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# Fuquay v. Low Appellant's Brief 1 Dckt. 44155

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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

APPELLANTS' BRIEF

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Appeal from the District Court of the Third Judicial District for the State of Idaho,

In and for Owyhee County

Honorable Thomas J. Ryan, District Judge, Presiding

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**I. TABLE OF AUTHORITIES**

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## I. STATEMENT OF THE CASE

### A. Nature of the Case

The Fuquays (Plaintiffs), and the Low and Kings (Defendants) all own adjacent property in rural Owyhee County. A street map showing the general location of the area is shown on Exhibit “A.” R 148. An aerial map showing the Owyhee County Assessor’s lot boundaries is shown on Exhibit “B.” R 150. A close-up aerial view and showing the general road boundaries and identities of the affected parcel owners is shown on Exhibit “C.” R 152.

The Fuquays have used the roadway identified on the maps as King Lane for access to their homes since 1977. The only other access to the properties is over property to the west owned by the U.S. Bureau of Land Management and no permanent access rights are available. In 2013, the Fuquays discovered that there was no recorded easement over King Lane for access to their property, leaving their properties without any recorded access rights. The Fuquays contacted the Kings to request a written easement. The Kings refused to sign an easement, and on August 21, 2014, the Kings erected gates across the roadway to prevent the Fuquays from using the roadway to access their homes. The Fuquays filed this suit, seeking a declaratory judgment confirming that they have an easement by prescription over King Lane to access their homes.

The King defendants filed a Motion for Summary Judgment which the Trial Court originally denied because there were disputed issues of fact. The King defendants requested reconsideration, and the Trial Court then reversed itself and granted the Kings summary judgment on the sole issue that the Fuquays had not shown a separate and distinct act of adversity. The Lows then filed a motion for summary judgment and the trial court granted the Lows summary judgment on the same reasons as it did for the Kings.

The Fuquays seek *de novo* review of the Trial Court's decisions granting summary judgment to the Kings and the Lows.

**B. Proceedings in the District Court**

The Fuquays filed their lawsuit on August 11, 2014. R 13. On September 4, 2014, the Fuquays filed a Motion for Temporary Restraining Order to enjoin the Kings from blocking their access. R 2. The Court issued a Temporary Order on September 5, 2014 and set a preliminary injunction hearing for September 18, 2014. At the September 18, 2014 hearing, several witnesses testified on behalf of the Fuquays. The trial court denied the Fuquays' motion for temporary injunction.

On October 29, 2014, the Fuquays filed a Motion for Summary Judgment against the Lows and set a hearing date for December 23, 2014. R 132. The Lows responded to the Motion. R 215. The Fuquays withdrew their Motion for Summary Judgment. R 274.

On January 29, 2014, the Kings filed a Motion for Summary Judgment. R 294. The Lows filed a joinder to the Kings' motion. R 311. The Fuquays filed a response to the Kings motion. R 311. On March 25, 2015, the Court issued a Memorandum Decision denying the Kings' Motion. R 423.

On March 30, 2015, Fuquays filed an Amended Complaint. R 432.

On April 7, 2015, the Kings filed a Motion for Reconsideration of the court's denial of their Motion for Summary Judgment. R 490. The Kings filed a Memorandum on April 20, 2015. R 493. The Fuquays filed a response. R 517. The Kings filed a Reply. R 523. On June 19, 2015, the trial court granted the King's Motion for Reconsideration. R 536. The Court entered a Judgment in favor of the Kings on July 8, 2015. R 590.

On July 6, 2015, the Fuquays filed a Motion for Reconsideration of the Court's Order granting the King's motion for reconsideration. R 548. The Kings responded on August 4, 2015. R 602. The Fuquays Replied on August 12, 2015. R 616. The Court issued a Memorandum Decision denying the Fuquays' motion. R 629.

The Lows filed a Motion for Partial Summary Judgment on July 15, 2015. R 622. The Fuquays responded. The Lows Replied on August 17, 2015. R 529. The Court issued a Memorandum Decision on September 21, 2015 granting the Lows' Motion. R 637. An Order was entered October 6, 2015. R 640. The Judgment was entered December 21, 2015. R 642.

The Fuquays appealed on January 6, 2016. R 644. The appeal was dismissed as being premature. R 651. An Amended Final Judgment was entered by the trial court on March 23, 2015. R 663. The Fuquays timely appealed on May 2, 2016 R 668.

### **C. Statement of Facts**

The Kings purchased their property in September 1973. R 572. The Kings sold their property to Zane Block in 1982 but repossessed it in 1986. Various family members and entities own what is collectively referred to as the "King property."

James Fuquay purchased the Fuquay Properties in 1977. R 376, 154-155. James was John Fuquay's father, and John Fuquay was about 12 years old when James purchased the Fuquay properties. John Fuquay has lived on the Fuquay properties continuously since 1977. R 376. In 1989, James Fuquay filed bankruptcy and John Fuquay purchased the Fuquay properties from the bankruptcy trustee. R 157-159.

