STATE OF IDAHO)
County of KOOTENAI)ss
FILED 10/22/19
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CLERK, DISTRICT COURT
Deputy

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

JAMES MCNAMARA, ET AL,
Plaintiffs,

VS.

AFTON MARIE HENDERSON, ET AL,

Defendants.

Case No. **CV28-19-6287**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

In December 1993, Eugene and Shirley Young (Youngs) recorded a plat titled "Young's Crystal Springs Estates." Complaint 4, ¶ 6; Trial Ex. 3. On November 1, 1994, plaintiff James McNamara and his wife at that time, Jaquelene McNamara (McNamaras), bought a 40-acre parcel from Youngs. *Id.* at 2, ¶ 2, Ex. 1; Trial Ex. 1. McNamaras' property borders Crystal Springs Estate to the north. Almost ten years later, on April 21, 2004, defendant Robert Robbins (Robbins) purchased his 10-acre property, Lot 13 of Young's Crystal Springs Estate. Complaint 3, ¶ 5. Lot 13 lies adjacent to the southern border of McNamaras' 40 acres. On June 6, 2019, nearly twenty five years after McNamaras purchased their land, on June 6, 2019, defendants Afton and Christepher Henderson (Hendersons) purchased their 10-acre property, described as Lot 12 of Young's Crystal Springs Estate. *Id.* at 2, ¶ 4, Exhibit 3. Lot 12 also lies adjacent to the

southern border of McNamaras' 40 acres, and lies to the west of Robbins' parcel.

The primary road accessing all these parcels is Crystal Springs Lane. Starting from the south border of Robbins' Lot 13, and proceeding north up the hill, Crystal Springs Lane then turns west and enters Hendersons' lot 12, then turns north and enters McNamaras' 40 acres. Mine Shack Road begins on the south end of Robbins' lot 13, where it leaves Crystal Springs Lane, and very shortly thereafter crosses into Hendersons' lot 12 where it proceeds north, crossing into McNamaras' 40 acres. James McNamara claims he has used Mine Shack Road a couple of times each year for about 23 years, accessing the southern portion of his property through Mine Shack Road. *Id.* at 6, ¶¶ 14-17; p. 7, ¶ 20.

On August 29, 2018, James McNamara and his present wife, Jody McNamara, filed their "Verified Complaint for Declaratory Judgment and Injunctive Relief", against Hendersons and Robbins, claiming that on June 11, 2019, Hendersons served a letter on McNamaras, threatening trespass charges if McNamara used Mine Shack Road. *Id.* at ¶ 22. Hendersons then erected a gate and locked it and took other action to keep McNamaras from using Mine Shack Road. *Id.* at ¶ 23. McNamaras claim they have an easement by implication (*Id.* at 8, ¶¶ 1-3) and an easement by prescription. *Id.* at 9, ¶¶ 1-3. On August 29, 2019, McNamaras also filed Plaintiffs' Motion/Application for Ex Parte Temporary Restraining Order and Preliminary Injunction and a memorandum in support of that motion. This case was originally assigned to District Judge Cynthia Meyer, and on September 3, 2019, Judge Meyer entered an Order Issuing Temporary Restraining Order, prohibiting defendants from obstructing Mine Shack Road. On September 9, 2019, Hendersons timely filed a Motion to Disqualify Judge Meyer pursuant to I.R.C.P. 40(a)(1). Judge Meyer entered an order disqualifying herself, this case was assigned to the undersigned District Judge.

On September 18, 2019, this Court held a hearing on McNamaras' motion for a preliminary injunction. Evidence was presented by both McNamaras and Hendersons. Robbins did not attend the hearing, and according to McNamaras' attorney, has been actively avoiding service. No evidence was presented at the hearing that Robbins was obstructing Mine Shack Road. At the conclusion of that hearing, this Court extended the temporary restraining order until October 18, 2019. The Court found an implied easement had not been proven sufficient for a preliminary injunction. The Court took the issue of prescriptive easement under advisement, and required McNamaras to submit additional briefing by September 25, 2019, the Hendersons to respond by October 2, 2019, and McNamaras' reply brief by October 4, 2019. Both parties timely submitted such briefing. This Court finds McNamaras have proven a prescriptive easement sufficient for a preliminary injunction to be entered against Hendersons.

II. STANDARD OF REVIEW.

The Idaho Supreme Court in *Lawrence Warehouse Co. v. Rudio Lumber Co.,* 89 Idaho 389, 395, 405 P.2d 634 (1965) indicated there should be a hearing where the injunction "encompasses the entire controversy between the parties." Any injunction in this case could encompass the "entire" controversy, or nearly the entire controversy. Justice Thomas in *Mountain States Tel. & Tel Co. v. Jones,* 75 Idaho 78, 267 P.2d 634 (1954), wrote:

> The discretionary power vested in the court to grant injunctive relief in such cases is not an arbitrary one; it is a sound and legal discretion which should be exercised with great caution; the requirements of caution and sound legal discretion can only be had upon a full hearing; it is indeed a delicate power which requires an abundance of caution, deliberation and sound discretion based upon a full disclosure of the facts which demonstrate with reasonable certainty and persuasiveness the probability of confiscation; it cannot be exercised soundly or with caution without hearing all the relevant facts on the issues joined with reference to the probability of confiscation.

75 Idaho at 86, 267 P.2d at 638, cited in *Lawrence Warehouse Co. v. Rudio Lumber Co.*, 89 Idaho 389, 395, 405 P.2d 634, 640 (1965). There has been a hearing in this case.

