

JUL 10 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 303233-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EDDIE E. ACORD and SHARON K. ACORD,
husband and wife,
Respondents

v.

BRITTON K. PETTIT and LYNNETTE F. PETTIT,
husband and wife,
Appellants.

BRIEF OF RESPONDENTS'

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FILED

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ASSIGNMENTS OF ERROR

1. The Trial Court properly admitted the Verbatim Transcript of Testimony of Fred L. Chandler (CP 323-324)
2. The Trial Court finding that no survey had been conducted of the contested common boundary between the Acords and Pettits was supported by substantial evidence(CP 357-372).
3. The Trial Court finding that 12 trees were harvested in the contested area between 1971 and 1985, likely by Kenneth G. Rhoads, was supported by substantial evidence (CP 357-372).
4. The Trial Court finding that two Forest Practice Activity maps had been filed, rather than prepared, by the Acords was harmless error (CP 357-372).
5. The Trial Court finding that the non-boundary fence used to contain cattle when the property was in common ownership was not the fence at issue in this case, was supported by substantial evidence (CP 357-372).
6. The Trial Court findings pertaining to Fred L. Chandler's construction and maintenance of the boundary fence were supported by substantial evidence in the form of the properly admitted Transcript of Testimony of Fred L. Chandler (CP 357-372).

7. The Trial Court finding that Brian Chandler was 6 or 7 years old when the fence was built was supported by substantial evidence (CP 357-372).

8. The Trial Court erred in finding that the Pettit cleaned up past logging jobs in the contested area, used an upper dirt road around their horse pen on a continuous basis during grazing season and thinned, piled and burned in the contested area since 2000 (CP 357-372).

9. The Trial Court properly concluded that Acords, and the Chandlers before them, demonstrated the elements necessary to acquire title to the contested area by adverse possession (CP 357-372).

10. The Trial Court erred when it concluded that the Pettits and Leigh Robertson, starting in 1995, made exclusive, actual and uninterrupted, open and notorious, and hostile under claim of right use of the eastern part of the contested area (CP 357-372).

11. The Trial Court erred in concluding the Pettits have also adversely possessed the entire contested area since 1995 (CP 357-372).

12. The Trial Court properly concluded that title vested in the Chandlers and Acords in 1984.

13. The Trial Court properly concluded that the Pettits could not acquire title by adverse possession. The Court's reference to the incorrect statute number, RCW 7.28.090 rather than 7.28.085 was a scrivener's error.

14. The Trial Court properly admitted the expert testimony of Al K. Lang regarding stumpages (RP 128).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did substantial evidence support the Trial Court's conclusion that the Acords had acquired title to the disputed property by adverse possession?

2. Did the Trial Court properly admit the Verbatim Transcript of Testimony of Fred L. Chandler, Deceased?

3. Did the Trial Court properly apply RCW 7.28.085 and correctly Quiet Title in the Acords to the entire disputed area?

4. Did the Trial Court error in concluding that the Pettits have adversely possessed the entire contested area since August, 2000?

STATEMENT OF THE CASE

This case involves a dispute over a strip of land, approximately 100-feet in width, where the properties of the Respondents Acord and Appellants Pettit join. The Acord property is North of the land belonging to Pettit.

Respondents, Eddie E. and Sharon K. Acord, purchased their 180 acre property, in September of 1991 (Ex. 5; Ex. 13/App "A", Tax Parcel Nos. 5229800, and 5230600), moved onto the land in October of that year, and have lived there ever since (RP 20 & 23). Eddie E. Acord testified that he owned Tax Parcels Nos. 5220800, 5230600 and 5230475 as shown on the aerial photograph (Ex. 13/App "A"). Parcel No. 5230475 was the land *within* his Eastern fence line and subject to a boundary dispute with Carl H. Thomsen and Donna L. Thomsen, husband and wife. (RP 28-29). Record title to that land was acquired by way of a Quit Claim Deed dated September 26, 1997 (Ex. 4); this conveyance resulted from a Judgment in Stevens County Superior Court No. 95-2-00164-3 which quieted title to that parcel to the Acords.

Prior to purchasing the land Acord negotiated directly with the seller, Fred L. Chandler, a dairy farmer, who gave him a tractor tour of the land. That tour included a view of the South and East fences, which Acord walked along and which he understood to be the boundaries of the property (RP 21

& 24). There was an East fence that followed a straight line demarking the boundary of the property (basically following the East line of Tax Parcel No. 5230475), extending from Grouse Creek to the Southeast corner, and a second internal meandering fence, a “drift fence” that is still in use today. (RP at 32-33; 36). The South line fence was a straight line fence as well (RP 36).

In 1991, Acord found the South and East fences all intact, constructed of steel posts spaced approximately 16 to 20 feet apart, occasionally nailed to a tree, with three strands of galvanized barb wire and wooden corner posts (RP 22 & 25-26). The fence was in “good shape” and “wasn’t old rusted broken up wire” (RP 25, Ins. 15-17). There were two gates: one in the South fence line and one in the East fence line on an easement road. These gates were constructed of barbed wire with wooden stays (RP 22). Eddie E. Acord testified that he understood he was purchasing everything inside the fences (RP 24).

Because the Acords’ grantor, Fred L. Chandler, deceased at the time of trial below (Ex. 17 – 19), the Acords introduced a verbatim transcript of Fred E. Chandler’s trial testimony, taken on March 7, 1996, in the case of *Eddie E. Acord, et ux, v. Carl H. Thomsen, et al., No. 95-2-00164-3*. It was in that case that Acord had acquired record title to Tax Parcel No. 5230475

(Thomsen to Acord Quitclaim Deed dated September 26, 1997, Ex. 4 & Ex 13/App "A"). In that hearing, Chandler testified he purchased what is now the Acord property in 1972 from John H. Sperber and Jacqueline Sperber, husband and wife. He originally purchased 160 acres from the Sperbers and then an additional 20 acres from Grouse Creek Associates, a Joint Venture, in 1974. (Ex. 1 and Ex 16 pp.4-5). By Real Estate Contract he sold the property to Kenneth G. Rhoads and Esther M. Rhoads, husband and wife, in 1988 (Ex. 2) but re-acquired it under a Declaration of Forfeiture in 1991 (Ex 3 and Ex 16 pp. 6-7). He and his wife moved back on to the property around that time because he still had a few cattle on the land. (Ex 16 p. 8)

At the time Chandler purchased the property in 1974, there was no fence. He hired Jim Bosingham, a surveyor and his brother-in-law, to assist him in establishing his boundary line of the original 160 acres. When he bought the additional 20 acres from Grouse Creek Associates, a Joint Venture, he had the perimeter surveyed and then marked the line by putting in a fence in 1974 (Ex 16 p. 11). On the East line he fenced around a knob to keep the cattle out of that area, and marked the line behind the knob to the East with stakes and by clearing brush along the line (Ex.16, p. 12 & 17-18). He then continued the fence all the way to the Southeast corner of the property he had

acquired from Grouse Creek Associates, a Joint Venture. The fence was a steel post, three wire fence and it ran in a straight line. When he got to the Southeast corner, he put in a corner and built a fence along his South line of the same construction: steel post, three wire (Ex 16 p. 19). There was an easement road in the Southeast corner of his property, and he put regular, farm gates – post and wire gates – which effectively fenced off his property in the area of the easement (Ex 16 pp. 23 & 44). He fenced the East side and South side of the twenty acres he purchased from Grouse Creek Associates, a Joint Venture, and the rest of his property according to the unofficial “survey on the South side of my property at the same time.” (Ex 16 p. 34)

Fred L. Chandler testified that he never sought nor obtained permission from anyone to build the fence, and no one ever objected to his fence and he believed this fence line to be his true property line (Ex 16 pp. 20-21; 24). He operated a dairy farm and did not pasture cows in the evergreen trees, “[S]o, the fence, when I put it up – more outlining my property than it was (inaudible) – (inaudible)” (Ex 16 p.21).

