IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29435

TODD FUOSS,

Appellee/Plaintiff,

v.

DAHLKE FAMILY LIMITED PARTNERSHIP
AND
RODNEY L. MANN,

Appellants/Defendants.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
JONES COUNTY, SOUTH DAKOTA

THE HONORABLE M. BRIDGET MAYER
Circuit Court Judge

APPELLANTS' BRIEF

Attorneys for Defendants/Appellants
Marty J. Jackley
Catherine A. Seeley
111 West Capitol Avenue
Suite 230
Pierre, SD 57501
(605) 494-0105

Attorneys for Plaintiff/Appellee
Robert C. Riter
A. Jason Rumpca
319 South Coteau
P.O. Box 280
Pierre, SD 57501
(605) 224-5825

The notice of appeal was filed on the 1st day of October, 2020.

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

JURISDICTIONAL STATEMENT

Appellants Dahlke Partnership and Rodney Mann appeal the decision of the Honorable M. Bridget Mayer granting Appellee adverse possession and a prescriptive easement, an implied easement by prior use, and an easement by necessity. R. 1072–75. The circuit court's Findings of Fact and Conclusions of Law were filed on August 31, 2020, and its Judgment and Order for Plaintiff was filed on September 25, 2020. R. III. Appellants Dahlke Partnership and Rodney Mann filed a timely Notice of Appeal on October 1, 2020. R. IV. This Court has jurisdiction under SDCL § 15-26A-3.

STATEMENT OF LEGAL ISSUES

I. Whether the circuit court erred in applying the Doctrine of Acquiescence to find that Appellee, Todd Fuoss, had acquired adverse possession of land to which Appellants, Dahlke Partnership and Rodney Mann, hold record title.

The circuit court erred by applying the Doctrine of Acquiescence to establish the hostile element when the alleged adverse possessor initially took possession of the property under permission granted from the owner of record and because the Doctrine requires actual occupancy throughout the statutory time period, which was lacking in this case.

- SDCL 15-3-12
- SDCL § 15-3-7
- *Lewis v. Moorhead*, 522 N.W.2d 1 (S.D. 1994)
- *Lien v. Beard*, 478 N.W. 2d 578 (S.D. 1991)
- *Gangle v. Spiry*, 2018 S.D. 55, 916 N.W.2d 119
- *Lehman v. Smith*, 40 S.D. 556, 168 N.W. 857 (S.D. 1918)

II. Whether the circuit court erred in granting Appellee, Todd Fuoss, a prescriptive easement, an easement implied from prior use, and an easement by necessity when it did not adequately consider evidence of permissive use and when Fuoss failed to adequately establish the necessary unity of title for an implied easement.

The circuit court erred when it granted a prescriptive easement because it failed to consider evidence that the servient land owner used the dominant tract with the dominant tract owner's permission. The circuit court further erred in its alternative holdings that Appellee had established an easement

implied from prior use and an easement by necessity because the Appellee failed to show by clear and convincing evidence that the tracts had been in unity of ownership.

- *Helleberg v. Estes*, 2020 S.D. 27, 943 N.W.2d 837
- *Heumiller v. Hansen*, 2020 S.D. 56
- *Springer v. Cahoy*, 2013 S.D. 86, 841 N.W.2d 15
- *First Church of Christ, Scientist v. Revell*, 68 S.D. 377, 2 N.W.2d 674

STATEMENT OF THE CASE

On June 27, 2019, Plaintiff and Appellee Todd Fuoss initiated this action to acquire adverse possession over a portion of Defendants' Dahlke Family Limited Partnership and Rodney Mann's land which, with the Defendants' permission, had been partially fenced off. R. 1–3. Fuoss also sought only a prescriptive easement over Defendants' property to access the disputed land and requested injunctive relief requiring Defendants to provide access over their land. R. 4–5. Dahlke Family Limited Partnership and Mann answered Fuoss's Complaint, asserting that the elements for adverse possession and prescriptive easement had not been met and counterclaiming for Fuoss to erect and maintain fencing on the property line consistent with South Dakota Codified Law ch. 43-23 and for injunctive relief to prevent Fuoss from trespassing on the property in question. R. 33–38.

After a hearing on competing motions for summary judgment, the circuit court denied both motions and set the matter for a court trial. R. 321. A court trial was held before the Honorable M. Bridget Mayer on January 2–3, 2020, at which Fuoss was permitted to add claims for an implied easement from prior use and an easement by necessity. R. 321. Following the trial, the circuit court issued Findings of Fact and Conclusions of Law and signed a Judgment and Order, granting Fuoss adverse possession and a prescriptive easement, easement by necessity, and easement by implication and

prior use, and denying Dahlke Family Limited Partnership and Mann's counterclaims. R. 958–87, 1072–75. Defendants Dahlke Family Limited Partnership and Rodney Mann now appeal.

STATEMENT OF THE FACTS

Rodney Mann (Mann) is a partner of Dahlke Family Limited Partnership (Dahlke Partnership) which owns land in Jones County, South Dakota. R. 152. Todd Fuoss is an adjoining landowner who maintains a fence encroaching on land to which the Dahlke Partnership and Mann hold record title. R. 89–91. Relevant to this appeal, Dahlke Partnership owns "The Northeast Quarter of Section 9, Township 3 South, Range 30 East, in Jones County, South Dakota,"[1] (Dahlke/Mann Property) R. 373, 959, 999; App. 40, while Fuoss owns the property directly to the east, described as "All of Section 10, Township 3 South, Range 30 East of the Black Hills Meridian, Jones County, South Dakota," (Fuoss Property), R. 959, 999, 1009; App. 51. Sometimes referred to as Bull Creek Road, 228th Street, runs along the north end of the Dahlke/Mann Property and the Fuoss Property. R. 396, 999. Bull Creek, a winding and steep waterway with flooding issues, traverses Township 3 and crosses under Bull Creek Road near the legal boundary line between the Dahlke/Mann Property and the Fuoss Property. R. 999. Bull Creek then cuts into the Fouss Property and divides that section diagonally. *Id.*

Regarding predecessors in interest of the Mann Property, in 1946, Laura and Jasper Hullinger executed a contract for deed with Ludwig and Florence Dahlke, granting equitable title and immediate possession of, among other real property, the Dahlke/Mann

[1] The Defendant's Proposed Findings of Fact and Conclusions of Law identify this property as the "Northwest Quarter of Section 9." This is a typographical error, and the evidence establishes that it is the Northeast Quarter of Section 9 that is at issue.

Property to the Dahlkes. R. 1026–27; App. 37-38. In June 1948, Clarence and Anna Marie Hullinger deeded the Dahlke/Mann Property to Ludwig and Florence Dahlke for "one dollar and other valuable consideration." R. 1015; App. 39. The Dahlke/Mann Property has remained in the Dahlke family since it acquired the property, and in 1999 Earl Dahlke deeded a one-half interest of that land to the Dahlke Partnership. R. 1024; App. 40.

The Fuoss Property has also had several predecessors in interest. In May 1948, Clarence and Anna Marie Hullinger deeded the Fuoss Property and other real property to Leo Nichols. R. 1016; App. 41. The Fuoss Property then passed from Leo Nichols to Darrel Lintvedt by contract in 1964 and was deeded to him in 1971. R. 1000–01; App. 42-43. The Fuoss Property was then transferred to Rodney Sather in 1996, and finally to Todd Fuoss in 2003. R. 1002–07, 1008–09; App. 44 -51.

When Darrel Lintvedt took over the Fuoss property in 1964, an east-west fence ran along his property parallel with Bull Creek Road over to Bull Creek; from there, the fence ran south to divide the Fuoss Property from the Dahlke/Mann Property. R. 264–66. As Bull Creek cut quite close to the property line between the tracts and was prone to flooding, the northwest portion of the fence frequently washed out, and Lintvedt had to replace or repair the fence often. R. 289, 543, 548, 555. A few years after Lintvedt purchased the Fuoss Property, he approached Lou Dahlke, the Dahlke/Mann Property owner at that time, and asked for permission to move a portion of the fence onto the Dahlke/Mann Property to avoid Bull Creek's further destruction of the fence. R. 287–88. Lou Dahlke surveyed the land with Lintvedt and granted him express verbal permission both to move the fence to its current location on the Dahlke/Mann Property and to use the

Dahlke/Mann Property on the east side of the new fence line, including for ranching and grazing cattle. R. 287–90, 299.

After obtaining Lou Dahlke's permission, Lintvedt's son and hired man moved the northwest portion of the fence away from Bull Creek and the property line and west onto the Dahlke/Mann Property. R. 558. The portion of the fence that Lintvedt moved ran south and linked back up with the existing fence where Bull Creek cuts further into the Fuoss Property. R. 556. This alteration created a triangular area, approximately one to one and one-half acres in size, which legally belonged to Lou Dahlke, but which was separated from the rest of his property and permissively used by Lintvedt. R. 287–88, 784–86, 1064, 1070; App. 1-2. That triangular area (Disputed Area) is the subject of this appeal. Lintvedt testified that the initial moving of the fence and his continued use of the land was not hostile to the Dahlke Partnership or Mann, but that each was done in a neighborly manner and with permission from the record owner of the Disputed Property. R. 287–88. Lintvedt testified that he was not seeking to take Dahlke/Mann land by moving the fence. R. 297. Lintvedt's son, Brian Lintvedt, also testified that the fence was moved with Lou Dahlke's permission and that his father never claimed ownership of the Disputed Property. R. 557, 560. Since Lou Dahlke allowed the fence to be moved sometime in the late 1960s or early 1970s, the fence has remained in the same location (with only slight alterations due to maintenance and repairs by subsequent Fuoss Property owners), and the parties and their successors have maintained their respective legal interests in their properties.

Dahlke Partnership and Mann remain the record owners of the Disputed Property. R. 760–763, 1064. In addition to holding record title of the Disputed Property, Dahlke

Partnership and Mann have maintained financial responsibility of the land by purchasing and continuing to pay Farmers Mutual Crop Insurance on the Disputed Property and by paying all property taxes associated with it. R. 767–71, 1037, 1038.

The first southern approach west of Bull Creek off Bull Creek Road is in the Dahlke/Mann Property hay yard. R. 270. Prior to moving the fence, Lintvedt used the approach on the Dahlke/Mann Property to traverse the hay yard and to access the Fuoss Property via a letdown fence on the north-south fence. R. 270. At the same time that Lintvedt received permission to move the fence, he sought permission from Lou Dahlke to put a wire gate on the north-south fence so he could access the Disputed Property and the Fuoss Property west of Bull Creek. R. 274, 289. Lou Dahlke again granted Lintvedt permission to install the gate and to access that property via his hay yard. *Id.* Brian Lintvedt confirmed that his father sought and received this permission to place a wire gate in the north-south fence and to use Dahlke/Mann property to access the land. R. 549–50.

Lintvedt sold the Fuoss Property to Rodney Sather in 1996. 1002–07; App. 44-49. When Sather purchased the property, Lintvedt specifically told him that he would not own the Disputed Property, and Sather testified that during his ownership he did not have exclusive control of the Disputed Property. R. 693–95, 706, 731. During his ownership, Sather erected an electric fence on the Fuoss Property along an old fence line and consistent with where he believed the property line to be. R. 690–97; App. 2 (depicted in orange highlighter). Sather's electric fence functioned to keep the buffalo he pastured out of Bull Creek altogether and on Fuoss Property. *Id.* Sometime after Sather purchased the Fuoss Property in 1996, he also placed "No Trespassing" signs on the east-

west fence along the roadside to keep hunters off of his and Mann's land. R. 721–25. Sather testified that he did not place the "No Trespassing" signs to represent his ownership of the Disputed Property, but merely placed it in that location, an access area on the main road, to keep hunters off their lands. R. 734. Consistent with both Darrel and Brian Lintvedt's testimony, Sather testified that he accessed the Fuoss Property on the west side of Bull Creek by driving through the Disputed Property with the permission of the Dahlke/Mann Property owners. 695–97. Sather testified that he never owned any part of Dahlke/Mann Property and that he never intended to sell or transfer any interest in property legally owned by the Dahlke Partnership and Mann when he sold the Fuoss Property. R. 689, 693–94.

Fuoss purchased the Fuoss Property from Sather by warranty deed in 2003. R. 1008–09; App. 50-51. As they had with Fuoss's predecessors, Mann and the Dahlke Partnership continued to permissively allow Fuoss to use the Disputed Property and to access the Fuoss Property west of Bull Creek over the Dahlke/Mann Property. R. 628, 630–33. In 2016, the Dahlke Partnership and Mann fenced in their hay yard and placed a gate across the approach in that area. R. 629–30. Later in 2016, Mann padlocked the gate across that approach during hunting season, thereby limiting Fuoss's access to the Disputed Property. R. 248–49. In December 2018, the Dahlke Partnership and Mann sent Fuoss a letter advising him of a "Notice of Trespass and Demand for Fencing." R. 114, 661. Mann later padlocked the gate leading to his hay yard permanently, effectively cutting off Fuoss's access to the Disputed Property by vehicle entirely. R. 942. In response, Fuoss placed a wire fence on the east-west fence running along the Disputed Property. R. 379–80. As record title of that property still belonged to the Dahlke

Partnership and Mann, Mann blocked Fuoss's access via that point of entry as well. R. 661–62. Mann has continued to permit Fuoss's brother and his hired man to access the Disputed Property and the Fuoss Property west of Bull Creek over the Dahlke/Mann Property so they may care for Fuoss's livestock. R. 777–78. In recent years, Mann has also granted permission to Fuoss's trapper, Billy Valberg, to access the Disputed Property. R. 778–79. These actions evidence that Mann has continued to exercise some level of control over the Disputed Property by restricting access to the property, as well as by continuing to purchase crop insurance and pay taxes on the Disputed Property. R. 767–69, 771, 777–79, 1037–38.

Fuoss initiated this action on June 27, 2019, claiming adverse possession of the Disputed Property and seeking a prescriptive easement over the Dahlke/Mann hay yard. R. 1–5. At trial, Fuoss orally amended his pleadings to include a claim for an implied easement by necessity or prior use. R. 640. After a court trial, the circuit court entered an order granting Plaintiff adverse possession and a prescriptive easement, easement by necessity, and easement by implication of prior use, and denying Defendants' counterclaims. R. 958–987, 1072–75; App. 3-6. Dahlke Partnership and Mann now appeal.

ARGUMENT

I. The circuit court erred in finding the elements for adverse possession by clear and convincing evidence because Fuoss and his predecessors did not openly, continuously, and hostilely possess the Disputed Property for a period of twenty years.

"Proof of the individual elements of adverse possession presents a question of fact for the trial court, while the ultimate conclusion of whether they are sufficient to constitute adverse possession is a question of law." *Lewis v. Moorhead*, 522 N.W.2d 1, 3

(S.D. 1994) (citing *Lien v. Beard*, 478 N.W. 2d 578, 580 (S.D. 1991)). "Therefore, the circuit court's findings of fact are reviewed under the clearly erroneous standard, while its conclusions of law are reviewed under the de novo standard." *Ashby v. Oolman*, 2008 S.D. 26, ¶ 10, 748 N.W.2d 132, 135 (citing *Fin-Ag, Inc. v. Feldman Bros.*, 2007 S.D. 105, ¶ 19, 740 N.W.2d 857, 862).

"'[T]o establish title by adverse possession, the claimant must be in actual, open, visible, notorious, continuous and hostile occupation for the statutory period.'" *Gangle v. Spiry*, 2018 S.D. 55, ¶ 13, 916 N.W.2d 119, 123 (quoting *Titus v. Chapman*, 2004 S.D. 106, ¶ 27, 687 N.W.2d 918, 925). Two key principles guide an analysis of these elements. First, the record owner of the disputed property is presumed to have possessed the property within the time required by law unless someone else proves that he possessed it adversely to that legal title for twenty years prior to the commencement of the action. SDCL 15-3-7; *City of Deadwood v. Summit, Inc.*, 2000 S.D. 29, ¶ 15, 607 N.W.2d 22, 26 (citing *Cuka v. Jamesville Hutterian Mutual Society*, 294 N.W.2d 419, 421–22 (1980)). Second, to establish ownership inconsistent with record title by adverse possession requires proof by clear and convincing evidence. *Cuka*, 294 N.W.2d at 422. Here, the circuit court erred in ruling that Fuoss overcame this presumption by clear and convincing evidence.

A. <u>The circuit court erred when it found that Fuoss's and his predecessors' possession of the Disputed Property met the hostility requirement for adverse possession because it incorrectly applied the Doctrine of Acquiescence when the evidence established that the land was used permissively.</u>

This issue concerns the interplay between the Doctrine of Acquiescence and the notion of permissive use as they pertain to the hostility requirement of adverse possession. The circuit court incorrectly applied the Doctrine of Acquiescence to find

that Lintvedt acquired title to the Disputed Property through his occupation of that land from the time he moved the fence onto Dahlke/Mann Property until he sold the Fuoss Property to Sather in 1996. R. 981–82. The circuit court further erred in its alternative holding that Fuoss's immediate predecessor, Sather, began a period of adverse possession through the Doctrine of Acquiescence in 1996, which Fouss tacked onto until 2018. R. 982–983.

i. The Doctrine of Title by Acquiescence does not apply to Lintvedt's occupation and use of the Disputed Property.

"The burden of proving a boundary by the [D]octrine of [A]cquiescence is identical to the strident standard required for proving adverse possession." *Summit*, 2000 S.D. 29, ¶ 20, 607 N.W.2d at 27. One asserting ownership of property to the exclusion of the true owner through the Doctrine of Acquiescence must prove the action by clear and convincing evidence. *Id.* (citing *Manz v. Bohara*, 367 N.W.2d 743, 748 (N.D. 1985)). Although this Court has considered cases involving the Doctrine of Acquiescence, those cases primarily involved mistaken boundary lines, and therefore, "[w]hat was there said must be considered in context with the question the [C]ourt had for determination." *Broadhurst v. American Colloid Co.*, 85 S.D. 65, 75, 177 N.W.2d 261, 267 (S.D. 1970). In this case, the circuit court incorrectly applied the Doctrine of Acquiescence when there was no evidence, and certainly no clear and convincing evidence, supporting its application. The Doctrine of Acquiescence applies when adjoining landowners agree to a property line, but agreeing to a *property line* differs drastically from agreeing to a *fence line*, as occurred here. One has ramifications on the legal title of land, while the other is a neighborly gesture.

The Doctrine of Acquiescence is more than a century old in South Dakota's precedents. *See Lehman v. Smith*, 40 S.D. 556, 168 N.W. 857 (S.D. 1918). In 1918, this Court decided *Lehman v. Smith*, which considered whether parties' acquiescence in a disputed boundary line could establish adverse possession. *Id.* at 859. This Court noted that "the question of adverse possession may be conclusively determined by the length of time during which there has been acquiescence in a disputed boundary." *Id.* In drafting the parameters of the Doctrine of Acquiescence, this Court looked to other jurisdictions and cited with authority their holdings. *Id.* This Court noted two New York cases which together held that "*where there was no consent to the original taking of possession*," and where the title holder did not challenge the disputed boundary line for the statutory period, title could ripen in an adverse possessor by reason of acquiescence. *Id.* (citing *Hinkley v. Crouse*, 125 N.Y. 731, 26 N.E. 452) (emphasis added); *Id.* (citing *Buchanan v. Ashdown*, 71 Hun, 327, 24 N.Y. Supp. 1122). This Court noted an Iowa case which found that "'[t]he [D]octrine of [A]cquiescence is founded on the presumption of an agreement fixing the division line… [and] [i]n the *absence of controlling circumstances*, acquiescence in the division line … accompanied by actual occupancy… by the adjoining landowners'" for the statutory time period is evidence of acquiescence in the boundary. *Id.* (quoting *Keller v. Harrison*, 139 Iowa 383, 116 N.W. 327) (emphasis added).

Since the introduction of the Doctrine of Acquiescence into South Dakota case law, this Court has had additional opportunities to explore and define its application. *See e.g. Lewis*, 522 N.W.2d at 5–6; *Summit*, 2000 S.D. 29 ¶¶ 21–28; 607 N.W.2d at 27–30. In *Lewis v. Moorhead*, this Court considered whether a triangular wedge of property separated from the remainder of its record holder's property by a fence had been

adversely possessed by the adjacent landowner. *Lewis*, 522 N.W.2d at 3–6. In *Lewis*, the original owner of both lots entered an oral agreement with the Moorheads to deed a portion of the property to him in exchange for services. *Id.* at 2. On the east side of the lot Moorhead was to receive, a fence ran along a portion of the property, and the parties agreed the fence line formed the eastern border of the lot. *Id.* Several years later, the record owner deeded the property to the Moorheads with a description the parties intended to include the property up to the fence line, but which fell short. *Id.* at 2, 5. Approximately nineteen years after the oral agreement, subsequent owners of the remaining property, the Lewises, surveyed the property and discovered the fence was not the lot line; rather, it enclosed a triangular wedge of property to which they held record title. *Id.* at 2. The circuit court granted the Moorheads adverse possession of the triangular wedge, and on appeal, this Court affirmed. *Id.* In its analysis, this Court stated "[t]he test is whether the person 'honestly enters into possession of land in the belief that the land is his own.'" *Id.* at 5 (quoting *Barclay v. Tussey*, 259 Ark. 238, 532 S.W.2d 193, 195 (1976)).

In *Lewis*, this Court had the opportunity to consider the interplay between the Doctrine of Acquiescence and the notion of permissive use. This Court noted that adverse possession does not require an intention to claim the land of another, but it "can be found upon ignorance, inadvertence, or mistake as to the actual boundary between two parcels," through the Doctrine of Acquiescence. *Id*. at 5 (citations omitted). This Court stated, "[t]his doctrine provides an evidentiary presumption of hostility to the occupation of property to a 'visible and ascertainable boundary' for the statutory period," and explained that "when adjoining land owners *mistakenly assume* that a fence line forms

the boundary between their properties, and the legal titleholder acquiesces in his neighbor's occupation of the land, the possession is presumed adverse." *Id.* (quoting *Lien*, 478 N.W.2d at 580); *id.* (emphasis added). Although the original grantee and the Moorheads assumed and treated the fence line as the property boundary, the Lewises argued that the Moorheads' occupation was permissive and therefore not adverse. *Id.* at 2. This Court looked to the deed that the original owner conveyed to the Moorheads to determine the extent of the permissive use[2] and found that because the Moorheads occupied the triangular wedge of land not conveyed in the deed, their occupation went beyond the permission given by the original owners and that occupation was therefore presumed hostile. *Id.* at 5–6.

Lewis v. Moorhead illustrates two important principles relevant to this case. First, the Doctrine of Acquiescence is most applicable, if not exclusively applicable, where there is "ignorance, inadvertence, or mistake" as to the true boundary line between two parcels. *Id.* at 5. Second, the Doctrine of Acquiescence cannot be used to establish the hostility element of adverse possession when the occupancy occurred through permissive use. *Id.* at 5–6.

More recently, this Court discussed the Doctrine of Acquiescence when it decided *City of Deadwood v. Summit, Inc.*, 2000 S.D. 29, 607 N.W.2d 22. This Court clarified the limitations of the Doctrine of Acquiescence in that it supplies an evidentiary

[2] In order to determine the extent of permission the original owners granted to the Moorheads before they actually deeded them the property, this Court determined that the terms of the grant were the best evidence of the permission the Moorheads had to occupy and use the land during the time between the oral agreement and the deeding of the property. That period of time was necessary to establish the statutory period for adverse possession. *Lewis*, 522 N.W.2d at 5.

presumption of hostility "and applies even though the occupancy occurred due to ignorance, inadvertence or mistake" and without the intent to claim another's land. *Id.* ¶ 22. Although the *Summit* case primarily dealt with the length of time the parties acquiesced in their mistaken understanding of the boundary line, this Court paid particular attention to the practicalities associated with applying the Doctrine of Acquiescence. *Id.* ¶ 27. This Court noted that

> [t]his doctrine is not intended to subvert neighborliness or prudence whereby a neighbor allows another to use part of his land for the neighbor's (or their mutual) benefit, and … the mere fact that a landowner allows his neighbor to occupy or use part of his land does not automatically fix the boundary between them or give the neighbor a right to use or take the property in perpetuity.

Id. (cleaned up and quotation omitted).

In deciding whether Fuoss and his predecessors occupied the Disputed Property in a hostile manner, the circuit court looked to a 2018 memorandum decision from the Sixth Judicial Circuit to determine that the Dahlke Partnership and Mann acquiesced in treating the fence line as the property boundary. R. 975–76 (citing *Kinsella v. Caldwell*, Stanley County 58-CIV16-000026, Memorandum Opinion, Patricia DeVaney, Circuit Court Judge). However, there are two significant differences that make the application of *Kinsella v. Caldwell* inapt. First, the memorandum opinion was issued before this Court decided *Gangle v. Spiry*, which solidified that permissive use cannot easily ripen into adverse possession. Second, the circuit court in *Kinsella*, had no admissible evidence before it that the adverse landowner had acquired the disputed property by permission. *Kinsella*, 58-CIV16-000026, Memorandum Opinion, pg. 3.

In *Kinsella v. Caldwell*, a fence separated neighboring landowners' properties, but it was inconsistent with their record title. *Id.* at 1–2. Kinsella testified that when she purchased the property, a neighbor told her the legal description did not match the fence line because multiple adjoining landowners had participated in a land swap for convenience. *Id.* at 2. Caldwell testified that his predecessor had given Kinsella's predecessor permission to move the fence onto his property. *Id.* at 3. Both Kinsella's and Caldwell's testimony on these issues consisted of hearsay, and therefore the circuit court could not consider them for their truth. *Id.* at 2, 3. When the circuit court addressed Caldwell's permissive use argument, it noted that without testimony from one of the parties to the original agreement to move the fence, it could not determine whether the use of the land was in fact permissive. *Id.* at 9.

In *Gangle v. Spiry*, this Court addressed whether permissive use may be used to bar subsequent possessors from claiming adverse possession of property which their predecessors occupied permissively under facts nearly indistinguishable from the case presently before this Court. *Gangle,* 2018 S.D. 55, 916 N.W.2d 119. This case should control any South Dakota court's analysis when there is direct evidence that an adverse possessor's occupation of disputed land was obtained through permission. In *Gangle*, a landowner platted his property into lots and sold two of them to Spiry in 1968. *Id.* ¶ 2. One month later, that same landowner sold Gangle's father pasture land to the east of Spiry's property. *Id.* ¶ 3. Shortly thereafter, Gangle and his father constructed a fence through a portion of Spiry's property in an attempt to separate the properties. *Id.* At the time of construction, Gangle knew Spiry's land extended east of the fence and would be cut off from the remainder of his property. *Id.* The fence enclosed less than one acre of

Spiry's land. *Id.* Sometime shortly after Gangle erected the fence, Spiry discovered the fence across his property and granted Gangle's father verbal permission to keep it there and to use the property on the east side of the fence. *Id.* ¶ 4. Spiry expressed that it was more convenient to allow Gangle to use the property, so long as he still owned it and could use it if he wanted. *Id.*

Gangle's father passed away in 1975, and Gangle gained ownership of his father's pasture land. *Id.* ¶ 5. In 1976, Spiry had his son and hired man place three fence posts where he believed the property line to be; however, Gangle continued to use the entirety of the land east of the fence. *Id.* ¶¶ 5–6. Gangle occupied and used this land for the next forty years without objection from Spiry. *Id.* ¶ 6. In its analysis, this Court cited the principle that "'[c]ontinued use which is permissive is insufficient to fulfill the requirement of… hostile use,'" *Id.* ¶ 14 (quoting *Travis v. Madden,* 493 N.W.2d 717, 720 (S.D. 1992)), and held that "Spiry's permission to Gangle's father continued through the subsequent transfer to Gangle absent proof that Gangle's permissive use changed into one of hostile occupation that would have put Spiry on notice." *Id.* ¶ 18. This Court remarked that "'only the most equivocal conduct on the part of the user'" can change a permissive use into a hostile one, and that "'every reasonable intendment should be made in favor of the true owner.'" *Id.* (quoting *Lindokken v. Paulson,* 224 Wis. 470, 272 N.W. 453, 455 (1937)).

Although this Court in *Gangle* made passing reference to some specific facts which the circuit court used as distinguishing points in its Findings of Fact and Conclusions of Law, none of those facts had any bearing on this Court's decision. *See* R. 981. First, the circuit court noted that the fence in question was put in with the

knowledge and by agreement of the parties, whereas in *Gangle*, permission was not given until after the fence was erected. *Id.* This distinguishing factor should not matter, as the determinative question is whether the occupation occurred with permission or not. In both cases, permission was granted and continued through subsequent owners. To be sure, the permission granted in the present case is even more unequivocal as all prior owners of the Fuoss Property, including Darrel and Brian Lintvedt and Sather unequivocally testified that they were granted permission to use the land and that no ownership interest changed hands due to the permissive use. R. 278, 557–59, 693–94.

Next, the circuit court found that Fuoss and his predecessors had exclusive use of the property, whereas Gangle did not. R. 981. This distinguishing characteristic apparently relates to the disputed fact as to whether Spiry's son piled unwanted tree trimmings on Gangle's property and would climb over the fence to retrieve the wood. *Gangle*, 2018 S.D. ¶ 8, 916 N.W.2d at 122. However, this fact does not factor into this Court's analysis as to whether the use was permissive or adverse in *Gangle*.

The circuit court also pointed out that in *Gangle*, Spiry drove posts into the ground to indicate where he thought the property line was seven years after he granted Gangle's father permission to use the land. R. 891. Although at first glance, this fact appears to indicate that Gangle's use was not exclusive of any other right, it is important to note that these posts were driven into the ground in 1976, and Gangle continued to occupy the land east of those posts without objection for far more than twenty years after that act of ownership. *Gangle*, 2018 S.D. ¶¶ 5–6, 916 N.W.2d at 122. This indicates that Gangle openly intended to occupy Spiry's land, which would meet the hostility requirement for adverse possession, but this Court found that because his use was still

permissive, it did not. *Id.* The fact that Spiry drove posts into the ground should not be determinative, as it still happened outside of the statutory period for adverse possession.

In the case currently before this Court, the permission that Lou Dahlke granted to Darrell Lintvedt was explicitly clear and is a controlling circumstance that precludes the Court from finding a presumption of hostility when an individual occupies land to an ascertainable boundary for the statutory period. The circuit court expressly found that "[t]here was credible testimony offered to characterize the decision to move the corner post of the old north-south fence line as 'permissive' or by 'agreement' or 'acquiescence.'" R. 952. Although those terms were used somewhat as synonyms to one another in the questioning of witnesses, they carry very different legal significance in this case. What is conclusive, is that Darrell Lintvedt, the original party who arranged to have the fence moved further away from the property line, testified that "[he] asked [Lou Dahlke] if [he] could put- - change the fence there because the water was just tearing it out all the time and stuff," and that Lou Dahlke told him "to move it to where the water won't bother you[.]" R. 264, 268. Despite Fuoss's attempt to characterize this interaction as an agreement or as acquiescence, the interaction evidences an affirmative grant of permission to move the fence and to occupy the land on the east side of the barrier. *See* R. 278 ("I had to have permission to move the fence out away from the creek a little bit."). Again, this permission is particularly evident as both Lintvedts and Sather testified that they never claimed ownership of the Disputed Property. R. 278, 557–59, 693–94. Therefore, there was *consent to the original taking of possession*, and the Doctrine of Acquiescence does not come into play under the parameters first outlined by this Court in *Lehman v. Smith*, 40 S.D. 556, 168 N.W. 857.