In 2014, John Fuquay divided the large property into two smaller parcels. During the subdivision and sale to Clinton and Haliey, the Fuquays discovered that there was no recorded

access for their properties. Clinton and Hailey Fuquay purchased the Clinton Fuquay Parcel from John Fuquay on June 24, 2014. R 163.

There is a roadway which runs from Oreana Loop Road west through the King and Low properties to the two houses located on the Clint Fuquay property. For purposes of this lawsuit, the roadway has been referred to as King Lane although the roadway never had an official name until 2002 when it was given a name for county emergency purposes. R 390. To access the Fuquay properties, a driver leaves Oreana Loop Road and drive onto King Lane which crosses the King property. The roadway then runs between barbed wire fences over the King property, the Low Property, and eventually to the Clint Fuquay Parcel. At the west end of King Lane, there is a driveway that runs south through the Clint Fuquay property to the house on the John Fuquay property. R 245-247. The Fuquays have used King Lane to access the two homes on the Clint Fuquay parcel since 1979 and the home on the John Fuquay parcel since 1977.

The Fuquays never asked for, nor received permission to use King Lane. R 375-388. King Lane has always been in existence for as long as anyone can remember – at least since before the mid-1950s. R 237. According to Rose King, when they bought the property in 1973, the fences had been in place along the same lines since the property was surveyed in 1884. R 574, 579. The roadway continues westward all the way to Oreana. R 575.

Over the years, the roadway was widened and improved with gravel. The parties dispute whether the Fuquays ever assisted in improving and maintaining the roadway. R 577, 260. The Fuquays never asked for or received permission to use the roadway. They simply always used it because it was there. R 375-380. The Fuquays testified that they used the

roadway to take children to and from school, for guest access, and for delivery vehicles. R 375-380. The Kings dispute the uses alleged by the Fuquays. R 234. In addition to being used by the Fuquays for their own personal use, King Lane was used by the renters who lived in the Fuquay homes at various times. R 575-576.

At various times, the Kings would fence cattle in the roadway area for the cattle to graze off the weeds. The parties dispute how often this would occur, and for how long. R 247-248. During these times, the Fuquays would have to exit their vehicles, open the gate, drive through, and then return to close the gate. R247-248. At some point, the Fuquays told the Kings that they would no longer open and close the gates across the roadway.

The Lows purchased their property in 2006. There are two parcels which had been owned by different owners in the past. R 181, 185. The Lows property at this location is only used for farming and livestock. There are no homes or buildings on the Low property located in the relevant area.

In 2014, when John Fuquay divided his property, he discovered that there was no recorded easement for access over King Lane. John and Clint Fuquay went to the Kings with a proposed easement. The Kings refused to sign the easement. However, the Kings apparently decided that since there was no written easement over King Lane for the benefit of the Fuquays, that the Kings would install gates to prevent the Fuquays from using the roadway and getting to the Fuquay properties.

In 2013, the Kings installed two gates across the roadway and told the Fuquays that the Fuquays could not use the roadway. R 21. In order to access their homes, the Fuquays are forced to take a 5-mile detour and drive over a BLM access road. R245. The Fuquays do not

have an easement over the BLM property to the west. Without access rights over King Lane, the Fuquays are legally landlocked. The Fuquays eventually filed suit to enjoin the Kings from preventing them from using the roadway and for declaration that the Fuquays hold a prescriptive easement over King Lane.

The parties dispute the nature and extent of the Fuquays' use of King Lane and when that use began. Those disputed facts materially affect the determination of whether or not the Fuquays have established a prescriptive easement. Because the material facts are disputed, summary judgment was inappropriate.

## **II. ISSUES PRESENTED ON APPEAL**

### **A. Standard of Review**

This Court reviews appeals from an order of summary judgment *de novo*, and the “standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment.” Thus, summary judgment is appropriate if “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Under this standard, “disputed facts are construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party.” Where “the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review.” This Court exercises “free review over interpreting a statute's meaning and applying the facts to the law.”

Stonebrook Const., LLC v. Chase Home Fin., LLC, 152 Idaho 927, 929–30, 277 P.3d 374, 376–77 (2012) (internal citations omitted).

**B. Plaintiffs Request *De Novo* Review of Kings and Lows Motions for Summary Judgment.**

The King Defendants filed their Motion for Summary Judgment on January 29, 2015. R 291. The Trial Court granted the motion. R536-546. The Fuquays request de novo review of the Motion.

The Low Defendants filed their Motion for Summary Judgment on August 17, 2015. R 622. The Trial Court Granted the Motion . R 637-642. The Fuquays request de novo review of the Motion.

**III. PRESCRIPTIVE EASEMENT LAW**

**A. Elements of Prescriptive Easements**

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>1</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

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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 established before 2006. Machado v. Ryan, 153 Id 212, 222.

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 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).

**B. Evaluation of Prescriptive Easement Presumptions Requires a Three-Step Analysis**

When evaluating a claim for a prescriptive easement, the Court may consider certain presumptions. 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. The General Presumption is that without Evidence of How Use Began, the Use is Presumed to be Adverse**

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).

