

9-1-2016

## Fuquay v. Low Clerk's Record Dckt. 44155

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IN THE  
**SUPREME COURT**  
OF THE  
**STATE OF IDAHO**

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JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY

Plaintiffs/Appellants,

Vs.

SUSIE LOW; CAL LOW; GILBERT KING, As Trustee of  
the HEART K RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF IDAHO  
FALLS, INC.; THE ESTATE OF GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN TITLE  
INSURANCE COMPANY,

Defendants/Respondents,

GILBERT KING, as Trustee, and ROSE M. KING, as  
Beneficiary of the HEART K RANCH TRUST UTA  
DECEMBER 28, 2012,

Counterclaimants,

Vs.

JOHN E. RUQUAY; CLINTON WARD FUQUAY and  
HAILEY ROSE FUQUAY

Counterdefendants,

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Appealed from the District of the Third Judicial District  
for the State of Idaho, in and for Owyhee County

Honorable THOMAS J. RYAN, District Judge

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Matthew R. Cleverly  
Fidelity National Law Group  
1200-6<sup>th</sup> Ave, Ste 620 Seattle, WA 98101

**Attorney for Appellants**

Ronald Rainey  
110 N. Ninth St. Caldwell, ID 83707  
S. Bryce Farris  
1101 W. River St. Ste. 110 Boise, ID 83707

**Attorney for State Of Idaho**

Date	Code	User		Judge
8/11/2014	NCOC	TRINA	New Case Filed - Other Claims	Christopher S. Nye
		TRINA	Filing: AA- All initial civil case filings in District Court of any type not listed in categories E, F and H(1) Paid by: Matthew R. Cleverley, Attorney Receipt number: 0002703 Dated: 8/11/2014 Amount: \$221.00 (Check) For: Fuquay, Hailey Rose (plaintiff), Fuquay, John E. (plaintiff) and Ward, Clinton (plaintiff)	Christopher S. Nye
	COMP	TRINA	Complaint Filed ( Prescriptive Easement)	Christopher S. Nye
	SMIS	TRINA	Summons Issued/6	Christopher S. Nye
	APER	TRINA	Plaintiff: Fuquay, Clinton Ward Appearance Matthew R. Cleverley	Christopher S. Nye
	APER	TRINA	Plaintiff: Fuquay, Hailey Rose Appearance Matthew R. Cleverley	Christopher S. Nye
	APER	TRINA	Plaintiff: Fuquay, John E. Appearance Matthew R. Cleverley	Christopher S. Nye
8/18/2014		TRINA	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Cheri Draper, Hawley Troxell Receipt number: 0002797 Dated: 8/18/2014 Amount: \$53.00 (Credit card)	Christopher S. Nye
		TRINA	Miscellaneous Payment: Technology Cost - CC Paid by: Cheri Draper, Hawley Troxell Receipt number: 0002797 Dated: 8/18/2014 Amount: \$3.00 (Credit card)	Christopher S. Nye
8/27/2014	FSTC	TRINA	File Sent To Caldwell basket	Christopher S. Nye
9/4/2014	MISC	TRINA	Exparte Motion for Temporary Restraining Order	Christopher S. Nye
	MISC	TRINA	Motion for Telephonic Hearing Appearance	Christopher S. Nye
	MISC	TRINA	Declaration of Raymond Jayo in Support of Exparte Motion for Temporary Restraining Order	Christopher S. Nye
	MISC	TRINA	Declaration of John Fuquay in Support of Exparte Motion for Temporary Restraining Order	Christopher S. Nye
	MISC	TRINA	Declaration of Matthew Cleverley in Support of Exparte Motion for Temporary Restraining Order	Christopher S. Nye
	ORDR	TRINA	Order On Motion for Telephonic Hearing Appearance	Christopher S. Nye
9/5/2014	ORDR	TRINA	Order Granting Motion for Restaining Order and Setting Date for Hearing on Preliminary Injunction	Christopher S. Nye
	HRSC	TRINA	Hearing Scheduled (Hearing Scheduled 09/18/2014 01:30 PM) for temporary restraining order	Christopher S. Nye
9/8/2014	NOAP	TRINA	Notice Of Appearance	Christopher S. Nye
	APER	TRINA	Defendant: King, Gordon G. Appearance Ronald P. Rainey	Christopher S. Nye
	APER	TRINA	Defendant: King, Rose M. Appearance Ronald P. Rainey	Christopher S. Nye

Date	Code	User		Judge
9/8/2014		TRINA	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Ronald Rainey Receipt number: 0003053 Dated: 9/8/2014 Amount: \$136.00 (Check) For: King, Gordon G. (defendant) and King, Rose M. (defendant)	Christopher S. Nye
9/9/2014		TRINA	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Sawtooth Law Office, PLLC Receipt number: 0003076 Dated: 9/9/2014 Amount: \$136.00 (Check) For: Low, Cal (defendant) and Low, Susie (defendant)	Christopher S. Nye
	APER	TRINA	Defendant: Low, Susie Appearance Bryce S Farris	Christopher S. Nye
	RTSR	CINDYH	Return Of Service/ Served First American Title on 8/29/2014	Christopher S. Nye
	MEFD	CINDYH	Murphy Envelope - Filing Of This Date	Christopher S. Nye
	RTSR	CINDYH	Return Of Service/served Cal Low	Christopher S. Nye
	MEFD	CINDYH	Murphy Envelope - Filing Of This Date	Christopher S. Nye
	MISC	TRINA	Answer and Counterclaims by Defendants Trustees for the Heart King Ranch Trust UTA December 28, 2012	Christopher S. Nye
	MISC	TRINA	Declaration of Mail Person in Support of Defendant's Objection to Plaintiffs' Ex-Parte Motion for Temporary Restraining Order	Christopher S. Nye
	AFFD	TRINA	Affidavit of Gilbert King	Christopher S. Nye
	AFFD	TRINA	Affidavit of Rose King	Christopher S. Nye
	MISC	TRINA	Declaration of Denice Collett in Support of Defendant's Objection to Plaintiffs Ex Parte Restraining Order	Christopher S. Nye
	MISC	TRINA	Objection to Ex Parte Motion for Temporary Restraining Order	Christopher S. Nye
	NOTC	TRINA	Notice of Intent to Cross Examine and Produce Witnesses	Christopher S. Nye
	MISC	TRINA	Defendants' Counterclaimants' Memorandum in Opposition to Plaintiffs' Request for Temporary Restraining Order	Christopher S. Nye
9/10/2014	AFFD	TRINA	Affidavit of Ronald P. Rainey	Christopher S. Nye
	ORDR	LENA	Amended Order Requiring All Attorneys to Appear in Person for the Hearing Scheduled September 18, 2014	Christopher S. Nye
9/12/2014	ORDR	TRINA	Order on Motion to Deposit Funds into the Court Registry	Christopher S. Nye
	HRSC	TRINA	Hearing Scheduled (Telephonic Conference 09/18/2014 01:30 PM) telephonic-recorded in Murphy	Christopher S. Nye
	MOTN	TRINA	Motion to Deposit Funds Into the Court Registry	Christopher S. Nye

Date	Code	User		Judge
9/12/2014	BNDL	TRINA	Bond Posted - Cash (Receipt 3131 Dated 9/12/2014 for 1000.00)	Christopher S. Nye
9/15/2014	MISC	TRINA	Return of Service - 2	Christopher S. Nye
	MISC	TRINA	Declaration of Schwann Delivery Person	Christopher S. Nye
9/16/2014	MISC	TRINA	Response and Objection to Plaintiffs' Motion for Preliminary Injunction	Christopher S. Nye
	AFFD	TRINA	Affidavit of Susie Low	Christopher S. Nye
	MISC	TRINA	Defendants'/Counterclaimants' Memorandum in Opposition to Plaintiffs' Request for Preliminary Injunction	Christopher S. Nye
9/17/2014	PRSV	CINDYH	Personal Return Of Service/S. Low served 9/3/2014	Christopher S. Nye
	PRSV	CINDYH	Personal Return Of Service - R. King served 8/28/2014	Christopher S. Nye
	MEFD	CINDYH	Murphy Envelope - Filings Of This Date	Christopher S. Nye
	ANSW	LENA	Answer of Defendants Susie and Cal Low and Counterclaim	Christopher S. Nye
	NOSV	LENA	Notice Of Service	Christopher S. Nye
	MEMO	LENA	Memorandum in Support of Plaintiff's Motion for Preliminary Injunction	Christopher S. Nye
9/18/2014	MISC	TRINA	Declaration of Scott Snyder	Christopher S. Nye
	MISC	TRINA	Return of Service - Susie Low	Christopher S. Nye
	MISC	TRINA	Return of Service - Rose M. King	Christopher S. Nye
	MISC	TRINA	Declaration of Scott Snyder	Christopher S. Nye
	MISC	TRINA	Declaration of Seth Thomas	Christopher S. Nye
	DCHH	TRINA	Hearing result for Motion scheduled on 09/18/2014 01:30 PM: District Court Hearing Held Court Reporter: Tammy Weber - held in Caldwell Number of Transcript Pages for this hearing estimated:	Christopher S. Nye
9/29/2014	ORDR	TRINA	Order Denying Plaintiffs' Motion for a Preliminary Injunction	Christopher S. Nye
	ORDR	TRINA	Order to File Stipulated Trial Dates	Christopher S. Nye
10/10/2014	MOTN	TRINA	Motion To Quash Subpoena and Motion for Protective Order	Christopher S. Nye
10/14/2014	FSTC	TRINA	File Sent with Judge Grober to Nampa Court for Caldwell to pick up	Christopher S. Nye
10/15/2014	NOTC	TRINA	Notice of Hearing	Christopher S. Nye
10/16/2014	NOTC	TRINA	Notice of Non-Opposition to Subpoena Concerning ITD Records	Christopher S. Nye
	HRSC	TRINA	Hearing Scheduled (Motion 10/20/2014 09:00 AM) Plaintiffs Motion to Quash Subpoena and Motion for Protective Order	Christopher S. Nye

Date	Code	User		Judge
10/20/2014	MOTN	TRINA	Motion for Default	Christopher S. Nye
	MISC	TRINA	Declaration of Matthew Cleverley in Support of Motion for Default	Christopher S. Nye
10/23/2014	MISC	TRINA	Reporters Transcript	Christopher S. Nye
10/28/2014	NOTC	TRINA	Notice of Compliance- Defendant Rose Kings First Responses to Plaintiffs First Interrogatories and Requests for Productions	Christopher S. Nye
	NOTC	TRINA	Notice of Compliance- Defendant Gilbert King's First Responses to Plaintiffs First Interrogatories and Requests for Production	Christopher S. Nye
10/29/2014	ORDR	TRINA	Order of Default	Christopher S. Nye
	MOTN	TRINA	Plaintiffs Motion for Partial Summary Judgment against Susie Low and Cal Low	Christopher S. Nye
	MISC	TRINA	Declarations of Matthew Cleverley	Christopher S. Nye
	MISC	TRINA	Declarations of John Fuquay	Christopher S. Nye
10/30/2014	HRSC	TRINA	Hearing Scheduled (Motion for Summary Judgment 12/23/2014 10:30 AM)	Christopher S. Nye
12/8/2014	ORDR	TRINA	Order Setting Case for Trial and Pretrial	Thomas J. Ryan
	HRSC	TRINA	Hearing Scheduled (Jury Trial 04/28/2015 09:00 AM) 3-day trial setting	Thomas J. Ryan
	HRSC	TRINA	Hearing Scheduled (Pretrial Conference 03/27/2015 10:30 AM)	Thomas J. Ryan
12/9/2014	MISC	TRINA	Response and Objection to Plaintiffs Motion for Summary Judgment	Christopher S. Nye
	AFFD	TRINA	Affidavit of Rose King	Christopher S. Nye
	AFFD	TRINA	Affidavit of Samuel V.C.Steiner	Christopher S. Nye
	AFFD	TRINA	Affidavit of S. Bryce Farris	Christopher S. Nye
12/17/2014	MISC	TRINA	Withdrawal of Motion for Summary Judgment Against Lows	Christopher S. Nye
	HRVC	TRINA	Hearing result for Motion for Summary Judgment scheduled on 12/23/2014 10:30 AM: Hearing Vacated MSJ/Lows	Christopher S. Nye
1/15/2015	NOTC	TRINA	Notice of Service -Defendants Susie and Cal Low's Responses to Plaintiffs' First Interrogatories and Request for Production of Documents to Susie Low and Cal Low	Christopher S. Nye
1/23/2015	MISC	TRINA	Amended Order Setting Case for Trial and Pretrial	Christopher S. Nye
	HRVC	TRINA	Hearing result for Jury Trial scheduled on 04/28/2015 09:00 AM: Hearing Vacated 3-day trial setting	Thomas J. Ryan
	HRVC	TRINA	Hearing result for Pretrial Conference scheduled on 03/27/2015 10:30 AM: Hearing Vacated	Thomas J. Ryan

Date	Code	User		Judge
1/23/2015	HRSC	TRINA	Hearing Scheduled (Jury Trial 06/15/2015 09:00 AM) 4-day trial setting	Thomas J. Ryan
	HRSC	TRINA	Hearing Scheduled (Pretrial Conference 04/24/2015 10:30 AM)	Thomas J. Ryan
	HRSC	TRINA	Hearing Scheduled (Motion 02/27/2015 10:30 AM) Motion to Amend Complaint	Thomas J. Ryan
1/26/2015	CHJG	TRINA	Change Assigned Judge (batch process)	
1/28/2015	MISC	TRINA	Plaintiffs Motion For Leave to File Amended Complaint	Thomas J. Ryan
1/29/2015	MOSJ	LENA	Defendant Heart K Ranch's Motion For Summary Judgment	Thomas J. Ryan
	NOHG	LENA	Notice Of Hearing	Thomas J. Ryan
	MEMO	LENA	Defendant Heart K Ranch's Memorandum in Support of Notion for Summary Judgment	Thomas J. Ryan
	AFFD	LENA	Affidavit of Ronald P. Rainey	Thomas J. Ryan
	AFFD	LENA	Affidavit of Rose King in Support of the Defendant Heart K Ranch's Motion for Summary Judgment	Thomas J. Ryan
	AFFD	LENA	Affidavit of Gilbert King in Support of the Defendant Heart K Ranch's Motion for Summary Judgment	Thomas J. Ryan
	HRSC	LENA	Hearing Scheduled (Motion for Summary Judgment 02/27/2015 10:30 AM) Heart K Ranch	Thomas J. Ryan
2/9/2015	MISC	TRINA	Heart King Ranch Defendants' Memorandum in Opposition to Plaintiffs' Motion for Leave to File Amended Complaint	Thomas J. Ryan
2/10/2015	RSPN	LENA	Defendant Lows' Response and Objection to Plaintiff's Motion to Amend Complaint	Thomas J. Ryan
	RSPN	LENA	Defendant Lows' Response to Kings' Motion for Summary Judgment	Thomas J. Ryan
2/12/2015	MISC	TRINA	Plaintiffs Reply in Support of Motion for Leave to File Amended Complaint	Thomas J. Ryan
2/13/2015	MISC	TRINA	Plaintiffs Response to Heart K. Ranch's MSJ	Thomas J. Ryan
	MISC	TRINA	Compilation of Testimony	Thomas J. Ryan
2/19/2015	MISC	TRINA	Reply Memorandum in Support Defendant Heart K Ranch's Motion for Summary Judgment	Thomas J. Ryan
2/27/2015	DCHH	TRINA	Hearing result for Motion for Summary Judgment scheduled on 02/27/2015 10:30 AM: District Court Hearing Held Court Reporter: Kim Saunders Number of Transcript Pages for this hearing estimated: Heart K Ranch	Thomas J. Ryan
	DCHH	TRINA	Hearing result for Motion scheduled on 02/27/2015 10:30 AM: District Court Hearing Held Court Reporter: Kim Saunders Number of Transcript Pages for this hearing estimated: Motion to Amend Complaint	Thomas J. Ryan

Date	Code	User		Judge
3/10/2015	NOHG	DORLA	Notice Of Hearing 3/17/15 @ 11:00 a.m. In chambers.	Thomas J. Ryan
3/17/2015	MISC	LENA	Clarification of Oral Ruling Re: Motion to Amend Complaint	Thomas J. Ryan
3/25/2015	MEMO	DORLA	Memorandum Decision upon King defendants' motion for summary judgment	Thomas J. Ryan
	ORDR	DORLA	Order referring case for mediation	Thomas J. Ryan
3/30/2015	AMCO	DORLA	Amended Complaint Filed/First amended	Thomas J. Ryan
3/31/2015	MEDI	DORLA	Mediation Ordered	Thomas J. Ryan
	HRSC	DORLA	Hearing Scheduled (Mediation 04/30/2015 01:00 PM)	Thomas J. Ryan
4/6/2015	ORDR	DORLA	Order vacating and rescheduling pretrial conference	Thomas J. Ryan
	HRVC	DORLA	Hearing result for Pretrial Conference scheduled on 04/24/2015 10:30 AM: Hearing Vacated	Thomas J. Ryan
	HRSC	DORLA	Hearing Scheduled (Pretrial Conference 05/22/2015 10:30 AM)	Thomas J. Ryan
	NOTC	DORLA	Notice of service of second set of interrogatories, requests for production of documents and request for admission to defendant owyhee county	Thomas J. Ryan
4/7/2015	MOTN	DORLA	Motion/King Defendant's motion for reconsideration under rule 11(a)(2)(B) of decision denying motion for summary judgment	Thomas J. Ryan
	AFFD	DORLA	Affidavit in support of motion for reconsideration	Thomas J. Ryan
4/13/2015	CONT	DORLA	Continued (Mediation 04/29/2015 01:00 PM)	Stephen S. Dunn
	MISC	DORLA	Amended notice of hearing, re:Mediation	Thomas J. Ryan
4/20/2015	MEMO	LENA	Memorandum in Support of King Defendant's Motion for Reconsideration Under Rule 11(a)(2)(B) of Decision Denying Motion for Summary Judgment	Thomas J. Ryan
	MEMO	LENA	Memorandum in Support of Defendant's Motion in Limine	Thomas J. Ryan
	MOTN	LENA	Defendant's Motion in Limine	Thomas J. Ryan
4/28/2015	AFFD	DORLA	Affidavit of service; letter, depositions subpoena	Thomas J. Ryan
	ORDR	DORLA	Order SETTING case for hearing	Thomas J. Ryan
	HRSC	DORLA	Hearing Scheduled (Motion in Limine 05/14/2015 02:30 AM)	Thomas J. Ryan
	MISC	DORLA	Plaintiff response to King's motion in limine	Thomas J. Ryan
	MISC	DORLA	Plaintiffs' response to Kings motion for reconsideration	Thomas J. Ryan
5/7/2015	MOTN	DORLA	Motion to vacate trial setting and reset	Thomas J. Ryan
	AFFD	DORLA	Affidavit of Ronald Rainey in support of motion to vacate	Thomas J. Ryan



Date	Code	User		Judge
5/7/2015	MISC	DORLA	Plaintiffs' response to King's motion to continue trial date	Thomas J. Ryan
	NOTC	DORLA	Notice of hearing on motion	Thomas J. Ryan
	HRSC	DORLA	Hearing Scheduled (Mediation 05/14/2015 02:30 PM)	Thomas J. Ryan
5/11/2015	MEMO	DORLA	Memorandum/Reply memorandum in support of King defendants' motion for reconsideration under Rule 11(a)(2)(B) of decision denying motion for summary judgment	Thomas J. Ryan
	CONT	DORLA	Continued (Motion in Limine 05/14/2015 02:30 PM)	Thomas J. Ryan
5/12/2015		LENA	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Gil/Angelia King Receipt number: 0005455 Dated: 5/12/2015 Amount: \$48.00 (Check)	Thomas J. Ryan
5/14/2015	HRHD	DORLA	Hearing result for Motion in Limine scheduled on 05/14/2015 02:30 PM: Hearing Held	Thomas J. Ryan
5/15/2015	HRSC	DORLA	Hearing Scheduled (Court Trial 10/26/2015 09:00 AM)	Thomas J. Ryan
	ORDR	DORLA	Order vacating and rescheduling court trial	Thomas J. Ryan
	HRVC	DORLA	Hearing result for Jury Trial scheduled on 06/15/2015 09:00 AM: Hearing Vacated 4-day trial setting	Thomas J. Ryan
	HRVC	DORLA	Hearing result for Pretrial Conference scheduled on 05/22/2015 10:30 AM: Hearing Vacated	Thomas J. Ryan
	HRHD	DORLA	Hearing result for Mediation scheduled on 05/14/2015 02:30 PM: Hearing Held	Thomas J. Ryan
	HRVC	DORLA	Hearing result for Mediation scheduled on 04/29/2015 01:00 PM: Hearing Vacated	Stephen S. Dunn
	HRHD	DORLA	Hearing result for Motion scheduled on 10/20/2014 09:00 AM: Hearing Held Plaintiffs Motion to Quash Subpoena and Motion for Protective Order	Christopher S. Nye
	HRSC	DORLA	Hearing Scheduled (Status 08/28/2015 10:30 AM)	Thomas J. Ryan
5/21/2015	MISC	DORLA	Declaration of Matthew Cleverley	Thomas J. Ryan
	MOTN	DORLA	Plaintiff's Motion for summary judgment against Susie Low and Cal Low's counterclaims	Thomas J. Ryan
	NOTC	DORLA	Notice of hearing	Thomas J. Ryan
	HRSC	DORLA	Hearing Scheduled (Motion for Summary Judgment 06/26/2015 01:00 PM) Plaintiff's motion	Thomas J. Ryan
	NOTC	DORLA	Amended as to time only. Notice of hearing	Thomas J. Ryan
6/16/2015	MISC	DORLA	Resonense and objection to plaintiff's motion for summary judgment against Susi and Cal Low's counterclaims	Thomas J. Ryan

Date	Code	User		Judge
6/16/2015	AFFD	DORLA	Affidavit of Steve Murdock	Thomas J. Ryan
	AFFD	DORLA	Affidavit of Cal Low	Thomas J. Ryan
6/17/2015	REPL	DORLA	Reply/Plaintiff, in support of motion for summary judgment against Susie and Cal Low's counterclaims	Thomas J. Ryan
6/19/2015	MEMO	DORLA	Memorandum Decision upon King Defendants' motion for reconsideration	Thomas J. Ryan
6/26/2015	FSTC	DORLA	File Sent To Caldwell	Thomas J. Ryan
	DCHH	DORLA	Hearing result for Motion for Summary Judgment scheduled on 06/26/2015 01:00 PM: District Court Hearing Held Court Reporter: Kim Saunders Number of Transcript Pages for this hearing estimated: Plaintiff's motion	Thomas J. Ryan
7/6/2015	MOTN	LENA	Plaintiff's Motion for Reconsideration of the Court's June 19, 2015 Memorandum Decision on King's Motion for Summary Judgment and Request for Reconsideration	Thomas J. Ryan
	MISC	LENA	Deposition of Rose King	Thomas J. Ryan
	MISC	LENA	Deposition of Gilbert King	Thomas J. Ryan
7/8/2015	JDMT	DORLA	Judgment	Thomas J. Ryan
7/15/2015	TRAN	LENA	Transcript Filed/May 14, 2015	Thomas J. Ryan
	MEMO	LENA	Susie and Cal Lowe's Memorandum in Support of Motion for Partial Summary Judgment	Thomas J. Ryan
	MOSJ	LENA	Motion For Summary Judgment	Thomas J. Ryan
	NOHG	LENA	Notice Of Hearing Re: Susie and Cal Lowe's Motion for Partial Summary Judgment	Thomas J. Ryan
	HRSC	LENA	Hearing Scheduled (Motion for Partial Summary Judgment 08/20/2015 02:00 PM)	Thomas J. Ryan
7/22/2015	NOHG	DORLA	Notice Of Hearing motion for Summary Judgment and request for reconsideration	Thomas J. Ryan
8/4/2015	MEMO	DORLA	Memorandum/King Defendants' memorandum in opposition to the Fuquay Plaintiff's Motion for reconsideration	Thomas J. Ryan
	NOHG	DORLA	Notice Of Hearing	Thomas J. Ryan
	MEMO	DORLA	Memorandum/King Defendant's memorandum in Support of motion to strike the Fuquay plaintiffs' motion for consideration	Thomas J. Ryan
	MOTN	DORLA	Motion/King Defendant's motion to strike the Fuquay Plaintiffs' motion for reconsideration	Thomas J. Ryan
	HRSC	DORLA	Hearing Scheduled (Hearing Scheduled 08/20/2015 02:00 PM)	Thomas J. Ryan
8/12/2015	NOHG	DORLA	Notice Of Hearing	Thomas J. Ryan

Date	Code	User		Judge
8/12/2015	MOTN	DORLA	Motion/Plaintiffs' motion to allow late filed declaration in support of motion for reconsideration	Thomas J. Ryan
	MOTN	DORLA	Motion/Plaintiffs' motion to shorten time for hearing on motion to allow late filed declaration in support of motion for reconsideration	Thomas J. Ryan
	MISC	DORLA	Declaration of Matthew Cleverley	Thomas J. Ryan
	MISC	DORLA	Plaintiffs' response to King's motion to strike deposition submissions	Thomas J. Ryan
	HRSC	DORLA	Hearing Scheduled (Motion 08/20/2015 02:00 PM) Plaintiff's motions	Thomas J. Ryan
	REPL	DORLA	Reply/Plaintiffs' reply in support of motion for reconsideration of the court's June 19, 2015 memorandum decision of King's motion for summary judgment and request for reconsideration	Thomas J. Ryan
8/17/2015	MEMO	DORLA	Memorandum/The King Defendants' reply memorandum on their motion to strike the Fuquay Plaintiffs' motion for reconsideration	Thomas J. Ryan
	MISC	DORLA	Susie and Cal Low's reply in support of motion for partial summary judgment	Thomas J. Ryan
8/21/2015	DCHH	RFAHEY	Hearing result for Motion for Partial Summary Judgment scheduled on 08/20/2015 02:00 PM: District Court Hearing Held Court Reporter: Kim Saunders Number of Transcript Pages for this hearing estimated:	Thomas J. Ryan
	DCHH	RFAHEY	Hearing result for Hearing Scheduled scheduled on 08/20/2015 02:00 PM: District Court Hearing Held Court Reporter: Kim Saunders Number of Transcript Pages for this hearing estimated:	Thomas J. Ryan
	DCHH	RFAHEY	Hearing result for Motion scheduled on 08/20/2015 02:00 PM: District Court Hearing Held Court Reporter: Kim Saunders Number of Transcript Pages for this hearing estimated: Plaintiff's motions	Thomas J. Ryan
	HRSC	RFAHEY	Hearing Scheduled (Status Conference 09/25/2015 10:30 AM)	Thomas J. Ryan
	CONT	RFAHEY	Hearing result for Status scheduled on 08/28/2015 10:30 AM: Continued	Thomas J. Ryan
8/25/2015	MEMO	RFAHEY	Memorandum Decision Upon Plaintiffs' Motion For Summary Judgment Against Susie Low and Cal Low's Counterclaims	Thomas J. Ryan
9/11/2015	MEMO	RFAHEY	Memorandum Decision Upon Plaintiffs' Motion For Reconsideration Filed July 6, 2015	Thomas J. Ryan
9/16/2015	MEMO	RFAHEY	Memorandum of Costs	Thomas J. Ryan

Date	Code	User		Judge
9/21/2015	MEMO	RFAHEY	Memorandum Decision Upon Low Defendants' Motion For Summary Judgment	Thomas J. Ryan
9/25/2015	DCHH	RFAHEY	Hearing result for Status Conference scheduled on 09/25/2015 10:30 AM: District Court Hearing Held Court Reporter:laura Whiting Number of Transcript Pages for this hearing estimated:	Thomas J. Ryan
	HRHD	RFAHEY	Hearing result for Status Conference scheduled on 09/25/2015 10:30 AM: Hearing Held	Thomas J. Ryan
10/2/2015	HRVC	RFAHEY	Hearing result for Court Trial scheduled on 10/26/2015 09:00 AM: Hearing Vacated	Thomas J. Ryan
10/6/2015	ORDR	RFAHEY	Order on Low Defendants' Motion For Partial Summary Judgment	Thomas J. Ryan
10/13/2015	STIP	RFAHEY	Stipulation for Entry of Final Judgment on King's Counterclaims	Thomas J. Ryan
10/21/2015	NOTA	RFAHEY	NOTICE OF APPEAL	Thomas J. Ryan
		RFAHEY	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Cleverley, Matthew R (attorney for Fuquay, Clinton Ward) Receipt number: 0007098 Dated: 10/21/2015 Amount: \$129.00 (Check) For: Fuquay, Clinton Ward (plaintiff), Fuquay, Hailey Rose (plaintiff) and Fuquay, John E. (plaintiff)	Thomas J. Ryan
		RFAHEY	Miscellaneous Payment: For Making Copy Of Any File Or Record By The Clerk, Per Page Paid by: Matthew Cleverley Receipt number: 0007099 Dated: 10/21/2015 Amount: \$100.00 (Check)	Thomas J. Ryan
12/21/2015	JDMT	RFAHEY	Judgment - Final Entered RE: counterclaims against Plaintiffs	Thomas J. Ryan
1/6/2016	NOTA	RFAHEY	NOTICE OF APPEAL-AMENDED	Thomas J. Ryan
2/16/2016	REQU	RFAHEY	Request For Status Conference	Thomas J. Ryan
2/19/2016	ORDR	RFAHEY	Order Setting Case For Telephonic Status Conference	Thomas J. Ryan
	HRSC	RFAHEY	Hearing Scheduled (Status 02/26/2016 11:00 AM) Telephonic	Thomas J. Ryan
2/22/2016	MISC	RFAHEY	Order Granting Motion To dismiss Appeal From Supreme Court	Thomas J. Ryan
3/10/2016	MEMO	RFAHEY	Kings' Memorandum In Support Of Proposed Judgment	Thomas J. Ryan
3/14/2016	MEMO	RFAHEY	Plaintiffs' Memorandum Regarding Entry Of Final Judgment On Kings' Counterclaims	Thomas J. Ryan
3/24/2016	REMT	RFAHEY	Remittitur	Thomas J. Ryan
3/29/2016	FJDE	RFAHEY	Amended Final Judgement, Order Or Decree Entered	Thomas J. Ryan

Date	Code	User		Judge
3/29/2016	MEMO	RFAHEY	Memorandum Decision Upon Request For Final Judgment	Thomas J. Ryan
	REMT	RFAHEY	Remittitur	Thomas J. Ryan
	CDIS	RFAHEY	Civil Disposition entered for: Fuquay, Clinton Ward, Plaintiff; Fuquay, Hailey Rose, Plaintiff; Fuquay, John E., Plaintiff. Filing date: 3/29/2016	Thomas J. Ryan
	STAT	RFAHEY	STATUS CHANGED: Closed pending clerk action	Thomas J. Ryan
	JDMT	RFAHEY	Judgment - Final Entered	Thomas J. Ryan
4/19/2016	BNDT	RFAHEY	Bond Transferred To County: (Transaction number 67 dated 4/19/2016 amount 1,000.00)	Thomas J. Ryan
5/2/2016	NOTA	RFAHEY	NOTICE OF APPEAL	Thomas J. Ryan
		RFAHEY	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Cleverley, Matthew R. (attorney for Fuquay, John E.) Receipt number: 0001083 Dated: 5/2/2016 Amount: \$129.00 (Check) For: Fuquay, Clinton Ward (plaintiff)	Thomas J. Ryan
		RFAHEY	Miscellaneous Payment: For Comparing And Conforming A Prepared Record, Per Page Paid by: Fuquay, Clinton Ward Receipt number: 0001084 Dated: 5/2/2016 Amount: \$100.00 (Check)	Thomas J. Ryan

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

**FILED**  
A.M. 2:50 P.M.

AUG 11 2014

ANGELA BARKELL, CLERK  
*A. Barkell*  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Case No. *OW-14-0278*

COMPLAINT  
(Prescriptive Easement)

Fee: \$221.00

**NATURE OF THIS PROCEEDING**

1. This is an action for a declaratory judgment to establish an easement to the real properties owned by 1) John E. Fuquay and 2) Clinton Ward Fuquay and Hailey Rose Fuquay. The Properties are accessed via a private roadway commonly known as King Lane.
2. Some of the Defendants own or have an interest in the parcels of property that are burdened by King Lane. Others may be burdened by the roadway, depending on the specific location of the roadway, if there is a dispute as to its actual location on the

COMPLAINT- 1

**ASSIGNED JUDGE**

**CHRISTOPHER S. NYE**

FIDELITY NATIONAL LAW GROUP  
1200 - 6<sup>TH</sup> AVENUE, SUITE 620  
SEATTLE, WA 98101  
(206) 223-4525

ground. Those Defendants whose property is determined not to be burdened by the roadway or any easement will be dismissed from this action.

3. This action does not seek any monetary damages or to change any property boundaries. It seeks only to confirm that the Plaintiffs have the right to access their properties over King Lane.

### **PARTIES**

4. The properties at issue are located east of the city of Oreana, Idaho in Owyhee County.
5. A street map showing the general location of the area is attached as Exhibit "A." An aerial map showing the Owyhee County Assessor's lot boundaries is attached as Exhibit "B." A Google Earth map showing an aerial view and general road boundaries and identities of the affected parcel owners is attached as Exhibit "C."

#### **Clinton Ward Fuquay and Hailey Rose Fuquay**

6. Clinton Ward Fuquay and Hailey Rose Fuquay own the parcel (the "Clinton Fuquay Parcel") at the west end of King Lane. It was once part of the John Fuquay Parcel. The legal description for the Clinton Fuquay Parcel is shown on the warranty deed attached as Exhibit "D."

#### **John Fuquay**

7. John Fuquay owns the parcel (the "John Fuquay Parcel") which is located south of the Clinton Fuquay Parcel. The legal description for the John Fuquay Parcel is shown on the Trustee's Deed dated October 13, 1989 attached as Exhibit "E," (less the Clinton Fuquay Parcel).

**Susie Low and Cal Low Parcel 1**

8. Susie Low and Cal Low own the parcel (the “Low Parcel 1”) located south of King Lane. There are two parcels which were conveyed by the same deed. The legal description for the Low Parcel 1 is shown on the Special Warranty Deed attached as Exhibit “F.”

**Avco Financial Services of Idaho Falls, Inc.**

9. Avco Financial Services of Idaho Falls, Inc. may claim some right, title or interest in the Low Parcel 1 by virtue of a Real Estate Mortgage in the amount of \$68,000 which was recorded on or around March 18, 1996 as Owyhee county records no. 218373. The Mortgage was executed by Samuel V.C. Steiner and Mary J. Steiner, husband and wife and encumbers Low Parcel 1. It is possible that this mortgage was paid but was never released. A copy of the Mortgage is attached as Exhibit “G.”

**Susie Low and Cal Low Parcel 2**

10. Susie Low and Cal Low own the parcel (the “Low Parcel 2”) located south of King Lane. Oreana Loop Road crosses the northwest corner of Low Parcel 2. The legal description for the Low Parcel 2 is shown on the Special Warranty Deed attached as Exhibit “H.”

**Heart K Ranch Trust**

11. The Heart K Ranch Trust UTA December 28, 2012 owns the parcel to the north of King Lane (the “Heart K Ranch Parcel”). The legal description for the Heart K Ranch Parcel is shown on the Gift Deed attached as Exhibit “I.”



**Gordon G. King and Rose M. King**

12. Gordon G. King and Rose M. King may claim some right, title or interest in the Heart K. Ranch Parcel by virtue of a Deed of Trust in the amount of \$86,500 in favor of One West Bank which was recorded on July 28, 2004 as Owyhee County records no. 248616 and encumbered the Heart K Ranch Parcel. A copy of the deed of trust is attached as Exhibit "J." The deed of trust was assigned to Gordon G. King and Rose M. King on September 12, 2005. A copy of the Assignment of Deed of Trust is attached as Exhibit "K."

**First American Title Insurance Company**

13. First American Title Insurance Company may claim some right, title or interest in the Heart K. Ranch Parcel by virtue of being named as the trustee under a Deed of Trust in the amount of \$86,500 in favor of One West Bank which was recorded on July 28, 2004 as Owyhee County records no. 248616 and encumbered the Heart K Ranch Parcel. A copy of the deed of trust is attached as Exhibit "J."

**FACTUAL ALLEGATIONS**

14. The properties at issue in this Complaint are located in Owyhee County, Idaho. They are located approximately three miles east of Oreana and are south of Highway 78. The closest public roadway to the properties is Oreana Loop Road.

15. Oreana Loop road runs in a generally west direction from Highway 78 to a point near a location where Low Parcels 1 and 2 and the Heart K Ranch Parcels intersect. Near that

location, Oreana Loop Road turns and continues in a southwesterly direction through Low Parcel 1.

16. King Lane is a private roadway that continues westerly from where Oreana Loop Road turns southwest Oreana Loop Road and provides the access to the Clint Fuquay Parcel and the John Fuquay Parcel.

17. The Plaintiffs have used King Lane to access the Clint Fuquay Parcel and the John Fuquay Parcel since at least 1989.

**FIRST CAUSE OF ACTION**  
**DECLARATORY JUDGMENT**  
**(PRESCRIPTIVE EASEMENT)**

18. The use of King Lane for access by owners of the Clint Fuquay Parcel and the John Fuquay Parcel has been open and continuous over the same route for more than 5 years,<sup>1</sup> and was without permission from adverse land owners.

19. Plaintiffs are entitled to a Judgment declaring that they have established a prescriptive easement for access and utilities from Oreana Loop Road over King Lane for access to the Clint Fuquay Parcel and the John Fuquay Parcel.

**WHEREFORE, PLAINTIFFS PRAYS AS FOLLOWS**


1. For a Judgment declaring that they have an easement for ingress, egress and utilities to over King Lane for access to Clint Fuquay Parcel and the John Fuquay Parcel.

---

<sup>1</sup> I.C. 5-203 was amended from 5 years to 20 years in 2006, but the 5 year time frame still applies to prescriptive claims before 2006. Machado v. Ryan, 153 Id 212, 222.

2. For a Judgment Declaring that each of the Defendants rights in their parcels are subject to and servient to the easement for access to Clint Fuquay Parcel and the John Fuquay Parcel.
3. For a Judgment declaring that the easement runs with the land and is binding and inures to the benefit of all subsequent owners, transferees, and assigns of the Clint Fuquay Parcel and the John Fuquay Parcel.
4. For a Judgment declaring that the easement runs with the land and is binding and that all subsequent owners, transferees, and assigns of Defendants shall be subject to the easement.
5. For a Judgment enjoining any defendant from impeding or interfering with Plaintiffs' access rights over King Lane.

Dated: August 6, 2014

  
\_\_\_\_\_  
Matthew R. Cleverley, SB #5418  
Fidelity National Law Group  
1200 – 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 223-4525, ext. 103  
[Matthew.Cleverley@fnf.com](mailto:Matthew.Cleverley@fnf.com)  
Attorney for Plaintiffs

# EXHIBIT A



# EXHIBIT E

TRUSTEE'S DEED

FOR VALUE RECEIVED

JOHN KROMMENHOEK, as trustee for the bankrupt Estate of James C. Fuquay

GRANTOR(s), does(do) hereby GRANT, BARGAIN, SELL and CONVEY all my right, title and interest unto

John Edmond Fuquay and Karen Lee Fuquay, husband and wife

GRANTEE(S), whose current address is: Rt. 79, Box 220, Murphy, Idaho 83650

the following described real property, in Blaine County, State of Idaho, more particularly described as follows, to wit:

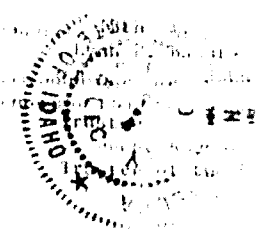
IN TOWNSHIP 4 SOUTH, RANGE 1 EAST, BLAINE COUNTY, IDAHO Section 34, SKINNEY, District, SKINNEY

200795

FILED 200795  
OCT 19 3 17 PM '07

6-17-07  
J. J. J.

to have and to hold the same to said grantee, his heirs, assigns and assigns forever, together and separately, and the trustee, or either of them, his heirs, assigns and assigns forever, or should sell and convey the same, IN WITNESS WHEREOF, I, the said trustee, have hereunto set my hand and the seal of said trust, this 17th day of October, 2007.



# EXHIBIT F



107036

Recording Requested By and  
When Recorded Return to:

SUSIE LOW  
CAL LOW  
21220 Oreana Loop Road  
Oreana, ID 83650

**Instrument # 254987**  
MURPHY, OWYHEE, IDAHO  
2006-01-27 04:35:41 No. of Pages: 4  
Recorded for : PIONEER TITLE COMPANY  
CHARLOTTE SHERBURN Fee: 12.00  
Ex-Officio Recorder Deputy A. Dygert  
Index to: DEED, WARRANTY

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

**SPECIAL WARRANTY DEED**

THIS SPECIAL WARRANTY DEED (this "Deed"), made as of the 6<sup>th</sup> day of January, 2006, is between **PIONEER EXCHANGE ACCOMMODATION TITLEHOLDER #69, LLC**, an Idaho limited liability company ("Grantor"), and **SUSIE LOW AND CAL LOW, HUSBAND AND WIFE** ("Grantee"), whose legal address is: 21220 Oreana Loop Road, Oreana, ID 83650.

WITNESSETH, That Grantor, for and in consideration of One Dollar and No/100 (\$1.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm, unto Grantee, its successors and assigns forever, all the real property, together with improvements, located in the County of Owyhee, State of Idaho, more particularly described as follows:

- See legal description described on Exhibit "A" attached hereto
- Futher Granted Water Rights as Defined in Attachment "Water Rights"

TOGETHER with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of Grantor, either in law or equity, of in and to the above bargained premises, with the hereditaments, easements, rights of way and appurtenances, and with all of Grantor's interest, if any, in and to any and all minerals, water, ditches, wells, reservoirs and drains, and all water, ditch, well, reservoir and drainage rights which are appurtenant to, located on, now or hereafter acquired under or above or used in connection with the property (collectively, the "Property").

TO HAVE AND TO HOLD the said premises above bargained and described with the appurtenances, unto Grantee, its successors and assigns forever. Grantor, for itself, and its successors and assigns, does covenant, grant, bargain and agree to and with the Grantee, its successors and assigns, that at the time of the ensealing and delivery of these presents, Grantor is well seized of the premises above conveyed, has good, sure, perfect, absolute and indefeasible estate of inheritance, in law, in fee simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form as aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, encumbrances and restrictions of whatever kind or nature whatsoever, as of July 15, 2005 .

The Grantor shall and will WARRANT AND FOREVER DEFEND the above-bargained premises in the quiet and peaceable possession of Grantee, its successors and assigns, against all and every person or persons claiming the whole or any part thereof BY, THROUGH OR UNDER Grantor.



EXHIBIT A

PO7036

In Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho.

Section 34: E1/2 SE1/4, SE1/4 NE 1/4

Section 35: W1/2 SW1/4, SW1/4 NW14

EXCEPTING 1-1/2 acres in the Southwest Quarter of the Northwest Quarter of Section 35, Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho, described as follows:

COMMENCING at the Northeast corner of the Southwest Quarter of the Northwest Quarter of said Section, running thence in a Westerly direction 630 feet; thence in a Southerly direction 104 feet; thence in an Easterly direction 630 feet; thence in a Northerly direction 104 feet to the PLACE OF BEGINNING.

In Township 5 South, Range 1 East, Boise Meridian, Owyhee County, Idaho.

Section 2: Lot 4

Section 3: Lot 1

WATER RIGHTS

1. No. 57-89. 4-1-1874 Priority. Castle Creek. Irrigation and Stock Water.	0.240 CFS.
2. No. 57-95. 4-1-1885 Priority. Castle Creek Irrigation.	0.360 CFS.
3. No. 57-104. 4-1-1887 Priority. Castle Creek. Irrigation.	0.200 CFS
4. No. 57-116. 4-1-1895 Priority. Castle Creek. Irrigation.	0.100 CFS
5. No. 57-120. 4-1-1896 Priority. Castle Creek. Irrigation.	0.300 CFS
6. No. 57-127. 4-1-1899 Priority. Castle Creek Irrigation.	0.400 CFS
7. No. 57-149. 4-1-1906 Priority. Castle Creek. Irrigation.	0.200 CFS
8. No. 57-2104. 10-5-1920 Priority. Castle Creek. Irrigation.	<u>1.280 CFS</u>
Total	3.080 CFS .

Total Acres: 145.

CDC.  
8/2

# EXHIBIT G

2262

# REAL ESTATE MORTGAGE

For Value Received, **SAMUEL V.C. STEINER AND MARY J. STEINER, HUSBAND AND WIFE**

the mortgagor do hereby grant, bargain, sell and convey unto  
**AVCO FINANCIAL SERVICES OF DIAHO FALLS, INC.**

the mortgagee the following described premises, in **OWYHEE** County, Idaho, to-wit:

**LEGAL DESCRIPTION MORE PARTICULARLY DESCRIBED IN EXHIBIT "A"  
ATTACHED HERETO AND MADE A PART HEREOF.**

**PROPERTY COMMONLY KNOWN AS: HC 79 BOX 2235  
MURPHY, IDAHO 83650**

**TO HAVE AND TO HOLD** the said premises, with their appurtenances, unto the said mortgagee, heirs and assigns forever.

This conveyance is intended as a mortgage to secure the payment of the sum of **\$68,000.00** **SIXTY EIGHT THOUSAND AND 00/100** DOLLARS with interest, in accordance with the terms of a promissory note of even date herewith, payable to the order of the mortgagee, with final payment due **Unisource Line of Credit** and providing for acceleration of the due date of the principal for default in the payment of interest or any installment of principal, and providing for a reasonable attorney's fee in case of suit or action.

The mortgagee consent and agree with the mortgagee as follows: That he the owner to fee simple of the above described premises and that they are free from all encumbrances.

That he will pay the indebtedness hereby secured promptly, according to the terms of said promissory note. That he will pay all taxes, liens and assessments of any nature hereafter levied or imposed, or becoming payable, upon said premises not later than the twentieth day before delinquency. That he will keep the buildings on said premises insured against loss or damage by fire, by some insurance company acceptable to the mortgagee, until the sum secured by this mortgage is fully paid with interest. The mortgagee may from time to time and whenever it so desires, cause an abstract of title to be returned to the town date or produce a title report from a reputable title company and the mortgagee agree to pay the cost thereof upon demand.

If the mortgagee shall fail to pay any such tax or lien, abstract or title report charge, or fail to maintain such fire insurance, the mortgagee may pay the same or procure and insurance, abstract continuation or title report and pay the cost thereof, and all payments by the mortgagee for any such purpose shall be added to the indebtedness hereby secured, and shall be repayable on demand, with interest at the rate of eight (8) per cent per annum until paid.

For the purpose of further securing said indebtedness and performance of the covenants herein contained, the mortgagee hereby sell and assigns to the mortgagee any and all rentals accruing, or to accrue on said premises, during the life of this mortgage.

Now, if the said mortgagee shall pay or cause to be paid all moneys which may become due upon said promissory note and shall otherwise comply with the terms and conditions hereof, this conveyance shall be void; but in case default shall be made in the payment of the indebtedness hereby secured, or any part thereof, principal or interest, or in any of the covenants or agreements herein contained, then the mortgagee or assigns, at his option, may declare the entire indebtedness hereby secured immediately due and payable, and foreclose this mortgage and cause said mortgaged premises to be sold in the manner provided by law, and out of the moneys arising from such sale retain principal and interest together with any sums advanced as provided herein, with interest as aforesaid, together with the costs and charges of such foreclosure suit and sale, including such sum as the court may adjudge reasonable as an attorney's fee to be allowed the plaintiff, and the overplus, if any there be, pay over to the mortgagee here and assigns.

Dated **MARCH 14, 1996**

*[Signature of Samuel V.C. Steiner]*  
**SAMUEL V.C. STEINER**

*[Signature of Mary J. Steiner]*  
**MARY J. STEINER**

**NOTARY PUBLIC**  
STATE OF IDAHO, COUNTY OF Owyhee  
On this **14th** day of **March**, 1996,  
before me, a Notary Public for said State, personally  
appeared **SAMUEL V.C. STEINER**  
**MARY J. STEINER**

known to me to be the persons whose names  
subscribed to the within instrument, and acknowledged to  
me that they executed the same.

*[Signature of Matt Smith]*  
**MATT SMITH**  
Residing at **NAMPA** Idaho.  
Comm. Expires **2-13-98**

REQUESTED  
*[Signature]*  
FEE

*[Signature]*

118773

Printed by the AMERICAN LAND TITLE CO., P.O. Box 1116, 1040

118773  
IDA  
Sec  
Sec

FE

to:

agree

0 DOLLARS  
to the order of the

st or any installment

with promise and that they

all taxes, liens and assessments  
to be paid by the mortgagor  
shall be secured by the mortgage and  
in full or pro rata a title report

may pay the same or  
shall be added to the interest

to the mortgage

mortgage comply with the terms  
of the deed, unless otherwise  
provided by law, and out of the  
proceeds of the sale of the  
premises if any there be, pay over

*over*

1000000

File No. 2262  
Exhibit "A", Land description:

IN TOWNSHIP 4 SOUTH, RANGE 1 EAST, B. M., OWYHEE COUNTY,  
IDAHO

Section 34: E1SE1, SE1NE1

Section 35: W1SW1, SW1NW1, EXCEPTING 1 1/2 acres in the  
SW1NW1 of Section 35, Township 4 South, Range  
1 East, B. M., described as follows:

Commencing at the NE corner of the SW1NW1 of  
said Section, running thence in a westerly direction 630  
feet; thence in a southerly direction 104 feet; thence in an  
easterly direction 630 feet; thence in a northerly direction  
104 feet to the place of beginning.

IN TOWNSHIP 5 SOUTH, RANGE 1 EAST, B. M., OWYHEE COUNTY,  
IDAHO

Section 2: Lot 4

Section 3: Lot 1

# EXHIBIT H



P07066

Recording Requested By and  
When Recorded Return to:

SUSIE LOW  
CAL LOW  
21220 Oreana Loop Road  
Oreana, ID 83650

**Instrument # 254988**

**MURPHY, OWYHEE, IDAHO**

2006-01-27 04:38:59 No. of Pages: 2

Recorded for : PIONEER TITLE COMPANY

CHARLOTTE SHERBURN

Ex-Officio Recorder Deputy *a. Dygent* Fee: 6.00

Index to: DEED, WARRANTY

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

### SPECIAL WARRANTY DEED

THIS SPECIAL WARRANTY DEED (this "Deed"), made as of the 6<sup>th</sup> day of January, 2006, is between **PIONEER EXCHANGE ACCOMMODATION TITLEHOLDER #69, LLC**, an Idaho limited liability company ("Grantor"), and **SUSIE LOW AND CAL LOW, HUSBAND AND WIFE** ("Grantee"), whose legal address is: 21220 Oreana Loop Road, Oreana, ID 83650.

WITNESSETH, That Grantor, for and in consideration of One Dollar and No/100 (\$1.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm, unto Grantee, its successors and assigns forever, all the real property, together with improvements, located in the County of Owyhee, State of Idaho, more particularly described as follows:

Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho; Section 35: Northeast Quarter Southwest Quarter; Southwest Quarter Northeast Quarter; Southeast Quarter Northwest Quarter; Northwest Quarter Southeast Quarter ; Including Water Right #57-10045 and #57-10046

TOGETHER with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of Grantor, either in law or equity, of in and to the above bargained premises, with the hereditaments, easements, rights of way and appurtenances, and with all of Grantor's interest, if any, in and to any and all minerals, water, ditches, wells, reservoirs and drains, and all water, ditch, well, reservoir and drainage rights which are appurtenant to, located on, now or hereafter acquired under or above or used in connection with the property (collectively, the "Property").

TO HAVE AND TO HOLD the said premises above bargained and described with the appurtenances, unto Grantee, its successors and assigns forever. Grantor, for itself, and its successors and assigns, does covenant, grant, bargain and agree to and with the Grantee, its successors and assigns, that at the time of the ensembling and delivery of these presents, Grantor is well seized of the premises above conveyed, has good, sure, perfect, absolute and indefeasible estate of inheritance, in law, in fee simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form as aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, encumbrances and restrictions of whatever kind or nature whatsoever, as of July 15, 2005 .

The Grantor shall and will WARRANT AND FOREVER DEFEND the above-bargained premises in the quiet and peaceable possession of Grantee, its successors and assigns, against all and every person or persons claiming the whole or any part thereof BY, THROUGH OR UNDER Grantor.

IN WITNESS WHEREOF, Grantor has executed this Special Warranty Deed as of the date set forth above.

**PIONEER EXCHANGE ACCOMMODATION TITLEHOLDER #69, LLC,**  
an Idaho limited liability company

By: Pioneer 1031 Company, Member

By: *Alicia Reinhard*  
As: Assistant Secretary

STATE OF IDAHO )  
 ) ss.  
COUNTY OF ADA )

The foregoing instrument was acknowledged before me this 6<sup>th</sup> day of January, 2006, by Alicia Reinhard, as Assistant Secretary of Pioneer 1031 Company, an Idaho corporation, Member of Pioneer Exchange Accommodation Titleholder #69, LLC, an Idaho limited liability company.

WITNESS my hand and official seal.

My commission expires: 9.9.09.

*Jesse Hamilton*  
Notary Public



(NOTARIAL SEAL)

# EXHIBIT I

**GIFT DEED**

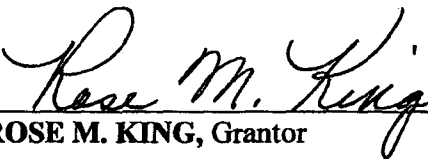
Intending a gift, **ROSE M. KING**, a single person, Grantor, does hereby grant, bargain, sell and convey to **GILBERT GENE KING, AS TRUSTEE (or any successor Trustee thereof) OF THE HEART K RANCH TRUST UTA DECEMBER 28, 2012**, Grantee, whose current address is Post Office Box 36, Murphy, Idaho 83650, the following real property located in Owyhee County, Idaho, as described on Exhibit A, attached hereto and incorporated herein.

SUBJECT TO current taxes and assessments and all subsequent years, together with any and all existing easements, rights-of-way, reservations, restrictions and encumbrances of record, to any existing tenancies, to all zoning laws and ordinances, and to any state of facts an accurate survey or inspection of the premises would show.

This conveyance shall include any and all appurtenances, tenements, hereditaments, reversions, remainders, easements, rights-of-way and water rights in anywise appertaining to the property herein described.

All income and gain derived from such property shall be the sole and separate property of said Grantee.

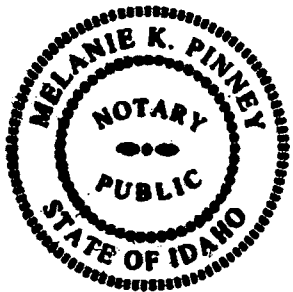
IN WITNESS WHEREOF, the Grantor has hereunto subscribed her name to this instrument this 28th day of December, 2012.

  
\_\_\_\_\_  
ROSE M. KING, Grantor

STATE OF IDAHO )  
) ss:  
County of Ada )

On this 28th day of December, 2012, before me, the undersigned, a notary public in and for said State, personally appeared ROSE M. KING, known or acknowledged to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.



*Melanie K. Pinney*  
Notary Public for Idaho  
My Commission Expires 10-26-2018

**EXHIBIT A**

**Tract I:**

**In Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho**

**Section 26: Southwest Quarter, South Half of the Northwest Quarter, North Half of the Southeast Quarter, Southwest Quarter of the Southeast Quarter, South Half of the Northeast Quarter, Northeast Quarter of the Northeast Quarter**

**Section 27: Southeast Quarter of the Southeast Quarter**

**Section 34: Northeast Quarter of the Northeast Quarter**

**Section 35: North Half of the Northwest Quarter, and a parcel in the Southwest Quarter of the Northwest Quarter described as follows: Beginning at the Northeast corner of the Southwest Quarter of the Northwest Quarter, Sec. 35, T4S, R1E, B.M.; thence in a Westerly direction 630 feet; thence in a Southerly direction 104 feet; thence in an Easterly direction 630 feet; thence in a Northerly direction 104 feet to the PLACE OF BEGINNING.**

**EXCEPTING THEREFROM:**

**A portion of the Northwest Quarter of the Northwest Quarter of Section 35 in Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho, described as follows:**

**COMMENCING at the Section corner common to Sections 26, 27, 34 and 35 of Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho; thence**

**South 1320 feet along the Section line common to Sections 34 and 35 a distance of 1320 feet to the Southwest corner of the Northwest Quarter of the Northwest Quarter of said Section 35; thence**

**East along the South line of said Northwest Quarter of the Northwest Quarter a distance of 558 feet to the TRUE POINT OF BEGINNING; thence**

**North parallel with the West line of said Section 35 a distance of 165 feet; thence**

**East and parallel with the South line of the Northwest Quarter of the Northwest Quarter a distance of 175 feet; thence**

**South and parallel with the West line of said Section 35 a distance of 165 feet to a point on the South line of the Northwest Quarter of the Northwest Quarter of said Section 35 that is East a distance of 175 feet from the POINT OF BEGINNING; thence**

**West along said South line of the Northwest Quarter of the Northwest Quarter a distance of 175 feet to the TRUE POINT OF BEGINNING.**

**Tract II:**

**A portion of the Northwest Quarter of the Northwest Quarter of Section 35 in Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho, described as follows:**

**COMMENCING at the Section corner common to Sections 26, 27, 34 and 35 of Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho; thence**

South 1320 feet along the Section line common to Sections 34 and 35 a distance of 1320 feet to the Southwest corner of the Northwest Quarter of the Northwest Quarter of said Section 35; thence

East along the South line of said Northwest Quarter of the Northwest Quarter a distance of 558 feet to the TRUE POINT OF BEGINNING; thence

North parallel with the West line of said Section 35 a distance of 165 feet; thence

East and parallel with the South line of the Northwest Quarter of the Northwest Quarter a distance of 175 feet; thence

South and parallel with the West line of said Section 35 a distance of 165 feet to a point on the South line of the Northwest Quarter of the Northwest Quarter of said Section 35 that is East a distance of 175 feet from the POINT OF BEGINNING; thence

West along said South line of the Northwest Quarter of the Northwest Quarter a distance of 175 feet to the TRUE POINT OF BEGINNING.

**Tract III:**

In Township 7 South, Range 1 East, Boise Meridian, Owyhee County, Idaho

Section 9: East Half of the Northeast Quarter

**Tract IV:**

In Township 7 South, Range 2 East, Boise Meridian, Owyhee County, Idaho

Section 30: West Half of the Northeast Quarter

**Tract V:**

In Township 8 South, Range 1 East, Boise Meridian, Owyhee County, Idaho

Section 6: Government Lot 7, Southeast Quarter of the Southwest Quarter, Southwest Quarter of the Southeast Quarter

Section 7: Government Lot 1, Northeast Quarter of the Northwest Quarter, North Half of the Northeast Quarter

Section 18: Government Lots 2, 3, 5, 6 and 7, Northwest Quarter of the Southeast Quarter

Section 19: Government Lots 1, 2 and 3, East Half of the Northwest Quarter, Northeast Quarter of the Southwest Quarter, North Half of the Southeast Quarter

**Tract VI:**

In Township 8 South, Range 1 West, Boise Meridian, Owyhee County, Idaho

Section 1: East Half of the Southeast Quarter

Section 12: East Half of the Northeast Quarter, East Half of the Northwest Quarter of the Northeast Quarter

Section 13: South Half of the North Half, North Half of the South Half, Government Lots 1, 2, 3 and 4

Section 18: Southeast Quarter, East Half of the Southwest Quarter, Government Lots 3 and 4

Section 19: North Half of the Northeast Quarter, Southeast Quarter of the Northeast Quarter, Northeast Quarter of the Northwest Quarter, Government Lot 1, East Half of the Southeast Quarter

Section 20: Southwest Quarter of the Northwest Quarter, Northwest Quarter of the Southwest Quarter

Section 22: Northwest Quarter of the Southeast Quarter, South Half of the Southeast Quarter

**Section 24:** Northwest Quarter, North Half of the Southwest Quarter  
**Section 26:** Southwest Quarter of the Northwest Quarter  
**Section 27:** Northeast Quarter of the Northeast Quarter

**TOGETHER WITH** a grant of Easement for a well, ditch and cooling pond located in the NWNE, Sec. 34, T4S, R1E, BM, as granted by the United States, Dept. of Interior, Bureau of Land Management, on August 4, 1961, under Serial No. Idaho 012682.



# EXHIBIT J

106120

After recording please return to:

Bank of the West, a  
California Corporation  
[Company Name]

[Name of Natural Person]

P.O. Box 512086 (service)  
[Street Address]

Los Angeles, CA 90051-0086  
[City, State Zip Code]

Instrument # 248616  
MURPHY, OWYHEE, IDAHO  
2004-07-28 04:26:21 No. of Pages: 16  
Recorded for: PIONEER TITLE COMPANY  
CHARLOTTE SHERBURN  
Ex-Officio Recorder Deputy B. Evans Fee: 48.00  
Index to: DEED OF TRUST

[Space Above This Line For Recording Data]

PREPARED BY:  
Kathy Rodriguez

(323) 727-4987 Ext.

## DEED OF TRUST

### DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated July 19, 2004 together with all Riders to this document.

(B) "Borrower" is Karla Kay King Love, an unmarried woman

Borrower is the trustor under this Security Instrument.

(C) "Lender" is Bank of the West, a California Corporation

Lender is organized and existing under the laws of California Lender's address is 1977 Saturn Street (bene), Monterey Park, CA 91755

Lender is the beneficiary under this Security Instrument.

: 3984002

Initials: KKKL

Idaho Deed of Trust-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT  
—THE COMPLIANCE SOURCE, INC.— Page 1 of 14  
www.compliance-source.com

Form 3013 01/01

140011D 02/00

©2000, The Compliance Source, Inc.

(D) "Trustee" is First American Title Insurance Company, a corporation

(E) "Note" means the promissory note signed by Borrower and dated July 19, 2004  
The Note states that Borrower owes Lender Eighty Six Thousand Five Hundred and  
NO/100ths Dollars (U.S. \$ 86,500.00 )  
plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not  
later than August 1, 2024

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the  
Property."

(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due  
under the Note, and all sums due under this Security Instrument, plus interest.

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following  
Riders are to be executed by Borrower [check box as applicable]:

- |  |   |   |
|--|---|---|
| <input type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider              | <input type="checkbox"/> Second Home Rider      |
| <input type="checkbox"/> Balloon Rider         | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> Biweekly Payment Rider |
| <input type="checkbox"/> 1-4 Family Rider      | <input type="checkbox"/> Revocable Trust Rider          |   |
| <input type="checkbox"/> Other(s) [specify]    |   |   |

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances  
and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable  
judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other  
charges that are imposed on Borrower or the Property by a condominium association, homeowners association or  
similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check,  
draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer,  
or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term  
includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by  
telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by  
any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to,  
or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance  
in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the  
Loan.

: 3984002

Initials: 

(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

**TRANSFER OF RIGHTS IN THE PROPERTY**

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the

of Owyhee county  
[Name of Recording Jurisdiction] [Type of Recording Jurisdiction]  
SEE ATTACHED HERETO AND MADE A PART HEREOF

which currently has the address of

Murphy, Idaho 83650 ("Property Address"):  
[City] [Street] [Zip Code]

: 3984002

Initials: KKR



PO6120

Exhibit "A"

PARCEL I:

A portion of the Northwest Quarter of the Northwest Quarter of Section 35 in Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho, described as follows:

COMMENCING at the Section corner common to Sections 26, 27, 34 and 35 of Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho; thence

South 1320 feet along the Section line common to Sections 34 and 35 a distance of 1320 feet to the Southwest corner of the Northwest Quarter of the Northwest Quarter of said Section 35; thence

East along the South line of said Northwest Quarter of the Northwest Quarter a distance of 558 feet to the TRUE POINT OF BEGINNING; thence

North parallel with the West line of said Section 35 a distance of 165 feet; thence

East and parallel with the South line of the Northwest Quarter of the Northwest Quarter a distance of 175 feet; thence

South and parallel with the West line of said Section 35 a distance of 165 feet to a point on the South line of the Northwest Quarter of the Northwest Quarter of said Section 35 that is East a distance of 175 feet from the POINT OF BEGINNING; thence

West along said South line of the Northwest Quarter of the Northwest Quarter a distance of 175 feet to the TRUE POINT OF BEGINNING.

PARCEL II:

An easement for ingress and egress over a parcel of land located in the Northwest Quarter of Section 35, Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho. Being further described as follows:

BEGINNING at a point on the Northerly right-of-way of Oreana Loop Road from which the East Quarter corner of said Section 35 bears South 68° 05'05" East a distance of 3,483.22 feet;

thence along said right-of-way on a curve to the left with a radius of 456.77 feet and a central angle of 13° 02'31", an arc length of 103.97 feet (with a chord bearing of South 74° 35'55" West, and a chord distance of 103.75 feet);

thence leaving said right-of-way North 89° 44'39" West a distance of 34.65 feet;

thence South 86° 52'41" West a distance of 101.22 feet;

thence along a curve to the right with a radius of 956.00 feet and a central angle of 08° 09'05", an arc length of 136.01 feet (with a chord bearing of South 82° 48'09" West, and a chord distance of 135.89 feet);

thence South 78° 43'37" West a distance of 16.97 feet;

thence along a curve to the right with a radius of 190.00 feet and a central angle of 34° 08'57", an arc length of 113.24 feet (with a chord bearing of North 84° 11'54" West, and a chord distance of 111.57 feet);

thence North 67° 07'26" West a distance of 132.56 feet;

thence along a curve to the right with a radius of 162.00 feet and a central angle of 57° 53'42", an arc length of 163.69 feet (with a chord bearing of South 83° 55'43" West

First American Title  
Datedown

and a chord distance of 156.82 feet);

thence into a tangent reverse curve to the right having a radius of 139.00 feet and a central angle of  $16^{\circ} 00' 01''$  and a length of 38.82 feet, (with a chord bearing of South  $62^{\circ} 58' 52''$  West, and a chord distance of 38.69 feet);

thence along a curve to the right having a radius of 474.00 feet and a central angle of  $18^{\circ} 35' 17''$ ;

thence westerly along the arc, a distance of 153.78 feet (with a chord bearing of South  $80^{\circ} 16' 32''$  West, and a chord distance of 153.10 feet);

thence South  $89^{\circ} 34' 10''$  West a distance of 364.49 feet;

thence along a curve to the right with a radius of 60.45 feet and a central angle of  $80^{\circ} 02' 33''$ , an arc length of 84.45 feet (with a chord bearing of North  $51^{\circ} 23' 44''$  West, and a chord distance of 77.75 feet);

thence South  $85^{\circ} 29' 29''$  East a distance of 30.23 feet;

thence along a curve to the right with a radius of 32.45 feet and a central angle of  $65^{\circ} 16' 28''$ , an arc length of 36.97 feet (with a chord bearing of South  $58^{\circ} 46' 46''$  East, and a chord distance of 35.00 feet);

thence North  $89^{\circ} 34' 10''$  East a distance of 364.49 feet;

thence along a curve to the right with a radius of 446.00 feet and a central angle of  $18^{\circ} 35' 17''$ , an arc length of 144.69 feet (with a chord bearing of North  $80^{\circ} 16' 31''$  East, and a chord distance of 144.06 feet);

thence along a curve to the left having a radius of 111.00 feet and a central angle of  $16^{\circ} 00' 01''$ , an arc length of 31.00 feet (with a chord bearing of North  $62^{\circ} 58' 52''$  East, and a chord distance of 30.90 feet);

thence along a curve to the right having a radius of 190.00 feet and a central angle of  $57^{\circ} 53' 42''$  and a length of 191.99 feet, (with a chord bearing of North  $83^{\circ} 55' 43''$  East, and a chord distance of 183.92 feet);

thence South  $67^{\circ} 07' 26''$  East a distance of 132.56 feet;

thence along a circular curve to the right with a radius of 162.00 feet and a central angle of  $34^{\circ} 08' 57''$ , an arc length of 96.55 feet (with a chord bearing of South  $84^{\circ} 11' 55''$  East, and a chord distance of 95.13 feet);

thence North  $78^{\circ} 43' 37''$  East a distance of 16.97 feet;

thence along a circular curve to the right with a radius of 984.00 feet and a central angle of  $08^{\circ} 09' 05''$ , an arc length of 139.99 feet (with a chord bearing of North  $82^{\circ} 48' 09''$  East, and a chord distance of 139.87 feet);

thence North  $86^{\circ} 52' 41''$  East a distance of 102.04 feet;

thence South  $89^{\circ} 44' 39''$  East a distance of 135.37 feet to the POINT OF EGINNING.

First American Title  
Datedown

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

**1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

**2. Application of Payments or Proceeds.** Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

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Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. **Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in the Security Instrument. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by notice and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

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**4. Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

**5. Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration

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Initials: 



or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

**6. Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

**7. Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

**8. Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

**9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security

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Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

**10. Mortgage Insurance.** If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

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As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has -- if any -- with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or

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not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

**12. Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

**13. Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

**14. Loan Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's

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acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

**15. Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

**16. Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

**17. Borrower's Copy.** Borrower shall be given one copy of the Note and of this Security Instrument.

**18. Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

**19. Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees

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Idaho Deed of Trust-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

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incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

**20. Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

**21. Hazardous Substances.** As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

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Idaho Deed of Trust-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

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Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

**22. Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law to Borrower and to other persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

**23. Reconveyance.** Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

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24. **Substitute Trustee.** Lender may, for any reason or cause, from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. **Area and Location of Property.** Either the Property is not more than forty acres in area or the Property is located within an incorporated city or village.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

\_\_\_\_\_  
*Karla Kay King Love* (Seal)  
Karla Kay King Love -Borrower  
Mailing Address: P.O. Box 36, Murphy, ID 83650

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\_\_\_\_\_  
Mailing Address: \_\_\_\_\_ (Seal)  
-Borrower

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Mailing Address: \_\_\_\_\_ (Seal)  
-Borrower

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Mailing Address: \_\_\_\_\_ (Seal)  
-Borrower

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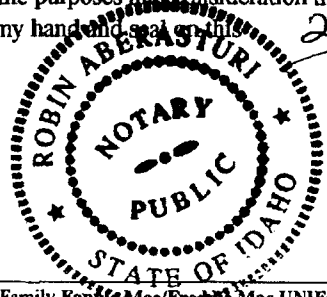
State of Idaho §  
County of Canyon §  
§

Before me the undersigned authority, on this day personally appeared

Karla Kay King Love

known to me (or proved to me through an identity card or other document) to be the person(s) whose name is subscribed to the foregoing instrument, and acknowledged to me that he/she/they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal on this 23<sup>rd</sup> day of July 2004.

(Seal)  Robin Aberasturi  
Notary Public  
My Commission Expires: \_\_\_\_\_

Residing in Homedale, Idaho  
My Commission Expires 3/26/10

# EXHIBIT K

RECORDING REQUESTED BY:

WHEN RECORDED MAIL TO:

Jones • Gledhill • Hess • Fuhrman  
& Eiden, P.A.  
225 N. 9<sup>th</sup> Street, Suite 820  
Boise, ID 83701

ATTN: Kimbell D. Gourley, Esq.

**Instrument # 253546**

MURPHY, OWYHEE, IDAHO  
2005-09-28 12:58:43 No. of Pages: 2

Recorded for : JONES-GLEDHILL ET AL

CHARLOTTE SHERBURN

Ex-Officio Recorder Deputy G. Sherburn Fee: 6.00

Index to: ASSIGNMENT, DEED OF TRUST

(Space above this line for Recorder's use)

### ASSIGNMENT OF DEED OF TRUST

Bank of the West , a California corporation ("Bank of the West"), the beneficiary under that certain deed of trust executed by Karla Kay King Love, a single individual, as grantor/trustor, in favor of Bank of the West, as beneficiary, securing a promissory note in the original principal sum of \$86,500.00, recorded July 28, 2004, as instrument no. 248616, in the records of Owyhee County, Idaho (the "Deed of Trust"), does hereby assign and transfer unto Gordon G. King and Rose M. King, husband and wife, whose address is 191<sup>24</sup> King Lane, Murphy, Idaho 83650, all right, title, and interest in and to the Deed of Trust, without Bank of the West's warranties, express or implied, as to the priority of the Deed of Trust, but with Bank of the West's warranty that it is the legal and lawful owner and holder of the Deed of Trust and the promissory note and other loan documents associated therewith.

DATED this 12<sup>th</sup> day of September, 2005.

First Hawaiian Bank, Attorney in Fact for:  
BANK OF THE WEST

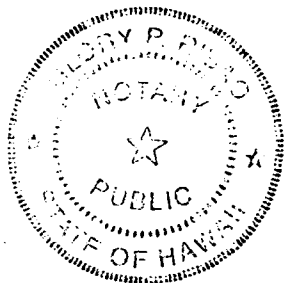
By: [Signature]  
Its: GARY Y. KAWAMOTO  
ASSISTANT VICE PRESIDENT



STATE OF HAWAII            )  
  : ss.  
City & County of Honolulu )

On the 12<sup>th</sup> day of September, 2005, before me, the undersigned notary public in and for said state, personally appeared GARY Y. KAWAMOTO, known or identified to me to be the ASSISTANT VICE PRESIDENT of First Hawaiian Bank, the company that executed the within instrument or the person who executed the same on behalf of said company, and acknowledged to me that said company executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.



Gary P. Ribae  
Notary Public for Hawaii  
Residing at Honolulu, HI  
Commission expires: NOV 14 2005

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 – 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

**FILED**  
A.M. 1:00 P.  
SEP 04 2014  
ANGELA JAYO, CLERK  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Case No. CV-14-0278

Plaintiffs,

DECLARATION OF RAYMOND JAYO  
IN SUPPORT OF EX PARTE MOTION  
FOR TEMPORARY RESTRAINING  
ORDER

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

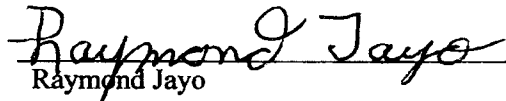
Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.
2. I am a friend of the Plaintiffs and have used King Lane to get to Plaintiffs houses for more than 5 years.

3. On or Around August 21, 2014, someone installed a gate across King Lane. Prior to the installation of this gate, there had never been any obstruction of the roadway or any prohibition of access.
4. On or around August 22, 2014, I attempted to cross the gated roadway to get to John Fuquay's house. Rose King confronted me and told me I was not allowed to use King Lane to get to the Fuquay's house.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY OF PERJURY.

Dated: August 27, 2014

  
Raymond Jayo

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 – 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

**FILED**  
A.M. / P.M.  
SEP 04 2014  
ANGELA BRYKELL CLERK  
*[Signature]*  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Case No. CV-14-0278

DECLARATION OF JOHN FUQUAY IN  
SUPPORT OF EX PARTE MOTION FOR  
TEMORARY RESTRAINING ORDER

Under penalty of perjury under the laws of the state of Oregon, the undersigned declares:

**Properties and Parties**

1. I am one of the Plaintiffs in this action. I am submitting this declaration in support of Plaintiffs' Motion for Temporary Restraining Order (the "Motion") preventing any of the Defendants from blocking access to our property over King Lane.
2. A street map showing the general location of the area is attached as Exhibit "A" to the Motion. An aerial map showing the Owyhee County Assessor's lot boundaries is attached as Exhibit "B" to the Motion. A Google Earth map showing an aerial view and general

road boundaries and identities of the affected parcel owners is attached as Exhibit "C" to the Motion.

3. Clinton Ward Fuquay and Hailey Rose Fuquay own the parcel (the "Clinton Fuquay Parcel") at the west end of King Lane. It was once part of the John Fuquay Parcel. The legal description for the Clinton Fuquay Parcel is shown on the warranty deed attached as Exhibit "D" to the Motion.
4. I own the parcel (the "John Fuquay Parcel") which is located south of the Clinton Fuquay Parcel. The legal description for the John Fuquay Parcel is shown on the Trustee's Deed dated October 13, 1989 attached as Exhibit "E" to the Motion (less the Clinton Fuquay Parcel).
5. Susie Low and Cal Low own the parcel (the "Low Parcel 1") located south of King Lane. There are two parcels which were conveyed by the same deed. The legal description for the Low Parcel 1 is shown on the Special Warranty Deed attached as Exhibit "F" to the Motion.
6. Avco Financial Services of Idaho Falls, Inc. may claim some right, title or interest in the Low Parcel 1 by virtue of a Real Estate Mortgage in the amount of \$68,000 which was recorded on or around March 18, 1996 as Owyhee county records no. 218373. The Mortgage was executed by Samuel V.C. Steiner and Mary J. Steiner, husband and wife and encumbers Low Parcel 1. It is possible that this mortgage was paid but was never released. A copy of the Mortgage is attached as Exhibit "G" to the Motion.



7. Susie Low and Cal Low own the parcel (the "Low Parcel 2") located south of King Lane. Oreana Loop Road crosses the northwest corner of Low Parcel 2. The legal description for the Low Parcel 2 is shown on the Special Warranty Deed attached as Exhibit "H" to the Motion.
8. The Heart K Ranch Trust UTA December 28, 2012 owns the parcel to the north of King Lane (the "Heart K Ranch Parcel"). The legal description of the Heart K Ranch Parcel is shown on the Gift Deed attached as Exhibit "I" to the Motion.
9. Gordon G. King and Rose M. King may claim some right, title or interest in the Heart K. Ranch Parcel by virtue of a Deed of Trust in the amount of \$86,500 in favor of One West Bank which was recorded on July 28, 2004 as Owyhee County records no. 248616 and encumbered the Heart K Ranch Parcel. A copy of the deed of trust is attached as Exhibit "J." The deed of trust was assigned to Gordon G. King and Rose M. King on September 12, 2005. A copy of the Assignment of Deed of Trust is attached as Exhibit "K" to the Motion.
10. First American Title Insurance Company may claim some right, title or interest in the Heart K. Ranch Parcel by virtue of being named as the trustee under a Deed of Trust in the amount of \$86,500 in favor of One West Bank which was recorded on July 28, 2004 as Owyhee County records no. 248616 and encumbered the Heart K Ranch Parcel. A copy of the deed of trust is attached as Exhibit "J" to the Motion.

### **FACTUAL ALLEGATIONS**

11. The properties at issue in this Complaint are located in Owyhee County, Idaho. They are located approximately three miles east of Oreana and are south of Highway 78. The closest public roadway to the properties is Oreana Loop Road.
12. Oreana Loop road runs in a generally west direction from Highway 78 to a point near a location where Low Parcels 1 and 2 and the Heart K Ranch Parcels intersect. Near that location, Oreana Loop Road turns and continues in a southwesterly direction through Low Parcel 1.
13. King Lane is a private roadway that continues westerly from where Oreana Loop Road turns southwest Oreana Loop Road and provides the access to the Clint Fuquay Parcel and the John Fuquay Parcel.
14. The Plaintiffs have used King Lane to access the Clint Fuquay Parcel and the John Fuquay Parcel since at least 1989.
15. King Lane has been an unobstructed roadway used by Plaintiffs and the general public since at least 1989.

**Blockage of King Lane by Defendants**

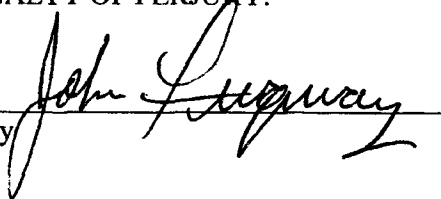
16. On or Around August 21, 2014, one or all of the Defendants installed gates across King Lane to prevent us from accessing King Lane to our properties. One gate was installed at the northeast corner of the Clinton Fuquay Parcel and a second gate was installed near the intersection of King Lane and Oreana Loop Road.
17. Pictures of the gated area are attached as Exhibit "K" to the Motion.

18. On or around August 22, 2014, a friend of ours, Raymond Jayco, attempted to cross the gated roadway to get to our house. Rose King confronted the friend and told him he was not allowed to use King Lane to access our property.
19. We are in immediate need of access to their properties over King Lane.
20. The gates interfere with normal delivery services used by Plaintiffs such as Federal Express, UPS and Schwann's.
21. The gates interfere with Plaintiffs' access to emergency services such as police, fire and ambulance services.
22. Defendants' installation of the gate across King Lane was done after this lawsuit was filed, and we were not consulted prior to the installation of the gate. None of the Defendants will be harmed or damaged by allowing us to continue the same uninterrupted access over King Lane that we have used for 25 years. Therefore, we should not be required to post a bond for the issuance of the Temporary Restraining Order.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY OF PERJURY.

Dated: August 27, 2014

John Fuquay



Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 – 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

**FILED**  
A.M. 1:00 P.M.  
SEP 04 2014  
ANGELA BAKER, CLERK  
*[Signature]*  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Case No. CV-14-0278

DECLARATION OF MATTHEW  
CLEVERLEY IN SUPPORT OF EX  
PARTE MOTION FOR TEMPORARY  
RESTRAINING ORDER

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

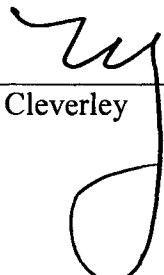
1. I am the attorney for Plaintiffs in this matter.
2. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.
3. This case was filed on August 11, 2014. The Summons and Complaints for each named party were sent for service shortly after that. I have received confirmation that First

American Title has been served, but I have not received confirmation of service on any of the other defendants.

4. I have not received any communications from any of the defendants or any attorneys for the defendants. I do not have phone numbers for any of the defendants.
5. On September 3, 2014, my office overnighted copies of the Motion for Temporary Restraining Order and exhibits, Declaration of John Fuquay, Declaration of Raymond Jayco, Declaration of Matthew Cleverley and the proposed Order to each of the defendants to give them notice of the motion.
6. Because the blocking of the roadway presents an immediate threat to the health and safety of Plaintiffs because it blocks emergency vehicles, and a delay in giving notice to the defendants creates an undue risk, I believe that entry of the Order is appropriate without additional notice to defendants.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY OF PERJURY.

Dated: September 3, 2014

  
\_\_\_\_\_  
Matthew Cleverley

RONALD P. RAINEY – ISB # 1022  
 Attorneys at Law  
 110 North Ninth Avenue  
 Post Office Box 26  
 Caldwell, Idaho 83606-0026  
 Telephone: (208) 459-3659  
 Facsimile: (208) 459-9067 or 459-6147

**FILED**

A.M. 4:41 P.M.

SEP 09 2014

ANGELA BARNELL, CLERK  
*A. Barnell*  
 Deputy Clerk

Attorney for Defendants  
 Gilbert King as Trustee for the  
 Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
 FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K )  
 RANCH TRUST UTA DECEMBER 28, )  
 2012; AVCO FINANCIAL SERVICES OF )  
 IDAHO FALLS, INC.; GORDON G. KING;) )  
 ROSE M. KING; FIRST AMERICAN )  
 TITLE INSURANCE COMPANY, )

Defendants. )

GILBERT KING, as Trustee, and )  
 ROSE M. KING, as Beneficiary of the )  
 HEART K RANCH TRUST UTA )  
 DECEMBER 28, 2012, )

Counterclaimants, )

vs. )

CASE NO. CV 2014-0278

**ANSWER AND COUNTERCLAIMS  
 BY DEFENDANTS TRUSTEES FOR  
 THE HEART KING RANCH TRUST  
 UTA DECEMBER 28, 2012**

**ANSWER AND COUNTERCLAIMS BY DEFENDANT HEART K RANCH – PAGE 1**

JOHN E. FUQUAY; CLINTON WARD )  
 FUQUAY and HAILEY ROSE FUQUAY )  
 Counterdefendants. )  
 \_\_\_\_\_ )

COMES NOW, the Defendants, GILBERT KING, as Trustee, and ROSE M. KING, as Beneficiary, both on behalf of the HEART K RANCH TRUST UTA DECEMBER 28, 2012 HEART K RANCH (hereinafter, "Heart K Ranch"), by and through its attorney of record, Ronald P. Rainey, and in response to the complaint of the Plaintiffs, answers, alleges, denies and counterclaims as follows:

**I.**

**FIRST DEFENSE**

1. The Plaintiffs' complaint fails to state any claim upon which relief can be granted.

**II.**

**SECOND DEFENSE**

2. Unless specifically admitted herein, The Defendant Heart K Ranch denies each and every allegation contained in the Plaintiffs' complaint. The Defendant Heart K Ranch specifically responds to the numbered allegations of the complaint as follows:

3. The Defendant Heart K Ranch admits the nature of the proceeding, as alleged in paragraph 1 of the complaint, but denies the validity of those claims as later specifically alleged within the complaint.

4. The Defendant Heart K Ranch denies the allegations made in paragraph 2 of the complaint as made specifically to it concerning "parcels of property that are burdened by King

Lane,” and further denies all allegations as to any burden of any easement, as alleged in that paragraph. The Defendant Heart K Ranch is without specific knowledge to admit or deny the allegations as to property it does not own or occupy and therefore denies the same on that basis.

5. The Defendant Heart K Ranch admits the allegation made in paragraph 3 that the Plaintiffs’ claims seek neither monetary damages nor to change any property boundaries. The Defendant Heart K Ranch denies the allegation that the Plaintiffs have any “right” to access their properties over King Lane, as alleged in that paragraph.

6. The Defendant Heart K Ranch admits that the general location of the properties is as alleged in paragraph 4 of the complaint.

7. In response to paragraph 5 of the complaint the Defendant Heart K Ranch only admits that the referenced Exhibits, “A,” “B,” and “C,” are attached to the complaint, but does not otherwise admit or deny the genuineness or accuracy of those documents, and specifically relies upon the provision of I.R.C.P. 36(a) declaring that, “The genuineness, accuracy or truth or any document attached to a pleading shall not be deemed as admitted by the other party by reason of failure to make a verified denial thereof by a responsive pleading or affidavit.”

8. The Defendant Heart K Ranch is without sufficient knowledge to admit or deny the allegation made in paragraph 6 of the complaint and therefore denies the same, and as to the legal description attached as Exhibit “D” to the complaint, does not admit or deny the genuineness or accuracy of that document, and specifically relies upon the provision of I.R.C.P. 36(a) declaring that, “The genuineness, accuracy or truth or any document attached to a pleading shall not be deemed as admitted by the other party by reason of failure to make a verified denial thereof by a responsive pleading or affidavit.”



9. The Defendant Heart K Ranch is without sufficient knowledge to admit or deny the allegation made in paragraph 7 of the complaint and therefore denies the same, and as to the legal description attached as Exhibit "E" to the complaint, does not admit or deny the genuineness or accuracy of that document, and specifically relies upon the provision of I.R.C.P. 36(a) declaring that, "The genuineness, accuracy or truth or any document attached to a pleading shall not be deemed as admitted by the other party by reason of failure to make a verified denial thereof by a responsive pleading or affidavit."

10. The Defendant Heart K Ranch is without sufficient knowledge to admit or deny the allegation made in paragraph 8 of the complaint and therefore denies the same, and as to the legal description attached as Exhibit "F" to the complaint, does not admit or deny the genuineness or accuracy of that document, and specifically relies upon the provision of I.R.C.P. 36(a) declaring that, "The genuineness, accuracy or truth or any document attached to a pleading shall not be deemed as admitted by the other party by reason of failure to make a verified denial thereof by a responsive pleading or affidavit."

11. The Defendant Heart K Ranch is without sufficient knowledge to admit or deny the allegation made in paragraph 9 of the complaint and therefore denies the same, and as to the legal description attached as Exhibit "G" to the complaint, does not admit or deny the genuineness or accuracy of that document, and specifically relies upon the provision of I.R.C.P. 36(a) declaring that, "The genuineness, accuracy or truth or any document attached to a pleading shall not be deemed as admitted by the other party by reason of failure to make a verified denial thereof by a responsive pleading or affidavit."

12. The Defendant Heart K Ranch is without sufficient knowledge to admit or deny the

allegation made in paragraph 10 of the complaint and therefore denies the same, and as to the legal description attached as Exhibit "H" to the complaint, does not admit or deny the genuineness or accuracy of that document, and specifically relies upon the provision of I.R.C.P. 36(a) declaring that, "The genuineness, accuracy or truth or any document attached to a pleading shall not be deemed as admitted by the other party by reason of failure to make a verified denial thereof by a responsive pleading or affidavit."

13. The Defendant Heart K Ranch admits the allegations made in paragraph 11 of the complaint, and as to the legal description attached as Exhibit "I" to the complaint, does not admit or deny the genuineness or accuracy of that document, and specifically relies upon the provision of I.R.C.P. 36(a) declaring that, "The genuineness, accuracy or truth or any document attached to a pleading shall not be deemed as admitted by the other party by reason of failure to make a verified denial thereof by a responsive pleading or affidavit."

14. The Defendant Heart K Ranch is without sufficient knowledge to admit or deny the allegation made in paragraph 12 of the complaint and therefore denies the same, and as to the legal description attached as Exhibits "J" and "K" to the complaint, does not admit or deny the genuineness or accuracy of those documents, and specifically relies upon the provision of I.R.C.P. 36(a) declaring that, "The genuineness, accuracy or truth or any document attached to a pleading shall not be deemed as admitted by the other party by reason of failure to make a verified denial thereof by a responsive pleading or affidavit."

15. The Defendant Heart K Ranch is without sufficient knowledge to admit or deny the allegation made in paragraph 13 of the complaint and therefore denies the same, and as to the legal description attached as Exhibit "J" to the complaint, does not admit or deny the genuineness or

accuracy of that document, and specifically relies upon the provision of I.R.C.P. 36(a) declaring that, "The genuineness, accuracy or truth or any document attached to a pleading shall not be deemed as admitted by the other party by reason of failure to make a verified denial thereof by a responsive pleading or affidavit."

16. The Defendant Heart K Ranch admits the allegations made in paragraphs 14 and 15 of the complaint.

17. The Defendant Heart K Ranch admits that King Lane is a private roadway as alleged in paragraph 16 of the complaint that continues westerly from where Oreana Loop Road turns southwest, and further admits that King Lane provides "an" access to the Cling Fuquay Parcel and the John Fuquay Parcel as alleged in that paragraph of the complaint.

18. The Defendant Heart K Ranch is without sufficient knowledge to admit or deny whether the Plaintiffs have used King Lane to access the Cling Fuquay Parcel and John Fuquay Parcels since at least 1989, as alleged in paragraph 17 of the complaint, and therefore deny the same.

19. The Defendant Heart K Ranch denies the allegations made in paragraph 18 of the complaint, and further responds that while the footnote attached to paragraph 18 of the complaint may or may not be a correct statement of the law, it does not apply to the facts of this case, and therefore in response to the allegations of paragraph 18 denies the application of that statement of the law to the facts of this case, if so intended to be alleged in that paragraph.

20. The Defendant Herat K Ranch denies the allegations made in paragraph 19 of the complaint.

### III.

#### AFFIRMATIVE DEFENSES

As declared in, *Fuhriman v. State Dept. of Transportation*, 143 Idaho 800, 153 P.3d 480, 483 (2007), under I.R.C.P. 8(c), **“An affirmative defense is ‘[a] defendant’s assertion raising new facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all allegations in the complaint are true.’** Blacks Law Dictionary 186 (2d Pocket ed.2001).” (emphasis added). Therefore, this answering defendant, *“Heart K Ranch,”* as declared and described above in the opening paragraphs of in this I.R.C.P. 7(a) pleading, further alleges the following affirmative defenses to the Fuquay Plaintiffs’ claims, as made in this complaint:

#### FIRST AFFIRMATIVE DEFENSE

21. A “trust” is not itself a separate legal entity that can itself own property, or that can be named as a party in a lawsuit under Idaho law, but instead, a “trust” merely describes a relationship having certain attributes. *See e.g., In re Thompson*, 454 B.R. 486, 492 (Bkrtcy.D.Ida. 2011) (citing Idaho case law). Therefore, the Fuquay Plaintiffs’ claims must fail as having been only alleged against directly against the Heart K Ranch Trust itself, rather than having been brought and alleged against the trustees of that trust.

#### SECOND AFFIRMATIVE DEFENSE

22. Gordon King, was named as a “coparty” Defendant by the Plaintiffs to this action, but was actually deceased on the date the complaint commencing this action was filed, August 11, 2014, and therefore could not be named as a party Defendant in this civil action. Inasmuch as the claims placed at issue by the Fuquay Plaintiffs’ complaint appear to survive Gordon King’s death without the need of substitution, and as further provided by I.R.C.P. 25(a)(2), “The death shall be

suggested upon the record and the action shall proceed in the favor or against the surviving parties.”

### **THIRD AFFIRMATIVE DEFENSE**

23. Inasmuch as Gilbert King is the sole trustee of the Herat K Ranch Trust, and he has not been named as a defendant in this action in a representative capacity under I.R.C.P. 17(b), in his standing as trustee of the Heart K Ranch, the Fuquay Plaintiffs’ claims must fail as having been only alleged directly against the Heart K Ranch Trust itself, rather than having been brought and alleged against the trustee of that trust.

### **FOURTH AFFIRMATIVE DEFENSE**

24. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint has been entirely permissive, and not by, or under, any claim of right.

### **FIFTH AFFIRMATIVE DEFENSE**

25. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint has NOT BEEN open and notorious, as is required as one of the five elements that must be proven by clear and convincing evidence in order to establish a prescriptive easement.

### **SIXTH AFFIRMATIVE DEFENSE**

26. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint has NOT BEEN continuous and uninterrupted, as is required as one of the five elements that must be proven by clear and convincing evidence in order to establish a prescriptive easement.

#### **SEVENTH AFFIRMATIVE DEFENSE**

27. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint has NOT BEEN adverse and under a claim of right, as is required as one of the five elements that must be proven by clear and convincing evidence in order to establish a prescriptive easement.

#### **EIGHTH AFFIRMATIVE DEFENSE**

28. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint has NOT BEEN with the actual or imputed knowledge of the owner of the servient estate, as is required as one of the five elements that must be proven by clear and convincing evidence in order to establish a prescriptive easement.

#### **NINTH AFFIRMATIVE DEFENSE**

29. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint has NOT BEEN for the applicable statutory period, as is required as one of the five elements that must be proven by clear and convincing evidence in order to establish a prescriptive easement.

#### **TENTH AFFIRMATIVE DEFENSE**

30. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint has in fact been undertaken in common with the servient landowner over which King Lane passes.

#### **ELEVENTH AFFIRMATIVE DEFENSE**

31. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint has been without the knowledge or adverse

and prescriptive claim sufficient to place the servient landowner on notice of that claim so as to have the opportunity to assert his or her rights against the development of an easement by prescription.

#### **TWELFTH AFFIRMATIVE DEFENSE**

32. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint did not meet the necessary requirements of a prescriptive right before the change in the statutory adverse period to twenty years in 2006, such that any prescriptive right claim must be established by a use that has persisted for a period of twenty years.

#### **THIRTEENTH AFFIRMATIVE DEFENSE**

33. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint, was of a limited character and use, as undertaken by a limited number of individuals and vehicles, such that any prescriptive right that might be recognized is limited to the nature and use established by that limited number of individuals and vehicles that persisted during the prescriptive use period.

#### **FOURTEENTH AFFIRMATIVE DEFENSE**

34. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint is limited in scope and purpose. to the length, width, location, and character of the prescriptive easement during the period of prescriptive use.

#### **FIFTEENTH AFFIRMATIVE DEFENSE**

35. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint DID NOT constitute an invasion or

infringement upon the rights of the servient owner over which King Lane crossed, and therefore no presumption arose that the use of King Lane by the Plaintiffs was in any way adverse to the to servient owners, as a necessary element of their prescriptive easement claim.

#### **SIXTEENTH AFFIRMATIVE DEFENSE**

36. Any and all use of King Lane by the Plaintiffs, and by their predecessors in interest, at all times relevant to the matter alleged in the complaint was only occasional and sporadic and therefore did not rise to the level of use required to meet the requirement of “continuous and uninterrupted use” that is necessary to establish a prescriptive easement.

#### **IV.**

#### **COUNTERCLAIMS**

#### **GENERAL FACTUAL ALLEGATIONS**

37. The Plaintiffs/Counterdefendants John E. Fuquay, Clinton Ward Fuquay and Hailey Rose Fuquay (hereinafter, “the Fuquays”) previously used King Lane in common with the Defendants and the Heart K Ranch Counterclaimants. The Fuquays use of King Lane was infrequent and sporadic and mostly for incidental residential use, such as taking their children to school.

38. Recently the Fuquays use of King Lane changed dramatically both as to frequency and type of use, by increasing that use to almost daily use and from use by passenger vehicles to very heavy commercial trucks used in hauling commercial construction materials.

39. As a result of this change in use the nature and extent of the prior permissive use that the Fuquays had been allowed by the Defendants in this action, and particularly by the Heart K. Ranch Counterclaimants, has been greatly exceeded.

40. The Fuquays have no right to make use of King Lane for the uses that they are



currently making of that access road by use of large commercial trucks on a daily basis, either by way of the scope of permissive use, nor by way of any prescriptive right.

### **FIRST COUNTERCLAIM**

#### **DECLARATORY RELIEF**

41. The Heart K Ranch Counterclaimants reallege all of the foregoing as if fully set forth herein.

42. The Idaho Declaratory Judgments Act, I.C. § 10-1201 et seq., provides for the determination of rights, status, and other legal relations between parties to an action, including the interpretation of contracts (I.C. § 10-1203), deeds, and other writings (I.C. § 10-12012), and also provides that the court may grant either negative or affirmative relief (I.C. § 10-1201), or such other relief as may be requested between the parties (I.C. § 10-1205).

43. Further relief may be granted on a petition for declaratory judgment whenever deemed necessary or proper (I.C. § 10-1208), whether or nor that further relief has been, is, or could be claimed (I.C. § 10-1201).

44. The Court can, on reasonable notice, require any adverse party whose rights will be adjudicated by the proposed declaratory judgment, to show cause why further relief should not be granted. (I.C. § 10-1208).

45. The Heart K Ranch Counterclaimants seek declaratory relief establishing that the Fuquays Counterdefendants have exceeded the nature and scope of their permissive right to use King Lane for ordinary and infrequent residential use.

46. The Heart K Ranch Counterclaimants seek declaratory relief establishing that the Fuquay Counterdefendants have no legal or equitable right to use King Lane for the current uses

being made of that access by means of large commercial trucks on an almost daily basis.

## **SECOND COUNTERCLAIM**

### **PERMANENT INJUNCTION**

47. The Heart K Ranch Counterclaimants reallege all of the foregoing as if fully set forth herein.

48. As alleged in the general factual allegations supporting these counterclaims, the actions of the Fuquay Plaintiffs/Counterdefendants in using King Lane as it crosses the property of the Heart K Ranch is in direct violation of the protectable property rights of the legal and equal ownership rights held by the owners of Heart King Ranch.

49. There is no adequate remedy at law for the injury that is being inflicted by the actions and conduct of the Fuquay Plaintiffs/Counterdefendants.

50. Unless enjoined the continued actions and conduct of the Fuquay Plaintiffs/Counterdefendants will produce great irreparable injury upon the Defendants/Counterclaimants.

51. When the right at issue has is clearly defined, and the possibility of future and on-going interference remains, then the entry of a permanent injunction is the appropriate remedy.

52. A permanent injunction is an especially appropriate remedy when the transgressing party retains the means of promptly resuming a prohibited practice, even if he declares that he no longer intends to do so.

53. A permanent injunction can be granted under Rule 65(e), I.R.C.P., "When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the actions complained of . . . perpetually.

54. The bond requirement under Rule 65(c) only applies to “restraining orders” or “preliminary injunction[s]” such that no bond is required for the issuance of a permanent injunction.

55. The Fuquay Plaintiffs/Counterdefendants, including their employees, invitees, agents, and other representatives should be ordered and restrained by entry of permanent injunction as follows:

- a. From any entry onto, or use of, King Lane by means of any motor vehicle, whatsoever, as the private roadway is owned by and held out only for the use of, the Heart K Ranch and its invitees; and
- b. From any in any way, or by any means, interfering with or obstructing the gates, chains, or any locks, or other hardware related to the structure and operation of those gates, which may have been placed across the entries to King Lane; and
- c. By undertaking to obstruct, by any means, or to molest or harass the users, in the rightful use of King Lane by the owners and invitees of Heart K Ranch.

### **THIRD COUNTERCLAIM**

#### **QUIET TITLE**

56. The Heart K Ranch Counterclaimants reallege all of the foregoing as if fully set forth herein.

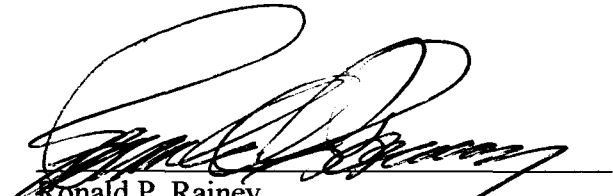
57. The Heart K Ranch Counterclaimants request a determination that no prescriptive or adverse rights exist in King Lane as it crosses their property, and that a decree quieting title in them, and extinguishing any such claims, or easements, be entered by this Court, such as can be recorded in the land title records of Owyhee County.

WHEREFORE, this Court is requested to entered judgment for the Defendant/Counterclaimants Heart K Ranch, as set forth below:

1. Denying all the claims made by the Fuquay Plaintiffs in this action.

2. Granting the Heart K. Ranch declaratory relief as requested in this action.
3. Granting the Heart K Ranch a permanent injunction as requested in this action.
4. Quieting titled in the Heart K. Ranch as requested in this action.
5. For such other relief as this Court may find is merited in this action.

Respectfully submitted this 9 day of September, 2014.




Ronald P. Rainey  
 Attorney for Defendant/Counterclaimants  
 Heart K Ranch

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 9 day of September, 2014, a true and correct copy of the foregoing document was served upon the following:

Matthew R. Cleverley	[ ]	U.S. Mail, postage prepaid
Fidelity National Law GROUP	[ ]	Hand Delivered
1200 6th Avenue, Suite 620	[ ]	Overnight Mail
Seattle, Washington 98101	[ ]	Facsimile Transmission
Telephone: 206-224-6003	[ ]	Other _____
Facsimile: 877-655-5281		
Email: <u>Matthew.Cleverly@fnf.com</u>		



Ronald P. Rainey

A.M. 4:44 P.M.

SEP 09 2014

ARVILL... CLERK  
*[Signature]*  
Deputy Clerk

RONALD P. RAINEY ISB #1022  
Attorney at Law  
P.O. Box 26  
110 North Ninth Street  
Caldwell, Idaho 83606-0026  
Phone (208)459-3659  
Facsimile Transmission No:459-9067

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K. Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
FUQUAY and HAILEY ROSE FUQUAY, )  
Plaintiffs, )

Case No. CV-2014-0278

vs. )

DECLARATION OF DENICE  
COLLETT IN SUPPORT OF DEFENDANT'S  
OBJECTION TO PLAINTIFFS' EX-PARTE  
MOTION FOR TEMPORARY  
RESTRAINING ORDER

SUSIE LOW; CAL LOW; HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )  
Defendants. )

GILBERT KING, as Trustee; and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )  
Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )

DECLARATION OF DENICE COLLETT -1

ORIGINAL

FUQUAY and HAILEY ROSE FUQUAY )  
Counterdefendants. )  
\_\_\_\_\_ )

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.

2. I reside on Collett Lane, Oreana, Idaho and have been a bus driver for the Grandview School District for 33 years.

3. I start my bus route at my residence by driving down Collett Lane to Oreana Loop, driving west on Oreana Loop to the Fuquay mail box where I pick up Jesse Fuquay, son of J.C. Fuquay. I proceed west on Oreana Loop through the village of Oreana up to the west end of Oreana Loop and Highway 78 east to the east of Oreana Loop where I make another stop. I do not make a school bus stop at Kings Lane. When I return the children home, I reverse the route on Oreana Loop and Highway 78 dropping off Jesse Fuquay at the Fuquay mailbox and then I go to my residence on Collett Lane.

*Through the years JC + Clint were also picked up at this location.*

I CERTIFY UNDER PENALTY OF PERJURY PURSUANT TO THE LAW OF THE STATE OF IDAHO THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 9 day of September, 2014.

Denise Collett  
Denise Collett

DECLARATION OF DENICE COLLETT -2

CERTIFICATE OF SERVICE

I, Ronald P. Rainey, hereby certify that on this \_\_\_ day of September, 2014, I caused a true and correct copy of the foregoing instrument to be delivered to the adverse party, via the method indicated below, addressed as follows:

\_\_\_ U.S. Mail, Postage Prepaid \_\_\_ Facsimile Transmission \_\_\_ Hand Delivery

Matthew R. Cleverley  
Fidelity National Law Group  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
Facsimile: \*77-655-5281  
Email: [Matthew.Cleverly@fnf.com](mailto:Matthew.Cleverly@fnf.com)

Ronald P. Rainey

RONALD P. RAINEY ISB #1022  
 Attorney at Law  
 P.O. Box 26  
 110 North Ninth Street  
 Caldwell, Idaho 83606-0026  
 Phone (208)459-3659  
 Facsimile Transmission No:459-9067

**FILED**  
 A.M. 4:44 P.M.  
 SEP 09 2014  
 ANGELA MARSHALL CLERK  
 Deputy Clerk

Attorney for Defendants  
 Gilbert King as Trustee for the  
 Heart K. Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
 FUQUAY and HAILEY ROSE FUQUAY, )  
 )  
 Plaintiffs, )

Case No. CV-2014-0278

vs. )

AFFIDAVIT OF ROSE KING

SUSIE LOW; CAL LOW; HEART K. )  
 RANCH TRUST UTA DECEMBER 28, )  
 2012; AVCO FINANCIAL SERVICES OF )  
 IDAHO FALLS, INC.; GORDON G. KING )  
 ROSE M. KING; FIRST AMERICAN )  
 TITLE INSURANCE COMPANY, )  
 )  
 Defendants. )

GILBERT KING, as Trustee; and )  
 ROSE M. KING, as Beneficiary of the )  
 HEART K RANCH TRUST UTA )  
 DECEMBER 28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )

AFFIDAVIT OF ROSE KING -1



FUQUAY and HAILEY ROSE FUQUAY )  
 )  
 Counterdefendants. )  
 )  
 )  
 )  
 )

STATE OF IDAHO )  
 ) ss:  
 County of Owyhee )

Rose King, being first duly sworn on oath, deposes and states as follows:

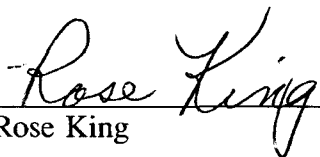
1. I am one of the defendants\counterclaimants in the above-entitled matter, I am over the age of majority, and I make this Affidavit based upon facts within my own personal knowledge.

2. My deceased husband, Gordon King and I purchased our ranch which included King Lane on September 17, 1973. At the time of purchase, King Lane was only a path through grass and weeds. My husband and I constructed what is now King Lane, an all weather road. We use this road several times a day in our family and ranching operation.

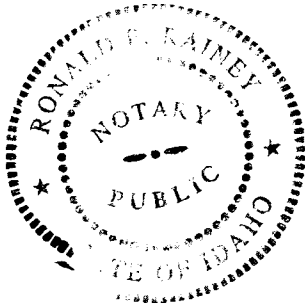
I later named this road King Lane.

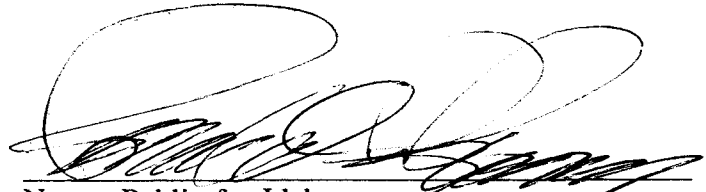
3. Attached to this affidavit are true and correct copies of photographs that I recently took of the area in question concerning King Lane, Castle Lane, the gates on King Lane, and the current location of the school bus stop, where children who attend the local school are picked up and dropped off. Each individual photo is captioned as to what it reveals

DATED This 9th day of September, 2014.

  
\_\_\_\_\_  
Rose King

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for said State,  
this 9th day of September, 2014.




  
Notary Public for Idaho  
Residing at: Caldwell, Idaho  
My Commission Expires: 12/18/2018

CERTIFICATE OF SERVICE

I, Ronald P. Rainey, hereby certify that on this 9 day of September, 2014, I caused a true and correct copy of the foregoing instrument to be delivered to the adverse party, via the method indicated below, addressed as follows:

U.S. Mail, Postage Prepaid     Facsimile Transmission     Hand Delivery

Matthew R. Cleverley  
Fidelity National Law Group  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
Facsimile: \*77-655-5281  
Email: [Matthew.Cleverly@fnf.com](mailto:Matthew.Cleverly@fnf.com)

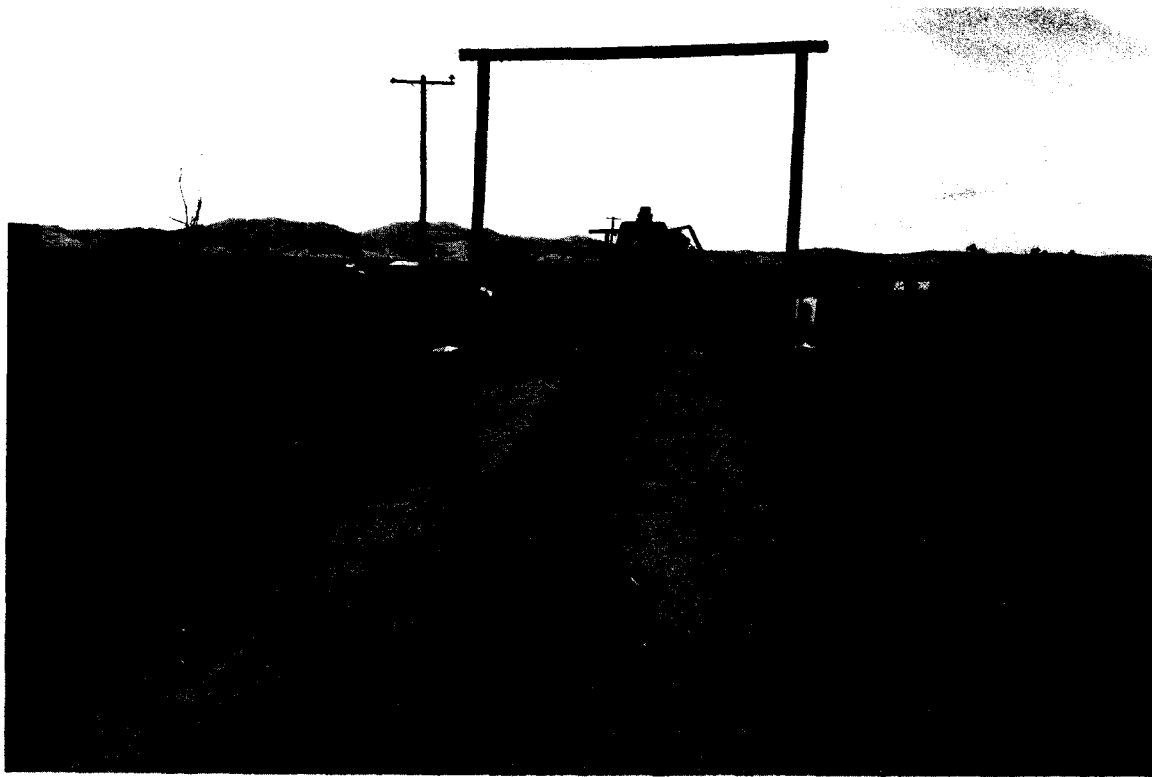
  
Ronald P. Rainey



View of the East Gate to King Lane  
Looking to the West



View of the East Gate to King Lane  
Looking to the West



Current West Gate to King Lane Being Constructed  
Looking to the West



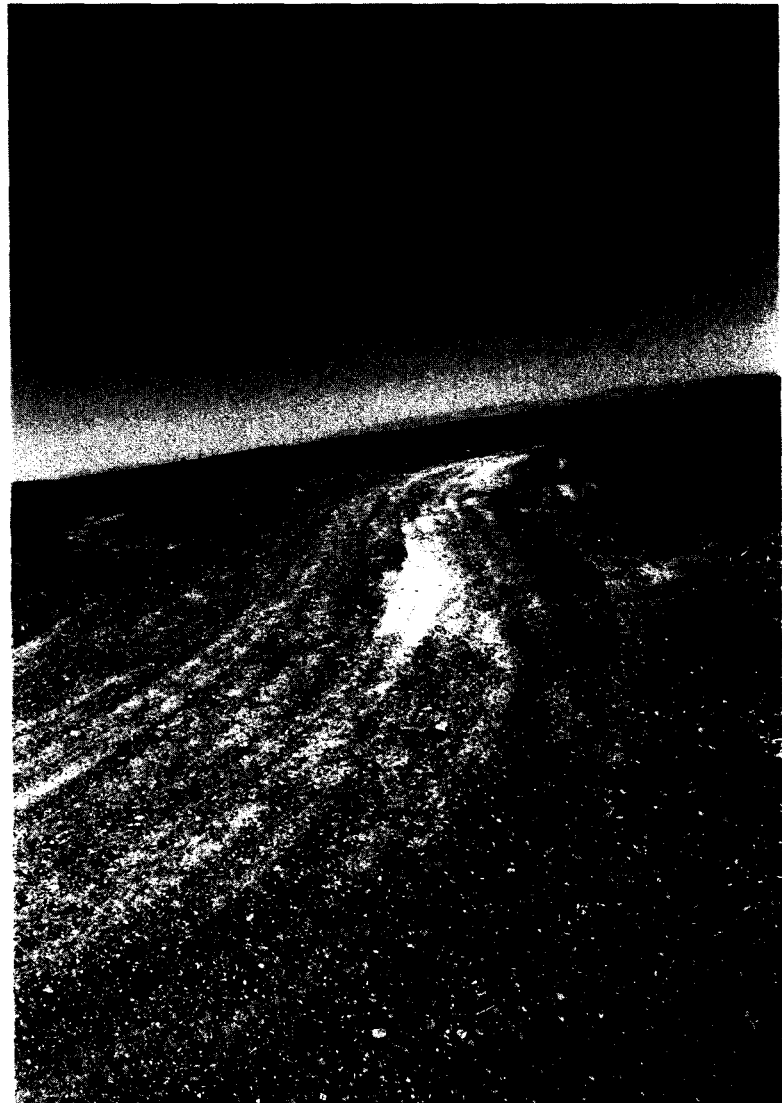
Area of the Current West Gate to King Lane Before Construction  
Which Indicates the Location of the Former Wire Gate

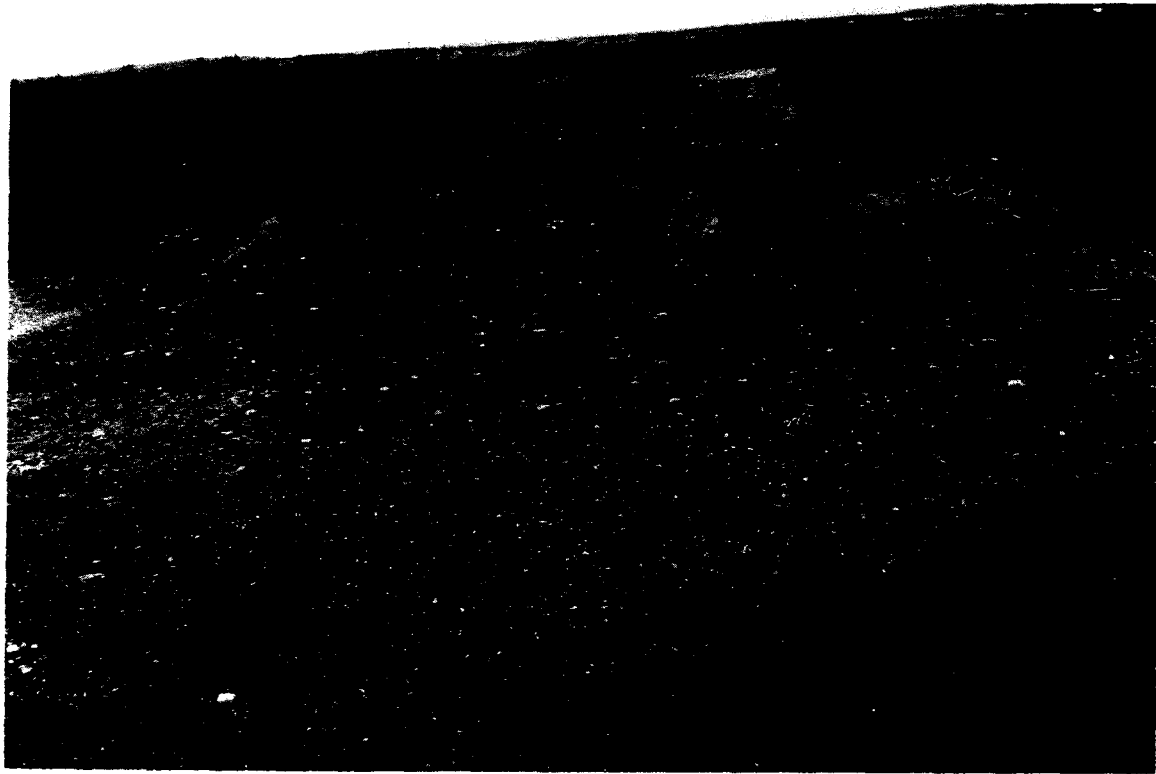


View of Castle Lane  
All Weather Surface Road  
Looking to the North from its  
Intersection with Oreana  
Loop Road



View of Castle Lane  
All Weather Surface Road  
Looking to the North





Entry to Castle Lane All-Weather Surface Road from the Oreana Loop Road  
Looking to the North



Mail Boxes at the Intersection of the Oreana Loop Road and Castle Lane School Bus Stop  
Looking to the South



View of the Castle Lane All-Weather Surface Road  
Looking to the North



View of the Castle Lane All-Weather Surface Road  
Looking to the North

**FILED**

A.M. *1:44* P.M.

SEP 09 2014

ANGELA BARKELL, CLERK

Deputy Clerk

RONALD P. RAINEY – ISB # 1022  
Attorneys at Law  
110 North Ninth Avenue  
Post Office Box 26  
Caldwell, Idaho 83606-0026  
Telephone: (208) 459-3659  
Facsimile: (208) 459-9067 or 459-6147

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )  
 )  
Plaintiffs, )

CASE NO. CV 2014-0278

vs. )

**AFFIDAVIT OF GILBERT KING**

SUSIE LOW; CAL LOW; HEART K )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING;) )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )  
 )  
Defendants. )

\_\_\_\_\_  
GILBERT KING, as Trustee, and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )  
 )  
Counterclaimants, )



vs. )  
 )  
 JOHN E. FUQUAY; CLINTON WARD )  
 FUQUAY and HAILEY ROSE FUQUAY )  
 )  
 Counterdefendants. )  
 \_\_\_\_\_ )

STATE OF IDAHO )  
 ) ss.  
 County of Canyon )

GILBERT KING, being first duly sworn, upon oath deposes and says:

1. I am a party in the above-captioned action, over the age of majority, competent to testify, and I make this affidavit upon personal knowledge.

2. Attached as **Exhibit A** to this affidavit is a true and correct copy of a “Bing Map” as obtained and downloaded from the Internet, which provides an accurate representation of the Oreana Loop Road.

3. State Highway 78 is highlighted in yellow on Exhibit A with the Oreana Loop Road itself highlighted in green. King Lane is highlighted in orange and another access from the Oreana Loop Road to King Lane that is known as Castle Lane is highlighted in blue. Although the size of this map does not reveal the actual location of the connection, the Oreana Loop road connects with State Highway 78 at both ends of that loop road.

4. Attached as **Exhibit B** to this affidavit is a true and correct copy of the same “Bing Map” in a closer view, which reveals the actual names of the roadways in question, but this closer view no longer reveals the location of State highway 78 to the north.

5. Attached as **Exhibit C** to this affidavit is a true correct copy of an Owyhee County reference map which shows the same area with a an overlay of sections, quarter sections, and

indications of townships and ranges.

6. I have indicated the approximate location of the Fuquay Plaintiffs' properties on Exhibit B.

7. As indicated on Exhibit B, the approximate length of King Lane is ½ mile, whereas Castle Lane has a length of approximately 1 ¾ miles.

8. As should be apparent from the maps that have been attached to this affidavit, and by the photographs attached to Rose King's affidavit, and by the other declarations that have been made and submitted by affected parties in this action, the Fuquay Plaintiffs property is neither landlocked, nor dependent upon the use of King Lane in order to access their property, but instead is readily accessible for all purposes by the all weather Castle Lane road.

9. The Fuquay Plaintiffs have no legal right to compel the continued use of the private King Lane, which use has at all times has been entirely permissive.

10. In the absence of any demonstrated necessity, or any manifest adverse claim, the Fuquay Plaintiffs have no right to any continued use of King Lane.

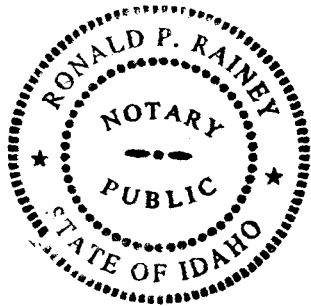
11. Because King Lane is an entirely private roadway, as the owners of that roadway, the Heart K Ranch is entirely within its rights to place gates across that entries to that roadway in order to limit and restrict its use the owners, their invitees, and other given express permission.


12. I have received neither written nor oral notice from the Plaintiff's attorney explaining what the nature and extent of any "immediate and irreparable injury, loss, or damage" that will result to the Fuquay Plaintiffs if a Temporary Restraining Order (TRO) is not issued, without first allowing our attorney to be heard in opposition to the issuance of that requested order.

Further affiant sayeth not.

  
Gilbert King

SUBSCRIBED AND SWORN to before me this 9<sup>th</sup> day of September, 2014.




