IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS E. HORNISH AND SUZANNE J. HORNISH JOINT LIVING TRUST, TRACY AND BARBARA NEIGHBORS, ARUL MENEZES AND LUCRETIA VANDERWENDE, LAKE SAMMAMISH 4257 LLC, HERBERT MOORE AND ELYNNE MOORE, AND EUGENE MOREL AND ELIZABETH MOREL,

Plaintiffs,

vs.

KING COUNTY, a home rule charter county,

Defendants.

Case No.: 2:15-cv-00284-MJP

PLAINTIFFS' BRIEF IN OPPOSITION TO KING COUNTY'S MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: February 19, 2016

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

King County filed their Motion for Summary Judgment on January 28, 2016 (Doc. 46). Because King County's Motion is inappropriate for a variety of reasons, including legal issues that should be decided in Plaintiffs' favor as a matter of law, including numerous factual issues that make summary judgment inappropriate, and including several procedural errors with respect to width issues and remand and standing issues, Plaintiffs respond to each section of King County's brief and separately file their own cross-motion for summary judgment on the underlying legal issues.

King County makes 4 basic arguments, all of which fail for different reasons, as follows:

1) King County asserts that it is entitled to summary judgment because it holds a valid railroad easement under the Trails Act, which is incorrect as a matter of law because the railroad purposes easement has been extinguished except for future use as a railroad, and has now been replaced by an easement for a hiking and biking trail on an interim basis (discussed in Section II *infra* and Plaintiffs' contemporaneous motion for summary judgment);

2) King County asserts that it is entitled to summary judgment against the Hornish Plaintiffs because the original source conveyance to the railroad conveyed a fee interest, which is not true under an avalanche of controlling precedent from the Washington Supreme Court (discussed in Section III *infra*);

3) King County asserts it is entitled to a ruling that the corridor is 100 feet wide adjacent to the prescriptive easement portions of the corridor, which is not true as a matter of law, as a matter of fact, or as a matter of procedure (discussed in Section IV *infra*); and

4) King County asserts that they are entitled to summary judgment because Plaintiffs lack standing under the centerline presumption because their deeds expressly exclude the corridor, which is simply false as a matter of law, as a matter of fact based on what the deeds say, and as a matter of procedure

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since this Court has already ruled on that subject (discussed in Section V *infra*).

II. THE TRAILS ACT PRESERVES CORRIDORS FOR POSSIBLE FUTURE RAILROAD USES AND THE ONLY CURRENT USE AVAILABLE TO KING COUNTY IS TO BUILD A TRAIL

Under the Trails Act, the preservation of railroad corridors for possible future reactivation as a railroad is called "railbanking." Under the Trails Act, while the railroad corridor is railbanked, the trail user can use the railroad corridor on an interim basis for a hiking and biking trail. Plaintiffs do not dispute that King County, as the trail user under the Trails Act, can build a hiking and biking trail. However, under the Trails Act and the cannons of construction interpreting the Act, railbanking does not preserve the railroad purposes easement for current railroad uses and King County does not currently hold or own BNSF's railroad purposes easement.

King County's motion for summary judgment on the scope of the Trails Act must fail as a matter of law. As a result, Plaintiffs response on this portion of King County's brief is contained within Plaintiffs' motion for summary judgment filed contemporaneously herewith.

III. THE HILCHKANUM DEED, WHICH APPLIES TO THE HORNISH PLAINTIFFS, CONVEYED AN EASEMENT ONLY TO THE RAILROAD

King County claims that they are entitled to summary judgment against the Hornish plaintiffs because the county owns a fee interest in the segment of the corridor adjacent to their property.[1] Unlike all of the other plaintiffs who are adjacent to areas of the corridor that the railroad acquired by prescriptive easement, the Hornish property is adjacent to a

[1] *See* Def.'s Br., Doc. 46, at p. 9.

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portion of the corridor where the railroad acquired their rights pursuant to the Hilchkanum original source conveyance deed. King County's argument is entirely based on the fact that the 9th Circuit previously ruled that the Hilchkanum deed conveyed fee ownership in *King County v. Rasmussen*, 299 F.3d 1077 (9th Cir. 2002). However, in relying on *Rasmussen*, decided in 2002, King County totally ignores subsequent controlling precedent from the Washington Supreme Court in 2006 in *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Assoc.*, 126 P.3d 16 (Wash. 2006), and attempts to relegate Judge Marian Blank Horn's thorough and most recent analysis in *Beres v. United States*, 104 Fed. Cl. 408 (Fed. Cl. 2012) to a footnote.[2]

The interpretation of whether the Hilchkanum deed conveyed an easement or fee must be determined under Washington law. In pertinent part, the Hilchkanum deed, executed in 1887, provides:

> In Consideration of the benefits and advantages to accrue to us from the location, construction and operation of the Seattle, Lake Shore and Eastern Railway in the County of King in Washington Territory we do hereby donate, grant and convey unto said Seattle, Lake Shore and Eastern Railway Company a right of way one hundred (100) fee in width through our lands in said County, described as follows to wit:
>
> Such right of way strip to be fifty (50) fee in width on each side of the center line of the railway track as located across our said lands by the Engineer of said Railway Company, which location is described as follows to wit:
>
> And the said Seattle, Lake Shore and Eastern Railway Company shall have the right to go upon the land adjacent to said line for a distance of two hundred (200) feet on each side thereof and cut down all trees dangerous to the operation of said road.

