8-6-2012

Akers v. D.L. White Construction Appellant's Brief Dckt. 39493

IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS LYLE AKERS and SHERRIE L. AKERS, husband and wife, **Respondents,** **vs.** **D.L.WHITE CONSTRUCTION, INC., An Idaho corporation; DAVID L. WHITE and MICHELLE WHITE, husband and wife;** **Appellants,** **and VERNON J. MORTENSEN and MARTIE E. MORTENSEN, husband and Wife, Defendants,** **Appellants.**	**APPELLANTS WHITES' BRIEF** **SUPREME COURT DOCKET NO. 39493-2011** **District Court Docket No. CV 02-222**

Appeal from the District Court of the First Judicial District

of the State of Idaho, in and for the County of Kootenai

Honorable John T. Mitchell
District Judge, Presiding

Robert Covington
8884 North Government Way
Suite A
Hayden, ID 83835
Tel. 208-762-4545
Fax: 208-762-4546
Attorney for Appellants White

Leander James & Susan Weeks
James, Vernon & Weeks, P.A.
1626 Lincoln Way
Coeur d'Alene, ID 83814
Tel: 208-667-0683
Fax: 208-664-1684
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

1. Nature of the Case.

This brief is filed by Defendants/Appellants David and Michelle White and D.L. White Construction, Inc. ("White"). This appeal concerns an easement dispute in Kootenai County, Idaho, between Plaintiffs/Respondents Dennis and Sherrie Akers ("Akers") and Defendants/Appellants Vernon Mortensen and Marti Mortensen ("Mortensen"). The case was filed in January, 2002. This appeal is the third appeal following two prior appeals that resulted in remands of the matter to the trial court for further fact finding and decision consistent with the decisions of the Supreme Court on the earlier two appeals. The first decision by the Supreme Court in this matter is *Akers v. D.L. White Construction, Inc.*, 142 Idaho 293, 127 P.3d 196 (2005) hereinafter referred to as *Akers I.* The second decision by the Supreme Court is *Akers v. D.L. White Construction, Inc.*, 147 Idaho 39, 205 P.3d 1175 (2009), hereinafter referred to as *Akers II.* In *Akers II* the Supreme Court issued a decision on June 4, 2008 ordering a new trial of this case before a new judge. On January 22, 2009 the prior decision was withdrawn and a substitute opinion issued remanding the case back to the trial court for additional fact finding with respect to the location of the easement in Parcel B, and, because the awards of damages and attorney fees were vacated, a new determination of such issues in light of new fact finding regarding the location of the easement in Parcel B. At this juncture, the trial court's determinations of the location of the easement in Parcel B and its awards of damages and attorney fees to Akers are in issue. Whites have appealed the determinations of the trial court on remand as the same are erroneous. Because of the extensive briefing and work in each of the prior appeals, Whites adopt and incorporate by reference the briefing that was submitted in the prior appeals by Whites and Mortensens.

2. Course of Proceedings.

The course of proceedings in this matter were set forth in briefing submitted by Appellants in *Akers I* and *Akers II* and by the Supreme Court in its decisions in each such appeal. The present brief will not restate the course of proceedings prior to the remand in *Akers II* except when necessary to highlight important information from the original matters. The course of proceedings on remand from *Akers II* are detailed below.

Following the issuance of the substitute opinion by the Supreme Court on January 22, 2009, Mortensen through then counsel Terri Pickens filed a Motion to Disqualify Judge John T. Mitchell from any further proceedings in this case for bias and prejudice against Mortensens or to recuse himself voluntarily. Judge Mitchell denied Mortensen's motion.

On October 8, 2009 Judge Mitchell conducted a status conference in this case wherein he announced that no new evidence would be considered in further proceedings in this case to carry out the fact finding necessary to locate the easement in Parcel B and make determinations regarding damages and costs. The trial court further issued its order setting a hearing on November 30, 2009 and briefing schedule to determine which party had the burden of proof on the easement location issue. On December 1, 2009, the trial court issued its order assigning the burden of proof to the defendants. The trial court then order that no new evidence was needed to locate the easement but further determined that a metes and bounds description was necessary, though no such evidence was in the record.

After briefing and argument the trial court issued its Memorandum Decision, Findings of Fact, Conclusions of Law and Order re: Easement Location on September 29, 2010. Prior to the hearing on the easement location issue, Whites filed a Motion to Consider Additional Evidence with the trial court including therewith two high resolution aerial photographs of the access road from the USGS that showed clearly the location of the

access road in Parcel B. Without considering the offered additional evidence, the trial court located the access road easement on Akers' property, Parcel B, approximately ten feet west of the location chosen by the trial court in *Akers II*, which location had been determined by the Supreme Court to not be based upon substantial evidence. According to the trial court, the access road turned immediately south onto Whites' land a mere ten feet after entering Parcel B. After further briefing the trial court conducted a hearing on damages and awarded precisely the same damages that it had awarded in *Akers I* and *Akers II*, in the total amount of $241,000, consisting of $17,000 compensatory for trespass which were trebled, $10,000 emotional distress and $180,000 punitive damages, plus attorney fees of $105,534 for a total judgment of $346,542. Whites properly filed their objection to the award of attorney fees. The trial court nevertheless awarded the requested attorney fees.

3. Concise Statement of Facts.

Whites will not restate the entire statement of facts from their brief in *Akers I.* However, Mortensen will summarize the facts and offer more detailed facts throughout the Argument section of Appellants' Brief herein.

The Parties and Property

The Akers own real property in Kootenai County, Idaho

A road branching from a county road called Millsap Loop Road traverses Akers' property along its southern boundary which is also the southern boundary of Government Lot 2, into Section 24, (the "Access road"). (See Trial Exhibit 6, attached hereto as Appendix A). Trial Exhibit 6 is a survey map produced in July, 2002, reflecting the state of the roadway in July, 2002.

Mortensen's property is adjacent to and directly south of White's property. Mortensen acquired the property in 1994 from Floyd and Stella Peplinksi. (Trial Exhibit D-20). Mortensen acquired the entire 160 acres owned by Peplinksi, and previously owned by W.L. and Patricia Millsaps.

White's property which, as indicated, is adjacent to, and directly south of the Parcel B portion of Akers', is an 80 acre parcel the Whites acquired from Mortensen in 2001 and 2002. (Trial Exhibits D-21 and D-22). The White parcel is part of the 160 acres that Mortensen obtained from Peplinksi.

The access road has been in the same location on Akers' property since as early as 1958. (Trial Exhibits J and J-1). In August of 1965, the Access Road was well defined and visible from aerial photographs. (Trial Exhibit K-1, attached hereto as Appendix B). The Access Road remained unchanged until Akers came in the scene in 1980.

Akers purchased their property in 1980 and sometime in 1982, Akers altered the approach to the Access Road as it left Millsap Loop Road (Tr., Vol. I, p. 662, II. 3-4). In realigning to the Access Road as it left Millsap Loop Road, Akers altered the travel portion of the easement that was being used by Peplinksi. (Tr., Vol. I, pp. 661-62, II. 18-25, II. 1-5). After Akers put in the curved approach 1982, Peplinski repaired and improved the access road 1983-84 to make it passable from Millsap Loop Road to his property. (Tr., Vol. I, pp. 812-13, II. 13-25, 1-20). To accomplish this, Peplinksi rebuilt the portion of the Access Road that tied into the new curved approach over the course of two or three days using fill material that he cut from the steep embankment on the south side of the Access Road in Section 24. (Tr., Vol. I, p. 812, II. 9-12). At the same time, Peplinski adjusted the position of the Access Road in Section 24 so that it curved slightly south onto his property a short

distance east of the former turn south onto his property. Peplinski continued to use the curved path approach of the Access Road to access his property until it was sold to Mortensen in 1994.

When Mortensen acquired the property, he also used the curved approach as part of the Access Road without any opposition from Akers. (Tr., Vol. I, pp. 251-52, II. 19-25, 1-7). Before Akers sued him, Mortensen never had problems using the Access Road or its curved approach to reach his property. (Tr., p. 253, II. 19-23). After Mortensen sold the property to White, Akers began blocking Appellants access to their respective properties and simultaneously filed this suit on January 10, 2002.

Use and Maintenance of the Access Road During the Lawsuit

The district court ordered that, during the lawsuit Appellants not use the curved approach and instead travel around the gate, closer to the southern boundary of Government Lot 2. The order was problematic for Appellants because the original approach was the only way to use the Access Road. Furthermore, Mortensen and his predecessor had always used the curved approach as part of the easement. (R., Vol. I, pp. 77-79). On May 8, 2002, the district court entered a temporary restraining order, restraining Akers from blocking access to Appellants' property, but also prohibited Appellants' use of the curved approach to reach the Access Road. (R., Vol. I, p. 78). This order from the district court precipitated the construction of the 12.2 foot approach as depicted above, but it is important to note the this 12.2 foot approach was not the original traveled route to use the Access Road. As Peplinski testified, when Akers modified the approach from Millsap Loop Road, the easement was realigned and simply moved slightly. (Tr., Vol. I, p. 830, 11. 147-19). The 12.2 foot approach was a fabrication of Akers and the

district court in attempt to prevent Appellants from using the Access Road altogether because as situated, the 12.2 food approach would prevent most vehicular traffic from entering the Access Road from Millsap Loop Road.

Nevertheless, in light of the district court's order, Mortensen and White began making improvements to the area south of the curved approach as authorized by the district court. (Tr., Vol. I, pp. 264-65, II. 10-25, 1-21). The improvements were done so that Appellants could get to the Access Road from Millsap Loop Road. Photographs of these improvements and the original curved path were admitted at trial, and clearly depict the area Appellants improved to allow them to reach the Access Road. (Trial Exhibit 76, attached hereto as Appendix C.)

Akers altered the curved approach in 1982, but the west end of the Access Road remained unchanged until 1983-84 when Peplinski slightly changed the shape of the turn at that location. The trial exhibits establish the Access Road's route as it left Government Lot 2 and crossed into Section 24. Trial Exhibits D-42, D-43 and D-44, depicted the access road as it left Millsap Loop Road, and made a wide curve into Section 19 before it turned into Appellants' property. (Trial Exhibits D-42, D-43, and D-44 attached hereto as Appendices D, E, and F, respectively.) The wide turn into Section 24 still clearly appeared in the 1988 aerial photograph to which expert witness, Alan Keibert referred in his testimony about roads in the area. (Trial Exhibit E, attached hereto as Appendix G).

In January 2002, White began excavating in his property south of section 24. (Tr., Vol. I, p. 937-38, II. 4-25, 1-2). This reduced the Whites property's elevation and grade. (Tr., Vol. I, p. 938. II. 3-8). As a result, White was able to access his property just beyond the corner of Section 24 and Government Lot 2, shortening the distance he must travel on the

Access Road. Trial Exhibit 6 (Appendix A hereto) shows the new access point White created in 2002. This excavation work precipitated Akers' lawsuit on January 10, 2002. It is in this location that Judge Mitchell decided the Access Road crossed into Whites' property via a prescriptive easement.

ISSUES PRESENTED ON APPEAL

1. Did the District Court err in refusing to consider and admit additional proffered evidence relevant to the location of the easement in the area specified on the second remand for the purpose of accurately and precisely locating the easement?
2. Did the District Court err in its decision regarding the size and location of the prescriptive easement determined by the Court?
3. Did the District Court err in its award of damages, triple damages, punitive damages, damages for emotional distress and attorney fees?
4. Did the District Court err in failing to apportion the attorney fees that it awarded to Respondents?
5. Did the District Court err in failing to disqualify Judge Mitchell from further proceedings in this case?
6. Should a new district judge be assigned to this case?

STANDARD OF REVIEW

Where issues involve mixed questions of law and fact, the appellant court reviews the trial court's findings for clear error and freely reviews the conclusions of law. *Phillips Industries, Inc., v. Firkins,* 121 Idaho 693, 696, 827 P.2d 706.709 (Ct. App. 1992).

Review of a trial court's decision is limited to ascertaining whether the evidence supports the findings of fact, and whether the findings of fact support the conclusions of law. *Benninger v. Derifield,* 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (citing *Alumet v. Bear Lake Grazing Co.,* 119 Idaho 946, 949, 812 P.2d 253, 256 (1991). Since it is the province of the trial court to weigh conflicting evidence and testimony and to judge the credibility of the witnesses, this Court will liberally construe the trial court's findings of fact in favor of the judgment entered. *Rowley v. Fuhrman,* 133 Idaho 105, 107, 982 P.2d 940, 942 (1999) (citing *Sun Valley Shamrock Res., Inc., v. Travelers Leasing Corp.,* 118 Idaho 116, 118, 794 P.2d 1389, 1391 (1990). A trial court's findings of fact will not be set aside on appeal unless the findings are clearly erroneous. *Ransom v. Topaz Mktg., L.P.,* 143 Idaho 641, 643, 152 P.3d 2, 4, (2006) (citing *Camp v. East Fork Ditch Co., Ltd.,* 137 Idaho 850, 856, 55 P.3d 304, 310 (2002); *Bramwell v. South Rigby Canal Co.,* 136 Idaho 648, 650, 39 P.3d 588, 590 (2001); I.R.C.P. 52(a). In deciding whether findings of fact are clearly erroneous, the appellate court determines whether the findings are supported by substantial, competent evidence. Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven. *Ransom,* 143 Idaho at 643, 152 P.3d at 4. If the findings of fact are based upon substantial evidence, even if the evidence is conflicting, they will not be overturned on appeal. *Benninger,* 142 Idaho at 489, 129 P.3d at 1238 (citing *Hunter v. Shields,* 131 Idaho 148, 151, 953 P.2d 588, 591 (1998). The appeal court will not substitute its view of the facts for that of the trial court. *Ransom,* 143 Idaho at 643, 152 P.3d at 4 (citing *Bramwell,* 136 Idaho at 648, 39 P.3d at 588). The appellate court exercises free review over legal conclusions to determine if the court correctly stated the applicable law, and whether the legal conclusions are sustained by the facts found. *Neider v. Shaw,* 138 Idaho at 506, 65 P.3d at 528. The

findings of fact on the question of damages will not be set aside when based upon substantial and competent evidence. *Triliogy Network Sys., Inc. v. Johnson,* 144 Idaho 844, 846, 172 P.3d 1119, 1121 (2007) (citing *Idaho Falls Bonded Produce Supply Co. v. General Mills Rest. Group, Inc.,* 105 Idaho 46, 49, 665 P.2d 1056, 1059 (1983).