The existence of the South and East fences is illustrated on two surveys of adjoining properties conducted for landowners not involved in the present lawsuit. A 1997 survey by Thomas E. Todd, PLS shows the East fence along

the East boundary of what is Acord's Tax Parcel No. 5230475 and extending into what is the Pettit parcel to the South (Ex. 10). A 2003 survey by Rudy F. Kitzan of RFK Surveying, illustrates the South fence running East-West through the Stimson property and extending into the Pettit land from the West (Ex. 11). The intersection of these two fences form the Southeast corner of the Acord property. Those fences remained fully intact until late 1995, when Leigh W. Robertson ripped out a section of the South fence line from the Southeast corner to a point just North of the Pettit's current horse barn. After prevailing in the 1996 suit with the Thomsens (*see* Ex. 4), Acord partially reinstalled the fence, but was confronted by Leigh W. Robertson who threatened him by firing gunshots (RP 49-50; 52). Thereafter, Walter Acord, Acord's son, built a cross fence that tied in to the South fence to keep the horses from getting out. He chose that location to keep out of sight of neighboring buildings -- to keep from getting shot after his father had been shot at. (RP 189-190.) This cross fence veered to the East and tied into the East fence line. It took less than an hour to install and was intended to keep his horses in, not to monument any boundary (RP 191). He testified that the existing line fence was a better quality fence than the cross fence he had installed (RP 193).

Photos taken in 2004 show the remains of the fence line, running North and West from the Southeast corner, with the exception of the missing fence posts removed by Roberston in 1995 (Ex. 20). There are no improvements on the land claimed by Pettit to the North of the Southern fence line. Pettit's horse barn and fenced horse pasture is South of that fence line; there remains a fence post just North of the barn (RP 51-53; Ex. 20). Evidence of Pettit's acknowledgment of the fence line as a boundary included 2011 photographs which show a "no trespassing, no hunting sign" posted on a tree at the disputed fence line – it faced out from the Pettit property so it could be read from the North looking South toward the Pettit land. This sign was not installed by Acord (RP 60-61; Ex. 20).

Since purchasing the property in 1991, Acord has cut firewood "off of that whole area on the South" [South of the easement road including the disputed area] from the time of purchase to the late 1990's and pastured horses in that area in the Spring of each year, until early 2000 or 2001. The horses created a trail down the fence line (RP 24 ln. 9; RP 39 & 73-74). Acord maintained the South and East fences: "cut trees off of it and stuck it back up" and "stretch the wire back up" and "stretch the gates up and tighten them up a bit," usually every Spring when he was going to have stock in that section.

He also replaced gate posts on the easement road on the East fence line (RP 40-41).

Walter Acord was an adult when his parents bought the property in 1991 (RP 186). He moved back to the area in 1996 (RP 187). Although he was not specific as to exact dates, he testified he worked on the fence on the South line, and rebuilt the gate on the South easement road (RP 189). He went around the whole triangle area Southeast of the easement road to check the fence where the horses would be pastured – he cleaned brush off the fence, removed downed trees, stretched wires where they had been mashed down by trees (RP 192). Walter Acord and his father both pastured horses in the disputed area and he would routinely check the fences whenever horses were put in that pasture (RP 193).

Eddie E. Acord testified that he logged to the South fence in 1997 (RP 91). Walter Acord, who has been in the logging business for 30 years, testified he logged to the South side of his father's property in 1997. As to the part West of the easement road, they logged up to the South fence line, culling trees for chip wood. East of the easement road [including the disputed area] was logged to the South fence line as well, but in that section the trees were thinned in order to leave the better growing trees (RP 195-196, 214). There

was no line other than the fence line marking the South boundary (RP 196). This logging operation was in the nature of a filler job – one he worked on when he was between other jobs, and he did not finish all the way to the Southeast corner of his father’s property because other work became available (RP 197).

On August 21, 2000, Appellants Britton K. and Lynnette F. Pettit, acquired title to their 20-acre real property, Tax Parcel No. 5232600, South of the Acord land (Ex. 13/App “A”). The Pettits acquired title from Leigh W. Robertson by virtue of a Statutory Warranty Deed, recorded August 30, 2000. (Ex. 8). Robertson in turn had acquired title from Donald A. Cooper by virtue of a Statutory Warranty Deed dated July 19, 1993 (Ex. 103, p. 19). Around the time they purchased, Britton K. Pettit walked around the boundaries of the property (RP 349) with his Realtor. At the Northeast corner they saw a witness tag used to relocate a monument (RP 350). There were old lath and old flagging on his Western border. On the North thirty-second corner there was flagging and then they came to a “drift” fence which they crossed over (RP 351). The section line had been “brushed” and the timber management South of the section line appeared to be different from that above the line (RP353).

In 2005, Pettit and Acord disagreed as to the location of the boundary line (RP 85). No action followed.

Walter Acord again logged his father's property in 2006; this time he logged to the fence line – what Acord considered to be the boundary of the property (RP 86). The Pettits then filed a Stumpage Lien on March 21, 2006 (Ex. 12), claiming title to the logs that had been harvested between the section line and the fence line. The Pettits commenced a small claim court action to recover the value of their claimed logs. The Acords moved the matter to Stevens County Superior Court (CP 1 – 54).

A non-jury trial was held on May 18, 19 and June 2, 2011 on Acords' Complaint to Quiet Title to Real Property by Adverse Possession and/or Mutual Recognition and Acquiescence and Pettit's Counterclaim to Quiet Title and for Trespass. The Trial Court heard testimony from various witnesses, examined 38 exhibits, and visited the property to walk the contested boundary. (CP 365-380). It ruled that Acords and their predecessors had acquired title to the disputed property by adverse possession and that such title had vested as of 1984.

ARGUMENT

Standard of Review

Findings of fact are reviewed to determine if they are supported by substantial evidence. Substantial evidence will support a finding when the evidence in the record is sufficient to persuade a rational, fair-minded person that the finding is true. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010); *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). “A challenge to the sufficiency of the evidence admits the truth of [the opposing party’s] evidence and any inference drawn therefrom and requires that the evidence be viewed in a light most favorable to [the opposing party].” *Bott v. Rockwell Int’l*, 80 Wn. App. 326, 332, 908 P.2d 909 (1996). A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. *Merriman* at 631; *Lamm v. McTighe*, 72 Wn.2d 587, 593, 434 P.2d 565 (1967).

Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003). An appellate court should not weigh the evidence, judge the credibility of the witnesses, or substitute its judgment for that of the trial court. *Washington Beef, Inc. v. Yakima County*, 143 Wn. App. 165, 177 P.3d 162

(2008) (citing *In re Marriage of Greene*, 97 Wn. App. 708, 714, 986 P.2d 144 (1999)).

I. Substantial Evidence Supports The Trial Court's Conclusion That Acords Had Acquired Title To The Disputed Property By Adverse Possession.

To establish an adverse possession claim, a claimant's possession must be: (1) open and notorious, (2) actual and uninterrupted, (3) exclusive, and (4) hostile. Possession of the property with each of the necessary concurrent elements must exist for the statutorily prescribed period of 10 years. *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984); RCW 4.16.020. Adverse possession is a mixed question of law and fact. Whether the essential facts exist is for the trier of fact; but whether the facts, as found, constitute adverse possession is for the court to determine as a matter of law. *Peeples v. Port of Bellingham*, 93 Wn.2d 766, 771, 613 P.2d 1128 (1980). Where there is privity between successive occupants holding continuously and adversely to the true title holder, the successive periods of occupation may be tacked to each other to compute the required 10-year period of adverse holding. *Roy v. Cunningham*, 46 Wn. App. 409, 412, 731 P.2d 526 (1986), *review denied*, 108 Wn.2d 1018, (1987); RCW 4.16.020.

In establishing adverse possession, open and notorious use need only be the character that a true owner would assert in view of the property's nature and location. *Chaplin, supra*, 100 Wn. 2d at 863. This requirement relates to the necessity and basic fairness of providing the record owners with actual notice of adverse use throughout the statutory period, such that the land is used in such a way that any reasonable person would assume the claimants are the true owners.

The hostile use requirement does not require ill will toward others, but rather a showing that the claimant treated the land as his own throughout the entire statutory period. *Chaplin v. Saunders, supra*, 100 Wn. 2d at 860-61.

Exclusive possession need not be absolutely exclusive of all others to prove adverse possession. Rather, the Acords only need to show that the possession was of the type expected of an owner. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 936 P.2d 1163, 1172 (1997).

Evidence of use is admissible because it is ordinarily an indication of possession. It is possession that is the ultimate fact to be ascertained. Exclusive dominion over land is the essence of possession, and it can exist in unused land if others have been excluded therefrom. A fence is the usual means relied upon to exclude strangers and establish the dominion and control characteristic of ownership.

