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Capstar Radio Operating Co v. Lawrence Respondent's Brief Dckt. 38300

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IN THE SUPREME COURT OF THE STATE OF IDAHO

CAPSTAR RADIO OPERATING COMPANY,
a Delaware corporation,

Plaintiff/Respondent,

vs.

DOUGLAS LAWRENCE and BRENDA J.
LAWRENCE, husband and wife,

Defendants/Appellants.

SUPREME COURT NO. 38300-2010

DISTRICT COURT CASE
NO. CV-02-7671

RESPONDENT'S BRIEF

RESPONDENT'S BRIEF

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

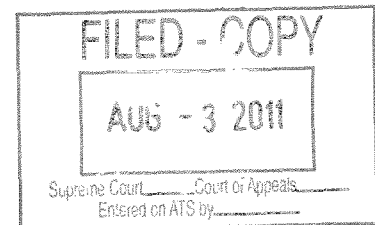
The Honorable John T. Mitchell
District Judge

Douglas and Brenda Lawrence
P.O. Box 1027
Coeur d'Alene, ID 83816

Pro Se Appellants

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For the Respondent



ERRATA SHEET FOR BRIEF OF RESPONDENT
FOR BRIEF SUBMITTED AUGUST 1, 2011 *NUNC PRO TUNC* JULY 6, 2011

COMES NOW Respondent Capstar Radio Operating Company, , and submits the following errata corrections for the brief submitted *nunc pro tunc*.

Page and Line	Correction
	Insert Table of Contents page i
	Insert Table of Cases and Authorities pages ii
2, line, line 13	"...Lawrence filed for a motion..." changed to "...Lawrence filed a motion"
Page 1, line 4	Renumber "II. Statement of the Case" to "IV. Statement of the Case"
Page 3, line 9	"... ..unable to proceed with additional..." changed to "unable to proceed with additional discovery..."
Page 3, line 20	"...Douglas Lawrence Filed..." changed to "...Douglas Lawrence filed..."
Page 4, line 1	"...Defendant's motion o reconsider..." changed to Defendant's motion to reconsider..."
Page 4, line 3	"R pp. 338-342" changed to read "R Vol. II, pp. 338-342."
Page 4, line 6	"R pp. 343-345." Changed to read "R Vol. II, pp. 343-345."
Page 4, line 7	"...Defendant's motion that it take judicial notice..." changed to read "...Defendant's motion to take judicial notice..."
Page 4, line 25	"The trail court granted the motion." Changed to read" The trial court partially granted the motion to strike."
Page 6, line 1	"... sold several parcels..." changed to read "...several parcels..."
Page 7, line 4	"...(Tr p. 43, ll. 22-25; p. 44; p. 45, p.4, ll.);" changed to read "...(Funk Dep. 1-14.)"
Page 8, line 9	"...Section 22 it..." changed to "...Section 22..."
Page 10, 19	(Tr p. 12, ll. 15-17).When... changed to (Tr p. 12, ll. 15-17). When..."
Page 10, line 21	"...L.2 5;..." changed to "...L. 25..."
Page 10, line 23	"...the bill for the Act..."
Page 13, lines 1	"...ll. 1-18)." Changed to "...ll. 1-18."
Page 14, Line 18	"... Lot 4 in West..." changed to "... Lot 4 in the West..."
Page 17, line 12	"...about 1996 or 1997and..." changed to "...about 1996 or 1997 and..."
Page 18, line 7	"... in support of its motion." changed to "...in support of their motion."
Page 18,Line 12	"...(Clear Channel)is... changed to "...Clear Channel) is..."
Page 18, Line 20	"...that he though Capstar's ..."changed to "that he thought Capstar's ...".
Page 19, Line 5	"...toconduct..." changed to "...to conduct..."
Page 19, Line 9	"IV." Changed to "V"
Page 21, line 1	"...the trial did inference draw..." changed to "...the trial court did not draw"
Page 21, line 12	"Supp R p. 365,..." changed to Supp R Vol. II, p. 365,..."
Page 22, line 11	".....testified that access agreement... changed to "...testified that the access agreement..."
Page 22, line 12	"... that gave them..." changed to "...gave them..."
Page 22, line 18	"...name corporate entities,," changed to "...corporate entities..."
Page 22, line 22	"...not correctly states..." changed to "...not correctly stated..."
Page 22, line 25	"...Funk Deposition p. 25,..." changed to "...Funk Deposition Tr. p. 25,..."
Page 23, line 3	"... R. p. 364, Funk Deposition,..." changed to R. Vol. II, p. 364, Funk Deposition Tr...."
Page 23, line 7	"...discussion the court engages in with respect to an implied easement."

	changed to "...discussion the court engaged in with respect to an implied easement.)"
Page 23, line 10	"...Funk Deposition p. 2-25..." changed to "Funk Deposition Tr. p. 2-25..."
Page 24, line 14	"...Lawrence has shown o reversible..." changed to "...Lawrence has shown no reversible..."
Page 24, line 16	"Regarding the error regarding..." changed to "Regarding the error concerning..."
Page 24, line 23	"...Sites predecessor..." changed to "...Site's predecessor..."
Page 24, line 16	"2004advisory..." changed to "2004 advisory..."
Page 30, line 6	"...opened the road that... changed to "...opened the road over that..."
Page 30, lines 9-10	"re was a road there in 1968, or even 1975. Removed from brief.
Page 30, line 23	"It h-ad..." changed to "It had..."
Page 31, line 6	"...access t his..." changed to "...access this..."
Page 31, line 21	"...rights Funks..." changed to "...rights Funk's..."
Page 32, line 1	"E" changed to "D"
Page 32, line 25	"...property of which the access road passed. ." changed to "... property over which the access road passed."
Page32, footnote line 4	"...Mellick Road as it now..." changed to "...Mellick Road as they now..."
Page 34, line 13	"...a portion of access..." changed to "...a portion of the access..."
Page 34, line 18	"...Funk Deposition p. 52..." changed to "...Funk Deposition Tr. p. 52..."
Page 34, line 20	"...Funk Deposition p. 53..." changed to "...Funk Deposition Tr. p. 53..."
Page 35, line 10	"...Funk Deposition p.55 ..." changed to "...Funk Deposition Tr. p. 55..."
Page 35, line 17	"...Funk Deposition p.71..." changed to "...Funk Deposition Tr. p. 71..."
Page 36, line 24	"...there is no additional,..." changed to "...there is no additional..."
Page 37, line 1	<i>Argle</i> corrected to <i>Argyle</i>
Page37, line 14	"F" changed to "E"
Page 39, line 20	"... Section" changed to "...Section 22 property.
Page 39, line 21	"...error because it did draw..." changed to "...error because it did not draw..."
Page 40, line 9	"...facts it had before..." changed to "...facts it had before it ..."
Page 41, line 2	371 changed to 371
Page 41, line 10	"Mr. Funk testified contemplated..." changed to "Mr. Funk testified he contemplated..."
Page 41, line 15	"...Funk Section property..." changed to "Funk Section 22 property..."
Page 43, line 10	"D" changed to "F"
Page 43, line 23	"... the sheriff office..." changed to "...the sheriff's office..."
Page 46, line 1	"E." changed to "G."
Page 46, line 4	"...trial court's impari8talty..." changed to "...trial court's impartiality..."
Page 46, line 17	"...rule of case ..." changed to "...rule or case..."
Page 47, line 3	"F" changed to "H"
Page 48, line 1-2	" <i>Jorgensen v. Coppedge</i> , ___ Idaho ___..." changed to <i>Jorgensen v. Coppedge</i> , 145 Idaho 524...
Page 48, line 3	"IV" changed to "VI"
Page 48, lines 8-9	"Their property rights are equally as important as Law perceived by" removed from brief

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III. STATEMENT OF THE CASE

A. Nature of the Case

Capstar Radio Operating Company (“Capstar”) is the owner of a parcel of property located in the Southwest Quarter of Section 22, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho. Defendants Doug and Brenda Lawrence, husband and wife (“Lawrence”) are the owners of a parcel of property located in the Southeast Quarter of Section 21, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho. At the time Lawrence acquired their parcel, there existed an unimproved road over, through and across the Lawrence parcel (R p. 011, paragraph V; R p. 021, paragraph 5.) Capstar filed a complaint November 7, 2002 seeking ingress and egress to their property under four alternative theories: express easement; implied easement; prescriptive easement; and/or an easement by necessity, and seeking an order of the trial court enjoining Lawrence from interfering with Capstar’s or its tenant’s right of use of the unimproved road for access to its parcel.

B. Course of the Proceedings

On November 7, 2002, Capstar filed its Complaint for Quiet Title and Permanent Injunction. R pp. 010-019. On November 8, 2002, the district court granted the motion and a bond was posted. Following hearing, a preliminary injunction was issued.

On September 11, 2003, Lawrence, through their attorney of record, answered the complaint. They did not request a jury trial. R p 20-26. On March 9, 2004, Capstar filed a motion for summary judgment, together with supporting affidavits. R Vol. I, pp. 26-63. Lawrence responded to the summary judgment on March 23, 2004, together with an opposing affidavit. R pp. 64-82 and Clerk’s Exhibits on Appeal. On June 7, 2005, the trial court issued an

order granting the motion for summary judgment and entering a decree of quiet title on the express easement theory only. R p 83-87.

Lawrence appealed the trial court's judgment in *Capstar Radio Operating Co. v. Lawrence*, 143 Idaho 704, 709, 152 P.3d 575, 580 (2007) ("*Capstar I*") seeking reversal of the district court's grant of summary judgment on the express easement theory. In *Capstar I*, this Court vacated the summary judgment finding no express easement existed across the Lawrence parcel and remanded the matter back to the district court for further proceedings. A remittitur was filed March 30, 2007. Supp R Vol. I, p. 6.

Following remand, on May 14, 2007, Capstar renewed its summary judgment motion on its remaining easement theories. Supp R Vol. I, pp. 7-8. Hearing on the motion was scheduled for June 13, 2007.

On May 30, 2007, Lawrence filed the affidavit of Douglas Lawrence in response to the summary judgment affidavit. On May 31, 2007, Lawrence filed a motion for an enlargement of time to August 15, 2007 to respond to the motion for summary judgment because Lawrence required additional time to conduct discovery in response to the motion for summary judgment. Supp R Vol. I, pp. 023-025.

On June 6, 2007, Capstar filed a motion to strike portions of Douglas Lawrence's affidavit and portions of John Mack's affidavit. Also on June 6, 2007, Capstar filed its reply memorandum in support of the renewed motion for summary judgment.

On June 6, 2007, Lawrence's counsel filed a motion to disqualify the district court judge for cause and an application for an order shortening time to have the matter heard on the same date scheduled for the summary judgment hearing and the motion for enlargement of time. Supp R Vol. I, pp. 049-54. Capstar did not object to the request to shorten time and the court heard the motion to disqualify for cause on June 13, 2007. Because the motion to disqualify divested the

trial court of jurisdiction to hear other motions, hearing on the other motion did not proceed as scheduled. Supp Tr p. 4, ll. 19-25; p. 5 ll. 1-11.

On June 25, 2007, the trial court issued a written decision denying the motion for disqualification for cause. Supp R Vol. I, pp. 066-091. A motion to reconsider the denial was filed July 9, 2007, as well as motion for permission to appeal. Supp R Vol. I, pp. 92-93. Orders denying these motions were entered August 7, 2007. Supp R Vol. II, pp. 338-339.

On July 24, 2007, Lawrence filed yet another motion for enlargement of time to respond to Capstar's motion for summary judgment, again indicating additional time was required to conduct discovery (purportedly because Lawrence had been unable to proceed with additional discovery because the trial court had not ruled on its earlier motion for additional time to conduct discovery.) Supp R Vol. I, pp. 127-129. A Motion to Strike portions of Rook's and Funk's affidavits was also filed July 24, 2007. Supp R Vol. I, pp. 130-136. The motions were heard August 7, 2007. The trial court granted the motion for enlargement of time and continued the summary judgment hearing to September 24, 2007. Supp R Vol. II, pp. 343-345.

Also on July 24, 2007, another Affidavit of Douglas Lawrence in Support of Opposition to Summary Judgment was filed, as well as a memorandum in opposition to the motion for summary judgment. Supp R Vol. II, pp. 146-303. In response, Plaintiff filed a motion to strike the pleadings because they were not timely served, or in the alternative for an enlargement of time to file its reply. Supp R pp. 309-312. Plaintiff also filed a motion to strike portions of the affidavit of Douglas Lawrence filed July 24, 2007, together with a motion to shorten time to have the matter heard at the August 7, 2007 summary judgment hearing date. Supp R Vol. II pp. 332-337. Plaintiff also filed its reply memorandum in support of its motion for summary judgment on August 2, 2007. Supp R. Vol. II pp. 319-331.

On August 7, 2007, the trial court heard the Defendant's motion to reconsider its disqualification and Lawrence's motion for permissive appeal. It denied the motion to reconsider and the motion for permissive appeal. R Vol. II, pp. 338-342.

The trial court also heard Lawrence's motion for enlargement of time for Lawrence to reply to the summary judgment. It granted the motion and moved the summary judgment proceeding to November 27, 2007. R Vol. II, pp. 343-345. The trial court also partially granted the Defendant's motion to take judicial notice of certain court files and that it take judicial notice of a Metzger map. Supp R Vol. II pp. 346-348. The court partially granted Capstar's motion to strike portions of Douglas Lawrence's July 24, 2007 affidavit. Supp Tr. p. 90, ll. 12-25; pp. 91-95; p. 96, l. 1, Supp R Vol. II pp. 504-507.

On September 10, 2007, Lawrence filed another affidavit of John Whelan in opposition to the renewed motion for summary judgment; another affidavit of Douglas Lawrence in opposition to the renewed motion for summary judgment and another memorandum in opposition to the summary judgment. Supp R Vol. II, pp. 352-483.

On September 17, 2007, Capstar filed a motion to strike portions of Douglas Lawrence's September 10, 2007 affidavit and a supplemental reply memorandum. Supp R Vol. II, pp. 484-503.

On September 26, 2007, following a September 24, 2007 hearing of the various motions, the trial court entered its order on Lawrence's motion for leave to amend their answer to include a claim for laches. Supp R Vol. II pp. 514-516.

On November 27, 2007, the trial court heard Lawrence's renewed motion to appeal the trial court's denial of Lawrence's motion for an interlocutory appeal of the denial of the motion to disqualify the trial judge for cause. Supp Tr. p. 133, ll. 12-23. The summary judgment was heard November 28, 2007. Supp R Vol. III, p. 553. The motion to strike the September 10,

2007 affidavit of Douglas Lawrence was also heard. The trial court partially granted the motion to strike.

On December 17, 2007, Lawrence filed a Motion for Permissive Appeal with this Court. The motion was denied by this Court January 17, 2008. Supp R Vol. II, pp. 343-344; Supp R Vol. III, pp. 553-554.

The District Court issued its Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment on February 6, 2008. Supp R Vol. III, pp. 553-591. No summary judgment was entered. Lawrence appealed the trial court's decision. Supp R Vol. III, pp. 592-595.

