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July 30, 2004

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File #14535

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**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF TUOLUMNE**

ALAMEDA BOY SCOUTS  
FOUNDATION, a California Nonprofit  
Benefit Corporation

Plaintiff,  
vs.

ODD FELLOWS SIERRA RECREATION  
ASSOCIATION, INC., OF TUOLUMNE  
COUNTY, DEL WALLIS, an individual,  
and ALL PERSONS UNKNOWN,  
CLAIMING ANY LEGAL OR  
EQUITABLE RIGHT, TITLE, ESTATE,  
LIEN, OR INTEREST IN THE PROPERTY  
DESCRIBED IN THE COMPLAINT  
ADVERSE TO PLAINTIFF'S TITLE OR  
ANY CLOUD ON PLAINTIFF'S TITLE  
THERE TO, WILLIAM H. SMITH,  
FLOELLEN W. SMITH, JOSEPH  
FREITAS, & GLADYS FREITAS and  
DOES 1 through 50,

Defendants.

Case No. CV49802

**PLAINTIFF ALAMEDA BOY SCOUTS  
FOUNDATION'S POST-TRIAL BRIEF**

*Date: July 30, 2004*

*Dept.: 1*

*Complaint Filed: May 22, 2003*

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7 **SUPERIOR COURT OF CALIFORNIA**  
 8 **COUNTY OF TUOLUMNE**

9 ALAMEDA BOY SCOUTS  
 10 FOUNDATION, a California Nonprofit  
 Benefit Corporation

Case No. CV49802

11 Plaintiff,  
 12 vs.

**PLAINTIFF ALAMEDA BOY SCOUTS  
 FOUNDATION'S POST-TRIAL BRIEF**

13 ODD FELLOWS SIERRA RECREATION  
 ASSOCIATION, INC., OF TUOLUMNE  
 14 COUNTY, DEL WALLIS, an individual,  
 and ALL PERSONS UNKNOWN,  
 15 CLAIMING ANY LEGAL OR  
 EQUITABLE RIGHT, TITLE, ESTATE,  
 16 LIEN, OR INTEREST IN THE PROPERTY  
 DESCRIBED IN THE COMPLAINT  
 ADVERSE TO PLAINTIFF'S TITLE OR  
 17 ANY CLOUD ON PLAINTIFF'S TITLE  
 THERETO, WILLIAM H. SMITH,  
 18 FLOELLEN W. SMITH, JOSEPH  
 FREITAS, & GLADYS FREITAS and  
 19 DOES 1 through 50,

*Date: July 30, 2004*  
*Dept.: 1*  
*Complaint Filed: May 22, 2003*

20 Defendants.  
 21

22 **I.**

23 **INTRODUCTION**

24 Plaintiff Alameda Boy Scouts Foundation, and its predecessors-in-interest (hereinafter  
 25 referred to as "Boy Scouts") have for many years operated a property known as "Camp  
 26 Cedarbrook" for the benefit of Boy Scout troops and other non-profit youth groups since  
 27 approximately 1929. In 1949 Defendant Odd Fellows Sierra Recreation Association, Inc.  
 28 (hereinafter "Odd Fellows") purchased real property contiguous to Camp Cedarbrook. The Boy

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Scouts contend that the evidence established their entitlement to an easement by way of prescription, necessity, and implication over Wheeler Road and Jordan Way across the Odd Fellows property. Additionally, Boy Scouts contend that the evidence established that the Odd Fellows are barred from denying the Boy Scouts' easement rights by way of promissory and equitable estoppel.

## II.

### LEGAL ARGUMENT

#### A. THE BOY SCOUTS ARE ENTITLED TO AN EASEMENT BY PRESCRIPTION OVER THE ODD FELLOWS' PROPERTY

The Boy Scouts have obtained an easement by prescription over Wheeler Road and Jordan Way. To establish a prescriptive easement, a claimant must have (1) used the subject property for a period of five years, (2) in a manner that was open and notorious, and (3) in a manner that was hostile and adverse to the interests of the owner of the burdened land. Cal. Civ. Code § 1007; Cal. Code Civ. Proc. § 321; Warsaw v. Chicago Metallic Ceilings, Inc., 35 Cal.3d 564, 570 (1984). The fact that an easement is, or is not, necessary as a means of access to the user's property is irrelevant in determining whether the use has been sufficient to create a prescriptive right. Jordan v. Worthen, 68 Cal.App.3d 310, 326 (1977). Additionally, the fact that the claimant has utilized alternative routes to access his/her property does not preclude the creation of a prescriptive right to use another route. Guerra v. Peckard, 236 Cal.App.2d 272, 293 (1965).

##### 1. The Evidence Presented Shows that the Boy Scouts' Continuously Accessed Camp Cedarbrook on Wheeler Road And Jordan Way For A Period in Excess Of Five Years.

The Boy Scouts have continuously accessed Camp Cedarbrook via Wheeler Road and Jordan Way for a period exceeding five years. The prescriptive period is measured from the time that the adverse use begins. Guerra at 291. The period in which the burdened property is used by the claimant's predecessors in a similar manner may be "tacked" onto the time it is used by the claimant. 6 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 15.38, p. 138 (citing 46 A.L.R. 792, 72 A.L.R. 648).

