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I. INTRODUCTION

Appellant Snyder appeals the trial court's peremptory injunction on summary judgment ordering Snyder to completely abate the flow of water from his uphill property onto the downhill property of Respondents Bublitz'.

The parcel lots of Appellant and Respondents lay on the side of a hill. Appellant's lot lays in the middle of the hill. The adjoining lots on the south and west are higher in elevation than the Appellant's lot. The adjoining lot on the east belongs to Respondents; it is lower in elevation than Appellant's lot.

Appellant appeals the trial court's order on summary judgment "to modify his drainage system installed on Lot 67 [Appellant's lot] to completely abate the flow of any water from Plaintiff [Appellant] Snyder's drainage system onto the Defendant [Respondent].Bublitz' property." (CP 126)

II. ASSIGNMENTS OF ERROR

A. The Trial Court erred by failing to apply the proper standard of proof to a Summary Judgment Motion

B. The Trial Court erred in the findings of fact regarding the Water Flow

The trial court erred in making 'finding' #7 (CP 125), which reads:

"That in 2015 the Plaintiff Snyder constructed a grange and workshop on Lot 67, which included the installation of a French drain system to collect rain and surface water. Mr. Snyder routed the 10" outlet

pipe for the new drainage system such that the out flow from the drainage system runs directly over Lot 66 of the Bublitz' property. Periodically the out flow from the drainage pipe results in a concentrated, channelized cascade of water several inches deep ruing over, and eroding, the Bublitz' property. The trespass of concentrated surface water from Mr. Snyder's drainage system will continue to periodically flow over, and damage, the Bublitz' property, unless abated"

And the trial court erred in adopting as pertinent facts the following: (CP 127, 114):

- That in 2015 Mr. Snyder constructed a large new garage and workshop on Lot 67, which included the installation of a French drain system to collect rain and surface water.
- That Mr. Snyder routed the 10" outlet pipe for the new drainage system such that the outflow from the drainage system ran directly over Lot 66 of the Bublitz's property.
- That periodically the outflow from the drainage pipe results in a concentrated, channelized cascade of water several inches deep running over, and eroding, the Bublitz's property.
- That before Mr. Snyder installed his new drainage system, there was only diffuse natural flow of any unabsorbed surface water coming from Mr. Snyder's property onto the Bublitz' property.
- That since the installation of his French drain system the water from Mr. Snyder's property is now concentrated and, during rain storms, flows out of the outflow of his drainage pipe over the Bublitz's property like a small stream *that did not occur before* Mr. Snyder installed his French drain system.
- That at times the outflow from the drainage pipe how results in a flow and puddling of water several inches deep running over, and eroding , the Bublitz' property.

C. The Trial Court Errored in Failing to Properly Apply the Common Enemy Doctrine

D. The Trial Court Errored in Issuing a Permanent Injunction on Summary Judgment

III. ISSUES PRESENTED

- A. What is the standard of proof required of the moving party on a summary judgment motion?**
- B. Is the appellate court bound by the trial court's findings & adoption of pertinent facts on summary judgment?**
- C. Does the Common Enemy Doctrine allow sidehill land owners to defend against surface waters ?**
- D. Should a permanent Injunction be issued on Summary Judgment when pertinent facts are in question?**
- E. Should Appellant be awarded attorney fees for the necessity of being required to defend against the injunction.**

IV. STATEMENT OF THE CASE

A. SUMMARY STATEMENT OF THE CASE

Appellant/plaintiff Lucas James Snyder (herein: Snyder) owns lot 67 of Sentinel Firs in Jefferson County which he purchased in 2009 from David Griswold. Respondents/Defendants Leo D. Bublitz and Susan Bublitz (herein Bublitz) purchased their three lots from David Griswold in 2011. The Bublitz lots border on the east, and are downhill of, the Snyder lot.

As a part of the agreement for purchase of his lot, Snyder was to receive, in order to have a view of the Sound from the house, view easements over portions of the lots now owned by Bublitz'. However at

the time the Bublitz purchased their lots, it was discovered that the legal descriptions in the recorded view easements did not adequately describe the subject areas as intended, and necessary, for the view easement corridor. Snyder brought suit in Jefferson County Superior Court to reform the mistake in the view easements.

Defendant/respondent Bublitz answered denying Snyder's claim for reformation, and counterclaiming against the seller, Griswold, and bringing countersuit against Snyder for water trespass. The trial court on summary judgment dismissed the Snyder complaint for reformation of the view easements, and ordered Snyder to completely abate the flow of water from his property onto the Bublitz property.

The parties agreed to the dismissal of Defendant Griswold.

Plaintiff/appellant Snyder moved the trial court to reconsider the court's order on summary judgment regarding the water flow. The court denied Snyder's motion. This Appeal follows.

B. BACKGROUND SUMMARY

Uphill and contiguous on the south of both the Snyder and the Bublitz' lots lies Pope Resources land; Pope Resources land also borders the Snyder lot on the southern portion of the Snyder lot's west boundary. All of the Pope Resources land is higher in elevation than the Snyder lot.

In the past a small stream from the Pope land bordering on the south and south-west of the Snyder lot flowed across the Snyder lot and then on down into a ravine on the Bublitz' lots. The prior owner of the Snyder lot installed a drainage system for the flow of water flowing on to the lot from Pope Resources land with a ditch along the southwest boundary of the lot next to Pope Resources, and then routing the flow downhill in a culvert about three quarters of the width of the lot where it flowed out onto the ground in a natural swale for about 50 feet and then onto the Bublitz lots, where it eventually fed into a stream in a natural ravine and a manmade dam reservoir on the Bublitz lot.

The water that runs off Pope Resources land above the Snyder lot and into the ditch and down thru a culvert and out on the ground into the natural swale on the Snyder lot, and which eventually flows off the Snyder lot onto the Bublitz' lot is a natural flow of water from the uphill Pope Resource property. Snyder has not channeled additional water onto the Bublitz' lots.

C. CASE PROCEEDURE IN TRIAL COURT

Plaintiff(appellant) Snyder filed a complaint in trial court to reform view corridor easements over the Bublitz' lots in order to correct a mistake made in the description of the areas covered by the easements. (CP 1-20).

