FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

No. 39093-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CARROLLS WATER ASSOCIATION

Respondent,

vs.

MARK HORN

Appellant.

BRIEF OF RESPONDENT

By DONALD W FREY
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COURT OF APPEALS, DIVISION II
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CARROLLS WATER ASSOCIATION

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I. STATEMENT OF CASE

Wesco Properties, Inc., an Oregon Corporation, developed a subdivision known as Carrollton Crest Estates located in Cowlitz County. The water supplied to Carrollton Crest Estates is from wells located outside of the subdivision. An 8" pipe connects the subdivision to its water source. A portion of the 8" waterline is located upon property owned by the appellant Mark Horn. The waterline was installed in 1998. The respondent Carrolls Water Association, a private non-profit corporation, received title to the waterline from the developer, Wesco Properties, Inc. Carrolls Water Association manages the waterline for Carrollton Crest Estates.[1]

[1] CP #3, Petitioner's Memorandum.

Carrolls Water Association filed a petition for Condemnation in the Cowlitz County Superior Court on December 10, 2007. A hearing was held and the Court found that the public use proposed by Carrolls Water Association and the property to be condemned was both reasonable and necessary for the further public for Carrollton Crest Estates and issued a Certificate of Necessity.[2]

A two day jury trial was held on January 7-8, 2009, and the jury returned a verdict awarding Mark Horn $2500.00 as "just compensation" for the easement placed on Mr. Horn's property.[3]

II. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN REFUSING TO ALLOW MR. HORN TO TESTIFY ABOUT PREVIOUS LITIGATION AND HIS CONTENTION THAT THE WATERLINE WAS ILLEGALLY PLACED UPON HIS PROPERTY BY THE DEVELOPER. MR. HORN'S PROPOSED TESTIMONY WAS IRRELEVANT IN DETERMINING "JUST COMPENSATION".

[2] CP #14, Certificate of Necessity.
[3] CP #124, Verdict.

1. **Abuse of Discretion**

Mark Horn claims that the Trial Court abused its discretion in its rulings set forth in his five assignments of error. A Trial Court abuses its discretion if a ruling is clearly unreasonable or based on untenable grounds or reasons. *In Re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362, (1997).

2. **Relevancy**

For Condemnation purposes, "just compensation" is an amount equal to the difference between the fair market value of the entire property and the fair market value of the remainder after the taking. *City of SeaTac v. Cassan*, 93 Wn. App. 357, 361, 967 P.2d 1274 (1998). See also *State v. Wandermere Co.*, 89 Wn. App. 369, 377, 949 P.2d 392 (1997), *review denied*, 135 Wn.2d 1012 (1998).

Just compensation ordinarily requires that condemnees be put in the same position monetarily as they would have been had their property not been taken. Condemnees may also be compensated for diminution in value of property not taken, but affected, by the condemnation. *Peterson v. Port of Seattle*,

94 Wn.2d 479, 484, 618 P.2d 67 (1980). The compensation is limited to value lost as to the property itself, and not for actual or potential lost profits. *State v. McDonald*, 98 Wn.2d 521, 532, 656 P.2d 1043 (1983).

Mr. Horn has produced no legal authority that would allow him to receive consequential damages in addition to "just compensation".

The Trial Court did not abuse its discretion when it disallowed Mr. Horn's testimony about the history of separate litigation he was engaged in; payment of his attorney fees and costs in that litigation; the contractor's alleged misconduct in placing the waterline on his property; and testimony as to whether the property line was straight or irregular.

None of the barred testimony complained of in Mr. Horn's first assignment of error has a tendency to make the existence of any fact that is of consequence in determining just compensation more probable or less probable than would have been without such testimony. *City of SeaTac v. Cassan*, 93 Wn. App. 357, 361, 967 P.2d 1274 (1998) ER 401.

The Trial Court correctly indicated that, with reference to damages, the only evidence relevant in the lawsuit was the value of the land taken.[4]

3. **Damages and Interest**

Mr. Horn also claims the court barred him from presenting evidence as to damages and interest.