Wood v. Nelson, 57 Wn.2d 539, 540, 358 P.2d 312 (1961). Like the present case, the dispute in *Wood* involved adverse possession of a strip of land where a fence had been constructed beyond the property line. Therein, the Washington Supreme Court held that an old, dilapidated fence that had separated property for more than 10 years, combined with the possessor occasionally cutting wild grass up to the fence line a few times, was sufficient to constitute adverse possession. While cutting the grass alone would have been insufficient, the court reasoned that the ultimate question is the indication of possession, and use is only relevant because it tends to indicate possession. 57 Wn.2d at 540. Because a fence is “the usual means relied upon to exclude strangers” and exclusion is another indication of possession, the existence of a fence is relevant. *Id.* Thus, the court concluded,

Where a fence purports to be a line fence, rather than a random one, and when it is effective in excluding an abutting owner from the unused part of a tract otherwise generally in use, it constitutes prima facie evidence of hostile possession up to the fence.

Id. At 541; *see also Roy v. Cunningham*, 46 Wn. App. 409, 412, 731 P.2d 526 (1986) (upholding a finding of adverse possession based on the objective use of the property up to the fence line, despite the fact that the fence may have originally been erected to control livestock).

A. Construction And Ongoing Maintenance Of The Boundary Fence Established Open, Notorious, Exclusive, Uninterrupted And Hostile Possession Of The Disputed Property.

In the instant case, the evidence showed that Fred L. Chandler began living on the property in 1971. When he purchased it in 1974, he installed the fence intending to mark the boundaries of his property (Ex 16 p.21). Chandler fenced the East side and South side of the twenty acres he purchased from Grouse Creek Associates, a Joint Venture, [immediately North of the Pettit parcel], and the rest of his “survey on the South side of my property at the same time” (Ex 16 p. 34). He maintained the fence, though not very often because it was a good, new straight fence. (Ex 16 pp. 21-22). The fence was not falling down and it would still hold cattle when he sold to Acords in 1991 and, as to the gates, he regularly closed them throughout the time he owned the property, repairing them once or twice a year (Ex 16 pp. 22-24).

Eddie E. Acord also maintained the fence South and East: “cut trees off of it and stuck it back up” and “stretch the wire back up” and “stretch the gates up and tighten them up a bit,” usually every Spring when he was going to have livestock in that section. He replaced gate posts on the easement road on the East fence line (RP 40-41).

Walter Acord, the Acords' adult son, moved back to the region in 1996 (RP 187). He testified he worked on the fence on the South line, rebuilt the gate on the South easement road (RP 189). He went around the whole triangle area Southeast of the easement road to check the fence where the horses would be pastured – he cleaned brush off the fence, removed downed trees, and stretched wires where they had been mashed down by trees (RP 192). He would routinely check the fences whenever horses were put in the pasture in the disputed area (RP 193).

B. The Chandlers' And Acords' Use Of The Disputed Property Was Consistent With The Character And Nature Of Forest Land Property.

Pasturing Horses

Acord pastured horses in the disputed area in the Spring of each year, until early 2000 or 2001. The horses created a well-defined trail down the fence line (RP 24 ln. 9; RP 39 & 73-74). After he moved back to the area in 1996, Walter Acord also kept some of his horses on his father's land in the pasture in the disputed area (RP 193).

Wood Cutting

The property in dispute was forest land (Ex. 13/App "A"). Chandler's use was that of an owner of similar, forest land: Fred L. Chandler testified he

cut trees in knob area around 1984 (Ex 16 p. 13), and that later Rhoads, his contract vendee who occupied the property between 1988 and 1990 and ultimately forfeited the property in bankruptcy (Ex 16 p. 7-8), “took all the trees off” the property (Ex 16 p. 32).

Acord also cut firewood “off of that whole area on the South” [South of the easement road including the disputed area] from the time of purchase to the late 1990’s (RP 24& 73). Walter Acord logged to the South side of his father’s property in 1997. As to the part West of the easement road, they logged up to the South fence line, and culling trees for chip wood. East of the easement road was logged to the South fence line as well, but in that section the trees were thinned in order to leave the better growing trees (RP 195-196, 214). There was no line other than the fence line marking the boundary (RP 196). This logging operation was in the nature of a filler job – one he worked on when he was between other jobs, and he did not finish all the way to the Southeast corner of his father’s property because other work became available (RP 197). In 2006 he logged the disputed portion of the property which precipitated this current litigation. At that time, he said there was no evidence of a Southern property line other than the fence line (RP 203).

Evidence as to trees cut from the disputed portion of the property was also supplied by the Acords' expert witness, Al K. Lang, a Forest Consultant, who previously worked for the Washington State Department of Natural Resources for 30 years, including working as a DNR Forester in charge of the North Columbia District (RP 109). Lang is also a licensed Forester in Idaho, and has done considerable work in that State as well (RP 127). He evaluated the volume of the cut timber and conducted a cruise of the standing timber, except for the pine, in the disputed area between the fence and survey lines (RP 113). He was able to locate the existing fence in 2010 when he conducted the evaluation, and described it as an "average" three-wire fence adequate for keeping horses in, but not for cattle which would required four- or five-wire fence (RP 135).

Lang testified that he did a physical comparison of the stumps between the survey line and fence line RP 114; (Ex. 15-1) with other comparable Post Falls property East of Spokane that had been logged in 1976 (RP 116-117, 120, 126; Exs. 15-2 & 15-3). He personally lives in Post Falls, Idaho three days a week and in Colville, Washington the rest of the time, traveling through the Valley area twice a week to get back and forth and he testified as to similarity in geographic features of the two properties, that both properties

slope to the Northwest (RP 122), both experience similar weather and both are located at similar latitudes with the same hours of sunlight everyday (RP 123-124).

Based on his experience as a Forester, Lang opined that certain stumps in the disputed area had been cut sometime between 1976 and 1980; he provided photos of 12 different stumps (RP 128; Ex. 14 & 15-1). This was consistent with stumps logged North of the survey line on the Acord property which were of the same vintage (RP129). His opinion was that all were harvested at the same time and in the same manner (RP 130-131), and that the cut was up to the fence line (RP 132; Exs. 14, 15-1 & 15-2). This was in the same time frame that Ken Rhoads occupied the land. Chandler sold to Rhoads by a Real Estate Contract in 1988 (Ex. 2) but reacquired it under a Declaration of Forfeiture in 1991 (Ex. 3 and Ex 16 pp. 6-7).

Lang distinguished other stumps that were not of the same age, likely cut for firewood, and stumps cut in 2006 as part of the disputed logging operation (RP 151 & 168). Lang also provided an estimate of the Acord's damages, based on timber prices in 2006, caused by their stated inability to finish logging the property and the inability to sell the logs following Pettits' filing of the Stumpage Lien (RP 151-155; Exs. 14 & 15-4).

The Trial Court allowed Lang's opinion based on comparables, ruling that objection went to the weight, not the admissibility, of the testimony.

The reason for admission of the comparison is that Mr. Lang has forty plus years experience as a forester and has furthermore decades of experience with the property there in Idaho and then has inspected the property here at Jump Off Joe and then makes a comparison of the logs and photographs these. They're the same species of trees, the same basic forest habitat in this part of the United States. And then the environmental variables that Mr. Phillabaum lists here, again, that would come into play, but Mr. Lang also answers that and says the he is personally familiar with the weather conditions in these two locations having lived in Idaho for a good part of the time and then the – the weather there at Jump Off Joe not enough different to change his opinion as to when these stumps were made. And so there's no peer review articles for sure, but again, he's been a forester in Idaho and Washington and he has been working in this part of this area for again about forty years. So for those reasons in the belief that the various environmental factors are much the same, I'll allow the – the opinion.

(Court's Ruling, RP 128.) This ruling was correct.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Wash.R. Evid. 702.

Whether a witness is qualified to testify as an expert is within the sound discretion of the Trial Court. The Court's decision to qualify a witness

will not be reversed absent a showing of a manifest abuse of discretion. *State v. Holland*, 77 Wn. App. 420, 427, 891 P.2d 49, review denied, 127 Wn.2d 1008, 898 P.2d 308 (1995). The Court's exercise of discretion will not be reversed so long as the expert's qualifications are "fairly debatable." *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979). As the pertinent rule itself states, a witness may qualify as an expert by knowledge, skill, experience, training, or education. For example, in *Kelly v. Valley Construction Company*, 43 Wn.2d 679, 262 P.2d 970 (1970), it was not an abuse of discretion for the trial court to permit one who, although not an engineer, had abundant experience in underground work, to testify concerning the estimated cost of completing a contract to drive a tunnel.

