

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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' MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT OF
SUMMARY JUDGMENT**

**NOTE ON MOTION CALENDAR:
March 4, 2016**

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

- I. INTRODUCTION.....1
- II. SUMMARY JUDGMENT STANDARD1
- III. THE TRAILS ACT PRESERVES CORRIDORS FOR POSSIBLE FUTURE RAILROAD USES AND THE ONLY CURRENT USE AVAILABLE TO KING COUNTY IS TO BUILD A TRAIL2
 - A. The Trails Act “Preserves” Railroad Corridors for Future Purposes While Allowing Interim Use in the Interim for Recreational Trails.....3
 - B. Railbanking Does Not Preserve the Railroad Purposes Easement Under the Trails Act for Current Railroad Purposes and Does Not Allow the Trail User to Use the Corridor for Current Railroad Purposes Because Railbanking is Not a Railroad Purpose6
 - C. King County Did Not Acquire the Railroad Purposes Easement by and through the Trails Act Because the Railroad Purposes Easement was Effectively Extinguished Under Both Federal and State Law But for Railbanking9
- IV. CONCLUSION12

TABLE OF AUTHORITIES

1

2 *Adkins v. United States*, 2012 US Claims Lexis 1975 (2012)..... 10

3 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)2

4 *Biery v. United States*, 99 Fed. Cl. 565 (Fed. Cl. 2011)..... 10

5 *Blendu v. United States*, 75 Fed. Cl. 543 (Fed. Cl. 2007) 10

6 *Burgess v. United States*, 109 Fed. Cl. 223 (Fed. Cl. 2013) 10

7 *Capreal v. United States*, 99 Fed. Cl. 133 (Fed. Cl. 2011)8, 10

8

9 *Caquelin v. United States*, 121 Fed. Cl. 658 (Fed. Cl. 2015)..... 10

10 *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)..... 1

11 *Dana R. Hodges Trust v. United States*, 101 Fed. Cl. 549 (Fed. Cl. 2011) 10

12 *Eldridge v. City of Greenwood*, 503 S.E.d 191 (S.C. App. 1998)..... 11

13 *Ellamae Phillips Co. v. United States*, 99 Fed. Cl. 483 (Fed. Cl. 2011)..... 10

14 *Farmers Cooperative v. United States*, 98 Fed. Cl. 797 (Fed. Cl. 2011)..... 10

15 *Furnace v. Sullivan*, 705 F.3d 1021 (9th Cir. 2013) 2

16 *Glosemeyer v. United States*, 45 Fed. Cl. 771 (Fed. Cl. 2000) 11

17 *Gregory v. United States*, 101 Fed. Cl. 203 (Fed. Cl. 2011)..... 10

18 *Haggart v. United States*, 108 Fed. Cl. 70 (Fed. Cl. 2012)..... 10

19 *Jenkins v. United States*, 102 Fed. Cl. 598 (Fed. Cl. 2011) 10

20 *King Cty. v. Squire Inv. Co.*, 801 P.2d 1022 (Wash. App. 1990)..... 11

21 *Lawson v. State of Washington*, 730 P.2d 1308 (Wash. 1986) 10, 11

22 *Longnecker v. United States*, 105 Fed. Cl. 393 (Fed. Cl. 2012).....7

23 *Macy Elevator v. United States*, 97 Fed. Cl. 708 (Fed. Cl. 2011)..... 10

24

25

1 *McClurg Family Farm LLC v. United States*, 115 Fed. Cl. 1 (Fed. Cl. 2014)..... 10

2 *National Wildlife Federation v. Interstate Commerce Comm'n*, 850 F.2d 694,
 3 (D.C. Cir. 1988)..... 11

4 *Nordhus Family Trust v. United States*, 98 Fed. Cl. 331 (Fed. Cl. 2011)..... 8, 10

5 *Preseault v. United States*, 494 U.S. 1 (1990) (“*Preseault I*”) 11

6 *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (“*Preseault II*”) 7, 8, 10, 11