  
Notary Public for Idaho  
Residing at Caldwell, Idaho  
My Commission expires: 12/18/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 9<sup>th</sup> day of September, 2014, a true and correct copy of the foregoing document was served upon the following:

Matthew R. Cleverley  
Fidelity National Law GROUP  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
Facsimile: 877-655-5281  
Email: Matthew.Cleverly@fnf.com

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Mail
- Facsimile Transmission
- Other \_\_\_\_\_

  
Ronald P. Rainey

# **EXHIBIT A**

**AFFIDAVIT OF GILBERT KING**

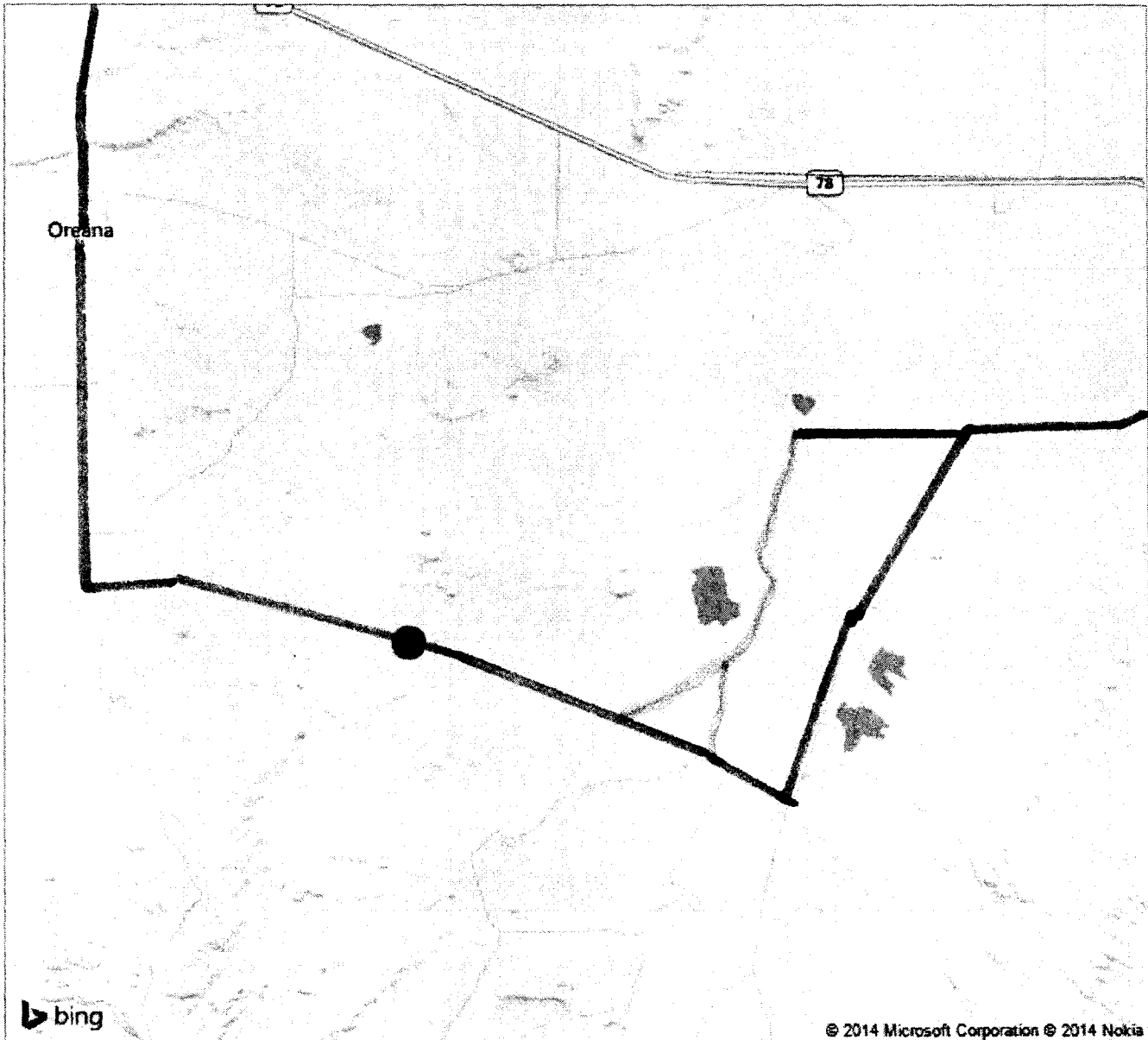
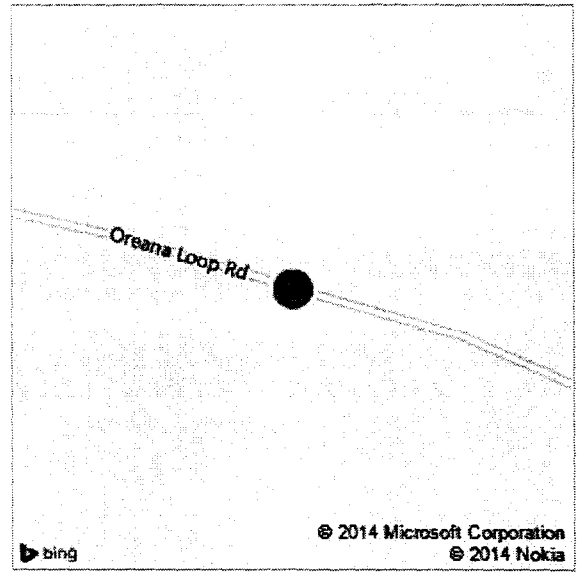
**EXHIBIT A**



### Oreana Loop Rd, ID 83650

My Notes

On the go? Use [m.bing.com](http://m.bing.com) to find maps, directions, businesses, and more



# **EXHIBIT B**

**AFFIDAVIT OF GILBERT KING**

**EXHIBIT B**

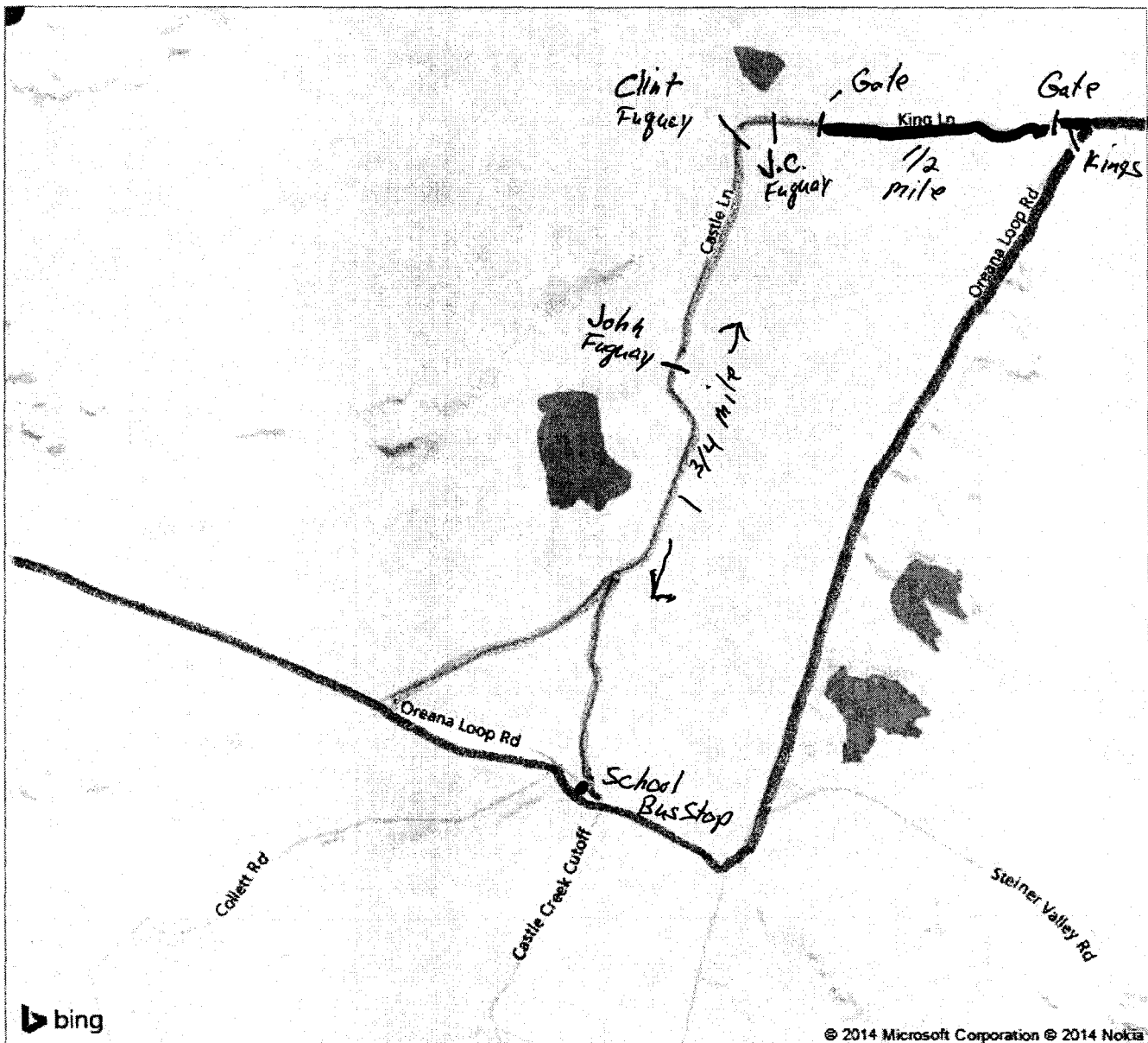
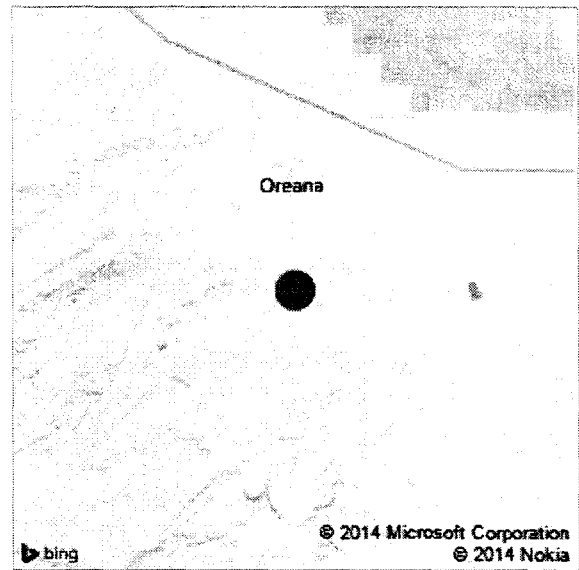


### Oreana Loop Rd, Murphy, ID 83650

My Notes



On the go? Use [m.bing.com](http://m.bing.com) to find maps, directions, businesses, and more



# **EXHIBIT C**

**AFFIDAVIT OF GILBERT KING**

**EXHIBIT C**





RONALD P. RAINEY – ISB # 1022  
Attorneys at Law  
110 North Ninth Avenue  
Post Office Box 26  
Caldwell, Idaho 83606-0026  
Telephone: (208) 459-3659  
Facsimile: (208) 459-9067

**FILED**

10:00 A.M. \_\_\_\_\_ P.M.  
SEP 10 2014

ANGELA BARKELL, CLERK  
*[Signature]*  
Deputy Clerk

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )  
 )  
Plaintiffs, )

CASE NO. CV 2014-0278

vs. )

**AFFIDAVIT OF RONALD P. RAINEY**

SUSIE LOW; CAL LOW; HEART K )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING;) )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )  
 )  
Defendants. )

\_\_\_\_\_  
GILBERT KING, as Trustee, and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )  
 )  
Counterclaimants, )

vs. )  
 )  
 JOHN E. FUQUAY; CLINTON WARD )  
 FUQUAY and HAILEY ROSE FUQUAY )  
 )  
 Counterdefendants. )  
 \_\_\_\_\_ )

STATE OF IDAHO )  
 ) ss.  
 County of Canyon )

RONALD P. RAINEY, being first duly sworn, upon oath deposes and says:

1. I am counsel for the Defendant and Counterclaimant, Heart K. Ranch Trust, in the above-captioned action, am over the age of majority, competent to testify, and I make this affidavit upon personal knowledge.

2. On or about \_\_\_\_\_ (date) Gilbert King provided to me the Plaintiff Fuquay's paper's in request for the issuance of a Temporary Restraining Order (TRO).

3. At no time since the serve of those papers, has the attorney for the Fuquay Plaintiffs, Matthew Cleverly, made any attempt to contact any of the King Defendants, nor has he provided to this Court, as required by I.R.C.P. 65(b), an explanation of the efforts, if any, that he has made and the reasons why notice should not be required before the issuance of a Temporary Restraining Order.

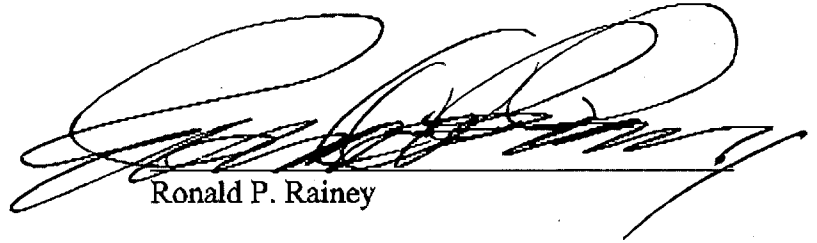
4. As supported by the complaint filed in this action, the Fuquay Plaintiffs have no colorable right to the claimed prescriptive easement, nor will they suffer any "immediate and irreparable harm," in the absence of the issuance of a Temporary Restraining Order (TRO).

5. As supported by the Affidavit of Gilbert King, the Fuquays have had at all times immediate and adequate access to their property through alternate routes, primarily Castle Lane.

6. Because the Fuquay Plaintiffs have not established the requirements for the issuance

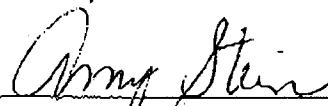
of either a TRO or a preliminary injunction under I.R.C.P. 65(c), their motion should be denied.

Further affiant sayeth not.

  
Ronald P. Rainey

SUBSCRIBED AND SWORN to before me this 9 day of September, 2014.



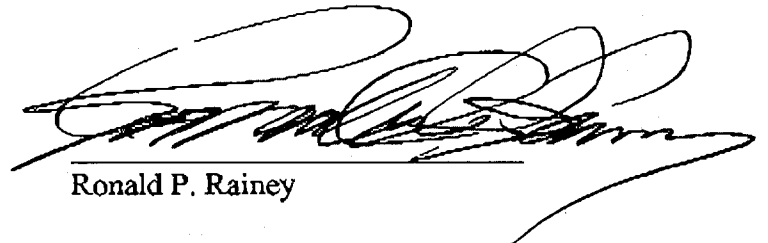
  
Notary Public for Idaho  
Residing at Caldwell, Idaho  
My Commission expires: 07-09-19

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 9<sup>th</sup> day of September, 2014, a true and correct copy of the foregoing document was served upon the following:

Matthew R. Cleverley  
Fidelity National Law GROUP  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
Facsimile: 877-655-5281  
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- U.S. Mail, postage prepaid
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- Facsimile Transmission
- Other \_\_\_\_\_

  
Ronald P. Rainey

RONALD P. RAINEY ISB #1022  
Attorney at Law  
P.O. Box 26  
110 North Ninth Street  
Caldwell, Idaho 83606-0026  
Phone (208)459-3659  
Facsimile Transmission No:459-9067

**FILED**  
11:51 A.M. P.M.

SEP 15 2014

ANGELA BARNETT, CLERK  
*[Signature]*  
Deputy Clerk

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K. Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
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JOHN E. FUQUAY; CLINTON WARD, )  
FUQUAY and HAILEY ROSE FUQUAY, )  
Plaintiffs, )

Case No. CV-2014-0278

vs. )

DECLARATION OF SCHWANN  
DELIVERY PERSON

SUSIE LOW; CAL LOW; HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )  
Defendants. )

GILBERT KING, as Trustee; and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )  
Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )

DECLARATION OF SCHWANN DELIVERY PERSON -1

FUQUAY and HAILEY ROSE FUQUAY )  
 )  
 Counterdefendants. )  
 )  
 )  
 )

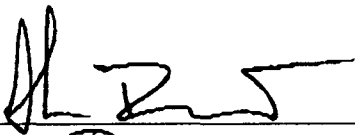
---

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.
2. I have been delivering Schwann products to people in the Oreana area for approximately five years.
3. I have delivered Schwann products to John Fuquay and Clinton and Hailey Fuquay by traveling up Oreana Loop Road then Castle Lane to their residences. The road was completely passable allowing me to travel it all year round. I was prevented from using this road when the gate was locked across Castle Road. I would still use Castle Road to make deliveries if the locked gate was not there.

I CERTIFY UNDER PENALTY OF PERJURY PURSUANT TO THE LAW OF THE STATE OF IDAHO THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 12<sup>th</sup> day of September, 2014.

  
 \_\_\_\_\_  
 Shawn Drew

S. BRYCE FARRIS  
[Idaho State Bar No. 5636]  
SAWTOOTH LAW OFFICES, PLLC  
Golden Eagle Building  
1101 W. River St., Ste. 110  
P. O. Box 7985  
Boise, Idaho 83707  
Telephone: (208) 629-7447  
Facsimile: (208) 629-7559  
E-mail: bryce@sawtoothlaw.com

**FILED**  
10:48 A.M. P.M.

SEP 16 2014

ANGELA BARKELL, CLERK  
*[Signature]*  
Deputy Clerk

Attorneys for Defendants Susie Low and Cal Low

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

**JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY;**

Plaintiffs,

vs.

**SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G.  
KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY;**

Defendants.

Case No. CV-2014-0278

**AFFIDAVIT OF SUSIE LOW**

STATE OF IDAHO )  
County of Ada ) ss.  
)

Susie Low being first duly sworn upon his oath, deposes and says that:

1. I am over the age of 18 and I make this Affidavit based upon my personal knowledge and I am competent to testify to the matters contained herein.

AFFIDAVIT OF SUSIE LOW - 1

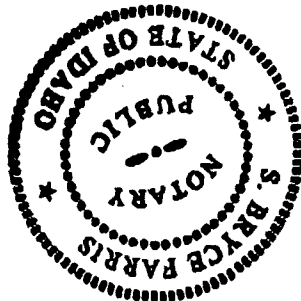
2. I have lived at 21101 Oreana Loop Road in Murphy, Idaho since September of 2005 and I am familiar with the roadway located on or between the property currently owned by Heart K Ranch Trust and the property currently owned by myself and my husband which as been referenced in this matter as "Kings Lane."

3. Since I have lived there, and during my observations of the roadway referenced as "Kings Lane" there has always been a minimum of two gates across the roadway which have been closed to prevent livestock from roaming onto and off of the property owned by Heart K Ranch Trust. Any person attempting to utilize the roadway has had to stop, open and close the gates.

DATED this 15<sup>th</sup> day of September, 2014.

Susie Low  
Susie Low

Sworn to and subscribed before me this 15<sup>th</sup> day of September, 2014.



[Signature]  
Notary Public for Idaho  
Residing in Meridian, Idaho  
My Commission Expires: 7/29/16



**CERTIFICATE OF SERVICE**

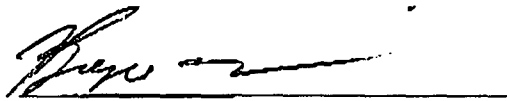
I hereby certify that a true and correct copy of the foregoing document was served on the following on this 16 day of September, 2014 by the following method:

**MATTHEW R. CLEVERLEY**  
**FIDELITY NATIONAL LAW GROUP**  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
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E-Mail: Matthew.Cleverley@fnf.com  
*Attorneys for Plaintiffs*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

**RONALD P. RAINEY**  
**RONALD P. RAINING PA**  
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E-Mail: erainey@qwestoffice.net  
*Attorneys for Defendants Gordon and Rose King*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF



S. Bryce Farris

**FILED**

           A.M.   00   P.M.

SEP 17 2014

ANGELA BARKELL, CLERK

Deputy Clerk

S. BRYCE FARRIS  
[Idaho State Bar No. 5636]  
SAWTOOTH LAW OFFICES, PLLC  
Golden Eagle Building  
1101 W. River St., Ste. 110  
P. O. Box 7985  
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Telephone: (208) 629-7447  
Facsimile: (208) 629-7559  
E-mail: bryce@sawtoothlaw.com

Attorneys for Defendants Susie Low and Cal Low

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

**JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY;**

Plaintiffs,

vs.

**SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G.  
KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY;**

Defendants.

Case No. CV-2014-0278

**ANSWER OF DEFENDANTS SUSIE  
AND CAL LOW AND COUNTERCLAIM**

COMES NOW Defendants, Susie Low and Cal Low (hereinafter collectively referred to as "Low"), by and through their attorneys of record, Sawtooth Law Offices, PLLC, and hereby answers Plaintiffs' Complaint, and complains and alleges as follows:

The Lows hereby deny each allegation contained in the Complaint unless specifically admitted herein.

ANSWER OF DEFENDANTS SUSIE AND CAL LOW AND COUNTERCLAIM - 1

**ORIGINAL**

1. With respect to the allegations contained in paragraph 1 of Plaintiffs' Complaint, the first sentence of the paragraph appears to be a statement by Plaintiffs and to which no response from the Lows is required. To the extent, a response is required or necessary, the allegations and characterizations contained therein are denied. With regard to the second sentence of paragraph 1 the Lows deny the allegations contained therein and affirmatively assert that the properties of Plaintiffs are not accessed, and have not been historically accessed via the disputed roadway which Plaintiffs have referred to as King Lane.

2. With respect to the allegations contained in paragraphs 2 and 3 of Plaintiffs' Complaint, the paragraphs appears to be statements by Plaintiffs and to which no response from the Lows is required. To the extent, a response is required or necessary, the allegations and characterizations contained therein are denied.

3. With respect to the allegations contained in paragraph 4 of Plaintiffs' Complaint, the Lows admit the allegations contained therein.

4. With respect to the allegations contained in paragraph 5 of Plaintiffs' Complaint, the Lows admit that Exhibits A, B and C appear to show the general area of the properties in dispute but the Lows deny the remainder of the characterizations or allegations contained therein or which have been imposed upon said Exhibits by Plaintiffs.

5. With respect to the allegations contained in paragraphs 6 and 7 of Plaintiffs' Complaint, the Lows are without sufficient knowledge or information to admit or deny the allegations contained therein and therefore the allegations or characterizations are denied. The Lows affirmatively assert that the documents referenced in said paragraphs speak for themselves.

6. With respect to the allegations contained in paragraph 8 and 10 of Plaintiffs' Complaint, the Lows admit that the Lows own certain real property located south of "King Lane" and that Exhibits F and H contain legal descriptions of said real property. The Lows deny any further allegations or characterizations contained therein.

7. With respect to the allegations contained in paragraph 9 of Plaintiffs' Complaint, the Lows deny that Avco Financial Services of Idaho Falls, Inc. claims an interest in the real property identified in Exhibit F and affirmatively assert that any interest of Avco Financial Services of Idaho Falls, Inc. has been satisfied and paid. The Lows deny any further allegations or characterizations contained therein.

8. With respect to the allegations contained in paragraphs 11, 12 and 13 of Plaintiffs' Complaint, such allegations appear to be directed towards other parties to this action and the Lows are without sufficient knowledge or information to admit the allegations and therefore deny the allegations or characterizations contained therein.

9. With respect to the allegations contained in paragraphs 14 and 15 of Plaintiffs' Complaint, the Lows admit the allegations contained therein.

10. With respect to the allegations contained in paragraphs 16, 17, 18 and 19 of Plaintiffs' Complaint, the Lows deny the allegations contained therein.

#### **AFFIRMATIVE DEFENSES**

The following defenses are not necessarily stated separately as to each claim for relief or allegation made by Plaintiffs' Complaint. Nevertheless, the following defenses are applicable, where appropriate, to any and all of Plaintiffs' claims for relief. In addition, the Lows, in asserting the

following defenses, does not admit that the burden of proving the allegations or denials contained in the defenses are upon the Lows but, to the contrary, assert that by reason of denials and/or by reason of relevant statutory and case authority, the burden of proving the facts relevant to many of the defenses and/or the burden of proving the inverse of the allegations contained in many of the defenses is upon Plaintiffs. Moreover, in asserting any defense, the Lows do not admit any responsibility or liability of the Lows but, to the contrary, specifically denies any and all allegations or responsibility and liability in Plaintiffs' Complaint.

**FIRST AFFIRMATIVE DEFENSE**

**(Failure to State a Claim)**

Plaintiffs' Complaint fails to state a cause of action upon which relief can be granted.

**SECOND AFFIRMATIVE DEFENSE**

**(Waiver, Estoppel, Laches, Consent and Unclean Hands)**

Plaintiffs are prevented from recovering damages or relief sought, if any, pursuant to laches, waiver, estoppel, abandonment, consent and unclean hands.

**THIRD AFFIRMATIVE DEFENSE**

**(Permissive Use)**

Any claimed easement or right-of-way by Plaintiffs was not adverse, was at most permissive, and was not for the prescriptive period as required by I.C. sections 5-203 et seq.

**FOURTH AFFIRMATIVE DEFENSE**

**(Failure to Mitigate and Preventative)**

The Lows deny that any relief alleged or requested by Plaintiffs in this action are appropriate

but Plaintiffs have failed to mitigate by reason of Plaintiffs failure to properly secure access to Plaintiffs' property via alternative routes which have been historically used to access Plaintiffs' property and which do not involve access across or over the property of Lows.

#### **FIFTH AFFIRMATIVE DEFENSE**

##### **(Reservation of Additional Affirmative Defenses)**

The Lows reserve the right to amend this Answer to assert additional defenses or abandon affirmative defenses once discovery has been completed.

#### **COURT COSTS AND ATTORNEY FEES**

As a result of Plaintiffs' Complaint, the Lows have retained attorneys to defend the Complaint and are entitled to an award of attorneys' fees and costs against Plaintiffs pursuant to Idaho Code § 12-121, and any other applicable statute or rule.

#### **COUNTERCLAIM**

COMES NOW, the Lows/Defendants/Counter-Claimant, and as a Counterclaim against the Plaintiffs/Counter-Defendant, complains and alleges as follows:

1. Counter-Defendants own real property in Owyhee County, Idaho adjacent to the real property owned by Counter-Claimant. Said real property is more particularly described in the Complaint filed by Counter-Defendants which initiated this action and which relates to the roadway referred to in said Complaint as Kings Lane.
2. Counter-Defendants use of their property has resulted in Counter-Defendants' livestock damaging fences between the property of Counter-Claimant and Counter-Defendants. Counter-Defendants have also failed to control their livestock to prevent damage to Counter-Claimant's

ANSWER OF DEFENDANTS SUSIE AND CAL LOW AND COUNTERCLAIM - 5

fences and other property and from coming onto Counter-Claimant's property without the consent of Counter-Claimant.

3. Counter-Defendants have allowed other animals, namely dogs, debris and trash from Counter-Defendant's property to come onto Counter-Claimant's property or to be deposited on Counter-Claimant's property without the consent of Counter-Claimant.

4. Counter-Defendants use of the roadway, referred to as Kings Lane, has exceeded the scope of any historic use and Counter-Defendants are using the roadway for hauling livestock and with large trucks which did not and have not historically used Kings Lane for access to the Counter-Defendants' real property and there has been no prescriptive or historic use of said roadway by these large trucks. Such use by Counter-Defendants, which is beyond the scope of any prior use, is causing damage to the roadway, culverts and bridges and causing additional maintenance which would not be necessary but for Counter-Defendants' unauthorized use.

#### **COUNT ONE - TRESPASS**

5. Counter-Claimant incorporates all of the foregoing allegations set forth in this Counterclaim as though fully set forth herein.

6. Counter-Defendants have exceeded the scope of any historic use of Kings Lane causing additional maintenance and damage to the roadway, bridge and culverts for said roadway. Such unauthorized use, beyond an prior, historic or prescriptive use, exceeds the scope of any rights of Counter-Defendants and results in an illegal trespass upon the property of Counter-Claimant.

7. Counter-Defendants have allowed their personal property, consisting of livestock, dogs, trash and debris to trespass onto Counter-Claimant's property without the consent of Counter-Claimant.

ANSWER OF DEFENDANTS SUSIE AND CAL LOW AND COUNTERCLAIM - 6

Counter-Defendants have allowed such trespass to continue and have failed to take necessary actions to control the use or trespass on Counter-Claimant's property. Counter-Defendants have also allowed livestock to damage fences of Counter-Claimants and have failed to take necessary action to control said livestock and prevent the unnecessary damage to Counter-Claimant's property and fences.

8. As a result of Counter-Defendants' trespass, Counter-Claimants have been damaged in an amount to be proven at trial, including all costs and attorney fees incurred for prosecuting this action.

### **COUNT TWO - INJUNCTION AND AFFIRMATIVE RELIEF**

9. Counter-Claimant incorporates all of the foregoing allegations set forth in this Counterclaim as though fully set forth herein.

10. The unauthorized use and/or trespass by Counter-Defendants is in violation of Counter-Claimant's property rights and Counter-Claimant is entitled to an order enjoining Counter-Defendants from any further trespass and an order which mandates that Counter-Defendants control their personal property, including livestock and dogs, to prevent such property from damaging Counter-Claimant and/or from trespassing on Counter-Claimant's property.

11. Counter-Claimant is entitled to an order from this Court compelling Counter-Defendants to immediately cease any unauthorized use of Counter-Claimant's property including use of Kings Lane by commercial or large trucks and trailers which cause damage to the roadway and which have increased the maintenance for Kings Lane.

### **REQUEST FOR ATTORNEY FEES**

Counter-Claimant is entitled to its reasonable attorneys' fees incurred in the prosecution



hereof pursuant Idaho Code § 12-121 and any other applicable statute or rule.

**DEMAND FOR JURY TRIAL**

Defendants/Counter-Claimant hereby demands a trial by a jury of not less than twelve jurors on all issues triable before a jury.

**PRAYER FOR RELIEF**

WHEREFORE, the Lows respectfully prays as follows:

1. That this Court dismiss Plaintiffs' Complaint in its entirety and that Plaintiffs take nothing thereby.
2. For an Order of this Court restraining Plaintiffs and Plaintiffs' agents from trespassing on the Lows' property with livestock, dogs, debris, trash and unauthorized vehicles as well as compelling Plaintiffs to control their livestock to prevent further damages to the fences between their adjoining property.
3. For a money judgment against Plaintiffs in an amount to be proven at trial for the damage caused by Plaintiffs.
4. That the Lows be awarded their reasonable costs and attorney's fees incurred in defense of Plaintiffs' Complaint and in prosecution of the Lows' Counterclaim.
5. For such other and further relief as to the Court may seem just and equitable in the premises.

DATED this 16<sup>th</sup> day of September, 2014.

SAWTOOTH LAW OFFICES, PLLC

by: 

S. Bryce Farris

**CERTIFICATE OF SERVICE**

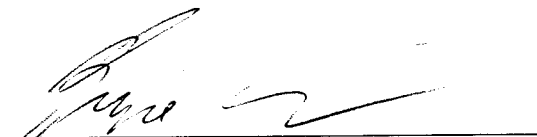
I hereby certify that a true and correct copy of the foregoing document was served on the following on this 16 day of September, 2014 by the following method:

**MATTHEW R. CLEVERLEY**  
**FIDELITY NATIONAL LAW GROUP**  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
Telephone: (206) 224-6003  
E-Mail: Matthew.Cleverley@fnf.com  
*Attorneys for Plaintiffs*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

**RONALD P. RAINEY**  
**RONALD P. RAINING PA**  
110 N. 9<sup>th</sup> Ave.  
PO Box 26  
Caldwell, ID 83606-0026  
Telephone: (208) 459-3659  
Facsimile: (208) 459-9067  
E-Mail: erainey@qwestoffice.net  
*Attorneys for Defendants Gordon and Rose King*

- U.S. First Class Mail, Postage Prepaid
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- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

  
\_\_\_\_\_  
S. Bryce Farris

RONALD P. RAINEY ISB #1022  
Attorney at Law  
P.O. Box 26  
110 North Ninth Street  
Caldwell, Idaho 83606-0026  
Phone (208)459-3659  
Facsimile Transmission No:459-9067

**FILED**  
8:29 A.M. P.M.  
SEP 18 2014

ANGELA BARNETT, CLERK  
*[Signature]*  
Deputy Clerk

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K. Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )

Defendants. )

GILBERT KING, as Trustee; and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )

DECLARATION OF SCOTT SNYDER -1

Case No. CV-2014-0278

DECLARATION OF SCOTT SNYDER


FUQUAY and HAILEY ROSE FUQUAY )  
 )  
 Counterdefendants. )  
 )  
 )  
 \_\_\_\_\_ )

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.
2. I am a deputy sheriff of Owyhee county had ave been in law enforcement for 4 years.
3. On May 29, 2014, I was dispatched to the residence of Gilbert King, 19100 King Lane. Oreana and the residence of John Fuquay at 18907 Castle Lane, Oreana, regarding a dispute concerning fences on private property. Then I met with Gilbert King and John Fuquay.
4. Attached as Exhibit "A" is a true and correct copy of my incident report regarding this matter.

I CERTIFY UNDER PENALTY OF PERJURY PURSUANT TO THE LAW OF THE STATE OF IDAHO THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 17 day of September, 2014.

  
 \_\_\_\_\_ 2031  
 Scott Snyder

CERTIFICATE OF SERVICE

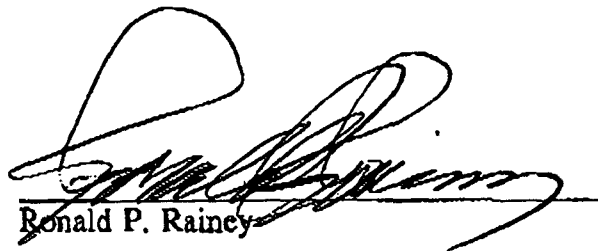
I, Ronald P. Rainey, hereby certify that on this 17<sup>th</sup> day of September, 2014, I caused a true and correct copy of the foregoing instrument to be delivered to the adverse party, via the method indicated below, addressed as follows:

     U.S. Mail, Postage Prepaid      X   Facsimile Transmission         Hand Delivery

Matthew R. Cleverley  
Fidelity National Law Group  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
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S. Bryce Farris  
P.O. Box 7985  
Boise, Idaho 83707  
Telephone: 629-7447  
Facsimile: 629-7559  
Email: bryce@sawtoothlaw.com

Susan Wildwood  
2911 S. Holden Ave  
Boise, Idaho 83706  
Telephone: 336-4433  
Email: Oceanbreezes75@gmail.com

  
Ronald P. Rainey

09/11/2014 13:22:54 LE0640 OWYHEE COUNTY SHERIFF  
WIDTE, BEV

Incident #: 01-2014-01430 PAGE 1  
Status/Dispo: CIVIL

# INCIDENT REPORT

Misdemeanor:  Felony:  Non Criminal:

Initial NOC: EVENT 59399  
Ver NOC: NEIGHBOR DISPUTE  
Location: 19100 KING LN  
Cross St:  
District: R4  
Rptd to: ALLEN, LUCILE MAY  
Dispatch: ALLEN, LUCILE MAY

Reported Date/Time: 05/29/2014 11:44  
Occurred Date: 5/29/2014 TO 5/29/2014  
Occurred Time: 11:44:51AM TO 11:44:51AM  
Rpt By: KING, GILBERT GENE  
PO BOX 38  
MURPHY ID 83650  
Phone 1: [REDACTED]  
Phone 2:

## Officers (O/I Reports)

## Incident Officers

31 SNYDER, SCOTT

31 SNYDER, SCOTT

## Description

NEIGHBOR DISPUTE ONGOING OVER BOUNDARY FENCES.

## Extended Description

## Incident Names

\*\*\* REPORTED PARTIES \*\*\*

**KING, GILBERT GENE**

PO BOX 38  
MURPHY ID 83650  
Home: [REDACTED]  
Work: (000) - [REDACTED]  
Employer:  
Comment:

Incident Name Entry Date: 05/29/2014  
DOB: [REDACTED] Age: [REDACTED]  
SSN: [REDACTED] OLN: [REDACTED]  
Race: WHITE Gender: MALE Ethn: NOT HISPANIC  
Hgt: [REDACTED] Wgt: [REDACTED] Hair: [REDACTED] Eyes: [REDACTED]  
Fax: [REDACTED] Cell: [REDACTED]  
Pager:

\*\*\* OTHERS \*\*\*

**FUQUAY, JOHN EDMOND**

18907 CASTLE LANE  
OREANA ID 83650  
Home:  
Work:  
Employer: ORIUS  
Comment: UTILITIES

Incident Name Entry Date: 05/29/2014  
DOB: [REDACTED] Age: [REDACTED]  
SSN: [REDACTED] OLN: [REDACTED]  
Race: [REDACTED] Gender: MALE Ethn: NOT HISPANIC  
Hgt: [REDACTED] Wgt: [REDACTED] Hair: [REDACTED] Eyes: [REDACTED]  
Fax: [REDACTED] Cell: [REDACTED]  
Pager:

## Incident Citations

## Incident Arrests

# EXHIBIT A

09/11/2014 13:22:54 LE0640 OWYHEE COUNTY SHERIFF  
WHITE, DEV

Incident #: 01-2014-01450 PAGE 1  
Status/Dispo: CIVIL

# INCIDENT REPORT

Incident Vehicles

Incident Property

### ACTION REQUESTED

- |   |                                    |                                       |
|---|------------------------------------|---------------------------------------|
| <input type="checkbox"/> Review/Comment | <input type="checkbox"/> Complaint | <input type="checkbox"/> Summons      |
| <input type="checkbox"/> Warrant        | <input type="checkbox"/> Arrested  | <input type="checkbox"/> Other: _____ |

AUDIO TAPE? <input type="checkbox"/> Yes <input type="checkbox"/> No	VIDEO TAPE? <input type="checkbox"/> Yes <input type="checkbox"/> No	CRIMINAL HISTORY ATTACHED? <input type="checkbox"/> Yes <input type="checkbox"/> No
PHOTOS? <input type="checkbox"/> Yes <input type="checkbox"/> No		

Make copies and send to:

Copies Sent by:  \_\_\_\_\_

- County Prosecutor
- Juvenile Probation
- Other: \_\_\_\_\_

OFFICER

REVIEWED BY

\*\*\*\*\*END OF REPORT\*\*\*\*\*

**OWYHEE COUNTY SHERIFF'S OFFICE**  
Report 1401450.001

**NATURE OF COMPLAINT:** Civil Dispute of Fences and Gates

On 5/29/2014 I was dispatched to King Lane, and 18907 Castle Lane, Oreana, Owyhee County, Idaho for a neighbor dispute concerning fences on private property.

I first made contact with John Edmund Fuquay at his residence, 18907 Castle Lane. On the way to John's residence, from the King's property, I had passed through two fences with the gates closed. I also observed cattle in the area. I asked John if he had any type of easement for the private road that is routed from the King property to John's residence. John advised he does have easement that came from many years past. I advised John, the Kings advised there was no legal easement, but permission was given to John use the road at any time, as long as if the gates were closed, they needed to remain closed due to cattle in the area.

I advised John of Idaho Code 35-112 Establishment of gates..., in which if any damages occurred to fences or gates, any claims made by the property owner, would be doubled in a court of law. John advised if any damages were to occur to any fence or gates, or to any cattle related to an open gate, he would take full responsibility. John advised he was not going to close any gates on the road in question, as he felt he had a right of way or easement. John also advised he would not close any gates, because he didn't want his older relatives to have to struggle with the gate, or step in cattle manure. John advised he was involved with multiple attorneys concerning the property and easements.

I then left John's residence, and returned to the King residence. I made contact with Gilbert Gene King, and advised Gilbert of my discussion with John, mainly to inform Gilbert of possible gates left open while Gilberts' cattle were in the area. I also advised Gilbert of Johns intentions of possibly not closing the gates. Gilbert did have cows in the area that would be affected if gates were left open.

Scott Snyder 2031 OCSO

Officer's Signature

3 June 2014

Date



**FILED**  
8:29 A.M. P.M.  
SEP 18 2014  
ANGELA BARKELL, CLERK  
*[Signature]*  
Deputy Clerk

RONALD P. RAINEY ISB #1022  
Attorney at Law  
P.O. Box 26  
110 North Ninth Street  
Caldwell, Idaho 83606-0026  
Phone (208)459-3659  
Facsimile Transmission No:459-9067

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K. Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
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FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

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2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )

Defendants. )

Case No. CV-2014-0278

DECLARATION OF SETH THOMAS

GILBERT KING, as Trustee; and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )

DECLARATION OF SETH THOMAS -1

FUQUAY and HAILEY ROSE FUQUAY )  
 )  
 Counterdefendants. )  
 )  
 )  
 )  
 )

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.
2. Please see the attached Exhibit "A" for my statement.

I CERTIFY UNDER PENALTY OF PERJURY PURSUANT TO THE LAW OF THE STATE OF IDAHO THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 16th day of September, 2014.

  
Seth Thomas

### CERTIFICATE OF SERVICE

I, Ronald P. Rainey, hereby certify that on this \_\_\_\_ day of September, 2014, I caused a true and correct copy of the foregoing instrument to be delivered to the adverse party, via the method indicated below, addressed as follows:

\_\_\_ U.S. Mail, Postage Prepaid     Facsimile Transmission    \_\_\_ Hand Delivery

Matthew R. Cleverley  
Fidelity National Law Group  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
Facsimile: 877-655-5281  
Email: [Matthew.Cleverly@fnl.com](mailto:Matthew.Cleverly@fnl.com)

S. Bryce Farris  
P.O. Box 7985  
Boise, Idaho 83707  
Telephone: 629-7447  
Facsimile: 629-7559  
Email: [bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)

---

Ronald P. Rainey

September 13, 2014

To Whom It May Concern:

Our winter range is adjacent to the property of Heart K Ranch Trust. We graze our cattle there during the winter months. It is beneficial to us if all landowners that border us keep their gates closed. This helps to insure cattle are secured on our property and not out.

Thank you,



Seth Thomas  
Oreana, ID 83650  
208-834-2251

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 – 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
[Matthew.Cleverley@fnf.com](mailto:Matthew.Cleverley@fnf.com)  
Attorney for Plaintiffs

**FILED**

                     A.M. 3:25 P.M.

OCT 29 2014

ANGELA BARKELL, CLERK

                      
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Case No. CV-14-0278

Plaintiffs,

PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT AGAINST  
SUSIE LOW AND CAL LOW

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

**I.      MOTION**

Pursuant to IRCP 56, Plaintiffs moves this court for a summary judgment against Susie Low and Cal Low (the "Lows") as to Plaintiffs' easement rights against Low Parcel 1 and Low Parcel 2 because there are no disputed issues of material fact and Plaintiffs are entitled to judgment as a matter of law. This Motion is limited to Plaintiffs' claims of prescriptive easement as to the Lows' parcels and does not address Plaintiffs' prescriptive rights as against the King Parcels.

PLAINTIFFS' MOTION FOR SUMMARY  
JUDGMENT AGAINST LOWS – 1

FIDELITY NATIONAL LAW GROUP  
1200 – 6<sup>th</sup> AVENUE, SUITE 620  
SEATTLE, WA 98101  
(206) 223-4525

 ORIGINAL

Plaintiffs have used King Lane to access their properties since 1977 and have established prescriptive rights over Low Parcel 1 and Low Parcel 2. Those prescriptive rights accrued before the Lows acquired the property and are therefore superior to the Lows rights. Because the prescriptive easement was established long before the Lows became the owners of their property, whatever rights the Lows acquired in their properties are subject to Plaintiffs' previously established prescriptive rights.

## II. STATEMENT OF FACTS

The properties at issue in this case are located east of the city of Oreana, Idaho in Owyhee County. For illustrative purposes, a street map showing the general location of the area is shown on Exhibit "A."<sup>1</sup> An aerial map showing the Owyhee County Assessor's lot boundaries is shown on Exhibit "B." A close-up aerial view and showing the general road boundaries and identities of the affected parcel owners is shown on Exhibit "C."

### A. Property History

#### 1. Clinton Fuquay Parcel

Clinton Ward Fuquay and Hailey Rose Fuquay own the parcel (the "Clinton Fuquay Parcel") at the west end of King Lane. It was once part of the John Fuquay Parcel. The legal description for the Clinton Fuquay Parcel is shown on the warranty deed attached as Exhibit "D." Clinton and Hailey Fuquay purchased the Clinton Fuquay Parcel from John Fuquay on June 24, 2014. Prior to that time, the Clinton Fuquay Parcel was part of the John Fuquay Parcel.

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<sup>1</sup> The documents referred to are attached to the Declaration of Matthew Cleverley.

## **2. John Fuquay Parcel**

John Fuquay owns the parcel (the "John Fuquay Parcel") which is located south of the Clinton Fuquay Parcel. The legal description for the John Fuquay Parcel is shown on the Trustee's Deed dated October 13, 1989 attached as Exhibit "E," (less the Clinton Fuquay Parcel).

Prior to John Fuquay's purchase of the John Fuquay Parcel, it was owned by James C. Fuquay, John Fuquay's father. John Fuquay has lived continuously on the John Fuquay Parcel since about January 1, 1977.

## **3. Low Parcel 1 Ownership History**

Susie Low and Cal Low own the parcel (the "Low Parcel 1") located south of King Lane. There are two parcels which were conveyed by the same deed. The legal description for the Low Parcel 1 is shown on the Special Warranty Deed attached as Exhibit "F."

- Based on the public records, on January 17, 1973, Elmer O. Johnston and May M. Johnston conveyed Low Parcel 1 to Charles W. Steiner and Florence W. Steiner.
- Based on the public records, on March 21, 1980, Charles W. Steiner and Florence W. Steiner were divorced and Low Parcel 1 was awarded to Florence W. Steiner.
- Based on the public records, on September 20, 1987, Samuel Steiner, as personal representative of Florence W. Steiner conveyed Low Parcel 1 to Samuel Steiner.
- Based on the public records, on January 23, 1995, Samuel V.C. Steiner and Mary Jane Steiner conveyed Low Parcel 1 to Samuel V.C. Steiner and Mary J. Steiner.
- Based on the public records, on July 15, 2005, Samuel V.C. Steiner and Mary J. Steiner conveyed Low Parcel 1 to Pioneer Exchange Accommodation Titleholder #69, LLC.

- Based on the public records, on January 27, 2006, Pioneer Exchange Accommodation Titleholder #69, LLC conveyed Low Parcel 1 to the Lows.

#### **4. Low Parcel 2**

Susie Low and Cal Low own the parcel (the "Low Parcel 2") located south of King Lane. Oreana Loop Road crosses the northwest corner of Low Parcel 2. The legal description for the Low Parcel 2 is shown on the Special Warranty Deed attached as Exhibit "H."

- From the public records, on May 6, 1942, D. Fred Henderson acquired Low Parcel 2.
- From the public records, between May 6, 1942 and March 18, 1997, the Low Parcel 2 was owned by D. Fred Henderson, individually.
- From the public records, on March 18, 1997 D. Fred Henderson conveyed the Low Parcel 2 to D. Fred Henderson and Mary F. Henderson as husband and wife.
- From the public records, on February 11, 2000, Mary F. Henderson conveyed the Low Parcel 2 to Mary F. Henderson, individually.
- From the public records, on July 8, 2005, Mary Frances Henderson conveyed the Low Parcel 2 to Pioneer Exchange Accommodation Titleholder #69, LLC.
- On January 27, 2006, Pioneer Exchange Accommodation Titleholder #69, LLC conveyed Low Parcel 2 to the Lows.

#### **B. Plaintiffs' Use of King Lane**

John Fuquay has lived continuously on the John Fuquay Parcel since about January 1977, when he was 12 years old. At that time, he lived with his father, James C. Fuquay. John Fuquay purchased the John Fuquay Parcel from the bankruptcy court on October 13, 1989.



From January 1977, John Fuquay, his family and guests have regularly and continuously used King Lane to access the John Fuquay and Clinton Fuquay parcels.

Between 1977 and the present, Plaintiffs and their families have openly and continuously used King Lane for the following types of purposes to benefit the owners and residents of the John Fuquay Parcel and the Clint Fuquay Parcel:

- Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
- Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when James Fuquay had his trucks and the use continued when John Fuquay began operating the John Fuquay Trucking Company.
- Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
- Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
- Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.

Plaintiffs never asked any of the prior owners of Low Parcel 1 or Low Parcel 2 for permission to use King Lane. Plaintiffs have always used King Lane as a matter of right for access to their properties.

**C. Utilities Along King Lane**

The overhead electric lines that service the houses located on the Clint Fuquay Parcel run from Oreana Loop Road along King Lane to the Clint Fuquay Parcel.

The underground Centurylink telephone lines run from Oreana Loop Road along King Lane to the Clint Fuquay Parcel. It then runs south along Castle Lane to my house on the John Fuquay Parcel.

Overhead electric lines for the house on the John Fuquay parcel run north through the property to the south of the John Fuquay Parcel.

**D. Use of King Lane**

At its west end, King Lane connects to Castle Lane. There are no other properties that use King Lane for access.

**III. LEGAL STANDARDS**

**A. Motion for Summary Judgment**

On a motion for summary judgment, the Court views all facts and inferences from the record in favor of the non-moving party and the moving party has the burden of proving the absence of genuine issues of material fact. Evans v. Griswold, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. Smith v. Meridian Joint School District No. 2, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

## B. Prescriptive Easement

A party seeking to establish the existence of an easement by prescription “must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period.” Hodgins v. Sales, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003).

The statutory period in question is five years.<sup>2</sup> I.C. § 5-203; *Weaver*, 134 Idaho at 698, 8 P.3d at 1241. A claimant may rely on his own use, or he “may rely on the adverse use by the claimant's predecessor for the prescriptive period, or the claimant may combine such predecessor's use with the claimant's own use to establish the requisite five continuous years of adverse use.” Hodgins v. Sales, 139 Idaho 225, 230, 76 P.3d 969, 973 (2003).

Once the claimant presents proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, even without evidence of how the use began, he raises the presumption that the use was adverse and under a claim of right. Wood v. Hoglund, 131 Idaho 700, 702-03, 963 P.2d 383, 385-86 (1998); Marshall v. Blair, 130 Idaho 675, 680, 946 P.2d 975, 980 (1997). The burden then shifts to the owner of the servient tenement to show that the claimant's use was permissive, or by virtue of a license, contract, or agreement. Wood, 131 Idaho at 703, 963 P.2d at 386; Marshall, 130 Idaho at 680, 946 P.2d at 980. The nature of the use is adverse if “it runs contrary to the servient owner's claims to the property.” Hodgins, 139 Idaho at 231, 76 P.3d at 975. The state of mind of the users of the alleged

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<sup>2</sup> I.C. 5-203 was amended from 5 years to 20 years in 2006, but the 5 year time frame still applies to prescriptive claims established before 2006. Machado v. Ryan, 153 Id 212, 222.

easement is not controlling; the focus is on the nature of their use. *Id.* at 231–32, 76 P.3d at 975–76. Akers v. D.L. White Const., Inc., 142 Idaho 293, 303, 127 P.3d 196, 206 (2005).

#### IV. ARGUMENT

##### A. Plaintiffs Have Established Prescriptive Rights as to the Low Parcels.

The key for this case is to look at *any* 5-year time period from Plaintiffs' first use of King Lane in 1977 to the present. Once Plaintiffs present evidence that their use was open, notorious, continuous, uninterrupted for those 5 years, the burden of proving permissive use shifts to the Lows. That means that the Lows must present evidence of permissive use for periods prior to the Lows' ownership. If they do not do so, then Plaintiffs presumption stands and Plaintiffs prevail against the Lows as a matter of law.

If Plaintiffs prescriptive rights matured against *any* of the prior owners of Low Parcel 1 or Low Parcel 2 during *any* 5-year period between 1977 and 2006, then Lows cannot prevail in this matter because they cannot defeat Plaintiffs' prescriptive easement which was established prior to the Lows acquisition in 2006.

Plaintiffs' prescriptive easement matured as to Low Parcel 1 during any of the following alternate time periods:

- Between January 1, 1977 and March 20, 1980 as against Charles W. Steiner and Florence W. Steiner.
- Between March 20, 1980 and September 30, 1987 as against Florence W. Steiner.
- Between September 30, 1987 and November 1, 1995 as against Samuel Steiner.
- Between November 1, 1995 and July 8, 2005 as against Samuel V.C. Steiner and Mary Jane Steiner.

- Between July 8, 2005 and January 6, 2006 against the Pioneer Exchange Accommodation Titleholder #69, LLC.
- January 6, 2006 to the present as against the Lows.

Similarly, Plaintiffs established the elements of a prescriptive easement as to Low Parcel 2 at any of the following times:

- Between 1977 and 1997 as against D. Fred Henderson.
- Between 1997 and 2005 as against Mary Frances Henderson.
- Between July 8, 2005 and January 6, 2006 against the Pioneer Exchange Accommodation Titleholder #69, LLC.
- January 6, 2006 to the present as against the Lows.

In this case, the ownership history of Low Parcel 1 and Low Parcel 2 is undisputed and a matter of public record. Based on John Fuquay's declaration, Plaintiffs' use of King Lane as to the prior owners of Low Parcel 1 and Low Parcel 2 met the elements of a prescriptive easement as to those parcels at many different 5-year periods, the earliest beginning in 1997. Plaintiffs' prescriptive rights of access over King Lane were established by operation of law as soon as Plaintiffs met the elements of a prescriptive easement. Those rights were established long before the Lows purchased Low Parcel 1 or Low Parcel 2. It does not matter whether the prescriptive rights were recorded or whether Plaintiffs sought prior judicial declaration of those rights. The prescriptive easement was conclusively established as a matter of law.

As a matter of law, Plaintiffs are entitled to their declaratory judgment as to the Lows that their prescriptive rights of access over King Lane matured prior to the Lows acquisition of Low Lot 1 or Low Lot 2 and Plaintiffs access rights are superior to any rights of the Lows.

**C. Alternate Access over Castle Lane is Irrelevant**


The defendants in this case may argue that Plaintiffs have access to their properties over Castle Lane, and that Plaintiffs therefore do not need access over King Lane. The argument is irrelevant and fails for several reasons:

1. "Necessity" is not a requirement for establishment of a prescriptive easement. It doesn't matter whether the Plaintiffs' *need* access over King Lane. The only issue is whether they established prescriptive rights by prior use of King Lane.
2. Castle Lane is not a public road. It crosses other private property as well as land owned by the US Government. This court has no jurisdiction to order the US Government to let Plaintiffs use King Lane. It is entirely possible that the US Government could decide to close all road access through the BLM property. If it were to do so, Plaintiffs would be without any access to their property at all—thus that could create an element of necessity. However, Plaintiffs are not required to wait to be landlocked before seeking a declaration of their rights over King Lane.

V. CONCLUSION

Plaintiffs established prescriptive easement rights over Low Parcel 1 and Low Parcel 2 against the predecessors to the Lows prior to the Low's acquisition of their properties. Therefore, Plaintiffs are entitled to summary judgment that they have prescriptive rights over King Lane as to the Lows. Final determination of the exact location of the roadway can be accomplished by a survey at a later time.

Dated: October 27, 2014

  
\_\_\_\_\_  
Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 223-4525, ext. 103  
[Matthew.Cleverley@fnf.com](mailto:Matthew.Cleverley@fnf.com)  
Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

On the date given below I caused to be served the foregoing Plaintiff's Motion for Summary Judgment and the supporting Declarations of Matthew Cleverley and John Fuquay on the following individuals in the manner indicated:

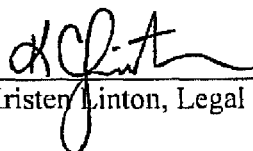
Ronald P. Rainey  
Attorney at Law  
110 North Ninth Street  
Caldwell, ID 83606  
208-459-3659  
[erainey@gwestoffice.net](mailto:erainey@gwestoffice.net)  
Attorney for Kings

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

S. Bryce Farris  
Sawtooth Law Offices, PLLC  
1101 W, River Street, Suite 110  
Boise, ID 83707  
208-629-7447  
[bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)  
Attorney for Lows

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Dated: October 28, 2014

  
\_\_\_\_\_  
Kristen Linton, Legal Assistant



Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

**FILED**

A.M. 2:25 P.M.

OCT 29 2014

ANGELA BARKELL, CLERK

Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Case No. CV-14-0278

DECLARATION OF MATTHEW  
CLEVERLEY IN SUPPORT OF  
PLAINTIFFS' MOTION FOR PARTIAL  
SUMMARY JUDGMENT AGAINST  
LOWS

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am the attorney for Plaintiffs in this matter.
2. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.
3. The documents attached to this Declaration are copies of public records and are not in dispute.

DECLARATION OF MATTHEW CLEVERLEY - 1

FIDELITY NATIONAL LAW GROUP  
1200 - 6<sup>th</sup> AVENUE, SUITE 620  
SEATTLE, WA 98101  
(206) 223-4525

 ORIGINAL

4. The properties at issue in this case are located east of the city of Oreana, Idaho in Owyhee County. For illustrative purposes, a street map showing the general location of the area is attached as Exhibit "A." An aerial map showing the Owyhee County Assessor's lot boundaries with identifying labels is attached as Exhibit "B." A close-up of the Owyhee County Assessor lots boundaries with identifying labels is attached as Exhibit "C."

**John Fuquay Parcel**

5. A copy of the Warranty Deed from Bob. D. Collett and Ruth M. Collett to James Fuquay dated December 31, 1976 and recorded on October 30, 1989 as Owyhee County Instrument Number 200901 is attached as Exhibit "D."
6. A copy of the Personal Representatives Deed from John Fuquay to John Fuquay dated January 1, 1987 and recorded on April 2, 1987 as Owyhee County Instrument Number 191948 is attached as Exhibit "E."
7. A copy of the Bankruptcy Trustee's Deed for the Estate of James Fuquay to John Fuquay dated October 19, 1989 and recorded on October 19, 1989 as Owyhee County Instrument Number 200795 is attached as Exhibit "F."

**Clinton Fuquay Parcel**

8. A copy of the Warranty Deed from John Fuquay to Clinton Fuquay and Hailey Fuquay dated June 24, 2014 and recorded on June 26, 2014 as Owyhee County Instrument Number 284171 is attached as Exhibit "G."

**Low Parcel 1**

9. A copy of the Deed from Elmer O. Johnston and May M. Johnston to Charles W. Steiner and Florence W. Steiner dated November 15, 1972 which was recorded on January 17, 1973 as Owyhee County Instrument Number 134636 is attached as Exhibit "H."
10. A copy of the Divorce Decree dated March 20, 1980 between Charles W. Steiner and Florence W. Steiner which was recorded on March 21, 1980 as Owyhee County Instrument Number 162981 is attached as Exhibit "I."
11. A copy of the Quitclaim Deed dated September 30, 1987 from Samuel Steiner as Personal Representative of the Estate of Florence W. Steiner to Samuel Steiner, individually, which was recorded on September 30, 1987 as Owyhee County Instrument Number 214740 is attached as Exhibit "J."
12. A copy of the Quitclaim Deed dated January 11, 1995 from Samuel V.C. Steiner and Mary Jane Steiner to Samuel V.C. Steiner and Mary Jane Steiner which was recorded on January 23, 1995 as Owyhee County Instrument Number 214740 is attached as Exhibit "K."
13. A copy of the Warranty Deed dated July 8, 2005 from Samuel V.C. Steiner and Mary J. Steiner to Pioneer Exchange Accommodation Titleholder #69 LLC which was recorded on July 15, 2005 as Owyhee County Instrument Number 252608 is attached as Exhibit "L."
14. A copy of the Special Warranty Deed dated January 6, 2006 from Pioneer Exchange Accommodation Titleholder #69 LLC to Susie Low and Cal Low which was recorded on January 27, 2006 as Owyhee County Instrument Number 254987 is attached as Exhibit "M."

DECLARATION OF MATTHEW CLEVERLEY – 3

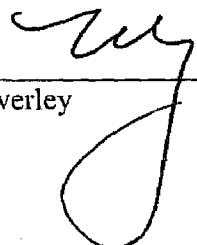
FIDELITY NATIONAL LAW GROUP  
1200 – 6<sup>TH</sup> AVENUE, SUITE 620  
SEATTLE, WA 98101  
(206) 223-4525

Low Parcel 2

15. A copy of the Gift Deed dated May 6, 1942 from Bessie Stein to D. Fred Henderson which was recorded on June 15, 1942 as Owyhee County Book 32 Page 398 is attached as Exhibit "N."
16. A copy of the Quitclaim Deed dated March 18, 1997 from D. Fred Henderson to D. Fred Henderson and Mary F. Henderson which was recorded on March 18, 1997 as Owyhee County Instrument Number 221274 is attached as Exhibit "O."
17. A copy of the Personal Representatives Deed dated February 9, 2000 from Mary F. Henderson to Mary Frances Henderson which was recorded on February 11, 2000 as Owyhee County Instrument Number 231423 is attached as Exhibit "P."
18. A copy of the Warranty Deed dated July 8, 2005 from Mary Frances Henderson to Pioneer Exchange Accommodation Titleholder #69 LLC which was recorded on July 15, 2005 as Owyhee County Instrument Number 252607 is attached as Exhibit "Q."
19. A copy of the Warranty Deed dated January 6, 2006 from Pioneer Exchange Accommodation Titleholder #69 LLC to Susie Low and Cal Low which was recorded on January 27, 2006 as Owyhee County Instrument Number 254988 is attached as Exhibit "R."

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY OF PERJURY.

Dated: October 27, 2014

  
\_\_\_\_\_  
Matthew Cleverley

DECLARATION OF MATTHEW CLEVERLEY - 4

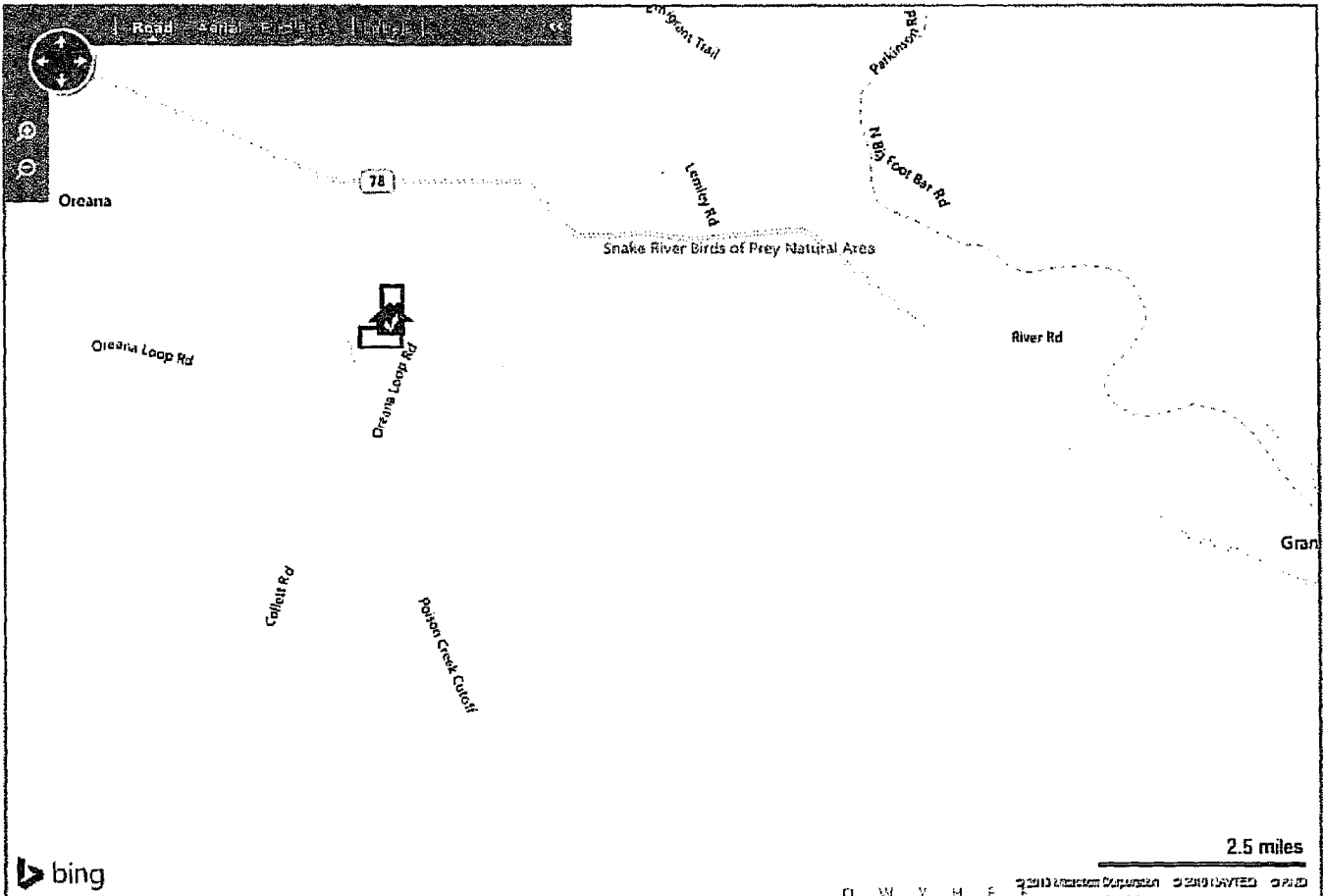
FIDELITY NATIONAL LAW GROUP  
1200-6<sup>TH</sup> AVENUE, SUITE 620  
SEATTLE, WA 98101  
(206) 223-4525

ADDRESS MAP OWNER APN ADVANCED

Map Address : 18907 castle lane, oreana, id

For Map Address Search, Please enter Street Address, City, State, OR Zip. (Ex: 312 N Vine St, Anaheim, CA 92805)

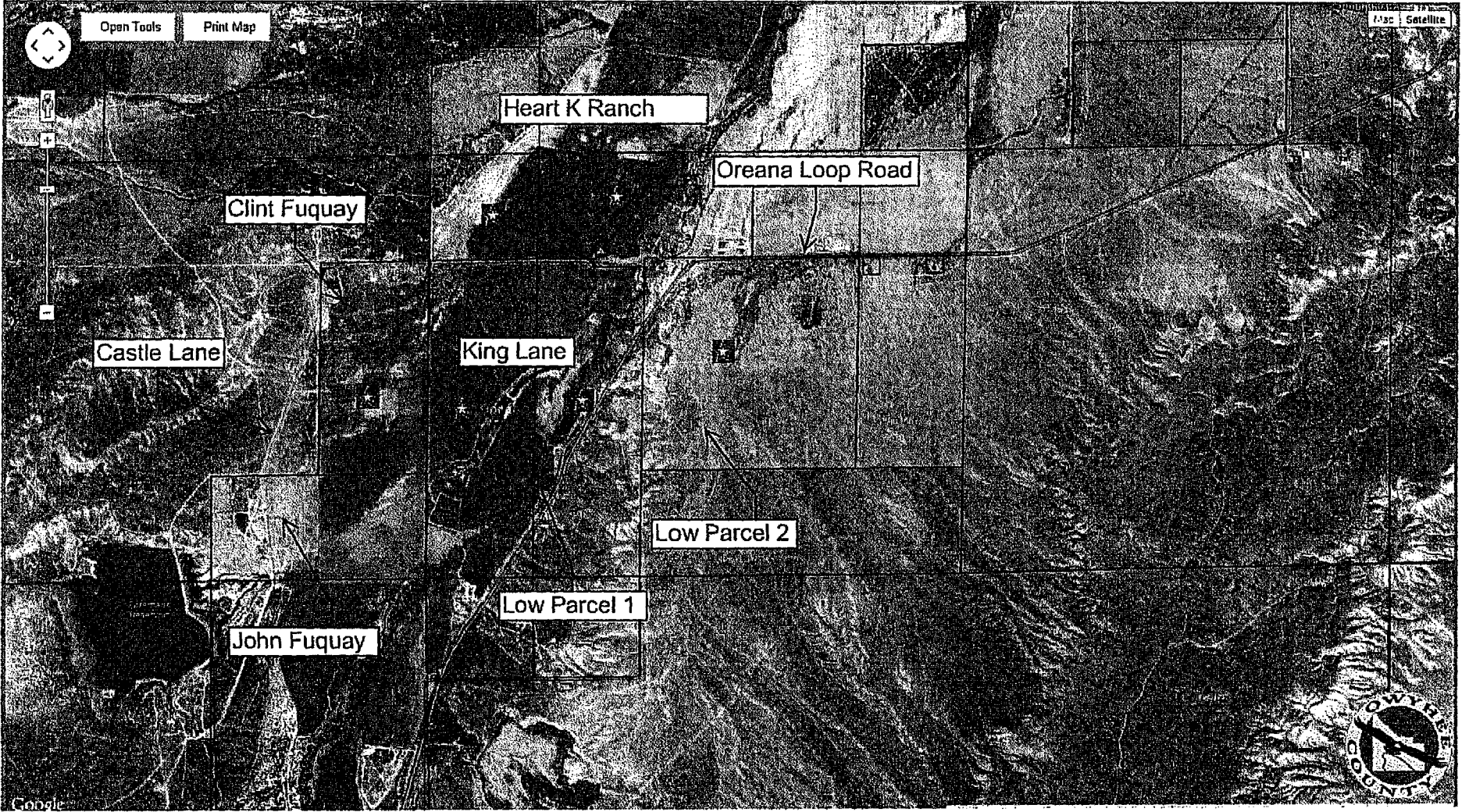
Parcel  Foreclosure  Auction  Pre-Foreclosure  RED  Short Sale



bing

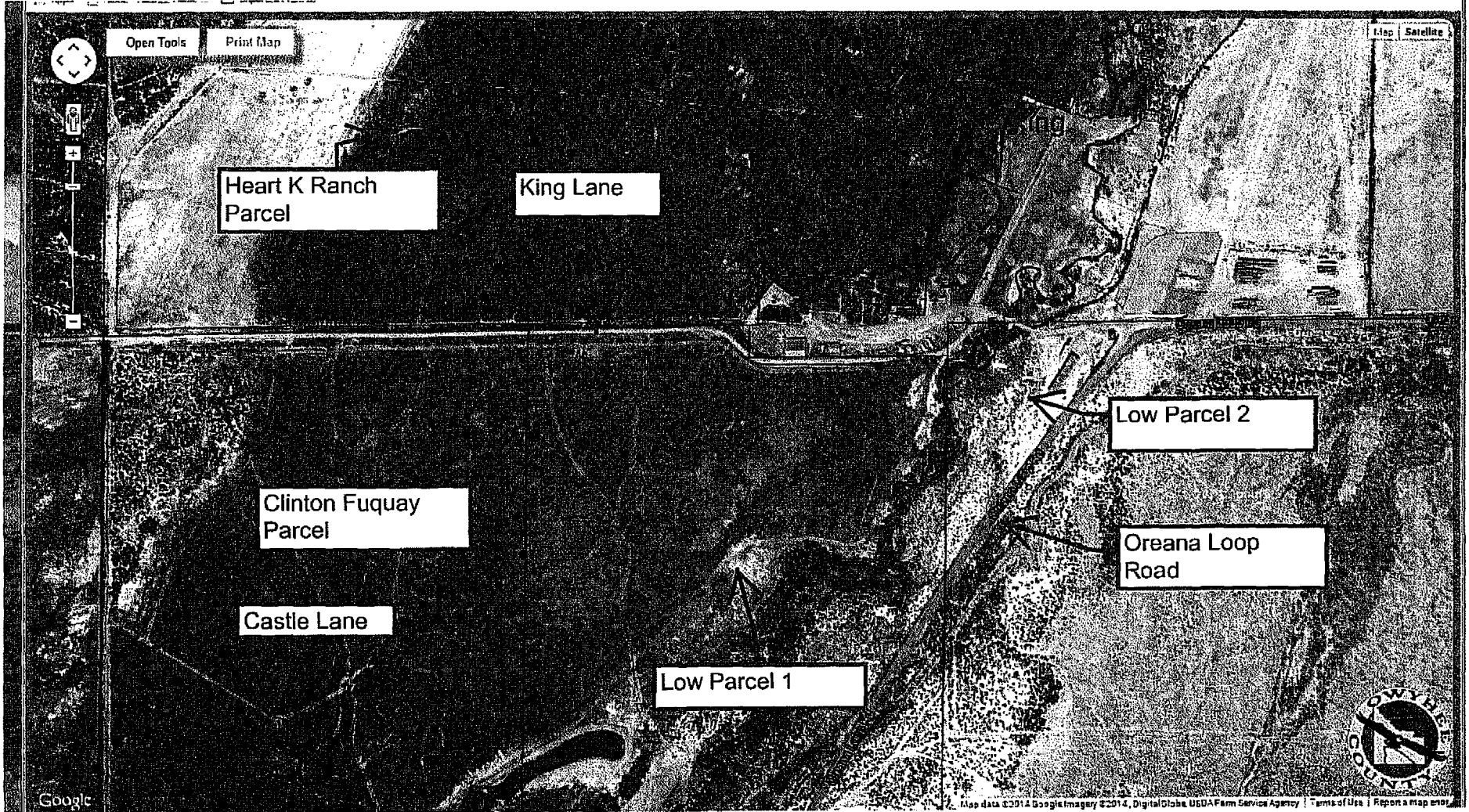
[View Map Help](#) | [Disclaimer](#) | [Bing Maps Terms of Use](#) | [Microsoft Privacy](#)

# **EXHIBIT B**



# **EXHIBIT C**





# EXHIBIT D

1 WARRANTY DEED

2 FOR VALUE RECEIVED, BOB D. COLLETT and RUTH M. COLLETT, husband  
3 and wife, of Grandview, Owyhee County, State of Idaho, the grantors,  
4 do hereby grant, bargain, sell and convey unto JAMES THORNTON, a married  
5 person, of Oreana, Owyhee County, Idaho, the grantee, the following  
6 described premises, situated in Owyhee County, State of Idaho, to-  
7 wit:

8 Southwest Quarter of the Northeast Quarter, North-  
9 west Quarter of the Southeast Quarter, Southeast  
10 Quarter of the Southwest Quarter, and Southeast  
11 Quarter of the Southeast Quarter of Section 34,  
12 Township 4 South, Range 1 East of T3N, R1E, Meri-  
13 dian.

14 Together with all water and ditch rights and rights  
15 of way for water and ditches, including the right  
16 of Reclamation of the State of Idaho, Section 8602,  
17 8603, 11494, 15223, and Storage Rights, all rights  
18 appurtenant to Foreman Reservoir, located upon the  
19 property owned by the United States of America.

20 Together with all and singular the tenements, rights, in-  
21 terests and appurtenances in anywise appertaining.

22 Subject to that certain easement, right of way and  
23 right of access across the SW 1/4 of Section 34, Township 4 South,  
24 Range 1 East of the Boise Meridian, Owyhee County, Idaho, for  
25 continued operation, maintenance, repair, replacement, inspec-  
26 tion and replacement of transmission lines, poles, towers,  
27 distribution and telephone lines, and related facilities  
28 to the Idaho Power Company, as shown on the plat recorded  
29 July 21, 1959 in Book 22 of Records, Owyhee County,  
30 Idaho.

31 Subject to that certain lease agreement, recorded in  
32 Owyhee County Records, Book 117, Page 27, between  
33 Bob D. Collett and Ruth M. Collett, his wife, as the lessors, and  
34 for term of ten years from April 25, 1973, with certain other  
35 provisions, for the purpose of exploring, producing, storing,  
36 utilizing, processing, and marketing all geothermal steam and  
37 resources, and subject to the terms and conditions  
38 recorded June 18, 1973 as Instrument No. 137,564, Owyhee  
39 County Records.

40 Subject to Gas and Oil Lease executed by Bob D. Collett and  
41 Ruth M. Collett, his wife, to the Amstar Corporation, for  
42 term of ten years from April 25, 1973, with certain other  
43 provisions, for the purpose of exploring by geophysical or other methods,  
44 producing gas and oil, laying pipelines, telegraph and  
45 telegraph lines, building tanks, ponds, roadways and other  
46 related facilities and structures and subject to the terms  
47 and conditions contained therein; recorded July 21, 1959  
48 as Instrument No. 137564, Owyhee County Records.

GIBBY, DOWNEN & GIBBY  
ATTORNEYS-AT-LAW  
100 AND 1020 WEST STATE ST., BOISE, IDAHO 83721



1 TO HAVE AND TO HOLD the said premises, with their appurten-  
2 ances unto the said Grantee, his heirs and assigns forever. And  
3 the said Grantors do hereby covenant to and with the said Grantee,  
4 that they are the owners in fee simple of said premises; that said  
5 premises are free from all incumbrances and that they will warrant  
6 and defend the same from all lawful claims whatsoever.

7 Dated this 31st day of December, 1976.

8 Bob D. Collett  
9 Ruth M. Collett

10  
11  
12

13 STATE OF IDAHO )  
14 ) ss.  
15 County of Canyon )

16 On this 31st day of December, 1976, before me, the undersigned,  
17 a Notary Public in and for said State, personally appeared BOB D.  
18 COLLETT and RUTH M. COLLETT, husband and wife, known to me to be  
19 the persons whose names are subscribed to the within instrument,  
20 and acknowledged to me that they executed the same.

21 IN WITNESS WHEREOF, I have hereunto set my hand and affixed  
22 my official seal the day and year in this certificate first above  
23 written.

24 [Signature]  
25 Notary Public for Idaho  
26 Residing at Caldwell, Idaho

12/31/76  
Caldwell, Idaho  
Notary Public  
GIGRAY, DORRIS E. GIGRAY  
Notary Public  
Caldwell, Idaho

27  
28  
29  
30  
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200901  
FILED-RECORDED  
OCT 30 2 14 PM '89  
DARRIN J. ...  
NOTARY PUBLIC ...  
Caldwell, Idaho  
OCT 6 1989

OFILM  
EMSL

# **EXHIBIT E**

PERSONAL REPRESENTATIVE'S DEED

THIS INDENTURE, Made as of this 1st day of January, 1987, by and between JAMES C. FUQUAY, the duly appointed and acting Personal Representative of the Estate of Wanda E. Fuquay, deceased, the party of the first part, and JAMES C. FUQUAY, a single man, of Box 2240, Murphy, Idaho, the party of the second part;

W I T N E S S E T H:

WHEREAS, under date January 17, 1985, Application for Informal Appointment of an Administrator was duly and regularly filed for probate in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Owyhee, and on January 18, 1985 Letters of Administration and Oath were issued by said court, in said matter, to James C. Fuquay, and the said James C. Fuquay is now duly qualified and acting personal representative of the estate of the said Wanda E. Fuquay, deceased; and,

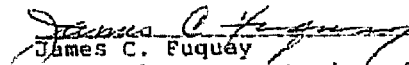
NOW, THEREFORE, in consideration of the premises and in distribution of said decedent's estate, the party of the first part does hereby set over, grant and convey unto the said party of the second part, his heirs and assigns forever, all of the right, title, interest and estate of the said Wanda E. Fuquay, deceased, at the time of her death, and also all of the right, title and interest that the said estate, by operation of the law or otherwise, may have acquired, other than or in addition to that part of the said decedent at the time of her death, and together with all right, title and interest which said decedent or her estate shall hereafter acquire, in and to all that real property situate in the County of Owyhee, State of

Idaho, and particularly described as follows, to-wit:

The SW $\frac{1}{4}$ NE $\frac{1}{4}$ , the W $\frac{1}{4}$ SE $\frac{1}{4}$ , and the SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 34, T. 4  
S., R. 1 E., B.M., Owyhee County, Idaho.

To have and to hold, all and singular, the above mentioned and  
described premises, together with the appurtenances, unto the said  
party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part, personal  
representative as aforesaid, has hereunto subscribed his name the day  
and year herein first above written.

  
James C. Fuquay  
Personal Representative of the  
Estate of Wanda E. Fuquay, Deceased.

STATE OF IDAHO )  
 ) ss.  
COUNTY OF OWYHEE )

On this 31st day of March, 1987, before me, the undersigned, a Notary Public in and for said State, personally appeared JAMES C. FUQUAY, known to me to be the person whose name is subscribed to the within instrument, as the personal representative of the estate of Wanda E. Fuquay, deceased, and acknowledged to me that he, as such personal representative, executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal as of the day and year in this certificate first above written.

*[Signature]*  
Notary Public for Idaho  
Residing at *[Signature]*  
My Commission Expires: 11/10/87

FILED-RECORDED

APR 2 2 30 PM '87

*[Signature]*

*[Signature]*

PERSONAL REPRESENTATIVE'S DEED - J



# **EXHIBIT F**

TRUSTEE'S DEED

FOR VALUE RECEIVED

JOHN KROMMENHOEK, as trustee for the bankrupt Estate of James C. Fuquay

GRANTOR(s), does (do) hereby GRANT, BARGAIN, SELL and CONVEY all my right, title and interest unto

John Edmund Fuquay and Karen Lee Fuquay, husband and wife

GRANTEES), whose current address is: Rt. 79 box 2260, Murphy, Idaho 83650

the following described real property in Owyhee County, State of Idaho, more particularly described as follows, to wit:

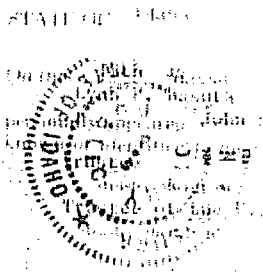
IN TOWNSHIP 6 SOUTH, RANGE 1 EAST, B.M. OWYHEE COUNTY, IDAHO Section 34: SW1/4, NW1/4, SE1/4, SW1/4

200795  
RECORDED  
OCT 19 3 17 PM '95  
6:27 A.  
3300

To have and to hold the same to said and their heirs, executors and assigns forever, in full and complete discharge of the said Trustee, by virtue of the power and authority so vested in me, said or should sell and convey the same.

IN WITNESS WHEREOF, I, said Trustee, have hereunto set my hand this 18th day of SEPTEMBER, A.D. 1995

John, Krommenhoek



# EXHIBIT G

Instrument # 284171  
MURPHY, OWYHEE, IDAHO  
2014-05-26 04:12:27 No. of Pages: 1  
Recorded for: ALLIANCE TITLE - BOISE PRODUCTIC  
ANGELA BARKELL Fee: \$10.00  
Ex-Officio Recorder Deputy: map  
Index To: DEED WARRANTY  
Electronically Recorded by Simplifile

**WARRANTY DEED**

Alliance Title & Escrow Corp. Order No.:217172

**FOR VALUE RECEIVED**

**John E Fuquay , a divorced man**

the grantor(s), do(es) hereby grant, bargain, sell and convey unto

**Clinton Ward Fuquay and Hailey Rose Fuquay, Husband and Wife**

whose current address is

**18907 Castle Lane  
Oreana, ID 83650**

the grantee(s), the following described premises, in Owyhee County, Idaho, TO WIT:

**In Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho.**

**Section 34: The Southwest Quarter of the Northeast Quarter and the Northwest Quarter of the Southeast Quarter**

**EXCEPT any mobile home or house trailer located thereon**

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee(s), that (s)he is/are the owner(s) in fee simple of said premises; that they are free from all encumbrances Except: Current Year Taxes, conditions, covenants, restrictions, reservations, easements, rights and rights of way, apparent or of record.

And that (s)he will warrant and defend the same from all lawful claims whatsoever.

Dated: June 24, 2014

John E Fuquay  
John E Fuquay

State of Idaho } ss  
County of Ada }

On this 26 day of June, 2014, before me, Jananne Keating, a Notary Public in and for said state, personally appeared John E Fuquay, known or identified to me to be the person(s) whose name(s) is/are subscribed to the within Instrument and acknowledged to me that he/she/they executed same.

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

Jananne Keating  
Notary Public for the State of \_\_\_\_\_  
Residing at: \_\_\_\_\_  
Commission Expires: 01/10/2017  
Residing in Boise, Idaho

JANANNE KEATING  
NOTARY PUBLIC  
STATE OF IDAHO

# EXHIBIT H

# WARRANTY DEED

For Value Received

ELMER O. JOHNSTON and MAY M. JOHNSTON, husband and wife,  
/ a/k/a MARGARET M. JOHNSTON

the grantor<sup>s</sup>, do hereby grant, bargain, sell and convey unto

CHARLES W. STEINER and FLORENCE W. STEINER, husband and wife,

the grantees, the following described premises, to-wit:

IN TOWNSHIP 4 SOUTH, RANGE 1 EAST, B. M., OWYHEE COUNTY, IDAHO

Section 34: E $\frac{1}{2}$ SE $\frac{1}{4}$ , SE $\frac{1}{4}$ NE $\frac{1}{4}$

Section 35: W $\frac{1}{2}$ SW $\frac{1}{4}$ , SW $\frac{1}{4}$ NW $\frac{1}{4}$ ; EXCEPTING 1 $\frac{1}{2}$  acres in the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of Section 35, Township 4 South, Range 1 East, B. M., described as follows: Commencing at the NE corner of the SW $\frac{1}{4}$ NW $\frac{1}{4}$  of said Section, running thence in a westerly direction 630 feet; thence in a southerly direction 104 feet; thence in an easterly direction 630 feet; thence in a northerly direction 104 feet to the place of beginning.

IN TOWNSHIP 5 South, RANGE 1 EAST, B. M., OWYHEE COUNTY, IDAHO

Section 2: Lot 4

Section 3: Lot 1

IN TOWNSHIP 9 SOUTH, RANGE 2 West, B. M., OWYHEE COUNTY, IDAHO

Section 15: SE $\frac{1}{4}$

Section 21: SW $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ SE $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$

Section 22: NE $\frac{1}{4}$ , SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$

Section 27: NW $\frac{1}{4}$ NE $\frac{1}{4}$ , SE $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , SE $\frac{1}{4}$

Section 34: NW $\frac{1}{4}$ NE $\frac{1}{4}$

Tax Lots Numbered 1 and 2 in Sections 14, 23 and 24, Township 7 South, Range 1 West, B. M., as shown by the records in the office of the Assessor of Owyhee County, Idaho and more particularly described as the Birch Lode Mining Claim, The Blue Jay Lode Mining Claim, The Sunset Lode Mining Claim, The Wren Lode Mining Claim, The Imperial Lode Mining Claim, The Magpie Lode Mining Claim, The Blue Jay Mill Site and the Birch Mill Site, all situate in the Pixley Basin Mining District in Owyhee County, Idaho.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee and their heirs and assigns forever. And the said Grantors do hereby covenant to and with the said Grantees, that they the owners in fee simple of said premises; that said premises are free from all incumbrances

and that they will warrant and defend the same from all lawful claims whatsoever.

Dated:

November 15, 1972

*Elmer O. Johnston*  
\_\_\_\_\_  
*May M. Johnston*  
\_\_\_\_\_

STATE OF IDAHO, COUNTY OF Owyhee

On this 15th day of Nov. 1972,  
before me, a notary public in and for said State, personally  
appeared Elmer O. Johnston and  
May M. Johnston

to be the person s whose name s are  
described in the within instrument, and acknowledged to  
me that they executed the same.

Notary Public  
Residing at Murphy, Idaho  
Comm. Expires Jan. 11, 1974

STATE OF IDAHO, COUNTY OF Owyhee

I hereby certify that this instrument was filed for record at  
the request of Owyhee Title Co.

at 30 minutes past 10 o'clock A.M.,  
this 17th day of Jun  
1973, in my office, and duly recorded in Book  
of Deeds at page

BARBARA JAYO  
Ex-Officio Recorder

By \_\_\_\_\_ Deputy.  
Fees 1.00  
Mail to:

INSTRUMENT NO. 134435

# **EXHIBIT I**

RUDOLF D. BARCHAS  
1274 Starline Drive  
P. O. Box 7744  
 Boise, Idaho 83707  
 Telephone: 344-9900

Attorney for Plaintiff

COPY

MARCH 1959

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BERNESE W. STINER,

Plaintiff,

VERNON W. STINER,

Defendant.

Case No. 7845

JUDGMENT AND DECREE  
OF DIVORCE

BERNESE W. STINER, having come on regularly to be heard on  
the within entitled March, 1959, before the Court, the plaintiff  
appeared in person and by Rudolf D. Barchas, her attorney, and  
the defendant appearing neither in person nor by attorney, and  
the Court finding that the defendant had been duly and regularly  
served with process as required by law and the order of this  
Court and that the defendant is not a minor nor an insane  
person, and that the military service of the United States,  
in which the defendant has been engaged, the  
plaintiff's evidence from which the  
Court finds the facts sufficient to sustain the allegations  
of the plaintiff's complaint and entitle her to a decree of divorce  
and the relief prayed for therein:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND  
DECLARED THAT:

DIVORCE GRANTED: That the bonds of matrimony  
existing and now existing between the plaintiff and defendant  
are forever dissolved and the parties are each restored to the

JUDGMENT AND DECREE - 1



status of a single person, and the plaintiff is granted a decree of absolute divorce from the defendant, for irreconcilable differences.

2. DIVISION OF PROPERTY: The Court finds that all of the property of the parties is community property, except for plaintiff's savings account which is hereby confirmed as her sole and separate property. With respect to the remaining property, the Court hereby divides such property and awards such property to each party as his or her sole and separate property as follows:

(a) REAL PROPERTY AWARDED TO PLAINTIFF: The plaintiff is awarded as her sole and separate property the following:

Those certain ranches in Goshute County, Idaho commonly referred to as "Mud Flat Ranch" and "Castle Creek Ranch", consisting of approximately 1,530 acres total, together with all appurtenances and improvements, and together with designated range rights, and which is more particularly described as follows:

NE 1/4, N 1/2 NE, SE 27 28 29  
SE 1/4 27 28 29  
N 1/2 SE 28 29 30, and

SE 1/4, W 1/2 SE 15 16 17  
SW 1/4, NE 1/4 SW, SW 1/4 SW  
W 1/2, NE 1/4, SW 1/4 SW, and

Lot 4 7 8 10  
Lot 11 15 17  
E 1/2 SW, SE 1/4 SW  
SW 1/4 SE 1/4 SW, N 1/2 SW, and

Tax No. 1, 2 and 75 14  
23 75 14

23 75 14 (commonly known as the  
Claybird Mine, See paragraph 20 below)

(b) REAL PROPERTY AWARDED TO DEFENDANT: The defendant is awarded as his sole and separate property the following:

That certain ranch located in Goshute County,  
Idaho, commonly referred to as "Tiddie's



(d) RANCH MACHINERY AND EQUIPMENT

Plaintiff is hereby awarded as her sole and separate property the following ranch machinery and equipment, together with all spare parts and accessories therefor:

Machinery and Automotive

New Holland Windrower and Railer  
Flatbed Trailer (2-axle)  
John Deere 40-10 Tractor  
1978 GMC 2 1/2 tone truck, including racks and bed  
1975 Mercury Montego automobile (4 door)

Equipment

Case-Scalpa equipment  
Eaton-Quincy equipment  
Cotton gin  
Cattle of treated posts

Assessments

Assessments and  
Assessments and  
Assessments and  
Assessments and

Plaintiff is awarded as her sole and separate property the following ranch machinery and equipment.

(e) LIVESTOCK

Approximately four hundred forty-nine head of cattle, including approximately four hundred thirty-nine head of cattle, shall be sold, and the net proceeds, less payment of feedlot and selling charges, shall be divided as follows:

The net proceeds, which shall be approximately of 100 head of steers, 400 head of cow-calf units, and 60 bulls, shall be divided three-fourths (3/4) to plaintiff and one-fourth (1/4) to defendant, with respect to each of the above-described categories.

(f) HORSES

The horses shall be divided as follows: three-fourths (3/4) to the plaintiff and one-fourth (1/4) to the defendant, and as plaintiff's three-fourths there shall be included the three horses commonly known as Boag, Brownie, Sailer and Ginger.

(g) FURNITURE AND HOUSEHOLD EFFECTS:

The parties will equitably divide their household furniture and effects. To the extent that a physical division of such household effects and furniture has already been accomplished, such division is hereby ratified by the Court.

(h) OTHER PROPERTY: To the extent, if any, that the parties own other community property not listed above, such property shall be equally divided between them.

3. DEBTS: The debts of the parties heretofore incurred shall be allocated as follows:

(a) AD VALOREM TAXES: Each party shall pay taxes due upon the real property awarded to such party.

(b) INDEBTEDNESS AGAINST PERSONAL PROPERTY: Each party shall be responsible for payment of any debts owing against or for the purchase of any personal property awarded to such party.

(c) REAL ESTATE DEBTS: Each party shall be responsible for discharging any mortgages or encumbrances specifically against the real property he or she is receiving herein.

Specifically, defendant shall be responsible for discharging the Guisti mortgage of approximately \$74,000 against Triangle Ranch.

Defendant shall be responsible for discharging all of the FHA indebtedness of approximately \$200,000, upon which all of the ranches are security, and plaintiff shall have no responsibility for payment of said FHA indebtedness or any part thereof.

Plaintiff is responsible for payment of the Federal Land Bank indebtedness of approximately \$120,000, against Mud Flat and Castle Creek Ranch.

ETS:

their household  
a physical division  
already been accom-  
y the Court.

nt, if any, that  
t listed above,  
een them.

ties heretofore

y shall pay taxes  
party.

PROPERTY: Each  
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y awarded to such party.  
y shall be responsible  
of specifically against  
tain.

responsible for dis-  
by \$78,400 against

discharging all  
06,000, upon which  
iff shall have no  
liability or any

ent at the Federal  
16,000, against the

(d) PCA INDEBTEDNESS: As noted above in paragraph  
2(e), 499 head of cattle presently in a feedlot will be sold  
and the net proceeds applied toward the PCA indebtedness. The  
remaining PCA indebtedness, which is secured by all of the  
cattle, shall be allocated between the parties as follows:  
Plaintiff shall be responsible for payment of three-fourths  
(3/4) of the remaining PCA indebtedness and defendant shall  
be responsible for payment of one-fourth (1/4) of the remaining  
PCA indebtedness.

(e) OTHER DEBTS: Defendant is responsible for the  
payment of all other debts heretofore incurred by the parties.

4. ATTORNEY'S FEES: Each party will pay his or her  
own attorney's fees in connection with this action.

5. SPOUSAL SUPPORT AND ALIMONY: In view of the  
substantial amount of property being received by each party  
hereto, the Court specifically finds that there is no necessity  
for an award of spousal support or alimony.

6. INCOME TAXES: Liability, if any, for 1978 State  
and Federal income taxes will be borne by defendant. To the extent,  
if any, that a refund is due to the parties or that a tax loss  
can be carried forward, such benefits will be equally be divided  
between the parties.

DATED this 20th day of March, 1980.

*Barla Williamson*  
JUDGE

DIVORCE DECREE - 4

STATE OF MICHIGAN  
COUNTY OF WASHTENAW  
I, the undersigned, Judge of the Court of the County of Washtenaw, Michigan, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the files of the Court.  
GIVEN UNDER MY HAND AND SEAL OF OFFICE this 20th day of March, 1980.  
Barla Williamson  
JUDGE

1002984

# EXHIBIT J

QUITCLAIM DEED

Pursuant to the Last Will and Testament of Florence W. Steiner, now deceased, THE ESTATE OF FLORENCE W. STEINER, acting through its Personal Representative, Samuel V.C. Steiner, the Grantor, does hereby convey, release, remise, and forever quitclaim unto SAMUEL V.C. STEINER, individually, the Grantee, whose address is H.C. 79, Box 2235, Oreana, Idaho 83650, the following described premises, to-wit:

IN TOWNSHIP 4 SOUTH, RANGE 1 EAST, B. M.,  
OWYHEE COUNTY, IDAHO

Section 34: E1/2SE1/4, SE1/4NE1/4

Section 35: W1/2SW1/4, SW1/4NW1/4 EXCEPTING  
1 1/2 acres in the SW1/4NW1/4 of  
Section 35, Township 4 South,  
Range 1 East, B. M., described as  
follows: Commencing at the NE  
corner of the SW1/4NW1/4 of said  
Section, running thence in a  
westerly direction 630 feet;  
thence in a southerly direction  
104 feet; thence in an easterly  
direction 630 feet; thence in a  
northerly direction 104 feet to  
the place of beginning.

IN TOWNSHIP 5 SOUTH, RANGE 1 EAST, B. M.,  
OWYHEE COUNTY, IDAHO

Section 2: Lot 4

Section 3: Lot 1

IN TOWNSHIP 9 SOUTH, RANGE 2 WEST, B. M.,  
OWYHEE COUNTY, IDAHO

Section 15: S1/2

Section 21: SW1/4NE1/4, N1/2SE1/4, SW1/4SE1/4

Section 22: N1/2, SW1/4, SW1/4SE1/4

Section 27: NW1/4NE1/4, S1/2NE1/4, NW1/4, SE1/4

Section 34: N1/2NE1/4

Tax Lots Numbered 1 and 2 in Sections 14, 23  
and 24, Township 7 South, Range 1 West, B. M.,  
as shown by the records in the office of the  
Assessor of Owyhee County, Idaho.

Together with their appurtenances.

EXCLUDING, HOWEVER, THE MINERAL RIGHTS TO THE  
FOREGOING PROPERTY.

QUITCLAIM DEED - 1

CA1:1.48

DATED this 23<sup>rd</sup> day of September, 1987.

THE ESTATE OF FLORENCE W. STEINER

By Samuel V.C. Steiner  
Samuel V.C. Steiner,  
Personal Representative

STATE OF IDAHO )  
                  ) :ss  
County of Ada )

On this 23<sup>rd</sup> day of September, 1987, before me, Cindy Abbott, a Notary Public in and for said State, personally appeared SAMUEL V.C. STEINER, known or identified to me to be the person whose name is subscribed to the within instrument as Personal Representative of The Estate of Florence W. Steiner, deceased, and acknowledged to me that he executed the same as Personal Representative of said Estate.

(SEAL)

Cindy Abbott  
Notary Public for Idaho  
Residing at ampa, Idaho  
Commission Expires: 11-10-92

RECORD OF  
Samuel Steiner  
1987 6.00

C. Abbott

SEP 30 3 00 PM '87

NOTARY PUBLIC

1987

QUITCLAIM DEED - 2  
CAL:1.48



# **EXHIBIT K**

THIS FORM FURNISHED COURTESY OF:

STEWART TITLE

READ & APPROVED BY GRANTEE(S): \_\_\_\_\_

SPACE ABOVE THIS LINE FOR RECORDING DATA  
Order No.: STE-94052553 PC

QUITCLAIM DEED

FOR VALUE RECEIVED SAMUEL V.C. STEINER (AKA SAM STEINER) AND MARY JANE STEINER, HUSBAND AND WIFE

GRANTOR(S)  
do(es) hereby CONVEY, RELEASE, REMISE and FOREVER QUIT CLAIM unto SAMUEL V.C. STEINER AND MARY J. STEINER, HUSBAND AND WIFE

GRANTEE(S)  
whose current mailing address is: HC 79 BOX 2235, OREGANA, ID 83650  
the following described property located in OWYHEE County, State of Idaho,  
more particularly described as follows, to wit:

As set forth on the attached EXHIBIT "A", which by reference becomes a part hereof.

FILED-RECORDED  
219740  
JAN 23 AM 9 50  
JIM HUNTER  
COUNTY CLERK  
OWYHEE COUNTY  
RECEIVED OF  
Shirley Miller  
FILE

together with their appurtenances.  
Dated: January 11, 1995

*Samuel V.C. Steiner*  
SAMUEL V.C. STEINER

*Mary Jane Steiner*  
MARY JANE STEINER

STATE OF IDAHO )  
COUNTY OF ELMORE )

On this 19<sup>th</sup> day of JANUARY, in the year of 1995, before me, the undersigned, a Notary Public in and for said State, personally appeared SAMUEL V.C. STEINER and MARY JANE STEINER

known or identified to me to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that he/she/they executed the same.

Signature: *Michael J. Miller*  
Name: MICHAEL J. MILLER  
Residing at: Mountain View, Id.  
My Commission Expires: 5-30-96

File Number  
The land is  
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SCHEDULE  
L. Amendment  
Page 1 of Form

## COMMITMENT FOR TITLE INSURANCE

## SCHEDULE C

File Number: PO 871

The land referred to in this Commitment is described as follows:

PARCEL NO. I:

A parcel of land situate in the SE $\frac{1}{4}$  of Section 34 and SW $\frac{1}{4}$  of Section 35, Township 4 South, Range 1 East, B.M., Owyhee County, Idaho, more particularly described as follows:

COMMENCING at a brass cap marking the West 1/16 corner on the South line of Section 35, T4S, R1E, B.M.; thence North 60°26'36" West a distance of 1463.74 feet to a 1/2 inch iron pin in a fence line on the Westerly Right-of-Way line of Castle Creek Road, and the REAL POINT OF BEGINNING; thence North 27°35'39" East a distance of 208.71 feet to a 1/2 inch iron pin; thence North 62°24'21" West a distance of 208.71 feet to a 1/2 inch iron pin; thence South 27°35'39" West a distance of 208.71 feet to a 1/2 inch iron pin; thence South 62°24'21" East a distance of 208.71 feet to the REAL POINT OF BEGINNING.

Together with an easement for maintaining and use of a well. This easement to be 10.00 feet on either side of the following described power line; COMMENCING at a 1/2 inch iron pin marking the Northeast corner of the previously described parcel; thence North 62°24'21" West a distance of 93.26 feet to the REAL POINT OF BEGINNING; thence North 9°32'00" East a distance of 151.00 feet to a point; thence North 5°02'00" East a distance of 222.00 feet to the end of said easement.

PARCEL NO. II:

IN TOWNSHIP 4 SOUTH, RANGE 1 EAST, B.M., OWYHEE COUNTY, IDAHO Section 34: SE $\frac{1}{4}$ , E $\frac{1}{4}$  EXCEPTING a tract of land described as follows: COMMENCING at section corner common to Sections 34 and 35, T4S, R1E, and Sections 2 and 3, T5S, R1E, B.M.; thence North 89°59' West a distance of 550 feet to the REAL POINT OF BEGINNING; thence North 89°59' West a distance of 208 feet to a point; thence North 0°89' West 208 feet to a point; thence South 89°59' East 208 feet to a point; thence South 0°89' East to the REAL POINT OF BEGINNING.

IN TOWNSHIP 4 SOUTH, RANGE 1 EAST, B.M., OWYHEE COUNTY, IDAHO Section 35: W $\frac{1}{4}$ , SW $\frac{1}{4}$  EXCEPTING 1 1/2 acres in SW $\frac{1}{4}$  described as follows: COMMENCING at the Northeast corner of SW $\frac{1}{4}$ , Sec. 35; thence in a westerly direction 630 feet; thence in a southerly direction 104 feet; thence in an easterly direction 630 feet; thence in a northerly direction 104 feet to the PLACE OF BEGINNING.

LESS the following described parcel of land; A parcel of land situate in the SE $\frac{1}{4}$  of Section 34, and SW $\frac{1}{4}$  of Section 35, T4S, R1E, B.M., Owyhee County, Idaho, more particularly described as follows: COMMENCING at a brass cap marking the West 1/16 Corner on the South line of Section 35, T4S, R1E, B.M.;

continued

COMMITMENT FOR TITLE INSURANCE  
CONTINUATION

SCHEDULE C

File Number: PO 871

Commitment Number: \_\_\_\_\_

thence North 60°26'36" West a distance of 1463.74 feet to a 1/2 inch iron pin in a fence line on the Westerly Right-of-Way line of Castle Creek Road, and the REAL POINT OF BEGINNING: thence North 27°35'39" East a distance of 208.71 feet to a 1/2 inch iron pin; thence North 62°24'21" West a distance of 208.71 feet to a 1/2 inch iron pin; thence South 27°35'39" West a distance of 208.71 feet to a 1/2 inch iron pin; thence South 62°24'21" East a distance of 208.71 feet to the REAL POINT OF BEGINNING.

TOGETHER with an easement for maintaining and use of a well. This easement is to be 10.00 feet on either side of the following described power line; Commencing at a 1/2 inch iron pin marking the Northeast corner of the previously described parcel; thence N 62°24'21" W a distance of 93.26 feet to the Real Point of Beginning; thence N 9°32'00" E a distance of 151.00 feet to a point; thence N 5°02'00" E a distance of 222.00 feet to the end of said easement.

IN TOWNSHIP 5 SOUTH, RANGE 1 EAST, B. M., OWYHEE COUNTY, IDAHO  
Section 2: Lot 4  
Section 3: Lot 1

PARCEL NO. 3:

IN TOWNSHIP 4 SOUTH, RANGE 1 EAST, B. M., OWYHEE COUNTY, IDAHO  
Section 34: COMMENCING at section corner common to Secs. 34 and 35, T4S, R1E, and Secs. 2 and 3, T5S, R1E, B. M.; thence North 89°59' West a distance of 550 feet to the REAL POINT OF BEGINNING; thence North 89°59' West a distance of 208 feet to a point; thence North 0°89' West 208 feet to a point; thence South 89°59' East 208 feet to a point; thence South 0°89' East to the REAL POINT OF BEGINNING.

\* \* \*

Page 3 of 6

CONTINUATION  
Commitment  
Recorder Form No 11119

# EXHIBIT L

P07036

Instrument # 252608  
MURPHY, OWYHEE, IDAHO  
2005-07-15 04:40:51 No. of Pages: 3  
Recorded for: PIONEER TITLE CO  
CHARLOTTE SHERBURN Fee: 9.00  
Ex-Office Recorder Deputy B. Subro  
Index to: DEED, WARRANTY

### WARRANTY DEED

FOR VALUE RECEIVED SAMUEL V C STEINER and MARY J STEINER,  
HUSBAND AND WIFE

the GrantorS, do hereby grant, bargain, sell and convey unto ~~XX~~  
~~HUSBAND AND WIFE XXXX~~ PIONEER EXCHANGE ACCOMMODATION TITLEHOLDER # 60, LLC

the GranteeS, whose address is 2511 EAST HILL ROAD, EAGLE, ID 83616

the following described premises, to-wit:

SEE ATTACHED LEGAL DESCRIPTION

FURTHER GRANTED WATER RIGHTS AS DEFINED IN ATTACHMENT "WATER RIGHTS"

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said GranteeS, THEIR heirs and assigns forever. And the said GrantorS do hereby covenant to and with the said GranteeS, that They ARE the ownerS in fee simple of said premises; that said premises are free from all encumbrances; except for general taxes and assessments for the year 2005 and subsequent years, covenants, conditions, restrictions and easements of record; and that TheY will warrant and defend the same from all lawful claims whatsoever.

DATED: July 8, 2005

*Samuel V C Steiner*  
\_\_\_\_\_  
SAMUEL V C STEINER

*Mary J Steiner*  
\_\_\_\_\_  
MARY J STEINER

STATE OF IDAHO  
COUNTY OF CANYON

On this 12 day of JULY, 2005, before me, a notary public personally appeared SAMUEL V.C. STEINER AND MARY J STEINER, known or identified to me to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same.

*Ken Aberasturi*  
\_\_\_\_\_  
Notary Public  
Residing at HOMEDALE, IDAHO  
My commission expires: 03-17-2010



Residing in Homedale, Idaho  
My Commission Expires 3/17/10

PIONEER TITLE COMPANY  
OF CANYON COUNTY

100 10TH AVE SOUTH  
NAMPA, IDAHO 8 51

423 SOUTH KIMBALL  
CALDWELL, ID 83605

PO7036

In Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho.

Section 34: E1/2 SE1/4, SE1/4 NE 1/4  
Section 35: W1/2 SW1/4, SW1/4 NW14

EXCEPTING 1-1/2 acres in the Southwest Quarter of the Northwest Quarter of Section 35, Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho, described as follows:

COMMENCING at the Northeast corner of the Southwest Quarter of the Northwest Quarter of said Section, running thence in a Westerly direction 630 feet; thence in a Southerly direction 104 feet; thence in an Easterly direction 630 feet; thence in a Northerly direction 104 feet to the PLACE OF BEGINNING.

In Township 5 South, Range 1 East, Boise Meridian, Owyhee County, Idaho.

Section 2: Lot 4  
Section 3: Lot 1

WATER RIGHTS

1. No. 57-89. 4-1-1874 Priority. Castle Creek. Irrigation and Stock Water.	0.240 CFS.
2. No. 57-95. 4-1-1885 Priority. Castle Creek Irrigation.	0.360 CFS.
3. No. 57-104. 4-1-1887 Priority. Castle Creek. Irrigation.	0.200 CFS
4. No. 57-116. 4-1-1895 Priority. Castle Creek. Irrigation.	0.100 CFS
5. No. 57-120. 4-1-1896 Priority. Castle Creek. Irrigation.	0.300 CFS
6. No. 57-127. 4-1-1899 Priority. Castle Creek Irrigation.	0.400 CFS
7. No. 57-149. 4-1-1906 Priority. Castle Creek. Irrigation.	0.200 CFS
8. No. 57-2104. 10-5-1920 Priority. Castle Creek. Irrigation.	<u>1.280 CFS</u>
Total	3.080 CFS

Total Acres: 145.

CDC  
2/2



# **EXHIBIT M**

107036

Recording Requested By and  
When Recorded Return to:

SUSIE LOW  
CAL LOW  
21220 Oreana Loop Road  
Oreana, ID 83650

**Instrument # 254987**  
MURPHY, OWYHEE, IDAHO  
2006-01-27 04:35:41 No. of Pages: 4  
Recorded for : PIONEER TITLE COMPANY  
CHARLOTTE SHERBURN Fee: 12.00  
Ex-Officio Recorder Deputy *A. Dygert*  
Index to: DEED, WARRANTY

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

**SPECIAL WARRANTY DEED**

THIS SPECIAL WARRANTY DEED (this "Deed"), made as of the 6<sup>th</sup> day of January, 2006, is between **PIONEER EXCHANGE ACCOMMODATION TITLEHOLDER #69, LLC**, an Idaho limited liability company ("Grantor"), and **SUSIE LOW AND CAL LOW, HUSBAND AND WIFE** ("Grantee"), whose legal address is: 21220 Oreana Loop Road, Oreana, ID 83650.

WITNESSETH, That Grantor, for and in consideration of One Dollar and No/100 (\$1.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm, unto Grantee, its successors and assigns forever, all the real property, together with improvements, located in the County of Owyhee, State of Idaho, more particularly described as follows:

See legal description described on Exhibit "A" attached hereto

Futher Granted Water Rights as Defined in Attachment "Water Rights"

TOGETHER with all and singular the hereditaments and appurtenances thereto belonging, or in anyway appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of Grantor, either in law or equity, of in and to the above bargained premises, with the hereditaments, easements, rights of way and appurtenances, and with all of Grantor's interest, if any, in and to any and all minerals, water, ditches, wells, reservoirs and drains, and all water, ditch, well, reservoir and drainage rights which are appurtenant to, located on, now or hereafter acquired under or above or used in connection with the property (collectively, the "Property").

TO HAVE AND TO HOLD the said premises above bargained and described with the appurtenances, unto Grantee, its successors and assigns forever. Grantor, for itself, and its successors and assigns, does covenant, grant, bargain and agree to and with the Grantee, its successors and assigns, that at the time of the ensealing and delivery of these presents, Grantor is well seized of the premises above conveyed, has good, sure, perfect, absolute and indefeasible estate of inheritance, in law, in fee simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form as aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, encumbrances and restrictions of whatever kind or nature whatsoever, as of July 15, 2005 .

The Grantor shall and will WARRANT AND FOREVER DEFEND the above-bargained premises in the quiet and peaceable possession of Grantee, its successors and assigns, against all and every person or persons claiming the whole or any part thereof BY, THROUGH OR UNDER Grantor.

IN WITNESS WHEREOF, Grantor has executed this Special Warranty Deed as of the date set forth above.

**PIONEER EXCHANGE ACCOMMODATION TITLEHOLDER #69, LLC,**  
an Idaho limited liability company

By: Pioneer 1031 Company, Member

By: Alicia Reinhard  
Its: Assistant Secretary

STATE OF IDAHO

)

) ss.

COUNTY OF ADA

)

The foregoing instrument was acknowledged before me this 6<sup>th</sup> day of January, 2006, by Alicia Reinhard, as Assistant Secretary of Pioneer 1031 Company, an Idaho corporation, Member of Pioneer Exchange Accommodation Titleholder #69, LLC, an Idaho limited liability company.

WITNESS my hand and official seal.

My commission expires: 9.9.09.



Jesse Hamilton  
Notary Public

EXHIBIT A

PO7036

In Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho.

Section 34: E1/2 SE1/4, SE1/4 NE 1/4  
Section 35: W1/2 SW1/4, SW1/4 NW1/4

EXCEPTING 1-1/2 acres in the Southwest Quarter of the Northwest Quarter of Section 35, Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho, described as follows:

COMMENCING at the Northeast corner of the Southwest Quarter of the Northwest Quarter of said Section, running thence in a Westerly direction 630 feet; thence in a Southerly direction 104 feet; thence in an Easterly direction 630 feet; thence in a Northerly direction 104 feet to the PLACE OF BEGINNING.

In Township 5 South, Range 1 East, Boise Meridian, Owyhee County, Idaho.

Section 2: Lot 4  
Section 3: Lot 1

## WATER RIGHTS

1. No. 57-89. 4-1-1874 Priority. Castle Creek. Irrigation and Stock Water.	0.240 CFS.
2. No. 57-95. 4-1-1885 Priority. Castle Creek Irrigation.	0.360 CFS.
3. No. 57-104. 4-1-1887 Priority. Castle Creek. Irrigation.	0.200 CFS
4. No. 57-116. 4-1-1895 Priority. Castle Creek. Irrigation.	0.100 CFS
5. No. 57-120. 4-1-1896 Priority. Castle Creek. Irrigation.	0.300 CFS
6. No. 57-127. 4-1-1899 Priority. Castle Creek Irrigation.	0.400 CFS
7. No. 57-149. 4-1-1906 Priority. Castle Creek. Irrigation.	0.200 CFS
8. No. 57-2104. 10-5-1920 Priority. Castle Creek. Irrigation.	<u>1.280 CFS</u>
Total	3.080 CFS

Total Acres: 145.

CDC.  
8/2

# EXHIBIT N

COMPAREC  
No. 6473

Beate Stein :  
: :  
to : DEED OF GIFT  
: :  
D. Fred Henderson :

THIS INSTRUMENT, made the 5th day of MAY, in the year 1946, between BEATE STEIN, a widow, of Glenna Ferry, County of Blaine, State of Idaho, the party of the first part, and D. FRED HENDERSON, a member of the party of the first part, of West Creek, County of Owyhee, State of Idaho, the party of the second part.

WITNESSETH, that the said party of the first part, for and in consideration of the love and affection which the said party of the first part has and bears unto the said party of the second part, does by these presents give, grant, alien, and confirm unto the said party of the second part, and to his heirs and assigns forever, all of that certain lot, piece or parcel of land, situate, lying and being in the County of Owyhee, State of Idaho, bounded and particularly described as it here, to-wit:

NORTHEAST QUARTER OF THE SOUTHWEST QUARTER (N/4SW/4),  
SOUTHWEST QUARTER OF THE SOUTHWEST QUARTER (S/4SW/4),  
SOUTHWEST QUARTER OF THE NORTHEAST QUARTER (S/4NE/4),  
SOUTHWEST QUARTER OF THE SOUTHWEST QUARTER (S/4SW/4),  
OF SECTION 36, IN TOWNSHIP 4 SOUTH OF RANGE 1 EAST,  
BOISE MERIDIAN.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereto in anywise pertaining, the revenues and profits, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular the said premises, together with the hereditaments, unto the said party of the second part, and to his heirs and assigns forever.

IN WITNESS WHEREOF, The said party of the first part has hereunto set her hand and seal the first and only day above written.

BEATE STEIN. (Sd)

STATE OF IDAHO )  
: ss.  
COUNTY OF OUYEHE )

On this 5th day of May in the year 1946, before me, the undersigned, a Notary Public in and for said State, personally appeared BEATE STEIN, a widow, known to me to be the person whose name is subscribed to the within instrument, and she acknowledged to me that she executed the same.

I, THOMAS WADSWORTH, a Notary Public in and for said State, qualified in said State, do hereby certify that above is true.

(NOTARIAL SEAL)

Tom. W. Wadsworth,  
Notary Public in and for the State of Idaho,  
Residing at Blaine, Owyhee County, Idaho.

STATE OF IDAHO )  
: ss.  
Owyhee County. )

Filed for record this 15th day of June, 1946, at 112 o'clock P. M., at the request of D. Fred Henderson, Grantor, Idaho, and recorded in Book 26 of Grants, page 10, of the records of said County.

F. H. MORSE,  
Ex-Officio Notary,  
By D. Fred Henderson, Grantor.

Page, 196

# EXHIBIT O



QUITCLAIM DEED

For Value Received D. Fred Henderson

do hereby convey, release, remise and forever quit claim unto D. Fred Henderson and Mary F. Henderson, Husband and Wife, 1705 St. Hwy 46, Gooding, ID the following described premises to-wit:

83330-5136

NESW, SWNE, SENW, NWSE Section 35, Township 4 South, Range 1 East Owyhee County, Idaho

NOTARY PUBLIC D. FRED HENDERSON

197 FEB 18 AM 11 39

FILED - RECORDED

Notary of D. Fred Henderson

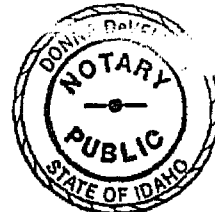
221274

together with their appurtenances.

DATED: 3/18/97

D. Fred Henderson Mary F. Henderson

STATE OF IDAHO, COUNTY OF OWYHEE On this 18th day of March, 1997, before me, a notary public in and for said State, personally appeared D. Fred Henderson and Mary F. Henderson known to me to be the person who name subscribed to the within instrument, and acknowledged to me that they executed the same.



Sharon DePeltier Clerk of the District Court County of Owyhee, State of Idaho

Notary: Manning, Id. 83635 Commission Expires 12-5-2001

# EXHIBIT P

**PERSONAL REPRESENTATIVE'S DEED**

THIS DEED, made by Mary Frances Henderson, Personal Representative of the estate of D. Fred Henderson, deceased, Grantor, to Mary Frances Henderson, whose address is 1705 State HWY46, Gooding, ID 83330, Grantee,

WHEREAS, Grantor is the qualified personal representative of said estate, filed as Probate Number 99-SP-00-00001, in Gooding County, Idaho;

THEREFORE, in accordance with the will of the deceased filed herein and for valuable consideration received, Grantor sells and conveys to Grantee the following described real property in Owyhee County, Idaho:

STATE OF IDAHO, COUNTY OF OWYHEE, TOWNSHIP 4 SOUTH, RANGE 1 EAST, BOISE MERIDIAN  
Section 35: SW1/4 NE1/4, SE1/4 NW1/4, NW1/4 SE1/4, NE1/4 SW1/4

with all appurtenances.

EXECUTED this 9<sup>th</sup> day of February, 2000.

*Mary Frances Henderson*  
Mary Frances Henderson  
Personal Representatives of the estate of  
Fred Henderson

STATE OF IDAHO )  
                  )ss.  
County of Gooding )

On this 9<sup>th</sup> day of February, 2000, before me, a Notary Public in and for said State, personally appeared Mary Frances Henderson, known to me or proved to me on oath, to be the personal representative of the estate of Fred Henderson, and the person whose names are subscribed to the within instrument, and acknowledged to me that he/she executed the same as said personal representative.

IN WITNESS WHEREOF, I have set my hand and affixed my official seal the day and year above written.

SEVERT SWENSON, JR.  
NOTARY PUBLIC  
STATE OF IDAHO  
Residing at Gooding  
Commission expires 03/13/2004

*Severt Swenson Jr.*  
Notary Public for Idaho

FILED - RECORDED  
00 FEB 14 AM 11:46

231423

# EXHIBIT Q

PO 7066

# WARRANTY DEED

FOR VALUE RECEIVED MARY FRANCES HENDERSON, AN UNMARRIED WOMAN

the Grantor, doES hereby grant, bargain, sell and convey unto ~~HUSBAND AND WIFE~~ ~~CAL D. DOW AND SUSAN DOW,~~ ~~Pioneer Exchange Accommodation Titleholder #60~~

the GranteeS, whose address is 2511 EAST HILLROAD, EAGLE, ID 83616

the following described premises, to-wit:

SEE ATTACHED LEGAL DESCRIPTION

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said GranteeS, THEIR heirs and assigns forever. And the said Grantor doES hereby covenant to and with the said GranteeS, that She IS the owner 2005 in fee simple of said premises; that said premises are free from all encumbrances; except for general taxes and assessments for the year S and subsequent years, covenants, conditions, restrictions and easements of record; and that he will warrant and defend the same from all lawful claims whatsoever.

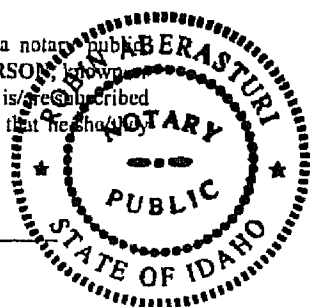
DATED: July 8, 2005

*Mary Frances Henderson*  
\_\_\_\_\_  
MARY FRANCES HENDERSON

STATE OF IDAHO  
COUNTY OF CANYON

On this 14 day of JULY, 2005, before me, a notary public, personally appeared MARY FRANCES HENDERSON, who was identified to me to be the person(s) who(se) name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same.

*Richard*  
\_\_\_\_\_  
Notary Public  
Residing at HOMEDALE, IDAHO  
My commission expires: 03-26-2010



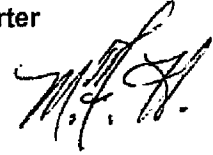
**PIONEER TITLE COMPANY**  
OF CANYON COUNTY  
100 10TH AVE SOUTH  
NAMPA, IDAHO 83651  
423 SOUTH KIMBALL  
CALDWELL, ID 83605

**Instrument # 252607**  
MURPHY, OWYHEE, IDAHO  
2005-07-15 04:38:33 No. of Pages: 2  
Recorded for : PIONEER TITLE CO  
CHARLOTTE SHERBURN  
Ex-Officio Recorder Deputy *B. Evans* Fee: 6.00  
Index to: DEED, WARRANTY

PO7066

Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho;  
Section 35: Northeast Quarter Southwest Quarter; Southwest Quarter Northeast Quarter;  
Southeast Quarter Northwest Quarter; Northwest Quarter Southeast Quarter

\*\*\*INCLUDING WATER RIGHT # 57-10045 and #57-10046

A handwritten signature in black ink, appearing to be 'M. J. H.', located to the right of the text block.

