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5  
6 IN THE SUPERIOR COURT OF THE  
7 STATE OF WASHINGTON FOR KING COUNTY

8 TRACY NEIGHBORS and BARBARA  
9 NEIGHBORS; ARUL MENEZES and  
10 LUCRETIA VANDERWENDE; LAKE  
11 SAMMAMISH 4257 LLC; HERBERT  
12 MOORE and ELYNNE MOORE; TED  
13 DAVIS and ELAINE DAVIS; REID BROWN  
14 and TERESA BROWN; SHAWN HUARTE  
15 and TRINA HUARTE; ANNETTE MCNABB;  
16 EUGENE MOREL and ELIZABETH  
17 MOREL; VOLKER ELSTE and GAIL  
18 UREEL; JOHN R. WARD and JOANNA  
19 WARD, AS CO-TRUSTEES OF THE WARD  
20 HALES LIVING TRUST; YORK HUTTON;  
21 L. LARS KNUDSEN and LISA SHDO.

22 Plaintiffs,

23 vs.

24 KING COUNTY, a municipal corporation and  
25 political subdivision of the State of  
Washington,

Defendant.

Cause No.: 15-2-20483-1 SEA

**PLAINTIFFS' RESPONSE TO  
DEFENDANT'S MOTION TO STAY**

**I. INTRODUCTION AND PROCEDURAL POSTURE**

Plaintiffs originally filed this action on August 20, 2015 to establish the width of the railroad's right-of-way easement along the shores of Lake Sammamish, which is a state law issue. After this case was wrongly removed to Federal District Court and then remanded back,

PLAINTIFFS' RESPONSE TO DEFENDANTS  
MOTION TO STAY

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1 the present motion to stay filed by King County is nothing more than a blatant attempt to  
2 circumvent the remand order.

3 In its motion, King County provides a thoroughly confusing and inaccurate sequence  
4 of events that has led to the filing of its motion. *See* Declaration of Thomas S. Stewart, Exhibit

5 1. In order to clarify the events for the Court, Plaintiffs provide the following timeline:

- 6 1) On February 25, 2015, numerous landowners who own property along the  
7 shores of Lake Sammamish (“the *Hornish* plaintiffs”) filed an action for  
8 declaratory relief and quiet title in Federal Court against by King County to  
9 determine the extent of King County’s property interest in the right-of-way  
10 along Lake Sammamish by virtue of the Trails Act in the former BNSF corridor  
11 along Lake Sammamish. *See Sammamish (Hornish) Compl.*, Stewart Decl.  
12 Exhibit A.
- 13 2) On August 20, 2015, Plaintiffs filed the present action in state court for  
14 declaratory relief and to quiet title, seeking resolution of the state law issue of  
15 the proper width of BNSF’s right of way easement located along the shores of  
16 Lake Sammamish. *See Pls.’ Compl.* Stewart Decl. Exhibit B.
- 17 3) On August 24, 2015, King County filed a Notice of Removal of the present  
18 action in the United States District Court for the Western District of  
19 Washington. *See Notice of Removal*, Stewart Decl. Exhibit C.
- 20 4) On August 28, 2015, King County filed its Answer and Counterclaim in  
21 *Hornish*, requesting that disputed portions of the corridor should be quieted to  
22 King County. *See Hornish*, King County’s Answer and Counterlcaim, Stewart  
23 Decl. Exhibit D.
- 24 5) On September 23, 2015, Plaintiffs filed their Motion to Remand the present  
25 action to Washington State Court. *See Motion to Remand*, Stewart Decl.  
Exhibit E.
- 6) On December 16, 2015, Judge Marsha Pechman remanded the present action to  
this court. *See Order Re Remand*, Stewart Decl. Exhibit F.
- 7) Unchastened by Judge Pechman’s ruling, on January 28, 2016, King County  
filed a Motion for Summary Judgment on several issues in the *Hornish* case,  
including the state law issue of the proper width of BNSF’s right of way  
easement, which is the issue involved in this action. *See Hornish*, King  
County’s Motion for Summary Judgment., Stewart Decl. Exhibit G.

