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Backman v. Lawrence Clerk's Record v. 2 Dckt.  
35151

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SUPREME COURT DOCKET: 35151

Volume II

LAW CLERK

IN THE  
SUPREME COURT  
OF THE STATE OF IDAHO

Vol. 2 of 3

BOB BACKMAN AND RHONDA BACKMAN,

Plaintiffs-Appellants,

vs.

JAMES A. SPAGON AND LINDA I. SPAGON, husband and wife ;  
KEITH G. LLOYD and PRISCILLA I. LLOYD, husband and wife;  
BRUCE JOHNSON and DEBORAH JOHNSON, husband and wife;  
WESTON SCOTT MILLWARD, a married man; and PEND O'REILLE VIEW  
ESTATES OWNERS' ASSOCIATION, INC., an Idaho nonprofit organization;  
GREGORY ZIRWES and THERESA ZIRWES, husband and wife;  
CHRISTOPHER BESSLER, an individual; ROBERT WALSH and LYNN WALSH,  
husband and wife; PATRICK MCKENNA and MICHELLE MCKENNA,  
husband and wife; CHRISTOPHER E. GRANT and SUSAN R. GRANT,  
husband and wife, THOMAS L. LAWRENCE and DEBRA A. LAWRENCE,  
husband and wife, KEVIN D. SCHRADER, a single person,

Defendants-Respondents.

*Appealed from the District Court of the First Judicial District of the State of Idaho,  
in and for Bonner County*

*Honorable Charles Hosack, District Judge*

JEFFREY R. SYKES

*Attorney for Appellant-Plaintiff*

SCOTT REED

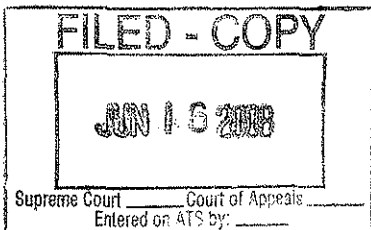
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*Filed this the \_\_\_\_\_ day of \_\_\_\_\_, 2008*

*By \_\_\_\_\_ Deputy Clerk*

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STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST  
2007 SEP 27 A 9:23  
MARIE SCOTT  
CLERK DISTRICT COURT  
DEPUTY

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

BOB BACKMAN and RHONDA BACKMAN,  
husband and wife,

Plaintiffs,

vs.

JAMES A. SPAGON and LINDA I. SPAGON, et  
al.,

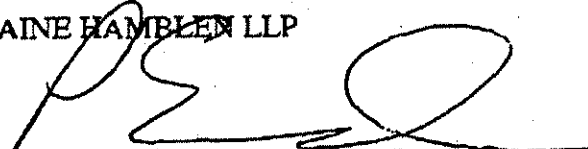
Defendants.

) Case No. CV 2006-00365  
)  
) DEFENDANT GRANTS' JOINDER  
) IN POST-TRIAL BRIEF OF  
) DEFENDANTS SPAGON, LLOYD,  
) JOHNSON, MILLWARD,  
) ZIRWES, BESSLER, MCKENNA  
) AND PEND OREILLE VIEW  
) ESTATES PROPERTY OWNERS  
) ASSOCIATION, INC.

COME NOW, defendants Christopher E. Grant and Susan R. Grant, and join in defendants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna and Pend Oreille View Estates Property Owners Association, Inc.'s Post Brief filed by Scott W. Reed in conjunction with this matter.

DATED this 26th day of September, 2007.

PAINE HAMBLEN LLP

By   
PETER C. ERBLAND,  
Attorney for Defendant Grants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of September, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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Richard L. Stacey  
Meuleman Mollerup, LLP  
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Boise, ID 83706

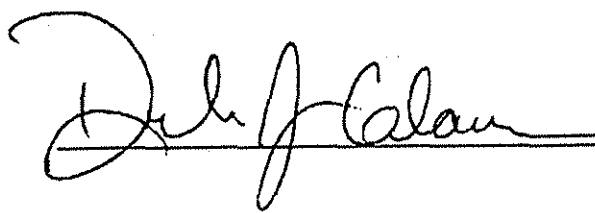
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STATE OF IDAHO )  
County of Bonner ) SS  
FILED 11-14-07

AT 2:30 O'clock P M  
CLERK, DISTRICT COURT  
  
Deputy Clerk

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

BOB BACKMAN and RHONDA )  
BACKMAN, )  
Plaintiff, )  
vs. )  
JAMES and LINDA SPAGON, KENNETH and )  
PRICILLA LLOYD, BRUCE and DEBORAH )  
JOHNSON, THOMAS and DEBRA )  
LAWRENCE, KEVIN SCHRADER, WESTON )  
MILLWARD, PEND OREILLE VIEW ESTATES )  
OWNERS' ASSOC. INC., GREGORY and )  
THERESA ZIRWES, CHRISTOPHER )  
BESSLER, ROBERT and LYNN WALSH, )  
PATRICK and MICHELLE McKENNA, )  
CHRISTOPHER and SUSAN GRANT, )  
Defendant. )

CASE NO. CV2006-365  
MEMORANDUM  
OPINION

**CLAIMS FOR ROAD ACCESS**

This is a case for a road easement for access to the real property owned by the Plaintiffs Backman. The Plaintiffs seek road access based upon claims of prescriptive easement, easement by necessity, and private condemnation. In that sense, the case is relatively straight forward.

However, the factual background is quite complex. Evidence regarding the history of access roads covers more than seventy (70) years. Depending on which route was discussed, most of the east half of Section 7 would be or could be impacted by one

or more of the proposed routes. The number of parcels of real property potentially encumbered by one or more of the proposed routes could be as high as twenty (20) or more. Furthermore, while the asserted legal theories are well recognized in Idaho case law, the application of the theories in this case is different, in that the Plaintiffs have proposed an analysis where the route would be established, not by either a prescriptive easement, easement by necessity, or private condemnation, but, by some combination thereof, applying different theories to different portions of the route so as to provide the entire road necessary for access to Backman's property.

In the post trial briefs, plaintiffs have limited their road access claims to Turtle Rock Road (and extensions thereof, referred to as the Upper Road, the Middle Road and the Lower Road). See Exhibit A, attached hereto. Plaintiffs Backman claim a right of access to their one-hundred acre (100) parcel to serve five (5) single family residences, one residence for each one of five (5) separate parcels of twenty (20) acres each.

The Backman claim is somewhat complicated by a cross claim filed by defendant Schrader against all the other defendants at the time of trial. Schrader currently owns a twenty (20) acre parcel that a prior owner, Randy Powers, had owned together with the one-hundred (100) acres currently owned by the Backmans. The one-hundred twenty (120) acre parcel previously owned as one parcel by Powers, had been owned by a common owner since the U.S. patent. Powers acquired the one-hundred twenty (120) acre parcel in early 1994. Powers sold the twenty (20) to Puryears (Schrader's predecessor in interest) in 1995. Powers retained the one-hundred (100) acre parcel now owned by Backman. Powers sold the one-hundred (100) acres to Backman, in February 2005. In the cross claim, Schrader seeks the same easement route (Turtle

Rock Road and one or more extensions) and for the same purpose (one single family residence for one 20 acre parcel) as does Backman. The Court allowed the cross claim, but only to the extent that Schrader's claim was based upon the same evidence and theories as Backman. If Backman can prevail on the claim of a right of access to the one-hundred (100), based upon an established right of access to the one-hundred twenty (120) when Powers bought the one-hundred twenty (120), then Schrader would be allowed to make the same claim for his twenty (20).

Following a four (4) day Court Trial, including a view of the property by the Court, and following post-trial submissions from counsel, the Court took the matter under advisement for purposes of rendering its written decision.

#### **STATEMENT OF CASE**

In a very general sense, the properties in question (both servient and dominant) are located in the Syringa Creek drainage. Syringa Creek drains southerly down a mountain side north of Sandpoint. Along the base of the mountainside, a public road known as Baldy Mountain Road runs westerly from Sandpoint. The Syringa Creek drainage is therefore located on a southerly exposure of a mountainside, over looking Sandpoint, Lake Pend Oreille, and the Pend Oreille River. The property in question is located north of Baldy Mountain Road, and is fairly high up in the Syringa Creek drainage.

Historically, the Syringa Creek drainage has been the site of logging operations. Logging operations date back to the days of Humbird Lumber prior to World War II, and continued up through the logging operation of Randy Powers in the 1990's. It was an attempt of Mr. Powers in the summer of 2004 to reopen a previously used logging road

to order to gain access to his one-hundred (100) acre parcel for logging purposes which precipitated the lawsuit in question.

For purposes of this lawsuit, the Syringa Creek drainage lies within the east half of Section 7 and the west half of Section 8. Syringa Creek flows down into Section 7 from Section 6 to the north, and then drains southerly across the east half of the northeast quarter of Section 7, entering Section 8 near the shared quarter corner of Section 7 and of Section 8. Syringa Creek then drains southeasterly across the southwest quarter of Section 8.

The Backman property lies within the northwest quarter of Section 8. The Backmans own the one-hundred (100) acres, constituting the south half of the northwest quarter of Section 8 (eighty (80) acres) and the south half of the northwest quarter of the northwest quarter of Section 8 (twenty (20) acres).

However, as a historical matter, the property also includes twenty (20) acres owned by Kevin Schrader consisting of the north half of the northwest quarter of the northwest quarter of Section 8. This twenty (20) acres, combined with the Backman parcel, is the entire one-hundred twenty (120) acres that had been owned by Randy Powers, and that had been previously owned by a common owner since the U. S. Patent.

The one-hundred twenty (120) acres had been owned by Humbird Lumber Company prior to 1943. Randy Powers acquired the entire one-hundred twenty (120) in the northwest quarter of Section 8 from the Shamrock Investment Company by warranty deed recorded January 25, 1994. Powers conveyed the twenty (20) acres in the north half of the northwest quarter of the northwest quarter to Schrader's predecessor in

interest (Puryears) by the warranty deed dated May 10, 1995. Powers conveyed the remaining one-hundred (100) acres to Backmans by warranty deed recorded February 11, 2005.

At the time of trial, Schrader filed a cross claim against all other defendants, essentially seeking the same right of access across the parcels of all other defendants (including himself) to his twenty (20) acres that Backman was seeking for the Backman one-hundred (100) acres. The Court permitted Schrader to file the cross claim, to the extent that Schrader was relying on the same evidence and legal theories which Backman would be presenting at trial.

The Court permitted the last minute filing of the cross claim because any evidence submitted by Backmans as to events prior to Powers purchase would apply to the entire one-hundred twenty (120) acre parcel, including the twenty (20) now owned by Schrader. Any differences between the claims of Schrader and the claims of Backman would arise out of any rights allegedly established or preserved during Powers ownership of the Backman one-hundred (100) acres. While such rights might not apply to the Schrader twenty (20) acres, in terms of allowing the cross claim to be filed, the Court concluded that the evidence at trial would not change, and that the defendants would not be prejudiced in their ability to resist any efforts by Schrader to essentially "piggyback" on the Backman claims, as long as Schrader's claim was based upon his parcel being part of the one-hundred twenty (120) acre parcel dating back to the days of Humbird Lumber. As such, Scharder's claim is a kind of "lesser included" of Backman's claims. Hughes v Fisher 142 Idaho 474, 484 (2006).

Up until 1943, Humbird also owned an adjoining one-hundred twenty (120) acre parcel located in the east half of the east half of Section 7, consisting of the southeast quarter of the northeast quarter and the east half of the southeast quarter. Humbird never did own the northeast quarter of the northeast quarter of Section 7. This one-hundred twenty (120) acre parcel has been referred to as the "Modig" parcel, conveyed by Humbird to Lewis Modig by warranty deed dated December 22, 1943. Defendant Exhibit H.

All of the defendants are owners of parcels of real property located in the east half of Section 7. All defendants are owners of single family residences, and access to their respective residences is from Baldy Mountain Road by way of Turtle Rock Road. Turtle Rock Road intersects with the public road of Baldy Mountain Road in the southwest quarter of Section 7. All parties have stipulated that the owner of the property in the southwest quarter of Section 7 which is encumbered by Turtle Rock Road (which land owner is the City of Sandpoint), has agreed to permit whatever right of access Backmans may have to use Turtle Rock Road, as may be determined by this case.

There was considerable testimony at trial regarding an existing road consisting of Redtail Hawk Road and Inspiration Way. Redtail Hawk Road intersects Turtle Rock Road near the north line of the southwest quarter of the southeast quarter of Section 7 (the northern boundary of the McKenna and Bessler properties) and proceeds northerly in the west half of the east half of Section 7 until it crosses into the east half of the east half of Section 7 and turns into Inspiration Way, near the southwest corner of the Spagon property located in the southwest quarter of the northeast quarter of the northeast quarter of Section 7. Inspiration Way then crosses the east half of the east



half of Section 7 and enters Section 8 in the southwest corner of the Schrader twenty (20) acre parcel.

Although the Redtail Hawk Road route provides a currently existing road upon which an ordinary passenger vehicle can drive from Baldy Mountain Road across the east half of Section 7 and access Section 8, Backman abandoned any claim to access over Redtail Hawk Road at the conclusion of the trial. As noted above the only route upon which Backman claims any right of access is exclusively founded upon Turtle Rock Road and its three extensions – Upper, Middle, or Lower Road.

The issue is therefore how can Backmans, located in the northwest quarter of Section 8, establish a right to cross the east half of Section 7 and get in and out to and from Baldy Mountain Road, a public road, using Turtle Rock Road and Upper, Middle or Lower Road.

In order to gain access to the one-hundred (100) acres, Backman relies upon a claim of a right to use an existing road known as Turtle Rock Road. Backman then claims that various extensions of, or branches from, Turtle Rock Road, which extend into the west half of the northwest quarter of Section 8, are legally available to Backman. Turtle Rock Road, as it presently exists, generally follows the route of the Syringa Creek Road as shown on the 1966 U.S.G.S. map. Plaintiff's Exhibit 43-4.

The Upper Road is basically a route that follows the Syringa Creek Road route, as shown by the 1966 U.S.G.S. map, northward from the current termination of Turtle Rock Road near the Millward residence. The Middle Road branches off Turtle Creek Road at a point between the Millward and Grant residences (in the southeast quarter of the northeast quarter of Section 7). The Lower Road branches off from Turtle Rock

Road just south of the Johnson residence and proceeds northerly into the Grant parcel where it crosses Syringa Creek, and then proceeds easterly into Section 8.

Turtle Rock Road encumbers ownerships of McKenna and of Bessler (southwest quarter southeast quarter Section 7); of Lawrence (southeast quarter southeast quarter Section 7); of Lloyds and of Johnsons (northeast quarter southeast quarter Section 7; and of Millward and of Grant (southeast quarter northeast quarter Section 7). (The parties have represented that Lawrences have agreed to provide the requested easement, and Lawrences did not appear or participate at trial.) The Upper Road crosses the Millward and Spagon parcels, as well as the ten (10) acre parcel of Schrader in Section 7. (The Upper Road also crosses the Rogers parcel, but the parties have represented that Backmans have reached an agreement with Rogers for a road easement). The Middle Road crosses the Millward and Grant parcels. The Lower Road crosses the Lloyd, Johnson, and Grant parcels.

According to the Meckel survey (Plaintiffs Exhibit 46), Turtle Rock Road may also encroach upon the parcel owned by defendant Zirwes in the west half of the southeast quarter of Section 7. Also named as a defendant is the Pend Oreille View Estates Owners Association, Inc. (POVE). Zirwes, as well as other land owners in Section 7 who are not named as parties, are members of POVE, and, as members, have an interest in the roads maintained by the POVE, including Turtle Rock Road. Other landowners in the east half of Section 7 who are not members of POVE, and who are parties to this litigation, also use the roads (including Turtle Rock) of POVE by agreement.

Historically, logging operations on the one-hundred twenty (120) acres in question in the northwest quarter of Section 8 have utilized various routes across the east half of Section 7.

Topographically, the ground in Section 8 lies to the east of Syringa Creek, and is considerably steeper and more rugged than the ground in Section 7 west of the creek. Evidence of old logging roads and tracks prior to WW II included a 1933 photo showing roads or tracks lying west of the creek. Plaintiffs exhibit 42, Plaintiff exhibit 43-0. There was some evidence there may have been logging operations of some sort, possibly by horse, east of the creek even before WW II, but that evidence was somewhat equivocal. However, after Humbird sold its ground in both Section 7 and Section 8 in 1943, and by the years immediately following WW II, logging operations had created roads or tracks which were crossing Syringa Creek from the west and leading to the higher ground east of the creek, including Humbird's ground in Section 8. Plaintiffs Exhibits 42, 43.

By 1966, various undefined logging operations, combined with random public use for outdoor recreation such as hunting, berry picking and the like, had established what the Court has designated, for purposes of this litigation, as Syringa Creek Road. The Syringa Creek Road is documented by a U.S.G.S. 1966 aerial photo. Plaintiffs exhibit 43-4. The road generally runs north-south in the east half of the east half of Section 7, and lies to the west of Syringa Creek. In the northeast quarter of the northeast quarter of Section 7, the road turns easterly, crosses the creek, and enters the northwest quarter of the northwest quarter of Section 8. The Syringa Creek Road turns north, crosses back into Section 7, and then proceeds northerly into Section 6, the section north of Section 7.

With the decline of logging as the dominant North Idaho activity, and given the proximity of Syringa Creek to Sandpoint, by the 1980's, large landowners, including lumber companies, began to sell parcels in Section 7 to private individuals or developers who were interested in building residences. In the 1980's, Dr. Lawrence purchased the southeast quarter of the southeast quarter of Section 7, and erected a residence sometime later.

By the 1990's real estate developers were acquiring parcels in the east half of Section 7 for purposes of residential development. The defendants are purchasers of some of those parcels. Some of the defendants are members of the Pend Oreille View Estates Owners Association (POVE), a homeowners association created by one of the developers. The other defendants are not formal members of POVE, but can use the POVE roads to access Baldy Mountain Road.

While residential development began to occur in the east half of Section 7 in the 1990's, there was no residential development in the northwest quarter of Section 8. However, when Backman purchased the property from Powers in early 2005, Backman purchased the property because he believed it had deeded legal access, and the purpose of Backman's purchase was for residential development. Backman divided his one-hundred (100) acres into five (5) parcels of twenty (20) acres each, and advertised the parcels for sale.

There is no deeded legal access for the one-hundred twenty (120) acres. Powers belief that there was legal access is based upon a legal description in a title insurance policy that is subsequent to Power's purchase. Powers testified he has no idea where on the ground the purported legal access might appear, and that he had no knowledge

of any such purported legal access when he bought the ground. Powers testified that he bought the property relying on his belief that there were prescriptive rights of access for purposes of logging. All parties agree no deeded legal access exists or ever did exist.

The parties agree that, without some access afforded through this lawsuit, the one-hundred twenty (120) acres in question in the northwest quarter in the northwest quarter of Section 8 are legally landlocked. The term "legally" means that the one-hundred twenty (120) acres is not served by any public road and has no written right of easement access. The one-hundred twenty (120) acres is surrounded by ground held in other ownerships. Although there was some testimony that the only way to physically access the northwest quarter of the northwest quarter of the Section 8 was from the east half of Section 7, the Court does not find that the evidence establishes that there is no other physical route to the one-hundred twenty (120) acres in question. There is insufficient evidence before the Court from which the Court could find that there is no physical way to build a road in to the one-hundred twenty (120) acres except from the east half of Section 7. However, there is no dispute that the one-hundred twenty (120) acres is legally landlocked in that, if there is another route, other than across the east half of Section 7, it is not only unknown as to location and cost, but it would also not be legally available, as such route would have to cross other ownerships, without any legal right to do so, in order to get out to any public road, Baldy Mountain Road or otherwise.

I. CLAIM OF PRESCRIPTIVE EASEMENT OVER TURTLE ROCK ROAD  
AND EXTENSIONS THEREOF  
(UPPER ROAD, MIDDLE ROAD, AND LOWER ROAD)

As discussed above with regard to the reasons for granting Schrader's Motion to Amend and add a cross-claim, the Court anticipated that the evidence with regard to a claim for prescriptive use would focus upon many years of historical use. However, Backmans base their prescriptive easement claim principally upon the use from 1994 into 2004 by their immediate predecessor in interest, Randy Powers.

Backmans do not appear to argue that it would be irrelevant to consider the historical use previous to Powers. In support of their prescriptive claim based upon use by Powers, Backmans do make reference to historical use prior to Powers ownership.

Nor would it be appropriate to analyze Powers use without reference to its prior history. One of the issues regarding the "open and notorious" element is whether the use was permissive. Where a use has commenced as permissive, Idaho law indicates that a user has to make some new and independent act of unequivocal conduct which would put the owner of the servient property on notice that the user no longer was making use by permission, but rather was using the easement under claim of right. Webster v. Magleby 98 Idaho 326 (1997).

Therefore the nature of the previous use (as permissive or adverse) of access by logging companies and loggers cannot be completely separated from Powers use. Indeed, Powers testified at trial that his use of the logging roads and trails was based upon his understanding that a prior prescriptive use had been established by previous

logging efforts in the drainage. Powers assumed he was exercising an established prescriptive right.

Backmans essentially propose three different routes which they claim can be based upon a prescriptive use. The first is Turtle Rock Road up to the fork with the Lower Road, and then along the Lower Road into the Backman property. The second is Turtle Rock Road up to the intersection with the Middle road, then along the Middle road and into the Backman property. The third is Turtle Rock Road up to the intersection with the Upper Road, and northward along the Upper Road into the northeast quarter of the northeast quarter of Section 7 and then easterly into the Schrader parcel in Section 8.

The route of the Turtle Rock and Upper Road is essentially the same route which the Court refers to as the Syringa Creek Road, shown on the 1966 U.S.G.S. map.

For purposes of discussion, the Upper Road can be described as two (2) segments. One segment is part of the currently existing road system; the other segment has been abandoned.

The segment of the Upper Road that is part of the existing road system is now known as Inspiration Way. The other segment of the Upper Road is the abandoned portion of what was Syringa Creek Road. This abandoned portion of Syringa Creek Road runs northerly from the end of the current Turtle Rock Road to where it intersects with Inspiration Way (as shown on Meckel survey, Plaintiff Exhibit 46.)

Based upon its view of the property, the Court finds that the abandoned section of the Upper Road (the old Syringa Creek Road route) has been quite thoroughly abandoned. The route is steep, heavily brushed, with deep erosion ruts or trenches. The route is so overgrown that it could be over looked, if one were not looking for it. At

one point the Court relied upon assistance of survey stakes left from the Meckel survey team to assure itself that the Court was still following the abandoned route of Syringa Creek Road.

The Inspiration Way segment of the Upper Road is readily passable by passenger vehicle. To the east of the driveway turn-off, to what was once the Sowder house, the road is less traveled but still readily passable by vehicle.

Inspiration Way is an extension of Redtail Hawk Road. Redtail Hawk Road is part of the POVE Development. Inspiration Way was a roadway apparently developed by predecessor owners/developers of parcels in the northeast quarter northeast quarter of Section 7. The owners of the property in the northeast quarter of the northeast quarter of Section 7 have legal access out to Baldy Mountain Road by way of Inspiration Way, Redtail Hawk Road and then the lower portion of Turtle Rock Road.

#### **(A) Powers Logging Activities**

Backmans assert that they primarily rely upon the logging activities by Randy Powers on the Backman property. The actual logging operation was from 1994 to 1996. This was an extensive and fairly continuous logging operation. Powers testified that he logged the ground pretty hard in that he had an aggressive payment schedule to meet on his purchase contract. He testified that perhaps five-hundred (500) truck loads of logs came out over the then existing roadway system in Section 7 from his logging operation.

However, following the completion of the 1994 to 1996 logging operation, no further logging was performed on the Backman property. Powers did testify that in



perhaps 1997 or 1998 he did bring equipment in by way of Turtle Rock and the Middle road, and extended an existing skid trail on the Backman property. The work on the skid trail extension occurred over about a two week period. However, another logging job became available, and Powers never did any actual logging on the Backman parcel as a result of that skid trail construction.

Following the 1994-1996 logging operation, the State of Idaho required Powers to physically close the Lower road. Powers was required to remove the bridge at the creek, and remediation was required because of damage done to the creek during the logging operation. A landslide had occurred on the Lower Road, west of the creek, and Powers was physically unable to access his property by vehicle via the Lower road.

As to the Middle Road, Powers did testify that he put in a 48" culvert in replacing the bridge across the creek. In walking the Middle Road, the Court noted evidence that the Middle Road had been used for logging on the ground in Section 7, and on both sides of the creek. The timing of the logging operations in Section 7 is unknown.

As to the Upper Road, Powers essentially testified he quit using the lower part of the Upper Road during the course of his 1994 to 1996 logging operations. Powers testified that when first on the ground, he did try to use the abandoned Syringa Creek Road route. At some point someone placed rocks in the way. After that, Powers testified that he started to use Redtail Hawk to access the Backman property. According to Powers Redtail Hawk was a better route anyway. While Powers may have used the abandoned Syringa Creek Road route portion of the Upper Road to move some equipment, his continued logging operation utilized Inspiration Way and Redtail Hawk to get the logs out.

After 1996, Powers use of the Backman property was essentially restricted to hunting, camping and other activity similar to recreational use. While Powers testified that he did go on the property to monitor the condition of the timber, Powers did not testify as to any logging activity actually undertaken.

The Court finds that whatever use of the Turtle Rock Road and extensions thereof Powers made after the 1996 logging operation would not have been any different from the use of any other member of the public who was exploring the Syringa Creek drainage, hunting, or berry picking, camping, firewood gathering, or other recreational uses.

Idaho law is quite clear that this type of continuous, open use by members of the public, who are trespassers or strangers to the title, does not establish an adverse use by a private party. Cordwell v. Smith 105 Idaho 71 (Ct App.1983). A private party trying to create a prescriptive right has to establish a kind and type of use different from that of general members of the public. Hughes v. Fisher 142 Idaho 474 (2006). Certainly moving in the equipment over the Middle Road to extend the skid trail in 1997 or 1998 was different from general use by the public. But all other use by Powers, including visiting the property to monitor the timber, would have been no different than that of any other member of the general public exploring the roadway system in the Syringa Creek drainage.

As such, the Court finds that Powers use of the Turtle Rock Road and its extensions is not of an open and notorious nature after the 1996 logging operation sufficient to put an owner of the servient tenant upon notice that Powers was asserting a

hostile and adverse right of use any different from that use by others for berry picking, hunting, firewood gathering, or other similar recreational activities.

Furthermore, the Court finds that the logging activity, of a nature sufficient to meet the element of continuous adverse possession, was limited to no more than two (2) years, and did not extend for the required statutory period.

The facts that support the findings with regard to a lack of showing of a continuous use of an open and notorious nature also lead the Court to conclude that Powers use was not an adverse use under claim of right. Certainly Powers testified that he believed he was following up on a prescriptive use established by previous loggers in the drainage. However, other than Powers assumption that there was an existing prescriptive use, Powers did not testify to any specific act intended to establish a hostile and adverse use. Powers testified that even his attempt to reopen the Lower Road for logging in 2004 was nothing more than what logging companies had been doing for years, and was consistent with his assumption that a prescriptive easement has been established by earlier logging operations.

In short, if the claim for prescriptive use is based upon Power's actions as the owner of the one-hundred twenty (120) acres, Powers himself concedes that he was doing nothing different than the previous owners who had been logging the property. Without proof establishing the previous use as adverse and under claim of right, (which Powers has simply assumed to exist), the previous use is presumably permissive. Powers did not testify to any new and unequivocal act different from previous logging activities designed to put a servient owner on notice that Powers was acting upon an independent claim of right.

Powers did testify that he was aware of a logging operation (apparently while Shamrock Investment Company owned the one-hundred twenty (120) acres) about six (6) years before his purchase. But Powers did not testify to what was relied upon for a right of access. Although Powers identified the forester for that logging operation, that individual did not testify. What arrangements Shamrock had with owners in Section 7 is simply unknown. Again, Powers merely assumed, as is certainly understandable, that he could access the Backman property using the same routes. But Power's assumption is not proof.

Power's actions as an owner of property in Section 8 in and of itself, does not establish a prescriptive right. The actual logging activities were of insufficient duration. The acts after the 1994-1996 logging were not of a character sufficient to distinguish Power's use from that of members of the public. Furthermore, without proof that his assumption (that there was a prescriptive right) was in fact correct, Powers was merely continuing permissive use. Permissive use cannot ripen into a prescriptive easement. Wood v. Hoglund 131 Idaho 700 (1998).

Because of the different natures of the use, the interruptions of use, and upon the facts as found by the Court above, the Court concludes that Powers did not establish a prescriptive use based upon all the required elements of a prescriptive easement claim for the statutory period.

**(B) Prescriptive Easement Based Upon Access Over Syringa Creek Road**

Given the long history of logging and of Syringa Creek Road, the Court's above analysis of a prescriptive easement, based upon the actions of Powers while an owner of land in Section 8, is a bit artificial, and somewhat like the tail wagging the dog. As noted above, Powers himself testified that he believed that he was simply continuing the historical use of prescriptive easements that he believed had been established by previous logging operations. If there were a prescriptive easement over Syringa Creek Road and its extensions as of the time Powers purchased his property, then certainly Powers testimony is that his actions were a continuation of that existing right.

In the Court's view, the threshold issue is whether there was a prescriptive right of access over Turtle Rock Road and its extensions when Powers purchased the one-hundred twenty (120) acres in 1994. If so, then Powers actions are relevant as to whether Powers did anything to modify or abandon any established prescriptive right. But if the previous use was permissive, the Court has found in the above section of this Memorandum, that Powers did not perform acts sufficient to convert that previous permissive use into a hostile and adverse use under a claim of right.

The history of use of any roads in the east half of Section 7 to reach the northwest quarter of Section 8 was solely for logging purposes. No residence has ever existed in the northwest quarter of Section 8.

In addition to logging operations, members of the general public used Syringa Creek Road, and presumably, the spur roads off Syringa Creek Road, for outdoor recreational activities such as hunting. The extent of the use is unknown, but the

existence of Syringa Creek Road on a 1966 map, together with the proximity of the Syringa Creek drainage to Sandpoint, suggests that there was repeated use over a period of years.

There was testimony that Humbird did some logging in the Syringa Creek drainage even prior to World War II. However, the road was in a substantially different route, south and west of the creek. Exhibit 43-0, 1933 aerial photo, as interpreted in Folsom report, Plaintiffs exhibit 42. Exhibit 43-3 (1958 U. S. G. S. aerial photo) suggests that access for logging in Section 8 as of 1958 may have also come in through Section 8. See Folsom report, 1958 drawing, Plaintiff Exhibit 42.

However, by shortly after World War II, the basic route of Syringa Creek Road had been established. At first, the route differed as to the point where it entered Section 8, entering Section 8 at the southwest corner of the northwest quarter of the northwest quarter of Section 8. (Plaintiff Exhibit 43-2; 1951 U. S. G. S. aerial photo as interpreted in Folsom report, Plaintiff Exhibit 42.) However, by 1966 the route is that of Syringa Creek Road, as shown by the 1966 U. S. G. S. map, entering Section 8 at the southwest corner of the <sup>north half</sup> northwest quarter of the northwest quarter of the northwest quarter of Section 8 (the Schrader twenty (20) acre parcel).

Contrary to Power's assumption that prior logging operations established a prescriptive right of access for future logging operations, defendants introduced evidence that, historically, most logging operations obtained permission to cross another party's property. 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."

While the Court finds that there were a number of different logging operations that extended into Section 8 which would have relied upon access across the east half of Section 7, the details of these previous operations are not in the record.

At least prior to the 1990's, the Court finds that the relevant portions of the Syringa Creek drainage consisted of wild and unenclosed land. Prior to the construction of the Lawrence residence on the southeast quarter of the southeast quarter in the late 1980's, there were no residences. Powers testified he was familiar with the ground since his youth, and it was forest land, used exclusively for hunting, camping, berry picking and logging.

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. *Id.*

Defendant introduced evidence as to an industry practice of permissive access. However, the evidence has not been given much weight, as the testimony was not specific to the Syringa Creek drainage.

Larry Moody testified to WI Forest Products logging in Section 8 in the 1970's. Moody logged for WI. Moody's family owned the ground in the east half of Section 7. (Modig parcel). Moodys were loggers. Moodys logged their ground in Section 7. The arrangement WI may have had with Moody's for access across Section 7 is not in the record, but there is certainly nothing that the Court finds sufficient to establish that WI's access was hostile and under a claim of right.