Defendants/Respondents Bublitz' answered denning Snyder's right to reformation of the corridor easements. (CP 21-31) Bublitz also counterclaimed, alleging that in 2015 Snyder had installed a 'french drain' type drainage system on his property in such a way as to force ground and surface water runoff from the Drain onto the lot owned by Bublitzes; that the water runoff from the Snyder Drain floods areas of the Bublitzes' lot several times per year and is causing harm to the Bublitzes' property. (CP 24-26) Bublitz' sought injunctive relief compelling Snyder to permanently abate the flow of surface and ground water from his property onto the Bublitz property. (CP 29)

Plaintiff/appellant Snyder answered that his lot is located uphill of the Bublitz' lot. He denied that he installed a "french drain" type drainage system on his property. He replied that he had replaced damaged and plugged coverts that had been installed by the prior owner, and that the drainage system carries downhill the natural runoff from the uphill Pope lots that are on the west and the south of his lot. Snyder answered that the system carries only the natural water runoff from the uphill lots, downhill thru a portion of his lot, then the runoff continues downhill across the rest of his lot and onto the Bublitz' lot. (CP 81)

1. TRIAL COURT: SUMMARY JUDGMENT

Bublitz' moved for Summary Judgment to dismiss Snyder's claim for reformation of the view easements, and for injunctive relief compelling Snyder to modify his drainage system to completely abate the flow of water onto the Bublitz' property. (CP 32– 57).

In regards to the water flow, Bublitz' alleged in the Summary Judgment Motion (CP 34-35) that:

“In 2015 Mr. Snyder constructed a large new garage and workshop on Lot 67, which included the installation of a French drain system to collect rain and surface water. Mr. Snyder routed the 10” outlet pipe for the new drainage system such that the outflow from the drainage system ran directly over Lot 66 of the Bublitz property. Periodically the outflow from the drainage pipe results in a concentrated, channelized cascade of water several inches deep running over, and eroding, the Bublitz' property. Before Mr. Snyder installed his new drainage system, there was only diffuse natural flow of any unabsorbed surface water coming from Mr. Snyder's property onto the Bublitz' property. Now the water from Mr. Snyder's property is concentrated and, during rain storms, flows out of the outflow of his drainage pipe over our property like a small creek. The At times outflow from the drainage pipe results in a flow and puddling of water several inches deep running over, and eroding the Bublitz' property.” (CP 34-35)

In support of the Motion, Bublitz declared (CP 63-64):
“In 2015 Mr. Snyder constructed on Lot 67 a large new garage and workshop. As part of the construction of that building Mr. Snyder installed a french drain to collect rain and surface water, and routed the 10” diameter outlet pipe for the new drainage system such that the outflow from the drainage system runs over lot 66 of our property. Mr. Snyder's construction of his drainage system and its outflow onto our property caused a radical increase in the amount, and concentration of, water flowing, off of Mr. Snyder's property and onto our property. While there was previously natural drainage of rain water from Mr. Snyder's property onto our property, that drainage was diffuse and spread out over the entire area of the gradient of the land, such that is was not noticeable in any defined area or areas. Now the water from Mr. Snyder's property is

concentrated and, during rain storms, flows out of the outflow of his drainage pipe over our property like a small creek. The At times the outflow from the drainage pipe results in a flow and puddling of water several inches deep running over, and eroding, our property. ... Prior to Mr. Snyder building his shop and installing his drainage system we did not have a concentrated flow of surface water coming from Mr. Snyder's property onto our property. (CP 63-64)....

“Unless Mr. Snyder modifies his drainage system, such that its outflow is not onto our property, we will continue to suffer periodic floods of water from Mr. Snyder's property onto our property every rainy season, which will continue to over-saturate and erode our property and diminish the value of our property. The topography of Mr. Snyder's lot 67 and our adjoining lot 6 is such that Mr. Snyder should be able to re-rout his drainage line so that it does not have its outflow onto our property.” (CP 64)

In his Memo Response to the Bublitz' summary judgment motion (CP 102-106) Snyder explained that he had only replaced a damaged and plugged system that had been installed by the prior owner; that the drainage system carries runoff water from uphill lots on the west and south of his lot, down-hill thru a portion of his lot, and that the runoff then flows out on the ground in a small natural swale on his lot, and then flows on down onto the Bublitz' lot. Snyder denied directing additional water onto the Bublitz' lot, and explained that the drainage that flows off his lot onto the Bublitz' lot is the natural flow of water that drains off the Pope Resource property uphill of the Snyder lot (CP 104):

“Plaintiff Snyder replaced a damaged and plugged coverts that had been installed prior to his purchase to carry the natural runoff from lots West and South of Plaintiff's lot. The culverts carry runoff water from lots West and South of Plaintiff's lot down-hill a portion of Plaintiff's lot, the runoff then continues downhill on Plaintiff's lot then feeds into a natural

ravine along the South border of the Bublitz' lots. Snyder has not directed additional water on to the Bublitz' lots. The drainage that flows off the Snyder lot onto the Bublitz' lots is the natural flow of water that drains off the Pope Resource property next to the Snyder and Bublitz' lots." (CP 104)

I support of the responsive Memo, Snyder filed a Declaration (CP 88-92), in which he declared:

"I own lot 67 of Sentinel Firs. My lot is situated uphill of the Bublitz' lots 64, 65, and 66. To the South of both my lot and the Bublitz's lots is Pope Resources land which is higher in elevation than both my lot and the Bublitz lots. A stream flows off of Pope land and onto the Bublitz' lots.

.....
"It appears that in the past a smaller stream from Pope land also flowed across the back side of my lot and down into the ravine to join the steam that is dammed up on the Bublitz' lots." (CP 88)

Mr. Snyder attached to his Declaration a survey map of the Sentinel Firs lots and Pope Resources land (CP 90), which denotes the Pope Resources land on the south of the Bublitz' lots [Lots 64, 65 & 66 on the map], and on the south and west of the Snyder lot [Lot 67]. (CP 90 is attached hereto as Exhibit A in the appendix). Snyder also attached to his Declaration a copy of the first page of the application from the Pope Resources Forest Practices Application to log the area mapped (CP 91), and the stream survey map of the area (CP 92, also attached hereto in appendix as Exhibit B). Snyder pointed out that at the top of the page of that stream survey, in the area labeled "Not Owned", is the location of his lot and the Bublitz' lots. He pointed out that on the map there are small

streams of water noted as originating on the Pope land on southern west border of his lot and flowing on down across his lot and the Bublitz' lots. (CP 88, CP 92) Snyder then explained that, prior to the purchase of his lot, those streams of water flowing onto his lot across the southern portion of his west border with Pope Resources, as shown on that stream map (CP 92), were ditched so as to flow along the southern portion of the lot's west boundary next to Pope Resources some distance, and then routed downhill thru a culvert about three quarters of the width of the lot. Snyder went on to explain:

