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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 301290

893418-9

KERRY A. CLARK, et al.,

Appellants,

v.

MIKE WALCH, et al.,

Respondents.

PETITON FOR REVIEW

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A. IDENTITY OF THE MOVING PARTY

Respondent Robert C. Folkman and Patricia W. Folkman, husband and wife (“Folkmans”), petition this court for review the Unpublished Decision filed on July 23, 2013 by the Court of Appeals, Division III, and Orders Denying Petitioner Folkmans’ Motion for Reconsideration and Motion for Attorney Fees filed on August 27, 2013. This Petition for Discretionary Review is made pursuant to RAP 13.4.

B. COURT OF APPEALS DECISION

Folkmans’ Petition for Discretionary Review seeks review of the Unpublished Decision filed on July 23, 2013 by the Court of Appeals, Division III in Cause No. 30129-0-III (“Opinion”). A copy of the Opinion is attached in Appendix (“App.”) A. Folkmans also seek review of Orders Denying Folkmans’ Motion for Reconsideration and Motion for Attorney Fees filed on August 27, 2013 at App. B.

C. ISSUES PRESENTED FOR REVIEW

Issue No. 1. Did the Appellate Court err in its holding that the trial court erred in awarding Folkmans their attorney fees under RCW 8.24.030 in defending Walches’ common law easement claims? (Stated differently, does RCW 8.24.030 require trial courts to first segregate attorney fees in defending

against common law easement claims joined with statutory easement claims and disallow an award of such fees?)

Issue No. 2. Did the Appellate Court err in its finding that Folkmans are not entitled to attorney fees on appeal even though they prevailed at trial and on appeal on the merits of all substantive common law and statutory easement claims?

Issue No. 3. Did the Appellate Court err in its finding that Folkmans and Clarks are not the substantially prevailing parties and entitled to any attorney fees on appeal unless they first prevail on remand and recover fees under CR 11 on the common law easement claims?

D. STATEMENT OF THE CASE

This is a case of first impression in Washington State involving Washington State's private condemnation statute, RCW Ch. 8.24, that is similar to the Court's review granted in *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 282 P.3d 1083 (2012).

On August 9, 2010 Walches filed an action in Kittitas County Superior Court entitled "COMPLAINT TO ESTABLISH EASEMENT IMPLIED FROM PRIOR USE AND/OR PRESCRIPTION; OR ALTERNATIVELY EASEMENT BY NECESSITY PURSUENT TO RCW 8.24.010 ET. SEQ."

App. F.

The trial court found that all three claims were interrelated and arose from a common core of facts and legal theories related to access routes allowing attorney fees to be awarded under RCW 8.24.030. App. C; CP 480-510. At the conclusion of a non-jury trial, Folkmans were awarded attorney fees and costs of \$43,885.25 in a final judgment for successfully defending Walches' three easement claims (prescriptive, implied, and by necessity). Of the \$43,885.25, \$12,402.00 and \$1,987.50 (totaling \$14,389.50) represented attorney fees that Folkmans incurred in successfully defending Walches' common law implied easement and prescriptive easement claims. CP 361. Co-Petitioners Clarks were awarded \$76,767.50 on the statutory easement claim. CP at 268, 306. The court also awarded fees in defending common law easement claims totaling \$45,155. CP at 268, 321-29.

After successfully defending Walches' appeal of statutory easement claims before Division III of the Court of Appeals, Folkmans moved for an award of \$37,987.28 for appellate attorney fees and costs, including statutory costs. In its Opinion at Page 11, the Appellate Court ruled that RCW 8.24.030 requires segregation of attorney fees for non-statutory easement claims. It ruled that the Petitioners' appeal fees were contingent upon the outcome of re-

manded hearings on attorney fees under CR 11 related to Walches' segregated common law easement claims. Opinion, Page 13; App. A. The court denied Folkmans' motion for reconsideration, including Folkmans' motion for appellate attorney fees, pending the outcome of remanded hearings under CR 11. App. B.

This Petition for Review is submitted to correct the Appellate Court's decision regarding the recovery of attorney fees on appeal under RCW 8.24.030. Both Folkmans and Clarks prevailed in the defense of jointly pled, tried, and argued common law easement claims brought by Walches along with statutory easement claims under RCW 8.24.010 that were based upon a common and inextricable set of core facts related to alternative access routes. This Court should reverse the Opinion and accept the trial court's decision by broadly construing RCW 8.24.030 to allow the condemnees (Folkmans and Clarks) to recover their attorney fees in "any action" under "reasonableness" standards.

The Appellate Court erred in concluding that Folkmans and Clarks were not the substantially prevailing parties where Folkmans and Clarks prevailed on every substantive claim filed by Walches before the trial court and Appellate Court, except the award of attorney fees. Regardless of the segregation of attorney fees under RCW 8.24.030, the Appellate Court's decision should be re-

versed. Folkmans and Clarks should be awarded their appellate attorney fees and costs in successfully defending Walches' appeal under RCW 8.20.030.

The court should not have applied the general rule of segregation of attorney fees in *Hume v. Am. Disposal. Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994) where a condemnor has consciously pled, argued, and tried multiple common law easement claims with RCW Ch. 8.24 easement claims based upon a common nexus of core facts. By ruling that the Petitioners' attorney fees in defending Walches' the common law easement claims can be segregated under these circumstances, the court has narrowly construed the relief accorded condemnees under RCW 8.24.030 that conflicts with the analysis of Division II in *Beckman v. Wilcox*, 96 Wn.App. 355, 365, 979 P.2d 890 (1999). The fact that attorney fees can be administratively segregated in cost bills does not *ipso facto* require mandatory segregation for purposes of RCW 8.24.030 fee awards.

The Appellate Court disregarded the trial court's Memorandum Decision Regarding Attorney Fees (App. D) entered as discretionary findings that segregation was not required where all three theories in Walches' complaint arose from the same set of common core facts for alternate access routes that were all interrelated and were required to be disproved in order to obtain access under RCW 8.24.010.

1. As Substantially Prevailing Party on Appeal Folkmans Were Entitled to Attorney Fees.

Folkmans incorporate, and do not repeat, the arguments and authorities cited by Clarks that the Appellate Court erred in not awarding appellate attorney fees as the substantially prevailing party on appeal against Walches' substantive claims related to statutory easement claims under RCW Ch. 8.24.

By affirming the trial court's decision on the merits of Walches' statutory easement claims; and common law easement claims (that Walches did not appeal), Folkmans and Clarks are prevailing parties on appeal under *Blair v. Washington State Univ.*, 108 Wn.2d 558, 571, 740 P.2d 1379 (1987). Yet, the Appellate Court erroneously concluded that: "At this point [respondents] have not substantially prevailed. While they have won on the merits of the private condemnation action, their attorney fee award has been reduced, at least temporarily. . . . If they do not prevail on the CR 11 claim, then no party will receive any fees for the appeal." *Id.* at 13.

It was error for the Appellate Court to not award attorney fees on appeal under RCW 8.24.030 and to make appellate attorney fees conditioned upon an award of attorney fees in a separate trial court hearing on common law claims under CR 11. The Appellate Court should have accepted the trial court's findings at CP 443 that Walches common law easement claims were pled, argued,

and tried together as a single action under RCW 8.24.030, citing *Beckman v. Wilcox*, 96 Wn.App. 355, 365, 979 P.2d 890 (1999). CP 443.

The Appellate Court's decision would end any trial court analysis of ever awarding fees on directly related and joined common law actions. It would add language not appearing on the face of RCW 8.24.030. This statute says "[i]n any action...reasonable attorneys' fees may be allowed." (Emphasis added). It does not state "in the action brought solely under RCW Ch. 8.24."

Allowing common law claims to be included within fee awards under RCW 8.24.030 under these circumstances would be consistent with *Noble v. Safe Harbor Trust*, 167 Wn.2d 11, 23, 216 P.3d 1007 (2009) holding that a trial court may consider whether a party's actions caused an increase in the cost of litigation. The trial court found that Walches "foisted" its common law claims upon the Petitioners forcing them to defend these incorporated claims. CP 443; App. D. Given that the Appellate Court also found at Page 11 of its Opinion that Walches caused Folkmans and Clarks to "fully contest the action at great expense to all," it should have applied *Noble's* rationale and not applied a narrow *per se* formula limiting attorney fees to statutory easement claims only.

2. Segregation of Fees Under RCW 8.24.030 Is Not Required.

Walches' based their case strategy upon complaint allegations over the

identical alleged routes of travel for all common law and statutory easement claims that it joined in a single action. CP 1-63; App. F. Walches' complaint at CP 1-11 and supporting exhibits at CP 56-63 affirmatively alleged a nexus of core facts that were common to all three easement theories for multiple access routes at ¶¶ V through XI. CP 5-10. The routes are thoroughly illustrated in Complaint exhibits H through K for all three claims at CP 57-63 at App. F.

In its Memorandum Decision Regarding Attorney Fees (Appendix D) at CP 443, that were incorporated as findings of fact and conclusions of law and final judgment order, the trial court carefully discussed and analyzed the basis for its award of fees under RCW 8.24.030 on all three easement claims.

[W]hile defendants have left no stone unturned in defending the claims foisted upon them by the plaintiffs, *there was a common core set of facts as outlined above*. . . . [T]he legislature intended broad application of RCW 8.24.030. *Beckman v. Wilcox*, 96 Wn. App. 355, 365 (1999). *Here, the three theories in the plaintiffs' cause of action were all interrelated and all arose from the same set of facts. Plaintiffs needed to demonstrate that they had no other practical way of accessing their property. One way was to demonstrate they had no implied easement. A second way was to demonstrate they had no prescriptive rights to otherwise be established because the court had previously dismissed their claim.*

CP at 443; (Emphasis added).

In making the above findings, the trial court adopted the condemnees' position:

Both defendants contend there is a common core of facts intertwining the implied easement and prescriptive easement claims for which they would otherwise not be entitled to attorney's fees with the easement by necessity claim for which they are entitled to attorney's fees. Specifically, the defendants argue the common nexus between the prescriptive easement, the implied easement, and the easement by necessity claims involve inherently related factual and legal issues and that as part of the easement by necessity claim, *the plaintiffs had the burden of proving that no implied easement or prescriptive easement existed to otherwise allow them access to their property. In fact, the defendants claim the plaintiffs argued they had met the burden of not showing implied easement by demonstrating to the court there has never been a common grantor that would have allowed them to pursue the implied easement claim.* Moreover, the defendants claim a common core of facts and related legal theories persists in relationship between the prescriptive easement and easement by necessity claims because both easement claims were over identical routes, which the plaintiffs claim to be 'existing roads' over and across defendants' properties, *that the defendants' defenses included establishing the roads in question never existed or were not on their property and that had the plaintiffs established the alleged roads in fact existed such a fact would have enhanced the claim for easement by necessity and undermined the defendants' defenses.*

CP at 441; (Emphasis added); *see also* the trial court's Findings of Fact and Conclusions of Law at CP 450, 452-53; App. D.

Washington law holds that “[b]ecause it is the plaintiff who is charged with proving necessity, the burden of proof includes proof that no implied easement exists over grantor's property.” *Roberts v. Smith*, 41 Wn.App. 861,

864,707 P.2d 143 (1985) (citing *Dreger v. Sullivan*, 46 Wn.2d 36, 40, 278 P.2d 647 (1955)). “Therefore, the trial court properly placed upon the Roberts the burden to prove there was no implied easement.” *Id.*

Walches themselves acknowledged the common core of facts and related legal issues on their implied and statutory easement claims. CP at 133, 149, 225. In their Trial Memorandum, the Walches asserted a common core of facts and related issues for their common law easement and statutory easement claims. CP at 133, 149, 225. Walches also cited *Roberts* for the proposition that “the condemner's burden to prove reasonable necessity for ingress and egress includes the burden to disprove the existence of an implied easement of necessity where there is some credible evidence that such an easement exists.”

Walches then argued that they “...met this burden by demonstrating to the Court that there has never been a common grantor which fact Clark and Folkman have stipulated is true.” CP 225; App. E. Significantly, Walches refused to stipulate to a dismissal of their implied easement claim. Only after Folkmans and Clarks had incurred great costs in defending these claims and after Folkmans’ and Clarks’ had filed motions for summary judgment on implied easement and the prescriptive easement claims did Walches stipulate to the dismissal of the implied easement claims. CP at 777-785, 987. Walches

prescriptive use claims were dismissed on summary judgment after the trial court found “no evidence” of prescriptive use. CP 992.

Despite the trial court’s dismissal of Walches’ common law claims, and to bolster their statutory easement claim, Walches continued to assert at trial that historical access nevertheless existed over the same purported access routes. CP 314-15, 217, 230-31; RP (Vol. I) at 16-18, 29, 61-66. Under these circumstances, the Appellate Court should have applied *Beckman* and construed RCW 8.24.030’s reasonableness provisions for the award of attorney fees to not require the segregation of attorney fees where the condemnor joined common law easement claims to prove his entitlement to a statutory easement by necessity.

E. ARGUMENT AND WHY REVIEW SHOULD BE GRANTED

In support of their Petition, Statement of the Case above, and argument below, the Folkmans incorporate by reference and do not repeat the factual history and arguments of Co-Petitioners Kerry A. Clark and Patricia L. Clark, and W.L. Clark Family, LLC filed with this court. The Unpublished Opinion and Orders denying reconsideration are in conflict with decisions with another Court of Appeals and Supreme Court; and represent an issue of substantial public interest related to the award of attorney fees under the private condemnation

statute, RCW 8.24.030.

1. The Decision Conflicts with Other Court of Appeals Decisions.

In its Memorandum Decision Regarding Attorney Fees at CP 443 at Appendix D, the trial court based the award of attorney fees for common law and easement claims upon the interpretation of RCW 8.24.030 “any action” and “reasonableness” standards discussed in *Beckman v. Wilcox*, 96 Wn.App. 355, 365 (1999). Judge Cooper concluded that a broad application of RCW 8.24.030 in awarding attorney fees for all three claims was warranted where: (1) all three theories and causes of action asserted by Plaintiff’s case were “...all interrelated and all arose from the same set of facts;” and that Plaintiff needed to demonstrate that they had no other way of accessing their property by demonstrating that they had no prescriptive use or implied easement rights.

Walches argued to the trial court at CP 225 that disproving conjoined common law easement claims were necessary to perfect their entitlement to a statutory easement under RCW 8.24.010: “...the condemnor’s burden to prove reasonable necessity for ingress and egress includes the burden to disprove the existence of an implied easement of necessity where there is some credible evidence that such an easement exists... Plaintiffs Walch have met this burden by

demonstrating to the Court that there has never been a common grantor which fact Clark and Folkman have stipulated is true.” CP 225; App. E.

Notwithstanding Walches’ arguments that common law claims were predicate causes of action that he was required to prove to show the absence of access by other legal means to support statutory easement claims, the Appellate Court nevertheless determined at Page 10 of its Opinion that the trial court could only award fees for prescriptive easement and implied easement claims following a remanded trial court hearing under CR 11.

The Court’s decision requiring segregation of fees related to common law easement claims, was based entirely on *Hume v. American Disposal*, supra. *Hume* involved three claims of unpaid overtime, wrongful harassment, constructive discharge, and age discrimination. *Hume*, however, applied a general rule of fee segregation. It did not involve interrelated common law access and easement by necessity claims under the attorneys’ fee provisions of RCW 8.24.030. *Id* at 674.

Importantly, the Appeals Court failed to distinguish the practical ability to segregate attorney fees for common law claims against Walches’ actions to disprove such claims in order to qualify for relief under RCW Ch. 8.24. Applying *Hume* under these circumstances where Respondents prevailed against

Walch on all filed common law and statutory easement claims represents a conflict with the *Beckman v. Wilcox*, supra, of Division II. Fees were not awarded on the basis of a segregation analysis, but a reasonableness determination of whether the fees claimed “meets the conditions of the statute authorizing fees” that “allows attorney fees for any action.” Id at 894; (underscoring added).

Beckman construed “action” broadly to mean “the lawsuit brought in a court.” An examination of the record shows that at the very outset, Walches filed their action with combined and integrated common law claims of prescriptive use, implied easement, and statutory easement by necessity. CP 1-CP 63; App. F. Given the substantial statewide public policy interests to be fostered in the enactment of RCW 8.24.030, the Appellate Court’s decision would emasculate *Beckman*’s findings of legislative intent to broadly interpret and apply “any action” to include the defense of predicate common law claims in this case. Review should be granted and the Appellate Court’s decision reversed under these first impression circumstances where: (1) Walches pled all three actions as conjoined causes of action in his detailed complaint at CP 1-63 (Appendix F); (2) Walches asserted in motions and arguments at trial that common law easement claims needed to disprove in order to qualify for relief under

RCW Ch. 8.24 (Appendix E); and (3) in the exercise of discretion¹ applying the *Lodestar*² formula and *Beckman*, the trial court entered adjudicative findings of fact and conclusions of law that: (a) all three of Walches' causes of action were required to perfect statutory easement claims under RCW 8.24.010 by showing that Walches had no other practical way of accessing his property; and (b) there was a common core set of facts that were all interrelated and arose from the same set of facts. CP 443; App. D.

By ruling against Respondent Folkmans' and Clarks' Motions for Reconsideration and Motion for attorney fees on appeal, the Opinion is in further conflict with Division II *Shields v. Garrison*, 91 Wn.App. 381, 388-89, 957 P.2d 1266 (1998). The court held that in awarding fees under RCW 8.24.030 that trial court determinations would not be disturbed absent a showing that the trial court abused its discretion:

The awarding of attorney fees pursuant to a statute or contract is a matter of discretion with the trial court that will not be disturbed absent a clear showing of an abuse of that discretion. *Fluke Capital & Management Servs. Co. v. Richmond*, 106 Wn.2d 614, 625, 724 P.2d 356 (1986); (other citations omitted).

¹ Trial courts must exercise its discretion in light of the particular circumstances of each case. *Beckman*, supra at 897 citing *Schmidt v. Cornerstone Inv., Inc.*, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990). "In a condemnation action, a trial court has discretion to grant an award for attorney fees in light of the circumstances in each case." *Kennedy v. Martin*, 115 Wn.App. 866, 872, 65 P.3d 866 (2003).

² *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597-99, 675 P.2d 193 (1983).

Page 11 of the Opinion states that “[t]he fees awarded each respondent were reasonable.” App. A. By affirming the trial court’s decision and judgment finding that the Respondents had successfully defended Walches’ statutory easement claims that incorporated common law claims, the Appellate Court committed error by not granting attorney fees on appeal under RAP 18.1(d) and RCW 8.24.030. This relief is compelled where the Appellate Court concluded that there was no abuse of discretion by the trial court in awarding fees for the defense of Walches’ statutory easement claims at Opinion at Page 11. At the very least, and without regard to common law easement claims, once the Appellate Court affirmed the trial court’s determination on fees related to RCW 8.24.030 claims, it was required to award Petitioners their appellate attorney fees where they successfully defended Walches’ claims on appeal.

Yet, the appellate court declined to award fees on appeal even though Respondents substantially prevailed against Walches’ statutory easement claims on appeal. Accordingly, this Division III Opinion is in conflict with holdings in *Shields* and *Beckman* and review should be granted.

2. The Decision Involves an Issue of Substantial Public Interest.

The award of attorney fees under RCW 8.24.030 turns on the correct interpretation and application of this statute. By its nature, the legislative poli-

cy objective in conferring discretion to trial courts in awarding fees directly affects every trial court and appellate court in Washington State that hears and reviews private condemnation cases. Guidance by this court is of paramount importance where two Divisions have applied different rules of statutory construction. Division II applies it broadly in *Beckman*, while the Division III court here construes it narrowly to segregated statutory easement claims only.

Reasonableness of fees by its very nature requires the exercise of trial court discretion. See *Clausen v. Icecicle Seafoods*, 174 Wn.2d 70, 81, 272 P.3d 827, (2012) holding that “...a trial judge, who is more familiar with advocacy and trial preparation, is better suited to determine the reasonableness of the fees award and whether particularities of the case require the fee request to be adjusted.” It was fundamental error to disregard rules of statutory construction by relying on *Hume* to require segregation of fees.

If trial courts are left with no discretion to award fees under RCW 8.24.030 on related claims, then the language: “[i]n any action brought under the provisions of this Ch. for a private way of necessity, reasonable attorneys’ fees...may be allowed by the court...,” would be meaningless.³ Trial courts

³ Courts avoid literal readings of a statute which would result in unlikely, absurd, or strained consequences. *Tingey v. Haisch*, 159 Wn.2d 652, 663-64, 152 P.3d 1020 (2007).

would never be permitted to review a party's advocacy, trial tactics, and circumstances in making reasonableness determinations under RCW 8.24.030.

The trial court exercised its discretion in determining that Walches as the condemning party pled, argued, and pursued a motion and trial strategy in an attempt to perfect a statutory easement claim to multiple access routes based upon disproving common law easement claims. These tactics that were extremely costly for Petitioners to defend are considerations that a trial court should be entitled to weigh in awarding fees under the "reasonableness" standard expressed in RCW 8.24.030 and *Clausen v. Icecicle Seafoods*, supra.

The Appellate Court confirmed the trial court's conclusion that Walches "foisted" all three easement claims upon the Petitioners; and, that they were "all interrelated and arose from a common core of facts and related legal theories," are "reasonableness" determinations made under RCW 8.24.030 that are supported by facts and findings in the record. Opinion, Page 11 (App. A); See CP 446 incorporating the July 5, 2011 Memorandum Decision Regarding Attorney Fees at App. D ; CP 247-249; CP 443; CP 453 at ¶10; and CP 494.

Under these circumstances, it was not an abuse of discretion for the trial court to reasonably determine in awarding fees and applying *Beckman*'s liberal construction of RCW 8.24.030 in awarding attorney fees on Walches' common

law claims that: “Plaintiffs needed to demonstrate they had no other practical way of accessing their property,” and that all “...three theories in the plaintiffs’ causes of action were all interrelated and all arose from the same set of facts.” CP 443. The Appeals Court erred in not considering these reasonableness factors under the statutory language of RCW 8.24.030 that must be corrected to assist trial courts in hearing private condemnation claims.

As noted in *Beckman, supra* at 896, “Beckman triggered his liability for fees when he initiated the action and could not escape this obligation by abandoning his claim.” (Emphasis added). Absent review by this court, non-prevailing parties could “shot gun” all common law claims to perfect statutory easement claims regardless of the cost to defend these claims. They could evade the responsibility of ever paying significant fees and costs merely because such fees would hypothetically be capable of segregation under the rationale presented in *Hume*. It would prevent a trial court from ever awarding fees on conjoined common law claims, no matter how related the facts and legal theories are to the statutory easement claim, and no matter the cost.

Walches and other condemners employing such tactics should be subject to the same financial consequences under *Beckman* after forcing Folkmans and Clarks to defend meritless common law easement claims. Walches need

only have affirmatively pled that access under alternate common law easement claims did not exist. Walches consciously chose not to do so, thereby forcing Folkmans and Clarks to defend these claims at significant costs.

F. CONCLUSION


A conflict exists between divisions on the scope and application of RCW 8.24.030 fee provisions as a case of first impression in Washington State of statewide significance and review should be accordingly be accepted.

The trial court's award of attorney fees on the Clarks' defense of Walches' common law implied and prescriptive easement claims should be affirmed and reinstated. Folkmans should be deemed the substantially prevailing party for purposes of submitting a cost bill under RAP 14.2. They should be awarded their attorney fees on appeal and attorney fees for all common law claims. Those portions of the Appellate Court's Opinion related to attorney fees should be reversed.

DATED this 22nd day of September, 2013.

Respectfully submitted,

WILLIAMSON LAW OFFICE

By: 
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Attorney for Petitioner Folkmans

CERTIFICATE OF SERVICE

I certify that on the 23rd day of September, 2013, I caused a true and correct copy of this document to be duly filed with the Court of Appeals Division III and served on the following in the manner indicated below:

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APPENDIX
PETITION FOR REVIEW
CLARK V. WALCH

Appendix A - Unpublished Opinion dated July 23, 2013 in Case No. 301290.

Appendix B - Orders Denying Reconsideration and Attorney Fees dated August 27, 2013.

Appendix C - Trial Court Memorandum Decision dated May 24, 2011 with attached Findings of Fact and Conclusions of Law; Order Awarding Clarks' Fees and Costs dated July 11, 2011; Final Judgment in Favor of Defendant Clark and W.L. Clark Family, LLC dated July 11, 2011; Order Awarding Folkmans Fees & Costs dated July 11, 2011; and Final Judgment in Favor of Defendant Folkmans dated July 11, 2011.

Appendix D - Memorandum Decision Regarding Attorney Fees dated July 11, 2011; Findings of Fact and Conclusions of Law dated July 11, 2011.

Appendix E - Excerpted Page 13 of Plaintiff's Trial Memorandum Re: Statutory Necessity Pursuant to RCW 8.24.030.

Appendix F - Plaintiff Walches "COMPLAINT TO ESTABLISH EASEMENT FROM PRIOR USE AND/OR PRESCRIPTION; NECESSITY PURSUANT TO RCW 8.24.010 ET. SEQ."