## **IV. ARGUMENTS AS TO KING’S MOTION FOR SUMMARY JUDGMENT**

The Kings argue in their motion for summary judgment was that Fuquay’s use of the roadway 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.”

**A. The Facts Support the General Presumption of Adverse Use**

In this case, the general rule of prescriptive easement presumptions applies, meaning that the Fuquays’ use is presumed to be adverse. First, the roadway was in existence and in use 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.

First, there is no evidence as to how the original use began. In fact, both Rose King and Samuel Steiner testified that the roadway had been in existence for perhaps over 100 years. Therefore, the court must apply the general rule presuming adverse use in favor of the Fuquays. The Kings and the Lows then have the burden of presenting evidence that the use by the Fuquays was permissive. The Kings and Lows may not merely rest on a claim that they acquiesced to Fuquays use; the Kings and Lows must present evidence of permissive use or use in common. However, even if they present 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 in favor of Fuquays. Melendez v. Hintz, 111 Idaho 401, 405, 724 P.2d 137, 141 (Ct. App. 1986).

As to the second step in the analysis, neither the Kings nor the Lows presented 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 2011, the similar use was “in common.” 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 Kings’ reliance on arguments that there was no damage to the roadway is illogical and contrary to public policy. Second, the Kings sold their property to Zane Block in 1982 and repossessed it some 4 years later, in 1986. R 573. The Kings presented 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 with the permission of Zane Block. Therefore, the Fuquays’ continued use of the roadway during that time must be presumed to be adverse to Zane Block and, therefore, the Kings.

In her deposition, Rose King acknowledged that she did not know if the use of the roadway from 1982-1986 was permissive or adverse:

- Q. All right. We're talking about King Lane when Zane Block was buying it.
- A. If I drive down and you drive down tomorrow, am I supposed to see your tracks?
- Q. Well, my question was could you tell whether or not anybody had been using the road? Did it look like it was in use?
- A. Well, somebody had been using it.
- Q. Okay. But if there's a -- you don't know who was using the road during that time?
- A. No, I do not know.
- Q. Okay. It could have been the Fuquays, right?
- A. I don't know who was using the road, sir.
- Q. When Mr. Block was buying the property, did you believe that you still had the right to control who could or could not use King Lane?
- A. We didn't try to do that.
- Q. Okay. Was it your belief that you still had that right to?
- A. No. But I had the right to observe what was going on.

Q. Okay. So when Mr. Block was there, you couldn't have come in and put gates up and said, "Well, you're just buying the property. We're going to put gates up and control who comes through"?

A. No, I could not have done that.

R 580 (Rose King Deposition at 39-40).

At the time the Kings re-acquired the property in 1986, the use by Plaintiffs was already adverse to the Kings because it was adverse to Zane Block. There is no evidence that the Plaintiffs' use during the time of Zane Blocks' ownership was permissive. Importantly, the Kings did not present any evidence of a change from adverse use to permissive use in 1986 when they re-acquired the property from Block. 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:

Q. Now, between 1986 and 1988 when you moved back up, did any of your -- did you have any indication during that two-year period that the Fuquays or anyone on their property were using King Lane?

A. I would assume they were, but I can't tell you.

Q. At any point, did you ask any of your children to prevent anybody from using King Lane?

A. No, we did not.

R 581 (Rose King Deposition at 42.)

At the very least, there is an issue of fact as to whether the Plaintiffs' use of the roadway during Blocks' 4- year ownership, and the year before or after Blocks ownership – a period totaling more than 5 years--was adverse.

**B. There was No Evidence of Use in Common in 1977**

The Kings' argument of "use in common" relies 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 already vested in favor of Fuquays in 1982 or 1984.

The evidence shows that Jim Fuquay purchased the property in 1977 and began using the roadway at that time. In his deposition, Gilbert King acknowledged that Fuquays began using the King Lane without permission for access after Jim Fuquay put in the mobile home:

A. Okay. We're probably not clear. When they lived in this house here where John lives, they went in and out Castle Lane. When they put the double-wide in over here -- so I suppose it would be closer to like '79 -- then, you know, their use was once in a while.

Q. Okay. Once in a while is what?

A. A time or two a week, I would say.

Q. Okay. A time or two a week with cars or a pickup?

A. Cars or pickups.

R 588-589. Gilbert King Deposition at 85-86.

There is no evidence that Jim Fuquay's use of King Lane 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 and Lows thus 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 also presented no evidence of any "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.

Q. Did you ever tell Jim and Wanda that they were not allowed to use King Lane?

A. No, I did not.

Q. Did you believe at the time that you had -- would have had the right to tell them that they couldn't use King Lane?

A. Yes, I do.

R 576 (Deposition of Rose King at 22-23).

**C. 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 Kings cited 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). Thus, in Hughes, the public use was equal to the adverse use.

That is not the same in this case. There is no evidence here that public use was equal to the adverse use. There was disputed material evidence of specific uses by the mail carrier, the Schwann Truck driver and the school bus driver. The declarations, 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.

R 232. Affidavit of Rose King dated December 4, 2014.