1           Testimony elicited during trial shows that the Boy Scouts have utilized Wheeler Road and  
2 Jordan Way for a period far in excess of five years. Richard Anderson, former President of the  
3 Alameda Boy Scouts Foundation, testified that he and the Boy Scouts have used Wheeler Road  
4 and Jordan Way since at least 1972 (Record at 16: 5; 71:10-12; 73: 15-20; 75: 13-17). John  
5 Pearl, Scout Executive of the Alameda Boy Scouts Council since 1994, also testified that the Boy  
6 Scouts have used such roads for a period in excess of five years (R. at 294 19-25, 295: 1-3; 345:  
7 7-16). Furthermore, Richard Welch, an owner of property near Camp Cedarbrook, testified that  
8 he had observed the Boy Scouts continuous use the roads through the Odd Fellows' property  
9 during the twenty years he has owned a neighboring parcel of land (R. at 97: 13-25, 98: 1-8).  
10 Moreover, when questioned by Roger Schrimp, Edward Smith, an owner of property in the Odd  
11 Fellows' subdivision for thirty-two years and former president of the Odd Fellows, testified that  
12 the Boy Scouts have "always" used Wheeler Road and Jordan Way:

13           Q.     So as you sit here today, is it your testimony that you don't know whether the  
14                   Scouts have been allowed to use Wheeler and Jordan Road or not to get into the  
15                   Scout camp?

16           A.     They always did, yeah.

17           Q.     They always have used those roads?

18           A.     As far as I know. (Emphasis added.)

19 (R. at 400: 17-23).

20           Documentary evidence also establishes that the Boy Scouts have utilized Wheeler Road  
21 and Jordan Way for a period far in excess of five years. The minutes from a July 14, 1957 Odd  
22 Fellows board meeting (See Exhibit 4) show that the Girl Scouts had used roads through the Odd  
23 Fellows property nearly fifty years ago. A letter from the Odd Fellows to the Boy Scouts, dated  
24 August 6, 1973, (See Exhibit 18) and the minutes from an Odd Fellows board meeting dated  
25 December 2, 1973 (See Exhibit 19) show that the Boy Scouts have used Wheeler Road since at  
26 least 1973 because the Odd Fellows expected the Boy Scouts to contribute their share in the costs  
27 of repairing that road. A letter from Edward Smith to Alvin Kidder, former president of the  
28 Camp Cedarbrook Trustees, dated February 7, 1992 (See Exhibit 23) shows that the Boy Scouts

1 had been using Wheeler Road and Jordan Way in 1992 and before because Smith asserts they the  
2 Odd Fellows had no intention of denying such usage.

3 To acquire a prescriptive easement, the easement must be used in the required manner  
4 continuously and without interruption for the full prescriptive period. It need not be used every  
5 day during the prescriptive period; use is sufficient if it occurs on those occasions when it is  
6 necessary for the convenience of the user. Scott v. Henry, 196 Cal. 666, 670 (1925). Use of a  
7 roadway is sufficient if it is used only three times a week, once each week, 20 times a year,  
8 sporadically, or occasionally as needed. Gaut v. Farmer, 215 Cal.App.2d 278, 284 (1963);  
9 Crimmins v. Gould, 149 Cal.App.2d 383, 397 (1957); Weideman v. Staheli, 149 Cal.App.2d  
10 613, 616 (1948); Warsaw at 570. Moreover, in the absence of facts to the contrary, testimony of  
11 use at different times throughout the prescriptive period is sufficient to establish the regularity  
12 and continuity of use during the interim period. Cleary v. Trimble, 229 Cal.App.2d 1, 10 (1964).

13 The Boy Scouts' use of Wheeler Road and Jordan Way meets this continuous  
14 requirement. Richard Anderson testified that he drove on Wheeler Road and Jordan Way many  
15 times annually to access Camp Cedarbrook (R. at 85: 24-25, 86: 1). Service vehicles, including  
16 trucks bringing supplies and propane, used Wheeler Road and Jordan Way to access Camp  
17 Cedarbrook during the summer seasons (R. at 300: 22-25, 301: 1-4). Camp Cedarbrook was  
18 used approximately twelve weekends per year during the winter season (R. at 330: 8-13).  
19 Furthermore, Mr. Anderson testified that the Boy Scouts used Camp Cedarbrook for non-summer  
20 camp and non-winter camp activities as well (R. at 335: 11-14). Campers and their parents  
21 accessed Camp Cedarbrook via Wheeler Road and Jordan Way (R. at 97: 22-25, 98: 1-8). Such  
22 continuous usage by the Boy Scouts of Wheeler Road and Jordan Way is more than sufficient to  
23 establish the continuous use requirement for an easement by prescription. Thus, it is clear that  
24 the Boy Scouts have continuously used Wheeler Road and Jordan Way for a period far in excess  
25 of five years.

26 **2. The Evidence Establishes That the Boy Scouts' Use of Wheeler Road And**  
27 **Jordan Way Was At All Times Open, Notorious, And Visible.**

28 The Boy Scouts satisfy the second element of an easement by prescription because the

1 Odd Fellows had actual notice of the Boy Scouts' continuous use of their roads. To obtain an  
2 easement by prescription, the claimant must show that his or her use has been "open,"  
3 "notorious," and "visible." Warsaw at 570. This requirement operates to "insure that the owner  
4 of real property ... has actual or constructive notice of the adverse use and to provide sufficient  
5 time to take necessary action to prevent that use from ripening into a prescriptive easement."  
6 Field-Escandon v. Demann, 204 Cal.App.3d 228, 235 (1988). Open and notorious use is  
7 characterized as use that notifies the landowner that a use inconsistent with his or her rights is  
8 being made. Kerr Land & Timber Co. v. Emmerson, 268 Cal.App.2d 628, 634 (1969). An  
9 owner of property acquires actual knowledge if the owner is informed of the property's use or if  
10 the owner observes the use. Adequate open, notorious and visible use of the property raises an  
11 inference that the owner has notice—either actual or constructive—of the claimant's use.  
12 Applegate v. Ota, 146 Cal.App.3d 702, 709 (1983).