Under the *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923) standard adopted by the Washington Courts for criminal cases and which Pettits assert applies in this case¹, an expert opinion based on scientific or behavioral theories must meet the rigors of a scientific theory, but if the expert testimony does not concern sophisticated or technical matters, it need not be subjected to such scientific scrutiny; indeed, it is hard to imagine what scientific theory or test can be applied to expert testimony which is based on

¹ In *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011) the Washington Supreme Court noted that "[i]n civil cases, we have neither expressly adopted *Frye* nor expressly rejected [*Daubert v. Merrell Dow Phar., Inc.*, 509 U.S. 579 (1993)]."

a witness' training, experience, and observations on the job and, given a witness's testimony on extensive experience and training, the trial court can properly admit evidence over any objection based on foundation or expertise. *State v. Sanders*, 66 Wn. App. 380, 386, 832 P.2d 1326 (1992) (training and experience on the job qualifies police officer as expert in drug transactions).

In an action for negligence in starting a slashing fire which spread to plaintiff's timber, upon the issue as to negligence in starting the fire, a woodsman was competent to testify as an expert where he had had seventeen years experience in the Federal forest service, and in cruising, building trails and protecting forests from fires. *Conrad v. Cascade Timber Company*, 166 Wash. 369, 7 P.2d 19 (1932).

Testimony similar in nature to that at issue in this case has even been properly received when it was offered by a witness who was not an expert, as such, but who could draw upon his considerable observation and experience.

In *Park v. Northport Smelting & Refining Co.*, 47 Wash. 597, 92 P. 442 (1907), an action for damages from the destruction of growing trees, a witness was competent to testify as to the number of thousand feet of saw timber on the land, although he was not an expert cruiser, where it appeared that he measured the fallen trees and ascertained the number of feet therein, and estimated the standing trees by comparison with the fallen trees of the same

size. In the same case the court found that a witness knowing the fact from observation and experience may testify that trees were destroyed by the fumes from a smelter, although without expert knowledge. Lang's testimony was properly admitted.

In the instant case, substantial evidence at trial established, and the Trial Court correctly found, that the Acords, in privity with their predecessor in interest, the Chandlers, met each of these elements for a period of at least 21 years, from 1974 to 1995, and that vesting of title occurred in 1984, once the ten-year period of adverse possession was completed (Conclusions of Law A – E).

II. The Trial Court Properly Admitted The Verbatim Transcript Of Testimony of Fred L. Chandler.

Because the Acords' grantor, Mr. Fred L. Chandler, deceased at the time of trial below (Ex. 17 – 19), the Acords introduced a verbatim transcript of Mr. Fred L. Chandler's trial testimony, taken on March 7, 1996, in the case of *Eddie E. Acord, et ux, v. Carl H. Thomsen, et al.*, No. 95-2-00164-3. It was in that case that the Acords acquired record title to Tax Parcel No. 5230475, the Easternmost portion of their land due in part due to the existence of the same fence at issue in the present case (Thomsen to Acord Quitclaim Deed dated September 26, 1997, Ex. 4 & Ex. 13/App "A"). The portion of the fence

in the Thomsen followed the Acords' East property line; the fence in the present dispute was constructed by the same person, Fred L. Chandler, at the same time and involves the portion on the South property line.

Washington ER 804(b)(1) allows the admission of

[t]estimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

This exception has been described as probably the most reliable of the hearsay exceptions, because it requires the declarant to have testified under oath and subject to cross-examination by the party against whom the statement is offered at trial. 1-804 *Law of Evidence in Washington* § 804.04 (2010).

A declarant is deemed unavailable as a witness when he or she is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. ER 804(a)(4). The admission of the former testimony of an unavailable witness under ER 804(b)(1) is discretionary with the trial court. The standard of review is an abuse of that discretion. *Keene v. Edie*, 77 Wn. App. 1068; 909 P.2d 1311 (1995), *motion to publish granted*, 1996 Wash. App. LEXIS 38, *review denied*, 129 Wn.2d 1012; 917 P.2d 130 (1996).

Keene v. Edie, involved an action by a daughter, Keene, to recover damages from her father for his sexual abuse of her when she was a minor. The trial court admitted deposition testimony by another daughter April, since deceased, concerning sexual abuse she had also suffered at the hands of her father. The father claimed that his former counsel who represented him in the action brought against him by his daughter did not have the opportunity or a motive to develop testimony with respect to the complaints of the plaintiff in this action, Sharon Keene. The father claimed counsel focused solely on the time the alleged incidents took place with his daughter because in that case he was only concerned with the statute of limitation since, regardless of the substance of the claims, they were time barred. 909 P.2d at 1318. Rejecting this contention, the court of appeals looked to the substance of the deposition testimony and concluded that it belied the father's claims: the deposition was a general exploratory examination in which counsel for the father attempted to learn what April knew about the claims of childhood sexual abuse by her father. The court concluded that the testimony did not violate ER 404(b), and its admission under ER 804(b)(1) was proper. *Id.*

In *Estate of Foster*, 55 Wn. App. 545, 779 P.2d 272 (1989), *review denied*, *sub nom. Koehler v. Fibreboard Corp.*, 114 Wash.2d 1004 (1990), a product liability action, the court of appeals held that the trial court did not

abuse its discretion in admitting deposition testimony of an employee of the manufacturer, which duplicated other testimony, where it was allowed as general background to the early production levels of the defendant manufacturer's product). See *Young v. Key Pharmaceuticals, Inc.*, 63 Wash. App. 427, 433, 819 P.2d 814 (1991) (holding that court abused its discretion in excluding former trial testimony of doctor employed by pharmaceutical company in suit involving same company but different plaintiff with same injury, when doctor refused to testify at trial), *review denied*, 118 Wash.2d 1023 (1992).

It is highly significant for the instant case that, in *Estate of Foster*, portions of the deposition testimony of the asbestos manufacturer employee, taken in connection with another lawsuit, were admitted when offered by the defendants on the question of whether the product was available on the West Coast prior to the time when plaintiff allegedly came into contact with it, even though the plaintiff in the previous case was not a predecessor in interest of the plaintiff in the case before the court. This is a clear indication that the "predecessor in interest" aspect of Rule 804(b)(1) is not to be rigidly applied, but rather calls for flexibility and discretion appropriate to each particular case.

Dykes v. Raymark Indus., Inc., 801 F.2d 810, 815-17 (6th Cir. 1986)
cert. denied sub nom. Dykes v. National Gypsum Co., 481 U.S. 1038 (1987)
addresses who qualifies as a “predecessor in interest” under the Federal R.
Evid. 804(b), reaching an outcome consistent with that in *Estate of Foster*.

The Sixth Circuit addressed this same issue with respect to this same deposition in *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289 (1983). There, the issue was whether Dr. Smith's deposition was admissible against Raybestos-Manhattan, which likewise was not a party in DeRocco.

In *Clay*, our court speaking through Judge Edwards adopted the Third Circuit's construction of Rule 804(b)(1) and the following language:

While we do not endorse an extravagant interpretation of who or what constitutes a "predecessor in interest," we prefer one that is realistically generous over one that is formalistically grudging. We believe that what has been described as "the practical and expedient view" expresses the congressional intention: "if it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party." Under these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.

722 F.2d at 1295 (citing *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1185 (3d Cir.), *cert. denied*, 439 U.S. 969, 99 S. Ct. 461, 58 L. Ed. 2d 428 (1978))(emphasis added).

* * *

We do not view our decision in *Clay* as establishing the admissibility of Dr. Smith's deposition for all purposes in all asbestos cases. *Clay* did not rule the deposition admissible as a matter of law. It only held that it was the type of deposition which was subject to the application of Rule 804(b)(1), and thus should have been admissible under the particular facts in *Clay*. While we agree with *Clay* that a realistic application of the rule is to be preferred over one which is formalistically grudging, we believe also that the preferred approach in determining admissibility is for the attorneys to present to the court and for the court to consider the circumstances under which the original deposition was taken so that a full understanding of the motives in the first case can be obtained.

801 F.2d at 815-16. In *Dykes*, the Sixth Circuit Court of Appeals determined that it was not an abuse of discretion to use excerpt of a deposition against different manufacturer, when another manufacturer in a similar case had opportunity and motive to question expert witness. Addressing the question of potential prejudice, the court noted that it is incumbent upon counsel for the defendant when objecting to the admissibility of such proof to explain as clearly as possible to the judge precisely why the motive and opportunity of the defendants in the first case was not adequate to develop the cross-examination which the instant defendant would have presented to the witness. *Id.* at 817.