# **EXHIBIT R**

P07066

Recording Requested By and  
When Recorded Return to:

SUSIE LOW  
CAL LOW  
21220 Oreana Loop Road  
Oreana, ID 83650

**Instrument # 254988**

MURPHY, OWYHEE, IDAHO  
2006-01-27 04:38:59 No. of Pages: 2  
Recorded for : PIONEER TITLE COMPANY  
CHARLOTTE SHERBURN  
Ex-Officio Recorder Deputy *C. Sargent* Fee: 6.00  
Index to: DEED, WARRANTY

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

### SPECIAL WARRANTY DEED

THIS SPECIAL WARRANTY DEED (this "Deed"), made as of the 6<sup>th</sup> day of January, 2006, is between PIONEER EXCHANGE ACCOMMODATION TITLEHOLDER #69, LLC, an Idaho limited liability company ("Grantor"), and SUSIE LOW AND CAL LOW, HUSBAND AND WIFE ("Grantee"), whose legal address is: 21220 Oreana Loop Road, Oreana, ID 83650.

WITNESSETH, That Grantor, for and in consideration of One Dollar and No/100 (\$1.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm, unto Grantee, its successors and assigns forever, all the real property, together with improvements, located in the County of Owyhee, State of Idaho, more particularly described as follows:

Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho; Section 35: Northeast Quarter Southwest Quarter; Southwest Quarter Northeast Quarter; Southeast Quarter Northwest Quarter; Northwest Quarter Southeast Quarter ; Including Water Right #57-10045 and #57-10046

TOGETHER with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of Grantor, either in law or equity, of in and to the above bargained premises, with the hereditaments, easements, rights of way and appurtenances, and with all of Grantor's interest, if any, in and to any and all minerals, water, ditches, wells, reservoirs and drains, and all water, ditch, well, reservoir and drainage rights which are appurtenant to, located on, now or hereafter acquired under or above or used in connection with the property (collectively, the "Property").

TO HAVE AND TO HOLD the said premises above bargained and described with the appurtenances, unto Grantee, its successors and assigns forever. Grantor, for itself, and its successors and assigns, does covenant, grant, bargain and agree to and with the Grantee, its successors and assigns, that at the time of the ensembling and delivery of these presents, Grantor is well seized of the premises above conveyed, has good, sure, perfect, absolute and indefeasible estate of inheritance, in law, in fee simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form as aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, encumbrances and restrictions of whatever kind or nature whatsoever, as of July 15, 2005 .

The Grantor shall and will WARRANT AND FOREVER DEFEND the above-bargained premises in the quiet and peaceable possession of Grantee, its successors and assigns, against all and every person or persons claiming the whole or any part thereof BY, THROUGH OR UNDER Grantor.



IN WITNESS WHEREOF, Grantor has executed this Special Warranty Deed as of the date set forth above.

**PIONEER EXCHANGE ACCOMMODATION TITLEHOLDER #69, LLC,**  
an Idaho limited liability company

By: Pioneer 1031 Company, Member

By: Alicia Reinhard  
As: Assistant Secretary

STATE OF IDAHO

)

COUNTY OF ADA

) ss.

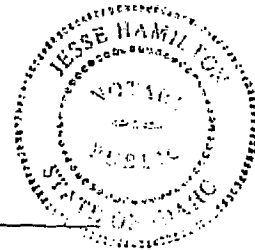
)

The foregoing instrument was acknowledged before me this 6<sup>th</sup> day of January, 2006, by Alicia Reinhard, as Assistant Secretary of Pioneer 1031 Company, an Idaho corporation, Member of Pioneer Exchange Accommodation Titleholder #69, LLC, an Idaho limited liability company.

WITNESS my hand and official seal.

My commission expires: 9.9.09.

Jane Hamilton  
Notary Public



(NOTARIAL SEAL)

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

**FILED**

A.M. 2:25 P.M.

OCT 29 2014

ANGELA BARKELL, CLERK  
[Signature]  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Case No. CV-14-0278

DECLARATION OF JOHN FUQUAY IN  
SUPPORT OF MOTION FOR PARTIAL  
SUMMARY JUDGMENT

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am one of the Plaintiffs in this action. I have personal knowledge of the facts in this declaration, and I am competent to testify at trial as to the matters herein.
2. I am submitting this declaration in support of Plaintiffs' Motion for Partial Summary Judgment against Defendant Lows.
3. Clinton Ward Fuquay and Hailey Rose Fuquay own the parcel (the "Clinton Fuquay Parcel") at the west end of King Lane. It was once part of the John Fuquay Parcel before I

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sold it to Clinton and Hailey Fuquay. The legal description for the Clinton Fuquay Parcel is shown on the warranty deed attached as Exhibit "D" to the Motion.

4. I also own the parcel (the "John Fuquay Parcel") which is located south of the Clinton Fuquay Parcel. The legal description for the John Fuquay Parcel is shown on the Trustee's Deed dated October 13, 1989 attached as Exhibit "E" to the Motion (less the Clinton Fuquay Parcel).
5. I began living on the John Fuquay Parcel in January 1977 when it was purchased by my father. I was about 12 years old when we first moved onto the John Fuquay Parcel. My parents bought a mobile home and put on the property and we lived in that for years.
6. From January 1977 forward, my family continuously used King Lane for access to Oreana Loop Road. My parents drove personal vehicles of all types over King Lane. From the time I was 12, we also walked over King Lane to get to the bus stop at Oreana Loop Road and to pick up mail from the mail box which is at the corner of King Lane and Oreana Loop Road.
7. Our family's guests regularly and continuously used King Lane to access our house.
8. My father, James Fuquay, owned large semi-trucks and cattle trucks that he used in his farming and ranching operations. He would regularly drive those trucks over King Lane to and from Oreana Loop Road.
9. At about age 14, I began driving large trucks for my father. Those included cattle trucks and semi trucks. I would drive them over King Lane to and from Oreana Loop Road.

10. At about age 21, I obtained my Idaho chauffeur's license which is the predecessor to the CDL license. It permitted me to drive commercial trucks. I started driving large trucks commercially at that time and have done so ever since. I currently drive commercial trucks under the assumed business name of John Fuquay Trucking.
11. Since 1977, I have continuously used King Lane to access both the John Fuquay Parcel and the Clinton Fuquay Parcel.
12. I have always believed that I have the right to access the John Fuquay Parcel and the Clinton Fuquay Parcel over King Lane and I have always acted in accordance with that belief.
13. At its west end, King Lane connects to Castle Lane. Castle Lane continues south until it reached Oreana Loop Road again. There are no other properties that use King Lane for access.

**LOW PARCEL 1**

14. Susie Low and Cal Low own the parcel (the "Low Parcel 1") which is located south of King Lane and east of the Clinton Fuquay Parcel. There are two parcels which were conveyed by the same deed. The legal description for the Low Parcel 1 is shown on the Special Warranty Deed attached as Exhibit "F" to the Motion.
15. Prior to the Lows ownership of Low Parcel 1, my family openly and continuously used King Lane to access the John Fuquay Parcel and the Clinton Fuquay Parcel for more than 5 years.

16. Based on the public records, on January 17, 1973, Elmer O. Johnston and May M. Johnston conveyed Low Parcel 1 to Charles W. Steiner and Florence W. Steiner.
17. Based on the public records, on March 21, 1980, Charles W. Steiner and Florence W. Steiner were divorced and Low Parcel 1 was awarded to Florence W. Steiner.
18. Based on the public records, on September 20, 1987, Samuel Steiner, as personal representative of Florence W. Steiner conveyed Low Parcel 1 to Samuel Steiner.
19. Based on the public records, on January 23, 1995, Samuel V.C. Steiner and Mary Jane Steiner conveyed Low Parcel 1 to Samuel V.C. Steiner and Mary J. Steiner.
20. Based on the public records, on July 15, 2005, Samuel V.C. Steiner and Mary J. Steiner conveyed Low Parcel 1 to Pioneer Exchange Accommodation Titleholder #69, LLC.
21. Based on the public records, on January 27, 2006, Pioneer Exchange Accommodation Titleholder #69, LLC conveyed Low Parcel 1 to the Lows.
22. From January 1, 1977 through March 21, 1980, I never asked Charles W. Steiner and Florence W. Steiner for permission to use King Lane. Charles W. Steiner and Florence W. Steiner never gave my family, my guests or me permission to use King Lane.
23. From January 1, 1977 through March 21, 1980, my family used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
  - a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.

- b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
  - c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
  - d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
  - e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.
24. From March 21, 1980 through September 20, 1987, I never asked Florence W. Steiner for permission to use King Lane. Florence W. Steiner never gave my family, my guests or me permission to use King Lane.
25. From March 21, 1980 through September 20, 1987, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
  - b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.

- c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
  - d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
  - e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.
26. From September 20, 1987 through January 23, 1995, I never asked Samuel V.C. Steiner and Mary Jane Steiner for permission to use King Lane. Samuel V.C. Steiner and Mary Jane Steiner never gave my family, my guests or me permission to use King Lane.
27. From September 20, 1987 through January 23, 1995, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
  - b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
  - c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
  - d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.

- e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.
28. From January 23, 1995 through July 15, 2005, I never asked Samuel V.C. Steiner and Mary Jane Steiner for permission to use King Lane. Samuel V.C. Steiner and Mary Jane Steiner never gave my family, my guests or me permission to use King Lane.
29. From January 23, 1995 through July 15, 2005, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
  - b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
  - c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
  - d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
  - e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.
30. From July 2, 2005 through January 27, 2006, I never asked Pioneer Exchange Accommodation Titleholder #69, LLC for permission to use King Lane. Pioneer



Exchange Accommodation Titleholder #69, LLC never gave my family, my guests or me permission to use King Lane.

31. From July 2, 2005 through January 27, 2006, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:

- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
- b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
- c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
- d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
- e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.

32. From January 27, 2006 through the present I never asked the Lows for permission to use King Lane. The Lows never gave my family, my guests or me permission to use King Lane.

33. From January 27, 2006 to the present, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:

- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
- b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
- c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
- d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
- e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.

#### LOW PARCEL 2

34. Susie Low and Cal Low own the parcel (the "Low Parcel 2") located south of King Lane. Oreana Loop Road crosses the northwest corner of Low Parcel 2. The legal description for the Low Parcel 2 is shown on the Special Warranty Deed attached as Exhibit "H" to the Motion.
35. Prior to the Lows ownership of Low Parcel 2, my family openly and continuously used King Lane to access the John Fuquay Parcel and the Clinton Fuquay Parcel for more than 5 years.
36. From the public records, on May 6, 1942, D. Fred Henderson acquired Low Parcel 2.

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37. From the public records, between May 6, 1942 and March 18, 1997, the Low Parcel 2 was owned by D. Fred Henderson, individually.
38. From the public records, on March 18, 1997 D. Fred Henderson conveyed the Low Parcel 2 to D. Fred Henderson and Mary F. Henderson as husband and wife.
39. From the public records, on February 11, 2000, Mary F. Henderson conveyed the Low Parcel 2 to Mary F. Henderson, individually.
40. From the public records, on July 8, 2005, Mary Frances Henderson conveyed the Low Parcel 2 to Pioneer Exchange Accommodation Titleholder #69, LLC.
41. On January 27, 2006, Pioneer Exchange Accommodation Titleholder #69, LLC conveyed the Low Parcel 2 to the Lows.
42. From January 1, 1977 through March 18, 1997, I never asked D. Fred Henderson for permission to use King Lane. D. Fred Henderson never gave my family, my guests or me permission to use King Lane.
43. From January 1, 1977 through March 18, 1997, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
  - a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
  - b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.

- c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
  - d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
  - e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.
44. From March 18, 1997 through July 8, 2005, I never asked D. Fred Henderson or Mary F. Henderson for permission to use King Lane. D. Fred Henderson or Mary F. Henderson never gave my family, my guests or me permission to use King Lane.
45. From March 18, 1997 through July 8, 2005, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
  - b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
  - c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
  - d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.

- e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.
46. From July 2, 2005 through January 27, 2006, I never asked Pioneer Exchange Accommodation Titleholder #69, LLC for permission to use King Lane. Pioneer Exchange Accommodation Titleholder #69, LLC never gave my family, my guests or me permission to use King Lane.
47. From July 2, 2005 through January 27, 2006, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
  - b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
  - c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
  - d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
  - e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.

48. From January 27, 2006 through the present I never asked the Lows for permission to use King Lane. The Lows never gave my family, my guests or me permission to use King Lane.

49. From January 27, 2006 to the present, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:

- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
- b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
- c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
- d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
- e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.

#### UTILITIES

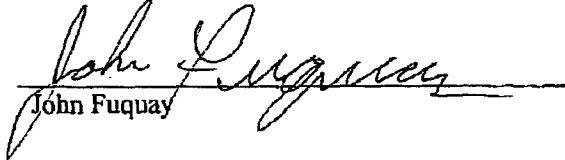
50. The overhead electric lines that service the houses located on the Clint Fuquay Parcel run from Oreana Loop Road along King Lane to the Clint Fuquay Parcel.

51. The underground Centurylink telephone lines run from Oreana Loop Road along King Lane to the Clint Fuquay Parcel. It then runs south along Castle Lane to my house on the John Fuquay Parcel.

52. <sup>Overhead</sup> ~~Underground~~ electric lines for the house on the John Fuquay parcel run north through the property to the south of the John Fuquay Parcel.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY OF PERJURY.

Dated: October \_\_, 2014

  
John Fuquay

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**FILED**  
A.M. 3:35 P.M.

DEC 09 2014

ANGELA BARKELL, CLERK  
*A. Barkell*  
Deputy Clerk

Attorneys for Defendants Susie Low and Cal Low

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

**JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY;**

Plaintiffs,

vs.

**SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G.  
KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY;**

Defendants.

Case No. CV-2014-0278

**RESPONSE AND OBJECTION TO  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT**

COMES NOW Defendants, Susie Low and Cal Low (hereinafter collectively referred to as "Low"), by and through their attorneys of record, Sawtooth Law Offices, PLLC, and hereby submits this response and objection to the motion for summary judgment filed by Plaintiffs. The Low's response and objection are supported by the Affidavits of Rose King, Samuel Steiner, and S. Bryce

RESPONSE AND OBJECTION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT -  
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Farris filed concurrently herewith, as well as the record already before this Court, including, but not limited to, the Declarations of Rose King, Gilbert King, the Mailperson and Denice Collett previously filed with the Court on or about September 9, 2014.

### I. INTRODUCTION/SUMMARY

On or about October 28, 2014, Plaintiffs filed a Motion for Summary Judgment against Low but not against the other Defendants named in this action (hereinafter collectively referred to as "King"). However, Plaintiffs' motion is inappropriate and ought to be denied for following reasons:

1. **Prior Testimony and Decision of this Court.** This Court has already ruled that Plaintiffs have not provided sufficient evidence for a preliminary injunction following a hearing on September 18, 2014 which included the testimony of John Fuquay, Clint Fuquay and J.C. Fuquay. Plaintiffs have not provided any new evidence and in fact have failed to acknowledge or address their prior testimony at the hearing before this Court. As discussed in more detail below, Plaintiffs own testimony establishes material issues of fact which would preclude summary judgment and there have been no additional facts presented which are undisputed and which would warrant summary judgment as requested by the Plaintiffs.

2. **Motion only as to Low.** Plaintiffs have only sought summary judgment against the Lows and not against the Kings. Presumably, Plaintiffs believed that because Lows have owned their property for less time than the Kings they are less likely to rebut their allegations. However, by not including Kings and by not establishing/surveying the ownership of road in question there are obvious material issues of fact which exist. Plaintiffs cannot establish their alleged use of the roadway was adverse under a claim of right if they cannot identify the owner of the road they are

supposedly adversely using.<sup>1</sup> Moreover, just because Plaintiffs have not sought summary judgment against the Kings does not mean that the Kings cannot rebut Plaintiffs' allegations of use which they have specifically done through the *Affidavit of Rose King* filed concurrently herewith. Ms. King's affidavit rebuts the alleged use of the road by the Plaintiffs regardless of whether it is owned by Lows or the Kings. Finally, Samuel Steiner, Low's predecessor in interest, has submitted an affidavit rebutting Plaintiffs claims that the use was regular and under a claim of right.

**3. Prescriptive Easement Elements.** Plaintiffs must show that there are no material issues of fact **AND** that they have established each and every element by clear and convincing evidence in order for the Court to grant summary judgment. As discussed in more detail below, there are numerous material issues of fact and Plaintiffs have not met their burden of proving by clear and convincing evidence the elements of a prescriptive easement. More specifically, Plaintiffs' motion is based primarily upon the allegations or statements contained in the affidavit of John Fuquay concerning the alleged use of the road. However, these allegations are unequivocally rebutted by Rose King, Samuel Steiner, Plaintiffs' own testimony and others that there has not been regular, continuous or adverse use of the road by Plaintiffs. To the contrary, any use has been occasional, with implied permission and has not interfered with the joint or common use by the servient estate holders. As to some of the statements of such alleged use by delivery folks, mailpersons or large trucks, these allegations are completely rejected and denied because said use

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<sup>1</sup> Plaintiffs are currently attempting to survey the location of the road but the deadline under Rule 56 of the Idaho Rules of Civil Procedure to submit affidavits in support of their motion for summary judgment has passed. In any event, and as discussed herein, there remain material issues of fact even if Plaintiffs had submitted a survey of the road which would preclude summary judgment.

simply did not occur or it is completely impossible for the alleged use to occur. In fact, the *Affidavit of Rose King* makes it clear that use of the road as alleged by Plaintiffs was impossible during much of the period alleged by Plaintiffs because the road was in reality simply a muddy path which is impassable during much of the year.

## **II. DISPUTED ISSUES OF FACT**

Plaintiffs have summarized the facts supporting their motion for summary judgment in five (5) bullet points which support their contention that between 1977 to present they have prescriptively used King Lane. *Plaintiffs' Motion*, page 5. These points can be combined and summarized into two points which relate to alleged use by personal vehicles and alleged use by large trucks. These points are listed below and facts rebutting/disputing each point are stated subsequent thereto:

1. Regular personal vehicle use to and from Oreana Loop road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.

a. Samuel Steiner, who lived at the property since 1959, has stated that the use was not regular but rather was occasionally used as a short cut. Mr. Steiner further states that the road was an old "farm access roadway" which would become muddy in wet weather and the majority of the vehicle use was down Castle Road to Oreana Loop Road.

b. Rose King, who has lived at the property since 1973, states that there has not been regular use of the road, that the primary access for Plaintiffs' properties has been Castle Lane, that the "road" was only a path when she purchased the property, was muddy and impassable most of the

year,<sup>2</sup> and that Plaintiffs and their children catch the bus at the end of Castle Lane. Ms. King goes on to state that she can observe and hear all traffic that uses King Lane from 1973 to present and she disputes any allegations “that King Lane has been used since 1977 for regular personal vehicles on a near daily basis . . . pedestrian traffic to and from the bus stop and guests going to and coming from the Fuquay properties.” *Affidavit of Rose King*, paragraph 16, pg. 6. The Affidavit of Rose King also rebuts any alleged use of King Lane by guests, delivery persons, mail persons, UPS or Schwans to the Fuquay properties with the exception of the one time Ms. King gave permission to the Schwans’ delivery person. *Affidavit of Rose King*, paragraphs 11 and 12.

c. The declaration of the Mailperson filed on or about September 9, 2014 states that mail to the Fuquays at one mail box on Oreana Loop at the end of Castle Lane and that the only people that receive mail at the end of King Lane is the King family.

d. The declaration of Denise Collett filed on or about September 9, 2014 states that she has been the bus driver for the Grandview School District for 33 years and the bus stop for the Fuquays, which is currently J.C. Fuquay’s son Jess, and which included Clint and J.C. Fuquay when they went to school was at the end of Castle Lane. She does “not make a school bus stop at Kings Lane.”

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<sup>2</sup> Rose King’s Affidavit states that the road in question was a path which was muddy and impassable when they purchased the property and that even her own children when they rented the houses currently occupied by Plaintiffs could not use the road to come to her house. This is further evidenced by the testimony of Plaintiffs’ own witness Raymond Jayo who testified that lane was marsh, a big mud hole and “pretty messy” for at least 10-15 years while it was being improved. *See Affidavit of S. Bryce Farris*, Exhibit A (Tr. pg. 105, Ins. 16-24).

e. Testimony of Plaintiffs.<sup>3</sup>

i. As to Clint Fuquay's property, Clint Fuquay testified that he has lived in his current house for the past eight years (Tr. Pg. 48, Ins. 1-6). This is clearly outside the prescriptive period, which as explained below, must be for 5 years prior to July 1, 2006. J.C. Fuquay, who occupies the other residence on Clint Fuquay's property testified that he has only lived on the property in the past eight years also, which again means this other residence, and any alleged use, is outside the prescriptive period. (Tr. pg. 72, Ins. 12-16).

ii. John Fuquay, Clint Fuquay and J.C. Fuquay testified that their addresses and mailboxes are located at the end of Castle Lane and that Castle Lane is an all weather road used to access their properties. (Tr. pgs. 25-26, Ins. 18-25 and 1-3; pg. 48, Ins. 11-15).

2. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when James Fuquay had his trucks and the use continued when John Fuquay began operating the John Fuquay Trucking Company.

a. Samuel Steiner, again who lived at the property since 1959, states that "I don't believe I ever saw anyone take a large truck out that way, logging trucks or cattle trucks." *Affidavit of Samuel Steiner*, paragraph 8.

b. Rose King has emphatically states in her affidavit that from 1973 to 1989 there were "never" large trucks on King Lane because King Lane was not suitable for said use given that it was

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<sup>3</sup> References herein to testimony refers to the testimony previously provided by Plaintiffs at the hearing on September 18, 2014 in which this Court denied Plaintiffs' motion for a preliminary injunction. A transcript of said hearing and said testimony is attached to the Affidavit of S. Bryce Farris filed concurrently herewith.

muddy and there were two welded barrels across the lane. *Rose King Affidavit*, paragraph 16.<sup>4</sup> Ms. King then goes on to state from 1989 to 2011 she has not observed any large trucks, cattle trucks or farm equipment of the Fuquays using King Lane and that the use of large trucks has only been in the past four to five years. *Id.*

c. Testimony of Plaintiffs. Perhaps the most telling evidence on this issue is the prior testimony of J.C. Fuquay at the hearing on the preliminary injunction in which he testified that he and his brother have only been driving large trucks or cattle trucks down the lane in the last five years, and his brother, Clint Fuquay has been doing it for less than five years. (Tr. Pg. 92, lns. 1-25).

### **III. STANDARD OF REVIEW**

Summary judgment must be granted when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). The court must liberally construe the facts in the light most favorable to the party opposing the motion, [Defendants/Lows], drawing all reasonable inferences and conclusions in that party’s favor. *Friel*, 126 Idaho at 485, 887 P.2d at 30 (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)) (emphasis added). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, a summary judgment motion must be denied. *Stevenson*, 125 Idaho

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<sup>4</sup> Again, Ms. King’s statements that the road was a muddy path are substantiated by the Affidavit of Samuel Steiner and the testimony of Plaintiffs’ own witness, Raymond Jayo.

at 272, 869 P.2d at 1367. (emphasis added).

#### IV. LEGAL ARGUMENT

A. **Prescriptive Easement Law.** An easement “is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property owner.” *Beckstead v. Price*, 146 Idaho 57 (2008) (citations omitted). In *Akers v. D.L. White Construction, Inc.*, 142 Idaho 293, 303, 197, 127 P.3d 196 (2006), the Idaho Supreme Court succinctly laid out the elements for a prescriptive easement. Easement by Prescription requires the party seeking the easement to prove by clear and convincing evidence the use is:

- a. Open and Notorious;
  - b. Continuous and Uninterrupted;
  - c. Adverse and Under a Claim of Right;
  - d. With Actual or Imputed Knowledge of the Owner of the Servient Tenement;
- and
- e. For the Statutory Period [20 years at the time of Filing pursuant to I.C. § 5-203].

“Recognizing that ‘[p]rescription acts as a penalty against a landowner[.]’ this Court has stated prescriptive rights ‘should be closely scrutinized and limited by the courts.’” *Beckstead v. Price*, 146 Idaho 57, 64. Accordingly, “[e]ach element is essential to the claim, and the trial court must make findings relevant to each element in order to sustain a judgment on appeal.” *Hodgins v. Sales*, 139 Idaho 225, 229 (2003). Moreover, “where there is more than one claimant [i.e. John and Clint Fuquay] to a prescriptive easement, the trial court must make findings sufficient to support

each claim.” *Id.* The Idaho Supreme Court went on to explain that “where, as here, the claimants purchased their property at different times and used the subject property for different purposes and with different frequency, the trial court must make findings specific to each Property Owner’s claim. Such findings are necessary, in part, because prescriptive rights are defined by actual prescriptive use of the property over the statutory period.” *Id.* (citation omitted). Thus, both John Fuquay and Clint Fuquay must prove each of the essential elements by clear and convincing evidence as to their respective use and this Court must make specific findings as to each. This is important for purposes of Plaintiffs’ motion for summary judgment because Plaintiffs have made no specific allegations, nor provided any evidence, of use of the property owned by Clint Fuquay.<sup>5</sup>

1. **Statutory Period.** An initial question which must be addressed is the statutory period which applies to the other elements of a prescriptive easement. As Plaintiffs correctly point out, Idaho Code § 5-203 was amended, effective July 1, 2006, to provide that the statutory period for adverse possession and prescriptive easement is now twenty years. In *Machado v. Ryan*, 153 Idaho 212, 280 P.3d 715 (2012), cited by Plaintiffs, the Court explained that the twenty year period does not apply to an easement by prescription acquired prior to the amendment and thus the party claiming the prescriptive easement must prove “the elements of an easement by prescription for a five year period prior to July 1, 2006.” *Id.* at 222. This means the prescriptive elements must be proven as far back as at least July 1, 2001. This date is important because Clint Fuquay has only lived on his

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<sup>5</sup> Again, Clint and J.C. Fuquay have occupied the residences for less than the prescriptive period and Rose King’s Affidavit states that her children previously occupied the residences and did not, and could not, use King Lane on a regular basis because it was simply impassible. *Affidavit of Rose King*, paragraphs 7 and 8.



property in the past eight years and Plaintiffs have not attempted to offer any evidence of specific use of King Lane by residences currently owned or occupied by Clint Fuquay and J.C. Fuquay.

2. **Use by Each Plaintiff.** A prescriptive easement arises because of the adverse “use” of another’s land. It is the “use” that creates the easement and the scope of the easement. A claimant may: (a) rely on his own “use” for the prescriptive period; (b) rely on the adverse “use” by the claimant’s predecessor for the prescriptive period; or (c) combine the predecessor’s “use” with the claimant’s own use to establish the requisite period of continuous adverse use. *Akers v. D. L. White Construction, Inc., supra*. However, and as discussed, *supra*, the use must be established for each claimant independently. *Hodgins v. Sales*, 139 Idaho 225, 229.

3. **Adverse Under a Claim of Right.** Plaintiffs have not surveyed the road referred as King Lane and have not identified those portions owned by Low which they claim to have adversely used under a claim of right. In other words, if the Plaintiffs do not know and have not provided a survey to determine the ownership of the road, how can they meet their burden of showing their use was adverse and under a claim of right? This is a threshold question before Plaintiffs can meet their burden of proving by clear and convincing evidence that their use was adverse and under a claim of right as to the Lows. At a minimum, a material issue of fact exists as to the ownership of the road and whether Plaintiffs have adversely used said road under a claim of right as against Low.

a. **Joint/Common Use.** In *Beckstead v. Price*, 146 Idaho 57, 64, the Supreme Court reiterated that Idaho law has recognized two exceptions to an adverse use presumption when the roadway was jointly used or used in common with the underlying property owner. First, “the

adverse use presumption has been rebutted by evidence of ‘use of the driveway in common with the owner and the general public, in absence of some decisive act on the user’s part indicating a separate and exclusive use . . . .’” *Id.* (citations omitted). Second, “when ‘a landowner ‘constructs a way over [the land] for his own use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of . . . permission’” *Id.* The Court, referring to its prior decision in *Hughes v. Fisher*, 142 Idaho 474, 481 (2006), stated such exceptions remain applicable as an “approach to determining whether a claimant had met the elements for a prescriptive easement by clear and convincing evidence.” *Id.* In other words, the joint or common use of the roadway by Lows/Kings and/or the construction of roadway by Lows/Kings remains applicable to determining whether Plaintiffs use of the road was in fact adverse. It is within the province of the district court to weigh such conflicting evidence concerning such joint/common use. *Id.* More importantly, and for purposes of Plaintiffs summary judgment motion, the Lows/Kings joint use of the roadway creates conflicting evidence and/or a material issue of fact which renders Plaintiffs’ motion inappropriate. It is undisputed in this case that the roadway, King Lane, has been jointly used by Lows and Kings to access their respective properties. Plaintiffs’ assertions of occasional use in common with the Lows and Kings fails to meet their burden by clear and convincing evidence that such “casual” use is adverse under a claim of right.<sup>6</sup>

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<sup>6</sup> In determining whether a prescriptive easement had been acquired for a public roadway the Court in *Lattin v. Adams County*, 149 Idaho 497, 502 (2010) stated “[t]his Court has repeatedly found that casual or sporadic use is not enough – the use must be regular and continuous.” The Court cited to *Kirk v. Schultz*, 63 Idaho 278, 282-84 (1941), which held that “casual and desultory” use by “miners, hunters, fisherman, and persons on horseback, even of a well-marked road was not public use.”

**b. Adverse Use.**

Since the use must be more than simply casual use and it must be regular and continuous use, Plaintiffs' suggestion that their use of Castle Lane is irrelevant is misplaced. While Plaintiffs have not asserted an easement of necessity, and which has been essentially rejected by this Court already when it denied Plaintiffs' motion for an injunction, the fact that Plaintiffs have regularly used Castle Lane for regular access to their respective properties rebuts Plaintiffs' claims of regular, "continuous" use of what has been termed King Lane. Since Castle Lane is an all weather road accessible by each of the Plaintiffs' residences, which provides access to the Plaintiffs' mail boxes and the Plaintiffs' bus stop and which, according to the *Affidavits of Samuel Steiner and Rose King* is the primary access for the Plaintiffs' properties, it is more than relevant concerning Plaintiffs' allegations of regular and continuous use. At a bare minimum, there is a material issue of fact as to the regular, continuous use by Plaintiffs of King Lane when they have acknowledge and admitted that their primary access to their properties is via Castle Lane.

Finally, Plaintiffs themselves have acknowledged that their alleged use of King Lane has not been adverse to the servient estate owners. John Fuquay previously testified that he has never done anything to kick the Kings off the disputed property or "interfered" with the use of the property. (Tr. pg. 37, Ins. 2-15). Likewise, Clint Fuquay testified that he has never attempted to exclude the Kings or to interfere with the use. (Tr. pgs. 66-67, Ins. 20-8). Finally, J.C. Fuquay testified that no one from his family has done anything that "interrupted" or interfered with the use of King Lane. (Tr. pgs. 86-87, Ins. 16-14).

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4. **Scope of the Easement.**

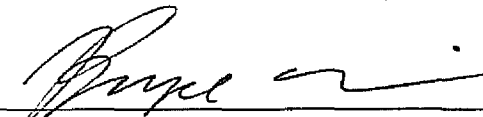
Again, the scope and character of a prescriptive easement is defined by the use. While the scope and character can be defined by the use, it is also necessary to define the width and location of the easement. “[A] judgment determining the existence of an easement across the land of another must also set forth the width and location of the easement.” *Argosy Trust v. Wininger*, 141 Idaho 570, 572, 114 P.3d 128, 130 (2005). The width of an easement is a question of fact which will not be disturbed on appeal if it is supported by substantial and competent evidence. *Id.* In *Argosy Trust*, the Court analyzed several cases in which it remanded those cases to find and decree the character, location, width and length of the easement. Thus, not only have Plaintiffs not identified the owners of the road to which they claim to adversely used under a claim of right, they have not defined the scope and location of the alleged easement.

**V. CONCLUSION**

For the foregoing reasons, Plaintiffs’ Motion for Summary Judgment ought to be **DENIED**.

**DATED** this 8th day of December, 2014.

SAWTOOTH LAW OFFICES, PLLC

by:   
S. Bryce Farris

**CERTIFICATE OF SERVICE**

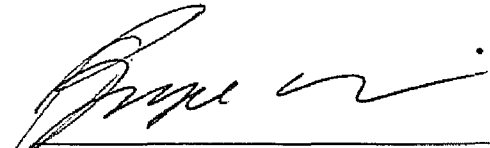
I hereby certify that a true and correct copy of the foregoing document was served on the following on this 8th day of December, 2014 by the following method:

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S. Bryce Farris

**FILED**

A.M. 3:35 P.M.

DEC 09 2014

ANGELA BARKELL, CLERK

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )

Defendants. )

Case No. CV-2014-0278

**AFFIDAVIT OF ROSE KING**

STATE OF IDAHO )  
)ss.  
County of Owyhee )

Rose King being first duly sworn upon her oath, deposes and says that:

1. I am a Defendant in the above-titled action, over the age of 18 and I make this affidavit based upon my personal knowledge and I am competent to testify to the matters contained herein. I have reviewed the Declaration of John Fuquay dated October 28, 2014. The

AFFIDAVIT OF ROSE KING -1

**ORIGINAL**

statements set forth by Mr. Fuquay in his declaration are inaccurate for the reasons hereinafter set forth:

2. My deceased husband, Gordon King and I purchased our ranch on September 17, 1973 which included a field lane which has been referred to as "King Lane" in this litigation. At the time of our purchase, King Lane was only a path through grass and weeds and was wet and muddy most of the year with a culvert constructed of 55 gallon barrels at the west end. We desired to access our fields through the use of this field lane, therefore, we started hauling rocks to build a base for this road so that it would be passable for our farm equipment. We did this annually until we decided to sell the ranch in 1982.

3. My husband and I sold our ranch to Zane Block in 1982 but had to repossess it in 1986. During this four year period I was still familiar with the use of King Lane as I frequently observed the property and the operations of the ranch. After we repossessed the ranch, the lane was in terrible condition and we had to construct and improve the road and the crossing where the road crosses an irrigation ditch which provides water to our ranch. There was a culvert made from 55 gallon barrels at the west end of the land and these were rusty and leaky. We replaced the welded barrel culvert in 1988-1989 with a concrete culvert. Prior to that time it was impossible for large trucks to cross over the welded barrels. This lane still requires annual maintenance to make it passable for our ranching operation.

4. The path/road which has been referred to as "King Lane" was not named King Lane until 2002 when emergency 911 came into existence and Gary Aman requested a name for the lane to access of emergency vehicles. I informed him that the access would be named "King Lane." At that time, addresses were provided for the four houses located on the King

property/ranch with an address of King Lane. Mailing addresses for the four residences on the King property/ranch then became King Lane. There was no determination that the path/road be named King Lane would continue any further than the access to our residences. For purposes of the rest of this Affidavit I will refer to the roadway at issue as King Lane but this does not alter my understanding that King Lane ends at the residences for my ranch.

5. What has been referred to as King Lane for purposes of litigation has also been used by Cal and Susie Low, who own the property generally to the south of the King property/ranch and their predecessors in interest. When my husband and I purchased our ranch in 1973, the property now owned by Lows was owned by the Steiner family, and the Steiners used the road to access their property to get to and from their fields. This use has continued since 1973 to present, including now that the property is owned by Cal and Susie Low.

6. I am familiar with the property currently owned by John Fuquay and Clint and Hailey Fuquay which is located generally to the south and west of the King ranch.

7. My son, Greg King, rented the house which is now occupied by J.C. Fuquay from 1979 to 1982. During said time my son worked for us and could not use King Lane on a regular or frequent basis because the road was wet and impassible approximately ninety percent (90%) of the time. Many times when he came to our house or for work he had to walk or drive a tractor to do so because the road was not suitable for regular vehicle use. It was not until the concrete culvert mentioned above was installed in the irrigation ditch that allowed more frequent use of the roadway.

8. Our daughter, Karla Love, rented the main house on the Fuquay property for a couple months in the 1980's. She traveled up and down Castle Lane to Oreana Loop for access



even when coming to visit us because King Lane was so impassible.

9. From 1973 to present the primary access for the properties owned by John and Clint Fuquay has been Castle Lane. Any use by the Fuquays of King Lane has been occasional use, but not on a daily or regular basis. This use has been casual use on occasion as a matter of convenience. This is because, among other things, as mentioned above, King Lane is in fact impassible during certain times of the year and cannot be used because it becomes too muddy. Such occasional/casual use by the Fuquays has been allowed because we wanted to be neighborly, their use did not interfere with our use of the road and it was done so with implied permission. The Fuquays use has been so infrequent that it has not bothered us until recently, or more specifically within the past five years, when the Fuquays have attempted to increase their use by bringing large trucks through our (King) property.

10. There has always been a fence and a gate on the west end of our property along what is referred to as King Lane to prevent our livestock from getting to the BLM property to the west. We have also used this fenced area where King Lane is located for our own livestock to graze and to pen up for sorting. While the Fuquays have occasionally/casually used the road on an infrequent basis they have previously respected the fence and gates across the roadway. It was not until recently, within the past year, that John Fuquay asserted they did not have to close the gate.

11. Prior to this lawsuit, I am not aware of any use by UPS, post office or other delivery services of King Lane to provide services to the Fuquay properties. To the contrary the mailboxes for the Fuquays are located at the end of Castle Lane and I have not observed any services using King Lane to provide deliveries to the Fuquay properties. The only mailbox at

the end of King Lane is for the Kings. Since this lawsuit has been initiated by the Fuquays, I have been asked if Schwans delivery person can use King Lane to access the Fuquay property because John Fuquay has locked the gate on Castle Lane directing them to use King Lane. I verbally gave permission to the Schwans delivery person to use King Lane that one time which was within the past six months.

12. I am not aware of any guests of the Fuquays using King Lane to access the Fuquay properties. Since my husband and I have owned the King ranch, there has been occasional use of King Lane by hunters or others who have asked permission.

13. Any use by Clint Fuquay of the road/King Lane to access the property now owned by Clint Fuquay has been in the last 8 years. Again, any use been occasional and not on a regular or primary access.

14. With regard to children catching the school bus at the end of King Lane, my children caught the bus there. I do remember that on occasion Megan, John's sister, did come down King Lane to catch the bus. I do not recall John Fuquay ever catching the bus at the end of King Lane. If he rode the school bus, he caught the bus at the bus stop at the end of Castle Lane. Clint Fuquay's children and J.C. Fuquay's children catch the bus at the end of Castle Lane.

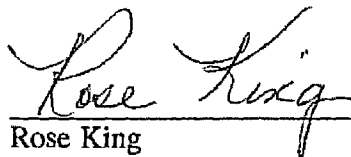
15. Until the spring of 2014, I have never seen the Fuquays operate farm equipment on King Lane.

16. From 1973 to 1988-1989 there were never any large trucks used on King Lane because, among other things, the trucks could not use the lane and pass over the welded barrels mentioned above and King lane was not suitable for said use. From 1988-89 to 2011 I have not

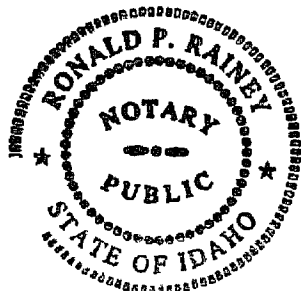
observed any large trucks or for that matter much traffic at all from the Fuquay properties using King Lane. The heavy truck traffic seemed to commence about 2011.

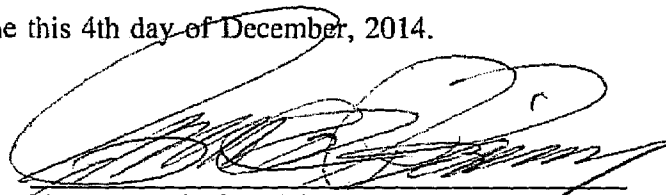
In summary I have lived on the King Ranch from 1973 to current except for the four years between 1982-1986. I can observe and hear all of the traffic that uses King Lane. I dispute Mr. Fuquay's allegations that King Lane has been used since 1977 for regular personal vehicles on a nearly daily basis, semi trucks consistently since 1977, regular farm vehicles such as cattle trucks and moving farm equipment, pedestrian traffic to and from the bus stop and guests going to and coming from the Fuquay properties.

The King family uses King Lane several times a day in our ranching/farming operations. Any use if any of King Lane by other people including the Fuquays has never interfered with our use of King Lane and in order to be neighborly we have allowed the use by others. Such use has been with implied permission.

  
Rose King

Sworn to and subscribed before me this 4th day of December, 2014.



  
Notary Public for Idaho  
Residing in Caldwell, Idaho  
My Commission Expires: 12/18/2018

**CERTIFICATE OF SERVICE**


I hereby certify that a true and correct copy of the foregoing document was served on the following on this 8<sup>th</sup> day of December 2014 by the following method:

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**FILED**  
A.M. 3:35 P.M.

DEC 09 2014

ANGELA BARKELL, CLERK  
*[Signature]*  
Deputy Clerk

Attorneys for Defendants Susie Low and Cal Low

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

**JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY;**

Plaintiffs,

vs.

**SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G.  
KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY;**

Defendants.

Case No. CV-2014-0278

**AFFIDAVIT OF SAMUEL V.C.  
STEINER**

STATE OF IDAHO            )  
  )  
COUNTY OF ADA            )

SAMUEL V.C. STEINER being first duly sworn, deposes and states that:

1. I and my wife Mary are the predecessors in title for Cal and Susie Low who purchased our properties located adjacent to Oreana Loop Road in Owyhee County in 2006.

AFFIDAVIT OF SAMUEL V.C. STEINER - 1

**ORIGINAL**

2. I was born 1957. My parents purchased these properties in 1959. I was two (2) or so when we moved onto the parcel in 1959 that is located across Oreana Loop Road from where Lows built their residence. Our farm residence was within a half mile of the road everyone is referring to as King Lane.

3. I inherited the properties from my mother in 1984. I had lived on the parcel referred to above until 1975 when I lived in Boise and went to college. I returned to the property in 1980.

4. There was an old one-room school building located on what is referred to as Castle Road close to the Foreman Reservoir, but classes were not held there. I believe the building was moved off sometime in the 1980s. I understood that it had been an active school site for a number of years before being closed down when another school building was built that was more convenient.

5. I do not know who, if anyone, constructed King Lane. This was an old farm access roadway that was used occasionally by a variety of people. My dad always told me that he thought the lane belonged to him. Neither my parents nor myself tried to stop anyone from using the road. As long as they did not interfere with our operations, we didn't object to them using the lane.

6. Sometimes hunters used it to go back to the reservoir on the BLM ground. Kings used it to go to the geothermal well they had leased on the BLM ground. Renters on the old Munger property, now owned by Fuquays and previously owned by Bob Collett used it occasionally as a short-cut to Grand View. I think that Jim Fuquay used it occasionally when he lived in the mobile home located near the rental property now owned by Clint Fuquay. Jim and John Fuquay lived in the old Foreman farm residence down by the Foreman Reservoir for many years and while they generally drove out Castle Road, they also used the lane as a short-cut to Grand View. When Jim Fuquay moved on a mobile home at the corner of what would be King Lane and Castle Road, he would occasionally use King Lane, probably as a short-cut when he went out to Grand View.

7. However, the majority of the vehicle use was down Castle Road to Oreana Loop Road to the west. This was especially true during wet weather because there is a slough at the common west corner of the Fouquay, Low's and King's properties that was pretty muddy in wet weather. It was pretty difficult to get through then. When Zane Block had the King property under contract, he and Jim Fuquay did some work on the lane one year.

8. While there was some use of King Lane by passenger vehicles and pickup trucks, I don't believe I ever saw anyone take a large truck out that way, logging trucks or cattle trucks. Those kind of vehicles always went out Castle Road. However, I think that John Fuquay may have brought an empty cattle truck in that way a few times.

DATED this 10<sup>th</sup> day of November, 2014.

*Samuel V.C. Steiner*

Samuel V.C. Steiner

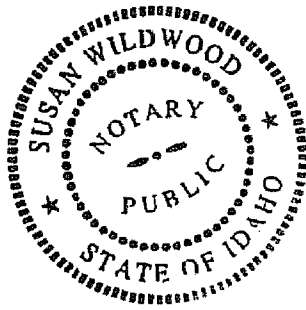
SUBSCRIBED AND SWORN to before me this 10<sup>th</sup> day of November, 2014.

*Susan Wildwood*

NOTARY PUBLIC FOR THE STATE OF IDAHO

Residing at Bow, Idaho

My Commission expires: 01-31-17



**CERTIFICATE OF SERVICE**

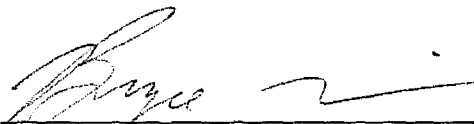
I hereby certify that a true and correct copy of the foregoing document was served on the following on this 8th day of ~~September~~, 2014 by the following method:  
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S. Bryce Farris

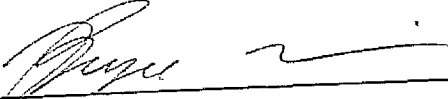




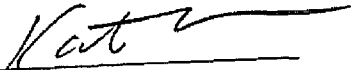
to the matters contained herein.

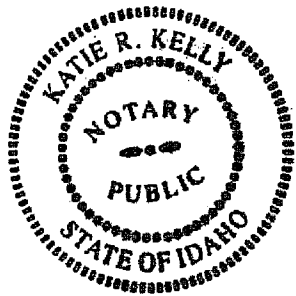
2. Attached hereto as **Exhibit A** is a true and correct copy of the transcript of the hearing held on September 18, 2014 in the above-captioned matter and before the above titled Court.

DATED this 8<sup>th</sup> day of December, 2014.

  
\_\_\_\_\_  
S. Bryce Farris

Sworn to and subscribed before me this 8 day of December, 2014.

  
\_\_\_\_\_  
Notary Public for Idaho  
Residing in Davis, Idaho  
My Commission Expires: 2/20/20



**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 8<sup>th</sup> day of ~~September~~, 2014 by the following method:


*December*

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\_\_\_\_\_  
S. Bryce Farris

# EXHIBIT A

1 (Proceedings begin at 1:28 p.m.)  
2 COURT: All right. We're taking up the case of  
3 John Fuquay and others versus Susan Low, Heart Ranch and  
4 others. Mr. Cleverley; is that correct?  
5 MR. CLEVERLEY: That is correct, Your Honor.  
6 COURT: He's here for the plaintiffs. Mr. Rainey's  
7 here for the defendants. Today is not a hearing to  
8 determine the merits of the case. It's only a hearing  
9 today to determine whether there should be a preliminary  
0 injunction issued.  
11 In other words, we'll get a trial set several  
2 months down the line and today we're going to determine  
3 whether -- what happens to the road between now and then.  
4 So is there any -- do you care to make any discussion  
5 amongst yourself for an accomodation between now and then  
6 or do you want the Court to make a decision on the use of  
7 the road pending the trial?  
8 MR. RAINEY: We're prepared to go ahead, Your  
9 Honor.  
10 MR. CLEVERLEY: We'll go ahead, Your Honor. That's  
11 fine.  
12 COURT: Plaintiffs were granted a temporary  
13 injunction so they can go forward. Go ahead and proceed.  
14 MR. CLEVERLEY: Your Honor, how would the Court  
15 like to proceed? Just go ahead and call witnesses?

4

1 COURT: Sure.  
2 MR. CLEVERLEY: All right. We call John Fuquay to  
3 the stand, please.  
4 (JOHN FUQUAY is sworn.)  
5 COURT: So kind of step behind the seat and you can  
6 swing in that way.  
7 WITNESS: Okay.  
8 COURT: Start out by stating your name and spell  
9 your last name.  
10 WITNESS: It's John Fuquay, F-u-q-u-a-y.  
11 COURT: Thank you. Go ahead and proceed.  
12 DIRECT EXAMINATION  
13 QUESTIONS BY MR. CLEVERLEY:  
14 Q Thank you. Mr. Fuquay, you're a plaintiff in this  
15 case?  
16 A Correct.  
17 Q Where do you live?  
18 A 18907 Castle Lane, Oreana, Idaho.  
19 Q And can you give me kind of a thumbnail sketch of  
20 where that is?  
21 A It's off of Oreana Loop Road.  
22 Q Okay.  
23 A And off of Castle Creek.  
24 Q What's the closest city to you?  
25 A Grand View.

5

1 Q And how long have you lived there?  
2 A Thirty-seven years.  
3 Q Okay. And do you own the property where you live?  
4 A Correct.  
5 Q And you recently sold a part of your property to  
6 Clint Fuquay?  
7 A Correct.  
8 MR. CLEVERLEY: May I approach, Your Honor?  
9 COURT: Sure.  
10 MR. CLEVERLEY: Your Honor, I have a copy. Would  
11 the Court like a copy?  
12 COURT: Yeah, go ahead. Thanks. This is No. 1?  
13 MR. CLEVERLEY: This will be Exhibit 1.  
14 BY MR. CLEVERLEY:  
15 Q Mr. Fuquay, do you recognize what that is?  
16 A Yeah. It's a map of Highway 78 and Oreana Loop  
17 Road.  
18 Q Okay. Does that show generally where you live?  
19 A In general, yeah.  
20 MR. CLEVERLEY: Your Honor, we'd ask 1 to be  
21 admitted.  
22 COURT: Any objection?  
23 MR. RAINEY: No, Your Honor.  
24 COURT: Okay. 1's admitted.  
25 (Plaintiffs' Exhibit No. 1 admitted.)

6

1 BY MR. CLEVERLEY:  
2 Q Mr. Fuquay, I'm handing you what we're going to be  
3 marking as Exhibit No. 2. Do you recognize what that is?  
4 A Yeah. It's a map of my property it looks like and  
5 some of Lows' property and some of Kings' property and  
6 Oreana Loop Road.  
7 Q Okay. And on that map, there are some lines in  
8 blue? Can you explain what those lines in blue are?  
9 A They look to me to be the Oreana Loop Road and then  
10 also the lane going to and from our property and to -- in  
11 and out of our property there.  
12 Q And you say your property. That's -- your property  
13 is off to the left-hand side of that?  
14 A Correct.  
15 Q Okay. And is that the one that's marked John  
16 Fuquay?  
17 A Correct.  
18 Q And the one above it, was that the property that  
19 you sold to Clint?  
20 A Correct.  
21 Q And that one's labeled with Clint Fuquay?  
22 A Correct.  
23 Q Now, to the best of your knowledge, is the property  
24 marked Susie and Cal Low parcel 1, is that generally the  
25 location of the Lows' property?

7

1 A Correct.  
2 Q And then farther to the east, there's a property  
3 marked Susie and Cal Low, parcel 2. Is that, to the best  
4 of your knowledge, about where that property is?  
5 A Correct.  
6 Q And then to the top or to the north, there's a  
7 property that's marked Heart K Ranch Trust. Is that  
8 generally your understanding of what that property is?  
9 A Correct.  
10 Q And then a small square that's labeled with Rose M.  
11 King, is that generally where her property would be  
12 located?  
13 A Yeah, correct.  
14 MR. CLEVERLEY: Your Honor, we'd offer 2.  
15 COURT: Any objection?  
16 MR. RAINEY: Your Honor, 2 somewhat duplicates --  
17 we'll explain that this King's Lane is not where it's  
18 located on this map.  
19 COURT: Is it on the King side or the Low side?  
20 WITNESS: It's in the middle.  
21 COURT: Are the Lows here?  
22 MR. RAINEY: I can't hear you.  
23 COURT: Are the Lows here?  
24 MR. RAINEY: Yes.  
25 MR. FARRIS: Yes, Your Honor.

8

1 COURT: Oh, okay. Are they represented by you, Mr.  
2 Rainey, as well or do you just represent the Kings?  
3 MR. RAINEY: No. Lows are represented by Bryce  
4 Farris.  
5 COURT: I'm sorry. Okay. All right. For  
6 illustrative purposes, do you have any objection?  
7 MR. RAINEY: Well, I want the record clear that  
8 what is called King's Lane is not accurate.  
9 COURT: You can take that up on cross-examination.  
10 MR. RAINEY: Okay.  
11 COURT: We'll let it in just for illustrative  
12 purposes.  
13 MR. RAINEY: Okay.  
14 (Plaintiffs' Exhibit No. 2 admitted.)  
15 BY MR. CLEVERLEY:  
16 Q And Mr. Fuquay, I'm handing you what we'll mark at  
17 Exhibit 3. And does this show the same information as the  
18 prior map?  
19 A As best I can tell, yeah.  
20 Q A little closer detail?  
21 A Yeah.  
22 MR. CLEVERLEY: Your Honor, we'd offer 3 for  
23 illustrative purposes.  
24 COURT: And Mr. Farris, Mr. Rainey, do you have any  
25 objection to 3 for illustrative purposes only?

9

1 MR. RAINEY: Well, with the same caveat, correct.  
2 COURT: Right. So we'll let 3 in for illustrative  
3 purposes.  
4 (Plaintiffs' Exhibit No. 3 admitted.)  
5 BY MR. CLEVERLEY:  
6 Q Mr. Fuquay, could you take a look at Exhibit 3 for  
7 me, please?  
8 COURT: Let me get it marked real quick. He's got  
9 a copy.  
10 WITNESS: I'm ready.  
11 BY MR. CLEVERLEY:  
12 Q Can you explain and show on this map where you  
13 live?  
14 A I live on the south side of the 80 there marked  
15 John Fuquay.  
16 Q Okay. So there's a parcel marked John Fuquay and  
17 it's got a red square around that?  
18 A Correct.  
19 Q You would be on the left-hand side of that?  
20 A Correct.  
21 Q There's a little dark spot there. Can you explain  
22 what that is? Is that close as a good marker for where you  
23 live?  
24 A Correct. The house and trees.  
25 Q So is there a road that runs through your property?

10

1 A Correct.  
2 Q And what's that road that runs through your  
3 property?  
4 A I believe that's called Castle Lane.  
5 Q Okay. And how long has that road run through your  
6 property?  
7 A Thirty-seven years that I know of. I don't know  
8 how much longer. I can only say for how long I've been  
9 there.  
10 Q Where does that road go if you follow it south?  
11 A It will bring you out on -- it forks up there a  
12 little ways from my house and then it goes out to Oreana  
13 Loop Road.  
14 Q Okay. And how far is it from your house to Oreana  
15 Loop Road?  
16 A Going that way --  
17 Q Going south.  
18 A -- probably approximately four miles. Three or  
19 four miles.  
20 Q Okay. And then if you follow that road north,  
21 where does it go?  
22 A It will hook into Castle Lane -- or it goes into  
23 Oreana Loop Road also.  
24 Q So if we follow that road north out of your  
25 property, what's the first thing that you would come to

11

1 ' after you pass -- let's just kind of walk it through.  
 2 After you pass your property, where are you?  
 3 A Then I would -- after I go out of my property, I  
 4 would hit the BLM land.  
 5 Q Okay.  
 6 A And then I would go to -- stay on the BLM land and  
 7 it would come up to Clint's house, goes around Clint's  
 8 house toward the east and then you would hit Clint's other  
 9 rental house and then it goes from there into Castle Lane  
 0 and goes -- the next house would be the King residence.  
 11 There's four of them there I believe.  
 2 Q And if you keep going east, where does that take  
 3 you?  
 4 A You'll cross the creek, Castle Creek, right there  
 5 by their yard and it would end up on Oreana Loop Road.  
 6 Oreana Loop Road would venture on up and connects into  
 7 Highway 78.  
 8 Q Can you describe, please, what Castle Lane looks  
 9 like as far as what type of a road or how wide it is?  
 0 A It's just a gravel -- gravel dirt road all the way  
 1 from Loop to Loop Road. It's just all gravel.  
 2 Q And about how wide is it?  
 3 A The actual road part, I'm going to say maybe 20  
 4 feet in gravel maybe.  
 5 Q Okay. Are there any fences along Castle Lane?

12

1 A There's fences that border us there on my property  
 2 and then it borders Clint's property and then it turns into  
 3 a lane where Lows are on one side of the lane and Kings are  
 4 on the other side of the lane.  
 5 Q So what I'm doing so we can have the record reflect  
 6 where you're talking about -- somebody reading this will  
 7 understand where you're talking about so if I ask a few  
 8 questions like this asking you to explain, that's partly  
 9 for the record of what we're doing.  
 0 A Okay.  
 1 Q So when you're talking about the road getting up to  
 2 Clint's property, you're talking about the northwest corner  
 3 of Clint Fuquay's property?  
 4 A Correct.  
 5 Q And then when that road turns east, does it change  
 6 condition? Does it change how wide it is?  
 7 A It varies in and out but it's basically the same.  
 8 I mean it's just a gravel road.  
 9 Q Now, what is -- let's take this kind of in  
 0 sections. From the corner -- the northwest corner of  
 1 Clint's property to the northeast corner of Clint's  
 2 property, are there any fences along that road?  
 3 A Just along Clint's side -- Clint's property line.  
 4 Q So there's a fence on Clint's side of the property  
 5 that follows the road all the way across the north side of

13

1 Clint's property?  
 2 A Correct.  
 3 Q Okay. And when that fence gets to the intersection  
 4 of Clint's property and the Lows' property, does that fence  
 5 continue?  
 6 A Yes. But it changes ownership I believe there and  
 7 goes to Lows' on easterly.  
 8 Q So from the northwest corner of Clint's property,  
 9 there's a fence that runs all the way along what would be  
 10 the south side of the lane?  
 11 A The south side of the road, yes.  
 12 Q And that runs from Clint's property how far east?  
 13 A Approximately a half a mile.  
 14 Q Okay. Does that fence go all the way through the  
 15 Lows' property?  
 16 A Oh, no. It would be about a quarter mile. I was  
 17 wrong. It continues into Lows' property, yes.  
 18 Q Okay. And then does that -- where does that fence  
 19 line end?  
 20 A Clint's fence or Lows' fence?  
 21 Q Well --  
 22 A Or the continuing fence?  
 23 Q The continued fence.  
 24 A It must end down on Oreana Loop Road.  
 25 Q So if you were to follow that fence line from the

14

1 northwest corner of Clint's property, that fence line would  
 2 continue along the south side of Oreana Loop -- excuse me,  
 3 off King's Lane or Castle Lane all the way to Oreana Loop  
 4 Road?  
 5 A Correct.  
 6 Q Are there any other fences along what's marked as  
 7 King Lane?  
 8 A There's a fence on the north side of that road.  
 9 Q So there's a fence on the south side of the road  
 10 and then there's a fence on the north side of the road?  
 11 A Correct.  
 12 Q Where does that fence start? Take from the west --  
 13 if you would, the west side. Where does it start on the  
 14 west side?  
 15 A It would start approximately where Clint's property  
 16 ends, in that general area, and it runs east to -- crosses  
 17 the creek and I assume it hooks into Oreana Loop Road there  
 18 somewhere.  
 19 Q Okay. So if you're driving down King's Lane on  
 20 this roadway from Oreana Loop Road to Clint's property,  
 21 would there be a fence on both sides?  
 22 A Correct.  
 23 Q Has there always been a fence on both sides of that  
 24 road?  
 25 A Correct.

15

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1 Q For 37 years?  
 2 A Correct.  
 3 Q Have you ever had any gates -- let me -- have there  
 4 ever been any gates across that section of road between  
 5 Clint's property and Oreana Loop Road?  
 6 A Yes.  
 7 Q Okay. What have they been?  
 8 A The last few years, they've been like a four or  
 9 five-wire -- barbed wire strand gate.  
 10 Q Okay. And before the last four or five years, so  
 11 between the time when you bought your property and the last  
 12 four or five years, have there ever been any gates across  
 13 there?  
 14 A No. It's always been open.  
 15 Q In the last four or five years, when did you start  
 16 noticing that there was a gate being put up?  
 17 A Well, the kids would call or we would see that they  
 18 had cattle locked in the lane so they would fence them in  
 19 there so they wouldn't escape I guess and eat the lane  
 20 down, eat the grass or the forage.  
 21 Q When you say there was a gate, describe what this  
 22 five-wire gate is. What is that?  
 23 A It's just a five -- four or five-wire stick gate  
 24 and it just kind of crosses the lane, approximately 10 feet  
 25 long, 15 feet long I guess. I don't know.

16

1 Q Is it made of barbed wire?  
 2 A Barbed wire and there may be some metal stakes or  
 3 sticks that vary probably.  
 4 Q So you would have, explain, five strands of barbed  
 5 wire?  
 6 A Yes.  
 7 Q And then how would it attach to the fence on either  
 8 side?  
 9 A They had just loops that you would loop over the  
 10 end stick and you would have to put the bottom in and push  
 11 the post up and put a loop across the top and that would  
 12 hold the gate up.  
 13 Q So on either end of the barbed wire, it was  
 14 attached to sticks on either end?  
 15 A Or the fence.  
 16 Q Or the fence?  
 17 A Or a post or something there, yeah.  
 18 Q And in order to open that, how would you open --  
 19 have to open that?  
 20 A You would have to get out and just push the post  
 21 in, lift the loop up, pull the gate around off of the road,  
 22 drive through, pick it up -- pick it up and hook it all  
 23 back up.  
 24 Q And how many gates were there that were like this?  
 25 A Two.

17

1 Q And where were they located?  
 2 A One was on the end of that lane and then the other  
 3 one would have been on the east side of the lane kind of  
 4 next to I guess it would be their shop or kind of where it  
 5 makes a corner there or turn right there. Kind of the  
 6 closest narrowest part of the lane.  
 7 Q Okay. And so the west -- the fence on the west  
 8 side would be approximately where Clint's property ends and  
 9 connects with the Lows' property?  
 10 A Correct.  
 11 Q And then on the east side, would it be -- can you  
 12 kind of point out where it would be on the east side?  
 13 A Well, it would be just -- just kind of behind their  
 14 shop building and maybe kind of across the way from Gil's  
 15 house now.  
 16 Q You're pointing to the small squares on the map?  
 17 A Yes. Yeah.  
 18 Q And how long would those gates be up?  
 19 A I think it varied. Anywhere -- it started out for  
 20 a few days and then it would be a week and then the next  
 21 time, it might be a couple weeks and it just kind of varied  
 22 on how many -- I think probably how many cattle he put in  
 23 there.  
 24 Q When you say cattle, where were those cattle  
 25 located?

18

1 A They were inside that lane.  
 2 Q Okay. In between the two fences that are bordering  
 3 the road?  
 4 A Correct.  
 5 Q And then a fence gate on both sides -- both ends?  
 6 A Correct.  
 7 Q Would that be considered normal pasture area for  
 8 those cattle?  
 9 MR. RAINEY: Objection, Judge. There's no  
 10 foundation for him to be an expert on pasture.  
 11 COURT: I'll sustain it.  
 12 BY MR. CLEVERLEY:  
 13 Q Okay. Do you have cattle, Mr. Fuquay?  
 14 A Yes.  
 15 Q Do you graze cattle?  
 16 A Yes.  
 17 Q Do you know what good grazing land is for cattle?  
 18 A Sometimes.  
 19 Q Okay. And how many cattle do you own?  
 20 A I don't have very many. Maybe 15.  
 21 Q And how long have you had cattle?  
 22 A Most of my life.  
 23 Q Based on your knowledge and experience of having  
 24 cattle, would you say that the area in between the fences  
 25 where the road is is a normal cattle grazing area?

19



1 A Some times of the year, sure.  
2 Q Okay. And for how long?  
3 A Again, it would depend on the number of cattle that  
4 you put in that area, you know. If you put too many or a  
5 lot, it would last a few days and if you put a handful, it  
6 might last a month.  
7 Q What would be the purpose of putting cattle in that  
8 area?  
9 MR. RAINEY: Objection, Judge. He doesn't know  
0 what the Kings have in mind.  
11 COURT: I'll let him answer.  
12 WITNESS: I would assume to grow beef. To produce  
13 livestock, weight.  
14 MR. RAINEY: Your Honor, I'd further object. We're  
15 getting beyond the purpose of their allegations that  
16 supported this temporary restraining order and the proposed  
17 injunction. They have specific allegations in their  
18 affidavits -- in the memorandums and affidavit by Mr.  
19 Cleverley himself setting out the emergency.  
20 COURT: Okay.  
21 MR. RAINEY: Now describing the land and all  
22 this --  
23 COURT: Let's go ahead and move along. I get it  
24 that they pasture the cattle there to keep the grass down.  
25 BY MR. CLEVERLEY:

20

1 Q So when was the first time that -- that there was a  
2 permanent fence anywhere -- excuse me, a permanent gate  
3 anywhere along what -- between Clint's property and Oreana  
4 Loop Road?  
5 MR. RAINEY: Judge, again, I object. They made  
6 specific --  
7 COURT: I think that goes to the -- I think when  
8 the gate was put up goes towards the injunction. So I'll  
9 allow him to answer that. When the permanent gate -- not  
10 the barbed wire gate. You can go ahead and answer that.  
11 WITNESS: The permanent gates I believe has been  
12 about a month ago, a month and a half ago approximately.  
13 BY MR. CLEVERLEY:  
14 Q Did anybody talk to you about that gate being  
15 installed?  
16 A They installed them while I was gone.  
17 Q Okay. Did you know that they were going to be  
18 installing the gates?  
19 A I didn't know that they were going to be installing  
20 them, no.  
21 Q Does the installation of those gates create a  
22 problem for you?  
23 A Yes.  
24 Q Why?  
25 A It's interfering with our normal daily activity of

21

1 coming and going and accessing the property.  
2 Q Okay. So where do you typically -- how do you  
3 access the property that -- yours and Clint's property?  
4 A Through -- through that lane. From Oreana Loop  
5 Road through the lane to Clint's property to my property  
6 and beyond. It depends on what direction I'm going.  
7 Q And how long have you regularly used that area to  
8 access your property?  
9 MR. RAINEY: Again, Your Honor --  
10 WITNESS: Thirty-seven years.  
11 MR. RAINEY: -- the issue on the restraining order  
12 was the emergency. The extreme emergency and dire health.  
13 That's what we focused our affidavits on.  
14 COURT: Right.  
15 MR. RAINEY: Not this easement. He's trying to  
16 prove the easement right now.  
17 COURT: I understand. I'll go ahead and allow him  
18 to answer the question. I'm not going to make a ruling on  
19 the permanency on the use of the land. Just whether there  
20 should be use of the road pending the trial. You said 37  
21 years.  
22 WITNESS: Thirty-seven years.  
23 COURT: Go ahead.  
24 BY MR. CLEVERLEY:  
25 Q Are you aware of any emergency vehicles that have

22

1 ever had to come down to your properties or in that area?  
2 A Yeah. Over the years, they've come and gone  
3 through that way.  
4 Q Okay. Where is the nearest ambulance located?  
5 A Grand View.  
6 Q And where is that in relationship to you?  
7 A It would be east of us approximately 15 miles.  
8 Q Okay. And if an ambulance was to come from Grand  
9 View to your house, how would it need to get to your house?  
10 MR. FARRIS: Objection. Calls for speculation.  
11 COURT: Are there other accesses to your house?  
12 WITNESS: There are.  
13 COURT: Can you explain what those are?  
14 WITNESS: They would go -- if they couldn't come  
15 that way, they would have to continue on Oreana Loop Road  
16 and follow the creek down. I think all the way around  
17 there, it's another four miles.  
18 COURT: What's the difference in mileage?  
19 WITNESS: About four miles.  
20 COURT: Okay.  
21 BY MR. CLEVERLEY:  
22 Q So in order -- an ambulance would have to take an  
23 additional four miles to the Loop Road or it would be a  
24 total of four miles that it would be?  
25 A It would be an additional four miles. From the

23

1 lane all the way around, it would be approximately four  
2 miles around.  
3 Q And how long would that take in minutes?  
4 A Ten minutes I guess. Ten minutes.  
5 Q Okay. So the other road, the Castle Lane Road, can  
6 you drive -- is that a paved surface?  
7 A No. It's gravel. Castle Lane is all gravel.  
8 Q But if there was an emergency, it would take at  
9 least -- take ten minutes more for them to go and traverse  
10 that way?  
11 A Approximately. Depending on which way they're  
12 coming I guess, you know.  
13 Q To the best of your knowledge, would an emergency  
14 vehicle have to stop at each one of those gates to open it?  
15 A As it is currently, yes.  
16 Q Have you had any conversations with any of the  
17 defendants about your ability to get through or whether or  
18 not those gates were going to be locked?  
19 A I haven't -- since they've put up these gates, I  
20 haven't had any conversation with any of them, no.  
21 Q Okay.  
22 MR. CLEVERLEY: I don't have any further questions  
23 for you, Mr. Fuquay.  
24 COURT: Who would like to do cross first?  
25 MR. RAINEY: I'll go first.

24

1 COURT: Mr. Rainey, Go ahead.  
2 MR. RAINEY: Thank you.  
3 CROSS-EXAMINATION  
4 QUESTIONS BY MR. RAINEY:  
5 Q Mr. Fuquay, first of all, let's be clear. That  
6 Castle Lane has been there for years and years and years.  
7 It's an ancient road, isn't it?  
8 A As far as I know, yeah.  
9 Q In fact, there was a schoolhouse up there by your  
10 house. Isn't that correct?  
11 A Correct.  
12 Q So Castle Lane is basically a public road, isn't  
13 it?  
14 A I don't know.  
15 Q Isn't it what we call the ancient -- let's see. An  
16 SR2477?  
17 A I don't know.  
18 Q There is an all-weather road that goes right to  
19 your house, isn't there?  
20 A There's a gravel road that goes --  
21 Q It's all-weather, isn't it?  
22 A I guess.  
23 Q And it goes on around to in front of Clint's place  
24 and then in front of J.C.'s place. Isn't that correct?  
25 A Correct.

25

1 Q Okay. And all of your addresses are on Castle  
2 Lane. Isn't that correct?  
3 A Correct.  
4 Q In fact, give me the address for Clint.  
5 A I think his is 18902.  
6 Q Castle Lane?  
7 A Castle Lane and I think the rental house is 18903 I  
8 believe.  
9 Q Okay.  
10 A I think.  
11 Q So again, all three of your -- you and your two  
12 sons live on Castle Lane.  
13 A Correct.  
14 Q Okay. And there's no gates. You don't gate that  
15 then. Somebody --  
16 A I gate mine -- on my piece of property, I gate that  
17 at times, yes.  
18 Q So you would be obstructing the emergency vehicle  
19 coming up Castle Lane then, huh?  
20 A If they come up that Castle Lane, yes.  
21 Q Okay. In your affidavits -- let me start out, in  
22 your motion for this temporary restraining order, you  
23 stated that you are in immediate need of access to the  
24 property over King Lane. Do you remember saying that?  
25 A Okay. Sure.

26

1 Q Do you remember?  
2 A Sure, yeah. I don't know. Sure.  
3 Q Okay. But you have access on Castle Lane, don't  
4 you?  
5 A Correct.  
6 Q All the way up.  
7 A Correct.  
8 Q All three houses.  
9 A Correct.  
10 Q So you don't have an immediate need for King's Lane  
11 because you could use Castle Lane, right?  
12 A Correct.  
13 Q Okay. You also say -- and this is paragraph 20 of  
14 your motion.  
15 MR. CLEVERLEY: I'm going to object to the extent  
16 that counsel's referring to the motion. If he wants to  
17 refer to Mr. Fuquay's declaration, I have no problem with  
18 that.  
19 MR. RAINEY: This motion was made on his behalf.  
20 COURT: Go ahead and ask the question and see what  
21 it is.  
22 MR. RAINEY: Yeah.  
23 BY MR. RAINEY:  
24 Q "The gates interfere with normal delivery services  
25 used by plaintiffs such as Fed Ex, UPS and Schwann's."

27

1 A Correct.  
 2 Q We did get an affidavit from the Schwann delivery  
 3 man. He would come up --  
 4 MR. CLEVERLEY: Objection. We don't know what he  
 5 would say.  
 6 MR. RAINEY: The affidavit's in record.  
 7 COURT: Go ahead and ask the question.  
 8 MR. RAINEY: Yeah.  
 9 BY MR. RAINEY:  
 0 Q You're familiar with the affidavit. I sent it to  
 11 your attorney.  
 2 A Okay.  
 3 MR. CLEVERLEY: Objection. There's no foundation  
 4 for that.  
 5 COURT: Does the Schwann guy use the road?  
 6 WITNESS: Correct.  
 7 BY MR. RAINEY:  
 8 Q Okay. And then so UPS and Fed Ex would come right  
 9 up Castle Lane too, wouldn't they?  
 0 A Correct.  
 1 Q Okay. Then you say that they interfere with the  
 2 children's ability to get to school.  
 3 A Correct.  
 4 Q There's one child and that's J.C.'s child; is that  
 5 right?

28

1 A Correct.  
 2 Q He's, what, five or six?  
 3 A Correct.  
 4 Q And he's picked up at Oreana right across from  
 5 Castle Lane, isn't he?  
 6 A Actually, he was picked up -- until the gates went  
 7 up, he was picked up at Highway 78 where Oreana Loop Road  
 8 connects to Highway 78 and refer to that as the top of the  
 9 hill and that's where he was picked up.  
 0 Q That's clear up on the highway?  
 1 A Correct. Until they put up the gates.  
 2 Q Okay. So now the bus driver picks him up right  
 3 below your house then?  
 4 A I guess so, yes.  
 5 Q Okay. So rather than driving clear to the highway,  
 6 all you have to do is just drive down over the hill to  
 7 your -- to Oreana Road -- Oreana Loop, right?  
 8 A Sure.  
 9 Q And that's where your mailbox is, isn't it?  
 0 A The current one, yes.  
 1 Q As of today's date, your mailbox is on Oreana Loop  
 2 and the boy going to school is picked up on Oreana Loop  
 3 right by Castle Lane.  
 4 A Correct.  
 5 Q So then you say that the emergency vehicles --

29

1 excuse me. The gates interfere with plaintiffs' access to  
 2 emergency services such as police, fire and ambulance. You  
 3 say that?  
 4 A Correct.  
 5 Q Well, these emergency vehicles can come up Castle  
 6 Lane all the way up to J.C.'s house, can they not?  
 7 A Correct.  
 8 Q Okay. So going through King Lane doesn't interfere  
 9 with you and your family getting emergency services up  
 10 through Castle Lane. Isn't that right?  
 11 A No. It delays it.  
 12 Q It doesn't interfere; is that right?  
 13 A It delays it.  
 14 Q Well, you're really not telling the judge it takes  
 15 ten minutes to go four miles, a vehicle driving 60, 70  
 16 miles an hour.  
 17 A Not on Oreana Loop Road, it's not.  
 18 Q You just got one curve and right down into your  
 19 place. Isn't that right?  
 20 A There's two curves, three curves, four curves.  
 21 Q Anyway, the whole point is that you have access to  
 22 emergency vehicles, general services, school and all  
 23 those -- the bus stop. Yeah. All those services are right  
 24 there at Castle Lane.  
 25 A Historically, they've come through Kings'.

30

1 Q They are coming right there to your place down  
 2 below the hill on Castle Lane, aren't they, as of today's  
 3 date?  
 4 A Sure.  
 5 Q Now, that's the same allegation that you made in  
 6 your affidavit, isn't it?  
 7 A Okay.  
 8 Q Pardon me?  
 9 A Okay.  
 0 Q But the truth of the matter is that all those  
 1 services and all those people can get to Castle Lane and up  
 2 to your house as of today's date, right?  
 3 A I guess, with a delay.  
 4 Q I'm not going to argue with it. Judge Nye knows  
 5 how long it takes to go four miles.  
 6 A Okay.  
 7 MR. CLEVERLEY: Objection. Argumentative.  
 8 COURT: Let's move on.  
 9 BY MR. RAINEY:  
 0 Q In fact, the police department or sheriff's office  
 1 has been to your house, have they not?  
 2 A Lots.  
 3 Q And they come right up Castle Lane, don't they?  
 4 A They come up both ways.  
 5 Q Well, you recognize Gary Aman, the former sheriff?

31

1 A Sure.  
2 Q He's been to your house?  
3 A Sure, lots.  
4 MR. CLEVERLEY: Your Honor, I'm sorry. I didn't  
5 realize that there were additional witnesses, non-parties  
6 in the room.  
7 COURT: Do you want to have them excluded?  
8 MR. CLEVERLEY: I would.  
9 COURT: He would like to exclude all witnesses  
10 until they're called and I'll -- I think that's Mr. Aman  
11 walking out there. So I'll go ahead and grant that  
12 request. If anybody's scheduled to testify in this  
13 hearing, you got to wait outside till you're called. Don't  
14 discuss your testimony until you're called.  
15 MR. FARRIS: If I may, you're referring to non-  
16 parties.  
17 COURT: Yes, parties can stay here. Parties can  
18 stay here. Just witnesses. Non-party witnesses.  
19 Okay. Go ahead.  
20 BY MR. RAINEY:  
21 Q Just to make the record clear, the only hindrance  
22 on Castle Lane going all the way up with emergency vehicles  
23 would be your locked gates.  
24 A Kings' locked gates.  
25 Q Pardon me?

32

1 A Kings' gates. Castle Lane goes all the way through  
2 to the Oreana Loop Road. To Oreana Loop Road is my  
3 understanding.  
4 Q Well, you've been calling the part on Kings'  
5 property King's Lane. That's what you said in all your  
6 pleadings.  
7 A Okay.  
8 Q So I'm talking about the Castle Lane going up to  
9 the last -- you call it the rental house.  
10 A Okay.  
11 Q And the only hindrance on coming up through that  
12 area is just your locked gates.  
13 A Okay.  
14 Q So you're creating any delay in the use of Castle  
15 Lane, isn't that correct?  
16 A At certain times of the year I guess, yeah.  
17 Q What time of year do you lock your gates?  
18 A Hunting season.  
19 Q What's that?  
20 A Hunting season.  
21 Q But it's open other than hunting season?  
22 A In general, if you can open the gate, yeah.  
23 They're not locked. They're just shut.  
24 Q Okay. Now, you do admit there were wire gates  
25 across this King's Lane -- what you're calling King Lane.

33

1 We'll explain that here in a few minutes.  
2 A Okay.  
3 Q Isn't that correct?  
4 A Yep.  
5 Q You had to get out and you had to lift the loop up  
6 over --  
7 A Sure.  
8 Q -- the fence post to get the gate out.  
9 A Sure.  
10 Q Now, the new gates are metal. They're metal gates  
11 and they have a plunger that goes into the hole in the gate  
12 on the opposite side of the plunger. Isn't that correct?  
13 A I have no idea. I haven't went up to them gates.  
14 Q Well, didn't you tell the deputy sheriff you were  
15 not about to lock the gates or close the gates?  
16 MR. CLEVERLEY: Objection. Foundation.  
17 MR. RAINEY: Well, okay.  
18 BY MR. RAINEY:  
19 Q Didn't Gilbert King call a deputy out because you  
20 were fussing with him about having the gates put up and the  
21 gates closed?  
22 A Correct.  
23 MR. CLEVERLEY: Objecting as to time and --  
24 MR. RAINEY: I'll get to that.  
25 COURT: Go ahead and set the time.

34

1 MR. RAINEY: Yeah.  
2 BY MR. RAINEY:  
3 Q Tell me when that conversation took place.  
4 A Approximately May.  
5 COURT: This year.  
6 WITNESS: This year.  
7 BY MR. RAINEY:  
8 Q So in May, you had a conversation with Gilbert and  
9 he was going to shut the gates to keep his cattle in,  
10 right?  
11 A Correct.  
12 Q And also the gate keeps the range cattle, the BLM  
13 cattle from coming into the Kings' place, right?  
14 A Historically, there's not been any range cattle out  
15 there.  
16 Q You know it's rented this year.  
17 A I've heard that.  
18 Q Your cattle were out there on that range for a  
19 while.  
20 A Sure.  
21 Q Then you told the deputy sheriff you're not about  
22 to close the gates. Isn't that right?  
23 A Correct.  
24 Q Okay. And in order to make sure the gates were  
25 closed, then Gilbert put a lock on it, correct?

35

1 A I don't know. I've never seen them locked.  
 2 Q So you haven't gone back there since the  
 3 conversation?  
 4 A Since I went back through there, the gates have  
 5 been -- I've been gone for the last month so I mean he put  
 6 the cattle in there and I assume he opened the gates back  
 7 up and there's not been an issue.  
 8 Q Well, let's make the record clear, Mr. Fuquay. The  
 9 Kings use that lane to graze cattle and to actually corral  
 0 the cattle too, don't they?  
 11 A Yeah. I don't know what they -- yeah, sure. They  
 2 graze it.  
 3 Q Okay. But they use it kind of as a holding pen  
 4 then?  
 5 A I don't know what -- I don't know about that but --  
 6 Q Well, there's cattle in there.  
 7 A Yep.  
 8 Q There's cattle in there an awful lot of the year,  
 9 isn't that correct?  
 10 A Sometimes, yeah.  
 11 Q Okay. And they also -- Kings use that road to get  
 12 to their fields, don't they?  
 13 A Correct.  
 14 Q They've used that road ever since you've lived in  
 15 that property.

36

1 A Correct.  
 2 Q And never have you tried to kick the Kings off the  
 3 property, have you, off the road?  
 4 A Not that I recall.  
 5 Q Well, you never have, have you?  
 6 A Not that I recall, no.  
 7 Q So in other words, you've never interfered with the  
 8 Kings using their own property, have you?  
 9 A Other than the gates.  
 10 Q Pardon me?  
 11 A Other than the issue with the gates.  
 12 Q Well, they put up gates. Particularly when they  
 13 had cattle in there, they had gates in there. Isn't that  
 14 right?  
 15 A Yeah.  
 16 Q Okay. Now, you can't tell Judge Nye whether it's  
 17 easier to open the metal gate than to put the wire over the  
 18 posts with the loop, can you?  
 19 A I've not opened them metal gates. I haven't been  
 20 through there since.  
 21 MR. RAINEY: That's all the cross I have, Your  
 22 Honor.  
 23 COURT: Mr. Farris.  
 24 MR. FARRIS: Thank you, Your Honor. I'll try not  
 25 to be redundant. Let me see if I can put a fine point on

37

1 some of these.  
 2 CROSS-EXAMINATION  
 3 QUESTIONS BY MR. FARRIS:  
 4 Q Mr. Fuquay, my name is Bryce Farris and I represent  
 5 the Lows.  
 6 A Okay.  
 7 Q You've been talking about this roadway that they've  
 8 referred to or referred to as Castle Lane and from what I  
 9 understand is that lane comes off Oreana Loop up to your  
 10 property? If you'd look at probably Exhibit 3 if you have  
 11 it in front of you.  
 12 A Okay.  
 13 Q You see where there's an arrow that says Castle  
 14 Lane?  
 15 A Yeah.  
 16 Q That Castle Lane originates at Oreana Loop further  
 17 to the south of the area of your property?  
 18 A Correct.  
 19 Q That's the road you've been talking about and it  
 20 comes up, goes through your property?  
 21 A Correct.  
 22 Q And then goes up to the property that you've --  
 23 that someone's identified as Clint Fuquay?  
 24 A Correct.  
 25 Q Okay. With respect to that Castle Lane, from what

38

1 I'm understanding your testimony is, that's where your  
 2 mailbox is currently?  
 3 A Currently, yes.  
 4 Q Okay. That's your address?  
 5 A Yes.  
 6 Q That's where Schwann's or other delivery folks  
 7 deliver to?  
 8 A Currently.  
 9 Q Okay. Currently. As we sit here today. And if  
 10 you'd look at Exhibit 1, do you have that in front of you?  
 11 A This one?  
 12 Q Yes, yeah.  
 13 COURT: Oh, I've got it. It's this one here.  
 14 Yeah.  
 15 WITNESS: Okay.  
 16 BY MR. FARRIS:  
 17 Q You see where at the top of that it says "map  
 18 address" and it says 18907 Castle Lane?  
 19 A Correct.  
 20 Q That's your address?  
 21 A Correct.  
 22 Q So that's -- if you want to put in your address to  
 23 find your property, that's the address you put in, Castle  
 24 Lane?  
 25 A Correct.

39

1 Q And that would be the same if it's an emergency  
2 vehicle trying to find your residence, wouldn't it be?  
3 A Correct.  
4 Q Okay. Now, the other thing I want to make sure  
5 that I'm understanding is that you don't dispute there's  
6 been fences across this -- we'll call it King's Lane for  
7 now.  
8 A Okay.  
9 Q You don't dispute there's been fences across there?  
10 A No.  
11 Q It's been for four or five or more years?  
12 A Five -- yes.  
13 Q They have been there for cattle, to keep cattle  
14 inside that lane?  
15 A Correct.  
16 Q Okay. There's been a fence at each end.  
17 A Correct.  
18 Q Okay. There's new fences that have been  
19 constructed more recently, right?  
20 A Correct.  
21 Q And the way I understand your testimony there at  
22 the end of your discussion with Mr. Rainey is that you  
23 don't know whether those new fences are easier or more  
24 difficult to open at this point.  
25 A Correct. I've not been out there.

40

1 Q Okay. The other thing I wanted to make sure I  
2 understand is that for the Castle Lane, the first lane that  
3 we talked about coming up Oreana Loop to your property  
4 where your mailbox --  
5 A Okay.  
6 Q -- your address, deliveries come from, it's not  
7 uncommon for you to put gates across that lane?  
8 A Correct.  
9 Q And it's not uncommon for you to put a lock across  
10 that lane?  
11 A Correct.  
12 Q A locked gate?  
13 A Correct.  
14 Q Okay.  
15 MR. FARRIS: That's all I have, Your Honor.  
16 COURT: Thank you. Redirect.  
17 REDIRECT EXAMINATION  
18 QUESTIONS BY MR. CLEVERLEY:  
19 Q Mr. Fuquay, as Mr. Rainey said and as Mr. Farris  
20 said, as we sit here today, those things are the way that  
21 things are and I want to ask you did things recently change  
22 from the way that they are today?  
23 A Yes.  
24 Q So as they are today, the Schwann's guy delivery  
25 person comes up Castle Lane. Has he always come up Castle

41

1 Lane?  
2 MR. RAINEY: Objection, Your Honor. He's got an  
3 affidavit in there.  
4 COURT: I'll give it the weight that it takes. He  
5 can answer that.  
6 MR. CLEVERLEY: Your Honor, I'm going to object to  
7 him refering the affidavits.  
8 COURT: Just go ahead and ask your question.  
9 BY MR. CLEVERLEY:  
10 Q Does the Schwann's person, historically has he come  
11 up Castle Lane?  
12 A No.  
13 Q Where has he come?  
14 A Up what they're referring to as King Lane.  
15 Q And do you receive UPS packages?  
16 A Correct.  
17 Q Where does that delivery driver come today?  
18 A Today, I guess they would have to come up Castle  
19 Lane.  
20 Q Okay. A month ago, where did he come?  
21 A He would -- historically, he would come through  
22 King Lane.  
23 Q Okay. And for the 37 years before that?  
24 A King Lane.  
25 Q Same thing with the Schwann's delivery?

42

1 A Yes.  
2 Q Have you ever seen the Kings use Castle Lane to get  
3 to their property on a regular basis?  
4 A I've seen them come through there, yes.  
5 Q Okay. Is that frequent?  
6 A A few times a year maybe.  
7 Q Has anyone ever questioned your use of the gate  
8 across Castle Lane?  
9 A No.  
10 Q Have you ever seen cattle grazing free on the BLM  
11 property?  
12 A No, other than ours when they get out.  
13 Q Are you aware of any cattle that have gone from BLM  
14 or your property into what's the King Lane fenced area?  
15 A Just not -- just Kings' cattle. None come -- I've  
16 not seen any come -- outside cattle come in there, no.  
17 Q The only cattle that would have been in there would  
18 have been placed in there?  
19 A Probably, yes.  
20 MR. CLEVERLEY: I don't have any further questions  
21 for Mr. Fuquay.  
22 COURT: Thank you. Next witness.  
23 MR. CLEVERLEY: Clint Fuquay, please.  
24 WITNESS: Do I leave these here?  
25 COURT: Yes, leave those there.

43

(CLINT FUQUAY is sworn.)

DIRECT EXAMINATION

QUESTIONS BY MR. CLEVERLEY:

1 Q Mr. Fuquay, you are also one of the plaintiffs in  
2 this action?  
3 A Yes.  
4 Q Can you tell me where you live?  
5 A 18903 Castle Lane.  
6 Q And you purchased that property recently from your  
7 father?  
8 A Yes.  
9 Q Have you lived on that property for -- prior to  
10 your purchase?  
11 A Yes.  
12 Q For how long?  
13 A Eight years.  
14 Q And where did you live before that?  
15 A In his house.  
16 Q Okay. And so have you lived your entire life in  
17 that area?  
18 A Yes.  
19 Q And did you go to school?  
20 A Yes.  
21 Q Where did you go to catch the bus for school?  
22 A When we were little, we caught the bus on King Lane

44

1 down by the Loop Road.  
2 Q And you have a child?  
3 A I do.  
4 Q Okay. And how old is he?  
5 A Two.  
6 Q Okay. Does he -- let me back up. Is J.C. your  
7 brother?  
8 A Yes.  
9 Q And he has a child as well?  
10 A Yes.  
11 Q How old is that child?  
12 A Six.  
13 Q Six? And do either of those children go to school?  
14 A The six-year-old son does, yes.  
15 Q And do you know where he caught the bus?  
16 A He used to catch the bus on the top of the hill on  
17 Highway 78.  
18 Q Okay. And when was the bus -- if you know. If  
19 not, that's okay. Do you know when the change was made to  
20 pick him up at the Castle Lane and Oreana Loop Road?  
21 A I do know that he changed after the gates -- the  
22 new gates were put up a month ago.  
23 Q How long have you -- back up. Are you aware of any  
24 accidents or injuries to anyone that has occurred near your  
25 property?

45

1 A Yes.  
2 Q When was that?  
3 A June of 2013.  
4 Q Can you explain briefly what happened?  
5 A Gil's son Jeff wrecked his motorcycle and was  
6 knocked unconscious.  
7 Q If you take a look at Exhibit 3, can you give me an  
8 idea of where that was?  
9 A It would be right on the corner of my -- there's a  
10 little box there in the northwest corner and that's my  
11 house and it was just on the outside of my property line  
12 right there on BLM.  
13 Q Okay. Were you present when that accident  
14 happened?  
15 A Yes.  
16 Q Did you call for emergency services?  
17 A I did not, no.  
18 Q Okay. Were you there when they came?  
19 A Yes.  
20 Q Where did they come from?  
21 A Gil and Joe asked what my address was and I gave  
22 them my address and they came down what they're calling  
23 King Lane from Grand View.  
24 Q So it came from Grand View over Oreana Loop Road?  
25 A Yep.

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1 Q And then they would have turned onto the King  
2 Lane --  
3 A Yes.  
4 Q -- area? And then ended up at your house?  
5 A Yes.  
6 Q Okay. And do you recall how long that took for the  
7 emergency services to arrive?  
8 A Not from the phone call, I don't. I can't remember  
9 how long it took.  
10 Q From your understanding, would it take longer if  
11 they had to go all the way down to King -- to Castle Lane  
12 and then come back up?  
13 A I feel like it would take longer. Where that  
14 accident was, it would have taken longer to go around.  
15 Q Okay. Do you know about how much longer?  
16 A I don't.  
17 Q Do you know how long it takes for you to drive from  
18 the corner of Oreana Loop and King Lane around to your  
19 house?  
20 A I would say it's an extra five, ten minutes to come  
21 around.  
22 Q Okay. Where do you typically get to and from your  
23 house?  
24 A I usually went down King Lane -- what they're  
25 referring to as King Lane.

47

1 Q And how long have you used that as -- I mean is  
2 that your primary access?  
3 A Yes.  
4 Q And how long has that been your primary access?  
5 A Since I've lived there so for eight years, my wife  
6 and I have lived there.  
7 Q Does -- do the fences interfere with your mail  
8 delivery -- the gates on either side of what we're calling  
9 King Lane, do they interfere with your mail delivery?  
10 A I would say UPS, yes.  
11 Q Okay. And where is your mailbox currently?  
12 A My mailbox is the same as John's.  
13 Q Okay. And that's located at the corner of Oreana  
14 Loop and Castle Lane?  
15 A Yes.  
16 Q And since you've purchased that property, is there  
17 an intent of changing that mailbox?  
18 A Yes. I want to put -- my mailing address right now  
19 is 18907 and I plan to change it to 18903 to where the old  
20 mailbox is still existing.  
21 Q So you used to receive mail at King Lane and Oreana  
22 Loop Road?  
23 A Yes.  
24 Q And there's still a mailbox there?  
25 A Yes.

48

1 what time periods are you talking about?  
2 A I would say from the end of May to the first of  
3 October.  
4 Q Would you expect to see cattle penned in there  
5 during the times other than the summertime?  
6 MR. RAINEY: Object to that, Judge. That's  
7 speculation.  
8 WITNESS: No.  
9 COURT: I'll allow him to answer.  
10 WITNESS: No.  
11 BY MR. CLEVERLEY:  
12 Q All right. How cold does it get in this area?  
13 MR. FARRIS: Objection. Calls for --  
14 (Fire alarm. Recess taken.)  
15 MR. RAINEY: Judge, before we start, I have one  
16 witness that has been in here but because of the testimony  
17 we've just heard and I had not intended to call her but she  
18 is going to be a rebuttal witness. I can have her step out  
19 now.  
20 COURT: If you could. So we're back on the record.  
21 I get this all printed out as she's typing it and the last  
22 questions were how cold does it get in the area?  
23 MR. CLEVERLEY: I'm sorry, Judge. What was the  
24 last question?  
25 COURT: "How cold does it get in the area?" You

50

1 Q Do the -- have you seen the cattle grazing inside  
2 the boxed area of King Lane?  
3 A Yes.  
4 Q Would it be normal for that -- those cows to be in  
5 there year round?  
6 A No.  
7 Q How long in your experience have you seen cows  
8 within that boxed area?  
9 A They'd put them on and off there only in the  
10 summertime.  
11 Q And for how long at a time?  
12 A It varies. Like you said, it depends on how many  
13 he puts in there. Sometimes a week, sometimes a couple  
14 weeks.  
15 Q Okay. And when there's cows and cattle in there,  
16 are there other means of keeping those cattle in other than  
17 fences?  
18 A No.  
19 Q Okay. And when there are cattle in there, have you  
20 in the past opened and closed the gates?  
21 A Yes.  
22 Q What about in January? Would there be cattle in  
23 that road in January?  
24 A No.  
25 Q When you say that they're there during the summer,

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1 were talking about cattle and whether they're there in the  
2 summertime, in the wintertime and when the fence is there.  
3 That's kind of where we left off.  
4 BY MR. CLEVERLEY:  
5 Q All right. Mr. Fuquay, let me go back to the  
6 accident that we were talking about earlier and you recall  
7 telling us that that was a motorcycle accident in front of  
8 your house?  
9 A Yes.  
10 Q And that was -- who was the person involved in  
11 that?  
12 A Jeff King, Gil's son.  
13 Q Okay. Do you know where he lived at the time?  
14 A He lives down at Kings'. I think he has his own  
15 house there within the four homes that are there.  
16 Q Okay. Was that -- was that a serious accident?  
17 A Yes.  
18 Q How serious was it?  
19 A He was unconscious or in and out of consciousness.  
20 Q And emergency medical was called?  
21 A Yes.  
22 Q And an ambulance came?  
23 A Yes.  
24 Q And what did the ambulance do -- what did the EMS  
25 workers do from the ambulance?

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1 A They stabilized Jeff.  
 2 Q And did they transport him to the hospital?  
 3 A No.  
 4 Q Who did?  
 5 A Life Flight came.  
 6 Q And was that a helicopter?  
 7 A Yes.  
 8 Q Where did that land?  
 9 A Next to their hot pond on BLM next to my house.  
 10 Q And then they transported him to the hospital?  
 11 A Yes.  
 12 Q About how long was it from the time that the  
 13 ambulance arrived to the time that the helicopter arrived?  
 14 A I would say ten minutes.  
 15 Q If the ambulance would have gone all the way down  
 16 and around, based on your estimate of the time that that  
 17 takes, which would have occurred first, the ambulance  
 18 arriving or the helicopter arriving?  
 19 A I would say the helicopter.  
 20 Q And you indicated that you have small children?  
 21 A Yes.  
 22 Q How old are they?  
 23 A Two and three months.  
 24 Q Okay. Are you concerned about being able to call  
 25 and have emergency access for them if you need it?

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1 A Yes.  
 2 Q Up until the installation of the gates last month,  
 3 were you concerned about the time that it would take for  
 4 emergency service personnel to arrive if you called for  
 5 assistance?  
 6 A If the gates would have been closed, yes.  
 7 Q If the gates were open, that would be less time?  
 8 A Yes.  
 9 Q For as long as you can remember up until four or  
 10 five years ago, were there ever gates locking the road?  
 11 A No.  
 12 Q And from the time four or five years ago when you  
 13 started seeing gates, how long would it be for those gates  
 14 to be closed?  
 15 A They would keep them closed with cattle in there  
 16 for a day or three days.  
 17 Q And then what would happen with the gates?  
 18 A They would open them and take the cattle out. They  
 19 would leave them in for two or three days and then take  
 20 them out because the grass was ate.  
 21 Q They would do that a couple times a year?  
 22 A Yes.  
 23 Q So they weren't in there all the time?  
 24 A No.  
 25 MR. CLEVERLEY: I don't have any further questions

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1 at this point, Your Honor.  
 2 COURT: Thank you. Mr. Rainey.  
 3 MR. RAINEY: Thank you, Your Honor.  
 4 CROSS-EXAMINATION  
 5 QUESTIONS BY MR. RAINEY:  
 6 Q With regard to Jeff's accident, that actually  
 7 happened on BLM ground, did it not?  
 8 A Yes.  
 9 Q And actually his mother's the one that called the  
 10 emergency.  
 11 A Yes.  
 12 Q And she -- do you know whether or not she even knew  
 13 your address?  
 14 A I know she did.  
 15 Q How do you know that?  
 16 A She asked me what my address was.  
 17 Q And that's after she got the ambulance coming?  
 18 A Or before.  
 19 Q The whole point is that the Kings came first  
 20 through that lane and they opened the gates so the  
 21 ambulance would come through to their son, right?  
 22 A They weren't closed at that time. There was no  
 23 cattle there and they were not closed to my recollection.  
 24 Q Are you sure of that?  
 25 A Yes.

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1 Q If the Kings disagree, are they more accurate than  
 2 you?  
 3 A I wouldn't say they was.  
 4 Q Now, let's talk about this Castle Lane. You know  
 5 that -- excuse me. Let me back up. I'm sorry, Judge.  
 6 I'll strike that question and ask -- how old are you?  
 7 A Twenty-seven.  
 8 Q And you say you've lived on the property for eight  
 9 years?  
 10 A I've lived in that address 18903 for eight years  
 11 and the house I'm currently living in.  
 12 Q So you were 19 years old then?  
 13 A Yes.  
 14 Q And then where did you live before that?  
 15 A In the 18902 address.  
 16 Q Okay. And did you at any time live off the  
 17 property?  
 18 A Yes.  
 19 Q When was that?  
 20 A From when I was 12 to 18 -- or 13 to 18. I lived  
 21 on the other side of Oreana.  
 22 Q Okay. So from 12 to 18, you didn't even live on  
 23 that property.  
 24 A I stayed on the weekends.  
 25 Q My question is from 12 to 18, you didn't live on

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1 that property?  
 2 A Not permanently.  
 3 Q Okay. Then you moved back when you were 18 and  
 4 moved into the double-wide? Is that --  
 5 A No.  
 6 Q Where did you live?  
 7 A 18902 address. Then that's what is the rental  
 8 house.  
 9 Q You moved into the rental house first.  
 10 A Yes.  
 11 Q Okay. Now, Castle Lane has been there all your  
 12 lifetime; is that correct?  
 13 A Yes.  
 14 Q And it's an all-weather road, isn't it?  
 15 A What do you mean by all-weather?  
 16 Q You can get up and down any time of the year.  
 17 A Yes.  
 18 Q And it's wide enough for emergency vehicles to get  
 19 up and down?  
 20 A Yes.  
 21 Q It's wide enough for the Schwann man to get up and  
 22 down?  
 23 A Yes.  
 24 Q And the Fed Ex man to get up and down?  
 25 A Yes.

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1 Q And the UPS person can get up and down?  
 2 A Yes.  
 3 Q And the police cars have actually been up to your  
 4 property, haven't they?  
 5 A 18903?  
 6 Q Well, up in that area, the Fuquay property.  
 7 A Yes.  
 8 Q They came up Castle Lane.  
 9 A Not to my recollection. I've seen them use both  
 10 ways.  
 11 Q The police cars that come up Castle Lane.  
 12 A From Kings', I've seen them come that way and  
 13 Castle Lane.  
 14 Q Okay. You admit that they use Castle Lane?  
 15 A Yes.  
 16 Q Okay. So that road is good enough for emergency  
 17 vehicles?  
 18 A Yep.  
 19 Q Okay. So whether King's Lane is closed or not, you  
 20 still have a way to get in and out through Castle Lane,  
 21 correct?  
 22 A Yes, yes.  
 23 Q Okay. And so all of these things, the emergency  
 24 vehicles, the Schwann deliveries, the mail person -- excuse  
 25 me, the mail person delivers the mail down at the bottom of

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1 Castle Lane. Isn't that right?  
 2 A Yes.  
 3 Q And the bus driver is Denise Collett, isn't it?  
 4 A Yeah.  
 5 Q And Denise lives up on Collett Road.  
 6 A Yes.  
 7 Q She just comes down to Oreana, correct?  
 8 A To Oreana Loop Road you mean?  
 9 Q Oreana Loop.  
 10 A Yes.  
 11 Q Makes a left-hand turn and goes about 100 feet to  
 12 your bus stop?  
 13 A Yes.  
 14 Q Okay. And that's where your son gets on the bus --  
 15 A Not my son.  
 16 Q Your nephew then.  
 17 A Yes.  
 18 Q Okay. So the gate on King's Lane doesn't interfere  
 19 with your son getting on the bus stop at the stop where  
 20 Denise picks him up?  
 21 A It did. That's why my brother said that he changed  
 22 where he gets on the bus.  
 23 Q My question is where he gets on the bus right now  
 24 isn't interfered by King Lane, is that correct?  
 25 A No.

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1 Q And I suppose somebody has to drive the boy down to  
 2 the bus stop.  
 3 A Yes.  
 4 Q Is that your sister-in-law?  
 5 A We all have.  
 6 Q Okay. So you folks drive him down to the bus stop.  
 7 The bus comes and picks him up right on Oreana Loop.  
 8 A Yes.  
 9 Q So all of these emergency conveniences -- have you  
 10 seen your motions?  
 11 A No.  
 12 Q You're one of the plaintiffs. Has your attorney  
 13 given you any of these motions?  
 14 A Yes.  
 15 Q You've seen them all?  
 16 A I've seen them, yes.  
 17 Q You know the allegations in the motions?  
 18 A Yes.  
 19 Q That the gate interferes with access to emergency  
 20 vehicles. You've just told me they can come up and down  
 21 Castle Lane.  
 22 A Yes.  
 23 Q Right? So that isn't true, is it?  
 24 A No.  
 25 Q Okay. Also the Fed Ex, UPS and Schwann man is

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1 coming up and down Castle Lane, isn't that correct?  
 2 A They have, yes.  
 3 Q Okay. So the gate on King's Lane doesn't interfere  
 4 with those delivery people, does it?  
 5 A No.  
 6 Q And we talked about emergency vehicles. You agree  
 7 that they can come up and down Castle Lane?  
 8 A Yes.  
 9 Q And the gate on King's Lane does not interfere with  
 10 the emergency vehicle?  
 11 A Well, I would say it interferes.  
 12 Q Pardon me?  
 13 A I would say that it interferes.  
 14 Q How does it interfere with them coming up and down  
 15 Castle Lane?  
 16 A It don't, no, not down Castle Lane, no.  
 17 Q They can come up and down Castle Lane no problem.  
 18 A Yes.  
 19 Q Okay. So all the allegations you've set forth here  
 20 are untrue, aren't they?  
 21 A No.  
 22 Q That gate doesn't interfere with any of these  
 23 people using Castle Lane?  
 24 A It takes longer time and my recollection is Castle  
 25 Lane continues all the way down from Oreana Loop to Oreana

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1 Loop.  
 2 Q Why is it called -- why is the address at Kings'  
 3 called King's Lane?  
 4 A Because they put a sign up that says King Lane. I  
 5 remember a sign that said Castle Lane there at one time.  
 6 Q You folks have called it King Lane in your  
 7 pleadings, haven't you?  
 8 A I can't recall.  
 9 Q Do you want to see your motions?  
 10 A No.  
 11 Q How long does it take you to stop and open the  
 12 gates that the Kings are entitled to have on their lane?  
 13 MR. CLEVERLEY: Objection to the characterization.  
 14 MR. RAINEY: I'll rephrase it.  
 15 BY MR. RAINEY:  
 16 Q How long does it take you to stop and open the  
 17 gates on King Lane?  
 18 A I'd say five minutes per gate.  
 19 Q And there's three gates, aren't there?  
 20 A There was only two last time I saw. I haven't been  
 21 through there since.  
 22 Q There's still a wire gate half way down the lane,  
 23 isn't that right?  
 24 A I can't recall. I haven't been down there since  
 25 the new ones.

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1 Q Well, you're taking ten minutes to open gates?  
 2 A Yeah.  
 3 Q Okay. And that's opening and closing them?  
 4 A Yes.  
 5 Q So it's about the same time as coming up Castle  
 6 Lane any way you look at it?  
 7 A Yeah.  
 8 Q And you know the Kings are ranchers. They're  
 9 cattle ranchers, aren't they?  
 10 A Yes.  
 11 Q And they raise a lot of cattle.  
 12 A Yes.  
 13 Q And there's times of year that they have the cattle  
 14 on the mountain?  
 15 A Yes.  
 16 Q And then they bring them home for a period of time?  
 17 A Yes.  
 18 Q And when they bring them home, they have just about  
 19 every lot filled up, don't they?  
 20 A Sure.  
 21 Q They have a lot of cattle, don't they?  
 22 A Yes.  
 23 Q So you wouldn't dispute the fact that they use that  
 24 lane to sort and work their cattle either, would you?  
 25 A I haven't seen them sort and work there, no.

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1 Q Would you dispute the fact that they put them in  
 2 there to hold them for a period of time while they're  
 3 working cattle?  
 4 A They're in there. I haven't seen them work them or  
 5 nothing like that.  
 6 Q Okay. So when you use King's Lane, you got to  
 7 dodge cattle then.  
 8 A What's that?  
 9 Q You have to dodge around cattle.  
 10 A Yes.  
 11 Q So you open at least two gates and dodge the cattle  
 12 to use King Lane?  
 13 A Yes.  
 14 Q But on Castle Lane, you can drive straight up,  
 15 correct?  
 16 A Yes.  
 17 Q No interference at all on Castle Lane; is that  
 18 correct?  
 19 A Yes.  
 20 Q Not any cattle roaming around there that you have  
 21 to watch out and dodge?  
 22 A No.  
 23 Q That would be the same way with any of these  
 24 vehicles. Emergency vehicles, delivery people. They would  
 25 have to stop and open gates and dodge cattle, correct?

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1 A Sure.  
 2 Q Coming up Castle Lane, that's a straight shot  
 3 without stopping for anything, correct?  
 4 A Yes.  
 5 Q Now, when did you get your driver's license?  
 6 A When I was 15.  
 7 Q And so you say you're 27 now.  
 8 A Yes.  
 9 Q So that's twelve years ago?  
 10 A Yes.  
 11 Q And six of those twelve years you lived somewhere  
 12 else.  
 13 A Yes.  
 14 Q So you've only been on this property for six years.  
 15 A No. Eight. Since I was 19.  
 16 Q Can you give me the years when you were gone, from  
 17 when to when?  
 18 A I would say from 2001 to 2005.  
 19 Q Well, that's five years.  
 20 A Four. I don't remember when in 2001. Moved back  
 21 the summer of 2005.  
 22 Q When you got your driver's license, you were gone.  
 23 You didn't even live on that property.  
 24 A I stayed there on the weekends.  
 25 Q Other than weekends but you didn't live there on a

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1 day-to-day basis.  
 2 A Correct.  
 3 Q You were not watching the Kings' operation on a  
 4 day-to-day basis.  
 5 A Correct.  
 6 Q In fact, you've never watched Kings on a day-to-  
 7 day --  
 8 A Correct.  
 9 Q Is that right?  
 10 A Correct.  
 11 Q Just occasionally seeing what's going on, right?  
 12 A Correct.  
 13 Q So when you say that they've never had cattle in  
 14 there, you don't know, do you?  
 15 A What are you talking about?  
 16 Q Well, there's periods of times you said they never  
 17 had cattle and never locked gates. You don't know because  
 18 you're not there on a day-to-day basis, are you?  
 19 A I drive that road on a day-to-day basis but in that  
 20 time, I wasn't there on a day-to-day basis so at that time,  
 21 I can't say what they did on a day-to-day basis.  
 22 Q Okay. And is there any reason you don't go down --  
 23 when you're driving, you don't go down to Dreana through  
 24 Castle Lane?  
 25 A It's quicker to get where I'm going going that way.

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1 Q So it's just a matter of convenience for you --  
 2 A Yes.  
 3 Q -- to go through the Kings?  
 4 A Yes.  
 5 Q Only convenience. That's the only reason.  
 6 A It's quicker.  
 7 Q Could be?  
 8 A It's quicker.  
 9 Q It's quicker. Well, that's what I'm calling  
 10 convenience.  
 11 A It's easier, yes.  
 12 Q Okay. So you want to use King's Lane just because  
 13 it's convenient.  
 14 A Because that's what I've always used.  
 15 Q You don't claim any right to it, do you?  
 16 A What's that?  
 17 Q You don't claim any right to King's Lane, do you?  
 18 A I've been using it so I just always assumed that I  
 19 could.  
 20 Q Have you ever excluded the Kings from using that  
 21 lane?  
 22 A No.  
 23 Q Have you ever told them to get off?  
 24 A No.  
 25 Q Have you ever told them that they couldn't use it

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1 if you're using it?  
 2 A No.  
 3 Q So in a way, have you interfered with the Kings?  
 4 A No.  
 5 Q Have you given them any hassle about when you use  
 6 the lane?  
 7 A No.  
 8 Q Okay.  
 9 MR. FARRIS: Your Honor, I don't have anything to  
 10 add.  
 11 COURT: Okay. Thank you. Redirect.  
 12 REDIRECT EXAMINATION  
 13 QUESTIONS BY MR. CLEVERLEY:  
 14 Q You indicated that Castle Lane is what Mr. Rainey  
 15 calls an all-weather road?  
 16 A Yes.  
 17 Q Is that -- who maintains that road?  
 18 A We do.  
 19 Q Do you maintain King Lane?  
 20 A Yes.  
 21 Q How do you maintain it?  
 22 A We've bladed it with a road grader and a land  
 23 plane.  
 24 Q What else?  
 25 A We've -- a backhoe. Filled in potholes with a

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1 backhoe.  
 2 Q Do you put gravel on it?  
 3 A Yes.  
 4 Q Do you maintain it all the way to the entire length  
 5 of the loop?  
 6 A Yes.  
 7 Q Through the Kings' property as well?  
 8 A Yes.  
 9 Q Have you ever seen the Kings maintain that road?  
 10 A Yes.  
 11 Q And what have they done to maintain it?  
 12 A Gordon land planed it.  
 13 Q What does that mean?  
 14 A It's a leveler for a field behind a tractor. It  
 15 smoothed it.  
 16 Q And what else have you done to want to maintain  
 17 that road?  
 18 A That's it.  
 19 Q Does it take you longer to get where you need to go  
 20 now that you've been blocked from using King Lane?  
 21 A Yes.  
 22 Q Is that different than what it's been in the past?  
 23 A Yes.  
 24 Q Was that all since the gates were installed a month  
 25 ago?

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1 A Yes.  
 2 MR. CLEVERLEY: I don't have anything else.  
 3 COURT: Thank you.  
 4 MR. RAINEY: Your Honor, he brought up some new  
 5 stuff.  
 6 COURT: Pardon me?  
 7 MR. RAINEY: He brought up some things that I  
 8 didn't ask on cross-examination.  
 9 COURT: On the road maintenance?  
 10 MR. RAINEY: Yes.  
 11 COURT: Yeah, go ahead.  
 12 RE-CROSS-EXAMINATION  
 13 QUESTIONS BY MR. RAINEY:  
 14 Q When did you grade that road, Mr. --  
 15 A I didn't personally grade it. My brother J.C. did.  
 16 Q When did he do that?  
 17 A In the fall of 2013.  
 18 Q Just last winter?  
 19 A A year ago, yeah.  
 20 Q And when before that?  
 21 A Just periodically in the spring, we would -- we  
 22 would land plane it.  
 23 Q I'm having a hard time hearing you.  
 24 A Periodically every spring, we would try and blade  
 25 it, land plane it.

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1 Q And where were the Kings when you were doing all  
 2 that?  
 3 A I don't know.  
 4 Q Okay. You're telling Judge Nye that you and your  
 5 brother have done maintenance work on that road every year?  
 6 A Yes. I might have skipped a year once in a while  
 7 but just about every year, yes.  
 8 Q Where did you buy your gravel?  
 9 A From Ridley's but I never said I hauled gravel on  
 10 it.  
 11 Q Well, you were asked if you put gravel on it.  
 12 A My dad put gravel on it. He got it off the air  
 13 base.  
 14 Q When was that?  
 15 A I don't remember the year. Maybe 2012.  
 16 Q So you're saying the last three years, there's  
 17 been gravel put on by your father?  
 18 A A piece of it, yes.  
 19 Q That was in exchange for hay?  
 20 A I couldn't answer that. It was not me.  
 21 Q Okay. You don't know why your father put the  
 22 gravel on that?  
 23 A Yes.  
 24 Q Okay.  
 25 MR. RAINEY: That's all, Judge.

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1 COURT: Mr. Farris.  
 2 MR. FARRIS: I don't have any.  
 3 COURT: Any other questions for redirect based on  
 4 this narrow --  
 5 MR. CLEVERLEY: No, Your Honor.  
 6 COURT: Okay. Thank you. You may step down.  
 7 WITNESS: Thanks.  
 8 COURT: Go ahead.  
 9 MR. CLEVERLEY: Your Honor, we call J.C. Fuquay.  
 10 COURT: Go ahead and come forward and we'll swear  
 11 you in.  
 12 WITNESS: All righty.  
 13 (JOHN COLT FUQUAY is sworn.)  
 14 COURT: Kind of step behind this seat. It's  
 15 easier --  
 16 WITNESS: It's nailed down there?  
 17 COURT: Yeah, it is.  
 18 WITNESS: All right.  
 19 COURT: If you would start out and state your name  
 20 and spell your last name.  
 21 WITNESS: My full name is John Colt Fuquay,  
 22 F-u-q-u-a-y.  
 23 COURT: Go ahead.  
 24 DIRECT EXAMINATION  
 25 QUESTIONS BY MR. CLEVERLEY:

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1 Q Mr. Fuquay, do you go by J.C.?  
 2 A I do.  
 3 Q Do you mind if I call you that since we have a lot  
 4 of Fuquays?  
 5 A That's fine.  
 6 Q Where do you reside?  
 7 A 18902 Castle Lane.  
 8 Q And where is that in proximity to Clint Fuquay's  
 9 house?  
 10 A It is probably a quarter of a mile east of my  
 11 brother's house.  
 12 Q Is that on the property that Clint owns?  
 13 A Yes.  
 14 Q How long have you lived there?  
 15 A I've lived there since Clint owned it since June.  
 16 Prior to that, I've lived there almost eight years.  
 17 Q And prior to that, where did you live?  
 18 A I was in college in Twin Falls.  
 19 Q Okay. Did you grow up in that area?  
 20 A I grew up at the home place at my father's  
 21 residence, 18907 Castle Lane.  
 22 Q At John's house?  
 23 A Yes.  
 24 Q Until you were how old?  
 25 A I was -- I think I was 14 or 15 when they separated

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1 and we moved with my mother to across town.  
 2 Q Okay. During -- and did you regularly come back to  
 3 your father's house --  
 4 A Yes, I did.  
 5 Q -- after that?  
 6 A Yes, I did.  
 7 Q How often?  
 8 A Pretty regular. I would say three or four times a  
 9 week I mean up until I graduated high school and then after  
 10 that, you know, a few times a month probably. It just  
 11 varied.  
 12 Q Do you recall there ever being any gates across  
 13 what we're calling King Lane?  
 14 A No.  
 15 Q Do you recall when the first time you saw a gate  
 16 across King Lane was?  
 17 A It's been four or five years ago when they started  
 18 putting up the wire gates.  
 19 Q Okay. And did -- how did you get through those  
 20 gates?  
 21 A Same as any other gate. You pull up and get out  
 22 and open the gate and drag it across the road and pull  
 23 through and drag it back and hang it back up.  
 24 Q Were there cattle enclosed in the pens during that  
 25 time?

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1 A Yes. When the gates were closed, there were cattle  
 2 in the lane.  
 3 Q How often would they be closed or how long of a  
 4 time period?  
 5 A It varied from a week to ten days to a month. It  
 6 just varied on how many head of cattle they had in the  
 7 lane.  
 8 Q And were the cattle grazed in there?  
 9 A No, they weren't raised in there. They were put in  
 10 there to feed them there.  
 11 Q So they were grazing?  
 12 A They were grazing the grass, what grass was there.  
 13 Q And did you have any issues with opening and  
 14 closing the gates during that time?  
 15 A Not at first, no.  
 16 Q It became more problematic?  
 17 A As time went on, yes.  
 18 Q Okay. Why was that?  
 19 A It was just a hindrance mainly for my wife. I work  
 20 out of town quite a bit so I mean when I was there, it was  
 21 a hindrance to me also but to the wives and friends and  
 22 neighbors.  
 23 Q You have a son?  
 24 A Yes, I do.  
 25 Q And he lives with you in your house?

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1 A Yes, sir.  
 2 Q Does he go to school?  
 3 A He does.  
 4 Q Where does he go?  
 5 A He goes to Grand View Elementary in Grand View,  
 6 Idaho.  
 7 Q And when -- how does he get to school?  
 8 A He gets on the school bus.  
 9 Q Where does he get on the school bus?  
 10 A As of right now, he gets on on the north side of  
 11 dad's property at the end of Castle Lane. Prior to that,  
 12 it was the top of the hill -- what they call the top of the  
 13 hill, Oreana Loop Road and Highway 78 on the east side of  
 14 the Loop Road -- of that loop.  
 15 Q How would you get him there?  
 16 A Through my house east down King Lane I guess  
 17 they're calling it, around Kings' place, across the bridge  
 18 onto Loop Road and east on up to the top of the hill.  
 19 Q Why do you take him up there for the bus stop?  
 20 A A couple -- last year -- last year I think, they  
 21 had some cutbacks at school and they had to cut back on  
 22 some of the buses and they changed the routes around and  
 23 that was originally his designated bus stop.  
 24 Q Prior to that, where did the school bus typically  
 25 stop?

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1 A Prior to that -- well, last year, he was in pre K  
2 and that's where he got on the bus also.  
3 Q Okay.  
4 A Prior to that, I mean he didn't go to school so I  
5 mean that was -- when we started taking him to school is  
6 when --  
7 Q When did he start -- did he change locations of  
8 where the bus is picking him up now?  
9 A We have, yes.  
10 Q When did that occur?  
11 A That happened about three weeks ago, maybe four.  
12 I'm not 100 percent sure. When the gates went up -- the  
13 permanent gates went up, my wife contacted the bus driver  
14 and asked to pick him up over there until this matter was  
15 resolved.  
16 Q Okay. Did you have any conversations with anyone  
17 while those gates were going up?  
18 A I did.  
19 Q What was -- what was the conversation you had with  
20 who?  
21 A I had a conversation with Gil when they were  
22 building the permanent gate on the east side of the bridge  
23 of their property there.  
24 Q What was that conversation that you had?  
25 A He just told me that he didn't have a problem with

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1 me and Clint. It was with my father and that we'd been  
2 pretty good to get along with but he wasn't and that we  
3 were going to open and close gates and the first time that  
4 the gates weren't closed, he was going to lock them.  
5 Q And until there had been these gates installed, had  
6 you ever had to worry about locked gates?  
7 A No.  
8 Q Have you ever maintained what we call King Lane?  
9 A Yes.  
10 Q What have you done to that?  
11 A We've hauled gravel -- a load of gravel once  
12 between the bridge and the Oreana Loop Road. And then I  
13 believe it was two years ago, I got a grader -- a motor  
14 roto grader and graded the road from the west side of the  
15 bridge which goes into Kings' yard. There's a little Y  
16 there and I graded that road all the way to my dad's  
17 property. Rebuilt -- regraded the road.  
18 Q Have you generally been the ones to maintain the  
19 road?  
20 A Yeah. I mean we all do but I mean -- I mean yeah.  
21 From -- we've been the one to maintain the road from my  
22 house basically to my father's plus theirs also.  
23 Q Have you seen any obstacles placed in the  
24 roadway --  
25 A Yes.