Idaho law requires every order granting an injunction shall set forth the reasons for its issuance, it shall be specific in terms, it shall describe in reasonable detail the act sought to be restrained and is binding only upon the parties to the action (their officers, agents, servants, employees and attorneys) who receive actual notice of the order by personal service or otherwise. Idaho Rule of Civil Procedure 65(d). In analyzing "the reasons for its issuance", the Court must look to the "grounds" for which a prelimnary injunction may be granted. Those grounds are set forth in Idaho Rule of Civil Procedure 65(e):

> **Rule 65 (e). Grounds for Preliminary Injunction.**
> A preliminary injunction may be granted in the following cases:
> (1) when it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part of it, consists of restraining the commission or continuance of the acts complained of, either for a limited period or perpetually;
> (2) when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff;
> (3) when it appears during the litigation that the defendant is doing, threatening, procuring or allowing to be done, or is about to do, some act in violation of the plaintiff's rights, respecting the subject of the action, and the action may make the requested judgment ineffectual;
> (4) when it appears, by affidavit, that the defendant is about to remove or to dispose of the defendant's property with intent to defraud the plaintiff;
> (5) for the defendant upon filing a counterclaim praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff;

Obviously not all grounds enumerated in Idaho Rule of Civil Procedure 65(e) apply to the facts of the present case ((4) and (5)), but the first three grounds apply, and the most applicable is the situation enumerated in paragraph (1). *Harris v. Cassia County,*

106 Idaho 513, 681 P.2d 988 (1984), provides a good analytical framework for analyzing the preliminary injunction grounds that apply to the present case.

This Court is cognizant of the fact that granting or denying injunctive relief is a matter of discretion vested in the trial court, and that such discretion is not to be abused. *Harris v. Cassia County,* 106 Idaho at 517, 681 P.2d at 992. The court which is to exercise the discretion is the trial court and not the appellate court, and an appellate court will not interfere absent a manifest abuse of discretion. *Id., citing Milbert v. Carl Carbon, Inc.,* 89 Idaho 471, 406 P.2d 113 (1965); *Western Gas & Power of Idaho, Inc. v. Nash,* 75 Idaho 327, 272 P.2d 316 (1954). Appellate courts apply a four-prong standard for discretionary review: "whether the trial court (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason." *Lunneborg v. My Fun Life*, 163 Idaho 856, 867, 421 P.3d 187, 198 (2018).

III. ANALYSIS

The "entitled to the relief demanded" language found in Idaho Rule of Civil Procedure 65(e)(1) is frequently restated as "substantial likelihood of success." The Idaho Supreme Court in *Harris* interpreted "substantial likelihood of success" as follows:

> The substantial likelihood of success necessary to demonstrate that appellants are entitled to the relief they demanded cannot exist where complex issues of law or fact exist which are not free from doubt. *First National Bank & Trust Co. v. Federal Reserve Bank,* 495 F.Supp. 154 (W.D.Mich. 1980); *Avins v. Widener College, Inc.,* 421 F.Supp. 858 (D.Del. 1976) (not granted where issues of fact and law are seriously disputed); *Wm. Rosen Monuments, Inc. v. Phil Madonick Monuments, Inc.,* 62 A.D.2d 1053, 404 N.Y.S.2d 133 (N.Y.App.Div. 1978) (granted only upon the clearest evidence). Appellants claim of right in this case is not one which is free from doubt and, accordingly, we hold that appellants have not carried their burden of proof under I.R.C.P. 65(e)(1).

Harris, 106 Idaho at 518, 681 P.2d at 993. In *First National Bank & Trust Co. v. Federal Reserve Bank,* 495 F.Supp. 154 (W.D.Mich. 1980), the federal district judge wrote:

> Although it appears to the Court that Plaintiff has a likelihood of success, whether it has a "substantial likelihood" as required by Mason, supra, is, at this juncture, unclear.
>
> It is the Court's opinion that there can be no substantial likelihood of success where there exist complex issues of law, the resolution of which are not free from doubt. This is especially true when the record before the Court is incomplete.

495 F.Supp. at 157. This Court has analyzed the facts and law of the present case. The facts are not complex and not in dispute. McNamaras have owned their land for 23 years and have used Mine Shack Road as it crosses lots 12 and 13 a couple of times a year for those 23 years. After recently purchasing lot 12, Hendersons have kept McNamaras from using that road. The parties disagree as to how those facts apply to the law. The issues of law in this case are not complex. In the present case, this Court finds that McNamaras have proven a "substantial likelihood of success", as required by Idaho Rule of Civil Procedure 65(e)(1) and *Harris.*

The Hendersons are correct in noting that:

> A prescriptive easement requires clear and convincing evidence that use of the subject property was "(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." *Akers v. DL White Const., Inc.,* 127 P.3d 196, 206 [142 Idaho 293, 303] (Id. Sup. Ct. 2005).

Defs.' Post-Hr'g Br. Opposing Prelim. Inj. 1-2. Interestingly, it is the distinction in the fourth element, the distinction between actual versus imputed knowledge, that is pivotal to this Court's decision. Youngs had actual notice of McNamara's use of the road.

In their briefing, Hendersons break down the three aspects of prescriptive easement as follows: a) open and notorious, and b) continuous and uninterrupted, and added, c) a claim that permission destroys a claim of easement by prescription. *Id.* at

1-9. The Court will discuss each of these aspects of a prescriptive easement. The Court begins with the last, Hendersons' claim that permission destroys a claim of easement by prescription. The Court notes that McNamara never had "permission", what McNamara had was an express easement which in fact did not exist. In discussing the distinction between "permission" and a "failed express easement" the Court will discuss the prescriptive easement concept of "under claim of right", a concept not discussed by the Hendersons.

A. McNamara had no permission; he had a failed express easement.

As a starting point, Hendersons argue:

> While this brief was initially limited to the elements of open and notorious, and continuous and uninterrupted; Plaintiff s brief points out, "Testimony confirmed that Eugene Young had seen McNamara using the road and that during the purchase of the McNamara's property **there was an understanding between McNamara and the Youngs, that McNamara was to have a legal right-of-way for use of said property."** Pl.'s Post-Hearing Brief in support of Prelim. Inj., p. 3. Mr. McNamara at trial testified that he had discussions with the Youngs when he purchased the property and obtained an agreement to use Eugene and Shirley Young's property to access his.

Defs.' Post-Hr'g Br. Opposing Prelim. Inj. 6 (bold and underlining in original).

