

STATE OF IDAHO)
County of KOOTENAI)^{ss}

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AT _____ O'Clock ___ 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**

**DENNIS LYLE AKERS AND SHERRIE L.
AKERS, HUSBAND AND WIFE,,**

Plaintiffs,

vs.

**D.L. WHITE CONST., INC., DAVID L.
WHITE AND MICHELLE WHITE,
HUSBAND AND WIFE, AND VERNON J.
MORTENSEN AND MARTI MORTENSEN,**

Defendants.

Case No. **CV 2002 222**

**MEMORANDUM DECISION,
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER RE: EASEMENT
LOCATION**

I. PROCEDURAL HISTORY AND BACKGROUND.

This action is before the Court on remand a second time from the Idaho Supreme Court. The purpose of this remand is to determine the location of the prescriptive easement as it enters Akers' Parcel B land and turns south onto the property owned by Whites and Mortensens.

To orient the reader, the land at issue has as its axis the quarter corners of Section 19 and 24, in Kootenai County. The Akers own the land to the north in two parcels: "Government Lot 2" to the east, which is in Section 19; and "Parcel B", the adjacent parcel to the west of Government Lot 2. All of Parcel B is in Section 24. Immediately to the south of Akers' Government Lot 2 is land owned by Reynolds, not a party to this litigation. Immediately to the south of Akers' Parcel B land is land purchased by defendants Whites and Mortensens. This litigation concerns Whites and

Mortensens rights to use a roadway that connects White and Mortensens' property to Millsap Loop Road. That roadway crosses Akers' property at the southern edge of Akers' Government Lot 2 near, at or over the northern boundary of Reynolds' land. It is the exact location of the road as it enters into Akers' Parcel B that is the subject of this remand, specifically, the exact location of the road as it existed in that area between 1966 and 1980, for prescriptive purposes.

The Court trial in this matter took place over fourteen days of trial testimony and occurred from September 2002 to May 2004. On January 2, 2003, this Court filed its "Findings of Fact, Conclusions of Law and Order." Later, the issue of damages was tried to the Court, and on April 1, 2004, this Court filed its "Memorandum Decision and Order on Reconsideration on New Trial Issues and Additional Findings of Fact, Conclusions of Law Regarding Damages, and Order." Defendants appealed to the Idaho Supreme Court. On December 30, 2005, the Idaho Supreme Court filed its first decision in this case. *Akers v. D. L. White Construction, Inc., et al.*, 142 Idaho 293, 127 P.3d 196 (2005).

In that opinion, the Idaho Supreme Court affirmed this Court's findings as to the triangle area to the east. 142 Idaho 293, 299-300, 127 P.3d 196, 202-03. The Idaho Supreme Court reversed this Court's findings regarding an implied easement from prior use (142 Idaho 293, 301-02, 127 P.3d 196, 204-05) and easement by prescription. 142 Idaho 293, 303-04, 127 P.3d 196, 206-07. The Idaho Supreme Court affirmed this Court's finding that the express easement defendants had over plaintiffs' land was 12.2 feet in width in 1966, but expressed no opinion as to the width or scope of any possible easement by prescription or implied from prior use, leaving that issue to be resolved by this Court on remand. 142 Idaho 293, 304, 127 P.3d 196, 207. This Court was also instructed to revisit the trespass and damages issue after determining easement rights. 142 Idaho 293, 304-05, 127 P.3d 196, 207-08.

After the remittitur was issued by the Idaho Supreme Court, this Court held a hearing on

April 19, 2006, wherein a briefing scheduled was issued. Additional briefing was filed and oral argument based upon that additional briefing was scheduled for June 22, 2006. On June 22, 2006, counsel appeared for oral argument. On September 7, 2006, this Court issued its “Order on Remand.” At that time this Court held:

IT IS ORDERED defendants have an easement by prescription, but not over the portion of Akers’ property they excavated. The easement by prescription is as established prior to 1980, and that is a 12.2 foot wide strip located just inside the northeast corner of defendants’ land, turning south immediately west of the west boundary of Government Lot 2 (where the express easement ends) and the east boundary of Parcel B.

IT IS FURTHER ORDERED defendants have no implied easement by necessity.

IT IS FURTHER ORDERED defendants are responsible for damages as previously set forth in the Memorandum Decision and Order, and Additional Findings of Fact, Conclusions of Law and Order filed April 1, 2004, pp. 12-29. The prescriptive easement does not expand the express easement, and the prescriptive easement over Akers’ land in Parcel B is in a slightly different location than defendants’ excavated on that parcel. Additionally, defendants placed fill from their excavation on Akers’ Parcel B. Accordingly, even with the finding of an easement by prescription, all previous findings regarding damages remain.

IT IS FURTHER ORDERED Akers are the prevailing party, entitled to costs as proven at a later hearing.

