

No. 36229-5-II

COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

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MARY A. KELLOGG, as trustee for the MARY A. KELLOGG LIVING TRUST, JOSEPH LEAS and JULIANNE LEAS, husband and wife

Appellants,

v.

ROBERT HARRINGTON and LAURA HARRINGTON, husband and wife; ROBERT SOUREK, an individual; SHARRON BRAINARD, and the Estate of KENNETH BRAINARD; MARK LASOF and JOANNA LASOF, husband and wife; DAVID INMAN and MARY INMAN, husband and wife; DON ELLERTSON and CHRISTY ELLERTSON, husband and wife; MICHAEL CHANG and SUN CHANG, husband and wife; ROSS BEAR and CHRISTINE BEAR, husband and wife; KATHY MARSHACK, an individual; and R.L. JACOB, as trustee for the R.L. JACOB LIVING TRUST,

Respondents.

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APPELLANTS' AMENDED OPENING BRIEF

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Steven E. Turner

MILLER NASH LLP  
500 E. Broadway, Suite 400  
Post Office Box 694  
Vancouver, Washington 98666-0694  
(360) 699-4771

Attorneys for Appellants  
Joseph and Julianne Leas

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## I. ASSIGNMENT OF ERROR

The scope of this appeal is very limited. Of the more than 100 findings of fact and conclusions of law, this appeal assigns error to just four conclusions of law: Nos. 87, 90, 91, and 115. These conclusions all relate to the location and the width of a particular segment of the easement that was the subject of the trial below.

The Appellants, Joseph and Julianne Leas, are the owners of two parcels of property.<sup>1</sup> According to the trial court's rulings, the Leas' parcels are separated by a strip of property 20 feet wide.<sup>2</sup> The trial court placed the east-west portion of the easement precisely within this 20-foot strip. But the trial court erred in this regard. According to the plain language of the deeds creating the neighbors' easements, the east-west segment is 30 feet wide, and it is located 10 feet further south than was found by the trial court. Thus, rather than laying between the Leas' parcels, the easement actually extends 20 feet into the Leas' southern parcel.

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<sup>1</sup> Although initially designated as an appellant, the Mary A. Kellogg Living Trust does not appeal from the trial court's judgment. This trust is, however, a respondent on the cross-appeal.

<sup>2</sup> The Leas contend, in another lawsuit still pending in the trial court, that the strip separating their parcels is only 10 feet wide.

## II. ISSUE PRESENTED

Once an easement has been created in a set location, it "may not be relocated absent mutual consent of the owners of the dominant and servient estates ...."<sup>3</sup> Here, the original grantor established a 30-foot wide easement that extends 20 feet into where the Leas' southern parcel now sits. The trial court ruled that subsequent owners of the servient estate—by granting a different easement to other grantees—had effectively narrowed and relocated the original easement. But there was no consent to this change by the owners of the dominant estates. Did the trial court err in narrowing and relocating the original easement?

## III. STATEMENT OF THE CASE

This case was tried to the court without a jury, the Honorable Superior Court Judge John E. Nichols presiding. One of the issues presented to Judge Nichols was: "What is the location of the East-West Portion of the easement?"<sup>4</sup> The answer to this question hinged on the trial

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<sup>3</sup> *Crisp v. Van Laeken*, 130 Wn. App. 320, 324, 122 P.3d 926 (2004) (quoting *MacMeekin v. Low Income Housing, Inst., Inc.*, 111 Wn. App. 188, 190, 45 P.3d 570 (2002)).

<sup>4</sup> Findings of Fact and Conclusions of Law ("Findings") ¶ 21(a), Clerk's Papers ("CP") 202:12. (For the Court's convenience, the Findings are attached in the Appendix.)

court's analysis of many deeds and other documents, some recorded before Washington had achieved statehood. Because the Leas' appeal relates solely to the location and width of the easement in the vicinity of their parcels, this brief will focus on the chain of title for the Leas' parcels.

**A. The Original Grantor Created a 30-Foot Wide Easement Along the Southern Half of the Old Camas Highway**

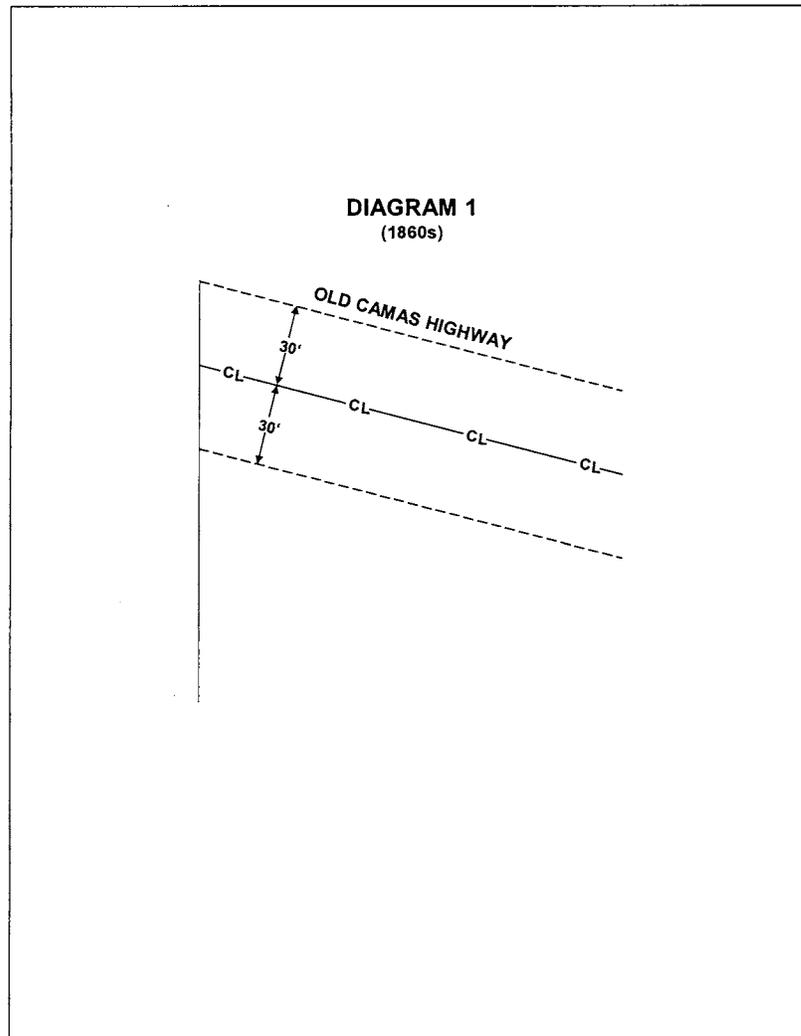
The origins of the easement's location dates back to a the creation of a public road in the mid-1800s. As found by the trial court: "In the 1850s or 1860s, Silas D. Maxon (the holder of the original Donation Land Claim) petitioned the County for a road (the 'County Road'), which would later be referenced as the Old Camas Highway. The County Commissioners ordered that the road be opened."<sup>5</sup> While this "County Road" had different names at different times, this brief shall refer to the road, whenever possible, as the "Old Camas Highway." The Old Camas Highway ran along the Columbia River in Clark County, and—as found by the trial court—it was 60 feet wide.<sup>6</sup> Diagram 1 shows the general

