STATE OF IDAHO)
County of KOOTENAI)ss
FILED June 2, 2021
AT 10:15 O'Clock A M
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

ERIC KITTELSON and KRISTI KITTELSON, husband and wife,

Plaintiffs,

VS.

MARK STEVEN HERNDON and KIMBERLY A. HERNDON, husband and wife,

Defendants.

Case No. **CV28-19-7131**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTIONS FOR RECONSIDERATION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOLLOWING COURT TRIAL

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTIONS FOR RECONSIDERATION

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This case involves an easement sought by plaintiffs Eric Kittelson and Kristi Kittelson (the Kittelsons), who own Parcel 6200, over Parcel 5650 which is owned by defendants Mark Herndon and Kimberly Herndon (Herndons). Compl. 7. Kittelsons seek the easement to access their property from East Hooker Hill Road as it travels very near to the northern boundary of their Parcel 6200. *Id.* at 7. Herndons' property is directly to the North of Kittelsons' property. Pls.' Ex. 3. The two parcels share a common boundary; the north boundary of Kittelsons' Parcel 6200 is the south boundary of Herdons' Parcel 5650. *Id.* To access this area in Kootenai County, one would take

East Garwood Road and take East Hooker Hill Road as it forks from East Garwood Road. East Hooker Hill Road travels across the very southern portion of Herndons' Parcel 5650 in an east-west direction. *Id.* As East Hooker Hill Road enters the western boundary of the Herndons' Parcel 5650, it bends to the south and comes very close to the northwest corner of Kittelsons' Parcel 6200. *Id.* On the maps and photographs admitted into evidence, it appears that East Hooker Hill Road touches Kittelsons' Parcel 6200, but apparently, it does not. Evidencing that no portion of East Hooker Hill Road touches the Kittelsons' Parcel 6200, counsel for the Kittelsons' writes: "The Herndons' legal property line extends about eight feet beyond the current driving lanes of Hooker Hill Road. Thus, to get from the existing roadway to their property, the Kittelsons must cross a range of 3-10-feet of the Herndons' property." Pls.' Closing Arguments 1-2. Travelling east on East Hooker Hill Road, just after East Hooker Hill Road exits the east boundary of Herndons' Parcel 5650, there is a fork, and North Ginger Lane is a right off of East Hooker Hill Road. Pls.' Ex. 3. North Ginger Lane travels south and ends in a short distance. East Hooker Hill proceeds north from the fork, and also ends in a short distance. North Ginger Lane provides direct access to the Byrds' parcel. *Id.* On the Byrds' parcel there is a house which was built by Terry Gordon. Terry Gordon testified at trial. Byrd's parcel and house are directly to the east of Kittelsons' Parcel 6200. *Id.*

All of this land was originally owned by Everett (E. L.) Hooker and Neva Hooker. Plaintiffs' Ex. 4 (Exhibit 4 was not admitted into evidence, but the fact of common ownership is acknowledged by Herndons, Revised Proposed Findings of Fact from Defs. and Counterclaimants 1). On September 15, 1943, Everett Hooker acquired title to Government Lots 3 and 4 located in Section 21, Township 52 North, Range 3 West,

B.M. Kootenai County. *Id.* Both Herdons' Parcel 5650 and Kittelsons' Parcel 6200 were included in this property.

On October 16, 1981, Hooker sold Parcel 5650 to Mark Walker. Defs.' And Countercl.s' Trial Br. 3-4, ¶ 5-6; Pls.' Ex. 31, 32. Walker conveyed Parcel 5650 to the Kenneth and Nancy Murren Trust on October 18, 1999. *Id.* at 4, ¶7; Pls.' Ex. 34. On October 21, 2013, the Murren Trust sold Parcel 5650 to the Herndons. *Id.*; Pls.' Ex. 35.

On August 23, 1979, the Hookers sold several parcels, one of which was 6200, Kittelsons' Parcel, to Terry Gordon and JoAnn Gordon, and Elmer and Diana Wright. *Id.*; Pls.' Ex. 17, 19. On November 16, 2006, the Gordons conveyed to themselves "Parcel 6200 Revised" which created an unimproved five-acre parcel now identified as Kittelsons' Parcel 6200. *Id.* at 5, Pls.' Ex. 42-46. This was essentially a property line adjustment, but the significance of that adjustment was that Parcel 6200 was no longer contiguous to North Ginger Lane. *Id.* at 6, Pls.' Ex. 6. Following the creation of Parcel 6200 Revised, the Gordons became in arrears on their property tax payments, and on May 11, 2011, Kootenai County acquired Parcel 6200 Revised by operation of Tax Deed. *Id.*; Pls.' Ex. 48. Kootenai County then conveyed Parcel 6200 Revised to the Henkoski Family Trust on September 20, 2011. *Id.*; Pls.' Ex. 49. On January 23, 2019, the Henkoski Family Trust sold Parcel 6200 Revised to the Kittelsons. *Id.*; Pls.' Ex. 51.

The Kittelsons filed their Complaint on October 4, 2019. The Kittelsons claim five causes of action and attorneys' fees (see Compl. generally). Those causes of action claimed by the Kittelsons are Declaration of Express Easement, Implied Easement by Prior Use, Easement by Necessity, Covenant Running with the Land, and Common Law Private Dedication. *Id.* Kittelsons claim, "The plaintiffs took title to Parcel 6200 under a Warranty Deed recorded on January 25, 2013 under Kootenai County

Instrument No. 2678595000." Compl. 2. Herndons claim "[T]he Herndons acquired title to their property by Warranty Deed, Kootenai County Record Instrument No. 2433442000 dated October 16, 2013." Answer and Countercl. 2.

The Herndons filed their Answer and Counterclaim on December 9, 2019. The Herndons filed a Counterclaim to Quiet Title on Parcel 6200 free of an easement because they assert that, "[w]hen the Herndons acquired fee title to the Herndon Parcel in October 2013, the half-acre triangular piece of their parcel located to the south of E. Hooker Hill Road was not encumbered by any access easement, whether express, implied or prescriptive, for the benefit of the property described herein as the Kittelson Parcel." *Id.* at 15.

The Kittelsons filed their Reply to Defendants' Counterclaim on January 2, 2020.

On June 9, 2020, the Herndons filed a Motion for Summary Judgment, Defendants' Statement of Undisputed Facts in Support of Motion for Summary Judgment, Defendants' Memorandum in Support of Motion for Summary Judgment, Declaration of Brian Hooker, Declaration of Nancy Murren, Declaration of Scott McArthur, and Declaration of Kimberly Herndon. On June 26, 2020, the Kittelsons filed Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment, Declaration of Mathew B. Mayberry, Declaration of Eric Kittelson, and Declaration of Terry Gordon.

Also on June 26, 2020, the Herndons filed a Motion for Preliminary Injunction, Memorandum in Support of Motion for Preliminary Injunction, Amended Declaration of Nancy Murren, Amended Declaration of Brian Hooker, Amended Declaration of Kimberly Herndon, Amended Declaration of Scott McArthur, and Declaration of Kimberly Herndon in Support of Defendants' Motion for Preliminary Injunction. On June 29, 2020, the Herndons filed a Supplemental Declaration of Kimberly Herndon in

Support of Defendants' Motion for Preliminary Injunction (Ex. X, DD, AA, BB, CC-1, CC-2 and DD submitted via disc). On June 30, 2020, Herndons filed Defendants' Reply Memorandum in Support of Motion for Summary Judgment.

Oral argument on the Motion for Summary Judgment and Preliminary Injunction was held on July 7, 2020. At the conclusion of that hearing, the Court granted defendants' Motion for Preliminary Injunction and stated that it was granting defendants' Motion for Summary Judgment as to express easement, but was denying summary judgment on all other grounds. The Court stated it would issue a written decision to more thoroughly explain its reasoning on summary judgment. The following is the Court's reasoning as to why it granted summary judgment on an express easement:

A. Express Easement over Defendants' Real Property

The Herndons argue that there is no express easement because:

> There is no language found in either the Memorandum of Contract, Instrument # 964582, or Warranty Deed, Instrument # 1730823, that grants and (sic) easement over Parcel 5650 for the benefit of Parcels 6200, 6250 or 6400. Therefore, there is no express easement over that area labeled "Access Driveway" as alleged in the Plaintiffs' Complaint.

Defs' Mem. is Supp. of Mot. for Summ. J. 6. The Kittelsons argue that:

> On the record before the court and construing the facts in favor of the plaintiffs, it is reasonable to assume that Hooker intended to both reserve an easement over the defendants' parcel for E. Hooker Hill Road, and to grant an easement over E. Hooker Hill Road for the property originally conveyed to Terry Gordon et al. In fact, Hooker's intent was expressly stated in the 1984 Warranty Deed to Gordon:
>
> > "Said rights of way are for the benefit of and appurtenant to the property described herein and shall inure to the benefit of and maybe used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof."
>
> The plaintiffs' parcel is a part or portion of the original property conveyed by Hooker to Gordon et al. By their summary judgment motion, the defendants ask this court to declare that Hooker did not intend to reserve or grant any easement rights over E. Hooker Hill Road to Gordon even though E. Hooker Hill Road is (and was) the only means to get to the County Road. It would be a strange interpretation of the deeds to conclude that Hooker granted

> an easement to Gordon over N. Ginger Lane, but did not grant Gordon any easement to use E. Hooker Hill Road. Under the summary judgment standard of review, the defendants are not entitled to such an extreme interpretation.

Pls.' Mem. in Opp. to Defs'. Mot for Summ. J. 4-5. In their Reply Brief the Herndons argue that:

> What the Herndons and their predecessors have recognized is that Hooker intended to provide access to the property located West of the centerline of N. Ginger Lane (i.e. Parcels 6200, 6250 and 6400) from the County Road (i.e. Garwood Road) to E. Hooker Hill Road and to N. Ginger Lane. (See Dec]. Brian Hooker, 1] 8). And this makes sense when you look at the lay of the land at the time of both the Hooker to Walker and Hooker to Gordon Memorandums of Contract. Notably, there is no dispute that the eastern boundary of Parcel 6200 originally bordered much of N. Ginger Lane. Therefore, access to Parcel 6200 only became an issue following the Gordon lot-line adjustment and subsequent severance of the Gordon's title to revised Parcels 6200 (i.e. Kittelson) and 6250 (Le. Byrd). The Herndons' point merely being is that the grant of right of way does not expressly grant an easement over Parcel 5650, let alone, that specific area labeled the "Access Driveway."

Defs'. Reply in Supp. of Mot. for Summ. J. 4.

The Idaho Supreme Court has held that:

> An easement is the right to use the land of another for a specific purpose that is not inconsistent with the general use of the property by the owner. *Akers v. D.L. White Const., Inc.* 142 Idaho 293, 301, 127 P.3d 196, 204 (2005). An express easement, being an interest in real property, may only be created by a written instrument. *Shultz v. Atkins,* 97 Idaho 770, 773, 554 P.2d 948, 951 (1976) (citing I.C. § 9–503; *McReynolds v. Harrigfeld,* 26 Idaho 26, 140 P. 1096 (1914)). "No particular forms or words of art are necessary [to create an express easement]; it is necessary only that the parties make clear their intention to establish a servitude." *Benninger v. Derifield,* 142 Idaho 486, 489, 129 P.3d 1235, 1238 (2006) (quoting *Seccombe v. Weeks,* 115 Idaho 433, 436, 767 P.2d 276, 279 (Ct.App.1989)). An express easement may be created by a written agreement between the owner of the dominant estate and the owner of the servient estate. It may also be created by a deed from the owner of the servient estate to the owner of the dominant estate. Where the owner of the dominant estate is selling the property to be subjected to the servitude, an express easement may be created by reservation or by exception. "An express easement by reservation reserves to the grantor some new right in the property being conveyed; an express easement by exception operates by withholding title to a portion of the conveyed property." *Akers,* 142 Idaho at 301, 127 P.3d at 204.

Tower Asset Sub Inc. v. Lawrence, 143 Idaho 710, 714–15, 152 P.3d 581, 585–86 (2007).

In this Case, this Court finds that no genuine issue of material fact exists as to the creation of an express easement for access to Parcel 6200 through Parcel 5650.

The Memorandum of Contract executed on May 3, 1981 (comp. Ex. 5) [Pls.' Ex. 31], and Warranty Deed, Executed October 8, 1981 (*Id.* Ex. 6) [Pls.' Ex. 32], conveyed a Warranty Deed from Everett L. Hooker and Neva A. Hooker (Hooker) to Mark Walker (Walker), "[T]OGETHER WITH a right of way from the County Road to the above described property, and SUBJECT TO an easement to use road ways in their present location as ingress and egress to property to the East thereof." Compl. Ex. 5 [Pls.' Ex. 31] and 6 [Pls.' Ex. 32]. This Court agrees with the Herndons, there is no language found in either the Memorandum of Contract, Instrument # 964582, or Warranty Deed, Instrument # 1730823, that grants an easement over Parcel 5650 for the benefit of Parcels 6200, 6250 or 6400. That fact answers the question on summary judgment as to an express easement. Therefore, there is no express easement over that area labeled "Access Driveway" as alleged in the Plaintiffs' Complaint. As noted above, Kittelsons' claim, "On the record before the court and construing the facts in favor of the plaintiffs, it is reasonable to assume that Hooker intended to both reserve an easement over the defendants' parcel for E. Hooker Hill Road, and to grant an easement over E. Hooker Hill Road for the property originally conveyed to Terry Gordon et al. In fact, Hooker's intent was expressly stated in the 1984 Warranty Deed to Gordon." Pls.' Mem. in Opp. to Defs'. Mot for Summ. J. 4. Such argument is misplaced. "Intent" is not an issue in determining whether there is an express easement. There is no ambiguity created by the language in the Memorandum of Contract or the Warranty Deed, both executed on October 8, 1981. Under that language, there is no express easement for access to Parcel 6200 through parcel 5650.