13 The record shows that the Odd Fellows had actual notice of the Boy Scouts' use of their  
14 roads. The Odd Fellows' former president, Edward Smith, testified that he had knowledge of the  
15 Boy Scouts' use of Wheeler Road and Jordan Way since at least the 1970s (R. at 893: 7-16; 400:  
16 17-23). Fred Coleman, another former president of the Odd Fellows, testified that he had  
17 knowledge of the Boy Scouts' use of Wheeler Road and Jordan Way in 1995 (R. at 839: 11-20).  
18 Moreover, the minutes from a July 14, 1957 Odd Fellows board meeting (See Exhibit 4) show  
19 that the Odd Fellows had actual knowledge of the Boy Scouts' predecessor in interest, the Girl  
20 Scouts,' use of the Odd Fellows' roads as early as 1957. A letter from the Odd Fellows asking  
21 the Boy Scouts to contribute to the repair costs associated with Wheeler Road, dated August 6,  
22 1973 (See Exhibit 18), and the minutes from an Odd Fellow board meeting acknowledging  
23 receipt of such contribution, dated December 2, 1973 (See Exhibit 19), demonstrate that the Odd  
24 Fellows had actual knowledge of the Boy Scouts' use of Wheeler Road in 1973. The Odd  
25 Fellows also received a letter, dated April 18, 1990 (See Exhibit 7), from Alvin Kidder, former  
26 president of Camp Cedarbrook Trustees, stating that the Boy Scouts have used the Odd Fellows'  
27 roads "continuously for over 30 years without any restrictions placed on us by the Odd  
28 Fellows," thus indicating, once again, that the Odd Fellows had actual notice of the Boy Scouts'

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1 use of their roads (Emphasis added.) Actual notice by the Odd Fellows of the Boy Scouts' use of  
2 their roads is also found in a letter from the Odd Fellows to the Boy Scouts, dated February 7,  
3 1992 (See Exhibit 23) and in a letter from the Odd Fellows to the Boy Scouts dated November  
4 20, 1995 (See Exhibit 10). Such testimony and exhibits clearly show that the Odd Fellows  
5 clearly had actual notice of the Boy Scouts' use of their roads.

6 Assuming arguendo that the Odd Fellows did not have *actual* notice of the Boy Scouts'  
7 use of their roads, the Odd Fellows had, at last, constructive notice because such use was open,  
8 notorious, and visible to the Odd Fellows. Richard Anderson testified that the Boy Scouts' use  
9 of Wheeler Road and Jordan Way was clearly visible to the homes in the overlooking Odd  
10 Fellows subdivision (R. at 23: 3-12). After all, approximately one hundred campers would come  
11 to Camp Cedarbrook (R. at 85: 4-6) via the roads through the Odd Fellows property (R. at 98: 7-  
12 8). Similarly, Richard Welsh testified that residents of the Odd Fellows' subdivision were able  
13 to observe those who went to Camp Cedarbrook via Wheeler Road and Jordan Way (R. at 100:  
14 8-13). Thus, the Boy Scouts' use of the roads on the Odd Fellows' property was open, notorious,  
15 and visible to the Odd Fellows.

16 The testimony and documentary evidence clearly establishes that the Odd Fellows had  
17 actual notice of the Boy Scouts' use of Wheeler Road and Jordan Way, and even if they did not,  
18 the Boy Scouts' use of such roads was open, notorious, and visible so that the Odd Fellows had  
19 constructive knowledge.

20 **3. The Boy Scouts' Use Was Hostile And Adverse To The Odd Fellows'**  
21 **Interest, Under Claim Of Right, And Non-Permissive.**

22 The Boy Scouts have satisfied the third element of an easement by prescription because  
23 their use of Wheeler Road and Jordan Way was hostile and adverse to the Odd Fellows' interest,  
24 under claim of right, and non-permissive. A claimant's use of property is "adverse" if it is not in  
25 subordination to the rights of the owner of the burdened land, is undertaken without the owner's  
26 permission and is wrongful and open. Use of servient land is considered "hostile" under the law  
27 if it is adverse and is made without express or implied recognition of the owner's rights. Clearly  
28 at 6-7. The claimant need not verbally declare a hostile intent to the owner of the burdened land.

1 Instead, use of property in a way that displays the user's claim of right establishes a prima facie  
2 case that the use is adverse and hostile to the rights of the owner of the property, and that the  
3 owner has constructive notice of the adverse claim. 6 Miller & Starr, Cal. Real Estate (3d ed.  
4 2000) § 15.35, p. 126. California courts have consistently ruled that open, notorious, and visible  
5 use creates a presumption that the claimant's use is hostile and adverse. Gates Rubber Co. v.  
6 Ulman, 214 Cal.App.3d 356, 366 (1989); Kerr Land & Timber Co. at 634-635. As the previous  
7 section makes clear, the Boy Scouts' use of the roads in question was open, notorious, and visible  
8 (See § A. 2.).

9 Although the Odd Fellows will may argue that the Boy Scouts' use of their roads was at  
10 all times permissive, and therefore, not hostile, adverse, and under claim of right, under  
11 California law, it is well-established that a claimant's failure to request permission to use  
12 burdened land is sufficient to prove the use was under a claim of right and thereby hostile. Twin  
13 Peaks Land Co. v. Briggs, 130 Cal.App.3d 587, 594 (1982); O'Banion v. Borba, 32 Cal.2d 145,  
14 152-153 (1948). As the Odd Fellows correctly point-out in their Trial Brief (Defendants' Trial  
15 Brief), use of an easement for a long period of time without interference gives rise to a  
16 presumption that such use was hostile. Once such evidence has been presented, the burden shifts  
17 to the owner of the burdened property to show that the use was permissive rather than hostile.  
18 Applegate v. Ota, 146 Cal.App.3d 702, 708-709 (1983). The Odd Fellows have clearly not met  
19 this burden.