In reviewing an exercise of discretion, the appellate court must consider (1) whether the trial court correctly perceived the issue as one of discretion; (2) whether the trial court acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices before it; and (3), whether the trial court reached its decision by an exercise of reason. *Hughes v. Fisher,* 142 Idaho 474, 484, 129 P.3d 1223, 1233 (2006).

ARGUMENT

1. Introduction.

The case now before the Court was filed in January, 2002. The principal issue in the case was the determination of the location of an access road that had been used since at least 1945 to reach a 160 acre parcel that did not have frontage or other access to a nearby public road. A series of aerial photographs taken by the USGS and various other federal and local government entities between 1951 and 1998 depict the road in varying degrees of detail. A photograph from 1975 and 1982 were located after the initial trial of this matter and show the road in greater detail and clarity than earlier photographs. The trial court was moved to consider the later photographs in locating the portion of the road at the top of the hill on the third remand as directed by the Court. The trial court declined to consider additional evidence to locate the road at the top of the hill and rendered a decision that is clearly erroneous, particularly when photographic evidence of great clarity is

available to accurately locate the roadway. The relevant photographs are attached to this brief as Appendicies A-G. Whites request that the Court carefully examine those photographs in determining an appropriate resolution of this case. The photographs themselves make it clear that the judgment of the trial court is flagrantly contrary to and not supported by the evidence and seriously flawed due in part to a lack of mastery of the record and law by the trial judge. Whites request that the Court resolve this matter by reversing judgment of the trial court on the issue of easement location, damages and attorney fees and remanding the case for a retrial before a different trial judge so that the current manifest injustice, both procedural and substantive, with extremely damaging consequences to the defendants and unwarranted benefits to the plaintiffs, may be justly avoided.

2. Did the District Court err in its decision regarding the size and location of the prescriptive easement determined by the Court?

The decision of the district court locating the easement in Parcel B at the top of the hill is clearly erroneous and not supported by substantial and competent evidence. The trial court chose to attempt its location of the easement by limiting the evidence it considered to that evidence put in the record at the time of trial. Such evidence, as will be later demonstrated, in not sufficient to precisely locate the easement. The trial court rejected the opportunity to receive new evidence which would have easily provided the basis for a precise location of the easement reflecting the location of the Access Road during the 1966-1980 timeframe. However, the trial court in fact chose to consider new submissions in conjunction with its decision on remand that were limited metes and bounds

descriptions of locations that could arguably be substantiated by the trial record. On that basis, the trial court located the easement as shown on trial exhibit 6, a copy of which is attached to this brief as Appendix A.

It is important initially to understand the location depicted on Appendix A in the context of this case. As found by the trial court, the easement travels over 0.007 acres, 304 square feet, of Akers' property in Section 24, described as Parcel B in this case. The east end of the easement turns south crossing from Akers' property onto Whites' property 9.8 feet from the Section 19 and 24 corner which is the northeast corner of Whites' property. On this third remand, Judge Mitchell moved the easement location less than ten feet to the west from his prior location, despite the holding by the Supreme Court in Akers II. The location by the trial court on the third remand represents the third location by the trial court that ignores substantial and competent evidence establishing a location as depicted on Appendix B. Appendix B is a USGS photograph taken in 1982 which was offered by Whites that the trial court declined to consider as evidence on the third remand of this case. The location shown in Appendix B is confirmed by Appendix C, another USGS photograph taken in 1975, which Whites offered as evidence that was rejected by the trial court. The trial court location is supported only by evidence that is not substantial or competent. The location reflects a misinterpretation of photographic evidence that was submitted at trial by the trial court and a continuing distortion of the plain meaning of testimony on which the trial court relied. The trial court theory remains since the trial that the Access Road turned south immediately after crossing into Parcel B, leaving Akers' land immediately and traveling thereafter on Whites' land. If, as Rasor's map (Trial Exhibit 6) shows, that curve begins after the road dips slightly to the south onto what is now Whites' property, then the shape of that curve is rather irrelevant as it does not pertain to Akers'

land. R., p. 379. The following review of the evidence cited by the trial court will demonstrate that the determination of the trial court that the road dipped south onto Whites' land 9.8 feet after crossing onto Akers' land is clearly erroneous and not supported by substantial and credible evidence.

A. Rasor Map

The Rasor Map, Trial Exhibit 6, was produced by Rasor based upon his examination of the site in May through July, 2002. It depicts the terrain as he found it at that time. Neither his testimony nor his map purported to depict the Access Road between 1966 and 1980, the relevant time for the prescriptive easement in Parcel B. No witness testified that the Access Road location on Exhibit 6 that was selected by the trial court depicts the location of the Access Road during the relevant time period. The Rasor Map is not substantial and competent evidence of the location of the Access Road in Parcel B during the relevant time.

B. Trial Exhibit J1

The trial court relied upon Trial Exhibit J1, a photograph of the site that was taken in 1958, to support its finding that the Access Road dipped south of Akers' south property line in Parcel B before reaching the common boundary with Whites' property. The trial court examined Trial Exhibit J1 and concluded that, "In J1 you can see where the road dips south relative to the east/west section line prior to entering into Parcel B". R. Vol. 2, p. 381. Significantly, no witness testified to the conclusion that the trial court drew to the effect that the road dipped south prior to entering Parcel B. As the trial court stated, its conclusion is based upon its application of a straight edge to the photograph to conjecture that the road dipped south. One witness, Mr. Kiebert, testified about J1 and the location of the Access Road into Whites' property. Mr. Kiebert testified, "You can see the road

going into Reynolds property, and you can see part of the road going up the hill into the White property, but they've drawn a rather wide blue line right down through there so it's a little difficult to see the road. Trial Exhibit J1 was shot more than twenty-two years before the end of the prescriptive period in 1980 when Akers purchased Parcel B. An examination of that 1958 exhibit shows that the trial court's conclusion about the location of the Access Road in 1980 is not supported by that exhibit, especially recognizing the limitation testified by Mr. Kiebert as stated above. Whites submit that a reasonable trier of fact would not rely on that exhibit as the trial court has in locating the Access Road, especially in light of other evidence in the record that reflects its location during the prescriptive period of 1966-1980. It is worth noting in this regard that Trial Exhibit E, a photograph of the site taken in 1998 that is cited by the Trial Court as supporting its conclusion about the location of the Access Road actually contradicts the Trial Court. The section line/boundary that the trial court relied upon in J1 is plainly south of the Access Road where it enters Parcel B in Exhibit E. There is no evidence that the Access Road location changed in that area over the course of time. In Exhibit J1 the trial court relies upon its view of the section/line boundary to support its conclusion while it ignores the section/line boundary shown in Exhibit E, a photograph with much higher clarity than J1. Whites acknowledge that neither J1 nor E depict the Access Road during or near the prescriptive period of 1966-1980. Taken together, however, they demonstrate that the conclusion of the trial court about the location of the Access road based upon J1 is clearly erroneous.

C. Miscellaneous Other Photographic Evidence

The trial court expressed its reliance upon other photographic evidence that was admitted at trial, none of which is substantial or competent to support its conclusion that

the Access Road went south into Whites' property 9.8 feet west of the 19/24 section corner. None of the photographs cited by the trial court depict the conditions during or near the prescriptive period. For example, Exhibits 82 and 83 were cited showing the Access Road going south as the trial court found. The trial court specified that the photographs were taken in 2002, after this lawsuit was filed, more than twenty two years after the prescriptive period ended and eighteen years after Peplinski altered the course of the road in approximately 1984 to curve more onto his and now Whites' property. Most significantly, Exhibit 82 depicts the revised entrance onto the Access Road created by White and shown by Rasor on his July, 2002 survey map, Trial Exhibit 6. No testimony even indirectly suggests that Exhibits 82 and 83 reflect the Access Road location between 1966 and 1980. Similarly, various photographs in Trial Exhibit 79 are relied upon by the trial court. All of the photographs were taken and depict the site before and just after White excavated on his land in 2002 to create a new entrance onto the Access Road. The trial court states that the photographs were taken before and after Whites' construction work and yet, incredulously, concludes that the photographs prove that the Access Road in the prescriptive period turned south onto Whites property immediately after passing the 19/24 section corner. No testimony at trial contended that the location of the Access Road west of the 19/24 section corner in the prescriptive period prior to 1980 turned south onto Whites' property as depicted in the trial exhibits referenced in this paragraph. Similarly, Trial Exhibits D57 and 176 are relied upon by the trial court, though they both suffer from the same problem since they depicts the site after 1993, after the Peplinski alteration, and does not show the site in the prescriptive period. Exhibit 176 depicts the turn south off the Access Road in 2002 after Whites' work. D57 is sometime after 1993 during Mortensen's ownership and shows a different section of the road up near the gate at the west end of the

Access Road. Nor is Exhibit 57 supported by any testimony that it depicts the site as it existed during the prescriptive period. Significantly, the trial court reasons Exhibit 57 proves the trial court's location alignment with three false rationales. First, the trial court concludes that, "if this roadway from 1966-1980 continued straight across the southern edge of Parcel B for 125-150 feet as advocated by Whites and as illustrated by the Welch Comer map, then the roadway in 1993 and at present would travel on Parcel B for a shorter length, and there is no evidence of that". R. Vol. 2, p. 384. The trial court's statement about the record is false. Richard Peplinski testified that when he modified the road at the top of the hill in approximately 1984, he did not extend the road farther west on Akers' property but he did change it so that it had a tendency to curve into the Peplinski property more and widened the road out at the west end so they could turn into their Quonset hut more easily. T. Vol. I, p. 799. The slightly changed location of the road post-1984 can be easily seen by comparing the aerial photographs from 1998 showing the post-1984 configuration with trial exhibits K-1 from 1965 before the Quonset hut, D44 in 1973 after construction of the Quonset hut and D41 in 1978. The exhibits offered by Whites during the easement location phase of the case which were erroneously excluded from consideration by the trial court, attached hereto as Appendix B and C showing the road in 1975 and 1982 respectively make it apparent that the location chosen by the trial court is clear error. A reasonable trier of fact would not accept or rely upon these photographs as establishing the location of the Access Road as found by the trial court. The cited evidence is not substantial, competent or probative on that disputed fact.

The trial court erroneously discredits trial exhibits 42 and 43 as lacking accuracy for purposes of locating the easement in Section 24 on the basis of testimony provided by Akers' expert, Scott Rasor. The trial court quotes and cites Rasor's testimony regarding

the accuracy of Exhibits 42 and 43 for purposes of locating items depicted on the exhibits. Tr. Vol. I, p. 462, L. 21-p. 465, L. 5. In the most pertinent portion, Akers' counsel asks Rasor if the Access Road could be located 200 feet, "one way or the other" on Exhibit 42. Rasor replied, "I'm not saying that. I'm just saying .....you can't accurately scale off those drawings more than 200 feet,". Tr. Vol. I, p. 464-465, ll. 23-5. The plain meaning of Rasor's testimony is that scaling a distance greater than 200 feet on Exhibit 42 would introduce the potential for error, but at distances less than 200 feet, a twenty scale on Exhibit 42 would yield an acceptable level of accuracy. Despite Whites repeatedly addressing with the purpose of correction this interpretation by the trial court in various arguments and briefs, the trial court continued through the current judgment to apply its misinterpretation of the plain meaning of Rasor's testimony to support the trial court's erroneous conclusion regarding the location of the easement in Section 24 while ignoring credible corroborated evidence of the true location of the Access Road. The distance of the Access Road beyond the 19/24 corner indicated on Exhibits K-1, 1965 aerial and W, a 1998 aerial photograph, was estimated by Alan Kiebert, Whites' expert surveyor to be 150 feet. Tr. Vol. II, p. 1830, ll. 20-25. In explicably, the trial court ignored the transcript of the testimony it cited. The trial court wrote, "Kiebert was looking at Exhibits I1 and K1 in coming to that opinion. However, in neither of those aerial photographs (I1 taken in 1951 or K1 taken in 1965 can you see exactly where the section line runs.)" R. Vol. II, p. 381. In this critical statement, the trial court is plainly wrong. The trial transcript reflects explicitly that Kiebert was asked by counsel to refer to Exhibits W and K-1 to estimate the distance. Significantly, Exhibit W indicates the Section 24 section line to which counsel explicitly referred in asking Kiebert for his estimated distance. Thus, the trial court ignored or forgot the plain fact, explicitly described in the transcript, that Kiebert's

testimonial estimate of 150 feet of Access Road across the Section 24 section line was based upon Exhibit W which showed the Section 24 section line when the trial court dismissed Kiebert's estimate as "not supported by other evidence." R. Vol. II, p. 381. This example of flawed analysis by the trial court is but one example of the principal problem in this case, the trial court is confused, biased to the point of ignoring the evidence, or simply not in command of the law and evidence, despite ten years of work on this matter. Ultimately, and also ignored by the trial court on this issue, is Exhibit B to Whites' opening brief to the trial court on the issue of easement location. Exhibit B is a map prepared by Welch Comer depicting the easement location that Whites' asked the trial court to adopt. In this context, the significant fact on the map is the location of the "big tree" that was repeatedly referenced by witnesses in conjunction with the turn south of the Access Road into Whites' property. Exhibit B locates the 'big tree" 149.2 feet west of the 19/24 corner and 2 feet north of the Akers/White property line. On its face, this dimension is remarkably close to Kiebert's estimate from Exhibit W of 150 feet that the Access Road crossed into Akers' land beyond the Section 24 section line. The trial court's conclusion on this fact is clearly erroneous.

