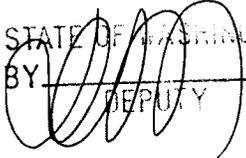


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DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 40812-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHAD A. NIEMELA,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF NATURAL RESOURCES,

Respondent.

APPELLANT'S BRIEF ON APPEAL

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I. STATEMENT OF THE ISSUES

A. Whether the trial court erred by granting summary judgment in favor of the STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES (STATE) despite a genuine issue of material fact as to whether CHAD A. NIEMELA (NIEMELA) has an easement implied from necessity over the STATE's property.

B. Whether the trial court erred by granting summary judgment in favor of the STATE despite a genuine issue of material fact as to whether NIEMELA has an easement implied from prior use over the STATE's property on Schraum County Road.

C. Whether the trial court erred by granting summary judgment in favor of the STATE despite a genuine issue of material fact as to whether NIEMELA has a common law right of access over the STATE's property on Schraum County Road.

D. Whether the trial court erred by granting summary judgment in favor of the STATE despite a genuine issue of material fact as to whether NIEMELA is entitled to use Schraum County Road because of dedication.

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II. STATEMENT OF THE CASE

The Appellant, CHAD A. NIEMELA (NIEMELA), owns the following real property in Wahkiakum County, Washington:

The South One-half of the Northeast Quarter of the Northwest Quarter (S1/2 NE1/4 NW1/4) and the North One-half of the Southeast Quarter of the Northwest Quarter (N1/2 SE1/4 NW1/4), in Section Thirty-Three (33), Township Nine (9) North, Range Five (5) West of the Willamette Meridian.

Situate in the County of Wahkiakum, State of Washington.

TOGETHER WITH all interest and estate in such real estate that may be hereafter acquired and together with the buildings, all improvements thereon and all of the rights, waters, privileges, appurtenances, access, easements and advantages thereto belonging or in any manner appertaining thereto.

SUBJECT TO:

1. Easements, restrictions, surveys and reservations of record, if any.

CP at 155-156.

The Respondent, STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES (STATE), manages as a trust asset the following real property in Wahkiakum County, Washington:

A tract of land located in Section 33, Township 9 North, Range 5 West of the Willamette Meridian, described as follows:

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The South-half of the Northwest Quarter of the Northwest Quarter; also the Southwest Quarter of the Northwest Quarter.

Situate in the County of Wahkiakum, State of Washington.

CP at 6. The STATE's property is adjacent to the western boundary of NIEMELA's property. CP at 11. A review of the properties' histories is necessary to understand the present dispute.

In 1907, the Northwest Quarter of Section 33, Township 9 North, Range 5 West of the Willamette Meridian (Northwest Quarter) was conveyed by Pelton-Armstrong Company to Elemar E. Bradley, Fred W. Bradley, and John S. Bradley. The Northwest Quarter was conveyed in 1908 by the Bradleys to Bradley Logging Company. CP at 86.

In 1918, the North One-half of the Southeast Quarter of the Northwest Quarter was conveyed by Bradley Logging Company to A.E. Myers. In 1920, the North One-half of the Southeast Quarter of the Northwest Quarter was conveyed by A.E. Myers and Martha Myers to H.M. Saxton. In 1926, the North One-half of the Southeast Quarter of the Northwest Quarter was conveyed by H.M. Saxton and Adeline Saxton to May H. Mott. In 1942, the North One-half of the Southeast Quarter of the Northwest Quarter was conveyed by May H. Mott and H.H. Mott to A.P. Schraum. CP at 86-87.

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In 1918, the South One-half of the Northeast Quarter of the Northwest Quarter was conveyed by Bradley Logging Company to Henry H. Doane. At some point between 1918 and 1941, the Wahkiakum County Treasurer acquired the South One-half of the Northeast Quarter of the Northwest Quarter. In 1941, the South One-half of the Northeast Quarter of the Northwest Quarter was conveyed by the Wahkiakum County Treasurer to Wahkiakum County. By 1943, the Wahkiakum County Treasurer had reacquired the South One-half of the Northeast Quarter of the Northwest Quarter and subsequently conveyed it to A.P. Schraum. CP at 86-87.