The parties agreed that Carrolls Water Association filed its petition for Condemnation on October 27, 2007, and that this date would be the date of "taking" at the trial for the purpose of determining damages.[5] It was also agreed that Carrolls Water Association received title to its waterline from the developer on January 15, 2004.[6]

Subject to some adjustments, Mr. Horn and Carrolls Water Association stipulated that Mr. Horn would receive trespass damages, and that these damages would be calculated after the jury verdict and would be based upon a calculation of 1% per month of the jury verdict award commencing January

[4] 1-7-09, RP 83.
[5] 1-7-09, RP 171, lines 5-9.
[6] 1-7-09, RP 165, lines 23-25; RP 166, lines 1-11; and RP 205.

15, 2004, and ending October 27, 2007. The parties stipulated that trespass damages would not be submitted to the jury.[7]

Accordingly, Mr. Horn was awarded trespass damages as reflected in the judgment entered herein, plus interest at the statutory rate from the date of trial retroactively to the date of the "taking" on October 27, 2007. This meant that Mr. Horn was awarded trespass damages from the date Carrolls Water Association acquired the pipeline on January 15, 2004, to October 27, 2007, when the Condemnation petition was filed. Additionally, Mr. Horn was entitled to pre-judgment interest from the date of taking on October 27, 2007, until the date of the jury verdict.[8] Any issue of trespass damages before January 15, 2004, would be resolved between Mr. Horn and the developer, Wesco Properties, Inc. as the subject of their then pending lawsuit.[9]

Mr. Horn never pled any separate damages to his property caused by the waterline, in addition to his request for the Condemnation award. Both of Mr. Horn's lawyers spoke, on the record, of the possibility of presenting evidence of how Mr.

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[7] 1-7-09, RP 171, lines 5-8; and RP 205-207.
[8] CP #140 Judgment.
[9] 1-7-09, RP 16, lines 3-72; and RP 206, lines 18-25; and RP 207, lines 1-8

Horn's property was damaged by the waterline and mentioned a damaged fence and the scarring of Mr. Horn's real estate by the waterline, but they never attempted to present such evidence.[10]

Contrary to his complaints, Mr. Horn was never barred from presenting relevant evidence relating to just compensation. Mr. Horn never called an expert appraiser as witness even though he indicated throughout the trial he would be calling one.[11] Mr. Horn, however, testified that he should receive $31,000 as damages resulting from the waterline.[12]

B. THE TRIAL COURT DID NOT ERR IN FAILING TO RECORD SOME "SIDEBARS".

Mr. Horn had the duty of making a record of what happened in the trial court. *State v. Garcia*, 45 Wn. App. 132, 140, 724 P.2d 412 (1986). It was within Mr. Horn's power to obtain an affidavit reciting what occurred during any sidebar conference that was omitted from the record. *State v. Neslund*, 50 Wn. App. 531, 561, 749 P.2d 725, review denied, 110 Wn.2d 125 (1988).

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[10] 1-7-09, RP 144, lines 18-25; and PR 194.
[11] 1-8-09, RP 182, lines 9-11; RP 183, lines 20-28; and RP 197, lines 22-24.
[12] 1-8-09, RP 124, line 20.

We are left to speculate as to what the appellant contends would have been added to the record had the sidebar conferences been recorded. Mr. Horn indicates that the unrecorded matters related to his property line and a previous decision of the Court of Appeals relating to the property line.

The trial court did not err in not recording all of the sidebar conferences. The unrecorded discussions, as referred to by Mr. Horn, were irrelevant whether they were recorded or not.

C. THE TRIAL COURT DID NOT ERR IN ADOPTING A LEGAL DESCRIPTION OF THE PROPERTY TO BE CONDEMNED AND IT DID NOT IGNORE ANY "MANDATE".

Carrolls Water Association called Mr. Cal Hampton, a licensed surveyor, who testified that he was acquainted with the area and that he prepared Exhibit 4 and that it accurately showed and depicted the location of the Carrolls Water Association waterline on Mr. Horn's property. (See Appendix A)

Mr. Horn testified that the waterline is on his property, but claims Mr. Hampton's legal description is wrong. Mr. Horn did not submit an alternate legal description and he never called an expert to refute Mr. Hampton's description.