“Recently when I installed a shop (for which I obtained from the County a drainage permit) on my lot, I discovered the culvert had been severely plugged. I installed catch basins (sediment traps) in the ditch and replaced the culvert. The water that runs off Pope Resources is a natural flow. I have not channeled additional water onto the Bublitz' lots.” (CP 89)

In a Supplemental Declaration in response to Snyder's declaration Bublitz admitted the shop built by Snyder had a small enough footprint that the county building permit did not require a storm water plan. (CP 119) But then Mr. Bublitz claimed that Snyder had put in a “10' diameter drainage pipe” and that the water was eroding his land and cutting a flow channel across his property. (CP 120)

On Summary Judgment, in regards to the water flow, the trial court entered the following ‘finding’ (CP 125-126):

“..in 2015 the Plaintiff Snyder constructed a garage and workshop on Lot 67, which included the installation of a French drain system to collect rain and surface water. Mr. Snyder routed the 10” outlet pipe for the new drainage system such that the out flow from the drainage system runs directly over Lot 66 of the Bublitz’ property. Periodically the outflow from the drainage pipe results in a concentrated, channelized cascade of water several inches deep running over, and eroding the Bublitz’ property. The trespass of concentrated surface water from Mr. Snyder’s system will continue to periodically flow over, and damage, the Bublitz’ property, unless abated. (CP 125-126)

In Memorandum Opinion (CP 127-129) the trial court adopted, “as pertinent facts those set forth in Defendant’s Reply on Motions for Summary Judgment set forth on ... page 8 at lines 1 thru 21.” (CP 127). Those ‘pertinent facts’ as alleged in “Defendants Leo D. Bulblitz and Susan Bublitz’ Reply on Motions for Summary Judgment” (CP 114) were:

- That in 2015 Mr. Snyder constructed a large new garage and workshop on Lot 67, which included the installation of a French drain system to collect rain and surface water.
- That Mr. Snyder routed the 10” outlet pipe for the new drainage system such that the outflow from the drainage system ran directly over Lot 66 of the Bublitz’s property.
- That periodically the outflow from the drainage pipe results in a concentrated, channelized cascade of water several inches deep running over, and eroding, the Bublitz’s property.
- That *before* Mr. Snyder installed his new drainage system, there was only diffuse natural flow of any unabsorbed surface water coming from Mr. Snyder’s property onto the Bublitz’ property.
- That since the installation of his French drain system the water from Mr. Snyder’s property is now concentrated and, during rain storms, flows out of the outflow of his drainage pipe over the Bublitz’s property like a small stream *that did not occur before* Mr. Snyder installed his French drain system.

- That at times the outflow from the drainage pipe now results in a flow and puddling of water several inches deep running over, and eroding, the Bublitz' property.
- That Mr. Bublitz requested repeatedly that Mr. Snyder modify his drainage system to stop the outflow of water from Mr. Snyder's property from running across the Bublitz' property and that Mr. Snyder has ignored those requests.(CP 114)

2. TRIAL COURT: MOTION FOR RECONSIDERATION

Snyder moved the trial court for a reconsideration of the court's summary judgment permanent injunction ordering Snyder to completely abate the flow of any water from his drainage system onto the Bublitz' property. (CP 130 - 141). Snyder's Motion for Reconsideration pointed out that Snyder had not directed any water onto the Bublitz' lot other than what is the natural flow of water flowing off of property uphill of Snyder; and that Snyder, in his "Declaration of Plaintiff regarding Water Runoff" (CP 88 -92), (which was timely filed prior to the Summary Judgment hearing), Snyder declared that he had not channeled additional water runoff onto the Bublitz' lots; and in that declaration Snyder stated that the water runoff is the natural water runoff from Pope Resource's land that is contiguous to, and uphill of, his lot. Plaintiff Snyder pointed out in that pre-summary judgment declaration that all he did was repair the water runoff system that already existed. (CP 88-89)

Snyder attached to the Motion for Reconsideration a letter from the Washington State Department of Natural Resources (DNR), by Ross Goodwin (CP 137-139), who, with representatives from Washington Department of Fish and Wildlife and Jefferson County Department of Community Development, viewed the Snyder and Bublitz properties on December 6, 1917, specifically to review water drainage patterns across the Snyder parcel and onto the Bublitz' lots. Mr. Goodwin reported:

“The group started the site visit just off the southwest corner of your parcel on property owned by Pope Resources. On the Pope Resources property we observed a topographic low pathway that led to the south-south west portion of your property. We did see evidence in this low area that surface water from rain events is guided gradually downslope to your property.

“Once on your property we observed a ditch, that you state, was constructed by the previous landowner circa 2000. This ditch, at the back of your outbuilding, travels approximately 125 feet north along the west side of your driveway. At this point there is an 8 inch culvert under the driveway and a portion of your yard that then directs storm water from the ditch to the east and back into the natural topographic low pathway. In discussing the ditch with you we observed that you increased the culvert size from 6 inches to 8 inches and installed Best Management Practices (BMPs) in the form of four sediment traps.” (CP 137)

.....

“The group observed a natural topographic low pathway that tracks from Pope Resources property generally northeast across your property and Mr. Bublitz's property ...

“This natural drainage has been altered both on your property and on the Bublitz property. On your property it had been altered by the ditch behind your shop and along your driveway. However the ditch then routes storm water back to the natural topographic drainage. ...

“The alterations to the natural drainage on both properties have no effect on the amount of water being transported through the drainage. The quantity of storm water is solely dependent on the amount of rainfall that occurs during individual storm events.

“The group did not witness any obvious damage from storm water to either your property or the Bublitz property.” (CP 138)

Also attached to Snyder’s Motion for Reconsideration was a current picture of the area of the Bublitz/Snyder boundary where the water runoff flows from Snyder property onto Bublitz property. The photo was taken during the ‘rainy season’, December 6, 2017. (CP 141, and attached hereto in the appendix as Exhibit C). There is no evidence in the picture of erosion, nor of any damage to the Bublitz’ property.

With his prior Declaration, Snyder provided the Forest Practice Application submitted by Pope (CP 91). Snyder pointed out that as Pope had recently logged the area it is to be naturally anticipated that the flow of water runoff, from the uphill, recently logged, Pope Resources land, would increase, especially when it rains. (CP 130).