In her deposition, Rose King reaffirmed her testimony that the roadway was never used for deliveries:

Q. You've never seen any delivery drivers using King Lane, FedEx, UPS, Post Office dropping off any mail packages to anybody that lived in Clint or JC's houses?

A. No. The only time that I ever saw, the Schwans asked me one day, he said, "The gate is locked. I can't go up." I said, "You can go this time, but don't go anymore. They'll have to unlock their gate if they want it." So, no, they didn't come our way. The FedEx man did stop several times and ask how we got there, and we directed them to go around the way they were supposed to. And I believe you have some affidavits showing that from those people.

R 581. 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 too far. If you're looking at the picture, if you're going to drive across our bridge and you don't know that there's a lane that goes to the left, you're going to come directly into my yard. We had that. We told people where they wanted to go. They turned around and went back. So most of the people that I would have come or if there was a hunter, as you have asked before, then they would ask.

Q. Okay. So if somebody didn't know that the road took the left turn after the bridge to go out there, they would have usually ended up in your driveway?

A. That's correct.

Q. And then they would have either said, "Oops, sorry," turned around and left, or if they were looking for somebody they might have stopped and asked? Is that a fair statement?

A. Yes. And we would have told them how they went to get there.

R 576-577 (Rose King Deposition at 25-26).

There is no evidence of any public use of King Lane that was indiscriminate or 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, her testimony creates an issue of material fact: Was King Lane used by UPS, Schwanns, and other delivery services as the Fuquays testified? 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? These are disputed issues of material fact that can only be decided at trial.

**D. There is Evidence of Distinct Adverse Use**

As noted, the Fuquays 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.

R 574. 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." R 237 (Declaration of Samuel V.C. Steiner at ¶ 5).

The Kings first acquired the property in 1973. According to Rose King, the fences lining the roadway were in the same place for nearly a hundred years before the Kings bought the property. R 579. 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, including the Kings. 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 Kings and predecessors to the Lows. 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 made a second distinct action by putting a new mobile home on his property and then 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.

R 202 (Declaration of John Fuquay dated October \_\_, 2014).

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." R 237 (Declaration of Samuel V.C. Steiner dated November 10, 2014 at ¶6).

The testimony is significant because it provides evidence of distinct and decisive acts by Jim Fuquay 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.

The Fuquays established a third distinctive use by allowing numerous renters on their property to 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.

Q. How about when Tanna Gilbert was there? Do you recall her living there?

A. I recall her living there.

Q. Do you recall how she would get to and from that house?

A. She came down the lane part of the time. She worked for other people. She wasn't always around.

Q. So she would use King Lane to get to and from her house?

A. I don't know if that was her primary, sir.

Q. I'm not saying whether or not it is her primary. I'm asking if she used it.

A. I saw her very seldom on the road because she was seldom ever around.

Q. Did you ever tell her not to use King Lane?

A. No, I did not.

Q. Is it your understanding and belief that you could have told her not to use that lane and that would have been within your rights?

A. Yes, I feel that.

R 576 (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:

Q. And when Nate lived in that house, how did he get to and from that house?

A. He would have probably went down our lane.

Q. And you were aware that he was going up and down?

A. Yes.

Q. And how often would he go up and down?

A. He went to work in the morning, and he came home in the evening. That was the extent. He didn't run up and down back and forth.

Q. Do you remember how many years that would have been?

A. Oh, maybe a couple of months.

Q. And again, same thing, is that you never told Nate that he wasn't able to use that, the road to get up and back from the house?

A. No, I did not.

Q. But, again, you understood that you could have if you had wanted to?

A. Yes, I do. Yes, I do.

R 577-578.

Gilbert King acknowledged that starting in at least 1980, renters on the Fuquay property would use the roadway for access:

Q. Okay. What was -- I don't know if you're old enough to remember what it was like then. Was it --

A. It was -- well, I remember in the wintertime, it would get pretty sloppy. My brother lived in the house where JC lives, and he had a two-wheel-drive pickup. And it was bad enough that he couldn't get back and forth at times in the winter because of the ruts where it is alkali, you know. That was the reason for gravelling it there in '80 in the summertime.

Q. Which brother was that?

A. Greg.

Q. How long did he live in that house?

A. It was from the time he got married until -- like three years, I think. '79 to '82 or so. Something like that.

Q. Okay. And when he lived there, how would he get back and forth to his house or to where he was living?

A. Oh, just, you know, on the dirt road there in the lane.

Q. He would go up and down King Lane to get to the house?

A. Um-hum.

Q. Do you know who else lived in that house over the years?

A. Some people by the name of Laws lived there. Tanna Gilbert lived there. Nate Moore. Somebody else.

Q. Dennis Trayo?

A. I don't remember. He was before my time. But I know John lived there for a period of time when they got divorced.

Q. John Fuquay?

A. Um-hum.

Q. Okay. And when those people lived in that house, how would they get back and forth to the house?

A. Down the lane there part of the time.

Q. So they would go -- this Exhibit 5 doesn't show it, but let me see it. All right. So Exhibit 3, you had marked where the gate is. JC's house is just west of where the gate is now?

