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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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DEPU Case No. 46774-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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D. NORMAN FERGUSON and KAREN FERGUSON,

Appellants,

v.

ALLEN McKENZIE and JANE McKENZIE,

Respondents.

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**AMENDED APPELLANTS' REPLY BRIEF AS DIRECTED BY  
THE COURT OF APPEALS ON JULY 30, 2015**

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## I. INTRODUCTION

Appellants contended that the builder/seller of the residence, Mr. Slye had cleared, filled and landscaped the Disputed Strip, in order to create a view, landscaped the Disputed Strip including planting pampas grass, and maintained the Disputed Strip in order to preserve the view from 1987 to 1994. The Appellants also contended that the Disputed Strip was cleared and landscaped when Petitioners acquired the property in 1994 and that the Disputed Strip was maintained and used as a yard by Petitioners through 2011.

While not really a finding, in Finding No. 5 (*CP 541*), the Trial Court stated:

The Fergusons have the burden of proof by a preponderance of the evidence, and the question before this Court is whether they have met that burden.

A large part of the evidence submitted by Petitioners was photographic. The principal focus of this appeal is a series of findings made by the Court going to that photographic evidence and particularly Findings 17 (*CP 544-545*) and 20 (*CP 545-546*). The latter concludes: "The Fergusons have failed to carry their burden of proof with the photographic evidence." As reflected in the Court's Findings, the analytical path taken by the Trial Court was first, does the photographic evidence establish the elements of adverse possession? Only then did the Trial Court turn to the testimony.

So, the first and principal focus of this appeal is whether the Trial Court's findings with respect to the photographic evidence are supported by substantial evidence, that evidence being the photos themselves and the



testimony regarding the field of view of the photos and what they depict. Appellants would submit that if the Trial Court's findings with respect to the photographic evidence are not supported by substantial evidence, the conclusion that follows is that Appellants did meet their burden of proof.

The Respondents' characterization of the appeal as a challenge to Findings involving the credibility of Respondents' witnesses is misdirection. The testimony which is the subject of the Findings going to credibility is unrelated to the content of the photos and the testimony regarding the field of view of the photos and what they depict.

This is not to say that the Findings based on other testimony as to for example, the supposed clearing in 2006 or Mr. Slye's activities in the Disputed Strip after 1987 are not being challenged. However, the issue is again whether those Findings are supported by substantial evidence. This challenge is predicated on two things. First, the testimony is internally contradictory.

As just one example, in his opening, Respondents' counsel stated that: "The McKenzies and Mr. Slye will testify -- ... that the entire Disputed Strip was completely covered with dense, lush, vegetation, all the way up until 2006." TP 13-14 (emphasis added). Respondents then contended that the Disputed Strip was not actually improved by the Appellants until 2006. In support of this scenario, Respondents pointed the Trial Court to Mr. Slye's testimony by Declaration:

Declaration of Christopher Slye- Paragraph 5:

- a. In conjunction with the construction of Plaintiffs' residence, I did not clear, grade, fill and install

improvements and landscaping in the Disputed Property.

- b. At the time I sold the property to D. Norman Ferguson, the Disputed Property was not cleared, graded or filled.
- c. At the time I sold the Ferguson Property to D. Norman Ferguson, no improvements or landscaping were installed in the disputed strip.

(Defendants' Trial Brief at *CP 69*). In Finding 11, the Court finds: "Slye testified that when he owned the property it was covered in thick natural brush, typical of an undeveloped piece of property in the Pacific Northwest." Slye owned the property from 1987 until 1994.

However, in Finding 18, the Court found:

The Court accepts that the encroachment [by Mr. Slye during construction] was for a limited time and purpose and, after the construction, the area affected regrew and returned to its natural state by 1994.

Finding 18 was based on other testimony by Mr. Slye given after he was confronted with the photographic evidence in which he admitted that he had cleared, graded and partially filled the Disputed Strip. The Trial Court simply ignored that Mr. Slye contradicted himself.

So the second issue here is whether Findings, and particularly Findings relating to the condition of the property from 1987 to 2004 and whether the Appellants cleared a portion of the property in 2006 are supported by substantial evidence where based on testimony which is internally contradictory as well as inconsistent with/unsupported by the photographic evidence.

Finally, the third issue raised here is a legal question. First, Respondents assert that this Court is not entitled to independently review photographic evidence in relation to Findings going solely to the contents of the photographic evidence. Respondents contend that this Court is precluded from reviewing the photographic evidence. However, the rule of law is that an appellate court “is not necessarily bound by the trial court's findings when based *solely* upon written or graphic evidence.”

## II. SUPPLEMENTAL STATEMENT OF THE CASE

The evidence in this case has to be viewed through the lens of the standard of review of findings of fact:

[R]eview [by the Court of Appeals] of a trial court's findings of fact and conclusions of law is a two-step process. We first determine whether the trial court's findings of fact were supported by substantial evidence in the record. Landmark Development, Inc. v. City of Roy, 138 Wash.2d 561, 573, 980 P.2d 1234 (1999). Substantial evidence is evidence which, viewed in the light most favorable to the party prevailing below, would persuade a fair-minded, rational person of the truth of the finding.

Tegman v. Accident & Med. Investigations, Inc., 107 Wash. App. 868, 874, 30 P.3d 8, 12 (2001).

With respect to the Findings that go to the contents of the photographic evidence, Respondents take the position that, in determining whether any Finding relating to what is depicted in a photographic exhibit is supported by substantial evidence, this Court should not look at the photographs themselves. Respondents cite no authority for this proposition and, in Bering v SHARE, 106 Wn. 2d 212 at 220, 721 P. 2d 918 (1986) the Court stated that an appellate court “is not necessarily

bound by the trial court's findings when based *solely* upon written or graphic evidence.” The rationale was that when analyzing graphic evidence, the appellate court would be in as good a position as the Trial Court to assess the evidence. Finding 17 and particularly Finding 20 are solely addressed to the photographic evidence. This Court would, therefore, be able to review and independently assess what the photographic evidence shows.

There are three aspects to this analysis:

1. What would a fair minded rational person conclude about the photographic evidence and other evidence relating to the nature and scope of Mr. Slye’s activities in the Disputed Strip during construction?
2. What would a fair minded rational person conclude about the photographic evidence relating to the “regrowth” of vegetation between 1987 when the residence was built and 1994 when it was acquired by Mr. Ferguson?
3. What would a fair minded rational person conclude about the photographic evidence relating to the nature and scope of the Petitioners’ activities in the Disputed Strip in the period 1994 to 2004?

In general, as the Appellants note: “The court did, however, find that photos purporting to show clearing and cultivation in the Disputed Strip were ‘ambiguous as to angle and depth and of limited value in drawing definitive and reliable conclusions.’ *CP 546 FF 20.*” (*Response* at 15).

Specifically with respect to Mr. Slye’s activities during construction Finding 17 reads as follows:

The photos show only partial areas of the disputed strip. For example, the Fergusons rely on Exhibit 19 for the proposition

that the disputed strip was cleared. Exhibit 19 depicts only a very limited area of the disputed strip where the construction was occurring. It is impossible to conclude that the whole disputed strip was cleared and planted.

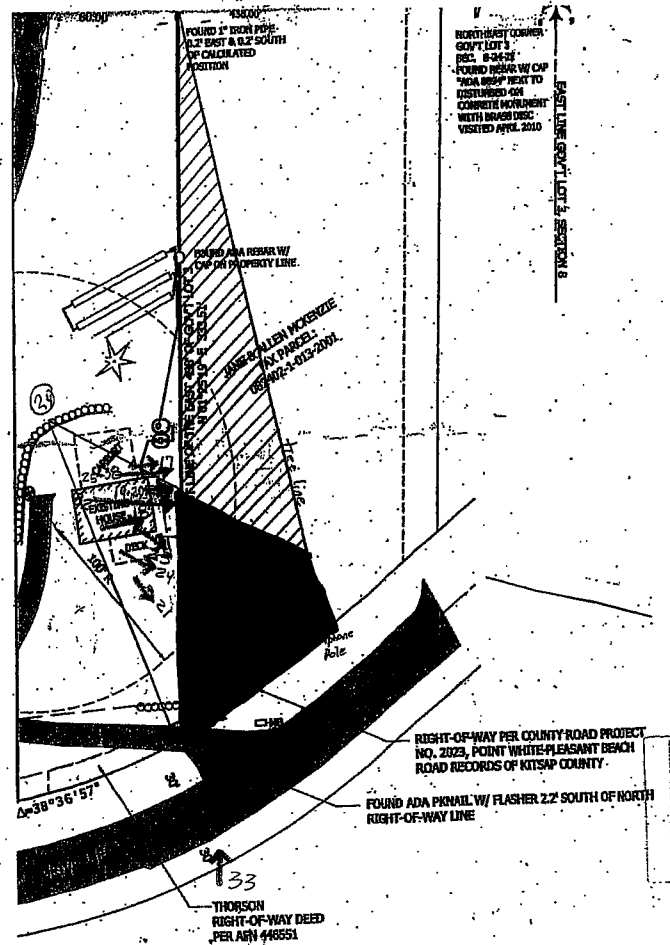
It is correct that none of the individual photos depicts the entirety of the Disputed Strip during construction.

However, there were 11 photographic exhibits admitted into evidence dating from the period of construction of the residence: Exs. 17 (CP 590-91), 18 (CP 592-93), 19 (CP 594-95), 20 (CP 596 -97), 21 (CP 598-99), 23 (CP 600-01), 24 (CP 602-03), 25 (CP 604-05), 32 (CP 610-11), and 33 (CP 612-13). The issue is: what do the photos show if the fields of view of each photo, based on the testimony of Mr. Slye as to the vantage point from which the photos were taken, are considered as a whole?

*Appendix 1* attached hereto consists of a portion of the survey admitted into evidence as Ex. D12; CP 711-713 (*Appendix 1 to Corrected Appellants' Opening Brief*); together with a copy of each photo accompanied by the trial testimony about the location from where it was taken. Each of these photos encompasses a field of view across the Disputed Strip.

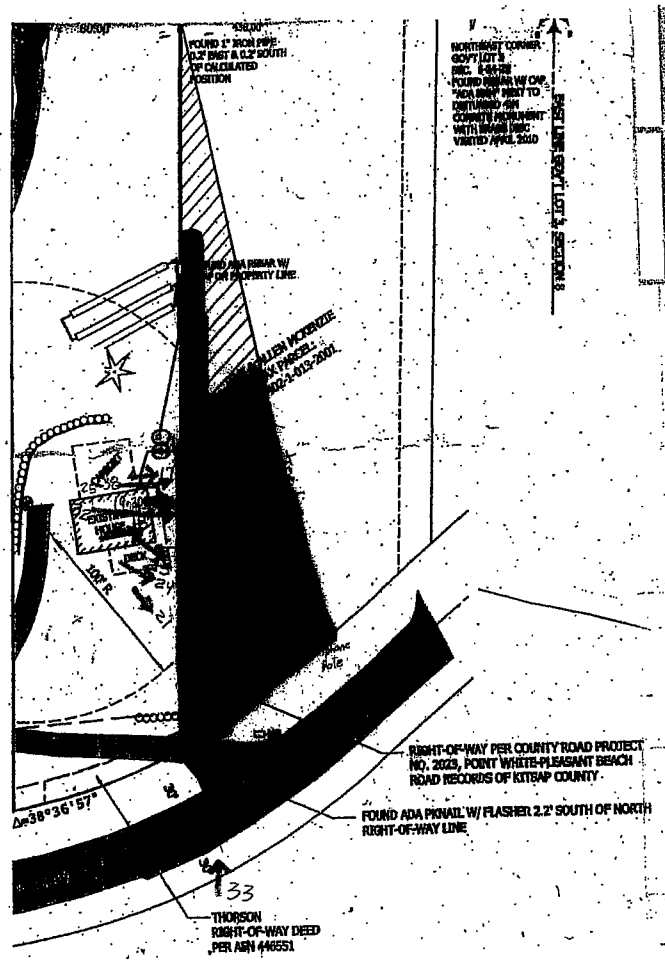
For example, Ex. 24 (CP 602 – 603) was taken from above the retaining wall on the left hand side of D12; CP 711-713 according to Mr. Slye (TP 64) and depicts a portion of the framing and floor plate. The point of view is looking southeast across the floor plate of the residence. You can project lines across the floor plate which delineate the field of

view across the Disputed Strip and what Appellants argue the portion of the Disputed Strip the photo depicts is as follows:



So what happens if you do that for all the photos? Appellants argue the portion of the Disputed Strip depicted cumulatively is:

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Viewed as a whole, the photos encompass almost the entirety of the Disputed Strip during construction. There is no portion of the Disputed Strip depicted in these photos which shows any vegetation on the Disputed Strip after Mr. Slye completed construction, which is disturbed or bare earth. Large amounts of fill have been placed as shown in Exs. 19 (CP 594-95) and 33 (CP 612-13) which fill it is undisputed remains in place to date.

The fact is that while any individual photo is insufficient to depict Mr. Slye's activities in the Disputed Strip, when the photos are considered

as a whole, the only conclusion a rational fair minded person would come to is that Mr. Slye cleared and graded the entirety of the Disputed Strip and partially filled the Disputed Strip. The Finding that these photos are insufficient to establish that Mr. Slye cleared and graded the entirety of the Disputed Strip and partially filled the Disputed Strip is clearly not supported by substantial evidence.

Ex. 42 is the magazine article accompanied by photos of the interior of the residence. As described in Ex. 42, dated July 1990, (CP 617-620):

From the kitchen in his home on Bainbridge Island Washington, Christopher Slye enjoys 180 – degree views of Puget Sound’s quarter mile wide Rich Passage.

This and other photographic evidence equally supports the conclusion that Mr. Slye cleared the Disputed Strip to create a view corridor which Mr. Slye maintained after 1987.

Finding 18 states:

The Court is not persuaded that once Slye obtained permission to encroach, that he cleared the property and continued to occupy the disputed strip for several years until the sale in 1994.

In Finding 18, the Court also found:

The Court accepts that the encroachment [by Mr. Slye during construction] was for a limited time and purpose and, after the construction, the area affected regrew and returned to its natural state by 1994.

In Finding 11, the Court finds: “Slye testified that when he owned the property it was covered in thick natural brush, typical of an undeveloped piece of property in the Pacific Northwest.” Slye owned the property from



1987 until 1994. But, Mr. Slye also testified that after he cleared the property, it regrew. Mr. Slye's testimony on "re-vegetation" appears at TP 86 and TP 92. As reflected in the Findings then, Mr. Slye testified that he had not cleared the Disputed Strip which remained lushly vegetated during his ownership but that he had indeed cleared the Disputed Strip which regrew by 1994. The Court's findings here are not even internally consistent.

Mrs. McKenzie described the "natural state" of the Disputed Strip as "*completely overgrown, lush vegetation*. ... Shrubbery, trees, you know as I mentioned, hollies. There are fruit trees. It was just as heavily overgrown as one expects in the Pacific Northwest of undeveloped land." (TP at 225) (emphasis added). Mr. Slye described the pre-construction "natural state" of the Disputed Strip as follows:

Well, I'm not an expert on trees, but there's what I'd call alders and some firs and Scotch broom. This, that, and the other thing, things that grow around here.

(TP 31:2-5).

Okay. How big were these trees? Were they mature?

A. Some were. Some small; some bigger.

(TP 31:8-9). Mr. Slye testified that, in its pre-construction condition – the "natural state," you could not see into the Disputed Strip because of the vegetation. (TP 31-34). If you can't see in, you can't see out.

Looking at Ex. 42, what you can see out of the right hand window is the Utility Pole down on Point White Drive about 100 feet away based

on the scale of the survey. (CP 133-34.<sup>1</sup>) How would you see that if the Disputed Strip had returned, even partially, to the natural state described by Mr. Slye and Ms. McKenzie? Not a rhetorical question. So, how did Mr. Slye maintain that 180 degree view across the Disputed Strip?

With respect to this Exhibit, the Court found at Finding 22:

The Fergusons assert that a magazine cover from 1990, when Slye owned the property, demonstrates and supports the proposition that the vegetation seen through the kitchen window confirms that the property was cleared through the disputed strip. One could argue that the area is cleared through to the trees, as trees can be seen. But one could equally argue that because it is impossible to tell from the picture, specifically as it relates to angle and depth, how much shrubbery has been cleared below the windowsill, the area purported to be cleared and cultivated between the house and vegetation is difficult to tell from this exhibit.

In other words, the photo shows the trees were removed from the Disputed Strip but is ambiguous as to whether the unseen portion of the Disputed Strip had returned to its "native state" because of its absence in the photograph.

Here we can draw on Mr. Holmes:

Gregory (Scotland Yard detective): "Is there any other point to which you would wish to draw my attention?"

Holmes: "To the curious incident of the dog in the night-time."

Gregory: "The dog did nothing in the night-time."

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<sup>1</sup> As discussed in more detail below, the view towards the Utility Pole is also through the same area Mrs. McKenzie testified was not cleared until 2006.

Holmes: "That was the curious incident."

The absence of vegetation obscuring the view from the window is of the same significance as the inactivity of the dog. You can still see the view.

Prior to Mr. Slye's construction activities, the view from the residence across the Disputed Strip would have been blocked by the vegetation. (TP 32:15 – 34:8). That is the natural state to which Mr. Slye testified. It obviously was not the natural state in 1990 or Mr. Slye would not have had the view. Mr. Slye got the view by first clearing and then maintaining the Disputed Strip as cleared. It is the same view that Mr. Slye sold to Mr. Ferguson in 1994 and it is the same 180 degree view seen some 24 years later in Ex. 51 (*CP 625-626*) and Ex. 54 (*CP 629-630*), taken during or after the construction of the boundary line fence by the McKenzies.

On the issue of what happened on the property between 1987 and 2004, another big part of the answer is in the pampas grass. Ex. 27 (*CP 606-607*) depicts how the property looked in 1994. (TP 67:24–68:2). Pampas grass in the lower right. Ex. 28 (*CP 608-609*) was taken in 1997 from the Disputed Strip looking Southeast towards Rich Passage and the utility pole ("Tphone pole" on Ex. 2). (TP 183-185). More pampas grass. Ex. 45 (*CP 621-622*) is a photo taken by Mr. Ferguson in Christmas 2003. Mr. Ferguson testified as to this photo:

Q. Okay. Now, see all those white things kind of poking up there?

A. Yes.

Q. What are those?

A. Pampas grass, ferns.

Q. Where are those located?

A. In the disputed strip.

(TP at 139). This photo clearly does not depict the Disputed Strip as having regrown to its “native state.”<sup>2</sup> Ex. 46 (CP 623-624) was taken by Mr. Ferguson in November 2006. More pampas grass. Moreover the condition of the property in this 2006 photo is identical to the condition of the property in 2003.

In these photos, it is hard to tell exactly where the pampas grass is, presumably the basis for the statement by the Trial Court in Finding 20. However, Ex. 5 (CP 575-576), Ex. 6 (CP 577-578), Ex. 51 (CP 625-626), Ex. 53 (CP 627-628) and Ex. 54 (CP 629-630), taken during or after the construction of the boundary line fence by the McKenzies, tells us exactly where the pampas grass was. Most of the pampas grass depicted in these photos are in the Disputed Strip.<sup>3</sup>

So, the photos show the pampas grass is there in 1994 through 2006 and the photos taken after construction of the boundary fence by the McKenzies in 2011 show unequivocally that the pampas grass is in the Disputed Strip.

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<sup>2</sup> Remember, it was the Respondents’ contention that after having been cleared in 1987, there was no activity in the Disputed Strip until 2006. If there had been no activity between 1987 and 2003, some 16 years, wouldn’t you expect to see dense lush *native* vegetation rather than pampas grass? Not a rhetorical question .

<sup>3</sup> In fact, in the area claimed to have been cleared in 2006 as discussed below.

Respondents do not dispute that there was pampas grass in the Disputed Strip continuously from 1994 through 2011. Respondents assert that it is an established verity that Mr. Slye did not plant the pampas grass.

Respondents state:

The pampas grass is a red herring. The trial court simply did not believe that Slye cleared the disputed strip and maintained it after completing his construction. The Court did not believe that Slye would seek the McKenzie's permission for construction purposes and then exceed the scope of the permission he was given.

(At 33).

We can be reasonably certain that the pampas grass fairy did not fly over the Disputed Strip in 1994 dropping mature pampas grass on to the Disputed Strip through the dense lush vegetation that had regrown. If it was there in 1994 but it was not planted by Slye, then it had to have been planted by the Appellants. But, what would a rational fair minded person conclude from this evidence? That Mr. Slye was not telling the truth and that the Court's "beliefs" as explained by Respondents have no substantial basis in the evidence.

In Finding 18, the Court found:

The Court accepts that the encroachment [by Mr. Slye during construction] was for a limited time and purpose and, after the construction, the area affected regrew and returned to its natural state by 1994.

Finding 32 states:

The attempts in 2006 to develop the property fit in with the attempts around the same time to clear the property.

In sum then, the Court found that the property returned to its natural state by 1994 only to be re-cleared by the Petitioners in 2006. The testimony about re-clearing was offered to rebut testimony by both Petitioners that the Disputed Strip had been clear and maintained by Petitioners continuously from 1994 to 2011.

Mr. Slye described the pre-construction “natural state” of the Disputed Strip as follows:

Well, I'm not an expert on trees, but there's what I'd call alders and some firs and Scotch broom. This, that, and the other thing, things that grow around here.

(TP 31:2-5).

Okay. How big were these trees? Were they mature?

A. Some were. Some small; some bigger.

(TP 31:8-9). Mrs. McKenzie testified that the Disputed Strip “was *completely overgrown, lush vegetation*. ... Shrubbery, trees, you know as I mentioned, hollies. There are fruit trees. It was just as heavily overgrown as one expects in the Pacific Northwest of undeveloped land.” (TP at 225) (emphasis added).

Mrs. McKenzie described the area supposedly cleared in 2006 as a semi circular area to the east of the residence, to the right of the residence in Ex. D12; CP 711-713 (*Appendix 2 to Corrected Appellants' Opening Brief*) running from the southeastern (bottom) corner of the deck to the tree-line and back to the northeast (upper) corner of the house: (TP 306:14- 307:16).

Again, based on the scale in the survey, the right to left dimension of the residence from the corner of the deck on the left to the end of the

carport on the right in Ex. 19 (CP 594-95) is 80 feet. As shown on the survey, the distance from the corner of the property line to the deck is 5.5 feet. The field of view in Ex. 18 is even larger.<sup>4</sup> Mr. Slye testified that all of the fill could be on the Appellants' side of the surveyed boundary (TP 53). That would require all of the fill to be within 5.5 feet of the deck.

No rational person would conclude these photos were taken 5.5 feet from the deck. The area depicted is exactly the area described by Mrs. McKenzie as having been cleared in 2006. The same area is depicted in other construction phase photos as well; see, for example. Exs. 17 (CP 590-91), 20 (CP 596 -97), and 33 (CP 612-13).

As Respondents note:

Again, the Trial Court found that "Exhibit 19 depicts only a very limited area of the disputed strip where the construction was occurring," making it "impossible to conclude that the whole disputed strip was cleared and planted." (CP 544, FF 17).

No doubt that these exhibits individually do not show the entirety of the Disputed Strip. But, they do show the whole of the area Mrs. McKenzie testified was re-cleared in 2006. What they do show beyond any doubt is that the entire area that Mrs. McKenzie testified was cleared by the Petitioners in 2006 was entirely denuded of vegetation and filled in 1987. Particularly, there are no trees, much less mature trees.

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<sup>4</sup> Mr. Slye's testimony regarding these photos is patent evasion. For example, Mr. Slye testified that all of the fill could be on the Appellants' side of the surveyed boundary (TP 53). That would require all of the fill to be within 5.5 feet of the deck. This is the kind of testimony on which the Trial Court relied to conclude the photographic evidence was ambiguous.

Mr. Slye described the pre-construction "natural state" of the Disputed Strip as follows:

Well, I'm not an expert on trees, but there's what I'd call alders and some firs and Scotch broom. This, that, and the other thing, things that grow around here.

(TP 31:2-5).

Okay. How big were these trees? Were they mature?

A. Some were. Some small; some bigger.

(TP 31:8-9). Mr. Slye testifies: "But I was told not to cut any firs or madronas or any of the nice, beautiful, big trees, the alders. And I didn't take any big trees." (TP 85). Mrs. McKenzie went on to describe what was allegedly cleared by the Fergusons in 2006 as follows:

A. Well, as I said, the most noticeable were the large trees, particularly the large fir tree which Mr. Slye had trimmed after having asked permission to do so. That was obvious. The other vegetation would have been just rough vegetation that grows in the Pacific Northwest.

(TP 313).

But, there were absolutely no mature trees left after Mr. Slye got done in 1987.<sup>5</sup> As the Court found in Finding No. 22 the Strip "is cleared through to the trees" on the far side. Mr. Ferguson's testimony (TP 131-136) which was undisputed,<sup>6</sup> that various of the objects viewed through the two windows to the left in Ex. 42 (CP 617-620) were on the far side of

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<sup>5</sup> The answer to what happened to the trees can be found by observing the large fir log in the foreground in Ex. 19.

<sup>6</sup> See Finding 22. The only testimony offered with respect to the magazine article and what was viewed in the windows was that of Mr. Ferguson. The photo, in conjunction with Mr. Ferguson's testimony leaves no mystery about what is depicted.



the boundary between the Disputed Strip and the remainder of the McKenzie property. Mr. Ferguson's testimony as to the condition of the Disputed Strip when he acquired it is as follows:

A. There was grass up near the septic tank. There was grass in the front going down the slope, maybe five, six, seven feet. There was some pampas grass. There was blackberries. There was some Scotch broom. There was typical scrubble that would be around in that neighborhood. But it -- it was clearly low kinds of brush, I would call.

Q. But there was no large trees, no mature trees?

A. I don't recall any large mature trees.

(TP at 136).

So, the question here is would a rational fair minded person conclude on the basis of Mrs. McKenzie's testimony that large trees, including a large mature fir tree which didn't exist on the property from 1987 to 1994, reappear in order to be cut down again in 2006? Petitioners would submit that such a person would come to two conclusions: (1) the Petitioners did not clear the Disputed Strip in 2006, and (2) Mrs. McKenzie's testimony was inaccurate if not deliberately untruthful. No rational person, on the basis of the evidence, would accept that Appellants cleared "large trees" in the Disputed Strip in 2006.

So, where does it leave you if the photographic evidence does establish that:

1. Mr. Slye cleared graded and filled the Disputed Strip in order to obtain a view;
2. Mr. Slye landscaped the Disputed Strip including planting pampas grass;

3. Mr. Slye maintained the Disputed Strip to preserve the view such that the Disputed Strip did not “regrow;” a
4. Petitioners used and maintained the Disputed Strip continuously from 1994 to 2004; and
5. The Appellants did not engage in any clearing in 2006.

The Trial Court specifically found that the Appellants failed to meet their burden of proof on the basis of the Court’s perceived deficiencies in that evidence: “The Fergusons have failed to carry their burden of proof with the photographic evidence.” (Finding No. 20). If the evidence in fact shows what Appellants contend it shows, the Appellants have, in fact, met their burden of proof.

### **III. APPLICABLE AUTHORITY AND DISCUSSION**

Respondents assert that this appeal is frivolous because it is based on a challenge to the Trial Court’s Findings on credibility. That is not in fact the case. First, the appeal is based on the contention that no rational person would agree with the Trial Court’s assessment of the photographic evidence either standing alone or in light of the internal contradictions in the testimony of Respondents’ witnesses.

The problem, which is pervasive, is that the evidence offered by Respondents is internally contradictory as well as irreconcilable with the photographic evidence. So, ultimately the issue here is not whether the Respondents’ testimony is more credible than the Appellants’. Rather, the issue is whether Findings based on testimony which is internally contradictory, objectively incredible in the case of Mrs. McKenzie, and

contradicted by the photographic evidence are supported by substantial evidence.

Just take the pampas grass for example. Mr. Slye testified; TP 89-90:

Q. From the time you completed your construction on the Ferguson residence until the time you sold the Ferguson residence, did you make any changes to the disputed strip?

A. No.

At TP 83:

Q. Okay. How can you be sure that you didn't plant anything in the disputed strip?

A. Because I made a point not to. ...

Q. Prior to the sale of the Ferguson property, did you plant anything on the Ferguson property?

A. Well, I planted some flowers and roses and pampas grass, plants.

Viewing the totality of the photographic evidence, the pampas grass was in the Disputed Strip when Mr. Ferguson bought the property in 1994. While the conflict between the photographic evidence and the testimony may raise an issue of credibility, it is not Petitioners' credibility which is compromised.

Which brings us back to Bering v SHARE, 106 Wn. 2d 212 at 220, 721 P. 2d 918 (1986). Petitioners recognize the longstanding rule that appellate courts do not review findings as to credibility. But, what happens if as a result of this Court's review of the photographic evidence,

the Court conclusions conflict with the testimony of Respondents' witnesses?

For example, no rational person would conclude that large mature trees, including specifically a large mature fir tree on site in 1987, which were removed in 1987 reappeared to be cut down again in 2006. But, that essentially was the testimony offered by the McKenzies. Is this Court still required to accept Mrs. McKenzie's testimony as established verity? To do so would make no sense whatsoever.

Aside from that, the response raises non-issues. Respondents do not dispute that if Appellants met their burden of proof, title to the Disputed Strip would have vested in 2004. Title acquired through adverse possession cannot be divested by acts other than those required to transfer a title acquired by deed; *Mugaas v. Smith*, 33 Wn. 2d 429, 206 P. 2d 332 (1949). Unless evidence relating to the period after 2004 goes to the issue of divestment, it is irrelevant to whether the Appellants' title vested in 2006.

Nevertheless, Respondents argue that the findings relating to the time period after go to Appellants' credibility. This is just more misdirection. The photographic evidence speaks for itself. What that evidence has to say does not depend to any degree on the testimony by Petitioners as to which the Trial Court found Respondents' witnesses were more credible. The septic permit issue falls in the same category. Respondents essentially acknowledge that the findings related to the permit are irrelevant.

Finally, there is the contention that this appeal is frivolous based on a number of contentions by Respondents. First, Respondents contend that the appeal is purely factual in nature. In point of fact, this appeal raises three legal issues one of which arises from the reply.

Respondents assert that this Court is not entitled to independently review photographic evidence in relation to Findings going solely to the contents of the photographic evidence. Respondents contend that this Court is precluded from reviewing the photographic evidence. A corollary issue is: if this Court concludes that the photographic evidence cannot be reconciled with the testimony of Respondents' witnesses, is this Court entitled to review the findings of credibility? Likewise, the issues of whether the post 2004 evidence and evidence pertaining to the septic permit are relevant are each legal issues.