[2] *Id.* at p. 10, fn. 6.

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> To have and to Hold said premises with the appurtenances unto the said party of the second part, and to its successors and assigns forever.

Text of Hilchkanum deed, *see Beres*, 104 Fed. Cl. at 414; *see also Ray v. King County*, 86 P.3d 183, 186 (Wash, App. 2004) (emphasis added).

The Hilchkanum deed specifically grants a "right-of-way" to the railroad. Since the Washington Supreme Court, in 2006, has clearly stated that the grant of a "right-of-way" in the granting clause is the grant of an easement, the Hilchkanum deed conveyed an easement to the railroad. *See Kershaw Sunnyside Ranches*, 126 P.3d at 25. The fact that the Hilchkanum deed is entitled "Right-of-Way deed" and specifically grants a "right-of-way" in the granting clause makes the deed a conveyance of the right-of-way for railroad purposes and presumptively conveys an easement which expressly limits or qualifies the interest conveyed. *Id.* at 24-25.

King County's attempt to classify the Hilchkanum deed as a fee conveyance is both misleading and incomplete and ignores the Washington Supreme Court's determination in *Kershaw Sunnyside Ranches* subsequent to *Ray* and *Rasmussen*. Beginning in 1893, only 6 years after the Hilchkanum deed, and for over 100 years thereafter, in 7 important cases, the Washington Supreme Court concluded that the railroad received an easement only when the granting clause contained similar language.[3]

The Washington Supreme Court again addressed the issue of fee versus easement in railroad conveyances in 1996 in *Brown v. State*, 924 P.2d 908 (Wash. 1996). Unlike the

[3] *See Biles v. Tacoma*, 32 P. 211 (Wash. 1893); *Reichenbach v. Washington Shore Line Ry. Co.*, 38 P. 1126 (Wash. 1894); *Pacific Ironworks v. Bryant Lumber & Shingle Mill Co.*, 111 P. 578 (Wash. 1910). *Morsbach v. Thurston County*, 278 P. 686 (Wash. 1929); *Swan v. O'Leary*, 225 P.2d 199 (Wash. 1950); *Veach v. Culp*, 599 P.2d 526 (Wash. 1979); *Roeder Co. v. Burlington Northern, Inc.*, 716 P.2d 855 (Wash. 1986).

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7 previous pronouncements from the Washington Supreme Court, the Court in *Brown* concluded that the language of the statutory warranty deeds at issue conveyed fee interests rather than easements. Although the *Brown* Court did enunciate factors to be considered when determining whether an easement or fee was intended to be conveyed, the ultimate conclusion in *Brown* that the railroad received fee interests rather than easements was actually not unexpected at all because the deed under review never mentioned "right-of-way" anywhere in the deed, let alone in the granting clause, and specifically stated that the railroad received "fee simple title."

It was in this context, with the *Brown* "factors to be considered" as the last pronouncement from the Washington Supreme Court, that the 9th Circuit decided *Rasmussen.* However, in 2006, in *Kershaw Sunnyside Ranches*, the Washington Supreme Court again considered whether a railroad right-of-way can be conveyed an easement or a fee interest and, like all of the previous decisions except for *Brown*, concluded that an easement was conveyed to the railroad. *See Kershaw Sunnyside Ranches,* 126 P.3d at 25.

The Washington Supreme Court began its analysis by reviewing the historical precedent as set forth in *Morsbach, Swan, Veach, Roeder,* and *Brown.* Most importantly, the Court in *Kershaw Sunnyside Ranches* specifically stated that the *Brown* decision had not overturned all of the established precedent on railroad rights-of-way established in *Morsbach, Swan, Veach,* and *Roeder* but, "rather it distinguished them on the limited basis that none of the deeds at issue in *Brown* possessed language relating to the purpose of the grant or limiting the estate conveyed." *Id.* at 22-23 (emphasis in original). Finally, the Court in *Kershaw Sunnyside Ranches* concluded that the *Brown* decision merely "refined the

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principle relied on in *Morsbach, Swan, Veach,* and *Roeder* and suggests a more thorough examination of the deed is appropriate." *Id* at 23.

