

Court of Appeals No. 36229-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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

Plaintiffs/Appellants,

v.

ROBERT HARRINGTON and LAURA HARRINGTON, husband and wife, 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,

Defendants/Respondents.

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DIVISION II
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STATE OF WASHINGTON
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**AMENDED
BRIEF OF RESPONDENTS HARRINGTON, BRAINARD,
LASOF, ELLERTSON, BEAR AND JACOB**

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I. INTRODUCTION

The Columbia River is one of the grand and beautiful natural resources of the State of Washington. The Columbia River is the stuff of legend and lyric. The great folk singer Woody Guthrie sang of the river's beauty and strength in the song "Roll On Columbia."

In the early 1900s, a number of property owners, in what is now the city of Vancouver, Washington, sought to protect in perpetuity their ability to travel to the Columbia River from their non-shoreland property. The parties executed easement deeds in 1912 (Ex 8 and 9) creating permanent easement rights to reach the river. Photographs dating back to the 1930s show a well defined "Lane" used for travel to the River. Ex 132, 133, 134 and 135. The Defendants and some of their predecessors travelled to and enjoyed the River in relative peace until 2004, when Plaintiffs instituted this litigation. The Defendants endured two and one half years of litigation before their right to continue traveling to the River was finally confirmed by the trial court and protected by a permanent injunction.

II. IDENTIFICATION OF PARTIES

This Response Brief is filed on behalf of the following Defendants/Respondents, who prevailed at trial and ask that the Court affirm the trial court ruling: Laura Harington; Sharon Brainard; Mark and

Joanna Lasof; Don and Christy Ellertson; Ross and Chris Bear; and R.L. Jacob as Trustee. Except where individual references are necessary, all of these parties will be jointly referenced as “Defendants.”

There is one other defendant involved in this appeal, and she is Kathy Marshack (“Marshack”). Marshack is represented by other counsel and is filing her own brief.

The Plaintiffs in the underlying action were Mary Kellogg as the trustee of her trust (“Kellogg Trust”), and Joseph and Julianne Leas (the “Leas”). The Kellogg Trust has not appealed; only the Leas have appealed.

III. SUMMARY OF THE TRIAL COURT DECISION

The trial court ruled that Defendants had an express appurtenant easement (the “Easement”) for access to the Columbia River. The Easement had three components:

The “Landing”: The Landing is an area on the beach, 125 foot wide. The Landing is owned by the Kellogg Trust.

The “Lane”: The Lane is a 30 foot wide strip of property traveling north from the Landing. Defendants’ Easement traverses the east 15 feet of the Lane. The Lane is owned by the Kellogg Trust.

The “East-West Portion” of the Easement is a 20 foot wide strip that runs east from the Lane. The East-West Portion is centered on the

center line of the Old Camas Highway and is located in a 20 foot strip of property that separates the Leas' two parcels of property. None of the 20 foot strip is owned by the Leas.¹ The East-West Portion is sometimes referenced as the "Old Camas Highway." Only the East-West Portion is at issue in this appeal.

Exhibit 92 (Appendix "B") depicts the Easement. Color coding has been added.

IV. PROCEDURAL HISTORY

The Kellogg Trust and the Leas filed this action in September 2004. While The Kellogg Trust and the Leas are both listed as Plaintiffs, it is important to note that they own their respective properties distinctly and separately, and that they own no properties in common. The Leas own two parcels of property which are separated by a 20 foot strip of property. Finding Nos. 46, 88, 90 and 91,² CP 210: 1-11, 218:3-5 and 218: 9-18.

In the "Prayer for Relief" contained in both their original and their first amended Complaint the Kellogg Trust and the Leas sought a decree that "defendants have no easement rights in plaintiffs' respective

¹ Plaintiff's "Figure 1" ("Appendix A") depicts the 20 feet as owned by the Kellogg Trust. CP 246. The Court adopted this position in its Finding No. 8; CP 200:2-7, where it referenced that the Kellogg Trust owns Parcel 25 as depicted on Exhibit 1 to the Findings. CP 226.

² The Trial Court Findings of Fact will be referenced as "Finding No." and the Conclusions of Law as "Conclusion No." The complete Findings and Conclusions are attached as an Appendix to the Leas' (Appellant's) Brief.

properties.” CP 6:11-12 and 10:11-12. Eventually the Kellogg Trust would lose its request, and it would be determined that the Defendants had an appurtenant easement over the Kellogg Trust’s property. The Kellogg Trust has accepted the determination and has not appealed. The Leas on the other hand had their “Prayer” answered as the Court ruled that none of the Defendants had easement rights across the Leas properties. Having achieved exactly what they sought when they initiated suit, the Leas are now unhappy with their request.

On February 24, 2005, the Honorable John Nichols heard cross motions for summary judgment. There were 11 sworn declarations and over 100 exhibits. Judge Nichols filed his Memorandum Decision on May 2, 2005, finding that the Defendants had an express appurtenant easement. CP 42-46. As to the matter at issue in this appeal, the Court referenced a “20 foot right of way” which followed over the “Old Camas Highway.” CP 43. An Order Granting Defendants’ Motion for Summary Judgment was entered on May 10, 2005. CP 47-49. Plaintiffs never sought reconsideration of the summary judgment ruling.

It was agreed and understood at the time of the summary judgment proceedings that the Defendants were not claiming any easement across the Leas Property. The Leas correctly stated and admitted in their Reply

Brief Regarding Summary Judgment that the Defendants did not seek any easement rights across the Leas Properties.

First, there is no contention raised by any defendant that they have any express easement rights across any portion of the two parcels owned by Joseph and Julianne Leas. Thus, at a minimum, Joseph and Julianne Leas are entitled to a judicial declaration to this effect, . . .

CP 261:12-15. The Leas got exactly what they asked for: a judgment that the Defendants' easement did not cross their two properties.

Following entry of the summary judgment rulings, the Leas and the Kellogg Trust filed another amended complaint. Once again, both Plaintiffs sought a judicial determination that the Defendants had no easement rights in Plaintiffs' properties. CP 53:20-21. The final judgment gave the Leas exactly what they requested.

The matter went to trial in August 2006. There were approximately 150 exhibits marked and admitted into evidence. On November 30, 2006, Judge Nichols filed his Opinion. CP 96-105. The Leas and the Defendants each filed their proposed Findings and Conclusions. CP 274-294,³ 107-136. On March 23, 2007, the trial court entered 112 Findings of Fact and 16 Conclusions of Law, which covered 27 pages. CP 198-226. The Judgment was entered on March 23, 2007.

³ The Leas inadvertently filed their proposed Findings on pleading paper listing Defendants' attorneys. See CP 274-293. The trial court entered an Order to Clarify Record on April 20, 2007, to clarify for the record that these were the Leas (and the Kellogg Trust) proposed Findings. CP 295-296.

CP 227-239. Leas filed their appeal on April 23, 2007. The Kellogg Trust has not appealed and has accepted the easement over its property.

V. ISSUES AND ARGUMENTS PRESENTED

The only issue raised on appeal by the Leas is the width and location of the East-West Portion of the Easement. The Leas only assign error to three Findings of Fact (Nos. 87, 90 and 91) and one Conclusion of Law (No. 115). All other Findings of Fact are considered verities on appeal. *Lawter v. Employment Security Dept.*, 73 Wn. App. 327, 869 P.2d 102 (1994).

The Leas have not cited any portion of the verbatim report of the trial in their Amended Opening Brief.⁴ The Court of Appeals must accordingly conclude that any findings included within Finding Nos. 87, 90 and 91 are supported by evidence in the record. See RAP 9.2(b).

The Leas claim that Finding Nos. 87, 90 and 91 are entirely Conclusions of Law. Appellants' Brief p. 1. As set out below, this characterization is not accurate. The Findings overall may, however, contain a mixture of factual findings and conclusions of law.⁵

⁴ The Leas did not include the verbatim report of the trial in the original record. Defendant Marshack later made arrangements for transcription and submission of the verbatim report of the trial.

⁵ The trial court recognized that some of the "Findings" relating to the deeds were actually conclusions: "I think its very helpful, to tell you the truth, but I think you're right that there is some conclusions involved in that. RP P. 36 L. 18-20. The Leas' counsel indicated he was not so concerned about intermixing findings and conclusions. RP P. 37 L. 4-7.

The trial court found that the East-West Portion was 20 feet wide, and that none of the East-West Portion was on the Leas' two parcels. The Leas seek reversal, asking the Court of Appeals to rule that the East-West Portion is 30 foot wide, and that the northern boundary of the East-West Portion should be moved south by 10 feet. This would place the Easement on the northern 20 feet of the Leas' south parcel. It would also place the Easement on the northern 20 feet of the Marshack south parcel, and on the northern 20 feet of the Kellogg Trust property (which is located next to and in between the Leas and the Marshack south parcels). See Exhibit 92 (Appendix B).

Defendants' arguments in response are as follows:

1. The Leas have no standing to appeal. The Leas are not an aggrieved party under RAP 3.1, because the trial court found that none of the Easement is on the Leas Property.
2. The decision of the trial court can be sustained based upon Findings of Fact to which error has not been assigned. These un-objected Findings include 23, 40, 41, 42 and 43.
3. The intent of the Grantor(s) of the Easement was to create a 20 foot wide easement, and the Easement is 20 foot wide.

4. The intent of the Grantor(s) of the Easement was to create an easement within the 20 foot strip that is located between the Leas' two parcels, and the Easement is so located.

5. Assuming for the sake of Argument that the Easement was originally located as argued by the Leas, it has been moved by mutual consent and agreement of both the servient and the dominant estates.

VI. STANDARD FOR REVIEW OF DEEDS

The Leas cite *Martin v. Seattle*, 111 Wn.2d 727, 765 P.2d 257 (1988), a 1988 Washington Supreme Court case for the proposition that “The construction of deeds is a matter of law for the courts.” Appellants’ Brief p 23. The Leas go on to argue that review is, therefore, de novo, because only a question of law is presented. *Id. Martin* has, however, been clarified and expanded in two later Supreme Court decisions.

