No. 301290-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

MIKE WALCH, et. al.,

Appellants

v.

KERRY A. CLARK, et. al.,

Respondents.

BRIEF OF APPELLANTS'

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STATEMENT OF THE CASE

Decisions for Which Review is Sought

Appellants are Mike Walch and Marcia Walch, husband and wife, (Walches; Plaintiffs below). Respondents are: Kerry A. Clark and Patricia L. Clark, husband and wife (Clark); W. L. Clark Family LLC, a Washington Limited Liability Company (Clark LLC); and Robert C. Folkman and Patricia W. Folkman, husband and wife (Folkman). Walches seek review of the Memorandum Decision (CP 246-251); the Findings of Fact and Conclusions of Law (CP 445-454); the Orders Awarding Clarks' and Folkmans' Fees and Costs CP 455-457 and CP 458-460); the Final Judgments in favor of Clarks and Folkman (CP 461-465 and CP 466-469), and the Order Denying Motion for Reconsideration (CP 208-212) by the Superior Court for Kittitas County. The Decisions, Findings and Orders: 1) dismissed Appellant Walches' claim for an easement by necessity pursuant to RCW 8.24.010 over property owned by Respondents Clark, Clark, LLC, and Folkman, 2) quieted title to the Clark, Clark, LLC and Folkman properties in the respective Respondents; 3) awarded Respondents attorney fees and costs associated with defending against the actions for prescriptive easement, implied easement and

condemnation of private way of necessity; and 4) denying Appellant Walches Motion for Reconsideration (CP 470-471).

Factual History

Appellants Walch are the owners of Rainier Skyline Excavators, Inc. (RSE), a company that designs, builds and delivers portable hydraulic track drive skyline excavators, buckets, teeth and accessory equipment (CP 447-448; Ex. 40). These systems incorporate redesigned cable logging systems to span areas and are used to harvest gravel and sand below water tables (RP Vol. I, p.10; Ex. 40). Mike Walch first became interested in the property in Cle Elum, Washington, in late 1999 or early 2000, when he saw it advertised for sale from the interstate, because it had large ponds (Dalle ponds) on the property which provided good exposure for sales and could be used to demonstrate and test the equipment before delivery (RP Vol. I, pp. 11-12; Exs. 42-45). The features of the property were unique – a horseshoe shaped pond and solid gravel ground surrounding the ponds were ideal for his business purposes (RP Vol. I, p. 12 -14). The Walches intend to use the land to demonstrate, display and sell Rainier Skyline Excavators' machinery, using the horseshoe shaped pond as a staging and observation area, and either

manufacture or assemble several components of the excavator on their land (CP 448; RP Vol. II, pp. 19 & 21). Many components of this equipment are transported on extra-long lowboy trailers, called superloads. These superloads can be up to 165 feet in length and can carry several hundred thousand pounds (CP 448).

The Dalle ponds were created by the removal of gravel during the development of Interstate 90 in the 1960's (CP 9). When Walch first viewed the property, they accessed their real property on several occasions from N. Oakes Avenue, thence Easterly, over and across an existing road that crossed the real property of the Clarks, Clark, LLC and Folkmans (RP Vol. I, pp. 16-18; Exs. 2-8), now known as Swiftwater Business Park. The property of each Respondent lies to the West of the Walch property. (Exs. 12, 45/App. "A", 52, and 54/App. "B")

The Walch property is located in the City of Cle Elum Industrial Zone (RP Vol. I, p. 72; Ex. 106). Prior to purchasing the property, Walch met with the City of Cle Elum City Planner and Mayor, and it was their understanding that their intended use of the property would be allowed. (RP Vol. I, p. 21). From discussions with the City officials, Walch understood the City wanted a street that was North of their property and South of the BNSF

tracks, the full length from Owens Alley clear to Oakes Avenue (RP Vol. I, p. 22). Nonetheless, they saw no problem bringing their equipment in via the Oakes route used when they first visited the property (RP Vol. I, p.29).

On May 12, 2004, the Walches purchased the Dalle property in Cle Elum, Washington. The Walches Real Estate Contract (Ex. 1) provided that access to the property was by way of an existing easement over an existing road on the Dalle property to the East of the Walches land, then across Northern Pacific Railroad land, "so long as the railroad shall allow" (now Burlington Northern & Santa Fe Railroad, BNSF). This road heading East through the Dalle property and then continuing East through the BNSF corridor to Owens Road, which is commonly known as Dalle Road.

Dalle Road connects to Owens Road, a private road (RP Vol. I, p. 126; Ex 54/App. "B") At Owens Road, the Walches must proceed North on the private Owens Road through the BNSF corridor, across the BNSF railroad crossing to the North edge of the BNSF corridor to get to the point where Owens Road becomes a public right of way owned by the City of Cle Elum (RP Vol. I, pp. 125-26; Exs. 12, 54/App. "A" & 57)

Schedule B of the Walches Real Estate Contract sets out special exceptions to the policy of title insurance, and Paragraph 6 thereof indicates:

> PRIVATE ACCESS TO SAID PREMISES is across a railroad right of way. This Company will require that the "Private Roadway and Crossing Agreement" and any assignment or modifications thereof which were issued by the railroad company, be submitted for examination. The coverage the afforded under any policies issued, relative to access to said premises, will be limited by the restrictions, conditions and provisions as contained therein. If no "agreement" exists, the forthcoming policy will contain the following exception:
>
> The lack of a right of access to and from the land across a railroad right of way.

(Ex. 01, Exhibit B.) Although the Walches contract provides for alternative access should Dalle Road be closed or vacated, the parties stipulated that, either way, the Walches legal access does not include the railroad corridor two hundred feet North and South of the centerline and that no permits exist for Walch or the City of Cle Elum to cross the BNSF Railroad corridor (RP Vol. I, 4-5; *see also* RP Vol. I, p. 16, 127 & 130; Exs. 1, 9 & 54/App. "B").[1] Moreover, the alternate route does not take Walch all the way to the privately held portion of Owens Road, and gives Walch no legal right to use that road (Ex 54/App. "B")

[1] The City of Cle Elum does have a private agreement with the Owens Family to use Owens Road South of the BNSF railroad crossing from the North line of Section 36 to the City of Cle Elum's sewage treatment plant (RP Vol. I, p. 126; Ex. 58). Nonetheless, no written agreement exists as to the railroad corridor and crossing.

After Walch purchased their property, BNSF sold the South 150-foot portion of the railroad corridor North of the Clark and Folkman parcels to the Clarks (Exs. 6 & 7). William and Patricia Clark in turn conveyed that property to Clark, LLC. (Ex. 3) As a result, Walch believed efforts to obtain a street easement through the BNSF corridor were futile (RP Vol. II, Pp. 51-52). According to the testimony of Mike Walch, he cannot get their access insured (Ex. 9); because they do not have a BNSF permitted easement for access to their property, and BNSF was not willing to grant an easement along its corridor to access their property (RP Vol. II, pp. 4-5; 9). Further, they cannot get bank financing to construct their manufacturing facility because of this condition of the title (RP Vol. II, p. 10). The Walches did file an Application for Purchase of Railroad Land (Ex. 114) on October 27, 2010, but BNSF has taken no action on that application (RP Vol. II, P 40). They have not sought a permit to cross the railroad at Owens Road (RP Vol. II, p. 43). They did, however, try to get a railroad crossing and access so they could access their property directly from the North, but BNSF refused to consider any additional unguarded railroad crossings (RP Vol. II, p. 46).

Since Walches purchased their property, Respondents Clark and Folkman have spent time and money to develop the Swiftwater Business

Park, including the Clarks' improvement of the building now housing Marson & Marson Lumber, developing and housing a glass company, and constructing a two-story office building which houses the Kubota tractor dealership and other tenants (CP 448). Clark, LLC has also sought to short plat and rezone its property immediately North of the Clark and Folkman lands (CP 448; RP Vol. I, p.76).

The property of all parties is presently zoned Industrial by the City of Cle Elum as defined by Chapter 17.36 of the Cle Elum Municipal Code (Ex. 106). According to the testimony of Matt Morton, City Administrator, the Walches have not submitted any land use applications for their property for the use by their company, RSE (RP Vol. I, p. 89). Mike Walch testified that he does not want to do any studies or plans until they have legal access to their property (RP Vol. II, p. 56). Morton indicated that while the Walches' intended uses of their property may be permitted in the Industrial Zone if they are developed and used in a manner that complies with the performance standards and aesthetics objectives of the Chapter 17.36 of the Municipal Code (RP Vol. I, p.72), he also noted that the Walches' use would be a conditional use and that it would be premature to give an opinion as to whether the use would be granted (RP Vol. I, p.90). Mike Walch testified that

none of the anticipated activities of RSE fell within the definitions of conditional uses (RP Vol. II, p.30-31; Ex. 106). Morton also pointed out that the Dalle ponds were classified Category Three Wetlands, and any application would have to be reviewed and reconciled with the City of Cle Elum Critical Areas Ordinance (RP Vol. I, pp. 91-97; Ex. 107).

On August 20, 2010, Walches filed a Complaint To Establish An Easement From Prior Use And/Or Prescription; Or Alternatively An Easement By Necessity Pursuant to RCW 8.24.010 Et. Seq. (CP 1 – 63).

