

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF FRESNO
CENTRAL DIVISION

Before the Honorable ALAN SIMPSON, Judge
Department 503

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WADE HAINES, an individual)
RHONDA HAINES,)
an individual,)
Plaintiffs,)

No. 09CECG02582

vs.)

TRIAL TESTIMONY

CHARLIE MAXWELL,)
an individual; TAMARA)
MAXWELL, an individual,)
et. al,)

Defendant.)

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Fresno, California

JULY 19, 2011
JULY 20, 2011

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REPORTER'S TRANSCRIPT

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A P P E A R A N C E S:

FOR THE PLAINTIFFS:

HELSEL
DAVID RICHARDS

FOR THE RESPONDENTS:

TIMOTHY JONES and
TIMOTHY BENNETT
Attorneys at Law

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1 TUESDAY, JULY 19, 2011 - - MORNING SESSION

2 THE COURT: The record should reflect that counsel are
3 present, and Mr. Maxwell is present, also Mr. Murray is
4 present. Ready to proceed?

5 MR. HELSEL: We are, your Honor.

6 THE COURT: Very well.

7 MR. HELSEL: At this time the plaintiffs would call Rob
8 Garson to the stand.

9 THE COURT: All right. Mr. Garson, please come forward.
10 Raise your right hand.

11 ROBERT STEVEN GARSON

12 called as a witness by and on behalf
13 of the Plaintiffs, being first duly sworn,
14 was examined and testified as follows:

15 THE COURT: Please come forward and have a seat at the
16 witness stand, make yourself comfortable. Once you are, if
17 you would state your name and spell your last name for the
18 record, please.

19 THE WITNESS: Robert Steven Carson, last name is spelled
20 G-A-R-S-O-N.

21 THE COURT: Thank you.

22 DIRECT EXAMINATION

23 BY MR. HELSEL:

24 Q Good morning, Mr. Garson.

25 A Good morning.

26 Q Are you currently employed?

1 A Yes.

2 Q And how are you employed?

3 A I work for Save Mart. I'm a pharmacist.

4 Q How long have you been with Save Mart as a
5 pharmacist?

6 A Four years.

7 Q How long have you been a pharmacist?

8 A 35 years.

9 Q Are you familiar with Rusty Spur Lane?

10 A Yes.

11 Q How?

12 A I used to own the back 40 with Nader Malakan.

13 Q Okay. Do you remember who you purchased that
14 property from?

15 A Charlie Maxwell.

16 Q Okay. Were there any real estate agents involved in
17 that sale?

18 A I think there was, yes.

19 Q Do you recall, prior to purchasing the property from
20 Mr. Maxwell, ever having any conversations with Mr. Maxwell
21 himself about the property?

22 A Oh, yeah. We had numerous conversations, sure.
23 Uh-huh.

24 Q Okay. Do you recall approximately when the first
25 conversation occurred?

26 A I want to say the early '90's.

1 Q Okay. And do you recall the substance of those
2 conversations?

3 A Yeah, well, I was purchasing the property from him
4 and I had numerous conversations.

5 Q And did you speak, or do you recall speaking with
6 Mr. Maxwell about access to the parcel?

7 A Yeah. Mine was the back 40, and there wasn't a road
8 to it, you had to go through other people's properties. So
9 when I purchased the property, we had to cut the road into the
10 property.

11 Q Okay. And when you say we had to cut the road into
12 the property, who cut the road into the property?

13 A Well, Charlie did, and I, I paid part of the escrow
14 instructions.

15 Q What, explain that. What was part of the escrow
16 instructions?

17 A To have access my 40 acres, so Charlie, I think
18 Charlie cut a road into it, yeah.

19 Q And do you recall, other than having conversations
20 with Mr. Maxwell about him cutting the road to provide access,
21 do you recall any other conversations with Mr. Maxwell about
22 the road?

23 A Well, it was a little dispute there at the
24 beginning. He cut the road in the summertime, and it was in
25 the escrow instructions that the road was going to be complete
26 before we closed escrow. And Charlie didn't want to bring a

1 water truck in to water the road down, so I wanted to wait, he
2 said that when it rained it would pack the road down, and he
3 didn't want, you know, to pay for a water truck to come in.
4 So I said, I'll close escrow at the time, and we had a little
5 dispute over that, we ended up going to arbitration over that.

6 Q Okay. So did Mr. Maxwell sue you over this?

7 A Well, he wanted to close escrow and I didn't want to
8 close escrow until the road was complete.

9 Q And so you said it ended up in arbitration?

10 A Yes.

11 Q And was it ultimately resolved?

12 A Yeah. In arbitration, the judge sided with us and
13 said that it was clearly in the escrow instructions, and then
14 it was okay to wait for the rain before I closed escrow.

15 Q And did Mr. Maxwell ultimately put in the road to
16 your parcel?

17 A Yeah, the road was put in there in the summertime,
18 but we waited until the rains came to pack it down before I
19 closed escrow.

20 Q Mr. Garson, do you still own the property on Rusty
21 Spur Lane?

22 A No, I sold it.

23 Q Do you remember when you sold the property?

24 A It was around 2002, 2003.

25 Q So approximately how long did you own the property?

26 A About ten years.

1 Q And at the time you owned the property, how was the
2 property accessed?

3 A It had a road, well, Rusty Spur. Rusty Spur went
4 all the way up to my 40 acres in the back.

5 Q And what did Rusty Spur Lane connect to?

6 A Old Millerton Road.

7 Q Now, Mr. Garson, at the time you sold the property,
8 not the time you purchased it, but at the time you sold the
9 property, how would you describe the condition of Rusty Spur
10 Lane?

11 A It was a nice road. Very nice road.

12 Q And what do you mean by that?

13 A Well, I mean it was, it was graveled and oiled, and
14 it was about 30-feet wide. It was a nice road.

15 Q Do you recall how the road was being used at that
16 time?

17 A When I sold it?

18 Q When you sold it.

19 A When I sold it we had a gate up front, and so we
20 limited access to just the people that were living there. And
21 so the road was, stayed in very good shape.

22 Q Do you recall, you just described a gate, do you
23 recall when that gate was installed?

24 A We signed a Maintenance Agreement, so about the time
25 we signed the Maintenance Agreement is when it was, I would
26 say around the late '90's?

1 Q Do you recall how, how it was decided to install the
2 gate at this particular location?

3 A Well, we had to go, it was a county-maintained road,
4 so we had to get permission by the the County to close it off,
5 and we had to sign a Maintenance Agreement to maintain the
6 road.

7 Q Okay. Now, were you in agreement to install the
8 gate?

9 A Yes.

10 Q Have you ever requested, or did you ever request
11 that the gate be removed for any reason?

12 A No.

13 Q Okay. Now, you just described a process whereby the
14 road was removed from the County. Do you recall how that
15 occurred? How the road was removed from the County?

16 A We had to go in, I think Jack Murray did the work on
17 it I think, I'm not absolutely positive, but you had to go
18 into the County and he had to apply for it, and you had to go
19 into CSA District County Service, County Service Agreement.
20 And you had to agree to maintain the road to the County's
21 specification.

22 Q Okay. And then was, was the road ultimately removed
23 from the CSA?

24 A No, it was put into the CSA.

25 Q Okay. I'm going to hand you what's been marked as
26 Exhibit 44. Mr. Carson, do you recognize this document?

1 A Yes.

2 Q And what do you recognize this document to be?

3 A A letter and petition to dissolve CSA 35.

4 Q And does your signature appear anywhere on this
5 document?

6 A Yes.

7 Q Okay. Now, you just testified that the road was put
8 into the CSA?

9 A No, maybe I'm mistaken. Maybe it was taken out of
10 the County Service.

11 Q Okay. Do you recall having any conversations or
12 meetings with the other Rusty Spur Lane property owners about
13 taking the roadway out of the CSA?

14 A Okay. Yeah. That was just the opposite, we took it
15 out of the CSA, so we were going to maintain it.

16 Q Okay. And let me ask you this, Mr. Garson, did you
17 draft this document?

18 A No.

19 Q Do you recall who did?

20 A It was either Charlie Maxwell or Jack Murray, I
21 think.

22 MR. JONES: Move to strike as speculation, lacks
23 foundation.

24 THE COURT: Sustained. I took that as I don't know.

25 MR. JONES: Well, that's fine with me.

26 THE COURT: Okay. Sustained.

1 MR. HELSEL: Q Mr. Garson, directing your attention to
2 the very first sentence that begins with, "The members of
3 County Service Area 35," do you see that?

4 A Yes.

5 Q Could you please read that.

6 A "The members of County Service Area number 35, zone
7 AW, have voted unanimously in favor of dissolving the service
8 area for the following reason."

9 Q Now, do you recall whether you in fact voted to
10 dissolve the CSA?

11 A Yes, I did.

12 Q And do you recall why it is you voted to dissolve
13 the CSA?

14 A We wanted to limit access to the road, and so, and
15 we were willing to pay for maintenance of the road to keep
16 people out.

17 Q Okay.

18 MR. JONES: I would only object to the, not the question,
19 but the answer, and move to strike as to the portion where he
20 said "we", I have no objection to the witness saying his
21 belief as to what he was trying to accomplish, but I don't
22 know who we is.

23 THE COURT: Sustained, the part regarding "we were
24 willing to pay for the maintenance of the road" is struck,
25 stricken.

26 MR. HELSEL: Q Okay. What do you mean, Mr. Garson,

1 when you say "we", "we wanted to keep people out"? Who are
2 you referring to when you say "we"?

3 THE WITNESS: The property owners.

4 Q Okay. And yourself included in that?

5 A Yes.

6 Q And directing your attention to the next sentence
7 down that ways "we wish", do you see that?

8 A Yes.

9 Q Can you please read that first sentence?

10 A "We wish to control access to Rusty Spur Lane."

11 Q Okay. Now, how, just you personally, not the rest
12 of the Rusty Spur Lane owners, but how did you intend to
13 control access to Rusty Spur Lane?

14 A How did I intend? By putting the gate up.

15 Q Okay. And was it necessary to remove the roadway,
16 in your opinion, from the CSA in order to install the gate?

17 A Yes, I think in order to install the gate we had to,
18 we had to take it out of the CSA.

19 Q Okay. Now, do you know, Mr. Garson, whether or not
20 the County of Fresno responded to this petition?

21 A Yeah, they granted us what we were asking for.

22 Q Okay. Which was, which was what?

23 A To put the gate up and to control access to the
24 road.

25 MR. JONES: Move to strike the answer that the County
26 granted them the rights under the CSA. I don't believe we

1 have had any testimony other than the permits. The County
2 certainly can dissolve the CSA.

3 THE COURT: Sustained.

4 MR. HELSEL: Q Mr. Garson, are you aware of whether or
5 not the, following the submission of this petition to the
6 County, are you aware of whether or not the CSA was ultimately
7 dissolved?

8 THE WITNESS: Yes, it was.

9 Q Now, after the CSA was dissolved, how did you intend
10 for the road to be maintained?

11 A All the property owners were going to be responsible
12 financially to maintain the road.

13 Q Okay. And had, did you ever, or do you recall ever
14 having any conversations with the other Rusty Spur Lane
15 property owners about maintaining the road?

16 A Yes, we had several meetings.

17 Q Okay. And do you recall approximately when the
18 first meeting occurred?

19 A We had meetings right before, you know, right before
20 they granted us the right to dissolve the CSA we had meetings,
21 and then we had a couple of meetings afterwards, and then
22 whenever there came something we had to do on the road, we
23 would have a meeting and we would vote on it.

24 Q Okay. I want to focus on the meetings immediately
25 after the CSA was dissolved and prior to executing the Roadway
26 Maintenance Agreement. Do you recall having any meetings with

1 the other Rusty Spur Lane owners to discuss the Roadway
2 Maintenance Agreement?

3 A Yes.

4 Q And do you recall who attended those meetings?

5 A The property owners.

6 Q Do you recall who those property owners were?

7 A Yeah. I think Jack Murray, Wade Haines, Nader
8 Malakan, Ralph Hader.

9 Q Okay. Was Mr. Maxwell present at any of those
10 meetings?

11 A Yes, he was.

12 Q And do you recall the nature of the conversations
13 that you had at that meeting or those meetings?

14 A Well, whenever we had a meeting, at the beginning it
15 was to discuss putting in, dissolving the CSA. After that was
16 accomplished, the only time we had meetings was when we had to
17 pony up some money for maintenance on the road.

18 Q Okay. And at any of these meetings did you ever
19 discuss with the other owners restricting access to Rusty Spur
20 Lane?

21 A Yes.

22 Q Okay. Do you recall what the nature of those
23 conversations were, what the substance of those conversations
24 were?

25 A Well, that was the whole reason for dissolving the
26 CSA, was to restrict access to the road.

1 Q Okay.

2 A By the public.

3 Q Do you recall having any conversations specifically
4 with Mr. Maxwell about restricting access to the road?

5 A I don't recall any specific conversations, no.

6 Q At any of these meetings, did you have any
7 conversations with anyone specifically about restricting
8 public access to the road?

9 A Well, yeah, that was the whole reason for putting
10 the gate up, yes.

11 Q And do you recall the nature or the substance of
12 those conversations?

13 A Well, I remember, you know, specifically speak, I
14 don't know who I was speaking to, but I remember speaking
15 there were people on the roads spinning their tires and
16 driving up and down that road, and we wanted to restrict
17 access to people that weren't supposed to be on that road.

18 Q Okay. Now, when you say we wanted to restrict
19 access, did you yourself want to restrict public access?

20 A Yes.

21 THE COURT: May I see counsel for just a moment, please?

22 (Thereafter, a discussion was had between
23 the Court and Counsel at bench, not
24 reported.)

25 THE COURT: Sorry for the interruption.

26 MR. HELSEL: Q Mr. Garson, handing you what's been

1 marked as Exhibit 27. Do you recognize that document?

2 THE WITNESS: Yes.

3 Q What do you recognize that document to be?

4 A This is an agreement to share roadway maintenance
5 expenses for Rusty Spur.

6 Q Were you involved in the drafting of this document?

7 A No.

8 Q Were you in any way involved in the negotiating the
9 terms of the document?

10 A No.

11 Q Now, to your understanding, why did you enter into
12 this agreement?

13 A Because we were pulling a roadway out of the CSA, we
14 had to agree to financially become responsible to maintain the
15 road.

16 Q Now, was public access of the road ever contemplated
17 by you at the time you enter into the Roadway Maintenance
18 Agreement?

19 A No.

20 Q Why not?

21 A When we put the gate up, we entered into this
22 document in order to restrict access to the road.

23 MR. JONES: Objection, your Honor, I object to the
24 characterization of the document by the witness that the
25 obviously, progressively getting close to trying to get the
26 subjected intent of this witness, now the witness is offering

1 the subjected intent of all of the parties in saying what was
2 intended by the entering into the agreement. It is improper
3 extrinsic evidence, parol evidence, the agreement is not
4 ambiguous, it is not plead in their Complaint, and it is
5 irrelevant to the case, and I move to strike the response.

6 THE COURT: Objection sustained, the response is
7 stricken.

8 MR. HELSEL: Q Just so I'm clear, Mr. Garson, just as
9 to you personally, did you ever contemplate public access of
10 Rusty Spur Lane at the time you entered into this agreement?

11 THE WITNESS: No.

12 Q Now, do you recall if this document was ever
13 recorded?

14 A Um, it states right on the top, Fresno County
15 Recorder, yes, it was.

16 Q Were you ever, were you involved in the recording of
17 this document?

18 A Physically?

19 Q Physically.

20 A No.

21 Q Okay. Were you ever told the document was going to
22 be recorded?

23 A Yes.

24 Q Did you have any objections to the document being
25 recorded?

26 A No, I actually agreed to have it recorded.

1 Q And why were you in favor of recording the document?

2 A We had to record this document in order to, in order
3 to dissolve the CSA.

4 Q Do you recall, I may have asked this already, but do
5 you recall who it is you sold your parcel to, your Rusty Spur
6 Lane parcel?

7 A Yeah, I sold it to Wade Haines.

8 Q Okay. And when you sold your property to Wade
9 Haines, did you ever mention the existence of the Roadway
10 Maintenance Agreement to Mr. Haines?

11 A Well, no, he was, I'm sure he was aware of it. I
12 think he signed it.

13 Q Okay. But as it relates to your parcel, did you
14 ever have a conversation with Mr. Haines about the Roadway
15 Maintenance Agreement?

16 A I'm sure I had a conversation with him, but at the
17 time I sold my property, probably not.

18 Q Okay. Now, during the time that you owned your
19 Rusty Spur Lane parcel, for what purposes would you use Rusty
20 Spur Lane?

21 A To access my parcel, my property.

22 Q Okay. Would you ever use Rusty Spur Lane for any
23 commercial purpose?

24 A No.

25 Q And at the time you lived at Rusty Spur Lane, did
26 you ever leave the gate open for any reason?

1 A No.

2 Q And by the way, Mr. Garson, how would you access
3 Rusty Spur Lane through the gate?

4 A I had a code. I entered in my code to open the
5 gate.

6 Q Did you ever provide that code to anyone?

7 A I don't think so.

8 Q And at the time you owned your parcel on Rusty Spur
9 Lane, was anything constructed on that parcel?

10 A No. I had a storage box up there. You know, one of
11 those big metal storage containers? That was kind of like an
12 office. But, so I had equipment up there, so I maintained the
13 road and stuff like that, but other than that, no. I had a
14 pad site built on the property and the road up to the pad
15 site.

16 Q Okay. Now, you just indicated that you had, what
17 was it, an office on the property?

18 A Well, it was one of those big storage, you know,
19 white storage box containers. But inside it was, it had panel
20 on the walls, and then it was divided in half so back half of
21 it I stored tools and stuff like weed eaters and chain saws
22 and stuff like that. And on the other half it had an office
23 but, you know, I rarely used it.

24 Q Did you operate a business out of this office?

25 A No, no.

26 Q So what was the purpose of the office?

A Just if I wanted to go up there and sleep overnight in there, I could do that.

Q So did patrons of your business ever access Rusty Spur Lane for the purposes of accessing your office?

A No, no.

Q Did any members of the public ever access Rusty Spur Lane for the purpose of accessing your office?

A No.

Q So other than your office, or what you are calling your office, the storage shed if you will, did you have any other land uses on your parcel?

A No.

Q Any agricultural uses?

A No.

Q Have you ever applied to the County of Fresno for any type of land use permit?

A No.

Q Have you ever had any conversations with Mr. Maxwell about his proposed horse project?

A No.

Q Has Mr. Maxwell ever talked with you about allowing public use of Rusty Spur Lane?

A No.

Q I have no further questions, your Honor.

THE COURT: Very well.

CROSS-EXAMINATION

1 BY MR. JONES:

2 Q Mr. Garson, I think I misheard you. I thought you
3 testified that when you lived at Rusty Spur Lane, you never
4 left the gate open, right?

5 A No.

6 Q That's not true?

7 A Yes, that's true.

8 Q But you never lived at Rusty Spur Lane, right? You
9 never had a house there, true?

10 A True.

11 Q And one of the reasons you bought the 40-acre parcel
12 on Rusty Spur Lane was so that you could proceed to subdivide
13 it, true?

14 A True.

15 Q And when you said earlier you didn't make any
16 applications to the County for any entitlement, that wasn't
17 correct, right? You, in fact, made an application to
18 quadruple the uses on the 40-acre parcel you bought, true?

19 A True.

20 Q Okay. And in fact, the parcel I'm pointing at,
21 which now is owned by Mr. Haines, he owns two of them,
22 Mr. Sample and Mr. Murray, of which I'm pointing in the lower
23 portion of Exhibit 1 that shows four separate parcels, that
24 was a subdivision you, in fact, did, right?

25 A Correct.

26 Q You had to submit an application to the County,

1 right?

2 A Correct.

3 Q You had to indicate that you had non-exclusive, full
4 easement rights and access to each of those four parcels,
5 true?

6 A Correct.

7 Q And in fact, you had to provide easements over each
8 of the respective parcels from Rusty Spur Lane to insure that
9 each of them had non-exclusive, unfettered access to Millerton
10 Road, true?

11 A Correct. I had to put the road in, yes.

12 Q Right. And in fact, the effect of subdividing that
13 40-acre parcel into four parcels substantially increased the
14 trips that would be on Rusty Spur Lane as a result of the use
15 of that 40-acre parcel, true?

16 A Correct.

17 Q Okay. And when you subdivided that 40-acre parcel,
18 did Mr. Murray already own his property?

19 A No, I think someone by the name of Deider owned that
20 40 acres there.

21 Q Okay. And how about Mr. Haines, did he own his
22 property?

23 A Yes.

24 Q Okay. When you submitted your applications for the
25 parcel split that created the four parcels, did Mr. Haines
26 ever object to your application to subdivide those properties?

1 A I can't recall.

2 Q Okay.

3 A I did have some objections from some property
4 owners, though.

5 Q Did anybody object as a result of your use of Rusty
6 Spur Lane for the subdivision?

7 A Any one of the property owners?

8 Q Correct.

9 A I had some objections, but I think it was Blasingame
10 family that objected, that's the only objection I got, I
11 think.

12 Q You are not sure?

13 A Yeah, that was 15, 15 years ago.

14 Q Mr. Haines didn't object though, did he?

15 A No, I don't think so.

16 Q Okay. And that use, subdividing 40-acre parcel, let
17 me back up. The zoning at the time was AL 40, correct?

18 A Correct.

19 Q And that only allowed for 40-acre parcels, right?

20 A Correct.

21 Q And so you were actually trying to change, get a
22 variance from the zoning to subdivide the properties into
23 these four parcels, correct?

