STATE OF IDAHO)
County of BONNER) ss

FILED_____

AT_____ O'clock _____M
CLERK, DISTRICT COURT

_____
Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
OF THE STATE OF IDAHO, COUNTY OF BONNER

ROBERT C. READ and ALEXIS M. READ, husband and wife,	) Case No.: CV-99-00830
Plaintiffs,	) MEMORANDUM DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW
vs.	
JENNIFER HARVEY, an unmarried woman,	
Defendant	

I. MEMORANDUM DECISION.

A. PROCEDURAL BACKGROUND.

This is a boundary line dispute. Plaintiffs Robert and Alexis Read own property adjacent and to the east of defendant Harvey. The parties' common boundary according to the deed is the centerline of a creek, known as Little Gold Creek. Presently, along this boundary the creek generally flows from the north to the southwest, then back toward the southeast. That route has come to be known throughout this litigation as "channel C" and then into "channel A". As the river flows into the area from the north, it makes a turn toward the southwest in "channel C" and then as the creek changes direction toward the southeast it flows in "channel A". "Channel B" is an area that does not have flowing water, and if it did contain water it would take the creek as it

flows into the area from the north, and instead of proceeding to the west and back as channel C and A do, channel B would proceed more nearly straight south, eventually joining up with the creek as it presently flows. At summary judgment and at trial Harvey claimed the creek flowed even further to the east of channel B. This is an oversimplification, but channel C and A on one hand, and the claimed "natural channel" of the creek which lies to the east of channel B on the other hand, if connected, create sort of a triangle of land. Reads claim their common boundary with Harvey lies to the west, along channel C and A. Harvey claims her common boundary with the Reads lies toward the east, to the east of channel B. As to each party, if that party prevails in this litigation, that party would have a greater amount of land. The dispute is over this "triangle" of land.

On March 13, 2002, this Court granted Reads' Motion for Summary Judgment, and entered an Order Granting Motion for Summary Judgment on April 2, 2002. The Court found that the boundary between the parcels was the centerline of Little Gold Creek, and that the centerline of Little Gold Creek had not changed since 1972 when the legal descriptions of the common boundary between the Reads' and Harvey's parcels were set. Harvey filed a Motion to Reconsider. Oral argument on said motion was held on June 18, 2002, and this Court denied that motion and entered an Order to that effect on July 1, 2002. Harvey appealed from these decisions.

On June 2, 2004, in an unpublished opinion, the Idaho Court of Appeals affirmed this Court's decision granting the Reads' Motion for Summary Judgment and affirmed this Court's decision denying Harvey's Motion to Reconsider, reversing only on the sufficiency of the boundary description of the creek. Harvey filed a Petition for Review, which was granted. The matter was argued to the Idaho Supreme Court and on April 6, 2005, the Idaho Supreme Court

filed its decision reversing this Court's grant of summary judgment in favor of the Reads. *Read v. Harvey*, 141 Idaho 497, 112 P.3d 785 (2005). The Idaho Supreme Court held: "The intentions of the parties to the conveyance instruments in question are consequently unclear and must be determined as questions of fact with reference to the surrounding facts and circumstances." 141 Idaho at 500, 112 P.3d at 788. As to the intent of the parties to the conveyance, the Idaho Supreme Court went on to find: "Whether the creek referred to in the deeds is channel A, a drainage ditch which has consistently during the times in question carried water, or the comparatively dry historical natural creek channel is a genuine issue of material fact that precludes summary judgment." *Id.* Accordingly, on remand, a trial was held before this Court on August 21-23, 2006. On August 30, 2006, the parties submitted post-trial briefs and amended proposed findings of fact and conclusions of law they felt were supported by the evidence at trial. Accordingly, the matter is now at issue.