Following briefing and oral argument on appeal, this Court issued an opinion in *Capstar Radio Operating Co. v. Lawrence*, 149 Idaho 623, 238 P.3d 223 (Idaho 2010) ("*Capstar II*") In *Capstar II*, this Court dismissed the appeal for lack of jurisdiction because no final appealable judgment had been entered by the trial court. A remittitur was issued August 26, 2010.

Following remand, on September 30, 2010, the trial court entered its Order Granting Plaintiff's Motion for Summary Judgment and Declaring Easement Rights. Second Supp R Vol. 1 of 3, pp. 52-55. On November 10, 2010, Lawrence appealed the decision. On December 3, 2010, the trial court entered its Amended Order Granting Plaintiff's Motion for Summary Judgment and Declaring Easement Rights, wherein it corrected the date of signature of the order from 2005 to 2010. Second Supp R Vol. 1 of 3, pp. 62-65.

C. Statement of Facts

In their preface to the appeal and in their statement of the facts, Lawrence discussed a conditional use permit granted to Nextel Communications, and a contract with Nextel (predecessor to Spectra Site) which they claim was breached. This conditional use permit and contract are unrelated to Capstar or the easement. Capstar submits that the relevant facts to the issues on appeal are those set forth hereafter.

In this case, there was unity of title of the Capstar and Lawrence parcel at one time. In 1968, Pike and Agnes Reynolds sold Edward and Colleen Raden and Harold and Viola Marcoe several parcels of property in Township 50 North, Range 5 West, Boise Meridian, Kootenai County, Idaho, consisting of Government Lot 3 of Section 15 (in the southwest corner of the Southwest Quarter of Section 15); the Southeast Quarter of Section 21; the adjacent Southwest Quarter of Section 22, except for a one acre parcel which had previously been conveyed to General Telephone Company (“GTC”), subject to easements granted to GTC over and across the Southwest Quarter of Section 22 and the Southeast Quarter of Section 21. Clerk’s Certificate of Exhibits, Weeks Affidavit, exhibit “A”.

This unity of title continued when Harold and Marlene Funk (“Funk”) entered into a purchase agreement with Edward and Colleen Raden and Harold and Viola Marcoe in 1969 which included a sale of the above parcels subject to the same GTC easement and exclusion of the GTC parcel. Clerk’s Certificate of Exhibits, Weeks Affidavit, exhibits “B”, “C” and “D”; R pp. 34-47.

When Pike and Agnes Reynolds granted GTC its parcel in 1966 in Section 22, they included in the deed an easement over and across the Southwest Quarter of Section 22 and the Southeast Quarter of Section 21, Township 50 North, Range 5 West Boise Meridian, Kootenai County, Idaho. Clerk’s Certificate of Exhibits, Weeks Affidavit, exhibits “V” and “FF” (identified as Exhibit A to Wenker Affidavit).

At the time Funks purchased the property in 1969, the GTC easement road was the only existing road providing access to the Funk’s real property. R. p. 036. GTC also obtained an easement from Glen and Ethel Blossom, husband and wife, over the Southwest Quarter of Section 21, Township 50 North, Range 5 West Boise Meridian, Kootenai County, Idaho. Clerk’s Certificate of Exhibits, Weeks Affidavit, exhibits “V” and “FF” (identified as Exhibit B to Wenker Affidavit). Additionally, GTC obtained an easement for ingress and egress to its parcel

across the North Half of the Northeast Quarter of Section 28. Clerk's Certificate of Exhibits, Weeks Affidavit, exhibit "X". Thus, GTC had recorded easements over the entire easement road from the county road to its parcel on Blossom Mountain in Section 22.

In 1972, Funk purchased an easement from Wilbur Mead to cross his property in the Southwest Quarter of Section 21. R Vol. II, pp. 367-368 (Funk Dep. Tr p. 43, ll. 22-25; p. 44; p. 45, p. 46, ll. 1-14); Clerk's Certificate of Exhibits, Lawrence Affidavit, exhibit "F". There was a locked gate on Mead's property. In 1992, GTE sent Funk a new key to the gate on the Mead property. R Vol. II, p. 363, ll. 9-25.

In 1975, Funk segregated and sold the Southeast Quarter of the Southeast Quarter of Section 21 (Lawrence parcel) to Human Synergistics, Inc. a Minnesota corporation. The sale was evidenced by a recorded Sale Agreement. This agreement indicated that the sale was subject to and including ingress egress easement over existing roads in Section 21. Clerk's Certificate of Exhibits, Weeks Affidavit, exhibit "E". In 1977, Human Synergistics recorded a Contract of Sale to Don E. Johnston and Fern Johnston, husband and wife, and John McHugh and Mary Ann McHugh, husband and wife of the Southeast Quarter of Section 21. In 1987, a Memorandum of Sale Agreement was recorded evidencing the sale of the Southeast Quarter of Section 21 from McHugh and Johnston to National Associated Properties. Clerk's Certificate of Exhibits, Weeks Affidavit, exhibit "G". On April 21, 1988, a corporation deed from Human Synergistics to Johnston and McHugh was recorded, granting title to Southeast Quarter of Section 21. Clerk's Certificate of Exhibits, Weeks Affidavit, Exhibit "H". On July 3, 1996, a warranty deed from Funk to Human Synergistics for the Southeast Quarter of Section 21 was given in fulfillment of the contracts. No mention was made of the ingress/egress easement referenced in the Sale Agreement. Clerk's Certificate of Exhibits, Weeks Affidavit, exhibit "I".

A warranty deed transferring the property from McHugh and Johnston to National Associated Properties was recorded July 16, 1996. Clerk's Certificate of Exhibits, Weeks

Affidavit, exhibit "O". In July 1996, National Associated Properties, Inc. conveyed the Lawrence parcel to Arman and Mary Jane Farmanian, husband and wife. Clerk's Certificate of Exhibits, Weeks Affidavit, exhibits "J" and "K". A Memorandum of Sale Agreement between Arman and Mary Jane Farmanian and Lawrence was recorded October 1, 1996. Clerk's Certificate of Exhibits, Weeks Affidavit, exhibit "L". A warranty deed from Farmanians to Lawrence was recorded August 27, 1998. Clerk's Certificate of Exhibits, Weeks Affidavit, exhibit "P".

Doug Lawrence provided a depiction of the GTC access road in a deposition taken in litigation between Lawrence with Verizon Northwest (GTC's successor in interest). (A copy of Lawrence's' Deposition Exhibit 15, the GTC easement, is included as an addendum to the deposition.) Mr. Lawrence testified the depiction was of the easement that was granted to GTC in 1966, and was a portrayal of the road prepared in 1967 by GTC as a detail of the access road to its parcel. Clerk's Certificate of Exhibits, Weeks Affidavit, exhibit "Y" and Exhibit 15 attached to Exhibit "Y". Exhibit 15 portrayed the GTC road as commencing at a county road and continuing in northeasterly direction through Section 21, then taking a sharp turn southeasterly into Section 28 in a "V" configuration, then changing direction at the belly of the "V" and turning to the northeast and entering Section 21 for a short distance and continuing generally in a northeasterly direction through Section 22 to its terminus at GTC's tower site. A recorded survey of a portion of the access as it existed over and across Section 28 and the Southeast Quarter of Section 21 which was consistent with the depiction of the GTC easement road was presented by Lawrence at his deposition. Clerk's Certificate of Exhibits, Weeks Affidavit, exhibit "Z". This road was depicted by GTC's successor in interest, Verizon Northwest, Inc., on a U.S. Geological Survey Map as commencing at the public road (identified on the U.S. Geological Survey map as "Ski Lodge Road") and traversing across the Southwest Quarter of Section 21, then traversing over and across into the East Half of the Northeast Quarter

of Section 28 in a “V” configuration; then passing through the Lawrence parcel at its southeast corner; and terminating in the Southwest Quarter of Section 22 at an area identified on the U.S. Geological Survey map as “Radio Tower” on Blossom Mountain. Clerk’s Certificate of Exhibits, Weeks Affidavit, exhibit “FF” (Exhibit C to Wenker Affidavit). This depiction was very similar to Lawrence’s depiction of the road in course, direction and configuration, including the sections over and across which it traversed.

In 1989, Funk segregated a parcel out of Section 22 to Kootenai Broadcasting, Inc (“KBI”). John Rook was the president of KBI. Clerk’s Certificate of Exhibits, Weeks Affidavit, exhibits “Q” and “R”, R p. 027. In October 1993, as part of a bankruptcy proceeding, a quit claim deed conveyed KBI’s interest in this parcel to Rook Broadcasting of Idaho, Inc. Clerk’s Certificate of Exhibits, Weeks Affidavit, exhibit “S”. In November 1998, Rook Broadcasting conveyed the property to AGM-Nevada, L.L.C. Clerk’s Certificate of Exhibits, Weeks Affidavit, exhibit “T”. In November 2000, AGM-Nevada, L.L.C. conveyed the property to Capstar. Clerk’s Certificate of Exhibits, Weeks Affidavit, exhibit “U”.

In 1992, Funk sold the remainder of his Section 22 property to John Mack. Clerk’s Certificate of Exhibits, Weeks Affidavit, exhibit “II”.

Arman and Mary Jane Farmanian executed a Memorandum of Sale Agreement with Lawrence on October 1, 1996. On September 20, 1996, immediately prior to signing the Lawrence sale agreement, Arman and Mary Jane Farmanian entered into a mutual agreement, grant of easement and quit claim deed with John Mack concerning their respective parcels. This agreement recited in relevant part: “AND WHEREAS, MACK and MACK’S predecessors in interest have used a preexisting private road traversing the most southeasterly portion of the FARMANIAN PROPERTY to gain access to the MACK PROPERTY. This private road is sometimes known as Blossom Mountain Road (hereinafter referred to as the “ACCESS ROAD”). For illustrative purposes only, the approximate location of the ACCESS ROAD is

depicted as a double dashed line on the Exhibit B, attached hereto and incorporated herein by reference. Exhibit A is an enlargement of a United States Geological Survey topographical map of the subject area.” This agreement referred to the access road as the historic location of the access road in more than one location. Clerk’s Certificate of Exhibits, Weeks Affidavit, exhibit “EE”. The attached exhibit “B” to the Farmanian/Mack deed depicted the road using a similar U.S. Geological Survey map that Wynn Wenker (Verizon Northwest) utilized to portray the GTC road as it existed in the Southeast Quarter of Section 21 across the Lawrence parcel and into Section 22 to the radio tower site. Clerk’s Certificate of Exhibits, Weeks Affidavit, Exhibit “FF”, Wenker Affidavit (exhibit C to Wenker Affidavit). Thus, Farmanian and Mack recognized the GTC easement road as the historical access road being used by Funk and his successor, Mack.

Harold Funk testified in his 2004 affidavit that when he purchased the property, the easement road that was used to access the property was the same road over which GTC had a recorded access easement. R p. 034-047. Consistent with his affidavit, Mr. Funk testified in his deposition in August 2007 that the access road he used when first looking at the property was the GTE (General Telephone and Electric) access road. Supp R Vol. II, p. 36, Funk Deposition Tr. p. 18, ll. 10-13. There was one gate on the road. R Vol. II, p. 361, Funk Deposition Tr. p. 18, ll. 25; p. 19, ll. 1-11. Mr. Funk and the realtor drove to the GTE facility using the access road. R Vol. II, p. 361 (Tr p. 19, ll. 15-25; p. 20, ll. 1-8.) Mr. Funk bought the property for investment purposes. Supp R Vol. II, p. 359 (Tr p. 12, ll. 15-17). When Mr. Funk passed over the property he didn’t own he thought he had a right to do so based upon the Mead easement he obtained. Supp R Vol. II, p. 370 (Tr p. 53, L.25; p. 54). In the six year period before selling the Lawrence parcel, Funk went to the property 20-30 times himself to target practice and pick huckleberries. Supp R Vol. II, p. 363, Funk Deposition Tr. p. 25, ll. 11-25; p. 26, Ll. 1-5.

When Funk visited the property, he used the GTE road and went to the GTE tower site. Supp R Vol. II, p. 370, Funk Deposition Tr. p. 53, ll. 1-24. Mr. Funk considered opening a road to the east, but someone told him he couldn't do it. Supp R Vol. II, p. 371, Funk Deposition Tr. p. 58, ll. 11-25; p. 59, ll. 1-2.

John Rook, the president of Kootenai Broadcasting, Inc ("KBI"), testified in his 2004 affidavit that KBI purchased the Capstar parcel from Funk to operate a wireless radio tower. Mr. Rook indicated that further east of the parcel were other tower parcels, including GTC. Rook testified that when KBI purchased the property, it used the same easement road that connected from the public road, Signal Point Road (identified on the map as "Ski Lodge Road"), to the GTC parcel. R pp. 026-033.

Lawrence claims in his statement of facts that there is nothing in the record that contradicts Funk's or his successor's permissive use of Blossom Mountain Road. Lawrence correctly states on appeal that Wilber and Florence Mead granted Funks an easement across the Southwest Quarter of Section 21. Lawrence contends that the record establishes that Rook believed the use of the road was permissive based upon an agreement with GTE.

However, in the July 24, 2007 Douglas Lawrence affidavit, Lawrence testified that he received a phone call from Mr. Rook shortly after November 17, 2000 wherein Mr. Rook asserted that he believed he had an easement, but that he had sold the tower site and was no longer involved with it. Supp R Vol. II, p. 167, Supp R Vol. II, p. 283 (exhibit W).

In his deposition taken August 2007, Mr. Rook indicated that he wanted to purchase a site at the top of Blossom Mountain to upgrade a radio station identified as KCDA. Supp R Vol. II, p. 402, Rook Deposition Tr. p. 9, ll. 11-24. Mr. Rook testified the purchase was in 1988 or 1989. Supp R Vol. II, p. 403, Tr. p. 10, ll. 19-25; p. 11, ll. 1-22. When Mr. Rook looked at the property, there was only one road to the top of Blossom Mountain, which was being used by GTE to access its parcel. Supp R Vol. II, p. 404, Rook Deposition Tr. p. 15, ll. 18-23; p. 16, L.

25; p. 17, ll. 1-21. Mr. Rook recollected that there was one chain link gate on the road and another gate positioned approximately one-half mile away, in the proximity of a sturdy fence, where a gate had once been in place. Supp R Vol. II, p. 406, Rook Deposition Tr. p. 22, Ll. 17-25; p. 23, Ll. 1-9; p. 24, Ll. 15-17. There were no signs on the access road identifying it. Mr. Rook referred to this road as the “main road” and the GTE site was at the end of the access road. Supp R Vol. II, p. 412, Rook Deposition Tr, p. 48, ll. 19-25; p. 49, ll. -1-19. Travelers on the road were monitored by Wilbur Mead. Supp R Vol. II, p. 406, Rook Deposition Tr. p. 25, ll. 24-25; p. 26; p. 27, ll. 1-4. Although Mr. Rook could not identify the sections through which the road passed by the time of his deposition in 2007, he confirmed that Exhibit C to his 2004 affidavit looked like the configuration of the road as he recalled it. Supp R Vol. II, p. 417, Rook Deposition Tr. p. 67, ll. 17-25; p. 68, ll. 1-13; Supp R Vol. II, p. 418, Rook Deposition Tr. p. 70, Ll. 13-25.