Order on Remand, p. 19. Specifically, this Court found the location of the pertinent portion of the easement to be as follows:

An alternative reason Akers claim defendants fail on their claim for an easement by necessity is that at the relevant time period, 1966, the road to which they seek to establish an easement by necessity upon *did not exist*, at least not on Akers’ land in Parcel B in the same location upon which defendants have excavated in recent times. As Akers point out, the road did not exist into Parcel B back in 1966. Plaintiffs’ Reply Brief on Remand, pp. 3-4. Instead, the road went on to Reynold’s land in 1966, and Reynolds is not a party to this litigation. According to Reynolds, the road was established in this century by defendant David White. Tr. Vol. I, p. 84, L. 16 – p. 85, L. 24. Reynold’s testimony is corroborated by some of the exhibits. Exhibit I1 and J1 do not show this road along any part of Parcel B back in 1951 and 1958 respectively. Reynold’s testimony is corroborated by the testimony of William Millsaps, as set forth in Finding of Fact 21:

21. * * * Bill Millsaps [sic] was also unclear as to whether the access road went on to Reynolds’ property or whether it went on to that portion of plaintiffs[’] land west of the western boundary of Government Lot 2. Thus, in 1966, it is unclear whether one could access the Millsaps’ [sic] 60 acres without traveling on the right of

way outside Government Lot 2.

January 2, 2003, Findings of Fact, Conclusions of Law and Order, pp. 7-8, Finding of Fact ¶ 21. This Court was not perfectly clear when it wrote Finding of Fact 26:

26. The curve into the Millsaps' [sic] property at the west end of the driveway in 1966 was east of its current location, in Government Lot 2. As stated *supra* in Finding of Fact ¶ 21, Bill Millsap was unclear as to the location of that "road" after it left Government Lot 2.

William Reynolds testified that after the "road" left the west boundary of Government Lot 2, it turned sharply in a 90 degree bend then went south, essentially right around the northwest corner of Reynolds' land. This is corroborated by Defendants' Exhibit D41 (map from photos taken in 1978) D42 (represented by Mr. Reagan [former defense counsel] as a 1973 aerial photo), D43 (represented by Mr. Reagan as a 1973 map) and D44 (represented by Mr. Reagan as a 1973 aerial photo), and thus, this Court finds this to be the approximate route of the "road" in 1966. Mr. Reynolds testified Peplinski worked on this area of the road toward the end of his ownership, and in doing so, caused part of Reynolds' fence to fall down. Sherrie Akers similarly testified that it was well after 1980 that Peplinski altered the course of the road to the west of the western boundary of Government Lot 2.

January 2, 2003, Findings of Fact, Conclusions of Law and Order, pp. 8-9, Finding ¶ 26. Any lack of clarity by this Court in Finding 26 was clarified in Finding 27.

27. With the Akers' permission, Richard Peplinski extended the driveway west of Government lot 2 and, with Akers's permission, used this driveway west of Government Lot 2 for farming and occasionally logging in the spring, summer and fall.

January 2, 2003, Findings of Fact, Conclusions of Law and Order, p. 10, Finding of Fact ¶ 27. What was testified by Reynolds, what this Court was persuaded by, and what this Court meant when writing Finding 26 was the route in 1966 was as shown on Exhibit D42, D43 and D44, but that the road essentially crossed and went south at the intersection or four corners formed by Government Lot 2 to the Northeast, Parcel B to the Northwest, Reynolds' land to the Southeast, Peplinskis' (now defendants') land to the Southwest. At the very least, defendants have failed in their burden of proof on the issue of "apparent continuous use" of this entire route over Parcel B which they now desire. The road defendants constructed in recent times crosses Akers land in Parcel B further to the west than it did in 1966. Thus, contrary to the Idaho Supreme Court's finding, element two "apparent continuous use long enough before separation of the dominant estate to show that the use was intended to be permanent" is lacking in defendants' case on implied easement by necessity.

Order on Remand, pp. 6-8.

Defendants again appealed to the Idaho Supreme Court. On June 4, 2008, the Idaho Supreme Court issued its opinion. However, no remittitur followed. On January 22, 2009, the Idaho Supreme Court issued its "Substitute Opinion" in this case. In pertinent part, the Idaho Supreme

Court held:

2. The district court erred when it found that Appellants' prescriptive easement turned immediately south upon entering Parcel B.

Appellants argue that their prescriptive easement does not turn immediately south upon entering Parcel B, and instead extends further to the west around a hill before turning south onto Appellants' property. The district court found that the access road on Parcel B, prior to 1980, turned south immediately after entering Parcel B from Government Lot 2. The district court included an attached exhibit to its amended judgment that illustrated the location of Appellants' prescriptive easement on Parcel B. After the prescriptive easement crossed the boundary of Government Lot 2 into Parcel B, the exhibit indicates that the easement turns 90 degrees to the south and enters Appellants' property. However, this finding is not supported by substantial and competent evidence.

The district court stated that it relied upon a number of exhibits when it concluded that Appellants' easement turned immediately south upon entering Parcel B, including Defendants' Exhibits 42 and 44. However, these exhibits, which are aerial photographs of the relevant property, indicate that the access road historically made a more gradual turn resembling a shepherd's crook rather than a 90-degree turn. Defendant's Exhibit 41, an aerial photograph from 1978 also shows that the access road made a gradual turn through Parcel B before entering Parcel A. Perhaps most telling is Plaintiff's Exhibit 253, which is a photograph of the shared boundary between Government Lot 2, Parcel B, and Parcel A, and the Quonset hut on Parcel A. While the photograph was taken in 2003 (well after the prescriptive easement was established prior to 1980), it is nonetheless informative. The photograph depicts a large hill to the south of the access road, which the access road gradually curves around. We recognize that the uncontroverted evidence showed that the Akers permitted Peplinski to extend the access road further to the west in Parcel B after the Akers purchased the property. However, the photograph does not support a finding that the access road previously turned 90 degrees to the south traveling straight up a steep hill in order to access Parcel A, as would be required if the access road had immediately turned 90 degrees upon entering Parcel B. In light of this photographic evidence, we conclude that there is not substantial evidence supporting the district court's conclusion as to the location of Appellants' prescriptive easement on Parcel B. This issue must be remanded to the district court for additional fact finding consistent with this opinion.