The Court finds that the existence of the spur roads of Middle Road and Lower Road is insufficient to establish any showing of an intent to establish permanent continuous access. The history of the spur road construction is vague. But, physically, the spur roads were on Section 7 first. Whether the roads were built to log Section 7 first and then extended to Section 8 is a logical assumption, but only an assumption. Nonetheless the record is clear that the spur roads that lead to Section 8 were utilized to log ground in Section 7. Where a road has been built on the servient estate, and then used by the dominant estate, such common use is not adverse. Melindez v. Hintz 111 Idaho 401 (Ct App 1986). The Court finds that plaintiff has failed to establish by a preponderance of the evidence that the spur roads on Section 7 were built first for the purposes of providing access to Section 8.

There is evidence that when a private party desired to use Syringa Creek Road for private purposes, an easement was obtained.



Historically, when someone wanted to use the old Syringa Creek Road to cross Moodys property, they got an easement.

Larry Moody testified that in the early 1960's the Syringa Creek Road was extended northerly into Section 6 for logging on BLM property. Moody testified his uncle granted an easement in 1964 to the BLM so they could log the ground to the north of Section 7.

In June 1964, Long Lake Lumber Company (the then current owner of the one-hundred twenty (120) acres in the northwest quarter of Section 8) granted an easement to the BLM to cross the northwest quarter of the northwest quarter of Section 8 for logging purposes. Plaintiff Exhibit 24. The map attached to the easement document shows a route similar to the Syringa Creek Road as shown in the 1966 U.S. G. S. map.

Marleys purchased the northwest quarter of the northeast quarter of Section 7 from Moodys in the 1960's. In June 1966 Moodys granted an access easement on an existing road across the Moody property in a southerly direction to the Bonner County Road. Plaintiff Exhibit 25. The legal description of the Moody property is a bit inscrutable, but the easement appears to be for Syringa Creek Road.

The testimony regarding any residences prior to the existing residences is very sparse. The testimony of Ella Smith regarding two different individuals who may have lived above his house did not even establish that such individuals had a vehicle. Furthermore, nothing is known about those residences. It is clear, however, such residences, if any, were located in Section 7, and therefore would not establish any use intended to benefit an owner of the Backman property.

The references to the "hippie house" were uncontroverted, and, indeed, during the Court's visit to the premises, the Court observed the "hippie house". Its history is unknown, and its right to use the existing roadway system (which apparently is not disputed) is not in evidence.

References to the Sowder residence also are made. Powers indicated that he did have some contact with Sowder, so apparently the Sowder residence existed by at least the 1990's. However, there is no evidence that any inhabitant of the Sowder residence ever used the upper Turtle Rock Road to any extent at all. As to the Sowder residence, Powers testified the best route was by Inspiration Way and Redtail Hawk Road.

There was testimony regarding a history of residences in Section 7 that may have made use of Syringa Creek Road. The evidence is quite vague. One such "residence" was nothing more than a cabin that Moodys used for hunting. Furthermore, using a road to get to alleged residences in Section 7 is not proof that the use was intended to benefit Section 8.

In short, what little evidence there is of the nature of use of Syringa Creek Road by landowners in the area indicates the nature of the use was permissive or pursuant to an express easement, even for logging.

Even if use of Syringa Creek Road did establish a prescriptive use into Section 8, Powers essentially abandoned the lower segment of the Upper Road during his 1994-1996 logging operation, instead using Redtail Hawk Road. The Middle and Lower Roads are temporary spur roads used during actual logging operations, and can hardly show intent to create roads providing permanent access over Section 7 as the servient parcel to Section 8. The Lower Road was physically closed down after 1996.

The Court finds that the previous use of Syringa Creek Road and any spur roads or skid trails did not establish a prescriptive easement across Section 7 to Section 8.

## II. EASEMENT BY NECESSITY

With regard to the route of Turtle Rock Road and any one of its three (3) extensions (Upper Road, Middle Road, and Lower Road), the parties concede that there is no unity of title. At the time of the U.S. Patents, the north half of the northeast quarter of Section 7 was within a U.S. Patent of 1905. The southwest quarter of the southeast quarter in Section 7 was part of a second separate U.S. patent of 1904. The Modig parcel and the one-hundred twenty (120) acres in the northwest quarter of Section 8 (the Humbird property as of 1943) were in two (2) patents as of 1907, separate from the 1904 and 1905 patents. Therefore, but for the original common ownership of the United States, there has never been a unity of title of common ownership for the original Humbird Lumber property in question (the 1907 patents for the Modig parcel, and for the one-hundred twenty (120) acres in the northwest quarter of Section 8) and for either the property now owned by Spagons (in the southwest quarter of the northeast quarter of the northeast quarter of Section 7; a part of the 1905 patent) or the property now owned by McKenna's and Besslers (in the southwest quarter of the southeast quarter of Section 7; a part of the 1904 patent). Defendant Exhibit KK.

Plaintiffs candidly acknowledge existing Idaho case law indicating that unity of title cannot be established by relying upon the original ownership of the United States. Roberts v. Swim, 117 Idaho 9 (Ct App 1989). Backmans set forth a reasonable legal argument as why another rule of law might be better (at least for their purposes in this case). However, this Court will follow existing Idaho case law. Easement by necessity

as a "stand alone" legal theory, simply does not apply, because unity of title is lacking as to the properties covered by the entire length of the road access necessary to physically connect the Backman parcel to Baldy Mountain Road.

### **III. PRIVATE CONDEMNATION OF A ROUTE ACROSS TURTLE ROCK ROAD AS EXTENDED BY EITHER THE UPPER ROAD, THE MIDDLE ROAD, OR THE LOWER ROAD**

All parties agree that the Backman parcel is legally landlocked. There is no deeded access. Furthermore, without either a prescriptive easement or an easement by necessity as sought by Backmans in this litigation, the record establishes that there is no known legal access to the one-hundred (100) acres.

The record is less clear with regard to whether the one-hundred (100) acres is physically landlocked except by a route across the east half of Section 7. Mr. Rasor did testify that, as far as he can tell, the only access to the one-hundred twenty (120) acres would be through the east half of Section 7. Mr. Rasor is an extremely well qualified witness, whom the Court finds entirely credible, but that particular statement is deemed by the Court to be somewhat conclusory. If there were further specific facts and observations which Mr. Rasor had identified as the basis for that conclusion, he was not given opportunity to explain his basis. Other evidence of aerial photos does show that tracks or other ways of access have in fact reached the one-hundred twenty (120) acres without crossing over into the east half of Section 7. Furthermore, the value of real property with views over looking Sandpoint and Lake Pend Orielle is substantial, and houses now appear high above on mountain sides which years ago would have been

considered totally impractical for residential purposes. The Court would have to rely upon speculation and conjecture to conclude that the only physical way to build a road to reach the one-hundred twenty (120) acres would be to cross the east half of Section 7.

Idaho law does not favor legally land locked parcels which would prohibit any sort of productive use. Cases talk about not depriving property of the use to which it is naturally fitted, which apparently depends upon the circumstances. It is true that Idaho law does not permit a private property owner to condemn a way over the land of another private property owner simply because the condemning land owner has a subjective desire to implement a certain use as a matter of personal preference. Larson v. Cohen 125 Idaho 82, 84 (1993).

Defendants concede that the Idaho Constitution contemplates that lumber companies have the right of private condemnation in order to access timberland for logging operations necessary to develop the natural resources of the State. Blackwell Lumber Company v. Empire Mill Company 28 Idaho 556 (1916). The Idaho Constitution does not specifically mention that the right of private of condemnation is available for roads leading to residences from highways, but that right is statutorily expressed in Section 7-701(5), I.C.

Although the power of private condemnation is established, it is difficult to find Idaho cases where an Idaho Appellate Court has actually upheld the right of one private landowner to condemn a right of way over the ground of another private landowner. In Gibbens v. Weissaupt, 98 Idaho 633 (1977), the Idaho Supreme Court declined to find an easement by necessity, and mentioned *in dicta* that the right of private condemnation

would be available, to the three or four houses which were being denied the easement by necessity, as the alternative means by which the residences could obtain road access. However, the opinion suggests that any approved right of private condemnation might only exist as to the existing houses (which were being deprived of their only way out to the public road by the Supreme Court's decision finding no easement by necessity).

There are of course no residences on the Backman property. Therefore this case is an effort to privately condemn an access for purposes of a proposed residential development. This is not the high density development of Aztec Ltd. Inc. v. Creekside Inn Company 100 Idaho 566 (1979) which the Supreme Court noted was a commercial enterprise. On the other hand, Mr. Backman, a self described builder/developer, purchased the property first and foremost as a commercial development. The property was immediately subdivided and listed for sale.

There is no history of any previous effort at residential development in Section 8. There is no history of any kind of road access into Section 8, other than for logging. Instead, the entire residential development concept was based upon an erroneous assumption that the one-hundred (100) acre parcel actually had deeded access.

Therefore the private condemnation claim seeks to have a residential development built in a large acreage historically devoted exclusively to timber, on the erroneous assumption that the ground had deeded access, appropriate for the proposed commercial enterprise.

In Gibbens, supra, the Idaho Supreme Court held that the residences had no easement out to the public road. The Idaho Supreme Court then noted that the

availability of the private right of eminent domain, to acquire access from highway to residences, meant that the denial of an easement by necessity would not create an undue hardship on the parties who had been using the road in question. Unlike Gibbens, in this case there is no established residential use. Indeed, the record established not only the absence of such use, but that the history and topography of the ground was exclusively a logging use.

Backman did have good reason to believe he had deeded access. He advertised his one-hundred (100) acres for sale shortly after purchase as having "deeded access on well maintained roads". His advertisement describes Redtail Hawk Road as the access. Defendant Exhibit T.

The Powers warranty deed to Backman did describe a recorded access easement. The parties in this case have stipulated the express easement did not exist. The location of the easement described in the recorded instrument has not been identified on the ground in this record. Although Powers was the owner of the ground allegedly benefited by the express easement, and according to the Powers warranty deed at least some of the instruments were recorded during his ownership, Powers stated he had no idea where the route of the supposedly express easement might appear on the ground.

In the advertisement, the phrase appears of "Private estate or split into smaller parcels... can be split into twenty (20), or split into five (5) or ten (10) acre parcels with County plat process." Defendant Exhibit T. The exact date of the advertisement is unknown, but the placement of the advertisement was on behalf of Backman.

Backman testified he did split his one-hundred (100) into five (5) different twenty (20) acres parcels, as that was easily done under County zoning ordinances at the time. Backman did testify that he was at least considering building a home for himself, but his primary goal was to list and sell the parcels. Powers had purchased the one-hundred twenty (120) acres for \$100,000.00 (one-hundred thousand) in 1993. Backman purchased his one-hundred (100) acres in December 2004 for \$475,000.00 (four-hundred seventy five thousand). Defendant Exhibit P. The advertisement for the one-hundred (100) acres on behalf of Backman had a stated price of \$1,250,000.00; and Backman testified he had an interested buyer for \$1,200,000.00 within a few months.

In short the proposed use of five (5) residential houses is not only not for an existing use, it is a proposed use based entirely upon a misunderstanding of the access issue, and upon investment expectations based upon this mistaken belief of deeded access.

Finally, the Court would note that objections were raised by landowners as to the Turtle Rock Road route in August 2004 when Powers tried to re-open the Lower Road for logging purposes. When Backman purchased in December 2004, he was presumably aware of the disputed nature of the Turtle Rock route even for logging. The basis for the belief in residential access was the title company's mistake in insuring the deeded access. As Backman testified, he had purchased the ground with deeded legal access, relying on the title insurance, and any problem was really up to the title insurance company to solve.

The right of private condemnation for residential home sites has not been often successfully exercised in the State of Idaho. The claim here is for a commercial



development of residential home sites which has been proposed in timber land historically utilized exclusively for logging, and the proposed commercial development was based upon a totally erroneous assumption of deeded access. A claim by the residential subdivision developer that there is a Constitutional right to condemn an access, across the property of other private owners so as to provide the deeded access that was mistakenly thought to exist, calls for a cautious approach by a trial court.

The Idaho cases discussing the right of private condemnation of access roads to residences use the test of "reasonable necessity". The burden of proving reasonable necessity is on the condemnor. Erickson V. Smith 99 Idaho 907 (1978). A private party is not accorded the deference given a public agency as to necessity and choice of route. Eisenbarth V. Delp 70 Idaho 266 91950). The private party must show an insufficiency of alternative routes. McKenney v. Anselmo 91 Idaho 118 (1966). Statutes conferring the power of eminent domain are to be strictly construed. McKenney, supra, construing Section 7-701 (5), I.C., applying to roads leading from highways to residences.

The Court was not able to find any Idaho case applying the private right of condemnation to provide access to vacant land which could be used for a residence. In McKenney, the condemnor's testimony that he "may use" the property for a residence was held "much too remote or abstract to permit condemnation under Section 7-701(5), I.C." The Supreme Court did note that if there were evidence of a plan to use the property as a residence, the claim might be viewed differently. However, in McKenney, the property had apparently been previously used as a residence, (although the use was at least twenty one (21) years earlier, and the house was "dilapidated"). Eisenbarth

involved a condemnor seeking access to his residence. While the Supreme Court at least impliedly concluded a private right of condemnation existed, the condemnation was denied for lack of a showing of reasonable necessity. As noted above, Gibbens v. Weisshaupt is actually an easement case, but the Idaho Supreme Court did state therein that the right of private condemnation would apply at least as to existing houses which were already using the road in question.

The Idaho Constitution does not expressly mention roads to residences. The Idaho Supreme Court has not specifically addressed any alleged unconstitutionality of Section 7-701(5), I.C., specifically declining to do so in Erickson v. Amoth because it was not necessary to do so.

Although this Court upholds the constitutionality of Section 7-701(5) based upon Gibbens and Eisenbarth (and also because no party directly attacks the constitutionality of the statute), this Court is mindful that the holding in Eisenbarth (that there was no showing of reasonable necessity) made it unnecessary for the Eisenbarth court to actually reach the Constitutional issue.

From the Court's review of the Idaho law, the degree to which a proposed residential use of vacant land comes within the Constitution's definition of complete development of the material resource of the State is a somewhat open question. Timber is a material resource. McKenney at p 123. But even the cases that solidly establish that rule set forth conflicting views of what constitutes a "material resource". In Blackwell Lumber v. Empire Mill, holding that timber is one of the state's great material resources, the Supreme Court noted the degree to which the welfare of the people of large sections of Idaho depended upon the timber industry and the necessary logging roads,

and that Section 14, of the Constitution, did not mean to differentiate between the "great timber industry and the mining or irrigation industry of the state". At p 582. Yet the dissent argued that at the time of the adoption of the Constitution, timber was not deemed a material resource, and that for ten (10) years after the adoption of the Constitution thousands of acres of growing timberland was destroyed "in order that the land might be reduced to a state of cultivation." P 583.

To the degree proposed residential development of previously existing timberland is a development of the material resources of the state, it is nonetheless clear the power of private eminent domain for access roads to residences is to be strictly construed. It is interesting to note that most condemnation cases now are inverse condemnation claims, which arise out of situations where the taking power is not even being advanced by the public entity. Idaho's recent adoption of Section 7-701A, I.C., indicates a legislative instruction to further limit the power of condemnation. While the legislation may reflect a concern over condemnation by a public entity, and perhaps does not address a private party's right to condemn the property of another private party, the exercise of the private right of eminent domain is not an area of law where this trial court sees a lot of legislative and appellate suggestions that trial courts should be expanding upon the power that does exist.

Where the power does exist, the condemnor must specifically disclose the purpose for which he is seeking to condemn the property. McKenney at p 124. Backman and Schrader have relied upon the residential access to highways provision of Section 7-701(5) I.C., as the purpose of their claim for private condemnation.

The specific use for which the Plaintiff seeks private condemnation is for five (5) single family residences, one (1) house each on five (5) twenty (20) acre parcels. As a practical matter, however, with the cross claim of Schrader, the legal relief sought is really for six (6) single family residences on one-hundred (120) acres. Given the historical use of the one-hundred twenty (120) acres originally owned by Humbird, the Court cannot come up with a supportable rationale to grant a Constitutional right of private condemnation for access to five (5) house on the one-hundred (100) acres of Backmans, but deny any access for a single family residence on the remaining twenty (20) acre parcel now owned by Schrader.

**(A) No Reasonable Necessity Shown**

Regardless of whether the proposed use is five (5) or six (6) single family residences, the Court concludes that there is no reasonable necessity shown as Constitutionally required.

The burden of use on the privately condemned way would expand the residential use from zero to five or six houses. Some Idaho cases analyzing the easement by necessity have concluded that an expansion of that degree is not afforded under the easement by necessity analysis. By analogy, a Constitutional right to create that same degree of expansion of burden of use does not appear to be consistent with prior Idaho cases.

If the Court were reviewing a claim for only one residence, then the Constitutional provision merits some sort of relief. However, this is not a claim for one residential use. (The Court would note that the sale advertisement for the Backman one-hundred (100)

acres does include the phrase "private estate", which the Court assumes would mean only one home on the one-hundred (100) acres; however, no evidence was introduced on that point, and no claim for one single family residence is advanced; so the Court would only be speculating on a theory no party is submitting to the Court.) Although the Court is aware of the "lesser included" analysis for a use lesser than the use actually claimed by a plaintiff, in this case the analysis of even a single residential use raises questions of what ground (Backmans' one-hundred (100) acres or Schrader's twenty (20) acres) within the one-hundred twenty (120) acre parcel would benefit; which route should be used; and how to determine any issues of compensation. These issues are simply not ripe for determination in the context of this record.

The same analysis would apply with regard to a logging easement. Most important, there is no claim for a logging easement asserted. The Idaho Constitution does make clear that lumber companies and the logging industry have the private right of condemnation. Backman did testify he would log the ground or mine it for landscaping rock if he did not get residential access. However, other than this statement of intent, should Backman's claim for residential access fail, no evidence was introduced, and no legal argument has been advanced, for a logging easement. Such claim has not been expressly sought in this case. Whether the cost of any road, once a route had been selected and the issue of just compensation determined, could be paid for by the value of any of the timber which the hypothetical logging company proposed to remove, would be a matter of complete speculation and conjecture for this Court on this record.

As to the condemnation claim for which the condemnor has specifically disclosed the purpose for which condemnation is being sought, the Court finds that condemnor has failed to meet the burden of proof establishing reasonable necessity.

**(B) Insufficient Evidence of the Absence of an Alternative Route**

Furthermore, in considering a condemnation route for an access across the east half of Section 7, the route of Turtle Rock Road and one of any of the three (3) extensions does not appear to be the most reasonable route. Although there was very little evidence regarding Redtail Hawk Road as an alternative route, the Court has ridden by vehicle the entire length of Redtail Hawk Road and Inspiration Way. The Court has also walked the route of the abandoned section of Syringa Creek Road between Inspiration Way and the current termination of Turtle Rock Road. Condemning an access over that abandoned section would require building a new road over difficult terrain, in close proximity to existing residences. Similarly, an access over either the Middle Road or Lower Road would require road construction that would noticeably impact the servient estate. The Court finds that the plaintiffs have not established a reasonable necessity to privately condemn a road across the route of the old Syringa Creek Road (lower segment of Upper Road), the Middle Road, or the Lower Road. That route requires either building what would essentially be a new road in difficult terrain, or making significant road improvements which would substantially impact the nature and character of the servient parcel, when compared to an existing road that is already available. (Redtail Hawk Road and Inspiration Way).

While neither party has specifically argued the issue of an alternative route as it may bear on the reasonable necessity of private condemnation, the evidence in the record essentially establishes an existing alternate route. The condemnor has not shown an insufficiency of alternative routes to the proposed route over Turtle Rock Road and any of its three (3) extensions.

The evidence is undisputed that Redtail Hawk Road/Inspiration Way had essentially replaced the old Syringa Creek Road as the access to the Backman property during the 1994-1996 logging operation. Backman testified he always used Redtail to get to the property. Powers, even in 1994-1996, found Redtail Hawk to be the better road, even for logging.

Having personally traveled both routes by foot or vehicle, the Court finds that the impact upon the servient parcels would be considerably greater by the Turtle Rock Road and extensions route than by the Redtail Hawk Road route. If the parties had expressly litigated the issue of alternative routes, the Court knows not the result, but, on this record, there are sufficient facts regarding available alternative routes to preclude a finding of reasonable necessity for condemnation of an access over the old Turtle Rock Road and any of its extensions.

Finally, with regard to either just one residence, or the logging use, the issue of alternative routes is not just between Redtail Hawk Road and the Turtle Rock Road route. It would be speculative on this record for the Court to conclude that, if only logging, or if only one single family residence, were to be permitted, then the only physical way in to the one-hundred twenty (120) acres would be over the east half of Section 7. The availability of other routes that might be topographically available for

these more limited uses, and any ability to secure easements over other routes from other directions that might well be more available, expedient, and less burdensome than the proposed routes across Turtle Rock Road, are matters that this Court simply cannot determine on the record in this case.

#### **IV. COMBINING DIFFERENT LEGAL THEORIES TO ESTABLISH A LEGAL RIGHT OF ACCESS FOR ENTIRE LENGTH OF PROPOSED ROUTE**

Backman claims a "catch-all" provision for establishing a legal right of access over the entire length of the Turtle Rock Road and Upper Road, Middle Road or Lower Road extensions. As discussed above, the Court has declined to find a private right of condemnation for legal access over Turtle Rock Road and its extensions to the one-hundred twenty (120) acres of Backman and Schrader for five (5) or six (6) single family residences. Therefore, even if there were a prescriptive easement or an easement by necessity across the Modig parcel, no right of private condemnation exists across the Spagon, Bessler or McKenna properties. The issue is therefore whether a combination of prescriptive easements and easement by necessity claims can provide legal access over Turtle Rock Road and any of its extensions across the east half of Section 7 to the ground in question in Section 8.

The Court has found that the history of Syringa Creek Road, whether combined with Power's use during his ownership or analyzed independently, does not support a finding as to that route that all the required elements of the basic prescriptive easement claims have been established by clear and convincing evidence (Hughes v. Fisher 474, 483). All parties agree that, at the very most, the easement by necessity claim for Section 8 is limited to crossing the Modig parcel (in the east half of the east half of



Section 7). Because of the unity of title requirement, easement by necessity fails as to the McKenna and Bessler properties in the southwest quarter of the southeast quarter of Section 7. Therefore, on the findings of the Court previously discussed, a combination of easement by necessity and prescriptive easement theories still fails to extend the right of access out to the city of Sandpoint property in the southwest quarter of Section 7. Combining these theories does not provide a complete route to Baldy Mountain Road.

The Court also adds that, at least on the facts of this case, it would be inappropriate to use an easement by necessity theory to "bridge" a gap in a route otherwise established by a prescriptive easement. The easement by necessity is based upon the severance of a parcel from a common ownership parcel that deprives the severed parcel of legal access to a public road. Roberts v. Swin 117 Idaho 9 (Ct App 1909). When Humbird sold the Modig parcel in 1943, the Modig parcel did not have direct access upon a public road. The access out to Baldy Mountain Road would only be prescriptive, and, on this record, for logging only. A claim for access for five (5) or six (6) residences in Section 8, based upon easement by necessity across the old Modig parcel, would expand the scope of the prescriptive easement that is relied upon to "bridge the gap" between the Modig parcel and Baldy Mountain Road. If the Court were to do so, the Court would essentially use the easement by necessity theory to expand the scope of the prescriptive easement. By "combining" the two theories, the Court would be extending the easement by necessity theory to ground where that doctrine has no legal application.

## CONCLUSION

The Court finds that plaintiffs have failed to establish by clear and convincing evidence that there is a prescriptive easement over Turtle Rock Road and any of its three (3) extensions for purposes of logging on the one-hundred twenty (120) acres of Backman and Schrader, or for purposes of permanent year round residences. The Court finds that the claim of easement of necessity over the described route does not apply, as all parties concede the required element of unity of title is lacking.

The Court finds that plaintiffs have failed to carry the burden of proof on the issue of reasonable necessity for a private right of condemnation over the described route for the purposes of either five (5) or six (6) residences on either the Backman one-hundred (100) acres or the entire one-hundred twenty (120) acres in question in Section 8. Having held that there is no reasonable necessity shown for the proposed use of five (5) or six (6) residences, it is unnecessary to address any issue of the constitutionality of a private right of condemnation for the degree and extent of residential development proposed by the plaintiffs. The Court concludes that a right of private condemnation for at least one residence would be constitutionally permissible. The Court declines to address the issue of reasonable necessity as to a single residence, or the issue of a private right of condemnation exclusively for logging purposes, as these claims are not expressly before the Court, and the record is insufficient for the Court to properly resolve such claims.

Finally, the Court declines to apply a combination of the three theories of the plaintiff to provide an access where no access can be established under a single theory. First of all, the Court finds that plaintiffs have not met their burden of proof on the

elements of the three theories. More importantly, the Court concludes it is inappropriate to "combine" theories on the facts of this case, where "combining" theories has the practical affect of extending the application of one theory to ground where that theory admittedly has no application – a "substitution" of theories, rather than a "combination".

Counsel for defendants may prepare a proposed judgment. The Court suggests that counsel for all parties confer regarding the form of any proposed judgment. Counsel for any of the parties may submit alternatives for a separate proposed judgment.

DATED this 14 day of November, 2007.

  
\_\_\_\_\_  
Charles W. Hosack, District Judge

Clerk's Certificate of Mailing

I hereby certify that on the 14~~th~~ day of November, 2007, that a true and correct copy of the foregoing was mailed/delivered by regular U.S. Mail, postage prepaid, Interoffice Mail, Hand Delivered or Faxed to:

mail Plaintiff's Attorney Jeff Sykes, 960 Broadway Ave, Ste 500, Boise, ID 83706

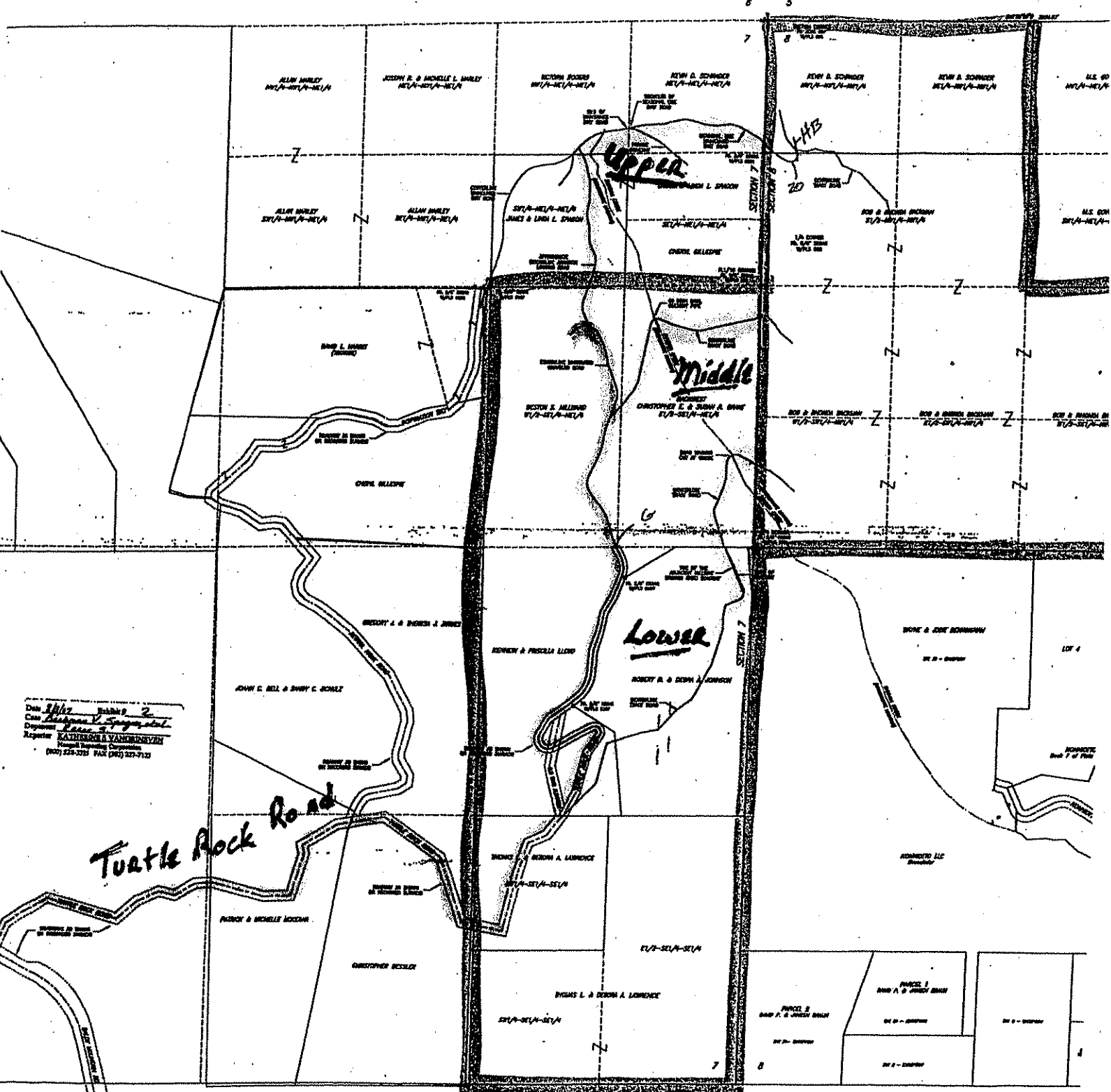
mail Defense Attorney Scott Reed, PO Box A, Coeur d'Alene, ID 83816

mail Defense Attorney Brent Featherston, 113 S. Second Ave, Sandpoint, ID 83864

mail Defense Attorney Peter Erbland, PO Box E, Coeur d'Alene, ID 83816

BY:   
\_\_\_\_\_  
Deputy Clerk

**BACKMAN ROAD EXHI**  
W 1/2, SW 1/4, NW 1/4, SEC. 8, T.57N., 1  
BONNER COUNTY, IDAHO



Drawn 8/1/07 Exhibit 2  
Case Backman v. Springer et al.  
Department Case 2  
Reporter KATHERINE VANWINDEN  
Herald Reporting Corporation  
(800) 228-2292 FAX (800) 227-7122

*Turtle Rock Road*

STATE OF IDAHO )  
County of Bonner ) SS  
FILED 1-3-08

AT 8:40 O'clock A M  
CLERK, DISTRICT COURT

  
Deputy Clerk

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

BOB BACKMAN and RHONDA  
BACKMAN,

Plaintiff,

vs.

JAMES and LINDA SPAGON, KENNETH and )  
PRICILLA LLOYD, BRUCE and DEBORAH )  
JOHNSON, THOMAS and DEBRA )  
LAWRENCE, KEVIN SCHRADER, WESTON )  
MILLWARD, PEND OREILLE VIEW ESTATES )  
OWNERS' ASSOC. INC., GREGORY and )  
THERESA ZIRWES, CHRISTOPHER )  
BESSLER, PATRICK and MICHELLE )  
McKENNA, CHRISTOPHER and )  
SUSAN GRANT, )  
Defendant. )

CASE NO. CV2006-365

JUDGMENT

JAMES and LINDA SPAGON, KENNETH and )  
PRICILLA LLOYD, BRUCE and DEBORAH )  
JOHNSON, THOMAS and DEBRA )  
LAWRENCE, WESTON MILLWARD, )  
PEND OREILLE VIEW ESTATES )  
OWNERS' ASSOC. INC., GREGORY and )  
THERESA ZIRWES, CHRISTOPHER )  
BESSLER, PATRICK and MICHELLE )  
McKENNA, CHRISTOPHER and SUSAN )  
GRANT, )

Counterclaimants,

v.

BOB AND RHONDA BACKMAN,

Counterdefendants.	)
<hr/>	
KEVIN SCHRADER,	)
Cross-claimant,	)
v.	)
JAMES and LINDA SPAGON, KENNETH and	)
PRICILLA LLOYD, BRUCE and DEBORAH	)
JOHNSON, THOMAS and DEBRA	)
LAWRENCE, WESTON MILLWARD,	)
PEND OREILLE VIEW ESTATES	)
OWNERS' ASSOC. INC., GREGORY and	)
THERESA ZIRWES, CHRISTOPHER	)
BESSLER, PATRICK and MICHELLE	)
McKENNA, CHRISTOPHER and SUSAN	)
GRANT.	)
Crossdefendants.	)
<hr/>	

This case was tried before the Court in the Courthouse in Sandpoint, Idaho, on September 4, 5, 6, and 7, 2007.