Respondents assert that: "[a] challenge to findings plainly supported by substantial evidence is frivolous. *Streater*, 26 Wn. App. At 434-35." What *Streater* actually says is:

RAP 18.9(a) provides that

(t)he appellate court on its own initiative . . . may order a party or counsel who uses these rules for the purpose of delay . . . to pay terms or compensatory damages to any other party who has been harmed by the delay . . .

In determining whether an appeal is brought for delay under this rule, our primary inquiry is whether, when considering the record as a whole, the appeal is frivolous, i. e., whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal.

Streater v. White, 26 Wash. App. 430, 434, 613 P.2d 187, 191 (1980).

The Petitioners assert that the seminal findings here relating to the photographic evidence are not supported by substantial evidence. Likewise, Petitioners assert that the fact that the Trial Court simply ignored direct contradictions in Mr. Slye's testimony and clear conflicts between the testimony and the photographic evidence and, accepted objectively incredible testimony by Mrs. McKenzie vitiates the Findings. Finally, the resolution of this issue is required to be based on a consideration of the record as a whole under the very authority cited by Respondents.

In that regard, the record speaks for itself. Further argument here would not further illuminate the subject of whether the appeal raises debatable issues.

DATED this 19th day of August, 2015.

BRAIN LAW FIRM PLLC

By: 

Paul E. Brain, WSBA #13438

Counsel for Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 19th day of August, 2015, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

***Counsel for Respondents:***


Gary T. Chrey	<input type="checkbox"/>	Hand Delivery
Michael D. Uhlig	<input checked="" type="checkbox"/>	U.S. Mail
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Port Orchard, WA 98366		

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Kenneth W. Masters	<input type="checkbox"/>	Hand Delivery
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Masters Law Group, P.L.L.C.	<input type="checkbox"/>	Facsimile
241 Madison Avenue North	<input checked="" type="checkbox"/>	Email
Bainbridge Island, WA 98110		

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 19th day of August, 2015, at Tacoma, Washington.

  
\_\_\_\_\_  
Kim Middleton

# **Appendix 1**



000711

STATE      Exhibit No. D 12  
 PLAINTIFF       DEFENDANT  
 PETITIONER       RESPONDENT  
 OTHER \_\_\_\_\_

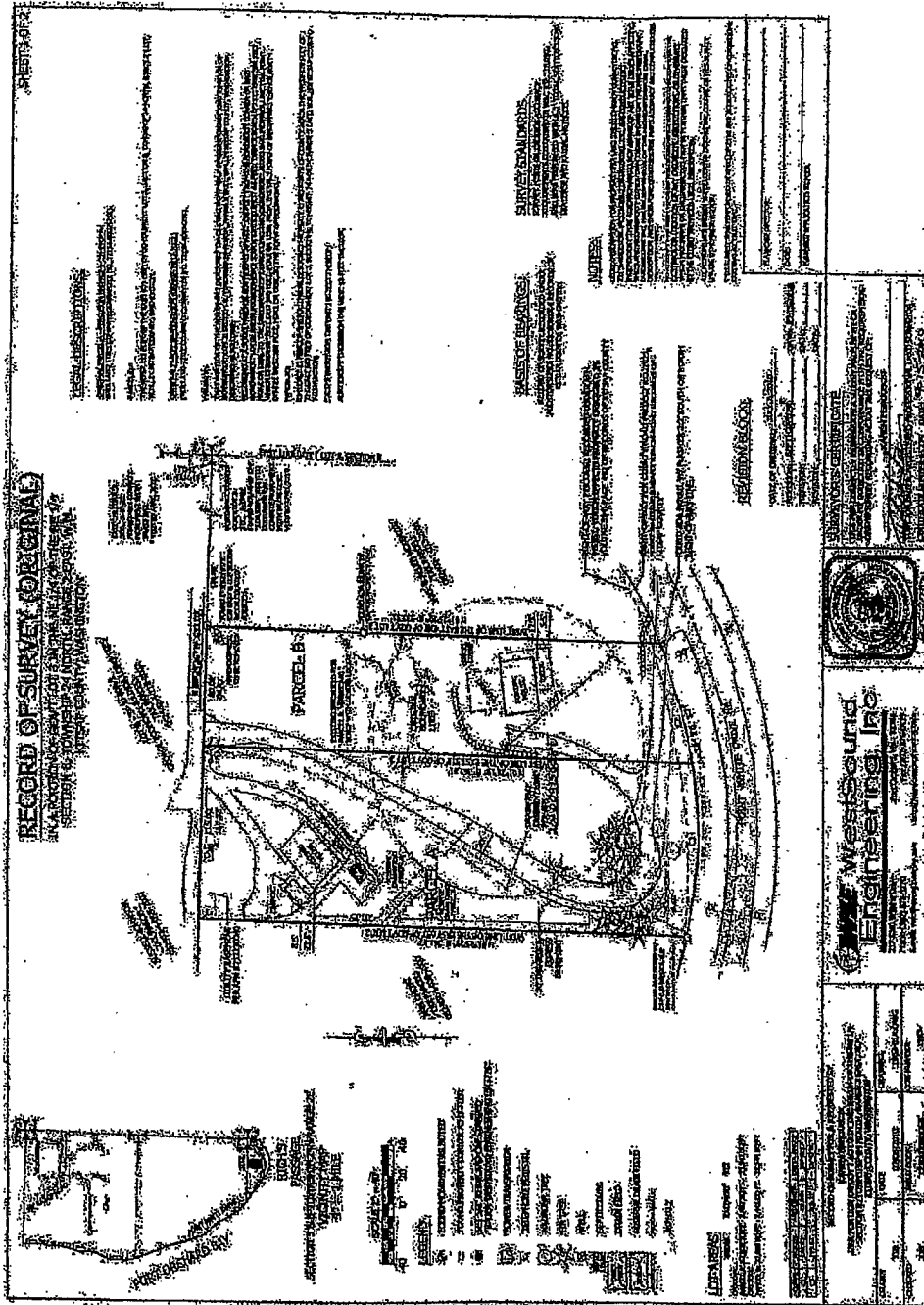
Case No. 11-2-01252-4

FERGUSON VS McKENZIE

Admitted       Refused  
 Withdrawn       Not Offered

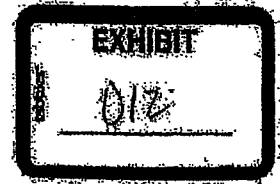
Date of Court's Ruling: 06/04/14

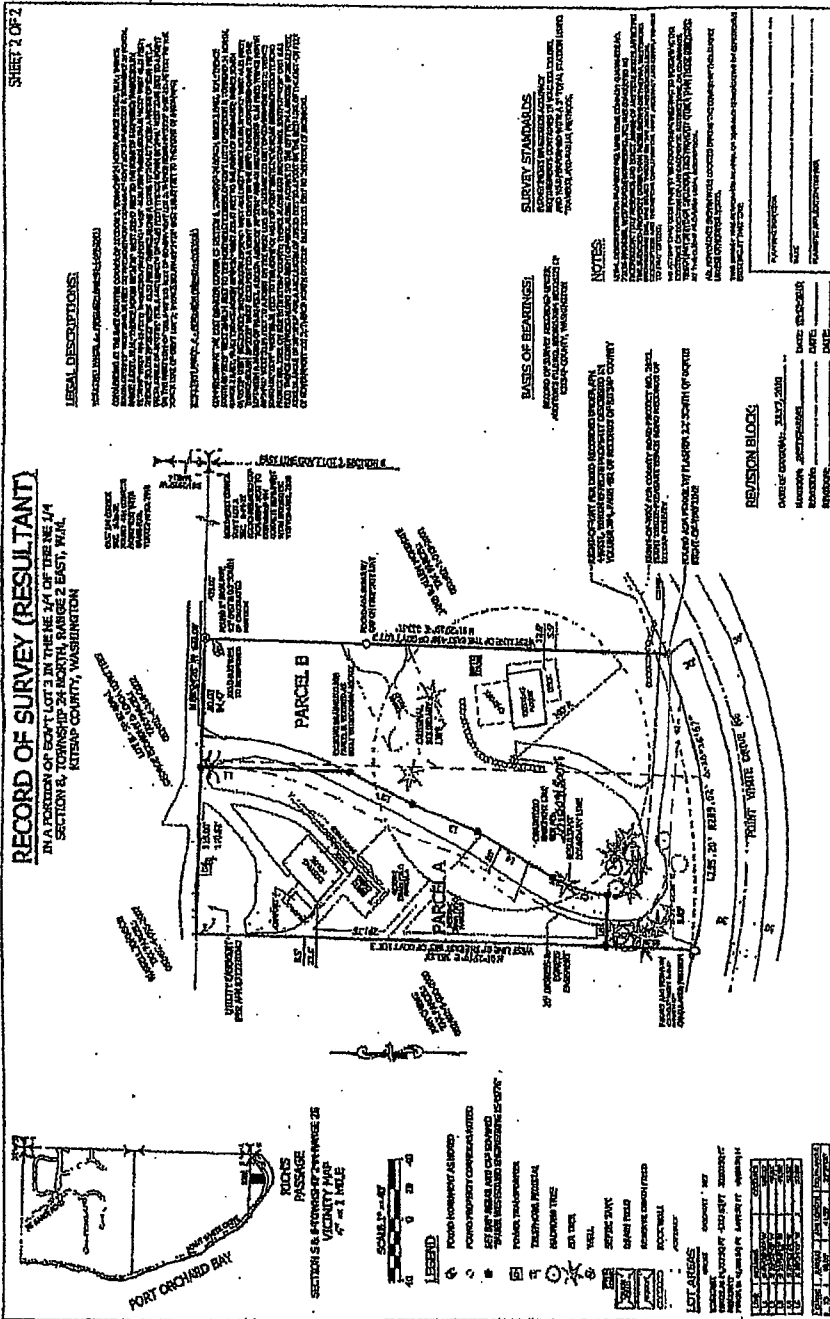
000712



**WestSound Engineering, Inc.**

EXHIBIT  
 SEP 1 19 2008  
 SURVEYING & DEVELOPMENT





**CITY OF**  
**BRANDRIDGE ISLAND**  
**DEPT OF PLANNING &**  
**COMMUNITY DEVELOPMENT**

**WESTSOUND ENGINEERING, INC.**  
 20110 WILSON AVENUE  
 MINNETONKA, MN 55345  
 (952) 835-1100  
 www.westsoundengineering.com

**DATE:** SEP 15 2010

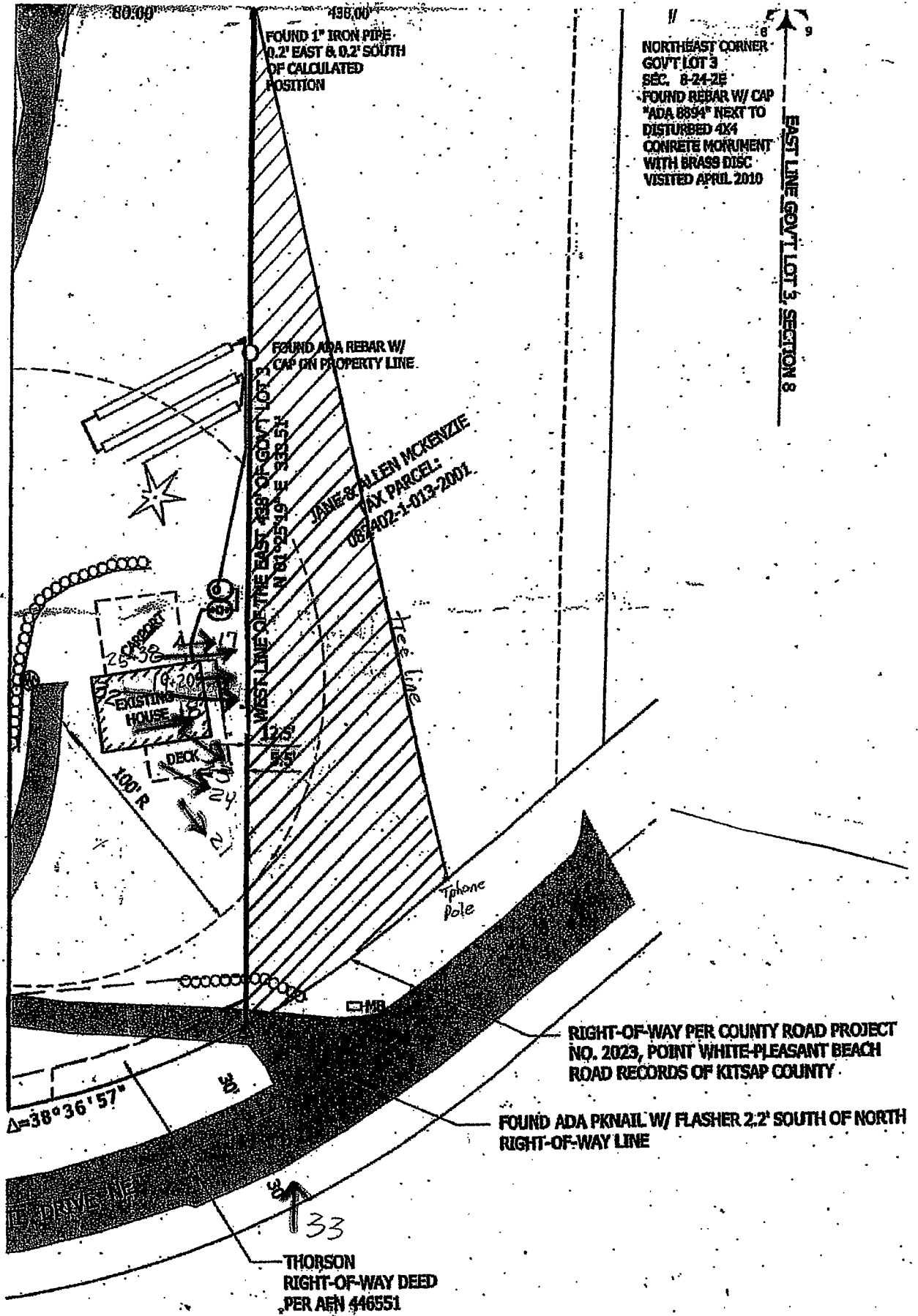
**PROJECT:** RECORD OF SURVEY FOR PARCEL A AND PARCEL B IN SECTION 8, TOWNSHIP 18 NORTH, RANGE 2 EAST, 74 RANGE COUNTY, MINNESOTA.

**PREPARED BY:** [Name]

**CHECKED BY:** [Name]

**SCALE:** AS SHOWN

# **Disputed Strip Map Exhibit**



**Exhibit 17**

000590

STATE

Exhibit No. 17

PLAINTIFF

DEFENDANT

PETITIONER

RESPONDENT

OTHER \_\_\_\_\_

Case No. **11-2-01252-4**

**FERGUSON VS MCKENZIE**

Admitted  
 Withdrawn

Refused  
 Not Offered

Date of Court's Ruling: \_\_\_\_\_

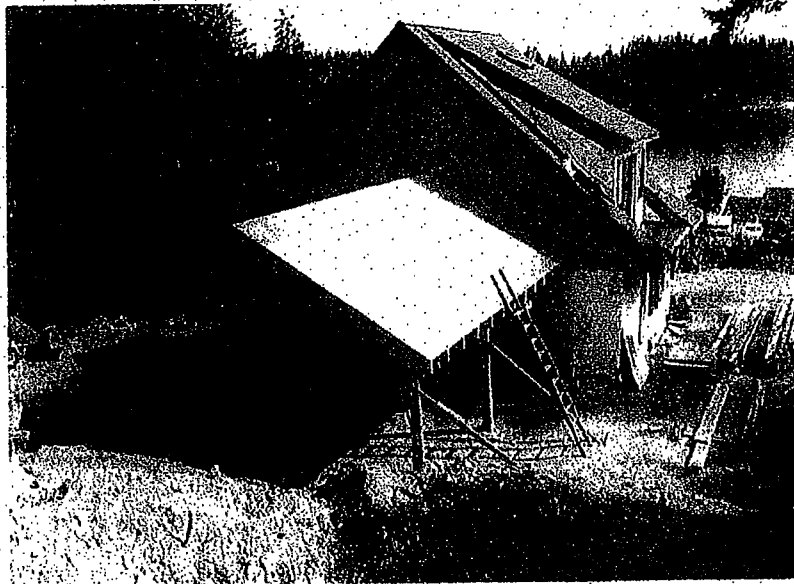


EXHIBIT  
Slye  
10/14/11  
[Illegible]

F 00006



1 BY MR. BRAIN:

2 Q. Okay. Is it your testimony, Mr. Slye, that you can't  
3 determine from your knowledge of the property the  
4 vantage point from which this picture was taken? The  
5 dimensions that's shown on the survey, the size of the  
6 equipment involved, that those pieces of equipment, the  
7 truck, the bulldozer, the front-end loader are all in  
8 the disputed strip?

9 A. It's possible that they are.

10 Q. Okay. All right. Let's go to Exhibit 17.

11 Do you recognize Exhibit 17, Mr. Slye?

12 A. I do.

13 Q. Okay. And this is a picture taken from roughly  
14 northwest of the residence looking to the southeast  
15 across the carport into the disputed strip, correct?

16 A. Correct.

17 Q. Okay. And that bucket that you see in the left-hand  
18 side of Exhibit 17, that's a front-end bucket for a  
19 front-end loader backhoe, right?

20 And do you think that's within five feet of the  
21 boundary line for the disputed strip based upon your  
22 knowledge of the property?

23 A. Once again, the angle of the photograph, that line, I  
24 don't know exactly where it is. It's possible.

25 Q. Okay. And according to your prior testimony, the strip

- 1 was vegetated right up to the boundary line.
- 2 A. It was, yeah.
- 3 Q. You see that vegetation up to the boundary line, like
- 4 where that front-end --
- 5 A. Those are trees.
- 6 Q. On the far side.
- 7 A. They are.
- 8 Q. Right.
- 9 How long is a backhoe?
- 10 A. I have no idea.
- 11 Q. You do construction for a living, don't you?
- 12 A. I don't.
- 13 Q. What do you do now?
- 14 A. I'm a handyman.
- 15 Q. Okay. Did you build houses for a living back when you
- 16 built this one?
- 17 A. I did not.
- 18 Q. Have you ever had any experience using or contracting
- 19 for the use of a backhoe front-end loader before?
- 20 A. I've never operated one.
- 21 Q. That's not my question.
- 22 A. Ask the question again.
- 23 Q. I said have you ever had any experience in contracting
- 24 for the use of.
- 25 A. Yeah.

1 Q. How frequently?

2 A. A couple times.

3 Q. Based upon that experience, do you think that backhoe  
4 is less than ten feet in length?

5 A. I don't know. I can find you a backhoe that's ten feet  
6 or a backhoe that's 50-feet long. I'm not sure which  
7 one that was.

8 Q. Okay. It's certainly not five feet; is it?

9 A. More than likely not.

10 Q. And that's all disturbed earth, that tan,  
11 sort-of-pinkish-colored stuff there; isn't it?

12 A. It is.

13 Q. Okay. It's not vegetation; is it?

14 A. It looks like dirt.

15 Q. Okay.

16 MR. BRAIN: I would like to move for the  
17 admission of Exhibit 17.

18 THE COURT: Any objection to 17?

19 MR. UHLIG: No objection, Your Honor.

20 If counsel could speak up just a little bit.

21 THE COURT: No. 17 is admitted.

22 MR. BRAIN: I will try.

23 (Exhibit No. 17 admitted into evidence.)

24 MR. BRAIN: Sorry about that.

25 THE COURT: The witness wants some water.

1 MR. BRAIN: Yeah. Certainly. Hang on,  
2 Mr. Slye. Just let me know if you need more.  
3 THE WITNESS: Thank you.  
4 BY MR. BRAIN:  
5 Q. Let's take a look at Exhibit 18.  
6 Now, drawing your attention to Exhibit 18, do you  
7 recognize that as a photograph that was taken during  
8 the construction of the residence?  
9 A. Yes.  
10 Q. And you note there's no carport attached to the  
11 residence at that point in time.  
12 A. Is that a yes-or-no question?  
13 Q. That's a yes-or-no question, yeah.  
14 A. Yes, there is no carport.  
15 Q. Right. And the carport was constructed subsequently to  
16 the main body of the residence.  
17 A. Correct.  
18 Q. And in the preceding two photographs, 16 and 17, we saw  
19 that the carport was already in the process of  
20 construction.  
21 A. Okay.  
22 Q. Okay. That -- wouldn't that indicate this photograph  
23 was taken before the other two?  
24 A. Yeah. Sure.  
25 Q. So would you agree with me, Mr. Slye, that that picture

1 was taken from a vantage point which would be  
2 approximately where the words "treeline" are --  
3 A. Can't say that. No.  
4 Q. Do you recognize that as the east side of the house?  
5 A. I do.  
6 Q. Okay. So that picture would have been taken from  
7 somewheres in the disputed strip to the east.  
8 A. Probably.  
9 Q. Okay. So what is that big round thing lying in the  
10 front of the picture; do you know?  
11 A. It looks like a log.  
12 Q. So is that part of the vegetation removed from the  
13 property during the course of construction, Mr. Slye?  
14 A. Which property?  
15 Q. Either property.  
16 A. It was removed from the property that I owned.  
17 Q. Okay. How do you know that?  
18 A. Well, I removed two or three large trees in a position  
19 of exactly where the house is located, and then I  
20 milled them up and had the carport made out of those.  
21 Q. Okay. Some kind of bush there to the right of that  
22 log?  
23 A. I would say it's a bush.  
24 Q. And is that one of the items of dense, lush  
25 vegetation --

1 A. It is.

2 Q. -- Mr. Uhlig was referring to?

3 A. It is.

4 MR. BRAIN: Now I would move for the  
5 admission of Exhibit 18.

6 THE COURT: Any objection?

7 MR. UHLIG: No objection.

8 THE COURT: 18 and 19 or 18 --

9 MR. BRAIN: 18.

10 THE COURT: Any objection?

11 MR. UHLIG: No objection, Your Honor.

12 THE COURT: 18 is admitted.

13 (Exhibit No. 18 admitted into evidence.)

14 BY MR. BRAIN:

15 Q. So let's go to 19.

16 Drawing your attention to Exhibit 19, Mr. Slye,  
17 would you agree with me that this picture is taken from  
18 roughly the same vantage point -- Exhibit 19 is taken  
19 from roughly the same vantage point as Exhibit 18?

20 A. Yes.

21 Q. Now, the log' gone.

22 A. Well, it's not in the picture.

23 Q. And the bush is gone?

24 A. I can look at the other picture.

25 Q. Sure.

1 A. Yes, it was.

2 Q. You are aware there was another well at the top of the  
3 Ferguson property?

4 A. I sure do.

5 Q. Okay. Just about done here. Find my notes. Okay.

6 Let's go to Exhibit 17 in our notebook.

7 And I'm thoroughly confused here, Mr. Slye,  
8 because Mr. Uhlig asked you about trees in the upper  
9 left-hand corner of this photograph and whether they  
10 were in the disputed strip or not.

11 So I want to know, is it your testimony that the  
12 trees that are displayed behind that bucket from the  
13 excavator are in the disputed strip?

14 A. Well, I couldn't say that from the angle of the  
15 photograph. It's not clear.

16 Q. You see where the excavator is sitting?

17 A. It could be.

18 Q. Is that 12 feet from the house?

19 A. It could be.

20 Q. Okay. Would you go to Exhibit 25?

21 Is that excavator sitting basically in the same  
22 place in both pictures?

23 A. What was the number before?

24 Q. 17 and 25.

25 A. It's in the general vicinity. I don't know if it's in

1 A. Yes, it was.

2 Q. You are aware there was another well at the top of the  
3 Ferguson property?

4 A. I sure do.

5 Q. Okay. Just about done here. Find my notes. Okay.

6 Let's go to Exhibit 17 in our notebook.

7 And I'm thoroughly confused here, Mr. Slye,  
8 because Mr. Uhlig asked you about trees in the upper  
9 left-hand corner of this photograph and whether they  
10 were in the disputed strip or not.

11 So I want to know, is it your testimony that the  
12 trees that are displayed behind that bucket from the  
13 excavator are in the disputed strip?

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15 photograph. It's not clear.

16 Q. You see where the excavator is sitting?

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18 Q. Is that 12 feet from the house?

19 A. It could be.

20 Q. Okay. Would you go to Exhibit 25?

21 Is that excavator sitting basically in the same  
22 place in both pictures?

23 A. What was the number before?

24 Q. 17 and 25.

25 A. It's in the general vicinity. I don't know if it's in



1 exactly the same place.

2 Q. Again, my question would be, it's your testimony that  
3 the trees on the far side of the excavator and the  
4 bulldozer are in the disputed strip?

5 A. I would think they are. Pretty close to, yeah. I  
6 think they are.

7 Q. Now, let's go to Exhibit 16.

8 Now, as I recall, this is the septic tank being  
9 put in the excavation which is larger than the septic  
10 tank itself which is in the order of five feet from the  
11 property line, right?

12 A. Well, there was a septic tank and a pump tank. What  
13 was your question again?

14 Q. My question is, it is your testimony as you sit here  
15 today that that excavator and that bulldozer, that the  
16 trees behind that are in the disputed strip?

17 A. Well, it looks like it to me.

18 Q. Okay.

19 MR. BRAIN: You know, that's all the  
20 questions I have for Mr. Slye.

21 THE COURT: Any other questions?

22 MR. UHLIG: Yes, Your Honor. Just in case I  
23 haven't done so, I would like to move to admit D-2,  
24 that area photograph.

25 THE COURT: Any objection to D-2?

1 condition of the property?

2 A. Yes, it is.

3 Q. And was that the condition of the property in 1994?

4 A. Yes, it is.

5 Q. Okay. Now, I would draw your attention to Exhibit 17,  
6 which has already been admitted.

7 Is the condition shown here, of the fill to the  
8 right on the photograph, consistent with the other  
9 photograph that we're looking at, Exhibit 19?

10 A. I think it's consistent.

11 Q. Okay. So would you agree with me that the grade of the  
12 property in the disputed strip was modified by the  
13 addition of fill in the area immediately to the west of  
14 the house, of the deck?

15 A. Yes, I would agree with you.

16 Q. Okay. Now, with respect to Exhibit 33, which was the  
17 kind of difficult photograph, can you point out to us  
18 the area that is effected? It would be above the  
19 retaining wall in here.

20 A. 33. Yeah. Point to the --

21 Q. Here's the retaining wall.

22 A. Yes.

23 Q. Okay.

24 A. Yes.

25 Q. And the slope breaks sharply downward at the front of

1 the property?

2 A. That is right.

3 Q. This picture would have been taken at approximately  
4 just below the break of the slope looking directly up  
5 the property line with fill on the right-hand side?

6 A. Yes.

7 Q. Okay. Slightly above the retaining wall?

8 A. That's correct.

9 Q. Would you go to Exhibit 53, please.

10 All right. Did you take this picture?

11 A. I don't recall if I took it or not.

12 Q. Would have taken it before --

13 A. Either Karen or myself.

14 Q. If Karen took it, were you present when it was taken?

15 A. Yes.

16 Q. Can you tell us what it depicts?

17 A. It shows the beginning of our driveway from Point White  
18 Drive up toward our house. It shows the rock retaining  
19 wall, and it shows workers beginning to install a spike  
20 fence.

21 Q. So if you count the fence poles going up -- one, two,  
22 three, four -- the fourth one up, it kind of points  
23 toward the very roof of your property. That would be  
24 in the same area that we've been talking about where  
25 fill was placed; wouldn't it?

1 Birmingham, England.

2 A. That is correct.

3 Q. So that's the traveling you were doing, back and forth  
4 to Birmingham --

5 A. Correct.

6 Q. -- and all other North --

7 A. All over North America.

8 Q. Okay. I hate to go through this all again, but if  
9 you've got our notebook. Since Mr. Uhlig asked you  
10 what was and was not in the disputed strip, I got to do  
11 this. If you go to Exhibit 16.

12 Now, based upon your knowledge of the survey and  
13 Exhibit 2 and, most importantly, your knowledge of the  
14 property, would you agree with Mr. Slye that that  
15 equipment that you're looking at there is not in the  
16 disputed strip? Specifically the bulldozer and the  
17 backhoe and the back end of the huge truck with a  
18 septic truck on it?

19 A. There's no way in heck that that's not in the disputed  
20 strip, and it's over to the edge of the disputed strip.

21 Q. The far side.

22 A. Far side.

23 Q. Okay. Now, going to Exhibit 17.

24 I was really unclear as to Mr. Slye's testimony.  
25 But as I understood him, he testified that the trees.

1 immediately behind the bucket of the backhoe there were  
2 in the disputed strip. Same basic question:

3 Based upon your knowledge of the property, would  
4 you agree or disagree with that statement?

5 A. Would you ask the question again? I see the bucket  
6 right there.

7 Q. And as I recall, Mr. Slye testified that the trees on  
8 the far side --

9 A. Yes.

10 Q. -- from this vantage point were in the disputed strip.

11 Would you agree or disagree with him based upon  
12 your knowledge of the property?

13 A. I would disagree.

14 Q. How far into the property do you think that bucket is?

15 A. Thirty, 35 feet, maybe.

16 Q. Okay. Okay. Going to Exhibit No. 24, in the bottom  
17 photo.

18 A. Wait a second.

19 Q. Should be the one showing the floor plate for your  
20 house.

21 Based upon your knowledge of the configuration of  
22 the property, would you agree or disagree with Mr. Slye  
23 that that panel van is not in the disputed strip?

24 A. In my considered opinion, that's definitely in the  
25 disputed strip.

1 Q. Okay. All right.

2 First, Mr. Uhlig asked you about talking to the  
3 McKenzies.

4 A. Yes.

5 Q. Did you actually connect with one or the other of the  
6 McKenzies?

7 A. I recall having one phone call with Jane.

8 Q. Okay. Did you actually mention to her that you had an  
9 interest in acquiring the property at that point in  
10 time?

11 A. My recollection of the conversation was, like to have  
12 her or them down for coffee or tea, discuss their plans  
13 for the property and whether it might be for sale at  
14 some point, whether we might get a first right of  
15 refusal, just a general conversation about the future  
16 of that property, because, obviously, it impacts my  
17 property.