Because Fuoss and his predecessors only occupied the land Lou Dahlke affirmatively granted them permission to use, their possession of the land up to the visible, ascertainable boundary is not hostile under this Court's precedent. Unlike the adverse possessor in *Lewis v. Moorhead*, Fuoss and his predecessors never occupied Dahlke/Mann land other than that which Lou Dahlke granted them permission to enclose and use. Lou Dahlke surveyed the land with Lintvedt and allowed him to move the fence to a more convenient location. Lintvedt moved the fence in accordance with that permission, and the fence has been maintained in that same location ever since. Therefore, neither Fuoss nor his predecessors exceeded the grant of permission issued by the Dahlke Partnership and Mann predecessors, and because their continued use of the Disputed Property remained permissive, the Doctrine of Acquiescence is not implicated.

The case at hand is most analogous to the facts and circumstances in *Gangle*, 2018 S.D. 55, 916 N.W.2d 119. As in *Gangle*, and unlike *Kinsella*, there is direct evidence that the landowners at the time the fence moved had a verbal agreement regarding the location of the fence, wherein the record title owner granted his neighbor permission to enclose a portion of his property for convenience. All parties maintained their separate legal interests in the land, and the record title owners could continue to access the land if they wished. *See* R. 302 (Darrell Lintvedt testified, "[w]ell, they could [go into the east side] if they wanted to."). In both cases, since the original grant of permission, record title of at least one of the parcels changed hands, but the location of the fence remained the same, and the record title owner never withdrew his permission during the period in which adverse possession was claimed. Additionally, the length of time in which the land remained fenced off in both cases was significant. Based on these

strong similarities, this Court should find, as it did in *Gangle*, that Fuoss's and his predecessors' occupation and use of the Disputed Property continued to be permissive and did not establish the hostility element of adverse possession.[3]

Furthermore, this Court should look to the principles of neighborliness and common sense it quoted in *City of Deadwood v. Summit, Inc.*, 2000 S.D. 29, 607 N.W.2d 22; to do otherwise would be to discourage adjoining landowners from exercising common courtesy due to fear of surrendering legal title to a portion of property, as well as to openly allow cheating amongst neighbors. The Doctrine of Acquiescence is not intended to create hostility where permission previously existed. This Court quoted an exceptionally on-point example of how the Doctrine of Acquiescence should not work in practice: "the mere fact that a landowner allows his neighbor to occupy or use part of his land does not automatically fix the boundary between them or give the neighbor a right to use or take the property in perpetuity." *Id.* at ¶ 27 (cleaned up and quotation omitted). Just because Lou Dahlke acted neighborly by allowing his neighbor, Lintvedt, to move a fence separating their property to a more convenient location and to use the property in between does not equate acquiescence in the changing ownership of the land. *See Gangle*, 2018 S.D. 55, 916 N.W.2d 119 (finding that verbal permission to maintain a fence encroaching on a title holder's land for convenience could not establish the hostility requirement of adverse possession); *see also Summit*, 2000 S.D. at ¶ 27, 607 N.W.2d at

[3] Although this Court did not address the Doctrine of Acquiescence in the *Gangle* decision, it was unnecessary to do so based on its finding of permissive use. *See Lehman*, 40 S.D. 556, 168 N.W. 857 (indicating acquiescence is applicable only when there is no consent to the original taking of possession) (quotation omitted); *see also Lewis*, 522 N.W.2d at 5–6 (applying the Doctrine of Acquiescence only after finding that a portion of land was not occupied permissively).

29 ("[The Doctrine of Acquiescence]… is not intended to subvert neighborliness or prudence whereby a neighbor allows another to use part of his land for the neighbor's (or their mutual) benefit[.]").

Accordingly, this Court should find that Lintvedt's occupation and use of the Disputed Property was by permission and did not meet the hostility requirement necessary to establish adverse possession.

ii. Rodney Sather's occupation and use of the Disputed Property did not ripen into adverse possession.

As an alternative holding, the circuit court found that even if Lintvedt's use and occupation of the Disputed Property for more than thirty years did not establish adverse possession, Sather's hanging of "No Trespassing" signs along the Bull Creek Road fence line constituted an action hostile to the record holder, which began a period of hostile occupation. R. 982–83. This conclusion however is not sufficiently supported by the evidence presented at trial, as Plaintiff failed to establish by clear and convincing evidence that Sather acted openly hostilely or that the Doctrine of Acquiescence comes into play to create a presumption of hostility. "The test is whether the person honestly enters into possession of land in the belief that the land is his own." *Lewis*, 522 N.W.2d at 5 (internal quotation omitted).

Here, Fuoss presented no evidence that Sather acted intentionally hostile to the Dahlke Partnership's and Mann's ownership interests during his ownership of the Fuoss Property. In fact, Sather testified that when he acquired the Fuoss Property he was aware that the Disputed Property did not belong to him. R. 693–95. Furthermore, the language of the contract for deed between Lintvedt and Sather supports his testimony that he knew

(or should have known) the Disputed Property would not belong to him.[4] The contract indicated that Lintvedt made no warranties as to the existing fence line, and the circuit court found that based on the way the fence line ran, it would be obvious that the Disputed Property was not contained within his record title. R. 977.[5] The circuit court recognized that Sather (and subsequently Fuoss) took title to the Fuoss Property knowing they did not hold record title to the Disputed Property. It is important to point out that Sather's testimony was consistent with Darrel Lintvedt's, Brian Lintvedt's and Rodney Mann's testimony that the use of the Disputed Property was permissive and that they did not own that land.

Sather's placement of the "No Trespassing" signs was not a hostile act. Sather testified that he put the "No Trespassing" signs up to keep hunters off of his property and to help his neighbors, Dahlke Partnership and Mann, keep hunters off of their land as well. R. 734. Sather's testimony established that he placed the "No Trespassing" signs for purposes other than to claim title to the Disputed Property exclusive of any other right. Sather explained that those signs were not intended to evidence his ownership of the property, but were placed there only to keep hunters off his and Mann's lands. He testified that typically, neighbors appreciate it when adjacent landowners help keep hunters off their property. R. 725. He also testified that the location of the sign relied

[4] The contract for deed between Lintvedt and Sather reads in part: "Sellers make no warranties, either express or implied, as to the accuracy or location of any boundary fences or lines." R. 1006.

[5] In questioning the credibility of Sather, the circuit court made much of the fact that Sather did not explicitly tell Fuoss he would not own the Disputed Property, saying "certainly common sense would dictate" such action. However, based on the circuit court's ruling on the obviousness of the nonconforming fence line, it is not apparent that common sense would so require. R. 969.

upon by the circuit court to establish an assertion of a right hostile to the record holder was at an access area to both his and Mann's property along the road. R. 734. Common sense would dictate that this is a reasonable location to post notice to potential trespassing hunters that they are not welcome on the land. Based on the lack of evidence before it, the circuit court erred in its determination that Sather's posting of "No Trespassing" signs constituted an act adverse to the legal record owner, since Fuoss maintained the burden to show by clear and convincing evidence that Sather's use was intentionally hostile, yet provided no direct evidence of intentional hostility.

Because Fuoss failed to show by clear and convincing evidence that Sather acted intentionally hostile to the true owners' interests, he must rely on the Doctrine of Acquiescence to create the presumption of hostility, which he cannot satisfy based on the evidence presented at trial.

As discussed above, the Doctrine of Acquiescence does not apply under these circumstances. The Doctrine of Acquiescence "provides an evidentiary presumption of hostility to the *occupation of property* to a visible and ascertainable boundary for the statutory period." *Summit*, 2000 S.D. at ¶ 22. This Court's discussion and holding in *Lien v. Beard*, 478 N.W.2d 578 (S.D. 1991) is instructive on this point. In *Lien*, there was a partial fence separating two parcels which had been in place for more than forty years. *Id.* at 579. The fence did not line up with the legal boundary line, but neither party actively used the land until the adjacent land owner began repairing the fence to make actual use of it. *Id.* Prior to the neighbor's use of the land, it had not been used for thirty-three years. *Id.* at 580. Although the fence divided the properties for four decades, this

Court held that the Doctrine of Acquiescence does not apply when there is not clear and convincing evidence of actual and continuous occupancy of the disputed area. *Id.*

Although the current north-south fence enclosed a portion of Dahlke/Mann Property when Sather placed "No Trespassing" signs, Fuoss did not provide clear and convincing evidence that Sather occupied the Disputed Property during his ownership of the Fuoss Property. Sather testified and the circuit court found that Sather erected an electric fence east of the fence in question. R. 968; App. 2. That fence ran closer to the actual property line, and prevented Sather's livestock from entering the Disputed Property altogether. App. 2. Therefore, Sather did not *occupy the Disputed Property* up to the visible and ascertainable boundary, and the Doctrine of Acquiescence cannot be used to create the presumption of hostility. *See Lien*, 478 N.W.2d at 580 ("*[O]ccupancy* to a visible and ascertainable boundary for the statutory period is the controlling feature in determining hostility[.]" (internal quotation omitted) (emphasis added)); *see also Lehman*, 168 N.W. at 859 ("'[A]cquiescence in the division line, assumed or established, accompanied by *actual occupancy* in accordance therewith by the adjoining landowners… is conclusive evidence of such an agreement.'" (quoting *Keller*, 139 Iowa 383, 116 N.W. 327) (emphasis added)).[6]

[6] Although SDCL 15-3-13 provides that "[f]or purposes of constituting an adverse possession" not founded upon a written instrument, "land shall be deemed possessed and occupied… [w]here it has been protected by a substantial [e]nclosure," that statute only applies to address the occupancy element of adverse possession and not the hostility element. This Court's precedent indicates that for purposes of employing the Doctrine of Acquiescence, *actual occupancy*, is the determinative quality to create the presumption of hostility, and it may not be based on an unoccupied fenced off area as in *Lien*. SDCL 15-3-13; *Lien*, 478 N.W.2d at 580.

Because Sather did not occupy the Disputed Property to the exclusion of all others, he did not begin a period of adverse possession which Fuoss could tack onto as a subsequent owner. Therefore, because Fuoss had not occupied the Disputed Property for twenty or more years at the commencement of this action, he cannot satisfy the elements of adverse possession, and this Court should accordingly reverse the circuit court's grant of adverse possession.

II. The circuit court erred by granting Fuoss an easement under multiple theories because Dahlke Partnership and Mann showed by clear and convincing evidence that Fuoss's and his predecessors' use of Dahlke/Mann Property to access the Disputed Property was permissive and because Fuoss failed to establish the necessary unity of title.

In easement cases, this Court reviews a circuit court's finding of facts under the clearly erroneous standard, and its conclusions of law under a de novo standard. *Rancour v. Golden Reward Mining Co., LLP*, 2005 S.D. 28, ¶ 5, 694 N.W.2d 51, 53.

B. The circuit court erred in granting Fuoss a prescriptive easement because Fuoss's and his predecessors' use of the Dahlke/Mann Property for ingress and egress was permissive.

"'The elements that a claimant must prove to establish a prescriptive easement serve to protect the servient land owner by providing [the servient land owner] with notice of a prescriptive right.'" *Helleberg v. Estes*, 2020 S.D. 27, ¶ 22, 943 N.W.2d 837, 843–44 (quoting *Hamad Assam Corp. v. Novotny*, 2007 S.D. 84, ¶ 14, 737 N.W.2d 922, 926–27). A party claiming a prescriptive easement must satisfy a two-part test by clear and convincing evidence. *Id.* (citing *Rancour v. Golden Reward Mining, Co.*, 2005 S.D. 28, ¶ 7, 694 N.W.2d 51, 53–54). The first part requires that the party claiming a prescriptive easement "show an open, continued, and unmolested use of the land in the possession of another for the statutory period… of 20 years." *Id.* (internal quotation

marks omitted). The second requires a showing that "the property is being used in a manner… hostile or adverse to the owner." *Id.* (internal quotation marks omitted). "In order to satisfy the adverse or hostile requirement, the use must be to the 'physical exclusion of all others under a claim of right.'" *Id.* (quoting *Thompson v. E.I.G. Palace Mall, LLC*, 2003 S.D. 12, ¶ 7, 657 N.W.2d 300, 304). "Thus, a use that is merely permissive and not adverse to the interests of the property owner will not become a prescriptive easement." *Thompson*, 2003 S.D. 12, ¶ 7, 657 N.W.2d at 304. A party claiming a prescriptive easement "makes a prima facie case by showing an open and continuous use of another's land with the owner's knowledge, creating a presumption that such use is adverse and under a claim of right." *Id.* ¶ 8 (citing *Kougl v. Curry*, 73 S.D. 427, 432, 44 N.W.2d 114, 117 (S.D. 1950)). "However, the presumption of a prescriptive right may be rebutted by proof that the use was by permission or not under a claim of right."[7] *Id.* To find a prescriptive easement when land has been used under permission "would be to adjudge that common neighborliness may only be indulged under penalty of encumbering one's property." *First Church of Christ, Scientist v. Revell*, 2 N.W.2d 674, 676 (S.D. 1942).

[7] This principle by which permissive use is a defense to the presumption of a prescriptive right is found in case law relating specifically to easement claims. The circuit court in the case currently before this Court improperly applied this defensive standard to the Doctrine of Acquiescence when it found adverse possession when it should have instead applied the principles found in adverse possession case law advising that the lack of permissive use is a prerequisite to applying the Doctrine of Acquiescence. R. 979. *See supra* Section I(A)(i). Although prescriptive rights and adverse possession are similar, not all principles that apply to one apply to the other. This makes sense, considering the drastic differences in the effects of prescriptive rights and adverse possession (i.e. using another's land versus obtaining full ownership of another's land).

The first part of the prescriptive easement analysis is not in dispute here. Lintvedt, Sather, and Fuoss used the Dahlke/Mann Property for ingress and egress openly, continuously, and unmolested for a combined total of more than twenty years. The inquiry of whether a prescriptive easement was created turns on the second part of the analysis—that is, whether the use was hostile or not. Dahlke/Mann Property owners knew of Fuoss's and his predecessors' use, thus creating the presumption that the use was adverse. However, Dahlke Partnership and Mann presented clear and convincing evidence that the use was permissive, thereby rebutting the presumption of hostility.

The circuit court erred in concluding that Fuoss property owners' use of the Dahlke/Mann Property for ingress and egress was not permissive based on the evidence presented at trial. Although Lintvedt's initial use of the Dahlke/Mann Property for ingress and egress may have been under a claim of right, he sought permission for such use before he openly and continuously used the land for more than twenty years. Lintvedt began driving over the Dahlke/Mann Property to access his land upon taking ownership of the Fuoss Property. R. 270. At the same time Lintvedt asked for permission to move the fence onto Dahlke/Mann Property, he asked Lou Dahlke, owner of the Dahlke/Mann Property, if he could put a gate in at the location he used to access the Fuoss Property. R. 274. This interaction occurred within a few years after Lintvedt took possession of the property. R. 265, 299. By asking for permission, Lintvedt expressly recognized that the fence line prior to moving it was up against Dahlke/Mann Property and that the land he drove over belonged to another. R. 290. When requesting permission to place a gate in the north-south fence, Lintvedt intrinsically sought permission to traverse Dahlke/Mann Property to access the Fuoss Property and Disputed

Property through the newly installed gate. Likewise, when Lou Dahlke granted Lintvedt permission to place a gate in the fence, he was granting him permission to use his property for ingress and egress. Lintvedt testified, "[Lou Dahlke] said either put that fence down or build a gate and go through it." R. 289. This statement constitutes clear and convincing evidence that Lou Dahlke granted Lintvedt and his successors permission to access the land east of the fence by traversing over his land. Based on this evidence, the circuit court clearly erred when it found that Lintvedt never asked for permission to use Dahlke/Mann Property for ingress and egress.[8] Furthermore, Sather testified that he understood his ability to access the Fuoss Property in this manner was under a gentlemen's agreement, indicating that such authority was obtained through permission. R. 695–96. Lintvedt's, Sather's, and Fuoss's use of Dahlke/Mann Property for ingress and egress has been permissive until 2018 and not under a claim of right; therefore any presumption of hostility which may arise from their open and continuous use of the land is appropriately rebutted.

Plaintiff presented no credible evidence that Lintvedt's predecessors openly and continuously used the Dahlke/Mann Property to access the Fuoss Property which could be tacked onto Lintvedt's brief use. Therefore, Fuoss has not met his burden to show by clear and convincing evidence that owners of the Fuoss Property openly, continuously, and adversely used Dahlke/Mann property for ingress and egress for the requisite twenty

[8] The circuit court discounted portions of Lintvedt's testimony that used the word "permission" because they typically came through affirmative responses to leading questions. R. 967. However, those leading questions attempted to clarify that the situation described herein constituted Lou Dahlke granting Lintvedt permission to traverse his property for ingress and egress to the Disputed Property and Fuoss Property.

years, and did not establish a viable claim for a prescriptive easement. Accordingly, this Court should reverse the circuit court's decision granting Fuoss a prescriptive easement.

B. The circuit court erred in granting Fuoss both an easement implied from prior use and an easement by necessity because Plaintiff failed to show unity of title and that the use was well established at the time of severance of title.

The common law recognizes two types of implied easements, both of which require that the dominant and servient tracts at one time had unity of title. To obtain an easement implied from prior use, Fuoss was required to establish four elements:

> (1) the relevant parcels of land had been in unitary ownership;
> (2) the use giving rise to the easement was in existence at the time of the conveyance dividing ownership of the property;
> (3) the use had been so long continued and so obvious as to show that it was meant to be permanent; and
> (4) at the time of the severance, the easement was necessary for the proper and reasonable enjoyment of the dominant tract.

Heumiller v. Hansen, 2020 S.D. 56, ¶ 16 (citing *Springer v. Cahoy*, 2012 S.D. 32, ¶ 7, 814 N.W.2d 131, 133). An easement by necessity can arise when a grantor conveys an inner portion of land which is surrounded by land owned by the grantor or by the grantor and others, and it will typically entitle the landlocked grantee to a right-of-way across the grantor's retained land for purposes of ingress and egress. *Springer v. Cahoy*, 2013 S.D. 86, ¶ 8, 841 N.W.2d 15, 19 (quoting *Thompson*, 2003 S.D. 12 ¶ 11, 657 N.W.2d at 304). "The necessity for access over the grantor's land must have arisen at the time of severance." *Id.* (citing *Magnuson v. Cossette*, 707 N.W.2d 738, 746 (Minn. Ct. App. 2006)). "'A party seeking an implied easement has the burden of proving the existence of the easement by clear and convincing evidence.'" *Springer*, 2012 S.D. at ¶ 7; 814 N.W.2d at 134. Here, Fuoss failed to meet this burden for either type of easement.

To establish unity of title, Fuoss presented evidence that on May 17, 1948, Clarence and Anna Marie Hullinger conveyed the Fuoss Property to Leo Nichols. App. 41. Fuoss also presented that on June 17, 1948, Clarence and Anna Marie Hullinger conveyed the Dahlke/Mann Property to Ludwig and Florence Dahlke. App. 39. The circuit court also received evidence that Laura and Jasper Hullinger entered a contract for deed with Ludwig and Florence Dahlke on June 24, 1946. App. 37-38. This Court has not previously determined whether the issuance of a contract for deed severs unity of title or if severance occurs upon issuance of the deed. *Heumiller*, 2020 S.D. at ¶ 20 n.2. However, such a determination is unnecessary here because Fuoss presented no evidence that on May 17, 1948, Clarence and Anna Marie Hullinger held legal title to the Dahlke/Mann Property. Presumably, Clarence and Anna Marie Hullinger acquired the Dahlke/Mann Property from Laura and Jasper Hullinger sometime between June 24, 1946, and June 17, 1948, but the exact date is unknown. It is possible they could have acquired such property between conveying the Fuoss Property to Leo Nichols and conveying the Dahlke/Mann Property to the Dahlkes. Without evidence of when Clarence and Anna Marie Hullinger acquired the Dahlke/Mann Property, there is not clear and convincing evidence of unity of title.

In his attempt to claim an easement implied from prior use, Fuoss also failed to establish that the use in question existed at the time of severance of title and that it was so long continued and so obvious to show that it was meant to be permanent. In determining whether the use of the land had been long continued, the circuit court relied on a 1948 United States Geological Survey aerial photograph dated October 10, 1948, to find that a dirt trail (herein referred to as "the use") existed at the time of the supposed

severance of title. R. 986; App. 52. However, the photograph in combination with the testimony regarding the photograph does not constitute clear and convincing evidence of the use. Todd Fuoss, who obtained the photograph from the internet and who introduced the photograph into evidence, testified that the "line," presumably what the circuit court determined to be a dirt trail, was the fence line and not evidence of the use. R. 404. This testimony seems reasonable considering the continuation of the "line" past the location where the use ends.[9] There was also testimony that it is difficult to distinguish what the "line" is, and that it may have been a cow trail or the tracks from an old wagon train travelled at one time and not even in the location in question. R. 294-95. Essentially, the 1948 aerial photograph is not clear and convincing evidence of anything. Based on the conflicting testimony and the unreliability of the contents and date of the aerial photograph, the circuit court erred in finding that the "line" on the 1948 aerial map constituted clear and convincing evidence that the use existed at the time of severance of title and that the use had been so long continued to establish that it was meant to be permanent.

With regard to his easement by necessity claim, not only did Fuoss fail to establish the necessary unity of title, but there was evidence presented at trial that such an easement is not in fact necessary. David Brost, a neighboring landowner, indicated that he put in a crossing on Bull Creek using culverts and that he maintains it in such a way

[9] If the "line" in the photograph does depict a fence line, it suggests one of two conclusions: (1) the date on the aerial photograph is incorrect because multiple parties with first-hand knowledge of the land in the late 1960s and early 1970s testified that the fence line ran much closer to Bull Creek and was not moved to that location until the late 1960s ore early 1970s; or (2) the fence had previously been moved away from Bull Creek, but had been moved to the property line before Lintvedt took possession of the property.

that he can drive a vehicle over Bull Creek. R. 532. Lintvedt also testified that he could cross the creek on a horse to access the Fuoss Property west of Bull Creek and that he believes he crossed it on a four-wheeler at times. R. 296. Based on this testimony, there is evidence in the record that at the time of severance, an easement for ingress and egress was not necessary for the reasonable enjoyment of the Fuoss Property, and Fuoss failed to meet his burden on this issue by clear and convincing evidence.

CONCLUSION

This case presents this Court with extremely powerful and compelling facts of permissive use. All of the prior owners of the Fuoss Property, namely Darell Lintvedt, Brian Lintvedt, and Rodney Sather, testified that they did not own the Disputed Property and that they had permission from the Dahlke/Mann Property owners to move a portion of an existing fence, to use the Dahlke/Mann Property east of the new fence line, and to drive over Dahlke/Mann Property to access that land. Rodney Mann confirmed that testimony. Dahlke Partnership and Mann request this Court apply the overwhelming evidence of permissive use in favor of a landowner who holds record title, exercises control over the access of the property, and maintains financial responsibility over the land. To find otherwise would subvert the neighborliness and decency that this Court venerated in *City of Deadwood v. Summit*, 2000 S.D. 29, ¶ 27, 607 N.W.2d 22, 29–30.

Because Fuoss failed to show by clear and convincing evidence that he occupied the Disputed Property under a claim of title exclusive of any other right, this Court should reverse the circuit court's grant of adverse possession to Fuoss. Additionally, because Fuoss failed to establish by clear and convincing evidence that the use of Dahlke/Mann Property to access land east of the north-south fence was hostile, this Court should

reverse the circuit court's grant of a prescriptive easement. Finally, because Fuoss failed to establish the necessary unity of ownership and because there was a lack of clear and convincing evidence relating to the prior use and necessity of an implied easement, this Court should reverse the circuit court's grant of an implied easement under both of these theories. This Court should enter an order denying Fuoss's request for adverse possession and an easement, and remand this matter to the circuit court for consideration of Defendants' counterclaims which the circuit court did not address based on its erroneous finding of adverse possession.

REQUEST FOR ORAL ARGUMENT

Dahlke Partnership and Mann hereby request oral argument.

Dated this 20th day of November, 2020

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ Catherine A. Seeley

Marty J. Jackley
Catherine A. Seeley
Attorneys for Defendant
111 West Capitol Ave., Suite 230
Pierre, South Dakota 57501
(605) 494-0105
mjackley@gpna.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66. The font is Times New Roman size 12, which includes serifs. The brief is 33 pages long and the word count is 9,957 exclusive of the Cover, Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated: November 20, 2020

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

By: /s/ Catherine A. Seeley_____

Marty J. Jackley
Catherine A. Seeley
Attorneys for Defendant
111 West Capitol Ave., Suite 230
Pierre, South Dakota 57501
Telephone: (605) 494-0105
E-mail: mjackley@gpna.com

CERTIFICATE OF SERVICE

I hereby certify on November 20, 2020, a true and correct copy of Appellant's Brief and its Appendix was filed and served through U.S. Mail and email upon the following individuals:

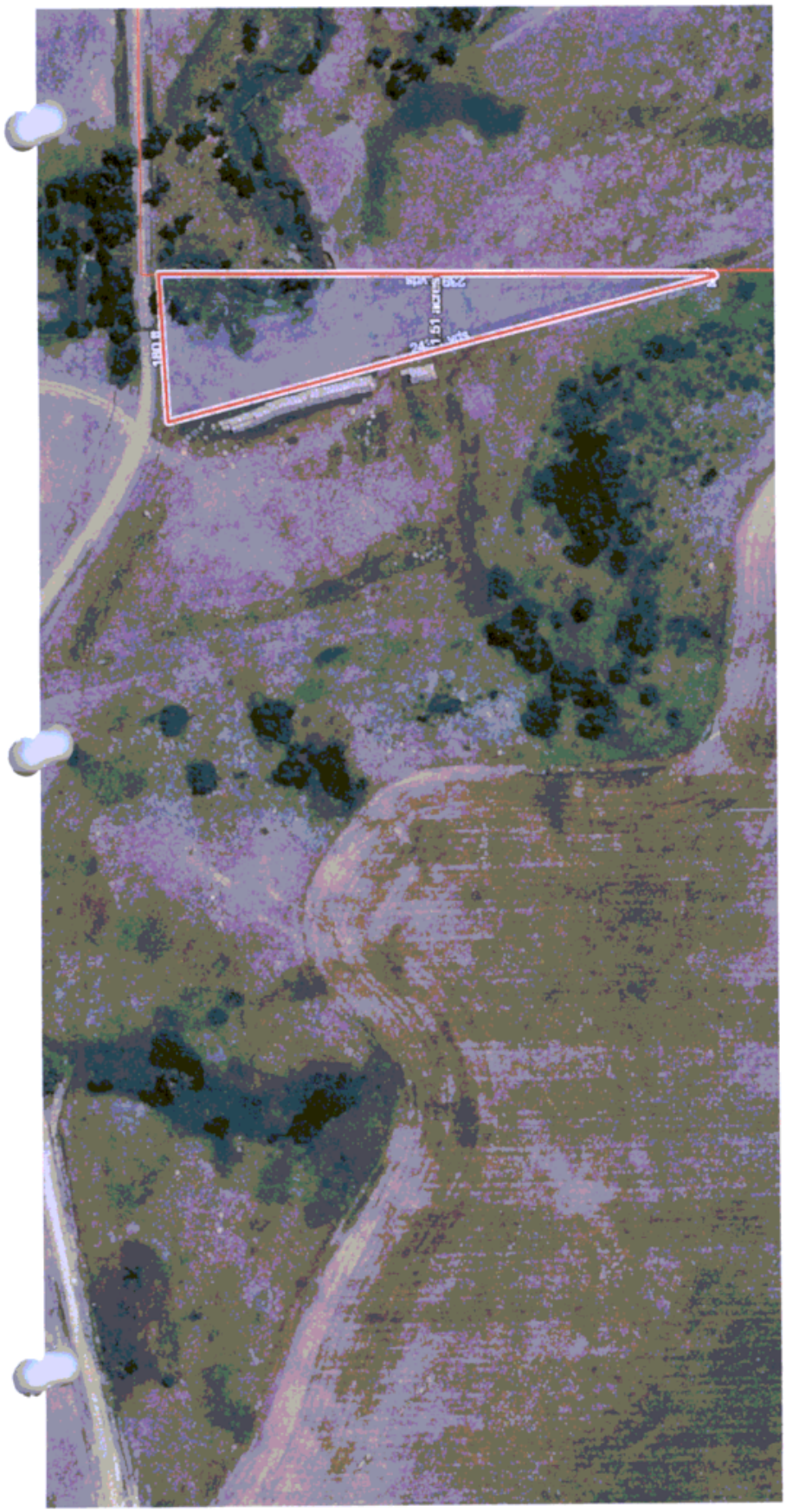
Robert C. Riter
A. Jason Rumpca
Riter Rogers LLP
319 S Coteau St. - PO Box 280
Pierre SD 57501
r.riter@riterlaw.com

Dated: November 20, 2020

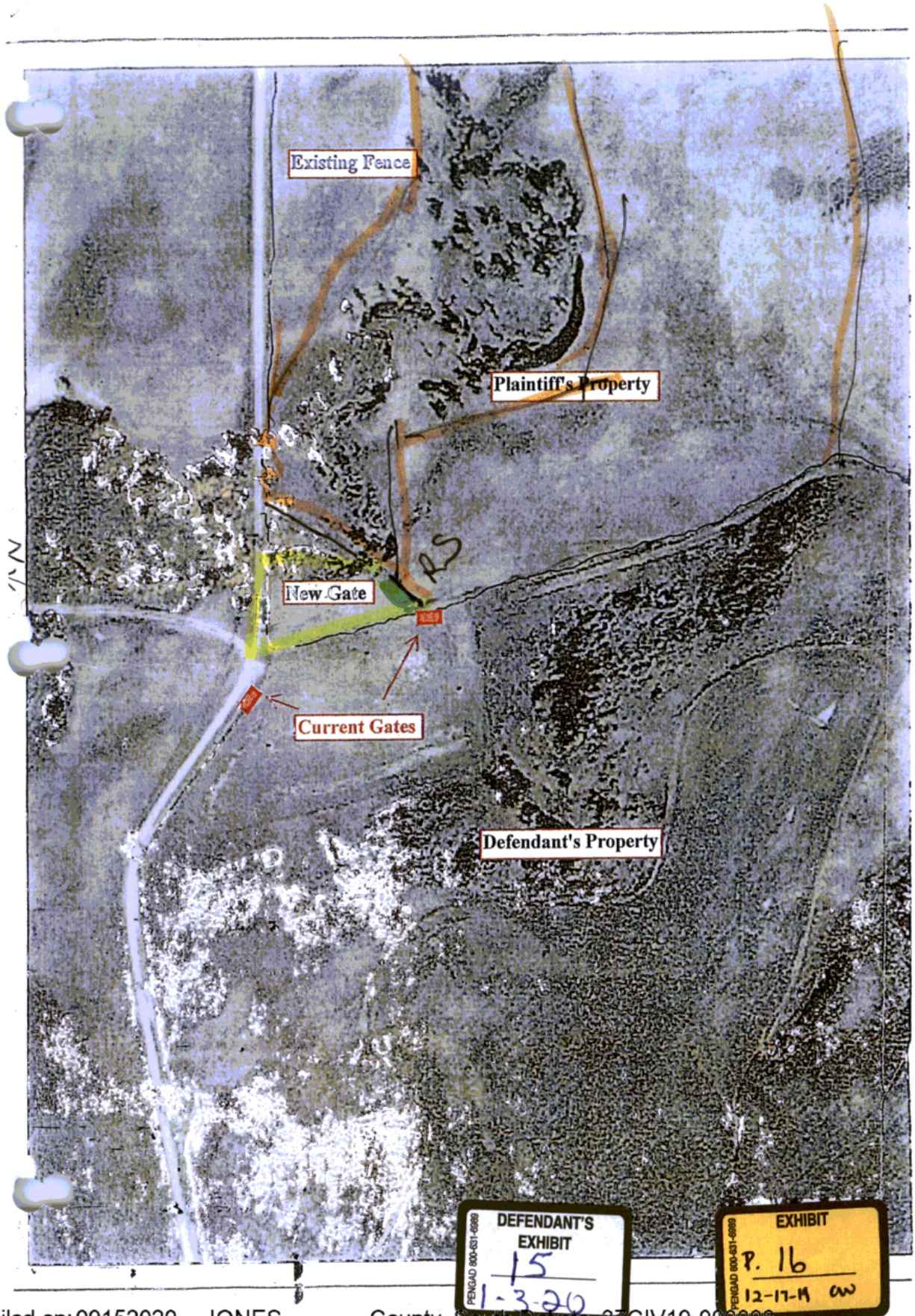
___/s/Catherine A. Seeley_____
Marty J. Jackley
Catherine A. Seeley