The trial court denied Plaintiff Snyder’s Motion for Reconsideration, stating, in part:

“At the hearing on Defendant Bublitz’s motion for summary judgment, based upon the documents filed for the hearing and the record as it existed then, the Court found that there were no issues of material fact and that Defendant Bublitz was entitled judgment as a matter of law regarding both the building height restriction and the flow of water.” (CP 153). (CP 153)

V. ARGUMENT

A. MATERIAL FACTS IN DISPUTE

A summary judgment is brought under the authority of Superior Court Civil Rule 56 which provides that the Court shall grant the judgment sought only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56 Summary judgment is available only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. United Pac. Ins. Co. v. Boyd, 34 Wash. App. 372, 375, 661 P.2d 987 (1983); CR 56(c). The burden is on the moving party to establish his right to judgment as a matter of law. Neff v. Allstate Ins. Co., 70 Wn. App. 796, 855 P.2d 1223, (1993) Any doubts as to the existence of factual disputes must be resolved against the moving party. Mason v. Kenyon Zero Storage, 71 Wn. App. 5, 856 P.2d 410 (1993).

The trial court should have denied the Bublitz' motion for summary judgment as regards the water flow issue, as there are material facts in dispute.

In a 'finding' the trial court 'found' that: "That in 2015 Mr. Snyder constructed a large new garage and workshop on Lot 67, which included the installation of a French drain system to collect rain and surface water". (CP 127, CP 114) However Snyder denied installing a new drainage system, instead, he explained, he had only replaced the damaged and plugged drainage system that had been installed prior to his purchase; and that the system carries the runoff water from the uphill Pope Resource land bordering his lot on the west and south. (CP 81) And, in spite of the claim that it was a large garage and workshop, even Bublitz admitted the building had a small enough footprint that the county building permit did not require a storm water plan. (CP 119) What was meant by a "French drain system" was never explained.

The trial court also 'found' that Snyder routed a "10" outlet pipe for the new drainage system such that the outflow from the drainage system ran directly over Lot 66 of the Bublitz' property." (CP 127, CP 114) But Snyder noted that it is an 8 inch culvert, and that it does not run directly over the Bublitz lot, but rather runs off on the ground on the Snyder lot, flowing down a natural swale before flowing onto the Bultitz lot. And, as stated, Snyder noted that it was not a 'new' system, but a pre-existing system he repaired. (CP 89)

The trial court also 'found', "That periodically the outflow from the drainage pipe results in a concentrated, channelized cascade of water several inches deep running over, and eroding, the Bublitz's property" (CP 127, CP 114) The pictures Bublitz provided in support of this claim are undated. (CP 77, 79, which are attached hereto in appendix as Exhibit D&E). It can be observed that on the Peninsula, in a heavy rain storm, there are streams of water flowing in lots of places, especially where there are surface depressions in the ground, and Snyder pointed out the Pope had recently logged the uphill areas. Bublitz provided no evidence of any erosion on his property; his claims of erosion and damage are contradicted by Snyder and the evidence provided by a picture of the area (CP 140-141) and the report of Ross Goodwin who viewed the area with county officials. (CP 137 -139)

The trial court also 'found':

"That before the installation of his French drain system, there was only diffuse natural flow of any unabsorbed surface water coming from Mr. Snyder's property onto the Bublitz' property.

"That since the installation of his French drain system the water from Mr. Snyder's property is now concentrated and, during rain storms, flows out of the out flow of his drainage pipe over the Bublitz' property like a small stream *that did not occur before* Mr.Snyder installed his French drain system." (CP 127, 114)

However Bublitz presented no evidence for the trial court to compare the flow before and after. There was no showing or testimony of what the flow of water was before 2015 “*during rain storms*”.

The trial court ‘found’, “That at times the outflow from the drainage pipe now results in a flow and a puddling of water several inches deep running over, and eroding, the Bublitz’ property”. (CP 127, CP 114) But Snyder pointed out that the out flow of the ‘drainage pipe’ is on his lot, and the water from there flows into the natural swale on his lot before flowing onto the Bublitz’ lot. And, again, there is no evidence of erosion.

The trail court erred in granting permanent injunction on summary judgment. A summary judgment motion should be granted only if, after viewing the pleadings, depositions, admissions and affidavits, and all reasonable inferences that may be drawn therefrom in the light most favorable to the nonmoving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact *McDonald v. Murray*, 83 Wn.2d 17, 515 P.2d 151 (1973), (2) all reasonable persons could reach only one conclusion, and (3) the moving party is entitled to judgment. *Ciminski v. Finn Corp.*, 13 Wn. App. 815, 537 P.2d 850 (1975); *Bader v. State*, 43 Wn. App. 223, 716 P.2d 925 (1986).

In reviewing the Bublitz’ motion for summary judgment the trial court failed to consider all facts submitted, and all reasonable inferences

from the facts, in a light most favorable to Snyder. In ruling on a motion for summary judgment, a court must consider all material evidence and reasonable inferences therefrom in a light most favorable to the nonmoving party and determine whether there exists a genuine issue of material fact, i.e., a fact upon which the outcome of the litigation depends. The motion for summary judgment should be denied if reasonable men might reach different conclusions as to the facts. Amant v. Pacific Power & Light, 10 Wn. App. 785, 520 P.2d 181 (1974), aff'd, 84 Wn.2d 872, 529 P.2d 829 (1975); Where the evidence and reasonable inferences therefrom supporting a motion for a summary judgment, considered in favor of the nonmoving party, present a genuine issue of material fact, the trial court's function is not to then resolve such issue but must permit it to go to trial. Reed v. Streib, 65 Wn.2d 700, 399 P.2d 338 (1965). If the pleadings and affidavits raise any genuine issues of material fact upon which the outcome of the litigation depends, motion for summary judgment should be denied. Summary judgment is error when questions raised can be resolved only by proof and determined only by the trier of facts. Reynolds v. Kuhl, 58 Wn.2d 313, 362 P.2d 589 (1961).

Essentially the trial court on summary judgment determined that: Snyder had installed a *new* drainage system; that it was a 'French' drain; that Snyder had routed drainage off *his land* thru a 10" drain pipe directly

onto the Bublitz' property; and that the drainage was *eroding and damaging the Bublitz' property*. But none of those determinations, or 'findings' by the trial court are supported by conclusive evidence; all were and are disputed by Snyder, the nonmoving party. The trial court erred in granting Bublitz' summary judgment motion for a permeant injunction.