The Washington Supreme Court in *Kershaw Sunnyside Ranches* determined that, "[1]ike the cases finding an easement, and unlike the deeds in *Brown,* the word [sic] 'right of way' is used to establish the purpose of the grant and thus presumptively conveys an easement interest." *Id* at 23. Specifically, the Court concluded:

> Here the deed appears to contain elements characteristic of both a fee an easement conveyance. In short, the deed is in statutory warranty form, which carries a presumption of conveying fee, but contains the words "right-of-way" in both the granting clause and the habendum clause, which we have stated presumptively evinces the parties' intent to convey only an easement.

Kershaw Sunnyside Ranches, 126 P.3d at 23 (emphasis added).

The Court then analyzed the 7 *Brown* factors. Ultimately, in analyzing the language of the deed at issue, the Court in *Kershaw Sunnyside Ranches* held that "there is insufficient evidence to overcome the presumption that an easement was created." *Id.* (emphasis added). Finally, like all of the cases over 100 plus years before the Washington Supreme Court, the Court concluded that the words "right-of-way" were used to establish the purpose of the grant and thus presumptively conveys an easement interest. *Id.* at 23.

King County is attempting to mislead this Court. The fact is that the Hilchkanum deed must be analyzed under the most recent pronouncement from the Washington Supreme Court on the subject in *Kershaw Sunnyside Ranches,* and *Kershaw Sunnyside Ranches* specifically concluded that a presumption of an easement exists when the phrase "right-of-way" is used to define the purpose of the grant. In fact, King County further misleads this Court by basically ignoring the *Beres* opinion which, in a thorough opinion

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written by Judge Horn, concluded that the Hilchkanum deed conveyed an easement to the railroad. *See Beres*, 104 Fed. Cl. at 430-431.

Judge Horn's conclusion in *Beres* may not be binding on this Court, but the pronouncement from the Washington Supreme Court in *Kershaw Sunnyside Ranches* should be controlling. Since *Kershaw Sunnyside Ranches* is the last pronouncement by the Washington Supreme Court on this subject, and since a presumption of easement exists when a grant of a "right-of-way" occurs, the Hilchkanum deed must be construed as an easement conveyance under Washington law.

IV. THE WIDTH OF THE CORRIDOR FOR TRAIL PURPOSES IS BASED ON THE WIDTH OF THE RAILROAD'S PRIOR USE AS A RAILROAD

For the prescriptive easement parcels, King County claims a 100 foot wide interest in the former railroad corridor. King County is simply wrong and their motion for summary judgment on the width issue should be denied because (1) the corridor was obtained as a prescriptive easement, not adverse possession, and the width is determined by prior use under state law; (2) the width issue is a state law issue as this Court has already determined; and (3) factual issues concerning the width would preclude summary judgment in any event.

A. The Railroad Only Held an Easement by Prescription and Did Not Adversely Possess the Railroad Corridor In Fee Under Washington Law

The Washington Supreme Court, quoting from the Corpus Juris Secundum on Easements, has indicated that "'[w]here an easement is acquired by prescription, the extent of the right is fixed and determined by the user in which it originated, or, as it is sometimes expressed, by the claim of the party using the easement and the acquiescence of the owner of

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the servient tenement.'" *Northwest Cities Gas Co. v. Western Fuel Co.*, 135 P.2d 867, 868–69 (1943) (quoting 28 C.J.S., Easements § 74, p. 751); *see also Lee v. Lozier*, 945 P.2d 214, 220 (Wash. App. 1997) (citing *Northwest Cities Gas Co. v. Western Fuel Co.*, 135 P.2d at 868–69 and Restatement of Property § 477, at 2992 (1944)) ("The extent of the rights acquired through prescriptive use is determined by the uses [sic] through which the right originated."); *Mahon v. Haas*, 468 P.2d 713, 716 (1970) ("The extent of any prescriptive rights based upon such adverse possession is fixed and determined by the user in which it originated, and prescriptive rights once acquired cannot be terminated or abridged at the will of the owner of the servient estate.").

The State of Washington Supreme Court also has written that "[t]here is a marked distinction between the extent of an easement acquired under a claim of right [prescriptive easement] and the scope of one acquired under color of title [adverse possession]. When one seeks to acquire an easement by prescription under a claim of right, user and possession govern the extent of the easement acquired. It is established only to the extent necessary to accomplish the purpose for which the easement is claimed." *Yakima Valley Canal Co. v. Walker*, 455 P.2d 372, 374 (1969) (emphasis added); *see also Lee*, 945 P.2d at 220 ("The easement acquired extends only to the uses necessary to accomplish the purpose for which the easement was claimed."). The State of Washington Supreme Court continued, "[o]n the other hand, however, where one's occupancy or adverse user is under color of title that is a matter of public record, possession or user of a portion is regarded as coextensive with the entire tract described in the instrument under which possession is claimed." *Yakima Valley Canal Co. v. Walker*, 455 P.2d at 374 (citing *Omaha & Republican Valley Ry. Co. v. Rickards*,

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57 N.W. 739 (1894)). Under Washington law, "[c]olor of title 'means that the adverse claimant holds or traces back to a title document, usually a deed, that appears on its face to convey good title, but that, for some reason that does not appear on its face, did not convey title.'" *Campbell v. Reed*, 349, 139 P.3d 419, 423 (2006) (quoting William B. Stoebuck & John W. Weaver, 17 Washington Practice, Real Estate: Property Law § 8.20, at 542 (2004)), *review denied*, 163 P.3d 794 (2007).