APPENDIX A

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CASE # 301290
Mike Walch, et al v. Kerry A. Clark, et al
KITITAS COUNTY SUPERIOR COURT No. 102003536

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:sh
Enclosure

c: **E-mail**
Information copy:
Honorable Frances Chmelewski (Judge Cooper's case)

FILED
July 23, 2013
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

| | | |
|-------------------------------------|---|---------------------|
| MIKE WALCH and MARCIA WALCH, |) | |
| Husband and wife, |) | No. 30129-0-III |
| |) | |
| Appellants, |) | |
| |) | |
| v. |) | |
| |) | |
| KERRY A. CLARK and PATRICIA L. |) | UNPUBLISHED OPINION |
| CLARK, husband and wife; W.L. CLARK |) | |
| FAMILY, LLC, a Washington Limited |) | |
| Liability Company; ROBERT C. |) | |
| FOLKMAN and PATRICIA W. |) | |
| FOLKMAN, husband and wife, |) | |
| |) | |
| Respondents. |) | |

KORSMO, C. J. — This is an action to attempt to obtain an easement by necessity across commercial property for the benefit of other commercial property owners. The trial court dismissed the common law theories of relief at summary judgment and then rejected the statutory theory after bench trial. We affirm the trial court’s rulings concerning the easement and partially affirm the attorney fees award. We remand for the court to segregate its fee award and consider respondents’ CR 11 argument. Whether respondents are entitled to attorney fees on appeal will be determined by the outcome of the remand.

No. 30129-0-III
Walch v. Clark

respondents are entitled to attorney fees on appeal will be determined by the outcome of the remand.

FACTS

Mike and Marcia Walch own Rainier Skyline Excavators, Inc. (RSE), a company that designs and builds portable hydraulic track drive skyline excavators. In 2000, the Walches became interested in buying some property in Cle Elum, Washington. They wanted to use the property, which included a pond known as the Dalle Pond, to demonstrate, display, and sell RSE's machinery as well as to manufacture excavators. Many components used to assemble the excavators must be 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.

The Walches purchased the property in May 2004. The real estate contract identifies the Walches' access to the property by way of an existing easement over the property located to the east of the Walches' property, then continuing east over and across the Burlington Northern Santa Fe (BNSF) railroad corridor, and then proceeding north over and across the BNSF railroad crossing to Owens Road, "so long as the railroad shall allow." Ex 1. At that point, Owens Road becomes a public right-of-way owned by the city of Cle Elum (City).

The City has a private agreement with the Owens family to use Owens Road south of the BNSF railroad crossing to access the City's sewage treatment plant. A trucking

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company and several private residents all use the BNSF crossing on Owens Road for access to their respective properties, but they do not have permits from BNSF to cross the railroad right-of-way.

The respondents in this action, the Clarks and the Folkmans, own property located to the west of the Walches' property, in the Swiftwater Business Park. All the property owned by the parties in this action is presently zoned by the City as being within its Industrial District.¹

On August 9, 2010, the Walches filed suit for a 30-foot easement across the respondents' properties. The Walches alleged that a road existed at this location, and that they used this road to access the property when they were deciding whether to purchase.² The Walches claimed an easement implied from prior use and/or prescription or, alternatively, an easement by necessity pursuant to RCW 8.24.010.

The trial court dismissed the common law claims for prescriptive easement or implied easement by prior use before trial. However, the statutory claim proceeded to bench trial, where the Walches claimed they were entitled to an easement by necessity because their property was effectively landlocked for several reasons: (1) they had no legal, insurable access over the railroad right-of-way, and (2) as a practical matter they

¹ See chapter 17.36 of the Cle Elum Municipal Code.

² The respondents disputed this claim, and the trial court found that there was no evidence that a road ever existed at this location.

could not physically enter or exit the property because the super-lowboy trailers could not use Owens Road.³

Mr. Walch testified that he had not taken any steps to submit any land use applications for the property because he did not want to do any studies or plans until they had legal access to the property. He also acknowledged that he had not hired any engineers to examine the route feasibility or made any attempts to obtain an estimate of the cost of improving Owens Road for the use of the super-lowboys. Additionally, he testified that the Walches could not get their access insured because they do not have a BNSF permitted easement for access to their property. The Walches had not sought a permit to cross the railroad at Owens Road.

City administrator Matt Morton testified that the Walches had never submitted any land use applications, their intended use of the property would be a conditional use, there was no guarantee that the Walches would be permitted to use the property for RSE, and it was premature to give an opinion on whether the City would grant a permit of any kind. He also testified that the Dalle Pond on the Walch property is classified as a category three wetland, which could further complicate the land use permit process.

³ In particular, they alleged that the superloads could not negotiate the turns at Owens Road, which also was too narrow, and the trailers would get high centered on the railroad tracks.

The trial court dismissed the Walches' RCW 8.24.010 claim without prejudice, finding that the Walches had physical access to their property over the BNSF railroad crossing and that until such access was denied or withdrawn the Walches could make use and enjoyment of their property for those uses authorized by the City within the industrial zone. The court concluded that the property was not landlocked and there was no guarantee that RSE could be situated on the property.

Respondents requested attorney fees and costs under RCW 8.24.030 for defending all three easement claims. Finding that the claims all involved the same underlying set of facts and were so interrelated that segregation of fees was not required, the trial court awarded attorney fees for defending all three claims. The Walches then timely appealed to this court.

ANALYSIS

The Walches challenge the court's statutory easement ruling and the attorney fee awards. All parties seek attorney fees on appeal. We will first discuss the easement ruling before turning to the fee arguments.

Easement

The trial court determined that the Walches had "not established a reasonable necessity for a private way of necessity because their property is not landlocked and because they have no guarantee that a future use of their property would include siting

the RSE, Inc. manufacturing business on the property.” Clerk’s Papers (CP) at 251. We agree with both of those assessments and affirm the denial of the easement.

This matter was tried on the authority of RCW 8.24.010 that provides:

An 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 its proper use and enjoyment to have and maintain a private way of necessity . . . on, across, over or through the land of such other . . . 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.

This statute is “not favored in law and thus must be construed strictly.” *Brown v. McAnally*, 97 Wn.2d 360, 370, 644 P.2d 1153 (1982). To condemn a private way of necessity, the Walches needed to show that access over the respondents’ property was reasonably necessary for the proper use and enjoyment of their property. *See id.*

The landowner’s necessity does not have to be absolute, but it must be reasonably necessary under the facts of the case. *State ex rel. Polson Logging Co. v. Superior Court*, 11 Wn.2d 545, 562-63, 119 P.2d 694 (1941). It is insufficient to show that the proposed route is more convenient or advantageous than another route. *State ex. rel Carlson v. Superior Court for Kitsap County*, 107 Wash. 228, 232, 181 P. 689 (1919). The party seeking to condemn the private way bears the burden of proving the reasonable necessity, including the absence of alternatives. *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009).

However, “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.’” *Brown*, 97 Wn.2d at 368. The Walches primarily rely upon this quote from *Brown*, arguing that although they currently have access to the property, they have no legally protected access and are entitled to pursue their private condemnation action. We agree. The existence of an access route does not bar a private condemnation action under the statute.⁴ *Id.* at 366-68. Existing access, however, is evidence that can be considered in adjudging the *necessity* of the proposed private condemnation action. That is how the trial court treated the matter.

The existing access is strong evidence that the property is not currently landlocked. There also was evidence that the Walches had not undertaken efforts to determine the feasibility of obtaining permission from BNSF railroad or of improving the existing access route to accommodate the superloads RSE would need to use. In light of these facts, the trial court did not err in determining that the property was not landlocked.

The trial court also determined that necessity had not been established because it was only speculative that RSE would be able to use the property for its intended

⁴ The Walches seek to extend *Brown* and apply the statute to condemn a new route rather than obtain legal standing to their existing route. In light of our agreement with the trial court that the Walches did not prove the necessity for private condemnation, we do not address the propriety of their proposed route or of their argument for extending *Brown*.

purposes. The testimony showed that a conditional use permit would be necessary to address zoning related restrictions on the property and there also were environmental concerns to address. Given these hurdles, it was understandable that the superloads might never need to access the property.

In *Brown*, the would-be condemners received approval of their proposed development on various conditions that included the need to obtain an easement permitting access to the property. *Id.* at 364-65. The Walches approached the matter from the opposite perspective by attempting to obtain their access before seeking approval of their development plans. While there is no legal impediment to using this approach, the uncertainty of the property's future use is a proper fact for the trier of fact to consider in assessing the necessity of the proposed private condemnation.

The record supported the trial court's determination that the Walches had not established the necessity of their proposed private condemnation. The property was not currently landlocked and it was uncertain whether future access would be inadequate. We thus affirm that aspect of the judgment.

Attorney Fees

The Walches attack the trial court's ruling assessing fees against them for defense of the common law claims as well as the reasonableness of the fee award. All parties seek attorney fees on appeal and the respondents also suggest alternative bases for upholding the fee award. We conclude that the trial court erred in not segregating the fee

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Walch v. Clark

awards, the fees were otherwise reasonable, and we remand for consideration of the CR 11 claim that was raised, but not decided, at trial. The Walches are not awarded any fees for the appeal; whether respondents obtain appellate attorney fees is dependent upon the outcome of the remand. We approach the fee question in a slightly different manner than it was presented by the parties.

RCW 8.24.030. Attorney fees in a private condemnation action are governed by RCW 8.24.030, which provides in relevant part:

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.

This court reviews a trial court's award of attorney fees for an abuse of discretion. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Attorney fees should be awarded only for services related to causes of action that allow for fees. *Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995). If fees are authorized for only some of the claims, the fee award must properly reflect a segregation of time spent on issues for which fees are authorized from time spent on other issues. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 672, 880 P.2d

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Walch v. Clark

988 (1994). However, if the claims are so related that no reasonable segregation can be made, the court does not need to require segregation. *See id.* at 673.

In awarding attorney fees, Washington courts apply the lodestar method and the trial court must enter findings of fact and conclusions of law supporting its decision to award fees. *Mahler*, 135 Wn.2d. at 434-35. The findings are necessary for an appellate court to review the award. *Bentzen v. Demmons*, 68 Wn. App. 339, 350, 842 P.2d 1015 (1993). Where a trial court fails to create the appropriate record, remand for entry of proper findings and conclusions is the appropriate remedy. *Mahler*, 135 Wn.2d at 435.

The Walches asserted three easement claims: an easement by necessity under RCW 8.24.010, a prescriptive easement, and an implied easement by prior use. The latter two common law claims were dismissed by agreement at summary judgment. After prevailing at trial, the respondents presented requests for attorney fees that segregated the fees related to the statutory action from those related to the common law claims, but argued on various theories that they were also entitled to attorney fees for defending the common law claims.

The Walches contend on appeal that the court erred by finding that the claims were too interrelated to segregate and that the fee award was excessive. We agree that the claims could be segregated and reverse the trial court's finding that it was not appropriate to segregate. However, we see no abuse of discretion in assessing the amount of attorney fees for the defense of the statutory claim.

Initially, we agree with the Walches that RCW 8.24.030 does not apply to the common law claims. The statute applies to any actions “brought under the provisions of this chapter.” RCW8.24.030. It does not thereby extend to all related claims. However, the trial court still has authority to grant the entirety of a fee request when it is impractical to segregate covered and noncovered claims. *Hume*, 124 Wn.2d at 673.

While that is how the trial court treated the requests here, it was not impractical to segregate the claims. The respondents did in fact segregate their requests. Indeed, the trial court also awarded fees to the respondents based on each category of claims. There were three distinct legal theories subject to different discovery and legal research efforts. It was not impractical to segregate. The trial court erred in concluding otherwise.

The Walches also challenge the reasonableness of the total fee award. We see no abuse of discretion. The Walches imposed significant costs on their neighbors who properly proved their defense costs, including the claims that were not subject to reimbursement under the statute. The Walches do not challenge the hourly rate charged by respective counsel. The court reviewed the time slips and properly applied the lodestar formula to calculate the fee award. The fees awarded each respondent were reasonable. The Walches sought an easement across commercial property owned by two parties and cannot now claim it was unreasonable for both respondents to fully contest the action at great expense to all.

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Walch v. Clark

The attorney fee awards for the defense of the statutory claim are affirmed; the awards under the statute for the defense of the common law claims are reversed.

Common Law Theories. Respondents also sought CR 11 sanctions in the trial court on the common law claims, arguing that they were brought without proper investigation. The trial court did not address this argument in light of its decision to grant fees under the statute. On appeal, the respondents reprise this argument as an alternative basis for affirming the fee award. The Walches contend that the argument cannot be addressed due to the failure of the respondents to cross appeal.

Only a party who has been aggrieved by a trial court action can appeal. RAP 3.1. The respondents were not aggrieved; the trial court awarded attorney fees on the common law claims. They had no basis for seeking affirmative relief. Instead, they properly raised the issue as an alternative basis for affirming the trial court. *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 206-07, 985 P.2d 400 (1999).

This court is not in a position to decide the CR 11 issue in the absence of finding by the trial court. Since we have reversed the fee award under the statute for the common law claims, we remand this issue to the trial court for consideration of the respondents' CR 11 argument related to those claims.

Attorney Fees on Appeal. Finally, all parties seek attorney fees on appeal. The Walches seek fees for responding to the CR 11 argument. However, as that argument

No. 30129-0-III
Walch v. Clark

was properly brought to this court, the Walches have not prevailed on that issue and there is no basis for awarding fees to them.

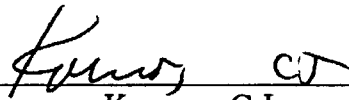
Respondents seek their attorney fees based on either RCW 8.24.030 or for responding to a frivolous appeal. This appeal was not frivolous. The Walches presented a debatable issue concerning the necessity of their private condemnation action. The statute does provide a basis for awarding fees to the respondents. However, at this point they have not substantially prevailed. While they have won on the merits of the private condemnation action, their attorney fee award has been reduced, at least temporarily.

If, on remand, respondents prevail on their CR 11 argument and regain their fees for the common law claims, the trial court also should award respondents their reasonable attorney fees for defending the appeal in this court. If they do not prevail on the CR 11 claim, then no party will receive any fees for the appeal.

Affirmed in part, reversed in part, and remanded.


No. 30129-0-III
Walch v. Clark

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

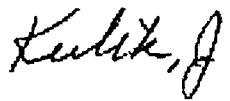


Korsmo, C.J.

WE CONCUR:



Brown, J.



Kulik, J.

APPENDIX B

Renee S. Townsley
Clerk/Administrator

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TDD #1-800-833-6388

*The Court of Appeals
of the
State of Washington
Division III*



August 27, 2013

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CASE # 301290
Mike Walch, et al v. Kerry A. Clark, et al
KITTITAS COUNTY SUPERIOR COURT No. 102003536

Counsel:

Enclosed is a copy of the Order Denying Motions for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:sh
Attachment

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

| | | |
|---|---|-----------------|
| MIKE WALCH and MARIA WALCH, husband and wife |) | |
| |) | No. 30129-0-III |
| |) | |
| Appellants, |) | |
| |) | |
| v. |) | ORDER DENYING |
| |) | MOTIONS FOR |
| KERRY A. CLARK and PATRICIA L. CLARK, husband and wife; W.L. CLARK FAMILY, LLC, a Washington Limited Liability Company; ROBERT C. FOLKMAN And PATRICIA W. FOLKMAN, husband and wife. |) | RECONSIDERATION |
| |) | |
| |) | |
| Respondents. |) | |

THE COURT has considered respondent Folkmans' Motions for Reconsideration & Modification of Ruling (RAP 12.4; RAP 17.7) and Motion for Attorney Fees and Costs, and respondent Clarks' Motion for Reconsideration of Decision on Attorney Fees, and is of the opinion the motions should be denied. Therefore,

IT IS ORDERED the motions for reconsideration of this court's opinion of July 23, 2013, are denied.

DATED: August 27, 2013

PANEL: Judges Korsmo, Brown, Kulik

FOR THE COURT:



KEVIN M. KORSMO
Chief Judge

APPENDIX C

FILED
11 MAY 24 AM 10:44
KITTITAS COUNTY
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

MIKE WALCH and MARCIA WALCH,)
husband and wife,)

Plaintiffs,)

vs.)

KERRY A. CLARK and PATRICIA)
L. CLARK, husband and wife;)
W. L. CLARK FAMILY, LLC, a)
Washington limited liability company,)
ROBERT C. FOLKMAN, et ux.,)

Defendants.)

No. 10 2 00353 6

MEMORANDUM DECISION

INTRODUCTION

Trial of the above captioned matter took place before this court on May 10 and 11, 2011. The plaintiffs were represented by attorneys Chris A. Montgomery and Richard T. Cole. The defendants Clark and Clark, LLC were represented by attorney Doug Nicholson and the defendants Folkman were represented by attorney Bill Williamson. The court heard the testimony of plaintiff Mike Walch, Super Load driving expert Royce Hatley, Cle Elum City Administrator Matt Morton, City of Cle Elum Public Works Director Jim Leonard, Joe Kretschman, Robert Folkman, Kerry Clark, and Ken Marson. The court also received into evidence Exhibits 1 through 18, 20 through 40, 42

MEMORANDUM DECISION - 1

000480

through 55, 57 through 59, 101 through 114 and 116 through 120. At the conclusion of the plaintiffs' case both Mr. Nicholson and Mr. Williamson made motions to dismiss on behalf of their clients. The court took their arguments under advisement, reserved ruling thereon and required that the defendants put on their cases.¹ At the conclusion of the trial the court heard the closing arguments of the parties and renewed motions by the defendants to dismiss the claims. The court thereafter took the matter under advisement to review all of the exhibits and consider the arguments as well as the testimony of the witnesses. The court has finished that process now and herebelow issues its memorandum decision.

DISCUSSION

1. Facts. The plaintiffs purchased real property situated in Cle Elum Washington in May, 2004². Access to plaintiffs' property is outlined in the real estate contract and is by way of an existing easement over the Dalle property to the east of the plaintiffs' property, east over and across a Burlington Northern Santa Fe Railroad corridor and then north over and across the Burlington Northern Santa Fe Railroad crossings crossing to Owens Road. The City of Cle Elum owns the public right of way of Owens Road from North First Street in the City of Cle Elum to the north edge of the Burlington Northern Santa Fe right of way. The City of Cle Elum also has a private agreement with the Owens family to use Owens Road south of the Burlington Northern Santa Fe railroad crossing to the City of Cle Elum sewage treatment plant. Peninsula Trucking also uses the same Owens Road to access its facilities to the south on Owens Road as do several private residences. None of these parties has been issued permits from Burlington Northern Santa Fe to cross the railroad right of way.

The plaintiffs own Rainier Skyline Excavators, Inc. (RSE) and intend to locate that business on their Cle Elum property. RSE designs and manufactures the world's largest portable hydraulic track drive skyline excavators, buckets, teeth and accessory

¹ See CR 41(b)(3).

² See Exhibit J.

equipment.³ The Walches intend to use their Cle Elum property to demonstrate their portable skyline excavator in conjunction with the Dalle pond on their property and either manufacture or assemble several components of the skyline excavator on their property. Many components of the portable skyline excavator are transported by long and extra long lowboy trailers, called super loads. These super loads can be up to 165 feet in length and carry several hundred thousand pounds.

The defendants own property to the west of the Walch property situated in the Swiftwater Business Park⁴. The Clarks and the Folkmans have spent the last five years developing the Swiftwater Business Park, improving 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. Clark, LLC has spent time and money to short plat its property immediately north of Clarks, which it purchased from Burlington Northern Santa Fe.

The property of all parties is presently zoned by the City of Cle Elum industrial as defined by Chapter 17.36 of the Cle Elum Municipal Code⁵. According to Matt Morton, Cle Elum city administrator, no land use applications have ever been submitted by the plaintiffs for the intended use by their company RSE on the property they now own. Moreover, while the intended uses by the plaintiffs of their property may be permitted outright in the industrial zone if they are developed and used in the manner that complies with the performance standards and aesthetics objectives of Chapter 17.36 of Cle Elum city code, Mr. Morton also pointed out that there is no guarantee of granting any application until it was submitted and reviewed and reconciled with the City of Cle Elum Critical Areas Ordinance,⁶ especially because of the Dalle ponds situated on the Walch property, which Walch has described as the Dalle wildlife and fish propagation ponds.⁷

The Walches seek a 30 foot easement by necessity, claiming their property is "landlocked" because they have no legal right to cross the railroad right of way over

³ See Exhibit 40.

⁴ See Exhibits 2 through 8.

⁵ See Exhibit 106.

⁶ See Exhibit 107.

⁷ See Exhibit 109.

Owens Road and the super load lowboys needed to transport their equipment cannot traverse the railroad crossing over Owens Road or make an immediate right turn down the railroad corridor.⁸ At trial the plaintiffs claimed that the easement by necessity they sought should be off of Swiftwater Boulevard through the Folkman/Clark properties in a south easterly direction along the southern edges of the defendants' properties immediately inside the DOT right of way fence to meet the plaintiffs' property at the southwest corner thereof.⁹

2. Law. The private condemnation statute, RCW 8.24.010 et seq. under which this action is brought by the plaintiffs "is not favored in law and thus must be construed strictly." *Brown v. McAnally*, 97 Wn.2d 360, 370 (1992). In a condemnation proceeding for a private way of necessity the condemnor, here Walch, has the burden of proving the reasonable necessity for a private way of necessity including the absence of alternatives. *Noble v. Safe Harbor Trust*, 167 Wn.2d 11, 17; *State ex rel. Carlson v. Superior Court*, 107 Wash. 228, 234 (1919). The need for a private way of necessity need not be absolute; instead the way must be reasonably necessary under the facts of the case, as distinguished from being merely convenient or advantageous. *Brown, supra*; *Ruvalcada v. Kwang Ho Baek*, 159 Wn.App. 702, 709 (2011).

The policy on which the doctrine of easement by necessity is based is that a landlocked land may not be rendered useless in perpetuity, that the "landlocked" landowner is entitled to the beneficial uses of the land. The landlocked owner is, therefore, given the right to condemn a private way of necessity to allow ingress and egress to the land to enjoy its beneficial use. *Hellberg v. Coffin Sheep Company*, 66 Wn.2d 664, 666-667 (1965); *Kennedy v. Martin*, 115 Wn.App. 866, 868 (2003).

What constitutes a reasonable necessity is a factual determination. As stated in *Beeson v. Phillips*, 41 Wn.App. 183 (1985):

"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 situated that in order for him to obtain 'its proper use and enjoyment', he must of

⁸ Two separate problems: one, not being able to cross the railroad crossing because of the low center of the super load lowboys creating risk of high centering on the railroad tracks and, secondly, the 165 foot load making a right turn within 30 feet of the crossing on to the railroad corridor passage. On May 4, 2011 the court, with each of the attorneys, took a view of the property at both the west and east ends, walked the property, drove on the property and witnesses a demonstration of a smaller lowboy high centering on the railroad tracks in question.

⁹ See Exhibit 53.

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."

Beeson, supra at 186-187 quoting *Brown v. McAnally, supra*.

3: Decision. Plaintiffs contend their property is landlocked because they cannot access their property for their intended purpose; that is to place their RSE, Inc. business thereon. More specifically, plaintiffs contend they cannot access their property for that intended use because they do not have legal, insurable access over the railroad right of way either at the crossing or along the railroad corridor to their granted easement through the Dalle property. And, as a practical matter, they cannot pull their super load lowboys over the railroad tracks and make the right turn because the lowboys would get high centered, and even if the lowboys could cross the tracks, they could not (because of their length) make the hard right 90 degree turn immediately after the railroad tracks on to the railroad corridor to access the granted easement. The defendants counter the plaintiffs' argument by contending the plaintiffs' proposed use of the property is purely speculative at this point; that the Walches have never made application for development of the property for the intended use and that there is no guarantee from the City of Cle Elum that Walches would be permitted to even situate their RSE business on their property, given the complexities of the industrial zone and Critical Areas Ordinances of the City of Cle Elum. In other words, there is no guarantee that the plaintiffs' intended use of their property would be a proper use and enjoyment of the property.

The plaintiffs have access to the property over the railroad crossing through the railroad corridor to their granted easement. The access may not be insurable because of the lack of permits from the railroad but no one has ever denied the plaintiffs or their predecessors' use of the railroad crossing and/or corridor to the granted easement and hence to the plaintiffs' property in question. Until such access is in fact denied or withdrawn the plaintiffs may utilize their property for uses authorized by the industrial zone of the City of Cle Elum and for which they can make use and enjoyment of their property. Taking by necessity is not extended to those necessities that may be created

by the contemplation of a future real estate subdivision development. *Brown, supra* at 370.

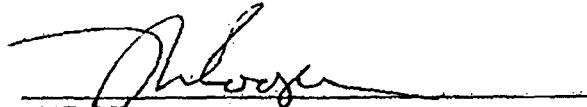
The court finds the plaintiffs have not established a reasonable necessity for a private way of necessity because their property is not landlocked and because they have no guarantee that a future use of their property would include situating the RSE, Inc. manufacturing business on the property.

Based on the foregoing, the court concludes the defendants are entitled to a judgment of dismissal¹⁰.

CONCLUSION

Based on foregoing, please prepare findings of fact, conclusions of law and a judgment of dismissal. Please also be prepared at presentation of those documents to argue on the award of attorney's fees pursuant to RCW 8.24.030.

DATED: May 24, 2011


JUDGE

¹⁰ Pursuant to CR 41(b)(3) the court declined to rule on the defendants' motions at the end of the plaintiffs' case. The court declined to render any judgment until after the close of all of the evidence and will base its decision upon the completed case. Moreover, because the court is ruling on the merits of the case the court chooses not to rule on the defendant Folkman's motion to dismiss on jurisdictional grounds based on the alleged failure of the plaintiffs to properly pursue its administrative remedies and remedies under the Land Use Petition Act (LUPA).

FILED

JUL 11 2011

JOYCE L. JUISKUD, CLERK
KITITITAS COUNTY WASHINGTON

IN THE SUPERIOR COURT OF WASHINGTON FOR KITITITAS COUNTY

MIKE WALCH and MARCIA WALCH,
husband and wife,

Plaintiffs,

v.

KERRY A. CLARK and PATRICIA L.
CLARK, husband and wife; W.L. CLARK
FAMILY, LLC, a Washington Limited
Liability Company; and ROBERT C.
FOLKMAN and PATRICIA W.
FOLKMAN, husband and wife,

Defendants.