Mr. Horn has failed to present anything in the record supporting his argument that Hampton's legal description misled the jury to believe that Mr. Horn was receiving "additional property". The jury was instructed to determine "just compensation" to be paid Mr. Horn because of the easement on his property.[13] There was no instruction or testimony relating to Mr. Horn receiving "additional property". Mr. Horn's speculation that the jury may have been misled is not relevant to the jury's determination of "just compensation".

Mr. Horn complains that the legal description in Exhibit 4 is contrary to "mandate of the Supreme Court" issued in the Cowlitz County case of *Horn v. Wesco Properties Inc.*, Cause No. 07-2-00438-7. In point of fact, the metes and bounds description accurately describes the property awarded to Mr. Horn in that particular litigation and illustrates that the waterline is located within that

[13] CP 121, Jury Instructions.

property. Mr. Horn's objection to lot 4 being referenced in the description is irrelevant to a proper description for valuation.[14]

D. THE TRIAL COURT DID NOT COMMIT ANY ERROR IN GIVING JURY INSTRUCTIONS #14.

Neither of Mr. Horn's two attorneys object to any jury instruction nor proposed any alternative instructions. The trial court provided counsel with copies of the proposed instructions and asked counsel for Carrolls Water Association if there was any objection and the following conversation took place:

> *(THE COURT:) Plaintiff's objections?
>
> MR. KING: No Objection.
>
> THE COURT: Defense objections?
>
> MS. WENGER: I do, but I wasn't here to discuss the jury instructions, so I guess it would be irrelevant, at this point.
>
> THE COURT: Okay.
>
> MR. KING: To clarify the record, Ms. Johnson, counsel for Mr. Horn, was here.
>
> THE COURT: I understand that.

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[14] 1-7-09, RP 86; and 1-8-09, RP 85, lines 1-14.
*Parentheses added

MS. WENGER: Yes.

THE COURT: Okay.[15]

Civil Rule 51 of the Superior Court Rules indicates that counsel should be given an opportunity in absence of the jury to make objections that he or she have as to any instruction. The rule provides that the objection should clearly state grounds for the objection. In addition, the party making the objection must propose an accurate alternative instruction. 1 Washington Appellate Practice Desk Book, § 17-42 (2005).

When no error is assigned to an instruction of the trial court, it becomes the law of the case on appeal. *Anderson Brown, Respondent v. Quick Mix, Appellant Star Machinery Company, Respondent*, 75 Wn.2d 833, 836, 454 P.2d 205 (1969).

When a party fails to properly object to a proposed instruction, any subsequent claimed error will not be reviewed for the first time on appeal. *Herman v. Merrill-Lynch, Pierce, Fenner and Smith Inc.*, 17 Wn. App. 626, 627, 564 P.2d 817 (1977).

E. THE TRIAL COURT DID NOT COMMIT ERROR IN NOT AWARDING REASONABLE ATTORNEY FEES AND EXPERT WITNESS FEES TO MR. HORN.

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[15] 1-8-09, RP 196, lines 4-15.

Washington follows the "American rule" that reasonable attorney fees are not recoverable as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity. 25 Washington Practice, Contract Law and Practice, § 14:14 (2008). Mr. Horn has failed to cite any such authority for his request for attorney and expert witness fees. In addition, Mr. Horn was not entitled to expert witness fees because he never called an expert witness to testify in this case.

Mr. Horn cites RCW 8.24.030 as the basis for his attorney fees requested. In this case, RCW 8.24.030 does not apply because it is not applicable to private condemnation action under RCW 90.03.40 related to the transport of water for beneficial public use, such as we have here. *Hallauer v. Spectrum Properties*, 143 Wn.2d 126, 151, 18 P.3d 540 (2000). The Court in Hallauer said:

> "The Del Rosario also seek attorney fees in this court pursuant to RCW 8.24.030. The Hallauers maintain that if they prevail on this review, the award of attorney fees on appeal should be reversed. Chapter 8.24 RCW does not apply in this case. Accordingly, the statute does not serve as the basis for awarding attorney fees in this court, or in the Court of Appeals. For this reason, aside from any other considerations, we decline to award fees in this court and we reverse the Court of Appeals' award of attorney fees to the Del Rosarios."