In 1997, Robert E. Cooper, Virginia G. Cooper, and the Cooper Family Trust (Coopers) purchased the North One-half of the Southeast Quarter of the Northwest Quarter and the South One-half of the Northeast Quarter of the Northwest Quarter. CP at 78. On June 4, 2010, the Coopers conveyed the North One-half of the Southeast Quarter of the Northwest Quarter and the South One-half of the Northeast Quarter of the Northwest Quarter to NIEMELA. CP at 155-156.

In 1924, the South One-half of the Northwest Quarter of the Northwest Quarter was conveyed by Bradley Logging Company to Fred W. Bradley and John S. Bradley. At some point between 1924 and 1938,

Wahkiakum County acquired the South One-half of the Northwest Quarter of the Northwest Quarter. In 1938, the South One-half of the Northwest Quarter of the Northwest Quarter; the North One-half of the Southwest Quarter of the Northwest Quarter; and the South One-half of the Southwest Quarter of the Northwest Quarter were conveyed by Wahkiakum County to the State Forest Board of the State of Washington. CP at 86-87. These properties now are managed as a trust asset by the STATE. CP at 22-23.

A main county road known as Beaver Creek County Road is located near the STATE's property and NIEMELA's property. CP at 11. Schraum County Road turns south off Beaver Creek County Road, travels over properties owned by third parties Rosemary Mogush, Russell Reid, the Gerald M. and Linda K. DeBriac Revocable Living Trust, and Shanna Vanvessen, travels over the STATE's property, and travels onto and ends on NIEMELA's property. On September 2, 1958, Schraum County Road was vacated and abandoned by Wahkiakum County at or near the boundary of the properties now owned by Rosemary Mogush and the Gerald M. and Linda K. DeBriac Revocable Living Trust. CP at 11. Although Schraum County Road was vacated and abandoned in 1958, it has been used continuously since that

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time and is the only access to Beaver Creek County Road from NIEMELA's landlocked property and the house located on the property. CP at 11, 79.

On March 20, 2009, the Coopers filed a complaint in Wahkiakum County Superior Court (trial court). They sought to quiet title in their favor over Schraum County Road so they would be able to continue using the road to access Beaver Creek County Road from their property. CP at 5-11.

On September 2, 2009, the STATE filed a motion for summary judgment. CP at 21-30. The trial court entered a Memorandum Decision in favor of the STATE on February 22, 2010. CP at 127-128. The trial court granted the STATE's motion for summary judgment and entered a judgment on May 3, 2010. CP at 129-134.

NIEMELA was substituted as the Plaintiff in this action on August 3, 2010. CP at 159-163. NIEMELA appeals the trial court's Order Granting Defendant State's Motion for Summary Judgment and Judgment Granting Attorney Fees.

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III. STANDARD OF REVIEW

“An order of summary judgment is reviewed de novo.” *Hanson Indus. Inc. v. Kutschkau*, 239 P.3d 367, 371 (2010). The Court of Appeals “engages in the same inquiry as the trial court and views the facts in the light most favorable to the nonmoving party.” *Id.* “Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.* (citing CR 56(c)). “A material fact is one that affects the outcome of the litigation.” *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

IV. ARGUMENT

The trial court erred by granting summary judgment in favor of the STATE because there are genuine issues of material fact as to whether NIEMELA (A) has an easement implied from necessity over the STATE’s property; (B) has an easement implied from prior use over the STATE’s property on Schraum County Road; (C) has a common law right of access over the STATE’s property on Schraum County Road; and (D) is entitled to use Schraum County Road because of dedication. The trial court’s Order Granting Defendant State’s Motion for Summary Judgment and Judgment Granting Attorney Fees should be reversed.

A. There is a genuine issue of material fact as to whether NIEMELA has an easement implied from necessity over the STATE's property.

There is a genuine issue of material fact as to whether NIEMELA has an easement implied from necessity over the STATE's property. Therefore, the trial court erred by granting summary judgment in favor of the STATE.

“An easement implied from necessity arises where a grantor conveys part of her land, retains part and, after the conveyance, it is necessary to cross the grantor's parcel to reach a street or road from the conveyed parcel.” *Visser v. Craig*, 139 Wn. App. 152, 158, 159 P.3d 453 (2007) (citing *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 667-68, 404 P.2d 770 (1965)). “Necessity must exist at the date the common parcel is severed.” *Visser*, 139 Wn. App. at 159, 159 P.3d 453 (quoting *Granite Beach Holdings, LLC v. Dep't of Natural Resources*, 103 Wn. App. 186, 196, 11 P.3d 847 (2000)).