D. Testimonial Evidence Cited by Trial Court

In its Memorandum Decision the trial court cites testimonial evidence as supporting what it calls the Rasor location advocated by Akers and ultimately selected by the trial court. The cited testimony is from Richard Peplinski and focuses on modifications to the Access Road that Peplinski made. R. Vol. II, p. 386. Careful reading of the trial court's discussion of Peplinski's testimony contradicts its conclusion that the testimony "supports" the Rasor location. Peplinski testified as follows:

Q. Okay. So in performing that work did you change the preexisting configuration of the access road up in that area?

A. Yes.

Q. And how did you make—and what changes?

A. Uh, it had a tendency to curve into our property more, and it changed the corner so it would widen out so we could turn into our Quonset hut more easily.

Q. Okay. And did that have the effect of moving the westerly side of the road more westerly?

A. No. No.

Q. I'm just pointing. Did it expand out westerly?

A. From what it was originally, no.

Tr. Vol. I. p. ll. 9-23. The trial court concludes its discussion with an inconclusive either/or observation regarding whether the "curve" was on Akers' land or Peplinski's land saying that Peplinski's testimony did not identify where the curve or his roadwork was located and that Peplinski's testimony "is not helpful to Whites' proposition." R. Vol. II, p. 387. In no respect did the trial court identify any portion of Peplinski's cited testimony that is evidence that supports the Rasor location it chose. The fact is that the cited Peplinski testimony is and could not be plausibly considered as substantial and competent evidence providing support for the Rasor location. One can only wonder what the trial court was thinking when its topic sentence for the cited discussion claims that the Peplinski testimony "supports" the Rasor location when the plain reading of the testimony reveals that not support is provided.

E. Circumstantial Evidence.

The trial court claims a final bit of support for its location in circumstantial evidence in the form of the 20 x 50 easement created in 1945 on Parcel B, then owned by Millsap's father. This easement disappeared through merger of title when Millsap purchased Parcel B from his father. Interestingly, the trial court contends that the merger occurred when Akers purchased Parcel B. R. Vol. II, p. 387. Its conclusion on merger reflects another error/flaw, even now, in the trial court's understanding of elementary real estate law and is indicative of the quality of analysis and judgment supplied by the trial court in this case. In light of the fact that the easement cited by the trial court was created thirty-five years before the end of the relevant prescriptive period in 1980 and ended thirty-two years before the end of the relevant prescriptive period in 1980, described a right-of-way easement that was twenty feet wide compared to the 12.2 foot wide easement determined by the trial court and is not supported by aerial photographs taken in 1951, 1958, 1965, 1972, 1973, 1975, 1978 and 1982, the circumstantial evidence cited by the trial court could not reasonably be substantial and competent because a reasonable trier of fact would not accept it and rely upon it in determining whether a disputed point of fact has been proven, e.g. that the Access Road in Parcel B was located in 1980 as determined by the trial court. The location chosen by the trial court is clearly erroneous.

Related to the location of the prescriptive easement in Parcel B is the question of the width of the prescriptive easement in Parcel B. In light of the location chosen by the trial court, the width of the easement in Parcel B was of little importance. However, as argued above, the location chosen by the trial court is erroneous and not supported by substantial and competent evidence. The trial court ruled that the easement in Parcel B had been previously determined to be 12.2 feet, though the easement located by the trial court exceeds that width. The reality is that the easement passed much farther into Parcel B

than found by the trial court and the width of that easement is therefore important to its location.

With respect to the easement in Parcel B that is the subject of this remand, the conclusion by the trial court that it is 12.2 feet wide in erroneous and not supported by substantial and competent evidence. The Supreme Court previously ruled that the prescriptive easement in Lot 2 was 12.2 feet wide based upon Plaintiffs' Exhibits 304 and 305. Each of those exhibits is a photograph taken after the beginning of this lawsuit that depicts the road at the top of the hill as it existed in 2002. That evidence is not probative, substantial or competent to establish the location of the easement in Parcel B between 1966 and 1980 because the photographs reflect primarily only changes by White in 2002, and to a lesser extent changes by Peplinski in 1984. All of the competent evidence, especially including the Exhibits 42 and 43 and exhibits presented by Whites on remand show that the road was located much differently in Parcel B in the relevant period from the location chosen by the trial court on remand. The Supreme Court previously cited the viewing of the road at the top of the hill by the trial court in 2003 as one basis for accepting the trial court's judgment with respect to the width of the easement. However, given the modifications by White and Peplinski, no reasonable person could conclude that the viewing in 2004 in the area selected by the trial court would be probative of the location of the easement in the relevant period.

The evidence in the record together with that offered and erroneously not considered by the trial court show that the true location of the easement in Parcel B in the relevant period was 20 feet wide as it traveled approximately 150 feet across Parcel B. Photographic evidence and testimony in the record provide a basis for determining the width of the prescriptive easement in Section 24. The best evidence is Plaintiffs' Exhibit

183 showing Sherrie Akers measuring the gate at the top of the hill near the time of Akers' purchase of their property. Plaintiffs' Exhibit 191 displays the measured width of the gate at the top of the hill as 20 feet. From Plaintiffs' Exhibit 183 one can discern that the travel way is as wide as the gate across the access road in Section 24. Notably, the large shadow across the access road in Plaintiffs' Exhibit 183 is almost surely the big pine tree referenced above. Other evidence in the record regarding the size of equipment that was pulled up the access road confirms its width being approximately 20 feet.

As a component of its work in generating a metes and bounds description of the prescriptive easement, Welch Comer ascertained the dimensions of the roadway in Section 24 that is depicted on Defendants' Exhibits 42 and 43. The width of the depicted roadway on Akers' property in Section 24 in those exhibits is approximately 30 feet. It should be understood that the northern line of that roadway as depicted in the referenced exhibits is along the toe of the roadway, meaning the junction between the natural slope of the hillside and the earth that was pushed down the hill during construction of the roadway, not along the edge of the travel way.

The trial court's judgment that the easement in Parcel B is 12.2 feet wide is erroneous and not supported by substantial and competent evidence. Most simply, because the Plaintiff always contended that the easement did not travel into Parcel B, evidence of its width in Parcel B in the relevant time from the Plaintiffs' was essentially non-existent except photographs near the relevant time that showed a 20 foot wide roadway. Evidence cited by Whites above from the record demonstrates clearly that the roadway was approximately 20 feet wide in Parcel B during the relevant time between 1966 and 1980.

The Supreme Court should correct the trial court errors on the location of the easement and direct a special master to determine the width of the easement in Parcel B

based upon either the evidence in the record and offered by Whites on remand or direct an evidentiary hearing to place into the record evidence of the location of the easement in Parcel B, including its width, during the relevant time.

3. Did the District Court err in refusing to consider and admit additional proffered evidence relevant to the location of the easement in the area specified on remand for the purpose of accurately and precisely locating the easement?

During the process established by the trial court on remand for locating the roadway in Parcel B Whites offered additional evidence demonstrating clearly the precise location of the roadway in Parcel B during the prescriptive period from 1966-1980. Copies of four United States Geological Survey photographs from 1975 and 1982 are attached to this brief as Appendix H and I. This evidence is the clearest evidence before the court of the location of the access road during the relevant time. The trial court rejected this evidence when offered by Whites for the purpose of locating the access road in Parcel B. R. Vol. 3, p. 575. This decision by the trial court was erroneous and should be reversed and the issue remanded so that the access road may be located in a manner consistent with its true location during the relevant period.

For more than fifty years cases in Idaho have held that in easement litigation where the location of the easement is in issue, the trial court is to precisely locate the easement using a metes and bounds description. *Sinnet v. Werelus,* 83 Idaho 514 (1961). In furtherance of an accurate determination, the trial court may conduct evidentiary hearings to receive additional evidence for the purpose of precisely locating the easement. Id. at p. 958. The principal established in *Sinnet* that the trial court may take additional evidence has been reiterated on numerous occasions since *Sinnet* was decided.

At its initial status conference on remand, the trial court announced that it would not take new evidence regarding the location of the access road in Parcel B. No explicit reason was announced at that time except that the trial court believed the record was sufficient to meet the criteria for precision. The trial court next addressed the issue of additional evidence of the location of the easement in its Order Regarding Burdens of Proof, and Order Establishing Briefing Schedule on Easement Location dated December 1, 2009. R. Vol. 1, p. 153. In paragraph 2 of that order the trial court stated as follows: " No additional evidence regarding location of the easement is needed, however, a metes and bounds description of the location as found by the Court will be necessary to comply with Idaho case law." R. Vol. 1, p. 154. There was no explanation or other reasoning by the trial court to support its decision. Even this order is internally contradictory as there was no evidence in the record at that time of a metes and bounds description of any easement in Parcel B. Plainly additional evidence was needed as admitted by the trial court but it did not want to permit any evidence other than a metes and bounds description. It seemed apparent that the trial court then knew where he wanted the easement to be and did not want to provide Whites an opportunity to present their evidence on the easement location issue. So, no additional evidence was "needed" but additional information in the form of a metes and bounds description was "needed". Surely such information was "evidence" so that the trial court did "need" data but not "evidence". The trial court in fact received "evidence" but Whites had no opportunity to present their own evidence, or to rebut, discredit or otherwise impeach the data the trial court needed. An evidentiary hearing should have been held to provide due process to Whites with respect to the easement location.

During the course of briefing to the trial court on the issue of easement location, Whites nevertheless moved to trial court to consider additional evidence of the location of the easement citing *Sinnet* as authority and submitting to the trial court copies of USGS photographs taken in 1975 and 1982 as examples of evidence that might be offered to prove the location of the easement. The trial court denied Whites motion to consider additional evidence. The trial court failed to analyze the offer of additional evidence regarding the location of the easement in the manner or for the purpose prescribed by *Sinnet* and its progeny. "This Court also agrees that the cases cited by Whites: *Sinnet* and *County of Bonner* , neither direct a new trial nor the reconsideration based on this "new evidence". R. Vol. 3, p. 514. Seemingly, the trial court did not understand that *Sinnet* established a "necessary" test to determine whether additional evidence should be taken to establish the location of an easement. The trial court then acknowledge that it "looked" at the photographs and concluded without considering any other testimony or evidence related to the photographs that "they certainly are not sufficient to cause this Court to grant a new trial". R. Vol. 3, p. 515. Incredibly and absolutely wrongly, the trial court then reasoned that it deny Whites' motion to consider additional evidence including the submitted photographs because "Thus, these photographs of the road in 1975 and 1982 are not taken *at the pertinent time period,* which was, and still is, 1966. Also, there were other photographs considered by the Court, which were taken at times near 1975 and 1986. Thus, the fact that these "newly discovered" photographs are more clear is of no assistance to the Court." R. Vol. 3, p. 515. Without further analysis or comment, the trial court ended its consideration of the additional evidence offered and took no new evidence except the metes and bounds description for location selected by the trial court.

Whites submit that the trial court erred in failing to conduct a hearing to consider additional evidence regarding the precise location of the easement in Parcel B and in rejecting the 1975 and 1982 photographic evidence that Whites offered. The 1982 and 1975 photographic evidence are "more clear" depictions of the road in Parcel B as noted by the trial court. Explanation of the offered photographic evidence by Mike Hathaway, the expert whose affidavit identified the evidence and supported Whites' motion to admit additional evidence would establish clearly the precise location of the access road in Parcel B. The failure of the trial court to take additional evidence to determine properly the true location of the access road impaired a substantial property right of Whites in having the right to access their property.

Whites believe that the standard of review on an issue of the trial court erroneously deciding not to take additional evidence on remand except the metes and bounds description of a location advocated by a party as authorized by *Sinnet* and its progeny is not clearly established by precedent. However, even under an abuse of discretion analysis, the decision of the trial court on this issue was erroneous. First, the trial court did not indicate in its discussion of its decision not to receive new evidence on remand regarding the location of the easement nor in denying Whites' motion to admit the photographs from 1982 and 1975 that it regarded the decision as a matter of discretion. The trial court completely failed to address the standard of evaluation as to whether it was "necessary" or useful to take additional evidence on the issue. In light of the discrepancy between the Supreme Court prior decision that the access road traveled around the hill before turning south, the plain photographic evidence showing the access road during the relevant time, the absence of substantial and competent evidence supporting the location chosen by the trial court and the acknowledgement by the trial court that some additional evidence in the

form of a metes and bounds description was needed, additional evidence was necessary. Second, the trial court failed to apply the applicable standard from *Sinnet* in its decision, though *Sinnet* was referenced. R. Vol. 3, p. 515. Further, the trial court specifically stated that 1966 was the "pertinent time" for determining the location of the prescriptive easement and reasoned that the 1975 and 1982 photographs were not relevant as they were not taken during the "pertinent time". This conclusion applies the wrong legal standard as the period of prescriptive use was between 1966 and 1980. The continuing inability of the trial court to correctly manage the facts and legal standards on this issue in this case cast doubt on its capabilities to exercise its function appropriately. Third, because of the flawed understanding of the applicable legal standard, the decision of the trial court was not reached by an exercise of legally cognizable reason. Finally, acknowledgement by the trial court that the 1975 and 1982 photographs are "more clear" than other evidence argues strongly that reason would dictate that new evidence be adduced to aid in the proper location of the access road. R. Vol. 3, p. 515. The trial court's decision not to consider additional evidence on the issue of access road location in Parcel B should be reversed so that justice may be credibly served.