On January 14, 2011, pursuant to a stipulation by all parties, the Court entered its Order dismissing the Walches' claim for an easement from prior use, with prejudice. On February 8, 2011, the Trial Court entered its order for partial Summary Judgment dismissing, with prejudice, the Walches' claims for prescriptive easements over and across the lands of Clark, Clark, LLC and Folkman.

The matter pertaining to the statutory easement by necessity pursuant to RCW 8.24.010 et seq. was tried by the Court, without a jury, on May 10 and 11, 2011. The Walches sought a 30-foot easement by necessity, asserting their property was landlocked because they have no legal right to cross the railroad right of way, at the Owens Road crossing or otherwise, and because

the Easterly access route was unsuitable for the Walches' heavy excavator equipment, including commercial extra-long lowboy traffic: The super-load lowboy hauling equipment would be forced to traverse an elevated railroad crossing, risking the danger that it would get "high-centered" and caught on the tracks (RP Vol. I, p.37; RP Vol. II, p. 44; 48-49). Further, included 1) the inability to negotiate the turns at Owens Road at the Dalle intersection; 2) the inability to negotiate turns at the intersection at First Street and Owens Road; 3) the inadequate width of Owens Road; and 4) the grade level at the Owens Road crossing. Each of the barriers renders it impossible for Walches to drive the RSE super-load lowboys (some as long as 165 feet) to and from their property. As a result of these physical constraints, it is virtually impossible to use the Easterly Dalle Road access, further necessitating an alternate right-of-way across the Clark and Folkman lands (RP Vol. I, pp. 42-44 & 56; Vol. II, pp 47, 49, 73; Exs. 46 & 47).

The Walches claimed the easement by necessity should be located off Swiftwater Boulevard through the Folkman, Clark, LLC and Clark properties in a Southeasterly direction along the Southern edges of the Defendants' properties immediately inside the Department of Transportation right of way fence, thence to the Southwest corner of the Walch property (RP Vol. II,

p.25; Ex. 53). Although they sought a 30-foot easement, Mike Walch testified that a 20-foot width would suffice. (RP Vol. II, p. 26).

On May 24, 2011, the Court issued its Memorandum Decision (CP 246-251) and on July 11, 2011, it entered Findings of Fact and Conclusions of Law (CP 445–454). Judgment was entered dismissing Walches' claim of an easement by necessity under RCW 8.24.010, without prejudice, and granting each of Defendants' counterclaim to quiet title in their respective properties (CP 461-465; 466-469). The Court also awarded Clark, Clark LLC and Folkman their attorney fees and costs (CP 455-457; 458-460). Reconsideration was denied on July 21, 2011 (CP 476) and Notice of Appeal was filed on August 4, 2011 (CP 477-511).

ARGUMENT

I. The Trial Court Erred As A Matter Of Law In Concluding That Reasonable Necessity Was Not Shown Sufficient To Established Private Way of Necessity Pursuant to RCW 8.24.010.

A. Private condemnation effectuates the overriding public policy against rendering landlocked property useless.

Article I, Section 16 of the Washington State Constitution provides: "Private property shall not be taken for private use, except for private ways

of necessity." This express provision reserves for private citizens the power of eminent domain. *See generally State ex rel. Mountain Timber Co. v. Superior Court of Cowlitz County et al.*, 77 Wash. 585, 137 P. 994 (1914).

In its current form, RCW 8.24.010 is a broad grant of eminent domain power to private citizens:

> [a]n owner or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for the proper use and enjoyment to have and maintain a private way of necessity . . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity.... The term 'private way of necessity,' as used in this chapter, shall mean and include a right-of-way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads... over and through which timber, stone, minerals or other valuable materials and products may be transported and carried.

The statute reserves, in private citizens, the right to condemn private property for private use. The constitution and statute say nothing about the condition of the property or the limitations regarding the application of the statute. Rendering title unmarketable and forever sealing valuable resources of the State, does not serve the public or private interest expressed in Washington Const. art. 1, § 16 and the private condemnation statute.

The effect of the Trial Court's decision basically leaves the Walch property landlocked and consequently renders the Walch property virtually

useless. In essence, because there is a remote and speculative chance that the City of Cle Elum may not grant permits for Walch's intended use of the property, the Trial Court refused the Walches the only remedy that would give them legal access: an easement by necessity. And, because Walch's permissive use of the railroad corridor has not been actually terminated or physically barred, the Trial Court again denied Walch the only remedy that would secure their access so that they could make full beneficial use of their property, and the permissive use of the Railroad Corridor and Crossing can be terminated at any time. Without legal, insurable access, they could not secure financing to develop their land, and the permissive use of the railroad corridor and crossing can be terminated at any time (RP Vol. II, p. 10). It sits vacant and unused. Landlocked property is greatly discouraged in Washington. *See* Const. art. 1, § 16; RCW 8.24.010; *State ex rel. Mountain Timber Co. v. Superior Court of Cowlitz County et al.*, 77 Wash. 585, 137 P. 994 (1914); *Hellberg v. Coffin Sheep Co.,* 66 Wn.2d 664, 404 P.2d 770 (1965) (discussing public policy against rendering landlocked pr operty useless). It is in the interest of the public welfare to fully utilize the resources of this state. *See Mountain Timber Co.*, 77 Wash. at 588-89. That public

interest is undermined when landowners are unable to develop and exploit their land to its desired and intended beneficial use.

B. Property without legal access is landlocked, satisfying the requirement of necessity.

The Trial Court erred by imposing the precondition that Walches first be denied use of the railroad crossing or corridor as a prerequisite to establishing necessity. The proof was clear that Walches lacked legal access to their property, and the parties stipulated that there were neither public nor private permits to traverse the railroad corridor or to use the railroad crossing (RP Vol. I, 4-5; *see also* RP Vol. I, p. 16, 127 & 130; Exs. 1, 9 & 54/App. "B"). Walches' Dalle Road easement runs over the railroad corridor without written permission and traverses the railroad crossing without a permit. And, although Walches have an alternative, contingent easement route should the Dalle Road section in the corridor be withdrawn, this alternative route does not resolve the issue. That route ends before it connects to Owens Road (Ex 54/App. "B") and, at the point of intended connection, Owens Road is a private road which Walches have no legal right to use (RP Vol. I, p. 126). Even if Owens Road were a legal route for Walches, it still bisects the

railroad corridor and necessitates the use of the railroad crossing (Ex 54/App. "B")

Despite these facts, the Trial Court concluded that Walches' property was not landlocked, and necessity not established, because their permissive access has not been denied or withdrawn (CP 451). Such a requirement does not exist. In fact, in *Brown v. McAnally,* 97 Wn. 2d 360, 367-68, 644 P.2d 1153 (1982), the court stated:

> We have long recognized that if one is otherwise entitled to a private way of necessity it may be condemned where an existing private way is already established. *State ex rel. Polson Logging Co. v. Superior Court,* 11 Wn.2d 119 P.2d 694 (1941); *State ex rel. Colyn v. Superior Court,* 132 Wash. 411, 232 P. 282 (1925). *See also State ex rel. St. Paul & Tacoma Lumber Co. v. Dawson,* 25 Wn.2d 499, 504, 171 P.2d 189 (1946). The single fact that a potential condemnor may previously have leased or otherwise contracted with the condemnees for an easement does not in and of itself prevent the potential condemnor from condemning a private way of necessity as a joint use. *State ex rel. Polson Logging Co. v. Superior Court, supra* at 568 (potential condemnor sought to condemn a private way of necessity over an easement already leased to the condemnor). *Similarly under this approach, a potential condemnor should not be prevented from condemning a private way of necessity merely because the condemnor may enjoy the permissive user of a "way".*

(Italics added). This clearly indicates that a denial or withdrawal of permission is not a prerequisite to a finding of necessity.

Case law from other jurisdictions supports this conclusion. In *Jernigan v. McLamb*, 192 N.C. App. 523, 665 S.E.2d 589 (2008), the plaintiff claimed an easement by necessity, or in the alternative a prescriptive easement over the property of his neighbor. The parcels had been created in 1925 when the original tract was divided between six heirs, and passed through a series of conveyances to the present day parties. The defendants' land had access to a public road. The plaintiff did not have direct access to a public road, but did have permissive access to his property via two alternate routes. 665 S.E.2d at 591. The trial court concluded that the plaintiff had access to his property and "is currently receiving the full use and benefit of his property, and it is not necessary for [plaintiff] to use the [defendants'] property . . . to have full, fair, convenient and comfortable use, benefit and enjoyment of his property." It ruled that the plaintiff had no claims to defendants' property. *Id.* The plaintiff appealed, arguing in part that his two current means of permissive access to public roads were over the property of strangers to his title, and that he had no legally enforceable access to his property. *Id.*

Although the decision is based on the doctrine of implied easements by necessity, the court's determination of what constitutes a necessity is instructive here:

> "Although a plaintiff may have a permissive right-of-way to a public highway, a plaintiff who has no legally enforceable right-of-way to a public highway may be entitled to an easement by necessity." *Whitfield v. Todd,* 116 N.C. App. at 339, 447 S.E.2d at 799 (citing *Wilson v. Smith,* 18 N.C. App. 414, 418, 197 S.E.2d 23, 25, cert. denied, 284 N.C. 125, 199 S.E.2d 664 (1973)).
>
> In *Wilson,* this Court affirmed an award to the plaintiffs of an easement by necessity when they were unable to obtain a deed of trust for the construction of their dwelling because, although they had permissive access to a public road, they had no legally enforceable access, and, as a result, they did not have the "full beneficial use of their property." *Wilson,* 18 N.C. App. at 418, 197 S.E.2d at 26. Further, in *Whitfield,* without requiring the showing of any present economic hardship or loss of use of the plaintiff's property, this Court granted the plaintiff an easement by necessity when the plaintiff only had permissive access to his property. *Whitfield,* 116 N.C. App. at 339, 447 S.E.2d at 799

665 S.E. 2d at 592. The court went on to hold:

> This lack of any legally enforceable access to Lot 4 denies plaintiff the full use and enjoyment of his property, because permissive use may be revoked at any time, subjecting plaintiff to the expense of another lawsuit, and potentially preventing him from deriving the financial benefit he enjoys from farming his property. Further, plaintiff could be subject to the same problems faced by the plaintiff in *Wilson* if he either decides to build upon the property, or sell it. Finally, the lack of any legally enforceable access to the

> property may well have a present deleterious impact on the value of the property.