“An easement of necessity is an expression of a public policy that will not permit property to be landlocked and rendered useless. In furtherance of that public policy, we give the owner, or one entitled to the beneficial use of landlocked property, the right to condemn a private way of necessity for ingress and egress.” *Hellberg*, 66 Wn.2d at 666-67, 404 P.2d 770. “Condemnation, however, is not necessary where the private way of necessity

is over the land of the grantor or lessor of the landlocked property.” *Id.* at 667. “The theory of the common law is that where land is sold (or leased) that has no outlet, the vendor (or lessor) by implication of law grants ingress and egress over the parcel to which he retains ownership, enabling the purchaser (or lessee) to have access to his property.” *Id.* (citing *State ex rel. Mountain Timber Co. v. Superior Court of Cowlitz County*, 77 Wn. 585, 588, 137 P. 994 (1914)).

From 1908 to 1918, Bradley Logging Company owned the Northwest Quarter. In 1918, Bradley Logging Company conveyed the North One-half of the Southeast Quarter of the Northwest Quarter to A.E. Myers and conveyed the South One-half of the Northeast Quarter of the Northwest Quarter to Henry H. Doane. Bradley Logging Company retained the remainder of the Northwest Quarter.

After Bradley Logging Company’s 1918 conveyance created landlocked property, A.E. Myers and Henry H. Doane had to cross Bradley Logging Company’s property (grantor’s parcel) to access the main road now known as Beaver Creek County Road from their properties (conveyed parcels). Thus, Bradley Logging Company granted ingress and egress over the grantor’s parcel when it severed the property, which enabled Myers and

Doane to have access to the main road from the conveyed parcels. The necessity to cross the grantor's parcel to access the main road from the conveyed parcels existed at the time the common parcel was severed in 1918.

To bar NIEMELA from accessing Beaver Creek County Road from his property would be grossly unjust. It is against public policy to deny access to Beaver Creek County Road from NIEMELA's property because doing so would render the property landlocked and useless.

These facts make clear that an easement implied from necessity was created by the 1918 conveyance over what is now the STATE's property for the benefit of what is now NIEMELA's property. This easement implied from necessity survives to this day and allows NIEMELA to access Beaver Creek County Road from his property by crossing the STATE's property. Because NIEMELA's private way of necessity is over the grantor's parcel, condemnation is not necessary.

NIEMELA has an easement implied from necessity over the STATE's property regardless of Schraum County Road's status. Schraum County Road's years of existence and continued use, however, reveal that an easement across the STATE's property has long been necessary and provides the perfect physical manifestation of the easement. It only makes sense that

NIEMELA should be allowed to use Schraum County Road as his easement over the STATE's property instead of creating a new easement road.

The trial court erred when it granted summary judgment in favor of the STATE because there is a genuine issue of material fact as to whether NIEMELA has an easement implied from necessity over the STATE's property. Therefore, the trial court's Order Granting Defendant State's Motion for Summary Judgment and Judgment Granting Attorney Fees should be reversed.

B. There is a genuine issue of material fact as to whether NIEMELA has an easement implied from prior use over the STATE's property on Schraum County Road.

There is a genuine issue of material fact as to whether NIEMELA has an easement implied from prior use over the STATE's property on Schraum County Road. Therefore, the trial court erred by granting summary judgment in favor of the STATE.

An easement implied from prior use exists when there is "(1) a unity of title and subsequent termination of two parcels of property; (2) apparent and continuous use of a quasi easement for the benefit of one parcel to the detriment to the other during the unity of title; and (3) a reasonable degree of necessity for the existence of the easement after severance." *Landberg v.*

Carlson, 108 Wn. App. 749, 757, 33 P.3d 406 (2001) (citing *Hellberg*, 66 Wn.2d at 668, 404 P.2d 770).

“Unity of title and subsequent separation is an absolute requirement.” *Adams v. Cullen*, 44 Wn.2d 502, 505, 268 P.2d 451 (1954). “The two remaining elements aid in determining the intent of the parties as represented by the extent of use, the nature of the property, and the relation of the severed parcels to each other.” *Landberg*, 108 Wn. App. at 757, 33 P.3d 406 (citing *Hellberg*, 66 Wn.2d at 668, 404 P.2d 770). The presence or absence of either or both of the last two elements “is not necessarily conclusive.” *Adams*, 44 Wn.2d at 506, 268 P.2d 451.

