STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

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

TOWER ASSET SUB, INC., a Delaware Corporation,

Plaintiffs,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

Case No. **CV 2003 4621**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND ORDER GRANTING PLAINTIFF'S MOTION TO SUBSTITUTE REAL PARTY IN INTEREST

CAPSTAR RADIO OPERATING COMPANY, a Delaware Corporation,

Plaintiffs,

vs.

DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, husband and wife,

Defendants.

Case No. **CV 2002 7671**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. BACKGROUND.

Although one decision is being filed in each of these two cases, these two cases are not consolidated. At the November 27, 2007, hearing on various motions in both cases, counsel for defendants in each of these two cases indicated on the record that he would be pursuing a motion to consolidate on behalf of his clients. No such motion has been filed. Although one decision is filed in each of these two cases, this decision will discuss each

case separately.

At the conclusion of the November 27, 2007, hearing, this Court stated that the ruling on the upcoming summary judgment motion (heard November 28, 2007) would be taken under advisement and that the decision on summary judgment would not be issued until after this Court filed its decision on "Defendant's Renewed Motion for Permission to Appeal from an Interlocutory Order, I.A.R. 12". This Court entered its "Memorandum Decision and Order Denying Defendant's Renewed Motion for Permission to Appeal from an Interlocutory Order, I.A.R. 12" on November 30, 2007. On December 17, 2007, defendants in both cases filed a "Motion for Permissive Appeal" with the Idaho Supreme Court. On January 25, 2008, this Court received notice that on January 17, 2008, the Idaho Supreme Court denied defendants' Motion for Permissive Appeal in each of these two cases. Accordingly, summary judgment in each of these two cases is at issue.

Oral argument on the summary judgment motion brought by plaintiffs in both cases was heard November 28, 2007.

Capstar Radio Operating Company and Tower Sub Asset (collectively the "Plaintiffs") filed suit to declare the existence of an easement over property owned by Douglas and Brenda Lawrence, the defendants in each of the two cases. Due to a discovery dispute, summary judgment was limited to only the issue of express easement. Oral argument on the express easement theory was heard in these two cases at two different times. This Court granted summary judgment in favor of Tower Asset Sub against Lawrences on May 27, 2005, and this Court granted summary judgment in favor of Capstar against Lawrences on June 7, 2005. Lawrences appealed this Court's finding of an express easement in both cases to the Idaho Supreme Court. On January 26, 2007, the Idaho Supreme Court vacated the summary judgment in both

cases and remanded to this Court "for further proceedings consistent with this opinion." *Capstar v. Lawrence,* 2007 Opinion No. 13, p. 7; *Tower Asset Sub, Inc. v. Lawrence,* 2007 Opinion No. 14, p. 7. The Supreme Court noted that although the plaintiffs did not have an express easement, it appeared that the case might have been concluded on summary judgment based upon the plaintiffs' other theories. The Idaho Supreme Court wrote in *Capstar:* "It is unfortunate that the district court confined the summary judgment proceeding to the express easement issue, as it appears the case might have been brought to a conclusion based on evidence that was submitted with respect to Capstar's other theories but not considered on summary judgment." *Capstar v. Lawrence,* 2007 Opinion No. 13, p. 7. A similar statement was made by the Idaho Supreme Court in *Tower Asset Sub, Inc.:*

> Final resolution of this case would have been expedited, had the district court not confined its inquiry to the express easement issue. Based on evidence submitted to the court, certain of the other theories showed greater promise from Tower's standpoint and it is unfortunate that those theories were not fully developed and decided upon.

Tower Asset Sub, Inc. v. Lawrence, 2007 Opinion No. 14, p. 7. On May 14, 2007, the plaintiffs in each case filed a "Renewed Motion for Summary Judgment", which again raised for this Court's consideration the other theories of easement advanced in plaintiffs' previous motions for summary judgment, but not decided upon by this Court in its initial decisions on summary judgment in 2005.

II. ANALYSIS REGARDING *CAPSTAR RADIO OPERATING CO. v. LAWRENCE.*

A. Facts Pertaining to *Capstar Radio Operating Co., v. Lawrence*.

Blossom Mountain is located south of Post Falls, Idaho. The Lawrences and Capstar own parcels of property on Blossom Mountain. Both the Capstar parcel and the Lawrences' parcel (Lawrence parcel) were once part of a larger tract held under

common ownership by Harold and Marlene Funk. The Lawrence parcel was broken out in 1975 when Funks sold that parcel to Human Synergistics (Affidavit of Susan Weeks in Support of Motion for Summary Judgment, p. 2, ¶ 1.e., Exhibit E), and the Capstar parcel was broken out in 1989 when Funks sold that parcel to Kootenai Broadcasting, Inc. (Affidavit of Susan Weeks in Support of Motion for Summary Judgment, p. 5, ¶3.3, Exhibit Q). The Lawrence parcel is located in the southeast quarter of Section 21, and the Capstar parcel is located to the east of the Lawrences' parcel in the southwest quarter of Section 22. Section 21 lies directly west of Section 22. Affidavit of Susan Weeks in Support of Motion for Summary Judgment, p. 7, ¶ 8, Exhibit Z. There is a public road in the area known as Signal Point Road. Signal Point Road lies generally to the west of the Lawrence parcel, which in turn is west of Capstar's parcel. Capstar seeks an easement to access its property from Signal Point Road over an unimproved private road commonly known as Blossom Mountain Road. Blossom Mountain Road crosses through the Lawrence parcel before passing near the Capstar parcel. In litigation in yet another case, Douglas Lawrence, in his deposition taken September 30, 2003, recognized the right of way easement General Telephone Corporation (GTC) obtained in July 1966 for access to GTC's property in Section 22 over the private road that crossed the southwest quarter of Section 21 (Lawrences' parcel). Affidavit of Susan Weeks in Support of Motion for Summary Judgment, pp. 6-7, ¶¶ 5-7, Exhibit W, X and Y. The detail of the access road prepared by GTC's engineer in 1967 shows the road leaves Signal Point Road, then travels southeast through the southwest portion of Section 21 (Lawrences' parcel), then enters the north half of Section 28 were it then turned northeast and entered the southeast quarter of Section 21. *Id.* Exhibit Y, and Exhibit 15 attached to Exhibit Y.

Capstar and Tower Asset have proven the following chain of title for the parcels involved in Sections 21 and 22:

1. Reynolds to the Radens and the Marcos (Contract in 1968, Deed in 1974): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibits A and D. Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibits A and D.

2. Radens and Marcos to Funk (Contract in 1969, Deed in 1974): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibits B and C. Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibits B and C.

To this point there was unity of title in the portions of Sections 21 and 22 at issue in this case.

Capstar and Tower Asset have established the title chain with respect to what became the Lawrence property located in the southeast quarter of Section 21 as:

1. Funk to Human Synergistics (Sale Agreement in 1975, Deed in 1992): Supplemental Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed November 2, 2004), E and I; Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibits A and F; Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibit A and F.
2. Human Synergistics to Johnston & McHugh (Contract and Deed May 16, 1977): Affidavit of Susan Weeks in Support of Motion for Summary Judgment

(Tower Asset case filed August 17, 2004), Exhibits F and H; Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibits F and H.

3. Johnston & McHugh to N.A.P. (Sale Agreement October 6, 1987, Deed July 16, 1996): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibits G and O; Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibits G and O.
4. N.A.P. to Farmanian (Deeds June 28, 1996 and July 8, 1996)): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibits J and K; Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibits J and K.
5. Farmanian to Douglas and Brenda Lawrence (Sale Agreement July 12, 1996, Deed July 5, 1996): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibits L, M, N and P; Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibits L, M, N and P.

Capstar establishes the title chain with respect to what became the Capstar property in the southwest corner of Section 22 as:

1. Funk to Kootenai Broadcasting (Deed September 22, 1989): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibits Q and R.