B. TRIAL COURT 'FINDINGS' ON SUMMARY JUDGMENT

In ruling on a motion for summary judgment the court's function is to determine whether such a genuine issue exists, not to resolve any existing factual issues. *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 353 P.2d 663 (1960). The trial court made 'findings' (CP 124 -126), but trial court findings of fact are superfluous in summary judgment proceedings. *Washington Optometric Ass'n v. County of Pierce*, 73 Wn.2d 445, 438 P.2d 861 (1968). *State ex rel. Carroll v. Simmons*, 61 Wn.2d 146, 377 P.2d 421 (1962). The function of a summary judgment proceeding is to determine whether or not a genuine issue of fact exists, not to determine issues of fact. The trial court "adopted pertinent facts" (CP 127), however, in ruling on a motion for summary judgment, the trial court is not to weigh the evidence or resolve existing factual issues. *Fleming v. Smith*, 64 Wn.2d 181, 390 P.2d 990 (1964).

The appellate court is not bound by the trial court's 'findings', or the trial court's adoption of pertinent facts. The appellate court reviews de novo a trial court's summary judgment decision, and analyzes whether any genuine issues exist as to any material fact and whether one party is entitled to judgment as a matter of law. In deciding a challenge to a trial court's order on summary judgment, the appellate court reviews the same record that was available to the trial court; all facts and inferences are considered in the light most favorable to the nonmoving party, and any doubts as to the existence of factual disputes must be resolved against the moving party. Shows v. Pemberton, 73 Wn. App. 107, 868 P.2d 164, review denied, 124 Wn.2d 1019, 881 P.2d 254 (1994). Bohn v. Cody, 119 Wn.2d 357, 362-63, 832 P.2d 71 (1992).

Snyder has not directed any more water to the Bublitz' lot other than what is the natural flow of water runoff from the property uphill of Snyder. Snyder declared that he has not channeled additional water runoff onto the Bublitz' lots; and that the water runoff is from Pope Resource's land that is contiguous to, and uphill of, the Snyder lot. All that Snyder did was repair an existing water runoff drainage system for the water runoff originating from the uphill Pope properties. The drainage system directs the uphill runoff flow to the side of the driveway and under the driveway and back into the natural topographical low area where it flows

naturally on down the Snyder lot and then onto the Bublitz' lots. (CP 137-138) The alterations to the natural drainage does not effect on the amount of water being transported through the drainage, as the quantity of storm water is solely dependent of the amount of rainfall that occurs during individual storm events. And there is no evidence of any damage the Bublitz property. (CP 137-138)

C. THE UPHILL WATER RUN OFF IS A COMMON ENEMY

The trial court ruled in the Memo of Opinion (CP 127-129):
“With respect to the water flow from Plaintiff’s property to Defendant’s property, Plaintiff’s actions increased and centralized the flow of water onto Defendant’s property as set forth above and depicted by the photographs filed by Defendant. Plaintiff is liable for this under the exception to the common enemy doctrine, which provides that surface waters cannot be artificially collected and discharged upon adjoining lands in amounts greater than or in a manner different from its natural flow. Colella V. King County, 72 Wn2d 386, 390, 433 P.2nd 154 (1967). The water as redirected by Plaintiff is clearly damaging Defendants property and will continue to do so.

“Defendants motion for summary judgment should, be granted regarding his issue.” (CP 129)

The water that runs off from the Snyder lot to the Bublitz’ lot is surface water. Surface waters are ordinarily those vagrant or diffused waters produced by rain, melting snow, or springs. Alexander v. Muenscher, 7 Wn. 2d 557, 110 P. (2d) 625 (1941). Surface waters are to be regarded as outlaw or common enemy waters, against which every

proprietor of land may defend himself, even to the consequent injury of others. Cass v. Dicks, 14 Wash. 75, 44 Pac. 113; Harvey v. Northern Pac. R. Co., 63 Wash. 669, 116 Pac. 464; Wood v. Tacoma, 66 Wash. 266, 119 Pac. 859; Miller v. Eastern R. & Lbr. Co., 84 Wash. 31, 146 Pac. 171; Morton v. Hines, 112 Wash. 612, 192 Pac. 1016; Wilkening v. State, 54 Wn. (2d) 692, 344 P. 2d 204. Under the common enemy doctrine a landowner may dispose of unwanted surface water without incurring liability for injury caused to adjacent land. Currens v. Sleek, 138 Wn.2d 858, 861, 983 P.2d 626 (1999)

Washington courts have long adhered to the common enemy doctrine. DiBlasi v. City of Seattle, 136 Wn.2d 865, 875, 969 P.2d 10 (1998); Cass v. Dicks, 14 Wash. 75, 78, 44 P. 113 (1896). This principle "provides that surface water is 'an outlaw and a common enemy **against** which anyone may defend himself, even though by so doing injury may result to others.'" DiBlasi, 136 Wn.2d at 875 (quoting Cass, 14 Wash. at 78). Therefore, if a landowner "in the lawful exercise of his right to control, manage or improve his own land, finds it necessary to protect it from surface water flowing from higher land, he may do so, and if damage thereby results to another, it is *damnum absque injuria* [injury without redress]." Cass, 14 Wash. at 78.

However Washington courts have carved out three exceptions where liability is possible: (1) a landowner may not block a watercourse or natural drain way; (2) a landowner may not collect and discharge water onto their neighbors' land in quantities greater than or in a manner different from its natural flow; and (3) a landowner must exercise their rights with due care by acting in good faith and by avoiding unnecessary damage to the property of others. Currens, 138 Wn.2d at 862-65. But it is also the rule that the flow of surface water along natural drains may be hastened or incidentally increased by artificial means, so long as the water is not ultimately diverted from its natural flow onto the property of another. Laurelon Terrace, Inc. v. Seattle, 40 Wn.2d 883, 246 P.2d 1113 (1952). Mere increases in volume or velocity of surface water drained into a natural watercourse are not actionable. Strickland v. City of Seattle, 62 Wn.2d 912, 915-16, 385 P.2d 33 (1963). The common enemy doctrine in Washington allows landowners to alter the flow of surface water to the detriment of their neighbors, so long as they do not block a watercourse or natural drainway, nor collect and discharge water onto their neighbors' land in quantities greater than, or in a manner different from, its natural flow. Currens, 138 Wn.2d at 862-863.