18 Q. Do you recall what the response was?

19 A. The response was, "Not interested. Wouldn't be."

20 Q. Okay. How long was the conversation?

21 A. Maybe two minutes at the outset.

22 Q. Okay. During the period of your residence, but most  
23 particularly between June 23, 2004 --

24 MR. UHLIG: Counsel, would you please --

25

1 BY MR. BRAIN:

2 Q. During the period of your residence on the property,  
3 but most particularly during the period June 23, 2004,  
4 to June -- between June 23, 1994, and June 23, 2004,  
5 did you ever see any of the McKenzies on your property  
6 or on any portion of the disputed strip?

7 A. No.

8 Q. Okay. Would you have recognized them?

9 A. I'm not sure.

10 Q. Okay. Did you ever see anybody, other than yourself,  
11 on the disputed strip?

12 A. A number of years ago, maybe two or three, I heard some  
13 kids' voices, and a couple of young kids popped out of  
14 the woods and hung out there for a minute and then  
15 left, headed back through the woods. And that's the  
16 only time I recall ever seeing anybody in that area at  
17 all.

18 Q. Okay.

19 MR. BRAIN: Thank you.

20 That's all the questions I have.

21 THE COURT: Any other questions?

22 MR. UHLIG: No further questions, Your Honor.

23 THE COURT: All right. You may step down.

24 THE WITNESS: Thank you, Your Honor.

25 (Witness excused.)

1 BY MR. BRAIN:

2 Q. You cannot determine from your knowledge of the  
3 property whether those -- the vehicle which is about to  
4 place a large concrete septic tank in the excavation is  
5 in the disputed strip?

6 A. As I said, I have difficulty orienting where this  
7 picture is looking.

8 Q. Okay. Let's go to the next one then. Let's go to  
9 Exhibit 17.

10 Now, this gives you a better perspective, right?

11 A. Yes.

12 Q. Okay. So you see the backhoe bucket on the left-hand  
13 side of Exhibit 17?

14 A. Yes, I do.

15 Q. Do you think that's less than five feet from the  
16 boundary line between Lot 13? Do you think that's  
17 actually on the disputed strip?

18 A. It's possible. But, once again, the -- because of the  
19 angle of the construction of Mr. Slye's residence --  
20 the carport, for example, is further west than the  
21 deck. So I'm -- so it's harder -- and I don't see a  
22 marking at the distance from the carport to the  
23 property line.

24 Q. Okay. So would it be your testimony here today  
25 that -- let's not go there.



1           So as I understood it; again, there were prominent  
2           trees that you testified to that were on the disputed  
3           strip, correct?

4           A.    Yes.  That is correct.

5           Q.    Where were those trees located?

6           A.    Those trees were located --

7           Q.    Can you point to the map, please.  Exhibit 2.

8           A.    To --

9           Q.    Right.

10          A.    Those would have been -- as I said before, there's a  
11               steep grade here, and the trees were up on the -- where  
12               the property flattened out.

13               Now, I can't -- this does not tell me where the  
14               grade stops or the slope stops, so I'm -- I would say  
15               they were approximately here.

16          Q.    Okay.  So we're looking at a -- at an area which would  
17               be roughly 15 feet south of the deck and 15 or 20 feet  
18               into the disputed strip to the east?

19          A.    Well, let's see.

20          Q.    See, this dimension here is 12.5 feet, right?

21          A.    That's 12.5 --

22          Q.    So looks like you're 15 or 20 feet south and 15 or  
23               20 feet into the disputed strip to the east of the  
24               property?

25          A.    It's about the same, so I would guess that's about 12

1 and a half feet, yes -- into the property line? Was  
2 that your question?

3 Q. Yeah.

4 Is that an accurate depiction of the point you  
5 were pointing to?

6 A. Would you repeat it again? I was trying to get my  
7 bearings.

8 Q. Looks like it's -- if you go down the property line  
9 from the edged corner of the house there.

10 A. Yes.

11 Q. Okay. Or the corner of the deck.

12 A. Uh-huh.

13 Q. So go from the corner of the deck, go down about 15 or  
14 20 feet, and then you go right to the east 15 or 20  
15 feet, right?

16 A. Yes. I'd put it a little bit further north than that.

17 Q. Maybe less than 15 feet from the deck.

18 A. Yes. And, again, I'm estimating. Without having the  
19 grade there, it's difficult to be precise.

20 Q. I think this is D-10. It is the map dated 4-30-2009.

21 MR. UHLIG: 4-30-2009 is D-11.

22 MR. BRAIN: D-11.

23 BY MR. BRAIN:

24 Q. Do you see the tree?

25 A. No.

1 Q. February 28, 2007, do you see those trees?

2 A. No.

3 Q. 2002, do you see those trees?

4 A. Yes.

5 Q. Where?

6 A. Right here.

7 THE COURT: Sorry. So just for the record,  
8 let's identify what's being pointed to.

9 MR. BRAIN: She's pointing to an area which  
10 is south --

11 MR. UHLIG: Counsel, could you take a step  
12 back.

13 MR. BRAIN: -- south and east of the corner  
14 of the Ferguson property.

15 BY MR. BRAIN:

16 Q. What kind of trees were those?

17 A. Fir, and there was a madrona there also.

18 MR. UHLIG: Can the witness be seated?

19 MR. BRAIN: Yeah.

20 BY MR. BRAIN:

21 Q. I want to draw your attention to Exhibit No. 20 to the  
22 upper picture.

23 Do you see those trees in that picture?

24 A. No.

25 Q. Okay. How about -- let's go to Exhibit 22.

1           Look at the photographs. The whole contention  
2           that during the period of Mr. Slye's construction  
3           activities the disputed strip was densely and lushly  
4           vegetated, or any time thereafter, is simply  
5           unsustainable. It's inarguable.

6           Look at Exhibit 25. What's the testimony there?  
7           That the only trees that are depicted in Exhibit 25 are  
8           on the other side of Point White Drive, which is  
9           completely consistent with the later photographs, which  
10          Ms. Ferguson can testify to.

11          You got Exhibit 17. Backhoe parked well into the  
12          disputed strip. Nothing but disturbed earth in the  
13          area she says was cleared in 2006.

14          Exhibit 20, the upper photograph: I mean, there's  
15          the power -- temporary power supply. There's no  
16          question that picture's taken from here looking through  
17          here in the area where Ms. Ferguson testified there are  
18          prominent trees cleared in 2006. Nothing, nada, zip,  
19          zero. There's no vegetation there whatsoever.

20          Again, Exhibit 21, same thing: You're looking  
21          back the other direction. Same truck. Same location.  
22          Same utility service. Prominent trees here? Not a  
23          chance. They don't exist. They never existed.

24          So, yeah, we think this is a case about  
25          credibility. We think that in light of the objective

**Exhibit 18**

000592

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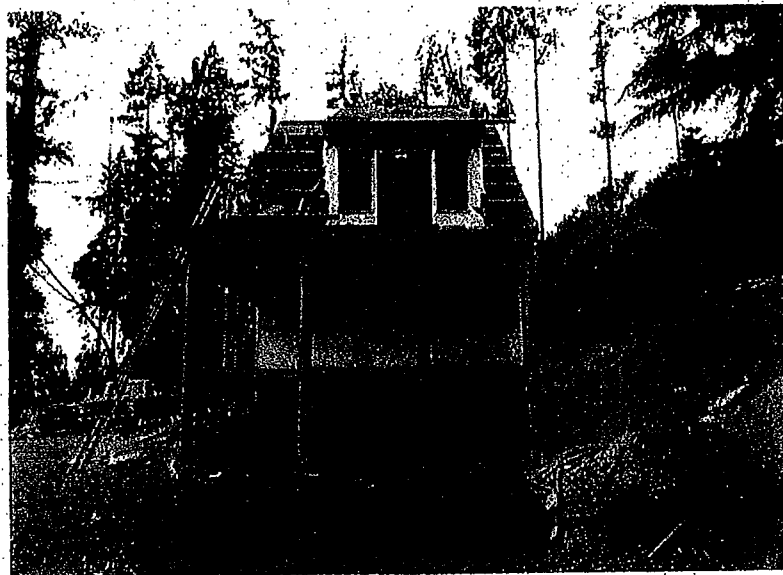
STATE                      Exhibit No. 18  
 PLAINTIFF                       DEFENDANT  
 PETITIONER                       RESPONDENT  
 OTHER \_\_\_\_\_

Case No. 11-2-01252-4

FERGUSON VS MCKENZIE

[ ] Admitted                      [ ] Refused  
[ ] Withdrawn                      [ ] Not Offered

Date of Court's Ruling: \_\_\_\_\_



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1 MR. BRAIN: Yeah. Certainly. Hang on,  
2 Mr. Slye. Just let me know if you need more.

3 THE WITNESS: Thank you.

4 BY MR. BRAIN:

5 Q. Let's take a look at Exhibit 18.

6 Now, drawing your attention to Exhibit 18, do you  
7 recognize that as a photograph that was taken during  
8 the construction of the residence?

9 A. Yes.

10 Q. And you note there's no carport attached to the  
11 residence at that point in time.

12 A. Is that a yes-or-no question?

13 Q. That's a yes-or-no question, yeah.

14 A. Yes, there is no carport.

15 Q. Right. And the carport was constructed subsequently to  
16 the main body of the residence.

17 A. Correct.

18 Q. And in the preceding two photographs, 16 and 17, we saw  
19 that the carport was already in the process of  
20 construction.

21 A. Okay.

22 Q. Okay. That -- wouldn't that indicate this photograph  
23 was taken before the other two?

24 A. Yeah. Sure.

25 Q. So would you agree with me, Mr. Slye, that that picture



- 1           was taken from a vantage point which would be  
2           approximately where the words "treeline" are --
- 3   A.    Can't say that.  No.
- 4   Q.    Do you recognize that as the east side of the house?
- 5   A.    I do.
- 6   Q.    Okay.  So that picture would have been taken from  
7           somewheres in the disputed strip to the east.
- 8   A.    Probably.
- 9   Q.    Okay.  So what is that big round thing lying in the  
10          front of the picture; do you know?
- 11  A.    It looks like a log.
- 12  Q.    So is that part of the vegetation removed from the  
13          property during the course of construction, Mr. Slye?
- 14  A.    Which property?
- 15  Q.    Either property.
- 16  A.    It was removed from the property that I owned.
- 17  Q.    Okay.  How do you know that?
- 18  A.    Well, I removed two or three large trees in a position  
19          of exactly where the house is located, and then I  
20          milled them up and had the carport made out of those.
- 21  Q.    Okay.  Some kind of bush there to the right of that  
22          log?
- 23  A.    I would say it's a bush.
- 24  Q.    And is that one of the items of dense, lush  
25          vegetation --

1 A. It is.

2 Q. -- Mr. Uhlig was referring to?

3 A. It is.

4 MR. BRAIN: Now I would move for the  
5 admission of Exhibit 18.

6 THE COURT: Any objection?

7 MR. UHLIG: No objection.

8 THE COURT: 18 and 19 or 18 --

9 MR. BRAIN: 18.

10 THE COURT: Any objection?

11 MR. UHLIG: No objection, Your Honor.

12 THE COURT: 18 is admitted.

13 (Exhibit No. 18 admitted into evidence.)

14 BY MR. BRAIN:

15 Q. So let's go to 19.

16 Drawing your attention to Exhibit 19, Mr. Slye,  
17 would you agree with me that this picture is taken from  
18 roughly the same vantage point -- Exhibit 19 is taken  
19 from roughly the same vantage point as Exhibit 18?

20 A. Yes.

21 Q. Now, the log' gone.

22 A. Well, it's not in the picture.

23 Q. And the bush is gone?

24 A. I can look at the other picture.

25 Q. Sure.

1 (Pause.)

2 A. You know, I could have been standing on the log and  
3 taken this picture with a wide-angle lens. So ask me  
4 the question again.

5 Q. Would you agree with me that the difference between  
6 this picture and the last one is that a bunch of fill  
7 has been put in the front of the house on the east  
8 side?

9 A. I'd say it's been graded.

10 Q. Okay. And does that grading extend into the disputed  
11 strip in your understanding?

12 A. I can't tell from the picture.

13 Q. Those are caterpillar tracks on the dirt; aren't they?

14 A. Could be.

15 Q. Okay. So is it your testimony here today that all of  
16 that is contained within the 12 feet from the front of  
17 the existing house to the boundary line?

18 A. It could be.

19 Q. With respect to the portion on the other side of the  
20 fill, I don't see any dense, lush vegetation there; do  
21 you?

22 A. Which side of the fill?

23 Q. From where the picture is taken.

24 A. Towards the house?

25 Q. There's no vegetation --

1 A. No.

2 Q. -- between the house --

3 A. I don't see any.

4 Q. Okay.

5 MR. BRAIN: I would move for the admission of  
6 Exhibit 19.

7 MR. UHLIG: Sorry.

8 THE COURT: No. 19 --

9 MR. BRAIN: No. 19.

10 THE COURT: -- any objection?

11 MR. UHLIG: No objection.

12 THE COURT: Admitted as to No. 19.

13 (Exhibit No. 19 admitted into evidence.)

14 THE COURT: And keep your voice up, please,  
15 Mr. Brain.

16 MR. BRAIN: I am trying, Your Honor.

17 BY MR. BRAIN:

18 Q. All right. Let's go to Exhibit No. 20.

19 Do you recognize Exhibit No. 20, Mr. Slye?

20 A. There's two pictures.

21 Q. Let's start with the top one.

22 A. Okay.

23 Q. Okay.

24 A. I do.

25 Q. All right. Now, this appears to still have the

1 Q. -- like it's --

2 THE COURT: Please wait for the question to  
3 finish before you answer.

4 THE WITNESS: Sorry.

5 BY MR. BRAIN:.

6 Q. See the tree?

7 A. I see something.

8 Q. Okay. And there's a pile of -- looks to me like gravel  
9 bedding for the septic system components?

10 A. Yes, I see.

11 Q. Okay. And, again, going back to 18 or 19 -- say 19 --  
12 all that stuff's gone.

13 THE COURT: Is there an answer?

14 THE WITNESS: I'm not sure of the picture  
15 reflecting the same piece of ground we're talking about  
16 here.

17 MR. BRAIN: Okay.

18 I would move for the admission of the upper  
19 portion of Exhibit 38 only.

20 THE COURT: Any objection?

21 MR. UHLIG: No, Your Honor.

22 THE COURT: Admitted.

23 (Upper portion of Exhibit No. 38 admitted  
24 into evidence.)

25

**Exhibit 19**

000594

STATE

Exhibit No. 19

PLAINTIFF

DEFENDANT

PETITIONER

RESPONDENT

OTHER \_\_\_\_\_

Case No. 11-2-01252-4

**FERGUSON VS McKENZIE**

[ ] Admitted  
[ ] Withdrawn

[ ] Refused  
[ ] Not Offered

Date of Court's Ruling: \_\_\_\_\_



EXHIBIT # 13  
Slye  
10/14/01  
Arlene M. [unclear]

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1 A. It is.

2 Q. -- Mr. Uhlig was referring to?

3 A. It is.

4 MR. BRAIN: Now I would move for the  
5 admission of Exhibit 18.

6 THE COURT: Any objection?

7 MR. UHLIG: No objection.

8 THE COURT: 18 and 19 or 18 --

9 MR. BRAIN: 18.

10 THE COURT: Any objection?

11 MR. UHLIG: No objection, Your Honor.

12 THE COURT: 18 is admitted.

13 (Exhibit No. 18 admitted into evidence.)

14 BY MR. BRAIN:

15 Q. So let's go to 19.

16 Drawing your attention to Exhibit 19, Mr. Slye,  
17 would you agree with me that this picture is taken from  
18 roughly the same vantage point -- Exhibit 19 is taken  
19 from roughly the same vantage point as Exhibit 18?

20 A. Yes.

21 Q. Now, the log' gone.

22 A. Well, it's not in the picture.

23 Q. And the bush is gone?

24 A. I can look at the other picture.

25 Q. Sure.

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(Pause.)

A. You know, I could have been standing on the log and taken this picture with a wide-angle lens. So ask me the question again.

Q. Would you agree with me that the difference between this picture and the last one is that a bunch of fill has been put in the front of the house on the east side?

A. I'd say it's been graded.

Q. Okay. And does that grading extend into the disputed strip in your understanding?

A. I can't tell from the picture.

Q. Those are caterpillar tracks on the dirt; aren't they?

A. Could be.

Q. Okay. So is it your testimony here today that all of that is contained within the 12 feet from the front of the existing house to the boundary line?

A. It could be.

Q. With respect to the portion on the other side of the fill, I don't see any dense, lush vegetation there; do you?

A. Which side of the fill?

Q. From where the picture is taken.

A. Towards the house?

Q. There's no vegetation --

1 A. No.

2 Q. -- between the house --

3 A. I don't see any.

4 Q. Okay.

5 MR. BRAIN: I would move for the admission of  
6 Exhibit 19.

7 MR. UHLIG: Sorry.

8 THE COURT: No. 19 --

9 MR. BRAIN: No. 19.

10 THE COURT: -- any objection?

11 MR. UHLIG: No objection.

12 THE COURT: Admitted as to No. 19.

13 (Exhibit No. 19 admitted into evidence.)

14 THE COURT: And keep your voice up, please,  
15 Mr. Brain.

16 MR. BRAIN: I am trying, Your Honor.

17 BY MR. BRAIN:

18 Q. All right. Let's go to Exhibit No. 20.

19 Do you recognize Exhibit No. 20, Mr. Slye?

20 A. There's two pictures.

21 Q. Let's start with the top one.

22 A. Okay.

23 Q. Okay.

24 A. I do.

25 Q. All right. Now, this appears to still have the

1 BY MR. BRAIN:

2 Q. Let's go to Exhibit 25, if you would, please.

3 Now, I want to draw your attention to the lower.  
4 half of Exhibit 25. And that's a picture taken from  
5 the west to the east.

6 A. Correct.

7 Q. Roughly east/west line.

8 A. Yes.

9 Q. Looking through the carport into the disputed strip.

10 A. Okay. Yes.

11 Q. Okay. And that's a full-sized backhoe and a bulldozer  
12 on the far side, right?

13 A. It is.

14 Q. Now, in this picture I do actually see there looks like  
15 a little tiny tree with orange leaves on it kind of in  
16 the right-hand side of the carport there.

17 A. In front of the bucket on the --

18 Q. Yeah. Yeah. See that?

19 A. I see something there.

20 Q. Yeah. If you go back to Exhibit No. 19, looks like  
21 it's gone.

22 A. I don't think those pictures are reflecting the same  
23 piece of real estate.

24 Q. Doesn't this picture really look just back down the  
25 same east/west line that the other one's taken on?

1 A. No. It's approximate. It's not that close. The  
2 picture is deceiving, I think.

3 Q. Okay.

4 MR. BRAIN: I would move for the admission of  
5 Exhibit 25.

6 THE COURT: Any objection to 25?

7 MR. UHLIG: No objection, Your Honor.

8 THE COURT: Admitted.

9 (Exhibit No. 25 admitted into evidence.)

10 BY MR. BRAIN::

11 Q. I would go to Exhibit No. 27.

12 Does this reflect the condition of the residence  
13 at the time you sold it to Mr. Ferguson?

14 A. Approximately. Is this -- can you tell me when this  
15 picture was taken?

16 Q. Mr. Ferguson can testify as to when the picture was  
17 taken. I can represent to you that his testimony would  
18 be that the picture was taken in 1994.

19 A. Did he take it or did I take it?

20 Q. I can represent to you that Mr. Ferguson has told me  
21 that he took the picture in conjunction with his  
22 purchase.

23 A. What was the question again?

24 Q. Is this what it looked like in your recollection at --

25 A. Yes.

1 Q. -- like it's --

2 THE COURT: Please wait for the question to  
3 finish before you answer.

4 THE WITNESS: Sorry.

5 BY MR. BRAIN::

6 Q. See the tree?

7 A. I see something.

8 Q. Okay. And there's a pile of -- looks to me like gravel  
9 bedding for the septic system components?

10 A. Yes, I see.

11 Q. Okay. And, again, going back to 18 or 19 -- say 19 --  
12 all that stuff's gone.

13 THE COURT: Is there an answer?

14 THE WITNESS: I'm not sure of the picture  
15 reflecting the same piece of ground we're talking about  
16 here.

17 MR. BRAIN: Okay.

18 I would move for the admission of the upper  
19 portion of Exhibit 38 only.

20 THE COURT: Any objection?

21 MR. UHLIG: No, Your Honor.

22 THE COURT: Admitted.

23 (Upper portion of Exhibit No. 38 admitted  
24 into evidence.)

25

1 A. That is correct.

2 Q. Did you discuss the location of the fill material with  
3 Mr. Slye when you were buying the property? Do you  
4 recall?

5 A. No.

6 Q. Okay.

7 A. No, I did not.

8 Q. Okay. Now, if you would go to Exhibit 19. Okay.

9 And you see the fill material that's been placed  
10 there?

11 A. Yes, I do.

12 Q. Does that fill material, based upon your knowledge of  
13 the property, extend beyond 12 feet from the front of  
14 the house, bearing in mind that the front of the house  
15 is the front of the house?

16 A. Would you ask the question again?

17 Q. Do you see the dimensions here? 5.5 feet from the  
18 property line to the edge of deck; 12.5 from the corner  
19 house to property.

20 My question is whether or not the fill material  
21 that is shown in this picture extends farther than  
22 those dimensions into the disputed strip, your  
23 understanding?

24 A. I would agree that it does.

25 Q. Okay. And is this consistent with the current

1 condition of the property?

2 A. Yes, it is.

3 Q. And was that the condition of the property in 1994?

4 A. Yes, it is.

5 Q. Okay. Now, I would draw your attention to Exhibit 17,  
6 which has already been admitted.

7 Is the condition shown here, of the fill to the  
8 right on the photograph, consistent with the other  
9 photograph that we're looking at, Exhibit 19?

10 A. I think it's consistent.

11 Q. Okay. So would you agree with me that the grade of the  
12 property in the disputed strip was modified by the  
13 addition of fill in the area immediately to the west of  
14 the house, of the deck?

15 A. Yes, I would agree with you.

16 Q. Okay. Now, with respect to Exhibit 33, which was the  
17 kind of difficult photograph, can you point out to us  
18 the area that is effected? It would be above the  
19 retaining wall in here.

20 A. 33. Yeah. Point to the --

21 Q. Here's the retaining wall.

22 A. Yes.

23 Q. Okay.

24 A. Yes.

25 Q. And the slope breaks sharply downward at the front of



1 BY MR. BRAIN:

2 Q. So then that area to the left would -- the view would  
3 be right through that semicircular area you just  
4 described as having been cleared in 2006, correct?

5 A. Well, it doesn't show that portion on the photo.

6 Q. If there was vegetation between the vantage point of  
7 that picture and the temporary utility pole in that  
8 location that was cleared in 2006, would you expect to  
9 have seen it in that photograph taken in 1987?

10 A. Seen what?

11 Q. The vegetation that you say was cleared in 2006.

12 A. Well, again, during the period of the construction,  
13 there was fill that was -- went over onto our property.

14 Q. I appreciate that, Ms. McKenzie, but you're not  
15 answering my question. And in a moment, I'm going to  
16 ask the Court to direct you to answer my question,  
17 which is a really simple one.

18 And, that is, if there was vegetation in that area  
19 in 1987, wouldn't you have seen it from the perspective  
20 described in that photograph?

21 A. Well, first of all, I have questioned your description  
22 of the perspective.

23 Second of all, you would not necessarily see the  
24 vegetation because of the fill that was a product of  
25 the construction process.

1 Q. Is it your testimony that Mr. Slye filled that area?

2 A. Well, I'm probably not using the term of art correctly.

3 There was dirt from the construction process that had  
4 fallen onto our property.

5 Q. Okay. Wouldn't that be the dirt depicted in Exhibit  
6 19?

7 A. This is dirt. So, yeah, probably.

8 Q. You recognize this, as Mr. Slye testified, as the east  
9 face of the Ferguson home?

10 A. Yes.

11 Q. And isn't that picture taken from exactly where you  
12 said clearing took place in 2006?

13 A. A portion -- the clearing is much larger than that.

14 Q. Isn't -- wouldn't you expect, if there was vegetation  
15 continuously from prior to the construction of the  
16 Ferguson residence until 2006, you'd see it in this  
17 photograph taken from the very area you have testified  
18 under oath was cleared by the Fergusons in 2006?

19 A. No. I -- no, I would not. Because, again, during the  
20 construction process, there was some, you know, dirt on  
21 our property. And this is -- you know, this just shows  
22 a -- a small portion of, you know -- it's not that far  
23 a distance from the house, it appears to me.

24 Q. Is it not your testimony, Ms. Ferguson, that prior to  
25 the construction of the residence, the entirety of the

1           disputed strip was covered with dense, lush, overgrown  
2           vegetation?

3                   MR. UHLIG: Objection. Misstates the  
4           witness's testimony.

5                   THE WITNESS: Yes.

6                   MR. BRAIN: I wrote it down.

7                   THE COURT: Answer the question.

8                   MR. BRAIN: Pardon?

9                   THE COURT: Answer the question.

10                   THE WITNESS: Yes.

11 BY MR. BRAIN:

12 Q. Do you see any of that vegetation in Exhibit No. 19?

13 A. No.

14 Q. Okay. So doesn't it not follow, Ms. McKenzie, that the  
15 vegetation you testified was there before Mr. Slye  
16 began construction was removed by Mr. Slye during  
17 construction and not in 2006 as you've testified by the  
18 Fergusons?

19 A. I believe Mr. Slye actually testified that after he  
20 occupied the house, the vegetation returned, went back  
21 to its natural state.

22 Q. Drawing your attention to Exhibit No. 44.

23 A. Yes.

24 Q. See all that pampas grass there?

25 A. Yes.

1       Andress, 2001, states that it's whether or not a  
2       hypothetical reasonable person would have known based  
3       on the use by the adverse possessor. And the nature of  
4       the use is that the reasonable -- the owner -- the  
5       adverse possessor used the property during the ten-year  
6       statutory period in the same manner that a true owner  
7       would use that. The use, in other words, is tied to  
8       the character of the property. And in this case, the  
9       character of the property is "yard adjacent to a  
10       residence."

11       So, fundamentally, the issue that this Court needs  
12       to face is whether or not in the period, June 23, 1994,  
13       through June 23, 2004, Mr. Ferguson used the property  
14       at issue here, the disputed strip, in the same fashion  
15       that any other owner of a side yard would have used  
16       that disputed strip.

17       Timing is an important issue in this case for two  
18       reasons: Number one, because much of the testimony  
19       relates to a period before Mr. Ferguson acquired the  
20       property, and some of the testimony relates to a time  
21       period after Mr. Ferguson acquired the property,  
22       specifically the purported clearing alleged by the  
23       defendants in 2006.

24       I think the most appropriate comment to make about  
25       that, if you look at Claimant's Exhibit 19, is that on

1 this whole subject matter of whether there were  
2 prominent trees, whether there was clearing engaged in,  
3 what the construction photos clearly show is that both  
4 Mr. Slye and Ms. McKenzie spent a lot of time denying  
5 what is absolutely undeniable based on the evidence,  
6 and that is the trees that were purportedly cleared in  
7 2006 simply didn't exist.

8 In that regard, again, I would draw your attention  
9 to Exhibit 19 -- excuse me -- Exhibit 19; the  
10 photograph on the upper part of Exhibit 20; Exhibit 21,  
11 the photograph on the left-hand side; Exhibit 24, the  
12 photograph on the bottom; testimony there being that  
13 the only trees depicted in that picture are actually on  
14 the other side of Point White Drive, and I would note  
15 that that testimony's uncontroverted.

16 The same is equally true of some of the pictures  
17 relating to the location of the construction equipment.  
18 Clearly Mr. Slye graded and filled substantial portions  
19 of the property. In fact, as I recall Ms. McKenzie's  
20 explanation as to why you couldn't see trees, which she  
21 claimed were cleared in 2006, immediately adjacent to  
22 the east-facing side of the Ferguson house was because  
23 Mr. Slye had filled over them. That was her response  
24 when looking at Exhibit 19.

25 So the bottom line is that all of the objective

1 Mr. and Ms. Ferguson, that the vegetation has been  
2 removed; it's been replanted with pampas grass.

3 And you want to know where in relationship to the  
4 boundary of the disputed strip that pampas grass is?  
5 Perhaps the best illustration is Exhibit 52 and  
6 Exhibit -- excuse me -- Exhibit 53, because there you  
7 got the property line on the left-hand side. And lo  
8 and behold, all that pampas grass, there's one, two,  
9 three, four in the foreground, there's a fifth one up  
10 by the new fence line; and then there are three across  
11 the top of the berm.

12 So the fact of the matter is the assertion that  
13 there's no evidence pertaining to the condition of the  
14 strip between June 1994 and 2004 asserted by Mr. Uhlig  
15 other than the testimony of the Fergusons is flat-out  
16 incorrect.

17 The significance of the photographs from Mr. Slye  
18 is that they demonstrate that the testimony of  
19 Ms. Ferguson, in particular, and Mr. Slye about the  
20 condition of the disputed strip, is, for want of a  
21 better word, a fiction. I mean, all you have to do is  
22 remember Ms. Ferguson asserting that the area that was  
23 cleared in 2006 of prominent trees is precisely the  
24 area depicted in Exhibit 19 as having nothing, nada,  
25 zip, zero.

1           Look at the photographs. The whole contention  
2           that during the period of Mr. Slye's construction  
3           activities the disputed strip was densely and lushly  
4           vegetated, or any time thereafter, is simply  
5           unsustainable. It's inarguable.

6           Look at Exhibit 25. What's the testimony there?  
7           That the only trees that are depicted in Exhibit 25 are  
8           on the other side of Point White Drive, which is  
9           completely consistent with the later photographs, which  
10          Ms. Ferguson can testify to.

11          You got Exhibit 17. Backhoe parked well into the  
12          disputed strip. Nothing but disturbed earth in the  
13          area she says was cleared in 2006.

14          Exhibit 20, the upper photograph: I mean, there's  
15          the power -- temporary power supply. There's no  
16          question that picture's taken from here looking through  
17          here in the area where Ms. Ferguson testified there are  
18          prominent trees cleared in 2006. Nothing, nada, zip,  
19          zero. There's no vegetation there whatsoever.

20          Again, Exhibit 21, same thing: You're looking  
21          back the other direction. Same truck. Same location.  
22          Same utility service. Prominent trees here? Not a  
23          chance. They don't exist. They never existed.