Id. at 592-93. Based on the trial court's error of law, the decision was reversed and remanded.

In *Lichty v. Luloff,* 512 N.W.2d 267 (Iowa S. Ct. 1994), a condemnee appealed the trial court denial of her injunctive relief in an action challenging her neighbor's right to condemn an access route across her land. Iowa's eminent domain statute provides, in part:

> The right to take private property for public use is hereby conferred:
>
> . . . .
>
> (2) Upon the owner or lessee of lands, which have no public or private way to the lands, for the purpose of providing a public way, not exceeding forty feet in width, which will connect with an existing public road . . . .

512 N.W.2d at 269.

In seeking to block the proposed condemnation, the condemnee asserted, in part, that the neighbor had an adequate means of access to his property across another portion of her lands identified as the "pasture route." *Id.* at 270-71. As to that claim, the court noted 1) that to succeed, a condemnor must show that he has no public or private way from his land to a street or highway, and 2) that the existing right of access sufficient to defeat

the right to condemn an access route must be reasonably adequate for the intended purpose. "'The statute, in our judgment, should be construed to mean that, unless a party has a way, either public or private, which is unobstructed and unquestioned, he may institute proceedings under the statute.'" *Id.* at 271 (quoting *Carter v. Barkley*, 137 Iowa 510, 115 N.W.2d 21, 22-23 (1908)).

Because the proposed pasture route was permissive, the court concluded that it was not "unobstructed and unquestioned." Accordingly, it affirmed the trial court's ruling that the condemnor had no existing right of access that would defeat his right of condemnation under the statute. 512 N.W. 2d at 272; *see also Indiana Regional Recycling, Inc. v. Belmont Industrial, Inc.* 957 N.E.2d 1279 (Ind. Ct. App. 2011) (granting implied easement by necessity; court rejected defendant's argument that the plaintiff's property was not landlocked because the plaintiff could have taken steps to access its land by petitioning the railroad for the right to cross the railroad's property, instead of placing the easement on the defendant's parcel).

The need to wait for a denial or withdrawal of access was an unnecessary condition imposed by the Trial Court. No such prerequisite exists, and would require Walch to file another lawsuit to condemn access.

Moreover, the Walches have no ability to compel BNSF to provide such access – the BNSF railroad property is not condemnable pursuant to *State of Washington v. M.C. Ballard*, 156 Wash. 530, 287 P. 27 (1930). Under these circumstances, an easement by necessity is authorized pursuant to Wash. Const. art. I, sec. 16 and RCW 8.24.010.

C. Walches were not required to prove that they could guarantee the City would issue permits for their intended use of the property.

According to Matt Morton, City Administrator for Cle Elum, Walches' intended use of the property to manufacture and display the portable skyline excavator is permitted within the Industrial District, as defined by Chapter 17.36 of the Cle Elum Municipal Code (RP RP Vol. I, p. 72; Ex. 43 & Ex. 106; *see also* Testimony of Mike Walch, RP Vol. II, pp. 28-29). He indicated that it was premature to give an opinion as to whether the use would be a conditional use, and that any permit application would have to be reviewed in light of the Critical Area Ordinance (RP Vol. I, pp. 90-92; Ex. 107).[2] The Trial Court erred in concluding that Walches did not establish a reasonable necessity because they had no guarantee that a future

[2] That ordinance expressly contains a "reasonable use" exception regarding road setback requirements which would have to be invoked no matter what use Walch were to make of the property, because the land has laid dormant beyond the one-year grandfathering clause (RP Vol. I, pp.92-93; Ex. 107). Under the Trial Court's logic, *any* use of the property whatsoever would be speculative because an exception is not guaranteed.

use of their property would include situating the RSE, Inc. manufacturing business on the property (CP 451). This "guarantee" exceeds the standards required to establish a reasonable necessity, and it ignores the ministerial nature of the permitting process.

In the eyes of the law an applicant for a grading permit, like a building permit, is entitled to its immediate issuance upon satisfaction of relevant ordinance and statutory criteria. Issuance of such a permit is not a matter of discretion but is ministerial. *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 954 P.2d 250 (1998). The court in *Mission Springs, Inc.*, further explained that a building *or use permit* must issue as a matter of right upon compliance with an ordinance. The discretion permissible in zoning matters is that which is exercised in adopting the zone classifications with the terms, standards, and requirements pertinent thereto, all of which must be by general ordinance applicable to all persons alike. The acts of administering a zoning ordinance do not go back to the questions of policy and discretion which were settled at the time of the adoption of the ordinance. Administrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. To subject individuals owning affected property to questions of policy in administrative matters would be unconstitutional. As simply put in *Mission Springs, Inc.*, neither a grading permit, building permit, *nor any*

other ministerial permit may be withheld at the discretion of a local official to allow time to undertake a further study or for any other such reason.

It is long-settled law in Washington that if a zoning ordinance is complied with, the issuance of a building permit is a ministerial act involving no exercise of discretion on the part of city officials. *State ex rel. Klappsa v. Enumclaw*, 73 Wn.2d 451, 439 P.2d 246 (1968). In fact, mandamus is a proper remedy to compel the issuance of a permit in such a situation. *State ex rel. Craven v. Tacoma*, 63 Wn.2d 23, 385 P.2d 372 (1963). The court in *Enumclaw* also stated that even where discretion is involved in determining compliance with a local code, a court has the power to require the permit to be issued conditionally, and to further require the officials to perform their discretionary function upon receipt of the applicant's plans and specifications.

In the instant case, there was testimony to the effect that the land use permit that Walch would need for their planned business was in the nature of or akin to a conditional use permit under a zoning ordinance (RP Vol. I, p. 90). Such a permit comes within the principles set forth above. A conditional use is a use that is not expressly permitted or prohibited by the zoning code and that is allowed when specific and special conditions are imposed. *Kelly v. Chelan County*, 157 Wn. App. 417, 237 P.3d 346 (2010).

On the facts in *Kelly* a developer was not able to succeed on a theory that he had a vested right to issuance of the conditional use permit, because the local jurisdiction's code authorized the issuance of a conditional use permit only if the proposed development was compatible with the jurisdiction's comprehensive plan, and the proposed development could not meet that requirement. Here, by contrast, there is no such apparent barrier to Walches' ability to obtain the necessary permit, and there is no reason to expect that they will not become entitled to issuance of the permit when the necessary application is completed. The Court below erred by concluding that the Walches could not establish a reasonable necessity to condemn a private way of necessity because they have no "guarantee" that they will be permitted to engage in the proposed use of the property[3]. No land use permit is ever "guaranteed" in the general sense used by the Trial Court, but the Walches may well be able to make it the ministerial, nondiscretionary duty of the appropriate officials to issue necessary permits if they comply with applicable requirements. That is more than enough to make their proposed

[3] Although the Trial Court, in its Findings of Fact (CP 449) referenced the critical areas ordinance in light of the Dalle ponds which Plaintiffs described as the Dalle Wildlife and Fish Propagation Ponds, it erroneously overlooked the testimony of Mike Walch that his equipment is used in other pit ponds that are stocked by the Fisheries Department and that in his experience, it is easy to get the permits from the Department of Ecology (RP Vol. II, pp. 11-13).

use of the property a viable potential use, not a merely speculative one, requiring the kind of access to the property which they seek in this action.

Moreover, the Trial Court also erred in its legal conclusion that taking by necessity is not extended to those necessities that may be created by the contemplation of future real estate development (CP 451). *Brown v. McAnally, supra, 97 Wn. 2d 360,* cited by the court for this principle, is distinguishable. In that case, the condemnors sought, and obtained, all rights which would have been obtained by the County had it been the condemnor under an order of public use and necessity (right to locate public and private utilities within the right of way so acquired, the right to regulate approaches along the full length of the right of way and the right to regulate uses inconsistent with the use of the right of way for the purposes for which it is acquired; including regulation of uses inconsistent with use of the right of way if it were to become a county road). This, the *McAnally* court concluded, greatly exceeded the rights contemplated by Const. art. 1, § 16 (amend. 9), RCW 8.24.010 and the applicable law of this state. 97 Wn. 2d at 369. *Cf. Beeson v. Phillips*, 41 Wn. App. 183, 186-87, 702 P.2d 1244 (1984) (the use contemplated for the property was future development: the erection of a residence on the property); *Sorenson v. Czinger,* 70 Wn. App. 270, 852 P.2d 1124, *review denied*, 122 Wn.2d 1026, 866 P.2d 40 (1993) (same).