4. **Did the District Court err in its award of damages, treble damages, punitive damages, damages for emotional distress and attorney fees?**

The trial court erred in its award of damages, treble damages, punitive damages, damages for emotional distress and attorney fees. Each element of error will be addressed below. In general, however, it is notable that the trial court has not altered its determination of damages in any respect subsequent to its initial decision in this matter in 2004, though the decisions regarding the facts and appropriate application of law to facts in

this case have changed substantially. In conjunction with the initial and ongoing evident confusion of the trial court with regard to understanding the applicable law such as the relevant time for determining the nature of the prescriptive easement and its location of the easement in Parcel B without the support of substantial and competent evidence demonstrates the absence of credible and carefully reasoned analysis in the case. In its place has been substituted a confused analysis unsubstantiated determination that does not serve well the ends of justice.

Certain of the Court's determinations regarding damages to Akers are not now supported by substantial and competent evidence or under the law applicable to the particular damage issues. These determinations of damage are erroneous and should be reversed.

Compensatory Damages.

The first of the erroneous damage decisions is the determination that $2210 for material and labor to repair and restore the easement roadway to its original condition in the area of the express easement. Of that amount, $1760 was to repair damage from tracked vehicles. The trial court stated that it was unreasonable that tracked vehicles used the easement roadway without any reference to factual support for that conclusion. The record does not contain any evidence that the tracked vehicle could have been carried up the easement road on a trailer. The trial court's conclusion was conjecture. Further, Defendants owned the dominant estate with respect to the easement roadway and had the right to use and maintain the easement road. The record showed that historically tracked vehicles had used the roadway to access the land served by the easement. Akers changed the roadway to suit his needs but as the owner of the servient estate he is not entitled to compensation when the easement road is used in a manner consistent with its historic and

lawful use by the owner of the dominant estate. Thus, Akers are not entitled to recover the $1760 for restoration of the easement roadway.

Second, the trial court improperly awarded Akers $6000 for "compensation" repairing damage to "Plaintiff's approach and restoration to land outside the easement". Careful review of the relevant testimony confirms that this work was on the easement road and ditches along the road and not attributable to any trespass by Defendants. (Tr., Vol. II, p. 1312 ll. 12-20, p. 1313, ll. 4-20). This component should be removed from any damages allowed to Akers as it consisted of grading and cleaning on the easement and removing mud from a ditch near his approach.

The trial court improperly awarded Akers $1939 for damage to his truck for an occurrence that took place within the easement area. Defendants were engaged in lawful use of their easement when Akers obstructed passage of a tracked vehicle driven by Mortensen. Defendants were the owners of the dominant estate and Akers was not permitted to use the easement in a manner that interfered with use of the easement by owners of the dominant estate. Akers is not entitled to recover damages that he caused by obstructing lawful use of the easement. This component should not be allowed to Akers.

Treble Damages.

The judgment entered by the trial court trebled the $17,002.85 property damages adjudged by the trial court to a total of $51, 008 on the authority of I.C. 6-202. The decision of the trial court to treble its damage award was erroneous in that it based upon findings of fact that are not supported by substantial and competent evidence and upon a wrongful application of the law to the facts. Damages pursuant to I.C. 6-202 may only be trebled where the trespass conduct of Whites was willfully and intentionally committed and that "No Trespassing" signage have been posted as required by statute. *Earl v. Fordice,* 84

Idaho 542, 374 P.2d 713 (1962). The rationale for the requirement that trespass be willful and intentional was expressed by the Idaho Supreme Court through a quotation from a California case that was regarded as instructive: "We think it entirely clear that the cutting of trees upon another's land, under the impression that the party had not gone beyond his own boundaries, was not within the contemplation of the legislature. Moral justice would forbid any extraordinary infliction in such a case, and the damages recoverable at common law would afford an adequate reparation." *Menasha Woodenware Company v. Spokane International Railway Company,* 19 Idaho 586, 115 P. 22.

The trial court held that "Defendants exceeded the scope of their easement on the terminus end. Accordingly, plaintiffs remain entitled to treble damages for 'Defendant's willful trespass ... pursuant to I.C. 6-202". R., Vol. 3, p. 524. The trial court used the expression "terminus end" to refer to the area at the west end of the access road in Parcel B. The trial court referred to its January 3, 2003 Findings of Fact and Conclusions of Law and Order in this context. It is notable that at that juncture, the trial court had determined that no easement existed in Parcel B and there was no specification where in Parcel B any trespass occurred. Despite the reversal of the trial court's judgment on this issue, its finding of fact was not modified by the trial court nor was any new finding of fact adopted to establish where in Parcel B the trial court determined any trespass occurred, even in light of the trial court's choice of location for and easement in Parcel B. There is no evidence that Defendants trespassed in Parcel B, even if limited to the location of the easement chosen by the trial court. The trial court simply adopted its prior findings and conclusions without regard for the changed fact that Whites have an easement in Parcel B. The trial court acknowledged that Whites and Mortensens knew that at best they had a prescriptive easement across the western portion of Akers' land. R., Vol. 3, p. 521. This

statement confirms that Whites and Mortensens believed that they had the right to cross the western portion of Akers' land to access their own lands and negatives the conclusion that in traveling across the western portion of Akers' land that they intentionally and willfully trespassed. The statement by the trial court that the Defendants exceeded the scope of their easement on the terminus end is not supported by substantial and competent evidence. The terminus end is significant to the trial court because Akers had posted a "No Trespassing" sign at the section line between Sections 19 and 24 which is also the line between Government Lot 2 and Parcel B. Thus, prior to the determination that Whites have an easement in Parcel B, the signage requirement would have been satisfied at that location. However, in light of the current state of Whites easement rights, the signage at that location does not support treble damages. It is notable that none of the property damages found by the trial court were located in Parcel B. There is no basis for treble damages based upon facts at the terminus end of the access road.

Pursuant to I.C. 6-202 the threshold question in determining whether the statute applies is whether "No Trespassing" signs are posted as required, with the exception of timber trespass which does not apply in this case. In the absence of necessary posting, common law trespass applies. If the posting requirement is satisfied, then the statute authorizes treble damages and attorney fees. That the trial court erroneously understood I.C. 6-202 is apparent from its holding that "I.C. 6-202 simply requires that the "No Trespassing" signs be located 600' feet apart in order to allow for an award of damages." R., Vol. 3, p. 525. The trial court clearly believed that it could only award damages if it held that the sign posting by Akers satisfied the requirements of I.C. 6-202 and did not understand that 6-202 only authorizes special sanctions in addition to common law trespass damages when its requirements are satisfied. This mistake by the trial court is erroneous.

Whites submit that the sign posting in this case did not satisfy the requirement with respect to conduct by Whites on the access road in Government Lot 2 or in the disputed triangle area and therefore, treble damages and attorney fees are not authorized by I.C. 6-202 in this case. One No Trespassing sign was posted were along the edge of the access road near the bog area, one was on the Akers' gate on Akers' curved approach and one at the top of the hill near the Section 19/24 corner. R., Vol. 2, p. 426. There were no No Trespassing signs in the disputed triangle where some damage occurred. The easement road itself could not have been lawfully posted against use by Whites and it was not posted by Akers. The question presented by these facts is whether the notification purpose of the statute with respect Akers' claim of ownership of the disputed triangle and his claim of preclusion of Whites' development of the express easement within its boundaries was accomplished by Akers' posted signage. If the posting was not sufficient to bring the provisions of the statute into play with respect to actions on the access road or within the disputed triangle, then there is no lawful basis for treble damages or attorney fees to awarded against Whites. Whites submit that the posting was not sufficient as to the access road as Whites had lawful right to use the access road. Whites submit that the posting was not sufficient as to the disputed triangle as the posting did not incorporate the area into space owned by Akers and protected by posting. There is no claim or evidence that Whites went upon and caused damages Akers' property within the posted zone. The statute requires that the signage be posted "spaced at intervals of not less than one (1) notice per six hundred sixty (660) feet along such real property". I.C. 6-202. The sanctions of the statute apply to one who enters upon the real property of another with such posting, intentionally and willfully. Whites find no precedent in this jurisdiction that interprets this aspect of I.C. 6-202. Whites submit that the legislature intended that the sanctions of

I.C. 6-202 not extend beyond the lines established by the posting of signage along the property. Thus, only common law trespass applies to areas of real property beyond or outside the lines established by postings spaced at intervals of not less than one (1) notice per six hundred sixty (660) feet along such property while the special sanctions apply inside or within the lines established by such postings. In this case, Whites submit that I.C. 6-202 does not authorize any of the treble damages sanctions imposed by the trial court upon Whites for damages in the disputed triangle or found by the trial court on the access road itself in Government Lot 2.

The decision of the trial court holding Whites liable for trebling of damages found in the disputed triangle is erroneous for the reason that Whites conduct there was not an intentional and willful trespass into that area. The disputed triangle area is a small area between Akers curved approach, the express easement along the south boundary of Government Lot 2 and the access road to the express easement turning off Millsap Loop Road. Much of this litigation involved a contest to determine ownership of the disputed triangle that required resolution of mistakes and oversights by surveyors defining boundaries twenty years before this suit was filed and patterns of use established in the 1050's and 1960's. No deed granted the disputed triangle to Akers until long after this suit was filed. The area was deeded to Whites by a predecessor in interest six months after the litigation began. Only in January, 2003 was ownership determined by the trial court. There is no claim of trespass causing damage in the triangle area after the summer of 2002. There are no facts in the record that are identified by the trial court as demonstrating that Whites did not have a genuine belief that they had the right to use the triangle area to access the express easement. Mr. Whites testified regarding his placement of fill material in the disputed triangle that he did not place the fill on the site until after it had been

professionally surveyed and the property lines located. Tr. Vol. I, p. 372. Ll. 3-p. 373. Ll. 5. Whites testimony in this regard was not controverted. When a party is trespassing on property that the party believes he owns, any invasion of property rights cannot then be willful and intentional, but merely negligent. *Bumgarner v. Bumgarner,* 124 Idaho 629, 639, 862 P.2d 321, 331 (Ct. App. 1993). Where negligence is the cause of the trespass, no treble damages can be awarded for the trespass involving that portion of property. *Id.* The Whites acknowledge liability for damages in the disputed triangle, but the holding trebling those damages should be reversed on the grounds that it is not supported by substantial and competent evidence and is clearly erroneous. Despite the Supreme Court's direction that damages be re-examined based upon the decision on the scope of the easement, Whites note that the trial court failed to make any adjustment to is finding of damages in the disputed triangle based upon its expansion of the east end of the access road beyond the location established in its January 3, 2003 order. Whites submit that damages there should be redetermined based upon the current determination of the easement location.

The trial court erred in holding that Whites are liable for estimated costs of returning the surface of the access road to the condition in which it existed immediately prior to use of the access road by Whites in moving equipment up the hill for work Whites did on their property and bringing fill material down the hill to render the boggy area of the access road passable. The undisputed facts with respect to this issue are that the access road had long been used by tracked vehicles and trucks to access the top of the hill area now owned by Whites. Over the years since Akers purchased the property in 1980 Peplinski and then Akers maintained the road and Akers later improved the access road for his own use by building up an oiled and gravel surface between the junction of his curved access onto the easement road and his driveway which joins the easement road part

way up the hill. When Whites used the easement road to take tracked equipment up the hill the oiled and graveled surface was penetrated by the tracks in places so that the surface became broken.

The Supreme Court extensively analyzed and determined the issues raised by Whites' use of the easement road in *Walker v. Boozer.* 140 Idaho 451, 95 P.3d 69 (2004). As Whites are the owners of the dominant estate with respect to the easement road, they have the right to use the roadway in the manner contemplated by the parties when the easement was created in 1966.

> **The duty of maintaining the easement rests with the easement owner (i.e. dominant estate), even when the servient landowner uses the easement. *Sellers v. Powell,* 120 Idaho 250, 251, 815 P.2d 448, 449 (1991). That duty requires the easement owner maintain, repair, and protect the easement so as not to create an additional burden on the servient estate or an interference that would damage the land, such as flooding of the servient estate. (Citations omitted). This duty to maintain does not mean that the easement owner is required to maintain and repair the easement for the benefit of the servient estate. *Rehwalt,* 97 Idaho at 636, 550 P.2d at 139. .... It follows then, that absent a showing that the easement owners' maintenance of the easement created additional burden or interference with the servient estate, the servient estate cannot dictate the standard by which the easement should be maintained, expend funds to maintain it to the level desired by the servient estate and then seek reimbursement for those expenditures and contribution for future expenditures from the easement owners.**

***Id.* at p. 74. Akers' claim for damages for the costs of repairing the easement road are in the nature of a claim for contribution to maintain a surface of Akers' choosing which is less tolerant of tracked vehicles than the road surface maintained by Millsaps and Peplinski on the easement road. There is no evidence in the record that the use of the easement road by Whites created a greater burden on the servient estate than had been true when the easement was created in 1966. In the absence of such a showing, there is no basis in the application of the law to the facts to award to Akers as damages the costs of repairing the surface to their standard and no basis for trebling any such damages under 6-202 as Whites were lawfully on the easement roadway.**

Emotional Distress Damages to Sherrie Akers.