24          So, yeah, we think this is a case about  
25          credibility. We think that in light of the objective

**Exhibit 20**



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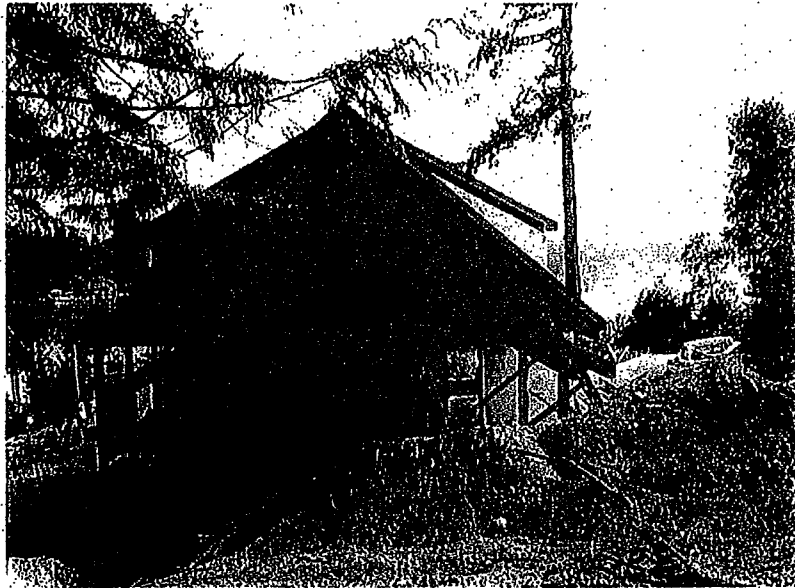
STATE                      Exhibit No. 20  
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 OTHER \_\_\_\_\_

Case No. 11-2-01252-4

**FERGUSON VS McKENZIE**

[ ] Admitted                      [ ] Refused  
[ ] Withdrawn                      [ ] Not Offered

Date of Court's Ruling: \_\_\_\_\_



15  
Slye  
101411  
Annularis 10/10/1961

F 000021

1 A. No.

2 Q. -- between the house --

3 A. I don't see any.

4 Q. Okay.

5 MR. BRAIN: I would move for the admission of  
6 Exhibit 19.

7 MR. UHLIG: Sorry.

8 THE COURT: No. 19 --

9 MR. BRAIN: No. 19.

10 THE COURT: -- any objection?

11 MR. UHLIG: No objection.

12 THE COURT: Admitted as to No. 19.

13 (Exhibit No. 19 admitted into evidence.)

14 THE COURT: And keep your voice up, please,  
15 Mr. Brain.

16 MR. BRAIN: I am trying, Your Honor.

17 BY MR. BRAIN:

18 Q. All right. Let's go to Exhibit No. 20.

19 Do you recognize Exhibit No. 20, Mr. Slye?

20 A. There's two pictures.

21 Q. Let's start with the top one.

22 A. Okay.

23 Q. Okay.

24 A. I do.

25 Q. All right. Now, this appears to still have the

1 excavation for the septic system components. Do you  
2 understand that?  
3 A. I see excavation. I'm not sure what it's for.  
4 Q. Okay. Now --  
5 A. Could be the drain field, too. I don't know.  
6 Q. Okay. Now, to the left of the building, there's a  
7 temporary power pole; do you see that?  
8 A. Yes.  
9 Q. That's located in the disputed strip; isn't it?  
10 A. Is it? I don't know for sure.  
11 Q. Do you think that's less than 5.5 feet from the deck?  
12 A. I don't see the deck, so -- I'm not positive. I'm not  
13 sure.  
14 Q. Now, we're looking basically from a point above the  
15 carport -- see this big kind of star thing here on the  
16 side? See that?  
17 A. I do.  
18 Q. All right. So we're somewhere a little bit to the  
19 left of that looking down to the southeast towards  
20 Point White Drive and the water, right?  
21 A. Okay. Yeah.  
22 Q. Okay. Where's the dense, lush vegetation on the  
23 disputed strip?  
24 A. I don't see a lot of vegetation in this picture except  
25 for the trees that are hanging over --

1 Q. Okay.

2 A. -- and on the edge of the bank there.

3 Q. Okay. Assuming that the power pole there is on or over  
4 the boundary into the disputed strip, if this site had  
5 been heavily vegetated, would you expect to see some on  
6 all of that bare area down there?

7 A. Yes. Here, again, vegetation can be grass or a little  
8 bush. It's not necessarily large fir tree. So there  
9 was vegetation on the property.

10 Q. Would you agree with me or disagree with me that  
11 whatever vegetation is in this picture in the disputed  
12 strip would not satisfy the description of overgrown or  
13 impenetrable applied to it by Mr. Uhlig during his  
14 opening remarks?

15 A. Can you point out this spot you're referring to here,  
16 and then I'll answer that question.

17 Q. Yeah. Okay.

18 See the utility service there?

19 A. I do.

20 Q. Okay. So if we draw a line from the corner of the  
21 house to the utility service --

22 A. Okay.

23 Q. -- then there's an area to the left.

24 THE COURT: I don't know what you're looking  
25 at -- well, no. If you could just somehow let us all

1 know what you're referring to because you're showing  
2 the witness something.

3 MR. BRAIN: See this vertical object here  
4 with the white box on the bottom? That's the temporary  
5 power service.

6 MR. UHLIG: Excuse me. Which photo are you  
7 looking at, counsel?

8 MR. BRAIN: We are still looking at Exhibit  
9 20.

10 MR. UHLIG: There's two photos.

11 MR. BRAIN: And I will confine my questioning  
12 from the beginning to the top. So we'll be looking at  
13 the top photo on Exhibit 20.

14 MR. UHLIG: Thank you.

15 BY MR. BRAIN:

16 Q. That feature is the temporary electrical service for  
17 the construction site.

18 A. Right.

19 Q. So everything to the left of that would be the disputed  
20 strip; wouldn't it?

21 A. Yes.

22 Q. Okay. And, again, my question to you was: With  
23 respect to the area to the left of the temporary power  
24 service that's shown in the upper photograph of Exhibit  
25 20, would you characterize the vegetation on the

1           disputed strip there, as Mr. Uhlig did, as dense, lush,  
2           overgrown impenetrable?

3       A.     On that narrow little strip? No.

4                       MR. BRAIN: I would move for the admission of  
5           only the upper photograph in Exhibit 20.

6                       THE COURT: Mr. Uhlig?

7                       MR. UHLIG: No objection, Your Honor.

8                       THE COURT: Admitted.

9                               (Exhibit No. 20 admitted into evidence.)

10                       THE COURT: And that was No. 20, correct?

11                       MR. BRAIN: Correct.

12                       THE COURT: Yes.

13       BY MR. BRAIN:

14       Q.     Let's go to Exhibit 21.

15                       All right. You there?

16       A.     Yes.

17       Q.     Okay. Now we're looking across the west side of the  
18           house, correct?

19       A.     This is from the west side, yes.

20       Q.     Okay. So west side. Would you agree with me that it's  
21           taken from a perspective somewhere close to the  
22           property line to the west and slightly above a point  
23           which would be directly west of the main structure of  
24           the house?

25       A.     Looks like it's taken from about where the wellhead is.

1           disputed strip there, as Mr. Uhlig did, as dense, lush,  
2           overgrown impenetrable?

3   A.   On that narrow little strip?  No.

4                   MR. BRAIN:  I would move for the admission of  
5           only the upper photograph in Exhibit 20.

6                   THE COURT:  Mr. Uhlig?

7                   MR. UHLIG:  No objection, Your Honor.

8                   THE COURT:  Admitted.

9                           (Exhibit No. 20 admitted into evidence.)

10                   THE COURT:  And that was No. 20, correct?

11                   MR. BRAIN:  Correct.

12                   THE COURT:  Yes.

13   BY MR. BRAIN:

14   Q.   Let's go to Exhibit 21.

15                   All right.  You there?

16   A.   Yes.

17   Q.   Okay.  Now we're looking across the west side of the  
18           house, correct?

19   A.   This is from the west side, yes.

20   Q.   Okay.  So west side.  Would you agree with me that it's  
21           taken from a perspective somewhere close to the  
22           property line to the west and slightly above a point  
23           which would be directly west of the main structure of  
24           the house?

25   A.   Looks like it's taken from about where the wellhead is.



1 Q. February 28, 2007, do you see those trees?

2 A. No.

3 Q. 2002, do you see those trees?

4 A. Yes.

5 Q. Where?

6 A. Right here.

7 THE COURT: Sorry. So just for the record,  
8 let's identify what's being pointed to.

9 MR. BRAIN: She's pointing to an area which  
10 is south --

11 MR. UHLIG: Counsel, could you take a step  
12 back.

13 MR. BRAIN: -- south and east of the corner  
14 of the Ferguson property.

15 BY MR. BRAIN:

16 Q. What kind of trees were those?

17 A. Fir, and there was a madrona there also.

18 MR. UHLIG: Can the witness be seated?

19 MR. BRAIN: Yeah.

20 BY MR. BRAIN:

21 Q. I want to draw your attention to Exhibit No. 20 to the  
22 upper picture.

23 Do you see those trees in that picture?

24 A. No.

25 Q. Okay. How about -- let's go to Exhibit 22.

1 A. -- because I'll just see if that's consistent.

2 THE COURT REPORTER: I'm sorry. One at a  
3 time, please.

4 BY MR. BRAIN:

5 Q. An area of disputed strip, approximately starting at  
6 the southeast corner of the deck on the property line  
7 running to the line which is identified as "treeline"  
8 on the Exhibit No. 2 northwards to a point which is  
9 roughly on an east/west line with the northeast corner  
10 of the existing house.

11 A. Well, if I was describing, it would be more of a curve,  
12 and it would curve upwards at an angle to approximately  
13 the -- to be in a line with the north corner of the  
14 house, northeast corner.

15 Q. So sort of a semicircle or an oval?

16 A. Yes. A semicircle, yes.

17 Q. If you go to Exhibit No. 20, and drawing your attention  
18 to the left side of the upper photograph on Exhibit 20,  
19 aren't you looking across from the north to the south  
20 directly through the portion of the property you just  
21 testified was cleared in 2006?

22 A. No. I'm looking -- it appears to me that the angle is  
23 from here down here.

24 Q. Okay. Let's turn -- see this? This is the carport  
25 here, right? On the north side of the house.

1 A. It appears to be, yes.

2 Q. So the left hand of the picture would be --

3 THE COURT: Sorry. For the record,  
4 left-handed picture?

5 MR. BRAIN: The upper picture of Exhibit 21.

6 THE COURT: All right.

7 BY MR. BRAIN:

8 Q. On the left hand of the picture would be the left-hand  
9 side of the carport. Okay.

10 So the portion of the property that's being viewed  
11 on the left-hand side would be exactly the portion you  
12 just testified was cleared; isn't it?

13 A. No.

14 Q. Back to Exhibit 24.

15 See the temporary utility service?

16 A. I see what you've identified as that, yes.

17 Q. And if you go back to Exhibit 20 -- so we've got the  
18 right number here, No. 20.

19 See the temporary utility service in the upper  
20 picture?

21 A. I see what -- I can't tell if it was the same thing.

22 Q. So the vantage point of that photograph includes a view  
23 directly through the area that you just testified was  
24 cleared in 2006.

25 A. It would -- yes, it would show a portion of it because

1           you were looking down through the carport.

2           Q.   Looking down the left side of the carport?

3           A.   Well, barely.  You're looking down through the carport.

4           Q.   I think Mr. Slye has already testified that the  
5           temporary utility service was in the disputed strip.

6                           THE COURT:  Is that a question?

7           BY MR. BRAIN:

8           Q.   Do you recall him testifying to that?

9           A.   No, I don't recall that.

10          Q.   If you assume the temporary utility service is in the  
11          disputed strip, then the portion to the left of it  
12          would be exactly in the area you testified was cleared  
13          in 2006; wouldn't it?

14          A.   We're looking at Exhibit 21 -- 20?

15          Q.   20.

16          A.   The top one.  And then if that is in -- if one assumes  
17          that that temporary utility pole, which you've  
18          identified as the temporary utility pole, is in the  
19          disputed strip, then, yes, that would make -- put it  
20          probably right around -- probably right around here.

21                           THE COURT:  I can't see.

22                           THE WITNESS:  Excuse me.  Right around here.

23          At this marking where it says 12.5.  It looks like that  
24          would be about the location of it.

25

1 BY MR. BRAIN:

2 Q. So then that area to the left would -- the view would  
3 be right through that semicircular area you just  
4 described as having been cleared in 2006, correct?

5 A. Well, it doesn't show that portion on the photo.

6 Q. If there was vegetation between the vantage point of  
7 that picture and the temporary utility pole in that  
8 location that was cleared in 2006, would you expect to  
9 have seen it in that photograph taken in 1987?

10 A. Seen what?

11 Q. The vegetation that you say was cleared in 2006.

12 A. Well, again, during the period of the construction,  
13 there was fill that was -- went over onto our property.

14 Q. I appreciate that, Ms. McKenzie, but you're not  
15 answering my question. And in a moment, I'm going to  
16 ask the Court to direct you to answer my question,  
17 which is a really simple one.

18 And, that is, if there was vegetation in that area  
19 in 1987, wouldn't you have seen it from the perspective  
20 described in that photograph?

21 A. Well, first of all, I have questioned your description  
22 of the perspective.

23 Second of all, you would not necessarily see the  
24 vegetation because of the fill that was a product of  
25 the construction process.

1 Q. Is it your testimony that Mr. Slye filled that area?

2 A. Well, I'm probably not using the term of art correctly.  
3 There was dirt from the construction process that had  
4 fallen onto our property.

5 Q. Okay. Wouldn't that be the dirt depicted in Exhibit  
6 19?

7 A. This is dirt. So, yeah, probably.

8 Q. You recognize this, as Mr. Slye testified, as the east  
9 face of the Ferguson home?

10 A. Yes.

11 Q. And isn't that picture taken from exactly where you  
12 said clearing took place in 2006?

13 A. A portion -- the clearing is much larger than that.

14 Q. Isn't -- wouldn't you expect, if there was vegetation  
15 continuously from prior to the construction of the  
16 Ferguson residence until 2006, you'd see it in this  
17 photograph taken from the very area you have testified  
18 under oath was cleared by the Fergusons in 2006?

19 A. No. I -- no, I would not. Because, again, during the  
20 construction process, there was some, you know, dirt on  
21 our property. And this is -- you know, this just shows  
22 a -- a small portion of, you know -- it's not that far  
23 a distance from the house, it appears to me.

24 Q. Is it not your testimony, Ms. Ferguson, that prior to  
25 the construction of the residence, the entirety of the

1           disputed strip was covered with dense, lush, overgrown  
2           vegetation?

3                   MR. UHLIG:  Objection.  Misstates the  
4           witness's testimony.

5                   THE WITNESS:  Yes.

6                   MR. BRAIN:  I wrote it down.

7                   THE COURT:  Answer the question.

8                   MR. BRAIN:  Pardon?

9                   THE COURT:  Answer the question.

10                   THE WITNESS:  Yes.

11  BY MR. BRAIN:

12  Q.  Do you see any of that vegetation in Exhibit No. 19?

13  A.  No.

14  Q.  Okay.  So doesn't it not follow, Ms. McKenzie, that the  
15       vegetation you testified was there before Mr. Slye  
16       began construction was removed by Mr. Slye during  
17       construction and not in 2006 as you've testified by the  
18       Fergusons?

19  A.  I believe Mr. Slye actually testified that after he  
20       occupied the house, the vegetation returned, went back  
21       to its natural state.

22  Q.  Drawing your attention to Exhibit No. 44.

23  A.  Yes.

24  Q.  See all that pampas grass there?

25  A.  Yes.

1           this whole subject matter of whether there were  
2           prominent trees, whether there was clearing engaged in,  
3           what the construction photos clearly show is that both  
4           Mr. Slye and Ms. McKenzie spent a lot of time denying  
5           what is absolutely undeniable based on the evidence,  
6           and that is the trees that were purportedly cleared in  
7           2006 simply didn't exist.

8           In that regard, again, I would draw your attention  
9           to Exhibit 19 -- excuse me -- Exhibit 19; the  
10          photograph on the upper part of Exhibit 20; Exhibit 21,  
11          the photograph on the left-hand side; Exhibit 24, the  
12          photograph on the bottom; testimony there being that  
13          the only trees depicted in that picture are actually on  
14          the other side of Point White Drive, and I would note  
15          that that testimony's uncontroverted.

16          The same is equally true of some of the pictures  
17          relating to the location of the construction equipment.  
18          Clearly Mr. Slye graded and filled substantial portions  
19          of the property. In fact, as I recall Ms. McKenzie's  
20          explanation as to why you couldn't see trees, which she  
21          claimed were cleared in 2006, immediately adjacent to  
22          the east-facing side of the Ferguson house was because  
23          Mr. Slye had filled over them. That was her response  
24          when looking at Exhibit 19.

25          So the bottom line is that all of the objective



1 evidence establishes that at the point in time Mr. Slye  
2 completed construction of the residence, he had  
3 cleared, graded, filled the disputed strip, stripped it  
4 of what little vegetation there was at that point in  
5 time; and that, in any case, the vegetation, that  
6 dense, lush, overgrown vegetation which Ms. McKenzie  
7 claimed existed on the property up to 2006, was gone in  
8 1987; and as observed by Mr. Ferguson in 1994, had been  
9 replaced by blackberries growing in that area, which he  
10 subsequently removed, lawn, pampas grass, which shows  
11 up in photo after photo after photo, which doesn't show  
12 any trees.

13 What that leaves us with, ultimately, are aerial  
14 photographs. We can use a couple of these to  
15 illustrate what I consider to be fundamental problems  
16 with relying on this evidence.

17 Also ask the Court to look at Exhibit 46, and then  
18 I'll put this one -- I'm not sure where I can put it.  
19 We'll leave it right here.

20 Here's the problem with aerial photographs, Your  
21 Honor: Number one, where the trunk of the tree is  
22 located is not the same thing as where its shadow will  
23 be from 6000 feet in altitude, or where the lateral  
24 extent of its branches will be. All right.

25 The thing that has always struck me about these

1           Look at the photographs. The whole contention  
2           that during the period of Mr. Slye's construction  
3           activities the disputed strip was densely and lushly  
4           vegetated, or any time thereafter, is simply  
5           unsustainable. It's inarguable.

6           Look at Exhibit 25. What's the testimony there?  
7           That the only trees that are depicted in Exhibit 25 are  
8           on the other side of Point White Drive, which is  
9           completely consistent with the later photographs, which  
10          Ms. Ferguson can testify to.

11          You got Exhibit 17. Backhoe parked well into the  
12          disputed strip. Nothing but disturbed earth in the  
13          area she says was cleared in 2006.

14          Exhibit 20, the upper photograph: I mean, there's  
15          the power -- temporary power supply. There's no  
16          question that picture's taken from here looking through  
17          here in the area where Ms. Ferguson testified there are  
18          prominent trees cleared in 2006. Nothing, nada, zip,  
19          zero. There's no vegetation there whatsoever.

20          Again, Exhibit 21, same thing: You're looking  
21          back the other direction. Same truck. Same location.  
22          Same utility service. Prominent trees here? Not a  
23          chance. They don't exist. They never existed.

24          So, yeah, we think this is a case about  
25          credibility. We think that in light of the objective

1 evidence, the testimony that Mr. and Ms. McKenzie have  
2 offered here is simply lacking in credibility.

3 I think that's equally true of Mr. Slye. And the  
4 excuse that Mr. Uhlig offers is that Mr. Slye is a  
5 disinterested party. The only reason he's not a party  
6 to this litigation, as I may remind the Court, is you  
7 dismissed him in an interlocutory summary judgment  
8 order. So his participation in this particular dance  
9 is the subject matter now in the hands of the court of  
10 appeals, because it wasn't a final order.

11 If you didn't notice, throughout the period of his  
12 testimony, he had the same lawyer that represented him  
13 when he was a party sitting in the back of the  
14 courtroom.

15 Going to their trial brief, notice that they cite  
16 to a declaration which was submitted in relation to the  
17 summary judgment proceeding in which he testifies he  
18 didn't clear, fill, grade, or construct any  
19 improvements in the disputed strip cited in their trial  
20 brief. Compare that to his testimony when he was  
21 sitting here. "Yeah, I filled it. I cut down trees.  
22 I got permission to do it. I put a tight line. I put  
23 a power service. I put a retaining wall." This man's  
24 credible? I don't think so.

25 So, yeah, we think it's all about credibility. We

**Exhibit 21**

000598

<input type="checkbox"/> STATE	Exhibit No. <u>31</u>
<input checked="" type="checkbox"/> PLAINTIFF	<input type="checkbox"/> DEFENDANT
<input type="checkbox"/> PETITIONER	<input type="checkbox"/> RESPONDENT
<input type="checkbox"/> OTHER	

Case No. 11-2-01252-4

FERGUSON VS. MCKENZIE

<input type="checkbox"/> Admitted	<input type="checkbox"/> KEUSEL
<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not Filed

Date of Court's Ruling \_\_\_\_\_

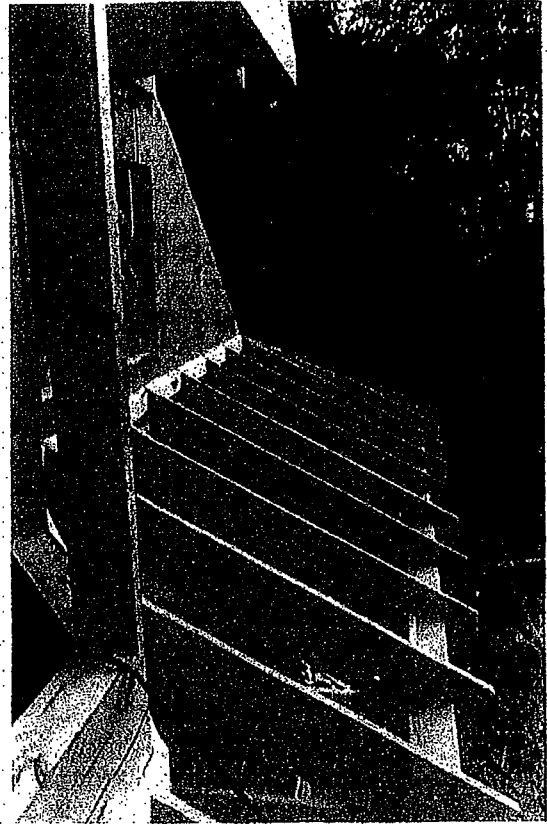
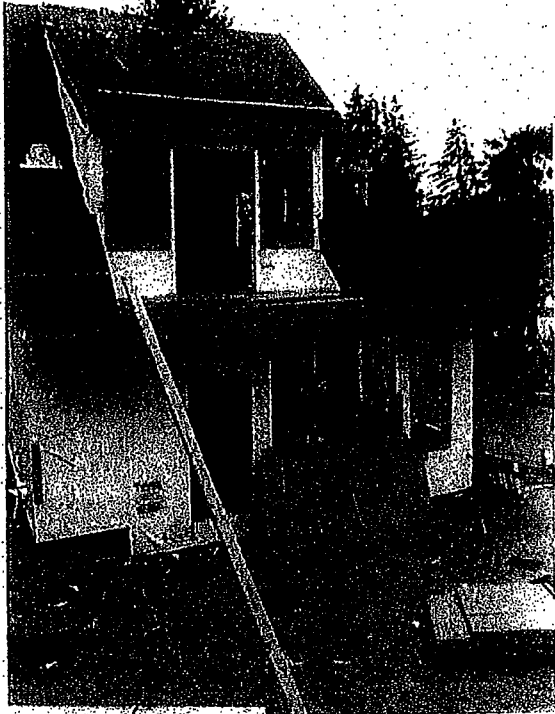


EXHIBIT 16  
Slye  
10/19/11  
Airtel - [illegible]

F.000022

1           disputed strip there, as Mr. Uhlig did, as dense, lush,  
2           overgrown impenetrable?

3           A.    On that narrow little strip?  No.

4                       MR. BRAIN:  I would move for the admission of  
5           only the upper photograph in Exhibit 20.

6                       THE COURT:  Mr. Uhlig?

7                       MR. UHLIG:  No objection, Your Honor.

8                       THE COURT:  Admitted.

9                               (Exhibit No. 20 admitted into evidence.)

10                      THE COURT:  And that was No. 20, correct?

11                      MR. BRAIN:  Correct.

12                      THE COURT:  Yes.

13           BY MR. BRAIN:

14           Q.    Let's go to Exhibit 21.

15                       All right.  You there?

16           A.    Yes.

17           Q.    Okay.  Now we're looking across the west side of the  
18           house, correct?

19           A.    This is from the west side, yes.

20           Q.    Okay.  So west side.  Would you agree with me that it's  
21           taken from a perspective somewhere close to the  
22           property line to the west and slightly above a point  
23           which would be directly west of the main structure of  
24           the house?

25           A.    Looks like it's taken from about where the wellhead is.

1 Q. The wellhead, you mean the circular symbol next to the  
2 retaining wall --

3 A. Yes.

4 Q. -- that's connected to the 100-foot radius.

5 A. Somewhere in there.

6 Q. Perspective would be looking down into the disputed  
7 strip to the southeast.

8 A. On the left-hand picture here.

9 Q. Yeah.

10 A. Yeah.

11 Q. We're only talking about the left-hand one.

12 And the reason we know it's the west side is  
13 because it's got that little deck off the door.

14 A. The other side has a deck as well.

15 Q. Did it? Gee. The pictures I have doesn't seem to show  
16 it. But this is the west side nevertheless. Okay.

17 And we see there's a pile of construction debris  
18 and some construction lumber and that same panel van  
19 again. See that?

20 A. Oh, yeah. Through the window.

21 Q. That's parked in the disputed strip; isn't it?

22 A. I can't tell from the picture.

23 Q. Let's go to Exhibit 23 then. And I want to ask you  
24 about the upper right-hand picture.

25 A. Excuse me?



- 1 Q. The upper --
- 2 A. Which one is 23?
- 3 Q. You got it there.
- 4 A. This one?
- 5 Q. Yeah. So if you -- yeah. The one with the orange van
- 6 in it.
- 7 A. Got it.
- 8 Q. Okay. And if you go back to 21 there -- all right?
- 9 A. Yes.
- 10 Q. That's sort of a picture of the same thing.
- 11 A. It is.
- 12 Q. Okay. So where do you think that upper right-hand
- 13 picture in Exhibit 23 was taken from, Mr. Slye?
- 14 A. Kind of off the front of the house.
- 15 Q. Okay. So --
- 16 A. It's not a very good picture.
- 17 Q. You're talking about off the front of the house.
- 18 You're talking about someplace immediately to the south
- 19 of what's been marked as the deck here on Exhibit
- 20 No. 2.
- 21 A. Yeah. I mean -- yeah. Somewhere in the front of the
- 22 house. There somewhere -- I'm not sure exactly.
- 23 Q. So somewheres in the front of the house looking towards
- 24 the southeast again?
- 25 A. Yeah.

1 Q. Through the disputed strip?

2 A. In that direction, yeah.

3 Q. Okay. And that would be an area, would it not, which  
4 should have been, in Mr. Uhlig's description, covered  
5 with dense, lush, overgrown vegetation?

6 A. I didn't hear his description so I can't answer that.

7 Q. Okay.

8 MR. BRAIN: I would like to move for the  
9 admission of the left-hand picture in Exhibit 21 and  
10 the upper right-hand picture showing the van in Exhibit  
11 23.

12 THE COURT: Any objection?

13 MR. UHLIG: No objection, Your Honor.

14 THE COURT: Admitted.

15 (Exhibit Nos. 21 and 23 admitted into  
16 evidence.)

17 THE WITNESS: May I please have some more  
18 water?

19 MR. BRAIN: Yeah. Sure.

20 THE WITNESS: Thanks.

21 MR. BRAIN: You're welcome.

22 BY MR. BRAIN::

23 Q. Let's go to Exhibit 32.

24 Do you recognize Exhibit 32?

25 A. I do.

1 is that tree.

2 Q. Okay. Now, I want to find one other picture first.

3 Let's go to Exhibit 23 for a minute. We'll look at the  
4 picture in the upper right-hand corner.

5 A. The panel truck?

6 Q. Yeah. And if you go back to the lower picture on 25 --  
7 all right? That's the same panel truck, right?

8 A. 23? 23 and 25?

9 Q. And 25. Right. Or 24. Excuse me.

10 The problem is, if you look at the tab behind it  
11 instead of the one in front.

12 A. Well, they look alike.

13 Q. They do.

14 So that's the same panel van, right?

15 A. All I can say is they look alike.

16 Q. They look alike.

17 And we have one more, if I could find it quickly.

18 If you could go to 22. The left-hand picture.

19 A. 22? The left -- I have --

20 Q. I did it again. 21. Got to read the number on the  
21 left, not on the right.

22 A. Yes.

23 Q. And that's the same panel van seen through the windows  
24 of the house, right?

25 A. Well, again, it's a yellow van.

1 Q. Right. And Mr. Slye testified that that picture was  
2 taken from the perspective about like this, which would  
3 put the same panel van in approximately the same  
4 position as in Exhibit 24, right?

5 A. This doesn't look like the same perspective to me.

6 Q. The perspective is slightly different, as Mr. Slye  
7 testified. The perspective in Exhibit 24 is from  
8 higher up and more behind. But, in this case, we're  
9 looking at Exhibit 21 through the set of windows on the  
10 southwest corner of the west side of the existing  
11 house.

12 See that?

13 A. I'm trying to orient the picture to where you're  
14 pointing.

15 Q. So the face of the house that you're looking at here is  
16 the west face. There's the main entrance.

17 There's the panel van in the back, correct?

18 Do the prominent trees that you've testified to  
19 previously appear in Exhibit 21?

20 A. 21, it appears to me that it's the tall tree above the  
21 house.

22 Q. On the far side of the panel van?

23 A. Well, the panel van is not in relation to it. It  
24 appears it's the fir tree that you see coming out from  
25 the top of the house.

1 Q. Okay. From that perspective, could you tell where the  
2 trunk of the tree is located?

3 A. Well, I know where the truck of the tree is located.

4 Q. I want you to go to Exhibit 32. Okay?

5 See that clump of trees in the middle of Exhibit  
6 32?

7 A. Yes.

8 Q. See that bright orange-colored curved branch going up  
9 there?

10 A. Yes.

11 Q. Okay. And going back to Exhibit 24, doesn't that  
12 appear to be the same bright orange-colored branch  
13 sticking up the top of the right front corner of that  
14 panel van?