The only road used by Rook was the GTE Road. At the time Mr. Rook built his radio transmitting tower, he looked around for other access roads. No one in Mr. Rook’s employ informed him of another access road. A helicopter pilot did inform him during a snow storm in 1995 that there was a goat trail but no one would ever get up it, even in good weather, let alone a snow storm. Supp R. Vol. II, p. 413, Rook Dep. Tr. p. 51, ll. 10-25; p. 53, ll. 1-11. Lawrence’s counsel suggested there was another entry into the GTE site through a public road known as Mellick Road. In response, Mr. Rook rejected this proposition, indicating he only knew of one road. He testified that he knew there was a trail that was unbelievably steep coming up the Post Falls side of the mountain that couldn’t provide access even in good weather. A pilot characterized it as a dirt motorbike trail. He never knew of any other road even though he looked around for other access roads to the site because the access road they were using was terribly bumpy. Supp R Vol. II, p. 413, Rook Dep. Tr. p. 50, ll. 12-25; p. 51-52; p. 53, ll. 1-8; Supp R Vol. II, p. 415, Rook Dep. Tr. p. 60, ll. 7-23.

During the ten years that KCDA used the road, they regularly bumped into other people from the neighboring tower sites on the road and no one ever mentioned an alternative access. Supp R Vol. II, p. 416, Rook Dep. Tr. p. 62, ll. 26-25; p 63, ll. 1-18. Mr. Rook indicated that he had recently been to Spokane before his deposition in 2007 and looked up the side of Blossom Mountain, and there were now roads on the mountain, but they were not there during his ownership of the Capstar parcel. Supp R Vol. II, p. 50, Rook Dep. Tr. p. 50, ll. 12-25; p. 51, ll. 1-5.

KCDA received approval in 1991 or 1992 to broadcast from the Capstar parcel. Supp R Vol. II, p. 409, Rook Deposition Tr. p. 35, ll. 7-11. There was an engineer who went up to the site at least every two to three weeks to do maintenance and sometimes every week. Supp R Vol. II, p. 408, Rook Deposition Tr. p. 32, ll. 4-17; p. 38, ll. 23-25; p. 39, ll. 1-2. KCDA continued to broadcast until Mr. Rook (Rook Broadcasting) sold the tower in 1998 or 1999. Supp R Vol. II, p. 410, Rook Deposition, Tr. p. 41, ll. 10-22. Mr. Rook testified that the companies that he owned (KBI and Rook Broadcasting) used the GTC road for the ten years they owned KCDA. Supp R Vol. II, p. 416, Rook Deposition, Tr. p. 62, ll. 11-25. Mr. Rook also leased tower space to Trinity Broadcasting the last five to seven years that his company owned the tower site. Supp R Vol. II, p. 416, Rook Deposition Tr. p. 63, ll. 19-25; p. 65, ll. 4-8; ll. 18-23. KCDA operated concurrently with Trinity Broadcasting. Supp R Vol. II, p. 416, Rook Deposition Tr. p. 65, ll. 18-23.

Mr. Rook further testified that during the years he owned the tower, “we used to pass people all the time on that road, somebody coming in or going out, they were working on this or that.” Supp R Vol. II, p. 418, Rook Deposition Tr. p. 72, ll. 18-20. Mr. Rook testified that they would pass someone else on the road “fairly frequently”, some of whom were with GTE . Supp R Vol. II, p. 418, Rook Deposition Tr. p. 73, ll. 24-25; p. 74, ll. 1-16.

In their statement of facts, Lawrence contends that “soon after entering Section 22, Blossom Mountain road divides with the main body of the road continuing in a northeasterly direction where it eventually turns into Mellick Road.” In support of this contention, Lawrence points to Doug Lawrence’s September 10, 2010 affidavit paragraph 16 and photographs referenced therein. In the September 10, 2010 affidavit, paragraph 16, Lawrence claims to have driven Mellick Road on at least 20 occasions since 1996 or 1997 and expressed the opinion that the layout of the road as he drove it closely resembled the layout of the road as it appeared in the 1959 Metzger map attached as Exhibit 2 to the Funk deposition. Exhibit 2 (a portion of the 1959 Metzger map). The probable inference Lawrence believes the trial court should have drawn is that the 1959 Metzger map is accurate, and the roads existed in such a configuration when Funk purchased the property in 1969, continued to exist when the Lawrence parcel was segregated in 1975, and existed when the Kootenai Broadcasting, Inc. purchased its parcel in 1989.

The 1907 survey included in the Viewer Report shows the Mellick Road commencing in the Northwest Quarter of Section 15; continuing southwesterly through the Southwest Quarter of Section 15, then entering the Southeast Quarter of the Southeast Quarter of Section 16, continuing southwesterly through the Northeast Quarter of the Northeast Quarter of Section 21 and terminating just across the section line in the Southeast Quarter of the Southeast Quarter of Section 21. Clerk’s Certificate of Exhibits, Lawrence Affidavit, Exhibit C. A copy of the survey plot is attached as an addendum to this brief.

The Metzger map submitted by Lawrence generally includes a similar road as depicted in the viewer report, but shows it continuing through Government Lot 4 in the West ½ of the Northwest Quarter of Section 22. Supp R Vol. II, p. 197; p. 389. This portion was also once owned by Funk.

The Mellick Road right of way is within the jurisdiction of Post Falls Highway District. Augmented Record on Second Appeal, Affidavit of Kelvin Brownsberger. It is marked “Dead

End” as one enters the road. Lawrence’s July 24, 2007 Affidavit, Exhibit T, photo 1B. Supp R. Vol. II p. 205.

Mr. Brownsberger’s affidavit was filed April 6, 2004. Mr. Brownsberger testified that only a small segment of Mellick Road was maintained by the Post Falls Highway District. Mr. Brownsberger submitted a map which included Mellick Road as it existed at that time in 2004, and highlighted the maintained portion as being a small segment in Section 15. This map also portrayed Mellick Road as branching at a “Y” intersection just beyond the publicly maintained portions. Both branches continue south and lay somewhat parallel two each other. A copy of the survey plot is attached as an addendum to this brief. The western branch more closely resembles the Viewer Report Road and shows the road following a southwesterly course through section 15, 16 and 21 as described in the Viewer’s Report. The eastern branch of Mellick Road is depicted as including a branch named Monument Drive in Section 15 and a branch named Fritz He(ath) in Section 22, as well as a branch named Ridge Road and Brochier Saddle in the Southwest Quarter of Section 22. Augmented Record, Exhibit A to Brownsberger Affidavit.

On March 24, 2004, John Mack, the owner of the remainder parcel in Section 22, prepared an affidavit in this matter which was submitted as an exhibit to Lawrence’s affidavit in opposition to the original motion for summary judgment in 2004. Clerk’s Certificate of Exhibits, Lawrence Affidavit, exhibit “L”. Mr. Mack testified that in 1992 he purchased property in Section 22 from Funk. Mr. Mack testified that at the time he purchased the property, he inquired about access and the realtor told him he knew the way. Mr. Mack testified in the Spring of 1994, he was stopped by Idaho Forest Industries (“IFI”) and informed he did not have legal access across Section 28, and IFI demanded he cease traveling across Section 28. Mr. Mack testified his Section 22 property was landlocked as a result of this circumstance because there was no other access road to the Section 22 property. Mr. Mack indicated that as late as 1996, he was attempting to obtain easements to access the Funk property in Section 22. Mr. Mack testified

that in 2002, he purchased property from Fred Zuber in the East half of the Northwest ¼ of Section 22 (property never owned by Funk) to develop an access to the north of the Section 22 property. Mr. Mack testified it appeared Mellick Road was abandoned and had not been used for 20 years.

John Mack's testimony is consistent with other evidence in the record. In 1999, the Southwest Quarter of Section 22 was platted as a subdivision identified as "Blossom Mountain Estates". Clerk's Record of Exhibits, Weeks Affidavit, Exhibit BB. The assessor map of this subdivision identified the access road at dispute in this matter as a private road named Apple Blossom Road. It also showed Mellick Road as a private road that branched from Apple Blossom Road at the southwest corner of the Southwest Quarter of Section 22. Mellick Road is shown on this map as continuing northeasterly through the remaining portion of the Southwest Quarter of Section 22. Consistent with Mr. Mack's testimony, the assessor map shows Mellick Road continuing through the East half of the Northwest ¼ of Section 22 through the Fritz Heath Forest Tracts (a parcel never owned by Funk). A road branches to the East from Mellick Road in the Fritz Heath plat and is identified as a private road named Fritz Heath Road. The assessor map indicates the Fritz Heath Forest Tracts were platted in 1998. Clerk's Record of Exhibits, Weeks Affidavit, exhibit BB. A copy of Exhibit BB is attached as an addendum to this brief.

On July 24, 2007, Lawrence filed the Affidavit of Douglas Lawrence in support of their opposition to the summary judgment. Supp R Vol. II, pp. 146-293. In paragraph 10 of this affidavit, Mr. Lawrence indicated he decided to drive his vehicle on Mellick Road and to take photographs to illustrate that the access route as depicted in the Viewer's report and the Metzger Map was still in existence as of the date of the affidavit. Supp R. Vol. II, p. 150. No mention was made of Lawrence ever having driven the road before in this affidavit. In paragraph 14 of the July 24, 2007 Affidavit, Mr. Lawrence testified that the pictures submitted with the affidavit were taken along the route of Mellick Road as it existed at that time and showed signs of

significant improvements in the road made by Mr. Mack in 2006. Supp. R Vol. II, p. 151. Mr. Lawrence indicated in his July 24, 2007 affidavit that the branch he was traveling intersected Monument Drive. Supp R Vol. II, p. 151. Mr. Lawrence acknowledged that Mr. Mack had made significant improvements to Mellick Road in 2006 as depicted in the photographs. Supp R, p. 151, paragraph 14; p. 206 (photographs).

After Plaintiff filed their reply brief pointing out that there was no foundation to support Lawrence's argument that the Metzger map established that Mellick Road connected through the Northeast Quarter of Section 21 into the Southwest Quarter of Section 22, and that the testimony of Mr. Mack submitted by Lawrence established that Mellick Road did not connect to the Southwest Quarter of Section 22, Lawrence filed the September 10, 2007 affidavit attempting to lay a foundation that the roads as they exist today traversed the same route as depicted in the 1907 Viewer's report and the 1959 Metzger map and to controvert his own evidence submitted through the affidavit of John Mack. The affidavit introduced a conclusion unsupported by any evidence that Mellick Road as travelled by Lawrence from since about 1996 or 1997 and depicted by Google Earth imagery was the same road as depicted in the Viewer's Report and the 1959 Metzger map.

The evidence submitted merely showed a road, with the only identifiers on it that gave the Court any clue as to where it lay in relation to sections on a map being the reference to an intersection with Monument Drive and a reference to an intersection with Apple Blossom Road. Since these intersections are identified in other evidence before the trial Court, the Court was able to determine that the road did not lie within the property owned by Funk or depicted on either the Viewer's Report or the Metzger map.

Finally, the deposition testimony of Harold Funk addressed the road shown on the 1959 Metzger map. Mr. Funk testified that there was possibly a logging road in the area shown on the Metzger map when he purchased. He considered cleaning it out at the time of his purchase in

1966, but the road was in poor shape. He did not care to drive along it. Supp R. Vol. II, p. 360, Funk Dep. Tr, p. 13, ll. 12-25; p. 14-15; p. 16, ll. 1-10. Mr. Funk had considered taking a bulldozer and opening a road down toward the Spokane River (north) to access his property in Section 22 along this road. However, without cleaning out the road to open it, he could not access his property beyond Section 15. Supp R Vol. II, p. 372, Funk Deposition p. 61, ll. 8-25; p. 62, ll. 1-19.

IV. ATTORNEY FEES ON APPEAL

Lawrence maintains that the action filed herein has been maintained frivolously and seeks attorney fees. Lawrence cites to no case law or statute in support of their motion . This court has repeatedly held it will not consider a request for attorney fees on appeal that is not supported by legal authority or argument. *Bream v. Benscoter*, 139 Idaho 364, 369, 79 P.3d 723, 728 (2003)

Lawrence does provide argument without legal authority. Lawrence's two arguments for claiming this matter is frivolous are: (1) one of Capstar's witnesses, John Rook, thinks a parent company he believes is associated with Capstar (Clear Channel) is a scavenger; and (2) one of Capstar's tenants is allegedly not honoring a license agreement it had with Lawrence. Lawrence also complains that this matter is in its ninth year of litigation and questions why, apparently inferring it is Capstar's fault.

Turning first to the contempt that Lawrence perceives John Rook holds for Clear Channel, it would only reinforce that Mr. Rook is not a biased witness inclined to give favorable testimony to curry favor with a company he believes is associated with Clear Channel. It is not frivolous to use a witness who is unbiased and perhaps hostile to the party utilizing the testimony. However, Rook's actual testimony was that he thought Capstar's predecessor in title, AGM, was a scavenger. Supp R Vol. II, p. 405, Rook Dep. Tr. p. 21, ll. 16-19.

Regarding the claim on the licensing agreement, while disputes with Capstar's tenant

may have brought the matter to a head, it is not frivolous to resort to a court of law for resolution of the dispute.

Finally, the record in this matter does not show that Capstar has frivolously delayed prosecution of this matter to harass Lawrence. In fact, the delays have primarily been attributable to Lawrence. Lawrence filed their answer late following informal requests for more time to answer; they moved for several enlargements of time to delay the summary judgment to conduct additional discovery thereby causing the summary judgment to be heard roughly five months from its original hearing date. They prematurely filed their appeal following the second remand, causing this Court to send the matter back for a final judgment. None of this delay is attributable to Capstar.

V. ARGUMENT

A. Standard of Review

In *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007), this court reviewed the standard of review for summary judgment when no jury trial was requested and held:

On appeal from the grant of a motion for summary judgment, this Court's standard of review is the same as the standard used by the district court originally ruling on the motion. *Intermountain Forest Management v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001). Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. I.R.C.P. 56(c).

The burden of proving the absence of material facts is upon the moving party. *Thomson v. City of Lewiston*, 137 Idaho 473, 476, 50 P.3d 488, 491 (2002); *see also Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 452 P.2d 362 (1969). The adverse party, however, "may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). The moving party is therefore entitled to a judgment when the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case on which that party will bear the burden

of proof at trial. *See Thomson*, 137 Idaho at 476, 50 P.3d at 491, *Badell*, 115 Idaho at 102, 765 P.2d at 127.

When an action, as here, will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Intermountain Forest Management*, 136 Idaho at 235, 31 P.3d at 923. Resolution of the possible conflict between the inferences is within the responsibilities of the fact finder. *Cameron v. Neal*, 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997). This Court exercises free review over the entire record that was before the district judge to determine whether either side was entitled to judgment as a matter of law and reviews the inferences drawn by the district judge to determine whether the record reasonably supports those inferences. *Intermountain Forest Management*, 136 Idaho at 236, 31 P.3d at 924.

B. The District Court did not Commit Reversible Error in Arriving at the Most Probable Inferences Based Upon the Undisputed Evidence Properly Before It.

In their brief on appeal, Lawrence cite to authority that facts are to be liberally construed in favor of the party opposing summary judgment and they are to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. While this authority is correct, it ignores the posture of this case. As noted previously, when an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences.