A. Yes.

Q. There? So the -- whoever lived in the house would come out King Lane past the -- down the lane past the houses out to Oreana Loop Road?

A. Yes.

R 584 (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 or Low predecessors. Use by renters is a third distinct act that put the Kings and Low predecessors on notice of Fuquays adverse use.

Since there is evidence of a distinct and decisive acts that put the Kings and Low predecessors on notice of Fuquays' adverse use in 1977, the presumption of adverse use has continued uninterrupted since then. The Kings and Lows offered no evidence to dispute the Fuquays' uninterrupted adverse use of the roadway or to change the adverse use to permissive. Since the Kings and Low predecessors were aware of Fuquays' adverse use, they lost any right to object in 1982 when the prescriptive rights vested.

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 in 1984 -- 5 years from the placement of the mobile home. In either event, the prescriptive rights have already vested.

The Kings argued that the Fuquays adverse use did not occur until 2011, and therefore did not occur within the 20-year statute of limitations period. This was inconsistent with the evidence that adverse use 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 because there was no evidence of how the roadway originated. And, at the very least, Jim Fuquay's use of the roadway in 1977, placement of the mobile home in 1979, and use of the roadway by renters were separate and distinct acts that gave notice to the Kings and Low predecessors that Fuquays intended to use King Lane for access.

**E. There are Disputed Issues of Fact Which Preclude Summary Judgment  
for Kings**

Although the Fuquays believe they have established prescriptive rights, for the purposes of the case, there are disputed issues of material fact. The following table shows some of the material facts that are disputed and why summary judgment was inappropriate:

Name	Testimony	Disputed Testimony	Clerk's Record Page #
Raymond Jayo	Used King Lane to access Plaintiffs properties for over 5 years		330
Denise Colette	School children do not use King Lane		359-360
John Fuquay		Children used King Lane to get to school	376
Rose King		No delivery trucks, UPS or Fed Ex ever used the roadway	392
John Fuquay		King Lane was never gated until the last few years	266
John Fuquay		Use of King Lane has always been without permission	375-388
John Fuquay		Fuquays have always used King Lane and have prescriptive rights	375-388
Scott Snyder	Fuquays said they would refuse to close gates		122-127
Seth Thomas	Graze cattle on adjacent land and need gates closed		128-130
John Fuquay		Cattle are only occasionally grazed in the area	252
Shawn Drew	Gates prevented him from delivering to Fuquay residences		373-374
John Fuquay		Deliveries were made using King Lane until the gates were locked at the inception	253

		of this litigation	
John Fuquay	Plaintiffs began using King Lane in 1977		203
Rose King		Fuquay did not start to use King Lane in 1977	390-391
John Fuquay	Fuquay family and guests used King Lane since 1977		202-203
Rose King		Fuquay family and guests always used Castle Lane but not King Lane	392, 393
John Fuquay	James Fuquay used King Lane for access for large semi trucks and cattle trucks since 1977.		202
Rose King		Fuquays did not use King Lane for large trucks until 2011	393-394, 283
John Fuquay	Operated John Fuquay trucking company and used King Lane regularly for trucks		377
Rose King		Fuquays did not use King Lane for large trucks for business until 2011	394, 408
Rose King		Fuquays could not use King Lane prior to 1988-89 when they replaced the culvert.	390, 409
Samuel Steiner	Fuquays used King Lane for access.		397
John Fuquay	Used King Lane on a near-daily basis for residential purposes		375-388
Rose King		Fuquays did not use King Lane for residential purposes	392
John Fuquay	Used King Lane without permission from Steiners		375-388
Samuel Steiner		Steiners did not object to anyone using King Lane	397
Samuel Steiner	Zane Block and Jim Fuquay did work on King Lane		397
Rose King		Fuquays have never maintained King Lane	392
Rose King	"I have reviewed the Declaration of John Fuquay dated October 28, 2014. The statements set forth by Mr.	**This statement alone shows that there is a disputed issue of fact	389-390

	Fuquay in his declaration are inaccurate ...”		
Rose King	Between 1979-1982 King Lane was impassable 90% of the time		391
John Fuquay		Used King Lane since 1977.	203
Rose King		The Fuquays did not use King Lane since 1977	392
Rose King	The Fuquays have damaged the roadway		409

**V. ARGUMENTS AS TO LOWS’ MOTION FOR SUMMARY JUDGMENT**

The analysis of prescriptive easement law as to the Lows’ property is the same as for the Kings. However, the Lows have an even more significant problem in that they did not purchase their property until 2006. That means the Lows acquired the Property subject to the Fuquays’ prescriptive rights that had already vested. The Lows offered no evidence that any of the prior owners of their property gave permission to the Fuquays. On the contrary, the undisputed testimony from the Fuquays was that the use of the roadway over the Lows property was never done with permission. R 375-388.

**A. The Lows Offered No Evidence of Permissive Use**

The Lows offered no evidence for their Motion for Summary Judgment beyond what the Kings offered. The Lows simply piggy-backed with the argument that if the Fuquays could not prevail as to the Kings, the Fuquays could not prevail as to the Lows. The Lows problem is that their ownership of their property did not arise until 2006. The Lows offered no evidence that the Fuquay’s use of the roadway was permissive as to the prior owners of the Low’s property.