- 1 8) On February 19, 2016, the *Hornish* plaintiffs filed their brief in opposition to  
2 King County's Motion for Summary Judgment, whereby the *Hornish* plaintiffs  
3 identified that the width issue was pending in the present action, and further  
4 requested partial denial of King County motion on that basis. *See Hornish*, Pls.'  
5 Resp. to King County Motion for Summary Judgment at pp.10-12, Stewart  
6 Decl. Exhibit H.
- 7 9) In its Reply to the *Hornish* plaintiffs' response, King County claimed that its  
8 August 28, 2015 Counterclaim established a basis for the Federal District Court  
9 to grant relief on the width of the easement issue. *See Hornish*, King County's  
10 Reply in Supp. Motion for Summary Judgment, Stewart Decl. Exhibit I.
- 11 10) Oral argument on King County' motion for summary judgment is currently  
12 scheduled for April 8, 2016. *See Hornish v. King County*, No. 2:15-cv-00284-  
13 MJP, Notice of Hearing Motion for Summary Judgment., Dkt. No. 60, March  
14 7, 2016.
- 15 11) After this case was remanded to this Court, King County has refused to file its  
16 Answer to Plaintiffs' complaint even though this Court informed them that  
17 pleadings were not transferred from Federal Court and even though Plaintiffs'  
18 counsel has requested that King County file its Answer on numerous occasions.  
19 Plaintiffs' counsel plans to comply with this Court's Scheduling Order and will  
20 be ready for trial on August 15, 2016 as established in the Scheduling Order.

21 King County is merely attempting to stall the resolution of Plaintiffs' claims that are  
22 rightfully before this Court. This attempt should be soundly rejected for what it is—a  
23 backwards attempt to ignore a jurisdictional order not subject to appeal. The present motion  
24 should also be denied because King County cannot obtain the benefit of the priority of the  
25 action doctrine because this Court is the "first-in-time" court such that the doctrine does not  
apply at all. In any event, King County cannot satisfy the elements to support the doctrine,  
most notably the identity of the subject matter and relief sought. For these reasons, King  
County's motion to stay should be denied.

## 26 II. ARGUMENT

### 27 A. King County Has Refused to Obey a Federal Order Remanding the Present Action to This Court

1 King County's request to stay this proceeding is part of a coordinated attempt to ignore  
2 and evade the Federal District Court's decision remanding this action to Washington State  
3 Court. This action involves a pure state law matter—resolution of the proper width of the  
4 former BNSF railroad corridor that runs along the eastern shore of Lake Sammamish. *See* Pls.'  
5 Compl. Stewart Decl. Ex. B. It does not, as King County argues, concern subsurface rights or  
6 the extent of the property interests acquired by King County pursuant to the Trails Act. Those  
7 issues are pending before Judge Marsha Pechman in the United States District Court for  
8 Western District of Washington in the action *Hornish v. King County*, No. 2:15-cv- 00284-  
9 MJP.  
10

11  
12 Indeed, Judge Pechman remanded this case to this Court, ruling that the Federal District  
13 Court did not have jurisdiction. *See* Order Re Remand, Stewart Decl. Ex. E. King County  
14 realizes this, yet refuses to acknowledge and comply with the jurisdictional decision handed  
15 down, no doubt disappointed by the reality that such orders are not subject to appeal. *See* 28  
16 U.S.C.A. § 1447. Rather than comply, King County has pursued resolution of the issue by  
17 summary judgment motion filed in the *Hornish* action, and in conjunction has filed the present  
18 motion to stay.  
19

20 There are several inaccuracies in King County's summation of the history of the  
21 litigation concerning the subject railroad corridor. The most important is King County's  
22 declaration that the claims in this case are the same as those in the *Hornish* case pending before  
23 Judge Pechman. That case concerns the following issues: 1) whether railbanking the corridor  
24 preserved property rights formerly held by the BNSF; 2) whether King County holds all of  
25 BNSF's property rights in the Corridor; and 3) whether King County or the *Hornish* plaintiffs

1 are entitled to the exclusive use and possession of the area on, above, and below the surface of  
2 the Corridor. *See Sammamish (Hornish) Compl.*, Stewart Decl. Ex. A.

3 The present action requests resolution of a straightforward issue: what location and  
4 width of prescriptive easement right-of-way did the Burlington Northern Santa Fe Railroad  
5 (“BNSF”) and/or its predecessors-in-interest possess and thereby transfer to King County.  
6 The resolution of this issue raises two corollary issues: 1) the determination of the location and  
7 width of BNSF’s original prescriptive easement; and 2) the determination of any of the changes  
8 in the original location and width over the years. Both of these issues are only resolved through  
9 the application of Washington law. *See Sunnyside Valley Irr. Dist. v. Dickie*, 73 P3d 369, 373  
10 (Wash. 2003) (the width of a prescriptive easement is restricted to that which is reasonably  
11 necessary and convenient to effectuate the original purpose of the easement); *Chaplin v.*  
12 *Sanders*, 676 P.2d 431, 433-434 (Wash. 1984) (describing the elements of adverse possession  
13 claim under Washington law). That is why Plaintiffs filed this action in Washington State  
14 Court.  
15

16  
17 King County removed this action, and attempted to tie this state law issue to a Federal  
18 issue, but Judge Marsha Pechman soundly ruled that “a substantial federal issue is not  
19 presented” and remanded to this Court. *See Order Re Remand*, Stewart Decl. Ex. F.  
20 Accordingly, Judge Marsha Pechman has in fact already determined that the issues involved  
21 in the *Hornish* litigation and the present action are separate. The claims in this action are now  
22 squarely where they belong—before this Washington state court.  
23