In *Niemann v. Vaughn Community Center*, 154 Wn.2d 365, 113 P.3d 463 (2005), the Supreme Court was concerned with construction of a restriction in a deed. The court stated that construction of the deed was a mixed question of fact and law:

The dispute between these parties can best be described as a mixed question of fact and law. While we have previously held that construction of deeds is a matter of law for the court, *see Martin v. City of Seattle*, 111 Wn.2d 727, 732, 765 P.2d 257 (1988), we additionally recognize that the primary objective of deed interpretation is to discern the parties’ intent.

Id. at 374.

In *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 73 P.3d 369 (2003), the issue was whether a maintenance area adjacent to an irrigation lateral could be expanded. The Supreme Court stated quite succinctly:

The interpretation of an easement is a mixed question of law and fact. What the original parties intended is a question of fact and the legal consequences of that intent is a question of law.

Id. at 880. Where the plain language of an easement is unambiguous, extrinsic evidence is not considered. *Id.* But where there is any ambiguity, extrinsic evidence is allowed to show intent, circumstances and the interpretation of the parties by their conduct and admissions. *Id.*

Under the “context rule,” the Court can look to the circumstances surrounding the execution of a deed to assist in determining the meaning of words and terms. *Hollis v. Garwall*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999).

The judgment of the trial court can be sustained on any theory established by the pleadings and supported by the proof. *Lucas Flower Co. v. Local 174*, 57 Wn.2d 95, 103, 356 P.2d 1 (1960).

As evidenced by the Memorandum of Opinion and the Findings, the trial court did a very careful job of listening to the evidence, reviewing the deeds and determining the intention of the parties.

VII. STATEMENT OF THE CASE

This case involved a close analysis and review of over 80 deeds that covered 94 years. The case also involved a number of factual issues regarding the use of the Easement, the intent of the parties, and the location of the Easement. The Leas have only appealed issues of law. The Leas have not appealed any issues of fact, nor have they cited the transcript of the trial for review of issues of fact. All factual findings of the trial court are verities on appeal.

A. The Properties

The properties of all the parties are designated in “ Figure 1 ” submitted by the Plaintiffs. (Appendix A) CP 245. The properties of the Plaintiffs are set out in blue, and the properties of the Defendants are set out in red, with the name for each owner. Figure 1 is based upon the Assessor’s Map and should be considered solely for demonstrative and orientation purposes. The Leas own parcels 35 and 55. The Leas’ two parcels are also depicted in Exhibit 92. (Appendix B)

The Leas’ two parcels are separated by a 20 foot strip of property. Finding Nos. 46, 88, 90 and 91; CP 210:1-11, 218:3-5, 218:9-18, Ex 85

and 92. The trial court located the East-West Portion of the Easement upon this 20 foot strip of property and an extension to the east. Finding Nos. 90 and 91, Conclusion Nos. 115 (c), (d) and (e); CP 218:9-18 and 222:20 - 223:4.

Marshack also owns two parcels of property separated by a 20 foot strip. Exhibit 92. The Marshack northern parcel is directly east of the Leas' north parcel. Exhibit 92. The Marshack south parcel and the Leas south parcel are separated by a strip of property owned by the Kellogg Trust. Finding No. 8; CP 200:2-7.

B. Timeline of Events

The story begins soon after the end of the 19th century.

1. October 1910. Three siblings, Clara Ryan, Grace Randall and B. A. Randall, owned a parcel of property bordering the Columbia River. In October 1910, they exchanged deeds whereby brother B.A. Randall took the western portion of the land and the sisters Clara and Grace took the eastern portion. Finding No. 25; CP 203:11-22, Ex 6 and 7. Exhibit 87 (Appendix C) is a sketch of the two properties. Only the sisters' property is at issue in this case.

2. May 1912. The three siblings jointly executed three deeds conveying rights in the Landing and the Lane. Finding No. 26; CP 203:23 – 204:12, Ex 8 and 9. The location of the Landing and the Lane are

depicted in Exhibit 87 (Appendix C). The intent of the three siblings was that B.A. Randall should own 1/8 of the Landing, Clara and Grace should own 1/8, Sill and Webster as grantee of Deed Exhibit 8 should own 1/4, and that Margaret Douthit as the grantee of Deed Exhibit 9 should own 1/2 of the Landing. Finding No. 26(c); CP 204: 5-9, Ex 60.

3. 1912-1928. Pursuant to four deeds, Exhibits 10, 11, 12 and 13, the property of the sisters, Clara and Grace, became vested in Paul and Eva Paulsen (“Paulsen”). Finding No. 27; CP 204:13-15. The last of the four deeds was from P.J. Burk and Agnes Burk to Paulsen. Ex 13.

4. May 1929. Exhibit 14 is the first of several key deeds. Paulsen conveyed a portion of their property to Herman and Elizabeth Graber (“Graber”). Finding No. 28; CP 204:17-205:15. The property conveyed by Paulsen to Graber is depicted in Exhibit 88 (Appendix D). The property retained by Paulsen included all of the Defendants’ properties. Finding No. 28(b); CP 204:23-25.

In the deed to Graber, Paulsen reserved an easement over and to the Landing for the benefit of his retained property. Finding No. 28(c); CP 205:1-7. The easement was appurtenant to the remaining land of Paulsen, and therefore, appurtenant to the Defendants’ land. Finding No. 28(c); CP 205:1-7. Access to the Lane was over a public road, which is sometimes referenced as the Old Camas Highway. Finding Nos. 52-56;

CP 211:11 - 212:2. The Old Camas Highway was later vacated in the early 1930s. Finding No. 57; CP 212:3-4.

Even though he had access over a public road, Paulsen sought to reserve an easement over the Old Camas Highway. This is the East-West portion of the Easement above identified. The Paulsen to Graber Deed referenced a “right of way along the ‘Old Camas Highway.’” The Deed also referenced a “right of way not to exceed 20 feet....said right of way to follow the ‘Old Camas Highway.’” Finding No. 86(a); CP 216:16-20, Ex 14.

In regards to the width of the East-West Portion, the trial court found that the intent in the Paulsen to Graber Deed was “clearly” to create a 20 foot wide easement. Finding No. 87; CP 217:21-23⁶ In regards to the location, the trial court made a finding that the intent was to locate the center line of the 20 foot easement at the center line of the County Road. Finding Nos. 88, 89 and 90; CP 217:24 - 218:12. This intended location is the same as the 20 foot strip of property excepted in the Leas Deed.⁷ The

⁶ The Leas, in fact, also proposed that the trial court make the finding that the intent was for a 20 foot easement. See Leas proposed Findings of Fact and Conclusions of Law (“Leas Proposed Findings”) Paragraph 79, CP 287: 22-25.

⁷ The Leas Proposed Findings, Paragraph 81, also requested that the Court make the finding that the intent was to place the Easement in this same location. The language proposed by the Leas was somewhat different than the language used by the trial court. Leas Proposed Findings Paragraph 81. CP 288: 4-8.

trial court's finding regarding location referenced "the deeds." Finding No. 90; CP 218:9-12.

In making its factual determination of the intent of the parties, the trial court looked not only at the Paulsen to Graber Deed, but looked at later deeds and the actions of the parties. Finding Nos. 87 and 90; CP 217:21-23 and 218:9-12.

5. June 1929. Graber received a deed from a party identified only as "Webster" to a portion of property located to the north of the property that Graber received from Paulsen. Finding No. 38; CP 207:7-9. This additional property is depicted in Exhibit 90 (Appendix E), which also depicts the location of the Highway after it was moved north of the railroad tracks.

6. June 1932. In June of 1932, Paulsen conveyed a portion of his remaining property to the widow Clara Frink. Finding No. 29; CP 205:16-21. Through five subsequent deeds, this property was conveyed to the Defendant R.L Jacob Trustee. *Id.* Each of the Deeds referenced the Easement. *Id.* The Jacob Trust property is depicted in Exhibit 89. (Appendix F) The trial court found that the intent of the "later deeds" was to convey a 20 foot easement over the 20 foot strip between the Leas' two parcels. Finding Nos. 87 and 90; CP 217:21-23 and 218:9-12. The Leas have only appealed the conclusions of law included in these Findings and,

in fact, the Leas Proposed Findings, Paragraphs 79 and 81, requested that the Court make this same finding of intent. CP 287:22-25 and 288:4-8.

7. 1944 and 1952. In 1944 and 1952, Paulsen conveyed the northern portion of his property to Howard and Dorothy Eby. Finding No. 30; CP 205:22 - 206:2, Ex 16 and 17. The Eby property is depicted in Exhibit 89 (Appendix F). The two Eby Properties were later divided into eight lots. Finding Nos. 6, 7 and 30; CP 199:18-24 and 205:22 - 206:2. Defendants Harrington, Brainard, Lasof, Bear and Ellertson own five of these eight lots. The trial court found that the intent of the “later deeds” was to convey a 20 foot easement over the 20 foot strip between the Leas’ two parcels. Finding Nos. 87 and 90; CP 217:21-23 and CP 218:9-12. The Leas have only appealed the conclusions of law included in these Findings and, in fact, the Leas Proposed Findings, Paragraphs 79 and 81, requested that the Court make this same finding of intent. CP 287:22-25 and 288:4-8.

8. August 1955. Sometime prior to 1955, Herman Graber passed away and Elizabeth Graber married Lester Kellogg. In August 1955, Elizabeth Kellogg and Lester Kellogg conveyed two parcels to Howard and Lois Miller. Finding No. 44; CP 209:10-19. Ex 80. This deed created the two parcels that would later be owned by the Leas. The trial court made a finding that the 20 foot wide strip, which is at issue in

this case, was “excepted, reserved and/or made expressly subject to the East-West Portion of the Easement.” Finding No. 44(b); CP 209:15-17. No error has been assigned to this Finding.