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<sup>5</sup> Findings ¶ 52, CP 211:11-14.

<sup>6</sup> Findings ¶ 53, CP 211:15.

orientation and width of the Old Camas Highway in the area relevant to this appeal.



In the early 1900s, three siblings owned a large tract of property in the vicinity of the Old Camas Highway. In 1910, the siblings divided their property. The area that now includes the Leas southern parcel was deeded to the sisters, Clara Ryan and Grace E. Randall, by their brother, B. A. Randall.<sup>7</sup>

The particular corner of the Ryan/Randall property where the Leas' southern parcel now sits was bounded on the north by the centerline of the Old Camas Highway.<sup>8</sup> The deeds dividing the siblings' property describe this corner as running to the "center of County road [Old Camas Highway] thence along the center of said county road ...."<sup>9</sup> The shaded area in Diagram 2 shows the overlap of the Old Camas Highway and the pertinent corner of the Ryan/Randall property.

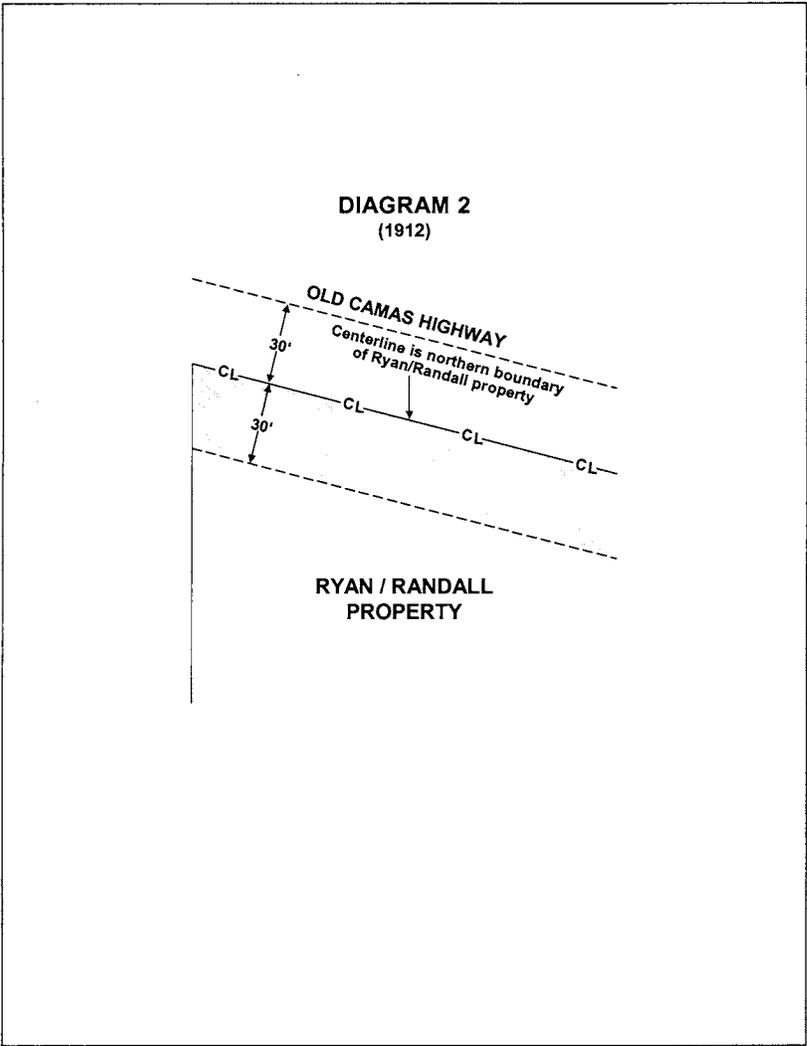
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<sup>7</sup> Exhibit 6.

<sup>8</sup> Findings ¶ 25, CP 203:11-22; Exhibit 87.

<sup>9</sup> Exhibit 6.