Plaintiffs/Counterdefendants Bob Backman and Rhonda Backman ("Backmans") were represented by Jeff R. Sykes and Jason G. Dykstra.

Defendant and Cross-claimant Kevin Schrader was represented by Brent C. Featherston.

Defendants/Counterclaimants Christopher Grant and Susan Grant ("Grants") were represented by Peter C. Erbland.

Defendants/Counterclaimants James Spagon and Linda Spagon, Kenneth Lloyd and Priscilla Lloyd, Bruce Johnson and Deborah Johnson, Weston Millward, Pend Oreille View Estates Owners' Associate, Inc., Gregory Zirwes and Theresa Zirwes, Christopher Bessler, and Patrick McKenna and Michelle McKenna (collectively, together with Grants, ("Defendants") were represented by Scott W. Reed.

Defendants Thomas Lawrence and Debra Lawrence did not appear or participate in any manner in the trial.

Witnesses testified and documentary and photographic evidence was received. Counsel for the parties submitted briefs upon the law before and after trial.

The Court, being fully advised, entered its Memorandum Opinion on November 11, 2007, which shall constitute findings of fact and conclusions of law under Rule 52(a), Idaho Rules of Civil Procedure.

Therefore,

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that the claims asserted by Backmans and Schrader for prescriptive easement, easement by necessity and to condemn a private roadway over and across Defendants' properties, to provide legal access across the east half of the east half and the southwest quarter of the southeast quarter of Section 7, Township 57 North, Range 2 West Boise Meridian, Bonner County, Idaho, for six (6) residential home sites on six (6) separate twenty (20) acre parcels owned respectively by Backmans and Schrader and located in Section 8, Township 57 North, Range 2 West Boise, Meridian, Bonner County, Idaho, are denied; and the amended complaint of plaintiffs Backman and the cross claims of cross-claimant Schrader are each hereby dismissed with prejudice, based upon the Court's Memorandum Opinion entered November 11, 2007, incorporated herein.

DATED this 2 day of January, 2008.

  
\_\_\_\_\_  
Charles W. Hosack, District Judge

Clerk's Certificate of Mailing

I hereby certify that on the 3<sup>rd</sup> day of January, 2008, that a true and correct copy of the foregoing was mailed/delivered by regular U.S. Mail, postage prepaid, Interoffice Mail, Hand Delivered or Faxed to:

mail Plaintiff's Attorney Jeff Sykes, 755 West Front Street, Ste 2, Boise, ID 83706

mail Defense Attorney Scott Reed, PO Box A, Coeur d'Alene, ID 83816

mail Defense Attorney Brent Featherston, 113 S. Second Ave, Sandpoint, ID 83864

mail Defense Attorney Peter Erbland, PO Box E, Coeur d'Alene, ID 83816

BY:

Shari R.  
Deputy Clerk



STATE OF IDAHO )  
County of Bonner ) SS  
FILED 1-3-08

AT 8:40 O'clock A M  
CLERK, DISTRICT COURT

  
Deputy Clerk

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

BOB BACKMAN and RHONDA )  
BACKMAN, )  
Plaintiff, )

vs. )

JAMES and LINDA SPAGON, KENNETH and )  
PRICILLA LLOYD, BRUCE and DEBORAH )  
JOHNSON, THOMAS and DEBRA )  
LAWRENCE, KEVIN SCHRADER, WESTON )  
MILLWARD, PEND OREILLE VIEW ESTATES )  
OWNERS' ASSOC. INC., GREGORY and )  
THERESA ZIRWES, CHRISTOPHER )  
BESSLER, PATRICK and MICHELLE )  
McKENNA, CHRISTOPHER and )  
SUSAN GRANT, )  
Defendant. )

CASE NO. CV2006-365

JUDGMENT

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PRICILLA LLOYD, BRUCE and DEBORAH )  
JOHNSON, THOMAS and DEBRA )  
LAWRENCE, WESTON MILLWARD, )  
PEND OREILLE VIEW ESTATES )  
OWNERS' ASSOC. INC., GREGORY and )  
THERESA ZIRWES, CHRISTOPHER )  
BESSLER, PATRICK and MICHELLE )  
McKENNA, CHRISTOPHER and SUSAN )  
GRANT, )  
Counterclaimants, )

v. )

BOB AND RHONDA BACKMAN, )

Counterdefendants.	)
<hr/>	
KEVIN SCHRADER,	)
Cross-claimant,	)
v.	)
JAMES and LINDA SPAGON, KENNETH and	)
PRICILLA LLOYD, BRUCE and DEBORAH	)
JOHNSON, THOMAS and DEBRA	)
LAWRENCE, WESTON MILLWARD,	)
PEND OREILLE VIEW ESTATES	)
OWNERS' ASSOC. INC., GREGORY and	)
THERESA ZIRWES, CHRISTOPHER	)
BESSLER, PATRICK and MICHELLE	)
McKENNA, CHRISTOPHER and SUSAN	)
GRANT.	)
Crossdefendants.	)
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DATED this 2 day of January, 2008.

  
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Charles W. Hosack, District Judge

Clerk's Certificate of Mailing

I hereby certify that on the 3<sup>rd</sup> day of January, 2008, that a true and correct copy of the foregoing was mailed/delivered by regular U.S. Mail, postage prepaid, Interoffice Mail, Hand Delivered or Faxed to:

mail Plaintiff's Attorney Jeff Sykes, 755 West Front Street, Ste 2, Boise, ID 83706

mail Defense Attorney Scott Reed, PO Box A, Coeur d'Alene, ID 83816

mail Defense Attorney Brent Featherston, 113 S. Second Ave, Sandpoint, ID 83864

mail Defense Attorney Peter Erbland, PO Box E, Coeur d'Alene, ID 83816

BY: Shari R.  
Deputy Clerk

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2008 JAN 17 P 1:39

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST. COURT

*Jlm*

Jeff R. Sykes, ISB #5058  
Jason G. Dykstra, ISB #6662  
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(208) 342-6066 Telephone  
(208) 336-9712 Facsimile  
sykes@lawidaho.com  
IA1547.111PLD\Disallow Costs Mtn 002.doc

*Attorneys For Plaintiffs Bob and Rhonda Backman*

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

BOB BACKMAN and RHONDA  
BACKMAN, husband and wife,

Plaintiff,

vs.

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  
nonprofit corporation; GREGORY ZIRWES  
and THERESA ZIRWES, husband and wife;  
CHRISTOPHER BESSLER, an individual;

Case No. CV-2006-00365

**PLAINTIFFS' MOTION TO  
DISALLOW PART OF DEFENDANTS'/  
COUNTERCLAIMANTS' COSTS**

ROBERT WALSH and LYNN WALSH,  
husband and wife; and PATRICK  
McKENNA and MICHELLE McKENNA,  
husband and wife,

Defendants.

**AND RELATED CROSS-ACTION.**

COME NOW Plaintiffs BOB BACKMAN and RHONDA BACKMAN, by and through their attorneys of record, Meuleman Mollerup LLP, and pursuant to 54(d)(6) of the Idaho Rules of Civil Procedure, hereby object to Defendants/Counterclaimants Memorandum of Costs and move to disallow the claimed costs as a matter of right and discretionary costs.

DATED this 17th day of January 2008.

MEULEMAN MOLLERUP LLP

By: 

Jeffrey R. Sykes  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 17<sup>th</sup> day of January 2008, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

Scott W. Reed, Esq.

Attorney at Law

Post Office Box A

401 Front Avenue, Suite 205

Coeur d'Alene, Idaho 83816

Telephone: 208/664-2161

Facsimile: 208/765-5117

*Counsel For Defendants/Counterclaimants Spagon, Lloyd, Johnson, Zirwes,  
Bessler, Millward, McKenna and the Association*

U.S. Mail    Hand Delivered    Overnight Mail    Facsimile

Brent C. Featherston, Esq.  
 Featherston Law Firm Chtd.  
 113 South Second Avenue  
 Sandpoint, Idaho 83864  
 Telephone: 208/263-6866  
 Facsimile: 208/263-0400  
*Counsel For Defendant Schrader*

U.S. Mail    Hand Delivered    Overnight Mail    Facsimile

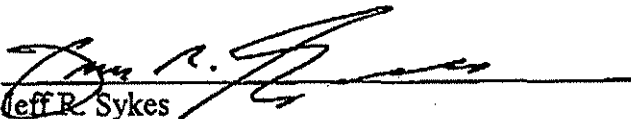
Peter C. Erbland, Esq.  
 Paine, Hamblen, Coffin, Brooke & Miller LLP  
 701 Front Avenue, Suite 101  
 Post Office Box E  
 Coeur d'Alene, Idaho 83816-0328  
 Telephone: 208/664-8115  
 Facsimile: 208/664-6338  
*Counsel For Defendants Grant*

U.S. Mail    Hand Delivered    Overnight Mail    Facsimile

With copies via U.S. Mail to:

The Honorable Charles W. Hosack [Two Copies]  
 Judge of the First Judicial District  
 Kootenai County Office  
 Post Office Box 9000  
 Coeur d'Alene, Idaho 83816-9000

Michael E. Reagan, Esq.  
 Liesche & Reagan, PA  
 1044 Northwest Boulevard, Suite D  
 Coeur d'Alene, Idaho 83814

  
 Jeff R. Sykes

STATE OF IDAHO  
COUNTY OF BONNER  
DISTRICT JUDICIAL DIST.

2008 JAN 17 P 1:39

CLERK DISTRICT COURT  
*Jlm*  
REPLY

Jeff R. Sykes, ISB #5058  
Jason G. Dykstra, ISB #6662  
MEULEMAN MOLLERUP LLP  
755 West Front Street, Suite 200  
Boise, Idaho 83702  
(208) 342-6066 Telephone  
(208) 336-9712 Facsimile  
sykes@lawidaho.com  
IN1547.111\PLD\Disallow Costs Mtn 002.doc

*Attorneys For Plaintiffs Bob and Rhonda Backman*

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

BOB BACKMAN and RHONDA  
BACKMAN, husband and wife,

Plaintiff,

vs.

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  
nonprofit corporation; GREGORY ZIRWES  
and THERESA ZIRWES, husband and wife;  
CHRISTOPHER BESSLER, an individual;

Case No. CV-2006-00365

**PLAINTIFFS' MOTION TO  
DISALLOW PART OF DEFENDANTS'/  
COUNTERCLAIMANTS' COSTS**



ROBERT WALSH and LYNN WALSH,  
husband and wife; and PATRICK  
McKENNA and MICHELLE McKENNA,  
husband and wife,

Defendants.

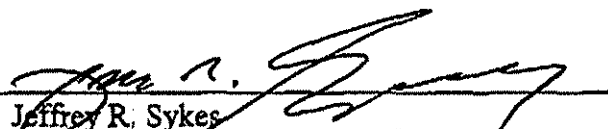
**AND RELATED CROSS-ACTION.**

COME NOW Plaintiffs BOB BACKMAN and RHONDA BACKMAN, by and through their attorneys of record, Meuleman Mollerup LLP, and pursuant to 54(d)(6) of the Idaho Rules of Civil Procedure, hereby object to Defendants/Counterclaimants Memorandum of Costs and move to disallow the claimed costs as a matter of right and discretionary costs.

DATED this 17th day of January 2008.

MEULEMAN MOLLERUP LLP

By:

  
Jeffrey R. Sykes  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 17<sup>th</sup> day of January 2008, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

Scott W. Reed, Esq.  
Attorney at Law  
Post Office Box A  
401 Front Avenue, Suite 205  
Coeur d'Alene, Idaho 83816  
Telephone: 208/664-2161  
Facsimile: 208/765-5117

*Counsel For Defendants/Counterclaimants Spagon, Lloyd, Johnson, Zirwes,  
Bessler, Millward, McKenna and the Association*

U.S. Mail    Hand Delivered    Overnight Mail    Facsimile

Brent C. Featherston, Esq.  
Featherston Law Firm Chtd.  
113 South Second Avenue  
Sandpoint, Idaho 83864  
Telephone: 208/263-6866  
Facsimile: 208/263-0400  
*Counsel For Defendant Schrader*

U.S. Mail    Hand Delivered    Overnight Mail    Facsimile

Peter C. Erbland, Esq.  
Paine, Hamblen, Coffin, Brooke & Miller LLP  
701 Front Avenue, Suite 101  
Post Office Box E  
Coeur d'Alene, Idaho 83816-0328  
Telephone: 208/664-8115  
Facsimile: 208/664-6338  
*Counsel For Defendants Grant*

U.S. Mail    Hand Delivered    Overnight Mail    Facsimile

With copies via U.S. Mail to:

The Honorable Charles W. Hosack [Two Copies]  
Judge of the First Judicial District  
Kootenai County Office  
Post Office Box 9000  
Coeur d'Alene, Idaho 83816-9000

Michael E. Reagan, Esq.  
Liesche & Reagan, PA  
1044 Northwest Boulevard, Suite D  
Coeur d'Alene, Idaho 83814

  
Jeff R. Sykes

CLERK OF DISTRICT COURT  
COUNTY OF BONNER  
DISTRICT OF IDAHO

2008 JAN 18 A 9:12

CLERK OF DISTRICT COURT  
*[Signature]*

Jeff R. Sykes, ISB #5058  
Jason G. Dykstra, ISB #6662  
MEULEMAN MOLLERUP LLP  
755 West Front Street, Suite 200  
Boise, Idaho 83702  
(208) 342-6066 Telephone  
(208) 336-9712 Facsimile  
sykes@lawidaho.com  
E:\1547.11\PLD\AMEND FINDINGS-MTN.DOC

Attorneys For Plaintiffs Bob and Rhonda Backman

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

BOB BACKMAN and RHONDA  
BACKMAN, husband and wife,

Plaintiff,

vs.

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  
nonprofit corporation; GREGORY ZIRWES  
and THERESA ZIRWES, husband and wife;  
CHRISTOPHER BESSLER, an individual;

Case No. CV-2006-00365

PLAINTIFFS' MOTION TO  
AMEND FINDINGS OF FACT  
AND  
TO AMEND JUDGMENT

ROBERT WALSH and LYNN WALSH,  
husband and wife; PATRICK McKENNA  
and MICHELLE McKENNA, husband and  
wife; and CHRISTOPHER E. GRANT and  
SUSAN R. GRANT, husband and wife,

Defendants.

**AND RELATED CROSS-ACTION.**

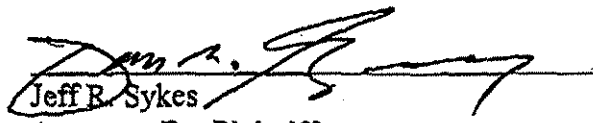
COMES NOW, Plaintiffs Bob Backman and Rhonda Backman ("Plaintiffs"), by and through their counsel of record, Meuleman Mollerup LLP, and move this Court to amend and supplement its Findings of Fact and Conclusions of Law pursuant to Idaho Rule of Civil Procedure 52(b) and to amend the Judgment entered on January 3, 2008, pursuant to Idaho Rule of Civil Procedure 59(a).

This motion is made and based upon the records and files herein, Plaintiffs' Memorandum in Support of Motion To Amend Findings of Fact and To Amend Judgment and the Affidavit of Jeff R. Sykes in Support of Motion To Amend Findings of Fact and To Amend Judgment; and Notice of Lodging Trial Transcript filed contemporaneously herewith.

DATED this 17<sup>th</sup> day of January 2008.

MEULEMAN MOLLERUP LLP

BY:

  
Jeff R. Sykes  
Attorneys For Plaintiffs  
Bob Backman and Rhonda Backman

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 17<sup>th</sup> day of January 2008, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

Scott W. Reed, Esq.  
Attorney at Law  
Post Office Box A  
Coeur d'Alene, Idaho 83816  
Telephone: 208/664-2161  
Facsimile: 208/765-5117  
*Counsel For Defendants/Counterclaimants Spagon, Lloyd, Johnson, Zirwes,  
Bessler, Millward, McKenna and the Association*

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Featherston Law Firm Chtd.  
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Telephone: 208/263-6866  
Facsimile: 208/263-0400  
*Counsel For Defendant Schrader*

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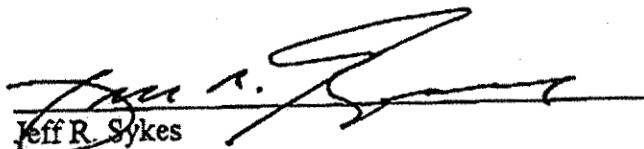
Peter C. Erbland, Esq.  
Paine, Hamblen, Coffin, Brooke & Miller LLP  
701 Front Avenue, Suite 101  
Post Office Box E  
Coeur d'Alene, Idaho 83616-0328  
Telephone: 208/664-8115  
Facsimile: 208/664-6338  
*Counsel For Defendants Grant*

U.S. Mail    Hand Delivered    Overnight Mail    Facsimile

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Michael E. Reagan, Esq.  
Liesche & Reagan, PA  
1044 Northwest Boulevard, Suite D  
Coeur d'Alene, Idaho 83814

  
Jeff R. Sykes

CERTIFICATE OF SERVICE

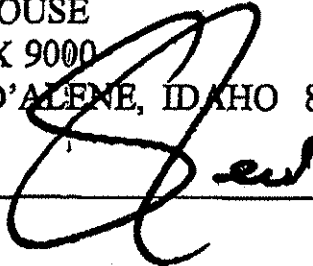
I certify that a copy of the above and foregoing has been faxed this 23rd day of January, 2008 to:

JEFF R. SYKES  
JASON G. DYKSTRA  
MEULEMAN MOLLERUP, LLP  
755 WEST FRONT STREET, SUITE 200  
BOISE, IDAHO 83706  
FAX # (208) 336-9712

BRENT C. FEATHERSTON  
ATTORNEY AT LAW  
113 SOUTH SECOND AVENUE  
SANDPOINT, IDAHO 83864  
FAX # (208) 263-0400

PETER C. ERBLAND  
PAINE, HAMBLÉN, COFFIN,  
BROOKE & MILLER  
ATTORNEYS AT LAW  
P. O. BOX E  
COEUR D'ALENE, IDAHO 83816-03284  
FAX # (208) 664-6338

HONORABLE CHARLES W. HOSACK  
COURTHOUSE  
P. O. BOX 9000  
COEUR D'ALENE, IDAHO 83816



**ORIGINAL**

Scott W. Reed, ISB#818  
Attorney at Law  
P. O. Box A  
Coeur d'Alene, ID 83816  
Phone (208) 664-2161  
FAX (208) 765-5117

STATE OF IDAHO  
COUNTY OF BONNER  
2009 FEB 13 P 12:34  
CLERK DISTRICT COURT  
*dy*

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

	)	Case No. CV-2006-00365
	)	
<b>BOB BACKMAN and RHONDA</b>	)	<b>CERTIFICATION ON TRANSCRIPT</b>
<b>BACKMAN, husband and wife,</b>	)	<b>EXCERPTS AND EXHIBITS SUBMITTED</b>
	)	<b>BY DEFENDANTS AND</b>
<b>Plaintiffs,</b>	)	<b>COUNTERCLAIMANTS IN OPPOSITION</b>
<b>v.</b>	)	<b>TO PLAINTIFFS' MEMORANDUM IN</b>
	)	<b>SUPPORT OF MOTION TO AMEND</b>
<b>JAMES A. SPAGON and LINDA I.</b>	)	<b>FINDINGS OF FACT AND TO AMEND</b>
<b>SPAGON, et al.,</b>	)	<b>JUDGMENT</b>
<b>Defendants.</b>	)	
	)	

Scott W. Reed certifies as follows:

1. I am attorney of record for defendants and counterclaimants Spagon, et al. I participated in the trial of this case and I have a copy of the original Trial Transcript consisting of Pages 1 through 709, inclusive, prepared by JoAnn Schaller, a Duly Qualified and Certified Shorthand Reporter for the First Judicial District of the State of Idaho.

2. Attached hereto is a true and correct copy of the Trial Transcript Excerpts as referenced and referred to in the Briefs of Defendants and Counterclaimants in

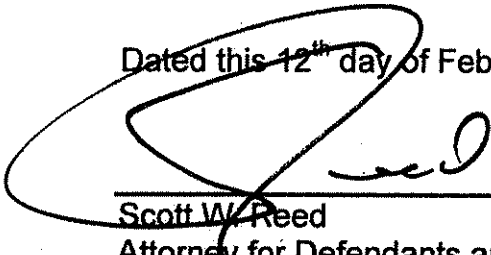
320



Opposition to Plaintiff's Memorandum and to Plaintiffs' Proposed Modification of Judgment.

3. Attached hereto are true and correct copies of four aerial photographs taken from Plaintiffs' Exhibit 43 prepared by Dr. Michael Folsom and deeds entered as Plaintiffs' Exhibits 18 and 25.

Dated this 12<sup>th</sup> day of February, 2008.



---

Scott W. Reed  
Attorney for Defendants and  
Cross Claimants Spagon, et al.

### CERTIFICATE OF MAILING

I certify that a copy of the above and foregoing has been sent by first class mail, postage prepaid, this 12<sup>th</sup> day of February to:

JEFF R. SYKES  
JASON G. DYKSTAN  
MEULEMAN MOLLERUP, LLP  
960 BROADWAY AVENUE, SUITE 500  
BOISE, IDAHO 83706

BRENT C. FEATHERSTON  
ATTORNEY AT LAW  
113 SOUTH SECOND AVENUE  
SANDPOINT, ID 83864

PETER C. ERBLAND  
PAINE, HAMBLE, COFFIN, BROOKE & MILLER  
ATTORNEYS AT LAW  
P.O. BOX E  
COEUR D'ALENE, IDAHO 83816



---

Scott W. Reed

Certification of Transcript Excerpts  
And Exhibits

105386

EASEMENT

For the sum of one dollar and other valuable consideration, Grantors, Emmert Marley and Bertha C. Marley, his wife, their successors and assigns, do hereby grant, access and permission to use existing road from the N.W. 1/4 of the N.E. 1/4 through the Grantors property, the N.E. 1/4 of the N.E. 1/4 and the S.W. 1/4 of the S.E. 1/4, all in Sec. 7, Twp. 57 North & Range 2 West, R.M., which road runs in a southerly direction to the Bonner County road.

The Grantors also give permission to Emmert Marley and Bertha Marley and their successors and assigns, to install, operate and maintain one and one-half inch pipe line from Springs Creek through the N.W. 1/4 of the N.E. 1/4 to the N.W. 1/4 of the N.E. 1/4, all in Sec. 7, Twp. 57 North & Range 2 West, R.M., taking the shortest and most efficient route. Grantors shall permit water from creek to flow through pipe line. All expense for installing and maintaining pipe line shall be the Grantees.

Any violation of the grantors property rights will automatically make this easement null and void.

*Emmert Marley*  
*Bertha C. Marley*



Witness my hand and seal this 21 day of August, 1960

at \_\_\_\_\_, Idaho, whereof I have hereunto set my hand and official seal.

*James H. Marley*



AFTER RECORDING MAIL TO:  
THE GRANTEE



608618

INSTRUMENT NO. 00031428

WARRANTY DEED

For Value Received JOHN PURYEAR III and NANETTE B. PURYEAR, HUSBAND AND WIFE, ALSO SHOWN OF RECORD AS JOHN LESLIE PURYEAR III AND NANETTE B. PURYEAR the grantor(s), do(es) hereby grant, bargain, sell and convey unto JOHN C. GILLHAM and LYNDA H. GILLHAM, Husband and Wife, the grantee(s) whose current address is 292 WINTERBERRY, SANDPOINT, IDAHO 83864, the following described premises, in Bonner County Idaho, to wit:

PARCEL 1:

The North half of the East half of the Northeast quarter of the Northeast quarter of Section 7, Township 57 North, Range 2 West, Boise Meridian, Bonner County, Idaho.

PARCEL 2:

The North half of the Northwest quarter of the Northwest quarter of Section 8, Township 57 North, Range 2 West, Boise Meridian, Bonner County, Idaho.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee(s), their heirs and assigns forever. And the said Grantor(s) do(es) hereby covenant to and with the said Grantee(s), that he/she/they is/are the owner(s) in fee simple of said premises; that they are free from all encumbrances except those matters shown on the Exceptions Exhibit attached hereto and made a part hereof, and that he/she/they will warrant and defend the same from all lawful claims whatsoever.

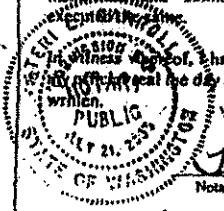
Dated: SEPTEMBER 11, 2002 9:10pm

JOHN PURYEAR III  
  
NANETTE B. PURYEAR

STATE OF Washington } SS  
COUNTY OF Clark

RECORDING DATA:

On this 11<sup>th</sup> day of SEPTEMBER, 2002, before me, the undersigned, a Notary Public in and for the said State, personally appeared JOHN PURYEAR III and NANETTE B. PURYEAR known or identified to me to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that he/she/they



Witness my hand and seal, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Notary Public in and for said County and State  
Residing at: Warren  
Commission Exp. July 21, 2003

JAMIE SCOTT  
DEPUTY  
BONNER COUNTY RECORDER  
FILED BY  
SANDPOINT TITLE RECORDS  
2002 SEP 13 P 4:25



AFTER RECORDING MAIL TO:  
THE GRANTEE



608618

INSTRUMENT NO. 00031428

WARRANTY DEED

For Value Received JOHN PURYEAR III and NANETTE B. PURYEAR, HUSBAND AND WIFE, ALSO SHOWN OF RECORD AS JOHN LESLIE PURYEAR III AND NANETTE B. PURYEAR the grantor(s), do(es) hereby grant, bargain, sell and convey unto JOHN C. GILLHAM and LYNDA H. GILLHAM, Husband and Wife, the grantee(s) whose current address is 292 WINTERBERRY, SANDPOINT, IDAHO 83864, the following described premises, in Bonner County Idaho, to wit:

PARCEL 1:

The North half of the East half of the Northeast quarter of the Northeast quarter of Section 7, Township 57 North, Range 2 West, Boise Meridian, Bonner County, Idaho.


PARCEL 2:

The North half of the Northwest quarter of the Northwest quarter of Section 8, Township 57 North, Range 2 West, Boise Meridian, Bonner County, Idaho.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee(s), their heirs and assigns forever. And the said Grantor(s) do(es) hereby covenant to and with the said Grantee(s), that he/she/they is/are the owner(s) in fee simple of said premises; that they are free from all encumbrances except those matters shown on the Exceptions Exhibit attached hereto and made a part hereof, and that he/she/they will warrant and defend the same from all lawful claims whatsoever.

Dated: SEPTEMBER 11, 2002 5:10pm

  
JOHN PURYEAR III

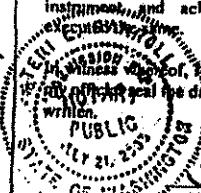
  
NANETTE B. PURYEAR

STATE OF Washington } SS  
COUNTY OF Clark

RECORDING DATA:


On this 11<sup>th</sup> day of SEPTEMBER, 2002, before me, the undersigned, a Notary Public in and for the said State, personally appeared JOHN PURYEAR III and NANETTE B. PURYEAR known or identified to me to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that he/she/they

as witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



  
Teri A. Cassell  
Notary Public in and for said County and State

Residing at: Wancowen  
Commission Exp. July 21, 2003

  
FRANK SCOTT  
DEPUTY  
BONNER COUNTY RECORDER  
FILED BY  
SANDPOINT TITLE INSURANCE  
2002 SEP 13 P 4 25



**EXCEPTIONS EXHIBIT**

**SUBJECT TO:**

GENERAL TAXES FOR THE YEAR 2002, A LIEN IN THE PROCESS OF ASSESSMENT, NOT YET DUE OR PAYABLE.

**EASEMENT AND CONDITIONS CONTAINED THEREIN:**

RECORDED: MAY 27, 1966

INSTRUMENT NO: 106286

IN FAVOR OF: EMMETT MARLEY AND BERTHA C. MARLEY, HUSBAND AND WIFE

FOR: INGRESS, EGRESS OVER EXISTING ROAD

AFFECTS: PARCEL 1

**EASEMENT AND CONDITIONS CONTAINED THEREIN:**

RECORDED: SEPTEMBER 15, 1981

INSTRUMENT NO: 247067

IN FAVOR OF: EMMETT MARLEY

FOR: INGRESS AND EGRESS OVER A ROAD NOT TO EXCEED 30 FEET IN WIDTH

AFFECTS: PARCEL 1

TERMS AND CONDITIONS OF THAT CERTAIN EASEMENT, BY AND BETWEEN EMMETT AND BERTHA MARLEY REVOCABLE INTER VIVOS TRUST; AND CAMERON BUCK AND JULIE BUCK, RECORDED DECEMBER 14, 1992, AS INSTRUMENT NO. 417053, RECORDS OF BONNER COUNTY, IDAHO. ✓

TERMS AND CONDITIONS OF THAT CERTAIN EASEMENT, BY AND BETWEEN LOUISIANA PACIFIC CORPORATION; AND TONY TRUNK, AN INDIVIDUAL, RECORDED MAY 6, 1993, AS INSTRUMENT NO. 424175, RECORDS OF BONNER COUNTY, IDAHO.

TERMS AND CONDITIONS OF THAT CERTAIN EASEMENT, BY AND BETWEEN ALLAN MARLEY, A MARRIED MAN AS HIS SOLE AND SEPARATE PROPERTY; AND CAMERON BUCK AND JULIE BUCK, RECORDED MAY 6, 1993, AS INSTRUMENT NO. 424177, RECORDS OF BONNER COUNTY, IDAHO.