24 A Yes, I did get a variance.

25 Q And that variance, it was not a buy-right use? In
26 other words, you had no right automatically to divide it into

1 four parcels, you had to actually get a variance of the zoning
2 and an approval from the County to do that, true?

3 MR. HELSEL: Objection, calls for legal conclusion.

4 THE COURT: Overruled.

5 MR. JONES: Is that true?

6 THE WITNESS: Correct.

7 MR. JONES: Q As far as the gate, you understood as to
8 the reason for wanting to have the gate installed was because
9 you effectively were having transients and uninvited people
10 coming onto the roadway and leaving garbage, right?

11 THE WITNESS: People were, yeah, we wanted to keep people
12 out, yes.

13 Q But you, you weren't trying to keep invited guests
14 from being able to come to the property owners property, true?

15 A I never really invited anybody. But I brought
16 people up to the property, but I never, I never gave that
17 access key out or the code out.

18 Q But by putting in the gate, you never told, for
19 example, Mr. Maxwell, by installing the gate, I am intending
20 not to allow you to have invited guests to your property? Is
21 that true?

22 A Oh yeah, if I wanted to invite someone, I would
23 invite them, sure.

24 Q And whether they were a personal invitee or a
25 business invitee, if they were invitees, they were allowed in
26 your mind, true?

1 MR. HELSEL: Objection, your Honor, vague as to the term
2 business invitee.

3 THE COURT: Sustained.

4 MR. JONES: Q If Mr. Haines' wife wanted to have a
5 Tupperware party at her house, right? Was that something you
6 believed would be allowed as a use of the roadway?

7 MR. HELSEL: Objection, incomplete hypothetical, lacks
8 foundation.

9 MR. JONES: Q Sure. If Mrs. Haines invites people to a
10 Tupperware party at her house at which she is going to sell
11 Tupperware to them like a normal Tupperware party, that's the
12 use to which she's going to put the property, did you ever
13 tell anyone that that type of use was not allowed for Rusty
14 Spur Lane?

15 MR. HELSEL: Same objection, your Honor.

16 THE COURT: Overruled, you can answer, sir.

17 THE WITNESS: No, I wouldn't object to that.

18 MR. JONES: Q What about a day care? Someone wanted to
19 have a personal day care for children, six people at best,
20 where they were bringing them onto their property and charging
21 them to leave their children with them, was that a use you
22 believed Rusty Spur Lane could be put to, in your mind?

23 MR. HELSEL: Same objection, your Honor.

24 THE COURT: Overruled.

25 THE WITNESS: No, I don't think I would object to that.

26 MR. JONES: Q I have no further questions, your Honor.

1 Thank you.

2 THE COURT: Counsel?

3 REDIRECT EXAMINATION

4 BY MR. HELSEL:

5 Q Mr. Garson, at the time that you were splitting your
6 parcels or going through process of splitting your parcels, do
7 you recall at that time whether Mr. and Mrs. Haines even owned
8 property out at Rusty Spur Lane?

9 A No, they didn't. It was a man by the name of
10 Lehman, and I think he did object to my subdividing the
11 parcels.

12 Q Okay. So the Haines wouldn't have had any knowledge
13 of you splitting parcels at this time, to even have a reason
14 to object?

15 A No.

16 Q Thank you. No further questions, your Honor.

17 MR. JONES: No questions, your Honor.

18 THE COURT: May this witness be excused?

19 MR. HELSEL: He may.

20 MR. JONES: Yes.

21 THE COURT: Thank you, sir.

22 MR. JONES: Just a matter of housekeeping I wanted to
23 take up with the court, so whenever counsel is ready. I want
24 to fix that exhibit to the document we submitted to the court.

25 THE COURT: Okay.

26 MR. JONES: Which is Exhibit 126, I have given a copy of

1 that.

2 THE COURT: Did you want to do that on the record or off?

3 MR. JONES: We can do it on the record or we can do it
4 off the record.

5 THE COURT: Okay. Thanks. I'll be right back.

6 (Whereupon, a break was taken.)

7 MR. HELSEL: Your Honor, the Plaintiff is not intending
8 to call anymore witnesses, but would intend to read deposition
9 testimony of Mr. Maxwell into the record.

10 MR. JONES: Your Honor, they have provided me with the
11 pages and lines they wish to read. I have no objection to
12 those being read, with one exception, and that is, they gave
13 me a page and line cite of page 300, line 15; to 301, line 1.
14 I think for completeness it should go to line 22.

15 MR. HELSEL: So instead of ending on 11, you said
16 continue to 22?

17 MR. JONES: Correct.

18 THE COURT: Start at what, 300 what? Starting?

19 MR. JONES: 300, it was on page 300, this is one of three
20 they wish to read.

21 THE COURT: Yes, I understand. And I have page, I'm
22 looking at page 300 right now, and they wanted to go to page
23 311, and you want them to go to page?

24 MR. JONES: No, they want to go from page 300, line 15,
25 to page 301, line 11, and I have asked that they read to line
26 22.

1 THE COURT: Okay. Just a moment. That's fine.

2 MR. HELSEL: The only issue I have, your Honor, is lines
3 12 through 22 really relate to Mr. Maxwell's understanding of
4 whether he's profiting or not, and that really isn't the
5 intention or the relevance of reading this section in, it is
6 simply to determine that there is going to be a fee charged
7 for these events.

8 MR. JONES: And my comment would only be, I think that
9 the questions, if you read from the beginning, were designed
10 to get a sense of how much would be charged, okay. What are
11 you in it for?

12 Answer: Fun.

13 Were you generating -- I think they were trying to figure
14 out was there a fee and is there a profit motive when you read
15 the testimony. And I think it just rounds out the rest of his
16 line of questioning. It is up to the court.

17 THE COURT: Yes, it is. Does it really matter? He can
18 read it anyway.

19 MR. HELSEL: Your Honor, yes. I'm not pushing the
20 matter. That's fine. I'm agreeable with that.

21 THE COURT: Do you to have a determination?

22 MR. HELSEL: No.

23 THE COURT: Anyone can read it. He's a party, he can
24 read whatever, it is his deposition. Okay. All right. Very
25 good.

26 MR. HELSEL: Okay. Then, I'm going to be reading from

1 the deposition transcript of Mr. Maxwell, of which the court
2 has a copy lodged, and I'm going to start at page 280, line
3 10, continuing to page 283 line 9.

4 "Question: So Exhibit 40 purports to be a director
5 review and approval application that appears to have your name
6 as the owner; is that correct?

7 Answer: That's correct.

8 Question: So was this the application that you submitted
9 to the Fresno County Department of Public Works and Planning?

10 Answer: Yes.

11 Question: And the purpose of this application was for a
12 horse arena?

13 Answer: Yes.

14 Question: I can't make out the date there on the bottom
15 right hand corner, is that December 16, 2008? Is that the
16 date of your application? I believe it is on the lower right
17 hand corner, if we can make it out of the first page.

18 Answer: Well, the subsequent are 8-18 of 2008, but the
19 latter part of 2008.

20 Mr. Bennett: Just trying to help here, it looks like
21 page five has a clearer date.

22 Question: So it appears to be December 16th, 2008,
23 correct?

24 Answer: Okay.

25 Question: And the proposed project, as indicated on page
26 2 under the section entitled proposed project, is horse arena,

1 youth and adult activities, correct?

2 Answer: Yes.

3 Question: Now, specifically, what type of youth and
4 adult activities are you referring to?

5 Answer: Activities with horses.

6 Question: What types of activities?

7 Answer: Gymkhanas, shows, roping.

8 Question: Anything else?

9 Answer: I'm sure there is. Horses come in a multitude
10 of disciplines.

11 Question: Okay. So the proposed project, then, as I
12 understand it, is anything relating to horse events?

13 Mr. Bennett: I'm going to object.

14 Question: Is that a fair statement?

15 Mr. Bennett: I'm going to object to the extent the
16 document and the project application speaks for themselves and
17 are the best evidence of what the project is, or what the
18 project isn't.

19 The witness: Youth and adult events.

20 Question: Okay. And I'm just trying to clarify
21 specifically what types of youth and adult activities are
22 contemplated.

23 Answer: Currently, youth gymkhana, adult gymkhana,
24 ropings, shows, halter-type shows.

25 Question: Do you intend on offering any types of riding
26 instruction?

1 Answer: Not currently, no.

2 Question: So is it fair to state that the youth and
3 adult activities that you are referring to, are horse-related
4 competitions?

5 Answer: Well, most of them, yes, they are all
6 competitions.

7 Question: Now, directing your attention to page, it's
8 actually page four of the document, the number at the bottom
9 of the document is actually three, it's the fourth page, and
10 in the exhibit I handed you, specifically 19-A, will
11 additional driveways from the proposed project site be
12 necessary to access public roads? And you indicate no,
13 correct?

14 Answer: That's correct.

15 Question: And it is that, is that because your
16 intentions are to have the proposed project site be accessed
17 by Rusty Spur Lane?

18 Answer: That's correct."

19 And then, now referring to page 298 of Maxwell's
20 deposition, lines 22, through 299, lines 19:

21 "Question: Well, let me ask it this way, Mr. Maxwell.
22 As you sit here today, do you intend to charge a fee for those
23 horse events?

24 Answer: At some time.

25 Question: Okay. And how are you going to charge that
26 fee? Explain that to me.

1 Answer: People enter the facility park and groom their
2 horses prior to the age groups for children, registrations,
3 you register your child and pay a fee there.

4 Question: Okay. So you pay a registration fee, so to
5 speak, to enter into the event?

6 Answer: Right.

7 Question: And this is for the youth events?

8 Answer: It will be for any event.

9 Question: For any of the events? So you pay essentially
10 a registration fee for entering into whatever horse event is
11 occurring?

12 Answer: Right.

13 Question: Do you know, as you sit here today,
14 approximately what the registration fee is going to be?

15 Answer: No."

16 And then now referring to page 300 of Mr. Maxwell's
17 deposition, beginning with lines 15, through page 301, line
18 11:

19 "Question: --"

20 THE COURT: Well, okay. That's fine.

21 MR. HELSEL: Q "And so as you sit here today, you don't
22 have any idea as to what the registration fee is going to be?

23 Answer: Nominal at best.

24 Question: Okay. And by nominal, what do you mean by
25 nominal?

26 Answer: Nominal at best. People in our community are

1 not very rich these days, pretty poor, it's a family-oriented
2 event, it is not designed to make money.

3 Question: So what's your idea of nominal?

4 Mr. Bennett: That calls for speculation.

5 The witness: I don't know. You want a dollar figure?

6 Question: I do.

7 Answer: Ten bucks. Ten bucks for the day.

8 Question: \$10 to \$20 for the day?

9 Answer: For the day.

10 Question: Per rider?

11 Answer: Per rider.

12 Question: Okay. Now, you mentioned a few moments ago
13 you are not in this for the profit. Is that an accurate
14 statement?

15 Answer: That's true.

16 Question: Okay. What are you in it for?

17 Answer: Fun.

18 Question: Will you generate income? Will you generate
19 revenue from having those projects?

20 Answer: If I had 60 riders, six times a year, it would
21 be 360, at ten bucks, would be \$3,600. I don't think I'm
22 making any money."

23 And, your Honor, I believe we had some housekeeping
24 issues as they relate to the exhibits. Mr. Jones and I had
25 talked about moving Exhibit 41 and 42 into evidence.

26 MR. JONES: I think it is 41 and 43, 41 is, I believe,

1 the staff report on the project.

2 THE COURT: We'll go off the record, and whatever it is,
3 it sounds like you both agree 41 will come into evidence, but
4 whether it is 42 or 43, you do that off the record and we'll
5 go back on the issue.

6 MR. JONES: We agree that's what the document is.

7 MR. HELSEL: That's correct, your Honor, it is Exhibit 41
8 and 43.

9 MR. JONES: We have no objection to that.

10 THE COURT: They will be received in evidence.

11 (Thereafter, Exhibit Numbers 41 and 43
12 were received into evidence.)

13 MR. JONES: And then the last one was Exhibit 53, which
14 was a document that was used with Mr. Murray. I just don't
15 know if it was ever moved into evidence by Mr. Helsel, and I
16 want to make sure it gets into evidence.

17 THE COURT: Any objection to 53 coming in?

18 MR. HELSEL: No objection, your Honor.

19 THE COURT: Exhibit 53 will be received in evidence.

20 (Thereafter, Exhibit Number 53 was
21 received into evidence.)

22 MR. HELSEL: Your Honor, at this time the Plaintiffs
23 would like to move to conform their Second Amended Complaint
24 to proof.

25 THE COURT: Okay.

26 MR. HELSEL: And specifically, your Honor, the only

1 amendments that are going to be made are as they relate to the
2 declarations that the plaintiffs are seeking.

3 Specifically, your Honor, as to the, well, there's no
4 longer a Second Cause of Action, so, the Second Cause of
5 Action can be stricken from the Second Amended Complaint.

6 Third Amended, strike that, the Third Cause of Action was
7 successfully demurred to by the County of Fresno, and as to
8 that Third Cause of Action, that will be stricken.

9 And then, as to the declarations that the plaintiffs were
10 seeking under their First Cause of Action, we would like to
11 amend, strike those declarations and include the following
12 four declarations:

13 First, for a judicial determination that public use of
14 Rusty Spur Lane as a result of the Commercial Rodeo Project
15 Access, which is a defined term in the Second Amended
16 Complaint, will constitute a material breach of the Roadway
17 Maintenance Agreement.

18 THE COURT: Do you have this written down?

19 MR. HELSEL: I do, just in notes.

20 THE COURT: Okay. All right.

21 MR. JONES: It is going to be really hard for us to
22 follow to discuss it.

23 MR. HELSEL: I have it written down here, your Honor, it
24 is not in the pleading form.

25 THE COURT: I can appreciate that, I'm just thinking that
26 it's, and appropriately so, there are going to be a lot of

1 words when you put it that way I can tell with regard to the
2 four areas of change that you want to make, and that's fine.

3 It's just that I am making notes, and will have the court
4 reporter's transcript, but it is not anywhere else. To go
5 back and refer to it, I have to get the court reporter, and,
6 frankly, practically speaking, this is a third reporter, if
7 you notice, in this case, so I have to find the correct
8 reporter and make sure that she does not go on vacation, or
9 leave, or to any appointments or anything between now and
10 whenever a decision is made in the case, so there's that
11 practical consideration. Or I could have her prepare a
12 transcript of just these amendments, or, because, you know, or
13 you can copy your notes or something and give it to me.

14 MR. HELSEL: I was going to suggest that to you, but I
15 can send somebody down, in fact, your Honor, back to the
16 office.

17 THE COURT: That's all right. We have a photocopier in
18 the back, do you have it right there?

19 MR. HELSEL: I do.

20 THE COURT: Do you want a copy, Mr. Jones?

21 MR. JONES: Please.

22 THE COURT: We'll do that right now. Fine. Perfect.

23 (Whereupon, a break was taken.)

24 THE COURT: Back on the record. You can read it into the
25 record if you would like, but would you like to have a copy of
26 this entered into the record as an exhibit or something?

1 Court exhibit?

2 MR. HELSEL: I was going to suggest I could do that, your
3 Honor, or if the court would prefer, we could also at the next
4 break have this put into a pleading.

5 THE COURT: That would be great. Let's do that. You
6 want to reserve the right to do that?

7 MR. HELSEL: I would, your Honor.

8 THE COURT: That would be fantastic. Thank you.
9 Anything else at this time?

10 MR. HELSEL: Your Honor, at this time, before the -- at
11 this time, your Honor, I think it is appropriate the
12 plaintiffs would like to bring a Motion for Judgment on the
13 Pleadings as it relates to the defendant's declaration
14 relating to the Sohm easement, and specifically, the motion
15 would be based on the fact that the defendants have failed to
16 name in the Cross-Complaint an indispensable party.
17 Specifically the indispensable party is the servient tenant of
18 the easement that they seek a declaration on.

19 THE COURT: Okay.

20 MR. HELSEL: Your Honor, we also do have for court and
21 counsel a pocket brief on the issue.

22 THE COURT: Okay. We better read that.

23 MR. HELSEL: Essentially, your Honor, the motion raises
24 the same arguments that the defendants have raised as against
25 our prior claims against the easement, that essentially as
26 mentioned before, that the servient tenant has not been named,

1 and therefore a declaration can not made as it relates to use
2 of that particular easement.

3 THE COURT: Okay.

4 MR. JONES: I would like to be heard, when the court's
5 ready.

6 THE COURT: Sure, anything else at this time, Mr. Helsel?

7 MR. HELSEL: No, your Honor, the plaintiffs are prepared
8 to rest.

9 THE COURT: All right. So you rest at this time, subject
10 to an additional pleading that you want to submit with regard
11 to the conforming the Second Amended Complaint?

12 MR. HELSEL: That's correct.

13 THE COURT: Okay. Great. Thank you.

14 MR. JONES: Your Honor, briefly on the issue of the
15 Motion for Judgment on the Pleadings. The reason we objected
16 to their requested declarations, is because they were asking
17 the court for a determination that the use to which we were
18 putting the property constituted an overburdening of the
19 easement, and the problem with that is, is that the only party
20 that can legally object to an overburdening of the easement,
21 is the servient tenant, which now is Blasingame, and they were
22 not named as a party to the Complaint that was filed by the
23 plaintiffs.

24 The difference between what they are seeking in their
25 declarations, what they asked for in their Second Amended
26 Complaint, is that "the use of a public and patrons and

1 participants of the Commercial Rodeo Project to gain access to
2 the Maxwell property from Millerton Road, changes the scope of
3 the 1970 easement, and overburdens the 1970 easement in a
4 manner not contemplated by any a party when the 1970 easement
5 was created." So, they were trying to get to the creation of
6 that document and the determination of overburdening, which
7 they don't have standing to raise, and the servient tenant
8 does, it would be a necessary party.

9 What we have asked the court is for a determination as
10 amongst these parties, the ones who are using the easement,
11 that the sole easement does not restrict the number of vehicle
12 trips any parcel may utilize over the Sohm easement, or in any
13 way attempt to limit the purpose of the trips for the types of
14 uses on the property serviced by the easement, whether
15 residential, commercial, or otherwise. And the second is a
16 similar declaration. And, actually, that goes to the Road
17 Maintenance Agreement.

18 But the bottom line is, that request which is one of the
19 our declarations requested in our cause of action, we have one
20 cause of action for declaratory relief, there's actually four
21 separate declarations sought, we believe is one the court can
22 adjudicate that the underlying servient tenant is not a
23 necessary and indispensable party, because we're not seeking
24 to determine the burden on them and their objection thereto,
25 or interpretation as it relates to that, but as related to the
26 parties to this action, where they have repeatedly asserted

1 that we can not use this easement for the purposes very
2 specific to this matter. We do not believe that the servient
3 tenant is an indispensable party.

4 And the Motion for Judgment on the Pleadings as to the
5 one request in our, it is actually two separate paragraphs, 41
6 and, excuse me, 41 only, with respect to our declaratory
7 relief cause of action, is not subject to a Motion for
8 Judgment on the Pleadings on the issues stated. I'll be happy
9 to answer the court's questions, if the court has any.

10 THE COURT: At this time, I don't. Thank you.

11 MR. JONES: Okay. Your Honor, the one thing -- I'm
12 sorry, go ahead.

13 MR. HELSEL: Your Honor, I would simply state that what
14 the defendants are seeking byway of their declarations that
15 relates to the Sohm easement, is just the exact opposite of
16 what we were seeking. And I don't see how, if, if their
17 argument to us was we somehow failed to name an indispensable
18 party by not bringing in the servient tenant by not naming
19 them as a party to the action, how a declaration that seeks
20 unrestricted use over that servient tenant is in any way
21 different. And even today, given the Blasingame, the servient
22 tenant owners, are not parties to this action, whatever
23 judgment this court renders byway of this declaration, isn't
24 going to be binding on the servient tenant, and that is
25 precisely the concern as stated in Civil, Code of Civil
26 Procedure Section 389, that "in the absence of that party, a

1 judgment could prejudice his or her ability to protect his or
2 her interest in later litigation, or leave any of the parties
3 before the court exposed to a risk of additional liability or
4 inconsistent obligations." And that's exactly what would
5 occur if the court rendered a declaration as it relates to the
6 Sohm easement, without the Blasingames, or the servient
7 tenants, having been named. And on that I would submit.

8 THE COURT: All right. Well, let me ask a couple of
9 questions now, that maybe the answers to which may be readily
10 apparent to everyone else, and you may have mentioned this
11 before, or assumed that I knew it, but I want to be sure that
12 I understand.

13 On the enlargement to Exhibit 1, which is in evidence,
14 Exhibit 1 is, but the enlargement is here in court, and I'm
15 looking at it now, we have been using that as a reference sort
16 of throughout the testimony of various witnesses. In what
17 I'll call the left side or left margin, there's, 40 percent of
18 the way down from the top, it says Blasingame Family Trust,
19 and on the right hand side or margin about 50 percent of the
20 way in the middle of the paper it says Blasingame Family
21 Trust. Do you see that?

22 MR. JONES: Yes.

23 MR. HELSEL: I do.

24 THE COURT: Over around the top, going from the right
25 where the words Rusty Spur Lane are in there, and then it
26 points to the Rusty Spur Lane as it comes off Millerton Road.

1 Where the words Rusty Spur Lane are written, that's Blasingame
2 land as well?

3 MR. JONES: True.

4 MR. BENNETT: No.

5 MR. HELSEL: It is my understanding, your Honor, that
6 this section over which the 1970's easement runs, is owned by
7 the Blasingames.