**A. The Fuquays Established Unrebutted Evidence of Prescriptive Rights as to the Low Parcels.**

As to the Lows, the Court needs only find that at *any* 5-year time period from Fuquays' first use of King Lane in 1977 to the present, Fuquays use was adverse. Once the Fuquays presented evidence that their use was open, notorious, continuous, uninterrupted for those 5 years, the burden of proving permissive use shifted to the Lows. That means that the Lows must present evidence of permissive use such that the Fuquays' prescriptive rights never vested. Since the Lows offered no evidence that the Fuquays' use of the roadway was with permission of any of the prior owners of the Low parcels, the Fuquays prevail as a matter of law.

The undisputed evidence was that the Fuquays prescriptive easement could have 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.

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.

Based on John Fuquay's declaration, the Fuquays' 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 prior to the Lows' ownership. The Fuquays' prescriptive rights of access over King Lane were established by operation of law as soon as the Fuquays met the elements of a prescriptive easement. Those rights vested 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 Fuquays' prescriptive easement was conclusively established as a matter of law.

As a matter of law, Fuquays 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 the Fuquays' access rights are superior to any rights of the Lows.

## VI. CONCLUSION

There are disputed issues of material fact in this case as to the Kings and summary judgment should be denied as to the Kings, and the Judgment reversed. As to the Lows, the Fuquays' prescriptive easement rights had already vested prior to the Lows purchase of their property. This Court should reverse the judgments in favor of the Kings and remand the case for trial.

The Court should reverse summary judgment in favor of the Lows and grant it in favor of the Lows because there is no way for the Lows to prevail at trial.

Dated: October 13, 2016

/s/ Matthew Cleverley

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## EXHIBITS

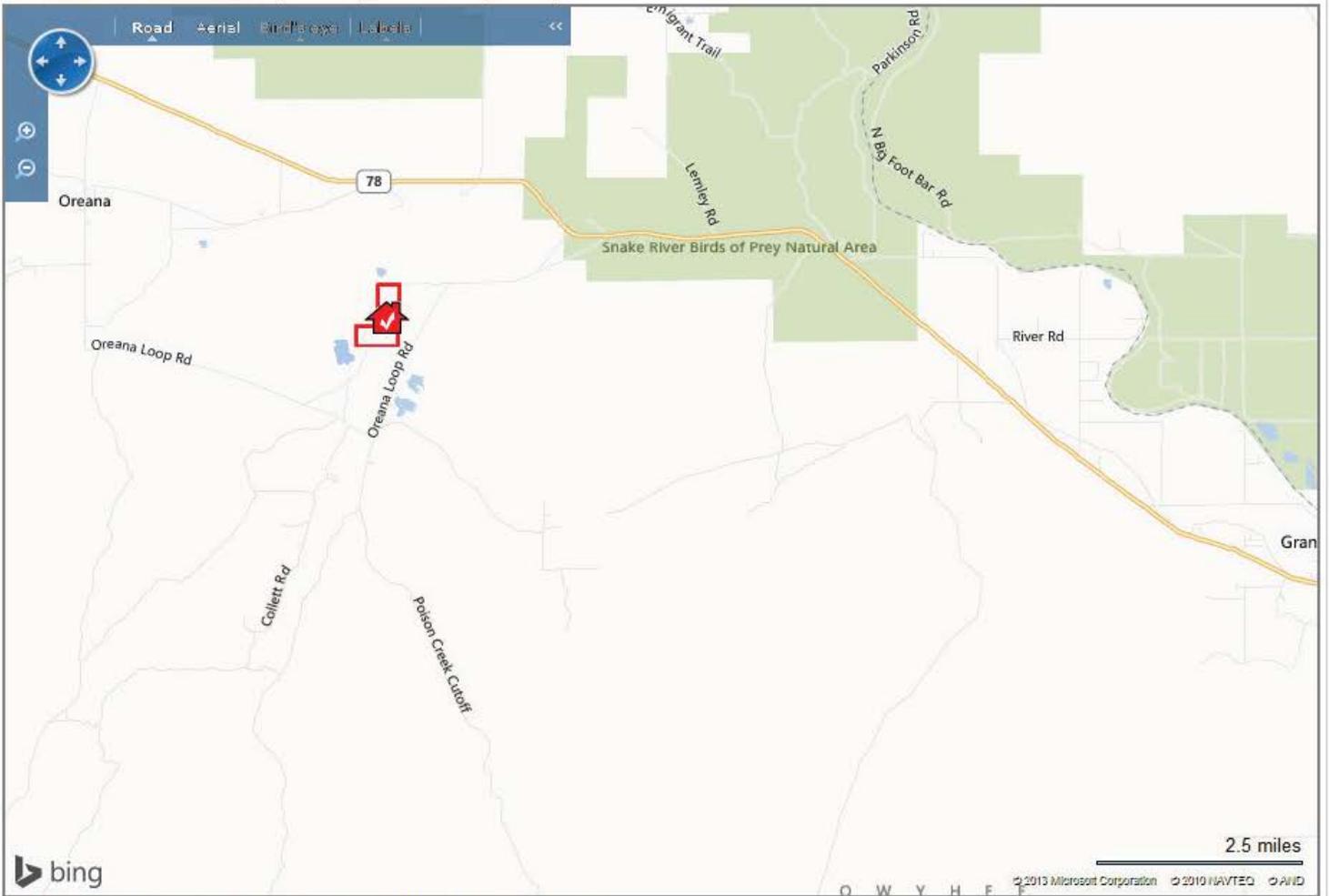
- A. Street map showing the general location of the area
- B. Aerial map showing the Owyhee County Assessor's lot boundaries
- C. Close-up aerial view and showing the general road boundaries and identities of the affected parcel owners.