**EASEMENT AND CONDITIONS THEREOF RESERVED BY INSTRUMENT:**

IN FAVOR OF: ANDREW PURYEAR

FOR: EASEMENT FOR INGRESS, EGRESS AND UTILITIES OVER EXISTING ROADS FOR ACCESS

AFFECTS: PARCEL 2

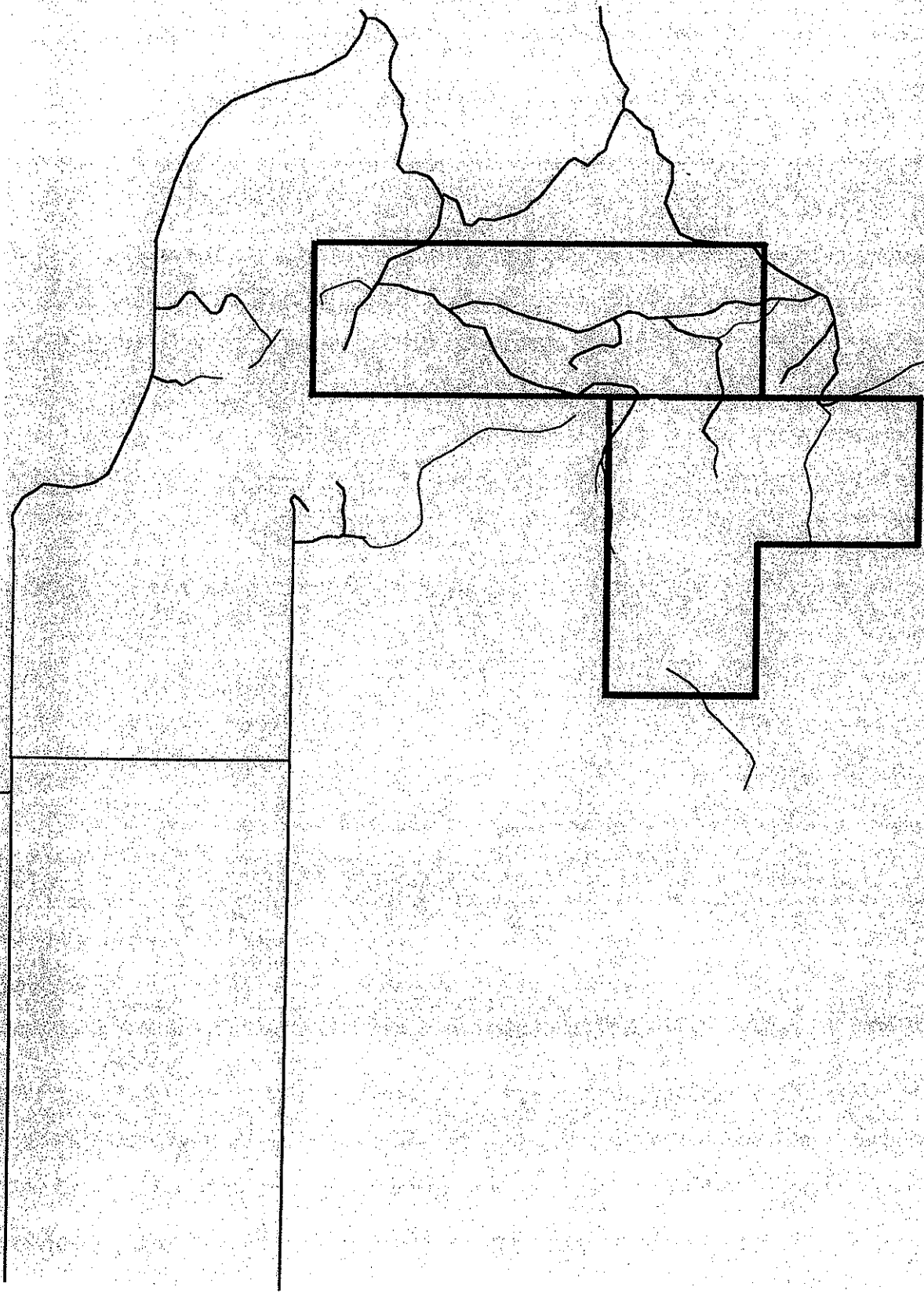
RECORDED: MAY 10, 1995

INSTRUMENT NO.: 465037

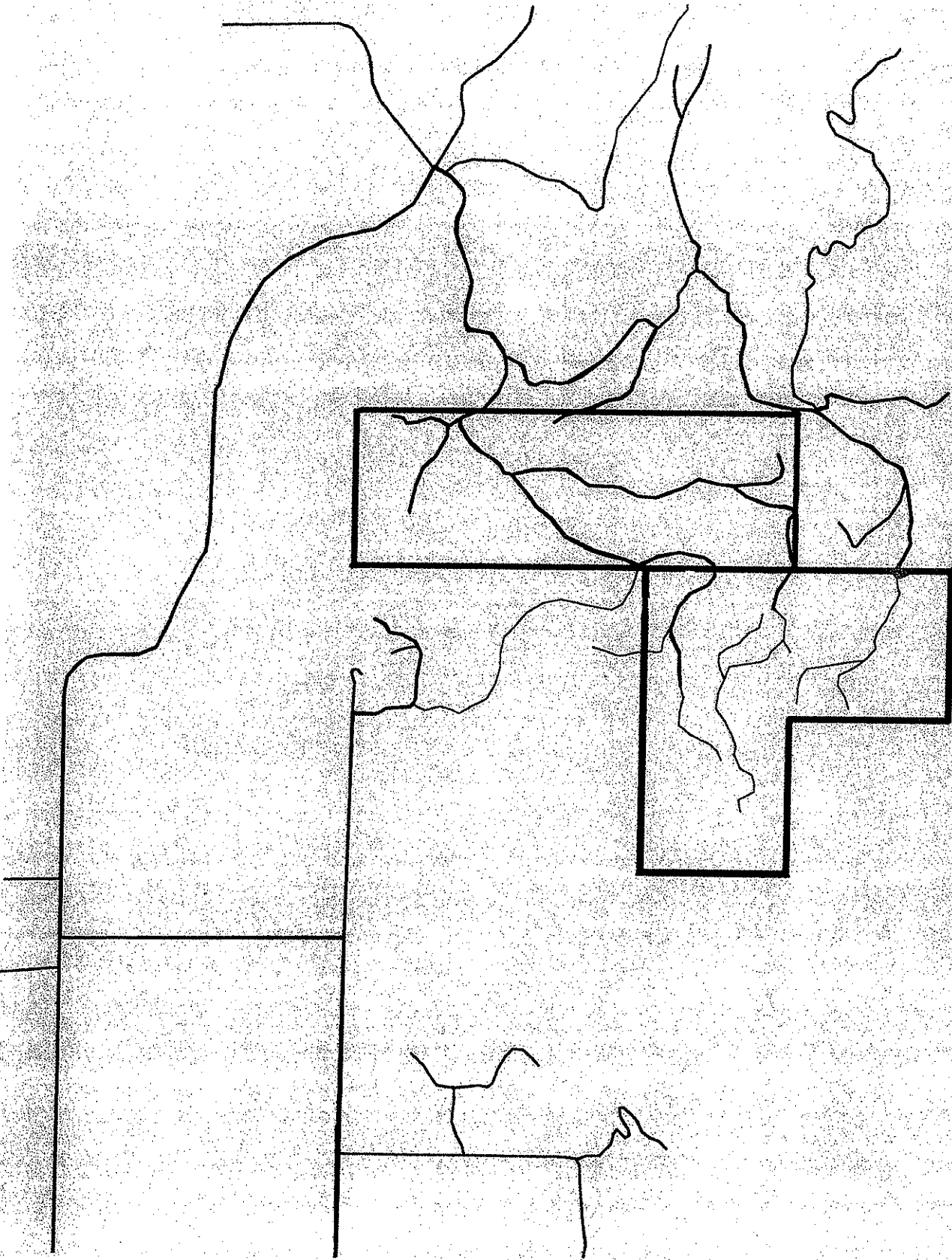
TERMS AND CONDITIONS OF THAT CERTAIN EASEMENT AND AGREEMENT, BY AND BETWEEN JOHN PURYEAR II AND NANETTE PURYEAR, HUSBAND AND WIFE AND ANDREW PURYEAR, AN UNMARRIED MAN; TO MICHAEL E. SOWDERS AND JUDITH SOWDERS, HUSBAND AND WIFE, RECORDED MARCH 22, 1996, AS INSTRUMENT NO. 482390, RECORDS OF BONNER COUNTY, IDAHO.

SHOULD PARCEL 2 BE SEPARATED FROM PARCEL 1, THE QUESTION OF LEGAL ACCESS WILL ARISE FOR PARCEL 2.

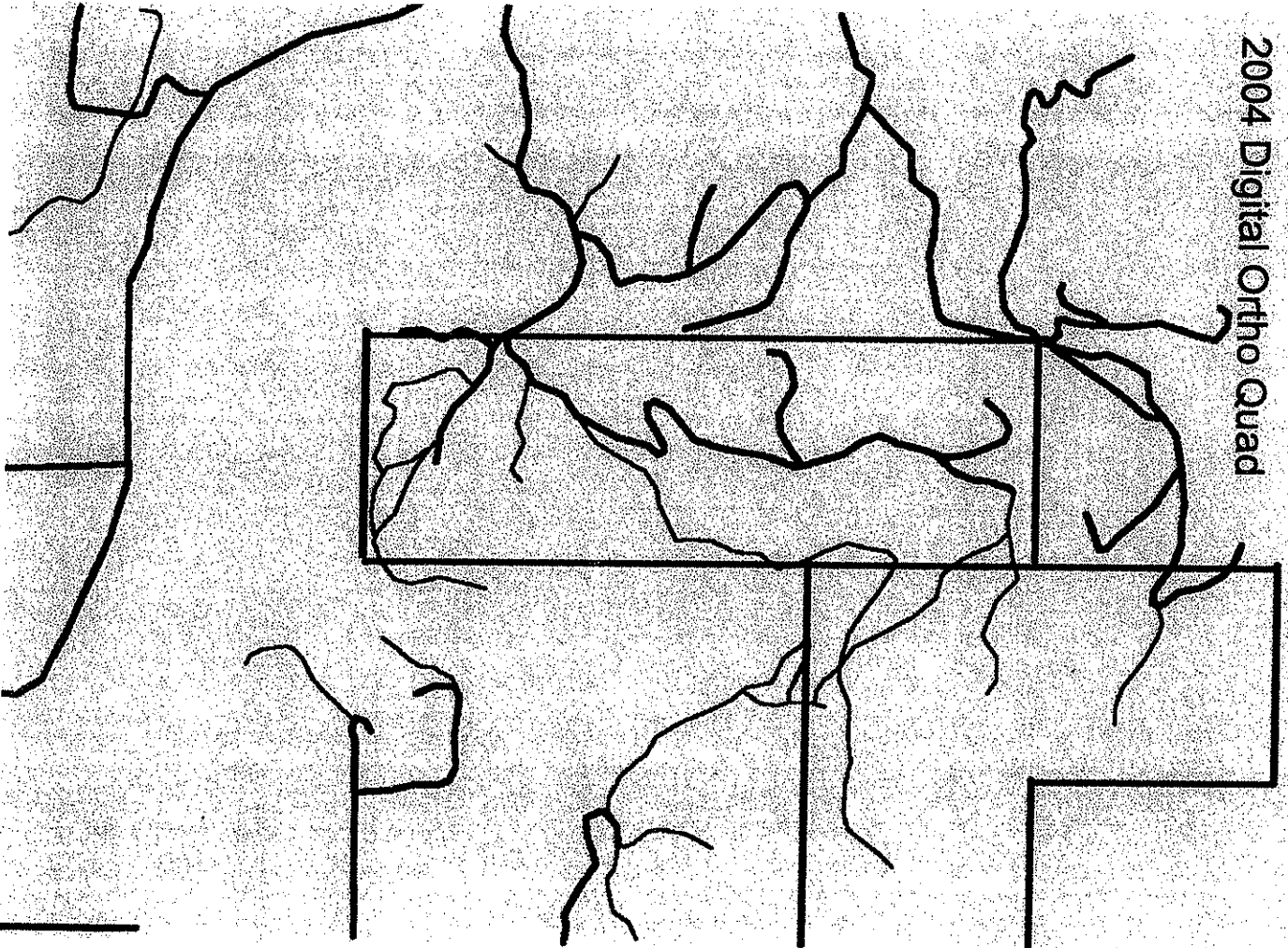
1992 May 25  
USGS High Resolution Scan



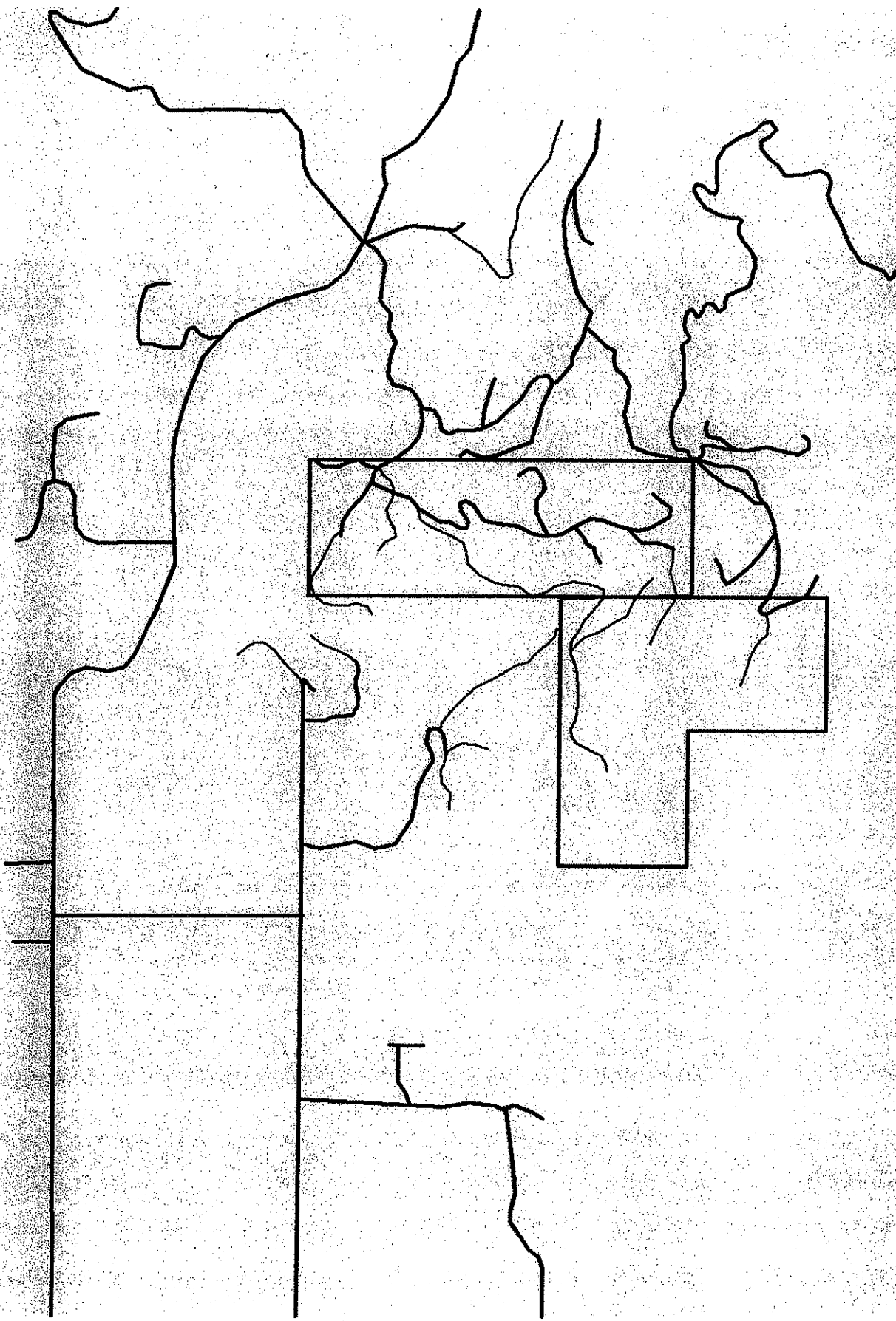
1998 August 11 USGS High Resolution Scan



2004 Digital Ortho Quad







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

\* \* \* \* \*

COUNTY

BOB and RHONDA BACKMAN,

Plaintiffs,

vs.

CASE NO. CV-06-00365

COURT TRIAL

JAMES and LINDA SPAGON,  
KENNETH and PRICILLA LLOYD,  
BRUCE and DEBORAH JOHNSON,  
THOMAS and DEBRA LAWRENCE,  
KEVIN SCHRADER, WESTON  
MILLWARD, PEND OREILLE VIEW  
ESTATES OWNERS' ASSOC. INC.,  
GREGORY and THERESA ZIRWES,  
CHRISTOPHER BESSLER, PATRICK  
and MICHELLE McKENNA,  
CHRISTOPHER and SUSAN GRANT,

Defendants.

---

JAMES and LINDA SPAGON, KENNETH  
and PRICILLA LLOYD, BRUCE and  
DEBORAH JOHNSON, THOMAS and  
DEBRA LAWRENCE, WESTON  
MILLWARD, PEND OREILLE VIEW  
ESTATES OWNERS' ASSOC. INC.,  
GREGORY and THERESA ZIRWES,  
CHRISTOPHER BESSLER, PATRICK  
and MICHELLE McKENNA,  
CHRISTOPHER and SUSAN GRANT,

Counterclaimants,

vs.

BOB and RHONDA BACKMAN,

Counterdefendants.

---

KEVIN SCHRADER,

Cross-claimant,

1 the relevance of this? I mean, I understand the dynamic of it,  
 2 of course, and I know why you want it in. But in terms of  
 3 decisions, I actually have to decide what difference does it make  
 4 as to the degree of dissatisfaction Mr. Backman has with Chicago  
 5 Title. I am not following -- I mean, there is a lot of appeal  
 6 to this, and I understand that, but in terms of the decisions I  
 7 need to actually make, how does this get me anywhere?

8 MR. REED: Well, the basis for it, your Honor, is that  
 9 there's a title insurance policy out there that is already  
 10 admitted into evidence, and the litigation is all a matter that  
 11 is not really in Mr. Backman's control. If he got his title  
 12 insurance policy he wouldn't be a plaintiff in this lawsuit.

13 THE COURT: Well, he still owns the property and  
 14 he's -- interest. So I don't think that's -- and just exactly --  
 15 I just don't follow -- I am going to sustain the objection.  
 16 Maybe you can educate me some other way, but I am missing the  
 17 point at this stage. So, I'll go ahead and sustain the  
 18 objection, just on the grounds of relevance and it's cumulative.

19 (Exhibit No. Defendants' ZZ offered and rejected)

20 Q. BY MR. REED: Mr. Backman, if you are unsuccessful in  
 21 this lawsuit, and you do not have access to the property, you  
 22 would then expect to obtain the \$475,000?

23 A. It would seem reasonable.

24 Q. And you would then be finished and completed payments  
 25 to Mr. Powers?

1 A. State that again, please.

2 Q. You -- would you proceed with the payments and then  
 3 obtain title to the property or would you seek to rescind the  
 4 contract with Mr. Powers?

5 A. I would still owe Mr. Powers money.

6 MR. REED: I have no further questions.

7 THE COURT: Any redirect?

8 MR. SYKES: Yes, your Honor, briefly.

9 REDIRECT EXAMINATION

10 BY MR. MR. SYKES:

11 Q. Mr. Backman, you testified earlier in questioning from  
 12 Mr. Erbland that, correct me if I am wrong, that you would like  
 13 to have or you thought you had access on Redtail Hawk Road up to  
 14 the upper road up to the top section, top portion of Section 8 of  
 15 your property; is that correct?

16 A. Yes.

17 Q. Now, if you had no legal right to that access, is  
 18 access up Turtle Rock Road and on the lower or the upper or the  
 19 middle roads acceptable?

20 A. Yes.

21 Q. Explain why.

22 A. Well, they all work. They all access the property. I  
 23 can get where I want to go from any one of them.

24 Q. And you are not a lawyer; is that correct?

25 A. No.

1 Q. Do you understand all the nuances and the issues behind  
 2 the concept of easement by prescriptive easement?

3 A. I can't say I do.

4 Q. How about this idea that has been touched on easement  
 5 by necessity, do you know anything about that?

6 A. Well, I understand the word "necessity."

7 Q. Is it fair to say that if you don't have access on  
 8 Redtail Hawk Road for some legal purpose and you do have a legal  
 9 basis to get access over Turtle Rock Road that would be  
 10 acceptable?

11 A. That would be fine.

12 Q. All right. You mentioned also in response to  
 13 questioning that your primary purpose when you bought the  
 14 property, I think we discussed this, is for five residential home  
 15 sites, correct?

16 A. That's right.

17 Q. And that is probably the highest and best use for the  
 18 property?

19 A. Yes.

20 Q. Now, if you are not able to have that, would you put  
 21 the property to some other use?

22 A. Well, yeah, I have a lot of money in it, and so I would  
 23 be looking for any way I could to recover. And as I say, stone  
 24 is probably the most obvious thing, and there is a lot of money  
 25 in stone.

1 Q. And timber, there is timber there?

2 A. There is a little timber. Yeah, I guess we would just  
 3 rape and pillage, you know.

4 Q. Well, I guess the end-all and be-all is that if the  
 5 choices between landlocked property that you can't get to and  
 6 property that you can get to for mining purposes, would you take  
 7 mining purposes?

8 A. Absolutely.

9 Q. Has there ever been any consideration of building your  
 10 own house there?

11 A. Oh, absolutely.

12 Q. Explain that, please.

13 A. Well, you know, we have looked at the view sites up  
 14 there, and there is one that we particularly like. And my wife  
 15 and I have discussed, you know, that if the market would come  
 16 back we would love to sell our own place and build a home up  
 17 there ourselves.

18 Q. And that is something that you consider doing?

19 A. Absolutely.

20 Q. Well, finally, the last question was the amount of cash  
 21 that you put into this. In addition to the cash, you have also  
 22 entered into a promissory note with Randy Powers that requires  
 23 you to pay back a certain amount of money?

24 A. Uh-huh.

25 Q. Is that yes?

1 Q. And same questions with regard to the upper road that I  
 2 asked you concerning the lower and middle. Did you find any  
 3 Record of Survey for that road?  
 4 A. No.  
 5 Q. That road crosses the property of Schrader and Rogers,  
 6 and the record that we have here shows, trust me, that there is  
 7 no objection from Mr. Schrader and there appears to be an  
 8 easement from Ms. Rogers. But it also crosses the property of  
 9 some defendants in this case by the name of Spagon, Spagon. You  
 10 see that?  
 11 A. Yeah.  
 12 Q. Did you find any evidence that the Spagons had granted  
 13 permission to Mr. Backman or his predecessors in interest,  
 14 Mr. Powers, others, to cross their property?  
 15 A. Not that I found.  
 16 Q. You testified earlier that, and these are my words, not  
 17 yours, paraphrasing your comments, that simply creating a survey  
 18 of a road does not create the legal entitlement -- creating  
 19 tracts does not create legal interests in them?  
 20 A. Not on a Record of Survey. On a subdivision plat you  
 21 can.  
 22 Q. There has to be something else that --  
 23 A. Title document, yes.  
 24 Q. Like deeds?  
 25 A. Correct.

1 Q. What about other types of restrictions on roadways, for  
 2 example?  
 3 A. Same thing. Has to be some kind of title document.  
 4 Q. In this case did you have an opportunity to look at the  
 5 Pend Oreille View Estates Declarations of Covenants, Conditions  
 6 and Restrictions?  
 7 A. Briefly.  
 8 Q. Showing you Exhibit No. 36, which has been admitted  
 9 into evidence, do you see paragraph 3.04?  
 10 A. Yes.  
 11 Q. Did you have a look at that when you were doing your  
 12 work?  
 13 A. I did.  
 14 Q. And that coincides with the Record of Survey, Record of  
 15 Survey showing that the Pend Oreille View Estates roads are  
 16 private roads, correct?  
 17 A. Correct.  
 18 Q. In fact, it says, quote, Said rights of way are private  
 19 roads, maintained for the use and benefit of the Tract Owners and  
 20 their guests, and those others entitled by legal instrument to  
 21 the use of the same. Correct?  
 22 A. Correct.  
 23 MR. ERBLAND: That's all the questions I have. Thank  
 24 you.  
 25 MR. REED: I have no questions.

1 THE COURT: Why don't we take our afternoon recess here  
 2 before we get to redirect, if any. Just take a brief break here.  
 3 So court is in recess for about ten minutes.  
 4 (Recess)  
 5 THE COURT: All right. Back on the record. We are on  
 6 redirect.  
 7 MR. DYKSTRA: May I approach the witness?  
 8 THE COURT: All right. Go ahead.  
 9 REDIRECT EXAMINATION  
 10 Q. BY MR. DYKSTRA: Mr. Rasor, handing you a 1968 USGS  
 11 quad, could you take a look at that and identify it for our  
 12 record?  
 13 A. That's a government quad sheet of Sandpoint.  
 14 Q. And is the Backman property visible on that quad?  
 15 A. We have drawn in and highlighted the back boundary of  
 16 the Backman property, yes.  
 17 Q. There was a discussion, some discussion of the  
 18 topography and the steepness of some of the surrounding  
 19 properties. Does that quad help you to explain the topography  
 20 around this property?  
 21 A. It is pretty much self-explanatory, if you looked at  
 22 one of these much. Closer those contour lines are the steeper  
 23 the ground.  
 24 Q. So if you look at that quad it would appear that south  
 25 of the Backman property is relatively steep; is that fair to say?

1 A. Very much so.  
 2 Q. And is it steep to the east of the property?  
 3 A. It is.  
 4 MR. DYKSTRA: I believe we are all in agreement that  
 5 this document can be admitted; is that correct?  
 6 MR. REED: No objection.  
 7 MR. ERBLAND: No objection.  
 8 THE COURT: This is Exhibit No --  
 9 MR. DYKSTRA: 49.  
 10 THE COURT: All right. So Exhibit No. 49 is admitted.  
 11 (Exhibit No. Plaintiffs' 49 offered and admitted)  
 12 Q. BY MR. DYKSTRA: You have also been asked, Mr. Rasor,  
 13 about the widths of the various roads, and did you have the  
 14 opportunity to measure the width of the driving -- the drivable  
 15 surface of the lower road in various spots?  
 16 A. Yes.  
 17 Q. What kind of numbers did you come up with?  
 18 A. Some of it had no width because the road wasn't there  
 19 anymore. Other places it may have been anywhere from eight to 12  
 20 feet.  
 21 Q. And some places was it even more than 12 feet?  
 22 A. You could say that.  
 23 Q. Now, we talk about the drivable surface that would be  
 24 the width for actual driving; is that correct?  
 25 A. Yes.

1 Q. Bulldozer?

2 A. Correct.

3 Q. And would you have graded it out to the landing?

4 A. Correct.

5 Q. Describe for me the logging that you did out there.

6 Any idea in the amount of board feet you took out of that

7 property?

8 A. Maybe 500,000 board feet.

9 Q. How many truck loads is that?

10 A. I think 500 or so.

11 Q. And which way would the trucks come out of the

12 property?

13 A. Well, the first half up there come out to the doctor's,

14 you know, Turtle.

15 Q. So would you come out Turtle Rock Road and then past

16 the gun range?

17 A. Correct.

18 Q. To Baldy?

19 A. Uh-huh.

20 Q. So all 500 loads had to go out that way?

21 A. Well, then when we got up to the top, we had that all

22 graded out up to the creek, and we was working that top landing

23 for maybe a month. And one day come to work and there was a

24 bunch of little rocks in the road. And I was trying to build

25 rapport with that guy that lived -- there was another house right

1 on the creek, that Sowders. He had all those cats up there. Cat

2 man, we called him. And I wanted to get along with him. I just

3 assumed he put them rocks in that road.

4 Q. But did you know who did it?

5 A. Never did ask Sowders. But we were talking, and I

6 stopped in to see him two or three times.

7 Q. So what did you do once you saw the rocks?

8 A. We started using Redtail.

9 Q. And that would have been, what, '94?

10 A. Correct.

11 Q. Do you have any idea, can you show us on that survey

12 whereabouts those rocks were?

13 A. Well, it was about the top 500 feet, right before you

14 got into Inspiration Way. It was right in here. And he had his

15 house right in there, too, the cat man.

16 Q. Nobody ever told you why the rocks ended up there, huh?

17 A. Never did ask. It was just kind of skirting around.

18 Q. You just went around them and went down Redtail Hawk

19 Road instead?

20 A. Yeah. It was a better road.

21 Q. Now, about how about the top part of Inspiration Way

22 where it crosses into the Backman property and the Schrader

23 property, what was it like? What work did you do up there?

24 A. This stretch right here (indicating)?

25 Q. Yes, sir.

1 A. I don't think we had to do much work from, oh, a

2 hundred, couple of hundred feet this side of the creek, right in

3 there. We didn't have to do much grading up to the Backman

4 switchback. That was kind of a steep little switchback. I can't

5 remember if we cut that a little bit. I don't think we had to

6 cut it, but we had a little problem, a few problems on that

7 throughout the project.

8 Q. Okay.

9 A. I heard you guys talking about a higher road right

10 there, and I couldn't really think of what was done.

11 Q. So fair to say that from the middle bench of the

12 property you owned -- and at this point in time you owned the 120

13 acres, not just the 100 acres, correct?

14 A. Correct.

15 Q. So from the lower portion all the roads went out on the

16 lower road and came out Turtle Rock Road?

17 A. Uh-huh.

18 Q. And then on the middle portion all of the logs came out

19 on the middle road and down Turtle Rock Road and out to Baldy

20 Mountain. And then on the upper portion, those came down Redtail

21 Hawk Road?

22 A. Well, we trucked on that for maybe a month.

23 Q. Okay.

24 A. And a few times, even after the rocks got there,

25 because they weren't that big of rocks but --

1 Q. Tell me what you mean by not that big.

2 A. I'd say about that big.

3 Q. Yea big (indicating)?

4 A. Correct.

5 Q. So they were something you could drive right over?

6 A. Well, it might a snowed and covered them up quite a

7 bit. The driver wasn't supposed to go down there, but he did.

8 And he didn't get too tore up, so it wasn't too big of a boo-boo.

9 Q. And how many members of your crew did you have working

10 up there?

11 A. I think we had a total of three.

12 Q. You guys work during the day?

13 A. Correct.

14 Q. Did you work -- how often during the course of this

15 time did you work? I guess that is a bad question. Did you work

16 five days a week? Four days a week?

17 A. We should always be there five and work eight or nine

18 hours a day probably. It is pretty slow.

19 Q. Pardon me?

20 A. It was a pretty slow project.

21 Q. Explain that to me, if you would.

22 A. The type of ground it was, it was slow going.

23 Expensive logging, I guess you would say.

24 Q. Did you work all seasons?

25 A. Correct.

1 A. Correct.

2 Q. Or the Backman property in Section 8?

3 A. Correct.

4 Q. That was about a year and a half after you finished the

5 logging?

6 A. I'm a thinking.

7 Q. When you finished up the logging stuff, you have to

8 deal with any slash piles or any stuff left on the property?

9 A. We went back and burned them that fall after the first

10 rain.

11 Q. So that would have been how far along after you had

12 finished the actual logging?

13 A. A few months, I am guessing, maybe three months.

14 Q. And then what, another 12 months after that you go in

15 and push in this road across Section 8?

16 A. Correct.

17 Q. What else did you use this Section 8 property for

18 during -- let's put it this way. You owned the Section 8

19 property until you sold it to the Backmans in late 2004. What

20 else did you use the property for during that time?

21 A. Well, we used to go berry picking up there quite a bit

22 and had a lot of friends that liked to hunt. They wanted to use

23 it to hunt. They would ask permission. Mr. Marley used to ask

24 permission to hunt it.

25 Q. Did you go hunting up there?

1 Q. Okay, so continuing on over the next few years how

2 often would you head up to that property?

3 A. Well, we goed up there about every week there for the

4 first year until it snowed. And then after that we would go a

5 couple of times a month.

6 Q. And you would -- that continued on until you sold the

7 property?

8 A. Correct.

9 Q. And you would get up there by driving on which

10 roadways?

11 A. Used them all.

12 Q. So you would use that Redtail Hawk Road and Turtle R

13 Roads?

14 A. Correct. And the gate popped up here on this right in

15 front of this road here (indicating). Well, first there was

16 building materials showed up on it. And I didn't want to move

17 them physically. I just walked through there. Two or three

18 trips through there and seen that. That was right in front of

19 that culvert, building materials.

20 Q. Okay.

21 A. And then a short while after that a gate come on, a

22 locked gate.

23 Q. When did the gate and the building materials show up?

24 A. I'm thinking we finished logging in '95, '96.

25 Q. '96, '97, yes? '96 or so?

1 A. I did.

2 Q. What else do you use the property for?

3 A. Well, we was growing trees on it again. And we would

4 monitor the growth and mortality.

5 Q. How do you go about doing that?

6 A. You have to walk around and look at it and see how

7 healthy different areas are and what's going on.

8 Q. So you drive in on the roadways to get in there and

9 then go walk the property?

10 A. Correct. Camp there a time or two.

11 Q. Okay. How often over the next -- after the logging is

12 done, after the next four years, after that would you be heading

13 up to that property?

14 A. Well, that first year after the logging we were working

15 on that slide down below on the lower road, so we would go in

16 there every week twice a week and water the willows we planted in

17 there.

18 Q. What do you mean the willows? What did you do?

19 A. We tried to do some reforestation along that slide

20 area, so we planted some willows. We was fertilizing and hauling

21 water to them. Not too many of them made it.

22 Q. What was the purpose of that, to stabilize the bank so

23 it would stay open?

24 A. Hold the soil in place. We had numerous things we

25 tried to stabilize that soil in there.

1 A. Five years after that.

2 Q. Five years after? So we would have been looking 2001

3 A. 2001.

4 Q. That is the first time you see a gate show up there?

5 A. Yeah.

6 Q. And that gate, say, what is it, it is a green gate,

7 isn't it?

8 A. Correct.

9 Q. It is up there today?

10 A. Yeah.

11 Q. And so that showed up some seven years after you

12 purchased the property, eh?

13 A. Correct.

14 Q. During those years after you finished logging did you

15 continue maintaining the roads?

16 A. Yeah, we were up there on top once, but in '04 I

17 figured that that lower road had stabilized enough, I took a cat

18 in there and opened that up again, because we had noticed some

19 timber dying that needed to come into that lower landing.

20 Q. This was on the timber monitoring that you would do up

21 there --

22 A. Correct.

23 Q. -- every month. Okay. And so what happened? What

24 the outfall from that 2004 incident?

25 A. Well, a week or so after, I got a letter from an

1 Q. When you purchased it in 1993 you actually purchased it  
 2 from a company that held it as timber property, correct?  
 3 A. Correct.  
 4 Q. Shamrock?  
 5 A. Correct.  
 6 Q. It had been logged about six years before you purchased  
 7 it?  
 8 A. I believe so.  
 9 Q. Based on your experience from looking at it, about six  
 10 years, right?  
 11 A. Correct.  
 12 Q. And it had even been logged before that because that's  
 13 what it was, it was timber production property, wasn't it?  
 14 A. Correct.  
 15 Q. And as far as you knew from what you saw, that was the  
 16 only use, commercial use anyway, of that property, correct?  
 17 A. Correct.  
 18 Q. There weren't any houses on it?  
 19 A. No.  
 20 Q. It wasn't being mined?  
 21 A. Correct.  
 22 Q. And other than people going onto it to shoot grouse and  
 23 to hunt or maybe to hike onto it, that's all the use that it was  
 24 put to, correct?  
 25 A. Correct.

