Was A Millpond: Humbird Lumber Company and Its Sawmill at Sandpoint, Idaho 1900-1948

Nancy F. Renk
Flume Creek Historical Services
Sandpoint, Idaho

June 2006

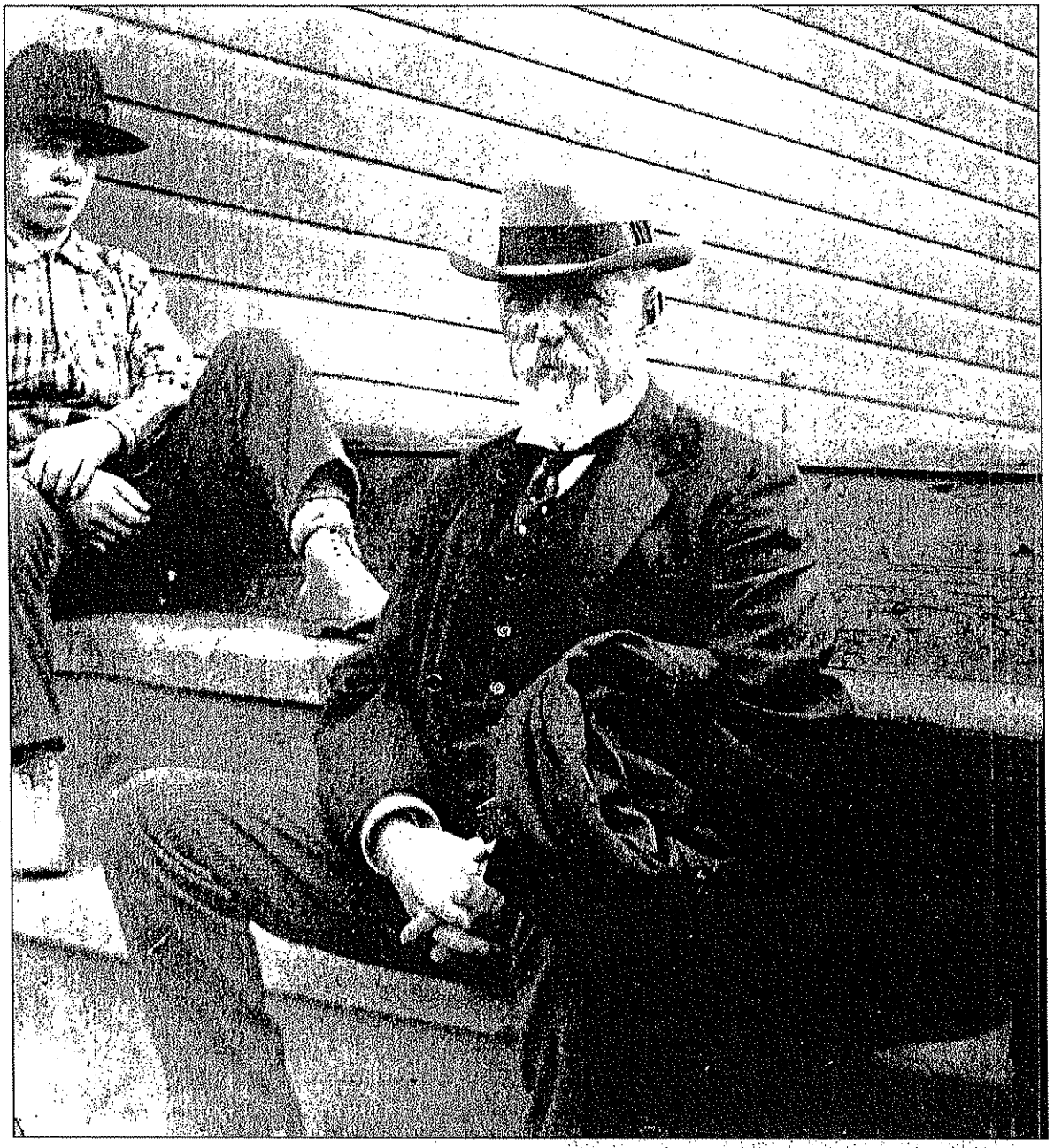


Figure 1. John A. Humbird, undated photo. Courtesy of the Bonner County Historical Society Museum Collections.