On remand the trial court against reinstated its prior award of $10,000 in damages against Whites and Mortensens to Sherrie Akers for negligent infliction of emotional distress. The trial court made no additional findings of fact on this issue and reinstated its award based upon the same findings as on previous remands. Notably, though the Supreme Court held in *Akers II* that any liability on the claim for negligent infliction of emotion distress must be based upon a breach of a recognized legal duty. The trial court made no specific holding identifying a breach of a recognized legal duty in its decision on remand. Its prior holdings were based upon the sole contention that Whites malicious behavior occurred while she was trying to prevent trespass on her property. The Supreme Court noted in *Akers II* that the trial court predicated the award of damages for negligent infliction of emotional distress on Whites' and Mortensens' malicious behavior while trespassing on Akers' property. The one incident that was described by Sherrie Akers in her testimony occurred when an employee of D. L. White Construction, Inc. was backing a dump truck down the easement road in the process of dumping fill in the approach area. Tr. Vol. II, pp. 1325-1326. Sherrie Akers placed herself on the easement road near the backing dump truck and felt fearful when the truck came near to her. Because Whites' operator was on the easement road, he was not in violation of a recognized legal duty during the described encounter and therefore the claim for negligent infliction of emotional distress must fail as to that encounter. A second event cited by the trial court was an encounter between Sherrie Akers and David White on an occasion when White had called the sheriff's office to have an officer come out to the site to inspect the removal of fill material by Akers or Reynolds. Tr. Vol. II, p. 1325. No holding of the trial court identifies any independent legal duty that was violated in that encounter. In both instances, the

holding of the trial court that Whites are liable for negligent infliction of emotional distress is clearly erroneous and should be reversed on the ground that the judgment is not supported by substantial and competent evidence of trespass or any other fact that constitutes violation of an independent legal duty.

Whites submit that the judgment of the trial court on Sherrie Akers' claims for negligent infliction of emotional distress should be reversed and dismissed on the alternate ground that the easement dispute in this case arises from a contract in the form of the easement reservation in 1966 by Millsap. The dispute in this case is whether Whites use of the easement road complied with the easement reservation on the road as it existed in 1966. "When a claim arises from a breach of contract, there can be no recovery for emotional distress suffered by a plaintiff." *Brown v.Fitz,* 108 Idaho 357, 699 P.2d 1371 (1985).

Punitive Damages Against White

An award of punitive damages will be sustained on appeal only when it is shown that the defendant acted in a manner that was an extreme deviation from reasonable standards of conduct, and that the act was performed by the defendant with an understanding of or disregard for its likely consequences. *Cheney v. Palo Verdes Inv. Corp.,* 104 Idaho 897, 904-905, 665 P.2d 661, 668-669 (1983). When a trial court makes an award of punitive damages, the appellate court's standard of review is whether substantial evidence supports the determination that the requisite factual criteria have been satisfied. *R.T. Nahas, Co. v. Hulet,* 114 Idaho 23, 29, 752 P.2d 625, 631 (Ct. App. 1988).

The trial court erred when it entered a judgment for punitive damages in the amount of $30,000 against Whites because the record does not demonstrate by clear and convincing proof through substantial and competent evidence an extreme deviation from reasonable standards of conduct with necessary malice to an extent that is required to

sustain such an award. Despite the requirement of I.C. 6-1604(1) that the claimant must prove facts by clear and convincing evidence to establish a claim for punitive damages, in all of its determinations on the issue of punitive damages prior to its Memorandum Decision and Order on Remand Re: Damages dated March 18, 2011, the trial court failed to apply the clear and convincing proof standard and yet imposed judgments for punitive damages. Without re-examining carefully the specific evidence, the trial court held on March 18, 2011 that "If in fact seven years ago this Court failed to mention that standard, it does so now. This Court specifically finds that Akers have proven, by clear and convincing evidence, oppressive, fraudulent, malicious and outrageous conduct (they only need to prove one type of conduct, they proved them all) by both Mortensen and Whites, under I.C. 6-1604(1)." R., Vol. 2, p. 542. This type of generalized conclusion by the trial court cannot justly provide the basis for sustaining a punitive damage award as there is no evident connection between the statement and specific facts constituting substantial evidence relating to Whites that can be assessed by the appellate court to determine whether the statutory criteria have been satisfied.

A review of the decision of the trial court reinstating all of its damage awards against Whites reflects the pattern of the trial court to collectively describe and attribute to both Mortensen and Whites the conduct of the other defendant in the context of punitive damages analysis. R., Vol. II, pp. 525-543. Rare in the record is an identification of specific acts of White that form the basis of the trial court's punitive damage award. R., Vol, 2, pp. 541-542. Except as referenced previously, the trial court did not identify specific actions by Whites that justified, in the mind of the trial court, punitive damages. A principal is liable for punitive damages based upon acts of its agent only in circumstances in which the principal participated, or in which the principal authorized or ratified the

agent's conduct. *Openshaw v. Oregon Auto Ins. Co.*, 94 Idaho 335 (1971). There is no evidence in the record nor finding of fact by the trial court that identifies specific acts of Mortensen in which Whites participated nor evidence that Whites authorized or ratified Mortensens' behaviors. Similarly, there is no evidence in the record that Whites authorized or ratified or participated in the acts of the employee of D.L. Construction, Inc. in the incident with Sherrie Akers on the easement road involving a backing dump truck. The acts of Mortensen and the D.L. White Construction, Inc. employee do not provide a basis for assessing punitive damages against Whites. The record does not indicate that White participated in or authorized events described in findings of fact from the April 1, 2004 decision numbered 5,6,7,8,9,10,11,12,16,20, or 24. They therefore provide no basis for an award of punitive damages against Whites.

The trial court found that White violated an injunction issued by the trial court prohibiting White from trespassing on Akers' property on an occasion when Akers claimed David White was on Akers' property near his house during the trial. R., Vol. 2, p. 542. The trial court relied on this finding as a conduct specific to Whites that justified punitive damages. An examination of the evidence on this issue reveals that the foundational evidence is not corroborated by any other evidence nor is it substantial and competent in meeting the clear and convincing evidence test. Evidence is regarded as substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven. The trial court recited that it found the testimony of Dennis Akers credible and the testimony of David White not credible. Whites submit that a reasonable trier of fact would not accept Akers testimony as fact nor would a reasonable trier of fact rely upon that testimony in determining whether a disputed point of fact has been proven in a manner meeting the clear and convincing standard. A reasonable trier of

fact knows that Dennis Akers testimony that the access road did not travel into Parcel B prior to his ownership is not credible. As the Supreme Court has previously found, the trial court's decision that the access road did not travel into Parcel B based on Dennis Akers testimony was clearly erroneous. Having heard Dennis Akers testify not credibly on that issue, a reasonable trier of fact would not accept Dennis Akers testimony that David White was thirty feet from his house at night as clear and convincing evidence of that fact when the claim is uncorroborated and denied by White. Not surprisingly, the trial court seems to overlook the lack of credibility in Dennis Akers' testimony that the access road did not extend into Parcel B when it finds Akers' uncorroborated testimony sufficiently credible to satisfy a clear and convincing proof standard. Akers testimony on this issue does not meet the substantial evidence standard to support an award of punitive damages against Whites.

The second act of David White that the trial court identified as a specific basis of its punitive damage award is a claimed violation of the Kootenai County subdivision ordinance permitting four free splits of a parent parcel without county approval of the subdivision of a parent parcel. The testimony on this issue was presented by Scott Rasor, a surveyor, for plaintiffs. Mr. Rasor testified on direct examination that a parent parcel cannot be divided into more than four separate parcels and remain in compliance with the subdivision ordinance. He then extrapolated and opined that because the eighty acre parcel that belongs to White had been divided into four twenty acre parcels leaving Mortensen with an eighty acre remaining parcel, that the free split exception to the subdivision ordinance was violated. Tr. Vol. I, pp. 460, l. 14-p. 462, l. 4. On cross-examination Mr. Rasor then acknowledged that there were additional factors that affect whether a property division qualifies under the free split exception including dates of

division, who parcels were deeded to, when they were deeded, how they were deeded, whether the parcels had different tax parcel numbers, whether the parcels were in different sections (as in this case), and finally concluding that Rasor did not have personal knowledge of whether Kootenai County regarded the division of the parcel acquired by Whites into four twenty acre parcels as a proper free split or not. Tr. Vol. I, pp. 511, l.9-p.514, l. 7. David White then testified that he check with Kootenai County regarding the free split rules before purchasing any property from Mortensen and that it was his understanding of the free split exception that the initial eighty acres he purchased from Mortensen was a parent parcel and could be split four times and that there were two splits available on the second purchase of forty acres from Mortensen as it was a separate parent parcel. Tr., Vol. I, p. 922, l. 11 – p. 924, l. 25. On this evidence the trial court now holds that by clear and convincing proof David White's conduct was fraudulent, oppressive, malicious and outrageous sufficient to warrant imposition of punitive damages. Whites submit that the evidence does not support the trial court's holding, is not substantial evidence and is clearly erroneous.

Whites can identify no other evidence in the record or cited by the trial court of conduct by David White or conduct ratified or authorized by David White to support the trial court's holding that punitive damages against David White are warranted by the facts and applicable law. The cited evidence does not support a conclusion that Whites' conduct was malicious or performed with a harmful state of mind toward Akers nor is Whites' conduct an extreme deviation from reasonable standards of conduct. In this case, Whites reasonably believed that they had the right to use the easement road to access their property. Their access had been insured in connection with their purchase of the property and the roadway had been used for more than sixty years to access the property they

purchased. Whites intended to construct their own home on the property and it makes no sense that they would knowingly and intentionally buy into problem with accessing property that was to be the site of their home. The commitment of the title company to insure access over the easement was vital to Whites decision to enter into the purchase transaction from Mortensen because it reflected a professional judgment that lawful access to the property had been established to the satisfaction of a company in the business of making such judgments. The record reflects no history of Whites buying into troubled situations, violating county ordinances or engaging in behavior harmful to others or the public interest. While the trial court found that there was some evidence of Mortensen engaging in such conduct in other circumstances, the same was not true for Whites. The decision of the trial court to award punitive damages against Whites is erroneous and should be reversed.

Attorney Fees

The trial court erroneously reinstated $105,534 in costs and attorney fees from the original decision in this case and erroneously added $22,000 in fees and costs claimed for services during the proceedings on remand. The total award of attorney fees and costs is 127,534. The award of attorney fees is based upon the trial court's holding that Akers were the prevailing party and its application of I.C. 6-202 as a basis to award attorney fees for all proceedings in this matter. The Supreme Court should vacate the entire award of attorney fees on the grounds that they are not authorized in this case by I.C. 6-202, or alternately, if 6-202 is determined to apply, remand for direction that the fees be apportion between those incurred in prosecuting claims for quiet title, punitive damages, emotional distress, fraud and trespass so that attorney fees are awarded only for claims for which there is a statutory basis.

The only basis for an award of any attorney fees in this case is I.C. 6-202. This the authority on which the trial court relied to award plaintiff all of the fees incurred in prosecuting the case. As discussed previously in relation to treble damages, 6-202 authorizes its sanctions in the form of treble damages and attorney fees in cases where the requisite signage is posted in the required manner and the conduct of the defendant is willful and intentional. The signage was not posted at the time Whites purchased their property or when they traveled up the access road and began excavation on their property at the top of the hill on January 3, 2002. The trial court made no finding establishing when Akers posted his "No Trespassing" signs. Whites find no Idaho precedent addressing the question presented regarding the location of signage relative to areas of trespass. The evidence shows that the signs were posted at the west end of Government Lot 2, on the fence west of the disputed triangle and north of the easement road. As posted, the signage did not encompass in any fashion the any portion of the disputed triangle or the easement road. None of the damages determined by the trial court were located in areas encompassed by Akers' No Trespassing signs. Whites submit that 6-202 was not intended and does not authorize its sanctions in areas not encompassed within the lines established by No Trespassing signage. The plain purpose of the signage is to caution those that travel past the signs of the added risks of sanctions in addition to common law trespass damages. As posted, the signage did not declare a claim of ownership by Akers to the disputed triangle nor purport to preclude Whites use of the easement road along the south boundary of Government Lot 2. The record contains no evidence showing that Whites intruded and caused any damage within areas encompassed by No Trespassing signage that were owned by Akers free or Whites easement. Under these facts, 6-202 does not authorize an award of attorney fees in this case.

I.C. 6-202 requires that its sanctions will only apply where the any trespass is willful and intentional. The trial court did not address this requirement of I.C. 6-202 in its Memorandum Decision and Order Denying Whites' Motion to Reconsider and Granting Akers' Claims for Attorney Fees despite the issue being raised by Whites. R., Vol. 3, p. 698. As discussed earlier in this brief in regard to Akers' claims for the treble damages sanction under 6-202, the trial court's holding that Whites trespasses were willful and intentional is clearly erroneous and not supported by substantial and competent evidence. Given the course of conveyancing, legal descriptions, fencing and use in this case, the evidence shows that White had a reasonable belief that he owned an easement that gave him the right to use the disputed triangle and easement road to access his property. Negligent or mistaken trespass does not provide a basis for an award of attorney fees in this case. No attorney fees award under 6-202 is therefore appropriate against Whites.