The properties owned by the STATE and NIEMELA are within the boundaries of the Northwest Quarter. The Northwest Quarter was conveyed in 1907 to Elemar E. Bradley, Fred W. Bradley, and John S. Bradley. In 1908, the Northwest Quarter was conveyed to Bradley Logging Company. In 1918, the Northwest Quarter was severed when the North One-half of the Southeast Quarter of the Northwest Quarter was conveyed to A.E. Myers, and the South One-half of the Northeast Quarter of the Northwest Quarter was conveyed to Henry H. Doane. There was unity of title in the Northwest Quarter from 1907 to 1918, when the Northwest Quarter was severed by the

conveyances to A.E. Myers and Henry H. Doane. The first element of an easement implied from prior use is satisfied.

According to Peter A. Ringen, a professional engineer and the Public Works Director and County Engineer for Wahkiakum County, Washington, a review of maps from 1920, 1932 and 1938 indicates that Schraum County Road has long been connected to Beaver Creek County Road. CP at 69-77. This reveals that Schraum County Road has existed since before 1920 because a road on a 1920 map would have pre-dated the map. A review of the 1908 deed that vested title to the Northwest Quarter in Bradley Logging Company reveals the existence of at least one county road at that time. CP at 88-100. When the 1920 map is considered with the 1908 deed, there is strong evidence that the road now known as Schraum County Road existed and was used during the unity of title.

Even without the 1920 map and 1908 deed, one can reasonably infer that Schraum County Road existed and was used during the unity of title. Pelton-Armstrong Company, a logging company, owned the Northwest Quarter until 1907. It is highly probable that a logging company required a road to access the main road from what is now NIEMELA's property. Without such a road, ownership of the property for logging purposes would

have been pointless. Similarly, one can reasonably infer that from 1908 to 1918 Bradley Logging Company required a road to access the main road from what is now NIEMELA's property because it would not have owned property for the purpose of logging if it did not have access to the main road. Further, it is highly unlikely that in 1918, A.E. Myers and Henry H. Doane would have bought what is now NIEMELA's property without access to the main road from their properties.

A road required by logging companies to access the main road from their properties surely was used in an apparent and continuous manner during the unity of title. The use of the road clearly would have been to the benefit of the property now owned by NIEMELA to the detriment of the property now owned by the STATE. Further, even if the "road" had been nothing more than a narrow clearing that had been repeatedly driven over, the element is still met because an official road is not required. Merely a quasi easement is necessary for the element to be satisfied. The second element of an easement implied from prior use is satisfied.

"The degree of necessity is such merely as renders the easement necessary for the convenient and comfortable enjoyment of the property as it existed when the severance was made." *Berlin v. Robbins*, 180 Wn. 176,

188, 38 P.2d 1047 (1934). The necessity need not be strict, but only a reasonable one. *Id.* “The test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute.” *Id.* at 189.

In *Bailey v. Hennessey*, 112 Wn. 45, 50-51, 191 P. 863 (1920), an alleyway entrance was held to be an easement reasonably necessary to the benefit of the property even though there was a front entrance that was available. The front entrance was held to be less convenient and the value of the property would have diminished without the use of the alleyway entrance. *Id.* at 51. In *MacMeekin v. Low Income Hous. Inst., Inc.*, 111 Wn. App. 188, 197, 45 P.3d 570 (2002), the court held that it was reasonably necessary to use a driveway and a leg leading from a house to the driveway because at the time the alternative was an unopened road that was nothing but a grassy field.

The road now known as Schraum County Road surely has been reasonably necessary from the time of the severance of the Northwest Quarter in 1918. The property now owned by NIEMELA is landlocked. As it is today, Schraum County Road would have been the only access to the main road from the property. The necessity of the road is shown by its existence prior to 1920, the 1908 deed that references a county road, the fact that the

individual and corporate property owners would have needed to leave their properties, and its continued use even after Wahkiakum County vacated and abandoned the road in 1958. There is a reason another road has never been constructed in approximately 100 years. No feasible alternate route exists to access the main road from NIEMELA's property. Because NIEMELA's property is landlocked, there is no route that would not trespass on his neighbors' properties. The third element of an easement implied from prior use is satisfied.