Twenty-four specific instances of error are pointed out by Lawrence and enumerated as items A through X. The first ones are that the trial court called Harold Funk Howard Funk at one place in its opinion. Lawrence makes the same complaint regarding reliance on the testimony of John Mack because the trial court called him Thomas Mack at another location. (Items A and B, pp. 21-22, Appellant's Opening Brief.) The trial court initially correctly identified the Funk affidavit as being from Harold Funk. Supp R Vol. III, p. 562. The trial court initially correctly identified the affidavit as being from John Mack. Supp R Vol. III, p. 568. While there are scrivener's errors of the first name of these individuals in a later portion of the opinion, (Supp R

Vol. III, p. 569), they are harmless and did not vitiate the substance of the point the trial court was making in its decision.

Lawrence also takes issue that the trial court did not draw the inference from the lack of the existence of an express easement that Funk did not intend to preserve an easement for the Section 22 parcel retained by him. (Items C and D, p. 22, Appellant's Opening Brief.) In analyzing this argument, the trial Court drew the inference from the fact that preservation of an easement was referenced in the 1975 Sales Agreement, but not included in the warranty deed issued 17 years later, that Funk had intended to reserve an easement and failed to do so.

Lawrence implies that the trial court should not have drawn such an inference from the evidence because Capstar did not present any testimony regarding the reason that there was no express easement reserved. However, this inference was the most probable inference given the language of the Sales Agreement and the lapse of time between the creation of the two documents.

Further, Mr. Funk did testify that he wanted everybody that purchased land to have an easement. Supp R Vol. II, p. 365, p. 34, ll. 12-19. Mr. Funk also testified it was not his intent to land lock anybody. Supp R Vol. II, p. 375, Funk Deposition p. 74, Ll. 20-25, p. 75, L. 1.

Lawrence also claims that because the trial court does not quote the language from the 1975 Sales Agreement that it is reasonable to assume the trial court is referring to the "subject to and including" language that excepted from fee simple an easement previously granted to GTE by Pike Reynolds. (Item I, p. 23, Appellant's Opening Brief.) This assumption is unreasonable. The trial court specifically discussed that the language it was referring to was language in the Sale Agreement that the Section 21 parcel being sold was subject to an ingress egress easement over the existing road on the property that was being sold the Human Synergistics. Supp R. Vol. III, p. 569.

Lawrence also claims that the trial court erred in determining that Funk's and Rook's use of the road was not always permissive. (Items W and X, p. 27, Appellants' Opening Brief.)

Lawrence attempts to make this case an examination on the entire access easement. However, the only portion relevant to the present case is the portion of the access road which crosses the Lawrence parcel.

From 1966 to 1975, use of the Section 21 portion of the access road was made by Funk as the owner of that parcel. After 1975, the use was made pursuant to the reservation of rights that Funk included in the Sales Agreement. Funk always intended everyone should have easements, and did not intend to leave any property landlocked. Funk believed he had an easement. Thus, the probable inference from the evidence is that Funk's use of Section 21 was under a claim of right. According to evidence submitted by Lawrence, on November 17, 2000, Rook declared to Lawrence in a telephone conversation that he believed he had an easement that gave him the right to use the road when he owned the Capstar parcel. Further, Rook did not testify that the use of the Section 21 parcel was permissive. Rather, he testified that the access agreement with GTE gave them the right to use the road. Supp R Vol. II, p. 413, Funk Deposition Tr. p. 53, Ll. 4-22. Moreover, Lawrence's predecessor in title, Farmanian, entered into an agreement with Funk's predecessor in title, Mack, recognizing that the GTE road was the historical access to Funk's Section 22 property. The reasonable and probable inference to be drawn from the testimony in the record, some of which was submitted by Lawrence, is that Rook used the access road under a claim of right to do so for a period of ten years from 1989 through 1999 under the corporate entities that held title.

Lawrence directs this Court to the trial Court's finding that the uncontradicted evidence was that Funk used the property consistently for the six year period from the day he sold to Human Synergistics to the day he moved from the area. (Items G and H, p 23, Appellants' Opening Brief.) Lawrence is correct that the trial court has not correctly stated this finding. Funk purchased the property in 1966. He testified in the six year period from the date of purchase to the date he sold the property to Human Synergistic that he continually used the

property and that he took the GTC Road to access it. Supp R p. 363, Funk Deposition Tr. p. 25, ll. 11-25, p. 26, ll. 1-4.. The sale of the property to Human Synergistics was July 1, 1975. (Clerk's Certificate of Exhibits, Weeks Affidavit, exhibit "E"). Funk moved to Aberdeen in the fall of 1975, and his wife in the Spring of 1976. R Vol. II, p. 364, Funk Deposition, p. 29, ll. 1-24. Thus, the uncontradicted evidence was that at the time Funk referenced the reservation of an easement in the Sale Agreement over and across the Southeast Quarter of the Southeast Quarter of Section 21, he had been continually using the GTC easement road. (This finding is relevant to the discussion the court engages in with respect to an implied easement.

Mr. Funk testified he continued to use the easement after the sale, although his use after the sale was limited to approximately three uses within the next five years following the sale. R. p. 364, Funk Deposition p. 2-25; p. 33, ll. 1-4.

Lawrence also takes issue with another scrivener's error made by the trial court wherein the trial court noted that when Funks sold a portion of their Section 21 property to Human Synergistics they still owned their land in Section 22, and the sales agreement included item 5 indicating the section 21 parcel was being sold subject to an ingress/egress easement over the existing road on the property sold to Human Synergistics. The trial court concluded that without those terms, Funks' Section 21 property would have been landlocked. Supp R Vol. III, p, 562-563. (Item T, p. 26, Appellant's Opening Brief.) Lawrence notes that Funk did not own Section 21 property. However, it is clear that the trial court made a scrivener's error and the Section 22 property would have been landlocked. This error does not constitute reversible error.

Lawrence also takes issue with the court's discussion of apparent continuous use from no later than 1975 of the GTE road based upon the affidavit of Wynn Wenker. (Item U, p. 26, Appellants' Opening Brief.) Lawrence is correct that the affidavit establishes that GTC (also referred to as GTE) was using the access road over which it had an express easement. However, this fact is relevant because it allowed the trial court to draw the inference that the GTC access

road used by Funk and Rook was the same road identified by Lawrence as the access road, and its configuration as traversing portions of Section 21, Section 28 and Section 22. Lawrence demonstrates no reversible error from this discussion in the opinion.

Another issue raised by Lawrence is a disagreement with the trial court's characterization of the filing of the second summary judgment brief in opposition as being in contravention of I.R.C.P. 56(c) because the summary judgment hearing was moved by the trial court to September 24, 2007 and Capstar stipulated to the continuance. (Item V, p. 26, Appellants' Opening Brief.) Capstar did not stipulate to the continuance. In fact, Capstar vehemently opposed the motion. Supp Tr p. 106, ll. 2-25; pp. 107-109, p. 110, ll. 1-6.. Lawrence is correct that the court granted the motion to enlarge. However, the order submitted by Lawrence only referenced the continuation of the hearing date, which may have contributed to the comments of the court. Supp R Vol. II, pp. 343-345. Nevertheless, the trial court did not refuse to consider the arguments or additional evidence submitted by Lawrence. In fact, the trial court noted that the brief contained a word for word repeat of the previous argument in opposition to the implied easement submitted by Lawrence. Thus, Lawrence has shown no reversible error on appeal related to this complaint.

Regarding the error concerning Rebeor's Affidavit raised on appeal, this affidavit recites to facts about the Spectra Site litigation. (Item E, p. 22, Appellants' Opening Brief.) Lawrence directed the trial court to this affidavit in support of its claim that the use of the road by Capstar had always been permissive. Supp R p. 302, n. 5. The trial court perpetuated this error in its opinion by indicating that Rebeor managed the Capstar site when in fact the affidavit said he managed the Nextel site. However, the opinion then discussed the actions of Nextel, Spectra Site's predecessor in the lease of the site. However, this scrivener's error was harmless with respect to the grant of the summary judgment in favor of Capstar as it involved no material fact regarding Capstar.

Lawrence also complains on appeal about statements made by the trial court regarding the use of the GTC easement by tenants of Robert Hall in the Tower Asset litigation (Items F, J, K, L, M, N, O, P, Q, R, S of Lawrence's opening appeal brief). These issues are irrelevant to the present appeal.

C. The Trial Court did not Err in Drawing Probable Inferences

In a similar argument to the one posed above, Lawrence claims the trial court failed to address their most important and compelling pieces of evidence on summary judgment, those being the 1907 road survey and viewer's report, Judge Haman's ruling in the Kootenai County case of *Loudin v. Stokes*, Funk's deposition testimony, Bruce Anderson's affidavit, Funk's deposition testimony, and Rook's deposition testimony. As a result, Lawrence claims the trial court improperly granted summary judgment to Capstar. Lawrence's issues with inferences drawn regarding the evidence are the trial court's finding that Mellick Road did not service the parcel in 1968, that the reasonable inference from the evidence is that Funk intended to reserve an easement across Section 21 and the trial court's refusal to consider the legality of passage over parcels not owned by Lawrence or Funk.

1. Mellick Road

The trial court did address Bruce Anderson's affidavit; the Viewer's Report and *Loudin v. Stokes* in its discussion of an Easement by Implication from Prior Use. Supp R Vol. II, p. 566. It found these items of evidence did not support an inference that Mellick Road provided access to the Southwest Quarter of Section 22 parcel because Mellick Road terminated in the Northeast Quarter of Section 21 (a parcel not owned by Funk).

Contrary to Lawrence's claim, the trial court did not dismiss the affidavit of Kelvin Brownsberger, road supervisor for the Post Falls Highway District., as being of no value to the present case. Rather, the trial court indicated that because Brownsberger's affidavit did not lay a foundation when he became familiar with Mellick Road, or when he began working with the

highway district, Brownsberger cannot testify regarding what existed in 1969 when Funk's purchased or what existed in 1975 when Funds sold the Lawrence parcel. Supp R Vol. III, p. 568. The trial court also found that Brownsberger's affidavit did not assist the trial court because it merely established that Mellick Road had not been constructed and maintained beyond its entry into Section 15 because no issue of fact as to an alternate route had been established by Lawrence, and only "reasonable necessity" was needed for an easement by implication. Supp R Vol. III, p. 564.

Lawrence claims the trial court erred in not considering other, much stronger, evidence in the record that Mellick Road did exist in 1975 and provided access to the Southwest Quarter of Section 22. That evidence is identified by Lawrence as the Viewer's Report; the *Loudin v. Stokes* decision, and an affidavit from county surveyor Bruce Anderson. Lawrence contends that this evidence collaborates that the 1959 Metzger map is accurate and establishes that Mellick road connected to the Southwest Quarter of Section 22 in 1966.

However, the Viewer's Report on its face demonstrates that Mellick Road as laid out did not extend into Section 22, and terminated in the Northeast Quarter of Section 21, a parcel not owned by Funk. The *Loudin* decision merely confirmed that Mellick Road as laid out was a public road and that the road constructed and existing in 1987 across Loudin's property in the Southwest Quarter of the Northeast Quarter and the Southeast Quarter of the Northwest Quarter of Section 15 was consistent with the road as laid out in the Viewer's Report. R. p. 188-193. The Affidavit of Anderson also merely indicates that Mellick Road would have provided access to the property owned by Funk in Section 15. It does not address access for the Southwest Quarter of Section 22. Thus, this "strong" evidence does nothing to verify the allegation that the 1959 Metzger map was accurate and the roads as depicted existed in 1966.

Lawrence also claims that the testimony of Funk and Rook established that Mellick Road existed at the time of his purchase. As discussed in the Statement of Facts, Mellick Road did not

extend to the Section 22 parcel when Funk purchased. Funk could have done as Mack did, and improved and opened up a road. However, he did not do so.

In 1989 when Rook purchased, he used the GTE access road, and continued to use it over the next 10 years. He confirmed the route of easement was as described in exhibit C of his 2004 affidavit. Rook looked for other access roads besides the GTC road to access his parcel. There were none. Rook encountered numerous users of the easement during the ten years he owned the easement. No one ever informed him of another access road, even though the quality of the access road and the quest for a better road was a common topic of discussion. His employees used the GTE access road. They never informed him of another access road. The only information Rook ever received that there was another road was from a pilot that informed him there was a dirt bike motorbike trail that came up the steep side of the north face. Rook testified that in 2007 he looked at Blossom Mountain while traveling to Spokane, Washington, and there were new roads on the north face of Blossom Mountain.

The testimony that there was no other access to the Section 22 parcel and that the roads on the north face are new is supported by Mack's testimony, presented by Lawrence, that when he purchased in 1992 he looked for another access beside the GTE access road and there was no connection of the Southeast Quarter to Mellick Road until he purchased property from Zuber across a portion of Section 22 that was not owned by Funk and began developing a road in 2002. Lawrence testified that the road portrayed in his pictures of Mellick Road show an improved road constructed by Mack in 2006.

Even if one were to ignore all of this actual evidence and draw the inference that Lawrence wishes the Court to draw that Mellick Road did connect to the Southwest Quarter of Section 22 through the Northeast Quarter of Section 21, there is absolutely no evidence it was passable in 1966 or ever used before then. Without some evidence regarding the condition of the road and actual use of it before Funk's purchase, Funk and his successors would have no claim

of a prescriptive easement across the Northeast Quarter of Section 21. Therefore, there is no reasonable inference from the evidence that Funk had the right to claim an access to Mellick Road.

Finally, the reasonable and probable inference from the evidence is that Mellick Road as it exists today is not the road depicted in the 1959 Metzger map. Rather, it is akin to the east branch of Mellick Road portrayed in Exhibit A of Mr. Brownsberger's Affidavit. The reasonable and probable inference is that this road was constructed in large part by Mr. Mack in 2006, and the use of it by the Southwest Quarter was not obtained until Mr. Mack obtained the easement through the Zuber parcel.

Lawrence also argues that the trial court should have disregarded the affidavit of Rook regarding Mellick road and the access road because he was on medication when he did his affidavit and because his deposition contradicted his deposition testimony. Turning to the first point, there is no indication in the record that the medication affected Mr. Rook's ability to perceive or understand what he was doing at the time he signed the affidavit in 2004. Rather, it affected his ability to recall the period of time after he signed the affidavit. Further, although Rook indicated he could not recollect some of the facts contained in his Affidavit, he confirmed that he used the GTC easement based upon an agreement he had with GTC that gave him a right to use it. He disclaimed personal knowledge of Funk's use of the easement road, but agreed Exhibit C of his affidavit depicted the road as he recollected it. In reviewing the information contained in his 2004 affidavit during deposition regarding the configuration of the road, Mr. Rook testified he threw out his files in either 2003 or 2004, and his engineer exhibit would have contained a plot of the exact location of the road and he could not testify in 2007 to the configuration. Supp R Vol. II, p. 414, Rook Dep. Tr. p. 54, ll. 23-25, p. 55, ll. 1-15. Nonetheless, Mr. Rook testified in deposition that the GTC access road was the only one they used. Supp R Vol. II, p. 414, Rook Dep. Tr. p. 57, ll. 6-12. Mr. Rook also testified the existing

road was the most reasonable alternative for access. In addition, Mr. Rook testified in 10 years use of the access road and numerous encounters with other users and tower site owners, and discussion about improving the access road, no one ever mentioned another available route. Supp R. Vol. II, p. 416, Rook Dep. Tr, p. 61, ll. 7-25, p. 62, p. 63, Ll. 1-13.. Mr. Rook also testified there was only one road of which he was aware and Exhibit C of his original affidavit depicted that road. Supp R. Vol., II, p. 418, Rook Dep. Tr. p. 71, ll. 13-25. The dirt bike motorbike trail was north of Rook's tower. There were no discussions between any of the owners or users of Blossom Mountain of any other access road. Had Rook known of a better access road, he would have used it. Supp R Vol. II, p. 418, Rook Dep. Tr p. 72, ll. 6-25; p. 73, ll. 1-2.