B. DISCUSSION.

The Idaho Supreme Court held it is the intention of the parties to the original conveyance back in 1972, which is the issue to be decided by the Court in this case. "Whether the creek referred to in the deeds is channel A, a drainage ditch which has consistently during the times in question carried water, or the comparatively dry historical natural creek channel is a genuine issue of material fact that precludes summary judgment." 141 Idaho at 500, 112 P.3d at 788. "The intentions of the parties to the conveyance instruments in question are consequently unclear and must be determined as questions of fact with reference to the surrounding facts and circumstances." *Id.* Presumably, the Affidavit of Jerry VanOoyen, filed in this case on February 7, 2002, was part of the record the Idaho Supreme Court reviewed. A reading of that affidavit

should have conclusively answered the question of the intent of the original parties to the conveyance. At summary judgment, Harvey put on no evidence to the contrary. The Supreme Court should have known from reading VanOoyen's Affidavit, that back in 1972: 1) VanOoyen was retained by Dick and Nancy Andersen to assist them in the subdivision of their land; 2) that VanOoyen subdivided Andersens' land into 14 parcels, all but two of which used the centerline of the main channel of Little Gold Creek which traversed the property as a boundary line; 3) that VanOoyen drew the location of Little Gold Creek on Exhibit A to his affidavit (trial Exhibit 7 and 8); and 4) that VanOoyen stated under oath in his affidavit:

> The main channel of Little Gold Creek that was intended to be the boundary between what are now the Read and Harvey properties is channel "A" as depicted on the Tucker Engineering survey. I am also positive that Little Gold Creek did not flow through the ditch labeled as "B" on the Tucker Engineering survey at any time relevant to this proceeding.

Affidavit of Jerry VanOoyen, filed February 7, 2002, p. 2, ¶7. In spite of that uncontroverted evidence, the Idaho Supreme Court felt there was an issue of material fact regarding the intent of the original owner. Accordingly, a trial was necessary.

The Idaho Supreme Court could not have been more direct when they wrote that it is the intent of the parties to the original conveyance back in 1972, which is the issue to be decided by the Court in this case. Harvey completely sidesteps this reality when she argues: "As explained to the Court in the opening statement, this case really involves one fundamental issue: Can a natural stream, used as a legal description for a common property boundary, be artificially diverted and relocated into man-made ditches to cause a modification of the common boundary line?" Closing Argument of Defendant/Counterclaimant, p. 1. Harvey argues the answer to this question should be "No." This Court finds the answer to that question is with out a doubt, "yes".

Reads purchased three parcels that reference the creek. The Reads' 1981 deed reads in part: "…lying South of the centerline of the Creek". Reads' 1987 deed reads in part: "…to the center line of the main tributary to the creek…". Finally, Reads 1997 deed reads in part: "to the centerline of the creek…" Exhibit E.

The deed under which Harvey purchased reads in part: "…to the centerline of the main tributary of the creek…" Exhibit F. All of the deeds at issue are consistent, they all reference the centerline of a creek. The deeds do not read: "to the center line of the natural stream which has been dry for untold decades." Harvey's argument would ignore VanOoyen's testimony that it was financially advantageous for he as his master's (the Andersons, who originally owned and subdivided this land) servant to subdivide with the creek as the boundary. Harvey's arugment would also assume that what VanOoyen ***really*** meant when he subdivided Andersens' land was to have 12 of the 14 lots have an irregular boundary to the centerline of an ancient river bed, of which at the time VanOoyen drew up the parcels, VanOoyen was ignorant even existed. Unlike the geohydrologist hired by Harvey, VanOoyen did not have the training to know what was a "natural" creek and what was man made. VanOoyen was a realtor, a man who knew that for his boss to get the most return for the property he was charged with subdividing, it meant VanOoyen's placing the boundary where the creek ***flowed*** in 1972. VanOoyen never gave a moment's thought as to ***how*** (forces of nature vs. force of a backhoe) Little Gold Creek came to flow at this exact spot on this property in question. All VanOoyen cared about is ***where*** Little Gold Creek flowed in 1972. It flowed in the same spot in 1972 as it did when Reads purchased their parcels, the same place it flowed when Harvey later purchased her parcel, the same place it flowed at summary judgment in 2002 and the same place it flowed at present at the time of trial in 2006.

