

**FILED**

SEP 30 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

NO. 287262

Kittitas County Superior Court Cause No. 07-2-00589-0

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**COURT OF APPEALS  
DIVISION III,  
OF THE STATE OF WASHINGTON**

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ROD ULLERY and DIANNE ULLERY, husband and wife,

Defendants/Respondents

v.

ESTATE OF BILLY L. FULLETON and ALICE FULLETON,

Plaintiff/Appellant

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**REVISED RESPONSE BRIEF OF ULLERY**

---

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## I. INTRODUCTION

This appeal challenges the application by the trial court of the doctrine of collateral estoppel in rejecting claims asserted by appellants in this action. Claims which were identical to those claims asserted by Billy and Alice Fulleton (the sole appellants in this action) against the same defendants in a prior Kittitas County lawsuit which went to trial. The first trial was in Kittitas County Cause No. 05-2-00084-1, with Billy L. Fulleton, a married man, the designated plaintiff suing Rod and Dianne Ullery. (CP 669-676). This trial involved a claim for breach of a “Reclamation Agreement” dated June 30, 2002.

The second trial, Kittitas County Cause No. 07-2-00589-0 (consolidated with Cause No. 07-2-00678-1, CP 11-46) involved claims asserted by Billy and Alice Fulleton (the same Billy Fulleton who commenced the first lawsuit) and Billy’s brother, Patrick Fulleton, as co-plaintiffs suing again for breach of the June 30, 2002 “Reclamation Agreement.” (CP 11-46).<sup>1</sup> It cannot be overemphasized that both lawsuits involved a claim asserted against Rod and Dianne Ullery for breach of the same contract. Except for the addition of Patrick Fulleton as an additional plaintiff in the later lawsuit, the parties and issues were the same in both.

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<sup>1</sup> Patrick Fulleton, although a plaintiff below, is not a designated appellant here (CP 633-668).

The first lawsuit was tried to the Honorable Judge Scott Sparks, Kittitas County Superior Court, and resulted in Findings of Fact, Conclusions of Law, and a Judgment being entered dismissing the claims of Billy Fulleton, a married man, with prejudice (Appendix 1, Exhibits 1 and 2; CP 809-16; CP 836-891). In that trial, the findings, conclusions, and judgment all demonstrate by their express language, that the trial court found two distinct grounds to dismiss the claims of Billy Fulleton against Rod and Dianne Ullery on the 2002 “Reclamation Agreement.” The first ground was lack of standing. The second ground was that Billy Fulleton had simply failed to prove that his assignor had performed under the contract, and therefore, failed to demonstrate that he was entitled to the relief he sought as a matter of fact and law. No appeal was taken by Billy Fulleton from this dismissal with prejudice.

The second suit, filed in response to an ejectment action brought by Rod and Dianne Ullery seeking removal of personal property from the property subject to the “Reclamation Agreement,” added as an additional party plaintiff Billy’s brother, Patrick. (CP 11-46). The claim was asserted that Patrick was the real party-in-interest and that, therefore, the first trial should not bar litigation of the claims for breach of the “Reclamation Agreement” in a new lawsuit. Judge Sparks heard that argument, considered the sworn testimony of Patrick Fulleton from his

deposition, and correctly concluded that collateral estoppel barred the re-litigation of the claims against Ullery based on the 2002 “Reclamation Agreement” that had been decided by the judgment in the first trial. Judge Sparks granted summary judgment of dismissal of the Fulleton claims against Ullery in the second case and granted Ullery judgment in their favor on their ejectment action (CP 467-78; Appendix 2). Appeal is taken by Alice Fulleton and the estate of Billy Fulleton.

Patrick Fulleton, the brother of Billy, who was the original contracting party with Ullery in the 2002 “Reclamation Agreement,” testified by deposition that he was knowledgeable that Billy Fulleton was pursuing Ullery in the first trial based on the “Reclamation Agreement,” that he approved of Billy doing so, that Billy doing so was part of an agreement that he and Billy had with each other as to how to pursue Ullery on the claims arising out of the 2002 “Reclamation Agreement,” and that he discussed being a witness in the trial with Billy’s attorney.<sup>2</sup> (CP 260-436; Appendix 3.) For example, Patrick Fulleton testified that:

Q. Okay. So my question is, did there come a time when you (Pat Fulleton) became aware that Billy Fulleton had sued Rod and Dianne Ullery?

A. I don’t know the exact time. I knew that he was going to because in that – when I bought him out of F2M,

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<sup>2</sup> Fulletons were represented by different counsel in the first trial. Michael Tabler was Fulleton’s attorney in the first trial.

and then as far as compensation, the property, he was going to end up with the property. . . .

Q. And the PB property?

A. Yeah. That was part of the deal – well, the PB, but that was not PB stuff. That was my stuff. Okay. And so in the process of doing it, I says – I’m off doing other things – you go ahead and do whatever you need to to get the property from Ullery. And I think he chose to sue Ullery, and I don’t know the dates. My guess, because the mine, you know, sold whenever, whenever he decided to – I don’t know when he filed it, so – when I bought him out, so that’s neither here nor there.

Q. But you did know that Billy had sued Ullery?

A. I knew that he had sued him, yes, uh, huh.

Q. Did you have any problem with him doing that?

A. No.

(Dep. Patrick R. Fulleton, September 3, 2009, pp. 30-31.)

\* \* \*

Q. Do you remember what year that call from Mr. [Michael] Tabler was about you testifying?

A. Yeah. It was, I would suppose it was when he, whenever – I think you [Watts] were involved in the other side. You would probably know the year better than me, because it was prior to trial.

Q. Okay.

A. And I told him that I didn’t need to, and I wasn’t going to get involved. That was part of the agreement on the F2M purchase, that Bill would go ahead and pursue

getting paid for work performed on the Ullery properties, so that's – we beat that up pretty good by now.

(Patrick R. Fulleton Dep., 9/3/09, p. 34.)

\* \* \*

Q. Did you ever tell Billy [Fulleton] that he had no right to be bringing the lawsuit?

A. No.

Q. Did you ever tell anybody but your personal lawyer Mr. Perkins, that Billy had no right to bring this lawsuit?

A. I don't believe Mr. Perkins and I discussed it, because when we formed the sale agreement in 2004, Bill says: Well, I'm going to get the property, you know. You need to secure some titles to it. And I said: Well, you know, I've got other things to do. You go chase Mr. Ullery. So that's how that transpired. So Mr. Perkins and I had no discussions on it or Mr. Tabler and I, either one.

Q. Did you ever tell any court or judge that Billy Fulleton had no right to be pursuing Rod or Dianne Ullery?

A. No.

(Dep. Patrick Fulleton, 9/3/09, pp. 37-8.) (All in CP 260-436.) (Appendix 3.)

The same Kittitas County Superior Court judge in two proceedings has determined that appellants have no claim against Ullery under the 2002 "Reclamation Agreement," both because of lack of standing, and on the merits based upon lack of proof, and finally upon the doctrine of collateral estoppel. (1<sup>st</sup> proceeding – (CP 809-816); 2<sup>nd</sup> proceeding (CP

472, 476-78). There is simply no justification for the Court of Appeals to reject the Findings of Fact, Conclusions of Law, and Judgment entered by Judge Sparks in the first trial dismissing with prejudice all claims by all appellants against Rod and Dianne Ullery based upon the 2002 “Reclamation Agreement.” The second trial is barred by collateral estoppel notwithstanding the addition of Patrick Fulleton as a party.

## **II. STATEMENT OF FACTS**

Appellants attempt to retry all of the legal and factual issues decided against them by the Kittitas County Superior Court in Cause No. 05-2-00084-1.<sup>3</sup> For example, at page 6-7 of the opening brief on appeal, appellants concede that Billy Fulleton in the 2005 lawsuit alleged that he was the assignee of Pat Fulleton’s claims against Ullery under the “Reclamation Agreement.” Ullery in responding to that allegation, put Billy to his proof. Then, contrary to the exact language of the conclusions of law and judgment in the 2005 litigation (CP 809-814), appellants maintain that the court in the 2005 decision dismissed the Billy Fulleton solely on the basis of lack of standing. The conclusions of law and judgment entered by the court terminating the 2005 lawsuit, demonstrate the fallacy of this contention. Conclusion of Law 2 reads in part:

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<sup>3</sup> Memorandum Decision and Findings, Conclusions and Judgment from this first trial are attached as Appendix 1. (CP 792-3; 809-816).

2. Plaintiff Billy L. Fulleton has failed to sustain his burden of establishing his status as the assignee to the rights of the designated “Contractor” under the June 30, 2002 “Reclamation Agreement” and, therefore, his status and standing to bring claims in the stead of the designated “Contractor” is absent. . . .

However, paragraph 3 of the Conclusions of Law immediately following reads:

3. Even were plaintiff entitled to bring suit on the June 30, 2002 “Reclamation Agreement” against defendants, plaintiff has failed to sustain the burden of proof as to the performance of the contract. Specifically, plaintiff has failed to sustain the burden of proving that the two State agencies required to approve the performance of the work under the June 30, 2002 “Reclamation Agreement” (the State of Washington Department of Natural Resources and the State of Washington Fish & Wildlife) have, in fact, made such approval. Absent these approvals, an essential condition precedent to the Contractor’s entitlement to payment under the contract is missing. (CP 809-814).