APPENDIX

Table of Contents



DEFENDANT'S EXHIBIT
1-3-20


Existing Fence
Plaintiff's Property
New Gate
Current Gates
Defendant's Property
DEFENDANT'S EXHIBIT 15 1-3-20
EXHIBIT P. 16 12-17-19 aw

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF JONES	)	SIXTH JUDICIAL CIRCUIT
TODD FUOSS,	)	37CIV19-000008
	)	
Plaintiff,	)	
	)	
vs.	)	JUDGMENT AND
	)	ORDER FOR
DAHLKE FAMILY LIMITED PARTNERSHIP	)	PLAINTIFF
	)	
AND	)	
	)	
RODNEY L. MANN,	)	
	)	
Defendants.	)	

A Court Trial in the above-entitled matter was held before the Honorable Bridget Mayer, Circuit Court Judge, on the 2nd and 3rd days of January, 2020, at the Jones County Courthouse in Murdo, South Dakota; Plaintiff, Todd Fuoss, appeared personally and by his attorneys Robert C. Riter and A. Jason Rumpca of Riter Rogers, LLP, of Pierre South Dakota; Defendants, Dahlke Family Limited Partnership and Rodney L. Mann, appeared personally and by their attorney Marty J. Jackley of Gunderson, Palmer, Nelson & Ashmore, LLP, of Pierre, South Dakota; the Court having heard the evidence adduced by the witnesses and having reviewed the file and pleadings herein and being fully advised in the premises; and the Court having made and entered its Findings of Fact and Conclusions of Law, now, therefore, it is hereby

ORDERED, ADJUDGED and DECREED that Plaintiff is granted adverse possession of that portion of the Northeast Quarter of Section 9, Township 3 South, Range 30 East of the Black Hills Meridian, Jones County, South Dakota currently owned by Defendants located east of the current north-south boundary fence between and separating that quarter of ground from the Northwest Quarter of Section 10, Township 3 South, Range 30 East of the Black Hills Meridian,

Jones County, South Dakota, which is hereby adjudicated and declared to be the property of the Plaintiff; it is further

ORDERED, ADJUDGED and DECREED that Plaintiff and his heirs, successors and assigns shall be the owner in fee simple and have the sole and exclusive rights to possess, use, occupy and enjoy that portion of property referenced in the preceding paragraph pursuant to Plaintiff's and his predecessor's adverse possession thereof, all free of any impairment, disturbance or interference by Defendants or their heirs, successors and assigns; it is further

ORDERED, ADJUDGED and DECREED that the real property owned by Defendants described as "The Northeast Quarter of Section 9, Township 3 South, Range 30 East in Jones County, South Dakota" as located immediately adjacent to the west side of the above referenced boundary fence is and shall be subject to a prescriptive easement, easement by implication and prior use, and easement by necessity for Plaintiff's ingress and egress over the northeast corner of Defendants' property. The easement follows the current dirt trail which is approximately ten foot in width from the current metal gate along the east-west fence on the north side of Section 9 parallel to Bull Creek Road to the current metal gate along the north-south boundary fence separating the Northeast Quarter of Section 9 and the Northwest Quarter of Section 10. The easement is permanent and perpetual; it is further

ORDERED, ADJUDGED and DECREED that the permanent easement is granted to Plaintiff and his heirs, successors, assigns and grantees who shall have the right to ingress and egress over the northeast corner of Defendants' property, free of any impairment, disturbance or interference by Defendants or their heirs, successors and assigns; it is further

ORDERED, ADJUDGED and DECREED that the permanent easement ordered hereunder shall be appurtenant to the Dominant Estate which is the Northwest Quarter of Section

10 to run with both that Dominant Estate and the Servient Estate, which is the Northeast Quarter of Section 9, both as herein described and shall be binding upon and inure to the respective parties hereto, their heirs, successors, grantees or assigns; it is further

ORDERED, ADJUDGED and DECREED that a survey and corresponding plat of the land adversely possessed by Plaintiff, and a survey of the easement area extending over the northeast corner of the Northeast Quarter of Section 9 west of the boundary fence referenced above may be completed at Plaintiff's expense and without any impairment, disturbance or interference by Defendants. Defendants shall remove any hay bales, obstacles or padlocks which may hinder the ability of the surveyor to conduct the survey. The surveyor shall file and record his plat confirming the line of division and the legal description of that portion of the Northeast Quarter of Section 9 to which the Plaintiff shall hereafter be considered the fee simple owner and entitled to rightful possession thereof. Upon completion of the plat, and the survey preparation of the easement area on the west side of the boundary fence, this matter shall be presented to this Court by Plaintiff, with notice to Defendants, so Defendants can be heard upon the survey of the access easement line. Upon further Order of the Court, the plat and any survey map shall be recorded in the Office of the Register of Deeds for Jones County, South Dakota; it is further

ORDERED, ADJUDGED and DECREED that Defendant's counterclaim seeking a declaratory judgment that Plaintiff must complete fencing in compliance with SDCL ch. 43-23, or in the alternative, that Defendants' may complete the required fencing at Plaintiff's expense, is hereby DENIED; it is further

ORDERED, ADJUDGED and DECREED that Defendant's request for injunctive relief enjoining Plaintiff from trespassing on the property in question is hereby DENIED; it is further

ORDERED, ADJUDGED and DECREED that this Judgment shall be considered and is a final Judgment and Order of the Court.

Signed: 9/25/2020 4:16:16 PM

BY THE COURT:

BRIDGET MAYER
CIRCUIT COURT JUDGE

Attest:
Feddersen, Judy
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF JONES	)	SIXTH JUDICIAL CIRCUIT
TODD FUOSS,	)	37CIV19-000008
	)	
Plaintiff,	)	
	)	COURT'S FINAL
vs.	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
DAHLKE FAMILY LIMITED PARTNERSHIP	)	
	)	
AND	)	
	)	
RODNEY L. MANN,	)	
	)	
Defendants.	)	

A Court Trial in the above-entitled matter was held before the Honorable Bridget Mayer, Circuit Court Judge, on the 2nd and 3rd days of January, 2020, at the Jones County Courthouse in Murdo, South Dakota; Plaintiff, Todd Fuoss, appeared personally and by his attorneys Robert C. Riter and A. Jason Rumpca of Riter Rogers, LLP, of Pierre South Dakota; Defendants, Dahlke Family Limited Partnership and Rodney L. Mann, appeared personally and by their attorney Marty J. Jackley of Gunderson, Palmer, Nelson & Ashmore, LLP, of Pierre, South Dakota; the Court having heard the evidence adduced by the witnesses and having reviewed the file and pleadings herein and being fully advised in the premises; the Court makes and files herein the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Todd Fuoss is a resident of Hughes County, South Dakota.
2. Dahlke Family Limited Partnership is a South Dakota limited partnership with its principal place of business in Murdo, South Dakota.

3. Rodney L. Mann is a resident of Jones County, South Dakota, and a partner of Dahlke Family Limited Partnership.

4. Todd Fuoss owns land in Jones County, including that described as follows:

> All of Section 10, Township 3 South, Range 30 East of the Black Hills Meridian, Jones County, South Dakota.

5. Dahlke Family Limited Partnership owns land in Jones County, including that described as follows:

> The Northeast Quarter of Section 9, Township 3 South, Range 30 East in Jones County, South Dakota.

6. Todd Fuoss initiated a declaratory judgment action: a) claiming adverse possession of a disputed strip of property bordering between the two properties described above of which the record owner by legal description are the Defendants; b) requesting a prescriptive easement for ingress and egress over Defendants' property through the northeast corner of Defendants' property along an established trail; and c) seeking a temporary restraining order and injunctive relief requiring Defendants provide immediate access to Fuoss' property to care for his cattle.

7. Defendants resisted Plaintiff's requested relief, alleging generally that Fuoss' use of the disputed property was permissive and that Fuoss' access for ingress and egress over Defendants' property was likewise permissive.

8. Defendants counterclaimed pursuant to SDCL § 43-23-2, requesting Fuoss construct a boundary fence consistent with the legal description of the properties.

9. The Court granted a Temporary Restraining Order and the parties thereafter stipulated to an agreement regarding access during the interim of this action.

10. Both parties testified at trial. The son of a former landowner, a former landowner, a neighbor and the Sheriff also testified. One former landowner's trial deposition was received into evidence along with multiple exhibits.

11. During the trial, the Court granted Fuoss' oral motion to amend the pleadings to conform to the evidence pursuant to SDCL § 15-6-15(b), allowing Fuoss to pursue additional claims of an easement implied from prior use and an easement by necessity.

12. 248th Street, or "Bull Creek Road" as the parties refer to it, runs east-west along the northern border of Sections 9 and 10. This is the only road adjacent to the subject properties.

13. The property owned by Fuoss in Section 10 is separated by Bull Creek which splits the property into two parcels. Approximately 40 percent of Section 10 is on the west side of Bull Creek.

14. Bull Creek meanders generally in a diagonal direction through Section 10, entering near the northwest corner of Section 10 and traversing southeast.

15. Bull Creek is a tributary to the White River. The banks of Bull Creek are generally rough and often steep. It is not uncommon for Bull Creek to flood during the spring or other wet seasons.

16. It is generally not possible to cross Bull Creek in Section 10 with a pickup or tractor even during a dry year. Although it may be possible to cross Bull Creek in Section 10 with a horse or four-wheeler in certain spots during a dry year, it cannot be crossed by any means during spring flooding or any other wet seasons.

17. No evidence of a survey was introduced.

18. The Zickrick Township plat map depicts the boundary between Sections 9 and 10 to be a straight north-south line which is generally consistent with the straight-line grid platting of all of Jones County.

19. Sufficient evidence was introduced to establish that the current north-south boundary fence separating Fuoss' land to the east and Defendants' land to the west is not on a straight north-south line. It is obvious that the fence has never been right on the section line.

20. The Court finds that the distance between the banks of Bull Creek and the current north-south boundary fence is likely between 50 and 100 feet depending on location. The close proximity between Bull Creek and the current north-south boundary fence only exists along the northern most portion of the fence, a distance likely less than 200 feet. The distance between Bull Creek and the fence gets greater farther south along the fence as Bull Creek meanders to the southeast.

21. As the north-south fence goes south it traverses to the east around a large hill before traversing back to the west and finally establishing what appears to be a straight north-south line.

22. There is likely some land within the legal description of Section 10 that is on the west side of the north-south boundary fence by the large hill.

23. There is likely some land within the legal description of Section 9 that is on the east side of the north-south boundary fence by Bull Creek.

24. This general area of Jones County is rough country and it is common practice that neighbors establish boundary fences that traverse steep hills, deep draws, or rough creek

banks in order that the fences hold to serve the purpose of keeping cattle off neighboring properties.

25. Because of the proximity between Bull Creek and the north-south boundary fence between Sections 9 and 10, Fuoss and predecessor owners of Section 10 have gained access to the portion of Section 10 on the west side of Bull Creek by way of a dirt trail that cuts across the northeast corner of Defendants' property in Section 9. The dirt trail begins at an approach off from Bull Creek Road a short distance west from the corner-post of the current north-south boundary fence. The dirt trail travels parallel to the fence for a couple hundred feet and ends at a metal gate along the north-south boundary fence.
26. A 1948 U.S.G.S. aerial map clearly shows a well-established dirt trail. The dirt trail was a visible easement on the west side of the north-south boundary fence leading from the corner on the northeast corner of Section 9 and connecting with the northwest corner of Section 10, so as to allow access to the portion of Section 10 west of Bull Creek.
27. That same dirt trail appears in more recent maps as well. The Court finds that the dirt trail that exists today had already been visibly established by 1948.
28. Defendants have traditionally used the area of property that the dirt trail traverses through as a hay stackyard.
29. In 2016, Defendants fenced in the hay stackyard and put a gate across the approach to the dirt trail.
30. Later in 2016, Defendant Rodney Mann padlocked the gate across the approach to the dirt trail during deer hunting season in an effort to block access to hunters.
31. In a letter dated December 31, 2018, Defendants, through legal counsel, sent a letter to Fuoss advising of a Notice of Trespass and Demand for Fencing.

32. In June of 2019, Defendant padlocked the gate across the approach to the dirt trail. In response, Fuoss constructed a new wire gate along the east-west fence along Bull Creek Road between Bull Creek and the corner post of the north-south boundary fence so that he could access his cattle located on the portion of Section 10 west of Bull Creek.
33. On June 20, 2019, Defendant padlocked the new wire gate that Fuoss had constructed. Fuoss then cut the padlocks to access his property to check water and otherwise care for his cattle.
34. On June 26, 2019, Fuoss discovered that Defendant drove five (5) wood posts into the ground in front of the new wire gate and stapled the gate to the posts.
35. Fuoss initiated this action on June 27, 2019.
36. Defendant soon thereafter removed the five (5) wood posts per agreement of the parties.
37. Defendant began stacking hay bales in the hay stackyard across the trail near the southern gate entrance to Section 10 later in 2019 after the agreement was reached that Fuoss could access the subject property through the new wire gate.
38. The only access Fuoss currently has to the portion of Section 10 on the west side of Bull Creek is through the new wire gate between Bull Creek and the corner post of the north-south boundary fence.
39. On May 17, 1948, Clarence Hullinger and Anna Marie Hullinger conveyed Section 10 to Leo Nichols by warranty deed.
40. On February 4, 1964, Darrel Lintvedt executed a contract for deed to Section 10 with Kenneth and Loma Nichols.
41. On September 16, 1971, Kenneth and Loma Nichols conveyed Section 10 to Darrel Lintvedt by warranty deed.

42. On June 4, 1996, Rodney Sather executed a contract for deed to Section 10 with Darrel Lintvedt and Mary Lou Lintvedt.

43. Paragraph 16 of the contract for deed between the Lintvedt's and Rodney Sather states in part:

> Sellers make no warranties, either express or implied, as to the accuracy or location of any boundary fences or lines.

44. On May 14, 2003, Rodney Sather conveyed Section 10 to Todd Fuoss by warranty deed.

45. The warranty deed conveying Section 10 from Rodney Sather to Todd Fuoss stated in part:

> The above conveyance is made subject to easements, reservations, mineral reservations, mineral conveyances, current fence location, as well as other exceptions of record, and statutory easements for road right-of-ways.

46. On June 24, 1946, Laura Hullinger and Jasper Hullinger executed a contract for deed to the Northeast Quarter of Section 9 with Ludwig Dahlke and Florence Dahlke.

47. On June 17, 1948, Clarence Hullinger and Anna Marie Hullinger conveyed the Northeast Quarter of Section 9 to Ludwig Dahlke and Florence Dahlke by quitclaim deed.

48. The Northeast Quarter of Section 9 has remained in the Dahlke family to the present day. On March 22, 1999, a one-half interest in the Northeast Quarter of Section 9 was conveyed by warranty deed from Earl D. Dahlke to the Dahlke Family Limited Partnership.

49. Rodney Mann's father, Wesley Mann, also had an ownership interest in the Northeast Quarter of Section 9. He is now deceased.

50. The Dahlke Family Limited Partnership and/or Rodney Mann himself own about 8,000 acres in this territory. The only tract of land they own south of Bull Creek Road is the Northeast Quarter of Section 9.

51. Rodney Mann pays taxes and insurance on the Northeast Quarter of Section 9 pursuant to the area of land identified in the legal description of the deed to the property.

52. Rodney Mann's grandfather, Ludwig ("Lou") Dahlke, owned the Northeast Quarter of Section 9 when Darrel Lintvedt executed the contract for deed to Section 10 in 1964.

53. Darrel Lintvedt accessed the portion of Section 10 on the west side of Bull Creek by way of the dirt trail that cut across the northeast corner of the Northeast Quarter of Section 9 on the west side of the north-south boundary fence.

54. There was a fence let down located along the north-south boundary fence at approximately the same location as the current Powder River metal gate. Darrel accessed his land through the fence let down.

55. During the first years of Darrel Lintvedt's ownership of Section 10 in the mid-1960's, the north-south boundary fence washed out whenever Bull Creek flooded.

56. Darrel Lintvedt thereafter asked Lou Dahlke if he could move the fence west and Lou agreed he could move it to where the water would no longer wash it out.

57. Darrel Lintvedt had also asked Lou Dahlke if he could put in a wire gate and Lou agreed he could do that too.

58. Sometime in the late 1960's or early 1970's, Darrel's son, Brian Lintvedt, and his hired man moved the corner post of the north-south boundary fence further to the west, they installed a wire gate at the approximate location of the old fence let down, and they straightened out the new north-south boundary fence between the new corner post and the new wire gate located a couple hundred feet to the south.

59. Brian Lintvedt drew a line on a copy of Plaintiff's Exhibit 16, which became Defendant's Exhibit 16A. The line drawn depicts the location of the old north-south boundary fence.

The south end of the line is located at the current Powder River metal gate and the line extends to the north to the approximate location of the new wire gate installed by Fuoss in June of 2019.

60. The Court finds Brian Lintvedt credible and the triangle-shaped sliver of property gained by Darrel Lintvedt in the late 1960's or early 1970's is accurately depicted in Defendants' Exhibit 16A.

61. There was testimony describing the decision to move the corner post west as "permissive" and also as by "agreement" or "acquiescence."

62. Both parties benefited from moving the fence because the new fence did not thereafter wash out and it kept Darrel Lintvedt's cattle on Darrel's property and off of Lou's property.

63. The Court finds that Darrel Lintvedt and Lou Dahlke mutually agreed to move the boundary fence and mutually recognized the new fence line as the boundary.

64. The amount of property involved is likely less than an acre.

65. Such verbal agreements between neighbors are common practice and consistent with fencing in rough country like southern Jones County.

66. Dave Brost and his family owned property that neighbors what is now owned by Todd Fuoss. He testified that when his brother owned the property there were places where they changed some of the fence. He testified that you use common sense and you talk to your neighbor and decide where the fence should go to miss bad draws, stay on a ridge or avoid a creek. He testified that sometimes you have to fence across Bull Creek, but it would be impossible to fence down the middle of Bull Creek.

67. The land east of the new north-south boundary fence was exclusively used by Darrel Lintvedt, primarily to graze cattle. The Dahlke's and Mann's to this day have never utilized the land on the east side of the new north-south boundary fence for any purpose.

68. Throughout the 30 plus years that Darrel Lintvedt owned Section 10, he accessed the portion of Section 10 located to the west side of Bull Creek by way of the dirt trail that cut across the northeast corner of the Northeast Quarter of Section 9 on the west side of the north-south boundary fence.

69. During Darrel Lintvedt's trial deposition he described in multiple ways an unfettered ability to use the dirt trail to access his land. He never asked for permission to use the dirt trail and he even brought big equipment over the trail for ingress and egress when constructing a dam on Section 10 shortly after constructing the new north-south boundary fence. The only references to his use of the trail as "permissive" were typically by way of affirmative responses to leading questions. The Court finds that Darrel Lintvedt's use of the trail was not permissive.

70. Rodney Sather purchased Section 10 from Darrel Lintvedt on June 4, 1996.

71. Rodney Sather and his family hunted on the property. Rodney Sather immediately began to utilize the land at issue, exclusive to the Dahlke's and Mann's. Again, under Sather's ownership, Dahlke and Mann's never used this property for any purpose whatsoever.

72. Shortly after Rodney Sather purchased the subject property from Darrel Lintvedt he posted "No Trespassing" signs on his property along Bull Creek Road, including on the current corner post of the north-south boundary fence between Sections 9 and 10. The signs state: "POSTED – Private – Wildlife Management Area – NO TRESPASSING – Thanks – Prairie Lands – R. J. Sather."

73. The NO TRESPASSING sign has remained on the subject corner post from 1996 to present.

74. Rodney Sather grazed bison (the parties referred to the bison as buffalo) on the property for a couple years. He put up electric buffalo fencing in the pasture, sectioning off ground to the west of Bull Creek and to the east of Bull Creek, running the electric fence near the barbed wire perimeter and on the tops of the west and east banks of Bull Creek. He ran the electric buffalo fencing across Bull Creek in the northwest corner of Section 10 and he squared off Bull Creek with the electric fencing along the southern border of Section 10. He fenced in this manner so that he could graze the buffalo in Bull Creek during dry times of year and he could prevent them from accessing Bull Creek during the flood-prone times of year. The Court finds this was not done to establish or reestablish any legal boundaries.

75. In addition, the court seriously questions Sather's credibility on his testimony claiming Lintvedt told Sather "this is not your property", as pertains to the disputed area. This was not in the Lintvedt deposition testimony. Furthermore, and in support of this courts credibility call (or lack thereof on this point), is Sather's immediate use of the area upon purchase and the posting of the sign on the "new" corner post bearing R.J. Sather's name and directive to keep out of the area.

76. Rodney Sather testified that he and Darrel Lintvedt drove out to Section 10 prior to the purchase. Sather testified that an area outlined in yellow on Defendants' Exhibit 15, which had been Plaintiff's Exhibit 16 in the trial deposition of Darrel Lintvedt, was a portion of land that Darrel told him he did not own. The outlined portion extends from the Powder River metal gate along the north-south boundary fence through Bull Creek

before meeting up with Bull Creek Road. However, on three occasions, in response to questions about the area outlined in yellow, Rodney Sather voluntarily reiterated that Darrel Lintvedt told him it was a gentlemen's agreement driving through the dirt trail to get to the property. The Court gives minimal weight to the testimony of Rodney Sather on these issues as he seemed to confuse the separate issues of land ownership east of the north-south boundary fence and land ownership along the dirt trail west of the north-south boundary fence.

77. Rodney Sather did not recall replacing the wire gate along the north-south boundary fence with a Powder River metal gate, although the Court finds that he or his hired men did in fact install such a gate as Brian Lintvedt testified credibly that the metal gate was not there during his father's ownership and Todd Fuoss testified credibly that the metal gate was there when he took over ownership.

78. During Rodney Sather's ownership of Section 10, the Dahlke's and Mann's did not utilize any portion of the land east of the north-south boundary fence for any purpose.

79. Rodney Sather's use of the dirt trail to access his property was not permissive, as he clearly understood that his right to use the trail was as a result of a gentlemen's agreement.

80. Rodney Sather did not inform Todd Fuoss that any of the land east of the north-south boundary fence belonged to Dahlke's or Mann's prior to the sale on May 14, 2003. Again, if this conversation of ownership between Rodney Sather and Darrel Lintvedt had actually occurred (which the court rejects), certainly common sense would dictate that Rodney Sather would have provided this important information to new owner Todd Fuoss.

81. When Fuoss purchased the land, he believed everything east of the north-south boundary fence was his property and that everything west of it was Defendants'.

82. In December of 2003 or January of 2004, when Todd Fuoss and his brother, Mike Fuoss, were fixing the fence south of the subject corner post and east of the subject corner post, they encountered Wesley Mann and Earl Dahlke who drove up in a vehicle and stopped to talk with Todd and his brother. They all had a good conversation lasting about 10 – 15 minutes and Wesley Mann commented that he liked the job that Todd Fuoss had done fixing the fence. No mention was made that any of the property east of the north-south boundary fence did not belong to Fuoss.

83. Fuoss has used the property east of the north-south boundary fence to graze cattle during the entire time he has owned the property. He and his family also from time to time hunt deer on the property.

84. To access the property in Section 10 west of Bull Creek, Todd Fuoss, his family members and ranch hands have utilized the dirt trail that cuts across the northeast corner of the Northeast Quarter of Section 9, as Darrel Lintvedt and his family did previously, and they have entered through the metal Powder River gate a couple hundred feet south of the subject corner post on the north-south boundary fence. Likewise, this area was fully utilized by Rodney Sather in the same way.

85. In 2016 Defendant Rodney Mann fenced in the hay stackyard, using the existing north-south boundary fence as one of the four sides. He placed a metal gate across the approach to the dirt trail off from Bull Creek Road. That gate remained unlocked until he placed a padlock on it for the first time during deer season in 2016. This was the first time that

access to the dirt trail had ever been cut off. The first time Todd Fuoss encountered a padlock on the gate was in 2018.

86. Fuoss' use of the dirt trail to access his property was not permissive. He used the trail without ever asking to use it until his ability to do so was cut off by Defendants in 2019.

From the above Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Any Conclusion of Law deemed to be a Finding of Fact or vice versa shall be appropriately incorporated into the Findings of Fact or Conclusions of Law as the case may be.
2. The Court has jurisdiction of the parties and the subject matter of this action.

ADVERSE POSSESSION

3. Dahlke's and Mann's were the record owner of the property in dispute. Due to this, Fuoss has the burden to prove title by adverse possession. *Gangle v. Spiry*, 2018 S.D. 55, ¶13, 916 N.W.2d 119, 123; *see also Lien v. Beard*, 478 N.W.2d 578, 579 (S.D. 1991). A person claiming title by adverse possession must prove the following elements by clear and convincing evidence: 1) an occupation that is 2) open and notorious, 3) continuous for the statutory period and 4) under claim of title exclusive of any other right. *Underhill v. Mattson*, 2016 S.D. 69, ¶11, 886 N.W.2d 348, 352 (citing SDCL § 15-3-12); *See also Gangle*, ¶13, 916 N.W.2d at 123.
4. Adverse possession occurs by operation of law and does not require an action to commence it, nor to continue it. *Lusk v. City of Yankton*, 40 S.D. 498, 168 N.W. 375, 377 (S.D. 1918).

5. As to the first element where title is claimed by adverse possession rather than upon a written instrument, SDCL § 15-3-13 provides that land shall be deemed to be possessed and occupied only if: 1) it has been protected by a substantial enclosure; or 2) it has been usually cultivated or improved.
6. The land between Bull Creek and the *old* north-south fence line which had a north corner post located approximately at the current "new gate" location was protected by a substantial enclosure, i.e., the fence serving as the boundary between Darrel Lintvedt's property and the adjoining landowner's property when Darrel Lintvedt purchased the subject property in the mid-1960's.
7. The land between Bull Creek and the *current* north-south fence has been protected by a substantial enclosure from the late 1960's or early 1970's through the present date, i.e., the fence serving as the current boundary between the Fuoss and Mann properties. This fence bordering the triangular property in question deviated from the recorded legal boundary due to the wild, treacherous and unpredictability of Bull Creek. It was impossible to maintain a fence under the legal description. (The court ponders: this could possibly be a reason why a quit claim deed was given from Hullinger to Dahlke, whereas Hullinger gave Lintvedt a warrant deed. That deed differentiation could also have been conveyed this way due to the use of the old dirt trail along that fence. This may be more pertinent to the easement issue).
8. The second element of adverse possession requires that the occupation be open and notorious. Darrel Lintvedt exercised open and notorious occupation of the land between Bull Creek and the current north-south fence line for approximately twenty-five (25) years until he sold the subject land to Rodney Sather in 1996. This included but was not

limited to, running cattle on that portion of the disputed land, repairing the north south boundary fence on numerous occasions, and utilizing the entry gate and area with big equipment, in order to get to the section 10 area to build a dam on Bull Creek.

9. The statutory period for adverse possession is twenty (20) years. SDCL §§ 15-3-1, SDCL 15-3-7. That period was met as to the current north-south fence location in the late 1980's or early 1990's – twenty (20) years after the Lintvedt's moved the north-south fence further to the west.

10. Rodney Sather purchased the property on June 4, 1996 and immediately began utilizing the property in question. Shortly thereafter he posted "No Trespassing" signs on his property along Bull Creek Road, including on the current corner post of the north-south boundary fence between Sections 9 and 10. The signs state: "POSTED – Private – Wildlife Management Area – NO TRESPASSING – Thanks – Prairie Lands – R. J. Sather.". Sather did not put either the Dahlke or Mann name on the sign. He put up electric buffalo fencing in the pasture, sectioning off ground to the west of Bull Creek and to the east of Bull Creek, running the electric fence near the barbed wire perimeter and on the tops of the west and east banks of Bull Creek. He ran the electric buffalo fencing across Bull Creek in the northwest corner of Section 10 and he squared off Bull Creek with the electric fencing along the southern border of Section 10. He fenced in this manner so that he could graze the buffalo in Bull Creek during dry times of year and he could prevent them from accessing Bull Creek during the flood-prone times of year. Rodney Sather's use was active and continuous.

11. Todd Fuoss purchased the subject property in 2003. He has openly occupied the land by using it to graze his livestock, he from time to time hunts deer on the land, and he has

repaired and replaced the fence running north and south between the Fuoss and Mann properties and east and west along Bull Creek Road perpendicular to the north-south fence corner post and Bull Creek. Fuoss' occupation of the disputed property has been open and notorious.

12. The principle of "tacking" allows Fuoss to add his own claim to that of the previous adverse possessors under whom he claims a right of possession. *Underhill*, 2016 S.D. 69, ¶16, 886. N.W.2d 348, 354.

13. Rodney Sather's utilization of the property, in whatever manner he pursued, did not extinguish the adverse possession created by Darrel Lintvedt. Our Court in *Shippy v. Hollopeter*, 304 N.W.2d 118, 121 (S.D. 1981), held that once a prescriptive easement had ripened under the twenty (20) year provision of Chapter 15-3, it would take a similar twenty (20) year period of non-use to extinguish the easement or grant that had been created and obtained. *Rotenberger v. Burghduff*, 2007 S.D. 19, ¶21, 729 N.W.2d 175, 178. The law on adverse possession in this regard is the same as the law on a prescriptive easement. *See Lusk*, 40 S.D. 498, 168 N.W. 375, 377 (S.D. 1918).

14. Regardless of how Rodney Sather utilized the land from 1996 until the property was sold in 2003 to Todd Fuoss, Fuoss continued to thereafter openly utilize the property up to the current boundary fence, just as Darrel Lintvedt had done for approximately twenty-five (25) years. There has not been a twenty (20) year period of non-use after Darrel Lintvedt's use of the property ceased.

15. Fuoss has met his burden by establishing by clear and convincing evidence that the subject land has been openly and notoriously occupied for twenty (20) years prior to the commencement of his lawsuit.

16. The final element of adverse possession requires Fuoss to establish that the occupation has been exclusive of any other right. Many cases refer to this element as a "hostile" possession.