) NO. 10-2-00353-6

)
) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW

)
) (Clerk's Action Required)

THIS MATTER, was tried to the Court, without a jury, on May 10 and 11, 2011, before the Honorable Michael E. Cooper, on plaintiffs' claim of a statutory easement by necessity under RCW 8.24.101 et seq. The plaintiffs were represented by their attorneys of record, Chris A. Montgomery and Richard T. Cole. The defendants, Kerry A. Clark and Patricia L. Clark ("Clarks"), and the W.L. Clark Family, LLC ("Clark, LLC"), were represented by their attorney of record, Douglas W. Nicholson, and the defendants Robert C. Folkman and Patricia W. Folkman ("Folkmans") were represented by their attorney of record, Bill Williamson. The Court

Findings of Fact and
Conclusions of Law
Page 1 of 10

CONE GILREATH
LAW OFFICES
200 East Third Avenue * P.O. Box 499
Ellensburg, Washington 98926
Telephone (509) 925-3191
Fax (509) 925-7640

1 heard the testimony of the following witnesses: plaintiff Mike Walch; super-load driving expert,
2 Royce Hatley; Cle Elum City Administrator, Matt Morton; City of Cle Elum Public Works
3 Director, Jim Leonhard; Joe Kretschman; Robert Folkman; Kerry Clark; and Ken Marson. The
4 following exhibits were admitted into evidence: Exhibits 1 through 18, 20 through 40, 42
5 through 55, 57 through 59, 101 through 114, and 116 through 120.¹

6 At the conclusion of the plaintiffs' case, counsel for the defendants each made motions
7 for dismissal on behalf of their clients. The Court took their arguments under advisement,
8 reserved ruling thereon, and required that the defendants put on their cases. At the conclusion of
9 the trial, the Court heard closing arguments of all parties and the renewed motions by defendants
10 to dismiss plaintiffs' claims. The Court then took the matter under advisement to review all of
11 the evidence and testimony, and to consider the parties' arguments. After doing so, on May 24,
12 2011, the Court issued its Memorandum Decision, which is incorporated by reference herein.

13 In accordance with said Memorandum Decision, counsel for the respective parties
14 submitted their briefs and supporting declarations on the award of attorney fees and costs, with
15 oral argument thereon having been heard on June 17, 2011. The Court then took the matter
16 under advisement to review the parties' written submissions and consider the oral arguments.
17 Thereafter, on July 5, 2011, the Court issued its Memorandum Decision Regarding Attorney's
18 Fees, which is incorporated by reference herein.

19 Based on the above matters, the Court now makes the following Findings of Fact and
20 Conclusions of Law:

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24 ¹ Regarding Exhibit 9, the attached declaration of Steve Locati was stricken, with the title policy itself being admitted.

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I. FINDINGS OF FACT

A. Easement by Necessity.

1. The plaintiffs purchased their real property situated in Cle Elum, Washington, in May of 2004.

2. Access to plaintiffs' property is identified in the real estate contract; it is by way of an existing easement over the Dalle property to the east of plaintiffs' property, then continuing east over and across the Burlington Northern & Santa Fe Railroad ("BNSF") corridor, and then proceeding north over and across the BNSF railroad crossing to Owens Road. The road heading east through the Dalle property, and then continuing east through the BNSF corridor to Owens Road, is commonly known as Dalle Road.

3. The City of Cle Elum owns the public right-of-way of Owens Road from North First Street in the City of Cle Elum to the north edge of the BNSF right-of-way.

4. The City of Cle Elum also has 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.

5. Peninsula Trucking also uses the same Owens Road to access its facilities to the south of the BNSF crossing on Owens Road, as do several private residences. None of these entities or persons has been issued permits from BNSF to cross the railroad right-of-way.

6. The plaintiffs own Rainier Skyline Excavators, Inc. ("RSE") and intend to locate that business on their Cle Elum property.

7. RSE designs and manufactures the world's largest portable hydraulic track-drive skyline excavators, buckets, teeth and accessory equipment.

1 8. Plaintiffs intend to use their Cle Elum property to demonstrate, display and sell
2 their portable skyline excavator in conjunction with the horseshoe-shaped Dalle pond on their
3 property, and either manufacture or assemble several components of the skyline excavator on
4 their property.

5 9. Many components of the portable skyline excavator are transported by long and
6 extra-long lowboy trailers, called super-loads. These super-loads can be up to 165 feet in length
7 and carry several hundred thousand pounds.

8 10. The defendants own property to the west of plaintiffs' property situated in the
9 Swiftwater Business Park. The individual defendants, Clarks and Folkmans, have spent the last
10 five years developing the Swiftwater Business Park, including the Clarks' improvement of the
11 building now housing Marson & Marson Lumber, developing and housing a glass company, and
12 constructing a two-story office building which houses the Kubota tractor dealership and other
13 tenants.

14 11. The defendant, Clark, LLC, has spent time and money to short plat its property
15 immediately north of the property owned by defendants Clarks and Folkmans, which it
16 purchased from BNSF.

17 12. The property of all parties to this action is presently zoned by the City of Cle
18 Elum as being within its Industrial District, as defined by Chapter 17.36 of the Cle Elum
19 Municipal Code.

20 13. According to Matt Morton, Cle Elum City Administrator, no land use applications
21 have ever been submitted by the plaintiffs for their intended use of their company, RSE, on the
22 property they now own.
23
24

1 14. While the plaintiffs' intended uses of their property may be permitted in the City
2 of Cle Elum's industrial zone, if they are developed and used in the manner that complies with
3 the performance standards and aesthetic objectives of Chapter 17.36 of the Cle Elum City Code,
4 Mr. Morton also pointed out that there is no guarantee of granting any land use application until
5 it is submitted and reviewed, and reconciled with the City of Cle Elum's critical areas ordinance,
6 especially because of the Dalle ponds situated on the plaintiffs' property, which plaintiffs have
7 described as the Dalle Wildlife and Fish Propagation Ponds.

8 15. The plaintiffs seek a thirty-foot (30') easement by necessity, claiming their
9 property is "landlocked" for the following reasons: first, they have no legal, insurable access
10 over the railroad right-of-way, either at the crossing over Owens Road or over the road along the
11 railroad corridor to their granted easement through the Dalle property; and, second, as a practical
12 matter, they cannot turn south onto Owens Avenue from 1st Avenue, and cannot pull their super-
13 load lowboys over the railroad tracks without the lowboys getting high centered, and even if the
14 super-load lowboys could cross the tracks, they could not (because of their length) make the
15 immediate right turn onto the road heading west through the railroad corridor to access their
16 granted easement.

17 16. At trial, the plaintiff sought an easement by necessity over a single route, which
18 they identified as coming off of Swiftwater Boulevard, and then running in a southeasterly
19 direction along the southern edge of the Folkman and Clark properties, immediately inside the
20 DOT right-of-way fence, to connect with the plaintiffs' property at the southwest corner thereof.

21 **B. Attorney Fees and Costs.**

22 17. The defendants seek an award of their reasonable attorney fees and costs
23 associated with defending their properties against the plaintiffs' claim to condemn a private way
24

1 of necessity through defendants' properties, as well as an award of such fees and costs incurred
2 as a result of defending the implied easement and prescriptive easement claims against their
3 properties, each of which the Court previously dismissed, with prejudice. The defendants seek
4 an award of attorney fees pursuant to RCW 8.24.030 and CR 11 or RCW 4.84.185.²

5 18. The defendants argue that a common nexus exists between the prescriptive
6 easement, the implied easement, and the easement by necessity claims, as each involves
7 inherently related factual and legal issues. As part of the easement by necessity claim, the
8 defendants argue that the plaintiffs had the burden of proving that no implied easement or
9 prescriptive easement existed to otherwise allow them to access their property. In fact,
10 defendants claim the plaintiffs argued that they had met their burden of showing no implied
11 easement existed, by demonstrating to the Court there has never been a common grantor that
12 would have allowed them to pursue the implied easement claim.

13 19. Moreover, the defendants claim a common core of facts and related legal issues
14 exist between the prescriptive easement and the easement by necessity claims, because both
15 easement claims were over identical roads, which plaintiffs claimed to be "existing roads" over
16 and across the defendants' properties; the defendants' defenses included establishing the roads in
17 question never existed or were not on their property; and had the plaintiffs established the
18 alleged roads in fact existed, this fact would have enhanced their claim for an easement by
19 necessity and undermined the defendants' defenses to that claim.

20 20. The Clarks' attorney, Mr. Nicholson, is seeking an award of fees and costs in the
21 total amount of \$121,922.50 (\$121,055 in fees and \$867.50 in costs); and the Folkmans'

22
23 ² Each attorney in submitting his request for attorney's fees has segregated their respective requests by claim and under
24 CR 11 or RCW 4.84.185.

1 attorney, Mr. Williamson, is seeking a total award of fees and costs of \$44,385.25 (\$43,885.25 in
2 fees and \$500 in costs).

3 21. Mr. Nicholson billed at \$275 per hour and Mr. Williamson billed at \$260 per
4 hour. Plaintiffs do not object to the reasonableness of the defendants' hourly attorney rates; and
5 the Court finds said hourly rates to be reasonable.

6 22. The Court has reviewed in detail each submission for fees and determines that the
7 amount of fees incurred by defendants was reasonable in light of the overall circumstances of
8 this case.

9 Based upon the Findings of Fact, the Court makes the following Conclusions of Law:

10 **CONCLUSIONS OF LAW**

11 A. **Easement by Necessity.**

12 1. The plaintiffs have physical access to their property over the Owens Road railroad
13 crossing, and through the railroad corridor to their granted easement.

14 2. The access may not be insurable because of the lack of a permit from the railroad
15 company, but no one has ever denied plaintiffs' or their predecessors' use of the railroad crossing
16 and/or the railroad corridor to the granted easement to the plaintiffs' property in question.

17 3. Until such access is in fact denied or withdrawn, the plaintiffs can make use and
18 enjoyment of their property for those uses authorized by the City of Cle Elum within its
19 industrial zone.

20 4. Taking by necessity is not extended to those necessities that may be created by the
21 contemplation of future real estate development.

22 5. Plaintiffs have not established a reasonable necessity to condemn a private way of
23 necessity because their property is not landlocked, and because they have no guarantee that a
24

1 future use of their property would include situating the RSE, Inc. manufacturing business on the
2 property.

3 6. For the above reasons, the defendants are each entitled to judgment of dismissal
4 on plaintiffs' claim of a statutory easement by necessity under RCW 8.24.010 et. seq.³

5 7. Plaintiffs' prescriptive easement claims were previously dismissed, with
6 prejudice, on defendants' motion for partial summary judgment, pursuant to this Court's
7 Memorandum Decision entered February 2, 2011, and Order of Dismissal, entered February 8,
8 2011; and plaintiffs' only other claim in this action, for an easement implied from prior use
9 during common ownership, was dismissed, with prejudice, pursuant to a Stipulation and Order
10 entered January 14, 2011; therefore, there being no remaining issues or claims among the parties
11 in this action, defendants are each entitled to judgment on their counterclaim to quiet title to their
12 respective properties.

13 **B. Attorney Fees and Costs.**

14 8. RCW 8.24.030 specifically allows a trial court the discretion to award attorney
15 fees and expert witness costs in any action brought under the provisions of the private
16 condemnation statute, RCW 8.24.010 et seq. No similar statute, however, authorizes the award
17 of reasonable attorney's fees and costs of litigation for either implied easement or a prescriptive
18 easement claim.

19 9. However, where the plaintiffs' claims involve a common core of facts and related
20 legal theories, the trial court is not required to segregate the fees. This is especially so in a
21 private condemnation action when one considers the legislative history of fee awards for private
22

23 ³ Because the Court is ruling on the merits of the case, the Court will not rule on defendant Folkmans' motion to
24 dismiss on jurisdictional grounds based on the alleged failure of the plaintiffs to properly pursue its administrative
remedies and the remedies available under the Land Use Petition Act ("LUPA").

1 way of necessity actions as they have evolved in the last thirty 30 years. The use of the term
2 "any action" and the other statutory language indicates that the legislature intended broad
3 application of RCW 8.24.030.

4 10. Here, plaintiffs three easement claims (prescriptive, implied, and by necessity)
5 were all interrelated and all arose from a common core of facts and related legal theories.

6 11. The hourly rates charged by Mr. Nicholson and Mr. Williamson were reasonable,
7 as were the hours they expended in defending plaintiffs' easement claims against their clients.

8 12. The Court will, therefore, award as reasonable attorney's fees all that which is
9 requested by Mr. Nicholson and Mr. Williamson. The Court will also allow the statutory costs
10 sought by Mr. Nicholson. However, the Court will deny the \$500 in costs sought by Mr.
11 Williamson as there is no specific showing of what that request entailed.

12 13. Accordingly, the Clarks are entitled to an award of attorney fees and costs in the
13 total amount of \$121,922.50; and the Folkmans are entitled to an award of attorney fees in the
14 amount of \$43,885.25.

15 DONE IN OPEN COURT this 11th day of July, 2011.

16 MICHAEL E. COOPER

17

The Honorable Michael E. Cooper

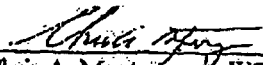
18 CONE GILREATH LAW OFFICES

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20 By:

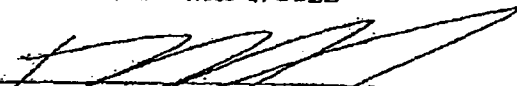
21 Douglas W. Nicholson, WSBA #24854
22 Attorneys for Defendants Clarks and
23 W.L. Clark Family, LLC
24

1 Approved as to form, notice of
2 presentation waived;

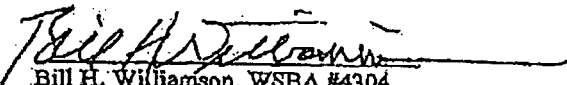
3 MONTGOMERY LAW FIRM

4 By: 
5 Chris A. Montgomery, WSBA #12377
6 Co-Attorney for Plaintiffs

7 LAW OFFICES OF RICHARD T. COLE

8 By: 
9 Richard T. Cole, WSBA #5072
10 Co-Attorney for Plaintiffs

11 WILLIAMSON LAW OFFICE

12 By: 
13 Bill H. Williamson, WSBA #4304
14 Attorney for Defendants Folkman

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Findings of Fact and
Conclusions of Law
Page 10 of 10

000495

1 The Court has set forth its specific findings, conclusions and reasons therefore in its
2 Memorandum Decision regarding attorney fees and costs, dated July 5, 2011, which is
3 incorporated by reference herein. As substantiated in said Memorandum Decision, and based on
4 the findings set forth in said Memorandum Decision,

5 IT IS HEREBY ORDERED ADJUDGED AND DECREED that plaintiffs, Mike Walch
6 and Marcia Walch, husband and wife, shall pay to the Clarks the following attorney fees and
7 costs incurred by them in the above-captioned lawsuit:

| | |
|-----------------------|--------------|
| 8 Attorney Fees: | \$121,055.00 |
| 9 Costs: | \$ 867.50 |
| Total Fees and Costs: | \$121,922.50 |

10 DATED this 11th day of July, 2011.

11 MICHAEL E. COOPER

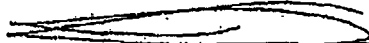
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The Honorable Michael E. Cooper

13 Presented by:

14 CONE GILREATH LAW OFFICES

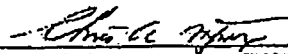
15 By:

16 
17 Douglas W. Nicholson, WSBA #24854
18 Attorneys for Defendants Clarks and
W.L. Clark Family, LLC

19 Approved as to form, notice of
20 presentation waived:


21 MONTGOMERY LAW FIRM

22 By:

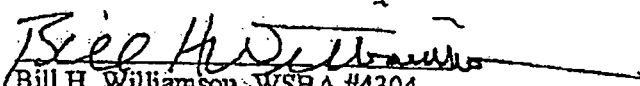
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24 Chris A. Montgomery, WSBA #12377
Co-Attorney for Plaintiffs

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LAW OFFICES OF RICHARD T. COLE

By: 
Richard T. Cole, WSBA #5072
Co-Attorney for Plaintiffs

WILLIAMSON LAW OFFICE

By: 
Bill H. Williamson, WSBA #4304
Attorney for Defendants Folkmans

FILED

JUL 11 2011

JOYCE L. JULSRUD, CLERK
KITTTAS COUNTY WASHINGTON

IN THE SUPERIOR COURT OF WASHINGTON FOR KITTTAS COUNTY

MIKE WALCH and MARCIA WALCH,
husband and wife,

Plaintiffs,

v.

KERRY A. CLARK and PATRICIA L.
CLARK, husband and wife; W.L. CLARK
FAMILY, LLC, a Washington Limited
Liability Company; and ROBERT C.
FOLKMAN and PATRICIA W.
FOLKMAN, husband and wife,

Defendants.

) NO. 10-2-00353-6

) FINAL JUDGMENT IN FAVOR OF
) DEFENDANTS CLARK AND
) W.L. CLARK FAMILY, LLC

) (Clerk's Action Required)

AFFECTED PARCELS

Property owned by Plaintiffs Mike Walch and Marcia Walch, husband and wife, identified as Kittitas County Assessor's Tax Parcel Nos. 401534 and 20353, is legally described as follows:

Lot 1 of that certain Boundary Line Adjustment Survey recorded May 4, 2004, in Book 30 of Surveys, Page 49, under Auditor's File No. 200405040030, records of Kittitas County, State of Washington; being a portion of Section 26 and 35, Township 20 North, Range 15 East, W.M., Kittitas County, State of Washington.

Property owned by Defendants Kerry A. Clark and Patricia L. Clark, husband and wife, identified as Kittitas County Assessor's Tax Parcel No. 123134, is legally described as follows:

Final Judgment in Favor of
Defendants Clark and W.L. Clark Family, LLC
Page 1 of 5

CONE GILREATH
LAW OFFICES
200 East Third Avenue * P.O. Box 499
Ellensburg, Washington 98926
Telephone (509) 925-3191
Fax (509) 925-7640

1 Parcel A:

2 That portion of the Southeast Quarter of the Southwest Quarter of Section 26,
3 Township 20 North, Range 15 East, W.M., Kittitas County, State of Washington, lying
4 South of the South line of the Burlington Northern Railroad Company's right-of-way;
5 and North and East of the Northerly right-of-way of Primary State Highway No. 2 (I-
6 90); EXCEPT the Westerly 4.05 acres thereof, all as described and/or delineated on the
7 face of that certain Survey filed in Book 18 of Surveys, page 120, records of Kittitas
8 County, State of Washington.

9 Property owned by Defendant W.L. Clark Family, LLC, a Washington Limited Liability
10 Company, identified as Kittitas County Assessor's Tax Parcel No. 20408, is legally described as
11 follows:

12 That portion of the South Half, Section 26, Township 20 North, Range 15 East, W.M.,
13 all situated in Kittitas County, State of Washington, described as follows:

14 Beginning at the South quarter corner of said Section; Thence North 00°23'00" East
15 along the East line of the Southwest Quarter of said Section 26, a distance of 853.03
16 feet to a point which is at right angles and 200 feet distance Southerly from the
17 centerline of the existing mainline for The Burlington Northern and Santa Fe Railway
18 Company, and is also the True Point of Beginning; Thence North 10°34'34" East at
19 right angles to said railway, 150.00 feet; Thence North 79°25'26" West, parallel with
20 and 50 feet distance at right angles from the centerline of the said railway, 1466.67 feet;
21 Thence South 10°34'34" West, at right angles from the said railway, 150.00 feet;
22 Thence South 79°25'26" East, parallel with and 200 feet distance at right angles from
23 the centerline of said railway, 1466.67 feet to the True Point of Beginning.

24 **FINAL JUDGMENT SUMMARY**

| | |
|-------------------------------|--|
| Judgment Creditors: | Kerry A. Clark and Patricia L. Clark, husband and wife; and the W.L. Clark Family, LLC, a Washington Limited Liability Company |
| Judgment Creditors' Attorney: | Douglas W. Nicholson of the Cone Gilreath Law Offices |
| Judgment Debtors: | Mike Walch and Marcia Walch, husband and wife |
| Judgment Debtors' Attorneys: | Richard T. Cole and Chris A. Montgomery |
| Statutory Costs: | \$ 867.50 |
| Attorney Fees: | \$121,055.00 |

Final Judgment in Favor of
Defendants Clarks and W.L. Clark Family, LLC
Page 2 of 5

000500

1 Total Judgment (Award of
Attorneys' Fees and Costs): \$121,922.50

2 Post-Judgment Interest: 12% per annum on the total judgment amount
3

4 JUDGMENT

5 THIS MATTER was tried by the Court without a jury on May 10 and 11, 2011, on
6 plaintiffs' claim of a statutory easement by necessity under RCW 8.24.010 et seq. The
7 Honorable Michael E. Cooper presided throughout the trial. Plaintiffs were represented by legal
8 counsel, Richard T. Cole and Chris A. Montgomery. Defendants Kerry A. Clark and Patricia L.
9 Clark, husband and wife, and the W.L. Clark Family, LLC, were represented by legal counsel,
10 Douglas W. Nicholson. Defendants Robert C. Folkman and Patricia W. Folkman, husband and
11 wife, were represented by legal counsel, Bill H. Williamson.

12 The Court received the admitted exhibits and testimony offered by the parties, heard
13 closing arguments by all counsel, and then took the matter under advisement to review the
14 admitted exhibits, the testimony of the witnesses, and the arguments of counsel. Thereafter, on
15 May 24, 2011, the Court issued its Memorandum Decision and, on July 11, 2011, the Court
16 entered its Findings of Fact and Conclusions of Law. Said Memorandum Decision and Findings
17 of Fact and Conclusions of Law are incorporated by reference herein.

18 Prior to trial, on February 2, 2011, the Court entered its Memorandum Decision granting
19 defendants' motion for partial summary judgment dismissal of plaintiffs' claims for prescriptive
20 easements over and across defendants' properties, and on February 8, 2011, entered its order
21 dismissing plaintiffs' prescriptive easement claims, with prejudice. Said Memorandum Decision
22 and Order are incorporated by reference herein. Previously, on January 14, 2011, pursuant to a
23

24 Final Judgment in Favor of
Defendants Clarks and W.L. Clark Family, LLC
Page 3 of 5

000501

1 stipulation by all parties, the Court entered its Order dismissing plaintiffs' claim for an easement
2 implied from prior use, with prejudice, which is also incorporated by reference herein.

3 Accordingly, there being no further claims or issues remaining among the parties in this
4 action, and consistent with the Court's Findings of Fact and Conclusions of Law entered July 11,
5 2011, which are incorporated by reference herein, it is hereby

6 ORDERED, ADJUDGED, AND DECREED that final judgment shall be entered in favor
7 of defendants, Kerry A. Clark and Patricia L. Clark, husband and wife, and the W.L. Clark
8 Family, LLC, as follows:

9 1. Plaintiffs' claim of an easement by necessity under RCW 8.24.010 et. seq. is
10 dismissed, without prejudice.

11 2. Regarding defendants' counterclaim to quiet title to their respective properties at
12 issue herein, judgment is granted forever quieting title in their favor, with plaintiffs having no
13 easement or other access rights over and across defendants' said properties;

14 3. Defendants Kerry A. Clark and Patricia L. Clark, husband and wife, and the W.L.
15 Clark Family, LLC are awarded their attorney fees and costs in the total amount of \$121,922.50,
16 consistent with the Court's Memorandum Decision Regarding Attorney's Fees entered on July 5,
17 2011, the Order thereon entered July 11, 2011, and the Findings of Fact and Conclusions of Law
18 also entered on July 11, 2011;

19 4. Post-judgment interest on said award of attorney fees and costs shall accrue at the
20 rate of 12% per annum as of the date of the entry of this Judgment, until satisfied.

21 DATED this 11th day of July 2011. MICHAEL E. COOPER
22

23 _____
The Honorable Michael E. Cooper
24

Final Judgment in Favor of
Defendants Clarks and W.L. Clark Family, LLC
Page 4 of 5

000502

1 Presented by:

2 CONE GILRBATH LAW OFFICES

3
4 By: 

5 Douglas W. Nicholson, WSBA #24854
6 Attorneys for Defendants Clarks and
W.L. Clark Family, LLC

7 Approved as to form, notice of
presentation waived:

8 MONTGOMERY LAW FIRM

9
10 By: 

11 Chris A. Montgomery, WSBA #12377
Co-Attorney for Plaintiffs

12 LAW OFFICES OF RICHARD T. COLB

13
14 By: 

15 Richard T. Cole, WSBA #5072
Co-Attorney for Plaintiffs

16 WILLIAMSON LAW OFFICE

17
18 By: 

19 Bill H. Williamson, WSBA #4304
Attorney for Defendants Folkman

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Final Judgment in Favor of
Defendants Clarks and W.L. Clark Family, LLC
Page 5 of 5

000503

Honorable Michael E. Cooper

FILED

JUL 11 2011

JOYCE L. JULSHUB, CLERK
KITTITAS COUNTY

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

MIKE WALCH and MARCIA WALCH,
husband and wife,

Plaintiffs,

v.

KERRY A. CLARK and PATRICIA L.
CLARK, husband and wife; W.L. CLARK
FAMILY, LLC, a Washington Limited
Liability Company; and ROBERT C.
FOLKMAN and PATRICIA W.
FOLKMAN, husband and wife,

Defendants.