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1 Q -- recently? What have you seen?  
2 A There's a concrete block right next to the bridge  
3 where the gravel and the bridge meet right there. They put  
4 a concrete block there.  
5 Q Does that interfere with your ability to access  
6 over the road?  
7 A Yes.  
8 Q How does that interfere with that?  
9 A It makes it extremely hard to get around that block  
10 with a trailer of -- even a gooseneck horse trailer up to a  
11 semi trailer.  
12 Q When was that block placed there?  
13 MR. RAJNEY: Judge, we're way beyond the --  
14 COURT: Is this on King Lane?  
15 BY MR. CLEVERLEY:  
16 Q This is on King Lane?  
17 A This the right next to their property -- right next  
18 to the bridge, yes.  
19 COURT: On the disputed road?  
20 WITNESS: On the disputed road, yes.  
21 COURT: I'll let him answer that.  
22 BY MR. CLEVERLEY:  
23 Q When was that placed there?  
24 A I want to say six months ago. I'm not 100 percent.  
25 Somewhere in that vicinity.

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1 Q Okay. Has it been consistently there since then?  
2 A Yes.  
3 Q Does it interfere with your ability to make it up  
4 and down the road?  
5 A Yes.  
6 Q You have one child who's six?  
7 A I have one child six and one that's about to turn  
8 three.  
9 Q Okay. And if you had any emergency medical -- let  
10 me ask, do they have any emergency medical issues?  
11 A My son is allergic to bees and, you know,  
12 penicillin, things like that but in our part of the world  
13 there, it's bees and he's deathly allergic to them.  
14 Q Okay. Have you had conversations with a physician  
15 about the impact of him getting stung by a bee?  
16 MR. FARRIS: Objection. Calls for hearsay, calls  
17 for opinion testimony. Calls for all kinds of stuff.  
18 MR. CLEVERLEY: I asked whether he had any  
19 conversations. That's all.  
20 COURT: Okay. That's a yes or no question.  
21 WITNESS: Yes.  
22 BY MR. CLEVERLEY:  
23 Q Are you aware if -- what would happen to your son  
24 if he were to get stung by a bee?  
25 MR. FARRIS: Objection. Calls for the same thing.

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1 Q They can get up Castle Lane, correct?  
2 A They can.  
3 Q And there's no obstructions going up Castle Lane at  
4 all?  
5 A It depends on the year.  
6 Q Well, what happens in an off year then?  
7 A Well, there's the ditch that can wash out.  
8 Q Who's locking you out?  
9 A I said there's a ditch that can wash out.  
0 Q Okay. And --  
11 A And that's -- that's the only one I can think of at  
2 the moment.  
3 Q When was the last time the ditch washed out?  
14 A Two years ago I want to say and we replaced the  
5 culvert.  
6 Q Okay. You got the culvert all replaced?  
17 A Uh-huh.  
8 Q And so it's a fine road now?  
9 A Uh-huh.  
20 Q Is that a yes?  
1 A Yes.  
22 Q Okay. So again, the emergency vehicles can go  
23 right up Castle Lane without any obstructions, correct?  
4 A Yes.  
25 Q And these delivery people can go up Castle Lane

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1 without any obstructions, correct?  
2 A Yes.  
3 Q And the mail person that delivers your mail right  
4 down at the bottom of Castle Lane and Oreana Loop.  
5 A Yes.  
6 Q So you have to go down the lane to get your mail.  
7 A Yes.  
8 Q And you do that at least once a day?  
9 A Can I say one thing?  
10 Q No.  
11 COURT: Wait until he asks you a question.  
2 WITNESS: Okay. All right.  
13 COURT: Your attorney can follow up.  
14 WITNESS: All right.  
5 BY MR. RAINEY:  
16 Q All these services are available through Castle  
17 Lane; is that correct?  
8 A Yes, yes.  
19 Q And one more time, there's not one obstruction  
0 other than maybe a ditch washing out once in a while or a  
1 culvert?  
22 A Uh-huh.  
3 Q And that only washes out when you don't clean out  
4 the debris, right?  
25 A Or if the creek is flooding and we can't control

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1 the water.  
2 Q Okay. And that's happened once since --  
3 A It's happened numerous times over the years.  
4 Q Do you know that this lane from the bottom of your  
5 house around the corner from your house to Oreana is Kings'  
6 private property?  
7 A No, I wasn't aware of that. It's always been an  
8 open lane since I've been around.  
9 Q You didn't know that Kings owned that property?  
10 A I knew that they owned the property on the north  
11 side of that lane.  
12 Q You didn't know that they owned the lane?  
13 A No. I did not. I always assumed it was an  
14 easement or private road -- or an access point to our  
15 property. It's never been disputed up until now.  
16 Q Well, have you ever interfered with the Kings' use  
17 of that land?  
18 A No, I have not.  
19 Q Have you ever told them to get out? It's your  
20 lane. You're going to use it?  
21 A No, sir, I have not.  
22 Q Have you ever done anything that interrupted their  
23 use? And they being Kings. Have you ever done anything to  
24 interrupt the Kings' use of that lane?  
25 A No, sir, I have not.

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1 Q Do you know if anyone in your family has ever  
2 interrupted the Kings' use of that lane?  
3 A Not to my recollection, no.  
4 Q And so bottom line is nobody from your family, as  
5 far as you know, have ever hindered or interfered with the  
6 Kings' use of that lane we're -- in the pleadings, it's  
7 called King's Lane. Do I need to rephrase that again?  
8 A Yeah, go ahead. Yeah.  
9 Q Can you recall anybody in your family, you, your  
10 brother, father, that's interfered with Kings' use of that  
11 lane called Kings' Lane?  
12 A Between my house and their houses?  
13 Q Yes.  
14 A No.  
15 Q So -- and you don't know who pays the taxes on that  
16 lane I take it?  
17 A No, I do not.  
18 Q You don't?  
19 A No, sir.  
20 Q Now, the gates you're talking about, have you ever  
21 looked at those gates?  
22 A Which gates?  
23 Q The new gates.  
24 A Not up close, no.  
25 Q Have you ever opened the new gates?

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1 A I have not. I have not been through there since  
2 the new gates went up.  
3 Q So you're getting by going down to Castle Road  
4 then?  
5 A Forced to go around, yes.  
6 Q Well, my question was you're getting by going  
7 straight down Castle Road to Oreana Loop.  
8 A Yes.  
9 Q That is the adequate way, is that correct?  
10 A That's not the adequate way. That's the way that  
11 we are forced to go at this point in time.  
12 Q Now, why do you use this King Lane? Is it just for  
13 convenience?  
14 A We've always used it.  
15 Q Is that just a matter of convenience?  
16 A It is a matter of convenience and it is the  
17 shortest way to my -- to where I reside, where I live from  
18 Grand View which is 85 percent of where I do my business is  
19 in that area.  
20 Q Okay. So it's just closer and more convenient to  
21 go down and use the Kings' property?  
22 A It is.  
23 Q And that's the only reason you're using it?  
24 A No.  
25 Q Why?

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1 A That's the way we've always gone since I can  
2 remember.  
3 Q But again --  
4 A I've lived there for eight years and I've had no  
5 disputes up until recently about going that direction.  
6 Q So eight years ago would have been about --  
7 A When I got married -- when I was married and  
8 moved -- officially moved into the house that I live in.  
9 Q You got married in 2007, didn't you?  
10 A Yes.  
11 Q So from 2007 till now, you're saying you use King  
12 Lane?  
13 A Yes.  
14 Q And then before that, you were gone with your  
15 brother and mother somewhere else?  
16 A Yeah. Well, I moved -- when I was 15, as I said  
17 earlier, I moved from my father's house to where my mother  
18 resides now. And then after that, after I graduated high  
19 school, I moved to Grand View and then I went to -- I lived  
20 and worked in Grand View and went to college in Twin Falls  
21 and then in 2007, I guess you'd say, is when I moved back.  
22 Q Okay. So this continuous use has only been since  
23 2007.  
24 A My continuous use, yeah.  
25 Q Yeah. Okay. I guess I'm curious. Why haven't you

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1 gone up and looked at the gates?  
2 A Because I've been waiting till this matter's  
3 resolved.  
4 Q Okay. So until this matter's resolved, you're  
5 content to go down Castle Lane?  
6 A I'm not content but I'm doing it.  
7 Q Okay. It doesn't hurt you, does it?  
8 A Yeah, it does. It costs more fuel and it's a  
9 hindrance.  
10 Q To go that extra mile down Castle Lane rather  
11 than --  
12 A It's not an extra mile, sir.  
13 Q The length of Castle Lane is only a mile and three  
14 quarters.  
15 A You're referring to just the lane. I'm referring  
16 to the Loop Road as well all the way around.  
17 Q No, I'm talking about from your house down to  
18 Oreana Road -- Oreana Loop Road.  
19 A Okay. That's a mile, yes.  
20 Q That's about a mile.  
21 A Yes.  
22 Q And it's three quarters of a mile to go down  
23 through the Kings' property, isn't it?  
24 A No, it is -- I thought it was a mile -- three  
25 quarters of a mile from my house to the Loop Road. To go

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1 around through my father's property, it's more than that.  
2 Q You said it was a mile.  
3 A No, sir, I'm sorry. I was wrong. It is not. It  
4 is -- from my house, it is more like two miles from my  
5 house to Loop Road going through my father's property.  
6 Q So you objected to driving that extra mile?  
7 A Yeah. In this day -- this day and age, fuel is  
8 expensive, sir.  
9 Q Does it cause you any hurt -- physical hurt?  
10 A No, it does not cause any physical hurt.  
11 Q Just the inconvenience that I asked before.  
12 A Yep.  
13 Q This block by the bridge --  
14 A Yes.  
15 Q -- was there to keep the trucks from running --  
16 breaking the bridge down? Isn't that why it's there?  
17 A Nobody ever said one way or the other to us.  
18 Q You started driving trucks up and down that lane,  
19 haven't you?  
20 A We've always drove trucks up and down that lane.  
21 Q I mean these cattle trucks.  
22 A Yeah.  
23 Q And that's just been in the last five years, hasn't  
24 it?  
25 A Yeah.

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1 Q So in the last five years, you and your brother  
 2 have started driving cattle trucks up and down King Lane.  
 3 A Yes.  
 4 Q And those cattle trucks are breaking in the bridge,  
 5 aren't they?  
 6 A No worse than theirs are, sir.  
 7 Q Are your cattle trucks adding to the breakdown of  
 8 that bridge?  
 9 A They are not helping it if that's how you want to  
 0 put it.  
 11 Q That's why you have a block there to keep you from  
 2 running across the corner of the bridge. Isn't that right?  
 3 A Those are your words.  
 4 Q Well, isn't that correct?  
 5 A They put that there to keep us from taking cattle  
 6 trailers across that way.  
 7 Q Okay. But you've only been doing this cattle  
 8 trucking --  
 9 A There have been trucks in and out of that lane all  
 20 along, sir.  
 1 Q You've only been doing it for the last five years.  
 22 A Yes.  
 23 Q Your brother's only been doing it for less than  
 4 five years.  
 25 A Yes.

1 Q So since '06 is when you -- at least '06 and past  
 2 is when you started using the big trucks?  
 3 A Yeah. Of my own, yeah.  
 4 Q And you would agree that those big trucks are hard  
 5 on the road and hard on the bridge?  
 6 A They are extra weight than a typical vehicle, yes,  
 7 but we also help to maintain the road.  
 8 Q My question is are those big trucks hard on the  
 9 bridge and hard on the road?  
 10 A They're hard on everything, yes.  
 11 Q Okay. And that's an increase in use that you've  
 2 been doing just in the last six years, five years?  
 13 A I wasn't aware that the bridge was under question.  
 14 I thought it was the lane.  
 5 Q But you've just increased your use by driving the  
 16 big trucks there?  
 17 A Yeah, I did.  
 8 Q Your brother did too?  
 19 A That is how I make my living.  
 0 Q And your brother also?  
 1 A And that's how he makes his living.  
 22 Q And you and your brother could go up and down  
 3 Castle Creek -- Castle Lane with your big trucks?  
 4 A We could.  
 25 Q And there's nothing -- no obstructions that would

1 obstruct a big truck to go up and down Castle Lane?  
 2 A No.  
 3 Q And again, it's just convenience. Just shorter to  
 4 drive down the Kings' property than go down Castle Lane?  
 5 A That's the way we've always gone.  
 6 Q Is it shorter?  
 7 A It's shorter.  
 8 Q And that's why you use it?  
 9 A Yes.  
 10 Q Okay. And you're well aware that the 911 vehicles,  
 11 sheriff's office and such, have been up Castle Lane?  
 12 They've been called to your --  
 13 A They have been called to the property, yes.  
 14 Q And so they've made it up and down Castle Lane  
 15 without any trouble?  
 16 A The ones that I know of have come up King Lane.  
 17 Q You're not aware of the ones that came to your  
 18 brother's or father's place up through Castle Lane?  
 19 A I wasn't there for all of them.  
 20 Q And again, Kings' property being a cattle ranch,  
 21 they have cattle everywhere, correct, all through the  
 22 pastures and the corrals?  
 23 A Who's this?  
 24 Q Kings.  
 25 A Yes.

1 Q And you have to dodge around cattle coming up King  
 2 Lane?  
 3 A If there's cattle in the lane, yep.  
 4 Q And you have to open the gates?  
 5 A Yep.  
 6 Q Something you don't have to do on Castle Road?  
 7 A No. That is BLM.  
 8 Q You're not dodging cattle on the BLM ground?  
 9 A Not as of yet, no.  
 10 Q And that road's been in there for what? As far as  
 11 you know -- you're 31?  
 12 A I'm 30.  
 13 Q Thirty, okay. So as far as you know, it's been  
 14 there 30 years?  
 15 A Yes.  
 16 Q Now, describe the school bus. Denise Collett is  
 17 the school bus driver.  
 18 A Yes.  
 19 Q And Collett Road is just -- comes into Oreana Loop,  
 20 what, 200 feet past your mailbox?  
 21 A Yes.  
 22 Q And Denise comes down Collett Road where she lives.  
 23 A Yep.  
 24 Q Turns left on Oreana Road.  
 25 A Yes.

1 Q Stops at the mailbox and picks up your boy.  
 2 A Yes.  
 3 Q So --  
 4 A As of now, yes.  
 5 Q So right now, the bus stop is convenient for  
 6 everybody, isn't it?  
 7 A It's convenient for Denise, yes.  
 8 Q And you don't have to drive clear to the top of the  
 9 hill.  
 10 A No.  
 11 Q Because there is no bus stop at King Lane. You  
 12 know that, don't you?  
 13 A I do.  
 14 MR. RAINEY: That's all I have.  
 15 COURT: Mr. Farris.  
 16 MR. FARRIS: Thank you, Your Honor. Just a few  
 17 follow-up questions and maybe sum things up.  
 18 CROSS-EXAMINATION  
 19 QUESTIONS BY MR. FARRIS:  
 20 Q So the way I'm understanding things is what we've  
 21 been talking about is Castle Lane. You know, when I refer  
 22 to Castle Lane, I'm talking about from Dreana Loop through  
 23 John Fuquay's property and up to your residence.  
 24 A Yes.  
 25 Q That's what we've been talking about as Castle Lane

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1 today?  
 2 A Yeah.  
 3 Q From what I'm understanding is Castle Lane is an  
 4 adequate road to provide emergency services? Is that  
 5 right?  
 6 A It could be.  
 7 Q It does. It has in the past.  
 8 A It has, yeah.  
 9 Q It provides deliveries whether it's Schwann's or  
 10 UPS or anyone else?  
 11 A As of a month ago, yes.  
 12 Q It has in the past even before then also?  
 13 A The majority that I can recollect, a majority of  
 14 the UPS, Schwann's man and any other services have come in  
 15 through King Lane to my property, to my brother's -- to my  
 16 house, to my residence, to my brother's house and then to  
 17 my father's house.  
 18 Q Don't they when they get your address, they look up  
 19 your address and it's Castle Lane, isn't it?  
 20 A Yes.  
 21 Q How do they know to even come down what you've  
 22 called King's Lane anyways?  
 23 A Because they've done that for years, sir.  
 24 Q The point is, at least currently, there's nothing  
 25 that restricts that access.

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1 A As of right now, no.  
 2 Q And your mail comes there at the end of Castle Lane  
 3 there at Dreana Loop, right?  
 4 A Yes.  
 5 Q And the way I'm understanding the bus stop is that  
 6 you've changed --  
 7 A We changed it, yes.  
 8 Q Okay. And they agreed. The bus driver agreed.  
 9 A The bus driver did agree, yes.  
 10 Q So it hasn't been an issue.  
 11 A No.  
 12 Q And the only issue is that it is an extra mile  
 13 drive for you?  
 14 A Yeah.  
 15 Q Okay. The blocks that you were talking about. Is  
 16 it block or blocks?  
 17 A It is one block.  
 18 Q One block, okay. You're saying that's been there  
 19 six months ago.  
 20 A I can't for sure tell you. It's been -- it's  
 21 been -- yeah, six months or maybe more. I'm not 100  
 22 percent.  
 23 Q It's not anything that's new?  
 24 A Not as of recently, no.  
 25 Q So that is not something -- you didn't file a

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1 lawsuit six months ago to address it.  
 2 A No, we just worked around it.  
 3 Q So it's not an issue and hasn't been an issue --  
 4 A We just worked around it.  
 5 Q -- for six months?  
 6 A We just worked around it.  
 7 Q Will you let me finish my questions?  
 8 A Yeah.  
 9 Q It hasn't been an issue for the last six months,  
 10 has it?  
 11 A It has but privately.  
 12 Q Not anything that warranted you having to bring a  
 13 legal action?  
 14 A No.  
 15 Q You mentioned that your son is allergic to bees.  
 16 A Yes.  
 17 Q And obviously anybody would want emergency services  
 18 as quick as possible.  
 19 A Sure, sure.  
 20 Q Right? Okay. If an emergency service were to come  
 21 down what we've been talking about as King's Lane, wouldn't  
 22 they have to stop at gates and open those gates?  
 23 A As of right now, yes.  
 24 Q For the last four or five years, you've said that  
 25 there have been gates.

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1 A They were not steadily opened -- or closed.  
2 Q You've said there have been gates for the last four  
3 or five years.  
4 A There have been gates, yes, when there was cattle  
5 present.  
6 Q Okay. So depending on the day, an emergency  
7 service would have to stop at possibly two gates?  
8 A Possibly.  
9 Q Dodge cattle.  
0 A Possibly.  
11 Q Make sure those gates are closed before cattle get  
12 back out.  
13 A Possibly.  
14 Q Okay. How long would that take?  
15 A Well, it would take an extra -- I would say it  
16 would take an extra five minutes.  
17 Q That's been the situation for the last four to five  
18 years, hasn't it?  
19 A Yeah.  
20 Q That's your testimony.  
1 A Yes.  
22 MR. FARRIS: I think that's all I have.  
23 COURT: Thank you. Redirect.  
4 REDIRECT EXAMINATION  
25 QUESTIONS BY MR. CLEVERLEY:  
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1 Q J.C., did you ever drive trucks up and down King  
2 Lane with your father?  
3 A I did.  
4 Q Prior to when you started driving trucks?  
5 A I did.  
6 Q To the best of your knowledge, how long have trucks  
7 been driven up and down that road into King Lane?  
8 A All of my life.  
9 Q What type of trucks?  
10 A Semi trucks, tractor trailer trucks, dump trucks,  
11 ten-wheelers, single -- single-wheeled trucks, two-ton  
12 trucks to commercial vehicle trucks.  
13 Q Your using trucks of your own is not a new use?  
14 A No.  
15 MR. CLEVERLEY: I don't have anything further.  
16 COURT: Thank you.  
17 MR. RAINEY: Judge, may I inquire on that last one.  
18 COURT: Very briefly.  
19 MR. RAINEY: Real quickly.  
0 RECROSS-EXAMINATION  
1 QUESTIONS BY MR. RAINEY:  
22 Q Now you and your brother are both driving trucks up  
3 and down this King's Lane.  
4 A Yes.  
25 Q Before, it was just your dad?  
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1 A It was.  
2 Q Okay. So you've increased the use by at least two  
3 different drivers by two different trucks?  
4 A Yes, yes.  
5 Q That's been in the last five years?  
6 A Yes.  
7 MR. RAINEY: That's all.  
8 COURT: Any questions, Mr. Farris, based on that?  
9 MR. FARRIS: No, Your Honor.  
10 COURT: Mr. Cleverley, any questions?  
11 MR. CLEVERLEY: Nothing else, Your Honor.  
12 COURT: Thank you.  
13 MR. CLEVERLEY: And Your Honor, I have I believe  
14 just one quick witness. Raymond Jayo.  
15 COURT: All right. Sir, come on up. We'll swear  
16 you in and then you can take a seat here.  
17 (RAYMOND JAYO is sworn.)  
18 COURT: Step around that chair and start out by  
19 stating your name and spelling your last name.  
20 WITNESS: Raymond Jayo, J-a-y-o.  
21 COURT: Okay. Proceed.  
22 DIRECT EXAMINATION  
23 QUESTIONS BY MR. CLEVERLEY:  
24 Q Mr. Jayo, where do you live?  
25 A At the current time, I live at John Fuquay's in my  
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1 camp trailer.  
2 Q Okay. And how long have you lived there?  
3 A Since May.  
4 Q Of --  
5 A Off and on. I work out of town too.  
6 Q Since May of this year?  
7 A Yeah.  
8 Q Did you live -- where have you lived before then?  
9 A Oreana all my life. Fifty-eight years.  
10 Q And have you known Mr. John Fuquay for a long time?  
11 A Ever since he moved to Oreana.  
12 Q Are you familiar with where his house is?  
13 A Yes, sir.  
14 Q Have you been there on numerous occasions?  
15 A Yes, sir.  
16 Q Okay. And you're familiar with what we're calling  
17 King Lane, the road between Oreana Loop Road and Clint  
18 Fuquay's house?  
19 A Yes, sir.  
20 Q And did you have an occasion recently to see gates  
21 being installed?  
22 A Yes. I come home I think around the 13th of last  
23 month. I come around Oreana into John's house. The next  
24 morning, I went out Castle Lane and realized the gate was  
25 there and when I shut the gate, I see a no trespassing  
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1 \*sign. Then I went on out and talked to Gil on the backhoe  
 2 down there.  
 3 Q Okay. And what did he tell you?  
 4 A I told him, "I guess I was trespassing," and he  
 5 said, "Yeah, I guess you were," and he said he didn't think  
 6 it would be any problem as long as I kept the gates shut.  
 7 I just told him all right and then Rose come out and asked  
 8 me when I come back to go around so then I told her I  
 9 would. That's where I've been going ever since.  
 10 Q She asked you not to go through the gates?  
 11 A Yeah. Asked me to go around the other way when I  
 12 come back from Grand View.  
 13 Q Now you've gone all the way back around to get back  
 14 to your place?  
 15 A Camp trailer, yeah.  
 16 Q In the 58 years that you've been in Oreana, have  
 17 you seen gates on this road before?  
 18 A Just recently. The barbed wire gates. I don't  
 19 know how many years ago when I first went up that lane,  
 20 there was no gates. Where Rose and Gil live, at that time,  
 21 they run milk cows up there. Just turned them out. There  
 22 was no gates. Cows come home at night. They'd milk them.  
 23 Q The installation of the gates that are there now  
 24 are just new within the last six weeks or so?  
 25 A Yes, sir.

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1 MR. CLEVERLEY: I don't have any further questions,  
 2 Your Honor.  
 3 COURT: Cross.  
 4 CROSS-EXAMINATION  
 5 QUESTIONS BY MR. RAINEY:  
 6 Q Mr. Jayo, are you telling us that you've been up  
 7 and down the King's Lane --  
 8 A What's that?  
 9 Q You've been up and down the King's Lane for 58  
 10 years?  
 11 A Yes, sir. First time I was 8 years old when I went  
 12 with my dad. Went to where Kings live then and Rollins  
 13 Farmin (phonetic) lived there and then we went to where  
 14 John Fuquay lves and talked to Kirby Foreman and then we  
 15 went out across the desert back to Oreana.  
 16 Q The truth is when the Kings moved onto that  
 17 property, that lane was nothing but a marsh -- a big mud  
 18 hole. Isn't that correct?  
 19 A The first time I went there, yeah.  
 20 Q And pretty messy?  
 21 A It was pretty messy.  
 22 Q And it was messy for at least 10 to 15 years while  
 23 they fixed it up. Isn't that right?  
 24 A Yes, yes.  
 25 Q And the Kings are the one that put all the gravel

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1 in there and fixed it up.  
 2 A I have no idea who put it there.  
 3 Q Okay. But at least it got fixed up?  
 4 A It got fixed up. It's a lot better passing the  
 5 road now.  
 6 Q Yeah, so now it's usable.  
 7 A Yeah.  
 8 Q And how long have -- did you pause and talk to the  
 9 Kings as you were driving through?  
 10 A Yes, I wave at them. I've known Kings ever since  
 11 they come here and the Lows. I've been neighbors. I got  
 12 caught in the crossfire here is what happened.  
 13 Q Well, what I'm getting at is you're well aware that  
 14 the Kings use that road to access their fields.  
 15 A Yes.  
 16 Q That's their main road in the whole farm, isn't it?  
 17 A Yes.  
 18 Q To get to the back area. That's their main  
 19 driveway to get to the area --  
 20 A Their farm ground, yes.  
 21 Q -- to the west side of the farm.  
 22 A Yeah.  
 23 Q And that's fairly obvious to anybody driving down  
 24 that lane because they've got gates along there, isn't that  
 25 right?

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1 A Yeah. Lows got gates along their fence line too.  
 2 That fence line's been there for as long as I can remember  
 3 on both sides.  
 4 Q Mr. Low has gates on his side of it?  
 5 A Correct.  
 6 Q That's how both of them access their property.  
 7 A Yes.  
 8 Q Now, to your knowledge, the Kings are the only ones  
 9 that put cattle in there?  
 10 A What's that?  
 11 Q Kings are the only ones that put cattle in this  
 12 lane?  
 13 A As far as I know, yeah.  
 14 Q How often have you been up and down there in the  
 15 last six years?  
 16 A Oh, I couldn't really tell you.  
 17 Q When did you move in with John Fuquay?  
 18 A May.  
 19 Q Of this year, 2014?  
 20 A Yeah. Pulled my camp trailer over there and put it  
 21 under a shade tree and whatnot and in the area, that's  
 22 where I stay.  
 23 Q And you're having no trouble driving from Mr. John  
 24 Fuquay's house down to Oreana Loop Road, are you?  
 25 A No. Not no more.

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1 Q Pardon me?  
2 A Not no more. After Rose asked me to go around, I  
3 started going around.  
4 Q Okay. And that's what I'm getting at. You're able  
5 to go down from John Fuquay's house to Oreana Loop Road and  
6 there's no obstructions, right?  
7 A No. I got to go around that way because she asked  
8 me not to come down that lane no more.  
9 Q You're missing my point. Is there any obstructions  
0 on Castle Lane Road?  
11 A If I'm going to Grand View to see all my relatives,  
2 it's easier to go down that lane to go to Grand View but I  
3 go around now. It's four miles.  
14 Q So you go down to Oreana Road and hit the gravel --  
5 or paved road.  
6 A Yes.  
17 Q And then you go on up the highway.  
8 A Yep.  
19 Q And so you're saying it's just more convenient to  
20 use the Kings' place?  
1 A Yeah. It has been for all my life but now it's  
22 not.  
23 Q But again, it's just a matter of convenience.  
4 There's nothing --  
25 A Yeah.

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1 Q No urgency that requires you to go through Kings'.  
2 A No. Not right at this point unless I have a heart  
3 attack or something.  
4 Q Well, the whole point is that there's nothing wrong  
5 with Castle Lane Road.  
6 A No.  
7 Q Perfectly drivable for motor vehicles, cars.  
8 A Yeah, you just got to go slow.  
9 Q Trucks.  
10 A You got to go slow.  
11 Q Well, you go slow on King's Lane too, don't you?  
2 A Yes, I do.  
13 Q You have to open gates on King's Lane, don't you?  
4 A Now we do.  
5 Q Well, there were wire gates before.  
16 A Yeah, I never did go through there when those wire  
7 gates were closed though. They didn't have cattle in there  
8 when I went through there.  
19 Q The times you've been through in the past, there  
0 were no cattle in there.  
1 A That's correct.  
22 Q Okay. And you know that BLM ground west of  
3 the Kings'?  
4 A Yeah, BLM ground clear to Oreana.  
25 Q You know that ranchers, property owners have to

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1 fence cattle out in open range?  
2 A Correct.  
3 Q And that is open range out there, isn't it?  
4 A Yep.  
5 Q And so to keep the cattle from the BLM property  
6 from trespassing onto the Kings', they have to have a fence  
7 or a gate, right?  
8 A Yep. Yes, sir.  
9 Q Okay. Did you stop and look at the gate, the new  
10 one?  
11 A Yes. I went through it.  
12 Q And it opens with a plunger, doesn't it?  
13 A Yeah.  
14 Q It's just got a hole in one post and a plunger?  
15 A Yep.  
16 Q And you just pull --  
17 A Spring-loaded.  
18 Q And then a spring pushes it back in?  
19 A Yep.  
20 Q The old gates, the wire gates, you had to lift a  
21 wire up over the post?  
22 A Correct.  
23 Q And you had to push the post up close enough to get  
24 that done.  
25 A Yep.

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1 Q So actually, the new gates are a lot more  
2 convenient, aren't they?  
3 A Yes, they are.  
4 Q And they swing open?  
5 A Yes.  
6 Q So like -- okay. Bottom line is the Kings have  
7 made an improvement on the road with easy-open gates.  
8 Right?  
9 A Yes, they're easily opened.  
10 MR. RAINEY: Nothing further.  
11 COURT: Redirect -- or Mr. Farris. I'm sorry.  
12 MR. FARRIS: I don't have anything, Your Honor.  
13 COURT: Redirect.  
14 MR. CLEVERLEY: I have nothing else, Your Honor.  
15 COURT: Okay. You can step down. Thanks. Can  
16 this witness be excused?  
17 MR. CLEVERLEY: He may.  
18 COURT: You can be excused, sir.  
19 MR. CLEVERLEY: Your Honor, I don't have any  
20 additional witnesses to call.  
21 COURT: Mr. Rainey, how many witnesses do you have?  
22 MR. RAINEY: Well, we've got five.  
23 COURT: You're going to wrap it up by 5:00.  
24 MR. RAINEY: Unlikely, Your Honor. I'd like to  
25 make a motion right now.

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1 COURT: Go ahead.  
2 MR. RAINEY: I understand that the plaintiffs have  
3 closed their case and rested. At this point, we would make  
4 a motion to dismiss their motion or quash their motion to  
5 grant a preliminary injunction.

6 The temporary restraining order actually expires on  
7 its own terms tomorrow. I guess I'd be asking that the  
8 temporary restraining order be dissolved today, that the  
9 Court dismiss the motion to grant a preliminary injunction  
10 at this point.

11 This temporary order, Your Honor -- and I can well  
12 see when you read these affidavits, it sounds horrible. We  
13 can't get emergency vehicles. We can't get mail. We can't  
14 get the deliveries. We can't get the child to the school  
15 bus. When you read their affidavits and their brief that  
16 even the attorney put together, it makes it sound like  
17 they're landlocked and the only way they can get out is  
18 through King's Lane.

19 They didn't tell you, Judge, that they had an all-  
20 weather road that went straight down to this Oreana paved  
21 road. There is absolutely no necessity shown and they  
22 certainly haven't proved any necessity today.

23 Now, they use the language like "immediate need of  
24 access. The gates interfere with normal deliveries."  
25 Well, all deliveries can come right up Castle Lane. They

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1 admitted that. There's nothing that blocks the deliveries  
2 from coming up Castle Lane.

3 The ability of the children to go to the school bus  
4 stop. The bus stop is right down at the bottom of their  
5 property. It's just 100 feet from where -- 200 maybe from  
6 where the school bus driver makes the curve onto the paved  
7 road so it's convenient for everybody. There's no  
8 emergency there picking the child up at the mailbox. The  
9 mailbox is down at the bottom of the hill. They admit they  
10 have to go down the hill to get to the mail so there's no  
11 emergency there.

12 And then these emergency services, police, fire,  
13 ambulances, everybody that they testified, all the Fuquays  
14 and their family and even Mr. Jayo admitted that Castle  
15 Lane is a good all-weather road that doesn't obstruct  
16 anybody. Their only reason they want to go through Kings'  
17 they say is it's more convenient and it saves them maybe  
18 five or ten minutes.

19 The Kings are ranchers, Your Honor. They run a lot  
20 of cattle. They will tell you how many cattle they run and  
21 they need every inch of that ground when they bring those  
22 cattle out of the hill. They have those fence gate --  
23 excuse me. They have that lane gated. It used to be wire  
24 fences. Now, Gilbert King has installed these swinging  
25 gates that have a plunger. The plunger goes into a hole in

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1 the post and all you have to do is pull the plunger back,  
2 open the gate. When you close it, you release the plunger  
3 and it goes back into the hole.

4 There's no question because John Fuquay told the  
5 deputy sheriff he was not going to lock -- to close the  
6 gates. There's no question about it. Gilbert locked the  
7 gates. Right now, they're not locked but the landowners as  
8 a matter of law have a right to use their easements or use  
9 their entire land.

10 There's the testimony that they've never interfered  
11 with the Kings' use so the issue of whether or not there's  
12 this immediate emergency that they allege in their  
13 affidavits over and over again just doesn't exist and we've  
14 proved -- and the Court has read by now the affidavits of  
15 the Schwann man. He has no problem coming up Castle Lane.  
16 In fact, would do it until John started locking his gate  
17 but get back here. Again, in the affidavit --

18 MR. CLEVERLEY: Your Honor, I'm going to object to  
19 reference to any affidavit. We have live testimony.

20 COURT: This is just argument. Go ahead. I'll  
21 note the objection. Go ahead.

22 MR. RAINEY: Okay. Well, what I'm getting at, Your  
23 Honor, their allegations to you to get the temporary order  
24 were horrible. You know, they're blocking the roadway.  
25 They had immediate threat to health and safety of the

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1 plaintiffs. It blocks emergency vehicles. Delaying and  
2 giving notice to the defendants. It blocks their access to  
3 all these services. None of that's true, Judge.

4 We've proven through the affidavits and we've  
5 proven actually through their own testimony. These  
6 Fuquays, they have more than an adequate access to their  
7 own property. There's not one reason to grant this  
8 preliminary injunction. They could use the Castle Lane  
9 like they've been doing and at the end of the day when we  
10 have the trial, you will decide whether or not they end up  
11 with an easement.

12 But until that time, this is the Kings' property.  
13 They're entitled to gate it as a matter of law. These  
14 people have other access. There's absolutely no emergency.  
15 No reason for preliminary injunction and I'm sure if you  
16 had all the facts on the September 4 or 5 when the  
17 restraining order was issued, you would probably would not  
18 have issued a restraining order knowing all the facts that  
19 you do now.

20 So I'm asking this Court, Your Honor, to dismiss  
21 the motion to grant a preliminary injunction. Dissolve the  
22 temporary restraining order and let's have the trial on  
23 this easement. Let's get to the full facts.

24 We have -- this case has just barely begun. Our  
25 time for appearance just barely expired. We both -- Mr.

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1 Farris and I have both filed Answers but we're just 20 days  
2 into this. We've got a lot of discovery. This will  
3 probably be a summary judgment case but at this point, Your  
4 Honor, there is absolutely no reason to grant a preliminary  
5 injunction.

6 COURT: Thank you. Mr. Farris, anything you'd like  
7 to add?

8 MR. FARRIS: Yeah, just a few things. I'd join in  
9 his motion. I think we could spend the next half hour  
10 listening to more testimony from the Kings and others  
11 testifying about the use of the road or the lack of the use  
12 of the road but what is very clear from the witnesses that  
13 we've heard today is there is no irreparable -- immediate  
14 or irreparable injury which is the threshold requirement in  
15 order to issue a preliminary injunction.

16 It's an extraordinary relief to even grant a  
17 preliminary injunction and the threshold requirement --  
18 we've gotten off track on a lot of things today.  
19 Maintenance of the road, whether it was maintenance,  
20 whatnot. But when you got down to it, the bottom line on  
21 do they have access from a well-maintained road, Castle  
22 Lane, that connects to Oreana, yep, they do. They have it  
23 for emergency services. That's where their addresses are.  
24 That's where their mailboxes are. That's where Schwann's  
25 can deliver. That's where UPS can deliver. That's where

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1 they've moved their bus location for the bus stop also for  
2 the boy to be picked up and that's actually more convenient  
3 for the bus driver who has agreed to do it.

4 So there's been no showing of irreparable immediate  
5 injury here and the status quo is there's gates across  
6 there. They've all testified there's been gates there for  
7 at least the last four to five years.

8 Now, whether or not -- whether or not that will be  
9 relevant when we get to the ultimate issue on whether or  
10 not there's a prescriptive easement, for purposes of today  
11 and whether or not we grant an injunction, a preliminary  
12 injunction, the testimony from them is the status quo is  
13 there's been -- there's been gates across these -- across  
14 this King's Lane, multiple gates. You have to stop and  
15 open them. There's cattle in the lane. You got to dodge  
16 the cattle, et cetera, et cetera.

17 There is no immediate or irreparable injury being  
18 shown and there's no basis for a preliminary injunction.  
19 So you know, I think putting on this additional testimony  
20 and whatnot, based on their own testimony that there is no  
21 such irreparable injury, that they can access it from  
22 Castle Lane and J.C. testifying that that has an extra mile  
23 inconvenience is not sufficient in this case or any other  
24 case to warrant granting the exceptional remedy of a  
25 preliminary injunction. So I join in Mr. Rainey's motion.

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1 COURT: Thank you. Mr. Cleverley.

2 MR. CLEVERLEY: Your Honor, I think what the Court  
3 has heard is that there is other access from Castle Lane.  
4 I don't think there's ever been a dispute. It doesn't  
5 matter. It's not relevant. The issue is has there been a  
6 change in the status quo by the defendants where they put  
7 up gates to block access to a roadway that was otherwise  
8 used by the plaintiffs.

9 Part of that reason is that the Supreme Court's  
10 addressed this particular issue in Walker versus Boozer,  
11 140 Idaho 451. It's a 2004 case. The Supreme Court said  
12 that this is an issue of discretion for the trial court,  
13 the issuance of this injunction is, and that it is needed  
14 because the continual -- in this case, the continuance or  
15 allowing the Boozers' barriers to stay in place would  
16 reduce waste. The waste envisioned by the district court  
17 was that which might result to the Quaker Haven owners  
18 because the barriers restricted the Quaker Haven owners'  
19 reasonable access to their property. Therefore the  
20 district court did not error by granting the preliminary  
21 injunction because the Boozers have not shown an abuse of  
22 discretion.

23 This Court has the discretion to enter this  
24 preliminary injunction. All we've asked for is the status  
25 quo to be maintained. Obviously there's a dispute as to

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1 this easement but the problem is that you now have the  
2 defendants who have installed these permanent gates who  
3 have now told the Fuquays not to go across the gates.  
4 Emergency services can't go in. They have to -- or are  
5 expected to go around. All of the delivery service people  
6 are now expected to go around. That's not the status quo.

7 By denying the preliminary injunction, the Court  
8 would be granting the relief to the defendants and allowing  
9 them to block the lane. That's not the way that this has  
10 ever been. It's not the way that it's been even accepting  
11 that there have been occasional gates there that were there  
12 for days at a time when they would have cattle in there but  
13 there was never any indication that there was ever any  
14 prohibition of access.

15 The testimony was that the Kings and Mrs. King in  
16 particular is now denying access and told Mr. Jayo not to  
17 go through there. That's an absolute denial of his right  
18 of access.

19 So what we're asking for is the Court to simply  
20 issue the injunction prohibiting them from closing and  
21 locking the gates and prohibiting the Kings from denying  
22 the Fuquays from having access to the property that they've  
23 always had. This isn't something that's new that we're  
24 asking for. We're asking the Court to simply allow what  
25 has always been to continue to be during the pendency of

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1 this trial.  
2 If at the end of the trial the Court decides that  
3 there's no prescriptive easement and that it's reasonable  
4 for the Kings to put gates at both ends and lock them and  
5 prohibit the Fuquays from using the road, that's a trial  
6 issue. But for today, all we're asking is the status quo.  
7 We're not asking for any relief other than to prevent the  
8 denial of access that's always been there. That's an issue  
9 of discretion.

10 There's nothing wrong with the Court issuing an  
11 order that says you leave your gates open. You can't lock  
12 the people -- the Fuquays out from accessing their house.  
13 At least for the status quo until we get done with trial,  
14 that's the way that it ought to be.

15 This wasn't an issue until four weeks ago when they  
16 put the gates up. They're the ones that have created the  
17 issue. Just allow the Fuquays the reasonable unrestricted  
18 access that they've had and then we'll deal with all of the  
19 issues when we get to trial. But at least for now, until  
20 we get to trial, they ought to have the exact same rights  
21 that they had before those gates were put up.

22 COURT: Thank you. I've reviewed the rule. The  
23 rule says -- this is Rule 65. "Preliminary injunction may  
24 be granted for the following cases when it appears by the  
25 Complaint that the plaintiff is entitled to relief

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1 demanded." Part 2 says, "When it appears by the Complaint  
2 or Affidavit that the commission or continuance of some act  
3 during litigation would produce waste or great irreparable  
4 harm to the plaintiff." And it appears -- part 3, "When it  
5 appears during litigation that the defendant is doing or  
6 threatens to do something that's in violation of the  
7 plaintiffs' rights respecting the action." And 4, it talks  
8 about disposing of property. It doesn't apply.

9 In this case, we will set this case for a trial and  
10 later next week, I'll send out a scheduling order asking  
11 the parties to give me their available dates. I'm not  
12 going to rule on the merits of the case at all today.  
13 Today, the only thing is what are we going to do about the  
14 road pending the trial and how -- and who's going to use  
15 the road.

16 It's a discretionary call, particularly when I read  
17 part 2 about whether there's acts that are likely to  
18 produce great or irreparable harm. I don't see that here  
19 at all, with this caveat. I'll grant a preliminary  
20 injunction that prohibits the defendants from keeping  
21 emergency vehicles -- if the police, fire or ambulance come  
22 up and want to open a gate, open the gate. Otherwise, it's  
23 closed to the public.

24 No one -- this is just for now. We'll have a  
25 litigation to determine whether there's a prescriptive

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1 easement and if there is a prescriptive easement, then  
2 that's all undone. If there isn't a prescriptive easement,  
3 we'll cover it there.

4 But for now, just for now, I'm granting a  
5 preliminary injunction that prohibits defendants from  
6 blocking police -- emergency vehicle access. Police, fire,  
7 ambulance. And they will make the call whether they want  
8 to use the road. If the police show up and say, "Open the  
9 gate. We need to get through," open the gate or the fire  
10 or the -- if his child gets bit by a bee and goes into  
11 anaphylactic shock, you're going to let them go down the  
12 road that way too but it has to be an objective emergency.

13 Otherwise it's closed to the public. You're going  
14 to have to make the long route around until we style this  
15 case for trial and have a hearing. Until then, you got to  
16 make the long route. So Mr. Rainey and Mr. Farris, can you  
17 draft that?

18 MR. FARRIS: One of us will.

19 MR. CLEVERLEY: Your Honor, is the Court denying  
20 the Fuquays any access?

21 COURT: Yes. Unless it's an emergency and an  
22 objective emergency and I'm going to allow emergency  
23 vehicles, police, ambulance, fire. They come up -- and  
24 it's up to them whether they want to use it. If they think  
25 it's faster to go the other way, then that's it. But if

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1 they knock on the Kings' door and say, "Open the gate. We  
2 need through," you open the gate.

3 So would you guys consider mediation at all on this  
4 case? I've handled these kind of cases. There's usually  
5 something else underlying these cases. Judge Dunn I think  
6 will be in town in -- he does it for free. Anyway, I'm not  
7 going to force you into it. If you think you can mediate  
8 it, fine. If not --

9 MR. RAINEY: Okay.

10 COURT: I'm just throwing that out there. You guys  
11 consider it. I'll send out a scheduling -- a request for  
12 unavailable dates next week so that we can get this styled  
13 for a trial.

14 CLERK: He's here the 28th for mediation so I don't  
15 know if he'll be --

16 COURT: He's here the end of October. Just keep  
17 that in mind. Let me know. And Mr. Cleverley, Judge  
18 Dunn's a judge from Pocatello, other end of the state. He  
19 comes here about twice a year and mediates ten cases. Two  
20 every day for five days and he does a good job but some  
21 cases can't be mediated. If this is one that can, then --

22 MR. FARRIS: Your Honor, could I ask a question for  
23 clarification?

24 COURT: Sure.

25 MR. FARRIS: There was a temporary restraining

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1 order. That obviously would be quashed, dismissed,  
2 whatever you want to call it.  
3 COURT: Yes. It's modified to a preliminary  
4 injunction to allow -- to prohibit them from -- prohibiting  
5 you guys from blocking emergency vehicles.  
6 MR. FARRIS: Yeah. The temporary restraining order  
7 goes away.  
8 COURT: Yes.  
9 MR. FARRIS: The bond that has been posted, the  
0 thousand dollars, is that going to remain while this --  
11 COURT: Yes.  
12 MR. FARRIS: Okay. Okay.  
13 COURT: Anything else?  
14 MR. CLEVERLEY: Who would you like to prepare the  
15 order?  
16 COURT: Well, who wants to?  
17 MR. FARRIS: One of us will.  
18 COURT: Let's let the defendants do it. Anything  
19 else on this case?  
20 MR. RAINEY: We have nothing further.  
21 COURT: All right. We'll be in recess. Like I  
22 said, I'll got a request for scheduling dates out probably  
23 next week.  
24 On the pretrials, Mr. Cleverley, I'll probably have  
25 you appear telephonically but it wouldn't have worked

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1 today. This is being recorded in Owyhee County.  
2 MR. CLEVERLEY: I would have been here today  
3 anyway. For the TRO, I would have been telephonic.  
4 COURT: The pretrial status conference, we might be  
5 able to have you appear telephonically.  
6 MR. CLEVERLEY: Thank you. Your Honor, can I  
7 request that -- although I think we're off the record, a  
8 quick trial date, are we looking at something -- do we  
9 know?  
10 COURT: It would be a court trial I'm presuming and  
11 I don't know if we could get it set by the end of the year  
12 or not. Maybe.  
13 MR. FARRIS: Your Honor --  
14 COURT: It would be done in Murphy.  
15 MR. FARRIS: -- I filed the counterclaim but did  
16 request a jury trial related to damages.  
17 COURT: Okay.  
18 MR. FARRIS: So something to keep in mind.  
19 COURT: So that puts it off till next year.  
20 MR. CLEVERLEY: Did we bifurcate --  
21 COURT: You're asking me a lot of questions I'm not  
22 prepared to answer right now.

3 (Proceedings concluded at 4:36 p.m.)  
4  
5

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**FILED**

A.M. 11:12 P.M.

DEC 17 2014

ANGELA BARKELL, CLERK  
  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

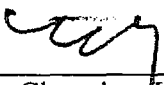
Defendants.

Case No. CV-14-0278

WITHDRAWAL OF MOTION FOR  
SUMMARY JUDGMENT AGAINST  
LOWS

Plaintiffs withdraw their Motion for Summary Judgment against Lows and request that the hearing set for December 23, 2014 be stricken. The parties also request that the court set a status conference with the parties to discuss scheduling issues.

Dated: December 15, 2014

  
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Withdrawal of Motion - 1

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**CERTIFICATE OF SERVICE**

On the date given below I caused to be served the foregoing document on the following individuals in the manner indicated:

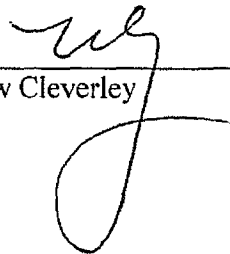
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<input type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

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<input type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
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Dated: December 15, 2014

  
\_\_\_\_\_  
Matthew Cleverley

**FILED**

         A.M. 12:10 P.M.

JAN 29 2015

ANGELA BARKELL CLERK  
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Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )  
Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING;) )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )  
Defendants. )

GILBERT KING, as Trustee, and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )  
Counterclaimants, )

CASE NO. CV 2014-0278

**AFFIDAVIT OF GILBERT KING IN  
SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR  
SUMMARY JUDGMENT**

**AFFIDAVIT OF GILBERT KING IN SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 1**

vs. )  
 )  
 )  
JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY )  
 )  
Counterdefendants. )  
\_\_\_\_\_ )

STATE OF IDAHO )  
 ) ss.  
County of Canyon )

GILBERT KING, being first duly sworn, upon oath deposes and says:

1. I am a party in the above-captioned action, over the age of majority, competent to testify, and I make this affidavit upon personal knowledge.
2. I have previously submitted affidavits in this action in opposition to the Fuquay Plaintiffs' request for a preliminary injunction (9/9/14).
3. It was not until sometime in 2011 that the Fuquay Plaintiffs began any use of King Lane by large semi-trucks.
4. This use appeared to be unrelated to uses occurring on the Fuquay property itself, but instead seemed to be for general commercial trucking purposes unrelated to the property itself.
5. On or about 12-15-13 (date) I had a large cement block placed at or near the location of a bridge over Cattle Crk. (state location) in any attempt eliminate this use of King Lane by the Fuquays which was contributing to damage to this bridge.
6. On or about 8-22-14 (date) I had two former wire gates on King Lane replaced with metal swing gates, so as to be able to better control entry onto and through King Lane.

**AFFIDAVIT OF GILBERT KING IN SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 2**

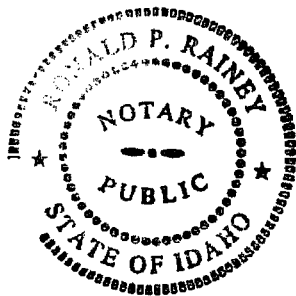
Further affiant sayeth not.

Gilbert King  
Gilbert King

SUBSCRIBED AND SWORN to before me this 27 day of January, 2015.

Ronald P. Rainey

Notary Public for Idaho  
Residing at Caldwell, Idaho  
My Commission expires: 2/12/2015



CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this \_\_\_\_ day of January, 2015, a true and correct copy of the foregoing document was served upon the following:

Matthew R. Cleverley	[ ]	U.S. Mail, postage prepaid
Fidelity National Law GROUP	[ ]	Hand Delivered
1200 6th Avenue, Suite 620	[ ]	Overnight Mail
Seattle, Washington 98101	[ ]	Facsimile Transmission
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*Attorney for Low Defendants*

\_\_\_\_\_  
Ronald P. Rainey



**FILED**

A.M. 12:10 P.M.

JAN 29 2015

ANGELA BARKELL, CLERK

Deputy Clerk

RONALD P. RAINEY – ISB # 1022  
Attorneys at Law  
110 North Ninth Avenue  
Post Office Box 26  
Caldwell, Idaho 83606-0026  
Telephone: (208) 459-3659  
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Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

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JOHN E. FUQUAY; CLINTON WARD )  
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ROSE M. KING; FIRST AMERICAN )  
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 )  
Defendants. )

\_\_\_\_\_) )  
GILBERT KING, as Trustee, and )  
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HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )  
 )  
Counterclaimants, )

CASE NO. CV 2014-0278

**AFFIDAVIT OF ROSE KING IN  
SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR  
SUMMARY JUDGMENT**

**AFFIDAVIT OF ROSE KING IN SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 1**

vs. )  
 )  
 )  
 JOHN E. FUQUAY; CLINTON WARD )  
 FUQUAY and HAILEY ROSE FUQUAY )  
 )  
 Counterdefendants. )  
 )

STATE OF IDAHO )  
 ) ss.  
 County of Canyon )

ROSE KING, being first duly sworn, upon oath deposes and says:

1. I am a party in the above-captioned action, over the age of majority, competent to testify, and I make this affidavit upon personal knowledge.

2. I have previously submitted affidavits in this action in opposition to the Fuquay Plaintiffs' request for a preliminary injunction (9/9/14), and in response and objection to the Fuquay Plaintiffs request for summary judgment against the Low Defendants (12/9/14), each of those affidavits is incorporated by reference herein.

3. I have reviewed the Declaration of John Fuquay, as filed with this Court on October 29, 2014, and submitted in support of the Fuquay Plaintiffs' motion for summary judgment against the Low Defendants, and the claims for prescriptive easement made in that declaration concerning the Fuquay Plaintiffs use of the roadway that has been identified in this action as "King Lane."

4. As made and declared within the Declaration of John Fuquay, it appears that the Fuquay Plaintiffs are asserting a prescriptive easement claim to the use of King Lane for the period beginning January 1, 1977 to the present.

5. As declared in my affidavit submitted in opposition to the Fuquay Plaintiffs' motion

***AFFIDAVIT OF ROSE KING IN SUPPORT OF THE DEFENDANT  
 HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 2***

for summary judgment against the Low Defendants, the King Defendants have owned the property alleged to be burdened by the alleged prescriptive easement claimed by the Fuquay Plaintiffs since 1973, except for a four year period between 1982 and 1986.

6. At all times prior to 2014 the Fuquay Plaintiffs' any use of King Lane, whether by regular passenger vehicles of the Fuquays and their guests, the infrequent use of semi-trucks in the course of the Fuquays' farm and ranch operations, other farm and ranch vehicle use, or simple pedestrian use, has been in common with, and without interference to or disruption of, the Kings' own use of that roadway, or without damage to that roadway or its bridges. As also stated in my earlier affidavit, the heavy truck traffic conducted by the Fuquay Plaintiffs on King Lane did not commence until about 2011, and until the spring of 2014 I had never seen the Fuquays operate farm equipment on King Lane.

7. At no time prior to about 2011 did any of the Fuquay Plaintiffs ever overly assert or claim any right or use in respect to King Lane in derogation to the rights of the Kings, or that was in any way exclusive or proprietary, such that it was adverse to the rights of the Kings in that roadway.

8. At no time prior to 2011 did any of the Fuquay Plaintiffs ever perform any act or make any declaration that would constitute a clear, open, and notorious assertion of a claim to an adverse and prescriptive right claim to the use of King Lane.

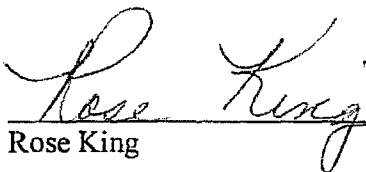
9. It was only about in 2011 that the Fuquays did suddenly, and without explanation, attempt to drive large semi-trucks for commercial purposes which increased use began to damage a bridge at the east side of King Lane. It was at this time that a cement block placed at that location

which prevented further use of those trucks, and it was also at this time that the former wire gates were replaced with metal swing gates.

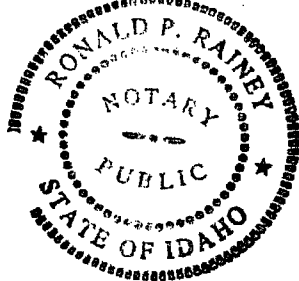
10. As stated in my earlier affidavit, at no time prior to about 1988-89 could any large trucks use King Lane because the condition of the road and the welded-barrel culvert simple was not allow that use.

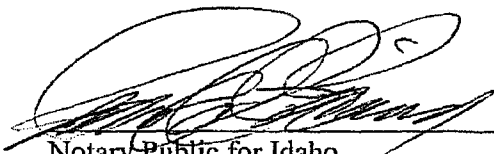
11. Because any claim by the Fuquay Plaintiffs to a prescriptive easement based upon uses that commenced after 2006 would be subject to the 20 year statutory period for such easements, those uses could not ripen into an actual prescriptive easement claim at any time before 2026.

Further affiant sayeth not.

  
Rose King

SUBSCRIBED AND SWORN to before me this 29 day of January, 2015.



  
Notary Public for Idaho  
Residing at Caldwell, Idaho  
My Commission expires: 12/12/2018

**AFFIDAVIT OF ROSE KING IN SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT - PAGE 4**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 29 day of January, 2015, a true and correct copy of the foregoing document was served upon the following:

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1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
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Facsimile: 877-655-5281  
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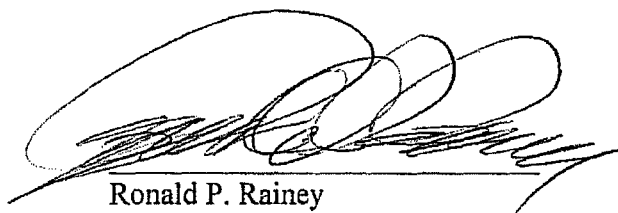
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 Other \_\_\_\_\_

*Attorney for Plaintiffs*

S. Bryce Farris  
Sawtooth Law Offices, PLLC  
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Boise, Idaho 83707  
Telephone: 208-629-7447  
Facsimile: 208-629-7559  
Email: [bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)

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*Attorney for Low Defendants*

  
Ronald P. Rainey

**FILED**

A.M. 12:10 P.M.

JAN 29 2015

ANGELA BARKELL, CLERK

Deputy Clerk

RONALD P. RAINEY – ISB # 1022  
Attorneys at Law  
110 North Ninth Avenue  
Post Office Box 26  
Caldwell, Idaho 83606-0026  
Telephone: (208) 459-3659  
Facsimile: (208) 459-9067 or 459-6147

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
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JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

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DECEMBER 28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY )

Counterdefendants. )

CASE NO. CV 2014-0278

**AFFIDAVIT OF RONALD P. RAINEY**

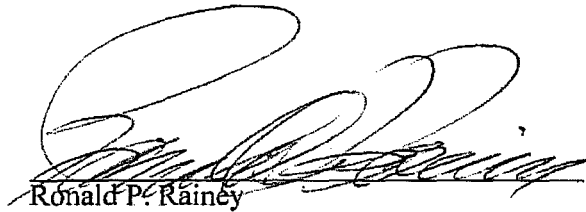
STATE OF IDAHO )  
 ) ss.  
County of Canyon )

RONALD P. RAINEY, being first duly sworn, upon oath deposes and says:

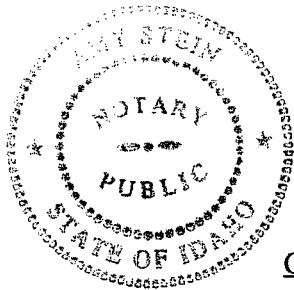
1. I am counsel for the Defendant and Counterclaimant, Heart K. Ranch Trust, in the above-captioned action, am over the age of majority, competent to testify, and I make this affidavit upon personal knowledge.

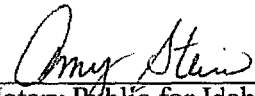
2. Attached as **Exhibit A** to this Affidavit is a copy of the cited testimony of J.C. Fuquay, John E. Fuquay and Clinton Ward Fuquay as given in open court on September 18, 2014 during the preliminary injunction hearing.

Further affiant sayeth not.

  
Ronald P. Rainey

SUBSCRIBED AND SWORN to before me this 29th day of January, 2015.



  
Notary Public for Idaho  
Residing at Caldwell, Idaho  
My Commission expires: 07-09-19

CERTIFICATE OF SERVICE

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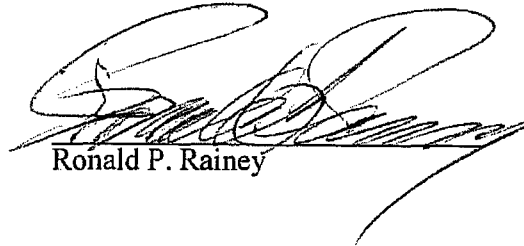
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*Attorney for Low Defendants*



Ronald P. Rainey



1 Q They can get up Castle Lane, correct?  
2 A They can.  
3 Q And there's no obstructions going up Castle Lane at  
4 3:17  
5 A It depends on the year.  
6 Q Well, what happens in an off year then?  
7 A Well, there's the ditch that can wash out.  
8 Q Who's locking you out?  
9 A I said there's a ditch that can wash out.  
10 Q Okay. And --  
11 A And that's -- that's the only one I can think of at  
12 the moment.  
13 Q When was the last time the ditch washed out?  
14 A Two years ago I want to say and we replaced the  
15 culvert.  
16 Q Okay. You got the culvert all replaced?  
17 A Uh-huh.  
18 Q And so it's a fine road now?  
19 A Uh-huh.  
20 Q Is that a yes?  
21 A Yes.  
22 Q Okay. So again, the emergency vehicles can go  
23 right up Castle Lane without any obstructions, correct?  
24 A Yes.  
25 Q And these delivery people can go up Castle Lane

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1 without any obstructions, correct?  
2 A Yes.  
3 Q And the mail person that delivers your mail right  
4 down at the bottom of Castle Lane and Oreana Loop.  
5 A Yes.  
6 Q So you have to go down the lane to get your mail.  
7 A Yes.  
8 Q And you do that at least once a day?  
9 A Can I say one thing?  
10 Q No.  
11 COURT: Wait until he asks you a question.  
12 WITNESS: Okay. All right.  
13 COURT: Your attorney can follow up.  
14 WITNESS: All right.  
15 BY MR. RAINEY:  
16 Q All these services are available through Castle  
17 Lane; is that correct?  
18 A Yes, yes.  
19 Q And one more time, there's not one obstruction  
20 other than maybe a ditch washing out once in a while or a  
21 culvert?  
22 A Uh-huh.  
23 Q And that only washes out when you don't clean out  
24 the debris, right?  
25 A Or if the creek is flooding and we can't control

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1 the water.  
2 Q Okay. And that's happened once since --  
3 A It's happened numerous times over the years.  
4 Q Do you know that this lane from the bottom of your  
5 house around the corner from your house to Oreana is Kings'  
6 private property?  
7 A No, I wasn't aware of that. It's always been an  
8 open lane since I've been around.  
9 Q You didn't know that Kings owned that property?  
10 A I knew that they owned the property on the north  
11 side of that lane.  
12 Q You didn't know that they owned the lane?  
13 A No. I did not. I always assumed it was an  
14 easement or private road -- or an access point to our  
15 property. It's never been disputed up until now.  
16 Q Well, have you ever interfered with the Kings' use  
17 of that land?  
18 A No, I have not.  
19 Q Have you ever told them to get out? It's your  
20 lane. You're going to use it?  
21 A No, sir, I have not.  
22 Q Have you ever done anything that interrupted their  
23 use? And they being Kings. Have you ever done anything to  
24 interrupt the Kings' use of that lane?  
25 A No, sir, I have not.

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1 Q Do you know if anyone in your family has ever  
2 interrupted the Kings' use of that lane?  
3 A Not to my recollection, no.  
4 Q And so bottom line is nobody from your family, as  
5 far as you know, have ever hindered or interfered with the  
6 Kings' use of that lane we're -- in the pleadings, it's  
7 called King's Lane. Do I need to rephrase that again?  
8 A Yeah, go ahead. Yeah.  
9 Q Can you recall anybody in your family, you, your  
10 brother, father, that's interfered with Kings' use of that  
11 lane called Kings' Lane?  
12 A Between my house and their houses?  
13 Q Yes.  
14 A No.  
15 Q So -- and you don't know who pays the taxes on that  
16 lane I take it?  
17 A No, I do not.  
18 Q You don't?  
19 A No, sir.  
20 Q Now, the gates you're talking about, have you ever  
21 looked at those gates?  
22 A Which gates?  
23 Q The new gates.  
24 A Not up close, no.  
25 Q Have you ever opened the new gates?

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1 A I don't know. I've never seen them locked.  
2 Q So you haven't gone back there since the  
3 conversation?  
4 A Since I went back through there, the gates have  
5 been -- I've been gone for the last month so I mean he put  
6 the cattle in there and I assume he opened the gates back  
7 up and there's not been an issue.  
8 Q Well, let's make the record clear, Mr. Fuquay. The  
9 Kings use that lane to graze cattle and to actually corral  
10 the cattle too, don't they?  
11 A Yeah. I don't know what they -- yeah, sure. They  
12 graze it.  
13 Q Okay. But they use it kind of as a holding pen  
14 then?  
15 A I don't know what -- I don't know about that but --  
16 Q Well, there's cattle in there.  
17 A Yep.  
18 Q There's cattle in there an awful lot of the year,  
19 isn't that correct?  
20 A Sometimes, yeah.  
21 Q Okay. And they also -- Kings use that road to get  
22 to their fields, don't they?  
23 A Correct.  
24 Q They've used that road ever since you've lived in  
25 that property.

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1 A Correct.  
2 Q And never have you tried to kick the Kings off the  
3 property, have you, off the road?  
4 A Not that I recall.  
5 Q Well, you never have, have you?  
6 A Not that I recall, no.  
7 Q So in other words, you've never interfered with the  
8 Kings using their own property, have you?  
9 A Other than the gates.  
10 Q Pardon me?  
11 A Other than the issue with the gates.  
12 Q Well, they put up gates. Particularly when they  
13 had cattle in there, they had gates in there. Isn't that  
14 right?  
15 A Yeah.  
16 Q Okay. Now, you can't tell Judge Nye whether it's  
17 easier to open the metal gate than to put the wire over the  
18 posts with the loop, can you?  
19 A I've not opened them metal gates. I haven't been  
20 through there since.  
21 MR. RAINEY: That's all the cross I have, Your  
22 Honor.  
23 COURT: Mr. Farris.  
24 MR. FARRIS: Thank you, Your Honor. I'll try not  
25 to be redundant. Let me see if I can put a fine point on

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1 some of these.  
2 CROSS-EXAMINATION  
3 QUESTIONS BY MR. FARRIS:  
4 Q Mr. Fuquay, my name is Bryce Farris and I represent  
5 the Lows.  
6 A Okay.  
7 Q You've been talking about this roadway that they've  
8 referred to or referred to as Castle Lane and from what I  
9 understand is that lane comes off Oreana Loop up to your  
10 property? If you'd look at probably Exhibit 3 if you have  
11 it in front of you.  
12 A Okay.  
13 Q You see where there's an arrow that says Castle  
14 Lane?  
15 A Yeah.  
16 Q That Castle Lane originates at Oreana Loop further  
17 to the south of the area of your property?  
18 A Correct.  
19 Q That's the road you've been talking about and it  
20 comes up, goes through your property?  
21 A Correct.  
22 Q And then goes up to the property that you've --  
23 that someone's identified as Clint Fuquay?  
24 A Correct.  
25 Q Okay. With respect to that Castle Lane, from what

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1 I'm understanding your testimony is, that's where your  
2 mailbox is currently?  
3 A Currently, yes.  
4 Q Okay. That's your address?  
5 A Yes.  
6 Q That's where Schwann's or other delivery folks  
7 deliver to?  
8 A Currently.  
9 Q Okay. Currently. As we sit here today. And if  
10 you'd look at Exhibit 1, do you have that in front of you?  
11 A This one?  
12 Q Yes, yeah.  
13 COURT: Oh, I've got it. It's this one here.  
14 Yeah.  
15 WITNESS: Okay.  
16 BY MR. FARRIS:  
17 Q You see where at the top of that it says "map  
18 address" and it says 18907 Castle Lane?  
19 A Correct.  
20 Q That's your address?  
21 A Correct.  
22 Q So that's -- if you want to put in your address to  
23 find your property, that's the address you put in, Castle  
24 Lane?  
25 A Correct.

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1 A Sure.  
 2 Q Coming up Castle Lane, that's a straight shot  
 3 without stopping for anything, correct?  
 4 A Yes.  
 5 Q Now, when did you get your driver's license?  
 6 A When I was 15.  
 7 Q And so you say you're 27 now.  
 8 A Yes.  
 9 Q So that's twelve years ago?  
 10 A Yes.  
 11 Q And six of those twelve years you lived somewhere  
 12 else.  
 13 A Yes.  
 14 Q So you've only been on this property for six years.  
 15 A No. Eight. Since I was 19.  
 16 Q Can you give me the years when you were gone, from  
 17 when to when?  
 18 A I would say from 2001 to 2005.  
 19 Q Well, that's five years.  
 20 A Four. I don't remember when in 2001. Moved back  
 21 the summer of 2005.  
 22 Q When you got your driver's license, you were gone.  
 23 You didn't even live on that property.  
 24 A I stayed there on the weekends.  
 25 Q Other than weekends but you didn't live there on a

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1 day-to-day basis.  
 2 A Correct.  
 3 Q You were not watching the Kings' operation on a  
 4 day-to-day basis.  
 5 A Correct.  
 6 Q In fact, you've never watched Kings on a day-to-  
 7 day --  
 8 A Correct.  
 9 Q Is that right?  
 10 A Correct.  
 11 Q Just occasionally seeing what's going on, right?  
 12 A Correct.  
 13 Q So when you say that they've never had cattle in  
 14 there, you don't know, do you?  
 15 A What are you talking about?  
 16 Q Well, there's periods of times you said they never  
 17 had cattle and never locked gates. You don't know because  
 18 you're not there on a day-to-day basis, are you?  
 19 A I drive that road on a day-to-day basis but in that  
 20 time, I wasn't there on a day-to-day basis so at that time,  
 21 I can't say what they did on a day-to-day basis.  
 22 Q Okay. And is there any reason you don't go down --  
 23 when you're driving, you don't go down to Oreana through  
 24 Castle Lane?  
 25 A It's quicker to get where I'm going going that way.

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1 Q So it's just a matter of convenience for you --  
 2 A Yes.  
 3 Q -- to go through the Kings'?  
 4 A Yes.  
 5 Q Only convenience. That's the only reason.  
 6 A It's quicker.  
 7 Q Could be?  
 8 A It's quicker.  
 9 Q It's quicker. Well, that's what I'm calling  
 10 convenience.  
 11 A It's easier, yes.  
 12 Q Okay. So you want to use King's Lane just because  
 13 it's convenient.  
 14 A Because that's what I've always used.  
 15 Q You don't claim any right to it, do you?  
 16 A What's that?  
 17 Q You don't claim any right to King's Lane, do you?  
 18 A I've been using it so I just always assumed that I  
 19 could.  
 20 Q Have you ever excluded the Kings from using that  
 21 lane?  
 22 A No.  
 23 Q Have you ever told them to get off?  
 24 A No.  
 25 Q Have you ever told them that they couldn't use it

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1 if you're using it?  
 2 A No.  
 3 Q So in a way, have you interfered with the Kings?  
 4 A No.  
 5 Q Have you given them any hassle about when you use  
 6 the lane?  
 7 A No.  
 8 Q Okay.  
 9 MR. FARRIS: Your Honor, I don't have anything to  
 10 add.  
 11 COURT: Okay. Thank you. Redirect.  
 12 REDIRECT EXAMINATION  
 13 QUESTIONS BY MR. CLEVERLEY:  
 14 Q You indicated that Castle Lane is what Mr. Rainey  
 15 calls an all-weather road?  
 16 A Yes.  
 17 Q Is that -- who maintains that road?  
 18 A We do.  
 19 Q Do you maintain King Lane?  
 20 A Yes.  
 21 Q How do you maintain it?  
 22 A We've bladed it with a road grader and a land  
 23 plane.  
 24 Q What else?  
 25 A We've -- a backhoe. Filled in potholes with a

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Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

**FILED**

A.M. 12:10 P.M.

JAN 29 2015

ANGELA BARKELL, CLERK

Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY, )  
Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING; )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )  
Defendants. )

GILBERT KING, as Trustee, and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )  
Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY )  
Counterdefendants. )

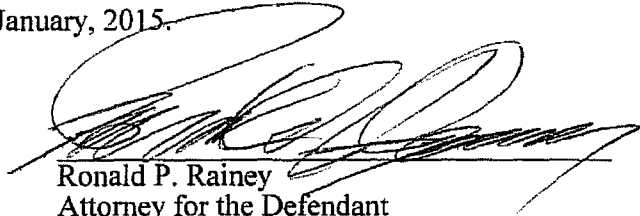
CASE NO. CV 2014-0278

**DEFENDANT HEART K RANCH'S  
MOTION FOR SUMMARY JUDGMENT**

**DEFENDANT HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 1**

COMES NOW the Defendant, HEART K RANCH TRUST UTA., acting by its Trustee, GILBERT KING and ROSE KING, by and through their counsel of record, RONALD P. RAINEY, and pursuant to I.R.C.P. 56 submits this MOTION FOR SUMMARY JUDGMENT. This motion is supported by the accompanying affidavits of Rose King, Gilbert King, and Ronald P. Rainey, and the prior affidavits submitted in this action by Rose King and Gilbert King, which are of record, and by the supporting memorandum on this motion for summary judgment.

Respectfully submitted this 29th day of January, 2015.



Ronald P. Rainey  
Attorney for the Defendant  
HEART K RANCH TRUST UTA  
ROSE KING

CERTIFICATE OF SERVICE

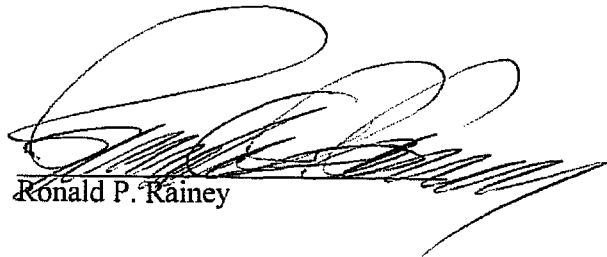
I HEREBY CERTIFY That on this 29th day of January, 2015, a true and correct copy of the foregoing document was served upon the following:

Matthew R. Cleverley	<input type="checkbox"/>	U.S. Mail, postage prepaid
Fidelity National Law GROUP	<input type="checkbox"/>	Hand Delivered
1200 6th Avenue, Suite 620	<input type="checkbox"/>	Overnight Mail
Seattle, Washington 98101	<input checked="" type="checkbox"/>	Facsimile Transmission
Telephone: 206-224-6003	<input type="checkbox"/>	Other _____
Facsimile: 877-655-5281		
Email: <a href="mailto:Matthew.Cleverly@fnf.com">Matthew.Cleverly@fnf.com</a>		

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S. Bryce Farris	<input type="checkbox"/>	U.S. Mail, postage prepaid
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*Attorney for Low Defendants*

  
Ronald P. Rainey

**FILED**

A.M. 12:10 P.M.

JAN 29 2015

ANGELA BARKELL, CLERK

Deputy Clerk

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Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
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Plaintiffs, )

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SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
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GILBERT KING, as Trustee, and  
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DECEMBER 28, 2012, )

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CASE NO. CV 2014-0278

**DEFENDANT HEART K RANCH'S  
MEMORANDUM IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT**

***DEFENDANT HEART K RANCH'S MEMORANDUM  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT – PAGE 1***

I.

**STATUS OF THE CASE**

This action seeking the declaration of a prescriptive easement on King Lane was commenced by a complaint filed by the Fuquay Plaintiffs on August 11, 2014. The Heart K Ranch Defendants filed an answer denying the requested relief, and counterclaiming for declaratory relief as to the scope of permissive use on King Lane, requesting permanent injunctive relief, and quiet title.

On Thursday September 4, 2014 the Fuquay Plaintiffs requested, and on the next day, Friday September 5, 2014, this Court granted, a Temporary Restraining Order (TRO), as based upon uncontested affidavits submitted in support of that motion. The matter went to hearing on September 18, 2014 on Plaintiffs' request for entry of a preliminary injunction, which the Court denied by an order entered on September 29, 2014, with a limited exception for emergency vehicles.

The Fuquay Plaintiffs filed a motion for partial summary judgment against the Low Defendants only on October 29, 2014, which motion was withdrawn on December 17, 2014.

As based upon the testimony provided in open court at the September 18, 2014 hearing on the motion for preliminary injunction and the prior affidavits which have been submitted by the parties in this action, and it now appearing that the Fuquay Plaintiffs cannot sustain the necessary evidence to prevail on an essential element of their prescriptive easement claim, the King Defendants now move for summary judgment on the Fuquay Plaintiffs' prescriptive easement claim in King Lane.

II.

**UNDISPUTED FACTS**

The maps attached to the Affidavit of Gilbert King previously submitted concerning the motion for preliminary injunction clearly illustrate the current conditions on the ground in the area of alleged dispute. King Lane is a private road located entirely upon private land that is about one half mile in length. It roughly runs in an east-west direction from the Oreana Loop Road until it connects with Castle Lane, which itself then proceeds on to the south where it connects to the public

***DEFENDANT HEART K RANCH'S MEMORANDUM  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT – PAGE 2***



Oreana Loop Road. Recent increased use of Kings Lane by the Plaintiffs by large commercial trucks, including loaded logging trucks, is rapidly degrading a bridge that was never designed to bear such loads.

Perhaps of even greater significance is the fact that Heart King Ranch conducts its livestock operations on, and about King Lane, and actually “grazes-out” King Lane itself, which requires a respectful use of that roadway, and the gates at each end of the roadway, which prevents the Heart King Ranch livestock from leaving its property, and also restricts livestock owned by others from entering the Heart King Ranch property. The state of Idaho – and especially Owyhee county – remains “open range” country. See e.g., *Greer v. Ellsworth*, 113 Idaho 979, 751 P.2d 675 (Ct.App.1988) (discussing “open range” in the area of Oreana in Owyhee County). In *Maguire v. Yanke*, 99 Idaho 829, 590 P.2d 85 (1978) the Idaho Supreme Court briefly explained the history of open range in Idaho:

Western cattle states generally rejected the common law, holding that livestock roaming at large committed no trespass when they strayed on unenclosed private land. [footnote 1 omitted] See Scott, *The Range Cattle Industry: Its Effect on Western Land Law*, 28 Mont.L.Rev. 155 (1967). Idaho, concurring with the approach of its neighboring states, also rejected the common law rule. *Kelly v. Easton*, 35 Idaho 340, 207 P. 129 (1922); *Johnson v. Oregon Short Line Ry. Co.*, 7 Idaho 355, 63 P. 112 (1900). The Idaho rule was stated as follows: “The common-law rule that every man must confine his own cattle to his own land does not obtain in this state, and in *Strong v. Brown*, 26 Idaho 1, 140 P. 773, 52 L.R.A.,N.S., 140, Ann.Cas. 1916E, 482, it is held that under our statute (C.S., c. 82), if a landowner fails to fence out cattle lawfully at large, he may not recover for loss caused by such livestock straying upon his unenclosed land.” *Kelly v. Easton*, 35 Idaho at 344, 207 P. at 130 (citations omitted). However, one who willfully and deliberately drives his stock upon the lands of another, whether enclosed or unenclosed and grazes them upon such land without the permission of the owner, is liable in damages for the trespass. *Lazarus v. Phelps*, 152 U.S. 81, 14 S.Ct. 477, 38 L.Ed. 363 (1894); *Swanson v. Groat*, 12 Idaho 148, 85 P. 384 (1906).

99 Idaho at 832, 590 P.2d at 88 (bracketed reference to, “footnote 1 omitted,” added; emphasis added). See also, I.C. § 25-2118 (“‘Open range’ means all uninclosed lands outside of cities, villages and herd districts, upon which cattle by custom, license, lease, or permit, are grazed or permitted to roam.”).

**DEFENDANT HEART K RANCH'S MEMORANDUM  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT – PAGE 3**

So long as neighbors located on "open range" remain on good terms, it is possible for that open range to be shared on fair terms. But when these friendly and accommodating arrangements between neighbors break down, then fences, gates, and even locks become necessary. In this case, as already mentioned above, the Heart King Ranch periodically grazes-off the area encompassed within King Lane. Reasonable means are therefore required to keep the Heart King Ranch livestock on its own property, and the livestock of adjoining landowners off the property of the Heart King Ranch. Consequently, gates and fences are necessary, and must be respected to accomplish this purpose in an area of open range.

As the additional affidavits that have been submitted in support of this motion for summary judgment and the earlier motions filed in this case by Rose King and Gilbert King amply illustrate, King Lane itself was in such a state of development that it could not sustain the decree of use that the Fuquay Plaintiffs claim at any time prior to 1988-89. Although arguably the Court could conclude that there remain genuine issues of material fact that would preclude entry of summary judgment as between the parties as to their contested issues of use of the road, there appears to be no contested genuine issue of fact in this case, as to any act or conduct by the Fuquay Plaintiffs that would have placed any of the named defendants in this action on notice of adverse prescriptive use claim made by the Fuquay Plaintiffs to King Lane. Therefore, it appears that this action is ripe for summary judgment.

### III.

#### SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to avoid useless trials. *Bandelin v. Pietsch*, 98 Idaho 337, 340-41, 563 P.2d 395, 398-99 (1977). The party moving for summary judgment initially carries the burden to establish that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. *Eliopulos v. Knox*, 123 Idaho 400, 404, 848 P.2d 984, 988 (Ct.App. 1992). The court must determine whether the moving party has shown that there is a lack of any

**DEFENDANT HEART K RANCH'S MEMORANDUM  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT – PAGE 4**

genuine issue of material fact as to each issue raised by the motion for summary judgment. *Coghlan v. Beta Theta Pi Fraternity*, 133 Idaho 388, 401, 987 P.2d 300, 313 (1999). This burden may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct.App.1994). Such an absence of evidence may be established either by an affirmative showing that is accomplished with the moving party's own evidence, or by a review of all the nonmoving party's evidence in view of the contention that such evidence fails to establish a required element of the non-moving party's claim. *Heath v. Honker's Mini-Mart, Inc.*, 134 Idaho 711, 712, 8 P.3d 1254, 1255 (Ct.App.2000).

Once such an absence of evidence has been established, the burden then shifts to the party opposing the motion to show, via further depositions, discovery responses or by affidavits, that there is indeed a genuine issue for trial, or if the non-moving party is able to offer a valid justification for the failure to do so under I.R.C.P. 56(f). *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). "The nonmoving party cannot rely on mere speculation, and a scintilla of evidence is insufficient to create a genuine issue of material fact." *Bollinger v. Fall River Rural Elec. Co-op., Inc.*, 152 Idaho 632, 637, 272 P.3d 1263, 1268 (2012).

#### IV.

#### ARGUMENT

**The Fuquay Plaintiffs' Claim Of A Prescriptive Easement To King Lane Fails For Lack Of Clear And Convincing Evidence Of An Adverse Claim Of Right With The Actual Or Imputed Knowledge Of The Servient Landowners For The Required Prescriptive Period Of Time**

Easements by prescription are not favored under Idaho law. *Lorang v. Hunt*, 107 Idaho 802, 803, 693 P.2d 448, 449 (1984). A plaintiff must establish by clear and convincing evidence each of the five required elements necessary to establish a prescriptive easement as declared by the Idaho Supreme Court in *Hodgins v. Sales*, 139 Idaho 700, 963 P.2d 383 (1998):

To establish an easement by prescription, the claimant must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period. See I.C. § 5-203; *Baxter v. Craney*, 135 Idaho 166, 173,

**DEFENDANT HEART K RANCH'S MEMORANDUM  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT – PAGE 5**

16 P.3d 263, 270 (2000). Each element is essential to the claim, and the trial court must make findings relevant to each element in order to sustain a judgment on appeal.

139 Idaho at 229, 76 P.3d at 973 (emphasis added). The 2003 Idaho Civil Jury Instructions define the “clear and convincing” standard of proof as follows:

When I say a party has the burden of proof on a proposition by clear and convincing evidence, I mean you must be persuaded that **it is highly probable** that such proposition is true. This is a higher burden than the general burden that the proposition is more probably true than not true.

IDJI 1.20.2 (underlined emphasis added). *See also, In re Adoption of Doe*, 143 Idaho 188, 191, 141 P.3d 1057, 1060 (2006) (Clear and convincing evidence, “is generally understood to require ‘[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.’”).

Because the burden of proof at trial to establish a prescriptive easement by clear and convincing evidence is placed upon the Fuquay plaintiffs as to each element of their claim, on this motion for summary judgment the defendants need only establish that the Fuquay plaintiffs cannot establish material facts on any single essential element of their prescriptive easement claim in order to prevail on this motion for summary judgment. This standard of proof on summary judgment was declared as follows by the Idaho Supreme Court in *Bromley v. Garey*, 132 Idaho 807, 979 P.2d 1165 (1999):

Where the non-moving party will bear the burden of proof at trial, the moving party’s burden may be satisfied by showing the absence of material fact with regard to any essential element of the non-moving party’s claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The absence of a genuine issue of fact with regard to an essential element of the plaintiff’s claim renders any other potential issues of fact irrelevant. Once the absence of sufficient evidence on an element has been shown, the burden shifts to the non-moving party to establish a genuine issue of material fact. The nonmoving party cannot merely rely upon its pleadings, but must produce affidavits, depositions, or other evidence establishing an issue of material fact. *R.G. Nelson, A.I.A. v. Steer*, 118 Idaho 409, 410, 797 P.2d 117, 118 (1990). The nonmoving party need not submit evidence on every element upon which it will bear the burden at trial, but only those elements about which the moving party successfully carried its burden. *Thomson v. Idaho Ins. Agency, Inc.* 126 Idaho 527, 887 P.2d 1034 (1995).

132 Idaho at 810-11, 979 P.2d at 1168-69.

**DEFENDANT HEART K RANCH’S MEMORANDUM  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT – PAGE 6**

The Fuquay plaintiffs have argued that they have established a prescriptive easement over King Lane at various times during the period of time during which the five year prescriptive use prevailed prior to the change in the period of time to twenty years in 2006. On this motion for summary judgment the King Defendants argue that all times during this time (prior to 2006), any use by the Fuquay plaintiffs or their predecessors, was use in common with the Kings and Lows that in no way interfered with their use of King Lane **and therefore under Idaho law was deemed permissive and could not be prescriptive.** This rebuts elements three and four (adverse use that is known to the servient landowner) making any prescriptive claim during this period impossible. The fact that the Fuquay plaintiffs may have used King Lane in a manner that has in fact interfered with the King and Low Defendants use of the road after 2006 (*e.g.*, use by large trucks commencing in 2011) places that use within the twenty year prescriptive period, which use cannot mature into any prescriptive right until at least 2026.

In *Chen w. Conway*, 116 Idaho 901, 781 P.2d 238 (Ct.App.1989), the Idaho Court of Appeals provided the following summary of the essential characteristics of prescriptive easements, including that conduct which is deemed permissive use:

The law in this state regarding prescriptive easements is well settled and was thoroughly summarized in *Melendez v. Hintz*, 111 Idaho 401, 404, 724 P.2d 137, 140 (Ct.App.1986):

A claimant, in order to acquire a prescriptive easement in Idaho, must present reasonably clear and convincing evidence of open, notorious, continuous, uninterrupted use, under a claim of right, with the knowledge of the owner of the servient estate for the prescriptive period. *State ex rel. Haman v. Fox*, 100 Idaho 140, 594 P.2d 1093 (1979); *West v. Smith*, 95 Idaho 550, 511 P.2d 1326 (1973); *Kaupp v. City of Hailey*, 110 Idaho 337, 715 P.2d 1007 (Ct.App.1986). The prescriptive period in Idaho is five years. I.C. § 5-203. A prescriptive right cannot be obtained if use of the servient estate is by permission of the owner. *State ex rel. Haman v. Fox, supra.*

The general rule in Idaho is:

[P]roof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, *without evidence as to how the use began*, raises the presumption that the use was adverse and under a claim of right. The burden is then on the owner of the servient tenement to show that

**DEFENDANT HEART K RANCH'S MEMORANDUM  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT – PAGE 7**

the use was permissive, or by virtue of a license, contract, or agreement. [Quoting *West v. Smith*, 95 Idaho at 557, 511 P.2d at 1333; emphasis added.]

In *Melendez*, **we noted that two exceptions have been recognized to the general rule stated in *West***. One of these exceptions is found in *Simmons v. Perkins*, 63 Idaho 136, 144, 118 P.2d 740, 744 (1941). There, the Supreme Court said:

The rule would seem to be that where the owner of real property constructs a way over it for his own use and convenience, **the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission.**

*Melendez* goes on to explain this variation in the general rule where a roadway, established and maintained by the owner of the servient tenement, is jointly used by the owner and others:

Understanding the basis for the *Simmons* rule helps to determine the limits of its application. There should be no presumption that the use originated adversely to the owner unless the use itself constitutes some invasion or infringement upon the rights of an owner. **Where one person merely uses a roadway in common with his neighbor, without damage to the roadway, without interfering with the neighbor's use of the roadway, and where the neighbor has established and maintained the roadway on his own property for his own purposes, only the most minimal intrusion is made into the owner's dominion over his property.** Logically, a use which is not in fact adverse to the owner provides no basis for the presumption that the use is adverse. However, where the use made of the property for the prescriptive period is shown to constitute some infringement or invasion of the owner's rights, it is more appropriate to apply the general rule, presuming the use to be adverse, that is, without permission of the owner.

111 Idaho at 405, 724 P.2d at 141.

116 Idaho at 903, 781 P.2d at 240 (emphasis added).

As the Idaho Supreme Court quite recently observed in, *H.F.L.P., LLC v. The City of Twin Falls*, 2014 WL 6865494 at \*8, 14.22 ISCR 45, 54 (December 8, 2014) "Moreover, if the presumption of permissiveness applied when the use began, the presumption continues until a hostile and adverse use is clearly manifested and 'brought home' to the servient property owner. *Backman v. Lawrence*, 147 Idaho 390, 398, 210 P.3d 75, 83 (2009); *Gameson v. Remer*, 96 Idaho 789, 792, 537 P.2d 631, 634 (1975)." The presumption of permissive use in common with the Defendant Kings and Lows applies in this case, and there is no evidence that any hostile or adverse use contrary

**DEFENDANT HEART K RANCH'S MEMORANDUM  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT – PAGE 8**

to that permissive use was ever "brought home" to the Kings, as was testified to by J.C. Fuquay at the preliminary injunction hearing in September 2014:

Q. Do you know that this lane from the bottom of your house around the corner from your house to Oreana is Kings' private property?

A. No, I wasn't aware of that. It's always been an open lane since I've been around.

Q. You didn't know that Kings owned that property?

A. I knew that they owned the property on the north side of that lane.

Q. You didn't know that they owned the lane?

A. No. I did not. I always assumed it was an easement or private road - or an access point to our property. It's never been disputed up until now.

Q. Well, have you ever interfered with the Kings' use of that land?

A. No, I have not.

Q. Have you ever told them to get out? It's your lane. You're going to use it?

A. No, sir, I have not.

Q. Have you ever done anything that interrupted their use? And they being Kings. Have you ever done anything to interrupt the Kings' use of that lane?

A. No, sir, I have not.

Q. Do you know if anyone in your family has ever interrupted the Kings use of that lane?

A. Not to my recollection, no.

Q. And so bottom line is nobody from your family, as far as you know, have ever hindered or interfered with the Kings' use of that lane we're - - in the pleadings, it's called King's Lane. Do I need to rephrase that again?

A. Yeah, go ahead. Yeah.

Q. Can you recall anybody in your family, you, your brother, father, that's interfered with Kings' use of that lane called Kings Lane?

A. Between my house and their houses?

Q. Yes.

A. No.

Preliminary Injunction Tr., pg. 86, L., 4 to pg. 87, L. 14. (as attached to the Affidavit of Ronald P. Rainey).

John E. Fuquay and Clinton Ward Fuquay have also acknowledged that they did not interfere with King's use of the farm lane known as King Lane. John E. Fuquay's testimony is recorded in the Preliminary Injunction Tr., pg. 36, L., 21-25 and pg.37, L., 1-15 and Clinton Ward Fuquay's testimony is recorded at pg. 66, L, 18-25 and pg. 67 L. 1-7.

The fourth element required to establish a prescriptive easement by clear and convincing evidence is that the claim is made, "with the actual or imputed knowledge of the owner of the servient tenement," it is closely related to the "open and notorious use" third element, and requires proof that the servient landowner had actual knowledge of the claimed prescriptive use, or that the use was of such a character that upon reasonable inquiry that the servient landowner ought to have known that such a prescriptive use existed. *See e.g., Baxter v. Crane*, 135 Idaho 166, 173, 16 P.3d 263, 270 (2000) ("The open and notorious use must rise to the level reasonably expected to provide notice of the adverse use to the servient landowner maintaining a reasonable degree of supervision over his premises.). This fourth requirement was further addressed by the Idaho Court of Appeals in *Hall v. Strawn*, 108 Idaho 111, 697 P.2d 451 (Ct.App.1985):

The trial court found that prior to 1981, Hall's use of Strawn's roadway was "not of such character as to give defendant notice of any adverse claim [sic] thereto by plaintiff." On appeal, Hall asserts that the trial court erred in requiring him to affirmatively prove that Strawn had knowledge of his use of the Police Cabin Road under a claim of right. He argues that his open and notorious use of the roadway for longer than the prescriptive period was sufficient to charge Strawn with knowledge of his claim. We recognize that a person is charged with knowledge of the status and condition of his or her land, and that, in the usual case, where a claimant succeeds in establishing open, notorious, continuous and uninterrupted use under a claim of right for the statutory period, knowledge of the owner may be presumed. *See* 2 G. Thompson, Commentaries on the Modern Law of Real Property, § 341, at 194-95 (1980 Replacement); *Sanchez v. Dale Bellamah Homes of New Mexico, Inc.*, 76 N.M. 526, 417 P.2d 25 (1966); *Jurgensen v. Ainscow*, 155 Neb. 701, 53 N.W.2d 196 (1952); 25 Am.Jur.2d, *Easements and Licenses* § 61, at 470. **However, mere use alone is insufficient to establish an easement. The use must also be exclusive in the sense that it is proprietary in nature and exercised independently of the**

**DEFENDANT HEART K RANCH'S MEMORANDUM  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT – PAGE 10**



rights of all others. *Thompson, supra*, at 195.

In the present case, Strawn testified that, with her permission, the Association and several of her neighbors used the road in question. Hall, himself, testified that he thought he was using a public road. Where, as here, the same degree of use upon which the adverse claim is based has been exercised indiscriminately by the general public, individual acquisition of a prescriptive easement has generally been held impossible. Annot., 111 A.L.R. 221 (1937). **In such a case, the claimant must perform some act whereby the adverse nature of the claim is clearly indicated to the owner of the servient estate.** *Id.*

The case at bar is analogous to *Cusic v. Givens*, 70 Idaho 229, 215 P.2d 297 (1950). In *Cusic* the plaintiffs sued to establish a prescriptive easement over a road crossing the defendant's property. The road had been opened by a Mr. Duffy, the defendant's predecessor. In rejecting plaintiff's claim our Supreme Court stated:

The record shows that the road was laid out and established by Mr. Duffy, for his own use, prior to the sale to McMullen. **Through the years following it was used by the owners and by all who had occasion to go to either of the adjacent farms, by the ditch rider, the milk trucker, hay buyers and the occupants of the farms in their farming operations. This use was entirely permissive. Mr. Duffy made no objection.** There is nothing in the record to indicate that any user claimed an adverse right. Mr. Morgan, a predecessor of plaintiff's in the ownership and occupation of the west eighty, and who farmed that land in 1939, 1940 and 1941, said he used it because he thought it was a public road. *The plaintiff, Cusic himself, testified he thought it was a county road and that the county owned it. A prescriptive right cannot be acquired by such use.* [Citations omitted; emphasis added.]

*Id.* at 231. 215 P.2d at 298. We agree with the trial court that the appellant did not demonstrate that his use of the Police Cabin Road was of such character as to give respondent notice of his adverse claim.

108 Idaho at 112-13, 697 P.2d at 452-53 (Italicized emphasis in original, underlined-bold emphasis added). This requirement was further addressed by the Idaho Supreme Court in *Anderson v. Larsen*, 136 Idaho 402, 34 P.3d 1085 (2001):

In order to establish a private prescriptive easement, a claimant must present reasonably clear and convincing proof of open, notorious, continuous, and uninterrupted use under a claim of right and with the knowledge of the owner of the servient tenement for the prescriptive period of five years. See I.C. s 5-203; *Baxter*, 135 Idaho at 172, 16 P.3d at 270; *West v. Smith*, 95 Idaho 550, 511 P.2d 1326 (1973). **The purpose of the requirement that prescriptive use be open and notorious is to give the owner of the servient tenement knowledge and opportunity to assert his rights against the development of an easement by prescription. The open and notorious use must rise to the level reasonably expected to provide notice of the adverse use to a servient landowner maintaining a reasonable degree of supervision over his premises.** See *Kaupf v. City of Hailey*, 110 Idaho 337, 340,

***DEFENDANT HEART K RANCH'S MEMORANDUM  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT – PAGE 11***

715 P.2d 1007, 1010 (Ct.App.1986).  
136 Idaho at 406, 34 P.3d at 1089 (emphasis added). *See also, Halvorson v. North Latah County Highway Dist.*, 151 Idaho 196, 204, 254 P.3d 497, 505 (2011) (citing *Anderson* on the “open and notorious use” issue).

The affidavits of Rose and Gilbert King, as submitted in support of this motion establishing that at no time prior to 2011 did the Fuquay Plaintiffs engage in any use of King Lane that was not considered, as described under the standard of *Melendez* and *Chen* decisions set out above, as not simply being in common with the Kings and Lows, and in no way interfering with their use of King Lane. It was only when the persistent use of the very large trucks began sometime in 2011, or thereafter, that any interference or damage to the road and its bridge began. Any alleged adverse or prescriptive use which commenced at that time would be subject to the twenty year prescriptive use period which went into effect in 2006, and would not yet have ripened into a prescriptive right. With all use prior to that time being by implied permission, no prescriptive use right arose under the previous five year statute either. Therefore, in the absence any facts that can establish the required adverse use, an essential element of the Fuquay Plaintiffs’ prescriptive easement claim fails, rendering all other facts irrelevant, and rendering the entry of summary judgment for the defendants appropriate.

## V.

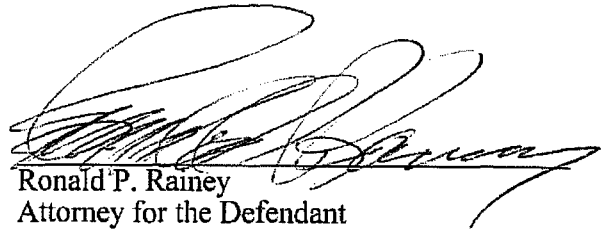
### CONCLUSION

Under the standard that the absence of a genuine issue of fact with regard to an essential element of the plaintiff’s claim renders all other potential issues of fact irrelevant, the Fuquay Plaintiffs cannot prevail on their prescriptive easement claim to King Lane due to an absence of any evidence in support of an open and notorious adverse claim known to either the Kings or the Lows that would have put the Kings or the Lows on notice of that prescriptive use easement claim. In the absence of this essential element of the Fuquay plaintiffs’ claim, all other issues of fact are rendered irrelevant, and entry of summary judgment for the defendant on the Fuquay Plaintiffs’ prescriptive

***DEFENDANT HEART K RANCH'S MEMORANDUM  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT – PAGE 12***

easement claim is appropriate.

Respectfully submitted this 29 day of January, 2015.



Ronald P. Rainey  
Attorney for the Defendant  
HEART K RANCH TRUST UTA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 29 day of January, 2015, a true and correct copy of the foregoing document was served upon the following:

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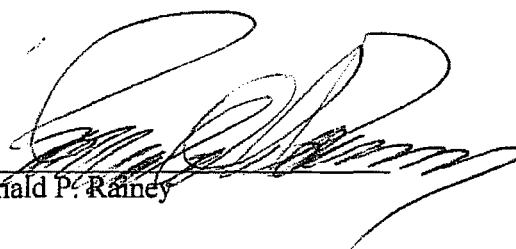
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 Hand Delivered  
 Overnight Mail  
 Facsimile Transmission  
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*Attorney for Low Defendants*

  
Ronald P. Rainey

**FILED**

A.M. 3:10 P.M.

FEB 10 2015

ANGELA BARKELL, CLERK

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Attorneys for Defendants Susie Low and Cal Low

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

**JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY;**

Plaintiffs,

vs.

**SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G.  
KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY;**

Defendants.

Case No. CV-2014-0278

**DEFENDANT LOWS'  
RESPONSE TO KINGS' MOTION FOR  
SUMMARY JUDGMENT**

COMES NOW Defendants, Susie Low and Cal Low (hereinafter collectively referred to as "Low"), by and through their attorneys of record, Sawtooth Law Offices, PLLC, and hereby submits this response to the motion for summary judgment submitted by Defendant Heart K Ranch (hereinafter "King").

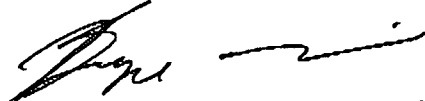
DEFENDANT LOWS' RESPONSE KINGS' MOTION FOR SUMMARY JUDGMENT - 1

On or about January 29, 2015, King's submitted a Motion for Summary Judgment along with a supporting memorandum and supporting affidavits which seeks dismissal of Plaintiffs' claims for a prescriptive easement because Plaintiffs have failed to establish the requisite elements. Low respond to the Kings' motion by supporting it. The Lows previously submitted affidavits and a memorandum in response to Plaintiffs' motion for summary judgment, which was subsequently withdrawn by Plaintiffs, but the arguments in support of King's motion are similar to those made by the Lows. Thus, the Lows support the King's motion and contend that if such a motion is granted then Lows reserve the right to bring their own motion dismissing the claims against the Lows based upon similar grounds that Plaintiffs cannot establish the necessary elements for a prescriptive easement.

Additionally, Plaintiffs have not established the ownership of the land where the roadway (King Lane) is located and thus if summary judgment is granted to King then it should also be granted to Low. Moreover, to the extent summary judgment is granted to King and King own any portion of the roadway referred to as "King Lane" then Plaintiffs would not have an easement for the roadway from Oreana Loop to their property. Put another way, once one link of the chain is broken then there is no easement and any easement across the property of Low would be moot or useless to Plaintiffs because it does not create an access easement from their property to Oreana Loop. Accordingly, Low not only support the King's motion for summary judgment but reserve the right to seek summary judgment/dismissal of Plaintiffs' action against the Lows if it grants summary judgment to the Kings.

DATED this 10<sup>th</sup> day of February, 2015.

SAWTOOTH LAW OFFICES, PLLC

by:   
S. Bryce Farris

**CERTIFICATE OF SERVICE**

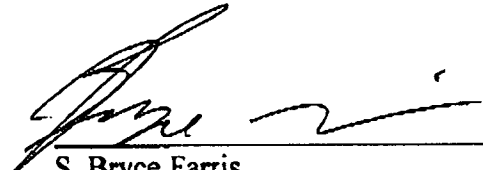
I hereby certify that a true and correct copy of the foregoing document was served on the following on this 10<sup>th</sup> day of February, 2015 by the following method:

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- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

  
S. Bryce Farris

**FILED**

~~A.M.~~ 5:54 P.M.

FEB 13 2015

ANGELA BARNELL, CLERK

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Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Case No. CV-14-0278

PLAINTIFFS' RESPONSE TO HEART K  
RANCH'S MOTION FOR SUMMARY  
JUDGMENT

**I. BACKGROUND**

This is a case where Plaintiffs are seeking judicial confirmation of their prescriptive easement rights over the defendants' properties. The defendants have installed gates to prevent Plaintiffs from accessing their homes, even though Plaintiffs' prescriptive rights were established years ago.

Plaintiffs filed a Motion for Summary Judgment as to their prescriptive easement claims against the Lows in in October 2014. In November 2014, the Lows responded to the motion and submitted an affidavit from Rose King that clearly created disputed issues of fact. In

PLAINTIFFS' RESPONSE TO HEART K MOTION  
FOR SUMMARY JUDGMENT – 1

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1200 – 6<sup>TH</sup> AVENUE, SUITE 620  
SEATTLE, WA 98101  
(206) 223-4525



**ORIGINAL**



December 2014, Plaintiffs withdrew their Motion and canceled the hearing because it was obvious from the declarations filed with the court that there were disputed issues of material fact that would require the Court to deny Plaintiffs' motion.

Heart K Ranch has now filed its own motion for Summary Judgment, notwithstanding that Rose King's testimony created the disputed issues of fact in the first place. None of the facts have changed, and the disputed testimony before the Court requires the Court to deny any party's motion for summary judgment.

## II. LEGAL STANDARDS

### A. Summary Judgment

On a motion for summary judgment, the Court views all facts and inferences from the record in favor of the non-moving party and the moving party has the burden of proving the absence of genuine issues of material fact. Evans v. Griswold, 129 Idaho 902, 905, 935 P.2d 165, 168 (1997). Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence. Smith v. Meridian Joint School District No. 2, 128 Idaho 714, 718, 918 P.2d 583, 587 (1996).

### B. Prescriptive Easement

A party seeking to establish the existence of an easement by prescription "must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period." Hodgins v. Sales, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003).

Once the claimant presents proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, even without evidence of how the use began, he raises the presumption that the use was adverse and under a claim of right. Wood v. Hoglund, 131 Idaho 700, 702–03, 963 P.2d 383, 385–86 (1998); Marshall v. Blair, 130 Idaho 675, 680, 946 P.2d 975, 980 (1997). The burden then shifts to the owner of the servient tenement to show that the claimant's use was permissive, or by virtue of a license, contract, or agreement. Wood, 131 Idaho at 703, 963 P.2d at 386; Marshall, 130 Idaho at 680, 946 P.2d at 980. The nature of the use is adverse if “it runs contrary to the servient owner's claims to the property.” Hodgins, 139 Idaho at 231, 76 P.3d at 975. The state of mind of the users of the alleged easement is not controlling; the focus is on the nature of their use. Id. at 231–32, 76 P.3d at 975–76. Akers v. D.L. White Const., Inc., 142 Idaho 293, 303, 127 P.3d 196, 206 (2005).

### **III. DISPUTED ISSUES OF MATERIAL FACT**

#### **A. Testimony Before the Court**

There are numerous declarations and affidavits before the Court. For the court's convenience, they are compiled and submitted with this response. They include:

- Declaration of Raymond Jayo dated August 27, 2014
- Declaration of John Fuquay dated August 27, 2014
- Affidavit of Rose King dated September 9, 2014
- Affidavit of Susie Low dated September 15, 2014
- Affidavit of Gilbert King dated September 8, 2014
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- Affidavit of Ron Rainey dated January 29, 2015
- Affidavit of Rose King dated January \_\_, 2015 (unsigned)
- Affidavit of Gilbert King dated January \_\_ 2015

In addition to the testimony, there are numerous exhibits and public records for the court to consider.

#### IV. ARGUMENT

##### A. Disputed Facts Preclude Summary Judgment

In order for this court to grant Heart K Ranch summary judgment, the Court would have to review all of the declarations and affidavits on record and made a determination that there are no disputed facts and that Heart K Ranch will prevail as a matter of law. That ruling is impossible in this case. As the testimony shows, historical use of the roadway is not only disputed, it is hotly disputed.

Heart K Ranch invites the court to *weigh* the testimony and find that Rose King and Gilbert King's declarations outweigh contrary declarations. Heart K argues that the court should *weigh* whether the evidence is "clear and convincing." Weighing evidence or testing credibility of witnesses is impermissible on a motion for summary judgment. For summary judgment, the court must find that that there are *no disputed issue of material facts* and that

only legal issues remain. The court must also grant all reasonable inferences to be drawn from the facts to the Plaintiffs. When the Court applies the proper standard here, the court cannot grant summary judgment.

The following table shows some of the material facts that are disputed:

Name	Testimony	Disputed Testimony
Raymond Jayo	Used King Lane to access Plaintiffs properties for over 5 years	
Denise Colette	School children do not use King Lane	
John Fuquay		Children used King Lane to get to school
Rose King		Her children used King Lane to get to school
Susie Low	King Lane has always been gated	
John Fuquay		King Lane was never gated until the last few years
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Scott Snyder	Fuquays said they would refuse to close gates	
John Fuquay		Fuquays did not close gates over the road
Seth Thomas	Graze cattle on adjacent land and need gates closed	
John Fuquay		Cattle are only occasionally grazed in the area
Shawn Drew	Gates prevented him from delivering to Fuquay residences	
John Fuquay		Deliveries were made until

		the gates were locked at the inception of this litigation
John Fuquay	Plaintiffs began using King Lane in 1977	
Rose King		Fuquay did not start to use King Lane in 1977
John Fuquay	Fuquay family and guests used King Lane since 1977	
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John Fuquay	James Fuquay used King Lane for access for large semi trucks and cattle trucks since 1977.	
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Samuel Steiner	Fuquays used King Lane for a short cut.	
John Fuquay	Used King Lane on a near-daily basis for residential purposes	
Rose King		Fuquays did not use King Lane for residential purposes
John Fuquay	Used King Lane without permission from Steiners	
Samuel Steiner		Steiners did not object to anyone using King Lane
Samuel Steiner	Zane Block and Jim Fuquay did work on King Lane	
Rose King		Fuquays have never maintained King Lane
Rose King	"I have reviewed the Declaration of John Fuquay dated October 28, 2014. The	**This statement alone shows that there is a disputed issue

	statements set forth by Mr. Fuquay in his declaration are inaccurate ...”	of fact
Rose King	Between 1979-1982 King Lane was impassable 90% of the time	
John Fuquay		Used King Lane since 1977.
Rose King		The Fuquays have always respected the gates
Rose King	The Fuquays have refused to close the gates	
Rose King	The Fuquays have damaged the roadway	

In short, it is clear that there are disputed issues of material fact in this case and summary judgment cannot be granted. As the Lows argued in their objection to Plaintiffs’ Motion for Summary Judgment in November 2014:

“There are numerous material issues of fact....More specifically, Plaintiffs’ motion is based primarily upon the allegations or statements contained in the affidavit of John Fuquay concerning use of the road. However, these allegations are unequivocally rebutted by Rose King, Samuel Steiner, Plaintiffs’ own testimony and others that there has not been regular, continuous or adverse use of the road by Plaintiffs.”

The Lows then went on to argue why there are disputed issues of fact that precluded Plaintiffs’ motion for summary Judgment. Those arguments are just as sound now as they were then. Plaintiffs recognized that summary judgment could not be granted and chose to withdraw the motion rather than waste everyone’s time at a hearing. Those same disputed facts still preclude summary judgment for Heart K Ranch.

**B. Heart K Asks the Court to Determine “Reasonableness” – which is a Fact Issue**

Heart K has asked the court to rule that Plaintiffs use of King Lane “did not rise to the level reasonably expected to provide notice of the adverse use.” The obvious problem is that

what is “reasonable” is a fact issue, not a legal issue. The court cannot look at disputed evidence on affidavits and make a determination of what was reasonable or what was not reasonable. Those are clearly issues of fact that must be deferred to trial.

Heart K argues that the affidavits of Rose King and Gilbert King show that Plaintiffs did not adequately use King Lane prior to 2011 and that the use was permissive. Again, Heart K ignores the disputed issues of fact. John Fuquay has testified that he is the owner of a trucking company, that his father also owned a trucking company, and that they used King Lane for trucks since 1977. Fuquays deny that they ever had permission to use the roadway. The evidence is obviously disputed.

Finally, it appears that Heart K believes that adverse use must mean that Fuquays intentionally interfered with the defendants’ use of the roadway – that somehow Fuquays must have tried to prevent the defendants from using the roadway. That is not the meaning of adverse and hostile for prescriptive easement claims. The nature of the use is adverse if “it runs contrary to the servient owner's claims to the property.” Hodgins, 139 Idaho at 231, 76 P.3d at 975. No legal standard requires a prescriptive right claimant to force the servient owner off of the property.

December 2014, Plaintiffs withdrew their Motion and canceled the hearing because it was obvious from the declarations filed with the court that there were disputed issues of material fact that would require the Court to deny Plaintiffs' motion.

Heart K Ranch has now filed its own motion for Summary Judgment, notwithstanding that Rose King's testimony created the disputed issues of fact in the first place. None of the facts have changed, and the disputed testimony before the Court requires the Court to deny any party's motion for summary judgment.

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Rose King	"I have reviewed the Declaration of John Fuquay dated October 28, 2014. The	**This statement alone shows that there is a disputed issue

	statements set forth by Mr. Fuquay in his declaration are inaccurate ...”	of fact
Rose King	Between 1979-1982 King Lane was impassable 90% of the time	
John Fuquay		Used King Lane since 1977.
Rose King		The Fuquays have always respected the gates
Rose King	The Fuquays have refused to close the gates	
Rose King	The Fuquays have damaged the roadway	

In short, it is clear that there are disputed issues of material fact in this case and summary judgment cannot be granted. As the Lows argued in their objection to Plaintiffs’ Motion for Summary Judgment in November 2014:

“There are numerous material issues of fact....More specifically, Plaintiffs’ motion is based primarily upon the allegations or statements contained in the affidavit of John Fuquay concerning use of the road. However, these allegations are unequivocally rebutted by Rose King, Samuel Steiner, Plaintiffs’ own testimony and others that there has not been regular, continuous or adverse use of the road by Plaintiffs.”

The Lows then went on to argue why there are disputed issues of fact that precluded Plaintiffs’ motion for summary Judgment. Those arguments are just as sound now as they were then. Plaintiffs recognized that summary judgment could not be granted and chose to withdraw the motion rather than waste everyone’s time at a hearing. Those same disputed facts still preclude summary judgment for Heart K Ranch.

**B. Heart K Asks the Court to Determine “Reasonableness” – which is a Fact Issue**

Heart K has asked the court to rule that Plaintiffs use of King Lane “did not rise to the level reasonably expected to provide notice of the adverse use.” The obvious problem is that

what is “reasonable” is a fact issue, not a legal issue. The court cannot look at disputed evidence on affidavits and make a determination of what was reasonable or what was not reasonable. Those are clearly issues of fact that must be deferred to trial.


Heart K argues that the affidavits of Rose King and Gilbert King show that Plaintiffs did not adequately use King Lane prior to 2011 and that the use was permissive. Again, Heart K ignores the disputed issues of fact. John Fuquay has testified that he is the owner of a trucking company, that his father also owned a trucking company, and that they used King Lane for trucks since 1977. Fuquays deny that they ever had permission to use the roadway. The evidence is obviously disputed.

Finally, it appears that Heart K believes that adverse use must mean that Fuquays intentionally interfered with the defendants’ use of the roadway – that somehow Fuquays must have tried to prevent the defendants from using the roadway. That is not the meaning of adverse and hostile for prescriptive easement claims. The nature of the use is adverse if “it runs contrary to the servient owner's claims to the property.” Hodgins, 139 Idaho at 231, 76 P.3d at 975. No legal standard requires a prescriptive right claimant to force the servient owner off of the property.

V. CONCLUSION

Very simply, the court cannot grant summary judgment for any party in this case. The parties have submitted enough disputed testimony that it is impossible for this case to be decided without a trial. The court must deny Heart K's motion.

Dated: February 12, 2015



---

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 – 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 223-4525, ext. 103  
[Matthew.Cleverley@fnf.com](mailto:Matthew.Cleverley@fnf.com)  
Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

On the date given below I caused to be served the foregoing Plaintiff's Motion for Summary Judgment and the supporting Declarations of Matthew Cleverley and John Fuquay on the following individuals in the manner indicated:

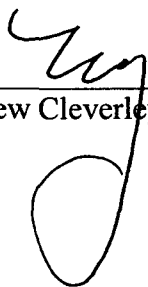
Ronald P. Rainey  
 Attorney at Law  
 110 North Ninth Street  
 Caldwell, ID 83606  
 208-459-3659  
[erainey@qwestoffice.net](mailto:erainey@qwestoffice.net)  
 Attorney for Kings

<input type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input checked="" type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

S. Bryce Farris  
 Sawtooth Law Offices, PLLC  
 1101 W, River Street, Suite 110  
 Boise, ID 83707  
 208-629-7447  
[bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)  
 Attorney for Lows

<input type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input checked="" type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Dated: February 12, 2015

  
 \_\_\_\_\_  
 Matthew Cleverley



**FILED**

A.M. 2:00 P.M.

FEB 13 2015

ANGELA BARKELL, CLERK

Deputy Clerk

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

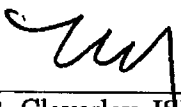
Defendants.

Case No. CV-14-0278

COMPILATION OF TESTIMONY

The attached declarations and affidavits have been previously submitted to the court. This compilation is for the Court's and parties' convenience.

Dated: February 12, 2015

  
Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 223-4525, ext. 103  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

COMPILATION - 1

FIDELITY NATIONAL LAW GROUP  
1200 - 6<sup>th</sup> AVENUE, SUITE 620  
SEATTLE, WA 98101  
(206) 223-4525

**CERTIFICATE OF SERVICE**

On the date given below I caused to be served the foregoing Plaintiff's Motion for Summary Judgment and the supporting Declarations of Matthew Cleverley and John Fuquay on the following individuals in the manner indicated:

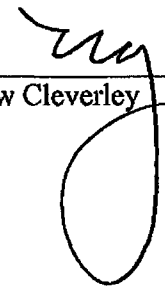
Ronald P. Rainey  
 Attorney at Law  
 110 North Ninth Street  
 Caldwell, ID 83606  
 208-459-3659  
[erainey@qwestoffice.net](mailto:erainey@qwestoffice.net)  
 Attorney for Kings

<input type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input checked="" type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

S. Bryce Farris  
 Sawtooth Law Offices, PLLC  
 1101 W, River Street, Suite 110  
 Boise, ID 83707  
 208-629-7447  
[bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)  
 Attorney for Lows

<input type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input checked="" type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Dated: February 12, 2015

  
 \_\_\_\_\_  
 Matthew Cleverley

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Case No. CV-14-0278

DECLARATION OF RAYMOND JAYO  
IN SUPPORT OF EX PARTE MOTION  
FOR TEMPORARY RESTRAINING  
ORDER

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.
2. I am a friend of the Plaintiffs and have used King Lane to get to Plaintiffs houses for more than 5 years.

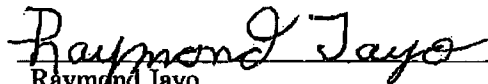
COMPLAINT- 1

FIDELITY NATIONAL LAW GROUP  
1200 - 6<sup>TH</sup> AVENUE, SUITE 620  
SEATTLE, WA 98101  
(206) 223-4525

3. On or Around August 21, 2014, someone installed a gate across King Lane. Prior to the installation of this gate, there had never been any obstruction of the roadway or any prohibition of access.
4. On or around August 22, 2014, I attempted to cross the gated roadway to get to John Fuquay's house. Rose King confronted me and told me I was not allowed to use King Lane to get to the Fuquay's house.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY OF PERJURY.

Dated: August 27, 2014

  
Raymond Jayo

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Case No. CV-14-0278

DECLARATION OF JOHN FUQUAY IN  
SUPPORT OF EX PARTE MOTION FOR  
TEMPORARY RESTRAINING ORDER

Under penalty of perjury under the laws of the state of Oregon, the undersigned declares:

Properties and Parties

1. I am one of the Plaintiffs in this action. I am submitting this declaration in support of Plaintiffs' Motion for Temporary Restraining Order (the "Motion") preventing any of the Defendants from blocking access to our property over King Lane.
2. A street map showing the general location of the area is attached as Exhibit "A" to the Motion. An aerial map showing the Owyhee County Assessor's lot boundaries is attached as Exhibit "B" to the Motion. A Google Earth map showing an aerial view and general

COMPLAINT- 1

FIDELITY NATIONAL LAW GROUP  
1200 - 6<sup>th</sup> AVENUE, SUITE 620  
SEATTLE, WA 98101  
(206) 223-4525

road boundaries and identities of the affected parcel owners is attached as Exhibit "C" to the Motion.

3. Clinton Ward Fuquay and Hailey Rose Fuquay own the parcel (the "Clinton Fuquay Parcel") at the west end of King Lane. It was once part of the John Fuquay Parcel. The legal description for the Clinton Fuquay Parcel is shown on the warranty deed attached as Exhibit "D" to the Motion.
4. I own the parcel (the "John Fuquay Parcel") which is located south of the Clinton Fuquay Parcel. The legal description for the John Fuquay Parcel is shown on the Trustee's Deed dated October 13, 1989 attached as Exhibit "E" to the Motion (less the Clinton Fuquay Parcel).
5. Susie Low and Cal Low own the parcel (the "Low Parcel 1") located south of King Lane. There are two parcels which were conveyed by the same deed. The legal description for the Low Parcel 1 is shown on the Special Warranty Deed attached as Exhibit "F" to the Motion.
6. Avco Financial Services of Idaho Falls, Inc. may claim some right, title or interest in the Low Parcel 1 by virtue of a Real Estate Mortgage in the amount of \$68,000 which was recorded on or around March 18, 1996 as Owyhee county records no. 218373. The Mortgage was executed by Samuel V.C. Steiner and Mary J. Steiner, husband and wife and encumbers Low Parcel 1. It is possible that this mortgage was paid but was never released. A copy of the Mortgage is attached as Exhibit "G" to the Motion.

7. Susie Low and Cal Low own the parcel (the "Low Parcel 2") located south of King Lane. Oreana Loop Road crosses the northwest corner of Low Parcel 2. The legal description for the Low Parcel 2 is shown on the Special Warranty Deed attached as Exhibit "H" to the Motion.
8. The Heart K Ranch Trust UTA December 28, 2012 owns the parcel to the north of King Lane (the "Heart K Ranch Parcel"). The legal description for the Heart K Ranch Parcel is shown on the Gift Deed attached as Exhibit "I" to the Motion.
9. Gordon G. King and Rose M. King may claim some right, title or interest in the Heart K Ranch Parcel by virtue of a Deed of Trust in the amount of \$86,500 in favor of One West Bank which was recorded on July 28, 2004 as Owyhee County records no. 248616 and encumbered the Heart K Ranch Parcel. A copy of the deed of trust is attached as Exhibit "J." The deed of trust was assigned to Gordon G. King and Rose M. King on September 12, 2005. A copy of the Assignment of Deed of Trust is attached as Exhibit "K" to the Motion.
10. First American Title Insurance Company may claim some right, title or interest in the Heart K Ranch Parcel by virtue of being named as the trustee under a Deed of Trust in the amount of \$86,500 in favor of One West Bank which was recorded on July 28, 2004 as Owyhee County records no. 248616 and encumbered the Heart K Ranch Parcel. A copy of the deed of trust is attached as Exhibit "J" to the Motion.

#### FACTUAL ALLEGATIONS

11. The properties at issue in this Complaint are located in Owyhee County, Idaho. They are located approximately three miles east of Oreana and are south of Highway 78. The closest public roadway to the properties is Oreana Loop Road.
12. Oreana Loop road runs in a generally west direction from Highway 78 to a point near a location where Low Parcels 1 and 2 and the Heart K Ranch Parcels intersect. Near that location, Oreana Loop Road turns and continues in a southwesterly direction through Low Parcel 1.
13. King Lane is a private roadway that continues westerly from where Oreana Loop Road turns southwest Oreana Loop Road and provides the access to the Clint Fuquay Parcel and the John Fuquay Parcel.
14. The Plaintiffs have used King Lane to access the Clint Fuquay Parcel and the John Fuquay Parcel since at least 1989.
15. King Lane has been an unobstructed roadway used by Plaintiffs and the general public since at least 1989.