This determination in the Conclusions of Law is supported in the Memorandum Decision of the trial court dated June 29, 2007 and by the Findings of Fact entered the same date. (CP 792-3; 809-814). In its Memorandum Decision, the court affirmed its two-pronged grounds for dismissal of the Billy Fulleton claims against Ullery under the 2002 “Reclamation Agreement.” The court determined that “. . . the record is devoid of evidence that Patrick Fulleton shared that belief [regarding assignment]. Since the plaintiff [Billy Fulleton] has not established that

the agreement was assigned to him, he is not entitled to bring suit against defendants for performance.” (CP 792-3). The court continues that even if a reviewing court were to reach a different conclusion that “. . . there still remains the question of complete performance.” The court concluded in its Memorandum Decision that “plaintiff [Billy Fulleton] has not established that the contract was completed.” (CP 792-3) (Exhibit 5 of CP 836-891, Exhibit 3.)

Based upon the Memorandum Decision and the conclusions of law quoted above, the judgment dismissing with prejudice the claims against Ullery under the 2002 “Reclamation Agreement” was entered. (CP 815-16). The trial court rejected motions for reconsideration or to re-open to present new evidence. Billy Fulleton did not appeal the judgment dismissing his claims or the post-judgment decisions of the trial court denying his motion to reconsider or to re-open to present new evidence. Thus, the 2005 decision of the Kittitas County Superior Court became final and binding on the parties and upon any non-party in privity with them.

Appellants’ entire argument is based on a fallacy.<sup>4</sup> The grounds for the judgment in the 2005 Kittitas County Superior Court case were

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<sup>4</sup> On at least the following pages of appellants’ brief, it is erroneously claimed by appellants that the only basis for the dismissal in the first trial was lack of standing: 7,

both lack of standing and failure of Billy Fulleton to prove his entitlement to recovery under the contract even if he had standing.<sup>5</sup> (CP 792-3; CP 809-814). Following expiration of the appeal period, Mr. and Mrs. Ullery filed a lawsuit (the 2007 lawsuit) in the Kittitas County Superior Court seeking to remove Billy Fulleton's personal property from the property titled in Mr. and Mrs. Ullery about which the first lawsuit centered (2005). (CP 1-10). That ejectment action was followed by a suit filed against Ullery in the Kittitas County Superior Court in a separate action in which Pat Fulleton and Billy Fulleton sought to enforce the 2002 "Reclamation Agreement." These two 2007 lawsuits were consolidated. (CP 238-9).

Mr. and Mrs. Ullery filed a motion for summary judgment in the 2007 action seeking dismissal of the complaint against them and any defenses asserted against their ejectment claim by Billy or Pat Fulleton based upon the doctrine of collateral estoppel. Judge Scott Sparks who had tried the 2005 case was assigned also to the 2007 case giving him a high level of familiarity with the situation. Judge Sparks concluded that

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11, 12, 13, 15, 17, 22, 24, 26, 28, 29, and 31. This error is fundamental to the appellants' appeal and represents a fatal flaw.

<sup>5</sup> See Appendix 1 attached.

collateral estoppel did bar the raising of the 2002 “Reclamation Agreement” as either an offensive or defensive weapon by Fulletons.<sup>6</sup>

In finding the existence of collateral estoppel, Judge Sparks entered a Memorandum Decision dated November 24, 2009 in which he states that the dismissal judgment in the 2005 lawsuit was made at a time when “. . . the court was unclear the exact nature of Mr. Patrick Fulleton’s knowledge of the extent of the litigation. . . .” (CP 472). The court continued in the Memorandum Decision stating that:

. . . it has become obvious, through the deposition of Mr. Patrick Fulleton, that he knew all along that his brother was prosecuting the claim against the Ullerys and that, in fact, Billy [Fulleton] was essentially prosecuting the claim for the benefit of Patrick. Now that this fact has become indisputable, it would be wholly inequitable and totally unfair to subject the Ullerys to a second trial.<sup>7</sup>

Summary judgment was entered in the 2007 action dismissing the Fulleton claims under the 2002 “Reclamation Agreement” with prejudice. Subsequently, based on formal proof, a judgment was entered in favor of Mr. and Mrs. Ullery on their ejectment action. This judgment of ejectment has been superseded pending this appeal.

Judge Sparks placed high importance in the summary judgment dismissing the Fulleton claims and defenses in the 2007 consolidated

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<sup>6</sup> (CP 476-78). See Appendix 2 for Memorandum Decision and summary judgment order of dismissal in 2007 actions.

<sup>7</sup> Portions of the Patrick R. Fulleton deposition transcript are attached as Appendix 3.

actions based on the 2002 “Reclamation Agreement” on the recently taken deposition of Patrick R. Fulleton. (CP 472). The Patrick Fulleton deposition testimony is compelling in support of the conclusion that Patrick Fulleton knew before the 2005 lawsuit was filed that it would be filed by Billy. Patrick Fulleton approved the filing of the lawsuit by Billy as Billy would be the only one to benefit from it by receiving land adjacent to his residence property in Liberty. Patrick Fulleton and Billy had previously entered into an agreement whereby Billy conveyed certain partnership interests to Patrick in partial consideration of Patrick conveying his interest in the 2002 “Reclamation Agreement” to Billy. Patrick Fulleton had been interviewed by Billy’s trial attorney prior to trial of the 2005 action and had told that attorney essentially that he was neither interested nor necessary as a witness in that action. The Patrick Fulleton deposition is compelling that at all times he was “in privity” with Billy as a party plaintiff to the 2005 action and that the outcome of that 2005 action should, therefore, be binding on him notwithstanding that he was not formally named as a party.<sup>8</sup>

Portions of the Patrick Fulleton deposition testimony which was considered by the trial court in granting the summary judgment of dismissal of the 2007 consolidated actions from which appeal is taken here

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<sup>8</sup> It is undisputed that Fulleton-Pacific Corporation was at all times defunct and that Patrick Fulleton was survivor to its assets.

have been referred to in the Introduction. Given the emphasis placed by the court on this deposition testimony, respondents Ullery have attached to this brief as Appendix 3 the same portions of the Patrick Fulleton deposition that were brought to the attention of the trial court in the summary judgment motion papers. (CP 260-436). The deposition leaves absolutely no doubt that Patrick Fulleton believed that he had assigned his claims under the “Reclamation Agreement” to Billy and that the claims were properly pursued by Billy in the 2005 action.

Even if Judge Sparks was wrong in determining that Billy lacked standing in the 2005 action, no appeal was taken from that determination. Even if Judge Sparks was wrong in the 2005 action to conclude that Billy had failed to meet his required proof of entitlement to performance by Ullery under the “Reclamation Agreement,” no appeal was taken from that determination.

What Billy and Alice Fulleton want this court to give them is something that the law does not allow. They want a “second bite at the apple” where their rights and responsibilities have been fully litigated to a judgment of dismissal with prejudice from which no appeal was taken. Patrick Fulleton being in privity with Billy in the 2005 action and its outcome, has no right to independently pursue Rod and Dianne Ullery on the same claims in a subsequent action.

### III. ARGUMENT

Whether collateral estoppel bars re-litigation is a question of law which is reviewed *de novo*. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004); *Spokane County v. City of Spokane*, 148 Wn. App. 120, 124, 197 P.3d 1228 (2009).

This court has recently applied the doctrine of issue – preclusion/collateral estoppel in *Worldwide Video v. Spokane*, 125 Wn. App. 289, 304-7, 103 P.3d 1265 (2005); *rev. den.* 155 Wn.2d (2005). *Worldwide* dealt with a situation where a second lawsuit concerning the same issues was filed by a person not a party to the first lawsuit. However, the person did participate as an expert witness and testified. The court found the party to be in “privity” and, therefore, barred by the doctrine of issue – preclusion/collateral estoppel from making the same claims in a later suit. The court held in regard to the necessary “privity” to bar a non-party from re-litigating an issue already decided that:

Generally, privity requires a “mutual or successive relationship to the same right or property.” *Hackler v. Hackler*, 37 Wn. App. 791, 794, 683 P.2d 241 (1984). Its binding effect flows from the fact that the successor who acquires an interest in the right is affected by the adjudication in the hands of the former owner. (Citing case.)

“Privity” for purposes of applying the doctrines of issue – preclusion/collateral estoppel to parties other than the litigants in the prior

case is defined in *Owens v. Kuro*, 56 Wn.2d 564, 568, 354 P.2d 696

(1960). *Kuro* defines “privity” for purposes of issue – preclusion with the following language:

. . . privity within the meaning of the doctrine of *res judicata* is privity as it exists in relation to the subject matter of the litigation, and the rules construed strictly to mean parties claiming under the same title. It denotes mutual or successive relationship to the same right or property. The binding effect of the adjudication flows from the fact that when the successor acquires an interest in the right it is then affected by the adjudication in the hands of the former owner.

In discussing the importance of the principle of collateral estoppel or “issue – preclusion” the court in *Christensen, supra*, at 306-7 held:

Collateral estoppel, or issue – preclusion, bars re-litigation of an issue in a subsequent proceeding involving the same parties. (Citing Treatise.) It is distinguished from claim – preclusion “in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted. (Citing cases.) Claim – preclusion, also called *res judicata*, “is intended to prevent re-litigation of an entire cause of action and collateral estoppel is intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation (citing case).

The collateral estoppel doctrine promotes judicial economy and serves to prevent inconvenience or harassment of parties (citing case). Also implicated are principles of repose and concerns about the resources entailed in repetitive litigation. (Citing treatise.) Collateral estoppel provides for finality in adjudication.