Akers v. Mortensen and White, 147 Idaho 39, 47-48, 205 P.3d 1175, 1183-84 (2009). Following that January 22, 2009, opinion by the Idaho Supreme Court, this Court, aided by briefing and oral argument, issued an order on December 1, 2009, establishing:

- 1) Plaintiff has the burden of proof on all damage issues.
- 2) No additional evidence regarding location of the easement is needed, however, a metes and bounds description of the location as found by the Court will be necessary to comply with Idaho case law.

3) The defendants have the burden of going forward (burden of production) and the burden of persuasion (burden of proof) as to the location of the easement. *Palmer v. Fitzpatrick*, 97 Idaho 925, 927, 557 P.2d 203, 205 (1976). While the parties continue to negotiate an agreed location of the easement, the following applies absent that agreement.

4) Each defendant will submit a brief regarding location of the easement, with reference to specific exhibits in evidence and specific reference to previous decisions of this Court or the Idaho Supreme Court, and such brief shall be due on or before January 15, 2009.

The plaintiffs shall then submit a brief regarding location of the easement, with reference to specific exhibits in evidence and specific reference to previous decisions of this Court or the Idaho Supreme Court, and such briefs shall be due on or before January 22, 2009.

Each defendant shall then submit a response brief, if any, by no later than January 29, 2009, regarding location of the easement.

Each party is encouraged (but not required) to submit a metes and bounds description of their claim as to the location of the easement, along with their briefing.

5) Once the Court determines the location of the easement (or the parties advise the Court that they have stipulated by agreement the location of the easement), the Court will establish a briefing schedule regarding the issue of damages.

Order Regarding Burdens of Proof and Order Establishing Briefing Schedule, pp. 2-3. On January 21, 2010, this Court extended that briefing schedule, based upon the parties' stipulation. On January 22, 2010, Vernon Jerry Mortensen *pro se*, filed his "Brief of Vernon J Mortensen Supporting Location of Easement." On March 29, 2010, Whites filed their "Brief of Defendants White Re: Section 24 Easement Location." On June 17, 2010, Akers filed "Plaintiffs' Brief on Second Remand Regarding Location of Easement." On June 24, 2010, Whites filed their "Reply Brief of Defendants White Re: Section 24 Easement Location." Oral argument was held on July 1, 2010. At oral argument on July 1, 2010, this Court was made aware of two additional pleadings filed by Whites the day before. On June 30, 2010, Whites filed an "Affidavit of Mike Hathaway" and a "Motion to Admit Additional Evidence Re: Easement Location." That motion was not noticed up for hearing. On July 1, 2010, at oral argument, the Court asked Whites' counsel if Whites were making a motion to continue the hearing scheduled for July 1, 2010, regarding the easement location. Whites' attorney indicated they were making a motion to continue the July 1, 2010, hearing. Akers objected.

Argument was held on Whites' motion to continue. At the conclusion of that argument, the motion to continue was denied. In the intervening two months, Whites have not noticed up for hearing their Motion to Admit Additional Evidence Re: Easement Location. Counsel for Whites also contacted this Court's Deputy Clerk of Court and reserved a time on September 29, 2010, to hear a motion to add additional evidence, but no hearing was ever noticed up and no hearing was held. In case such motion was noticed, this Court waited for that time reserved for hearing before issuing this opinion. The Court's waiting for Whites to bring their Motion to Admit Additional Evidence to a head creates problems for the Court (Article V, Section 17, Idaho Constitution; I.C. § 59-502) as this matter has technically been under advisement with the Court since July 1, 2010. This Court will wait no longer on the issue of taking additional evidence. Marti E. Mortensen has not filed any briefing regarding the easement location, but at the July 1, 2010, oral argument, adopted the submissions filed by the Whites.

II. ANALYSIS.

A. EASEMENT WIDTH IS NOT AN ISSUE ON REMAND.

This Court must make it clear that it is only the easement location that is at issue. Whites urge the Court to re-visit the issue of the width. Whites write:

Photographic evidence and testimony in the record provide a basis for determining the wide [sic] of the prescriptive easement in Section 24. The best evidence is Plaintiffs' Exhibit 183 showing Sherrie Akers measuring the gate at the top of the hill near the time of Akers' purchase of the property. Plaintiffs' Exhibit 191 displays the measured width of the gate at the top of the hill as 20 feet. From Plaintiffs' Exhibit 183 one can discern that the travel way is as wide as the gate across the access road in Section 24. Notably, the large shadow across the access road in Plaintiffs' Exhibit 183 is almost surely the big pine tree referenced above. Other evidence in the record regarding the size of equipment that was pulled up the access road confirms its width as being approximately 20 feet.

As a component of its work in generating a metes and bounds description of the prescriptive easement, Welch Comer ascertained the dimensions of the roadway in Section 24 that is depicted on Defendants' Exhibits 42 and 43. The width of the depicted roadway on Akers' property in Section 24 in those exhibits is approximately 30 feet. It should be understood that the northern line of that roadway as depicted in the referenced exhibits is along the toe of the roadway, meaning the

junction between the natural slope of the hillside and the earth that was pushed down the hill during construction of the roadway, not along the edge of the travel way.