**Blockage of King Lane by Defendants**

16. On or Around August 21, 2014, one or all of the Defendants installed gates across King Lane to prevent us from accessing King Lane to our properties. One gate was installed at the northeast corner of the Clinton Fuquay Parcel and a second gate was installed near the intersection of King Lane and Oreana Loop Road.
17. Pictures of the gated area are attached as Exhibit "K" to the Motion.

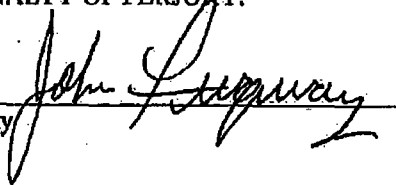


18. On or around August 22, 2014, a friend of ours, Raymond Jnyco, attempted to cross the gated roadway to get to our house. Rose King confronted the friend and told him he was not allowed to use King Lane to access our property.
19. We are in immediate need of access to their properties over King Lane.
20. The gates interfere with normal delivery services used by Plaintiffs such as Federal Express, UPS and Schwann's.
21. The gates interfere with Plaintiffs' access to emergency services such as police, fire and ambulance services.
22. Defendants' installation of the gate across King Lane was done after this lawsuit was filed, and we were not consulted prior to the installation of the gate. None of the Defendants will be harmed or damaged by allowing us to continue the same uninterrupted access over King Lane that we have used for 25 years. Therefore, we should not be required to post a bond for the issuance of the Temporary Restraining Order.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY OF PERJURY.

Dated: August 27, 2014

John Fuquay



COMPLAINT- 5

FIDELITY NATIONAL LAW GROUP  
1200-6<sup>TH</sup> AVENUE, SUITE 620  
SEATTLE, WA 98101  
(206) 223-4523

RONALD P. RAINEY ISB #1022  
Attorney at Law  
P.O. Box 26  
110 North Ninth Street  
Caldwell, Idaho 83606-0026  
Phone (208)459-3659  
Facsimile Transmission No:459-9067

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K. Ranch Trust UTA December 28, 2012.

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )

Defendants. )

GILBERT KING, as Trustee; and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )

AFFIDAVIT OF ROSE KING -1

Case No. CV-2014-0278

AFFIDAVIT OF ROSE KING

FUQUAY and HAILEY ROSE FUQUAY )  
 )  
 Counterdefendants. )  
 )  
 )  
 \_\_\_\_\_ )

STATE OF IDAHO )  
 ) ss:  
 County of Owyhee )

Rose King, being first duly sworn on oath, deposes and states as follows:

1. I am one of the defendants/counterclaimants in the above-entitled matter, I am over the age of majority, and I make this Affidavit based upon facts within my own personal knowledge.

2. My deceased husband, Gordon King and I purchased our ranch which included King Lane on September 17, 1973. At the time of purchase, King Lane was only a path through grass and weeds. My husband and I constructed what is now King Lane, an all weather road. We use this road several times a day in our family and ranching operation.

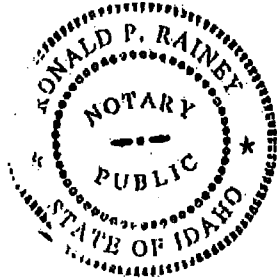
I later named this road King Lane.

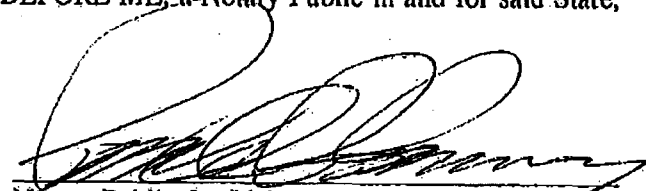
3. Attached to this affidavit are true and correct copies of photographs that I recently took of the area in question concerning King Lane, Castle Lane, the gates on King Lane, and the current location of the school bus stop, where children who attend the local school are picked up and dropped off. Each individual photo is captioned as to what it reveals

DATED This 9th day of September, 2014.

\_\_\_\_\_  
Rose King

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for said State,  
this 9th day of September, 2014.



  
Notary Public for Idaho  
Residing at: Caldwell, Idaho  
My Commission Expires: 12/18/2018

CERTIFICATE OF SERVICE

I, Ronald P. Rainey, hereby certify that on this 9 day of September, 2014, I caused a true and correct copy of the foregoing instrument to be delivered to the adverse party, via the method indicated below, addressed as follows:

U.S. Mail, Postage Prepaid     Facsimile Transmission     Hand Delivery

Matthew R. Cleverley  
Fidelity National Law Group  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
Facsimile: \*77-655-5281  
Email: [Matthew.Cleverly@fnf.com](mailto:Matthew.Cleverly@fnf.com)

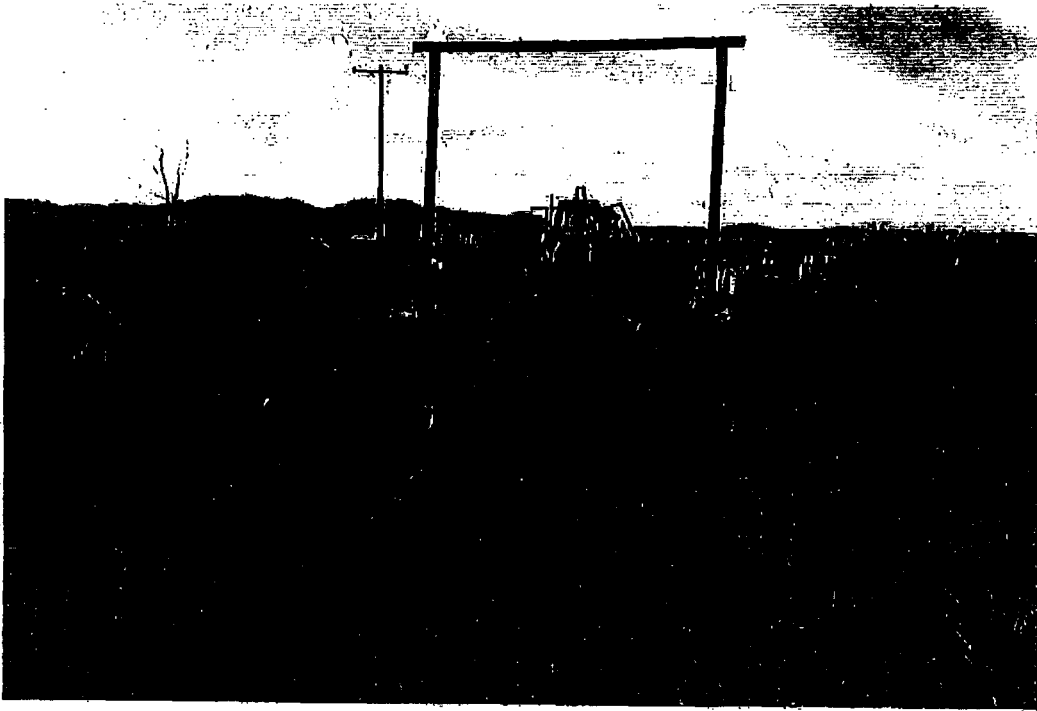
  
Ronald P. Rainey



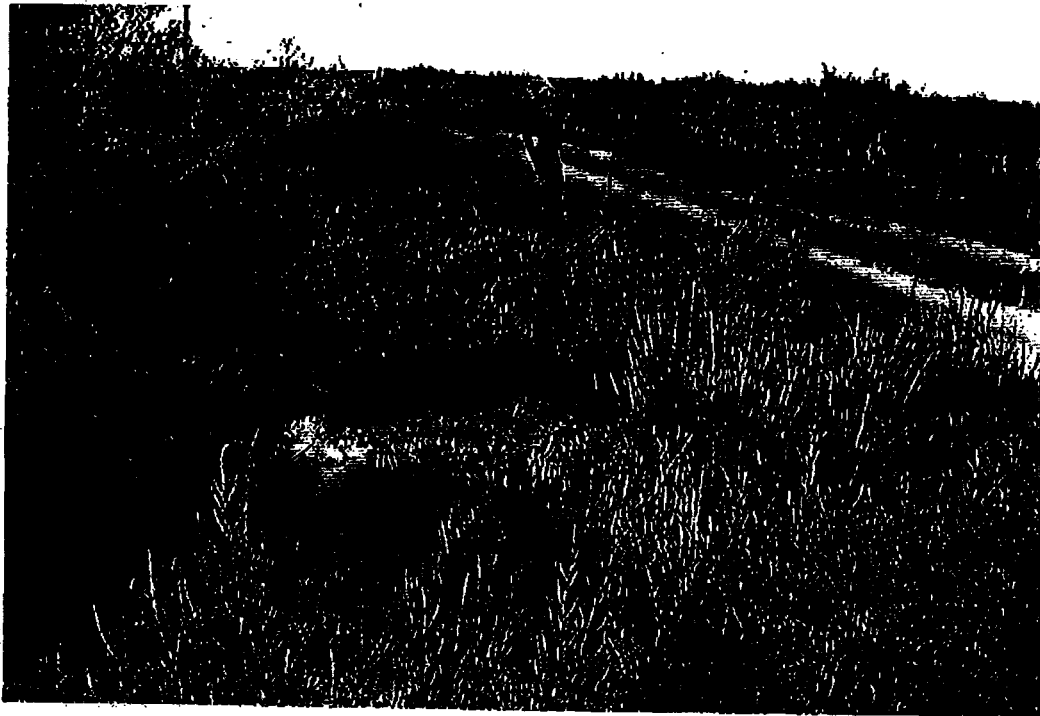
View of the East Gate to King Lane.  
Looking to the West



View of the East Gate to King Lane  
Looking to the West



**Current West Gate to King Lane Being Constructed  
Looking to the West**



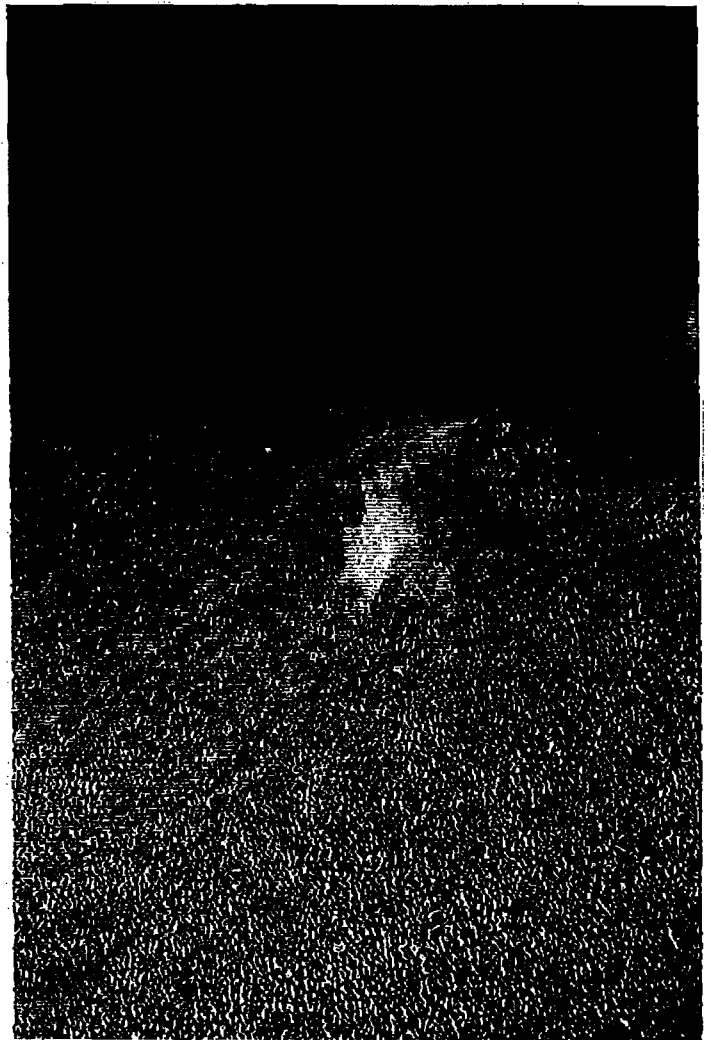
**Area of the Current West Gate to King Lane Before Construction  
Which Indicates the Location of the Former Wire Gate**

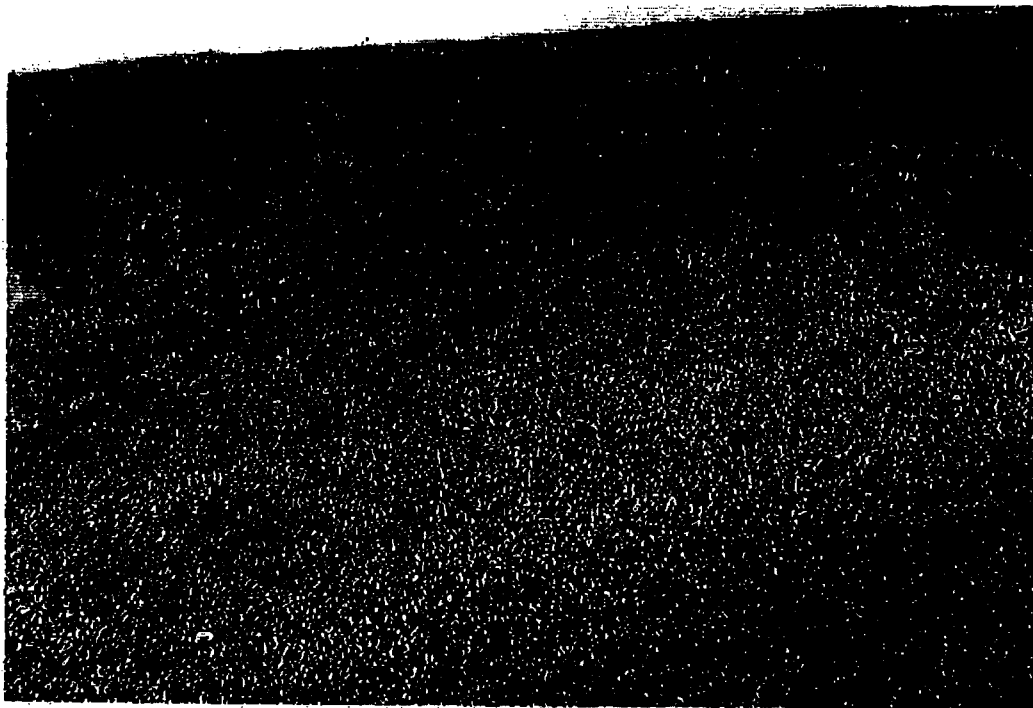


View of Castle Lane  
All Weather Surface Road  
Looking to the North from its  
Intersection with Oreana  
Loop Road



View of Castle Lane  
All Weather Surface Road  
Looking to the North





Entry to Castle Lane All-Weather Surface Road from the Oreana Loop Road  
Looking to the North

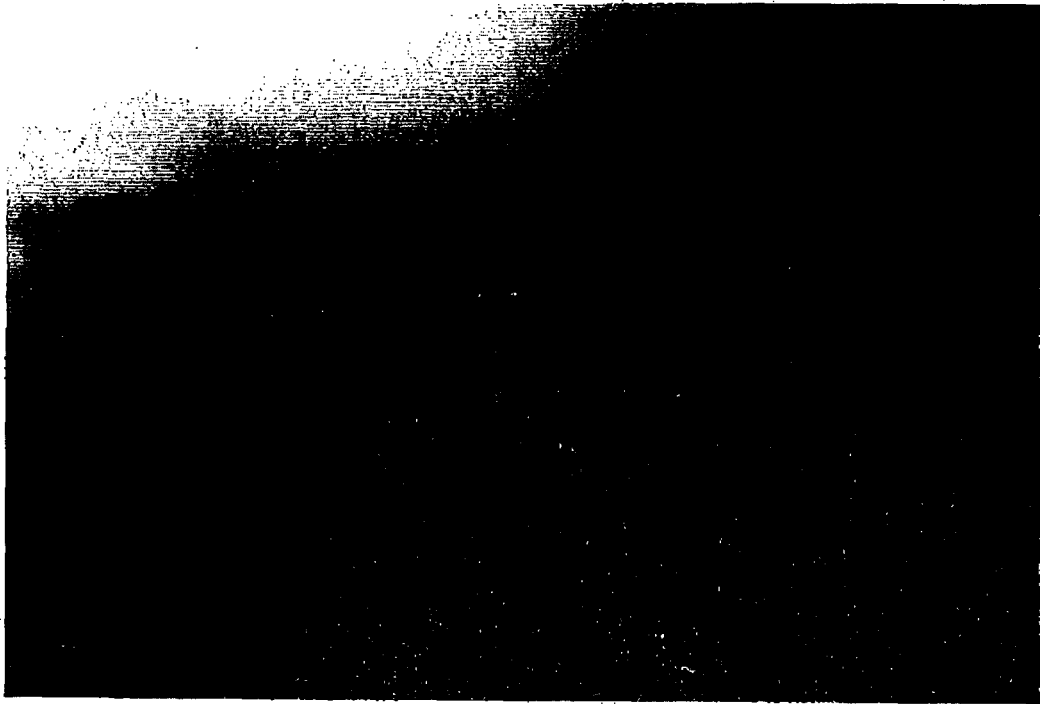


Mail Boxes at the Intersection of the Oreana Loop Road and Castle Lane School Bus Stop  
Looking to the South





View of the Castle Lane All-Weather Surface Road  
Looking to the North



View of the Castle Lane All-Weather Surface Road  
Looking to the North

S. BRYCE FARRIS  
[Idaho State Bar No. 5636]  
SAWTOOTH LAW OFFICES, PLLC  
Golden Eagle Building  
1101 W. River St., Ste. 110  
P. O. Box 7985  
Boise, Idaho 83707  
Telephone: (208) 629-7447  
Facsimile: (208) 629-7559  
E-mail: bryce@sawtoothlaw.com

Attorneys for Defendants Susie Low and Cal Low

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

**JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY;**

Plaintiffs,

vs.

**SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G.  
KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY;**

Defendants.

Case No. CV-2014-0278

**AFFIDAVIT OF SUSIE LOW**

STATE OF IDAHO )  
County of Ada ) ss.  
)

Susie Low being first duly sworn upon his oath, deposes and says that:

1. I am over the age of 18 and I make this Affidavit based upon my personal knowledge and I am competent to testify to the matters contained herein.

AFFIDAVIT OF SUSIE LOW - 1

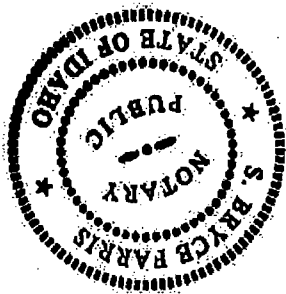
2. I have lived at 21101 Oreana Loop Road in Murphy, Idaho since September of 2005 and I am familiar with the roadway located on or between the property currently owned by Heart K Ranch Trust and the property currently owned by myself and my husband which as been referenced in this matter as "Kings Lane."

3. Since I have lived there, and during my observations of the roadway referenced as "Kings Lane" there has always been a minimum of two gates across the roadway which have been closed to prevent livestock from roaming onto and off of the property owned by Heart K Ranch Trust. Any person attempting to utilize the roadway has had to stop, open and close the gates.

DATED this 15<sup>th</sup> day of September, 2014.

Susie Low  
Susie Low

Sworn to and subscribed before me this 15<sup>th</sup> day of September, 2014.



[Signature]  
Notary Public for Idaho  
Residing in Moscow, Idaho  
My Commission Expires: 7/26/16

**CERTIFICATE OF SERVICE**

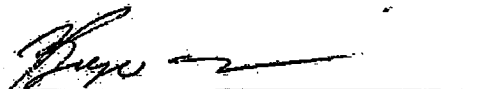
I hereby certify that a true and correct copy of the foregoing document was served on the following on this 16 day of September, 2014 by the following method:

**MATTHEW R. CLEVERLEY**  
**FIDELITY NATIONAL LAW GROUP**  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
Telephone: (206) 224-6003  
E-Mail: Matthew.Cleverley@fnf.com  
*Attorneys for Plaintiffs*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

**RONALD P. RAINEY**  
**RONALD P. RAINING PA**  
110 N. 9<sup>th</sup> Ave.  
PO Box 26  
Caldwell, ID 83606-0026  
Telephone: (208) 459-3659  
Facsimile: (208) 459-9067  
E-Mail: erainey@qwestoffice.net  
*Attorneys for Defendants Gordon and Rose King*

- U.S. First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

  
\_\_\_\_\_  
S. Bryce Farris

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110 North Ninth Avenue  
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Caldwell, Idaho 83606-0026  
Telephone: (208) 459-3659  
Facsimile: (208) 459-9067 or 459-6147

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING;) )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )

Defendants. )

GILBERT KING, as Trustee, and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )

Counterclaimants, )

CASE NO. CV 2014-0278

AFFIDAVIT OF GILBERT KING

**AFFIDAVIT OF GILBERT KING – PAGE 1**

vs.

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY

Counterdefendants.

STATE OF IDAHO

County of Canyon

)  
) ss.  
)

GILBERT KING, being first duly sworn, upon oath deposes and says:

1. I am a party in the above-captioned action, over the age of majority, competent to testify, and I make this affidavit upon personal knowledge.

2. Attached as **Exhibit A** to this affidavit is a true and correct copy of a "Bing Map" as obtained and downloaded from the Internet, which provides an accurate representation of the Oreana Loop Road.

3. State Highway 78 is highlighted in yellow on Exhibit A with the Oreana Loop Road itself highlighted in green. King Lane is highlighted in orange and another access from the Oreana Loop Road to King Lane that is known as Castle Lane is highlighted in blue. Although the size of this map does not reveal the actual location of the connection, the Oreana Loop road connects with State Highway 78 at both ends of that loop road.

4. Attached as **Exhibit B** to this affidavit is a true and correct copy of the same "Bing Map" in a closer view, which reveals the actual names of the roadways in question, but this closer view no longer reveals the location of State highway 78 to the north.

5. Attached as **Exhibit C** to this affidavit is a true correct copy of an Owyhee County reference map which shows the same area with a an overlay of sections, quarter sections, and

**AFFIDAVIT OF GILBERT KING – PAGE 2**

indications of townships and ranges.

6. I have indicated the approximate location of the Fuquay Plaintiffs' properties on Exhibit B.

7. As indicated on Exhibit B, the approximate length of King Lane is  $\frac{1}{2}$  mile, whereas Castle Lane has a length of approximately  $1 \frac{3}{4}$  miles.

8. As should be apparent from the maps that have been attached to this affidavit, and by the photographs attached to Rose King's affidavit, and by the other declarations that have been made and submitted by affected parties in this action, the Fuquay Plaintiffs property is neither landlocked, nor dependent upon the use of King Lane in order to access their property, but instead is readily accessible for all purposes by the all weather Castle Lane road.

9. The Fuquay Plaintiffs have no legal right to compel the continued use of the private King Lane, which use has at all times has been entirely permissive.

10. In the absence of any demonstrated necessity, or any manifest adverse claim, the Fuquay Plaintiffs have no right to any continued use of King Lane.

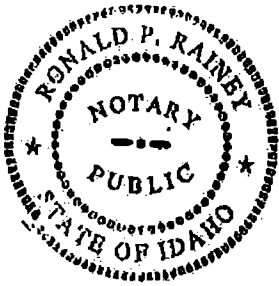
11. Because King Lane is an entirely private roadway, as the owners of that roadway, the Heart K Ranch is entirely within its rights to place gates across that entries to that roadway in order to limit and restrict its use the owners, their invitees, and other given express permission.

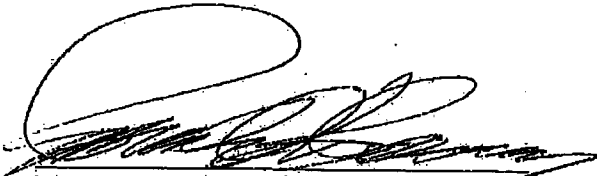
12. I have received neither written nor oral notice from the Plaintiff's attorney explaining what the nature and extent of any "immediate and irreparable injury, loss, or damage" that will result to the Fuquay Plaintiffs if a Temporary Restraining Order (TRO) is not issued, without first allowing our attorney to be heard in opposition to the issuance of that requested order.

Further affiant sayeth not.

  
Gilbert King

SUBSCRIBED AND SWORN to before me this 9<sup>th</sup> day of September, 2014.



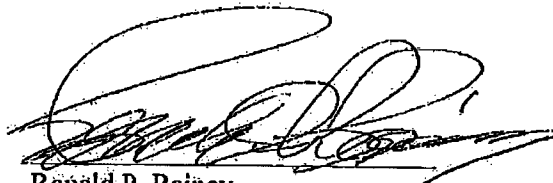
  
Notary Public for Idaho  
Residing at Caldwell, Idaho  
My Commission expires: 12/18/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 9<sup>th</sup> day of September, 2014, a true and correct copy of the foregoing document was served upon the following:

Matthew R. Cleverley  
Fidelity National Law GROUP  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
Facsimile: 877-655-5281  
Email: [Matthew.Cleverly@fnf.com](mailto:Matthew.Cleverly@fnf.com)

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Mail
- Facsimile Transmission
- Other \_\_\_\_\_

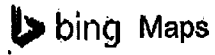
  
Ronald P. Rainey



# EXHIBIT A

AFFIDAVIT OF GILBERT KING

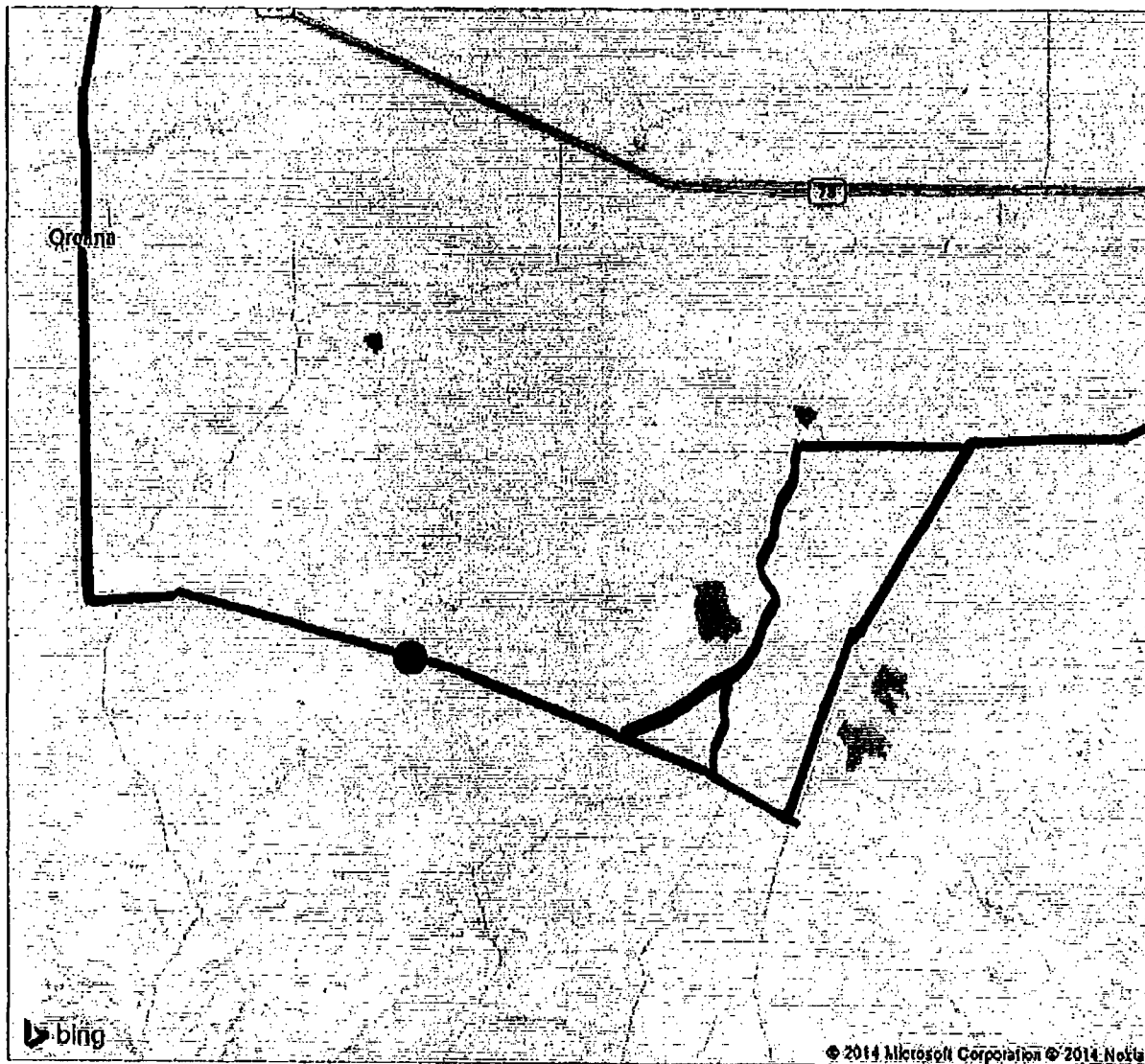
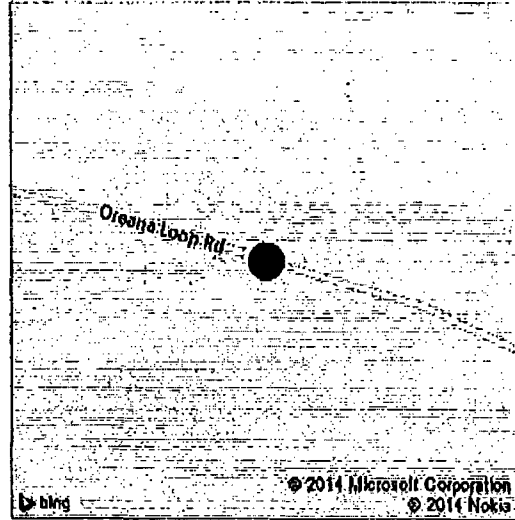
EXHIBIT A



Oreana Loop Rd, ID 83650

My Notes

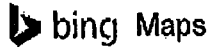
On the go? Use [m.bing.com](http://m.bing.com) to find maps, directions, businesses, and more



# EXHIBIT B

AFFIDAVIT OF GILBERT KING

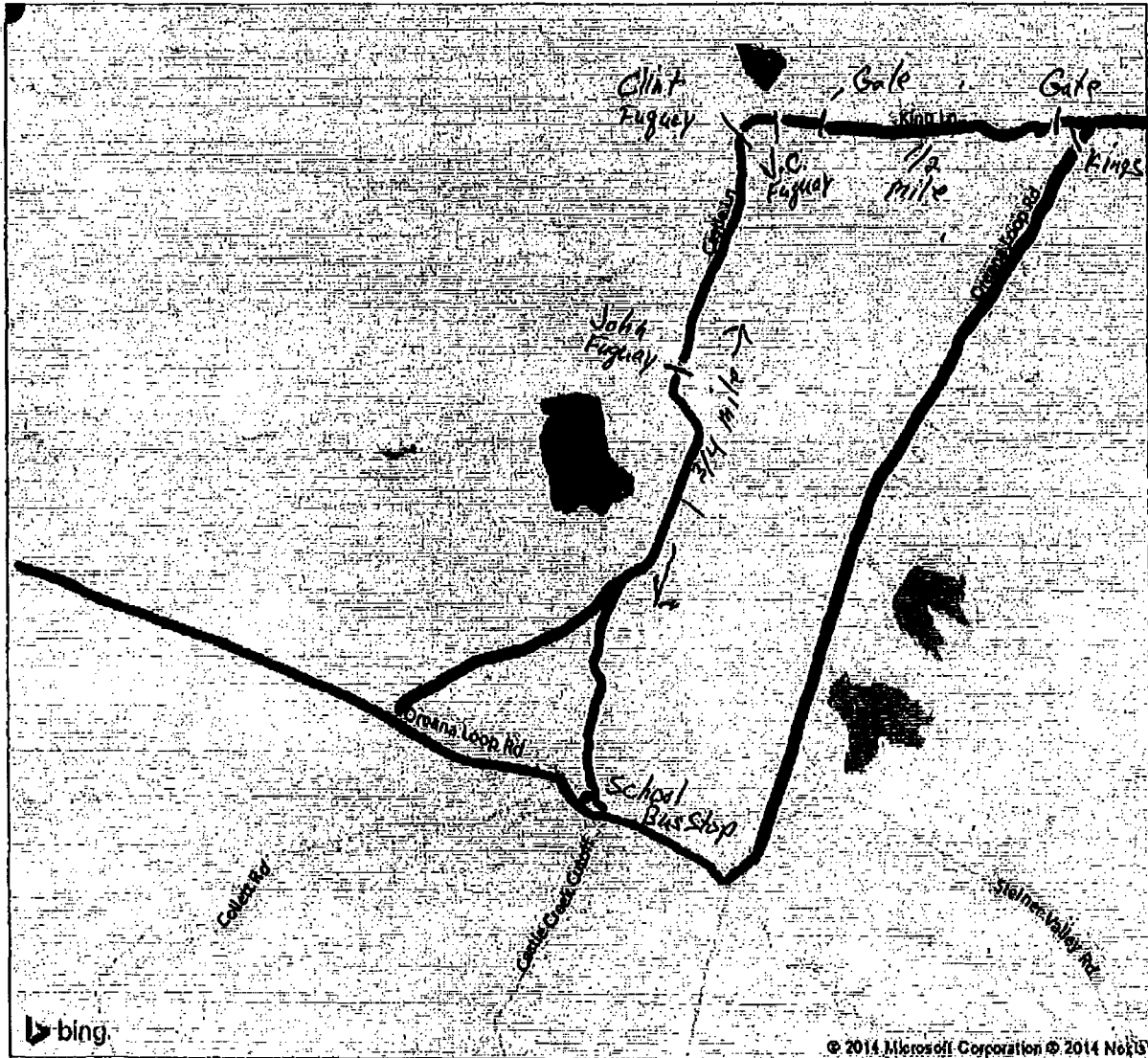
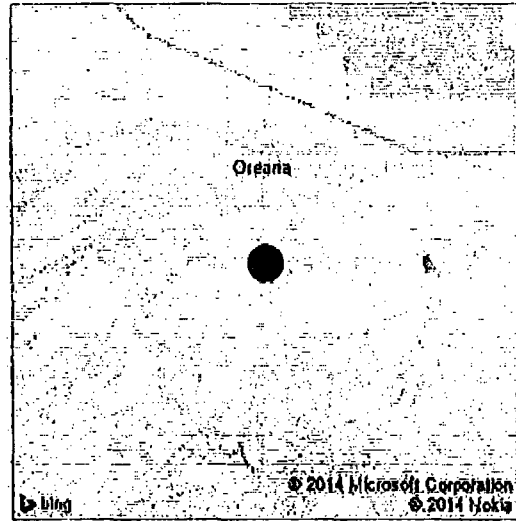
EXHIBIT B



Oreana Loop Rd, Murphy, ID 83650

My Notes

On the go? Use m.bing.com to find maps, directions, businesses, and more



# EXHIBIT C

AFFIDAVIT OF GILBERT KING

EXHIBIT C





RONALD P. RAINEY ISB #1022  
Attorney at Law  
P.O. Box 26  
110 North Ninth Street  
Caldwell, Idaho 83606-0026  
Phone (208)459-3659  
Facsimile Transmission No:459-9067

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K. Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )

Defendants. )

GILBERT KING, as Trustee; and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )

Case No. CV-2014-0278

DECLARATION OF DENICE  
COLLETT IN SUPPORT OF DEFENDANT'S  
OBJECTION TO PLAINTIFFS' EX-PARTE  
MOTION FOR TEMPORARY  
RESTRAINING ORDER

DECLARATION OF DENICE COLLETT -1



FUQUAY and HAILEY ROSE FUQUAY )

Counterdefendants. )

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.

2. I reside on Collett Lane, Oroann, Idaho and have been a bus driver for the Grandview School District for 23 years.

3. I start my bus route at my residence by driving down Collett Lane to Oreana Loop, driving west on Oreana Loop to the Fuquay mail box where I pick up Jesse Fuquay, son of J.C. Fuquay. I proceed west on Oreana Loop through the village of Oreana up to the west end of Oreana Loop and Highway 78 east to the east of Oreana Loop where I make another stop. I do not make a school bus stop at Kings Lane. When I return the children home, I reverse the route on Oreana Loop and Highway 78 dropping off Jesse Fuquay at the Fuquay mailbox and then I go to my residence on Collett Lane. *Through the years J.C. & Clint were also picked up at this location.*

I CERTIFY UNDER PENALTY OF PERJURY PURSUANT TO THE LAW OF THE STATE OF IDAHO THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 9 day of September, 2014.

Denice Collett  
Denice Collett

DECLARATION OF DENICE COLLETT -2

**CERTIFICATE OF SERVICE**

I, Ronald P. Rainey, hereby certify that on this \_\_\_ day of September, 2014, I caused a true and correct copy of the foregoing instrument to be delivered to the adverse party, via the method indicated below, addressed as follows:

\_\_\_ U.S. Mail, Postage Prepaid    \_\_\_ Facsimile Transmission    \_\_\_ Hand Delivery

Matthew R. Cleverley  
Fidelity National Law Group  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
Facsimile: \*77-655-5281  
Email: [Matthew.Cleverly@fnf.com](mailto:Matthew.Cleverly@fnf.com)

\_\_\_\_\_  
Ronald P. Rainey

DECLARATION OF DENICE COLLETT -3

RONALD P. RAINEY, Attorney at Law  
180 N. 9th Street, P. O. Box 26  
Caldwell, Idaho 83405  
Telephone (208) 459-3659  
Fax No. 459-9067

Date: September 11, 2014  
From: Ronald P. Rainey  
To: Orphan County Clerk  
495-1226

Re: CV2014-0278 Paquay v. Low & King Following please find Declaration of  
Scott Snyder person, please file. Thank you.

Number of pages, including this cover sheet <sup>2/</sup>  
**IF YOU DID NOT RECEIVE ALL OF THE PAGES LISTED ABOVE, PLEASE CALL (208) 459-3659 IMMEDIATELY.**

This information contained in this message is attorney-privileged and confidential information. Intended only for the use of the individual or entity named above. If you have received this communication in error, please immediately notify us by telephone to arrange for the return of this document.

*3 pages to Orphan County Clerk.*

RONALD P. RAINEY ISB #1022  
 Attorney at Law  
 P.O. Box 26  
 110 North Ninth Street  
 Caldwell, Idaho 83605-0026  
 Phone (208)459-3659  
 Facsimile Transmission No:459-9067

Attorney for Defendants  
 Gilbert King as Trustee for the  
 Heart K. Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
 FUQUAY and BAILEY ROSE FUQUAY, )  
 Plaintiffs, )

Case No. CV-2014-0278

DECLARATION OF SCOTT SNYDER

vs. )

SUSIE LOW; CAL LOW; HEART K. )  
 RANCH TRUST UTA DECEMBER 28, )  
 2012; AVOC FINANCIAL SERVICES OF )  
 IDAHO FALLS, INC.; GORDON G. KING )  
 ROSE M. KING; FIRST AMERICAN )  
 TITLE INSURANCE COMPANY, )

Defendants. )

GILBERT KING, as Trustee; and )  
 ROSE M. KING, as Beneficiary of the )  
 HEART K RANCH TRUST UTA )  
 DECEMBER 28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )

DECLARATION OF SCOTT SNYDER -1

GIL AND JO KING

2018-894-2208

p.2

FRUQUAY and HALEY ROSE FRUQUAY )

Countendants )


\_\_\_\_\_ )

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.
2. I am a deputy sheriff of Owyhee county and have been in law enforcement for 11 years.
3. On May 29, 2014, I was dispatched to the residence of Gilbert King, 19100 King Lane, Oreana and the residence of John Fruquay at 18907 Castle Lane, Oreana, regarding a dispute concerning fences on private property. There I met with Gilbert King and John Fruquay.
4. Attached as Exhibit "A" is a true and correct copy of my incident report regarding this matter.

I CERTIFY UNDER PENALTY OF PERJURY PURSUANT TO THE LAW OF THE STATE OF IDAHO THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 17 day of September, 2014.

  
\_\_\_\_\_  
Scott Snyder 2014

GI, AND JO KING

208-884-2205

p.3

CERTIFICATE OF SERVICE

I, Ronald P. Rainey, hereby certify that on this 17<sup>th</sup> day of September, 2014, I caused a true and correct copy of the foregoing instrument to be delivered to the addressee party, via the method indicated below, addressed as follows:

     U.S. Mail, Postage Prepaid  Facsimile Transmission      Email Delivery

Matthew R. Cleverley  
Fidelity National Law Group  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-8009  
Facsimile: 877-655-5281  
Email: Matthew.Cleverley@fnl.com

S. Bryce Farris  
P.O. Box 7985  
Boise, Idaho 83707  
Telephone: 620-7447  
Facsimile: 620-7559  
Email: bryce@servertothelaw.com

Shawn Whitwood  
2911 S. Holden Ave  
Boise, Idaho 83705  
Telephone: 336-4433  
Email: Ocasalvarez173@gmail.com

  
Ronald P. Rainey

09/11/2014 13:22:54 LE0640 OWYHEE COUNTY SHERIFF  
WHITE, BEV

Incident #: 01-2014-01450 PAGE 1  
Status/Dispo: CIVIL

# INCIDENT REPORT

Incident Vehicles

Incident Property

## ACTION REQUESTED

Review/Comment  
 Warrant

Complaint  
 Arrested

Summons  
 Other:

AUDIO TAPE?  Yes  No  
PHOTOS?  Yes  No

VIDEO TAPE?  Yes  No

CRIMINAL HISTORY ATTACHED?  Yes  No

Make copies and send to:

Copies Sent by:

County Prosecutor  
 Juvenile Probation  
 Other: \_\_\_\_\_

OFFICER

REVIEWED BY

\*\*\*\*\*END OF REPORT\*\*\*\*\*

09/11/2014 13:22:54 LE0640 OWYHEE COUNTY SHERIFF  
WIDTH, BBV

Incident #: 01-2014-01430 PAGE 1  
Status/Dispo: CIVIL

# INCIDENT REPORT

Misdemeanor:  Felony:  Non Criminal:

Initial NOC: EVENT 59399  
Ver NOC: NEIGHBOR DISPUTE  
Location: 19100 KING LN  
Cross St:  
District: R4  
Rpted to: ALLEN, LUCILE MAY  
Dispatch: ALLEN, LUCILE MAY

Reported Date/Time: 05/29/2014 11:44  
Occurred Date: 6/29/2014 TO 5/29/2014  
Occurred Time: 11:44:51AM TO 11:44:51AM  
Rpt By: KING, GILBERT GENE  
PO BOX 30  
MURPHY ID 83650  
Phone 1: [REDACTED]  
Phone 2:

## Officers (O/I Reports)

31 SNYDER, SCOTT

## Incident Officers

31 SNYDER, SCOTT

### Description

NEIGHBOR DISPUTE ONGOING OVER BOUNDARY FENCES.

### Extended Description

### Incident Names

\*\*\* REPORTED PARTIES \*\*\*

#### KING, GILBERT GENE

PO BOX 30  
MURPHY ID 83650  
Home: [REDACTED]  
Work: (600) - [REDACTED]  
Employer:  
Comment:

Incident Name Entry Date: 05/29/2014  
DOB: [REDACTED] Age: [REDACTED]  
SSN: [REDACTED] OLN: [REDACTED]  
Race: WHITE Gender: MALE Ethn: NOT HISPANIC  
Hgt: [REDACTED] Wgt: [REDACTED] Hair: [REDACTED] Eyes: [REDACTED]  
Fax: [REDACTED] Cell: [REDACTED]  
Pager:

\*\*\* OTHERS \*\*\*

#### FUQUAY, JOHN EDMOND

16007 CASTLE LANE  
OREANA ID 83650  
Home:  
Work:  
Employer: ORION  
Comment: UTILITIES

Incident Name Entry Date: 05/29/2014  
DOB: [REDACTED] Age: [REDACTED]  
SSN: [REDACTED] OLN: [REDACTED]  
Race: [REDACTED] Gender: MALE Ethn: NOT HISPANIC  
Hgt: [REDACTED] Wgt: [REDACTED] Hair: [REDACTED] Eyes: [REDACTED]  
Fax: [REDACTED] Cell: [REDACTED]  
Pager:

### Incident Citations

### Incident Arrests

# EXHIBIT A



OWYHEE COUNTY SHERIFF'S OFFICE  
Report 1401430.001

**NATURE OF COMPLAINT: Civil Dispute of Fences and Gates**

On 5/29/2014 I was dispatched to King Lane, and 18907 Castle Lane, Oreana, Owyhee County, Idaho for a neighbor dispute concerning fences on private property.

I first made contact with John Edmund Fuquay at his residence, 18907 Castle Lane. On the way to John's residence, from the King's property, I had passed through two fences with the gates closed. I also observed cattle in the area. I asked John if he had any type of easement for the private road that is routed from the King property to John's residence. John advised he does have easement that came from many years past. I advised John, the Kings advised there was no legal easement, but permission was given to John use the road at any time, as long as if the gates were closed, they needed to remain closed due to cattle in the area.

I advised John of Idaho Code 35-112 Establishment of gates..., in which if any damages occurred to fences or gates, any claims made by the property owner, would be doubled in a court of law. John advised if any damages were to occur to any fence or gates, or to any cattle related to an open gate, he would take full responsibility. John advised he was not going to close any gates on the road in question, as he felt he had a right of way or easement. John also advised he would not close any gates, because he didn't want his older relatives to have to struggle with the gate, or step in cattle manure. John advised he was involved with multiple attorneys concerning the property and easements.

I then left John's residence, and returned to the King residence. I made contact with Gilbert Gene King, and advised Gilbert of my discussion with John, mainly to inform Gilbert of possible gates left open while Gilberts' cattle were in the area. I also advised Gilbert of Johns intentions of possibly not closing the gates. Gilbert did have cows in the area that would be affected if gates were left open.

Scott Snyder 2031 OCSD

3 June 2014

Officer's Signature

Date

RONALD P. RAINEY ISB #1022  
Attorney at Law  
P.O. Box 26  
110 North Ninth Street  
Caldwell, Idaho 83606-0026  
Phone (208)459-3659  
Facsimile Transmission No:459-9067

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K. Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
FUQUAY and HAILEY ROSE FUQUAY, )  
Plaintiffs, )

Case No. CV-2014-0278

DECLARATION OF SETH THOMAS

vs. )

SUSIE LOW; CAL LOW; HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AYCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )  
Defendants. )

GILBERT KING, as Trustee; and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )

DECLARATION OF SETH THOMAS -1

FUQUAY and HAILEY ROSE FUQUAY )


Counterdefendants. )  
)  
)  
)

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.
2. Please see the attached Exhibit "A" for my statement.

I CERTIFY UNDER PENALTY OF PERJURY PURSUANT TO THE LAW OF THE STATE OF IDAHO THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 16th day of September, 2014.

  
Seth Thomas

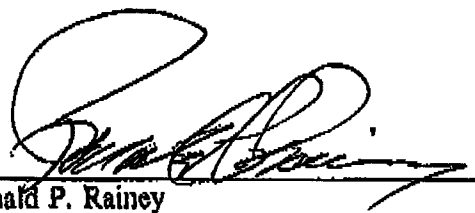
**CERTIFICATE OF SERVICE**

I, Ronald P. Rainey, hereby certify that on this 18<sup>th</sup> day of September, 2014, I caused a true and correct copy of the foregoing instrument to be delivered to the adverse party, via the method indicated below, addressed as follows:

U.S. Mail, Postage Prepaid     Facsimile Transmission     Hand Delivery

Matthew R. Cleverley  
Fidelity National Law Group  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
Facsimile: 877-655-5281  
Email: [Matthew.Cleverly@fnf.com](mailto:Matthew.Cleverly@fnf.com)

S. Bryce Farris  
P.O. Box 7985  
Boise, Idaho 83707  
Telephone: 629-7447  
Facsimile: 629-7559  
Email: [bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)

  
\_\_\_\_\_  
Ronald P. Rainey

DECLARATION OF SETH THOMAS -3

September 13, 2014

To Whom It May Concern:

Our winter range is adjacent to the property of Heart K Ranch Trust. We graze our cattle there during the winter months. It is beneficial to us if all landowners that border us keep their gates closed. This helps to insure cattle are secured on our property and not out.

Thank you,



Seth Thomas  
Oreana, ID 83650  
208-834-2261

RONALD P. RAINEY ISB #1022  
Attorney at Law  
P.O. Box 26  
110 North Ninth Street  
Caldwell, Idaho 83606-0026  
Phone (208)459-3659  
Facsimile Transmission No:459-9067

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K. Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
FUQUAY and HAILEY ROSE FUQUAY, )  
 )  
Plaintiffs, )

Case No. CV-2014-0278

vs. )

DECLARATION OF SCHWANN  
DELIVERY PERSON

SUSIE LOW; CAL LOW; HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )  
 )  
Defendants. )

GILBERT KING, as Trustee; and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )

DECLARATION OF SCHWANN DELIVERY PERSON -1

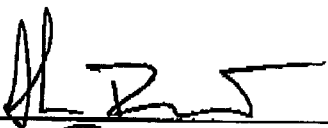
FUQUAY and HAILEY ROSE FUQUAY )  
 )  
 Counterdefendants. )  
 )  
 )  
 \_\_\_\_\_ )

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.
2. I have been delivering Schwann products to people in the Oreana area for approximately five years.
3. I have delivered Schwann products to John Fuquay and Clinton and Hailey Fuquay by traveling up Oreana Loop Road then Castle Lane to their residences. The road was completely passable allowing me to travel it all year round. I was prevented from using this road when the gate was locked across Castle Road. I would still use Castle Road to make deliveries if the locked gate was not there.

I CERTIFY UNDER PENALTY OF PERJURY PURSUANT TO THE LAW OF THE STATE OF IDAHO THAT THE FOREGOING IS TRUE AND CORRECT.

Dated this 12<sup>th</sup> day of September, 2014.

  
 \_\_\_\_\_  
 Shawn Drew

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Case No. CV-14-0278

DECLARATION OF JOHN FUQUAY IN  
SUPPORT OF MOTION FOR PARTIAL  
SUMMARY JUDGMENT

Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am one of the Plaintiffs in this action. I have personal knowledge of the facts in this declaration, and I am competent to testify at trial as to the matters herein.
2. I am submitting this declaration in support of Plaintiffs' Motion for Partial Summary Judgment against Defendant Lows.
3. Clinton Ward Fuquay and Hailey Rose Fuquay own the parcel (the "Clinton Fuquay Parcel") at the west end of King Lane. It was once part of the John Fuquay Parcel before I

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sold it to Clinton and Hailey Fuquay. The legal description for the Clinton Fuquay Parcel is shown on the warranty deed attached as Exhibit "D" to the Motion.

4. I also own the parcel (the "John Fuquay Parcel") which is located south of the Clinton Fuquay Parcel. The legal description for the John Fuquay Parcel is shown on the Trustee's Deed dated October 13, 1989 attached as Exhibit "B" to the Motion (less the Clinton Fuquay Parcel).
5. I began living on the John Fuquay Parcel in January 1977 when it was purchased by my father. I was about 12 years old when we first moved onto the John Fuquay Parcel. My parents bought a mobile home and put on the property and we lived in that for years.
6. From January 1977 forward, my family continuously used King Lane for access to Oreana Loop Road. My parents drove personal vehicles of all types over King Lane. From the time I was 12, we also walked over King Lane to get to the bus stop at Oreana Loop Road and to pick up mail from the mail box which is at the corner of King Lane and Oreana Loop Road.
7. Our family's guests regularly and continuously used King Lane to access our house.
8. My father, James Fuquay, owned large semi-trucks and cattle trucks that he used in his farming and ranching operations. He would regularly drive those trucks over King Lane to and from Oreana Loop Road.
9. At about age 14, I began driving large trucks for my father. Those included cattle trucks and semi trucks. I would drive them over King Lane to and from Oreana Loop Road.

DECLARATION OF JOHN FUQUAY-2

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10. At about age 21, I obtained my Idaho chauffeur's license which is the predecessor to the CDL license. It permitted me to drive commercial trucks. I started driving large trucks commercially at that time and have done so ever since. I currently drive commercial trucks under the assumed business name of John Fuquay Trucking.
11. Since 1977, I have continuously used King Lane to access both the John Fuquay Parcel and the Clinton Fuquay Parcel.
12. I have always believed that I have the right to access the John Fuquay Parcel and the Clinton Fuquay Parcel over King Lane and I have always acted in accordance with that belief.
13. At its west end, King Lane connects to Castle Lane. Castle Lane continues south until it reached Oreana Loop Road again. There are no other properties that use King Lane for access.

**LOW PARCEL 1**

14. Susie Low and Cal Low own the parcel (the "Low Parcel 1") which is located south of King Lane and east of the Clinton Fuquay Parcel. There are two parcels which were conveyed by the same deed. The legal description for the Low Parcel 1 is shown on the Special Warranty Deed attached as Exhibit "F" to the Motion.
15. Prior to the Lows ownership of Low Parcel 1, my family openly and continuously used King Lane to access the John Fuquay Parcel and the Clinton Fuquay Parcel for more than 5 years.

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16. Based on the public records, on January 17, 1973, Elmer O. Johnston and May M. Johnston conveyed Low Parcel 1 to Charles W. Steiner and Florence W. Steiner.
17. Based on the public records, on March 21, 1980, Charles W. Steiner and Florence W. Steiner were divorced and Low Parcel 1 was awarded to Florence W. Steiner.
18. Based on the public records, on September 20, 1987, Samuel Steiner, as personal representative of Florence W. Steiner conveyed Low Parcel 1 to Samuel Steiner.
19. Based on the public records, on January 23, 1995, Samuel V.C. Steiner and Mary Jane Steiner conveyed Low Parcel 1 to Samuel V.C. Steiner and Mary J. Steiner.
20. Based on the public records, on July 15, 2005, Samuel V.C. Steiner and Mary J. Steiner conveyed Low Parcel 1 to Pioneer Exchange Accommodation Titleholder #69, LLC.
21. Based on the public records, on January 27, 2006, Pioneer Exchange Accommodation Titleholder #69, LLC conveyed Low Parcel 1 to the Lows.
22. From January 1, 1977 through March 21, 1980, I never asked Charles W. Steiner and Florence W. Steiner for permission to use King Lane. Charles W. Steiner and Florence W. Steiner never gave my family, my guests or me permission to use King Lane.
23. From January 1, 1977 through March 21, 1980, my family used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
  - a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.

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- b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
  - c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
  - d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
  - e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.
24. From March 21, 1980 through September 20, 1987, I never asked Florence W. Steiner for permission to use King Lane. Florence W. Steiner never gave my family, my guests or me permission to use King Lane.
25. From March 21, 1980 through September 20, 1987, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
  - b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.

- c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
  - d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
  - e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.
26. From September 20, 1987 through January 23, 1995, I never asked Samuel V.C. Steiner and Mary Jane Steiner for permission to use King Lane. Samuel V.C. Steiner and Mary Jane Steiner never gave my family, my guests or me permission to use King Lane.
27. From September 20, 1987 through January 23, 1995, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
  - b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
  - c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
  - d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.

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- e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.
28. From January 23, 1995 through July 15, 2005, I never asked Samuel V.C. Steiner and Mary Jane Steiner for permission to use King Lane. Samuel V.C. Steiner and Mary Jane Steiner never gave my family, my guests or me permission to use King Lane.
29. From January 23, 1995 through July 15, 2005, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
  - b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
  - c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
  - d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
  - e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.
30. From July 2, 2005 through January 27, 2006, I never asked Pioneer Exchange Accommodation Titleholder #69, LLC for permission to use King Lane. Pioneer

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Exchange Accommodation Titleholder #69, LLC never gave my family, my guests or me permission to use King Lane.

31. From July 2, 2005 through January 27, 2006, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:

- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
- b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
- c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
- d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
- e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.

32. From January 27, 2006 through the present I never asked the Lows for permission to use King Lane. The Lows never gave my family, my guests or me permission to use King Lane.

33. From January 27, 2006 to the present, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:

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- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
- b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
- c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
- d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
- e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.

#### LOW PARCEL 2

34. Susie Low and Cal Low own the parcel (the "Low Parcel 2") located south of King Lane. Oreana Loop Road crosses the northwest corner of Low Parcel 2. The legal description for the Low Parcel 2 is shown on the Special Warranty Deed attached as Exhibit "H" to the Motion.
35. Prior to the Lows ownership of Low Parcel 2, my family openly and continuously used King Lane to access the John Fuquay Parcel and the Clinton Fuquay Parcel for more than 5 years.
36. From the public records, on May 6, 1942, D. Fred Henderson acquired Low Parcel 2.

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37. From the public records, between May 6, 1942 and March 18, 1997, the Low Parcel 2 was owned by D. Fred Henderson, individually.
38. From the public records, on March 18, 1997 D. Fred Henderson conveyed the Low Parcel 2 to D. Fred Henderson and Mary F. Henderson as husband and wife.
39. From the public records, on February 11, 2000, Mary F. Henderson conveyed the Low Parcel 2 to Mary F. Henderson, individually.
40. From the public records, on July 8, 2005, Mary Frances Henderson conveyed the Low Parcel 2 to Pioneer Exchange Accommodation Titleholder #69, LLC.
41. On January 27, 2006, Pioneer Exchange Accommodation Titleholder #69, LLC conveyed the Low Parcel 2 to the Lows.
42. From January 1, 1977 through March 18, 1997, I never asked D. Fred Henderson for permission to use King Lane. D. Fred Henderson never gave my family, my guests or me permission to use King Lane.
43. From January 1, 1977 through March 18, 1997, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
  - a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
  - b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.

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- c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
- d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
- e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.

44. From March 18, 1997 through July 8, 2005, I never asked D. Fred Henderson or Mary P. Henderson for permission to use King Lane. D. Fred Henderson or Mary F. Henderson never gave my family, my guests or me permission to use King Lane.

45. From March 18, 1997 through July 8, 2005, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:

- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
- b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
- c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
- d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.

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- e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.
46. From July 2, 2005 through January 27, 2006, I never asked Pioneer Exchange Accommodation Titleholder #69, LLC for permission to use King Lane. Pioneer Exchange Accommodation Titleholder #69, LLC never gave my family, my guests or me permission to use King Lane.
47. From July 2, 2005 through January 27, 2006, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:
- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
  - b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
  - c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
  - d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
  - e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.

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48. From January 27, 2006 through the present I never asked the Lows for permission to use King Lane. The Lows never gave my family, my guests or me permission to use King Lane.

49. From January 27, 2006 to the present, we used King Lane for access to the Fuquay Parcel and the Clinton Fuquay Parcel for the following types of purposes:

- a. Regular personal vehicle access to and from Oreana Loop Road on a near-daily basis for regular residential purposes such as going to and from the store, picking up mail from the mail box, taking children to and from the bus stop, going to and from personal errands.
- b. Regular use of King Lane for driving large semi-trucks to and from the John Fuquay Parcel. This use has been consistent since 1977 when my father had his trucks and continued when I began operating the John Fuquay Trucking Company.
- c. Regular farm vehicle use of King Lane for cattle trucks, moving farm equipment from one location to another.
- d. Pedestrian use of King Lane for children to walk to and from the bus stop previously located at the corner of King Lane and Oreana Loop Road.
- e. Use of King Lane by guests of the Fuquays to get to and from the Fuquays' properties.

#### UTILITIES

50. The overhead electric lines that service the houses located on the Clint Fuquay Parcel run from Oreana Loop Road along King Lane to the Clint Fuquay Parcel.

DECLARATION OF JOHN FUQUAY- 13

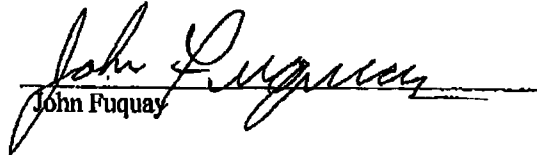
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51. The underground Centurylink telephone lines run from Oreana Loop Road along King Lane to the Clint Fuquay Parcel. It then runs south along Castle Lane to my house on the John Fuquay Parcel.

52. ~~Underground~~ <sup>Overhead</sup> electric lines for the house on the John Fuquay parcel run north through the property to the south of the John Fuquay Parcel.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY OF PERJURY.

Dated: October \_\_, 2014

  
John Fuquay

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Attorney for Defendants Susie Low and Cal Low  
 IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
 FUQUAY and HAILBY ROSE FUQUAY, )  
 Plaintiffs, )

Case No. CV-2014-0278

vs. )

**AFFIDAVIT OF ROSE KING**

SUSIE LOW; CAL LOW; HEART K. )  
 RANCH TRUST UTA DECEMBER 28, )  
 2012; AVCO FINANCIAL SERVICES OF )  
 IDAHO FALLS, INC.; GORDON G. KING )  
 ROSE M. KING; FIRST AMERICAN )  
 TITLE INSURANCE COMPANY, )  
 Defendants. )

STATE OF IDAHO )  
 )ss.  
 County of Owyhee )

Rose King being first duly sworn upon her oath, deposes and says that:

1. I am a Defendant in the above-titled action, over the age of 18 and I make this affidavit based upon my personal knowledge and I am competent to testify to the matters contained herein. I have reviewed the Declaration of John Fuquay dated October 28, 2014. The

AFFIDAVIT OF ROSE KING -1

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statements set forth by Mr. Fuquay in his declaration are inaccurate for the reasons hereinafter set forth:

2. My deceased husband, Gordon King and I purchased our ranch on September 17, 1973 which included a field lane which has been referred to as "King Lane" in this litigation. At the time of our purchase, King Lane was only a path through grass and weeds and was wet and muddy most of the year with a culvert constructed of 55 gallon barrels at the west end. We desired to access our fields through the use of this field lane, therefore, we started hauling rocks to build a base for this road so that it would be passable for our farm equipment. We did this annually until we decided to sell the ranch in 1982.

3. My husband and I sold our ranch to Zane Block in 1982 but had to repossess it in 1986. During this four year period I was still familiar with the use of King Lane as I frequently observed the property and the operations of the ranch. After we repossessed the ranch, the lane was in terrible condition and we had to construct and improve the road and the crossing where the road crosses an irrigation ditch which provides water to our ranch. There was a culvert made from 55 gallon barrels at the west end of the land and these were rusty and leaky. We replaced the welded barrel culvert in 1988-1989 with a concrete culvert. Prior to that time it was impossible for large trucks to cross over the welded barrels. This lane still requires annual maintenance to make it passable for our ranching operation.

4. The path/road which has been referred to as "King Lane" was not named King Lane until 2002 when emergency 911 came into existence and Gary Aman requested a name for the lane to access of emergency vehicles. I informed him that the access would be named "King Lane." At that time, addresses were provided for the four houses located on the King

AFFIDAVIT OF ROSE KING -2

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property/ranch with an address of King Lane. Mailing addresses for the four residences on the King property/ranch then became King Lane. There was no determination that the path/road be named King Lane would continue any further than the access to our residences. For purposes of the rest of this Affidavit I will refer to the roadway at issue as King Lane but this does not alter my understanding that King Lane ends at the residences for my ranch.

5. What has been referred to as King Lane for purposes of litigation has also been used by Cal and Susie Low, who own the property generally to the south of the King property/ranch and their predecessors in interest. When my husband and I purchased our ranch in 1973, the property now owned by Lows was owned by the Steiner family, and the Steiners used the road to access their property to get to and from their fields. This use has continued since 1973 to present, including now that the property is owned by Cal and Susie Low.

6. I am familiar with the property currently owned by John Fuquay and Clint and Hailey Fuquay which is located generally to the south and west of the King ranch.

7. My son, Greg King, rented the house which is now occupied by J.C. Fuquay from 1979 to 1982. During said time my son worked for us and could not use King Lane on a regular or frequent basis because the road was wet and impassible approximately ninety percent (90%) of the time. Many times when he came to our house or for work he had to walk or drive a tractor to do so because the road was not suitable for regular vehicle use. It was not until the concrete culvert mentioned above was installed in the irrigation ditch that allowed more frequent use of the roadway.

8. Our daughter, Karla Love, rented the main house on the Fuquay property for a couple months in the 1980's. She traveled up and down Castle Lane to Oreana Loop for access



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even when coming to visit us because King Lane was so impassible.

9. From 1973 to present the primary access for the properties owned by John and Clint Fuquay has been Castle Lane. Any use by the Fuquays of King Lane has been occasional use, but not on a daily or regular basis. This use has been casual use on occasion as a matter of convenience. This is because, among other things, as mentioned above, King Lane is in fact impassible during certain times of the year and cannot be used because it becomes too muddy. Such occasional/casual use by the Fuquays has been allowed because we wanted to be neighborly, their use did not interfere with our use of the road and it was done so with implied permission. The Fuquays use has been so infrequent that it has not bothered us until recently, or more specifically within the past five years, when the Fuquays have attempted to increase their use by bringing large trucks through our (King) property.

10. There has always been a fence and a gate on the west end of our property along what is referred to as King Lane to prevent our livestock from getting to the BLM property to the west. We have also used this fenced area where King Lane is located for our own livestock to graze and to pen up for sorting. While the Fuquays have occasionally/casually used the road on an infrequent basis they have previously respected the fence and gates across the roadway. It was not until recently, within the past year, that John Fuquay asserted they did not have to close the gate.

11. Prior to this lawsuit, I am not aware of any use by UPS, post office or other delivery services of King Lane to provide services to the Fuquay properties. To the contrary the mailboxes for the Fuquays are located at the end of Castle Lane and I have not observed any services using King Lane to provide deliveries to the Fuquay properties. The only mailbox at

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the end of King Lane is for the Kings. Since this lawsuit has been initiated by the Fuquays, I have been asked if Schwans delivery person can use King Lane to access the Fuquay property because John Fuquay has locked the gate on Castle Lane directing them to use King Lane. I verbally gave permission to the Schwans delivery person to use King Lane that one time which was within the past six months.

12. I am not aware of any guests of the Fuquays using King Lane to access the Fuquay properties. Since my husband and I have owned the King ranch, there has been occasional use of King Lane by hunters or others who have asked permission.

13. Any use by Clint Fuquay of the road/King Lane to access the property now owned by Clint Fuquay has been in the last 8 years. Again, any use been occasional and not on a regular or primary access.

14. With regard to children catching the school bus at the end of King Lane, my children caught the bus there. I do remember that on occasion Megan, John's sister, did come down King Lane to catch the bus. I do not recall John Fuquay ever catching the bus at the end of King Lane. If he rode the school bus, he caught the bus at the bus stop at the end of Castle Lane. Clint Fuquay's children and J.C. Fuquay's children catch the bus at the end of Castle Lane.

15. Until the spring of 2014, I have never seen the Fuquays operate farm equipment on King Lane.

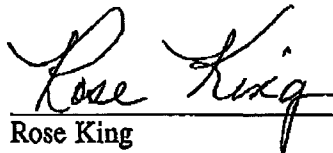
16. From 1973 to 1988-1989 there were never any large trucks used on King Lane because, among other things, the trucks could not use the lane and pass over the welded barrels mentioned above and King lane was not suitable for said use. From 1988-89 to 2011 I have not

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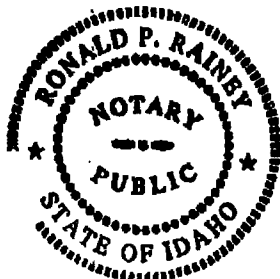
observed any large trucks or for that matter much traffic at all from the Fuquay properties using King Lane. The heavy truck traffic seemed to commence about 2011.


In summary I have lived on the King Ranch from 1973 to current except for the four years between 1982-1986. I can observe and hear all of the traffic that uses King Lane. I dispute Mr. Fuquay's allegations that King Lane has been used since 1977 for regular personal vehicles on a nearly daily basis, semi trucks consistently since 1977, regular farm vehicles such as cattle trucks and moving farm equipment, pedestrian traffic to and from the bus stop and guests going to and coming from the Fuquay properties.

The King family uses King Lane several times a day in our ranching/farming operations. Any use if any of King Lane by other people including the Fuquays has never interfered with our use of King Lane and in order to be neighborly we have allowed the use by others. Such use has been with implied permission.

  
Rose King

Sworn to and subscribed before me this 4th day of December, 2014.



  
Notary Public for Idaho  
Residing in Caldwell, Idaho  
My Commission Expires: 12/18/2018

AFFIDAVIT OF ROSE KING -6

# COPY

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 8<sup>th</sup> day of December 2014 by the following method:

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\_\_\_\_\_  
S. Bryce Farris

# COPY

S. BRYCE FARRIS  
 [Idaho State Bar No. 5636]  
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Attorneys for Defendants Susie Low and Cal Low

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

**JOHN E. FUQUAY; CLINTON WARD  
 FUQUAY and HAILEY ROSE FUQUAY;**

Plaintiffs,

vs.

**SUSIE LOW; CAL LOW; HEART K  
 RANCH TRUST UTA DECEMBER 28,  
 2012; AVCO FINANCIAL SERVICES OF  
 IDAHO FALLS, INC.; GORDON G.  
 KING; ROSE M. KING; FIRST  
 AMERICAN TITLE INSURANCE  
 COMPANY;**

Defendants.

Case No. CV-2014-0278

**AFFIDAVIT OF SAMUEL V.C.  
 STEINER**

STATE OF IDAHO        )  
                                   )  
 COUNTY OF ADA        )

SAMUEL V.C. STEINER being first duly sworn, deposes and states that:

1. I and my wife Mary are the predecessors in title for Cal and Susie Low who purchased our properties located adjacent to Oreana Loop Road in Owyhee County in 2006.

AFFIDAVIT OF SAMUEL V.C. STEINER - 1

# COPY

2. I was born 1957. My parents purchased these properties in 1959. I was two (2) or so when we moved onto the parcel in 1959 that is located across Oreana Loop Road from where Lows built their residence. Our farm residence was within a half mile of the road everyone is referring to as King Lane.

3. I inherited the properties from my mother in 1984. I had lived on the parcel referred to above until 1975 when I lived in Boise and went to college. I returned to the property in 1980.

4. There was an old one-room school building located on what is referred to as Castle Road close to the Foreman Reservoir, but classes were not held there. I believe the building was moved off sometime in the 1980s. I understood that it had been an active school site for a number of years before being closed down when another school building was built that was more convenient.

5. I do not know who, if anyone, constructed King Lane. This was an old farm access roadway that was used occasionally by a variety of people. My dad always told me that he thought the lane belonged to him. Neither my parents nor myself tried to stop anyone from using the road. As long as they did not interfere with our operations, we didn't object to them using the lane.

6. Sometimes hunters used it to go back to the reservoir on the BLM ground. Kings used it to go to the geothermal well they had leased on the BLM ground. Renters on the old Munger property, now owned by Fuquays and previously owned by Bob Collett used it occasionally as a short-cut to Grand View. I think that Jim Fuquay used it occasionally when he lived in the mobile home located near the rental property now owned by Clint Fuquay. Jim and John Fuquay lived in the old Foreman farm residence down by the Foreman Reservoir for many years and while they generally drove out Castle Road, they also used the lane as a short-cut to Grand View. When Jim Fuquay moved on a mobile home at the corner of what would be King Lane and Castle Road, he would occasionally use King Lane, probably as a short-cut when he went out to Grand View.

7. However, the majority of the vehicle use was down Castle Road to Oreana Loop Road to the west. This was especially true during wet weather because there is a slough at the common west corner of the Fouquay, Low's and King's properties that was pretty muddy in wet weather. It was pretty difficult to get through then. When Zane Block had the King property under contract, he and Jim Fuquay did some work on the lane one year.

8. While there was some use of King Lane by passenger vehicles and pickup trucks, I don't believe I ever saw anyone take a large truck out that way, logging trucks or cattle trucks. Those kind of vehicles always went out Castle Road. However, I think that John Fuquay may have brought an empty cattle truck in that way a few times.

DATED this 10<sup>th</sup> day of November, 2014.

AFFIDAVIT OF SAMUEL V.C. STEINER - 2

COPY

*Samuel V.C. Steiner*

Samuel V.C. Steiner

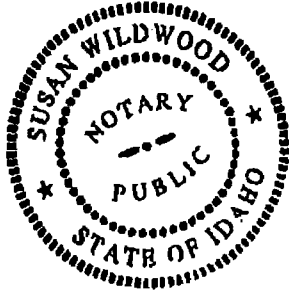
SUBSCRIBED AND SWORN to before me this 10<sup>th</sup> day of November, 2014.

*Susan Wildwood*

NOTARY PUBLIC FOR THE STATE OF IDAHO

Residing at Boise, Idaho

My Commission expires: 01-31-17



AFFIDAVIT OF SAMUEL V.C. STEINER - 3

# COPY

## CERTIFICATE OF SERVICE

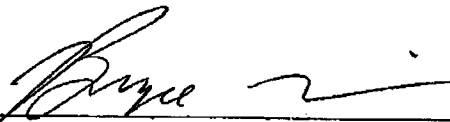
I hereby certify that a true and correct copy of the foregoing document was served on the following on this 8th day of ~~September~~, 2014 by the following method:  
*December*

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Rose King*

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S. Bryce Farris



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Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K. Ranch Trust UTA December 28, 2012

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FEB 11 2015

SEATTLE LITIGATION

**FILED**

A.M. 12:10 P.M.

JAN 29 2015

ANGELA BARKELL, CLERK  
Lena Johnson  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs,

vs.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY, )

Defendants.

GILBERT KING, as Trustee, and  
ROSE M. KING, as Beneficiary of the  
HEART K RANCH TRUST UTA  
DECEMBER 28, 2012,

Counterclaimants,

vs.

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY )

Counterdefendants.

CASE NO. CV 2014-0278

AFFIDAVIT OF RONALD P. RAINEY

*AFFIDAVIT OF RONALD P. RAINEY – PAGE 1*

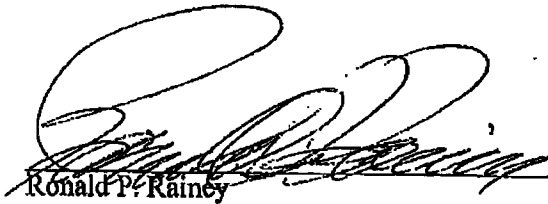
STATE OF IDAHO )  
County of Canyon ) ss.

RONALD P. RAINEY, being first duly sworn, upon oath deposes and says:

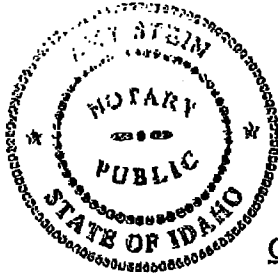
1. I am counsel for the Defendant and Counterclaimant, Heart K. Ranch Trust, in the above-captioned action, am over the age of majority, competent to testify, and I make this affidavit upon personal knowledge.


2. Attached as Exhibit A to this Affidavit is a copy of the cited testimony of J.C. Fuquay, John E. Fuquay and Clinton Ward Fuquay as given in open court on September 18, 2014 during the preliminary injunction hearing.

Further affiant sayeth not.

  
Ronald P. Rainey

SUBSCRIBED AND SWORN to before me this 29<sup>th</sup> day of January, 2015.



  
Notary Public for Idaho  
Residing at Caldwell, Idaho  
My Commission expires: 07-09-19

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 29 day of January, 2015, a true and correct copy of the foregoing document was served upon the following:

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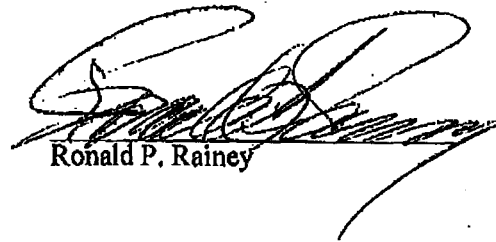
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[ ] Overnight Mail  
 Facsimile Transmission  
[ ] Other \_\_\_\_\_

*Attorney for Plaintiffs*

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[ ] Other \_\_\_\_\_

*Attorney for Low Defendants*



Ronald P. Rainey

1 Q They can get up Castle Lane, correct?  
2 A They can.  
3 Q And there's no obstructions going up Castle Lane at  
4 all?  
5 A It depends on the year.  
6 Q Well, what happens in an off year then?  
7 A Well, there's the ditch that can wash out.  
8 Q Who's locking you out?  
9 A I said there's a ditch that can wash out.  
10 Q Okay. And --  
11 A And that's -- that's the only one I can think of at  
12 the moment.  
13 Q When was the last time the ditch washed out?  
14 A Two years ago I want to say and we replaced the  
15 culvert.  
16 Q Okay. You got the culvert all replaced?  
17 A Uh-huh.  
18 Q And so it's a fine road now?  
19 A Uh-huh.  
20 Q Is that a yes?  
21 A Yes.  
22 Q Okay. So again, the emergency vehicles can go  
23 right up Castle Lane without any obstructions, correct?  
24 A Yes.  
25 Q And these delivery people can go up Castle Lane

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1 without any obstructions, correct?  
2 A Yes.  
3 Q And the mail person that delivers your mail right  
4 down at the bottom of Castle Lane and Oreana Loop.  
5 A Yes.  
6 Q So you have to go down the lane to get your mail.  
7 A Yes.  
8 Q And you do that at least once a day?  
9 A Can I say one thing?  
10 Q No.  
11 COURT: Wait until he asks you a question.  
12 WITNESS: Okay. All right.  
13 COURT: Your attorney can follow up.  
14 WITNESS: All right.  
15 BY MR. RAINEY:  
16 Q All these services are available through Castle  
17 Lane; is that correct?  
18 A Yes, yes.  
19 Q And one more time, there's not one obstruction  
20 other than maybe a ditch washing out once in a while or a  
21 culvert?  
22 A Uh-huh.  
23 Q And that only washes out when you don't clean out  
24 the debris, right?  
25 A Or if the creek is flooding and we can't control

85

1 the water.  
2 Q Okay. And that's happened since since --  
3 A It's happened numerous times over the years.  
4 Q Do you know that this lane from the bottom of your  
5 house around the corner from your house to Oreana is Kings'  
6 private property?  
7 A No, I wasn't aware of that. It's always been an  
8 open lane since I've been around.  
9 Q You didn't know that Kings owned that property?  
10 A I knew that they owned the property on the north  
11 side of that lane.  
12 Q You didn't know that they owned the lane?  
13 A No. I did not. I always assumed it was an  
14 easement or private road -- or an access point to our  
15 property. It's never been disputed up until now.  
16 Q Well, have you ever interfered with the Kings' use  
17 of that land?  
18 A No, I have not.  
19 Q Have you ever told them to get out? It's your  
20 lane. You're going to use it?  
21 A No, sir, I have not.  
22 Q Have you ever done anything that interrupted their  
23 use? And they being Kings. Have you ever done anything to  
24 interrupt the Kings' use of that lane?  
25 A No, sir, I have not.

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1 Q Do you know if anyone in your family has ever  
2 interrupted the Kings' use of that lane?  
3 A Not to my recollection, no.  
4 Q And so bottom line is nobody from your family, as  
5 far as you know, have ever hindered or interfered with the  
6 Kings' use of that lane we're -- in the pleadings, it's  
7 called King's Lane. Do I need to rephrase that again?  
8 A Yeah, go ahead. Yeah.  
9 Q Can you recall anybody in your family, you, your  
10 brother, father, that's interfered with Kings' use of that  
11 lane called Kings' Lane?  
12 A Between my house and their houses?  
13 Q Yes.  
14 A No.  
15 Q So -- and you don't know who pays the taxes on that  
16 lane I take it?  
17 A No, I do not.  
18 Q You don't?  
19 A No, sir.  
20 Q Now, the gates you're talking about, have you ever  
21 looked at those gates?  
22 A Which gates?  
23 Q The new gates.  
24 A Not up close, no.  
25 Q Have you ever opened the new gates?

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1 A I don't know. I've never seen them locked.  
2 Q So you haven't gone back there since the  
3 conversation?  
4 A Since I went back through there, the gates have  
5 been -- I've been gone for the last month so I mean he put  
6 the cattle in there and I assume he opened the gates back  
7 up and there's not been an issue.  
8 Q Well, let's make the record clear, Mr. Fuquay. The  
9 Kings use that lane to graze cattle and to actually corral  
10 the cattle too, don't they?  
11 A Yeah. I don't know what they -- yeah, sure. They  
12 graze it.  
13 Q Okay. But they use it kind of as a holding pen  
14 then?  
15 A I don't know what -- I don't know about that but --  
16 Q Well, there's cattle in there.  
17 A Yep.  
18 Q There's cattle in there an awful lot of the year,  
19 isn't that correct?  
20 A Sometimes, yeah.  
21 Q Okay. And they also -- Kings use that road to get  
22 to their fields, don't they?  
23 A Correct.  
24 Q They've used that road ever since you've lived in  
25 that property.

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1 A Correct.  
2 Q And never have you tried to kick the Kings off the  
3 property, have you, off the road?  
4 A Not that I recall.  
5 Q Well, you never have, have you?  
6 A Not that I recall, no.  
7 Q So in other words, you've never interfered with the  
8 Kings using their own property, have you?  
9 A Other than the gates.  
10 Q Pardon me?  
11 A Other than the issue with the gates.  
12 Q Well, they put up gates. Particularly when they  
13 had cattle in there, they had gates in there. Isn't that  
14 right?  
15 A Yeah.  
16 Q Okay. Now, you can't tell Judge Nye whether it's  
17 easier to open the metal gate than to put the wire over the  
18 posts with the loop, can you?  
19 A I've not opened them metal gates. I haven't been  
20 through there since.  
21 MR. RAINEY: That's all the cross I have, Your  
22 Honor.  
23 COURT: Mr. Farris.  
24 MR. FARRIS: Thank you, Your Honor. I'll try not  
25 to be redundant. Let me see if I can put a fine point on

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1 some of these.  
2 CROSS-EXAMINATION  
3 QUESTIONS BY MR. FARRIS:  
4 Q Mr. Fuquay, my name is Bryce Farris and I represent  
5 the Lows.  
6 A Okay.  
7 Q You've been talking about this roadway that they've  
8 referred to or referred to as Castle Lane and from what I  
9 understand is that lane comes off Oreana Loop up to your  
10 property? If you'd look at probably Exhibit 3 if you have  
11 it in front of you.  
12 A Okay.  
13 Q You see where there's an arrow that says Castle  
14 Lane?  
15 A Yeah.  
16 Q That Castle Lane originates at Oreana Loop further  
17 to the south of the area of your property?  
18 A Correct.  
19 Q That's the road you've been talking about and it  
20 comes up, goes through your property?  
21 A Correct.  
22 Q And then goes up to the property that you've --  
23 that someone's identified as Clint Fuquay?  
24 A Correct.  
25 Q Okay. With respect to that Castle Lane, from what

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1 I'm understanding your testimony is, that's where your  
2 mailbox is currently?  
3 A Currently, yes.  
4 Q Okay. That's your address?  
5 A Yes.  
6 Q That's where Schwann's or other delivery folks  
7 deliver to?  
8 A Currently.  
9 Q Okay. Currently. As we sit here today. And if  
10 you'd look at Exhibit 1, do you have that in front of you?  
11 A This one?  
12 Q Yes, yeah.  
13 COURT: Oh, I've got it. It's this one here.  
14 Yeah.  
15 WITNESS: Okay.  
16 BY MR. FARRIS:  
17 Q You see where at the top of that it says "map  
18 address" and it says 18907 Castle Lane?  
19 A Correct.  
20 Q That's your address?  
21 A Correct.  
22 Q So that's -- if you want to put in your address to  
23 find your property, that's the address you put in, Castle  
24 Lane?  
25 A Correct.

39

1 A Sure.  
 2 Q Coming up Castle Lane, that's a straight shot  
 3 without stopping for anything, correct?  
 4 A Yes.  
 5 Q Now, when did you get your driver's license?  
 6 A When I was 15.  
 7 Q And so you say you're 27 now.  
 8 A Yes.  
 9 Q So that's twelve years ago?  
 10 A Yes.  
 11 Q And six of those twelve years you lived somewhere  
 12 else.  
 13 A Yes.  
 14 Q So you've only been on this property for six years.  
 15 A No. Eight. Since I was 19.  
 16 Q Can you give me the years when you were gone, from  
 17 when to when?  
 18 A I would say from 2001 to 2005.  
 19 Q Well, that's five years.  
 20 A Four. I don't remember when in 2001. Moved back  
 21 the summer of 2005.  
 22 Q When you got your driver's license, you were gone.  
 23 You didn't even live on that property.  
 24 A I stayed there on the weekends.  
 25 Q Other than weekends but you didn't live there on a

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1 day-to-day basis.  
 2 A Correct.  
 3 Q You were not watching the Kings' operation on a  
 4 day-to-day basis.  
 5 A Correct.  
 6 Q In fact, you've never watched Kings on a day-to-  
 7 day --  
 8 A Correct.  
 9 Q Is that right?  
 10 A Correct.  
 11 Q Just occasionally seeing what's going on, right?  
 12 A Correct.  
 13 Q So when you say that they've never had cattle in  
 14 there, you don't know, do you?  
 15 A What are you talking about?  
 16 Q Well, there's periods of times you said they never  
 17 had cattle and never locked gates. You don't know because  
 18 you're not there on a day-to-day basis, are you?  
 19 A I drive that road on a day-to-day basis but in that  
 20 time, I wasn't there on a day-to-day basis so at that time,  
 21 I can't say what they did on a day-to-day basis.  
 22 Q Okay. And is there any reason you don't go down --  
 23 when you're driving, you don't go down to Oreana through  
 24 Castle Lane?  
 25 A It's quicker to get where I'm going going that way.

65

1 Q So it's just a matter of convenience for you --  
 2 A Yes.  
 3 Q -- to go through the Kings'?  
 4 A Yes.  
 5 Q Only convenience. That's the only reason.  
 6 A It's quicker.  
 7 Q Could be?  
 8 A It's quicker.  
 9 Q It's quicker. Well, that's what I'm calling  
 10 convenience.  
 11 A It's easier, yes.  
 12 Q Okay. So you want to use King's Lane just because  
 13 it's convenient.  
 14 A Because that's what I've always used.  
 15 Q You don't claim any right to it, do you?  
 16 A What's that?  
 17 Q You don't claim any right to King's Lane, do you?  
 18 A I've been using it so I just always assumed that I  
 19 could.  
 20 Q Have you ever excluded the Kings from using that  
 21 lane?  
 22 A No.  
 23 Q Have you ever told them to get off?  
 24 A No.  
 25 Q Have you ever told them that they couldn't use it

66

1 if you're using it?  
 2 A No.  
 3 Q So in a way, have you interfered with the Kings?  
 4 A No.  
 5 Q Have you given them any hassle about when you use  
 6 the lane?  
 7 A No.  
 8 Q Okay.  
 9 MR. FARRIS: Your Honor, I don't have anything to  
 10 add.  
 11 COURT: Okay. Thank you. Redirect.  
 12 REDIRECT EXAMINATION  
 13 QUESTIONS BY MR. CLEVERLEY:  
 14 Q You indicated that Castle Lane is what Mr. Rainey  
 15 calls an all-weather road?  
 16 A Yes.  
 17 Q Is that -- who maintains that road?  
 18 A We do.  
 19 Q Do you maintain King Lane?  
 20 A Yes.  
 21 Q How do you maintain it?  
 22 A We've bladed it with a road grader and a land  
 23 plane.  
 24 Q What else?  
 25 A We've -- a backhoe. Filled in potholes with a

67

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Attorney for Defendants  
 Gilbert King as Trustee for the  
 Heart K Ranch Trust UTA December 28, 2012

**FILED**

A.M. 12:10 P.M.

JAN 29 2015

ANGELA BARKELL, CLERK  
 Lena Johnson

Deputy Clerk

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SEATTLE LITIGATION

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
 FUQUAY and HAILEY ROSE FUQUAY, )  
 )  
 Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K )  
 RANCH TRUST UTA DECEMBER 28, )  
 2012; AVCO FINANCIAL SERVICES OF )  
 IDAHO FALLS, INC.; GORDON G. KING;) )  
 ROSE M. KING; FIRST AMERICAN )  
 TITLE INSURANCE COMPANY, )  
 )  
 Defendants. )

GILBERT KING, as Trustee, and )  
 ROSE M. KING, as Beneficiary of the )  
 HEART K RANCH TRUST UTA )  
 DECEMBER 28, 2012, )  
 )  
 Counterclaimants, )

CASE NO. CV 2014-0278

**AFFIDAVIT OF ROSE KING IN  
 SUPPORT OF THE DEFENDANT  
 HEART K RANCH'S MOTION FOR  
 SUMMARY JUDGMENT**

**AFFIDAVIT OF ROSE KING IN SUPPORT OF THE DEFENDANT  
 HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 1**





for summary judgment against the Low Defendants, the King Defendants have owned the property alleged to be burdened by the alleged prescriptive easement claimed by the Fuquay Plaintiffs since 1973, except for a four year period between 1982 and 1986.

6. At all times prior to 2014 the Fuquay Plaintiffs' any use of King Lane, whether by regular passenger vehicles of the Fuquays and their guests, the infrequent use of semi-trucks in the course of the Fuquays' farm and ranch operations, other farm and ranch vehicle use, or simple pedestrian use, has been in common with, and without interference to or disruption of, the Kings' own use of that roadway, or without damage to that roadway or its bridges. As also stated in my earlier affidavit, the heavy truck traffic conducted by the Fuquay Plaintiffs on King Lane did not commence until about 2011, and until the spring of 2014 I had never seen the Fuquays operate farm equipment on King Lane.

7. At no time prior to about 2011 did any of the Fuquay Plaintiffs ever overly assert or claim any right or use in respect to King Lane in derogation to the rights of the Kings, or that was in any way exclusive or proprietary, such that it was adverse to the rights of the Kings in that roadway.

8. At no time prior to 2011 did any of the Fuquay Plaintiffs ever perform any act or make any declaration that would constitute a clear, open, and notorious assertion of a claim to an adverse and prescriptive right claim to the use of King Lane.

9. It was only about in 2011 that the Fuquays did suddenly, and without explanation, attempt to drive large semi-trucks for commercial purposes which increased use began to damage a bridge at the east side of King Lane. It was at this time that a cement block placed at that location

***AFFIDAVIT OF ROSE KING IN SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT -- PAGE 3***

which prevented further use of those trucks, and it was also at this time that the former wire gates were replaced with metal swing gates.

10. As stated in my earlier affidavit, at no time prior to about 1988-89 could any large trucks use King Lane because the condition of the road and the welded-barrel culvert simple was not allow that use.

11. Because any claim by the Fuquay Plaintiffs to a prescriptive easement based upon uses that commenced after 2006 would be subject to the 20 year statutory period for such easements, those uses could not ripen into an actual prescriptive easement claim at any time before 2026.

Further affiant sayeth not.

\_\_\_\_\_  
Rose King

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of January, 2015.

\_\_\_\_\_  
Notary Public for Idaho  
Residing at Caldwell, Idaho  
My Commission expires: \_\_\_\_\_

***AFFIDAVIT OF ROSE KING IN SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT - PAGE 4***

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this \_\_\_\_ day of January, 2015, a true and correct copy of the foregoing document was served upon the following:

Matthew R. Cleverley	<input type="checkbox"/>	U.S. Mail, postage prepaid
Fidelity National Law GROUP	<input type="checkbox"/>	Hand Delivered
1200 6th Avenue, Suite 620	<input type="checkbox"/>	Overnight Mail
Seattle, Washington 98101	<input type="checkbox"/>	Facsimile Transmission
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*Attorney for Plaintiffs*

S. Bryce Farris	<input type="checkbox"/>	U.S. Mail, postage prepaid
Sawtooth Law Offices, PLLC	<input type="checkbox"/>	Hand Delivered
1101 W. River Street, Suite 110	<input type="checkbox"/>	Overnight Mail
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Facsimile: 208-629-7559		
Email: <u>bryce@sawtoothlaw.com</u>		

*Attorney for Low Defendants*

\_\_\_\_\_  
Ronald P. Rainey

**AFFIDAVIT OF ROSE KING IN SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 5**

**FILED**

A.M. 12:20 P.M.

JAN 29 2015

ANGELA BARKELL, CLERK

Lana Johnson

Deputy Clerk  
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FEB 11 2015

SEATTLE LITIGATION

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Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING;) )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )

Defendants. )

GILBERT KING, as Trustee, and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )

Counterclaimants, )

CASE NO. CV 2014-0278

**AFFIDAVIT OF GILBERT KING IN  
SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR  
SUMMARY JUDGMENT**

**AFFIDAVIT OF GILBERT KING IN SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 1**

vs.

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY

Counterdefendants.

STATE OF IDAHO

County of Canyon

)  
) ss.  
)

GILBERT KING, being first duly sworn, upon oath deposes and says:

1. I am a party in the above-captioned action, over the age of majority, competent to testify, and I make this affidavit upon personal knowledge.

2. I have previously submitted affidavits in this action in opposition to the Fuquay Plaintiffs' request for a preliminary injunction (9/9/14).

3. It was not until sometime in 2011 that the Fuquay Plaintiffs began any use of King Lane by large semi-trucks.

4. This use appeared to be unrelated to uses occurring on the Fuquay property itself, but instead seemed to be for general commercial trucking purposes unrelated to the property itself.

5. On or about 12-15-13 (date) I had a large cement block placed at or near the location of a bridge over Cashie Crk (state location) in any attempt eliminate this use of King Lane by the Fuquays which was contributing to damage to this bridge.

6. On or about 8-27-14 (date) I had two former wire gates on King Lane replaced with metal swing gates, so as to be able to better control entry onto and through King Lane.

**AFFIDAVIT OF GILBERT KING IN SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT - PAGE 2**

Further affiant sayeth not.

  
\_\_\_\_\_  
Gilbert King

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of January, 2015.

\_\_\_\_\_  
Notary Public for Idaho  
Residing at Caldwell, Idaho  
My Commission expires: \_\_\_\_\_

***AFFIDAVIT OF GILBERT KING IN SUPPORT OF THE DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT - PAGE 3***

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**FILED**  
A.M. 2:14 P.M.  
FEB 19 2015  
ANGELA BARNELL, CLERK  
Deputy Clerk

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )  
Plaintiffs, )

CASE NO. CV 2014-0278

vs. )

REPLY MEMORANDUM IN SUPPORT  
DEFENDANT HEART K RANCH'S  
MOTION FOR SUMMARY JUDGMENT

SUSIE LOW; CAL LOW; HEART K )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING; )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )  
Defendants. )

GILBERT KING, as Trustee, and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )  
Counterclaimants, )

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT - PAGE 1**

vs. )  
 )  
 )  
 JOHN E. FUQUAY; CLINTON WARD )  
 FUQUAY and HAILEY ROSE FUQUAY )  
 )  
 Counterdefendants. )  
 \_\_\_\_\_ )

I.

REPLY ARGUMENT

In the opening brief submitted in support of their motion for summary judgment the Heart K Ranch Defendants argued that the Fuquay Plaintiff's alleged prescriptive easement claims, as asserted in this action, must necessarily fail because,

any use [of King Lane] by the Fuquay plaintiffs or their predecessors, [prior to 2006] was use in common with the Kings and Lows that in no way interfered with their use of King Lane and therefore under Idaho law was deemed permissive and could not be prescriptive. This rebuts elements three and four (adverse use that is known to the servient landowner) making any prescriptive claim during this period impossible.

Heart K Ranch Summary Judgment Memorandum at pg 8 (emphasis in original/bracketed references added). Heart K Ranch's summary judgment motion was premised upon the standard that the absence of evidence necessary to establish an element that the nonmoving party will be required to prove at trial renders any other potential issues of fact irrelevant. *Bromley v. Garey*, 132 Idaho 807, 810-11, 979 P.2d 1165, 1168-69 (1999).

The Fuquay Plaintiffs have firmly planted their alleged prescriptive easement claims, as made in this action, within the five year prescriptive period that existed prior to the change in the applicable statute, I.C. § 5-203, to a twenty year prescriptive use period in 2006. *See e.g., Capstar*

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT  
 HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 2**



*Radio Operating Co. v. Lawrence*, 153 Idaho 411, 420 n. 2, 283 P.3d 728, 737 n. 2 (2012). Any actual adverse use that arose after that date would be governed by the twenty year statute that is now in effect and therefore would not ripen into an actual prescriptive right claim, at the earliest, until 2026, and therefore such claims could not be at issue in this action. Under the controlling Idaho case law standards set out in *Chen v. Conway*, 116 Idaho 901, 903, 781 P.2d 238, 240 (Ct.App.1989) and *Melendez v. Hintz*, 111 Idaho 401, 405, 724 P.2d 137, 141 (Ct.App.1986) the use of a roadway in common by neighbors is deemed “permissive,”

Where one person merely uses a roadway in common with his neighbor, without damage to the roadway, without interfering with the neighbor’s use of the roadway, and where the neighbor has established and maintained the roadway on his own property for his own purposes, only the most minimal intrusion is made into the owner’s dominion over his property.

111 Idaho at 405, 724 P.2d at 141, as cited at 116 Idaho at 903, 781 P.2d at 240.

The various affidavits that have been submitted to the Court – and the Fuquays’ own hearing testimony, as submitted to this Court on September 18, 2014 – remains unrefuted on this critical point that the parties to this action used King Lane in common without damage to the roadway and without interference with each other’s use at all times prior to 2011. In other words the use of King Lane by the Fuquays was at all times permissive as a matter of law under the standards of *Chen v. Conway* and *Melendez v. Hintz*.

The testimony of Rose King, as set forth in her Affidavit submitted in Support of the Defendant Heart K Ranch’s Motion for Summary Judgment filed January 29, 2015, on page 3 paragraph 6 states, “the Fuquay Plaintiffs’ . . . use of King Lane . . . has been in common with, and without interference to or disruption of, the Kings’ own use of that roadway, . . . .” Furthermore

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT  
HEART K RANCH’S MOTION FOR SUMMARY JUDGMENT – PAGE 3**

Rose King states in paragraph 7, "At no time prior to about 2011 did any of the Fuquay Plaintiffs ever over[t]ly assert or claim any right or use in respect to King Lane in derogation to the rights of the Kings, or that was in any way exclusive or proprietary, such that it was adverse to the rights of the Kings in that roadway." The Fuquay Plaintiffs have further acknowledged that they never interfered with Kings use of the lane as set forth in the excerpts of the trial transcript that were both quoted in the Kings' summary judgment memorandum and attached to the Affidavit of Ronald P. Rainey filed January 29, 2015.

Therefore the fact that King Lane was used in common, and without any interference to its use by the Kings, remains unrefuted, as to the Fuquays' alleged prescriptive use claim, as based upon a five year period of adverse use, which allegedly arose at some period of time prior to 2006. The only time that any damage to the road (the bridge crossing), and any ensuing alleged hostile use could have arose, was after the statutory period had changed to twenty years in 2006. As already noted above, no alleged prescriptive right arising out of such a claim could possibly mature and be asserted at any time before 2026.

As to any change from permissive to hostile use as occurring within the earlier five year period, prior to the change in the statute in 2006, the Idaho Supreme Court was emphatic in its recent decision handed down in *H.F.L.P. v. City of Twin Falls*, 157 Idaho 672, 339 P.3d 557 (2014):

Moreover, if the presumption of permissiveness applied when the use began, the presumption continues until a hostile and adverse use is clearly manifested and "brought home" to the servient property owner. *Backman v. Lawrence*, 147 Idaho 390, 398, 210 P.3d 75, 83 (2009); *Gameson v. Remer*, 96 Idaho 789, 792, 537 P.2d 631, 634 (1975).

157 Idaho at 681, 339 P.3d at 566.

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 4**

Not to draw too fine a point on this question, but note should be taken of the fact that any actual change in the initial "permissive" use of King Lane by the Fuquay Plaintiffs, to an "adverse" use, within the context of their five-year claim, had to be accomplished no later than June 30, 2001. The reason is that the statutory period of required adverse use changed from five years to twenty years effective July 1, 2006. *See*, Ch. 158, § 1, of the 2006 Idaho Session Laws; I.C. § 67-510. Any effective notice to the defendants in this action of that change in adverse use would have to have occurred no later than June 30, 2001 in order for the Fuquay Plaintiffs to claim a five year prescriptive right under the former five-year adverse use statute. Any change in use from "permissive" to "adverse" which occurred at any time after July 1, 2001 would have necessarily failed to mature under that five year statute before it changed to a twenty year prescriptive use period on July 1, 2006, and thereafter would have required an additional fifteen years to become effective under the new twenty year statute that went into effect July 1, 2006.

A review of the chart of alleged disputed material facts, which the Fuquay Plaintiffs have submitted at pp. 5-7 of their summary judgment response brief, only reveals a single allegation which touches upon the specific issue that was raised in the motion for summary judgment submitted by Heart K Ranch. The very last entry cites the January 2015 affidavit of Rose King for the proposition that the Fuquay Plaintiffs' "use" has damaged King Lane. What Rose King actually declared in that affidavit was the following:

9. It was only about in 2011 that the Fuquays did suddenly, and without explanation, attempt to drive large semi-trucks for commercial purposes which increased use began to damage a bridge at the east side of King Lane. It was at this time that a cement block placed at that location which prevented further use of those trucks, and it was also at this time that the former wire gates were replaced with mental swing gates.

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 5**

Affidavit of Rose King in Support of the Defendant Heart K Ranch's Motion for Summary Judgment at pp. 3-4 (emphasis added). The above highlighted language certainly implicates the *Chen v. Conway* and *Melendez v. Hintz* standard of permissive use – as cited above – concerning, “use of a roadway in common with a neighbor, without damage to the roadway,” since the use of those trucks in 2011 began to damage the bridge. The problem with any application of that standard to the facts of this case is that the alleged damaging use in question did not arise until 2011, almost five years after the prescriptive period had become twenty years, rather than the five years upon which the Fuquay Plaintiffs rely. Even under the applicable summary judgment standard that all facts and inferences are viewed in favor of the Fuquays, as the non-moving party, a claim based upon that allegation could not mature into a prescriptive right until 2031, at the earliest.

In addition, the Fuquay Plaintiffs refuse to acknowledge the established fact that under Idaho law even if they did have an established prescriptive easement over King Lane, the Kings, as the servient landowners, are entitled to maintain gates over such an easement. *See e.g., Beckstead v. Price*, 146 Idaho 57, 67, 190 P.3d 876, 886 (2008), by citation to *Gibbens v. Weisshaupt*, 98 Idaho 633, 570 P.2d 870 (1977) and *Lovitt v. Robideaux*, 139 Idaho 322, 78 P.3d 389 (2003). The remaining alleged “disputed facts” as outlined in their chart do not raise any issues that go to the “adverse use” element that has been actually raised and put at issue by Heart K Ranch's motion for summary judgment (*i.e.*, children walking to school, deliveries, use by friends and guests, daily or infrequent use, express or implied permission, maintenance of the roadway).

On a motion for summary judgment once the absence of evidence in support of an essential element of the non-moving party's claim has been demonstrated, the burden then shifts to opposing

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 6**

party to show, via further depositions, discovery responses, or affidavits that there is indeed a genuine issue for trial. *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct.App.1994). "The nonmoving party cannot rely on mere speculation, and a scintilla of evidence is insufficient to create a genuine issue of material fact." *Bollinger v. Fall River Rural Elec. Co-op., Inc.*, 152 Idaho 632, 637, 272 P.3d 1263, 1268 (2012). On the facts of this case that have been submitted to this Court for decision on this motion for summary judgment the Fuquay Plaintiffs have simply failed to submit even a scintilla of evidence in opposition to the "adverse use" element that Heart K Ranch challenged and raised on its motion for summary judgment.

As declared by the Idaho Supreme Court in *Anderson v. Larsen*, 136 Idaho 402, 406, 34 P.3d 1085, 1089 (2001) the purpose for imposing the requirement that a prescriptive use be open and notorious is to give the owner of the servient estate an opportunity to assert his rights against the development of an easement by prescription. In that same vein, this is also why "mere use" in common with the servient owner is deemed to be permissive, and is also deemed insufficient to establish hostile and adverse use. Instead, such an adverse use claim must be in some sense exclusive, proprietary in nature, and exercised independently of the rights of all others. *See, Hall v. Strawn*, 108 Idaho 111, 112, 697 P.2d 451, 452 (Ct.App.1985).

As based upon the burden-shifting standard that is implicated on a motion for summary judgment when there is an absence of evidence in support of an essential element of the non-moving party's case, the Fuquay Plaintiffs' in their response have failed to come forward and meet that burden through the submission of further required evidence in order to avoid the entry of summary judgment. Throughout this case the Fuquay Plaintiffs have based their alleged prescriptive easement

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT – PAGE 7**

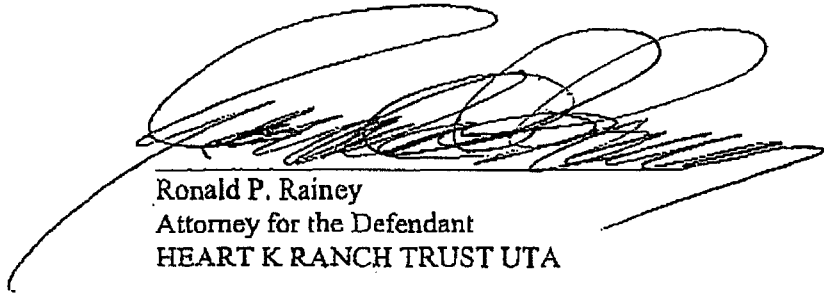
claim on a five year prescriptive period, which necessarily must have commenced at some time prior to June 30, 2001. The only evidence before this Court that in any way "brings home" an end of the presumptive permissive use of King Lane by the Fuquay Plaintiffs is that use which arose in 2011, at a time well within the twenty year prescriptive use period that under no circumstances has matured, and that has not even been claimed by the Fuquays in this action. Beyond that single incident, there is not even a scintilla of evidence before this Court that otherwise supports the Fuquay Plaintiffs' burden to establish an open, hostile, and adverse use claim in existence for the requisite five year period of which the Kings ever had any notice sufficient to establish their alleged right to a prescriptive easement in King Lane.

V.

CONCLUSION

Under the standard that the absence of a genuine issue of fact with regard to an essential element of the plaintiff's claim renders all other potential issues of fact immaterial, the Fuquay Plaintiffs cannot prevail on their alleged prescriptive easement claim to King Lane due to an absence of any evidence in support of an open and notorious adverse claim known to either the Kings or the Lows that would have put the Kings or the Lows on notice of that alleged prescriptive use easement claim. In the absence of this essential element of the Fuquay plaintiffs' claim, all other issues of fact are rendered immaterial, and entry of summary judgment for the defendants on the Fuquay Plaintiffs' alleged prescriptive easement claim is therefore appropriate in this case.

Respectfully submitted this 19 day of February, 2015.



Ronald P. Rainey  
 Attorney for the Defendant  
 HEART K RANCH TRUST UTA

CERTIFICATE OF SERVICE

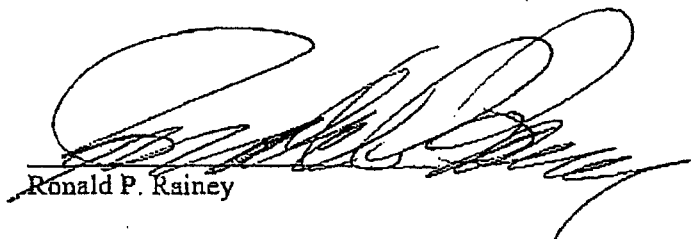
I HEREBY CERTIFY That on this 19 day of February, 2015, a true and correct copy of the foregoing document was served upon the following:

Matthew R. Cleverley	[ ]	U.S. Mail, postage prepaid
Fidelity National Law GROUP	[ ]	Hand Delivered
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*Attorney for Low Defendants*



Ronald P. Rainey

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT  
HEART K RANCH'S MOTION FOR SUMMARY JUDGMENT ~ PAGE 9**

**FILED**  
10:26 A.M. \_\_\_\_\_ P.M.

MAR 25 2015

Angela Barkell, Clerk  
*Darla Stoneham*  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )  
Plaintiffs, )

CASE NO. CV 2014-0278

vs. )

SUSIE LOW; CAL LOW; GILBERT )  
KING as Trustee of the HEART K RANCH )  
TRUST UTA DECEMBER 12, 2012; )  
AVOCO FINANCIAL SERVICES )  
OF IDAHO FALLS, INC.; THE ESTATE )  
OF GORDON G. KING; ROSE M. KING; )  
FIRST AMERICAN TITLE INSURANCE )  
COMPANY, )  
Defendants. )

MEMORANDUM DECISION  
UPON KING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

GILBERT KING, as Trustee, and ROSE M. )  
KING, as Beneficiary of HEART K )  
RANCH UTA DECEMBER 28, 2012, )  
Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )  
Counterdefendants. )

---

MEMORANDUM DECISION UPON KING  
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Page 1



This matter came on for hearing on February 27, 2015 upon defendants Heart K Ranch Trust UTA., acting by its Trustee, Gilbert King; the Estate of Gordon G. King and Rose M. King's (hereinafter the "King defendants") Motion for Summary Judgment. Appearing on behalf of the King defendants was attorney Ronald Rainey. Appearing on behalf of the plaintiffs was attorney Matthew Cleverley, of the law firm Fidelity National Law Group. Appearing on behalf of defendants Susie Low and Cal Low (hereinafter the "Low defendants") was attorney Bryce Farris, of the law firm Sawtooth Law Offices, PLLC. The Court has considered the briefing, affidavits, pleadings and argument submitted and sets forth its decision below.

#### **STANDARD FOR SUMMARY JUDGMENT**

Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In a motion for summary judgment, this Court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party. Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. *West Wood Investments, Inc. v. Acord* 141 Idaho 75, 86-87, 106 P.3d 401, 412 - 413 (2005), citing *Iron Eagle Dev., L.L.C. v. Quality Design Sys., Inc.*, 138 Idaho 487, 491, 65 P.3d 509, 513 (2003) (citations omitted); see also *Willie v. Bd. of Trustees*, 138 Idaho 131, 133, 59 P.3d 302, 304 (2002).

On a motion for summary judgment, the burden is always upon the moving party to prove the absence of a genuine issue of material fact. If, however, the basis for a properly supported motion is that no genuine issue of material fact exists with regard to an element of the non-moving party's case, it is incumbent upon the non-moving party to establish an issue of fact regarding that element. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

The burden on the moving party may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994).

Summary judgment should be granted with caution. If the record contains conflicting

inferences or reasonable minds might reach different conclusions, summary judgment must be denied. *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991). *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991).

Where the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences. *Riverside Dev. Co. v. Ritchie*, 103 Idaho 515, 650 P.2d 657 (1982).

“While the court was permitted to draw probable inferences from the *uncontradicted* evidence because it would serve as the trier of fact, it was not permitted to make conclusive findings with regard to issues upon which the parties submitted conflicting evidence.” *Banner Life Ins. Co. v. Dixon Irrevocable Trust*, 147 Idaho 117, 127, 206 P.3d 481 (2009). Citing *Williams v. Computer Res., Inc.*, 123 Idaho 671, 673, 851 P.2d 967, 969 (1993); *Ashley v. Hubbard*, 100 Idaho 67, 70, 593 P.2d 402, 405 (1979); *Argyle v. Slemaker*, 107 Idaho 668, 670-71, 691 P.2d 1283, 1285-86 (Ct.App. 1984).

#### **BACKGROUND**

Plaintiffs seek a declaration of a prescriptive easement over King Lane in Owyhee County. King Lane is a private, all-weather road about one-half mile in length. It runs in an east-west direction from the public Oreana Loop Road until it connects with Castle Lane, which then runs south until it connects with Oreana Loop Road. The King defendants own the parcel of land to the north of King Lane, the Low defendants own the parcel of land to the south of King Lane and the plaintiffs own parcels of land to the west of King Lane where it ends and connects with Castle Lane.

According to the Affidavit of Rose King filed on December 9, 2014, the Kings purchased their property on September 17, 1973. From 1973 to 1989, King Lane was just a path through their property and at certain times of the season, it was impossible to use.<sup>1</sup> However, the Kings assert that by 1989, they replaced the barrel welded culvert with a concrete culvert and improved the road making it possible to access year-round.

---

<sup>1</sup> Ms. King states that King Lane was unnamed until 2002 when The Owyhee County Sheriff's Office requested that the Kings name the lane for identification by emergency vehicles.

According to the Declaration of John Fuquay filed on October 29, 2014, the plaintiffs state that since 1977, they have continuously used large semi-trucks, cattle trucks, farm vehicles and personal vehicles to cross King Lane.

At various times throughout the year, the Kings graze their cattle over King Lane on both the King property and the Low property. Prior to 2014, the Kings had barbed wire gates erected on both the east and west ends of King Lane to keep the livestock contained. Anyone attempting to use King Lane had to stop, open and close the gates. They also had to dodge the Kings' cattle. (See Affidavit of Susie Low filed on 9/16/2014 and 9/18/2014 Preliminary Injunction Hearing transcript pg. 17).

During the summer of 2014, a dispute arose between Gilbert King and John Fuquay regarding the installation of large iron gates that the defendants recently placed at each end of King Lane. (See Affidavit of Scott Snyder filed on 9/18/2014). According to the police report, the King defendants told Deputy Snyder that they gave the plaintiffs permission to use King Lane so long as the gates remained closed. At the time, the Kings had cattle grazing over King Lane that would be affected if the gates were left open. However, John Fuquay stated that he did not have to close the defendants' gates because he had an easement over King Lane. On August 11, 2014, the plaintiffs filed this suit seeking a declaration of a prescriptive easement over King Lane.

According to the affidavits and declarations submitted by both the plaintiffs and the defendants, King Lane was used by the general public. The plaintiffs assert that they have used King Lane as a shortcut to access their property from Oreana Loop Road since 1977. (See Declaration of John Fuquay in Support of Ex Parte Motion for TRO and Declaration of John Fuquay filed on October 29, 2014). The King defendants assert that they use King Lane several times a day to access their pastures and operate their cattle business. (See Affidavit of Rose King 9/9/2014).

#### **ARGUMENTS OF THE PARTIES**

In their motion for summary judgment, the King defendants argue that the plaintiffs claim of prescriptive easement is not supported by the necessary evidence to prevail on an essential element of a prescriptive easement claim. Specifically, the King defendants argue that the record before the Court shows that the plaintiffs' use of King Lane was entirely permissive and there is

nothing in the record to show that their use was adverse and under a claim of right.<sup>2</sup>

The plaintiffs contend that there remain genuine issues of fact regarding the required elements of their prescriptive easement claim and therefore, summary judgment should be denied.

## LAW & ANALYSIS

### A. Requirements for establishing a prescriptive easement

The requirements for a prescriptive easement have been clearly established in Idaho:

A party seeking to establish the existence of an easement by prescription “must prove by clear and convincing evidence use of the subject property, which is characterized as: (1) open and notorious; (2) continuous and uninterrupted; (3) adverse and under a claim of right; (4) with the actual or imputed knowledge of the owner of the servient tenement (5) for the statutory period.” *Hodgins v. Sales*, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003). A claimant may rely on his own use, or he “may rely on the adverse use by the claimant's predecessor for the prescriptive period, or the claimant may combine such predecessor's use with the claimant's own use to establish the requisite five continuous years of adverse use.” *Hodgins*, 139 Idaho at 230, 76 P.3d at 974. Once the claimant presents proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, even without evidence of how the use began, he raises the presumption that the use was adverse and under a claim of right. *Wood v. Hoglund*, 131 Idaho 700, 702–03, 963 P.2d 383, 385–86 (1998); *Marshall v. Blair*, 130 Idaho 675, 680, 946 P.2d 975, 980 (1997). The burden then shifts to the owner of the servient tenement to show that the claimant's use was permissive, or by virtue of a license, contract, or agreement. *Wood*, 131 Idaho at 703, 963 P.2d at 386; *Marshall*, 130 Idaho at 680, 946 P.2d at 980. The nature of the use is adverse if “it runs contrary to the servient owner's claims to the property.” *Hodgins*, 139 Idaho at 231, 76 P.3d at 975. The state of mind of the users of the alleged easement is not controlling; the focus is on the nature of their use. *Id.* at 231–32, 76 P.3d at 975–76.

*Beckstead v. Price*, 146 Idaho 57, 62, 190 P.3d 876, 881 (2008); citing *Akers v. D.L. White Constr., Inc.*, 142 Idaho 293, 303, 127 P.3d 196, 206 (2005).

“A prescriptive right cannot be obtained if the use of the servient estate is by permission of the landowner.” *Brown v. Miller*, 140 Idaho 439, 443, 95 P.3d 57, 61 (2004); (quoting *Wood*, 131

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<sup>2</sup> The Low defendants support the Kings' Motion for Summary Judgment and reserve the opportunity to file their own motion for summary judgment based on the same facts and argument.

Idaho at 702, 963 P.2d at 385).

A determination that a claimant has established a prescriptive easement involves entwined questions of law and fact. *Beckstead v. Price*, 146 Idaho 57, 61, 190 P.3d 876, 880 (2008). “Each element is essential to the claim, and the trial court must make findings relevant to each element in order to sustain a judgment on appeal.” *Hodgins v. Sales*, 139 Idaho 225, 229, 76 P.3d 969, 973 (2003). It is the province of the trial court to determine whether the plaintiffs presented “reasonably clear and convincing evidence” of each of the five elements. *Roberts v. Swim*, 117 Idaho 9, 12–13, 784 P.2d 339, 342–43 (Ct.App.1989). In addition, the creation of a private easement by prescription is not favored under Idaho law. *Elder v. Nw. Timber Co.*, 101 Idaho 356, 358, 613 P.2d 367, 369 (1980).

The King defendants argue that the plaintiffs’ claim of prescriptive easement fails as a matter of law because there is no evidence in the record to show that prior to 2011, the plaintiffs’ use of King Lane was “adverse or under a claim of right” for the statutory period.<sup>3</sup> *Hodgins*, 139 Idaho at 229. Rather, the record reflects that the plaintiffs’ use of King Lane was permissive and in common with the Kings, the Lows and the general public.

**B. Adverse and under a claim of right**

The Idaho Supreme Court has provided explanation for the prescriptive easement requirement that use be adverse and under a claim of right:

A prescriptive right cannot be granted if the use of the servient tenement was by permission of its owner, because the use, by definition, was not adverse to the rights of the owner. Indeed, the rule is well established that no use can be considered adverse or ripen into a prescriptive right unless it constitutes an actual invasion of or infringement on the rights of the owner.

*Hughes v. Fisher*, 142 Idaho 474, 480, 129 P.3d 1223, 1229 (2006) (citations omitted).

The nature of the use is adverse if “it runs contrary to the servient owner’s claims to the property.” *Akers*, 142 Idaho at 303 (quoting *Hodgins v. Sales*, 139 Idaho 225, 231, 76 P.3d 969, 975 (2003)). “The state of mind of the users of the alleged easement is not controlling; instead,

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<sup>3</sup> In 2006, I.C. § 5-203 was amended to extend the statutory period from five years to twenty years. However, the twenty year period does not apply to a prescriptive easement prior to 2006. The plaintiffs claim that they established the required elements for prescriptive easement prior to 2006.

the focus is on the nature of their use.” *Backman v. Lawrence*, 147 Idaho 390, 397-98, 210 P.3d 75, 82-83 (2009).

If a use has commenced as permissive, a user must make some new and independent act that would put the owner of the servient property on notice that the use was no longer permissive. *Webster v. Magleby*, 98 Idaho 326, 327, 563 P.2d 50, 51 (1977). However, “mere inaction and passive acquiescence is not a sufficient basis for proving that the use of the claimed right was with the permission of the owner of the servient tenement.” *West v. Smith*, 95 Idaho 550, 557, 511 P.2d 1326, 1333 (1973).

There is nothing in the record to show how plaintiffs’ use began but it is undisputed and the record establishes that the plaintiffs’ use of King Lane was (1) open and notorious; (2) continuous and uninterrupted; (4) with the actual or imputed knowledge of the defendants. Proof of these elements, without evidence as to how the use began, raises the presumption that such use was adverse and the burden is then on the defendants to show that such use was permissive.

The King defendants claim that beginning in 2011, the Fuquays use of King Lane became adverse use and interfered with their ownership rights when an increased amount of commercial and heavy truck traffic was causing excessive damage to the road surface. However, John Fuquay claims that his use of King Lane has always been the same, which has always included moving heavy trucks and equipment across King Lane.

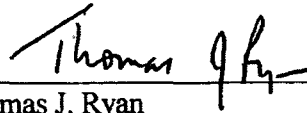
According to the Declaration of John Fuquay filed on October 29, 2014, the plaintiffs have used King Lane to access the Fuquay Parcel and the Clinton Fuquay Parcel since 1977. John Fuquay asserts that his father, James Fuquay, owned large semi-trucks and cattle trucks that he regularly drove across King Lane from the time they moved onto their property in January 1977. John Fuquay also states that as a teenager, he drove large trucks across King Lane while working for his father. (See Declaration of John Fuquay filed on October 29, 2014). Once he obtained his commercial truck license, John Fuquay stated that he started driving large trucks commercially. Currently, John Fuquay asserts that he operates under the business name John Fuquay Trucking Company and continues to drive commercial trucks across King Lane. In addition to the commercial semi-truck use, John Fuquay asserts that since 1977, the plaintiffs have used King Lane to access their parcels with the use of personal vehicles, regular farm vehicles, cattle trucks,

pedestrian use, and use by the Fuquay's guests. (See Declaration of John Fuquay filed on October 29, 2014).

As stated above, in considering a motion for summary judgment, the Court must make all inferences in favor of the nonmoving party. While the evidence in the record does not meet the clear and convincing standard required to prove the creation of a prescriptive easement that is not the standard for summary judgment. The material question of fact that remains to be decided is when adverse use began, (whether it was in 2011 as alleged by the Kings or in 1977 as alleged by John Fuquay).