The testimony of Patrick Fulleton in his deposition, relied upon heavily by the trial court in granting the summary judgment of dismissal based upon collateral estoppel, demonstrates the identity of the issue, the chain of “title,” and the active participation of both Pat and Billy Fulleton in regard to the pursuit of Rod and Dianne Ullery in asserting claims under the 2002 “Reclamation Agreement.” (CP 260-436). Patrick Fulleton, although not named as a party to the 2005 lawsuit, had previously turned over his interest in the claims under the “Reclamation Agreement” to his brother Billy, knew that Billy was pursuing the Ullerys in a lawsuit in the Kittitas County Superior Court, had discussed with Billy’s attorney testifying in the trial, had advised Billy’s attorney that he did not think his testimony was necessary at the trial, and submitted post-trial materials through his attorney, James Perkins, supporting Billy’s motion for reconsideration or a motion to re-open the 2005 lawsuit.<sup>9</sup>

This tight relationship of Pat Fulleton to the 2005 lawsuit against Mr. and Mrs. Ullery was not obvious until his deposition was taken in 2009 prior to the filing by Mr. and Mrs. Ullery of their summary judgment motion seeking dismissal of the 2007 (second) lawsuit against them based on the 2002 “Reclamation Agreement.” Judge Sparks found that the deposition provided all of the necessary requirements for the application

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<sup>9</sup> A copy of the post-trial “Assignment” of the claims under the 2002 “Reclamation Agreement” from Pat to Billy is attached as Appendix 4. (CP 805-08).

of the collateral estoppel doctrine and dismissed the second lawsuit as the first lawsuit had been decided in favor of Mr. and Mrs. Ullery. Putting Mr. and Mrs. Ullery through a second trial on the same issue involving the claims for damages or specific performance of the 2002 “Reclamation Agreement” would have been a violation of the spirit and letter of the collateral estoppel doctrine. Judge Scott Sparks correctly ruled in dismissing with prejudice the Fulleton claims and defenses in the action appealed from based upon the doctrine of collateral estoppel.

Appellants’ efforts to characterize the 2005 lawsuit dismissal as being “technical” or “procedural” only flies in the face of the specific determinations made by the court in that unappealed decision. The time to challenge the decision of the Kittitas County Superior Court in the first trial would have been by appeal from the Findings, Conclusions, and Judgment entered in the 2005 lawsuit. Filing a new lawsuit on the same issues with only a technical challenge in the designation of named party violates fundamental legal principles.

Appellants claim that a “new” issue was injected by the “post-trial 2007 written Assignment.” (App. Br., p. 12.) This argument falls easily. The written Assignment upon which this claim of “new evidence” is based was submitted to the trial court in a post-trial motion to re-open the case or to reconsider the decision and was rejected by the trial court. Therefore,

by not appealing the Judgment in the 2005 suit and any post-trial motion entered in the same case, the challenge to the outcome is barred and re-litigation of the issues prevented by the doctrine of collateral estoppel.

The appellants attempt to support the argument about standing being the only issue forming the basis for the outcome of the 2005 lawsuit, by quoting from the Memorandum Decision of the Superior Court in the 2007 action where the court denied the Ullery motion for judgment on the pleadings. (CP 229-235). This motion was filed before Patrick Fulleton's deposition was taken. Consequently, the court did have the Patrick R. Fulleton testimony before it in ruling on the judgment on the pleadings. Under CR 12(c), only the pleadings are considered in such a motion; otherwise, the motion is converted to a summary judgment motion. Denial of a motion for judgment on the pleadings was not an appealable decision under RAP 2.2(a)(1). *See, e.g., McDonald v. Moore*, 57 Wa. App. 778, 790 P.2d 213 (1990). (No appeal of right allowed from an order denying motion for summary judgment.) Similarly, an order denying a motion for judgment on the pleadings would have no preclusive effect on a subsequent summary judgment based on facts that were not developed by deposition testimony at the time of the motion for judgment on the pleadings.

Finally, appellants claim that it would be “unjust” for the issues regarding the merits of the performance or non-performance by appellants of the 2002 “Reclamation Agreement” to be re-litigated. Would it not also be “unjust” for Rod and Dianne Ullery to have to go through a third litigation on the same contract? Would it also not be unjust for Rod and Dianne Ullery to be forced to perform a bilateral contract where the other party to the contract had not performed? Contract law principles excuse parties to a bilateral contract from performing where the other party has “materially breached” the contract. *Maryland Casualty Co. v. Seattle*, 9 Wn.2d 666, 676-7, 116 P.2d 280 (1941).

The trial court in the 2005 action found that plaintiff Fulleton had failed to obtain the approvals of two state agencies for the work in question, which was a crucial component of the contract performance. The work itself involved stream and land remediation to satisfy government agencies from prior mining operations. Without the government agency approval, the contract had no meaning to the property owners, Rod and Dianne Ullery. If the approval of the two state agencies was considered to be a “condition precedent” to the obligation of Mr. and Mrs. Ullery to perform the contract, the failure to secure performance of that condition precedent excuses the performance of the Ullerys under the contract. *Jones Associates, Inc. v. Eastside Properties*, 41 Wn. App. 462,

466, 704 P.2d 681 (1985). Finally, the fact that a contract performance obligation may have become more difficult or expensive does not provide an excuse for non-performance by the obligated party. *Liner v. Armstrong Homes of Bremerton*, 19 Wn. App. 921, 926-7, 579 P.2d 367 (1978).

Surprisingly, at page 19 of the appellants' brief, appellants concede that both Billy and Pat Fulleton thought that the contract claims against Rod and Dianne Ullery under the 2002 "Reclamation Agreement" had been assigned to Billy Fulleton before he commenced the lawsuit. Having conceded this fact, there is no basis for Pat Fulleton to claim that he was not in privity with Billy in Billy's prosecution of the 2005 lawsuit against Ullerys to its completion. What appellants fail to take into account is that that 2005 lawsuit was decided on the merits against Billy Fulleton. It does not matter whether or not Billy Fulleton was poorly represented, poorly assisted his counsel, or in some other fashion simply failed to persuade Judge Sparks of the Kittitas County Superior Court that he should prevail in the lawsuit on the merits. He was not able to persuade Judge Sparks, and the remedy for review of the decision of the Superior Court in the 2005 litigation should have been appeal of that decision. Neither Billy nor Pat Fulleton did so. Having failed to appeal that decision, it is final and there is nothing more to try or retry in a later suit. Pat Fulleton concedes in the appellants' brief that he had no ownership claim in the 2005 lawsuit

at the time Billy commenced it as he believed he had assigned his claims to Billy previous to that time. Case closed.

The 2007 Assignment Agreement is claimed by appellants to have not been before the court in the 2005 lawsuit.<sup>10</sup> This claim is of no factual or legal significance, given the admission by Pat and Billy that they believed the assignment had been completed before Billy commenced that 2005 lawsuit. If Billy failed to prove that he had standing in the first lawsuit, it was his or his attorney's failing, not a failing of the judicial system. Billy had ample opportunity before trial, during trial, or post-trial to provide evidence of assignment and yet he failed to do so and failed to appeal the decision of the trial court from the first lawsuit. Even if the standing issue had been decided differently by the trial court in the first lawsuit, the trial court in its Memorandum Decision and in its conclusions of law determined that Billy had failed to prove that he was entitled to performance from Rod and Dianne Ullery under the 2002 "Reclamation Agreement" by reason of his own material failure to perform.

#### **IV. ATTORNEY'S FEES REQUESTED**

Pursuant to RAP 18.1, respondents Ullery request an award of attorney's fees in their favor based upon the provisions of the 2002

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<sup>10</sup> It was the basis for a post-trial motion, however. (Appendix 4.) (CP 805-08).

“Reclamation Agreement.” This Agreement provides on its third page just above the signatures that

If a dispute arises, this Agreement shall be interpreted and resolved in Kittitas County; under the laws of the State of Washington.

\* \* \*

The prevailing party shall receive; reasonable attorney’s fees, and court costs in the event that judgment must be, and is, obtained to enforce this Agreement or any breach thereof.

**V. CONCLUSION/RELIEF SOUGHT**

The central premise of the appellants in this case is that the final judgment in the 2005 lawsuit (the “first lawsuit”), was only based on standing. This argument is belied by the Memorandum Decision of the trial court and the subsequent findings of fact, conclusions of law, and judgment entered on August 20, 2007 following trial of the first lawsuit. Without this argument, all of appellants’ arguments fail.

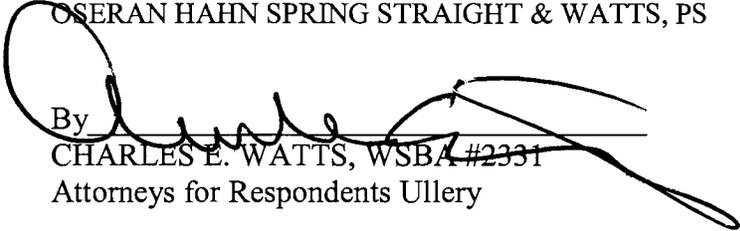
There was a trial on the merits in the first action. Pat Fulleton and Billy Fulleton both believed that Billy Fulleton was authorized to pursue that action. The action was tried. It was decided against Billy Fulleton on the merits and on the standing issue, and it was not appealed. There is nothing more required for the application of the doctrine of collateral estoppel to claims and defenses by Fulletons in the second lawsuit filed in

2007 against Ullery. Judge Sparks so ruled and his ruling is correct and should be affirmed on appeal.