In the present case, the testimony of Fred L. Chandler was properly admitted into evidence, as it concerned the same issue which was posed by this litigation and a party owning adjoining property and having essentially the same interests as the Pettits in this case had a full opportunity to develop the issue in the prior proceeding. Although Pettits attempt to undermine the credibility of Chandler or the reliability of the testimony, a fair reading clearly shows that 1) Chandler built the fence on the East and South sides of his property in 1974 intending to monument the boundary; 2) Chandler maintained the fence although minimal maintenance was required because it was a new fence; 3) Chandler built and maintained the gates on the South and East boundaries where the fence crossed the easement road; and 4) that Chandler's contract purchaser, Rhoads, "took all the trees off" the property before Chandler retook possession in 1988.² The Trial Court did not abuse its discretion in admitting the transcript testimony, nor did it err as a matter of law in so doing.

² This direct knowledge testimony properly carried more weight than that of witnesses offered by the Pettits such as Brian Chandler, who did not remember his father building the fence; Brian was born in 1969 and therefore was approximately six years old when his father built the fence (RP 226, 228-229) or Jill Metlow, Chandler's stepdaughter who was 14 when she moved to the property and 17 when she married and left (RP 324 & 327).

III. The Trial Court Properly Applied RCW 7.28.085 And Correctly Quieted Title in the Acords to the Entire Disputed Area.

A. Chandlers' Title In The Disputed Area, And Thus Acords' By Tacking, Vested In 1984, And Therefore Acords Did Not Have To Satisfy The Requirements Of RCW 7.28.085.

RCW 7.28.085, enacted by the Washington Legislature in 1998, imposes additional requirements in order to sustain a claim of adverse possession of forest land. Specifically, this statute provides that in any action claiming or defending a claim of adverse possession,

the adverse claimant shall not be deemed to have established open and notorious possession of the forest lands at issue unless, as a minimum requirement, the adverse claimant establishes by clear and convincing evidence that the adverse claimant has made or erected substantial improvements, which improvements have remained entirely or partially on such lands for at least ten years. If the interests of justice so require, the making, erecting, and continuous presence of substantial improvements on the lands at issue, in the absence of additional acts by the adverse claimant, may be found insufficient to establish open and notorious possession.

RCW 7.28.085(1). The term “substantial improvements” is defined as a “permanent or semi-permanent structure or enclosure for which the costs of construction exceeded fifty thousand dollars.” RCW 7.28.085(3)(d). Several exceptions are created for this statute. First, it does not apply to

any adverse claimant who establishes by clear and convincing evidence that the adverse claimant occupied the lands at issue and made continuous use thereof for at least ten years in good faith reliance on location stakes or other boundary markers set by a registered land surveyor purporting to establish the boundaries of property to which the adverse claimant has record title.

RCW 7.28.085(2). Nor does it apply to any claim where the adverse claim involves less than 20 acres of land. RCW 7.28.085 (5). However, the most important exception for purposes of resolving the present dispute is found in subsection (4):

This section shall not apply to any adverse claimant who, before June 11, 1998, acquired title to the lands in question by adverse possession under the law then in effect.

RCW 7.28.085(4). The statute does *not* require that there be the entry of a court judgment to establish the acquisition of title. Thus the underlying question is what is meant by “acquired title to the lands by adverse possession”? Or, when does title vest pursuant to adverse possession?

The Washington Supreme Court’s decision in *El Cerrito, Inc. v. Ryndak*, 60 Wn.2d 847, 376 P.2d 528 (1962) indicates that vesting of title occurs once the ten-year period of adverse possession is completed. In *El Cerrito*, the Supreme Court affirmed the trial court judgment quieting title to a 2-½-foot strip of land in a claimant who established privity with two prior

landowners who had adversely possessed the strip for a period of 13 and 8 years respectively. A period of approximately five years had elapsed between the adverse possession by those prior owners and the filing of the claimant's suit. Noting that adverse possession ripens into title after ten years, the court reasoned as follows:

When real property has been held by adverse possession for 10 years, such possession ripens into an original title. Title so acquired by the adverse possessor cannot be divested by acts other than those required where title was acquired by deed. *Mugaas v. Smith, supra; McInnis v. Day Lbr. Co.*, 102 Wash. 28, 172 Pac. 844 (1918). The person so acquiring this title can convey it to another party without having had title quieted in him prior to the conveyance. Once a person has title (which was acquired by him or his predecessor by adverse possession), the 10-year statute of limitations does not require that the property be continuously held in an adverse manner up to the time his title is quieted in a lawsuit. *He may bring his action at any time after possession has been held adversely for 10 years.*

60 Wn. 2d at 855 (emphasis added). The fact that the court specifically noted that “the person so acquiring this title can convey it to another party without having had title quieted in him prior to the conveyance” clearly indicates the court's belief that court action is *NOT* a prerequisite to the vesting of title under adverse possession.

In *Mugaas v. Smith*, 33 Wn. 2d 429, 206 P.2d 332 (1949), the Washington Supreme Court affirmed a decision quieting title to a strip of land

claimed by an adverse possessor. On appeal, the question pertained to the fact that fence, which between 1910 and 1928 clearly marked the boundary line for which the claimant contended, disappeared by a process of disintegration in the years which followed. When the appellants purchased their property in 1941 by a legal description and with a record title which included the disputed strip, there was no fence and nothing to mark the dividing line between the property of appellants and the claimant, or to indicate to the appellants that the claimant was asserting title to the strip in question. The Supreme Court determined that the fact that the claimant had ceased to use the strip in question in such a way that her claim of adverse possession was apparent, did not divest her of the title she had acquired when the adverse possession limitations period had passed. 33 Wn.2d at 430-31.

“It is elementary that where the title has become fully vested by disseizin so long continued as to bar an action, it cannot be divested by parol abandonment or relinquishment or by verbal declarations of the disseizor, nor by any other act short of what would be required in a case where his title was by deed.”

Id. (quoting *Towles v. Hamilton*, 94 Neb. 588, 143 N.W. 935). The court focused especially on the fact that the adverse possession statute is a statute of limitations.

As the foregoing authorities illustrate, once the ten-year limitation period is passed, no further action is required, and the adverse possessor’s title

can only be divested by such acts as are required to divest a title acquired by deed. In the present case, the Acords' claim of ownership of the property to the existing fence line dates back to 1974. Based upon the prior litigation with the Thomsens, the testimony of Fred L. Chandler, and the facts, the Acords' title by adverse possession up to the existing fence line vested in 1984, some fourteen (14) years prior to the deadline of June 11, 1998 established in RCW 7.28.085(4) (which provides that "[t]his section shall not apply to any adverse claimant who, before June 11, 1998, acquired title to the lands in question by adverse possession under the law then in effect."). The Acords' clearly fit within that statutory exception, their title having vested long before that date.

B. Pettits Did Not Re-Acquire Title To The Disputed Area Of Forest Land By Adverse Possession.

Applying this same statute, the trial court correctly concluded that the Pettits, who purchased their property in 2000 (two years after the statute pertaining to adverse possession of forest lands was enacted), did not reacquire title to the disputed area of forest land by adverse possession because they had not satisfied the "substantial improvements" requirements of RCW 7.28.085(1)³ and because they did not rely on surveyed boundary markers

³ In its Conclusion of Law "H" the Trial Court erroneously cited RCW 7.28.090 and RCW 7.28.090(3)(d) when referencing "substantial improvements." Taken in context, it can be assumed the court intended to cite RCW 7.28.085 and RCW 7.28.085(3)(d).

when purchasing their land. In the specific instance of claimants seeking to establish title of forest lands through adverse possession, RCW 7.28.085(1) imposes a heightened burden of “clear and convincing evidence.”

The term “substantial improvements” is defined as a “permanent or semi-permanent structure or enclosure for which the costs of construction exceeded fifty thousand dollars.” RCW 7.28.085(3)(d). The Pettits have made no improvements in the disputed area. Photos taken in 2004 show the remains of the fence line, running North and West from the Southeast corner, with the exception of the missing fence posts removed by Roberston in 1995 (Ex. 20). There are no improvements on the land claimed by Pettits to the North of the Southern fence line. Pettits’ horse barn and fenced horse pasture is South of that fence line; a fence post remains just North of the barn (RP 51-53; Ex. 20).

Furthermore, Pettits have not shown that they established by clear and convincing evidence that they occupied the lands at issue and made continuous use thereof for at least ten years in good faith reliance on location stakes or other boundary markers set by a registered land surveyor purporting to establish the boundaries of the property to which the adverse claimant has record title. RCW 7.28.085(2). First, they had not even owned their property for ten years prior to the institution of this suit. They purchased their land on

August 21, 2000 and recorded their deed on August 30, 2000 (Ex. 8). This action was instituted on June 20, 2010, less than ten years later (CP 1 – 54).