8 THE COURT: Now?

9 MR. HELSEL: Now.

10 MR. BENNETT: The Blasingame Family Trust owns the
11 property to the west of the property, this red line all the
12 way around, all the way around, all the way up to
13 approximately right about here, your Honor. There is, the
14 parcel that is here owns this sliver here as well.

15 MR. HELSEL: But it would include the land over which the
16 1970 easement runs.

17 MR. BENNETT: What's that?

18 MR. HELSEL: The Blasingames own the property over which
19 the 1970 easement runs.

20 MR. BENNETT: That's right, yeah.

21 THE COURT: Okay. In Sohm and the 1970 easement, the
22 easement that was created that allowed the creation of this,
23 ultimately this Rusty Spur Lane, you are saying that it's the,
24 it is the plaintiff's position that Blasingame is an essential
25 party?

26 MR. HELSEL: That is correct, your Honor.

1 THE COURT: Because, the easement that's created to allow
2 Rusty Spur Lane is derived from that original 1970 easement
3 off, well, off Millerton Road?

4 MR. JONES: As to up to where the perpendicular line
5 runs. The Sohm easement runs from Millerton Road right to
6 Charlie's parcel.

7 THE COURT: Okay.

8 MR. JONES: And our contention is that, as it relates to
9 these parties who have the dispute over how each other can use
10 the roadway, we think Blasingame on that issue, is not an
11 indispensable party, because we're not seeking to determine
12 whether or not anything overburdens their easement to which
13 they would have, you know, a significant vested interest, and
14 Blasingame, if they came back later, they could make their
15 argument about it. But at the end of the day what we have
16 been trying to do is to get a determination between these
17 parties, who seem to be the ones raising the interest and
18 issue, that this use is not prohibited by the easement.

19 MR. HELSEL: And that may very well be, your Honor. The
20 problem, however, is that byway of their declaration they are
21 seeking to have unlimited and unrestricted use over the 1970
22 easement, the Sohm easement, of which the Blasingames are the
23 current servient tenants of.

24 MR. JONES: I don't think that's what our request is.

25 THE COURT: Well, in order to get to what the defendants
26 position is, and as I understand it the defendant's position

1 is that from the, is it, if you want to call it that, is it
2 the north east corner of Mr. Maxwell's parcel which is the
3 inner corner where the Rusty Spur Lane easement from Millerton
4 Road down to the property line between the Maxwell property
5 and Hall property is, is that that upper right corner on the
6 map?

7 MR. HELSEL: I believe, your Honor, this is the access to
8 Mr. Maxwell's property here.

9 THE COURT: Is that up in the north east corner
10 basically?

11 MR. JONES: It is.

12 MR. HELSEL: Yes, your Honor.

13 THE COURT: What the plaintiffs are claiming is that,
14 from Millerton Road to that corner, north east corner of
15 Mr. Maxwell's property, since that involves the easement that
16 involved the Sohm trust only back in the 1970's, and it
17 involves Blasingame on the land, and they are not involved in
18 this lawsuit, that the court can't adjudicate use of an
19 easement from the Rusty Spur Lane easement from Millerton Road
20 down to its end, three-quarters of a mile long or whatever it
21 is, because Blasingame is not involved in this lawsuit.

22 MR. HELSEL: That's correct, your Honor. And to be even
23 more specific, the only easement that the defendants seek a
24 declaration of, is the Sohm easement.

25 THE COURT: Well, if I can't, if the court can't do that,
26 and what the defense is saying is that, well, really what the

1 court is going from that north east corner across that
2 horizontal line where the easement is, up in that north east
3 corner of the Maxwell property, straight down that line and it
4 is adjudicating the rights of the parties to this lawsuit
5 within that context only.

6 MR. JONES: Right.. And I will add, your Honor, that
7 there's case law that says that relative right holders in an
8 easement can dispute each other's use, relative to
9 interference with their rights. In other words, the Haines's,
10 for example --

11 THE COURT: Let me, I'm sorry to interrupt you, I want to
12 be sure. So, you are saying that the parties to this lawsuit
13 could seek, by virtue of this lawsuit or Cross-Complaint or
14 cross-claims, or seeking declaratory relief, can try and get a
15 judicial determination of what their respective rights are,
16 but it's clear that that determination would not be binding
17 upon, for example, the Blasingames, or anyone else that
18 legally was entitled to use that easement between Millerton
19 Road and that north east corner of the Maxwell property,
20 because they are not parties to the case. And there could be
21 litigation, maybe not, but there could be litigation between,
22 for instance, the Blasingame Family Trust, and any or all
23 perhaps, of the parties to this lawsuit, in the event that the
24 Blasingames had objections to use of that easement, or wanted
25 to claim it was overuse of the easement, or some other
26 misapplication or misuse of the easement between Millerton

1 Road and the upper north east corner of the Maxwell property,
2 or the activities as determined by the court, if the court
3 found that whatever the court found, that ultimately resulted
4 perhaps in increased use of some portion of the easement
5 coming off of Millerton Road, that Blasingame, the Blasingame
6 Family Trust can then pursue their lawsuit?

7 MR. JONES: Yeah, if the court, for example, if the
8 County approves the project and the project results in use,
9 Blasingames always hold the right to come back and say, you
10 are overburdening our easement. But relative easement holders
11 have the right to determine between themselves whether or not
12 a use interferes with each other's rights.

13 THE COURT: I think that, and I interrupted you.

14 MR. JONES: That was my answer. There's case law that
15 says that relative easement holders can have determinations
16 between themselves as to whether or not a use of an easement
17 in particular is interfering with each other's relative access
18 and use rights. Which in a way, is what they have effectively
19 argued at some level.

20 And so I think that the court can deliver a decision that
21 is binding upon these parties, relative to this matter. All
22 of the parties that are using the Sohm easement for access to
23 this development, are parties to this action, and we believe
24 that the court can determine what is at issue here relative to
25 the relative rights of the parties.

26 MR. HELSEL: Your Honor?

1 THE COURT: Yes.

2 MR. HELSEL: I was just going to say, the problem here is
3 a practical problem. The Blasingames may not have an issue
4 now, but what about their successors in interest? And we're
5 heading down a road of having inconsistent obligations and
6 inconsistent liabilities. Because if the court renders a
7 declaration as it relates to all the parties in this action
8 and use of that easement, that's not going to effect
9 Blasingames or their successors in interest from later
10 bringing a lawsuit relating to the overburdening or overuse of
11 the easement, and that creates a problem, it creates a
12 potential for inconsistent obligations.

13 THE COURT: Well --

14 MR. JONES: That's always the case though, your Honor.

15 THE COURT: Let me ask this. Again, this may be readily
16 apparent to everyone else, but I want to be sure that I
17 understand.

18 Essentially, whatever you call it, and how many theories
19 or areas of declaration that are sought by either the
20 plaintiffs or the defendant, one side wants the court to say
21 "Well, there is a Roadway Maintenance Agreement or Roadway
22 Service Agreement, and by virtue of that and certain other
23 evidence, the court finds that the phrase 'private road' means
24 that only the nine parcel owners, the parcels which are served
25 directly by Rusty Spur Lane, and but then extended to their
26 families, and then extended to their social but not commercial

1 guests, could use Rusty Spur Lane." That's what one side
2 wants.

3 The other side says, "Well, use of the phrase 'private
4 road' and the other evidence in this case indicates that,
5 first of all, there's an absence of anything that further
6 defines 'private road', and secondly, 'private road' can just
7 as well have a meaning or perhaps more so in the absence of
8 anything defining what that means, it means that the roadway
9 is privately owned and maintained by the nine parcel owners
10 that pay or are assessed to own it or to maintain it, but, and
11 they have access to it, but they also have a right, a private
12 right, to determine who else accesses it, and what it boils
13 down to is, do any of the nine parcel owners or each of them
14 have a private right within themselves, by virtue of being
15 beneficiaries of the easement, they have a right to determine
16 that the public can use Rusty Spur Lane to whatever degree
17 that property owner allows, or wants to open its, exercise its
18 rights, I'll put it that way." That's the other side of it.

19 The private road doesn't mean that only the parcel owners
20 themselves could use it. And, in fact, the evidence doesn't
21 indicate that anyone thought that, because if the next step is
22 if only the nine parcel owners, if you take that literally,
23 literally -- and I see that a couple of the parties are
24 looking aghast at what I just said -- but when you take that
25 literally, that means that their families, their children, no
26 one else could use it, only the people that signed, the nine

1 people that signed those, or however many people are in the
2 case, there are some that are joint property holders, husband
3 and wife, so on or a representative of a trust for example, or
4 some other legal entity, only those signatories could use that
5 property, if it's a quote, unquote, private road, to be used
6 only by the parcel owners. Do you follow me?

7 MR. HELSEL: I do.

8 THE COURT: Okay. That means their families couldn't use
9 it. But there's been, no one intended that, that's clear from
10 the evidence. No one intended that.

11 So, it means that private right of way, or private
12 roadway, means the signatories to, if you use this Roadway
13 Maintenance Agreement in terms of an access agreement -- which
14 is a different thing in my view -- but if you follow that
15 logic for a moment. So the people who signed the Roadway
16 Maintenance Agreement, they can use the easement, and then
17 their family members, their immediate family members can use
18 it.

19 Does that mean that their extended family members can not
20 use it? And how far extended? Does it mean that a brother in
21 law who has cattle can't use it? Does it mean that the
22 brother in law's children, who would be nieces and nephews,
23 couldn't use it? Where do you cut it off as the extensions in
24 the extended family go? So does it mean only the signatories
25 to the document can use it, the nine parcel owners? No one
26 thought that, from what I can detect in the evidence.

1 Does it mean that only the nine parcel owners and the way
2 it's been expressed often in this case, and in papers, the
3 nine parcel owners and their families? Okay. Well, what does
4 that mean? What families? How much of their family? How do
5 you make that determination? What family? Where? Who?

6 So, then it gets even more nebulous when one considers
7 the additional interpretation that is urged upon the court,
8 which is, it means the nine signatories to the agreement, not
9 just them, but their families, whatever that means, and their
10 friends, their social friends. Then you get to, and I don't
11 mean this in a negative way toward anyone, but absurdities
12 when taken to logical conclusion, because you can decide that
13 maybe everyone in your family, whatever that is, or some
14 people do, or whatever have they have a wedding every month or
15 two, or six months, or whatever it is, and there are 500 or
16 1,000 people that come. Well, that's fine. That's fine.

17 That's, in reality, no one's going to like that, that
18 lives out there because that's too much traffic, but they
19 can't say it that way. In terms of the litigation what it has
20 to be is, well, that's the signers, their family, and their
21 social friends, or their friends. It's not a commercial
22 purpose.

23 Yet, on the other hand, if somebody has something and
24 they have got less than a hundred people there -- just to pick
25 an odd number -- and they charge an entry fee or something,
26 can't do that. You got ten times less people, but you can't

1 do that because that's public, or it's commercial, or, those
2 are the kinds of things that the court is asked in this case,
3 that those are among the things that the court is asked in
4 this case to decide.

5 So there's a problem with these declarations that the
6 parties are seeking. Because if you take certain things to
7 their conclusion, as best I can understand it, if I take one,
8 this Blasingame is an essential party and they aren't involved
9 in the case, and therefore, the defendants lose on this
10 portion of their cross-complaint, if I take that to its
11 logical conclusion, I just say, well, this lawsuit's over and
12 get up and walk off the bench.

13 If I take that, that argument to its logical conclusion,
14 I think -- and I'm thinking as I'm saying this -- because if I
15 can't make that determination because the Blasingames aren't
16 in the case, then I can't decide what either side wants.
17 Lawsuit's over. So you all've spent your money and your time
18 here, and you go home, and not that you, I don't mean this in
19 a bad way either, would really care what the court thinks
20 because you are going to do whatever you are going to do to
21 work out your dispute. It may be appealed and so on, and I
22 understand that. But what I understand is, if I take that
23 argument to its logical conclusion, I can't decide any, at
24 least one aspect of the declaration that each side is seeking
25 the court to decide. I'm done. If I make that determination
26 that I have jurisdiction, don't have jurisdiction to make a

1 declaration one way or the other, because of that, the
2 Blasingames not being involved in the case, we're done, at
3 least as to that part of the case. Probably as to the whole
4 case. So, you have done nothing here if that's the decision
5 that I come to.

6 Nothing, nothing at all. I don't know how much is going
7 to be accomplished anyway, I have told you that as we were
8 trying to work on resolving the case, but nothing has been
9 accomplished if I rule that way.

10 I think, and you can tell me if that's not correct, but,
11 if I accept that position, they are essential parties, nobody
12 gets any declaration. We're done.

13 MR. HELSEL: Well, the distinction as I see it, though,
14 your Honor, is that --

15 THE COURT: And then you are just like wherever you were
16 before the lawsuit was filed and before any evidence was
17 heard, and so on. It's like this didn't happen. And am I
18 mistaken or do I misunderstand that?

19 MR. HELSEL: Well, the distinction that I would draw,
20 your Honor, is we are seeking a declaration as it relates to
21 the parties and signers to the RMA.

22 THE COURT: Well, that's what --

23 MR. HELSEL: And they are also seeking --

24 THE COURT: But you are also seeking that you, okay,
25 well, that's one thing. But the declaration that you want is
26 different. So you do want the court to decide the relative

1 rights and responsibilities of the parties to the RMA? It is
2 just that your position is that the RMA governs access to the
3 road, in addition to the responsibility to maintain it or
4 service it. And it is the defendant's position that the RMA
5 does not do that. Did I say that correctly?

6 MR. HELSEL: You did. But what we're seeking is a
7 declaration as to, it only involves, in terms of the
8 indispensable parties, all of the parties that are responsible
9 for maintaining the road under the Roadway Maintenance
10 Agreement, have been named in this Complaint. So as this
11 court has jurisdiction to enter a judgment as it relates to
12 the parties rights as they exist under the RMA, it can do
13 that.

14 MR. JONES: Your Honor, if I could just jump in?

15 THE COURT: Yes, in just a second. But I don't -- the
16 court, to make a judicial determination of the parties
17 respective rights under the RMA, the rights are, they are in
18 the RMA? I don't know that, well, their responsibilities are
19 in the RMA. The only dispute about the RMA in terms of
20 Roadway Maintenance in and of itself that I can recall, is
21 not, it wasn't characterized as a dispute, but the only
22 evidence that I heard, I'll put it that way, that I can recall
23 right now, off the tip of my tongue, with regard to the
24 Roadway Maintenance Agreement itself, or the effect of it, or
25 the responsibilities of the parties relative to the Roadway
26 Maintenance Agreement, was some testimony yesterday, that as

1 of this year, everyone except for Mr. Maxwell has paid their
2 assessment. That's the only, it seems like other than that,
3 as to the Roadway Maintenance Agreement, and how it would be
4 funded and so forth, there don't seem to be any other disputes
5 amongst the parties.

6 And so a declaration, a determination by the court of the
7 relative responsibilities of the parties subject to the
8 Roadway Maintenance Agreement itself, I guess, I can say well,
9 it maybe that Mr. Maxwell owes some money for this year, but
10 we really didn't talk about that much, and I haven't seen that
11 just came out during the course of the testimony, but it maybe
12 that that's the case. Looks like that might be the case, if
13 that evidence is accurate, and all that. I mean, we're only
14 halfway through the case at this point, so I don't know.

15 But where the problem comes in, is that the position of
16 the plaintiffs is if the Roadway Maintenance Agreement
17 actually operates to do something more than be an operative
18 agreement between the parties about maintenance or servicing
19 of the roadway. And that is that the Roadway Maintenance
20 Agreement is really an access agreement.

21 And that goes back to what I was saying about private
22 road and what does that mean? And the absence of evidence
23 that there's been any, in the minds of people that there may
24 have been something that they thought that something they were
25 signing or doing was going to limit access to Rusty Spur Lane,
26 but there really isn't anything that does that.

1 For example, and I don't know, there must be about five
2 or six of them that have been put in evidence, maybe all nine
3 of them have, but the documents that are the applications or
4 the petitions to County to remove the CSA from, to remove
5 Rusty Spur Lane from the CSA halfway down toward the bottom it
6 says reason, and Mr. Murray typed in the reason. It's the
7 same one on all of them, best I can determine, but he typed in
8 that reason. There's a question there. But I guess by
9 signing it, the people who signed it, adopted that as their
10 reason. But whether that's really their reason or not is
11 another issue, because that's the reason they said, it's not
12 under penalty of perjury, that's what they put in the petition
13 to get the County to take it out of the CSA.

14 And what was most important to me is that, of the nine
15 people that signed this thing, some of them may have intended
16 that, some of them didn't really care, some of them signed it
17 because they figured that's what the thing to do, there's no
18 agreement between those nine people though, those are separate
19 petitions or applications that were submitted together to the
20 County to accomplish a goal. There's no agreement among those
21 people that signed those petitions that we are seeking to
22 limit public access. They are each petitioning the County,
23 saying, or they are signing the petitions to the County
24 saying, for this reason we want to remove Rusty Spur Lane from
25 CSA 35. But there's no agreement amongst them saying that
26 that's what we agreed to do, that's what we're actually doing,

1 and we agree that only the signers to the Roadway Maintenance
2 Agreement and their immediate families or their extended
3 family, not to go beyond second degree or whatever or it is,
4 can use the roadway without approval of two-thirds or
5 unanimous approval of the remainder of the property owners or
6 something, it doesn't say that.

7 In fact, it further illustrates a vagary of that
8 document. I don't have it in front of me. But if we pick out
9 one of them, doesn't that document also make reference to the,
10 or a homeowner's association? In about the last sentence of
11 the reason that was typed in by Mr. Murray, it says that, we
12 are going to work out the details based upon the homeowner's
13 association, or based on the HOA?

14 MR. HELSEL: Your Honor, I believe you may be referring
15 to the letter that Mr. Murray sent out around April of 1999,
16 and it did specifically reference an HOA.

17 THE COURT: There was something that not only went out to
18 the individual signers, but there was some documentation
19 between Mr. Murray and the County, I thought, that indicated
20 there would be an HOA.

21 MR. JONES: The first is, 46 was the letter to the County
22 where there's a reference, your Honor, to the HOA. At the
23 bottom, I think there was also a memo or two that went to the
24 home owners talking about forming the HOA.

25 THE COURT: I think that's the document that I'm talking
26 about. So there's a petition that's submitted to the County

1 to have CSA, have Rusty Spur Lane removed from CSA 35, but
2 there's somehow that actually happens and there's no home
3 owners association in place. There's no home owners
4 association in place. And so there's no discussion about what
5 the scope of the authority of the home owners association
6 would be. There's no agreement, there's no writing, because
7 there's no home owners association. There are no covenants,
8 conditions, and restrictions, no CC and R's, not only with the
9 home owners association, but no other ones.

10 But there is an RMA, or roadway service or Roadway
11 Maintenance Agreement. But the Road Maintenance Agreement at
12 best it would seem, is somewhat vague in terms of what private
13 roadway means for the reasons I have already indicated. How
14 private is it? It's a private right of each of those parcel
15 owners to determine the access to the road that is commonly,
16 but privately owned amongst them, is how it kind of appears.

17 So, I have been talking now for awhile around what some
18 of these issues are, and I wanted to be sure, and I'll invite
19 counsel to comment, because if I take certain things that have
20 been said as I understand them, as they were, as I understood
21 them, as I thought they were expressed, the lawsuit's over if
22 I make a determination that Blasingame is an essential party
23 and that there cannot be any declaratory relief for one side
24 or the other, because Rusty Spur Lane crosses, it crosses some
25 property owned by the Blasingame Family Trust. And it then
26 determination is made then this is over for everyone.

1 MR. HELSEL: And then we're back to count one.

2 THE COURT: Well, yes.

3 MR. JONES: Or another lawsuit.

4 THE COURT: Well, sure. But that's what, if that's what
5 I'm being asked to do, and I make that determination, then
6 we're done.

7 MR. JONES: Your Honor, just to kind of highlight, not
8 that point in particular, but the notion --

9 THE COURT: Am I wrong about that?

10 MR. JONES: No, I don't think you are wrong about that,
11 and here's why. Here's the problem. The problem is, if
12 Mr. Murray's testimony, which we read into the record
13 previously, and if you look at this, this is at page 120, line
14 10, through 120 line 25 of his deposition, and what he
15 basically says is, "Is there any portion of the document" --
16 and that was the RMA, it was the RMA -- "that you could point
17 to you believe demonstrates that the horse arena use is not
18 allowed?"

19 "Answer: The only thing I can point to is reference to
20 the Mutual Easement Agreement for private right of way that
21 did not contemplate the commercial aspect nor defy.

22 And you are referring to the second paragraph of what's
23 in quotes?"

24 And he says, "Mutual easement provided right of way.

25 Question: That document is not the Maintenance
26 Agreement, correct?

1 Answer: That's correct.

2 Question: And so you are saying as you understood it, if
3 there's a preclusion of the type of use Mr. Maxwell is
4 attempting to put the property, it's going to be in the Mutual
5 Easement Agreement for private right of way, not in the
6 Maintenance Agreement; is that right?

7 Answer: I didn't say that either. I said that was my
8 interpretation.

9 Question: That's what you intended when you created the
10 document?

11 Answer: Correct.

12 Question: Now, that Mutual Easement Agreement for
13 private right of way was the same easement agreement that was
14 allowing access to the property owners when the CSA was
15 maintaining it, correct?

16 Answer: That's correct."

17 So my point is, is that the interpretation made that's
18 seeking the Road Maintenance Agreement, as their party admits,
19 was based on the rights of way that are the Sohm easement
20 right of way. And so if they say you can't review that and
21 determine that, I think that's a problem, vis-a-vie the
22 parties to this action.