2. Kootenai Broadcasting to Rook Broadcasting (Deed October 25, 1993): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004) Exhibit S.
3. Rook Broadcasting to AGM (Deed November 20, 1998): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibit T.
4. AGM to Capstar (Deed October 25, 2000): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibit U.

Capstar asserts that prior to the separation by the Funks of the Lawrences' parcel from the parent parcel in 1975, the private road across the Section 21 parcel had been used by the Funks as the exclusive means to access their property in Sections 21 and 22. Memorandum in Support of Motion for Summary Judgment (filed March 9, 2004), pp. 4-5, ¶¶ 7-9. Capstar asserts that even after the separation of Section 21, the Funks continued to use the private easement road to access their Section 22 parcel. *Id.,* pp. 5-6, ¶¶ 10-12. Capstar argues the road was also later used by Kootenai Broadcasting, Inc. for access to its segregated parcel in Section 22. This claim is proven by the Affidavit of John Rook in Support of Motion for Summary Judgment, filed March 9, 2004. John Rook was the President of Kootenai Broadcasting, Inc. Rook's testimony is uncontroverted.

The chain of title as to both the Lawrence parcel and the Capstar parcel is set forth in the Affidavit of Susan Weeks in Support of Motion for Summary Judgment, filed March 9, 2004, and attached exhibits thereto. In 1975, the Funks agreed to sell the Lawrence parcel to Human Synergistics, Inc. In 1992, the Funks gave Human

Synergistics a warranty deed that stated it was “given in fulfillment of those certain contracts between the parties hereto dated July 1, 1975 and conditioned for the conveyance of the above described property ...” This property passed through several other hands before the Lawrences purchased it in 1996.

When the Lawrences questioned Capstar's right to access its property over the portion of Blossom Mountain Road that traversed their property, Capstar filed suit on November 7, 2002, seeking declaratory and injunctive relief. Tower Asset filed a similar suit on June 27, 2003. Capstar and Tower Asset sought to have an easement declared based on four theories: express easement, easement by implication, easement by necessity, and prescriptive easement. On plaintiffs’ previous motion for summary judgment, this court found that plaintiffs held an express easement over the Lawrence property based on the sale agreement, as well as the deed. The Court did not address Capstar's other theories. The Lawrences appealed from that decision and the Supreme Court reversed summary judgment holding the deed did not create an express easement over the Lawrence property. On remand, the plaintiffs renew their motion for summary judgment based on the other theories of easement previously advanced by Capstar.

B. Easement by Implication from Prior Use.

An easement can be formed by implication from prior use. Creation of easements by implication rests upon exceptions to the rule that written instruments speak for themselves, and because implied easements are contrary to that rule, the courts disfavor them. *Sutton v. Brown,* 91 Idaho 396, 400, 422 P.2d 63, 67 (1966); *Cordwell v. Smith,* 105 Idaho 71, 77, 665 P.2d 1081, 1087 (Ct. App. 1983). An easement is implied because it is presumed that if an access was in use at the time of

severance it was meant to continue. *Bob Daniels and Sons v. Weaver,* 105 Idaho 535, 542, 681 P.2d 1010, 1017 (Ct. App. 1984). Easements by implication rest on the view that land should not be rendered unfit for use due to a lack of access. *Id.*

In order to establish an easement by implication from prior use, the party attempting to establish such easement must prove: 1) unity of title or ownership and subsequent separation by grant of the dominant estate; 2) apparent continuous use; and 3) the easement must be reasonably necessary to the proper enjoyment of the dominant estate. *Bear Island Water Association v. Brown,* 125 Idaho 717, 725, 874 P.2d 528, 536 (1994); *Cordwell v. Smith,* 105 Idaho 71, 77, 665 P.2d 1081, 1087 (Ct.App. 1983); *Close v. Rensick,* 95 Idaho 72, 76, 501 P.2d 1383, 1387 (1972); *Davis v. Gowen,* 83 Idaho 204, 210, 360 P.2d. 403, 406-07. *See also Phillips Industries, Inc. v. Firkins,* 121 Idaho 693, 698, 827 P.2d 706, 711 (Ct. App. 1992); and *Davis v. Peacock*, 133 Idaho 637, 642, 991 P.2d 362, 367 (1999). Apparent continuous use refers to the use before the separation of the parcels that would indicate the roadway was intended to provide permanent access to the parcels. *Cordwell,* 105 Idaho at 78, 665 P.2d at 1088. The party seeking to establish the easement has the burden of providing the facts to establish the easement. *Id.,* 105 Idaho at 77, 665 P.2d at 1087. In *Davis v. Peacock,* 133 Idaho 637, 641-42, 991 P.2d 362, 366-67 (1999), the Idaho Supreme Court held that successors in interest to the original grantors of property could assert easement rights by implied or prior use.

Strict necessity is not required for the creation of an implied easement by prior use. All that is required is reasonable necessity. *Davis v. Peacock*, 133 Idaho 637, 991 P.2d 362 (1999); *Thomas v. Madsen*, 142 Idaho 635, 132 P.3d 392 (2006). Reasonable necessity is something less than the great present necessity required for

an easement implied by necessity. *Davis,* 133 Idaho at 642. Furthermore, the easement by implication is not extinguished if the easement no longer exists or is no longer reasonably necessary. *Id*. at 643. The Idaho Supreme Court further noted in *Davis*:

> This long standing rule is based on the theory that when someone conveys property, they also intend to convey whatever is required for the beneficial use and enjoyment of that property, and intends to retain all that is required for the use and enjoyment of the land retained. Consequently, an easement implied by prior use is a true easement of a permanent duration, rather than a temporary easement which exists only as long as the necessity continues. *See, e.g., Norken v. McGahan,* 823 P.2d 622, 631 (Alaska 1991); *Thompson v. Schuh,* 286 Or. 201, 593 P.2d 1138, 1145 (1979); *Story v. Hefner,* 540 P.2d 562, 566 (Okla.1975). Additionally, an implied easement by prior use is appurtenant to the land and therefore passes with all subsequent conveyances of the dominant and servient estates. *See Hughes v. State,* 80 Idaho 286, 328 P.2d 397 (1958); I.C. § 55-603 (stating that a transfer of real property also includes all easements attached to the property).

Id.

There can be no dispute that the first element has been proven. As to use and reasonable necessity, Harold Funk testified in his affidavit that when he and his wife Marlene purchased parts of Section 21 and 22 in 1969, there was "an existing private easement road used for access that crossed the Southeast Quarter of Section 21 and entered into the Southwest Quarter of Section 22 and provided access to these two parcels and access to the General Telephone Company parcel [GTC owned about one acre in Section 22]." Affidavit of Harold Funk in Support of Motion for Summary Judgment, p. 2, ¶¶ 2-3. This is the same easement road referenced in the Real Estate Contract between Funks and their predecessor in interest, the Radens, over which General Telephone Company had a recorded easement for access. *Id.* p. 2, ¶ 3, Exhibit A. This was the Funks only access into Section 21. *Id.* p. 3, ¶ 4. When Funks sold their portion of Section 21 to Human Synergistics (Lawrences' predecessor) in

1975, Funks still owned their land in Section 22, and the sales agreement to Human Synergistics included "Item 5" in the Sales Agreement that "…indicated that the Section 21 parcel was being sold subject to an ingress/egress easement over the existing road on the property that was being sold to Human Synergistics." *Id.* p. 3, ¶ 6. Without those terms Funks' Section 21 property would have been landlocked, and that was not Harold Funk's intent. *Id.* Harold Funk testified that following the sale [to Human Synergistics], we continuously utilized the existing road in Section 21 to access Funks' property in Section 22. *Id.* p. 4, ¶. 6. That Sales Agreement was recorded as well. *Id.* In 1989 Funks sold part of their Section 22 property to Kootenai Broadcasting, Inc., and Funks knew Kootenai Broadcasting, Inc. was going to use that parcel for construction of a broadcasting tower. *Id.* p. 4, ¶ 8. Rook testified that he used this road several times to access the Kootenai Broadcasting, Inc. parcel. Affidavit of John Rook in Support of Motion for Summary Judgment, p. 3, ¶ 4.