NO. 10-2-00353-6

**ORDER AWARDING FOLKMANS'
FEES & COSTS**

This Motion having come before the Court for hearing on June 17, 2011, upon Motion of Defendant ROBERT C. FOLKMAN and PATRICIA W. FOLKMAN, husband and wife, supported by a Memorandum of Law, and Declaration of Bill H. Williamson with itemized attorney fees and costs related to the review of Plaintiff's claims; and

The Plaintiff being represented by attorneys Chris A. Montgomery and Richard T. Cole, and the Defendant Folkmans represented by Bill H. Williamson; and

Defendant Clarks and and W.L. Clark Family, LLC represented by Douglas W. Nicholson of Cone Gilreath Law Offices; and

**ORDER AWARDING FOLKMANS'
FEES & COSTS - 1**

WILLIAMSON LAW OFFICE

COLUMBIA CENTER TOWER
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TEL: 206.292.0411 / FAX 206.292.0313

1 The Court having reviewed the records and pleadings, including Plaintiff's Response to
2 Defendant Folkmans' Proposed Attorney Fees Award, having heard the argument of the parties, and
3 being advised in the premises; and

4 The Court having set forth its specific findings, conclusions and reasons therefore in its
5 Memorandum Decision regarding attorney fees and costs, entered July 5, 2011, and its Findings of
6 Fact and Conclusions of Law entered July 11, 2011, both of which are incorporated by reference
7 herein;

8 IT IS NOW ORDERED, ADJUDGED AND DECREED that:

9 1. Defendant ROBERT C. FOLKMAN and PATRICIA W. FOLKMANS' motion for attorney fees is granted; however, their motion for costs is denied.

2. As the prevailing party, the Defendant Folkmans are awarded the following attorney fees and costs which shall be paid by Plaintiffs Michael Walch and Marcia Walch, husband and wife:

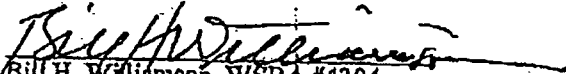
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|-------------------------------|--------------------|
| A. Total Attorney Fees | \$43,885.25 |
| B. Costs | \$ -0- |
| TOTAL FEES & COSTS | \$43,885.25 |

DATED this 11th day of July, 2011.

MICHAEL E. COOPER

Judge Michael E. Cooper

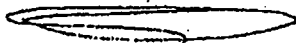
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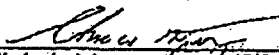

Bill H. Williamson, WSBA #4304
Attorney for Defendant Folkmans

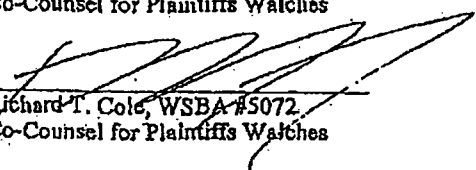
ORDER AWARDING FOLKMANS'
FEES & COSTS -2

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1 Approved as to Form; Notice of Presentation Waived:

2 
3 Douglas W. Nicholson, WSBA #24854
4 Attorney for Defendant Clarks

5 
6 Chris A. Montgomery, WSBA #12377
7 Co-Counsel for Plaintiffs Walches

8 
9 Richard T. Cole, WSBA #5072
10 Co-Counsel for Plaintiffs Walches

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25 ORDER AWARDCING FOLKMAN'S
26 FEES & COSTS - 3

WILLIAMSON LAW OFFICE

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000506

Honorable Michael E. Cooper

FILED

JUL 11 2011

JOYCE L. JULSHUD, CLERK
KITITITAS COUNTY WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR KITITITAS COUNTY

MIKE WALCH and MARCIA
WALCH, husband and wife,

Plaintiffs,

v.

KERRY A. CLARK and PATRICIA L.
CLARK, husband and wife; W.L.
CLARK FAMILY, LLC, a Washington
Limited Liability Company; and
ROBERT C. FOLKMAN and
PATRICIA W. FOLKMAN, husband
and wife,

Defendants.

NO. 10-2-00353-6

FINAL JUDGMENT IN FAVOR OF
DEFENDANT FOLKMAN'S

(CLERK'S ACTION REQUIRED)

AFFECTED PARCELS

Property owned by Plaintiff Mike Walch and Marcia Walch, husband and wife, identified as Kittitas County Assessor's Tax Parcel Nos. 401534 and 20353, and legally described as:

Lot 1 of that certain Boundary Line Adjustment Survey recorded on May 4, 2004 in Book 30 of Surveys, Page 49, under Auditor's File No. 200405040030, records of Kittitas County, State of Washington; being a portion of Sections 26 and 35, Township 20 North, Range 15 East, W.M., Kittitas County, State of Washington. (Hereafter "Plaintiff's Real Property")

Property owned by Defendants Robert C. Folkman and Patricia W. Folkman, husband and wife, legally described as:

Those portions of the SE 1/4 of the SW 1/4 of Section 26, Township 20 North, Range 15 East, W.M., Kittitas County, State of Washington; lying South of the South line of the Burlington Northern Railroad Company's right-of-way and North and East of the

CR 54 - FINAL JUDGMENT -1

WILLIAMSON LAW OFFICE

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1 Northerly line of Interstate Highway I-90 right-of-way more particularly described as
2 follows: Beginning at the South Quarter SC of said subdivision, then North 00°23'00"
3 East, 853.03 feet to a point on the South line of the Burlington Northern Railroad
4 Company's right-of-way; thence North 79°25'26" West along said right-of-way 306.16
5 feet to the True Point of the Beginning; thence continuing along said right-of-way North
6 79°25'26" West, 667.44 feet to a point where last said right-of-way intersects with the
7 North line of the right-of-way for Interstate I-90; thence South 40°07'50" East along last
8 said right-of-way 681.51 feet; thence South 65°53'20" East along last said right-of-way
9 143.43 feet; thence North 10°34'34" East, 462.72 feet to the True Point of the Beginning,
10 Kittitas County, State of Washington. ("Hereafter Folkman Real Property")

7 **FINAL JUDGMENT SUMMARY**

8 Judgment Creditor: ROBERT C. FOLKMAN and PATRICIA W.
9 FOLKMAN, husband and wife
10 Judgment Creditor's Attorney: Bill H. Williamson
11 Judgment Debtors: MICHAEL WALCH and MARCIA WALCH husband and
12 wife
13 Attorney Fees: \$43,885.25
14 Costs \$ -0-
15 TOTAL JUDGMENT (with accruing statutory interest of 1% per month) \$43,885.25

15 **FINAL JUDGMENT**

16 This final judgment pursuant to CR 54 terminates the action as to any and all claims of the
17 parties in this action. The court incorporates by reference its Memorandum Decision of
18 February 2, 2011 and Order thereon entered on February 8, 2011, dismissing Plaintiffs'
19 prescriptive easement claims, and the Stipulation and Order dismissing Plaintiff's implied
20 easement claims entered on January 14, 2011; the Memorandum Decision entered on July 5,
21 2011, and the Order thereon entered July 11, 2011, awarding attorney fees; and hereby enters
22 the following Judgment and Order concerning Plaintiffs' Statutory Private Condemnation
23 Claims under RCW Chapter 8.24:
24

25 CR 54 - FINAL JUDGMENT . 2

26 **WILLIAMSON LAW OFFICE**

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1 1. The Court incorporates the Findings of Fact and Conclusions of Law entered on July
2 11, 2011.

3 2. The legal interests of the Plaintiffs and Defendants related to their above-described
4 real property parcels arising out of Plaintiffs' prescriptive use and implied easement claims are
5 hereby and forever quieted in favor of Defendants ROBERT C. FOLKMAN and PATRICIA
6 W. FOLKMAN, husband and wife.

7 3. Plaintiffs MIKE WALCH and MARCIA WALCHES' claims and causes of action
8 relating to private condemnation claims made under RCW Chapter 8.24 are dismissed without
9 prejudice.

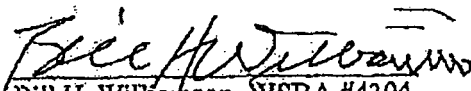
4. Defendants ROBERT C. FOLKMAN and PATRICIA W. FOLKMAN, husband and
wife are awarded their attorney fees and costs in the amount of \$43,885.25 as Judgment
Creditors and statutory interest of one percent (1.00%) per month on the accruing unpaid
balance until satisfied.

DATED this 11th day of July, 2011.

MICHAEL E. COOPER

Judge Michael E. Cooper

Presented by:


Bill H. Williamson, WSBA #4304
Attorney for Defendant Folkmans

22 Notice of Presentation Waived; Approved
as to Form:

23 _____
24 Douglas W. Nicholson, WSBA #24854
Attorney for Defendant Clarks

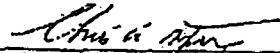
25 CR 54 - FINAL JUDGMENT - 3
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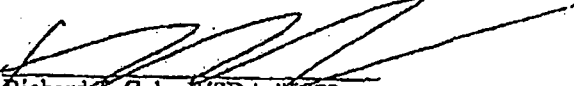
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Chris A. Montgomery, WSBA #12377
Co-Counsel for Plaintiffs Walches


Richard T. Cole, WSBA #3072
Co-Counsel for Plaintiffs Walches

CR 54 - FINAL JUDGMENT - 4

WILLIAMSON LAW OFFICE
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TEL: 206.292.6411 / FAX 206.292.6213

APPENDIX D

FILED
11 JUL -5 PM 2:48
KITTITAS COUNTY
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

MIKE WALCH and MARCIA WALCH,)
husband and wife,)
)
Plaintiffs,)
)
vs.)
)
KERRY A. CLARK and PATRICIA)
L. CLARK, husband and wife;)
W. L. CLARK FAMILY, LLC, a)
Washington limited liability company,)
ROBERT C. FOLKMAN, et ux.,)
)
Defendants.)

No. 10 2 00353 6
MEMORANDUM DECISION
REGARDING ATTORNEY'S FEES

INTRODUCTION

The defendants Clark and Folkman seek an award of reasonable attorney's fees, expert witness costs and other costs associated with defending their properties against the plaintiffs' claim to condemn a private way of necessity through their property. The defendants also seek an award for attorney's fees and costs incurred as a result of defending the implied easement and prescriptive easement claims against their properties which the court previously dismissed. The court heard oral argument by the parties on Friday, June 17, 2011 and took the matter under advisement to review the arguments.

DISCUSSION

1. Facts. Plaintiffs sued defendants to obtain a right of access to their property, asserting three primary theories: implied easement, prescriptive easement, and condemnation for private way of necessity. On February 2, 2011 the court granted the defendants' partial motion for summary judgment of dismissal of the prescriptive easement claim.¹ The remaining claim of private way of necessity went to trial on May 10 and 11, 2011 after which the court determined the plaintiffs had not established a reasonable necessity for a private way of necessity because their property is not land ~~locked and because they have no guarantee that future use of their property would~~ include situating the RSE, Inc. manufacturing business on the property. The defendants now seek an award of attorney's fees pursuant to RCW 8.24.030 and CR 11.

2. When to Award Attorney's Fees. Washington generally follows the "American Rule" on attorney's fees, which provides that attorney's fees are not recoverable by the prevailing party as costs of litigation unless the recovery is permitted by contract, statute, or some recognized ground of equity. *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 143 (1997); *PUD v. Kottsick*, 86 Wn.2d 388, 389 (1976).

RCW 8.24.030 specifically provides in pertinent part:

"In any action brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable attorney's fees and expert witness costs may be allowed by the court to reimbursement the condemnee."

So, the defendants may be entitled to an award of fees pursuant to RCW 8.24.030 on the private way of necessity claim. No similar statute, however, authorizes the award of reasonable attorney's fees as costs of litigation for an implied easement and/or

¹ The court had previously denied the defendants' partial motion for summary judgment of dismissal on the easement by necessity claim on December 16, 2010 by memorandum decision which was finalized in an order on March 28, 2011 and after the defendants' motion for reconsideration was denied.

prescriptive easement claim. Nor has there been advanced any ground of equity on which the court could award fees except as outlined herein.

Both defendants contend there is a common core of facts intertwining the implied easement and prescriptive easement claims for which they would otherwise not be entitled to attorney's fees with the easement by necessity claim for which they are entitled attorney's fees. Specifically, the defendants argue the common nexus between the prescriptive easement, the implied easement and the easement by necessity claims involve inherently related factual and legal issues and that as a part of the easement by necessity claim the plaintiffs had the burden of proving that no implied easement or prescriptive easement existed to otherwise allow them access to their property. In fact, the defendants claim the plaintiffs argued they had met the burden of not showing implied easement by demonstrating to the court there has never been a common grantor that would have allowed them to pursue the implied easement claim. Moreover, the defendants claim the common core of facts and related legal theories persists in the relationship between the prescriptive easement and easement by necessity claims because both easement claims were over identical routes, which the plaintiffs claim to be "existing roads" over and across the defendants' properties, that the defendants' defenses included establishing the roads in question never existed or were not on their property and that had the plaintiffs established the alleged roads in fact existed such a fact would have enhanced the claim for easement by necessity and undermined the defendants' defenses.

3. Reasonable Attorney's Fees. As indicated above, RCW 8.24.030 authorizes the award of reasonable attorney's fees and expert witness costs to reimburse the condemnee in a private way of necessity claim. Pursuant to that statute this court has the discretion to grant an award of attorney's fees in light of the circumstances of the case. *Kennedy v. Martin*, 115 Wn.App. 866, 872 (2003). In fact, the trial court has the discretion to determine what amount, if any, a condemnee receives in attorney's fees from the condemnor, including, attempting to "balance the equities". *Noble v. Safe Harbor Trust*, 167 Wn.2d 11, 23 (2009).

The "lode star" method set out in *Bowers v. Transamerica Title Insurance Company*, 100 Wn.2d 581 (1983) appears to be the accepted starting point for all

attorney's fee determinations. The "lode star" fee is determined by multiplying the hours reasonably expended in the litigation by each lawyer's reasonable hourly rate of compensation. *Bowers, supra* at 597. The "lode star" is only the starting point and the fee thus calculated is not necessarily a "reasonable" fee. *Scott Fetzer Company v. Weeks*, 122 Wn.2d 141, 151 (1993 *Fetzer II*); *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744 (1987). Whether a fee is reasonable is an independent determination to be made by the awarding court. *Fetzer, supra*; *Nordstrom, supra*; *Boeing Company v. Sierrasin Corp.*, 108 Wn.2d 38, 65 (1987).

In determining whether a fee is reasonable the court may use the "factors" approach. *Allard v. First Interstate Bank NA*, 112 Wn.2d 145, 149 (1989). The "factors" include:

"(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation and ability of the lawyer performing the services; and (8) whether the fee is fixed or contingent." *Allard, supra* at 149-150.

Many of these "factors" are subsumed within the "lode star" approach. *Scott Fetzer Company v. Weeks*, 122 Wn.2d 141, 151 (1993 *Fetzer I*). Accordingly, the court can consider the relationship between the amount in dispute and the fee requested. *Fetzer II*, 122 Wn.2d at 150. The court may also consider the hourly rate of opposing counsel. *Boeing, supra* at 66. The court also notes that the fee should be awarded only for services related to causes of action which allow for fees. *Boeing, supra*; *Nordstrom, supra* at 743. Moreover, the court may discount hours spent on unsuccessful claims, duplicity of effort, or otherwise unproductive time. *Bowers, supra*. Again the reasonableness of the request depends on the circumstances of each individual case. *Absher Construction Company v. Kent School District*, 79 Wn.App. 841, 847 (1995). Finally, it is noted the determination of the fee should not become an unduly burdensome proceeding for the court or the parties. The court should indicate at least

approximately how it arrived at any final numbers especially if it discounted or reduced the requested amount. *Absher, supra* at 848.

4. Decision. With the above stated case law principles in mind the court notes the Clarks' attorney, Mr. Nicholson is seeking an award of fees and expert costs in the total amount of \$121,922.50 and Folkmans' attorney Mr. Williamson is seeking a total award of attorney's fees and costs of \$44,385.25.² Mr. Nicholson billed at \$275 per hour and Mr. Williamson billed at \$260 per hour. Plaintiffs do not object to the reasonableness of defendants' attorney rates. The court has reviewed in detail each submission for fees and determines, while defendants have left no stone unturned in defending the claims foisted upon them by the plaintiffs, there was a common core set of facts as outlined above. Especially when one consider the legislative history of fee awards for private way of necessity actions has evolved in the last 30 years, the use of the term "any action and other statutory language indicates that the legislature intended broad application of RCW 8.24.030. *Beckman v. Wilcox*, 96 Wn.App. 355, 365 (1999). Here, the three theories in the plaintiffs' cause of action were all interrelated and all arose from the same set of facts. Plaintiffs needed to demonstrate they had no other practical way of accessing their property. One way was to demonstrate they had no implied easement. A second way was demonstrate they had no prescriptive rights to otherwise be established because the court had previously dismissed their claim. The court will, therefore, award as reasonable attorney's fees all that which is requested by Mr. Nicholson and Mr. Williamson. The court will allow the costs sought by Mr. Nicholson and the court will deny the \$500 in expert costs sought by Mr. Williamson as there is no specific showing of what that request entailed.

CONCLUSION

Based on foregoing include an award of attorney's as outlined herein in the final findings of fact, conclusions of law and judgment to be presented at the July hearing.

²Each attorney is claiming \$200 in statutory attorney's fees, pursuant to RCW 4.84.080. Note also each attorney in submitting his request for attorney's fees has segregated their requests by claim and under CR 11 or RCW 4.84.185.

DATED: July 5, 2011



JUDGE

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11 JUL 11 AM 10:08
KITITAS COUNTY
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF WASHINGTON FOR KITITAS COUNTY

MIKE WALCH and MARCIA WALCH,
husband and wife,

Plaintiffs,

v.

KERRY A. CLARK and PATRICIA L.
CLARK, husband and wife; W.L. CLARK
FAMILY, LLC, a Washington Limited
Liability Company; and ROBERT C.
FOLKMAN and PATRICIA W.
FOLKMAN, husband and wife,

Defendants.

) NO. 10-2-00353-6
)
)

) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW
)

) (Clerk's Action Required)
)
)

THIS MATTER, was tried to the Court, without a jury, on May 10 and 11, 2011, before the Honorable Michael E. Cooper, on plaintiffs' claim of a statutory easement by necessity under RCW 8.24.101 et seq. The plaintiffs were represented by their attorneys of record, Chris A. Montgomery and Richard T. Cole. The defendants, Kerry A. Clark and Patricia L. Clark ("Clarks"), and the W.L. Clark Family, LLC ("Clark, LLC"), were represented by their attorney of record, Douglas W. Nicholson, and the defendants Robert C. Folkman and Patricia W. Folkman ("Folkmans") were represented by their attorney of record, Bill Williamson. The Court

Findings of Fact and
Conclusions of Law
Page 1 of 10

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heard the testimony of the following witnesses: plaintiff Mike Walch; super-load driving expert, Royce Hatley; Cle Elum City Administrator, Matt Morton; City of Cle Elum Public Works Director, Jim Leonhard; Joe Kretschman; Robert Folkman; Kerry Clark; and Ken Marson. The following exhibits were admitted into evidence: Exhibits 1 through 18, 20 through 40, 42 through 55, 57 through 59, 101 through 114, and 116 through 120.¹

At the conclusion of the plaintiffs' case, counsel for the defendants each made motions for dismissal on behalf of their clients. The Court took their arguments under advisement, reserved ruling thereon, and required that the defendants put on their cases. At the conclusion of the trial, the Court heard closing arguments of all parties and the renewed motions by defendants to dismiss plaintiffs' claims. The Court then took the matter under advisement to review all of the evidence and testimony, and to consider the parties' arguments. After doing so, on May 24, 2011, the Court issued its Memorandum Decision, which is incorporated by reference herein.

In accordance with said Memorandum Decision, counsel for the respective parties submitted their briefs and supporting declarations on the award of attorney fees and costs, with oral argument thereon having been heard on June 17, 2011. The Court then took the matter under advisement to review the parties' written submissions and consider the oral arguments. Thereafter, on July 5, 2011, the Court issued its Memorandum Decision Regarding Attorney's Fees, which is incorporated by reference herein.

Based on the above matters, the Court now makes the following Findings of Fact and Conclusions of Law:

¹ Regarding Exhibit 9, the attached declaration of Steve Locati was stricken, with the title policy itself being admitted.

I. FINDINGS OF FACT

A. Easement by Necessity.

1. The plaintiffs purchased their real property situated in Cle Elum, Washington, in May of 2004.

2. Access to plaintiffs' property is identified in the real estate contract; it is by way of an existing easement over the Dalle property to the east of plaintiffs' property, then continuing east over and across the Burlington Northern & Sante Fe Railroad ("BNSF") corridor, and then proceeding north over and across the BNSF railroad crossing to Owens Road. The road heading east through the Dalle property, and then continuing east through the BNSF corridor to Owens Road, is commonly known as Dalle Road.

3. The City of Cle Elum owns the public right-of-way of Owens Road from North First Street in the City of Cle Elum to the north edge of the BNSF right-of-way.

4. The City of Cle Elum also has 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.

5. Peninsula Trucking also uses the same Owens Road to access its facilities to the south of the BNSF crossing on Owens Road, as do several private residences. None of these entities or persons has been issued permits from BNSF to cross the railroad right-of-way.

6. The plaintiffs own Rainier Skyline Excavators, Inc. ("RSE") and intend to locate that business on their Cle Elum property.

7. RSE designs and manufactures the world's largest portable hydraulic track-drive skyline excavators, buckets, teeth and accessory equipment.

8. Plaintiffs intend to use their Cle Elum property to demonstrate, display and sell their portable skyline excavator in conjunction with the horseshoe-shaped Dalle pond on their property, and either manufacture or assemble several components of the skyline excavator on their property.

9. Many components of the portable skyline excavator are transported by long and extra-long lowboy trailers, called super-loads. These super-loads can be up to 165 feet in length and carry several hundred thousand pounds.

10. The defendants own property to the west of plaintiffs' property situated in the Swiftwater Business Park. The individual defendants, Clarks and Folkmans, have spent the last five years developing 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.

11. The defendant, Clark, LLC, has spent time and money to short plat its property immediately north of the property owned by defendants Clarks and Folkmans, which it purchased from BNSF.

12. The property of all parties to this action is presently zoned by the City of Cle Elum as being within its Industrial District, as defined by Chapter 17.36 of the Cle Elum Municipal Code.

13. According to Matt Morton, Cle Elum City Administrator, no land use applications have ever been submitted by the plaintiffs for their intended use of their company, RSE, on the property they now own.

14. While the plaintiffs' intended uses of their property may be permitted in the City of Cle Elum's industrial zone, if they are developed and used in the manner that complies with the performance standards and aesthetic objectives of Chapter 17.36 of the Cle Elum City Code, Mr. Morton also pointed out that there is no guarantee of granting any land use application until it is submitted and reviewed, and reconciled with the City of Cle Elum's critical areas ordinance, especially because of the Dalle ponds situated on the plaintiffs' property, which plaintiffs have described as the Dalle Wildlife and Fish Propagation Ponds.

15. The plaintiffs seek a thirty-foot (30') easement by necessity, claiming their property is "landlocked" for the following reasons: first, they have no legal, insurable access over the railroad right-of-way, either at the crossing over Owens Road or over the road along the railroad corridor to their granted easement through the Dalle property; and, second, as a practical matter, they cannot turn south onto Owens Avenue from 1st Avenue, and cannot pull their super-load lowboys over the railroad tracks without the lowboys getting high centered, and even if the super-load lowboys could cross the tracks, they could not (because of their length) make the immediate right turn onto the road heading west through the railroad corridor to access their granted easement.

16. At trial, the plaintiff sought an easement by necessity over a single route, which they identified as coming off of Swiftwater Boulevard, and then running in a southeasterly direction along the southern edge of the Folkman and Clark properties, immediately inside the DOT right-of-way fence, to connect with the plaintiffs' property at the southwest corner thereof.

B. Attorney Fees and Costs.

17. The defendants seek an award of their reasonable attorney fees and costs associated with defending their properties against the plaintiffs' claim to condemn a private way

of necessity through defendants' properties, as well as an award of such fees and costs incurred as a result of defending the implied easement and prescriptive easement claims against their properties, each of which the Court previously dismissed, with prejudice. The defendants seek an award of attorney fees pursuant to RCW 8.24.030 and CR 11 or RCW 4.84.185.²

18. The defendants argue that a common nexus exists between the prescriptive easement, the implied easement, and the easement by necessity claims, as each involves inherently related factual and legal issues. As part of the easement by necessity claim, the defendants argue that the plaintiffs had the burden of proving that no implied easement or prescriptive easement existed to otherwise allow them to access their property. In fact, defendants claim the plaintiffs argued that they had met their burden of showing no implied easement existed, by demonstrating to the Court there has never been a common grantor that would have allowed them to pursue the implied easement claim.

19. Moreover, the defendants claim a common core of facts and related legal issues exist between the prescriptive easement and the easement by necessity claims, because both easement claims were over identical roads, which plaintiffs claimed to be "existing roads" over and across the defendants' properties; the defendants' defenses included establishing the roads in question never existed or were not on their property; and had the plaintiffs established the alleged roads in fact existed, this fact would have enhanced their claim for an easement by necessity and undermined the defendants' defenses to that claim.

20. The Clarks' attorney, Mr. Nicholson, is seeking an award of fees and costs in the total amount of \$121,922.50 (\$121,055 in fees and \$867.50 in costs); and the Folkmans'

² Each attorney in submitting his request for attorney's fees has segregated their respective requests by claim and under CR 11 or RCW 4.84.185.

attorney, Mr. Williamson, is seeking a total award of fees and costs of \$44,385.25 (\$43,885.25 in fees and \$500 in costs).

21. Mr. Nicholson billed at \$275 per hour and Mr. Williamson billed at \$260 per hour. Plaintiffs do not object to the reasonableness of the defendants' hourly attorney rates; and the Court finds said hourly rates to be reasonable.

22. The Court has reviewed in detail each submission for fees and determines that the amount of fees incurred by defendants was reasonable in light of the overall circumstances of this case.