24 The *Hornish* plaintiffs identified the inappropriateness of King County’s actions in  
25 their response to King County’s motion for Summary Judgment in the *Hornish* action. *See*  
*Hornish*, Pls.’ Resp. to King County Mot. for S.J., Stewart Decl. Ex. H. Since counsel for the

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1 *Hornish* plaintiffs is the same as for the Plaintiffs in this action, counsel will certainly bring  
2 King County's actions in this litigation to the attention of Judge Pechman in *Hornish*. King  
3 County actions are inappropriate and amount to a brazen refusal to obey a valid Federal order.  
4 For this reason, King County's motion to stay should be denied.

5 **B. King County Cannot Satisfy the Elements of the Priority of the Action**  
6 **Doctrine**

7  
8 Even if this Court does not deny King County's motion on the above basis, King  
9 County's motion should be denied for the additional reason that King County cannot satisfy  
10 the elements of Washington's priority of action doctrine.

11 **1. This case is the "first-in-time court" and so the doctrine cannot apply**

12 King County's request for relief must fail because the *Hornish* action is not the first to  
13 gain jurisdiction of the present cause of action. *See Sherwin v. Arveson*, 633 P.2d 1335, 1337,  
14 (Wash. 1981). As described in the previous section, this action originated in this Court, and  
15 so it "retains the exclusive authority to deal with the action until the controversy is resolved."  
16 *Id.* This element is inflexible and is the bedrock principal of the doctrine. Plaintiffs anticipate  
17 that King County will claim that the *Hornish* case is the first-filed case because that action was  
18 filed in advance of the present action. Yet, as already identified, the present issue was not  
19 included among the claims in that case, a fact which was solidified when Judge Pechman  
20 declined jurisdiction. If such claims in this case had been included in the *Hornish* complaint,  
21 then certainly there would have been a different ruling on Plaintiffs' motion to remand.  
22

23  
24 King County's reliance on the doctrine is further undone based upon its admission in  
25 *Hornish* that the federal district court's authority to rule on the issue was its counterclaim filed  
in the *Hornish* action on August 28, 2015. *See Hornish*, King County's Reply in Supp. of

1 Mot. for Summ. J., Stewart Decl. Ex. I. This action was filed on August 20, 2015. *See* Pls.’  
2 Compl. Stewart Decl. Ex. B. King County therefore cannot lay the essential groundwork to  
3 establish that this action should be stayed pursuant to the priority of action doctrine.

4 King County’s actions in the Hornish case is in fact representative of the problems  
5 that the doctrine was designed to prevent. It is possible (and likely) that Judge Pechman might  
6 not issue a ruling in *Hornish* on whether she will even hear the claims that are involved in this  
7 case in the *Hornish* matter for several months. If Judge Pechman declines to hear the issue,  
8 then there will have been delay caused in this matter for no reason. Plaintiffs will have then  
9 suffered the injustice of not having their claims resolved in a timely fashion. Indeed, Plaintiffs  
10 have already had to endure significant delay as a result of King County’s efforts to remove  
11 this action to Federal Court. The prospect of severe injustice being done should a stay issue  
12 is very real, for at present there is a permit pending that would permit construction of a nature  
13 and hiking in the area that is in dispute in this litigation.

14  
15 If a stay is entered and Judge Pechman declines to hear the issue in the *Hornish* action,  
16 the Court and the parties will have missed the opportunity to resolve the dispute prior to  
17 additional resources being spent developing a trail area that might be contradictory to a final  
18 judgment from this Court. King County implores the Court to adopt the priority of action  
19 doctrine and warns of a dangerous conflict that could occur if a stay is not entered. King  
20 County’s warning is not genuine for King County has manufactured its own conflict. If King  
21 County had chosen to abide by the remand order there would be no “unseemly, expensive,  
22 and dangerous conflicts of jurisdiction and of process” to begin with. *See Sherwin*, 633 P.2d  
23 at 1337.  
24  
25



1                   **2. The relief sought in this action is different than the relief sought in**  
2                   ***Hornish***

3                   Even if this Court decides to enter into an analysis of the doctrine, a stay in this case  
4 would not be appropriate because the relief sought in this case is different that the relief sought  
5 in the *Hornish* matter. King County reasons that because the claims in this action could  
6 possibly have been brought in the *Hornish* action, then the doctrine “requires” that a stay issue.  
7 *See* Def.’s Br. at p.11. King County cites an unpublished opinion as its primary support for its  
8 incorrect proposition. As explained in *Bunch v. Nationwide Mut. Ins. Co.*, 321 P.3d 266 (Wash.  
9 App. 2014), the actual rule in the priority of the action doctrine relies on res judicata principals,  
10 which are “designed to prevent repetitive litigation of the **same matters.**” *Id.* at 44 (citations  
11 omitted).