Respondents Ullery request, in addition to affirmation of the trial court dismissal with prejudice of the Fulleton claims and defenses based upon the 2002 "Reclamation Agreement," an award of reasonable attorney's fees and costs in connection with this appeal.

RESPECTFULLY SUBMITTED on September <sup>28<sup>th</sup></sup>, 2010.

OSERAN HAHN SPRING STRAIGHT & WATTS, PS

By   
CHARLES E. WATTS, WSBA #2331  
Attorneys for Respondents Ullery

PROOF OF SERVICE

TO: Clerk, Division III, Court of Appeals

AND TO: Defendant/Respondent

PLEASE TAKE NOTICE on the 28<sup>th</sup> day of September, 2010, the Revised Response Brief of Ullery was filed with Division III, Court of Appeals and served via US Mail on the following:

Court of Appeals  
Division III  
500 N. Cedar St.  
Spokane, WA 99201

Mr. James A. Perkins  
Attorney at Law  
Larson & Perkins  
105 North Third Street  
Yakima, WA 98907

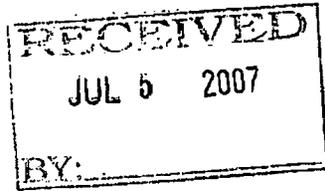
Dated this 28<sup>th</sup> day of September, 2010.

  
\_\_\_\_\_  
Joy Griffin, Legal Assistant

# **APPENDIX 1**

THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF KITTITAS

Michael E. Cooper  
Judge  
Department One



FILED  
07 JUN 29 AM 11:30  
SUPERIOR COURT CLERK

Scott R. Sparks  
Judge  
Department Two

June 29, 2007

Mr. Michael Tabler  
PO Box 876  
Ephrata, WA 98823

Mr. Charles E. Watts  
10900 NE Fourth Street #850  
Bellevue, WA 98004

Re: Billy L. Fulleton v. Rod Ullery and Dianne Ullery  
Kittitas County Superior Court case # 05-2-00084-1

Counsel:

The trial in this matter was conducted on June 19, 2007. The court has reviewed the testimony, the exhibits and the law in this area. The court's decision follows.

To prevail, plaintiff would have to establish by a preponderance of the evidence that the Reclamation Agreement (made between the defendants and Patrick Fulleton) had been assigned to plaintiff and that said agreement had been totally performed. Neither of these propositions has been established.

Although plaintiff *believes* Patrick Fulleton assigned the Reclamation Agreement to him, the record is devoid of evidence that Patrick Fulleton shared that belief (the evidence relied on by plaintiff, exhibits 6 and 11, do not operate to assign the contract: at best they contemplate some sort of future assignment). Since the plaintiff has not established that the agreement was assigned to him, he is not entitled to bring suit against defendants for performance.

Even if a reviewing court were to interpret exhibits 6 and 11 in the same fashion as plaintiff, there still remains the question of complete performance. While the Department of Natural Resources is satisfied with the work done (exhibit 8), the

Anna M. Barnaby  
Court Administrator

Kittitas County Courthouse  
205 West Fifth Avenue Suite 207  
Ellensburg, Washington 98926  
509-962-7533

Jewel Smith  
Court Reporter

(CP 792-3)

plaintiff is not authorized to speak for the Department of Fish and Wildlife (DFW); plaintiff's testimony regarding the quality of work on the "Lower Settling Pond" and "Williams Creek" (exhibit 9) is not competent to establish that the DFW is completely satisfied. While much time has past since the DFW has shown an interest in this property, the court has seen nothing which would preclude DFW from, in the future, requiring defendants to continue to reclaim this property in some regard. Plaintiff has not established that the contract was completed.

As to the complaint, the court finds for the defendant. The court has already dismissed the counterclaims. Each party shall bear their own attorney fees.

Mr. Watts should prepare findings of fact and conclusions of law and note the matter for presentment.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott R. Sparks", with a long horizontal flourish extending to the right.

Scott R. Sparks

SRS/hs

cc: file

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KITTITAS COUNTY  
SUPERIOR COURT CLERK

The Honorable Scott R. Sparks

**SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY**

BILLY L. FULLETON, a married man,

Plaintiff,

vs.

ROD ULLERY and DIANNE ULLERY,  
husband and wife,

Defendants.

No. 05 2 00084 1

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

THIS MATTER having come on for trial before the Honorable Scott R. Sparks, Judge, Kittitas County Superior Court on the 19<sup>th</sup> day of June, 2007; plaintiff Billy L. Fulleton appearing in person and through his attorney, Michael Tabler, Mrs. Alice Fulleton being present during the trial proceedings; defendant Rod Ullery appearing in person and he and Dianne Ullery, husband and wife, being represented by counsel, Charles E. Watts; the court having heard the arguments of counsel, considered the memoranda submitted by the parties; heard and considered the evidence admitted at trial and having heretofore made its Memorandum Decision dated June 29, 2007 (a true copy of which is attached hereto); now, therefore, the Court does make and enter its

(CP809-14)

53

**FINDINGS OF FACT**

1  
2           1.     Plaintiff Billy L. Fulleton is married to Alice Fulleton and both reside in the  
3 Liberty area of Kittitas County, Washington.

4           2.     Defendants Rod and Dianne Ullery, husband and wife, own property in the  
5 Liberty area of Kittitas County, Washington and are residents of King County,  
6 Washington.

7           3.     On or about the 30<sup>th</sup> day of June 2002 a "Reclamation Agreement" was  
8 entered into between defendants Ullery and a "Contractor" identified as "Fulleton Pacific  
9 Construction ala Patrick, [sic] R. Fulleton, a single man." This Agreement provided for  
10 the performance by the Contractor of certain work on the Ullery real property located in  
11 the Liberty area of Kittitas County, Washington known as a portion of the Black Jack  
12 Placer Mine.

13           4.     The work on the Black Jack Placer Mining Claim by the Contractor under  
14 the Reclamation Agreement was required to be approved by the State of Washington  
15 Department of Natural Resources and the State of Washington Department of Fish &  
16 Wildlife.

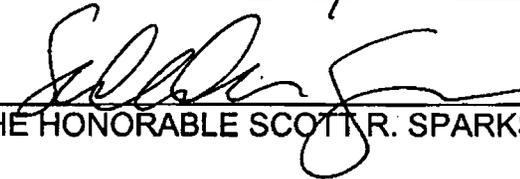
17           5.     Plaintiff, Billy L. Fulleton, was not an original contracting party to the June  
18 30, 2002 "Reclamation Agreement." Plaintiff Fulleton claims to be an assignee of the  
19 rights of the designated "Contractor" in that Agreement, described as "Fulleton Pacific  
20 Construction ala, Patrick R. Fulleton, a single man."  
21  
22



1 3. Even were plaintiff entitled to bring suit on the June 30, 2002 "Reclamation  
2 Agreement" against defendants, plaintiff has failed to sustain the burden of proof as to  
3 the performance of the contract. Specifically, plaintiff has failed to sustain the burden of  
4 proving that the two State agencies required to approve the performance of the work  
5 under the June 30, 2002 "Reclamation Agreement" (the State of Washington  
6 Department of Natural Resources and the State of Washington Fish & Wildlife) have in  
7 fact made such approval. Absent these approvals, an essential condition precedent to  
8 the Contractor's entitlement to payment under the contract is missing.

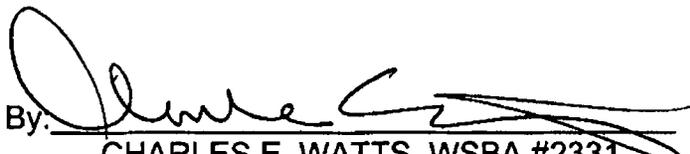
9 4. Neither party should recover their attorney's fees from the other in this  
10 action. Defendants Ullery should recover their statutory costs upon filing of a Cost Bill.

11 DONE and DATED this 20<sup>th</sup> day of August 2007.

12   
13 THE HONORABLE SCOTT R. SPARKS

14 Presented by:

15 OSERAN, HAHN, SPRING & WATTS, P.S.

16   
17 By: \_\_\_\_\_  
18 CHARLES E. WATTS, WSBA #2331  
19 Attorney for Defendants

20 Approved as to Form and  
21 Notice of Presentation Waived:

22 By: \_\_\_\_\_  
MICHAEL R. TABLER, WSBA #2331  
Attorney for Plaintiff

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The Honorable Scott R. Sparks

**SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY**

BILLY L. FULLETON, a married man,

Plaintiff,

vs.

ROD ULLERY and DIANNE ULLERY,  
husband and wife,

Defendants.

No. 05 2 00084 1

**JUDGMENT**

THIS MATTER having come on for trial before the Honorable Scott R. Sparks,  
Judge, Kittitas County Superior Court on the 19<sup>th</sup> day of June, 2007; plaintiff Billy L.  
Fulleton appearing in person and through his attorney, Michael Tabler, Mrs. Alice Fulleton  
being present during the trial proceedings; defendant Rod Ullery appearing in person and  
he and Dianne Ullery, husband and wife, being represented by counsel, Charles E.  
Watts; the court having heretofore made and entered its Findings of Fact and  
Conclusions of Law; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that plaintiff's claims  
against defendants as asserted in the Complaint in this action be and the same are

 (CP 815-16)

1 hereby dismissed with prejudice and with taxation of costs in favor of defendants against  
2 plaintiff.