Based upon the Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

A. Easement by Necessity.

1. The plaintiffs have physical access to their property over the Owens Road railroad crossing, and through the railroad corridor to their granted easement.

2. The access may not be insurable because of the lack of a permit from the railroad company, but no one has ever denied plaintiffs' or their predecessors' use of the railroad crossing and/or the railroad corridor to the granted easement to the plaintiffs' property in question.

3. Until such access is in fact denied or withdrawn, the plaintiffs can make use and enjoyment of their property for those uses authorized by the City of Cle Elum within its industrial zone.

4. Taking by necessity is not extended to those necessities that may be created by the contemplation of future real estate development.

5. Plaintiffs have not established a reasonable necessity to condemn a private way of necessity because their property is not landlocked, and because they have no guarantee that a

future use of their property would include situating the RSE, Inc. manufacturing business on the property.

6. For the above reasons, the defendants are each entitled to judgment of dismissal on plaintiffs' claim of a statutory easement by necessity under RCW 8.24.010 et. seq.³

7. Plaintiffs' prescriptive easement claims were previously dismissed, with prejudice, on defendants' motion for partial summary judgment, pursuant to this Court's Memorandum Decision entered February 2, 2011, and Order of Dismissal, entered February 8, 2011; and plaintiffs' only other claim in this action, for an easement implied from prior use during common ownership, was dismissed, with prejudice, pursuant to a Stipulation and Order entered January 14, 2011; therefore, there being no remaining issues or claims among the parties in this action, defendants are each entitled to judgment on their counterclaim to quiet title to their respective properties.

B. Attorney Fees and Costs.

8. RCW 8.24.030 specifically allows a trial court the discretion to award attorney fees and expert witness costs in any action brought under the provisions of the private condemnation statute, RCW 8.24.010 et seq. No similar statute, however, authorizes the award of reasonable attorney's fees and costs of litigation for either implied easement or a prescriptive easement claim.

9. However, where the plaintiffs' claims involve a common core of facts and related legal theories, the trial court is not required to segregate the fees. This is especially so in a private condemnation action when one considers the legislative history of fee awards for private

³ Because the Court is ruling on the merits of the case, the Court will not rule on defendant Folkmans' motion to dismiss on jurisdictional grounds based on the alleged failure of the plaintiffs to properly pursue its administrative remedies and the remedies available under the Land Use Petition Act ("LUPA").

way of necessity actions as they have evolved in the last thirty 30 years. The use of the term "any action" and the other statutory language indicates that the legislature intended broad application of RCW 8.24.030.

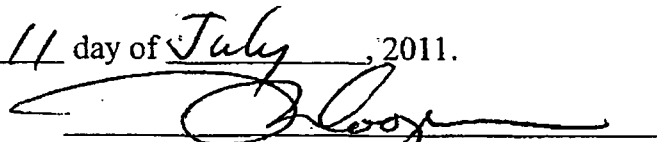
10. Here, plaintiffs three easement claims (prescriptive, implied, and by necessity) were all interrelated and all arose from a common core of facts and related legal theories.

11. The hourly rates charged by Mr. Nicholson and Mr. Williamson were reasonable, as were the hours they expended in defending plaintiffs' easement claims against their clients.

12. The Court will, therefore, award as reasonable attorney's fees all that which is requested by Mr. Nicholson and Mr. Williamson. The Court will also allow the statutory costs sought by Mr. Nicholson. However, the Court will deny the \$500 in costs sought by Mr. Williamson as there is no specific showing of what that request entailed.


13. Accordingly, the Clarks are entitled to an award of attorney fees and costs in the total amount of \$121,922.50; and the Folkmans are entitled to an award of attorney fees in the amount of \$43,885.25.

DONE IN OPEN COURT this 11 day of July, 2011.



The Honorable Michael E. Cooper

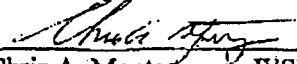
CONE GILREATH LAW OFFICES

By: 
Douglas W. Nicholson, WSBA #24854
Attorneys for Defendants Clarks and
W.L. Clark Family, LLC

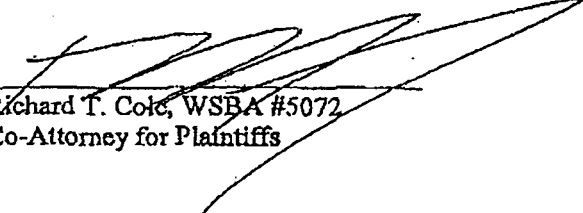
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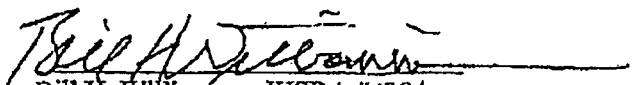
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By: 
Chris A. Montgomery, WSBA #12377
Co-Attorney for Plaintiffs

LAW OFFICES OF RICHARD T. COLE

By: 
Richard T. Cole, WSBA #5072
Co-Attorney for Plaintiffs

WILLIAMSON LAW OFFICE

By: 
Bill H. Williamson, WSBA #4304
Attorney for Defendants Folkmans

APPENDIX E

1
2 upper and lower portions by a bluff with an average slope of 60 degrees. There was no direct access
3 to the upper portion which was the only usable and relatively level portion of the property. The cost
4 to construct a road was prohibitive, and thus the court concluded that, because the condemnor could
5 not obtain "proper use and enjoyment" of his property, a reasonable necessity had been established.
6 *See also Sorenson v. Czinger, supra* (access to a portion of the property does not necessarily defeat
7 establishment of necessity where the property is divided by physical features). *Ruvalcaba v. Kwang*
8 *Ho Baek*, 159 Wn. App. 702 (Jan. 2011) adds to *Beeson* by finding at 709 that "Washington does
9 not require that the need for a way of necessity to be absolute. Instead, the way must be reasonably
10 necessary under the facts of the case."

11 While mere convenience does not establish necessity, *State ex rel. Carlson v. Superior Court*,
12 107 Wash. 228, 181 P. 689 (1919), the ability to make "effective use" of one's land is key. *Thus,*
13 *the availability of an alternate route does not prevent a private taking if the alternate access would*
14 *not permit the landowner to effectively use the land or it would result in a prohibitive cost for such*
15 *use. Beeson, supra*, 41 Wn. App at 187. *Cf. Dreger v. Sullivan*, 46 Wn.2d 36, 278 P.2d 647 (1955)
16 (where an implied easement crosses the land of the condemnor's grantor, the requisite necessity
17 cannot be shown to cross a stranger's land simply because it is a shorter, more direct route); *Roberts*
18 *v. Smith*, 41 Wn. App. 861, 707 P.2d 143 (1985) (the condemnor's burden to prove reasonable
19 necessity for ingress and egress includes the burden to disprove the existence of an implied easement
20 of necessity where there is some credible evidence that such an easement exists). Plaintiffs Walch
21 have met this burden by demonstrating to the Court that there has never been a common grantor
22 which fact Clark and Folkman have stipulated is true.

23 In the present case, the alternate Easterly route, proposed by the Defendants, is unsuitable for
24 Walches' heavy construction equipment, including commercial long and extra long lowboy traffic,
25 because such equipment would be forced to traverse an elevated railroad crossing risking the danger
26 that it would get "high-centered" and caught on the tracks. 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, supra*, 119 Wash. 372,

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PLAINTIFFS' TRIAL MEMORANDUM RE: STATUTORY
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APPENDIX F

FILED

AUG 09 2010
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JOYCE L. JULSRUD, CLERK
KITITAS COUNTY, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KITITAS

MIKE WALCH and MARCIA WALCH,
Husband and wife,

Plaintiffs,

vs.

KERRY A. CLARK and PATRICIA L.
CLARK, husband and wife; W.L. CLARK
FAMILY, LLC, a Washington Limited
Liability Company; and ROBERT C.
FOLKMAN and PATRICIA W.
FOLKMAN, husband and wife,

Defendants.

NO. 10-2E00353-6

COMPLAINT TO ESTABLISH
EASEMENT IMPLIED FROM
PRIOR USE AND/OR PRESCRIPTION;
OR ALTERNATIVELY AN EASEMENT BY
NECESSITY PURSUANT TO
RCW 8.24.010 ET. SEQ.

COME NOW the Plaintiffs, MIKE WALCH and MARCIA WALCH, husband and wife,
by and through their attorney, Chris A. Montgomery of Montgomery Law Firm, and for causes of
action against the Defendants, KERRY A. CLARK and PATRICIA L. CLARK, husband and wife;
W. L. CLARK FAMILY LLC, a Washington Limited Liability Company; and ROBERT C.
FOLKMAN and PATRICIA W. FOLKMAN, husband and wife, allege as follows:

COMPLAINT TO ESTABLISH EASEMENT
IMPLIED FROM PRIOR USE AND/OR PRESCRIPTION;
OR ALTERNATIVELY AN EASEMENT BY
NECESSITY PURSUANT TO RCW 8.24.010 ET. SEQ. Page - 1

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I.

1.1 Plaintiffs, MIKE WALCH and MARCIA WALCH, are husband and wife, and own landlocked real property located in Cle Elum, Kittitas County, Washington, legally described as follows:

Lot 1 of that certain Boundary Line Adjustment Survey recorded May 4, 2004 in Book 30 of Surveys, Page 49, under Auditor's File No. 2004 05040030, records of Kittitas County, State of Washington; being a portion of Sections 26 and 35, Township 20 North, Range 15 East, W.M., Kittitas County, State of Washington.

Assessor's Tax Parcel Nos. 401534 and 20353.

1.2 MIKE WALCH and MARCIA WALCH, husband and wife, hereinafter sometimes referred to as WALCHES, acquired title to their real property hereinabove described from Shirley J. Dalle, as Personal Representative of the Estate of Reno J. Dalle, by virtue of Real Estate Contract (Residential Short Form), dated May 12, 2004, and recorded June 21, 2004, under Kittitas County Auditor's File No. 200406210054, a copy of which is attached hereto as Exhibit "A," and by this reference incorporated herein as if though fully set forth.

II.

2.1 Defendants, KERRY A. CLARK and PATRICIA L. CLARK, are husband and wife, reside in Cle Elum, Kittitas County, Washington, and own real property in Cle Elum, Kittitas County, Washington, which is legally described as follows:

Parcel A:

That portion of the Southeast Quarter of the Southwest Quarter of Section 26, Township 20 North, Range 15 East, W.M., Kittitas County, State of Washington, lying South of the South line of the Burlington Northern Railroad Company's right-of-way; and the North and East of the Northerly right-of-way of Primary State Highway No. 2 (I-90);

EXCEPT the Westerly 4.05 acres thereof, all as described and/or delineated on the face of that certain Survey filed in Book 18 of Surveys, page 120, records of Kittitas County, State of Washington.

Assessor's Tax Parcel No. 123134.

**COMPLAINT TO ESTABLISH EASEMENT
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1 2.2 Defendants, KERRY A. CLARK and PATRICIA L. CLARK, husband and wife,
2 acquired title from William L. Clark and Patricia Lane Clark, husband and wife, by virtue of a
3 Quitclaim Deed, dated May 20, 2005, and recorded May 24, 2005, under Auditor's File No.
4 200505240034. A copy of said Quitclaim Deed is attached hereto as Exhibit "B," and incorporated
5 herein as if though fully set forth.

6 III.

7 3.1 Defendant, W.L. CLARK FAMILY, LLC, is a Washington Limited Liability
8 Company, and does business in Cle Elum, Kittitas County, Washington. The Registered Agent for
9 W.L. CLARK FAMILY, LLC is Patricia L. Clark, 480 River Ranch Lane, Cle Elum, Washington
10 98922,

11 3.2 Defendant, W.L. CLARK FAMILY, LLC, a Washington Limited Liability Company
12 owns real property in Cle Elum, Kittitas County, Washington, which is legally described as follows:

13 Part of the South half of Section 26, Township 20 North, Range 15 East,
14 W.M., Kittitas County, Washington, and legally described as:

15 The Southerly 150 feet of The Burlington Northern and Santa Fe Railway
16 Company's (formerly Northern Pacific Railway Company) 400 foot wide Charter
17 Right of Way, being 200 feet wide on each side of said Railroad Company's Main
18 Track centerline, as originally located and constructed upon, over and across the S
19 1/2 of Section 26, Township 20 North, Range 15 East, W.M., Kittitas County,
20 Washington, lying between two lines drawn parallel with and distant, respectively,
21 50 feet and 200 feet Southerly, as measured at right angles from said Main Track
22 centerline, bounded on the East by a line drawn parallel with and 120 feet normally
23 distant Easterly from the Southerly extension of the centerline of Peoh Avenue,
24 according to the Plat of Hazelwood, and bounded by the West by a line drawn
25 parallel with and 30 feet normally distant Westerly from the Southerly extension of
26 the centerline of Harris Avenue, according to the Plat of Cle Elum.

27 *SUBJECT TO the rights and interests of Grantor, Grantor's licensees,
28 permittees and other third parties in and to all existing driveways, roads, utilities,
fiber optic lines, tracks, wires and easements of any kind whatsoever on the
Property whether owned, operated, used or maintained by the Grantor, Grantor's
licensees, permittees or other their parties and whether or not of public record.
Grantor shall have a perpetual easement on the Property for the use of such
existing driveways, roads, utilities, fiber optic lines, tracks, wires and easements by
Grantor and Grantor's licensees, permittees and customers. Grantor shall have*

29 COMPLAINT TO ESTABLISH EASEMENT
30 IMPLIED FROM PRIOR USE AND/OR PRESCRIPTION;
31 OR ALTERNATIVELY AN EASEMENT BY
32 NECESSITY PURSUANT TO RCW 8.24.010 ET. SEQ. Page - 3

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1 *a non-exclusive easement for the construction, maintenance and operation of one*
2 *or more pipelines or fiber optic lines and any and all communication facilities as*
3 *may be located in the future on the Property within 60 feet of the center line of any*
4 *Main Track on or adjacent to the Property and as may be presently located on the*
5 *Property.*

6 Assessor's Tax Parcel Number: 20408.

7 3.3 Defendant, W.L. CLARK FAMILY, LLC, a Washington Limited Liability Company,
8 acquired title to the hereinabove described real property from PATRICIA L. CLARK, as Trustee of
9 the William Luther Clark By Pass Trust e/u/w/d 5/25/1999, by virtue of that certain Quitclaim Deed,
10 dated June 11, 2008, and recorded June 11, 2008, under Auditor's File No. 2008 06110041; and from
11 Patricia L. Clark, a single woman, by virtue of that certain Quitclaim Deed dated September 28, 2009
12 and recorded September 28, 2009 under Auditor's File No. 200909280082. Copies of said Quitclaim
13 Deeds are attached hereto as Exhibits "C-1" and "C-2," and by this reference are incorporated herein
14 as if though fully set forth.

15 3.4 PATRICIA L. CLARK, acquired title to an undivided one-half (½) interest in and to
16 the hereinabove described real property from Candis L. Snyder, as Personal Representative of the
17 Estate of William Luther Clark, by virtue of that certain Personal Representative's Deed, dated
18 March of 2006, and recorded April 3, 2006, under Auditor's File No. 2006 04030053. A Copy of
19 said Personal Representative's Deed is attached hereto as Exhibit "D," and by this reference is
20 incorporated herein as if though fully set forth.

21 3.5 William L. Clark and Patricia Lane Clark, acquired title to the hereinabove described
22 real property from Burlington Northern and Santa Fe Railway Company, a Delaware Corporation
23 (formerly Burlington Northern Railroad Company), by virtue of that certain Quitclaim Deed, dated
24 June 22, 2004, and recorded July 2, 2004, under Auditor's File No. 200407020048. A Correction
25 Quitclaim Deed from Northern and Santa Fe Railway Company, a Delaware Corporation (formerly
26 Burlington Northern Railway Company), to William L. Clark and Patricia Lane Clark, dated
27 November 15, 2004, was recorded December 2, 2004, under Auditor's File No. 200412020030.

28 **COMPLAINT TO ESTABLISH EASEMENT
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1 Copies of said Quitclaim Deeds are attached hereto as Exhibits "E" and "F" respectively, and by this
2 reference are incorporated herein as if though fully set forth.

3 IV.

4 4.1 Defendants, ROBERT C. FOLKMAN and PATRICIA W. FOLKMAN, are husband
5 and wife, reside in King County, Washington, and own real property located in Cle Elum, Kittitas
6 County, Washington, legally described as follows:

7 Those portions of the SE ¼ of the SW ¼ of Section 26, Township 20 North,
8 Range 15 East, W.M., Kittitas County, State of Washington; lying South of the South
9 line of the Burlington Northern Railroad Company's right-of-way and North and East
10 of the Northerly line of Interstate Highway I-90 right-of-way more particularly
11 described as follows: Beginning at the South Quarter SC of said subdivision, thence
12 North 00°23'00" East, 853.03 feet to a point on the South line of Burlington Northern
13 Railroad Company's right-of-way; thence North 79°25'26" West along said right-of-
14 way 306.16 feet to the True Point of Beginning; thence continuing along said right-
15 of-way North 79°25'26" West, 667.44 feet to a point where last said right-of-way
16 intersects with the North line of the right-of-way for Interstate I-90; thence South
17 40°07'50" East along last said right-of-way 681.51 feet; thence South 65°53'20" East
18 along last said right-of-way 143.43 feet; thence North 10°34'34" East, 462.72 feet to
19 the True Point of Beginning.

20 Tax Parcel No. 618936.

21 4.2 Defendants, ROBERT C. FOLKMAN and PATRICIA W. FOLKMAN, husband and
22 wife, acquired title to the hereinabove described real property by virtue of that certain Statutory
23 Warranty Deed (Fulfillment), executed by Thomas A. McKnight and Jami L. McKnight, husband
24 and wife, as Grantors, to ROBERT C. FOLKMAN and PATRICIA W. FOLKMAN, husband and
25 wife, as Grantees, dated September 30, 1988, and recorded June 16, 1993, under Auditor's File No.
26 560405, in fulfillment of that certain Real Estate Contract dated September 30, 1988. A copy of said
27 Statutory Warranty Deed (Fulfillment) is attached hereto as Exhibit "G," and by this reference
28 incorporated herein as if though fully set forth.

V.

5.1 The subject of this action is for thirty foot (30') perpetual, non-exclusive, Easements
Implied from prior use, from N. Oakes Avenue, Easterly, over and across existing roads known as

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1 Dalle Road and the Burlington Northern and Santa Fe Railway Corridor Road, which roads cross real
2 property of the Defendants, KERRY A. CLARK and PATRICIA L. CLARK, husband and wife; W.
3 L. CLARK FAMILY LLC, a Washington Limited Liability Company; and ROBERT C. FOLKMAN
4 and PATRICIA W. FOLKMAN, husband and wife, to and for the benefit of the Plaintiffs, MIKE
5 WALCH and MARCIA WALCH, husband and wife's, real property located in Cle Elum, Kittitas
6 County, Washington, described in Paragraph No. 1.1 hereof.

7 5.2 Alternatively, the subject of this action is for thirty foot (30') perpetual, non-exclusive,
8 Prescriptive Easements, from N. Oakes Avenue, Easterly, over and across existing roads known as
9 Dalle Road and the Burlington Northern and Santa Fe Railway Corridor Road, which roads cross real
10 property of the Defendants, KERRY A. CLARK and PATRICIA L. CLARK, husband and wife; W.
11 L. CLARK FAMILY LLC, a Washington Limited Liability Company; and ROBERT C. FOLKMAN
12 and PATRICIA W. FOLKMAN, husband and wife, to and for the benefit of the Plaintiffs, MIKE
13 WALCH and MARCIA WALCH, husband and wife's, real property located in Cle Elum, Kittitas
14 County, Washington, described in Paragraph No. 1.1 hereof.

15 5.3 Alternatively, the subject of this action is for a thirty foot (30') perpetual, non-
16 exclusive, Easement by Necessity for landlocked property pursuant to RCW 8.24.010 et. seq. (*which*
17 *allows the private right of condemnation when landlocked*), over and across one (1) of the existing
18 roads, known as Dalle Road and the Burlington Northern and Santa Fe Railway Corridor Road,
19 which roads commence at N. Oakes Avenue, thence continue Easterly, over and across the real
20 property of the Defendants, KERRY A. CLARK and PATRICIA L. CLARK, husband and wife; W.
21 L. CLARK FAMILY LLC, a Washington Limited Liability Company; and ROBERT C. FOLKMAN
22 and PATRICIA W. FOLKMAN, husband and wife, to and for the benefit of the Plaintiffs, MIKE
23 WALCH and MARCIA WALCH, husband and wife's, real property located in Cle Elum, Kittitas
24 County, Washington, described in Paragraph No. 1.1 hereof.

25
26 **COMPLAINT TO ESTABLISH EASEMENT**
27 **IMPLIED FROM PRIOR USE AND/OR PRESCRIPTION;**
28 **OR ALTERNATIVELY AN EASEMENT BY**
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1 VI.

2 6.1 The Kittitas County Superior Court has jurisdiction over both the parties and the subject
3 matter of this action.

4 6.2 Venue for this action is properly laid in Kittitas County, Washington.

5 VII.

6 7.1 When the WALCHES' purchased their real property in May of 2004, they and their
7 predecessors in interest, had previously accessed their real property on a continuous basis, from N.
8 Oakes Avenue, thence Easterly, over and across existing roads, thirty feet (30') in width, commonly
9 referred to as Dalle Road and the Burlington Northern and Santa Fe Railway Corridor Road, which
10 roads cross the real property of Defendants, KERRY A. CLARK and PATRICIA L. CLARK,
11 husband and wife; W. L. CLARK FAMILY LLC, a Washington Limited Liability Company; and
12 ROBERT C. FOLKMAN and PATRICIA W. FOLKMAN, husband and wife, described in Paragraph
13 Nos. 2.1, 3.2, and 4.1 hereof, to and for the benefit of the Plaintiffs, MIKE WALCH and MARCIA
14 WALCH, husband and wife's, real property located in Cle Elum, Kittitas County, Washington,
15 described in Paragraph No. 1.1 hereof.

16 7.2 Access over and across the existing Burlington Northern and Santa Fe Railway
17 Corridor Road was reserved by the Burlington Northern and Santa Fe Railway, for itself, and its
18 licensees, permittees, and other third parties (*the Walches, to whom the Burlington Northern and*
19 *Santa Fe Railway has offered its adjacent Railway Corridor Property to the East*) in and to all
20 existing roads and easements of any kind whatsoever, whether or not of public record, including a
21 portion of Dalle Road, and the Burlington Northern and Santa Fe Railway Corridor Road, in its Deed
22 to Defendants, William L. Clark and Patricia Lane Clark, in sub-paragraph (c) thereof, where it
23 specifically states:

24 *"Grantee's interest shall be subject to the rights and interests of Grantor,*
25 *Grantor's licensees, permittees and third parties in and to all existing driveways,*
and roads, utilities, fiber optic lines, tracks, wires and easements of any kind

26 COMPLAINT TO ESTABLISH EASEMENT
27 IMPLIED FROM PRIOR USE AND/OR PRESCRIPTION;
28 OR ALTERNATIVELY AN EASEMENT BY
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1 *whatsoever on the Property whether owned, operated, used or maintained by the*
2 *Grantor, Grantor's licensees, permittees or other third parties and whether or not*
3 *of public record."*

4 7.3 The approximate locations of Dalle Road and the Burlington Northern and Santa Fe
5 Railway Corridor Road are depicted on the Kittitas Assessor's Aerial Photograph, the Google Aerial
6 Photograph, and the Department of Transportation Aerial Photographs, attached hereto as Exhibits
7 "H," "I," "J" and "K" respectively, and by this reference incorporated herein as if though fully set
8 forth.

9 **VIII.**

10 Both Dalle Road and the Burlington Northern and Santa Fe Railway Corridor Road, as
11 illustrated in the aerial photographs described in Paragraph No. 7.3 hereof, were impressed into use
12 during common ownership and existed at the time of severance from common ownership and were
13 reasonable and necessary for continuous access to a public right-of-way by the WALCHES', and
14 the previous owners of the WALCHES' property, which is otherwise landlocked, and as such, the
15 WALCHES are entitled to reformation of the deeds of records to reflect the implied easement(s) of
16 necessity.

17 **IX.**

18 The WALCHES' and their predecessors in interest historically accessed their property over
19 and across both Dalle Road and the Burlington Northern and Santa Fe Railway Corridor Road, as
20 illustrated in the aerial photographs described in Paragraph No. 7.3 hereof, which access has been
21 under a claim of right which has been open, notorious, continuous, and uninterrupted without
22 permission, and adverse to the rights of the servient ownerships of the Defendants herein for a period
23 of time exceeding ten (10) consecutive years preceding the recent blockage of both roads by the
24 Defendants erecting chain link fencing over and across both roads, preventing access by the
25 WALCHES to their property.

26 **COMPLAINT TO ESTABLISH EASEMENT**
27 **IMPLIED FROM PRIOR USE AND/OR PRESCRIPTION;**
28 **OR ALTERNATIVELY AN EASEMENT BY**
NECESSITY PURSUANT TO RCW 8.24.010 ET. SEQ. Page - 8.

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P.O. Box 269
Colville, WA 99114-0269
(509) 684-2519

000008

X.