The analysis of the elements makes clear the intent of the previous property owners as far back as 1907 by shedding light on the extent of use, the nature of the property, and the relation of the severed parcels to one another. Clearly, the use of Schraum County Road to access the main road from what is now NIEMELA's property was intended by the early logging companies. Their businesses required a road to bring timber from what is now NIEMELA's property to the main road so it could enter the stream of commerce. The extent of the past use of the road indicates it was always intended to be used, and indeed necessary, for accessing the main road from what is now NIEMELA's property. Once the property was no longer used by logging companies, it was used by individuals. It follows that individual

property owners would have required the use of the road to access the main road. The nature of the properties at issue required the use of Schraum County Road to the benefit of one parcel to the detriment of the others because of how NIEMELA's property is located in relation to the other properties.

The trial court erred when it granted summary judgment in favor of the STATE because there is a genuine issue of material fact as to whether NIEMELA has an easement implied from prior use over the STATE's property on Schraum County Road. Therefore, the trial court's Order Granting Defendant State's Motion for Summary Judgment and Judgment Granting Attorney Fees should be reversed.

Previously, the STATE has relied greatly on *Granite Beach Holdings, LLC*, 103 Wn. App. 186, 11 P.3d 847, to argue that NIEMELA cannot obtain implied easements over state forest land. The decision in *Granite Beach Holdings, LLC* was based on a very unique factual background involving land that had been owned by the United States. 103 Wn. App. at 191, 11 P.3d 847. The court held that implied easements were not created when there was common ownership by the United States. *Id.* at 199. The action now before the Court does not involve previous land ownership by the United States.

Instead, the implied easements were created during private ownership of the properties. Thus, as to implied easements, *Granite Beach Holdings, LLC* is distinguishable.

Further, the STATE has argued that NIEMELA cannot condemn a private easement on state land. As established in *Hellberg*, condemnation “is not necessary where the private way of necessity is over the land of the grantor or lessor of the landlocked property.” 66 Wn.2d at 667, 404 P.2d 770. NIEMELA is not attempting to condemn a private easement on state land.

Finally, the STATE previously has argued that it has discretion to grant easements on state forest land. NIEMELA does not ask that the STATE grant easements on state forest land. Instead, NIEMELA already possesses easements implied from necessity and prior use that were created long before the STATE owned the property that is now state forest land. Therefore, because the easements already were in existence, there is no need to rely on the STATE’s discretion to grant easements.

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C. There is a genuine issue of material fact as to whether NIEMELA has a common law right of access over the STATE's property on Schraum County Road.

There is a genuine issue of material fact as to whether NIEMELA has a common law right of access over the STATE's property on Schraum County Road. Therefore, the trial court erred by granting summary judgment in favor of the STATE.

Schraum County Road at one time was a county road. "County road" is defined as "every highway or part thereof, outside the limits of incorporated cities and towns and which has not been designated as a state highway." RCW 36.75.010(6). "Highway" is defined as "every way, lane, road, street, boulevard, and every way or place in the state of Washington open as a matter of public right to public vehicular travel both inside and outside the limits of incorporated cities and towns." RCW 36.75.010(11) (emphasis added). Clearly, Schraum County Road was a public right-of-way from before 1920 through 1958.

In *Howell v. King County*, 16 Wn.2d 557, 558, 134 P.2d 80 (1943), the respondent owned property that abutted the south end of a vacated street. The respondent had no avenue of ingress and egress to her property other than the vacated street. *Id.* at 559. "For more than twenty years, she and her

predecessors in interest have used the vacated strip in controversy in getting in and out. A road, traversable by motor vehicles, has existed along the easterly margin of the vacated strip for that length of time.” *Id.* Although the public easement is lost when a street is vacated, the private easement persists. *Id.* The action was remanded “with directions to enter a decree declaring the strip in controversy vacated, subject, however, to a private easement for the use and benefit of the property owned by respondent abutting on the south – the extent of the easement to correspond with the roadway which has been used by her and her predecessors in interest.” *Id.* at 560.

Howell provides guidance for this action. Here, as in *Howell*, NIEMELA owns property that abuts a vacated public right-of-way and NIEMELA has no avenue of ingress and egress other than the vacated road. For approximately 100 years, NIEMELA and his predecessors in interest have used what is now known as Schraum County Road to get to and from the property. The public easement in Schraum County Road was lost in 1958 when the road was vacated and abandoned, but the private easement has persisted. Even though the private easement in *Howell* was created before the respondent owned the abutting property, she was still entitled to the private easement for the use and benefit of her property. 16 Wn.2d at 558-59, 134

P.2d 80. Here, a private easement was created well before the STATE or NIEMELA owned their properties and continues to exist for NIEMELA's use and benefit.