The trial court failed to apportion any of the attorney fees claimed by Akers so that only those fees incurred in prosecuting trespass claims would be awarded. This failure to apportion fees is an abuse of discretion by the trial court. If the Court determines that I.C. 6-202 does authorize an attorney fees award in this case, the matter should be remanded to the trial court to apportion fees so that only those fees incurred in prosecuting trespass claims are awarded. *Bumgarner v. Bumgarner,* 124 Idaho 629, 644, 862 P.2d 321, 336 (Ct. App. 1993). "Gary is correct with respect to his assertion that where parties have succeeded on entirely separate claims, those claims are properly distinguished and should be analyzed separately in determining whether attorney fees are appropriate. (Citations Omitted). We also note, however, that the trial court is authorized to award attorney fees only as provided by statute or contract. IRCP 54(e)(1). (Citations omitted). In this case, the Court based its award of fees on I.C. 6-202. That statute, which applies to claims for

willful and intentional trespass mandates an award of attorney fees in an action "brought to enforce the terms of this act if the plaintiff prevails. As applied to the case at hand, this statute authorized the district court to award fees only to Kent, "the plaintiff" in that action, and then to only award those fees reasonably incurred in prosecuting the trespass action upon which he prevailed." *Id.* at p. 644. This case falls squarely within the holding in *Bumgarner* in that plaintiff brought claims for quiet title to establish the location and rights held by the easement owner, emotional distress, punitive damages, fraud, as well as trespass. Since there is no authority for any attorney fees in this action except as a sanction for trespass under 6-202, as a matter of law the trial court was required to apportion in its award of attorney fees only those fees reasonably incurred in prosecuting the trespass claim under 6-202. The award of attorney fees should be reversed and remanded for apportionment consistent with the holding in *Bumgarner.*

DISQUALIFICATION OF TRIAL JUDGE

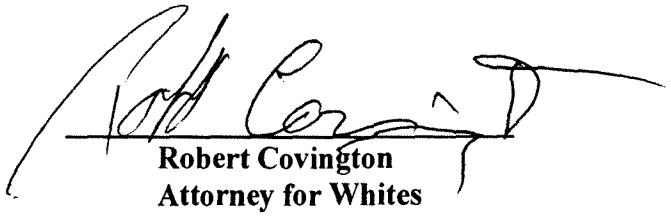
The recent decision of the Court in *Capstar v. Lawrence,* 2012 Opinion No. 80, provides to the defendants in that case the relief sought and temporarily received by Whites in the most recent prior appeal to the Supreme Court in this case. In *Capstar,* as in this case, a motion to disqualify the trial judge on grounds of bias or prejudice had been brought and denied by the trial judge. Also in *Capstar* the identity of the trial judge, original plaintiffs' counsel, Lee James, and subsequent counsel and member of the firm, Susan Weeks, are precisely the same as in this case. Similarly, the litigation between Akers and Whites and the parties in *Capstar* began at approximately the same time with the Akers bringing suit on January 10, 2002, some seventy-one days after the trial judge assumed his position and passed his mantle as counsel to the ITLA to Lee James. The Court ruled in *Capstar,* "Nevertheless, because this case has a long and complex history,

with close to ten years of litigation, this Court believes, that a new judge would provide a much needed fresh perspective and eliminate any concern of bias. Therefore, this Court orders that the case on remand be assigned to a new district judge. *Id.* Much like Mr. Whelan, the remarks of the trial judge reflect a bias or hostility to Whites' counsel through gratuitous insults of counsel. Examples of the foregoing are: (1) "Whites' argument that the statutory requirement has not been met is simply absurd." R., Vol. 3, p. 694, (2)"Apparently Whites attorney is not reading those previous opinions". R. , Vol. 3, p. 694, "Finally, citing and comparing the instant case to *Good v. Sichelstiel,* Kootenai County Case No. CV 2010 1862, Whites make an incomprehensible argument that,...". R., Vol. 3, p. 695. What is incomprehensible is that the trial court closed its mind long ago to a fair consideration of the claims and interests of the Whites in a just outcome in this case. The trial court has altered its judgment in only one respect, a minor relocation of the easement at the top of the hill when his prior location was held to clearly erroneous. A legitimate concern about bias of the trial judge has infected this case. Consider that a case with approximately $17,000 of property damage now has a judgment against the defendants for $368,000. Add the decision not to take additional evidence to ensure that the location of the prescriptive easement is supported by substantial and competent evidence and a failure to acknowledge and take into account in assessing their credibility that Dennis and Sherrie Akers' testimony regarding the location of the easement road in Parcel B was simply not true, to the prior history of the case and it is not difficult to perceive that the trial judge has not been much inclined to seriously reconsider his views of this case. As urged in the second appeal of this case, the interests of justice will be well served by conducting a new trial of this case before a new judge where a fresh perspective will be present and eliminate any concern of bias.

CONCLUSION

The trial court received this case again on remand and moved the prescriptive easement approximately ten feet to the west based upon evidence that was not substantial or competent to establish the location of the easement road in Parcel B during the prescriptive period between 1966 and 1980. The trial court rejected additional photographic evidence that was admittedly "more clear" on the issue reasoning that it was not relevant because the relevant time was 1966. The trial court continues to improperly analyze the facts and law of this case and the result is virtually the same flawed decision that the trial court made in 2003 and 2004. Whites request that the case be remanded for a new trial before a new district judge so that the interests of justice can be served free of any concern of bias in the trial judge. Alternately, Whites request that the case be remanded to determine the location of the easement in Parcel B through the use of a special master to independently take and consider the evidence on the issue of easement location and to review the transcript of the trial and take additional evidence if necessary to provide a basis for reconsidering the decisions of the trial court regarding damages and attorney fees. Alternately, Whites request that the decisions of the trial court on remand be reversed and remanded to a new district judge to make determinations on all remand issues. Alternately, Whites request that the Supreme Court reverse those decisions of the trial judge on easement location, damages and attorney fees that are not supported by substantial and competent evidence and locate the easement based on the metes and bounds description supplied by Whites to the trial court and award only those damages and attorney fees that are authorized by law and supported by substantial and competent evidence.

Respectfully submitted this 30th day of July, 2012.



Robert Covington
Attorney for Whites

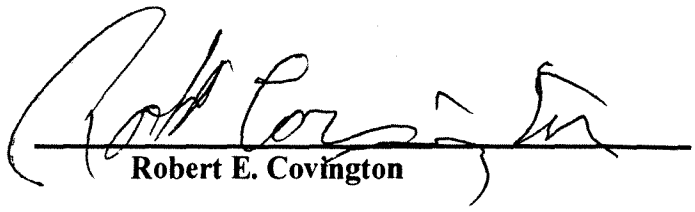
CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2012, I caused to be served three copies of the foregoing Appellants' Brief by placing the same in the United States mail, First Class, postage prepaid, to the following:

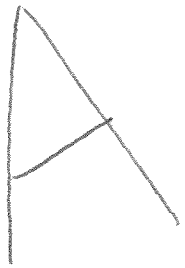
Susan Weeks
James, Vernon & Weeks,
1626 Lincoln Way
Coeur d'Alene, Idaho 83814
Fax: 208-664-1684

Dustin Deissner
Deissner Law Office
1707 West Broadway Avenue
Spokane, WA 99201
Fax: 509-326-6978

Vernon J. Mortensen
PO Box 1922
Bonners Ferry, ID 83805

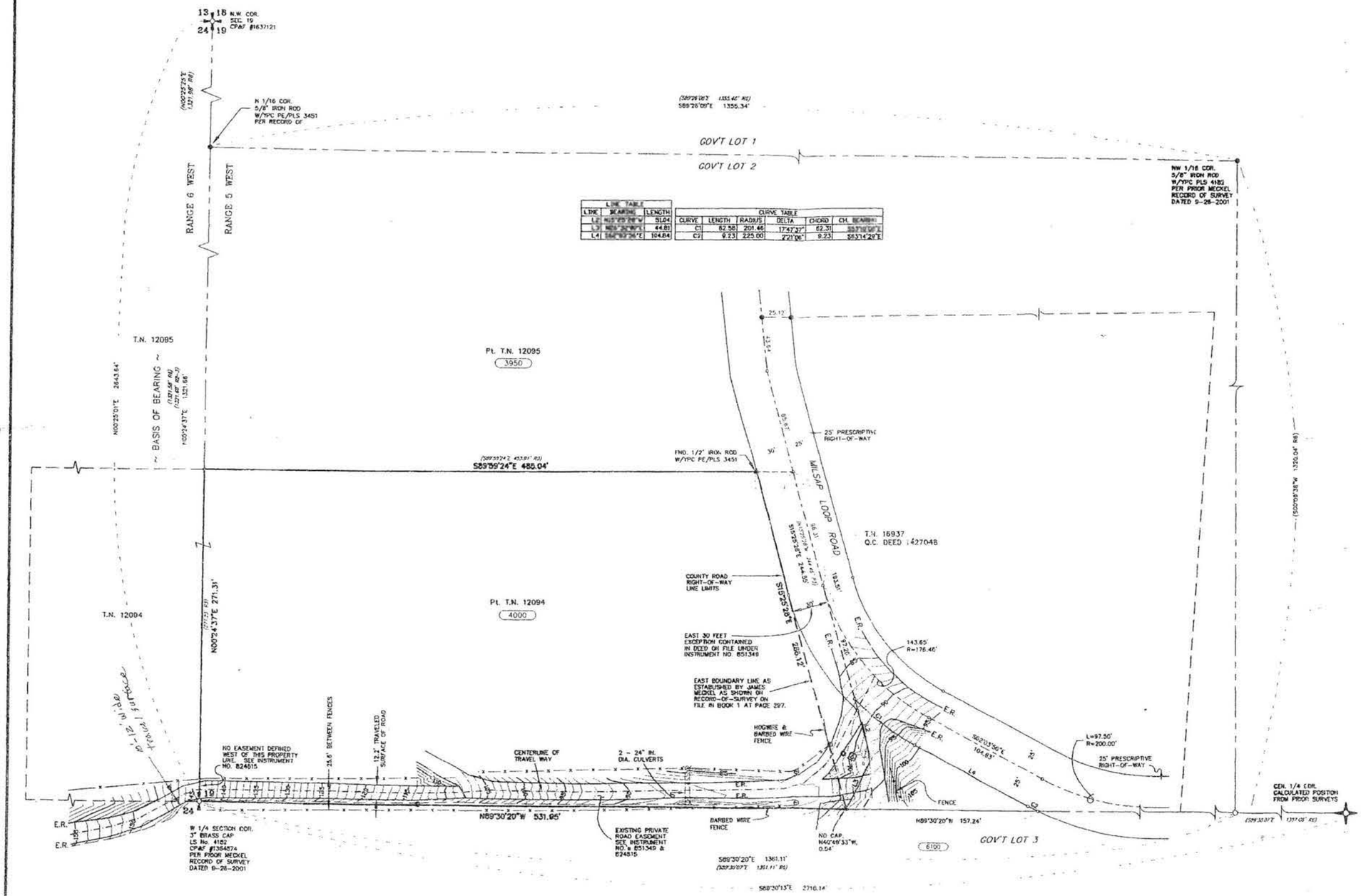


Robert E. Covington



BOUNDARY & TOPOGRAPHIC SURVEY EXHIBIT

FOR TAX NUMBER 12094, A PORTION OF GOV'T LOT 2, SEC. 19, T.50N., R.5W., B.M.,
KOOTENAI COUNTY, IDAHO



BASIS OF BEARING

BASIS OF BEARING ~ N00°24'37"E ALONG THE WEST LINE OF THE NORTHWEST QUARTER OF SECTION 19 AS PER A RECORD OF SURVEY BY DAVID E. SCHUMANN, PLS 4182, RECORDED IN BOOK 20 AT PAGE 269.

ELEVATION DATUM

ASSUMED

SURVEYORS NOTE

1. THE EASTERN BOUNDARY LINE OF TAX NUMBER 12094 WAS RE-ESTABLISHED IN THIS SURVEY HOLDING THE MONUMENTS AND LINES AS ORIGINALLY ESTABLISHED FOR THE SUBDIVISION OF PORTIONS OF SECTIONS 19 & 24 AS SHOWN ON RECORD-OF-SURVEYS BY JAMES MECKEL ON FILE IN BOOK 1 AT PAGE 297 AND BOOK 2 AT PAGE 167. THIS WAS DETERMINED TO BE THE ORIGINAL INTENT OF THE PARTIES BASED UPON CORRESPONDENCE AND DOCUMENTS IN THE FILES OF MECKEL ENGINEERING AND SURVEYING INC., RELATED TO THE TWO RECORD-OF-SURVEYS LISTED ABOVE.

PURPOSE OF SURVEY

THIS SURVEY WAS PERFORMED TO REESTABLISH THE BOUNDARIES OF THE AKERS PROPERTY, TAX NUMBER 12094, AS ORIGINALLY SURVEYED BY JAMES MECKEL AS SHOWN ON RECORD-OF-SURVEYS ON FILE IN BOOK 1 AT PAGE 297 AND BOOK 2 AT PAGE 167. THIS SURVEY ALSO SHOWS EXISTING CONDITIONS FOR ACCESS TO THE SUBJECT PROPERTY AND ADJOINING PROPERTIES.