Hendersons then argue:

> "A prescriptive right cannot be obtained if the use of the servient estate is by permission [or agreement] of the owner." *Christie v. Scott*, 718 P.2d 1267, 1269 [110 Idaho 829, 831] (Id. Ct. App. 1986) (cited approvingly by *HFLP, LLC v. City of Twin Falls*, 339 P.3d 557, 567 (Id. Sup. Ct. 2014)). A property owner may rebut a prescriptive claim "by showing the use was 'permissive, or by virtue of a license, contract, or agreement.'" *Id.* (citation omitted).
>
> Mr. McNamara admits that he had an agreement with Eugene and Shirley Young (who owned the defendant's property until 2002) by which he was allowed to use Mine Shack Road to access his own property. Mr. McNamara testified that when he purchased the property, he reached an agreement with the Youngs to use Mine Shack Road. This is also confirmed by the evidence submitted.
>
> At the hearing, Mr. McNamara testified that he personally wrote Defendant's Hearing Exhibit B, and that after he wrote it, he got Shirley Young to sign it and have it notarized. Exhibit B states,

> I, Shirley Young, Grantor named on [the warranty deed transferring 40 acres to Mr. McNamara], do hereby assign and convey rights of way to James McNamara for the road . . . known as Mine Shack Road lying Within Lots 12 and 13 of Young's Crystal Springs Estates. . . **this conveyance has always been a verbal one since November 1, 1994.**
>
> Hearing Ex. B (emphasis added). Mr. McNamara wrote that language and had Shirley Young sign it. It clearly demonstrates that Mr. McNamara had a verbal agreement with the Youngs to use Mine Shack Road. That is permission and/or an agreement, which defeats a prescriptive claim.

Id. 7 (bold and underlining in original). The problem with this argument is the Hendersons conflate, a) an incorrect assumption that a person had a legal right of way, with, b) permission. The holdings Hendersons cite from *Christie* above are correct (absent the bracket insertion placed by defendants), "A prescriptive right cannot be obtained if the use of the servient estate is by permission of the owner," (110 Idaho at 831, 718 P.2d at 1269), and, "A property owner may rebut a prescriptive claim "by showing the use was 'permissive, or by virtue of a license, contract, or agreement.'" *Id.* However, Hendersons are simply wrong in equating McNamaras' mistaken assumption that he had a legal right of way across Youngs' land (Hendersons' predecessor), with Gene Young's permission, license, contract or agreement to cross Youngs' land. The two concepts are not remotely the same factually or legally. In fact, they are the antithesis of each other in the context of prescriptive easement. Hendersons discuss "open and notorious" and "continuous and uninterrupted" at length, but what Hendersons fail to discuss is the concept of "under a claim of right." Just before the portion quoted by defendants, the Idaho Supreme Court held in *Christie*:

> A claimant, in order to acquire a prescriptive easement in Idaho, must present clear and convincing evidence of open, notorious, continuous, uninterrupted use, under a claim of right, for a period of five years, all with the knowledge of the owner of the servient estate. I.C. § 5–203; *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).

110 Idaho at 831-32, 718 P.2d at 1269-70. If a person only has permission to cross another's land, that is all they have...permission. They lack a "claim of right." Permission is only permission, it can be revoked any time; permission provides no legal right. When a person has a deeded right of way or an easement across another person's land, that person with the deed or easement has a legal right across that person's land. In other words, they have a "claim of right." When a person "thinks" he has a deeded right of way or an easement across another's land, and the other person also thinks his land is so encumbered, but they are both wrong (there was no deeded right of way or easement), the person using the other's land is still doing so under a "claim of right." That claim happens to be wrong, but it is still a "claim of right."

In *Mulcahy v. Verhines*, 276 Mich.App. 693, 742 N.W.2d 393 (Mich. App. 2007), the Court of Appeals of Michigan held:

> "An easement by prescription results from use of another's property that is open, notorious, adverse, and continuous for a period of fifteen years." *Plymouth Canton Community Crier, Inc. v. Prose,* 242 Mich.App. 676, 679, 619 N.W.2d 725 (2000); see MCL 600.5801(4). The burden is on the party claiming a prescriptive easement to show by satisfactory proof that the use of the defendant's property was of such a character and continued for such a length of time that it ripened into a prescriptive easement. *Prose, supra* at 679, 619 N.W.2d 725.
>
> Citing this Court's opinion in *Prose,* plaintiffs argue that a prescriptive easement can be established by a use that is made pursuant to the terms of an intended but imperfectly created servitude. In *Prose,* this Court relied on the Restatement of Property, 3d, Servitudes, and held that a use that is made pursuant to the terms of an intended but imperfectly created servitude can establish a prescriptive easement when all the other requirements for such an easement are met. *Id.* at 684–687, 619 N.W.2d 725. The Restatement of Property, 3d, Servitudes, provides as follows:
>
> > A prescriptive use of land that meets the requirements set forth in § 2.17 creates a servitude. A prescriptive use is either
> > (1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or
> > (2) *a use that is made pursuant to the terms of an intended*

> *but imperfectly created servitude,* or the enjoyment of the benefit of an intended but imperfectly created servitude. [1 Restatement Property, 3d, Servitudes, § 2.16, pp. 221–222 (emphasis added).]

Comment a to § 2.16 of the Restatement of Property, 3d, Servitudes, provides, in relevant part:

> In the second situation, people try to create a servitude but fail, initially because they do not fully articulate their intent or reduce their agreement to writing, or because they fail to comply with some other formal requirement imposed in the jurisdiction. If they proceed to act as though they have been successful in creating the servitude, and continue to do so for the prescriptive period, the servitude is created by prescription if the other requirements of § 2.17 are met. In this second situation, prescription performs a title-curing function. [1 Restatement Property, 3d, Servitudes, § 2.16, comment a, p. 222.]