Therefore, summary judgment must be denied.

Dated this 25<sup>th</sup> day of March, 2015.



\_\_\_\_\_  
Thomas J. Ryan  
District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing to be served upon the following via U.S. Mail, postage prepaid, facsimile transmission or by hand delivery:

RONALD P. RAINEY  
Attorneys at Law  
PO Box 26  
Caldwell, ID 83606

S. BRYCE FARRIS  
SAWTOOTH LAW OFFICES, PLLC  
PO Box 7985  
Boise, ID 83707

MATTHEW R. CLEVERLEY  
FIDELITY NATIONAL LAW GROUP  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101

3/25/15  
Date

Dora Stoneman  
Deputy Clerk



Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 – 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

**FILED**  
A.M. 4:15 P.M.

MAR 30 2015

Angela Barkell, Clerk  
*Angela Barkell*  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; GILBERT KING  
as Trustee of the HEART K RANCH TRUST  
UTA DECEMBER 28, 2012; AVCO  
FINANCIAL SERVICES OF IDAHO  
FALLS, INC.; THE ESTATE OF GORDON  
G. KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY,

Defendants.

GILBERT KING, as Trustee , and ROSE M.  
KING, as Beneficiary of the HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012,

Counterclaimants,

vs.

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Counterdefendants.

Case No. CV-2014-0278

FIRST AMENDED COMPLAINT

FIRST AMENDED COMPLAINT- 1

FIDELITY NATIONAL LAW GROUP  
1200 – 6<sup>TH</sup> AVENUE, SUITE 620  
SEATTLE, WA 98101  
(206) 223-4525

 ORIGINAL

### **NATURE OF THIS PROCEEDING**

1. This is an action for a declaratory judgment to establish an easement to the real properties owned by 1) John E. Fuquay and 2) Clinton Ward Fuquay and Hailey Rose Fuquay. The Properties are accessed via a private roadway commonly known as King Lane. Plaintiffs seek a declaratory judgment confirming their rights of access over all of the Defendants' properties.
2. The Low and King defendants may own or have an interest in the parcels of property over which King Lane runs.
3. The properties at issue are located east of the city of Oreana, Idaho in Owyhee County.
4. A street map showing the general location of the area is attached as Exhibit "A." An aerial map showing the Owyhee County Assessor's lot boundaries is attached as Exhibit "B." A Google Earth map showing an aerial view and general road boundaries and identities of the affected parcel owners is attached as Exhibit "C."

#### **Clinton Ward Fuquay and Hailey Rose Fuquay**

5. Clinton Ward Fuquay and Hailey Rose Fuquay own the parcel (the "Clinton Fuquay Parcel") at the west end of King Lane. It was once part of the John Fuquay Parcel. The legal description for the Clinton Fuquay Parcel is shown on the warranty deed attached as Exhibit "D."

#### **John Fuquay**

6. John Fuquay owns the parcel (the "John Fuquay Parcel") which is located south of the Clinton Fuquay Parcel. The legal description for the John Fuquay Parcel is shown on the

Trustee's Deed dated October 13, 1989 attached as Exhibit "E," (less the Clinton Fuquay Parcel).

**Susie Low and Cal Low Parcel 1**

7. Susie Low and Cal Low own the parcel (the "Low Parcel 1") located south of King Lane. There are two parcels which were conveyed by the same deed. The legal description for the Low Parcel 1 is shown on the Special Warranty Deed attached as Exhibit "F."

**Avco Financial Services of Idaho Falls, Inc.**

8. Avco Financial Services of Idaho Falls, Inc. may claim some right, title or interest in the Low Parcel 1 by virtue of a Real Estate Mortgage in the amount of \$68,000 which was recorded on or around March 18, 1996 as Owyhee County Records No. 218373. The Mortgage was executed by Samuel V.C. Steiner and Mary J. Steiner, husband and wife and encumbers Low Parcel 1. It is possible that this mortgage was paid but was never released. A copy of the Mortgage is attached as Exhibit "G."

**Susie Low and Cal Low Parcel 2**

9. Susie Low and Cal Low own the parcel (the "Low Parcel 2") located south of King Lane. Oreana Loop Road crosses the northwest corner of Low Parcel 2. The legal description for the Low Parcel 2 is shown on the Special Warranty Deed attached as Exhibit "H."

**Heart K Ranch Trust**

10. The Heart K Ranch Trust UTA December 28, 2012 owns the parcel to the north of King Lane (the "Heart K Ranch Parcel"). The legal description for the Heart K Ranch Parcel is shown on the Gift Deed attached as Exhibit "I."

**Estate of Gordon G. King and Rose M. King**

11. The Estate of Gordon G. King and Rose M. King may claim some right, title or interest in the Heart K. Ranch Parcel by virtue of a Deed of Trust in the amount of \$86,500 in favor of One West Bank which was recorded on July 28, 2004 as Owyhee County Records No. 248616 and encumbered the Heart K Ranch Parcel. A copy of the deed of trust is attached as Exhibit "J." The deed of trust was assigned to Gordon G. King and Rose M. King on September 12, 2005. A copy of the Assignment of Deed of Trust is attached as Exhibit "K."

**First American Title Insurance Company**

12. First American Title Insurance Company may claim some right, title or interest in the Heart K. Ranch Parcel by virtue of being named as the trustee under a Deed of Trust in the amount of \$86,500 in favor of One West Bank which was recorded on July 28, 2004 as Owyhee County Records No. 248616 and encumbered the Heart K Ranch Parcel. A copy of the deed of trust is attached as Exhibit "J."

**PROPERTIES AND ROADWAYS**

13. The properties at issue in this Complaint are located in Owyhee County, Idaho. They are located approximately three miles east of Oreana and are south of Highway 78. The closest public roadway to the properties is Oreana Loop Road.
14. Oreana Loop road runs in a generally west direction from Highway 78 to a point near a location where Low Parcels 1 and 2 and the Heart K Ranch Parcels intersect. Near that

location, Oreana Loop Road turns and continues in a southwesterly direction through Low Parcel 1.

15. King Lane is a private roadway that continues westerly from where Oreana Loop Road turns southwest Oreana Loop Road and provides the access to the Clint Fuquay Parcel and the John Fuquay Parcel.

16. The Plaintiffs have used King Lane to access the Clint Fuquay Parcel and the John Fuquay Parcel since at least 1989.

**FIRST CAUSE OF ACTION**  
**DECLARATORY JUDGMENT**  
**(PRESCRIPTIVE EASEMENT)**

17. The use of King Lane for access by owners of the Clint Fuquay Parcel and the John Fuquay Parcel has been open and continuous over the same route for more than 5 years,<sup>1</sup> and was without permission from adverse land owners.

18. Plaintiffs are entitled to a Judgment declaring that they have established a prescriptive easement for access and utilities over King Lane for access to the Clint Fuquay Parcel and the John Fuquay Parcel.

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<sup>1</sup> I.C. 5-203 was amended from 5 years to 20 years in 2006, but the 5 year time frame still applies to prescriptive claims before 2006. Machado v. Ryan, 153 Id 212, 222.

**SECOND CAUSE OF ACTION**  
**(INJUNCTION)**

19. The Low and King defendants have installed gates that block Plaintiffs' access to King Lane and the Low and King defendants continue to block Plaintiffs' rightful access.


20. Plaintiffs are entitled to a Judgment enjoining the Low and King defendants or any person who takes by, through or under them, from blocking or impeding Plaintiffs' access over King Lane.

**WHEREFORE, PLAINTIFFS PRAYS AS FOLLOWS**

1. For a Judgment declaring that Plaintiffs have an easement for ingress, egress and utilities to over King Lane for access to Clint Fuquay Parcel and the John Fuquay Parcel.
2. For a Judgment Declaring that each of the Defendants rights in their parcels are subject to and servient to the easement for access to Clint Fuquay Parcel and the John Fuquay Parcel.
3. For a Judgment declaring that the easement runs with the land and is binding and inures to the benefit of all subsequent owners, transferees, and assigns of the Clint Fuquay Parcel and the John Fuquay Parcel.
4. For a Judgment declaring that the easement runs with the land and is binding and that all subsequent owners, transferees, and assigns of Defendants shall be subject to the easement.

5. For a Judgment enjoining any defendant from impeding or interfering with Plaintiffs' access rights over King Lane.

Dated: March 30, 2015

  
\_\_\_\_\_  
Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 – 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 223-4525, ext. 103  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

# EXHIBIT A



ADDRESS MAP OWNER APN ADVANCED

Map Address : 18907 castle lane, oreana, id

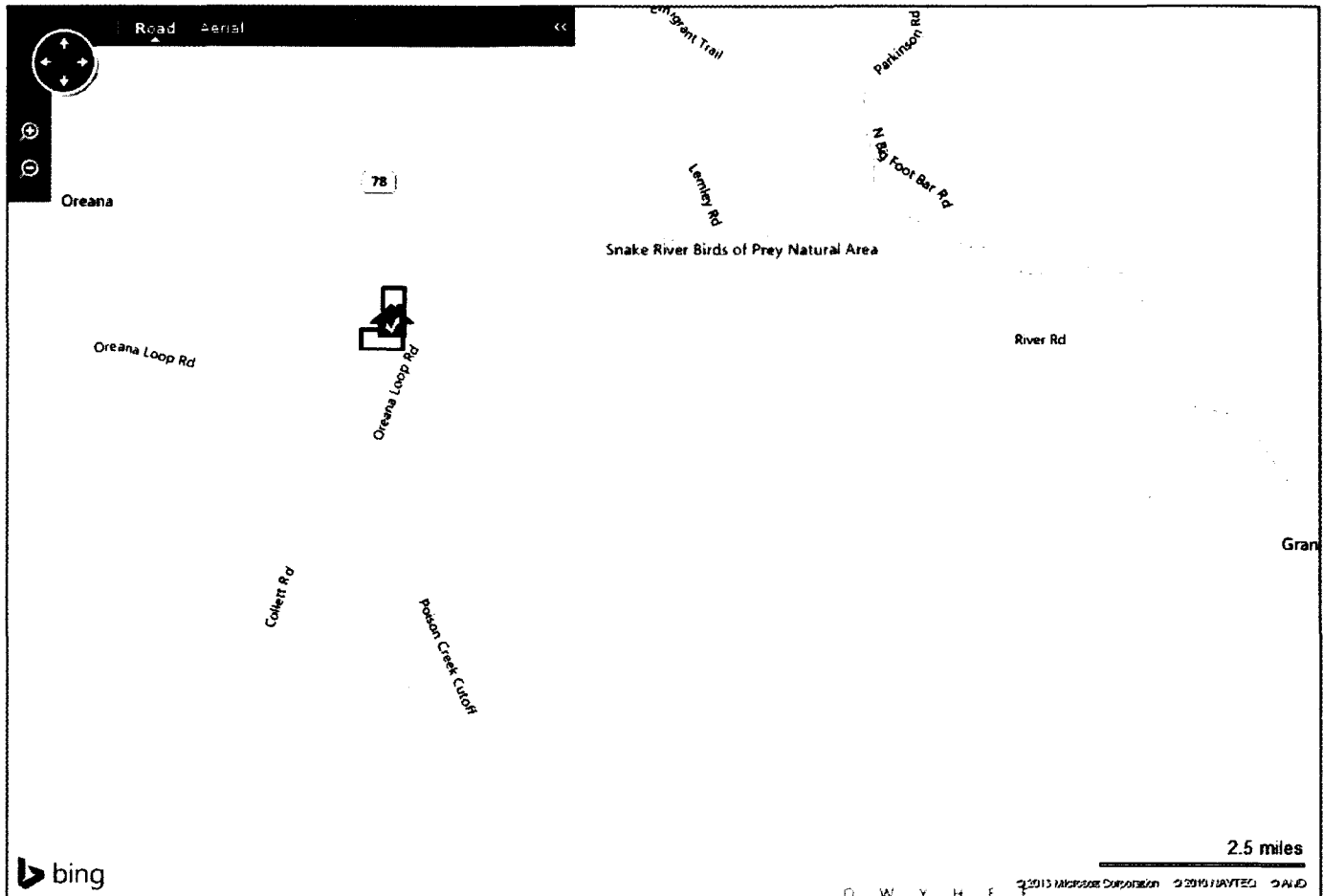


Search

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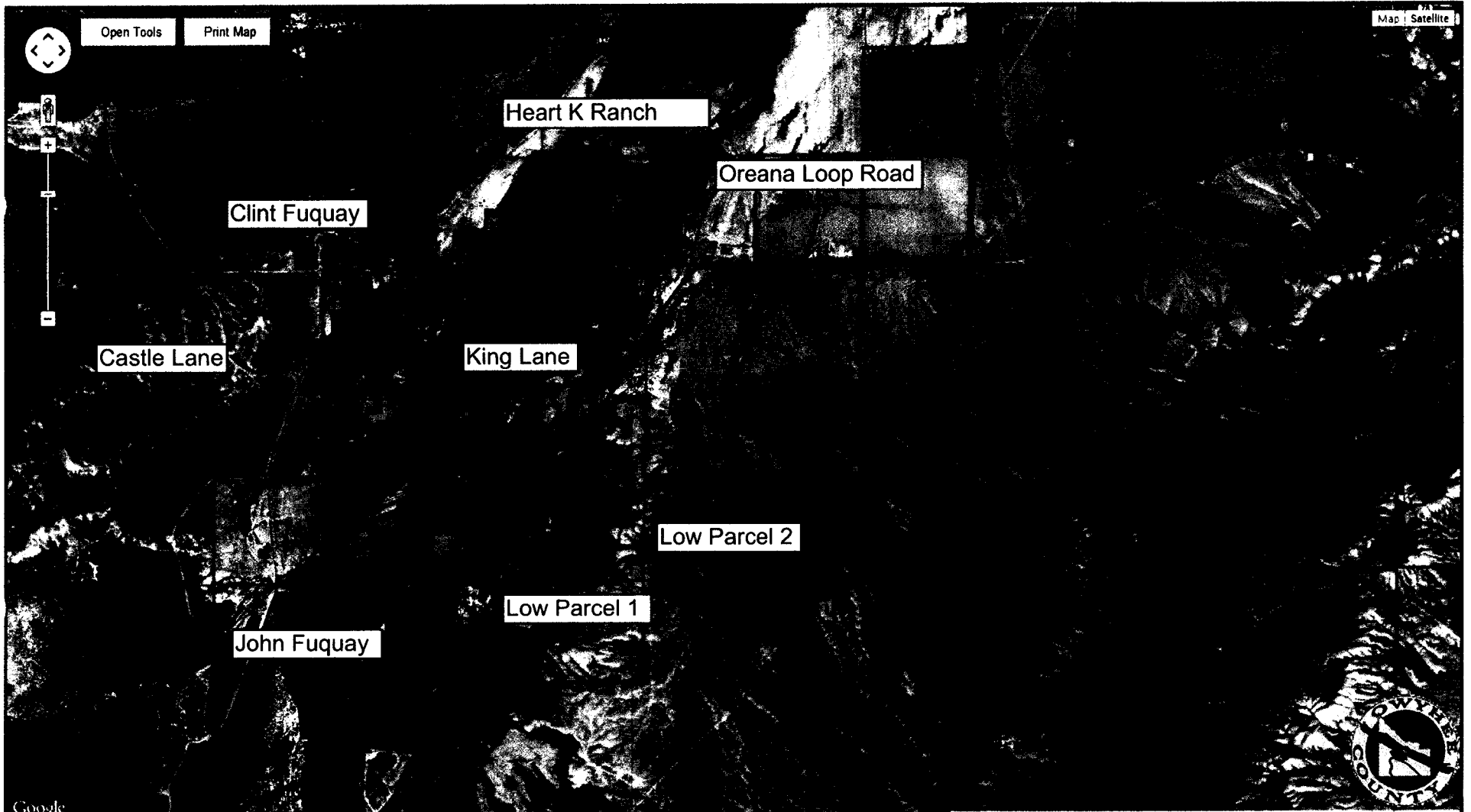
For Map Address Search, Please enter Street Address, City, State, OR Zip.(Ex: 312 N Vine St, Anaheim, CA 92805)

Parcel  Foreclosure  Auction  Pre-Foreclosure  REO  Short Sale

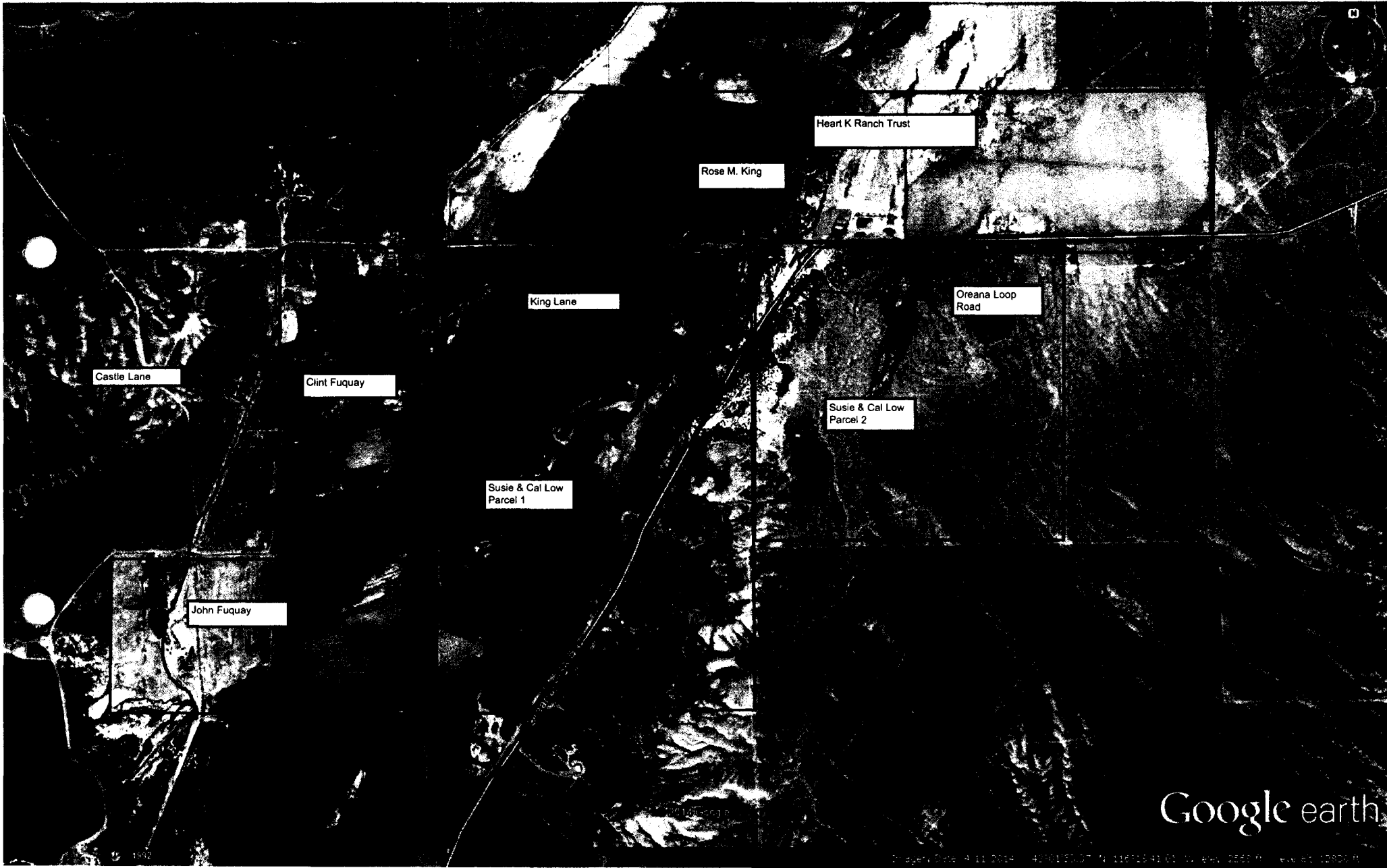


view Map Help | Disclaimer | Bing Maps Terms of Use | Microsoft Privacy

# EXHIBIT B



# EXHIBIT C



Google earth

# EXHIBIT D

Instrument # 284171  
MURPHY, OWYHEE, IDAHO  
2014-06-26 04:12:27 No. of Pages: 1  
Recorded for: ALLIANCE TITLE - BOISE PRODUCTIC  
ANGELA BARKELL Fee: \$10.00  
Ex-Officio Recorder Deputy: map  
Index To: DEED WARRANTY  
Electronically Recorded by Simplifile

**WARRANTY DEED**

Alliance Title & Escrow Corp. Order No.:217172

**FOR VALUE RECEIVED**

**John E Fuquay , a divorced man**

the grantor(s), do(es) hereby grant, bargain, sell and convey unto

**Clinton Ward Fuquay and Hailey Rose Fuquay, Husband and Wife**

whose current address is

**18907 Castle Lane  
Oreana, ID 83650**

the grantee(s), the following described premises, in Owyhee County, Idaho, TO WIT:

**In Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho.**

**Section 34: The Southwest Quarter of the Northeast Quarter and the Northwest Quarter of the Southeast Quarter**

**EXCEPT any mobile home or house trailer located thereon**

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee(s), that (s)he is/are the owner(s) in fee simple of said premises; that they are free from all encumbrances Except: Current Year Taxes, conditions, covenants, restrictions, reservations, easements, rights and rights of way, apparent or of record.

And that (s)he will warrant and defend the same from all lawful claims whatsoever.

Dated: June 24, 2014

John E Fuquay  
John E Fuquay

State of Idaho ) ss  
County of Ada )

On this 26 day of June, 2014, before me, Jananne Keating, a Notary Public in and for said state, personally appeared John E Fuquay, known or identified to me to be the person(s) whose name(s) is/are subscribed to the within Instrument and acknowledged to me that he/she/they executed same.

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

Jananne Keating  
Notary Public for the State of \_\_\_\_\_  
Residing at: \_\_\_\_\_  
Commission Expires: \_\_\_\_\_  
**Commission Expires 01/10/2017**  
Residing in Boise, Idaho

JANANNE KEATING  
NOTARY PUBLIC  
STATE OF IDAHO

# EXHIBIT E



TRUSTEE'S DEED

FOR VALUE RECEIVED

JOHN KROMMENHOEK, as trustee for the bankrupt Estate of James C. Fuquay

GRANTOR(s), does(do) hereby GRANT, BARGAIN, SELL and CONVEY all by right, title and interest unto

John Edmond Fuquay and Karen Lee Fuquay, husband and wife

GRANTEES(s), whose current address is: Rt. 79 box 2240, Murphy, Idaho 83400

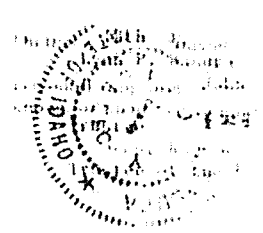
the following described real property in Owyhee County, State of Idaho, more particularly described as follows, to wit:

IN TOWNSHIP 4 SOUTH, RANGE 1 EAST, B.M. OWYHEE COUNTY, IDAHO Section 34: SW1/4, SE1/4, SW1/4, SE1/4

200795  
OCT 19 3 12 PM '95  
RECORDED

To have and to hold the same to said and their heirs, assigns and assigns forever, as fully and completely as if the undersigned Trustee, by virtue of the power and authority aforesaid, were to sell or should sell and convey the same.

IN WITNESS WHEREOF, I, said Trustee, have hereunto set my hand, this 15th day of NOVEMBER, A.D. 1995.



# EXHIBIT F

107036

Recording Requested By and  
When Recorded Return to:

SUSIE LOW  
CAL LOW  
21220 Oreana Loop Road  
Oreana, ID 83650

**Instrument # 254987**

MURPHY, OWYHEE, IDAHO  
2006-01-27 04:35:41 No. of Pages: 4  
Recorded for : PIONEER TITLE COMPANY  
CHARLOTTE SHERBURN Fee: 12.00  
Ex-Officio Recorder Deputy A. Dygert  
Index to: DEED, WARRANTY

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

**SPECIAL WARRANTY DEED**

THIS SPECIAL WARRANTY DEED (this "Deed"), made as of the 6<sup>th</sup> day of January, 2006, is between PIONEER EXCHANGE ACCOMMODATION TITLEHOLDER #69, LLC, an Idaho limited liability company ("Grantor"), and SUSIE LOW AND CAL LOW, HUSBAND AND WIFE ("Grantee"), whose legal address is: 21220 Oreana Loop Road, Oreana, ID 83650.

WITNESSETH, That Grantor, for and in consideration of One Dollar and No/100 (\$1.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm, unto Grantee, its successors and assigns forever, all the real property, together with improvements, located in the County of Owyhee, State of Idaho, more particularly described as follows:

See legal description described on Exhibit "A" attached hereto

Futher Granted Water Rights as Defined in Attachment "Water Rights"

TOGETHER with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of Grantor, either in law or equity, of in and to the above bargained premises, with the hereditaments, easements, rights of way and appurtenances, and with all of Grantor's interest, if any, in and to any and all minerals, water, ditches, wells, reservoirs and drains, and all water, ditch, well, reservoir and drainage rights which are appurtenant to, located on, now or hereafter acquired under or above or used in connection with the property (collectively, the "Property").

TO HAVE AND TO HOLD the said premises above bargained and described with the appurtenances, unto Grantee, its successors and assigns forever. Grantor, for itself, and its successors and assigns, does covenant, grant, bargain and agree to and with the Grantee, its successors and assigns, that at the time of the ensealing and delivery of these presents, Grantor is well seized of the premises above conveyed, has good, sure, perfect, absolute and indefeasible estate of inheritance, in law, in fee simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form as aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, encumbrances and restrictions of whatever kind or nature whatsoever, as of July 15, 2005 .

The Grantor shall and will WARRANT AND FOREVER DEFEND the above-bargained premises in the quiet and peaceable possession of Grantee, its successors and assigns, against all and every person or persons claiming the whole or any part thereof BY, THROUGH OR UNDER Grantor.



EXHIBIT A

PO7036

In Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho.

Section 34: E1/2 SE1/4, SE1/4 NE 1/4  
Section 35: W1/2 SW1/4, SW1/4 NW14

EXCEPTING 1-1/2 acres in the Southwest Quarter of the Northwest Quarter of Section 35, Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho, described as follows:

COMMENCING at the Northeast corner of the Southwest Quarter of the Northwest Quarter of said Section, running thence in a Westerly direction 630 feet; thence in a Southerly direction 104 feet; thence in an Easterly direction 630 feet; thence in a Northerly direction 104 feet to the PLACE OF BEGINNING.

In Township 5 South, Range 1 East, Boise Meridian, Owyhee County, Idaho.

Section 2: Lot 4  
Section 3: Lot 1

WATER RIGHTS

1. No. 57-89. 4-1-1874 Priority. Castle Creek. Irrigation and Stock Water.	0.240 CFS.
2. No. 57-95. 4-1-1885 Priority. Castle Creek Irrigation.	0.360 CFS.
3. No. 57-104. 4-1-1887 Priority. Castle Creek. Irrigation.	0.200 CFS
4. No. 57-116. 4-1-1895 Priority. Castle Creek. Irrigation.	0.100 CFS
5. No. 57-120. 4-1-1896 Priority. Castle Creek. Irrigation.	0.300 CFS
6. No. 57-127. 4-1-1899 Priority. Castle Creek Irrigation.	0.400 CFS
7. No. 57-149. 4-1-1906 Priority. Castle Creek. Irrigation.	0.200 CFS
8. No. 57-2104. 10-5-1920 Priority. Castle Creek. Irrigation.	<u>1.280 CFS</u>
Total	3.080 CFS

Total Acres: 145.

CDC  
2/2

# EXHIBIT G

2002

### REAL ESTATE MORTGAGE

For Value Received, **SAMUEL V.C. STEINER AND MARY J. STEINER, HUSBAND AND WIFE**

The mortgagor do hereby grant, bargain, sell and convey unto  
**AVCO FINANCIAL SERVICES OF IDAHO FALLS, INC.**

the mortgagee, the following described premises, in **OWYHEE** County, Idaho, to-wit:

**LEGAL DESCRIPTION MORE PARTICULARLY DESCRIBED IN EXHIBIT "A"  
ATTACHED HERETO AND MADE A PART HEREOF.**

**PROPERTY COMMONLY KNOWN AS: HC 79 BOX 2235  
MURPHY, IDAHO 83650**

TO HAVE AND TO HOLD the said premises, with their appurtenances, unto the said mortgagee .  
heirs and assigns forever.

This conveyance is intended as a mortgage to secure the payment of the sum of **\$68,000.00**  
**SIXTY EIGHT THOUSAND AND 00/100** DOLLARS  
with interest, in accordance with a promissory note of even date herewith, payable to the order of the  
mortgagee, with final payment due **Unisource Line of Credit**  
and providing for acceleration of the due date of the principal for default in the payment of interest or any installment  
of principal, and providing for a reasonable attorney's fee in case of suit or action.

The mortgagee consent and agree with the mortgagee to follow: That is the power to foreclose of the above described premises and that they  
are free from all encumbrances

That the said pay the indebtedness hereby created promptly, according to the terms of said promissory note. That the mortgagee shall keep the Lender  
of any nature hereafter levied or imposed, or becoming payable, upon said premises not later than the twentieth day before delinquency. That the mortgagee shall keep the Lender  
in each premises insured against loss or damage by fire, by some insurance company acceptable to the mortgagee. That the mortgagee shall keep the Lender  
interest may appear, in the sum of at least \$ and deliver such policy or policies of insurance to the mortgagee. That the mortgagee shall keep the Lender  
fully paid and insured. The mortgagee may from time to time and whenever it so desires, cause an abstract of title to be obtained for the above premises and the mortgagee  
from a reputable title company and the mortgagee agree to pay the cost thereof upon demand.

If the mortgagee shall fail to pay any such tax or lien, interest or this report charge, or fail to maintain such fire insurance, the mortgagee may pay the same or  
procure such insurance, abstract construction or title report and pay the cost thereof, and all payments by the mortgagee for any such purpose shall be added to the indebtedness  
hereby secured, and shall be repayable on demand, with interest at the rate of eight (8) per cent per annum until paid.

For the purpose of further securing said indebtedness and performance of the covenants herein established, the mortgagee hereby sell and assign to the mortgagee  
any and all rents, royalties, or to rents on said premises, during the life of this mortgage.

Now, if the said mortgagee shall pay or cause to be paid all mortgage which may become due upon said promissory note, and shall otherwise comply with the terms  
of the promissory note, the mortgagee shall be entitled to take default on the mortgagee in the payment of the indebtedness hereby secured, if any part of such principal or interest,  
or in any of the covenants or agreements herein established, is broken by the mortgagee. At any time, at his option, may cause the entire or part of  
the mortgage to be immediately due and payable, and thereupon the mortgagee and cause said mortgagee premises to be sold by the mortgagee as provided by law, and out of the  
proceeds arising from such sale retain principal and interest together with any expenses or (as specified herein), with interest as aforesaid, together with the costs of collection of  
such interest and sale, including such sum as the court may adjudge reasonable as an attorney's fee to be paid to the plaintiff, and the mortgagee, if any there be, pay over  
to the mortgagee.

Dated: **MARCH 14, 1996**  
*[Signature]*  
**SAMUEL V.C. STEINER**

*[Signature]*  
**MARY J. STEINER**

**NOTARY PUBLIC**  
STATE OF IDAHO, COUNTY OF OWYHEE  
On this **14th** day of **March**, 1996,  
before me, the undersigned Notary Public for said State, personally  
appeared **SAMUEL V.C. STEINER**  
**MARY J. STEINER**

Known to me to be the persons whose names  
subscribed to the within instrument and acknowledged to  
me that they executed the same.  
*[Signature]*  
**HATT SMITH**  
Residing at **HANPA** Idaho  
Comm. Expires **2-13-98**

**RECORDED**  
*[Signature]*  
**1996**

Printed by the AMERICAN LAND TITLE CO., Boise, Idaho



FE

U:

20000

0 DOLLARS  
to the order of the  
or any installment

with interest and that they

to keep the full value  
of the mortgage as  
secured by the mortgage are  
to be paid to the lender

may pay the same or  
add to the principal

to the mortgage

to the same with the same  
interest, principal and interest,  
and for the entire term of the  
loan, the mortgagor and chargee of  
the same, they shall pay and

*over*

210373

File No. 2262  
Exhibit "A", Land description:

IN TOWNSHIP 4 SOUTH, RANGE 1 EAST, B. M., OWYHEE COUNTY,  
IDAHO

Section 34: E1SE1, SE1NE1

Section 35: W1SW1, SW1NW1, EXCEPTING 1 1/2 acres in the  
SW1NW1 of Section 35, Township 4 South, Range  
1 East, B. M., described as follows:

Commencing at the NE corner of the SW1NW1 of  
said Section, running thence in a westerly direction 630  
feet; thence in a southerly direction 104 feet; thence in an  
easterly direction 630 feet; thence in a northerly direction  
104 feet to the place of beginning.

IN TOWNSHIP 5 SOUTH, RANGE 1 EAST, B. M., OWYHEE COUNTY,  
IDAHO

Section 2: Lot 4  
Section 3: Lot 1

# EXHIBIT H

P07066

Recording Requested By and  
When Recorded Return to:

SUSIE LOW  
CAL LOW  
21220 Oreana Loop Road  
Oreana, ID 83650

**Instrument # 254988**

MURPHY, OWYHEE, IDAHO  
2006-01-27 04:38:59 No. of Pages: 2  
Recorded for : PIONEER TITLE COMPANY  
CHARLOTTE SHERBURN  
Ex-Officio Recorder Deputy *A. Ogant* Fee: 6.00  
Index to: DEED, WARRANTY

SPACE ABOVE THIS LINE FOR RECORDER'S USE ONLY

### SPECIAL WARRANTY DEED

THIS SPECIAL WARRANTY DEED (this "Deed"), made as of the 6<sup>th</sup> day of January, 2006, is between PIONEER EXCHANGE ACCOMMODATION TITLEHOLDER #69, LLC, an Idaho limited liability company ("Grantor"), and SUSIE LOW AND CAL LOW, HUSBAND AND WIFE ("Grantee"), whose legal address is: 21220 Oreana Loop Road, Oreana, ID 83650.

WITNESSETH, That Grantor, for and in consideration of One Dollar and No/100 (\$1.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell, convey and confirm, unto Grantee, its successors and assigns forever, all the real property, together with improvements, located in the County of Owyhee, State of Idaho, more particularly described as follows:

Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho; Section 35: Northeast Quarter Southwest Quarter; Southwest Quarter Northeast Quarter; Southeast Quarter Northwest Quarter; Northwest Quarter Southeast Quarter ; Including Water Right #57-10045 and #57-10046

TOGETHER with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, claim and demand whatsoever of Grantor, either in law or equity, of in and to the above bargained premises, with the hereditaments, easements, rights of way and appurtenances, and with all of Grantor's interest, if any, in and to any and all minerals, water, ditches, wells, reservoirs and drains, and all water, ditch, well, reservoir and drainage rights which are appurtenant to, located on, now or hereafter acquired under or above or used in connection with the property (collectively, the "Property").

TO HAVE AND TO HOLD the said premises above bargained and described with the appurtenances, unto Grantee, its successors and assigns forever. Grantor, for itself, and its successors and assigns, does covenant, grant, bargain and agree to and with the Grantee, its successors and assigns, that at the time of the ensealing and delivery of these presents, Grantor is well seized of the premises above conveyed, has good, sure, perfect, absolute and indefeasible estate of inheritance, in law, in fee simple, and has good right, full power and lawful authority to grant, bargain, sell and convey the same in manner and form as aforesaid, and that the same are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, encumbrances and restrictions of whatever kind or nature whatsoever, as of July 15, 2005 .

The Grantor shall and will WARRANT AND FOREVER DEFEND the above-bargained premises in the quiet and peaceable possession of Grantee, its successors and assigns, against all and every person or persons claiming the whole or any part thereof BY, THROUGH OR UNDER Grantor.

IN WITNESS WHEREOF, Grantor has executed this Special Warranty Deed as of the date set forth above.

**PIONEER EXCHANGE ACCOMMODATION TITLEHOLDER #69, LLC,**  
an Idaho limited liability company

By: Pioneer 1031 Company, Member

By: Alicia Reinhard  
As: Assistant Secretary

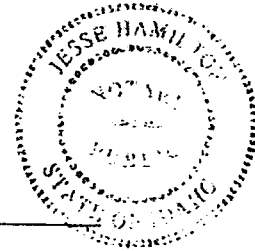
STATE OF IDAHO )  
 ) ss.  
COUNTY OF ADA )

The foregoing instrument was acknowledged before me this 6<sup>th</sup> day of January, 2006, by Alicia Reinhard, as Assistant Secretary of Pioneer 1031 Company, an Idaho corporation, Member of Pioneer Exchange Accommodation Titleholder #69, LLC, an Idaho limited liability company.

WITNESS my hand and official seal.

My commission expires: 9.9.09.

Jesse Hamilton  
Notary Public



(NOTARIAL SEAL)

# EXHIBIT I

**GIFT DEED**


Intending a gift, **ROSE M. KING**, a single person, Grantor, does hereby grant, bargain, sell and convey to **GILBERT GENE KING, AS TRUSTEE (or any successor Trustee thereof) OF THE HEART K RANCH TRUST UTA DECEMBER 28, 2012**, Grantee, whose current address is Post Office Box 36, Murphy, Idaho 83650, the following real property located in Owyhee County, Idaho, as described on Exhibit A, attached hereto and incorporated herein.

SUBJECT TO current taxes and assessments and all subsequent years, together with any and all existing easements, rights-of-way, reservations, restrictions and encumbrances of record, to any existing tenancies, to all zoning laws and ordinances, and to any state of facts an accurate survey or inspection of the premises would show.

This conveyance shall include any and all appurtenances, tenements, hereditaments, reversions, remainders, easements, rights-of-way and water rights in anywise appertaining to the property herein described.

All income and gain derived from such property shall be the sole and separate property of said Grantee.

IN WITNESS WHEREOF, the Grantor has hereunto subscribed her name to this instrument this 28th day of December, 2012.

  
\_\_\_\_\_  
ROSE M. KING, Grantor

GIFT DEED - 1 00433804.000

**Instrument # 279640**

MURPHY, OWYHEE, IDAHO

12-31-2012

10:09:48 No. of Pages: 5

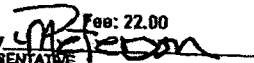
Recorded for: ROSE KING

CHARLOTTE SHERBURN

Ex-Officio Recorder Deputy

Index to: DEED, PERSONAL REPRESENTATIVE

Fee: 22.00





**EXHIBIT A**

**Tract I:**

**In Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho**

**Section 26: Southwest Quarter, South Half of the Northwest Quarter, North Half of the Southeast Quarter; Southwest Quarter of the Southeast Quarter, South Half of the Northeast Quarter, Northeast Quarter of the Northeast Quarter**

**Section 27: Southeast Quarter of the Southeast Quarter**

**Section 34: Northeast Quarter of the Northeast Quarter**

**Section 35: North Half of the Northwest Quarter, and a parcel in the Southwest Quarter of the Northwest Quarter described as follows: Beginning at the Northeast corner of the Southwest Quarter of the Northwest Quarter, Sec. 35, T4S, R1E, B.M.; thence in a Westerly direction 630 feet; thence in a Southerly direction 104 feet; thence in an Easterly direction 630 feet; thence in a Northerly direction 104 feet to the PLACE OF BEGINNING.**

**EXCEPTING THEREFROM:**

**A portion of the Northwest Quarter of the Northwest Quarter of Section 35 in Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho, described as follows:**

**COMMENCING at the Section corner common to Sections 26, 27, 34 and 35 of Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho; thence**

**South 1320 feet along the Section line common to Sections 34 and 35 a distance of 1320 feet to the Southwest corner of the Northwest Quarter of the Northwest Quarter of said Section 35; thence**

**East along the South line of said Northwest Quarter of the Northwest Quarter a distance of 558 feet to the TRUE POINT OF BEGINNING; thence**

**North parallel with the West line of said Section 35 a distance of 165 feet; thence**

**East and parallel with the South line of the Northwest Quarter of the Northwest Quarter a distance of 175 feet; thence**

**South and parallel with the West line of said Section 35 a distance of 165 feet to a point on the South line of the Northwest Quarter of the Northwest Quarter of said Section 35 that is East a distance of 175 feet from the POINT OF BEGINNING; thence**

**West along said South line of the Northwest Quarter of the Northwest Quarter a distance of 175 feet to the TRUE POINT OF BEGINNING.**

**Tract II:**

**A portion of the Northwest Quarter of the Northwest Quarter of Section 35 in Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho, described as follows:**

**COMMENCING at the Section corner common to Sections 26, 27, 34 and 35 of Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho; thence**



South 1320 feet along the Section line common to Sections 34 and 35 a distance of 1320 feet to the Southwest corner of the Northwest Quarter of the Northwest Quarter of said Section 35; thence East along the South line of said Northwest Quarter of the Northwest Quarter a distance of 558 feet to the TRUE POINT OF BEGINNING; thence North parallel with the West line of said Section 35 a distance of 165 feet; thence East and parallel with the South line of the Northwest Quarter of the Northwest Quarter a distance of 175 feet; thence South and parallel with the West line of said Section 35 a distance of 165 feet to a point on the South line of the Northwest Quarter of the Northwest Quarter of said Section 35 that is East a distance of 175 feet from the POINT OF BEGINNING; thence West along said South line of the Northwest Quarter of the Northwest Quarter a distance of 175 feet to the TRUE POINT OF BEGINNING.

**Tract III:**

In Township 7 South, Range 1 East, Boise Meridian, Owyhee County, Idaho  
 Section 9: East Half of the Northeast Quarter

**Tract IV:**

In Township 7 South, Range 2 East, Boise Meridian, Owyhee County, Idaho  
 Section 30: West Half of the Northeast Quarter

**Tract V:**

In Township 8 South, Range 1 East, Boise Meridian, Owyhee County, Idaho  
 Section 6: Government Lot 7, Southeast Quarter of the Southwest Quarter, Southwest Quarter of the Southeast Quarter  
 Section 7: Government Lot 1, Northeast Quarter of the Northwest Quarter, North Half of the Northeast Quarter  
 Section 18: Government Lots 2, 3, 5, 6 and 7, Northwest Quarter of the Southeast Quarter  
 Section 19: Government Lots 1, 2 and 3, East Half of the Northwest Quarter, Northeast Quarter of the Southwest Quarter, North Half of the Southeast Quarter

**Tract VI:**

In Township 8 South, Range 1 West, Boise Meridian, Owyhee County, Idaho  
 Section 1: East Half of the Southeast Quarter  
 Section 12: East Half of the Northeast Quarter, East Half of the Northwest Quarter of the Northeast Quarter  
 Section 13: South Half of the North Half, North Half of the South Half, Government Lots 1, 2, 3 and 4  
 Section 18: Southeast Quarter, East Half of the Southwest Quarter, Government Lots 3 and 4  
 Section 19: North Half of the Northeast Quarter, Southeast Quarter of the Northeast Quarter, Northeast Quarter of the Northwest Quarter, Government Lot 1, East Half of the Southeast Quarter  
 Section 20: Southwest Quarter of the Northwest Quarter, Northwest Quarter of the Southwest Quarter  
 Section 22: Northwest Quarter of the Southeast Quarter, South Half of the Southeast Quarter

**Section 24:** Northwest Quarter, North Half of the Southwest Quarter  
**Section 26:** Southwest Quarter of the Northwest Quarter  
**Section 27:** Northeast Quarter of the Northeast Quarter

**TOGETHER WITH** a grant of Easement for a well, ditch and cooling pond located in the NWNE, Sec. 34, T4S, R1E, BM, as granted by the United States, Dept. of Interior, Bureau of Land Management, on August 4, 1961, under Serial No. Idaho 012682.

# EXHIBIT J

PO6120

After recording please return to:

Bank of the West, a  
California Corporation  
[Company Name]

[Name of Natural Person]

P.O. Box 512086 (service)  
[Street Address]

Los Angeles, CA 90051-0086  
[City, State Zip Code]

Instrument # 248616  
MURPHY, OWYHEE, IDAHO  
2004-07-28 04:26:21 No. of Pages: 16  
Recorded for: PIONEER TITLE COMPANY  
CHARLOTTE SHERBURN  
Ex-Officio Recorder Deputy B. Evans Fee: 48.00  
Index to: DEED OF TRUST

[Space Above This Line For Recording Data]

PREPARED BY:  
Kathy Rodriguez

(323) 727-4987 Ext.

## DEED OF TRUST

### DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated July 19, 2004 together with all Riders to this document.

(B) "Borrower" is Karla Kay King Love, an unmarried woman

Borrower is the trustor under this Security Instrument.

(C) "Lender" is Bank of the West, a California Corporation

Lender is organized and existing under the laws of California Lender's address is 1977 Saturn Street (bene), Monterey Park, CA 91755  
Lender is the beneficiary under this Security Instrument.

: 3984002

Initials: KKKL

Idaho Deed of Trust-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT  
—THE COMPLIANCE SOURCE, INC.—  
www.compliance-source.com



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Form 3013 01/01

148911D 02/00

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(D) "Trustee" is First American Title Insurance Company, a corporation

(E) "Note" means the promissory note signed by Borrower and dated July 19, 2004  
The Note states that Borrower owes Lender Eighty Six Thousand Five Hundred and  
NO/100ths Dollars (U.S. \$ 86,500.00 )  
plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not  
later than August 1, 2024

(F) "Property" means the property that is described below under the heading "Transfer of Rights in the  
Property."

(G) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due  
under the Note, and all sums due under this Security Instrument, plus interest.

(H) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following  
Riders are to be executed by Borrower [check box as applicable]:

- |  |   |   |
|--|---|---|
| <input type="checkbox"/> Adjustable Rate Rider | <input type="checkbox"/> Condominium Rider              | <input type="checkbox"/> Second Home Rider      |
| <input type="checkbox"/> Balloon Rider         | <input type="checkbox"/> Planned Unit Development Rider | <input type="checkbox"/> Biweekly Payment Rider |
| <input type="checkbox"/> 1-4 Family Rider      | <input type="checkbox"/> Revocable Trust Rider          |   |
| <input type="checkbox"/> Other(s) [specify]    |   |   |

(I) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances  
and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable  
judicial opinions.

(J) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other  
charges that are imposed on Borrower or the Property by a condominium association, homeowners association or  
similar organization.

(K) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check,  
draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer,  
or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term  
includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by  
telephone, wire transfers, and automated clearinghouse transfers.

(L) "Escrow Items" means those items that are described in Section 3.

(M) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by  
any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to,  
or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance  
in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(N) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the  
Loan.

: 3984002

Initials: 

Idaho Deed of Trust-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

—THE COMPLIANCE SOURCE, INC.—  
www.compliance-source.com



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14881FD 08/00  
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(O) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(P) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. §2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(Q) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

#### TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the

county

[Type of Recording Jurisdiction]

of Owyhee

[Name of Recording Jurisdiction]

SEE ATTACHED HERETO AND MADE A PART HEREOF

which currently has the address of

19100 King Lane

[Street]

Murphy  
[City]

, Idaho

83650  
[Zip Code]

("Property Address"):

: 3984002

Initials: *KKR*

Idaho Deed of Trust-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT  
—THE COMPLIANCE SOURCE, INC.—  
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140011D 02/00

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PO6120

Exhibit "A"

PARCEL I:

A portion of the Northwest Quarter of the Northwest Quarter of Section 35 in Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho, described as follows:

COMMENCING at the Section corner common to Sections 26, 27, 34 and 35 of Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho; thence

South 1320 feet along the Section line common to Sections 34 and 35 a distance of 1320 feet to the Southwest corner of the Northwest Quarter of the Northwest Quarter of said Section 35; thence

East along the South line of said Northwest Quarter of the Northwest Quarter a distance of 558 feet to the TRUE POINT OF BEGINNING; thence

North parallel with the West line of said Section 35 a distance of 165 feet; thence

East and parallel with the South line of the Northwest Quarter of the Northwest Quarter a distance of 175 feet; thence

South and parallel with the West line of said Section 35 a distance of 165 feet to a point on the South line of the Northwest Quarter of the Northwest Quarter of said Section 35 that is East a distance of 175 feet from the POINT OF BEGINNING; thence

West along said South line of the Northwest Quarter of the Northwest Quarter a distance of 175 feet to the TRUE POINT OF BEGINNING.

PARCEL II:

An easement for ingress and egress over a parcel of land located in the Northwest Quarter of Section 35, Township 4 South, Range 1 East, Boise Meridian, Owyhee County, Idaho. Being further described as follows:

BEGINNING at a point on the Northerly right-of-way of Oreana Loop Road from which the East Quarter corner of said Section 35 bears South  $68^{\circ} 05'05''$  East a distance of 3,483.22 feet;

thence along said right-of-way on a curve to the left with a radius of 456.77 feet and a central angle of  $13^{\circ} 02'31''$ , an arc length of 103.97 feet (with a chord bearing of South  $74^{\circ} 35'55''$  West, and a chord distance of 103.75 feet);

thence leaving said right-of-way North  $89^{\circ} 44'39''$  West a distance of 34.65 feet;

thence South  $86^{\circ} 52'41''$  West a distance of 101.22 feet;

thence along a curve to the right with a radius of 956.00 feet and a central angle of  $08^{\circ} 09'05''$ , an arc length of 136.01 feet (with a chord bearing of South  $82^{\circ} 48'09''$  West, and a chord distance of 135.89 feet);

thence South  $78^{\circ} 43'37''$  West a distance of 16.97 feet;

thence along a curve to the right with a radius of 190.00 feet and a central angle of  $34^{\circ} 08'57''$ , an arc length of 113.24 feet (with a chord bearing of North  $84^{\circ} 11'54''$  West, and a chord distance of 111.57 feet);

thence North  $67^{\circ} 07'26''$  West a distance of 132.56 feet;

thence along a curve to the right with a radius of 162.00 feet and a central angle of  $57^{\circ} 53'42''$ , an arc length of 163.69 feet (with a chord bearing of South  $83^{\circ} 55'43''$  West

First American Title

Datedown

and a chord distance of 156.82 feet);

thence into a tangent reverse curve to the right having a radius of 139.00 feet and a central angle of  $16^{\circ} 00' 01''$  and a length of 38.82 feet, (with a chord bearing of South  $62^{\circ} 58' 52''$  West, and a chord distance of 38.69 feet);

thence along a curve to the right having a radius of 474.00 feet and a central angle of  $18^{\circ} 35' 17''$ ;

thence westerly along the arc, a distance of 153.78 feet (with a chord bearing of South  $80^{\circ} 16' 32''$  West, and a chord distance of 153.10 feet);

thence South  $89^{\circ} 34' 10''$  West a distance of 364.49 feet;

thence along a curve to the right with a radius of 60.45 feet and a central angle of  $80^{\circ} 02' 33''$ , an arc length of 84.45 feet (with a chord bearing of North  $51^{\circ} 23' 44''$  West, and a chord distance of 77.75 feet);

thence South  $85^{\circ} 29' 29''$  East a distance of 30.23 feet;

thence along a curve to the right with a radius of 32.45 feet and a central angle of  $65^{\circ} 16' 28''$ , an arc length of 36.97 feet (with a chord bearing of South  $58^{\circ} 46' 46''$  East, and a chord distance of 35.00 feet);

thence North  $89^{\circ} 34' 10''$  East a distance of 364.49 feet;

thence along a curve to the right with a radius of 446.00 feet and a central angle of  $18^{\circ} 35' 17''$ , an arc length of 144.69 feet (with a chord bearing of North  $80^{\circ} 16' 31''$  East, and a chord distance of 144.06 feet);

thence along a curve to the left having a radius of 111.00 feet and a central angle of  $16^{\circ} 00' 01''$ , an arc length of 31.00 feet (with a chord bearing of North  $62^{\circ} 58' 52''$  East, and a chord distance of 30.90 feet);

thence along a curve to the right having a radius of 190.00 feet and a central angle of  $57^{\circ} 53' 42''$  and a length of 191.99 feet, (with a chord bearing of North  $83^{\circ} 55' 43''$  East, and a chord distance of 183.92 feet);

thence South  $67^{\circ} 07' 26''$  East a distance of 132.56 feet;

thence along a circular curve to the right with a radius of 162.00 feet and a central angle of  $34^{\circ} 08' 57''$ , an arc length of 96.55 feet (with a chord bearing of South  $84^{\circ} 11' 55''$  East, and a chord distance of 95.13 feet);

thence North  $78^{\circ} 43' 37''$  East a distance of 16.97 feet;

thence along a circular curve to the right with a radius of 984.00 feet and a central angle of  $08^{\circ} 09' 05''$ , an arc length of 139.99 feet (with a chord bearing of North  $82^{\circ} 48' 09''$  East, and a chord distance of 139.87 feet);

thence North  $86^{\circ} 52' 41''$  East a distance of 102.04 feet;

thence South  $89^{\circ} 44' 39''$  East a distance of 135.37 feet to the POINT OF BEGINNING.

First American Title  
Datedown



TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property."

**BORROWER COVENANTS** that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

**UNIFORM COVENANTS.** Borrower and Lender covenant and agree as follows:

**1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

**2. Application of Payments or Proceeds.** Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

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Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

3. **Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in the Security Instrument. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by notice and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required.

Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

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4. **Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

5. **Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration

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or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

6. **Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

7. **Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. **Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

9. **Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security

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Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

**10. Mortgage Insurance.** If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

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As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly) amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

11. Assignment of Miscellaneous Proceeds; Forfeiture. All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or

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not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

**12. Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

**13. Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

**14. Loan Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's

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acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

15. **Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

16. **Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

17. **Borrower's Copy.** Borrower shall be given one copy of the Note and of this Security Instrument.

18. **Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

19. **Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees

: 3984002

Initials: 



incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

20. **Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law. There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

21. **Hazardous Substances.** As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

: 3984002

Initials: *IKKKJ*

Idaho Deed of Trust-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

—THE COMPLIANCE SOURCE, INC.—

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Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

**NON-UNIFORM COVENANTS.** Borrower and Lender further covenant and agree as follows:

**22. Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender or Trustee shall mail copies of the notice as prescribed by Applicable Law to Borrower and to other persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

**23. Reconveyance.** Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

: 3984002

Initials: *K K R J*

Idaho Deed of Trust-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

—THE COMPLIANCE SOURCE, INC.—

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24. Substitute Trustee. Lender may, for any reason or cause, from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

25. Area and Location of Property. Either the Property is not more than forty acres in area or the Property is located within an incorporated city or village.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

\_\_\_\_\_ (Seal)  
 Karla Kay King Love -Borrower  
 Mailing Address: P.O. Box 36, Murphy, ID 83650

\_\_\_\_\_ (Seal)  
 -Borrower  
 Mailing Address:

\_\_\_\_\_ (Seal)  
 -Borrower  
 Mailing Address:

\_\_\_\_\_ (Seal)  
 -Borrower  
 Mailing Address:

\_\_\_\_\_ (Space Below This Line For Acknowledgment) \_\_\_\_\_

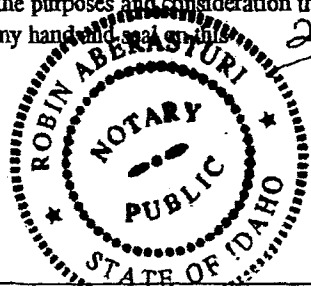
State of Idaho §  
 County of Canyon §  
 §

Before me the undersigned authority, on this day personally appeared

Karla Kay King Love

known to me (or proved to me through an identity card or other document) to be the person(s) whose name is subscribed to the foregoing instrument, and acknowledged to me that he/she/they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal this 23rd day of July 2004

(Seal)  Robin Aberasturi  
 Notary Public  
 My Commission Expires:

Residing in Homedale, Idaho  
 My Commission Expires 3/26/10

# EXHIBIT K

RECORDING REQUESTED BY:

WHEN RECORDED MAIL TO:

Jones ♦ Gledhill ♦ Hess ♦ Fuhrman  
& Eiden, P.A.  
225 N. 9<sup>th</sup> Street, Suite 820  
Boise, ID 83701

ATTN: Kimbell D. Gourley, Esq.

**Instrument # 253546**

MURPHY, OWYHEE, IDAHO

2005-09-28

12:58:43 No. of Pages: 2

Recorded for: JONES-GLEDHILL ET AL

CHARLOTTE SHERBURN

Ex-Officio Recorder Deputy *C. Sherburn* Fee: 6.00

Index to: ASSIGNMENT, DEED OF TRUST

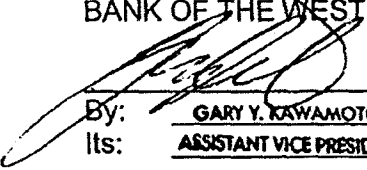
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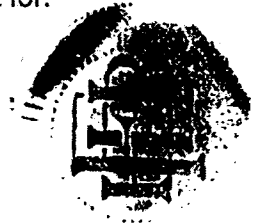
### ASSIGNMENT OF DEED OF TRUST

Bank of the West, a California corporation ("Bank of the West"), the beneficiary under that certain deed of trust executed by Karla Kay King Love, a single individual, as grantor/trustor, in favor of Bank of the West, as beneficiary, securing a promissory note in the original principal sum of \$86,500.00, recorded July 28, 2004, as instrument no. 248616, in the records of Owyhee County, Idaho (the "Deed of Trust"), does hereby assign and transfer unto Gordon G. King and Rose M. King, husband and wife, whose address is 191 24 King Lane, Murphy, Idaho 83650, all right, title, and interest in and to the Deed of Trust, without Bank of the West's warranties, express or implied, as to the priority of the Deed of Trust, but with Bank of the West's warranty that it is the legal and lawful owner and holder of the Deed of Trust and the promissory note and other loan documents associated therewith.

DATED this 12<sup>th</sup> day of September, 2005.

First Hawaiian Bank, Attorney in Fact for:  
BANK OF THE WEST

By:   
Its: GARY Y. KAWAMOTO  
ASSISTANT VICE PRESIDENT

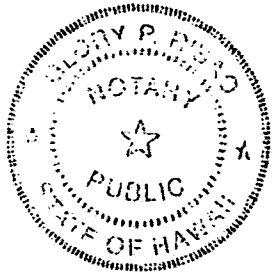


ASSIGNMENT OF DEED OF TRUST - 1

STATE OF HAWAII            )  
  : ss.  
City & County of Honolulu )

On the 12<sup>th</sup> day of September, 2005, before me, the undersigned notary public in and for said state, personally appeared GARY Y. KAWAMOTO, known or identified to me to be the ASSISTANT VICE PRESIDENT of First Hawaiian Bank, the company that executed the within instrument or the person who executed the same on behalf of said company, and acknowledged to me that said company executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first above written.



Gary P. Rhee  
Notary Public for Hawaii  
Residing at Honolulu, HI  
Commission expires: NOV 14 2005

RONALD P. RAINEY ISB #1022  
Attorney at Law  
P.O. Box 26  
110 North Ninth Street  
Caldwell, Idaho 83606-0026  
Phone (208)459-3659  
Facsimile Transmission No:459-9067

**FILED**  
A.M. 3:10 P.M.

APR - 7 2015

Angela Barkell, Clerk  
*Dolla Stoneman*  
Deputy Clerk

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K. Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
FUQUAY and HAILEY ROSE FUQUAY, )  
Plaintiffs, )

Case No. CV-2014-0278

vs. )

AFFIDAVIT IN SUPPORT OF MOTION  
FOR RECONSIDERATION UNDER RULE  
11(A)(2)(b) OF DECISION DENYING  
MOTION FOR SUMMARY JUDGMENT

SUSIE LOW; CAL LOW; HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )  
Defendants. )

GILBERT KING, as Trustee; and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )  
Counterclaimants, )

vs. )

AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION UNDER RULE 11(2)(b)  
ETC. -1

**ORIGINAL** 486

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY )  
 )  
Counterdefendants. )  
 )  
 )

STATE OF IDAHO )  
 ) ss:  
County of Owyhee )

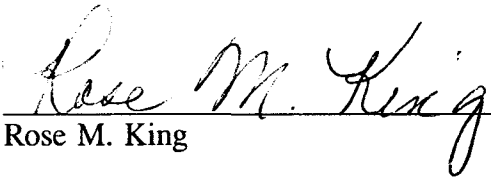
Rose M. King, being first duly sworn on oath, deposes and states as follows:

1. I am one of the defendants in the above-entitled matter, I am over the age of majority, and I make this Affidavit based upon facts within my own personal knowledge.
2. The area in which we live in Owyhee county is cattle country and my deceased husband, Gordon, and I always owned and used trucks in our ranching operation. Many of our neighbors also owned trucks and it would not have been out of character for the area for these trucks to have used King Lane although I did not see them.
3. It should be noted that the size of trucks used today are much larger than the trucks used in the 1970's and 1980's.
4. If other people drove large trucks on King Lane it would not have been out of character for where we live, and such use did not interfere with our use of the lane and the use did not damage the lane or bridges. Therefore we permitted other people to use the lane in an attempt to be neighborly.
5. It was not until J.C. Fuquay and Clint Fuquay got married and started their own trucking business on or about 2011 that the damage to the lane and bridges started occurring. There is still not interference with others use of King Lane and our ranching operation.&2

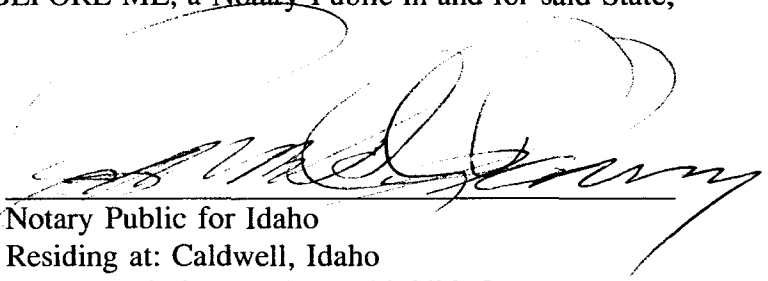
AFFIDAVIT IN SUPPORT OF MOTION FOR RECONSIDERATION UNDER RULE 11(2)(b)  
ETC. -2

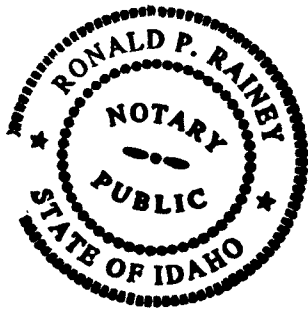


DATED This 7th day of April, 2015.

  
\_\_\_\_\_  
Rose M. King

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public in and for said State,  
this 7th day of April, 2015.

  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at: Caldwell, Idaho  
My Commission Expires: 12/18/2018



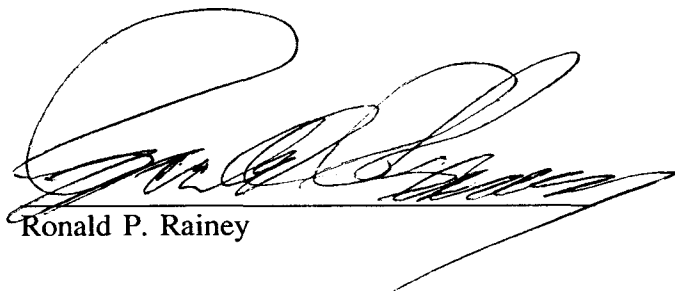
CERTIFICATE OF SERVICE

I, Ronald P. Rainey, hereby certify that on this 2 day of April, 2015, I caused a true and correct copy of the foregoing instrument to be delivered to the adverse party, via the method indicated below, addressed as follows:

U.S. Mail, Postage Prepaid     Facsimile Transmission     Hand Delivery

Matthew R. Cleverley  
Fidelity National Law Group  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
Facsimile: 877-655-5281  
Email: [Matthew.Cleverly@fnf.com](mailto:Matthew.Cleverly@fnf.com)

S. Bryce Farris  
P.O. Box 7985  
Boise, Idaho 83707  
Telephone: 629-7447  
Facsimile: 629-7559  
Email: [bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)



Ronald P. Rainey

**FILED**

A.M. 3:10 P.M.

APR - 7 2015

Angela Barkell, Clerk  
*Della Stoneham*  
Deputy Clerk

RONALD P. RAINEY – ISB # 1022  
Attorneys at Law  
110 North Ninth Avenue  
Post Office Box 26  
Caldwell, Idaho 83606-0026  
Telephone: (208) 459-3659  
Facsimile: (208) 459-9067 or 459-6147

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )  
 )  
Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING;) )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )  
 )  
Defendants. )

\_\_\_\_\_  
GILBERT KING, as Trustee, and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )  
 )  
Counterclaimants, )

CASE NO. CV 2014-0278

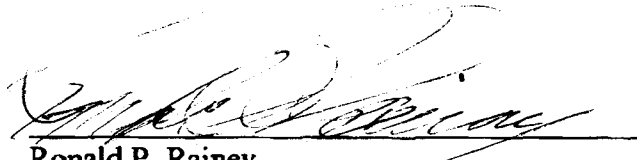
**KING DEFENDANTS' MOTION FOR  
RECONSIDERATION UNDER RULE  
11(a)(2)(B) OF DECISION DENYING  
MOTION FOR SUMMARY JUDGMENT**

**ORIGINAL**

vs. )  
 )  
 )  
 JOHN E. FUQUAY; CLINTON WARD )  
 FUQUAY and HAILEY ROSE FUQUAY )  
 )  
 Counterdefendants. )  
 \_\_\_\_\_ )

COMES NOW the Defendant, HEART K RANCH TRUST UTA., acting by its Trustee, GILBERT KING (Hereinafter, "King Defendants"), by and through its counsel of record, RONALD P. RAINEY, and submits this MOTION FOR RECONSIDERATION pursuant to I.R.C.P. 11(a)(2)(B) of the Court's March 25, 2015 Memorandum Decision Upon King Defendants' Motion for Summary Judgment. This motion is supported by the accompanying affidavits, and by a supporting memorandum to be filed with the Court within fourteen (14) days of the date of this motion as provided by I.R.C.P. 7(b)(3)(C).

Respectfully submitted this 7 day of April, 2015.

  
 Ronald P. Rainey  
 Attorney for the King Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 7 day of April, 2015, a true and correct copy of the foregoing document was served upon the following:

Matthew R. Cleverley  
Fidelity National Law GROUP  
1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
Facsimile: 877-655-5281  
Email: Matthew.Cleverly@fnf.com


- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Mail
- Facsimile Transmission
- Other \_\_\_\_\_

*Attorney for Plaintiffs*

S. Bryce Farris  
Sawtooth Law Offices, PLLC  
1101 W. River Street, Suite 110  
Boise, Idaho 83707  
Telephone: 208-629-7447  
Facsimile: 208-629-7559  
Email: bryce@sawtoothlaw.com

- U.S. Mail, postage prepaid
- Hand Delivered
- Overnight Mail
- Facsimile Transmission
- Other \_\_\_\_\_

*Attorney for Low Defendants*

  
Ronald P. Rainey

RONALD P. RAINEY – ISB # 1022  
Attorneys at Law  
110 North Ninth Avenue  
Post Office Box 26  
Caldwell, Idaho 83606-0026  
Telephone: (208) 459-3659  
Facsimile: (208) 459-9067 or 459-6147

**FILED**  
A.M. 3:55 P.M.

APR 20 2015

ANGELA BARKELL, CLERK  
Deputy Clerk

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )  
 )  
Plaintiffs, )  
 )  
vs. )  
 )  
SUSIE LOW; CAL LOW; GILBERT KING )  
as Trustee of the HEART K RANCH )  
TRUST UTA DECEMBER 28, 2012; )  
AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; THE ESTATE OF )  
GORDON G. KING; ROSE M. KING; )  
FIRST AMERICAN TITLE INSURANCE )  
COMPANY, )  
 )  
Defendants. )  
\_\_\_\_\_ )

CASE NO. CV 2014-0278  
**MEMORANDUM IN SUPPORT OF  
KING DEFENDANTS' MOTION FOR  
RECONSIDERATION UNDER RULE  
11(a)(2)(B) OF DECISION DENYING  
MOTION FOR SUMMARY JUDGMENT**

**MEMORANDUM IN SUPPORT OF KING DEFENDANTS'  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
OF DECISION DENYING MOTION FOR SUMMARY JUDGMENT – PAGE 1**

**ORIGINAL**

I.

**ISSUES RAISED ON MOTION FOR RECONSIDERATION**

The King Defendants were extremely “surprised,” not only by the Court’s decision on their motion for summary judgment, but by the Court’s complete failure to either directly address the single issue raised on that motion, or to address the specific arguments raised and presented by the Kings in support of their summary judgment motion on the single issue presented to the Court. This surprise was further fueled by what could only be the Court’s inadvertent mischaracterization of the Kings’ motion as apparently being a “concession” as to the other elements of the Fuquays’ case.

On summary judgment when a single element of a case is challenged, this only means that the moving party is only challenging the failure of proof on that single element of the case, which if successful, will necessarily render all other elements of the case “immaterial.” This does not mean that the moving party is conceding those remaining elements of the case. Somehow that characterization crept into this case, when at page 7 of its Memorandum Decision the Court declared:

There is nothing in the record to show how plaintiffs’ use began **but it is undisputed and the record establishes that the plaintiffs’ use of King Lane was (1) open and notorious; (2) continuous and uninterrupted; and (4) with the actual or imputed knowledge of the defendants.** Proof of these elements, without evidence as to how the use began, raises the presumption that such use was adverse and the burden is then on the defendants to show that such use was permissive.

Memorandum Decision at pg. 7 (emphasis added).

As simply as can be stated, the King Defendants were only arguing that if, under the controlling rule of Idaho law, the Fuquay Plaintiffs use of King Lane was at all times deemed to be permissive, then there can be no prescriptive easement, which is dependent upon “adverseness” in

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order to be established. If that single element can be shown not to exist – as a matter of law – then all other elements – and all other alleged genuine issues of material of fact – thereafter become immaterial, and the entire claim fails, for lack of the required proof as to that single element – adverseness.

Therefore, as just noted, the King Defendants' summary judgment motion was premised upon that standard which provides that proof of the absence of evidence that is necessary to establish an essential element of the claim that the nonmoving party will be required to prove at trial **renders all other potential issues of fact irrelevant**. *Bromley v. Garey*, 132 Idaho 807, 810-11, 979 P.2d 1165, 1168-69 (1999). In respect to the five elements that are required to prove a claim for a prescriptive easement, the King Defendants had placed at issue on their motion for summary judgment the fact that all use of King Lane by the Fuquay Plaintiffs during the claimed five year prescriptive use period had been deemed permissive – **as a matter of law** – under Idaho's long-recognized joint-use-in-common rule. Consequently, there never had been any adverse use of King Lane by the Fuquay Plaintiffs, whatsoever, during any claimed five year adverse use period – **as a matter of law** – therefore rendering all other potential issues of facts irrelevant. Instead, as the Court stated on page 7 of its opinion, the King Defendants were characterized to have conceded those elements.

In addition to this point, there were several other significant factual elements, which although they were in fact noted by the Court in its decision, their full weight and significance to this summary judgment motion apparently were not completely appreciated by the Court. These include the following:

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- (1) The Fuquay Plaintiffs' claimed prescriptive use of King Lane is only being asserted during the existence of Idaho's five year statutory prescriptive use period prior that existed prior to 2006, and only upon their use made after 1989, as specifically pled by the Fuquays in paragraph 17 of their original complaint and in paragraph 16 of their amended complaint.
- (2) The mere use of large commercial trucks in common on King Lane for normal ranching purposes – both by the King Defendants and by the Fuquays – does not create any notice of an adverse or prescriptive use by the Fuquays.
- (3) The Court failed to address in any fashion Idaho's long-standing "Joint-use-in-common-rule," and its associated and derivative rules, as establishing only a permissive use of a common roadway, such as King Lane.

Each of these specific points will be addressed in turn in the King Defendants' argument that is presented in support of their motion for reconsideration of the Court's denial of their motion for summary judgment.

## II.

### RESTATEMENT OF THE QUESTION PRESENTED ON MOTION FOR SUMMARY JUDGMENT

On their motion for summary judgment the King Defendants had presented a single narrow issue for the District Court's consideration under the standard that if the Fuquay Plaintiffs failed in the proof of a single element of their prescriptive easement claim, then that entire claim would necessarily fail. The King Defendants had argued that the Fuquay Plaintiffs' alleged prescriptive easement claim, as asserted in this action, must necessarily fail because,

any use [of King Lane] by the Fuquay plaintiffs or their predecessors, [prior to 2006] was use in common with the Kings and Lows that in no way interfered with their use of King Lane **and therefore under Idaho law was deemed permissive and could not be prescriptive.** This rebuts elements three and four (adverse use that is known to the servient landowner) making any prescriptive claim during this period impossible.

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Heart K Ranch Summary Judgment Memorandum at pg 8 (emphasis in original/bracketed references added). Heart K Ranch's summary judgment motion was premised upon the standard that the absence of evidence necessary to establish an element that the nonmoving party will be required to prove at trial renders any other potential issues of fact irrelevant. *Bromley v. Garey*, 132 Idaho 807, 810-11, 979 P.2d 1165, 1168-69 (1999).

The King Defendants argued that under the primary controlling principles of Idaho law when a neighbor (the Fuquays) is allowed to merely use a roadway (King Lane) in common with his neighbor (the Kings), without either damaging the roadway itself, and without interfering with the neighbor's use of the roadway, then that use of the roadway is deemed to be permissive, as a matter of law. This is sometimes known as the "joint-use-in-common rule," and the King Defendants had cited to, and provided an extensive quotations from, *Chen v. Conway*, 116 Idaho 901, 903, 781 P.2d 238, 240 (Ct.App.1989) and *Melendez v. Hintz*, 111 Idaho 401, 404, 724 P.2d 137, 140 (Ct.App. 1986). This particular rule of Idaho law was first stated by the Idaho Supreme Court almost 75 years ago in *Simmons v. Perkins*, 63 Idaho 136, 118 P.2d 740 (1941), and was reaffirmed by Idaho's high court as recently as, *Lattin v. Adams County*, 149 Idaho 497, 503, 236 P.3 1257, 1263 (2010) ("[W]here the owner of real property constructs a way over it for his use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission.' *Chen v. Conway*, 121 Idaho 1000, 1005, 829 P.2d 1349, 1354 (1992) (quoting *Simmons v. Perkins*, 63 Idaho 136, 144, 118 P.2d 740, 744 (1941)).").

The Court denied the King Defendants' motion for summary judgment without directly addressing, or even acknowledging, the single issue that the King Defendants had raised on their

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motion for summary judgment. Therefore, the King Defendants' request reconsideration, at least to obtain clarification in moving towards trial, as to the Court's position on this essential question.

### III.

#### STANDARD OF REVIEW ON MOTION FOR RECONSIDERATION UNDER RULE 11(A)(2)(B)

In *Boise Mode, LLC v. Donahoe Pace & Partners Ltd.*, 154 Idaho 99, 107, 294 P.3d 1111, 1119 (2013) the Court declared that, "This Court has repeatedly held that I.R.C.P. 11(a)(2)(B) provides a district court with authority to reconsider and vacate interlocutory orders so long as final judgment has not been entered." [citations omitted]. Denial of a motion for summary judgment is such an interlocutory order that can be reconsidered under Rule 11(a)(2)(B). See e.g., *Wandering Trails, LLC v. Big Bite Excavation, Inc.*, 156 Idaho 586, 589, 329 P.3d 368, 371 (2014).

When considering a motion for reconsideration under Rule 11(a)(2)(B) the Court may consider any new evidence that may be presented that bears upon the correctness of the interlocutory order that is being challenged. *International Real Estate Solutions, Inc. v. Arave*, 157 Idaho 816, 819, 340 P.3d 465, 468 (2014).

### IV.

#### ARGUMENT

A. **The Existence Of Commercial Trucking On King Lane, At Times Other Than When The Five Year Prescriptive Use Period Applied, Is Irrelevant To The Fuquay Plaintiffs' Claims**

As the Fuquay Plaintiffs have unequivocally acknowledged in both of the complaints that they have filed with this Court, their alleged prescriptive easement claims are only based during that

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time when Idaho had a five year prescriptive easement period prior to July 1, 2006. *See*, Ch. 158, § 1, pg. 474 of the 2006 Idaho Session Laws. In paragraph 18 of the original complaint and in paragraph 17 of the First Amended Complaint, the Fuquays alleged:

18. The use of King Lane for access by owners of the Clint Fuquay parcel and the John Fuquay Parcel has been open and continuous over the same route for more than 5 years, [footnote 1, noting changing in statutory period to 20 years omitted] and was without permission from adverse land owners.

Original complaint at pg. 5; First Amended Complaint pg. 5. (bracketed referenced added).

This particular fact is significant because virtually all of the alleged “commercial” truck traffic activity that the Fuquays have engaged in on King Lane has occurred after 2006 when the prescriptive use period increased to 20 years. The Fuquays have made no claims in this action under that 20 years prescriptive use period. Therefore, that particular “commercial” truck traffic, which is all the trucking activity that has been engaged in by both Clint and J.C. Fuquay on King Lane, is simply irrelevant to the five year prescriptive easement claims made in this action. Both Clint and J.C. Fuquay testified at the September 18, 2014 preliminary injunction hearing that all of the commercial trucking that they have personally engaged in on King Lane has occurred within the last eight years – 2015 minus eight equals 2007. The following is the extracted testimony of Clint and J.C. Fuquay from the preliminary injunction hearing:

Both Clint and J.C. Fuquay previously have testified that their alleged use of large trucks on King Lane for commercial trucking purposes, in alleged adverse use to the King Defendants, arose after the change in the statute to a twenty year prescriptive use period:<sup>1</sup>

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<sup>1</sup> The entire transcript of the September 18, 2014 preliminary injunction hearing has previously been submitted to the court, as attached to the affidavit of Bryce Farris.

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Q. So you've only been on this property for six years.

A. No. Eight. Since I was 19.

Q. Can you give me the years when you were gone, from when to when?

A. I would say from 2001 to 2005.

Q. Well, that's five years.

A. Four. I don't remember when in 2001. Moved back the summer of 2005.

Q. When you got your driver's license, you were gone. You didn't even live on that property.

A. I stayed there on the weekends.

Testimony of Clint Fuquay, son of John Fuquay and brother of J.C. Fuquay, September 18, 2014

Preliminary Injunction Hearing Transcript, pg. 65, LL. 5-24.

Q. Where do you reside?

A. 18902 Castle Lane.

Q. And where is that in proximity to Clint Fuquay's house?

A. It is probably a quarter of a mile east of my brother's house.

Q. Is that on property that Clint owns?

A. Yes.

Q. How long have you lived there?

A. I've lived there since Clint owned it since June. Prior to that, I've lived there almost eight years.

Q. And prior to that, where did you live?

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A. I was in college in Twin Falls.

Testimony of J.C. Fuquay, son of John Fuquay and brother of Clint Fuquay, September 18, 2014

Preliminary Injunction Hearing Transcript, pg. 73, LL. 6-18.

A. I've lived there for eight years and I've had no dispute up until recently about going that direction.

Q. So eight years ago would have been about - -

A. When I got married - - when I was married and moved - - officially moved into the house that I live in.

Q. You got married in 2007, didn't you?

A. Yes.

Q. So from 2007 till now, you're saying you use King Lane?

A. Yes.

Q. And then before that, you were gone with your brother and mother somewhere else?

A. Yeah. Well, I moved - - when I was 15, as I said earlier, I moved from my father's house to where my mother resides now. And then after that, after I graduated high school I moved to Grand View and then I went to - I lived and worked in Grand View and went to college in Twin Falls and then in 2007, I guess you'd say, is when I moved back.

Q. Okay. So this continuous use has only been since 2007.

A. My continuous use, yeah.

Testimony of J.C. Fuquay, son of John Fuquay and brother of Clint Fuquay, September 18, 2014

Preliminary Injunction Hearing Transcript, pg. 89, LL. 4-24.

A. We've always drove trucks up and down that lane.

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Q. I mean these cattle trucks.

A. Yeah.

Q. And that's just been in the last five years, hasn't it?

A. Yeah.

Q. So in the last five years, you and your brother have started driving cattle trucks up and down King Lane.

A. Yes.

Testimony of J.C. Fuquay, son of John Fuquay and brother of Clint Fuquay, September 18, 2014

Preliminary Injunction Hearing Transcript, pg. 91, L. 20 to pg. 92, L. 3.

Q. You've only been doing it for the last five years.

A. Yes.

Q. Your brother's only been doing it for less than five years.

A. Yes.

Q. So since '06 is when you - - at least '06 and past is when you started using the big trucks.

A. Yeah. Of my own, yeah.

Q. And you would agree that those big trucks are hard on the road and hard on the bridge?

A. They are extra weight than a typical vehicle, yes, but we also help to maintain the road.

Q. My question is are those big trucks hard on the bridge and hard on the road?

A. They're hard on everything, yes.

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Q. Okay. And that's an increase in use that you've been doing just in the last six years, five years?

A. I wasn't aware that the bridge was under question. I thought it was the lane.

Q. But you've just increased your use by driving the big trucks there?

A. Yeah, I did.

Q. Your brother did too?

A. That is how I make my living.

Q. And your brother also?

A. And that's how he makes his living.

Q. And you and your brother could go up and down Castle Creek - - Castle Lane with your big trucks?

A. We could.

Testimony of J.C. Fuquay, son of John Fuquay and brother of Clint Fuquay, September 18, 2014

Preliminary Injunction Hearing Transcript, pg. 92, L. 21, to pg. 93, L. 24.

Q. Now you and your brother are both driving trucks up and down this King's Lane.

A. Yes.

Q. Before, it was just your dad?

A. It was.

Q. Okay. So you've increased the use by at least two different drivers by two different trucks?

A. Yes. yes.

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Q. That's been in the last five years?

A. Yes.

Testimony of J.C. Fuquay, son of John Fuquay and brother of Clint Fuquay, September 18, 2014 Preliminary Injunction Hearing Transcript, pg. 101, L. 22 to pg. 102, L. 6.<sup>2</sup>

In sum, the only significant point that the Court seemed to make in its March 25, 2015 Memorandum Decision concerning the existence of genuine issues of material fact that would preclude entry of summary judgment, was the use of King Lane by large commercial cattle trucks. See, Memorandum Decision at pp. 7-8. Based upon the evidence presented, the use of such large trucks for "commercial" purposes falls outside of "any" claim made by the Fuquay Plaintiffs in this action, since that use has arisen after the prescriptive use period changed from five to twenty years, and the Fuquays' claim in this action is only being made within the five year prescriptive period that existed before 2006.

Another point that arises as to the time of use by the Fuquay Plaintiffs also goes to the claims made on the face of their complaint. As recently stated by the Idaho Supreme Court in, *Mickelsen Construction, Inc. v. Horrocks*, 154 Idaho 396, 299 P.3d 203(2013):

**“[T]he only issues considered on summary judgment are those raised by the pleadings.”** A cause of action not raised in the pleadings may not be raised on appeal, **even if the trial court considered the issue.** *Nelson v. Big Lost River Irrigation Dist.*, 148 Idaho 157, 160, 219 P.3d 804, 807 (2009) (quoting *Vanvooren v. Astin*, 141 Idaho 440, 444, 111 P.3d 125, 129 (2005)) (citation omitted); *Nava v. Rivas-Del Toro*, 151 Idaho 853, 860-61, 264 P.3d 960, 967-68 (2011); accord

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<sup>2</sup> If you go further back in time than 2007, then you will find that neither Clint (age 27, – Tr., pg. 64, L. 7), nor J.C. ( age 29, – Tr., pg. 55, LL. 20-21; Tr., pg. 89, L. 16) would have been then old enough to have held a commercial license to drive such commercial trucks at that earlier date, as within the five year period of their prescriptive easement claim (1989-2006).

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*O'Guin v. Bingham Cnty.*, 139 Idaho 9, 15, 72 P.3d 849, 855 (2003).

154 Idaho at 405, 299 P.3d at 212 (emphasis added). In both the Fuquay's original complaint, and also in the now pending, First Amended Complaint, they have only pled and placed at issue their use of King Lane since 1989:

17. The Plaintiffs have used King Lane to access the Clint Fuquay Parcel and the John Fuquay Parcel **since at least 1989**.

Original Complaint at pg. 5; *See also*, First Amended Complaint, ¶ 16 at pg. 5. (emphasis added).

As already noted above, as pled, the Fuquay Plaintiffs' claim to a prescriptive easement over King Lane requires proof of five years of continuous adverse use. As based upon the face of their own pleading this adverse use would have had to have commenced at some time between 1989 and mid-2001. Arguably, any adverse use that commenced after July 1, 2001 could not have ripened into a full prescriptive easement before the required five year adverse use period changed to twenty years on July 1, 2006. *See*, Ch. 158, § 1, pg. 474 of the 2006 Idaho Session Laws.

Again, the Court in going the other direction has simply stated that, "There is nothing in the record to show how plaintiffs' use began . . ." Memorandum Decision at pg. 7, but the Fuquay Plaintiffs themselves allege that the use began in 1989, and at least for summary judgment purposes under the *Mickelsen Construction* case that is the basis upon which the case is to be submitted to the Court for decision.

**B. The Normal Course Of Development Allows For The Use Of Large Commercial Trucks As A Regular Part Of Common Ranching Operations**

It seems that a key element of the Court's March 25, 2015 summary judgment decision was that the use of large commercial trucks on King Lane was one of the primary grounds upon which

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the Court determined that a genuine issue of material fact existed that precluded a grant of summary judgment to the King Defendants. The Court's conclusion is encapsulated in the following two paragraphs of its summary judgment Memorandum Decision.

The King defendants claim that beginning in 2011, the Fuquays use of King Lane became adverse use and interfered with their ownership rights when an increased amount of commercial and heavy truck traffic was causing excessive damage to the road surface. However, John Fuquay claims that his use of King Lane has always been the same, which has always included moving heavy trucks and equipment across King Lane.

According to the Declaration of John Fuquay filed on October 29, 2014, the plaintiffs have used King Lane to access the Fuquay Parcel and the Clinton Fuquay parcel since 1977. John Fuquay asserts that his father, James Fuquay, owned large semi-trucks and cattle trucks that the regularly drive across King Lane from the time they moved onto their property in January 1977. John Fuquay also states that as a teenager, he drove large trucks across King Lane while working for his father. (See Declaration of John Fuquay filed on October 29, 2014). Once he obtained his commercial truck license, John Fuquay stated that he started driving large trucks commercially. Currently, John Fuquay asserts that he operates under the business name John Fuquay Trucking Company and continues to drive commercial trucks across King Lane. In addition to the commercial semi-truck use, John Fuquay asserts that since 1977, the plaintiffs have used King Lane to access their parcels with the use of personal vehicles, regular farm vehicles, cattle trucks, pedestrian use, and use by the Fuquay's guests. (See Declaration of John Fuquay filed on October 29, 2014).

Memorandum Decision at pp. 7-8 (emphasis added).

The King Defendants continue to adhere to their original argument that it was not until 2011 that any use of King Lane by the Fuquay Plaintiffs became adverse to them, such to trigger any adverse or prescriptive claim. Nonetheless, there are certain intervening issues that have emerged from the Court's analysis on this summary judgment motion, as set out above, which deserve further consideration on this motion for reconsideration. First, is the alleged continuing and on-going use

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of King Lane by the Fuquays' large cattle trucks – prior to their increased damaging and interfering use that began in 2011. This use of large cattle trucks by the Fuquays does not in any fashion rebut the King Defendants' primary argument on summary judgment of the existence of an “in-common” and permissive use of King Lane between the Kings and Fuquays. The use of such large trucks is not at all uncommon in the general ranching community and in the cattle business, and therefore should be considered an “in common” use of King Lane in the same fashion as any other non-interfering use. *See. April 7, 2015 Affidavit of Rose King.*

While the applicable rule itself is stated in the context of an existing easement, which easement the King Defendants do not in this case concede, for purposes of addressing this issue, this discussion of Idaho easement law provides a useful benchmark. When an easement has been recognized, some change in use of that easement is permissible over time to accommodate normal development. *McFadden v. Sein*, 139 Idaho 921, 924, 88 P.3d 704, 743 (2004); and *Elder v. Northwest Timber Co.*, 101 Idaho 356, 613 P.2d 367 (1980). Uses made by servient and dominant owners may be adjusted consistent with normal development over their respective lands. *Boydston Beach Ass'n v. Allen*, 111 Idaho 370, 723 P.2d 914 (Ct.App.1986). The degree of change that will be allowed in use of an easement differs with the manner in which the easement was conveyed, language of conveyance, and use of servient estate before and after conveyance. *Abbott v. Nampa School Dist. No. 131*, 119 Idaho 544, 808 P.2d 1289 (1991). The question of whether a dominant tenants' increased use of an easement over a roadway amounts to an expansion of original easement or merely an increase in the degree of use is a question of law. *Gibbons v. Weisshaupt*, 98 Idaho 633, 570 P.2d 870 (1977) (Where prescriptive easement was established for access to single family

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residence and movement necessitated by cattle and farming operations, additional use of easement for commercial business and additional four residents amounted to an expansion of the original easement).

Therefore, under the Idaho's "joint-use-in-common" rule, the mere use of large cattle trucks has in fact become a normal part of normal ranching operations, such that their use on King Lane should be treated no differently for purposes of "in common use" than the other uses the Court observed concerning, "the use of personal vehicles, regular farm vehicles, cattle trucks, pedestrian use, and use by the Fuquay's guests." Consequently, the use of large cattle trucks by the Fuquays was just as much a non-interfering use "in common" with the Kings as was any other use of personal vehicles, farm vehicles, or other vehicle that was typical to a farming or ranching operation. The key element, was that there was no evidence of either "interference," or "damage" to the Kings.

C. **The Court Failed To Address The Primary Legal Question Raised By The King Defendants' Motion For Summary Judgment, The Application Of The "Joint-Use-In-Common Rule"**

Finally, as based upon two Idaho Court of Appeal's decisions – *Chen v. Conway*, 116 Idaho 901, 903, 781 P.2d 238, 240 (Ct.App.1989) and *Melendez v. Hintz*, 111 Idaho 401, 405, 724 P.2d 137, 141 (Ct.App.1986) – the King Defendants had presented to the District Court the "joint use-in-common rule" upon which they had based their argument that **there was simply no evidence of adverse use** upon which the Fuquay Plaintiffs' could proceed on their prescriptive easement claim to King Lane. The foundation of the "joint use-in-common rule" is an almost 75 year old decision of the Idaho Supreme Court in *Simmons v. Perkins*, 63 Idaho 136, 118 P.2d 740 (1941), in which the Court set out authority from a number of sister states in support of that rule, which decision since

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that time has been consistently followed in this jurisdiction, having been most recently cited and followed by the Idaho Supreme Court in, *Lattin v. Adams County*, 149 Idaho 497, 503, 236 P.3 1257, 1263 (2010). As originally stated by the Idaho Supreme Court in 1941, the “joint use-in-common rule” as stated in *Simmons v. Perkins*, 63 Idaho 136, 118 P.2d 740 (1941) was declared as follows:

The rule would seem to be that where the owner of real property constructs a way over it for his own use and convenience, the mere use thereof by others **which in no way interferes with his use will be presumed to be by way of license or permission.** *Harkness v. Woodmansee*, 7 Utah 227, 26 P. 291; *Howard v. Wright*, 38 Nev. 25, 143 P. 1184; *Bradford v. Fultz*, 167 Iowa 686, 149 N.W. 925; *Burk v. Diers*, 102 Neb. 721, 169 N.W. 263; *Long v. Mayberry*, 96 Tenn. 378, 36 S.W. 1040; *Parish v. Kaspere*, 109 Ind. 586, 10 N.E. 109; *Null v. Williamson*, 166 Ind. 537, 78 N.E. 76; *Gascho v. Lennert*, 176 Ind. 677, 97 N.E. 6; *Kilburn v. Adams*, 48 Mass. 33, 7 Met. 33, 39 Am. Dec. 754; 18 C. J., sec. 120, p. 105.

The use of a driveway **in common with the owner and the general public**, in the absence of some decisive act on the user’s part **indicating a separate and exclusive use on his part negatives any presumption of individual right therein in his favor.** *Clarke v. Clarke*, 133 Cal. 631, 66 P. 10; *Heenan v. Bevans*, 51 Cal.App. 277, 196 P. 802; *Bradford v. Fultz*, 167 Iowa 686, 149 N.W. 925; *Pirman v. Confer*, 273 N.Y. 357, 7 N.E.2d 262, 264.

An individual using land as a road **in common with the public cannot acquire a prescriptive right of way against the owner.** *Thornley Land & Livestock Co. v. Morgan Bros.*, 81 Utah 317, 17 P.2d 826; *Pirman v. Confer*, 273 N.Y. 357, 7 N.E.2d 262; 111 A. L. R., Extended Annotation, p. 221.

The rule is well established that no use can be considered adverse or ripen into a right by prescription **unless it constitutes some actual invasion or infringement of the rights of the owner.** *Thomas v. England*, 71 Cal. 456, 12 P. 491; *Monarch Real Estate Co. v. Frye*, 77 Ind.App. 119, 133 N.E. 156; 19 C. J. 887, sec. 52, Citations, Note 74.

63 Idaho at 144, 118 P.2d at 744 (emphasis added). *See also*, *Lattin v. Adams County*, 149 Idaho 497, 503, 236 P.3 1257, 1263 (2010); *Weitz v. Green*, 148 Idaho 851, 861, 230 P.3d 743, 753 (2010); *Beckstead v. Price*, 146 Idaho 57, 64, 190 P.3d 876, 883 (2008); *Marshall v. Blair*, 130 Idaho 684,

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691, 946 P.2d 984, 991 (Ct.App.1996); *Burns v. Alderman*, 122 Idaho 749, 754-55, 838 P.2d 878, 883-84 (Ct.App.1992); *Roberts v. Swim*, 117 Idaho 9, 13, 784 P.2d 339, 343 (Ct.App.1989); and *Melendez v. Hintz*, 111 Idaho 401, 404, 724 P.2d 137, 140 (Ct.App.1986).

In its March 25, 2015 Memorandum Decision the Court had several times noted that King Lane had also been used by, “the public,” which also under the *Simmons* decision creates a strong presumption against the establishment of a prescriptive easement. The rule that use by the “public” can never ripen into a prescriptive right is derived from the broader rule to the same effect concerning use of a “public road.” *French v. Sorensen*, 113 Idaho 950, 958, 751 P.2d 98, 106 (1988).

The requirement of such “independent decisive acts, serves to reemphasizes that “mere use,” in common with the owner, can never establish a prescriptive easement. *State v. Camp*, 134 Idaho 662, 666 n.4, 8 P.3d 657, 661 n.4 (Ct.App.2000); *Cardenas v. Kurpjuweit*, 114, Idaho 79, 83, 753 P.2d 290, 294 (Ct.App.1988). As pointed out on the summary judgment motion, the Idaho Supreme Court in one its most recent decisions, *H.F.L.P. v. City of Twin Falls*, 157 Idaho 672, 339 P.3d 557 (2014) had declared:

Moreover, if the presumption of permissiveness applied when the use began, the presumption continues until a hostile and adverse use is clearly manifested and “brought home” to the servient property owner. *Backman v. Lawrence*, 147 Idaho 390, 398, 210 P.3d 75, 83 (2009); *Gameson v. Remer*, 96 Idaho 789, 792, 537 P.2d 631, 634 (1975).

157 Idaho at 681, 339 P.3d at 566.

With all due respect to this Court, no acknowledgment of these arguments, much less any consideration of them, was provided in the Court’s March 25, 2015 Memorandum Decision. It was

**MEMORANDUM IN SUPPORT OF KING DEFENDANTS’  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
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the primary question that had been advanced by the King Defendants' in support of their argument that if the Fuquays were unable to prove that they had established an adverse claim, then all other elements of their alleged prescriptive easement claim were simply rendered immaterial – not as the Court somehow had characterized those elements, as having been conceded by the King Defendants.

While the King Defendants had presented the preliminary injunction testimony of J.C. Fuquay as being fairly representative of all the Fuquay Plaintiffs to the effect that they had in fact never interfered with the Kings' use of King Lane, all of the Fuquays did so-testified at that September 18, 2014 hearing, as set forth in the following excerpts from that testimony:

Q. And never have you tried to kick the Kings off the property, have you, off the road?

A. Not that I recall.

Q. Well, you never have, have you?

A. Not that I recall, no.

Q. So in other words, you've never interfered with the Kings using their own property, have you?

A. Other than the gates.

Q. Pardon me?

A. Other than the issue with the gates.

Q. Well, they put up gates. Particularly when they had cattle in there, they had gates in there. Isn't that right.

A. Yeah.

**MEMORANDUM IN SUPPORT OF KING DEFENDANTS'  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
OF DECISION DENYING MOTION FOR SUMMARY JUDGMENT – PAGE 19**



Q. Okay. Now, you can't tell Judge Nye whether it's easier to open the metal gate than to put the wire over the posts with the loop, can you?

A. I've not opened them metal gates. I haven't been through there since.

Testimony of John Fuquay, the father of Clint and J.C. Fuquay, September 18, 2014 Preliminary Injunction Hearing Transcript, pg. 37, LL. 2-20.

Q. Have you ever excluded the Kings from using that lane?

A. No.

Q. Have you ever told them to get off?

A. No.

Q. Have you ever told them that they couldn't use it if you're using it?

A. No.

Q. So in a[ny] way, have you interfered with the Kings?

A. No.

Q. Have you given them any hassle about when you use the lane?

A. No.

Q. Okay.

Testimony of Clint Fuquay, son of John Fuquay and brother of J.C. Fuquay, September 18, 2014 Preliminary Injunction Hearing Transcript, pg. 66, L. 20 to pg. 67, L. 8 (bracketed reference added).

Q. Do you know that this lane from the bottom of your house around the corner from your house to Oreana is Kings' private property?

A. No, I wasn't aware of that. It's always been an open lane since I've been around.

**MEMORANDUM IN SUPPORT OF KING DEFENDANTS'  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
OF DECISION DENYING MOTION FOR SUMMARY JUDGMENT – PAGE 20**

Q. You didn't know that Kings owned that property?

A. I knew that they owned the property on the north side of that lane.

Q. You didn't know that they owned the lane?

A. No. I did not. I always assumed it was an easement or private road -  
- or an access point to our property. It's never been disputed up until now.

Q. Well, have you ever interfered with the Kings' use of that land?

A. No, I have not.

Q. Have you ever told them to get out? It's your lane. You're going to  
use it?

A. No, sir, I have not.

Q. Have you ever done anything that interrupted their use? And they  
being Kings. Have you ever done anything to interrupt the Kings' use of that lane?

A. No, sir, I have not.

Q. Do you know if anyone in your family has ever interrupted the Kings  
use of that lane?

A. Not to my recollection, no.

Q. And so bottom line is nobody from your family, as far as you know,  
have ever hindered or interfered with the Kings' use of that lane we're - - in the  
pleadings, it's called King's Lane. Do I need to rephrase that again?

A. Yeah, go ahead. Yeah.

Q. Can you recall anybody in your family, you, your brother, father, that's  
interfered with Kings' use of that lane called Kings Lane?

A. Between my house and their houses?

Q. Yes.

**MEMORANDUM IN SUPPORT OF KING DEFENDANTS'  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
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A. No.

Testimony J.C. Fuquay, Son of John Fuquay and brother of Clint Fuquay, September 18, 2014 Preliminary Injunction Tr., pg. 86, L., 4 to pg. 87, L. 14.

In sum, the Fuquays all testified that they had not interfered with the Kings' use of King Lane. Clint and J.C. Fuquays' use of large cattle trucks for "commercial" uses did not arise until after 2006, which is beyond the time at which the claims are being made in this lawsuit. The remaining uses of large cattle trucks on King Lane, within the five-year prescriptive-use period has been non-interfering and non-injurious, and therefore in common with the Kings – **as a matter of law.**

Under the *Simmons v. Perkins* standard, and the decisions in *Chen w. Conway* and *Melendez v. Hintz*, within that *Simmons* standard, which were cited and relied upon in the Kings' summary judgment memorandum, **the Fuquays' use of King Lane has been at all times permissive as a matter of law.**

Prescriptive easements are disfavored under Idaho law. *Lorang v. Hunt*, 107 Idaho 802, 803, 693 P.2d 448, 449 (1984). Trials are expensive. This case is set for trial beginning June 15, 2015. Both the facts and the law upon which this case will be tried appear to be fairly well settled at this time. The King Defendants respectively request that the Court reconsider its summary judgment decision and directly and specifically address the factual issues and legal questions raised concerning the application of the rule in *Simmons v. Perkins* to this case.

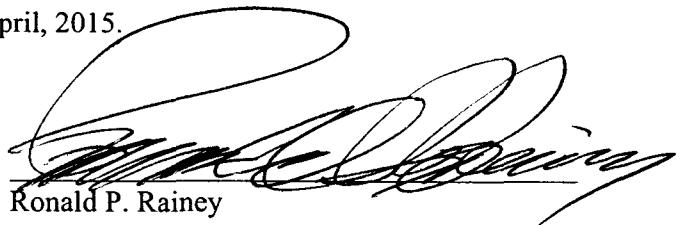
**MEMORANDUM IN SUPPORT OF KING DEFENDANTS'  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
OF DECISION DENYING MOTION FOR SUMMARY JUDGMENT – PAGE 22**

V.

**CONCLUSION**

For all the reasons set out above, the King Defendants respectfully request that their motion for reconsideration be granted.

Respectfully submitted this 20 day of April, 2015.



Ronald P. Rainey  
Attorney for the King Defendants

**MEMORANDUM IN SUPPORT OF KING DEFENDANTS'  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
OF DECISION DENYING MOTION FOR SUMMARY JUDGMENT – PAGE 23**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 20 day of April, 2015, a true and correct copy of the foregoing document was served upon the following:

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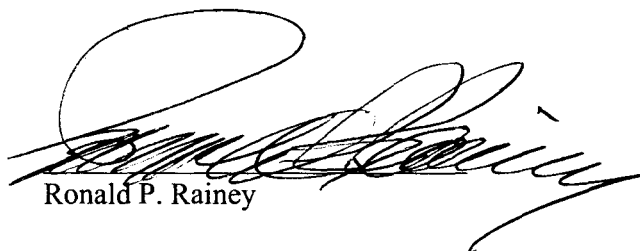
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**MEMORANDUM IN SUPPORT OF KING DEFENDANTS'  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
OF DECISION DENYING MOTION FOR SUMMARY JUDGMENT – PAGE 24**

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**FILED**

A.M. 4:45 P.M.

APR 28 2015

Angela Barkell Clerk  
*Dora Stone*  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Case No. CV-14-0278

Plaintiffs,

PLAINTIFFS' RESPONSE TO KING'S  
MOTION FOR RECONSIDERATION

v.

SUSIE LOW; CAL LOW; GILBERT KING  
as Trustee of the HEART K RANCH TRUST  
UTA DECEMBER 28, 2012; AVCO  
FINANCIAL SERVICES OF IDAHO  
FALLS, INC.; THE ESTATE OF GORDON  
G. KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY,

Defendants.

**SUMMARY**

The Kings request for the Court to reconsider its denial of the King's Motion for Summary Judgment should be denied. The court's ruling shouldn't have come as a "surprise" to anyone. The Court cannot grant summary judgment to any party in this case because there are disputed issues of material fact.

In its March 25, 2015 ruling, the trial court pointed out that “the material question of fact that remains to be decided is when adverse use began, (whether it was in 2011 as alleged by the Kings or in 1977 as alleged by John Fuquay.)” Very simply, Plaintiffs’ arguments for reconsideration are irrelevant because the Court has already determined that there are disputed issues of fact. Whether the Court considered all of the Kings nuanced legal arguments really doesn’t matter because the disputed issues of fact preclude summary judgment.

### **LEGAL STANDARD**

Idaho Rule of Civil Procedure 11(a)(2)(B) permits parties to move the court to reconsider an interlocutory order until fourteen days after a final judgment has been entered. The court must consider new evidence bearing on the correctness of a summary judgment order if the motion to reconsider is filed within fourteen days after a final judgment issues. Kepler-Fleenor v. Fremont Cnty., 152 Idaho 207, 210, 268 P.3d 1159, 1162 (2012).

The district court has no discretion on whether to entertain a motion for reconsideration pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B). On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. Fagnella v. Petrovich, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). The decision to grant or deny a request for reconsideration generally rests in the sound discretion of the trial court. Johnson v. Lambros, 143 Idaho 468, 473, 147 P.3d 100, 105 (Ct. App. 2006).

When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being

reconsidered. In other words, if the original order was a matter within the trial court's discretion, then so is the decision to grant or deny the motion for reconsideration. If the original order was governed by a different standard, then that standard applies to the motion for reconsideration. On the other hand, when reviewing the grant or denial of a motion for reconsideration following the grant of summary judgment, the Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment. Fragnella v. Petrovich, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012).

### ARGUMENT

#### A. There are Disputed Issues of Fact that Preclude Summary Judgment

The Kings ask the court to reverse itself but offer no basis for the court to suddenly find that the material facts are undisputed. On that point alone, the court cannot grant Kings' motion.

The Kings complain that the Court ignored their "sole argument" in their motion -- that Fuquay's use falls under the "use in common" rule, and was therefore permissive. The Kings actually make two arguments which can be succinctly distilled as: 1) The Fuquay's use of King Lane was permissive and was not adverse until 2011; and 2) the use was not adverse because it was "in common."

Kings attempt to prove this by using the testimony of JC Fuquay and Clint Fuquay because *they* didn't have trucks until 2011. However, Kings totally ignore John Fuquay's testimony that he and his father used trucks over the roadway starting in 1977.



The Kings continue to ignore the disputed issues of fact. As the court noted, “the King defendants claim that beginning in 2011, the Fuquays use of King Lane became adverse.... According to the Declaration of John Fuquay filed on October 29, 2014, the plaintiffs have used King Lane to access the Fuquay Parcel and the Clinton Fuquay Parcel since 1977.” The Kings are asking the Court to simply ignore the disputed issues of fact and accept their conclusory “use in common” argument. As the court has recognized, adverse use, and when it began, is at the heart of the dispute. There is no reason to reconsider Kings’ arguments because the *facts* are disputed. The court must decide based on the evidence at trial, not at summary judgment.

**B. “Adverse and Under a Claim of Right” does not mean confrontational**

The Kings also argue that because the Fuquays never interfered or tried to kick the Kings off the roadway that their use wasn’t adverse enough. The Kings seem to argue that some sort of physical confrontation is required to show adversity. That isn’t the case. “Under a claim of right” means that the claimant has used the property without recognition of the rights of the servient landowner. Drew v. Sorensen, 133 Idaho 534, 541, 989 P.2d 276, 283 (1999). It would be ludicrous to think that the Fuquays – or any other easement claimant -- would have to engage in a physical confrontation or prevent the servient landowner from using the roadway. The Kings’ argument that confrontation is required would not make good public policy.


**C. The Kings Misrepresent Fuquay's Pleadings and the Testimony**

The Kings also argue that the Fuquays cannot prove any use of the roadway prior to 1989 because "they have only pled and placed at issue their use of King Lane since 1989." (King's Memorandum at 13). The Kings misrepresent the Complaint. The Complaint alleges that John Fuquay acquired the property in 1989 from his father and that the use was adverse "*since at least 1989.*" John Fuquay's declaration states that adverse use commenced in 1977. Kings representations and arguments that the Plaintiffs allegations are limited to 1989 forward are simply untenable and without merit.

**CONCLUSION**

The court correctly recognized that there are disputed issues of fact. King's Motion for Reconsideration should be denied.

Dated: April 28, 2015

  
\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

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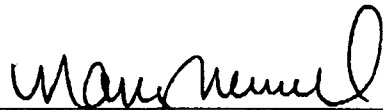
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Dated: April 28, 2015

  
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**FILED**  
10:40 A.M. P.M.

MAY 11 2015

Angela Barkell, Clerk  
*Angela Barkell*  
Deputy Clerk

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )  
Plaintiffs, )

CASE NO. CV 2014-0278

vs. )

**REPLY MEMORANDUM IN SUPPORT  
OF KING DEFENDANTS' MOTION FOR  
RECONSIDERATION UNDER RULE  
11(a)(2)(B) OF DECISION DENYING  
MOTION FOR SUMMARY JUDGMENT**

SUSIE LOW; CAL LOW; GILBERT KING )  
as Trustee of the HEART K RANCH )  
TRUST UTA DECEMBER 28, 2012; )  
AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; THE ESTATE OF )  
GORDON G. KING; ROSE M. KING; )  
FIRST AMERICAN TITLE INSURANCE )  
COMPANY, )  
Defendants. )

**REPLY MEMORANDUM IN SUPPORT OF KING DEFENDANTS'  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
OF DECISION DENYING MOTION FOR SUMMARY JUDGMENT – PAGE 1**

## I.

**REPLY ARGUMENT**

This Court concluded its Memorandum decision on the King Defendants' Motion for Summary Judgment with the following sentence:

The material question of fact that remains to be decided is when adverse use began, (whether it was in 2011 as alleged by the Kings or in 1977 as alleged by John Fuquay).[?]

Memorandum Decision at pg. 8. The essential question that the King Defendants have raised on this Motion for Reconsideration is:

Whether there is any evidence before this Court of "any" **adverse use** of King Lane by the Fuquay Plaintiffs that arose before 2011 under the applicable legal standards for determining such "adverse use," as established by *Simmons v. Perkins*, and its progeny?

In response to the King Defendants' arguments made in support of its Motion for Reconsideration the Fuquay Plaintiffs have argued: (1) That the Kings have ignored other essential genuine issues of material fact in the case upon which summary judgment should be denied; (2) That the Kings have raised and asserted an incorrect standard of "adverseness" in respect to the Fuquay Plaintiffs' prescriptive easement claim, and (3) That the Kings have mis-read the extent of claims presented by the Fuquays on the face of their complaint. The King Defendants will respond to each of these arguments in this Reply Brief on its Motion for Reconsideration of the Court's denial of its Motion for Summary Judgment.

**REPLY MEMORANDUM IN SUPPORT OF KING DEFENDANTS'  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
OF DECISION DENYING MOTION FOR SUMMARY JUDGMENT – PAGE 2**

**A. The Standard Of “Interference” Or “Injury” Necessary To Establish The Existence Of The Required “Adverseness” Of An Alleged Prescriptive Easement On Summary Judgment Is Well Established Under Idaho Law**

The King Defendants have argued on their Motion for Reconsideration that this Court erred in failing to fully and completely consider the single issue that was raised by the Kings on their Motion for Summary Judgment, which is that the Fuquay Plaintiffs have failed to establish the required “adverseness” of their alleged prescriptive easement claim within any five year period necessary to claim a prescriptive easement in King Lane. The essence of the Kings’ argument, is that in the absence of the required “adverseness,” all other elements of the Fuquays’ alleged prescriptive easement claim are therefore rendered irrelevant, and as a consequence, cease to be genuine material facts in the case. *See e.g., O’Guin v. Bingham County*, 139 Idaho 9, 13, 72 P.3d 849, 853 (2003) (“A material fact is one upon which the outcome of the case may be different. *Rife v. Long*, 127 Idaho 841, 849, 908 P.2d 143, 151 (1995)”).

In support of their motion for summary judgment, the King Defendants primarily relied upon the testimonial evidence of the Fuquay Plaintiffs themselves, which testimony established that the Fuquays had neither: (a) interfered with the Kings’ own use of King Lane, nor, (b) that by their use of King Lane had the Fuquays injured that roadway, at any time within any claimed five year prescriptive use period, thus eliminating any basis upon which the Fuquays could allege their prescriptive easement claim to King Lane.

In response to this argument, the Fuquay Plaintiffs have essentially ignored the Kings’ argument that all of their alleged use of King Lane prior to 2011 was permissive – as a matter of law – under Idaho’s long-recognized joint-use-in-common rule. The Fuquays have instead responded

**REPLY MEMORANDUM IN SUPPORT OF KING DEFENDANTS’  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
OF DECISION DENYING MOTION FOR SUMMARY JUDGMENT – PAGE 3**

that, “The Kings seem to argue that some sort of physical confrontation is required to show adversity.” *See*, Fuquays’ Reconsideration Response, at pg. 4. The Kings have never made any such argument that any “physical confrontation” is required to establish the required adverseness to establish a prescriptive easement. The Kings have consistently, and repeatedly, relied upon the long-established rules, as laid down by the Idaho Supreme Court. In this instance, the applicable standard was most recently summarized by the Court in, *Hodgins v. Sales*, 139 Idaho 225, 76 P.3d 969 (2003):

Proof of independent, decisive acts, such as maintenance of the way, tearing down barriers, and other indications of separate and exclusive use is sufficient to rebut a presumption of permissive use. *Marshall v. Blair*, 130 Idaho at 680-681, 946 P.2d at 980-981; *Simmons v. Perkins*, 63 Idaho 136, 140, 118 P.2d 740, 744 (1941).

139 Idaho at 232, 76 P.3d at 976. This requirement of the existence of evidence consisting of independent decisive acts, such as the maintenance of the road, or tearing down of barriers, or other indications of separate and exclusive use, of such an extent sufficient to rebut the presumption of permissive use is required to emphasize the corollary rule that “mere use” can never establish a prescriptive easement to the use of a roadway in common with a neighbor. *State v. Camp*, 134 Idaho 662, 666 n.4, 8 P.3d 657, 661 n.4 (Ct.App.2000); *Cardenas v. Kurpjuweit*, 114, Idaho 79, 83, 753 P.2d 290, 294 (Ct.App.1988).

In the King Defendants original memorandum that was submitted in support of their motion for summary judgment the Kings had cited a recent decision from the Idaho Supreme Court, *H.F.L.P., LLC v. The City of Twin Falls*, 157 Idaho 672, 339 P.3d 557 (2014), in which the Court had declared that a change from permissive use to adverse use must be of such an extent that the change in use is, “brought home,” to the servient landowner (the Kings) before that permissive use

**REPLY MEMORANDUM IN SUPPORT OF KING DEFENDANTS’  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
OF DECISION DENYING MOTION FOR SUMMARY JUDGMENT – PAGE 4**

can be held to have changed to an adverse use:

Moreover, if the presumption of permissiveness applied when the use began, the presumption continues until a hostile and adverse use is clearly manifested and “brought home” to the servient property owner. *Backman v. Lawrence*, 147 Idaho 390, 398, 210 P.3d 75, 83 (2009); *Gameson v. Remer*, 96 Idaho 789, 792, 537 P.2d 631, 634 (1975).

157 Idaho at 681, 339 P.3d at 566.

Throughout the course of this action the Fuquay Plaintiffs have alleged nothing more than their mere use of King Lane. They have utterly failed to allege any “adverse” use of King Lane, which was at the heart of the claim raised on the King Defendants’ motion for summary judgment. It has been the very absence any “interfering use,” or any “damaging use,” at any time during a claimed five year claimed period of adverse use which would serve the purpose of the required adverse use. That required, “adverse use,” is simply absent from the Fuquay Plaintiffs’ prescriptive easement claim in this action. The only evidence of any maintenance by the Fuquay’s in this action was conduct that occurred after the prescriptive period changed to twenty years in 2012 and 2013 and therefore would not be relevant to five year claim that has made by the Fuquays in this action. See, Preliminary Testimony of Clint Fuquay at pg. 67, L. 21 to pg. 68, L. 1; pg. 69, LL. 4-21; and pg. 70, LL. 11-15.

In conjunction with the fact that the Fuquays have offered no evidence whatsoever of any “independent or decisive acts that demonstrate their “adverse” claims to King Lane at any time during their use of that roadway within their alleged five year prescriptive use claims, they also allege that, “Kings totally ignore John Fuquay’s testimony that he and his father used trucks over the roadway starting in 1977.” See, Fuquay Response to Motion to Reconsideration at pg. 3. The King

**REPLY MEMORANDUM IN SUPPORT OF KING DEFENDANTS’  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
OF DECISION DENYING MOTION FOR SUMMARY JUDGMENT – PAGE 5**



Defendants have not ignored this evidence. Instead, it is merely the fact that all of this evidence, when considered by the Court, does not meet the required threshold standard of either: (1) having interfered with the Kings' own use of King Lane, or (2) in any way having injured King Lane, at any time prior to 2011, as that rule of adverse use was first announced in *Simmons v. Perkins*, 63 Idaho 136, 118 P.2d 740 (1941), and was most recently applied in *Lattin v. Adams County*, 149 Idaho 497, 503, 236 P.3 1257, 1263 (2010). **There is simply is no evidence of required adverse use by the Fuquay Plaintiffs in this action.**

As apparently emphasized by this Court at pp. 7-8 of its summary judgment decision, it was the use of "commercial trucks, **both for the Fuquay Plaintiffs' own use, and for other use in commercial trucking**, that apparently swayed this Court to deny the King Defendants' motion for summary judgment. But as demonstrated by the affidavit submitted in support of the King Defendants' Motion for Reconsideration, the mere use of commercial trucks, standing alone, does not create an adverse use of King Lane by the Fuquay Plaintiffs, since the Kings themselves use such commercial size trucks in their own use of that roadway, and the commercial trucking use for others by the Fuquays did not begin until the prescriptive use period changed to twenty years in 2006, and is therefore outside the scope of the prescriptive easement claims that have been made by the Fuquay Plaintiffs in this action.

Consequently, none of the "permissive use" of King Lane by the Fuquays, under the joint-use-in-common rule established by *Simmons v. Perkins*, has ever been rebutted by any evidence presented by the Fuquay Plaintiffs, much less for any continuous five-year period of claimed prescriptive use. There simply has been no adverse use of King Lane by the Fuquay Plaintiffs as is

**REPLY MEMORANDUM IN SUPPORT OF KING DEFENDANTS'  
MOTION FOR RECONSIDERATION UNDER RULE 11(a)(2)(B)  
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required to establish such a prescriptive easement.

In sum, in the absence of any alleged "adverse use," of King Lane by the Fuquay Plaintiffs, they simply have no colorable claim to a prescriptive easement at any time prior to 2006 when the statute changed to 20 years. As such, summary judgment for the King Defendants is appropriate on that basis.

**B. The King Defendants Have Not Misrepresented The Fuquay Plaintiffs Pleading Under The Standards Applicable To Summary Judgment Motions**

The United States Supreme Court's precedent in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), as that standard has been adopted and followed in Idaho, is often cited by Idaho Courts in support of summary judgment procedure. (The United State Supreme Court noting that summary judgment upon a proper showing of the lack of a genuine, triable issue of material fact, is not a disfavored procedural shortcut, but rather is an integral part of the civil rules as a whole, which rules are designed "to secure the just, speedy and inexpensive determination of every action."): 477 U.S. at 327 106 S.Ct. at 2555.

In *Dunnick v. Elder*, 126 Idaho 308, 882 P.2d 475 (Ct.App. 1994), the Idaho Court of Appeals cited the summary judgment rule that has been cited, invoked, and relied upon by the King Defendants in this case::

The United States Supreme Court, in interpreting Federal Rule of Civil Procedure 56(c), which is identical in all relevant aspects to I.R.C.P. 56(c), stated:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party **who fails to make a showing sufficient to establish the existence of an element essential to that party's case**, and on which that party will bear the burden of proof at trial. In such a situation, there can be

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“no genuine issue as to any material fact,” since **a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.** The moving party is “entitled to a judgment as a matter of law” because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. “[The] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). . . .”

*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986) (citations omitted).

The language and reasoning of *Celotex* has been adopted by the appellate courts of Idaho. See, e.g., *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991); *Barab v. Plumleigh*, 123 Idaho 890, 892, 853 P.2d 635, 637 (Ct.App.1993); *Podolan v. Idaho Legal Aid Services, Inc.*, 123 Idaho 937, 941, 854 P.2d 280, 284 (Ct.App.1993); *Ryan v. Beisner*, 123 Idaho 42, 44-45; 844 P.2d 24, 26-27 (Ct.App.1992).

126 Idaho at 311-12, 882 P.2d 478-79 (emphasis added). This conclusion of the Idaho Court of Appeals, as to the adoption of *Celotex* by the Idaho Courts, was affirmed by the Idaho Supreme Court in *Chandler v. Hayden*, 147 Idaho 765, 770 n. 2, 215 P.3d 485, 490 n. 2 (2009) (“Our court of appeals has correctly recognized that “[t]he language and reasoning of *Celotex* has been adopted by the appellate courts of Idaho.” *Dunnick v. Elder*, 126 Idaho 308, 312, 882 P.2d 475, 479 (Ct.App.1994) (citing, *inter alia*, *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 808 P.2d 851 (1991)).”)

*Celotex* was included within the cited authority that was relied upon in the King Defendants’ opening brief on this motion for summary judgment. The King Defendants’ have also raised and cited to this Court the principle that the only issues that are before the Court on a motion for summary judgment are those that are presented on the face of the pleadings that are before the court

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in the case. *Mickelsen Construction, Inc. v. Horrocks*, 154 Idaho 396, 405, 299 P.3d 203, 2012 (2013). This point is raised again here because the Fuquay Plaintiffs have made the argument in opposition to the King Defendants Motion for Reconsideration that the Kings have misinterpreted the Fuquays complaint, as unfairly limiting their claims on summary judgment concerning both the Fuquays' use of King Lane after 1989 and prior to 2006 under the former five year prescriptive use statute. These are simply the facts that have been pled on the face of the Fuquay Plaintiffs' own complaint in this action for an alleged prescriptive easement in King Lane.

Although Idaho is clearly a "notice pleading" state, the Idaho Supreme Court has recently stated that within this notice pleading standard that, "The key issue in determining the validity of a complaint is **whether the adverse party is put on notice of the claims brought against it.**" *Brown v. Greenheart*, 157 Idaho 156, 164, 335 P.3d 1, 9 (2014) (emphasis added). Critical to the five elements necessary to prove a prescriptive easement is the actual prescriptive period that applies to that claimed easement. The Fuquay Plaintiffs have made it quite clear in footnote 1 to their complaint in this action that they intend to proceed under the former statute that provided for a five year prescriptive period.<sup>1</sup> The *Machado* case, as cited in that footnote to their complaint, indicates this is permissible. ("We held that 'the twenty year time period does not apply to an easement by prescription acquired prior to the amendment.'").