The only evidence regarding the intent of the parties to the original conveyance back in 1972, is the testimony of Jerry VanOoyen.. Mr. VanOoyen testified very credibly and clearly that he was the one who drew up the property boundaries for Nancy and Dick Andersen, who subdivided the Andersons160 acre parcel (Northwest Quarter of Section 12 in Township 58) for sale in to smaller tracts, back in 1972. While the Andersens did not testify (it was not made known to the Court whether they are even living at the time of trial), it was clear from VanOoyen's testimony that the Andersens' testimony would not be relevant, as VanOoyen was trusted entirely due to his expertise in subdividing property, to establish the boundaries. VanOoyen testified he arranged the parcels as shown on Exhibit 7, and arranged as many as possible to have a boundary on Little Gold Creek (not some dry former creekbed), for two reasons: 1) to make as many parcels as possible more valuable as they would have access to water, and 2) so you wouldn't have a parcel bisected by the creek, such that the owner could not get to both sides of his/her parcel without building a bridge. VanOoyen testified that he created the map in 1972 with the help of aerial photos from Bonner County, and that after he drew Exhibit 7 he had John Engman chain and compass the property. Engman's measurements showed VanOoyen that his original drawing based on aerial photographs was off slightly, and VanOoyen then moved Little Gold Creek slightly on the map to correct that error, as shown on Exhibit 8. VanOoyen testified that Engman flagged the boundaries of the creek with markers. VanOoyen testified he intended the boundary to go to the centerline of the creek that flowed, the only creek that had water flowing in it, because flowing water was important to him to maximize the value of the parcels. VanOoyen testified he drew the parcel boundaries and drew the route of the creek, with arrows to show the direction of the flow. This corroborates the fact that in no way was he intending to establish a boundary to some historical, dry creek bed, of which he was

in 1972, unaware even existed. All VanOoyen's testimony at trial was consistent with his Affidavit filed February 7, 2002.

VanOoyen's testimony that the course in which Little Gold Creek flowed in the area in question had not changed since 1972, was corroborated by Tom Tauber, who testified that he was familiar with the area back in 1972, and who hayed in the area from 1975 to 1982. VanOoyen's testimony was corroborated by Harvey's own witness, Frank Boss. In 1972, Boss bought the parcel Harvey now owns, plus some additional land which totalled 75 acres. Boss testified he sold the land in 1974, in part because he was tired of walking down to the creek to get his water. While living there in 1927-74, Boss dug a deep hole with a backhoe, adjacent to the creek, on what he considered his land and his side of the creek, from which to fetch his water to haul back to his cabin. Boss marked the location of the hole he dug on Exhibit QQQQQ. The mark on the map was adjacent to where Little Gold Creek currently flows, in channel C. That wasn't the only witness Harvey called that hurt her position. Richard Tucker's letter JJ reflected his views at the time it was written in 2003, and shows that ever since 1977, when Tucker was first involved in surveying this area, Little Gold Creek has always flowed through channel A. Tucker's trial testimony was that when his crew surveyed out there they marked two coordinates for the "creek", it was all wet out there and his crew went out in the water as far as they could to set the points in two locations for the centerline for the "creek". But obviously the survey crew got out far enough and felt and measured something deep enough and with sufficient flow that they labeled the feature "creek", and marked its centerline, and it is in the location of channel A.

Since no later than February 7, 2002, the date VanOoyen's affidavit was filed, Harvey has known what the intent of the original owner, Andersens. To create an issue of fact in this case, Harvey needed to get the testimony of the original owners to contradict VanOoyen.

Apparently Harvey could not obtain this evidence. To then attempt to "create" an issue of fact in this case by the ruse of the location of an ancient creek bed, is disingenuous, and ignores the language of all relevant deeds.

Harvey's argument is beyond contorted. In 1972, Andersons sold a parcel to Popplewells, which deed has a grant of easement across other property "…for the purpose of cleaning and maintaining drainage ditches." Exhibit G. There are drainage ditches in the area, other than channel A, B or C. Harvey thus argues: 1) Andersons knew the difference between a ditch and the natural channel of a creek, and 2) geohydrologists hired by Harvey gave the opinion that sometime before 1972, Little Gold Creek was diverted from its natural channel to the east of channel B, to the combination channel C and A, it follows that Andersens must have somehow intended to have meant the boundary be the historical natural creek channel (though dry), and not where Little Gold Creek was actually flowing (though in a ditch that was man made, or augmented by man). (Harvey's) Amended Proposed Findings of Fact and Conclusions of Law, p. 5, ¶¶ 9, 10; p. 5, ¶5. Harvey's conclusion in no way flows from the premise. Harvey's contorted argument ***assumes*** the Andersens had the knowledge that channel C and A were man made drainage ditches. There is not one shred of evidence to support that *assumption.*