Second, the Pettits did not prove by clear and convincing evidence that they had relied on location stakes or other boundary markers set by a registered land surveyor purporting to establish the boundaries. At trial, and in their brief, Pettits argue that the boundary *between the properties* was established by at least four recorded surveys (CP 066-068; Exs. 10, 11 & 104/App “B”). This is not true. The evidence presented showed that properties of different neighboring landowners, at various times, were surveyed, but *only once* the boundary between the Acord and Pettit lands:

- 1) The 1988 survey by Thomas E. Todd, PLS surveys the *North* property line of Acords. In the *South* quarter corner is the notation “***No monument found or set.***”
- 2) The 1992 survey by Thomas E. Todd, PLS also shows the South quarter corner with the notation “***No monument found or set.*** Position per Book of Surveys at Page 25.”
- 3) The 1997 survey by Richard Barr, Jr. PLS, again shows the notation at the South quarter corner, “***No monument found or set.*** Proportionate position.”
- 4) The 1997 Thomas E. Todd, PLS survey is the one discussed in the lawsuit between Acord and Thomsen. It shows the East boundary of the Acord property. At the South quarter corner is the notation “Position per ...surveyors book.” ***No monument is noted.***

5) The 2004 RFK Land Surveying survey of the Stimson property (West of Pettit's land) set the North quarter corner of Section 6. This is the point referenced as the South quarter corner in the four surveys above.

(Exhibits 10, 11 & 104/App "B"). Thus, the *only* time the Western corner between the Acords and Pettits was ever established by a surveyor was in 2004, four years *after* the Pettits purchased their land. The line between the North quarter corner and the Northeast corner of Section 6 (the common boundary between Acord and Pettit by deed description) has never been surveyed. Clearly, they did not possess for ten years in reliance on any surveyors stakes or boundary markers set by a registered land surveyor. The Trial Court properly concluded that Pettits did not establish title by adverse possession under the RCW 7.28.085.

IV. The Trial Court Erred In Concluding That The Pettits Have Adversely Possessed The Entire Contested Area Since August 2000.

Pursuant to RAP 2.4, Acords request this Court review that portion of the Trial Court's Conclusions of Law G that states the Pettits have adversely possessed the entire contested area since August 2000. This legal conclusion is unsupported by the facts and, if this case were to be remanded for any reason, this conclusion would, if repeated below. When real property has been held by adverse possession for 10 years, such possession ripens into an

original title. Title so acquired by the adverse possessor cannot be divested by acts other than those required where title was acquired by deed. *El Cerrito, Inc. v. Ryndak, supra*, 60 Wn.2d 847.

The only facts pertaining to *any* interruption in the Acords' possession pertains to the incident in which Leigh W. Robertson destroyed the *Southeast corner of the boundary fence*, not the entire fence line. The elder Acord partially reinstalled the fence, but was confronted by Leigh W. Robertson who threatened him by firing gunshots (RP 49-50; 52). Fearing for his safety, he left. Thereafter, Walter Acord, Acord's son, built a cross fence that tied in to the South fence to keep the horses from getting out. He chose that location to keep out of sight of neighboring buildings -- to keep from getting shot after his father had been shot at. (RP 189-190.) This cross fence veered to the East and tied into the East fence line. It took less than an hour to install and was intended to keep his horses in, not to monument any boundary (RP 191).

By contrast, there is a dearth of evidence to show any action by the Pettits that would constitute an ouster of the Acords. There are no improvements on the land claimed by Pettit to the North of the Southern fence line. Pettits' horse barn and fenced horse pasture is South of that fence line; there remains a fence post just North of the barn (RP 51-53; Ex. 20). Taking an inventory of trees is not such "open and notorious" conduct as would put

the Acords on notice of any claim by the Pettits. The other activities cited by the Court all occurred *South* of the fence line or in the Easternmost section of the land. (i.e. the activities discussed by Pettits were in the context of improving the area around his horse barn, including the construction of a loafing shed.) No evidence of burning was visible on the walkabout view of the property (RP 417). No structures have ever been constructed North of the fence. (RP 92-93). The Pettits never removed the fence, or any portion thereof. No improvements or notorious acts of ownership were asserted in the contested area West of the barn.

The “no trespassing” sign referenced in the Trial Court’s Finding of Fact N is not evidence of any claim to the land between the section line and the fence line. To the contrary, it is evidence of the Pettits’ acknowledgment of the fence line as the true boundary. This sign, depicted in a 2011 photograph, was posted on a tree *at the disputed fence line rather than farther North at the alleged property line*. It faced out from the Pettit property so it could be read from the North looking South toward the Pettit land (Ex. 20). This sign was not installed by Acord (RP 60-61; Ex. 20).

Moreover, the evidence indicates that it was not until *after* the lien was filed in 2006 that Pettit installed some fence posts on the survey line; before that time Acord never observed Pettit encroach across the fence line nor were

any structures built North of the fence line (RP 92-93). Likewise, Walter Acord testified that when he logged the property in 2006, there was no evidence of a Southern property line other than the existing fence line (RP 203). There was simply no activity on the Pettits' part that justifies the Court conclusion that any type of adverse possession was made between 2000 and 2006.

Sometime in 2008, Brandon Field, the Acords' grandson, saw Pettit burning a small brush pile in the disputed area on his grandparents' land; he also noticed small, wooden stakes, with no markings, on the claimed survey line (RP 250). Cindy Field, the Acords' daughter, and Brandon Field, her son, recalled a 2010 confrontation with Mr. Pettit when Brandon cut firewood off the log deck North of the fence line. Mr. Pettit asserted ownership of the logs in the deck and both sides accused the other of trespassing (RP 243 & 260).

And, although the Pettits assert that the 2006 logging permits demonstrate that the Acords respected the survey line, the contrary is true. In 2006, Eddie E. Acord filed a Forest Practices Application, dated February 13, 2006 and prepared by his son, Walter, to log his property. It specified the SW $\frac{1}{4}$ of Section 6; however, he had no thought about Section 6 or Section 7 – he intended to log to the fence line as that was his boundary (RP 91). The harvest boundaries described in the application were “fences and fields and

county roads.” (Ex. 9). The attached map showed the unit boundary extending South into Section 7 to the fence line. (RP 41 & 43), and this is the map Pettit asserts is a false map. To the extent that the Trial Court used the term “filed” it was harmless error as the Court clearly understood the two different maps that were at issue. See *Tacoma Boys’ Club v. Salvation Army*, 47 Wn. 2d 113, 286 P.2d 709 (1955).

Walter Acord testified that he learned he had not submitted a correct map when the DNR official, at Pettit’s behest, visited the worksite. Walter Acord then modified the map for re-submission but, because Pettit filed a Stumpage Lien before he could file the corrected map, he did not submit the modified application. He believed it was a futile act to do so because he could not finish the logging operation in light of the lien (RP 201-202; 220-221).⁴

Walter Acord also testified that he used the “fences and fields” as the boundary so he could go into the whole property (RP 211); he believed he had filled out the permit in a manner that would enable him to go to the East and South fence lines (RP 219).

⁴ Acord testified no mill would take the logs and all logging came to a halt (RP 89). Wesley Blord, a Resource Manager for Pend Oreille Fiber, affirmed that the logs could not be processed with a stumpage lien (RP 304-305 & 397). Josh Anderson, of Vaagen Brothers Lumber, said it would be processed and the proceeds held if the transaction was not too complex. (RP 359 & 361).

After Mr. Pettit's call alleging his neighbor had trespassed, Bernard Jones, a Washington State Department of Natural Resources forest practices Forester, went out to the property, talked with Walter Acord, and told the parties that the DNR did not get involved in property line disputes (RP 102). Although he had authority to issue an informal conference note, a notice to comply or a stop work order, he exercised his discretionary authority and took no action regarding the alleged permit violation (RP 103). He also opined that had Acord retroactively sought an amendment to the application with the correct description, it would have been approved (RP 104). The description "fences, fields and county roads" is a typical description on permit applications (RP 106). For example, Pettit's own 2005 permit application identified harvest boundaries as "pink flagging" and did not mention survey boundaries (RP 106-07).

Clearly, there is insufficient evidence to support the Trial Court's conclusion that the Pettits had adversely possessed the entire contested area since August 2000.