There is no original deed for the parcels impacted herein. Since there is no deed conveying legal title in the right-of-way to the railroad, the railroad's prescriptive easement is based on a claim of right. Therefore, the railroad's prescriptive easement extends only to the uses necessary to accomplish the purpose for which the easement was claimed. *See Yakima Valley Canal Co. v. Walker*, 455 P.2d at 375; *see also Lee*, 945 P.2d at 220.

The Defendant cites to *Illig v. United States*, 58 Fed. Cl. 619, 629 (Fed. Cl. 2003) for the proposition that extrinsic evidence, such as NARA "Valuation maps are now routinely used to determine the boundaries of railroad corridors." Def. Br. at 12. Defendant misleads this Court to the actual holdings of *Illig*. That language from *Illig* dealt with condemnation and/or a deed where there was adequate evidence that an original conveyance to the railroad existed, in *Illig*, the valuation schedules listed warranty deeds and quitclaim deeds and only one deed could be located. The court analyzed the allowance of extrinsic evidence to determine the width and evidence that the railroad relied upon. Plaintiffs were arguing the width of the railroad was the "actual use" for the railroad's easement and the court rejected plaintiffs' argument for the areas where there was evidence of an original source conveyance to the railroad because Missouri law disfavors "bottlenecking." Defendant again misleads

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this Court to the reference of "the law disfavors bottlenecking" to try to bootstrap the missing deed analysis in *Illig* to this case.

Here is what the *Illig* court actually held for areas acquired by prescriptive easement at issue in the case at bar: "On the other hand, for any properties not subject to the condemnation decree, which were not part of the original Grant property, and for which no evidence for any deed can be found, we believe it is inappropriate to look to extrinsic evidence to determine the original agreement of the parties when no proof that any agreement ever existed has been offered. Under Missouri law, we believe it would be incorrect to use such extrinsic evidence to elucidate an agreement that we have no reason to believe ever existed. Under the circumstances, these appear to be easements by prescription. The width of such an easement can only be established by proof of use." *Illig*, 58 Fed. Cl. at 630.

B. The Width Issue is a State Law Issue and Should be Determined by Washington State Court in *Neighbors v. King County*—as Acknowledged by this Court in Its Order of Remand

First, as a procedural matter, King County's answer and counterclaim does not provide adequate notice of the relief sought on the width issue. A counterclaim must satisfy the Federal Rule of Civil Procedure 8(a)(2) notice pleading standard. *See Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008). "Rule 8 states that a civil complaint 'must contain ... a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 908 (9th Cir. 2011) (*quoting* Fed.R.Civ.P. 8(a)(2)). The Supreme Court has interpreted the "short and plain statement" requirement to mean that the complaint must provide "the defendant [with] fair notice of what

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the... claim is and the grounds upon which it rests." *Id*. (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)).

In its motion for summary judgment, King County sets forth seven specific requests for relief, two of which attempt to address the width issue even though there is no mention of width anywhere in its counterclaim. Specifically, King County requests rulings that (1) it owns a one hundred foot railroad easement based on assessor records, probate deeds, and ICC maps; and (2) in the alternative it acquired a one hundred wide corridor by operation of RCW 7.28.070. (*See* Def.'s Mot. For Summ. J., p.1, ECF No. 46.) The fact is that King County's counterclaim does not set forth any factual allegations concerning the appropriate width and there are no allegations anywhere in King County's pleadings that can be taken to give notice that the width of the corridor was in dispute. This case is about fee ownership of the railroad corridor, not the width of the corridor. (*See* Pls.' Am. Compl. at ¶12, ECF No. 31 ("Plaintiffs seek a declaratory judgment ordering that the railroad only held an easement for railroad purposes…")). Furthermore, RCW 7.28.070 is Washington's adverse possession statute and King County makes no mention of the statute in any of their pleadings. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000) ("A complaint guides the parties' discovery, putting the [counterclaim] defendant on notice of the evidence it needs to adduce in order to defend against the plaintiff's allegations.") Accordingly, King County cannot ask for, and cannot be granted the relief it seeks. The portions of King County's motion devoted to the width issue should therefore be stricken for King County's failure to satisfy Rule 8.