The Dalle ponds, one of which is located upon the WALCHES' real property described in Paragraph No. 1.1 hereof, were created by the removal of gravel during the development of Interstate 90 in the 1960's. Heavy equipment was utilized for the removal of gravel. Previous to the development of the Dalle Ponds, and after development of the Dalle Ponds, the Dalle Family utilized Dalle Road and the Burlington Northern and Santa Fe Railway Corridor Road, for access to and from their property by regular passenger vehicles, and with heavy equipment and machinery. The Dalle Family grew hay and alfalfa on their property until the freeway came through Cle Elum, Kittitas County, Washington in the early 1960's. From the early 1960's until 1988 the Dalle Family was in the excavation business and used the roads extensively to bring in their construction equipment to and from the Dalle property. The road was graded three (3) to four (4) times per year, and more, if necessary, due to high traffic volumes of construction equipment. The roads were always well defined, and continued to be used by Dalle Family members, and the WALCHES until the recent reconfiguration by the Clark Family. The use by the Dalle Family, and their successors, was open, notorious, continuous, and uninterrupted without permission for a period of time exceeding ten (10) consecutive years, which use was adverse to the rights of the servient ownerships of the Defendants herein, described in Paragraph Nos. 2.1, 3.2, and 4.1 hereof.

XI.

The intended use by the WALCHES of their landlocked real property includes the continuous commercial use of Dalle Road and the Burlington Northern and Santa Fe Railway Corridor Road for ingress and egress for regular passenger vehicles and heavy equipment in and out of their property. It is not possible for such vehicles or equipment to be brought to or taken from the WALCHES' property without utilizing Dalle Road or the Burlington Northern and Santa Fe Railway Corridor Road, from N. Oakes Avenue, Easterly, over and across the real property of Defendants,

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**COMPLAINT TO ESTABLISH EASEMENT
IMPLIED FROM PRIOR USE AND/OR PRESCRIPTION;
OR ALTERNATIVELY AN EASEMENT BY
NECESSITY PURSUANT TO RCW 8.24.010 ET. SEQ.** Page - 9

1 KERRY A. CLARK and PATRICIA L. CLARK, husband and wife; W. L. CLARK FAMILY LLC,
2 a Washington Limited Liability Company; and ROBERT C. FOLKMAN and PATRICIA W.
3 FOLKMAN, husband and wife, described in Paragraph Nos. 2.1, 3.2, and 4.1 hereof. In such
4 situations, an Easement By Necessity is authorized pursuant to RCW 8.24.010 et. seq. to secure a
5 thirty (30) foot perpetual, non-exclusive easement for ingress and egress, over and across one (1)
6 of the existing roadways; to-wit: Dalle Road or the Burlington Northern and Santa Fe Railway
7 Corridor Road, as described in Paragraph No. 7.3 hereof, to and for the benefit of the Plaintiffs,
8 MIKE WALCH and MARCIA WALCH, husband and wife's, real property located in Cle Elum,
9 Kittitas County, Washington, described in Paragraph No. 1.1 hereof.

10 **PRAYERS FOR RELIEF**

11 **WHEREFORE**, the Plaintiffs, MIKE WALCH and MARCIA WALCH, husband and wife,
12 pray for relief as follows:

13 1. That Plaintiffs' right be established to a thirty (30) foot perpetual, non-exclusive
14 Easement Implied from prior use, for ingress and egress, from N. Oakes Avenue, Easterly, over and
15 across the existing Roadways, commonly known as Dalle Road and the Burlington Northern and
16 Santa Fe Railway Corridor Road, which extend over and across the real property of Defendants,
17 KERRY A. CLARK and PATRICIA L. CLARK, husband and wife; W. L. CLARK FAMILY LLC,
18 a Washington Limited Liability Company; and ROBERT C. FOLKMAN and PATRICIA W.
19 FOLKMAN, husband and wife, to and for the benefit of the Plaintiffs, MIKE WALCH and
20 MARCIA WALCH, husband and wife's, real property located in Cle Elum, Kittitas County,
21 Washington, described in Paragraph No. 1.1 hereof;

22 2. Alternatively, that Plaintiffs' right be established to a thirty (30) foot perpetual, non-
23 exclusive Prescriptive Easement, for ingress and egress, from N. Oakes Avenue, Easterly, over and
24 across the existing Roadways, commonly known as Dalle Road and the Burlington Northern and
25 Santa Fe Railway Corridor Road, which extend over and across the real property of Defendants,

26 **COMPLAINT TO ESTABLISH EASEMENT**
27 **IMPLIED FROM PRIOR USE AND/OR PRESCRIPTION;**
28 **OR ALTERNATIVELY AN EASEMENT BY**
NECESSITY PURSUANT TO RCW 8.24.010 ET. SEQ. Page - 10.

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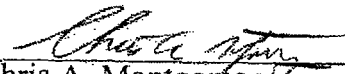
1 KERRY A. CLARK and PATRICIA L. CLARK, husband and wife; W. L. CLARK FAMILY LLC,
2 a Washington Limited Liability Company; and ROBERT C. FOLKMAN and PATRICIA W.
3 FOLKMAN, husband and wife, to and for the benefit of the Plaintiffs, MIKE WALCH and
4 MARCIA WALCH, husband and wife's, real property located in Cle Elum, Kittitas County,
5 Washington, described in Paragraph No. 1.1 hereof;

6 3. Alternatively, that Plaintiffs' right be established to a thirty (30) foot perpetual, non-
7 exclusive Easement By Necessity pursuant to RCW 8.24.010 et. seq. for ingress and egress, from N.
8 Oakes Avenue, Easterly, over and across one (1) of the existing roadways, commonly known as
9 Dalle Road, or the Burlington Northern and Santa Fe Railway Corridor Road, which extend over and
10 across the real property of Defendants, KERRY A. CLARK and PATRICIA L. CLARK, husband
11 and wife; W. L. CLARK FAMILY LLC, a Washington Limited Liability Company; and ROBERT
12 C. FOLKMAN and PATRICIA W. FOLKMAN, husband and wife, to and for the benefit of the
13 Plaintiffs, MIKE WALCH and MARCIA WALCH, husband and wife's, real property located in Cle
14 Elum, Kittitas County, Washington, described in Paragraph No. 1.1 hereof;

15 4. For WALCHES' reasonable attorney's fees and costs in connection with this action;
16 and

17 5. For such other and further relief as the Court deems just and equitable under the
18 premises.

19 DATED this 4th day of August, 2010.


Chris A. Montgomery
Attorney for Plaintiffs
Mike and Marcia Walch
WSBA # 12377

26 **COMPLAINT TO ESTABLISH EASEMENT**
27 **IMPLIED FROM PRIOR USE AND/OR PRESCRIPTION;**
28 **OR ALTERNATIVELY AN EASEMENT BY**
NECESSITY PURSUANT TO RCW 8.24.010 ET. SEQ. Page - 11

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EXHIBIT "A"

EXHIBIT "A"

EXHIBIT

"A"

EXHIBIT "A"

EXHIBIT "A"

000012



RE EXCISE TAX PAID

Amount \$3060.00
Date 06-21-04
Affidavit No. 2004-1374
KITTITAS COUNTY TREASURER
By K. Jell

WHEN RECORDED RETURN TO:

Name: Stewart Title
Address: 208 W. 9th #6
Ellensburg WA 98926

Escrow Number: 16364
Filed for Record at Request of: Stewart Title of Kittitas County

ANY OPTIONAL PROVISION NOT INITIALED BY ALL PERSONS SIGNING THIS CONTRACT -
WHETHER INDIVIDUALLY OR AS AN OFFICER OR AGENT - IS NOT A PART OF THIS CONTRACT.

S.T. 16364

REAL ESTATE CONTRACT
(RESIDENTIAL SHORT FORM)

\$ 29.00

1. PARTIES AND DATE. This Contract is entered into on May 12, 2004 between Shirley J. Dalle, as Personal Representative for the Estate of Reno J. Dalle, deceased as "Seller" and Mika Welch and Marcella Welch, husband and wife as "Buyer."

2. SALE AND LEGAL DESCRIPTION. Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller the following described real estate in Kittitas County, State of Washington:

Being a portion of Sections 28 and 35, Township 20 North, Range 15 East, W.M.

Legal Description: See Exhibit A attached hereto and made a part hereof.

TOGETHER WITH all water rights and irrigation ditches appurtenant thereto, if any.

SUBJECT TO: All matters including reservations, restrictions, exceptions, easements and rights-of-way apparent or of record; and also including items disclosed in addendum to Real Estate Contract per paragraph 7 attached hereto and made a part hereof.

Subject to Exhibit B attached and made a part hereof.

Assessor's Property Tax Parcel/Account Number: 20-15-28043-0001/20-15-26044-0002/20-15-35010-0001

3. PERSONAL PROPERTY. Personal property, if any, included in the sale is as follows:

"NONE"

No part of the purchase price is attributed to personal property.

| | | |
|------------------------------------|-----------------|---------------------------|
| 4. (a) PRICE. Buyer agrees to pay: | \$200,000.00 | Total Price |
| Less: | (\$50,000.00) | Down Payment |
| Less: | (\$0.00) | Assumed Obligation(s) |
| Results in: | \$150,000.00 | Amount Financed By Seller |

(b) ASSUMED OBLIGATIONS: Buyer agrees to pay the above assumed obligation(s) by assuming and agreeing to pay that certain _____ dated _____ recorded as A/R# _____

Seller warrants the unpaid balance of said obligation is _____ which is payable on or before the _____ day of _____ interest at the rate of _____ % per annum on the declining balance thereof and a like amount on or before the _____ day of each and every _____ thereafter until paid in full.

NOTE: Fill in the date in the following two lines only if there is an early cash out date.

NOTWITHSTANDING THE ABOVE, THE ENTIRE BALANCE OF PRINCIPAL AND INTEREST IS DUE IN FULL NOT LATER THAN _____

ANY ADDITIONAL ASSUMED OBLIGATIONS ARE INCLUDED IN ADDENDUM.



(c) PAYMENT OF AMOUNT FINANCED BY SELLER:

Buyer agrees to pay the sum of \$150,000.00 as follows:
\$5,000.00 or more at buyer's option on or before the 1st day of July, 2004, includes
interest from May 21, 2004 (date of closing) at the rate of 5% per annum on the
declining balance thereof; and a like amount or more on or before the 1st day of each
and every month thereafter until paid in full.

NOTE: Fill in the date in the following two lines only if there is an early cash out date.

**NOTWITHSTANDING THE ABOVE, THE ENTIRE BALANCE OF PRINCIPAL AND INTEREST IS DUE
IN FULL NOT LATER THAN**

Payments are applied first to interest and then to principal. Payments shall be made at Stewart Title
of Kittitas County, 206 W. 9th, Ellensburg Wa 98926 or such other place as the Seller may
hereafter indicate in writing.

5. FAILURE TO MAKE PAYMENTS ON ASSUMED OBLIGATIONS. If Buyer fails to make any payments
on assumed obligation(s), Seller may give written notice to Buyer that unless Buyer makes the delinquent
payment(s) within 15 days, Seller will make the payment(s), together with any late charge, additional
interest, penalties, and costs assessed by the Holder of the assumed obligation(s). The 15-day period
may be shortened to avoid the exercise of any remedy by the Holder of the assumed obligation(s). Buyer
shall immediately after such payment by Seller reimburse Seller for the amount of such payment plus a
late charge equal to five percent (5%) of the amount so paid plus all costs and attorney fees incurred by
Seller in connection with making such payment.

6. (a) OBLIGATIONS TO BE PAID BY SELLER. The Seller agrees to continue to pay from payments
received hereunder the following obligation, which obligation must be paid in full when Buyer pays the
purchase price in full: That certain _____ dated _____ recorded as A/F# _____

ANY ADDITIONAL OBLIGATION TO BE PAID BY SELLER ARE INCLUDED IN ADDENDUM

(b) EQUITY OF SELLER PAID IN FULL. If the balance owed the Seller on the purchase price herein
becomes equal to the balance owed on prior encumbrances being paid by Seller, Buyer will be deemed to
have assumed said encumbrances as of that date. Buyer shall thereafter make payments directly to the
holders of said encumbrances and make no further payments to Seller. Seller shall at that time deliver to
Buyer a fulfillment deed in accordance with the provisions of paragraph 8.

(c) FAILURE OF SELLER TO MAKE PAYMENTS ON PRIOR ENCUMBRANCES. If Seller fails to
make any payments on any prior encumbrance, Buyer may give written notice to Seller that unless Seller
makes the delinquent payments within 15 days, Buyer will make the payments together with any late
charge, additional interest, penalties, and costs assessed by the holder of the prior encumbrance. The 15-
day period may be shortened to avoid the exercise of any remedy by the holder of the prior encumbrance.
Buyer may deduct the amount so paid plus a late charge of 5% of the amount so paid and any attorneys'
fees and costs incurred by Buyer in connection with the delinquency from payments next becoming due
Seller on the purchase price. In the event Buyer makes such delinquent payments on three occasions,
Buyer shall have the right to make all payments due thereafter directly to the holder of such prior
encumbrance and deduct the then balance owing on such prior encumbrance from the then balance
owing on the purchase price and reduce periodic payments on the balance due Seller by the payments
called for in such prior encumbrance as such payments become due.

7. OTHER ENCUMBRANCES AGAINST THE PROPERTY. The property is subject to encumbrances
including the following listed tenancies, easements, restrictions, and reservations in addition to the
obligations assumed by Buyer and the obligations being paid by Seller.

ANY ADDITIONAL NON-MONETARY ENCUMBRANCES ARE INCLUDED IN ADDENDUM

8. FULFILLMENT DEED. Upon payment of all amounts due Seller, Seller agrees to deliver to Buyer a
Statutory Warranty Deed in fulfillment of this Contract. The covenants of warranty in said deed shall not
apply to any encumbrances assumed by Buyer or to defects in title arising subsequent to the date of this
Contract by, through, or under persons other than the Seller herein. Any personal property included in the
sale shall be included in the fulfillment deed.

9. LATE CHARGES. If any payment on the purchase price is not made within ten (10) days after the
date it is due, Buyer agrees to pay a late charge equal to 5% of the amount of such payment. Such late
payment charge shall be in addition to all other remedies available to Seller and the first amounts received
from Buyer after such late charges are due shall be applied to the late charges.

10. NO ADVERSE EFFECT ON PRIOR ENCUMBRANCES. Seller warrants that entry into this Contract
will not cause in any prior encumbrance (a) a breach, (b) accelerated payments, or (c) an increased
interest rate, unless (a), (b), or (c) has been consented to by Buyer in writing.

11. POSSESSION. Buyer is entitled to possession of the property from and after the date of this Contract
or whichever is later, subject to any tenancies described in paragraph 7.

12. TAXES, ASSESSMENTS, AND UTILITY LIENS. Buyer agrees to pay by the date due all taxes and assessments becoming a lien against the property after the date of this Contract. Buyer may in good faith contest any such taxes or assessments so long as no forfeiture or sale of the property is threatened as the result of such contest. Buyer agrees to pay when due any utility charges which may become liens superior to Seller's interest under this Contract. If real estate taxes and penalties are assessed against the property subsequent to date of this Contract because of a change in use prior to the date of this Contract for Open Space, Farm, Agricultural, or Timber classifications approved by the County or because of a Senior Citizen's Declaration to Defer Property Taxes filed prior to the date of this Contract, Buyer may demand in writing payment of such taxes and penalties within 30 days. If payment is not made, Buyer may pay and deduct the amount thereof plus 5% penalty from the payments now becoming due Seller under the Contract.

13. INSURANCE. Buyer agrees to keep all buildings now or hereafter erected on the property described herein continuously insured under fire and extended coverage policies in an amount not less than the balance owed on obligations assumed by Buyer plus the balance due Seller, or full insurable value, whichever is lower. All policies shall be held by the Seller and be in such companies as the Seller may approve and have loss payable first to any holders of underlying encumbrances, then to Seller as their interests may appear and then to Buyer. Buyer may within 30 days after loss negotiate a contract to substantially restore the premises to their condition before the loss. If insurance proceeds are sufficient to pay the contract price for restoration or if the Buyer deposits in escrow any deficiency with instructions to apply the funds on the restoration contract, the property shall be restored unless the underlying encumbrances provide otherwise. Otherwise the amount collected under any insurance policy shall be applied upon any amounts due hereunder in such order as Seller shall determine. In the event of forfeiture, all rights of Buyer in insurance policies then in force shall pass to Seller.

14. NONPAYMENT OF TAXES, INSURANCE, AND UTILITIES CONSTITUTING LIENS. If Buyer fails to pay taxes or assessments, insurance premiums, or utility charges constituting liens prior to Seller's interest under this Contract, Seller may pay such items and Buyer shall forthwith pay Seller the amount thereof plus a late charge of 5% of the amount thereof plus any costs and attorney's fees incurred in connection with making such payment.

15. CONDITION OF PROPERTY. Buyer accepts the property in its present condition and acknowledges that Seller, his/her agents, and subagents have made no representation or warranty concerning the physical condition of the property or the uses to which it may be put other than as set forth herein. Buyer agrees to maintain the property in such condition as complies with all applicable laws.

16. RISK OF LOSS. Buyer shall bear the risk of loss for destruction or condemnation of the property. Any such loss shall not relieve Buyer from any of Buyer's obligations pursuant to this Contract.

17. WASTE. Buyer shall keep the property in good repair and shall not commit or suffer waste or willful damage to or destruction of the property. Buyer shall not remove commercial timber without the written consent of Seller.

18. AGRICULTURAL USE. If this property is to be used principally for agricultural purposes, Buyer agrees to conduct farm and livestock operations in accordance with good husbandry practices. In the event a forfeiture action is instituted, Buyer consents to Seller's entry on the premises to take any reasonable action to conserve soil, crops, trees, and livestock.

19. CONDEMNATION. Seller and Buyer may each appear as owners of an interest in the property in any action concerning condemnation of any part of the property. Buyer may within 30 days after condemnation and removal of improvements, negotiate a contract to substantially restore the premises to their condition before the removal. If the condemnation proceeds are sufficient to pay the contract price for restoration or if the Buyer deposits in escrow any deficiency with instructions to apply the funds on the restoration contract, the property shall be restored unless underlying encumbrances provide otherwise. Otherwise, proceeds of the award shall be applied in payment of the balance due on the purchase price, as Seller may direct.

20. DEFAULT. If the Buyer fails to observe or perform any term, covenant, or condition of this Contract, Seller may:

- (a) Suit for Installments. Sue for any delinquent periodic payment or
- (b) Specific Performance. Sue for specific performance of any of Buyer's obligations pursuant to this Contract or
- (c) Forfeit Buyer's Interest. Forfeit this Contract pursuant to Ch. 61.30, RCW, as it is presently enacted and may hereafter be amended. The effect of such forfeiture includes: (i) all right, title, and interest in the property of the Buyer and all persons claiming through the Buyer shall be terminated; (ii) the Buyer's rights under the Contract shall be cancelled; (iii) all sums previously paid under the Contract shall belong to and be retained by the Seller or other person to whom paid and entitled thereto; (iv) all improvements made to and unharvested crops on the property shall belong to the Seller; and (v) Buyer shall be required to surrender possession of the property, improvements, and unharvested crops to the Seller 10 days after the forfeiture.
- (d) Acceleration of Balance Due. Give Buyer written notice demanding payment of said delinquencies and payment of a late charge of 5% of the amount of such delinquent payments and payment of Seller's reasonable attorney's fees and costs incurred for services in preparing and sending such Notice and stating that if payment pursuant to said Notice is not received within 30 days after the date said Notice is either deposited in the mail addressed to the Buyer or personally delivered to the Buyer, the entire balance owing, including interest, will become immediately due and payable. Seller may thereupon institute suit for payment of such balance, interest, late charge, and reasonable attorney's fees and costs.
- (e) Judicial Foreclosure. Sue to foreclose this Contract as a mortgage, in which event Buyer may be liable for a deficiency.

21. RECEIVER. If Seller has instituted any proceedings specified in Paragraph 20 and Buyer is receiving rental or other income from the property, Buyer agrees that the appointment of a receiver for the property is necessary to protect Seller's interest.

22. BUYER'S REMEDY FOR SELLER'S DEFAULT. If Seller fails to observe or perform any term, covenant, or condition of this Contract, Buyer may, after 30 days' written notice to Seller, institute suit for damages or specific performance unless the breaches designated in said notice are cured.

23. NON-WAIVER. Failure of either party to insist upon strict performance of the other party's obligations hereunder shall not be construed as a waiver of strict performance hereafter of all of the other party's obligations hereunder and shall not prejudice any remedies as provided herein.

24. ATTORNEYS' FEES AND COSTS. In the event of any breach of this Contract, the party responsible for the breach agrees to pay reasonable attorney's fees and costs, including costs of service of notices and title searches, incurred by the other party. The prevailing party in any suit instituted arising out of this Contract and in any forfeiture proceedings arising out of this Contract shall be entitled to receive reasonable attorney's fees and costs incurred in such suit or proceedings.

25. NOTICES. Notices shall be either personally served or shall be sent certified mail, return receipt requested, and by regular first class mail to Buyer at 16131 SE Green Valley RD, Auburn, WA 98992 and to the Seller at 402 E. 2nd, Cle Elum, WA 98922 or such other addresses as either party may specify in writing to the other party. Notices shall be deemed given when served or mailed. Notice to Seller shall also be sent to any institution receiving payments on the Contract.

26. TIME FOR PERFORMANCE. Time is of the essence in performance of any obligations pursuant to this Contract.

27. SUCCESSORS AND ASSIGNS. Subject to any restrictions against assignment, the provisions of this Contract shall be binding on the heirs, successors, and assigns of the Seller and the Buyer.

28. OPTIONAL PROVISION - SUBSTITUTION AND SECURITY ON PERSONAL PROPERTY. Buyer may substitute for any personal property specified in Paragraph 3 herein other personal property of like nature which Buyer owns free and clear of any encumbrances. Buyer hereby grants Seller a security interest in all personal property specified in Paragraph 3 and future substitutions for such property and agrees to execute a financing statement under the Uniform Commercial Code releasing such security interest.

| | | |
|--------|----------|-------|
| SELLER | INITIALS | BUYER |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

29. OPTIONAL PROVISION - ALTERATIONS. Buyer shall not make any substantial alteration to the improvements on the property without the prior written consent of Seller, which consent will not be unreasonably withheld.

| | | |
|--------|----------|-------|
| SELLER | INITIALS | BUYER |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

30. OPTIONAL PROVISION - DUE ON SALE. If Buyer, without written consent of Seller, (a) conveys, (b) sells, (c) leases, (d) assigns, (e) contracts to convey, sell, lease or assign, (f) grants an option to buy the property, (g) permits a foreclosure or foreclosure or trustee or sheriff's sale of any of the Buyer's interest in the property or this Contract, Seller may at any time thereafter either raise the interest rate on the balance of the purchase price or declare the entire balance of the purchase price due and payable. If one or more of the entities comprising the Buyer is a corporation, any transfer or successive transfers in the nature of items (a) through (g) above of 45% or more of the outstanding capital stock shall enable Seller to take the above action. A lease of less than 3 years (including options for renewal), a transfer to a spouse or child of Buyer, a transfer incident to a marriage dissolution or condemnation, and a transfer by inheritance will not enable Seller to take any action pursuant to this Paragraph; provided the transferee other than a condemnor agrees in writing that the provisions of this paragraph apply to any subsequent transaction involving the property entered into by the transferee.

| | | |
|--------|----------|-------|
| SELLER | INITIALS | BUYER |
| _____ | _____ | _____ |
| _____ | _____ | _____ |

31. OPTIONAL PROVISION - PRE-PAYMENT PENALTIES ON PRIOR ENCUMBRANCES. If Buyer elects to make payments in excess of the minimum required payments on the purchase price herein, and Seller, because of such prepayments, incurs prepayment penalties on prior encumbrances, Buyer agrees to forthwith pay Seller the amount of such penalties in addition to payments on the purchase price.

SELLER INITIALS BUYER

32. OPTIONAL PROVISION - PERIODIC PAYMENTS ON TAXES AND INSURANCE. In addition to the periodic payments on the purchase price, Buyer agrees to pay Seller such portion of the real estate taxes and assessments and fire insurance premium as will approximately total the amount due during the current year based on Seller's reasonable estimate.

The payments during the current year shall be per month. Such "reserve" payments from Buyer shall not accrue interest. Seller shall pay when due all real estate taxes and insurance premiums, if any, and debit the amounts so paid to the reserve account. Buyer and Seller shall adjust the reserve account in April of each year to reflect excess or deficit balances and changed costs. Buyer agrees to bring the reserve account balance to a minimum of \$10 at the time of adjustment.

SELLER INITIALS BUYER

33. ADDENDA. Any addenda attached hereto are part of this Contract.

34. ENTIRE AGREEMENT. This Contract constitutes the entire agreement of the parties and supercedes all prior agreements and understandings, written or oral. This Contract may be amended only in writing executed by Seller and Buyer.

IN WITNESS WHEREOF the parties have signed and sealed this Contract the day and year first above written.

SELLER: BUYER:

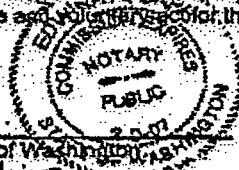
The Estate of Reno J. Dalle
 By: Shirley J. Dalle, Personal Representative
 By: _____

Marci Walch
 Marci Walch

STATE OF Washington)
) ss.
 COUNTY OF Kittitas)

I certify that I know or have satisfactory evidence that Mike Walch and Marci Walch (is/are) the person(s) who appeared before me, and said person(s) acknowledged that (he/she/they) signed this instrument and acknowledged it to be (his/hers/their) free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: June 17 2004



Notary Public in and for the State of Washington
 My appointment expires: 2/2/07

STATE OF Washington)
) ss.
 COUNTY OF Kittitas)

I certify that I know or have satisfactory evidence that Shirley J. Dalle (is/are) the person(s) who appeared before me, and said person(s) acknowledged that (he/she/they) signed this instrument, on oath stated that (he/she/they) (is/are) authorized to execute the instrument and acknowledged it as the Personal Representative for the Estate of Reno J. Dalle to be the free and voluntary act for the uses and purposes mentioned in this instrument.