Apparent continuous use from no later than 1975 is also shown by the Affidavit of Wynn Wenker. Affidavit of Susan Weeks in Support of Motion for Summary Judgment filed March 9, 2004, Exhibit FF at ¶10. The Farmanian – Mack Agreement and Quit Claim Deed attached also infers that there is a road across the Section 21 property, the Farmanian property at that time. *Id.* Exhibit EE. Harold Funk's Affidavit indicates that the road subject to this action is the only road onto the property. Affidavit of Harold Funk in Support of Motion for Summary Judgment, p. 2, ¶¶ 3, 4. Harold Funk further indicates that it was their intent to include an easement in the transfer to Human Synergistics so the property in Section 22 would not be landlocked. *Id.* ¶ 6. Similarly, John Rook's Affidavit states that when Kootenai Broadcasing purchased from the Funks (at a later time in 1989), this road that is subject of this dispute was the only access to

the property now held by Capstar. Affidavit of John Rook in Support of Motion for Summary Judgment, ¶ 6.

Capstar noticed their Motion for Summary Judgment to be heard on April 14, 2004. Just prior to that hearing, Lawrences *pro se* made discovery motions related to information Rook and Funk had. Because such discovery was not relevant to the express easement theory, discovery was allowed and Capstar's motion for summary judgment proceeded on the express easement theory alone. The Idaho Supreme Court has ruled on that issue. On March 23, 2004, Lawrences *pro se* filed Defendants Lawrences Reply in Opposition to Plaintiff's Motion for Summary Judgment. In that pleading Lawrences claim, with a reference to a Metzker Map, that Capstar has access to its parcel via Mellick Road. Defendants Lawrences' Reply in Opposition to Plaitiff's Motion for Summary Judgment, p. 5. On April 6, 2004, Capstar filed an Affidavit of Kelvin Brownsberger, the Road Supervisor for Post Falls Highway District. He testified in his affidavit that Post Falls Highway District has not constructed and maintained Mellick Road beyond its entry into Section 15, well short of Section 21 or Section 22. Even if Lawrences had created an issue of fact as to an alternate route (they have not), the Idaho Supreme Court in *Davis v. Peacock,* 133 Idaho 637, 642, 991 P.2d 362, 367 (1999) held only "reasonable necessity" is needed for an easement by implication, not strict necessity which is needed in an implied easement by necessity.

Lawrences made one other argument in Lawrences' Reply in Opposition to Plaintiff's Motion for Summary Judgment, pp. 16-17. Lawrences claim Wilber Mead testified he kept his gate locked from1966 until 1998, that the only party that had a key to the gate was General Telephone Company, that Mead granted Funks an easement in 1972 and that Funks moved to American Falls in 1975; thus, Funks could have only

used the property for three years instead of the requisite five. *Id.* Lawrences cite to the Affidavit of Douglas Lawrence in Support of Defendants Lawrences' Reply in Opposition to Plaintiff's Motion for Summary Judgment, Exhibit H, but no such document exists. Only the cover page of Douglas Lawrence's Affidavit is filed.

Capstar argues that Mead only stated "*to his knowledge"* Mr. Funk was not using the road, that Mead indicates he gave a key to GTE, but Mead has no knowledge as to whether GTE gave a copy of the key to Funk or any knowledge that Funk did not go around the gate. Capstar also argues there is no evidence to support Lawrences's allegation that Funks moved to American Falls in 1975. Plaintiff's Reply Brief in Support of Motion for Summary Judgment, p. 4.

In Capstar's Memorandum in Support of Renewed Motion for Summary Judgment filed May 14, 2007, Capstar reiterates the same facts, law and arguments it made in 2004. Lawrences, through their attorney, filed their "Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff" on July 24, 2007. In that brief, Lawrences essentially argue that since Funks had no right to cross Section 28 (Section 28 lies immediately to the south of Section 22 in which Lawrences' parcel is contained and Blossom Mountain Road dips from Section 22, down to Section 28, before reaching Section 21), they have no right to cross Blossom Mountain Road as it crosses Lawrences' land. Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff, pp. 4-5. Capstar correctly notes that in this lawsuit the owner of Section 28 is not a party. Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 7. Capstar's access, or lack thereof, over the portion of Blossom Mountain Road as it travels through Section 28 is simply not an issue before this Court. Finally, Lawrences again argue Capstar and their predecessor Funk had the

ability to access their land via Mellick Road. Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff, p. 6. On August 2, 2007, Capstar filed "Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment". Capstar correctly points out that nothing in Bruce Anderson's Affidavit (Attached as Exhibit D to the Affidavit of Douglas Lawrence filed July 24, 2007), nothing in the Viewer's Report and nothing in *Loudin v. Stokes* (a 1987 District Court decision by District Judge Gary M. Haman which shows it was related to Section 15 and Mellick Road, Exhibit C to Affidavit of Douglas Lawrence in Support of Opposition to Summary Judgment filed July 24, 2007), demonstrate that Funks could access their Section 22 property from Mellick Road because the Funks never owned the Northeast Quarter of Section 21. Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 3.

After Capstar filed its reply brief on summary judgment, on September 10, 2007, Lawrences filed yet another brief on summary judgment (in contravention of I.R.C.P. 56(c)), this one entitled "Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff". In that brief, Lawrences repeat, word for word the brief Lawrences filed on July 24, 2007, as it pertains to implied easements from prior use.

No request for a jury trial has ever been made in *Capstar v. Lawrence.* Accordingly, "When an action will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Shawver v. Huckleberry Estates, L.L.C.,* 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004).

In the *Capstar* case, there is unity of title at the time of the severance of the

dominant and servient estate. The road was in use by the Funks at the time of the severance and served as their sole access to the Section 21 and Section 22 properties they retained. Thus, it was reasonably necessary for the beneficial use of the dominant estate, Funk's Section 22 property at the time of severance. Capstar has met its burden of proving there is an implied easement by prior use which is appurtenant to the property.

C. Easement by Necessity.

Capstar correctly notes that an easement by necessity has some similar elements to an easement by prior use. Memorandum in Support of Motion for Summary Judgment, p. 13. The elements are: (1) that the dominant parcel and the servient parcel were once part of a larger tract under common ownership; (2) that the necessity for the easement claimed over the servient estate existed at the time of the severance; and (3) the present necessity for the claimed easement is great. *Id., citing B&J Development & Inv. Inc. v. Parsons,* 126 Idaho 504, 507, 887 P.2d 49, 52 (Ct.App. 1994), *MacCaskill v. Ebbert,* 112 Idaho 1115, 1118, 739 P.2d 414, 417 (Ct.App. 1987); *Bob Daniels & Sons v. Weaver,* 106 Idaho 535, 543, 681 P.2d 1010, 1018 (Ct.App 1984). *See also, Bear Island Water Ass'n, Inc. v. Brown,* 125 Idaho 717, 725, 874 P.2d 528, 536 (1994). Capstar added little in its Memorandum in Support of Renewed Motion for Summary Judgment, p. 13.

There is no dispute that the first element exists.

As to the second and third elements, Lawrences *pro se* made an argument unsupported by the law, that because "Funks and [Capstar] don't have a legal easement to get to the Lawrence property to cross it", necessity does not exist. Defendants Lawrences Reply in Opposition to Plaintiff's Motion for Summary Judgment,

p. 18. This argument was noted by the Court in its analysis of an implied easement from prior use. Since the owner of Section 28 is not a party to this lawsuit, Lawrences' argument is without merit.