9. June 1961. By 1961, Elizabeth Kellogg (fka Graber) had passed away. She was survived by her son Ervin Graber. In 1961, Ervin Graber conveyed a portion of his mother’s land to Lester Kellogg (now a widower by virtue of Elizabeth’s death). Finding Nos. 28(d), 40; CP 205:8-15 and 207:13-23, Ex 47. The deed included a reservation of a right of way for the Defendants’ properties:

ALSO the right to use a right of way, which said right of way is reserved for the purpose of travel for and to by [sic] the owners and occupants of any part of that certain tract of land conveyed by P.J. Burk and wife to Paul Paulsen and wife. . . .

Exhibit 47. The trial court made a specific finding that this conveyance was subject to the Easement by the owners of the Defendants’ properties. Finding No. 40(a); CP 207:17-20. No error has been assigned to this Finding.

10. June 1965. In June of 1965, Ervin Graber conveyed to Lester Kellogg (still a widower) the remaining property that Ervin obtained from his deceased mother, Elizabeth Kellogg. Finding No. 41; CP 207:24-208:11, Ex 48. The Court made a number of important findings in regards to this deed. The Court found that there was a “clear

and expressed intent” to grant to the Defendants as grantees of Paulsen, the right to use the Old Camas Highway, which Ervin Graber specifically described as 20 feet wide and located within the 20 feet excepted by the Leas Deed. Finding No. 23; CP 99-100 and 203:6-7. No error has been assigned to this Finding.

11. October 1985. In 1968, Lester Kellogg, perhaps tiring of the life of a widower, married Plaintiff Mary Kellogg. In October 1985, very shortly before his death, Lester Kellogg conveyed his property to himself and his wife, Mary Kellogg. Finding No. 49; CP 211:1-3, Ex 49.⁸ Lester Kellogg would pass away before the end of the year. Finding No. 28(d); CP 205:14-15. Lester Kellogg was a careful and knowledgeable person. Finding No. 86(c); CP 216:24-217:2. As a careful person, Lester Kellogg certainly would have wanted his wife to know what she was getting and what she was not getting. The deed contained a specific description of the Old Camas Highway, which corresponded to the 20 foot gap between the two Leas parcels. Ex 49. The deed also contained an Exception for the “rights excepted and reserved” in the Paulsen to Graber Deed and an Exception for the right to travel along the Old Camas Highway which had been granted to the predecessor of Defendant R. L. Jacob. Ex 49. No error has been assigned to this Finding.

⁸ The legal description in Exhibit 49 is difficult to read, however, the trial court made the finding that the legal description is the same as Exhibit 48.

12. August 1993. In 1993, Mary Kellogg, now a widow for approximately eight years, conveyed her property to her trust. Finding No. 43; CP 208:25 - 209:8, Ex 53. The conveyance made reference to the easement across the Old Camas Highway. Finding Nos. 43(b) and 43(c); CP 209:5-8. The conveyance specifically described in the East-West Portion of the Easement as 20 foot wide, and also described its location exactly as placed by the trial court. Ex 53.

13. 1990 to 2002. The Defendants all received deeds to their respective properties. Finding Nos. 10, 12, 13, 15, 17, 18 and 19; CP 200: 11-14, 200:22 - 201:4, 201:10-16, 201:22 - 202:4. The deeds referenced the Easement in one form or another. CP 30, 33, 35, 36, 37, 205:22 - 206:2, 206:12-13 and 206:21 - 207:4. The trial court found that the intent of the “later deeds” was to convey a 20 foot easement over the 20 foot strip between the Leas’ two parcels. Finding Nos. 87 and 90; CP 217: 21-23 and CP 218:9-12. The Leas have only appealed the conclusions of law included in these Findings and, in fact, the Leas Proposed Findings, Paragraphs 79 and 81, requested that the Court make this same finding of intent. CP 287:22-25 and 288:4-8.

C. Use of the East-West Portion of the Easement

The trial court found that there is a paved “Driveway” located between the two Leas parcels and the two Marshack parcels. Finding Nos.

61, 62 and 63; CP 212:17-26. The location of the Driveway is depicted in Exhibit 92 (Appendix B), and in Exhibit 122. The trial court further found that the Defendants, Marshack and some of their predecessors travelled on the Driveway in their use of the Easement. Finding No. 64; CP 213:1-2.

There was no evidence adduced at trial that any of the Defendants or Marshack travelled on the 20 feet south of the Driveway, which is the easement area claimed by the Leas in this appeal.

VIII. LEGAL ARGUMENT

A. The Leas do not have standing to appeal

RAP 3.1 provides that “only an aggrieved party” can seek review. In *Sheets v. Benevolent and Protective Order*, 34 Wn.2d 851, 210 P.2d 690 (1949), the court discussed the meaning of “aggrieved party.” The court quoted 4 C.J.S. 356 with approval for the following:

1. A party is aggrieved when a judgment operates “prejudicially and directly upon his property or pecuniary rights and interest.” *Id.* at 855.
2. The word “aggrieved” refers to a “substantial grievance.” *Id.*
3. A party is aggrieved when the judgment imposes a “burden or obligation” upon the party, but the “right invaded must be immediate, not merely some possible, remote consequence.” *Id.*

The law of standing can by analogy provide additional rules for analysis. In *Dean v. Lehman*, 143 Wn.2d 12, 18 P.3d 523 (2001), the Supreme Court stated that the “basic rule of standing prohibits a litigant from asserting legal rights of another.” *Id.* at 18.

Turning to the present case, the Leas are not “aggrieved” parties. The trial court found that none of the Easement was on the Leas Property. There was no “burden or obligation” that was placed directly on the Leas Property. The Leas have no substantial interest in the Easement which goes over property of another. There has been no invasion of a right of the Leas. To the extent that the Leas have a right of passage over the 20 foot strip, they never complained or raised any issue at trial that the Easement in any way interfered with their right of passage.

The lack of burden on the Leas Property is forcefully brought out by the fact that the Leas are asking the Court to expand the Easement to 30 feet so that a portion of the easement will traverse their property. Clearly, if the Leas were seeking to avoid the “burden” or “obligation” of the Easement, they would not be asking the Court to expand the size of the Easement on to their land; nor would the Leas be asking the Court to move the Easement to less than 10 feet from their house. See Ex 124.

Since the Easement is not in their property, the Leas are forced to argue the rights of the land owner, the Kellogg Trust, that the Easement should not be placed upon the Kellogg Trust's property, or should be moved to a different location on the Kellogg Trust's Property. Both the Kellogg Trust and the Defendants have accepted the easement upon the Kellogg Trust Property.

The Leas do not have standing to complain. The appeal should be dismissed.

B. There are other Findings, which have not been objected to and are verities upon appeal, which are sufficient by themselves to support the final judgment.

1. Finding No. 23.

Finding No. 23 incorporated the trial court's Memorandum of Opinion. CP 203:6-7. A trial court's decision is binding when it is formally incorporated into findings of fact and conclusions of law. *Seidler v. Hansen*, 14 Wn. App. 915, 917, 547 P.2d 917 (1976). The Leas have not assigned error to Finding No. 23. Appellants' Brief p 1.⁹

The trial court made the following findings of fact in its Memorandum of Opinion regarding the 1948 deed from Ervin Graber to Lester Kellogg (Exhibit 48):

⁹ In fact, the Leas could not assign error to Finding No. 23, even if they wanted, because the Leas did not provide any specific objection to this Finding, at least to the extent this Finding is argued as independently supporting the Judgment. Lack of specific objection precludes appellate review. *Seidler, supra* at 918.

(a) Graber specifically described the center line of the Old Camas Highway and reserved 10 feet on each side. CP 99.

(b) The width of the roadway was referenced in three portions of the legal description as 20 feet, either by specifically describing it as 20 feet, or by referring to another deed inferred to be 20 feet.

(c) “The clear and expressed intent was to grant not only to Kellogg, but also to the Paulsen grantees, the right to use the OCH [Old Camas Highway] for access to the [L]ane.” CP 100.

(d) Graber “specified the width and the location of said OCH [Old Camas Highway].” CP 100.

The trial court’s finding is that Graber granted to Defendants an easement over the 20 foot strip for access to the Lane and eventually the Columbia River.

This Finding is a verity on appeal. Since interpretations of easements are mixed questions of law and fact, this is both a finding of fact as to intent, and a legal conclusion of a conveyance.

It will be noted that the Leas’ main argument, that Paulsen did not own north of the center line of the Old Camas Highway, was not applicable to Graber. See Ex 90. Graber acquired property north of the Old Camas Highway in 1929. Finding No. 38; CP 207:7-9. The Leas

concede in their brief that Graber owned “both sides of the center line of the Old Camas Highway.” Appellants’ Brief p 20.

Finding No. 23 is an independent basis to affirm the trial Court’s decision.

2. Finding No. 40

In Finding No. 40, the trial court found that Ervin Graber, in his 1961 deed to Lester Kellogg, made his conveyance subject to the Easement held by the Defendants. CP 207:13-23, Ex 47. Lester Kellogg accordingly took title subject to the Easement. The Leas have not assigned error to the Finding that this conveyance was subject to the Defendants’ Easement.¹⁰

The conveyance from Graber included the following language:

ALSO the right to use a right of way, which said right of way is reserved for the purpose of travel for and to by [sic] the owners and occupants of any part of that certain tract of land conveyed by P.J. Burk and wife to Paul Paulsen and wife....

Ex 47. The P.J. Burk to Paulsen deed included the property of the Defendants. Finding Nos. 25 and 27; CP 203:20-22, 204:13-15, Ex 87, 88 and 89.

The 1961 deed contained a detailed description of the Easement, including the 20 foot strip of property that is at issue on this appeal. The

¹⁰ The Leas could not assign error to Finding No. 40 as they did not provide any specific objections to the proposed finding at the trial court. *Seidler, supra* at 918.