In addition, RCW 8.25.070, which also awards attorney fees in a Condemnation action, is inapplicable because Mr. Horn can not demonstrate that his judgment exceeds by 10 percent Carroll Water Association's written offer. It also appears that RCW 8.25.070 is inapplicable to private condemnations, and thus would be inapplicable even if Mr. Horn's judgment exceeded the offer by 10 percent or more. *Daviscourt v. Peitrup*, 40 Wn. App. 433, 440, 698 P.2d 1093 (1985).

Mr. Horn's request for attorney fees under RAP 18.1 is also without merit because of his failure to cite any applicable law or appropriate legal theory supporting his request. *State v. Woods*, 72 Wn. App. 544, 558, 865 P.2d 33 (1994).

III. CONCLUSION

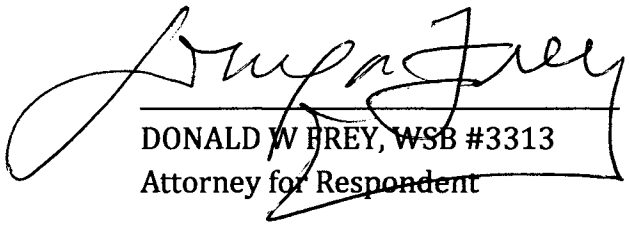
The Trial Court did not abuse its discretion by excluding testimony offered by Mr. Horn because it was irrelevant to the issue of "just compensation". No error was shown or committed in not recording some sidebars, and the legal description obtained by Carrolls Water Association was accurate and proper. There is no legal basis for awarding Mr. Horn reasonable attorney fees or expert

witness fees. The jury instructions were proper and became the law of the case because Mr. Horn's counsels failed to object to any of them.

Mr. Horn's request for appellate relief should be denied.

DATED: September 25th, 2009.

Respectfully submitted,



DONALD W FREY, WSB #3313
Attorney for Respondent

CARROLS WATER DISTRICT
WATER LINE EASEMENT

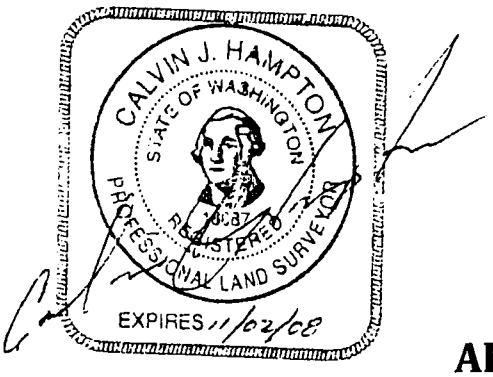
LEGAL DESCRIPTION

A strip of land, encompassing an existing water line, located within the Easterly thirty (30) feet of Lot Four (4), Block Four (4) of the Plat of Carrollton Crest, recorded in Volume 7 of Plats, at Page 43 in the records of Cowlitz County, Washington, as determined and shown on that particular survey recorded in Volume 22 of Surveys, at Page 117, in the records of said county, being located within the West half (W.1/2) of Section Thirty (30), Township Seven (7) North, Range One (1) West of the Willamette Meridian, as situated within the County of Cowlitz, State of Washington, said strip being more particularly described as follows, to-wit:

