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Backman v. Lawrence Appellant's Reply Brief Dckt. 35151

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IN THE SUPREME COURT OF THE STATE OF IDAHO

BO B BACKMAN and RHONDA BACKMAN,
husband and wife,

Plaintiffs-Counterdefendants-Appellants,

vs.

THOMAS L. LAWRENCE and DEBRA A.
LAWRENCE, husband and wife,

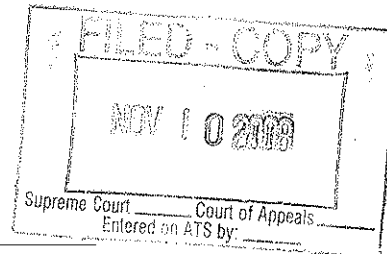
Defendants,

and

JAMES A. SPAGON and LINDA I. SPAGON,
husband and wife, *et al.*,

Defendants-Counterclaimants-Respondents.

**SUPREME COURT
NO. 35151**



APPELLANTS' REPLY BRIEF

**Appeal From The District Court Of The First Judicial District
In And For The County Of Bonner
District Court Case No. CV 2006-365**

The Honorable Charles W. Hosack, District Judge, Presiding

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I.
INTRODUCTION

The Backman Property is landlocked. The underlying issue in this appeal is whether or not Idaho law permits landlocked property to remain landlocked. Respondents Spagon, *et al.* (“Spagon”) and Respondents Grant (“Grant”) cite to cases and submit arguments that, taken collectively, would result in Idaho real property remaining landlocked, unused, unoccupied and undeveloped. Such a result directly contravenes Idaho’s stated public policies reflected in this Court’s prior decisions promoting the use, occupancy and cultivation of land, and that oppose leaving property landlocked.

The fact is that Idaho law does provide mechanisms to obtain access to landlocked property. These mechanisms are rooted in the public policies that promote the use and occupancy of land and oppose leaving property landlocked. Backmans have presented three alternative theories pursuant to which this Court could grant them access to the landlocked Backman Property. If Backmans fail to establish their claim for a prescriptive easement, then the necessity is established for Backmans’ easement by necessity and private condemnation claims. If the Court denies Backmans’ claim for an easement by necessity, then Backmans should be permitted to privately condemn access to the landlocked Backman Property.

Here, Backmans did not freely convey away the access to their property. On the contrary, the Backman Property has been landlocked since its patent in 1905. Although all of the property in Sections 7 and 8 was historically used for logging, the current state of the land reflects increasing residential development. Section 7 is checkered with 10- to 20-acre private residential developments. If the roles were reversed and the Spagon and Grant properties were landlocked, they would be entitled to benefit from the Idaho statutes and caselaw enabling

landowners to obtain access to their landlocked property. Simply, a group of private landowners should not be permitted to landlock neighboring property.

Permitting Backmans to access their property promotes the strong public policy of the State of Idaho favoring the use, occupancy and cultivation of land. This Court should find that Backmans have access to the Backman Property either by an easement by necessity, private condemnation or a prescriptive easement.

A. This Court Should Hold That Backmans Are Permitted To Access The Backman Property With An Easement By Necessity.

1. Backmans' Evidence of Common Ownership by the United States is Sufficient to Satisfy the Unity of Title Element of Their Easement by Necessity Claim.

There is a split of authority in both the caselaw and secondary materials regarding whether or not government ownership satisfies the unity of title element of an easement by necessity claim. Not surprisingly, Spagon and Grant advocate for a different rule and cite to the cases and treatises in line with their position. Of all of the cases cited by Spagon and Grant in their respective Respondents' Briefs, only two expressly hold that government ownership does not satisfy the unity of title element of an easement by necessity claim. *Guess v. Azar*, 57 So.2d 443 (Fl. 1952); *State v. Black Bros.*, 297 S.W. 213 (Tex. 1927). The more recent case is dated 1952.