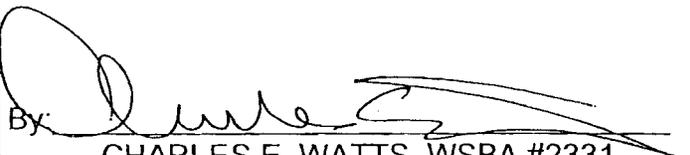
3 DONE and DATED this 20<sup>th</sup> day of August 2007.

4 19

5 THE HONORABLE SCOTT R. SPARKS

6 Presented by:

7 OSERAN, HAHN, SPRING & WATTS, P.S.

8  
9 By:   
10 CHARLES E. WATTS, WSBA #2331  
11 Attorney for Defendants

12 Approved as to Form and  
13 Notice of Presentation Waived:

14 By: \_\_\_\_\_  
15 MICHAEL R. TABLER, WSBA #2331  
16 Attorney for Plaintiff

17  
18  
19 DATED: July 13, 2007.  
20  
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## **APPENDIX 2**

THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF KITTITAS

Michael E. Cooper  
Judge  
Department One



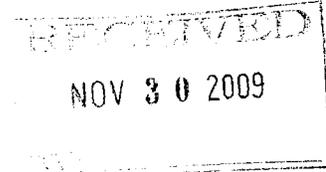
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09 NOV 24 AM 10:38  
KITTITAS COUNTY  
SUPERIOR COURT CLERK

Scott R. Sparks  
Judge  
Department Two

November 24, 2009

Mr. Charles E. Watts  
10900 NE Fourth Street #850  
Bellevue, WA 98004

Mr. James A. Perkins  
PO Box 550  
Yakima, WA 98907



RE: Summary Judgment  
*Ullery v. Fulleton*, Kittitas County Superior Court case # 07-2-00589-0

Mr. Watts and Mr. Perkins:

Enclosed please find the documents entitled *Summary Judgment* and *Order on Defendant's Motion for Summary Judgment*, filed this date.

While the standard of review for a decision on summary judgment precludes the necessity of any comment, as this court did in November 2007 allow this litigation to proceed, it is only fitting at this juncture to briefly address the question of why summary judgment has now been granted.

When this court heard the trial that Mr. Billy Fulleton brought against the Ullerys in June 2007 Mr. Patrick Fulleton did not participate in any fashion. In November 2007 the court was unclear of the exact nature of Mr. Patrick Fulleton's knowledge of the extent of the litigation, and so in an effort to give Mr. Patrick Fulleton an opportunity to "have his day in court" the court declined to grant judgment on the pleadings. However, at this point it has become obvious, through the deposition of Mr. Patrick Fulleton, that he knew all along that his brother was prosecuting the claim against the Ullerys, and that in fact Billy was essentially prosecuting the claim for the benefit of Patrick. Now that this fact has become indisputable, it would be wholly inequitable and totally unfair to subject the Ullerys to a second trial.

Mr. Watts, please prepare your affidavit on fees and costs and note that matter for presentment.

Sincerely,

  
Scott R. Sparks

SRS/hs

Enclosures

cc: Court File

Anna M. Barnaby  
Court Administrator

Kittitas County Courthouse  
205 West Fifth Avenue Room 207  
Ellensburg, Washington 98926  
509-962-7533

Jewel Smith  
Court Reporter

(CP 472)

11/24

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KITTITAS COUNTY  
SUPERIOR COURT CLERK

~~JUDGE'S COPY~~ SM

Judge Scott R. Sparks

Hearing Date: 11/16/09; 9:30 a.m.

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

ROD ULLERY and DIANNE ULLERY,  
husband and wife,

Plaintiffs,

v.

BILLY L. FULLETON and ALICE FULLETON,  
husband and wife,

Defendants.

No. 07-2-00589-0

(Consolidated with  
07-2-00678-1)

SUMMARY JUDGMENT

~~PROPOSED~~ SM

PATRICK R. FULLETON, an individual, and  
FULLETON-PACIFIC CORP., a Washington  
corporation, d/b/a FULLETON-PACIFIC  
CONSTRUCTION,

Third-Party Plaintiffs,

v.

ROD ULLERY and DIANNE ULLERY,  
husband and wife,

Third-Party Defendants.

CP 476-78

11/24

1 THIS MATTER coming on before the undersigned judge upon the motion by plaintiffs/  
2 defendants Rod Ullery and Dianne Ullery, husband and wife, seeking dismissal of all claims by  
3 defendants Billy Fulleton (now deceased) and Alice Fulleton, husband and wife, Patrick R.  
4 Fulleton, an individual and Fulleton-Pacific Corporation, a Washington corporation, d/b/a  
5 Fulleton-Pacific Construction; the court having read and considered the records and files herein  
6 and having specifically considered the Declaration of Charles E. Watts dated September 29,  
7 2009 (attaching the deposition testimony of Patrick R. Fulleton) and the Declaration of James  
8 Perkins; the court believing that plaintiffs' motion is well-taken and that the claims of the named  
9 defendants/plaintiffs Fulleton, et al. based upon the Reclamation Agreement should be dismissed  
10 with prejudice; now, therefore,

11 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the claims of Billy L.  
12 Fulleton (now deceased) and Alice Fulleton, his widow, Patrick R. Fulleton, an individual,  
13 Fulleton-Pacific Corp., a Washington corporation, d/b/a Fulleton-Pacific Construction against  
14 plaintiffs Ullery and defendants Ullery in this consolidated cause be and the same are hereby  
15 dismissed with prejudice; and

16 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as prevailing party,  
17 Rod and Dianne Ullery, husband and wife, are entitled under the Reclamation Agreement to  
18 recover their reasonable costs and attorneys' fees by subsequent motion.

19 DONE and DATED this 24<sup>th</sup> day of NOV 2009.

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21 \_\_\_\_\_  
22 JUDGE SCOTT R. SPARKS

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Presented by:

OSERAN, HAHN, SPRING, STRAIGHT & WATTS, P.S.

By: Mr. Burtow #31099  
CHARLES E. WATTS, WSBA #2331  
Attorney for Defendants Ullery

## **APPENDIX 3**

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

PATRICK R. FULLETON, an individual,  
and FULLETON-PACIFIC CORP., a  
Washington corporation, d/b/a  
FULLETON-PACIFIC CONSTRUCTION;  
BILLY L. FULLETON and ALICE FULLETON,  
husband and wife,

Plaintiffs,

vs.

ROD ULLERY and DIANNE ULLERY,  
husband and wife,

Defendants.

NO. 07-2-00678-1

COPY

DEPOSITION UPON ORAL EXAMINATION OF  
PATRICK R. FULLETON

TAKEN ON: Thursday, September 3, 2009

TAKEN AT: Law Office of Kenneth D. Beckley  
701 North Pine  
Ellensburg, Washington 98926

REPORTED BY: MARILYNN S. McMARTIN, RMR, CRR  
CCR NO. 2515

CP 260-436

1 Q. Where did you go?

2 A. I went to College of Idaho, and then Wenatchee, and then  
3 some at the University of Washington.

4 Q. Did you have a focus or a major in your college career?

5 A. Yes, psychology.

6 Q. Psychology. And you are single now, you said?

7 A. Yes.

8 Q. And Billy Fulleton was your brother?

9 A. Yes.

10 Q. And was he older or younger than you?

11 A. He was older than me.

12 Q. By how many years?

13 A. Two years.

14 Q. All right. And had you been in business with Billy Fulleton  
15 during his lifetime?

16 A. Oh, we had a couple ventures together, yes.

17 Q. Can you tell me about those.

18 A. We had one that was PB Properties, where we owned some  
19 property together. At one time we had some mining ventures  
20 down at Vantage.

21 Q. Okay. And FM2?

22 A. Yeah, FM2, my new venture up in Stampede Pass.

23 Q. All right. Anything else?

24 A. No.

25 Q. And how about with Fulleton Pacific, did Billy have any

1 here. Beckley's office put it together. It went to an LLC,  
2 and then I don't know what was disposed of, because Bill  
3 ended up with it.

4 Q. Bill ended up with PB?

5 A. Yes.

6 Q. How did that happen?

7 A. In 2004 when I bought him out of the gravel pit on  
8 Stampede Pass.

9 Q. That's FM2?

10 A. FM2 didn't buy him out. I bought him out.

11 Q. All right. But the gravel pit is FM2?

12 A. The FM2 gravel pit, yeah.

13 Q. So in addition to buying Billy out of the gravel pit or FM2,  
14 you bought him out of PB?

15 A. I gave him. No. Part of the deal was he took my share,  
16 half share of PB as part of his purchase -- or his  
17 compensation, I guess you could say.

18 Q. And was there documentation to reflect that?

19 A. Yes, there was.

20 Q. Okay. And who prepared those?

21 A. They were prepared, done by the people that financed the  
22 gravel pit, and I can't remember. They're in Portland,  
23 Oregon.

24 Q. So PB has no assets at this time?

25 A. You know, you'd have to ask somebody other than me. I don't

1 know.

2 Q. Okay. And when you and Billy were in PB, how was that  
3 business or partnership affair conducted? Who managed it?

4 A. Joint decisions, discussions, 50-50.

5 Q. Did you make joint decisions on buying the properties?

6 A. Yeah.

7 Q. And did you make joint decisions on how to manage the  
8 properties?

9 A. I guess so, yeah.

10 Q. And did you make a joint decision, then, between you and  
11 Billy, that he would end up with the properties?

12 A. I guess. I said, "You can have this as part of your  
13 compensation." He said, "Okay." So it wasn't difficult.

14 Q. And what was the compensation for that caused you to give  
15 your interest in PB to Billy?

16 MR. PERKINS: Before you go, how is this --  
17 and I've been a little liberal, because it's useful to get  
18 background information, but this isn't supplemental  
19 proceedings, and these aren't companies that are involved in  
20 this lawsuit.