7 *Raulerson v. United States*, 99 Fed. Cl. 9 (Fed. Cl. 2011) 10

8 *Rhutasel v. United States*, 105 Fed. Cl. 220 (Fed. Cl. 2012) 10

9 *Rogers v. United States*, 90 Fed. Cl. 418 (Fed. Cl. 2009) 8

10 *Rogers v. United States*, 101 Fed. Cl. 287 (Fed. Cl. 2011) 10

11 *Thomas v. United States*, 106 Fed. Cl. 467 (Fed. Cl. 2012)..... 10

12 *Thompson v. United States*, 101 Fed. Cl. 416 (Fed. Cl. 2011)..... 10

13 *Toscano v. United States*, 107 Fed. Cl. 179 (Fed. Cl. 2012)..... 10

14 *Whispell Foreign Cars v. United States*, 100 Fed. Cl. 529 (Fed. Cl. 2011)..... 10

15 *Ybanez v. United States*, 98 Fed. Cl. 659 (Fed. Cl. 2011)..... 10

16

17

18

19

20

21

22

23

24

25

1 **I. INTRODUCTION**

2 Defendant King County attempts to trample over Plaintiffs property rights and
3 attempts to use this Court to authorize its actions. King County, via the Trails Act, only
4 acquired a trail/railbanked easement and nothing more. The Trails Act expressly authorizes
5 a recreational trail upon rail corridors that would be abandoned but for the Trails Act. The
6 Trails Act does not preserve former rail corridors for current rail use, but rather preserves
7 the former rail corridor for **future** rail use only while allowing the corridor to be used in
8 the interim as a recreational trail. King County’s attempt to expand the uses of the corridor
9 via the Trails Act must fail as a matter of law. Plaintiffs are entitled to summary judgment
10 that the railroad purposes easement does not currently exist, except for the fact that it is
11 railbanked for possible future use, and that the only use King County is currently able to
12 use the corridor for is a hiking and biking trail.

14 **II. SUMMMARY JUDGMENT STANDARD**

15 Rule 56(a) provides that “the Court shall grant summary judgment if the movant shows
16 that there is no genuine dispute as to any material fact and the movant is entitled to judgment
17 as a matter of law.” To avoid summary judgment, the non-moving party must present, by
18 affidavits, depositions, answers to interrogatories, or admissions on file “specific facts
19 showing that there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324,
20 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). “Summary judgment is appropriate only if, taking
21 the evidence and all reasonable inferences drawn therefrom in the light most favorable to the
22 non-moving party, there are no genuine issues of material fact and the moving party is entitled
23 to judgment as a matter of law. If, as to any given material fact, evidence produced by the
24
25

1 moving party... conflicts with evidence produced by the nonmoving party..., [the court] must
2 assume the truth of the evidence set forth by the nonmoving party with respect to that material
3 fact.” *Furnace v. Sullivan*, 705 F.3d 1021, 1026 (9th Cir. 2013). In resolving summary
4 judgment motions, courts are not at liberty to weigh the evidence, make credibility
5 determinations, or draw inferences from the facts that are adverse to the non-moving party.
6 As the Supreme Court has held, “[c]redibility determinations, the weighing of the evidence,
7 and the drawing of legitimate inferences from the facts are jury functions, not those of a judge,
8 whe[n] he is ruling on a motion for summary judgment.” *Anderson v. Liberty Lobby, Inc.*,
9 477 U.S. 242, 255 (1986).

11 **III. THE TRAILS ACT PRESERVES CORRIDORS FOR POSSIBLE FUTURE**
12 **RAILROAD USES AND THE ONLY CURRENT USE AVAILABLE TO**
13 **KING COUNTY IS TO BUILD A TRAIL**

14 Under the Trails Act, the preservation of railroad corridors for possible future
15 reactivation as a railroad is called “railbanking.” Under the Trails Act, while the railroad
16 corridor is railbanked, the trail user can use the railroad corridor on an interim basis for a
17 hiking and biking trail. Plaintiffs do not dispute that King County, as the trail user under
18 the Trails Act, can build a hiking and biking trail. However, under the Trails Act and the
19 cannons of construction interpreting the Act, railbanking does not preserve the railroad
20 purposes easement for current railroad uses and King County does not currently hold or
21 own BNSF’s railroad purposes easement. If the Trails Act preserved the railroad purposes
22 easement for current uses, no Trails Act takings could occur. The federal government made
23 this argument for years and was rejected every time it was made. As a result, under the
24 Trails Act, King County only possesses a railbanked/hiking and biking trail easement and
25

1 cannot use the corridor as if the railroad purposes easement currently exists, including any
2 purported incidental uses.