12                   In *Bunch*, the court reflected on the actions pending between the two jurisdictions,  
13 noting specifically that the court’s “determination of liability will bar relitigation of [the issue]  
14 in the other court, assuming that the other collateral estoppel requirements are met.” *Id.* at 46.  
15 The court identified an issue in the first action that, when determined, would have “collateral  
16 estoppel effect in the other action.” *Id.* There can be no collateral estoppel effect here because  
17 there are no issues in the *Hornish* case whose resolution would be determinative of the claims  
18 in this case.  
19

20                   As explained above, the *Hornish* case concerns property **rights** in the subject  
21 corridor—whether King County or the *Hornish* plaintiffs have control over the subsurface in  
22 the subject corridor. The present action concerns nothing more than the size of the corridor,  
23 regardless of which party has ownership and control of the surface or subsurface. King County  
24 attempts to tie the cases together because the nature of the relief sought between the two  
25



1 actions—quiet title and declaratory judgment—are the same. That is an argument of form over  
2 substance. The outcome in the *Hornish* case will have no preclusive effect on the claims in  
3 this case, and as a result the priority of action doctrine cannot apply.

4 **3. The subject matter and parties are different between the actions to the**  
5 **extent that the priority of action doctrine cannot apply**

6 As discussed in the previous section, the subject matter that King County argues is the  
7 same between the two actions is the extent of the property rights obtained by King County in  
8 the corridor under the federal Trails Act. King County's argument is reminiscent of the one it  
9 made in its response to Plaintiffs' motion to remand. In its response, King County attempted  
10 to tie Plaintiffs' claims for relief to the federal issue of the extent of the property interests that  
11 King County obtained from BNSF as a result of the Trails Act. *See* King County's Opposition  
12 to Pls.' Mot. to Remand, Stewart Decl. Ex. K. ("Plaintiffs fail to acknowledge that the elements  
13 of their state law claims ... require an interpretation of and determination of federal law.").  
14 Judge Pechman squarely rejected King County's interpretation of Plaintiffs' claims in this  
15 action:  
16

17 Because Plaintiffs do not appear to contend that the Trails Act did not prevent  
18 the easement from being extinguished (Dkt. No. 22 at 3), or to make any other  
19 argument that conflicts with Defendant's interpretation of the effect of the  
20 Trails Act, the issues involving the Trails Act do not appear to be "actually  
21 disputed." At this stage of the case, it also appears that interpretation of the  
22 Trails Act is not necessary to determine whether the declaratory relief  
requested by Plaintiffs (Dkt. No. 1 at 7) is proper, so it falls short of the  
"necessarily raised" requirement as well. The Court does not have federal  
jurisdiction by virtue of this claim on the current record.

23 *See* Order Re Remand at p. 3, Stewart Decl. Ex. F. As recognized by Judge Pechman, Plaintiffs  
24 in this action do not challenge King County's right to construct a nature and hiking trail. The  
25 only question is the boundaries of where that nature and hiking trail may be built, which is a

1 purely state law issue. *See Sunnyside Valley Irr. Dist.*, 73 P.3d at 373; *Chaplin*, 676 P.2d at  
2 433-434. The subject matter in the Hornish case, the Trails Act, is separate and distinct from  
3 the subject matter in this case.

4 King County also makes the dubious claim that because some of the parties in the  
5 original *Lake Sammamish* action were not included in the current *Hornish* action, and are  
6 included in this action, that the outcome in *Hornish* should have preclusive effect in this action.  
7 But that argument assumes the false premise that forms the basis of King County's motion,  
8 that the claims in this action can rightfully be adjudicated in the *Hornish* action. Stated again,  
9 Judge Pechman already declined jurisdiction over the claims of the Plaintiffs in this case, and  
10 she will no doubt decline King County's invitation to rule on these Plaintiffs' claims in  
11 *Hornish*.

### 13 III. CONCLUSION

14 King County's attempt to stay this case is, in effect, an inappropriate effort to appeal  
15 the order remanding this action to state court, and so it should be denied. In addition, the  
16 priority of action doctrine cannot apply because this Court was the first of "competent  
17 jurisdiction to become possessed of [this case]," this case and it should continue in this Court  
18 "until the matter is finally and completely disposed of and no court of co-ordinate authority is  
19 at liberty to interfere with its action." *State ex rel. Greenberger v. Superior Court*, 235 P. 957,  
20 (Wash. 1925).

22 Date: March 21, 2016.

/s/ Thomas S. Stewart

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**ATTORNEYS FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 21<sup>st</sup> day of March, 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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