Weyerhaeuser, Humbird, and other associates traveled to northern Idaho in October 1900. They first toured the Clearwater region where they had recently secured 40,000 acres. Then Weyerhaeuser and his son Charles went north to Sandpoint where they met with Norman Holter, acting manager of the Sand Point Lumber Co. On a rainy day, the prospective buyers piled into a wagon with Holter, his wife, and a local guide and headed out to inspect the timber first hand. The bad weather was not a detriment; in fact, the elder Weyerhaeuser remarked "that he liked to buy timber when it was raining and sell it on a day when the sun was shining." Within a few days, Humbird and Edward Rutledge,

another well-known lumberman, came to Sandpoint to look over the prospects at the mill. Apparently the business looked like a good investment (Holter 1941: 2).

Incorporation of Humbird Lumber Company

Back in St. Paul, buyers and sellers met with an attorney on December 3, 1900, to work out details of the sale. After agreeing on a sale price of $190,000, Weyerhaeuser and Humbird offered A. M. Holter and W. E. Cullen a choice of either cash or stock in the new company. Cullen took the cash option and Holter, remembering his difficulties as an absentee owner, postponed his decision until he knew who would be managing the operations. Once he learned that John Humbird's son, Thomas J. Humbird, would be moving to Sandpoint to manage the mill operations, Holter took the stock option (Holter 1941: 2-3).

Three days after this meeting, on December 6, 1900, Humbird Lumber Company incorporated under the laws of the state of Washington. The original capital investment of $500,000 was divided into 5,000 shares of stock, each worth $100. Four shareholders (John A. Humbird, Frederick Weyerhaeuser, F. C. A. Denkmann, and A. M. Holter) held 1,000 shares each; Edward Rutledge held 999 shares; and George S. Long held one. The new company had its first stockholder meeting a week after incorporation. At that time, they elected trustees (all of the stockholders but Holter); adopted bylaws; and, most importantly, approved the purchase of Sand Point Lumber Co. (The date on the deed of sale for the mill and some associated lands is February 12, 1901.) On January 7, 1901, the stockholders elected the officers. The list held no surprises: John A. Humbird, president; Frederick Weyerhaeuser, vice president; Edward Rutledge, secretary; John A. Humbird, treasurer; and Thomas J. Humbird, general manager (Bonner County Deed Record, Book 4:238-239; Humbird ca. 1947: 6-7; Humbird Lumber Co. 1900).

The appointment of Thomas J. Humbird to be general manager of the new lumber company elevated a second generation of Humbirds in the timber business. He had worked for more than seventeen years for the White River Lumber Company in Mason, Wisconsin, a mill owned and run by his father, John A. Humbird, and associates including Frederick Weyerhaeuser. T. J. Humbird had started in the company store there, working his way up to managing the store before beginning to take over more of the sawmill operations. By 1900, he was familiar with many aspects of the lumber business. After several decades of living there, he was also well established in Mason, where he and his family recently had built a large new home. He later recalled the decision to move him to the new operations in Idaho. At a meeting with Weyerhaeuser in St. Paul, the older man told him about his recent trip to Idaho where he and John Humbird had bought Sand Point Lumber Co., followed by the organization of the new Humbird Lumber Co. "I told . . . [your father] that I wanted you to go out and manage this company, that we had bought it for you," Weyerhaeuser said. He then continued, "You will make a great many mistakes. Your father does and I do. Everyone who accomplished anything does, but try not to make the same mistake twice. I know you can manage this company and I want you to go out there and do it." During negotiations, Weyerhaeuser offered to raise Humbird's salary from his current $2,833.33 per year to a

full $3,000. With the difference given in advance, there was $166.67 to cover moving expenses (Humbird ca. 1939: 38-39, 42, 45, 48; Humbird ca. 1947:4).