3 **A. The Trails Act “Preserves” Railroad Corridors for Future Purposes**
4 **While Allowing Interim Use in the Interim for Recreational Trails**

5 What is the Trails Act and what was its purpose? The purpose of the Trails Act was
6 to first and foremost encourage and promote recreational trails by allowing the preservation
7 of railroad rights-of-ways for future use and allow federal jurisdiction to remain over those
8 former rights-of way by preventing the land from reverting to the adjacent landowners.
9 Congress recognized that the establishment of railroads in this country was a very significant
10 part of our history and was therefore aware of the significant impact railroads had on our
11 country and its growth. In order to preserve this National treasure, Congress recognized that:

12
13 ...trails provide for the ever-increasing outdoor recreation needs of an
14 expanding population and in order to promote the preservation of, public
15 access to, travel within, and enjoyment and appreciation of the open-air,
16 outdoor areas and historic resources of the Nation, trails should be
established. Preserving the national treasure of railroad rights-of-way
while promoting outdoor recreation was accomplished by allowing
interim use of railroad rights-of-way as recreational trails.

17 16 U.S.C. § 1241(2)(a). “This Act may be cited as the ‘National Trails System Act’.” 16
18 U.S.C. § 1241(1). The entire purpose of the Act was to encourage and establish hiking and
19 biking trails by utilizing would-be abandoned rights-of-way that have actually been
20 abandoned by the railroad under the Trails Act by blocking abandonment and reversion in
21 order to utilize the right-of-way for hiking and biking trails on an interim basis.
22

23 The Act is actually quite comprehensive. A complete reading of the Act provides
24 direct evidence that the sole purpose of the act was to narrowly authorize and promote
25 recreational trails. The Act is specific and provides for trails and nothing more. This was the

1 sole purpose of Congress—to prevent the loss of this national treasure by preserving rights-
2 of-way for potential future use while promoting trails—period. Nowhere in the Trails Act
3 does it authorize a trail user to use the corridor for anything except a trail.

4 However, because state law issues existed relating to the reversion of rights-of-way to
5 the adjoining landowners prior to consummating the establishment of trails, and in order to
6 prevent reversion and allow trail users time to negotiate with railroads, Congress enacted
7 section 1247(d). 16 U.S.C. § 1247(d). In 1983, concerned by the rapid contraction of
8 America's rail network, Congress amended the 1963 National Trails System Act to create the
9 railbanking program thereby preventing reversionary interests from vesting while trail
10 negotiations were ongoing. Railbanking is a method by which lines proposed for
11 abandonment can be preserved through interim conversion to trail use:
12

13 The Secretary of Transportation, the Chairman of the Interstate Commerce
14 Commission, and the Secretary of the Interior, in administering the Railroad
15 Revitalization and Regulatory Reform Act of 1976, shall encourage State and
16 local agencies and private interests to establish appropriate trails using the
17 provisions of such programs. Consistent with the purposes of that Act, and
18 in furtherance of the national policy to **preserve established railroad rights-
19 of-way for future reactivation of rail service**, to protect rail transportation
20 corridors, and to encourage energy efficient transportation use, **in the case of
21 interim use of any established railroad rights-of-way** pursuant to donation,
22 transfer, lease, sale, or otherwise in a manner consistent with the National
23 Trails System Act, **if such interim use is subject to restoration or
24 reconstruction for railroad purposes, such interim use shall not be
25 treated, for purposes of any law or rule of law, as an abandonment of the
use of such rights-of-way for railroad purposes.** If a State, political
subdivision, or qualified private organization is prepared to assume full
responsibility for management of such rights-of-way and for any legal
liability arising out of such transfer or use, and for the payment of any and all
taxes that may be levied or assessed against such rights-of-way, then the
Commission shall impose such terms and conditions as a requirement of any
transfer or conveyance **for interim use in a manner consistent with this
Act**, and shall not permit abandonment or discontinuance inconsistent or
disruptive of such use.