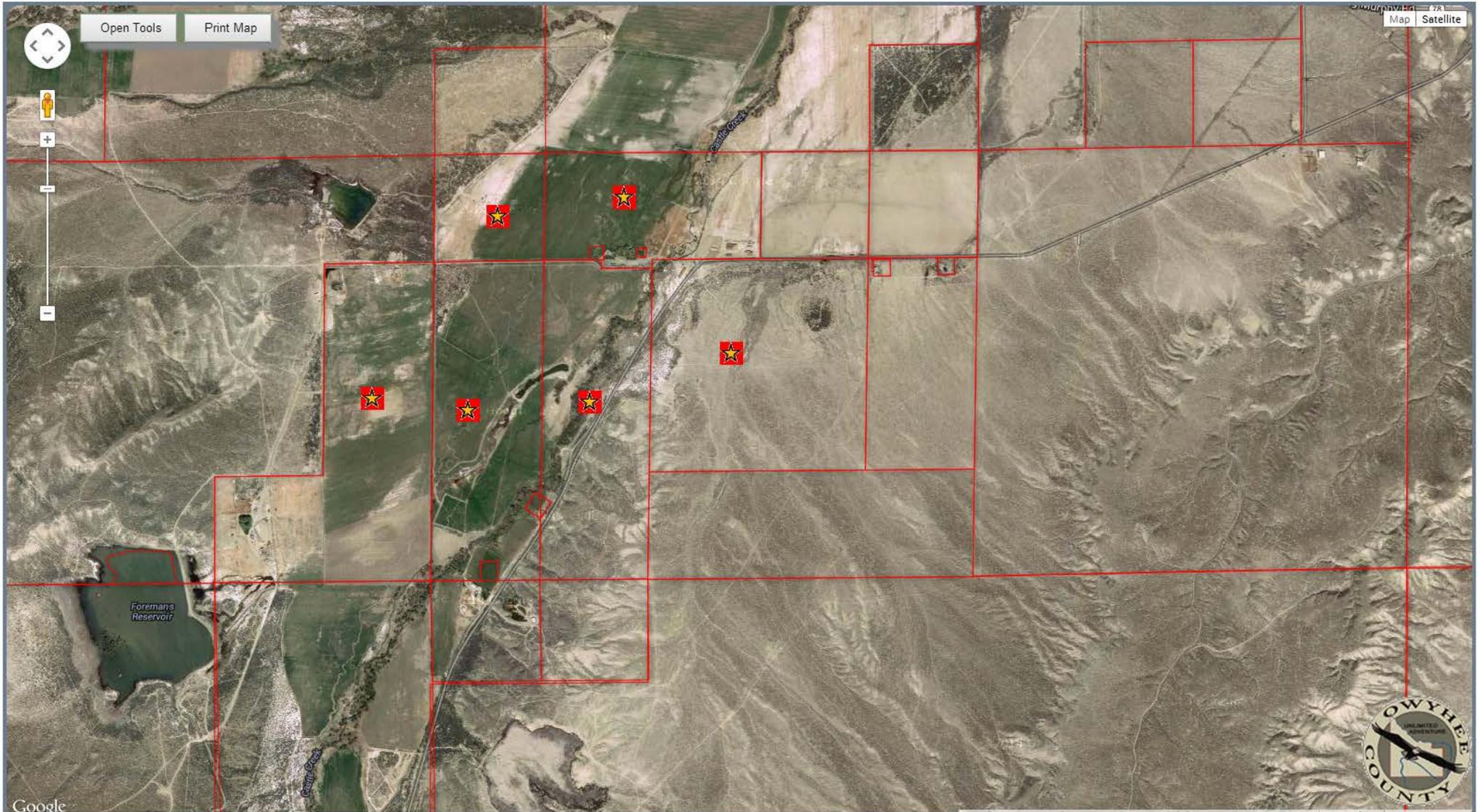
ADDRESS MAP OWNER APN ADVANCED

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  REO  Short Sale





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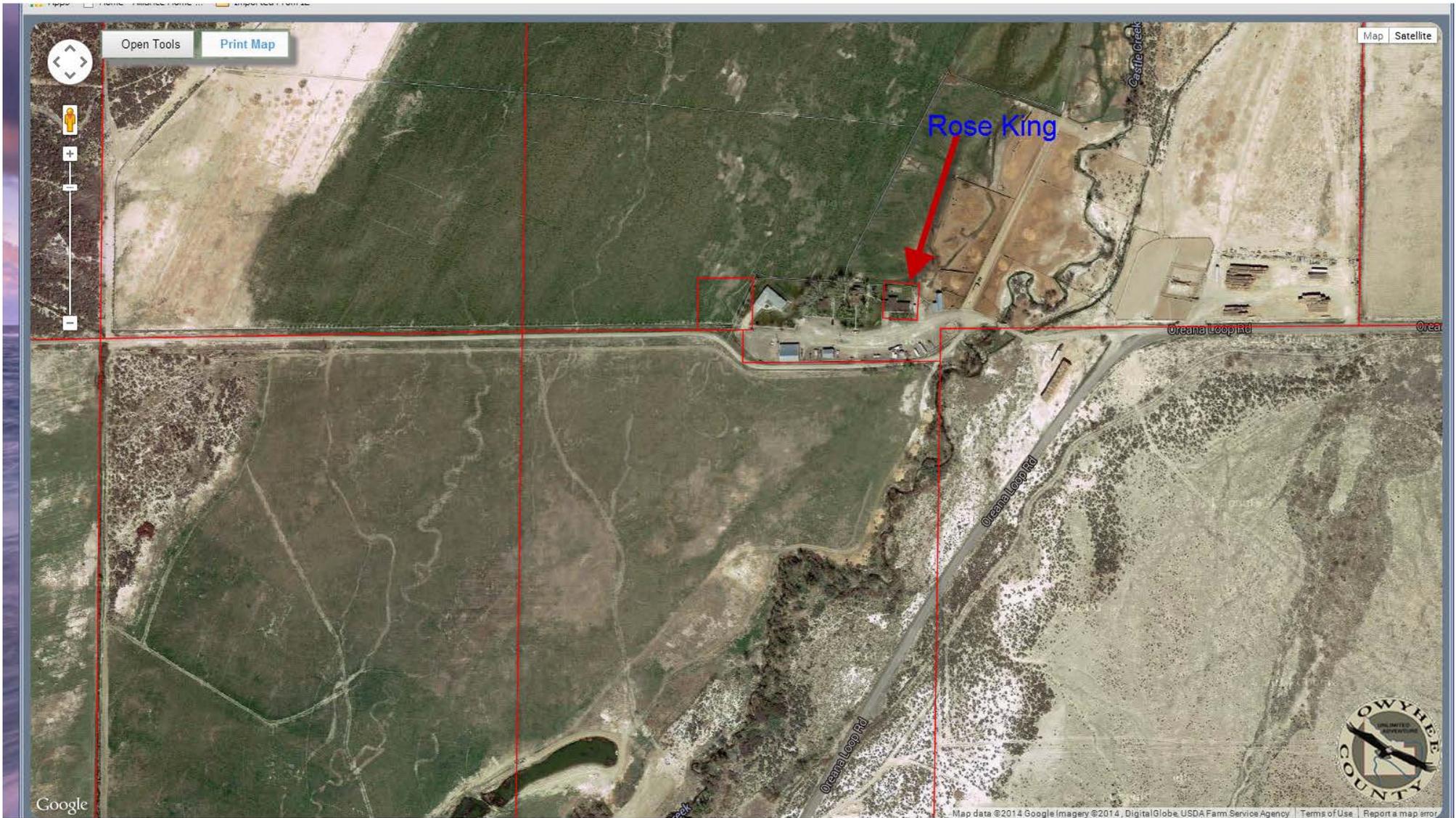
Print Map

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Foreman's Reservoir



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Rose King

Oreana Loop Rd

Oreana Loop Rd

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**CERTIFICATE OF SERVICE**

On the date given below I caused to be served **2 Bound Copies of Appellant’s Brief** and an electronic copy on the following individuals in the manner indicated:

<p>Ronald P. Rainey          Attorney at Law          110 North Ninth Street          Caldwell, ID 83606          208-459-3659  <a href="mailto:erainey@qwestoffice.net">erainey@qwestoffice.net</a>          Attorney for Kings</p>	<table border="1"> <tr><td><input checked="" type="checkbox"/></td><td>U.S. MAIL</td></tr> <tr><td><input type="checkbox"/></td><td>LEGAL MESSENGER</td></tr> <tr><td><input checked="" type="checkbox"/></td><td>EMAIL</td></tr> <tr><td><input type="checkbox"/></td><td>HAND DELIVERED</td></tr> <tr><td><input type="checkbox"/></td><td>EXPRESS DELIVERY</td></tr> <tr><td><input type="checkbox"/></td><td>FACSIMILE</td></tr> </table>	<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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<p>Supreme Court of Idaho</p>	<p>1 Original Bound Brief          6 Copies of Bound Brief          1 Copy of Unbound, Unstapled Brief          1 Electronic copy of brief emailed to:  <a href="mailto:sctbriefs@idcourts.net">sctbriefs@idcourts.net</a></p>												

Dated: October 13, 2016

/s/ *Estela Acosta*  
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 Estela Acosta