15 A. Well, it could be.

16 Q. Uh-huh. Now --

17 A. But there are lots of trees, so I don't know for sure  
18 if it's the same tree.

19 Q. Well, see, here's the situation: Mr. Slye testified  
20 that Exhibit 32 -- mark it on here -- was taken from  
21 this location looking almost dead east. Okay? Which  
22 would actually place that clump of trees in the middle  
23 of the picture on the far side of Point White Drive and  
24 not even on your property.

25 Is that not correct?

1 A. That's your -- that's your perspective. There are  
2 trees on the other side of Point White Drive.

3 Q. Uh-huh.

4 A. My testimony is that there were trees on our property  
5 also.

6 Q. Show me where they are in these pictures.

7 A. I -- as I told you, on one of the exhibits, it appeared  
8 that the top of the tree -- I don't remember what  
9 number we were looking at.

10 Q. 21, I think.

11 A. 21. It appears to be the top of the tree that is above  
12 the -- you know, the house under construction, given  
13 the perspective that you tell me this is being taken  
14 from.

15 Q. Okay. You can't see the base of the tree from that  
16 picture. Okay.

17 Let's go to Exhibit 33. You got that same yellow  
18 truck there.

19 Both Mr. Slye and Mr. Ferguson testified that the  
20 property line runs diagonally from the corner marker,  
21 which is partly obscured from fill in the lower  
22 left-hand corner, to a point about an  
23 equivalent -- through a point which would be  
24 equivalent to the lower corner of the left-hand window  
25 of the panel van.

1 A. Is --

2 Q. So was it your testimony that this is the area that was  
3 densely, lushly overgrown to the right of that property  
4 line?

5 A. Actually, the property line, as I pointed out, is  
6 located -- if I may.

7 Q. Yeah.

8 We're talking -- where do you think the property  
9 line is in this picture?

10 A. If you're talking about this concrete marker in the  
11 lower left-hand corner --

12 Q. And Mr. Slye identified as being right here.

13 A. The -- actually, the corner of our property  
14 is -- excuse me, Your Honor -- as we can see is  
15 the -- there is a corner marker that is more right in  
16 here.

17 Q. Okay. Mr. Slye identified that concrete monument as  
18 being a boundary marker located in this position, the  
19 same one that's depicted in Exhibit 33. Okay?

20 And he testified that the panel van would be  
21 wholly or partially on the disputed strip. Okay?

22 A. That's what he testified.

23 Q. Okay. So wouldn't that mean if that's accurate, that  
24 everything to the -- diagonally to the lower  
25 left -- right-hand corner of that photograph, between

1 the monument and the panel van, would depict the  
2 disputed strip, correct?

3 A. I'm afraid you're confusing me.

4 Q. Sure. Hand me the marker here for a second.

5 Mr. Slye's testimony is that the panel van is  
6 located --

7 MR. UHLIG: Counsel, could you step back one  
8 foot? Thank you.

9 BY MR. BRAIN:

10 Q. -- right here. Okay. And the picture is taken from  
11 the right looking up the property line. Right?  
12 There's the corner marker. Taken from some point down  
13 here. There's the corner marker. Panel van. You're  
14 looking up the disputed strip.

15 There should be lush, overgrown vegetation on the  
16 right-hand side of that photograph between the camera  
17 lens and the panel van; shouldn't there?

18 A. Well --

19 Q. According to your testimony.

20 A. I would say that, for one thing, the perspective is  
21 different. And, in Exhibit 33, the angle of which one  
22 is looking more south -- or is more northwest. And the  
23 house itself is situated so it looks more to the  
24 southeast.

25 So this is -- this is not the same angle as the



1 exhibit -- whatever that is -- 2A.

2 Q. Now, again, according to Mr. Slye, that picture was  
3 taken from a point about here, depicting the concrete  
4 monument and the panel van. Right? And that would be  
5 looking directly up the property line to the north.

6 Do you see any of the lush, overgrown vegetation  
7 on the property from the right-hand side of that  
8 photograph between the lens of the camera and the panel  
9 van parked in the disputed strip approximately in the  
10 area of the carport?

11 A. Well, again, as I said, this is at a different angle  
12 than that. So it's difficult to transpose from this  
13 picture to Exhibit 2A because it's a completely  
14 different angle looking at the Ferguson residence.

15 Q. Okay. You've already testified -- and I've wrote it  
16 down, that the entirety of the disputed strip was, and  
17 I quote, dense, lush, and overgrown. Okay?

18 And isn't it true, Ms. McKenzie, that if you're  
19 standing here looking at something parked there, you  
20 would expect to see dense, lush, overgrown vegetation  
21 based on your testimony?

22 A. Well, as I've also testified, this is -- and would you  
23 like me to use the pointer? Would that be --

24 Q. Sure. Go right ahead.

25 THE COURT: Please.

1 THE WITNESS: There is -- this is steep  
2 through here. And, you know, there aren't really trees  
3 on there except the ones that I pointed out. And then  
4 it -- and then on up here. Yes. This would be dense,  
5 lush vegetation with trees and shrubs, et cetera.

6 The -- but relating it to that picture -- for one  
7 thing, the picture is so unclear, it's hard to tell  
8 what you're looking at except for the house; you can  
9 see the house --

10 Q. If you can --

11 THE COURT: Wait. You're both talking at one  
12 time.

13 Let the witness finish her comment.

14 BY MR. BRAIN:

15 Q. Were you done? I'm sorry to interrupt you.

16 A. Yes, I'm done.

17 Q. If you were standing here, Ms. Ferguson -- or  
18 Ms. McKenzie, and the truck is parked here and there's  
19 a tree here, don't you think it would obscure the view  
20 of the truck?

21 MR. UHLIG: Your Honor, I'm going to object.  
22 It seems like this question has been asked several  
23 times, and she's fully explained her --

24 MR. BRAIN: I would submit, Your Honor, it's  
25 been asked numerous times without getting a credible

1 answer.

2 THE COURT: Well, I'm not going to comment on  
3 whether or not it was a credible answer, but the  
4 question can be asked as it relates to just the diagram  
5 separate and apart from this Exhibit 33, which seems to  
6 be the issue here, trying to relate 33 to the diagram.

7 The last question was just pointing to Exhibit 2A  
8 and the hypothetical or the --

9 MR. BRAIN: Right.

10 THE COURT: -- situation asked. If you can  
11 answer that question --

12 MR. BRAIN: Yeah.

13 THE COURT: -- if you can answer it, fine.  
14 If you can't, you can't.

15 BY MR. BRAIN:

16 Q. I will answer it -- just to clarify, based upon what  
17 the judge has said, hypothetically, assuming there's a  
18 bright orange panel van parked in the disputed strip  
19 adjacent to the location of the septic tank but in the  
20 disputed strip, which I believe was Mr. Slye's  
21 testimony, and you're standing at the top or close to  
22 the top of the break in the slope looking in the  
23 direction of that panel van, isn't it true,  
24 Ms. McKenzie, that you would expect to see both the  
25 trees and the lush, dense, overgrown vegetation that

1           you've testified to between you and the panel van?  
2   A.   Well, first of all, as I said when pointing out the  
3       location of the trees, I could not do with great  
4       precision because it's -- you know, I don't have the  
5       topography there and all.

6           The -- as to -- as to what you can see at a  
7       certain point -- and, you know, again, I point  
8       out -- excuse me for not speaking so that you can  
9       transcribe so easily.

10           But as I pointed out before, the -- there was some  
11       fill dirt that was on our property during the  
12       construction process. To the -- however, to the east  
13       of that was lush, green, overgrown property.

14   Q.   I think we'll move on at this point in time.

15           Do you know when that corner marker, the one that  
16       you referred to, the nail marker, in the asphalt on the  
17       driveway was placed?

18   A.   I believe that was placed before we owned the property.

19   Q.   Okay. Do you recall Mr. Slye's testimony that they  
20       didn't locate any corner marker at the southern part of  
21       your property when they visited with Mr. Ferguson  
22       during the inspection period for his acquisition of the  
23       house in 1994?

24   A.   I don't recall his exact testimony.

25   Q.   Okay. With respect to the trees topped by Puget Sound

1 Energy that you were talking about, did they request  
2 any permission from you to remove those trees?

3 A. No.

4 Q. Doesn't that suggest to you, Ms. Ferguson, that the  
5 trees weren't actually on your property, that they were  
6 on the Point White right-of-way?

7 A. No.

8 Q. Think Puget Sound Energy just trespasses on people's  
9 property and cuts their trees down? Is that your  
10 testimony here today?

11 A. That's not my testimony, no.

12 Q. Okay. But it was Puget Sound Energy who did the  
13 topping, correct?

14 A. That's my recollection.

15 Q. Okay. And in your understanding, was the purpose for  
16 topping those trees to remove interference with the  
17 power lines?

18 A. That was my understanding, yes.

19 Q. So that --

20 A. They may have given us notice. It's been a long time.  
21 I don't have a recollection of whether they did.

22 Q. Now, you're an attorney licensed to practice law  
23 attached to the Civil Division of the Prosecuting  
24 Attorney for King County, correct?

25 A. I'm retired. I am an attorney licensed, though.

1 Q. When did you retire?

2 A. I retired about a year and a half ago.

3 Q. And what kind of things did you practice consistently  
4 as a civil deputy for King County?

5 A. You know, I provided -- mainly it was in an advisory  
6 role to the County.

7 Q. And what kind of subject matters did you provide advice  
8 on?

9 A. Well, two of my principal clients were the King County  
10 Board of Health and the Seattle King County Department  
11 of Public Health.

12 Q. Okay.

13 A. I also, you know, represented other agencies and, you  
14 know, and counsel, et cetera, as needed.

15 Q. In relation to public health issues?

16 A. No. Relation to other issues also.

17 Q. Okay. Anything related to real estate?

18 A. No.

19 Q. Okay. Now, it's my understanding that Puget Sound  
20 Energy installed underground power lines on the access  
21 on the east side of Lot 13, your access to your main  
22 house.

23 A. It would have been on the -- it was on the east side,  
24 but on the west side of the access road.

25 Q. Okay. And when that happened, didn't you insist that

- 1           they be placed in a recorded easement?
- 2    A.    I didn't insist that. They wanted it in a recorded  
3           easement. It was their easement. I wanted them placed  
4           underground, and they conditioned their doing that on  
5           our granting an easement.
- 6    Q.    So they specifically wanted a recorded easement  
7           authorizing the use of your property?
- 8    A.    For purposes of maintaining the line, yes.
- 9    Q.    Underground power lines?
- 10   A.    Yes.
- 11   Q.    But at the point in time Mr. Slye placed his power  
12           lines across that portion of Lot 13 connecting to the  
13           utility pole, you didn't discuss with him whether there  
14           should be an easement?
- 15   A.    Did I discuss with him whether that should be an  
16           easement? No.
- 17   Q.    Now, you offered a bunch of testimony about in 1987  
18           when the house was being constructed you knew where the  
19           properties lines were.
- 20   A.    I knew generally.
- 21   Q.    How did you know that?
- 22   A.    Well, because I knew the corner down here that -- that  
23           the south end, and I knew north end. And so it ran  
24           north and south.
- 25   Q.    So your testimony is you knew that this corner marker

1 was in the asphalt down there?

2 A. Yes.

3 Q. In 1987?

4 A. That's my recollection.

5 Q. When the house construction started?

6 A. That's my recollection. Yeah.

7 Q. You sure that road was even paved at that point in  
8 time?

9 A. No, I'm not.

10 Q. So do you know whether or not surveyors generally make  
11 a practice of putting nail corner markers in dirt  
12 roads?

13 A. I do not know.

14 Q. Okay. Now, during the course of your testimony, in  
15 discussing the kind of vegetation that was on the  
16 property, I never heard you mention pampas grass.

17 Was there pampas grass on the property prior to  
18 1987?

19 A. I don't recall whether there was or not.

20 Q. Okay. Do you recall Mr. Slye putting pampas grass on  
21 the property?

22 A. I recall he testified to that, yes.

23 Q. Okay. Now --

24 MR. UHLIG: Objection. Just to clarify "on  
25 the property." There's several properties.



1 MR. BRAIN: That's an appropriate question.  
2 BY MR. BRAIN:  
3 Q. Did you understand, during the question, I was talking  
4 about the disputed strip and not generally the entirety  
5 of Lot 13?  
6 A. I didn't understand that he put pampas grass on the  
7 disputed strip.  
8 Q. Okay. Now, during the course of Mr. Ferguson's  
9 testimony yesterday, Mr. Ferguson testified that with  
10 respect to Exhibit 53, the pampas grass depicted in  
11 that photograph had been present since his acquisition  
12 of the house, and that he understood the pampas grass  
13 were planted by Mr. Slye. Okay.  
14 Isn't it true, Ms. Ferguson, that if you were  
15 walking along Point White Drive, you would have --  
16 THE COURT: Excuse me. I --  
17 MS. FERGUSON: McKenzie, not --  
18 MR. BRAIN: McKenzie. I'm sorry.  
19 THE COURT: Hang on just a minute. We can't  
20 have comments from the back. Even if you identify that  
21 there's a mistake, it's not appropriate to be calling  
22 out the mistakes that may be made by the attorney.  
23 THE WITNESS: Okay.  
24 MR. BRAIN: And I apologize. It runs in my  
25 family that we just mess up on names all the time.

1 BY MR. BRAIN:

2 Q. Ms. McKenzie, isn't it true walking along Point White  
3 Drive, if those pampas grass had been there for years,  
4 since 1987, '88, that you would have seen them?

5 A. As I testified, in 2006, I saw that there was  
6 substantial clearing. Prior to 2006, I could not see  
7 that cleared area in there.

8 Q. Okay. So the area where the substantial clearing took  
9 place, right, is that the same area -- this is mine.  
10 Let's use the official one -- are depicted in Exhibit  
11 24, where that panel van is sitting?

12 A. No.

13 Q. Where would that substantial clearing have been?

14 A. It would have been -- assuming that this is the  
15 Ferguson house and we're -- we must be facing south --  
16 well, at the angle which the house is at, then the  
17 cleared area would be to my left of this photograph.

18 Q. Okay. So, again, panel van's down here someplace. It  
19 would have been over here?

20 MR. UHLIG: Counsel, if you would step back  
21 one foot.

22 MR. BRAIN: Sorry.

23 BY MR. BRAIN:

24 Q. Would have been to the north and west of the line drawn  
25 between the northwest corner of the existing house and

1 the utility the pole?

2 A. Through here.

3 THE COURT: Let's identify for the  
4 record what --

5 THE WITNESS: Did you see that?

6 THE COURT: I saw it, but we need to identify  
7 it for the record --

8 BY MR. BRAIN:

9 Q. Let me see if this is consistent --

10 A. I can draw it again and perhaps give a verbal  
11 description. Would that be best?

12 Q. That would be perfect. Let's refer to notations so  
13 somebody can --

14 A. Okay. It would be -- the substantial clearing would be  
15 approximately from the deck on out about 60 feet and  
16 then curving back at an angle probably going up ten or  
17 15 feet and then curving back.

18 Q. So basically the portion of the property between the  
19 southeast corner of the deck and the northeast  
20 corner -- or the northeast corner of the existing house  
21 to the point -- a line marked by the treeline.

22 A. Well, as -- I described what I was saying.

23 Q. Yeah. Is that consistent with --

24 A. Well, you'll have to tell me again --

25 Q. Again --

1 A. -- because I'll just see if that's consistent.

2 THE COURT REPORTER: I'm sorry. One at a  
3 time, please.

4 BY MR. BRAIN:

5 Q. An area of disputed strip, approximately starting at  
6 the southeast corner of the deck on the property line  
7 running to the line which is identified as "treeline"  
8 on the Exhibit No. 2 northwards to a point which is  
9 roughly on an east/west line with the northeast corner  
10 of the existing house.

11 A. Well, if I was describing, it would be more of a curve,  
12 and it would curve upwards at an angle to approximately  
13 the -- to be in a line with the north corner of the  
14 house, northeast corner.

15 Q. So sort of a semicircle or an oval?

16 A. Yes. A semicircle, yes.

17 Q. If you go to Exhibit No. 20, and drawing your attention  
18 to the left side of the upper photograph on Exhibit 20,  
19 aren't you looking across from the north to the south  
20 directly through the portion of the property you just  
21 testified was cleared in 2006?

22 A. No. I'm looking -- it appears to me that the angle is  
23 from here down here.

24 Q. Okay. Let's turn -- see this? This is the carport  
25 here, right? On the north side of the house.

1 A. It appears to be, yes.

2 Q. So the left hand of the picture would be --

3 THE COURT: Sorry. For the record,  
4 left-handed picture?

5 MR. BRAIN: The upper picture of Exhibit 21.

6 THE COURT: All right.

7 BY MR. BRAIN:

8 Q. On the left hand of the picture would be the left-hand  
9 side of the carport. Okay.

10 So the portion of the property that's being viewed  
11 on the left-hand side would be exactly the portion you  
12 just testified was cleared; isn't it?

13 A. No.

14 Q. Back to Exhibit 24.

15 See the temporary utility service?

16 A. I see what you've identified as that, yes.

17 Q. And if you go back to Exhibit 20 -- so we've got the  
18 right number here, No. 20.

19 See the temporary utility service in the upper  
20 picture?

21 A. I see what -- I can't tell if it was the same thing.

22 Q. So the vantage point of that photograph includes a view  
23 directly through the area that you just testified was  
24 cleared in 2006.

25 A. It would -- yes, it would show a portion of it because

1           you were looking down through the carport.

2   Q.   Looking down the left side of the carport?

3   A.   Well, barely. You're looking down through the carport.

4   Q.   I think Mr. Slye has already testified that the  
5       temporary utility service was in the disputed strip.

6                   THE COURT: Is that a question?

7   BY MR. BRAIN:

8   Q.   Do you recall him testifying to that?

9   A.   No, I don't recall that.

10   Q.   If you assume the temporary utility service is in the  
11       disputed strip, then the portion to the left of it  
12       would be exactly in the area you testified was cleared  
13       in 2006; wouldn't it?

14   A.   We're looking at Exhibit 21 -- 20?

15   Q.   20.

16   A.   The top one. And then if that is in -- if one assumes  
17       that that temporary utility pole, which you've  
18       identified as the temporary utility pole, is in the  
19       disputed strip, then, yes, that would make -- put it  
20       probably right around -- probably right around here.

21                   THE COURT: I can't see.

22                   THE WITNESS: Excuse me. Right around here.  
23       At this marking where it says 12.5. It looks like that  
24       would be about the location of it.

25

1 BY MR. BRAIN:

2 Q. So then that area to the left would -- the view would  
3 be right through that semicircular area you just  
4 described as having been cleared in 2006, correct?

5 A. Well, it doesn't show that portion on the photo.

6 Q. If there was vegetation between the vantage point of  
7 that picture and the temporary utility pole in that  
8 location that was cleared in 2006, would you expect to  
9 have seen it in that photograph taken in 1987?

10 A. Seen what?

11 Q. The vegetation that you say was cleared in 2006.

12 A. Well, again, during the period of the construction,  
13 there was fill that was -- went over onto our property.

14 Q. I appreciate that, Ms. McKenzie, but you're not  
15 answering my question. And in a moment, I'm going to  
16 ask the Court to direct you to answer my question,  
17 which is a really simple one.

18 And, that is, if there was vegetation in that area  
19 in 1987, wouldn't you have seen it from the perspective  
20 described in that photograph?

21 A. Well, first of all, I have questioned your description  
22 of the perspective.

23 Second of all, you would not necessarily see the  
24 vegetation because of the fill that was a product of  
25 the construction process.

1 Q. Is it your testimony that Mr. Slye filled that area?

2 A. Well, I'm probably not using the term of art correctly.  
3 There was dirt from the construction process that had  
4 fallen onto our property.

5 Q. Okay. Wouldn't that be the dirt depicted in Exhibit  
6 19?

7 A. This is dirt. So, yeah, probably.

8 Q. You recognize this, as Mr. Slye testified, as the east  
9 face of the Ferguson home?

10 A. Yes.

11 Q. And isn't that picture taken from exactly where you  
12 said clearing took place in 2006?

13 A. A portion -- the clearing is much larger than that.

14 Q. Isn't -- wouldn't you expect, if there was vegetation  
15 continuously from prior to the construction of the  
16 Ferguson residence until 2006, you'd see it in this  
17 photograph taken from the very area you have testified  
18 under oath was cleared by the Fergusons in 2006?

19 A. No. I -- no, I would not. Because, again, during the  
20 construction process, there was some, you know, dirt on  
21 our property. And this is -- you know, this just shows  
22 a -- a small portion of, you know -- it's not that far  
23 a distance from the house, it appears to me.

24 Q. Is it not your testimony, Ms. Ferguson, that prior to  
25 the construction of the residence, the entirety of the



1           disputed strip was covered with dense, lush, overgrown  
2           vegetation?

3                   MR. UHLIG:  Objection.  Misstates the  
4           witness's testimony.

5                   THE WITNESS:  Yes.

6                   MR. BRAIN:  I wrote it down.

7                   THE COURT:  Answer the question.

8                   MR. BRAIN:  Pardon?

9                   THE COURT:  Answer the question.

10                   THE WITNESS:  Yes.

11  BY MR. BRAIN:

12  Q.  Do you see any of that vegetation in Exhibit No. 19?

13  A.  No.

14  Q.  Okay.  So doesn't it not follow, Ms. McKenzie, that the  
15       vegetation you testified was there before Mr. Slye  
16       began construction was removed by Mr. Slye during  
17       construction and not in 2006 as you've testified by the  
18       Fergusons?

19  A.  I believe Mr. Slye actually testified that after he  
20       occupied the house, the vegetation returned, went back  
21       to its natural state.

22  Q.  Drawing your attention to Exhibit No. 44.

23  A.  Yes.

24  Q.  See all that pampas grass there?

25  A.  Yes.

1 this whole subject matter of whether there were  
2 prominent trees, whether there was clearing engaged in,  
3 what the construction photos clearly show is that both  
4 Mr. Slye and Ms. McKenzie spent a lot of time denying  
5 what is absolutely undeniable based on the evidence,  
6 and that is the trees that were purportedly cleared in  
7 2006 simply didn't exist.

8 In that regard, again, I would draw your attention  
9 to Exhibit 19 -- excuse me -- Exhibit 19; the  
10 photograph on the upper part of Exhibit 20; Exhibit 21,  
11 the photograph on the left-hand side; Exhibit 24, the  
12 photograph on the bottom; testimony there being that  
13 the only trees depicted in that picture are actually on  
14 the other side of Point White Drive, and I would note  
15 that that testimony's uncontroverted.

16 The same is equally true of some of the pictures  
17 relating to the location of the construction equipment.  
18 Clearly Mr. Slye graded and filled substantial portions  
19 of the property. In fact, as I recall Ms. McKenzie's  
20 explanation as to why you couldn't see trees, which she  
21 claimed were cleared in 2006, immediately adjacent to  
22 the east-facing side of the Ferguson house was because  
23 Mr. Slye had filled over them. That was her response  
24 when looking at Exhibit 19.

25 So the bottom line is that all of the objective

1 evidence establishes that at the point in time Mr. Slye  
2 completed construction of the residence, he had  
3 cleared, graded, filled the disputed strip, stripped it  
4 of what little vegetation there was at that point in  
5 time; and that, in any case, the vegetation, that  
6 dense, lush, overgrown vegetation which Ms. McKenzie  
7 claimed existed on the property up to 2006, was gone in  
8 1987; and as observed by Mr. Ferguson in 1994, had been  
9 replaced by blackberries growing in that area, which he  
10 subsequently removed, lawn, pampas grass, which shows  
11 up in photo after photo after photo, which doesn't show  
12 any trees.

13 What that leaves us with, ultimately, are aerial  
14 photographs. We can use a couple of these to  
15 illustrate what I consider to be fundamental problems  
16 with relying on this evidence.

17 Also ask the Court to look at Exhibit 46, and then  
18 I'll put this one -- I'm not sure where I can put it.  
19 We'll leave it right here.

20 Here's the problem with aerial photographs, Your  
21 Honor: Number one, where the trunk of the tree is  
22 located is not the same thing as where its shadow will  
23 be from 6000 feet in altitude, or where the lateral  
24 extent of its branches will be. All right.

25 The thing that has always struck me about these

1           Look at the photographs. The whole contention  
2           that during the period of Mr. Slye's construction  
3           activities the disputed strip was densely and lushly  
4           vegetated, or any time thereafter, is simply  
5           unsustainable. It's inarguable.

6           Look at Exhibit 25. What's the testimony there?  
7           That the only trees that are depicted in Exhibit 25 are  
8           on the other side of Point White Drive, which is  
9           completely consistent with the later photographs, which  
10          Ms. Ferguson can testify to.

11          You got Exhibit 17. Backhoe parked well into the  
12          disputed strip. Nothing but disturbed earth in the  
13          area she says was cleared in 2006.

14          Exhibit 20, the upper photograph: I mean, there's  
15          the power -- temporary power supply. There's no  
16          question that picture's taken from here looking through  
17          here in the area where Ms. Ferguson testified there are  
18          prominent trees cleared in 2006. Nothing, nada, zip,  
19          zero. There's no vegetation there whatsoever.

20          Again, Exhibit 21, same thing: You're looking  
21          back the other direction. Same truck. Same location.  
22          Same utility service. Prominent trees here? Not a  
23          chance. They don't exist. They never existed.

24          So, yeah, we think this is a case about  
25          credibility. We think that in light of the objective

1 evidence, the testimony that Mr. and Ms. McKenzie have  
2 offered here is simply lacking in credibility.

3 I think that's equally true of Mr. Slye. And the  
4 excuse that Mr. Uhlig offers is that Mr. Slye is a  
5 disinterested party. The only reason he's not a party  
6 to this litigation, as I may remind the Court, is you  
7 dismissed him in an interlocutory summary judgment  
8 order. So his participation in this particular dance  
9 is the subject matter now in the hands of the court of  
10 appeals, because it wasn't a final order.

11 If you didn't notice, throughout the period of his  
12 testimony, he had the same lawyer that represented him  
13 when he was a party sitting in the back of the  
14 courtroom.

15 Going to their trial brief, notice that they cite  
16 to a declaration which was submitted in relation to the  
17 summary judgment proceeding in which he testifies he  
18 didn't clear, fill, grade, or construct any  
19 improvements in the disputed strip cited in their trial  
20 brief. Compare that to his testimony when he was  
21 sitting here. "Yeah, I filled it. I cut down trees.  
22 I got permission to do it. I put a tight line. I put  
23 a power service. I put a retaining wall." This man's  
24 credible? I don't think so.

25 So, yeah, we think it's all about credibility. We

1 think the witnesses that testified on behalf of the  
2 defendants, when viewed in relation to the objective  
3 evidence, are completely lacking in credibility. And  
4 the fact of the matter is, I think the plaintiffs have  
5 met their burden, have demonstrated that within the  
6 period of June 23rd, 1994, through June 23, 2004, the  
7 circumstances justifying a finding by this Court to  
8 quiet title on an adverse possession theory existed.

9 Thank you.

10 THE COURT: Anything else, Mr. Uhlig?

11 MR. UHLIG: Nothing further, Your Honor.

12 THE COURT: All right. As far as the  
13 exhibits are concerned, we have what is still marked as  
14 2A, 1A.

15 Did you resolve how to address that, whether or  
16 not you are actually seeking the clerk to keep those  
17 large posters as exhibits, or were you coming to some  
18 stipulation about a --

19 MR. BRAIN: Can I ask a question?

20 THE COURT: -- equally reliable rendition?

21 Yes.

22 MR. BRAIN: Would they be of value to you in  
23 your deliberations?

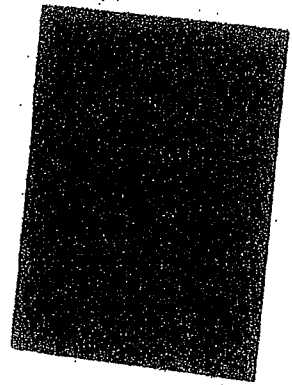
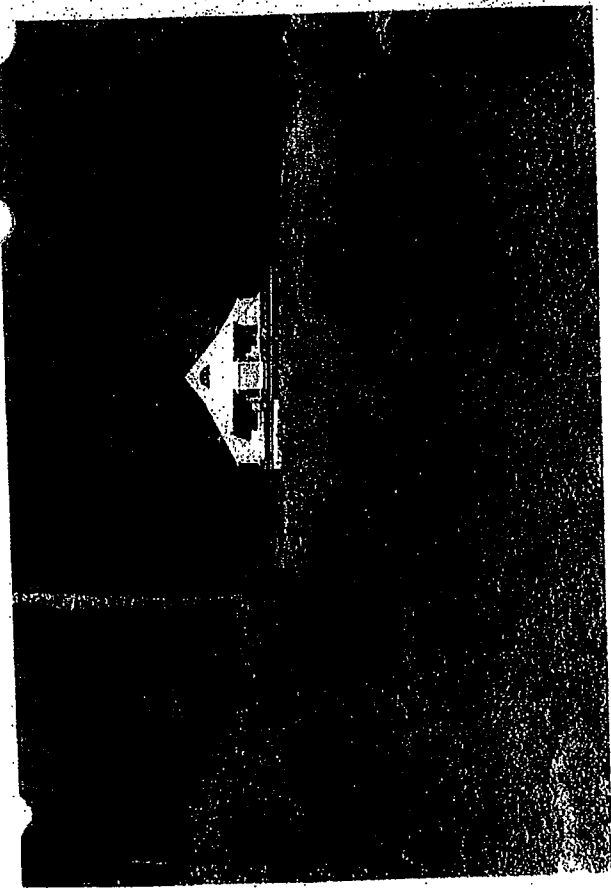
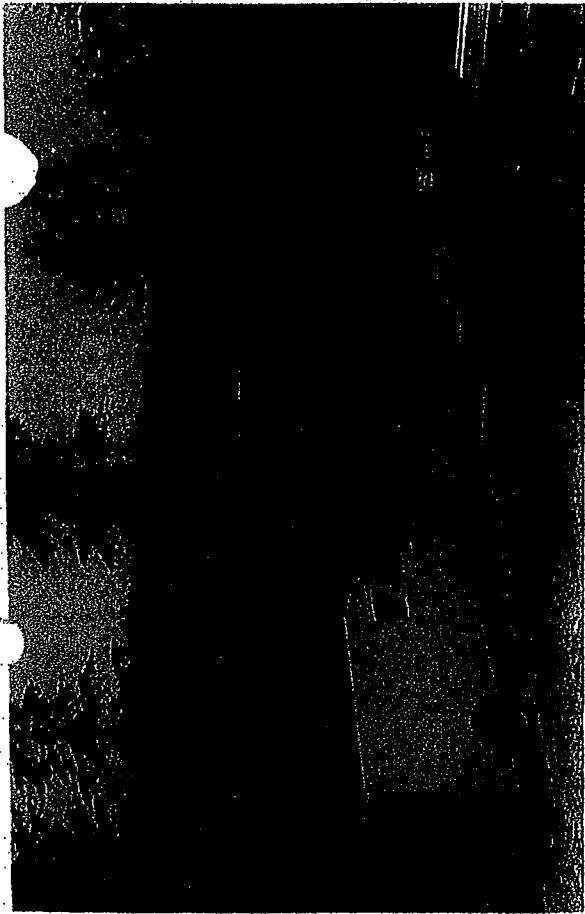
24 THE COURT: Well, I've got 1 and 2 in my box.  
25 The only difference, as I can tell, is that there is a

**Exhibit 23**

000600

<input type="checkbox"/> STATE	ZIP CODE <u>48</u>
<input checked="" type="checkbox"/> PLAINTIFF	<input type="checkbox"/> DEFENDANT
<input type="checkbox"/> PETITIONER	<input type="checkbox"/> RESPONDENT
<input type="checkbox"/> OTHER	
CASE NO. <u>11-2-01262-4</u>	
<u>FERGUSON VS NICKENZIE</u>	
<input type="checkbox"/> Admitted	<input type="checkbox"/> Retired
<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Inactive
Date of Court's Ruling: _____	





1 Q. The wellhead, you mean the circular symbol next to the  
2 retaining wall --

3 A. Yes.

4 Q. -- that's connected to the 100-foot radius.

5 A. Somewhere in there.

6 Q. Perspective would be looking down into the disputed  
7 strip to the southeast.

8 A. On the left-hand picture here.

9 Q. Yeah.

10 A. Yeah.

11 Q. We're only talking about the left-hand one.

12 And the reason we know it's the west side is  
13 because it's got that little deck off the door.

14 A. The other side has a deck as well.

15 Q. Did it? Gee. The pictures I have doesn't seem to show  
16 it. But this is the west side nevertheless. Okay.

17 And we see there's a pile of construction debris  
18 and some construction lumber and that same panel van  
19 again. See that?