This Court agrees with Herndons, that, "The Memorandum of Contract, Instrument # 964582, does not contain any language that grants an easement over Parcel 5650 for the benefit of Parcels 6200, 6250 and 6400 the subject property of the Hooker to Gordon conveyance." Defs.' Mem. in Supp. of Mot. for Summ. J. 5, citing Compl Ex. 9, 15, 16, 17 and 18.

What is stated in a Warranty Deed issued in 1984 is not relevant in determining whether an express easement was created (or not) in 1981. The May 3, 1984, Warranty Deed, conveyed the property in question from Hooker to Terry E. Gordon and Joanne F. Gordon and states that the property is conveyed:

> ALSO TOGETHER with a right of way over and across the existing drive for access purposes.
>
> Said rights of way are for the benefit of and appurtenant to the property described herein and shall inure to the benefit of and may be used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof.

Compl. Ex. 18, page 2. This Court agrees with Herndon's argument that:

> Accordingly, it would be a non-sequitur to argue that Hooker granted an easement over Parcel 5650 any time after October 8,

> 1981. *Capstar Radio Operating Co.*, 153 Idaho at 417, 283 P.3d at 734.
>
> As the Plaintiffs recognize in their Complaint, on May 3, the Gordons (and Wrights) quitclaimed their property back to Hooker for the purpose of correcting an erroneous description of 6250 that had carried forward in subsequent conveyances. (See Pls.' Compl., 9 h, Ex. 16). While Hooker obliged by issuing corrected deeds to Gordon; by 1984, Hooker had already sold Parcel 5650 to Mark Walker and, therefore, as a matter of law, could not have granted an easement over Parcel 5650 for the benefit of Parcels 6200, 6250 and 6400. *Capstar Radio Operating Co.*, 153 Idaho at 41 7, 283 P.3d at 734. There is no language found in either the Memorandum of Contract, Instrument #964582, or Warranty Deed, Instrument # 1730823, that grants and easement over Parcel 5650 for the benefit of Parcels 6200, 6250 or 6400. Therefore, there is no express easement over that area labeled "Access Driveway" as alleged in the Plaintiffs' Complaint.
>
> Defs.' Mem. in Supp. of Mot. for Summ. J. 6. For the reasons described above, this Court finds that no genuine issue of material fact exists as to the existence of an express easement over parcel 5650 for access to parcel 6200. There is no express easement.

Mem. Decision and Order Granting in Part and Den. in Part Defs.' Mot for Summ. J 5-9.

Not long before the court trial, on April 26, 2021, Kittelsons filed Plaintiffs' Motion for Reconsideration of Orders Granting Defendants' Motion for Summary Judgment and Preliminary Injunction, in which Kittelsons ask this Court to reconsider its decision granting defendants' motion for summary judgment as to an express easement. In that motion, the Court heard for the first time the claim by the Kittelsons that there was a 30-foot-wide easement which runs across the entire southern border of Herndons' Parcel 5650. This was based on new evidence which was not presented to the Court at the time of defendants' motion for summary judgment. This new evidence consists of three deeds dated February 15, 1977, from Hookers to William C. Bell and Marie J. Bell (Pls.' Ex. 10, 11 and 12), and a deed dated January 5, 1977, from Hookers to William Meyer and Sylvia Meyer. Pls.' Ex. 8. Each of these deeds reference and convey from Hookers to the Bells, "A right of way for road and utility purposes over, under and across the existing access road...**and the South 30 feet of the Northwest**

Quarter of the Southwest Quarter of Section 21, Township 52 North, Range 3 W.B.M., and that portion of the South 30 feet of the Northeast Quarter of the Southeast Quarter of Section 20, Township 52 North, Range 3 W.B.M., lying East of the existing access road, as the access road now exists or is replaced hereafter." *Id.* (bold added). This 30-foot strip is illustrated in Pls.' Ex. 9. The bold portion above which describes the 30-foot strip as it exists in Section 21 **is across the southern boundary of Herndons' land**, and thus contiguous to Kittelsons' entire north border. As to that 30-foot strip, Hookers in their deeds to the Bells wrote, "RESERVING unto the Sellers [Hookers] herein, their successors and assigns, the right and power to convey rights of way for road and utility purposes over, under and across said 30 foot strip of land to other persons (and the said Sellers also likewise reserve the right and power in gross to dedicate to the public a right of way for public road purposes over said 30 foot strip of land)." Pls.' Ex. 10, 11, and 12.

In Kittelsons' Motion for Reconsideration of Orders Granting Defendants' Motion for Summary Judgment and Preliminary Injunction, counsel for the Kittelsons writes:

> In 1943, Everett Hooker acquired the SW ¼ of Section 21, Township 52 North, Range 3 W. In 1977, Everett and Neva Hooker began selling portions of the property. As they did so, they conveyed the various parcels of property along with easement and access rights to the properties. The easements and access rights varied in language, but often referred to the existing roadways that crossed the SW ¼ of Section 21 that had been built and established by the Hookers during their logging operations. **In addition, with the first two sales of properties in 1977, the Hookers reserved a specific 30-foot wide easement with the intent of dedicating it as a public roadway in the future. That 30-foot roadway easement runs along the entire southern 30-feet of the Herndon's property.**
>
> In 1979, Terry and JoAnn Gordon and Elmer and Diana Wright purchased one of the parcels from the Hookers. At the time of their purchase, the roadways were not well built. Terry Gordon and Elmer Wright primarily built and expanded the roadways to provide access to the various parcels. In 1984, the Gordons and Wrights reconfigured and split their property.

In 2006, Terry Gordon split his property into two sections – Tax Lots 6200 and 6250. The Gordons house was located on TL 6250. In 2011, TL 6200 was acquired by Kootenai County at a tax deed sale for failure to pay property taxes. Tax Lot 6200 was sold by Kootenai County to the Henkoski Family Trust later in 2011. The Henkoski Family Trust sold Tax Lot 6200 to the Kittelsons in 2019.

To access their property, the Kittelsons cross the Herndon's property over an area approximately 20 feet long and 3 to10 feet wide between Hooker Hill Road and the Kittelsons' property and within the 30-foot easement area.

Pls.' Mot. for Recons. of Orders Granting Defs.' Mot. for Summ. J. and Prelim. Inj, 3-4 (bold added). Terry Gordon testified at trial. The facts as set forth above by Kittelsons' attorney are consistent with Terry Gordon's testimony at trial. Terry Gordon testified that he bought his 45-acre government lot from the Hookers, and that they skipped using a realtor. He testified that when he bought from the Hookers, East Hooker Hill Road was a trail which had been used by Hookers to log the area, and was not really a road at that time. After he bought the property, Terry Gordon testified that he used East Hooker Hill Road to do some additional logging, run cattle, and that he improved both East Hooker Hill Road and Ginger Lane. The improvements Terry Gordon made (along with his neighbor Elmer Wright) were to widen the road with heavy equipment and bring in gravel to make a road surface. Terry Gordon testified that in about 1985 a road maintenance association was created to plow in the winter and do maintenance in the summer.

Counsel for Kittelsons then argues:

REQUEST FOR RECONSIDERATION

Although the Court granted the Herndons' motion for summary judgment as to the express easement and granted a preliminary injunction, these were not final orders, and the Court may revise and reconsider its interlocutory ruling. "When an order granting summary judgment is filed before a final judgment, the order granting summary judgment is an interlocutory order." *Lanham v. Lanham*, 160 Idaho 89, 93, 369 P.3d 307, 311 (Ct. App. 2016). If no final judgment is entered, any request to reconsider the order is timely. *Wickel v. Chamberlain*, 159 Idaho 532, 537, 363 P.3d 854, 859 (2015). Pursuant to IRCP 11.2(b)(1),

the Kittelsons request that the Court reconsider its orders based on the evidence presented at trial.

The deed to the Kittelsons does not include a specific grant of access rights. However, the deed to the Gordons and Wrights – the prior owners of the pre-divided Kittelson property -- includes an express "right of way from the County road to the above described property." And "said rights of way are for the benefit of and appurtenant to the property described herein and shall insure to the benefit of and may be used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof." However, this right of access is ambiguous and the Court must examine evidence of the intent of the original grantors to make a determination as to whether this access right was limited to a specific location, as argued by the Herndons.

By examining the deeds from the Hookers to the other property purchasers in the SW ¼, the access easement in the original deed was intended to benefit the Kittelsons' property even though it was subdivided from a larger parcel. "In construing an easement in a particular case, the instrument granting the easement is to be interpreted in connection with the intention of the parties, and the circumstances in existence at the time the easement was granted." *Kolouch v. Kramer*, 120 Idaho 65, 69, 813 P.2d 876, 880 (1991).

"One who purchases land expressly subject to an easement, or with notice, actual or constructive, that it is burdened with an existing easement, takes the land subject to the easement." *Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 301, 127 P.3d 196, 204 (2005). The evidence presented at trial will show that the original owners of the various properties intended there to be a 30-foot wide express easement for a roadway along the entire southern 30 feet of the Herndon's property. This is adjacent to the norther line of the Kittelsons' property and was intended to provide access to the Kittelsons' property. Thus, the Herndons' property is subject to express easements for access to all the properties in the SW ¼.

Id. at 5-6.

A two-day court trial was then held on May 10 and 11, 2021. Following the court trial, on May 18, 2021, the Herdons filed Closing Argument of Defendants and Counterclaimants, and Revised Proposed findings of Fact From Defendants and Counterclaimants. Also on May 18, 2021, Kittelsons filed Plaintiffs' Closing Argument and Plaintiffs' Revised Proposed Findings of Fact and Conclusions of Law. Finally, on May 18, 2021, Kittelsons filed yet another Plaintiffs' Motion for Reconsideration of Order

Granting Defendants' Motion for Summary Judgment. In that motion, counsel for Kittelsons argues:

> **B. The Hookers Created a 30-foot Roadway over the Herndons' Property in 1977**
>
> The summary judgment motion relied on a limited set of facts that did not fully explain the history surrounding the creation of the Gordons' easement. The history must go back to when the Hookers owned the entire SW ¼ and began subdividing it in 1977.
>
> **1. The Hookers Conveyance to Meyers**
>
> On January 5, 1977, the Hookers conveyed the SE ¼ of the SW ¼ of Section 21 to William J. Meyer and Silvia Meyer. This was the Hookers' first conveyance of the subdivided property. The conveyance included a right of way for road and utility purposes over, under and across the South 30 feet of the NW ¼ of the SW ¼ of Section 21. (Exhibit 008). An illustration of the conveyance to the Meyers is shown [in Pls.' Ex. 9]
>
> The deed granted Meyers an easement over the south 30 feet of the NW ¼ of the SW ¼ section, which includes the Herndons' property.
>
> * * *
>
> The language in the easement is important because it also reserved to the Hookers, "their successors and assigns, ***the right and power to convey rights of way for road and utility purposes over, under and across said 30 foot strip of land to other persons*** (and the said Grantors also likewise reserve the right and power in gross to dedicate to the public a right of way for public road purposes over said 30 foot strip of land.)" The Hookers clearly contemplated they would grant easements over 30-foot strip to benefit others, and that the 30-foot strip could become a public roadway.
>
> **2. The Hookers Conveyance to Bells**
>
> On February 15, 1977, the Hookers conveyed the NE ¼ of the SW ¼ to William Bell and Marie Bell. (Exhibits 010, 011, 012, 030). An illustration of the property conveyed to the Bells is shown [in Pls.' Ex. 13].
>
> Each of the deeds to the Bells granted an easement over the southern 30-feet of the NW ¼ of the SW ¼.
>
> Again, the easement language is important because it reserved to the Hookers, "their successors and assigns, ***the right and power to convey rights of way for road and utility purposes over, under and across said 30 foot strip of land to other persons*** (and the said Grantors also likewise reserve the right and power in gross to dedicate to the public a right of way for public road purposes over said 30 foot strip of land.)" Again, the Hookers clearly contemplated they would grant easements over 30-foot strip to benefit others, and that the 30-foot strip could become a public roadway.
>
> **3. The Deeds to Gordons Contained Express Easements**
>
> The Hookers had reserved the right to grant easements over the 30-foot strip regardless of whether the properties in the NW ¼ of the SW ¼ had already been sold. Nonetheless, at the time of the conveyance to

the Gordons, the Hookers still owned the properties in the NW ¼. The Hookers granted express easements in each of the conveyance documents to the Gordons.

The Hookers conveyance to Gordon and Wright in the Memorandum of Contract (Exhibit 017) granted an easement from the county road to the property:

> That portion of Government Lot 4 in the Southwest Quarter of Section 21, Township 52 North, Range 3 W.B.M., Kootenai County, State of Idaho, lying West of the center line of the existing road running North and South in said Government Lot 4 as said road existed May 17, 1979.
> TOGETHER WITH a right of way from the County road to the above described property.