It is not known how T. J. Humbird felt about this promotion and move, but he did as he was told. Just a few weeks after his appointment, after celebrating the Christmas holiday with his wife and children, he left home for the unfamiliar territory of Sandpoint, Idaho, arriving to four feet of snow. The town was "in a feverish excitement" over the news that the well-known Weyerhaeuser syndicate had bought the local lumber mill. Thomas Humbird set to work at his new job but within a few months, he suffered a nervous breakdown. He spent the next two and a half years recuperating, first under a doctor's care in Wisconsin, and later in Florida and Chemainus, British Columbia, where another family business, the Victoria Lumber & Manufacturing Company, was located. It is apparent that he returned to Sandpoint from time to time, probably after he moved his family to Spokane in 1901, but he turned active management of the sawmill over to A. E. Rickerd for this difficult period (Humbird ca. 1939: 52; Humbird ca. 1947: 4-5, 7; *Silver Blade,* 15 December 1900, 3:1).

Humbird Family and Business Associates

The men involved in the Humbird Lumber Company included three generations of the Humbird family, as well as multiple generations of their business associates. It was a family business, where sons followed in their father's footsteps and took direction from the older generation. The sons were expected to work hard and were not coddled with easy jobs or exorbitant salaries. The family business also depended on its personal and business ties with other lumber barons, especially the family of Frederick Weyerhaeuser, as well as officials of the Northern Pacific Railroad.

The Humbird family included the following lumbermen:

- John Alexander Humbird (1836-1911). He initially followed his father, Jacob, into railroad construction, working with him in Brazil during the mid-1860s. John Humbird entered the lumber business in Wisconsin in 1875, first with Humbird & Company in Clayton, and later with the White River Lumber Company in Mason. He and the other investors sold this last company in 1905, making a tidy profit. He remained active in the lumber industry for the rest of his life. At the time of his death in 1911, he was still president and treasurer of Humbird Lumber Company, as well as president of Clearwater Timber Company and Victoria Lumber & Manufacturing Company (Humbird ca. 1939: 11-13, 15, 26-28, 63; Humbird ca. 1947: 17; Humbird n.d.: 10).

- Thomas J. Humbird (1865-1956). Although he was born in Brazil, Thomas Humbird grew up in the lumber industry in Wisconsin. After graduating from high school in 1882, he joined the staff at the White River Lumber Company's store in Mason, working his way up to manager. He also became familiar with the operations of the sawmill and took over the management from his father in

Figure 2. Thomas J. Humbird (seated) with his son John A. Humbird and daughter-in-law Hedvig Pearson Humbird, ca. 1920. Photo courtesy of the Bonner County Historical Society Museum Collection.

1888. He remained there until he was appointed general manager of the newly-formed Humbird Lumber Company in December 1900. He remained manager of that company until replaced by his own son in 1919. T. J. Humbird also served as president of the company from 1911 until its dissolution in 1948. Like his father, he served as an officer or board member for other companies, including the Weyerhaeuser Sales Company, Clearwater Timber Company, Potlatch Forests, Inc., and Victoria Lumber & Manufacturing Company (Hidy et al. 1963: 93, 662; Humbird ca. 1939: 38-39, 42, 48).

- John A. Humbird (1888-1963). As a child, John Humbird moved with his family to Spokane, Washington, in the spring of 1901, soon after his father took over as manager of the Humbird Lumber Company in Sandpoint. Once he was old enough, the younger Humbird worked in the lumber shipping department during his summer vacations, with at least one summer (1907) loading railroad cars on the night shift in Kootenai. He briefly attended Princeton University but soon returned to the family's line of work in the lumber industry. He worked as assistant manager of Humbird Lumber Company from 1911-1917 and then as general manager from 1919-1923. During World War I, he served in the U.S. Army where he rose from Lieutenant to Captain and earned numerous awards from both the French and American military. He was appointed general manager in 1923 for the Victoria Lumber & Manufacturing Company in Chemainus,

British Columbia, a position he held until his retirement in 1944 (Humbird n.d.: 1; T. J. Humbird ca. 1939: 57; Princeton University 1963: 14).