Capstar claims that Kelvin Brownsberger's affidavit contradicts Lawrences' claim that there is access via Mellick Road based upon a Metsker's map. Plaintiff's Reply Brief in Support of Motion for Summary Judgment, p. 5. Because Brownsberger does not tell us in his affidavit when he became familiar with Mellick Road, nor does he tell us when he began working for the Post Falls Highway District, Brownsberger cannot discuss what existed back in 1969 when Funk's purchased or what existed back in 1975 when Funks sold to Human Synergistics (Lawrences' predecessor). What is pertinent is what existed at severance in 1975. The Metsker's map (at the August 7, 2007 hearing on motions to strike, this Court took judicial notice that Metsker maps have been relied upon for decades, but not as to their accuracy) is not sufficient to contradict Howard Funk's testimony. The only competent evidence of what existed in 1975 is from Howard Funk. Funk stated: "The private easement road was the only existing road providing access to the Southeast Quarter of Section 21 and the Southwest Quarter of Section 22" and when they severed the property in 1975 the sales agreement referenced that private road and that the Section 21 property being sold to Human Synergistics, Inc., was being sold subject to an ingress egress easement over the existing road, and that it was not their intent to landlock the Section 22 property. Affidavit of Harold Funk in Support of Motion for Summary Judgment, pp. 3, ¶¶ 4, 6. John Rook corroborates Harold Funk, but does so at a later time in 1989 when Kootenai Broadcasting, Inc. purchased its land. Rook testified in his affidavit that in 1989 the private access road was the only road that provided access to the Funks' parcels in the Southwest Quarter

of Section 22. Affidavit of John Rook in Support of Motion for Summary Judgment, p. 3, ¶¶ 4, 6. Finally, John Mack's affidavit makes it clear that Mellick Road did not provide access to the Funks' parcels in 1992 when Mack purchased. Affidavit of John Mack in Support of Defendants Lawrences Reply in Opposition to Plaintiff's Motion for Summary Judgment, filed March 23, 2004.

Lawrences then make the argument that: "Funk obviously had access to his other lands when he severed the parcel sold to Hyman Synergistics in 1975, otherwise Funk would have taken great care to reserve an easement across the parcel he sold to Human Synergistics in 1975." Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff, p. 7. The identical argument is made in Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff, pp. 10-11. This argument by Lawrences actually cuts against Lawrences quite clearly when one considers the uncontradicted fact that Funks in their Sale Agreement to Human Synergistics, Inc., stated that "the Section 21 parcel being sold was subject to an ingress egress easement over the existing road on the property that was being sold to Human Synergistics (Affidavit of Harold Funk in Support of Motion for Summary Judgment, p. 3, ¶ 6). Just as the Lawrences argue, Funks actually *did* take great care to reserve an easement across the parcel he sold to Human Synergistics in 1975; however, they errantly put that language in the Sale Agreement. That is why there is no express easement. But the reason there is no express easement is perhaps the most convincing evidence as to the implied easement theories…Funks needed to, intended to, and thought they did reserve an easement across the Human Synergistics land (now Lawrences land) when they sold to Human Synergistics in 1975. At all times thereafter Funks used this road as if they had every right in the world to use it. This Court finds

that the second element of easement by necessity exists...the necessity for the easement claimed over the servient estate existed at the time of the severance in 1975.

Capstar argues that the third element, present great necessity for the easement, is supported by the Affidavit of Thomas Mack. Mack's affidavit does indicate Mellick Road does not pass over Funks' property, and Mack's affidavit indicates that even Mack had no access to Mellick Road until he made an agreement with Fred Zuber, who owned to the North of Mack, "whereby I agreed to reconstruct the road leading down the north face of Blossom Mountain." Mack also testified "Over the years, the road had been completely abandoned" and "It did not appear that anyone had used the road for nearly 20 years." Capstar also argues "As demonstrated on the assessor's map included as Exhibit 'A' to Weeks' Affidavit in Support of Motion to Strike Lawrence Affidavit filed 7/24/07, Mellick Road as constructed today lies in the Northeast Quarter and the Southeast Quarter of Section 22", and "Funks never owned either of these parcels." Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 13; Affidavit of Weeks in Support of Motion to Strike Lawrence Testimony, filed August 4, 2007, Exhibit A.

This Court finds there is no question of fact as to whether the *present* necessity for the claimed easement is great. There is no evidence that Capstar has any other access other than the Blossom Mountain Road access which is the subject of this litigation.

D. Easement by Prescription.

An easement by prescription was not raised in Capstar's initial Memorandum in Support of Motion for Summary Judgment filed March 9, 2004, nor did Lawrences discuss the theory in their *pro se* Defendants Lawrences Reply in Opposition to

Plaintiff's Motion for Summary Judgment, filed March 23, 2004. Capstar did not raise the theory in its Reply Brief in Support of Plaintiff's Motion for Summary Judgment filed April 6, 2004. The first time the issue of a prescriptive easement was raised was in Capstar's Memorandum in Support of Renewed Motion for Summary Judgment, pp. 11-12.

Capstar argues the road was established as early as 1966, and that it is undisputed that Funks were using the road for access to both their Section 21 and Section 22 parcels. *Id.* p. 12. Capstar argues that when Funks sold the Section 21 parcel to Human Synergistics (Lawrences' predecessor), Funks included in the sales contract language that gave notice that Funks intended to continue to use the road for ingress and egress to the Section 22 parcel Funks retained. *Id.* Capstar argues this language provided notice to others that they were claiming a right to use the road in the future for ingress and egress to the lands the Funks retained, and that it is undisputed that Funks and their predecessors (successors) then proceeded to use the road openly, continuously, without interruption, under a claim of right for the statutory period. *Id.*

Capstar notes the Idaho Supreme Court in *Akers v. D. L. White Construction, Inc.,* 142 Idaho 293, 303, 127 P.3d 196, 206 (2005) held:

> 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." (citation omitted). The statutory period in question is five years. (citations omitted). A claimant may rely on his own use, or he "may rely on the adverse use by the claimant's predecessor for the prescriptive period, or the claimant may combine such predecessor's use with the claimant's own use to establish the requisite five continuous years of use." (citation omitted). Once the claimant presents proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, even without evidence of how the use began, he raises the presumption that the use was adverse and under

> a claim of right. (citations omitted). The burden then shifts to the owner of the servient tenement to show that the claimant's use was permissive, or by virtue of a license, contract, or agreement. (citations omitted).

Memorandum in Support of Renewed Motion for Summary Judgment, pp. 11-12.

A prescriptive right cannot be granted if the use of the servient tenement was by permission of its owner, because the use, by definition, was not adverse to the rights of the owner. *Hughes v. Fisher*, 142 Idaho 474, 480, 129 P.3d 1223, 1229 (2006).

Lawrences argue that Capstar's use of the land has always been permissive. Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff, p. 9, n. 5. Footnote five of Lawrences' brief cites the Court to the "affidavits of Daniel Rebor [sic, actually Rebeor] and Douglas Lawrence" to support this claim. There are several Douglas Lawrence affidavits filed in this matter. The Affidavit of Douglas Lawrence in Support of Opposition to Summary Judgment filed July 24, 2007, indicates just the opposite, that Capstar's use of the land at least when Lawrences came into possession of the land, was anything *but* permissive:

> 25. Since taking title to the land, I have worked hard to protect my private property rights from illegal trespass. I have maintained one or more locks on my gate, placed no trespass signs at various points on the property, stopped and turned back people who cannot demonstrate a legal right to use the road, and have actively attempted to engage the local Sheriff's office on many occasions to get their support. Between May 2000, and October 2003, I have filed over 10 separate crime reports with the Kootenai County Sheriff's office for vandalism, trespass, destruction of personal property, and for leaving my gate open and unlocked. These Crime Reports are attached and included herein as Exhibit "I".