The Hookers deed to Gordon for the 1-acre parcel (Exhibit 019) granted an easement over and across the existing drive:

> ALSO TOGETHER with a right of way over and across the existing drive for access purposes.

The revised Memorandum of Contract from the Hookers to Gordons (Exhibit 025) granted an easement across the existing drive for County Road access purposes:

> TOGETHER WITH a right of way over and across the existing drive for County Road access purposes.

The later quitclaim deed from the Hookers to Gordons (Pl Ex 027) also granted an easement over and across the existing drive and clarified that it was for the benefit of anyone who became an owner of part of the Gordons' property:

> ALSO TOGETHER with a right of way over and across the existing drive for access purposes.
> Said rights of way are for the benefit of and appurtenant to the property described herein and shall inure to the benefit of and may be used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof.

The Hookers clearly contemplated that the Gordons might subdivide their property and that others would have access over the easement as well.

4. The Herndons Property was Conveyed Subject to the 30-Foot Road Easement

The deeds from the Herndons [Hooker] to Mark Walker (Exhibit 32), from Mark Walker to the Murrens (Exhibit 34), and the Murrens to the Herndons (Exhibit 35) did not specifically reference the 30-foot road easement, but were subject to easements of record. However, each owner of the Herndon property was still on notice of the 30-foot easement. "One who purchases land expressly subject to an easement, or with notice, actual or constructive, that it is burdened with an existing easement, takes the land subject to the easement." *Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 301, 127 P.3d 196, 204 (2005). See also I.C. 55-811; *Large v. Cafferty Realty, Inc.*, 123 Idaho 676, 680, 851 P.2d 972,

976 (1993); *Davis v. Tuma*, 167 Idaho 267, 275, 469 P.3d 595, 603 (2020).

5. The Kittelsons Had an Express Easement Even if Not in their Deed

The deed to the Kittelsons (Exhibit 51) does not include a specific grant of access rights. However, the deeds from the Hookers to the Gordons (the prior owners) did include an express easement. Further, according to the express easement, "said rights of way are for the benefit of and appurtenant to the property described herein and shall insure to the benefit of ***and may be used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof***." Thus, the easement from the Hookers to Gordons ran with the Gordons' property and parts thereof, even if not listed in the deeds. The easement thus benefitted the Kittelsons, who became owners of part of the Gordons' property.

6. The Location of the Gordons' Easement is Ambiguous

The easements from the Hookers to the Gordons are ambiguous because they do not state a specific location for the easement. They use differing terms of "from the County Road," "across the existing drive," and "across the existing drive for County Road purposes." Since the easement is ambiguous, the Court must examine evidence of the intent of the original grantors to make a determination as to the location of the easement. "In construing an easement in a particular case, the instrument granting the easement is to be interpreted in connection with the intention of the parties, and the circumstances in existence at the time the easement was granted." *Kolouch v. Kramer*, 120 Idaho 65, 69, 813 P.2d 876, 880 (1991).

7. The Hookers Intended the Easement to Run Along the 30-Foot Roadway

To determine the intent of the Hookers when the properties were subdivided, the Court may examining other conveyances. As shown above, the deeds from the Hookers to other property purchasers in the SW ¼ included specific easement grants for a 30-foot wide roadway across the Herndon's property. The 30-foot road easement in the deeds from the Hookers to the Meyers and Bells was intended to ensure permanent access rights to all of the SW ¼ because it could have been dedicated as a public roadway. The Hookers also intended the access easement to benefit the Gordons' property even if it was subdivided.

It would be illogical for the Gordons' easement to be interpreted in any location other than the 30-foot strip. That was the location that the Hookers specifically reserved for granting access to others. The Hookers had the right to dedicate Hooker Hill into a public roadway. One of the deeds to the Gordons specifically mentions access for "county road purposes." Under the circumstances, the only reasonable interpretation is that the Hookers intended the Gordons to have access to their property over the 30-foot road easement that crosses the Herndons' property.

Pls.' Mot. for Recons. of Order Granting Defs.' Mot. for Summ. J. 3-10. (bold and italics in original).

This Court finds that it does have the ability to reconsider its earlier ruling in which this Court granted the Herndons' summary judgment motion and dismissed the Kittelsons' claim of express easement. At this point, that decision on summary judgment is an interlocutory order. *Lanham v. Lanham*, 160 Idaho 89, 93, 369 P.3d 307, 311 (Ct. App. 2016). No final judgment has been issued at this time, so the Kittelsons' motions to reconsider are timely. *Wickel v. Chamberlain*, 159 Idaho 532, 537, 363 P.3d 854, 859 (2015). A motion for reconsideration is allowed under Idaho Civil Rule 11.2(b)(1). Kittelsons have presented new evidence in the form of these deeds to Meyer and to Bell. Pls.' Ex. 8, 10, 11, and 12. A party making a motion for reconsideration of an interlocutory order is permitted to present new evidence. *Johnson v. Lambros*, 143 Idaho 468, 471-72, 147 P.3d 100, 103-04 (Ct. App. 2006) On a motion for reconsideration of facts deemed established at summary judgment, the trial court should reconsider those facts in light of any new or additional facts that are submitted in support of the motion to reconsider. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

> A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be.

Id. quoting *J.I. Case Company v. McDonald*, 76 Idaho 223, 229, 280 P. 2d 1070, 1073 (1955). The decision to grant a motion to reconsider is left to the discretion of the trial court, and may be appealed from but only on the question of whether there has been a

manifest abuse of discretion. *Id.* citing *Lowe v. Lynn*, 103 Idaho 259, 263, 646 P.2d 1030, 1034 (1982).

This Court agrees with all claims and arguments made by the Kittelsons in their two motions for reconsideration. Essentially, all those claims and arguments are set forth above. The Court is not persuaded by arguments and contentions made by the Herndons. Factually and legally, Herndons have conflated the 30-foot easement with East Hooker Hill Road.

First, Herndons argue that the 30-foot easement across their southern boundary and East Hooker Hill Road are the same thing. Counsel for Herndons writes:

> This reinforces Mrs. Herndon's trial testimony that neither she nor her husband have disputed the existence of the 30' foot right of way known as E. Hooker Hill Road and that E. Hooker Hill Road travels over a 30' wide strip of land located over the southern boundary of their property. As Mrs. Herndon further testified, neither she nor her husband have disputed or otherwise sought to deny the Kittelsons, or their predecessors in interest, the right to travel over E. Hooker Hill Road as it exists and travels over that 30' strip of land over their parcel.

Closing Argument of Def. and Counterclaimants 8. The physical evidence shows that the 30-foot easement across their southern boundary and East Hooker Hill Road are not the same thing. Pls.' Ex. 2, 3, 46, 56, and 61. The physical evidence shows that only the last little bit (the western portion) of East Hooker Hill Road is within the easement which is the southernmost 30-foot of Herndons' property. The physical evidence shows that more than half of the length of East Hooker Hill Road is north of that 30-foot easement as it crosses Herndons' property.

Second, Herndons make an argument that ignores a clear reading of the deeds at issue. Counsel for Herndons proposes the following finding of fact:

> 19. The Court finds that the 1977 Warranty Deed from the Hookers to William and Silvia Meyer admitted as Plaintiffs' Exhibit 8 conveyed the Southeast Quarter of the Southwest Quarter of Section 21 to Meyer subject to the following language:

> A right of way for road and utility purposes over, under and across the existing access road as the same now exists across the Southeast Quarter of Section 20, Township 52 North, Range 3 W.B.M., and the South 30 feet of the Northwest Quarter of the Southwest Quarter of Section 21 ...and the North 30 feet of the East 30 feet of Southwest Quarter of the Southwest Quarter of Section 21...and that portion of the South 30 feet of the Northeast Quarter of the Southeast Quarter of Section 20...lying East of the existing access road.
>
> Said right of way is for the benefit of and appurtenant to the property described herein and shall inure to the benefit of and may be used by all person who may hereinafter become the owners of said appurtenant property or any parts for portions thereof.
>
> RESERVING unto the Grantors herein, their successors and assigns, the right and power to convey rights of way for road and utility purposes over, under and across said 30 foot strip of land to other persons (and the Grantors also likewise reserve the right and power in gross to dedicate to the public a right of way for public road purposes over said 30 foot strip of land.)
>
> 20. The Court finds the language of the 1977 Warranty Deed from Hooker to Meyer to be plain and unambiguous. Based on the plain and unambiguous language, the Court finds that the Hookers granted to Meyer a "right of way for road and utility purposes." The Court finds that the right of way, as granted, was "over, under and across the existing access road."

Revised Proposed Findings of Fact From Defs. and Counterclaimants 7-8, ¶¶ 19-20.

Herndons' argument is that the 30-foot easement and East Hooker Hill Road are legally the same thing, according to the language of the deed. Counsel for Herndons accurately quoted the language of the deed found in Exhibit 8, but counsel for Herndons makes a legal interpretation which is not supported by the plain and unambiguous language of that deed. Counsel for Herndons wants to ignore the word "and" as contained in the first sentence. The first sentence reads: "A right of way for road and utility purposes over, under and across the existing access road as the same now exists across the Southeast Quarter of Section 20, Township 52 North, Range 3 W.B.M., **and** the South 30 feet of the Northwest Quarter of the Southwest Quarter of

Section 21." Pls.' Ex. 8 (bold added). The first portion of that sentence describes East Hooker Hill Road as it crosses Herndons' (and others') land; the latter portion of that sentence describes the 30-foot easement across Herndons' (and others') land.

Counsel for Herndons honestly discloses that Plaintiffs' Exhibit 8 is found in Herndons' title report, writing as a proposed finding:

> 18. At trial, the Plaintiffs offered new and additional title documents by way of Plaintiffs' Exhibits 8, 10, 11, 12, 14, 15, 30, 36, 38 and 40 for the purpose of proving that a blanket 30' access easement exists across the southern 30' of Herndon Parcel 5650. The Court notes that only one of these new and additional title documents was referenced in the Herndons' Commitment for Title Insurance admitted as Plaintiffs' Exhibit 98. The lone document being the 1977 Warranty Deed from Hooker to Meyer, Instrument 810873, admitted as Plaintiffs' Exhibit 8.

Revised Proposed Findings of Fact From Defs. and Counterclaimants 7, ¶ 18. This Court finds Herndons were thus given notice of the 30-foot easement across the southern 30 feet of their parcel. From the language of that document, they were put on notice that the 30-foot easement was different from and in addition to the easement for East Hooker Hill Road, the "existing access road" using the language from Plaintiffs' Exhibit 8. It is of no legal significance whether the other nine exhibits were in the Herndons' title report. The presence of Exhibit 8 in the Herndons' title report gives notice to the Herndons.

This Court finds there is no doubt that East Hooker Hill Road existed in essentially its current location at the time the Hookers conveyed to the Meyers and the Bells. There is evidence that East Hooker Hill Road has been improved over time, but there is no evidence that its location has ever changed. This Court finds the language in the deeds from the Hookers to the Meyers and the Bells to be clear that a 30-foot easement was reserved across the southernmost portion of Herndons' parcel, and that 30-foot easement was in addition to and different from East Hooker Hill Road.

Accordingly, this Court grants Kittelsons' motion to reconsider its July 21, 2020, Order granting partial summary judgment (that there was no express easement), and the Court now finds that the Kittelsons have an express easement over the southern 30 feet of the Herndons' property.

FINDINGS OF FACT and CONCLUSIONS OF LAW

The Court has reviewed Plaintiffs' Revised Proposed Findings and Conclusions. They are attached to this Memorandum Decision and Order Granting Plaintiffs' Motions to Reconsider, Findings of Fact, Conclusions of Law and Order. Those findings are separate from the conclusions of law, as required by Idaho Rules of Civil Procedure 52(a)(1). The Court adopts Plaintiffs' Revised Proposed Findings of Fact 1-91 and 94 in their entirety. The Court rejects Plaintiffs' Revised Proposed Findings of Fact 92-93, as this Court finds Kittelsons have not proven an easement by prior use or an easement by prescription. The Court adopts General Conclusion of Law 1-10 in their entirety as set forth in Plaintiffs' Revised Proposed Findings of Fact. As to the conclusions of law set forth in the section titled "Kittelsons' Claims" set forth in Plaintiffs' Revised Proposed Findings of Fact at pages 25-33, the Court rejects Kittelsons' claim that they have proven an implied easement by prior use (*Id.* at 25-27) and rejects Kittelsons' claim that they have proven an easement by prescription (*Id.* at 33) because Kittelsons have not proven apparent continuous use to demonstrate that the roadway was intended to provide access to Kittelsons' parcel across that small strip of Herndons' land, (*Cordwell v. Smith*, 105 Idaho 71, 78, 665 P.2d 1081, 1088 (Ct. App. 1983)), nor have Kittelsons proven continuous and uninterrupted use of that same small strip of Herndons' land. *Akers v. D.L. White Const., Inc.* 142 Idaho 293, 303, 127 P.3d 196, 206 (2005). The Court specifically adopts the conclusions of law set forth in Plaintiffs' Revised Proposed Findings of Fact under the heading, "Easement by Necessity"

(Plaintiffs' Revised Proposed Findings of Fact 27-29), under the heading "Covenant Running With the Land" (*Id.* at 30-32), and under the heading "Common Law Private Dedication" (*Id.* 32-33). As to "Easement by Necessity", the Court finds that were it not for the express easement, the Kittelsons would have no other legal access to their property. This is because with the property line adjustment which occurred, the Kittelsons lost their access to North Ginger Lane. They would be landlocked. This meets the "great present necessity" requirement. *Machado v. Ryan*, 153 Idaho 212, 220, 280 P.3d 715, 723 (2012). As to "Covenant Running With the Land", the Court finds the Herndons' had notice of this 30-foot easement on their southern border. As to "Common Law Private Dedication", the Court finds the Hookers specifically reserved a 30-foot wide easement across Herndons' land (and the land of others) for use as a public roadway, and the Hookers did this prior to selling any of the parcels involved in this litigation. These three implied easements are **alternative** findings in the even the Kittelsons do not have an express easement.