Secondly, and most importantly, King County's request for summary judgment on the width issue also attempts to circumvent this Court's prior order remanding the issue to

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Washington State court. The case is *Neighbors et al., v King County*, No. C15-1538 MJP ("*Neighbors II*"), and is an action for declaratory relief and to quiet title originally brought in the Superior Court of the State of Washington for King County. *See Neighbors II* Complaint, attached hereto as Exhibit A. The case was brought by nearly all of the same plaintiffs in the present action and requested resolution of the issue of the proper width of BNSF's right of way easement. King County filed a Notice of Removal of the action with this Honorable Court, and the case was removed to the United States District Court for the Western District of Washington. *Neighbors et al., v King County*, No. C15-1538 MJP (W.D. Wash. Aug. 24, 2015) (notice of removal). In response, the *Neighbors II* plaintiffs filed a motion to remand the case to state court, which this Court granted, reasoning that a substantial federal issue had not been presented and the District Court did not have original jurisdiction over claims subject to the primary or exclusive jurisdiction of the STB. *Tracy Neighbors et al., v King County*, No. C15-1538 MJP (W.D. Wash. Dec. 16, 2015) (order remanding to state court). The case is now proceeding before the Honorable Patrick H. Oishi of the King County Superior Court. King County's motion pertaining to the two above-referenced requests for relief should therefore be denied on the grounds that this Court has already declined jurisdiction. If this Court agrees that it does not have jurisdiction over the width issue, and thereby denies the portions of King County's motion relating thereto, it will be the third occasion this Court has ruled in such manner.

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C. The Current Width is the "Footprint" of the Former Railroad Based on the Former Railroad's Prior Use and Consists of No More Greater Than 18 Feet Wide

The width is dictated by what the railroad actually used. Plaintiffs have personal knowledge of what the railroad actually used and what the actual footprint of the railroad was and are prepared to offer their testimony in the state court action.

Morel Declaration (attached hereto as Exhibit B): Morel's original house was built in the 1920's and expanded in the 1930's. The house was removed when the current house was built in the year 2000. The picture in the Morel declaration shows the location of the original house's footprint relative to two survey lines. The dotted line through the house represents the King County's claimed ROW width of 100 ft. based on the 1917 Val Maps. As can be seen from this survey, the original house's footprint was more than 50% inside the ROW width claimed by King County based on these 1917 Val maps. Neither BNSF nor any prior railroad operator ever objected to or sought to clarify ownership of the claimed 100 ft. easement for over 80 years (1920 to tear down in 2000). Multiple homes in the area, including homes owned by other Plaintiffs in this lawsuit, are also constructed and still in existence today well within this supposed 100 ft. ROW width claimed by King County.

Up until the Morel's built their current home in 2000, the Morel family parked two cars near the tracks and walked across the tracks to stairs down to the house. The picture in Gene Morel's declaration shows the improved area on the east side of the tracks where cars were parked just outside of the necessary width for rail cars to pass. Gene Morel set up temporary markers on the driveway to locate the necessary width a rail car would need to pass, which was a distance of about 7 feet from center line of the tracks. The picture contained in Gene

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Morel's declaration is from about 1995 and shows the configuration of the Morel's parking area and driveway. The picture of the front of the Morel home shows walkway stones. The walkway stones are about 7 feet from the centerline of the right-of-way

There was a row of privacy trees that Gene Morel's grandmother planted in the 1950s that were just off the right-of-way. These trees are shown in in the Morel declaration and were planted about 7 feet from the centerline of the tracks. Other Morel improvements to the land included turf, rhododendrons, and other landscaping, plants, including irrigation, patios and child swing sets were all installed in this area. All of these uses and improvements were done without any use permits and with complete knowledge of BNSF and other rail operators of the corridor. The Morel's were never asked to stop or limit our use of this land by BNSF or other rail operators.

There is an 8 foot diameter boulder, estimated to weigh 11 tons, that sits on the lot owned by the Neighbors Plaintiffs. A picture of the boulder next to the right-of-way is included in Gene Morel's declaration. Gene Morel played on the boulder as a child in the 1950s. The edge of the rock is just over 6 feet from the centerline of the right-of-way and the railroad never moved the rock and never needed more than a 12 foot right-of-way. Moreover, despite what King County claims, the Morels pay the taxes on land located in the area claimed by King County and not King County. *See* Exhibit B.