The evidence in the record demonstrates that the [sic] during the relevant period for the prescriptive easement the access road traveled east/west along the property line into Section 24 a distance of approximately 125 to 140 feet from the 19-24 corner and that the travel way was approximately 20 feet wide before it turned south near the big tree into the Peplinski property. As directed by this Court, a proposed description prepared by Welch Comer of the prescriptive easement for the access road in Section 24 is attached to this brief along with a map depicting the location of the described prescriptive easement.

Defendants White Brief Re: Easement Location, pp. 20-21. The Akers correctly point out that the width of the prescriptive easement was a subject to be addressed by this Court on remand from the Idaho Supreme Court. Plaintiffs' Brief on Remand regarding Location of Easement, pp. 2-3.

The width of the easement has been established by this Court at 12.2 feet. This was noted by the Idaho Supreme Court in the first appeal (147 Idaho 39, 43, 205 P.3d 1175, 1179), and following its decision on the second appeal. 147 Idaho 39, 48, 205 P.3d 1175, 1184. In fact, in a different case involving Jerry Vernon Mortensen, the Idaho Supreme Court recently held (referring to the instant case):

In the most recent ruling, this Court affirmed the trial court's finding that a prescriptive easement 12.2 feet wide permits Mortensen to reach his property over the access road, but remanded for further fact finding on the exact location of the easement and for a redetermination of damages. *Akers II*, 147 Idaho at 44, 48, 205 P.3d at 1180, 1184.

Vernon Jerry Mortensen v. Stewart Title Guaranty Company, ___ Idaho ___, 235 P.3d 387, 391, (July 1, 2010). The width of that easement was affirmed by the Idaho Supreme Court, and the Idaho Supreme Court did not direct this Court to re-visit that issue. As noted by counsel for Akers at oral argument on July 1, 2010: “[t]he general rule is that, on remand, a trial court has authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court.” *Mountainview Landowners Co-op Association v. Cool*, 142 Idaho 861, 866, 136 P.3d 332, 337 (2006), citing *State v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000). Thus, the width of this prescriptive easement remains at 12.2 feet.

B. LOCATION OF THE EASEMENT.

Idaho Rule of Civil Procedure 52(a) provides: “In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment;” That rule continues: “A written memorandum decision issued by the court may constitute the findings of fact and conclusions of law only if the decision expressly so states...” I.R.C.P. 52(a). This Court expressly states that this memorandum decision constitutes the findings of fact and conclusions of law. Given that there are hundreds of exhibits the Court has again reviewed, 2,030 pages of trial transcript, extensive current briefing, past Idaho Supreme Court decisions and directives on remand, a memorandum decision is preferred over individual paragraph findings of fact and conclusions of law.

As mentioned above, the defendants have the burden of going forward (burden of production) and the burden of persuasion (burden of proof) as to the location of the easement. *Palmer v. Fitzpatrick*, 97 Idaho 925, 927, 557 P.2d 203, 205 (1976). December 1, 2009, Order Regarding Burdens of Proof and Order Establishing Briefing Schedule, pp. 2-3. Because defendants have the burden of proof, defendants were the first to brief and defendants were also allowed the last word via a response brief to be submitted after plaintiffs’ brief.

Also as shown above, Whites argue the “...prescriptive easement the access road traveled east/west along the property line into Section 24 a distance of approximately 125 to 140 feet from the 19-24 corner...” Defendants White Brief Re: Easement Location, p. 21. The map attached to Whites’ opening brief was prepared by Welch Comer on January 21, 2010, well after the trial concluded. That map represents where Whites argue the road existed at the pertinent time, prior to 1980. Exhibit B to Whites’ opening brief shows the road travelling due west (and ever so slightly north) as it passes the 19-24 quarter corner, and proceeding in that west and slightly north alignment

for 82.14 feet, then the road abruptly turns more than ninety degrees to then run south and slightly east. Defendants White Brief Re: Easement Location, Exhibit B. That map has not been offered into evidence. However, Whites (and Marti E. Mortensen by joining in Whites' argument) have referred to this map throughout their briefing on remand, and Akers have not objected.

Akers argue the prescriptive easement across Akers' Parcel B "...is concomitant with the easement road as surveyed and depicted by Scott Rasor (Rasor) in Plaintiffs' Exhibits 6 and 7." Plaintiffs' Brief on Remand Regarding Location of Easement, p. 3. Exhibit 6 and 7 were prepared by Rasor on July 2, 2002, before this trial began. Exhibit 6 and 7 as pertains to the pertinent area are identical (Exhibit 6 shows the eastern part of the disputed roadway as well as the pertinent portion and other witnesses have drawn on Exhibit 6), but Exhibit 7 also shows elevation change relative to location of the road. Rasor's map, Exhibit 7, shows that road making a gradual bend to the south and southwest, immediately after it passes the 19-24 quarter corners. Rasor's map is found in a host of other Exhibits, or as the basis of other drawings that were made on Rasor's map: Defendants' Exhibit AA was admitted at the trial date held on December 22, 2003; and Plaintiffs' Exhibit 179 was admitted at the trial date held on December 17, 2003.

Obviously, Akers on one hand and Whites on the other describe two totally different road routes across Akers' Parcel B.