Harvey makes the claim:

> That conclusion [that Andersens meant the boundary to be the natural channel of the creek not the drainage ditch] is further supported by reference to the principles of accretion and avulsion. Accretion is "the process of ***gradual*** addition of solid materials, so as to extend the shoreline." *Smith v. Long,* 73 Idaho 309, 311, 251 P.22d 206, 207 (1952) (emphasis added). If accretion occurs, "the riparian owner's title extends over and covers the land thus accreted." *Id.*

Amended Proposed Findings of Fact and Conclusions of Law, pp. 11-12, ¶6. Harvey's claim ignores the fact that none of her experts, nor Reads' expert, testified about accretion. Certainly

no one has ever opined about accretion occurring *after* 1972, which is the only time period that would be relevant.

Harvey argues the creek originally flowed where Larry Glahe testified where the "natural drainage" is located on Exhibit QQQQQ, and not in drainage channels A, B or C. Amended Proposed Findings of Fact and Conclusions of Law, p. 9, ¶ 27. In 2001, Glahe admitted that it was "difficult to determine where the center line of the main tributary to Gold Creek was on 10/25/72 when the parcel was created, but it is clearly not the man made ditches constructed after the deed was created." Exhibit MM. But nowhere in that letter or at any other time does Glahe state that channel A and C were man made *after* the 1972 deed was created. Most importantly, it is factually undisputed that water flowed in channel A and C in 1972. The Idaho Supreme Court so found *Read v. Harvey,* 141 Idaho 497, 112 P.3d 785 (2005), and this Court so found at summary judgment and so finds following trial. Thus, Glahe's opinion as to where the "natural drainage" is located on Exhibit QQQQQ, is completely irrelevant. Even if it were relevant, Glahe's opinion that such was the "natural channel" is entirely impeached as he had no idea that this "natural channel" is the same location where Reads have since 1991, been excavating a landscaping diversion stream, pursuant to proper permitting of record, that had never come to fruition (never held flowing water). Harvey argues John Gillham's testimony corroborates the USGS maps (and presumably Glahe's opinion) as to the location of the "natural channel". Amended Proposed Findings of Fact and Conclusions of Law, pp. 9-10, ¶¶ 27-30. There was testimony both ways as to the accuracy of USGS maps. Gillham's opinion was the water in 1977, flowed further to the east when he first became familiar with the area. However, Gillham really had no basis for that opinion, no landmarks or any reason why he held that opinion.

Harvey claims that "During the Reads' ownership of the land, the natural channel was changed" (Amended Proposed Findings of Fact and Conclusions of Law, p. 6, ¶13), and that the Reads accomplished this change after Harvey purchased her parcel in 1993. *Id.*, p. 6-9, ¶¶ 13-25; p. 12, ¶ 9. Specifically, Harvey claims the Reads "impermissibly altered channel C". *Id.*, pp. 13-14, ¶5. This claim is not only factually unsupported by the evidence (this Court finds Reads to be more credible regarding any excavation to be for the purpose increasing the existing creek bed in part, and the purpose of creating a landscape diversion stream, and not the wholesale alteration of the creek channel), but is factually and legally irrelevant since all the evidence as found by this Court and by the Idaho Supreme Court, is that back in 1972, the creek flowed where it flows today.

The Court, having considered the evidence, admitted at trial and having considered the argument and briefing of counsel, makes the following findings of fact and conclusions of law:

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. FINDINGS OF FACT.

1. Plaintiffs, Robert and Alexis Read, are the owners of adjoining parcels of real property in Bonner County, Idaho formally described on Exhibit A hereto (the "Read Property").

2. Defendant, Jennifer Harvey, is the owner of the real property in Bonner County, Idaho formally described on Exhibit B hereto (the "Harvey Property").