Affidavit of Douglas Lawrence in Support of Opposition to Summary Judgment, filed July 24, 2007, p. 9 (unnumbered pages), ¶ 25. Douglas Lawrence's affidavit contradicts the claim his attorney makes on his behalf. Lawrences' claim that use of the land has always been permissive flies in the face of the fact that the genesis of this lawsuit was Lawrences "periodically locked the gate which they placed across the Blossom

Mountain Road in an effort to deny Capstar its right of access over and across the Blossom Mountain Road." Complaint for Quiet Title and Permanent Injunction, p. 6, ¶ XVIV (XIX).

Douglas Lawrence's affidavit claims that prior to 2001, "Capstar's use of the road as it crosses my land was permissive." Affidavit of Douglas Lawrence in Support of Opposition to Summary Judgment, filed July 24, 2007, p. 14 (unnumbered pages), ¶ 49, Exhibit M. Douglas Lawrence cites to Capstar's response to Lawrences' Request for Admission No. 85 which reads: "Please admit that, prior to 2001, Defendants Lawrence did not use any gate to restrict Plaintiff Capstar's Vehicular access", to which Capstar responded: "Admit that the gate has always been on the road since Capstar's predecessors in title acquired the Capstar parcel was not locked and did not obstruct either Capstar or its predecessors in title's access until it was locked by Lawrence." *Id.* The fact that the gate is not locked may be evidence of Lawrences' acquiescence of others, including Capstar, to travel this road, it may be evidence of Lawrences' indifference of others, including Capstar, travelling this road, and it may be evidence of Lawrences' ignorance of anyone, including Capstar travelling this road, but it is not evidence that Lawrences or their predecessors gave Capstar or its predecessors permission to use this road. "Mere inaction and passive acquiescence is not a sufficient basis for proving that the use of the claimed right was with the permission of the owner of the servient tenement." *West v. Smith,* 95 Idaho 550, 557, 511 P.2d 1326, 1333 (1973).

Lawrences claim that "Capstar's use of the land has always been permissive" ignores the fact that Lawrences did not purchase their property until 1996. Thus, in the years from 1966 to 1996, they are not competent to testify as to anything that occurred in that period.

Lawrences cite the affidavit of Daniel Rebor [Rebeor] for their claim that Capstar's use of the road was permissive. Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff, p. 9, n. 5. There is an Affidavit of Daniel E. Rebeor in Support of Motion for Temporary Restraining Order filed July 22, 2003. A review of Rebeor's affidavit shows he managed the tower site for Capstar, and that "On November 3, 1997, Nextel West Corp. entered into an "Access License Agreement" with Douglas and Brenda Lawrence in an effort to avoid litigation regarding access to a leased parcel upon which it was locating a communications tower…" Affidavit of Daniel E. Rebeor, p. 2, ¶¶ 2, 3. On January 13, 2003, Nextel assigned the Access License Agreement to Capstar. *Id.* ¶ 4. The uncontroverted evidence is the license was entered into in 1997 "in an effort to avoid litigation". That certainly is not evidence that there was permissive use of the road at that time. It is evidence of just the opposite, that Lawrences were claiming Capstar had no right to use the road. Certainly the assignment of a license would stop the adverse period from running per the quoted portion of *Akers,* but the evidence has not been contradicted by Lawrences that from 1966 to 2003 Capstar and their predecessors used this road under a claim of right.

Capstar's uncontradicted evidence is as follows: Harold Funk testified in his affidavit that: "Following the sale [in 1975], we continuously utilized the existing road in Section 21 to access our property in Section 22 without interference." Affidavit of Harold Funk in Support of Motion for Summary Judgment, filed March 9, 2004, p. 4, ¶ 6. John Rook testified in his affidavit that when Kootenai Broadcasting, Inc. purchased its parcel in 1989:

> There were other nearby parcels used for towers further east from the parcel purchased by Kootenai Broadcasting, Inc., including a parcel of

> property owned and used by General Telephone Company. At the time that Kootenai Broadcasting, Inc. purchased its parcels, these property owners and their tenants were using the road to access their parcels, and continued to do so after Kootenai Broadcasting, Inc. purchased its parcel.

Affidavit of John Rook in Support of Motion for Summary Judgment, filed March 9, 2004, p. 2, ¶3.

> The existing private access road was visible and in use by Funks at the time Kootenai Broadcasting purchased its parcel. I have personally driven this road and used it on several occasions to access the Kootenai Broadcasting, Inc. parcel. The private road was the only road that provided access to Kootenai Broadcasting, Inc.'s parcel of property.

Id. p. 3, ¶ 4.

Lawrences make several arguments regarding Capstar's predecessor's (the Funks) ability to obtain a prescriptive easement. First, Lawrences claim "In 1975, Funk moved to Aberdeen and then to American Falls, Idaho, where he has resided since. (Funk Deposition, hereinafter 'FD' 28:20 to 28:24.). Opposition of Douglas and Brenda Lawrence to Renewed Motion for Summary Judgment, p. 4. Lawrences then argue: "After moving to American Falls, Funk visited his land on Blossom Mountain only two or three times (FD 30:25 to 31:4)" and "Funk has not visited the Blossom Mountain land since 1981 (FD 31:17)." *Id.*, p. 5. What Lawrences omit from that same deposition is the following:

> Q. BY MR. WHELAN: Now between the time you bought the property and the time you sold it to Human Synergistics, how many times did you go up to the property?
> A. Well, we'd always go up andpick huckleberries and stuff, and target practice and – I don't know. I would have to guess maybe, I don't know, 20, 30 times.
> Q. In the two year period, well three years since 1969. I'm sorry. Six-year period, from 1969 until 1975, about 30 times you were on top of the mountain?
> A. I would suppose, yeah.

Opposition of Douglas and Brenda Lawrence to Renewed Motion for Summary

Judgment, Exhibit A (August 17, 2007 Deposition of Harold Funk), p. 25, Ll. 11-23. Lawrences fail to realize that Funk's use of his property and the use he made of the Lawrence property in getting to his property from 1975 to the present is not relevant. The uncontradicted evidence is that Funk used the property consistently for the **six-year period** from the day he sold to Human Synergistics to the day he moved from the area. This is one year more than the five years required for the prescriptive use. This isn't the type of property of which one would expect daily use. The property is on top of a mountain. Capstar seeks this easement to maintain its radio equipment on top of this mountain. The use Capstar seeks is no different than the prescriptive use Funks made of Lawrences' land for that six-year period from 1969 to 1975.

> It is the long established rule in this jurisdiction [Idaho] that any right gained by prescription is confined to the right as exercised during the prescriptive period. "It is limited by the purpose for which it is acquired and the use to which it is put."

Idaho Forest Indus., v. Hayden Lake Watershed Imporvement Dist., 112 Idaho 512, 515, 733 P.2d 733, 736 (1987); *citing Azteck Limited, Inc. v. Creekside Inv. Co.,* 100 Idaho 566, 568, 602 P.2d 64, 66 (1979). "[P]resciption acts as a penalty against a landowner and thus the rights obtained by prescription should be closely scrutinized and limited by the courts. *Id., citing Gibbens v. Weisshaupt,* 98 Idaho 633, 570 P.2d 870 (1977). The character and extent of a prescriptive easement generally is fixed and determined by the use under which it was acquired. No different or materially greater use can be made of such an easement, except by further adverse use for the prescriptive period. 25 Am.Jur.2d Easements and Licenses § 81.