Dated: May 19 2004



Notary Public in and for the State of Washington
 My appointment expires: 11/11/04



EXHIBIT A

PARCEL A:

Lot 1 of that certain Boundary Line Adjustment survey recorded May 4, 2004, in Book 30 of Surveys, page 49, under Auditor's File No. 200405040030, records of Kittitas County, State of Washington; being a portion of Sections 26 and 35, Township 20 North, Range 15 East, W.M., Kittitas County, State of Washington.

PARCEL B:

Together with an easement 25.00 feet in width, 12.50 feet on each side of the following described centerline following the existing road across Lots 1, 2, 3 and 4, THIRD ADDITION TO CLE ELUM, as per plat thereof recorded June 13, 1903 in Book 2 of Plats at page 29, Records of Kittitas County, State of Washington:

BEGINNING at the Southwest corner of Lot 1 of said THIRD ADDITION TO CLE ELUM as surveyed in Book 22 of Surveys, page 55; THENCE North 10°40'09" East, along the West line of said Lot 1, 139.87 feet to the middle of the existing road and the true point of beginning for said described centerline; THENCE along the middle of the existing road the following six courses: North 73°41'48" East, 108.94 feet; North 77°57'11" East, 74.15 feet; North 75°40'56" East, 144.15 feet; North 79°02'13" East, 311.23 feet; North 74°40'57" East, 88.00 feet; AND North 64°51'56" East, 52.32 feet to the centerline intersection of said road with the Southerly right of way boundary of the Burlington Northern and Santa Fe Railroad and the terminus for said described centerline.

PARCEL C:

An easement for ingress, egress and utilities described as follows:

This easement is intended to extend the existing "non-exclusive easement in perpetuity for right-of-way along the present existing roadway 25 feet in width extending across Tracts 1, 2, 3, and 4, THIRD ADDITION TO CLE ELUM," said non-exclusive easement recorded in Volume 128, Page 216, records of Kittitas County, from the Westerly edge of said Tract 1 through portions of Tax Parcels 20-15-26043-0001 and 20-15-35010-0001 to the Westerly edge of Tax Parcel 20-15-08043-0001 along the following centerline description:

BEGINNING at a point on the centerline of the said non-exclusive easement which is on the Westerly edge of said Tract 1 and also N 10°40'09" East 139.87 feet from the Southeast corner of Tax Parcel 20-15-26043-0001 as recorded in Book 22 of Surveys, Page 55, records of Kittitas County; THENCE South 73°41'48" West, 116.72; THENCE South 51°48'39" West, 106.77 feet; THENCE South 51°34'12" West, 124.43 feet; THENCE South 75°34'13" West, 67.01 feet; THENCE South 51°39'57" West, 49.30 feet; THENCE South 47°47'48" West, 28.98 feet to the Southerly edge of Tax Parcel 20-15-26043-0001 and the Northerly edge of Tax Parcel 20-15-35010-0001; THENCE continuing South 47°47'48" West, 23.58 feet; THENCE South 82°03'22" West, 49.60 feet; THENCE South 25°50'03" West, 29.90 feet; THENCE South 36°07'56" West, 45.52 feet; THENCE South 53°21'19" West, 27.28 feet; THENCE South 71°25'18" West, 29.83 feet; THENCE South 85°48'10" West, 30.11 feet; THENCE North 53°56'57" West, 45.35 feet; THENCE North 32°36'05" West, 307.28 feet; THENCE North 64°41'50" West, 49.62 feet;



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Page: 8 of 10
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KILLIAN Co. Register STAMPT TITLE KITTITAS REC 28.00

THENCE North 45°38'07" West 50.52 feet;
THENCE North 40°17'01" West, 18.52 feet to the Northerly edge of Tax Parcel 20-15-35010-0001 and the Southerly edge of Tax Parcel 20-15-26043-0001;
THENCE continuing North 40°17'01" West, 15.75 feet;
THENCE North 35°19'46" West 98.63 feet to end this easement at a point on the Westerly edge of Tax Parcel 20-15-26043-0001 and the Easterly edge of Tax Parcel 20-15-26043-0002, said point being North 13°23'23" East, 52.37 feet from the Southwest corner of Tax Parcel 20-15-26043-0001.
THIS COMPLETES the centerline description of an easement for a right-of-way of a roadway 25 feet in total width.
EXCEPT any portion of said easement lying within the above described Parcel A.



000020

EXHIBIT B

FUTURE FACILITY CHARGES, if any, including but not limited to hook-up, or connection charges and latecomer charges for water or sewer facilities of Cle Elum as disclosed by instrument recorded under recording number 589881.

INITIAL
HERE

THE TAXES AS CURRENTLY ASSESSED include other property. The Kittitas County taxing authorities may not recognize a segregation created by the proposed transaction unless a parcel segregation is approved by said County and submitted to the Kittitas

INITIAL
HERE

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 then 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(ies) will contain the following exception:

The lack of a right of access to and from the land across a railroad right of way.

COVENANT AGAINST BLASTING AND/OR DISCHARGE OF EXPLOSIVES as contained in instrument granting easement on adjacent property:

Recorded: July 9, 1957
Recording no.: 264889

CONDEMNATION IN KITTITAS COUNTY SUPERIOR COURT by the State of Washington of the rights of access to state highway and of light, view and air as disclosed by Lis Pendens.

Recorded: October 20, 1964
Recording no.: 316313
Decree entered: October 20, 1964
Cause no.: 16091
Affects: A portion of said premises and other property.

RESERVATIONS, EASEMENTS AND CONDITIONS thereof contained in Real Estate

Contract:

Recorded: December 13, 1965
Recording no.: 326442

As Follows:

As part of this agreement purchaser is granted by sellers a non-exclusive easement in perpetuity for the right of way along the present existing roadway 25 feet in width extending across tracts 1, 2, 3, 4, Third Addition to the City of Cle Elum, in Kittitas County, Washington and then across Northern Pacific Railroad land (so long as the railroad shall allow) for ingress and egress to and from the properties herein sold to purchaser. By deed dated April 15, 1960 recorded in Volume 105 of Deeds at page 69, records of Kittitas County, from sellers to Richard Owens Sr. and Wife, sellers reserved an easement across Tracts 5, 6, and 7 of that portion of Third Addition to Cle Elum in Kittitas County, Washington, which lies South of the Northern Pacific Railway Company right of way, for purpose of ingress and egress, provided this easement is to be exercised only if the existing roads leading to the sellers lands are for reasons beyond control of sellers and Owens, vacated or closed in the future. Sellers agree that if the existing roadway through the Northern Pacific Railroad Company land is so vacated or closed in the future, purchasers shall have joint use of this reserved easement, with sellers, across said Tracts 5, 6, and 7 of that portion of Third Addition to the City of Cle Elum which lies south of the said railroad company right of way. Purchaser shall use neither easement until road across N.P. lands is vacated or closed.

REFERENCE IS ALSO MADE TO RESERVATIONS, EASEMENTS AND CONDITIONS contained in Warranty Deed:

Recorded: December 20, 1965
Recording no.: 345126

Refer to record for full particulars.



RESERVATIONS AND EXCEPTIONS, including the terms and conditions thereof:

Reserving: Minerals
Reserved by: Northwestern Improvement Company
Recorded: February 11, 1922
Recording no.: 84948

Note: No examination has been made as to the current ownership of said mineral estate.

Refer to the record of said instrument for full particulars.

RESERVATIONS AND EXCEPTIONS, including the terms and conditions thereof:

Reserving: Minerals
Reserved by: Frank Della Mollie and Regina Della Mollie
Recorded: August 10, 1955
Recording no.: 252165

Refer to the record of said instrument for full particulars.

Note: No examination has been made as to the current ownership of said mineral estate.

A RECORD OF SURVEY and matters relating thereto:

Recorded: August 13, 1896
Recording no.: 199508130027
Book: 22
Page: 55

A RECORD OF SURVEY and any and all matters relating thereto:

Recorded: May 4, 2004
Recording no.: 200405040030
Book: 30
Page: 49



EXHIBIT "B"

EXHIBIT "B"

EXHIBIT

"B"

EXHIBIT "B"

EXHIBIT "B"

000023



Real Estate Excise Tax
Exempt

Kittitas County Treasurer

By K. J. Bell
AFF # 2005-1227

05-24-05

AFTER RECORDING RETURN TO:
CONE GILBREATH LAW OFFICES
P. O. BOX 337
CLE ELUM, WASHINGTON 98922

Tax Parcel No. 20-15-26034-0001
Abbrev. Descr.: Pta SE 1/4 of the SW 1/4 of Sec 26, Twp 20N, Rge 15 E,
Kittitas County, Washington
Complete Description on page 1

QUIT CLAIM DEED

THE GRANTORS, WILLIAM L. CLARK and PATRICIA LANE CLARK, husband and wife, for and in consideration of LOVE and AFFECTION, conveys and quit claims to KERRY A. CLARK and PATRICIA L. CLARK, husband and wife, GRANTEES, the following described real estate, situated in the County of Kittitas, State of Washington:

Parcel A:

That portion of the SE 1/4 of the SW 1/4 of Section 26, Township 20 North, Range 15 East, W.M., in the County of Kittitas, State of Washington, lying South of the South line of the Burlington Northern Railroad Company's right-of-way, and North and East of the Northerly right-of-way line of Primary State Highway No. 2 (I-90)

EXCEPT the Westerly 4.05 acres thereof, all as described and/or delineated on the face of that certain Survey filed in Book 18 of Surveys, page 120, records of Kittitas County, State of Washington.

Parcel B:

An easement for ingress and egress over, under and across the North 60 feet of the Westerly 4.04 acres of that portion of the SE 1/4 of the SW 1/4 of Section 26, Township 20 north, Range 15 East, W.M., in the County of Kittitas, State of Washington, lying South of the South line of the Burlington Northern Railroad Company's right-of-way, and North and East of the Northerly right-of-way line of Primary State Highway No. 2 (I-90)

TOGETHER WITH all of Grantor's right title and interest under that certain Railroad Lease/Permit No. 250216 provided however Grantor makes no representation as to the assignability of said lease/permit and Grantees assume any and all obligations to contact the railroad to pursue assignment of said lease/permit for the acquisition of Grantees own Railroad Lease/Permit.

INCLUDING all improvements and appurtenances.

SUBJECT TO:

The premises herein described may be subject to possible tap or connection charges with respect to either city sewer or city water facilities as recorded in instrument under Auditor's File No. 569881.

Any unpaid assessments levied by the Town of Cle Elum.

Condemnation by the State of Washington of right of access to State Highway and of light, view and air, by decree entered in Kittitas County Superior Court, Case No. 15935.

Pendency of Yakima County Superior Court Cause No. 77-2-01484-5, State vs. Acquavella, et AL; as the same pertains to water rights.

Exceptions and Reservation as contained in instrument recorded under Auditor's File No. 499625.

All matters contained and/or delineated on Survey file under Auditor's File NO. 523211.

All matters contained and/or delineated on Survey file under Auditor's File NO. 546773.

Easement and the terms and conditions thereof as contained in instrument recorded under Auditor's File No. 548632.

DATED this 20 day of May 2005.

William L. Clark
WILLIAM L. CLARK

Patricia Lane Clark
PATRICIA LANE CLARK

STATE OF WASHINGTON)
County of Kittitas) ss.

I certify that I know or have satisfactory evidence that WILLIAM L. CLARK and PATRICIA LANE CLARK are the persons who appeared before me, and said persons acknowledged that they signed this instrument and acknowledged it to be their free and voluntary act for the uses and purposes mentioned in the instrument.

DATED this 20 day of May 2005.

(Notary Public)

[Signature]
Notary Public in and for the State of Washington.
My Commission expires: 11-1-08



EXHIBIT "C-1"

EXHIBIT "C-1"

EXHIBIT

"C-1"

EXHIBIT "C-1"

EXHIBIT "C-1"

000026

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\$44.00
Quit Claim Deed CLARK
Kittitas County Auditor

200806110041
Page 1 of 3

After recording return to:

Patricia L. Clark
480 River Ranch Lane
Cle Elum, WA 98922

Real Estate Excise Tax
Exempt
Kittitas County Treasurer
By: *[Signature]*
Affidavit No. *2008-923*
Date: *6/11/08*

| | |
|-----------------------|---|
| DOCUMENT TITLE | Quit Claim Deed |
| GRANTOR | Patricia L. Clark, Trustee of the William Luther Clark By Pass Trust e/u/w/d 5/25/1999 |
| GRANTEE | W.L. Clark Family, LLC |
| LEGAL DESCRIPTION | Ptn of S 1/2 of S 26, T 20 N, R 15 E, W.M. |
| ASSESSOR'S PARCEL NO. | 20-15-26044-0003 (20408) |

QUIT CLAIM DEED

THE GRANTOR, PATRICIA L. CLARK, Trustee of the William Luther Clark By Pass Trust e/u/w/d 5/25/1999, for and in consideration of transfer to a limited liability company, conveys and quit claims to the W.L. CLARK FAMILY, LLC, a Washington limited liability company, the following described real estate, situated in the County of Kittitas, State of Washington, together with all after acquired title of the Grantor therein:

All of Grantor's undivided 1/2 interest in the real estate described on Exhibit A attached hereto, situated in the County of Kittitas, State of Washington,

DATED: 6/11/08

Patricia L. Clark Trustee
PATRICIA L. CLARK, Trustee



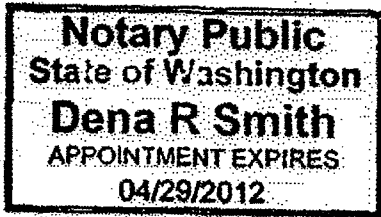
STATE OF WASHINGTON)
) ss.
County of Kittitas)

THIS IS TO CERTIFY that on the 11, day of June, 2008, before me, a Notary Public in and for the State of Washington, duly commissioned and sworn, came PATRICIA L. CLARK, trustee of the WILLIAM LUTHER CLARK BY PASS TRUST e/u/w/d 5/25/1999, personally known or having presented satisfactory evidence to be the individual described in and who executed the within instrument, and acknowledged that she signed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS MY HAND and official seal the day and year in this certificate first above written.

Dena R Smith

Print Name: Dena R Smith
Notary Public in and for the State of Washington,
residing at Kittitas County
Expiration Date: 4-29-2012



**EXHIBIT A**

That portion of the South Half, Section 26, Township 20 North, Range 15 East, W. M., all situated in Kittitas County, State of Washington described as follows:

Beginning at the South quarter corner of said Section; Thence North $00^{\circ}23'00''$ East along the East line of the Southwest Quarter of said Section 26, a distance of 853.03 feet to a point which is at right angles and 200 feet distance Southerly from the centerline of the existing mainline for The Burlington Northern and Santa Fe Railway Company, and is also the True Point of Beginning; Thence North $10^{\circ}34'34''$ East at right angles to said railway, 150.00 feet; Thence North $79^{\circ}25'26''$ West, parallel with and 50 feet distance at right angles from the centerline of the said railway, 1466.67 feet; Thence South $10^{\circ}34'34''$ West, at right angles from the said railway, 150.00 feet; Thence South $79^{\circ}25'26''$ East, parallel with and 200 feet distance at right angles from the centerline of said railway, 1466.67 feet to the True Point of Beginning.

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EXHIBIT "C-2"

EXHIBIT "C-2"

EXHIBIT

"C-2"

EXHIBIT "C-2"

EXHIBIT "C-2"

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564.00
Quit Claim Deed CLARK
Kittitas County Auditor

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Page 1 of 3

After recording return to:



Patricia L. Clark
480 River Ranch Lane
Cle Elum, WA 98922

Real Estate Excise Tax
Exempt
Kittitas County Treasurer
By: [Signature]
Affidavit No. 209-1317
Date: 9-28-09

| | |
|-----------------------|--|
| DOCUMENT TITLE | Quit Claim Deed |
| GRANTOR | Patricia L. Clark, a single woman |
| GRANTEE | W.L. Clark Family, LLC, a Washington limited liability company |
| LEGAL DESCRIPTION | Pt of S 1/2 of S 26, T 20 N, R 15 E, W.M. |
| ASSESSOR'S PARCEL NO. | 20-15-26044-0003 (20408) |

QUIT CLAIM DEED

THE GRANTOR, PATRICIA L. CLARK, a single woman, for and in consideration of transfer to a limited liability company, conveys and quit claims to the W.L. CLARK FAMILY, LLC, a Washington limited liability company, the following described real estate situated in the County of Kittitas, State of Washington, together with all after acquired title of the Grantor therein:

All of Grantor's undivided 1/2 interest in the real estate described on Exhibit A attached hereto, situated in the County of Kittitas, State of Washington,

DATED: 9/28/09

[Signature]
Patricia L. Clark, a single woman

STATE OF WASHINGTON)
) ss.
County of Kittitas)

THIS IS TO CERTIFY that on the 28, day of September, 2009, before me, a Notary Public in and for the State of Washington, duly commissioned and sworn, came PATRICIA L. CLARK, a single woman, personally known or having presented satisfactory evidence to be the individual described in and who executed the within instrument, and acknowledged that she signed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS MY HAND and official seal the day and year in this certificate first above written.

Shelley Winfrey
Print Name: Shelley Winfrey
Notary Public in and for the State of Washington,
residing at Che Elum
Expiration Date: 2-3-10

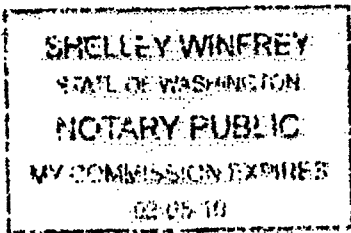


EXHIBIT A

That portion of the South Half, Section 26, Township 20 North, Range 15 East, W. M., all situated in Kittitas County, State of Washington described as follows:

Beginning at the South quarter corner of said Section; Thence North $00^{\circ}23'00''$ East along the East line of the Southwest Quarter of said Section 26, a distance of 853.03 feet to a point which is at right angles and 200 feet distance Southerly from the centerline of the existing mainline for The Burlington Northern and Santa Fe Railway Company, and is also the True Point of Beginning; Thence North $10^{\circ}34'34''$ East at right angles to said railway, 150.00 feet; Thence North $79^{\circ}25'26''$ West, parallel with and 50 feet distance at right angles from the centerline of the said railway, 1466.67 feet; Thence South $10^{\circ}34'34''$ West, at right angles from the said railway, 150.00 feet; Thence South $79^{\circ}25'26''$ East, parallel with and 200 feet distance at right angles from the centerline of said railway, 1466.67 feet to the True Point of Beginning.

EXHIBIT "D"

EXHIBIT "D"

EXHIBIT

"D"

EXHIBIT "D"

EXHIBIT "D"

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 Page: 1 of 3
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 34.00

Kittitas Co. Auditor HANSON ET AL NOED

Filed at Request of:

ANDRÉE R. CHICHA
 HANSON BAKER LUDLOW DRUMHELLER P.S.
 10777 Main Street, Suite 300
 Bellevue, Washington 98004

Real Estate Excise Tax
 Exempt
 Kittitas County Treasurer
 By M. Slarks
 Affidavit No. 2006-731
 Date: 4-3-2006

| | |
|--|---|
| DOCUMENT TITLE | Personal Representative's Deed |
| REFERENCE NO. OF DOCUMENTS ASSIGNED/RELEASED | |
| GRANTOR | Snyder, Candi L., as personal representative of the Estate of Clark, William Luther. |
| GRANTEE | Clark, Patricia L. Trustee of the Clark, William Luther By Pass Trust e/u/w d 5/25/1999 |
| LEGAL DESCRIPTION | Portion of S 1/2 of Sec 26, Twn 20 N, R 15 E, W.M. |
| ASSESSOR'S PARCEL NO. | "Railroad Right of Way" 201526-0440003 |

PERSONAL REPRESENTATIVE'S DEED

THE GRANTOR, Candis L. Snyder, Personal Representative of the Estate of William Luther Clark, for and in consideration of the distribution of estate assets, conveys and quit claims to Patricia L. Clark, Trustee of the William Luther Clark By Pass Trust e/u/w/d 5/25/1999:

All of Grantor's undivided 1/2 interest in the real estate described on Exhibit A attached hereto, situated in the County of Kittitas, State of Washington,

Together with all after acquired title of the Grantor therein:

King County Probate Cause No. 05-4-04871-6SEA.

DATED March 22, 2006

Candis L. Snyder
 Candis L. Snyder, Personal Representative of the Estate of William Luther Clark



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Page: 2 of 3
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34.00

STATE OF WASHINGTON)
) SS.
COUNTY OF KING)

THIS IS TO CERTIFY that on the _____ day of March, 2006 before me, a Notary public in and for the State of Washington, duly commissioned and sworn, came Candis L. Snyder, personally known or having presented satisfactory evidence to be the individual described in and who executed the within instrument, and acknowledged that she signed the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS MY HAND and official seal the day and year in this certificate first above written.



Print Name: _____
Notary Public in and for the
State of Washington, residing at

Expiration Date: _____

EXHIBIT A

That portion of the South Half, Section 26, Township 20 North, Range 15 East, W. M., all situated in Kittitas County, State of Washington described as follows:

Beginning at the South quarter corner of said Section; Thence North $00^{\circ}23'00''$ East along the East line of the Southwest Quarter of said Section 26, a distance of 853.03 feet to a point which is at right angles and 200 feet distance Southerly from the centerline of the existing mainline for The Burlington Northern and Santa Fe Railway Company, and is also the True Point of Beginning; Thence North $10^{\circ}34'34''$ East at right angles to said railway, 150.00 feet; Thence North $79^{\circ}25'26''$ West, parallel with and 50 feet distance at right angles from the centerline of the said railway, 1466.67 feet; Thence South $10^{\circ}34'34''$ West, at right angles from the said railway, 150.00 feet; Thence South $79^{\circ}25'26''$ East, parallel with and 200 feet distance at right angles from the centerline of said railway, 1466.67 feet to the True Point of Beginning.



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Page: 3 of 3
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Kittitas Co Auditor HANSON ET AL MOED 34.00

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EXHIBIT "E"

EXHIBIT "E"

EXHIBIT

"E"

EXHIBIT "E"

EXHIBIT "E"

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WHEN RECORDED MAIL TO:

CONE GILREATH LAW OFFICES
P.O. Box 337
Cle Elum, WA 98922

RE EXCISE TAX PAID
Amount 14207.50
Date 7-2-04
Affidavit No. 2004-1477
KITITIAS COUNTY TREASURER
By [Signature]

QUITCLAIM DEED

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation, (formerly Burlington Northern Railroad Company), of 2500 Lou Menk Drive, Fort Worth, Texas 76131-2830, hereinafter called "Grantor", for and in consideration of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration, in hand paid, conveys and quitclaims, without any covenants of warranty whatsoever and without recourse to the Grantor, its successors and assigns, to WILLIAM L. CLARK AND PATRICIA LANE CLARK, of 480 River Ranch Lane, Cle Elum, Washington 98922, hereinafter collectively called "Grantee", all its right, title and interest, if any, in real estate, subject, however, to all existing interests, including but not limited to all reservations, rights-of-way and easements of record or otherwise, situated in the County of Kittitas, State of Washington, hereinafter called "Property", together with all after acquired title of Grantor therein, more particularly described as follows:

Part of the South half of Section 26, Township 20 North, Range 15 East, W.M., Kittitas County, Washington, complete legal description is described on page 7 as Exhibit "A", consisting of one (1) page, attached hereto and made a part hereof.

The obligations in this Section shall be binding upon Grantee and its heirs, successors and assigns, and shall be covenants running with the land benefiting Grantor and Grantor's successors and assigns.

(a) Grantee's interest shall be subject to the rights and interests of Grantor, Grantor's licensees, permittees and other third parties in and to all existing driveways, roads, utilities, fiber optic lines, tracks, wires and easements of any kind whatsoever on the Property whether owned, operated, used or maintained by the Grantor, Grantor's licensees, permittees or other third parties and whether or not of public record. Grantor shall have a perpetual easement on the Property for the use of such existing driveways, roads, utilities,

Assessor's Property Tax Parcel Account Number: Railroad right of way.



fiber optic lines, tracks, wires and easements by Grantor and Grantor's licensees, permittees and customers. Grantor shall have a non-exclusive easement for the construction, maintenance and operation of one or more pipelines or fiber optic lines and any and all communications facilities as may be located in the future on the Property within 60 feet of the center line of any Main Track on or adjacent to the Property and as may be presently located on the Property.

(b) Any improvements constructed or altered on the Property after the date Grantor quitclaims its interest to Grantee shall be constructed or altered in such a manner to provide adequate drainage of water away from any of Grantor's railroad tracks on nearby property.