21 MR. WATTS: Well, you know, I don't need to  
22 explain to you where I'm going with all this, but I'll just  
23 tell you that I'm trying to establish the nature of the  
24 relationship.

25 MR. PERKINS: We know that they're brothers

1 MR. WATTS: All right. Let the record show  
2 that the witness was instructed not to answer.

3 Could you mark that.

4 Q. (By Mr. Watts) All right. Let's go on to your mining  
5 interests with Bill. What was the nature of those mining  
6 interests?

7 A. I had no mining interests with Bill other than the gravel  
8 pit, so if you want to call a gravel pit mining, that's  
9 mining.

10 Q. Okay. And that gravel pit, then, is FM2?

11 A. FM2 was the owner of the gravel pit, yes.

12 Q. And what was the nature of the ownership interest in FM2  
13 between you and Billy?

14 A. I owned 42 1/2 percent.

15 Q. What did he own?

16 A. 42 1/2 percent.

17 Q. And who owned the other 15?

18 A. Joe McInturff.

19 Q. All right. And what was FM2? Was it a partnership?  
20 Corporation?

21 A. LLC.

22 Q. And how was it managed between you and Billy?

23 A. The three of us on any major decisions pretty much made our  
24 decisions. There wasn't any one guy, I guess you could say,  
25 that was exactly in charge of things. We all had a common

1 goal. That was to get it licensed and running.

2 Q. Was it a collaborative effort? Is that a good way to put  
3 it?

4 A. Yeah, that's a good way to put it.

5 Q. Okay. And any decisions that were made were joint decisions?

6 A. Yes.

7 Q. Did you ever have any formal meetings of FM2, or did you  
8 just decide over a beer or a soft drink sort of thing?

9 A. Well, we might have sat down in my office a couple times, or  
10 something like that, but mostly it was one goal, working on  
11 getting the permits in place and licensed so it would  
12 operate.

13 Q. Okay. And what happened to FM2?

14 A. I sold it.

15 Q. And when did you do that?

16 A. 2006.

17 Q. And who did you sell it to?

18 A. Shomac Corporation, Tucson, Arizona.

19 Q. Can you spell Shomac?

20 A. S-h-o-m-a-c.

21 Q. And do you have any involvement with Shomac?

22 A. No, I don't.

23 Q. And how did the sale come about in terms of you and Billy  
24 deciding on it?

25 A. Bill had nothing to do with it in 2006.

1 A. I don't know the legal who, part or whole. I don't remember  
2 that.

3 Q. Well, let me just say to you that Billy's house is on part  
4 of Black Jack, and the reclamation work involved another  
5 part of Black Jack.

6 MR. PERKINS: You are asking him to assume  
7 that?

8 Q. Well, yeah. Okay. Go ahead and assume that.

9 Well, what properties was it that these two  
10 properties were that you were to get? Did you know what  
11 they were?

12 A. Yes. They were two properties that were down at the end of  
13 the properties that Dianne -- one of them was close to  
14 Bill's property, and the other one was a claim that adjoined  
15 it.

16 Q. Okay. On the claim that adjoined Bill's property, do you  
17 know that that was Black Jack?

18 A. You know, I can't recall, but I believe it was.

19 Q. Yeah. All right. Let me ask you to assume it was.

20 A. I'll assume it was.

21 Q. All right. Now, what interest did you have in or Fulleton  
22 Pacific have in obtaining Black Jack? Why did you care  
23 about it?

24 A. Just compensation, because the property was quite valuable.

25 Q. Did you have any discussions with Billy about acquiring

1 Black Jack as a part of the reclamation contract?

2 A. Sure, I talked to Bill about acquiring it as part of the  
3 reclamation project.

4 Q. And what was the -- did you have any arrangement between  
5 yourself or Fulleton Pacific and Billy about what would  
6 happen to Black Jack after it was acquired?

7 A. Yeah. We talked about the possibility of him acquiring it  
8 after it was acquired.

9 Q. And what did you talk about?

10 A. The possibility. He said that he wanted it if it showed up,  
11 and I said, well, you're going to -- I had to pay you out  
12 for the property that I got next to you. You're going to  
13 have pay me for the property that's next to you.

14 Q. And how was Billy to pay you?

15 A. He was -- well, this didn't come about until a long time  
16 later. I guess that you asked me about the discussions at  
17 the time? Shall we clarify that?

18 Q. Sure.

19 A. Okay. Nothing was discussed how. He just knew that if he  
20 was going to get it, he was going to have to pay.

21 Q. Now, when were those discussions in relation to the  
22 reclamation contract itself?

23 A. I don't recall.

24 Q. Were they before the contract was entered into?

25 A. I don't recall.

1 Q. Tell me about any discussions you had with Billy about how  
2 he would end up with title to the Black Jack property  
3 adjoining his.

4 MR. PERKINS: Timing?

5 A. Timing? Time frame?

6 Q. Well, any discussions.

7 A. Well, later on when the contract was complete and then he  
8 wanted to get the property, I was interested in the claim  
9 next-door. And he said the only thing that he had to pledge  
10 was his share of, against his share of F2M; as far as  
11 securing whatever occurred, that he would pay for the  
12 mine -- or he would pay for the property that was next to  
13 his.

14 Q. So Billy said he would use his interest in FM2, in part, to  
15 pay for acquiring this Black Jack property?

16 A. He didn't say that -- I guess, let me rephrase, then. You  
17 say you want me to clarify.

18 Q. Sure.

19 A. He said that he would put it up as security against AMD. He  
20 didn't say: I will use FM2 to pay you. I will pay you, but  
21 I will put FM2 -- my share of F2M will be used as security  
22 to make sure that I do pay you.

23 Q. And was there a price discussed?

24 A. No, never did determine a price on that.

25 Q. Was there any contract entered into between you and Billy

1 that set out this arrangement for his purchase of  
2 Black Jack?

3 A. We had an agreement that, well, later on, that he would use  
4 this property as collateral, so I don't recall dates or  
5 times or when.

6 Q. Did you discuss with Billy during the reclamation contract  
7 performance the status of the contract, in other words, the  
8 work that was being done?

9 A. Of course.

10 Q. Okay. What did you talk about?

11 A. Getting it done.

12 Q. How often would you see Billy during these days and months  
13 you were performing the reclamation contract?

14 A. Oh, usually a couple, three times a week, maybe four times.  
15 I went up there almost every day or every other day.

16 Q. Up to Liberty?

17 A. Yeah, up to Liberty, while the project was transpiring.

18 Q. So you'd see Billy at his homesite there?

19 A. There, or if I had him, take him with me, go look at the  
20 site, see what's going on. And I would tell him what I  
21 wanted him to do if I wasn't there, get the people together.  
22 So yeah.

23 Q. It sounds like you and Billy until this lawsuit had a --  
24 this FM2 lawsuit had a pretty close relationship?

25 A. Bill and I had on-and-off relationships our whole lives,

1           then. Start it again. Let's hear your question again.

2                           MR. WATTS: Well, I'm not even sure I can  
3           remember the question Jim asked you about. I'll carry on.  
4           That's probably easier.

5   Q. (By Mr. Watts) How many times would you say after September  
6           of '02 you and Billy talked about the fact that Fulleton  
7           Pacific hadn't received what it thought it should from  
8           Ullery on the reclamation contract?

9   A. Several.

10   Q. How many is several, would you say?

11   A. Six? A dozen?

12   Q. And over what period of time would that have been?

13   A. Oh, a couple years.

14   Q. Were you still seeing Billy three and four times a week  
15           after September of '02?

16   A. Oh, probably, yeah.

17   Q. Okay.

18   A. Every time he come to town he stopped by the office,  
19           so . . .

20   Q. The Fulleton Pacific office?

21   A. Yeah.

22   Q. That's just out here --

23   A. Yes.

24   Q. -- toward 97 from town?

25   A. Yes.

1 Q. Would he stop by just to shoot the breeze, or did he have  
2 some purpose?

3 A. Both. If you know Bill, there's usually a purpose, but to  
4 shoot the breeze.

5 Q. And what decisions did you make about how to deal with the  
6 fact that you felt Fulleton Pacific wasn't getting what it  
7 should have on the reclamation agreement?

8 A. I think Mr. Perkins sent a letter, and I think you  
9 responded, or something like that. At that time there was  
10 still a trommel left on there, or something, and somebody  
11 said that -- at one time we discussed leaving it on there  
12 for decoration, you can leave it on there; another time, you  
13 know, get it off, and I think come back, get it off there.  
14 We got it off.

15 And that was it. Never did get it. I got off onto  
16 other things. At the time we were having financial  
17 difficulties with Fulleton Pacific, so I wasn't chasing what  
18 happened two years ago.