20 Although the Odd Fellows claim that the Boy Scouts were required to ask the Odd  
21 Fellows for permission to use their roads, the Odd Fellows have failed to produce a single  
22 document that memorializes such a requirement. Representatives from the Odd Fellows testified  
23 that the organization considered the use of its roads a very important matter (R. at 473: 11-20);  
24 they claimed that the Boy Scouts would ask for permission to use its roads at board meetings and  
25 by way of yearly application (R. at 448: 21-24, 449: 3-114; 465: 18-22; 542: 13-17; 544: 1-4, 13-  
26 20; 545: 20-25; 549: 5-9, 551: 7-13); they even testified that such important discussions at board  
27 meetings would, as a matter of course, be reflected in the minutes of those meetings (R. at 200:  
28 15-22; 401: 16-18; 552: 8-16; 879: 23-25, 880: 1-2); that they spent considerable time looking

1 for all documents in their possession relating to the Boy Scouts' use of their roads (R. at 196: 14-  
2 21; 843: 8-17; 845: 15-21, 879: 12-19), and had produced all such documents (R. at 474: 18-25,  
3 475: 1-6; 829: 17-25, 830: 1-9; 831: 6-7; 845: 15-25, 846: 1-23). Yet, the Odd Fellows have  
4 produced no evidence showing that the Boy Scouts had ever asked for permission to use its  
5 roads: such a request is not apparent in any board meeting minutes, any application, or in any  
6 letter from the Boy Scouts. Edward Smith testified that the Odd Fellows required the Boy Scouts  
7 to ask for permission to use its roads "in order to not give them the permanent right" to use such  
8 roads (R. at 443: 20-25). Yet, Smith has produced no such writing or application. Moreover, the  
9 representatives from the Odd Fellows cannot recall the alleged conversations they had with  
10 representatives from the Boy Scouts regarding the use of their roads, the time frame during which  
11 these conversations allegedly occurred, or even the persons to whom they spoke about this matter  
12 (R. at 466: 7-17; 470: 12-21; 471: 9-14; 544: 5-12). Instead, the Odd Fellows have provided the  
13 Court with unsupported claims. The Boy Scouts, however have, provided testimony denying the  
14 existence of such claims for permission (R. at 19: 1-5; 297: 5-17; 310: 4-17).

15 The use of Wheeler Road and Jordan Way by Camp Cedarbrook campers also provides  
16 support to the premise that the use of the roads was hostile, adverse, and non-permissive. "The  
17 fact that a roadway is used by family, guests, relatives and business invitees is evidence that  
18 supports the inference that use was adverse and not permissive." Castollo v. Celaya, 155  
19 Cal.App. 469, 473 (1957). Camp Cedarbrook, at times, accommodated over one-hundred  
20 campers (R. 85: 4-6). It is undisputed that such campers accessed Camp Cedarbrook via Wheeler  
21 Road and Jordan Way (R. 97: 21-25, 98: 1-8).

22 The Boy Scouts' financial contribution to the repairs of such road on the Odd Fellows  
23 property also supports the claim that the use of the roads was hostile, adverse, and non-  
24 permissive. Sharing of such expenses has been recognized by several courts as a tacit  
25 recognition of a claimant's easement rights, which defeats a claim that use was non-permissive.  
26 Serrano v. Grissom, 213 Cal.App. 300, 302-303 (1963); Marangi v. Domenici 161 Cal.App.2d  
27 552, 554 (1958). In 1973, the Odd Fellows asked the Boy Scouts to share in the expense of  
28 repairing Wheeler Road (See Exhibit 18). The Boy Scouts responded affirmatively by sending a

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1 check for \$300.00 for such repair (See Exhibits 19, 24).

2       Such evidence shows that the Boy Scouts' use of the roads on the Odd Fellows property  
3 was adverse, hostile, and under claim of right. The evidence also shows that the Odd Fellows  
4 have not met their burden to demonstrate that the Boy Scouts' use of their roads was by express  
5 permission. Accordingly, the Boy Scouts satisfy the final element of an easement by  
6 prescription.

7 **B. THE BOY SCOUTS ARE ENTITLED TO AN EASEMENT BY NECESSITY**  
8 **OVER THE ODD FELLOW'S PROPERTY**

9       To establish an easement by necessity, a claimant must show (1) that the dominant and  
10 servient tenements were once in common ownership and (2) that there is a strict necessity for the  
11 right-of-way as when the claimant's property is landlocked. Reese v. Borghi, 216 Cal.App.2d  
12 324, 332-333 (1963). The Boy Scouts' property is landlocked by the property of the Odd  
13 Fellows and others (See Exhibits 1, 2). Whenever a landowner sells one of two or more parcels,  
14 and the parcel sold is landlocked by the remaining property of the grantor or partly by the land of  
15 the grantor and partly by the land of others, the law implies that the parties intend to create an  
16 easement across the remaining land of the grantor to benefit the property conveyed. Mesner v.  
17 Uharriet, 174 Cal. 110, 112 (1916). The public policy behind an easement by necessity is "to  
18 prevent any man-made efforts to hold land in perpetual idleness as would result if it were cut off  
19 from all access by being completely surrounded by lands privately owned." Reese at 331 (citing  
20 2 Thompson on Real Property (1961 Replacement), § 362, p. 410).

21       Several courts have ruled that the mere landlocking of a parcel after the conveyance by a  
22 common owner is sufficient to create the easement as a matter of law. 6 Miller & Starr, Cal.  
23 Real Estate (3d ed. 2000) § 15.27, p. 98. The general rule is that "the creation of an easement by  
24 necessity depends on the presumed intent of the parties as determined from the physical  
25 condition of the respective parcels of property, the agreements between the parties, the contracts  
26 and instruments of conveyance and all of the surrounding facts and circumstances." Id. at 98-99  
27 (citing Roemer v. Pappas, 203 Cal.App.3d 201, 207-208 (1988)). Evidence produced at trial has  
28 clearly shows that the Boy Scouts are entitled to an easement by necessity.

1           **1.     The Boy Scouts Meet The Common Ownership Requirement For Easement**  
2           **By Necessity.**

3           The Boy Scouts satisfy the common ownership element of an easement by necessity  
4 because their property and the Odd Fellows' property were both owned by the same individual,  
5 E.O. Sylvester (See Exhibit 35). "One of the elements of an easement by necessity is that the  
6 dominant and servient tenements were under the same ownership at the time of the conveyance  
7 that gave rise to the necessity." Kellogg v. Garcia, 102 Cal.App.4th 796, 804 (2002).