Lawrence does not specifically indicate which inferences drawn from Rook's testimony they believes are in error or contradicted by the deposition testimony. The trial court indicated Rook testified that he used the GTC access road several times to access the Kootenai Broadcasting, Inc. parcel. Supp R Vol. III, p. 563. This finding is supported by the record. The trial court refers to Rook's Affidavit in support of its statement that when Kootenai Broadcasting purchased from the Funks, the access road was the only access to the Capstar property. Supp R Vol. III, p. 563. This fact was also stated in Rook's deposition.

Lawrence also directs the court's attention to Exhibit 1, identified as being a scan of Exhibit 2 of the Funk deposition depicting the route Funk used with call-outs and highlights added. Mr. Lawrence contends that the selected portion of Funk's deposition supports the inference that there was a passable road when Funk purchased the property. However, taken in its totality, Mr. Funk's testimony establishes that there was no such road at the time of his purchase and it would have taken a bulldozer to re-establish a road.

Lawrence also claims the reasonable inference to be drawn from Funk's deposition is that a logging road was used some years earlier, prior to his purchase in 1968. Mr. Funk testified that

there was an old logging road that went over and across Government Lot 3 (in Section 15) and someone had logged the top of the mountain and had hauled on the logging road a number of years before he bought it. Mr. Funk testified that he would had to have taken a bulldozer and cleaned out the roadbed from Section 15 (approximately at the location where Mr. Brownsberger indicated the public road maintenance ceased) to the top of the mountain, through Section 21, to open the road. Thus, Mr. Funk would had to have opened the road over that portion of Section 21 not owned by him to open the old logging road.

While this testimony would support an inference that there was a logging road along this route in 1959, it does not support an inference that the road continued to be in use in 1968. In fact, Mack's testimony corroborates that the road was defunct in 1968. Mr. Mack testified that over the years Mellick Road had been abandoned and to him it appeared no one had used the road in 20 years. (Mack took possession in 1992.)

Lawrence claims that Funk's admission that there was a remnant of a logging road when he purchased which could have been bulldozed open creates an issue of credibility and an evidentiary conflict with Funk's statement in his affidavit that the GTC easement was the only *existing* easement road providing access to the Southeast Quarter of Section 21 and the Southwest Quarter of Section 22. However, such is not the case. Funk's testimony is clear, as corroborated by Mack, that the road was abandoned at the time Funk purchased and would require significant bulldozer work, including work across property not owned by Funk in Section 21, to convert it into an access road.

Lawrence contends that the probable inference to be drawn from the evidence was that the Mellick road access was neglected and had become overgrown, and therefore Funk chose not to use it. In reality, the evidence goes beyond a finding that the road was neglected. It had reached such a state of disrepair that it would have required heavy machinery and labor to make

it passable. Under such conditions, the reasonable inference is that when Funks purchased, it was not being used as an access to the Section 22 property as argued by Lawrence.

2. Inference that Funk Intended to Reserve an Easement across Section 21

Lawrence also finds fault with the trial court for not considering Doug Lawrence's May 31, 2007 affidavit, specifically paragraph 3 in drawing the inference that Funk intended to reserve an easement across Section 21 for access this remaining Section 22 property. This paragraph contains hearsay regarding an alleged telephone call between Funk and Lawrence in 1998, which Capstar moved to strike. It also includes as an exhibit a copy of a letter prepared by Lawrence, which Funk signed and returned to Lawrence regarding certain language in the Sale Agreement between Funk and Human Synergistic wherein Mr. Funk clarified that Pike Reynolds sold a 1 acre parcel to GTE in Section 22 and Pike deeded an easement across Sections 21 and 22 of the Funk property which was subject to the easement. It also addressed the right of the buyer to use the Mead easement. Lawrence claims that the letter reassured him that the language was not intended be a reservation for Funk. The clarification letter was silent regarding whether the Sale Agreement was intended to encompass a reservation of easement. It merely addressed the GTE easement that was granted across portions of Funk's property as being an encumbrance. R p 032. Thus, this piece of evidence did not dispute Funk's deposition testimony of his intent in including clause 5 in the Sale Agreement or the express language reserving an easement found in the Sale Agreement.

3. The Legality of Funk's Passage over Other Parcels not Owned by Funk

On appeal, indicates the trial court failed to consider what easement rights Funks' predecessors had to convey to Funks. Without any cite to authority, or any extension of the argument, Lawrence claims this failure constituted error by the trial court. The trial court was not required to examine Ravens' and Marcos' easement rights.

D. The District Court did not Err in Finding an Easement by Necessity

In response to the finding of the trial court claim that Capstar was entitled to an easement by necessity, Lawrence argues on appeal that Funk impermissibly created their own necessity at the time of severance by not re-establishing an abandoned logging road.¹

An easement by necessity has some similar elements to an easement by prior use. The Court in *B&J Development & Inv., Inc. v. Parsons*, 126 Idaho 504, 887 P.2d 49 (Catnap. 1994) noted:

To establish an easement by necessity, the claimant must prove the following elements: (1) that the dominant parcel and the servant parcel were once part of a larger tract under common ownership; (2) that the necessity for the easement claimed over the servant estate *existed at the time of the severance*; and (3) the present necessity for the claimed easement is great. *MacCaskill v. Ebbert*, 112 Idaho 1115, 1118, 739 P.2d 414, 417 (Ct. App. 1987) (emphasis added). An easement by necessity is a creature of public policy. *Bob Daniels & Sons v. Weaver*, 106 Idaho 535, 543, 681 P.2d 1010,1018 (Ct. App. 1984). Therefore, the easement does not depend on an express mutual agreement. Rather, it arises, and will be recognized, when the three required elements have been established. Establishment of an easement by necessity is not defeated by a contrary expectation harbored by one of the parties. *MacCaskill*, 112 Idaho at 1119, 739 P.2d at 418. It is a question of law. An owner of property, however, cannot create the necessity by his or her own actions. *Cardwell v. Smith*, 105 Idaho 71, 80, 665 P.2d 1081, 1090 (Ct. App. 1983).

Lawrence argues the trial court erred in determining that there was an easement by necessity because Funk failed to establish he had an express easement across all parcels of property over which the access road passed. Lawrence concludes because Funk did not have a recorded easement across Section 28 that they had no legal access to the county road, presumably a recorded express easement, and therefore the trial court could not find there was an easement by necessity.

¹ Ironically, Lawrence completely ignores that to have done so would have required Funk to trespass over property they did not own in Section 21 and over which they had no express easement, nor any implied easement. There is no evidence Funk would have had a right to a prescriptive easement over Section 21. Thus, Lawrence would have Funk take the same action on Mellick Road as they now criticizes him for taking on the GTC Road across the parcels that weren't owned by him.

There is no case law that supports this argument. Further, it ignores the fact that easement rights can be established by use, or that permissive use can be given to pass over the land of another.

In *Hughes v. Fisher*, 142 Idaho 474, 129 P.3d 1223, 1231-1232 (2006) it was stated:

This Court has quoted with approval the following analysis of the theory behind easements by necessity:

A way of necessity is an easement arising from an implied grant or implied reservation; it is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation.... It is a universally established principle that where a tract of land is conveyed which is separated from the highway by other lands of the grantor or surrounded by his lands or by his and those of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway. *Burley Brick and Sand Co. v. Cofer*, 102 Idaho 333, 335, 629 P.2d 1166, 1168 (1981) (quoting 17A Am.Jur. Easements § 58 (1957)); see 25 Am.Jur.2d Easements and Licenses §§ 30-31 (2005).

One who claims an easement by necessity across another's land must prove: (1) unity of title and subsequent separation of the dominant and servient estates; (2) necessity of the easement at the time of severance; and (3) great present necessity for the easement." *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 725, 874 P.2d 528, 536 (1994).

The fact that there is a third party (the Section 28 owner) between Capstar and the public highway is of no significance to Capstar's right to seek an easement by necessity across Lawrence's parcel.

Lawrence also contends that Funk created his own necessity at the time of severance by failing to recognize, develop and utilize Mellick Road as their access prior to transferring title to Capstar's predecessor. As previously discussed, there is no evidence in the record that Mellick Road provided access to Funk's Section 22 parcel at the time of their purchase or that Funk had a right to open a road across property they did not own in Section 21. Thus, the necessity for the easement claimed over the Lawrence parcel existed at the time of the severance.

As to great present necessity, Lawrence does not contend that there is a material dispute of fact regarding this element, or that the trial court drew an improbable inference. Rather, they

argue that the trial court erred as a matter of law in failing to recognize that Capstar created its own necessity for an easement through the actions of its predecessor, Funk. Lawrence claims Funk chose not to develop an access route using the Mellick Road right of way, including trespassing on property he did not own, which means in this case Capstar is precluded from claiming a great present necessity. This is yet another argument that the necessity did not exist at the time of severance. It does not present this Court with any facts that there is not great present necessity for the road at this time.

In fact, Lawrence presented the trial court evidence to the contrary in Mr. Mack's affidavit. That affidavit acknowledged when he purchased in 1996 there was no access, and to obtain access to Mellick road, he had to purchase it and develop it through a neighboring property in Section 22. Capstar has no legal right to travel over Mack's private road. Thus, it has great present necessity for the easement.

Lawrence raises on appeal that Funk only used a portion of the access easement to access his property, relying upon Funk's deposition testimony regarding the configuration of the GTC road as it approached Blossom Mountain.

Mr. Funk testified that that he drove across Section 28, and that after going through the gate on the road, Funk followed the GTE Road to the tower site. Supp R Vol. II, p. 369-370, Funk Deposition Tr., p. 52, ll. 9-25; p. 53, ll. 1-24. Mr. Funk never obtained permission of Ulrich to travel in section 28 because he thought the Mead easement gave him the right to use the easement. Supp R Vol. III, p. 371, Funk Deposition Tr. p. 53, ll. 25; p. 54, ll. 1-25.

There was a discrepancy at Mr. Funk's deposition regarding the location of Blossom Mountain as depicted by Mr. Funk in his affidavit and as compared to a map utilized by Lawrence during Mr. Funk's deposition consisting of the 1959 Metzger map. Mr. Funk indicated to Lawrence's counsel that the map he was being shown (Exhibit 1) was different than his recollection of the road and it wasn't drawn right, and that the mountain (Blossom Mountain)

was “up here” and had the tower site. Lawrence’s counsel response to this concern about the top of the mountain being “up here” on the deposition exhibit 1 was, “Yeah, you owned some land in 22, sure. Yeah, okay.” Supp R Vol. II, p. 368, Funk Dep. Tr. p. 45, Ll. 7-25; p. 46, Ll. 1-14. Later, Lawrence’s counsel presented an enlarged portion of the exhibit 1 map that Mr. Funk had indicated was not drawn right. In asking questions about the road, Lawrence’s counsel prefaced his statements with a representation that Blossom Mountain was in Section 21. Supp R Vol. II, p. 369, Funk Deposition Tr. p. 49, ll. 18-15, p. 50, Ll. 1-4. Upon further examination of deposition exhibit 2, Mr. Funk questioned counsel if the telephone company’s site was at the top of Blossom Mountain as depicted on Exhibit 2. Counsel replied “Close to the top. Okay?” Supp R. p. 370, Funk Deposition Tr. p. 55, Ll. 23-25.

However, on being shown a map by Capstar showing the tower sites identified as being in Section 22, Mr. Funk testified that the road ended at the telephone tower in Section 22. Supp R Vol. II, p. 372, Funk Deposition Tr. p. 64, Ll. 7-25; p. 65, Ll. 1-3. Further edification came when Mr. Funk testified that the road he drew on Exhibit 2 was the road that was built by the telephone company. Supp R. Vol. II, p. 373, Funk Deposition Tr. p. 68, Ll. 12-19. Mr. Funk testified when taking the route through Section 28 to the tower sites, Mr. Funk assumed he had a right to take that route. Supp R Vol. II, p. 374, Funk Deposition Tr. p. 71, ll. 18-23. Mr. Funk concluded his deposition by indicating that the road he drew on Exhibit 2 in pen was the telephone company road that existed at the time he purchased the property. Supp R Vol. II, p. 376, Funk Deposition Tr., p. 77, Ll. 5-25; p. 78, Ll. 1-10.

It is undisputed that Mr. Funk bought property in 1969. It is undisputed in 1972 he obtained an easement from Wilbur Mead for that portion of the access road which crosses Mead’s property in the Southwest Quarter of Section 21. It is undisputed Funk reserved an easement in the 1975 Sales Agreement across the Southeast Quarter of the Southeast Quarter of Section 21 to access property he retained in Section 22. It is undisputed that Funk was using the

GTC access easement that lead to GTC's tower sites as his access to Section 22. It is undisputed there was only one GTC (GTE) access road. It is undisputed that the GTC access easement was configured as depicted in Exhibit 15 of Lawrence deposition.

On appeal, Lawrence claims that the route used by Mr. Funk for accessing his property was the road drawn by Mr. Funk in Section 21 to the top of the area identified as "Blossom Mountain" in Section 21. Therefore, Mr. Lawrence argues that there was no easement across his property at the time of severance.

Although not argued by Lawrence, the issue is whether the trial court was presented with an evidentiary conflict that could not be resolved on summary judgment. Mr. Funk lives in American Falls, more than 100 miles away from the place of trial. Therefore, his testimony at trial will be confined to the written record of his deposition, and there is no additional in-court testimony to be obtained, and the trial judge alone will be responsible for choosing the evidentiary facts he deems most probable regarding Mr. Funk's testimony. As in *Argyle v. Slemaker*, 107 Idaho 668, 691 P.2d 1283 (Ct.App.1984), the issue is then whether an extension of the holding in *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982) is warranted in this case.

Because Funk's deposition testimony is inconsistent regarding the location and configuration of the GTC road, it would appear at first glance that an evidentiary conflict exists and that *Ritchie* would not empower the district judge to resolve this conflict on summary judgment. However, *Ritchie* can be extended to this type of conflict under the holding of *Argyle*. As noted in *Argyle*, *Ritchie* allows the trial judge in non-jury cases to grant summary judgment on undisputed evidentiary facts, despite conflicting inferences, because the court alone will be responsible for choosing those inferences where, as here, the evidence is entirely confined to a written record, there is no additional in-court testimony to be obtained, and the trial judge alone will be responsible for choosing the evidentiary facts he deems most probable. Under such

circumstances, *Argyle* holds that a choice similarly can be made on summary judgment. *Argyle* at 671. Thus, the trial court did not err in drawing the inference that Exhibit C to Funk's affidavit, confirmed as being correct at the deposition, was a more accurate depiction of the GTC road as it existed in 1975 as the trial court did not have to determine Mr. Funk's credibility. Mr. Funk's testimony remained constant that the road he used was the GTC road.