1 *Id.*

2 Even though the Act only specifies recreational trails, the Defendants attempt to
3 interject other uses for railbanked rights-of-way which violate all rules of statutory
4 construction. As provided by the Rehnquist Court's Canons of Statutory Construction, the
5 plain meaning of the ordinary statutory text should be followed—here, allowing would-be
6 abandoned railroad rights-of-way to be used as recreational trails while railbanking the
7 corridor. Moreover, the canon of Expressio unius provides that the expression of one thing
8 suggests the exclusion of others—here, use as a recreational trail excludes uses other than trail
9 use. Regardless of Judge Coughenour's ruling in *Kaseburg*, upon which the Defendants rely,
10 trail use is the only authorized use under the Trails Act. See
11 http://www.ncsl.org/documents/lss/2013PDS/Rehnquist_Court_Canons_citations.pdf (last
12 visited 9/29/2015). Congress did not intend to allow third parties or governmental entities to
13 abuse the Trails Act in order to utilize the rights-of-way for other purposes other than
14 reactivation of a railroad operation or trail use. If Congress intended any other type of use, it
15 would have expressly stated so. It did not. Congress was very specific in the language of the
16 Trails Act and authorized trails upon would-be abandoned railroad rights-of-ways and nothing
17 more.
18
19
20

21 The STB views its rule as a ministerial role. Once the STB issues a NITU, it does not
22 regulate or monitor, or authorize any activities on the railbanked corridor—it merely
23 maintains jurisdiction for potential reactivation by a railroad. Since abandonment is blocked,
24 the adjacent landowners don't get their land back, but the fact that a trail operator can use the
25 right-of-way for a recreational trail on an interim basis does not mean that anyone can

1 continue to trample on the adjacent landowners' rights by currently using the right-of-way in
2 any fashion they want by claiming uses incidental to a current railroad purposes easement that
3 no longer exists.

4 **B. Railbanking Does Not Preserve the Railroad Purposes Easement Under**
5 **the Trails Act for Current Railroad Purposes and Does Not Allow the**
6 **Trail User to Use the Corridor for Current Railroad Purposes Because**
7 **Railbanking is Not a Railroad Purpose**

8 As a threshold matter, King County did not acquire a railroad purposes easement by
9 and through the Trails Act but, rather, acquired a trail/railbanked easement. That is the law.
10 A railbanked easement, by definition, is the preservation of the railroad purposes easement
11 for potential future reactivation, not the current right to use a railroad purposes easement. In
12 fact, in order for any entity, Defendant or not, to invoke the use of the railbanked corridor, it
13 must comply with the reactivation requirements of the STB. *See* GNP Rly, Inc., FD 35407,
14 Decision dated June 15, 2011, attached as Exhibit A (denying GNP Railway's request to
15 reactivate the banked right-of-way that is also involved in this case). *See also* Report to the
16 Honorable Sam Brownback, Surface Transportation Issues Related to Preserving Inactive Rail
17 Lines as Trails, attached as Exhibit B (noting that "if the rail carrier that banked a right-of-
18 way wants to return it to rail service, the carrier has to notify the Board, the abandonment
19 proceeding is then reopened, and the trail use authority is revoked"). As stated by the STB,
20 King County, who holds the reactivation rights, could request that the NITU be vacated to
21 permit reactivation for continued rail service in the future. It is clear under the Trails Act, as
22 well as the STB's own decisions, that the corridor is either a railroad running trains or a
23 recreational trail—one or the other—period, it can't have it both ways—the uses are mutually
24 exclusive.
25

1 King County argues that the Trails Act preserves the railroad easement and merely
2 “adds” the recreational trail to it. That is legally incorrect. Railbanking maintains federal
3 jurisdiction over the line and preserves a potential future railroad purposes easement upon
4 reactivation. King County argues that because BNSF previously held a railroad purposes
5 easement, and because the right-of-way is now railbanked, they can use the right-of-way in
6 any manner that is incidental to railroad activities. King County cannot, however, because
7 railbanking preserves the right-of-way for possible reactivation in the future and railbanking
8 is not a current railroad purpose.
9

10 Every Federal Circuit decision and Court of Claims decision affirms this point and is
11 why Trails Act takings require just compensation. If the railroad purposes easement is
12 preserved for current use upon issuance of the NITU no takings could ever occur and that is
13 NOT the law. In the railbanking process, the federal government maintains jurisdiction
14 over the right-of-way and a railroad must petition the STB for reactivation of the railroad.
15 Under the Trails Act, the trail user cannot use the recreational trail easement for railroad
16 purposes or any other purposes other than as a recreational hiking and biking trail.¹
17

18 Courts have always declined to find that railbanking is a current railroad purpose. *See,*
19 *Preseault v. United States*, 100 F.3d 1525, 1554 (Fed. Cir. 1996) (“*Preseault II*”) (Rader, J.,
20 concurring) (rejecting the railbanking argument as a “vague notion,” incapable of overriding
21 the present use of the property as a recreational trail); *Longnecker v. United States*, 105 Fed.
22