1 Do you know what the elements of the law are for prescriptive  
 2 easement? Can you tell me that as you sit here today?  
 3 A. Just usage, continued usage.  
 4 Q. For how long a period of time?  
 5 A. Well, I couldn't give you a definite date.  
 6 Q. Okay. That's fine. So, continuous usage, and you  
 7 figure that this qualified, right?  
 8 A. Correct.  
 9 Q. And so even in 1993, other than some of the people th  
 10 you have identified, most of that area was still undeveloped,  
 11 wasn't it?  
 12 A. Correct.  
 13 Q. Still wild and unenclosed?  
 14 MR. FEATHERSTON: Your Honor, I object to the form  
 15 the question. These are legal conclusions. Counsel keeps using  
 16 the legal terminology in the terms of a question to a lay  
 17 witness.  
 18 THE COURT: Well, I think I can sort that out. I  
 19 understand the attorney is using a term of art. I also  
 20 understand that the lay person is going to be responding to it in  
 21 the ordinary sense and the lay person is not trying to tell the  
 22 Court any legal conclusion. So it is the attorney that is trying  
 23 to tell the Court the legal conclusion, but I think I can figure  
 24 that out.  
 25 MR. FEATHERSTON: Thank you, your Honor.

1 Q. And you actually believed, didn't you, that because  
 2 others had used it as timber production property and had built  
 3 those roads, those three roads we are talking about --  
 4 A. Correct.  
 5 Q. -- that you could use those roads?  
 6 A. Correct.  
 7 Q. And because that's the way it was, wasn't it?  
 8 A. That's the way I thought the law was, yeah.  
 9 Q. And that's the way, kind of the way it was around  
 10 Bonner County, wasn't it, as you were growing up -- well, not  
 11 growing up, but as you worked into the logging business?  
 12 A. Yes.  
 13 Q. So you assumed that because others had gone in there  
 14 and nobody had objected, crossing their land, that you could do  
 15 the same?  
 16 A. Yeah, I tried to find out kind of what the law was, and  
 17 it appeared to me that a prescriptive easement was good enough to  
 18 use.  
 19 Q. You thought you had a prescriptive easement?  
 20 A. Yes.  
 21 Q. You found out later on that property owners that owned  
 22 property underneath those roads, some of them, objected to you  
 23 crossing, correct?  
 24 A. Yes.  
 25 Q. Now, do you know -- let's just get this out of the way.

1 THE COURT: Normal questions, normal answer. We will  
 2 overrule the objection. We can go forward.  
 3 MR. ERBLAND: Just doing my job.  
 4 Q. BY MR. ERBLAND: So -- all right. Your logging  
 5 operation lasted two years, didn't it?  
 6 A. Correct.  
 7 Q. It began -- well, you bought this property in December  
 8 of '93, so let's just move right to '94. It began in the winter  
 9 of '94, correct?  
 10 A. It was '93, wasn't it?  
 11 Q. You bought it in December of '93. So did you start  
 12 logging right away?  
 13 A. Yes.  
 14 Q. Immediately?  
 15 A. Yes.  
 16 Q. Okay. Fine. The last month of '93, and then it went  
 17 on for about two years, correct?  
 18 A. Right.  
 19 Q. And then it ended?  
 20 A. Yes.  
 21 Q. It had a definite beginning and it had a definite end?  
 22 A. Correct.  
 23 Q. A two-year period of time?  
 24 A. Correct.  
 25 Q. And you purchased the property for logging, didn't you?

1 Q. And as far as you know, had not been used for anything  
 2 other than recreation for about six years?  
 3 A. Yes. What I assumed.  
 4 Q. You pushed -- well, you pushed the dirt across the  
 5 creek?  
 6 A. No. That was on the side of the hillside there where  
 7 that kind of slid over the road. And that was about 500 feet  
 8 long, that stretch. And below that there was good flat road  
 9 surface still existing, a couple of stretches of that. There was  
 10 another little creek drops in there or just a seasonal thing that  
 11 I don't believe there was a culvert in that. So we had to be  
 12 careful. It was that seasonal.  
 13 Q. So you opened the road?  
 14 A. Correct.  
 15 Q. You logged?  
 16 A. Correct.  
 17 Q. So all of your operations to start with starting in  
 18 late '93 and in the winter of '94 were off of the lower road?  
 19 A. Correct. I was trying to think if I had done any  
 20 grading above that, but I think I was pretty much straight from  
 21 the bottom.  
 22 Q. And you are pulling out the timber that is merchantable  
 23 at that point at that location?  
 24 A. Correct.  
 25 Q. Were you here when Mr. Razor testified there are

1 here. Figuratively. You worked down in there and pulled logs  
 2 out in the winter of 1994?  
 3 A. (Witness nods)  
 4 Q. You then were done at this point, weren't you?  
 5 A. With that lower road?  
 6 Q. Yes.  
 7 A. Yes.  
 8 Q. And at the end of the whole job, after two years, the  
 9 state told you close that road?  
 10 A. Correct.  
 11 Q. And you did?  
 12 A. Yes.  
 13 Q. And you didn't open it up again until when?  
 14 A. August '04.  
 15 Q. So for 1996 you obliterated the road, in fact?  
 16 A. Correct.  
 17 Q. And for eight years, for eight years from the point  
 18 where the road had washed out originally, you never went into  
 19 that property with a vehicle?  
 20 A. Correct. And it would have been the late '96, isn't  
 21 that what we --  
 22 Q. Yeah.  
 23 A. At the very end of the job.  
 24 Q. Right. And then I just added eight years, or maybe it  
 25 is seven and a half, but in any event, from '96 to '04 you never

1 basically three benches on that property?  
 2 A. Correct.  
 3 Q. Do you agree with that?  
 4 A. Yes.  
 5 Q. So you are working on the lower bench?  
 6 A. Correct.  
 7 Q. In the spring of 1994 I understand that there was a lot  
 8 of rain?  
 9 A. Yeah, we had quite a torrential bunch of rain right  
 10 there.  
 11 Q. And is that when the problems came up with the creek?  
 12 A. Correct.  
 13 Q. And that is when the state got involved?  
 14 A. Correct.  
 15 Q. And they told you to close that road, didn't they?  
 16 A. Well, we made repairs to it right there, and we  
 17 continued to use it until the end of the job, and then that's  
 18 when that decision was made.  
 19 Q. Okay. Great. So you had problems with the creek. I  
 20 think maybe you pushed it a little bit too much, you didn't mean  
 21 to, but it happened, right?  
 22 A. Yeah, the cat was a little too big, and we weren't  
 23 aware we were in that spring slide area and just kind of start  
 24 running over the road.  
 25 Q. Now I want to follow this low road for a little bit

1 went back in there with a vehicle?  
 2 A. The first few years you were able to get a four-wheeler  
 3 through there, but then it pretty got skid over.  
 4 Q. Now, a four-wheeler is a recreational vehicle, isn't  
 5 it?  
 6 A. Correct. But we do use it to scout timber.  
 7 Q. To monitor?  
 8 A. Yes.  
 9 Q. But the road was obliterated?  
 10 A. Yes.  
 11 Q. In '04 you went in and tried to open the road, didn't  
 12 you?  
 13 A. Correct.  
 14 Q. Why did you do that?  
 15 A. We had some timber up there that was turning color, and  
 16 it looked like that was a couple loads of it that was ready, that  
 17 was dying, that red fir and blue spruce, and I wanted to get it  
 18 out.  
 19 Q. Understandable. So you went in again for logging?  
 20 A. Correct.  
 21 Q. And you were stopped, weren't you?  
 22 A. No. I did the job. It was a big half a day and loaded  
 23 the cat. Kind of moving the cat around and were kind of in that  
 24 area. So I loaded the cat and moved out after the road got  
 25 opened up.



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1 Q. You opened it up, you took out a load or two?  
 2 A. I didn't go back in there and log.  
 3 Q. Oh, you didn't?  
 4 A. Before we got a chance to do it we received a letter  
 5 from I believe it was Scott Reed.  
 6 Q. Okay. And that's what I was referring to, you were  
 7 stopped. Go ahead.  
 8 A. Well, that night the sheriff called and said what's  
 9 going on. And I told him that we were opening this road up for  
 10 some logging. And that was about as far as that went.  
 11 Q. And that's what I was getting to. In '04 you are  
 12 thinking about going in and getting a couple of loads of log.  
 13 The road has been obliterated for about eight years?  
 14 A. It was a good dry time of the year.  
 15 Q. And so you open it?  
 16 A. I was kind of continuing the startup and maintenance on  
 17 it, trying to keep the water off of it.  
 18 Q. So you open it, and that night you get a call from the  
 19 sheriff?  
 20 A. Correct.  
 21 Q. And then you were done at that point?  
 22 A. The work was done, and we were kind of waiting for our  
 23 other job to finish before we were going to move in there.  
 24 Q. And you didn't?  
 25 A. We didn't, no.

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1 Q. Okay. And then you got a letter from Scott Reed saying  
 2 that you didn't have a right to cross property to go in there?  
 3 A. Correct.  
 4 Q. And so after that point when you got that letter you  
 5 didn't try to log that property?  
 6 A. Correct. I think we got kind of busy with other  
 7 things.  
 8 Q. Okay. So you never really tested Mr. Reed's position  
 9 at that point?  
 10 A. No.  
 11 Q. Okay. And shortly after that you sold the property?  
 12 A. Correct.  
 13 Q. Let's talk about the middle road. When did you begin  
 14 using the middle road for your logging operation?  
 15 A. I believe in July of '95 -- '94.  
 16 Q. '94, okay. Makes sense, because you were done working  
 17 down below?  
 18 A. Correct.  
 19 Q. You now felt like you wanted to log the middle portion  
 20 of your property, correct?  
 21 A. Correct.  
 22 Q. So in order to get to the middle road you did the same  
 23 thing, correct? You would go down Baldy, Turtle Rock Road, take  
 24 a right, go up Turtle Rock Road, a graveled portion of it, to  
 25 this location where the culvert eventually was placed?

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1 A. Yeah, I believe from the doctor's -- it was pretty much  
 2 remote from the doctor's. It was just tracks.  
 3 Q. It was just tracks?  
 4 A. Yeah.  
 5 Q. All right. Could you point where it became remote?  
 6 A. Yeah, it must have been right here, because the doctor  
 7 hasn't bought any more land because it was just about right on  
 8 his property line is where the semi remote road service appeared.  
 9 Q. And again was that just dirt tracks?  
 10 A. Correct.  
 11 Q. It is the old logging road?  
 12 A. Correct.  
 13 Q. So trace that for us.  
 14 A. It was -- here's the first Y, yeah, that's just a  
 15 little ways up from the doctor's. If you stay on the main road,  
 16 you come up here to the next Y. And there was a cutoff or two in  
 17 here you could take.  
 18 Q. Just logging spurs?  
 19 A. Yeah, kind of, had a bunch of Ss in them. But this is  
 20 the prevailing road (indicating).  
 21 Q. Okay. Cross just a creek?  
 22 A. Correct.  
 23 Q. There was another one of those bridges with logs laid  
 24 lengthwise in the creek bed?  
 25 A. Yeah.

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1 Q. And began logging the property off of the middle road,  
 2 correct?  
 3 A. Correct.  
 4 Q. How long did that last?  
 5 A. I think winter was coming.  
 6 Q. Remember you started in July of '94. Did you log it  
 7 through the summer?  
 8 A. I think we might have worked here for a month and then  
 9 moved up on top, I think. I remember -- that sounds a little  
 10 contrary to what I thought yesterday, but I remember going back  
 11 on top maybe and working finishing the top off before winter  
 12 possibly.  
 13 Q. Now, looking back now as you sit here today, you worked  
 14 it maybe about a month, went up top, and then did you come back?  
 15 A. To the middle, yeah.  
 16 Q. So then what?  
 17 A. I think we worked out the middle and dropped back to  
 18 the bottom. I think we finished the top first.  
 19 Q. Okay. When you worked in the middle, there came a  
 20 point where somebody blocked road access, right?  
 21 A. Not while we were logging.  
 22 Q. When did they block it?  
 23 A. I would say '98.  
 24 Q. And where was it blocked?

1 Q. And where was the location where you testified that you  
 2 just tip-toed your equipment around?  
 3 A. See, I had a gate, and then somebody else put a gate  
 4 up.  
 5 Q. Okay. On the lower road?  
 6 A. Yeah.  
 7 Q. Do you know about how much timber you got off of the  
 8 middle bench area?  
 9 A. I would say a couple hundred thousand board feet.  
 10 Q. When you finished the overall logging job which lasted  
 11 two years, the state required you to take some steps to remedy  
 12 that issue with the creek on the middle road too, didn't they?  
 13 A. I think standard just water bars anywhere there is down  
 14 slope on the road.  
 15 Q. You put a culvert in?  
 16 A. Correct.  
 17 Q. Did the state recommend that you put a culvert in?  
 18 A. No, they didn't.  
 19 Q. What did they recommend?  
 20 A. They told me to take the wooden bridge out.  
 21 Q. So you took the wooden bridge out, and you put a  
 22 culvert in?  
 23 A. Yeah, that was my own thought so I could drive that for  
 24 access.  
 25 Q. And that was at the end of the logging job?

1 A. Very end, yeah.  
 2 Q. So now just a creek running through that four-foot  
 3 culvert?  
 4 A. Correct.  
 5 Q. Did you understand that that was on somebody else's  
 6 property at this time?  
 7 A. I was aware of it.  
 8 Q. Okay. Now, on the middle road, once you put the  
 9 culvert in after the two-year logging job, how often did you go  
 10 back there?  
 11 A. Well, once a month.  
 12 Q. Same thing that you described earlier?  
 13 A. Correct.  
 14 Q. Intermittently, didn't go through in the winter months  
 15 if there was too much snow on the ground, that type of thing?  
 16 A. Correct.  
 17 Q. And that was for the purposes in the early years after  
 18 the logging job to monitor, to make sure that the logging  
 19 practices, slash, et cetera, was taken care of?  
 20 A. Correct.  
 21 Q. And then in later years less and less?  
 22 A. Correct. We went back late '97 and built that road  
 23 through there.  
 24 Q. Right, that spur that you were thinking about going in  
 25 further and logging but didn't?

1 A. Correct.  
 2 Q. And then did you access it once in awhile for  
 3 recreation, deer hunting?  
 4 A. Yes.  
 5 Q. All right. Let's talk about the upper road. You  
 6 worked a while on the land off of the middle road, then went up  
 7 and logged the upper road, correct?  
 8 A. Correct.  
 9 Q. Tell us how you access the upper road.  
 10 A. Well, I started out I come right up the old road that  
 11 Bradetich had showed me. And we used that, and I think we hauled  
 12 out of for a month maybe. And one morning some rock showed up in  
 13 that road.  
 14 Q. Where?  
 15 A. It's just below that Michael Sowders' house. It might  
 16 have been right in here (indicating).  
 17 Q. Can you give us a year when those rocks showed up?  
 18 A. Was there in the logging, so --  
 19 Q. '94 or '95?  
 20 A. Correct.  
 21 Q. And then so as a result of those rocks showing up, how  
 22 did you get up there?  
 23 A. Well, we started using this Redtail Hawk.  
 24 Q. Okay. And so you -- as a result of that you stopped  
 25 using Turtle Rock?

1 A. Primarily. We were still moving equipment back and  
 2 forth because quite a bit of shoring it. And then from talking  
 3 to Michael Sowders, there was improvement to Redtail Hawk Road  
 4 and kind of wanted to include him -- well, he was a landowner up  
 5 there and the only one up there. They kind of wanted to get him  
 6 involved. They offered him power and stuff like this, utilities.  
 7 He never did hook up to anything. So I kind of thought he was in  
 8 on the ground floor of any improvements that were going on on  
 9 that Redtail Hawk Road.  
 10 Q. So in 1995 after the rock showed up you primarily used  
 11 Redtail Hawk Road --  
 12 A. Correct.  
 13 Q. -- for your logging?  
 14 A. Correct. So when the rock showed up I didn't do  
 15 anything other than talk to Michael Sowders. We never really  
 16 discussed the rocks.  
 17 Q. Well, if you had what you believed to be a right to use  
 18 those roads by prescription, why didn't you push the issue?  
 19 A. Well, the road was still usable, you know, when they  
 20 put the rocks in. And I was just wanting to get along with  
 21 everybody.  
 22 Q. And that is typically what you do, isn't it? You ask  
 23 landowners for permission and try to develop what I think you  
 24 said was a rapport with them to access their property?  
 25 A. Yes.

1 Q. You knew you didn't have access across Marley's  
 2 property, didn't you?  
 3 A. Yes.  
 4 Q. He told you that, didn't he?  
 5 A. Well, we all knew it wasn't in black and white.  
 6 Q. Where was his property?  
 7 A. But he never said don't use my road.  
 8 Q. Right. But you never believed you had access across  
 9 it, did you?  
 10 A. Correct.  
 11 Q. Where was his property?  
 12 A. It was right here (indicating). If he would have said  
 13 that I couldn't have used his road, I would have used my road.  
 14 Q. Understood.  
 15 A. His road was a little better.  
 16 Q. How long did you spend logging off of the upper road?  
 17 A. Two months, three months maybe.  
 18 Q. And then when you were done up there, did you go back  
 19 with any logging equipment?  
 20 A. No, never was back with machinery.  
 21 Q. All right. And then I believe you testified that you  
 22 had went back down to the lower road, and we already covered  
 23 that?  
 24 A. Correct.  
 25 Q. And then you sold the property, or reached an agreement

1 result?  
 2 A. Correct.  
 3 Q. Where was that access? Do you know?  
 4 A. You know, I kind of read it once, but it was a lot  
 5 legal, and I really didn't know. And it mentioned Humbirc  
 6 and the Department of Lands.  
 7 Q. Was it one of those three roads we have been ta  
 8 about here today?  
 9 A. You know, I don't know how it was legally descri  
 10 There was a lot of legal description to it. Well, I can't real  
 11 say that. But Humbird Lumber was mentioned, and they  
 12 somebody a right to this. And I can't tell you the years el  
 13 But I kind of read it.  
 14 Q. So is it fair to say you don't know which one of t  
 15 three roads, if any of them, get described?  
 16 A. Correct.  
 17 MR. ERBLAND: Thanks. That's all the questions  
 18 THE COURT: Mr. Reed.  
 19 MR. SYKES: Just one second, your Honor.  
 20 Go ahead.  
 21 CROSS-EXAMINATION  
 22 BY MR. REED:  
 23 Q. Mr. Powers, you were just describing having reac  
 24 policy. Let me show you Defendants's Exhibit O. I'm not  
 25 whether you have that there or not. But was that the poli

1 with Mr. Backman to sell the property, for \$475,000?  
 2 A. Correct.  
 3 Q. And you got your own title policy, didn't you?  
 4 A. Correct.  
 5 Q. Again from Alliance Title?  
 6 A. Correct.  
 7 Q. And you understood that that title policy provided  
 8 access also, didn't you?  
 9 A. The one I received?  
 10 Q. Yes.  
 11 A. Yeah, it became aware to me there was one available, so  
 12 I bought one.  
 13 Q. Good. Okay. And based on that then you were able to  
 14 enter into negotiations with Mr. Backman through his realtor and  
 15 sell the property?  
 16 A. Yeah. There was a local boy that was kind of talking  
 17 to me about the property, and Doug Ward and I had worked  
 18 together. And he was working with Mr. Backman, I think. And  
 19 then when the title policy came into effect, the value of land  
 20 went up.  
 21 Q. Because no longer was the access just for prescriptive  
 22 easement for logging, but it was an actually legal deeded access?  
 23 A. Yeah. They had found an old language that said that  
 24 there was easement to that property.  
 25 Q. Okay. And so the property value went way up as a

1 you read?  
 2 A. This looks like the one from Shamrock. Is that  
 3 possible?  
 4 Q. Let me back up a little bit and give you Exhibit N  
 5 Exhibit N is the deed from your mother to you, the warrant  
 6 This is the deed that you got from your mother?  
 7 A. Right.  
 8 Q. That's correct?  
 9 A. Yeah.  
 10 Q. Dated December 3, 2004?  
 11 A. (Witness nods)  
 12 Q. Is that what that says at the bottom there?  
 13 A. Yeah, because --  
 14 Q. Down there?  
 15 A. Notarized in '04.  
 16 Q. Dated down there December 3?  
 17 A. (Witness nods)  
 18 Q. That is the deed that you got from your mother, i  
 19 not?  
 20 A. Yes, this is the deed.  
 21 Q. And the policy date here is in December 9, '04?  
 22 A. Right.  
 23 Q. So the policy would have followed the deed? You  
 24 the policy right after you got the deed?  
 25 A. No. The policy followed the deed when we record

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1 Q. Right. Within a few days?  
 2 A. It appears so.  
 3 Q. All right.  
 4 MR. REED: Offer in evidence Exhibit O.  
 5 (Exhibit No. Defendants' O offered)  
 6 MR. SYKES: Is O that policy?  
 7 MR. REED: Policy.  
 8 MR. SYKES: Objection, your Honor, relevance.  
 9 MR. FEATHERSTON: I'll join in the objection.  
 10 THE COURT: Let's see, the relevance?  
 11 MR. REED: The relevance, your Honor -- have you found  
 12 the policy yet?  
 13 THE COURT: I believe so.  
 14 MR. REED: The witness described having read, unlike  
 15 Mr. Backman, having read the policy in some detail and when he  
 16 looked at the easements that were in there, he concluded that  
 17 those were recorded easements and that therefore he was entitled  
 18 to have clear title to the policy. And the deed that is Exhibit  
 19 N likewise contains the exact same description, part 2, of the  
 20 same easements. So the relevance is that this is what he relied  
 21 upon in determining that he now had deeded access to the property  
 22 and was able to proceed with the sale.  
 23 THE COURT: Well, I guess basically it goes to the  
 24 weight. I will overrule the objection as to relevance.  
 25 (Exhibit No. Defendants' O admitted)

1 A. Not while we were logging. I might have seen him down  
 2 at the filling station a time or two.  
 3 Q. Down at the filling station, but you didn't see him on  
 4 the property?  
 5 A. No.  
 6 Q. And, Mr. Powers, when you were logging at that period  
 7 of time, the property that is to the west here, this was all  
 8 owned by Louisiana-Pacific, was it not, as far as you knew?  
 9 A. I believe so.  
 10 Q. All right. And where you were actually logging you  
 11 talked to the Lawrences, and you said, I think, Dr. Lawrence had  
 12 been the doctor for your wife, and he was agreeable to your  
 13 parking your equipment there and so forth; is that right?  
 14 A. Yes.  
 15 Q. But north of Dr. Lawrence there were no houses anywhere  
 16 in that property?  
 17 A. I don't believe there was any.  
 18 Q. And you didn't, I think you testified in your  
 19 deposition, and I'm sure earlier than here, that you never saw  
 20 somebody?  
 21 A. I didn't, other than that one neighbor down off of  
 22 Mountain View Road.  
 23 Q. That was the only one?  
 24 A. Correct.  
 25 Q. But that was not a neighbor who was in this property?

1 Q. BY MR. REED: Thank you, sir. I will take those back  
 2 now.  
 3 A. This seems quite condensed. It seems like the one I  
 4 got --  
 5 Q. There were more pages. There were more pages in the  
 6 total policy. You are quite correct, Mr. Powers.  
 7 Is the marker up there? There we go.  
 8 Mr. Powers, when you were logging there in '93 and '94  
 9 and '95, you said that you had talked to the Sowders,  
 10 Mr. Sowders, who is about right in here (indicating)?  
 11 A. He is right next to the creek.  
 12 Q. Right close to the creek, all right. But he had a  
 13 property up there, and I think you said he had been logging too?  
 14 A. It was some old slash piles.  
 15 Q. He had been logging too?  
 16 A. I never did confirm that.  
 17 Q. But there had been logging on his property?  
 18 A. There was some slash piles there.  
 19 Q. And he had no objection to your using his road?  
 20 A. Correct.  
 21 Q. And you said that the Marleys lived over in here  
 22 somewhere?  
 23 A. They were pretty close up there to where that high road  
 24 intersected with Redtail.  
 25 Q. Okay. But you never talked to the Marleys?

1 A. No.  
 2 Q. And when you were using the Redtail Hawk Road there  
 3 were no houses in here?  
 4 A. Correct.  
 5 Q. And there were no houses down here where we have the  
 6 property of Christopher Bessler is listed right down in here. In  
 7 other words, going from the intersection of Turtle Rock Road and  
 8 Redtail to the Lawrence property, no one lived in this property?  
 9 A. Correct.  
 10 Q. Didn't see anyone there?  
 11 A. No.  
 12 Q. And there were no fences on the property?  
 13 A. Correct.  
 14 MR. REED: That's all the questions I have.  
 15 THE COURT: Any redirect?  
 16 MR. SYKES: Briefly, your Honor.  
 17 REDIRECT EXAMINATION  
 18 BY MR. SYKES:  
 19 Q. When you ended your logging operation with regard to  
 20 the middle road, you installed that culvert?  
 21 A. Correct.  
 22 Q. Why did you do that?  
 23 A. So I could continue use.  
 24 Q. What intent did you have to continue use of that road  
 25 for?

1 A. Well, it was -- I knew it was prescriptive easement, so  
 2 I understand you can't use it for anything other than logging.  
 3 Q. Pardon me?  
 4 A. You can't use that easement for anything other than  
 5 logging.  
 6 Q. And so you went and punched a road in across Section 8?  
 7 A. Correct.  
 8 Q. Now, after the logging operation ended, which was the  
 9 primary access into Section 8?  
 10 A. Primary access was off of Turtle Rock, right up here  
 11 (indicating). And you had these three spurs that ran off it.  
 12 Q. After your logging operation ended, I believe you said  
 13 that the lower road you had closed?  
 14 A. Correct.  
 15 Q. But you put a culvert in the middle road?  
 16 A. Yes.  
 17 Q. So was the primary access in that middle road?  
 18 MR. ERBLAND: Objection, leading.  
 19 THE COURT: I'll overrule.  
 20 MR. SYKES: I can reask the question.  
 21 Q. BY MR. SYKES: What was the primary access in?  
 22 A. At that point I was using all three of them.  
 23 Q. All right. Fair enough, thank you. No further  
 24 questions.  
 25 MR. FEATHERSTON: Just one question, if I can.

1 REDIRECT EXAMINATION  
 2 BY MR. FEATHERSTON:  
 3 Q. Did you ever discuss or consider building a home on  
 4 Section 8?  
 5 A. It is beautiful property, you know.  
 6 Q. I think you said in your deposition you had thought  
 7 about it or talked about it with your wife; is that right?  
 8 A. Well, we would have --  
 9 Q. If you had kept it?  
 10 A. -- things went that way, yeah.  
 11 MR. FEATHERSTON: Thanks.  
 12 THE COURT: All right. Any re--  
 13 MR. ERBLAND: I want to make sure I heard something  
 14 correctly. Can I ask him a question?  
 15 THE COURT: All right.  
 16 RECROSS-EXAMINATION  
 17 BY MR. ERBLAND:  
 18 Q. I believe you testified that you put the culvert in and  
 19 you understand that your prescriptive easement, you can't use it  
 20 for any other purpose other than logging?  
 21 A. Well, that's what I think a prescriptive, prescriptive  
 22 deals with.  
 23 Q. That's what your understanding was?  
 24 A. I was kind of aware of that.  
 25 MR. ERBLAND: Thanks. That's all I have.

1 THE COURT: All right. Then I believe, Mr. P...s, you  
 2 may step down.  
 3 \* \* \* \* \*  
 4 MR. REED: Your Honor, plaintiffs' counsel has kindly  
 5 allowed us the opportunity to present a witness who would be  
 6 unavailable tomorrow or the next day. Should be rather brief.  
 7 THE COURT: All right.  
 8 MR. REED: With that understanding we would like to  
 9 call (inaudible).  
 10 THE COURT: If you would come up to the witness stand  
 11 and then stop there so the clerk can swear you in, please.  
 12 LINDA SPAGON,  
 13 called as a witness at the request of the  
 14 Defendants, being first duly sworn, was examined and testified as  
 15 follows:  
 16 DIRECT EXAMINATION  
 17 BY MR. REED:  
 18 Q. Please state your name.  
 19 A. Linda Larson Spagon.  
 20 Q. And your husband's name?  
 21 A. James Anthony Spagon.  
 22 Q. And you own property there?  
 23 A. Yes, we do.  
 24 Q. And you happen to be the lead defendant in this  
 25 lawsuit?

1 A. Yes. We are privileged for that.  
 2 Q. And your husband. Could you point out using that  
 3 little pointer that everybody is using there where your property  
 4 is? You need to get closer so you can read it? If you can read  
 5 it and then step aside so His Honor may see where you are talking  
 6 about.  
 7 A. This is the property that we originally bought.  
 8 Q. And when did you buy that property, Ms. Spagon?  
 9 A. In April of '99.  
 10 Q. And could you describe the condition of the property as  
 11 you bought it in relation to roads?  
 12 A. Well, the main road was up through Redtail Hawk and to  
 13 Inspiration Way. And Inspiration Way at that time went right  
 14 past the building site of where we decided to build our home.  
 15 Q. And when you are speaking of Inspiration Way, could you  
 16 point that out?  
 17 A. It is that one right there.  
 18 Q. Right up there?  
 19 A. Yes.  
 20 Q. So Inspiration Way as it presently is located is  
 21 different than when you bought it in 1999?  
 22 A. Yes. It was -- when we built, that road went right  
 23 past our front door. And so in 2003 we decided to put the road  
 24 up at the top of our property. So we built that road. And at  
 25 that time John Gillham, who was developing property up here --

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1 THE COURT: Okay.

2 Q. BY MR. SYKES: Okay. Now, does the L box, does it go

3 all the way to the top of Section 8? Does it include that full

4 120 acres?

5 A. On my diagram it does.

6 Q. Okay. And just so we get clear, because I know we are

7 putting two things together here, and we just want to make sure

8 we are all on the same page and we know what we are talking

9 about. So can you walk us through now the exhibit that's on the

10 screen and explain to the Court your findings, based upon your

11 interpretation of the aerial photographs and walking the property

12 and talking with Mr. Smith?

13 A. The process is fairly straightforward. It is

14 identification interpretation from the aerial photograph, the

15 same process I just illustrated with the red image. And that is

16 to find and mark the presence of linear -- curved, linear

17 openings in the forest that are connected to the outside traffic

18 way, the outside road map which makes them trafficable traces.

19 They are not just errant lines off in the forest. Those things

20 do exist, but it is possible to make a distinction from them.

21 Q. And what did you find as a result to the 1933

22 photograph?

23 A. That there was a trafficable road, as I define road,

24 ordinary motor vehicle road, from Baldy Mountain north into the

25 southern portion of the site.

1 A. Yes. It would be the same procedure repeated on all

2 them to focus in on the site itself. In this case the photograph

3 is oriented with north to the right. You would have to orient it

4 on screen, narrow down to the area of interest and examine the

5 forest cover using various contrast stretch methods, find the

6 roads, trace the roads up onto an overlay, and this is all done

7 on screen.

8 Q. And you did that?

9 A. Yes. And that's the result of what I found.

10 Q. Walk us through this, where Baldy Mountain Road is and

11 what your opinion is regarding access to the site.

12 A. Baldy Mountain Road is off to the south here. The rest

13 of it does not show because it doesn't show on that particular

14 image. This is the road from the Ellis Smith property that has

15 been extended and improved and extends all the way north, curving

16 around into the area that now I would understand as Inspiration

17 Way, and back into from Section 7 to Section 8. There is also a

18 spur of road that extends off in this direction (indicating).

19 Q. Okay. And that's going off to the east?

20 A. To the east and into Section 8, towards Section 8.

21 Q. Now, you see the survey that is off to your right-hand

22 side there?

23 A. Yes.

24 Q. Does that lower spur -- well, actually, does the road

25 up through the site property and the spur correspond with roads

1 Q. Okay. Can you show that with the pointer?

2 A. (Witness complies)

3 Q. So, that's the darker line?

4 A. Yes.

5 Q. You have an annotation on the bottom of the exhibit

6 there.

7 A. Yeah, wider lines are roads, and the narrower lines are

8 tracks. And, again, a track is a traffic way that requires

9 specialized vehicles.

10 Q. And so tell the Court what your opinion is as of 1933

11 what the access to the site was.

12 A. In 1933 there was reliable easy motorized vehicle

13 access to the southern portion of the site using conventional

14 vehicles.