**DIAGRAM 2**  
(1912)

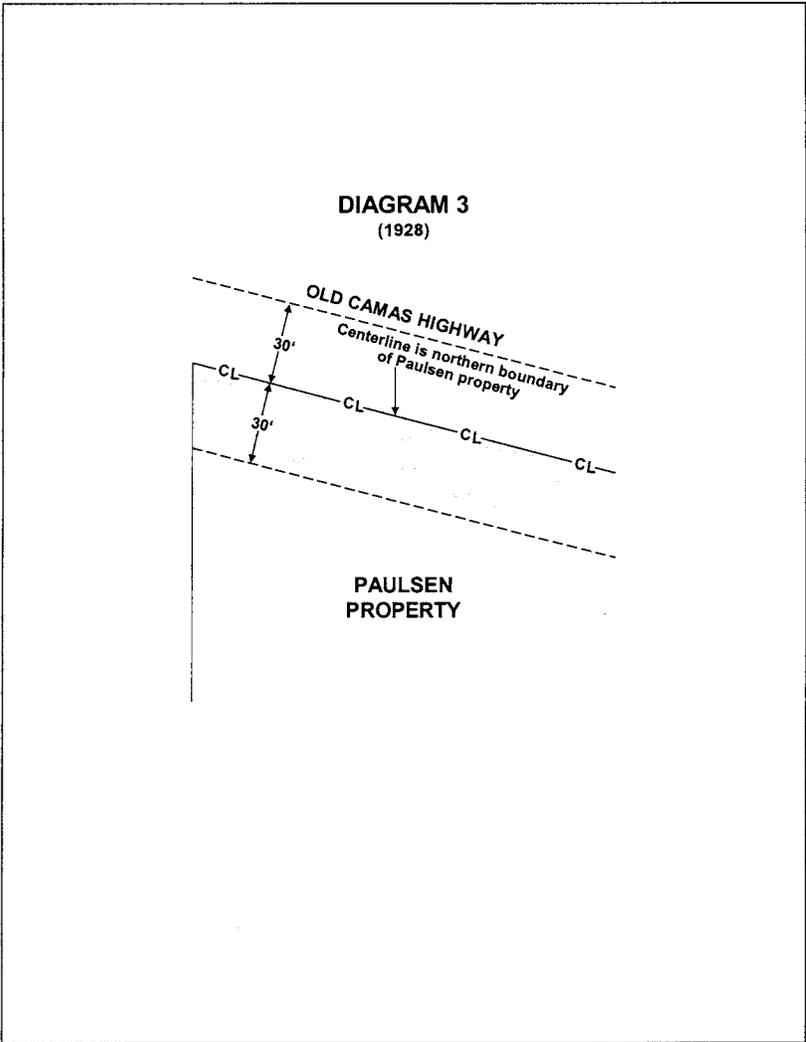


Over the next 20 years, Clara Ryan deeded all of her interest in the property to Grace Randall, Grace Randall deeded all of her interest to the Hewetts, the Hewetts deeded all of their interest to the Burks, and, in 1928, the Burks ultimately deeded all of their interest to the Paulsens. As the trial court found: "Pursuant to four deeds, Exhibit Nos. 10, 11, 12, and 13, the property of Grace E. Randall and Clara Ryan became vested in Paul Paulsen and Eva Paulsen ('Paulsen')." <sup>10</sup> None of these transfers changed the overlap between the Old Camas Highway and the corner of the property in question. The shaded area in Diagram 3 shows the overlap of the Old Camas Highway in the pertinent corner of the property acquired by the Paulsens.

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<sup>10</sup> Findings ¶ 27, CP 204:13-15.

**DIAGRAM 3**  
(1928)



Several years after Paulsen acquired the property, the County Commissioners vacated this portion of the Old Camas Highway. "In the early 1930s, the County approved various petitions to vacate the old location of the County Road [Old Camas Highway], Exhibits 105 and 106."<sup>11</sup> As a result, the northern thirty feet of the Paulsens' property was no longer subject to a right of way for a public road. The Paulsens' northern boundary, however, remained fixed on the centerline of where the road had been. In other words, the fact that the Old Camas Highway was vacated did not change the northern boundary of the Paulsen estate. Thus, the Paulsens still did not own an inch of property across the centerline of the Old Camas Highway's right of way.

**B. The 144<sup>th</sup> Court Owners Have an Easement Along the Southern Half of the Old Camas Highway**

The northeastern portion of the Paulsen property is now known as "144<sup>th</sup> Court." Paulsen conveyed this portion to Mr. and Mrs. Eby. As the trial court found: "By two conveyances dated 1944 and 1952, Paulsen

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<sup>11</sup> Findings ¶ 57, CP 212:3-4.

conveyed to Howard Eby and Dorothy Eby ('Eby') that portion of their property located north of Evergreen Highway."<sup>12</sup>

In the first conveyance, Paulsen granted to Eby an easement across Paulsen's remaining parcel, giving Eby access to the Columbia River. This easement consisted of three legs: a north-south leg leading down across the railroad tracks to the Paulsen property, an east-west leg leading to the western edge of the Paulsen property, and a final north-south leg down to the Columbia River. The east-west leg of this easement was described as "the *right of travel along the old Camas Highway...*"<sup>13</sup>

In the second conveyance, when Paulsen deeded the other half of the 144<sup>th</sup> Court property to Eby, he gave Eby the same easement. "For the same consideration, the grantors grant to the grantees a *right of travel ... along old Camas Highway....*"<sup>14</sup>

Because the Old Camas Highway was 60 feet wide, and because Paulsen owned the property underlying the southern half of this road, Paulsen's grant of a "right of travel along the old Camas Highway" created