8 Furthermore, at the time of division, the original owner may or may not have retained a part of  
9 the divided property, as easements by necessity may arise from simultaneous conveyance of the  
10 severed portions as well as by piecemeal conveyance or conveyance of only part. (Powell on  
11 Real Property, Ch. 34, *Easements and Licenses* (Matthew Bender); California Real Estate Law  
12 and Practice, Ch. 343, §343.15, *Easements and Licenses* (Matthew Bender)).

13           Michael Azzaro, Chief Title Officer and Vice-President of Yosemite Title Company,  
14 testified that the Boy Scouts' property and the Odd Fellows' property were owned by E.O.  
15 Sylvester from 1923 to 1929 (See Exhibit 35). Mr. Azzaro further testified that the parcel was  
16 severed in 1929, and the resulting two parcels were subsequently, and respectively, transferred to  
17 the Boy Scouts in 1930 and the Odd Fellows in 1949 (R. at 88: 19-25, 89: 1-23; See Exhibit 35).  
18 Thus, the common ownership element is met by the Boy Scouts.

19           **2.     The Boy Scouts Meet The Strict Necessity Requirement For An Easement By**  
20           **Necessity.**

21           The Boy Scouts also satisfy the strict necessity element of an easement by necessity  
22 because, without the use of Wheeler Road and Jordan Way, they (1) cannot access their property  
23 via other routes. Strict necessity must be shown in order to establish an easement by necessity.  
24 County of Los Angeles v. Bartlett, 203 Cal.App.2d 523, 528-526 (1962). Furthermore, contrary  
25 to the requirements of an easement by implication, "a way of necessity does not rest on a pre-  
26 existing use but on the need for a way across the granted or reserved premises." Kellogg at 810  
27 (citing Reese at 331).

28           At trial, it was shown that access by Long Barn Sugar Pine Road to Camp Cedarbrook

1 camp to the south-east of the creek is Jordan Way (R. at 18: 5-15). The Boy Scouts cannot  
2 utilize Camp Cedarbrook without such access (R. at 311: 18-22). Service vehicles, including  
3 trucks carrying necessary supplies and propane, must use Jordan Way to get to Camp Cedarbrook  
4 south of the creek (R. at 300: 22-25, 301: 1-4). More importantly, the roads on the Odd Fellows'  
5 property are also the only means by which emergency vehicles, such as ambulances and fire  
6 trucks, can get to Camp Cedarbrook (R. at 164: 7-11; 305: 2-15). Accordingly, the Boy Scouts  
7 must necessarily use Wheeler Road and Jordan Way to access their property south of Sugar Pine  
8 Creek.

9 The evidence shows that the Boy Scouts' and Odd Fellows' properties were under  
10 common ownership by E.O. Sylvester in 1929. The Boy Scouts have also shown that their use of  
11 Wheeler Road and Jordan Way is strictly necessary to access Camp Cedarbrook, both during the  
12 winter, and year-round access vital, important portions of the camp. Therefore, the Boy Scouts  
13 have satisfied the elements of easement by necessity and are entitled to such an easement.

14 **C. THE BOY SCOUTS ARE ENTITLED TO AN EASEMENT BY IMPLICATION**  
15 **OVER THE ODD FELLOWS' PROPERTY**

16 To establish an easement by implication, a claimant must show (1) that there was a  
17 separation or severance of title which implies a unity of ownership at some time in the past, (2)  
18 that prior to the division of title, the use which gives rise to the easement must have continued for  
19 so long and in such an obvious manner as to show that it was intended to be permanent, and (3)  
20 that the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement.  
21 Mopres v. Walsh, 38 Cal.App.4th 1046, 1050 (1995) citing (5 Miller & Starr, Cal. Real Estate  
22 (2d ed. 1989) § 15.20, p. 454); Mickels v. Rager, 232 Cal.App.3d 334, 357 (1991); Kytasty v.  
23 Godwin, 102 Cal.App.3d 762, 76 (1980).

24 **1. The Boy Scouts' And Odd Fellows' Properties Were At One Time In**  
25 **Common Ownership**

26 The Boy Scouts have satisfied the common ownership element of an easement by  
27 implication because their property and the property of the Odd Fellows were under the same  
28 ownership. An easement by implication will not arise unless the common owner of both the  
servient and the dominant tenements conveys or transfers a portion of the property to another.

1 Leonard v. Haydon, 110 Cal.App.3d 263, 266 (1980). The conveyance may be accomplished in  
2 any manner that transfers an interest in real property (including a contract of sale; severance of  
3 cotenancy; leases; death of an owner; encumbrances). Laux v. Freed, 53 Cal.2d 512, 521 (1960);  
4 Cheda v. Bodkin, 173 Cal. 7, 16 (1916).

5 As stated above, Camp Cedarbrook and the Odd Fellows' properties were both owned by  
6 E.O. Sylvester from 1923 to 1929. The parcel was severed in 1929, and the individual parcels  
7 were subsequently transferred to the Boy Scouts and the Odd Fellows (R. at 88: 19-25, 89: 1-23;  
8 See Exhibit 35). Accordingly, the element of common ownership has been satisfied.