The uncontroverted evidence is the road was established as early as 1966, and it is undisputed that Funks were using the road for access to both their Section 21 and Section 22 parcels. It is uncontradicted that when Funks sold the Section 21 parcel to

Human Synergistics (Lawrences' predecessor), Funks included in the sales contract language that gave notice that Funks intended to continue to use the road for ingress and egress to the Section 22 parcel Funks retained. It is uncontradicted that Funks in fact made use of that road. This language in the recorded sales contract provided notice to others that Funks were claiming a right to use the road in the future for ingress and egress to the lands the Funks retained. The uncontroverted evidence is that Funks and their successors relied on that language in the recorded sales contract as it is undisputed that Funks and their successors then proceeded to use the road openly, continuously, without interruption, under a claim of right for much longer than the statutory period requires.

E. Lawrences' New Defenses of Laches and Statute of Limitations.

On September 10, 2007, Lawrences filed their Motion for Leave to File Amended Answer, requesting to add the additional defense of laches. This motion to amend was granted and an order to that effect was filed on September 26, 2007. Also on September 10, 2007, Lawrences filed another brief on summary judgment, this one entitled "Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff". In that brief, Lawrences repeat their arguments made in their brief filed July 24, 2007, regarding implied easement by prior use, easement by necessity and easement by prescription. Lawrences claim additional facts not in dispute. Finally, Lawrences also added a brief argument on Statute of Limitations and a one paragraph argument regarding laches. Lawrences also filed on September 10, 2007, an "Affidavit of Douglas Lawrence in Support of Opposition to Renewed Motion for Summary Judgment" and an "Affidavit of John P. Whelan in Support of Defendants' Opposition to Plaintiff's Renewed Motion for Summary Judgment and in Support of Defendants'

Motion for Leave to Amend." On September 17, 2007, Capstar filed "Plaintiff's Supplemental Reply Memorandum in Support of Motion for Summary Judgment".

1) Statute of Limitations.

Lawrences argue Idaho Code § 5-203 and 5-204 apply to bar Capstar's claims. Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff, p. 6. Lawrences provide no legal analysis to support that argument. Idaho Code § 5-203 is not a statue of limitation. It simply sets forth the number of years a plaintiff in an action must be in possession of the property in question before filing a lawsuit to adverse possess that property. Idaho Code § 5-204 is also not a statute of limitation, but, simply a statute setting forth the number of years a party must be seized or be in possession of property following an act of adverse use. It applies to all parties, not just the plaintiff as in I.C. § 5-203, and it applies to defenses and to prescriptive easements, where I.C. § 5-203 only concerns prescriptive possession of property.

Lawrences argue: "Plaintiff's complaint makes no reference to its predecessors interest". *Id.* **First**, Lawrences completely fail to explain the **legal** significance of that claim. There can be no legal basis for this argument, as both I.C. § 5-203 and § 5-204 specifically mention a party's *predecessor.* Idaho case law has long since recognized this fact that a party's predecessor's use of property or time in possession can be tacked on to the party's use or time in possession to achieve the requisite number of years. *Akers v. D. L. White Construction, Inc.,* 142 Idaho 293, 303, 127 P.3d 196, 206 (2005); *Hodgins v. Sales,* 139 Idaho 225, 230, 76 P.3d 969, 975 (2003); *State ex rel. Haman v. Fox,* 100 Idaho 140, 146, 594 P.2d 1093, 1099 (1979); *Marshall v. Blair,* 130 Idaho 675, 680, 946 P.2d 975, 980 (1997). **Second**, from a **factual** standpoint, Lawrences' claim is **false**. Capstar's Complaint, p. 6, ¶ XVII alleges: "Capstar and its

predecessors in title have used the Blossom Mountain Road as it crosses the Defendants' real property for access to Capstar's real property openly, notoriously, continuously, adversely and under claim of right for a period exceeding five (5) years." Lawrences next argue: "Any such rights would necessarily had to have been litigated to be perfected." Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff, p. 7. Again, there is no explanation as to the legal basis of this claim. Such argument is squarely contradicted by Idaho Code § 5-203, § 5-204, and the analysis of *Hodgins, Haman, Marshall* and *Akers.*

2) Laches.

Lawrences entire argument on laches is as follows:

> Whether or not a party is guilty of laches is ordinarily a question of fact. *Osterlich v.State of Idaho,* 100 Idaho 702, 604 P.2d 716. It is beyond question that the Lawrences have been prejudiced by the alleged stale claims which Plaintiff now seeks to enforce. If Plaintiff and its predecessors truly enjoyed easements by implication, necessity and/or by prescriptive use, those claims should have been perfected through litigation. The failure to pursue the claims by Plaintiff's predecessors has clearly prejudiced the ability of the Lawrences *and their predecessors* to defend against the claims.

Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff, p. 7. (italics in original). While Lawrences claim it is "beyond question" that Lawrences have been prejudiced, there is not one fact alleged, not one bit of argument stating why this is so. Similarly, there is no factual or legal argument made why Capstar's claims or Capstar's predecessor's "claims should have been perfected through litigation." The obvious flaw to Lawrences' unsupported argument is prior to Lawrences purchasing their property and subsequently denying Capstar access, *there was no need to litigate!* Every indication is that as soon as Lawrences prohibited Capstar's access, Capstar took action. Capstar simply is not "guilty of laches."

There is absolutely no merit to either of Lawrences' defenses of statute of limitations or laches.

II. ANALYSIS REGARDING *TOWER ASSET SUB, INC. v. LAWRENCE*.

A. Facts Pertaining to *Tower Asset Sub, Inc., v. Lawrence*.

As a preliminary matter, on November 13, 2007, Tower Asset filed a "Motion for Substitution of Real Party in Interest." The basis for this motion is Tower Asset Sub, Inc. became Tower Asset Sub, L.L.C., and on February 23, 2007, Tower Asset Sub, L.L.C. merged into Spectra Site, L.L.C., a different Deleware Corporation. Affidavit of Raymond W. Goodwin in Support of Substitution of Real Party in Interest. This motion was heard on November 28, 2007, just prior to oral argument on Capstar's summary judgment motion. At the end of oral argument on the Motion for Substitution of Real Party in interest, the Court granted the motion and directed counsel for Tower Asset to prepare an order. No order has been prepared to date. Since no order has been entered until this decision and order, the Court will continue to refer to the plaintiff in this action as Tower Asset Sub, Inc., (Tower Asset) even though the Court has granted the motion to substitute Spectra Site, L.L.C., as the real party in interest.

Tower Asset has made it clear that it is only seeking injunctive relief in this case, and that Tower Asset is not making any claim to title over Lawrences' land. Plaintiff's Supplemental Reply Memorandum in Support of Motion for Summary Judgment, p. 1.

Blossom Mountain is located south of Post Falls, Idaho. The Lawrences and the Halls (through whom Tower Asset claims its right) own parcels of property on Blossom Mountain. Both the Halls' parcel and the Lawrences' parcel (Lawrence parcel) were once part of a larger tract held under common ownership by Harold and Marlene Funk. The Lawrence parcel was broken out in 1975 when Funks sold that parcel to Human

Synergistics. Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset Case filed August 17, 2004), p. 2, ¶ 2.e., Exhibit E. The Halls' parcel was broken out in 1996 when Funks sold a parcel to Rasmussen. *Id.,* Exhibit Q. The Lawrence parcel is located in the southeast quarter of Section 21, and the Halls' parcel is located to the east in the southwest quarter of Section 22. *Id.* Section 21 lies directly west of Section 22. *Id.,* p. 6, ¶ 8, Exhibit Z. There is a public road in the area known as Signal Point Road. Signal Point Road lies generally West of the Lawrence parcel, which in turn is west of Hall's parcel. Tower Asset, as a tenant of Halls, seeks an easement to access its equipment located on Halls' property which Tower Asset leases from the Halls. The easement is located on an unimproved private road commonly known as Blossom Mountain Road as Blossom Mountain Road crosses through the Lawrence parcel. In litigation in yet another case, Douglas Lawrence, in his deposition taken September 30, 2003, recognized the right-of-way easement General Telephone Corporation (GTC) obtained in July 1966 for access to GTC's property in Section 22 over the private road that crossed the Southwest Quarter of Section 21 (Lawrences' parcel). *Id.,* pp. 6-7, ¶¶ 5-7, Exhibit W, X and Y. The detail of the access road prepared by GTC's engineer in 1967 shows the road leaves Signal Point Road, then travels southeast through the southwest portion of Section 21 (Lawrences' parcel), then enters the North Half of Section 28 where it then turned northeast and entered the southeast quarter of Section 21. *Id.* Exhibit Y, and Exhibit 15 attached to Exhibit Y. Tower Asset asserts that prior to the separation by the Funks of the Lawrences' parcel from the parent parcel, the private road across the Section 21 parcel had been used by the Funks as the exclusive means to access their property in Sections 21 and 22. Memorandum in Support of Motion for Summary Judgment (field August 17, 2004), pp.