According to plaintiffs, William Verhines intended to create an express easement, but, because he failed to sign or record the easement, the formal requirements for the establishment of the easement were not met. In 1986, counsel for William Verhines drafted a proposed easement agreement between William Verhines and plaintiffs "for the purpose of granting reciprocal access and parking rights" on the western half of Lot 1213. Under the proposed easement agreement, William Verhines would have granted plaintiffs a "nonexclusive easement over the parking areas, driveways and access drives" of the western half of Lot 1213. There is no evidence regarding why William Verhines never signed the proposed easement or why it was never recorded. Were it not for the fact that the city, in approving William Verhines's site plan for the construction of the muffler shop on the eastern half of Lot 1213, required William Verhines to establish an easement agreement, we would be disinclined to assume that William Verhines's failure to sign and record the easement agreement was inadvertent, or a mistake or accident. Without the city's easement contingency and in the absence of evidence to the contrary, we might simply conclude that William Verhines consciously decided not to execute the easement and that there was no title problem to be cured. However, in light of the city's approval of William Verhines's site plan and the city's requirement that Verhines execute an easement, William Verhines was not at liberty simply to change his mind regarding the establishment of an easement. Indeed, in his letter to the city, William Verhines's counsel stated that, upon the city's acceptance of the easement agreement, he would "secure the signing of it...." The city apparently did not follow up to ensure that the easement was signed and recorded; nevertheless, we conclude that William Verhines intended to create an easement but inadvertently failed to sign and record the easement agreement.

In sum, given the city's requirement that William Verhines establish an easement and the fact that counsel for William Verhines drafted a proposed easement agreement in 1986, we are persuaded that William Verhines intended to create an easement but inadvertently failed to

> comply with the formal requirements that he sign and record the easement. We are therefore persuaded that plaintiffs' and Bartell's use of the western half of Lot 1213 was made pursuant to an intended but imperfectly created servitude. See 1 Restatement Property, 3d, Servitudes, § 2.16, pp. 221–222.
>
> Plaintiffs argue that the trial court erred in concluding that they failed to establish the element of adverse or "hostile" use necessary for a prescriptive easement. We agree. The term "hostile," as used in the law of adverse possession, is a term of art and does not imply ill will. *Prose, supra* at 681, 619 N.W.2d 725. The claimant is not required to make express declarations of adverse intent during the prescriptive period. *Id.* Adverse or hostile use is use that is inconsistent with the right of the owner, without permission asked or given, that would entitle the owner to a cause of action against the intruder for trespassing. *Id.* The use of another's property qualifies as adverse if made under a claim of right when no right exists. *Id.*
>
> In *Prose,* this Court recognized that use under an intended but imperfect express easement may establish a prescriptive easement and that such use satisfies the hostile- or adverse-use element of a prescriptive easement. *Id.* at 684–687, 619 N.W.2d 725. In *Cook v. Grand River Hydroelectric Power Co., Inc.,* 131 Mich.App. 821, 826, 346 N.W.2d 881 (1984), this Court also held that "if a claimant has obtained a conveyance of an easement which is ineffective, his use of the subservient estate, made on the assumption that the conveyance was legally effective, is adverse and not made in subordination to the owner of the burdened estate." Similarly, we conclude in this case that plaintiffs' and Bartell's use of defendants' property was sufficiently adverse to establish the element of hostile or adverse use required for a prescriptive easement.
>
> There was also sufficient evidence regarding the remaining elements necessary to establish a prescriptive easement. The evidence clearly shows that plaintiffs' and Bartell's use of defendants' property was open and notorious and that either plaintiffs or Bartell had used defendants' property for more than 15 years. Because plaintiffs satisfied all the elements necessary to establish a prescriptive easement, the trial court erred in granting summary disposition in favor of defendants.
>
> Given our conclusion that the trial court erred in granting summary disposition in favor of defendants, we need not address plaintiffs' remaining issues on appeal.

742 N.W.2d at 397-99, 276 Mich.App. at 699-702. The Supreme Court of Virginia came to a different conclusion in *Chaney v. Haynes,* 250 Va. 155, 458 S.E.2d 451 (Va. 1995), finding claimants in that case failed to prove that a prescriptive easement was established because "[u]se of property, under the mistaken belief of a recorded right,

cannot be adverse as long as such mistake continues." *Id.* at 159, 458 S.E.2d at 453 (citations omitted). Cited with approval in *Nelson v. Davis*, 546 S.E.2d 712, 715, 262 Va. 230, 235 (Va. 2001). This Court finds the reasoning of the Michigan Court of Appeals to be more persuasive, and more likely to be followed by the Idaho Supreme Court given its citation to the Restatement of Property, 3d. Also, the Idaho Supreme Court in *Akers v. D.L. White Const. Inc.*, 142 Idaho 293, 304, 127 P.3d 196, 207 n. 4 (2005) held: "It is not only possible that an easement by prescription or implied from prior use exists in Parcel B, but also that easements exist under one or both of those theories in Government Lot 2 concurrent with the Appellants' express easement. Any concurrently existing easements may have different boundaries or scope than the express easement."

Hendersons claim:

> Mr. McNamara admits that he had an agreement with Eugene and Shirley Young (who owned the defendant's property until 2002) by which he was allowed to use Mine Shack Road to access his own property. Mr. McNamara testified that when he purchased the property, he reached an agreement with the Youngs to use Mine Shack Road. This is also confirmed by the evidence submitted.

Defs.' Post-Hr'g Br. Opposing Prelim. Inj. 7. This Court finds Hendersons' characterization to be wholly misplaced. McNamara testified he thought he had an express easement, not an "agreement" with the Youngs.

McNamara testified that he purchased his property from Gene Young in 1994. Trial Exhibit 1 is a certified copy of the warranty deed from Eugene Young and Shirley Young to James McNamara and Jaquelene McNamara. Referenced in the Warranty Deed is "TOGETHER WITH AND SUBJECT TO those easements set forth on Exhibit "A: Attached hereto and by reference incorporated herein." Attached to the warranty deed and filed along with the warranty deed is Exhibit "A". Exhibit A reads in part:

> RESERVING to Grantors herein, their heirs and assigns, a right of way for a road 60' in width over, under and across the existing roads lying within the first above described parcel known as the Mine Shack Road, Crystal Springs Lane and Ridge Road as generally shown on Exhibit "A" attached hereto.