19 Q. So did there come a time when you became aware that Billy  
20 filed a lawsuit against Rod and Dianne Ullery?

21 A. I believe that lawsuit was filed after I purchased Bill out  
22 from F2M.

23 Q. Okay. Which would have been 2006?

24 A. I don't know if it was 2006 or 2007.

25 Q. Excuse me. I'm misstating your dates here.

1 A. Yeah.

2 Q. You said in 2004 you purchased Bill's F2M interest?

3 A. Right.

4 Q. And then F2M was resold to Arizona people in '06?

5 A. There's two years from the time I bought Bill out to the  
6 time that F2M sold.

7 Q. That's right. And I think your testimony already is it was  
8 sold to the Arizona people in '06.

9 A. Late '06, yeah.

10 Q. And that you bought out Billy in '04?

11 A. Early, January of '04.

12 Q. Okay. So my question is, did there come a time when you  
13 became aware that Billy Fulleton had sued Rod and Dianne  
14 Ullery?

15 A. I don't know the exact time. I knew that he was going to,  
16 because in the -- when I bought him out of F2M, and then as  
17 far as compensation, the property, he was going to end up  
18 with the property.

19 Q. "The property" being the Black Jack property?

20 A. The Liberty property and the mine, and the adjoining claim.

21 Q. And the PB property?

22 A. Yeah. That was part of the deal -- well, the PB, but that  
23 was not PB stuff. That was my stuff. Okay.

24 And so in the process of doing it, I says -- I'm  
25 off doing other things -- you go ahead and do whatever you

1 need to get the property from Ullery.

2 And I think he chose to sue Ullery, and I don't  
3 know the dates. My guess, because the mine, you know, sold  
4 whenever, whenever he decided to -- I don't know when he  
5 filed it, so . . . When I bought him out, so that's  
6 neither here nor there.

7 Q. But you did know that Billy had sued Ullery?

8 A. I knew that he had sued him, yes, uh-huh.

9 Q. Did you have any problem with him doing that?

10 A. No.

11 Q. Did you ever see the suit papers he filed?

12 A. No.

13 Q. Did you help Billy in any way in preparing the lawsuit  
14 papers?

15 A. No.

16 Q. Or advice or information?

17 A. No.

18 Q. Did you help Billy in any way in funding that lawsuit?

19 A. No.

20 Q. Paying costs?

21 A. No.

22 Q. And I believe the lawsuit was initially started by -- well,  
23 I shouldn't. I'll just say it was started by Ken Beckley.  
24 I think that's correct. Do you remember?

25 A. I think that Beckley had both Bill and Rod as clients, and I

1 believe Bill went to a lawyer in Ephrata. Tabler, does that  
2 sound right?

3 Q. Mike Tabler, T-a-b-l-e-r, is his name.

4 A. Yeah, I believe Bill got another lawyer because of you guys,  
5 lawyers, call it conflict or something.

6 Q. Did you and Billy both use Ken Beckley as an attorney on  
7 legal matters when you had legal matters?

8 A. When we first started together, I think Ken Beckley drew up  
9 the PB thing. And after that, Mr. Beckley and I had some  
10 pretty sour results on some stuff, and Mr. Perkins and I had  
11 had associations prior to that, and so Mr. Perkins has been  
12 my attorney since in the mid-nineties.

13 Q. Okay. So I will try to avoid asking you about any  
14 communications between you and Mr. Perkins, but I know that  
15 he'll let me know if I slip on that. It's not my intention  
16 to ask you about your discussions of anything with your  
17 attorney Jim Perkins. Okay? If I make a mistake, you let  
18 me know.

19 When you were aware that Billy had sued Rod and  
20 Dianne Ullery on the reclamation contract, that was of no  
21 concern to you, right?

22 A. That's correct.

23 Q. Okay. And what did you understand happened after the  
24 lawsuit was filed? Did Billy discuss it with you?

25 A. The only thing is, I never had discussions with Bill. He,

1 he never. His attorney Tabler called me and said that the  
2 court had ruled that it wasn't Bill's place to sue. It was  
3 yours.

4 And I says, well, it's not my deal, so Mr. Perkins  
5 can lead you on the legal deals, is how Mr. Perkins become  
6 involved, because I said, well, I'm not going to have you  
7 represent me. My attorney's Mr. Perkins.

8 And so I'm thinking an arm-length agreement was put  
9 in place -- if you would like to ask Mr. Perkins to explain  
10 that legally, he can do so far better than I can -- that  
11 refrained from any conflicts as far as my lawsuit against  
12 Bill, and that I would, in turn, then go pursue as, I guess,  
13 the original owner, pursue payment for my contract,  
14 completed contract.

15 Q. Between the time you got the -- was it a phone call from  
16 Mr. Tabler that the court had ruled on the assignment?

17 A. I believe it was a phone call, yeah.

18 Q. Between the time you learned that Billy had filed a lawsuit  
19 against Rod and Dianne on the reclamation agreement and that  
20 phone call from Mr. Tabler, had you talked to Mr. Tabler?

21 A. Mr. Tabler asked if I would come and testify. One time he  
22 called me, not Bill. There was no communication with Bill  
23 whatsoever. And I says: No, I don't need to. I said, I  
24 think it's pretty cut-and-dried. I said, I did a contract  
25 and didn't get paid for it, and, I said, so it should be

1           pretty simple. And he said okay.

2                       So I was off running around the world, or whatever,  
3           and so never heard any more. Never heard any more until  
4           after the court hearing.

5   Q. Do you remember what year that call from Mr. Tabler was  
6           about you testifying?

7   A. Yeah. It was, I would suppose it was when he, whatever -- I  
8           think you were involved in the other side. You would  
9           probably know the year better than me, because it was prior  
10          to trial.

11   Q. Okay.

12   A. And I told him that I didn't need to, and I wasn't going to  
13          get involved. That was part of the agreement on the F2M  
14          purchase, that Bill would go ahead and pursue getting paid  
15          for work performed on the Ullery properties, so that's . . .  
16          We've beat that up pretty good by now.

17   Q. Because I did talk to Mr. Tabler about some of this, I ask  
18          you whether or not you've ever had a knee replacement.

19   A. Oh, yeah, two of them.

20   Q. Okay. And do you remember telling Mr. Tabler that you  
21          couldn't appear at the trial date in the case because you  
22          were laid up with a knee replacement surgery in Arizona?

23   A. I don't. I don't recall that. I didn't have my knee  
24          replacement surgeries in Arizona.

25   Q. Did you have a knee replacement surgery around the time that

1 in late 2006?

2 A. Yes.

3 Q. Okay. And where were they done, here or in Arizona?

4 A. In Portland.

5 Q. In Portland, all right.

6 How many times do you think you talked to Mike  
7 Tabler, the Moses Lake attorney representing Billy in the  
8 Ullery lawsuit?

9 A. Once. He called me about our prior discussion, you know,  
10 would you take part in the lawsuit, and I said: I don't  
11 think so. I mean, it's simply a debt collection. We  
12 performed the work and didn't get paid. It should be pretty  
13 cut-and-dried, and I don't need to. I mean, the documents  
14 are there, and I'm off and out of here.

15 And then after the lawsuit he made a call to me,  
16 and I think -- I'm going to go back to Mr. Perkins. I said:  
17 You don't talk to me about those things. If you want -- you  
18 need to talk to my lawyer, Mr. Perkins.

19 And I believe that that's the next conversation. I  
20 didn't have any more with Tabler. They're all with  
21 Mr. Perkins.

22 Q. Did you ever have any kind of professional relationship with  
23 Mike Tabler as an attorney representing you?

24 A. None.

25 Q. Wouldn't know him to see him?

1 A. No.

2 Q. Okay. But I take it when Mr. Tabler called you and asked  
3 you to testify or talk to you about testifying in the Billy  
4 Fulleton lawsuit against Rod and Dianne Ullery, you were  
5 okay with the fact that the lawsuit was being pursued?

6 A. Sure.

7 Q. Did you ever tell Mr. Tabler that Billy had no right to be  
8 bringing this lawsuit?

9 A. No.

10 Q. Did you ever tell Billy that he had no right to be bringing  
11 the lawsuit?

12 A. No.

13 Q. Did you ever tell anybody but your personal lawyer,  
14 Mr. Perkins, that Billy had no right to bring this lawsuit?

15 A. I don't believe Mr. Perkins and I discussed it, because when  
16 we formed the sale agreement in 2004, Bill says: Well, I'm  
17 going to get the property, you know. You need to secure  
18 some titles to it.

19 And I said: Well, you know, I've got other things  
20 to do. You go chase Mr. Ullery.

21 So that's how that transpired. So Mr. Perkins and  
22 I had no discussions on it or Tabler and I, either one.

23 Q. Did you ever tell any court or judge that Billy Fulleton had  
24 no right to be pursuing Rod and Dianne Ullery?

25 A. No.

1            somewhere.

2            Q. Do you have a practice as to whether you read documents  
3            before you sign them?

4            A. Usually try to read most of them, yeah.

5            Q. Did you read this document before you signed it, the  
6            assignment?

7            A. Well, I thought I did.

8            Q. You think you read it then?

9            A. Yeah. If it came from Mr. Perkins, I'm sure I perused it.  
10           Let's put it that way, I perused it.

11           Q. And what did you understand the purpose of the assignment  
12           document to be?

13           A. The purpose of this assignment document was that I would --  
14           as I understood it to be, is that the judge had said that I  
15           had to pursue; that the obligation to pursue Mr. Ullery for  
16           payment of the contract was mine, not Bill's.

17                      And that in order for me to do it and use my  
18           attorney doing that, that the agreement would be reached  
19           that they would compensate, they would pay the compensation,  
20           all the court costs -- that Bill would, excuse me, so Bill  
21           or however he wants to do it, his estate or whatever you  
22           want to call it, and that we would open the court back up  
23           and I would go ahead and pursue it, and Mr. Perkins would  
24           then go ahead and handle it for me.