17. Darrel Lintvedt's occupation of the disputed property was exclusive of any other right and is thus deemed hostile possession. The South Dakota Supreme Court has held that "adverse possession may be conclusively determined by the length of time during which there has been acquiescence in a disputed boundary," and "[w]hen such acquiescence continues during the statutory period prescribed as a bar to reentry, title may be acquired through acquiescence alone." *City of Deadwood v. Summit*, 2000 S.D. 29, ¶22, 607 N.W.2d 22, 28. The doctrine of acquiescence "provides an evidentiary presumption of hostility to the occupation of property to a visible and ascertainable boundary for the statutory period." *Id.*

18. A claim for adverse possession does not require a good faith belief or an intention to claim another's land, but can be founded upon ignorance, inadvertence, or mistake as to the actual boundary between two parcels. *Lewis v. Moorhead*, 522 N.W.2d 1, 5 (S.D. 1994).

19. The evidentiary presumption of hostility applies "even though occupancy occurred due to ignorance, inadvertence, or mistake, and without an intention to claim the lands of another." *Summit*, 2000 S.D. 29, ¶22, 607 N.W.2d 22, 28.

20. It is not clear from South Dakota Supreme Court precedent that a mutual mistake is a prerequisite to applying the doctrine of acquiescence. "Rather, a mutual mistake was deemed a scenario which our Court has found to suffice, even though '[a]s a general rule possession is not adverse when the parties intend to claim only as far as the true line.'

Lehman v. Smith, 40 S.D. 556, 168 N.W. 857, 859 (S.D. 1918)." *Kinsella v. Caldwell*, Stanley County 58CIV16-000026, Memorandum Opinion, pg. 8, Patricia J. DeVaney, Circuit Court Judge.

21. "This begs the question: If our Court has applied the doctrine when parties have acquiesced in a boundary due to a mutual mistake, without an intent to claim another's land, why would the doctrine not also be applied when parties have acquiesced in a boundary for the sake of convenience, without intent to claim another's land? Regardless of the reason, so long as the parties have acquiesced in such an arrangement for the statutory period, i.e., twenty years, this Court concludes that the presumption of hostility applies." *Id.*

22. The terms "acquiesce" or "acquiescence" are not synonymous with "mutual mistake." "Acquiesce" or "acquiescence" is defined as "a person's tacit or passive acceptance, implied consent to act." Black's Law Dictionary (10th ed. 2014). *Id.*

23. The North Dakota Supreme Court has held that "[t]o establish a new boundary line by the doctrine of acquiescence, it must be shown by clear and convincing evidence that both parties recognized the line as a boundary, and not a mere barrier, for at least 20 years prior to the litigation." *Moody v. Sundley*, 2015 N.D. 204, ¶23, 868 N.W.2d 491, 499 (quoting *Brown v. Brodell*, 2008 N.D. 183, ¶9, 756 N.W.2d 779). Mutual recognition of the boundary may be inferred by a party's conduct or silence. *Id.*

24. This Court concludes that mutual mistake is not a prerequisite to the application of the doctrine of acquiescence.

25. From the time that Darrel Lintvedt moved the corner post of the north-south fence to the west, he treated the property up to the boundary fence as his own, all the while knowing

that it was not contained within the legal description of his property. The adjoining landowners, Lou Dahlke and his successors, acquiesced and agreed to this new boundary by passively and impliedly consenting to Darrel Lintvedt's exclusive use of this land for approximately 25 years.

26. Where both parties knew a fence was not the actual boundary, but one party treated it as such, and the other party impliedly consented, the doctrine of acquiescence, and the resulting presumption of hostility is applicable.

27. Fuoss has met his burden by establishing by clear and convincing evidence that Darrel Lintvedt's use of the land east of the new north-south boundary fence was under a claim exclusive of any other right, i.e., hostile.

28. Beyond Darrel Lintvedt's adverse possession period of time, there has been a separate twenty (20) year period of adverse possession from the time that Rodney Sather purchased the land in 1996 to the end of 2018 when Defendants first objected to Fuoss' possession of the land east of the current north-south boundary fence.

29. When Rodney Sather purchased the land in 1996, it was clear by the way the north-south fence line angled around Bull Creek on the north end of Section 10 and wrapped around the big hill further south on Section 10 that the property up to the boundary fence on the northern portion of Section 10 was not contained within the legal description of his property. Nonetheless, he treated the land east of the north-south boundary fence as his own and Defendants' predecessors at the time acquiesced in this boundary by passively and impliedly consenting to Rodney Sather's exclusive use of the land.

30. "The test is whether the person 'honestly enters into possession of land in the belief that the land is his own.'" *Lewis*, 522 N.W.2d 1, 5 (S.D. 1994) (quoting *Barclay v. Tussey*, 259 Ark. 238, 532 S.W.2d 193, 196 (1976)).

31. The Court concludes that from the time Rodney Sather purchased his property, it had been his intent to "claim land of another," as reflected in part by his posting of the "No Trespassing" sign, in the sense that he was knowingly claiming property not contained in his legal description. It was admitted that the Dahlke and Mann's never used nor asserted their right to utilize this property until 2018, at which time Fuoss first noticed the padlock. In addition, Sather was likewise knowingly giving up property not contained in his legal description further south.

32. When Todd Fuoss purchased the land in 2003, it was clear by the way the north-south fence line angled around Bull Creek on the north end of Section 10 and wrapped around the big hill further south on Section 10 that the property up to the boundary fence on the northern portion of Section 10 was not contained within the legal description of his property. Nonetheless, he treated the land east of the north-south boundary fence as his own and the adjoining landowner, Rodney Mann, acquiesced in this boundary by passively and impliedly consenting to Fuoss' exclusive use of the land until December 31, 2018. Fuoss continuously repaired the fence, used the entry and hunted on the property openly. The RJ Sather signed remained intact and was there when Fuoss purchased the land and remain there today.

33. From the time Todd Fuoss purchased his property it was his intent to "claim the land of another" in the sense that he was knowingly claiming property not contained in his legal

description. He was likewise knowingly giving up property not contained in his legal description further south.

34. Using Sather and Fuoss' possession under the tacking doctrine, a separate and additional 20 year period of adverse possession has also been legally established, separate from what was established under Lintvedt.

35. Fuoss has established by clear and convincing evidence the evidentiary presumption of hostility.

36. The evidentiary presumption of hostility may be overcome with proof that the use of the land was permissive.

37. Permissive use cannot ripen into adverse possession until a positive assertion of a right hostile to the record holder is known to him. *Gangle v. Spiry*, 2018 S.D. 55, ¶15, 916 N.W.2d 119, 123-24 (footnote omitted).

38. A party asserting the defense of permissive use bears the burden of proof to show that the use was only permissive. *Hofmeister v. Sparks*, 2003 S.D. 35, ¶17, 660 N.W.2d 637, 642.

39. There was no evidence offered to even suggest that Darrel Lintvedt's use of the land between Bull Creek and the *old* north-south fence line was ever permissive. The Court therefore finds, as a matter of law, and fact, that the evidentiary presumption of hostility was not overcome with proof that the use of the land between Bull Creek and the old north-south fence line was permissive.

40. Todd Fuoss has met his burden of establishing by clear and convincing evidence the elements of adverse possession for the land between the old north-south boundary fence and Bull Creek during Darrel Lintvedt's ownership. Furthermore, because there has not been a twenty (20) year period of non-use after Darrel Lintvedt's use of the property

ceased, Fuoss is entitled to a declaratory judgment that he adversely possessed the land east of the old north-south boundary fence.

41. The Court makes additional conclusions of law below regarding the issue of adverse possession of the land between the old north-south boundary fence and the new north-south boundary fence.

42. The South Dakota Supreme Court did not overturn any existing precedent regarding the doctrine of acquiescence in *Gangle v. Spiry*, 2018 S.D. 55, 916 N.W.2d 119. "Both parties presented arguments in their briefs regarding the doctrine of acquiescence; however, the circuit court did not mention the doctrine in its letter decision, findings of fact and conclusions of law, or its judgment. Therefore, we decline to address it." *Id.* at n. 5.

43. It is well-established in South Dakota that continued use of land which is permissive is insufficient to fulfill the requirement of hostile use. *Gangle*, 2018 S.D. 55, ¶14, 916 N.W.2d 119, 123; *Travis v. Madden*, 493 N.W.2d 717, 720 (S.D. 1992); *First Church of Christ Scientist v. Revell*, 68 S.D. 377, 382, 2 N.W.2d 674, 677 (S.D. 1942).

44. The question in *Gangle* was whether a permissive use can ripen into one of hostility by merely transferring property. The South Dakota Supreme Court looked to other courts and adopted the well-established rule that permissive use cannot ripen into adverse possession until a positive assertion of a right hostile to the record holder is made known to him. *Id.* at, ¶15, 123-24 (footnote omitted).

45. The Court in *Gangle* found that Spiry had given consent to Gangle's predecessor to occupy the disputed property. The finding of permissive use for the initial occupation of

the disputed land in *Gangle* is inapposite of this Court's finding regarding permission of the initial occupation of the disputed land (discussed below).

46. The facts in *Gangle* are distinguishable from the case before this Court. Unlike *Gangle*, the placement of the fence in this case was with knowledge and by agreement of both parties. Unlike *Gangle*, Fuoss and his predecessors have had exclusive use of the subject property. Unlike *Gangle*, the Dahlke's never drove posts in the ground to indicate where they understood the true boundary line to be. Unlike *Gangle*, Rodney Sather posted a "No Trespassing" sign with his name exclusively on it on the boundary fence corner post. And unlike *Gangle*, all parties in the current case and their respective predecessors have acquiesced in the current boundary fence location for fifty (50) years. In addition, Dahlke and Mann never used the property in question, whereas in *Gangle*, the son had utilized the property to store tree trimming and brush and would go over the fence and retrieve the wood when he wanted to use it for firewood down by the lake.

47. The Court rejects as a matter of law, and fact, Defendant Rodney Mann's claim that the presumption of hostility should be rebutted by his allegation that his predecessors had granted permission to Fuoss' predecessor, Darrel Lintvedt, to use the property from the old north-south fence line to the new north-south fence line. Darrel Lintvedt testified by way of trial deposition and Brian Lintvedt testified at trial. There was credible testimony offered to characterize the decision to move the corner post of the old north-south fence line as "permissive" or by "agreement" or "acquiescence." However, Darrel Lintvedt's use of the property between the old north-south fence line and the new north-south fence line, and the fact that the Dahlke's or Mann's never again used any of that land for any purpose, is more consistent with a recognition that Darrel Lintvedt had rights over the

property and his use of the same was not merely permissive and was not merely being neighborly as contended by the Mann's and Dahlke's.

48. Although the Court has found that Darrel Lintvedt's use of the property between the old north-south fence line and new north-south fence line was not merely permissive, and that such a conclusion of law is dispositive on the issue of adverse possession of the land between the old north-south fence and the new north-south fence, the Court will make additional conclusions of law below.

49. Defendants bear the burden of rebutting the presumption of hostility by establishing clear and convincing evidence that not only Darrel Lintvedt's use of the property east of the current north-south boundary fence for more than twenty (20) years was permissive, which this Court has rejected, *but also* that Rodney Sather and Todd Fuoss' use of the property east of the current north-south boundary fence for more than twenty (20) years was permissive.

50. The same year that Rodney Sather purchased the subject property from Darrel Lintvedt in 1996, he posted "No Trespassing" signs on his property along Bull Creek Road, including the corner post of the new north-south fence line. The signs state: "POSTED – Private – Wildlife Management Area – NO TRESPASSING – Thanks – Prairie Lands – R. J. Sather." These signs, and in particular the sign on the subject corner post, clearly provided actual notice of the hostile claim or constituted an act or declaration of hostility so manifest and notorious that actual notice will be presumed. Neither Dahlke nor Mann's name is on the sign. Nor was ever a demand to remove the sign ever tendered or corrected.

51. The NO TRESPASSING sign has remained on the subject corner post from 1996 to present. Therefore, Defendants and their predecessors had actual and continuous notice of the hostile claim for twenty-two (22) years before the first objection to Fuoss using the land was made at the end of 2018, exceeding the statutory period for adverse possession of twenty (20) years. SDCL §§ 15-3-1, 15-3-7.

52. The land between the old north-south fence line and the new north-south fence line has been exclusively used by Rodney Sather from 1996 to 2003 and by Todd Fuoss from 2003 to present.

53. Defendants and their predecessors acquiesced in Rodney Sather's exclusive use of this property from 1996 through 2003. Defendants acquiesced in Todd Fuoss' exclusive use of this property from 2003 through December 31, 2018. Defendants have failed to rebut the resulting presumption of hostility with clear and convincing evidence that such use was permissive.

54. Defendants' assertion that their payment of taxes on the disputed ground should defeat a claim of adverse possession has been rejected by the South Dakota Supreme Court in numerous cases, even where it was the taxing entity claiming adverse possession. *See Summit*, 2000 S.D. 29, ¶12, 607 N.W.2d 22, 26; *Lusk*, 40 S.D. 498, 168 N.W. 375, 377 (S.D. 1918); *Cuka v. Jamesville Hutterian Mutual Society*, 294 N.W.2d 419, 423 (S.D. 1980); *Johnson v. Biegelmeier*, 409 N.W.2d 379, 382 (S.D. 1987).

55. This Court concludes by clear and convincing evidence that Todd Fuoss is entitled to a Declaratory Judgment that he adversely possessed the land east of the current north-south boundary fence.

56. As a result of the Court's conclusion that Todd Fuoss has a legitimate adverse possession claim, Defendants' counterclaim requesting Fuoss build half of a partition fence along the legal description property boundary is denied.

EASEMENTS

57. A claim for a prescriptive easement is similar to a claim of ownership by adverse possession, except in a prescriptive easement claim, the claimant only receives the easement, not the land title. *Thompson v. E.I.G. Palace Mall, L.L.C.*, 2003 S.D. 12, ¶6, 657 N.W.2d 300, 303-04.

58. A party claiming the existence of a prescriptive easement must meet a two-part test by clear and convincing evidence. First, the party must show an open, continued, and unmolested use of the land in the possession of anther for the statutory period of twenty years. Second, the party claiming a prescriptive easement must show the property is being used in a manner that is hostile or adverse to the owner. *Rotenberger v. Burghduff*, 2007 S.D. 19, ¶8, 729 N.W.2d 175, 178.

59. A prima facie case for a prescriptive easement is established by showing an open and continuous use of another's land with the owner's knowledge, creating a presumption that such use is adverse under a claim of right. That presumption may be rebutted by proof that the use was by permission or not under a claim of right, i.e., "hostile". *Id.* at ¶9, 178-79; *Thompson*, 2003 S.D. 12, ¶7, 657 N.W.2d 300, 304.

60. Fuoss has established by clear and convincing evidence that the use of the dirt trail across the northeast corner of the Northeast Quarter of Section 9 has been open and continuous dating back to the mid-1960's when Darrel Lintvedt took possession of the property east of the north-south boundary fence.

61. The owners of Section 9 knew the trail was being used to access the property on the east side of the north-south boundary fence.

62. The Court rejects as a matter of law, and fact, Defendants' claim that Darrel Lintvedt's use of the trail was merely permissive.

63. Fuoss has proved by clear and convincing evidence the existence of a prescriptive easement.

64. The common law recognizes two types of implied easements: easements by necessity and easements implied from prior use.

65. "To establish an easement by implication from prior use, the claimant must show that (1) the relevant parcels of land had been in unitary ownership; (2) the use giving rise to the easement was in existence at the time of the conveyance dividing ownership of the property; (3) the use had been so long continued and so obvious as to show that it was meant to be permanent; and (4) at the time of the severance, the easement was necessary for the proper and reasonable enjoyment of the dominant tract." *Thompson*, 2003 S.D. 12, ¶14, 657 N.W.2d 300, 305.

66. The Northeast Quarter of Section 9 and Section 10 were owned by Clarence Hullinger and Anna Marie Hullinger in 1948. On May 17, 1948, Section 10 was conveyed to Leo Nichols by warranty deed. One month later on June 17, 1948, the Northeast Quarter of Section 9 was conveyed to Ludwig Dahlke and Florence Dahlke by quitclaim deed. The Dahlke's had previously executed a contract for deed with Laura Hullinger and Jasper Hullinger on June 24, 1946. The Court therefore concludes that adequate unitary ownership of the Northeast Quarter of Section 9 and Section 10 has been established.

67. The 1948 U.S.G.S. aerial photograph clearly establishes that the dirt trail was in existence at the time the conveyances dividing ownership of the property were made in 1948.

68. The dirt trail that was well established in 1948 is still in existence today.

69. At the time the relevant parcels were severed, the dirt trail was necessary for the proper and reasonable enjoyment of land west of Bull Creek in Section 10.

70. Fuoss has proved by clear and convincing evidence the existence of an easement by implication of prior use.

71. In contrast to an easement by implication of prior use, an easement by necessity allows for a route of access where one previously did not exist. *Patterson v. Buffalo Nat. River*, 76 F.3d 221, 226 (8th Cir. 1996).

72. An easement by necessity can occur when a grantor conveys to another an inner portion of land surrounded by lands owned by the grantor or the grantor and others. Unless a contrary intent is manifest, the landlocked grantee will be entitled to have a right-of-way across the retained land of the grantor for ingress and egress. *Thompson*, 2003 S.D. 12, ¶11, 657 N.W.2d 300, 304-05.

73. At the time the relevant parcels were severed, the dirt trail was necessary for the proper and reasonable enjoyment of the land west of Bull Creek in Section 10.

74. Fuoss has proved by clear and convincing evidence the existence of an easement by necessity.

Based upon the foregoing and Findings of Fact and Conclusions of Law, the Court directs that a Declaratory Judgment shall be entered accordingly. Todd Fuoss as the prevailing party, shall submit an order consistent with these Findings of Fact and Conclusions of Law.

Dated this 28th day of August, 2020.

BY THE COURT:

M. Bridget Mayer
M. BRIDGET MAYER
CIRCUIT COURT JUDGE

Attest:
Feddersen, Judy
Clerk/Deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, JONES CO.
FILED
AUG 31 2020
Judy Feddersen Clerk
By_____Deputy

CONTRACT FOR DEED (Revised) 19B MITCHELL PUB. CO., MITCHELL, S. DAK.

THIS AGREEMENT, Made and entered into this 24th day of June A. D. 19 46., by and between Laura E.Hullinger and Jasper S.Hullinger,her husband parties of the first part, and Ludwig C.Dahlke and Florence M.Dahlke

parties of the second part,

WITNESSETH, That if the parties of the second part shall make the payments and perform the covenants hereinafter mentioned on their part to be made and performed, the said parties of the first part hereby convenant.... and agree.... to convey and assure to the said parties of the second part, in fee simple, free and clear of all incumbrances, by a good and sufficient Warranty Deed, that certain real property situated in the County of Jones and State of South Dakota, known and described as follows, to-wit: Lots 3,4,and South Half of the North West Quarter and South West Quarter of Section 3 and East Half of South East Quarter of Section 4 and North East Quarter of Section 9,all in Township 3 South of Range 30 East B.H.M.

and the said parties of the second part hereby covenant and agree to pay to the said parties of the first part the sum of Forty Four Hundred and Eighty---

DOLLARS, in the manner following:

The sum of $ 3000.00 at or before the execution of this contract; balance to be paid when parties of first part tender warranty deed and abstracts showing good title

The sum of $ on the day of 19

The sum of $ on the day of 19

The sum of $ on the day of 19

The sum of $ on the day of 19

The sum of $ on the day of 19

with interest at the rate of five per cent per annum, payable annually, on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said land, subsequent to the year 1945. In case of the failure of the said parties of the second part to make any of the aforesaid payments, or interest thereon, or any part thereof, or to perform any of the covenants on their part to be performed, then all of said payments, together with interest, shall become immediately due and payable, and this contract shall be forfeited and terminated, at the option of the parties of the first part, and the parties of the first part shall have the right to re-enter and take immediate possession of the premises aforesaid. If this instrument shall have been recorded in the office of any Register of Deeds, then, and in that event, the filing of a declaration of forfeiture setting forth the fact or facts of the default or breach of contract, by the said parties of the first part in the office of such recording shall be sufficient to cancel and discharge this instrument

The said part.....of the second part agree.....to keep the buildings insured against loss by Fire, Lightning and Wind in companies satisfactory to the part..... of the first part for the sum of at least $....., and to deliver such policies to part.....of first part.

If the said part.**ies**.. of the second part shall make payment of all of the principal and interest herein agreed to be paid to the said part.**ies**..... of the first part, then, and upon full payment, the part.**ies** of the first part will deliver to the part.**ies**... of the second part abstract of title showing good, marketable title to the real property herein described, and convey the said premises to the said part.**ies** of the second part by good and sufficient Warranty Deed.

Immediate possession to be given.
It is agreed and understodd that title to NE¼ Sec 9,Twp 3 S,Range 30 E B.H.M. is based on tax deed proceedings and in case parties of the first part are unable to quiet title to said land it is agreed that parties of the second part shall pay $3200.00 for the 400 acres upon delivery of warranty deed and abstracts showing good title

IT IS MUTUALLY AGREED, By and between the parties hereto, that the time of payment shall be a essential part of this contract, and that all the covenants and agreements herein contained shall extend to an be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

IN TESTIMONY WHEREOF, Both parties have hereunto set their hands and seals, the day and yea hereinbefore written.

Signed, Sealed and Delivered in Presence of

Laura E. Hullinger (SEA
Jasper S. Hullinger (SEA
Ludwig C. Dahlke (SEA
Florence M. Dahlke (SEA

STATE OF SOUTH DAKOTA, } ss.
County of Jones }

On this the 24th day of June, 19 46, before me, F.J.Carpenter, the undersigned officer, personally appea Laura E. Hullinger, Jasper S. Hullinger, Ludwig C. Dahlke, Florence M. Dah known to me or satisfactorily proven to be the person whose name.s are subscribed to within instrument and acknowledged that the.y executed the same for the purposes therein contair

In witness whereof I hereunto set my hand and official seal.

Notary Public
Title of Officer

Deed Record No. 21, Jones County, S. Dak.

QUIT CLAIM DEED.

Clarence H. Hullinger and Anna Marie Hullinger, husband and wife,

grantor of Jones *County, State of* South Dakota *for and in consideration of* one dollar and other valuable considerations, QUIT CLAIMS *TO* Ludwig C. Dahlke and Florence M. Dahlke

grantee of Murdo, South Dakota *P. O.* all interest in */ the following described real estate in the County of Jones in the State of South Dakota.*

Lots 3, 4, and South Half of the North West Quarter and
South West Quarter of Section 3, and
East Half of South East Quarter of Section 4, and
North East Quarter of Section 9, ALL in Township 3 South of
Range 30, East B. H. M.

Dated this 17th *day of* June *19* 48.

Clarence Hullinger

Anna Marie Hullinger

STATE OF SOUTH DAKOTA }
County of Jones } *ss.*

On *the* 17th *day of* June, in the year / *19* 48, *before me,* John E. Goodrich, a notary public within and for said county and state, *personally appeared* Clarence H. Hullinger and Anna / Marie Hullinger, *known to me* *to be the person* s are / described in and who executed the within and foregoing instrument and acknowledged to me that they executed the same.

NOTARIAL SEAL

John E. Goodrich
Notary Public
Jones County, South Dakota

My commission expires April 30, 1951. John E. Goodrich
My Commission Expires April 30, 1951.

STATE OF SOUTH DAKOTA, County of Jones, ss.

Filed *this* 3rd *day of* February A.D. *19* 50, *at* 4:50 *o'clock* P. *M., and* *recorded in Book* 21 of Deeds *Page* 588.

SEAL OF THE REGISTER OF DEEDS JONES COUNTY

Deputy Anna Brooks *Register of Deeds*

OFFICE OF REGISTER OF DEEDS
STATE OF SOUTH DAKOTA } SS
JONES COUNTY

I hereby certify that I have carefully examined the within instrument with the original instrument now on record in my office and that it is a true and correct copy of the same and that the filing thereon is a true and correct copy of the filing.

Dated January 3 A.D., 20 20
Terri Volmer
Register of Deeds, Jones County, S.D.

By ________________ D.C.

SEAL OF THE REGISTER OF DEEDS JONES COUNTY SOUTH DAKOTA

PLAINTIFF'S EXHIBIT 23 1-3-20

WARRANTY DEED

Earl D. Dahlke, GRANTORS, for and in consideration of One dollar and other valuable consideration, CONVEY, GRANT AND WARRANT to the **Dahlke Family Limited Partnership**, GRANTEE, of HCR 74, Box 75, Murdo, South Dakota 57559, an undivided one-half interest in the following described real estate in the County of Jones in the State of South Dakota:

An undivided one-half interest in all of that real estate described on Exhibit A attached hereto and included herein as if restated.

This conveyance is also subject to all recorded easements, prior conveyance of mineral interests, covenants, rights of way established by public record or by law and reservations or exceptions in patents or acts authorizing the issuance thereof.

Dated this 22 day of March, 1999.

Earl D. Dahlke

Earl D. Dahlke

State of South Dakota)
:ss
County of Stanley)

Exempt from Transfer Fees SDCL 43-4-22(14)

On this 22nd day of March, 1999, before me, the undersigned, a Notary Public, personally appeared Earl D. Dahlke, known to me or satisfactorily proven to be the persons whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

(SEAL)

Notary Public
My Commission Expires: 10/1/99

Document prepared by:
Kimberley A. Mortenson
Mortenson Law Office
PO Box 190 - 32 East Main
Ft. Pierre, SD 57532
605-223-9040

STATE OF SOUTH DAKOTA } SS.
County of Jones

Filed for record this 31 day of MARCH 19 99
10:10 o'clock A. M. and recorded
in Book 31 DEEDS page 861-862
Register of Deeds
FEE: $12.00

EXHIBIT
D-2

Deed Record No. 21, Jones County, S. Dak.

WARRANTY DEED

Clarence Hullinger and Anna Marie Hullinger, husband and wife

grantor of Murdo, Jones *County, State of* South Dakota *for and in consideration of*

Ten Thousand Five Hundred and Sixty ---------- *DOLLARS*

GRANTS, CONVEYS AND WARRANTS TO Leo Nichols

grantee of Draper, South Dakota *P. O., the following described real estate in the County of Jones in the State of South Dakota.*

South Half and North West Quarter and West Half of the North East Quarter of Section Ten; West Half of North East Quarter and East Half of North West Quarter and South West Quarter of Section Eleven, all in Township Three South of Range Thirty East B.H.M., subject to a Mortgage to the Federal Land Bank of Omaha, which the grantee assumes and agrees to pay.

(Documentary stamps attached ($12.20)

Dated this 17th *day of* May *19* 48

Clarence Hullinger

Anna Marie Hullinger

STATE OF South Dakota }
County of Jones } *ss.*

On this the 19th *day of* May *19* 48 *before me,* F.J. Carpenter *the undersigned officer, personally appeared* Clarence Hullinger and Anna Marie Hullinger, husband and wife, known to *me or satisfactorily proven to be the person whose names are subscribed to the within instrument and acknowledged that they executed the same for the purposes therein contained.*

Notarial seal

IN WITNESS WHEREOF I hereunto set my hand and official seal.

F.J. Carpenter
Notary Public

My commission expires Jan 2, 1949 *Title of Officer*

STATE OF SOUTH DAKOTA, County of Jones, ss.

SEAL OF THE REGISTER OF DEEDS JONES COUNTY

Filed for record this 22nd *day of* May *19* 48, *at* 3:00 *o'clock* P. M., *and recorded in Book* 21 *of Page* 141

By ---------- *Deputy* Mary A. Sorensen *Register of Deeds*

OFFICE OF REGISTER OF DEEDS
STATE OF SOUTH DAKOTA } SS
JONES COUNTY

I hereby certify that I have carefully examined the within instrument with the original instrument now on record in my office and that it is a true and correct copy of the same and that the filing thereon is a true and correct copy of the filing.

Dated January 3 A.D., 20 20

Register of Deeds, Jones County, S.D.

By ---------- D.C.

SEAL OF THE REGISTER OF DEEDS JONES COUNTY SOUTH DAKOTA

PLAINTIFF'S EXHIBIT 24 1-3-20

Filed on: 09152020 JONES County, South Dakota 37CIV19-000008

168

MISCELLANEOUS RECORD No. 9

JONES COUNTY, SOUTH DAKOTA

CONTRACT FOR DEED (SDC 51.1418)

THIS AGREEMENT, made and entered into this 4th day of February, 1964, by and between Kenneth Nichols and Loma A. Nichols, Husband and wife hereinafter described as party of the first part, and Norman Lintvedt and Darrel Lintvedt, doing business as Lintvedt Brothers hereinafter described as party of the second part, witnesseth:

If the party of the second part shall first make the payments and perform the covenants hereinafter mentioned on its part to be made and performed, the said party of the first part hereby covenants and agrees to convey and assure to the party of the second part, in fee simple, clear of all incumbrances, whatever, by a good and sufficient Warranty Deed, the real property situated in the County of Jones and State of South Dakota described as

All of Section Ten (10) and West Half (W½) and West Half of the North East Quarter (W½NE¼) Section Eleven (11), all Township Three (3) South, Range Thirty (30), E.B.H.M., Jones County, South Dakota.

And as consideration therefor the said party of the second part hereby covenants and agrees to pay the said party of the first part the sum of Forty-two Thousand Dollars and no/00--- payable at Draper State Bank at Draper South Dakota, in the manner following:

The sum of $3000.00 at or before the execution of this contract;

The balance of $39000.00 to be paid in ten equal annual installments of $4965.48 each, the first installment due February 4, 1965 and a like installment on February 4th of each year thereafter until fully paid. Such installments are amortized to include interest at 5%. It is agreed that the last two installments may be paid at once at the option of the second party.

with interest at the rate of Five per cent per annum payable amortized on the whole sum remaining from time to time unpaid, and to pay all taxes, assessments or impositions that may be legally levied or imposed upon said land, subsequent to the year 1963.

In case of the failure of said party of the second part to make either of the payments or interest thereon or any part thereof, or perform any of the covenants on its part hereby made and entered into, then the whole of said payments and interest shall at the election of said first party become immediately due and payable, and this Contract shall at the option of the party of the first part be forfeited and determined by giving to said second party thirty days' notice in writing of the intention of said first party to cancel and determine this Contract, setting forth in said notice the amount due upon said Contract, and the time and place, when and where, payment can be made by said second party.

It is mutually understood and agreed by and between the parties to this Contract that thirty days is a reasonable and sufficient notice to be so given to said second party in case of failure to perform any of the covenants on its part hereby made and entered into, and shall be sufficient to cancel all obligations hereunto on the part of the said first party and fully reinvest them with all right, title and interest hereby agreed to be conveyed, and the party of the second part shall forfeit all payments made by it on this Contract, and its right, title and interest in all buildings, fences and other improvements whatsoever, and such payments and improvements shall be retained by the said party of the first part in full satisfaction and in liquidation of all damages by them sustained, and they shall have the right to re-enter and take possession of the premises aforesaid.

The second party agrees to keep the buildings insured for the sum of at least $None against Fire, Lightning, Wind and Extended Coverage in a company or companies satisfactory to the first party, with loss payable as the interests of the parties shall appear.

The first party will deliver to the second party on or before April 1, 1964 a duly certified abstract of title to said property for examination and will promptly take proper steps to overcome any legal and valid objections to the title, and upon payment of the balance of the purchase price will deliver to the second party a warranty deed as above provided together with an abstract of title to said property duly certified to date showing marketable title in the first party free and clear of all encumbrances.

The second party shall have possession of said property and the rents, issues and profits thereof from February 4, 1964.

IT IS MUTUALLY AGREED by and between the parties hereto that the time of payment shall be an essential part of this Contract and that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties.

IN TESTIMONY WHEREOF, the parties have hereunto set their hands and seals the day and year hereinbefore written.