1961 deed placed the East-West Portion exactly as located by the trial court.

Finding No. 40 is an independent basis to affirm the trial court's ruling.

3. Finding No. 41

In Finding No. 41, the trial court found that the 1965 deed from Ervin Graber to Lester Kellogg specifically described the East-West Portion of the Easement. Finding No. 41(b); CP 208:5-7, Ex 48. The trial court went on to find that the first "Except" clause in the 1965 Deed was the Easement. Finding No. 41(c); CP 208:8-9. The third "Except" clause was for the Easement to the widow Clara Frink, the predecessor in interest of Defendant R.L. Jacob, Trustee. Finding No. 41(d); CP 208:10-11.

The Leas have not assigned error to Finding No. 41, nor to any of its subparagraphs.¹¹ Finding No. 41 is a verity on appeal. Lester Kellogg took title specifically subject to the Easement. Finding No. 41 is an independent basis to affirm the trial court's ruling.

4. Finding No. 42

In Finding No. 42, the trial court made findings of fact regarding the 1985 Deed from Lester Kellogg to himself and his wife Mary Kellogg.

¹¹ The Leas could not assign error to Finding No. 41 as they did not provide any specific objections to the proposed finding at the trial court. *Seidler, supra* at 918.

CP 208:12-24, Ex 49. The trial court found that this deed specifically included an exception for the Easement. Finding No. 42(e); CP 208:24. Mary Kellogg accordingly took title specifically subject to the Easement.

The Leas have not assigned error to Finding No. 42, nor to any of its subparagraphs.¹² Finding No. 42 is a verity on appeal. Finding No. 42 is an independent basis to affirm the trial court's ruling.

5. Finding No. 43

In Finding 43, the trial court made findings of fact regarding the 1993 deed from Mary Kellogg to the Kellogg Trust. CP 208:25 - 209:8, Ex 53. The trial court found that this deed specifically included an exception for the Easement. Finding Nos. 43(a)(b) and (c); CP 209:1-9. The Kellogg Trust accordingly took title specifically subject to the Easement.

The Leas have not assigned error to Finding No. 43, nor to any of its subparagraphs.¹³ Finding No. 43 is a verity on appeal. Finding No. 43 is an independent basis to affirm the trial court's ruling.

It is important to note that the Kellogg Trust has not appealed this finding. Assuming, for the sake of discussion only, that the Leas had properly objected to this finding and the other findings at the trial court,

¹² The Leas could not assign error to Finding No. 42 as they did not provide any specific objections to the proposed finding at the trial court. *Seidler, supra* at 918.

¹³ The Leas could not assign error to Finding No. 43 as they did not provide any specific objections to the proposed finding at the trial court. *Seidler, supra* at 918.

and that they had assigned error on appeal, the Leas would still be in a position of arguing the rights of another party, which is not appropriate.

C. **The Trial Court correctly ruled that the East-West Portion of the Easement is 20 feet wide.**

The “primary objective” of deed interpretation is to determine the parties’ intent. *Niemann v. Vaughn Community Church, supra* at 374. If there is any ambiguity it is appropriate for the trial court to consider extrinsic evidence, such as the circumstances and prior conduct. *Sunnyside Valley Irrigation District v. Dickie, supra* at 880. It is also appropriate under the “Berg” rule, to consider the surrounding circumstances. *Hollis v. Garwell*, 137 Wn.2d 683, 974 P.2d 836 (1999).

The trial court made a factual finding that the intent in the Paulsen to Graber Deed and the “later deeds” was for a 20 foot wide easement. Finding No. 87; CP 217:21-23. In fact, the Leas Proposed Findings, Paragraph 79, specifically asked the Court to make this same finding of intent. CP 287:22-25.

The trial court considered the actions of the parties, which included the use and the subsequent deeds that specifically identified the width of the easement as 20 feet. Finding No. 87; CP 217: 21-23. The later deed by Ervin Graber, heir of the grantees in the Paulsen to Graber Deed, confirmed the intention for a 20 foot easement. Ex 48. Later Deeds by

the successors in interest to Graber confirmed the intention for a 20 foot easement. Ex 49, 53 and 80. The use of the parties within the 20 foot strip was further evidence to confirm the intent to create a 20 foot wide easement. Finding No. 64; CP 213:1-2.

The Leas made no objection to the trial court's consideration of the extrinsic evidence. In fact, the Leas specifically proposed that the trial court's findings include references to extrinsic evidence. Leas Proposed Finding Nos. 79 and 81; CP 287:22-24 and 288:4-8.

The Leas do not on appeal challenge the factual finding of intent, other than to claim that "According to the plain language of the deeds creating the neighbors' easements, the east-west segment is 30 feet wide." Appellants' Brief p 1. An examination of the deeds reveals otherwise.

The Paulsen to Graber Deed referenced a right of way along the Old Camas Highway, without defining the width. Ex 14. Later in the deed there was a reference to a second right of way not to exceed 20 feet that was to "follow the Old Camas Highway." What was the intent? Why reference 20 feet for the easement to follow the Old Camas Highway if that was not the intent? What was meant by "Old Camas Highway?" Did they mean the travelled portion, the improved portion, or the full right of way? And if they meant the full right of way, were they relying upon the survey, Exhibit 94, which depicted a 40 foot right of way? The trial court

determined that the intent was for a 20 foot wide easement. It should be noted that nowhere in the Paulsen to Graber Deed is there a reference to a 30 foot wide East-West Portion of the Easement.

Later deeds clearly spelled out 20 feet for the width. Ex 48, 49, 53 and 80. In fact, the legal description in the Leas Deed specifically described the north parcel and the south parcel by explicit reference to a “20 foot road” which is located exactly in the East-West Portion as found by the trial court. Ex 85. Despite the introduction of approximately 80 deeds as Trial Exhibits, the Leas are unable to point to a single deed that specifically described the East-West Portion as 30 feet.

The Leas’ argument is contrary to the intent of the parties, contrary to the findings of fact, contrary to the deeds, and contrary to the Leas proposed findings. The trial court should be affirmed as to the width of the easement at 20 feet.

D. The Trial Court correctly placed the East-West Portion of the Easement.

The trial court made a finding that “the deeds, the use of the Easement and the actions of the parties clearly evidence an intent for a 20 foot wide easement” centered on the center line of the Old Camas Highway. Finding Nos. 88, 89 and 90; CP 217:24 - 218:12. The Leas also proposed that the trial court make a similar finding of fact regarding

the intent of “the deeds.” Leas Proposed Findings, Paragraph 81; CP 288:4-8.

Paulsen, the first grantor to create the easement, owned no property north of the center line of the Old Camas Highway. Finding No. 23; CP 203:6-7 and 99. In point of fact, the Old Camas Highway was still a public road in 1929, when Paulsen reserved the easement. Finding No. 57; CP 212:3-4.

Defendants submit there are three separate basis to affirm that the trial court correctly located the East-West Portion.

1. Upon vacation of the public right of way, Paulsen and his grantees had an easement across the center 20 feet of the Old Camas Highway.

When the Paulsen to Graber deed was recorded, Paulsen accessed the Easement by traveling west along a public road to the private Lane, and then south on the Lane to the Columbia River. If the road had never been vacated, there would be no issue that Paulsen and his successors could travel across the road to get to the Lane.

Washington has long recognized that the access rights of private parties must be protected when there is a vacation of a public road. The Washington Court has adopted rules that protect private property owners from such loss of access. In *Humphrey v. Jenks*, 61 Wn.2d 565, 379 P.2d 366 (1963), the Supreme Court set out the general and established rule:

It is well established in this jurisdiction that the vacation of a platted street or alley puts an end to all interest of the public in the land, but does not affect private easements over the streets by those who have bought with reference to the plat and in reliance thereon.”

Id. at 567. The protection of private access rights is based in part upon the inability of the common grantor to defeat the access rights:

As between the grantees of a common grantor who had platted and sold land, rights are to be primarily determined by reference to the right of the grantor. That is to say, if the common grantor could not deny the full effect of his deed and the right of ingress and egress, his grantee could not do so.

Van Buren v. Trumbull, 92 Wash. 691, 694, 159 P. 891 (1916). If a common grantor could not defeat an easement right on a street, then the common grantees cannot among themselves deny the right of ingress and egress. *Burkhard v. Bowen*, 32 Wn.2d 613, 623, 203 P.2d 361 (1949).

In the case at bar, Silas Maxon, the holder of the original Donation Land Claim, was the common grantor of all parties. See Ex 6 and 7. Silas Maxon did not file a plat on his property, but he did petition and dedicate the Old Camas Highway. Finding No. 52; CP 211:11-14, Ex 101, 102 and 103. The Old Camas Highway was vacated in the early 1930s. Finding No. 57; CP 212:3-4. Paulsen did not, however, sign the petition to vacate the Old Camas Highway. Ex 105.

Under the analysis of *Van Buren*, the question is whether Silas Maxon could have, by virtue of a vacation, denied access along the

vacated public street as against someone who bought later on the basis of their ability to use the public street for access. Defendants submit that the answer is “No”; Silas Maxon could not have denied access to Paulsen or any of Paulsen’s grantees. Therefore, the easement across the Old Camas Highway to get to the Lane continued after vacation of the public highway.

The intent of all subsequent owners (until the Leas claimed otherwise) was to recognize that this easement continued over the vacated public road, to the extent of a 20 foot wide private road/right of way, centered on the center of the old Camas Highway. This is evident from a large number of deeds. There were not less than 15 deeds from 1944 to 2004 introduced into evidence which reference the “20 foot road” Ex 2, 3, 4, 48, 49, 50, 51, 52, 53, 80, 81, 82, 83, 84 and 85. There were at least three deeds which specifically described the 20 foot easement and its use in favor of the Paulsen grantees. Ex 47, 48 and 53. Last, but not least, the deed that first created the two Leas parcels specifically described this 20 foot easement and the right of use by the Paulsen grantees. Ex 80.