**RESPONDENTS ARE ENTITLED TO AN AWARD OF
ATTORNEY'S FEES AND COSTS**

Pursuant to RAP 18.1, the Respondents Eddie E. Acord and Sharon K. Acord, husband and wife, request attorney fees and costs pursuant to RCW

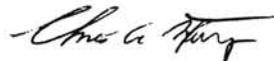
4.84.080(2). The Respondents have endured countless hours and great expense pursuing their legal remedies at trial against the claims of Appellants. Respondents are entitled to recover attorney's fees from Appellants, Britton K. Pettit and Lynnette F. Pettit, husband and wife, pursuant to RCW 4.84.080(2). In addition, Respondents request that they be awarded their costs on Appeal pursuant to RAP 14.2 and 14.3.

CONCLUSION

In view of the foregoing authority, facts, and argument, the Acords respectfully request that the decision of the Trial Court Quieting Title in them be affirmed and the Pettits appeal be dismissed.

DATED this 9th day of July, 2012.

Respectfully submitted

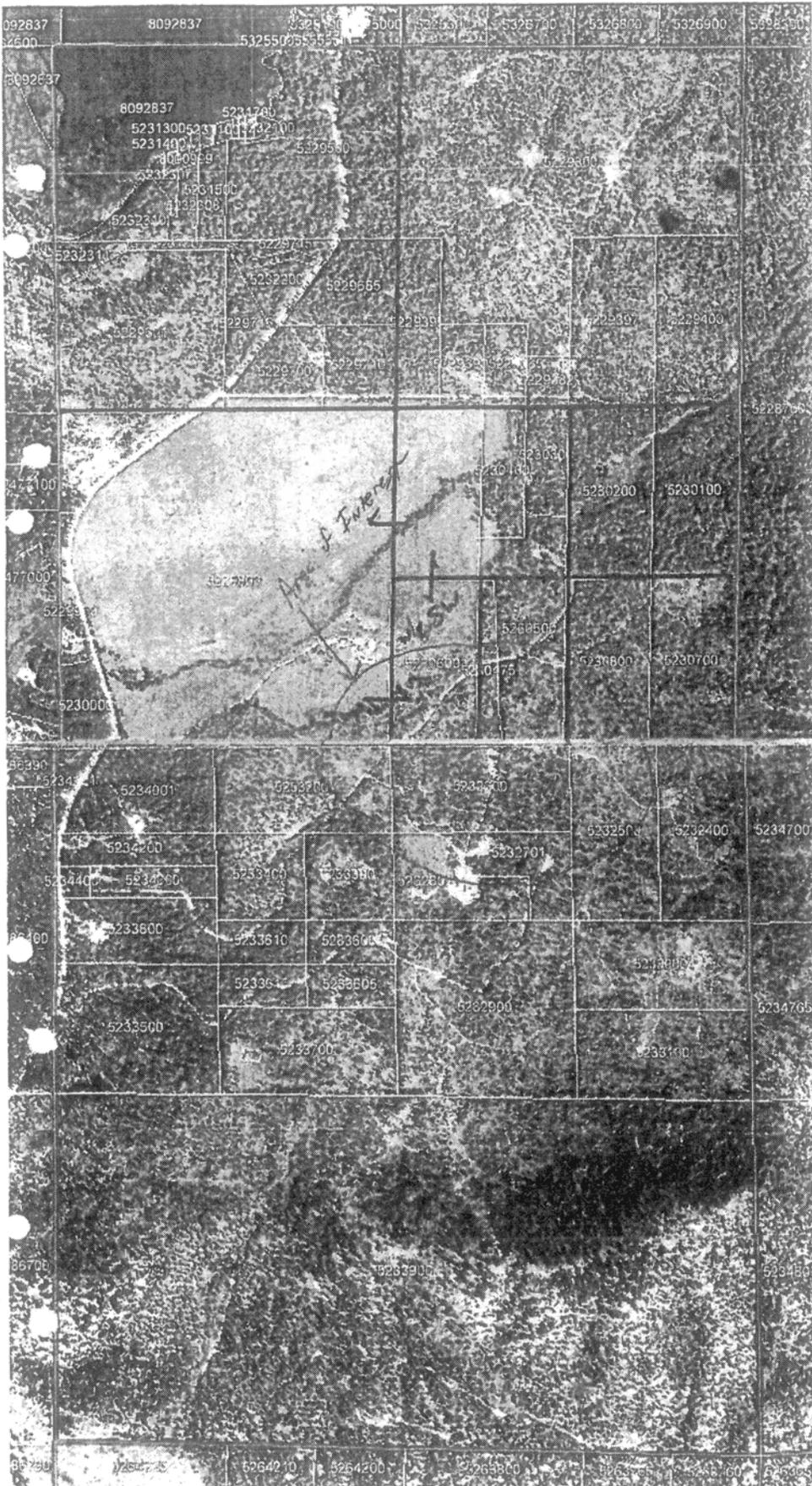


Chris A. Montgomery
WSBA #12377
Attorney for Respondents
Eddie E. and Sharon K. Acord

APPENDIX

“A”

3/4/09



**Stevens County
Washington**

Township 30 N
Range 41 E
Section (see grid)

| | | | | | |
|----|----|----|----|----|----|
| 06 | 05 | 04 | 03 | 02 | 01 |
| 07 | 08 | 09 | 10 | 11 | 12 |
| 18 | 17 | 16 | 15 | 14 | 13 |
| 19 | 20 | 21 | 22 | 23 | 24 |
| 30 | 29 | 28 | 27 | 26 | 25 |
| 31 | 32 | 33 | 34 | 35 | 36 |



1 Inch = 774 Feet

Disclaimer:
This GIS Data is deemed reliable but provided "as is" without warranty of any representation of accuracy, timeliness, reliability or completeness. These map documents do not represent a legal survey of the land and are for graphical purposes only. Use of this Data for any purpose should be with acknowledgment of the limitations of the Data, including the fact that the Data is dynamic and is in a constant state of maintenance, correction, and update.

2006 NAIP Photo

Prepared by the 
Washington

Township 30 N
Range 41 E
Section (see grid)

| | | | | | |
|----|----|----|----|----|----|
| 06 | 05 | 04 | 03 | 02 | 01 |
| 07 | 08 | 09 | 10 | 11 | 12 |
| 18 | 17 | 16 | 15 | 14 | 13 |
| 19 | 20 | 21 | 22 | 23 | 24 |
| 30 | 29 | 28 | 27 | 26 | 25 |
| 31 | 32 | 33 | 34 | 35 | 36 |