/s/ Kenneth Nichols (SEAL)
/s/ Loma A. Nichols (SEAL)
LINTVEDT BROTHERS (SEAL)
By:/s/ Darrel Lintvedt (SEAL)
Partner

STATE OF SOUTH DAKOTA,)
County of Jones)ss.

On this the 4th day of February, 1964, before me, C. D. Kell, the undersigned officer, personally appeared Kenneth Nichols and Loma A. Nichols, Husband and Wife and Darrel Lintvedt a partner of Lintvedt Brothers, known to me or satisfactorily proven to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same for the purposes therein contained.

In witness whereof I have hereunto set my hand and official seal.

/s/ C. D. Kell
Notary Public Title of Officer.

(NOTARIAL SEAL)
My commission expires 10/21/65.

Office of Register of Deeds
County of Jones, S. D.

I hereby certify that the within Instrument was filed in this office for record on the 1 day of May, A. D. 1964, at 4:00 o'clock P. M., and was duly recorded in Book 9 of Misc. on page 168.

/s/ Lois Jaide
Register of Deeds.

SEAL OF THE REGISTER OF DEEDS JONES COUNTY

Kenneth Nichols and Loma A. Nichols, Husband and Wife

grantor S of Jones County, State of South Dakota for and in consideration of Forty-two Thousand Dollars and no/00 ---------- DOLLARS

GRANTS, CONVEYS AND WARRANTS TO Darrel Lintvedt

grantee of Vivian, South Dakota P.O., the following described real estate in the County of Jones in the State of South Dakota.

All of Section Ten (10); the West Half (W½) and the West Half of the North East Quarter (W½NE¼) Section Eleven (11), Township Three (3) South, Range Thirty (30), E.B.H.M., Jones County, South Dakota

TRANSFER FEE PAID $42.00

PLAINTIFF'S EXHIBIT 12

Dated this 16th day of September, 1971.

Loma A. Nichols

Kenneth Nichols

STATE OF SOUTH DAKOTA
County of Jones } ss.

On this the 16th day of September, 1971, before me, C.D.Kell the undersigned officer, personally appeared Kenneth Nichols and Loma A. Nichols/ Husband and Wife, known to me or satisfactorily proven to be the person S whose name S are subscribed to the within instrument and acknowledged that t he Y executed the same for the purposes therein contained.

NOTARY PUBLIC SEAL

IN WITNESS WHEREOF I hereunto set my hand and official seal.

C.D.Kell

My commission expires 10/21/73 Notary Public Title of Officer.

STATE OF SOUTH DAKOTA, County of Jones, ss.

Filed for record this 20 day of September, 19 71, at 9:55 o'clock A. M., and recorded in Book 28, Deeds, Page 114.

By ____ Deputy. James C. Strait Register of Deeds.

873

CONTRACT FOR DEED

THIS AGREEMENT, made and entered into as of the 4th day of June, 1996, between Darrel Lintvedt and Mary Lou Lintvedt, husband and wife, of HC 67 Box 49A, Presho, SD 57568, parties of the first part, hereafter called "SELLERS" and Rodney J. Sather, a single man, of Box 509, Presho, SD 57568, party of the second part, hereafter called "PURCHASER". WITNESSETH:

That if the Purchaser shall first make the payments and perform the covenants hereafter mentioned on his part to be made and performed, the Sellers hereby covenant and agree to convey and assure unto Purchaser, in fee simple, clear and free from all encumbrances whatsoever, except for covenants, reservations, restrictions and easements of record as of April 21, 1996, by a good and sufficient Warranty Deed, the following described real property, to-wit:

All of Section Ten; and the West Half, and the West Half of the Northeast Quarter of Section Eleven, in Township Three South, Range Thirty East of the Black Hills Meridian, in Jones County, South Dakota, subject to highway conveyances of record.

As consideration for the conveyance of said property Purchaser agrees to pay to Sellers the sum of $187,200.00 payable in the manner following:

By paying the sum of $37,440.00 as a down payment on or before the date of execution of this contract; and

By paying the deferred principal balance of $149,760.00 in four annual principal installments of $15,000.00 each, with the first installment coming due on the 1st day of January, 1997, and three subsequent installments coming due on the 1st day of January of 1998, 1999 and 2000, with the entire remaining principal balance of $89,760.00 coming due on January 1, 2001, plus, in addition, interest to be paid on the unpaid balance of principal at the rate of eight percent (8%) per annum, such interest to commence as of the date of execution of this contract, and such interest to be paid annually at the same time as the payments on the principal.

The parties further covenant and agree with each other that the following provisions shall constitute a part of this contract:

1. Sellers shall pay the 1995 real estate taxes payable in 1996 and all prior taxes on the date of execution hereof. Sellers shall also pay a one-third prorated share of the 1996 real estate taxes payable in 1997. Since the actual amount of said 1996 taxes are not now known, the 1995 taxes will be used as the amount thereof for proration purposes. Sellers one-third share of said prorated taxes shall be deducted from the down

874

payment, and thereafter Purchaser shall make actual payment of all said 1996 taxes payable in 1997 to the County Treasurer before same become delinquent. Purchaser shall also pay all subsequent taxes before the same become delinquent.

2. Possession of the said premises as owner shall be given to Purchaser as of the date of execution of this contract. Risk of loss shall pass to Purchaser on said date. Any grass or crops growing on the property as of such date shall belong solely to Purchaser. The parties also agree that for income tax purposes and all other purposes the selling price shall be allocated between the real estate and improvements as follows: fences and corrals: $10,000.00; well: $300.00; 3 dams: $4,500.00; and real estate: $172,400.00.

3. Purchaser acknowledges and agrees that if he resells the property by contract for deed, assignment or otherwise he will still remain personally liable to Sellers for all payments and performance of all agreements and covenants made by him under the provisions of this contract.

4. It is mutually agreed between the parties that Purchaser may not prepay the unpaid principal or any portion thereof without first obtaining the written consent of Sellers. Sellers agree to consider a full prepayment without penalty by Purchaser on January 1, 1998; however no guarantee is made by Sellers to allow such prepayment, nor shall Sellers have a right to demand same.

5. It is agreed that prior to the execution of this contract Sellers have furnished to Purchaser a title insurance commitment in the amount of the purchase price issued by Lyman County Title Company, Inc. under date of April 22, 1996, and containing file number 96-196, and covering the above property, and naming Purchaser as the proposed insured. Purchaser has reviewed such commitment and Purchaser finds and accepts the title as set forth in the title commitment except as follows: the taxes and mortgages listed as items 1 through 5 of Schedule B Section 2 of said commitment shall all be paid and fully released on or before the date of execution of this contract. It is agreed a final title insurance policy shall be issued and placed in escrow. The cost of such title insurance shall be shared equally with each party paying one-half thereof.

6. In the event Purchaser shall fail to make the payments set forth in this contract, or any portion thereof, or in the event Purchaser shall fail to pay the taxes as hereinabove provided, or in the event Purchaser fails to perform any of the covenants on his part herein made and entered into, then the whole of said unpaid principal and interest shall, at the election of Sellers, become immediately due and payable, and this Contract shall, at the sole option of Sellers, be forfeited and determined by giving to said Purchaser thirty days notice in writing of the intention of said Sellers to cancel and determine

815

this Contract, setting forth in said notice the amount due upon this Contract, and the time and place, when and where, payment can be made by said Purchaser. It is mutually understood by and between Sellers and Purchaser that thirty days is a reasonable and sufficient notice to be so given to said Purchaser in case of failure to perform any of the covenants on his part herein made and entered into and shall be sufficient to cancel all obligations hereunder on the part of Sellers and fully reinvest Sellers with all right, title and interest hereby agreed to be conveyed, and Purchaser shall forfeit all payments made by him on the Contract, and all of Purchaser's right, title, and interest in all buildings, fences and other improvements whatsoever, and such payments and improvements shall be retained by Sellers, and Sellers shall have the right to re-enter and take possession of the property. If this Contract is forfeited as hereinabove set forth, Purchaser shall convey to Sellers by quit claim deed all of his right, title, and interest in the property, and any buildings, fences and other improvements located thereon. Forfeiture, as described above, shall not be Sellers' sole remedy for default, but shall be cumulative with, and Sellers shall retain, all other rights and remedies provided at law or in equity for breach of contract.

Sellers and Purchaser acknowledge that:

(a) Sellers damages in the event of Purchaser's breach of this Contract are incapable or very difficult of estimation;

(b) Sellers and Purchaser have reasonably endeavored to fix such damages;

(c) In the event Sellers elect, upon default, to retake possession of the property, the value of the property, assuming Purchaser's compliance with this Contract, will bear a reasonable relation to probable damages and would not be disproportionate to any damages which can reasonably be anticipated by the parties as of the date hereof.

In the event of a breach of this Contract by Purchaser, Purchaser hereby waives any claim against Sellers for restitution or unjust enrichment.

7. Notwithstanding the provisions of the foregoing paragraph, Purchaser shall have the right within thirty days following written notice of such default to correct and cure such default by Purchaser paying to Sellers, all delinquent principal and interest installment payments due, plus, in addition thereto, interest at the rate of ten percent per annum on the total amount (principal and interest) of the delinquent payment due, said ten percent interest to commence on the date said delinquent payment was due and continuing until payment is made. In the event of such payment, the terms and conditions herein shall be continued

as if no default had occurred. In the event the Purchaser does not elect to so rectify such default, the remedies of the preceding paragraph may be pursued by Sellers.

8. It is mutually agreed between the parties that the acceptance of any late payment by Sellers or the acquiescence by Sellers in any default hereunder shall not be a waiver of the right of the Sellers to insist upon timely payments and compliance with the other provisions of this contract in the event of any subsequent breach of the Contract by Purchaser.

9. Sellers covenant to pay any South Dakota transfer fee that may be due upon the sale of the premises at the time of completion of the said contract and delivery of the said deed. At Purchaser's option, he may deduct the amount of such transfer fee from the final payment and thereafter pay such fee.

10. BankWest, Inc., of PO Box 998, Pierre, SD 57501 is hereby mutually nominated by the parties to act as escrow agent hereunder, and it is understood and agreed that the good and sufficient warranty deed to this property is to be executed at once by Sellers and placed in escrow with said escrow agent, along with a copy of this contract. Upon Purchaser's payment of the balance of the purchase price and completion and full performance of all of the covenants required by said contract, Sellers shall notify and direct the said escrow agent to deliver to the Purchaser the said warranty deed and title insurance policy. In the event of default on the contract by Purchaser, Sellers shall notify and direct the escrow agent to return said deed and other documents to Sellers. It is agreed that all payments due under this contract except for the down payment shall also be made to said escrow agent. Escrow fees shall be paid as follows: one-half by Sellers and one-half by Purchaser.

11. The parties agree that this Contract constitutes an executory contract as defined at and used in 11 U.S.C. Sec. 365, as now written or as it may hereafter be amended.

12. It is mutually agreed between parties that Sellers make no warranty as to any oil, gas, or other mineral rights which they may own or be able to convey respecting the real property above described, but that Sellers agree to convey any and all mineral rights which they may own in said premises.

13. Purchaser shall hold harmless the Sellers and the property of the Sellers, including the Sellers interest in the property herein, from liability for any and all mechanic's or materialman's liens or any other expenses resulting from any construction or improvements or other alterations which may take place on the above described real estate. Purchaser agrees to either pay such mechanic's lien or commence an action to determine the validity of such lien within sixty days of the filing of the lien and if the lien is found to be valid after final judgment, including all appeals, the Purchaser agrees to

pay such lien within thirty days and the failure to do so shall constitute a default in this agreement.

14. Purchaser agrees to hold the Sellers harmless from any liability of any kind or character arising out of the use or occupation of the property described herein by the Purchaser, or any one claiming under Purchaser, including but not limited to a reasonable attorney's fee for any litigation to which the Sellers are made a party or threatened to be made a party, and which arises out of the use or occupation of the property described herein by the Purchaser.

15. The Purchaser agrees and affirms that he has examined the real property and any improvements thereon, and the same is acceptable in the physical condition as it shall be received on the date of transfer of possession herein. Purchaser further agrees that the Sellers have not expressly or impliedly warranted or represented any portion or item thereof and Purchaser has relied wholly on his own examination. It is agreed the improvements on the property are those items listed in paragraph no. 2 of this contract.

16. Sellers make no warranties, either express or implied, as to the accuracy or location of any boundary fences or lines.

17. Purchaser shall obtain and maintain during the term of this agreement farm liability insurance coverage with annual aggregate limits for personal injury, wrongful death, and property damage of no less than $500,000 with respect to his ranching and farming operation, as well as liability insurance covering all vehicles owned or used by Purchaser in said operation. Purchaser also agrees to name Sellers as additional insureds under said liability policy and Purchaser will provide continuous evidence of insurance throughout the period of this contract.

18. It is understood that after the execution of this contract Sellers may assign their interest in this contract and the property described herein to BankWest, Inc., as security for certain obligations from Sellers to said BankWest; however it is understood and agreed that BankWest, Inc. is taking such assignment subject to the terms of this contract. It is further agreed that all payments to be made by Purchaser hereunder will be made to BankWest, Inc., as escrow agent, as set forth in paragraph 10 hereof. Immediately thereafter said escrow agent shall apply said payments as payments on Sellers said obligations to BankWest, Inc.. Sellers agree to allow such payments to be so made.

19. It is mutually agreed between the parties that time is of the essence in this contract, including time of payment and of performance of other covenants of this contract, and that all of the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, personal representa-

876

tives, administrators, successors, and assigns of the respective parties.

SELLERS:

Darrel Lintvedt

Mary Lou Lintvedt

PURCHASER:

Rodney J. Sather

STATE OF SOUTH DAKOTA:
ss.
County of Lyman :

On this 4th day of June, 1996, before me, the undersigned officer, personally appeared Darrel Lintvedt and Mary Lou Lintvedt, husband and wife, known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same for the purposes therein contained.

In Witness Whereof I hereunto set my hand and official seal.

(Notary Seal)

Notary Public, South Dakota
My comm. exp. 1-9-97

STATE OF SOUTH DAKOTA:
ss.
County of Lyman :

On this 4th day of June, 1996, before me, the undersigned officer, personally appeared Rodney J. Sather, a single man, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In Witness Whereof I hereunto set my hand and official seal.

(Notary Seal)

Notary Public, South Dakota
My comm. exp. 1-9-97

This document prepared by:
Herb C. Sundall
Larson, Sundall, Larson, Schaub & Fox, P.C.
PO Box 187 Tele: 605-869-2233
Kennebec, SD 57544-0187

Page 6

STATE OF SOUTH DAKOTA }ss
County of Jones
Filed for record this 4 day of JUNE 19 96
4:20 o'clock P. M. and recorded in Book 15 MISC page 873-878
Register of Deeds
FEE: $15.00

WARRANTY DEED

Rodney J. Sather, a single person, of Lyman County, State of South Dakota, Grantors, for and in consideration of Two Hundred Fifty Thousand ($250,000.00) Dollars and other good and valuable consideration, GRANTS, CONVEYS AND WARRANTS, to Todd Fuoss, a single person, of RR 1 Box 31, Draper, South Dakota 57531, Grantee, the following described real estate in the County of Jones in the State of South Dakota:

All of Section Ten (10); and the West Half (W½) and the West Half of the Northeast Quarter (W½NE¼) of Section Eleven (11); all in Township Three (3) South, Range Thirty (30) E.B.H.M., Jones County, South Dakota.

The above conveyance is made subject to easements, reservations, mineral reservations, mineral conveyances, current fence location, as well as other exceptions of record, and statutory easements for road right-of-ways.

This conveyance is also made subject to the title exception caused by a Warranty Deed to Zickrick Township dated August 20, 1945, recorded September 27, 1945 at 2:30 P.M. in Book 17 of Deeds, page 288 in the office of the Jones County Register of Deeds.

Dated this 14th day of May, 2003.

Rodney J. Sather

Rodney J. Sather

State of South Dakota)
:ss
County of Hughes)

On this the 14th day of May, 2003, before me, Ronald D. Olinger, the undersigned officer, personally appeared Rodney J. Sather, a single person, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

Ronald D. Olinger

Notary Public - South Dakota

My commission expires:

(SEAL)

Ronald D. Olinger, Notary Public
My Commission Expires
September 13, 2004

PLAINTIFF'S EXHIBIT 15

Prepared by: Ronald D. Olinger
Olinger Law Firm
PO Box 66
Pierre, SD 57501
(605) 224-8851

STATE OF SOUTH DAKOTA } SS.
County of Jones
Filed for record this 15 day of
MAY 20 03
10:50 o'clock A.M. and recorded
In Book 32 DEEDS page 703
Register of Deeds
FEE: $10.00

Transfer Fee
Paid $250.00

WARRANTY DEED

Rodney J. Sather, a single person, of Lyman County, State of South Dakota, Grantors, for and in consideration of Two Hundred Fifty Thousand ($250,000.00) Dollars and other good and valuable consideration, GRANTS, CONVEYS AND WARRANTS, to Todd Fuoss, a single person, of RR 1 Box 31, Draper, South Dakota 57531, Grantee, the following described real estate in the County of Jones in the State of South Dakota:

All of Section Ten (10); and the West Half (W½) and the West Half of the Northeast Quarter (W½NE¼) of Section Eleven (11); all in Township Three (3) South, Range Thirty (30) E.B.H.M., Jones County, South Dakota.

The above conveyance is made subject to easements, reservations, mineral reservations, mineral conveyances, current fence location, as well as other exceptions of record, and statutory easements for road right-of-ways.

This conveyance is also made subject to the title exception caused by a Warranty Deed to Zickrick Township dated August 20, 1945, recorded September 27, 1945 at 2:30 P.M. in Book 17 of Deeds, page 288 in the office of the Jones County Register of Deeds.

Dated this 14th day of May, 2003.

Rodney J. Sather

State of South Dakota)
:ss
County of Hughes)

On this the 14th day of May, 2003, before me, Ronald D. Olinger, the undersigned officer, personally appeared Rodney J. Sather, a single person, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.

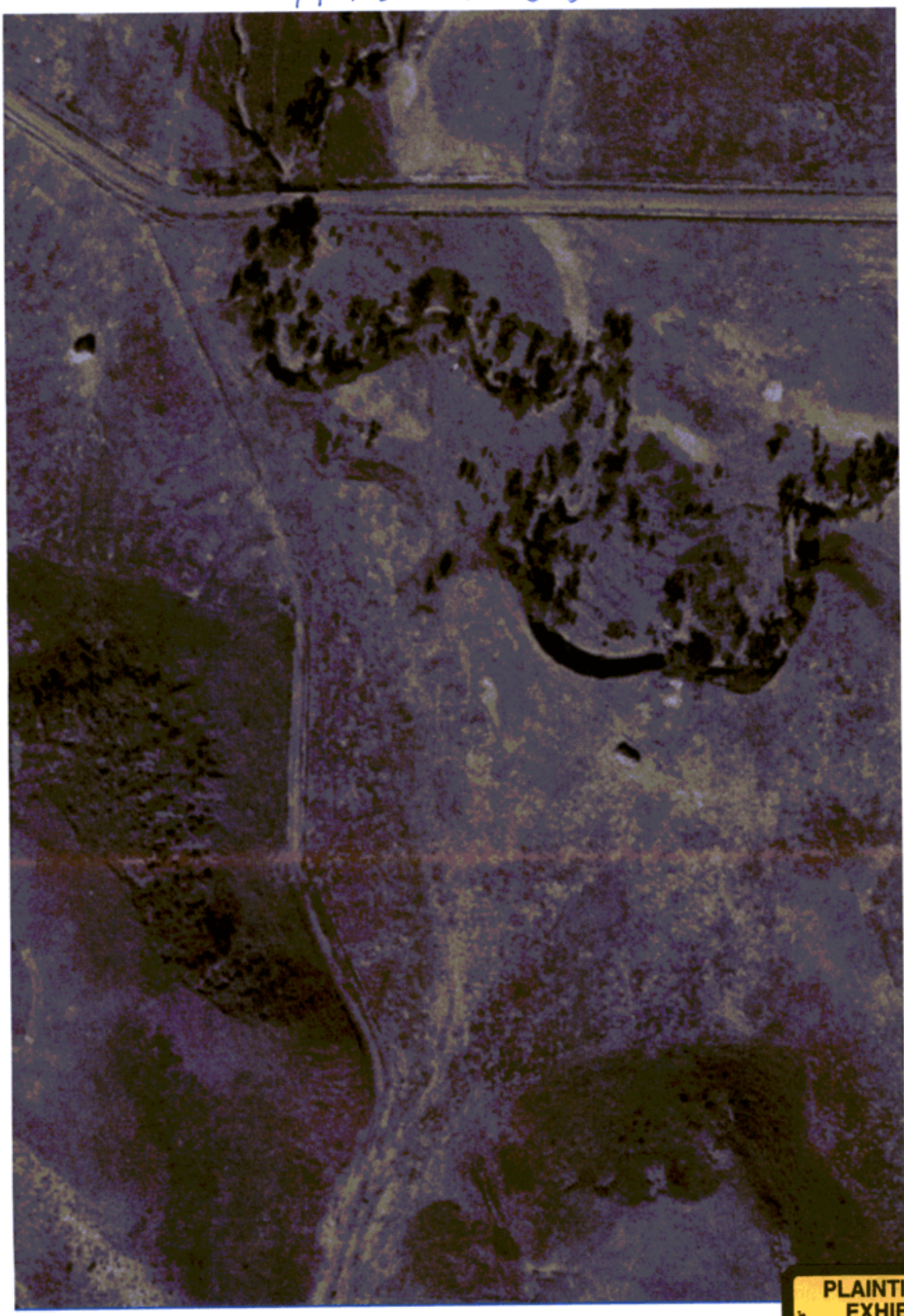
Notary Public - South Dakota

My commission expires:
(SEAL)

Ronald D. Olinger, Notary Public
My Commission Expires
September 13, 2004

PLAINTIFF'S EXHIBIT 15-A

1948 USGS



PLAINTIFF'S EXHIBIT 2

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 29435

TODD FUOSS,

Plaintiff/Appellee,

vs.

DAHLKE FAMILY LAND LIMITED PARTNERSHIP AND RODNEY L. MANN,

Defendants/Appellants.

Appeal from the Circuit Court
Sixth Judicial Circuit
Jones County, South Dakota
Honorable M. Bridget Mayer

BRIEF OF APPELLEE TODD FUOSS

Attorneys for Plaintiff/
Appellee
Robert C. Riter
A. Jason Rumpca
Riter Rogers, LLP
319 S. Coteau
P. O. Box 280
Pierre, SD 57501
605-224-5825

Attorneys for Defendant/
Appellant
Marty J. Jackley/Catherine A. Seeley
Gunderson, Palmer, Nelson
& Ashmore
111 W. Capitol Ave., Ste. 230
Pierre, SD 57501
605-494-0105

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

Other:

PRELIMINARY STATEMENT

For the convenience of the Court, Appellee/Plaintiff, Todd Fuoss is referred to as "Fuoss"; Appellants/Defendants, Dahlke Family Limited Partnership and Rodney L. Mann are referred to as "Dahlke Partnership" and "Mann"; documents from the record of the Jones County Clerk are cited as "R. _____"; Appellants' Brief is cited as "AB ____"; Fuoss' Appendix is cited as "App. ____"; and Appellants' Appendix is cited as "AB App."

JURISDICTIONAL STATEMENT

Dahlke Partnership and Mann properly set forth the status and jurisdiction of this matter before this Court.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I. Whether the circuit court erred when it concluded that Fuoss had acquired adverse possession of land to which Dahlke Partnership and Mann hold record title.

The circuit court concluded that Fuoss had acquired adverse possession.

- SDCL 15-3-13
- *Lehman v. Smith*, 40 S.D. 556, 168 N.W. 857 (1918)
- *City of Deadwood v. Summit*, 2000 S.D. 29, 607 N.W.2d 22
- *Gangle v. Spiry*, 2018 S.D. 55, 916 N.W.2d 119

II. Whether the circuit court erred in granting Fuoss a prescriptive easement, an easement by implication from prior use, and an easement by necessity.

The circuit court granted Fuoss a prescriptive easement, an easement by implication from prior use, and an easement by necessity.

- SDCL 15-3-1
- *Thompson v. E.I.G. Palace Mall, L.L.C.*, 2003 S.D. 12, 657 N.W.2d 300
- *Rotenberger v. Burghduff*, 2007 S.D. 19, 729 N.W.2d 175
- *Shippy v. Hollopeter*, 304 N.W.2d 118 (S.D. 1981)

STATEMENT OF THE CASE

Fuoss does not dispute the procedural history as stated in Mann's Statement of the Case. Fuoss does, however, dispute certain of Mann's factual assertions and arguments contained therein as further discussed below.

STATEMENT OF FACTS

Fuoss has reviewed the Statement of Facts included in Appellants' Brief and responds to them as necessary. Mann accurately set forth the legal description of the subject properties. Fuoss owns Section 10 which is immediately east of the Northeast Quarter of Section 9 which is owned by Mann. 248th Street, or "Bull Creek Road" as the parties refer to it, runs east-west along the northern border of Sections 9 and 10. R. 960. This is the only road adjacent to the subject properties. R. 960. The property owned by Fuoss in Section 10 is separated by Bull Creek which splits the property into two parcels. Approximately 40 percent of Section 10 is on the west side of Bull Creek. R. 374, 960. Bull Creek meanders generally in a diagonal direction through Section 10, entering near the northwest corner of Section 10 and traversing southeast.

Bull Creek is a tributary to the White River. R. 960. The banks of Bull Creek are generally rough and often steep. R. 960. It is not uncommon for Bull Creek to flood during the spring or other wet seasons. R. 960. It is generally not possible to cross Bull Creek in Section 10 with a pickup or tractor even during a dry year. R. 277, 960. Although it may be possible to cross Bull Creek in Section 10 with a horse or four-wheeler in certain spots during a dry year, it cannot be crossed by any means during spring flooding or any other wet seasons. R. 960.

No evidence of a survey was introduced. R. 960. The Zickrick Township plat map depicts the boundary between Sections 9 and 10 to be a straight north-south line which is generally consistent with the straight-line grid platting of all of Jones County. R. 961, 1028. However, sufficient evidence was introduced to establish that the current north-south boundary fence separating Fuoss' land to the east and Defendants' land to the west is not on a straight north-south line. R. 961. It is obvious that the fence has never been precisely on the section line, a fact that has been well known and accepted by all parties. R. 410, 961.

The distance between the banks of the meandering Bull Creek and the current north-south boundary fence is likely between 50 and 100 feet depending on location. R. 419, 961. The close proximity between Bull Creek and the current north-south boundary fence only exists along the northern most portion of the fence, and for a distance likely less than 200 feet. R. 961. The distance between Bull Creek and the fence becomes greater as Bull Creek meanders to the southeast. R. 961.

As the north-south fence goes south it traverses to the east around a large hill before traversing back to the west and finally establishing what appears to be a straight north-south line. R. 961. There is clearly some land within the legal description of Section 10 that is on the west side of the north-south boundary fence by the large hill. R. 961. There is clearly some land within the legal description of the Northeast Quarter of Section 9 that is on the east side of the north-south boundary fence by Bull Creek. R. 961.

This general area of Jones County is rough country and it is common practice that neighbors establish boundary fences that traverse steep hills, deep draws, or rough creek

banks in order that the fences hold to serve the purpose of keeping cattle off neighboring properties. R. 531, 555, 961-62.

Because of the proximity between Bull Creek and the north-south boundary fence between Sections 9 and 10, in order to gain access to the substantial portion of Section 10 on the west side of Bull Creek Fuoss and predecessor owners of Section 10 have used a dirt trail that cuts across the northeast corner of Defendants' property in Section 9. R. 962. The dirt trail begins at an approach off of Bull Creek Road a short distance west from the current corner-post of the north-south boundary fence. R. 962. The dirt trail travels parallel to the fence for a couple hundred feet and ends at a metal gate along the north-south boundary fence. R. 962.

A 1948 U.S.G.S. aerial map clearly shows a well-established dirt trail. R. 962, 991; AB App. 52. The dirt trail was clearly visible on the west side of the north-south boundary fence cutting through the northeast corner of Section 9, so as to allow access to the portion of Section 10 west of Bull Creek. R. 962. That same dirt trail appears in more recent maps as well. R. 962, 993 (App. 2), 1036 (App. 3). The dirt trail that exists today had been visibly established prior to 1948. R. 962.

Defendants have traditionally used the area of property that the dirt trail traverses through as a hay stackyard. R. 962. In 2016, Defendants fenced in the hay stackyard and put a gate across the approach to the dirt trail. R. 759, 962. Later in 2016, Defendant Rodney Mann padlocked the gate across the approach to the dirt trail during deer hunting season in an effort to block access to hunters. R. 648, 962.

In June of 2019, Defendant padlocked the gate across the approach to the dirt trail. R. 3, 963. In response, Fuoss constructed a new wire gate along the east-west fence

along Bull Creek Road between Bull Creek and the corner post of the north-south boundary fence so that he could access his cattle located on the portion of Section 10 west of Bull Creek. R. 3, 391-92, 963. On June 20, 2019, Defendant padlocked the new wire gate that Fuoss had constructed. R. 3, 393, 963. Fuoss then cut the padlocks to access his property to check water and otherwise care for his cattle. R. 3, 392, 963. On June 26, 2019, Fuoss discovered that Defendant drove five (5) wood posts into the ground in front of the new wire gate and stapled the gate to the posts. R. 3, 393, 963; App. 4. Fuoss initiated this action on June 27, 2019. R. 1-2, 963. Defendant did not remove the wood posts until after Fuoss had initiated this action and the parties agreed Fuoss could have access. R. 24, 963.

The only access Fuoss currently has to the portion of Section 10 on the west side of Bull Creek is through the new wire gate he erected between Bull Creek and the corner post of the north-south boundary fence after Mann blocked Fuoss' access by way of the easement (dirt trail). R. 963. Mann has subsequently stacked hay bales across the trail near the southern metal gate entrance to Section 10. R. 433-34, 963, 1018-19; App. 5-6.

The circuit court made accurate Findings of Fact regarding the predecessors in interest to Sections 9 and 10. Likewise, Mann's Statement of Facts adequately describes the conveyance timelines for both properties. The deeds speak for themselves.

Dahlke Partnership and/or Mann himself own about 8,000 acres in this territory. R. 614, 964. The only tract of land they own south of Bull Creek Road is the Northeast Quarter of Section 9. R. 964. Mann pays taxes and insurance on the Northeast Quarter of Section 9 pursuant to the area of land identified in the legal description of the deed to the property. R. 965.

Mann's grandfather, Ludwig ("Lou") Dahlke, owned the Northeast Quarter of Section 9 when Darrel Lintvedt executed the contract for deed to Section 10 in 1964. R. 965. Darrel Lintvedt accessed the portion of Section 10 on the west side of Bull Creek by way of the dirt trail that cut across the northeast corner of the Northeast Quarter of Section 9 on the west side of the north-south boundary fence. R. 270-71, 965. There was a fence letdown located along the north-south boundary fence at approximately the same location as the current metal gate. R. 271, 965. Darrel accessed his land through the fence letdown. *Id*.

During the first years of Darrel Lintvedt's ownership of Section 10 in the mid-1960's, the north-south boundary fence often washed out when Bull Creek flooded. R. 264, 543, 548, 555, 965. Darrel Lintvedt thereafter asked Lou Dahlke if he could move the fence west and Lou agreed he could move it to where the water would no longer wash it out. R. 268, 279, 287, 965. Darrel Lintvedt had also asked Lou Dahlke if he could put in a wire gate in place of the letdown and Lou agreed he could do that too. R. 265, 274, 965.

