

STATE OF NEW MEXICO
COUNTY OF MORA
FOURTH JUDICIAL DISTRICT

NO. D430-CV-2006-00030

ROQUE MAES,

Plaintiff,

v.

JACK ARTHUR RAINS and SHELLEY HELEN
RAINS, husband and wife, and ALL UNKNOWN
CLAIMANTS OF INTEREST IN THE PREMISES
ADVERSE TO PLAINTIFF,
Defendants.

ENDORSED
Fourth Judicial District Court
San Miguel, Mora & Guadalupe

DEC 03 2007

Fred A. Sena
District Court Clerk
o.l.i.
Deputy Clerk

**FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

General Jurisdiction

1. This Court has jurisdiction over the subject matter of this proceeding and has personal jurisdiction over the parties hereto; venue is proper in this Court.

Evidentiary Support. Consolidated Pretrial Order; Uncontroverted fact.

2. Plaintiff Roque Maes is the owner of the real property and improvements located at Holman, within Mora County, New Mexico, being a tract of land comprising a house and lot more particularly described as:

Bounded on the north by the public road used by the people of Holman (which leads to the Catholic and Presbyterian churches),
on the south by property of Eusebio or Agustina Arellano;
on the west by the Agua Negra Mission;
on the east by property of Ventura Medina or Cirelio Maestas;

the same is described in that certain Warranty Deed dated June 5, 1965 wherein Jose T. and Amalia A. Maes are grantors and Roque Maes and his heirs are grantee, which deed was filed for

record June 4, 1976, recorded in Book D-29, Pages 633-634 of the Warranty Deeds Records of the Clerk of Mora County, New Mexico (hereinafter, the "Maes Property").

Evidentiary Support. Consolidated Pretrial Order; Uncontroverted fact.

3. Defendants are the owners of a tract of land which adjoins the above-described property of the Plaintiff Roque Maes, to the west of his property, more particularly described as:

A tract of land within the Mora Grant, in projected Section 19, Township 21 North, Range 15 East, NMPM in the vicinity of Holman, Mora County, New Mexico, containing 1.038 acres, more or less, as shown on plat of survey by Winston & Associates, Inc., dated August 8, 1995, drawing no. 95062, filed in the office of the Mora County Clerk, August 9, 1995 as plat no. 227-B and revised July 8, 1997, drawing No. 97084, filed in the office of the Mora County Clerk, July 9, 1997 as plat no. 339-B.

as the same is described in that certain Warranty Deed dated July 10, 1997, wherein Russell R. Hanks and Lavon Hanks are grantors and Shelly Helon Rains and Jack Arthur Rains are grantees, which deed was filed for record July 11, 1997, recorded in Book 72, Page 331 of the records of deeds of the Clerk of Mora County, New Mexico (hereinafter, the "Rains Property").

Evidentiary Support. Consolidated Pretrial Order; Uncontroverted fact.

4. The Maes Property fronts on a dirt road, Dos Iglesias Road, the same dirt road that traverses the northerly boundary of the Rains Property. The Maes Property is a deep, narrow tract, the northerly road frontage of which is almost entirely occupied by the house on the Maes Property.

Evidentiary Support. Consolidated Pretrial Order; Uncontroverted fact.

5. The house on the Maes property was constructed in approximately 1939 by Jose Tomas Mesa and Amalia Maes, the parents of Roque Maes. It was occupied by the Maes family including Roque Maes until the early 1960's, when they moved to a home across Dos Iglesias

Road. It was then occupied by tenants until the early to mid-1970's. (Testimony of Jose Benito Trujillo.)

6. The driveway was regularly used by the Maes family and their tenants in a peaceable, open, notorious, adverse and uninterrupted manner under claim of right commencing no later than 1939, continuing until April 1985. (Testimony of Tomas Maes, Maes Siblings, Fidelia Maes, Francisco Maes, Ruben Maes, Michael Esquibel, Elias Hurtado, George Montoya, Moises Maestas, Juan Felix Archuleta, Jose Benito Trujillo, Peter Ricky Lucero, Rudy Padilla, Ella Arellano, Russell and Lavon Hanks.)

7. Prior to 2002, there was a fence with a gate along the westerly terminus of the Rains Property. In 2002, the Defendants constructed a new section of fence that closed off access to the gate in the old fence. Defendants have maintained the new section of fence continuously thereafter.

Evidentiary Support. Consolidated Pretrial Order; Uncontroverted fact.

Prescriptive Use of Alleged Roadway By Russell and Lavon Hanks; Plaintiff's Nonuse; Infrequent Use by Plaintiff's Relatives

8. From April 1985 until July 1997 (twelve years) Russell and Lavon Hanks (the "Hanks"), blocked access to the Alleged Roadway by placing a lock on the southwest gate of the Alleged Roadway.

Evidentiary Support. Testimony of Russell Hanks; Testimony of Lavon Hanks.