The Humbirds were business associates of many prominent lumbermen over the years. Those involved with Humbird Lumber Company included the legendary Frederick Weyerhaeuser and two of his sons, John Philip and Frederick E. Weyerhaeuser. Other multi-generational associates were Montana lumberman A. M. Holter and his son, Norman B. Holter, along with Northern Pacific land agent William H. Phipps and his son, Stephen C. Phipps (Humbird ca. 1947, ca. 1951).

Land Acquisitions

Around the turn of the century, the pattern of land ownership changed dramatically in northern Idaho as vast tracts of land in the federal domain were set aside for Forest Reserves, transferred to state holdings, or moved into private ownership. From 1900-1909, an estimated one-third of the timberlands in the Inland Northwest changed ownership. The major private land holder was the Northern Pacific Railroad Company, which had been granted more than 38 million acres of public lands to encourage the building of the transcontinental railroad as well as to help offset the tremendous costs of construction. This grant included alternate sections of land on both sides of the railroad line, extending forty miles on either side of the tracks through Idaho. Much smaller parcels left the public domain as settlers moved into the region and began filing under the 1862 Homestead Act for up to 160 acres. Others, many of them not even residents of the region, filed under the 1878 Timber and Stone Act which allowed 160 acre claims when the claimant affirmed that the timber and stone was intended solely for personal use and not for speculation. There was rampant abuse under this act, especially by timber companies which paid dummy entrymen to make the claims and then turn them over to the corporations. Approximately 3.6 million acres nationwide had been claimed under this act by 1900, and most of the profits went to large timber companies (Billington 1974: 608; Fahey 1985: 97).

While the purchase of Sand Point Lumber Company brought with it a small amount of timberland, Humbird Lumber Company officials recognized immediately that they needed much more. They began negotiations with Northern Pacific Railroad and secured just over 20,000 acres in early January 1901, paying more than $144,000. Most of this land was in the Priest River drainage. Two other large deals with the railroad followed in 1902-1903. The first included nearly 45,000 acres in the Hoodoo Valley and another 7,000 acres in the area around Naples and McArthur. The second purchase covered nearly 60,000 acres in several townships covering much of the area tributary to the Pack River. The final major deal occurred in 1910 when the company purchased nearly 18,000 acres northeast of Sandpoint in the Grouse, Gold, and Rapid Lightning drainages. In addition, the company bought just under 2,800 acres of land in scattered small sales from the railroad, along with a later purchase of over 6,700 acres on the Upper Pack River. In all, nearly 75 percent of Humbird holdings came from the Northern Pacific Railroad (Humbird ca. 1947: 62-64).

Table 1. Humbird Lumber Company Purchases from Northern Pacific Railroad

Acres	Price	Av. Price/Acre	Date of Deed
20,018	$144,133.05	$7.20	1-7-1901
52,321	$148,324.50	$2.83	7-22-1902
59,309	$197,197.53	$3.32	10-5-1903
17,899	$300,000.00	$16.76	7-11-1910
2,785	$9,596.55	$3.44	Various
6,719	$90,000.00	$13.40	After 1916
159,051	$889,251.63	$5.60	

(Source: Humbird ca. 1947: 62-64.)