Contrary to Spagon's argument, the United States Supreme Court's decision in *Leo Sheep Co. v. United States* does not directly address whether or not government ownership satisfies the unity of title element of an easement by necessity claim asserted by a private landowner. 440 U.S. 668 (1979). Instead, the issue addressed by the Court in *Leo Sheep* was whether the Union Pacific Act of 1862 carried with it an implied reservation of access in favor of

the federal government over the lands that had been granted to private railroads. *Id.* at 680-81. In *Leo Sheep*, the federal government sought an implied easement to build a road over adjacent land owned by private landowners. *Id.* at 669. In rejecting the government's easement by necessity claim, the Court explained:

Where a private landowner conveys to another individual a portion of his lands in a certain area and retains the rest, it is presumed at common law that the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property. These rights-of-way are referred to as "easements by necessity." There are two problems with the Government's reliance on that notion in this case. 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. More importantly, the easement is not actually a matter of necessity in this case because the Government has the power of eminent domain.

....
The applicability of the doctrine of easement by necessity in this case is, therefore, somewhat strained, and ultimately of little significance. The pertinent inquiry in this case is the intent of Congress when it granted land to the Union Pacific in 1862. The 1862 Act specifically listed reservations to the grant, and we do not find the tenuous relevance of the common-law doctrine of ways of necessity sufficient to overcome the inference prompted by the omission of any reference to the reserved right asserted by the Government in this case. It is possible that Congress gave the problem of access little thought; but it is at least a likely that the thought which was given focused on negotiation, reciprocity considerations, and the power of eminent domain as obvious devices for ameliorating disputes.

Id. at 679-80 (emphasis added).

Leo Sheep involved a limited analysis of a federal railroad land grant statute in the context of the federal government's claim for an easement by necessity to provide public access to recreational property. Therefore, *Leo Sheep* is distinguishable from the facts of this case.

Here, no federal statute is at issue and Backmans are private landowners with no power of eminent domain seeking private access to their private property. In any event, *Leo Sheep*, as a United States Supreme Court decision, represents, at best, only persuasive authority on a question of Idaho state law.

The more recent treatises and decisions cited in Backmans' Appellants' Brief recognize that the better rule is to allow government ownership to satisfy the unity of title element of an easement by necessity claim. As one commentator explained:

Special problems concerning easements by necessity are encountered where the only unity of title was the original ownership by the government. A considerable number of decisions can be found refusing to allow an easement by necessity where the claimant has relied upon such original unity of ownership. The courts did not base these decisions upon the prerogative of the sovereign. There are, however, some decisions permitting easements by necessity upon such proof, and this is believed to represent the wiser holding.... It has been suggested that the more liberal rule would permit every remote grantee of a portion of the public domain to have an easement of way by necessity over surrounding lands. This argument overlooks the special terminability aspect of easements by necessity upon a change of circumstances. The changed circumstances effectively eliminate the necessity.

4 Michael Allan Wolf (ed.), Powell on Real Property § 34.07[4] (2006), p. 34-59 - 34-60 (emphasis added).

Restatement (Third) of Property: Servitudes § 2.15 (2000), also supports government ownership as satisfying the unity of title element of an easement by necessity claim.

The general Restatement rule as to easements by necessity provides:

§ 2.15 Servitudes Created By Necessity

A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of

rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.

Restatement (Third) of Property: Servitudes § 2.15 (2000). Comment c. to this section, entitled “Severance of rights arising out of common ownership is required,” states that “Servitudes by necessity arise only on severance of rights held in a unity of ownership.... Servitudes by necessity arise on conveyances by governmental bodies as well as by other grantors.” (Emphasis added.) *Id.*, at cmt. c.

The parties agree that *Roberts v. Swim* is the only Idaho case addressing government ownership and the unity of title element of an easement by necessity claim. 117 Idaho 9 (Ct.App. 1989). As Grant recognizes in its Respondents’ Brief, Idaho Court of Appeals’ decisions are not binding case law precedent on the Idaho Supreme Court. *State v. Morton*, 140 Idaho 235, 238 (2004). The Court of Appeals’ decision in *Roberts* would perhaps be more persuasive if it had included an analysis of why it determined that government ownership did not satisfy the unity of title element of an easement by necessity claim or such a determination was germane to the case. Instead, the Court of Appeals merely cited to an A.L.R. annotation. *Roberts*, 117 Idaho at 15. Importantly, the Court of Appeals remanded the case to the district court to craft more particularized findings on the claimant’s prescriptive easement claim. *Id.* at 16-17. As such, the Court did not need to address, *in dicta*, the easement by necessity claim.