The holding in *Howell* is supported by common law. "Under the common law, property owners have a right to access abutting public roads." *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 207, 762 A.2d 1219 (2000). "The general rule is that an owner of property abutting a public road has both the right to use the road in common with other members of the public and a private right for the purpose of access." *Id.* "Under this doctrine, when a public road is opened adjacent to private property, the owner of the abutting property obtains a right to access the public road by operation of law, and when a public road is discontinued or abandoned, the abutting landowner retains the private right of access." *Id.* "The right of access has two requirements: (1) the person claiming the right must own land that *abuts* the road, and (2) the road must be a *public* road." *Id.* (emphasis in original).

As established above, one reasonably can infer that from at least 1907 to 1920, the road now known as Schraum County Road existed. From at least 1920 the road was a county road. The road was vacated and abandoned by Wahkiakum County in 1958. What is now NIEMELA's property was owned

by A.E. Myers and Henry H. Doane before and during 1920. A.E. Myers and Martha Myers sold their property in 1920 to H.M. Saxton. Thus, from at least as far back as 1920, there was created in the abutting properties – including what is now NIEMELA’s property – a private right of access over the road. Alternatively, a private right of access was created any time between 1920 and 1958 when Schraum County Road was a county road. There is no dispute that NIEMELA’s property abuts the road in controversy. Nor is there a dispute that the road was a public road at the time the private right of access was created. Therefore, NIEMELA has a private right of access to and from his property over Schraum County Road even though it was vacated and abandoned in 1958.

The trial court erred when it granted summary judgment in favor of the STATE because there is a genuine issue of material fact as to whether NIEMELA has a common law right of access over the STATE’s property on Schraum County Road. Therefore, the trial court’s Order Granting Defendant State’s Motion for Summary Judgment and Judgment Granting Attorney Fees should be reversed.

In *Okemo Mountain, Inc.*, the Supreme Court of Vermont held that the property owner had a common law right of access to his property and that

closing the road for the winter violated his property right. 171 Vt. at 209, 762 A.2d 1219. The court held the State had the power to take private land as long as it paid compensation for the taking and that the property owner had the right “to recover damages for the inverse condemnation that took part of his access right.” *Id.* at 212. In *Okemo Mountain, Inc.*, it was not feasible to open the road in controversy in winter because the road was used as a ski trail and, therefore, an injunction was not appropriate. *Id.* at 211-12. In this action, leaving Schraum County Road open for the same access that has taken place for approximately 100 years is not an imposition on the STATE. NIEMELA should be allowed to continue using Schraum County Road because he has a right of access to and from his property. However, if the Court finds NIEMELA is not entitled to the continued use of Schraum County Road, he is entitled to just compensation for the taking of his access right.

“The right of access of an abutting property owner to a public right-of-way is a property right which if taken or damaged for a public use requires compensation under article 1, section 16 of the Washington State Constitution.” *Keiffer v. King County*, 89 Wn.2d 369, 372, 572 P.2d 408 (1977). “The issue of whether compensation must be paid in a particular case

is best resolved through a two-step process. The first is to determine if the government action in question has actually interfered with the right of access as that property interest has been defined by our law.” *Id.* The degree of damage is the second step. *Id.* at 373. Compensation is paid when there is “physical impairment of access.” *Id.* at 373 (quoting *Walker v. State*, 48 Wn.2d 587, 590, 295 P.2d 328 (1956)). Here, if the STATE is allowed to bar access to Schraum County Road, there will be interference with the right of access and there will be the ultimate physical impairment of access to NIEMELA’s property. There is a sufficient degree of impairment to create liability for the STATE’s taking of NIEMELA’s right of access to and from his property over Schraum County Road.

The STATE previously has argued that an inverse condemnation claim cannot be brought on state forest land but has not provided support for that argument. In *Granite Beach Holdings, LLC*, the court stated that there cannot be inverse condemnation if no property right exists. 103 Wn. App. at 205, 11 P.3d 847. The court held that the appellants’ inverse condemnation claim was properly dismissed because the appellants did not have a property right. *Id.* at 207. The court did not hold that an inverse condemnation claim on state forest land can never be successful. This action is distinguishable

because NIEMELA has a property right and, therefore, is entitled to recover damages if an inverse condemnation takes away his access right.