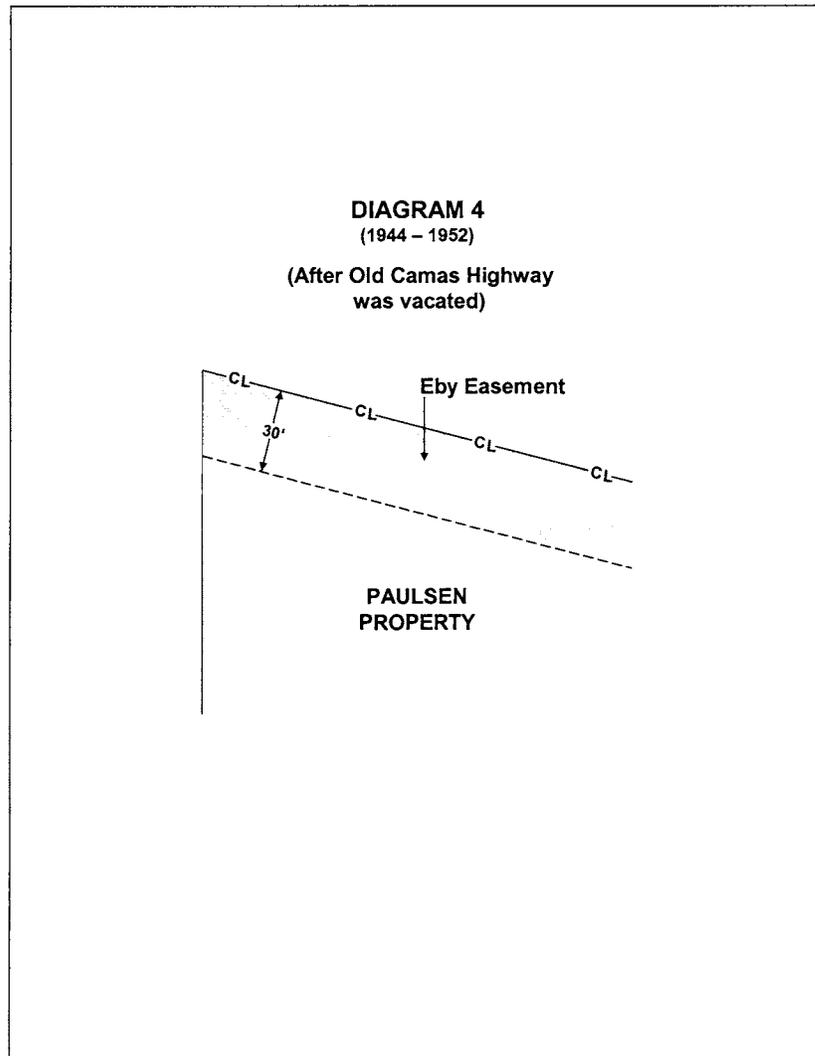
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<sup>12</sup> Findings ¶ 30, CP 205:22-24; *see also* Exhibits 16 and 17.

<sup>13</sup> Exhibit 16 (emphasis added).

<sup>14</sup> Exhibit 17 (emphasis added).

an easement that was 30 feet wide and ran along the northern boundary of Paulsen's property. The shaded area in Diagram 4 depicts the east-west leg of the Eby easement in relation to Paulsen's property.



The Eby property was ultimately subdivided into eight parcels. These properties were conveyed, through a series of transfers, to the current owners.<sup>15</sup> Several of these current owners were defendants in the trial court action and are respondents on this appeal. They are: Laura Harrington and the Estate of Robert Harrington; Sharron Brainard and the Estate of Kenneth Brainard; Mark and Joanna Lasof; Don and Christy Ellertson; and Ross and Christine Bear. Because their property is located on what is now 144<sup>th</sup> Court, these respondents will be referred to as the "144<sup>th</sup> Court Owners."

When the 144<sup>th</sup> Court Owners acquired their property, they each succeeded in the easement that Paulsen had granted to Eby. Like Eby's deeds from Paulsen, the 144<sup>th</sup> Court Owners' deeds all include the "right to travel along the Old Camas Highway ...". The following table sets forth the pertinent language from the 144<sup>th</sup> Court Owners' deeds.<sup>16</sup>

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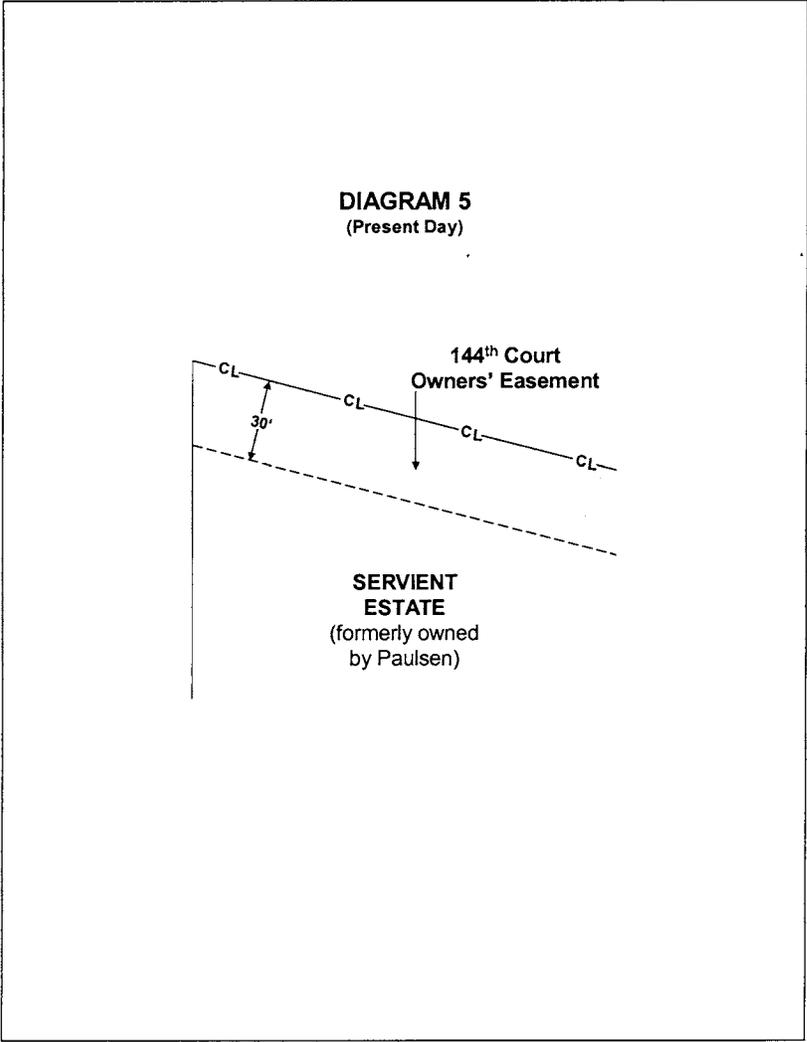
<sup>15</sup> Findings ¶¶ 31 through 37, CP 206:5 – 207:4.