SURVEYS OF RECORD & PRIOR SURVEYS

1.	J. MECKEL	PLS 3451	DEC. 1978	UNRECORDED
2.	J. MECKEL	PLS 3451	OCT. 1979	BOOK 1 PAGE 297
3.	J. MECKEL	PLS 3451	AUG. 1980	BOOK 2 PAGE 167
4.	M. BOOTH	PLS 748	FEB. 1992	BOOK 10 PAGE 219
5.	J. MONACO	PLS 4194	AUG. 1999	BOOK 20 PAGE 61
6.	D. SCHUMANN	PLS 4182	MAY 2000	BOOK 20 PAGE 269

LEGEND

- ● FOUND AN IRON ROD, 5/8 IN. DIAM., WITH PLASTIC CAP MARKED AS NOTED
- ▲ FOUND AN IRON ROD, 1/2 IN. DIAM., WITH PLASTIC CAP MARKED AS NOTED
- ○ SET AN IRON ROD, 30 INS. LONG, 5/8 IN. DIAM., WITH A PLASTIC CAP MKD. PLS 6374
- ◦ CALCULATED POINT (NOTHING FOUND OR SET)
- R1 SURVEYS OF RECORD & PRIOR SURVEYS AS LISTED BELOW
- (0000) TAX PARCEL NUMBER
- CULVERTS - (CMP) CORRUGATED METAL PIPE
- —x— FENCE - HOGWIRE/BARBED WIRE
- GATE POSTS - NEW
- GATE POSTS - OLD
- LOG RETAINING WALL
- SIGN "STOP WORKING..."
- E.R. EDGE OF ROAD
- OTHERS AS NOTED

40 0 40 80
Scale: 1" = 40'

PLAINTIFF'S EXHIBIT 6

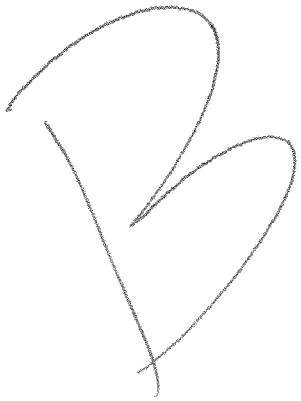
SURVEYOR'S CERTIFICATE

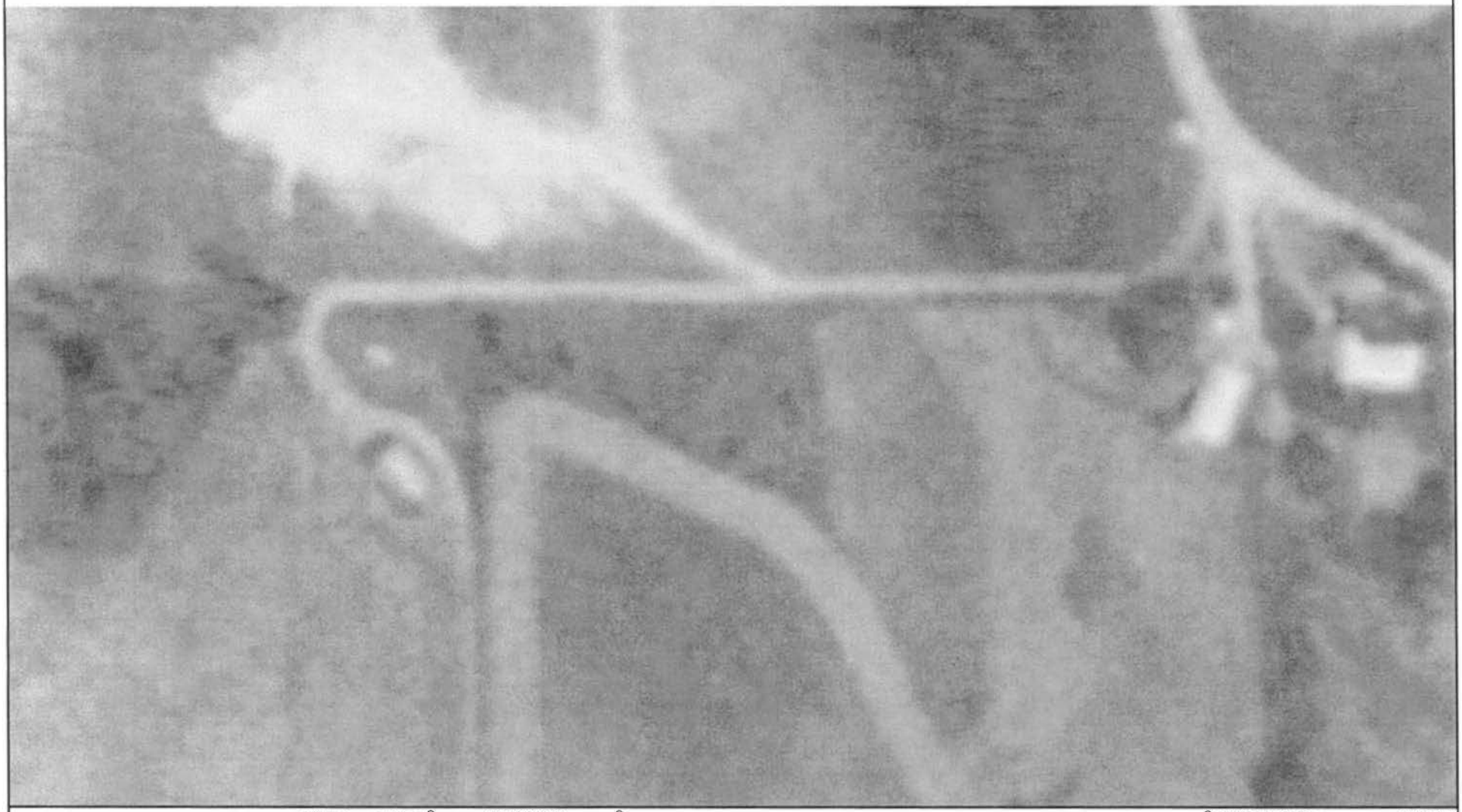
I, SCOTT M. RASOR, PROFESSIONAL LAND SURVEYOR No. 6374 IN THE STATE OF IDAHO, DO HEREBY CERTIFY THAT THIS SURVEY WAS MADE BY ME OR UNDER MY SUPERVISION FOR DENNIS AKERS.

SCOTT M. RASOR, PLS 6374 DATE

PROFESSIONAL LAND SURVEYOR REGISTERED 6374 STATE OF IDAHO SCOTT M. RASOR

SCALE: 1"= 40'	CREW: CVF & JMB	PROJECT NO: 02.074	MECKEL ENGINEERING & SURVEYING, INC.
DATE: JULY 2, 2002	DRAWN BY: SAQ	REF: AKERS/KELCH	401 IDAHO AVENUE, COEUR D' ALENE, IDAHO, 83814 (208)667-4673 fax (208)664-3347
SHEET 1 OF 2	APPROVED BY: SMR	DWG: AKE020741.DWG	BOUNDARY & TOPOGRAPHIC SURVEY EXHIBIT FOR TAX NO. 12094, A PORTION OF GOV'T LOT 2, SEC. 19, T.50N., R.5W., B.M., KOOTENAI COUNTY, IDAHO