D. There is a genuine issue of material fact as to whether NIEMELA is entitled to use Schraum County Road because of dedication.

There is a genuine issue of material fact as to whether NIEMELA is entitled to use Schraum County Road because of dedication. Therefore, the trial court erred by granting summary judgment in favor of the STATE.

“Dedications devote land to a public use and they may be classified as either statutory or common law.” *McConiga v. Riches*, 40 Wn. App. 532, 537, 700 P.2d 331 (1985). This action does not present a statutory dedication. “There are two essential elements to a valid common law dedication: (1) an intention on the part of the owner to devote his land, or an easement in it, to a public use, followed by some act or acts clearly and unmistakably evidencing such intention, and (2) an acceptance of the offer by the public.” *Id.* “The use must be for the public generally.” *Knudsen v. Patton*, 26 Wn. App. 134, 141, 611 P.2d 1354 (1980). “One asserting that the public has acquired a right to use an area as a public street has the burden of establishing these elements.” *McConiga*, 40 Wn. App. at 537, 700 P.2d 331.

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“Dedication originates in the voluntary donation of the owner or seller, and, when the intention of the owner to dedicate is clear, manifest, and unequivocal, whether by a written instrument or by some act or declaration of the owner manifesting his clear intent to devote the property to public use, it becomes effective for that purpose.” *City of Spokane v. Catholic Bishop of Spokane*, 33 Wn.2d 496, 503, 206 P.2d 277 (1949) (quoting *Corning v. Aldo*, 185 Wn. 570, 55 P.2d 1093, 1096 (1936)). “Acceptance may arise (1) by express act; (2) by implication from the acts of municipal officers; and (3) by implication from [use] by the public for the purposes for which the property was dedicated.” *City of Spokane*, 33 Wn.2d at 503, 206 P.2d 277.

In 1938, the STATE acquired the property over which Schraum County Road travels, with full knowledge that a county road was present on the property. In 1958, the road was vacated and abandoned by Wahkiakum County. However, the road was left in place and remained open to the public to use as it had been used for many years before even though it was no longer maintained by Wahkiakum County. Schraum County Road has been left open for continuous public use. Thus, beginning in 1958, the STATE manifested its clear intent to devote Schraum County Road to public use by not dismantling the road or otherwise preventing its use.

It follows that the road that was once officially a public road was devoted to the public generally and not just certain private users; all members of the public were allowed to use the road as they desired. The public accepted the offer by continuing to use Schraum County Road. Because Schraum County Road was dedicated by the STATE, it became devoted to public use. NIEMELA, as a member of the public, has a right to use a vacated road that has been devoted to public use.

The trial court erred when it granted summary judgment in favor of the STATE because there is a genuine issue of material fact as to whether NIEMELA is entitled to use Schraum County Road because of dedication. Therefore, the trial court's Order Granting Defendant State's Motion for Summary Judgment and Judgment Granting Attorney Fees should be reversed.

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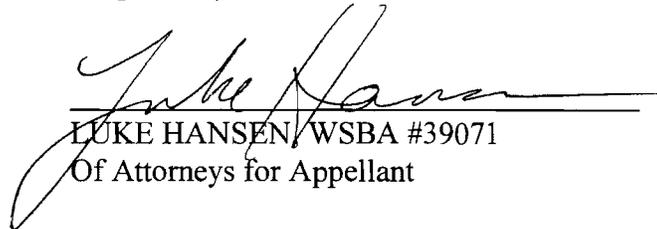
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V. CONCLUSION

For the foregoing reasons, the trial court's Order Granting Defendant State's Motion for Summary Judgment and Judgment Granting Attorney Fees should be reversed.

DATED: December 13, 2010.

Respectfully submitted,



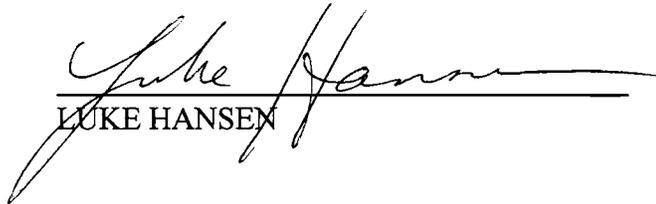
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Of Attorneys for Appellant

CERTIFICATE

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

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DATED this 13th day of December 2010, at Longview, Washington.



LUKE HANSEN

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