The Walches' intended use is entirely consistent with the allowed uses within the Industrial District: The manufacture and demonstration of RSE machinery and equipment. Under the private condemnation statute, a landowner is entitled to the beneficial uses of the land. The only requirement is that the owner demonstrates a reasonable need for the easement for the use and enjoyment of his property. *Hellberg v. Coffin Sheep Co.* 66 Wn.2d 664, 666-67, 404 P.2d 770 (1965); *Kennedy v. Martin*, 115 Wn. App. 866, 63 P. 3d 866 (2003). *Nothing in the statute requires that the use be restricted to presently existing uses*. In fact, such a requirement is counter to the interest of the public welfare to fully utilize the resources of this state. *See Mountain Timber Co., supra,* 77 Wash. at 588-89.

D. The physical inability to drive the Walches' super-load lowboys over the Easterly access route established a reasonable need for the Easement By Necessity across the lands of Clarks, Clark, LLC and Folkman.

Aside from the lack of legal access, the Walches also demonstrated a physical necessity for the easement across the Clarks, Clark, LLC, and Folkman lands. What constitutes a reasonable necessity is a factual determination. *Beeson v. Phillips, supra,* 41 Wn. App. at 186-87. The only requirement is that the owner demonstrate a reasonable need for the easement

for the use and enjoyment of his or her property. *Wagle v. Williamson*, 51 Wn. App. 312, 314, 754 P.2d 684 (1988), *appeal after remand*, 61 Wn. App. 474, 810 P.2d 1372 (1991). The burden of proof is on the condemnor. *Sorenson v. Czinger, supra.*

> The core of the public policy behind the statute's grant of condemnatory authority lies in the admonition that the condemnor's property must be so situate that in order for him to obtain "its proper use and enjoyment", he must of necessity obtain use of another's property. In Washington, that necessity need not be absolute; it must, however, *be reasonably necessary as opposed to merely convenient or advantageous*. *Brown v. McAnnally, supra* [97 Wn.2d 360, 644 P.2d 1153 (1982)]. It is, of course, impossible to state a rule which would in all cases fix the dividing line between reasonable necessity and inconvenience. Every case must to a large extent depend upon its own facts.

Beeson v. Phillips, supra, 41 Wn. App. at 186-87 (italics added). While mere convenience does not establish necessity, *State ex rel. Carlson v. Superior Court*, 107 Wash. 228, 181 P. 689 (1919), the ability to make "effective use" of one's land is key. Thus, the availability of an alternate route does not prevent a private taking if the alternate access would not permit the landowner to effectively use the land or it would result in a prohibitive cost for such use. *Beeson, supra*, 41 Wn. App at 187.

According to the testimony of Royce Hatley (RP Vol. I, p.37), a Superload Superintendent for 50 years, and the testimony of Mike Walch (RP Vol. II, p. 44; 48-49), the alternate Easterly route proposed by the Clark and

Folkman is unsuitable for Walches' heavy excavator equipment, including commercial extra long lowboy traffic, because such equipment would be forced to traverse an elevated railroad crossing risking the danger that it would get "high-centered" and caught on the tracks. (In fact, one witness recalled seeing another lowboy get stuck on the Owens Road Crossing (RP Vol . I, pp. 131-32)).

The danger of a prospective railroad crossing has been considered as a factor by the Washington Supreme Court in upholding a decision to reject a proposed alternate route. In *State ex rel. Schleif v. Superior Court,* 119 Wash. 372, 205 P. 1046 (1922), a reasonable necessity to condemn a roadway was shown where the alternate route would have required construction of a bridge at an expense "not within reasonable bounds." In addition to the cost of bridge construction, the Washington Supreme Court focused on the trial evidence indicating that the alternate route would require crossing railroad "tracks on a curve with a fifteen per cent grade and would result in a very dangerous crossing even if permission could be obtained for making it." 119 Wash. at 374.

Potential danger was also shown to be a prohibitive factor making the Easterly alternate unreasonable for the Walches. Not only is the danger to Walches' employees and invitees significant, but so is the danger to the

general public should an accident occur because equipment could not safely traverse the tracks and get stuck thereon.

Additional physical barriers addressed at trial included 1) the inability to negotiate the turns at Owens Road at the Dalle Road intersection; 2) the inability to negotiate turns at the intersection at First Street and Owens Road; 3) the inadequate width of Owens Road; and 4) the grade level at the Owens Road crossing. Each of the barriers renders it impossible for Walches to drive the RSE super-load lowboys (some as long as 165 feet) to and from their property. As a result of these physical constraints, it is virtually impossible to use the Easterly Dalle Road access, further necessitating an alternate right-of-way across the Clarks, Clark, LLC and Folkmans lands (RP Vol. I, pp. 42-44 & 56; Vol. II, pp 47, 49, 73; Exs. 46 & 47).

Generally, a condemnor has a right to select the route which, according to his own views, is reasonably necessary for the full enjoyment of his land. *Wagle v. Williamson, supra.* Once a necessity is established, the potential condemnee may demonstrate the existence of a feasible alternative. *Kennedy v. Martin, supra; Sorenson v. Czinger, supra.* However, merely showing the existence of a feasible alternative does not, in and of itself, rebut the necessity; the relative merits of the two routes must be considered. *Wagle*, 51 Wn. App. at 316-17. The Walches made the requisite showing of

necessity. There was no dispute that their property is landlocked. There is no dispute that the super-load lowboys cannot use the Eastern route. The existing access via Owens Road is not feasible. In order for Walches to have proper use and enjoyment of their property they must obtain a private way of necessity across the land owned by the Clarks, Clark, LLC and Folkmans. *See Beeson v. Phillips, supra.*

The alternative, Westerly easement route selected by the Walches was via Oakes Avenue, along Stillwater Boulevard and then Southeasterly along the Southern, outer edge of the Folkman, Clark, LLC and Clark properties, immediately inside the Department of Transportation right-of-way fence, immediately inside the Department of Transportation right-of-way fence. This route is illustrated on Exs. 45/App. "A" & 57, the *potential* lot layouts within the Swiftwater Business Park. (This is not intended to represent the existing configuration of improvements on the property, but rather to show the location of the proposed route. (See App. "B")

At trial, the Clarks, Clark LLC, and Folkman, as the potential condemnees, did not join any other property owners and did not present any evidence of any feasible alternate routes. Accordingly, the Trial Court should have awarded the easement by necessity as outlined by the Walches' proposal.

II. The Trial Court Erred as a Matter of Law by Awarding Respondents' Attorney Fees Under RCW 8.24.030 for Walch's Separate Claims For Prescriptive Easement and Implied Easement.

A. The Trial Court Misconstrued RCW 8.24.030

The Court below erred in concluding that the use of the term "any action" in RCW 8.24.030 intended a broad application of that statute, so that it could encompass even awarding fees expended on common law claims not brought pursuant to that statute. The full sentence using the term "any action" states as follows: "In any action *brought under the provisions of this chapter* for the condemnation of land for a private way of necessity, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee" (emphasis added). The plain meaning of this language is that it authorizes an award of fees only for any action brought under the private condemnation statute. Only by impermissibly taking the phrase "any action" entirely out of its context can it be read to embrace common law causes of action such as for an implied easement or a prescriptive easement. The Trial Court erred as a matter of law in its construction of the statute.

B. There was no common core of facts and related legal issues between the statutory private way of necessity claim and the common law prescriptive easement and implied easement claims.

This case, from its inception, was based upon two (2) separate and independent grounds for obtaining legal access to the Walch property. The first was based upon prescriptive use dating back to pre Interstate 90 days in May of 1956 for which only statutory attorneys fees of $200.00 are available. The second was based upon the statutory easement by necessity which pursuant to RCW 8.24.030 entitles the Respondents to an award of reasonable attorney's fees. The Trial Court, in Findings of Fact (CP 449-450) states that the Defendants "claim" and "argue" a common nexus and common core of facts and related legal issues, but it did not expressly find that such common elements existed. That is because they simply did not exist.

The elements of proof for the separate theories for obtaining legal access are distinctly different. Except for the parties themselves, there was no commonality of witness testimony, and absolutely no commonality of factual testimony. Nonetheless, the attorneys for Clark and Folkman presented to the Court Declarations (CP 267-349 and CP 364-405) of fees that are largely attributable exclusively to the prescriptive easement claims. At the same time, they failed to explain to the Court why, if there was such

a common core of facts, they did not present one, single non-party witness used in support of the Summary Judgment Motions to dismiss the prescriptive easement claim to counter the private necessity claim. The answer is simple. There was no common core of facts.

The straight forward requirements to establish a prescriptive easement are proof of: (1) use adverse to the right of the servient owner; (2) open, notorious, continuous, and uninterrupted use for ten years; and (3) knowledge of such use at a time when the owner was able to assert and enforce his or her rights. *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 694, 709 P.2d 782 (1985); *Anderson v. Secret Harbor Farms, Inc.*, 47 Wn.2d 490, 288 P.2d 252 (1955); *Crescent Harbor Water Co. v. Lyseng*, 51 Wn. App. 337, 753 P.2d 555 (1988).

By contrast, the only requirement for an easement by necessity pursuant to RCW 8.24.010 is reasonable need based on the policy that landlocked land may not be rendered useless and the landlocked landowner is entitled to the beneficial uses of the land. The landlocked owner is given the right to condemn a private way of necessity to allow ingress and egress only to land; the landowner is also given the right to select the route. The only requirement is that the owner demonstrates a reasonable need for the easement for the use and enjoyment of his property. *Hellberg v. Coffin Sheep*

Co., supra, 66 Wn.2d at 666-67; *Kennedy v. Martin, supra,* 115 Wn. App. 866; *Wagle v. Williamson, supra,* 51 Wn. App. 312.