3. The respective properties owned by Reads and Harvey were originally subdivided in 1972 by the Andersens.

4. Portions of the Read Property and the Harvey Property share a common boundary described in their deeds generally as the centerline of a creek. Though the creek does not appear

to be formally named, the parties and their witnesses have consistently referred to the creek as Little Gold Creek.

5. At present, Little Gold Creek flows in a channel coming from the northeast, ultimately entering a channel marked on trial Exhibit 11 (the "Tucker Survey") as Channel C. The creek then flows through Channel C into Channel A, which then carries the flow southward past the parties' properties where it eventually empties into Gold Creek.

6. The parties do not dispute that at some time before 1972, Little Gold Creek flowed in a channel different than Channel C to Channel A.

7. The Idaho Supreme Court has held the "…drainage ditch which has consistently during the times in question carried water…" is the Channel C to Channel A route. Harvey did not appeal such finding. That finding is consistent with this Court's finding on summary judgment, is consistent with all the evidence produced at trial, and is the finding of this Court after trial. There is absolutely no evidence that at any time since 1972, has Little Gold Creek actually flowed in any other location than Channel C to Channel A. There is absolutely no evidence that Little Gold Creek flowed in Channel B or at any other location at any time from 1972, to the present. Prior to 1972, it is simply not relevant where, or when, Little Gold Creek flowed in some other location other than in channel C to channel A.

8. Based on the credible evidence introduced at trial, this Court is convinced and so finds that:

a. Nancy and Dick Andersen, who subdivided the Northwest Quarter of Section 12 in Township 58 in 1972, and thus created the legal descriptions at issue, intended the common boundary between those portions of the Read Property and the Harvey Property

involved in this action to be the centerline of the channel in which water was then flowing, whether or not the channel was natural or manmade.

b. In 1972, only one channel carried water on a consistent basis at any location between the Read Property and the Harvey Property, that flow being from the northeast into channel C and then channel A.

c. The location of the channel in which Little Gold Creek flowed, the centerline of which the Andersens intended to be the common boundary, has not changed other than perhaps by slight accretion since 1972 (there was no evidence of accretion at trial).

9. The Court also finds that no credible evidence was presented by the defendant that:

a. The natural historical channel of Little Gold Creek was visible or identifiable on the ground in 1972.

b. The centerline of the natural historical channel of Little Gold Creek carried a flow of water at any time relevant to this action.

c. The Andersens (directly or through their agent Jerry VanOoyen) did, or logically would, intend their reference to the centerline of the creek to mean dry, or comparatively dry, ground instead of a channel containing a constant flow of water.

d. The Reads did anything to materially alter the flow of water in Little Gold Creek.

10. In making the foregoing findings of fact, the Court places particular emphasis on the very credible and convincing testimony of Jerry VanOoyen. The Court fully accepts his testimony that he designed the subdivision on behalf of the Andersens, that he selected the centerline of the creek to be the common boundary, that he intended the channel in which water

was actually flowing to be the creek referenced in the deeds, and that the creek appears to be flowing in the same location today as it was in 1972.

B. CONCLUSIONS OF LAW

1. This matter was tried before the Court as a bench trial. Therefore, the Court was the trier of fact. "When a case has been tried to a court, it is the province of the trial judge to weigh the conflicting evidence and testimony and to judge the credibility of witnesses." *Magic Valley Truck Brokers, Inc. v. Meyer,* 133 Idaho 110, 114, 982 P.2d 945, 989 (Ct. App. 1999).

2. Reads claim the Idaho Supreme Court's comment that channel A "…has consistently during the times in question carried water" (*Read v. Harvey*, 141 Idaho 497, 500, 112 P.3d 785, 788 (2005), is "the law of the case". The doctrine of "law of the case," mandates that the rule of law necessary to the Court's decision on appeal must be adhered to throughout the case's subsequent progress, both in the trial court and upon subsequent appeal. *Union Pacific v. Idaho State Tax Commission,* 139 Idaho 572, 575, 83 P.3d 116, 119 (2004); *citing Suitts v. First Sec. Bank of Idaho,* 110 Idaho 15, 21, 713 P.2d 1374, 1380 (1985). Where the case is remanded to the trial court, the case "must be tried in light of and in consonance with the rules of law as announced by the appellate court in that particular case." *Union Pacific v. Idaho State Tax Commission,* 139 Idaho 572, 575, 83 P.3d 116, 119 (2004); citing *Creem v. Northwestern Mut. Fire Ass'n of Seattle, Wash.*, 58 Idaho 349, 352, 74 P.2d 702, 703 (1937). This Court has read the Idaho appellate cases interpreting "the law of the case" doctrine, and finds that the doctrine is applied to legal "principles" and "rules of law", and not findings of fact made by the appellate court. The Idaho Supreme Court's finding that channel A "…has consistently during the times in question carried water", is not "the law of the case", but a finding of fact by the Idaho