23 THE COURT: The action is over.

24 MR. JONES: Yeah, I don't think it is necessary. I don't
25 think they are a necessary party for that purpose, but, you
26 know, that's certainly the argument they are positing.

1 THE COURT: I don't know how much of this discussion, it
2 is probably better to have it on the record, although I can
3 have this discussion with counsel as well off the record if
4 you want to discuss it, but I don't know where you want to go
5 from here. I can make certain determinations and we'll see
6 what happens, but if I made that determination, I think we
7 know what's going to happen.

8 I'm going to do that. But what you really want, I think,
9 is for us on other determinations to be made by the court, and
10 that is whether or not more specific to the parties that are
11 in this lawsuit, the use of the roadway, and the use of the
12 easement by one of the, in particular Mr. Maxwell, overburdens
13 the easement, whether it's a misuse of the easement, whether
14 it is permitted by some agreement, presumably the RMA and the
15 Roadway Maintenance Agreement, you want some determination of
16 that kind, whether or not his use of his portion, the portion
17 of the easement leading to his property is appropriate in
18 light of these horse equine sports events that he has had, and
19 proposes to have in the future. That's what both sides really
20 want.

21 I don't think you want me to make some determination
22 that, well, guess what? This last week this is, this means
23 nothing. I don't think you want me to do that. If you do,
24 that's okay. Let me know.

25 MR. HELSEL: Well, your Honor, the plaintiffs have
26 dismissed the Second Cause of Action as it relates to the

1 easements. What your Honor just described is not what we're
2 seeking. We're, as I have said before, I don't want to repeat
3 myself, we're just seeking an adjudication as to the parties
4 rights under the RMA.

5 I understand the argument that in order to get there, you
6 have to consider what gives rise to the RMA, and that is Rusty
7 Spur Lane, which is created by these easements.

8 THE COURT: Well, I have kind of explained already why I,
9 it doesn't seem to me that the RMA is a controlling document,
10 or the controlling agreement between the parties to this
11 lawsuit that would allow the court to adjudicate the use of
12 Rusty Spur Lane, or the amount or type of use of Rusty Spur
13 Lane by one or more of the parties to this lawsuit.

14 And not to repeat myself, but the court can adjudicate
15 whether or not the parties are following the RMA. That's not
16 what you want. But, and I told you, it doesn't look like
17 Mr. Maxwell did, he probably owes some money, but I haven't
18 heard his side of the thing yet either, the controversy yet,
19 maybe he'll pay it, I don't know.

20 But those issues, if we stick just to the RMA, could be
21 adjudicated. But I don't think that that document is a
22 controlling document regarding access to Rusty Spur Lane, and
23 that would open the door to the court determining the amount
24 or kind of access that the property owners of those parcels
25 serviced by Rusty Spur Lane can allow. But I'm willing to
26 listen.

1 MR. JONES: Your Honor, I think, whenever you are done
2 with this, I would like to take up the issues of, before we
3 start our case, I think it is only fair that we figure out
4 what is really the pleadings in the case.

5 THE COURT: I think that I want to afford the opportunity
6 certainly to do that, but in light of where we are, it seems
7 that we might best wait for the actual pleading that will be
8 offered later this afternoon. And then we can see what the
9 actual suggested amendments are, plus combining that with the
10 document that we already have from earlier this morning, the
11 notes, Mr. Helsel's notes, if you want.

12 MR. JONES: Okay. Well, I would like to be heard on
13 that. I think that's fine, but I have a couple of things I
14 would like to say about it, whenever you are done with this
15 Motion for Judgment on the pleadings or motion for good faith.

16 THE COURT: Well --

17 MR. HELSEL: Your Honor, if I may ask, if before we move
18 forward on this, can I discuss this with my clients for just a
19 few minutes?

20 THE COURT: I was going to ask you, do you really want me
21 to do that? Make that determination?

22 MR. HELSEL: We're going to talk about that now.

23 THE COURT: Good. Thanks. Maybe I can see counsel for a
24 quick minute before you talk about that. Can I see you guys?

25 (Thereafter, a discussion was had between
26 the Court and Counsel at bench, not

reported.)

(Whereupon, the lunch recess was taken.)

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1 TUESDAY, JULY 19, 2011 - - AFTERNOON SESSION

2 THE COURT: The record should reflect the parties, except
3 for Mr. Haines, are present, and counsel are present. Did we
4 have any other matters you needed to take up before you kind
5 of formally rested your case, subject to pleading you were
6 going to submit the defense was going to begin?

7 MR. HELSEL: We did, your Honor, except for the, I guess
8 the last follow up issue, is that the plaintiffs still do
9 remain committed to the position that without the servient
10 tenant being named as a party to this action, that they
11 constitute an indispensable party, and that we essentially, I
12 mean, the court has its own understanding as to whether or not
13 it can proceed on the RMA issues, but as to delay the easement
14 issues, we do not believe this court are proceed.

15 THE COURT: All right.

16 MR. JONES: Your Honor, I would just state for the record
17 that to the extent the court remembered that we have four
18 declarations regarding the, regarding this matter on
19 Cross-Complaint, only one of them addresses the issue of the
20 Sohm easement. And so therefore, I don't think a Motion for
21 Judgment on the pleadings as to the cause of action is
22 appropriate, because it has three other requests specifically
23 related to the Road Maintenance Agreement.

24 In addition, to the extent that the court seeks
25 supplemental briefing, we have found a case, which we're glad
26 to submit to the court, but we're also, we think that to the

1 extent the court's going to entertain that issue given its
2 relationship to the easement part of it, that the court have
3 supplemental briefing on that issue, and whether or not on the
4 issue of the Sohm easement in particular, it's an
5 indispensable party question. But I think as to our
6 Cross-Complaint and as to any issues that are in their
7 complaint as to the Road Maintenance Agreement, I agree the
8 court can proceed to decide those issues. That's our position
9 stated for the record, for the court's consideration.

10 I do have a motion to make under 631 of the Code of Civil
11 Procedure for judgment on plaintiff's complaint. I believe
12 the evidence has failed wholesale to support the allegations
13 of their complaint, even as they proposed to amend. I do
14 think that the court should address their amendment at this
15 time for two reasons.

16 One, I think it relates directly to our Motion for
17 Judgment under 631.8 of the Code of Civil Procedure.

18 And two, it will also potentially relate to the
19 admissibility of our evidence and where we go with our case.
20 Admittedly, it sounded like they were withdrawing all of their
21 declarations set forth in their First Cause of Action, which
22 is what I heard at the opening of their comments, which relate
23 to the Road Maintenance Agreement. I think whether they
24 withdraw them or not, I do not believe the agreement was
25 susceptible to the interpretations they have sought in their
26 declarations in the First Cause of Action, which are that,

1 "the increased public use of Rusty Spur Lane as a result of
2 the Commercial Rodeo Project access constitutes a breach of
3 the Roadway Maintenance Agreement, in that such additional
4 public traffic will increase the cost of repairing and
5 maintaining the Rusty Spur Lane for Rusty Spur Lane property
6 owners." They offer no competent evidence on that point, nor
7 does the Road Maintenance Agreement by its terms, contain
8 language that could be construed as requiring that the parties
9 not have uses that could increase their cost, even if the
10 document was so construed.

11 The second declaration that they have asked for, is "that
12 the Commercial Rodeo Project access which contemplates use by
13 the public, namely patrons and participants of the Commercial
14 Rodeo Project, constitutes a further breach of the Roadway
15 Maintenance Agreement, in that such public traffic will
16 increase the individual liability of each Rusty Spur Lane
17 property owner as an owner of a tenant in common interest in
18 Rusty Spur Lane Road."

19 The agreement which the court has heard testimony about,
20 it has been admitted into evidence, nowhere states that the
21 uses of the property, uses of the property which increase
22 liability somehow constitutes a breach of the agreement, nor
23 have they offered testimony from a competent source that in
24 fact the increased use of the road from the project
25 Mr. Maxwell's proposed, will in fact increase the individual
26 liability of such property owners.

1 Therefore, I believe judgment should be entered on those,
2 on the entirety of the First Cause of Action as currently
3 plead.

4 And then as to the request for their new declaratory
5 relief. First and foremost I do not believe that they have
6 established by any evidentiary basis whatsoever, that in fact,
7 the agreement, the context in which it was created as the law
8 provides, is vague and ambiguous for purposes of interpreting
9 what the word private right of way means. And they have
10 certainly not offered any testimony that would support any
11 construction of that language without substantially modifying
12 the terms of the agreement. As the court knows, even if you
13 were allowed to try to admit parol evidence for the purposes
14 of demonstrating an ambiguity and definition to which a
15 document might be construed, they still have to be able to
16 show that they can do it based on the language of the document
17 as written, and there are couple of legal principles that
18 govern that.

19 One document is to be construed in the context of itself,
20 in this document is unquestionably a Road Maintenance
21 Agreement, not a road control and use agreement.

22 And two, they simply cannot admit evidence, and have not
23 admitted evidence, to demonstrate the interpretations of the
24 agreement or breaches thereof as requested in their motion for
25 leave to amend according to proof.

26 I also think that leave to amend according to proof,

1 where they seek to insert new factual matters not the subject
2 of their pleading, constitutes undue prejudice, it's unfair,
3 it's unreasonable. If these were really their claims, and
4 they really had arguments relative to the Road Maintenance
5 Agreement that they wanted to assert with respect to these new
6 declarations, they should have been part of their complaint a
7 long time ago, certainly before the close of their case.

8 And the interesting thing, your Honor, is when we started
9 this trial, they had requested, the approval, the authority of
10 the court to submit parol evidence on an interpretation for
11 declaratory relief related to the Road Maintenance Agreement,
12 none of which is in that list. So what they had even asked
13 the court to consider when we started the trial, isn't even
14 one of their assertions as to what they want to seek amendment
15 on now.

16 So for all those reasons, and the evidence which I think
17 the court is undoubtedly aware, we request judgment be entered
18 against the plaintiffs and in favor of the defendants on the
19 Second Cause of Action, that the motion for leave to amend
20 according to proof be denied, but if that motion is granted,
21 that the court determine that they have still failed to
22 establish and carry the burden of proof on each of the
23 declarations that they have requested, one, two, three, and
24 four, in the supplemental document which they have submitted,
25 and judgment be entered accordingly with respect to the
26 plaintiff's case.

1 MR. HELSEL: Your Honor, I believe before we even get to
2 the issue that Mr. Jones has just raised, we still have the
3 issue of the judgment of the pleadings and whether or not this
4 trial is even going to move forward in light of the fact that
5 the defendants have failed to name an indispensable party.

6 I think as a preliminary issue we need to get a ruling on
7 that before we can discuss whether or not we're going to move
8 forward on the amended complaint.

9 THE COURT: Okay. I'm looking at the Second Amended
10 Complaint for Declaratory Relief that, as of at least 9
11 o'clock this morning, was the operative pleading and
12 plaintiff's are operating with, correct?

13 MR. HELSEL: That's correct.

14 THE COURT: Okay. And then what you wanted to do was
15 file, provide the court with, first you were going to read
16 some proposed amendments to that Second Amended Complaint into
17 the record, and it appeared that they could be kind of
18 lengthy, and we wouldn't have any other record to reference to
19 other than the court reporter's record, any notes that were
20 made, and so I asked for a copy of it if you had it, and
21 notes, and you indicated you had a copy of the notes, but you,
22 I thought I heard you say you were going to file the
23 supplemental pleading or some amended pleading.

24 MR. HELSEL: That is correct, your Honor.

25 THE COURT: Did that happen?

26 MR. HELSEL: It has not been filed, yet.

1 THE COURT: Okay. So what you are asking the court to
2 do, and I may be going very slowly, but we have a Second
3 Amended Complaint that is going to be, you're moving to amend
4 or conform to proof, but I don't have in writing all the bases
5 which constitute the changes; is that right?

6 MR. HELSEL: That's correct.

7 THE COURT: So, and they have not been fully articulated
8 on the record, correct?

9 MR. HELSEL: Correct.

10 THE COURT: So, I don't know if I can grant or deny your
11 motion to conform with the complaint to proof, first of all,
12 because I don't know what it contains. But secondly, since I
13 don't know what it contains, I can't rule on the motions that
14 the defense has made, because, well, at least as to the
15 Complaint and the Motion for Judgment pursuant to 631.8, I'm
16 trying to decide when an appropriate time would be to address
17 that, but I don't have an operative pleading. Well, the most
18 recent operative pleading is the Second Amended Complaint. So
19 I'm --

20 MR. JONES: Your Honor, I'm standing up and I don't mean
21 to interrupt you -- I do have the language, and I don't think
22 they can actually file anything until the court gives them
23 leave to do so unless they are going to be filing a motion,
24 because they can't filed an amendment to the Second Amended
25 Complaint, because this court has to authorize such a filing.

26 I don't know that counsel, I think counsel's

1 representation is that the language in items 1, 2, 3, and 4 on
2 the document that they gave to us, which says, decs, which I
3 think means declaration for new prayer, is what they were
4 opposing for their request for leave to amend, and I guess my
5 point is, I don't think they get to file anything, I think
6 what they have is what they are attempting to assert as the
7 basis for their leave to amend according to proof. I do think
8 they have to make a showing to do so, which I don't think has
9 been made, any element of that have been previously been
10 touched upon.

11 MR. HELSEL: And your Honor, just one thing, I want to
12 add to what Mr. Jones just said, just so we're clear. I
13 believe what I represented to the court was I handed the court
14 notes, typed notes that I had, but that was not going to be
15 precisely the language of the amended declarations that we
16 were seeking. Those contain four of the seven declarations
17 that we're seeking, but there are three additional
18 declarations, one of which, one of which, was already, it's
19 not even an amended declaration, it was already included in
20 the original, or I shouldn't say original, but the Second
21 Amended Complaint.

22 THE COURT: Well, first of all, as to the dismissal of
23 any part of this action or any of the leave that's requested
24 because the Blasingame Family Trust is not named as a party to
25 the action, that's denied.

26 I'm not sure how to approach this issue regarding

1 amendment of the, proposed amendment of the second amended
2 complaint. You want a declaration for a judicial
3 determination that public use of Rusty Spur Lane, as a result
4 of the Commercial Rodeo Project access, will constitute a
5 material breach of the Roadway Maintenance Agreement?

6 MR. HELSEL: That's correct, your Honor, that is one of
7 the --

8 THE COURT: You want the pleading to allege that or seek
9 that?

10 MR. HELSEL: That's correct. As it relates to the Prayer
11 for Relief in the Second Amended Complaint.

12 MR. JONES: It is not just the Prayer, it is the Cause of
13 Action, you have to allege the Cause of Action, you have it in
14 the Prayer.

15 MR. HELSEL: And if I may add to that, your Honor. The
16 Cause of Action is declaratory relief as it relates to the
17 parties rights under the RMA. It has been consistently
18 alleged from the original filing of the Complaint, that public
19 use of this roadway breaches the RMA. Now, through different
20 amendments and at different times in litigation, depending on
21 what discovery was revealing or what this court's rulings were
22 on certain law and motion issues, that has morphed into coming
23 into trial and not knowing exactly what was going to be
24 presented in terms of the evidence, what the witnesses were
25 going to say and what this court's rulings were going to be as
26 they related to the parol evidence, and the admissibility of

1 parol evidence.

2 And so after the presentation of the evidence, we have
3 now come down to what really constitutes simplifying two of
4 our earlier Prayers for Relief, and rather than saying that
5 we're breaching, the public use breaches the RMA because of
6 the increased cost, we're simply stating that the increased
7 public use, or the public use, breaches the RMA. We're not
8 seeking a declaration as to the specific reason as to why that
9 is. And then as it relates to --

10 THE COURT: There is a difference between alleging that,
11 and, alleging that and asking the court to make that finding,
12 and at some point versus the court making that finding.
13 Right? So we're at the, you want to make that allegation and
14 make that request stage, correct?

15 MR. HELSEL: Correct.

16 MR. JONES: And your Honor, the standards for seeking
17 leave to amend according to proof, is:

18 1. Whether there there is a reasonable excuse for the
19 delay in seeking leave to amend.

20 2. Whether the change relates to facts or only legal
21 theories.

22 And 3. When a proposing party will be prejudiced by the
23 amendment.

24 We came into trial on the theories alleged in their
25 Second Amended Complaint related to two elemental facts
26 related to the RMA. And as you look at the declarations that

1 they sought, what they sought was that the RMA would be
2 breached by the increased cost of repairing and maintaining
3 Rusty Spur Lane.

4 And two, that the Road Maintenance Agreement would be
5 breached by the increase of individual liability. But those
6 are very specific facts which we asked witnesses in the
7 deposition about, and they could not really articulate
8 responses to those. And we either designated experts or
9 didn't, based on the belief that those were what they were
10 trying to get a declaration on the Road Maintenance Agreement
11 about.

12 Now they come in, because they can't, they don't have any
13 of those, that evidence, and they are seeking to admit facts
14 to try to change the theories of their declaratory relief,
15 that had we known those facts were the basis of the claims, we
16 would have discovered it in into them, and likely, I think,
17 proven that they didn't exist, and I'm not sure they have
18 proven as of their case.

19 But, they have, when you look at the declarations they
20 are seeking, and I don't know what the other new ones might
21 be, for judicial determination, well, one of them is a
22 Covenant of Good Faith and Fair Dealing claim, which I think
23 is a completely different claim than anything stated in the
24 claim, I'm not sure it gets them where they want to be.

25 One is the keeping the gate open constitutes a breach of
26 the Road Maintenance Agreement. You know, I mean, counsel

1 acts as if this whole case hasn't been a surprise to them,
2 when the reality is that they plead it, and we litigated it,
3 and we have deposed witnesses and designated experts, and now
4 they say, well, we didn't know what our case was going to be.
5 Well, the only reason if they had any question about it was
6 because on the eve of trial, they sought to amend according to
7 proof to allege yet a different request for judicial relief.

8 So I don't think they have satisfied the test in any way,
9 for being entitled to seek leave to amend now. The court had
10 ruled on summary judgment motion months ago. If they felt
11 they were had a problem with the easements and needed to
12 switch their tactic to the Road Maintenance Agreement, they
13 could have sought amendment at that time. I think it is
14 wholly unfair and prejudicial to extend these proceedings,
15 allow them leave to amend under these circumstances, and they
16 have not made any showing justifying it.

17 MR. HELSEL: Your Honor, again, I would just reiterate
18 that counsel is trying to argue that this is somehow a
19 surprise attack that we're alleging new theories, that we're
20 involving new documents. We are still talking about seeking a
21 declaration on the same document we have been alleging since
22 day one, which is the RMA. And we are still alleging that the
23 public use, the theory of the case hasn't changed. The degree
24 of the declaration perhaps has changed, but the theory of the
25 case is public use, equals a breach of the Road Maintenance
26 Agreement. That remains consistent still to this day.

1 THE COURT: Let me say this, and I, I don't know if
2 confused is the right word, but I have some real question
3 about where we are exactly procedurally. And I don't think it
4 is, but, and I'm not accusing anyone of anything, but if it's
5 a failing on my part, on the part of the court, I'm really
6 sorry, but this has become quite confusing.

7 And I will tell you this, and that it would be my
8 intention to make rulings consistent with everything that each
9 of you are asking, rulings consistent with what I'm about to
10 tell you.

11 One is that I don't think, I think there are parts of
12 this lawsuit that go on, and that is the dispute between the
13 nine parcel owners, regardless whether the Blasingame Family
14 Trust is a party to this lawsuit or not.

15 2. I realize that there are requests for declaratory
16 relief regarding the Road Maintenance Agreement and the effect
17 of what the evidence has shown if defendant Maxwell's use and
18 or proposed future use of the property would be, of his
19 property, would be, and increased vehicular traffic on the
20 easement.

21 I heard that people believe there will be increased
22 vehicular traffic on the easement, at least on the portion
23 leading from Millerton Road to some area just slightly south
24 of Mr. Maxwell's driveway, but I don't know how much, or that
25 I could make a determination that the increased use as
26 proposed with this rodeo gymkhana, horse event activity, is

1 unreasonable or is somehow a breach of the Roadway Maintenance
2 Agreement. There was other evidence that, by virtue of, for
3 example, cutting up the parcels that, I believe it was Mr.
4 Garson once owned, if that could increase traffic. If there
5 are a number of other things that could increase traffic. And
6 frankly, there could be some non-commercial uses, and social
7 uses that would far exceed the number of people and vehicles
8 that may go to and from Mr. Maxwell's property for
9 horse-related events.

10 And there was some evidence that there have been other
11 events that have occurred at other properties, I'll be it not
12 on a monthly basis apparently, but there have been parties and
13 other get togethers at least one of which was apparently a
14 fund raising event.

15 So, I'm not sure that the activity, that the court could
16 find that the activity on Rusty Spur Lane between Millerton
17 Road and Mr. Maxwell's driveway or just south of it, or even
18 to the extent someone drives down, and as Mr. Haines
19 testified, they show up outside his property and he says what
20 are you doing here? And he says, well, I'm just looking
21 around. That that occurs occasionally. That can occur, there
22 was no quantifying how often that occurred or that that's
23 changed as a result of activities on Mr. Maxwell's property,
24 and I could be mistaken, but frankly, there wasn't any
25 evidence that that actually occurred because of an activity on
26 Mr. Maxwell's property. I don't doubt that it occurred as it

1 was described in testimony, but there was no evidence that it
2 occurred because something was taking place on Mr. Maxwell's
3 property.

4 So on a number of fronts with regard to the Roadway
5 Maintenance Agreement, I would not be comfortable in finding
6 that, to the extent that there's increased use of that portion
7 of Rusty Spur Lane, or Rusty Spur Lane in general as a result
8 of the events on the Maxwell property, if that's a breach of
9 the Road Maintenance Agreement, or that it's an undue burden
10 on anyone.