Other cases in which the courts have addressed statutory attorney fees in the context of multiple claims are illustrative. In *Brand v. Dept. of Labor & Industry*, 139 Wn.2d 659, 989 P.2d 1111 (1999), the petitioner employee, whose workers' compensation claim culminated in a lawsuit over her disability level, sought review of the appellate court's order reducing and recalculating her attorney fees award, arguing that the award under RCW 51.52.130 should have been calculated without regard to her overall recovery on appeal, and should not have excluded fees for work done on unsuccessful claims. The court found that nothing in the language of RCW 51.52.130 suggested that an attorney fees award was dependent upon the worker's overall success on appeal. Thus, the court held that reducing attorney fees awards to account for a worker's limited success was inappropriate. Referring to *Hensley v. Eckerhart*, 461 U.S. 424 (1983), a case which it has followed, the Supreme Court of Washington said the following in *Brand:*

> We conclude that claims brought under the Industrial Insurance Act are different from the discrete, unrelated claims at issue in *Hensley*. Workers' compensation claims are statutorily based, and deal with one set of facts and related legal issues. The sole issue on appeal before the superior or appellate court in an Industrial Insurance Act case is whether or not the Board adequately assessed the worker's degree of injury. Alternative theories regarding the nature and extent of

> the worker's injury cannot be said to be unrelated, inseparable claims. An attorney's work on each theory is work "'expended in pursuit of the ultimate result achieved.'461 U.S. at 435. Claims brought in the context of the Industrial Insurance Act are distinguishable from claims brought in the general civil context, which could, as in *Hensley*, be viewed as a series of discrete claims."

Brand v. Dept.of Labor & Industry, supra, 139 Wn.2d at 673, 989 P.2d at 1118.

The above-quoted language from *Brand* indicates why, in the instant case, the court below erred in awarding fees for time spent on separate common law theories, that is, implied easement and prescriptive easement, as well as for time spent on the one statutory claim for which an award of attorneys fees is authorized, that is, easement by necessity. To award the Clarks, Clark, LLC and Folkman all of the fees incurred for all claims asserted against them, is to grant them a windfall, merely because one of the theories, for an easement by necessity, authorizes a fee award, in RCW 8.24.030. Unlike in *Brand*, the distinct theories asserted by the Walches are not all within a single statutory scheme; rather, only the easement by necessity claim is statutory. Also unlike in *Brand*, there is not merely a single common issue that spans all of the plaintiffs' theories; on the contrary, the alternative theories involve different elements and necessarily different legal issues. As mentioned in the quoted language from *Brand*, in this case there

is not a common core of facts, or, related, inseparable claims, but rather a series of discrete claims arising in the general civil context, not several claims all under the umbrella of a single statutory scheme.

The Court below erroneously found that a common core of facts and related legal issues existed between the prescriptive easement and the statutory easement by necessity claims, finding that both easement claims were over identical roads. This was clear error, as the condemnor in a statutory easement by necessity action has the right to select the route which, according to his own views, is reasonably necessary for the full enjoyment of his land. *Wagle v. Williamson*, 51 Wn. App. 312, 754 P.2d 684 (1988), *appeal after remand*, 61 Wn .App. 474, 810 P.2d 1372 (1991). The identity of location of the route for prescription and the route for necessity neither strengthens nor weakens either party's case. The court either did not recognize or overlooked this distinction between the two causes of action, causing it to conflate what are actually separate causes of action with different requirements.

That a statutory private condemnation claim for a private way of necessity must be considered separately from common law claims for an implied easement or a prescriptive easement, for purposes of an attorney fees award, is well demonstrated by the decision in *Ruvalcaba v. Kwang Ho Baek,*

159 Wn. App. 702, 247 P.3d 1 (2011). Reasoning that claims for private condemnation and for a common law implied easement are separate and distinct causes of action, the court ruled that the mere joinder of a party to the private condemnation action, when that party is only being sued for a common law implied easement, does not qualify the party for an award of attorney fees under RCW 8.24.030.

By way of contract, the instant case is also distinguishable from a case such as *Steele v. Lundgren*, 96 Wn. App. 773, 982 P.2d 619 (1999). There, the prevailing plaintiff was able to recover attorney fees related to several different theories of recovery, all of which arose from a set of facts in which the plaintiff was subjected to sexual harassment in her employment in the form of a hostile environment. One such claim was statutory, under Washington's employment discrimination statute, RCW 49.60.030(2), and the other claims were for negligent and intentional infliction of emotional distress. In contrast with *Steele*, here the elements and necessary factual foundations for the Walch's three separate claims are not the same, so that there is no common core of facts, nor are the theories of recovery sufficiently related.

In *Ethridge v. Hwang*, 105 Wn.App. 447, 20 P.3d 958 (2001), cited and relied upon by the Clarks, Clark, LLC and Folkman in the Court below,

the circumstances were distinguishable from the instant case. The plaintiff sued the defendant, alleging violations of the Mobile Home Landlord Tenant Act, RCW 59.20.010 et seq., the Consumer Protection Act, and tortious interference with contract. The central and pivotal fact, common to all of the claims, was that the defendant had unreasonably rejected potential purchasers of the plaintiff's mobile home. The plaintiff prevailed at trial, receiving money damages for interference with business expectancy, for pain and suffering, and for violation of the Consumer Protection Act (CPA). She was awarded attorney fees incurred in the prosecution of all of her theories of recovery, and that award was affirmed on appeal. The Court of Appeals reasoned that a trial court in calculating an award of attorney fees under RCW 19.86.090 of the Consumer Protection Act is not required to segregate the time expended by counsel on the Consumer Protection Act claim from the time expended by counsel on other claims, where the claims all relate to the same fact pattern but allege different bases for recovery.

In *Ethridge,* because the plaintiff was entitled to all attorney's fees occurring after arbitration, and all attorney's fees incurred in connection with the MHLTA and CPA claims, the only work for which attorney's fees might not be awarded would be for work on the tortious interference claim prior to arbitration. In other words the challenged fees were but a small part of the

total fees in the case. By contrast, in the instant case, the Clarks, Clark, LLC and Folkman, and the Court below, would allow "the tail to wag the dog." That is, only one of the claims by the Walches is under a statute authorizing a fee award, while the Clarks, Clark, LLC and Folkmans have sought to bootstrap an exorbitant fee recovery for time spent not only on the statutory claim, but also on the two additional and separate claims brought under the common law.

Perhaps more importantly, in *Ethridge* each claim involved the same central fact—the defendant's unreasonable rejection of prospective buyers at the park. Proof of the tortious interference claim involved the same preparation as the other claims--establishing that the defendant acted unreasonably. As the court put it, "because nearly every fact in this case related in some way to all three claims, segregation of the fee request was not necessary and the trial court did not abuse its discretion in awarding fees as it did." *Ethridge v. Hwang, supra*, 105 Wn.App. at 461. By contrast, in the instant case, the facts necessary for each of the claims asserted by Walches are not identical, so that segregation of the fee request was required. Except for the parties themselves, in this case there was no commonality of witness testimony among the separate claims asserted, and no commonality of factual testimony.

There is no reason why the time expended by the Clarks, Clark, LLC and Folkmans attorneys on the separate claims cannot be separated out and attributed to each claim, so as to allow recovery of only such fees as the legislature saw fit to make recoverable, for the easement by necessity claim based on RCW 8.24.030. This case should have been governed by the rule that if an attorney fees recovery is authorized for only some of the claims (in this case, the statutory private condemnation claim), the attorney fees award must properly reflect a segregation of the time spent on issues for which attorney fees are authorized from time spent on other issues (in this case, the common law claims for an implied easement or a prescriptive easement); the court must separate the time spent on those theories essential to the cause of action for which attorneys' fees are properly awarded and the time spent on legal theories relating to the other causes of action; this must include, on the record, a segregation of the time allowed for the separate legal theories . *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994).

In this case, the Clarks, Clark, LLC and Folkmans attorneys in their Declarations have separated their time according to the three (3) causes of action asserted against their clients. The three (3) theories asserted by the Walches obviously were not so intertwined factually or legally that this task could not be accomplished. The Clarks, Clark, LLC and Folkmans are

entitled to *reasonable* fees attributable to their attorneys' time actually spent on the statutory easement by necessity claim because of the attorney fee provision in RCW 8.24.030, but they are NOT entitled to the windfall they received when they also were awarded fees for the time devoted to the distinct common law claims brought by the Walches. The Trial Court erred in awarding such fees.

C. The Award of Attorney Fees and Costs in the Amount of $165,807.75 Was Excessive and Unjustified.

Washington courts use the Lodestar Method to calculate an award for reasonable attorney's fees. *Mayer v. City of Seattle*, 102 Wn. App. 66, 79, 10 P.3d 408 (2000) (citing *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998)). The court applies the Lodestar Method by multiplying the total number of attorney hours spent on the action by the attorney's hourly compensation rate. *Mayer*, 102 Wn. App. at 79 (citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983)). Trial courts may not exclusively rely upon the billing records of the attorney seeking fees but must instead make an independent calculation of a reasonable amount of attorney fees. *Mayer,* 102 Wn. App. at 79 (citing *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987)).