20 A. Oh, yeah. Through the window.

21 Q. That's parked in the disputed strip; isn't it?

22 A. I can't tell from the picture.

23 Q. Let's go to Exhibit 23 then. And I want to ask you  
24 about the upper right-hand picture.

25 A. Excuse me?

- 1 Q. The upper --
- 2 A. Which one is 23?
- 3 Q. You got it there.
- 4 A. This one?
- 5 Q. Yeah. So if you -- yeah. The one with the orange van
- 6 in it.
- 7 A. Got it.
- 8 Q. Okay. And if you go back to 21 there -- all right?
- 9 A. Yes.
- 10 Q. That's sort of a picture of the same thing.
- 11 A. It is.
- 12 Q. Okay. So where do you think that upper right-hand
- 13 picture in Exhibit 23 was taken from, Mr. Slye?
- 14 A. Kind of off the front of the house.
- 15 Q. Okay. So --
- 16 A. It's not a very good picture.
- 17 Q. You're talking about off the front of the house.
- 18 You're talking about someplace immediately to the south
- 19 of what's been marked as the deck here on Exhibit
- 20 No. 2.
- 21 A. Yeah. I mean -- yeah. Somewhere in the front of the
- 22 house. There somewhere -- I'm not sure exactly.
- 23 Q. So somewheres in the front of the house looking towards
- 24 the southeast again?
- 25 A. Yeah.

1 Q. Through the disputed strip?

2 A. In that direction, yeah.

3 Q. Okay. And that would be an area, would it not, which  
4 should have been, in Mr. Uhlig's description, covered  
5 with dense, lush, overgrown vegetation?

6 A. I didn't hear his description so I can't answer that.

7 Q. Okay.

8 MR. BRAIN: I would like to move for the  
9 admission of the left-hand picture in Exhibit 21 and  
10 the upper right-hand picture showing the van in Exhibit  
11 23.

12 THE COURT: Any objection?

13 MR. UHLIG: No objection, Your Honor.

14 THE COURT: Admitted.

15 (Exhibit Nos. 21 and 23 admitted into  
16 evidence.)

17 THE WITNESS: May I please have some more  
18 water?

19 MR. BRAIN: Yeah. Sure.

20 THE WITNESS: Thanks.

21 MR. BRAIN: You're welcome.

22 BY MR. BRAIN::

23 Q. Let's go to Exhibit 32.

24 Do you recognize Exhibit 32?

25 A. I do.

1 admission of Exhibit 32.

2 MR. UHLIG: No objection, Your Honor.

3 THE COURT: With no objection, 32 is  
4 admitted.

5 (Exhibit No. 32 admitted into evidence.)

6 BY MR. BRAIN:

7 Q. All right. Let's go to Exhibit 24. I want to draw  
8 your attention to only the lower picture. I'm not  
9 going to ask you any questions about the upper one.  
10 All right?

11 A. Okay.

12 Q. Do you recognize Exhibit 23?

13 A. Yes.

14 Q. And this would be a picture taken of the construction  
15 of the residence after the floor plate and framing has  
16 been in place?

17 A. Correct.

18 Q. Okay. So we're looking from a perspective again about  
19 where the wellhead is?

20 A. This would be up above that; I would say up above the  
21 retaining wall, a little higher, and maybe over a  
22 little bit to the east.

23 Q. Here?

24 A. Yeah. That's about right. Yeah. I -- that  
25 would -- yes.

1 Q. So you're above that line that connects diagonally the  
2 two corners of the floor.

3 A. Right. Yes.

4 Q. So wouldn't that place the panel van in the disputed  
5 strip on the far side of that temporary utility  
6 service?

7 A. You know, I can't tell which side of the temporary  
8 service the van is parked on from this picture.

9 Q. See that fir tree behind the temporary utility service?

10 A. I see a tree behind there.

11 Q. Do you know how far away that is?

12 A. No, I do not.

13 Q. Do you know whether or not that's on the McKenzie  
14 property outside of the disputed strip?

15 A. I do not.

16 Q. Okay. Okay.

17 MR. BRAIN: I would move for the admission of  
18 Exhibit 24.

19 THE COURT: Any objection to 24?

20 MR. UHLIG: No objection, Your Honor..

21 THE COURT: Admitted.

22 (Exhibit No. 24 admitted into evidence.)

23 BY MR. BRAIN:

24 Q. Let's go to Exhibit 25.

25 THE COURT: Could you speak up, please.

1 is that tree.

2 Q. Okay. Now, I want to find one other picture first.  
3 Let's go to Exhibit 23 for a minute. We'll look at the  
4 picture in the upper right-hand corner.

5 A. The panel truck?

6 Q. Yeah. And if you go back to the lower picture on 25 --  
7 all right? That's the same panel truck, right?

8 A. 23? 23 and 25?

9 Q. And 25. Right. Or 24. Excuse me.

10 The problem is, if you look at the tab behind it  
11 instead of the one in front.

12 A. Well, they look alike.

13 Q. They do.

14 So that's the same panel van, right?

15 A. All I can say is they look alike.

16 Q. They look alike.

17 And we have one more, if I could find it quickly.

18 If you could go to 22. The left-hand picture.

19 A. 22? The left -- I have --

20 Q. I did it again. 21. Got to read the number on the  
21 left, not on the right.

22 A. Yes.

23 Q. And that's the same panel van seen through the windows  
24 of the house, right?

25 A. Well, again, it's a yellow van.

1 Q. Right. And Mr. Slye testified that that picture was  
2 taken from the perspective about like this, which would  
3 put the same panel van in approximately the same  
4 position as in Exhibit 24, right?

5 A. This doesn't look like the same perspective to me.

6 Q. The perspective is slightly different, as Mr. Slye  
7 testified. The perspective in Exhibit 24 is from  
8 higher up and more behind. But, in this case, we're  
9 looking at Exhibit 21 through the set of windows on the  
10 southwest corner of the west side of the existing  
11 house.

12 See that?

13 A. I'm trying to orient the picture to where you're  
14 pointing.

15 Q. So the face of the house that you're looking at here is  
16 the west face. There's the main entrance.

17 There's the panel van in the back, correct?

18 Do the prominent trees that you've testified to  
19 previously appear in Exhibit 21?

20 A. 21, it appears to me that it's the tall tree above the  
21 house.

22 Q. On the far side of the panel van?

23 A. Well, the panel van is not in relation to it. It  
24 appears it's the fir tree that you see coming out from  
25 the top of the house.



1 Q. Okay. From that perspective, could you tell where the  
2 trunk of the tree is located?

3 A. Well, I know where the truck of the tree is located.

4 Q. I want you to go to Exhibit 32. Okay?

5 See that clump of trees in the middle of Exhibit  
6 32?

7 A. Yes.

8 Q. See that bright orange-colored curved branch going up  
9 there?

10 A. Yes.

11 Q. Okay. And going back to Exhibit 24, doesn't that  
12 appear to be the same bright orange-colored branch  
13 sticking up the top of the right front corner of that  
14 panel van?

15 A. Well, it could be.

16 Q. Uh-huh. Now --

17 A. But there are lots of trees, so I don't know for sure  
18 if it's the same tree.

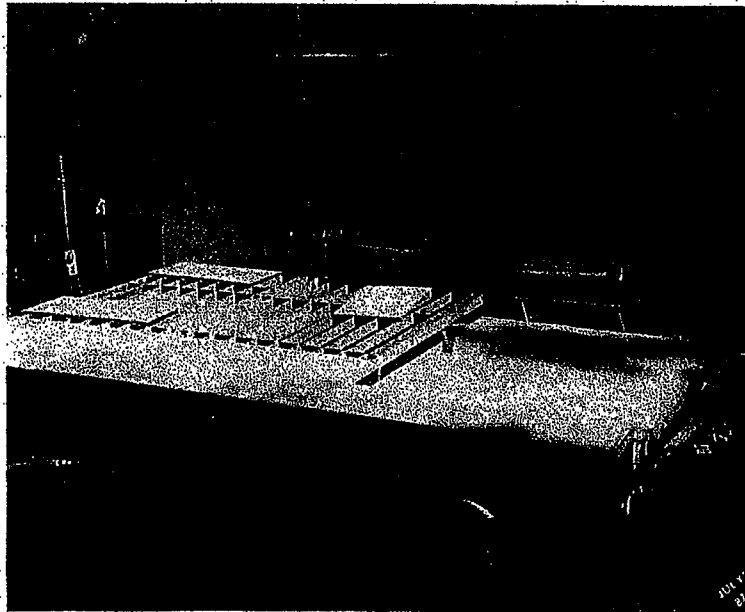
19 Q. Well, see, here's the situation: Mr. Slye testified  
20 that Exhibit 32 -- mark it on here -- was taken from  
21 this location looking almost dead east. Okay? Which  
22 would actually place that clump of trees in the middle  
23 of the picture on the far side of Point White Drive and  
24 not even on your property.

25 Is that not correct?

**Exhibit 24**

000602

<input type="checkbox"/> STATE	EXHIBIT No. <u>14</u>
<input checked="" type="checkbox"/> PLAINTIFF	<input type="checkbox"/> DEFENDANT
<input type="checkbox"/> PETITIONER	<input type="checkbox"/> RESPONDENT
<input type="checkbox"/> OTHER	
Case No. <u>14-2401252-4</u>	
<u>FERGUSON VS MCKENZIE</u>	
<input type="checkbox"/> Admitted	<input type="checkbox"/> Refused
<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Not Offered
Date of Court's Ruling: _____	



F 000023

1 admission of Exhibit 32.

2 MR. UHLIG: No objection, Your Honor.

3 THE COURT: With no objection, 32 is  
4 admitted.

5 (Exhibit No. 32 admitted into evidence.)

6 BY MR. BRAIN:

7 Q. All right. Let's go to Exhibit 24. I want to draw  
8 your attention to only the lower picture. I'm not  
9 going to ask you any questions about the upper one.  
10 All right?

11 A. Okay.

12 Q. Do you recognize Exhibit 23?

13 A. Yes.

14 Q. And this would be a picture taken of the construction  
15 of the residence after the floor plate and framing has  
16 been in place?

17 A. Correct.

18 Q. Okay. So we're looking from a perspective again about  
19 where the wellhead is?

20 A. This would be up above that; I would say up above the  
21 retaining wall, a little higher, and maybe over a  
22 little bit to the east.

23 Q. Here?

24 A. Yeah. That's about right. Yeah. I -- that  
25 would -- yes.

1 Q. So you're above that line that connects diagonally the  
2 two corners of the floor.

3 A. Right. Yes.

4 Q. So wouldn't that place the panel van in the disputed  
5 strip on the far side of that temporary utility  
6 service?

7 A. You know, I can't tell which side of the temporary  
8 service the van is parked on from this picture.

9 Q. See that fir tree behind the temporary utility service?

10 A. I see a tree behind there.

11 Q. Do you know how far away that is?

12 A. No, I do not.

13 Q. Do you know whether or not that's on the McKenzie  
14 property outside of the disputed strip?

15 A. I do not.

16 Q. Okay. Okay.

17 MR. BRAIN: I would move for the admission of  
18 Exhibit 24.

19 THE COURT: Any objection to 24?

20 MR. UHLIG: No objection, Your Honor.

21 THE COURT: Admitted.

22 (Exhibit No. 24 admitted into evidence.)

23 BY MR. BRAIN:

24 Q. Let's go to Exhibit 25.

25 THE COURT: Could you speak up, please.

1 immediately behind the bucket of the backhoe there were  
2 in the disputed strip. Same basic question:

3 Based upon your knowledge of the property, would  
4 you agree or disagree with that statement?

5 A. Would you ask the question again? I see the bucket  
6 right there.

7 Q. And as I recall, Mr. Slye testified that the trees on  
8 the far side --

9 A. Yes.

10 Q. -- from this vantage point were in the disputed strip.

11 Would you agree or disagree with him based upon  
12 your knowledge of the property?

13 A. I would disagree.

14 Q. How far into the property do you think that bucket is?

15 A. Thirty, 35 feet, maybe.

16 Q. Okay. Okay. Going to Exhibit No. 24, in the bottom  
17 photo.

18 A. Wait a second.

19 Q. Should be the one showing the floor plate for your  
20 house.

21 Based upon your knowledge of the configuration of  
22 the property, would you agree or disagree with Mr. Slye  
23 that that panel van is not in the disputed strip?

24 A. In my considered opinion, that's definitely in the  
25 disputed strip.

1 Q. Okay. All right.

2 First, Mr. Uhlig asked you about talking to the  
3 McKenzies.

4 A. Yes.

5 Q. Did you actually connect with one or the other of the  
6 McKenzies?

7 A. I recall having one phone call with Jane.

8 Q. Okay. Did you actually mention to her that you had an  
9 interest in acquiring the property at that point in  
10 time?

11 A. My recollection of the conversation was, like to have  
12 her or them down for coffee or tea, discuss their plans  
13 for the property and whether it might be for sale at  
14 some point, whether we might get a first right of  
15 refusal, just a general conversation about the future  
16 of that property, because, obviously, it impacts my  
17 property.

18 Q. Do you recall what the response was?

19 A. The response was, "Not interested. Wouldn't be."

20 Q. Okay. How long was the conversation?

21 A. Maybe two minutes at the outset.

22 Q. Okay. During the period of your residence, but most  
23 particularly between June 23, 2004 --

24 MR. UHLIG: Counsel, would you please --

25



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Do you see those trees in that picture?

THE COURT: I'm sorry. 22? Upper or lower?

MR. BRAIN: Lower. Hold on a second.

THE WITNESS: Yes.

MR. BRAIN: Hold on a second here. Let me check and see the exhibit.

(Pause.)

MR. BRAIN: No, it's not. So let's use another one. Let me find the right one with the panel van.

Again, I apologize.

BY MR. BRAIN:

Q. Drawing your attention to Exhibit No. 24, the lower picture; do you see that?

A. I see the picture, yes.

Q. Do you see the yellow panel van?

A. The yellow panel van?

Q. In the picture.

A. Yes, I do.

Q. You see the utility service, temporary utility service there?

A. Yes. I see what's been identified as that, yes..

Q. Isn't that really the area exactly where you indicated that those trees would have been?

A. No.

1 Q. That doesn't appear to you to be south and east of the  
2 corner of the deck?

3 A. Yes, but I can actually see a tree.

4 Q. And what trees are you looking at?

5 A. I'm looking at the trees -- well, one of them is right  
6 behind that, what you've called the utility pole, the  
7 temporary utility pole I believe you called it. And  
8 I'm looking at a tree right by what you described as  
9 the yellow-paneled truck.

10 Q. On the far side of the yellow panel truck, right?

11 A. Well, in front of it.

12 Q. In front of the front of the truck?

13 A. Yes.

14 Q. Okay. So the truck is between the point of view from  
15 which the camera was taken and those trees?

16 A. Would you repeat that, please?

17 Q. The truck is between the trees and the point of view  
18 from which the picture was taken?

19 A. Yes.

20 Q. Okay. And if you look in that picture just above the  
21 left-hand side edge of the back end of the truck, you  
22 see the top of the utility pole there, that white  
23 object?

24 A. Are you talking about the temporary utility pole?

25 Q. No. The white object that's just off the left-hand

1 corner of the rear of the panel van. See that?

2 Do you recognize that as a transformer that's on  
3 the top of that utility pole?

4 A. I think I see what you're talking about. It's a -- I  
5 see some -- you know, a pole with a white object on  
6 top. Yes.

7 Q. And there's a phone pole on Point White Drive with a  
8 white transformer at the top, right?

9 A. Yes.

10 Q. Okay. Now, looking at the area where the truck and the  
11 utility service are parked, all of that area, does that  
12 look densely-vegetated, lushly-vegetated or overgrown  
13 to you?

14 A. Not at this time.

15 Q. Okay.

16 THE COURT: This might be a good point to  
17 take a morning recess.

18 MR. BRAIN: Great.

19 THE COURT: So let's take about 15 minutes.

20 (Recess taken.)

21 THE COURT: Ms. McKenzie, you remain under  
22 oath.

23 BY MR. BRAIN:

24 Q. Okay. Ms. McKenzie, before we took our break, you were  
25 talking about the photograph which is the bottom half

1 of Exhibit 24.

2 A. Yes.

3 Q. And just to kind of close this out, you see the madrona  
4 tree trunk to the right of and extending over the top  
5 of the panel down there? It's kind of orange color.

6 A. I -- I don't know what a madrona tree --

7 Q. See here? They have that distinctive orange color;  
8 don't they?

9 A. Actually looks like it's the roof of the house across  
10 the street.

11 Q. Okay. How about the feature here?

12 Let me ask you this: With respect to those trees  
13 that are on the other side by the front of the panel  
14 van, is it your testimony that those trees are the same  
15 trees you were talking about as being the prominent  
16 trees on the property?

17 A. You know, there's several prominent trees on our  
18 property, first of all.

19 Q. We were talking about the ones right by the deck.

20 A. And we were talking about the ones off of the deck. I  
21 don't know which portion of the Ferguson residence this  
22 portrays.

23 Q. Okay. Mr. Slye testified yesterday that this picture  
24 was taken from a position about here.

25 You see the corner of the floor plate of the

1 house?

2 MR. UHLIG: Counsel, can you step back? My  
3 apologies for interrupting. If you can step back one  
4 foot. Thank you.

5 THE COURT: Maybe you should use the pointer.

6 MR. BRAIN: That's a really great idea  
7 actually. Why didn't we think of that, Mike?

8 BY MR. BRAIN:

9 Q. Mr. Slye testified yesterday that the perspective of  
10 the photograph was looking across the floor plate from  
11 the northwest to the phone pole with the panel van  
12 somewhere in between. Okay?

13 So if you start at this corner -- okay -- is the  
14 equivalent of this corner. So the picture's taken from  
15 this perspective. Right? Which would mean the trees  
16 that you're talking about should be in that picture,  
17 right?

18 A. Well, it appears to me that I see them.

19 Q. Okay. You're talking about the trees on the far side  
20 of the truck?

21 A. Yes.

22 Q. Okay.

23 A. But, again, it's -- not having been there when the  
24 photograph was taken and seeing the entire layout, it's  
25 difficult for me to say that this is this tree or this

1 is that tree.

2 Q. Okay. Now, I want to find one other picture first.

3 Let's go to Exhibit 23 for a minute. We'll look at the  
4 picture in the upper right-hand corner.

5 A. The panel truck?

6 Q. Yeah. And if you go back to the lower picture on 25 --  
7 all right? That's the same panel truck, right?

8 A. 23? 23 and 25?

9 Q. And 25. Right. Or 24. Excuse me.

10 The problem is, if you look at the tab behind it  
11 instead of the one in front.

12 A. Well, they look alike.

13 Q. They do.

14 So that's the same panel van, right?

15 A. All I can say is they look alike.

16 Q. They look alike.

17 And we have one more, if I could find it quickly.

18 If you could go to 22. The left-hand picture.

19 A. 22? The left -- I have --

20 Q. I did it again. 21. Got to read the number on the  
21 left, not on the right.

22 A. Yes.

23 Q. And that's the same panel van seen through the windows  
24 of the house, right?

25 A. Well, again, it's a yellow van.

1 Q. Right. And Mr. Slye testified that that picture was  
2 taken from the perspective about like this, which would  
3 put the same panel van in approximately the same  
4 position as in Exhibit 24, right?

5 A. This doesn't look like the same perspective to me.

6 Q. The perspective is slightly different, as Mr. Slye  
7 testified. The perspective in Exhibit 24 is from  
8 higher up and more behind. But, in this case, we're  
9 looking at Exhibit 21 through the set of windows on the  
10 southwest corner of the west side of the existing  
11 house.

12 See that?

13 A. I'm trying to orient the picture to where you're  
14 pointing.

15 Q. So the face of the house that you're looking at here is  
16 the west face. There's the main entrance.

17 There's the panel van in the back, correct?

18 Do the prominent trees that you've testified to  
19 previously appear in Exhibit 21?

20 A. 21, it appears to me that it's the tall tree above the  
21 house.

22 Q. On the far side of the panel van?

23 A. Well, the panel van is not in relation to it. It  
24 appears it's the fir tree that you see coming out from  
25 the top of the house.

1 Q. Okay. From that perspective, could you tell where the  
2 trunk of the tree is located?

3 A. Well, I know where the trunk of the tree is located.

4 Q. I want you to go to Exhibit 32. Okay?

5 See that clump of trees in the middle of Exhibit  
6 32?

7 A. Yes.

8 Q. See that bright orange-colored curved branch going up  
9 there?

10 A. Yes.

11 Q. Okay. And going back to Exhibit 24, doesn't that  
12 appear to be the same bright orange-colored branch  
13 sticking up the top of the right front corner of that  
14 panel van?

15 A. Well, it could be.

16 Q. Uh-huh. Now --

17 A. But there are lots of trees, so I don't know for sure  
18 if it's the same tree.

19 Q. Well, see, here's the situation: Mr. Slye testified  
20 that Exhibit 32 -- mark it on here -- was taken from  
21 this location looking almost dead east. Okay? Which  
22 would actually place that clump of trees in the middle  
23 of the picture on the far side of Point White Drive and  
24 not even on your property.

25 Is that not correct?



1 A. That's your -- that's your perspective. There are  
2 trees on the other side of Point White Drive.

3 Q. Uh-huh.

4 A. My testimony is that there were trees on our property  
5 also.

6 Q. Show me where they are in these pictures.

7 A. I -- as I told you, on one of the exhibits, it appeared  
8 that the top of the tree -- I don't remember what  
9 number we were looking at.

10 Q. 21, I think.

11 A. 21. It appears to be the top of the tree that is above  
12 the -- you know, the house under construction, given  
13 the perspective that you tell me this is being taken  
14 from.

15 Q. Okay. You can't see the base of the tree from that  
16 picture. Okay.

17 Let's go to Exhibit 33. You got that same yellow  
18 truck there.

19 Both Mr. Slye and Mr. Ferguson testified that the  
20 property line runs diagonally from the corner marker,  
21 which is partly obscured from fill in the lower  
22 left-hand corner, to a point about an  
23 equivalent -- through a point which would be  
24 equivalent to the lower corner of the left-hand window  
25 of the panel van.

1 A. Is --

2 Q. So was it your testimony that this is the area that was  
3 densely, lushly overgrown to the right of that property  
4 line?

5 A. Actually, the property line, as I pointed out, is  
6 located -- if I may.

7 Q. Yeah.

8 We're talking -- where do you think the property  
9 line is in this picture?

10 A. If you're talking about this concrete marker in the  
11 lower left-hand corner --

12 Q. And Mr. Slye identified as being right here.

13 A. The -- actually, the corner of our property  
14 is -- excuse me, Your Honor -- as we can see is  
15 the -- there is as corner marker that is more right in  
16 here.

17 Q. Okay. Mr. Slye identified that concrete monument as  
18 being a boundary marker located in this position, the  
19 same one that's depicted in Exhibit 33. Okay?

20 And he testified that the panel van would be  
21 wholly or partially on the disputed strip. Okay?

22 A. That's what he testified.

23 Q. Okay. So wouldn't that mean if that's accurate, that  
24 everything to the -- diagonally to the lower  
25 left -- right-hand corner of that photograph, between

1 the monument and the panel van, would depict the  
2 disputed strip, correct?

3 A. I'm afraid you're confusing me.

4 Q. Sure. Hand me the marker here for a second.

5 Mr. Slye's testimony is that the panel van is  
6 located --

7 MR. UHLIG: Counsel, could you step back one  
8 foot? Thank you.

9 BY MR. BRAIN:

10 Q. -- right here. Okay. And the picture is taken from  
11 the right looking up the property line. Right?  
12 There's the corner marker. Taken from some point down  
13 here. There's the corner marker. Panel van. You're  
14 looking up the disputed strip.

15 There should be lush, overgrown vegetation on the  
16 right-hand side of that photograph between the camera  
17 lens and the panel van; shouldn't there?

18 A. Well --

19 Q. According to your testimony.

20 A. I would say that, for one thing, the perspective is  
21 different. And, in Exhibit 33, the angle of which one  
22 is looking more south -- or is more northwest. And the  
23 house itself is situated so it looks more to the  
24 southeast.

25 So this is -- this is not the same angle as the

1 exhibit -- whatever that is -- 2A.

2 Q. Now, again, according to Mr. Slye, that picture was  
3 taken from a point about here, depicting the concrete  
4 monument and the panel van. Right? And that would be  
5 looking directly up the property line to the north.

6 Do you see any of the lush, overgrown vegetation  
7 on the property from the right-hand side of that  
8 photograph between the lens of the camera and the panel  
9 van parked in the disputed strip approximately in the  
10 area of the carport?

11 A. Well, again, as I said, this is at a different angle  
12 than that. So it's difficult to transpose from this  
13 picture to Exhibit 2A because it's a completely  
14 different angle looking at the Ferguson residence.

15 Q. Okay. You've already testified -- and I've wrote it  
16 down, that the entirety of the disputed strip was, and  
17 I quote, dense, lush, and overgrown. Okay?

18 And isn't it true, Ms. McKenzie, that if you're  
19 standing here looking at something parked there, you  
20 would expect to see dense, lush, overgrown vegetation  
21 based on your testimony?

22 A. Well, as I've also testified, this is -- and would you  
23 like me to use the pointer? Would that be --

24 Q. Sure. Go right ahead.

25 THE COURT: Please.

1 THE WITNESS: There is -- this is steep  
2 through here. And, you know, there aren't really trees  
3 on there except the ones that I pointed out. And then  
4 it -- and then on up here. Yes. This would be dense,  
5 lush vegetation with trees and shrubs, et cetera.

6 The -- but relating it to that picture -- for one  
7 thing, the picture is so unclear, it's hard to tell  
8 what you're looking at except for the house; you can  
9 see the house --

10 Q. If you can --

11 THE COURT: Wait. You're both talking at one  
12 time.

13 Let the witness finish her comment.

14 BY MR. BRAIN:

15 Q. Were you done? I'm sorry to interrupt you.

16 A. Yes, I'm done.

17 Q. If you were standing here, Ms. Ferguson -- or  
18 Ms. McKenzie, and the truck is parked here and there's  
19 a tree here, don't you think it would obscure the view  
20 of the truck?

21 MR. UHLIG: Your Honor, I'm going to object.  
22 It seems like this question has been asked several  
23 times, and she's fully explained her --

24 MR. BRAIN: I would submit, Your Honor, it's  
25 been asked numerous times without getting a credible

1 answer.

2 THE COURT: Well, I'm not going to comment on  
3 whether or not it was a credible answer, but the  
4 question can be asked as it relates to just the diagram  
5 separate and apart from this Exhibit 33, which seems to  
6 be the issue here, trying to relate 33 to the diagram.

7 The last question was just pointing to Exhibit 2A  
8 and the hypothetical or the --

9 MR. BRAIN: Right.

10 THE COURT: -- situation asked. If you can  
11 answer that question --

12 MR. BRAIN: Yeah.

13 THE COURT: -- if you can answer it, fine.  
14 If you can't, you can't.

15 BY MR. BRAIN:

16 Q. I will answer it -- just to clarify, based upon what  
17 the judge has said, hypothetically, assuming there's a  
18 bright orange panel van parked in the disputed strip  
19 adjacent to the location of the septic tank but in the  
20 disputed strip, which I believe was Mr. Slye's  
21 testimony, and you're standing at the top or close to  
22 the top of the break in the slope looking in the  
23 direction of that panel van, isn't it true,  
24 Ms. McKenzie, that you would expect to see both the  
25 trees and the lush, dense, overgrown vegetation that

1 you've testified to between you and the panel van?

2 A. Well, first of all, as I said when pointing out the  
3 location of the trees, I could not do with great  
4 precision because it's -- you know, I don't have the  
5 topography there and all.

6 The -- as to -- as to what you can see at a  
7 certain point -- and, you know, again, I point  
8 out -- excuse me for not speaking so that you can  
9 transcribe so easily.

10 But as I pointed out before, the -- there was some  
11 fill dirt that was on our property during the  
12 construction process. To the -- however, to the east  
13 of that was lush, green, overgrown property.

14 Q. I think we'll move on at this point in time.

15 Do you know when that corner marker, the one that  
16 you referred to, the nail marker, in the asphalt on the  
17 driveway was placed?

18 A. I believe that was placed before we owned the property.

19 Q. Okay. Do you recall Mr. Slye's testimony that they  
20 didn't locate any corner marker at the southern part of  
21 your property when they visited with Mr. Ferguson  
22 during the inspection period for his acquisition of the  
23 house in 1994?