11 There hasn't been sufficient qualitative or quantitative
12 evidence to support a conclusion of that kind. There have
13 been allegations and there have been some opinions, but I
14 don't believe that there, they are very strongly factually
15 supported.

16 And then with regard to other issues, as I understand it,
17 whether or not this proposed use by Mr. Maxwell on his
18 property for horse-related activities, whether or not that's a
19 violation of the original easement when the Sohm family was
20 involved, that's not an issue now, right?

21 MR. HELSEL: Correct.

22 THE COURT: So that, I don't need to make a determination
23 on that.

24 The other thing is whether or not the Roadway Maintenance
25 Agreement in some way, what does it really do? What is it,
26 what does it legally represent, if anything, in addition to,

1 or beyond being an agreement to maintain Rusty Spur Lane from
2 Millerton Road to the end of it, going southern from Millerton
3 Road, what is it, if anything, other than agreement between
4 the nine parcel holders, or the holders of the nine parcels,
5 to maintain that roadway? Is it also a use or access
6 agreement? And as I have told you before, but I guess we'll
7 have it in one spot on the record, I don't know that I can
8 find that. I can't find that. It is a Maintenance Agreement,
9 I don't think it's a use or access agreement. It is an access
10 agreement, actually, in a limited sense, or use and access
11 agreement in a limited sense, in that, as I have explained
12 before, the way I interpret it, private roadway doesn't mean
13 that it is private just to those owners of the nine parcels
14 that are serviced by Rusty Spur Lane that get access to those
15 parcels by Rusty Spur Lane. Private roadway doesn't mean no
16 one from the general public can come upon that property, on
17 the Rusty Spur Lane.

18 It means that they can put up a gate. They have got
19 permission from the County to put up the gate, to come out
20 from the CSA 35, and put up a gate. Does that mean that it
21 becomes a scenario where the public can't come in? Yes and
22 no.

23 By virtue of the fact that there is, it's a private road
24 and there's a privately owned gate, the public can not come
25 in. But that Roadway Service Agreement and the lack of any
26 limitations by virtue of some other agreement, or specific

1 provisions in the Roadway Service Agreement limiting use and
2 access, and not further defining private roadway, or road,
3 means that the public may not be able to get in because of the
4 gate. But, each of the nine parcel owners of the nine parcels
5 can decide if they want to let the public in.

6 And so, if, and they have the right to do that because
7 that right has not been taken away. They have a private
8 right, each one of them has a private right to determine
9 whether or not they are going to let the public in. And
10 that's way it seems to me.

11 And I'm frankly having a little difficulty in determining
12 what kinds of declarations you want me to make based upon
13 what, other than those things that I have mentioned.

14 In the First Cause of Action, the plaintiffs are seeking
15 that the increased public use of Rusty Spur Lane as a result
16 of the Commercial Rodeo Project Access, constitutes a breach
17 of the Roadway Maintenance Agreement, in that such additional
18 public traffic will increase the cost of repairing and
19 maintaining Rusty Spur Lane for the Rusty Spur Lane property
20 owners.

21 There's been some conjecture and some opinion, no expert
22 opinion, and there's been no quantification or further
23 discernment of what, if any, additional public traffic would
24 cost, any additional public traffic will cause, anymore than
25 some of the other activities that are going on on some of the
26 other properties, the other nine properties, or could go on on

1 some of the other nine properties. There's just not
2 sufficient evidence. I can't make that declaration regarding
3 that, that there's sufficient evidence to come to that
4 conclusion.

5 Another part is that "Commercial Rodeo Project Access
6 which contemplates use by the public, (namely patrons and
7 participants of the rodeo project) constitutes a further
8 breach of the Road Maintenance Agreement in that such public
9 traffic will increase the individual liability of each Rusty
10 Spur Lane property owner as an owner of a tenant in common
11 interest in Rusty Spur Lane Road." There was evidence that
12 there was, I believe that would increase liability, but there
13 wasn't any evidence that it would increase liability, or what
14 amount or what manner.

15 Plaintiffs desire a judicial determination of their
16 respective rights and obligations under the Roadway
17 Maintenance Agreement, and whether the increased public
18 traffic contemplated by the Commercial Rodeo Public Access
19 project would materially increase the cost of repairing and
20 maintaining Rusty Spur Lane and/or materially increase the
21 individual liability of each Rusty Spur Lane property owner.
22 That's kind of a combination of the previous two things. I
23 won't go back over that.

24 So was, in looking at page 15 of the Second Amended
25 Complaint, as to the First Cause of Action it says, that's
26 what we're dealing with here, right?

1 MR. HELSEL: That's correct, your Honor, and as the court
2 --

3 THE COURT: In light --

4 MR. HELSEL: I was going to ask, is the court, are we
5 discussing the amended declaration the plaintiff is seeking
6 to?

7 THE COURT: See, I'll get through it. If I don't clear
8 it up sufficiently when I finish in the next five minutes or
9 so, let me know.

10 At the end of the Complaint, near the end of the Second
11 Amended Complaint, at line one it says: "Therefore,
12 plaintiffs pray for a judgment as set forth more fully below."
13 What you want the court to do is line 2, "that's against the
14 Rusty Spur Lane defendants on the First Cause of Action.

15 1. For a judicial determination that the increased
16 public use of Rusty Spur Lane as a result of the Commercial
17 Rodeo Project access will increase the cost of repairing and
18 maintaining Rusty Spur Lane for the Rusty Spur Lane property
19 owners."

20 I'm not sure that you want me to do that still or not,
21 but if you do, I already told you I don't think I can find
22 that for the reasons that I have indicated.

23 Number 2 at line 6: "For a declaration that the
24 increased cost of repairing and maintaining Rusty Spur Lane
25 for the Rusty Spur Lane property owners as a result of the
26 Commercial Rodeo Project Access constitutes a material breach

1 of the Roadway Maintenance Agreement."

2 I don't think I can make that finding or arrive at that
3 kind of declaration based upon the evidence that's been
4 presented this far.

5 "3. For a judicial determination that the contemplated
6 use of Rusty Spur Lane by the public and patrons and
7 participants of the Commercial Rodeo Project will increase the
8 individual liability of each Rusty Spur Lane property owner as
9 an owner of a tenant in common interest in Rusty Spur Lane
10 Road."

11 I mentioned that I don't think there's been, there have
12 been some belief and testimony of belief, but no
13 quantification or actual, there hasn't been any other
14 testimony as to that it will, or anything other than belief,
15 really. I thought that it would increase individual
16 liability.

17 "Number 4. For a declaration that the increased
18 individual liability of each Rusty Spur Lane property owner as
19 a result of the contemplated use of Rusty Spur Lane Road by
20 the public and patrons and participants of the Commercial
21 Rodeo Project, constitutes a material breach of the Roadway
22 Maintenance Agreement."

23 I don't think I can find that, either, for the reasons I
24 have mentioned. That's the declarations that are sought in
25 the Second Amended Complaint as filed, September 10, 2010.

26 Based upon the notes that have been provided, and what

1 you would propose to put in an amended pleading is:

2 1. For a judicial determination and public use of Rusty
3 Spur Lane as a result of the Commercial Rodeo Project Access
4 will constitute a material breach of the Roadway Maintenance
5 Agreement.

6 That's just, okay. That's not stated that way exactly in
7 the Second Amended Complaint, in either of the, any of the
8 four sections, from, on page 15, from lines 1 through 16 that
9 I read into the record. If you want to change your Second
10 Amended Complaint to allege that, is that what you are saying?

11 MR. HELSEL: Yes, your Honor.

12 THE COURT: The other three things after that, is that
13 what you want to do?

14 MR. HELSEL: That's correct. And then there are also two
15 other declarations.

16 THE COURT: Okay. Let's stick with what we have so far,
17 because you said something about 7 and there are 4 here.

18 MR. HELSEL: Right.

19 THE COURT: Let's not get to the ones that aren't even
20 here yet.

21 MR. HELSEL: Okay. So as to the First Declaration, what
22 we have essentially done is we have taken the first two
23 declarations we were seeking in the Second Amended Complaint,
24 and we have removed language relating to increasing the cost
25 and repairing and maintaining Rusty Spur Lane, and we have
26 just really stripped it down to public use versus material

1 breach.

2 THE COURT: You can amend to say that if you want, I
3 can't find that for the reasons that I have indicated. So you
4 can amend it, and I'm not going to give declaratory relief on
5 that because I have already said why I can't find that, at
6 least in my reasonings.

7 The next one, number two is, for a judicial
8 determination, and this is from your notes again, court
9 stamped this as a court exhibit, I'll just mark it as a
10 court's exhibit and you can stamp it later. I have written
11 that up in the upper right hand corner. That this would be
12 court's exhibit number 1, I guess.

13 The second thing is, for judicial request, is to change
14 the pleading to seek a judicial determination that Commercial
15 Rodeo Project Access is not a permitted right of access under
16 the course of conduct to the signatories to the Roadway
17 Maintenance Agreement. Different words, but that says the
18 same thing.

19 MR. HELSEL: It is essentially the same thing, your
20 Honor, except for here we are focusing, because as the
21 testimony was elicited at trial, there was a lot of testimony
22 relating to the parties course of conduct, installation of the
23 gate, installation of the sign, all things they did after
24 executing the Roadway Maintenance Agreement.

25 MR. JONES: Your Honor, the issue there would be whether
26 they could submit parol evidence of subsequent conduct to vary

1 the terms of the document. I still think you are stuck, not
2 stuck, I still think that the language of the Road Maintenance
3 Agreement is operative, and I don't think that the course of
4 conduct of a few, bind everyone to a legal determination of
5 the agreement. So I think it is just another way of saying
6 number one.

7 MR. HELSEL: Well, first of all, your Honor --

8 THE COURT: What do you mean by course of conduct?

9 MR. HELSEL: The way the parties have performed under the
10 Roadway Maintenance Agreement. I don't believe this is parol
11 evidence. This didn't happen prior to or contemporaneous with
12 the execution of the agreement, it happened afterwards. And I
13 think the testimony was clear that as it related to all the
14 parties, by the way, not just a few, including Mr. Maxwell.
15 The RMA was signed, and then we had the gate installed, and
16 then we had the sign installed. I think these are all clear
17 indications of the parties performance under the agreement, to
18 have public access restricted from the roadway.

19 THE COURT: Unless one of the owners the nine parcels
20 decided to let the public in, that's what the evidence was.
21 So there's a sign that says notice, whatever it says, it is in
22 the exhibit, I know I did read it, but it says something like
23 notice, and it's the one at the bottom that has the FMC or
24 Fresno Municipal Code as opposed to Clovis, but that's not a
25 big deal for purposes of what we're talking about. And it
26 says notice, something about, may say no trespassing, and the

1 right to pass is for owners or something, and not the public,
2 except for the course of conduct.

3 If that's what the course of the conduct in the proposed
4 amendment to the Second Amended Complaint means, virtually
5 every one of the nine parcel owners has allowed members of the
6 public in to one degree or another in contravention of what is
7 being urged to be the stated intent of that sign. And they
8 have all acknowledged, well, if I want to leave the gate open,
9 I can, and let someone in, or give them the gate code or
10 whatever.

11 MR. HELSEL: And the course of conduct being --

12 THE COURT: So the course of conduct has been virtually
13 everyone that's testified has let someone in.

14 MR. HELSEL: They have let somebody in, your Honor, but I
15 believe the testimony as I heard it was, it was friends,
16 invited guests, family. There had never been, at least in
17 terms of the testimony the court has heard so far --

18 THE COURT: The fund raiser?

19 MR. HELSEL: Well, but that doesn't require special land.

20 THE COURT: Cattle, doing the cattle.

21 MR. HELSEL: Well, again, I think the testimony as it
22 relates to the cattle grazing, was this is not for profit use.
23 No one is selling.

24 THE COURT: I go back, I read it as an absurdity. That
25 may not be, because it doesn't make sense. You can have a
26 thousand people there every month if you want; you can have a

1 wedding party; then you have a divorce party for some other
2 friend; and then you have an orgy, I think somebody said
3 something about, Mr. Haines or somebody eluded to that. And
4 each month you can have a different activity, and everyone
5 that comes is your friend. And you can have literally five
6 hundred to a thousand people there and you don't charge,
7 that's okay. That's social use. That's, personal, family,
8 and friends. Everyone that comes is your friend, okay? You
9 are not asking for donation, you are not, okay.

10 But if somebody has a party and they have 50 people
11 there, or a 100 people there, or 150 or 200 people there, and
12 they say, you know, it's going, you need to pay a few bucks to
13 do whatever this activity is, or offset the cost of it. That
14 becomes commercial.

15 There's another issue that I have, and I've thought about
16 it a little bit, but I haven't said anything about it. If I
17 understand it correctly, there was some, and I probably will
18 state this wrong, agricultural issue. And so you could have,
19 you could sell, the way that the property was zoned, you could
20 sell agricultural products that were produced on the property,
21 from the property. Now, I don't know how would you do that
22 without having some vehicular traffic, in this case on Rusty
23 Spur Lane, but that was permitted use at some point.

24 MR. HELSEL: Well, here's what I would say to that, your
25 Honor. That again, we are not arguing that the RMA in any way
26 affects land use, it does not. But what we're arguing is,

1 that collectively these nine owners --

2 THE COURT: You are, you are not arguing the RMA affects
3 land use?

4 MR. HELSEL: We are not, your Honor, we are talking about
5 access.

6 THE COURT: So if you are not arguing that it effects
7 easement use, well, you are arguing that if that's the amount
8 of traffic and the affect.

9 MR. HELSEL: It absolutely does. It affects the
10 easement. But as it relates to the land use, again I want to
11 be clear, Mr. Maxwell built another road. We, we're not here
12 today. But the fact is, he's attempting to use a road that's
13 not only owned by, not just himself, eight other property
14 owners. And what he's attempting to do is seek a for-profit
15 use, that's going to benefit him and only him, on the backs of
16 the other eight owners.

17 THE COURT: I guess what I'm trying to say is that the
18 way the Roadway Maintenance Agreement is written, he may be
19 able to, as to any of the other owners of nine parcels, decide
20 to open his private right to use that road to the public to
21 the extent that he wants to do it. He has that private right
22 to open that portion of the road to the public.

23 MR. HELSEL: And that's where I believe, number 3 comes
24 in, your Honor. Essentially, if we could take this out of the
25 perspective of real property and talk about, let's just say
26 these --

1 THE COURT: This is number 3 of what you want to amend
2 the Complaint to say?

3 MR. HELSEL: That's correct.

4 THE COURT: So with regard to number 2, under the part
5 that reads dec for new prayer, it is not under the original
6 DEC or dec part, it is under the part that says decs for new
7 prayer.

8 MR. HELSEL: That's correct.

9 THE COURT: Under number 2, Court's Exhibit 1, decs for
10 new prayer, for a judicial determination that the Commercial
11 Rodeo Project Access is not a permitted right of access under
12 the course of conduct to under the signatories to the Roadway
13 Maintenance Agreement, I have told you what. Now we have
14 talked about what course of conduct means, I can't make that
15 finding. So now we're going to move to number 3.

16 MR. HELSEL: Okay.

17 THE COURT: Go ahead.

18 MR. HELSEL: And in number 3 the analogy that I was going
19 to draw, if you take this out of the context of real property,
20 let's assume that these eight private parties, or nine private
21 parties, instead of owning an easement, they owned an RV, they
22 had an agreement relating to the maintenance of that RV, and
23 over the course of 10, 11 years, all of them used it for their
24 own personal use. Now, personal use can allow friends, family
25 guests. But now one of them decides, one of them decides, I
26 want to go into business and I'm going to rent out the RV to

1 the public. That is what we're arguing is a breach of the
2 implied Covenant of Good Faith and Fair Dealing as it relates
3 to how that covenant is applied in that agreement.

4 THE COURT: Factually it is different, because in your
5 scenario I can think of something closer than that. In an RV
6 scenario, what you are really saying is that when that
7 individual, co-owner of the RV has their private turn to use
8 it, their personal turn to use it, they decide that they are
9 going to use it as a taxi, not rent it out, because he's not
10 renting out, Mr. Maxwell is not renting out his property per
11 se, he is allowing people to use, to do certain events on the
12 property. But I think it would be, well, if you had this RV
13 in there, and you still are in control of it, this RV, but you
14 allow people to pay you to transport them somewhere, or you
15 have this RV and you tell them, I'll drive you around and you
16 can have -- and this is a better example -- a party in the RV.
17 And, you know, I'm going to charge you because you may drink a
18 glass of wine or something like that in the RV, and some
19 spritzer, or whatever else you can take in there, so you are
20 going to pay for those things.

21 But, we'll drive around. We'll go on some trips. You
22 can have a great deal, rent to own, play some nice music, or
23 watch whatever you want to watch on the big screen TV in
24 there, and so there you have it. And during that individual
25 use of the commonly owned RV, they decide that they are going
26 to use it like that. And the other people say, well, wait a

1 minute, that's tearing the RV up so that we can't, it's
2 causing our, the value of it to go down because of our use.
3 See, that's getting different.

4 The only thing that arguably is different in terms of the
5 value or something being torn up here, is this roadway. And
6 as I have mentioned, I'm not sure that the evidence has
7 demonstrated qualitatively or quantitatively, the extent to
8 which there would be this addition of the wear and tear on the
9 roadway below there. But it is not clear to me that it's been
10 established, and that it is going to be significantly let
11 alone substantially, more than anything anyone else has or
12 would be allowed to permit on Rusty Spur Lane, that is one of
13 the, any one of the owners in the nine parcels.

14 MR. HELSEL: Your Honor, if I could say two things. One
15 is, if the permit hasn't been issued so the projects haven't
16 yet occurred. So it would be really speculation as to what
17 the impact's going to be. I believe the testimony of Charlie
18 Maxwell is, he's indicated 30 plus vehicles are how many he
19 anticipates are going to be attending these projects. But in
20 his deposition it became clear that he doesn't really know.
21 It could be a lot more, it could be less.

22 THE COURT: How will I know? How do I determine that
23 it's going to be a --

24 MR. HELSEL: Well, that's right, your Honor. And then
25 one other issues of course, is that aside from the issues
26 relating to the increase of cost of maintenance, and I think

1 it came through very clearly with Mrs. Haines's testimony,
2 that she has security concerns. So putting aside the
3 increased cost and increased maintenance, she's alone a lot on
4 the weekends, and she doesn't want to be sitting up on her
5 house with nobody there.

6 THE COURT: That concerned me, too, not just for her, but
7 for everybody. That is of concern. I heard that very
8 carefully and very clearly. So there's this gate, there are
9 two gates. Assuming that no one uses some bolt cutters and
10 cuts the pad locked gate with the chain, the manual gate that
11 goes across the gravel road that's there in the way. There's
12 been a lot of discussion about it. But you can see it in one
13 or two of the exhibits to the left side of the electrically
14 operated solar powered armed gate.

15 I heard what Ms. Haines said. So, if someone decides
16 that they want to have whatever at their property, and Mrs.
17 Haines doesn't know it, and that person, or maybe they give
18 notice, maybe they don't, to all the other parcel occupants,
19 and they leave the gate open, people can come in there. It
20 has nothing to do with necessarily anything that's going on in
21 Mr. Maxwell's property, but someone else has decided that a
22 family member, or friend, or some other member of the general
23 public can come onto that portion of Rusty Spur Lane, and she
24 may never, may not be as secure as she thinks.

25 And an amount, the degree, who people that have the right
26 to let others onto Rusty Spur Lane, ultimately decide who

1 those people are that are let onto Rusty Spur Lane, is, I
2 don't want to say anybody's guess, but, it is. But it is up
3 to those nine, the owners of those nine parcels.

4 I mean, I can't go out there, I don't have any interest
5 in there. I can't go out there, you couldn't go out there and
6 say, you know what? Raise that gate up, we want to drive in
7 here, this is a public deal.

8 Now, if one of the nine parcel owners said, yeah, come on
9 in here, it's great. Come on down and see what I have got
10 going on down on my property. Fine. But without the
11 permission of one of those nine parcel holders, I have no more
12 right to do that than anyone else, any other person publicly
13 or privately, nor do you or anyone else. That's what, that's
14 the effect of having a gate there and having a Roadway
15 Maintenance Agreement is. Actually, the practical of it is
16 saying it's a private roadway, sure it is, to that extent.

17 I interrupted you and I'm sorry, I'll let you continue.
18 I don't, I'm sorry, I have to, I am pressed time wise. I'm
19 going to need about ten, hopefully only ten minutes to take
20 care of some matters that have to be taken care of on a couple
21 of other cases, and I'll return. I mean, I'll be in the back
22 working basically, but I will return here to take this up some
23 more, in about ten or twelve minutes. I'll be right back.
24 Thanks.

25 (Whereupon, a break was taken.)

26 THE COURT: We're back on the record.

1 MR. HELSEL: Your Honor, I'm not entirely sure where we
2 were, where we left off.

3 THE COURT: We were talking about, I said I wanted to
4 know what plaintiffs say about 1 and 2 of court's exhibit
5 number 1 under the part that reads decs for new prayer, items
6 one and two. And in the course of discussing number two, you
7 mentioned it dovetailing into number three, and I said, well,
8 we'll go there in a minute.

9 Now we're on to number three, which is for a judicial
10 determination that Commercial Rodeo Project Access violates
11 the Covenant of Good Faith and Fair Dealing implied in the
12 Roadway Maintenance Agreement, in that the other parties to
13 the Roadway Maintenance Agreement will be responsible for
14 maintaining Rusty Spur Lane for public use.

15 And you want to amend the Second Amended Complaint to be
16 a pleading that alleges that as a request for declaratory
17 relief as well.