"The reasonableness of attorney fees in a factual issue depending upon the circumstances of a given case, and the trial court has broad discretion in fixing attorney fees." *Sign-O.Lite Signs, Inc.*, 64 Wn. App. 553, 566, 825 P.2d 714 (1992) (citing *Schmidt v. Cornerstone Invs., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990)).

When an attorney is authorized fees for only some of the Petitioner's claims, a trial court - and, hence the fee applicant - must make a reasonable attempt at segregating fees. *Hume v. American Disposal Co.,* 124 Wn.2d 656, 673, 880 P.2d 988 (1994). Importantly, a court may not just accept at face value a fee applicant's claim for fees:

> Courts must take an active role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. Court should not simply accept unquestioningly fee affidavits from counsel. Consistent with such an admonition is the need for an adequate record on fee decisions. Washington courts have repeatedly held that the absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record. Not only do we affirm the rule regarding an adequate record on review to support a fee award, we hold findings of fact and conclusions of law are required to establish such a record.

Mahler v. Szucs, 135 Wn.2d 398, 434-435, 957 P.2d 632 (1998).

The burden of demonstrating that a requested fee is reasonable "always remains on the fee applicant." *Absher Const. Co. v. Kent Sch. Dist. No.* 415, 79 Wn. Appl. 841, 847, 917 P.2d 1086 (1995).

The Declarations of Douglas W. Nicholson (CP 267-349) and Bill H. Williamson (CP 364-405) were deficient on multiple levels. Among other things, they charged excessive time for multiple entries to prepare, review, re-review, re-draft; they did not segregate between fees and costs; they lacked detail in many entries that appeared to be secretarial in nature; and included many fees attributable only to defense of the prescriptive easement claim. To put another way, the Clarks, Clark, LLC and Folkmans counsels failed to provide the Court with sufficient information to conduct a Lodestar Calculation.

Accordingly, the Counsels' requests for fees should have been denied until such time as they performed a proper Lodestar segregation. The Trial Court Erred in awarding the attorney fees in this case.

CONCLUSION

The principal issue in this Appeal is the Trial Court's error as a matter of law in not granting the Easement by Necessity pursuant to RCW 8.24.010 et. seq. The Trial Court should be reversed on this issue and the case remanded for an award of an Easement by Necessity along the route proposed by Walch from Oakes Avenue, East along the Southern boundary of Clark, Clark LLC, and Folkman parallel with the Interstate 90 right-of-way fence to

the Walch property and for a valuation determination, consistent with the provisions of RCW 8.24.010 et. seq.

The award of Attorney's fees should be remanded and the Trial Court ordered to use the Lodestar method to calculate an award of reasonable attorney's fees.

DATED this 7th day of June, 2012.

Respectfully submitted,

Chris A. Montgomery, WSBA #12377
Richard T. Cole, WSBA #5072
Attorneys for Appellants
Mike and Marcia Walch

APPENDIX

A


Kittitas County map viewer - COMPAS
Page
Safety
Tools
PRINT
MAPS
VIEW
SEARCH
SELECTION
TOOLS
HELP
COMPAS
Kittitas County
Scale: 1 inch = 600 ft (1:7,200)
Map Transparency:
0
CLARK, LLC
FOLKMAN
CLARK
WALCH
BAILE Rd
Owens Rd.

APPENDIX

B

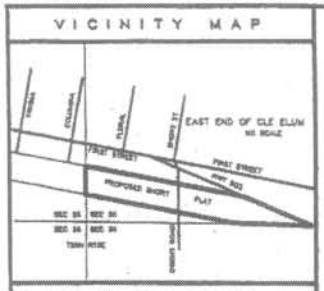
K-162

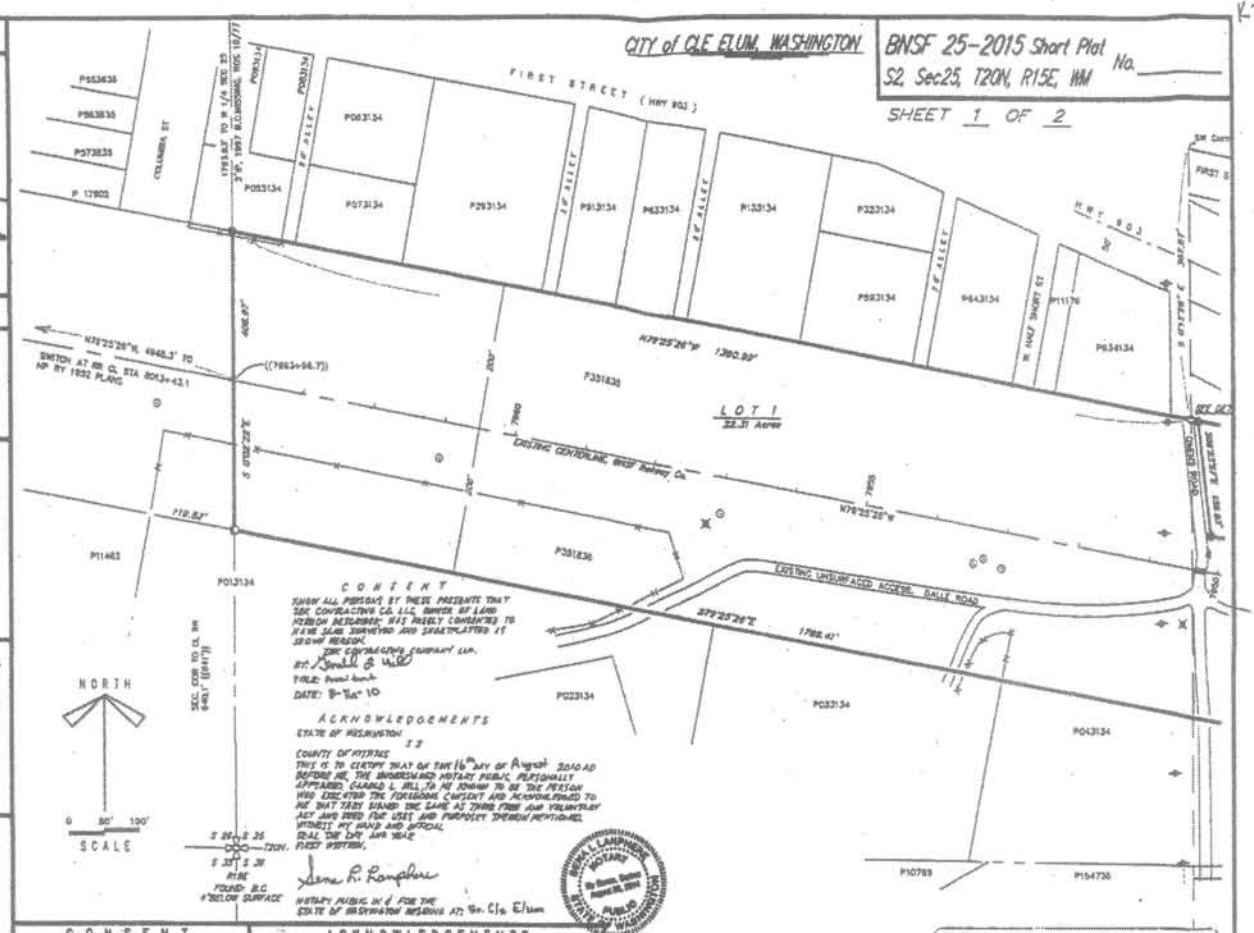
CITY of CLE ELUM, WASHINGTON

BNSF 25-2015 Short Plat No. _____

S2, Sec25, T20N, R15E, WM

SHEET 1 OF 2





VICINITY MAP

STATEMENTS OF APPROVAL

ENGINEER for the CITY OF CLE ELUM, WA.
EXAMINED AND APPROVED THIS 12th DAY OF August 20 10 AD.
Jeffrey T. Lanman PE
EXAMINING ENGINEER for the CITY OF CLE ELUM, WA.

OFFICE of the MAYOR, CITY of CLE ELUM, WA
REVIEWED AND APPROVED THIS 8 DAY OF August 20 10 AD.
Charles D. Kondo
MAYOR, CITY of CLE ELUM, WA

CERTIFICATE of the COMMUNITY DEVELOPMENT DIRECTOR, CITY of CLE ELUM, WA
I HEREBY CERTIFY THAT THE BNSF 25-2015 SHORTPLAT HAS BEEN EXAMINED BY ME AND FIND THAT IT CONFORMS TO THE COMPREHENSIVE PLAN FOR THE CITY OF CLE ELUM
THIS 8th DAY OF August 20 10 AD.
COMMUNITY DEVELOPMENT DIRECTOR

CERTIFICATE of KITTITAS COUNTY TREASURER
I HEREBY CERTIFY THAT THE TAXES AND ASSESSMENTS ARE PAID FOR THE PRECEDING YEARS AND FOR THIS YEAR IN WHICH THE SHORT PLAT IS NOW TO BE FILED.
ORIGINAL TRACT PARCEL NO.: 20-15-25033-0001
THIS 17 DAY OF August 20 10 AD.
KITTITAS COUNTY TREASURER

NAME & ADDRESS; ORIGINAL TRACT OWNERS

NAME: BNSF RAILWAY COMPANY
ADDRESS: POB 961089 FT. WORTH, TX 76161-0089
PHONE: 817 230 2600

EXISTING ZONE:	INDUSTRIAL
SOURCE OF WATER:	CITY OF CLE ELUM
SEWER SYSTEM:	CITY OF CLE ELUM
WIDTH & TYPE OF ACCESS:	EXISTING
NO. OF SHORTPLATTED LOTS:	3
SCALE:	1" = 100'

CONSENT

KNOW ALL PERSONS BY THESE PRESENTS THAT BNSF RAILWAY COMPANY, ____ OWNER OF THE LAND HEREIN DESCRIBED, HAS FREELY CONSENTED TO HAVE SAME SURVEYED AND SHORTPLATTED AS SHOWN HEREON.