COMMENCING at the Southwest corner of the Southeast Quarter of the Northwest Quarter (SE.1/4 NW.1/4) of said Section 30, Township 7 North, Range 1 West, shown as the CW.1/16 corner on those particular surveys recorded in Volume 22, at Page 117 and in Volume 22, at Pages 64 and 65, in the records of Cowlitz County, Washington; thence, South 89°13'30" West, along the South line of the Northwest Quarter (NW.1/4) of said Section 30, for a distance of 23.36 feet to the East line of Lot 4, Block 4 of said Plat of Carrollton Crest, as shown on said surveys, being the **TRUE POINT OF BEGINNING;** thence, North 1°33'26" East, along the East line of said Lot 4, for a distance of 153.51 feet to the Northeast corner thereof, as shown on said surveys; thence, South 89°43'34" West, along the North line of said Lot 4, for a distance of 23.38 feet to an existing North-South fence line; thence, South 2°05'47" West, along said fence line, for a distance of 344.76 feet to the Northerly right-of-way line of Risley Road, and being the Southerly line of said Lot 4; thence, North 84°39'33" East, along said Northerly right-of-way line and Southerly line of said Lot 4, for a distance of 26.81 feet to Southeast corner of said Lot 4, as shown on said surveys; thence, North 1°33'26" East, along the Easterly line of said Lot 4, for a distance of 188.76 feet to the **TRUE POINT OF BEGINNING:** containing 0.20 acres, more or less.

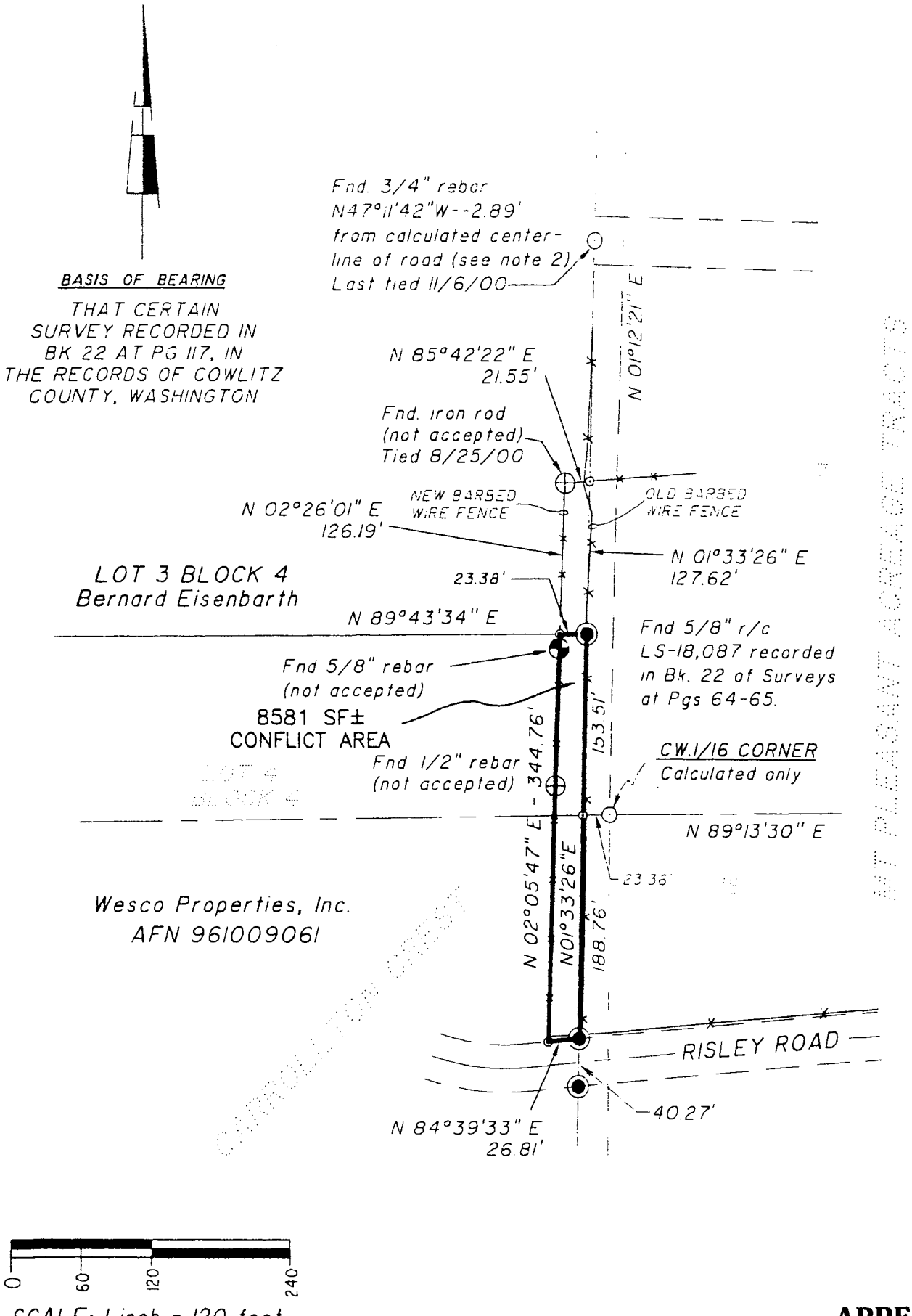
Written by:
Calvin J. Hampton,
PLS #18,087