24 A. I don't recall his exact testimony.

25 Q. Okay. With respect to the trees topped by Puget Sound

1 BY MR. BRAIN:

2 Q. Ms. McKenzie, isn't it true walking along Point White  
3 Drive, if those pampas grass had been there for years,  
4 since 1987, '88, that you would have seen them?

5 A. As I testified, in 2006, I saw that there was  
6 substantial clearing. Prior to 2006, I could not see  
7 that cleared area in there.

8 Q. Okay. So the area where the substantial clearing took  
9 place, right, is that the same area -- this is mine.  
10 Let's use the official one -- are depicted in Exhibit  
11 24, where that panel van is sitting?

12 A. No.

13 Q. Where would that substantial clearing have been?

14 A. It would have been -- assuming that this is the  
15 Ferguson house and we're -- we must be facing south --  
16 well, at the angle which the house is at, then the  
17 cleared area would be to my left of this photograph.

18 Q. Okay. So, again, panel van's down here someplace. It  
19 would have been over here?

20 MR. UHLIG: Counsel, if you would step back  
21 one foot.

22 MR. BRAIN: Sorry.

23 BY MR. BRAIN:

24 Q. Would have been to the north and west of the line drawn  
25 between the northwest corner of the existing house and



1 the utility the pole?

2 A. Through here.

3 THE COURT: Let's identify for the  
4 record what --

5 THE WITNESS: Did you see that?

6 THE COURT: I saw it, but we need to identify  
7 it for the record --

8 BY MR. BRAIN:

9 Q. Let me see if this is consistent --

10 A. I can draw it again and perhaps give a verbal  
11 description. Would that be best?

12 Q. That would be perfect. Let's refer to notations so  
13 somebody can --

14 A. Okay. It would be -- the substantial clearing would be  
15 approximately from the deck on out about 60 feet and  
16 then curving back at an angle probably going up ten or  
17 15 feet and then curving back.

18 Q. So basically the portion of the property between the  
19 southeast corner of the deck and the northeast  
20 corner -- or the northeast corner of the existing house  
21 to the point -- a line marked by the treeline.

22 A. Well, as -- I described what I was saying.

23 Q. Yeah. Is that consistent with --

24 A. Well, you'll have to tell me again --

25 Q. Again --

1 A. -- because I'll just see if that's consistent.

2 THE COURT REPORTER: I'm sorry. One at a  
3 time, please.

4 BY MR. BRAIN:

5 Q. An area of disputed strip, approximately starting at  
6 the southeast corner of the deck on the property line  
7 running to the line which is identified as "treeline"  
8 on the Exhibit No. 2 northwards to a point which is  
9 roughly on an east/west line with the northeast corner  
10 of the existing house.

11 A. Well, if I was describing, it would be more of a curve,  
12 and it would curve upwards at an angle to approximately  
13 the -- to be in a line with the north corner of the  
14 house, northeast corner.

15 Q. So sort of a semicircle or an oval?

16 A. Yes. A semicircle, yes.

17 Q. If you go to Exhibit No. 20, and drawing your attention  
18 to the left side of the upper photograph on Exhibit 20,  
19 aren't you looking across from the north to the south  
20 directly through the portion of the property you just  
21 testified was cleared in 2006?

22 A. No. I'm looking -- it appears to me that the angle is  
23 from here down here.

24 Q. Okay. Let's turn -- see this? This is the carport  
25 here, right? On the north side of the house.

1 A. It appears to be, yes.

2 Q. So the left hand of the picture would be --

3 THE COURT: Sorry. For the record,  
4 left-handed picture?

5 MR. BRAIN: The upper picture of Exhibit 21.

6 THE COURT: All right.

7 BY MR. BRAIN:

8 Q. On the left hand of the picture would be the left-hand  
9 side of the carport. Okay.

10 So the portion of the property that's being viewed  
11 on the left-hand side would be exactly the portion you  
12 just testified was cleared; isn't it?

13 A. No.

14 Q. Back to Exhibit 24.

15 See the temporary utility service?

16 A. I see what you've identified as that, yes.

17 Q. And if you go back to Exhibit 20 -- so we've got the  
18 right number here, No. 20.

19 See the temporary utility service in the upper  
20 picture?

21 A. I see what -- I can't tell if it was the same thing.

22 Q. So the vantage point of that photograph includes a view  
23 directly through the area that you just testified was  
24 cleared in 2006.

25 A. It would -- yes, it would show a portion of it because

1           you were looking down through the carport.

2       Q.   Looking down the left side of the carport?

3       A.   Well, barely.  You're looking down through the carport.

4       Q.   I think Mr. Slye has already testified that the  
5           temporary utility service was in the disputed strip.

6                   THE COURT:  Is that a question?

7       BY MR. BRAIN:

8       Q.   Do you recall him testifying to that?

9       A.   No, I don't recall that.

10      Q.   If you assume the temporary utility service is in the  
11           disputed strip, then the portion to the left of it  
12           would be exactly in the area you testified was cleared  
13           in 2006; wouldn't it?

14      A.   We're looking at Exhibit 21 -- 20?

15      Q.   20.

16      A.   The top one.  And then if that is in -- if one assumes  
17           that that temporary utility pole, which you've  
18           identified as the temporary utility pole, is in the  
19           disputed strip, then, yes, that would make -- put it  
20           probably right around -- probably right around here.

21                   THE COURT:  I can't see.

22                   THE WITNESS:  Excuse me.  Right around here.

23           At this marking where it says 12.5.  It looks like that  
24           would be about the location of it.

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MR. UHLIG: No objection, Your Honor.

THE COURT: All right.

And just -- I may have missed it.

Can you repeat the time frame that this may have been taken?

BY MR. BRAIN:

Q. Ms. Ferguson, let me ask it in the form of a question.

THE COURT: Thank you.

BY MR. BRAIN:

Q. As I understand your prior testimony, you identified the picture as being taken prior to 2002 because the owner of the white house built an additional structure in 2002 that's not depicted in the picture, correct?

A. Correct.

And for the Court, I can identify --

THE COURT: That was the question.

THE WITNESS: Okay.

MR. BRAIN: Yeah. Yeah.

THE COURT: I just missed the date. That's

all I needed. Thank you.

BY MR. BRAIN:

Q. Now, I would ask you to -- let me find the picture. I think it's 24.

Drawing your attention to the picture, which is at the bottom half of 24, I would like you to pay

1 particular attention to the various trees depicted in  
2 the background of the picture.

3 Are any of those located on the north side of  
4 Point White Drive?

5 A. No.

6 Q. Okay. So those would be trees located in the lower  
7 left-hand side of the aerial photograph which was  
8 marked as D-10?

9 A. Correct.

10 Q. On the far side of Point White Drive from the disputed  
11 strip?

12 A. Correct.

13 Q. Okay.

14 A. And they still are there.

15 Q. We're going to get to that.

16 A. Okay.

17 Q. Drawing your attention to Exhibit 51. Okay?

18 Did you take this picture?

19 A. Either Norm or I took the picture.

20 Q. Were you present when it was taken?

21 A. Yes.

22 Q. And what does it depict?

23 A. Well, it depicts the installation of the spiked fence.

24 Q. And drawing your attention particularly to the trees  
25 depicted in the background of the photograph, are those

1 the same trees you were looking at in Exhibit 24?

2 A. Correct.

3 Q. Okay.

4 A. Here is the utility pole, and here's the tree.

5 Q. And those are on the far side of Point White Drive?

6 A. Correct.

7 MR. BRAIN: I would move for the admission of  
8 Exhibit 51.

9 MR. UHLIG: No objection, Your Honor.

10 THE COURT: Admitted.

11 (Exhibit No. 51 admitted into evidence.)

12 BY MR. BRAIN:

13 Q. I would ask you to go to Exhibit 54. Okay?

14 Drawing your attention to Exhibit 54, which I  
15 think has already been admitted. Yes?

16 Are those trees on the far side of Point White  
17 Drive in that picture the same trees we were looking at  
18 in Exhibit 24?

19 A. They are indeed.

20 Q. Now, I would ask you to turn to Exhibit 46.

21 Drawing your attention to Exhibit 46 --

22 MR. UHLIG: Excuse me. I couldn't hear that  
23 number.

24 MR. BRAIN: 46.

25 MR. UHLIG: 46.

1           this whole subject matter of whether there were  
2           prominent trees, whether there was clearing engaged in,  
3           what the construction photos clearly show is that both  
4           Mr. Slye and Ms. McKenzie spent a lot of time denying  
5           what is absolutely undeniable based on the evidence,  
6           and that is the trees that were purportedly cleared in  
7           2006 simply didn't exist.

8           In that regard, again, I would draw your attention  
9           to Exhibit 19 -- excuse me -- Exhibit 19; the  
10          photograph on the upper part of Exhibit 20; Exhibit 21,  
11          the photograph on the left-hand side; Exhibit 24, the  
12          photograph on the bottom; testimony there being that  
13          the only trees depicted in that picture are actually on  
14          the other side of Point White Drive, and I would note  
15          that that testimony's uncontroverted.

16          The same is equally true of some of the pictures  
17          relating to the location of the construction equipment.  
18          Clearly Mr. Slye graded and filled substantial portions  
19          of the property. In fact, as I recall Ms. McKenzie's  
20          explanation as to why you couldn't see trees, which she  
21          claimed were cleared in 2006, immediately adjacent to  
22          the east-facing side of the Ferguson house was because  
23          Mr. Slye had filled over them. That was her response  
24          when looking at Exhibit 19.

25          So the bottom line is that all of the objective



1 evidence establishes that at the point in time Mr. Slye  
2 completed construction of the residence, he had  
3 cleared, graded, filled the disputed strip, stripped it  
4 of what little vegetation there was at that point in  
5 time; and that, in any case, the vegetation, that  
6 dense, lush, overgrown vegetation which Ms. McKenzie  
7 claimed existed on the property up to 2006, was gone in  
8 1987; and as observed by Mr. Ferguson in 1994, had been  
9 replaced by blackberries growing in that area, which he  
10 subsequently removed, lawn, pampas grass, which shows  
11 up in photo after photo after photo, which doesn't show  
12 any trees.

13 What that leaves us with, ultimately, are aerial  
14 photographs. We can use a couple of these to  
15 illustrate what I consider to be fundamental problems  
16 with relying on this evidence.

17 Also ask the Court to look at Exhibit 46, and then  
18 I'll put this one -- I'm not sure where I can put it.  
19 We'll leave it right here.

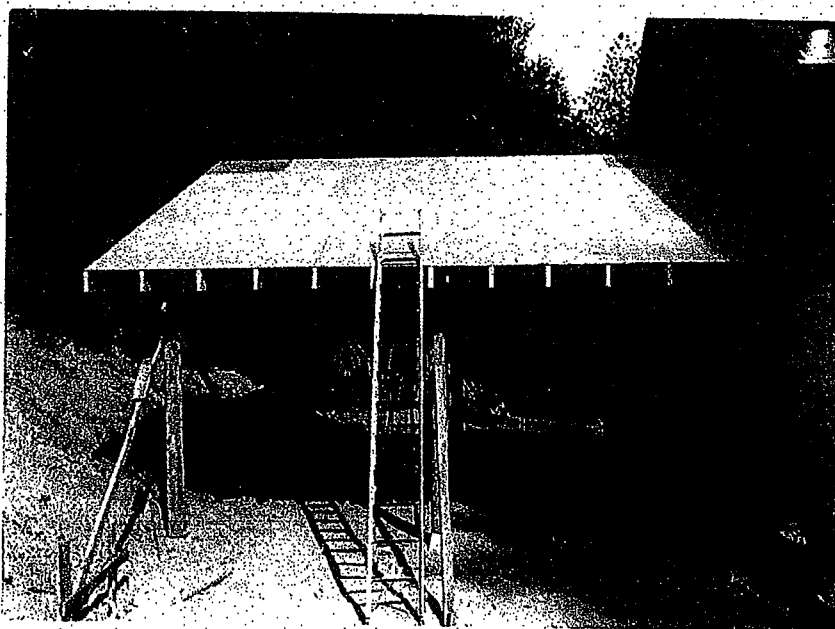
20 Here's the problem with aerial photographs, Your  
21 Honor: Number one, where the trunk of the tree is  
22 located is not the same thing as where its shadow will  
23 be from 6000 feet in altitude, or where the lateral  
24 extent of its branches will be. All right.

25 The thing that has always struck me about these

**Exhibit 25**

000604

<input type="checkbox"/> STATE	ENDING <b>25</b>
<input checked="" type="checkbox"/> PLAINTIFF	<input type="checkbox"/> DEFENDANT
<input type="checkbox"/> PETITIONER	<input type="checkbox"/> RESPONDENT
<input type="checkbox"/> OTHER	
Case No. 13-2-01252-2	
<b>HERGUSON VS MCKENZIE</b>	
<input type="checkbox"/> Admitted	<input type="checkbox"/> Railway
<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Non-Railway
Date of Court Filing	



F 000019

1 Q. So you're above that line that connects diagonally the  
2 two corners of the floor.

3 A. Right. Yes.

4 Q. So wouldn't that place the panel van in the disputed  
5 strip on the far side of that temporary utility  
6 service?

7 A. You know, I can't tell which side of the temporary  
8 service the van is parked on from this picture.

9 Q. See that fir tree behind the temporary utility service?

10 A. I see a tree behind there.

11 Q. Do you know how far away that is?

12 A. No, I do not.

13 Q. Do you know whether or not that's on the McKenzie  
14 property outside of the disputed strip?

15 A. I do not.

16 Q. Okay. Okay.

17 MR. BRAIN: I would move for the admission of  
18 Exhibit 24.

19 THE COURT: Any objection to 24?

20 MR. UHLIG: No objection, Your Honor.

21 THE COURT: Admitted.

22 (Exhibit No. 24 admitted into evidence.)

23 BY MR. BRAIN:

24 Q. Let's go to Exhibit 25.

25 THE COURT: Could you speak up, please.

1 BY MR. BRAIN:

2 Q. Let's go to Exhibit 25, if you would, please.

3 Now, I want to draw your attention to the lower  
4 half of Exhibit 25. And that's a picture taken from  
5 the west to the east.

6 A. Correct.

7 Q. Roughly east/west line.

8 A. Yes.

9 Q. Looking through the carport into the disputed strip.

10 A. Okay. Yes.

11 Q. Okay. And that's a full-sized backhoe and a bulldozer  
12 on the far side, right?

13 A. It is.

14 Q. Now, in this picture I do actually see there looks like  
15 a little tiny tree with orange leaves on it kind of in  
16 the right-hand side of the carport there.

17 A. In front of the bucket on the --

18 Q. Yeah. Yeah. See that?

19 A. I see something there.

20 Q. Yeah. If you go back to Exhibit No. 19, looks like  
21 it's gone.

22 A. I don't think those pictures are reflecting the same  
23 piece of real estate.

24 Q. Doesn't this picture really look just back down the  
25 same east/west line that the other one's taken on?

1 A. No. It's approximate. It's not that close. The  
2 picture is deceiving, I think.

3 Q. Okay.

4 MR. BRAIN: I would move for the admission of  
5 Exhibit 25.

6 THE COURT: Any objection to 25?

7 MR. UHLIG: No objection, Your Honor.

8 THE COURT: Admitted.

9 (Exhibit No. 25 admitted into evidence.)

10 BY MR. BRAIN::

11 Q. I would go to Exhibit No. 27.

12 Does this reflect the condition of the residence  
13 at the time you sold it to Mr. Ferguson?

14 A. Approximately. Is this -- can you tell me when this  
15 picture was taken?

16 Q. Mr. Ferguson can testify as to when the picture was  
17 taken. I can represent to you that his testimony would  
18 be that the picture was taken in 1994.

19 A. Did he take it or did I take it?

20 Q. I can represent to you that Mr. Ferguson has told me  
21 that he took the picture in conjunction with his  
22 purchase.

23 A. What was the question again?

24 Q. Is this what it looked like in your recollection at --

25 A. Yes.

1 A. Okay. It's 12 feet.

2 Q. No. What direction is it? North? South? East? Or  
3 west?

4 A. Ask me the question again.

5 Q. Sure.

6 From the residence, what direction is the boundary  
7 of the McKenzie property?

8 A. Oh, okay. It's to the east.

9 Q. And you've testified the trees are also to the east.

10 A. Yes.

11 Q. Okay. So are some of those trees located in the  
12 disputed strip?

13 A. Yes.

14 Q. Okay. Please turn to Exhibit 25, and I'd like you to  
15 look at the lower photo only.

16 Do you understand?

17 A. Right.

18 Q. Now, that photo is taken looking through the carport;  
19 is that right?

20 A. Correct.

21 Q. And you see the orange vehicle there?

22 A. The bulldozer. Right.

23 Q. Do you see any vegetation on the other side of the  
24 bulldozer?

25 A. Yes, I do.



1 Q. Do you know where that vegetation would be located?

2 A. On the McKenzie property.

3 Q. Do you know if it would be on the disputed strip or the  
4 remainder of the McKenzie property?

5 A. I'd say it's on the disputed strip.

6 Q. Okay. Thank you. That's all I have of those.

7 If you'd pick up the other binder, the defendants'  
8 exhibits, and turn to Exhibit D-2.

9 A. Got it.

10 MR. UHLIG: Your Honor, I'll also be using an  
11 enlargement of Exhibit D-2, but I don't intend to make  
12 any marks upon it.

13 THE COURT: Just so that we are clear about  
14 the exhibits, we've been using these notebooks. And I  
15 know that earlier on in the pleadings, the clerk was  
16 asked to mark the actual exhibits that will become a  
17 part of the record.

18 Is there an agreement that all the numbers  
19 contained in the notebook that Mr. Slye is looking at,  
20 what's been called the defendants' trial exhibits, are  
21 the same numerical designation as what's in the  
22 originals that have been now marked?

23 MR. UHLIG: I can represent that they are  
24 exactly the same.

25 MR. BRAIN: We're talking about the documents

1 A. Yes, it was.

2 Q. You are aware there was another well at the top of the  
3 Ferguson property?

4 A. I sure do.

5 Q. Okay. Just about done here. Find my notes. Okay.

6 Let's go to Exhibit 17 in our notebook.

7 And I'm thoroughly confused here, Mr. Slye,  
8 because Mr. Uhlig asked you about trees in the upper  
9 left-hand corner of this photograph and whether they  
10 were in the disputed strip or not.

11 So I want to know, is it your testimony that the  
12 trees that are displayed behind that bucket from the  
13 excavator are in the disputed strip?

14 A. Well, I couldn't say that from the angle of the  
15 photograph. It's not clear.

16 Q. You see where the excavator is sitting?

17 A. It could be.

18 Q. Is that 12 feet from the house?

19 A. It could be.

20 Q. Okay. Would you go to Exhibit 25?

21 Is that excavator sitting basically in the same  
22 place in both pictures?

23 A. What was the number before?

24 Q. 17 and 25.

25 A. It's in the general vicinity. I don't know if it's in

1 exactly the same place.

2 Q. Again, my question would be, it's your testimony that  
3 the trees on the far side of the excavator and the  
4 bulldozer are in the disputed strip?

5 A. I would think they are. Pretty close to, yeah. I  
6 think they are.

7 Q. Now, let's go to Exhibit 16.

8 Now, as I recall, this is the septic tank being  
9 put in the excavation which is larger than the septic  
10 tank itself which is in the order of five feet from the  
11 property line, right?

12 A. Well, there was a septic tank and a pump tank. What  
13 was your question again?

14 Q. My question is, it is your testimony as you sit here  
15 today that that excavator and that bulldozer, that the  
16 trees behind that are in the disputed strip?

17 A. Well, it looks like it to me.

18 Q. Okay.

19 MR. BRAIN: You know, that's all the  
20 questions I have for Mr. Slye.

21 THE COURT: Any other questions?

22 MR. UHLIG: Yes, Your Honor. Just in case I  
23 haven't done so, I would like to move to admit D-2,  
24 that area photograph.

25 THE COURT: Any objection to D-2?

1           Look at the photographs. The whole contention  
2           that during the period of Mr. Slye's construction  
3           activities the disputed strip was densely and lushly  
4           vegetated, or any time thereafter, is simply  
5           unsustainable. It's inarguable.

6           Look at Exhibit 25. What's the testimony there?  
7           That the only trees that are depicted in Exhibit 25 are  
8           on the other side of Point White Drive, which is  
9           completely consistent with the later photographs, which  
10          Ms. Ferguson can testify to.

11          You got Exhibit 17. Backhoe parked well into the  
12          disputed strip. Nothing but disturbed earth in the  
13          area she says was cleared in 2006.

14          Exhibit 20, the upper photograph: I mean, there's  
15          the power -- temporary power supply. There's no  
16          question that picture's taken from here looking through  
17          here in the area where Ms. Ferguson testified there are  
18          prominent trees cleared in 2006. Nothing, nada, zip,  
19          zero. There's no vegetation there whatsoever.

20          Again, Exhibit 21, same thing: You're looking  
21          back the other direction. Same truck. Same location.  
22          Same utility service. Prominent trees here? Not a  
23          chance. They don't exist. They never existed.

24          So, yeah, we think this is a case about  
25          credibility. We think that in light of the objective

**Exhibit 32**

000610

<input type="checkbox"/> STATE	EXHIBIT No. <u>22</u>
<input checked="" type="checkbox"/> PLAINTIFF	<input type="checkbox"/> DEFENDANT
<input type="checkbox"/> PETITIONER	<input type="checkbox"/> RESPONDENT
<input type="checkbox"/> OTHER	
Case No. <u>MEZ-01254</u>	
<u>FERGUSON VS MCKENZIE</u>	
<input type="checkbox"/> Admitted	<input type="checkbox"/> Retired
<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Family Non-Party
Date of Court's Ruling: _____	



1 Q. Through the disputed strip?

2 A. In that direction, yeah.

3 Q. Okay. And that would be an area, would it not, which  
4 should have been, in Mr. Uhlig's description, covered  
5 with dense, lush, overgrown vegetation?

6 A. I didn't hear his description so I can't answer that.

7 Q. Okay.

8 MR. BRAIN: I would like to move for the  
9 admission of the left-hand picture in Exhibit 21 and  
10 the upper right-hand picture showing the van in Exhibit  
11 23.

12 THE COURT: Any objection?

13 MR. UHLIG: No objection, Your Honor.

14 THE COURT: Admitted.

15 (Exhibit Nos. 21 and 23 admitted into  
16 evidence.)

17 THE WITNESS: May I please have some more  
18 water?

19 MR. BRAIN: Yeah. Sure.

20 THE WITNESS: Thanks.

21 MR. BRAIN: You're welcome.

22 BY MR. BRAIN::

23 Q. Let's go to Exhibit 32.

24 Do you recognize Exhibit 32?

25 A. I do.



1 Q. Okay. Do you recall testifying about Exhibit 32 during  
2 the course of your deposition?

3 A. I remember seeing this picture during that, yeah.

4 Q. This is a picture that was taken either by you or for  
5 you during the construction process.

6 A. Yes.

7 Q. And would I be correct in stating that this picture was  
8 probably taken very early in the construction process?

9 A. Before the house was completed, yeah. I'm not sure.

10 Q. All right. So as I recall your deposition testimony,  
11 that picture was taken from roughly the same position  
12 we were talking about for the previous exhibit, looking  
13 at the phone pole across the disputed strip on Point  
14 White Drive?

15 A. I'm pretty sure this was taken right at the base of  
16 that large fir tree that was recently removed.

17 Q. So that --

18 A. As you come up the top of the driveway.

19 Q. -- here.

20 That would be more farther down to the south from  
21 the deck. Okay.

22 A. Left. There -- more. More. Yeah.

23 Q. Okay.

24 A. That's about where this is.

25 MR. UHLIG: Counsel, could you stand to the

1 left of the drawing?

2 BY MR. BRAIN:

3 Q. So we're talking about -- okay.

4 A. That's my recollection.

5 Q. Okay. So you're looking at the utility pole, correct?

6 A. There's a pole there.

7 Q. I understand you're looking west-southwest across the  
8 disputed strip at the utility pole; is that correct?

9 A. I would say that's southeast.

10 Q. Excuse me. East-southeast.

11 A. It makes a difference.

12 Q. Yeah.

13 A. Yeah.

14 Q. Okay.

15 A. Yes.

16 Q. So that's a pile of grubbing debris there; isn't it?

17 A. It is.

18 Q. And that's all been cleared and graded in there, right?

19 A. It's been -- yeah. It's been cleared or graded, yeah.

20 Q. And do you see any dense, lush vegetation, mature fir  
21 trees, mature alder trees, any such stuff obscuring the  
22 view of the phone pole?

23 A. Not that pole, no.

24 Q. Okay.

25 MR. BRAIN: I would like to move for the

1 admission of Exhibit 32.

2 MR. UHLIG: No objection, Your Honor.

3 THE COURT: With no objection, 32 is  
4 admitted.

5 (Exhibit No. 32 admitted into evidence.)

6 BY MR. BRAIN:

7 Q. All right. Let's go to Exhibit 24. I want to draw  
8 your attention to only the lower picture. I'm not  
9 going to ask you any questions about the upper one.  
10 All right?

11 A. Okay.

12 Q. Do you recognize Exhibit 23?

13 A. Yes.

14 Q. And this would be a picture taken of the construction  
15 of the residence after the floor plate and framing has  
16 been in place?

17 A. Correct.

18 Q. Okay. So we're looking from a perspective again about  
19 where the wellhead is?

20 A. This would be up above that; I would say up above the  
21 retaining wall, a little higher, and maybe over a  
22 little bit to the east.

23 Q. Here?

24 A. Yeah. That's about right. Yeah. I -- that  
25 would -- yes.

1 Q. Okay. From that perspective, could you tell where the  
2 trunk of the tree is located?

3 A. Well, I know where the trunk of the tree is located.

4 Q. I want you to go to Exhibit 32. Okay?

5 See that clump of trees in the middle of Exhibit  
6 32?

7 A. Yes.

8 Q. See that bright orange-colored curved branch going up  
9 there?

10 A. Yes.

11 Q. Okay. And going back to Exhibit 24, doesn't that  
12 appear to be the same bright orange-colored branch  
13 sticking up the top of the right front corner of that  
14 panel van?

15 A. Well, it could be.

16 Q. Uh-huh. Now --

17 A. But there are lots of trees, so I don't know for sure  
18 if it's the same tree.

19 Q. Well, see, here's the situation: Mr. Slye testified  
20 that Exhibit 32 -- mark it on here -- was taken from  
21 this location looking almost dead east. Okay? Which  
22 would actually place that clump of trees in the middle  
23 of the picture on the far side of Point White Drive and  
24 not even on your property.

25 Is that not correct?

1 A. That's your -- that's your perspective. There are  
2 trees on the other side of Point White Drive.

3 Q. Uh-huh.

4 A. My testimony is that there were trees on our property  
5 also.

6 Q. Show me where they are in these pictures.

7 A. I -- as I told you, on one of the exhibits, it appeared  
8 that the top of the tree -- I don't remember what  
9 number we were looking at.

10 Q. 21, I think.

11 A. 21. It appears to be the top of the tree that is above  
12 the -- you know, the house under construction, given  
13 the perspective that you tell me this is being taken  
14 from.

15 Q. Okay. You can't see the base of the tree from that  
16 picture. Okay.

17 Let's go to Exhibit 33. You got that same yellow  
18 truck there.

19 Both Mr. Slye and Mr. Ferguson testified that the  
20 property line runs diagonally from the corner marker,  
21 which is partly obscured from fill in the lower  
22 left-hand corner, to a point about an  
23 equivalent -- through a point which would be  
24 equivalent to the lower corner of the left-hand window  
25 of the panel van.

**Exhibit 33**

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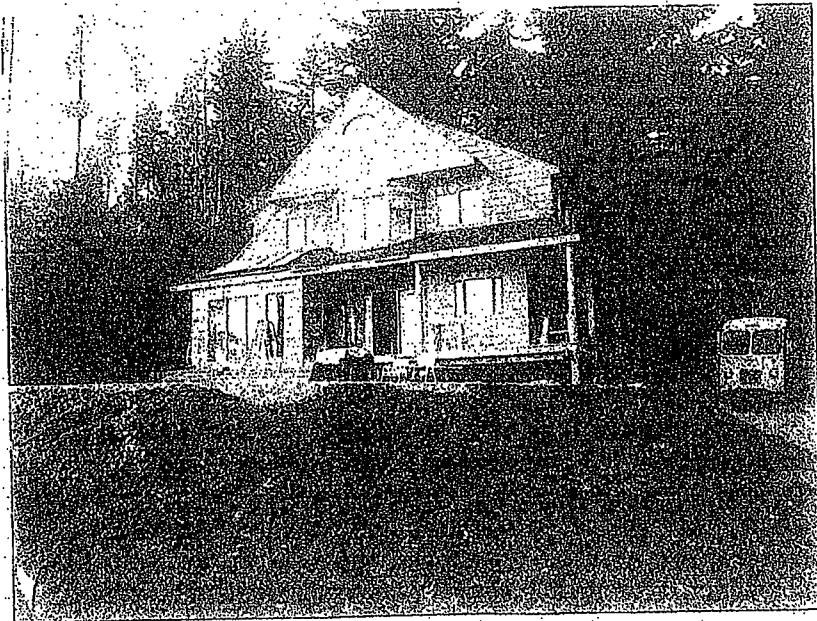
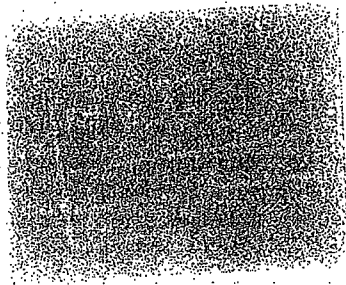
STATE                      Exhibit No. 33  
 PLAINTIFF                       DEFENDANT  
 PETITIONER                       RESPONDENT  
 OTHER \_\_\_\_\_

Case No. 11-2-01252-4

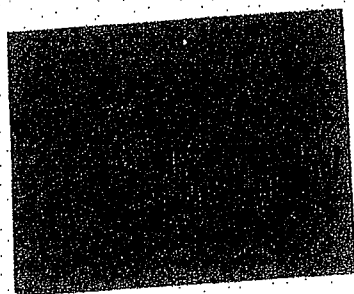
FERGUSON VS MCKENZIE

[ ] Admitted                      [ ] Refused  
[ ] Withdrawn                      [ ] Not Offered

Date of Court's Ruling: \_\_\_\_\_







1 MR. BRAIN: No.

2 THE COURT: -- are you just doing that on  
3 the --

4 MR. BRAIN: This is demonstrative.

5 THE COURT: Okay.

6 MR. BRAIN: Okay?

7 THE COURT: I just want to make sure that we  
8 have a thorough record and permanent record when -- for  
9 appellate purposes.