The Court specifically finds that Kittelsons have an express easement over this small strip of Herndons' land by express easement, and alternatively, that Kittelsons have proven an easement by necessity, a covenant running with the land and a common law private dedication. The Court specifically finds that Herndons have failed to prove their counterclaim for quiet title made against the Kittelsons, and accordingly, Herndons' counterclaim is dismissed. The Court specifically declares that the southern 30-foot strip of the Herndons' property is subject to a permanent roadway easement for the benefit of all property owners in the Southwest Quarter of Section 21. The Court specifically declares the Kittelsons have the right to use the southern 30 feet of the Herndons' property for access to the Kittelsons' property. The Court rescinds the Order for Preliminary Injunction entered on July 10, 2020, and as of June 2, 2021, enjoins the

Herndons from interfering with the Kittelsons' access rights. The Court specifically finds the Kittelsons to be the prevailing parties as compared to the Herndons.

The Court has reviewed its notes taken during the two-day trial and the Court minutes. The Court did not find any witness to be not credible.

ORDER

For the reasons set forth above, plaintiffs Kittelsons' motions to reconsider are granted and the plaintiffs Kittelsons are entitled to the following relief.

IT IS HEREBY ORDERED that the Kittelsons' motions to reconsider are GRANTED, and that Kittelsons have an express easement over this small strip of Herndons' land by express easement, and alternatively, that Kittelsons have proven an easement by necessity, a covenant running with the land and a common law private dedication.

IT IS FURTHER ORDERED that the Kittelsons' claims of implied easement by prior use and easement by prescription are DENIED.

IT IS FURTHER ORDERED that the Herndons have failed to prove their counterclaim of quiet title made against the Kittelsons, and accordingly, Herndons' counterclaim is DISMISSED.

IT IS FURTHER ORDERED that the southern 30-foot strip of the Herndons' property is subject to a permanent roadway easement for the benefit of all property owners in the Southwest Quarter of Section 21.

IT IS FURTHER ORDERED that the Kittelsons have the right to use the southern 30 feet of the Herndons' property for access to the Kittelsons' property.

IT IS FURTHER ORDERED that the Order for Preliminary Injunction entered on July 10, 2020, is RESCINDED and VACATED, and as of June 2, 2021, the Herndons are ENJOINED from interfering with the Kittelsons' access rights.

IT IS FURTHER ORDERED that the Kittelsons are the prevailing parties as compared to the Herndons.

DATED this 2nd day of June, 2021.

John T. Mitchell, District Judge

Certificate of Service

I certify that on the 2nd day of June, 2021, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail, email or facsimile to each of the following:

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

ERIC KITTELSON and KRISTI KITTELSON, husband and wife, Plaintiffs, vs. MARK STEVEN HERNDON and KIMBERLEY A. HERNDON, husband and wife, Defendants.	Case No. CV28-19-7131 PLAINTIFFS' REVISED PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the Court for a bench trial on May 10-11, 2021. Plaintiffs (the Kittelsons) alleged six causes of action in their Amended Complaint:

1. Express Easement
2. Implied Easement by Prior Use
3. Easement by Necessity
4. Covenant Running with the Land
5. Common Law Private Dedication
6. Prescriptive Easement (added by stipulation on April 4, 2021)

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Attachment

The Court previously entered an order granting the Defendants ("Herndons") motion for summary judgment as to the Kittelsons' claim for an express easement, bud denied the Herndons' motion on all other claims. The order was entered July 21, 2020. The Kittelsons moved for reconsideration of that order prior to trial based on the evidence to be submitted at trial. The Court reserved ruling on that motion, but the Kittelsons have also now filed a separate Motion for Reconsideration with supporting evidence, and that issue will be decided separately.

The Herndons counterclaimed for a judgment quieting any claims by the Kittelsons for access to the Kittelsons' property over the Herndon's property.

Based on the evidence presented at trial, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiffs Eric and Kristi Kittelson (the Kittelsons) are residents of Kootenai County, Idaho and the record owners of certain real property located in Kootenai County legally described as follows:

> A portion of Government Lot 4 in the Southwest Quarter of Section 21, Township 52 North, Range 3 West, Boise Meridian, Kootenai County, Idaho, more particularly described as follows:
>
> BEGINNING at the Southwest corner of the said section; thence
> North 01°33'52" East, 712.47 feet to a point on the Westerly line of Government Lot 4 described as the TRUE POINT OF BEGINNING; thence
> North 01°33'52" East, 612.46 feet to the Northwest corner of Government Lot 4; thence
> South 88°08'08" East, 355.50 feet to a point on the Northerly line of Government Lot thence
> South 01°33'52" West, 612.87 feet; thence
> North 88°04'11" West, 355.50 feet to the TRUE POINT OF BEGINNING.

(The Kittelsons' property is referred to as the "Kittelson Property" or "Parcel 6200") (Pl Ex 051)

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2. Defendants Mark Steven Herndon and Kimberly A. Herndon (the "Herndons") are residents of Kootenai County, Idaho and the record owners of certain real property located adjacent to the plaintiffs' Parcel legally described as follows:

> The West 404 feet of Government Lot 3, Section 21, Township 52 North, Range 3 West, Boise Meridian, Kootenai County, Idaho.

(The Herndon's property is referred to as the "Herndon's Property" or "Parcel 5650") (Pl Ex 035).

3. The Kittelson and Herndon properties are located in the Southwest ¼ of Section 21, Township 52 North, Range 3 West, Boise Meridian, Kootenai County, Idaho (the "SW ¼"). An aerial image of Section 21 from 1983 is shown below (Pl Ex 001):

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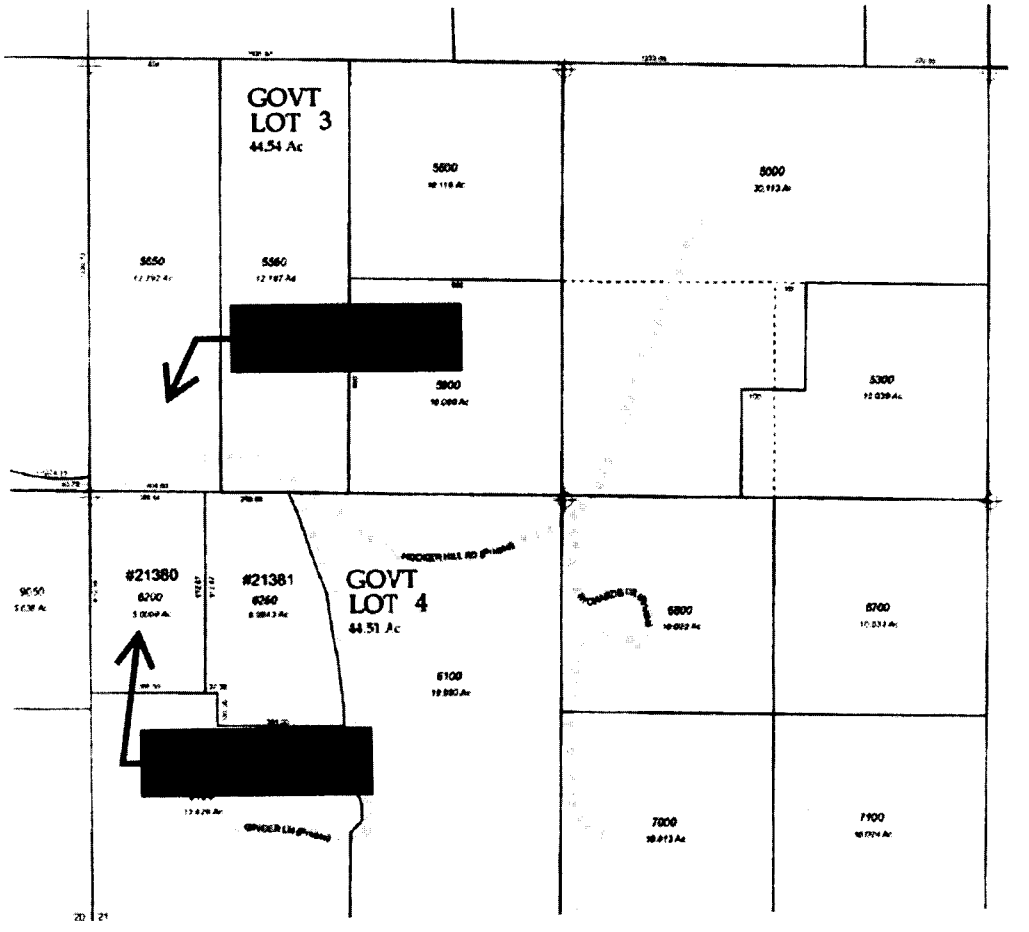
4. A tax map image of the current SW ¼ is shown below: (Pl Ex 046)



5. The current location and configuration of the Kittelson and Herndon properties are shown in the aerial photo below (Pl Ex 003):

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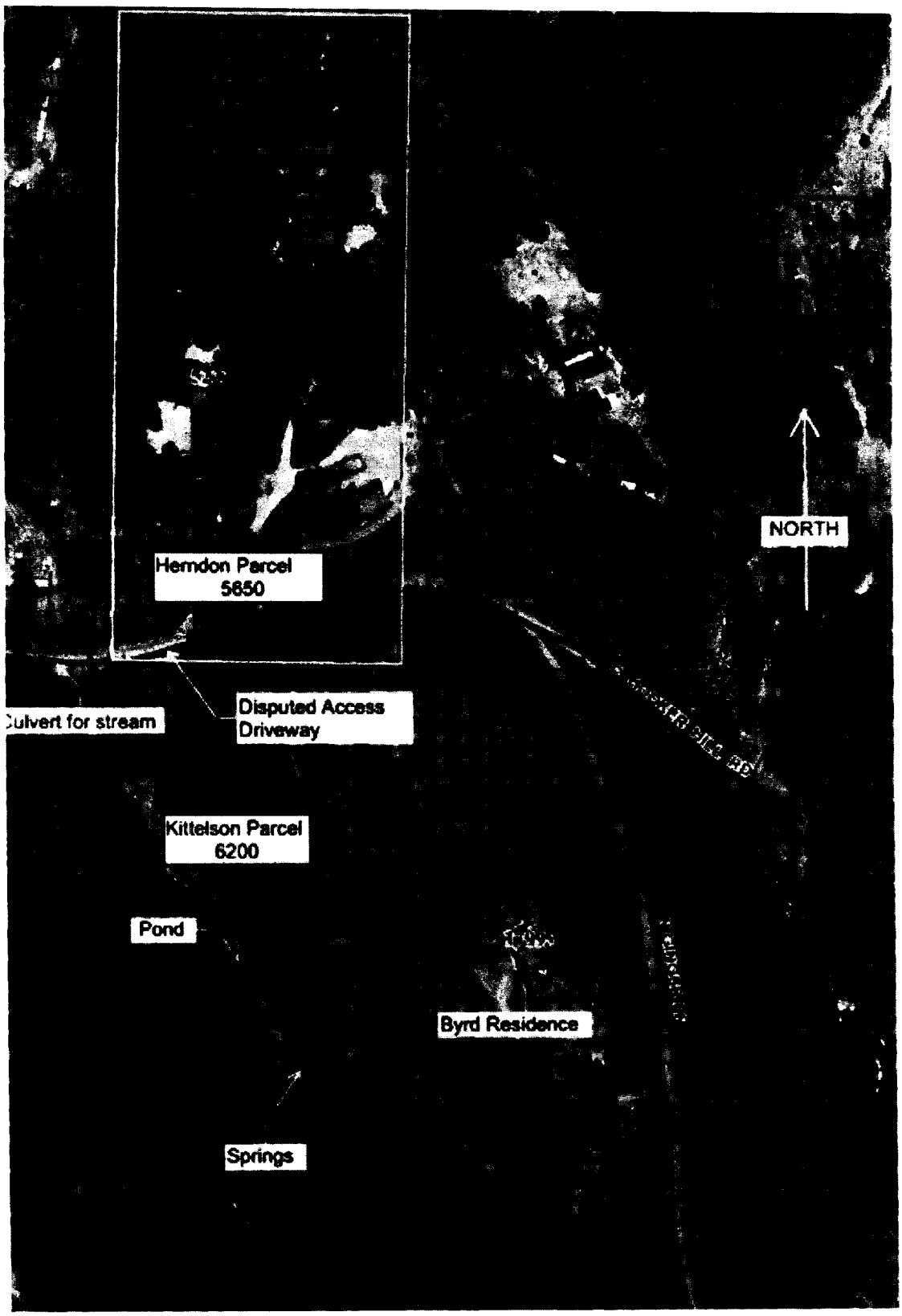