Pursuant to the discussion and agreement Darrel Lintvedt and Lou Dahlke had regarding the boundary fence line, sometime in the late 1960's or early 1970's, Darrel's son, Brian Lintvedt, and his hired man moved the corner post of the north-south boundary fence further to the west, they installed a wire gate at the approximate location of the old fence letdown, and they straightened out the new north-south boundary fence between the new corner post and the new wire gate located a couple hundred feet to the south. R. 548-49, 556, 558, 965.

Appellants' Brief fails to accurately identify the actual area in dispute in this case. As later discussed, identification of the correct area in dispute is obviously significant in a case involving adverse possession. Appellants' Brief states that "[t]he portion of the fence that Lintvedt moved ran south and linked back up with the existing fence where Bull Creek cuts further into the Fuoss Property. R. 556. This alteration created a triangle area, approximately one to one and one-half acres in size, which legally belonged to Lou Dahlke, but which was separated from the rest of his property and permissively used by Lintvedt. R. 287-88, 784-86, 1064, 1070; [AB] App. 1-2." "AB App. 1", however, is Defendant's Exhibit 8, which is an aerial photograph of the general area, but the triangle depicted was created by Mann using the On-X hunting app based upon where he claims the app estimated the legal description boundary line to be, not the location of the old north-south fence line. R. 782-85. "AB App. 2" was Plaintiff's Exhibit 16 at the trial deposition of Darrel Lintvedt, which became Defendant's Exhibit 15 at trial. This too is an aerial photograph of the general area, but the yellow highlighted triangle depicted was actually drawn on that photograph by Mann's attorney at the deposition. R. 284-87.

In addition to citing maps which fail to accurately identify the actual area in dispute, Appellants' Brief cites deposition testimony from Darrel Lintvedt to support their assertion that "from [Bull Creek], the fence ran south". AB. 4, citing R. 264-66. However, the fence Darrel Lintvedt described going "over to Bull Creek" was the east-west fence that ran parallel to Bull Creek Road. Darrel described the north-south boundary fence as emanating from the road, not "from [Bull Creek]". Examination of Darrel's testimony transcript confirms the same. R. 264-66.

At trial, Brian Lintvedt was asked to draw a line depicting the location of the original north-south boundary fence that was moved in the late 1960's or early 1970's. R. 573-74, 965. Brian is the person who actually moved the north-south boundary fence with the assistance of Darrell Lintvedt's hired man. The line was drawn on a copy of Plaintiff's Exhibit 16, which became Defendant's Exhibit 16A. R. 573-74, 965, 1071; App. 1. The south end of the line is located at the current metal gate and the line extends to the north to the approximate location of the new wire gate installed by Fuoss parallel to Bull Creek Road in June of 2019. R. 966, 1071; App. 1. The court found Brian Lintvedt credible and the triangle-shaped sliver of property gained by Darrel Lintvedt in the late 1960's or early 1970's is accurately depicted in Defendants' Exhibit 16A. R. 966, 1071; App. 1.

The testimony of Darrel Lintvedt described his discussion with Lou Dahlke about moving the corner post west as follows: "I just went and asked him, and we talked about it. As a matter of fact, he came down and looked the situation over." R. 296. "He said whatever will keep you from tearing the fence out." R. 279. "Lou said, move that up there where you don't have to worry about it." R. 295.

The court found that Darrel Lintvedt and Lou Dahlke mutually agreed to move the boundary fence and mutually recognized the new fence line as the boundary. R. 278, 966. Both parties benefited from moving the fence because the new fence did not thereafter wash out and it kept Darrel Lintvedt's cattle on Darrel's property and off of Lou's property. R. 966. The amount of property involved is likely less than an acre. R. 966.

Such verbal agreements between neighbors are common practice and consistent with border fencing in rough country like southern Jones County. R. 966. Dave Brost and his family own property that neighbors what is now owned by Fuoss. R. 966. Brost testified that when his brother owned the property there were places where they changed some of the fence. R. 531, 966. He testified that you use common sense and you talk to your neighbor and decide where the fence should go to miss bad draws, stay on a ridge or avoid a creek. R. 531, 966. He testified that sometimes you have to fence across Bull Creek, but it would be impossible to fence down the middle of Bull Creek. R. 532, 966.

The land east of the new north-south boundary fence Brian Lintvedt installed was exclusively used by Darrel Lintvedt and his successors in interest, primarily to graze cattle. R. 268, 272, 302, 967. The Dahlke's and Mann's to this day have never utilized the land on the east side of the new north-south boundary fence for any purpose. R. 302, 633, 849-50, 967.

During Darrel Lintvedt's trial deposition he described in multiple ways an unfettered ability to use the dirt trail to access his land. R. 967. He never asked for permission to use the dirt trail and he even brought in big equipment using the trail for ingress and egress when constructing a dam on Section 10. R. 289, 309, 967. The only references to his use of the trail as "permissive" were typically by way of affirmative responses to leading questions. R. 967. The court found that Darrel Lintvedt's use of the trail was not permissive. R. 967.

Rodney Sather purchased Section 10 from Darrel Lintvedt on June 4, 1996. R. 967, 1002-07. Sather and his family hunted on the property and he grazed bison on the property for a couple years. R. 720, 967-68. Shortly after Rodney Sather purchased the

subject property from Darrel Lintvedt he posted "No Trespassing" signs on his property along Bull Creek Road, including on the current corner post of the north-south boundary fence between Sections 9 and 10. R. 721-22, 967. The signs state: "POSTED – Private – Wildlife Management Area – NO TRESPASSING – Thanks – Prairie Lands – R. J. Sather." R. 721, 967, 1020-21; App. 7-8. The NO TRESPASSING sign has remained on the subject corner post from 1996 to present. R. 968.

Sather put up electric buffalo fencing in the pasture, sectioning off ground to the west of Bull Creek and to the east of Bull Creek, running the electric fence near the barbed wire perimeter and on the tops of the west and east banks of Bull Creek. R. 498, 968, 1070. He ran the electric buffalo fencing across Bull Creek in the northwest corner of Section 10 and he squared off Bull Creek with the electric fencing along the southern border of Section 10. R. 498, 968. He fenced in this manner so that he could graze the buffalo in Bull Creek during dry times of year and he could prevent them from accessing Bull Creek during the flood-prone times of year. R. 703-04, 968. The court found that this was not done to establish or re-establish any legal boundaries. R. 968.

Sather testified that an area outlined in yellow on Defendants' Exhibit 15, which had been Plaintiff's Exhibit 16 in the trial deposition of Darrel Lintvedt, was a portion of land that Darrel Lintvedt told him he did not own. R. 695, 968, 1070. The outlined portion extends from the metal gate along the north-south boundary fence through Bull Creek before meeting up with Bull Creek Road. R. 968-69, 1070; AB App. 2. However, on four occasions, in response to questions about the area outlined in yellow, Sather voluntarily reiterated that Darrel Lintvedt told him it was a gentlemen's agreement driving through the dirt trail to get to the property. R. 695-96, 706, 713, 736, 969. The

court found that Sather's use of the dirt trail was not permissive. But the court gave minimal weight to the testimony of Sather on the issue of land ownership as he seemed to confuse the separate issues of land ownership east of the north-south boundary fence and land ownership along the dirt trail west of the north-south boundary fence. R. 969.

Sather did not recall replacing the wire gate along the north-south boundary fence with a metal gate, although the court found that he or his hired men did in fact install such a gate as Brian Lintvedt testified credibly that the metal gate was not there during his father's ownership and Fuoss testified credibly that the metal gate was there when he took over ownership. R. 269, 433, 571, 707, 969.

Sather did not inform Fuoss that any of the land east of the north-south boundary fence belonged to Dahlke's or Mann's prior to the sale on May 14, 2003. R. 496, 717, 969. The court found that if the conversation regarding ownership between Rodney Sather and Darrel Lintvedt had actually occurred (which the court rejected), certainly common sense would dictate that Sather would have provided this important information to the new owner, Todd Fuoss. R. 969.

When Fuoss purchased the land he believed everything east of the north-south boundary fence was his property and that everything west of it was Mann's. R. 383, 970. In December of 2003 or January of 2004, when Fuoss and his brother, Mike Fuoss, were fixing the fence south of the subject corner post and east of the subject corner post, they encountered Wesley Mann (Mann's father) and Earl Dahlke (Mann's uncle) who drove up in a vehicle and stopped to talk with them. R. 386-91, 970. They all had a good conversation lasting about 10 – 15 minutes and Wesley Mann commented that he liked

the job that Fuoss had done fixing the fence. *Id*. No mention was made that any of the property east of the north-south boundary fence did not belong to Fuoss. *Id*.

Fuoss has used the property east of the north-south boundary fence to graze cattle during the entire time he has owned the property. R. 369, 970. He and his family also from time-to-time hunt deer on the property. R. 493, 970. To access the property in Section 10 west of Bull Creek, Todd Fuoss, his family members and ranch hands have utilized the dirt trail that cuts across the northeast corner of the Northeast Quarter of Section 9, as Darrel Lintvedt and his family did previously, and they have entered through the metal gate a couple hundred feet south of the subject corner post on the north-south boundary fence. R. 375, 395, 970.

In 2016 Mann fenced in the hay stackyard, using the existing north-south boundary fence as one of the four sides. R. 375, 970. He placed a metal gate across the approach to the dirt trail off from Bull Creek Road. *Id*. That gate remained unlocked until he placed a padlock on it for the first time during deer season in 2016. R. 648, 970. This was the first time that access to the dirt trail had ever been cut off. R. 970-71. The first time Todd Fuoss encountered a padlock on the gate was in 2018. R. 395, 971. Fuoss' use of the dirt trail to access his property was not permissive. R. 375, 971. He used the trail without ever asking to use it until his ability to do so was cut off by Mann in 2019. R. 3, 395, 971.

PRELIMINARY STATEMENT

"In a bench trial, the circuit court is the finder of fact and sole judge of credibility." *Lindblom v. Sun Aviation, Inc.*, 2015 S.D. 20, ¶ 9, 862 N.W.2d 549, 552 (quoting *Osman v. Karlen & Assocs.*, 2008 S.D. 16, ¶ 30, 746 N.W.2d 437, 445). "It is the trial court's responsibility to weigh the evidence, including credibility, and make factual findings." *State v. Labine*, 2007 S.D. 48, ¶ 18, 733 N.W.2d 265, 270 (citing *State v. Lockstedt*, 2005 S.D. 47, ¶ 33, 695 N.W.2d 718, 729). "Due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses. SDCL 15-6-52(a). This Court does not reweigh the evidence and derive new factual findings; rather, the trial court's factual finding will not be overturned unless they are clearly erroneous." *Id*. (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74, 105 S.Ct. 1504, 1511, 84 L.E.2d 518 (1985)) (noting that reviewing courts may not reverse factual findings if plausible in light of the entire record, even if it would have weighed the evidence differently).

On appeal, "[d]oubts about whether the evidence supports the court's findings of fact are to be resolved in favor of the successful party's version of the evidence and of all inferences fairly deducible therefrom which are favorable to the court's decision. *State , Department of Game, Fish and Parks v. Troy Township, Day County* 2017 S.D. 50, ¶ 36, 900 N.W.2d 840, 854 (quoting *Gartner v. Temple*, 2014 S.D. 74, ¶ 8, 855 N.W.2d 846, 850). "The trial court's findings of fact are presumptively correct and the burden is upon appellant to show error." *Taylor v. Taylor*, 2019 S.D. 27, ¶ 15, 928 N.W.2d 458, 465 (quoting *Grode v. Grode*, 1996 S.D. 15, ¶ 19, 543 N.W.2d 795, 801).

ARGUMENT AND AUTHORITIES

I. The circuit court did not err when it concluded that Fuoss had acquired adverse possession of land to which Dahlke Partnership and Mann hold record title.

"Proof of the individual elements of adverse possession present questions of fact for the circuit court, while the ultimate conclusion of whether they are sufficient to constitute adverse possession is a question of law." *Gangle v. Spiry,* 2018 S.D. 55, ¶ 11, 916 N.W.2d 119, 123 (quoting *Underhill v. Mattson,* 2016 S.D. 69, ¶ 9, 886 N.W.2d 348, 352). "Therefore, the circuit court's findings of fact are reviewed under the clearly erroneous standard, while its conclusions of law are reviewed under the de novo standard." *Ashby v. Oolman,* 2008 S.D. 26, ¶ 10, 748 N.W.2d 132, 135.

Adverse Possession

"In South Dakota, property is subject to adverse possession when it has been actually and continuously occupied under a claim of title exclusive of any other right. SDCL 15-3-12." *City of Deadwood v. Summit,* 2000 S.D. 29, ¶ 16, 607 N.W.2d 22, 26. A person claiming title by adverse possession must prove the following elements by clear and convincing evidence: 1) an occupation that is 2) open and notorious, 3) continuous for the statutory period and 4) under claim of title exclusive of any other right. *Underhill*, 2016 S.D. 69, ¶ 11, 886 N.W.2d 348, 352 (citing SDCL § 15-3-12).

The element predominantly at issue in the case before this Court is the fourth element – that the occupation has been exclusive of any other right. Many cases refer to this element as "hostile" possession. *See e.g., Summit,* 2000 S.D. 29, ¶ 16, 607 N.W.2d 22, 26 ("[t]he traditional elements of adverse possession require the 'actual, open, visible, notorious, continuous and hostile' occupation of the property for the statutory period").

This element, however, does not require wrongful intent on the part of the adverse possessor. *Underhill,* 2016 S.D. 69, ¶ 17, 886 N.W.2d 348, 354. To establish that a use or possession of another's property is hostile, rather than permissive, it is not necessary to show that there was a heated controversy, manifestation of ill-will, or that the claimant was in any sense an enemy of the owner. 68 Am. Jur. 3d *Proof of Facts* 239 § 4 (2002).

The Doctrine of Acquiescence

The doctrine of acquiescence in boundaries (the doctrine of acquiescence) provides an evidentiary presumption of hostility to the occupation of property to a visible and ascertainable boundary for the statutory period. *Summit*, 2000 S.D. 29, ¶ 22, 607 N.W.2d 22, 28 (citing *Lewis v. Moorhead*, 522 N.W.2d 1, 5 (S.D. 1994)).

The doctrine of acquiescence was recognized in South Dakota as early as 1918, in *Lehman v. Smith*, 40 S.D. 556, 168 N.W. 857 (1918). The Court in *Lehman* stated:

> [t]he question of adverse possession may be conclusively determined by the length of time during which there has been acquiescence in a disputed boundary. When such acquiescence continues during the statutory period prescribed as a bar to re-entry, title may be acquired through acquiescence alone. The rule that the presumption of an agreement fixing a division line is conclusive, where both parties have been in possession and use of their respective lands up to a dividing line marked by visible objects, such as a fence, is correlated to the rule of adverse possession…

Id. at 859 (additional citations omitted). *Lehman* considered an Iowa case which stated:

> The doctrine of acquiescence is founded on the presumption of an agreement fixing the division line from long maintenance of a fence or other monument marking a line as boundary between the adjoining owners, and this is of such strength that after the lapse of 10 years, in the interest of peace and quiet, they are not permitted to gainsay the agreement thus inferred.

Id. (citing *Keller v. Harrison*, 116 N.W. 327 (Iowa 1908)).

The doctrine of acquiescence gives an evidentiary presumption as to the element of hostility and applies even though the occupancy occurred due to ignorance,

inadvertence, or mistake and without an intention to claim the lands of another. *Summit*, 2000 S.D. 29, ¶22, 607 N.W.2d 22, 28 (citing *Lien v. Beard*, 478 N.W.2d 578, 580 (S.D. 1991)). "This doctrine does not eliminate the necessity that adjoining landowners must acquiesce in the boundary for twenty years but merely provides that such acquiescence furnishes the element of hostility necessary for adverse possession." *Summit*, 2000 S.D. 29, ¶ 22, 607 N.W.2d 22, 28.

In *Kinsella v. Caldwell*, Stanley County 58CIV16-000026, the Honorable Patricia J. DeVaney[1] issued a Memorandum Opinion which included an analysis of the doctrine of acquiescence. The circuit court in the case at hand adopted the same legal analysis as was applied in *Kinsella* with regard to the doctrine of acquiescence, noting that the terms "acquiesce" or "acquiescence" are not synonymous with "mutual mistake" and this Court has not held that a mutual mistake is a prerequisite to applying the doctrine of acquiescence; rather, a mutual mistake was deemed a scenario which our Court has found to suffice. *Kinsella*, p. 8. R. 975-76.[2]

A. The circuit court did not err when it found that Fuoss established the elements of adverse possession for the land east of the old north-south boundary fence during Darrel Lintvedt's ownership.

[1] Patricia J. DeVaney served as a circuit court judge from 2012 until her elevation to the South Dakota Supreme Court in 2019.

[2] In addition to analyzing this Court's precedent and the decision in *Kinsella*, the circuit court considered the law in North Dakota. "To establish a new boundary line by the doctrine of acquiescence, it must be shown by clear and convincing evidence that both parties recognized the line as a boundary, and not a mere barrier, for at least 20 years prior to the litigation." *Moody v. Sundley*, 2015 N.D. 204, ¶23, 868 N.W.2d 491, 499 (quoting *Brown v. Brodell*, 2008 N.D. 183, ¶ 9, 756 N.W.2d 779). R. 976. Mutual recognition of the boundary may be inferred by a party's conduct or silence. *Id.*; R. 976.

The court made findings of fact and conclusions of law which clearly distinguished adverse possession of the land east of the *old* north-south boundary fence and adverse possession of the land east of the *current* (new) north-south boundary fence. R. 979-80. Perplexingly, Appellants' Brief does not even acknowledge this clear distinction, let alone make argument against it. By failing to address the court's findings on this issue, Mann has waived any argument against the court's finding of adverse possession for the land east of the old north-south boundary fence line.[3]

It is unclear whether Mann's failure to correctly identify the "Disputed Area" was the cause for his failure to argue against the court's findings on this issue. But the only evidence introduced clearly established that the land east of the old north-south boundary fence was always used by Darrel Lintvedt "exclusive of any other claim of right" and is thus deemed hostile. R. 975. In any event, there was absolutely no evidence introduced to even suggest that Darrel Lintvedt's occupation and possession of the land east of the old-north south boundary fence was ever permissive. R. 979. Therefore, any failure to raise such an argument is inconsequential as there was no evidence to support such a claim.

B. <u>The circuit court did not err when it found that Fuoss established the elements of adverse possession for the land between the old north-south boundary fence and the new north-south boundary fence during Darrel Lintvedt's ownership.</u>

As to the first element where title is claimed by adverse possession rather than upon a written instrument, SDCL § 15-3-13 provides that land shall be deemed to be

[3] *See People in interest of M.S.*, 2014 S.D. 17, ¶ 18, 845 N.W.2d 366, 371 (father waived claim on appeal where he failed to address one of the trial court's findings); *see also In re Estate of Smid*, 2008 S.D. 82, ¶ 43 n. 15, 756 N.W.2d 1, 15 n. 15 (Konenkamp, J. dissenting) (it is the Court's "standard policy" that "failure to argue a point waives it on appeal.").

possessed and occupied only if: 1) it has been protected by a substantial enclosure; or 2) it has been usually cultivated or improved. R. 972. The circuit court found that "[t]he land between Bull Creek and the old north-south fence line which had a north corner post located approximately at the current 'new gate' location was protected by a substantial enclosure, i.e., the fence serving as the boundary between Darrel Lintvedt's property and the adjoining landowner's property when Darrel Lintvedt purchased the subject property in the mid-1960's." *Id*. The same finding was made as to the fence serving as the current boundary between the Fuoss and Mann properties. *Id*.

The second element of adverse possession requires that the occupation be open and notorious. Darrel Lintvedt exercised open and notorious occupation of the land between Bull Creek and the current north-south fence line for approximately twenty-five (25) years until he sold the subject land to Sather in 1996. R. 972.

The third element of adverse possession requires continuous possession for the statutory period. The statutory period for adverse possession is twenty (20) years. SDCL §§ 15-3-1, 15-3-7. R. 973. That period was met as to the current north-south fence location in the late 1980's or early 1990's – twenty (20) years after the Lintvedt's moved the north-south fence further to the west. R. 973. Additionally, adverse possession occurs by operation of law and does not require an action to commence it, nor continue it. *Lusk v. City of Yankton*, 40 S.D. 498, 168 N.W. 375, 377 (S.D. 1918) (R. 971); *Johnson v. Biegelmeier*, 409 N.W.2d 379, 382 (S.D. 1987).

The fourth element of adverse possession requires the occupation be under a claim of title exclusive of any other right, i.e., hostile. This is the element which is predominantly at issue for the land between the old north-south boundary fence and the

new north-south boundary fence during Darrel Lintvedt's ownership. The court found that the doctrine of acquiescence applied, which had the effect of creating a presumption of hostility which required Mann to overcome said presumption with proof that the use of the land was permissive.

This Court did not overturn any existing precedent regarding the doctrine of acquiescence in *Gangle v. Spiry*, 2018 S.D. 55, 916 N.W.2d 119.[4] Further, it is well-established in South Dakota that continued use of land which is permissive is insufficient to fulfill the requirement of hostile use. *Id*. at ¶ 14, 123 (citations omitted). R. 980. The question in *Gangle* was whether a permissive use can ripen into one of hostility by merely transferring property. *Id*. at ¶ 15, 123; R. 980. This Court looked to other courts and adopted the well-established rule that permissive use cannot ripen into adverse possession until a positive assertion of a right hostile to the record holder is made known to him. *Id.* at ¶ 15, 123-24 (footnote omitted). R. 980. The circuit court in *Gangle* found that Gangle's father's use was permissive, but the circuit court declined to extend the permissive use to Gangle and this Court reversed on that issue. *Id*. at ¶ 18, 124-25. Here, the circuit court noted that the finding of permissive use for the initial occupation of the disputed land in *Gangle* is distinguishable from this case where the initial occupation of the disputed land was not merely permissive. R. 980-82.

"Unlike *Gangle*, the placement of the fence in this case was with knowledge and by agreement of both parties. Unlike *Gangle*, Fuoss and his predecessors have had

[4] "Both parties presented arguments in their briefs regarding the doctrine of acquiescence; however, the circuit court did not mention the doctrine it its letter decision, findings of fact and conclusions of law, or its judgment. Therefore, we decline to address it." *Id.* at ¶ 18, 125, n. 5.

exclusive use of the subject property. Unlike *Gangle*, the Dahlke's never drove posts in the ground to indicate where they understood the true boundary line to be. Unlike *Gangle*, Rodney Sather posted a "No Trespassing" sign with his name exclusively on it on the boundary fence corner post. And unlike *Gangle*, all parties in the current case and their respective predecessors have acquiesced in the current boundary fence location for fifty (50) years. In addition, Dahlke and Mann never used the property in question, whereas in *Gangle*, the son had utilized the property to store tree trimmings and brush and would go over the fence and retrieve the wood when he wanted to use it for firewood down by the lake." R. 981.

The court found that Darrel Lintvedt and Lou Dahlke mutually recognized the new fence line as the boundary. R. 278, 966. Consistent with *Keller v. Harrison*, 139 Iowa, 383, 116 N.W. 327 which was quoted in *Lehman v. Smith*, 40 S.D. 556, 168 N.W. 857 (1918), after the lapse of [the statutory period], in the interest of peace and quiet, [Dahlke Partnership and Mann] are not permitted to gainsay the agreement thus inferred. *See also Wood v. Bapp,* 41 S.D. 195, 169 N.W. 518 (1918) (acquiescence for the period required for obtaining property by adverse possession is sufficient to work an estoppel). In other words, if Lou Dahlke wanted Lintvedt to tear out the new fence and place it back where it was, the time for Lou Dahlke to do that would have been within the first twenty years that the new boundary fence line was established.

Mann states that "this Court should look to the principles of neighborliness and common sense it quoted in *City of Deadwood v. Summit, Inc.*, 2000 S.D. 29 [¶ 27], 607 N.W.2d 22[, 29]… '[The Doctrine of Acquiescence] … is not intended to subvert neighborliness or prudence whereby a neighbor allows another to use part of his land for

the neighbor's (or their mutual) benefit[.]'" AB. 20-21. As the circuit court in *Kinsella* aptly pointed out, "this reference was in regard to the *timeframe* during which the acquiescence must continue, i.e., a period of twenty years." *Id*. p. 9, n. 6.

But, regardless, any argument from Mann about being neighborly rings hollow. Mann is literally asking that the fence be ripped out and placed where he believes the legal description of the property line is located, which is right down the middle of Bull Creek (R. 784-85, 1064; AB App. 1). And to take it a step farther, Mann knows full well that such a fence placement would likely washout every spring, and the partition fencing Mann requested in his counterclaim (SDCL § 43-23-2; R. 37) would require Fuoss to continually reconstruct that entire part of the partition fence right down the middle of Bull Creek every time it washes out. Neighborly? Any argument from Mann about being neighborly is disingenuous at best.

The principle of "tacking" allows Fuoss to add his own claim to that of the previous adverse possessors under whom he claims a right of possession. *Underhill*, 2016 S.D. 69, ¶ 16, 886. N.W.2d 348, 354. R. 974. Sather's utilization of the property, in whatever manner he pursued, did not extinguish the adverse possession created by Darrel Lintvedt. Once adverse possession has ripened under the twenty (20) year provision of Chapter 15-3, it would take a similar twenty (20) year period of non-use to extinguish the adverse possession. *See Lusk*, 40 S.D. 498, 168 N.W. 375, 377 (S.D. 1918). Therefore, because the court found that Fuoss had established the elements of adverse possession during his ownership of the land beginning in 2003 (discussed below), the court correctly concluded that Fuoss was entitled to a declaratory judgment that he adversely possessed the land east of the current north-south boundary fence. R. 983.

C. The circuit court did not err when it found that Fuoss established the elements of adverse possession for the land between the old north-south boundary fence and the new north-south boundary fence during Sather and Fuoss' ownership.

The circuit court found that Sather and Fuoss' use of the land has been open and notorious (R. 973-74) and that "[b]eyond Darrel Lintvedt's adverse possession period of time, there has been a separate twenty (20) year period of adverse possession from the time that [] Sather purchased the land in 1996 to the end of 2018 when [Mann] first objected to Fuoss' possession of the land east of the current north-south boundary fence." R. 977. This finding is important for this appeal in the event that this Court reverses the circuit court's ultimate conclusion on the issue of adverse possession for the land between the old north-south boundary fence and the new north-south boundary fence during Darrel Lintvedt's ownership.

"The test is whether the person 'honestly enters into possession of land in the belief that the land is his own.'" *Lewis*, 522 N.W.2d 1, 5 (S.D. 1994) (quoting *Barclay v. Tussey*, 259 Ark. 238, 532 S.W.2d 193, 196 (1976)). R. 978. Mann contends that "the language of the contract for deed between Lintvedt and Sather supports [Sather's] testimony that he knew (or should have known) the Disputed Property would not belong to him." AB 21-22. Mann ignores, however, the Warranty Deed from Sather to Fuoss wherein Sather conveys the subject property to Fuoss subject to "current fence location." R. 1008-09.

"From the time Rodney Sather purchased his property, it had been his intent to 'claim land of another,' as reflected in part by his posting of the 'No Trespassing' sign, in the sense that he was knowingly claiming property not contained in his legal

description… Dahlke and Mann's never used nor asserted their right to utilize this property until 2018, at which time Fuoss first noticed the padlock.

With regard to the "No Trespassing" signs, (which had Sather's name on them), Mann claims Sather "testified that he put the "No Trespassing" signs up to keep hunters off of his property and to help his neighbors, Dahlke Partnership and Mann, keep hunters off of their land as well. R. 734." AB 22. And with particular regard to the "No Trespassing" sign that was placed upon the subject corner post, Mann states "[Sather] also testified that the location of the sign relied upon by the circuit court to establish an assertion of a right hostile to the record holder was at an access area to both his and Mann's property along the road. R. 734." But Sather's testimony is simply not accurate. The subject corner post is not at the access point to the dirt trail that cuts through Mann's hay yard. The subject corner post (which the sign is on) is located to the east of the dirt trail access approach. This further supports the court's findings that Sather's testimony was not credible and he was confused.

The legal significance of the "No Trespassing" sign in this case (which is only significant if this Court does not find adverse possession of the land between the old north-south fence line and the new north-south fence line during Darrel Lintvedt's ownership due to "permission"), is that a permissive use cannot ripen into adverse possession until a positive assertion of a right hostile to the record holder is made known to him. *Gangle.* at ¶ 15, 123-24. R. 980. But if purchasing land and immediately thereafter placing a sign on the corner post that says "POSTED – Private – Wildlife Management Area – NO TRESPASSING – Thanks – Prairie Lands – R. J. Sather." is not

"a positive assertion of a right hostile to the record holder [] made known to him", then what is?

The court found that "[t]hese signs, and in particular the sign on the subject corner post, clearly provided actual notice of the hostile claim or constituted an act or declaration of hostility so manifest and notorious that actual notice will be presumed. Neither Dahlke nor Mann's name is on the sign. Nor was ever a demand to remove the sign ever tendered or corrected." R. 982. The court continued, stating "[t]he NO TRESPASSING sign has remained on the subject corner post from 1996 to present. Therefore, [Mann] and [his] predecessors had actual and continuous notice of the hostile claim for twenty-two (22) years before the first objection to Fuoss using the land was made at the end of 2018, exceeding the statutory period for adverse possession of twenty (20) years. SDCL §§ 15-3-1, 15-3-7." R. 983.

Finally, the court found that "[Mann's]' assertion that [his] payment of taxes on the disputed ground should defeat a claim of adverse possession has been rejected by the South Dakota Supreme Court in numerous cases, even where it was the taxing entity claiming adverse possession. *See Summit*, 2000 S.D. 29, ¶12, 607 N.W.2d 22, 26; *Lusk*, 40 S.D. 498, 168 N.W. 375, 377 (S.D. 1918); *Cuka v. Jamesville Hutterian Mutual Society*, 294 N.W.2d 419, 423 (S.D. 1980); *Johnson v. Biegelmeier*, 409 N.W.2d 379, 382 (S.D. 1987)." R. 983. The court correctly concluded that Todd Fuoss is entitled to a declaratory judgment for adverse possession of the land between the old north-south boundary fence and the new north-south boundary fence during Sather and Fuoss' ownership.

II. The circuit court did not err when it granted Fuoss a prescriptive easement, an easement by implication from prior use, and an easement by necessity.

Like adverse possession, in cases involving easements the circuit court's findings of fact are reviewed under the clearly erroneous standard, and its conclusions of law under a de novo standard. *Rancour v. Golden Reward Mining Co., LLP*, 2005 S.D. 28, ¶ 5, 694 N.W.2d 51, 53.

A. The circuit court did not err in granting Fuoss a prescriptive easement.

A claim for a prescriptive easement is similar to a claim of ownership by adverse possession, except in a prescriptive easement claim, the claimant only receives the easement, not the land title. *Thompson v. E.I.G. Palace Mall, L.L.C.*, 2003 S.D. 12, ¶ 7, 657 N.W.2d 300, 304. A party claiming the existence of a prescriptive easement must meet a two-part test by clear and convincing evidence. First, the party must show an open, continued, and unmolested use of the land in the possession of anther for the statutory period of twenty years. Second, the party claiming a prescriptive easement must show the property is being used in a manner that is hostile or adverse to the owner. *Rotenberger v. Burghduff*, 2007 S.D. 19, ¶ 8, 729 N.W.2d 175, 178.