<sup>16</sup> The Ellertsons' deed was not submitted into evidence.

Owners	Exhibit No.	Pertinent Easement Language
Bears	30	<i>Together with a right to travel along the Old Camas Highway</i> leading to a lane known as Lot 16 of S.D. Maxon Donation Land Claim, and a right to travel along said lane.
Brainards	37	<i>Together with a right to travel along the Old Camas Highway</i> to a lane known as Lot 16 of the S.D. Maxon Donation Land Claim, and a right to travel along said lane.
Harringtons	46	<i>Together with a right to travel along the Old Camas Highway</i> leading to a lane known as Lot 16 of the S.D. Maxon Land Claim and a right to travel along said lane.
Lasofs	35	<i>Together with a right to travel along the Old Camas Highway</i> to a lane known as Lot 16 of the S.D. Maxon Donation Land Claim.

As noted above, the creator of the original easement—Paulsen—owned the property underlying the southern half of the Old Camas Highway. Paulsen gave an easement across the Old Camas Highway to Eby. Thus, the "right to travel the Old Camas Highway" acquired by the 144<sup>th</sup> Court Owners gave them an easement coextensive with the southern

half of the Old Camas Highway. The shaded area in Diagram 5 depicts the location of the east-west leg of the 144<sup>th</sup> Court Owners' easement in relation to the Old Camas Highway and the servient estate.



**C. The Old Camas Highway Extends 20 Feet Into the Leas' South Parcel**

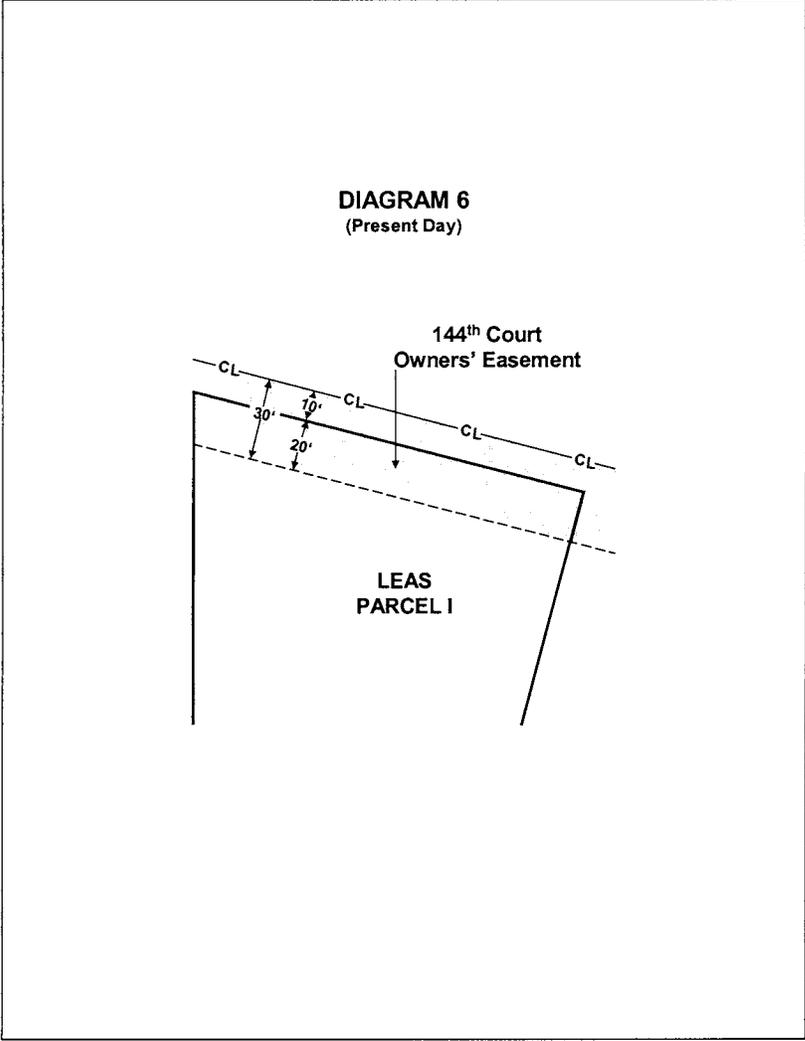
The servient estate is now owned by the appellants, Joseph and Julianne Leas. Their title to this parcel can be traced back to Paulsen through a series of intervening transfers. In one of these transfers, the grantors retained ownership to—or an easement across—the north 10 feet of the servient estate.<sup>17</sup> As the trial court found, "... the North 10 Feet of the [Leas'] South Parcel (55) were excepted, reserved, and/or made expressly subject to the East-West portion of the Easement."<sup>18</sup> Thus, the Leas' South parcel lies approximately 10 feet south of the centerline of the Old Camas Highway. Diagram 6 shows the juxtaposition of the Leas parcel and the southern half of the Old Camas Highway. The shaded area continues to depict the location of the east-west leg of the 144<sup>th</sup> Court Owners' easement.