Trial Ex. 1, Ex. A. Thus, Exhibit "A" to Exhibit 1 references another Exhibit "A". The second Exhibit "A", is a map, referenced in the first Exhibit "A" and all attached to Trial Exhibit 1. Also attached to the Warranty Deed and recorded with the Warranty Deed is Exhibit A, a hand-drawn map, referenced in Exhibit A, the reservation of easement to the Warranty Deed. Trial Ex. 1, Ex. A, Ex. A. That-hand drawn map depicts Mine Shack Road, Crystal Springs Road and Ridge Road as those roads exist across the 40 acres McNamara was purchasing from the Youngs, but also depicts those roads as they existed across Parcel 12 and Parcel 13, the parcels directly to the south of McNamaras' 40-acre parcel. Parcel 12 is the parcel that Henderson bought in 2019. McNamara testified that with the written easement shown in Exhibit A which referenced the hand-drawn map attached as Exhibit A, that he, McNamara, had a right of way over the lands Youngs retained. McNamara testified he understood he had an express easement under the Warranty Deed. That understanding was bolstered by Trial Exhibit 2, the "Contract for Sale of Land" which McNamara drew up in 1994, in anticipation of purchasing the 40 acres from the Youngs. The "Contract for Sale of Land" was signed by McNamaras and by Eugene and Shirley Young, but it was not dated. Exhibit 2, the "Contract for Sale of Land" has the Youngs agreeing to sell the 40 acres to McNamaras for $124,000.00, and provides, "Rights of Way will be provided for as agreed across this property to access other family owned properties. A final provision will be drawn into the deed at the time of sale." Ex. 2. The problem with the express easement was that it is in favor of the Youngs, the grantor, and not the McNamaras. However, the Court can understand why McNamara felt he had an express easement across Mine Shack Road

as it traversed across Lot 12, which was at that time retained by the Youngs. The Court finds McNamara credible in his testimony in that regard.

Next, Hendersons claim:

> At the hearing, Mr. McNamara testified that he personally wrote Defendant's Hearing Exhibit B, and that after he wrote it, he got Shirley Young to sign it and have it notarized. Exhibit B states,
>
> > I, Shirley Young, Grantor named on [the warranty deed transferring 40 acres to Mr. McNamara], do hereby assign and convey rights of way to James McNamara for the road . . . known as Mine Shack Road lying within Lots 12 and 13 of Young's Crystal Springs Estates. . . **this conveyance has always been a verbal one since November 1, 1994.**
>
> Hearing Ex. B (emphasis added). Mr. McNamara wrote that language and had Shirley Young sign it. It clearly demonstrates that Mr. McNamara had a verbal agreement with the Youngs to use Mine Shack Road. That is permission and/or an agreement, which defeats a prescriptive claim. brief at page 3, and confirmed in the deed submitted as an exhibit at the hearing (the deed from Eugene and Shirley Young to Joanne Young).

Defs.' Post-Hr'g Br. Opposing Prelim. Inj. 7 (bold and underlining in original).

This Court finds Hendersons' argument that, "It clearly demonstrates that Mr. McNamara had a verbal agreement with the Youngs to use Mine Shack Road," to be unavailing. There was no such agreement. Trial Exhibit B was prepared by McNamara personally (not by his attorney) and signed by Shirley Young, on July 9, 2019. The language in Exhibit B does not reference any "agreement"; the language in Exhibit B, even the portion emphasized by defendants, speaks in terms of a "conveyance", not an agreement.

The language in Exhibit B supports McNamara's claim that at all times he thought he had an express easement, and the fact that Shirley Young signed Exhibit B shows that at all times she thought that she and her husband had given McNamara an express easement. This Court specifically finds there is no "agreement" that defeats McNamaras' prescriptive easement.

B. Open and Notorious

McNamaras' argument that James McNamara's use of Mine Shack Road was open and notorious is as follows:

> A use is sufficiently open and notorious when it would provide notice to a servient landowner maintaining a reasonable degree of supervision over his premises. *See Backman v. Lawrence*, 147 Idaho 390, 396, 210 P.3d 75, 81 (2009). "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." *Baxter v. Craney*, 135 Idaho 166, 173, 16 P.3d 263, 270 (2000). Absent actual knowledge of use, knowledge of extemporaneous facts which would reasonably indicate the possibility of an adverse use on the property is sufficient to establish a prescriptive easement as it would require the property owner to investigate. *Kaupp v. City of Hailey*, 110 Idaho 337, 340, 715 P.2d 1007, 1010 (Ct. App. 1986); *see also Weitz v. Green*, 148 Idaho 851, 861, 230 P.3d 743, 753 (2010) (finding the condition of the disputed footpath as a material element of whether use was open and notorious; the court found the use was not open and notorious as numerous trees laid across the trail when it was inspected for purchase).
>
> In this case, the testimony of McNamara confirmed that the predecessors in interest, Eugene and Shirley Young had actual knowledge of McNamara's use of Mine Shack Road to access the southern portion of his property from 1996 until they transferred their property in 2002. Testimony confirmed that Eugene Young had seen McNamara using the road and that during the purchase of the McNamara's property there was an understanding between McNamara and the Youngs, that McNamara was to have a legal right-of-way for use of said property.[1] [[1] As expressed at the hearing, the language of the Contract for Sale of Land and Warranty Deed was misconstrued by McNamara and he did in fact, not have an express easement under these documents.] The actual knowledge by the predecessors in interest of McNamara's use establishes that his use was open and notorious. McNamara openly accessed his property through Mine Shack Road under his belief of his claim of right and Eugene Young knew of this use.
>
> Furthermore, even absent the actual knowledge of Eugene Young, McNamara's continuous use of Mine Shack Road was open and notorious so that a land owner maintaining a reasonable degree of supervision over their property would have been put on notice of such use. Where the adverse use of property causes impact or evidence of use, such use is deemed open and notorious and the property owner must investigate to protect their interests. *See Kaupp*, 110 Idaho at 340. Here, McNamara accessed Mine Shack Road at a minimum, a couple of times per year to spray and mow weeds, cut wood on his property, and to maintain the road for his access. McNamara testified that he sprayed weeds on and around Mine Shack Road and kept the road clear for his access.[2] [[2] This was