For some 60 -70 years everyone was in agreement, and so confirmed by their actions and deeds that there was a 20 foot easement across the center of the vacated road for the use by Paulsen and his grantees. It was not until the Leas purchased their property in 2004 that

litigation ensued. The 20 foot wide East-West Portion of the Easement has been established and accepted, and the Leas should not be allowed to now try and make a change.

2. The Easement that was reserved and later conveyed has been ratified and cannot be changed.

The Leas claim that Paulsen could not effectively grant an easement over the 10 feet that lies north of the center line of the Old Camas Highway because he owned no property north of the center line. To the extent that Paulsen lacked title to the 10 feet above the center line, his reservation of the easement in the Paulsen to Graber Deed, and his later conveyances of the easement to the predecessors in interest of the Defendants, have been ratified by the true owners of the 10 foot strip.

As set out above, the trial court found, and its finding is a verity on appeal, that there was an intent in the deeds to create and convey an easement over the 20 foot strip in between the Leas' two parcels. Finding Nos. 90 and 91; CP 218:9-18. When Paulsen conveyed, by three deeds, property to the Defendants' predecessors in interest, he referenced and intended to convey an easement over the 20 foot strip between the Leas' two parcels. Ex 15, 16 and 17. There is no claim that these three Paulsen Deeds did not comply with statutory formalities for a deed. To the extent that these three deeds conveyed an easement over property which Paulsen

as the grantor did not own, the deeds may have been voidable, but they were not void.

Defendants submit that there are two methods by which these three deeds could become fully valid, as far as the conveyance of an easement that the grantor did not own. The first method for validity would be if Paulsen later acquired title to the full property within the easement. By virtue of the after-acquired title, the three deeds would be fully effective as to the easement. RCW 64.04.070. This first method is not, however, applicable to the present case.

The second method by which these three deeds could become fully valid, as far as the conveyance of the easement, was if the true owners of the property later ratified the easement. The meaning for the term “ratify” includes “to make valid or legally operative” and “to confirm.” *McKenzie v. Mukilteo Water District*, 4 Wn. App. 103 110, 102 P.2d. 251 (1940) quoting Webster’s New International Dictionary (2d ed). The issue becomes whether the owners of the 10 feet lying north of the center line have ratified the three Paulsen deeds, and thereby ratified the subsequent deeds in the chain history, which each intended to center the easement on the center line of the Old Camas Highway.

The first question is: Who owned the 10 feet above the center line upon vacation of the Old Camas Highway? Graber owned both sides of

the Old Camas Highway when it was vacated in the early 1930s and therefore Graber came into ownership of all the Old Camas Highway. Ex 14 and 90. This is agreed by the parties. See Appellants' Brief p 20. Did Graber act to ratify the location of the easement? The answer is "Yes" on at least three occasions. First, in the deed to the Leas' predecessor, the same deed that carved out the Leas' two parcels, Elizabeth Graber (who by then had remarried and become Elizabeth Kellogg), specifically stated that the 20 feet was "excepted, reserved, and/or made expressly subject to the East-West Portion of the easement." Finding No. 44(b); CP 209:15-17, Ex 80. The language of the deed is instructive:

RESERVING UNTO THE GRANTOR the right to use the following described land as a right of way for the purpose of travel, **along with other owners and occupants who qualify under the terms of that particular instrument conveying a certain tract of land from P.J. Burk and wife to Paul Paulsen and wife....**The South 10 feet of the above described tract of land ...

Ex 80. This describes the 10 feet lying north of the center line. By the language in the deed, Elizabeth Graber ratified the easement created and conveyed by Paulsen.

Ervin Graber on two occasions stated in writing his agreement of the location of the easement in his 1961 deed to Lester Kellogg and in his 1965 deed to Lester Kellogg. Ex 47 and 48.

Appellants state that “Mr. [Lester] Kellogg was the successor in interest to Mr. Ervin Graber.” Appellants’ Brief p 20. To the extent that Lester Kellogg was a successor in interest to Graber, he specifically ratified and approved the location of the easement in his 1985 deed to his wife, Plaintiff Mary Kellogg, and to himself. Ex 49. Lester Kellogg referenced the “Old Camas Highway” much like Paulsen had done, and Lester Kellogg specified the size and location of the East-West Portion exactly consistent with Paulsen’s intent and with the Court’s ruling.

To the extent that Mary Kellogg was a successor in interest to Graber, she likewise ratified and approved the location of the easement in the 1993 deed to her trust. Ex 53. Much like her husband had done eight years earlier, Mary Kellogg specifically referenced the “Old Camas Highway” and she specified the size and location of the East-West Portion, exactly consistent with Paulsen’s intent and with the Court’s ruling.

To the extent that Paulsen lacked title to reserve the East-West Portion and to convey it to other parties, the owners have repeatedly and conclusively ratified the easement, in writing, under oath, and in documents recorded with the County Auditor. The trial court correctly located the easement.

3. The location of the Easement has been changed by agreement of the dominant and servient estates (assuming Leas are accurate regarding the original easement location).

This section of Defendants' Brief assumes, for the sake of argument only, that the Leas are correct and that the intent of the easement created by Paulsen was to run below the center line of the Old Camas Highway. Taking that assumption as correct, then the parties by their actions and deeds have consented and agreed to the movement of the easement to the location found by the trial court.

The Leas correctly state that Washington law requires the mutual consent of the dominant and servient estates in order to relocate an easement. Appellants' Brief p 24.

An agreement to relocate an easement can be inferred from the actions of the parties. *Barnhart v. Gold Run, Inc.*, 68 Wn. App. 417, 422-423, 843 P.2d 545 (1993). In *Barnhart* the Plaintiffs sought to establish their right to use an access easement in a plat. The actual access road, however, was built north of the access easement and used by the various owners for many years. The Court of Appeals ruled that the evidence supported the trial court's determination that the location of the platted right of way had been relocated by the long period of use of the actual access road. *Id.* at 420-421.

The *Barnhart* court relied in part upon *Curtis v. Zuck*, 65 Wn. App. 377, 829 P.2d 187 (1992). “As in *Curtis*, these facts are sufficient to support a finding that the location of the easement shifted to the existing road.” *Barnhart*, *supra* at 423.

Other jurisdictions are in accord that consent to change the location of an easement can be implied from the parties’ action. For example, in *Buxton v. Murch*, 249 Va. 502, 457 S.E.2d 81 (1995), the plaintiffs argued against a shift in the location of an easement for access to the Rappahannock River. The Virginia Supreme Court found that the location of the easement had been changed by the use and actions of the parties.

The court’s language is instructive:

Even where there has been a definite location of an easement, it may be changed with the express or implied consent of the persons interested. Such consent may be implied from the acts and acquiescence of the parties...

Id. at 508. The law of the State of Utah is in accord. *Tripp v. Bailey*, 74 Utah 57, 276 P. 912 (1928). (The consent of the owner of the servient estate to a change in the location of an easement may be implied from acquiescence. *Id.* at 75-76.)

Turning to the case at bar, the parties have by their actions and their deeds mutually consented to the relocation of the easement. The Leas admit that Graber was the owner of the servient estate. Appellants’

Brief p 20.¹⁴ The following deeds and actions show the consent, both actual and implied, to relocate the easement.

In the 1955 deed from Elizabeth Kellogg (formerly Elizabeth Graber) and her husband Lester Kellogg (the then owners of the servient estate) to Miller, specifically described the location and size of the East-West Portion as a 20 foot easement. Finding No. 44; CP 209:10-19, Ex 80. The specific location fixed by the deed places the center of the Easement at the center of the Old Camas Highway. If the Easement was ever elsewhere, clearly this deed evidenced the intent of the servient owner to move the Easement. The subsequent deeds of the dominant owners all intended to locate the Easement as centered on the center line of the Old Camas Highway. Finding No. 90; CP 218:9-12. The deeds in the chain of the dominant estates, with this intent, include the following deeds: Ex 20, 21, 22, 23, 24, 25, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42, 43, 44, 45, 46, 51 and 52. While the trial court did not make specific findings as to each of these deeds, it did make the general finding that “the deeds, the use of the Easement and the actions of the parties clearly evidence an intent for a 20 foot wide easement to be located in the

¹⁴ Appellants brief identifies Ervin Graber as the person who combined ownership of the property on both sides of the Old Camas Highway. Appellants Brief p 20. In actuality it was Ervin Graber’s parents, Herman and Elizabeth Graber. Findings 28 and 38. Ervin Graber was, however, the son and successor to his parent’s interest so the Appellant’s reference to Ervin Graber does not change the analysis. See Finding 28(d).

20 foot strip of property excepted by the Leas Deed.” Finding No. 90; CP 218:9-12.

These deeds alone are enough to show the agreement of the parties to relocate the easement. But there is more than these deeds. The trial court also found that the use of the East-West Portion was on a “Driveway” located between the Leas’ two parcels. Finding Nos. 62, 63 and 64; CP 212:21 - 213:2. There was no evidence of any use of the easement on the north 20 feet of the Leas’ south parcel. The actions of the parties, especially when combined with the deeds, allow for no other conclusion than the parties agreed to relocate the deed.

There is still other evidence of the consent/agreement of the servient estate to relocate the easement. Ervin Graber was the successor in interest to his parents. Finding No. 28(d); CP 205:8-15. In both his 1961 Deed and his 1965 Deed to Lester Kellogg, he specifically described and located the 20 foot easement as being centered on the center line of the Old Camas Highway. Ex 47 and 48. The trial court, in fact, made a specific finding as to the 1965 deed that Ervin Graber intended to fix the 20 foot easement at the center line of the Old Camas Highway. Finding No. 23; CP 99-100 and 203:6-7. As set out above, the dominant estates have agreed to the relocation by their deeds and their actions.