Backmans submit that the better rule of law is that government ownership satisfies the unity of title element of an easement by necessity claim. Such a rule would promote Idaho’s “sound public policy that lands should not be rendered unfit for occupancy or successful

cultivation.” *Cordwell v. Smith*, 105 Idaho 71, 79 (Ct.App. 1983) (quoting *Burley Brick & Sand Co. v. Cofer*, 102 Idaho 333, 335 (1981)). For these reasons, this Court should overrule the *dicta* reference in *Roberts* and hold that Backmans proved the unity of title element of their easement by necessity claim with evidence of the common ownership by the United States.

2. **Backmans Proved Necessity for the Easement to Access the Landlocked Backman Property.**

Backmans proved that there has never been legal access to the Backman Property since the date the Backman Property was first patented by the United States government. The District Court found the Backman Property was historically and is presently landlocked, and that unless the District Court ordered access, the Backman Property would remain landlocked. R. Vol. II., p. 268. Backmans submit that Backmans’ proof and the District Court’s factual findings are sufficient to establish the “necessity” elements of an easement by necessity claim.

Spagon’s argument about the historical existence or nonexistence of roads across Section 7 is not relevant to the Court’s decision in this case. Idaho case law holds that an actual developed road need not exist at the time of severance. *Cordwell*, 105 Idaho at 79. As explained by the court in *Cordwell*:

It should be reemphasized that the existence of a way of necessity does not depend upon what use the common owner was making of the roads existing at the time of severance. Such easement could arise even if at the time of severance there was no road across the grantor’s property to the part conveyed. Thus, a remote grantee of land not being used at the time of severance-as in the present case-may nevertheless, when the use becomes necessary to the enjoyment of his property, claim the easement under this remote deed.

Id. (emphasis added) .

Backmans also proved great present necessity for an access easement. Proof of “strict” necessity for an easement is only required where the claimant owns other lands that abut a public way. *Cordwell*, 105 Idaho at 80. Here, the Backman Property is landlocked. Therefore, Backmans were only required to prove that access was reasonably necessary. *Id.* Backmans proved that the Backman Property has always been legally landlocked and set forth an existing route that had been used for over seventy (70) years to access the Backman Property. Backmans’ proposed route is the only reasonable route providing access to Section 8. Backmans’ road expert, Scott Rasor, testified that except for the three extensions off of Turtle Rock Road/Syringa Creek Road accessing the Backman Property from the west, he did not find any other feasible access to the Backman Property from the north, east or south. Tr. p. 144-45.

This Court should hold that Backmans’ proof and the District Court’s factual findings are sufficient to establish the “necessity” elements and hold that Backmans are entitled to an easement by necessity over and across Turtle Rock Road/Syringa Creek Road, and the three extensions, onto the Backman Property. This case should then be remanded to the District Court to determine the scope of the easement.

B. Backmans Should Be Permitted To Privately Condemn An Easement For Access To The Backman Property.

Backmans have proved the elements of their private condemnation claim. Spagon would have this Court believe that *Cohen v. Larson* represented this Court’s rejection of private condemnation for the purpose of obtaining access to residences. 125 Idaho 82 (1993). Contrary to Spagon’s characterization of that case, *Cohen* is not dispositive. The Court in *Cohen* did not

address Idaho Code § 7-701, which expressly states that “[b]yroads, leading from highways to residences” is a public use for which “the right of eminent domain may be exercised.”

The Court in *Cohen* recognized the legislature’s role in defining the changing characteristics of “public uses” under Idaho law. The Court stated:

The notion of public use is a flexible one depending on the needs and wants of the community, and we note that the public, the legislature, and the courts of this state have demonstrated an awareness of public benefits, including environmental and population concerns, that perhaps were not recognized a century ago.

Id. at 84. Thus, the Court recognized that the definition of “public use” must be interpreted by looking beyond the four corners of the Idaho Constitution. Despite such recognition, however, the Court failed to analyze the case in light of the statute that is directly on point regarding public use – Idaho Code § 7-701.