23 ¹ Although King County holds the “residual common carrier rights and obligations,” King County cannot
24 reactivate rail service alone because King County is not a “railroad” or “rail carrier” and does not comply with
25 the requirements of a railroad subject to the jurisdiction of the STB—and the STB has jurisdiction over any
reactivation of the railbanked corridor. *See* 49 U.S.C. § 10102 (defining “rail carrier” as “a person providing
common carrier railroad transportation for compensation, but does not include street, suburban, or interurban
electric railways not operated as part of the general system of rail transportation.”); *see also*, 45 U.S.C. § 151
(defining rail carrier)..

1 Cl. 393 (Fed. Cl. 2012) (involving Washington state property laws); *Capreal, Inc. v. United*
2 *States*, 99 Fed. Cl. 133, 146 (Fed. Cl. 2011) (interpreting Massachusetts law in which the court
3 stated, “that railbanking is too hypothetical and unlikely to serve as a railroad purpose”);
4 *Nordhus Family Trust v. United States*, 98 Fed. Cl. 331, 339 (Fed. Cl. 2011) (interpreting
5 Kansas law, the court stated, “[i]n the present case, there is no evidence of any plan to
6 reactivate rail service and railbanking is simply a speculative assertion by Defendant that
7 some resumed rail service could occur in the future. The transfer of the easement to entities
8 completely unconnected with rail service, and the removal of all rail tracks on the corridor,
9 lead the Court to conclude that any future rail use simply is unrealistic”); *Rogers v. United*
10 *States*, 90 Fed. Cl. 418, 432 (Fed. Cl. 2009) (interpreting Florida law and indicating, “[h]ere,
11 as in *Preseault II*, the use of the right-of-way as a public trail while preserving the right-of-
12 way for future railroad activity was not something contemplated by the original parties to the
13 Honore conveyance back in 1910”). As a result of overwhelming authority from numerous
14 judges and Courts who have interpreted the Trails Act, the potential future reactivation of the
15 railroad under the railbanking provision of the Trails Act is not a current railroad purpose.
16
17

18 Under the Trails Act, it is imperative to note that if railbanking was a current railroad
19 purpose, there would not be any Trails Act takings cases because the “reversionary interest,”
20 to have land back unencumbered by a railroad purposes easement, would **never vest** or be
21 blocked from vesting if the current railroad purposes easement did not extinguish/expire upon
22 issuance of the NITU by the STB. Instead, the railroad purposes easement is converted to a
23 new “railbanked” easement/trail easement that replaces the former railroad purposes easement
24 with a new trail easement with the potential reactivation of the railroad easement. Railbanking
25

1 under the Trails Act is not a current railroad purposes easement but is, instead, merely meant
2 to maintain federal jurisdiction in case a qualified railroad reactivates service over the corridor
3 at some unknown future time.

4 The Defendants simply do not have any current rights in the former railroad purposes
5 easement. Rather, the Defendants acquired a recreational trail/railbanked easement pursuant
6 to the Trails Act. The Defendants, as the “trail users” under the Trails Act (the manner they
7 acquired their interest formerly held by BNSF), are authorized to use the land on an interim
8 basis as a trail.
9

10 **C. King County Did Not Acquire the Railroad Purposes Easement By and**
11 **Through the Trails Act Because the Railroad Purposes Easement was**
12 **Effectively Extinguished Under Both Federal and State Law But for**
13 **Railbanking**

14 King County’s attempted argument that the railroad purposes easement still exists is
15 incredible. In fact, King County not only misinterprets numerous Trails Act cases but
16 remarkably states that all of the binding authority to the effect that the railroad purposes
17 easement is extinguished do not actually say that. Contrary to all of King County’s lame
18 arguments, the railroad’s easement extinguishes because of the change in use from railroad
19 purposes easement is converted to a new easement under extensive and numerous authority
20 in a myriad of federal cases and from the Supreme Court of Washington too. The reason that
21 railway purposes easements terminate is because the easement holder changes the use in a
22 way that goes far beyond the purpose for which the easement was created—and is no longer
23
24
25

1 used for railroad purposes—this is basic property law that King County simply fails to
2 acknowledge.²