10 MR. BRAIN: Right.

11 BY MR. BRAIN:

12 Q. And I'm going to point out -- my understanding is that  
13 would be somewhere in the area of ten to 15 feet north  
14 up the property line from the retaining wall.

15 A. I'm not sure.

16 Q. Okay. But it would be on the property line.

17 A. Yes.

18 Q. And it would be north of the retaining wall.

19 A. Yes.

20 Q. Okay. Would you go to Exhibit No. 33 in the notebook?  
21 And these photographs don't copy real well so I've got  
22 an additional copy.

23 A. So when you say 33, is it the front side or the back  
24 side?

25 Q. It would be this one.

1 A. Okay.

2 Q. Okay. Do you recognize Exhibit 33, Mr. Slye?

3 A. Yes.

4 Q. It's the same exhibit that was marked as Exhibit 20 in  
5 your deposition.

6 A. I don't have my deposition with me so I can't say yes  
7 or no.

8 Q. Do you recall taking this photograph during the  
9 construction of the Slye residence?

10 A. I don't recall.

11 Q. Do you recall taking the photograph?

12 A. No, I don't.

13 Q. Do you recall providing it to me --

14 A. I do.

15 Q. -- at your deposition?

16 A. Yes.

17 Q. Do you have any reason you didn't take the photograph?

18 A. Other people were taking pictures, and --

19 Q. So this is --

20 THE COURT: You're both talking over each  
21 other, for the court reporter.

22 BY MR. BRAIN:

23 Q. This is a photograph of your residence, Mr. Slye.

24 A. This is true.

25 Q. Okay. And do you recall testifying during the course

1 of your deposition that that little speck in the lower  
2 left-hand corner of the photograph is, in fact, the  
3 concrete monument?

4 A. I do.

5 Q. Okay. And that's partially obscured with fill at this  
6 point in time of the photograph.

7 A. Yes.

8 Q. Okay. And what is that big orange thing back there in  
9 the back?

10 A. It's a utility truck.

11 Q. And that was a utility truck that was used by one of  
12 your contractors during the course of construction?

13 A. Yes.

14 Q. Okay. So this picture would have been taken during or  
15 in close proximity to the completion of construction in  
16 1987?

17 A. More than likely.

18 Q. Okay. And all that material -- so if you draw a line  
19 from the corner marker and project it up towards that  
20 utility van, right, that would represent the property  
21 line; wouldn't it?

22 A. Kind of a weird angle we're shooting the picture from.

23 Q. That van is parked approximately adjacent to the  
24 location of the septic tank.

25 A. Approximately.

- 1 Q. Yeah. Okay.
- 2 So if the van's parked adjacent to the septic tank
- 3 in the disputed strip and this is a concrete monument
- 4 in the lower left-hand corner, then the property line
- 5 would run somewhere from that concrete monument on the
- 6 left side of the van.
- 7 A. It's all perspective. I can't say yes or no.
- 8 Q. But all of that dark material on the right-hand side,
- 9 wouldn't that be fill placed in the disputed strip?
- 10 A. Once again, it's perspective of how the picture was
- 11 taken. Some of it was, but I'm not sure if all of it
- 12 was.
- 13 Q. Okay. Where's the dense, lush vegetation in the
- 14 disputed strip, Mr. Slye?
- 15 A. You know, there's no saying that this was parked on the
- 16 other property. It's -- I'm not sure that it is. This
- 17 picture wouldn't reflect that anyway.
- 18 Q. Let's follow up on that, Mr. Slye.
- 19 Now, the feature to the left of the van on the
- 20 right side of the house, right? Okay? See that?
- 21 Right here?
- 22 That's the east side of the house; isn't it?
- 23 A. Yes.
- 24 Q. Okay. How wide do you think that van is?
- 25 A. Well, six, eight feet; six to seven. I don't know.

1 Q. So if it's six to seven feet, even if it were parked  
2 immediately adjacent to the deck, it would still be  
3 intruding into the disputed strip; wouldn't it?

4 A. Well, it's possible.

5 Q. Okay. Didn't you testify that if you were standing in  
6 a place down here by the retaining wall looking up the  
7 property line, you wouldn't have been able to see as  
8 far as into the property as this septic tank a few  
9 minutes ago because of the vegetation?

10 A. Standing down on Point White Drive, more than likely  
11 not.

12 Q. Okay. So where's that vegetation in this picture,  
13 Mr. Slye?

14 A. You know, we -- we disrupted a little bit of the  
15 vegetation on the adjoining lot as we constructed the  
16 property. And this picture does not show quite very  
17 much of that property. So I don't understand that  
18 question.

19 Q. Do you see any mature fir trees or alder trees between  
20 the point from which this picture was taken and the  
21 van?

22 A. I see some -- I can't say that for sure because this is  
23 not a very good picture.

24 Q. Let's go to Exhibit 15, Mr. Slye. 16. Excuse me.

25 By the way --

1 THE COURT: Sorry. 16, did you say?

2 MR. BRAIN: -- before we move on, I would  
3 like to move for the admission of Exhibit 33.

4 THE COURT: Any objection?

5 MR. UHLIG: No objection, Your Honor.

6 THE COURT: Admitted.

7 (Exhibit No. 33 admitted into evidence.)

8 THE COURT: Just to have a clear record on  
9 the previous exhibit, I want to make sure that that was  
10 indicated to be admitted.

11 I'm sorry. What number was the last one?

12 THE COURT CLERK: 9 and 10.

13 THE COURT: Yeah. That was --

14 MR. BRAIN: 9 and 10.

15 THE COURT: -- requested, and I don't think I  
16 said specifically that that was admitted, so it is.

17 Okay.

18 BY MR. BRAIN:

19 Q. Drawing your attention to Exhibit 16, Mr. Slye, do you  
20 recognize that?

21 A. Yes.

22 Q. Okay. And is that a picture you took of construction  
23 activities during the construction of the residence?

24 A. Somebody took it. Either I took it or somebody else  
25 took it.

1           been built up with fill material?" And your answer is,  
2           "Part of the front yard."

3                   Do you see that?

4   A.   Where are we at? Question No. 10?

5   Q.   Yeah.

6   A.   Yes.

7   Q.   Okay. And would that be the same fill material that we  
8       were talking about when we were looking at Exhibit

9       No. 33?

10  A.   Yes.

11                   MR. BRAIN: I would move for the admission of  
12       Exhibit 12.

13                   MR. UHLIG: No objection, Your Honor.

14                   THE COURT: No. 12's admitted.

15                               (Exhibit No. 12 admitted into evidence.)

16  BY MR. BRAIN:

17  Q.   Let's go to 13.

18                   Do you recognize Exhibit 13?

19  A.   Yes.

20  Q.   Okay. And what is Exhibit 13?

21  A.   It's a notice of disapproval of inspection report.

22  Q.   And does that have your signature on it under "seller  
23       signature"?

24  A.   Yes.

25  Q.   What was the purpose of this document?



1 MR. BRAIN: You really need to wait.

2 THE COURT: So the last question once more?

3 BY MR. BRAIN:

4 Q. Last question was: Was the basis for your understanding  
5 that the southwest corner of the property was in the  
6 location of -- the approximate location of the phone  
7 pole due to your communications with Mr. Slye?

8 A. That is correct.

9 Q. Okay. Did Mr. Slye identify for you where the utility  
10 or power service ran from the property?

11 A. I don't remember that he did.

12 Q. Okay. There was testimony from Mr. Slye this morning  
13 that he did not install a drainage tight line across  
14 the disputed strip.

15 Was there a drainage tight line across the  
16 disputed strip when you acquired the property?

17 A. Yes.

18 Q. We got a photograph of that someplace. We'll get to  
19 that later on. All right.

20 Now, would you go to Exhibit 33. Again, I think  
21 I've got a better version of the picture if you have  
22 problems with that one.

23 Now, you heard Mr. Slye's testimony that the  
24 object in the lower left-hand corner is a concrete  
25 monument that is located somewhere near what he was

1 referring to as the top of the berm, somewhere in  
2 close proximity to above -- north of the retaining wall  
3 as shown in Exhibit 2.

4 A. I did hear that testimony.

5 Q. Now, did you also hear Mr. Slye's testimony that a  
6 portion of the dark fill material to the right would be  
7 on the disputed strip?

8 A. Yes.

9 Q. Okay. Did you hear Mr. Slye testify that the reference  
10 in the Form 17 disclosure statement in Item 10, Exhibit  
11 15, relating to fill, referred to the fill material  
12 shown in Exhibit 33?

13 A. Yes. That's my understanding.

14 Q. My question for you now is, is that configuration of  
15 fill material that you see in Exhibit 33 consistent  
16 with the current condition of the property and/or the  
17 condition of the property when you bought it in  
18 2004 -- or 1994? Excuse me.

19 In other words, was the fill in that location when  
20 you bought the property?

21 A. That is consistent with the way the property looked and  
22 was when I bought it. That's correct.

23 Q. So when you acquired the property, the fill material  
24 referenced in Form 17 is the same fill material that  
25 we're looking at in this picture?

1 A. That is correct.

2 Q. Did you discuss the location of the fill material with  
3 Mr. Slye when you were buying the property? Do you  
4 recall?

5 A. No.

6 Q. Okay.

7 A. No, I did not.

8 Q. Okay. Now, if you would go to Exhibit 19. Okay.

9 And you see the fill material that's been placed  
10 there?

11 A. Yes, I do.

12 Q. Does that fill material, based upon your knowledge of  
13 the property, extend beyond 12 feet from the front of  
14 the house, bearing in mind that the front of the house  
15 is the front of the house?

16 A. Would you ask the question again?

17 Q. Do you see the dimensions here? 5.5 feet from the  
18 property line to the edge of deck; 12.5 from the corner  
19 house to property.

20 My question is whether or not the fill material  
21 that is shown in this picture extends farther than  
22 those dimensions into the disputed strip, your  
23 understanding?

24 A. I would agree that it does.

25 Q. Okay. And is this consistent with the current

1 condition of the property?

2 A. Yes, it is.

3 Q. And was that the condition of the property in 1994?

4 A. Yes, it is.

5 Q. Okay. Now, I would draw your attention to Exhibit 17,  
6 which has already been admitted.

7 Is the condition shown here, of the fill to the  
8 right on the photograph, consistent with the other  
9 photograph that we're looking at, Exhibit 19?

10 A. I think it's consistent.

11 Q. Okay. So would you agree with me that the grade of the  
12 property in the disputed strip was modified by the  
13 addition of fill in the area immediately to the west of  
14 the house, of the deck?

15 A. Yes, I would agree with you.

16 Q. Okay. Now, with respect to Exhibit 33, which was the  
17 kind of difficult photograph, can you point out to us  
18 the area that is effected? It would be above the  
19 retaining wall in here.

20 A. 33. Yeah. Point to the --

21 Q. Here's the retaining wall.

22 A. Yes.

23 Q. Okay.

24 A. Yes.

25 Q. And the slope breaks sharply downward at the front of

1 the property?

2 A. That is right.

3 Q. This picture would have been taken at approximately  
4 just below the break of the slope looking directly up  
5 the property line with fill on the right-hand side?

6 A. Yes.

7 Q. Okay. Slightly above the retaining wall?

8 A. That's correct.

9 Q. Would you go to Exhibit 53, please.

10 All right. Did you take this picture?

11 A. I don't recall if I took it or not.

12 Q. Would have taken it before --

13 A. Either Karen or myself.

14 Q. If Karen took it, were you present when it was taken?

15 A. Yes.

16 Q. Can you tell us what it depicts?

17 A. It shows the beginning of our driveway from Point White  
18 Drive up toward our house. It shows the rock retaining  
19 wall, and it shows workers beginning to install a spike  
20 fence.

21 Q. So if you count the fence poles going up -- one, two,  
22 three, four -- the fourth one up, it kind of points  
23 toward the very roof of your property. That would be  
24 in the same area that we've been talking about where  
25 fill was placed; wouldn't it?

1 A. That's your -- that's your perspective. There are  
2 trees on the other side of Point White Drive.

3 Q. Uh-huh.

4 A. My testimony is that there were trees on our property  
5 also.

6 Q. Show me where they are in these pictures.

7 A. I -- as I told you, on one of the exhibits, it appeared  
8 that the top of the tree -- I don't remember what  
9 number we were looking at.

10 Q. 21, I think.

11 A. 21. It appears to be the top of the tree that is above  
12 the -- you know, the house under construction, given  
13 the perspective that you tell me this is being taken  
14 from.

15 Q. Okay. You can't see the base of the tree from that  
16 picture. Okay.

17 Let's go to Exhibit 33. You got that same yellow  
18 truck there.

19 Both Mr. Slye and Mr. Ferguson testified that the  
20 property line runs diagonally from the corner marker,  
21 which is partly obscured from fill in the lower  
22 left-hand corner, to a point about an  
23 equivalent -- through a point which would be  
24 equivalent to the lower corner of the left-hand window  
25 of the panel van.

1 A. Is --

2 Q. So was it your testimony that this is the area that was  
3 densely, lushly overgrown to the right of that property  
4 line?

5 A. Actually, the property line, as I pointed out, is  
6 located -- if I may.

7 Q. Yeah.

8 We're talking -- where do you think the property  
9 line is in this picture?

10 A. If you're talking about this concrete marker in the  
11 lower left-hand corner --

12 Q. And Mr. Slye identified as being right here.

13 A. The -- actually, the corner of our property  
14 is -- excuse me, Your Honor -- as we can see is  
15 the -- there is a corner marker that is more right in  
16 here.

17 Q. Okay. Mr. Slye identified that concrete monument as  
18 being a boundary marker located in this position, the  
19 same one that's depicted in Exhibit 33. Okay?

20 And he testified that the panel van would be  
21 wholly or partially on the disputed strip. Okay?

22 A. That's what he testified.

23 Q. Okay. So wouldn't that mean if that's accurate, that  
24 everything to the -- diagonally to the lower  
25 left -- right-hand corner of that photograph, between

1 the monument and the panel van, would depict the  
2 disputed strip, correct?

3 A. I'm afraid you're confusing me.

4 Q. Sure. Hand me the marker here for a second.

5 Mr. Slye's testimony is that the panel van is  
6 located --

7 MR. UHLIG: Counsel, could you step back one  
8 foot? Thank you.

9 BY MR. BRAIN:

10 Q. -- right here. Okay. And the picture is taken from  
11 the right looking up the property line. Right?  
12 There's the corner marker. Taken from some point down  
13 here. There's the corner marker. Panel van. You're  
14 looking up the disputed strip.

15 There should be lush, overgrown vegetation on the  
16 right-hand side of that photograph between the camera  
17 lens and the panel van; shouldn't there?

18 A. Well --

19 Q. According to your testimony.

20 A. I would say that, for one thing, the perspective is  
21 different. And, in Exhibit 33, the angle of which one  
22 is looking more south -- or is more northwest. And the  
23 house itself is situated so it looks more to the  
24 southeast.

25 So this is -- this is not the same angle as the



1 exhibit -- whatever that is -- 2A.

2 Q. Now, again, according to Mr. Slye, that picture was  
3 taken from a point about here, depicting the concrete  
4 monument and the panel van. Right? And that would be  
5 looking directly up the property line to the north.

6 Do you see any of the lush, overgrown vegetation  
7 on the property from the right-hand side of that  
8 photograph between the lens of the camera and the panel  
9 van parked in the disputed strip approximately in the  
10 area of the carport?

11 A. Well, again, as I said, this is at a different angle  
12 than that. So it's difficult to transpose from this  
13 picture to Exhibit 2A because it's a completely  
14 different angle looking at the Ferguson residence.

15 Q. Okay. You've already testified -- and I've wrote it  
16 down, that the entirety of the disputed strip was, and  
17 I quote, dense, lush, and overgrown. Okay?

18 And isn't it true, Ms. McKenzie, that if you're  
19 standing here looking at something parked there, you  
20 would expect to see dense, lush, overgrown vegetation  
21 based on your testimony?

22 A. Well, as I've also testified, this is -- and would you  
23 like me to use the pointer? Would that be --

24 Q. Sure. Go right ahead.

25 THE COURT: Please.

1 THE WITNESS: There is -- this is steep  
2 through here. And, you know, there aren't really trees  
3 on there except the ones that I pointed out. And then  
4 it -- and then on up here. Yes. This would be dense,  
5 lush vegetation with trees and shrubs, et cetera.

6 The -- but relating it to that picture -- for one  
7 thing, the picture is so unclear, it's hard to tell  
8 what you're looking at except for the house; you can  
9 see the house --

10 Q. If you can --

11 THE COURT: Wait. You're both talking at one  
12 time.

13 Let the witness finish her comment.

14 BY MR. BRAIN:

15 Q. Were you done? I'm sorry to interrupt you.

16 A. Yes, I'm done.

17 Q. If you were standing here, Ms. Ferguson -- or  
18 Ms. McKenzie, and the truck is parked here and there's  
19 a tree here, don't you think it would obscure the view  
20 of the truck?

21 MR. UHLIG: Your Honor, I'm going to object.  
22 It seems like this question has been asked several  
23 times, and she's fully explained her --

24 MR. BRAIN: I would submit, Your Honor, it's  
25 been asked numerous times without getting a credible

1 answer.

2 THE COURT: Well, I'm not going to comment on  
3 whether or not it was a credible answer, but the  
4 question can be asked as it relates to just the diagram  
5 separate and apart from this Exhibit 33, which seems to  
6 be the issue here, trying to relate 33 to the diagram.

7 The last question was just pointing to Exhibit 2A  
8 and the hypothetical or the --

9 MR. BRAIN: Right.

10 THE COURT: -- situation asked. If you can  
11 answer that question --

12 MR. BRAIN: Yeah.

13 THE COURT: -- if you can answer it, fine.  
14 If you can't, you can't.

15 BY MR. BRAIN:

16 Q. I will answer it -- just to clarify, based upon what  
17 the judge has said, hypothetically, assuming there's a  
18 bright orange panel van parked in the disputed strip  
19 adjacent to the location of the septic tank but in the  
20 disputed strip, which I believe was Mr. Slye's  
21 testimony, and you're standing at the top or close to  
22 the top of the break in the slope looking in the  
23 direction of that panel van, isn't it true,  
24 Ms. McKenzie, that you would expect to see both the  
25 trees and the lush, dense, overgrown vegetation that

1 you've testified to between you and the panel van?

2 A. Well, first of all, as I said when pointing out the  
3 location of the trees, I could not do with great  
4 precision because it's -- you know, I don't have the  
5 topography there and all.

6 The -- as to -- as to what you can see at a  
7 certain point -- and, you know, again, I point  
8 out -- excuse me for not speaking so that you can  
9 transcribe so easily.

10 But as I pointed out before, the -- there was some  
11 fill dirt that was on our property during the  
12 construction process. To the -- however, to the east  
13 of that was lush, green, overgrown property.

14 Q. I think we'll move on at this point in time.

15 Do you know when that corner marker, the one that  
16 you referred to, the nail marker, in the asphalt on the  
17 driveway was placed?

18 A. I believe that was placed before we owned the property.

19 Q. Okay. Do you recall Mr. Slye's testimony that they  
20 didn't locate any corner marker at the southern part of  
21 your property when they visited with Mr. Ferguson  
22 during the inspection period for his acquisition of the  
23 house in 1994?

24 A. I don't recall his exact testimony.

25 Q. Okay. With respect to the trees topped by Puget Sound

1 Energy that you were talking about, did they request  
2 any permission from you to remove those trees?

3 A. No.

4 Q. Doesn't that suggest to you, Ms. Ferguson, that the  
5 trees weren't actually on your property, that they were  
6 on the Point White right-of-way?

7 A. No.

8 Q. Think Puget Sound Energy just trespasses on people's  
9 property and cuts their trees down? Is that your  
10 testimony here today?

11 A. That's not my testimony, no.

12 Q. Okay. But it was Puget Sound Energy who did the  
13 topping, correct?

14 A. That's my recollection.

15 Q. Okay. And in your understanding, was the purpose for  
16 topping those trees to remove interference with the  
17 power lines?

18 A. That was my understanding, yes.

19 Q. So that --

20 A. They may have given us notice. It's been a long time.  
21 I don't have a recollection of whether they did.

22 Q. Now, you're an attorney licensed to practice law  
23 attached to the Civil Division of the Prosecuting  
24 Attorney for King County, correct?

25 A. I'm retired. I am an attorney licensed, though.

1 Q. When did you retire?

2 A. I retired about a year and a half ago.

3 Q. And what kind of things did you practice consistently  
4 as a civil deputy for King County?

5 A. You know, I provided -- mainly it was in an advisory  
6 role to the County.

7 Q. And what kind of subject matters did you provide advice  
8 on?

9 A. Well, two of my principal clients were the King County  
10 Board of Health and the Seattle King County Department  
11 of Public Health.

12 Q. Okay.

13 A. I also, you know, represented other agencies and, you  
14 know, and counsel, et cetera, as needed.

15 Q. In relation to public health issues?

16 A. No. Relation to other issues also.

17 Q. Okay. Anything related to real estate?

18 A. No.

19 Q. Okay. Now, it's my understanding that Puget Sound  
20 Energy installed underground power lines on the access  
21 on the east side of Lot 13, your access to your main  
22 house.

23 A. It would have been on the -- it was on the east side,  
24 but on the west side of the access road.

25 Q. Okay. And when that happened, didn't you insist that

- 1           they be placed in a recorded easement?
- 2   A.   I didn't insist that. They wanted it in a recorded
- 3       easement. It was their easement. I wanted them placed
- 4       underground, and they conditioned their doing that on
- 5       our granting an easement.
- 6   Q.   So they specifically wanted a recorded easement
- 7       authorizing the use of your property?
- 8   A.   For purposes of maintaining the line, yes.
- 9   Q.   Underground power lines?
- 10   A.   Yes.
- 11   Q.   But at the point in time Mr. Slye placed his power
- 12       lines across that portion of Lot 13 connecting to the
- 13       utility pole, you didn't discuss with him whether there
- 14       should be an easement?
- 15   A.   Did I discuss with him whether that should be an
- 16       easement? No.
- 17   Q.   Now, you offered a bunch of testimony about in 1987
- 18       when the house was being constructed you knew where the
- 19       properties lines were.
- 20   A.   I knew generally.
- 21   Q.   How did you know that?
- 22   A.   Well, because I knew the corner down here that -- that
- 23       the south end, and I knew north end. And so it ran
- 24       north and south.
- 25   Q.   So your testimony is you knew that this corner marker

1 was in the asphalt down there?

2 A. Yes.

3 Q. In 1987?

4 A. That's my recollection.

5 Q. When the house construction started?

6 A. That's my recollection. Yeah.

7 Q. You sure that road was even paved at that point in  
8 time?

9 A. No, I'm not.

10 Q. So do you know whether or not surveyors generally make  
11 a practice of putting nail corner markers in dirt  
12 roads?

13 A. I do not know.

14 Q. Okay. Now, during the course of your testimony, in  
15 discussing the kind of vegetation that was on the  
16 property, I never heard you mention pampas grass.

17 Was there pampas grass on the property prior to  
18 1987?

19 A. I don't recall whether there was or not.

20 Q. Okay. Do you recall Mr. Slye putting pampas grass on  
21 the property?

22 A. I recall he testified to that, yes.

23 Q. Okay. Now --

24 MR. UHLIG: Objection. Just to clarify "on  
25 the property." There's several properties.



1 MR. BRAIN: That's an appropriate question.

2 BY MR. BRAIN:

3 Q. Did you understand, during the question, I was talking  
4 about the disputed strip and not generally the entirety  
5 of Lot 13?

6 A. I didn't understand that he put pampas grass on the  
7 disputed strip.

8 Q. Okay. Now, during the course of Mr. Ferguson's  
9 testimony yesterday, Mr. Ferguson testified that with  
10 respect to Exhibit 53, the pampas grass depicted in  
11 that photograph had been present since his acquisition  
12 of the house, and that he understood the pampas grass  
13 were planted by Mr. Slye. Okay.

14 Isn't it true, Ms. Ferguson, that if you were  
15 walking along Point White Drive, you would have --

16 THE COURT: Excuse me. I --

17 MS. FERGUSON: McKenzie, not --

18 MR. BRAIN: McKenzie. I'm sorry.

19 THE COURT: Hang on just a minute. We can't  
20 have comments from the back. Even if you identify that  
21 there's a mistake, it's not appropriate to be calling  
22 out the mistakes that may be made by the attorney.

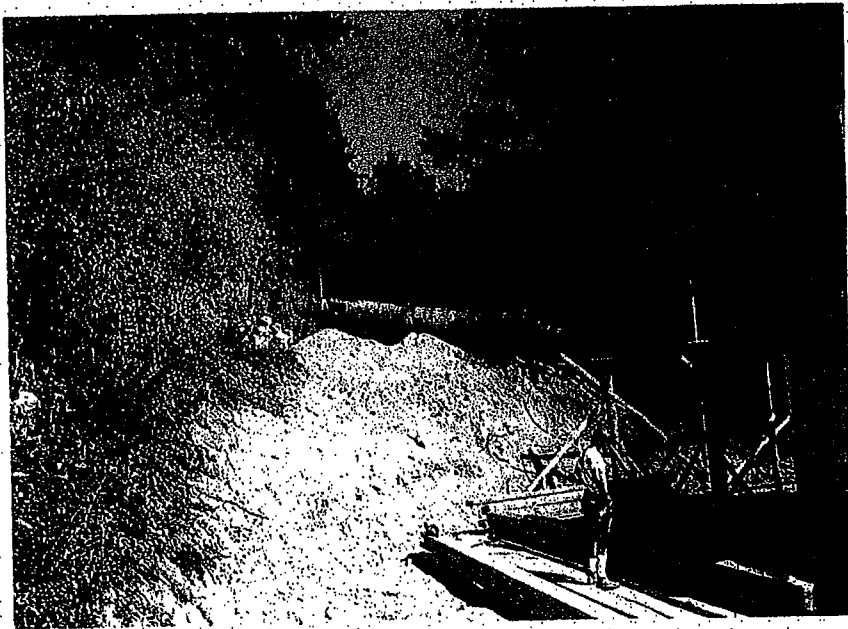
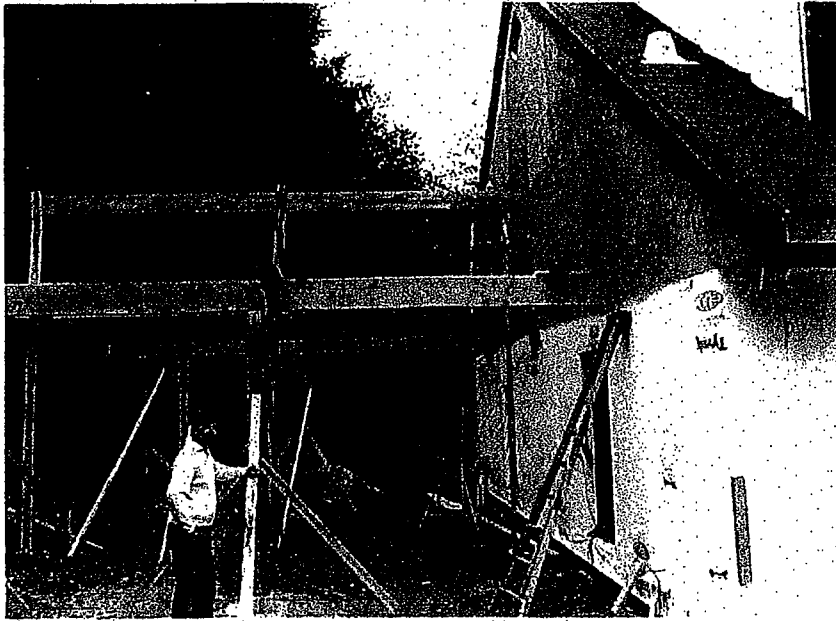
23 THE WITNESS: Okay.

24 MR. BRAIN: And I apologize. It runs in my  
25 family that we just mess up on names all the time.

**Exhibit 38**

000615

<input type="checkbox"/> STATE	Exhibit No. <b>38</b>
<input checked="" type="checkbox"/> PLAINTIFF	<input type="checkbox"/> DEFENDANT
<input type="checkbox"/> PETITIONER	<input type="checkbox"/> RESPONDENT
<input type="checkbox"/> OTHER	
Case No. MT 2-01252-4	
<b>FERGUSON VS WICKENZIE</b>	
<input type="checkbox"/> Admitted	<input type="checkbox"/> Referred
<input type="checkbox"/> Withdrawn	<input type="checkbox"/> Notified
Date of Court Filing	



F 000025

1 Q. -- the point in time you sold the house?

2 A. Yes.

3 Q. Okay. That's all I wanted.

4 MR. BRAIN: I would move for the admission of  
5 Exhibit 27. Excuse me.

6 THE COURT: Okay. This is No. 27. Any  
7 objection?

8 MR. UHLIG: No objection, Your Honor.

9 THE COURT: 27 is admitted.

10 (Exhibit No. 27 admitted into evidence.)

11 BY MR. BRAIN:

12 Q. I would draw your attention to Exhibit No. 38, and I'm  
13 only going to ask you about the upper photograph.

14 I believe you told me that the reason you took the  
15 lower photograph was because there's a couple of deer  
16 in the midrange of the picture.

17 A. There are, yeah.

18 Q. Yeah. But I'm only going to ask about the upper half.

19 This picture's taken, again, on an west/east line  
20 looking through the carport.

21 A. Correct.

22 Q. And it looks like there's, again, that little orange  
23 tree there and a pile of some kind of construction  
24 material --

25 A. I see that.

1 Q. -- like it's --

2 THE COURT: Please wait for the question to  
3 finish before you answer.

4 THE WITNESS: Sorry.

5 BY MR. BRAIN::

6 Q. See the tree?

7 A. I see something.

8 Q. Okay. And there's a pile of -- looks to me like gravel  
9 bedding for the septic system components?

10 A. Yes, I see.

11 Q. Okay. And, again, going back to 18 or 19 -- say 19 --  
12 all that stuff's gone.

13 THE COURT: Is there an answer?

14 THE WITNESS: I'm not sure of the picture  
15 reflecting the same piece of ground we're talking about  
16 here.

17 MR. BRAIN: Okay.

18 I would move for the admission of the upper  
19 portion of Exhibit 38 only.

20 THE COURT: Any objection?

21 MR. UHLIG: No, Your Honor.

22 THE COURT: Admitted.

23 (Upper portion of Exhibit No. 38 admitted  
24 into evidence.)

25