On appeal, Lawrence also argues there is no evidence that suggests there was an existing easement to the future Capstar parcel. However, there is ample evidence that in 1975 at the time the Lawrence parcel was severed that the GTC road ran over and across the Lawrence parcel and provided access to the Section 22 parcel.

Lawrence also contends that the land on Blossom Mountain is wild, open and unimproved lands, which establishes that Funk did not have apparent continuous use of the road prior to severance. It is not necessary to establish this element for Easement by Necessity. This argument will be discussed further in the section on Implied Easement.

E. The District Court did not Err in Finding there was an Implied Easement

In *Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 127 P.3d 196 (2005), this Court held:

A party seeking to establish an implied easement from prior use "must demonstrate three essential elements: (1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate." *Davis*, 133 Idaho at 642, 991 P.2d at 367.

Creation of easements by implication rests upon exceptions to the rule that written instruments speak for themselves, and because implied easements are contrary to that rule, the courts disfavor them. *Sutton v. Brown*, 91 Idaho 396, 400, 422 P.2d 63, 67 (1966); *Cordwell v. Smith*, 105 Idaho 71, 77, 665 P.2d 1081, 1087 (Ct. App. 1983). An easement is implied because it is presumed that if an access was in use at the time of severance it was meant to continue. *Bob*

Daniels and Sons v. Weaver, 105 Idaho 535, 542, 681 P.2d 1010, 1017 (Ct. App. 1984).

Easements by implication rest on the view that land should not be rendered unfit for use due to a lack of access. *Id.*

Apparent continuous use refers to the use before the separation of the parcels that would indicate the roadway was intended to provide permanent access to the parcels. *Cordwell*, 105 Idaho at 78, 665 P.2d at 1088. The party seeking to establish the easement has the burden of providing the facts to establish the easement. *Id.*, 105 Idaho at 77, 665 P.2d at 1087. In *Davis v. Peacock*, 133 Idaho 637, 641-42, 991 P.2d 362, 366-67 (1999), this Court held that successors in interest to the original grantors of property could assert easement rights by implied or prior use.

Strict necessity is not required for the creation of an implied easement by prior use. All that is required is reasonable necessity. *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (1999); *Thomas v. Madsen*, 142 Idaho 635, 132 P.3d 392 (2006). Reasonable necessity is something less than the great present necessity required for an easement implied by necessity. *Davis*, 133 Idaho at 642. Furthermore, the easement by implication is not extinguished if the easement no longer exists or is no longer reasonably necessary. *Id.* at 643. This Court noted in *Davis*:

This long standing rule is based on the theory that when someone conveys property, they also intend to convey whatever is required for the beneficial use and enjoyment of that property, and intends to retain all that is required for the use and enjoyment of the land retained. Consequently, an easement implied by prior use is a true easement of a permanent duration, rather than a temporary easement which exists only as long as the necessity continues. *See, e.g., Norken v. McGahan*, 823 P.2d 622, 631 (Alaska 1991); *Thompson v. Schuh*, 286 Or. 201, 593 P.2d 1138, 1145 (1979); *Story v. Hefner*, 540 P.2d 562, 566 (Okla.1975). Additionally, an implied easement by prior use is appurtenant to the land and therefore passes with all subsequent conveyances of the dominant and servient estates. *See Hughes v. State*, 80 Idaho 286, 328 P.2d 397 (1958); I.C. § 55-603 (stating that a transfer of real property also includes all easements attached to the property).

1) *Unity of Title*

Lawrence contends that the GTC road passed through Section 28, and since Funk never had title to Section 28, Capstar can not establish the unity of title necessary for an implied

easement. Capstar does not seek to establish in this suit an implied easement over Section 28. This argument is not relevant to the issues before the trial court.

Lawrence also contends the district court erred in finding that Capstar had an implied easement because Capstar's parcel was still a part of Funk's Section 22 parcel at the time of separation of the Lawrence parcel. However, a transfer of real property includes all easements appurtenant, including implied easements. *Davis v. Peacock*, 133 Idaho 637, 643, 991 P.2d 362 (1999), I.C. § 55-603. Thus, the trial court did not err when it held Capstar had an implied easement arising from the 1975 severance.

2) *Apparent Continuous Use*

Lawrence contends on appeal that the trial court erred when it found apparent continuous use. As discussed in the previous section, Lawrence characterizes this land as unimproved, open, and wild land. This argument is somewhat contrary to evidence in the record. The record reflects that the land was developed for use for tower sites and that the road was gated. There was frequent traffic on the road. Further, the testimony of Wilber Mead relied upon by Lawrence in support of this contention sheds very little light on how often Funk used the road prior to severing the Lawrence parcel. Mead indicated he did not see Funk using the road between 1966 and 1972. He did not testify Funk did not use it. Funk didn't even own the property until the fall of 1968. During his ownership, prior to severance, he went up to the property 20-30 times. Thus, there was continuous use of the road for ingress/egress to the Section 22 property.

Finally, Lawrence argues the trial court committed error because it did draw not an inference in their favor from the evidence presented that Funk's use was hardly enough for anyone to notice. In support of this claim, Lawrence directs this Court to a statement from Wilbur Mead that to his knowledge, Funk did not use the gate on the road as it crossed his property in the Southwest Quarter of Section 21 between 1966 and 1972. Additionally,

Lawrence argues Funk sold to a Minnesota corporation that would hardly have knowledge of Funk's use. Lawrence also contends that the fact that after the sale to Human Synergistics, Funk relocated to Aberdeen and didn't use the road after 1981 is significant.

The events that occurred after the sale to Human Synergistic were immaterial to the trial court's inquiry regarding the use of the access prior to the severance. The only fact that was relevant was Mr. Mead's statement that *to his knowledge* Funk did not use the gate on his property. However, this fact does not directly contradict Funk's testimony that he did use it. It was merely a scintilla of evidence that neither contradicted nor directly disputed Funk's testimony. Thus, the trial court did not err in finding that the undisputed facts it had before it, including Funk's testimony; the Farmanian grant of easement to Mack in 1996 recognizing the access road as the historical access to the site; the Human Synergistics Sales Agreement (Lawrence's predecessor) which indicated that the existing ingress/egress road was the access to the Section 22 property retained by Funk; and the use of the road which was consistent with the use and location of the property, established apparent continuous use. Supp R Vol. III, pp. 561-565.

3) *Reasonable Necessity*

Lawrence argues that the district court erred in finding there was reasonable necessity for the easement at the time of severance of their parcel. Lawrence maintains that the undisputed facts in the record demonstrate that Mellick Road extended to the Funk property in Section 15. In footnote 15, Lawrence contends that Funk identified a logging road from Section 22 to Mellick Road in Section 15. Thus, Lawrence concludes that there was access to the Section 22 property at the time Funk purchase Section 22 by connecting the logging road from Section 22 into Section 15.

In his deposition, Mr. Funk testified that there was a logging road in poor shape on the east side of Blossom Mountain. Contrary to the claims of Lawrence to the contrary, the facts in

the record show that the logging road was not open all the way to Mellick Road at the time Funk purchased Section 22, and crossed property not owned by Funk. Supp R Vol. II, p. 371 (Tr. 61, Ll. 8-25; p. 62; p. 63, Ll. 1-15). The Exhibit provided Mr. Funk during his deposition portrayed a road going through the Southwest Quarter of Section 22, into the Northwest Quarter of Section of 22, and crossing over into the Northeast Quarter of Section 21 (in areas not encompassed in the Viewer's Report of the Mellick Road public right of way) and back into Section 15.

Therefore, the portion of the road depicted in Exhibit 1 to Funk's deposition laying in the Southeast Quarter of the Northeast Quarter of Section 21 was not on property owned by Funk. Mr. Funk further testified that this road was in poor shape. Supp R Vol. II, p. 360 (Tr p. 15, Ll. 6-25; p. 16, Ll. 1-6). Mr. Funk testified he contemplated taking a bulldozer and opening up the logging road but did not pursue this idea because another property owner told him he couldn't do that. Supp R Vol. II, p. 371 (Tr p. 58, Ll. 11-25; p. 59, Ll. 1-6).

Further, the trial court's finding that Mellick Road did not provide access in 1975 was corroborated by John Mack's testimony (provided by Lawrence) that there was no alternate access road existing at the time of his purchase of the Funk Section 22 property in 1992. The trial court did not err when it found from these undisputed facts that the use of the access road was reasonably necessary at the time Funk severed the Lawrence parcel.

Mr. Funk testified the GTC road was the only road that provided access to Section 22. Mellick Road as laid out on the Viewer's report terminated in the Northeast Quarter of the Northeast Quarter (approximately) of Section 21. Thus, the undisputed facts before the trial court were that Mellick Road did not provide access to Funk's Section 22 property at the time he purchased; nor did the logging road provide access, nor did Funk have the right to extend the logging road to connect to the public right of way across property he did not own. To reach the conclusion Lawrence urges, Funk would had to have bulldozed the road to open it; crossed property that wasn't owned by Funk and over which Funk had been told he better not do it.

Lawrence included an argument on appeal that Funk never showed the Capstar parcel to Mr. Rook in 1981 and that Mr. Rook could not identify whose land the road crossed. These arguments are irrelevant to the issue of reasonable necessity at the time of severance of the Lawrence parcel in 1975.

Further, the trial court's finding that Mellick Road did not provide access in 1975 was supported by John Mack's testimony that there was no alternate access existing at the time of his purchase of the Funk Section property in 1992. The trial court did not err when it found from these undisputed facts that use of the access road was reasonably necessary at the time Funk severed the Lawrence parcel.

F. The Trial Court did not Err in Determining there was an Easement by Prescription

The standards for establishment of a prescriptive easement were reiterated in *Akers*, *supra* at 206, as follows:

A party seeking to establish the existence of an easement by prescription "must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period." *Hodgins*, 139 Idaho at 229, 76 P.3d at 973. The statutory period in question is five years. I.C. § 5-203; *Weaver*, 134 Idaho at 698, 8 P.3d at 1241. A claimant may rely on his own use, or he "may rely on the adverse use by the claimant's predecessor for the prescriptive period, or the claimant may combine such predecessor's use with the claimant's own use to establish the requisite five continuous years of adverse use." *Hodgins*, 139 Idaho at 230, 76 P.3d at 974. Once the claimant presents proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, even without evidence of how the use began, he raises the presumption that the use was adverse and under a claim of right. *Wood v. Hoglund*, 131 Idaho 700, 702-03, 963 P.2d 383, 385-86 (1998); *Marshall v. Blair*, 130 Idaho 675, 680, 946 P.2d 975, 980 (1997). The burden then shifts to the owner of the servient tenement to show that the claimant's use was permissive, or by virtue of a license, contract, or agreement. *Wood*, 131 Idaho at 703, 963 P.2d at 386; *Marshall*, 130 Idaho at 680, 946 P.2d at 980. The nature of the use is adverse if "it runs contrary to the servient owner's claims to the property." *Hodgins*, 139 Idaho at 231, 76 P.3d at 975. The state of mind of the users of the alleged easement is not controlling; the focus is on the nature of their use. *Id.* at 231-32, 76 P.3d at 975-76.

Lawrence correctly notes that the trial court made an error in its ruling regarding the prescriptive period as applied to Funk. The trial court correctly noted that in looking at the prescriptive period it was required to examine the six year period following Funk's sale of the Lawrence parcel to Human Synergistics. Funk owned the entire parcel for a six year period from 1969 to 1975. After selling the Lawrence parcel, he personally used the road from 1975 to 1981, another six year period. The trial court discussed the six year prescriptive period as being from 1969 to 1975. It is clear the trial court became confused regarding the years encompassed in the six year prescriptive use period. The evidence in the record before the trial court was that after moving to Aberdeen in 1975, Funk only visited the property two or three times and stopped visiting after 1981 or 1982 when he was diagnosed with cancer.

However, this defect in the Court's analysis regarding the time period of Funk's use does not invalidate the trial court's finding that there was a prescriptive easement established over the property. The trial court held the undisputed facts established that Funk's successors used the road openly, continuously, without interruption, under a claim of right much longer than the statutory period required. Supp R Vol. III, p. 576.

Lawrence argued to the trial court that the undisputed facts established that Capstar's use of the access road was based upon permission they granted. Supp R Vol. III, p. 571. Relying on *Akers v. D. L. White, supra*, the trial court also correctly held that the only period of time for which Lawrence could give permission was the period of time during their ownership, which commenced in 1996. The Court rejected this argument, noting that Lawrence submitted an affidavit that since taking title to the land, he maintained a locked gate on his property, stopped and turned back people whom he deemed could not demonstrate a legal right to use the road, and actively attempted to engage the sheriff's office to get their support in limiting use of the road.

Supp R Vol. III, p. 572.² Lawrence argues that the trial court erred as a matter of law in finding that Funk and its successors use of the road was not permissive. Lawrence raises two theories in support of this contention. Lawrence contends the trial court should have determined that the use was permissive based upon the fact that there was common use with the owner of the servient estate and based upon the fact that Lawrence's parcel was wild, unenclosed or unimproved.

Lawrence did not raise the wild, unenclosed or unimproved theory below, and should not be allowed to raise it on appeal. Further, Lawrence cites to no facts in the record to support this contention.

Lawrence argues on appeal that the trial court erred by failing to rule it was entitled to a presumption that Capstar's use was permissive based upon public use. In support of this argument, Lawrence cites to *Marshall v. Blair*, 130 Idaho 675, 679, 946 P.2d 975, 979 (1997). The *Marshall* court held that when the origin of use of an easement is unknown, there is a presumption of adverse use. The servient estate can rebut this presumption by presenting evidence of general public use.

The origin of the use of this easement is known. It commenced on purchase of the Funk property and continued after severance. Even if Lawrence were correct, the trial court held that the undisputed facts established Funk's use was not permissive. The trial court correctly noted that after Funk sold the property to Human Synergistics in 1975, he recorded the sales agreement which contained the clause that the parcel was subject to an ingress/egress easement for the benefit of Section 22. Even though this language did not reserve an express easement, it evidenced a claim of right for Funk and their successors to use the road for ingress and egress to Section 22, and was recorded in the real property records. The trial court concluded that this document established that the use of the easement by Funk and his successors was under a claim of right.

² The affidavit referenced by the trial court is in the record at Supp R Vol. I, pp. 146-293.

Even if these facts allowed rebuttal of the of the evidence, the record is devoid of any facts presented by Lawrence that the easement is used by the general public. To the contrary, Mr. Lawrence's affidavit testimony was that he locked the gate on the road on his property and did not allow the public to use it. It was also undisputed that the access road was gated and locked as it crossed Wilbur Mead's property and keys were given to Funk and Rook to use the road. These undisputed facts show the road was not used by the general public.

Lawrence asserts that the trial court committed error when it did not draw an inference of permissive use from the fact that Wilbur Mead's gate in the Southwest Quarter of Section 21 was locked and keys were provided to Funk and Rook. Funk had an easement across Mead's property. Mead did not impede this right, even though he used a gate and lock to impede others from using the access road. A legal right is not a permissive right. The trial court did not err when it did not draw an inference that a legal right was a permissive right.