Cohen is further distinguishable in light of the fact that the claimants seeking to privately condemn access already had legally available alternative access by way of Lake Coeur d’Alene. *Cohen*, 125 Idaho at 85 n.3 (“The development the group seeks can occur with or without this road.”). Thus, this existing legal access further distinguishes *Cohen* from the issues at bar. The Court in *Cohen* held only that the development of seven lakeside houses or condominiums on Lake Coeur d’Alene with legally available water access is not a “public use” under Article I, Section 14 of the Idaho Constitution. *Cohen*’s holding, therefore, does not apply to Backmans’ claim to privately condemn access pursuant to Idaho Code § 7-701(5) and is limited to its facts.

Spagon attempts to characterize *Dengler v. Hazel Blessinger Family Trust* as an affirmation of Spagon’s overly broad reading of *Cohen*. This reading is a red herring. Spagon states that the Court in *Dengler* “rejected the proposition of condemnation to a private residence

as a reasonable alternative.” Brief of Respondents Spagon, *et al.*, p. 31-32. *Dengler*, however, involved a claim by prospective purchasers of property against the vendor for breach of contract when the vendor failed to obtain an easement to access the subject landlocked property. 141 Idaho 123, 129 (2005). The Court found that obtaining the access easement was a condition precedent to the vendor’s conveyance of the property, and failure of the condition excused the vendor’s performance. *Id.* After the Court determined that the vendors’ attempts to obtain an access easement were reasonable, the prospective purchasers at oral argument claimed that the vendor should have condemned access to the property. *Id.* The Court rejected this notion stating that, “pursuant to Idaho Code the only relevant use of condemnation relates to ‘Byroads, leading from highways to residences and farms.’ I.C. § 7-701(5). The property at issue here was neither a residence nor a farm.” *Id.* (emphasis added). The Court further determined that where the contract called for “reasonable” terms regarding the easement, condemnation was not a reasonable requirement to impose on the vendor. *Id.*

Thus, the issue in *Dengler* was whether the vendor should have condemned access through adjacent property to satisfy the condition precedent in the contract. The Court found that the property was not a residence or farm and, therefore, condemning access would not be a public use under Idaho Code § 7-701(5). Contrary to Spagon’s assertion, the Court in *Dengler* did not hold that condemning access to a residence is unreasonable. Rather, the Court in *Dengler* determined only that the parties’ contract did not require the vendor to condemn access to the subject property. *Id.*

The determination as to whether a party is entitled to exercise the right of private condemnation is dependent upon the facts and circumstances of the particular case. *McKenney v. Anselmo*, 91 Idaho 118, 122 (1966); *Eisenbarth v. Delp*, 70 Idaho 266, 270 (1950). The fact that

Backmans seek to build one (1) residence on each of the five (5) 20-acre parcels on the Backman Property is undisputed. Backmans' desire to build residences on the Backman Property is a public use for which Backmans may privately condemn access pursuant to Idaho Code § 7-701(5).

The additional facts and circumstances of this case demonstrate the following: 1) Backmans' desired residential development of the Backman Property (one [1] residence on each of the five [5] 20-acre parcels) is equal to or less invasive than the residential development in Section 7, which consists of residences on 10- or 20-acre parcels; and, 2) the Backman Property is landlocked. Backmans seek to condemn routes to the Backman Property that have existed for over seventy (70) years. Spagon and Grant have not and do not now suggest a specific, alternate route is both legally available to Backmans and more reasonable than Backmans' proposed routes. The access which Backmans desire to condemn is necessary for the use of the Backman Property. The Backman Property is landlocked and there is no legally available alternative access. Backmans' proposed development is virtually identical to the development in Section 7. For these reasons, this Court should hold that Backmans are permitted to condemn access to the Backman Property. The case should be remanded to the District Court to determine the compensation to be paid for the condemnation and the scope of the easement.