1 Inch = 753 Feet

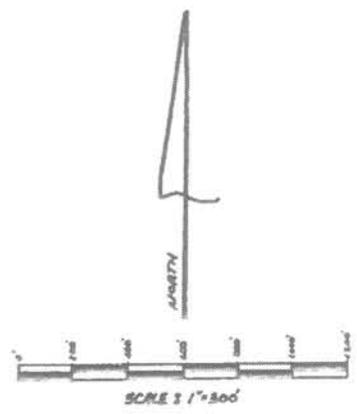
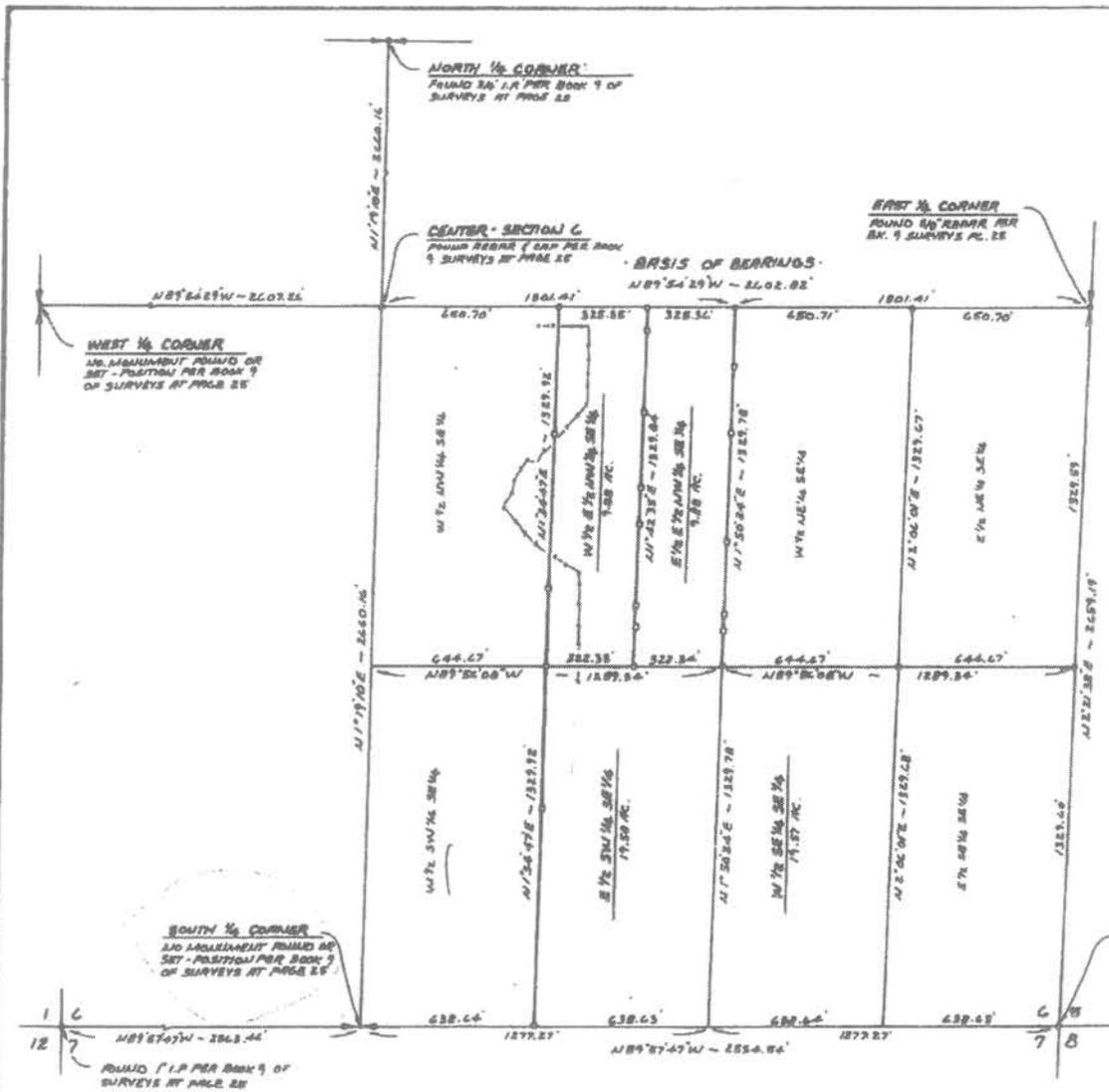
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2006 NAIP Photo

Prepared by the 
Stevens County
Assessor's Office
Feb 05, 2009

APPENDIX

“B”



LEGEND

- SET 5/8" NERAR WITH 1 1/2" ALUM. CAP
- FOUND 5/8" NERAR WITH 1 1/2" ALUM. CAP MARKED "T. TODD L.S. 1884" OR AS INDICATED
- NO MONUMENT FOUND OR SET
- SET NUB OR LATH ON LINE
- EXISTING FENCE LINE
- TOPCON 678-30 AND FIELD TRAVERSE

SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT AT THE REQUEST OF CARL H. THOMAS IN 1992

Thomas E. Todd
 THOMAS E. TODD, L.S. 18848 10-10-72
 790 SOUTH MAIN STREET
 COLVILLE, WASHINGTON, 98114
 (509) 884-8881



AUDITOR'S CERTIFICATE

FILED FOR RECORD THIS 31ST DAY OF December 1992
 AT COLVILLE IN BOOK 108 OF SURVEYS AT PAGE 110
 AT THE REQUEST OF THOMAS E. TODD.

Tim Gray *Jonathan Hawley*
 COUNTY MARSHAL COUNTY AUDITOR

9216698

RECORD OF SURVEY

IN THE W 1/2 OF THE SE 1/4 OF SECTION 8, T. 30 N.,
 R. 41 E., W.M., STEVENS COUNTY, WASHINGTON

RECORD OF SURVEY

A PORTION OF THE NORTHWEST QUARTER OF SECTION 07 TOWNSHIP 30 NORTH, RANGE 41 EAST, W.M., STEVENS COUNTY, WASHINGTON

AUDITOR'S CERTIFICATE

at 13:54 P.M. on document # 2004 0000229
in book 337 of records at page 144
at the request of the land surveyor, R. J. BISHOP, Sr.
Stevens County Auditor

FILED IN
BOOK 337
PAGE 144
DATE 12/17/03



LEGEND
 ■ FOUND MONUMENT IS SET
 ○ SET BY "ONE WITH" (3311)

SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME
IN ACCORDANCE WITH THE REQUIREMENTS OF THE SURVEY RECONSTRUCTION ACT OF THE
STATE OF WASHINGTON, CHAPTER 65A, RCW.
 R. J. BISHOP, Sr.
 SURVEYOR, WASHINGTON, U.S. 93315



RFK LAND SURVEYING

| | | |
|-----------|----------|--------------------|
| DRAWN | DATE | 1522 M. MONROE ST. |
| BY | 12/17/03 | STOANAC, WA 99281 |
| APPROVED | DATE | TEL-509-324-7861 |
| BY | 12/17/03 | FAX-509-327-7243 |
| SCALE | SHEET | PROJECT NO. |
| 1" = 300' | 1 OF 1 | 03-181 |



NORTH QUARTER CORNER

SET 3/4" IRON PIN WITH A 2-1/2" ALUMINUM CAP
IN THE CENTER OF THE NORTHWEST QUARTER AND
IS 331.13' AS A MONUMENT POINT.
MAJORITY RECORDS OF SURVEYS HAVE CALCULATED
THIS POINT, BUT IT HAS NOT BEEN MANUFACTURED
BY ME.
 SET REFERENCE POINTS:
 MAG IN 15' MAG 531° 23.93'
 MAG IN 8' MAG 58° 39' 31.2'

NORTHEAST SECTION CORNER

FOUND 3/4" IRON PIN WITH A 2" ALUMINUM CAP
"TOMB" 1844.
 FOUND REFERENCE POINTS:
 15" MAG BE 38° 55' WITH SCREWS
 15" MAG SW 43.10 WITH SCREWS

EQUIPMENT AND PROCEDURES

THE TOTAL STATION WAS CALIBRATED WITH A NAD83
PROCEDURE AND A LOCAL STATION CAP
WAS USED TO CORRECT FOR LOCAL DISTORTION.
 SET OF MEASUREMENTS IS GIVEN IN THE TABLES.

BASE OF BEARING

THE BASE OF BEARING IS NORTH 88° 37' 41"
JUST ALONG THE NORTH LINE OF SECTION 5
AS SHOWN IN RECORD OF SURVEY BOOK
15, PAGE 144.

DISCLAIMERS

- THE PURPOSE OF THIS SURVEY WAS TO
MONUMENT THE CORNERS OF THE PARCELS AS
NOT RECORDED.
- ALL INTERFERENCES TO THE 1/4" IRON PINS
WERE SET ON THIS SURVEY AND TO BE DOWNS
ON THE SIDE-CORNER OF THE 81' x 81' MAG WITH THE
THEY THAT IS FRAMED THE MONUMENT.
- THE RECORD #11316 WAS USED TO OBTAIN THE
RECORD OF SURVEY BOOK 15 PAGE 144 APPLIES
TO THE NORTHWEST QUARTER OF SECTION 07
SECTION 07, TOWNSHIP 30 NORTH, RANGE 41 EAST,
STEVENS COUNTY, WASHINGTON. THIS MONUMENTARY
SURVEY HAS BEEN SET IN ACCORDANCE WITH THE
REQUIREMENTS OF THE SURVEY RECONSTRUCTION
ACT OF WASHINGTON.

LEGAL DESCRIPTION

THE NORTHEAST QUARTER OF THE NORTHWEST
QUARTER OF THE NORTHWEST QUARTER
TOGETHER WITH THE NORTHWEST QUARTER OF
THE NORTHWEST QUARTER OF THE NORTHWEST
QUARTER.

ALSO TOGETHER WITH THE SOUTHWEST
QUARTER OF THE NORTHWEST QUARTER OF
THE NORTHWEST QUARTER OF THE NORTHWEST
QUARTER.
 ALL IN SECTION 7, TOWNSHIP 30 NORTH,
RANGE 41 EAST, W.M., STEVENS COUNTY,
WASHINGTON.

ALL ACCORDING TO GOVERNMENT MEASURE.

1200 BALL SW

| | | | |
|----|----|----|----|
| 1 | 2 | 3 | 4 |
| 5 | 6 | 7 | 8 |
| 9 | 10 | 11 | 12 |
| 13 | 14 | 15 | 16 |

WA 305 1588