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<sup>17</sup> Exhibit 80. While it is not clear whether this deed was intended to reserve ownership of the north 10 feet, or merely reserve an easement across the north 10 feet, it does not matter for purposes of this appeal.

<sup>18</sup> Findings ¶ 44(b), CP 209:15-17.

**DIAGRAM 6**  
(Present Day)

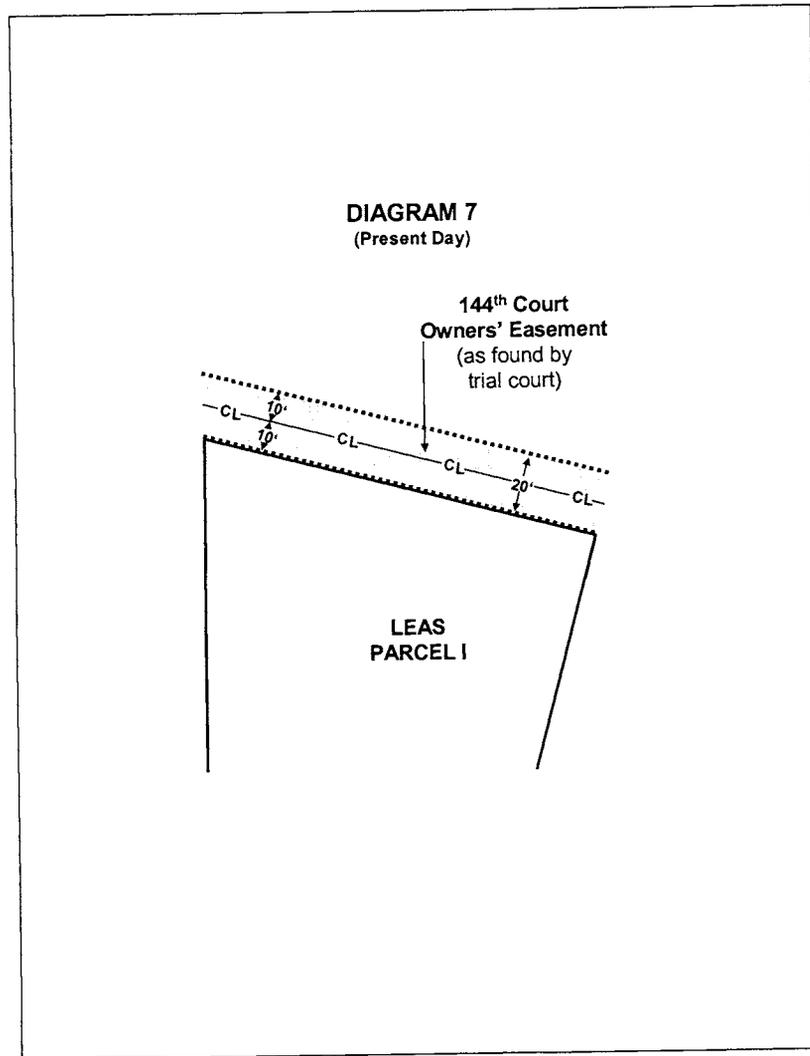


The genesis of this appeal is the trial court's erroneous location of the east-west leg of the respondents' easement. Rather than find the easement to be located as shown in Diagram 6, the trial court narrowed and relocated the easement. More specifically, the trial court found that the east-west leg of the easement was only 20 feet wide—not 30 feet wide—and the trial court shifted the easement 10 feet to the north.<sup>19</sup> The shaded area in Diagram 7 depicts the trial court's ruling regarding the location and width of the east-west leg of the easement.

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<sup>19</sup> Findings ¶¶ 88-91, CP 217:24 – 218:18.

**DIAGRAM 7**  
(Present Day)



**D. The Jacob Trust's Easement Runs Along the Southern Half of the Old Camas Highway**

The respondent R.L. Jacob Living Trust acquired its property in a slightly different chain of title. The Jacob property had been part of the Paulsen property, but title did not flow through Eby. Before Paulsen deeded the 144<sup>th</sup> Court property to Eby, he had already deeded the Jacob Trust portion of his property to Clara Frink. As in the deeds to Eby, Paulsen granted Frink the "right of travel over the 'Old Camas Highway' ...."<sup>20</sup>

The Frink parcel was subsequently conveyed several times—from Frink to Dawson, from Dawson to Masters, from Masters to Epley, from Epley to the Epley Trust—and is now owned by the Jacob Trust. Each of the intervening deeds included a grant of the "*right of travel over the 'Old Camas Highway'* ...."<sup>21</sup>

In sum, Paulsen granted to Frink an easement to cross the same stretch of property that Paulsen granted to Eby—the southern half of the Old Camas Highway. The Jacob Trust is a successor to Frink, and like the 144<sup>th</sup> Court Owners, its easement is located on the southern half of the Old

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<sup>20</sup> Exhibit 15.

<sup>21</sup> Exhibits 18 through 22.

Camas Highway. It is 30 feet wide, and it overlaps approximately 20 feet with the Leas' South parcel.

**E. Respondent Marshack's Easement Runs Along the Old Camas Highway**

The Marshack property sits just east of the Leas property.