John A. Humbird had a profitable business relationship with the Northern Pacific Railroad. William H. Phipps, land commissioner for the railroad, had been one of Humbird's business partners for many years. Humbird had hired Phipps in 1872 to serve as land commissioner for what became the Chicago, St. Paul, Minneapolis & Omaha Railway Company, and Phipps held this position until he moved to the Northern Pacific in 1893. The two men also were associated in the Cumberland Land Company during the late 1800s, buying white pine tracts in Minnesota. Following the organization of the Victoria Lumber & Manufacturing Company in 1889, Phipps became a stockholder and officer for many years. In addition to these business relationships, the two men were "warm personal friends" (Humbird ca. 1939: 11-12, 17-18, 30; Humbird ca. 1947: 62; Humbird ca. 1951: unnumbered page on Wm. H. Phipps).

Despite the warm friendship, the two men were not above hard bargaining. During negotiations for the 60,000 acres of lands tributary to the Pack River, they got hung up over mineral rights. Deeds from the railroad typically retained mineral rights for the seller, a fact well-known to Humbird and his associates. He claimed, however, that he had not been told of this exclusion at the beginning of the bargaining. After consulting with Frederick Weyerhaeuser, Humbird continued to object because they had found through experience that such a reservation made it more difficult to resell the lands once logging was finished. He went on, "We are now and have been spending so much money on mills and improvements for the manufacture of this timber that we do not at this late date want to give it up and do not feel that you ought to insist upon the reservation, but if you do insist upon it, we feel that your company ought to at least pay half the taxes." Phipps took up Humbird's concerns with C. S. Mellen, President of Northern Pacific Railroad Company, in March 1902, but he was unable to get the mineral clause removed. More than a year later, Phipps tried to put pressure on Humbird officials to close the deal, but it took until October 1903 to finalize the sale (Phipps 1902a-c, 1903a-b).

Up to 1910, John A. Humbird and Frederick Weyerhaeuser had been the company's negotiators with Northern Pacific. That year, however, Thomas J. Humbird brokered his first deal with the railroad. Dover Lumber Company had obtained considerable acreage in the mountains northeast of Sandpoint, mixed in with the checkerboard of Northern Pacific holdings. T. J. Humbird suggested that Humbird Lumber should try to buy these railroad lands, a move that both older men approved. The younger Humbird also wanted

to push the railroad to throw in enough steel for a logging railroad, along with an agreement to buy ties from the company. This seemed excessive to the others and they advised against it, but they let the younger manager see what he could do. After a month of negotiations in St. Paul, T. J. Humbird emerged triumphant with an agreement to purchase twenty-eight sections of land. In addition to the land, he obtained the means to log it: enough steel rails, switches, etc. for twenty-five miles of logging railroad, for a rent of $100/mile; permission to connect the logging railroad with the main line at Kootenai; permission to run logging trains on the main tracks between Kootenai and Sandpoint for $1/mile/train; and rental of logging flat cars at fifty cents per day. A further bonus was the agreement that the railroad would buy a minimum of 150,000 ties and a maximum of 300,000 ties every year for ten years, with the price negotiated annually. This purchase suddenly put Humbird Lumber Company at an advantage over Dover Lumber Company in the area northeast of Sandpoint, and the two companies eventually traded some lands to block up larger areas for each (Humbird ca. 1947:14-16).

The company obtained other lands, in smaller parcels, from individual land owners. In addition, it bought the rights to the timber, excepting the land, from a number of people. Humbird officials initially were slow to pick up these claims since they had set a price limit for white pine of $1 per thousand board feet, well below what the owners could sell to others. After T. J. Humbird had recovered his health and returned to work at the mill in Sandpoint ca. 1903, he decided to pay the asking price to help build up the company's timber inventory. The other company officers approved and the offer rose to $3 per thousand board feet; the price covered not only white pine but also cedar poles, mixed species, and the land itself (Humbird ca. 1947: 8, 61).