At least one state has held that its private condemnation statute effectively abrogates common law easement by necessity claims in that state. In *Ferguson Ranch, Inc. v. Murray*, the Wyoming Supreme Court held that its legislature resolved the competing policy considerations supporting the productivity of land and opposing the taking of a landowner's property without compensation by enacting a statute permitting private condemnation. 811 P.2d 287, 289

(Wyo. 1991). Wyoming's condemnation statute is more specific than Idaho's in its applicability to landlocked property owners, stating that "Any person whose land has no outlet to, nor connection with a public road, may apply in writing... for a private road leading from his premises to some convenient public road." Wyoming Statutes § 24-9-101. Although Idaho's condemnation statute does not so specifically refer to landlocked property, this Court could determine, as the Wyoming Supreme Court determined, that the legislature's intent regarding Idaho Code § 7-701(5) was to balance competing policy interests and provide a mechanism for obtaining access to landlocked property for certain enumerated purposes. Such a determination would, effectively, make Idaho Code § 7-701 a last resort for parties seeking to obtain access to landlocked property while promoting the public policies of this State.

C. The District Court's Dismissal Of Backmans' Prescriptive Easement Claim Should Be Reversed And The Case Should Be Remanded To The District Court For A Determination As To Whether Backmans Proved The Five Elements Of A Prescriptive Easement.

Backmans submit that the District Court erred as a matter of law by misapplying various presumptions not applicable to Backmans' prescriptive easement claim. The District Court erred in characterizing Powers's use as "public," in applying the wild and unenclosed lands presumption, and in applying the common use rule. As a result of these errors, the District Court did not properly consider the evidence presented as it pertained to the five elements of a prescriptive easement claim. Backmans submit that the record contains ample evidence to support a finding that their immediate predecessor-in-interest's, Randy Powers, use of Turtle Rock Road/Syringa Creek Road and the extensions thereto satisfied the five elements of a prescriptive easement claim. For these reasons, this Court should remand the case to the District Court.

D. The District Court Erred In Failing To Combine Easement By Necessity, Private Condemnation And/Or Prescriptive Easement Theories To Provide Access To The Landlocked Backman Property.

The District Court should have permitted Backmans to combine the theories of easement by necessity, private condemnation and/or prescriptive easement to provide access to the landlocked Backman Property. Spagon and Grant do not cite to any authority prohibiting the combination of these theories. This case should be remanded to the District Court for a determination as to the theories to be used to provide Backmans with access to the Backman Property and the scope of such access in light of the facts and circumstances of this case.

E. Spagon And Grant Are Not Entitled To Attorneys' Fees And Costs On Appeal.

Backmans' appeal asks this Court to review the District Court's conclusions of law. Backmans do not invite this Court to second-guess the District Court's factual findings. Therefore, this Court should decline to award Spagon and Grant their costs and attorney fees on appeal. *See, Beckstead v. Price*, 146 Idaho 57, 190 P.3d 876, 888 (2008).

II.
CONCLUSION

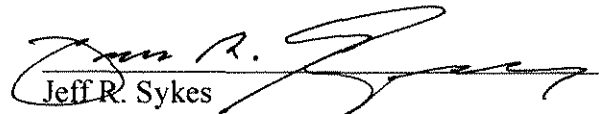
The Backman Property is landlocked and at the mercy of the adjacent landowners who have refused to grant Backmans an easement. Public policy in Idaho supports the use of property. The District Court erred in denying Backmans' easement by necessity, private condemnation and prescriptive easement claims. The District Court also erred in declining to combine such theories to provide access to the Backman Property. As Backmans' appeal seeks the review of the District Court's conclusions of law, Spagon and Grant are not entitled to attorneys' fees and costs on appeal.

This Court should either reverse the District Court's decision and hold that Backmans are entitled to a prescriptive easement or easement by necessity, or to condemn an easement to access their landlocked property, or remand to the District Court to make a decision consistent with this Court's opinion.

RESPECTFULLY SUBMITTED this 10th day of November 2008.

MEULEMAN MOLLERUP LLP

By:



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Attorneys For Appellants

Bob Backman and Rhonda Backman

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on the 10th day of November 2008, true and correct copies (2) of the foregoing document were served *via United States First-Class Mail* upon each of the following parties:

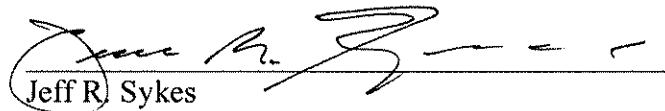
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