Grantee has been allowed to make an inspection of the Property. **GRANTEE IS PURCHASING THE PROPERTY IN AN "AS-IS WITH ALL FAULTS" BASIS WITH ANY AND ALL PATENT AND LATENT DEFECTS, INCLUDING THOSE RELATING TO THE ENVIRONMENTAL CONDITION OF THE PROPERTY, AND IS NOT RELYING ON ANY REPRESENTATION OR WARRANTIES, EXPRESS OR IMPLIED, OF ANY KIND WHATSOEVER FROM GRANTOR AS TO ANY MATTERS CONCERNING THE PROPERTY,** including, but not limited to the physical condition of the Property; zoning status; tax consequences of this transaction; utilities; operating history or projections or valuation; compliance by the Property with Environmental Laws (defined below) or other laws, statutes, ordinances, decrees, regulations and other requirements applicable to the Property; the presence of any Hazardous Substances (defined below), wetlands, asbestos, lead, lead-based paint or other lead containing structures, urea formaldehyde, or other environmentally sensitive building materials in, on, under, or in proximity to the Property; the condition or existence of any of the above ground or underground structures or improvements, including tanks and transformers in, on or under the Property; the condition of title to the Property, and the leases, easements, permits, orders, licensees, or other agreements, affecting the Property (collectively, the "Condition of the Property"). Grantee represents and warrants to Grantor that Grantee has not relied and will not rely on, and Grantor is not liable for or bound by, any warranties, guaranties, statements, representations or information pertaining to the Property or relating thereto (including specifically, without limitation, Property information packages distributed with respect to the Property) made or furnished by Grantor, the manager of the Property, or any real estate broker or agent representing or purporting to represent Grantor, to whomsoever made or given, directly or indirectly, orally or in writing. Grantee assumes the risk that Hazardous Substances or other adverse matters may affect the Property that were not revealed by Grantee's inspection and indemnifies, holds harmless and hereby waives, releases and discharges forever Grantor and Grantor's

officers, directors, shareholders, employees and agents (collectively, "Indemnitees") from any and all present or future claims or demands, and any and all damages, Losses, injuries, liabilities, causes of actions (including, without limitation, causes of action in tort) costs and expenses (including, without limitation fines, penalties and judgments, and attorneys' fees) of any and every kind or character, known or unknown, which Grantee might have asserted or alleged against Indemnitees arising from or in any way related to the Condition of the Property or alleged presence, use, storage, generation, manufacture, transport, release, leak, spill, disposal or other handling of any Hazardous Substances in, on or under the Property. Losses shall include without limitation (a) the cost of any investigation, removal, remedial or other response action that is required by any Environmental Law, that is required by judicial order or by order of or agreement with any governmental authority, or that is necessary or otherwise is reasonable under the circumstances, (b) capital expenditures necessary to cause the Grantor remaining property or the operations or business of the Grantor on its remaining property to be in compliance with the requirements of any Environmental Law, (c) Losses for injury or death of any person, and (d) Losses arising under any Environmental Law enacted after transfer. The rights of Grantor under this section shall be in addition to and not in lieu of any other rights or remedies to which it may be entitled under this document or otherwise. This indemnity specifically includes the obligation of Grantee to remove, close, remediate, reimburse or take other actions requested or required by any governmental agency concerning any Hazardous Substances on the Property. The term "Environmental Law" means any federal, state or local statute, regulation, code, rule, ordinance, order, judgment, decree, injunction or common law pertaining in any way to the protection of human health or the environment, including without limitation, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Toxic Substances Control Act, and any similar or comparable state or local law. The term "Hazardous Substance" means any hazardous, toxic, radioactive or infectious substance, material or waste as defined, listed or regulated under any Environmental Law, and includes without limitation petroleum oil and any of its fractions. The provisions of this Section shall be binding on Grantee, and its heirs, successors and assigns, and shall be covenants running with the land.

By accepting this Deed, Grantee acknowledges that Grantor, as successor in interest to the Northern Pacific Railway Company, acquired a determinable ownership interest in the Property from the United States of America, pursuant to Section 2 of the Northern Pacific Land Grant Act of 1864, and Grantee agrees to the conditions and limitations imposed by this Northern Pacific Land Grant Act.

Grantee shall, at its sole cost and expense, construct and maintain a protective fence on or inside the north, east and west boundaries of the hereinafter described Property, using such material and at such height that meets the approval of Grantor.

TO HAVE AND TO HOLD the Property, together with all the appurtenances thereunto belonging, to the said Grantees, their heirs and assigns, forever.

IN WITNESS WHEREOF, the said Grantor caused this instrument to be signed by its authorized representative, attested by its Assistant Secretary, and its corporate seal to be affixed hereto on the 22nd day of June, 2004.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

By: D. P. Schneider
D. P. Schneider
General Director Real Estate

ATTEST:

By: Patricia Zbichorski
Patricia Zbichorski
Assistant Secretary



ACCEPTED:

WILLIAM L. CLARK AND PATRICIA
LANE CLARK

By: William L. Clark
Name: William L. Clark

By: Patricia Lane Clark
Name: Patricia Lane Clark

STATE OF WASHINGTON §
 § ss.
COUNTY OF KITTITAS §

On this 5 day of July, 2004, before me personally appeared William L. Clark and Patricia Lane Clark, to me known to be the persons that they accepted the foregoing instrument, and acknowledged the said instrument to be their free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal hereto affixed the day and year first above written.



[Signature]
Notary Public in and for the State of WA
Residing at: Cle Elum
My appointment expires: 11/1/04



STATE OF TEXAS

§

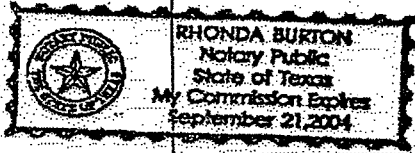
§ ss.

COUNTY OF TARRANT

§

On this 22nd day of June, 2004, before me, the undersigned, a Notary Public in and for the State of Texas, duly commissioned and sworn, personally appeared D. P. Schneider and Patricia Zbichorski, to me known to be the General Director Real Estate and Assistant Secretary, respectively, of THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, the Delaware corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal hereto affixed the day and year first above written.



Rhonda Burton
Notary Public in and for the State of Texas
Residing at Carellton, Texas
My appointment expires: 9/21/2004

FORM APPROVED BY LAW

| | |
|----------------|--------------------|
| APPROVED LEGAL | <i>[Signature]</i> |
| APPROVED FORM | <i>AH</i> |
| APPROVED | <i>[Signature]</i> |

EXHIBIT "A"

The Southerly 150 feet of The Burlington Northern and Santa Fe Railway Company's (formerly Northern Pacific Railway Company 400 foot wide Charter Right of Way, being 200 feet wide on each side of said Railway Company's Main Track centerline, as originally located and constructed upon, over and across the S½ of Section 26, Township 20 North, Range 15 East, W. M., Kittitas County, Washington, lying between two lines drawn parallel with and distant, respectively, 50 feet and 200 feet Southerly, as measured at right angles from said Main Track centerline, bounded on the East by a line drawn parallel with and 120 feet normally distant Easterly from the Southerly extension of the centerline of Peoh Avenue, according to the Plat of Hazelwood, and bounded on the West by a line drawn parallel with and 30 feet normally distant Westerly from the Southerly extension of the centerline of Harris Avenue, according to the Plat of Cle Elum.

 200407020048
Page: 7 of 7
Kittitas Co Auditor: CONE, SILBERTH, ELLIS LOCONE 25.88 07/02/2004 04:17P

EXHIBIT "F"

EXHIBIT "F"

EXHIBIT

"F"

EXHIBIT "F"

EXHIBIT "F"

000046

WHEN RECORDED MAIL TO:



200412020030
Page: 1 of 6
12/02/2004 04:29P
QCD 24.00

CONE GILREATH LAW OFFICES
P.O.Box 337
Cle Elum, WA 98922

Real Estate Excise Tax
Exempt
Kittitas County Treasurer
By K. Hill
AFF # 2004-2999
12-02-04

CORRECTION QUITCLAIM DEED

This deed supersedes and replaces, and is given to correct the description to that certain Quitclaim Deed dated June 22, 2004 between The Burlington Northern and Santa Fe Railway Company and William L. Clark and Patricia Lane Clark which deed was recorded July 2, 2004 in the records of the Kittitas County Auditor, as Auditor's Number 200407020048.

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, a Delaware corporation, (formerly Burlington Northern Railroad Company), of 2500 Lou Menk Drive, Fort Worth, Texas 76131-2830, hereinafter called "Grantor", for and in consideration of Ten and No/100 Dollars (\$10.00) and other good and valuable consideration, in hand paid, conveys and quitclaims, without any covenants of warranty whatsoever and without recourse to the Grantor, its successors and assigns, to **WILLIAM L. CLARK AND PATRICIA LANE CLARK**, of 480 River Ranch Lane, Cle Elum, Washington 98922, hereinafter collectively called "Grantee", all its right, title and interest, if any, in real estate, subject, however, to all existing interests, including but not limited to all reservations, rights-of-way and easements of record or otherwise, situated in the County of Kittitas, State of Washington, hereinafter called "Property", together with all after acquired title of Grantor therein, more particularly described as follows:

Part of the South half of Section 26, Township 20 North, Range 15 East, W.M., Kittitas County, Washington, complete legal description is described on page 6 as Exhibit "A", consisting of one (1) page, attached hereto and made a part hereof.

Assessor's Property Tax Parcel Account Number: Railroad right of way.



The obligations in this Section shall be binding upon Grantee and its heirs, successors and assigns, and shall be covenants running with the land benefiting Grantor and Grantor's successors and assigns.

(a) Grantee's interest shall be subject to the rights and interests of Grantor, Grantor's licensees, permittees and other third parties in and to all existing driveways, roads, utilities, fiber optic lines, tracks, wires and easements of any kind whatsoever on the Property whether owned, operated, used or maintained by the Grantor, Grantor's licensees, permittees or other third parties and whether or not of public record. Grantor shall have a perpetual easement on the Property for the use of such existing driveways, roads, utilities, fiber optic lines, tracks, wires and easements by Grantor and Grantor's licensees, permittees and customers. Grantor shall have a non-exclusive easement for the construction, maintenance and operation of one or more pipelines or fiber optic lines and any and all communications facilities as may be located in the future on the Property within 60 feet of the center line of any Main Track on or adjacent to the Property and as may be presently located on the Property.

(b) Any improvements constructed or altered on the Property after the date Grantor quitclaims its interest to Grantee shall be constructed or altered in such a manner to provide adequate drainage of water away from any of Grantor's railroad tracks on nearby property.

Grantee has been allowed to make an inspection of the Property. **GRANTEE IS PURCHASING THE PROPERTY IN AN "AS-IS WITH ALL FAULTS" BASIS WITH ANY AND ALL PATENT AND LATENT DEFECTS, INCLUDING THOSE RELATING TO THE ENVIRONMENTAL CONDITION OF THE PROPERTY, AND IS NOT RELYING ON ANY REPRESENTATION OR WARRANTIES, EXPRESS OR IMPLIED, OF ANY KIND WHATSOEVER FROM GRANTOR AS TO ANY MATTERS CONCERNING THE PROPERTY,** including, but not limited to the physical condition of the Property; zoning status; tax consequences of this transaction; utilities; operating history or projections or valuation; compliance by the Property with Environmental Laws (defined below) or other laws, statutes, ordinances, decrees, regulations and other requirements applicable to the Property; the presence of any Hazardous Substances (defined below), wetlands, asbestos, lead, lead-based paint or other lead containing structures, urea formaldehyde, or other environmentally sensitive building materials in, on, under, or in proximity to the Property; the condition or existence of any of the above ground or underground structures or improvements, including tanks and transformers in, on or under the Property; the condition of title to the Property, and the leases, easements, permits, orders, licensees, or other agreements, affecting the Property (collectively, the "Condition of the Property"). Grantee represents and warrants to Grantor that Grantee has not relied and will not rely on, and Grantor is not liable for or



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bound by, any warranties, guaranties, statements, representations or information pertaining to the Property or relating thereto (including specifically, without limitation, Property information packages distributed with respect to the Property) made or furnished by Grantor, the manager of the Property, or any real estate broker or agent representing or purporting to represent Grantor, to whomever made or given, directly or indirectly, orally or in writing. Grantee assumes the risk that Hazardous Substances or other adverse matters may affect the Property that were not revealed by Grantee's inspection and indemnifies, holds harmless and hereby waives, releases and discharges forever Grantor and Grantor's officers, directors, shareholders, employees and agents (collectively, "Indemnitees") from any and all present or future claims or demands, and any and all damages, Losses, injuries, liabilities, causes of actions (including, without limitation, causes of action in tort) costs and expenses (including, without limitation fines, penalties and judgments, and attorneys' fees) of any and every kind or character, known or unknown, which Grantee might have asserted or alleged against Indemnitees arising from or in any way related to the Condition of the Property or alleged presence, use, storage, generation, manufacture, transport, release, leak, spill, disposal or other handling of any Hazardous Substances in, on or under the Property. Losses shall include without limitation (a) the cost of any investigation, removal, remedial or other response action that is required by any Environmental Law, that is required by judicial order or by order of or agreement with any governmental authority, or that is necessary or otherwise is reasonable under the circumstances, (b) capital expenditures necessary to cause the Grantor remaining property or the operations or business of the Grantor on its remaining property to be in compliance with the requirements of any Environmental Law, (c) Losses for injury or death of any person, and (d) Losses arising under any Environmental Law enacted after transfer. The rights of Grantor under this section shall be in addition to and not in lieu of any other rights or remedies to which it may be entitled under this document or otherwise. This indemnity specifically includes the obligation of Grantee to remove, close, remediate, reimburse or take other actions requested or required by any governmental agency concerning any Hazardous Substances on the Property. The term "Environmental Law" means any federal, state or local statute, regulation, code, rule, ordinance, order, judgment, decree, injunction or common law pertaining in any way to the protection of human health or the environment, including without limitation, the Resource Conservation and Recovery Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Toxic Substances Control Act, and any similar or comparable state or local law. The term "Hazardous Substance" means any hazardous, toxic, radioactive or infectious substance, material or waste as defined, listed or regulated under any Environmental Law, and includes without limitation petroleum oil and any of its fractions. The provisions of this Section shall be binding on Grantee, and its heirs, successors and assigns, and shall be covenants running with the land.



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Page: 4 of 6
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Kittling Co Auditor CONE ETAL

By accepting this Deed, Grantee acknowledges that Grantor, as successor in interest to the Northern Pacific Railway Company, acquired a determinable ownership interest in the Property from the United States of America, pursuant to Section 2 of the Northern Pacific Land Grant Act of 1864, and Grantee agrees to the conditions and limitations imposed by this Northern Pacific Land Grant Act.

Grantee shall, at its sole cost and expense, construct and maintain a protective fence on or inside the north, east and west boundaries of the hereinafter described Property, using such material and at such height that meets the approval of Grantor.

TO HAVE AND TO HOLD the Property, together with all the appurtenances thereunto belonging, to the said Grantees, their heirs and assigns, forever.

IN WITNESS WHEREOF, the said Grantor caused this instrument to be signed by its authorized representative, attested by its Assistant Secretary, and its corporate seal to be affixed hereto on the 15th day of November, 2004.

THE BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY

By: D. F. Schneider
D. F. Schneider
General Director Real Estate

ATTEST:

By: Patricia Zbichorski
Patricia Zbichorski
Assistant Secretary



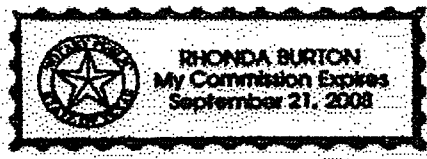


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Page: 5 of 6
12/02/2004 04:29P
OCB 24.90

STATE OF TEXAS §
§ ss.
COUNTY OF TARRANT §

On this 15th day of November, 2004, before me, the undersigned, a Notary Public in and for the State of Texas, duly commissioned and sworn, personally appeared D. P. Schneider and Patricia Zbichorski, to me known to be the General Director Real Estate and Assistant Secretary, respectively, of THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY, the Delaware corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal hereto affixed the day and year first above written.



Rhonda Burton
Notary Public in and for the State of Texas
Residing at: Cummins, Texas
My appointment expires: 9/21/2008

FORM APPROVED BY LAW

| | |
|----------------|-----------|
| APPROVED LEGAL | <i>EA</i> |
| APPROVED FORM | <i>AH</i> |
| APPROVED | <i>EW</i> |



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Page: 6 of 6
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Kittitas Co Auditor CONE ETRL

EXHIBIT "A"

That portion of the South Half, Section 26, Township 20 North, Range 15 East, W. M., all situated in Kittitas County, State of Washington described as follows:

Beginning at the South quarter corner of said Section; Thence North $00^{\circ}23'00''$ East along the East line of the Southwest Quarter of said Section 26, a distance of 853.03 feet to a point which is at right angles and 200 feet distance Southerly from the centerline of the existing mainline for The Burlington Northern and Santa Fe Railway Company, and is also the True Point of Beginning; Thence North $10^{\circ}34'34''$ East at right angles to said railway, 150.00 feet; Thence North $79^{\circ}25'26''$ West, parallel with and 50 feet distance at right angles from the centerline of the said railway, 1466.67 feet; Thence South $10^{\circ}34'34''$ West, at right angles from the said railway, 150.00 feet; Thence South $79^{\circ}25'26''$ East, parallel with and 200 feet distance at right angles from the centerline of said railway, 1466.67 feet to the True Point of Beginning.

EXHIBIT "G"

EXHIBIT "G"

EXHIBIT

"G"

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EXHIBIT "G"

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Pet. file

560405

800

KITTITAS COUNTY AUDITOR
FILED REQUEST OF:
93 JUN 15 PM 3:47

1% RE EXCISE TAX PAID
Amount: 4001.70
Date: 10/17/88
Affidavit No. 26290
SALLY SCHORMANN, TREAS.
KITTITAS COUNTY TREASURER
By: [Signature]

Filed for Record at Request of
AFTER RECORDING MAIL TO:

Robert C. Folkman
Patricia W. Folkman
1100 1st St. N.E.
Spokane, WA 99207

STATUTORY WARRANTY DEED

THE GRANTOR, THOMAS A. MCKNIGHT and JAMI L. MCKNIGHT, husband and wife, for and in consideration of TEN AND NO/100 DOLLARS (\$10.00) and other valuable consideration, in hand paid, conveys and warrants to ROBERT C. FOLKMAN and PATRICIA W. FOLKMAN, husband and wife, the following described real estate, situated in the County of Kittitas, State of Washington:

(4662)

The Westerly 4.05 acres of that portion of the Southeast quarter of the Southwest quarter of Section 26, Township 20 North, Range 15 East, W.M., Kittitas County, State of Washington, lying South of the South line of the Burlington Northern Railroad Company's right of way, and North and East of the Northerly right of way line of primary State Highway No. 2 (I-90).

(CK-17211-036)

TOGETHER WITH all water rights and irrigation ditches appurtenant thereto, if any.

SUBJECT TO all reservations, restrictions, easements and rights of way apparent or of record.

SUBJECT TO the pendency of Yakima County Superior Court Case No. 77-2-01484-5, an action by the State of Washington, Department of Ecology v. James J. Acquavella, et al, for the purpose of securing a judgment adjudicating the relative rights of all persons diverting, withdrawing or otherwise making use of surface waters of the Yakima River Drainage Basin.

SUBJECT TO special assessments levied by the City of Cle Elum, if any.

SUBJECT TO condemnation of right of access to State Highway and light, view and air by Decree in favor of the State of Washington entered in Kittitas County Superior Court Cause No. 15935.

SUBJECT TO a 60' wide non-exclusive easement for access, egress and underground utilities along the North boundary of the above described real property.

This deed is given in fulfillment of that certain real estate contract between the parties hereto, dated September 30, 1988, and conditioned for the conveyance of the above described property, and the covenants of warranty herein contained shall not apply to any title, interest or encumbrance arising by, through or under

VOL 343 PAGE 772

LAW OFFICES OF
FREDERICK, BECKLEY & COOPER

301 NORTH MAIN
PO BOX 1000
CLELLANBURG, WASHINGTON 99004
TELEPHONE (509) 838-1138

the purchaser in said contract, and shall not apply to any taxes, assessments or other charges levied, assessed or becoming due subsequent to the date of said contract.

DATED this 30th day of September, 1988.

Thomas A. McKnight
Thomas A. McKnight

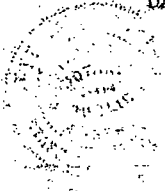
Jami L. McKnight
Jami L. McKnight

STATE OF WASHINGTON }
County of Kittitas } ss.

I certify that I know or have satisfactory evidence that THOMAS A. MCKNIGHT and JAMI L. MCKNIGHT signed this instrument and acknowledged it to be their free and voluntary act for the uses and purposes mentioned in the instrument.

DATED: October 1, 1988

Betty Mae Sullivan
NOTARY PUBLIC in and for
the State of Washington.
My appointment expires 4-14-89



777-7777

EXHIBIT "H"

EXHIBIT "H"

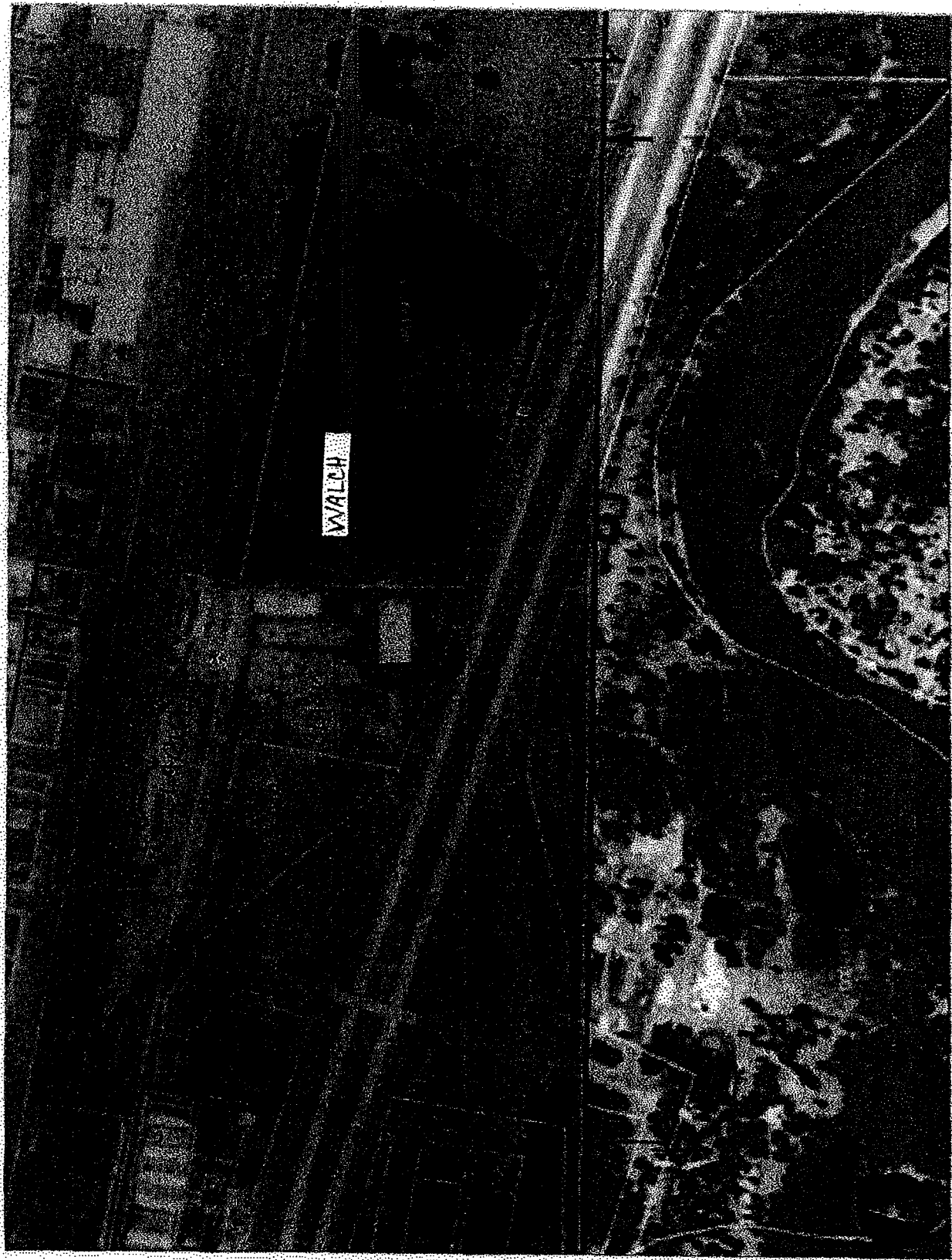
EXHIBIT

"H"

EXHIBIT "H"

EXHIBIT "H"

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000057

EXHIBIT "I"

EXHIBIT "I"

EXHIBIT

"I"

EXHIBIT "I"

EXHIBIT "I"

000058

EXHIBIT "J"

EXHIBIT "J"

EXHIBIT

"J"

EXHIBIT "J"

EXHIBIT "J"

000060

BURLINGTON NORTHERN + SANTA FE RAILWAY CORRIDOR

EXHIBIT "K"

EXHIBIT "K"

EXHIBIT

"K"

EXHIBIT "K"

EXHIBIT "K"

000062



BURLINGTON NORTH
EAST RAILWAY CORRIDOR

DARTMOUTH

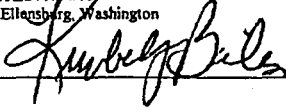
Certificate of Mailing

FILED

10 SEP 14 PM 3:01

KITTITAS COUNTY
SUPERIOR COURT CLERK

Pursuant to RCW 9A.72.085 today I deposited in the U.S. mail a copy of this document directed to: Chris Montgomery, Attorney for Plaintiffs
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED: 9/4/10
At Ellensburg, Washington



IN THE SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

MIKE WALCH and MARCIA WALCH,
husband and wife,

Plaintiffs,

NO. 10-2-00353-6

ANSWER TO COMPLAINT

v.

KERRY A. CLARK and PATRICIA L.
CLARK, husband and wife; W.L. CLARK
FAMILY, LLC, a Washington Limited
Liability Company; and ROBERT C.
FOLKMAN and PATRICIA W.
FOLKMAN, husband and wife,

Defendants.

Defendants, Kerry Clark, W.L. Clark Family, LLC, Robert C. Folkman and Patricia

Folkman hereby answer plaintiffs' complaint as follows:

I.

1.1 Defendants deny that plaintiffs' real property is landlocked. Defendants admit the legal description of plaintiffs' real property, as alleged at paragraph 1.1 of the complaint, but only to the extent the legal description and tax parcel number contained therein are identical to that which is of record; otherwise, defendants deny same.

Answer to Complaint
Page 1 of 6

CONE GILREATH
LAW OFFICES
200 East Third Avenue * P.O. Box 499
Ellensburg, Washington 98926
Telephone (509) 925-3191
Fax (509) 925-7640

000064

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