The trial court may have failed to take into proper consideration that the Snyder and Bublitz lots lay on the side of a hill, and that the flow

of the surface water is from lots uphill of the Snyder lot, and the Snyder lot is uphill of the Bublitz lots. An uphill landowner is not liable for damages caused to downhill properties by natural water flow. See Price v. City of Seattle, 106 Wn. App. 647, 658, 24 P.3d 1098 (2001); see also Currens, 138 Wn.2d at 861, (holding that an uphill landowner may not be liable for damage caused to downhill properties where the uphill landowner “defend[s] himself” against surface water, thereby causing greater damage to the downhill properties than would otherwise naturally occur). Laurelon Terrace Inc., 40 Wn.2d at 892. (holding same); Cass, 14 Wash. at 78.

The trial court herein relied on the exception to the common enemy doctrine, which provides that surface waters cannot be artificially collected and discharged upon adjoining lands in amounts greater than or in a manner different from its natural flow. The channel and discharge exception to the common enemy doctrine requires that the finder of fact compare the amount of surface water that would naturally reach the Bublitz property with the amount that reaches the property after the changes made to the Snyder property. Ripley v. Grays Harbor County, 107 Wn. App 575, 582; 27 P.3d 1197 (2001). In order to demonstrate that the actions of an uphill landowner caused a downhill landowner to suffer injury from water flowing downhill, the downhill landowner must provide

some evidence that allows a finder of fact to compare the amount of surface water that would naturally reach the downhill property with the amount of water actually reaching the downhill property after the uphill landowner's alleged wrongful acts. Ripley, 107 Wn. App 575, 583.

The trial court could not simply assume that the amount of water currently flowing down the Snyder drainage system into to the swale and then on down and onto the Bublitz property is in a quantity greater than the amount that would naturally flow onto the Bublitz' property. Attwood v. Albertson's Food Ctrs. Inc., 92 Wn. App. 326, 331, 966 P.2d 351 (1998) (“evidence establishing proximate cause must rise above speculation, conjecture, or mere possibility”). Without evidence regarding the amount of surface water that would naturally flow off Pope onto Snyder and then on down onto the Bublitz', there is no way to determine whether Snyder's drainage system caused the amount of water flowing onto the Bublitz property to exceed its natural flow. Here, not only is the present amount of flow not well documented, there is an absence of any evidence of what the flow would be absent the existence of the Snyder drainage system. It is material fact whether or not Snyder caused more water to flow onto the Bublitz property than the amount that would flow naturally.

Bublitz alleges that the flow of surface water onto his property had increased since Snyder built the garage in 2015, and repaired the existing

drainage system, but Bublitz bases his allegations on his claim of what the flow the surface water was before and after the Snyder built his garage, rather than on a comparison of the flow after the improvements with the *natural flow* in the area. Ripley, 107 Wn. App. At 583.

In addition, Bublitz attempts to prove causation merely by showing a coincidence in time. Without more, a coincidence in time between the increased flow and the alleged cause is insufficient proof. Bublitz claimed that, “Even if Mr. Snyder did not channel “addition” water onto the Bublitz’ property, it is clear that he had collected and concentrated what had previously been a diffuse natural flow of surface water unto a concentrated flow that now traverses the Bublitz’ property.” (CP 115) But is should be noted that Bublitz also stated, “On the summer months, the gradient is essentially dry and, absent an unusually heavy summer rain, there is no noticeable flow of surface water from Mr. Snyder’s property onto our property.” (CP 120) It would appear from these statements that the flow of water is the natural runoff from uphill lots, especially in light of the recent logging activity on the uphill Pope Resources land.

Bublitz charges Snyder with water trespass, but Snyder only repaired an existing drainage system. Passive usage of a pre-existing system is not an intentional trespass. In Hughes v. King County, 42 Wn. App. 776; 714 P.2d 316 (1986), the court found no trespass occurred

because King County did nothing to cause the intrusion of water into the drainage system and did not materially alter the flow of water through the system. Id. at 780-81. The flow of surface water along depressions or drainways may be hastened and incidentally increased by artificial means so long as the water is not diverted from its natural flow. The common enemy doctrine in Washington allows landowners to alter the flow of surface water to the detriment of their neighbors, so long as they do not block a watercourse or natural drainway, nor collect and discharge water onto their neighbors' land in quantities greater than, or in a manner different from, its natural flow. Currens, 138 Wn.2d at 862-863. The flow of surface water may be hastened or incidentally increased by artificial means, so long as the water is not ultimately diverted from its natural flow onto the property of another. Trigg v. Timmerman, 90 Wash. 678, 681-82, 156 P. 846 (1916)

In the letter from DNR (CP 137- 139), Mr. Goodwin noted that the “..natural drainage has been altered both on your [Snyder] property and on the Bublitz’ property. On your [Snyder] property it has been altered by the ditch behind your shop and along your driveway. However the ditch then routes storm water back to the natural topographic drainage.” (CP 138)

Mr. Snyder built a shop, however, “In practical terms, the court in *Currens* held that a landowner may improve his or her land with impunity (subject to local land use and permitting requirements) without liability for damages to another's land as long as the landowner acts in good faith and any damage is not in excess of that called for by the particular project.” *Colwell v. Etzell*, 119 Wn. App. 432, 441, 81 P.3d 895 (2003).

The trial court Memorandum Opinion makes reference to photographs filed by Bublitz: “With respect to the water flow from Plaintiff’s property to Defendant’s property, Plaintiff’s actions increased and centralized the flow of water onto Defendant’s property as set forth above and depicted by the photographs file by Defendant.” (CP 129) Evidently the reference is to the undated photo of the area attached to the Declaration of Leo Bublitz (CP 77, and, attached hereto in appendix as Exhibit D), and another undated photo (CP 79, and attached hereto in appendix as Exhibit E) which is said to be a picture of Mr. Bublitz “standing on our property in the water outflowing from Mr. Snyder’s drainage pipe...” (CP 64). Neither the date nor the exact location is provided for the second photo. Although the one photo apparently displays a significant flow of water runoff, the photo is undated. At times in our Puget Sound area water runoff is significant everywhere, and there is often standing water in many areas.

In any case, Snyder's shop is not the cause, nor source of the water runoff. As shown by the evidence presented, the water runoff originates from the uphill Pope Resources land, and is a 'common enemy' to both Snyder and Bublitz. The common enemy doctrine in Washington allows landowners to alter the flow of surface water to the detriment of their neighbors, so long as they do not block a watercourse or natural drainway, nor collect and discharge water onto their neighbors' land in quantities greater than, or in a manner different from, its natural flow. Currens, 138 Wn.2d at 862-863.