18 MR. HELSEL: That's correct.

19 THE COURT: Okay. I can not, you can amend it, but I
20 can't find that it is a judicial determination to that effect
21 or in that regard would be appropriate at this point anyway,
22 from what I have gleaned from the evidence. Because I
23 mentioned it several times, I don't want to go back over it
24 again, any of the nine parcel owners, owners of the nine
25 parcels, it's about nine people, is responsible for their
26 assessed portion of maintaining Rusty Spur Lane, even though

1 any number of the other of the parcel owners can have members
2 of the public as they deem appropriate, use Rusty Spur Lane as
3 well. So, to the extent that any parties using Rusty Spur
4 Lane are, or any one of the nine, the owners of the nine
5 parcels are using Rusty Spur Lane to let members of the public
6 have access to their properties, the roadway still needs to be
7 repaired, and all of the property owners are assessed equally
8 at this point, for that use. They are all subsidizing each
9 other's personal, familial, public, private, whatever you want
10 to call it, whoever uses those individual parcel owners want
11 to put to Rusty Spur Lane, the other ones are subsidizing
12 that. You can amend it, but I can't make that finding.

13 MR. HELSEL: Then, your Honor, as to number four, I think
14 the issue here, and this is yet another reason why we're here
15 before the court trying to get some understanding of the
16 obligations of the RMA, because as the court has heard, one of
17 the conditions of approval, Mr. Maxwell's project is that the
18 gate be left open on event days.

19 THE COURT: Whose condition is that?

20 MR. HELSEL: County of Fresno's.

21 THE COURT: But the, let's back up just one second, so
22 that, because we want to get this at least so some of it is
23 clear. Item number four, the fourth thing you are seeking to
24 change or add to, or make different in the, to the Second
25 Amended Complaint is a judicial determination in the
26 declaration as stated as item number four on page 2 of court's

1 exhibit 1, under the section entitled decs for new prayer.

2 And that section four reads as follows:

3 "For a judicial determination that the condition of
4 approval of the Commercial Rodeo Project to keep the gate at
5 the entrance of Rusty Spur Lane and Millerton Road open during
6 the event days constitutes a breach of the Roadway Maintenance
7 Agreement." So that's how that reads.

8 MR. HELSEL: Correct.

9 THE COURT: Okay. Now, just reading it quickly, did you
10 want the court to determine that the County's condition that
11 if there are events on Mr. Maxwell's property, that the County
12 requiring Mr. Maxwell to keep, that the County requiring the
13 gate to be open is a breach of the Roadway Maintenance
14 Agreement? Whose breaching it?

15 MR. HELSEL: Your Honor, just to be a little bit more
16 clear on it.

17 THE COURT: No, but is that what that is? Because the
18 County's not a party to this anymore --

19 MR. HELSEL: That's correct, and perhaps --

20 THE COURT: -- for one thing, and I'm just thinking as I
21 do that, I talk and think, because we don't have enough time
22 to sit and think, like in for days, and then figure it all out
23 and talk, we have to do it in bits and pieces unfortunately,
24 but, so the County's not a party, but what this sounds like
25 you want me to determine is that if the County were to approve
26 Mr. Maxwell's uses and that he, a condition of that approval

1 is that he keep the gate open, and that the fact that that
2 would be a condition of approval is a breach of the Roadway
3 Maintenance Agreement?

4 MR. HELSEL: Well, your Honor, the assumption would be
5 that because it is a condition of approval, Mr. Maxwell would
6 be leaving the gate open. So essentially what this
7 declaration is seeking is that the act of leaving the gate
8 open, presumably by Mr. Maxwell, would constitute a breach of
9 the Roadway Maintenance Agreement.

10 And the problem specifically that we have is, these are
11 all simultaneous rights. Mr. Maxwell doesn't have anymore of
12 a right to the gate than do the other eight owners.

13 THE COURT: You know, interestingly, I mean, I don't want
14 to be absurd, but, obviously, any one of these, the owners of
15 these nine parcels can leave the gate open whenever they want
16 to.

17 MR. HELSEL: And conversely, your Honor, they can close
18 it whenever they want to.

19 THE COURT: Right. So he can just leave the gate open
20 whenever they felt like it, whether there was an event or not.
21 Would that be a breach of the Roadway Maintenance Agreement?

22 MR. HELSEL: Well, that's the declaration that we're
23 seeking in number four, yes.

24 THE COURT: How could I find that?

25 MR. HELSEL: Well, that again, because of the actions of
26 the parties in installing the gate in the first place, and the

1 sign, I mean, there's a reason they are doing this, and the
2 reason is to restrict and control access. And by keeping the
3 gate open, you are not restricting and controlling access, you
4 are allowing it open to the general public.

5 THE COURT: He says, I don't care who comes in and out,
6 I'm not particularly worried about it, I haven't seen that
7 many people, there have a right to be around here, too, I'll
8 let somebody else handle that.

9 MR. HELSEL: He may not care, but the other owners --

10 THE COURT: So he can just leave it open.

11 MR. HELSEL: And as I said, in conversely, the other
12 owners can shut it.

13 THE COURT: Right. So, how, for judicial determination
14 that the condition of approval of the Commercial Rodeo Project
15 to keep the gate of the entrance of Rusty Spur Lane and
16 Millerton Road open during event days constitutes a breach of
17 the Roadway Maintenance Agreement, he can leave it open. He
18 can leave it open anytime. So I just don't care, I really,
19 you have heard he was ambivalent anyway, that was the
20 evidence. He helped get the gate and put it up, or get
21 someone to put it up, but he was, the way it was described by
22 one of your clients is he was ambivalent about the whole idea.

23 MR. HELSEL: And again, your Honor, the plaintiffs
24 assertion to that, we're coming full circle with this, they
25 are not agreeing to maintain this road so that the gate can be
26 left open and so that the public can have free access to the

1 road. That's the assertion and that's the declaration that's
2 being sought in number four.

3 THE COURT: Well, what if he wants to have the gate up,
4 and what he really wants is not to have the gate down most of
5 the time, and open it when whenever he wants certain public or
6 private or whatever related people to come through, and
7 instead, they think it's okay, like it is pretty much, and he
8 has the gate up most of the time. He says, if someone else
9 doesn't like the people coming through here, certain public
10 people, well they can shut the gate. And I'll shut it
11 whenever I don't want the public through, or somebody says
12 doesn't look like that's the right public, or whatever the
13 situation is, I'll shut it. But generally speaking, I'm okay
14 with the way it is. It is okay the way it is. Can he do
15 that.

16 Is there a requirement in the Roadway Maintenance
17 Agreement or some other, some document, that it makes it
18 incumbent upon the home owners of those nine parcels to keep
19 the gate closed?

20 MR. HELSEL: We believe there is, your Honor, because of
21 the language that says they are agreeing to maintain this road
22 as a private right of way, not one time is the word public
23 mentioned in the Roadway Maintenance Agreement. Commercial
24 access isn't mentioned, it is maintained as a private right of
25 way.

26 THE COURT: Okay. Go ahead.

1 MR. HELSEL: The, so that's as to number 4. And you
2 know, perhaps as we're having this discussion on the record,
3 that should be stated in the converse, that it wouldn't be
4 considered a breach the Roadway Maintenance Agreement to shut
5 the gate on days of these events.

6 THE COURT: Well, I think that came out in the evidence,
7 too.

8 MR. HELSEL: I agree.

9 THE COURT: Was that anyone else can shut the gate, there
10 would be a real problem. That wasn't what came up, but it,
11 other people might decide to shut the gate. It will be a real
12 mess out there, because people can't get over or reach an
13 agreement. So that could happen.

14 MR. HELSEL: I agree.

15 THE COURT: But I think that came out in some of the
16 testimony. There was some questions and answers that maybe
17 somebody, didn't it?

18 MR. HELSEL: I believe it did. I believe it was
19 Mr. Haines that testified to that.

20 THE COURT: So he goes down there and shuts the gate, and
21 we have a fight about whether the gate is going to be open or
22 closed, and the Sheriff comes. And it is a big mess.

23 MR. HELSEL: Right.

24 THE COURT: See, so, better to settle it. But that's not
25 going to happen, I'm telling you. Okay. Well, you can amend
26 the Complaint to whatever you would like within the parameters

1 of what's been stated on the record and could be reasonably
2 interpreted from the Court's exhibit number 1, and the court
3 will rule as indicated on those amendments.

4 MR. HELSEL: Okay. And then, your Honor, just for the
5 record and the court, and the opposing counsel has not seen
6 the 5th and 6th declarations that we're seeking, and this was
7 evidence that came to light during this trial, and that is
8 Mr. Maxwell's failure to pay the annual assessment.

9 THE COURT: He's, at least, so far he's clearly failed to
10 pay that. Now, I don't know if he's going to get on the stand
11 and say he didn't get the notice, so I don't know there might
12 be excuse.

13 MR. JONES: Your Honor, I can clear this up in about two
14 seconds flat. The agreement says the annual assessment will
15 be paid by August 15th of the year. We aren't in August 15th
16 yet.

17 THE COURT: Wasn't there some testimony that there,
18 everyone agreed to move that backward or that there was an
19 effort to move it backward because it's in April or something,
20 because it, in fact it is on some of the documents it says
21 something about if we wait too long, there's going to be
22 problems with the contractor, and the roads get soft, and
23 there's all kinds of bad things happen, so let's get this
24 done.

25 MR. JONES: It might be, but I don't believe there's been
26 testimony the agreement was in fact amended to change it, or a

1 vote was taken to bring that, a proper vote under the
2 agreement, was made to advance that date beyond August 15th.
3 What the agreement says is, is that it says that, "provided
4 however, should an owner subdivide his parcel, no increase in
5 fees should be assessed." It was talking about the \$400 fee.
6 "This sum is, is due no later than August 15th of each year,
7 beginning August 15th, 1999, and continuing thereafter." It
8 says, "the sum may be amended from time to time at the annual
9 meeting by vote of two-thirds of the owners, whether present
10 or not, meaning two-thirds of the total number of owners,
11 whether present or not, the vote may be made by proxy of an
12 owner unable to attend the annual meeting."

13 There's nothing in the agreement that authorizes anything
14 less than a hundred percent of the participants to change that
15 date of payment.

16 THE COURT: Oh.

17 MR. JONES: If they can point me to the language, I'll be
18 glad to look at it. There's nothing in the agreement,
19 Mr. Maxwell, there's no testimony he voted to change the date
20 of that payment. Here's the document.

21 THE COURT: Well, see, he hasn't paid it, but their
22 position is that he's got until, through August 15th. Now, no
23 one's going to agree on what that says.

24 MR. HELSEL: That's true, your Honor. And I believe that
25 there was testimony, I believe it was from Mr. Murray, to the
26 effect that the date had been changed to April 15th. Now,

1 whether or not that constituted amendment of the agreement, I
2 don't know, that's one of the declarations we're seeking.

3 THE COURT: He did not say, as I recall, that there was a
4 vote or anything of the group, but he said that there had been
5 something to the effect of a consensus, or a decision, or that
6 it was understood, or that it was apparent that they needed to
7 do something sooner than the original later date. But I don't
8 believe that the state of the evidence is that there was an
9 actual vote of those concerned, changing it. If there was,
10 please, you can find that for me in the record or something,
11 but I don't think that's what he testified to.

12 MR. HELSEL: And in any event, your Honor, the 7th, it is
13 not a declaration, it is just --

14 THE COURT: So as to that unwritten but verbal fifth
15 proposed area of declaration sought from the court with regard
16 to whether or not Mr. Maxwell is in violation of the Roadway
17 Maintenance Agreement by virtue of not making his pro rata or
18 whatever it is share of the cost for this year, I am not able
19 to make that finding at this time.

20 MR. HELSEL: And that was, your Honor, that related to
21 the fifth and the sixth proposed amendments to the
22 declaration.

23 THE COURT: And do you want to say for the record,
24 because I don't think we have it, what the sixth proposed
25 amendment to the declaration would be?

26 MR. HELSEL: I will. And perhaps I should read in the

1 number five as well.

2 THE COURT: Okay. All right. I thought that was number
3 five. There are four here.

4 MR. HELSEL: There are four there, and I'm going to read
5 five and six.

6 THE COURT: Oh, sure. Thanks. Good. Perfect.

7 MR. HELSEL: The fifth, "for a judicial determination
8 that failure to pay the agreed upon annual assessments under
9 the Roadway Maintenance Agreement on or before the due date is
10 a material breach the Roadway Maintenance Agreement.

11 Number six, for a judicial determination that the
12 defendants Charlie and Tamara Maxwell are in material breach
13 of the Roadway Maintenance Agreement for failure to pay their
14 2011 annual assessment."

15 THE COURT: Okay. With regard to the, it sounds like
16 those are the same, but the one is plural and the other one is
17 singular as to the 2011 assessment; is that right?

18 MR. HELSEL: Correct. The first one is just
19 acknowledging or just seeking a declaration of failure to pay
20 assessments a breach.

21 THE COURT: Oh, I thought it said the assessments,
22 plural. I recall the testimony that he, the only time he had
23 not paid or that there was a problem that had come to the
24 attention of the court is this year. There was no evidence
25 that he had ever not paid before. And so when you said
26 assessments, I thought I heard you say assessments in relation

1 to when you were stating number five.

2 MR. HELSEL: I did, your Honor, because number five isn't
3 directed towards Mr. Maxwell. It is just generally speaking
4 failure to pay your annual, failure to pay the agreed upon
5 annual assessments by anyone.

6 THE COURT: Oh, okay. But would be a material breach?

7 MR. HELSEL: Would be a material breach.

8 MR. JONES: I would like to be heard on that and the
9 other additional one on the breach question.

10 THE COURT: All right. Wait just a minute, I'm thinking
11 again. Anything else before I let Mr. Jones --

12 MR. HELSEL: No, your Honor, other than number seven
13 which is not a declaration, it was part of our original Second
14 Amended Complaint, and it just says for any further relief as
15 the County may, as the court, strike that, as the court may
16 deem just and proper.

17 THE COURT: All right. Very good.

18 MR. HELSEL: And if can I provide this to the court
19 clerk?

20 THE COURT: What is it?

21 MR. HELSEL: This is the Second Amended Complaint for
22 declaratory relief that's conformed to proof at trial.

23 MR. JONES: We would like to read it, your Honor, just to
24 see if it matches what we have been discussing.

25 THE COURT: Very good.

26 MR. JONES: And then on those last two couple of points

1 quickly. First and foremost, if in fact, there was a breach,
2 and I submit the only evidence before the court is, based on
3 the agreement that's due on August 15th. And there is no
4 evidence that in fact, there was a vote of all nine which is
5 required under the agreement to change that date, there can't
6 be a breach. But second of all, as the court knows,
7 declaratory relief is not available for a claim of past
8 breach. It's a request by the court to determine future what
9 the court, what might happen to avoid these types of problems,
10 and so they are not asking to amend a declaratory relief plan,
11 they are actually asking the court to state an entirely new
12 claim which is for breach of contract, and we submit that's an
13 improper amendment at this point in the proceedings. Nobody
14 said, that in fact I have a letter, your Honor, that was
15 written by Mr. Murray before today, threatening to sue
16 Mr. Maxwell over the non-payment.

17 But the point of it is, is that 1, they can't get dec
18 relief on a breach. Number 2, they haven't made any material
19 showing that they are entitled to amend to add in that breach
20 claim. And 3, evidence from the evidentiary standpoint, they
21 failed to provide sufficient evidence that it is in fact a
22 breach, and they have failed to provide any evidence of its
23 materiality within the terms of the agreement in the context
24 of what we're talking about.

25 And with that, I will answer any questions you have.
26 Otherwise, I'll submit that issue.

1 MR. HELSEL: I'm just going to provide this to the clerk,
2 your Honor.

3 THE COURT: All right. Do you have any response to the,
4 that you care to make, to Mr. Jones' assertion that regarding
5 the use of the declaratory relief for past, to remedy past
6 wrongs versus prospective future remedy, some prospective
7 future problem?

8 MR. HELSEL: Only to add, your Honor, as Mr. Jones
9 pointed out to the court, that there apparently is a question
10 as to when the due date actually is. And according to the
11 express terms of the RMA, it appears that the assessments are
12 due on August 15th, and if that's the case, obviously that
13 date hasn't arrived. In which case, we are seeking
14 declaratory relief on that issue, appropriate and proper
15 declaratory relief as Mr. Jones as termed it.

16 THE COURT: Oh, are you saying what you are seeking is
17 that if he doesn't pay it by on or before August 15th, that
18 then he would be in breach of the RMA?

19 MR. HELSEL: That's correct.

20 MR. JONES: And your Honor, I don't believe that an
21 advisory opinion about that issue is appropriate, and I
22 believe for sure that certainly not appropriate is a matter of
23 declaratory relief in this action as that is a wholesale
24 different sum and substance of the claim for declaratory
25 relief nowhere found in the substance of their Complaint or
26 even in any broad interpretation of what they were seeking

1 byway of this action. It is inappropriate.

2 THE COURT: Well, in addition to that, were there any
3 reasons why if something is not paid, it is not paid, and they
4 excuse the permission of the pay, time for paying, or
5 otherwise alter what other, what might appear to be a certain
6 requirement or condition. I don't think that it would be
7 appropriate to make that determination at this time. If you
8 want to make those amendments to the Complaint, I guess you
9 could make those. I don't know that, I can't make those
10 findings. But, and I don't think that what has been proven so
11 far as it, that he has not paid his share of his assessment so
12 far this year, it has not been demonstrated that he is, was
13 obligated to pay it before now or anytime before August 15th.
14 So if you want to make that request of the court that the
15 court make such a declaration or such a finding, you could
16 make that request, but I don't know that I could make that
17 finding, the state of the evidence as it is. I don't think I
18 can.

19 So, there we are. I think we have gotten through, I
20 haven't looked at the amended, Second Amended Complaint yet.
21 But, did we get through all of it?

22 MR. HELSEL: We got through all of it, your Honor, as it
23 relates to the plaintiff's declarations that are being sought.
24 The defendants, as the court is aware, also has affirmative
25 declarations as it relates to the Road Maintenance Agreement.

26 THE COURT: Well, now, we have to go to --

1 MR. JONES: Your Honor, we're obviously not stipulating
2 to the amendment, but I understand the court's rulings.

3 THE COURT: I thought that I had the Cross-Complaint.
4 Here it is, I have it filed. I'm looking at pages 14 and 15
5 of the Cross-Complaint for declaratory relief. I would just
6 note that at line 21 where it says, "Wherefore the plaintiffs
7 claim objection and those opinions are more fully set forth
8 below." What that really should say is, defendants and
9 cross-complainants pray for judgment against
10 plaintiffs/cross-defendants, at line 21, I think.

11 MR. JONES: Correct, your Honor.

12 THE COURT: Okay. "Number 1, the Sohm easement," this is
13 at line 23, "does not restrict the number of vehicle trips any
14 parcel may utilize over the Sohm easement or in any way
15 attempt to limit the purpose of the trips for the types of
16 uses on the property serviced by the easement or the
17 residential, commercial or otherwise."

18 All right. That's something you think the court's
19 supposed to decide in light of the state of the pleadings
20 because you are seeking that determination.

21 MR. JONES: No, your Honor, we haven't put on our case
22 yet. Our motion for judgment was just as to their Complaint.

23 THE COURT: Right. I thought we were past these things,
24 but anyway. Okay. There are 2, 3, 4, 5, and 6 are the other
25 items that declaratory relief is sought by the defendant or
26 defendants and cross-complainants, and I don't think that this

1 is the time to rule on those requests, and we'll proceed from
2 here.

3 Anything else we need to take -- might as well come back
4 tomorrow at nine o'clock, because I have law and motion in the
5 next five minutes.

6 MR. JONES: Do I take the court's statement as
7 effectively a ruling on the Motion for a Leave to Amend and
8 the Motion for a Judgment on the Plaintiff's Complaint? I was
9 just, I understand the court gave us guidance on what it was,
10 I just didn't know if you were accepting their amended
11 pleading and ruling on the 631.8 motion as to their Complaint.

12 THE COURT: We're not going, here's what I'm telling you,
13 is that I'm not going to be able to do that today because of
14 the other matters that are scheduled in 6 or 7 minutes, or
15 however many there are. The court's law and motion calendar.
16 And I again, I haven't read it, but it, it is however many
17 pages it is, and I realize it is probably the last part of it,
18 that is different, it being this new amended pleading. But I
19 haven't even read it, to be candid with you, and I assume that
20 it says the same thing that we were talking about, that I did
21 read into the record which came from Court's Exhibit 1.

22 Making that assumption, what I said as to just about each
23 one of those things, the four that are actually contained in
24 Exhibit 1, Court's Exhibit 1, is that I'm not going to
25 disallow the amendments. If counsel believed that that was
26 the proof or the evidence and they wanted to conform their

1 pleadings to that proof or evidence, but I don't think that
2 they have met the burden or the standard that they would need
3 to acquire a declaration from the court of their rights or
4 responsibilities of the parties that, that would afford them
5 that kind of relief. I don't think that the evidence is such
6 that the court can give declaratory relief on what I
7 understand to be the four things that are written in the
8 proposed amended pleading that was just filed this afternoon.
9 So I went through each one of them and kind of explained why,
10 and I guess I didn't formally make a ruling, but I haven't
11 actually read that document either. But if it is what it we
12 talked about, those would be the rulings.