4-5, ¶¶ 7-9. Tower Asset asserts that even after the separation of Section 21, the Funks continued to use the private easement road to access their Section 22 parcel. *Id.,* pp. 5-6, ¶¶ 10-11.

Capstar and Tower Asset prove the following chain of title for the parcels involved in Sections 21 and 22:

1. Reynolds to the Radens and the Marcos (Contract in 1968, Deed in 1974): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibits A and D.

2. Radens and Marcos to Funk (Contract in 1969, Deed in 1974): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibits B and C.

To this point there was unity of title in the portions of Sections 21 and 22 at issue in this case.

Capstar and Tower Asset establish the title chain with respect to what became the Lawrence property located in the southeast quarter of Section 21 as:

1. Funk to Human Synergistics (Sale Agreement in 1975, Deed in 1992): Supplemental Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed November 2, 2004), E and I; Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibits A and F; Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibit A and F.
2. Human Synergistics to Johnston & McHugh (Contract and Deed May 16, 1977): Affidavit of Susan Weeks in Support of Motion for Summary

Judgment (Tower Asset case filed August 17, 2004), Exhibits F and H; Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibits F and H.

3. Johnston & McHugh to N.A.P. (Sale Agreement October 6, 1987, Deed July 16, 1996): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibits G and O; Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibits G and O.
4. N.A.P. to Farmanian (Deeds June 28, 1996 and July 8, 1996)): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibits J and K; Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibits J and K.
5. Farmanian to Douglas and Brenda Lawrence (Sale Agreement July 12, 1996, Deed July 5, 1996): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibits L, M, N and P; Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibits L, M, N and P.

Capstar establishes the title chain with respect to what became the Capstar property in the southwest corner of Section 22 as:

1. Funk to Kootenai Broadcasting (Deed September 22, 1989): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibit Exhibits Q and R.

2. Kootenai Broadcasting to Rook Broadcasting (Deed October 25, 1993): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004) Exhibit S.
3. Rook Broadcasting to AGM (Deed November 20, 1998): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibit T.
4. AGM to Capstar (Deed October 25, 2000): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Capstar case filed March 9, 2004), Exhibit U.

Tower Asset establishes the title chain with respect to what became the Hall property in the southwest corner of Section 22 as:

1. Funk to Rasmussen (Deed August 26, 1996): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibit Q.
2. Rasmussen to VanSky (Deed September 29, 1978): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibit R.
3. VanSky to Switzer Communications, Inc. (Deed December 11, 1981): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibit S.
4. Switzer Communications, Inc. to Term Corp. (Deed December 8, 1982): Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibit T.

5. Term Corp. to Mark E. Hall and Robert A. Hall (Deed April 16, 1997); Affidavit of Susan Weeks in Support of Motion for Summary Judgment (Tower Asset case filed August 17, 2004), Exhibit U.
6. Spectra Site was assigned a leasehold interest with Mark Hall and Robert Hall in a Parcel of property situated in the Southwest quarter of Section 22, Township 50 North, Range 5 West, Boise Mer4idian, Kootenai County, Idaho. Affidavit of Dan Rebeor (Tower Asset case filed July 22, 2003).

When the Lawrences questioned Tower Asset's right to access the property it leases from the Halls over the portion of Blossom Mountain Road that traversed Lawrences', Tower Asset filed suit on June 27, 2003, seeking declaratory and injunctive relief. Tower Asset sought to have an easement declared based on four theories: express easement, easement by implication, easement by necessity, and prescriptive easement. On Tower Asset's previous motion for summary judgment, this court found that Tower Asset held an express easement over the Lawrence property based on the sale agreement, as well as the deed. Order Granting Motion for Summary Judgment and Entering Decree of Quiet Title, filed May 27, 2005. The Court did not address Tower Asset's other theories raised in its Complaint due to a discovery issue at the time. Accordingly, Tower Asset and Lawrences in that initial motion for summary judgment did not address theories of easement by implication, easement by necessity and prescriptive easement. The Lawrences appealed from that decision, and the Supreme Court reversed summary judgment holding the deed did not create an express easement over the Lawrence property. On remand, Tower Asset renews its motion for summary judgment based on the other theories of easement previously raised in their complaint.

The Lawrence parcel and the Hall parcel were once part of a single tract of land under the common ownership of Harold and Marlene Funk. In 1975, the Funks divided their land and sold what is now the Lawrence parcel to Human Synergistics, Inc., while retaining the southwest quarter of Section 22. Tower Asset asserts that although its origins are unknown, it is apparent that an easement over the road existed as early as 1966. In litigation in yet another case, Douglas Lawrence, in his deposition taken September 30, 2003, recognized the right of way easement General Telephone Corporation (GTC) obtained in July 1966 for access to GTC's property in Section 22 over the private road that crossed the Southwest Quarter of Section 21 (Lawrences' parcel). Affidavit of Susan Weeks in Support of Motion for Summary Judgment, pp. 6-7, ¶¶ 5-7, Exhibit W, X and Y. The detail of the access road prepared by GTC's engineer in 1967 shows the road leaves Signal Point Road, then travels southeast through the Southwest portion of Section 21 (Lawrences' parcel), then enters the North Half of Section 28 were it then turned northeast and entered the Southeast quarter of Section 21. *Id.* Exhibit Y, and Exhibit 15 attached to Exhibit Y.

Tower Asset claims that prior to the separation of the Lawrence parcel from the parent parcel, the private road across the Section 21 parcel had been used by the Funks as an exclusive means to access their property. That same road was later used by Hall for access to their segregated parcel in Section 22. Affidavit of Robert Hall in Support of Motion for Summary Judgment, p. 3, ¶¶ 7, 8. In 1992, the Funks executed and delivered a warranty deed conveying the Lawrence parcel to Human Synergistics. The warranty deed stated that the deed was given "in fulfillment of those certain contracts between the parties hereto dated July 1, 1975 and conditioned for the conveyance of the above described property." In 1996, after a number of other

intermediate conveyances, the Lawrences acquired ownership of their parcel.

The Idaho Supreme Court noted on appeal that Tower Asset had already established that the Halls (and thus, Tower Asset) were intended to have the right to use the easement. The Idaho Supreme Court noted in footnote 1 that: "Tower presented uncontroverted evidence that the Hall parcel was intended to have the benefit of the access road across the Lawrence parcel." *Tower Asset Sub, Inc. v. Lawrence,* 2007 Opinion No. 14, p. 4.