9. From 1985 until 1997 there were only two occasions in which the Hanks allowed relatives of the Plaintiff to use the southwest gate of the Alleged Roadway and both times it was with permission.

Evidentiary Support. Testimony of Russell Hanks; Testimony of Lavon Hanks.

10. Andres Maes knew about the lock being placed on the southwest gate to block access to the Alleged Roadway as he asked Russell Hanks about his action. Russell Hanks indicated that since the property was private property he had a right to block access to his property.

Evidentiary Support. Testimony of Russell Hanks.

11. Tomas Maes, Sr. told Tomas Maes, Jr. that a lock was put on the southwest gate of the Alleged Roadway.

Evidentiary Support. Testimony of Tomas Maes, Jr.

12. The Rains Property did not have a septic system during the time period that the Hanks owned the property (1985-1997), but only had a cesspool that caused gray water to run down the property toward the arroyo on the south and to pool on the southeast end of the property.

Evidentiary Support. Testimony of Russell Hanks.

13. Driving on the Alleged Roadway more than one time would cause vehicles to get stuck in a mud bog near the east side of the Rains Property at the entrance of the old southwest gate to the Maes Property.

Evidentiary Support. Testimony of Russell Hanks.

Existence of Alleged Roadway

14. A survey of the Rains Property was performed by Winston & Associates, Inc., dated August 8, 1995 and an update of the survey was performed by Winston & Associates dated July 8, 1997 (the "Surveys").

Evidentiary Support. Consolidated Pretrial Order; Testimony of Edward Winston, surveyor.

15. Mr. Winston, who performed the Surveys, saw no evidence of a two-track roadway or any other evidence of a roadway traversing the southerly edge of the Rains Property, along the northerly edge of the ditch which lies between the lands of the Defendants and the property to the south belonging to Ella Arellano, running from Dos Iglesias/County Road in an easterly direction to the Maes Property (the "Alleged Roadway").

Evidentiary Support. Testimony of Edward Winston.

16. If Mr. Winston would have seen evidence of vehicular use along the Alleged Roadway he would have indicated a roadway on his Surveys.

Evidentiary Support. Testimony of Edward Winston, surveyor.

17. The Surveys, as filed in the office of the Mora County Clerk, show no indication of the Alleged Roadway as a two-track road or as any other type of road, or as an easement for ingress and egress.

Evidentiary Support. Defendants' Exhibit A; Testimony of Edward Winston.

18. The August 1, 1996 aerial photograph of the Maes Property and the Rains Property is a fair and accurate representation of the Alleged Roadway area both in August 1995 and in July 1997. The aerial photograph does not show evidence of vehicular use of the Alleged Roadway from the southerly edge of the Rains Property running in an easterly direction to the Maes Property.

Evidentiary Support. Testimony of Edward Winston.

19. The Department of Transportation aerial photograph taken in May 1973 does not show a two track roadway at the east boundary of the Rains Property and the west boundary of the Maes Property where the south gate to the Maes Property was located.

Evidentiary Support. Testimony of Francisco Luciano Maes.

20. During the early to mid 1950's the Plaintiff's family moved livestock along either side of the ditch which separates the Rains Property and the property to the south belonging to Ella Arellano.

Evidentiary Support. Testimony of Ruth Fort.

21. In 1997, when the Hanks sold the property to Rains, Russell Hanks removed the lock from the gate. (Testimony of Russell Hanks.)

22. In 2002, the Defendants Rains made a request conveyed through Tomas Maes that Roque cover the well at the rear of the Maes property. In summer 2002, Roque Maes and his wife Fidelia Maes traversed the driveway in his truck for purposes of fencing and covering the well. Roque Maes attempted to place a lock on the west wire gate and offered a key to the Defendants; Jack Rains refused the key and told Roque Maes he could not use the driveway. Subsequently, the Defendants constructed a new section of fence on Dos Iglesias Road outside the wire gate. (Testimony of Jack Rains, Shelley Rains, Tomas Maes, Roque Maes, Fidelia Maes.)

Prescriptive Easement after 1985

23. Plaintiff established a prescriptive easement based on his use of the Roadway for a specific ten year period prior to 1985.

24. Plaintiff failed to prove a prescriptive easement based upon his failure to use the Roadway continuously and uninterrupted after April 1985.

Evidentiary Support. Testimony of Russell Hanks; Testimony of Lavon Hanks.

25. Plaintiff failed to prove all elements of a prescriptive easement by clear and convincing evidence after April 1985.

Evidentiary Support. Absence of evidence.

CONCLUSIONS OF LAW

THE COURT CONCLUDES AS FOLLOWS:

1. This Court has jurisdiction over the persons and subject matter.
2. An easement by prescription is created by an adverse use of land, that is open or notorious, and continued without effective interruption of for the prescriptive period (of ten years).