Because the railroad acquired its interest by way of a prescriptive easement, the actual prior use dictates the actual width of the former railroad corridor, which varies but is no greater than 18 feet anywhere along the line in the prescriptive easement areas. All other Plaintiffs

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would have prepared similar Declarations raising significant factual disputes if Plaintiffs motion for an extension of time had been granted.[4]

V. PLAINTIFFS HAVE ARTICLE III STANDING

The Plaintiffs here received all of the interest the previous grantors held and are now the owners of the underlying fee in the former railroad corridor. King County's declaration by Mr. Hackett is self-serving and inaccurate. Defendant cites to a Middleton Probate document (Hackett Decl. Exhibit C), for the bold statement that the former railroad right-of-way did not pass to his heirs. Not so. In fact, the former railroad corridor was not excluded and moreover, the word "railroad" appears nowhere in the document. There is only mention of a 60-foot right of way that was excluded on page 8 of the document. But as will be explained below, the words "excluding" or "excepting" does not restrict the passing of the fee—but rather, limits the grantee's use on the property and here, that means the grantee cannot interfere with the railroad's for railroad operations which was an easement.

Mr. Middleton owned the fee in the railroad corridor and his Will passed all the interest he owned. Otherwise, is King County asserting that a deceased person owns the former railroad right-of way?? If so, that doesn't work either because it would have passed intestate. That argument totally fails.

Regarding the centerline presumption and Article III standing, this exact issue was addressed by Judge James V. Selna in California litigation. (*See* Opinion dated January 21, 2016, pps. 5-6, attached as Exhibit C). Judge Selna analyzed this Court's previous decision

[4] Further evidence of King County's knowledge of and acquiescence in the width of the corridor at less than 100 feet for prescriptive easement parcels can be found in the easement agreements of Reinhardsen and Rojalski, attached hereto as Exhibits E and F, where King County received a 20 foot easement for the operation of the railroad, which establishes the width of the hiking and biking trail at that location.

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in *Sammamish Homeowners v. County of King*, 2015 WL 3561533 (W.D. Wash. June 5, 2015) and the issue of whether certain deed language can rebut the centerline presumption under Washington law because California law has a similar "quirk" on this issue of the centerline presumption. Judge Selna held that Plaintiffs did have Article III standing and that "even assuming the centerline presumption is rebutted by particular language… the result of rebutting that presumption is the creation of a factual issue: who, the adjoining landowner or some predecessor in title, is the owner of the strip of land?"

A. The Centerline Presumption Applies and the Defendant Misconstrues *Roeder* and Misconstrues the Use of the Word "Exception" in a Deed

King County alleges that the individually-named Plaintiffs lack standing to raise their claims because they cannot demonstrate an ownership interest in the right-of-way pursuant to the centerline presumption under Washington law. Defendant King County conceded that Washington has adopted the centerline presumption. Washington has also adopted the strip and gore doctrine.

When a deed conveys a tract adjoining a street or railroad right-of-way easement or other small strip of land, any ownership rights of the grantor are presumed to pass to the grantee. The standard justification for the doctrine is two-fold. First, efficient use of land is promoted by keeping the title to both parts unified—rarely would the grantor find a way to devote a small and narrow retained strip of land to productive use, especially where, as here, the small strip is only one or two small parcels of land over multiple miles. *See, e.g., Kershaw Sunnyside Ranches*, 126 P.3d 16.

Second, including the strip comports with the parties' probable intent. *See, e.g., Roeder II,* 716 P.2d 855, followed in *Northlake Marine Works, Inc. v. City of Seattle*, 857

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P.2d 283 (Wash. App. 1993); *See e.g.*, *Besneatte v. Gourdin*, 21 Cal. Rptr. 2d 82 (Ct. App. 4th Dist. 1993); *Brown v. Penn Cent. Corp.*, 510 N.E.2d 641 (Ind. 1987); *Hedrick v. Zilge*, 368 N.W.2d 205 (Iowa Ct. App. 1985); *Pebsworth v. Behringer*, 551 S.W.2d 501 (Tex. Civ. App. Waco 1977); *Roeder Co. v. Burlington N., Inc*., 716 P.2d 855 (Wash. 1986), followed in *Northlake Marine Works, Inc. v. City of Seattle*, 857 P.2d 283 (Wash. Ct. App. 1993); *Cantley v. Gulf Production Co*., 143 S.W.2d 912, 915 (Tex. 1940).

Courts all over this Country apply the centerline presumption to railroad rights-of-way. For instance, the Washington Supreme Court in *Kershaw Sunnyside Ranches* upheld the majority rule in this country that the centerline presumption applies when a deed does not contain any evidence that a grantor intends to expressly reserve any interest in the property. Whether a deed contains a description by a lot, or by metes and bounds referencing a railroad right-of-way, or contains an exception of the railroad right-of-way, under the *Kershaw* opinion, construing the deed against the drafter and ascertaining the grantor's intent is paramount, and it is more probable and presumed that the grantor conveys all that they own.