Mr. Snyder has made passive usage of a pre-existing system. Passive use of a pre-existing system is not considered an intentional trespass. Hughes v. King County, 42 Wn. App. 776, 780, 714 P.2d 316 (1986).

Bublitz has failed to show that the flow the surface water flow since Snyder repaired the drainage system is greater than the natural flow would be without the drainage system. Ripley, 107 Wn. App. at 583.

D. INJUNCTIVE RELIEF IMPROPER

A party seeking an injunction must show (1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or

will result in actual and substantial injury to him. Tyler Pipe Indus., Inc. v. Dep't of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982) (quoting Port of Seattle v. Int'l Longshoremen's & Warehousemen's Union, 52 Wn.2d 317, 319, 324 P.2d 1099 (1958)). Doyle v. Lee, 166 Wn. App. 397, 272 P.3d 256, (2012).

In Holmes Harbor Water Co. v. Page, 8 Wn. App. 600, 603, 508 P.2d 628 (1973) the court stated, “An injunction does not issue to a petitioner as an absolute right and is granted only on a clear showing of necessity.” There must be a showing of necessity and irreparable injury. “An injunction is an extraordinary equitable remedy designed to prevent serious harm. Its purpose is not to protect a plaintiff from mere inconveniences or speculative and insubstantial injury.” Tyler Pipe Indus. v. State, 96 Wn.2d 785, 796, 638 P.2d 1213, (1982).

Although Bublitz’ alleged that their property is being eroded by the runoff, there is no evidence of erosion, nor evidence of damage to the Bublitz’ property. The DNR letter notes that, “The group did not witness any obvious damage from storm water to either your [Snyder] property or the Bublitz property”. (CP 138) The photo taken on December 6, 2017 (CP 148, 141 and appendix Exhibit C) of the area of the Bublitz/Snyder boundary area, which is the natural low topographical area in which the

water runoff flows from the Snyder property on to the Bublitz property, reveals no apparent damage to the Bublitz property.

When granting injunctive relief, the court should consider the parties' relative hardship caused by denying or granting injunctive relief, and the order's enforceability. Holmes Harbor Water Co. v. Page, 8 Wn. App. 600, 603, 508 P.2d 628 (1973). As to the relative hardship, little if any hardship to the Bublitz' has been shown. Although Bublitz' alleges that was in 2015 when Snyder water trespass began (CP 25) and that the trespass is causing damage and erosion, still, two years later there is no evidence of any damage to the Bublitz property. Bublitz' has not shown an immediate danger so that a permanent injunction should be issued on summary judgment.

On the other hand, since the water runoff is coming from Pope property uphill of Snyder, and since the Snyder lot is uphill of the Bulblitz lot, Snyder is faced with injunctive order that is nearly, if not totally, impossible to comply with. The common enemy doctrine is, in part, a recognition of laws of gravity. Mr. Goodwin writes, "I do not recommended trying to reroute storm water to another location. Such a project would require significant excavation and potentially cause issues elsewhere." (CP 138)

Mr. Bublitz' in his declaration alleges, "...the topography of Mr. Snyder's lot 67 and our adjoining Lot 66 is such that Mr. Snyder should be able to re-rout his drainage line so that it does not have its outflow on to our property". (CP 64) But there is no evidence that Snyder could do so; nor was there any consideration of the relative hardship to Snyder in attempting to comply with the injunction. The fact of the matter is that all of Mr. Snyder's lot 67 is higher in elevation than any part of Bublitz' lot 66, and the lots are contiguous to one another.

In summary judgment proceedings the evidence and all reasonable inferences therefrom are considered in the light most favorable to the plaintiff, the nonmoving party. Young v. Key Pharm., Inc., 112 Wn.2d 216, 770 P.2d 182 (1989). Evidence submitted and all reasonable inferences from the evidence are considered in the light most favorable to the nonmoving party. Woodward v. Lopez, 174 Wn. App. 460, 467, 300 P.3d 417 (2013). Ordinarily, a trial court's decision to grant an injunction and its decision regarding the terms of the injunction are reviewed for an abuse of discretion. Kucera v. Dep't of Transp., 140 Wn.2d 200, 209, 995 P.2d 63 (2000). But here, because the injunction is an appeal from a summary judgment order granting the injunction and its validity, the appellate courts' review should be 'de novo'. Mains Farm

Homeowners Ass'n v. Worthington, 121 Wn.2d 810, 813, 854 P.2d 1072 (1993).

The trial court erred in issuing the injunction on summary judgment.

VI. ATTORNEY FEES

Washington courts traditionally follow the American rule in not awarding attorney fees as costs absent a contract, statute, or recognized equitable exception." City of Seattle v. McCreedy, 131 Wn.2d 266, 273-74, 931 P.2d 156 (1997). One exception to this rule is the dissolution of an injunction when wrongfully issued. The exception recognizing an awards of attorney fees is based on a recognition that a wrongful injunction order may leave a party with no choice but to litigate. Rorvig, 123 Wn.2d at 862. City of Seattle v. McCreedy, 131 Wn.2d 266, 931 P.2d 156, (1997). Thus, if the wrongfully enjoined party prevails in the action to dissolve the temporary injunction, then attorney fees represent the damages suffered from the injunction. Cecil v. Dominy, 69 Wn.2d 289, 291-94, 218 P.2d 233, 1966; All Star Gas, Inc. v. Bechard, 100 Wn. App. 732, 739, 998 P.2d 367, (2000).

In Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 143, 937 P.2d 154 (1997), the court explained that the purpose for allowing a party to recover attorney fees to defeat a wrongfully issued injunction was

equitable and was to deter a party from seeking an injunction prior to a trial on the merits. To deter plaintiffs from seeking relief prior to a trial on the merits, an award of attorney fees is often available on equitable grounds after a court has dissolved a wrongfully issued injunction. Ino, Inc., 132 Wn.2d at 143.

Bublitz sought on a summary judgment motion to permanently enjoin Snyder from allowing any runoff to flow from the Snyder lot onto his lots. He did so by summary judgment, even though the claimed water trespass had, by his testimony, been occurring for over two years. He did so without any showing of erosion or damages. He did so even though his lots are lower in elevation than the Snyder lot.