9 **2. The Use Of Roads Over The Odd Fellows' Property Existed, And Was**  
10 **Intended To Be Permanent, When The Boy Scouts And The Odd Fellows**  
11 **Property Was Initially Served.**

12 The Boy Scouts have satisfied the second element of an easement by implication because  
13 the use of roads over Odd Fellows property to access Camp Cedarbrook existed, and was  
14 intended to be permanent, at the time the two parcels were severed. The doctrine of easement by  
15 implication has been applied by the courts to carry out the intention of the parties as manifested  
16 by the facts and circumstances of the transaction. 6 Miller & Starr, Cal. Real Estate (3d ed. 2000)  
17 § 15.20, p. 82. In Fristoe v. Drapeau, 35 Cal.2d 5, 9-10 (1950), the California Supreme Court  
18 held that prior existing and known use is one factor to be used in determining the creation of an  
19 easement by implication, but also found that "consideration must be given not only to the actual  
20 uses being made at the time of severance, but also to such uses as the facts and circumstances  
21 show were within the reasonable contemplation of the parties at the time of the conveyance."  
22 Additionally, California Courts of Appeal have ruled that, if the subject parcels are conveyed to  
23 two or more grantees, the likelihood an easement was intended is greater than in other situations,  
24 as a reasonable inference can be made that a grantor who has divided land among several  
25 grantees intends the privileges of use to be shared by them all. McCarthy v. Watson, 212  
26 Cal.App.2d 39, 43-44 (1963); Gagnon v. Adamson, 122 Cal.App.2d 253, 260 (1953).

27 During trial, Edward Smith testified that he had visited the Odd Fellows property in 1948  
28 with his father (R. at 374: 12-14). To access the property, and to get to the area where the eastern  
and the western portions of Jordan Way split, Smith took the current Wheeler Road, which had

1 been built recently at the time (R. at 375: 13-22). Smith also testified that there was another road  
2 that existed on the property at that time: Old Wheeler Road (R. at 378: 1-11; See Exhibits 48-56)  
3 It is quite likely that when the Boy Scouts' property and the Odd Fellows' property were severed  
4 in 1929, the parties to the transaction intended that Old Wheeler Road be used by the owner of  
5 the Boy Scout property to access his/her property from Highway 108. Testimony at trial shows  
6 that the Boy Scouts property was transferred to a Boy Scout group shortly after the severance of  
7 the two parcels (R. at 89: 6-11; See Exhibit 35). This group undoubtedly used the property for  
8 camping purposes, and would have accessed the campgrounds from Highway 108 via Old  
9 Wheeler Road. When the Odd Fellows purchased their property in 1949, they constructed the  
10 current version of Wheeler Road (R. at 410: 6-9) and eventually put berms to block usage of Old  
11 Wheeler Road at a time no earlier than 1972 (R. at 414: 16-25; See Exhibits 48-51). Such  
12 blockage did not concern the Boy Scouts because they had been using the current Wheeler Road  
13 and Jordan Way to access their property by that time (R. at 400: 17-23; 893: 7-16).

14 It is clear that, at the time of the severance of the two parcels owned by the Boy Scouts  
15 and the Odd Fellows, a road existed, Old Wheeler Road, on what is now the Odd Fellows  
16 property. Old Wheeler Road was used to access what is now Camp Cedarbrook both before and  
17 after the severance of the two parcels in 1929. The surrounding facts and circumstances lead to  
18 the conclusion that when E.O. Sylvester severed the two parcels in question in 1929, he must  
19 have necessarily intended that the means by which the future owners of what is now Camp  
20 Cedarbrook would have access to their property would have been via Old Wheeler Road.  
21 Subsequently, the Boy Scouts relied on the current Wheeler Road for access when the Odd  
22 Fellows blocked it with berms and, thereby, acquiesced to the usage of Wheeler Road. Thus, the  
23 Boy Scouts satisfy the requirement that the roads by which they access their property were  
24 intended for such access when the original property was severed.

25 **3. Use Of Wheeler Road And Jordan Way Is Reasonably Necessary To The**  
26 **Enjoyment Of The Boy Scouts Property.**

27 The Boy Scouts also satisfy the third element of an easement by implication because  
28 Wheeler Road and Jordan Way are reasonably necessary to the enjoyment of Camp Cedarbrook.

1 An easement will be implied in a sale or division of property when it is reasonably necessary for  
2 the beneficial enjoyment of the quasi-dominant tenement. Leonard v. Haydon at 266. The  
3 requirement of reasonable necessity for use and enjoyment of the dominant tenement is  
4 equivalent to the statutory requirement that the easement be "for the benefit of" the dominant  
5 tenement. 6 Miller & Starr, Cal. Real Estate (3d ed. 2000) § 15.22, p. 88. Thus, an easement  
6 may be implied even though it is not essential to the dominant tenement and even though there is  
7 other suitable access or easement, or where the grantee could easily establish a substitute for the  
8 easement on his or her own property. Owsley v. Hamner, 36 Cal.2d 710, 717 (1951).

9 The concept of reasonable necessity has also been framed by the courts in terms of the  
10 "importance" of the claimed access to a property. California Real Estate Law and Practice, Ch.  
11 343, §343.15, p. 343-50, *Easements and Licenses* (Matthew Bender) (citing Powell on Real  
12 Property, ¶ 411.) Under this test, a use will be found to be reasonably necessary if it is  
13 "important" to the enjoyment of the conveyed land.

14 In addition to being strictly necessary to the use of Camp Cedarbrook (See § B. 2.), the  
15 use of Wheeler Road and Jordan Way is important, and thus, "reasonably" necessary, to the use  
16 of Camp Cedarbrook because it is the means by which campers and camp staff access the camp  
17 (R. at 97: 17-25, 98: 1-8). At times, the camp was occupied by upwards of one hundred campers  
18 (R. at 85: 4-6). While Wheeler Road and Jordan Way are paved and in good condition (R. at 98:  
19 16-22), the only other potential means of access to Camp Cedarbrook, Long Barn Sugar Pine  
20 Road, is in poor condition, with ruts, has not been maintained for years (R. at 568: 7-17; 639: 15-  
21 18: 522: 9-11), is not passable in the winter (R. at 99: 11-14; 334: 16-24), and does not provide  
22 access to the most vital portions of the camp (See Exhibit 2) Use of Wheeler Road and Jordan  
23 Way provides a substantially shorter drive time from Highway 108 as well (R. at 166: 2-14). In  
24 fact, without the use of Wheeler Road and Jordan Way, a contractor employed by the Boy Scouts  
25 was not able to complete his work on one of the buildings on Camp Cedarbrook (R. at 20: 15-  
26 25). Testimony also shows that the value of Camp Cedarbrook would be diminished without  
27 such use (R. at 166: 15-19). Thus, the Boy Scouts' use of Wheeler Road and Jordan Way  
28 satisfies the "reasonable necessity" requirement.