Lawrences also claim Tower Asset has not established that it is Hall's tenant and that Tower Asset has no standing to seek to quiet title across Lawrences' land. Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff, pp. 1, 2, 9, 10. A copy of the lease between Nextel Communications and Hall is included with the Affidavit of Robert Hall. Affidavit of Robert Hall in Support of Motion for Summary Judgment, p. 2, ¶¶ 3, 4, Exhibit A. Hall received notice that this lease was assigned to Tower Parent Corp., and Tower Asset Sub, Inc., and that Tower Asset Sub, Inc. continues to lease the site from us." *Id.* p. 2, ¶¶ 4, 5. Additionally, the Supreme Court in *Tower Asset, Inc., v. Lawrence, supra,* noted that: "We hold that Tower, as lessee of the alleged dominant estate, has standing to seek injunctive relief preventing the Lawrence's from interfering with its right to sue the easement." *Tower Asset Sub, Inc. v. Lawrence,* 2007 Opinion No. 14, p. 4. The Idaho Supreme Court also held: "Tower will have standing to seek injunctive relief if it can establish it has an alleged legal right to benefit from the Blossom Mountain Road easement." *Id.* Lawrences' argument that Tower Asset lacks standing to pursue easement theories of implication or necessity (Opposition of Douglas and Brenda Lawrence to Renewed Motion for Summary Judgment of Plaintiff, pp. 6-7) is without merit. Lawrences admit Tower Asset

has standing to prove an easement by prescription. *Id.,* p. 7.

Lawrences next argue that Hall has no easement by necessity or implication and thus has nothing to assign to Tower Asset, and that the only theory available to Tower Asset is easement by prescription. Opposition of Douglas and Brenda Lawrence to Motion for Summary Judgment of Plaintiff, pp. 1-3, 8. Tower Asset now argues that nothing presented by the Lawrences alters the Supreme Court holding that Tower Asset has standing as a lessee of the dominant estate. Tower Asset correctly argues "**the only issue remanded by the appellate court in this case was whether Tower Asset, as a tenant, has a legal right to benefit from the Blossom Mountain Road easement of its landlord, Halls."** Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 2. (emphasis added). This is because the Idaho Supreme Court noted in Footnote 1 that: "Tower presented uncontroverted evidence that the Hall parcel was intended to have the benefit of the access road across the Lawrence parcel." *Tower Asset Sub, Inc. v. Lawrence,* 2007 Opinion No. 14, p. 4.

In accordance with 28A C.J.S. *Easements* § 164 (1996), Tower Asset argues that while a private way may not be used by the general public, it may be used by the owner of the way, his family, **tenants,** servants, and guests, as well as by persons transacting business with him, in the absence of a special agreement to the contrary. Plaintiff's Reply Memorandum in Support of Motion for Summary Judgment, p. 2. Additionally, Tower Asset asserts that there is nothing contained in the copy of the lease between Tower Asset and Hall that demonstrates a special agreement between Hall and Tower Asset that Tower Asset may not use an easement for which the Halls have the benefit. *Id.* at p. 3. Hence, Tower Asset argues they are entitled to injunctive relief. *Id.*

Lawrences argue that Tower Asset is not the Halls' tenant since the Halls and Tower Asset did not follow the assignment provision of the lease agreement. Opposition of Douglas and Brenda Lawrence to Renewed Motion for Summary Judgment, p. 10. The lease between Nextel and the Halls has a provision that reads: "Lessee may not assign, or otherwise transfer all or any part of its interest in this Agreement or in the Premises without the prior written consent of Lessors…" Affidavit of Robert Hall in Support of Motion for Summary Judgment, Exhibit A, ¶ 14. Tower Asset re-characterizes Lawrences argument as follows: "Essentially, Lawrences argue that Hall may not waive a contract clause." Plaintiffs' Supplemental Reply Memorandum in Support of Motion for Summary Judgment, p. 3. Tower Asset correctly states that as long as the Halls and Tower Asset are in agreement that they share a tenant/landlord relationship pursuant to the lease, Lawrences may not challenge that relationship. *Id.* The uncontroverted evidence by Robert Hall is "…that Tower Asset Sub, Inc. continues to lease the site from us." Affidavit of Robert Hall in Support of Motion for Summary Judgment, p. 2, ¶¶ 4, 5, Exhibit A. This Court finds the uncontroverted evidence shows that Hall and Tower Asset are in agreement that they share a landlord and tenant relationship. As noted by Tower Asset, "No law requires strict compliance to the terms of the lease agreement if the parties agree to the waiver of the term." Plaintiff's Supplemental Reply Memorandum in Support of Motion for Summary Judgment, p. 3. Obviously, Hall and Nextel either agreed to waive the assignment term, or they simply are not concerned with that provision. There is no assignment issue at issue here. Quite simply, the Lawrences are not in privity to the leasing agreement between Nextel and the Halls, or the agreement between Nextel's assignee, Tower Asset, and the Halls. Therefore, Tower Asset is correct in asserting its

right to use the Halls' easement over Lawrences' land. Tower Asset is entitled to injunctive relief.

As noted by the Idaho Supreme Court, "Tower presented uncontroverted evidence that the Hall parcel was intended to have the benefit of the access road across the Lawrence parcel." *Tower Asset Sub, Inc. v. Lawrence,* 2007 Opinion No. 14, p. 4. Additionally, the analysis above as to Capstar's easement by implication from prior use, easement by necessity and easement by prescription, applies to the Halls.

The only additional argument made by Lawrences as to an easement by prescription is that Lawrences argue that Tower Asset itself makes no claim that it has used the Lawrence parcel openly, notoriously, continuously, and in a hostile manner for the statutory period. Lawrences' argument continues that since no prescriptive claim has been established by Tower Asset and since Tower Asset's use of the road has always been permissive, a prescriptive easement cannot exist. The Court's analysis above explains why these arguments have no merit. The only additional argument made by Lawrences as to an implied easement by prior use is Lawrences assert that the parcel at issue in the Tower Asset case was not created or severed from the Funks' other lands until 1977 (as opposed to 1975 in the Capstar case) when Funk conveyed the property to Rasmussen/Chamberlain. Lawrences argue that because there was no easement in 1975 when the servient estate was severed from the dominant estate, and therefore no prior use, Tower Asset has failed to meet the second element of an implied easement. This Court has already explained why there was an easement by implication, from prior use and by prescription in 1975.

As lessee from Halls, Tower Asset is entitled to injunctive relief against Lawrences as to use of this easement across Lawrences' land for use of this road

known as Signal Point Road.

Just as in the Capstar case, Lawrences in this Tower Asset case also make the arguments of statute of limitations and laches. Opposition of Douglas and Brenda Lawrence to Renewed Motion for Summary Judgment of Plaintiff, pp. 8-9. The analysis above as to those arguments applies in the Tower Asset case. Lawrences cannot avail themselves of those defenses for the reasons stated above.

III. ORDER.

IT IS HEREBY ORDERED that the Renewed Motion for Summary Judgment filed by *Capstar v. Lawrence,* CV 2002 7671 and Renewed Motion for Summary Judmgnet filed in *Tower Asset Sub, Inc. v. Lawrence,* CV 2003 4621, are **GRANTED**. In the *Capstar* case, Capstar has proven they have an implied easement by prior use, an easement by necessity, and an easement by prescription, and Lawrences have failed to establish a material fact as to any other these theories. In the *Capstar* case, Lawrences have failed to establish a material fact in dispute as to any of these theories. The defenses of laches and statute of limitations are not available to the Lawrences in the *Capstar* case.

In the *Tower Asset* case, Tower Asset has proven they are entitled to injunctive relief, as their landlord, the Halls, have an easement over Lawrences land established by prior use, by necessity and by prescription, and Lawrences have failed to establish a material fact in dispute as to any of these theories. The defenses of laches and statute of limitations are not available to the Lawrences in the *Tower Asset* case.

IT IS FURTHER ORDERED in the *Tower Asset* case, that Tower Asset's motion to substitute Spectra Site, L.L.C., as the real party in interest is **GRANTED**.

Entered this 6th day of February, 2008.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2008, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
John P. Whelan	208 664-2240	Susan Weeks	208 664-1684

_____
Deputy Clerk