15 Q. From Baldy Mountain Road?

16 A. Yes.

17 Q. And where is Baldy Mountain Road on there?

18 A. (Witness indicates)

19 Q. Thank you. Let's move onto the next image. This is

20 Exhibit 43. And it is 43-1. Can you identify this one for us,

21 this photograph and where it came from?

22 A. The 1946 photograph also from the U.S. Geological

23 Survey.

24 Q. All right. And you did an analysis of this photograph;

25 is that correct?

1 on the survey?

2 A. It corresponds to some of it. There have been some

3 changes in the roads since then.

4 Q. Explain that, would you please?

5 A. This road here came up from the south, connected. This

6 is a portion of it which has been abandoned and is still visible.

7 It extends up in this direction and extended off here

8 (indicating) in a roadway which is presently visible but not any

9 longer walkable -- not any longer trafficable; you can walk it.

10 Q. And then continue on. How about the lower spur that we

11 were talking about?

12 A. That is this way right here which extends off into this

13 direction. There is a slightly different portion to it here.

14 The roads have changed a lot through the years. Some new parts

15 built, some old parts moved, some old parts abandoned. So this

16 (indicating) track in 1946 was a road in the same spot.

17 Q. And on the darker lines you said that those were roads?

18 A. Yes.

19 Q. Did you find evidence that these roads terminated

20 anywhere other than into Section 8? Or did you find that they

21 went on outside Section 8?

22 A. I found that they did not continue on through.

23 Q. All right. So this is 1946?

24 A. Yes.

25 Q. So that's 13 years, roughly, after the first aerial

1 A. That is also in the upper section. Also taken in the  
 2 same area. Pretty much all these photographs will be from the  
 3 same 200, 300-yard area in the vicinity of that log landing  
 4 feature.  
 5 Q. And how old is that particular guy?  
 6 A. Many decades. Not possible to be more specific than  
 7 that.  
 8 Q. And then describe this particular photograph.  
 9 A. That is also in the upper area, fairly close to the log  
 10 landing site. This is an old stump. It is high cut. It has  
 11 trees growing on the top of it. And, again, these are one-foot  
 12 units, so this thing was cut three and a half, four feet above  
 13 the ground which indicates that it was done quite some time ago  
 14 in an earlier episode of logging technology.  
 15 Q. When you say quite some time ago, can you give us an  
 16 estimate on that?  
 17 A. Only an estimate, many decades, 40 years, 50 years.  
 18 Q. And is this another example of the same?  
 19 A. Of another old stump that is also being colonized by  
 20 replacement vegetation.  
 21 Q. Now --  
 22 MR. SYKES: Your Honor, I am going to move for the  
 23 admission of Exhibit 42, the gray scales, which we -- Mr. Folsom  
 24 has testified about.  
 25 THE COURT: All right. Now, original 42 includes what

1 THE COURT: Defendants' double G is admitted by  
 2 stipulation.  
 3 (Exhibit No. Plaintiffs' 42 and Defendants' GG  
 4 offered and admitted)  
 5 Q. BY MR. SYKES: Now we have admitted as an exhibit yo  
 6 entire report, which is exhibit -- losing my mind here -- 42. Is  
 7 that the complete report you prepared in this matter regarding  
 8 your investigation of the subject properties?  
 9 A. Yes, it is.  
 10 Q. Okay. And then Exhibit 43, those are the aerial  
 11 photographs which were relied upon in the preparation of the  
 12 report?  
 13 A. Yes, they are.  
 14 Q. And your report sets forth your opinions in here that  
 15 you have testified to today?  
 16 A. I'm sorry?  
 17 Q. Sorry. Sitting here looking down at this.  
 18 A. You are going to ask me a question.  
 19 Q. The report, that sets forth your opinions that you have  
 20 testified to here today?  
 21 A. Yes, it is.  
 22 MR. SYKES: Thank you. I have no further questions,  
 23 your Honor.  
 24 THE COURT: All right. Well, we are a little bit  
 25 before noon. Do you want to start in with cross-examination and

1 you are calling the gray scales and also some other materials.  
 2 The offer of the whole thing or --  
 3 MR. REED: What are you talking about?  
 4 MR. SYKES: I am talking about the gray scales that he  
 5 prepared. That point forward.  
 6 MR. REED: Gray.  
 7 MR. SYKES: Yeah.  
 8 MR. REED: I have no objection to the gray scales.  
 9 MR. SYKES: And I don't have a good way to define it  
 10 but --  
 11 MR. FEATHERSTON: That is separate from the report  
 12 or --  
 13 THE COURT: That's what we are trying to clear up.  
 14 MR. SYKES: They are actually part of the report. And  
 15 I move the admission of the entire report but subject to if you  
 16 guys are going to object or stipulate to that.  
 17 MR. ERBLAND: If you will stipulate to the admission of  
 18 Creed's (phonetic) report?  
 19 MR. SYKES: Yeah, that's fine.  
 20 MR. ERBLAND: Okay. We will agree.  
 21 MR. SYKES: We will stipulate to the admission of those  
 22 two expert reports in toto.  
 23 THE COURT: So 42 is admitted by stipulation. And  
 24 there was some sort of reference to probably a defense exhibit.  
 25 MR. ERBLAND: Double G.

1 go for a while? We still have some direct, so let's go to  
 2 direct.  
 3 MR. FEATHERSTON: Want me to start now?  
 4 MR. REED: That will take us past lunch.  
 5 THE COURT: Let's see if we can get through direct. I  
 6 don't know how much you have, so, Mr. Featherston, go ahead.  
 7 MR. FEATHERSTON: It will be a little while, but I will  
 8 try to be as quick as I can.  
 9 DIRECT EXAMINATION  
 10 BY MR. FEATHERSTON:  
 11 Q. Dr. Folsom, I want to step back. Mr. Sykes asked you  
 12 some questions about your experience and your background as a  
 13 faculty member at the -- in the geography department at Eastern  
 14 Washington University. What I didn't hear is what are the  
 15 various disciplines that you have obtained degrees in that go  
 16 into your credentials as a faculty member at the university.  
 17 A. Well, we are a small department. We do a lot of  
 18 things. So my areas of technical competence in which I feel  
 19 confident enough to present myself as an expert would be aerial  
 20 photograph interpretation, wetlands and wetlands ecology, soil  
 21 science, and land use.  
 22 Q. What specifically is your Ph.D. degree in?  
 23 A. It is in physical geography.  
 24 Q. What does that mean?  
 25 A. Oh, yes, that's a hard question.

1 on the east that goes -- comes into the Backman property, and  
 2 then you don't show it as going any particular place?  
 3 A. It did connect to another -- to other tracks that were  
 4 farther to the east.  
 5 Q. So it would be a connection over to the east to -- for  
 6 logging purposes they were going in that direction, apparently?  
 7 A. It's possible.  
 8 Q. And we have -- and here we have finally put in -- is  
 9 this the Red Hawk?  
 10 A. Yes.  
 11 Q. The Red Hawk Road appears here. Can we have the next  
 12 one?  
 13 This again is a Sioux Falls, 1998, August 11, high  
 14 resolution scan. I didn't mean to say scam. This shows a road  
 15 that goes up and shows connecting in and that's -- doesn't appear  
 16 to be consistent with the others that we have looked at  
 17 previously in the middle. Is there any particular explanation?  
 18 To add to that question, sir, there doesn't seem to be up here --  
 19 I can't tell whether that is a middle road or the upper road or  
 20 what.  
 21 A. That's the middle road.  
 22 Q. That's the middle road. So again, this is a matter of  
 23 parallax.  
 24 A. Yes.  
 25 Q. Everything has moved a little bit and changed their

1 shape a little bit?  
 2 A. The image shows it differently. I am sure the road --  
 3 Q. And again we have an actual road that comes off the  
 4 lower part here that comes off the public road and then another  
 5 track that comes up to that point, and that was apparently  
 6 visible in 1998 and something that was a logging track?  
 7 A. Yes.  
 8 Q. Next. And here we have the 2004 digital orthoquad.  
 9 Tell us one more time what a digital orthoquad is.  
 10 A. An orthoquad is an orthogonal quadrangle. What happens  
 11 here is very clever. They take a scanner and separate a  
 12 photograph into its picture elements. Then they will take each  
 13 one of those picture elements and subtly adjust its size, make it  
 14 bigger, make it smaller, so that if a photograph is of the hill,  
 15 you get a different scale here than here because you are closer  
 16 to the airplane. What the orthoquad does is pretends the world  
 17 is flat so that the scale is in fact reliable. Had we had  
 18 orthoquads back to 1933, I could have made this map we are  
 19 talking about.  
 20 Q. I don't suspect in 1933 anyone would have been asking  
 21 you to do that, but that's all right.  
 22 A. Yes.  
 23 Q. We will go on with this. Now, at this point we have  
 24 coming off the I-shaped a track only?  
 25 A. Yes.

1 Q. That goes in there. That's what I am pointing out, is  
 2 a track only?  
 3 A. Yes.  
 4 Q. And we also in what apparently is the middle road again  
 5 have two tracks going into the Backman property?  
 6 A. Yes.  
 7 Q. And the only road that comes in in 2004 is that same  
 8 little dip into it at the top of the property; is that right?  
 9 A. Yes.  
 10 Q. And otherwise we have -- at that point we have  
 11 depictions of a number of roads that have been constructed in a  
 12 period of time between 19 -- certainly between 1991 and 2004 for  
 13 the residential development that you saw up there?  
 14 A. That's what it looks like, yes.  
 15 (Discussion off the record)  
 16 Q. BY MR. REED: Your conclusion, you have already  
 17 answered orally, but your conclusion is written on page 10, is  
 18 that motor vehicle traffic has had continuous access by road to  
 19 the site since before 1933. By site you are talking about both  
 20 those parcels of land?  
 21 A. Yes.  
 22 Q. The road pattern has changed becoming denser by  
 23 episodes and providing motor vehicle access to more and more of  
 24 the site. And that's particularly true now, the entire area has  
 25 -- the area of Section 7 now has roads that are built and

1 improved and the ones that are depicted on Mr. Rasor's plan  
 2 there?  
 3 A. Yes.  
 4 Q. And all of that, according to your view, was caused --  
 5 all of that up until the residential development, was caused by  
 6 timber harvest activity?  
 7 A. That seems to be the most logical explanation for the  
 8 roads, yes.  
 9 Q. And you say it was -- there was elaborate network of  
 10 tracks that were never intended for use by conventional vehicles.  
 11 Logging activity, once we leave the horse era, was conducted by  
 12 usually by skidders, tractors, and then, according to Mr. Powers,  
 13 smaller logging trucks that were able to get into the property  
 14 and haul logs out? Is that your understanding?  
 15 A. Yes.  
 16 Q. Okay. So would it be fair to say that up until or  
 17 rather through the period of time that is shown in your pictures,  
 18 up to 1992, that the roads in that entire area, regardless of  
 19 what you called them, originated in logging activities?  
 20 A. I would agree with that as a statement, yes.  
 21 MR. REED: I have no further questions.  
 22 THE COURT: Any redirect?  
 23 MR. SYKES: I have nothing further, your Honor.  
 24 MR. FEATHERSTON: One question.  
 25 THE COURT: All right.



1 that is, I think, something that you described as not as reliable  
2 as the USGS?

3 A. Well, I give you the same paragraph back again, Mr.  
4 Reed, is that what I was not able to do is to tease out the finer  
5 network of tracks out of it, because the resolving power of that  
6 image isn't very good. The planimetry is fine. The facts, the  
7 things I have found are there, and that's where they are.

8 Q. When you start to resolve it, it isn't as reliable as  
9 U.S. --

10 A. I could not work my techniques on this one and the  
11 other Bonner County.

12 Q. Fine. This is another one from Sioux Falls?

13 A. Yes.

14 Q. 1981. And, again, we find reappearing here a track  
15 that comes from what appears to be a public road to the south  
16 that goes into the Backman property?

17 A. Goes to it.

18 Q. And you saw that as being a logging track?

19 A. Very likely.

20 Q. Very likely, okay. It appears on this one that the  
21 little hook that went into the Backman property has -- is not the  
22 same place it was the last time.

23 A. Yes. That's what it appears like. And there is a very  
24 straightforward technological reason related to the imagery why  
25 that is so, which I can do in a paragraph, if you would like.

1 Q. Fine, I would.

2 A. It is call parallax, if you will indulge me.

3 Q. I will.

4 A. Can I see your thumb? No, no. Just hold it out there  
5 in front of you. Put it in front of my nose.

6 Q. Which eye?

7 A. Doesn't matter. One eye, now, don't move but change  
8 eyes, and your thumb appears to move.

9 Q. No, it was your head.

10 A. Probably.

11 Q. I understand, thank you.

12 A. That is called parallax, and that is sort of a parlor  
13 room trickery version of what the aircraft sees when it is  
14 looking straight down on something. That is a cylinder versus  
15 from the side where it turns into a rectangle.

16 Q. All right.

17 A. All right. The image is taken by the aircraft from a  
18 particular place. In the middle it is looking straight down and  
19 it is -- the planimetry is true. It is an orthogonal image. Out  
20 to the side we have something called radial distortion in which  
21 the tops of the hills are laid out radially away. I tried very  
22 hard to make a co-sequence overlay of the roads, and it didn't  
23 work, because what -- in order to do that we would have to do  
24 what is called photogrammetry, and you hire somebody else to do  
25 that. I am not a photogrammetist.

1 Q. What is a photogrammetry?

2 A. I would like it -- it would have been very convenient  
3 and neat and convincing had I been able to give you a map from  
4 which the roads just grew from a single place. But this built-in  
5 thing in the technology doesn't let me do that. That road is  
6 there. Now, it might be drifting a bit here and there in that  
7 red rectangle, because the different images were taken by  
8 different airplanes in different places. And the parallax on  
9 this site is widely exaggerated because of the steepness of the  
10 slope. Limitation to the technology.

11 Q. So the road hasn't changed. Did the relation to the  
12 line --

13 A. That road has not changed.

14 Q. It is the same road you are looking at?

15 A. There are some others that have.

16 Q. Sure, but because of what you are talking about and the  
17 picture was either directly over or not directly over, it would  
18 be somewhat different?

19 A. Yeah.

20 Q. And again this is the Bonner County assessor putting  
21 out something in which everything seems to be a road. Again, is  
22 this another one of those that is not as reliable as the USGS?

23 A. It is not as -- it doesn't give me the detail.

24 Q. Fine.

25 A. So I could not reliably find the things that weren't

1 roads. So, yes, everything on there appears to be a road because  
2 that is all I could see on that image.

3 Q. Fine. The next one.

4 This is 1992, May 25, USGS high resolution scan. This  
5 is another one that came from Sioux Falls?

6 A. Yes.

7 Q. And here again, you have not made the roads quite as  
8 wide as you did in your other images or the tracks seem to be a  
9 little bit smaller. That is just a matter of scale, is it?

10 A. Yes.

11 Q. But what you are showing then are three different what  
12 you call roads going into the Backman property?

13 A. Yes.

14 Q. And again we have another one of these, that is  
15 somewhat different location, tracks that comes almost to the  
16 Backman property?

17 A. Yes.

18 Q. And it would appear from this that at least for logging  
19 purposes it was possible to go from south from the Backman  
20 property to the public road, if you wanted to. You were able to  
21 log it, you should be able to --

22 A. If that's what those roads were for and those are  
23 tracks and they connect, I would agree. In some of these times  
24 it was possible.

25 Q. Okay. And we also have a funny little track over here

1 Q. And when you say 50 percent what do you mean? Is that  
 2 a distance?  
 3 A. That means that we have completed 56 percent of the  
 4 road so far that we set out to complete.  
 5 Q. And when you have it completed what would the road be?  
 6 A. It would be gravel from the beginning, Baldy Mountain  
 7 Road, all the way to the end, which would end at the green gates  
 8 on Turtle Rock Road. The rock on Redtail Hawk Road and the end  
 9 of Destiny Lane.  
 10 Q. The end of which?  
 11 A. Destiny Lane at the McKenna residence.  
 12 Q. Does your work include work on Inspiration Way?  
 13 A. No. However, I have a working relationship with the  
 14 people on Inspiration Way. And so I have been asked to do some  
 15 work privately on that road. I haven't done it yet. However,  
 16 there was a time -- there has been times when I hired the grader,  
 17 and I called the owners on that land and asked them if they would  
 18 like me to contract the grader to do their road in which case  
 19 they have to pay separately. But it just doesn't pay to bring  
 20 that kind of equipment up there and send them home so they can  
 21 get their road done. So I usually call them a few days before  
 22 and say hey, I got the grader, would you like them to do the  
 23 road.  
 24 Q. But they are billed separately, and they are not  
 25 working for POVE?

1 A. That's correct.  
 2 Q. How about snowplowing?  
 3 A. Every homeowner, whether they are in POVE or not, pays  
 4 separately.  
 5 Q. And that is based on what? How do you calculate the  
 6 payment?  
 7 A. We calculate it based on the distance from Baldy  
 8 Mountain Road. So some people pay for two miles of road to be  
 9 plowed -- nobody would pay for two miles, sorry. Some people pay  
 10 more. Like, if they live on the end of the road they pay more.  
 11 Q. And when it is 100 percent done, when will that be,  
 12 based upon your --  
 13 A. A long time from now, because I only get about \$5,000 a  
 14 year to work with. It just went up a little bit because somebody  
 15 said we are now charging \$600 per household. So that's almost  
 16 nothing. I spend about half of that in maintenance now because  
 17 there is so much traffic that it destroys the gravel. And people  
 18 who are building, they have a lot of trucks that destroy the  
 19 gravel. And the snowplow throws gravel. So I am constantly  
 20 resurfacing what we have already done to try to keep it from  
 21 eroding.  
 22 Q. How many -- first of all, you bought the property, the  
 23 property you had nothing on. It was vacant land?  
 24 A. Correct.  
 25 Q. You built a house?

1 A. Yes.  
 2 Q. How long did it take?  
 3 A. About eight months.  
 4 Q. And since you acquired the property how many other  
 5 houses have been constructed on that property?  
 6 A. On my property?  
 7 Q. Not on your property, in the whole area.  
 8 A. Uh --  
 9 Q. The area I am talking about is the area under POVE and  
 10 also that in which you have a working arrangement with others.  
 11 A. Okay. Let me think about that for a second.  
 12 Five.  
 13 Q. And these are fairly large houses?  
 14 A. Yes.  
 15 Q. And the construction of those houses involves what as  
 16 far as the road is concerned?  
 17 A. Well, cement trucks, lots of construction workers.  
 18 Some heavy trucks hauling rock in, moving rock around. Usually  
 19 Caterpillars to make their driveway. So there's a fair amount  
 20 of -- and a lot of times before a homeowner will build, they have  
 21 to do some logging, they will have to haul some logs out. So  
 22 there is an awful lot of traffic produced by each home that is  
 23 built.  
 24 Q. And the effect upon the road from that traffic is what?  
 25 A. It is tough. And we have considered as POVE of

1 assessing people as they build a dollar amount to help us repair  
 2 the road after they are done but have not done it yet. We  
 3 haven't come to an agreement on that.  
 4 Q. In your work have you kept some kind of personal  
 5 supervision over who is on the road?  
 6 A. Oh, yes.  
 7 Q. Tell us about it.  
 8 A. Well, it is kind of neat. People stop and talk to me  
 9 and thank me for my work. They realize that I have a better job  
 10 and that I don't -- this isn't how I make my living. And in the  
 11 beginning it was all volunteer time until it got way out of hand  
 12 hours wise. So they just appreciate it. I ask -- we tried to do  
 13 the work committee thing in the beginning of the subdivision.  
 14 But that didn't work very well. Everybody has got busy lives and  
 15 things to do outside of maintaining roads. And it is hard to get  
 16 everybody together on a particular day to bring their loppers out  
 17 and brush a road. So I kind of gave up on that after the first  
 18 couple of years trying to get everybody together to help me. And  
 19 most of the time when I order gravel it is Monday through Friday,  
 20 so everybody has to work. I am lucky where I work, you know, a  
 21 week or two at a time and then I am back, so I can have some  
 22 Monday through Fridays to work on it.  
 23 So they stop and they talk to me as they drive by  
 24 almost always. If they are in a hurry they won't stop, but they  
 25 wave. Most of the time, though, they will stop. And then there

1 over the top of it to cross.  
 2 Q. What you have described here has been identified in the  
 3 course of this trial as the lower road?  
 4 A. Yes.  
 5 Q. What kind of a road was that?  
 6 A. Very wet, and we had a hard time holding it. So after  
 7 we got this lower portion logged out, we abandoned it and put  
 8 draining in and let it slough in and then seeded it, because it  
 9 was so wet on both sides, and we just let it come back in and  
 10 then just kept the drainage open until it had shored itself up  
 11 with the seeding and stuff, because the only way you can hold  
 12 that road even today at today's standards would be to be a full  
 13 bench road, which is to excavate out of the bank, no fill, and  
 14 put curtain drains in at great expense.  
 15 Q. What would require you to do that today?  
 16 A. Because of the wet. You are basically -- it is still  
 17 part of the head waters of Syringa Creek. And all of this is wet  
 18 through there, and it leads down and goes to the creek, you know.  
 19 It is just full of springs.  
 20 Q. Does the Forest Practices Act apply?  
 21 A. Yes. And back when we put that road in, you know, all  
 22 of these roads went up and accessed anywhere into the BLM ground,  
 23 and all of that nobody even knew what forest practices were then.  
 24 Q. Okay. There were no regulations, all right. Did you  
 25 have any other roads that you used in that logging operation to

1 A. BLM.  
 2 Q. Owns property to the north of that?  
 3 A. To the north and east and one piece to the west. They  
 4 own two pieces up there.  
 5 Q. And the road as it was originally located back in the  
 6 1970s was straight up through here?  
 7 A. Straight up through here. It was not -- just a logging  
 8 access. Back in those days roads were all built for the course  
 9 of least resistance, get in as cheap as you can and you know.  
 10 Q. So all the area that you are talking about and all the  
 11 roads that were there were logging roads and nothing more than  
 12 that?  
 13 A. Nothing more. Nobody ever dreamed there would be homes  
 14 up there ever, you know.  
 15 Q. Okay. Up until the development that went in about 1995  
 16 and '96 that you are acquainted with, number of houses, they  
 17 divided the property into 20-acre tracts?  
 18 A. Yes.  
 19 Q. Up until then were there anything up there other than  
 20 logging roads?  
 21 A. No.  
 22 MR. REED: I have no further questions.  
 23 THE COURT: Mr. Erbland?  
 24 MR. ERBLAND: No questions.  
 25 THE COURT: Cross.

1 get to what is now the Backman property?  
 2 A. No, not at that time.  
 3 Q. At any subsequent time?  
 4 A. Afterwards, but we did not put them in, and it would  
 5 have come off from the switchback on the upper road.  
 6 Q. Can you point that out?  
 7 A. Okay. It would be right up in here (indicating).  
 8 Q. You are pointing to the division that is what we call  
 9 the upper road, and that is between Section 7 and Section 8?  
 10 A. Yes.  
 11 Q. There is a little turn-around there?  
 12 A. Right.  
 13 Q. A hook that comes into the property. What kind of a  
 14 road was that?  
 15 A. Just a one-lane logging access only, steep, narrow,  
 16 rocky, rough.  
 17 Q. Were there any roads other than logging roads that came  
 18 out of the property that Louis Modig acquired?  
 19 A. No.  
 20 Q. During your experience?  
 21 A. No. Because this road, the upper road from this  
 22 property line here on up which goes on and which was in one of  
 23 the deeds where my uncle had granted right of way to the U.S.  
 24 government was so they could log that property up above in 1964.  
 25 Q. And the government, BLM?

1 MR. SYKES: Thank you, your Honor.  
 2 CROSS-EXAMINATION  
 3 BY MR. SYKES:  
 4 Q. Mr. Moody, my name is Jeff Sykes. A pleasure to meet  
 5 you.  
 6 A. Yes.  
 7 Q. I have a few questions for you today. You pointed out  
 8 the property which your family owned?  
 9 A. Yes.  
 10 Q. You actually didn't own the property; it was your  
 11 parents and uncle, right?  
 12 A. My grandparents, my uncle, and my mother and father.  
 13 Q. And when you logged in Section 8 were you working for  
 14 the property owners that owned Section 8?  
 15 A. Yes, I was. It was WI Forest Products Incorporated.  
 16 Q. Right. Now you also said there was a cabin somewhere.  
 17 Can you point that out for me?  
 18 A. Yes. There is this little spur road that went right up  
 19 into here.  
 20 Q. Uh-huh.  
 21 A. And it was right -- right about in there is a flat up  
 22 there, and there was remnants of it. As a matter of fact, it  
 23 became my parents' front living room.  
 24 Q. The remnants of the cabin -- any idea from family  
 25 history of when that was put in?

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1 A. Correct.

2 Q. And your answer was?

3 A. Yes.

4 Q. But that you did have road access without question to

5 the 10 acres?

6 A. Yes.

7 (Reading questions and answers ends)

8 MR. ERBLAND: That's all I have. Thanks.

9 THE COURT: All right. Any redirect?

10 MR. FEATHERSTON: No.

11 THE COURT: All right. Then you may step down.

12 MR. FEATHERSTON: That's --

13 MR. REED: We would call Dalyn Marley.

14 THE COURT: Ms. Marley, if you would come forward and

15 up to the witness stand so the clerk can swear you in.

16 DALYN MARLEY,

17 called as a witness at the request of the

18 Defendants, being first duly sworn, was examined and testified as

19 follows:

20 DIRECT EXAMINATION

21 BY MR. REED:

22 Q. Please state your name.

23 A. Dalyn Marley.

24 Q. Are you married?

25 A. Yes.

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1 Q. Your husband's name?

2 A. Allan.

3 Q. And where do you live, Ms. Marley?

4 A. 840 Redtail Hawk Road.

5 Q. Can you find that little pointer right in front of you

6 and point out to the Court where your house is?

7 A. Right there (indicating).

8 Q. And is there another property owned by people named

9 Marley up in that general area?

10 A. Our son.

11 Q. And where is that?

12 A. Right about there (indicating).

13 Q. And when did you acquire the property?

14 A. 1991.

15 Q. And who did you acquire it from?

16 A. It was inherited from my husband's father.

17 Q. And his name?

18 A. Emmett Marley.

19 Q. And Emmett Marley owned which pieces of property?

20 A. He owned that 40 right there.

21 Q. And the portion -- that's the portion you sold to your

22 son or is that --

23 A. This is 40. And we sold our son 10 of the 40.

24 Q. 10 of the 40. So the 40 you got by inheritance from

25 your husband's father?

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1 A. Right.

2 Q. And do you know when your husband's father had acquired

3 the property, how long ago?

4 A. Probably in the '60s.

5 Q. In the '60s, okay. Was there a house on the property?

6 A. No.

7 Q. On either one of those?

8 A. No.

9 Q. You got the property in 1991. Did you ultimately build

10 a house upon the property?

11 A. No. We started building in 1996.

12 Q. And you did that in 1996?

13 A. Yes.

14 Q. Were you acquainted with the property before your

15 husband inherited it?

16 A. No. Well, we had been up there maybe once or twice but

17 not --

18 Q. Had you been to the property?

19 A. Maybe once or twice.

20 Q. And how did you get there?

21 A. There was a road up the same road we drive right now.

22 Q. Redtail Hawk?

23 A. It wasn't named Redtail Hawk until the road -- the

24 roads needed to be named, so we named it.

25 Q. You named the road?

610

1 A. Yeah. I think it was called Jeep Trail Road.

2 Q. Okay. And would you -- when did you first go up there,

3 as best you could recall?

4 A. Maybe in the '80s, late '80s.

5 Q. Would you describe the road -- let's start at Baldy and

6 describe where you went.

7 A. Well, you drive past the shooting range, and then it

8 was only like for fire control access. It was just a skid road.

9 It was accessible, but it wasn't used, and it wasn't maintained.

10 It was just access to get up for fire control.

11 Q. Fire control being this is -- the state doing -- Forest

12 Service doing fire control?

13 A. Right.

14 Q. You got the property in 1991. How many times did you

15 go up there after that before you bought the property? I mean

16 before you started building. Excuse me.

17 A. Oh, I don't know, four or five, you know, just random.

18 Q. Were there any changes made in the road?

19 A. No.

20 Q. Still a fire control?

21 A. It was just -- I don't know, primitive, primitive, not

22 maintained by anyone. When we -- our easement, it was through

23 Louisiana-Pacific, so they owned that whole portion. And I don't

24 know why the road was there except for fire access maybe.

25 Q. You had an easement to the property that your father --

1 A. My father-in-law had an easement so when we inherited  
 2 it, it was our easement also.  
 3 Q. You got it from Louisiana-Pacific and Louisiana-Pacific  
 4 at that time owned most of the rest of the property?  
 5 A. The whole -- yes.  
 6 Q. You started building in 1996?  
 7 A. Yes.  
 8 Q. And what was the condition of the road at that time?  
 9 A. Passable. It wasn't really a road. As we used it, we  
 10 maintained it. Like, as we were building, there was a huge mud  
 11 hole. We had to -- actually, there was a lost vehicle in it. We  
 12 fixed it as we could, as we used it. And after we moved up  
 13 there, it was fixed in little portions as people had money, or  
 14 whoever drove it would fix a portion of it. Like a load of  
 15 gravel or road paper, or just, you know, simple whatever we  
 16 needed to get past.  
 17 Q. You mentioned there was a lost vehicle in the road?  
 18 A. Actually, there was.  
 19 Q. Tell us about that.  
 20 A. It was just a -- it was in the spring when we were  
 21 building, and one of the people that were helping build our  
 22 house, the vehicle just sank. And so then we took another  
 23 vehicle and it got stuck too. It was a huge hole. But it was --  
 24 and then there's been other big major places that were fixed.  
 25 You would have to put big rock, and then you would have to put

1 road paper, and then you would have to put gravel and just slowly  
 2 build up portions of the road.  
 3 Q. Now, Yellowstone Basin and Mountain View purchased the  
 4 property from Louisiana-Pacific in --  
 5 A. I don't know that.  
 6 Q. Did the road become improved after you built your  
 7 house?  
 8 A. Only as there would be a property owner, and then  
 9 something would happen to the road, and we would do a portion and  
 10 then another property owner. There wasn't very many people when  
 11 we moved up there.  
 12 Q. But as time went on did the road get better?  
 13 A. It is better, slowly better.  
 14 Q. Don't lose any more vehicles in it?  
 15 A. Yeah.  
 16 Q. And so you have lived there since 1996?  
 17 A. 1997 in April we moved.  
 18 Q. All right. And does your son have a house on his  
 19 property?  
 20 A. Yes.  
 21 Q. And, again, if you could use the pointer and describe  
 22 how you get to your property.  
 23 You go down there and you are coming off --  
 24 A. This is Baldy Mountain Road.  
 25 Q. You come off Baldy Mountain Road.

1 A. Turn at it is Turtle Rock Road, go back past the  
 2 shooting range, and here's the junction of Turtle Rock and  
 3 Redtail. So then we go up here. There is a switchback there,  
 4 and we keep going. So our property corner is right there. We  
 5 have a gate, and then we have a driveway.  
 6 Q. So all of that property in that area is Marley  
 7 property?  
 8 A. We have 30. There's 30. And then there's our son has  
 9 10.  
 10 Q. Your son has 10 up there, okay. So the roads that go  
 11 off Redtail Hawk Road are roads that you built, driveways that  
 12 you built for yourself?  
 13 A. Just that one.  
 14 Q. Just the one right there?  
 15 A. Right. We both use the same driveway.  
 16 Q. Same driveway. All right. And you have been there in  
 17 the 10 years since the house was completed?  
 18 A. (Witness nods)  
 19 Q. What's been the -- well, first of all, the road is  
 20 improved somewhat?  
 21 A. Yes, little by little.  
 22 Q. And then that's been, as you say, primarily by the  
 23 property owners below you within that what is shown there as a  
 24 dedicated easement, the double line?  
 25 A. Right. We drive through. We drive through the Pend

1 Orelle View Estate Association. Before there was like an  
 2 organized association, property owners helped maintain or build  
 3 or add to the road foundation.  
 4 Q. Now, you have an easement to your property so you don't  
 5 need permission from anybody. But do you have any association  
 6 with -- any relation with the association?  
 7 A. No.  
 8 Q. Have you ever met Randy Powers?  
 9 A. I did one time.  
 10 Q. About when was that?  
 11 A. It was the summer of '97 or '98.  
 12 Q. And how did that happen? Describe the circumstances.  
 13 A. Well, I was outside with our grandchildren, and I could  
 14 hear this motor bike driving around, and there wasn't anybody  
 15 that lived up there. He was going up a lot of different trails  
 16 and roads. So I was outside, and finally he came up our driveway  
 17 and came over to me, standing on the deck.  
 18 Q. Did he introduce himself?  
 19 A. He said I am Randy Powers.  
 20 Q. What was the conversation?  
 21 MR. SYKES: Objection, hearsay.  
 22 MR. FEATHERSTON: Join in the objection.  
 23 THE COURT: Well, technically it is hearsay. Is there  
 24 an exception?  
 25 MR. REED: No.