There is yet more evidence of the consent/agreement of the servient estate. The parties agree that Lester Kellogg was the successor in interest to Graber. Appellants' Brief p 20. In his 1985 deed to his wife and himself, Lester specifically described and located the 20 foot easement as centered on the center line of the Old Camas Highway. Ex 49. Appellants agree that the trial court found an intent to center the easement on the center line of the Old Camas Highway. Appellants' Brief p 25. Again, as set out above, the dominant estates have repeatedly manifested their assent to the location.

There is still more evidence of the consent/agreement of the servient estate. The northeast corner of the Leas house sits approximately 28 feet from the easement as found by the trial court. Ex 122. But if the Leas are correct, then the house would be less than eight feet from the easement. It seems unlikely that a residence would be constructed so close to an existing easement. Clearly then, the house was built with reference to the easement as located by the trial court, which supports a determination that the easement location was moved by mutual agreement.

At the risk of belaboring this point, there is yet more evidence of the consent/agreement to the relocation of the easement. The Driveway was built within the 20 foot easement found by the trial court. Ex 122. Proceeding to the east, the Driveway continues to be placed within the 20

foot easement that is centered on the center line of the Old Camas Highway.

In conclusion, even if the Court were to accept the Leas' argument that the 1929 Paulsen to Graber deed intended to establish the easement below the Old Camas Highway center line, the actions of the parties over 50 years clearly indicate that the easement was moved to the center line of the Old Camas Highway.

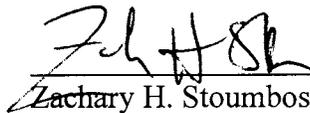
IX. CONCLUSION

The Leas are not "aggrieved" parties and their appeal should be dismissed.

The trial court correctly fixed the width of the East-West Portion at 20 feet. The trial court also correctly located the East-West Portion on the 20 foot gap between the Leas' two parcels. The trial court should be affirmed.

Respectfully submitted this 6th day of June, 2008.

LANDERHOLM, MEMOVICH,
LANSVERK & WHITESIDES, P.S.



Zachary H. Stoumbos, WSBA No. 7868
Attorney for Respondents Harrington
Brainard, Lasof, Ellertson, Bear and
Jacob

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of June, 2008, I served the following:

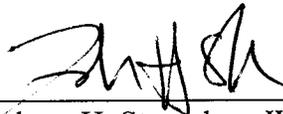
AMENDED
BRIEF OF RESPONDENTS HARRINGTON, BRAINARD,
LASOF, ELLERTSON, BEAR AND JACOB

upon the attorneys for all parties by depositing in the United States Post Office, Vancouver, Washington, a full, true and correct copy thereof, with postage thereon prepaid, addressed to them at the addresses set forth below their name(s):

Steven E. Turner
MILLER NASH LLP
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LANSVERK & WHITESIDES, P.S.



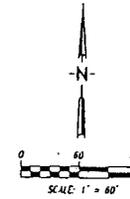
Zachary H. Stoumbos, WSBA No. 7868
Attorney for Respondents Harrington
Brainard, Lasof, Ellertson, Bear and
Jacob

APPENDIX A

APPENDIX B

EXHIBIT MAP 6

IN A PORTION OF THE S. D. MAXON D.L.C. NO. 37
 LYING IN THE SW 1/4 OF THE SE 1/4
 OF SECTION 2, T.1N, R.2E, W.M.
 CITY OF VANCOUVER, CLARK COUNTY, WASHINGTON
 FEBRUARY, 2005



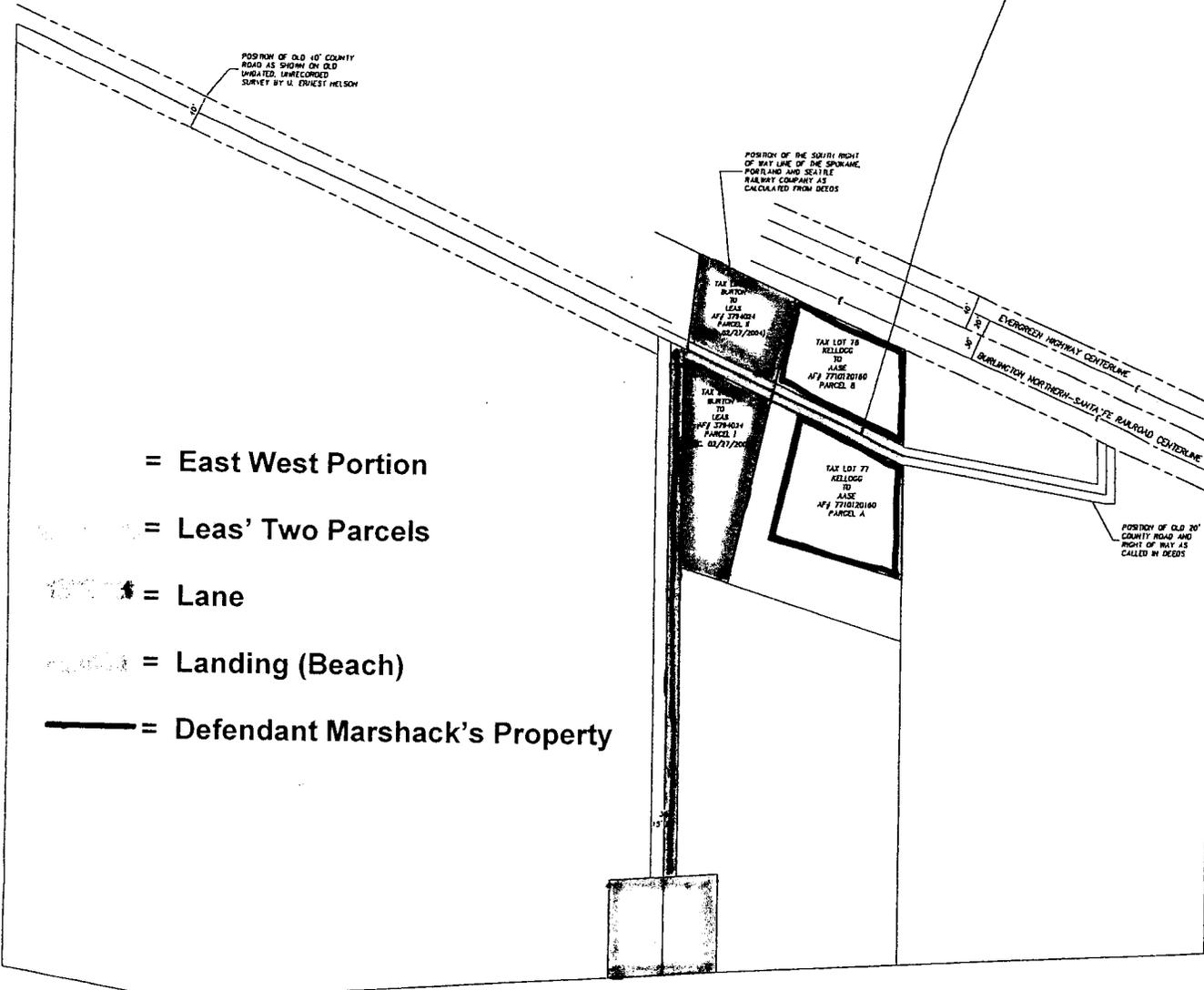
LEGEND

- D.L.C. DONAHAY LAND CLAIM
- R.G.S. RECORD OF SURVEY
- S.P. SHORT PLAT
- A/E. ADJOINER'S FILE NUMBER
- B.C. BOUND
- P.C. PLICE
- REC. RECORDED



MacKay & Sposito, Inc.
 ENGINEERS SURVEYORS PLANNERS
 1211 SE TECH CENTER DRIVE, SUITE 140 VANCOUVER, WA 98663
 (206) 833-3411 (206) 769-8156 PFD FAX: (206) 833-0823

DATE BY: H.S.B. DRAWN BY: J.H.S. JOB NO.: 11061
 CHECKED BY: D.A.B./L.S.E. ENG. NAME: 11061 E.C.B. DNE SHEET 7 OF 7



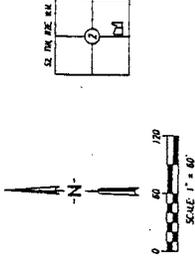
- = East West Portion
- = Leas' Two Parcels
- = Lane
- = Landing (Beach)
- = Defendant Marshack's Property

APPENDIX C

EXHIBIT MAP 1

IN A PORTION OF THE S. D. MAXON DLC NO. 37
 LYING IN THE SW 1/4 OF THE SE 1/4
 OF SECTION 2, T1N, R2E, W4M
 CITY OF VANCOUVER, CLARK COUNTY, WASHINGTON
 FEBRUARY, 2005