further evidenced by the aerial photographs in Plaintiff's Exhibits 5-11 depicting Mine Shack Road in clear, usable form up to and through McNamara's property.] Such access by itself is sufficient to prompt notice of a reasonable land owner. Unlike the path disputed in *Weitz*, Mine Shack Road has remained open due to McNamara's use and maintenance. Thus, a reasonable land owner would have been on notice of McNamara's use of Mine Shack Road.

The testimony regarding Eugene Young's actual knowledge of McNamara's use, coupled by the evidence presented establishing that such use would have placed a reasonable land owner on notice that McNamara was using and maintaining Mine Shack Road, sufficiently establishes McNamara's open and notorious use.

Pls.' Post-Hr'g Br. In Supp. of Prelim. Inj. 3-4. Hendersons cite *Backman* as well, and distinguish it as follows:

In *Backman*, there the plaintiffs had used the road in question for logging for a year and a half. *Id.* Thereafter, the plaintiff "planted willows," and "would water them twice a week." *Id.* After the willows began to grow, the plaintiff would use the road to "monitor the growth and mortality" of the willows. *Id.* The plaintiff also used the road to access hunting. *Id.* The Court in that matter determined that the plaintiff had visited the property on "an average of once per month." *Id.* Still, when the trial court found that the plaintiff s use in *Backman* was not sufficient to constitute open and notorious use, the Idaho Supreme Court affirmed the decision as being based on competent evidence. *Id.*

In this particular case, we have a very factually similar event. Mr. McNamara claims to have used **a portion**[1] [[1]It is vital to remember that Mr. McNamara testified that he did not perform any maintenance on the portion of Mine Shack Road that was a driveway (other than a very occasional snowplow for the neighbors, but which was done as a favor to the neighbors and not under a claim of right). Mr. McNamara testified that the only portion on the Defendants' property that he may have maintained was a tiny portion between the driveway and the border between his property and the defendants" property.] of the road in a similar matter, but much less frequently. Mr. McNamara testified that he would spray weeds and remove any downed trees one to two times per year, which is drastically less use than the [sic] that alleged in *Backman*. The activity of watering trees is very similar to the activity of spraying knapweed. Similar to the finding by the Court in *Backman* that watering trees would not have provided the servient tenant on notice, Mr. McNamara's spraying knapweed would not have put anyone on notice that he was using the driveway. Other than the fact that there may[2] [[2]Note that there was no testimony that spraying knapweed actually worked. So, there is no evidence that there was actually less knapweed. The burden of proving by clear and convincing evidence to show these elements falls on Mr. McNamara.] have been less knapweed in that area, it would be

impossible to know that someone was spraying knapweed. Mr. McNamara testified that he never brought in gravel and there is no evidence that he ever actually improved the road (i.e. took a grader over it to improve the road's condition).

Using a road two times a year to spray weeds is simply not sufficient to be open and notorious. Moreover, there is no testimony in the record that spraying the knapweed was even successful. Mr. McNamara provided no evidence that because of his spraying, there was a stark lack of knapweed there. At best, the use was not apparent unless the owners realized that knapweed was missing. However, the Court could not even reach such a finding because there is no testimony that Mr. McNamara's spraying weeds had any effect, which could be noticed by the landowners.

There were no physical indications present that would have told the owner that their property was being used. Reasonable supervision would not have put any landowner on notice that someone was driving across their property up to twice a year to spray weeds. Moreover, there as [sic] no testimony that any of the work Mr. McNamara performed was on the Defendant's property.

In order for Mr. McNamara's use of the driveway to be considered open and notorious, the Defendants' predecessors in interest would have had to be able to divine from an apparent lack of knapweed that someone was using Mine Shack Road to spray for knapweed. Such a proposition is simply unreasonable.

Each persons' testimony corroborated and demonstrated that Mr. McNamara removed trees on his property only. He never indicated that he had removed any trees on the Defendant's property. As such, it would have been all but impossible for a reasonable person to know that someone was using the property under a claim of right.

Furthermore, the use would have to be the kind that would put a landowner on notice, even if the landowner only visiting the property three times a year. *Baxter v.Craney*, 16 P.3d 263, 270 (Id. Sup. Ct. 2000). The Idaho Supreme Court has held that visiting a property two to three times per year constitutes reasonable supervision by a landowner. *Id.* In *Baxter*, a party used another's property to water their cattle. *Id.* However, the trails used by the cattle were the same trails used by deer and elk. *Id.* As a result, the Idaho Supreme Court there held that, "Because a landowner need only maintain reasonable supervision over his property.... we agree with the district court that the presence of the trails on [the land], without more, was insufficient to place[the landowner]on notice of their use by the [] cattle." *Id.*

Again, in the case before this Court, there is no dispute that there is a road. But, similarly, there needs to be more. The evidence that would demonstrate to a reasonable landowner that the road was being used is lacking. A reasonable person would not have been on notice that Mr. McNamara crossed the property one or two times per year under a claim of right. There is no evidence of tire marks, or fresh cuts, or fresh gravel on the road. A person supervising that property a handful of times per

year would never have known that Mr. McNamara was making use of the road. There is no evidence of any signs that Mr. McNamara used the road.

As such, Mr. McNamara's use was not open because his use was not noticeable and it was so infrequent. As such, no prescriptive easement can lie and this Court should deny the Plaintiff' s preliminary injunction.