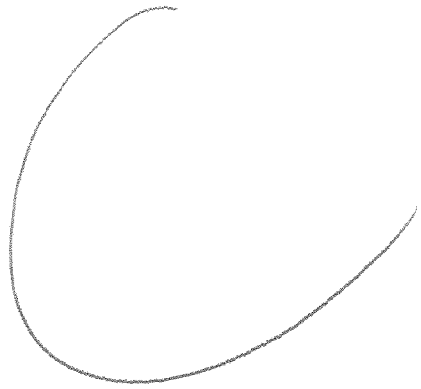


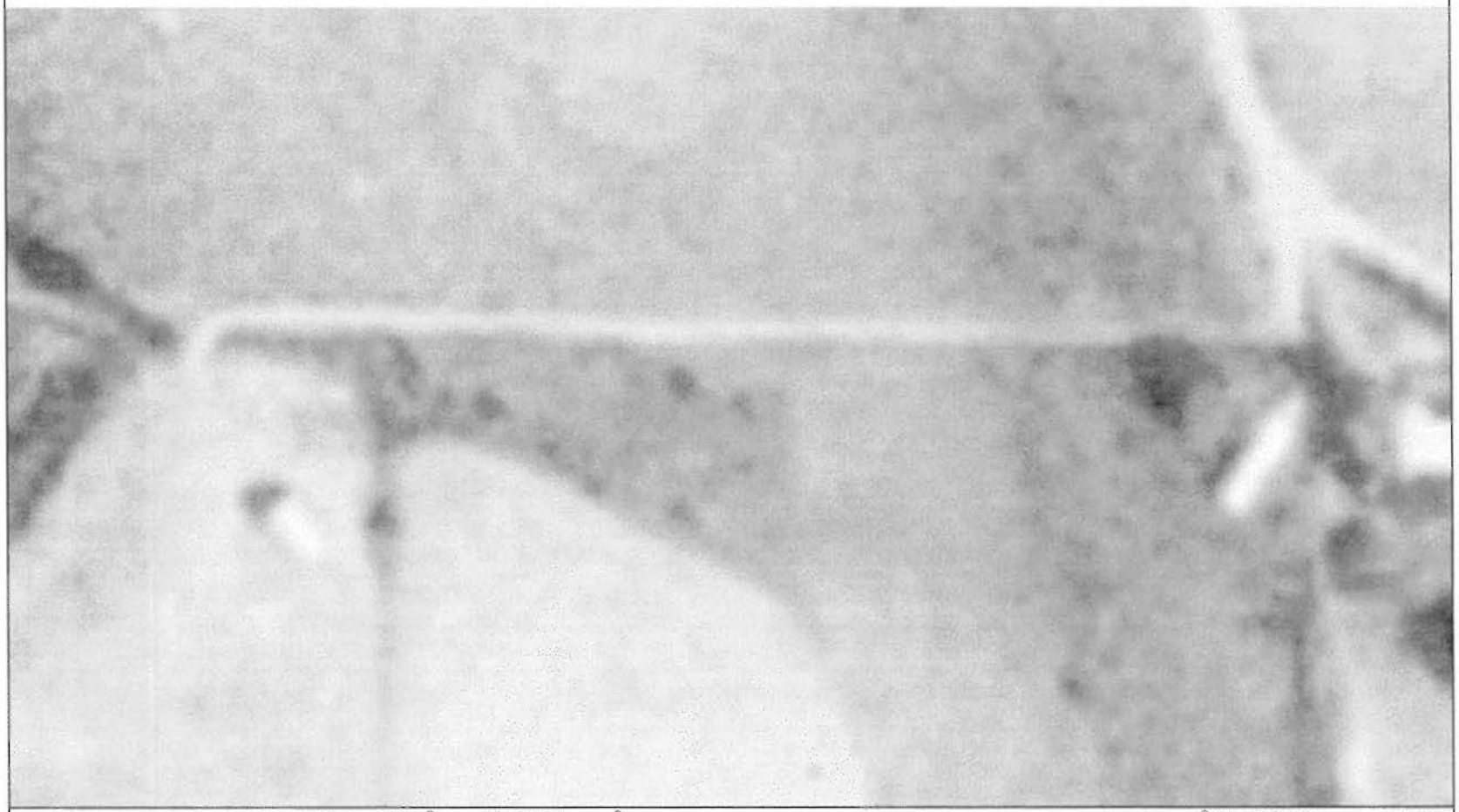
WELCH-COMER
ENGINEERS | SURVEYORS

www.welchcomer.com
350 E. Kathleen Ave.
Coeur d'Alene, ID 83815

208-664-9382
(toll free) 877-815-5672
(fax) 208-664-5946

PROJECT NO.:	WHITE
DESIGNED BY:	
DRAWN BY:	TJF
DWG NAME:	WHITE-EX
DATE:	7-12-2010
SHEET NO:	1





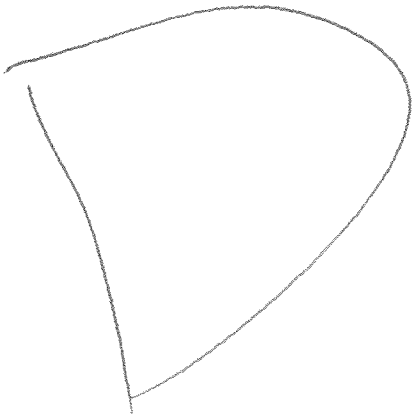
WELCH-COMER
ENGINEERS | SURVEYORS

www.welchcomer.com
350 E. Kathleen Ave.
Coeur d'Alene, ID 83815

208-664-9382
(toll free) 877-815-5672
(fax) 208-664-5946

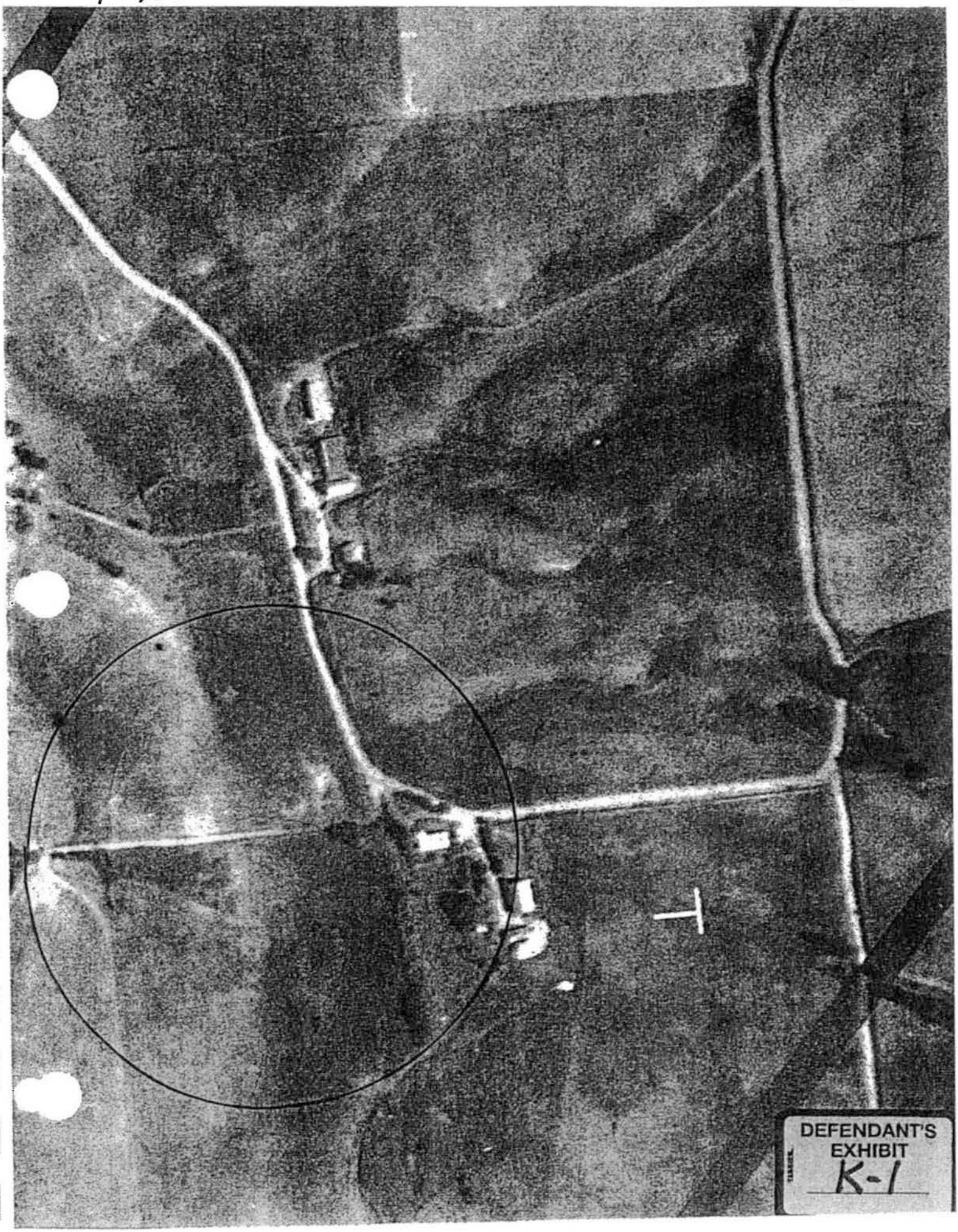
USGS AERIAL IMAGE
DATED 8-14-75
ID NUMBER 3-33
MAP IS NOT TO SCALE

PROJECT NO.:	WHITE
DESIGNED BY:	
DRAWN BY:	TJF
DWG NAME:	WHITE-EX
DATE:	7-12-2010
SHEET NO:	1

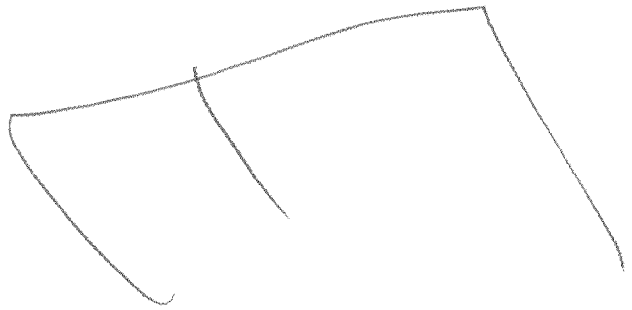


8/8/65

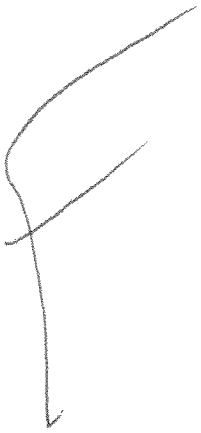
DOS-2FF-93

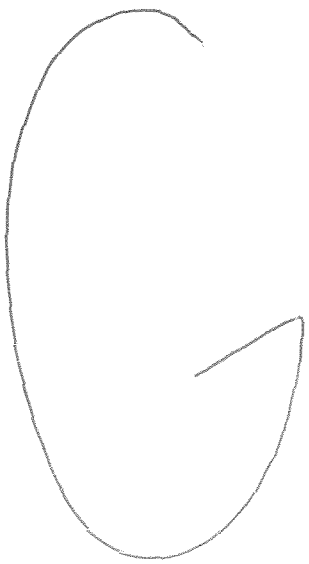


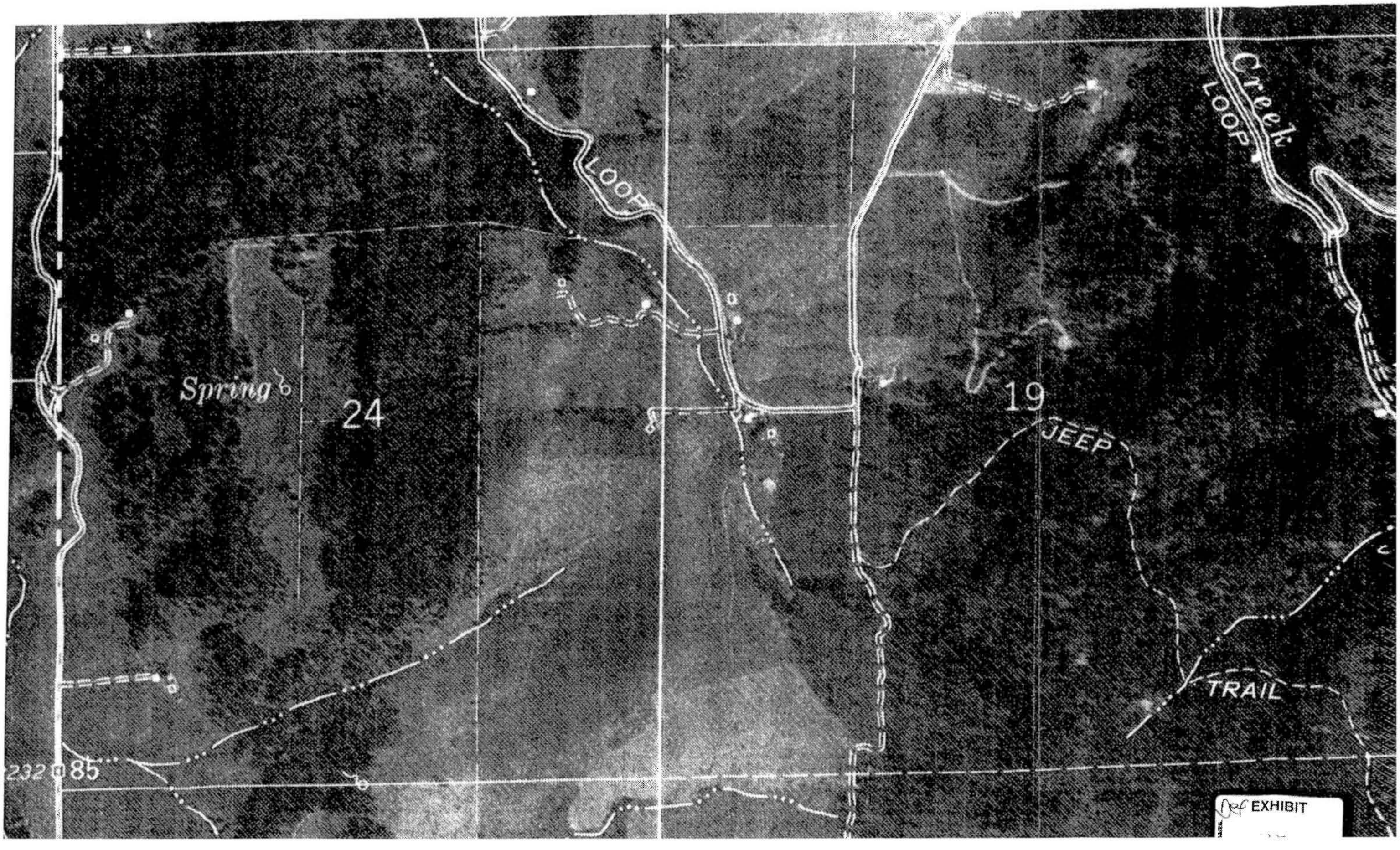
DEFENDANT'S EXHIBIT K-1




B E & J L
REYNOLDS
PLAINTIFF'S
EXHIBIT






LOOP
Creek
LOOP
Spring
24
19
JEEP
TRAIL
232
85
Def EXHIBIT

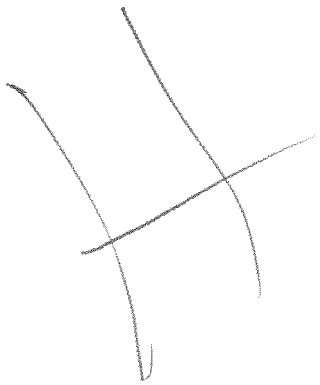
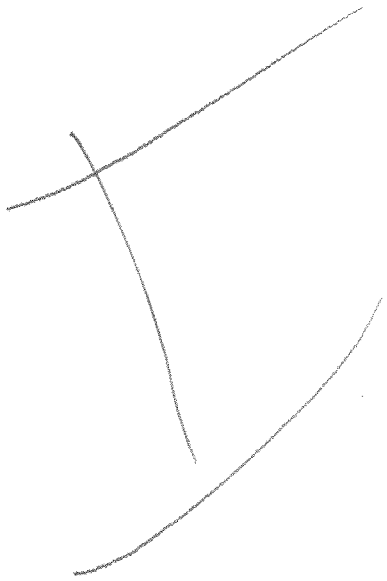
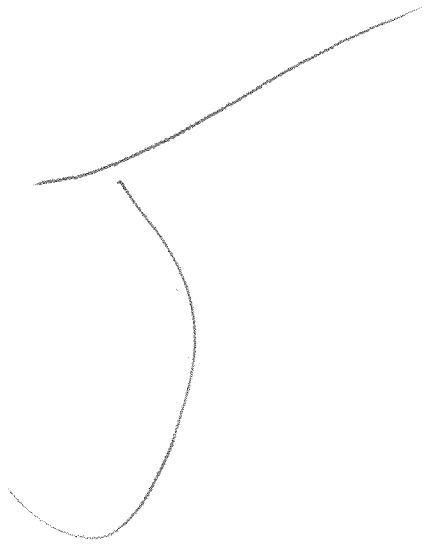
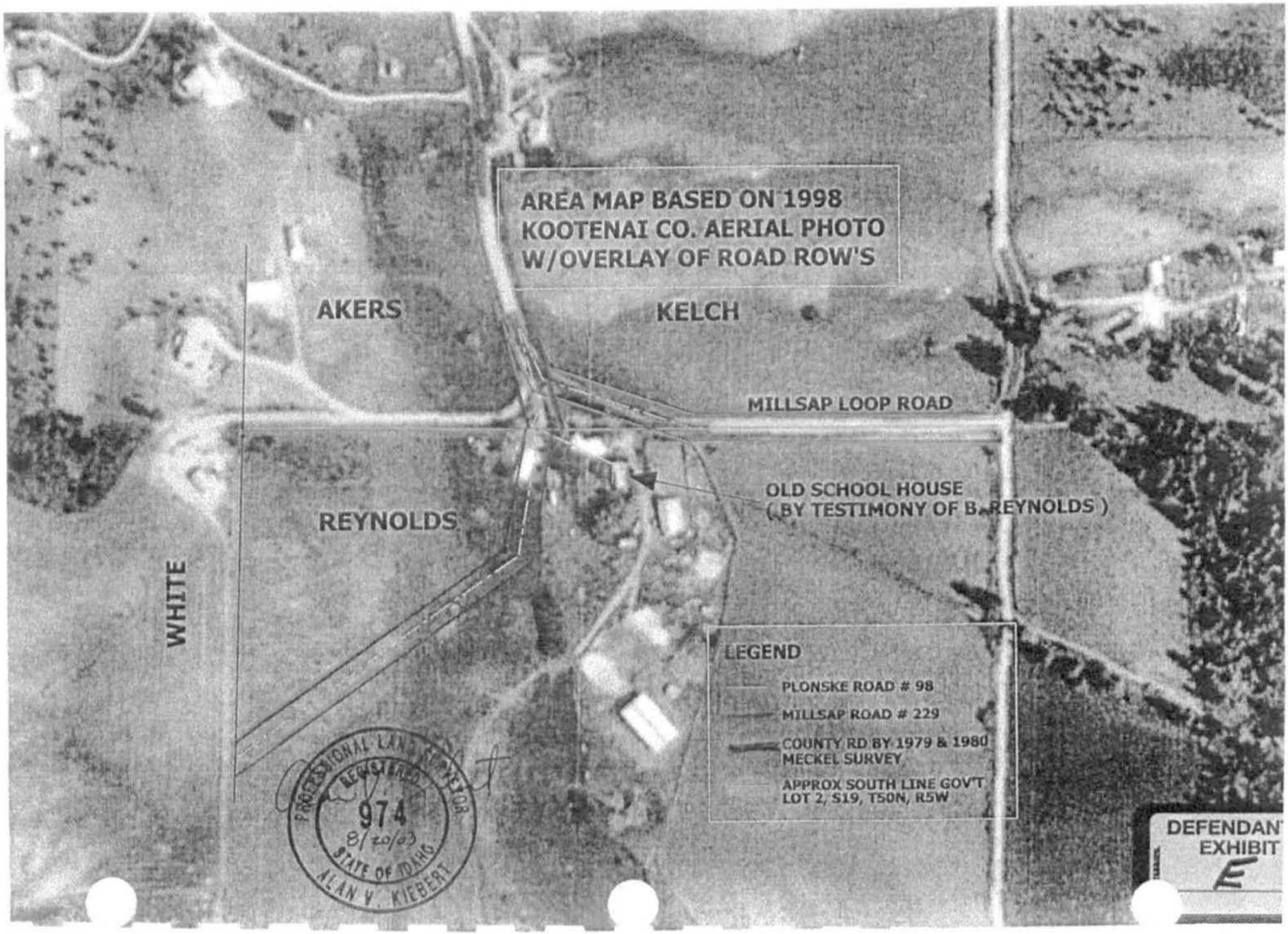


EXHIBIT
43



△ EXHIBIT
044




AREA MAP BASED ON 1998
KOOTENAI CO. AERIAL PHOTO
W/OVERLAY OF ROAD ROW'S
AKERS
KELCH
MILLSAP LOOP ROAD
REYNOLDS
OLD SCHOOL HOUSE
(BY TESTIMONY OF B. REYNOLDS)
WHITE
LEGEND
PLONSKE ROAD # 98
MILLSAP ROAD # 229
COUNTY RD BY 1979 & 1980 MECKEL SURVEY
APPROX SOUTH LINE GOV'T LOT 2, S19, T50N, R5W
PROFESSIONAL LAND SURVEYOR
REGISTERED
974
8/20/03
STATE OF IDAHO
ALAN V. KIEBERT
DEFENDANT
EXHIBIT
E