BNSF RAILWAY COMPANY

BY David P. Schneider

TITLE General Director - Land Revenue Management

DATE 7-28-2010

ACKNOWLEDGEMENTS

STATE OF TEXAS
ss
COUNTY OF TARRANT

THIS IS TO CERTIFY THAT ON THIS 28th DAY OF July 20 10 AD, BEFORE ME, THE UNDERSIGNED NOTARY PUBLIC, PERSONALLY APPEARED DAVID P Schneider TO ME KNOWN TO BE THE PERSONS WHO EXECUTED THE FOREGOING DEDICATION AND ACKNOWLEDGED TO ME THAT THEY SIGNED THE SAME AS THEIR FREE AND VOLUNTARY ACT & DEED FOR USES & PURPOSES THEREIN MENTIONED.

WITNESS MY HAND AND OFFICIAL SEAL THE DAY AND YEAR FIRST WRITTEN.

RHONDA BURTON
My Commission Expires
September 01, 2013

NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS RESIDING AT Carrollton TX

CONSENT

KNOW ALL PERSONS BY THESE PRESENTS THAT ZBK CONTRACTING CO. LLC, OWNER OF LAND HEREIN DESCRIBED, HAS FREELY CONSENTED TO HAVE SAME SURVEYED AND SHORTPLATTED AS SHOWN HEREON.

ZBK CONTRACTING COMPANY LLC.
BY: Randall D. Hill
TITLE: Owner/Member
DATE: 8-16-10

ACKNOWLEDGEMENTS

STATE OF WASHINGTON
ss
COUNTY OF KITTITAS

THIS IS TO CERTIFY THAT ON THIS 16th DAY OF August 2010 AD BEFORE ME, THE UNDERSIGNED NOTARY PUBLIC, PERSONALLY APPEARED, CHARLES L. HILL, TO ME KNOWN TO BE THE PERSON WHO EXECUTED THE FOREGOING CONSENT AND ACKNOWLEDGED TO ME THAT THEY SIGNED THE SAME AS THEIR FREE AND VOLUNTARY ACT AND DEED FOR USES AND PURPOSES THEREIN MENTIONED.

WITNESS MY HAND AND OFFICIAL SEAL THE DAY AND YEAR FIRST WRITTEN.

Irene P. Lanphere

NOTARY PUBLIC IN & FOR THE STATE OF WASHINGTON RESIDING AT: Po. Cle Elum

IRENE L. LANPHERE NOTARY PUBLIC STATE OF WASHINGTON My Comm. Expires March 06, 2014

08/17/2010 10:29:00 AM Vr: K Pr: 162 201008170004
KITTITAS COUNTY AUDITOR
Page 1 of 2

SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT AT THE REQUEST OF ZBK Contracting Company, LLC 5/27/10

ROBERT L. BAILEY, PE/PLS #8743

ROBERT L. BAILEY — STATE OF WASHINGTON — 8743 — REGISTERED PROFESSIONAL LAND SURVEYOR

SOSE LLC
—PROFESSIONAL LAND SURVEYING—
4201 HWY 970, CLE ELUM, WA. 98922
509-674-5551

AUDITOR'S CERTIFICATE

FILED OF RECORD THIS 17 DAY OF August 2010 AT 10:29 A M IN BOOK K OF SHORTPLATS, PAGE 162 AT THE REQUEST OF Bob Baker

Deputy County Auditor

K/162 20100817000 4

08/17/2010 14:20:08 AM Yr: K Pg: 163 2010081700004
Page 1 of 2
Kittitas County Auditor

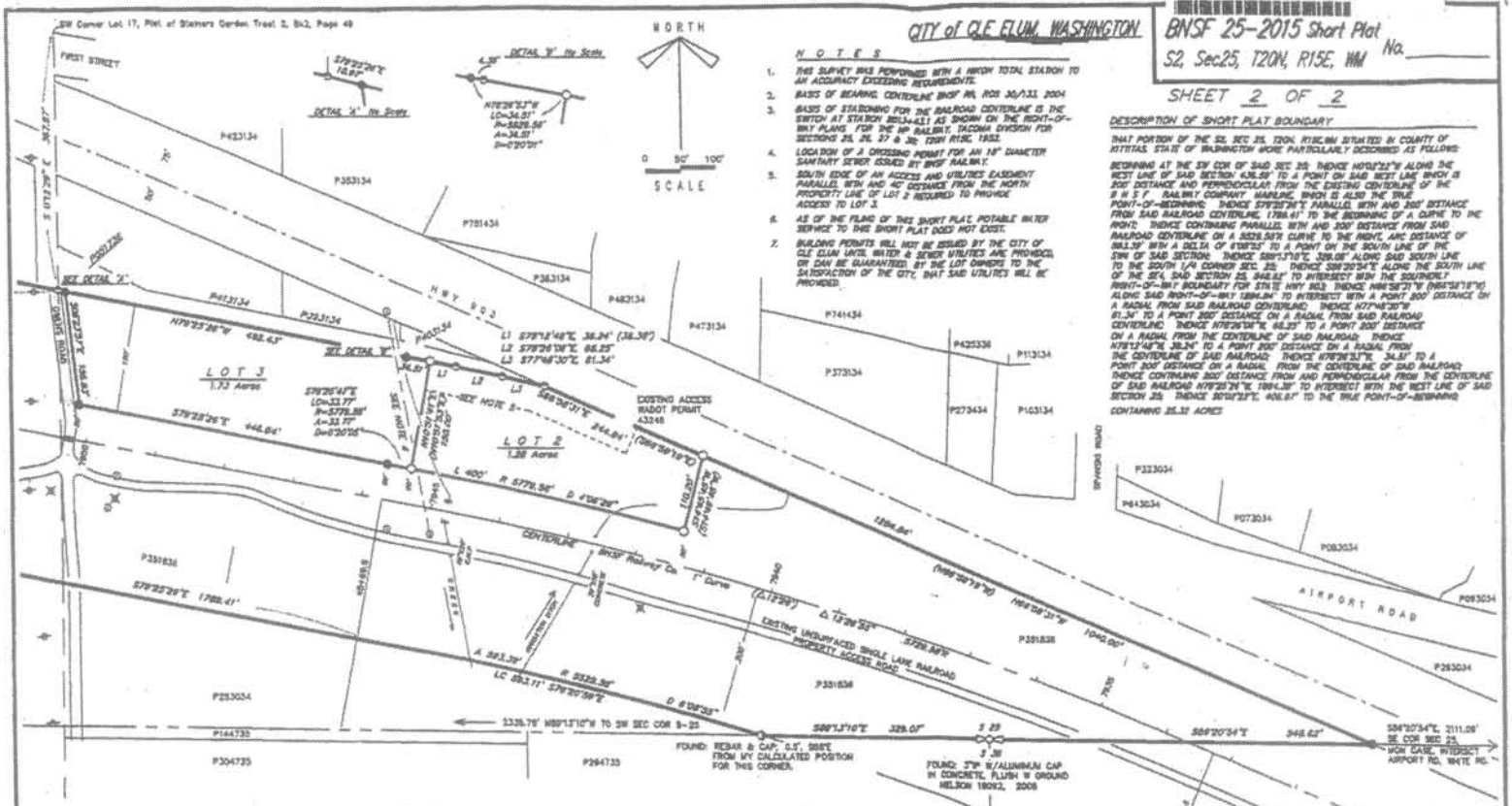
K-163

CITY of CLE ELUM, WASHINGTON

BNSF 25-2015 Short Plat

S2, Sec25, T20N, R15E, WM No.

SHEET 2 OF 2



NOTES

1. THIS SURVEY WAS PERFORMED WITH A NIKON TOTAL STATION TO AN ACCURACY EXCEEDING REQUIREMENTS.
2. BASIS OF BEARING: CENTERLINE BNSF RR, ROS 30/133, 2004
3. BASIS OF STATIONING FOR THE RAILROAD CENTERLINE IS THE SWITCH AT STATION 2013+43.1 AS SHOWN ON THE RIGHT-OF-WAY PLANS FOR THE NP RAILWAY, TACOMA DIVISION FOR SECTIONS 25, 26, 27 & 35, T20N R15E, 1932.
4. LOCATION OF A CROSSING PERMIT FOR AN 18" DIAMETER SANITARY SEWER ISSUED BY BNSF RAILWAY.
5. SOUTH EDGE OF AN ACCESS AND UTILITIES EASEMENT PARALLEL WITH AND 40' DISTANCE FROM THE NORTH PROPERTY LINE OF LOT 2 REQUIRED TO PROVIDE ACCESS TO LOT 3.
6. AS OF THE FILING OF THIS SHORT PLAT, POTABLE WATER SERVICE TO THIS SHORT PLAT DOES NOT EXIST.
7. BUILDING PERMITS WILL NOT BE ISSUED BY THE CITY OF CLE ELUM UNTIL WATER & SEWER UTILITIES ARE PROVIDED OR CAN BE GUARANTEED, BY THE LOT OWNERS TO THE SATISFACTION OF THE CITY, THAT SAID UTILITIES WILL BE PROVIDED.