3 More importantly, however, the Supreme Court of Washington, in *Lawson v. State of*
4 *Washington*, 730 P.2d 1308 (Wash. 1986) specifically ruled that trail use exceeds a railroad
5 purpose under Washington law and specifically held that “We hold that a change in use from
6 ‘rails-to-trails’ constitutes abandonment of an easement which was granted for railroad
7 purposes only.” *Lawson*, 730 P.2d at 1312-13 (emphasis added). The Supreme Court cited
8 *Lawson* as on all fours with *Preseault*. The overwhelming federal authority on this topic and
9 the *Lawson* opinion from the Supreme Court of Washington is totally dispositive that trail
10 use/railbanking under the Trails Act exceeds the scope of the original railroad purposes
11 easement under Washington law and that the change from railroad purposes to trails purposes
12 extinguishes the original railroad purposes only easements.
13
14
15
16

17 ² See (1) *Haggart v. United States*, 108 Fed. Cl. 70 (2012) (Washington) (Judge Lettow); (2) *Macy Elevator v.*
18 *United States*, 97 Fed. Cl. 708 (2011) (Indiana) (Judge Firestone); (3) *Anna F. Nordhus Family Trust v. United*
19 *States*, 98 Fed. Cl. 331 (2011) (Kansas) (Judge Wheeler); (4) *Ybanez v. United States*, 98 Fed. Cl. 659 (2011)
20 (Texas) (Judge Hodges); (5) *Farmers Cooperative v. United States*, 98 Fed. Cl. 797 (2011) (Kansas) (Judge
21 Damich); (6) *Capreal v. United States*, 99 Fed. Cl. 133 (2011) (Massachusetts) (Judge Wheeler); (7) *Ellamae*
22 *Phillips Co. v. United States*, 99 Fed. Cl. 483 (2011) (Colorado) (Judge Baskir); (8) *Biery v. United States*, 99
23 Fed. Cl. 565 (2011) (Kansas) (Judge Firestone); (9) *Gregory v. United States*, 101 Fed. Cl. 203 (2011)
24 (Mississippi) (Judge Wheeler); (10) *Thompson v. United States*, 101 Fed. Cl. 416 (2011) (Michigan) (Judge
25 Braden); (11) *Dana R. Hodges Trust v. United States*, 101 Fed. Cl. 549 (2011) (Michigan) (Judge Damich);
(12) *Raulerson v. United States*, 99 Fed. Cl. 9, 11-12 (2011) (South Carolina) (Judge Margolis); (13) *Rogers*
v. United States, 101 Fed. Cl. 287 (2011) (Florida) (Judge Williams); (14) *Whispell Foreign Cars v. United*
States, 100 Fed. Cl. 529 (2011) (Florida) (Judge Hewitt); (15) *Jenkins v. United States*, 102 Fed. Cl. 598 (2011)
(Iowa) (Judge Firestone); (16) *Adkins v. United States*, 2012 US Claims Lexis 1975 (2012) (Judge Baskir);
(17) *Rhutasel v. United States*, 105 Fed. Cl. 220 (2012) (Iowa) (Judge Smith); (18) *McClurg Family Farm*
LLC v. United States, 115 Fed. Cl. 1 (2014) (Iowa) (Judge Allegra); (19) *Burgess v. United States*, 109 Fed.
Cl. 223 (2013) (Iowa) (Judge Allegra); (20) *Thomas v. United States*, 106 Fed. Cl. 467 (2012) (Tennessee)
(Judge Firestone); (21) *Toscano v. United States*, 107 Fed. Cl. 179 (2012) (Utah) (Judge Bruggink); (22)
Blendu v. United States, 75 Fed. Cl. 543 (2007) (Idaho) (Judge Hewitt), (22) *Caquelin v. United States*, 121
Fed. Cl. 658 (2015) (Iowa) (Judge Lettow).