In contrast to the *Machado* rule, as applied only to the facts of this case, a civil action is generally controlled by the law that is in force at the time the complaint is filed. *See e.g., Woodland*

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<sup>1</sup> The text of that footnote to the Fuquays' complaint declares that: "I.C. 5-203 was amended from 5 years to 20 years in 2006, but the 5 year time frame still applies to prescriptive claims before 2006. *Machado v. Ryan*, 153 Id 212, 222."

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*Furniture, LLC v. Larsen*, 142 Idaho 140, 146, 124 P.3d 1016, 1022 (2005) (“We agree with Woodland that the version of I.C. § 48-104 in effect when Woodland filed its complaint in March 2000 governs this suit.”), citing to, *Unity Light & Power Co. v. City of Burley*, 92 Idaho 499, 503-04, 445 P.2d 720, 724-25 (1968) (A lawsuit is governed by the statutes in effect at the time the complaint is filed). Under I.C. § 73-101 statutes are not to be applied retroactively, “unless expressly so declared.” *But see, Guzman v. Piercy*, 155 Idaho 928, 938, 318 P.3d 918, 928 (2014) (The Legislature’s intent to apply a statute retroactively is sufficient if that intention to make that law retroactive is clear and if the language clearly refers to the past as well as to the future, then the intent to make the law retroactive is expressly declared.).

When I.C. § 5-203 was amended from five to twenty years effective July 1, 2006, *see*, Ch. 158, § 1, pg. 474 of the 2006 Idaho Session Laws, that new twenty year prescriptive period was to operate prospectively only, such that no new claim to adverse rights under that amended statute could ripen into an actual prescriptive right – at the soonest – until July 1, 2026.

The Fuquays’ have pointed out in response to the King Defendants’ Motion for Reconsideration that on the face of their complaint that they state their alleged use has been adverse “since at least 1989,” which allows them to also provide proof of use prior to 1989. As noted above, the questions that are placed at issue on a motion for summary judgment are those that are stated on the face of the complaint, as supported by the *Mickelsen Construction* decision. In addition, the Idaho Supreme Court has also declared that the standards of Rule 15(b) do not apply to motions for summary judgment in *Estes v. Barry*, 132 Idaho 82, 967 P.2d 284 (1998):

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Rule 15(b) applies only to unpled theories that are litigated through the submission of evidence at a trial of the cause on the merits, and not to factual issues raised in a motion for summary judgment.

132 Idaho at 86, 967 P.2d at 288. *See also, O'Guin v. Bingham County*, 139 Idaho 9, 15, 72 P.3d 849, 855 (2003). Consequently, on summary judgment the rules seems fairly well established that it is only what is stated on the face of the complaint that is placed at issue, and not what might be established at a subsequent trial by consent of the parties. This is a risk that a party must bear, that chooses to plead its claims differently than what it might subsequently attempt to prove at trial, if it is successful in reaching trial.

A number of the specific evidentiary questions raised by the Fuquays' response are more appropriately addressed in response to the Kings' motion in limine and therefore have been reserved for the Reply to the King Defendants' motion in limine. Nonetheless, at some point, the Fuquay Plaintiffs must confine their alleged prescriptive easement claim to a specific declared discrete five year period, even if that five year period is tacked with a predecessor's alleged adverse use. But, as consistent with the purposes of summary judgment, as stated above, the Fuquay Plaintiff's should not be allowed to avoid summary judgment by merely speculating as to the existence of their alleged prescriptive easement claim, hoping that the required evidence will eventually appear at trial. Although that evidence at this point would be highly contradictory to the evidence that has already been presented in court under oath by the Fuquays themselves. As the Idaho Court of Appeals in *Heather v. Honkers' Mini-Mart, Inc.*, 134 Idaho 711, 8 P.3d 1254 (Ct.App.2000) summarized:

Idaho Rule of Civil Procedure 56(e) governs the defense of a motion for summary judgment, and states, in relevant part:

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When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of that party's pleadings, but the party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

(Emphasis added.).

Idaho Rule of Civil Procedure 56(e) is identical to its federal counterpart and, thus, we find federal law instructive to this Court's analysis of the issue at hand. It is not the intent of F.R.C.P. 56 "to preserve purely speculative issues of fact for trial." *Exxon Corp. v. Federal Trade Comm'n*, 663 F.2d 120, 128 (D.C.Cir.1980). [8 P.3d 1257] **A party opposing summary judgment cannot demand a trial simply because of the "speculative possibility that a material issue of fact may appear at that time."** 10B CHARLES A. WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, WRIGHT MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2739 at 388-89 (3d ed.1998). See *Childers v. High Society Magazine, Inc.*, 557 F.Supp. 978, 984 (S.D.N.Y. 1983) (an unsupported statement that "it might not be so" was insufficient to raise a genuine issue of material fact to defeat a motion for summary judgment).

134 Idaho at 713-14, 8 P.3d at 1256-57 (emphasis added).

In sum, there simply appears to be **no evidence within any specific five year period** – as claimed by the Fuquay Plaintiffs – that supports their claim of an adverse prescriptive easement to King Lane. It was the Fuquay Plaintiffs' burden in response to the King Defendants' motion for summary judgment, not just to allege the existence of genuine issues of material fact, of disputed genuine issues of material fact on the motion for summary judgment – whether the Fuquays use of King Lane had ever interfered with of Kings's use of King Lane or injured King Lane during the period of alleged adverse five period of alleged prescriptive use claimed under the Fuquays' complaint? This alleged use necessarily had to occur at some time prior to 2006, and as pled on the face of that complaint ~ sometime after 1989. That evidence – other than mere permissive use in

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common with the Kings – in fact has not been presented to this Court. The Fuquays do nothing more than merely speculate that a genuine issue of fact may appear at the time of trial. Something more is required to avoid the entry of summary judgment.

## II.

### CONCLUSION

Under the *Simmons v. Perkins* standard, raised on the King Defendants original motion for summary judgment, the Fuquay Plaintiffs have not established an adverse claim to King Lang. The King Defendants' Motion for Reconsideration should be granted, and summary judgment should be entered for the King Defendants on the Fuquays alleged claim to a prescriptive easement in King Lane.

Respectfully submitted this 11 day of May, 2015.



Ronald P. Rainey  
Attorney for the King Defendants

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**FILED**  
11:20 A.M. P.M.

JUN 19 2015

Angela Barkell, Clerk  
*Darla Cherman*  
Deputy Clerk

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )  
Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K )  
RANCH TRUST UTA DECEMBER 12, )  
2012; AVOCO FINANCIAL SERVICES )  
OF IDAHO FALLS, INC.; GORDON G. )  
KING; ROSE M. KING; FIRST )  
AMERICAN TITLE INSURANCE )  
COMPANY, )  
Defendants. )

CASE NO. CV 2014-0278

MEMORANDUM DECISION UPON  
KING DEFENDANTS' MOTION  
FOR RECONSIDERATION

This matter came on for hearing on May 14, 2015 upon the King defendants' Motion for Reconsideration of this Court's ruling on their Motion for Summary Judgment. Appearing on behalf of the plaintiffs was attorney Matthew Cleverley, of the law firm Fidelity National Law Group. Appearing on behalf of the King defendants was attorney Ronald Rainey. Appearing on

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MEMORANDUM DECISION UPON KING  
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behalf of the Low defendants was attorney Bryce Farris, of the law firm Sawtooth Law Offices, PLLC. The Court has considered the briefing, affidavits, pleadings and argument submitted and sets forth its decision below.

### **MOTION FOR RECONSIDERATION STANDARD**

IRCP 11(a) (2) (B) allows a party to seek reconsideration of any interlocutory order before the entry of judgment. Final judgment has not been entered in this case therefore, Defendants' motion is timely. On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. *See PHH Mortg. Servs. Corp. v. Pereira*, 146 Idaho 631, 635, 200 P.3d 1180, 1184 (2009) (citing *Coeur d'Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)).

“When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered.” *Fagnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012), reh'g denied (Aug. 1, 2012). In this case, the King defendants seek reconsideration of the Court's Memorandum Decision upon King defendants' Motion for Summary Judgment filed on March 25, 2015. Thus, this Court must apply the summary judgment standard that it applied to its earlier decision.

Summary judgment is proper when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” In a motion for summary judgment, this Court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party. Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. *West Wood Investments, Inc. v. Acord* 141 Idaho 75, 86-87, 106 P.3d 401, 412 - 413 (2005), citing *Iron Eagle Dev., L.L.C. v. Quality Design Sys., Inc.*, 138 Idaho 487, 491, 65 P.3d 509, 513 (2003) (citations omitted); see also *Willie v. Bd. of Trustees*, 138 Idaho 131, 133, 59 P.3d 302, 304 (2002).

On a motion for summary judgment, the burden is always upon the moving party to prove the absence of a genuine issue of material fact. If, however, the basis for a properly supported motion is that no genuine issue of material fact exists with regard to an element of the non-moving party's case, it is incumbent upon the non-moving party to establish an issue of fact regarding that element. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

The burden on the moving party may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct. App. 1994).

A trial court, in ruling on a motion for summary judgment, is not to weigh evidence or resolve controverted factual issues. *American Land Title Co. v. Isaak*, 105 Idaho 600, 671 P.2d 1063 (1983).

Summary judgment should be granted with caution. If the record contains conflicting inferences or reasonable minds might reach different conclusions, summary judgment must be denied. *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991). *Loomis v. City of Hailey*, 119 Idaho 434, 807 P.2d 1272 (1991).

### **BACKGROUND**

Plaintiffs seek a declaration of a prescriptive easement over King Lane in Owyhee County. King Lane is a private, all-weather road about one-half mile in length. It runs in an east-west direction from the public Oreana Loop Road until it connects with Castle Lane, which then runs south until it connects with Oreana Loop Road. The King defendants own the parcel of land to the north of King Lane, the Low defendants own the parcel of land to the south of King Lane and the plaintiffs own parcels of land to the west of King Lane where it ends and connects with Castle Lane.

The Court went into greater background detail in its Memorandum Decision Upon King Defendants' Motion for Summary Judgment filed on March 25, 2015. That background information is incorporated herein.

**Argument Supporting Motion to Reconsider**

Quoting from King Defendants' Memorandum in Support, beginning on page 2:

As simply as can be stated, the King Defendants were only arguing that if, under the controlling rule of Idaho law, the Fuquay Plaintiffs use of King Lane was at all times deemed to be permissive, then there can be no prescriptive easement, which is dependent upon "adverseness" in order to be established. If that single element can be shown not to exist – as a matter of law – then all other elements – and all other alleged issues of material fact – thereafter become immaterial, and the entire claim fails, for lack of the required proof as to that single element – adverseness.

.....

The Court denied the King Defendants' motion for summary judgment without directly addressing, or even acknowledging, the single issue that the King Defendants had raised on their motion for summary judgment. Therefore, the King Defendants' request reconsideration, at least to obtain clarification in moving towards trial; as to the Court's position on this essential question.

The King Defendants' argue that: (1) the five year prescriptive period had to begin sometime between 1989 and 2001 since it had have been completed before the law changed in 2006; therefore, use of commercial truck traffic is not relevant since it only occurred after 2007 when Clint and J.C. Fuquay started to run their commercial trucks over that road (2) John Fuquay's claimed use beginning as far back as 1977 of large cattle trucks was not adverse as it simply was the same sort of general cattle ranching operation that the King Defendants' were involved in and thus not adverse – but rather consistent with the "joint use in common rule" established in Idaho; (3) and it is this "joint use in common rule" that the King Defendants' are asking the Court to apply to grant summary judgment.

In their response to the King Defendants' motion to reconsider, the Fuquays state:

The Kings continue to ignore the disputed issues of fact. As the court noted, "the King defendants claim that beginning in 2011, the Fuquays use of King Lane became adverse . . . According to the Declaration of John Fuquay filed on October 29, 2014, the plaintiffs have used King Lane to access the Fuquay Parcel and the Clinton Fuquay Parcel since 1977." The Kings are asking the Court to simply ignore the disputed issues of fact and accept their conclusory "use in common" argument. As the court has recognized, adverse use, and when it began, is at the heart of the dispute. There is no

reason to reconsider Kings' arguments because the *facts* are disputed. The court must decide based on the evidence at trial, not at summary judgment.

The argument that the King Defendants want the Court to revisit is that pursuant to the law set forth in *H.E.L.P., LLC v. The City of Twin Falls*, 157 Idaho 672, 339 P.3d 557 (2014) a change from permissive use to adverse use must be of such an extent that the change in use is "brought home" to the servient landowner before that permissive use can be held to have changed to an adverse use. Citing *Backman v. Lawrence*, 147 Idaho 390, 398, 210 P.3d 75, 83 (2009):

Moreover, if the presumption of permissiveness applied when the use began, the presumption continues until a hostile and adverse use is clearly manifested and "brought home" to the servient property owner.

The King Defendants argue that although John Fuquay, in his affidavit, claimed that he and his father used to run their commercial or cattle trucks through and over King Lane as far back as possibly 1977, there is nothing in Fuquay's claim that describes the use as interfering with or damaging the use of the lane for the Kings. It is upon that basis that the King Defendants seek summary judgment. That is, there is no evidence in the record before the Court that can establish adverse use for any five year period leading up to 2006. Thus, summary judgment should be granted as there is no issue of fact on the element of adverse use.

**Adverse and under a claim of right**

The Idaho Supreme Court has provided explanation for the prescriptive easement requirement that use be adverse and under a claim of right:

A prescriptive right cannot be granted if the use of the servient tenement was by permission of its owner, because the use, by definition, was not adverse to the rights of the owner. Indeed, the rule is well established that no use can be considered adverse or ripen into a prescriptive right unless it constitutes an actual invasion of or infringement on the rights of the owner.

*Hughes v. Fisher*, 142 Idaho 474, 480, 129 P.3d 1223, 1229 (2006) (citations omitted).

The nature of the use is adverse if "it runs contrary to the servient owner's claims to the property." *Akers*, 142 Idaho at 303 (quoting *Hodgins v. Sales*, 139 Idaho 225, 231, 76 P.3d 969, 975 (2003)). **"The state of mind of the users of the alleged easement is not controlling;**

**instead, the focus is on the nature of their use.”** *Backman v. Lawrence*, 147 Idaho 390, 397-98, 210 P.3d 75, 82-83 (2009). **Emphasis added.**

If a use has commenced as permissive, a user must make some new and independent act that would put the owner of the servient property on notice that the use was no longer permissive. *Webster v. Magleby*, 98 Idaho 326, 327, 563 P.2d 50, 51 (1977). However, “mere inaction and passive acquiescence is not a sufficient basis for proving that the use of the claimed right was with the permission of the owner of the servient tenement.” *West v. Smith*, 95 Idaho 550, 557, 511 P.2d 1326, 1333 (1973).

It is undisputed and the record establishes that the plaintiffs’ have used King Lane as far back as 1977, and the use was with the actual knowledge of the defendants. It can be argued that plaintiffs use has been open, notorious, continuous, and uninterrupted. Proof of these elements, without evidence as to how the use began, raises the presumption that such use was adverse and the burden is then on the defendants to show that such use was permissive. *Marshall v. Blair*, 130 Idaho 675, 680, 946 P.2d 975 (1997). However, the Idaho Supreme Court has articulated exceptions to the presumption of adverse use in the case of roadways and driveways like King Lane.

‘use of a driveway in common with the owner and the general public, *in the absence of some decisive act on the user’s part indicating a separate and exclusive use on his part* negatives any presumption of individual right therein in his favor.’ *Simmons v. Perkins*, 63 Idaho 136, 118 P.2d 740 (1941) (emphasis added). This Court further explained in *Simmons* that use of a roadway must invade or infringe on the owner’s rights in order for the use to be considered adverse and, thus, to ripen into a prescriptive right of way.

*Marshall*, 130 Idaho at 680.

On summary judgment, the King defendants argue that there is nothing in the record to show a decisive act on the part of the plaintiffs that would have interfered with their use. The burden is on the plaintiffs to present some evidence to show a decisive act or incident to create a genuine issue of material fact that defendant’s use of King Lane was adverse and under a claim of right. Since plaintiffs have not done so, the King defendants believe that summary judgment is appropriate.

According to the Affidavit of Rose King filed on September 9, 2014, the King defendants began making improvements to King Lane in 1973 when they purchased their property. By 1988-89, the defendants had turned King Lane into an all-weather road. The record before the Court shows that the Kings were the only parties to maintain or make improvements to King Lane until 2013 when the plaintiffs assert that they graded or added gravel to the lane. (See Transcript of Preliminary Injunction Hearing, pgs. 67 – 69 attached to Affidavit of Bryce Farris filed December 9, 2014). The evidence also shows that the Kings use King Lane on a day-to-day basis to conduct their cattle operation, and at various times throughout the year, graze their cattle over King Lane between two gates at either end of the lane.

There is also evidence in the record to show that King Lane was used by the general public. According to Samuel Steiner, a predecessor in title to the Low property, King Lane “was an old farm access roadway that was used occasionally by a variety of people.” (See Affidavit of Samuel Steiner filed on December 9, 2014) Steiner stated that his family did not try to stop anyone from using the road so long as they did not interfere with his family’s operations. He stated that hunters used King Lane to access the reservoir on BLM land, that the Kings used it to access a geothermal well, and that the predecessors to the Fuquay property used it as a shortcut to Grandview. Steiner also stated that the majority of vehicle use was down Castle Road, especially during the wet weather because King Lane was difficult to cross when muddy. Furthermore, there is evidence in the record of other specific public use by the mail carrier, the Schwann Truck driver and the school bus driver. See Declarations of Krivanec, Drew and Collett filed September 9, 2014.

On a motion for summary judgment, the Court must construe all facts in favor of the nonmoving party. However, it is incumbent upon the nonmoving party to “make a showing sufficient to establish the existence of an element essential to that party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986).

In this case, the plaintiffs have simply stated that there was adverse use prior to 2006 and that a genuine issue of fact exists. However, there is nothing in the record to show a decisive act of interference that could be construed as a separate and exclusive use. According to the Declaration of John Fuquay in Support of the Ex Parte Motion for TRO, the plaintiffs began using King Lane in 1989. The Fuquays also state that the general public has also used King Lane since

1989. This only supports the defendants' argument that there was no decisive act or incident of exclusive use because the use was in common. At the preliminary injunction hearing, there was disputed testimony that the plaintiffs actually began using King Lane in 1977. However, even when this Court views those facts in favor of the nonmoving party, there is no evidence to show that the plaintiff's use was ever adverse to or ran contrary to the Kings' claims to the property.

Rather, the evidence shows that prior to 2011, the plaintiffs never interfered with the defendants' use of King Lane and their use was in common with the Kings, the Lows and the general public. The only evidence of an adverse use and decisive act occurred in 2011 when the plaintiffs increased large commercial truck traffic over King Lane. However, that adverse use places the prescriptive easement claim within the twenty year statutory period.

Not only do the plaintiffs state that the general public used King Lane, they admit that their own use of King Lane never interfered with the defendants. According to the transcript from the September 18, 2014 hearing on plaintiffs' motion for preliminary injunction, plaintiff Clint Fuquay, the son of John Fuquay, testified to the following:

Mr. Rainey: You don't claim any right to King's Lane, do you?

Clint Fuquay: I've been using it so I just always assumed that I could.

Mr. Rainey: Have you ever excluded the Kings from using that lane?

Clint Fuquay: No.

Mr. Rainey: Have you never told them to get off?

Clint Fuquay: No.

Mr. Rainey: Have you ever told them that they couldn't use it if you're using it?

Clint Fuquay: No.

Mr. Rainey: So in a way, have you interfered with the Kings?

Clint Fuquay: No.



Mr. Rainey: Have you given them any hassle about when you use the lane?

Clint Fuquay: No.

(Transcript of Preliminary Injunction hearing on September 18, 2014, pgs. 66-67).

Plaintiff John Fuquay also testified at the September 18, 2014 hearing. According to the transcript, John Fuquay stated that whenever the Kings' cattle were grazing over King Lane, there was barbed wire gates placed on both the east and west ends of the road. John Fuquay also testified as to the physical description of the gates as well as how he would unlatch, open and close the gates each time he passed through. He also testified that before the "last four or five years," King Lane has always been open. (See Transcript, pgs. 16-17).

J.C. Fuquay (not a party to this case), the son of plaintiff John Fuquay, also testified at the hearing and stated the following:

Mr. Rainey: Do you know that this lane from the bottom of your house around the corner from your house to Oreana is Kings' private property?

J.C.: No, I wasn't aware of that. It's always been an open lane since I've been around.

Mr. Rainey: You didn't know that Kings owned that property

J.C.: I knew that they owned the property on the north side of that lane.

Mr. Rainey: You didn't know that they owned the lane?

J.C.: No. I did not. I always assumed it was an easement or private road—or an access point to our property. It's never been disputed up until now.

Mr. Rainey: Well, have you ever interfered with the Kings' use of that land?

J.C.: No, I have not.

Mr. Rainey: Have you ever told them to get out? It's your lane. You're going to use it?

J.C.: No, sir, I have not.

Mr. Rainey: Have you ever done anything that interrupted their use? And they being Kings. Have you ever done anything to interrupt the Kings' use of that lane?

J.C.: No, sir, I have not.

Mr. Rainey: Do you know if anyone in your family has ever interrupted the Kings' use of that lane?

J.C.: Not to my recollection, no.

(Transcript, pgs. 86-87).

Based on the record before this Court the plaintiff has failed to make any showing on the essential element that plaintiffs' use of King Lane was adverse and under claim of right. Even when this Court makes all inferences in favor of the plaintiffs, there is nothing in the record to indicate a decisive act or incident of separate and exclusive use from 1977 until 2011. While the use of King Lane may not have started with express or even implied permission, the record and testimony of the plaintiffs shows that plaintiffs' use of King Lane was in "common with the owner and the general public." *Marshall* 130 Idaho at 680; (quoting *Simmons*, 63 Idaho 136, 118 P.2d 740 (1941). A prescriptive easement cannot be granted unless there is evidence of a decisive act or incident showing adverse use that could be considered an "actual invasion of or infringement on the rights of the owner." *Hughes*, 142 Idaho at 480.

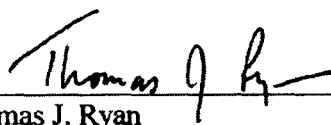
Because there is no proof or evidence concerning this essential element of the plaintiffs' case, that the Fuquays' use was adverse and contrary to the ownership rights of the Kings, the King defendants have met their burden of showing there is no genuine issue of material fact regarding the element of *adverse use*.

Once such an absence of evidence has been established, the burden shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56 (f). *Boots v. Winters*, 145 Idaho 389, 392, 179 P.3d 352, 355 (Ct.App. 2008).

This court has reviewed the record thoroughly and cannot find that plaintiffs have met this burden. Thus, summary judgment is appropriate. This is especially so given the plaintiffs burden of proof at trial (clear and convincing evidence).

Therefore, counsel for the King defendants is directed to prepare a judgment consistent with this Memorandum Decision and Idaho Rule of Civil Procedure 54.

Dated this 19<sup>th</sup> day of June, 2015.

  
\_\_\_\_\_  
Thomas J. Ryan  
District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing to be served upon the following via U.S. Mail, postage prepaid, facsimile transmission or by hand delivery:

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6/19/15  
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FILED  
11:40 A.M. P.M.

JUL 06 2015

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IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Case No. CV-14-0278

PLAINTIFFS' MOTION FOR  
RECONSIDERATION OF THE  
COURT'S JUNE 19, 2015  
MEMORANDUM DECISION ON  
KING'S MOTION FOR SUMMARY  
JUDGMENT AND REQUEST FOR  
RECONSIDERATION

**I. MOTION AND BACKGROUND**

Pursuant to IRCP 11(a)(2)(B), Plaintiffs move the court for reconsideration of its June 19, 2015 *Memorandum Decision Upon King Defendants' Motion for Reconsideration*. The Kings sought reconsideration of the Court's original March 25, 2015 *Memorandum Decision Upon King Defendants' Motion for Summary Judgment* which had denied the Kings' Motion for Summary Judgment.

PLAINTIFFS' MOTION FOR RECONSIDERATION  
OF THE COURT'S JUNE 19, 2015  
MEMORANDUM DECISION – 1

FIDELITY NATIONAL LAW GROUP  
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The Court's original March 25, 2015 decision denied the Kings' Motion for Summary Judgment because the court found that there were disputed issues of material facts as to when adverse use began. In its decision, the Court concluded:

As stated above, in considering a motion for summary judgment, the Court must make all inferences in favor of the nonmoving party. While the evidence in the record does not meet the clear and convincing standard required to prove the creation for a prescriptive easement that is not the standard for summary judgment. The material question of fact that remains to be decided is when adverse use began, (whether it was in 2011 as alleged by the Kings or in 1977 as alleged by John Fuquay).

Despite finding that there were material issues of fact regarding when adverse use began, the Court reversed itself and granted the Kings' motion for summary judgment. In its June 19, 2015 decision, the Court stated:

Based on the record before this Court the plaintiff has failed to make any showing on the essential element that plaintiffs' use of King Lane was adverse and under a claim of right. Even when this Court makes all inferences in favor of the plaintiffs, there is nothing in the record to indicate a decisive act or incident of separate and exclusive use from 1977 until 2011. While the use of King Lane may not have started with express or even implied permission, the record and testimony of the plaintiffs show that plaintiffs' use of King Lane was in "common with the owner and the general public." *Marshall* 130 Idaho at 680; (quoting *Simmons*, 63 Idaho 136, 118 P.2d 740 (1941)). A prescriptive easement cannot be granted unless there is evidence of a decisive act or incident showing adverse use that could be considered an "actual invasion or infringement on the rights of the owner." *Hughes*, 142 Idaho at 480.

Because there is no proof or evidence concerning this essential element of the plaintiffs' case, that the Fuquays' use was adverse and contrary to the ownership rights of the Kings, the King defendants have met their burden of showing there is no genuine issue of material fact regarding the element of *adverse use*.

June 19 Memorandum Decision at p. 10.

Plaintiffs respectfully request that the Court reconsider its reversal because its original decision was correct. There are disputed issues of material facts that make summary judgment inappropriate.

In addition, the Court used the incorrect legal standard in reconsidering its decision and based its decision on an incorrect application of the law. When the correct legal standard is applied, the court should have denied the Kings' request for reconsideration and concluded that the Kings are not entitled to summary judgment.

Plaintiffs are also submitting pages from the deposition of Rose King and Gilbert King which were taken on May 11, 2015 and which were not available to be submitted in response to the prior motions.

## II. LEGAL STANDARD

Idaho Rule of Civil Procedure 11(a)(2)(B) permits parties to move the court to reconsider an interlocutory order until fourteen days after a final judgment has been entered. The court must consider new evidence bearing on the correctness of a summary judgment order if the motion to reconsider is filed within fourteen days after a final judgment issues. Kepler-Fleenor v. Fremont Cnty., 152 Idaho 207, 210, 268 P.3d 1159, 1162 (2012).

The district court has no discretion on whether to entertain a motion for reconsideration pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B). On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. Fragnella v. Petrovich, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012). The decision to grant or deny a request for reconsideration generally rests in the sound

discretion of the trial court. Johnson v. Lambros, 143 Idaho 468, 473, 147 P.3d 100, 105 (Ct. App. 2006).

When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered. In other words, if the original order was a matter within the trial court's discretion, then so is the decision to grant or deny the motion for reconsideration. If the original order was governed by a different standard, then that standard applies to the motion for reconsideration. On the other hand, when reviewing the grant or denial of a motion for reconsideration following the grant of summary judgment, the Court must determine whether the evidence presented a genuine issue of material fact to defeat summary judgment. Fagnella v. Petrovich, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012).

### III. ARGUMENTS

Respectfully, there are several problems with the court's rulings:

1. The Court applied the wrong presumption of adverse use. There is no evidence of how the road was created, and there is a presumption of adverse use which should have been construed in favor of the Fuquays.
2. "Use in common" is a factual determination and there is conflicting evidence as to the use of the roadway. The court construed inferences from the conflicting evidence in favor of the Kings instead of in favor of the Fuquays.
3. Even if there was "use in common" the evidence showed that Jim Fuquay had committed a distinct act of placing a new mobile home on his property in 1977 and



using the roadway for access to that mobile home. The placement of the mobile home was a separate distinctive act that created an adverse use. The court ignored the evidence of the adverse use commencing in 1977 and focused only on the use in 2011.

**A. The Prescriptive Easement Requires a Three-Step Analysis**

Presumptions for prescriptive easements use a three-step analysis: 1) Does the general rule presuming adverse use apply? 2) Is there evidence of permission by the landowner that negates the presumption of adverse use? and 3) If there is evidence of permission, is there evidence of an infringement of right by the easement claimant that reinstates the presumption of adverse use?

**1. General Presumption**

The first prong is a presumption that use of a roadway, without evidence of how that use began, is presumed to be adverse to the servient owner.

Although clear and convincing proof of each of the elements necessary to establish a prescriptive easement is generally essential to a claim, there is a shortcut in terms of proving adverse use. Without evidence of how the use of the property began, proof of open, notorious, continuous and uninterrupted use for the prescriptive period raises a presumption that the use was adverse and under a claim of right.”

Hodgins v. Sales, 139 Idaho 225, 232, 76 P.3d 969, 976 (2003).

Once the presumption of adverse use is established, the servient landowner has the burden of proving that the use was permissive:

The general rule is that proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, without evidence as to how the use began, raises the presumption that the use was adverse and under a claim of right. The burden is then on the owner of the servient tenement to show that the use was permissive, or by virtue of a license, contract, or agreement.

W. v. Smith, 95 Idaho 550, 557, 511 P.2d 1326, 1333 (1973). See also Marshall v. Blair, 130 Id. 675, 680; Beckstead v. Price, 146 Idaho 57, 62, 190 P.3d 876, 881 (2008).

## **2. “In Common” Exception to General Presumption**

The second prong, the exception to the adverse presumption rule is: if the servient landowner presents evidence of a use “in common,” then the use may be deemed permissive. However, for the “use in common” exception to apply, there must be an “absence of evidence as to whether the use began adversely or with permission of the servient owner.” Melendez v. Hintz, 111 Idaho 401, 404, 724 P.2d 137, 140 (Ct. App. 1986). Mere acquiescence by the servient owner, however, is not evidence of permission: “As we have noted, mere proof that the owner “acquiesced” in the use is not proof that the use was with the owner's consent or permission.” Melendez v. Hintz, 111 Idaho 401, 405, 724 P.2d 137, 141 (Ct. App. 1986). This puts the burden on the servient owner to produce affirmative evidence that the use was permissive. Simply “doing nothing” is not evidence of permission or of a “use in common.”

## **3. The General Presumption Overrides the Exception**

The third step is: even if there is some evidence of permission or use in common from the servient owner, if there is some evidence that the easement claimants’ use infringed on or invaded of the owners’ rights, the general rule presuming adverse use, rather than the exception, still applies:

Understanding the basis for the *Simmons* rule helps to determine the limits of its application. There should be no presumption that the use originated adversely to the owner unless the use itself constitutes some invasion or infringement upon the rights of an owner. Where one person merely uses a roadway in common with his neighbor, without damage to the roadway, without interfering with the neighbor's use of the roadway, and where the neighbor has established and maintained the roadway on his own property for his own purposes, only the most minimal intrusion is made into the owner's dominion over his property. Logically, a use which is not in fact adverse to

the owner provides no basis for the presumption that the use is adverse. *However, where the use made of the property for the prescriptive period is shown to constitute some infringement or invasion of the owner's rights, it is more appropriate to apply the general rule, presuming the use to be adverse, that is, without permission of the owner.*

Melendez v. Hintz, 111 Idaho 401, 405, 724 P.2d 137, 141 (Ct. App. 1986) (emphasis added).

**B. The Facts in this Case Support the General Presumption of Adverse Use**

In this case, the general rule applies. First, the roadway was in existence long before any of the parties in this case owned their properties. Second, the Kings did not show evidence of permission (as opposed to mere acquiescence). And third, even if the Kings showed some evidence of permission or use in common, the Plaintiffs presented evidence of an infringement of right that re-instated the presumption of adverse use.

The court applied the presumptions incorrectly. There is no evidence as to how the original use began. Therefore, the court must apply the general rule in favor of the Plaintiffs. The Kings then have the burden of presenting evidence that the use was permissive. The Kings may not merely rest on acquiescence. However, even if there is some evidence as to use in common, if there is any evidence to show an infringement or invasion of the owners' rights, then the general presumption of adverse use must apply. Melendez v. Hintz, 111 Idaho 401, 405, 724 P.2d 137, 141 (Ct. App. 1986). Here, the court simply looked at the evidence of increased truck use in 2011 but ignored the evidence as to the adverse use that began in 1977.

The court was initially correct in its analysis when it applied the general rule that when there is no evidence as to how use of a road began, the use is presumed adverse to the landowners. However, as to the second step, the Kings did not present evidence that the use

of the roadway commenced as permissive or that there was use in common in 1977. The Kings merely argued that they had a similar use of the roadway for farm trucks in 2011, and since Plaintiffs did not cause any damage to the roadway until then, the similar use was “in common.” The Court accepted Kings’ arguments that because Plaintiffs did not cause any damage to the roadway until 2011, the use was “in common” with the Kings.

First, it is illogical that the law would require an easement claimant to damage a roadway in order to show adverse use. Common sense dictates that one who regularly uses a roadway would take care to *prevent*, not *cause*, damage to the roadway. After all, why would someone intentionally cause damage to a roadway that they would then need to repair? The reliance on arguments that there was no damage to the roadway is illogical and contrary to public policy.

Second, the Court did not address the fact that the Kings sold their property to Zane Block in 1982 and repossessed it some 4 years later, in 1986. Affidavit of Rose King Dated December 4, 2014 ¶ 3. There was no evidence of use in common during the year before or the year after Block’s ownership of the property. The Kings also presented no evidence that the use of the roadway between March 1982 and September 1986 – when the Kings did not own the property-- was permissive. Therefore, the Fuquays’ continued use of the roadway during that time is presumed to be adverse.

In her deposition, Rose King acknowledged that she did not know if the use of the roadway from 1982-1986 was permissive or adverse.

13 Q. All right. We're talking about  
14 King Lane when Zane Block was buying it.  
15 A. If I drive down and you drive down  
16 tomorrow, am I supposed to see your tracks?

17 Q. Well, my question was could you tell  
18 whether or not anybody had been using the road?  
19 Did it look like it was in use?  
20 A. Well, somebody had been using it.  
21 Q. Okay. But if there's a -- you don't  
22 know who was using the road during that time?  
23 A. No, I do not know.  
24 Q. Okay. It could have been the Fuquays,  
25 right?  
1 A. I don't know who was using the road,  
2 sir.  
3 Q. When Mr. Block was buying the property,  
4 did you believe that you still had the right to  
5 control who could or could not use King Lane?  
6 A. We didn't try to do that.  
7 Q. Okay. Was it your belief that you  
8 still had that right to?  
9 A. No. But I had the right to observe  
10 what was going on.  
11 Q. Okay. So when Mr. Block was there, you  
12 couldn't have come in and put gates up and said,  
13 "Well, you're just buying the property. We're  
14 going to put gates up and control who comes  
15 through"?  
16 A. No, I could not have done that.

Rose King Deposition at 39-40

At the time the Kings re-acquired the property in 1986, the use by Plaintiffs was presumptively adverse to the Kings because there is no evidence that the Plaintiffs' use during the time of Blocks' ownership was permissive. The Kings did not present any evidence of a change from adverse use to permissive use in 1986 when they re-acquired the property. In fact, the Kings did not live on the property immediately after re-acquiring it in 1986 and took no steps to determine whether the Fuquays' use of the roadway was adverse at that time.

12 Q. Now, between 1986 and 1988 when you  
13 moved back up, did any of your -- did you have any  
14 indication during that two-year period that the  
15 Fuquays or anyone on their property were using

16 King Lane?

17 A. I would assume they were, but I can't

18 tell you.

19 Q. At any point, did you ask any of your

20 children to prevent anybody from using King Lane?

21 A. No, we did not.

Rose King Deposition at 42.

There is at least an issue of fact as to whether the Plaintiffs' use of the roadway during Blocks' ownership, and the year before or after Blocks ownership -- a period totaling more than 5 years--was adverse.

**C. There is No Evidence of Use in Common in 1977**

The court's analysis of "use in common" relied exclusively on the evidence of increased truck use in 2011. Again, that issue is largely irrelevant. While the increased use is relevant to the *scope* of the easement, the prescriptive easement had vested long before 2011.

The evidence in the record showed that Jim Fuquay purchased the property in 1977 and began using the roadway at that time. (Declaration of John Fuquay dated October \_\_ 2014). In his deposition, Gilbert King acknowledged that Fuquays began using the roadway for access after Jim Fuquay put in the mobile home:

23 A. Okay. We're probably not clear. When  
24 they lived in this house here where John lives,  
25 they went in and out Castle Lane. When they put  
Page 86

1 the double-wide in over here -- so I suppose it  
2 would be closer to like '79 -- then, you know,  
3 their use was once in a while.

4 Q. Okay. Once in a while is what?

5 A. A time or two a week, I would say.

6 Q. Okay. A time or two a week with cars

7 or a pickup?

8 A. Cars or pickups.

Gilbert King Deposition at 85-86.

There is no evidence that Jim Fuquay's use of the roadway began as permissive in 1977. Since there was no evidence that the use began as permissive in 1977, the presumption is that the use was adverse. The Kings had an obligation to show evidence of a change in use from hostile to permissive by 1982 (5 years after Jim Fuquays purchase in 1977). The Kings presented no evidence of "use in common" between 1982 and 1986. Based on the presumption of adverse use commencing in 1977, Plaintiffs' prescriptive rights vested in 1982. No amount of permissive or in-common use after that time nullifies the fact that the easement rights had already vested.

The evidence is that the Kings never enforced any right to exclude Jim Fuquay from using King Lane. They merely acquiesced:

Q. Did you ever tell Jim and Wanda that  
22 they were not allowed to use King Lane?  
23 A. No, I did not.  
24 Q. Did you believe at the time that you  
25 had -- would have had the right to tell them that  
Page 23  
1 they couldn't use King Lane?  
2 A. Yes, I do.

Deposition of Rose King at 22-23.

**D. The Public Use Exception Does Not Apply**

The "public use" exception requires indiscriminate public use equal to the use of the easement claimant. Hall v. Strawn, 108 Idaho 111, 112-13, 697 P.2d 451, 452-53 (Idaho App., 1985) ("Where, as here, the same degree of use upon which the adverse claim is based has been exercised indiscriminately by the general public, individual acquisition of a prescriptive easement has generally been held impossible.") The Court relied on Huges v. Fischer for

support that use in common with the public requires a separate distinct act of adversity. However, the facts in Huges show the road at issue in that case was actually open to the general public. "All of the plaintiffs themselves corroborated the public use of the Path by testifying that use of the Path was "common knowledge," that "everybody did it." Hughes v. Fisher, 142 Idaho 474, 481, 129 P.3d 1223, 1230 (Idaho,2006). So, in Hughes, the public use was to the same degree as the adverse use.

That is not the same in this case. In this case, the Court stated that "there is evidence in the record of other specific public use by the mail carrier, the Schwann Truck driver and the school bus driver." Memorandum Decision at 7. The first issue is there is no evidence that that use would be "to the same degree" as the adverse use. The second issue is those declarations, which were submitted by the Kings, say that those drivers did NOT use King Lane.

In addition, Rose King testified that there was never any public use of the roadway:

Prior to this lawsuit, I am not aware of any use by UPS, post office or other delivery services of King Lane to provide services to Fuquay properties. To the contrary, the mailboxes for the Fuquays are located at the end of Castle Lane and I have not observed any services using King Lane to provide deliveries to the Fuquay properties....I am not aware of any guests of the Fuquays using King Lane to access the Fuquay properties.

Affidavit of Rose King dated December 4, 2014.

In her deposition, Rose King reaffirmed her testimony that the roadway was never used for deliveries:

- 1 Q. You've never seen any delivery drivers
- 2 using King Lane, FedEx, UPS, Post Office dropping
- 3 off any mail packages to anybody that lived in
- 4 Clint or JC's houses?
- 5 A. No. The only time that I ever saw, the



6 Schwan's asked me one day, he said, "The gate is  
7 locked. I can't go up." I said, "You can go this  
8 time, but don't go anymore. They'll have to  
9 unlock their gate if they want it."  
10 So, no, they didn't come our way. The  
11 FedEx man did stop several times and ask how we  
12 got there, and we directed them to go around the  
13 way they were supposed to. And I believe you  
14 have some affidavits showing that from those  
15 people.

Deposition of Rose King at 58.

In her deposition, Rose King indicated that if the general public tried to go down the roadway, she would stop them in her driveway:

A. Let me tell you one thing before you go  
20 too far. If you're looking at the picture, if  
21 you're going to drive across our bridge and you  
22 don't know that there's a lane that goes to the  
23 left, you're going to come directly into my yard.  
24 We had that. We told people where they wanted to  
25 go. They turned around and went back. So most of  
1 the people that I would have came or if there was  
2 a hunter, as you have asked before, then they  
3 would ask.

4 Q. Okay. So if somebody didn't know that  
5 the road took the left turn after the bridge to go  
6 out there, they would have usually ended up in  
7 your driveway?

8 A. That's correct.

9 Q. And then they would have either said,  
10 "Oops, sorry," turned around and left, or if they  
11 were looking for somebody they might have stopped  
12 and asked? Is that a fair statement?

13 A. Yes. And we would have told them how  
14 they went to get there

Rose King Deposition at 25-26.

There is no evidence of any public use that was equal to or greater than the use by the Plaintiffs. In addition, Rose King specifically denied any public use of the roadway. At the

very least, that testimony creates an issue of material fact. Was King Lane used by UPS, Schwanns, and other delivery services as the Court decided? Or did they never use King Lane, as Rose King testified? To what extent was there use by the general public versus invitees of the Fuquays? While the court can certainly make those factual findings at trial, the question of whether there was public use is clearly a disputed issue of material fact. In addition, the Court made the reasonable inferences of public use against the Plaintiffs instead of against the Kings as the moving party. The court should not have construed any facts or inferences against the Plaintiffs.

**E. There is Evidence of Distinct Adverse Use**

As noted, the Plaintiffs are entitled to rely on the presumption of adverse use because there is no evidence that the use of the roadway began as permissive. According to Rose King, the roadway has existed in the same location since at least 1894:

A. It goes right where it is today. It is the same spot. It hasn't moved. That lane goes to where the fence -- the gate is because those fences are all the borderlines. When we bought the property, nobody resurveyed any land. Where we live, it was surveyed in 1894. So when they took us around to show us the borderline, and if you will look, the fence goes all the way across what's between Cal and Susie's and then it comes right here in front of Clint and JC's house. That same fence. And then it turns and goes south.

Deposition of Rose King at 15-16.

Samuel Steiner also testified that King Lane was in existence since at least 1959 when he was born and lived on it: "I do not know who, if anyone, constructed King Lane. This was

an old farm access roadway that was used occasionally by a variety of people.” Declaration of Samuel V.C. Steiner at ¶ 5.

The Kings first acquired the property in 1973. Affidavit of Rose King dated December 4, 2014 at ¶ 2. According to Rose King, the roadway was in existence for nearly a hundred years before they bought the property. There is no evidence as to how the road was created or when the use began. Therefore, under the first prong of the analysis, the presumption is that the use of the roadway was adverse to the owners. Marshall v. Blair, 130 Id. 675, 680.

There is also ample evidence in the record to show the Fuquays’ use of the roadway was adverse to the owners. The record first shows a distinctly adverse act when Jim Fuquay purchased his property in 1977 and began using the roadway for access. After purchasing the property, Jim Fuquay put a new mobile home on his property and began using King Lane to access that new home. As John Fuquay testified:

I was about 12 years old when we first moved onto the John Fuquay Parcel. My parents bought a mobile home and put on the property and we lived in that for years. From January 1977 forward, my family continuously used King Lane for access to Oreana Loop Road. My parents drove personal vehicles of all types over King Lane.... Since 1977, I have continuously used King Lane to access both the John Fuquay Parcel and the Clinton Fuquay Parcel.

Declaration of John Fuquay dated October \_\_, 2014.

John Fuquay is not the only one to testify as to the Fuquays’ use of the roadway after the placement of the mobile home in 1977. Samuel Steiner testified in his declaration that: “When Jim Fuquay moved on a mobile home at the corner of what would be King Lane and Castle Road, he would occasionally use King Lane, probably as a short cut when he went out to Grand View.” Steiner also testified that “Renters on the old Munger property, now owned

by Fuquays and previously owned by Bob Collette used [King Lane] occasionally as a short-cut to Grandview. I think that Jim Fuquay used it occasionally when he lived in the mobile home located near the rental property now owned by Clint Fuquay.” Declaration of Samuel V.C. Steiner dated November 10, 2014 at ¶6.

The testimony is significant because it provides evidence of a distinct and decisive act that put the Kings on notice as to Jim Fuquay’s adverse use of the roadway. At the time the Kings purchased their property in 1973, the mobile home on the Fuquay property did not exist. Once Jim Fuquay placed the mobile home on his property in 1977, he began using King Lane for access to that home. From that testimony, the court must make the reasonable inference that the Fuquays’ use of the roadway after placement of the new mobile home was a distinct and decisive act that showed adverse use of the roadway by the Fuquays. At the very least, it is a material issue of fact as to when the adverse use began that precludes summary judgment.

In addition to the Fuquays’ use for access to the mobile home, the Fuquays had numerous renters on their property who would use the roadway for access to the rental property. Dennis Jayo, Nate Moore and Tanna Gilbert are some of the renters. The Kings were aware that all of these people were using the roadway.

12 Q. How about when Tanna Gilbert was there?

13 Do you recall her living there?

14 A. I recall her living there.

15 Q. Do you recall how she would get to and

16 from that house?

17 A. She came down the lane part of the

18 time. She worked for other people. She wasn't

19 always around.

20 Q. So she would use King Lane to get to

21 and from her house?

22 A. I don't know if that was her primary,  
23 sir.

24 Q. I'm not saying whether or not it is her  
25 primary. I'm asking if she used it.

A. I saw her very seldom on the road  
2 because she was seldom ever around.

3 Q. Did you ever tell her not to use  
4 King Lane?

5 A. No, I did not.

6 Q. Is it your understanding and belief  
7 that you could have told her not to use that lane  
8 and that would have been within your rights?

9 A. Yes, I feel that.

Deposition of Rose King at 18-25.

Rose King acknowledged that during the time that Nate Moore was a renter and lived  
on Fuquays' property, he used the roadway for access:

6 Q. And when Nate lived in that house, how  
7 did he get to and from that house?

8 A. He would have probably went down our  
9 lane.

10 Q. And you were aware that he was going up  
11 and down?

12 A. Yes.

13 Q. And how often would he go up and down?

14 A. He went to work in the morning, and he  
15 came home in the evening. That was the extent.  
16 He didn't run up and down back and forth.

17 Q. Do you remember how many years that  
18 would have been?

19 A. Oh, maybe a couple of months.

20 Q. And again, same thing, is that you  
21 never told Nate that he wasn't able to use that,  
22 the road to get up and back from the house?

23 A. No, I did not.

24 Q. But, again, you understood that you  
25 could have if you had wanted to?

Page 31

1 A. Yes, I do. Yes, I do.

Gilbert King acknowledged that starting in at least 1980, renters on the Fuquay property would use the roadway for access:

21 Q. Okay. What was -- I don't know if  
22 you're old enough to remember what it was like  
23 then. Was it --

24 A. It was -- well, I remember in the  
25 wintertime, it would get pretty sloppy. My  
Page 19

1 brother lived in the house where JC lives, and he  
2 had a two-wheel-drive pickup. And it was bad  
3 enough that he couldn't get back and forth at  
4 times in the winter because of the ruts where it  
5 is alkali, you know. That was the reason for  
6 gravelling it there in '80 in the summertime.

7 Q. Which brother was that?

8 A. Greg.

9 Q. How long did he live in that house?

10 A. It was from the time he got married  
11 until -- like three years, I think. '79 to '82 or  
12 so. Something like that.

13 Q. Okay. And when he lived there, how  
14 would he get back and forth to his house or to  
15 where he was living?

16 A. Oh, just, you know, on the dirt road  
17 there in the lane.

18 Q. He would go up and down King Lane to  
19 get to the house?

20 A. Um-hum.

21 Q. Do you know who else lived in that  
22 house over the years?

23 A. Some people by the name of Laws lived  
24 there. Tanna Gilbert lived there. Nate Moore.  
25 Somebody else.

Page 20

1 Q. Dennis Trayo?

2 A. I don't remember. He was before my  
3 time. But I know John lived there for a period of  
4 time when they got divorced.

5 Q. John Fuquay?

6 A. Um-hum.

7 Q. Okay. And when those people lived in  
8 that house, how would they get back and forth to

9 the house?

10 A. Down the lane there part of the time.

11 Q. So they would go -- this Exhibit 5

12 doesn't show it, but let me see it. All right.

13 So Exhibit 3, you had marked where the gate is.

14 JC's house is just west of where the gate is

15 now?

16 A. Yes.

17 Q. *There? So the -- whoever lived in*

18 *the house would come out King Lane past the --*

19 *down the lane past the houses out to Oreana Loop*

20 *Road?*

21 A. Yes.

Gilbert King Deposition at 18-20.

The use of the roadway by renters for access to the rental property is not in common with the Kings. Use by renters is a distinct act that put the Kings on notice of Plaintiffs adverse use.

Since there is evidence of a distinct and decisive act that put the Kings on notice of Plaintiffs adverse use in 1977, the presumption of adverse use has continued uninterrupted. The Kings offered no evidence to interrupt the adverse use of the roadway or to change the adverse use to permissive. Since the Kings were aware of the adverse use, they lost any right to object in 1982.

The law will presume that the land belongs to the owner of the paper title, and that the use was by permission or silent acquiescence. If this presumption is overcome by evidence showing the use to have been hostile, and that the owner knew of such hostile claim and took no steps to protect his property for a period of five years, then the presumption changes. No injustice is done to the owner, if he knows the claim to be hostile, and that title is being asserted against him, but neglects for five years to avail himself of the right which the law gives him. He is in the position of any other owner of property who negligently allows the statute of limitations to run against him.

Clarke v. Clarke, 133 Cal. 667, 670-71, 66 P. 10, 11-12 (1901).

Since there is no evidence to contradict the presumed adverse use of the roadway beginning in 1977, Fuquays' prescriptive rights would have ripened and vested in 1982—either 5 years from Jim Fuquays' purchase of the property in January 1977 or 5 years from the placement of the mobile home.

The Kings argued that Plaintiffs' adverse use did not occur until 2011, and therefore did not occur within the 20-year statute of limitations period. The court accepted this premise but ignored the evidence of adverse use that began in 1977 when Jim Fuquay placed the mobile home on his property and began using the roadway for access. The Kings showed no evidence of use "in common" between 1977 and 1982. Again, this is significant because the presumption is that Jim Fuquay's use beginning in January 1977 was presumptively adverse. And, at the very least, the Fuquay's placement of the mobile home in 1977 was a separate and distinct act that brought home to the Kings that Fuquays intended to use King Lane for access.

Because it is apparent that there are disputed issues as to when the adverse use began, summary judgment was inappropriate:

This case is highly complex and presents multiple issues of material fact which the lower court should address at trial. The testimony of several material witnesses presented conflicting information and the parties should be cross-examined to determine their credibility. Thus, the district court erred in granting Capstar summary judgment because the case presents multiple issues of material fact that preclude the court from deciding on a motion for summary judgment whether an easement exists.

Capstar Radio Operating Co. v. Lawrence, 153 Idaho 411, 421, 283 P.3d 728, 738 (2012).



#### IV. CONCLUSION

The Court's original determination that there are disputed issues of material fact that preclude summary judgment was correct. As has been noted, summary judgment is inappropriate when the evidence and inferences are in dispute:

Summary judgment was not a proper method to dispose of a case with so much conflicting evidence... Although the court, as the trier of fact, may draw the most probable inferences from the undisputed evidence, there are enough genuine issues of material fact to warrant deciding the merits of the case at trial. There is a fine line between drawing the most probable inferences and weighing the evidence, and this Court holds the belief that the district court should have allowed the case to go to trial in order to weigh the conflicting evidence and test the credibility of the witnesses.

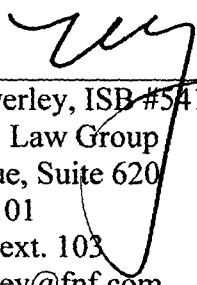
Capstar Radio Operating Co. v. Lawrence, 153 Idaho 411, 416, 283 P.3d 728, 733 (2012).

The Court's determination on reconsideration that there was no evidence of adverse use or distinctive acts is incorrect. The record has heavy evidence that the adverse use began in 1977, and of distinct acts that put the Kings on notice of Plaintiffs' adverse use of the roadway after that time.

Plaintiffs are not required to put forth their entire case or to present clear and convincing evidence to defend against a summary judgment motion. They need only show material issues of fact. It was erroneous for the court to suggest that it was considering the weight of the evidence at this point in the case. The only way for the court to hear and weigh all of the evidence is for it to be presented at trial.

Plaintiffs respectfully request that the Court reconsider its reconsidered order, acknowledge that there are disputed issues of material fact, deny the Kings' motion for summary judgment, and continue the matter for trial.

Dated: July 2, 2015



---

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Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

On the date given below I caused to be served the foregoing Plaintiff's Motion for Reconsideration and the pages from Depositions of Gilbert King and Rose King on the following individuals in the manner indicated:

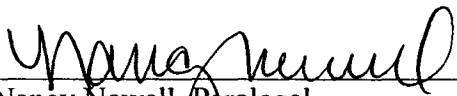
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Attorney for Kings

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

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Attorney for Lows

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Dated: July 2, 2015

  
\_\_\_\_\_  
Nancy Newell, Paralegal

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

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:  
JOHN E. FUQUAY; CLINTON WARD FUQUAY :  
and HAILEY ROSE FUQUAY, :  
:  
Plaintiffs, :  
:  
vs. :  
:  
SUSIE LOW; CAL LOW; HEART K RANCH :  
TRUST UTA DECEMBER 28, 2012; AVCO :  
FINANCIAL SERVICES OF IDAHO FALLS, :  
INC.; GORDON G. KING; ROSE M. KING; :  
FIRST AMERICAN TITLE INSURANCE :  
COMPANY, :  
:  
Defendants. :  
:  
----- x

Case No. CV-14-0278

**FILED**  
11:40 A.M. P.M.

JUL 06 2015

ANCELA BARKELL, CLERK  
*[Signature]*  
Deputy Clerk

DEPOSITION OF ROSE KING  
May 11, 2015

VOLUME 1  
Pages 1 - 80

Reported by  
Brooke R. Bohr  
CSR No. 753

Job No. CS2066702

Page 2

1 DEPOSITION OF ROSE KING, taken at the  
 2 instance of the Plaintiffs, at the Holiday Inn  
 3 Express, 4104 E. Flamingo Avenue, Conference Room,  
 4 in the City of Nampa, State of Idaho, commencing  
 5 at 11:57 a.m., on May 11, 2015, before Brooke R.  
 6 Bohr, CSR, RPR, a Notary Public in and for the  
 7 State of Idaho, pursuant to notice, and in  
 8 accordance with the Idaho Rules of Civil  
 9 Procedure.  
 10  
 11 APPEARANCES  
 12  
 13 FOR PLAINTIFFS  
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 (208) 459-3659  
 24 erainey@questoffice.net  
 25

Page 3

1 WITNESS  
 2  
 3 ROSE KING Page:  
 4 Examination by Mr. Cleverley 4  
 5 Examination by Mr. Rainey 76  
 6  
 7 \* \* \* \* \*  
 8  
 9 EXHIBITS  
 10 Page:  
 11  
 12 No Exhibits Marked.  
 13  
 14 \* \* \* \* \*  
 15  
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Page 4

1 NAMPA, IDAHO  
 2 May 11, 2015, 11:57 a.m.  
 3  
 4 ROSE KING,  
 5 produced as a witness at the instance of the  
 6 Plaintiffs, having been first duly sworn, was  
 7 examined and testified as follows:  
 8  
 9 EXAMINATION  
 10 BY MR. CLEVERLEY:  
 11 Q. Ms. King, as you know, I'm  
 12 Matt Cleverley. I represent the Fuquays.  
 13 You've observed several of the  
 14 depositions. So you kind of know how this is  
 15 going to work. So if you have any -- if you're  
 16 not understanding any questions, let me know.  
 17 A. Okay.  
 18 Q. Can you state your name, please.  
 19 A. Rosemary King.  
 20 Q. And where do you live?  
 21 A. I live at 19124 King Lane.  
 22 Q. How long have you lived there?  
 23 A. Total years, probably 40.  
 24 Q. Total years?  
 25 A. Um-hum.

Page 5

1 Q. When did you first move into the  
 2 property?  
 3 A. We bought it in September of 1973.  
 4 Q. You and your husband bought it?  
 5 A. Yes, we did.  
 6 Q. And did you buy the entire property  
 7 that is now also known as the Heart K Ranch  
 8 property, as well?  
 9 A. It is all one piece of property.  
 10 Q. It is all one piece? And you have your  
 11 house now that has a separate property?  
 12 A. I just have my home, yes. Due to the  
 13 trust, I have my home.  
 14 Q. Okay. So I just want to make sure I'm  
 15 clarifying. You're the one that's been around the  
 16 longest on this one?  
 17 A. Yes.  
 18 Q. All of the property at one time  
 19 belonged to you and your Mr. King?  
 20 A. Yes.  
 21 Q. Okay. And then at some point you sold  
 22 all of the property to Zane Block?  
 23 A. Yes.  
 24 Q. Do you recall when that was?  
 25 A. We sold it in March of '82 is when we

Page 6

1 signed the papers to sell it.  
2 Q. And then he owned all of the property,  
3 including your house, all of the houses?  
4 A. No. There was no houses there. There  
5 was only one house.  
6 MR. RAINEY: He asked you if he owned the  
7 house. Explain to Mr. Cleverly the mechanism of  
8 the sale.  
9 THE WITNESS: Okay. We sold it to him,  
10 but we retained -- we had a Quitclaim Deed we  
11 retained because we weren't sure of the man's  
12 abilities. So everything, the State leases, the  
13 BLM, the water rights, everything retained in our  
14 name. He was more or less a tenant.  
15 Q. BY MR. CLEVERLEY: So explain --  
16 explain that to me. He was -- did he put money  
17 down as a down payment?  
18 A. He did.  
19 Q. How much?  
20 A. I don't remember.  
21 Q. Does \$650,000 sound right?  
22 A. Truthfully, I do not remember.  
23 Q. What was he supposed to pay monthly?  
24 A. He didn't pay monthly. It was supposed  
25 to be yearly.

Page 7

1 Q. How much was he supposed to pay each  
2 year?  
3 A. The figure, if I can recall correctly,  
4 should have been about \$96,000.  
5 Q. And for how many years was he supposed  
6 to pay that?  
7 A. I don't know.  
8 Q. Was he --  
9 A. Until it was paid for.  
10 Q. Okay. Do you know what the total  
11 overall purchase price was?  
12 A. \$1,860,000, I believe.  
13 Q. All right. And so he put a down  
14 payment down, and you were carrying the balance of  
15 the contract?  
16 A. We did.  
17 Q. Okay. So he would then pay you  
18 payments, and he was supposed to make one payment  
19 a year?  
20 A. Yes.  
21 Q. And was that -- when was this first  
22 payment due?  
23 A. The first payment was due January 3rd,  
24 1983. He made that payment.  
25 Q. And then did he make payments after

Page 8

1 that?  
2 A. He had a payment January 3rd, 1984, and  
3 that was the last payment that he made.  
4 Q. All right. So what happened -- he made  
5 his second payment. 1985 comes around, and you  
6 don't get a payment? Or had there been any  
7 conversations before then that he wasn't going to  
8 be able to make the payment?  
9 A. There was no conversation from him.  
10 Q. So what happened after he didn't make  
11 the third payment or he made a second payment  
12 and didn't make anything else? Tell me what  
13 happened.  
14 A. We went to the bank to give us our  
15 papers, and then he filed a lawsuit against the  
16 bank if they gave us our papers and then he filed  
17 bankruptcy.  
18 Q. And what happened as part of everything  
19 that was going on?  
20 A. What do you mean what happened?  
21 Q. Well, was he -- was he filing  
22 bankruptcy to try and make payments?  
23 A. No, not to us. He was just filing  
24 bankruptcy because he wanted the property.  
25 Q. So he wanted to keep the property? Was

Page 9

1 he going to try and make payments through the  
2 bankruptcy to be able to pay you from the  
3 bankruptcy?  
4 A. I truly don't know how that all  
5 operated, sir.  
6 Q. So you said you went down to the bank  
7 to get your papers. What do you mean you went to  
8 the bank to get your papers?  
9 A. Because they held it in escrow for us.  
10 We owned -- we still owned the property.  
11 Q. So you had a purchase contract for the  
12 property he was buying. He would get the title to  
13 the property --  
14 A. When it was paid for.  
15 Q. -- when it was paid for?  
16 A. Yes.  
17 Q. When did you end up getting the  
18 property back?  
19 A. We had to evict him because he would  
20 not leave the premises after the judge gave it  
21 back to us, and it was in September of '86.  
22 Q. So you had to evict him? Did the  
23 sheriff come out and move him out?  
24 A. Yes, he did.  
25 Q. Did you have a separate lawsuit that

Page 14

1 A. Where JC lives was there.  
2 Q. Okay. Did somebody live in that one?  
3 A. The Foreman -- the Foreman we purchased  
4 from, his hired hand lived there.  
5 Q. Was the?  
6 A. The house where Clint lives, no. There  
7 was no house there. The Fuquays bought that and  
8 moved it in.  
9 Q. That was in about 1979?  
10 A. I think so.  
11 Q. It would have been at least -- so we're  
12 getting time references -- after you bought the  
13 property, but before you had sold to Steiner --  
14 I'm sorry. Not Steiner -- Zane Block, sometime  
15 between then and when you sold is when the Fuquays  
16 put that additional house in -- Clint's house  
17 where Clint currently lives on the corner; is that  
18 right?  
19 A. Yes.  
20 Q. Okay. So tell me how -- what about  
21 what we're calling King Lane? What was it called  
22 when you bought your property?  
23 A. When we bought the property, it was --  
24 it is a road so we could get to and from our  
25 fields. The only King Lane is from Oreana Loop

Page 15

1 into our premises. This is just a field road to  
2 get to and from our properties. It is not a lane.  
3 It doesn't have a name. But everybody is calling  
4 it King Lane. For the premiss of this lawsuit, we  
5 call it King Lane. But the 9-1-1 only comes into  
6 our property.  
7 Q. Okay. So tell me about -- so that  
8 we're referencing the same thing for what we're  
9 talking about, tell me what King Lane looked like  
10 when you bought your property.  
11 A. What it looked like?  
12 Q. Um-hum.  
13 A. It was a little narrow two-wheel track  
14 to go to and from because we have to go that way  
15 to get into our fields, and that's all it was used  
16 for.  
17 Q. Okay. So how far down did those tracks  
18 go? I mean, did they go all the way down to where  
19 Clint's house is now?  
20 A. It goes right where it is today. It is  
21 the same spot. It hasn't moved. That lane goes  
22 to where the fence -- the gate is because those  
23 fences are all the borderlines. When we bought  
24 the property, nobody resurveyed any land. Where  
25 we live, it was surveyed in 1894. So when they

Page 16

1 took us around to show us the borderline, and if  
2 you will look, the fence goes all the way across  
3 what's between Cal and Susie's and then it comes  
4 right here in front of Clint and JC's house. That  
5 same fence. And then it turns and goes south.  
6 Q. Okay. So the fence was there when you  
7 bought the property?  
8 A. The fence was there when we bought the  
9 property, and we were told that was the property  
10 line.  
11 Q. Were there two fences, one on either  
12 side of the road?  
13 A. There was a fence. So they had -- the  
14 fence was there so the movement of the cattle, if  
15 you wanted to bring your cattle out of the field,  
16 you moved them in. And if by chance that's what  
17 the reason for all of those fences are.  
18 Q. So maybe I -- I probably didn't ask  
19 this clearly. When you moved in, was there a  
20 fence on both sides of King Lane?  
21 A. Both sides. But the south fence, which  
22 is against the Lows', is what they called the  
23 section fence, the border fence.  
24 Q. Okay. So was it your understanding  
25 that the roadway was entirely on your property?

Page 17

1 A. Yes, we were under that understanding.  
2 But we were also told that they had -- because of  
3 the bridge to get to and from, that they were  
4 allowed to come around and come in. They have  
5 three gates in their fence so they can get into  
6 their property. So they used it in common.  
7 Nobody else.  
8 Q. And who is "they"?  
9 A. Well, at that time, it was the  
10 Steiners.  
11 Q. Okay.  
12 A. They came in and used it. But they  
13 had three gates. And if they wanted to move  
14 their cows out, then they could move them up and  
15 go out, and they didn't get into our fields and  
16 intermingle with our cows. If we needed to move  
17 our cows, they didn't intermingle with theirs.  
18 Q. Did the Steiners own their property  
19 before you bought the property?  
20 A. Yes, they did.  
21 Q. Did you ever talk with the Steiners  
22 about who owned the road?  
23 A. I had no reason to.  
24 Q. As far as where that road went, you  
25 were calling it a path, a two-lane path that went

1 between the fences. How far west did that path  
2 go? Did it stop at the gate or did it -- at the  
3 corner of where your property was or did it  
4 continue on past the Fuquays?

5 A. Well, I'm sure at one time when they  
6 had a school there, I'm sure that they probably  
7 used the wagons to go that way for the school.  
8 But that didn't make it a road, sir. And I know  
9 on one of these pictures that you have, you can  
10 even see the grass in between the tire -- where  
11 the wheel tracks go.

12 Q. So if you were to go down King Lane  
13 through your property and out, would you  
14 eventually be able to connect back up with  
15 Castle Lane and end up at the schoolhouse?

16 A. You could or you could go straight  
17 across the desert, and you can come out at Oreana.

18 Q. So what was the -- did you ever see  
19 where the Fuquays lived, Clint and JC have their  
20 houses at the end, if you follow the road out, you  
21 get to their houses. Did they use that road --  
22 sorry. Did anybody that lived there at the time  
23 use that road to -- King Lane to get to Oreana  
24 Loop?

25 A. Run that by me again.

1 Q. Sure. Well, let's narrow that down.

2 The Foreman owned the property that now  
3 belongs to the Fuquays?

4 A. Yes.

5 Q. And they lived in the house where  
6 John Fuquay lived?

7 A. Correct.

8 Q. The house where JC lives, which is up  
9 there along King Lane --

10 A. Yes.

11 Q. -- you said somebody -- the Foreman  
12 hired hand lived in that house when you bought the  
13 property?

14 A. Yes. That was Mr. Foreman that lived  
15 where we do.

16 Q. What do you mean he lives where you  
17 do?

18 A. We bought from DI Foreman. Fuquays  
19 bought from Kirby Foreman. Two different segments  
20 of properties.

21 Q. Okay. All right.

22 A. They separated out their properties,  
23 and Mr. Foreman says, "This is your lane. You own  
24 it. Nobody else has it."

25 Q. Is that -- so is that what you

1 understood when you bought the property from  
2 DI Foreman --

3 A. Correct.

4 Q. -- that you owned that lane and that  
5 nobody else had the right to use it?

6 A. I didn't say they had a right to use  
7 it. I said the neighbors, they had an agreement  
8 at the time we moved there. And at the time we  
9 moved there it was the Steiners.

10 Q. Did you ever have an agreement with the  
11 Steiners?

12 A. No, we did not. You know, there was a  
13 thing that was called an honor. Mr. Foreman told  
14 us that those people that owned that ranch had  
15 that right. So when they sold it to the Lows, it  
16 went to the Lows.

17 Q. When was the first time that you were  
18 aware that the Fuquays were using -- going up and  
19 down King Lane? When is the first time you became  
20 aware of that?

21 A. Which Fuquays?

22 Q. Well, it would have either been Jim,  
23 because he was the one that ended up buying the  
24 property, or any -- John eventually bought the  
25 property. Let's start with Jim Fuquay. When he

1 bought the property, did he ever go up and down  
2 King Lane?

3 A. Very, very seldom.

4 Q. When you say "very seldom," what does  
5 that mean?

6 A. Maybe once a week. Maybe not that  
7 often. It was closer for them. They lived where  
8 John lives. It would be closer for them to go  
9 south. That's only three-quarters of a mile. And  
10 their children caught the bus there, John, when he  
11 went to school, John and Megan.

12 Q. Okay. So let's -- hang on with me so  
13 we can track. When Jim Fuquay bought the  
14 property, they bought it from Kirby Foreman in  
15 19 -- it was 1977 when Jim bought the property?

16 A. Okay.

17 Q. And they moved into -- which house did  
18 they move into?

19 A. Where John lives.

20 Q. Where John lives? And then they  
21 brought in a couple of years later, the doublewide  
22 mobile and put that at the property where Clint  
23 now lives, right?

24 A. Correct.

25 Q. When they put that mobile home in



Page 22

1 there, who lived in that mobile home?  
2 A. Well, eventually, Jim and Wanda moved  
3 into it.  
4 Q. Okay. And when Jim and Wanda moved  
5 into that home, did they use King Lane to get to  
6 and from that house?  
7 A. From which house?  
8 Q. From the house that they put in the  
9 doublewide that Jim and Wanda put in that they  
10 moved into, did they use King Lane to get to and  
11 from that house, the one that they put in and  
12 moved into?  
13 A. How did they use it?  
14 Q. No. Did they use King Lane to get to  
15 and from their house?  
16 A. Very seldom. They went south.  
17 Q. So you're saying maybe once a week that  
18 they would use it, and otherwise they would go  
19 south?  
20 A. They went south.  
21 Q. Did you ever tell Jim and Wanda that  
22 they were not allowed to use King Lane?  
23 A. No, I did not.  
24 Q. Did you believe at the time that you  
25 had -- would have had the right to tell them that

Page 23

1 they couldn't use King Lane?  
2 A. Yes, I do.  
3 Q. Now, at some point, there were other  
4 people that lived in the house that we call JC's  
5 house, which is the one that fronts on King Lane?  
6 A. Yes.  
7 Q. And there have been a number of people  
8 that had lived in that house. And tell me who I  
9 might be missing. Dennis Jayo, Tanna Gilbert.  
10 A. Dennis Jayo would have been long before  
11 my time. I don't know about him.  
12 Q. How about when Tanna Gilbert was there?  
13 Do you recall her living there?  
14 A. I recall her living there.  
15 Q. Do you recall how she would get to and  
16 from that house?  
17 A. She came down the lane part of the  
18 time. She worked for other people. She wasn't  
19 always around.  
20 Q. So she would use King Lane to get to  
21 and from her house?  
22 A. I don't know if that was her primary,  
23 sir.  
24 Q. I'm not saying whether or not it is her  
25 primary. I'm asking if she used it.

Page 24

1 A. I saw her very seldom on the road  
2 because she was seldom ever around.  
3 Q. Did you ever tell her not to use  
4 King Lane?  
5 A. No, I did not.  
6 Q. Is it your understanding and belief  
7 that you could have told her not to use that lane  
8 and that would have been within your rights?  
9 A. Yes, I feel that.  
10 Q. Do you recall who lived in the house  
11 after Tanna Gilbert?  
12 A. No. Truthfully, I can't tell you who  
13 all lived because I had things I had to do. So  
14 that wasn't my primary concern to watch who lived  
15 where.  
16 Q. Well, you knew that there were some  
17 people living there, regardless of who it was?  
18 A. Yes.  
19 Q. Okay. And were you aware of how they  
20 were getting to and from that house?  
21 A. Well, they had both ways to go.  
22 Q. Okay.  
23 A. I don't know.  
24 Q. I understand that they could have gone  
25 both ways. My question is were you aware that

Page 25

1 they were using King Lane?  
2 A. I was aware. Periodically I saw  
3 people, yes.  
4 Q. Did you always know who they were or  
5 did you not know who they were that were living  
6 there?  
7 A. I knew who the Lows were or the --  
8 shoot. Who the Laws were. I knew Tanna; the  
9 young boy that worked at the garage. Those, I  
10 remember.  
11 Q. Was there ever anybody that lived there  
12 that you didn't know or you don't --  
13 A. Sir, I don't know.  
14 Q. Did you ever stop anybody along those  
15 going up and down saying, "Hey, who are you?  
16 Where are you going"?  
17 A. I have.  
18 Q. What --  
19 A. Let me tell you one thing before you go  
20 too far. If you're looking at the picture, if  
21 you're going to drive across our bridge and you  
22 don't know that there's a lane that goes to the  
23 left, you're going to come directly into my yard.  
24 We had that. We told people where they wanted to  
25 go. They turned around and went back. So most of

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1 the people that I would have come or if there was  
2 a hunter, as you have asked before, then they  
3 would ask.  
4 Q. Okay. So if somebody didn't know that  
5 the road took the left turn after the bridge to go  
6 out there, they would have usually ended up in  
7 your driveway?  
8 A. That's correct.  
9 Q. And then they would have either said,  
10 "Oops, sorry," turned around and left, or if they  
11 were looking for somebody they might have stopped  
12 and asked? Is that a fair statement?  
13 A. Yes. And we would have told them how  
14 they went to get there.  
15 Q. Did you ever have anybody stopped that  
16 were looking for the Fuquays?  
17 A. Yes.  
18 Q. How would you tell them to go to the  
19 Fuquays?  
20 A. We told them to go back to the highway,  
21 Oreana Road South, and that was their road.  
22 Q. I was using the term Fuquays broadly.  
23 Were they looking for John Fuquay at that time?  
24 A. I would say so.  
25 Q. Did you ever have anybody stop that was

Page 27

1 looking for Tanna Gilbert?  
2 A. No.  
3 Q. Or anyone else?  
4 A. No.  
5 Q. Do you recall -- just to make it clear,  
6 do you recall anybody stopping and asking for  
7 directions to anyone other than John Fuquay's  
8 house that would come in and stop?  
9 A. No, I do not.  
10 Q. Was there a gate at the west end of  
11 your property where the Fuquay's property is and  
12 the Lows and then yours is on the other side where  
13 the new gates have been put up. Was there a gate  
14 down at that end of the property?  
15 A. When we bought it, yes, there was.  
16 Q. Was that left open or was that closed?  
17 A. It was closed most of the time.  
18 Q. So if people were going through along  
19 that road, would they open and close the gate?  
20 A. They had to open and close the gate.  
21 That's common courtesy.  
22 Q. When Tanna Gilbert lived there, did you  
23 ever see her stop and open the gate?  
24 A. If it was closed, I'm sure she did, and  
25 she would have closed it if they went through.

Page 28

1 Q. How about the Laws?  
2 A. They would have did the same.  
3 Q. So when we're talking King Lane, you  
4 said that it was mostly a path, a two-wheel  
5 path --  
6 A. Yes.  
7 Q. -- that went out that way. Who  
8 improved it and made it into the type of gravel  
9 road it is now?  
10 A. My husband and I did, our boys.  
11 Q. Tell me about when that was.  
12 A. Well, when we first moved there, we had  
13 to do different things to it. It is alkali  
14 ground. When alkali gets wet, you sink. And it  
15 had to be very firm. So we hauled big rocks and  
16 put on it. I can't tell you all of the years that  
17 we did what we did, but we made the road to what  
18 it is today. And that was so we could take our  
19 feed in to feed the cattle, so we could irrigate,  
20 so we could take our equipment back and forth.  
21 All of our individual fields are individually  
22 fenced, and they've all got gates.  
23 Q. Did anyone else assist in the road  
24 improvements that you were doing? You and your  
25 husband and your children. Did anybody else

Page 29

1 help?  
2 A. No.  
3 Q. When do you recall the -- let me back  
4 up. Do you recall when Jim Fuquay moved into the  
5 house that Clint now lives in, the doublewide?  
6 A. Um-hum.  
7 Q. Do you recall when he moved in there?  
8 A. I do not.  
9 Q. Do you know when -- and, again, going  
10 back. Do you recall if when he moved into that  
11 house, John lived in the other house where John  
12 currently lives? I'm just trying to get a gauge  
13 on how people moved around.  
14 A. You know, sir, John didn't always live  
15 on that property. And when -- I don't know when  
16 he moved into that house to live there for his  
17 own.  
18 Q. Okay. Do you remember when Nate Moore  
19 lived out there?  
20 A. I know he lived there, but I can't tell  
21 you when he lived there.  
22 Q. Do you remember which house he lived  
23 in?  
24 A. The little tiny one where JC lives.  
25 Q. Where JC lives now?

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1 A. That was the only house that anybody  
2 lived in that was not Fuquay.  
3 Q. That would have been used more like a  
4 rental house?  
5 A. It sat vacant a great deal of the time.  
6 Q. And when Nate lived in that house, how  
7 did he get to and from that house?  
8 A. He would have probably went down our  
9 lane.  
10 Q. And you were aware that he was going up  
11 and down?  
12 A. Yes.  
13 Q. And how often would he go up and down?  
14 A. He went to work in the morning, and he  
15 came home in the evening. That was the extent.  
16 He didn't run up and down back and forth.  
17 Q. Do you remember how many years that  
18 would have been?  
19 A. Oh, maybe a couple of months.  
20 Q. And again, same thing, is that you  
21 never told Nate that he wasn't able to use that,  
22 the road to get up and back from the house?  
23 A. No, I did not.  
24 Q. But, again, you understood that you  
25 could have if you had wanted to?

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1 A. Yes, I do. Yes, I do.  
2 Q. When was the first time that you  
3 remember seeing John -- let me back up.  
4 Do you ever remember seeing John Fuquay  
5 using King Lane to get to and from any of the  
6 properties?  
7 A. Yes.  
8 Q. Do you recall when you first would have  
9 seen him doing that?  
10 A. No, sir, I do not.  
11 Q. Was he -- did you ever stop him and  
12 say, "You've got to go use your other road"?  
13 A. No, I did not.  
14 Q. But it is your understanding and belief  
15 that you could have if you had wanted to at that  
16 time?  
17 A. If we hadn't have been neighbors -- if  
18 we hadn't have been nice neighbors to them, we  
19 could have, yes.  
20 Q. Did you ever give him any permission,  
21 say, "Hey, you're supposed to use the other road,  
22 but it is okay if you use this one"?  
23 A. Never said anything to him.  
24 Q. Did John Fuquay ever drive big trucks  
25 that you recall -- and I'm talking either semi

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1 trucks or cattle trucks or things like that -- up  
2 and down King Lane?  
3 A. Maybe once or twice. I don't recall  
4 him very seldom on our lane. And I know that  
5 until Block moved there, we got it back, I know  
6 that they didn't.  
7 Q. Okay.  
8 A. Or if they did, I don't know how they  
9 maneuvered it.  
10 Q. When Zane Block owned the property and  
11 lived there, did he make any improvements to the  
12 road, to King Lane?  
13 A. Not that was visible.  
14 Q. So would you say that King Lane then  
15 has been in its current state since you -- since  
16 before Zane Block, as far as the condition that it  
17 is in now?  
18 A. Yes.  
19 Q. Do you recall when Clint Fuquay moved  
20 into his house?  
21 A. About the time he and Haley got  
22 married, I would say.  
23 Q. Do you know how long ago that was?  
24 A. Maybe 2008, '9. I don't know.  
25 Somewhere in through there.

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1 Q. Did Clint and Haley use King Lane to  
2 access and get to and from their property?  
3 A. Some.  
4 Q. Okay. When you say "some," tell me  
5 what that means.  
6 A. Well, I'm sure they went the other way,  
7 too, or they should have. I don't know. They  
8 went sometimes.  
9 Q. Okay. So, again, I'm not really --  
10 whether they could have gone the other way is --  
11 A. Is irrelevant to you.  
12 Q. Right. My question is did they go  
13 through and use King Lane from the time that  
14 they moved in -- Clint and Haley moved into that  
15 house?  
16 A. I can't answer that.  
17 Q. Do you recall ever stopping them or  
18 saying, "Hey, stop coming up and down the road"?  
19 A. No.  
20 Q. Is it fair to say that you never did  
21 that to any of the Fuquays or anybody that was  
22 living on those properties?  
23 A. I think that would be a fair  
24 assessment.  
25 Q. I don't want to have to keep asking

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1 specifically like that. If that's a fair --  
2 A. That's a fair statement.  
3 Q. Okay. And it is also a fair statement  
4 that you believed that you could have told anybody  
5 at any time to stop using that road if you had  
6 wanted to do that?  
7 A. Probably. I don't know. I don't  
8 know. I think so. We were trying to be neighbors  
9 to the Fuquays.  
10 Q. How long did it take for you to put the  
11 gravel and rock down on the road on King Lane as  
12 it is now?  
13 A. It took years.  
14 Q. So was it -- if you -- was it a gradual  
15 improvement?  
16 A. It is alkali soil. When alkali gets  
17 wet, it eats. So those rocks and things  
18 disappear. Now then, we have put big rocks in the  
19 road, so we have built a base now that we are  
20 pretty firm. But we still have to keep  
21 maintaining it every year when there's a wet spot.  
22 If the neighbor's ditch runs over on us or if the  
23 sub gets out, it gets wet and it goes down. You  
24 have to keep doing it. It is a never-ending job.  
25 But we have to use it daily, so we have to

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1 maintain it so we can get to and from our fields.  
2 Q. If you had known that the road was  
3 actually on the Steiners' property, would you have  
4 actually done anything differently?  
5 MR. RAINEY: Objection to the form of the  
6 question because it calls for pure speculation,  
7 first of all. And, secondly, we don't know who  
8 owns the road at this point. We don't agree with  
9 your survey.  
10 Q. Okay. Well, let's take it this way  
11 then. You believed that you owned the property  
12 over which the road run?  
13 A. Correct.  
14 Q. Was it your belief you owned all of the  
15 road and all of the property from Oreana Loop all  
16 the way to the west of your property?  
17 A. Yes.  
18 Q. And was it your belief that that was  
19 entirely -- that the road was entirely on your  
20 property?  
21 A. Yes.  
22 Q. Did -- were there ever any  
23 conversations between you and the Steiners about  
24 the Steiners believing the road was on their  
25 property?

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1 A. No.  
2 Q. If you had discovered that the road was  
3 on the Steiners property instead of your property,  
4 would you have still done all of the improvements  
5 that you did to the road for your own maintenance  
6 and access?  
7 MR. RAINEY: Counsel, your question still  
8 calls for pure speculation. I don't know that the  
9 witness can answer that.  
10 Q. BY MR. CLEVERLEY: Well, if she can  
11 answer it. You either would have or wouldn't  
12 have, I'm guessing?  
13 A. I cannot answer that for you.  
14 Q. Okay. You indicated that you believed  
15 that the section fence was the fence on the south  
16 side of the road, and that you owned up to that  
17 section fence. Was there a map or something that  
18 you saw that made you believe that that was the  
19 section fence?  
20 A. No. That was just what the Foremans  
21 had bought when they bought it in 1894. That's  
22 where the fence was, and that's what their old  
23 survey or however they bought it.  
24 Q. Did you ever see that?  
25 A. No, I did not see that, sir.

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1 Q. Okay. Then how -- I'm wondering how  
2 you came to the belief that that was where the  
3 section fence was?  
4 A. The Foremans told us, sir. That's how  
5 I came to that belief. When they sold it us to,  
6 that's where they sold it to.  
7 Q. So it was your belief that you were  
8 buying -- when you bought that, you were buying  
9 the road, as well as both fences on -- the fences  
10 on both sides of the road?  
11 A. Correct, sir.  
12 Q. When you moved to California after  
13 Mr. Block bought the property, how often did you  
14 come back to Idaho and go over to see the  
15 property?  
16 A. We were probably back to Idaho,  
17 probably, monthly. At least, every two months.  
18 Q. Okay. And did you go over to see  
19 Block?  
20 A. No, we did not go see Mr. Block, but we  
21 went to observe.  
22 Q. When you say you went to "observe,"  
23 what does that mean?  
24 A. We drove around so we could see what  
25 was happening on the premises.

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1 Q. You drove around -- tell me where you  
2 would drive. Just drive in through the barn or  
3 you'd go down the lane?  
4 A. We would go down the lane and look.  
5 Q. So would you go all the way back out  
6 Castle Lane, as well?  
7 A. No, we didn't go back out Castle Lane.  
8 We came out through the ranch.  
9 Q. What did you observe when you were  
10 observing to see how things were being handled or  
11 what he was doing to the property?  
12 A. It wasn't good.  
13 Q. Okay. Tell me what you saw or why you  
14 think it wasn't good.  
15 A. Well, when you have weeds that are  
16 3 feet tall and you don't see things that are  
17 going like they should, they are tearing up  
18 things, taking out -- it just wasn't -- he was not  
19 trying to maintain it good.  
20 Q. You were, I guess, concerned because  
21 you were concerned that you might end up getting  
22 it back in worse condition or he was not going to  
23 maintain it?  
24 A. Yes, we were concerned he was not  
25 maintaining it.

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1 Q. Did you ever talk with him about  
2 that?  
3 A. No, we did not.  
4 Q. Could -- when you were driving down the  
5 road, could you tell that anybody else had been up  
6 and down the road, on King Lane?  
7 A. Well, that's hard to say, sir.  
8 Q. Was it -- was there any track marks or  
9 anything like that that would show people had been  
10 up and down the road?  
11 A. I don't -- I don't understand your  
12 phrasing of that.  
13 Q. All right. We're talking about  
14 King Lane when Zane Block was buying it.  
15 A. If I drive down and you drive down  
16 tomorrow, am I supposed to see your tracks?  
17 Q. Well, my question was could you tell  
18 whether or not anybody had been using the road?  
19 Did it look like it was in use?  
20 A. Well, somebody had been using it.  
21 Q. Okay. But if there's a -- you don't  
22 know who was using the road during that time?  
23 A. No, I do not know.  
24 Q. Okay. It could have been the Fuquays,  
25 right?

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1 A. I don't know who was using the road,  
2 sir.  
3 Q. When Mr. Block was buying the property,  
4 did you believe that you still had the right to  
5 control who could or could not use King Lane?  
6 A. We didn't try to do that.  
7 Q. Okay. Was it your belief that you  
8 still had that right to?  
9 A. No. But I had the right to observe  
10 what was going on.  
11 Q. Okay. So when Mr. Block was there, you  
12 couldn't have come in and put gates up and said,  
13 "Well, you're just buying the property. We're  
14 going to put gates up and control who comes  
15 through"?  
16 A. No, I could not have done that.  
17 Q. When you moved back onto the property  
18 after evicting Mr. Block and after getting the  
19 ownership back, that was in 1986?  
20 A. Yes.  
21 Q. All right. Did you make any  
22 improvements to King Lane after that point, other  
23 than -- let me -- from 1986 forward, did you make  
24 any improvements to the King Lane road?  
25 A. Yes, we did.

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1 Q. Okay. What were those improvements  
2 that you made?  
3 A. That's when we put in the new culvert  
4 across the ditch, across the lane, as you're  
5 calling it. And that's when we hauled in more  
6 rocks, made it a harder surface.  
7 Q. Okay. And after you had done those  
8 improvements, did you ever see the Fuquays using  
9 the road after you had done those other  
10 improvements? Did you see anybody to and from the  
11 Fuquay property over King Lane after you had --  
12 between '86 and 1987, in that first year you were  
13 back?  
14 A. I don't know how to put that first year  
15 we were back. We got the property back. Mr. King  
16 and I sent Gil and our daughter and husband to  
17 stay up on that ranch. We continued on the other  
18 ranch coming back monthly. Mr. King and I did not  
19 move back until '88, our personal self, but we had  
20 our home that we came up and stayed there and we  
21 did things while we were there.  
22 Q. So you moved back permanently in 1988?  
23 A. Yes. But our children came before us.  
24 We sent them on up.  
25 Q. Okay. So they would have lived there

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1 Q. You've never seen any delivery drivers  
2 using King Lane, FedEx, UPS, Post Office dropping  
3 off any mail packages to anybody that lived in  
4 Clint or JC's houses?  
5 A. No. The only time that I ever saw, the  
6 Schwan's asked me one day, he said, "The gate is  
7 locked. I can't go up." I said, "You can go this  
8 time, but don't go anymore. They'll have to  
9 unlock their gate if they want it."  
10 So, no, they didn't come our way. The  
11 FedEx man did stop several times and ask how we  
12 got there, and we directed them to go around the  
13 way they were supposed to. And I believe you  
14 have some affidavits showing that from those  
15 people.  
16 Q. Do you have any agreements with the  
17 Lows about the use of the King Lane?  
18 A. No, we do not. We just honored what  
19 Mr. Foreman told us.  
20 Q. Is King Lane impassable certain times  
21 of the year?  
22 A. The lane was impassable until we fixed  
23 it.  
24 Q. In 19 -- in the 1970s or 1980s?  
25 A. Yes. 1989.

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1 Q. So the statement -- I'm looking in your  
2 affidavit that says, "This use has been casual use  
3 on occasion as a matter of convenience. This is  
4 because, among other things as mentioned above,  
5 King Lane is, in fact, impassable during certain  
6 times of the year and cannot be used because it  
7 becomes too muddy." Is that true?  
8 A. That is very true. The ditches -- we  
9 now have a cement ditch. Our well runs 24 hours a  
10 day, 365 days a year. And when you have a dirt  
11 ditch, water is always subbing. I don't know if  
12 you're familiar with things like that. But the  
13 Steiners, the Lows also had irrigation ditches  
14 that are dirt. There's times in our yard the  
15 water would get so high, and we would ask them if  
16 they would turn off their water if they weren't  
17 irrigating so it would go down.  
18 So that road is that way. It is so  
19 wet. It mires down. So we keep building up that  
20 base, and we have to do that. That's the only way  
21 we can get back and forth.  
22 Q. When was the last time that the road  
23 was impassable?  
24 A. Well, I think the neighbors water got  
25 out of control and came running down the ditch,

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1 and it took a number of days -- or coming down the  
2 road. It took a number of days before it dried  
3 out enough it was good again.  
4 Q. Other than that time, when was it  
5 impassable?  
6 A. Periodically during the year. Like I  
7 was telling you, when the water is in -- the Lows  
8 now have put in pivots. So they don't have that  
9 ditch. So that ditch is no longer there. So that  
10 water isn't there 24 hours a day.  
11 (Cell phone ringing.)  
12 MR. CLEVERLEY: We'll take a pause while  
13 your attorney steps out.  
14 (Recess taken.)  
15 Q. BY MR. CLEVERLEY: Before our break,  
16 you were telling me -- we were talking about when  
17 the road is impassable. And you told me there was  
18 a time when the neighbor's ditch had overflowed  
19 and had come down and made the road impassable,  
20 and then you were going to tell me when else the  
21 King Lane has been impassable.  
22 A. Well, if -- it doesn't happen very  
23 often. But if we get a downpour of rain, then it  
24 goes back. Like I said, it is a marshmallow, and  
25 it all sinks down.

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1 Q. How long does it take to dry out?  
2 A. Well, it depends on how wet it gets.  
3 Q. A day?  
4 A. Oh, no. It will take several days.  
5 And we have -- like I say, we have alkali. So if  
6 you look, at times, you'll look at it and you  
7 think it's snowed and it looks like there's salt  
8 out there because that's what alkali is.  
9 Q. If there was a bad downpour, maybe a  
10 few days for it to dry out that it would become  
11 impassable?  
12 A. Yes. It would take a few days to a  
13 week. But as long as we stay right on the road,  
14 we can keep the base. But it is a work in  
15 progress.  
16 Q. How often does that happen where it  
17 becomes impassable like that that you wouldn't be  
18 able to use it for a few days or a week?  
19 A. Well, there again, it is going to be  
20 determined by the weather and if the ditch  
21 overflows or something. I can't tell you. I  
22 can't be specific like you want.  
23 Q. Okay. Well, can you tell me when in  
24 the last year it was impassable?  
25 A. I don't think we've had a problem this

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

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JOHN E. FUQUAY; CLINTON WARD FUQUAY :  
and HAILEY ROSE FUQUAY, :  
:  
Plaintiffs, :  
:  
vs. :  
:  
SUSIE LOW; CAL LOW; HEART K RANCH :  
TRUST UTA DECEMBER 28, 2012; AVCO :  
FINANCIAL SERVICES OF IDAHO FALLS, :  
INC.; GORDON G. KING; ROSE M. KING; :  
FIRST AMERICAN TITLE INSURANCE :  
COMPANY, :  
:  
Defendants. :  
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Case No. CV-14-0278

**FILED**  
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Deputy Clerk

DEPOSITION OF GILBERT KING  
May 11, 2015  
  
VOLUME 1  
Pages 1 - 98  
  
Reported by  
Brooke R. Bohr  
CSR No. 753

Job No. CS2066702

Page 2

1 DEPOSITION OF GILBERT KING, taken at the  
 2 instance of the Plaintiffs, at the Holiday Inn  
 3 Express, 4104 E. Flamingo Avenue, Conference Room,  
 4 in the City of Nampa, State of Idaho, commencing  
 5 at 9:07 a.m., on May 11, 2015, before Brooke R.  
 6 Bohr, CSR, RPR, a Notary Public in and for the  
 7 State of Idaho, pursuant to notice, and in  
 8 accordance with the Idaho Rules of Civil  
 9 Procedure.  
 10  
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 12  
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1 WITNESS  
 2  
 3 GILBERT KING Page:  
 4 Examination by Mr. Cleverley 4  
 5 Examination by Mr. Farris 83  
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 9 EXHIBITS  
 10 Page:  
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 12 10 Exhibit Map 58  
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 24  
 25

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1 NAMPA, IDAHO  
 2 May 11, 2015, 9:07 a.m.  
 3  
 4 GILBERT KING,  
 5 produced as a witness at the instance of the  
 6 Plaintiffs, having been first duly sworn, was  
 7 examined and testified as follows:  
 8  
 9 (Exhibit Nos. 3 through 8 marked.)  
 10  
 11 EXAMINATION  
 12 BY MR. CLEVERLEY:  
 13 Q. Could you please state and spell your  
 14 full name.  
 15 A. Gilbert Gene King.  
 16 Q. And what's your address, please.  
 17 A. 19100 King Lane.  
 18 Q. In Oreana?  
 19 A. Oreana.  
 20 Q. And you are here as the trustee of the  
 21 Heart K Ranch Trust; is that correct?  
 22 A. Yes.  
 23 Q. Okay. How long have you been the  
 24 trustee for that trust?  
 25 A. Two years.

Page 5

1 Q. Do you have any ownership in any of the  
 2 properties that we're talking about and have been  
 3 involved in litigation as an individual or are you  
 4 just through the trust?  
 5 A. Just through the trust.  
 6 (Exhibit No. 20 marked.)  
 7 Q. BY MR. CLEVERLEY: I'll hand you  
 8 what's we've marked as Exhibit 20. From that, can  
 9 you tell me or show which property is owned by  
 10 Heart K Ranch?  
 11 A. Okay. I can show you right here.  
 12 Q. You can go ahead and draw on that, if  
 13 that helps. I just want to make sure we know  
 14 exactly which ones are which.  
 15 A. Just outline it for you?  
 16 Q. Sure. That's fine.  
 17 A. (Indicating.)  
 18 Can you see that? It is this in here,  
 19 and it continues on.  
 20 Q. It continues to the north?  
 21 A. Yes.  
 22 Q. Okay. So the -- there are a couple of  
 23 small squares of property inside there. Does the  
 24 trust own those or is that Rose's property and  
 25 someone else's property?



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1 Q. Do you know when this road became  
2 called King Lane?  
3 A. Ever since I was a little boy. I don't  
4 know. That's just what we referred to it as  
5 there, King Lane.  
6 Q. Did it ever have a -- was it always  
7 called King Lane or was it part of Castle Lane or  
8 what was it?  
9 A. It was never part of Castle Lane that I  
10 knew of.  
11 Q. So let's talk about King Lane. And  
12 we'll just talk about the road there that you're  
13 considering King Lane. How long has that been  
14 there?  
15 A. It was there when we moved there in  
16 '74, as far as I know. It was a lane, you know,  
17 which -- it was a lane, not necessarily that there  
18 was a road in the lane, but there was a fence on  
19 each side and a way up the middle. And then my  
20 folks gravelled it in, probably, '80.  
21 Q. Okay. What was -- I don't know if  
22 you're old enough to remember what it was like  
23 then. Was it --  
24 A. It was -- well, I remember in the  
25 wintertime, it would get pretty sloppy. My

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1 brother lived in the house where JC lives, and he  
2 had a two-wheel-drive pickup. And it was bad  
3 enough that he couldn't get back and forth at  
4 times in the winter because of the ruts where it  
5 is alkali, you know. That was the reason for  
6 graveling it there in '80 in the summertime.  
7 Q. Which brother was that?  
8 A. Greg.  
9 Q. How long did he live in that house?  
10 A. It was from the time he got married  
11 until -- like three years, I think. '79 to '82 or  
12 so. Something like that.  
13 Q. Okay. And when he lived there, how  
14 would he get back and forth to his house or to  
15 where he was living?  
16 A. Oh, just, you know, on the dirt road  
17 there in the lane.  
18 Q. He would go up and down King Lane to  
19 get to the house?  
20 A. Um-hum.  
21 Q. Do you know who else lived in that  
22 house over the years?  
23 A. Some people by the name of Laws lived  
24 there. Tanna Gilbert lived there. Nate Moore.  
25 Somebody else.

Page 20

1 Q. Dennis Trayo?  
2 A. I don't remember. He was before my  
3 time. But I know John lived there for a period of  
4 time when they got divorced.  
5 Q. John Fuquay?  
6 A. Um-hum.  
7 Q. Okay. And when those people lived in  
8 that house, how would they get back and forth to  
9 the house?  
10 A. Down the lane there part of the time.  
11 Q. So they would go -- this Exhibit 5  
12 doesn't show it, but let me see it. All right.  
13 So Exhibit 3, you had marked where the gate is.  
14 JC's house is just west of where the gate is  
15 now?  
16 A. Yes.  
17 Q. There? So the -- whoever lived in  
18 the house would come out King Lane past the --  
19 down the lane past the houses out to Oreana Loop  
20 Road?  
21 A. Yes.  
22 Q. Are there utility lines that run along  
23 King Lane?  
24 A. Yes.  
25 Q. Do you know where they go?

Page 21

1 A. Well, somewhere in here, right about  
2 where this white dirt is, one takes off through  
3 the field.  
4 Q. North?  
5 A. North, yeah.  
6 Q. Okay.  
7 A. And the rest of it continues up here.  
8 (Indicating.) I don't know if it stops at Clint's  
9 house or if it -- I don't know where it goes from  
10 Clint's.  
11 Q. Okay. What's the condition of  
12 King Lane now? What's its road surface? Can  
13 you describe how wide it is and what it is like  
14 now?  
15 A. Oh, it is probably 10-, 12-foot wide of  
16 gravel.  
17 Q. Has it had more than just gravel? Has  
18 it had a road base put down under it and gravel on  
19 it?  
20 A. No. It is just pit run.  
21 Q. Who's been maintaining that road?  
22 A. Kings.  
23 Q. Has anybody else ever helped maintain  
24 that road?  
25 A. JC brought a road grader down once that

1 I know of.  
 2 Q. Do you know why he would do that?  
 3 A. No. To make it hard for us to mow the  
 4 weeds along there. I don't know why he brought  
 5 it.  
 6 Q. Did it help improve the road or did it  
 7 make the road --  
 8 A. No.  
 9 Q. It didn't help improve the road at  
 10 all?  
 11 A. Not from my point of view.  
 12 Q. Okay. What about any other gravel or  
 13 things like that? Anybody else contribute to  
 14 gravel or anything else along the road?  
 15 A. JC got from hay from me once. And  
 16 instead of reimbursing me for the hay, I had him  
 17 bring me a load of gravel. It would have been on  
 18 the east end of the lane between the bridge and  
 19 the highway.  
 20 Q. Did anybody else ever add gravel or do  
 21 anything else besides that?  
 22 A. No.  
 23 Q. Now, down at the east end of King  
 24 Lane -- I'm going to show you Exhibit 4. And  
 25 these numbers are the same ones that we had. On

1 Exhibit 4, were there any other gates or any other  
 2 fences that would have crossed the road anywhere  
 3 between -- that is shown on that portion of the  
 4 map?  
 5 A. Yeah. There's a gate right here.  
 6 (Indicating.) Do you want me to draw on this?  
 7 Q. Sure. Go ahead.  
 8 A. (Indicating.)  
 9 Q. Okay. So you put an X on the roadway  
 10 just to the west of the buildings there. What  
 11 type of a gate is that?  
 12 A. That's a wire gate.  
 13 Q. What's the purpose of that wire gate?  
 14 A. To keep the cows from coming down by  
 15 the creek when I didn't -- because there's another  
 16 fence right here. You can't quite -- your picture  
 17 doesn't go far enough. There's another gate here,  
 18 and we fenced this off. And if we'd ate this off  
 19 already, and we don't want the cows coming down  
 20 here. So this just closed it off. So they are  
 21 just locked in this portion of the lane.  
 22 (Indicating.)  
 23 Q. Okay. How often does that happen?  
 24 A. Every year we do it. We eat it off.  
 25 We keep the grass and the weeds ate down.

1 Q. How long does that take to have the  
 2 cattle eat the grass off?  
 3 A. It depends on what kind of season it  
 4 is, how wet the season it is, and how many cattle  
 5 are put on it for the given time, you know.  
 6 Q. Okay.  
 7 A. So it could be from two weeks to two  
 8 months. And then part of the year the lane is  
 9 used for a water gap to water cattle out of  
 10 Lows' property because the last several years  
 11 the creek hasn't had any water in it for the cows  
 12 to drink, and the artesian well runs down the  
 13 ditch that parallels the lane. So the cattle had  
 14 to come off their property into the lane to get a  
 15 drink. So, you know, it's been -- shoot, the last  
 16 few years, it's been, you know, up to six months  
 17 at a time it's been closed up.  
 18 Q. If someone were to go down the road,  
 19 were those gates able to be open and passed  
 20 through?  
 21 A. Oh, yeah.  
 22 Q. Okay. Now, is it your understanding  
 23 that the King Lane is on Heart K Ranch property or  
 24 is on the Lows' property?  
 25 A. It could be on both up through there.

1 I don't know. It is on one or the other.  
 2 Q. Is it anything that's ever been --  
 3 was ever discussed with the Steiners or anybody  
 4 else about whose property the road actually is  
 5 on?  
 6 A. No.  
 7 Q. Everybody has just used it?  
 8 A. Yeah. Well, rephrase that. How  
 9 everybody has just used it?  
 10 Q. Well, I guess -- let me be a little  
 11 bit, just kind of an offhand comment. Has  
 12 anybody, to your knowledge, ever had a survey or  
 13 investigation to determine whose property the road  
 14 actually goes on?  
 15 A. To my knowledge, no.  
 16 Q. So I guess when it was -- when it's  
 17 been built and maintained, you haven't been  
 18 concerned about whose property that it's been on,  
 19 as long as it has just been maintained and you've  
 20 had it available for access; is that fair?  
 21 A. It is either on -- it was either  
 22 Steiners' or Kings' property or Lows' or Kings'  
 23 property, one or the other, and we both use it in  
 24 common. So...  
 25 Q. Were there ever any -- to your

1 knowledge, ever any discussions between the Kings  
2 and the Steiners or anybody that owned the  
3 property prior to the Steiners? I guess the  
4 Steiners have owned the property for a long time.  
5 Ever any discussion about whose property the road  
6 was on or anything like that? Ever any  
7 discussions that you're aware of?

8 A. No.

9 Q. So what's at the west end of -- if  
10 you're going to be -- let me back up.

11 What types of things do you use,  
12 say, you in general, the Kings, use that roadway  
13 for? Where do you go if you're going down that  
14 road?

15 A. To the irrigation well. What do we  
16 use? Is that your question? Tractors, hay  
17 trailers, trucks, any field equipment.

18 Q. Do you have any reason to go past the  
19 gate that is on the west end of King Lane now?

20 A. Yeah. Our well water comes from right  
21 here, from this pond.

22 Q. Okay.

23 A. So we go up there, and we check it.

24 Q. Is that well on your property or is it  
25 on BLM property?

1 A. It is on BLM.

2 Q. Take a look at Exhibit 6, which shows  
3 JC's house and Clint's house.

4 A. Okay.

5 Q. And then the fence would be -- the gate  
6 would be over here, somewhere right around in  
7 here?

8 A. Um-hum.

9 Q. Where would you go once you came down  
10 around this way?

11 A. Right -- that well is right here.  
12 Right here is where I go to. There's a number of  
13 ways you can go. You can go up the road here.  
14 You can go up the ditch, in the upper ditch here.  
15 (Indicating.)

16 Q. What's the primary route that you would  
17 take?

18 A. On my motorcycle, probably right up the  
19 ditch. In a vehicle, right up this lane, this  
20 road here. (Indicating.)

21 Q. I'm looking at the overhead. It looks  
22 like there's some well-used roads coming north off  
23 of Castle Lane at the corner of the Fuquay  
24 property.

25 A. Yeah. There's no vegetation at all

1 hardly in this country. So a rabbit trail shows  
2 up forever, you know.

3 Q. Do you drive cattle trucks with cattle  
4 in over there? Do you take the cattle trucks out  
5 over to that well?

6 A. No loaded trucks. We go up there and  
7 wash out periodically.

8 Q. So who else -- we were talking about  
9 people that have lived in the house that JC lives  
10 in now that have used that road. You mentioned  
11 the Laws and Tanna Gilbert and Nate Moore and  
12 John Fuquay. Would anybody else go up there  
13 besides those people? Would you have, I don't  
14 know, hunters? Would you have BLM people going  
15 through over there? Was it pretty much just who  
16 lives there that would be going out there?

17 A. Pretty much just the people that live  
18 there, as far as I can remember.

19 Q. And there's nowhere else that this --  
20 that the roads go to, other than the houses and  
21 the BLM property? There's no businesses or  
22 destinations out there that anybody would go to?

23 A. No.

24 Q. Again, that's not a trick question?

25 A. No.

1 Q. If there was something out --

2 A. No, there's nothing out there.

3 Q. I saw you kind of getting worried about  
4 it. It is not a trick question. I just want to  
5 know if there's any other reason why anybody would  
6 come down the roads, other than, assumably, they  
7 would be the people that live there. There's no  
8 grocery store, you know, anything else that anyone  
9 would have a reason to go out there?

10 A. (Witness shakes head.)

11 Q. You're shaking your head no?

12 A. No.

13 Q. What about UPS or FedEx? Have you ever  
14 seen them go down the road?

15 A. No.

16 Q. Down King Lane?

17 A. (Witness shakes head.)

18 Q. No? Do you recall the Fuquays ever  
19 having a mailbox at the end of King Lane near  
20 Oreana Loop Road?

21 A. Yeah.

22 (Exhibit No. 21 marked.)

23 Q. BY MR. CLEVERLEY: I'll show you  
24 Exhibit 21 which is an aerial view of where Oreana  
25 Loop curves off into King Lane. Can you indicate

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1 Q. BY MR. CLEVERLEY: So you previously  
2 submitted an affidavit in this case, a couple of  
3 them. You said that it was not until sometime in  
4 2011 that the Fuquay plaintiffs began any use of  
5 King Lane by large semi trucks. Is that true?  
6 A. Yeah. Any use that was, you know,  
7 noticeable. Like I told you earlier, when John  
8 lived where JC does, you know, he took his truck  
9 up there periodically. And then he moved back to  
10 the other house, and there was no use to speak of.  
11 Q. So I don't want to put too fine of a  
12 point on it. But there was use, it was just not  
13 as noticeable as what you're saying in 2011?  
14 A. Well, it was just -- the only time I  
15 remember is when he lived in that little house  
16 where JC does. And then when Karen moved off and  
17 he moved back to the other house, I don't remember  
18 anymore truck use until those kids started doing a  
19 little trucking around here and there.  
20 Q. How much use are you seeing Clint and  
21 JC use? Do they have a lot of trucks?  
22 A. They each had a truck for a period  
23 there. It is just seasonal use, you know. It  
24 was.  
25 Q. Would they be going up and down all the

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1 time or was it just out and then you might see  
2 them come back in a week or two later? What was  
3 the type of --  
4 A. Yeah. It would be out, do their work  
5 and then back. They didn't truck up and down the  
6 lane, you know. It was seasonal work, it seemed  
7 like.  
8 Q. When you say "semi truck," what type of  
9 trucks were they? What type of trucks do you see  
10 them using?  
11 A. They have a ten-wheeler truck, and then  
12 the trailer is -- they borrow different trailers  
13 around from people. I seen them go by with a  
14 belly dump. That was pretty much it. Dirt  
15 trailers that I remember.  
16 Q. Do you recall whether or not you would  
17 see them trucking their cattle in and out?  
18 A. No.  
19 Q. You don't recall or, no, you didn't see  
20 them?  
21 A. No.  
22 Q. What about the cement block that you  
23 placed by the bridge?  
24 A. It is right here in this picture.  
25 It was just to keep people from running off the

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1 edge of the bridge. They were getting careless  
2 coming around there, and it was keeping -- so they  
3 got straight before they tried to cross the  
4 bridge, to prevent from breaking the corners off  
5 the bridge.  
6 Q. Did that block impede anybody's use of  
7 the bridge or did it make your corner wider so you  
8 hit straight before you hit the bridge?  
9 A. Make sure you're correct before you go  
10 across.  
11 Q. So in your declaration you said, "I  
12 had a large cement block placed at or near the  
13 location of the bridge over Castle Creek in any  
14 attempt eliminate this use of King Lane by the  
15 Fuquays which was contributing to the damage to  
16 the bridge." Were they contributing damage to the  
17 bridge?  
18 A. They -- it hadn't, but it would. If  
19 the use continued, it would.  
20 Q. Okay. So up until then, there hadn't  
21 been any damage to the bridge?  
22 A. I guess it is preventative.  
23 Q. Okay. So you put the block there to --  
24 A. There's no broken boards on the bridge  
25 yet.

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1 Q. Okay. All right. And at the time that  
2 you put that there, there wasn't any damage? You  
3 were doing it as preventative?  
4 A. There was tire tracks, you know. I  
5 could see what was going to happen.  
6 Q. Did you ever have to make any repairs  
7 to the bridge because of truck use or anything  
8 else?  
9 A. No. I put out some -- a cement wall on  
10 this other side to keep the bank from eroding  
11 away.  
12 Q. Did you ever see anybody bring any  
13 loaded trucks in that way over the bridge?  
14 A. I did not. But to my understanding,  
15 there were -- somebody brought a loaded log truck  
16 over there, but I wasn't home at the time.  
17 Q. Was that one of the Fuquays that did  
18 that?  
19 A. I think one of them -- one of the  
20 Fuquays was a passenger in the truck, I believe.  
21 I don't know. I wasn't home.  
22 Q. Any other -- was there any damage that  
23 the Fuquays ever caused to the bridge that you  
24 recall, aside from your preventative wanting to be  
25 sure? Did they ever cause any damage to the

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1 it during the week and drive home in a car on the  
2 weekends or time off, you know. So it varied.  
3 From time to time, it would be daily, you know.  
4 And then if they went somewhere else and worked,  
5 it wouldn't be.  
6 Q. All right. That helps me understand.  
7 Oh, let me have just a minute here.  
8 Let me ask you about this one. Take a look at  
9 that exhibit. Do you recognize what that is?  
10 A. Yes.  
11 Q. What is that?  
12 A. It is the west end of King Lane.  
13 Q. Okay. Is that the gate that you put at  
14 the west end?  
15 A. Yeah, the gate and the new fence.  
16 Q. Okay. And there's a chain that goes  
17 around the top rail of that fence, it looks like.  
18 Is that --  
19 A. Yes.  
20 Q. Is that a fence to lock the gate?  
21 MR. FARRIS: Chain.  
22 Q. BY MR. CLEVERLEY: I'm sorry. The  
23 chain.  
24 A. Yeah. I believe it is not locked on  
25 the gate right there. It is just a chain laying

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1 around the pipe.  
2 Q. Okay. Is that chain currently used to  
3 lock that gate and prevent it from being opened?  
4 A. There's a chain around it. I assume it  
5 is probably that one.  
6 That looks nice, that white fence metal  
7 gate. I wish they would have got a picture more  
8 to the south.  
9 MR. CLEVERLEY: Let's go off the record.  
10 (Off the record.)  
11 MR. CLEVERLEY: All right. I don't have any  
12 other questions, unless Mr. Farris or Mr. Rainey  
13 have any for you.  
14 MR. FARRIS: I do. I have a few questions.  
15  
16 EXAMINATION  
17 BY MR. FARRIS:  
18 Q. Mr. King, you know me. My name is  
19 Bryce Farris, and I represent Cal and Susie Low,  
20 for the record.  
21 A. Yes.  
22 Q. I have a few follow-up questions I want  
23 to make sure I'm understanding.  
24 Do you have Exhibit 3 in front of you?  
25 It is this one right here.

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1 A. Okay.  
2 Q. So you were talking earlier about when  
3 Jim Fuquay owned the property in 1977.  
4 A. Yes.  
5 Q. And what piece of property, if you look  
6 at Exhibit 3, did you understand he owned at that  
7 time?  
8 A. Okay. It would be this and this here.  
9 (Indicating.)  
10 Q. Okay.  
11 A. So it would be west of the Lows'  
12 property and next to the Lewis' property would be  
13 the boundary on the south side.  
14 Q. And on Exhibit 3 you marked what has  
15 been labeled by someone as Clint Fuquay and  
16 John Fuquay?  
17 A. Yes.  
18 Q. Okay.  
19 A. Yes, sir.  
20 Q. Where did you understand Jim Fuquay to  
21 have lived in 1977?  
22 A. Where Clint lives currently at the  
23 corner of -- the northwest corner of the property.  
24 Q. Did anyone occupy the house where  
25 John Fuquay currently resides?

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1 A. Ask me that again.  
2 Q. At that time, in 1977, did anybody  
3 occupy the house where John Fuquay currently  
4 resides?  
5 A. Okay. I could have told you wrong to  
6 begin with. Maybe when they first moved there,  
7 they might have lived in the house where John  
8 lives.  
9 Q. Where he currently lives?  
10 A. Yes. And then maybe it was a couple of  
11 years later they moved in the double-wide.  
12 Q. Okay. And you mentioned in 1977 there  
13 was use by Jim Fuquay with a car or pickup  
14 occasionally?  
15 A. That's what I recall.  
16 Q. Can you explain what you mean by  
17 "occasionally"? Is that once per week, once per  
18 day?  
19 A. Probably, about a couple times a week.  
20 Q. Okay. And so we're clear, we're  
21 talking about the house that John currently  
22 resides in.  
23 A. Okay. We're probably not clear. When  
24 they lived in this house here where John lives,  
25 they went in and out Castle Lane. When they put

1 the double-wide in over here -- so I suppose it  
 2 would be closer to like '79 -- then, you know,  
 3 their use was once in a while.  
 4 Q. Okay. Once in a while is what?  
 5 A. A time or two a week, I would say.  
 6 Q. Okay. A time or two a week with cars  
 7 or a pickup?  
 8 A. Cars or pickups.  
 9 Q. It wouldn't have been with larger  
 10 trucks?  
 11 A. No.  
 12 Q. The house where John currently resides,  
 13 you said they went --  
 14 A. Out Castle Lane to the south.  
 15 Q. Have you ever seen anybody residing at  
 16 that house use what we've been calling King Lane  
 17 for purposes of your deposition today?  
 18 A. No. Their use was primarily Castle  
 19 Lane.  
 20 Q. Okay. Now, you were talking about that  
 21 it was physically impossible to use what we've  
 22 been calling King Lane because of some corrals  
 23 that were built?  
 24 A. Yes.  
 25 Q. Do you know when those corrals were

1 removed?  
 2 A. Sometime during the period when Zane  
 3 Block was on the King property.  
 4 Q. Was that, I think you said, between '83  
 5 and '86?  
 6 A. Yes.  
 7 Q. So prior to '83, at least, it was  
 8 physically impossible for any truck use down what  
 9 has been called King Lane?  
 10 A. Yes.  
 11 Q. And then sometime during that period of  
 12 '83-'86, the corrals were removed by Zane Block  
 13 when he occupied the property?  
 14 A. Yes.  
 15 Q. Did -- are there any other impediments  
 16 that would prevent the use of King Lane by large  
 17 trucks since 1986? Let me ask it a different  
 18 way. Prior to '83 or '86, there was the corrals  
 19 that prevented it from physically happening.  
 20 After that time and current, today, are there  
 21 any physical impediments that would prevent use  
 22 of large trucks on what is now referred to as  
 23 King Lane?  
 24 A. Not that I'm thinking of.  
 25 Q. Okay. Is there a -- I guess it is the

1 east -- no, the west end, where there's been a  
 2 gate that's been installed?  
 3 A. Yes.  
 4 Q. Is there a culvert that you would have  
 5 to drive over?  
 6 A. At the west end?  
 7 Q. Yes.  
 8 A. Yes.  
 9 Q. How wide is that culvert? Do you know?  
 10 A. It is 10 -- 8-, 10-foot wide.  
 11 Q. Do you know what that culvert is made  
 12 of?  
 13 A. Concrete.  
 14 Q. A concrete culvert? Do you know how  
 15 deep it is?  
 16 A. It has got maybe a foot of dirt on it.  
 17 Prior to that concrete culvert being put in there,  
 18 there was just a couple old tin barrels that were  
 19 welded together.  
 20 Q. Do you know when the concrete culvert  
 21 was installed?  
 22 A. It was when we poured the cement  
 23 ditches so the trucks could come in that way. I  
 24 would say '89-ish or so.  
 25 Q. Okay. Because I thought -- yeah,

1 I'm trying to track the timeframe. So you had  
 2 mentioned that Zane Block when he was occupying  
 3 the property removed all of the ditches?  
 4 A. The ditches -- excuse me. The dirt  
 5 ditches in the field, he had tore out the ditches,  
 6 plowed them out and taken the fences out. We have  
 7 it fenced up to where you can control the cows in  
 8 smaller bunches. On the section of property,  
 9 there's ten or a dozen fields.  
 10 Q. So you weren't referring to the  
 11 concrete ditches along the roadway?  
 12 A. No.  
 13 Q. But, nevertheless, the barrels that you  
 14 were talking about got replaced sometime after --  
 15 A. After.  
 16 Q. -- you took possession of the property  
 17 back in, roughly, '89?  
 18 A. That's when we poured some ditch and  
 19 the barrels had a hole in it, I remember, and it  
 20 had to be replaced because we had to bring the  
 21 cement trucks in that way to get in the field  
 22 because you couldn't cross the bridge with a  
 23 loaded truck.  
 24 Q. Okay. You had discussed this concept  
 25 of open range and that you would have to put a

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**FILED**

A.M. 3:45 P.M.

JUL - 8 2015

*Angela Barkell, Clerk*  
*Della Stone*  
Deputy Clerk

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K. Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

vs, )

SUSIE LOW; CAL LOW; GILBERT KING )  
as trustee of the HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )

Defendants. )

Case No. CV-2014-0278

**JUDGMENT**

CERTIFICATE OF SERVICE

I, Angela Barkell, the undersigned authority, hereby certify that on this 8<sup>th</sup> day of July 2015, I caused a true and correct copy of the foregoing instrument to be delivered to the adverse party, via the method indicated below, addressed as follows:  
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Angela Barkell  
Clerk of the District Court

Dola Stoneman



**FILED**

A.M. 1:10 P.M.

**JUL 15 2015**

**ANGELA BARKELL, CLERK**

*[Signature]*  
Deputy Clerk

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Attorneys for Defendants Susie Low and Cal Low

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

**JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY;**

Plaintiffs,

vs.

**SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G.  
KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY;**

Defendants.

Case No. CV-2014-0278

**SUSIE AND CAL LOW'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

COMES NOW Defendants, Susie Low and Cal Low (hereinafter collectively referred to as "Low"), by and through their attorneys of record, Sawtooth Law Offices, PLLC, and hereby **MOVES** the Court as follows:

- (1) Pursuant to Rule 56 of the IDAHO RULES OF CIVIL PROCEDURE for entry of an Order granting partial summary judgment to Low and dismissing Plaintiffs' claims against Low in their

SUSIE AND CAL LOW'S MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

**ORIGINAL**  
592

entirety.

The basis and grounds for this Motion is set forth in the Memorandum in Support submitted herewith and is supported by the Affidavits already on file with the Court, the Court's prior decisions in this matter, along with the record and pleadings already on file with the Court.

Low reserve the right to submit additional affidavits in support of this Motion.

Oral argument on this Motion is respectfully requested.

DATED this 14<sup>th</sup> day of July, 2015.

SAWTOOTH LAW OFFICES, PLLC

by:   
S. Bryce Farris

**CERTIFICATE OF SERVICE**

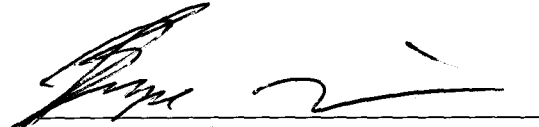
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S. Bryce Farris

FILED

A.M. 10 P.M.

JUL 15 2015

MISSOURI CLERK



Deputy Clerk

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Attorneys for Defendants Susie Low and Cal Low

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

**JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY;**

Plaintiffs,

vs.

**SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G.  
KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY;**

Defendants.