For clarity in this decision, the two alignments will be identified by the surveyor that prepared the maps showing the alignments: Akers advocate the "Rasor" alignment (shown in trial Exhibit 7) and Whites advocate the "Welch Comer" alignment (found in Exhibit B attached to White's opening brief on remand).

Whites correctly note that "The relevant time period for the analysis of the prescriptive easement is between the sale by Millsap to Baker in 1966 of the servient estate in Section 24 and its purchase by Akers from Wiggin and Wilhelm in 1980." Defendants White Brief Re: Easement

Location, p. 2. Thus, evidence (aerial photographs, photographs taken from road level, or testimony regarding what was observed to exist) before 1966 and after 1980 are somewhat limited in terms of relevance as to where the road was located during those fourteen years in between. As previously set forth above, the Idaho Supreme Court felt differently about the evidentiary value of Exhibit 253, even though it was taken in 2003:

Perhaps most telling is Plaintiff's Exhibit 253, which is a photograph of the shared boundary between Government Lot 2, Parcel B, and Parcel A, and the Quonset hut on Parcel A. While the photograph was taken in 2003 (well after the prescriptive easement was established prior to 1980), it is nonetheless informative. The photograph depicts a large hill to the south of the access road, which the access road gradually curves around. We recognize that the uncontroverted evidence showed that the Akers permitted Peplinski to extend the access road further to the west in Parcel B after the Akers purchased the property. However, the photograph does not support a finding that the access road previously turned 90 degrees to the south traveling straight up a steep hill in order to access Parcel A, as would be required if the access road had immediately turned 90 degrees upon entering Parcel B. In light of this photographic evidence, we conclude that there is not substantial evidence supporting the district court's conclusion as to the location of Appellants' prescriptive easement on Parcel B.

147 Idaho 39, 48, 205 P.3d 1175, 1184.

For a variety of reasons, this Court concludes the Rasor alignment advocated by the Akers is the location of the road as it existed from 1966 to 1980. The Court will discuss those reasons.

First, Whites and Mortensens have the burden of proving the Welch Comer map is the correct depiction of the location of the road as it existed from 1966 to 1980. This Court finds Whites and Mortensens have failed to meet that burden of proof as pertains to the location they are advocating. In other words, this Court finds on a more probable than not basis that the Welch Comer map is not the correct depiction of the location of the road as it existed from 1966 to 1980. This Court finds on a more probable than not basis that the alignment shown on the Rasor map is the correct location of the road as it existed across Parcel B from 1966 to 1980.

Second, the proof itself shows the Rasor map more likely demonstrates the location of the road during those years. Thus, even if the burden of persuasion were placed upon the Akers, they

have proved the easement location shown on the Rasor map by a preponderance of the evidence.

Whites' argument that: "...during the relevant period for the prescriptive easement the access road traveled east/west along the property line into Section 24 a distance of approximately 125 to 140 feet from the 19-24 corner..." (Defendants White Brief Re: Easement Location, p. 21), is not borne out by the very map which Whites submitted. That map represents where Whites argue the road existed at the pertinent time, prior to 1980. Exhibit B to Whites' opening brief shows the road travelling due west (and ever so slightly north) as it passes the 19-24 quarter corner, and proceeding in that west and slightly north alignment for 82.14 feet, then the road abruptly turns more than ninety degrees to then run south and slightly east. Defendants White Brief Re: Easement Location, Exhibit B. The *farthest* this roadway runs into Akers' Parcel B is 116.57 feet. Thus, even this new map submitted by Whites does not support their claim that: "...prescriptive easement the access road traveled east/west along the property line into Section 24 a distance of approximately 125 to 140 feet from the 19-24 corner..." Defendants White Brief Re: Easement Location, p. 21.

The Idaho Supreme Court was persuaded by trial Exhibit 253, a photograph of the area in dispute taken in 2003, long after the prescriptive period had ended in 1980, and indeed taken after the trial in this matter had begun. Reading the Idaho Supreme Court's decision, that Court was focused on the *shape* of the curve, as it wrote: "The photograph depicts a large hill to the south of the access road, which the access road gradually curves around." If, as Rasor's map (trial Exhibit 7) shows, that curve begins after the road dips slightly to the south onto what is now Whites' property, then the shape of that curve is rather irrelevant as it does not pertain to Akers' land.

The Idaho Supreme Court wrote that Exhibit 253 was taken in 2003. 147 Idaho 39, 48, 205 P.3d 1175, 1184. However, that is not consistent with the testimony of Dennis Akers at the time the photograph was admitted into evidence. Dennis Akers testified the photograph was taken in

the early 1990's. Tr. Vol. II, p. 1199, L. 16 – p. 1200, L. 16. In any event, it was taken after the pertinent prescriptive period had run.

There is a variety of other evidence to show that the roadway dipped down toward Whites' property, almost immediately after crossing the quarter corner point onto Parcel B, (as depicted in Rasor's map, trial Exhibit 7), as opposed to continuing straight on for quite some distance onto Parcel B (as depicted by the 2010 Welch Comer map). There is no evidence to corroborate the slight north bend of this roadway as it crosses the quarter corner point onto Parcel B (as depicted by the 2010 Welch Comer map). The evidence the Court has reviewed shows the roadway began to bend toward the south, at or before it crosses the quarter corner point as it proceeds west onto Parcel B, and because of that bend, the evidence shows the roadway travelled onto Parcel B only a short distance before it is entirely on what is now Whites' land.