Marshack acquired all of her property from Mr. and Mrs. Aase, who in turn had acquired the same property from Lester Kellogg.<sup>22</sup> Mr. Kellogg was the successor in interest to Mr. Ervin Graber.<sup>23</sup>

Mr. Graber is an important player in this history because he was the first owner in the pertinent area to combine ownership of property on both sides of the centerline of the Old Camas Highway. In 1929, Graber acquired the property south of the centerline directly from Paulsen.<sup>24</sup> "The property [Paulsen] conveyed to Graber is depicted in Exhibit Map 88."<sup>25</sup> That same year, Graber acquired the adjoining property north of the

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<sup>22</sup> Exhibits 51 and 52.

<sup>23</sup> Finding ¶ 28(d), CP 205:8-15; Exhibits 47 and 48.

<sup>24</sup> Exhibit 14.

<sup>25</sup> Findings ¶ 28, CP 204:18-19, Exhibit 88.

centerline from its owner, Webster. Exhibit 90 is a schematic drawing by respondents' surveyor noting the Webster to Graber grant in 1929.

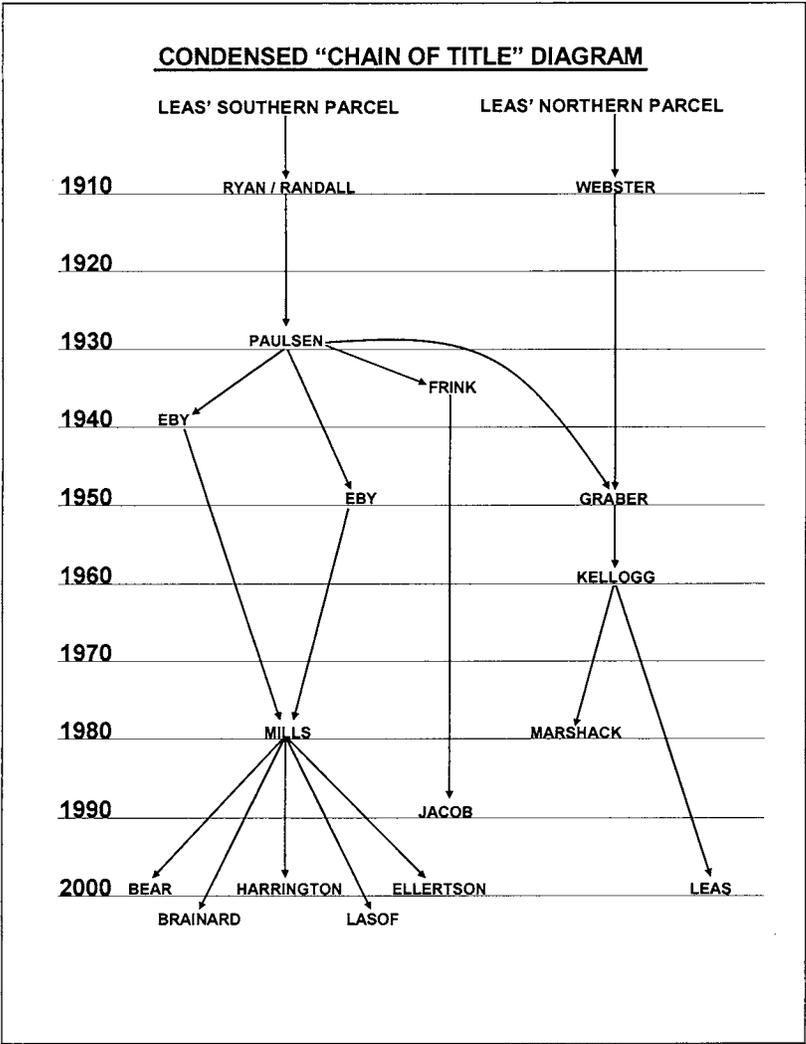
The Graber property became owned by Kellogg. Over the years, Kellogg sold off portions of his property, including the property currently owned by respondent Marshack. When Kellogg first conveyed this property, to Mr. and Mrs. Aase, the grant included a "***right-of-way over and across real estate described as the 'Old Camas Highway' ....***"<sup>26</sup> The Aases then passed this same easement along when they conveyed their property to Marshack. That deed granted an "easement for ingress and egress ... leading over and across ***that tract of land described as the 'Old Camas Highway.***"<sup>27</sup>

In summary, the following diagram shows graphically a condensed chain of title for the Leas' North parcel and for the Leas' South parcel. Not every transfer of property is shown, as numerous intermediate transfers that had no affect on the easement have been left out.

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<sup>26</sup> Exhibit 50.

<sup>27</sup> Exhibit 51.



#### **IV. LEGAL AUTHORITY AND ANALYSIS**

##### **A. The Applicable Standard of Review is *De Novo***

This appeal hinges on the proper construction of the deeds that created the subject easement. This is a question of law. "The construction of deeds is a matter of law for the courts."<sup>28</sup> And when it comes to the construction of deeds, it does not matter what label the trial court attaches to its finding. "A conclusion of law described as a finding of fact is reviewable as a conclusion of law."<sup>29</sup> Because this appeal presents only a pure question of law, the proper standard of review is *de novo*. "We review issues of law *de novo*."<sup>30</sup> Thus, the trial court's conclusion regarding the width and location of the easement is entitled to no special deference from this Court.

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<sup>28</sup> *Martin v. Seattle*, 111 Wn.2d 727, 732, 765 P.2d 257 (1988) (citations omitted).

<sup>29</sup> *Ibid.* (citation omitted).

<sup>30</sup> *State v. Macon*, 128 Wn.2d 784, 799, 911 P.2d 1004 (1006) (citation omitted).