Humbird Lumber Company also purchased the timber from state lands. In one state sale in 1907, T. J. Humbird and F. A. Blackwell, owner of Panhandle Lumber Company in Spirit Lake, devised a strategy ahead of time whereby both companies ended up with much of the timber they wanted. During the sale, the representative from each of these two companies bid on every tract of timber offered based on the company's independent timber cruise. Unless a third company joined the bidding, Humbird and Blackwell did not raise bids against each other. At the end of the sale, they divided the timber up so that each company got the tracts that were tributary to its mill; this enabled Humbird to obtain the timber on 2,837 acres of state lands. There was a twenty-year time limit for cutting this timber without forfeit, however. In 1920, Humbird Lumber Company decided to buy the state lands under some of its purchases, for $10 per acre, to retain rights to the timber (Humbird ca. 1947: 12, 62).

Humbird Lumber Company, 1901-1909: A Time of Expansion

The newly organized Humbird Lumber Company arrived in northern Idaho on the eve of the regional boom in lumber production. The first decade of the twentieth century saw production statewide increase thirteen-fold, from 56 million board feet in 1899 to 728 million board feet in 1911. There was a rush to buy timberland, open new mills, and get products onto the national market. As the industry expanded during this period, Humbird also grew at a rapid pace. The company bought more than 150,000 acres of forests;

1932	-$252,513.01	$60,000
1933	-$25,539.77	$160,000
1934	-$32,265.29	$430,000
1935	-$641.29	$800,000
1936	-$13,306.71	$600,000
1937	$39,427.03	$500,000
1938	$34,960.35	$350,000
1939	$17,689.94	$200,000
1940	$4,680.54	$200,000
1941	-$14,296.03	$200,000
1942	$3,826.50	$200,000
1943	-$34,015.10	-0-
1944	-$540,646.35	-0-

(Source: Humbird Lumber Company ca. 1937; Annual Reports).

Conclusion

Humbird Lumber Company in Sandpoint exemplified large lumber companies in the Inland Northwest during the early twentieth century. It was founded and run by experienced lumbermen from the upper Midwest who were attracted to the region by its vast stands of white pine and other virgin timber. Both the Humbird and Weyerhaeuser families were well-financed and well-connected, which enabled Humbird Lumber to acquire thousands of acres of timber lands, rebuild after disastrous fires, and continue in business during difficult times. As was typical of the lumber industry of the time, Humbird Lumber was not designed to be a never-ending operation using sustainable yield practices in its forests. Instead, under the management of T. J. Humbird, the company cut the timber and then sold the underlying lands. As the white pine was depleted or became difficult to reach, and market conditions turned bad, Humbird Lumber terminated its operations and shut down its three sawmills. When T. J. Humbird analyzed the situation in the late 1920s, this was the expedient thing to do since he believed that the company had run its course. The closure not only stopped the financial losses but also ensured greater profits for the stockholders. And this, after all, was a primary purpose of the company.

Today there is little left to see at the once-bustling mill site. The huge buildings are gone, marked only by bits of foundations and remnants of building materials. The lake, once filled with logs from Sandpoint to Kootenai, is empty and waves lap at the foundations. The myriad sounds of the mill, from immigrant voices to the din of a steam engine, are quiet. The foundations and associated archaeological site are all that remains of Sandpoint's largest lumber mill, an industry that sustained the town for three decades. Indeed, they are all that is left of an entire era when trees were tall and sawmills dotted the shores of the lake and river.