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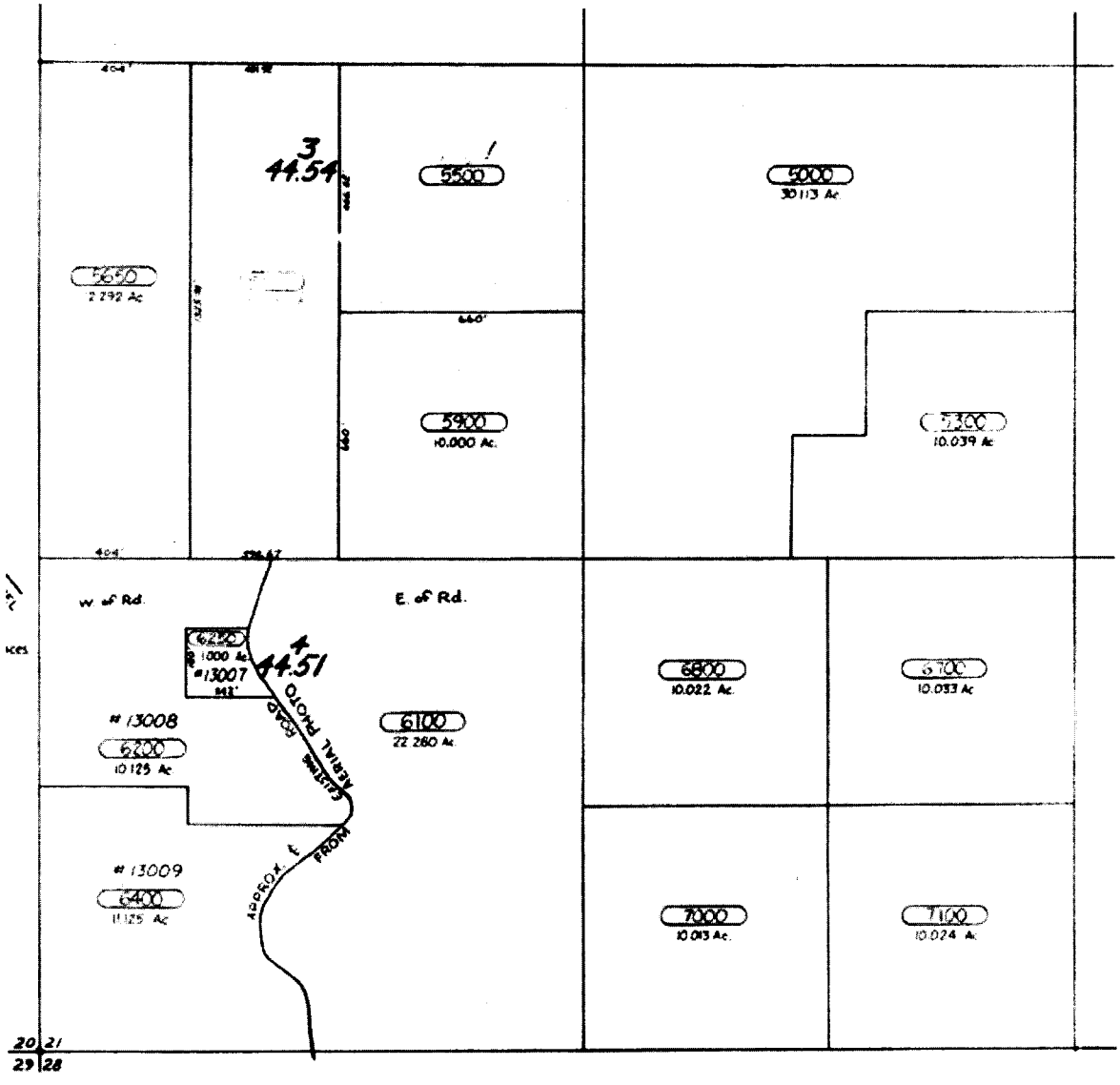
Hooker's Subdivision of the SW ¼ of Section 21

6. Brian Hooker testified that his father, E.L. Hooker (aka Everett Hooker or "Hooker") and step-mother, Neva Hooker were the owners of all of the SW ¼ of Section 21 (the "SW ¼"). (Also, Pl Ex 006)

7. The relevant section of the SW ¼ owned by Hooker is shown in the 1977 tax lot map below (Pl Ex 002):



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8. Hooker owned all of the SW ¼ of Section 21 until 1979 when Everett Hooker and his then-wife, Neva Hooker (collectively the "Hookers"), began selling the subdivided parcels of the SW ¼. (Pl Ex 006, 007).

Hooker's Conveyance to Meyers – 1977 (SE ¼)

9. On January 5, 1977, the Hookers conveyed the SE ¼ of the SW ¼ of Section 21 to William J. Meyer and Silvia Meyer via deed recorded on July 2, 1979 as Book 300 Page 62, Instrument Number 810873. The conveyance included *a right of way for road and utility purposes over, under and across the South 30 feet of the NW ¼ of the SW ¼ of Section 21.* This 30-foot strip encumbered the south 30 feet of the Herndons' property, which was still owned by the Hookers at the time. (Pl Ex 008).

10. The right of way in the Meyers deed was "for the benefit of and appurtenant to the property described herein and shall inure to the benefit of and may be used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof." (Pl Ex 008).

11. The Hookers also reserved to themselves, "their successors and assigns, the right and power to convey rights of way for road and utility purposes over, under and across said 30 foot strip of land to other persons (and the said Grantors also likewise reserve the right and power in gross to dedicate to the public a right of way for public road purposes over said 30 foot strip of land.)" (Pl Ex 008).

12. The Herndons do not dispute the easement that benefits the property originally owned by Meyers.

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13. The Herndons had actual notice of the 30-foot right of way because it was provided as an exception to their title insurance policy. (Pl Ex 098)

Hooker's Conveyance to Bell – 1977 (NE ¼)

14. On February 15, 1977, the Hookers conveyed the NE ¼ of the SW ¼ to William Bell and Marie Bell. The deeds were recorded on June 12, 1998 as Instruments Number 1541769, 1541770, and 1541771. (Pl Ex 010, 011, 012) A fourth deed was also executed on February 15, 1977 but not recorded until March 10, 1992 as Instrument number 1250350. (Pl Ex 030)

15. The conveyances to Bell all included *"a right of way for road and utility purposes over, under and across ...the South 30 feet of the Northwest Quarter of the Southwest Quarter of Section 21."* This 30-foot easement encumbered the south 30 feet of the Herndons' property, which was still owned by the Hookers at the time.

16. The right of way granted to the Bells was "for the benefit of and appurtenant to the property described herein and shall inure to the benefit of and may be used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof." (Pl Ex 010, 011, 012, 30)

17. The Hookers also reserved to themselves, *"their successors and assigns, the right and power to convey rights of way for road and utility purposes over, under and across said 30 foot strip of land to other persons (and the said Sellers also likewise reserve the right and power in gross to dedicate to the public a right of way for public road purposes over said 30 foot strip of land.)"* (Pl Ex 010, 011, 012, 30)

18. The Herndons do not dispute the easement that benefits the property originally owned by Bells.

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19. The Herndons had constructive notice of the 30-foot right of way because the deeds were recorded in the public records.

Hooker's Conveyance to Christ (TL6100) – (1979)

20. On or about July 10, 1979, the Hookers conveyed the eastern portion of Government Lot 4 to Roger A. Christ under a Memorandum of Contract. The Memorandum of Contract was recorded on July 11, 1979 as Instrument Number 811864/Book 101 Page 405. (PL Ex 014)

21. The deed from the Hookers to Christ was recorded on July 27, 1995 as Instrument number 1406963. (Pl Ex 015)

22. The conveyance included "a right of way from the County Road to the above described property." The easement for access encumbered the Herndons' property, which was still owned by the Hookers at the time.

23. The Herndons do not dispute the easement that benefits the property originally owned by Christ.

24. The Herndons had constructive notice of the easement for the Christ property because the deed was recorded in the public records.

Hooker's Conveyance to Gordon and Wright – 1979/1984

25. On August 23, 1979, the Hookers recorded a Memorandum of Contract with Terry and JoAnn Gordon and Elmer and Diana Wright for the portion of Government Lot 4 west of the existing roadway. The Memorandum was recorded as Instrument number 831483/Book 105 Page 92. (Pl Ex 017)

26. The Memorandum of Contract included a "right of way from the County road to the above described property." The Memorandum of Contract does not indicate a specific location

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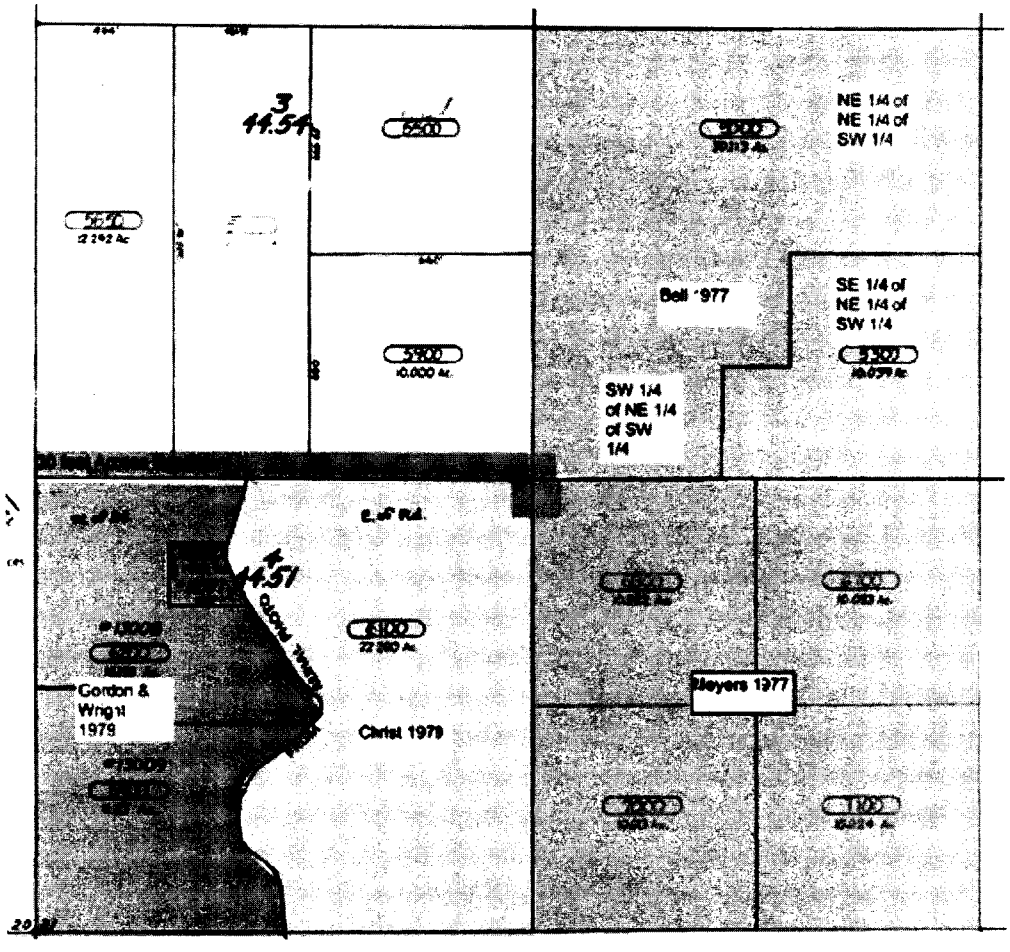
of the "right of way" for access to the property or limit it to the north-south roadway (Ginger Lane).

27. An illustration of the property included in the Memorandum of Contract to Gordon and Wright is shown below: (Pl Ex 018)



28. On November 18, 1983, the Hookers granted a quitclaim deed to the Gordons and the Wrights for a one-acre parcel within the larger area. The quitclaim deeds were recorded on November 22, 1983 as instrument number 956610 /Book 327 Page 51 (Gordon's deed) and 956611 /Book 327 Page 52 (Wright's deed). (Pl Ex 019, 020)

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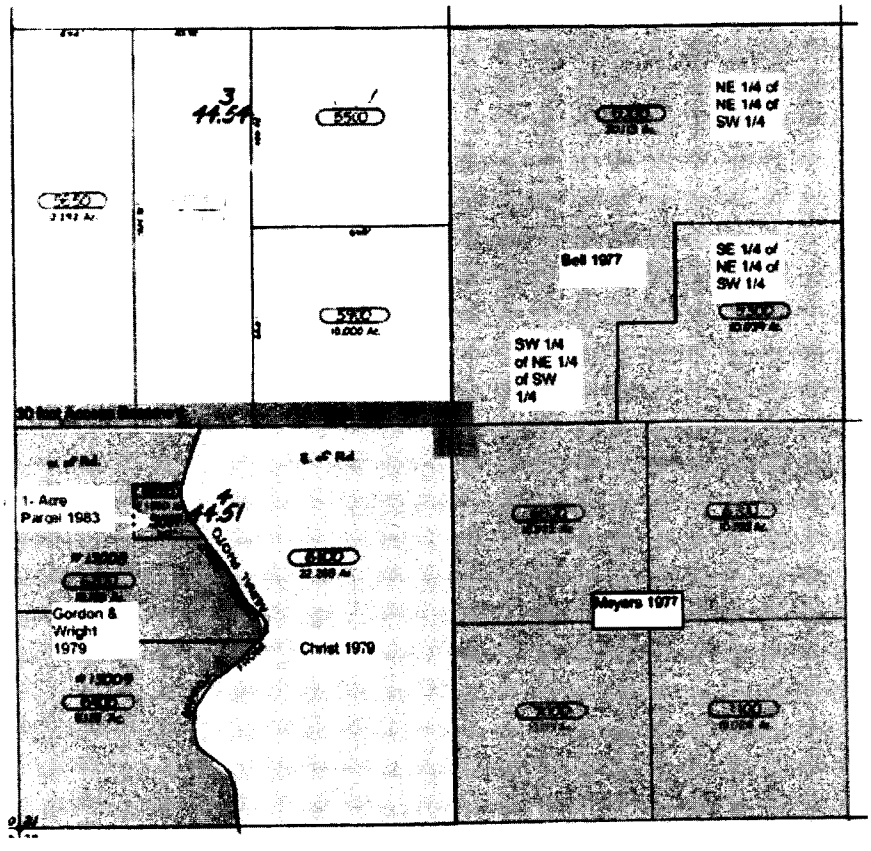
29. The quitclaim deeds included "a right of way over and across the existing drive for access purposes. Said rights of way are for the benefit of and appurtenant to the property described herein and shall inure to the benefit of and may be used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof."