King County improperly asserts that none of the Plaintiffs have any ownership within the former rail corridor based on the language in Plaintiffs' deeds that "exclude" or "except" or "lying south" of the right-of-way. *See* D.E. 46, Nunnenkamp Decl., Exhibit Q. Defendant's position is directly contrary to the Washington Supreme Court's decision in *Kershaw*. In *Kershaw*, the defendant, like Defendant King County here, also argued that Kershaw lacked standing because their ownership deed "excepted" the right-of-way. The Court ruled that Kershaw did have standing and that the words "exception" did not reserve the right-of-way unto the grantor. King County lacks candor to the Court regarding the

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Kershaw opinion. The ownership deeds in Kershaw were described by the Supreme Court as follows:

> On January 20, 1960, Ora Kershaw quitclaimed the Kershaw property to her son Ronald E. Kershaw, **specifically excepting** the 'right-of-way of the Northern Pacific Railway,' predecessor in interest to BNSF. In 1986, Ronald and Betty Kershaw transferred the real property to the family business, Kershaw Sunnyside Ranches. The real estate contract memorializing this transfer, in describing the property conveyed, **again excepted** from the transfer the 'right of way of the Northern Pacific Railway.' At the present time, Kershaw Sunnyside Ranches owns approximately 80-90 acres on the site transpierced by the railroad right of way.

Kershaw, 126 P.3d at 19 (emphasis added). The Supreme Court held that any ambiguity should be construed against the drafter and the exception was ambiguous. The Court held that:

> the 1960 deed's exception is ambiguous; in addition to operating to reserve an interest in the grantor, it 'logically could have been an expression of the parties' understanding that Ronald Kershaw's fee interest was subject to the railroad's easement.' Kershaw Sunnyside Ranches, 121 Wn. App. At 728. This later interpretation is supported by Ora Kershaw's further 'except[ion]' of a road and state highway. While the deed purports to except these lands, it could just as reasonably be interpreted to reference them because of the significant nature of the easements present… we hold that Ora Kershaw, by the 1960 deed, did not reserve in herself any rights in the right of way and that all said rights transferred to her son and then to Kershaw Sunnyside Ranches.

Id. at 31.

In *Kershaw*, the Defendant argued that the language in the Kershaw deed with the "exception" was similar to the facts of *Harris v. Ski Park Farms, Inc*., 120 844 P.2d 1006 (1993). The Washington Supreme Court disagreed. The court held that:

> Here, Level 3 relies on *Harris*, where we held that a similar exception in a deed did operate to reserve the grantor's interest in

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> the right of way. However, *Harris* contained evidence of the grantor's intent to except the right of way not present here, most specifically the grantor's subsequent conveyance of the right of way to a third party and the grantor's **broker's declaration that the grantor intended to reserve its interest in the right of way**.

Kershaw, 126 P.3d at 26.

Further, consistent with Washington law, the use of the words "exception" grant all that the grantor owns and only reserves the easement for the railroad operations. For instance, noting longstanding Washington precedent, the court of appeals in *Zobrist v. Culp* held:

> The grantor here excepted a right-of-way amounting to an easement from the grant. No reference was made in the conveyance to Custer of an exception of the fee to the 100 feet. The railroad received an easement from Watson and nothing more. The landowner's predecessor in interest, Custer, on the other hand, received a fee interest in the land and could use it in any way he saw fit, restricted only in that he could not use the 100-foot wide strip in a manner inconsistent with the existing rights of the railroad to pass over it.

Zobrist v. Culp, 570 P.2d, 147, 152 (Wash. App. 1977).

In *Zobrist*, the court noted the longstanding principal that "The conveyance of a fee simple interest with a clause excepting an easement previously deeded to a third party, therefore, conveys to the grantee all the grantor's rights and interests in the land, yet compels the grantee to refrain from acting in a manner inconsistent with the rights of the third party in the land as described in the exception." *Id*. at 151 (citing *Duus v. Ephrata*, 128 P.2d 510 (Wash. 1942). Moreover, 'the fact that the exact boundaries of the right-of-way were set out does not outweigh the express intent of the grantor to convey only a right to use the land, not the land itself." *Id*. at 152.

Here, all Plaintiffs have provided their ownership deeds and chains of title evidencing ownership in the railroad corridor, as well as the declaration of John Rall opining that the

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review of the chains of title, no grantor expressly intended to reserve the right-of-way unto themselves in fee, and the Defendant's attempts to assert differently, misconstrue Washington law. *See* Rall Decl., Exhibit D.

King County misunderstands and misapplies the centerline presumption as set forth in *Roeder Co. v. Burlington Northern, Inc.*, 716 P.2d 855 (Wash. 1986) and Plaintiffs have provided chains of title for all individual landowners in the right-of-way who owned fee title adjacent to the right-of-way. For the centerline presumption NOT to apply, the *Roeder* court very narrowly excluded the centerline presumption from certain deeds. "When, however, a deed refers to the right of way as a boundary but also gives a metes and bounds description of the abutting property, the presumption of abutting landowners taking to the center of the right of way is rebutted." *Id*. at 862. Thus, Plaintiffs' deeds must contain BOTH a metes and bounds description and must also refer to the railroad right-of-way as a boundary in the metes and bounds description for the centerline presumption not to apply.