Lawrence cite to *Hughes v. Fisher*, 124 Idaho 474, 129 P.3d 1223 (2006) for the proposition that there is no prescriptive use in the present case. In *Hughes v. Fisher*, the court reiterated the general rule that the regular crossing of another's property was presumed to be adverse with the exception where a landowner constructed a way over the land for his own use and convenience, the mere use of it by others that doesn't interfere with his use will be presumed permissive.

In this case, there is no evidence that Lawrence or his predecessor constructed the road. In the present case, there is evidence that the road existed at least around 1967 when GTE prepared a road profile of it. It certainly existed when Funk started using it, and it existed when Rook started using it. Thus, the trial court had no basis to presume that the use by Funks and others has been permissive. Lawrence did not present evidence in support of its laches claim sufficient to prevent entry of summary judgment.

G. The Trial Court Properly Considered and Ruled Upon Lawrence's Motion to Disqualify for Cause

Lawrence devotes a large portion of his brief to the argument that the district judge should have disqualified himself. Lawrence claims the trial court's impartiality could reasonably be questioned.

In support of this argument, Lawrence claims that over the course of the litigation, they perceive the judge disregarded meritorious arguments made by them. They also cite to the fact that the judge disqualified himself without cause in a former case involving their legal counsel at the time (John Whelan).

Lawrence also argues that the fact that the court took the motion under advisement and then issued a written opinion was a clear indicator that the court was no longer impartial and had a stake in the proceedings.

Lawrence also takes umbrage with rulings with which it disagrees in this case and the case with Tower Asset. Lawrence claims that rulings favorable to Capstar demonstrate that the district judge is "just a tool of these corporations."

Finally, Lawrence claims that the evidentiary rulings made on motions to strike display the district judge's prejudice against them. However, as noted above, Lawrence cite to no evidentiary rule or case in support of the claim that the trial court committed error in striking portions of their submitted affidavits. On summary judgment, a trial court is only allowed to consider admissible evidence. *Posey v. Ford Motor Credit Co.*, 111 P.3d 162 (Idaho Ct. App. 2005).

The trial court issued a thorough opinion that enunciated its reasons for denying Lawrence's motion for disqualification for cause. Supp R Vol. II, p. 66-91. This memorandum sets forth the reasons the trial court refused the motion and clearly addresses the concerns raised by Lawrence on appeal. Lawrence has raised nothing on appeal that was not addressed in the

trial court's decision except for the evidentiary rulings. Further, the evidentiary rulings made by the trial court were supported by the rules of evidence.

H. The Trial Court did not Err in Rejecting Defendants' Laches and Statute of Limitation Claims

Defendant argues on appeal that Capstar was required in its complaint to allege that it would be relying upon easement rights established by its predecessors in interest in order to proceed with its suit. Lawrence presents no case law or argument why this statement supports a claim of laches. Further, as pointed out by the trial court, Capstar's complaint did allege Capstar and its predecessors in title had used Blossom Mountain Road as it crossed the Defendants' real property for access to Capstar's real property openly, notoriously, continuously, adversely and under claim of right for a period exceeding five (5) years. Supp R Vol. III, p. 578.

Lawrence also challenges the trial court's finding that there was no evidence in the record that the doctrine of laches should not apply. On appeal, Lawrence claims they were prejudiced because the severance occurred nearly 33 years ago without any further explanation or argument. This argument was not presented to the trial court. Further, the facts on appeal show that Lawrence had an opportunity to depose both Funk and Rook. It is difficult to ascertain the prejudice Lawrence claims to have suffered. Further, Lawrence acknowledges in its brief on appeal that the catalyst for the present suit occurred when Lawrence began blocking the road. Thus, Capstar had no need to defend its legal rights until Lawrence blocked its use of the access road.

Although contained in its caption, Lawrence did not present argument on the statute of limitation defense. This Court has consistently indicated it will not consider assignments of error not supported by argument and authority in the opening brief. *Jorgenson v. Coppedge*, 145 Idaho 524, 181 P.3d 450 (2008).

VI. CONCLUSION

Defendants attempt to appeal to this Court's sympathies and passions in seeking a reversal on appeal. Extended litigation is frustrating for both sides. However, Lawrence bear some of the responsibility for the delay involved in this case. Capstar is not entitled to any less careful consideration of this matter by this Court purely because they are a corporation. All property rights involved in this litigation are equally important.

SUBMITTED this 1st day of August, 2011 *nunc pro tunc* July 6, 2011.

JAMES, VERNON & WEEKS, P.A.

A handwritten signature in cursive script that reads "Susan P. Weeks". The signature is written in dark ink and is positioned above a horizontal line.

SUSAN P. WEEKS


Attorneys for Plaintiff/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of August, 2011, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Douglas and Brenda Lawrence
P.O. Box 1027
Coeur d'Alene, ID 83816

- U.S. Mail
- Hand Delivered
- Overnight Mail
- Telecopy (FAX)



ADDENDUM

Exhibit 15 to Lawrence Deposition

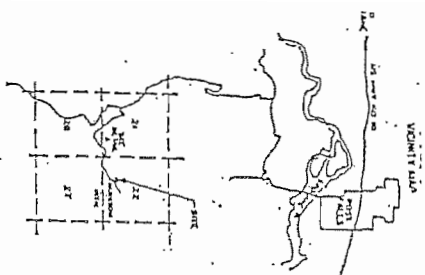
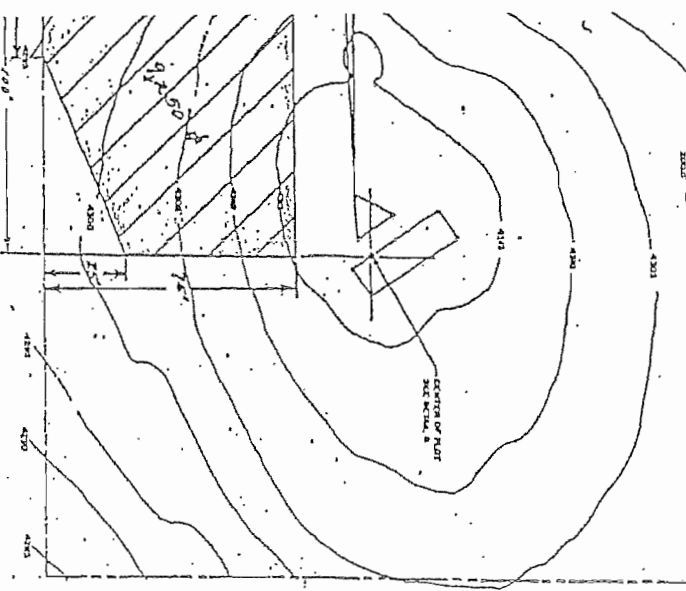
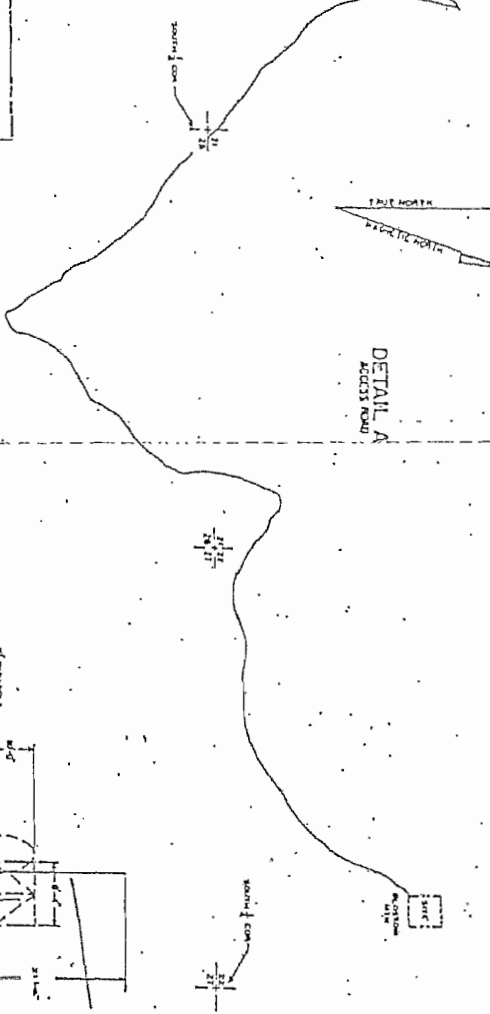


FIG. 2
FLOOR PLAN

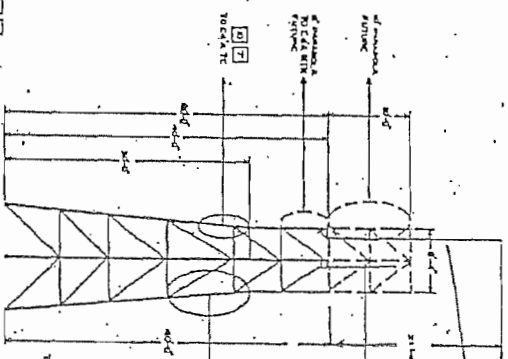


VECTRA TOWER
IS WIDENED AREA
1/2" = 1'-0"
1/2" = 1'-0"

DETAIL A
MOBILE TOWER

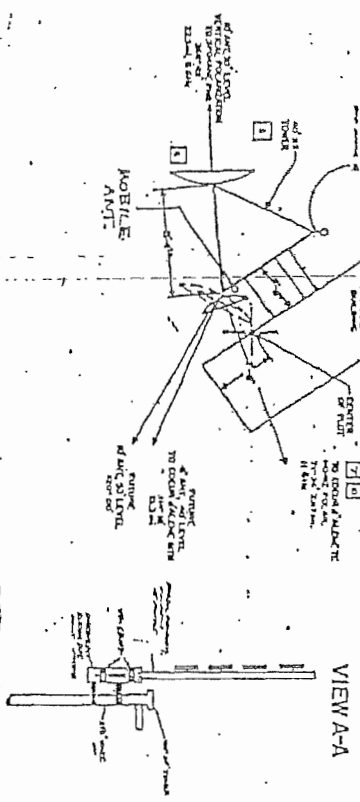


DETAIL B



VIEW A-A

DETAIL C



NO.	DESCRIPTION	DATE	BY	CHKD.
1
2
3
4
5
6
7
8
9
10

1. ALL ABUTTING ARE WITH RESPECT TO THE NORTH UNLESS OTHERWISE INDICATED.
2. GEODERPHICAL COORDINATES FOR THE SITE ARE
LATITUDE: 47° 51' 42" NORTH
LONGITUDE: 118° 58' 55" WEST
3. TOWER BASE ELEVATION IS 4350 FT. AMSL.
4. ANTENNA HEIGHT TO TOP OF ANTENNA IS
127 FT. FOR 50' X 40' ARRAY
5. ULTIMATE TOWER WIND LOADING IS 30 LB/FT² WITH
15% P.E.C.
6. WINDSPEED: 147 KTS. (MSL)
7. WINDSPEED: 147 KTS. (MSL)

T-120-PP
1

NO.	REVISION	DATE	BY	CHKD.
1
2
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LENHURT ELECTRIC CO., INC.
L-62733B3-B-110
GENERAL TELEPHONE CO. OF THE NORTHWEST
RAJON REC'D
MOSBORN 1178, 10448

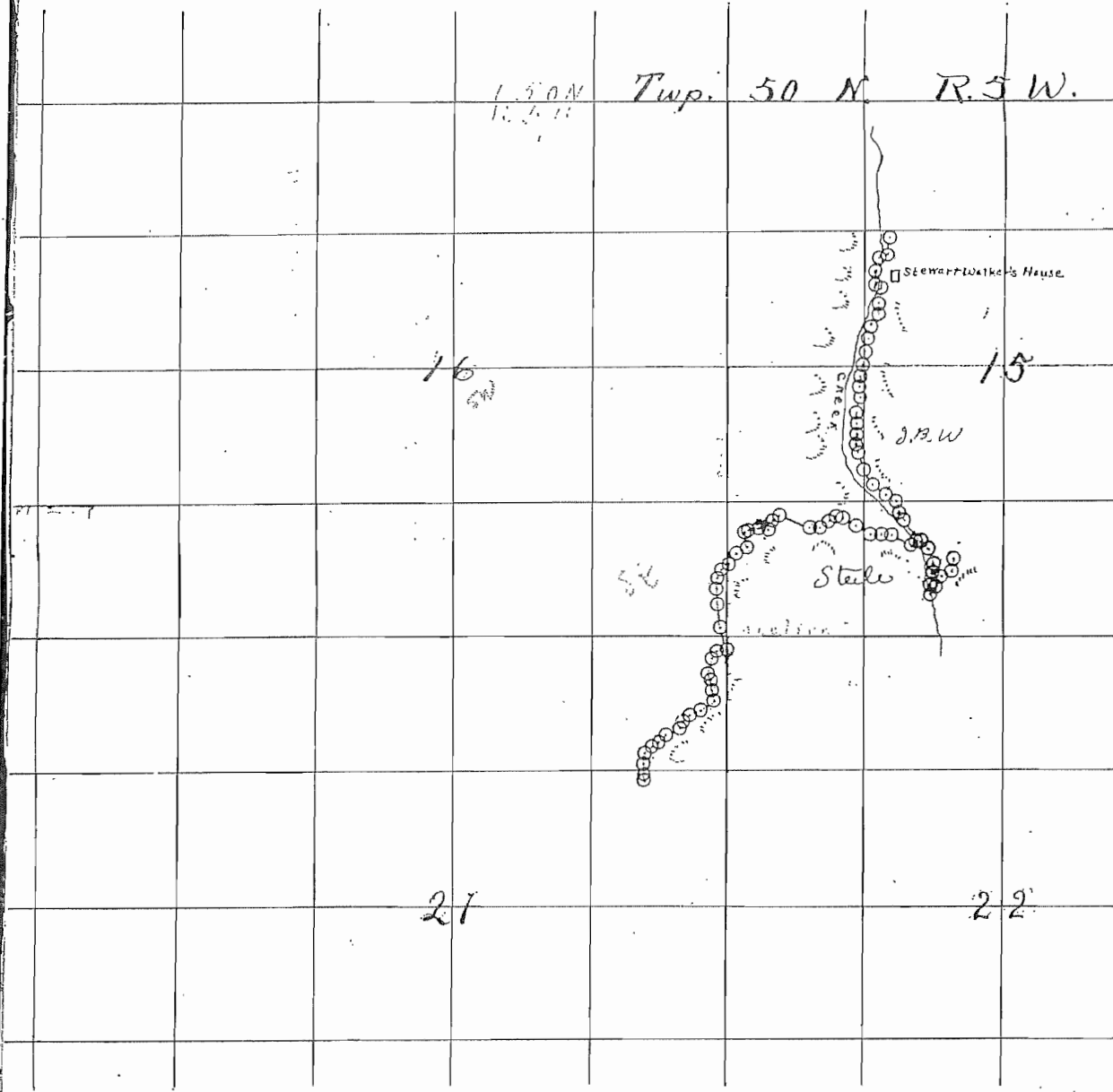
PENGAD-Bayonne, N. J.
EXHIBIT
15
R. M. ...