"The party asserting a prescriptive right makes a prima facie case be showing an open and continuous use of another's land with the owner's knowledge, creating a presumption that such use is adverse and under a claim of right." *Thompson*, 2003 S.D. 12, ¶ 8, 657 N.W.2d 300, 304 (citing *Kougl v. Curry*, 73 S.D. 427, 432, 44 N.W.2d 114, 177 (S.D. 1950)). A party asserting the defense of permissive use bears the burden of proof to show that the use was only permissive. *Hofmeister v. Sparks*, 2003 S.D. 35, ¶ 17, 660 N.W.2d 637, 642 (citing *Kougl*, at 432-33, 117).

Aerial photographs from 1971 (R. 993; App. 2) and more recently (R. 1036, App. 3) depict the dirt trail which is the subject of the easement claims. Mann acknowledges that "Lintvedt, Sather, and Fuoss used the Dahlke/Mann Property for ingress and egress openly, continuously, and unmolested for a combined total of more than twenty years." AB 27. Mann further acknowledges that the "Dahlke/Mann property owners knew of Fuoss's and his predecessors' use, thus creating the presumption that the use was adverse." *Id*. Mann contends, however, that "Dahlke Partnership and Mann presented clear and convincing evidence that the use was permissive, thereby rebutting the presumption of hostility." *Id*. This claim is without merit.

Mann concedes that "Lintvedt's initial use of the Dahlke/Mann Property may have been under a claim of right." AB 27. Mann painstakingly dissects Darrel Lintvedt's testimony in an effort to ultimately claim that "[w]hen requesting permission to place a gate in the north-south fence, Lintvedt *intrinsically sought permission* to traverse Dahlke/Mann Property to access the Fuoss Property and Disputed Property through the newly installed gate." AB 27-28. (emphasis added). Mann attempts to further bolster his argument that Lintvedt's use of the trail was permissive by explaining that Lintvedt testified, "[Lou Dahlke] said either put that fence down or build a gate and go through it." R. 289. AB 28. That statement is clearly not evidence that Darrel Lintvedt's use of the trail was permissive. However, the questions and answers immediately preceding that quote demonstrate clear as day that Lintvedt's use of the trail was not permissive:

Q: And he knew you had from time to time driven in there and use it had to build the dam, and he was okay with that, wasn't he?
A: Oh, yeah.
Q: And did you talk to him at all about being able to drive in there even when you were putting the fence down before you put the new fence in?

A: *Well, no.* I asked him if we could put a gate in because that's the only way you could get in there on that side.
Q: Okay.
A.: He said either put that fence down or build a gate and go through it.

R. 289. (emphasis added).

The court found that "[Darrel Lintvedt] never asked for permission to use the dirt trail and he even brought big equipment over the trail for ingress and egress when constructing a dam on Section 10 shortly after constructing the new north-south boundary fence. The court finds that Darrel Lintvedt's use of the trail was not permissive." R. 967. Consistent with the court's Findings of Fact, the court rejected Mann's claim that Darrel Lintvedt's use of the trail was merely permissive. R. 985. Clearly, Mann has not shown clear error on this issue.

The Court in *Shippy v. Hollopeter*, 304 N.W.2d 118, 121 (S.D. 1981), held that once a prescriptive easement had ripened under the twenty (20) year provision of Chapter 15-3, it would take a similar twenty (20) year period of non-use to extinguish the easement or grant that had been created and obtained. Additionally, possession of successive occupants can be tacked together to make up the required continuity. *Rotenberger v. Burghduff*, 2007 S.D. 19, ¶ 13, 729 N.W.2d 175, 180 (citing *Shippy*, at 121 n. 2 (citing *Walker v. Sorenson*, 64 S.D. 143, 265 N.W. 589 (1936)). Therefore, Rodney Sather's utilization of the dirt trail, in whatever manner he utilized it, did not extinguish the prescriptive easement created by Darrel Lintvedt's use of the trail.

Nonetheless, the court made findings of fact on the issue of permissive use of the trail for both Sather and Fuoss. "Rodney Sather's use of the dirt trail was not permissive, as he clearly understood that his right to use the trail was as a result of a gentlemen's agreement." R. 969. "Fuoss' use of the dirt trail to access his property was not

permissive. He used the trail without ever asking to use it until his ability to do so was cut off by [Mann] in 2019." R. 971. Fuoss has proved by clear and convincing evidence the existence of a prescriptive easement. R. 985.

Although Mann's contention that Sather used the dirt trail permissively (which the court rejected) is not relevant to the ultimate conclusion that a prescriptive easement exists because of Lintvedt and Fuoss' non-permissive use of the trail, the phrase "gentlemen's agreement" as used by Mann to describe Sather's understanding of his right to use the trail is similar to how the circuit court described the decision to move the corner post west. The difference, however, is that there is no real mutual benefit for use of the trail as it only truly benefits the owners of Section 10, unlike moving the corner post west which benefited both parties because it solved the problem of the boundary fence washing out during the spring when Bull Creek would flood. But a current owner's understanding of their ability to use a trail as the result of a "gentlemen's agreement" between previous owners is akin to the doctrine of acquiescence which the court considered on the issue of adverse possession and would result in a second twenty-year timeframe (1996 – 2018) which Fuoss could also use prove a prescriptive easement.

In *Rotenberger v. Burghduff*, 2007 S.D. 19, ¶ 12, 729 N.W.2d 175, 179-80, the South Dakota Supreme Court "acquiesced" to the circuit court's application of the doctrine of acquiescence in a prescriptive easement case.

> The circuit court noted he did not show any evidence he granted Rotenberger "permission" to use the trail. Instead, the circuit court noted the doctrine of acquiescence, found in adverse possession law, could be used to demonstrate the adverse or hostile requirement in prescriptive easements. It is undisputed that Burghduff had knowledge of Rotenberger's use of the trail and did not prevent him from using it. "When such acquiescence continues during the statutory period prescribed as a bar to reentry, title may be acquired through acquiescence alone."

City of Deadwood v. Summit, Inc., 2000 S.D. 29, ¶ 22, 607 N.W.2d 22, 28 (citing *Lehman v. Smith*, 40 S.D. 556, 168 N.W. 857, 859 (1918)).

The law with regard to adverse possession is often cited and applied in prescriptive easement cases and vice versa. One area of the law in both of these types cases that remains ambiguous, however, is the law with regard to the burden of proof and evidentiary presumptions. The burden of proof in both adverse possession and prescriptive easement cases is "clear and convincing evidence." That burden of proof applies to each of the individual elements. *Underhill*, 2016 S.D. 69, ¶ 11, 886 N.W.2d 348, 352 (citing SDCL § 15-3-12). With regard to the final element, however, the doctrine of acquiescence gives an evidentiary presumption as to the element of hostility. *Summit*, 2000 S.D. 29, ¶ 22, 607 N.W.2d 22, 28 (citing *Lien v. Beard*, 478 N.W.2d 578, 580 (S.D. 1991)).

In *Hofmeister v. Sparks*, 2003 S.D. 35, ¶ 17, 660 N.W.2d 637, 642, this court stated, "like a party asserting the defense of permissive use to prevent the creation of a prescriptive right, the party asserting extinguishment by prescription also *bears the burden of proof* to show that the use was only permissive." (citing *Kougl v. Curry*, 73 S.D. 427, 432, 44 N.W.2d 114, 177 (S.D. 1950) (stating that "[t]he owner of the servient estate, in order to avoid the acquisition of an easement by prescription, has the burden of rebutting this presumption by showing that the use was permissive.")). (emphasis added). This suggests that the "burden of proof" to show "permission" in prescriptive easement cases is clear and convincing evidence, although that has not been explicitly stated in South Dakota case law.

If the burden of proof to show permission in prescriptive easement cases is clear and convincing evidence, is that also the burden of proof to show permission in cases of

adverse possession? This Court has not clarified whether the burden of proof required to overcome the presumption of hostility in adverse possession cases is "clear and convincing evidence" or the "substantial, credible evidence" standard provided for in SDCL 19-19-301[5], or some other standard for that matter.

Mann has failed to raise the issue of whether "substantial, credible evidence" rather than "clear and convincing" evidence should be the standard of proof to show permission. Furthermore, the court's factual findings that trail use and land use was *not permissive* makes remand to apply a different legal standard moot as the factual findings of *not permissive* would result in the same legal conclusions reached under any standard applied.[6]

B. The circuit court did not err in granting Fuoss both an easement by implication from prior use and an easement by necessity.

[5] Clear and convincing evidence is "proof that is certain, definite, reliable, and convincing, leaving no doubt on the intention of the parties." In re Dimond, 2008 S.D. 131, ¶ 6, 759 N.W.2d 534, 536. "[T]he substantial, credible evidence requirement means that a presumption may be rebutted or met with such evidence as a trier of fact would find sufficient to base a decision on the issue, if no contrary evidence was submitted. But mere assertions, implausible contentions, and frivolous avowals will not avail to defeat a presumption." Id. at ¶ 9, 538 (footnote omitted).

[6] Pertinent to the prescriptive easement issue, the court expressly found that Lintvedt, Sather and Fuoss' use of the trail was *not* permissive. R. 967, 969, 971. Similarly, the court found "[t]here was no evidence offered to even suggest that Darrel Lintvedt's use of the land between Bull Creek and the *old* north-south fence line was ever permissive." R. 979. And as to the issue of permission for Darrel Lintvedt's use of the land between the old north-south fence line and the new north-south fence line, the court made the following finding: "[t]he Court rejects as a matter of law, *and fact*, Defendant Rodney Mann's claim that the presumption of hostility should be rebutted by his allegation that his predecessors had granted permission … Darrel Lintvedt's use of the property between the old north-south fence line and the new north-south fence line, and the fact that the Dahlke's or Mann's never again used any of that land for any purpose, is more consistent with a recognition that Darrel Lintvedt had rights over the property and his use of the same was not merely permissive…" R. 981-82. (emphasis added).

The common law recognizes two types of implied easements: easements by necessity and easements implied from prior use. "To establish an easement by implication from prior use, the claimant must show that (1) the relevant parcels of land had been in unitary ownership; (2) the use giving rise to the easement was in existence at the time of the conveyance dividing ownership of the property; (3) the use had been so long continued and so obvious as to show that it was meant to be permanent; and (4) at the time of the severance, the easement was necessary for the proper and reasonable enjoyment of the dominant tract." *Thompson*, 2003 S.D. 12, ¶ 14, 657 N.W.2d 300, 305. "A party seeking an implied easement has the burden of proving the existence of the easement by clear and convincing evidence." *Springer v. Cahoy*, 2012 S.D. 32, ¶ 7, 814 N.W.2d 131, 134. The court found that Fuoss met his burden for both types of easements. R. 986.

Mann contends that because it is possible for Clarence and Anna Marie Hullinger to have acquired their rights to Section 9 between May 17, 1948 and the date they conveyed Section 9 to the Dahlke's one month later on June 17, 1948, that unity of title has not been demonstrated. But the mere fact that such a conveyance timeline is *possible* should not be sufficient to overcome the court's finding that adequate unitary of title had been established by clear and convincing evidence.

The court found that the 1948 U.S.G.S. aerial photograph clearly establishes that the dirt trail that exists today was in existence at the time the conveyances dividing ownership of the property were made in 1948. R. 986, 991. The court noted that the use of the old dirt trail along the fence could have been the reason why a quit claim deed was given from Hullinger to Dahlke, whereas Hullinger gave Lintvedt a warranty deed. R.

972. The court's reasoning on this issue is sound, and it supports the court's conclusion that "[a]t the time of the relevant parcels were severed, the dirt trail was necessary for the proper and reasonable enjoyment of land west of Bull Creek in Section 10." R. 986.

In contrast to an easement by implication of prior use, an easement by necessity allows for a route of access where one previously did not exist. *Patterson v. Buffalo Nat. River*, 76 F.3d 221, 226 (8th Cir. 1996). An easement by necessity can occur when a grantor conveys to another an inner portion of land surrounded by lands owned by the grantor or the grantor and others. Unless a contrary intent is manifest, the landlocked grantee will be entitled to have a right-of-way across the retained land of the grantor for ingress and egress. *Thompson*, 2003 S.D. 12, ¶ 11, 657 N.W.2d 300, 304-05.

Testimony that Bull Creek can at times be crossed by horse, contrary to Mann's contention, is clear evidence that the easement is necessary. The court did not err in finding that Fuoss had proved by clear and convincing evidence the existence of an easement by necessity. R. 986.

CONCLUSION

The circuit court is the finder of fact and sole judge of credibility. Dahlke Partnership and Mann have failed to show that the circuit court's findings of fact are clearly erroneous. The court's factual findings that Lintvedt's use of the land east of both the old and current north-south boundary fence was not permissive supports the conclusion that Fuoss is entitled to adverse possession. The court's finding that Sather's posting of a "No Trespassing" sign on the subject corner post constitutes a positive assertion of a right hostile to Dahlke Partnership and Mann established an additional

timeframe for adverse possession which supports the court's conclusion that Fuoss is entitled to adverse possession.

With regard to the easement, the court's finding that Lintvedt, Sather and Fuoss' use of the dirt trail was not permissive supports the conclusion that Fuoss is entitled to a prescriptive easement. Additionally, the court's granting of an easement by implication from prior use and an easement by necessity is supported if this Court deems the unity of title established to be sufficient.

REQUEST FOR ORAL ARGUMENT

Fuoss hereby requests oral argument.

Dated this 4th day of January, 2021.

RITER ROGERS, LLP

By: */s/ A. Jason Rumpca*

Robert C. Riter
A. Jason Rumpca
Attorneys for Plaintiff/Appellee
319 S. Coteau St. – P.O. Box 280
Pierre, South Dakota 57501
Phone: 605-224-5825
Fax: 605-224-7102
r.riter@riterlaw.com
j.rumpca@riterlaw.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66. The font is Times New Roman size 12, which includes serifs. The brief is 33 pages long and the word count is 9,996 exclusive of the Cover, Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated this 4th day of January, 2021.

RITER ROGERS, LLP

By: */s/ A. Jason Rumpca*

Robert C. Riter
A. Jason Rumpca
Attorneys for Plaintiff/Appellee
319 S. Coteau St. – P.O. Box 280
Pierre, South Dakota 57501
Phone: 605-224-5825
Fax: 605-224-7102
r.riter@riterlaw.com
j.rumpca@riterlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2021, a true and correct copy of Appellee's Brief and its Appendix was filed and served through U.S. Mail and email upon the following individuals:

Marty J. Jackley
Catherine A. Seeley
Attorneys for Defendant/Appellant
111 West Capitol Ave., Suite 230
Pierre, South Dakota 57501
m.jackley@gpna.com

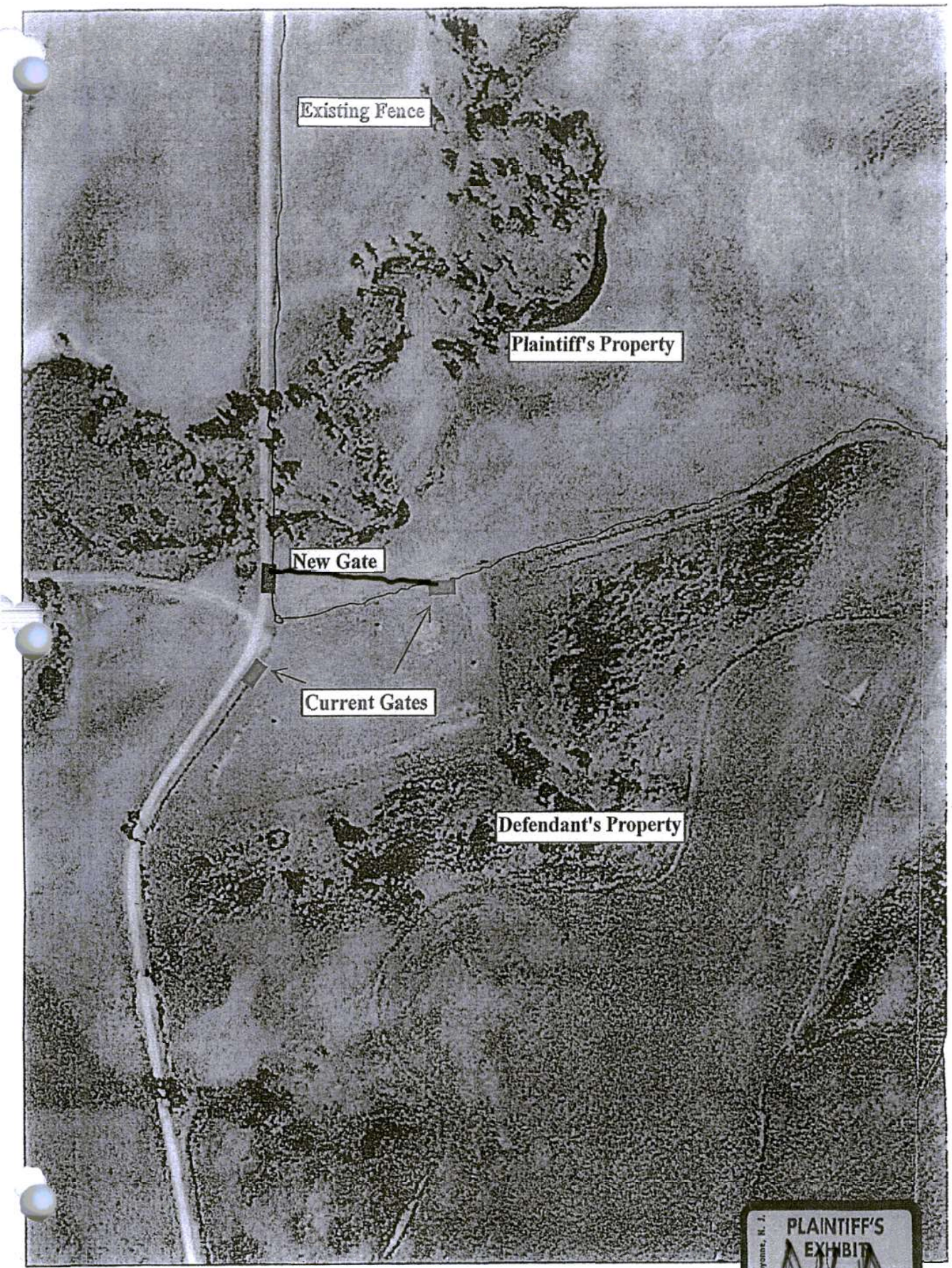
Dated this 4th day of January, 2021.

RITER ROGERS, LLP

By: */s/ A. Jason Rumpca*

Robert C. Riter
A. Jason Rumpca
Attorneys for Plaintiff/Appellee
319 S. Coteau St. – P.O. Box 280
Pierre, South Dakota 57501
Phone: 605-224-5825
Fax: 605-224-7102
r.riter@riterlaw.com
j.rumpca@riterlaw.com

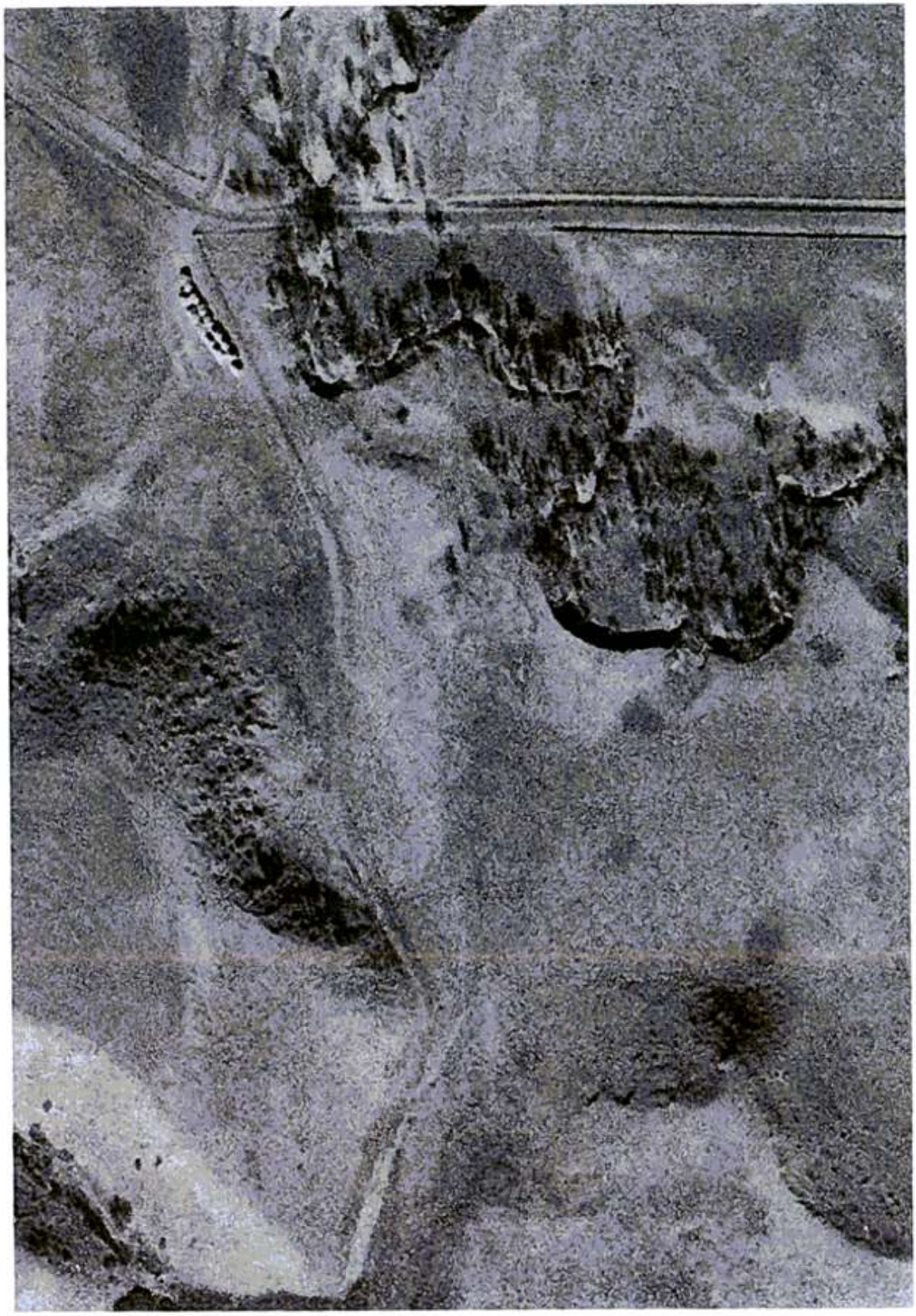
APPENDIX TABLE OF CONTENTS

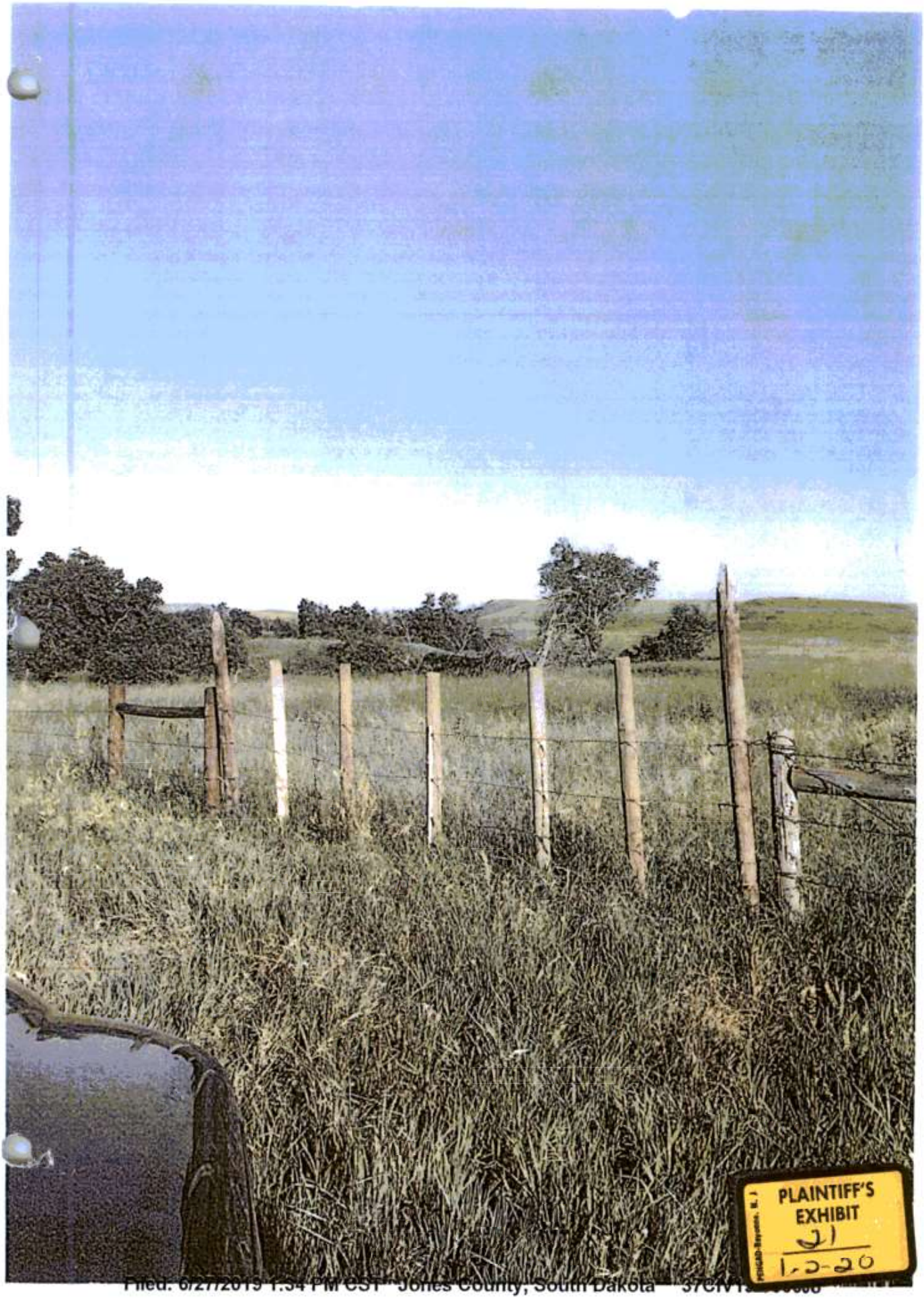


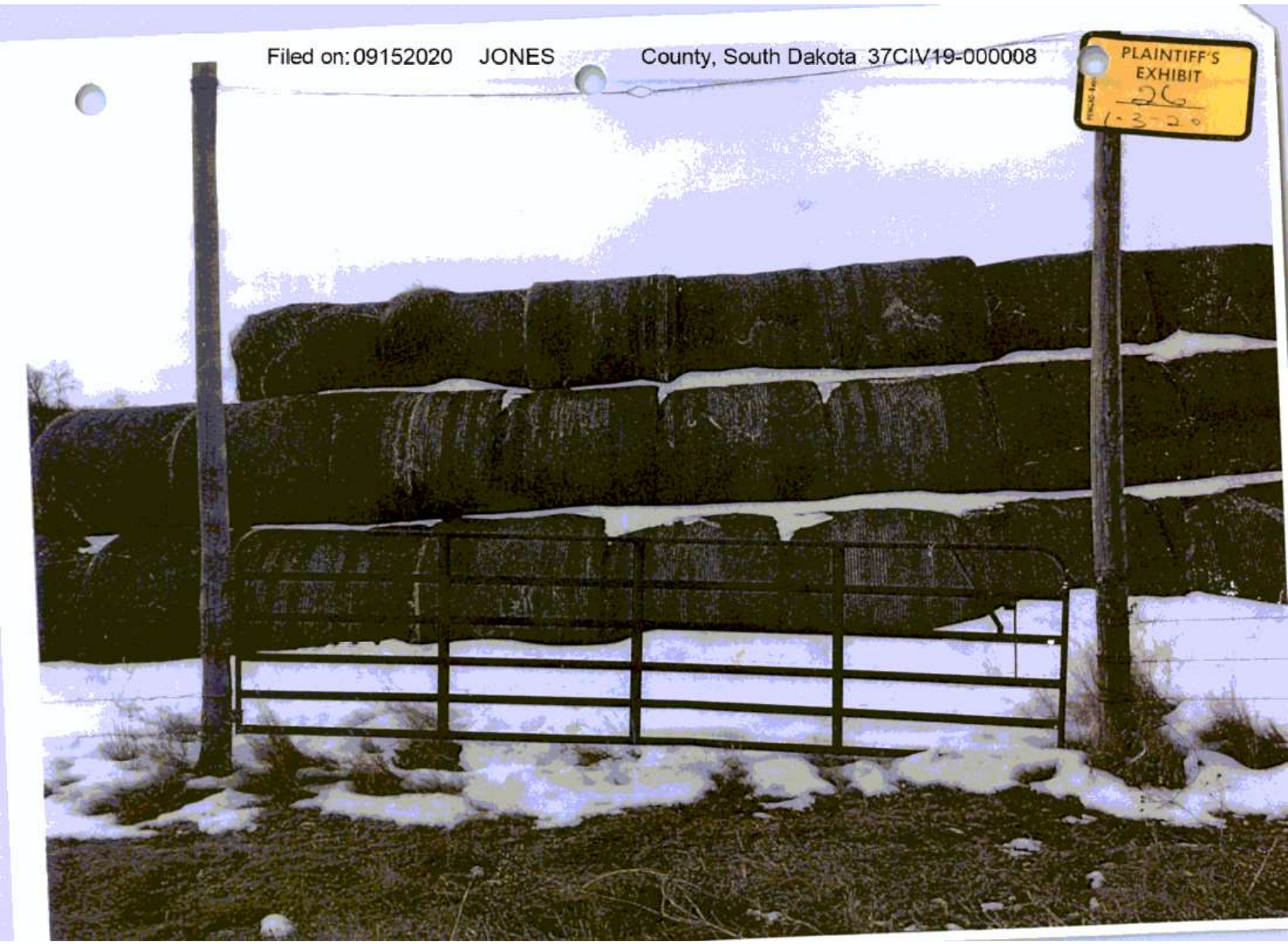
PLAINTIFF'S EXHIBIT 16A

USGS 11-23-1971

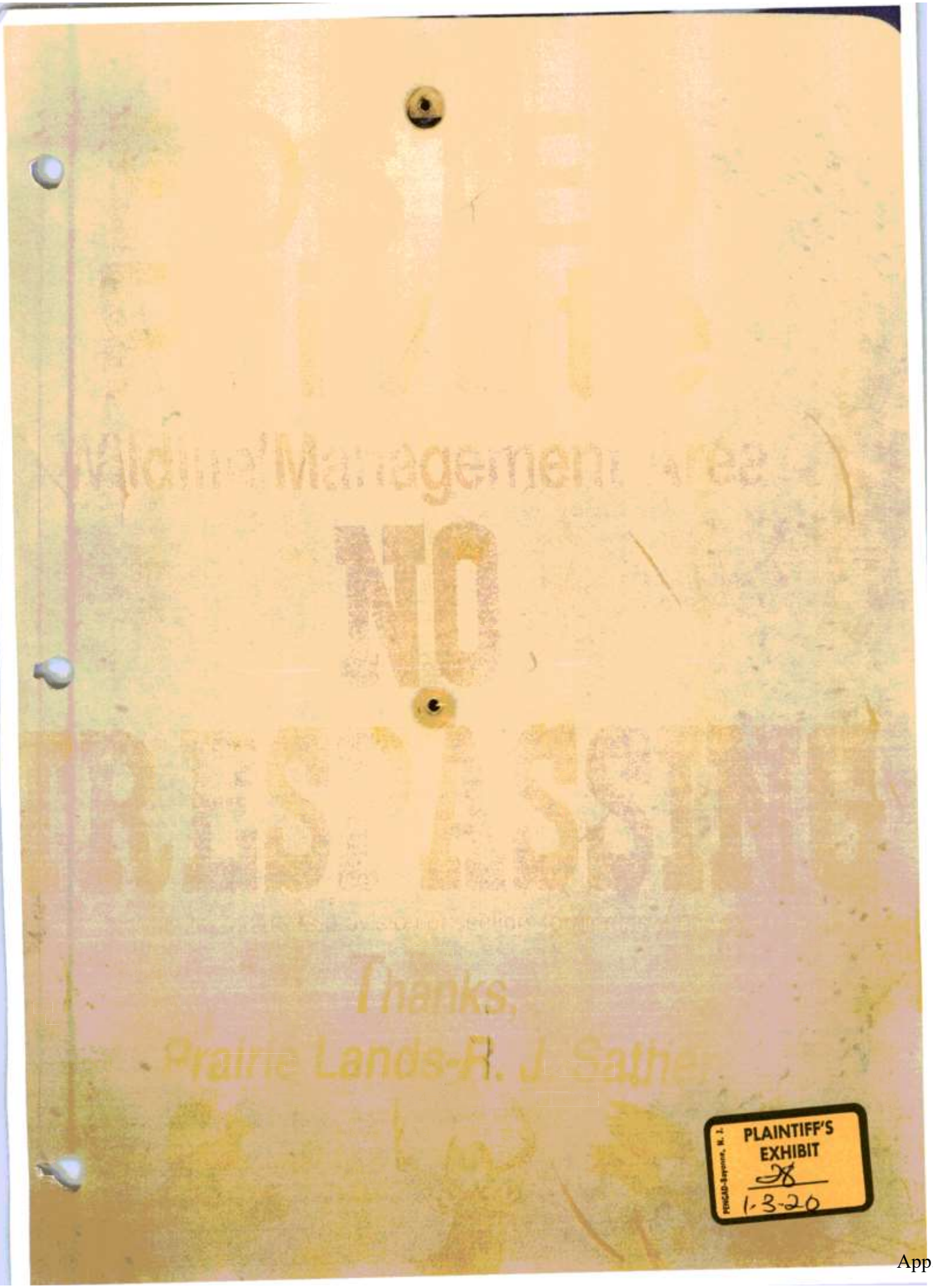
PLAINTIFF'S EXHIBIT 5






Filed on: 09152020 JONES County, South Dakota 37CIV19-000008
PLAINTIFF'S EXHIBIT
26
1-3-20


PLAINTIFF'S
EXHIBIT
27
1-30


Wildlife Management Area
NO
TRESPASSING
Thanks,
Prairie Lands-R. J. Sather
PLAINTIFF'S EXHIBIT
28
1-3-20


Filed on: 09152020 JONES County, South Dakota 37CIV19-000008
PLAINTIFF'S EXHIBIT
29
1-3-20

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29435

TODD FUOSS,

Appellee/Plaintiff,

v.