30. The quitclaim deeds do not specify any particular location of the right of way.

31. This one-acre parcel is where the Gordons built their home and where the Byrd's (the current owners) home is. The location is shown on the callout below (Pl Ex 021):



32. The Wrights and Gordons sought to divide their property so that the Gordons owned the north half and the Wrights owned the south half.

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33. On or about February 9, 1984, the Hookers granted a Warranty Deed to the Wrights for the southern half of the property. The warranty deed was recorded on February 28, 1984 as Instrument Number 964578/ Book 328 Page 648. (Pl Ex 022)

34. On or about February 8, 1984, the Wrights quitclaimed their rights to the north half of the property to the Gordons. The quitclaim deed was recorded on February 28, 1984 as Instrument Number 964580/ Book 328 Page 649. (Pl Ex 023)

35. On or about February 8, 1984, the Gordons quitclaimed their rights to the south half of the property to the Wrights. The quitclaim deed was recorded on February 28, 1984 as Instrument Number 964581/ Book 328 Page 650. (Pl Ex 024)

36. On or about February 9, 1984, the Hookers and Gordons recorded a revised Memorandum of Contract to encumber only the north half of the property which excluded the property owned by the Gordons. It also excluded the one-acre parcel previously conveyed by the Hookers for the house location. The Memorandum of Contract was recorded on February 28, 1984 as Instrument Number 964582/ Book 131 Page 104. (Pl Ex 025)

37. The legal description for the north half of property in the Gordons' revised Memorandum of Contract also included "a right of way over and across the existing drive for County Road access purposes." (Pl Ex 25) The only "County Road" would be the 30-foot strip reserved in the prior deeds for eventual dedication as a public roadway.

38. The legal descriptions in the above transactions apparently contained some errors in the intended lot split, and in May 1984, the parties again recorded deeds to correct the legal descriptions.

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39. On May 3, 1984, the Wrights and Gordons quitclaimed all of the property back to the Hookers. The quitclaim deed was recorded on May 4, 1984 as Instrument number 961867/Book 330 Page 93. (Pl Ex 026)

40. On May 3, 1984, the Hookers granted a quitclaim deed to the Gordons for all of the north half of the property. The quitclaim deed was recorded on May 4, 1984 as Instrument number 961868/Book 330 Page 94. (Pl Ex 027)

41. The quitclaim deed from the Hookers included "a right of way over and across the existing drive for access purposes. Said rights of way are for the benefit of and appurtenant to the property described herein and shall inure to the benefit of and may be used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof."

42. On May 3, 1984, the Hookers executed a Warranty Deed to the Gordons for all of the north half of the property. The deed excepts the property that had been conveyed to the Wrights. The Warranty Deed was recorded on April 30, 2002 as Instrument number 1730823 when the Gordon's purchase contract had been paid in full. (Pl Ex 028)

43. The Warranty Deed from the Hookers included "a right of way over and across the existing drive for access purposes. Said rights of way are for the benefit of and appurtenant to the property described herein and shall inure to the benefit of and may be used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof."

44. As a result of the various deeds and payments on purchase contracts from the original 1979 purchase and the revised 1984 deeds, the ownership of the Wright/Gordon property resulted in a split as illustrated below (Pl Ex 029):

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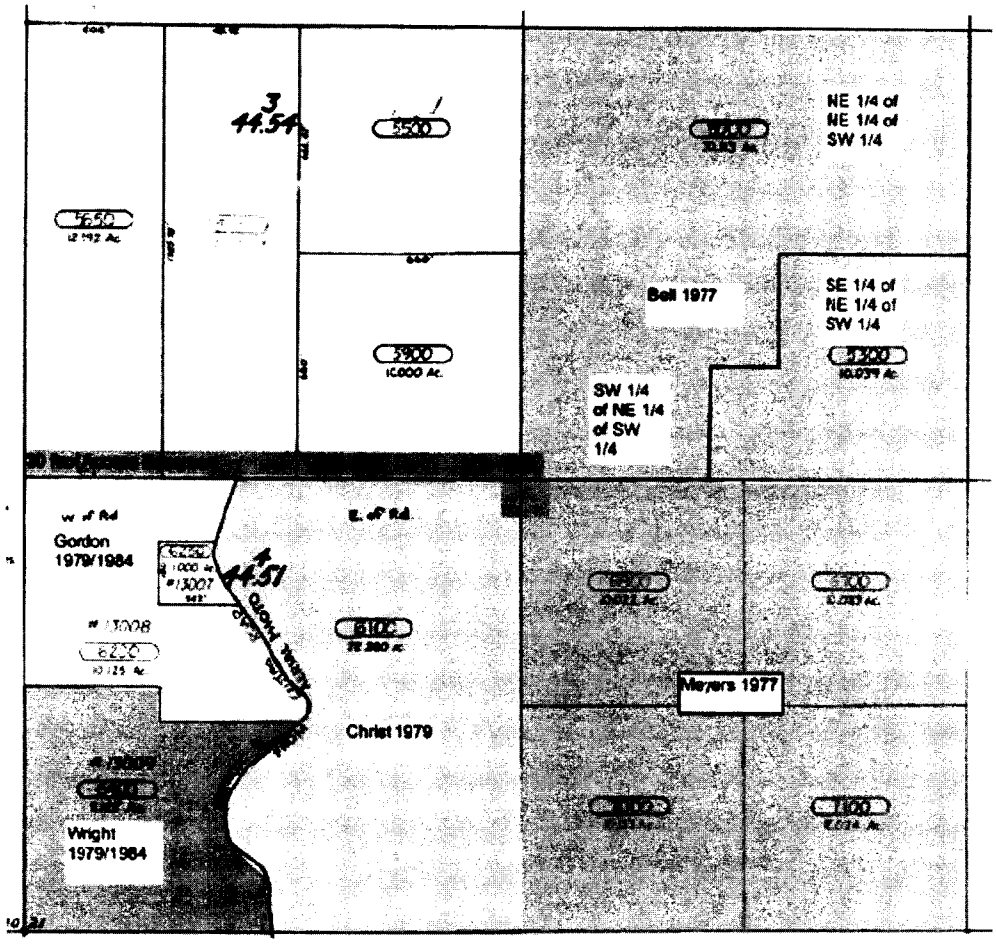

45. The Herndons had constructive notice of the easement for the Gordon/Wright properties because the deeds were recorded in the public records.

Hooker to Walker (1981) Murren (1999) Herndon (2013) (TL 5650)

46. On or around October 8, 1981, the Hookers conveyed the west 404 feet of Government Lot 3 to Mark Walker via a Memorandum of Contract. This property eventually became the Herndon Property. The Memorandum of Contract was recorded on October 16, 1981 as Instrument number 888945/Book 116 Page 93. (Pl Ex 31)

47. The Warranty Deed from Hookers to Walker was dated October 8, 1981 and was recorded on March 22, 1991 as Instrument number 1212297. (Pl Ex 032)

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48. The deed included "a right of way from the County Road to the above described property" and was "*SUBJECT to an easement to use roadways in their present location as ingress and egress to property to the East thereof.*"

49. In addition to the easement for "roadways in their present location," the conveyance was still subject to the 30-foot roadway easement along the south 30 feet of the property which was reserved for the intended public roadway.

50. On October 18, 1999, Mark Walker conveyed the property to Kenneth J. Murren and Nancy Anne Murren, Trustees of the Kenneth J. Murren and Nancy Anne Murren Trust Agreement dated September 15, 1989. The deed was recorded on November 4, 1999 as Instrument number 1612902. (Pl Ex 034)

51. The deed warranted that the property was "free from all incumbrances EXCEPT current taxes *and easements of record.*" (Pl Ex 34)

52. Although not specifically listed in the deed, the conveyance was still subject to the 30-foot roadway easement along the south 30 feet of the property which was reserved for the intended public roadway because it was an easement of record.

53. On October 15, 2013, Kenneth J. Murren and Nancy Anne Murren, Trustees of the Kenneth J. Murren and Nancy Anne Murren Trust Agreement dated September 15, 1989 conveyed the property to Mark Steven Herndon and Kimberly A. Herndon, husband and wife. The deed was recorded on October 21, 2013 as Instrument number 2433442000. (Pl Ex 035)

54. The deed was "*subject to all easements, rights of way, covenants, restrictions, reservations*, applicable building and zoning ordinances and use regulations *and restrictions of record.*"

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55. Although not specifically listed in the deed, the conveyance was still subject to the 30-foot roadway easement along the south 30 feet of the property which was reserved for the intended public roadway because it was an easement of record.

Hooker to Smith (1983) (TL 5900)

56. On or about February 24, 1983, the Hookers conveyed Tax Lot 5900 to Steven A. Smith and Patricia K. Smith, husband and wife. The deed was executed on February 24, 1983 and recorded on January 24, 1992. (Pl Ex 038)

57. The deed included "a right of way over existing roads from the County Road to the above described property." (Pl Ex 038)

58. The conveyance was also free from incumbrances "except (a) *easements and rights of way in view and of record.*" (Pl Ex 038)

59. Although not specifically listed in the deed, the conveyance was subject to the 30-foot roadway easement along the south 30 feet of the property which was reserved for the intended public roadway because it was an easement of record.

60. The Herndons had constructive notice of the easement for the Smith property because the deed was recorded in the public records.

Hooker to Hudson (1990) (TL 5550)

61. On or about February 28, 1990, the Hookers conveyed Tax Lot 5550 to Marshall Hudson and Corena Hudson, husband and wife. The deed was executed on February 28, 1990 and recorded on March 2, 1990 as Instrument number 1175576. (Pl Ex 036)

62. The legal description included "*a right of way for road and utility purposes over, under and across ... the South 30 feet of the West 404 feet of the Northwest Quarter of the Southwest Quarter of Section 21* [the Herndon Property]...as the access road now exists or is replaced

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hereafter. Said right of way is for the benefit of and appurtenant to the property described herein and shall inure to the benefit of and may be used by all persons who may hereafter become the owners of said appurtenant property or any parts or portions thereof."

63. The legal description also "Reserv[ed] to the grantees herein, their successors and assigns, a right of way for road and utility purposes over, under and across said 30 foot strip of land and to other persons (and the said Grantors also likewise reserve the right and power in gross to dedicate to the public a right of way for public road purposes over said 30 foot strip of land)."

64. The Herndons had constructive notice of the easement for the Hudson property because the deed was recorded in the public records.

Hooker to Shull (1990) (TL 5500)

65. On August 16, 1990, Everett Hooker conveyed Tax Lot 5500 to John W. Shull, Jr. and Sherron L. Shull, husband and wife. The deed was executed on August 16, 1990 and recorded on August 21, 1990 as Instrument number 1192239. (Pl Ex 040)

66. The deed did not specifically grant rights other than "the said premises, with their appurtenances." It excepted "easements of record or in view."

67. The Herndons do not dispute that there is an easement over their property for access to the Shull property.

The Gordon Lot Split

68. In 2006, the Gordons decided to split their existing ~11-acre property (TL6200 and TL 6250) into two lots – a vacant 5-acre parcel which would eventually become the Kittelson Property (TL 6200), and a 5.984 acre parcel which included the house and eventually became the Byrd property (TL 6250).