Because this road was only 12.2 feet in width, and because it was right up against the northern boundary of the Reynolds property (and on the southern boundary of Akers' property), and then as the road proceeded west, it was right up against the northern boundary of what is now Whites' property (indeed Welch Comer has the straight portion of the road well onto Reynolds' property and Whites' property before it even begins to turn into Whites' property), it did not take much of a deviation (or curve) to drop all of the road down into Whites' property and off of Parcel B further to the east (immediately after crossing the quarter corner point onto Parcel B, as shown in the Rasor map, trial Exhibit 7), as opposed to the road continuing straight for quite some distance further to the west (as shown in the 2010 Welch Comer map).

That slight curve or deviation appears in many of the trial exhibits. The aspect of the Welch Comer map that is supported by the evidence is that the road extended to the west past the east border of Parcel B, before it turned to the south. However, this Court finds the majority of

that western continuation occurred on what is now Whites' property, as depicted on Rasor's map, trial Exhibit 7.

That curve occurring more to the east immediately after crossing the quarter corner point is corroborated to a limited extent by the 2010 Welch Comer map, as that map shows a good portion of the roadway existed on Reynolds' property, existing slightly further to the south than shown on Rasor's map. If the location of the straight portion of roadway as shown on the Welch Comer map is accurate, the road need only drop to the south (or curve to the south) about eight feet, to be completely off Akers' Parcel B land, and off that Parcel B land completely at a point near the quarter corner point and not at a point 150 feet more to the west.

Indeed Exhibit 253, persuasive to the Idaho Supreme Court, shows the road bending toward the south as it proceeds west past the quarter corner point (the west boundary of Akers' Parcel B). And while Exhibit 253 does not show the quarter corner point with specificity, that location can be approximated on Exhibit 253 by reference to a couple of different landmarks that have a known location from other exhibits. The Quonset hut shown in Exhibit 253 is about 100 feet from the property line according to the January 2010 Welch Comer map. Exhibit B to "Defendants White Brief Re: Section 24 Easement Location." That is consistent with the trial testimony of Richard Peplinski, who testified at trial that the Quonset hut was located about 75 feet from his property line with Reynolds' property. Defendants White Brief Re: Easement Location, p. 18. Tr. Vol I, p. 780, Ll. 6-12. The Quonset hut was 30 feet wide. Tr. Vol. I, p. 780, Ll 13-25. If that Quonset hut is located only 75 feet from Reynolds' property, that demonstrates that the curve in the road bending slightly toward the south (as shown on Exhibit 253) begins just as the roadway proceeds west past the quarter corner point.

Exhibit 253 also illustrates the impossibility that the road existed straight into Parcel B 125-150 feet before turning to the south into what is now Whites' land, as testified to by Alan

Kiebert (Tr. Vol. II, p. 1830, Ll. 2025), and as argued currently by the Whites. Defendants White Brief Re: Section 24 Easement Location, p. 6, p. 19. While 150 feet is only an “estimate” as testified to by Kiebert, it is not an estimate supported by other evidence. Kiebert was looking at Exhibits I1 and K1 in coming to that opinion. However, in neither of those aerial photographs (I1 taken in 1951) or K1 taken in 1965) can you see exactly where the section line runs. In J1 you can see where the road dips to the south relative to the east/west section line prior to entering into Parcel B. Exhibit J1 was admitted (Tr. p. 1678 L. 16 – p. 1680, L. 23) and is an aerial photograph taken in 1958. If the section line in Exhibit J1 is accurate, the road has already dropped down into what is now Whites’ land before it begins the “shepherd’s crook” bend. Holding a straight edge across the common boundary between Akers’ Government Lot 2 land and the Reynolds property, it is clear from these aerial photographs that during the relevant time period (and before that time period) the roadway dipped to the south into what is now Whites’ parcel as it crosses the quarter corner and into Parcel B. Assuming that boundary line between Akers’ Government Lot 2 land and the Reynolds’ property was accurately placed on these aerial photographs, the roadway deviates from that straight line as it dips to the south into what is now Whites’ parcel as it crosses the quarter corner and into Parcel B. While this Court makes an assumption that the boundary line between Akers’ Government Lot 2 land and the Reynolds’ property is accurately placed, that assumption is supported by the evidence. These aerial photographs provide evidence supporting the Rasor location and not supporting the Welch Comer location. In Exhibit J1, taken just eight years before the relevant time period began, most, if not all, the bend occurs on what is now Whites’ land. On Exhibit J1, all the “shepherd’s crook” exists on what is now Whites’ land. On Exhibit J1, little if any of the road exists in Parcel B, and certainly, if any of the road exists on Parcel B it does not exist for 150 feet as testified to by Kiebert. In Exhibit I1, the shepherd’s crook bend exists, but is faint (less used),

and to the extent it exists it appears to all exist on what is now Whites land.

The Idaho Supreme Court decision recognized Akers permitted Peplinski to extend the access road further to the west after Akers purchased their property. The import of that finding is that prior to 1980 the road did not exist on Parcel B as far to the west as it does now. The importance of that is that the more current photos (Exhibit 253, 331) must show the road continuing even further to the west across Parcel B than the road existed between 1966 and 1980, the pertinent time for the prescriptive period.

The “Welch Comer” alignment, even as it travels across Akers’ Government Lot 2 land, is not completely on Akers’ property. About 60 percent of the roadway in the Welch Comer alignment is on Akers’ section 19 property, and about 40 percent is on the Reynolds property. Reynolds have never been made a part of this lawsuit.