Defs.' Post-Hr'g Br. Opposing Prelim. Inj. 2-5 (bold in original). Wholly missing from Hendersons' argument is any analysis as to why Gene Young did not have ***actual*** knowledge of McNamaras' easement across Mine Shack Road. Hendersons acknowledge the four elements of a prescriptive easement set forth in *Akers* (Defs.' Post-Hr'g Br. Opposing Prelim. Inj. 1), but then Hendersons exclusively focus on the ***imputed*** knowledge to Gene Young, which is the subject of the first three elements, while ignoring the word "actual" in the fourth element, "with ***actual*** *or imputed* knowledge of the owner of the servient tenement." *Akers*, 142 Idaho at 303, 127 P. 3d at 206. To prove a prescriptive easement, one need only prove actual or imputed knowledge; only one is necessary. If you have "actual" knowledge you need not prove "imputed" knowledge. McNamaras replied to Hendersons' arguments as follows:

> Where the owner of the servient tenement has knowledge of an individual's prescriptive use, the purpose of open and notorious element has been satisfied. *See Baxter v. Craney*, 135 Idaho 166, 173, 16 P.3d 263, 270 (2000). Where actual knowledge of use is not proven, a presumption of knowledge is provided where the prescriptive use would have been discovered by the landowner maintaining a reasonable degree of supervision over his premises. *See Backman v. Lawrence*, 147 Idaho 390, 396, 210 P.3d 75, 81 (2009); *Kaupp v. City of Hailey*, 110 Idaho 337, 340, 715 P.2d 1007, 1010 (Ct. App. 1986).
>
> In this matter, testimony confirmed that the predecessors in interest of the servient property, Eugene and Shirley Young, had actual knowledge of McNamara's use and maintenance of Mine Shack Road to access the southern portion of his property beginning in 1996.[1] [[1]McNamara testified that Eugene Young had seen him on the road. Further, an incorrect understanding of property interest existed between McNamara and the predecessors in interest, whereby it was believed McNamara had a legal right of way for use of Mine Shack Road.] The predecessors in interest knew of McNamara's claim of right and use from 1996 until they

transferred their interest in 2002, yet they never prevented his use.[2] [[2]This use was continuous and uninterrupted for the statutory period of five (5) years. I.C. §5-203 (2005).] These facts alone satisfy the open and notorious elements of prescriptive easement use under Idaho law.

Moreover, even ignoring such actual knowledge for the statutory period, McNamara's use was sufficient to establish the open and notorious element. McNamara testified that he accessed his property through Mine Shack Road at a minimum, a couple of times per year to cut wood, recreate, and to keep the roadway open and clear for his use, including actions such as spraying and mowing weeds on and around the roadway. This use was further corroborated by Plaintiffs' Exhibits 5-11, depicting Mine Shack Road in clear, usable form up to and through McNamara's property from 1998 until present day.

From 1996 to 2019, McNamara openly used Mine Shack Road to access his property in the presence of the servient owners and took it upon himself to clear the roadway for his use. A reasonable landowner would have been put on notice of McNamara's use, and in fact, was put on notice. Indeed, Mr. McNamara's typical use of Mine Shack Road was noticed by the Henderson's within weeks of their acquisition of this property. It would be illogical to conclude that a landowner would not have been put on notice of McNamara's use where extemporaneous facts indicated the maintenance of Mine Shack Road, i.e., no fallen trees, a cleared roadway, and an entrance into the southern portion of McNamara's property.

Regardless of the fact that McNamara used Mine Shack Road a few times per year, his use was of the nature that would have been noticed upon even limited surveillance by the servient landowner. McNamara's use was open and notorious.

Pls.' Reply to Defs.' Post-Hr'g Br. Opposing Prelim. Inj. 2-3.

This Court agrees with the McNamaras' interpretation of the facts as to the applicable law. The Hendersons argue that two to three times a year is simply not sufficient frequency, not sufficient use to place the servient owner (the Youngs) on notice that when James McNamara was on the Youngs' land, on Mine Shack Road, he was doing so claiming a right to that road. Again, Hendersons' argument ignores the undisputed fact that the Youngs had ***actual knowledge*** of McNamaras' use of Mine Shack Road on the Youngs' property. "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." Anderson v. Larsen, 136 Idaho 402, 406, 34 P.3d 1085, 1089 (2001). Where the owner of the servient tenement has knowledge of an individual's prescriptive use, the purpose of open and notorious element has been satisfied. *Baxter*, 135 Idaho at 173, 16 P.3d at 270. It is only when ***actual knowledge*** of use ***is not proven*** that a presumption of knowledge arises if the prescriptive use would have been discovered by the landowner maintaining a reasonable degree of supervision over his premises. *Id.* The Idaho Supreme Court noted, "The Baxters argue that Esterhodt, the Craneys' predecessor in interest, had actual knowledge that the Baxters' cattle used trails on land east of the fence to reach the spring for water." *Id.* The district court apparently disagreed as to actual knowledge, and then also found that because there was evidence that deer and elk used the trails on the servient land, in addition to the Baxters' cattle (which Baxters were claiming provided their prescriptive use) there was insufficient evidence to place the servient land owner on notice of the use by Baxters' cattle. *Id.* The Idaho Supreme Court upheld that finding. *Id.* In the present case, James McNamara was asked if anyone (other than Hendersons this summer) had ever challenged his use of Mine Shack Road to access the southern portion of his land, and he testified "No." McNamara testified that he had met Gene Young on Mine Schack Road a couple of times and that Gene not only did not complain about McNamara's use, but that Gene took him around and showed McNamara the cabin (mine shack) located on Gene's land located to the west of McNamaras' land. McNamara testified that there were gates across Mine Shack Road that Gene Young had installed, but they were usually unlocked. In the unusual occasion where the gate was locked, James McNamara testified he would simply go to Gene Young's home and have him open the gate. On cross-examination, James McNamara testified that he saw Gene Young on Mine Shack Road on the portion that crosses McNamaras' land. The only inference

that can be made is that Gene Young felt James McNamara had the same right to use Mine Shaft Road that Gene Young did. Gene Young's right was express under the warranty deed; James McNamara's right was a failed express easement under that same warranty deed. Clear and convincing evidence, indeed uncontroverted evidence, has been presented, that Gene Young had actual knowledge of James McNamara's use of Mine Shack Road as it traversed across Gene Young's land. Clear and convincing evidence, uncontroverted evidence, has been presented that James McNamara used Mine Shack Road across Gene Young's land, and he did so under what each (James McNamara and Gene Young) thought, mistakenly, was an express easement in favor of James McNamara.