**B. Once an Easement is Created in one Location, it Cannot be Relocated Without Consent from All Parties**

Our Supreme Court has long held that "the consent of all interested parties is prerequisite to the relocation of an easement."<sup>31</sup> Moreover, the consent must be given by whoever owns the dominant and servient estates at the time the easement is relocated. For example, consent cannot be given, after the fact, by one who no longer owns the affected property.<sup>32</sup> In sum, our courts "adhere to the traditional rule that easements may not be relocated absent mutual consent of the owners of the dominant and servient estates, regardless of how the easement was created."<sup>33</sup>

In the trial court below, the Judge erred because his construction of the deeds violates this rule. Under the trial court's construction of the deeds, the owner of the servient estate effectively relocated the easement without the consent of the then-current owners of the dominant estates.

To support its finding regarding the location of the easement, the trial Court relied on numerous deeds granted by owners of the servient

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<sup>31</sup> *Coast Storage Co. v. Schwartz*, 55 Wn.2d 848, 854, 351 P.2d 520 (1960).

<sup>32</sup> *Ibid.*

<sup>33</sup> *Crisp v. Van Laeken*, 130 Wn. App. 320, 324, 122 P.3d 926 (2004) (quoting *MacMeekin v. Low Income Housing, Inst., Inc.*, 111 Wn. App. 188, 190, 45 P.3d 570 (2002)).

estate after 1954. In particular, the trial court relied on: (1) the 1955 deed from Kellogg to Miller and the subsequent deeds conveying that property (¶ 85e); (2) the 1956 deed from Elizabeth Kellogg to herself and Lester Kellogg (¶ 85g); (3) the 1965 deed from Graber to Kellogg (¶ 85b); (4) the 1985 deed from Kellogg to himself and his wife Mary (¶ 85c); (5) the 1993 deed from Mary Kellogg to her living trust (¶ 85d); and (6) the 1997 deed from Kellogg to Aase (¶ 85h). The trial court found that these deeds evinced an intention to create a 20-foot wide easement centered on the centerline of the Old Camas Highway.

But there is a fundamental flaw in the trial court's reliance on these deeds—by the time all of these deeds were conveyed, Paulsen had already created and granted the easement along the Old Camas Highway to Frink and to Eby. In other words, Eby and the subsequent owners of Eby's dominant estate, and Frink and the subsequent owners of Frink's dominant estate, were the holders of an express easement of a certain width in a certain location, i.e., a 30-foot wide easement running along the southern half of the Old Camas Highway. Without the consent of the owners of the dominant Eby and Frink estates, the owners of the servient estate—such as Graber and Kellogg—had no power to narrow the

easement, from 30 feet to 20 feet, or to shift the location of the easement 10 feet to the north.

The only other deed relied upon by the trial court in reaching its conclusion was the 1929 deed from Paulsen to Graber. The trial court noted that the "1929 Paulsen to Graber deed, Exhibit 14, which first created the easement, refers to a 'right of way not to exceed twenty feet.'" But the trial court's reliance on this deed is also misplaced, because the trial court erroneously applies this specific reference to the subject easement, even though it is actually describing a different leg of the easement.

This reference, to a right of way "not to exceed twenty feet," is actually to the portion of the easement that leads "from the present North Bank Highway to the above described premises ... [and] leading from the said 'Old Camas Highway' to the present North Bank Highway."<sup>34</sup> In other words, this reference is to the north-south leg that is used to cross the railroad tracks, not to the east-west leg that crosses in the vicinity of the Leas' property. That leg is simply described as "the right of way over and

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<sup>34</sup> Exhibit 14.

across said real estate along the 'Old Camas Highway," and it is not limited in width to 20 feet.

Similarly, when Paulsen gave the same easement to Frink, several years later, the "right of travel over the 'Old Camas Highway'" was not limited to 20 feet in width.<sup>35</sup> And when Paulsen gave the same easement to Eby, in the two deeds in 1944 and 1952, Paulsen again did not limit the "right of travel along the Old Camas Highway" to 20 feet. The Frink and Eby deeds belie any intent by Paulsen in the Graber deed to limit the easement to 20 feet in width on the Old Camas Highway.

Moreover, assuming for the sake of argument that Paulsen had intended to limit the easement along the Old Camas Highway to 20 feet in width, he still could not grant any easement north of the centerline, because he did not own any property north of the centerline. Thus, even if the subject easement were limited to 20 feet in width, it could not lie 10 feet north of the centerline—as found by the trial court—and it would still extend ten feet into the Leas' southern parcel.

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<sup>35</sup> Exhibit 15.

V. CONCLUSION

In sum, the trial court erred in its legal conclusion regarding the location and width of the east-west leg of the easement in the vicinity of the Leas' parcels. The proper construction of the deeds establishes an easement that is 30 feet wide and bordered on the north by the centerline of the Old Camas Highway. Any other finding would be inconsistent with the plain language of the pertinent deeds, or it would allow the owner of the servient estate to change unilaterally the location and width of an existing easement. The appellants Joseph and Julianne Leas, therefore, request this Court to remand the case to the trial court with instructions to revise the judgment to declare the easement to be 30 feet wide and bordered on the north by the centerline of the Old Camas Highway. Doing so will help the Leas obtain the coverage they paid for in their title insurance policy.

Dated this 3rd day of April, 2008.

MILLER NASH LLP



Steven E. Turner  
WSB No. 33840

**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing Appellants' Amended

Opening Brief on:

Daniel C. Lorenz  
Attorney at Law  
521 SW Clay  
Portland, Oregon 97201

Zach Stoumbos  
The Landerholm Law Firm  
Post Office Box 1086  
Vancouver, Washington 98666-1086

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DATED this 3rd day of April, 2008.

Steven E. Turner  
Steven E. Turner