1 The Boy Scouts have shown that their property and the Odd Fellows' property were under  
2 common ownership, that roads over what is now Odd Fellow property were used prior to the  
3 severance of the parcels and were intended to be used in the future to access what is now Camp  
4 Cedarbrook. Furthermore, the evidence establishes that the use of the Odd Fellows' roads is  
5 reasonably necessary to the Boy Scouts. Therefore, the Boy Scouts have satisfied all of the  
6 elements of an easement by necessity.

7 **D. THE DOCTRINE OF PROMISSORY ESTOPPEL BARS THE ODD FELLOWS**  
8 **FROM DENYING THE BOY SCOUTS' EASEMENT RIGHTS OVER THEIR**  
9 **PROPERTY**

10 As to the doctrine of promissory estoppel, 1 Witkin, Summary 9<sup>th</sup> (1987) Contracts § 248,  
11 p. 249-50 states:

12 In its usual application, estoppel is based upon a representation of fact which the party is  
13 not permitted to deny. The doctrine of *promissory estoppel* is distinct, and applies even  
14 though there is no misrepresentation: One who makes a promise upon which another  
15 justifiable relies may be bound to perform it, despite lack of consideration, i.e., the  
16 estoppel is a substitute for consideration.

17 As to the same, Restatement (Second) of Contracts § 90 states:

18 A promise which the promisor should reasonably expect to induce action or  
19 forbearance on the part of the promisee or a third person and which does induce such  
20 action or forbearance is binding if injustice can be avoided only by enforcement of the  
21 promise. The remedy granted for breach may be limited as justice requires.

22 Courts have interpreted this rule as having four elements: (1) a promise clear and  
23 unambiguous in its terms; (2) reliance by the party to whom the promise is made, (3) the  
24 promisee's reliance must be both reasonable and foreseeable; and (4) the promisee must be  
25 injured by his or her reliance. Maria B. v. Superior Court, 118 Cal.App.4<sup>th</sup> 966, 980 (2004)  
26 (citing Laks v. Coast Fed. Sav. & Loan Assn., 60 Cal.App.3d 885, 890 (1976)); Thomson v.  
27 International Alliance of Stage Employees, 232 Cal.App.2d 446, 454 (1965).

28 **1. The Odd Fellows Promised The Boy Scouts That They Would Not Interfere**  
**With Their Easement Rights Over Wheeler Road And Jordan Way If The**  
**Boy Scouts Supported The Odd Fellows' Efforts to Abandon Long Barn**  
**Sugar Pine Road.**

The Odd Fellows made a clear and unambiguous promise to the Boy Scouts that the Odd  
Fellows would not interfere with the Boy Scouts' easement rights across Odd Fellow property if  
the Boy Scouts supported the Odd Fellows' petition to abandon the portion of Long Barn Sugar

1 Pine Road that crosses Odd Fellows' property. In 1991, the Odd Fellows, led by their president  
2 Edward Smith, petitioned the County of Tuolumne to abandon the portion of Long Barn Sugar  
3 Pine Road that crossed its property (See Exhibits 42, 76). The Odd Fellows asked the Boy  
4 Scouts if they would join their petition to abandon the roadway (R. at 689: 15-24; 765: 20-25;  
5 766: 5-11; 767: 13-16). The Boy Scouts, led by their president Gary Thomas, sent a letter, dated  
6 December 18, 1991, to the Odd Fellows stating that "...the Alameda Council has no objection to  
7 your proposal [i.e., abandonment of a the portion of Long Barn Sugar Pine Road] providing that  
8 we can maintain easement rights through the property to access our camp facility" (See Exhibit  
9 28). In a letter to Allen Roberts, Acting Director, Engineering Services, County of Tuolumne,  
10 dated February 1, 1992, Alvin Kidder, President of Camp Cedarbrook Trustees, stated that "[t]he  
11 Trustees of Camp Cedarbrook favor the abandonment of the Bottine Apple Road [sic.] as long as  
12 we continue to have access to our Camp thru [sic.] the Odd Fellows Park, which we have used  
13 without restriction for over fifty (50) years" (See Exhibit 76). Edward Smith of the Odd Fellows  
14 sent a letter to Alvin Kidder dated February 7, 1992, stating that "[i]t has never been our  
15 position to deny the scouts access to their property, via our roads" (See Exhibit 23)  
16 (Emphasis Added.). Minutes from the County of Tuolumne Board of Supervisors meeting of  
17 February 11, 1992 show that, accordingly, Kidder attended the meeting and spoke in favor of the  
18 Odd Fellows' request to abandon (See Exhibit 85). The Board of Supervisors granted the  
19 request, as memorialized in Resolution No. 33-92 (See Exhibit 71). It is clear, particularly in the  
20 letters of December 18, 1991 and February 7, 1992, that the Odd Fellows promised not to  
21 interfere with the Boy Scouts easement rights over their property in exchange for the Boy Scouts'  
22 assistance in petitioning for abandonment of the portion of Long Barn Sugar Pine Road that  
23 crosses the Odd Fellows' property. Thus, the Odd Fellow made a clear and unambiguous  
24 promise to the Boy Scouts.