**ORIGINAL**

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2012 APR 18  
CLERK  
*ap*

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

	)	Case No. CV-2006-00365
	)	
<b>BOB BACKMAN and RHONDA</b>	)	<b>RESPONSE OF</b>
<b>BACKMAN, husband and wife,</b>	)	<b>DEFENDANTS/COUNTERCLAIMANTS</b>
	)	<b>TO PLAINTIFFS' MOTION TO</b>
<b>Plaintiffs,</b>	)	<b>DISALLOW COSTS</b>
<b>v.</b>	)	
	)	
<b>JAMES A. SPAGON and LINDA I.</b>	)	
<b>SPAGON, et al.,</b>	)	
<b>Defendants.</b>	)	
	)	

**A. Expense of Video Deposition:**

Plaintiffs have lengthy objections to the following costs itemized in the Memorandum of Costs of Defendants/Counterclaimants.

<b>Naegeli Reporting</b>	
<b>Video Depositions</b>	
<b>Bob Backman, Rhonda Backman and Doug Ward</b>	<b>\$2,276.20</b>

Plaintiffs admit that Idaho appellate courts have not made any rulings related to allowability of costs for video depositions. Memorandum in Support, p. 3. Plaintiffs' Memorandum has quoted verbatim from the portion of Taxation of Costs Associated with Videotaped Depositions under 28 U.S.C.A. § 1920 and Rule 54(d) of Federal

Rules of Civil Procedure, "156 A.L.R. Fed 311 (1999): Under the subtitle (b) Cost held not taxable" (1)

Defendants/Counter-claimants are delivering to the Court with this response the complete annotations which have seven pages of cases allowing the costs as compared with three pages of disallowance. pp. 337-334.

In any event, the applicable Federal Rule 54 is very different from the explicit directions in Idaho Rules of Civil Procedure 54(d)(1)(c)(9).

**I.R.CIV.P.**

**Rule 54(d)(1)(c)(9). Costs- Items allowed.**

**(C) Costs as a Matter of Right. When costs are awarded to a party, such party shall be entitled to the following costs, actually paid, as a matter of right:**

...

**9. Charges for reporting and transcribing of a deposition taken in preparation for trial of an action, whether or not read into evidence in the trial of the action.**

\*\*\*

**F.R. Civ. P. Rule 54(d)**

**(1) Costs Other than Attorneys' Fees. Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; . . .**

The authors in Wright, Miller, Kane, FEDERAL PRACTICE AND PROCEDURE, state that, unlike Idaho, it is a very open question as to when costs of depositions are allowed whether transcribed or taken by video in any federal case:

---

(1 ) Counsel for plaintiffs did not furnish to the undersigned nor presumably to the Court copies of either the A.L.R. citation nor of the cases cited.

**§ 2626. \_\_ Depositions**

**There has been some confusion with regard to the taxability of expenses incurred in the taking of depositions, a question that is of importance because of the widespread use of depositions in federal litigation. The rules themselves do not indicate whether these expenses are taxable as costs and the existing statutes offer only very limited guidance. The matter is left to the discretion of the district court, which rarely will be interfered with on appeal.**

Ibid., Vol. 10, §2626, p. 421.

Plaintiffs do not challenge that these depositions were taken. The charge reflected was the actual bill received. The depositions were taken in preparation for trial of the action. I.R. Civ. P. Rule 54(d)(1)(c)(9) explicitly allows the cost whether or not used in trial. The costs must be allowed.

**B. Expert witness fees.**

Expert witness fees were necessarily incurred, necessary and exceptional and in the interest of justice. I.R. Civ. P. Rule 54(d)(1)(D).

The charges made to defendants and counter-claimants by Richard F. Creed of \$3,228.38 and by Graydon Johnson for \$3,000.00 were very reasonable for the work done by each . In 2002, the Idaho Supreme Court raised the amount allowed by right of expert witness fees from \$500.00 to \$2,000.00, recognizing that the \$500.00 would not begin to cover any expert in today's practice.

The \$2,000.00 will cover a witness such as Nancy Rink who drew most of her testimony from her publication about Humbird Lumber Company that was directly in point. The \$2,000.00 generally will not cover any qualified expert witness who must devote any significant amount of time whatsoever to the case.

The timing of the expert witness testimony was a critical matter in this case. The



USGS in Sioux Falls, SD, Mr. Johnson provided a very solid and practical doubting perspective to Dr. Folsom's interpretation of those photographs. The measure of the success of Mr. Johnson's testimony is that the Memorandum Opinion does not make any mention of Dr. Folsom's interpretation.

To sum up, the case itself was exceptional. The testimony of Richard Creed and Graydon Johnson was necessary and exceptional in order to counter what plaintiffs were attempting to create. As Dr. Folsom asserted in his testimony and in his created illustrations, his distinction between "road" and "track" were unique and indeed unprecedented. Countering this testimony was necessary and exceptional.

**C. Costs of Mediation were split.**

Plaintiffs are correct in denying the mediation costs. There was an agreement to split the same.

Respectfully submitted this 13<sup>th</sup> day of  
February, 2008.

---

Scott W. Reed  
Attorney for Defendants /  
Counterclaimants Spagon, et al.

report of Dr. Michael Folsom was received in May and that of Scott Razor in July. The full extent of Dr. Folsom's knowledge was not available until after he was deposed on July 11<sup>th</sup>. Scott Razor was originally set to be deposed on July 11<sup>th</sup>, but that deposition did not take place until August. Scott Razor's map was made available shortly before his deposition.

Undersigned counsel for defendants/counterclaimants guessed that Scott Razor was going to testify as to the location of various roads and trails, but his conclusions were not available until his report had been received and he had been deposed. As to Dr. Folsom, counsel did not have a clue as to the nature of his testimony until his report was received and more fully explained in his deposition on July 11<sup>th</sup>.

It was then necessary to scramble to find witnesses who could respond to both Scott Razor and Michael Folsom. Richard Creed was retained after another potential expert had declined. Mr. Creed did some quick work to come up with a report. A significant part of his time was spent being deposed by counsel for plaintiffs. The same was true for Graydon Johnson.

Idaho Civil Rule 26(b)(4)(C) requires that any party deposing an expert witness must pay the fees and expenses reasonably incurred by the opposing party in obtaining facts and opinions from these experts.

On November 27, 2007, a letter was sent to attorney Jeff R. Sykes seeking reimbursement for \$929.05 billed by Richard Creed for expenses related to his deposition and for \$775.00 billed by Graydon Johnson. Copies of the letter and bills are attached to this response. Neither sum has been paid. These amounts are owing separate and apart from the \$2,000 limitation.

The issue could be resolved by requiring allowing the costs sought for the testimony of both of these witnesses at their deposition and then treating the \$2,000.00 as applicable to time spent outside the depositions.(2)

This case itself was exceptional in an attempt to rebut the testimony sought by plaintiffs to support its very creative and inventive but totally unsubstantiated theories of road access.

Richard Creed was a highly knowledgeable road expert having spent a career in the Forest Service and then became available as an expert witness in many matters thereafter.

With Graydon Johnson, the need was to get Mr. Johnson to apply his expertise in computer technology to the interpretation of the subject of aerial photographs with which he had had little experience.

The whole subject of aerial photography is itself exceptional. One would measure the exceptional nature of the testimony by Dr. Folsom's admission that he had never been asked in litigation to do the sort of interpretation to which he was testifying in trial.

Counsel for both parties agreed to waive the time limitations set forth in the pre-trial order in order to allow the depositions to be taken of Richard Creed, Graydon Johnson and Nancy Rink shortly before trial, and to have the deposition of Scott Rasor also taken in the period of time very close to trial.

The effect of Mr. Johnson's testimony was to discount the "road" and "tracks" analysis made by Dr. Folsom. This was not easy. From photographs obtained from

---

(2) This would allow for Richard Creed \$2,929.05 and for Graydon Johnson \$2,775.00. Defendants/Counterclaimants are of the opinion that the full amount s of \$3,228.38 for Creed and \$3,000.00 for Johnson should be allowed.

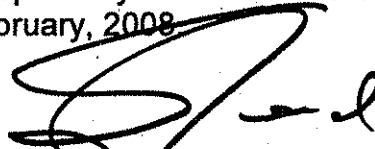
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Respectfully submitted this 13<sup>th</sup> day of  
February, 2008



---

Scott W. Reed  
Attorney for Defendants /  
Counterclaimants Spagon, et al.

CERTIFICATE OF MAILING

I certify that a copy of the above and foregoing has been sent by first class mail, postage prepaid, this 13<sup>th</sup> day of February, 2008 to:

JEFF R. SYKES  
JASON G. DYKSTAN  
MEULEMAN MOLLERUP, LLP  
960 BROADWAY AVENUE, SUITE 500  
BOISE, IDAHO 83706

BRENT C. FEATHERSTON  
ATTORNEY AT LAW  
113 SOUTH SECOND AVENUE  
SANDPOINT, ID 83864

PETER C. ERBLAND  
PAINE, HAMBLE, COFFIN, BROOKE & MILLER  
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P.O. BOX E  
COEUR D'ALENE, IDAHO 83816

  
\_\_\_\_\_  
Scott W. Reed

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ISBA#2456

2010-15-03-11  
asp

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

BOB BACKMAN and RHONDA BACKMAN,  
husband and wife,

Plaintiffs,

vs.

JAMES A. SPAGON and LINDA I. SPAGON, et  
al.,

Defendants.

) Case No. CV 2006-00365  
)  
) **DEFENDANT GRANTS' JOINDER**  
) **IN DEFENDANTS SPAGON,**  
) **LLOYD, JOHNSON, MILLWARD,**  
) **ZIRWES, BESSLER, MCKENNA**  
) **AND PEND OREILLE VIEW**  
) **ESTATES PROPERTY OWNERS**  
) **ASSOCIATION, INC.'S**  
) **OPPOSITION TO PLAINTIFFS'**  
) **PROPOSED MODIFICATION OF**  
) **JUDGMENT**  
)  
)  
)  
)


COME NOW, defendants Christopher E. Grant and Susan R. Grant, and join in defendants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna and Pend Oreille View Estates Property Owners Association, Inc.'s Opposition to Plaintiffs' Proposed Modification of Judgment filed by Scott W. Reed in conjunction with this matter.

**DEFENDANT GRANTS' JOINDER IN OPPOSITION TO  
PROPOSED MODIFICATION OF JUDGMENT - 1**

DATED this 13<sup>th</sup> day of February, 2008.

PAINE HAMBLEN LLP

By

  
PETER C. ERBLAND,  
Attorney for Defendant Grants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13<sup>th</sup> day of February, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Jeff R. Sykes  
Richard L. Stacey  
Meuleman Mollerup, LLP  
960 Broadway Ave., Ste. 500  
Boise, ID 83706

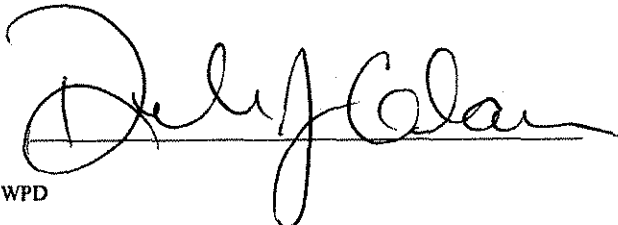
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AP

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

BOB BACKMAN and RHONDA BACKMAN,  
husband and wife,

Plaintiffs,

vs.

JAMES A. SPAGON and LINDA I. SPAGON, et  
al.,

Defendants.

) Case No. CV 2006-00365  
)  
) **DEFENDANT GRANTS' JOINDER**  
) **IN DEFENDANTS SPAGON,**  
) **LLOYD, JOHNSON, MILLWARD,**  
) **ZIRWES, BESSLER, MCKENNA**  
) **AND PEND OREILLE VIEW**  
) **ESTATES PROPERTY OWNERS**  
) **ASSOCIATION, INC.'S**  
) **OPPOSITION TO PLAINTIFFS'**  
) **MEMORANDUM IN SUPPORT OF**  
) **MOTION TO AMEND FINDINGS**  
) **OF FACT AND TO AMEND**  
) **JUDGMENT**  
)  
)

COME NOW, defendants Christopher E. Grant and Susan R. Grant, and join in defendants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna and Pend Oreille View Estates Property Owners Association, Inc.'s Opposition to Plaintiffs' Memorandum in Support of Motion

360



to Amend Findings of Fact and to Amend Judgment filed by Scott W. Reed in conjunction with this matter.

DATED this 13<sup>th</sup> day of February, 2008.

PAINÉ HAMBLEN LLP

By

  
PETER C. ERBLAND,  
Attorney for Defendant Grants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13<sup>th</sup> day of February, 2008, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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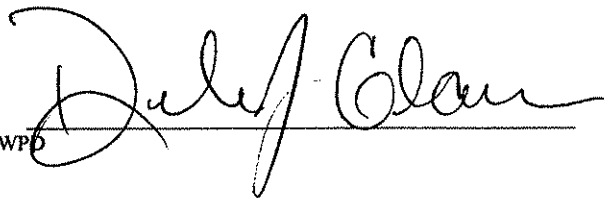
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**Court Minutes:**

Session: HOSACK030508P  
Session Date: 03/05/2008  
Judge: Hosack, Charles  
Reporter: Schaller, Joann

Division: DIST  
Session Time: 15:21

Courtroom: Courtroom9

Clerk(s): Rohrbach, Shari

State Attorney(s):

Public Defender(s):

Prob. Officer(s):

Court interpreter(s):

Case ID: 0001

Case number: BONCV06-365  
Plaintiff: Backman etal, Bob  
Plaintiff Attorney:  
Defendant: Spagon etal, James  
Pers. Attorney:  
Co-Defendant(s):  
State Attorney:  
Public Defender:

03/05/2008

15:31:03

Recording Started:

15:31:03

Case called

15:31:12

Plaintiff Attorney:

15:31:14

Judge: Hosack, Charles  
Calls, parties present. Mr Featherston is not  
present and has waived

15:31:55

appearance.



15:31:57 **Add Ins: Sykes, Jeff**  
That is correct.

15:32:02 **Add Ins: Reed, Scott**  
Mr Featherston advised since we were not seeking costs against him he was not going to come.

15:32:18

15:32:23 **Judge: Hosack, Charles**  
Will address motions to amend before we address costs. I've read the submissions.

15:33:02

15:33:04 **Add Ins: Sykes, Jeff**  
Two issues were raised, one is the wild and uninclosed area where the road leaves the city, Turtle Rock Road, we believe there should have been a finding. That property had already been subdivided and utilities placed.

15:33:56

15:34:18

15:35:15 Powers said he went into that area, improved the road, installed culverts.

15:35:42 The use in 1994 was hostile, and that use continued until 1994. His actions gave notice of using the land. And then the issue of condemnation. POVE put into the record that Backmans could not use Red Tail Hawk Road. That was not a viable roadway. Turtle Rock and Syringa were the roads going into Section 7. Evidence established that Red Tail road was cut off. We were looking to condemn the road and then get to easement by necessity. We're looking for amendments and modifying the judgment. And then the value that needs to be paid for the private condemnation.

15:36:38

15:37:23

15:37:40

15:38:40

15:39:31

15:40:45

15:41:13

15:42:38 **Judge: Hosack, Charles**  
I don't follow the POVE finding that takes it out of condemnation. Comments.

15:43:39 **Add Ins: Sykes, Jeff**  
Once you reach the conclusion that the land is legally land locked, then easement by necessity. Burden of the PL is to

15:44:01

show this road is best to get  
15:44:49 into the property.

15:49:57 **Judge: Hosack, Charles**  
Discussion.

15:51:21 **Add Ins: Reed, Scott**  
Extensive opinion was done. This was a case  
15:52:40 where attorney fees would not be  
awarded. In 1994 a survey was done, there  
15:54:43 weren't any houses up there. There  
were no fences, the evidence establishes what  
the court found. Comments re:  
15:55:49 Cohn v. Larson, you cannot condemn a road to go  
in and build houses. There is  
15:56:55 no establishment of necessity. We don't think  
the elements are there to  
15:58:25 modify or amend the findings of the court.

15:58:58 **Add Ins: Erbland, Peter**  
No argument.

15:59:23 **Add Ins: Sykes, Jeff**  
Comments re: private condemnation, there isn't a  
lot of case law.

16:02:33 **Judge: Hosack, Charles**  
I did decide the case based on the 5-6 lots and  
the Turtle Rock Road and  
16:02:55 extensions. Comments regarding use of roads. I  
was addressing what PL were  
16:07:47 seeking. The combination of theories, the Court  
has found that combining  
16:08:53 theories is inappropriate, even if supported by  
the facts in the case. Id law  
16:09:10 is clear that you don't get easement by  
necessity by Baldy Mt Road. The law  
16:09:46 you can't do that directly. Easement by  
necessity the court finds not  
16:10:43 supported by the facts. The prescriptive  
easement claim is that up until 1994  
16:11:02 the ground was wild and uninclosed. The logging  
did not establish a  
16:11:54 prescriptive right into Section 8. Insufficient  
evidence. I don't find a  
16:16:00 prescriptive use on Turtle Rock Road.

16:16:39 Insufficient evidence to find the land  
was land-locked. Comments.

16:24:52 The roads were temporary roads, for logging. The  
middle road was not ever  
16:25:43 utilized in a way to constitute adverse action.

16:32:08 Error on page 20, last paragraph, should be  
north half, explains. And page  
16:33:34 21, clarifies. The Court may rephrase some  
paragraphs. Since I'm doing some  
16:35:30 writing I'll also do the Order denying. RE:  
costs,

16:36:49 **Add Ins: Sykes, Jeff**  
RE: costs, nothing more than what is in the  
brief.

16:37:04 **Add Ins: Reed, Scott**  
Nothing more.

16:37:07 **Judge: Hosack, Charles**  
The Court would grant the additional costs of  
video depo as long as there is  
16:37:25 a showing for the reason of doing the video.

16:38:03 **Add Ins: Reed, Scott**  
Video depo were taken because these were 3 very  
important people, we needed  
16:39:00 that to be available at trial. You never know  
until you get to trial.

16:40:14 **Add Ins: Erbland, Peter**  
We didn't take video depositions of every witness in  
the case, we made a decision  
16:40:39 for these three people, comments.

16:41:01 **Add Ins: Sykes, Jeff**  
The two PL had to come to testify at trial,  
comments.

16:41:46 **Add Ins: Reed, Scott**  
There is a breakdown in the billing for the  
video and what was transcript, we  
16:42:06 did file that with our cost bill, hands bill.

16:45:44 **Judge: Hosack, Charles**  
Reviews the bill.

16:47:28 **Add Ins: Erbland, Peter**  
Explains bill, difference of about 45.00

16:48:16 **Judge: Hosack, Charles**  
The next issue was costs of experts, there is a  
basis for some compromise.

16:49:02 Find that whatever costs for the video are  
discretionary. Award the amount

16:49:49 and disallow the claims for experts in excess of  
2,000. Mr Reed prepare

16:50:15 Order.

16:51:03 **Stop recording**

---

Scott W. Reed, ISB#818  
Attorney at Law  
P. O. Box A  
Coeur d'Alene, ID 83816  
Phone (208) 664-2161  
FAX (208) 765-5117

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DISTRICT  
**ORIGINAL**

2008 MAR 14 A 10:08

MARIE SCOTT  
CLERK DISTRICT COURT

*MS*  
DEPUTY

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

**BOB BACKMAN and RHONDA  
BACKMAN,**

**Plaintiffs/Counterclaimants**

v.

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

**Defendants/Counterdefendants**

Case No. CV-06-00365

**ORDER AWARDING COSTS**

Defendants/counterclaimants Spagon, et al, as prevailing parties filed a Memorandum of Costs. Plaintiffs/counterdefendants Backman filed timely objection to certain cost items. Pursuant to notice, hearing was held on March 5, 2008. Plaintiffs/counterdefendants were represented by attorney Jeff R. Sykes. Defendants/counterclaimants were represented by attorneys Peter C.

**ORDER AWARDING COSTS**

Erbland and Scott W. Reed. The Court, being fully advised, now therefore,


IT IS HEREBY ORDERED that the costs paid to Naegeli Reporting for Video Depositions in the amount of \$2,276.20 is allowed in full with the condition that the amount of said bill which constitutes the cost of video is allowed only as discretionary costs based on circumstances special to the case.

IT IS FURTHER ORDERED that the objection of plaintiffs/counterdefendants to the expert witness fees for Richard Creed and Graydon Johnson above the rule limit is granted and the fees for each witness is limited to \$2,000 each.

The parties have stipulated that \$664.00 related to mediation should not be allowed so to be deducted from the Memorandum of Costs are \$2,228.38 and \$664.00 equalling \$2,892.38.

IT IS FURTHER ORDERED that defendants/counterclaimants be, and they are hereby awarded costs as against plaintiffs/counterdefendants Backman in the total amount of \$14,257.87.

Dated this 10 day of March, 2008.

  
\_\_\_\_\_  
CHARLES W. HOSACK  
DISTRICT JUDGE



CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was sent by first class mail, postage prepaid on the 21 day of March, 2008, to:

JEFF R. SYKES  
RICHARD L. STACEY  
MEULEMAN MOLLERUP, LLP  
960 BROADWAY AVENUE, SUITE 500  
BOISE, IDAHO 83706

PETER C. ERBLAND  
PAINE, HAMBLÉN, COFFIN,  
BROOKE & MILLER  
ATTORNEYS AT LAW  
P. O. BOX E  
COEUR D'ALENE, IDAHO 83816-03284

BRENT C. FEATHERSTON  
ATTORNEY AT LAW  
113 SOUTH SECOND AVENUE  
SANDPOINT, IDAHO 83864

SCOTT W. REED  
ATTORNEY AT LAW  
P. O. BOX A  
COEUR D'ALENE, IDAHO 83816

A. Phillips  
Deputy Clerk

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2008 MAR 14 P 3:28

MARIE SCOTT  
CLERK DISTRICT COURT

MS  
DEPUTY

STATE OF IDAHO )  
County of Bonner ) SS  
FILED \_\_\_\_\_

AT \_\_\_\_\_ O'clock \_\_\_\_\_ M  
CLERK, DISTRICT COURT

\_\_\_\_\_  
Deputy Clerk

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

BOB BACKMAN and RHONDA )  
BACKMAN, )  
Plaintiff, )  
vs. )  
JAMES and LINDA SPAGON, KENNETH and )  
PRICILLA LLOYD, BRUCE and DEBORAH )  
JOHNSON, THOMAS and DEBRA )  
LAWRENCE, KEVIN SCHRADER, WESTON )  
MILLWARD, PEND OREILLE VIEW ESTATES )  
OWNERS' ASSOC. INC., GREGORY and )  
THERESA ZIRWES, CHRISTOPHER )  
BESSLER, ROBERT and LYNN WALSH, )  
PATRICK and MICHELLE McKENNA, )  
CHRISTOPHER and SUSAN GRANT, )  
Defendant. )  
\_\_\_\_\_ )

CASE NO. CV2006-365

ORDER DENYING  
MOTION TO AMEND  
and CORRECTIONS  
TO MEMORANDUM  
DECISION

Plaintiffs Motion to Amend Findings of Fact and to Amend the Judgment having come before the Court, and the Court being fully advised;

The Court having addressed additional findings or clarifications of findings, and, having stated its reasons for denial of plaintiffs Motion to Amend the Findings of Fact and the Motion to Amend the Judgment, the plaintiffs' motions are hereby denied.

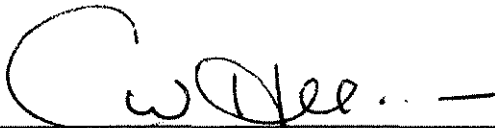
Having reviewed its Memorandum Decision, the Court, *sua sponte*, makes the following corrections (in italics):

1. Page 15, second paragraph, is amended to read as follows: "As to the Middle Road, Powers did testify that he put in a forty-eight inch culvert in

replacing the bridge across the creek. *However, the Middle Road was physically blocked for a period of time in approximately 1998, after the logging operation had been discontinued.* In walking the Middle Road, the Court noted evidence that the Middle Road had been used for logging on the ground in Section 7 and on both sides of the creek. The timing of these logging operations in Section 7 is unknown.

2. Page 20, second full paragraph, last sentence is amended to read: "However, by 1966, the route is that of Syringa Creek Road, as shown by the 1966 U. S. G. S. map, entering Section 8 at the southwest corner of the *north half* of northwest quarter of the northwest quarter of Section 8 (the Schrader twenty acre parcel)."
  
3. Page 21, last four lines, is amended as follows: "*Having found that the historical use that established Syringa Creek Road was permissive or pursuant to express easements, 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 to prove adverse use by clear and convincing evidence. Hodgins v. Sales supra.*"

DATED this   11   day of March, 2008.

  
\_\_\_\_\_  
CHARLES W. HOSACK, DISTRICT JUDGE

Clerk's Certificate of Mailing

I hereby certify that on the 18 day of March, 2008, that a true and correct copy of the foregoing was mailed/delivered by regular U.S. Mail, postage prepaid, Interoffice Mail, Hand Delivered or Faxed to:

- Plaintiff's Attorney Jeff Sykes (fax: 208-336-9712)
- Defense Attorney Scott Reed (fax: 208-765-5117)
- Defense Attorney Brent Featherston (fax: 208-263-0400)
- Defense Attorney Peter Erbland (fax: 208-664-6338)


BY: A. Phillips  
Deputy Clerk



replacing the bridge across the creek. *However, the Middle Road was physically blocked for a period of time in approximately 1998, after the logging operation had been discontinued.* In walking the Middle Road, the Court noted evidence that the Middle Road had been used for logging on the ground in Section 7 and on both sides of the creek. The timing of these logging operations in Section 7 is unknown.

2. Page 20, second full paragraph, last sentence is amended to read: "However, by 1966, the route is that of Syringa Creek Road, as shown by the 1966 U. S. G. S. map, entering Section 8 at the southwest corner of the *north half* of northwest quarter of the northwest quarter of Section 8 (the Schrader twenty acre parcel)."
  
3. Page 21, last four lines, is amended as follows: "*Having found that the historical use that established Syringa Creek Road was permissive or pursuant to express easements, 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 to prove adverse use by clear and convincing evidence.* Hodgins v. Sales supra."

DATED this 11 day of March, 2008.

  
\_\_\_\_\_  
CHARLES W. HOSACK, DISTRICT JUDGE

Clerk's Certificate of Mailing

I hereby certify that on the 18 day of March, 2008, that a true and correct copy of the foregoing was mailed/delivered by regular U.S. Mail, postage prepaid, Interoffice Mail, Hand Delivered or Faxed to:

         Plaintiff's Attorney Jeff Sykes (fax: 208-336-9712)

         Defense Attorney Scott Reed (fax: 208-765-5117)

         Defense Attorney Brent Featherston (fax: 208-263-0400)

         Defense Attorney Peter Erbland (fax: 208-664-6338)

BY: *A. Phillips*  
Deputy Clerk

Jeff R. Sykes, ISB #5058  
Jason G. Dykstra, ISB #6662  
MEULEMAN MOLLERUP LLP  
755 West Front Street, Suite 200  
Boise, Idaho 83702  
(208) 342-6066 Telephone  
(208) 336-9712 Facsimile  
sykes@lawidaho.com  
I:\1547.111\APPEAL\nOTICE OF APPEAL.DOC

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2006 MAR 21 A 11:17  
2006 MAR 21 P 12:06

MARIE SCOTT  
CLERK DISTRICT COURT  
CLERK DISTRICT COURT  
DEPUTY

Attorneys For Plaintiffs/Appellants Bob and Rhonda Backman

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

BOB BACKMAN and RHONDA  
BACKMAN, husband and wife,

Plaintiffs/Appellants,

vs.

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  
nonprofit corporation; GREGORY ZIRWES  
and THERESA ZIRWES, husband and wife;  
CHRISTOPHER BESSLER, an individual;

Case No. CV-2006-00365

**PLAINTIFFS/APPELLANTS'  
NOTICE OF APPEAL**

**ORIGINAL**



ROBERT WALSH and LYNN WALSH,  
husband and wife; PATRICK McKENNA  
and MICHELLE McKENNA, husband and  
wife; and CHRISTOPHER E. GRANT and  
SUSAN R. GRANT, husband and wife,

Defendants/Respondents.

**TO: The Above-Named Defendants/Respondents:**

**JAMES A. SPAGON and LINDA I. SPAGON  
KENNETH G. LLOYD and PRISCILLA I. LLOYD  
BRUCE JOHNSON and DEBORAH JOHNSON  
WESTON SCOTT MILLWARD  
PEND OREILLE VIEW ESTATES OWNERS' ASSOCIATION, INC.  
GREGORY ZIRWES and THERESA ZIRWES  
CHRISTOPHER BESSLER  
PATRICK McKENNA and MICHELLE McKENNA  
CHRISTOPHER E. GRANT and SUSAN R. GRANT**

**TO: SCOTT W. REED, ESQ., whose address is Post Office Box A, Coeur d'Alene,  
Idaho 83816 (Attorney for all Defendants/Respondents, except Grants);**

**PETER C. ERBLAND, Paine, Hamblen, Coffin, Brooke & Miller LLP, Post Office  
Box E, Coeur d'Alene, Idaho 83816 (Attorneys for Grants); and**

**TO: The Clerk of the above-entitled Court.**

**NOTICE IS HEREBY GIVEN THAT:**

1. The above-named Plaintiffs/Appellants Bob Backman and Rhonda Backman (collectively, "Plaintiffs") appeal against the above-named Defendants/Respondents James A. Spagon and Linda I. Spagon; Kenneth G. Lloyd and Priscilla I. Lloyd; Bruce Johnson and Deborah Johnson; Weston Scott Millward; Pend Oreille View Estates Owners' Association, Inc.; Gregory Zirwes and Theresa Zirwes; Christopher Bessler; Patrick McKenna and Michelle McKenna; and Christopher E. Grant and Susan R. Grant (collectively, "Defendants"), to the Idaho Supreme Court

from the following orders and judgments entered in the above-entitled action, the Charles W. Hosack presiding:

- a. Memorandum Opinion [following court trial] entered by the Court on November 14, 2008;
- b. Judgment entered by the Court on January 3, 2008;
- c. Order Denying Motion to Amend and Corrections to Memorandum Decision; and
- d. Order on award of Defendants' attorneys' fees and costs.

The pleadings identified in foregoing Subparagraphs a., b., c. and d. are collectively referred to as the "Orders."

2. Plaintiffs have the right to appeal to the Idaho Supreme Court, as the Orders described in Paragraphs 1.a. and 1.b. are appealable orders pursuant to Rule 11(a)(1) I.A.R.

3. The preliminary issues on appeal are:

- a. Did the District Court error by denying Plaintiffs' claim of a "prescriptive easement" to access Plaintiffs' one hundred (100) acres of landlocked property?
- b. Did the District Court error by denying Plaintiffs' claim of an "easement by necessity" to access Plaintiffs' one hundred (100) acres of landlocked property?
- c. Did the District Court error by denying Plaintiffs' claim "to condemn a private easement" to access Plaintiffs' one hundred (100) acres of landlocked property?
- d. Did the District Court error in awarding Defendants their costs of litigation?

4. No order has been entered sealing any part of the record.

5. Is a reporter's transcript requested?

a. Yes.

b. Plaintiffs request preparation of the following portions of the reporter's transcript:

(i) All testimony presented at the trial of this litigation, which took place on September 4, 5, 6 and 7, 2007.

(ii) All testimony presented at the hearing on March 5, 2008.