Case No. CV-2014-0278

**SUSIE AND CAL LOW'S  
MEMORANDUM IN SUPPORT OF  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

COMES NOW Defendants, Susie Low and Cal Low (hereinafter collectively referred to as "Low"), by and through their attorneys of record, Sawtooth Law Offices, PLLC, and hereby submits this Memorandum in Support of the Low's Motion for Partial Summary Judgment filed concurrently herewith. Low's Motion and Memorandum are supported by the Affidavits already on file with the

SUSIE AND CAL LOW'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - 1

ORIGINAL 595

Court, including, but not limited to the Affidavits of Rose King, Samuel Steiner, and S. Bryce Farris , as well as the record already before this Court, including, but not limited to, the Declarations of Rose King, Gilbert King, the Mailperson and Denice Collett previously filed with the Court on or about September 9, 2014. The Low's Motion and Memorandum are also supported by this Court's prior Decision regarding the Kings' Motion for Summary Judgment and the Judgment entered in favor of Kings in this matter.

## I. INTRODUCTION

As this Court is well aware, Plaintiffs claim an easement by prescription for use of King Lane across the property of Low and Defendants Heart K Ranch, Gordon King and Rose King (hereinafter collectively "King"). It is not known at this time to what extent the road crosses the Low and King properties but there is no dispute that the road crosses a portion of each. King filed a motion for summary judgment contending that Plaintiffs had not met the necessary elements to establish a prescriptive easement for King Lane and thus summary judgment was appropriate. This Court issued a *Memorandum Decision Upon King Defendants' Motion for Summary Judgment* on March 25, 2015 denying King's motion. Low participated in the oral argument for said motion and advised the Court that should summary judgment be granted to King it would apply equally to Low and that Low anticipated they would file their own motion for summary judgment. King subsequently filed a Motion for Reconsideration and on June 19, 2015 this Court issued a *Memorandum Decision Upon King Defendants' Motion for Reconsideration* which again analyzed whether Plaintiffs had met the necessary elements to establish a prescriptive easement. Again, Low participated in support of King's motion. The Court granted King's *Motion for Reconsideration* and concluded that "[t]his

court has reviewed the record thoroughly and cannot find that plaintiffs have met this burden. Summary judgment is appropriate. This is especially so given plaintiffs burden of proof at trial (clear and convincing evidence).” *Memorandum Decision Re: Reconsideration*, pg. 11. The Court then issued a *Judgment* in favor of Kings on July 8, 2015.<sup>1</sup>

Now that the Court has granted judgment in favor of King, the same basis, reasoning, facts and law support granting summary judgment in favor of Low. In fact, the facts relied upon by this Court includes the *Affidavit of Samuel Steiner*, a predecessor in title to the Low property. *Memorandum Decision Re: Reconsideration*, pg. 7. Thus, Low now seek summary judgment dismissing Plaintiffs’ claims to a prescriptive easement across any portion of King Lane which is owned by Low and thus dismissing Plaintiffs’ claims against Low.

## II. STANDARD OF REVIEW

Summary judgment must be granted when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c); *Friel v. Boise City Housing Authority*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994). The court liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party’s favor. *Friel*, 126 Idaho at 485, 887 P.2d at 30 (citing *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272, 869 P.2d 1365, 1367 (1994); *Harris v. Dept. of Health and Welfare*, 123 Idaho 295, 298, 847 P.2d 1156, 1159 (1992)). If reasonable people

---

<sup>1</sup> Plaintiffs have filed a *Motion for Reconsideration* of the Court’s June 19, 2015 Decision but no hearing has been scheduled.

could reach different conclusions or draw conflicting inferences from the evidence, a summary judgment motion is typically denied. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho at 272, 869 P.2d at 1367.

However, these standards differ where cases, such as this one, are tried to courts in the absence of a jury. *See, e.g., State v. Yakovac*, 145 Idaho 437, 444, 180 P.3d 476, 483 (2008) (citations omitted) (“[W]here the evidentiary facts are not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences. When an action is to be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts.”).

### III. ARGUMENT

The facts, law and arguments supporting the Low’s motion for partial summary judgment are already part of the record before this Court. In fact, this Court has decided the very issue that Low now seek to address with respect to the claims against Low. Thus, in order to avoid redundancy and for judicial economy Low will not repeat said facts and law and instead incorporate by reference the existing record which specifically includes the Court’s *Memorandum Decision Upon King Defendants’ Motion for Summary Judgment* dated March 25, 2015 and the Court’s *Memorandum Decision Upon King Defendants’ Motion for Reconsideration* dated June 19, 2015.

After thoroughly reviewing the affidavits in the record, including those of the Kings, Samuel

Steiner, the predecessor to the Low property and the testimony of Plaintiffs themselves, the Court concluded the following:

Based on the record before this Court the plaintiff has failed to make any showing on the essential element that plaintiffs' use of King Lane was adverse under claim of right. Even when this Court makes all inferences in favor of the plaintiffs, there is nothing in the record to indicate a decisive act or incident of separate or exclusive use from 1977 to 2011. While the use of King Lane may not have started with express or even implied permission, the recorded and the testimony of the plaintiffs shows that plaintiffs' use of King Lane was in "common with the owner and general public." *Marshall* 130 Idaho at 680; (quoting *Simmons*, 63 Idaho 136, 118 P.2d 740 (1941)). A prescriptive easement cannot be granted unless there is evidence of a decisive act or incident showing adverse use that could be considered an "actual invasion of or infringement on the rights of the owner." *Hughes*, 142 Idaho at 480.

Because there is no proof or evidence concerning this essential element of plaintiffs' case, that the Fuquays' use was adverse and contrary to the ownership rights of the Kings, the King defendants have met their burden of showing there is no genuine issue of material fact regarding the element of *adverse use*.

Once such an absence of evidence has been established, the burden shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56 (f). *Boots v. Winters*, 145 Idaho 389, 392, 179 P.3d 352, 355 (Ct.App. 2008).

*Memorandum Decision Re: Motion for Reconsideration*, pg. 10.

The law, facts and reasoning of the Court applies equally to the Lows. This is not a situation where Low is asking the Court to apply Idaho Supreme Court precedent or decision from some other judge, court or jurisdiction, but rather Low is seeking to have the Court apply the same law and facts it has already applied to another defendant, i.e. Low. Evidence concerning the use of the roadway in common with Low is provided in the *Affidavit of Samuel Steiner*, was examined, considered and relied upon by this Court, and the lack of evidence or showing by Plaintiffs as to the elements of

SUSIE AND CAL LOW'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - 5



their claim equally applies to those claims against Low. For these reasons, and the reasons already specified in the Court's decision, summary judgment is appropriate because Plaintiffs cannot meet their burden of showing that any use of King Lane as it applies to Low was "adverse and contrary to the ownership rights to the" Lows.

Given the Court has granted summary judgment to King based upon the same facts, law and analysis applicable to the claims against Low, the Court could possibly enter conflicting decisions if it did not grant summary judgment to Low. Under the rule of stare decisis, when the Court states a rule of law necessary to resolve and issue, the rule of law becomes the law of the case and must be adhered to through the case's subsequent history. *Suitts v. First Bank of Idaho, N.A.*, 110 Idaho 15, 21-22, 713 P.2d 1374, 1380-81 (1985). The rule of law or decision becomes precedent and controls future decisions under the rule of stare decisis.

Finally, Plaintiffs' claims against Low are rendered moot by the Court's decision granting summary judgment to King. If Plaintiffs cannot establish an easement over the property of King, which there is no dispute that the roadway crosses a portion of the King property, then Plaintiffs cannot have a prescriptive easement across any portion of the roadway which crosses the property of Low. In other words, now that the Court has granted judgment in favor of King, there can be no easement across the property of Low because there is no continuous easement for Plaintiffs' access from their property to Oreana Loop Road. Thus, whether mootness, stare decisis, issue preclusion or some other basis, summary judgment is appropriate in favor of Low just as the Court has granted judgment in favor of King as to the prescriptive easement claims by Plaintiffs.

//

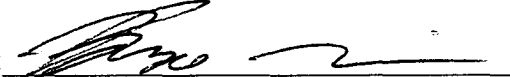
SUSIE AND CAL LOW'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - 6

**IV. CONCLUSION**

For the same reasons this Court has granted summary judgment to the Kings, this Court should also grant the Low's motion for partial summary judgment and dismiss all causes of action of the Plaintiffs against Low.

**DATED** this 14<sup>th</sup> day of July, 2015.

SAWTOOTH LAW OFFICES, PLLC

by:   
S. Bryce Farris

**CERTIFICATE OF SERVICE**


I hereby certify that a true and correct copy of the foregoing document was served on the following on this 14 day of July, 2015 by the following method:

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**FILED**

A.M. 3:50 P.M.

AUG - 4 2015

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Deputy Clerk

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )  
Plaintiffs, )

CASE NO. CV 2014-0278

vs. )

**KING DEFENDANTS' MEMORANDUM  
IN OPPOSITION TO THE FUQUAY  
PLAINTIFFS' MOTION FOR  
RECONSIDERATION**

SUSIE LOW; CAL LOW; GILBERT KING )  
as Trustee of the HEART K RANCH )  
TRUST UTA DECEMBER 28, 2012; )  
AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; THE ESTATE OF )  
GORDON G. KING; ROSE M. KING; )  
FIRST AMERICAN TITLE INSURANCE )  
COMPANY, )  
Defendants. )

**KING DEFENDANTS' MEMORANDUM IN OPPOSITION TO THE  
FUQUAY PLAINTIFFS' MOTION FOR RECONSIDERATION - PAGE 1**

## I.

**QUESTION PRESENTED ON THE FUQUAY  
PLAINTIFFS' MOTION FOR RECONSIDERATION**

The Fuquay Plaintiffs' July 6, 2015 Motion for Reconsideration essentially presents only a single question for this Court's determination:

Whether the undisputed facts in the record before this Court support the application of the "Use in Common" rule, upon which summary judgment has been granted to the King Defendants, or whether, in the alternative, a presumption of adverse use should be applied to the facts of this case?

## II.

**THE APPLICABLE IDAHO LEGAL STANDARD**

Beginning with the first memorandum that was submitted to the Court by the King Defendants in support of their motion for summary judgment they have consistently – and correctly – cited the controlling Idaho legal standard on the question presented on this motion for reconsideration, as initialing supported by their citation to the Idaho Court of Appeals decision in *Chen w. Conway*, 116 Idaho 901, 781 P.2d 238 (Ct.App.1989):

The general rule in Idaho is:

[P]roof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, without evidence as to how the use began, raises the presumption that the use was adverse and under a claim of right. The burden is then on the owner of the servient tenement to show that the use was permissive, or by virtue of a license, contract, or agreement. [Quoting *West v. Smith*, 95 Idaho at 557, 511 P.2d at 1333; emphasis added.]

In *Melendez*, we noted that two exceptions have been recognized to the general rule stated in *West*. One of these exceptions is found in *Simmons v. Perkins*, 63 Idaho 136, 144, 118 P.2d 740, 744 (1941). There, the Supreme Court said:

**KING DEFENDANTS' MEMORANDUM IN OPPOSITION TO THE  
FUQUAY PLAINTIFFS' MOTION FOR RECONSIDERATION – PAGE 2**

The rule would seem to be that where the owner of real property constructs a way over it for his own use and convenience, **the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission.**

116 Idaho at 903, 781 P.2d at 240 (italicized emphasis in original; bold/underlined emphasis added), as originally cited at pg. 9 of the King Defendants' Opening Brief in Support of Motion for Summary Judgment.

In this case, the King Defendants have submitted facts to this Court which have established the existence of the "joint use-in-common" exception, as described above, that created a presumption of permissive use by the Fuquays concerning King Lane from the time that use began. There has been no question presented in this case as to any uncertainty as when the Fuquay Plaintiffs' "use" of King Lane began, and as further argued below, if anything, their arguments submitted in support of their motion for reconsideration only further solidify the fact that their "use" of King Lane is well established as to how and when it began, such that **the presumption of adverseness does not apply**, to the facts of this case, and instead, **the "joint-use-in-common" rule does apply** to the circumstances concerning the Fuquay Plaintiffs' use of King Lane.

The above-stated rule, as to the application of the "presumption of adverse use" that is based upon the absence of any evidence of **how the claimed "use" began**, has remained unchanged as applied in Idaho. *See e.g., H.F.L.P., LLC v. The City of Twin Falls*, 157 Idaho 672, 681, 339 P.3d 557, 566 (2014); and *Hodgins v. Sales*, 139 Idaho 225, 232, 76 P.3d 969,976 (2003) ("**Without evidence of how the use of the property began**, proof of open, notorious, continuous and uninterrupted use for the prescriptive period raises a presumption that the use was adverse and under a claim of right.") (emphasis added). Here we have evidence of how the Fuquays "use" began.

***KING DEFENDANTS' MEMORANDUM IN OPPOSITION TO THE  
FUQUAY PLAINTIFFS' MOTION FOR RECONSIDERATION – PAGE 3***

## III.

**THE FUQUAY PLAINTIFFS HAVE MISSTATED THE APPLICABLE IDAHO LEGAL RULES IN ORDER TO SUPPORT THE ARGUMENT PRESENTED IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION**

The Fuquay Plaintiffs have summarized the three points that they have raised in support of their argument in support of their motion for reconsideration on pages 4-5 of their supporting memorandum. All three points are founded upon material misstatements of Idaho law, or the application of the facts to Idaho law. The first point contains the following misstatement of Idaho law:

1. The Court applied the wrong presumption of adverse use. **There is no evidence of how the road was created**, and there is a presumption of adverse use which should have been construed in favor of the Fuquays.

(Emphasis added). As already stated and emphasized above, the presumption of adverse use under Idaho law, only arises when there is no evidence as to how the “use” that is at issue began – not how the road itself was created. Here, the evidence before the Court – as presented by the Fuquays themselves – establishes that their use of King Lane began in 1977.

The Fuquays simply misstate the law when they predicate their entire argument on their motion for reconsideration on the premise that a presumption of adverse use under Idaho law can arise upon an absence of evidence as to how the road was created, instead of an absence of evidence of **how their own “use” of the road began**, which is the proper question. *H.F.L.P., LLC v. The City of Twin Falls*, 157 Idaho 672, 681, 339 P.3d 557, 566 (2014); *Hodgins v. Sales*, 139 Idaho 225, 232, 76 P.3d 969, 976 (2003); and *Chen w. Conway*, 116 Idaho 901, 903, 781 P.2d 238, 240 (Ct.App. 1989).

**KING DEFENDANTS' MEMORANDUM IN OPPOSITION TO THE  
FUQUAY PLAINTIFFS' MOTION FOR RECONSIDERATION – PAGE 4**

The second point that the Fuquays have attempted to argue on their motion for reconsideration is that application of the “use in common” rule is to be determined as a “factual determination,” rather than as a “presumption,” which they are required to rebut. Under Rule of Evidence 301, Idaho follows the “bursting bubble” theory of presumptions, *State v. Hagerman Water Right Owners, Inc.*, 130 Idaho 736, 745, 947 P.2d 409, 418 (1997), which in simple parlance means that by its operation a presumption relieves the party in whose favor it operates from presenting further evidence of the existence of the presumed fact until the opposing party has introduced substantial evidence of the nonexistence of that presumed fact. 130 Idaho at 745-46, 947 P.2d at 418-19.

Here, under the applicable *Simmons* standard – as declared almost 75 years ago in 1941 and that is still followed – and which was clearly stated in the Kings’ Motion for Reconsideration, the applicable controlling presumption is:

where the owner of real property constructs a way over it for his own use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission.

63 Idaho at 144, 118 P.2d at 744 (emphasis added). *See also, Lattin v. Adams County*, 149 Idaho 497, 503, 236 P.3 1257, 1263 (2010); *Weitz v. Green*, 148 Idaho 851, 861, 230 P.3d 743, 753 (2010); *Beckstead v. Price*, 146 Idaho 57, 64, 190 P.3d 876, 883 (2008); *Marshall v. Blair*, 130 Idaho 684, 691, 946 P.2d 984, 991 (Ct.App.1996); *Burns v. Alderman*, 122 Idaho 749, 754-55, 838 P.2d 878, 883-84 (Ct.App.1992); *Roberts v. Swim*, 117 Idaho 9, 13, 784 P.2d 339, 343 (Ct.App.1989); and *Melendez v. Hintz*, 111 Idaho 401, 404, 724 P.2d 137, 140 (Ct.App.1986).

The Fuquay Plaintiffs in their argument on their Motion for Reconsideration now attempt to

***KING DEFENDANTS’ MEMORANDUM IN OPPOSITION TO THE  
FUQUAY PLAINTIFFS’ MOTION FOR RECONSIDERATION – PAGE 5***

ignore this long-standing presumption, and instead argue as follows:

2. "Use in common" is a factual determination and there is conflicting evidence as to the use of the roadway. The court construed inferences from the conflicting evidence in favor of the Kings instead of in favor of the Fuquays.

Plaintiffs' Motion for Reconsideration at pg. 4 (emphasis added). In one of the Idaho Supreme Court's most recent decisions on this specific question concerning rebuttal of a presumed permissive use, *H.F.L.P., LLC v. The City of Twin Falls*, 157 Idaho 672, 339 P.3d 557 (2014), the Court emphasized that the burden is on the party claiming a prescriptive right to present evidence to rebut the existence of such a presumed "permissive use:"

Moreover, if the presumption of permissiveness applied when the use began, the presumption continues until a hostile and adverse use is clearly manifested and "brought home" to the servient property owner. *Backman v. Lawrence*, 147 Idaho 390, 398, 210 P.3d 75, 83 (2009); *Gameson v. Remer*, 96 Idaho 789, 792, 537 P.2d 631, 634 (1975).

157 Idaho at 681, 339 P.3d at 566.

The question of what constitutes sufficient rebuttal of this permissive use presumption leads directly into the Fuquays' third argument presented in support of their motion for reconsideration alleging that they had provided evidence in rebuttal of the King Defendants' presumption of the Fuquays' permissive "use-in-common" of King Lane:

3. Even if there was "use in common" the evidence showed the Jim Fuquay had committed a distinct act of placing a new mobile home on his property in 1977 and using the roadway for access to that mobile home. The placement of the mobile home was a separate and distinctive act that created an adverse use. The court ignored the evidence of the adverse use commencing in 1977 and focused only on the use in 2011.

Plaintiffs' Motion for Reconsideration at pp. 4-5 (emphasis added).

**KING DEFENDANTS' MEMORANDUM IN OPPOSITION TO THE  
FUQUAY PLAINTIFFS' MOTION FOR RECONSIDERATION – PAGE 6**



Nothing that Jim Fuquay did, or for that matter, that any of the other Fuquays did or undertook on their own land would have any effect whatsoever as to their alleged rights to the “use” of King Lane as that roadway crossed over property owned by the Kings. Only the Fuquays’ actions as taken in respect to King Lane as that roadway passed over King property would affect any potential easement claim that they could ever potentially assert in this action. The general principles that apply on this particular question were recently summarized in, *Capstar Radio Operating Co. v. Lawrence*, 153 Idaho 411, 283 P.3d 728 (2012):

“An easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner.” *Hughes*, 142 Idaho at 480, 129 P.3d at 1229 (citing *Hodgins*, 139 Idaho at 229, 76 P.3d at 973). In other words, “an easement is defined as a right in the lands of another, and therefore one cannot have an easement in his own lands.” *Zingiber Inv., L.L.C., v. Hagerman Highway Dist.*, 150 Idaho 675, 681, 249 P.3d 868, 874 (2011) (quoting *Gardner v. Fliegel*, 92 Idaho 767, 771, 450 P.2d 990, 994 (1969)).

153 Idaho at 420, 283 P.3d at 737 (emphasis added).

What the Fuquays have argued on their Motion for Reconsideration is nothing more than actions constituting an alleged “distinct act” for purposes of rebutting the “use-in-common” rule that only affected their own land, rather than land owned that was by the King Defendants. These so-called “distinct acts,” as allegedly only undertaken by the Fuquays on their own property, cannot create an adverse use, much less an easement, in respect to King Lane as that roadway crosses the King Defendants’ property. In direct contrast, the adverse conduct that did arise in 2011 consisted of distinct acts undertaken by the Fuquays that occurred on the King Defendants’ property, which as argued in the Kings’ Motion for Reconsideration, placed the Kings on notice for the first time of the Fuquays’ adverse right claim to the “use” of King Lane.

**KING DEFENDANTS’ MEMORANDUM IN OPPOSITION TO THE  
FUQUAY PLAINTIFFS’ MOTION FOR RECONSIDERATION – PAGE 7**

This alleged damage to King Lane, as allegedly caused by the Fuquay Plaintiffs in 2011, occurred on the King Defendants' property. Such damage, as arising on King property, as opposed to actions only taken on the Fuquays' own property would be sufficient to constitute, "independent decisive acts," under the standard of *Hodgins v. Sales*, 139 Idaho 225, 76 P.3d 969 (2003), as cited in the King Defendants' Reconsideration Reply Memorandum:

Proof of independent, decisive acts, such as maintenance of the way, tearing down barriers, and other indications of separate and exclusive use is sufficient to rebut a presumption of permissive use. *Marshall v. Blair*, 130 Idaho at 680-681, 946 P.2d at 980-981; *Simmons v. Perkins*, 63 Idaho 136, 140, 118 P.2d 740, 744 (1941).

139 Idaho at 232, 76 P.3d at 976. See, King Defendants' Reconsideration Reply Memorandum at pg. 4. But actions taken by the Fuquays that only affect their own property do not satisfy this standard, inasmuch as those actions cannot in any manner establish any right to an easement over the King Defendants' property.

Finally, although not put at issue by the Fuquays' motion for reconsideration, the Court should be reminded that throughout this matter it has been undisputed by any of the parties that King Lane has been used by the general public. Use by the general public also rebuts any claim to a presumption of adverse use as summarized in *Hughes v. Fisher*, 142 Idaho 474, 129 P.3d 1223 (2006), as also incorporating the 1941 *Simmons* decision in its overall analysis, as summarized in the following excerpts from the *Hughes v. Fisher* decision:

However, there are special considerations relating to notice to the owner when the claimant's use of the subject property **is shared with the general public**:

Where, as here, the same degree of use upon which the adverse claim is based has been exercised indiscriminately by the general public, **individual acquisition of a prescriptive easement has generally been held impossible**. In such a case, the claimant must perform some act whereby the

***KING DEFENDANTS' MEMORANDUM IN OPPOSITION TO THE  
FUQUAY PLAINTIFFS' MOTION FOR RECONSIDERATION – PAGE 8***

adverse nature of the claim is clearly indicated to the owner of the servient estate.

*Hall*, 108 Idaho at 112-13, 697 P.2d at 452-53.

In such situations, mere use of property alone is insufficient to establish a private prescriptive easement; rather, the claimant must perform some independent act signifying to the owner the adverse user's claim. *Cardenas v. Kurpjuweit*, 114 Idaho 79, 753 P.2d 290 (Ct.App.1988), vacated by 116 Idaho 739, 779 P.2d 414 (1989); *Hall*, 108 Idaho at 112, 697 P.2d at 452. This independent act requirement is merely a common sense way of ensuring the prescriptive easement elements have been satisfied. By definition, a use must be open and notorious, continuous and uninterrupted, and adverse and under a claim of right with the actual or imputed knowledge of the landowner for five years before it can ripen into a prescriptive easement. **When the claimant is using the land along with members of the general public, it would simply be unfair to impute knowledge to the landowner that the claimant is making an adverse claim.** The law in Idaho is clear that the general public may not obtain a private prescriptive easement. *See State ex rel. Haman v. Fox*, 100 Idaho 140, 145, 594 P.2d 1093, 1098 (1979) (“[T]his court is of the opinion that the ‘general public’ or ‘the people of the state of Idaho’ as distinguished from specific individuals cannot, absent specific statutory authorization, acquire prescriptive rights to private property.”). Fairness demands the landowner receive some type of “special notice” so the landowner can differentiate between an adverse claimant—who can seek a private prescriptive easement—and a member of the general public—who cannot—and take action to protect the landowner's property rights.

...

Once such use by the public is established, **the claimant is obligated to identify some independent act signifying the adverse claim to the landowner.** There is simply nothing in the record indicating acts were committed that would have put Fisher on notice that Hughes' use was adverse. In fact, the district court found, “Plaintiffs each admitted that there was nothing about their respective uses of the Path that would have imparted to Fisher or his predecessors that they were claiming a right to use the Path.” Hughes has not shown this factual finding was clearly erroneous. In the absence of some independent act, Fisher cannot be deemed to have been on notice that the plaintiffs were each claiming an adverse right. Accordingly, Hughes has failed to establish all elements of a prescriptive easement and the district court's decision on this matter is affirmed.

142 Idaho at 481-82, 129 P.3d at 1230-31 (emphasis added).

***KING DEFENDANTS' MEMORANDUM IN OPPOSITION TO THE  
FUQUAY PLAINTIFFS' MOTION FOR RECONSIDERATION – PAGE 9***

In sum, no act undertaken by the Fuquays in respect to King Lane, as that roadway crossed the King property, prior to 2011, ever put the Kings on notice of any adverse or prescriptive claim made by the Fuquays to a prescriptive right claim to an easement in King Lane. On this motion for reconsideration, the only independent act that the Fuquays have alleged is an action in respect to their own property, which is insufficient – as a matter of law – to create any adverse claim to King Lane as it crosses the Kings' property.

#### IV.

#### **THE FUQUAYS' MOTION FOR RECONSIDERATION THEREFORE FAILS ON ALL ARGUMENTS RAISED**

Ultimately, the Fuquays' adverse use argument is simply self-rebutting, since they have provided the Court with ample evidence as to how their alleged "use" of King Lane began in 1977 at the time of the placement of Jim Fuquay's mobile home, followed by his commencement of the use of King Lane for ordinary access to and from that mobile home at that time. Under the *Simmons* decision, and its progeny, the Fuquays' use of King Lane could only be presumed to be adverse if there was no evidence as how the Fuquays' use of King Lane had begun. On this Motion for Reconsideration the Fuquays themselves have offered precise and exact evidence of just how and when their alleged use of King Lane first began, thus rebutting any possibility of a presumption of adverse use under that specific adverse use rule. Therefore, the use-in-common rule, upon which this Court granted summary judgment to the King Defendants, does in fact apply here, where all the evidence before this Court points to the fact that no use of King Lane by the Fuquay Plaintiffs as that roadway crosses over the King property had been anything other than permissive until 2011.


Because the "use-in-common" rule is in the nature of a presumption, the Fuquays can only

rebut that presumption by proof of independent decisive acts taken to establish an adverse claim to King Lane for purposes of establishing a prescriptive easement across the King Defendants' property. Such acts undertaken upon the Fuquays' own property have no rebuttal effect for this purpose because: (1) the Fuquays cannot establish any claim to an easement in their own lands, and (2) such actions are wholly ineffective as to any claim to an easement as made against the King Defendants' land.

Finally, the Fuquays' use of King Lane was at all times also in common with members of the general public.

In sum, none of the grounds alleged in the Fuquay Plaintiffs' Motion for Reconsideration state a valid basis upon which to overturn the Court's grant of summary judgment to the King Defendants. Therefore, the Fuquay Plaintiffs' Motion for Reconsideration should be denied.

Respectfully submitted this \_\_\_\_ day of August, 2015.



Ronald P. Rainey  
Attorney for the King Defendants

CERTIFICATE OF SERVICE

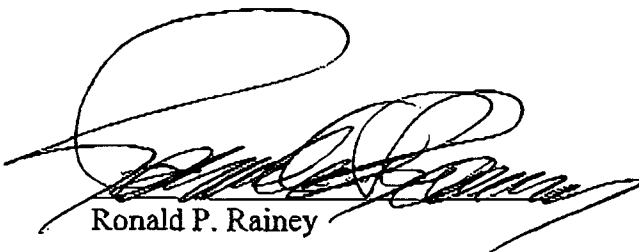
I HEREBY CERTIFY That on this 4<sup>th</sup> day of August, 2015, a true and correct copy of the foregoing document was served upon the following:

Matthew R. Cleverley	<input type="checkbox"/>	U.S. Mail, postage prepaid
Fidelity National Law GROUP	<input type="checkbox"/>	Hand Delivered
1200 6th Avenue, Suite 620	<input type="checkbox"/>	Overnight Mail
Seattle, Washington 98101	<input checked="" type="checkbox"/>	Facsimile Transmission
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*Attorney for Plaintiffs*

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*Attorney for Low Defendants*

  
Ronald P. Rainey

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**FILED**  
11:10 A.M. P.M.

AUG 12 2015

Angela Barkell, Clerk  
*Dolla Stoneham*  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Case No. CV-14-0278

Plaintiffs,

DECLARATION OF MATTHEW  
CLEVERLEY

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.


Under penalty of perjury under the laws of the state of Idaho, the undersigned declares:

1. I am the attorney for Plaintiffs in this matter.
2. I am over the age of 18. I am not related to any of the parties in this action and am not involved in the litigation. I have personal knowledge of the events in this declaration and could testify to them in a court proceeding.
3. Relevant pages of Gilbert King's deposition dated May 11, 2015 and Rose King dated May 11, 2015 were submitted concurrently with Plaintiffs' Motion for Reconsideration which was dated July 2, 2015.

4. Those deposition pages are true and correct pages from the deposition transcripts.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY OF PERJURY.

Dated: August 11, 2015

  
\_\_\_\_\_  
Matthew Cleverley



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Attorney for Plaintiffs

**FILED**  
11:10 A.M. P.M.

AUG 12 2015

Angela Barkley, Clerk  
*Angela Barkley*  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Case No. CV-14-0278

Plaintiffs,

PLAINTIFFS' REPLY IN SUPPORT OF  
MOTION FOR RECONSIDERATION OF  
THE COURT'S JUNE 19, 2015  
*MEMORANDUM DECISION ON KING'S  
MOTION FOR SUMMARY JUDGMENT  
AND REQUEST FOR  
RECONSIDERATION*

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Plaintiffs respectfully submit this Reply in support of their motion for reconsideration.

There are three key issues raised in Plaintiffs' Motion for Reconsideration:

1. Did the Court apply the correct presumptions?
2. Is there conflicting evidence as to "use in common?"
3. Is there evidence of a "distinct act of adverse use?"

While the answers to the questions not dispose of the case at this time, they show enough  
disputed issues of fact that the Court should not have granted summary judgment in favor of

PLAINTIFFS' REPLY IN SUPPPORT OF MOTION  
FOR RECONSIDERATION OF THE COURT'S  
JUNE 19, 2015 MEMORANDUM DECISION - 1

FIDELITY NATIONAL LAW GROUP  
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SEATTLE, WA 98101  
(206) 223-4525

the Kings. Because there are disputed issues of material fact, the court must, as a matter of law, reverse itself and vacate the Kings' summary judgment order and the Judgment.

It is important to note that the original Motion for Summary Judgment was brought by the Kings. Therefore, the Court was required to construe all facts and all reasonable inferences from the facts in favor of the Plaintiffs. Originally, the Court ruled (correctly) that there are disputed issues of material fact and denied the Kings' motion. The Court then erred on reconsideration when it construed the facts and inferences in favor of the Kings as the moving party instead of in favor of the Plaintiffs as the non-moving party.

It was not the Plaintiffs' burden to prove their entire case in opposing the Kings' motion. The Plaintiffs needed only show that there are factual disputes that cannot be resolved on summary judgment. The arguments and evidence before the court show that there are disputed issues of fact as to when the roadway was constructed, when the adverse use began, and whether the nature of the use was adverse to the Kings. Those facts are clearly disputed in the evidence before the court, and summary judgment should not have been granted.

**1. The Court Applied the Presumptions Incorrectly**

The presumption is that when there is no evidence of how the use of a roadway began, the use is presumed adverse to the owner. The Kings are arguing that the evidence of initial use of the roadway is limited to the Plaintiffs, and therefore the presumption does not apply. That is not correct. Idaho law allows dominant easement holders to "tack" their adverse use onto prior owners, and any vesting of prescriptive rights of prior owners is conveyed with the land to subsequent owners. Thus, the presumption of adverse use relates back to the initial use of the roadway. It is not is not limited to just Plaintiffs' use of the roadway.

PLAINTIFFS' REPLY IN SUPPORT OF MOTION  
FOR RECONSIDERATION OF THE COURT'S  
JUNE 19, 2015 MEMORANDUM DECISION - 2

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In this case, the evidence shows that the roadway has been in existence for nearly 100 years and was used by the property owners prior to the Plaintiffs. There is no evidence that the initial use of the roadway was ever permissive. Therefore the use of the roadway from its inception, including the time through Plaintiffs predecessors, is presumed to be adverse to the Kings. The Kings have the burden of showing permissive use at the time the roadway was built and use began, not just from the Fuquays' first use in 1977. The Kings have not shown any evidence that the initial use nearly 100 years ago was permissive; therefore, the presumption is that the use has been adverse.

Since the initial use is presumed to be adverse, then the Kings cannot prevail on summary judgment.

**2. There is Conflicting Evidence as to "Use in Common"**

The Kings rely on Simmons v. Perkins, 63 Idaho 136, 118 P.2d 740, 744 (1941) to support their claim of "use in common." However, Simmons was later discussed in Melendez v. Hintz, 111 Idaho 401, 405, 724 P.2d 137, 141 (Ct. App. 1986) where the court said if there is "some infringement or invasion of rights" that the general rule (presuming adverse use) instead of the exception (presuming permission) applies.

The Plaintiffs presented evidence that their use was adverse to the Kings. The Kings argue that evidence is insufficient and that the use was "in common." The court should not weigh the conflicting evidence in a summary judgment motion. Since there is conflicting evidence as to what the "use in common" is, and whether that use "infringed" or "invaded" the Kings rights, the inference must be construed in favor of Plaintiffs, and summary judgment was inappropriate. Once the court hears testimony of all of the evidence and considers the

credibility of the witnesses, the court can weigh it and decide whether the Plaintiffs have met the clear and convincing standard. However, the court should not have made any inferences against the Plaintiffs on summary judgment because they were the non-moving parties. The court was required to make all reasonable inferences in favor of Plaintiffs and against the Kings, meaning that the court was required to infer that all of the Plaintiffs' use was adverse.

### 3. There is Evidence of a Distinctive Event Creating Adverse Use

As the evidence shows, Jim Fuquay purchased his property and then placed a mobile home on his property in 1977. It is not the act of placing a new home on one's own property that creates adverse use, it is placing a new home on one's own property *and then using someone else's roadway to access it* that creates the distinct adverse use. Once the mobile home was placed in 1977 and Jim Fuquay started using the roadway to access it, the Kings were on notice that Fuquay's use was adverse to theirs and under a claim of right. That notice continued as the homes on the Fuquay property were rented to others and the renters used the roadway for access.

Finally, the Kings continue to argue that *any* public use of the roadway requires separate and distinct adverse use. That is not the standard. The standard is: indiscriminate use by the general public equal to that of the claimants. Hall v. Strawn, 108 Idaho 111. Here, there is no evidence of "indiscriminate public use." In fact, Rose King repeatedly testified that the roadway was *never* used by the general public. The Kings argument that the roadway was open to the general public is directly contradicted by Rose King's own testimony. The Kings can't have it both ways -- either Rose King's testimony must be discounted entirely, or their argument must be ignored.

PLAINTIFFS' REPLY IN SUPPPORT OF MOTION  
FOR RECONSIDERATION OF THE COURT'S  
JUNE 19, 2015 MEMORANDUM DECISION - 4

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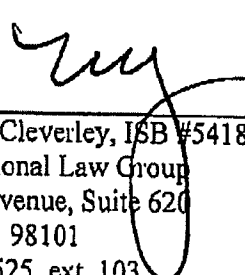
## CONCLUSION

Respectfully, the court erred when it granted the Kings' Motion after originally denying it. The presumption of adverse use applies because there is no evidence as to how the original use of the roadway began, and thus the originating use is deemed adverse. The Kings never presented any evidence that the use began as permissive. Without permissive use, the Kings cannot prevail.

Even if the court were to agree with Kings that Jim Fuquay's use began as permissive, Jim Fuquay's separate and distinct act of placing a new home on his property and then using the roadway to access the new home is sufficient to show adverse use. The continued use by renters to access the home is also a distinct event evidencing adverse use.

The Plaintiffs simply want to have their day in court where they can present all of the evidence in this case. At that time, the court can weigh the evidence and the credibility of the witnesses and make a decision based on all of the facts.

Dated: August 12, 2015



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PLAINTIFFS' REPLY IN SUPPORT OF MOTION  
FOR RECONSIDERATION OF THE COURT'S  
JUNE 19, 2015 MEMORANDUM DECISION - 5

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**CERTIFICATE OF SERVICE**

On the date given below I caused to be served the foregoing Plaintiff's Motion for Reconsideration and the pages from Depositions of Gilbert King and Rose King on the following individuals in the manner indicated:

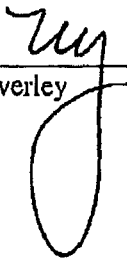
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<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
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Attorney for Lows

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
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Dated: August 12, 2015

  
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**FILED**  
A.M. 3:20 P.M.

AUG 17 2015

Angela Barkell, Clerk  
*Angela Barkell*  
Deputy Clerk

Attorneys for Defendants Susie Low and Cal Low

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

**JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY;**

Plaintiffs,

vs.

**SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G.  
KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY;**

Defendants.

Case No. CV-2014-0278

**SUSIE AND CAL LOW'S REPLY IN  
SUPPORT OF MOTION FOR PARTIAL  
SUMMARY JUDGMENT**

COMES NOW Defendants, Susie Low and Cal Low (hereinafter collectively referred to as "Low"), by and through their attorneys of record, Sawtooth Law Offices, PLLC, and hereby submits this Reply in Support of the Low's Motion for Partial Summary Judgment.

//

SUSIE AND CAL LOW'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY  
JUDGMENT - 1

**ORIGINAL**  
622

## I. INTRODUCTION

As indicated in the Low's initial *Memorandum in Support of Partial Summary Judgment*, this Court has granted summary judgment to Defendants Heart K Ranch, Gordon King and Rose King (hereinafter collectively "King") because Plaintiffs have been unable to establish the necessary elements for a prescriptive easement. See *Memorandum Decision Upon King Defendants' Motion for Reconsideration*, dated June 19, 2015. Since the roadway at issue, referred to in this litigation as "King Lane", is partially on the property of Low, Low have filed their own motion for summary judgment on the same grounds as those already decided by this Court. In response, Plaintiffs do not dispute the common use and public use of King Lane, or that Plaintiffs have not met their burden of establishing a decisive act of adverse use, but instead argue the following: (1) the "common use" by Low is somehow distinguishable because the use common use was for agricultural purposes even though Plaintiffs provide no citations or authority for the basis of their argument; and (2) that Low purchased the property in 2006 and that the prescriptive easement claimed by Plaintiffs ripened before Low purchased the property even though the record is clear that the use in common occurred while the Low's predecessor, Samuel Steiner, owned the property and according to Rose King as early as 1973. Plaintiffs' arguments lack merit in fact and law and this Court should grant summary judgment to Low based upon the same reasoning, facts, law and basis already determined when it granted summary judgment to King.<sup>1</sup>

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<sup>1</sup> Plaintiffs have filed a *Motion for Reconsideration of the Memorandum Decision Upon King Defendants' Motion for Reconsideration*, dated June 19, 2015, which is to be argued on the same date as the Low's *Motion*, and Low reserve the right to respond and support the Court's decision and the position of King regarding Plaintiffs' *Motion*.



## II. ARGUMENT

The first argument raised by Plaintiffs is that the “common use” by Low was for agricultural purposes and not to access their homes. *Plaintiffs’ Response*, pg. 2. In other words, Plaintiffs do not dispute that there is common use by Low or their predecessors, which then modifies the presumption standards for adverse use, but simply argue the common use is not exactly the same because it was not to access homes. Plaintiffs suggest this is a “critical distinction” but then provide no argument, citations or basis for this alleged distinction. The reason Plaintiffs do not do so is because there is no basis for their unsupported argument. The use in common is for a roadway with other vehicles of Low, Low’s predecessors, King, and the general public and there is no case law suggesting the use must be exactly the same. The fact that both are using the roadway in common is sufficient to shift the presumption regarding adverse use and Plaintiffs again fail establish the necessary element of adverse use by some decisive act.

Moreover, Plaintiffs have failed to dispute the undisputed evidence that King Lane was used by the general public, which is something also relied upon by the Court in its *Memorandum Decision Upon King Defendants’ Motion for Reconsideration*, dated June 19, 2015, and which also rebuts any claim to a presumption of adverse use by the Plaintiffs. The Court specifically referred to the affidavit of the Low’s predecessor, Samuel Steiner, to conclude that the use of King Lane was in common with the general public. Again, it is not disputed that King Lane was used in common with the general public and again there is no support for the argument that the use by the general public must be exactly the same as the claimed use by Plaintiffs. That said, there is no dispute that the use is the same which is for vehicular access. Whether the particular vehicle was going to the grocery

store to get eggs, access a field for agricultural purposes, or to access a pond for hunting does not change the fact that the use was in common and the burden is on the Plaintiffs to show adverse use by some “decisive act.” Plaintiffs have failed to do so.

While somewhat redundant, it is worth repeating this Court’s decision, which is *stare decisis*, as to this issue:

Based on the record before this Court the plaintiff has failed to make any showing on the essential element that plaintiffs’ use of King Lane was adverse under claim of right. Even when this Court makes all inferences in favor of the plaintiffs, there is nothing in the record to indicate a decisive act or incident of separate or exclusive use from 1977 to 2011. While the use of King Lane may not have started with express or even implied permission, the recorded and the testimony of the plaintiffs shows that plaintiffs’ use of King Lane was in “common with the owner and general public.” *Marshall* 130 Idaho at 680; (quoting *Simmons*, 63 Idaho 136, 118 P.2d 740 (1941)). A prescriptive easement cannot be granted unless there is evidence of a decisive act or incident showing adverse use that could be considered an “actual invasion of or infringement on the rights of the owner.” *Hughes*, 142 Idaho at 480.

Because there is no proof or evidence concerning this essential element of plaintiffs’ case, that the Fuquays’ use was adverse and contrary to the ownership rights of the Kings, the King defendants have met their burden of showing there is no genuine issue of material fact regarding the element of *adverse use*.

Once such an absence of evidence has been established, the burden shifts to the party opposing the motion to show, via further depositions, discovery responses or affidavits, that there is indeed a genuine issue for trial or to offer a valid justification for the failure to do so under I.R.C.P. 56 (f). *Boots v. Winters*, 145 Idaho 389, 392, 179 P.3d 352, 355 (Ct.App. 2008).

*Memorandum Decision Re: Motion for Reconsideration*, pg. 10.

For the reasons already determined by this Court in the *Memorandum Decision Upon King Defendants’ Motion for Reconsideration*, dated June 19, 2015, this Court should grant summary judgment to Low because Plaintiffs have not met their burden of showing adverse use.

SUSIE AND CAL LOW’S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - 4

The second argument raised by Plaintiffs is that the prescriptive easement ripened before the Lows purchased the property in 2006. This argument lacks merit and fails because Plaintiffs have again not disputed that the use of King Lane was in common with the Low's predecessors, namely Samuel Steiner, or the general public. While Lows may not owned the property during this time frame, they have submitted the affidavit of Samuel Steiner, and again relied upon by this Court, who moved to the parcel in 1959 with his parents and was the owner of the property since 1984. *See Affidavit of Samuel Steiner*, filed December 9, 2014. In addition, Plaintiffs simply disregard the *Affidavit of Rose King*, also filed on December 9, 2014, which provided the following:

What has been referred to as King Lane for purposes of litigation **has also been used by Cal and Susie Low**, which own the property generally to the south of the King property/ranch **and their predecessors in interest**. When my husband and I purchased our ranch in 1973, the property now owned by Lows was owned by Steiner family, and the Steiners used the road to access their property to get to and from their fields. **This use has continued since 1973 to present**, including now that the property is owned by Cal and Susie Low.

*See Affidavit of Rose King*, ¶ 5.

For Plaintiffs to now suggest that the easement ripened before Low purchased the property is flat out incorrect. Again, the evidence is clear that the use was in common and by the general public before and during Plaintiffs' alleged use and Plaintiffs have not and cannot meet their burden of showing by clear and convincing evidence that their alleged use was adverse. Simply because Low purchased their property in 2006 does not alleviate Plaintiffs from establishing adverse use by a decisive act given the undisputed evidence of common use and public use.

Finally, Low contends that Plaintiffs claims against Low are rendered moot by the Court's decision granting summary judgment to King because if Plaintiffs cannot establish an easement over

SUSIE AND CAL LOW'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - 5

the property of King, which there is no dispute that the roadway crosses a portion of the King property, then Plaintiffs cannot have a prescriptive easement across any portion of the roadway which crosses the property of Low. Plaintiffs have responded by citing to a Montana decision which suggests “better rule” is that the existence of intervening land does not itself defeat an easement. Plaintiffs fail to point out that the “better rule” cited in the Montana decision, recognizes a disagreement among jurisdictions on the issue, but then holds that the “better rule” which the Montana court followed applies to an express easement and not implied easements or easements by prescription like the one at issue in this case. *See Davis v. Hall*, 280 P.3d 261 (Mont. 2012). In other words, the Court did not hold that there can be intervening land when dealing with implied easements. Indeed, the Court stated “this Court adheres to the rule that in order to establish an implied easement, the dominant and servient parcels must be held as a single track of land or contiguous tracts of land at the time of severance.” *Id.* at 270. Plaintiffs cannot have an easement by prescription which goes nowhere and it is illogical to suggest that Plaintiffs can establish an easement by prescription as to one defendant property owner and not the other. Again, for the reasons this Court granted summary judgment to Kings, this Court should grant summary judgment to Low.

### III. CONCLUSION

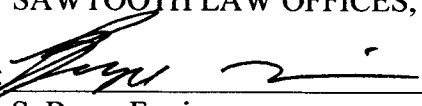
For the same reasons this Court has granted summary judgment to the Kings, this Court should also grant the Low’s motion for partial summary judgment and dismiss all causes of action of the Plaintiffs against Low.

DATED this 2<sup>nd</sup> day of August, 2015.

SUSIE AND CAL LOW’S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - 6

SAWTOOTH LAW OFFICES, PLLC

by:

  
S. Bryce Farris

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served on the following on this 2 day of August, 2015 by the following method:

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SUSIE AND CAL LOW'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT - 7

**FILED**

A.M. 5:05 P.M.

SEP 11 2015

ANGELA BARKELL, CLERK

Deputy Clerk

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON**

JOHN E. FUQUAY, CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES )  
OF IDAHO FALLS, INC.; GORDON G. )  
KING; ROSE M. KING; FIRST )  
AMERICAN TITLE INSURANCE CO., )

Defendants. )

GILBERT KING, as Trustee; and ROSE )  
M. KING, as Beneficiary of the HEART )  
K. RANCH TRUST UTA DECEMBER )  
28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )

Counterdefendants. )

**CASE NO. CV-2014-0278-M**

**MEMORANDUM DECISION UPON  
PLAINTIFFS' MOTION FOR  
RECONSIDERATION FILED  
JULY 6, 2015**

SUSIE LOW AND CAL LOW, )  
 )  
 Counterclaimants, )  
 )  
 vs. )  
 )  
 JOHN E. FUQUAY; CLINTON WARD )  
 FUQUAY and HAILEY ROSE FUQUAY, )  
 )  
 Counterdefendants. )  
 )

---

This matter came on for hearing August 20, 2015 upon the Fuquays' Motion for Reconsideration of the Court's June 19, 2015 Memorandum Decision on Kings' Motion for Summary Judgment and Request for Reconsideration. Appearing on behalf of the Fuquays was attorney Matthew Cleverly, of the law firm Fidelity National Law Group. Appearing on behalf of the Kings was attorney Ronald Rainey. Appearing on behalf of the Lows was attorney Bryce Farris, of the law firm Sawtooth Law Offices, PLLC. The Court has considered the briefing, affidavits and pleadings of record and hereby renders its decision below.

**BACKGROUND**

The Fuquays seek a declaration of a prescriptive easement over King Lane in Owyhee County. King Lane is a private, all-weather road about one-half mile in length. It runs in an east-west direction from the public Oreana Loop Road until it connects with Castle Lane, which then runs south until it connects with Oreana Loop Road. The King defendants own the parcel of land to the north of King Lane, the Low defendants own the parcel of land to the south of King Lane, and the Fuquays own parcels of land to the west of King Lane, where it ends and connects with Castle Lane. The Court went into greater background detail in its Memorandum Decision upon King Defendants' Motion for Summary Judgment filed on March 25, 2015. That background information is incorporated herein.

**MOTION FOR RECONSIDERATION STANDARD**

Idaho Rule of Civil Procedure 11(a)(2)(B) allows a party to seek reconsideration of any interlocutory order before the entry of judgment. Final judgment as to the King defendants was not entered in this case until July 8, 2015, two days after the filing of this motion. Therefore,

plaintiffs' motion is timely. On a motion for reconsideration, the court must consider any new admissible evidence or authority bearing on the correctness of an interlocutory order. *See PHH Mortg. Servs. Corp. v. Perreira*, 146 Idaho 631, 635, 200 P.3d 1180, 1184 (2009) (citing *Coeur d' Alene Mining Co. v. First Nat'l Bank of N. Idaho*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990)).

“When deciding the motion for reconsideration, the district court must apply the same standard of review that the court applied when deciding the original order that is being reconsidered.” *Fragnella v. Petrovich*, 153 Idaho 266, 276, 281 P.3d 103, 113 (2012), *reh'g denied* (Aug. 1, 2012). In this case, the Court denied King defendants' Motion for Summary Judgment in a memorandum decision filed March 25, 2012. It then reversed itself and granted the Kings' Motion for Summary Judgment in its June 19, 2015 Decision on Kings' Motion for Summary Judgment and Request for Reconsideration. Now, the Fuquays seek reconsideration of the Court's June 19<sup>th</sup> decision granting defendants' motion. Thus, this Court must apply the summary judgment standard that it applied to its original decision filed March 25, 2012, in which it denied Kings' Motion for Summary Judgment.

Summary judgment is proper when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” In a motion for summary judgment, this Court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party. Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. *West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 86-87, 106 P.3d 401, 412-413 (2005) (citing *Iron Eagle Dev., L.L.C. v. Quality Designs Sys., Inc.*, 138 Idaho 487, 491, 65 P.3d 509, 513 (2003); *see also Willie v. Bd. of Trustees*, 138 Idaho 131, 133, 59 P.3d 302, 304 (2002)).

On a motion for summary judgment, the burden is always upon the moving party to prove the absence of a genuine issue of material fact. If, however, the basis for a properly supported motion is that no genuine issue of material fact exists with regard to an element of the non-moving party's case, it is incumbent upon the non-moving party to establish an issue of fact



regarding that element. *Yoakum v. Hartford Fire Ins. Co.*, 129 Idaho 171, 923 P.2d 416 (1996).

The burden on the moving party may be met by establishing the absence of evidence on an element that the nonmoving party will be required to prove at trial. *Dunnick v. Elder*, 126 Idaho 308, 311, 882 P.2d 475, 478 (Ct.App.1994). A trial court, in ruling on a motion for summary judgment, is not to weigh evidence or resolve controverted factual issues. *American Land Title Co. v. Isaak*, 105 Idaho 600, 671 P.2d 1063 (1983). However, “[w]hen an action will be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from *uncontroverted* evidentiary facts.” *Loomis v. City of Hailey*, 119 Idaho 434, 437, 807 P.2d 1272, 1275 (1991) (internal citations omitted) (emphasis added); see also *Riverside Development Co. v. Ritchie*, 103 Idaho 515, 519, 650 P.2d 657, 661 (1982) (internal citations and quotation marks omitted). On review, the court will look to whether the record reasonably supports the inferences drawn by the trial court. *Intermountain Forest Mgmt., Inc. v. Louisiana Pac. Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001).

#### **THE PARTIES’ ARGUMENTS RE: MOTION TO RECONSIDER**

The Fuquays argue the Court incorrectly inferred controverted facts in favor of the Kings and present four arguments for the Court to reconsider: (1) the Kings failed to bear their burden of showing that any use of King Lane, since its inception, has been permissive, therefore the Court should have presumed any and all use was adverse; (2) the Court improperly weighed evidence in favor of the Kings by concluding the Fuquays use of the road was permissive and “in common” with the Kings’ use, rather than adverse and an infringement on the Kings’ rights; (3) the infringement was established in 1977, when the Fuquays began using the road to come and go from their home, not in 2011, as the Court concluded; and (4) conflicting evidence exists as to whether King Lane was used by the public.

In their memorandum in opposition, the Kings make the following arguments: (1) the presumption of adverse use is inapplicable because the Fuquays use of the road was “in common” with the Kings; (2) where a claimant’s use is in common with the landowner’s, the use is presumed permissive; (3) the Fuquays have failed to show their use infringed on the Kings’ rights prior to 2011; and (4) it is undisputed that the public used King Lane.

### ANALYSIS

To acquire a prescriptive easement in Idaho, the Fuquays must show reasonably clear and convincing evidence of open, notorious, continuous, uninterrupted use of King Lane, under a claim of right, with the knowledge of the owner of the servient estate for the prescriptive period of five years. I.C. § 5-203; *West v. Smith*, 95 Idaho 550, 557, 511 P.2d 1326, 1333 (1973). Thus, a prescriptive right cannot be obtained if use of the alleged easement is by permission of the landowner. *Wood v. Høglund*, 131 Idaho 700, 702-03, 963 P.2d 383, 385-86 (1998). Therefore, the Fuquays must show through reasonably clear and convincing evidence that their use of King Lane was not permissive, but adverse, and for a period of five years.

The general rule is that a presumption of adverse use arises where it is undisputed that an alleged easement has been used, without interruption, for the established period of prescription. *Eagle Rock Corp. v. Idamont Hotel Co.*, 59 Idaho 413, 85 P.2d 242 (1938). Where an adverse presumption is applied, a landowner bears the burden of showing the use was by virtue of a license or permission. *Id.* This showing must be more than mere inaction and passive acquiescence. *Smith*, 95 Idaho at 557, 511 P.2d at 1333.

An exception to the general rule exists, which, when applicable, presumes use is permissive: "Where the owner of real property constructs a way over it for his own use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission." *Simmons v. Perkins*, 63 Idaho 136, 144, 118 P.2d, 740, 744 (1941). Where a permissive presumption is applied, the claimant bears the burden of showing he or she engaged in some unequivocal conduct giving the landowner notice of his or her hostile and adverse use. *Webster v. Magleby*, 98 Idaho 326, 327, 563 P.2d 50, 51 (1977).

Here, the Fuquays argue the adverse presumption applies because it is unknown whether the *general* use of the alleged easement began as adverse or permissive. In support of this contention, the Fuquays rely on the deposition testimony of Rose King, where she asserts the roadway that is now King Lane has been in existence since at least 1894. *Plaintiffs' Motion for Reconsideration*, pg. 14. The Fuquays also rely on the testimony of Samuel Steiner, who stated, "I do not know who, if anyone, constructed King Lane. This was an old farm access roadway

that was used occasionally by a variety of people.” *Id.* (quoting *Declaration of Samuel V.C. Seiner*, at ¶ 5). The Fuquays’ argue that since it is unknown whether the historical use of the roadway began permissively or adverse to the owner(s), the general rule is that the use is presumed adverse.

Conversely, the Kings argue the adverse presumption only applies where it is unknown whether a *claimant’s* use of an alleged easement began as adverse or permissive. In this case, it is known when the Fuquays’ use of King Lane began, 1977. When the Kings acquired their property in 1973, they took steps to improve the roadway. Thereafter, Jim Fuquay acquired his property in 1977, placed a mobile home on his property and began using King Lane at that time. It is true that the general rule in Idaho is that proof of open, notorious, continuous, uninterrupted use of the claimed right of way for the prescriptive period raises the presumption that the use is adverse. *West v. Smith*, 95 Idaho 550, 511 P.2d 1326 (1973). However, there exists an exception to that presumption under Idaho law. Specifically, “where the owner of real property constructs a way over it for his own use and convenience, the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission.” *Simmons v. Perkins*, 63 Idaho 136, 144, 118 P.2d 740, 744 (1941). That exception was reaffirmed as Idaho law in *Marshall v. Blair*, wherein the Idaho Supreme Court articulated:

...[U]se of a driveway in common with the owner and the general public, *in the absence of some decisive act on the user's part indicating a separate and exclusive use on his part* negatives any presumption of individual right therein in his favor.’ *Simmons v. Perkins*, 63 Idaho 136, 118 P.2d 740 (1941) (emphasis added). This Court further explained in *Simmons* that use of a roadway must invade or infringe on the owner’s rights in order for the use to be considered adverse and, thus, to ripen into a prescriptive right of way.

130 Idaho 675, 680, 946 P.2d 975, 980 (1997).

In this case, it is undisputed that the Kings began improving the roadway, which is now King Lane, in 1973 to benefit their farming operation. In her affidavit, Rose King stated that at the time of their purchase of this property in 1973, “King Lane was only a path through grass and weeds and was wet and muddy most of the year.... We desired to access our fields through the use of this filed lane, therefore, we started hauling rocks to build a base for this road so that it

would be passable for our farm equipment. We did this annually....” *Affidavit of Rose King*, pg. 2, filed Dec. 9, 2014. Thus, the Kings constructed the roadway for their own use and convenience. The law applicable here is that “the mere use thereof by others which in no way interferes with his use will be presumed to be by way of license or permission.” *Simmons v. Perkins, supra*. Therefore, the permissive presumption is applicable here.

As previously addressed, where a permissive presumption is applied, the claimant bears the burden of showing he or she engaged in some unequivocal conduct giving the landowner notice of his or her hostile and adverse use. *Magleby, supra*, 98 Idaho at 327, 563 P.2d at 51. Here, the Fuquays only argument is that when Jim Fuquay purchased his property in 1977 and put a mobile home on it and began using the roadway as access to his property that this was the decisive act that placed the Kings on notice that his use was hostile. The Court disagrees, because Jim Fuquay’s use did nothing to interfere with the King’s use. Interference is required to show adverse use.

The Fuquays further assert that because they used the road for residential purpose and the Kings used the road for business purposes the road was not being used in a similar manner, therefore the presumption of permissive use is not applicable. However, the Fuquays fail to take their argument to the next and necessary step by way of showing that such use interfered with the Kings’ use. Simply put, the Fuquays have produced no evidence that their use of King Lane interfered with the Kings’ rights.

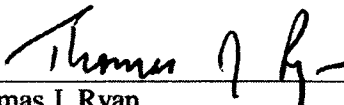
The Court, in its memorandum decision filed June 19, 2015 also accepted the premise that use of King Lane by the general public also rebutted the Fuquays’ claim to a presumption of adverse use. In their motion to reconsider, the Fuquays point out that the declarations of the school bus driver and the Schwann Truck driver disclosed that those declarants did not use King Lane, but rather used the Oreana Loop Road and Castle Lane. *Plaintiffs’ Motion*, pg. 12-13. The Fuquays also quote from Rose Kings’ testimony that essentially states that she instructed the public that they could not use King Lane. *Id.*, at pg. 13. It does appear that there is a question of fact as to whether there has been use by the general public. However, it does not change this Court’s conclusion that because the Fuquays’ use did not interfere with the Kings’ use of King Lane, the presumption applicable in this case is that the Fuquays use was permissive.

Therefore,

**ORDER**

Based upon the foregoing analysis, Fuquays' Motion for Reconsideration is DENIED.

Dated this 11<sup>th</sup> day of September, 2015.

  
\_\_\_\_\_  
Thomas J. Ryan  
District Judge

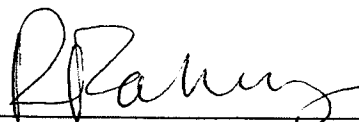
**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing to be served upon the following via U.S. Mail, postage prepaid, facsimile transmission or by hand delivery:

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September 11, 2015   
Date Deputy Clerk

**FILED**

8:44 A.M. P.M.

SEP 21 2015

ANGELA BARKELL, CLERK

Deputy Clerk

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE**

JOHN E. FUQUAY, CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY )

Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES )  
OF IDAHO FALLS, INC.; GORDON G. )  
KING; ROSE M. KING; FIRST )  
AMERICAN TITLE INSURANCE CO., )

Defendants. )

GILBERT KING, as Trustee; and ROSE )  
M. KING, as Beneficiary of the HEART )  
K. RANCH TRUST UTA DECEMBER )  
28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )

Counterdefendants. )

CASE NO. CV-2014-0278-M

**MEMORANDUM DECISION UPON  
LOW DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT**

**MEMORANDUM DECISION UPON LOW DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT**

Page 1

_____	)
SUSIE LOW AND CAL LOW,	)
	)
Counterclaimants,	)
	)
vs.	)
	)
JOHN E. FUQUAY; CLINTON WARD	)
FUQUAY and HAILEY ROSE FUQUAY,	)
	)
Counterdefendants.	)
_____	)

On July 15, 2015, Defendants Susie and Cal Low (hereinafter referred to as the “Low Defendants”) filed a motion for partial summary judgment. The matter came on for hearing on August 20, 2015. Appearing on behalf of the Lows was attorney Bryce Farris, of the law firm Sawtooth Law Offices, PLLC. Appearing on behalf of the Fuquays was attorney Matthew Cleverly, of the law firm Fidelity National Law Group. Appearing on behalf of the Kings was attorney Ronald Rainey. The Court has considered the briefing, affidavits and pleadings of record and hereby finds as follows.

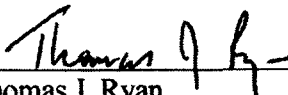
The Fuquays argue in this lawsuit that they possess a prescriptive easement by adverse use over King Lane located near Oreana, Owyhee County, Idaho. King Lane travels over and through property owned by both the Kings and the Lows. It is not specifically known to what extent the road crosses the Low and King properties but there is no dispute that the road crosses a portion of each.

On January 29, 2015, the King Defendants filed a motion for summary judgment. The matter was fully briefed and argued by both the Kings and the Fuquays. The Lows did not file their own summary judgment at that time but their legal position has always been clearly in line with the King Defendants. The Court initially denied the Kings’ motion for summary judgment in its Memorandum Decision filed on March 25, 2015. Thereafter, the Kings filed a motion to reconsider. After another round of briefing and oral argument, the Court, upon reconsideration granted the Kings’ motion for summary judgment. The Fuquays then filed their own motion for reconsideration and another round of briefing, affidavits and oral argument ensued. In its Memorandum Decision filed September 11, 2015, the Court affirmed its’ Order granting summary judgment for the King Defendants.

At the hearing on August 20, 2015, the Court verbally expressed the opinion that because the Low Defendants' legal position is identical to the King Defendants' position relating to whether the Fuquays possess a prescriptive easement over King Lane. Since the Court has now affirmed its Order granting summary judgment to the Kings, the Low Defendants would likewise be entitled to summary judgment.

Therefore, based upon the analysis of this Court in its Memorandum Decisions of June 19, 2015 and September 11, 2015 granting the King Defendants summary judgment, the Court hereby intends to enter an Order granting summary judgment to the Low Defendants. Counsel for the Lows is directed to prepare the appropriate Order.

Dated this 21st day of September, 2015.

  
\_\_\_\_\_  
Thomas J. Ryan  
District Judge

**CERTIFICATE OF SERVICE**

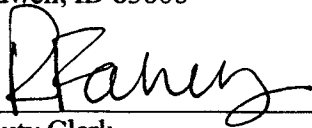
I hereby certify that I caused the foregoing to be served upon the following via U.S. Mail, postage prepaid, facsimile transmission or by hand delivery:

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Caldwell, ID 83606

9/21/15  
Date

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

MEMORANDUM DECISION UPON LOW DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

Page 3



**FILED**

A.M. 1:12 P.M.

OCT 06 2015

ANGELA BARKELL, CLERK

*Angela Barkell*  
Deputy Clerk

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE**

**JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY;**

Plaintiffs,

vs.

**SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 23,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G.  
KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY;**

Defendants.

Case No. CV-2014-0278

**ORDER ON LOW DEFENDANTS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

This matter having come before the Court on Defendants Susie and Cal Low's (hereinafter "Low Defendants") motion for Summary Judgment, and being otherwise fully advised in the premises, and finding good cause appearing therefor, the Court hereby GRANTS Low Defendants' Motion for Summary Judgment pursuant to its Memorandum Decision, dated September 21, 2015, and thereby dismissing Plaintiffs' Amended Complaint against Low Defendants.

Dated this 2<sup>nd</sup> day of October, 2015.

*Thomas J. Ryan*  
\_\_\_\_\_  
HON. THOMAS J. RYAN  
District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was served via U.S. Mail, postage prepaid, on this 6<sup>th</sup> day of October, 2015:

**MATTHEW R. CLEVERLEY**  
**FIDELITY NATIONAL LAW GROUP**  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
Telephone: (206) 274-6003  
E-Mail: Matthew.Cleverley@fnl.com  
*Attorneys for Plaintiffs*

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- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

**S. BRYCE FARRIS**  
**SAWTOOTH LAW OFFICES, PLLC**  
1101 W. River St., Ste. 110  
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Boise, Idaho 83707  
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Facsimile: (208) 629-7559  
E-mail: bryce@sawtoothlaw.com  
*Attorneys for Defendants Susie and Cal Low*

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- U.S. Certified Mail, Postage Prepaid
- Federal Express
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- Electronic Mail or CM/ECF

**RONALD P. RAINEY**  
**RONALD P. RAINEY P.A.**  
110 N. 9<sup>th</sup> Ave.  
P.O. Box 25  
Caldwell, ID 83606-0026  
Telephone: (208) 459-3659  
Facsimile: (208) 459-9067  
E-Mail: rrailey@gquestoffice.net  
*Attorney for Defendants Gordon and Rose King*

- First Class Mail, Postage Prepaid
- U.S. Certified Mail, Postage Prepaid
- Federal Express
- Hand Delivery
- Facsimile
- Electronic Mail or CM/ECF

  
Clerk of the Court

919 FILED P.M.

DEC 21 2015

AND CLERK  
Deputy Clerk

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 - 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Case No. CV-14-0278

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

1. Defendant Lows' counterclaims against Plaintiffs are dismissed with prejudice and without the award of fees or costs either party; and
2. Plaintiffs' Amended Complaint and the causes of action for Declaratory Judgment (Prescriptive Easement) and Injunction against Defendant Lows are dismissed with prejudice.

Dated: 12/18/15

Thomas J. Ryan  
Hon. Thomas J. Ryan

JUDGMENT - 1

FIDELITY NATIONAL LAW GROUP  
1200 - 6<sup>th</sup> AVENUE, SUITE 620  
SEATTLE, WA 98101  
(206) 223-4525

**NOTICE OF ENTRY**

On the date given below, I served the attached document on the following individuals in the manner indicated:

Ronald P. Rainey  
 Attorney at Law  
 110 North Ninth Street  
 Caldwell, ID 83606  
 208-459-3659  
[erainey@gwestoffice.net](mailto:erainey@gwestoffice.net)  
 Attorney for Kings

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

S. Bryce Farris  
 Sawtooth Law Offices, PLLC  
 1101 W. River Street, Suite 110  
 Boise, ID 83707  
 208-629-7447  
[bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)  
 Attorney for Lows

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Matthew R. Cleverley  
 Fidelity National Law Group  
 1200 - 6<sup>th</sup> Avenue, Suite 620  
 Seattle, WA 98101  
 (206) 224-6003  
[Matthew.Cleverley@fnf.com](mailto:Matthew.Cleverley@fnf.com)  
 Attorney for Plaintiffs

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Dated: \_\_\_\_\_

\_\_\_\_\_  
 Clerk

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
1200 – 6<sup>th</sup> Avenue, Suite 620  
Seattle, WA 98101  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

**FILED**  
A.M. 4:09 P.M.  
JAN 06 2016  
ANGELA BARKELL, CLERK  
*Angela Barkell*  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; GILBERT KING  
as Trustee of the HEART K RANCH TRUST  
UTA DECEMBER 28, 2012; AVCO  
FINANCIAL SERVICES OF IDAHO  
FALLS, INC.; THE ESTATE OF GORDON  
G. KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY,

Defendants.

GILBERT KING, as Trustee , and ROSE M.  
KING, as Beneficiary of the HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012,

Counterclaimants,

vs.

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Counterdefendants.

Case No. CV-2014-0278

AMENDED NOTICE OF APPEAL

TO: SUSIE LOW and CAL LOW  
And their Attorney: S. BRYCE FARRIS

And to: GILBERT KING as Trustee of the HEART K RANCH TRUST UTA  
DECEMBER 28, 2012; THE ESTATE OF GORDON G. KING; and ROSE  
M. KING;  
And their Attorney: RONALD P. RAINEY

And to: THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, JOHN E. FUQUAY; CLINTON WARD FUQUAY and HAILEY ROSE FUQUAY, appeal against the above-named respondents to the Idaho Supreme Court from following:

03/25/2015 Memorandum Decision upon King Defendants' Motion for Summary Judgment

06/19/2015 Memorandum Decision upon King Defendants' Motion for Reconsideration

07/08/2015 Judgment (Dismissing Plaintiff's Easement Claims against the Kings)

09/11/2015 Memorandum Decision Upon Plaintiffs' Motion For Reconsideration Filed July 6, 2015

09/21/2015 Memorandum Decision Upon Low Defendants' Motion For Summary Judgment

10/06/2015 Order on Low Defendants' Motion For Partial Summary Judgment

**12/21/2015 Judgment dated December 18, 2015 Dismissing Plaintiff's easement claims against the Lows (Item #2 of the Judgment. Item #1 is not appealed.)**

That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to I.A.R 11(a)(1).

2. Preliminary Statement of Issues:

The trial court erred when it granted summary judgment in favor of the Respondents and dismissed Plaintiff/Appellant's Complaint seeking a prescriptive easement. The Trial court erred because:

- a. It failed to use the proper legal standards in making its decisions.
- b. It granted summary judgment to Defendants/Respondents even though there are disputed issues of material fact.
- c. It construed facts in the light most favorable to the Defendant/Respondents instead of the non-moving Plaintiff/Appellant.

d. The Low Defendants were not entitled to summary judgment on the same basis as the King Defendants because the facts and issues are different.

3. Has an order been entered sealing all or any portion of the record? No.  
If so, what portion? N/A

4. (a) Is a reporter's transcript requested?

**No transcripts are requested from the court reporter. The transcripts of the preliminary injunction hearing held on September 18, 2014 were already transcribed and are included in the 12/8/2014 Affidavit of Bryce Farris, which is listed in #6.**

**Additional or separate copies of the transcripts from the 12/8/2014 hearing are not necessary. No other hearings had testimony, and were all argument. Since review is de novo, prior oral arguments are irrelevant and transcripts of the parties' arguments is not requested.**

(b) The appellant requests the preparation of the following portions of the reporter's transcript: None.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.

08/11/2014	Complaint Filed ( Prescriptive Easement)
09/04/2014	Declaration of Raymond Jayo in Support of Ex parte Motion for Temporary Restraining Order
09/04/2014	Declaration of John Fuquay in Support of Ex parte Motion for Temporary Restraining Order
09/04/2014	Declaration of Matthew Cleverley in Support of Ex parte Motion for Temporary Restraining Order
09/09/2014	Answer and Counterclaims by Defendants Trustees for the Heart King Ranch Trust UTA December 28, 2012
09/09/2014	Affidavit of Gilbert King
09/09/2014	Affidavit of Rose King
09/09/2014	Declaration of Denice Collett in Support of Defendant's Objection to Plaintiffs Ex Parte Restraining Order
09/10/2014	Affidavit of Ronald P. Rainey
09/15/2014	Declaration of Schwann Delivery Person
09/16/2014	Affidavit of Susie Low
09/17/2014	Answer of Defendants Susie and Cal Low and Counterclaim
09/18/2014	Declaration of Scott Snyder

09/18/2014 Declaration of Scott Snyder  
09/18/2014 Declaration of Seth Thomas  
**12/9/2014 Affidavit of Bryce Farris (which includes a full transcript of the preliminary injunction hearing which was held on September 18, 2014) (out of date order) which is related to the above filings**

10/29/2014 Plaintiffs Motion for Partial Summary Judgment against Susie Low and Cal Low  
10/29/2014 Declarations of Matthew Cleverley  
10/29/2014 Declarations of John Fuquay  
12/09/2014 Response and Objection to Plaintiffs Motion for Summary Judgment  
12/09/2014 Affidavit of Rose King  
12/09/2014 Affidavit of Samuel V.C. Steiner  
12/09/2014 Affidavit of S. Bryce Farris (which includes a full transcript of the preliminary injunction hearing which was held on September 18, 2014)

12/17/2014 Withdrawal of Motion for Summary Judgment Against Lows  
01/29/2015 Defendant Heart K Ranch's Motion For Summary Judgment  
01/29/2015 Defendant Heart K Ranch's Memorandum in Support of Notion for Summary Judgment  
01/29/2015 Affidavit of Ronald P. Rainey  
01/29/2015 Affidavit of Rose King in Support of the Defendant Heart K Ranch's Motion for Summary Judgment  
01/29/2015 Affidavit of Gilbert King in Support of the Defendant Heart K Ranch's Motion for Summary Judgment  
02/10/2015 Defendant Lows' Response to Kings' Motion for Summary Judgment  
02/13/2015 Plaintiffs Response to Heart K. Ranch's MSJ  
02/13/2015 Compilation of Testimony  
02/19/2015 Reply Memorandum in Support Defendant Heart K Ranch's Motion for Summary Judgment  
03/25/2015 Memorandum Decision upon King defendants' motion for summary judgment  
03/30/2015 Amended Complaint Filed/First amended  
04/07/2015 Motion/King Defendant's motion for reconsideration under rule 11(a)(2)(B) of decision denying motion for summary judgment  
04/07/2015 Affidavit in support of motion for reconsideration  
04/20/2015 Memorandum in Support of King Defendant's Motion for Reconsideration Under Rule 11(a) (2)(B) of Decision Denying Motion for Summary Judgment  
04/28/2015 Plaintiffs' response to Kings motion for reconsideration



05/11/2015 Memorandum/Reply memorandum in support of King defendants' motion for reconsideration under Rule 11(a)(2)(B) of decision denying motion for summary judgment

06/19/2015 Memorandum Decision upon King Defendants' motion for reconsideration Plaintiff's Motion for Reconsideration of the Court's June 19, 2015

07/06/2015 Memorandum Decision on King's Motion for Summary Judgment and Request for Reconsideration

07/06/2015 Deposition of Rose King

07/06/2015 Deposition of Gilbert King

07/08/2015 Judgment

07/15/2015 Susie and Cal Lowe's Memorandum in Support of Motion for Partial Summary Judgment

07/15/2015 Motion For Summary Judgment

08/04/2015 Memorandum/King Defendants' memorandum in opposition to the Fuquay Plaintiff's Motion for reconsideration

08/12/2015 Declaration of Matthew Cleverley

08/12/2015 Reply/Plaintiffs' reply in support of motion for reconsideration of the court's June 19, 2015 memorandum decision of King's motion for summary judgment and request for reconsideration

08/17/2015 Susie and Cal Low's reply in support of motion for partial summary judgment

09/11/2015 Memorandum Decision Upon Plaintiffs' Motion For Reconsideration Filed July 6, 2015

09/21/2015 Memorandum Decision Upon Low Defendants' Motion For Summary Judgment

10/06/2015 Order on Low Defendants' Motion For Partial Summary Judgment

12/21/2015 **Judgment dated December 18, 2015 Dismissing Plaintiff's easement claims against the Lows (Item #2 of the Judgment. Item #1 is not appealed.)**

7. I certify:

- (a) that a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

**NOTE: No Additional Transcripts are Requested.**

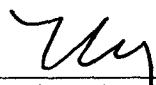
Name and  
address: \_\_\_\_\_

Name and address: \_\_\_\_\_

Name and address: \_\_\_\_\_

- (b) (1)  That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.
- (2)  That the appellant is exempt from paying the estimated transcript fee because \_\_\_\_\_
- (c) (1)  That the estimated fee for preparation of the clerk's or agency's record will be paid upon request.
- (2)  That appellant is exempt from paying the estimated fee for preparation of the record because \_\_\_\_\_
- (d) (1)  That the appellate filing fee has been paid.
- (2)  That appellant is exempt from paying the appellate filing fee because \_\_\_\_\_
- (e) That service has been made upon all parties required to be served pursuant to Rule 20.

Dated: January 5, 2016



---

Matthew R. Cleverley, ISB #5418  
 Fidelity National Law Group  
 1200 - 6<sup>th</sup> Avenue, Suite 620  
 Seattle, WA 98101  
 (206) 223-4525, ext. 103  
[Matthew.Cleverley@fnf.com](mailto:Matthew.Cleverley@fnf.com)  
 Attorney for Plaintiffs

STATE OF IDAHO }  
 County of Owyhee } ss  
 I hereby certify that the foregoing instrument is a true and correct copy of the original as it appears.

Record of Owyhee County  
 Dated 1/11/16  
 Title District Court Clerk

**CERTIFICATE OF SERVICE**

On the date given below I caused to be served the foregoing **Amended Notice of Appeal** on the following individuals in the manner indicated:

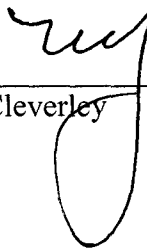
Ronald P. Rainey  
Attorney at Law  
110 North Ninth Street  
Caldwell, ID 83606  
208-459-3659  
[erainey@qwestoffice.net](mailto:erainey@qwestoffice.net)  
Attorney for Kings

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

S. Bryce Farris  
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208-629-7447  
[bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)  
Attorney for Lows

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Dated: January 5, 2016

  
\_\_\_\_\_  
Matthew Cleverley

In the Supreme Court of the State of Idaho FEB 13 2016

ANGELA BARKELL, CLERK

Deputy Clerk

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY; and HAILEY ROSE FUQUAY, )

Plaintiffs-Counterdefendants- )  
Appellants, )

v. )

SUSIE LOW and CAL LOW, )

Defendants-Respondents, )

and )

GILBERT KING, as Trustee of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012; THE ESTATE OF )  
GORDON G. KING; and ROSE M. KING, )  
as Beneficiary of the HEART K RANCH )  
TRUST UTA DECEMBER 28, 2012 )

Defendants-Counterclaimants- )  
Respondents, )

and )

AVCO FINANCIAL SERVICES OF IDAHO )  
FALLS; and FIRST AMERICAN TITLE )  
INSURANCE COMPANY, )

Defendants. )

ORDER GRANTING MOTION TO )  
DISMISS APPEAL )

Supreme Court Docket No. 43705-2015 )  
Owyhee County No. CV-2014-278 )

Ref. No. 16-34 )

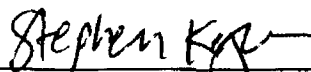
RESPONDENT HEART K RANCH'S MOTION TO DISMISS APPEAL and an AFFIDAVIT OF RONALD P. RAINEY IN SUPPORT OF RESPONDENT HEART K RANCH'S MOTION TO DISMISS APPEAL with attachments were filed by counsel for Respondent Heart K. Ranch Trust on January 19, 2016, requesting this Court for an Order dismissing this appeal on the basis that no final appealable judgment has yet been entered in the action below upon which this appeal may proceed. Thereafter, PLAINTIFF/APELLANTS' RESPONSE TO HEART K RANCH MOTION TO DISMISS APPEAL was filed by counsel for Appellants on January 22, 2016. The Court is fully advised; therefore, good cause appearing,

ORDER GRANTING MOTION TO DISMISS APPEAL - Docket No. 43705-2015

IT HEREBY IS ORDERED that RESPONDENT HEART K RANCH'S MOTION TO DISMISS APPEAL be, and hereby is, GRANTED and this appeal is DISMISSED.

DATED this 8 day of February, 2016.

By Order of the Supreme Court

  
\_\_\_\_\_  
Stephen W. Kenyon, Clerk

cc: Counsel of Record  
District Court Clerk  
District Judge Thomas J. Ryan  
District Court Reporter

**FILED**

A.M. *4:00* P.M.

MAR 10 2016

ANGELA BARKELL CLERK

Deputy Clerk

RONALD P. RAINEY ISB #1022  
Attorney at Law  
P.O. Box 26  
110 North Ninth Street  
Caldwell, Idaho 83606-0026  
Phone (208)459-3659  
Facsimile Transmission No:459-9067

Attorney for Defendants  
Gilbert King as Trustee for the  
Heart K. Ranch Trust UTA December 28, 2012

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD, )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K. )  
RANCH TRUST UTA DECEMBER 28, )  
2012; AVCO FINANCIAL SERVICES OF )  
IDAHO FALLS, INC.; GORDON G. KING )  
ROSE M. KING; FIRST AMERICAN )  
TITLE INSURANCE COMPANY, )

Defendants. )

GILBERT KING, as Trustee; and )  
ROSE M. KING, as Beneficiary of the )  
HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )

Case No. CV-2014-0278

KINGS' MEMORANDUM IN SUPPORT OF  
PROPOSED JUDGMENT

KINGS' MEMORANDUM IN SUPPORT OF PROPOSED JUDGMENT \_1

FUQUAY and HAILEY ROSE FUQUAY )

Counterdefendants. )

The King defendants, Counterclaimants, have redrafted Mr. Cleverley's initial proposed judgment on King's counterclaims deleting what were paragraphs 5 and 6 quoted as follows:

- 5 The kings have no legal or equitable right to use any part of the Fuquay properties or the portion of King Lane that extends west beyond the King or Low property boundary. The Kings are enjoined from entry onto or use of the Fuquay properties.
6. To the extent that the Kings have the right to maintain ditches on the fuquay properties under I.C. 42-1102, access to the ditches shall be from along the ditch banks only. The ditches shall not be accessed from over any of the Fuquay roads or through the Fuquays' fields.

The basis for deleting these paragraphs is that the issues addressed in paragraphs 5 and 6 were not raised as issues in the case in chief.

The Kings feel that it is necessary to pursue the three counterclaims in order to clearly establish that the Fuquays do not have any right whatsoever to enter King's property in any manner. Kings first counterclaim is for a declaratory judgment and merely dismissing Fuquay's complaint to establish a prescriptive easement over King Lane does not extinguish all legal and equitable rights that Fuquays may claim in the future.

King's second counterclaim seeks a permanent injunction to keep Fuquays from using King Lane and goes to the future claims that Fuquays may generate which may not be addressed by merely dismissing Fuquays claim for prescriptive easement. The contentious nature of the relationship between the Fuquays and Kings causes the Kings to be proactive in preventing future problems.

KINGS" MEMORANDUM IN SUPPORT OF PROPOSED JUDGMENT \_2

problems.

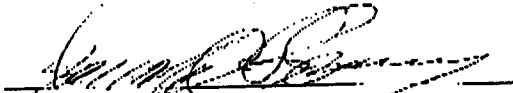
King's third counterclaim makes it clear that the Fuquay's have no interest in King Lane of any kind whether an easement or ownership.

While the Court granted the order dismissing Fuquay's complaint for prescriptive easement over the King's property, the Kings were intending to eliminate any possible future claims Fuquays may have in drafting their counterclaims were intending to eliminate any possible future claims Fuquays may have to complete termination of any legal or any type of claim they may raise in the future.

Just dismissing Fuquay's complaint does not provide the parties with a complete settlement of the future issues which may arise.

DATED This 12 day of March, 2016.

RONALD P. RAINEY P.A.

  
\_\_\_\_\_  
Ronald P. Rainey

Attorney for Defendants, Gilbert King as  
Trustee, and Rose M. King, as Beneficiary  
of the Heart K. Ranch Trust UTA December 28,  
2012



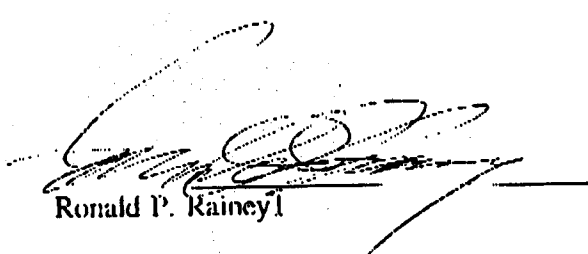
## CERTIFICATE OF SERVICE

I, Ronald P. Rainey, hereby certify that on this 10<sup>th</sup> day of March, 2016, I caused a true and correct copy of the foregoing instrument to be delivered to the adverse party, via the method indicated below, addressed as follows:

U.S. Mail, Postage Prepaid     Facsimile Transmission     Hand Delivery

Matthew R. Cleverley  
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1200 6th Avenue, Suite 620  
Seattle, Washington 98101  
Telephone: 206-224-6003  
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Facsimile: 629-7559  
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Ronald P. Rainey

Matthew R. Cleverley, ISB #5418  
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701 Fifth Avenue, Suite 2710  
Seattle, WA 98104  
(206) 224-6003  
Matthew.Cleverley@fnf.com  
Attorney for Plaintiffs

**FILED**

A.M. 4:13 P.M.

MAR 14 2016

ANGELA BARKELL, CLERK  
*Angela Barkell*  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012; AVCO FINANCIAL SERVICES OF  
IDAHO FALLS, INC.; GORDON G. KING;  
ROSE M. KING; FIRST AMERICAN  
TITLE INSURANCE COMPANY,

Defendants.

Case No. CV-14-0278

PLAINTIFFS' MEMORANDUM  
REGARDING ENTRY OF FINAL  
JUDGMENT ON KINGS'  
COUNTERCLAIMS

This Memorandum is submitted in support of Plaintiffs' proposed form of Judgment as to the Kings' counterclaims.

**1. First Counterclaim – Scope of Easement**

Kings' first counterclaim seeks declaratory relief that the Plaintiffs have exceeded the scope of their prescriptive easement and that the Fuquays do not have the right to drive trucks over King Lane:

45. The Heart K Ranch Counterclaimants seek declaratory relief establishing that the Fuquay Counterdefendants have exceeded the nature and scope of their permissive right to use King Lane for ordinary and infrequent residential use.

FUQUAYS' MEMORANDUM RE: ENTRY OF  
FINAL JUDGMENT – 1

FIDELITY NATIONAL LAW GROUP  
COLUMBIA CENTER  
701 FIFTH AVENUE, SUITE 2710  
SEATTLE, WA 98104  
(206) 223-4525

46. The Heart K Ranch Counterclaimants seek declaratory relief establishing that the Fuquay Counterdefendants have no legal or equitable right to use King Lane for the current uses being made of that access by means of large commercial trucks on an almost daily basis.

Since the Court has determined that the Plaintiffs do not have prescriptive rights over King Lane, a declaration regarding specific scope of the easement or use is irrelevant. The claim must be denied as moot.

## **2. Second Counterclaim – Permanent Injunction**

The Kings second counterclaim seeks a permanent injunction as follows:

55. The Fuquay Plaintiffs/Counterdefendants, including their employees, invitees, agents, and other representatives should be ordered and restrained by entry of permanent injunction as follows:

- a. From any entry onto, or use of, King Lane by means of any motor vehicle, whatsoever, as the private roadway is owned by and held out only for the use of, the Heart K Ranch and its invitees; and
- b. From any in any way, or by any means, interfering with or obstructing the gates, chains, or any locks, or other hardware related to the structure and operation of those gates, which may have been placed across the entries to King Lane; and
- c. By undertaking to obstruct, by any means, or to molest or harass the users, in the rightful use of King Lane by the owners and invitees of Heart K Ranch.

### **a. Injunctive Relief is Not a Proper Remedy**

Injunctive relief is only available when there is no adequate remedy at law. “Injunction to restrain trespass is ordinarily confined to cases where the nature of the property or frequent repetition of the trespass precludes recovery of remedial damages at law. In the case of injury to land, injunctive relief will not be granted where the plaintiff has an adequate remedy at law.” Milbert v. Carl Carbon, Inc., 89 Idaho 471, 479, 406 P.2d 113, 118 (1965). In this case, there has been no evidence that the Plaintiffs have used King Lane since the Court denied

their Motion for Preliminary Injunction in September 2014. In addition, Plaintiffs have an adequate remedy at law: a suit for trespass, the same as any other landowner.

Further, an injunction should not be granted unless there is irreparable injury to the landowner. Johnson v. Twin Falls Canal Co., 66 Idaho 660, 675, 167 P.2d 834, 841 (1946). Here there is no showing that the Kings will suffer any irreparable injury if they are not granted an injunction. There is no evidence that the Plaintiffs have threatened to continue to use the roadway in violation of any orders, to remove or obstruct gates, or remove locks. There is no evidence that the Kings would be unable to seek any other remedy afforded to any other landowner. Thus, an injunction is not a proper remedy.

**b. The Kings Seek an Injunction Against Unnamed Third Parties.**

The Kings seek an injunction against third parties other than the Plaintiffs who might happen to use King Lane. The Court does not have jurisdiction to issue an injunction against unnamed third parties. Further, there is no basis for an injunction against a third-party who might be looking for the Fuquays' property and who happens to drive down King Lane looking for them. That is entirely outside the Fuquays' control.

**c. There is No Evidence to Support an Injunction**

Finally, the only evidence in the case related to the Plaintiffs' use of King Lane under their assertion of a legal right. There is no evidence that the Plaintiffs ever "obstructed, molested or harassed" any users of King Lane, so there is no evidentiary basis for an injunction.

### 3. Third Counterclaim - Quiet Title

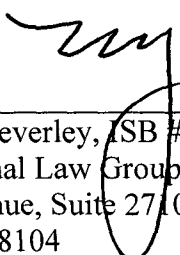
The Kings' third counterclaim is for quiet title:

57. The Heart K Ranch Counterclaimants request a determination that no prescriptive or adverse rights exist in King Lane as it crosses their property, and that a decree quieting title in them, and extinguishing any such claims, or easements, be entered by this Court, such as can be recorded in the land title records of Owyhee County.

Since the Court has determined that the Plaintiffs do not have prescriptive rights over King Lane, the most appropriate Judgment is simply that the Plaintiffs do not have a prescriptive easement over King Lane.

There are other issues between the parties that are not involved in the easement dispute. That has to do with water rights and scope of access to ditches. Any Judgment in this case should address only the Plaintiffs' prescriptive rights over King Lane. The Judgment should not be any broader as the parties may have various other access and use rights that are not being addressed in this case.

Dated: March 7, 2016



---

Matthew R. Cleverley, ASB #5418  
Fidelity National Law Group  
701 Fifth Avenue, Suite 2710  
Seattle, WA 98104  
(206) 223-4525, ext. 103  
[Matthew.Cleverley@fnf.com](mailto:Matthew.Cleverley@fnf.com)  
Attorney for Plaintiffs

**CERTIFICATE OF SERVICE**

On the date given below, I caused to be served the foregoing document entitled PLAINTIFFS' MEMORANDUM RE: ENTRY OF FINAL JUDGMENT ON KINGS' COUNTERCLAIMS on the following counsel of record, in the manner of service indicated as follows:

Ronald P. Rainey  
Attorney at Law  
110 North Ninth Street  
Caldwell, ID 83606  
208-459-3659  
[erainey@qwestoffice.net](mailto:erainey@qwestoffice.net)  
Attorney for Kings

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	E-MAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

S. Bryce Farris  
Sawtooth Law Offices, PLLC  
1101 W. River Street, Suite 110  
Boise, ID 83707  
208-629-7447  
[bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)  
Attorney for Lows

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input checked="" type="checkbox"/>	E-MAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Dated: March 9, 2016

  
\_\_\_\_\_  
Estela Acosta, Paralegal

**FILED**

10:29 A.M. P.M.

# In the Supreme Court of the State of Idaho

ANGELA BARKELL, CLERK

Deputy Clerk

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY; and HAILEY ROSE FUQUAY,

Plaintiffs-Counterdefendants-  
Appellants,

v.

SUSIE LOW and CAL LOW,

Defendants-Respondents,

and

GILBERT KING, as Trustee of the  
HEART K RANCH TRUST UTA DECEMBER  
28, 2012; THE ESTATE OF  
GORDON G. KING; and ROSE M. KING,  
as Beneficiary of the HEART K RANCH  
TRUST UTA DECEMBER 28, 2012

Defendants-Counterclaimants-  
Respondents,

and

AVCO FINANCIAL SERVICES OF IDAHO  
FALLS; and FIRST AMERICAN TITLE  
INSURANCE COMPANY,

Defendants.

REMITTITUR

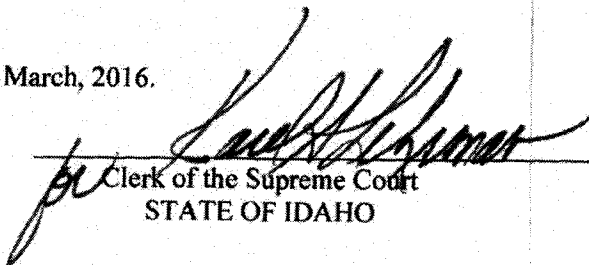
Supreme Court Docket No. 43705-2015  
Owyhee County No. CV-2014-278

TO: THIRD JUDICIAL DISTRICT, COUNTY OF OWYHEE.

The Court having granted Respondent's Motion to Dismiss Appeal on February 8, 2016, and having entered an Order dismissing this appeal February 8, 2016; therefore,

IT IS HEREBY ORDERED that the appeal herein from the judgment of the district court be, and hereby is, DISMISSED.

DATED this 23<sup>rd</sup> day of March, 2016.

  
Clerk of the Supreme Court  
STATE OF IDAHO

cc: Counsel of Record  
District Court Clerk  
District Judge

REMITTITUR - Docket No. 43705-2015

**FILED**  
843 A.M. P.M.

MAR 29 2015

ANGELA BARKELL, CLERK  
*Angela Barkell*  
Deputy Clerk

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE**

JOHN E. FUQUAY, CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K )  
RANCH TRUST UTA DECEMBER 28 )  
2012; AVCO FINANCIAL SERVICES )  
OF IDAHO FALLS, INC.; GORDON G. )  
KING; ROSE M. KING; FIRST )  
AMERICAN TITLE INSURANCE CO., )

Defendants. )

**CASE NO. CV-2014-0278-M**

**AMENDED FINAL JUDGMENT**

GILBERT KING, as Trustee; and ROSE )  
M. KING, as Beneficiary of the HEART )  
K. RANCH TRUST UTA DECEMBER )  
28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )

Counterdefendants. )

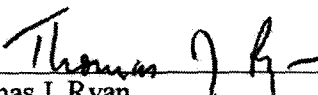
**JUDGMENT IS ENTERED AS FOLLOWS:**



IT IS HEREBY ORDERED that the amended complaint is dismissed with prejudice as to the defendants, Gilbert King, as trustee of the Heart K Ranch Trust UTA December 28, 2012; the estate of Gordon G. King and Rose M. King.

IT IS FURTHER ORDERED that the King defendants' counterclaims are dismissed without prejudice.

Dated this 28<sup>th</sup> day of March, 2016.

  
\_\_\_\_\_  
Thomas J. Ryan  
District Judge

**CERTIFICATE OF SERVICE**


I hereby certify that I caused the foregoing to be served upon the following via U.S. Mail, postage prepaid, facsimile transmission or by hand delivery:

✓ MATTHEW R. CLEVERLY  
FIDELITY NATIONAL LAW GROUP  
1200 6<sup>th</sup> Avenue, Suite 620  
Seattle, Washington 98101

✓ S. BRYCE FARRIS  
SAWTOOTH LAW OFFICES, PLLC  
P.O. Box 7985  
Boise, Idaho 83707

✓ RONALD P. RAINEY  
Attorney at Law  
PO Box 26  
Caldwell, ID 83606

3/29/16  
Date

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

**FILED**  
8:45 A.M. P.M.

MAR 20 2015

ANGELA BARKELL CLERK  
*Angela Barkell*  
Deputy Clerk

**IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE**

JOHN E. FUQUAY, CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiffs, )

vs. )

SUSIE LOW; CAL LOW; HEART K )  
RANCH TRUST UTA DECEMBER 28 )  
2012; AVCO FINANCIAL SERVICES )  
OF IDAHO FALLS, INC.; GORDON G. )  
KING; ROSE M. KING; FIRST )  
AMERICAN TITLE INSURANCE CO., )

Defendants. )

GILBERT KING, as Trustee; and ROSE )  
M. KING, as Beneficiary of the HEART )  
K. RANCH TRUST UTA DECEMBER )  
28, 2012, )

Counterclaimants, )

vs. )

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY, )

Counterdefendants. )

CASE NO. CV-2014-0278-M

**MEMORANDUM DECISION UPON  
REQUEST FOR FINAL JUDGMENT**

**MEMORANDUM DECISION UPON  
REQUEST FOR FINAL JUDGMENT**

Page 1

The above-entitled matter came on for hearing February 26, 2016 upon a motion for status conference filed on behalf of the plaintiffs. Matthew R. Cleverly, of the law firm Fidelity National Law Group, appeared on behalf of the moving plaintiffs (hereinafter "Fuquays"). Ronald P. Rainey, Attorney at Law, represented the defendants (hereinafter "Kings"). The issue before the Court is the parties dispute exactly what language should be placed in a final judgment allowing this matter to proceed to appeal. The Court asked each party to submit their proposed Final Judgment. The Kings submitted theirs on March 10, 2016 and the Fuquays submitted theirs on March 14, 2016. The Court has considered the parties' briefing and oral argument and hereby finds as follows.

### **BACKGROUND**

In their Complaint, the Fuquays sought a declaration of a prescriptive easement over King Lane in Owyhee County. King Lane is a private, all-weather road about one-half mile in length. It runs in an east-west direction from the public Oreana Loop Road until it connects with Castle Lane, which then runs south until it connects with Oreana Loop Road. The King defendants own the parcel of land to the north of King Lane, the Low defendants own the parcel of land to the south of King Lane and the plaintiffs own parcels of land to the west of King Lane where it ends and connects with Castle Lane.

The Court determined that, under the controlling rule of Idaho law, the Fuquays use of King Lane was at all times deemed to be permissive, therefore there could not be a prescriptive easement, which is dependent upon "adverseness" in order to be established. Based upon the Court's decision granting Defendant Kings' motion for summary judgment,<sup>8</sup> the Court entered a Final Judgment dismissing the Fuquays' Complaint. However, that Final Judgment did not address the Kings' counterclaims.

The Kings filed counterclaims alleging the following: (1) that the Court should grant declaratory relief finding the Fuquays exceeded the nature and scope of their permissive right to use King Lane for ordinary and infrequent residential use; (2) seeking a permanent injunction that the Fuquays cannot enter onto King Lane and may not interfere with or obstruct the gates; and (3) that the Court quiet title to King Lane to the Kings and determine that no prescriptive or adverse rights exist.

As to (1) and (3) set forth above, the court is of the opinion that the ruling upon Kings' summary judgment effectively made those counterclaims moot. The Court will order those

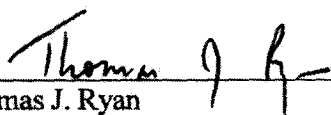
counterclaims dismissed without prejudice so that in the event the Kings disagree, they may refile for said relief.

As to counterclaim (2) set forth above, the Court agrees with the position of the Fuquays that injunctive relief is not a proper remedy. In its Memorandum Decision upon Fuquays motion for summary judgment regarding the Lows counterclaims, this Court found:

The Lows also seek an injunction to prevent the dogs from entering their property in the future. "Injunction to restrain trespass is ordinarily confined to cases where the nature of the property or frequent repetition of the trespass precludes recovery of remedial damages at law." *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 479, 406 P.2d 113, 118 (1965). Moreover, "[i]n the case of injury to land, injunctive relief will not be granted where the plaintiff has an adequate remedy at law." *Id.* (citing 43 C.J.S. Injunctions §§ 57 and 60). This court has discretion to grant or refuse injunctive relief. I.C. § 8-402; *Unity Light & Power Co. v. City of Burley*, 83 Idaho 285, 361 P.2d 788 (1961); *White v. Coeur d'Alene Big Creek Mining Co.*, 56 Idaho 282, 55 P.2d 720 (1936); *Rowland v. Kellogg Power & Water Co.*, 40 Idaho 216, 233 P. 869 (1925). The exercise of such discretion by the trial court in granting or refusing an injunction will not be reversed on appeal unless a clear abuse of discretion is shown. *Milbert v. Carl Carbon, Inc.*, 89 Idaho 471, 479, 406 P.2d 113, 118 (1965).

Thus, the Court finds that the Kings' second counterclaim should also be dismissed but without prejudice.

Dated this 28<sup>th</sup> day of March, 2016.

  
\_\_\_\_\_  
Thomas J. Ryan  
District Judge

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
701 Fifth Avenue, Suite 2710  
Seattle, WA 98104  
(206) 224-6003  
[Matthew.Cleverley@fnf.com](mailto:Matthew.Cleverley@fnf.com)  
Attorney for Plaintiffs

**FILED**

A.M. 5:52 P.M.

MAY 02 2016

ANGELA BARKELL, CLERK  
Deputy Clerk

IN THE DISTRICT COURT OF THE STATE OF IDAHO  
FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs,

v.

SUSIE LOW; CAL LOW; GILBERT KING  
as Trustee of the HEART K RANCH TRUST  
UTA DECEMBER 28, 2012; AVCO  
FINANCIAL SERVICES OF IDAHO  
FALLS, INC.; THE ESTATE OF GORDON  
G. KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY,

Defendants.

GILBERT KING, as Trustee , and ROSE M.  
KING, as Beneficiary of the HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012,

Counterclaimants,

vs.

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Counterdefendants.

Case No. CV-2014-0278

NOTICE OF APPEAL

NOTICE OF APPEAL - 1

FIDELITY NATIONAL LAW GROUP  
701 FIFTH AVENUE, SUITE 2710  
SEATTLE, WA 98104  
(206) 223-4525

TO: SUSIE LOW and CAL LOW  
And their Attorney: S. BRYCE FARRIS

And to: GILBERT KING as Trustee of the HEART K RANCH TRUST UTA  
DECEMBER 28, 2012; THE ESTATE OF GORDON G. KING; and ROSE  
M. KING;  
And their Attorney: RONALD P. RAINEY

And to: THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named appellants, JOHN E. FUQUAY; CLINTON WARD FUQUAY and HAILEY ROSE FUQUAY, appeal against the above-named respondents to the Idaho Supreme Court from following:

03/25/2015 Memorandum Decision upon King Defendants' Motion for Summary Judgment  
06/19/2015 Memorandum Decision upon King Defendants' Motion for Reconsideration  
07/08/2015 Judgment (Dismissing Plaintiff's Easement Claims against the Kings)  
09/11/2015 Memorandum Decision Upon Plaintiffs' Motion For Reconsideration Filed July 6,  
2015  
09/21/2015 Memorandum Decision Upon Low Defendants' Motion For Summary Judgment  
10/06/2015 Order on Low Defendants' Motion For Partial Summary Judgment  
12/21/2015 Judgment dated December 18, 2015 Dismissing Plaintiff's easement claims  
against the Lows (Item #2 of the Judgment. Item #1 is not appealed.)

That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to I.A.R 11(a)(1).

2. Preliminary Statement of Issues:

The trial court erred when it granted summary judgment in favor of the Respondents and dismissed Plaintiff/Appellant's Complaint seeking a prescriptive easement. The Trial court erred because:

- a. It failed to use the proper legal standards in making its decisions.
- b. It granted summary judgment to Defendants/Respondents even though there are disputed issues of material fact.
- c. It construed facts in the light most favorable to the Defendant/Respondents instead of the non-moving Plaintiff/Appellant.

d. The Low Defendants were not entitled to summary judgment on the same basis as the King Defendants because the facts and issues are different.

3. Has an order been entered sealing all or any portion of the record? No.  
If so, what portion? N/A

4. (a) Is a reporter's transcript requested?

**No transcripts are requested from the court reporter. The transcripts of the preliminary injunction hearing held on September 18, 2014 were already transcribed and are included in the 12/8/2014 Affidavit of Bryce Farris, which is listed in #6 below.**

**Additional or separate copies of the transcripts from the 12/8/2014 hearing are not necessary. No other hearings had oral testimony, and were all argument. Since review is de novo, prior oral arguments are irrelevant and transcripts of the parties' arguments is not requested.**

(b) The appellant requests the preparation of the following portions of the reporter's transcript: None.

6. The appellant requests the following documents to be included in the clerk's record in addition to those automatically included under Rule 28, I.A.R.

08/11/2014	Complaint Filed ( Prescriptive Easement)
09/04/2014	Declaration of Raymond Jayo in Support of Ex parte Motion for Temporary Restraining Order
09/04/2014	Declaration of John Fuquay in Support of Ex parte Motion for Temporary Restraining Order
09/04/2014	Declaration of Matthew Cleverley in Support of Ex parte Motion for Temporary Restraining Order
09/09/2014	Answer and Counterclaims by Defendants Trustees for the Heart King Ranch Trust UTA December 28, 2012
09/09/2014	Affidavit of Gilbert King
09/09/2014	Affidavit of Rose King
09/09/2014	Declaration of Denice Collett in Support of Defendant's Objection to Plaintiffs Ex Parte Restraining Order
09/10/2014	Affidavit of Ronald P. Rainey
09/15/2014	Declaration of Schwann Delivery Person
09/16/2014	Affidavit of Susie Low
09/17/2014	Answer of Defendants Susie and Cal Low and Counterclaim
09/18/2014	Declaration of Scott Snyder

09/18/2014 Declaration of Scott Snyder  
09/18/2014 Declaration of Seth Thomas  
12/9/2014 Affidavit of Bryce Farris (which includes a full transcript of the preliminary  
(out of date injunction hearing which was held on September 18, 2014) which is related to  
order) the above filings

10/29/2014 Plaintiffs Motion for Partial Summary Judgment against Susie Low and Cal  
Low  
10/29/2014 Declarations of Matthew Cleverley  
10/29/2014 Declarations of John Fuquay  
12/09/2014 Response and Objection to Plaintiffs Motion for Summary Judgment  
12/09/2014 Affidavit of Rose King  
12/09/2014 Affidavit of Samuel V.C. Steiner  
12/09/2014 Affidavit of S. Bryce Farris (which includes a full transcript of the preliminary  
injunction hearing which was held on September 18, 2014)

12/17/2014 Withdrawal of Motion for Summary Judgment Against Lows  
01/29/2015 Defendant Heart K Ranch's Motion For Summary Judgment  
01/29/2015 Defendant Heart K Ranch's Memorandum in Support of Notion for Summary  
Judgment  
01/29/2015 Affidavit of Ronald P. Rainey  
01/29/2015 Affidavit of Rose King in Support of the Defendant Heart K Ranch's Motion  
for Summary Judgment  
01/29/2015 Affidavit of Gilbert King in Support of the Defendant Heart K Ranch's Motion  
for Summary Judgment  
02/10/2015 Defendant Lows' Response to Kings' Motion for Summary Judgment  
02/13/2015 Plaintiffs Response to Heart K. Ranch's MSJ  
02/13/2015 Compilation of Testimony  
02/19/2015 Reply Memorandum in Support Defendant Heart K Ranch's Motion for  
Summary Judgment  
03/25/2015 Memorandum Decision upon King defendants' motion for summary judgment  
03/30/2015 Amended Complaint Filed/First amended  
04/07/2015 Motion/King Defendant's motion for reconsideration under rule 11(a)(2)(B) of  
decision denying motion for summary judgment  
04/07/2015 Affidavit in support of motion for reconsideration  
04/20/2015 Memorandum in Support of King Defendant's Motion for Reconsideration  
Under Rule 11(a) (2)(B) of Decision Denying Motion for Summary Judgment  
04/28/2015 Plaintiffs' response to Kings motion for reconsideration

NOTICE OF APPEAL – 4

FIDELITY NATIONAL LAW GROUP  
701 FIFTH AVENUE, SUITE 2710  
SEATTLE, WA 98104  
(206) 223-4525



05/11/2015 Memorandum/Reply memorandum in support of King defendants' motion for reconsideration under Rule 11(a)(2)(B) of decision denying motion for summary judgment

06/19/2015 Memorandum Decision upon King Defendants' motion for reconsideration Plaintiff's Motion for Reconsideration of the Court's June 19, 2015

07/06/2015 Memorandum Decision on King's Motion for Summary Judgment and Request for Reconsideration

07/06/2015 Deposition of Rose King

07/06/2015 Deposition of Gilbert King

07/08/2015 Judgment

07/15/2015 Susie and Cal Lowe's Memorandum in Support of Motion for Partial Summary Judgment

07/15/2015 Motion For Summary Judgment

08/04/2015 Memorandum/King Defendants' memorandum in opposition to the Fuquay Plaintiff's Motion for reconsideration

08/12/2015 Declaration of Matthew Cleverley

08/12/2015 Reply/Plaintiffs' reply in support of motion for reconsideration of the court's June 19, 2015 memorandum decision of King's motion for summary judgment and request for reconsideration

08/17/2015 Susie and Cal Low's reply in support of motion for partial summary judgment

09/11/2015 Memorandum Decision Upon Plaintiffs' Motion For Reconsideration Filed July 6,2015

09/21/2015 Memorandum Decision Upon Low Defendants' Motion For Summary Judgment

10/06/2015 Order on Low Defendants' Motion For Partial Summary Judgment

12/21/2015 Judgment dated December 18, 2015 Dismissing Plaintiff's easement claims against the Lows (Item #2 of the Judgment. Item #1 is not appealed.)

7. I certify:

- (a) that a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below:

**NOTE: Hearing transcripts are already included as part of other motion papers. No Additional Transcripts are Requested.**

Name and  
address: \_\_\_\_\_

NOTICE OF APPEAL – 5

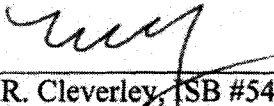
FIDELITY NATIONAL LAW GROUP  
701 FIFTH AVENUE, SUITE 2710  
SEATTLE, WA 98104  
(206) 223-4525

Name and address: \_\_\_\_\_

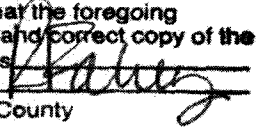
Name and address: \_\_\_\_\_

- (b) (1)  That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.
- (2)  That the appellant is exempt from paying the estimated transcript fee because \_\_\_\_\_
- (c) (1)  That the estimated fee for preparation of the clerk's or agency's record will be paid upon request.
- (2)  That appellant is exempt from paying the estimated fee for preparation of the record because \_\_\_\_\_
- (d) (1)  That the appellate filing fee has been paid.
- (2)  That appellant is exempt from paying the appellate filing fee because \_\_\_\_\_
- (e) That service has been made upon all parties required to be served pursuant to Rule 20.

April 27, 2016

  
\_\_\_\_\_  
Matthew R. Cleverley, SB #5418  
Fidelity National Law Group  
701 Fifth Avenue, Suite 2710  
Seattle, WA 98104  
(206) 223-4525, ext. 103  
[Matthew.Cleverley@fnf.com](mailto:Matthew.Cleverley@fnf.com)  
Attorney for Plaintiffs

STATE OF IDAHO }  
County of Owyhee } ss

I hereby certify that the foregoing instrument is a true and correct copy of the original as it appears. 

Record of Owyhee County

Dated 4/27/16

Title District Clerk

FIDELITY NATIONAL LAW GROUP  
701 FIFTH AVENUE, SUITE 2710  
SEATTLE, WA 98104  
(206) 223-4525

NOTICE OF APPEAL - 6

**CERTIFICATE OF SERVICE**

On the date given below I caused to be served the foregoing **Notice of Appeal** on the following individuals in the manner indicated:


Ronald P. Rainey  
Attorney at Law  
110 North Ninth Street  
Caldwell, ID 83606  
208-459-3659  
[erainey@qwestoffice.net](mailto:erainey@qwestoffice.net)  
Attorney for Kings

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

S. Bryce Farris  
Sawtooth Law Offices, PLLC  
1101 W River Street, Suite 110  
Boise, ID 83707  
208-629-7447  
[bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)  
Attorney for Lows

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Dated: April 27, 2016

  
\_\_\_\_\_  
Estela Acosta

AUG 22 2016

ANGELA BARKELL, CLERK  
*Angela Barkell*  
Deputy Clerk

Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
701 Fifth Avenue, Suite 2710  
Seattle, WA 98104  
(206) 224-6003  
[Matthew.Cleverley@fnf.com](mailto:Matthew.Cleverley@fnf.com)  
Attorney for Plaintiffs/Appellants

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs/Appellants,

v.

SUSIE LOW; CAL LOW; GILBERT KING  
as Trustee of the HEART K RANCH TRUST  
UTA DECEMBER 28, 2012; AVCO  
FINANCIAL SERVICES OF IDAHO  
FALLS, INC.; THE ESTATE OF GORDON  
G. KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY,

Defendants/Respondents.

GILBERT KING, as Trustee , and ROSE M.  
KING, as Beneficiary of the HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012,

Counterclaimants,

vs.

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Counterdefendants.

Supreme Court No. 44155

Owyhee District Court No. CV-2014-0278

APPELLANT'S OBJECTION TO  
CLERK'S RECORD AND REQUEST  
FOR SUPPLEMENTATION

The Clerk for the Owyhee County District Court submitted the Clerk's record to the Supreme Court on or about July 29, 2016. However, the Clerk's record is missing the following documents, even though they were designated in the Notice of Appeal:


9/10/2014 Affidavit of Ron Rainey

2/13/2015 Compilation of Testimony

6/19/2015 Memorandum Decision upon King Defendants' Motion for Reconsideration

Appellants request that the Court enter an Order requiring the Clerk of the District Court of the Third Judicial District of the State of Idaho in and for the County of Owyhee to supplement the Clerk's record so it includes the designated documents.

August 17, 2016



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Matthew R. Cleverley, ISB #5418  
Fidelity National Law Group  
701 Fifth Avenue, Suite 2710  
Seattle, WA 98104  
(206) 223-4525, ext. 103  
[Matthew.Cleverley@fnl.com](mailto:Matthew.Cleverley@fnl.com)  
Attorney for Plaintiffs/Appellants

**CERTIFICATE OF SERVICE**

On the date given below I caused to be served the foregoing **Objection to Clerk's Record** on the following individuals in the manner indicated:

Ronald P. Rainey  
 Attorney at Law  
 110 North Ninth Street  
 Caldwell, ID 83606  
 208-459-3659  
[erainey@qwestoffice.net](mailto:erainey@qwestoffice.net)  
 Attorney for Kings

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

S. Bryce Farris  
 Sawtooth Law Offices, PLLC  
 1101 W River Street, Suite 110  
 Boise, ID 83707  
 208-629-7447  
[bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)  
 Attorney for Lows

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Clerk of the District Court of the Third  
 Judicial District of the State of Idaho in and  
 for the County of Owyhee  
 PO Box 128  
 20381 State Highway 78  
 Murphy ID 83650

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Dated: August 17, 2016

  
 \_\_\_\_\_  
 Estela Acosta

**FILED**

A.M. 4:19 P.M.

AUG 30 2016

ANGELA BARKELL, CLERK

Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Plaintiffs/Appellants,

v.

SUSIE LOW; CAL LOW; GILBERT KING  
as Trustee of the HEART K RANCH TRUST  
UTA DECEMBER 28, 2012; AVCO  
FINANCIAL SERVICES OF IDAHO  
FALLS, INC.; THE ESTATE OF GORDON  
G. KING; ROSE M. KING; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY,

Defendants/Respondents.

GILBERT KING, as Trustee, and ROSE M.  
KING, as Beneficiary of the HEART K  
RANCH TRUST UTA DECEMBER 28,  
2012,

Counterclaimants,

vs.

JOHN E. FUQUAY; CLINTON WARD  
FUQUAY and HAILEY ROSE FUQUAY,

Counterdefendants.

Supreme Court No. 44155

Owyhee District Court No. CV-2014-0278

[PROPOSED] ORDER GRANTING  
APPELLANT'S REQUEST FOR THE  
CLERK TO SUPPLEMENT THE  
RECORD

Plaintiff/Appellants objection to the Clerk's record dated August 17, 2016 is sustained.

The Clerk of the District Court of the Third Judicial District of the State of Idaho in and for the  
County of Owyhee is ordered to supplement the Clerk's Record with the following documents:

9/10/2014 Affidavit of Ron Rainey

2/13/2015 Compilation of Testimony

ORDER - 1

FIDELITY NATIONAL LAW GROUP  
701 FIFTH AVENUE, SUITE 2710  
SEATTLE, WA 98104  
(206) 223-4525

6/19/2015 Memorandum Decision upon King Defendants' Motion for Reconsideration

Dated: 8/30/16

Thomas J. King  
~~For the Supreme Court~~  
District Judge

ORDER - 2

FIDELITY NATIONAL LAW GROUP  
701 FIFTH AVENUE, SUITE 2710  
SEATTLE, WA 98104  
(206) 223-4525



**CERTIFICATE OF SERVICE**

On the date given below I caused to be served the foregoing **Order** on the following individuals in the manner indicated:

Ronald P. Rainey  
 Attorney at Law  
 110 North Ninth Street  
 Caldwell, ID 83606  
 208-459-3659  
[erainey@qwestoffice.net](mailto:erainey@qwestoffice.net)  
 Attorney for Kings

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[bryce@sawtoothlaw.com](mailto:bryce@sawtoothlaw.com)  
 Attorney for Lows

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Clerk of the District Court of the Third  
 Judicial District of the State of Idaho in and  
 for the County of Owyhee  
 PO Box 128  
 20381 State Highway 78  
 Murphy ID 83650

<input checked="" type="checkbox"/>	U.S. MAIL
<input type="checkbox"/>	LEGAL MESSENGER
<input type="checkbox"/>	EMAIL
<input type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
<input type="checkbox"/>	FACSIMILE

Dated: 9/30/16

  
 Clerk

ORDER - 3

FIDELITY NATIONAL LAW GROUP  
 701 FIFTH AVENUE, SUITE 2710  
 SEATTLE, WA 98104  
 (206) 223-4525

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD . )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiff-Appellants, )

Vs. )

SUSIE LOW; CAL LOW; GILBERT KING, As )  
Trustee of the HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012; AVCO FINANCIAL )  
SERVICES OF IDAHO FALLS, INC.; THE )  
ESTATE OF GORDON G. KING; ROSE M. )  
KING; FIRST AMERICAN TITLE )  
INSURANCE COMPANY, )

Defendant-Respondents, )

GILBERT KING, As Trustee, and ROSE M. )  
KING, as Beneficiary of the HEART K )  
RANCH TRUST UTA DECEMBER 28, 2012, )

Counterclaimants, )

Vs. )

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY. )

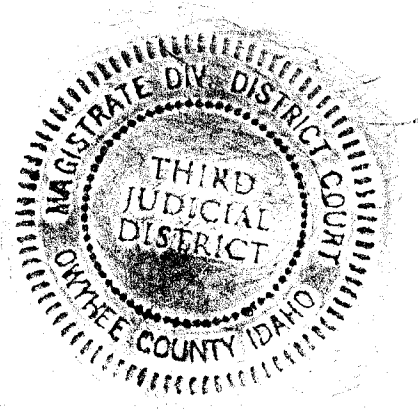
Counterdefendants, )

Case No. CV-2014-0278\*M  
Docket No. 44155

**CERTIFICATE OF EXHIBITS**

I, ANGELA BARKELL, Clerk of the District Court of the Third Judicial District of  
the State of Idaho, in and for the County of Owyhee, do hereby certify that the following  
are being sent as exhibits: **NONE**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of  
the said Court at Murphy, Idaho this ~~1st~~ day of ~~September~~, 2016.



ANGELA BARKELL, Clerk of the District  
Court of the Third Judicial  
District of the State of Idaho,  
in and for the County of Owyhee.

By: *[Signature]* Deputy

CERTIFICATE OF EXHIBITS

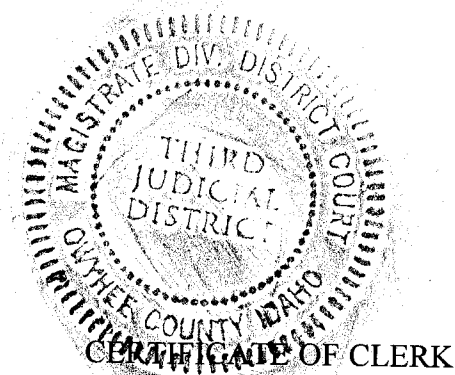
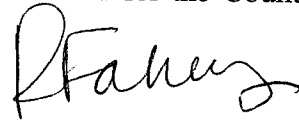


the Idaho Appellate Rules, except no documents were included from the previous appeal in Docket No. 44155.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 1st day of September 2016.

ANGELA BARKELL, Clerk of the District  
Court of the Third Judicial  
District of the State of Idaho,  
in and for the County of Owyhee.

By: Deputy



IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF OWYHEE

JOHN E. FUQUAY; CLINTON WARD . )  
FUQUAY and HAILEY ROSE FUQUAY, )

Plaintiff-Appellants, )

Vs. )

SUSIE LOW; CAL LOW; GILBERT KING, As )  
Trustee of the HEART K RANCH TRUST UTA )  
DECEMBER 28, 2012; AVCO FINANCIAL )  
SERVICES OF IDAHO FALLS, INC.; THE )  
ESTATE OF GORDON G. KING; ROSE M. )  
KING; FIRST AMERICAN TITLE )  
INSURANCE COMPANY, )

Defendant-Respondents, )

GILBERT KING, As Trustee, and ROSE M. )  
KING, as Beneficiary of the HEART K )  
RANCH TRUST UTA DECEMBER 28, 2012, )

Counterclaimants, )

Vs. )

JOHN E. FUQUAY; CLINTON WARD )  
FUQUAY and HAILEY ROSE FUQUAY. )

Counterdefendants, )

Case No. CV-2014-0278\*M  
Docket No. 44155

**CERTIFICATE OF SERVICE**

I, ANGELA BARKELL, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Owyhee, do hereby certify that I have personally served or had delivered by United State's Mail, postage prepaid, one copy of the Clerk's Record record, and one copy of the transcripts to each party as follows:

Matthew R. Cleverly Fidelity National Law Group 1200-6<sup>th</sup> Ave, Ste 620 Seattle, WA 98101.

Ronald Rainey 110 N. Ninth St. Caldwell, ID 83707

S. Bryce Farris 1101 W. River St. Ste. 110 Boise, ID 83707

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of  
the said Court at Murphy, Idaho this 1st day of September, 2016.

ANGELA BARKELL, Clerk of the District  
Court of the Third Judicial  
District of the State of Idaho,  
in and for the County of Owyhee.

By: R. Fahney Deputy