ADDENDUM

Viewer's Report Plot

PLAT OF SURVEY,

Road No.....



Scale 4 inches to one mile.

I hereby certify that the above is an accurate plat of said road.

W.A. Edelblute

County Surveyor

ADDENDUM

Assessor's Map of Section 22

Sec. 22 Twp. 50 N. R. 5 W. B. M.

50N05W-22

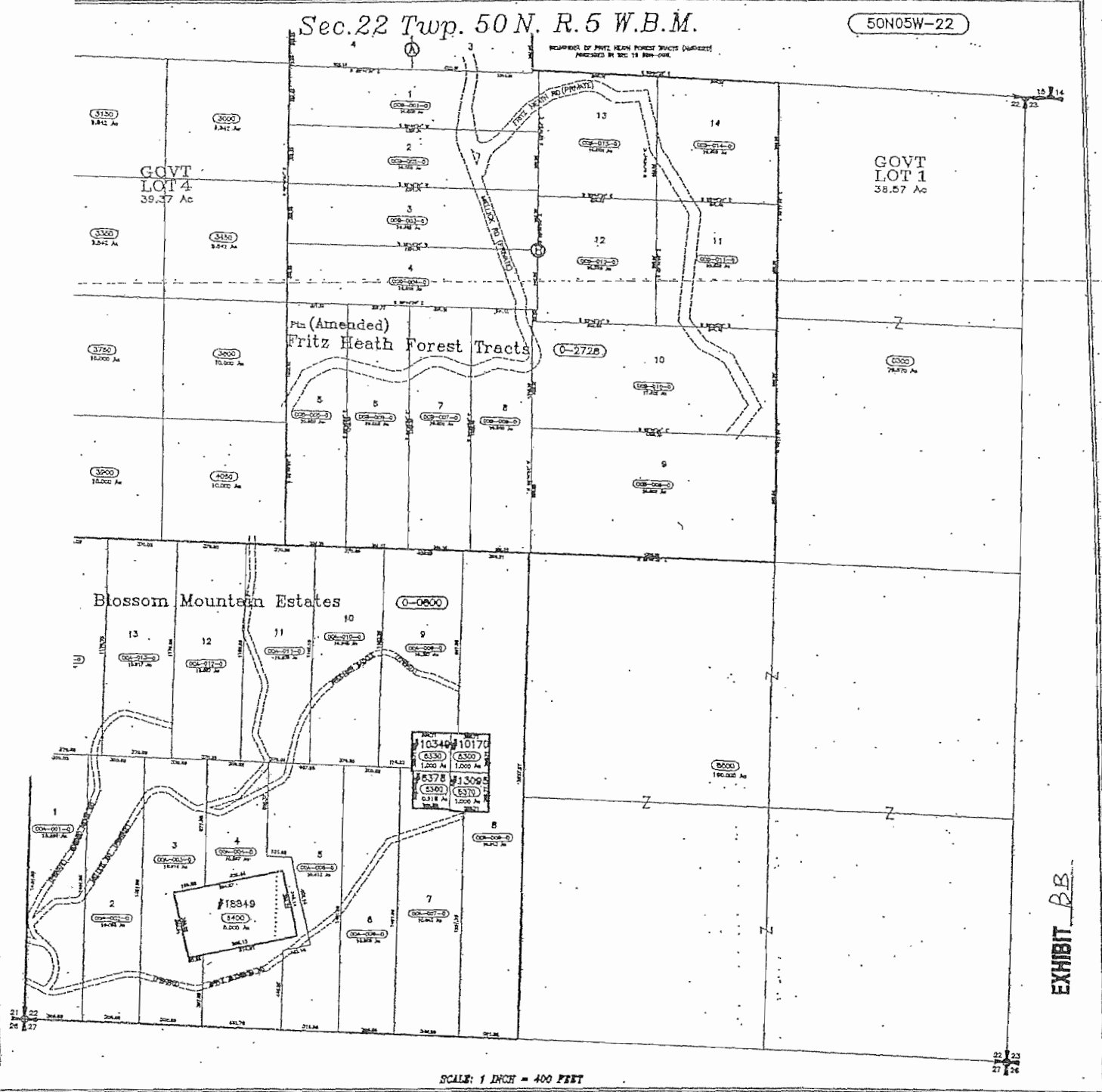


EXHIBIT B.B.

SCALE: 1 INCH = 400 FEET

Sec. 22 Twp. 50 N. R. 5 W. B. M.

ADDENDUM

Exhibit 15 to Lawrence Deposition

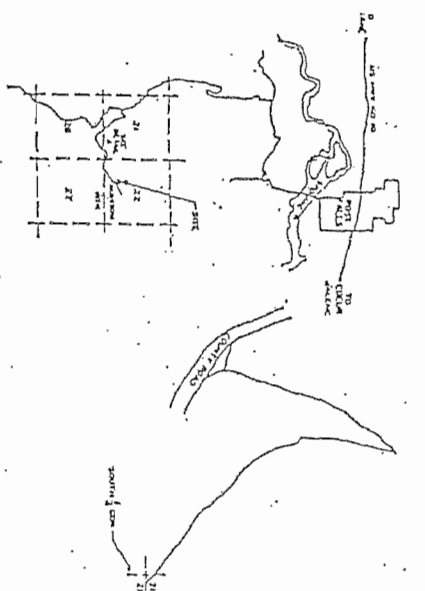
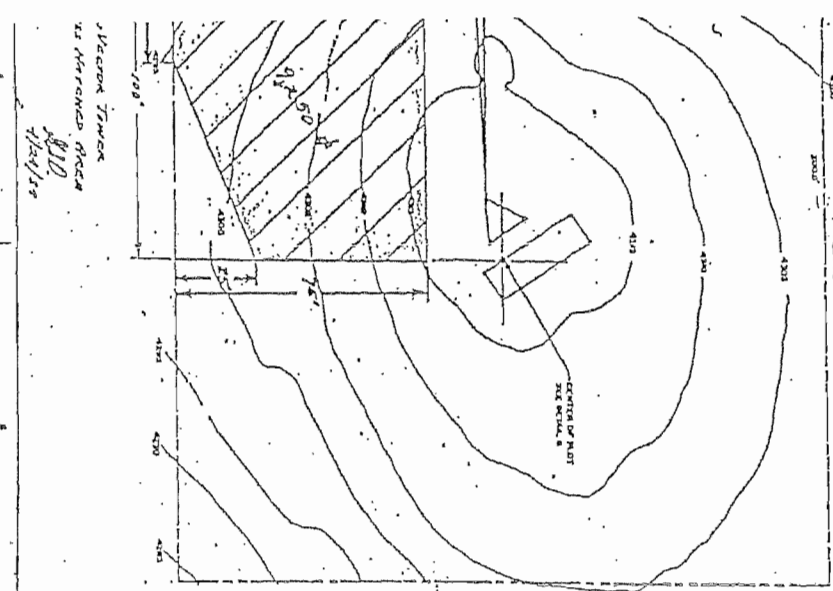
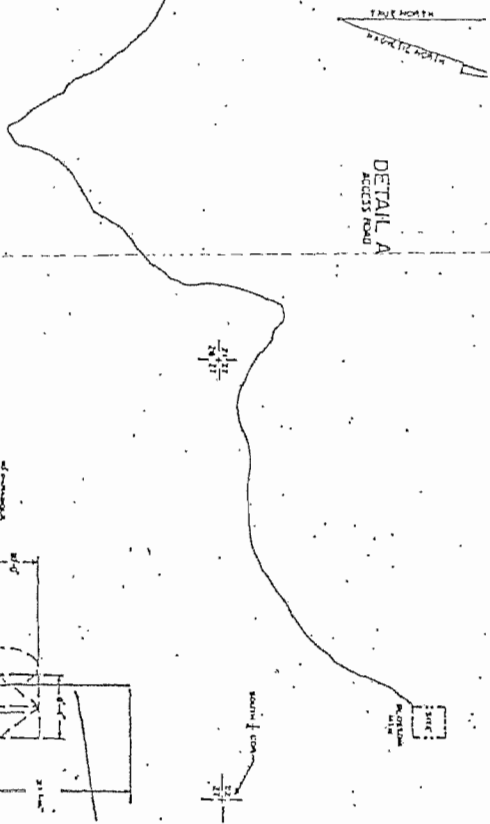


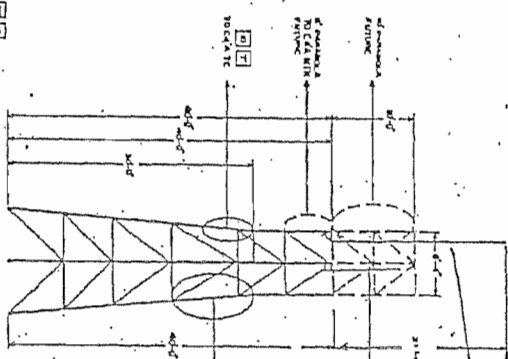
FIG. 2
PLANT PLAN



DETAIL A
FIELD ROAD

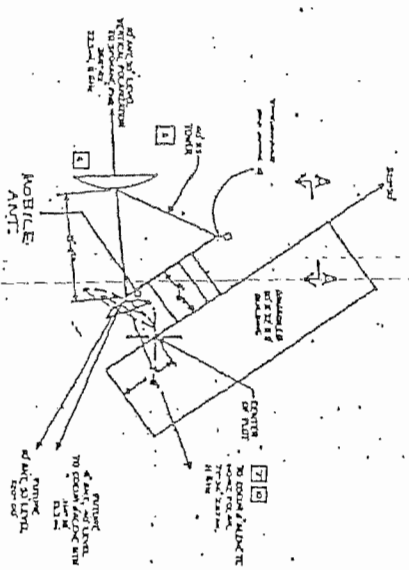
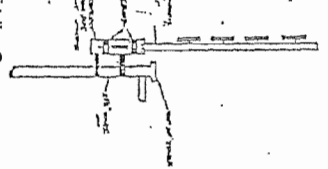


DETAIL B



VIEW A-A

DETAIL C



No.	Description	Date	By
1
2
3
4
5
6
7
8
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10

- NOTES
1. ALL DIMENSIONS ARE WITH RESPECT TO THE NORTH UNLESS OTHERWISE SPECIFIED.
 2. EROSIONAL CONTROL MATS PER THE SITE LOG.
 3. LATITUDE 47° 59' 47" NORTH
LONGITUDE 116° 58' 55" WEST
 4. TOWER BASE ELEVATION IS 4250 M.S.L.
 5. ANTENNA HEIGHT TO CENTER OF ANTENNA IS 21'.
 6. ANTENNA IS 10' SQUARE.
 7. ANTENNA IS 10' SQUARE.

T-120-PP
1

REVISION	DATE	BY	REASON
1	2-11-57	R. H. HARRISON	...
2	3-10-57	...	...
3	3-10-57	...	...
4	3-10-57	...	...
5	3-10-57	...	...

DESIGNED BY	PROJECT NO.	DATE
...
DRAWN BY	SCALE	...
...	1" = 20'	...

CONTRACT NO.	PROJECT NO.	DATE
...
CLIENT	...	...
...

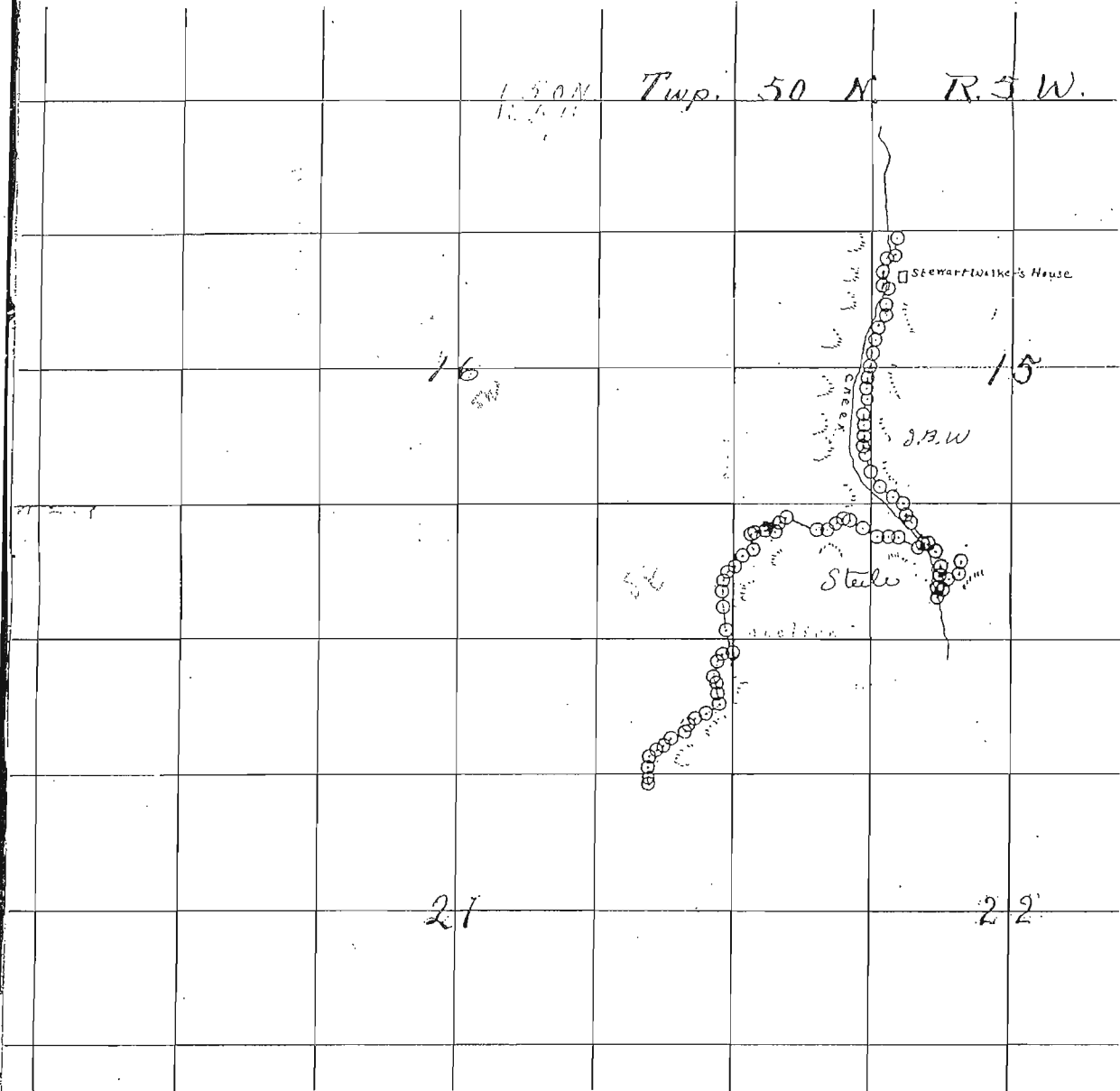
FENGAD - Bayonne, N. J.
EXHIBIT
15
R. Harrison

ADDENDUM

Viewer's Report Plot

PLAT OF SURVEY,

Road No.



Scale 4 inches to one mile.

I hereby certify that the above is an accurate plat of said road.

W. H. Edelblute

County Surveyor.

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