13 And so I guess it would be 631.8 as to those four things.
14 Now as to the other two or three things that are not written
15 anywhere but were discussed, because there are about seven
16 altogether, I mentioned rulings as to those as well, or let's
17 put it this way, I didn't mention rulings, what I did mention
18 was that well, it sounds like Mr. Maxwell, for example, has
19 not paid, but the document doesn't require him to pay until
20 August 15th. And apparently there hasn't been any evidence
21 that the condition precedent of there being a change in the
22 date, meaning the unanimous vote by the parcel owners, took
23 place.

24 So I don't know that I would be able to give the
25 declaratory relief to plaintiffs on that unwritten as of now,
26 proposed amendment. And so, it may be a little vague, but in

1 terms of where we are, but I hope that clears it up a little
2 bit.

3 They have a Second Amended Complaint, they had an added a
4 pleading, then they have some additional things they are
5 seeking declaratory relief on that are not written, and I have
6 indicated what the court's rulings would be as to each of
7 these things.

8 MR. JONES: I think they are all in this document, slight
9 modification of this.

10 THE COURT: All 6?

11 MR. JONES: Yes, they are all in, no, there's, in the, in
12 the Prayer they have said they were withdrawing the first two.
13 Is that true, you are withdrawing the two that were in the
14 original First Cause of Action.

15 MR. HELSEL: We're withdrawing the first four and
16 restating it.

17 MR. JONES: So this is all you are talking about, right?
18 Before the court in this Prayer.

19 THE COURT: I have a page 12 of the document entitled
20 Second Amended Complaint for Declaratory Relief as Conformed
21 to Proof at Trial. Page 12 begins at line 3, where it says,
22 "Wherefore plaintiffs pray for judgment as set forth more
23 fully below." Through page 13, line 1, that's what the new
24 pleading we're operating on.

25 MR. HELSEL: That's correct.

26 THE COURT: If the court allows the amendment, I have

1 told you I'll allow the amendments, but I have also told you
2 what the rulings would be as to each of those requests for
3 declaratory relief, and the net effect of that we'll talk
4 about tomorrow morning.

5 MR. JONES: Thank you, your Honor.

6 (Whereupon, the evening recess was taken.)

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1 WEDNESDAY, JULY 20, 2011 - - MORNING SESSION

2 THE COURT: The record should reflect counsel are
3 present, and Mr. Murray and Haines are present as well.

4 We need to take up with where we were yesterday, and
5 basically I think that the plaintiffs had rested, and we were
6 discussing the declarations that, the declaratory relief
7 sought by the plaintiffs as stated in their Second Amended
8 Complaint for Declaratory Relief as Conformed to Proof at
9 Trial. The court allowed a motion to amend and conform to
10 proof, and that subsequent pleading was filed.

11 And the court indicated what its thoughts were with
12 regard to the areas where plaintiffs were seeking declaratory
13 relief, and also somewhere in there the defense wanted to
14 bring a, mentioned a Motion for Judgment pursuant to CCP
15 Section 631.8, so that's basically where we are.

16 And we need to move forward toward the end of whatever
17 that might be.

18 MR. JONES: I think what was pending was a request for
19 entry of the judgment pursuant to CCP 631.8. The court
20 certainly provided us its oral rendition of its position
21 analytically and where you were on the case. We believe from
22 the court's oral rendition of its position, that judgment
23 would be appropriate on the plaintiff's case under 631.8.

24 THE COURT: All right. Did anyone wish to be heard
25 further with regard to that motion?

26 MR. HELSEL: Your Honor, I believe that yesterday we

1 exhaustedly, we discussed on the record the plaintiff's
2 position, and with that we would submit.

3 THE COURT: All right. Well, the court will grant that
4 motion.

5 MR. JONES: Thank you, your Honor. We're prepared to,
6 we'll prepare a written order on that.

7 As to our case, we're prepared to proceed on that when
8 the court is ready.

9 THE COURT: All right.

10 MR. JONES: We had reached a stipulation with counsel
11 which we would provide orally to avoid the testimony of Terri
12 Hall, and I wanted just to give me a moment to confirm with
13 counsel that we're in agreement with what that is, your Honor.

14 THE COURT: Sure.

15 MR. JONES: The stipulation we have with respect to the
16 Halls, effectively is that at the time they purchased the
17 parcel which is reflected as APN 138061-061, that they were
18 told about the Road Maintenance Agreement but did not receive
19 a copy of it, that they have never executed the Road
20 Maintenance Agreement, but they have been making payments in
21 response to Mr. Murray's request annually to make payments
22 since the, since they acquired the property. That's our
23 stipulation of facts with respect to the Halls; and is that
24 correct, counsel?

25 MR. HELSEL: So stipulated, your Honor.

26 THE COURT: Just out of curiosity, when did they acquire

1 the property?

2 MR. HELSEL: I believe it was January of 2006.

3 THE COURT: I see. All right.

4 MR. JONES: I think it is in evidence because their deed
5 is in evidence, and we can show the court that. I believe
6 that's correct.

7 THE COURT: All right. Thank you.

8 MR. JONES: We would call as our first witness, Dirk
9 Poeschel.

10 THE COURT: Good morning, sir. Please come forward and
11 raise your right hand.

12 DIRK POESCHEL

13 called as a witness by and on behalf
14 of the Defendants, being first duly sworn,
15 was examined and testified as follows:

16 THE COURT: Please have a seat at the witness stand, sir,
17 and make yourself comfortable. And once you are, if you would
18 state your full name and spell your last name for the record,
19 please.

20 THE WITNESS: Dirk Poeschel, P-O-E-S-C-H-E-L.

21 THE COURT: Thank you.

22 DIRECT EXAMINATION

23 BY MR. JONES:

24 Q Mr. Poeschel, are you employed or do you have an
25 occupation?

26 A Yes, I do.

1 Q What is that?

2 A I'm a land planner.

3 Q And how long have you been a land planner?

4 A Approximately 35 years.

5 Q And in your position and profession as a land
6 planner, what do you do?

7 A I help people develop real estate, assess general
8 plans, policies, guidelines to make sure that projects are
9 approvable.

10 Q And in the course of performing your duties as a
11 land planner, do you have occasion to review zoning
12 ordinances?

13 A Yes, I do.

14 Q Do you read zoning ordinances?

15 A Yes.

16 Q And do you opine to cities and counties about zoning
17 ordinances and what they mean?

18 A Yes.

19 Q And in fact, back in 1980, were you on a team that
20 changed, that constructed the current zoning ordinances for
21 the County of Fresno, relative to the agricultural areas
22 within the County of Fresno?

23 A Yes, as a planner with the Fresno County Planning
24 Department, I performed those service.

25 Q And are you familiar with the property that is
26 involved here on Rusty Spur Lane?

1 A Yes.

2 Q And I'm going to show you what has been marked and
3 admitted into evidence as Exhibit 4, which should be in front
4 of you in a binder, if you could look at that for me. Can you
5 tell me what Exhibit 4 is?

6 THE COURT: Is that the Record of Survey?

7 THE WITNESS: Sorry took me a minute there, there were
8 two, 4's in this binder, sorry. Yes, it is the Record of
9 Survey that is inclusive of the actual property.

10 MR. JONES: Q And can you tell me from looking at the
11 record survey what section is this property located in?

12 A It is in Section 20.

13 Q All right. And in looking at this Record of Survey,
14 are you able to identify from the Record of Survey, the map in
15 comparison to the map, which parcel on Exhibit 4 would be the
16 Maxwell parcel identified on the map?

17 A Yes, it is the north west parcel on the map, the
18 colored map in front of you, and it is the north west parcel
19 on this Record of Survey of Section 20.

20 Q Would you describe it, if you go to the far left
21 corner of the survey, the far, well, the far right corner on
22 the document lines up with the Hall property; is that true?

23 A Yes.

24 Q And then the parcel next to it is the Maxwell
25 parcel?

26 A Yes.

1 THE COURT: Just, just to be clear, because he said, you
2 said the far north and far west parcel is the Maxwell
3 property? It's actually, that's the Hall property, isn't it?
4 The one next to it, to the left of it is the Maxwell property.
5 If you look at the numbers that are running vertically up the
6 side, these little teeny numbers, is it the Maxwell one that
7 says, 503, then there's a hyphen, or not a hyphen, but a
8 little hash mark, 22-31, is that a degree sign or something,
9 west, and then it has 1326.37? That's the Maxwell property,
10 isn't it? See what I'm talking about? The one that ends in
11 1326.00 is the Hall property. It is further west.

12 THE WITNESS: Your Honor, if I may, I marked it in red,
13 this is the Maxwell property and this is the Hall property.

14 THE COURT: Okay. That's right.

15 MR. JONES: Which is consistent with what the court just
16 said, right.

17 THE WITNESS: Yes.

18 THE COURT: Okay. Thank you.

19 MR. JONES: Q I'd like you to now look at Exhibit 8, if
20 you would. And can you tell us what Exhibit 8 is?

21 THE WITNESS: Yes, this is a zone map from Fresno County,
22 and it identifies the amendments to zoning relative to the
23 properties on this map.

24 Q And well, first start with, can you identify the
25 Maxwell property on Exhibit 8?

26 A Yes.

1 Q Where is it?

2 A It's the north west 40 acres within Section 20.

3 Q Okay. So, I'm looking at Exhibit 8 and comparing it
4 to Exhibit 1, and would you agree that where the 20 exists on
5 Exhibit 8 is right in the middle of the four properties
6 identified on Exhibit 1, as Maxwell, Hall, Haines, and Murray?

7 A Yes.

8 Q And so, if you if you look at Exhibit 8, one, you
9 can identify the Maxwell property as you just identified,
10 true?

11 A Yes.

12 Q And then in the right hand side of the document it
13 states amendments. Can you read to us what those amendments
14 are and what they relate to?

15 A Yes. The first is rezone, excuse me, 31/71, dated
16 12/9, 1980, which rezoned the property from A-1 to AE 20, and
17 an amendment 1817, which occurred on April 21st, 1980, which
18 zoned the property from A-1 to AE 40.

19 Q And what is the current zoning on the property?

20 A AL 40.

21 Q Okay. And if you go back to the first rezoning
22 described in this document, is, are you meaning to say that as
23 of December 9th, 1980, the zoning of the property which
24 included the Maxwell property and the Rusty Spur Lane
25 property, changed at that date from A-1 to AE 20?

26 A Yes.

1 Q And so prior to 1980, what was the zoning of the
2 Maxwell property and the properties that are within Rusty Spur
3 Lane?

4 A A-1.

5 Q And you were part of the group at the County that
6 changed the zoning, correct?

7 A Yes.

8 Q And can you tell us what, strike that. As of 1970,
9 what was the zoning on these properties?

10 A A-1.

11 Q And can you tell us what uses are allowed in an A-1
12 zone?

13 A There's a wide range of uses that allowed in the A-1
14 zone, much more inclusive or wide ranging than in the AE or AL
15 zones.

16 Q All right. And were industrial uses allowed in an
17 A-1 zone?

18 A Yes.

19 Q I would like to show you a document which is
20 identified as Section 843 A-1 agricultural district, and ask
21 you to look at that for me. Do you recognize it?

22 A Yes.

23 Q What is it?

24 A This is the A-1 zone of the Fresno County Zoning
25 Ordinance Code that was adopted in 1960, and would have been
26 applicable to the subject property in 1970.

1 Q Okay. And can you go through, go through that and
2 identify for us the uses that were allowed in the zoning as of
3 1970?

4 A Yes. The A-1 zone allowed multi-family zoning, an
5 R-4; TP, which was trailer park; CP, which is commercial and
6 professional; C-4, which is also a commercial zoning; C-6 is a
7 commercial zoning; CR, which is commercial, recreational; M-3,
8 which is an industrial, heavy industrial use; P is park; O,
9 open space; RA is, those are the by right uses subject to
10 property development standards.

11 THE COURT: Where is that?

12 MR. JONES: Your Honor, I would like to move that
13 document into evidence and mark it as next in order on, from
14 the defendant's and cross-complainants.

15 MR. RICHARDS: Your Honor, we only object to the extent
16 we haven't seen what's been presented to the witness.

17 THE COURT: I haven't either, that's what I'm trying to
18 see, what is that, is that an exhibit?

19 MR. JONES: It is not currently an exhibit. It was,
20 Mr. Poeschel obtained it through the County through some
21 effort, because it is a historical zoning.

22 THE COURT: I was trying to write down everything he said
23 as he was saying all those different things.

24 MR. JONES: And I can show you the global code.

25 MR. RICHARDS: I just want to see what you showed the
26 witness. Thanks.

1 THE COURT: So with A-1 zoning as of the 1970, any or all
2 of those uses that you just described, Mr. Poeschel, would
3 have been appropriate within the purview of the County for
4 that particular, those particular parcels of land in Section
5 20?

6 THE WITNESS: Yes.

7 THE COURT: I see. Thank you.

8 MR. JONES: Any objection?

9 MR. RICHARDS: No.

10 THE COURT: You could have a trailer park in Section 20
11 in 1970, and that would have been okay?

12 THE WITNESS: Yes.

13 MR. JONES: Would you like to look at this first?

14 THE COURT: We need to mark this as an exhibit.

15 MR. JONES: It is the defendant and cross-complainants,
16 334.

17 THE COURT: It consists of, just for the record, three
18 pages. Do you mind if I staple them together?

19 MR. JONES: Absolutely not.

20 THE COURT: 334. It is Defendant's 334.

21 MR. JONES: And that was in evidence now, your Honor.

22 THE COURT: Any objection?

23 MR. RICHARDS: No, your Honor.

24 THE COURT: It will be received in evidence.

25 MR. JONES: Does the court have any other questions?

26 THE COURT: Not yet, thanks.

1 MR. JONES: All right.

2 Q So, the zoning was ultimately amended to the zoning
3 that exists now, which is AL 40; is that true?

4 A Yes.

5 Q Would you look at what has been marked Exhibit 37,
6 please? And what I would like you to do, if you could, is
7 turn to what has been marked Exhibit 37, sub tab 2.

8 A I have done so.

9 Q All right. And what does that sub tab 2 in Exhibit
10 37, what is that document?

11 A It is Section 817 of the Fresno County Ordinance
12 Code, defining a limited number of agricultural zone district.

13 Q Okay. And just as an overview, are you familiar
14 with this document?

15 A Yes.

16 Q And the document appears to have three sections to
17 it, it has use, it actually has four sections, it has uses
18 permitted, it has uses permitted subject to director review
19 and approval, it has uses permitted subject to conditional
20 subject use permit, and then it has uses expressly prohibited.
21 Do you see that?

22 A Yes, I do.

23 Q One of the uses I would like to turn to under uses
24 expressly prohibited, it says under uses expressly prohibited,
25 under F was residential subdivisions. Do you see that?

26 A Yes.

1 Q What does that mean?

2 A The zoning ordinance is stating clearly that the
3 purpose of this zone district is to prohibit residential
4 subdivisions in this exclusive agricultural zone.

5 Q Okay. Now, just for an understanding, what is a
6 director review?

7 A A director's review and approval was a process
8 utilized by the Fresno County Planning Department to have an
9 administrative review of uses that are allowed in a given zone
10 district.

11 Q Is that the lowest level of review the County can
12 provide?

13 A Yes.

14 Q And I want to turn to the uses permitted, and first
15 and foremost, under A of uses permitted it states, "The
16 maintaining, breeding, and raising of bovine and equine
17 animals, except dairy feed laws and uses specified in Section
18 817.2 and 817.3." Do you see that?

19 A Yes.

20 Q Do you have an understanding as to whether or not
21 that would allow someone to raise horses or cattle on their
22 property and sell them for slaughter?

23 A Yes.

24 Q And in particular I would like to point you to N of
25 the code.

26 THE COURT: Just so we're clear, I'm sorry you may have

1 been going there, we asked if you had an opinion, you said
2 yes.

3 MR. JONES: I thought, well, maybe I didn't follow up, I
4 apologize, your Honor.

5 THE COURT: Well, I just wanted to be sure. Why don't
6 you read that back.

7 (Thereafter, the requested testimony
8 was read by the court reporter.)

9 MR. JONES: I will follow up just so it's clear.

10 Q Is it your understanding and opinion that under uses
11 permitted within the AL zone district, item A, that someone
12 living on Rusty Spur Lane subject to the zoning, could raise
13 cattle on their property and sell them for slaughter?

14 A Yes.

15 Q Turning to item N, let's back up. Turning to item
16 M, there's a reference to historic and monument sites. Do you
17 see that?

18 A Yes.

19 Q Is it your understanding and opinion that a
20 permitted use within the AL 40 zone district would be the
21 maintenance of a historic and monument site?

22 A Yes.

23 Q Item N under the permitted uses states, "the
24 harvesting, curing, processing, packaging, packing, shipping,
25 and selling of agricultural products produced upon the
26 premises, or where such activity is carried on in conjunction

1 with, or as part of a bona fide agricultural operation." Do
2 you see that?

3 A Yes.

4 Q Is it your opinion that that allows someone to, for
5 example, raise strawberries on their property, have a
6 strawberry stand, and sell the strawberries raised from the
7 property from that stand?

8 A Yes.

9 Q Under item F of the uses permitted it states, "home
10 occupation, class 1. Subject of the provisions of Section
11 855N, is it your understanding and opinion that that would, or
12 that that by right use, would allow for someone to have, for
13 example, a day care with up to six children at their home,
14 pursuant to that code?

15 A Yes.

16 Q Your Honor, I have no further questions of the
17 witness.

18 THE COURT: Very well.

19 CROSS-EXAMINATION

20 BY MR. RICHARDS:

21 Q Good morning, Mr. Poeschel.

22 A Good morning.

23 Q Are you of the understanding that the easement
24 implicated in the 1970 zone easements, are private road
25 easements?

26 A No.

1 Q What type of easements are they, then?

2 A I believe they are a non-exclusive easement.

3 Q Can you differentiate for the court the difference
4 between a private road easement and a, what you just spoke to,
5 a non-exclusive easement might be?

6 A A non-exclusive easement is not restricted. Its
7 purpose is to allow ingress and egress over and across
8 property, to protect the public welfare, to have the public
9 visit sites, to have commercial vehicles be able to cross, and
10 ingress and egress properties.

11 Q And it is your opinion that the easement that allows
12 access from Millerton Road to the properties on Rusty Spur
13 Lane, that's sort of a non-existent, excuse me, a
14 non-exclusive easement; is that correct?

15 A That's correct.

16 Q And so is it your opinion that there's no
17 restriction on the easement whatsoever for ingress/egress to
18 any of the Rusty Spur Lane parcels?

19 A That's my opinion.

20 Q I would like for you to turn to Exhibit 63, which
21 should be in one of the binders in front of you. I'll give
22 you a moment to locate that. Have you located that, sir?

23 A Yes.

24 Q Normally we put this up on the Elmo, but through
25 some technological glitches we don't have that today, but you
26 recognize what Exhibit 63 is?

1 A Yes.

2 Q Have you personally ever seen what's depicted in
3 Exhibit 63 before?

4 A Yes.

5 Q And can you describe for the court what you believe
6 Exhibit 63 to represent?

7 A It represents the gate that exists on Rusty Spur
8 Lane.

9 Q Fair enough. And there's a sign affixed to that
10 gate, is there not?

11 A Yes.

12 Q And that sign is depicted in Exhibit 63; is that
13 true?

14 A Yes.

15 Q And I realize it is a bit small, but there's a red
16 and white type on that sign; is there not?

17 A Yes.

18 Q And are you able to read the first two words at the
19 top of that sign that's depicted on Exhibit 63?

20 A Yes.

21 Q And what are those two words?

22 A Private road.

23 Q And just posing your opinion that this is a
24 non-exclusive easement, please describe for the court what you
25 believe those words, private road, to represent?

26 MR. JONES: Your Honor, calling for speculation on the

1 part of the witness, he did not create that document, nor is
2 it appropriate, lacks foundation.

3 MR. RICHARDS: Your Honor, this witness is opining that
4 there's no restriction whatsoever on the ingress and egress to
5 the Rusty Spur Lane parcels through this gate. I'm trying to
6 elicit from this witness what he believes these words to mean.

7 MR. JONES: Your Honor, I believe that does not correctly
8 state the witness's testimony. I believe the question was,
9 did the easement provide any restrictions? The witness said
10 no. Now, they are attempting to try to go after some issue
11 related to this gate, of which this witness was not involved
12 in the creation of that gate or that sign.

13 THE COURT: Well, let me just ask this, Mr. Poeschel, do
14 you see that this Exhibit 63 which depicts a gate, and part of
15 another gate, did you understand that that is the gate that is
16 across Rusty Spur Lane?

17 THE WITNESS: Yes.

18 THE COURT: South of Millerton Road?

19 THE WITNESS: Yes.

20 THE COURT: Before looking at that picture, whenever the
21 first time you looked at that picture was, had you seen that
22 sign?

23 THE WITNESS: Not that I recall.

24 THE COURT: Did you, do you know how the sign came to be
25 in that location?

26 THE WITNESS: No.

1 THE COURT: Or why?

2 THE WITNESS: I don't know why, why it was put there, but
3 I believe that there's an assertion that one the property
4 owners believes it to be a private road.

5 THE COURT: Get ready to object, okay? With regard to
6 your opinion that Rusty Spur Lane is controlled by a
7 non-exclusive road easement, that's what you said, right?

8 THE WITNESS: Yes.

9 THE COURT: What, if anything, can you tell me regarding
10 the existence of that sign on that gate, relative to your
11 opinion that there is a non-exclusive road easement on Rusty
12 Spur Lane?

13 THE WITNESS: It would be my opinion that the sign does
14 not necessarily make it a private road, restricted easement.

15 THE COURT: Thank you.

16 MR. RICHARDS: Fair enough.

17 Q You would agree though, that if there are private,
18 if there are owners of a private road easement, that through
19 agreement they could limit access to that easement, would you
20 not?