Whites attached Exhibit D47 and Exhibit 156 to their Defendants White Brief Re: Easement Location. Exhibit 156 was not admitted into evidence and it is unknown when it was taken. Exhibit 156 shows the road tapering off to the south as it approaches its west end. Exhibit D47 was admitted into evidence, but it is unknown when Exhibit D47 was taken. Tr. p. 346, L. 5 – p. 347, L. 3. Exhibit D47 shows the road tapering off to the south as it approaches its west end.

Exhibit 82 and 83 were testified to by Dennis Akers. Tr. Vol. I, p. 704, L. 11 – p. 716. L. 23. These photos were taken by Dennis Akers shortly after the lawsuit was filed in 2002. Tr. Vol I, p. 709. L. 22 – p. 710, L. 18. Exhibit 82 and 83 show the easement road going south onto what is now Whites’ property as soon as the road crosses the quarter corner area proceeding west into Akers’ Parcel B. Exhibit 79, page 1, photograph 3, 6, 11, page 2, photograph 9, page 3, photograph 2, 3, 5, 6, 7, 8, 11, 12, 14 all show the easement road going south onto what is now Whites’ property as soon as the road crosses the quarter corner area proceeding west into Akers’ Parcel B. All the

photographs shown on Exhibit 79, page 3, were taken before White and Mortensen began any of their work to this road, and thus, obviously taken before this lawsuit was filed, and the photographs on pages 1 and 2 were taken after White and Mortensen began working on this road. Tr. Vol. 1, p. 718, L. 3 – p. 722, L. 16.

Exhibit 57 is instructive. Akers writes: “Defendants’ Exhibit 57, taken by Mr. Peplinski at a point after his father bought the property and improved it and estimated to be around 1993, shows the upper road before it turned into White’s property.” Plaintiffs’ Brief on Remand Regarding Location of Easement, p. 10. Akers continues:

From these photographs [D57 and 176], it can be seen that the access road did not run parallel with the east/west section line through section 24. Instead, it dipped south before the curve in the road, referred to as the “shepherd’s hook” by the Supreme Court.

Id., p. 12. This Court agrees. Exhibit D57 was identified by Mortensen as being representative of the roadway when Mortensen purchased the property in 1994. Tr. Vol. I, p. 344, Ll. 3-18. Most importantly, if this roadway from 1966-1980 continued straight across the southern edge of Parcel B for 125-150 feet as advocated by Whites and as illustrated in the Welch Comer map, then the road in 1993 and at present would travel on Parcel B for a shorter length, and there is no evidence of that. Keep in mind Akers allowed Peplinski to *extend* the road further to the west into Parcel B after Akers purchased their land. If the road before 1980 travelled as far to the west as Whites claim, then there would be some evidence of it being obliterated or abandoned. There would need to be signs of obliteration or abandonment because had such a roadway further to the west existed prior to 1980, it would need to have had fill to have existed prior to 1980 (given the slope of Akers land as shown in Exhibit D57), and then the fill would have had to have been taken away to match the contour of the slope of the ground on Akers’ land. There is no physical evidence of that having happened, and there is no testimony of that having happened. Instead, as shown in Exhibit D57, there are large trees growing in the very area Whites advocate the road existed prior to 1980.

Exhibit E is an “Area Map Based on 1998 Kootenai Co. Aerial Photo”, and it clearly shows the roadway veering off to the south as it crosses the quarter corner.

Exhibit 331, cited by Whites, corroborates Rasor’s alignment. Exhibit 331 contradicts the Welch Comer alignment in that it appears to have entered into the White property well before this triangle wooded area. Exhibit 331 was taken in 1998, and shares the same problem as Exhibit 253 in that it was taken after the relevant time period.

Exhibit 41 and Exhibit 42 (Exhibit 42 is simply an enlarged copy of the pertinent portion of Exhibit 41) are aerial photographs which show a straight road appearing to be on Akers’ property (Government Lot 2), then a shepherd’s crook sort of turn to the south where it immediately appears to terminate at a structure. All of this route and structure are silhouetted by an interlineated line placed by someone over the aerial photograph, making it impossible to tell what actually existed on the earth under that interlineated line.

A problem with the Welch Comer location is that according to the Welch Comer illustration, the road and the Quonset hut are all located “per exhibit 42 and 43” which are both aerial photographs. Scott Rasor testified specifically about those two exhibits:

Q. (Mr. James) With respect to Exhibits 42 and 43 are you familiar with – these are blow-ups of maps. Are you familiar with these maps?

A. I’m familiar with the quad sheet which is – I can’t see the number on it.

Q. Yeah. Admittedly some of the references are not on these blow-ups, but you work on a daily basis with these types of maps?

A. Yes.

Q. I’ll just lay it out this way. The other side has been using these maps to try to create – in blowing them up to create propositions regarding the exact location of this road that you see depicted here, and I want to ask you are these maps – what’s the margin of error on these maps, these types of maps? For example, if in referencing a road of this kind and section lines –

The Court: And for the record, you’re pointing to which –

Mr. James: Exhibit Number 42, Defendants’ 42.

Mr. Reagan: Objection, your Honor. That mischaracterizes the exhibit. Number 43 is an aerial photograph.

Mr. James: No, 42.