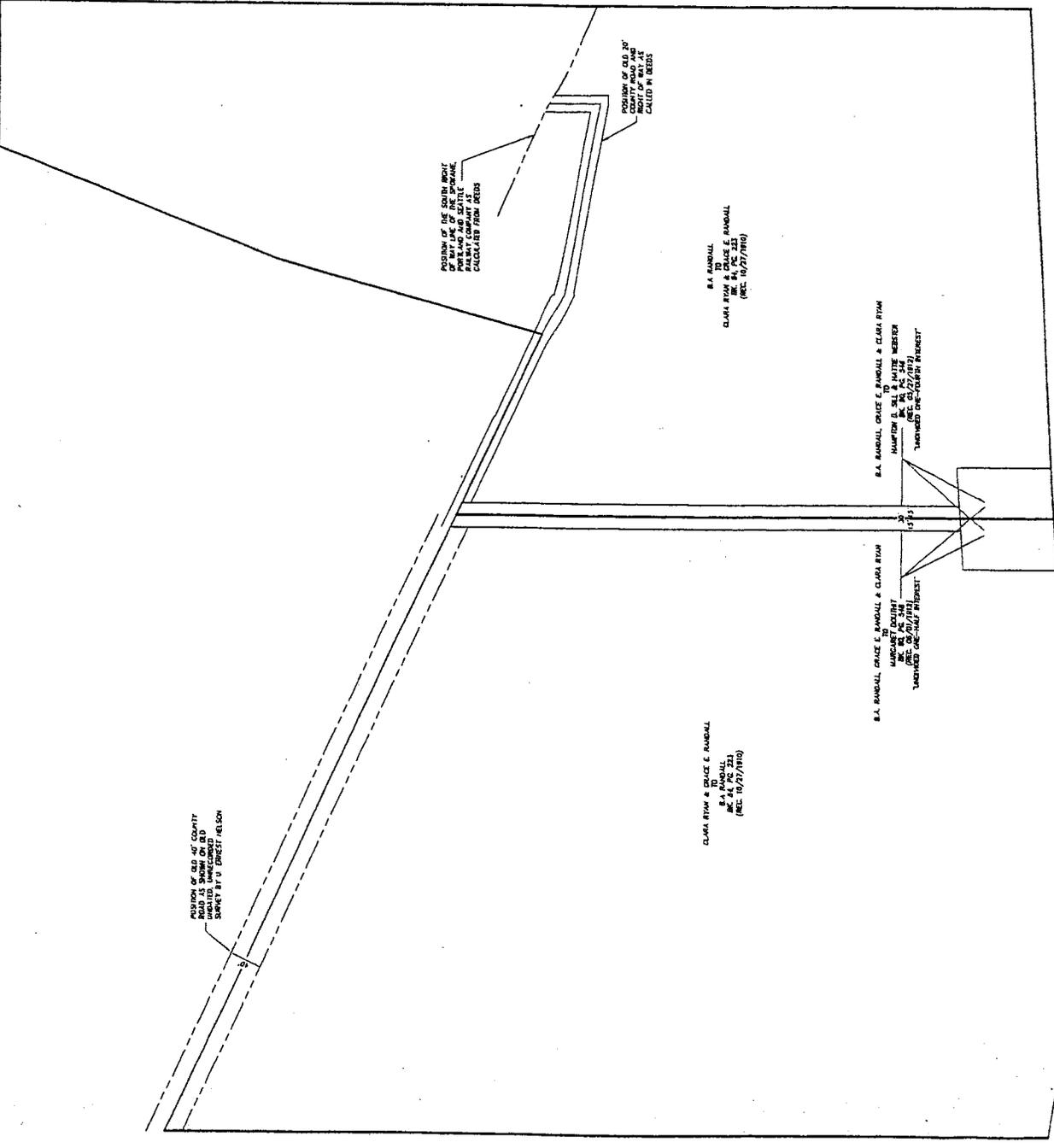
THIS POINT IS HALF NORTH OF
 SECTION 2, T1N, R2E, W4M



- LEGEND**
- D.L.C. BOUNDARY AND CLAIM
 - P.B.S. RECORD OF SURVEY
 - S.P. SHORT PLAT
 - A.P. ADJUTANT FILE NUMBER
 - R.C. RANGE
 - T.E. TOWNSHIP
 - P.C. SECTION



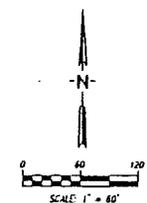
MacKay & Spostio, Inc.
 ENGINEERS SURVEYORS PLANNERS
 1243 SE TECH CENTER DRIVE SUITE 100 VANCOUVER, WA 98661
 (206) 843-2311 FAX (206) 843-6333
 DRAWN BY: JLB
 CHECKED BY: JLB/ELH
 SHEET 2 OF 7



APPENDIX D

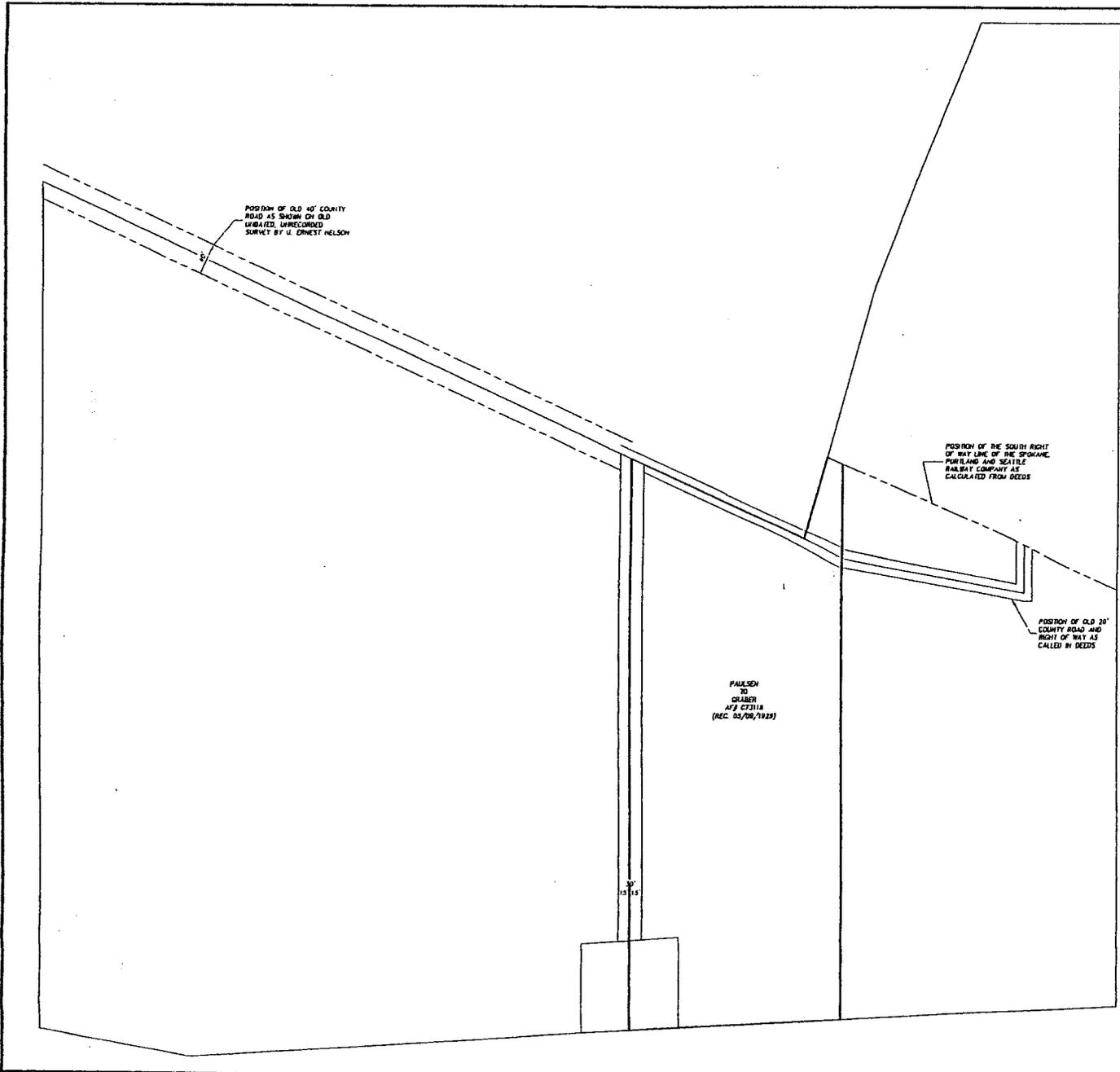
EXHIBIT MAP 2

IN A PORTION OF THE S. D. MAXON D.L.C. NO. 37
 LYING IN THE SW 1/4 OF THE SE 1/4
 OF SECTION 2, T.1N, R.2E, W.M
 CITY OF VANCOUVER, CLARK COUNTY, WASHINGTON
 FEBRUARY, 2005



LEGEND

- D.L.C. DOWRYEN LAND CLAIM
- R.O.S. RECORD OF SURVEY
- S.P. SHORV PLAT
- A.F. ADJUSTER'S FILE NUMBER
- B.C. BOOK
- P.C. PAGE
- REC. RECORDED



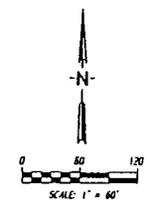
MacKay & Spósito, Inc.			
ENGINEERS SURVEYORS PLANNERS			
1225 SE TECH CENTER DRIVE, SUITE 140 VANCOUVER, WA 98662		VANCOUVER, WA 98662	
(206) 893-3111		(206) 288-8126 (FAX)	
CALC BY: S.J.R.	DRAWN BY: J.M.E.	JOB NO.: 11081	
CHECKED BY: S.J.R. / J.M.E.	DATE: 1/08/05	SHEET 3 OF 7	

EXHIBIT 88

APPENDIX E

EXHIBIT MAP 4

IN A PORTION OF THE S. D. MAXON D.L.C. NO. 37
 LYING IN THE SW 1/4 OF THE SE 1/4
 OF SECTION 2, T.1N, R.2E, W4M
 CITY OF VANCOUVER, CLARK COUNTY, WASHINGTON
 FEBRUARY, 2005



LEGEND

- D.L.C. DONAHAY LAND CLAIM
- R.O.S. RECORD OF SURVEY
- S.P. SHORT PLAT
- A/J ADJUDICATOR'S FILE NUMBER
- BC BOOK
- PC PAGE
- REC. RECORDED

DEED NOTE

THE DEED CALL OF "6.6 CHAINS NORTH AND 6.42 CHAINS WEST" OF THE SE CORNER OF THE S.D. MAXON DONAHAY LAND CLAIM APPEARS ON THE DEEDS (A/J 078471-HELLOG TO MILLER AND A/J 041840-CRANER TO HILLOCK) AND SUBSEQUENT DEEDS. THE DEEDS CALL THIS AS BEING ON THE CENTER OF A 20 FOOT ROAD. THIS CALL IS INCORRECT AS IT DOES NOT FIT THE ROAD AS MODELED FROM PHOTON DEEDS. HOW DO DEEDS MODELLED FROM IT FIT SURROUNDING SECTOR DEEDS. THE CORRECT CALL WOULD BE S.O. CHAINS (253.17 FT.) NORTH AND 8.1 CHAINS (402.61 FT.) WEST OF THE SE CORNER OF THE D.L.C.