A party that succeeds in having an appellate court dissolve a wrongfully issued injunction is entitled to an award of attorney fees on appeal. Doyle v. Lee, 166 Wn. App. 397, 407, 272 P.3d 256, (2012). Generally, attorney fees are recoverable by the party that successfully resists a wrongful injunction. Parsons Supply, Inc. v. Smith, 22 Wn. App. 520, 524, 591 P.2d 821 (1979). Appellant Snyder requests he be granted attorney fees on this appeal.

VII. CONCLUSION

The trial court erred in finding on summary judgment that Appellant Snyder “increased and centralized the flow of water onto

Defendant's property" and "is liable for this under the exception to the common enemy doctrine, which provides that surface waters cannot be artificially collected and discharged upon adjoining lands in amounts greater than or in a manner different from its natural flow." And the trial court error in determining on summary judgment that "The water as redirected by Plaintiff [Snyder] is clearly damaging Defendants [Bublitz] property and will continue to do so." The evidence clearly disputes that Snyder increased and centralized the flow of water onto Bublitz property and that Bublitz property has been, or is being, damaged. There is no evidence that Snyder has channeled more water onto the Bublitz than is the natural runoff flow from the uphill lands.

The trial court should not have awarded Bublitz an injunction against Snyder on Bublitz' summary judgment motion. The injunction should be dissolved.

Snyder should be awarded attorney fees as he has been left with no choice but to appeal the wrongfully obtained injunction.

Respectfully submitted this 11th day of July, 2018.



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APPENDIX to Opening Brief of Appellant

No. 51429-0-II

LUCAS JAMES SNYDER, a single man, Appellant

v.

DAVID ANTHONY GRISWOLD, a single man, and LEO BUBLITZ and SUSAN BUBLITZ,
husband and wife, Respondents

APPENDIX CONTENTS:

Exhibit A: CP 90, Survey Map of the Sentinel Firs Lots and Pope Resources land
(Snyder lot is 67; Bublitz' lots are 66, 65, and 64)

Exhibit B: CP 92, Stream Survey Map

Exhibit C: CP 141, December 6, 2017 photo of water runoff

Exhibit D: CP 77, undated photo of water runoff

Exhibit E: CP 79, undated photo of Mr. Bublitz standing in water

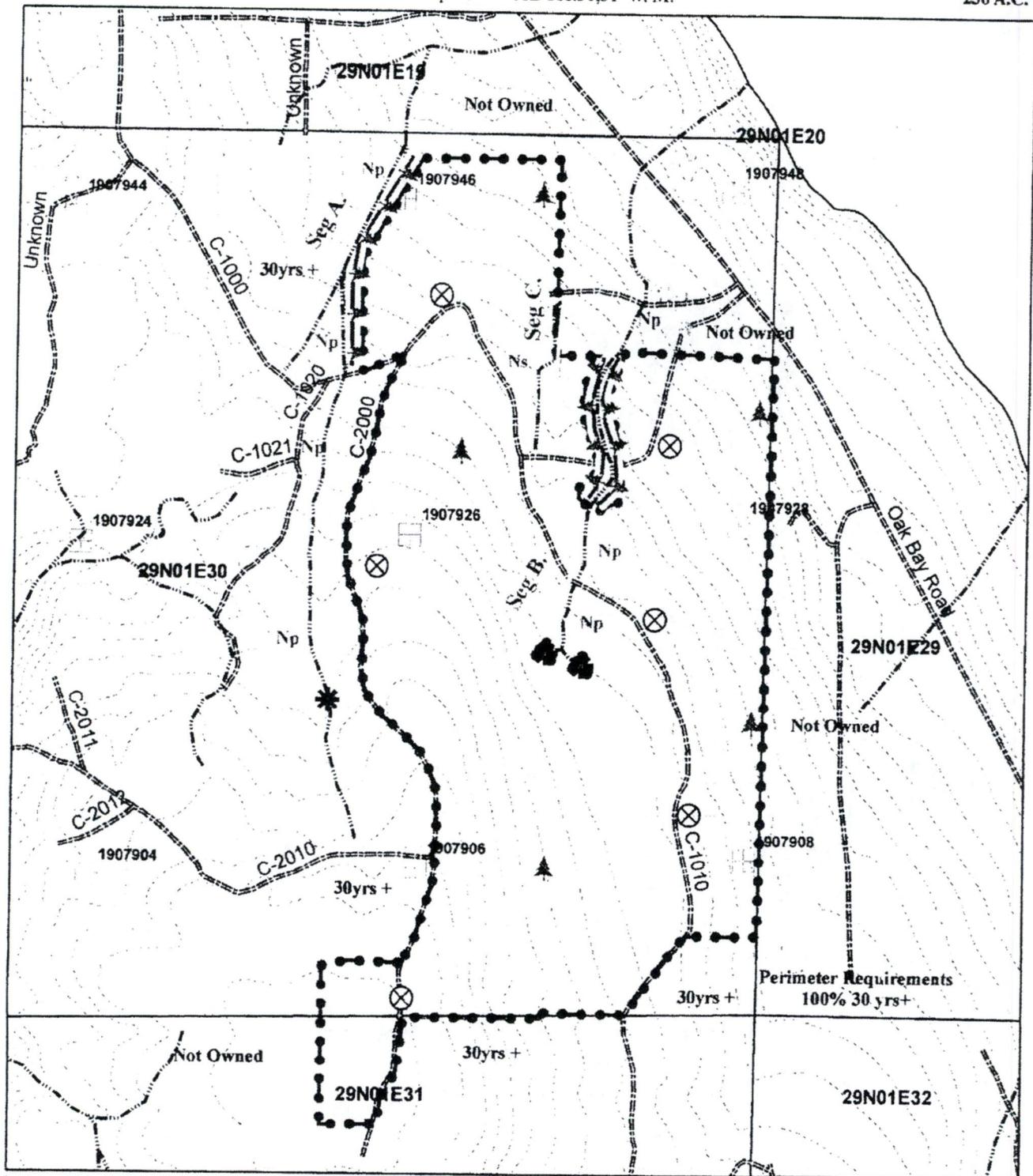
Bedlam

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236 A.C.



Harvest Unit Boundary	Landing
Sections	GRT/WRT
Streams	RMZ-WMZ
Trans	PIP
20' Contours	Equipment Limitation Zone

0 250 500 1,000 Feet

Lat./Lon. -122.72 47.98

Perimeter Requirements 100% 30+ Years

Nad 1983 Utm Feet Zone 10

EXHIBIT B-2 CP 92



Exhibit C CP141



EXHIBIT D CP 77



Exhibit E CP 79