Date signed: 4/8/08



APPENDIX A
Exhibit 1

EXHIBIT



APPENDIX A
Exhibit 1

RCW 8.25.070 Award of attorney's fees and witness fees to condemnee – Conditions to award.

(1) Except as otherwise provided in subsection (3) of this section, if a trial is held for the fixing of the amount of compensation to be awarded to the owner or party having an interest in the property being condemned, the court shall award the condemnee reasonable attorney's fees and reasonable expert witness fees in the event of any of the following:

(a) If condemnor fails to make any written offer in settlement to condemnee at least thirty days prior to commencement of said trial; or

(b) If the judgment awarded as a result of the trial exceeds by ten percent or more the highest written offer in settlement submitted to those condemnees appearing in the action by condemnor in effect thirty days before the trial.

RCW 8.24.030 Procedure for condemnation – Fees and costs.

The procedure for the condemnation of land for a private way of necessity or for drains, flumes or ditches under the provisions of this chapter shall be the same as that provided for the condemnation of private property by railroad companies, but no private property shall be taken or damaged until the compensation to be made therefor shall have been ascertained and paid as provided in the case of condemnation by railroad companies.

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

APPENDIX B

RCW 90.03.040 Eminent domain – Use of water declared public use.

The beneficial use of water is hereby declared to be a public use, and any person may exercise the right of eminent domain to acquire any property or rights now or hereafter existing when found necessary for the storage of water for, or the application of water to, any beneficial use, including the right to enlarge existing structures employed for the public purposes mentioned in this chapter and use the same in common with the former owner, and including the right and power to condemn an inferior use of water for a superior use. In condemnation proceedings the court shall determine what use will be for the greatest public benefit, and that use shall be deemed a superior one: PROVIDED, That no property right in water or the use of water shall be acquired hereunder by condemnation for irrigation purposes, which shall deprive any person of such quantity of water as may be reasonably necessary for the irrigation of his land then under irrigation to the full extent of the soil, by the most economical method of artificial irrigation applicable to such land according to the usual methods of artificial irrigation employed in the vicinity where such land is situated. In any case, the court shall determine what is the most economical method of irrigation. Such property or rights shall be acquired in the manner provided by law for the taking of private property for public use by private corporations.

APPENDIX B

RAP RULE 18.1
ATTORNEY FEES AND EXPENSES

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court. The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

APPENDIX C

(f) Commissioner or Clerk Awards Fees and Expenses. A commissioner or clerk will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

[Amended to become effective December 29, 1998; December 5, 2002;
September 1, 2003; September 1, 2006.]

APPENDIX C

RULE ER 401
DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

[Adopted effective April 2, 1979.]

RULE CR 51
INSTRUCTIONS TO JURY AND DELIBERATION

(f) Objections to Instruction. Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

APPENDIX C

FILED
COURT OF APPEALS
DIVISION II

09 SEP 30 PM 12: 52

STATE OF WASHINGTON
BY
DEPUTY

CERTIFICATE

I certify that on this day, I caused a copy of the foregoing Brief to Respondent to be mailed, postage prepaid, to Appellant's attorney at:

Marlene K Wenger
107 N Tower, #11
Centralia, WA 98531

DATED this 25th day of September, 2009, at Kelso, Washington.

Conni Janssen
CONNI L JANSSEN