1 King County may attempt to argue that *Lawson* does not apply because it did not
2 involve railbanking but, in order to prevail on that argument, King County would effectively
3 have to persuade this Court that the Federal Circuit misinterpreted *Lawson* in *Preseault II*.
4 Plaintiffs submit, however, that the Federal Circuit's interpretation of *Lawson* is extremely
5 relevant and persuasive authority for this Court. The Federal Circuit was clear that *Lawson*
6 "is an example of a case practically on all fours with" *Preseault II*. 100 F.3d at 1543. Even
7 the dissent in *Preseault II* recognized that *Lawson* is a "leading case" and "is virtually on all
8 fours with the facts of this case (except that the plaintiff sued the state, not the United States):
9 a state with a railbanking policy which used state government agencies to convert an old
10 railroad easement to a recreational trail..." *Id.* at 1574. ***Preseault II*, itself a railbanking
11 case, relied on *Lawson* as a leading case that was "on all fours"; thus, the Defendant's
12 attempt to distinguish *Lawson* on the basis that it did not involve railbanking defies logic
13 and has no merit.** Despite the Defendants' disagreement with the consistent holdings of the
14 Federal Circuit and the Supreme Court of Washington, it is the law and the Defendant is bound
15 by binding precedent.
16
17

18 Besides the United States Supreme Court, other courts have likewise cited *Lawson* for
19 the proposition that authorization for trail use/railbanking exceeds a railroad purpose
20 easement. *See Preseault I*, 494 U.S. at 926 (stating that "reference to state law has guided
21 other courts seeking to determine whether a railway right of way lapsed upon conversion to
22 trail use" and then citing *Lawson* for the proposition that "change in use would give effect to
23 reversionary interest"); *National Wildlife Federation v. Interstate Commerce Comm'n*, 850
24 F.2d 694, 704-708 (D.C. Cir. 1988); *Glosemeyer v. United States*, 45 Fed. Cl. 771, 780 (Fed.
25

1 Cl. 2000); *Eldridge v. City of Greenwood*, 503 S.E.d 191, 202 (S.C. Ct. App. 1998). The fact
2 of the matter is that *Lawson and King Cty. v. Squire Inv. Co.*, 801 P.2d 1022 (Wash. App.
3 1990 are indeed directly on point. Under Washington law, the Railroad acquired an easement
4 limited to railroad purposes and railbanking and public recreational trail is not a railroad
5 purpose, and the railroad purpose easement does not currently exist, period.

6 King County specifically states that “the Trails Act expressly preserves a railroad’s
7 property rights in a railbanked corridor” and that “Congress, the Supreme Court, and the
8 STB have all recognized that railbanking preserves railroad easements that otherwise
9 would extinguish after cessation of railroad use.”³ King County’s statements are true but,
10 under the plain and specific language of the Trails Act, the railroad’s easement is preserved
11 for future use in case it is ever reinstated as a railroad but, in the interim, is only used as a
12 recreational trail. King County’s statements that they can use the railroad purposes
13 easement for railroad purposes in the interim, or for incidental purposes, are patently false.
14 King County’s attempted “land grab”⁴ must fail as a matter of law.

15
16
17 **IV. CONCLUSION**

18 King County only acquired a trail/railbanked easement via the Trails Act and
19 nothing more. The Trails Act does not preserve former rail corridors for current rail use,
20 but rather preserves the former rail corridor for **future** rail use only while allowing the
21 corridor to be used in the interim as a recreational trail.

22 Date: February 16, 2016. /s/ Thomas S. Stewart
23 Thomas S. Stewart
24 Elizabeth McCulley

25 ³ Def.’s Br., D.E. 46, at p. 6.
⁴ King County miraculously states that “Plaintiffs are merely attempting a land grab against a well-established
railroad corridor.” See Def.’s Br., D.E. 46, at p. 1.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STEWART, WALD & McCULLEY, L.L.C.
2100 Central, Suite 22
Kansas City, MO 64108
Telephone: (816) 303-1500
Facsimile: (816) 5278068
stewart@swm.legal
mcculley@swm.legal

AND

RODGERS DEUTSCH & TURNER, P.L.L.C.
Daryl A. Deutsch, WSBA No. 11003
Rodgers Deutsch & Turner, P.L.L.C.
3 Lake Bellevue Dr. Suite 100
Bellevue, WA 98005
Telephone (425) 455-1110
Facsimile (425) 455-1626
daryl@rdtlaw.com

ATTORNEYS FOR PLAINTIFFS

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.

Andrew W Marcuse
David J. Hackett
King County Prosecuting Attorney, Civil Division
andrew.marcuse@kingcounty.gov
david.hackett@kingcounty.gov
Attorneys for Defendant King County

Emily J. Harris
Special Deputy Prosecuting Attorneys
Corr Cronin Michelson Baumgardner Fogg & Moore LLP
eharris@corrchronin.com
Attorneys for Defendant King County

/s/ Thomas S. Stewart