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69. October 3, 2006, the Gordons recorded a quitclaim deed to themselves which created the 5.984-acre parcel with the house now known as TL 6250 (the Byrd property). The quitclaim deed was recorded on October 3, 2006 as Instrument Number 2059143000. (Pl Ex 042)

70. On October 3, 2006, the Gordons recorded a quitclaim deed to themselves which created the 5-acre parcel now known as TL 6200 or the Kittelsons' Property. The quitclaim deed was recorded on October 3, 2006 as Instrument Number 2059144000. (Pl Ex 043)

71. On November 17, 2006, the Gordons a recorded a corrected quitclaim deed to themselves which corrected the legal description for the 5-acre parcel now known as TL 6200 or the Kittelsons' property. The quitclaim deed was recorded on November 17, 2006 as Instrument Number 2067570000. (Pl Ex 044)

72. On November 17, 2006, the Gordons a recorded a corrected quitclaim deed to themselves which created the 5.984-acre parcel with the house now known as TL 6250 (the Byrd property). The quitclaim deed was recorded on October 3, 2006 as Instrument Number 2067571000. (Pl Ex 045)

73. As a result of the lot split, the Gordon's property was split into two lots with revised tax lot numbers – 6200 and 6250. This resulted in a new tax lot map. (Pl Ex 046) The Gordons' resulting lot split is illustrated below:

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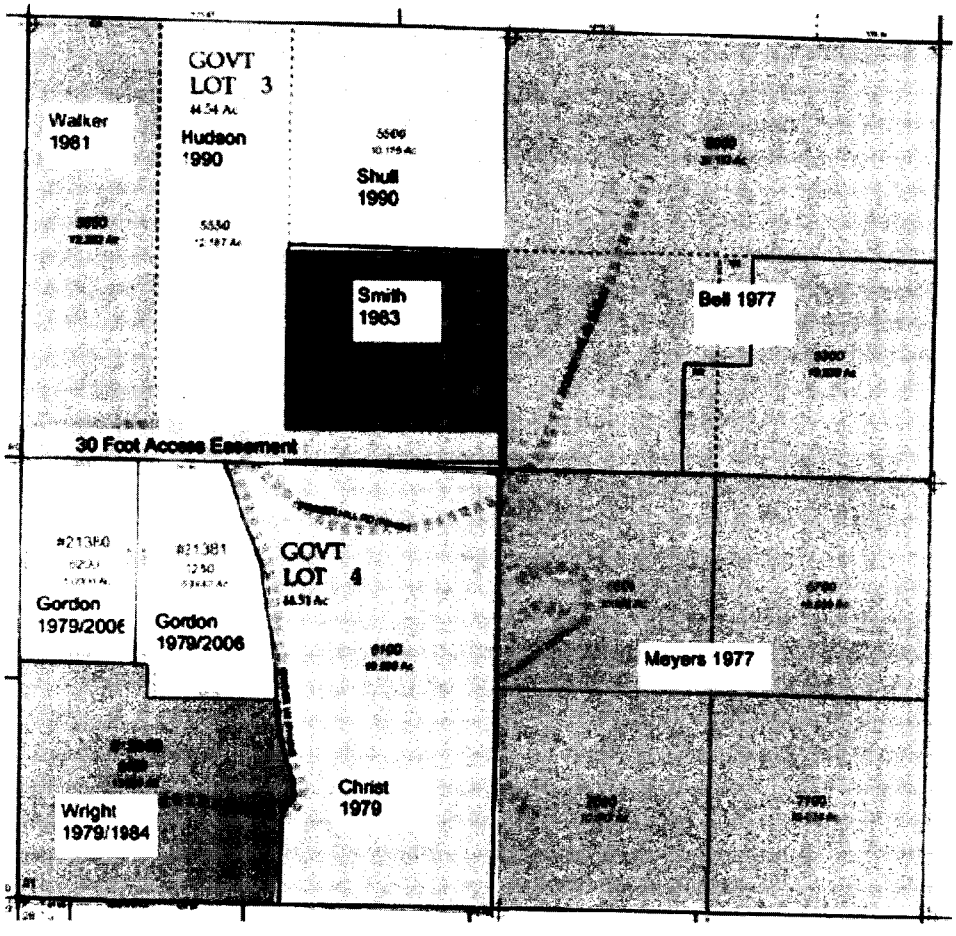

The Tax Foreclosure of TL6200 (2011) and

Conveyance to Henkoski (2011) and Kittelson (2019)

74. The Gordons failed to pay property taxes on the 5-acre vacant parcel (TL6200), and on April 26, 2011 Kootenai County acquired title to Tax Lot 6200 via tax deed. The tax deed was recorded on May 3, 2011 as Instrument number 2312263000. (Pl Ex 048)

75. The Gordons did not timely redeem Tax Lot 6200 from the tax sale, and on September 20, 2011, Kootenai County conveyed Tax Lot 6200 to the Henkoski Family Trust. The deed was recorded on September 22, 2011 as Instrument number 2328300000. (Pl Ex 049)

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76. On December 5, 2018, the Gordons executed a quitclaim deed of their interest in Tax Lot 6200 to the Henkoski Family Trust. The quitclaim deed was recorded on December 14, 2018 as instrument number 2674064000. (Pl Ex 050)

77. On January 22, 2019, the Henkoski Family Trust conveyed Tax Lot 6200 to the Kittelsons. The Warranty Deed was recorded on January 25, 2019 as Instrument number 2678595000. The Kittelsons are the current owners of the vacant 5-acre Tax Lot 6200 (the Kittelson Property). (Pl Ex 051)

Conveyance from Gordons to Byrd (TL 6250) (2018)

78. On May 2, 2018, the Gordons executed a Warranty Deed for Tax Lot 6250 to Benjamin Luke Byrd and Breann Byrd, husband and wife. The Warranty Deed was recorded on May 11, 2018 as Instrument number 2643031000. The Byrds are the current owners of Tax Lot 6250. (Pl Ex 052)

The Use of Hooker Hill Road for Access in 1977

79. Terry Gordon and Brian Hooker testified that in 1977, when the Hookers began selling the lots, and in 1979, when the Gordons and Wrights purchased their property, Hooker Hill Road was an old logging road that entered into the SW ¼ at the southwest corner of the Herndon's Property.

80. When the Hookers sold the properties to the Meyers and the Bells, the Hookers encumbered the southern 30 feet of the entire NW ¼ of the SW ¼ with a 30-foot wide road easement which was intended to provide road access to the parcels being sold by the Hookers and to eventually become a public roadway. The 30-foot wide road easement was created and reserved by the Hookers before the Herndon property was sold. (Pl Ex 008, 010, 011, 012, 030)

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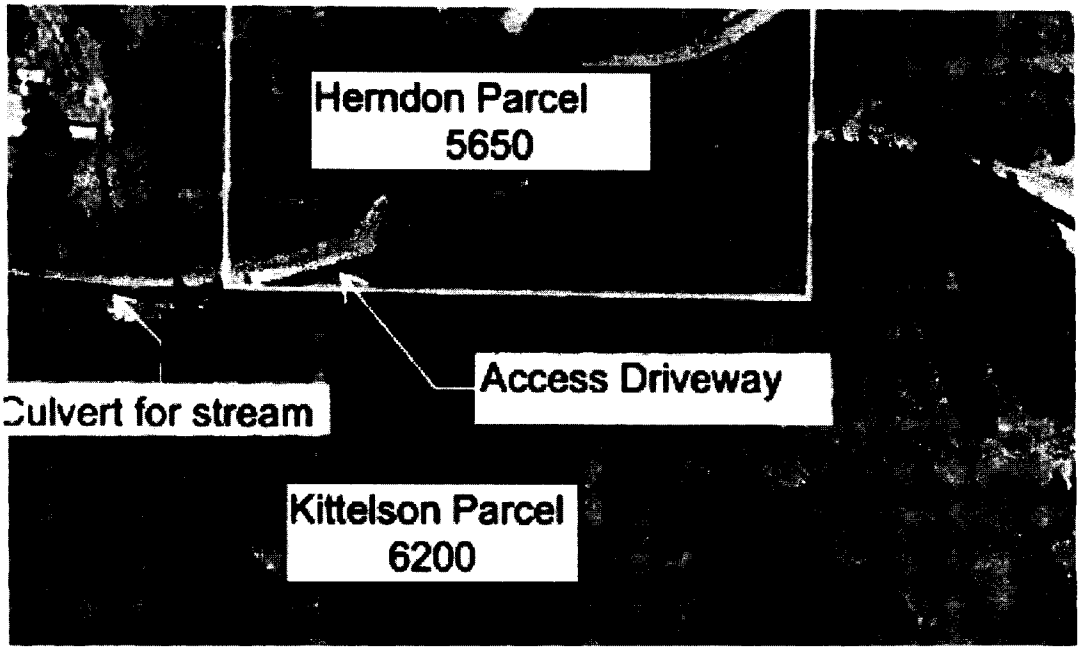
81. The Herndon's survey of their property line shows that Hooker Hill Road enters the SW ¼ within the 30-foot right of way reserved for the public roadway. The 30-foot wide road easement abuts the northern border of the Kittelsons' Property. (Pl Ex 58)

82. The existing logging road entered the SW ¼ and extended into the Kittelsons' property at the location indicated as the "Access Driveway" shown below:



83. Terry Gordon used Hooker Hill Road to access the Kittelson Parcel at the time he and Elmer Wright purchased the property in 1979. The Gordons and Wrights' purchase of their property was before the Hookers sold what is now the Herndon property. Terry Gordon and Elmer Wright improved the roadway, graded it, added gravel to it, and used it for access into the Kittelson Parcel.

84. The 30-foot wide road easement created when the Hookers sold the first lot to the Meyers, and then when the Hookers sold to the Bells, was intended to provide legal access to all the other properties in the SW ¼. Because the Hookers intended this 30-foot right of way

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was to eventually be dedicated as a public roadway, the intent of the Hookers was for all properties in the SW ¼ to have full use of the 30-foot roadway.

85. Terry Gordon testified that soon after he purchased the property in 1979, the neighbors discussed the possibility of dedicating Hooker Hill Road to the county as a public roadway. However, it was too expensive to build the roadway to county road standards.

86. Terry Gordon testified that although he used Ginger Lane for regular access to his house, he still used the access from Hooker Hill Road to Parcel 6200 for over 30 years.

87. When the Herndon property was sold to Walker in 1981, the property was already encumbered by the recorded 30-foot road easement along the south 30-feet of the Herndon's property even if the roadway was not specifically excepted in the Walker's deed.

88. The access driveway from Hooker Hill Road to Parcel 6200 that existed in 1978 still exists today and currently provides the only means of reasonable access to Parcel 6200 as it is currently configured. Although Terry Gordon built his house on the high point of Parcel 6250, he regularly used the access driveway on Hooker Hill Road to access Parcel 6200 because the slopes were too steep to drive up to Parcel 6250 from Parcel 6200 except in certain times of the year with 4-wheel drive. He could drive *down* the slope from Parcel 6250 to 6200 with cattle and logging trucks, but could not drive *up* them.

89. Terry Gordon placed a gate and fence across the driveway of Parcel 6200 soon after he purchased it in 1979 so that he could continue to have regular access to Parcel 6200 but keep his cattle in.

90. Because the access to Parcel 6200 from Parcel 6250 is too steep for reasonable access, it was reasonable for Gordon to access Parcel 6200 from Hooker Hill Road.

91. The tax sale did not divest the property of its appurtenant easement and access rights.

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92. Terry Gordon testified that, beginning about January of 1980 and for approximately 30 years thereafter, he maintained, improved, and made open, notorious, continuous, adverse and uninterrupted use of the Access Driveway to access the Kittelson Property. Although Nancy Murren and Brian Hooker testified that they never *personally* saw Terry Gordon use the driveway, that did not mean that he did not.

93. Terry Gordon's use of the disputed access driveway to access Parcel 6200 would have ripened into prescriptive rights by 1985 when Walker owned the property, which was well before the Murrens and Herndons purchased their property.

94. Nancy Murren testified that she had no objection to Terry Gordon using the gate and Hooker Hill Road to access Parcel 6200, and that she expected that since there was a gate there, it would be used for access to the property.

CONCLUSIONS OF LAW

A. General Conclusions

1. This court has jurisdiction over the parties and the subject matter of this case pursuant to Idaho Code §5-514. Kootenai County is the proper venue for this action under Idaho Code §5-401.
2. The Kittelsons do not have an express easement over either the Byrd or Beatty properties.
3. There is a unity of title to all of the properties at issue by virtue of Everett Hooker's ownership of SW ¼ through 1979.
4. The 30-foot easement granted by the Hookers in the deeds to the Meyers and the Bells in 1977 was intended to provide legal access to all properties located in the SW ¼ and was

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also intended to be dedicated as a public roadway. This 30-foot right of way encumbered the southern 30 feet of the Herndon's Property.

5. The Hookers confirmed the intent of the 30-foot strip becoming a public roadway in the deed to Hudson in 1990.

6. The Memorandum of Contract and subsequent deeds from the Hookers to the Gordons for what became Parcel 6250 and 6200 includes a "right of way." The Court finds that this language is ambiguous because it does not specify a location for entry into the Gordon's property or restrict them to access off of Ginger Lane.

7. Based on the circumstances of the contemporaneous sales of other properties which referenced the 30-foot roadway, and the Hooker's intent that the 30-foot roadway was to become a public road, the 1979 conveyance from Hookers to Gordon and Wright implicitly included access over the 30-foot right of way.

8. The Court finds it is reasonable to interpret the 1979 conveyance to Gordon and Wright to have the same access rights over the 30-foot strip as the Hookers granted to Meyers and Bells.

9. The 1981 conveyance from Hooker to Walker (and eventually to the Herndons) was after the 1977 conveyances to Bell and Meyer. Therefore, in addition to the "existing roadway," the Herndon property was subject to and encumbered by the express 30' wide road easement created by the Hookers.

10. The Hookers confirmed their intent that the 30-foot strip was intended to become a public roadway in 1990 in their deed to Hudson.

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B. Kittelsons' Claims

1. Express Easement

The Court previously granted the Herndons' motion for summary judgment as to the Kittelsons' express easement claim. That issue will be addressed in Kittelsons' Motion for Reconsideration.

2. Implied Easement by Prior Use

An easement implied from prior use must meet three elements: (1) unity of title or ownership and subsequent separation by grant of the dominant estate; (2) apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent; and (3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate. *Akers v. D.L. White Const., Inc.,* 142 Idaho 293, 301, 127 P.3d 196, 204 (2005).