C. Continuous and Uninterrupted

Hendersons argue, "While it is true that the 'continuous and uninterrupted' element does not require consistent daily or monthly use, the use must be at least seasonal. *See Beckstead v Price*, 190 P.3d 876, fn. 2 (2008)." Defs.' Post-Hr'g Br. Opposing Prelim. Inj. 5. That is an incorrect reading of footnote 1 from *Beckstead*. That footnote actually reads in its entirety as follows:

> The Prices claim because the Becksteads' use was only seasonal, it was not continuous and uninterrupted. First, the cases cited by the Prices do not support their contention because they are factually dissimilar. *See Brown,* 140 Idaho at 443, 95 P.3d at 61; *Anderson*, 136 Idaho at 406, 34 P.3d at 1089. Second, it is generally accepted that the "continuous and uninterrupted" element does not require daily use or even monthly use. 25 Am.Jur.2d *Easements and Licenses* § 61 (2004). The acquisition of a prescriptive easement requires continuous use "according to the nature of the use and the needs of the claimant." *Id.*

McNamaras' recitation of *Beckstead* is accurate:

> Continuous and uninterrupted for the statutory period use does not require a quantifiable number of entries or uses. *Beckstead v. Price*, 146 Idaho 57, 63, 190 P.3d 876, fn.2 [actually footnote 1] (2008), quoting 25 Am.Jur.2d *Easements and Licenses* § 61 (2004). Continuous use and

> uninterrupted use is a fluid element that is determined according to nature of the use and needs of claimant. *See Id.*; *Lemhi Cty. v. Moulton*, 163 Idaho 404, 408, 414 P.3d 226, 230 (2018).

Pls.' Reply to Defs.' Post-Hr'g Br. Opposing Prelim. Inj. 3. Hendersons point out the testimony of Pat Annotti, who took ownership of his property (Lot 11 in Crystal Springs Estate) in 2003, establishes a break in the continuous use by McNamara, because Annotti locked the gate. Defs.' Post-Hr'g Br. Opposing Prelim. Inj. 5-6. Hendersons' argument is that, "The testimony [of Annotti] corroborates that use in the early to mid-2000's was interrupted for at least one to two years." *Id.* at 6. The problem with Hendersons' argument is that what occurred in the mid 2000's is not at all legally relevant. The uncontradicted testimony of McNamara is that he began using Mine Shack Road in 1996. Gene Young was still alive at that time, and the uncontradicted testimony is that Gene Young knew James McNamara was using Mine Shack Road as it crossed Gene Young's property. At that time, all that was required under Idaho Code §5-203 was adverse use for five years. In 2006 the statute was amended to require twenty years of adverse use. Thus, before Annotti purchased his lot in 2006, the applicable statutory period of adverse use had already run on Gene Young, as it pertains to lot 12 and 13, had already run. Annotti's lot, Lot 11, which Annotti testified he had sold earlier in 2019, is not at issue in this case.

Hendersons argue the current 20-year prescriptive period applies under Idaho Code § 5-203. Defs.' Post-Hr'g Br. Opposing Prelim. Inj. 6, 8. This Court finds as a matter of law the five-year period applies in this case, and ran no later than 2001, five years after McNamara began using Mine Shack Road with Youngs' knowledge. "Once the five-year period of adverse use has been attained, the prescriptive right to continue the use of the way has been established, *Burnett v. Jayo*, 119 Idaho 1009, 1012, 812 P.2d 316, 319 (Ct. App. 1991)." *Anderson*, 136 Idaho at 407, 34 P.3d at 1090. Once a

prescriptive easement is created, it becomes fixed as an appurtenance to the real property and may be claimed by a successor in interest. *Id.*

IV. CONCLUSION AND ORDER.

This Court finds that McNamara has proven by clear and convincing evidence, that from 1996 on, McNamaras had, for a period of at least five years, used of Mine Shack Road across the Youngs' land; Youngs' land at the time included lots 12 and 13 (Hendersons' and Robert's property, respectively); and that such use by McNamaras was, as to the Youngs, 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**. *Akers,* 142 Idaho at 303, 127 P.3d at 206.

The Court finds that under I.R.C.P. 65(e)(1) and (2), that McNamara is entitled to the relief demanded, and such relief, or any part of it, consists of restraining the commission or continuance of the acts complained of, either for a limited period or perpetually; and that it appears by the evidence that the commission or continuance of Hendersons actions during the litigation would produce irreparable injury to the McNamaras. Hendersons must remove their impediments to Mine Shack Road so that McNamaras may use that road as it crosses Hendersons land.

The Court finds McNamaras' use of that road is limited to their historical use. "The right gained by prescription is always confined to the right as exercised for the full period of time required by the statute, five years. A party claiming prescriptive right for five years, who, within that time, enlarges the use, cannot, at the end of that time, claim the use as enlarged within that period." *Brown v. Miller*, 140 Idaho 439, 444, 95 P.3d 57, 62 (2004), *quoting Loosli v. Heseman*, 66 Idaho 469, 481, 162 P.2d 393, 398 (1945).

IT IS HEREBY ORDERED the McNamaras' motion for a preliminary injunction to

preserve the status quo until the matter can be fully litigated is GRANTED.

IT IS FURTHER ORDERED counsel for McNamaras prepare an order to that effect.

Entered this 21st day of October, 2019.

John T. Mitchell, District Judge

Certificate of Service

I hereby certify that on the 22nd day of October, 2019 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

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By Jeanne Clausen, Secretary