Hornish Deed. The Hornish deed contains a metes and bounds description bounded by a railroad right-of-way, and thus, *Roeder* applies. However, based on the Hornish chain of title, no grantor expressly intended to reserve the railroad right-of-way unto themselves, and thus, the Hornish Plaintiffs own the underlying fee in the former railroad right-of-way. *See* Rall Decl., Exhibit D.

Moore Deed. The Moore deed does not contain a metes and bounds description bounded by a right-of-way. The Moore deed describes a certain portion of Government lot 3 "lying south of the railroad right-of-way. Lying south is not a boundary as described in

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Roeder, but rather a location of the property in the Government lot. This parcel benefits from the centerline presumption under Washington law. *See* Rall Decl., Exhibit D.

Menezes and Vanderwend Deed. The Menezes and Vanderwend Deed does contain a metes and bounds description but the railroad is not mentioned as a boundary in the metes and bounds description. The words "except" the railroad right-of-way do not limit that the grantor granted all ownership, but merely limits the use of the grant of fee in all the grantor owned. This parcel benefits from the centerline presumption under Washington law. *See* Rall Decl., Exhibit D.

Sammamish 4257. The Sammamish 4257 deed has no metes and bounds description and does not "except" the railroad right-of-way. It merely describes the property as lying westerly of the right-of-way and does not meet the limitation of the centerline as stated in *Roeder*. This parcel benefits from the centerline presumption under Washington law. *See* Rall Decl., Exhibit D.

Neighbors Deed. The Neighbors Deed contains a metes and bounds description but the railroad is not mentioned as a boundary in the metes and bounds description. The words "except" the railroad right-of-way do not limit that the grantor granted all ownership, but merely limits the use of the grant of fee in all the grantor owned. This parcel benefits from the centerline presumption under Washington law. *See* Rall Decl., Exhibit D.

Morel Deed. The Morel Deed contains a metes and bounds description but the railroad is not mentioned as a boundary in the metes and bounds description. The words "except" the railroad right-of-way do not limit that the grantor granted all ownership, but

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merely limits the use of the grant of fee in all the grantor owned. This parcel benefits from the centerline presumption under Washington law. *See* Rall Decl., Exhibit D.

Therefore, based on Washington's adoption of the centerline presumption and the strip and gore doctrine, as well as the longstanding precedent holding the words "exception" do not reserve the fee in the grantor, it should be presumed that the grantors of the land to the Plaintiffs in this case granted all that they owned. King County's standing argument should be rejected again.

B. Even if the Centerline Presumption is Questioned by Metes and Bounds Bounded by a Railroad Right-of-Way, Plaintiffs' Chains of Title Provide Evidence that they benefit from the Centerline Presumption Because no Grantor in the Chain of Title Reserved the Right-of-way unto Themselves

Plaintiffs have retained an expert witness who will to testify regarding the chains of title. The expert will express the opinion that Plaintiffs own the fee in the right-of-way under Washington law because no grantor in the chain of title expressly reserved unto themselves the former railroad right-of-way, such that under Washington law, each grantor's intent controls and each grantor is presumed to convey all that they own unless expressly stating otherwise. The expert's opinion opines that the word "reserve" a right-of-way does not amount to a reservation unto the grantor intending to expressly reserve the right-of-way unto themselves, but rather, only intending to merely note that the land is encumbered with an easement.

The Chains of Title for each Plaintiff evidence that (1) no grantor in the chain of title expressly reserved the former railroad right-of-way unto themselves despite describing the land conveyed in metes and bounds; (2) no grantor in the entire chain of title has ever claimed ownership in the former railroad right-of-way because each grantor conveyed their interest in

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the former railroad right-of-way; and (3) based on the opinion of plaintiffs' title expert, each and every grantor in the chain of title intended to convey all the interest they owned to each grantee. The chain of title documentation has been reviewed by Plaintiffs' title expert, John Rall, and he has concluded that each of the Plaintiffs own the fee title in the right-of-way under Washington law.

VI. CONCLUSION

Because the railroad only held an easement by prescription (except for Plaintiff Hornish), the width of the easement by prescription varies from twelve to eighteen feet only. King County's attempts to claim greater than 18 feet must fail as a matter of law. Further, because King County disputes the width, this issue is not proper for summary judgment and is an issue better suited for state court as this Court has already recognized.

Date: February 16, 2016.

/s/ Thomas S. Stewart

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2016, the foregoing was filed electronically with the Clerk of the Court to be served by the operation of the Court's electronic filing system upon all parties of record.

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