25 ///



1  
2           **2. The Boy Scouts Justifiably Relied On The Odd Fellows' Promise Not To**  
3           **Interfere With The Boy Scouts' Easement Rights Over Wheeler Road And**  
4           **Jordan Way.**

5           The Boy Scouts justifiably relied on the Odd Fellows' promise to not interfere with the  
6 Boy Scouts' easement rights in exchange for the Boy Scouts' assistance in petitioning for  
7 abandonment of a portion of Long Barn Sugar Pine Road. The Boy Scouts' former president,  
8 Gary Thomas, testified that he would not have supported the Odd Fellows' application to  
9 abandon the portion of Long Barn Sugar Pine Road that went through the Odd Fellows' property  
10 if he knew that the Odd Fellows would later claim that the Boy Scouts did not have easement  
11 rights to access Camp Cedarbrook:

12           Q. If you knew that the Odd Fellows were going to later claim that the Boy Scouts  
13 did not have an easement right through its property to Camp Cedarbrook, would  
14 you have written the letter which is Exhibit 28, sir?

15           A. If I had any inclination in any way, shape or form, I would have never signed the  
16 letter. Absolutely no.

17 (R. at 772: 2-6, 22-24). The Boy Scouts not only did not object to the Odd Fellows' request for  
18 the road abandonment, but went so far as to support the request (See Exhibits 28, 85). This was  
19 clearly done in reliance on the Odd Fellows' promise not to interfere with the Boy Scouts'  
20 easement rights across their property.

21           **3. The Boy Scouts' Reliance on the Odd Fellows' Promise To Not Interfere**  
22           **With The Boy Scouts' Easement Rights Over Wheeler Road And Jordan**  
23           **Way Was Reasonable and Foreseeable.**

24           The Boy Scouts' reliance on the Odd Fellows' promise to not interfere with the Boy  
25 Scouts' easement rights was reasonable and foreseeable. Edward Smith testified that the Boy  
26 Scouts and the Girl Scouts had used Wheeler Road and Jordan Way for as long as he had been  
27 involved in the Odd Fellows property (R. at 893: 7-16). He also testified that the Boy Scouts had  
28 used Wheeler Road and Jordan Way both before and after the Odd Fellows had requested and  
were granted the abandonment of a portion of Long Barn Sugar Pine Road (R. at 895: 2-9).  
Furthermore, Gary Thomas' letter, dated December 18, 1991, to Edward Smith indicates that the

1 would have known that the Odd Fellows would renege on its promise and later deny it access to  
2 Camp Cedarbrook. Thus, the third element of equitable estoppel is satisfied.

3 **4. The Boy Scouts Relied Upon The Conduct Of The Odd Fellows To Their**  
4 **Injury.**

5 The Boy Scouts have been injured by their reliance upon the Odd Fellows' promise to not  
6 interfere with their easement rights. As stated above, the Boy Scouts would not have consented  
7 to the abandonment of the County road over the Odd Fellows' property that provided them with  
8 access to Camp Cedarbrook had they known that the Odd Fellows would later deny them their  
9 rightful easement rights over Wheeler Road and Jordan Way (R. at 772: 2-6; 22-24). Now that  
10 the Odd Fellows have reneged on their promise to not interfere with the Boy Scouts' easement  
11 rights over their property, the Boy Scouts have not been able to: (1) use Camp Cedarbrook for  
12 camping purposes (R. at 311: 18-22), (2) access their camp in the winter (R. at 99: 11-14; 334:  
13 16-24), (3) access the important structures on their camp (R. 292: 2-6; 311: 18-22), (4) repair and  
14 maintain the structures on their camp (R. at 20: 15-25), and (5) have a full-time ranger living and  
15 working on their camp (R. at 17: 10-19; 76: 3-7). The value of Camp Cedarbrook has  
16 diminished as well (R. at 166: 15-25, 167: 1-11). Thus, the fourth element of equitable estoppel  
17 is satisfied.

18 The Boy Scouts have shown that: (1) the Odd Fellows were apprised of all the facts  
19 relating to the Boy Scouts' easement rights and Odd Fellows' promise not to interfere with such  
20 rights in exchange for the Boy Scouts' promise to support the Odd Fellows' petition for  
21 abandonment, (2) the Odd Fellows intended that the conduct, by way of their promise to the Boy  
22 Scouts, be acted upon, (3) the Boy Scouts were ignorant of the fact that the Odd Fellows would  
23 later deny the Boy Scouts' easement rights, and (4) the Boy Scouts relied on the Boy Scouts'  
24 promise to their injury. Therefore, the Boy Scouts have satisfied all of the necessary elements of  
25 equitable estoppel and are entitled to an easement over Wheeler Road and Jordan Way.

26 ///

**PROOF OF SERVICE**

I am a citizen of the United States and am employed in Stanislaus County, California. I am over the age of eighteen (18) years and not a party to this action; my business address is 1601 I Street, Fifth Floor, Modesto, California 95354.

On July 30, 2004, I served the following document: **PLAINTIFF ALAMEDA BOY SCOUTS FOUNDATION'S CLOSING BRIEF** by placing a true copy thereof enclosed in a sealed envelope and served in the manner and/or manners described below to each of the parties herein and addressed as follows:

Roger A. Brown, Esq.  
38 North Washington Street  
P.O. Box 475  
Sonora, CA 95370  
Fax: (209) 533-7757

Honorable William H. Polley  
Department One  
41 West Yaney Street  
Sonora, CA 95370  
Telephone: (209) 533-5555

X **BY MAIL:** I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated. I am readily familiar with Damrell, Nelson, Schrimp, Pallios, Pacher & Silva's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

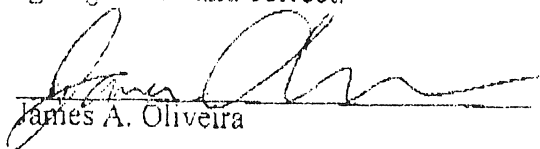
XXX **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the addressee(s) designated above.

— **BY OVERNIGHT COURIER SERVICE (Federal Express):** I caused such envelope(s) to be delivered via overnight courier service to the addressee(s) designated.

X **BY FACSIMILE:** I caused said document to be transmitted to the telephone number(s) of the addressee(s) designated.

Executed at Modesto, California on July 30, 2004

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

  
James A. Oliveira