APPENDIX B

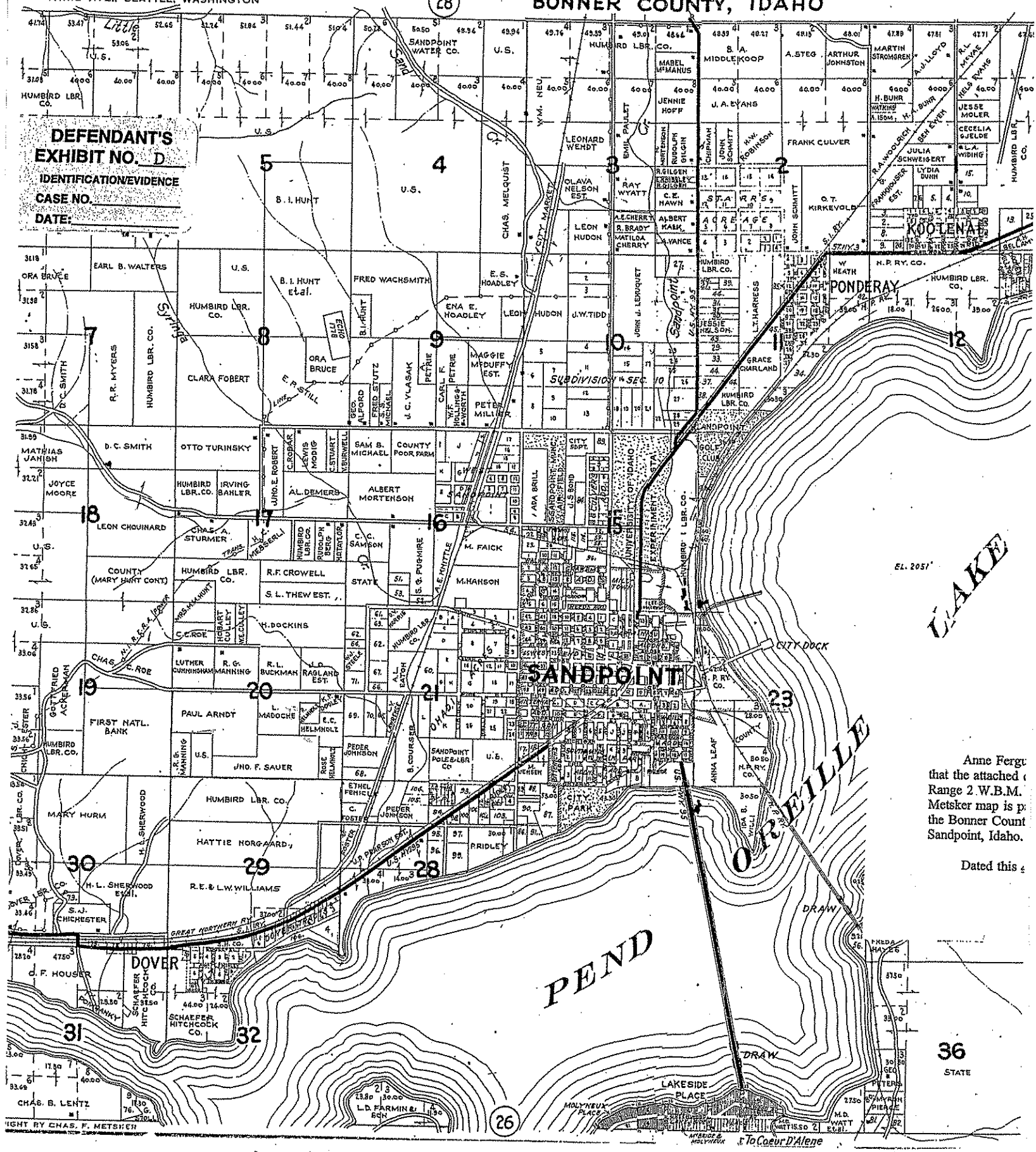
1939 METZKER MAP

FOR SALE BY
CHAS. F. METSKER
14 S. W. OAK STREET, PORTLAND, OREGON
1 SOUTH 10TH ST., TACOMA, WASHINGTON
THIRD AVE., SEATTLE, WASHINGTON

TOWNSHIP 57 N., RANGE 2 W. B. M.

BONNER COUNTY, IDAHO

DEFENDANT'S EXHIBIT NO. D
IDENTIFICATION/EVIDENCE
CASE NO.
DATE:



Anne Fergu
that the attached
Range 2 W.B.M.
Metsker map is p
the Bonner Count
Sandpoint, Idaho.

Dated this