21 MR. JONES: Your Honor, that's calling for speculation,
22 lacks foundation. Plaintiffs have already had judgment
23 entered against them on those issues, and we attempt to
24 reintroduce them through an expert, and a witness, put him up
25 in direct examination relative to the easement is improper and
26 irrelevant at this point.

1 MR. RICHARDS: Your Honor, if you turn to the second
2 declaration sought by defendant and cross-complainant, second
3 cross-complaint, remaining alive is their assertion there's
4 this unfettered access across this road. I'm trying to elicit
5 from this witness, and he's been designated to speak to this
6 issue, about exactly what the nature of unfettered access
7 means.

8 MR. JONES: The witness --

9 THE COURT: Well, I think what it says is that the,
10 quote, "the Roadway Maintenance Agreement does not limit
11 vehicle trips to personal residential trips, and allows
12 vehicular trips for any lawfully permitted uses by the County,
13 including commercial agricultural uses, such as the proposed
14 project."

15 Now, you are moving a little bit faster than I am, I have
16 it right here, but that book over here, and a picture over
17 here, but when I look at that, I'm going slow now, what we
18 were talking about was his opinion about private road easement
19 versus non-exclusive road easement, he thinks it's a
20 non-exclusive road easement. Then we were talking about
21 exhibit, Exhibit 37.

22 MR. RICHARDS: 63.

23 THE COURT: 63, and the gate, and the sign on the gate,
24 and whether he had some thought as to what relationship, if
25 any, or how that existence of that sign could be interpreted
26 in view of his opinion, or how his opinion should be

1 interpreted in view of the presence of that sign, I heard
2 that, but I, not to be technical, but he hasn't said anything
3 about the Roadway Maintenance Agreement, and that's what this
4 talks about.

5 MR. RICHARDS: Fair enough.

6 THE COURT: This Prayer for Judgment in the, in the
7 cross-complainant's cross-complaint. It says the, I just read
8 it. So, it's talking about something different.

9 MR. RICHARDS: Your Honor, if you would like to rule on
10 defendant's objection, I'll move on to a separate area of
11 inquiry that will probably get back to the same area, but
12 might tighten things up a bit, how's that.

13 MR. JONES: Your Honor, I would only add, this witness
14 has percipient knowledge regarding the zoning given his
15 relationship to the County, and he has been offered as an
16 expert witness on the zoning, and now they have expanded that
17 directly to the easement by an order of questions, but he was
18 not offered as an expert on the Roadway Maintenance Agreement.

19 THE COURT: Those words have not been spoken until now.

20 MR. JONES: Right.

21 THE COURT: That's my problem.

22 MR. RICHARDS: Fair enough. I appreciate the court's
23 concern.

24 Q Mr. Poeschel, I believe in your deposition you
25 testified that you had visited the Maxwell property in excess
26 of 25 times; is that correct?

1 THE WITNESS: Yes.

2 Q And you were hired by Mr. Maxwell several years ago
3 to help him prepare the DRA application he submitted to the
4 County of Fresno; isn't that also correct?

5 A Yes.

6 Q And you testified that part of your preparation or
7 assistance in the preparation of the DRA permit, that one of
8 the things you examined was, well, first of all, you examined
9 the nature of what Mr. Maxwell was desirous of in creating the
10 horse arena project; is that correct?

11 A Yes.

12 Q And when you were going through the assistance in
13 Mr. Maxwell in preparing the application, you noted that one
14 of your concerns was making sure the project was compatible
15 for the neighborhood. Do you recall testifying to that
16 effect?

17 A Yes.

18 Q And so compatibility of this project to the
19 neighborhood was an importance to you in preparing the DRA
20 application to submit to the County; is that correct?

21 A Yes.

22 Q Now, in your last visit to Mr. Maxwell's property,
23 at least at the time of your deposition you said, I believe
24 it's three to four months ago, correct?

25 A Yes.

26 Q And when you most recently visited the Maxwell

1 property, did you actually physically see the horse arena as
2 it exists today?

3 A Yes.

4 Q And when you saw the horse arena, did you see large
5 lights up on poles?

6 A Yes.

7 Q I will call those stadium lights, but lights on very
8 tall poles; is that fair?

9 A I know what you are talking about.

10 Q Okay. Are you also of the understanding there's
11 some PA or public address system present in the Maxwell horse
12 arena?

13 A No.

14 Q Are you aware if there's any public rest rooms that
15 have been installed on or around the Maxwell horse arena?

16 A I believe there are rest rooms approximate to the
17 arena.

18 Q Fair enough.

19 THE COURT: May I see counsel, please.

20 (Thereafter, a discussion was had between
21 the Court and Counsel at bench, not
22 reported.)

23 THE COURT: Thank you.

24 MR. RICHARDS: Q Mr. Poeschel, I just asked you about
25 some fixtures of the Maxwell horse arena. Are you of the
26 opinion that those fixtures are consistent with the

1 neighborhood?

2 A Yes.

3 Q And do you consider the neighborhood, when I use
4 that term, the parcels around Rusty Spur Lane?

5 A Yes.

6 Q Mr. Poeschel, do you hold the opinion that as part
7 of the Maxwell horse arena project that there was going to be
8 a riding academy at the project?

9 A I'm not aware of a riding academy.

10 Q Are you aware of any type of commercial stable
11 operations?

12 A I don't believe there's any commercial stable
13 operations that are proposed.

14 Q And can you tell me the nature of how many events
15 were submitted in the original DRA application to the County?

16 A I would have to look, but I recall 16. I'm sorry, I
17 don't recall the exact number, but I want to say 16.

18 Q And, fair enough. Is there any, in the original DRA
19 application, were there any expressions as to the amount of
20 vehicle traffic that was submitted as part of the application?

21 A Yes, there was.

22 Q What was that number?

23 A I believe it was 40 in bound and 40 exiting trips.

24 Q Fair enough. No further questions. Thank you.

25 REDIRECT EXAMINATION

26 BY MR. JONES:

1 Q The, Mr. Poeschel, in your opinion, is the use to
2 which Mr. Maxwell seeks to put his property under the project,
3 a use allowed under the AL 40 zoning subject of director
4 review?

5 A Yes.

6 Q I have no further questions.

7 RECROSS-EXAMINATION

8 BY MR. RICHARDS:

9 Q Mr. Poeschel, just one more question. You just
10 testified that you believe that the Maxwell horse riding arena
11 project is consist with the use permitted under 817.2; is that
12 correct?

13 A Yes.

14 Q Can you, and what's, Exhibit 37, sub 2, if you could
15 turn to that and look at 817.2. Can you list under what
16 letter subdivision you believe this DRA to be consistent with?

17 A I believe it is consistent with Section 817.2, which
18 is categorized broadly as commercial stables and riding
19 academies.

20 Q So it is your opinion that the project's consistent
21 with subdivision B, which is commercial riding stables or
22 academies, despite there being no commercial riding stable or
23 academy?

24 A Yes.

25 Q Fair enough. Thank you.

26 MR. JONES: One short question, your Honor, and that is

1 that the County the entity that interprets its own zoning
2 code?

3 THE WITNESS: That's correct.

4 Q And that was there interpretation that this
5 application was consistent with that provision of the, of its
6 AL 40 zoning?

7 A That's correct.

8 Q No further questions.

9 MR. RICHARDS: No further.

10 THE COURT: May this witness be excused?

11 MR. JONES: Yes.

12 MR. RICHARDS: Yes.

13 THE COURT: Thank you.

14 MR. JONES: Your Honor, we had a couple of witnesses
15 left. I would like to take, with the court's indulgence,
16 about a three or four minute break and come back.

17 THE COURT: Certainly.

18 (Whereupon, a break was taken.)

19 MR. JONES: Your Honor, we are prepared to rest, with one
20 minor housekeeping matter, which I have already presented to
21 counsel. I believe the court has marked their modifications
22 to their declarations as Court Exhibit 1. I would like to,
23 with the court's indulgence, to mark as Court Exhibit 2, what
24 I have already shown to counsel as modifications to our
25 declarations, which would simply be to delete declaration
26 number 3, which states; "The Road Maintenance Agreement

1 recorded against the Maxwell property is unenforceable, and as
2 a matter of law, shall be removed from Maxwells chain of
3 title." We're going to delete that.

4 And as to declaration number 1, which included, which
5 read originally, "the Sohm easement does not restrict the
6 number of vehicle trips any parcel may utilize over the Sohm
7 easement, or in any way attempt to limit the purpose of trips
8 for the types of uses on the property serviced by the
9 easement, whether residential, commercial, or otherwise." And
10 we want to delete from that the language in that which states,
11 "restricts the number of vehicle trips any parcel may utilize
12 over the Sohm easement, or in any way attempt to," so the
13 declaration we are seeking from the court now is, "the Sohm
14 easement does not limit the purpose of the trips for the types
15 of uses on the property serviced by the easement, whether
16 residential, commercial, or otherwise."

17 And there's no objection from counsel.

18 MR. HELSEL: I have no objection, your Honor.

19 THE COURT: Thank you. All right. Those changes are
20 noted. And just for the record, you provided me with a
21 typewritten document that seeks the six, actually now five,
22 because what was number three has been deleted, judicial
23 declarations that are sought by the cross-complainant. We'll
24 mark that as Court's Exhibit 2. All right. Anything further?

25 MR. JONES: Nothing on behalf of the defendants,
26 cross-complainants, your Honor. We rest.

1 THE COURT: All right. Anything further?

2 MR. HELSEL: Nothing on behalf of the plaintiffs at this
3 time, your Honor.

4 THE COURT: All right. Did counsel wish to be heard at
5 all with regard to -- you are resting?

6 MR. JONES: I'm resting.

7 THE COURT: Well, did you wish to be heard at all with
8 regard to the cross-complainant's positions that, or position,
9 we're going to amend the cross-complaint, but to incorporate
10 the changes as set forth in Court's Exhibit 2 with regard to
11 analysis of the evidence and any of those now five areas
12 sought for judicial declaration? Did you wish to be heard in
13 regard to that?

14 MR. JONES: I do, your Honor.

15 MR. HELSEL: I will as well, your Honor.

16 THE COURT: I think that's where we are.

17 MR. HELSEL: Does the court have a preference who they
18 wish to hear from first?

19 MR. JONES: We're the plaintiff I think in the
20 cross-complaint, so to speak.

21 THE COURT: Right.

22 MR. JONES: Your Honor, the first declaration we seek is
23 that the Sohm easement, which is in evidence as Exhibit 2, is
24 a non-exclusive easement for roadway purposes for ingress and
25 egress to and from the Fresno County road known as Millerton
26 Road, and it provided easement access by its terms to the 200

1 acres which later became the subdivision on Rusty Spur Lane.

2 The legal issue for the court is whether or not the case
3 law says that an easement is essentially granted unless
4 otherwise restricted when it's a non-exclusive easement for
5 any use to which the property can be lawfully put, and any
6 reasonable extension thereof as of the time of the granting of
7 the easement, and we have cited a number of cases. One of the
8 cases is Atchison, Topeka, and Santa Fe Railway Company vs.
9 Charles Ibar, which is at 275 Cal. Ap. 2d, 456. And in
10 particular, and I'm quoting from the case at page 464:

11 "The grant of an unrestricted easement not specifically
12 defined as to the burden imposed upon the servient land,
13 entitles the easement holder to a use limited by the
14 requirement that it may be reasonably necessary and consistent
15 for the purposes for which the easement was granted. This
16 permits a use consistent with normal future development within
17 the scope of the basic purpose."

18 And the point of that is, at the time that easement was
19 granted in 1970, these properties were zoned A-1, and an A-1
20 zoning allowed mobile home parks, it allowed industrial uses,
21 it allowed commercial uses, so the law would, absent contrary
22 intent, impose upon the language of the non-restricted,
23 non-exclusive easement, all of the uses that were allowable,
24 the uses to which an AL 40 zoning has changed over time. But
25 as Mr. Poeschel opined, the uses in the AL 40 might have
26 become slightly more restrictive, but that does not change the

1 original uses that were governed by this easement. And thus,
2 the use of a commercial stable, or the use of a horse arena as
3 Mr. Maxwell has posited the project, which is in fact what is
4 before the County, and has been introduced into evidence here,
5 would have been uses that were by right under the zoning as of
6 1970. And thus, we believe are uses allowed today.

7 The fact of the matter is that the declaration we seek
8 from the court, which is even a step back from that, is, as
9 stated, that there is no designation in this easement, and as
10 a matter of law the authority under the Zoning Code at the
11 time and now does not create, by virtue of the grant, any
12 restrictions on the type of use to which the roadway can be
13 put as requested in our declaration. And we submit we're
14 entitled to judgment on that declaration.

15 As to declaration number 2 on the issue of the Road
16 Maintenance Agreement, we believe the evidence has been almost
17 exclusively, if not exclusively in plaintiff's case, that the
18 Road Maintenance Agreement is not a controlled document, that
19 it is was not designed to control the use, and does not
20 control the use of Rusty Spur Lane for this purpose.

21 The fact is, that the evidence that was presented, at
22 least the evidence at the time the agreement was entered into,
23 all demonstrates that there is no indication in the document,
24 no oral conversations, no written documentation, to reflect
25 that this document was intended, and did restrict the uses on
26 the properties, and thus, and we believe we're entitled to our

1 second declaration that the Road Maintenance Agreement, by
2 virtue of the document, does not preclude the use of the Rusty
3 Spur Lane as a result of the proposed project by Mr. Maxwell.

4 The declaration relative to the Halls is simple. And
5 that is, this document is not a covenant that runs with the
6 land as a matter of law. And the reason for that is, the
7 covenant that runs with the land as the law provides, must be
8 signed by the grantor and the grantee. This document is only
9 signed individually by each of the people.

10 The document has to touch in concern the land, and the
11 document has to meet effectively the legal requirement for a
12 covenant that binds a successor in interest.

13 The fact of the matter is, the Halls subsequent -- you
14 can try to call a cat a dog, which was what happened in that
15 document. There was, there is language in there that tries to
16 say it binds and its successors and all of that, but you can't
17 make it do it by virtue of that, it has to meet the legal test
18 of it.

19 And the fact of the matter is that it doesn't meet the
20 legal test. And therefore, the Halls are not bound by that
21 document. They are bound, by the way, they are bound by Civil
22 Code Section 845, which says if you own a common interest, you
23 got to pay your fair share of the common obligation of
24 maintaining that roadway, but it is not a contractual
25 obligation, that's a statutory obligation. And our position
26 with them is that they are not subject to the Road Maintenance

1 Agreement for those reasons.

2 The last two in our Prayer, your Honor, one was for
3 attorney's fees, and the other is for attorney's fees and
4 costs. We would simply ask that the court, in its
5 determination of this matter, make a determination that my
6 client as defendants and cross-complainants, are the
7 prevailing party for purposes of further motions that proceed
8 thereafter. I am happy to answer any of the court's
9 questions, should you have any.

10 THE COURT: Very well, thank you.

11 MR. HELSEL: Your Honor, as to the Sohm easement, which I
12 believe may have been referred to sometimes throughout this
13 case as the 1970 easement, the defendants are seeking
14 essentially to have a declaration from this court that the use
15 of that easement is unlimited, it's unrestricted. And I would
16 argue simply as a matter of law, that there is no such thing
17 as an unrestricted or unlimited easement. That would be
18 referred to as a fee simple interest in the property. So
19 there has to be some restrictions. There has to be some
20 limits on use. Where that court draws the line, I don't know.
21 But the fact of the matter is, there has to be some
22 restriction.

23 More importantly as to the second declaration that the
24 defendants are seeking, the road, and this is a declaration
25 relating to the Roadway Maintenance Agreement. The court has
26 made abundantly clear that the Roadway Maintenance Agreement

1 speaks only to the maintenance obligations of the parties. In
2 other words, it's a contract, if I understood the court
3 correctly, that says the parties are obligated to pay an
4 annual assessment, and that annual assessment then, they use
5 those funds to repair and maintain the road.

6 So, the court, in its rulings on the plaintiff's
7 declarations, indicated that there isn't anything in the
8 language of the agreement that restricts access. And in fact,
9 there isn't anything, it's my understanding the court's
10 ruling, there isn't anything in the RMA that even speaks to
11 access.

12 And so, really, what the defendants are seeking byway of
13 their second declaration is the converse of that. So whereas
14 we were arguing that you couldn't restrict access, now they
15 are arguing it actually can allow an increase in access, or an
16 increase in use. And I would argue, your Honor, that the
17 reciprocity of the declarations mandates this court's denial
18 of the second declaration sought by the defendants.

19 As to the third declaration that the defendant's are now
20 seeking, the Roadway Maintenance Agreement, as against the
21 Halls is unenforceable as a matter of law. We didn't hear
22 from Mr. Hall, but as to Mrs. Hall, the stipulated testimony
23 was that, yes, she did not sign the Roadway Maintenance
24 Agreement, but that she has performed under the agreement
25 since January of 2006 when the Halls acquired the property. I
26 believe the stipulation also stated that she had actual

1 knowledge, she was told of the Roadway Maintenance Agreement.
2 She may not have reviewed it, but she at least had actual
3 knowledge of it. So, based on her actual knowledge, and
4 presumably Mr. Hall's actual knowledge, although he didn't
5 testify, coupled with their subsequent performance over the
6 last five years under the agreement, I don't think that this
7 court can declare that the contract is unenforceable as a
8 matter of law.

9 And as it relates to the being removed from the Halls
10 chain of title, the Roadway Maintenance Agreement has been
11 admitted into evidence as it related to the Gallaghers, and
12 the Grant Deed conveying the property from the Gallaghers to
13 the Halls has been introduced, but I don't believe this court
14 heard any expert testimony from the title officer or otherwise
15 in relation to how a document would be properly recorded in a
16 chain of title. So I would ask that this court, for those
17 reasons, deny the defendant's their third declaration.

18 And with regard to the prevailing party issue, in light
19 of the fact that as it relates anyway to the Roadway
20 Maintenance Agreement, that none of the declarations that are
21 requested by either party would be granted by this court, that
22 there really, there is no prevailing party, and with that,
23 your Honor, we would submit.

24 THE COURT: All right. Thank you.

25 MR. JONES: Your Honor, just a couple very minor
26 comments, with the court's indulgence.

1 THE COURT: Very well.

2 MR. JONES: First of all, I think the stipulation with
3 respect to the Halls was that neither her or her husband
4 signed the document, and I don't think anybody disputes that,
5 because there is no signature to it.

6 And 2, they, the stipulation did not provide that they
7 performed under the agreement. The stipulation provided that
8 they have paid fees at Mr. Murray's request.

9 Beyond that, if you look at our declaration it is not
10 we're asking for an unlimited declaration with respect to the
11 Road Maintenance Agreement, as the court is clearly aware, we
12 simply ask that the Road Maintenance Agreement does not limit
13 vehicle trips to personal residential trips, and allows
14 vehicular trips for any lawfully permitted uses by the County,
15 including commercial, agricultural uses, such as the proposed
16 project. That's what we ask. Thank you, your Honor.

17 THE COURT: Thank you both, all. With regard to the, now
18 with regard to Court's Exhibit 2, which is the declaratory
19 relief sought by cross-complainant, you have copies of that, I
20 imagine?

21 MR. JONES: I only have one. I only had one, your Honor.

22 THE COURT: Well, I made it Court's Exhibit 2, and it
23 says at the very top, "Wherefore the plaintiff's pray for
24 judgment against the defendants more fully below." It is very
25 similar to, that's all right, page 14, line 21 and 22, of the
26 actual cross-complaint itself. I'm going to change those

1 words to cross-complainants, "wherefore the
2 cross-complainants", I'll insert cross-complainants instead of
3 plaintiffs, and I'll put instead of defendants, I'll cross
4 that or interlineate that, and put cross-defendants. Just for
5 the sake of clarity. The court finds as follows:

6 First, the Sohm easement does not limit the purpose of
7 the trips for the types of uses on the properties serviced by
8 the easement, whether residential, commercial, or otherwise.

9 Secondly, the Roadway Maintenance Agreement does not
10 limit vehicle trips to personal, residential trips, and allows
11 vehicular trips for any lawfully permitted uses by the County,
12 including commercial, agricultural uses, such as the proposed
13 project.

14 Next, the Roadway Maintenance Agreement recorded against
15 the Hall property is unenforceable as a matter of law, and it
16 shall be removed from the Halls chain of title.

17 Finally, the court finds that the defendants are the
18 prevailing party with regard to the plaintiff's Complaint, and
19 the court finds that the cross-complainants are the prevailing
20 party with regard to the cross-complaint.

21 And accordingly, defendants/cross-complainants, are
22 entitled to costs of suit, and such other further relief as
23 the court deems just and proper, and maybe entitled to
24 attorney's fees. And those matters both would be the subject
25 of further motions, as they are not the subject of evidence
26 presented in this trial.

1 Anything further that we need to discuss at this time?

2 MR. JONES: Nothing, your Honor, thank you.

3 MR. HELSEL: No, your Honor.

4 THE COURT: Thank you.

5 (Whereupon, the proceedings were concluded.)

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1 STATE OF CALIFORNIA)
2) ss.
3 COUNTY OF FRESNO)

4 I, MYRA A. PISH, Certified Shorthand Reporter, do hereby
5 certify that the foregoing pages, numbered 1 to 147,
6 inclusive, comprise a full, true and correct transcript of my
7 shorthand notes, and a full, true and correct statement of the
8 proceedings held at the time and place heretofore stated.

9 DATED: August 15, 2011

10 FRESNO, CALIFORNIA

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A handwritten signature in dark ink, appearing to read "Myra A. Pish", is written over a horizontal line.

MYRA A. PISH, CSR
Certificate No. 11613