MacKay & Sposito, Inc.
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 1338 SE TECH CENTER DRIVE, SUITE 140 VANCOUVER, WA 98663
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CALC BY: <i>MJB</i>	DRAWN BY: <i>JMB</i>	JOB NO.: 20051
CHECKED BY: <i>MJB/MS</i>	DATE: 1-28-05	SHEET 5 OF 7

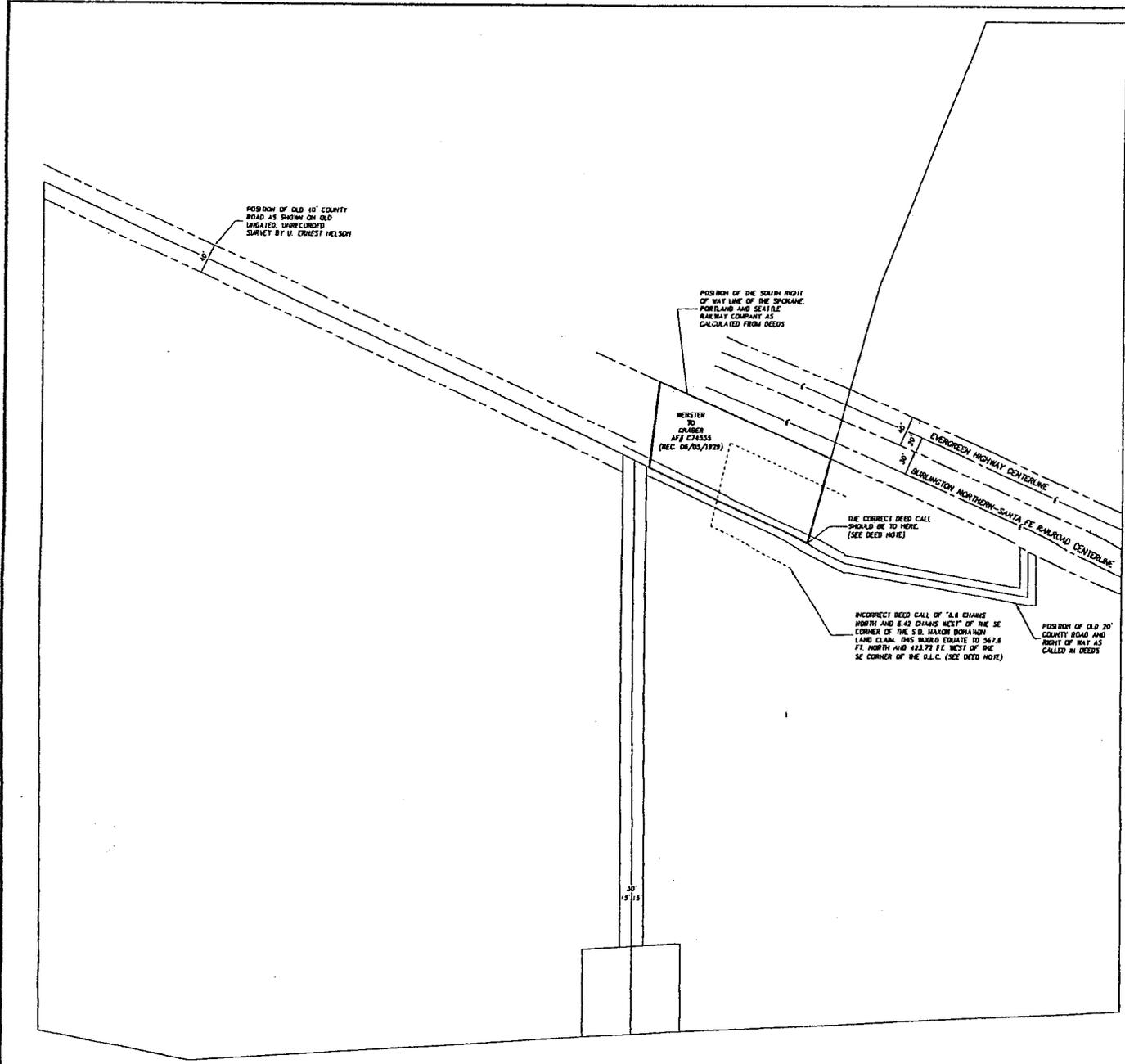
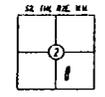
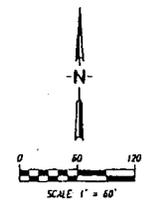


EXHIBIT 90

APPENDIX F

EXHIBIT MAP 3

IN A PORTION OF THE S. D. MAXON D.L.C. NO. 37
 LYING IN THE SW 1/4 OF THE SE 1/4
 OF SECTION 2, T.1N, R.2E, W.4M
 CITY OF VANCOUVER, CLARK COUNTY, WASHINGTON
 FEBRUARY, 2005



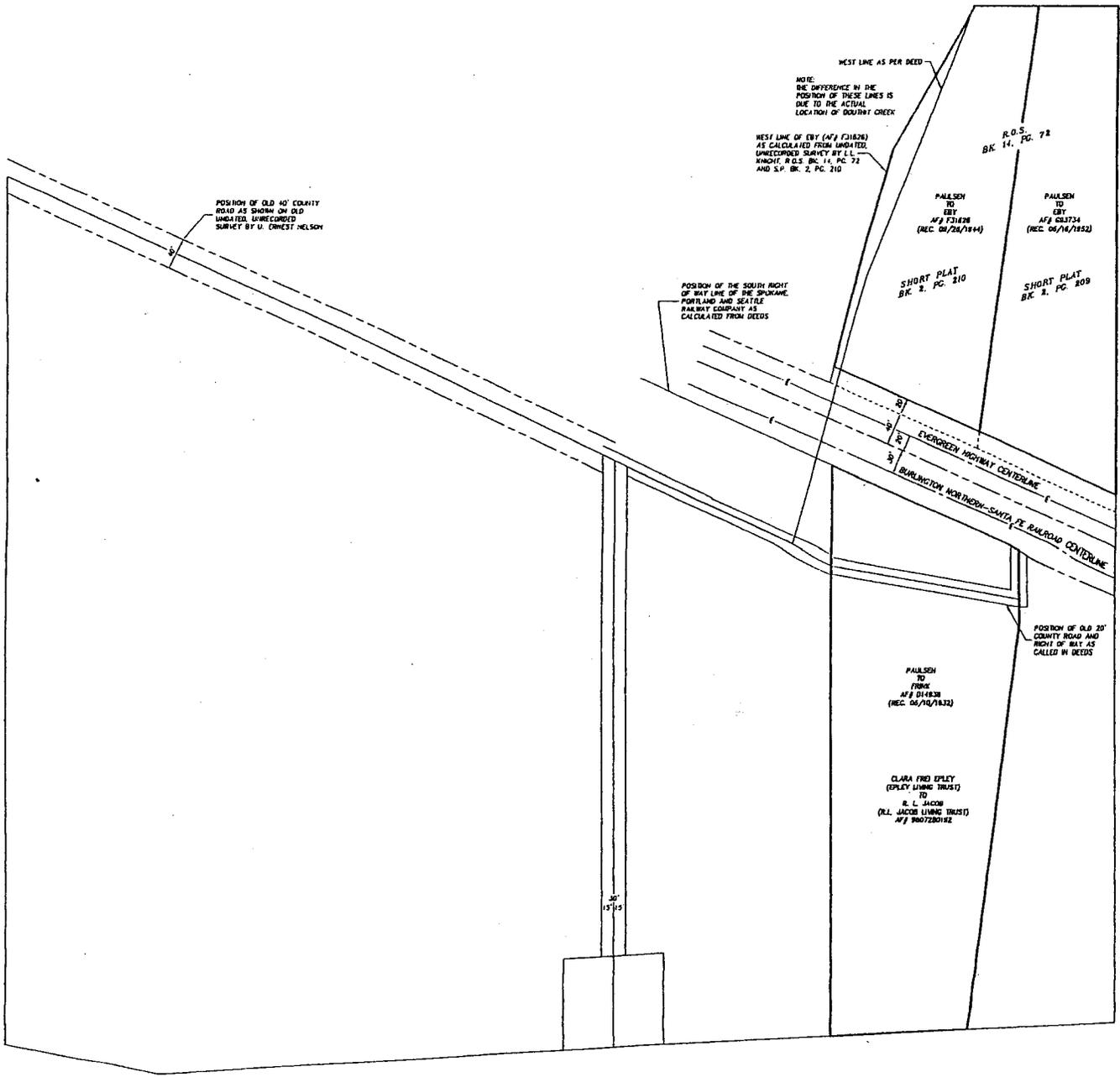
LEGEND

- S.D. MAXON D.L.C. NO. 37
- R.O.S. RECORD OF SURVEY
- S.P. SHORT PLAT
- A/F. ADVERSE FILE NUMBER
- BK. BOOK
- P.C. PAGE
- REC. RECORDED



Maakay & Sposito, Inc.
 ENGINEERS SURVEYORS PLANNERS
 1313 SE TECH CENTER DRIVE, SUITE 148 VANCOUVER, WA 98661
 (206) 835-2111 FAX: 206-878-1110 FAX: (206) 835-0823

DATE BY: J.S.B. DRAWN BY: J.S.B. JOB NO.: 14054
 CHECKED BY: P.A.S. D.S. ENG. NAME: JAMES SPOSITO SHEET 4 OF 7



THIS POINT IS 1262.8' NORTH OF THE SE CORNER OF THE 'S.D. MAXON D.L.C. HOWEVER THE DEED (A/F 13124) FROM PAULSEN TO EBY INCORRECTLY REFERS TO IT AS BEING THE NE CORNER OF THE MAXON D.L.C.

EXHIBIT 89