The Kittelsons established all three elements of an easement implied from prior use:

1) The entire SW ¼ of Section 21 was owned by Everett and Neva Hooker. The Hookers began selling the properties to other owners in 1977. Thus, there was unity of title.
2) "The time that is legally relevant to the question of "apparent continuous use" is the time the dominant and servient estates were severed. *Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 302, 127 P.3d 196, 205 (2005). "The common owner must have used the premises and the system of roadways long enough to show that the roadways were intended to provide permanent access to those lands which are later severed." *Cordwell v. Smith*, 105 Idaho 71, 78, 665 P.2d 1081, 1088 (Ct. App. 1983). The time of severance was in 1977 when the Hookers sold the Meyer and Bell parcels, and 1979 when the Hookers sold the property to the Gordons and Wrights.

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The access into the Kittelsons' property had been built by the Hookers as a logging road for access into the Kittelsons' property for regular use prior to severance of the Gordon/Wright property from the rest of the Hookers' property. The logging road was used by Terry Gordon to access what became the Kittelsons' Parcel 6200 from Hooker Hill Road in 1979 and was consistent with the nature of the property at the time. Terry Gordon continued to improve the logging road and use it for access into for 30 years into what eventually became the Kittelsons' property.

Whether there has been "apparent and continuous use" of the access during the Murren and Herndons ownership of the Herndons' property is irrelevant since, *at the time of severance in 1979*, there was apparent and continuous use of Hooker Hill Road for access to the Kittelson Property.

3) The third element requires the party claiming an implied easement from prior use to show the easement to be "reasonably necessary" for the proper enjoyment of the dominant estate. With respect to an implied easement from prior use, under Idaho law "reasonable necessity is something less than the great present necessity required for an easement implied by necessity." *Davis,* 133 Idaho at 643, 991 P.2d at 368.

When determining whether such "reasonable necessity" existed, a court does not look to the present moment, but instead determines whether reasonable necessity existed at the time the dominant and servient estates were severed. *Id.* at 642, 991 P.2d at 367. Once an implied easement by prior use is found to have existed at the time of severance, it "is not later extinguished if the easement is no longer reasonably necessary." *Id.* at 643, 991 P.2d at 368. "[A]n implied easement by prior use is appurtenant to the land and therefore passes with all subsequent conveyances of the

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dominant and servient estates." *Id. Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 302, 127 P.3d 196, 205 (2005).

"When deciding the issue of reasonable necessity, the court should "balance the relative situations pro and con, as to the respective convenience, inconvenience, costs and all other pertinent, connected facts." *Akers v. Mortensen*, 147 Idaho 39, 46, 205 P.3d 1175, 1182 (2009)(citing *Eisenbarth v. Delp*, 70 Idaho 266, 270, 215 P.2d 812, 814 (1950). The relevant time period for consideration of reasonable necessity is at the time the Hookers conveyed the property to Gordons and Wrights in 1979. The easement across the Herndon's property for access to Parcel 6200 from Hooker Hill Road was reasonably necessary for the enjoyment and use of Parcel 6200 at the time of severance because other potential access routes were too steep to reasonably build a driveway. In addition, the Kittelsons have no other easements to get to their property.

The Court finds the Kittelsons have established an easement implied by prior use.

3. Easement by Necessity

An easement by necessity is of common-law origin and is supported by the rule of sound public policy that lands should not be rendered unfit for occupancy or successful cultivation. It is a universally established principle that where a tract of land is conveyed which is separated from the highway by other lands of the grantor or surrounded by his lands or by his and those of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway. *Backman v. Lawrence*, 147 Idaho 390, 395, 210 P.3d 75, 80 (2009).

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To establish an easement implied by necessity the party must show: (1) unity of title and subsequent separation of the dominant and servient estates; (2) necessity of the easement at the time of severance; and (3) great present necessity for the easement. *Bear Island Water Ass'n, Inc. v. Brown*, 125 Idaho 717, 725, 874 P.2d 528, 536 (1994).

The Kittelsons established all three elements of an Easement Implied by Necessity:

1) The entire SW ¼ of Section 21 was owned by Everett and Neva Hooker. The Hookers began selling the properties to other owners in 1977. Thus, there was unity of title.

2) Reasonable necessity is sufficient to satisfy the second element. Reasonable necessity is "something less than" great present necessity. *Machado v. Ryan*, 153 Idaho 212, 219, 280 P.3d 715, 722 (2012). A reasonable necessity for an easement may exist even if the property is not landlocked. In determining whether reasonable necessity exists, the district court must "balance the respective convenience, inconvenience, costs, and other pertinent facts." A court may find reasonable necessity due to the nature of the property and that constructing access from that road would have required "considerable expense and time." *Machado v. Ryan*, 153 Idaho 212, 219, 280 P.3d 715, 722 (2012).

"Concerning these two requirements, it should be reemphasized that the existence of a way of necessity does not depend upon what use the common owner was making of the roads existing at the time of severance. Such easement could arise even if at the time of severance there was no road across the grantor's property to the part conveyed. Thus, a remote grantee of land not being used at the time of severance—as in the present case—may nevertheless, when the use becomes necessary to the enjoyment of his property, claim the easement under this remote

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deed." *Cordwell v. Smith,* 105 Idaho 71, 79, 665 P.2d 1081, 1089 (Ct. App. 1983). Access to the Kittelsons' property via Hooker Hill Road was necessary at the time of the Hookers conveyance to Gordon/Wright because the alternative access routes to the property were down steep hills that made access from the remaining property necessary. The necessity is measured at the time of the Hookers' conveyance to Gordon/Wright and runs with the land, even though the Kittelsons' property was once part of a larger parcel subdivided by the Gordons that had access elsewhere.

3) A complete lack of access is sufficient to meet the "great present necessity" standard. *Machado v. Ryan*, 153 Idaho 212, 220, 280 P.3d 715, 723 (2012). The Kittelsons have no other legal access to their property. While the Herndons argued that the Kittelsons could seek an easement over either the Beatty or Byrd parcels, no such easements currently exist. Thus, the Kittelsons meet the "great present necessity" element.

The Court should consider all of the circumstances surrounding the easement, including cost. *Cordwell v. Smith*, 105 Idaho 71, 80, 665 P.2d 1081, 1090 (Ct. App. 1983). Here, the geography of access over the Beatty and Byrd parcels makes alternative access impracticable, even if the Kittelsons had an express easement. Building a driveway over the alternative routes would be expensive and, under all the circumstances, the only practical and reasonable method of affording ingress and egress is through the proposed area onto Hooker Hill Road. The court finds that the Kittelsons have met the great present necessity element.

The Court finds that the Kittelsons have established an easement by necessity.

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4. Covenant Running with the Land

Covenants that run with the land are enforceable contracts relating to the use of property. The burdens imposed by restrictive covenants run with the land, i.e., they may be enforced against one who purchases real property with notice of the covenants. *Indep. Sch. Dist. of Boise City v. Harris Fam. Ltd. P'ship*, 150 Idaho 583, 588, 249 P.3d 382, 387 (2011). Thus, the Kittelsons may enforce covenants that ran with the Herndons' property.

Idaho recognizes the validity of covenants that restrict the use of private property. When interpreting such covenants, the Court generally applies the same rules of construction as are applied to any contract or covenant. However, because restrictive covenants are in derogation of the common law right to use land for all lawful purposes, the Court will not extend by implication any restriction not clearly expressed. Further, all doubts are to be resolved in favor of the free use of land. *Rutter v. McLaughlin,* 101 Idaho 292, 612 P.2d 135 (1980).

Beginning with the plain language of the covenant, the first step is to determine whether or not there is an ambiguity. "Words or phrases that have established definitions in common use or settled legal meanings are not rendered ambiguous merely because they are not defined in the document where they are used." Rather, a covenant is ambiguous when it is capable of more than one reasonable interpretation on a given issue. To determine whether or not a covenant is ambiguous, the court must view the agreement as a whole. A restrictive covenant is ambiguous when it is capable of more than one reasonable interpretation on a given issue. *Rutter v. McLaughlin,* 101 Idaho 292, 612 P.2d 135 (1980).

The second step in contract or covenant construction depends on whether or not an ambiguity has been found. If the covenants are unambiguous, then the court must apply them as a matter of law. "Where there is no ambiguity, there is no room for construction; the plain

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meaning governs." Conversely, if there is an ambiguity in the covenants, then interpretation is a question of fact, and the Court must determine the intent of the parties at the time the instrument was drafted. *Shawver v. Huckleberry Ests., L.L.C.*, 140 Idaho 354, 363–64, 93 P.3d 685, 694–95 (2004). The interpretation of the restrictive covenants intended by the drafters can be ascertained from the language of the covenants, the existing circumstances at the time of the formulation of the covenants, and the conduct of the parties. *Nordstrom v. Guindon*, 135 Idaho 343, 346, 17 P.3d 287, 290 (2000).

The first issue is whether the Hookers' creation of the 30-foot roadway across the Herndon property, and the intent that the 30-foot right of way become a public roadway, is ambiguous. (Pl Ex 008, 010, 011, 012, 030) The Court finds that the 30-foot roadway easement is not ambiguous, and that later purchasers of property from the Hookers had the right to rely on the 30-foot easement for future public roadway access to their properties.

The Court must also evaluate whether the original grantors, the Hookers, covenanted and promised to provide access to the Kittelsons' property. In doing so, the court finds the language of the easement in the deeds to the Gordons and Wrights are ambiguous because the deeds did not limit access to Gordons' and Wrights' property *to a specific location*. Because the language as to location of access is ambiguous, the Court has considered the circumstances and intent of the Hookers and Gordon/Wright when the access was granted in 1979. Further, the court can look beyond the specific deed and look to the circumstances of the surrounding grants of access to other property owners to determine what the intent of the Hookers and Gordons/Wrights was at the time. The Court finds that the Hooker's granting a 30-foot wide right of way over the Herndon property to Meyers and Bells was intended to benefit all owners of the SW ¼ because

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it was intended to be dedicated as a public road. The court finds that this shows an intent that access to the Kittelson Property be included within the 30-foot roadway reservation.

The Court finds that there is a covenant running with the land for access to the Kittelson property over the southern 30-feet of the Herndon property.

5. Common Law Private Dedication

Dedication is essentially the setting aside of real property for the use or ownership of others. The elements of a common law dedication are (1) an offer by the owner clearly and unequivocally indicating an intent to dedicate the land and (2) an acceptance of the offer. The offer to dedicate may be made in a number of ways, including the act of recording or filing a subdivision plat depicting the specific areas subject to dedication, so long as there is a clear and unequivocal indication the owner intends to dedicate the land as depicted. In determining whether the owner intended to offer the land for dedication, the court must examine the plat, as well as the surrounding circumstances and conditions of the development and sale of lots. *Armand v. Opportunity Mgmt. Co.*, 141 Idaho 709, 714–15, 117 P.3d 123, 128–29 (2005)(internal citations omitted).

In this case, the Hookers specifically created a 30-foot wide easement over the southern 30 feet of the Herndon property for use as a roadway and to be dedicated as a public roadway in the future. The Hookers created and reserved this 30-foot easement when they sold the properties to the Meyers and Bells in 1977. (Pl Ex 008, 010, 011, 012, 030) It is reasonable to interpret this 30-foot easement as a dedication of a permanent roadway for the use of other owners in the SW ¼, and that the Gordons/Wrights could rely on it when they purchased their property in 1979. Accordingly, the Court finds the Hookers' intended all owners of the subdivided lots to have access to their lots over the 30-foot easement.

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The Kittelsons have established a common law dedication of the southern 30 feet of the Herndon property as a permanent roadway.

6. Easement by Prescription

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. The statutory period in question is five years. I.C. § 5–203;[1] *Akers v. D.L. White Const., Inc.*, 142 Idaho 293, 303, 127 P.3d 196, 206 (2005).

Terry Gordon openly used the area between Hooker Hill Road and the Kittelson property for access to the Kittelson property for more than five years, starting in 1979. Because the prescriptive easement vested by 1985 – long before the Gordons subdivided their property, the prescriptive easement to access the Kittelson property over the Herndon property was established by 1985. The prescriptive easement ran with Kittelson property.

C. Herndons' Counter Claims

The court finds that because the Kittelsons have established easement rights under their various claims that judgment should be entered against the Herndons on their counterclaims.

D. Conclusion

The Court finds in favor of the Kittelsons on all of their claims and against the Herndons on the Herndons' counterclaims. The Kittelsons are entitled to a Judgment:

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[1] The statutory time period was changed from five years to 20 years starting July 1, 2006. However, in this case, the relevant time period began in 1979, so the five-year statute still applies.

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1. Declaring that the southern 30-foot strip of the Herndon property is subject to a permanent roadway easement for the benefit of all property owners in the SW ¼.
2. Declaring that the Kittelsons have the right to use the southern 30 feet of the Herndon property for access to the Kittelson property.
3. Enjoining the Herndons from interfering with the Kittelsons' access rights.
4. For an award of attorney fees and costs against the Herndons under I.C. 12-121 and 12-123.

Dated: _____

_____
Hon. John T. Mitchell
District Judge

Dated: May 18, 2021

/s/ Matthew Cleverley
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Clerk's Notice of Entry

I certify I served a copy of the forgoing, Plaintiffs' Revised FFCL on the following parties in the manner indicated:

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Dated:

_____
Clerk/Deputy