DESCRIPTION OF SHORT PLAT BOUNDARY

THAT PORTION OF THE SE, SEC 25, T20N, R15E,WM SITUATED IN COUNTY OF KITTITAS, STATE OF WASHINGTON MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SW COR OF SAID SEC 25; THENCE N01°12'21"W ALONG THE WEST LINE OF SAID SECTION 436.59' TO A POINT ON SAID WEST LINE WHICH IS 200' DISTANCE AND PERPENDICULAR FROM THE EXISTING CENTERLINE OF THE B W S F RAILWAY COMPANY MAINLINE, WHICH IS ALSO THE TRUE POINT-OF-BEGINNING; THENCE S78°23'26"E PARALLEL WITH AND 200' DISTANCE FROM SAID RAILROAD CENTERLINE, 1788.41' TO THE BEGINNING OF A CURVE TO THE RIGHT; THENCE CONTINUING PARALLEL WITH AND 200' DISTANCE FROM SAID RAILROAD CENTERLINE ON A 5529.58'R CURVE TO THE RIGHT, ARC DISTANCE OF 393.39' WITH A DELTA OF 4°04'52" TO A POINT ON THE SOUTH LINE OF THE SW¼ OF SAID SECTION; THENCE S89°13'10"E, 329.05' ALONG SAID SOUTH LINE TO THE SOUTH 1/4 CORNER SEC. 25; THENCE S89°20'34"E ALONG THE SOUTH LINE OF THE SE¼ SAID SECTION 25, 348.62' TO INTERSECT WITH THE SOUTHERLY RIGHT-OF-WAY BOUNDARY FOR STATE HWY 903; THENCE N66°39'21"W (N89°58'18"W) ALONG SAID RIGHT-OF-WAY 1894.84' TO INTERSECT WITH A POINT 200' DISTANCE ON A RADIAL FROM SAID RAILROAD CENTERLINE; THENCE N73°48'20"W 81.34' TO A POINT 200' DISTANCE ON A RADIAL FROM SAID RAILROAD CENTERLINE; THENCE N78°26'04"E, 66.25' TO A POINT 200' DISTANCE ON A RADIAL FROM THE CENTERLINE OF SAID RAILROAD; THENCE N78°12'48"E, 38.34' TO A POINT 200' DISTANCE ON A RADIAL FROM THE CENTERLINE OF SAID RAILROAD; THENCE N78°26'04"E, 34.51' TO A POINT 200' DISTANCE ON A RADIAL FROM THE CENTERLINE OF SAID RAILROAD; THENCE CONTINUING 200' DISTANCE FROM AND PERPENDICULAR FROM THE CENTERLINE OF SAID RAILROAD N78°23'26"E, 1884.28' TO INTERSECT WITH THE WEST LINE OF SAID SECTION 25; THENCE S01°12'21"E, 400.61' TO THE TRUE POINT-OF-BEGINNING

CONTAINING 26.33 ACRES

PROPERTY OWNERS, WITHIN 300' OF PROPOSED SHORT PLAT ON SHEET 1 OF 2

Parcel #	Address
483134	EZ INVESTMT CO; c/o S.ZAICHKOWSKY, 1102 E 1st, CLE ELUM, WA 98922
363134	EZ INVESTMT CO; " " "
363134	EZ INVESTMT CO; " " "
781184	EZ INVESTMT CO; " " "
403134	EZ INVESTMT CO; " " "
383134	EZ INVESTMT CO; " " "
981736	EZ INVESTMT CO; " " "
923134	EZ INVESTMT CO; " " "
413134	EZ INVESTMT CO; " " "
749134	SUZANNE STOREY, JOANNE MANOUS, MARILYN URSIK, 1310 E 1st, CLE ELUM, WA
373134	SUZANNE STOREY, JOANNE MANOUS, MARILYN URSIK, 1310 E 1st, CLE ELUM, WA
473134	SUZANNE STOREY, JUAN BASTERRECHEA, 1310 E 1st, CLE ELUM, WA
405338	JUAN BASTERRECHEA, SUZANNE STOREY, 1310 E 1st, CLE ELUM, WA
113134	JUAN BASTERRECHEA, ETUX, 1310 E 1st, CLE ELUM, WA
103134	JUAN BASTERRECHEA, ETUX, 1310 E 1st, CLE ELUM, WA
273134	SUZANNE STOREY, ETAL, 1310 E 1st, CLE ELUM, WA
843034	GEO. CHAMBERS, ETAL; POB 588, CLE ELUM, WA
323034	GEO. CHAMBERS, ETAL; POB 588, CLE ELUM, WA
073034	RICHARD BALLARD, 1040 McDONALD RD #44, CLE ELUM, WA
083034	WAYNE BALLARD, 17417 SPRUCE WAY, LYNNWOOD, WA 98037
093034	OLD MILL STE LLC, 205 W WRIGHT AV, CLE ELUM, WA
253034	STATE OF WASH; DOT, REAL ESTATE SERV, POB 12560, TACOMA, WA 98909
253034	RONNIE NORRIS; POB 11, SOUTH CLE ELUM WA
114735	RONNIE NORRIS; POB 11, SOUTH CLE ELUM WA
304735	OWENS & SONS; c/o JANET OWENS, 811 COLUMBIA, CLE ELUM, WA
284736	CITY OF CLE ELUM; 119 W 1st, CLE ELUM, WA
924735	CITY OF CLE ELUM; 119 W 1st, CLE ELUM, WA

PROPERTY OWNERS, WITHIN 300' OF PROPOSED SHORT PLAT ON SHEET 2 OF 2

Parcel #	Address
553835	JEFFERY E STUBBS, 1241 WOOD DUCK RD, CLE ELUM, WA 98922
563838	BRYCE TINGLEY ETUX, 37212 183d AV SE, AUBURN, WA 98002
573838	MARK P CARROL ETUX, 108 COLUMBIA, CLE ELUM, WA
17902	MARK P CARROL ETUX, 108 COLUMBIA, CLE ELUM, WA
093134	MARK R HAYDEN, 101 SPRING VALLEY LN, ELLENSBURG, WA 98926
053134	MARK R HAYDEN, 101 SPRING VALLEY LN, ELLENSBURG, WA 98926
063134	C&H CORNERSTONE LLC, c/o PYONG & CHIN SIN, 908 E 1st, CLE ELUM, WA
073134	C&H CORNERSTONE LLC, c/o PYONG & CHIN SIN, 908 E 1st, CLE ELUM, WA
083134	TOM WILLETTE, 901 E 1st, CLE ELUM, WA
293134	TOM WILLETTE, 901 E 1st, CLE ELUM, WA
913134	TED & BETTY CHECKLENSKY, 914 E 1st, CLE ELUM, WA
433134	ROBERT M BATOR, 1704 WESTSIDE ROAD, CLE ELUM, WA
133134	GARY, PAUL, CRAIG PADAMON, 302 W 3rd, CLE ELUM, WA
323134	S & G LAND LTD, 923 E 1st, CLE ELUM, WA
883134	STANLEY ZAICHKOWSKY, 1102 E 1st, CLE ELUM, WA
643134	STANLEY ZAICHKOWSKY, 1102 E 1st, CLE ELUM, WA
223134	PNS PROPERTIES, 1000 E 1st, CLE ELUM, WA
11178	PNS PROPERTIES, 1000 E 1st, CLE ELUM, WA
11462	RENO DALLE, 402 E 2st, CLE ELUM, WA
013134	RENO DALLE, 402 E 2st, CLE ELUM, WA
023134	WILLIAM A BACKSTROM, 360 DALLE RD, CLE ELUM, WA
043134	CALVIN BEEDLE, 351 PAYS RD, CLE ELUM, WA
154736	RONALD SILVERSON & ROBT.C HALEY, POB 758, CLE ELUM, WA
133134	ANITA KARTER, 101 OWENS RD, CLE ELUM, WA
10789	ANITA KARTER, 101 OWENS RD, CLE ELUM, WA

LEGEND

- ● SET 5/8"Ø REBAR, 30"LONG WITH AN ORANGE PLASTIC CAP MARKED BAILEY PLS 8743 AND A 2"Ø"TOP" WHITE STAKE AND WHISKER
- ○ EXISTING IP, ROS 30/133, 2004
- ◎ EXISTING IP, ROS 31/82, 2005
- ◐ EXISTING IP, ROS 22/20, 1994
- ⊕ EXISTING IP, ROS 16/20, 1989
- ⊙ SEWER ACCESS
- ✕ CAR LINE POSTS
- ( ) PREVIOUSLY RECORDED DATA, ROS 30/133
- (( )) EXISTING DATA, NP RAILWAY R/W PLANS 1890's +/-
- UTILITY POLES
- FENCES

RECEIVING NUMBER 201008170004

AUDITOR'S CERTIFICATE

FILED OF RECORD THIS 17 DAY OF August 2010 AT 8:29 AM IN BOOK K OF SHORTPLATS, PAGE 163, AT THE REQUEST OF Bob Bailey

Kittitas County Auditor, by

Deputy County Auditor

BOBBLLC
—PROFESSIONAL LAND SURVEYING—
4201 HWY 970, CLE ELUM, WA 98922
509-674-5531

K/163 20100817000 4