DAHLKE FAMILY LIMITED PARTNERSHIP
AND
RODNEY L. MANN,

Appellants/Defendants.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
JONES COUNTY, SOUTH DAKOTA

THE HONORABLE M. BRIDGET MAYER
Circuit Court Judge

APPELLANTS' REPLY BRIEF

Attorneys for Defendants/Appellants
Marty J. Jackley
Catherine A. Seeley
111 West Capitol Avenue
Suite 230
Pierre, SD 57501
(605) 494-0105

Attorneys for Plaintiff/Appellee
Robert C. Riter
A. Jason Rumpca
319 South Coteau
P.O. Box 280
Pierre, SD 57501
(605) 224-5825

The notice of appeal was filed on the 1st day of October, 2020.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. The Disputed Property consists of all land in the Northeast Quarter of Section 9 east of the current north-south fence.

This Court should not accept Appellee's invitation to avoid the inescapable evidence of permissive use by now raising issue with the eastern sliver of the "Disputed Property" area. Appellants Dahlke Partnership and Rodney Mann appealed from the final judgment rendered by the Circuit Court of the Sixth Judicial Circuit which awarded Appellee Todd Fuoss adverse possession of that portion of the Northeast Quarter of Section 9, Township 3 South, Range 30 East of the Black Hills Meridian, Jones County, South Dakota, located east of the current north-south fence. R. 1092; *see also* Appellants' Brief at 1 ("Appellants… appeal the decision of the Honorable M. Bridget Mayer granting Appellee adverse possession and a prescriptive easement, easement by prior use, and an easement by necessity."). This appeal includes all areas over which the circuit court granted adverse possession, including that portion which may have been between an old north-south fence and the property line.[1] Therefore, the Disputed Property is the entire portion of the Northeast Quarter of Section 9 located east of the current north-south fence, as described in Appellants' Brief. Appellants' Brief at 5.

As with the entire Disputed Property, the land between the old north-south fence and the legal property line on its own does not meet the elements of adverse possession.[2]

---

[1] Fuoss takes issue with the fact that the Appellants' counsel placed the highlighted triangle on its exhibit depicting the Disputed Area. Appellee's Brief at 7. However, the marks were placed in accordance with the witness's testimony, and at the time, Fuoss's attorney remarked "if you want to mark it on the exhibit, I don't care." R. 284.

[2] Even if this Court determines that the circuit court's grant of adverse possession between the old north-south fence and the property line was not sufficiently addressed earlier, the circuit court's determination on this issue was a clear error of law, which this Court may still consider. *See People in interest of M.S.*, 2014 S.D. 17, ¶ 17 n. 4, 845

To establish title by adverse possession, Fuoss must show "(1) an occupation that is (2) open and notorious, (3) continuous for the statutory period, and (4) under a claim of title exclusive of any other right." *Underhill v. Mattson*, 2016 S.D. 69, ¶ 11, 886 N.W.2d 348, 352. Because his claim was not based on a written instrument, to satisfy the first element, Fuoss must show either the land had been protected by a substantial enclosure, or the land had been usually cultivated or improved. SDCL §§ 15-3-12, 15-3-13.

The circuit court concluded the land between the old north-south fence and Bull Creek was protected by a substantial enclosure when Lintvedt took possession of the Fuoss Property in the mid-1960s. R. 972. However, after Lintvedt moved the fence in the late 1960s or early 1970s, that land ceased to be protected by a substantial enclosure, a fact the circuit court did not reckon with in its analysis.[3] Thus, the evidence only shows that piece of land as occupied from when Lintvedt took possession of the land in the mid-1960s to when he had the fence moved in the late 1960s or early 1970s—a period far less than the twenty years required for adverse possession. *See* SDCL §§ 15-3-1, 15-3-7. Accordingly, Fuoss failed to meet his burden to prove by clear and convincing evidence the elements of adverse possession on the land located east of the old north-south fence and the property line, just as he failed to meet his burden with respect to the Disputed Property in its entirety.

N.W.2d 366, 371 n. 4 ("It is the Court's 'standard policy' that 'failure to argue a point waives it on appeal.' The exception to the standard involves a 'pure question of law' which may be inquired into *sua sponte*, especially if it risks a miscarriage of justice." (internal citations omitted)); *see also Lewis v. Moorhead*, 522 N.W.2d 1, 3 (S.D. 1994) ("[T]he ultimate conclusion of whether [the facts] are sufficient to constitute adverse possession is a question of law." (citation omitted)).

[3] If the circuit court intended the new north-south fence to constitute a substantial enclosure with respect to the old north-south fence because the latter was contained within the former, then there seems little need to distinguish the two pieces of land.

II. The circuit court erred when it found that Fuoss satisfied the hostile element of adverse possession over the Disputed Property.

The primary focus of this appeal relates to the fourth element of adverse possession: hostility. Fuoss acknowledges "it is well established in South Dakota that continued use of land which is permissive is insufficient to fulfill the requirement of hostile use." Appellee's Brief at 19 (citing *Gangle v. Spiry*, 2018 S.D. 55, ¶14, 916 N.W.2d 119, 123). Once granted, this permission continues to subsequent owners of property to block them from claiming title by adverse possession. *Gangle*, 2018 S.D. ¶ 18, 916 N.W.2d at 124.

A. The Doctrine of Acquiescence does not apply because the Disputed Property was used by Fuoss and his predecessors with the express permission of Dahlke Partnership and Mann.

As discussed in Appellants' Brief, the circuit court erred in applying the Doctrine of Acquiescence because there was substantial and unequivocal evidence of permissive use. *See* Appellants' Brief at 9-21. In his response, Fuoss primarily relied upon those erroneous conclusions of the circuit court and ignored the case law supporting that the Doctrine of Acquiescence cannot be used to create the presumption of hostility when there is consent to the original taking of possession. *Lehman v. Smith*, 40 S.D. 556, 168 N.W. 857, 859 (S.D. 1918). This mistake in law is reversible error under a de novo review.

It is not surprising that Fuoss chose not to address the argument, as there is little he could say to refute it. Here, all of the evidence showed that the Fuoss Property owners had permission to move the fence, use the Disputed Property, and use the Dahlke/Mann Property for ingress and egress. Yet, Fuoss effectively seeks, and the circuit court erred in applying, an evidentiary presumption that the parties, when agreeing to move the

fence, also changed the property line. Building off that erroneous presumption, the court invoked the Doctrine of Acquiescence to presume that the actions were hostile. Ultimately, Fuoss presented no evidence that the initial agreement to move the fence line was intended to change the property line, and the record clearly demonstrates otherwise.

On the other hand, the record is replete with testimony clearly establishing that the fence was not intended to change the boundary line because Fuoss and his predecessors Darrel Lintvedt and Rodney Sather (to the extent that Rodney Sather did so) occupied the Disputed Property with the continued permission of Lou Dahlke and his successors. Even the circuit court acknowledged that "[t]here was credible testimony offered to characterize the decision to move the corner post of the old north-south fence line as 'permissive' or by 'agreement' or 'acquiescence.'" R. 981. The permission that the owners of the Dahlke/Mann Property granted to the owners of the Fuoss Property to place and maintain a fence in its current location and to use the Disputed Property is clear and undisputed.

Darrel Lintvedt was a party to the original grant of permission from the Dahlke/Mann Property owner, and he testified that he asked for and received express permission to move the fence. In Lintvedt's own words:

> A. …Lou[4] said, Move [the fence] up there where you don't have to worry about it.
> …
> Q. Lou was being neighborly and said go ahead and move the fence; right?
> A. Right.
> Q. That wasn't a hostile moving the fence, was it?
> A. Oh, no.
> Q. That was by permission.
> A. Right.

[4] Lou Dahlke was Rodney Mann's grandfather and was the owner of the Dahlke/Mann Property when Lintvedt sought and received permission to move the fence. R. 287.

> Q. Did Lou suggest it?
> A. I asked him if I could—since I was having so much problem with the fence there, and he said you bet.

R. 287-88. Lintvedt further testified that the Dahlke/Mann Property owner granted him express permission to use the land on the east side of the new fence:

> Q. And you were able to use the land on what I would say your side of the fence?
> A. Right.
> Q. With his permission?
> A. Right.
> **Q. And it wasn't hostile use, was it?**
> **A. No, it wasn't.**
> …
> Q. … you had cattle in this area we talked about, whether it be 1 acre, 1.4 acres, you had permission for that, didn't you?
> A. Right. Right.
> Q. And you had express permission; right?
> A. Yeah.

R. 288, 290-91(emphasis added); *see also* R. 307.

Not only does the record clearly establish permission by the Dahlke/Mann Property owners to place and maintain the fence in its current location and to permissively use the property, it unequivocally establishes that the parties' moving of the fence did not change the ownership of the Disputed Property. R. 291-92. Darrel Lintvedt testified that he was not trying to take Dahlke's land by moving the fence, Brian Lintvedt testified that his father never owned any part of Section 9 which includes the Disputed Property, and Sather testified that he never owned or conveyed property in Section 9. R. 297, 694-95, 718-19; *see* R. 557 Specifically, Darrel Lintvedt testified:

> Q. You weren't trying to take [Dahlke/Mann's] land, were you?
> A. No.

R. 297, and Brian Lintvedt testified:

> Q. And you and your dad never owned any part of Section 9 [which includes the Disputed Property], did you?
> A. No.

R. 557. The record displays no evidence, let alone clear and convincing evidence, [5] the property owners agreed to change the property line to apply the Doctrine of Acquiescence.

Furthermore, Lintvedt's testimony regarding the express permission he received to enclose and use the Disputed Property is corroborated by every witness with personal knowledge. Lintvedt's son, Brian Lintvedt, was one of the individuals who actually moved the fence to its current location. R. 556. As it related to moving the fence, Brian Lintvedt testified that he was aware of the permission Lou Dahlke granted his father:

> Q. And [Lou Dahlke] said of course you have permission; is that fair?
> A. Yes. He actually come out there and looked at it.

R. 559. As it related to using the land east of the north-south fence, Brian Lintvedt testified:

> Q. … And then he also said explicitly, you can use the land over on the east side of this fence?
> A. Correct.

[5] In applying the Doctrine of Acquiescence, the circuit court relies on North Dakota Supreme Court precedent, which states that in order to apply the doctrine, "it must be shown by clear and convincing evidence that both parties recognized the line as a **boundary, and not a mere barrier**, for at least 20 years prior to the litigation." R. 976 (citing *Moody v. Sundley*, 2015 N.D. 204, ¶ 23, 868 N.W.2d 491, 499) (emphasis added). Fuoss failed to meet this burden, as three separate times in Darrel Lintvedt's deposition, Fuoss's attorney referred to the fence as a "barrier," to which Lintvedt responded affirmatively. R. 279, 306, 309. Therefore, there is not clear and convincing evidence Lintvedt considered the fence in question as more than a mere barrier.

R. 560. Rodney Sather also testified that "**that corner that we're talking about, Darrel Lintvedt specifically told me that I did not own that piece of property**." R. 706.[6] (emphasis added). Rodney Mann testified that "[Darrel Lintvedt] asked permission to put the fence and use that property and go across the west end and put the gate in." R. 835.

In light of the foregoing, Fuoss's argument and the circuit court's conclusion that Lou Dahlke's permission granted to Lintvedt to enclose and use the Disputed Property constituted an agreement for a new boundary line through the Doctrine of Acquiescence is clear error. R. 977. Lou Dahlke consented to Lintvedt's original taking of possession, and the Doctrine of Acquiescence does not apply. *See Lehman*, 40 S.D. 556, 168 N.W. at 859. Lou Dahlke's permission to Lintvedt continued through subsequent owners of the parcels, and thus Lintvedt, Sather, and Fuoss each occupied the Disputed Property permissively until Dahlke Partnership and Mann revoked that permission in 2018.

Therefore, the circuit court erred in determining that Fuoss met his burden of establishing each of the elements of adverse possession over the Disputed Property during Lintvedt's ownership of the Fuoss Property under the principles announced in *Gangle v. Spiry*, 2018 S.D. 55, 916 N.W.2d 119.[7]

B. <u>The "No Trespassing" sign on the corner post of the current north-south fence was not a positive assertion of a right hostile to Dahlke Partnership and Mann.</u>

The circuit court erred in its alternative holding that Fuoss established adverse possession based on Sather's and Fuoss's successive occupation of the land. First, the

[6] Although the circuit court doubted Sather's credibility on this issue, his testimony is consistent with Darrel and Brian Lintvedt's, and corroborates their recollection of events.
[7] Although this Court did not address the Doctrine of Acquiescence when it decided *Gangle*, it was unnecessary to do so based on its finding of permissive use. *See Lehman* 40 S.D. 556, 168 N.W. 857 (indicating acquiescence is applicable only when there is no consent to the original taking of possession (quotation omitted)).

record is clear that Mann exercised a level of control over the land in question by purchasing crop insurance for it and controlling access to hunters, Fuoss's ranch hands, and Fuoss's trapper. R. 763-69, 777-78. "[I]t is well established that permissive use cannot ripen into adverse possession until a positive assertion of a right hostile to the record holder is made known to him." *Gangle*, 2018 S.D. ¶ 15, 916 N.W.2d at 123-24. As discussed above, the permission granted by Dahlke/Mann Property owners carried through Lintvedt's, Sather's, and Fuoss's ownership of the Fuoss Property until it was revoked in 2018. The circuit court found that when Sather took possession of the Fuoss Property in 1996, he placed "No Trespassing" signs along Bull Creek Road, including on the corner post of the new north-south fence. R. 982.

Sather's posting of "No Trespassing" signs was not a hostile act. Appellants' Brief at 21-25. "The test is whether the person 'honestly enters into possession of land in the belief that the land is his own.'" *Lewis*, 522 N.W.2d at 5 (internal quotation omitted). The test is subjective—requiring an inquiry into the person's intent and belief, but in this case, the court relied exclusively on the objective language of the "No Trespassing" sign.

The only evidence supporting Sather's actual intent is his own testimony. Sather testified that he knew the Disputed Property did not belong to him. R. 693, 695. Although the circuit court discounted Sather's testimony on this issue, the language in the conveyance from Lintvedt supports Sather's testimony by not warranting the accuracy of fence locations. R. 968, 1014.

Fuoss argues that the mere fact of placing a "No Trespassing" sign on a fencepost constitutes an act "hostile to the record owner" which takes it out of the application of permissive use. Appellee's Brief 23-24; R. 982. Sather testified that the "No

Trespassing" signs were posted along joint access areas to his and Dahlke/Mann Property simply to keep hunters off his and his neighbors' land, and that neighbors in that area are typically appreciative of such actions. R. 725.

Sather's testimony, which is based on his knowledge of neighborly interactions in the area, along with Fuoss's actions following his purchase of the Fuoss Property supports the notion that "No Trespassing" signs posted along joint access areas are not interpreted as definitive statements of ownership, but are merely intended to keep unwanted trespassers off of the land.[8] Should there be any further doubt, Sather made clear that he was not trying to claim ownership by posting the "No Trespassing" sign and that neighbors usually appreciate it when you post such signs. R. 725, 734. The fact that Fuoss has left the "No Trespassing" sign not bearing Fuoss's name on the subject corner post even though he now claims ownership of the land is evidence that he himself does not consider these signs to state claims of ownership. Therefore, the sign cannot reasonably be interpreted as a positive assertion of a right hostile to the owner.

Furthermore, Fuoss makes much of the idea that the "No Trespassing" sign on the corner fencepost bears Sather's name. Appellee's Brief at 23. Fuoss presents two exhibits to create this implication; a review of those exhibits shows it is not evident that Sather's name was ever written on a "No Trespassing" sign on the subject corner fencepost. R. 1020-21. The exhibit Sather identified as his "No Trespassing" sign which he hung along the fence running parallel to Bull Creek Road is yellow and longer

[8] Fuoss takes issue with Sather's description of the sign being at an access point along the road and claims the sign is on a corner post "located to the east of the dirt trail access approach." Appellee's Brief at 24; R. 734. However, the fence post is located quite close to the approach, and therefore was the closest vertical post upon which a person could hang a sign. R. 558 (Brian Lintvedt testified that he moved the fence out "almost to the approach."); R. 270 (indicating that the approach is "[r]ight there next to the fence.").

vertically. R. 721-23, 1020. The sign posted on the subject corner post, which Sather said that he "[c]ertainly could have," placed there, is white and longer horizontally. R. 723, 1021. These signs are both extremely faded, but the similarity ends there. It is impossible to tell from looking at these two signs whether Sather's name appeared on the specific sign at issue. Thus, the court clearly erred in relying upon these signs in support of its conclusion that Fuoss met his burden of proof.

Next, and reiterating a point that was unaddressed by Fuoss in his response, the Doctrine of Acquiescence is not applicable during the term of Sather's ownership because he did not "actually occupy" the Disputed Property during his ownership. *See Lien v. Beard*, 478 N.W.2d 578, 580 (S.D. 1991). Sather erected a buffalo fence which kept his livestock out of the Disputed Property, and therefore, the Disputed Property remained vacant during his ownership of the Fuoss Property. R. 968. Therefore, Sather did not begin a period of adverse possession which Fuoss could tack onto.

C. The principles of neighborliness and common sense as discussed by this Court in *City of Deadwood v. Summit, Inc.* should be applied and adhered to in this case.

Fuoss implies that this Court may disregard the principles of neighborliness and common sense that it discussed in *City of Deadwood v. Summit, Inc.*, 2000 S.D. 29, ¶ 27, 607 N.W.2d 22, 29, because Mann's request for their application is "disingenuous at best." Appellee's Brief at 21. Fuoss complains that Mann's counterclaim would require him to erect a fence in accordance with his statutory obligation on the legal property line which may wash out regularly and need to be reconstructed due to Bull Creek's rough terrain and frequent flooding. Appellee's Brief at 21. However, this is an ordinary burden of a property owner who owns pasture land in rough country. Typically, landowners may avoid these difficulties by placing the fence further into their own

property or by getting along with their neighbors and seeking permission to place their fences in convenient locations. R. 531. This latter common practice would be severely hindered if landowners could no longer feel they can assist their neighbors without fear of losing their land. Dahlke Partnership and Mann granted Fuoss and his predecessors permission for a period of approximately 50 years—a significant benefit that saved them from having to reconstruct the fence whenever Bull Creek flooded or to otherwise adjust the fence's location. It was not until Fuoss and his family members began disrespecting Mann's property that the permission was rescinded. *See* R. 651, 779-780.

Furthermore, Fuoss left Mann no choice. Fuoss initiated this action to take advantage of Mann's generosity and demanding that Fuoss is entitled to Dahlke/Mann Property. R. 10-13. Mann seeks only to protect his land, and to avoid any future claims for adverse possession, he must request that a fence be constructed to comport with the legal boundary line.

III. The circuit court erred when it granted Fuoss a prescriptive easement, an easement by implication, and an easement by necessity.

A. The circuit court erred by granting Fuoss a prescriptive easement because neither he nor his predecessors used the dirt trail in Section 9 without permission from Dahlke/Mann Property owners for the statutory period.

To obtain a prescriptive easement, the plaintiff has the burden to show an open, continued, and unmolested use of another's land for twenty years and that such use is hostile or adverse to the owner. *Rotenberger v. Burghduff*, 2007 S.D. 19, ¶ 8, 729 N.W.2d 175, 178. A party makes a prima facie case for a prescriptive easement "by showing an open and continuous use of another's land with the owner's knowledge, creating a presumption that such use is adverse and under a claim of right." *Thompson v. E.I.G. Palace Mall, L.L.C.*, 2003 S.D. 12, ¶ 8, 657 N.W.2d 300, 304 (citation omitted).

This presumption may be rebutted by the owner showing the use was only permissive. *Hofmeister v. Sparks*, 2003 S.D. 35, ¶ 17, 660 N.W.2d 637, 642 (citation omitted).

Even assuming there is a presumption in this case that use was adverse, the overwhelming evidence of permissive use presented at trial rebutted that presumption, and it was reversible error for the circuit court to grant a prescriptive easement.

Fuoss questions whether Lou Dahlke granted Lintvedt permission to traverse Dahlke/Mann Property to access the Disputed Property and the Fuoss Property, and characterizes the permission as a "painstaking[] dissect[ion] [of] Darrel Lintvedt's testimony." Appellee's Brief at 26. To the extent there remains any question, Brian Lintvedt testified clearly on the issue:

> Q. (by Fuoss's attorney) … Do I understand correctly that the permission that you understood was to drive on the west side of the fence and have a gate that would then enter into your property?
> A. Correct, because the approach is right there.

R. 562. Notably, the circuit court expressly found Brian Lintvedt's testimony credible on multiple issues. R. 966, 969.

Fuoss provides the following excerpt from Darrel Lintvedt's testimony in an attempt to undermine the permission Lou Dahlke granted Lintvedt:

> Q. And he knew you had from time to time driven in there and use it had to build the dam, and he was okay with that, wasn't he?
> A. Oh, yeah.
> Q. And did you talk to him at all about being able to drive in there even when you were putting the fence down before you put the new fence in?
> A. Well, no. I asked him if we could put a gate in because that's the only way you could get in there on that side.
> Q. Okay.
> A. He said either put that fence down or build a gate and go through it.

Appellee's Brief at 26-27; R. 289. This excerpt relates to Lintvedt's use prior to moving the fence and putting in a gate. It establishes that Lintvedt wanted and sought Lou Dahlke's permission, and Brian Lintvedt's testimony clearly establishes that he and his father understood the ability to traverse Dahlke/Mann Property to access the Disputed Property and Fuoss Property from there on out was by an affirmative grant of permission.[9] To state the obvious, Lou Dahlke's permission to place a gate in a fence was permission to drive through it. Because of the clear and unequivocal evidence of permissive use, the circuit court erred when it found that Fuoss was entitled to a prescriptive easement based on Lintvedt's use of Dahlke/Mann Property. R. 985.

The permission Lou Dahlke granted Lintvedt applied to Sather and Fuoss under the principles announced in *Gangle*, 2018 S.D. ¶ 18, 916 N.W.2d at 124-25. Even during Fuoss's use of the dirt trail, his own ranch hand trapper have sought and received Rodney Mann's permission to use the dirt trail and to use the Disputed Property on behalf of their principal, further evidencing that Fuoss's use has been permissive. R. 777-79. Therefore Fuoss failed to show that the use of Dahlke/Mann Property was ever adverse, and the circuit court erred by granting him a prescriptive easement. R. 985.

B. <u>The circuit court erred when it granted Fouss an easement implied from prior use and an easement by necessity because Fuoss failed to show the necessary unity of title and that the use was well established at severance of title.</u>

At trial, as it became clear that Fuoss's claims for adverse possession and a prescriptive easement would fail based upon permissive use, Fuoss amended his

[9] This scenario is reminiscent of the situation in *Gangle v. Spiry*, 2018 S.D. ¶¶ 3-4, 18, 916 N.W.2d at 120, 124-25, where a neighboring landowner originally fenced off a piece of his neighbor's land in a hostile manner, but once the neighbor granted him permission to leave his fence where it was, this Court determined that the occupation of the land was permissive and continued to be permissive through successive owners.

pleadings to add implied easement theories. R. 640-43. Both of his amended implied easement theories fail because Fuoss did not show that the relevant parcels had unity of ownership. *Huemiller v. Hansen*, 2020 S.D. 56, ¶ 16; *Springer v. Cahoy*, 2013 S.D. 86, ¶ 8, 841 N.W.2d 15, 19.

Fuoss argues that unity of title was established, even though Clarence and Anna Marie Hullinger could have obtained title to the Dahlke/Mann Property after they conveyed the Fuoss Property. Appellee's Brief at 31. However, there is no evidence that the Hullingers ever owned the Fuoss Property and the Dahlke/Mann Property at the same time. *See* R. 1015-16, 1026. The record shows that someone other than these Hullingers owned the Dahlke/Mann Property less than 24 months before they conveyed it to Ludwig and Florence Dahlke. R. 1026. The Hullingers obviously conveyed title to the Dahlke/Mann Property shortly after acquiring it; therefore, it is necessary to show precisely when they obtained such title to establish unity of ownership.

The burden to show unitary ownership by clear and convincing evidence rests with Fuoss, but he failed to present to the court a record search sufficient to establish that unitary ownership. His failure to meet his evidentiary burden, especially considering his knowledge of the recent ownership history, should not be considered "good enough."

Furthermore, this Court has not yet considered whether a contract for deed severs unity of title. *Heumiller*, 2020 S.D. 26, ¶ 20 n.2. If this Court determines that Fuoss's efforts were sufficent, it calls into question whether unity of title was severed when Jasper and Laura Hullinger executed a contract for deed with Ludwig and Florence Dahlke. R. 1026. The better answer is that a contract for deed severs unity of title because possession of the property and use of the implied easement changes hands. If

that is the case, Fuoss failed to prove unity of ownership by any standard because he gave no evidence that Laura and Jasper Hullinger ever owned the Fuoss Property. Therefore, Fuoss's claims for both an easement implied from prior use and an easement by necessity fail.

Even if this Court agrees that Fuoss's attempt to show unity of ownership is sufficient, the 1948 map the circuit court relied upon to show that the use was in existence at the time of severance and was long continued is not sound. R. 986. A simple review of the map shows that the image is not clear and convincing evidence of anything. R. 990, 991. Dahlke Partnership and Mann question the accuracy of the photograph's date, but even assuming the date is accurate, the image was taken *after* the suggested severance of title and cannot establish that the use was in existence at any such alleged severance. R. 400, 990. Ultimately, Fuoss failed to establish three of the four elements for an easement implied from prior use, and therefore the circuit court erred by granting one.

CONCLUSION

Dahlke Partnership, Rodney Mann, and their predecessors did the various owners of the Fuoss Property a substantial favor. They granted their neighbors express permission to move a fence, to use a triangular portion of their land, and to drive over their property. Mr. Fuoss seeks to exploit the Dahlke Partnership's and Mann's kindness and take what belongs to them through a claim for adverse possession and a prescriptive and implied easement. The law centered upon permissive use says otherwise, as perhaps best iterated by this Court,

> [t]he law is very rigid with respect to the fact that a use permissive in the beginning can be changed into one which

> is hostile and adverse only by the most unequivocal conduct on the part of the user. The rule is that the evidence of adverse possession must be positive, must be strictly construed against the person claiming a prescriptive right, and that every reasonable intendment should be made in favor of the true owner.

Gangle, 2018 S.D. ¶ 18, 916 N.W.2d 125. There exists no evidence, let alone clear and convincing evidence, that Lintvedt and Dahlke/Mann agreed to change the property line to apply the Doctrine of Acquiescence. To hold otherwise turns a blind eye to the explicit testimony of Darrel Lintvedt, Brian Lintvedt, Rodney Sather, and Rodney Mann, while putting no burden on Fuoss to prove that Dahlke/Mann agreed to relinquish actual ownership of the Disputed Property.

Accordingly this Court should reverse the circuit court's grant of adverse possession over all of the Disputed Property and its grant of prescriptive and implied easements, and it should remand this matter to the circuit court for consideration of Dahlke Partnership's and Mann's counterclaims which the circuit court did not address based on its erroneous finding of adverse possession.

Dated this 3rd day of February, 2021.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: /s/ Marty J. Jackley

Marty J. Jackley
Catherine A. Seeley
Attorneys for Defendant
111 West Capitol Ave., Suite 230
Pierre, South Dakota 57501
(605) 494-0105
mjackley@gpna.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL § 15-26A-66. The font is Times New Roman size 12, which includes serifs. The brief is 16 pages long and the word count is 5,068 exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated: February 3, 2021

GUNDERSON, PALMER, NELSON & ASHMORE, LLP

By: /s/ Marty J. Jackley

Marty J. Jackley
Catherine A. Seeley
Attorneys for Defendant
111 West Capitol Ave., Suite 230
Pierre, South Dakota 57501
Telephone: (605) 494-0105
E-mail: mjackley@gpna.com

CERTIFICATE OF SERVICE

I hereby certify on February 3, 2021, a true and correct copy of Appellants' Reply Brief was filed and served through email and a true and correct copy of the same was served by U.S. Mail upon the following individuals:

Robert C. Riter
A. Jason Rumpca
Riter Rogers LLP
319 S Coteau St. - PO Box 280
Pierre SD 57501
r.riter@riterlaw.com

Dated: February 3, 2021

/s/ Marty J. Jackley
Marty J. Jackley
Catherine A. Seeley