6. Plaintiffs request that the following documents be included as exhibits to the Clerk's

**Record:**

a. Affidavit of Jeff R. Sykes in Support of Plaintiffs' Opposition to Defendants' Motion For Summary Judgment served and filed by Plaintiffs on or about October 3, 2006;

b. Affidavit of Doug Ward in Support of Plaintiffs' Opposition to Defendants' Motion For Summary Judgment served and filed by Plaintiffs on or about October 3, 2006;

c. Plaintiffs' Opposition to Defendants' Motion For Summary Judgment served and filed by Plaintiffs on or about October 3, 2006;

d. Motion For Partial Summary Judgment served and filed by Plaintiffs on or about December 27, 2007;

e. Affidavit of Richard L. Stacey in Support of Plaintiffs' Motion For Partial Summary Judgment and in Opposition to Defendants' Motion For Summary Judgment served and filed by Plaintiffs on or about December 27, 2007;

f. Affidavit of Scott Razor in Support of Plaintiffs' Motion For Partial Summary Judgment and in Opposition to Defendants' Motion For Summary Judgment served and filed by Plaintiffs on or about December 27, 2007;

- g. Plaintiffs' *Proposed Findings of Fact and Conclusions of Law* served and filed by Plaintiffs on or about August 28, 2007;
- h. Plaintiffs' Trial Memorandum served and filed by Plaintiffs on or about August 28, 2007;
- i. Plaintiffs' Post-Trial Memorandum served and filed by Plaintiffs on or about September 25, 2007;
- j. Affidavit of Jeff R. Sykes Lodging Court Trial Excerpts served and filed by Plaintiffs on or about September 25, 2007;
- k. Plaintiffs' Post-Trial Reply Memorandum served and filed by Plaintiffs on or about October 5, 2007;
- l. Memorandum Opinion entered by the Court on or about November 14, 2007;
- m. Judgment entered by the Court on or about January 3, 2008;
- n. Plaintiffs' Motion to Disallow Part of Defendants'/Counterclaimants' Costs served and filed by Plaintiffs on or about January 17, 2008;
- o. Plaintiffs' Motion To Amend Findings of Fact and To Amend Judgment served and filed by Plaintiffs on or about January 17, 2008;
- p. Plaintiffs' Memorandum in Support of Motion To Amend Findings of Fact and To Amend Judgment served and filed by Plaintiffs on or about January 17, 2008;
- q. Affidavit of Jeff R. Sykes in Support of Motion To Amend Findings of Fact and To Amend Judgment; and Notice of Lodging Trial Transcript served and filed by Plaintiffs on or about January 17, 2008;

r. Plaintiffs' Trial Exhibit Nos. 1 through 50, inclusive, all of which were entered into evidence at the trial of this matter that took place from September 4, 2007, through September 7, 2007; and

s. Defendants' Trial Exhibits A through ZZ, inclusive, all of which were entered into evidence at the trial of this matter that took place from September 4, 2007, through September 7, 2007.

7. I certify that:

a. A copy of this Notice of Appeal has been served on the Reporter;

b. The estimated fee for preparation of the Reporter's Transcript Clerk's Record, determined pursuant to Rule 24(b) I.A.R., has been paid;

c. The estimated fee for preparation of the Clerk's Record, determined pursuant to Rule 27(c) I.A.R., has been paid;

d. That the appellate filing fee has been paid; and

e. That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

**DATED** this 19<sup>th</sup> day of March 2008.

MEULEMAN MOLLERUP LLP

BY: 

Jeff R. Sykes

Attorneys For Plaintiffs

Bob Backman and Rhonda Backman

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on the 19<sup>th</sup> day of March 2008, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

Scott W. Reed, Esq.  
Attorney at Law  
Post Office Box A  
Coeur d'Alene, Idaho 83816  
Telephone: 208/664-2161  
Facsimile: 208/765-5117  
*Counsel For Defendants/Respondents Spagon, Lloyd, Johnson, Zirwes,  
Bessler, Millward, McKenna and the Association*

U.S. Mail    Hand Delivered    Overnight Mail    Facsimile

Brent C. Featherston, Esq.  
Featherston Law Firm Chtd.  
113 South Second Avenue  
Sandpoint, Idaho 83864  
Telephone: 208/263-6866  
Facsimile: 208/263-0400  
*Counsel For Defendant Schrader*

U.S. Mail    Hand Delivered    Overnight Mail    Facsimile

Peter C. Erbland, Esq.  
Paine, Hamblen, Coffin, Brooke & Miller LLP  
701 Front Avenue, Suite 101  
Post Office Box E  
Coeur d'Alene, Idaho 83816-0328  
Telephone: 208/664-8115  
Facsimile: 208/664-6338  
*Counsel For Defendants/Respondents Grant*

U.S. Mail    Hand Delivered    Overnight Mail    Facsimile

With copies via U.S. Mail to:

Ms. Joann Schaller, C.S.R. No. 160  
Official Court Reporter, First Judicial District  
Kootenai County Courthouse  
501 Government Way  
Post Office Box 9000  
Coeur d'Alene, Idaho 83816-9000

Michael E. Reagan, Esq.  
Liesche & Reagan, PA  
1044 Northwest Boulevard, Suite D  
Coeur d'Alene, Idaho 83814

  
Jeff R. Sykes

STATE OF IDAHO  
COUNTY OF BONNER  
FIRST JUDICIAL DIST.

2008 APR 25 A 10:47

MARIE SCOTT  
CLERK DISTRICT COURT  
  
DEPUTY

Jeff R. Sykes, ISB #5058  
Jason G. Dykstra, ISB #6662  
MEULEMAN MOLLERUP LLP  
755 West Front Street, Suite 200  
Boise, Idaho 83702  
(208) 342-6066 Telephone  
(208) 336-9712 Facsimile  
sykes@lawidaho.com  
E:\1547.111\APPEAL\NOTICE OF APPEAL-AMENDED.DOC

Attorneys For Plaintiffs/Appellants Bob and Rhonda Backman

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

BOB BACKMAN and RHONDA  
BACKMAN, husband and wife,

Plaintiffs/Appellants,

vs.

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  
nonprofit corporation; GREGORY ZIRWES  
and THERESA ZIRWES, husband and wife;  
CHRISTOPHER BESSLER, an individual;

Case No. CV-2006-00365

**PLAINTIFFS/APPELLANTS'  
AMENDED  
NOTICE OF APPEAL**



ROBERT WALSH and LYNN WALSH,  
husband and wife; PATRICK McKENNA  
and MICHELLE McKENNA, husband and  
wife; and CHRISTOPHER E. GRANT and  
SUSAN R. GRANT, husband and wife,

Defendants/Respondents.

**TO: The Above-Named Defendants/Respondents:**

**JAMES A. SPAGON and LINDA I. SPAGON  
KENNETH G. LLOYD and PRISCILLA I. LLOYD  
BRUCE JOHNSON and DEBORAH JOHNSON  
KEVIN D. SCHRADER  
WESTON SCOTT MILLWARD  
PEND OREILLE VIEW ESTATES OWNERS' ASSOCIATION, INC.  
GREGORY ZIRWES and THERESA ZIRWES  
CHRISTOPHER BESSLER  
PATRICK McKENNA and MICHELLE McKENNA  
CHRISTOPHER E. GRANT and SUSAN R. GRANT**

**TO: SCOTT W. REED, ESQ., whose address is Post Office Box A, Coeur d'Alene,  
Idaho 83816 (Attorney for all Defendants/Respondents, except Grants);**

**PETER C. ERBLAND, Paine, Hamblen, Coffin, Brooke & Miller LLP, Post Office  
Box E, Coeur d'Alene, Idaho 83816 (Attorneys for Grants); and**

**BRENT C. FEATHERSTON, Featherston Law Firm Chtd., 113 South Second Avenue,  
Sandpoint, Idaho 83864; and**

**TO: The Clerk of the above-entitled Court.**

**NOTICE IS HEREBY GIVEN THAT:**

1. The above-named Plaintiffs/Appellants Bob Backman and Rhonda Backman (collectively, "Plaintiffs") appeal against the above-named Defendants/Respondents James A. Spagon and Linda I. Spagon; Kenneth G. Lloyd and Priscilla I. Lloyd; Bruce Johnson and Deborah Johnson; Kevin D. Schrader; Weston Scott Millward; Pend Oreille View Estates Owners'

Association, Inc.; Gregory Zirwes and Theresa Zirwes; Christopher Bessler; Patrick McKenna and Michelle McKenna; and Christopher E. Grant and Susan R. Grant (collectively, "Defendants"), to the Idaho Supreme Court from the following orders and judgments entered in the above-entitled action, the Charles W. Hosack presiding:

- a. Memorandum Opinion [following court trial] entered by the Court on November 14, 2008;
- b. Judgment entered by the Court on January 3, 2008;
- c. Order Denying Motion to Amend and Corrections to Memorandum Decision; and
- d. Order on award of Defendants' attorneys' fees and costs.

The pleadings identified in foregoing Subparagraphs a., b., c. and d. are collectively referred to as the "Orders."

2. Plaintiffs have the right to appeal to the Idaho Supreme Court, as the Orders described in Paragraphs 1.a. and 1.b. are appealable orders pursuant to Rule 11(a)(1) I.A.R.

3. The preliminary issues on appeal are:

- a. Did the District Court error by denying Plaintiffs' claim of a "prescriptive easement" to access Plaintiffs' one hundred (100) acres of landlocked property?
- b. Did the District Court error by denying Plaintiffs' claim of an "easement by necessity" to access Plaintiffs' one hundred (100) acres of landlocked property?
- c. Did the District Court error by denying Plaintiffs' claim "to condemn a private easement" to access Plaintiffs' one hundred (100) acres of landlocked property?
- d. Did the District Court error in awarding Defendants their costs of litigation?

4. No order has been entered sealing any part of the record.
5. Is a reporter's transcript requested?
  - a. Yes.
  - b. Plaintiffs request preparation of the following portions of the reporter's transcript:
    - (i) All testimony and oral argument presented at the trial of this litigation, which took place on September 4, 5, 6 and 7, 2007.
    - (ii) All proceedings on the record from ~~testimony presented at~~ the hearing on March 5, 2008.
6. Plaintiffs request that the following documents be included as exhibits to the Clerk's

**Record:**

- a. Affidavit of Jeff R. Sykes in Support of Plaintiffs' Opposition to Defendants' Motion For Summary Judgment served and filed by Plaintiffs on or about October 3, 2006;
- b. Affidavit of Doug Ward in Support of Plaintiffs' Opposition to Defendants' Motion For Summary Judgment served and filed by Plaintiffs on or about October 3, 2006;
- c. Plaintiffs' Opposition to Defendants' Motion For Summary Judgment served and filed by Plaintiffs on or about October 3, 2006;
- d. Motion For Partial Summary Judgment served and filed by Plaintiffs on or about December 27, 2007;
- e. Affidavit of Richard L. Stacey in Support of Plaintiffs' Motion For Partial Summary Judgment and in Opposition to Defendants' Motion For Summary Judgment served and filed by Plaintiffs on or about December 27, 2007;

- f. Affidavit of Scott Razor in Support of Plaintiffs' Motion For Partial Summary Judgment and in Opposition to Defendants' Motion For Summary Judgment served and filed by Plaintiffs on or about December 27, 2007;
- g. Plaintiffs' *Proposed* Findings of Fact and Conclusions of Law served and filed by Plaintiffs on or about August 28, 2007;
- h. Plaintiffs' Trial Memorandum served and filed by Plaintiffs on or about August 28, 2007;
- i. Plaintiffs' Post-Trial Memorandum served and filed by Plaintiffs on or about September 25, 2007;
- j. Affidavit of Jeff R. Sykes Lodging Court Trial Excerpts served and filed by Plaintiffs on or about September 25, 2007;
- k. Plaintiffs' Post-Trial Reply Memorandum served and filed by Plaintiffs on or about October 5, 2007;
- l. Memorandum Opinion entered by the Court on or about November 14, 2007;
- m. Judgment entered by the Court on or about January 3, 2008;
- n. Plaintiffs' Motion to Disallow Part of Defendants'/Counterclaimants' Costs served and filed by Plaintiffs on or about January 17, 2008;
- o. Plaintiffs' Motion To Amend Findings of Fact and To Amend Judgment served and filed by Plaintiffs on or about January 17, 2008;
- p. Plaintiffs' Memorandum in Support of Motion To Amend Findings of Fact and To Amend Judgment served and filed by Plaintiffs on or about January 17, 2008;

q. Affidavit of Jeff R. Sykes in Support of Motion To Amend Findings of Fact and To Amend Judgment; and Notice of Lodging Trial Transcript served and filed by Plaintiffs on or about January 17, 2008;

r. Plaintiffs' Trial Exhibit Nos. 1 through 50, inclusive, all of which were entered into evidence at the trial of this matter that took place from September 4, 2007, through September 7, 2007; and

s. Defendants' Trial Exhibits A through ZZ, inclusive, all of which were entered into evidence at the trial of this matter that took place from September 4, 2007, through September 7, 2007.

7. I certify that:

a. A copy of this Amended Notice of Appeal has been served on the Reporter, as follows:

Ms. Joanni Schaller, C.S.R. No. 160  
Official Court Reporter, First Judicial District  
Kootenai County Courthouse  
501 Government Way  
Post Office Box 9000  
Coeur d'Alene, Idaho 83816-9000

b. The estimated fee for preparation of the Reporter's Transcript Clerk's Record, determined pursuant to Rule 24(b) I.A.R., has been paid;

c. The estimated fee for preparation of the Clerk's Record, determined pursuant to Rule 27(c) I.A.R., has been paid;

d. That the appellate filing fee has been paid; and

e. That service has been made upon all parties required to be served pursuant to Rule 20, I.A.R.

DATED this 22<sup>nd</sup> day of April 2008.

MEULEMAN MOLLERUP LLP

BY:



Jeff R. Sykes

Attorneys For Appellants/Plaintiffs  
Bob Backman and Rhonda Backman

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 22<sup>nd</sup> day of April 2008, a true and correct copy of the foregoing document was served by the method indicated below to the following parties:

Scott W. Reed, Esq.

Attorney at Law

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*Counsel For Defendants/Respondents Spagon, Lloyd, Johnson, Zirwes,  
Bessler, Millward, McKenna and the Association*

U.S. Mail     Hand Delivered     Overnight Mail     Facsimile

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Featherston Law Firm Chtd.

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*Counsel For Defendant/Respondent Schrader*

U.S. Mail     Hand Delivered     Overnight Mail     Facsimile

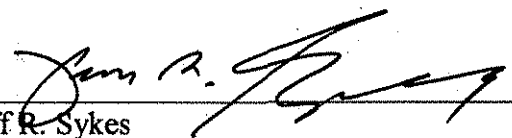
Peter C. Erbland, Esq.  
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*Counsel For Defendants/Respondents Grant*

U.S. Mail    Hand Delivered    Overnight Mail    Facsimile

With copies via U.S. Mail to:

Ms. Joann Schaller, C.S.R. No. 160  
Official Court Reporter, First Judicial District  
Kootenai County Courthouse  
501 Government Way  
Post Office Box 9000  
Coeur d'Alene, Idaho 83816-9000

Michael E. Reagan, Esq.  
Liesche & Reagan, PA  
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Coeur d'Alene, Idaho 83814

  
\_\_\_\_\_  
Jeff R. Sykes

IN THE SUPREME COURT OF THE STATE OF IDAHO

BOB BACKMAN AND RHONDA BACKMAN,  
husband and wife,

Plaintiffs/Appellants,

vs.

JAMES A. SPAGON AND LINDA I.  
SPAGON, husband and wife; KEITH  
G. LLOYD and PRISCILLA I. LLOYD,  
husband and wife; BRUCE JOHNSON  
and DEBORAH JOHNSON, husband  
and wife; WESTON SCOTT MILLWARD,  
a married man; and PEND O'REILLE  
VIEW ESTATES OWNERS' ASSOCIATION,  
INC., an Idaho nonprofit organization;  
GREGORY ZIRWES and THERESA  
ZIRWES, husband and wife; CHRISTOPHER  
BESSLER, an individual; PATRICK  
MCKENNA AND MICHELLE MCKENNA,  
husband and wife; ROBERT WALSH AND LYNN  
WALSH, husband and wife; CHRISTOPHER E.  
GRANT and SUSAN R. GRANT, husband  
and wife, THOMAS L. LAWRENCE and DEBRA  
A. LAWRENCE, husband and wife,  
KEVIN D. SCHRADER, a single person,

Defendants-Respondents

SUPREME COURT NO. 35151

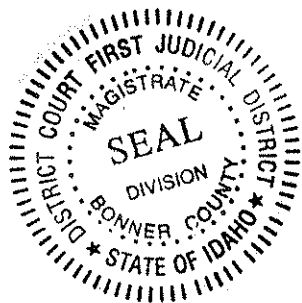
CLERK'S CERTIFICATE

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I, Marie Scott, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, do certify that the foregoing Record in this cause was compiled and bound under my direction and is a true, correct and complete Record of the pleadings and documents requested by Appellant Rule 28.



IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 28 day of May, 2008.



MARIE SCOTT  
Clerk of the District Court

*Carolyn Brackett*  
Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

BOB BACKMAN AND RHONDA BACKMAN, )  
husband and wife, ) SUPREME COURT NO. 35151  
 )  
Plaintiffs/ Appellants, )  
 )  
 ) CERTIFICATE OF EXHIBITS  
 )  
vs. )  
 )  
 )  
and )  
 )  
JAMES A. SPAGON AND LINDA I. )  
SPAGON, husband and wife; KEITH )  
G. LLOYD and PRISCILLA I. LLOYD, )  
husband and wife; BRUCE JOHNSON )  
and DEBORAH JOHNSON, husband )  
and wife; WESTON SCOTT MILLWARD, )  
a married man; and PEND O'REILLE )  
VIEW ESTATES OWNERS' ASSOCIATION, )  
INC., an Idaho nonprofit organization; )  
GREGORY ZIRWES and THERESA )  
ZIRWES, husband and wife; CHRISTOPHER )  
BESSLER, an individual; ROBERT WALSH AND )  
LYNN WALSH, husband and wife; PATRICK )  
MCKENNA AND MICHELLE MCKENNA, )  
husband and wife; CHRISTOPHER E. )  
GRANT and SUSAN R. GRANT, husband )  
and wife; THOMAS L. LAWRENCE and DEBRA )  
A. LAWRENCE, husband and wife, )  
KEVIN D. SCHRADER, a single person, )  
 )  
 )  
 )  
 )  
Defendants-Respondents )

I, Marie Scott, Clerk of the District Court of the First Judicial District of the State of Idaho, in and for the County of Bonner, do hereby certify that the following is offered as the Clerk's exhibit on appeal:

Defendant's Brief in Support of Supplemental Motion for Summary  
Judgment filed October 2, 2006  
Plaintiff's Opposition to Defendants' Motion for Summary Judgment filed  
October 4, 2006

Certificate of Exhibits-1

Affidavit of Doug Ward in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment filed October 4, 2006

Affidavit of Jeff R. Sykes in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment filed October 4, 2006

Plaintiffs' Reply Brief in Support of Motion for Summary Judgment filed October 12, 2006

Certificate of Deposition Exhibits No. 9, 10, and 11 filed October 12, 2006

Affidavit of Richard L. Stacey in Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment filed December 27, 2006

Affidavit of Scott Razor in Support of Plaintiff's Motion for Partial Summary Judgment and in Opposition to Defendants' Motion for Summary Judgment filed December 27, 2006

Defendants' Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment against Defendants Kenneth G. Lloyd, and Priscilla I. Lloyd; Bruce Johnson and Deborah Johnson; and Weston Scott Millward filed January 10, 2007

Plaintiff's Identification of Trial Exhibits filed August 22, 2007

Exhibit List of Defendants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna and Pend O'Reille View Estates Owners Association, Inc. filed August 23, 2007

Plaintiffs' Proposed Findings of Fact and Conclusions of Law filed August 29, 2007

Plaintiffs' Pre-trial Memorandum filed August 29, 2007

Pre-trial Brief of Defendants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna and Pend O'Reille View Estates Owners Association, Inc. filed August 29, 2007

Proposed Findings of Fact and Conclusions of Law of Defendants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna and Pend O'Reille View Estates Owners Association, Inc. filed August 29, 2007

Supplemental Memorandum of Defendants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna and Pend O'Reille View Estates Owners Association, Inc. on Recorded Easements April 2005 filed August 29, 2007

Affidavit of Scott W. Reed in Support of Defendants Motion to Strike Crossclaim of Defendant Kevin D. Schrader filed August 30, 2007

Memorandum in Support of Defendants' Motion to Strike Crossclaim of Defendant Kevin D. Schrader filed August 30, 2007

Memorandum in Response to Defendants' Motion to Strike Crossclaim of Defendant Kevin Schrader filed August 31, 2007

Affidavit of Counsel in Response to Defendants' Motion to Strike Crossclaim of Defendant Kevin D. Schrader filed August 31, 2007

Supplemental Exhibit List of Defendants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna and Pend O'Reille View Estates Owners Association, Inc., filed September 4, 2007

Plaintiff's Post-Trial Memorandum filed September 25, 2007

Post-Trial Brief of Defendants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler,

McKenna and Pend O'Reille View Estates Owners Association, Inc. filed September 26, 2007

Post Trial Brief filed September 26, 2007

Affidavit of Jeff R. Sykes Lodging Court Trial Excepts filed September 27, 2007

Reply Brief of Defendants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna, and Pend O'Reille View Estates Owners Association, Inc. to Post-trial Memorandum of Plaintiffs Backman and Post-trial Brief of Cross-Plaintiff Kevin Schrader filed October 3, 2007

Post-trial Reply Memorandum of Defendants Grant filed October 3, 2007

Plaintiffs' Post-trial Reply Memorandum filed October 5, 2007

Memorandum of Defendants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna and Pend O'Reille View Estates Owners Association, Inc. in Support of Defendants' Judgment filed December 20, 2007

Memorandum of Costs of Defendants and Counterclaimants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna and Pend O'Reille View Estates Owners Association, Inc. filed January 7, 2008

Memorandum in Support of Plaintiffs' Motion to Disallow Part of Defendants' / Counterclaimants' Costs filed January 17, 2008

Affidavit of Jeff Sykes in Support of Motion to Amend Findings of Fact and to Amend Judgment; and Notice of Lodging Trial Transcript filed January 18, 2008

Plaintiffs' Memorandum in Support of Motion to Amend Findings of Fact and to Amend Judgment filed January 18, 2008

Brief of Defendants and Counterclaimants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna and Pend O'Reille View Estates Owners Association in Opposition to Plaintiffs' Memorandum in Support of Motion to Amend Findings of Fact and to Amend Judgment filed February 13, 2008

Brief of Defendants and Counterclaimants Spagon, Lloyd, Johnson, Millward, Zirwes, Bessler, McKenna and Pend O'Reille View Estates Owner Association in Opposition to Plaintiffs' Proposed Modification of Judgment filed February 13, 2008

Letter from Brent Featherston to Marie Scott filed April 9, 2008

### **PLAINTIFF'S EXHIBITS:**

1: Aerial Photograph

2: Patient Recorded October 23, 2007, page 186, Records of Bonner County, Idaho Supreme Court

- 3: Warranty Deed recorded August 20, 1908
- 4: Warranty Deed recorded February 2, 1945
- 5: Quitclaim Deed recorded September 19, 1952, Instrument No. 43397
- 6: Quitclaim Deed recorded March 21, 1969, Instrument No. 120920
- 7: Quitclaim Deed recorded April 7, 1969, Instrument No. 121135
- 8: Quitclaim Deed recorded June 26, 1980, Instrument No. 229468
- 9: Quitclaim Deed recorded March 21, 1984, Instrument, whereby the Backman Property was conveyed from Pack River Management Company to Shamrock Investment Company
10. Quitclaim Deed recorded May 10, 1990, Instrument No. 374968
11. Warranty Deed recorded January 25, 1994, Instrument No. 439443
12. Quitclaim Deed recorded February 8, 1994, Instrument No. 440197
13. Quitclaim Deed recorded May 10, 1995, Instrument No. 465036
14. Warranty Deed recorded December 9, 2004, Instrument No. 665845
15. Warranty Deed recorded February 11, 2005, Instrument No. 670211
16. Five separate Quitclaim Deeds recorded July 12, 2005, whereby the Backmans subdivided the Backman Property into 5 (five) 20 acre parcels
17. Warranty Deed recorded May 10, 1995, Instrument No. 465037
18. Warranty Deed recorded September 13, 2002, Instrument No. 608618
19. Warranty Deed recorded December 23, 2004, Instrument No. 666818
20. Patent No. 2443 dated May 20, 1907, and recorded in the Official Records of Bonner County, Idaho, at page 483
21. Warranty Deed recorded May 17, 1907, page 587
22. Warranty Deed recorded January 8, 1945, Instrument No. 15340
23. Road Easement dated May 18, 1964, and recorded as Instrument No. 96152
24. Road Easement dated June 26, 1964, whereby the Long Lake Lumber Company granted the United States of America a road easement
25. Easement Recorded May 21, 1996, Instrument No. 106286
26. Easement Agreement Recorded June 3, 1994, Instrument No. 446468
27. Record of Survey Recorded in June 1994, Instrument No. 447412
28. Deed Recorded September 21, 1994, Instrument No. 452610
29. Easement Recorded May 22, 2006, Instrument No. 704434
30. Patent No. 1656 dated December 29, 1904
31. Patent No. 1805 dated May 5, 1905
32. Patent No. 1973 dated January 23, 1908
33. Land Purchase Agreement dated December 27, 2004
34. Promissory Note dated February 9, 2005
35. Backmans' Real Estate Mortgage entered in connection with the purchase of the Backman Property
36. Declaration of Covenants, Conditions and Restrictions of Pend O'Reille View Estates, Phase One, recorded July 26, 1994, Instrument No. 449457

37. Articles of Amendment of Declaration of Covenants, Conditions and Restrictions of Pend O'Reille View Estates, Phase One, recorded January 20, 1995

38. Articles of Amendment of Declaration of Covenants, Conditions and Restrictions of Pend O'Reille View Estates, Phase One, recorded September 15, 1999, Instrument No. 551966

39. Declaration of Non-Access Across Pend O'Reille View Estates, a Recorded Subdivision

40. Letter dated April 9, 2005, from Scott Reed to Doug Ward, Sundance Realty \ regarding access to the Backman Property.

41. Diagram identifying property owners in POVE, access roads, and the road used by Randy Powers.

42. Expert Report prepared on behalf of Backmans by Michael M. Folsom, Ph.D.

43. Dr. Folsom's aerial photographs of the Backman Property and surrounding areas

44. Various photographs of the Backman Property and Surrounding Properties taken by Dr. Folsom

45. Surveyor's Expert Report prepared on behalf of Backmans by Scott M. Rasor, P.L.S., President and Chief of Surveys of Meckel Engineering and Surveying, together with Easement Exhibit

46. Survey prepared by Scott Rasor

47. Rasor Photographs

48. 1981 Survey by Tucker

49. 1968 USGS Quad Sheet of Sandpoint

50. Map from Mark Hall 11-15-04

51. Record of Patents 10-28-08

52. Deed of Distribution 2-10-04

53. Declaration of Homestead DC Smith 10-14-40

54. Deed of County Property 7-31-31

## **DEFENDANT'S EXHIBITS**

A. Record of Survey, Gordon E. Sorenson, 6/14/94

B. Declaration of Covenants, Conditions and Restrictions, Pend O'Reille View Estates, Phase One, Bonner County, recorded July 1996 as Instrument No. 449457

C. Articles of Incorporation Pend O'Reille View Estates Owners Association, Inc

D. 1939 Metsker Map

E. Hand Drawn Sketch of Turtle Rock, Redtail Hawk and Inspiration Roads

F. ATEC Plat Backman Property

G. Chain of Title Backman Property

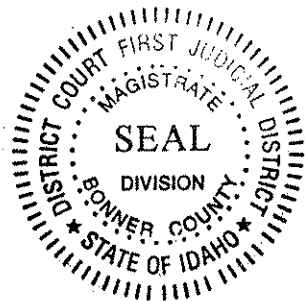
H. Warranty Deed, Humbird Lumber Co. to Lewis Modig December 22, 1943

I. Seven Deeds from Humbird Lumber Company to other grantees, 1915-1940


J. Warranty Deed, Lewis Modig to William Moody, October 9, 1959

- K. Warranty Deed, Lewis Modig to Clarence Moody
  - L. Quitclaim Deed, Powers to McGhee, February 1, 1994
  - M. Quitclaim Deed, McGhee to Powers, May 5, 1995
  - N. Warranty Deed, McGhee to Powers, December 3, 2004
  - O. Owner's Policy Powres, \$420,000 December 9, 2004
  - P. Land Purchase Agreement Powers/Backman, December 27, 2004
  - Q. Commitment for Title Insurance, Backman, \$475.000
  - R. Warranty Deed, Powers to Backman, February 10, 2005
  - S. Owner's Policy, Backman, \$475.000 February 11, 2005
  - T. Sundance Realty Advertisement of Backman Property, March 2005
  - U. Letter from Scott Reed August 19, 2004
  - V. Declaration of Non-Access, recorded April 13, 2005
  - W. Letter from Scott W. Reed to Doug Ward, April 18, 2005
  - X. Letter Ed Holmes to Chicago Title Ins., Co. April 26, 2005
  - Y. Letter Chicago Title Ins., Co. to attorney Holmes, May 19, 2005
  - Z. Letter Attorney Holmes to Chicago Title Ins. Co July 15, 2005 (2<sup>nd</sup> pg missing)
  - AA. Letter of Attorney Mollerup to Ed Morse, July 21, 2005
  - BB. Letter of Attorney Mollerup to Attorney Holmes, August 17, 2005
  - CC. Letter Bob Backman to Attorney Holmes, October 25, 2005
  - DD. Excerpt, answers to plaintiffs Backman to Interrogatory No. 7, June 2, 2006
  - EE. Photographs by Theresa Zirwes used in depositions of Randy Powers and of Theresa Zirwes.
  - FF. Google Aerial photographs with Defendants' Certification, January 10, 2007
  - GG. Report of Richard F. Creed, P.E. on roads, August 14, 2007.
  - HH. Forests for Idaho Best Management Practices,
  - II. Title 12, Chapter 23, Private Roads Standards Manual, Bonner County Idaho
- Supreme Court
- JJ. Rules Pertaining to the Idaho Forest Practices Act
  - KK. Backman Road Exhibit
  - LL. Backman Road Exhibit-Small Rendering of Survey
  - MM. 1946 Aerial with Google Photo Analysis
  - NN. 1958 Aerial Photo Analysis
  - OO. 1992 Aerial Photo Analysis
  - PP. 1981 Aerial Photo Analysis
  - QQ. 1998 Aerial Photo Analysis
  - RR. Miscellaneous Record 7:51-54 1920

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court this 28 day of May, 2008



Marie Scott  
Clerk of the District Court

  
Deputy Clerk



IN THE SUPREME COURT OF THE STATE OF IDAHO

BOB BACKMAN AND RHONDA BACKMAN, )  
husband and wife, )

SUPREME COURT NO. 35151

Plaintiffs/ Appellants, )

CERTIFICATE OF SERVICE

vs. )

JAMES A. SPAGON AND LINDA I. )  
SPAGON, husband and wife; KEITH )  
G. LLOYD and PRISCILLA I. LLOYD, )  
husband and wife; BRUCE JOHNSON )  
and DEBORAH JOHNSON, husband )  
and wife; WESTON SCOTT MILLWARD, )  
a married man; and PEND O'REILLE )  
VIEW ESTATES OWNERS' ASSOCIATION, )  
INC., an Idaho nonprofit organization; )  
GREGORY ZIRWES and THERESA )  
ZIRWES, husband and wife; CHRISTOPHER )  
BESSLER, an individual; ROBERT WALSH )  
AND LYNN WALSH, husband and wife; )  
PATRICK MCKENNA AND MICHELLE )  
MCKENNA, husband and wife; )  
CHRISTOPHER E. GRANT and SUSAN R. )  
GRANT, husband and wife, THOMAS L. )  
LAWRENCE and DEBRA. LAWRENCE, )  
husband and wife, KEVIN D. SCHRADER, )  
a single person )

Defendants-Respondents )

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

**Certificate of Service**

JEFFREY R. SYKES  
755 WEST FRONT STREET, #200  
BOISE, ID. 83702-5802

SCOTT REED  
P O Box A  
COEUR D'ALENE, ID. 83816

ATTORNEY FOR PLAINTIFF-APPELLANTS


ATTORNEY FOR DEFENDANTS-  
RESPONDENTS:

JAMES and LINDA SPAGON  
KENNETH and PRISCILLA LLOYD  
BRUCE and DEBORAH JOHNSON  
WESTON MILLWARD  
PEND O'REILLE VIEW ESTATES  
GREG AND THERESA ZIRWES  
CHRISTOPHER BESSLER

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said  
Court this 28 day of May, 2008.



Marie Scott  
Clerk of the District Court

  
Deputy Clerk

Certificate of Service