Legal Support. *Algermissen v. Sutin*, 2003-NMSC-1 ¶10, 133 N.M. 50, 54 (2003).

3. Plaintiff has the burden of establishing a prescriptive easement by clear and convincing evidence.

Legal Support. *Id.* at 2003-NMSC-1 ¶9, 133 N.M. at 54.

4. An easement arising from prescription may be lost by nonuse for a period that generally follows the prescriptive period.

Legal Support. *Andrews v. Hatten*, 794 So.2d 1184, 1188 (Ala. Civ. App. 2001) (holding that any period of nonuse of an easement by prescription “must extend for the entire prescriptive period in order to terminate the prescriptive easement.”); *Owners Assoc. of Foxcroft Woods, Inc. v. Foxglen Associates*, 57 S.W.3d 187, 195 (Ark. 2001) (holding that “a prescriptive easement may be abandoned by more than seven years of nonuse.”); *Cook v. Grand River Hydroelectric Power Co.*, 346 N.W.2d 881, 884 (Mich. Ct. App. 1984) (holding that prescriptive flowage easements may be abandoned if it shown that continuous nonuse of the easements lasted for 15 years.); Cal. Civ. Code § 887.050 (2007); Official Code Ga. § 44-9-6 (2007).

5. In New Mexico, the prescriptive period is ten years.

Legal Support. *Algermissen*, 2003-NMSC-1 at ¶10, 133 N.M. at 54.

6. Because of the lack of evidence that Plaintiff personally and continuously used the Alleged Roadway between April 1985 and July 1997 there is sufficient evidence to find that

Plaintiff has not used the Alleged Roadway for the prescriptive period of ten years. Accordingly, any prescriptive easement that may have existed in Plaintiff's favor has been extinguished by his nonuse.

Legal Support. *Andrews*, 794 So.2d at 1188; *Owners Assoc. of Foxcroft Woods, Inc.*, 57 S.W.3d at 195; *Cook*, 346 N.W.2d at 884; Cal. Civ. Code § 887.050 (2007); Official Code Ga. § 44-9-6 (2007); *Algermissen*, 2003-NMSC-1 at ¶10, 133 N.M. at 54.

7. The sporadic use by Plaintiff of the southwest gate of the Alleged Roadway, such use is not sufficient to meet the element of continuousness for establishing a prescriptive easement after 1985.

Legal Support. *Algermissen*, 2003-NMSC-1 at ¶23, 133 N.M. at 58.

8. Use of an easement may be interrupted by a physical act of the servient tenement, such as by blocking access to the property.

Legal Support. *Id.* at 2003-NMSC-1 ¶23, 133 N.M. at 58

9. When the Hanks blocked access to the Alleged Roadway by placing the southwest gate under lock and key from April 1985 to July 1997, they interrupted any use Plaintiff or his predecessors made of the Alleged Roadway.

Legal Support. *Id.*

10. A prescriptive easement once acquired can be extinguished by actions of the servient tenement which satisfy the same elements required for the creation of the easement.

Legal Support. *Luevano v. Maestas*, 117 N.M. 580, 584, 874 P.2d 788, 792 (Ct. App. 1994) (holding that “[a]n easement is extinguished by prescription through a use made by the possessor of a servient tenement of land in his own possession.”); *Zimmer v. Dykstra*, 39 Cal. App. 3d 422, 435 (Cal. Ct. App. 1974) (stating that a prescriptive easement can be extinguished by the

servient tenement's subsequent prescription) disapproved on other grounds by *Douglas v. Ostermeier*, 1 Cal. App. 4th 729, 744 n. 1 (Cal. Ct. App. 1991); see also Restatement of Property § 506 cmt. b (1944).

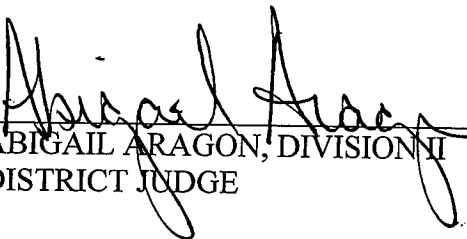
11. The physical act of blocking access to the Alleged Roadway by placing the southwest gate under lock and key was adverse to the Plaintiff and his predecessors, was open or notorious, and continued without effective interruption for more than ten years.

Legal Support. *Algermissen*, 2003-NMSC-1, 133 N.M. 50.

12. Therefore, to the extent Plaintiff had a prescriptive easement in his favor, said easement has been extinguished by prescription.

Legal Support. *Algermissen*, 2003-NMSC-1, 133 N.M. 50. *Luevano*, 117 N.M. at 584, 874 P.2d at 792 (Ct. App. 1994); *Zimmer v. Dykstra*, 39 Cal. App. 3d 422 at 435; Restatement of Property § 506 cmt. b (1944).

November 28, 2007


ABIGAIL ARAGON, DIVISION II
DISTRICT JUDGE