Mr. Reagan: Forty-two? Which are you – are you asking him the question as to 42? That’s an aerial photograph. That’s a blow-up of an aerial photograph.

Mr. James: Okay. I'll rephrase it.

Q. (by Mr. James) With respect to what counsel's represented as a blow-up of an aerial photograph, these lines you see, are those overlays?

A. I assume so. You don't take a photograph and get those automatically on the photograph. Somebody has to draw those on there, superimpose it over the photo, so depending on how they did that, you know.

Q. Are there errors?

A. Yeah. There's always a margin of error in those kinds of things, yes.

Q. Can you quantify that at all for us, the margin of error?

A. Well, on a quad sheet that's blown up like that –

Q. Exhibit 42.

A. Yeah. You can scale a full-size drawing within 200 feet.

Q. Within how many feet?

A. Two hundred feet.

Q. Two hundred feet?

A. Yeah.

Q. In other words, so this road that's depicted here could be 200 feet one way or the other?

A. I'm not saying that. I'm just saying you're trying to pick – go to that drawing and a scale a distance at a twenty scale, one – well, I don't know the distance, but you can't accurately scale off those drawings more than 200 feet, but, you know, the roads that are drawn shown on those were taken from aerial photos and then put onto the map, so as good as the photo is so is the drawing, the quad sheet.

Tr. Vol. I, p. 462, L. 21 - p. 465, L. 5. Thus, the Welch Comer map is an estimate based on Exhibits 42 and 43, and there is a foundational accuracy problem with those photographs. Scott Rasor also testified that the county assessor's maps in evidence are not based on surveys, and they're quite often not accurate. Tr. Vol. I, p. 439, Ll. 5-12.

Beyond the photograph evidence and maps, there is testimonial evidence which supports the Rasor location advocated by Akers and which contradicts the Welch Comer location advocated by Whites. Akers claim Richard Peplinski (predecessor to Whites' land) testimony shows he widened the roadway further to the west with Akers' permission. Plaintiffs' Brief on Second Remand Regarding Location of Easement, p. 7-8. Whites claim Peplinski said no such thing. Reply Brief of Defendants White Re: Easement Location, p. 3. The Court heard Peplinski testify. The Court has re-read Peplinski's testimony. Peplinski testified he had the Quonset hut built on his property in about 1971. Tr. Vol. I, p. 779, Ll. 16-24. This Quonset hut was built about 75 feet west of his

section line. *Id.*, p. 779, L. 25 – p. 780, L. 12. Peplinski testified the road went about 125 feet west of the section line but defendants attorney did not ask him if that 125 feet was on Akers’ land,

Peplinski’s land or on both parcels. *Id.*, p. 782, Ll. 1-24. Peplinski testified:

Q. Okay. So in performing that work did you change the preexisting configuration of the access road up in that area?

A. Yes.

Q. And how did you make – and what changes?

A. Uh, it had a tendency to curve into our property more, and it changed the corner so it would widen it out so we could turn into our quonset hut more easily.

Q. Okay. And did that have the effect of moving the westerly side of the road more westerly?

A. No. No.

Q. I’m just pointing. Did it expand it out westerly?

A. From what it was originally, no.

Id., p. 799, Ll. 9-23. At best, Peplinski’s testimony does not help Whites’ proposition. Peplinski widened the roadway. If the curve occurred on Akers’ land, then the roadway was widened to the west on Akers’ land, meaning the roadway existed slightly more to the east than it does at present. If the curve occurred on Peplinski’s own land, then that supports Akers’ position that the roadway dipped to the south more to the east than as advocated by Whites. Either way, Peplinski’s testimony is not helpful to Whites’ proposition. The fact is, Peplinski did not identify where this roadwork occurred or where the curve existed prior to that roadwork, as between his land and Akers’ land.

Finally, there is circumstantial evidence supporting the Rasor location advocated by Akers and contradicting the Welch Comer location advocated by Whites. As noted by Akers. “David English, title officer, testified that at one point in time around 1945 there had been a 20 x 50 foot easement reserved across a portion of Parcel B for access to the 160 acres owned by Moretensen and White. Vol. I, P. 857, ll. 3-25; p. 858, ll. 1-20; p. 860, ll. 14-20.” Plaintiffs’ Brief on Second Remand Regarding Location of Easement, p. 8. Since Akers eventually purchased Parcel B, that express easement evaporates under the doctrine of merger, but the amount of land reserved in that express easement is circumstantial evidence of what someone thought was the

amount of land necessary across Parcel B, given the terrain, to have an express easement into what is now Whites' land.

III. CONCLUSION AND ORDER.

Based on the above, the location of the prescriptive easement across Akers' Parcel B land is as shown in Exhibit 6 and 7. Akers have proven such by a preponderance of the evidence, even though Akers did not have the burden of proof. Whites and Mortensens have not proved any contrary location by a preponderance of the evidence when they had the burden of proof.

IT IS HEREBY ORDERED the prescriptive easement in favor of Whites and Mortensens across Akers' Parcel B land is as shown in Exhibit 6 and 7, and as described in Exhibit C to the Plaintiffs' Brief on Second Remand Regarding Location of Easement. Exhibit C to the Plaintiffs' Brief on Second Remand Regarding Location of Easement is attached hereto. That easement is 12.2 feet wide.

Dated this 29th day of September, 2010.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of September, 2010 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

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By _____
Jeanne Clausen, Secretary