Supreme Court which is not binding on this Court. However, it is a finding of fact which is supported by all the evidence.

3. This Court must interpret the deeds granting the Reads their parcels, and granting Harvey her parcel. The Idaho Supreme Court has previously noted, on an earlier appeal of this matter, that if deeds are ambiguous, their interpretation is a question of fact. *Read v. Harvey*, 141 Idaho 497, 112 P.3d 785 (2005). The Idaho Supreme Court has also found that the Read and Harvey deeds are ambiguous. *Id.*

4. When interpreting deeds, courts seek to ascertain the drafter's intent. *Id.* In this case, the task of the Court is to determine what the Andersens' meant when they used the term "the centerline of the creek."

5. In making that determination, the Court must consider the deeds as a whole, and not select certain parts of the deeds. Moreover, the deeds should be construed so that all terms in the deed are given effect. *Thompson on Real Property*, David A. Thomas, Editor-in-Chief (2nd Thomas Ed. 1999), § 82.13(b)(2), p. 668 (footnotes omitted).

6. This Court is not persuaded by Harvey's arguments regarding Andersens' distinctions between "creek" and "drainage" ditch, as it asks the Court to engage in wholesale assumption as to Andersens' knowledge of the ground in question, and asks the Court to ignore the uncontroverted testimony of Jerry VanOoyen as to Andersens' intent, and would result in Andersens having subdivided their land based upon a meandering line to a dry creek bed, not clearly visible on the ground at the time, leaving several parcels bisected by the actual flowing creek and leaving several parcels without access to the water in the actual flowing creek.

7. The Andersens, who in 1972, created the legal descriptions at issue in this case, intended the common boundary at issue to be the centerline of the channel in which water

presently flows between Reads' property and Harvey's property. That was the same channel in which water flowed in 1972.

8. Plaintiffs Robert and Alexis Read are entitled to judgment against defendant Jennifer Harvey, quieting title to the property on their side of Little Gold Creek as it currently flows. This is the same location as Little Gold Creek flowed in 1972.

9. To comply with Idaho law, Little Gold Creek must be surveyed over the course it serves as the common boundary between the Read Property and the Harvey Property, such distance extending the northerly pin placed near the creek by Tucker Engineering in its 1977 survey for Don Schull (Trial Exhibit 9) and the southerly pin set near the creek by Tucker Engineering in its 1997 survey (Trial Exhibit 10).

10. In the exercise of its equitable powers, the Court concludes that defendant Harvey should bear the cost of such survey and directs that the same be completed within 60 days of the date hereof. Upon completion, the survey must be presented to counsel for the plaintiffs Reads for review and approval. The legal description of the course of Little Gold Creek, when approved by the Court, shall be included its final judgment.

11. The plaintiffs are deemed to be the prevailing parties for purposes of IRCP 54(d). Furthermore, after no later than February 7, 2002, the date Jerry VanOoyen's affidavit was filed, Harvey's defense of this lawsuit and prosecution of her counterclaim has been frivolous, because as of that date Harvey has known of the original landowner's (Andersens') intent as stated by Andersens' agent Jerry VanOoyen, and Harvey has never obtained any evidence to the contrary of the original landowner's (Andersens') intent.

DATED this 1st day of September, 2006.

John T. Mitchell, District Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of August, 2006, I caused a true and correct copy of the foregoing **MEMORANDUM DECISION, FINDINGS OF FACT AND CONCLUSIONS OF LAW** to be served by facsimile to the following:

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_____
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