25                      But the only way I would do that was that I would

1 pursue that without ruining or taking prejudice or any type  
2 of conflicts of Bill and Mr. Perkins, so that Mr. Perkins  
3 could go ahead and represent me in my suit against Bill for  
4 compensation that I think we discussed earlier.

5 Q. So you wanted it to be okay with Billy, if you pursued Rod  
6 and Dianne Ullery, that you could use Jim Perkins, who is in  
7 the same suit representing you against Billy?

8 A. That's correct.

9 Q. All right. And you said --

10 A. That I would not have any conflict on any issues with my  
11 dealings with Jim Perkins.

12 Q. And you said that you wanted it understood that Billy was to  
13 pay all the costs and fees of pursuing Ullerys?

14 A. Bill was to compensate me or Mr. Perkins for fees. In order  
15 to get us to continue to pursue those things, Mr. Perkins  
16 would go ahead and open the case, as I understand the judge  
17 had stipulated that I was the one that should do the suing,  
18 not Bill, and that Mr. Perkins would represent me.

19 Q. So is it correct, then, that your understanding of this  
20 whole thing is that you were doing this as a favor to Billy?

21 A. Yes.

22 Q. And that you didn't expect to get anything out of it in the  
23 end; that whatever got -- that whatever Ullerys had to do  
24 would go directly to Billy?

25 A. There was discussions made that, you know, I felt that

1 possibly the financial returns that would come because of  
2 the properties, that those would go to me. Those  
3 discussions were made at that time, and that Bill was  
4 interested in the property next to him.

5 Q. And the whole purpose of this agreement, as you understood  
6 it when you signed it, this assignment agreement, was to  
7 attempt to cover for the outcome of the trial where the  
8 judge said Billy didn't have the right to sue?

9 A. No. This was to get the money from Ullery. He's never paid  
10 for the contract.

11 Q. But if the money had come from Ullery, it would have gone to  
12 Billy; is that correct?

13 A. Yes. Prior to this, it would have gone to -- if Bill had  
14 prevailed, then he would have received the total  
15 compensation from whatever those were.

16 Q. In other words, you had no interest in the outcome of the  
17 lawsuit?

18 A. Not before this.

19 Q. Before "this" being the assignment?

20 A. Yes.

21 Q. And after the assignment, what interest did you have in the  
22 lawsuit?

23 A. The possibility of securing the property that's next to Bill  
24 and Alice. I mean, Alice, she's a nice lady. She's done a  
25 lot of work, fixed the property up. She's made it very

1 nice. So getting that property for them. At that time  
2 didn't know Bill was sick. No one did.

3 And something was going to have to come out of the  
4 property that was -- apparently, it's not available, the  
5 adjoining claim, so something's going to have to come out of  
6 that. And there was discussions possibly if there's some --  
7 if something comes out of that, that you can receive that if  
8 it's financial.

9 Q. So even after you agreed to take over the lawsuit for Billy  
10 in this assignment document, Billy would have ended up with  
11 the Black Jack claim property next to him, next to his  
12 house?

13 A. Yes.

14 Q. And only if there was some money coming out of it in  
15 addition would you -- might you have gotten something out of  
16 this lawsuit?

17 A. The idea was that whatever -- if there was some money that  
18 came out of it, that that would maybe help go towards  
19 getting a resolution to the lawsuit.

20 Q. In other words, the money that came out of it from Ullery,  
21 if any did, would go to pay costs and fees?

22 A. Yeah, costs and fees. And any additional to costs and fees,  
23 cash would most likely go to me to try to defray some work  
24 towards a resolution of our lawsuit.

25 Q. Of the F2M lawsuit?

1 MR. WATTS: I'll show you Exhibit 2.

2 (EXHIBIT NO. 2 MARKED.)

3 MR. WATTS: Let's see. Does anybody have one  
4 with yellow pen on it? Maybe I didn't mark this.

5 Q. (By Mr. Watts) Okay. Showing you Exhibit 2, Mr. Fulleton,  
6 a document entitled Declaration of James A. Perkins in  
7 Support of Plaintiff's Motion for Order Reopening Judgment,  
8 have you seen that document before?

9 A. I don't know.

10 Q. Well, just read Mr. Perkins' declaration.

11 A. All right. I am.

12 Q. Okay. Take a look at paragraph 4 at the top of the second  
13 page of Mr. Perkins' declaration. Mr. Perkins states: I  
14 then contacted my client, Patrick H. Fulleton, to discuss  
15 the court's Letter Opinion.

16 Do you remember him contacting you? I'm not going  
17 to ask you what he said. I'm just asking if you remember  
18 that contact.

19 A. I know we had several conversations, so . . .

20 Q. Then the next sentence reads, and this is Mr. Perkins  
21 talking: Patrick R. Fulleton authorized me to draft a new  
22 assignment confirming his agreement and intention to provide  
23 Billy L. Fulleton with an enforceable assignment of claims.

24 Do you remember authorizing Mr. Perkins to draft a  
25 new assignment?

1 A. Well, I don't remember. No, I don't remember that, but if  
2 Mr. Perkins has it written here, then that could have been  
3 in that conversation, so I'm not doubting his, what do you  
4 call it, declaration.

5 Q. Mr. Perkins refers in that second sentence in paragraph 4 of  
6 his declaration to the new assignment, and I'm quoting:  
7 Confirming his agreement and intention -- "his" being you --  
8 agreement and intention to provide Billy L. Fulleton with an  
9 enforceable assignment of claims.

10 What agreement is he talking about there? Did you  
11 have an agreement with Billy?

12 A. Yeah. Bill was going to get the property, so I think --  
13 boy, we've beat that one to death, but yeah.

14 Q. That's the agreement that you are talking about?

15 A. I think that was back at the sale of -- or when I bought him  
16 out in 2004, yeah.

17 MR. WATTS: Okay. Let me show you Exhibit 3.

18 (EXHIBIT NO. 3 MARKED.)

19 Q. (By Mr. Watts) I'm not going to ask you to read this  
20 document. It's entitled Memorandum of Authorities in  
21 Support of Plaintiff's Motion for an Order Reopening  
22 Judgment. Let me just ask you to look at the second full  
23 paragraph on page 2 of Exhibit 3.

24 This is a statement by Mike Tabler, who represented  
25 Billy, stating that --

## **APPENDIX 4**

COPY

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

BILLY L. FULLETON, a married man,

Plaintiff,

vs.

ROD ULLERY and DIANNE ULLERY,  
husband and wife,

Defendants

No. 05-2-00084-1

MOTION FOR AN ORDER  
REOPENING JUDGMENT

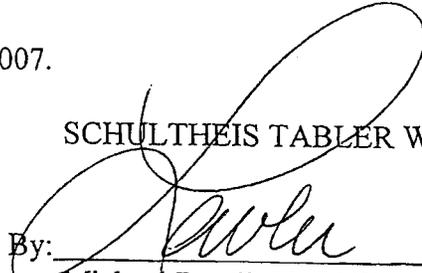
Fulleton  
EXHIBIT NO. 1  
9/3/09  
M. McMartin

COMES NOW Plaintiff, Billy L. Fulleton, by and through his attorneys, Schultheis  
Tabler Wallace and Michael Rex Tabler, and moves the court for its order reopening its  
judgment herein.

This motion is made pursuant to authority in CR 59(g) and is based upon the supporting  
declarations of Michael Rex Tabler, James A. Perkins, and Plaintiff's supporting memorandum  
of authorities as well as the records and files herein.

DATED this 9 day of August, 2007.

SCHULTHEIS TABLER WALLACE

By: 

Michael Rex Tabler, WSBA #6047  
Attorneys for Plaintiff

(CP 754)

COPY

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

BILLY L. FULLETON, a married man,

Plaintiff,

vs.

ROD ULLERY and DIANNE ULLERY,  
husband and wife,

Defendants

No. 05-2-00084-1

DECLARATION OF MICHAEL REX  
TABLER IN SUPPORT OF  
PLAINTIFF'S MOTION FOR AN  
ORDER REOPENING JUDGMENT

MICHAEL REX TABLER, hereby declares under penalty of perjury:

1. I am the attorney for Plaintiff, Billy L. Fulleton, in these proceedings and I make this declaration on Plaintiff's behalf.

2. I am personally familiar with all facts set forth herein and am otherwise competent to testify the same.

3. Following my receipt of the court's letter opinion dated June 29, 2007, I contacted attorney, James A. Perkins in Yakima, Washington. Mr. Perkins is known to me to represent Plaintiff's brother, Patrick R. Fulleton.

4. I advised Mr. Perkins of the court's letter opinion. In particular, I informed him of the court's determination the documents admitted as evidence at trial did not operate as a valid assignment of claims from Patrick R. Fulleton to Plaintiff.

CCP 799-804



## **ASSIGNMENT**

This assignment agreement (Assignment) is entered into this \_\_\_\_ day of July, 2007, by and between Patrick R. Fulleton and Billy L. Fulleton.

### **RECITALS**

A. On or about June 30, 2002, a certain Reclamation Agreement was entered into by and between Patrick R. Fulleton (Pat) and Rod Ullery and Dianne Ullery, husband and wife (Ullery). A copy of this Reclamation Agreement is attached as Exhibit 1 and is by reference made a part of this agreement as if fully set forth.

B. After the Reclamation Agreement was entered into, Billy L. Fulleton (Bill) expressed an interest in eventually having title to the Ullery property, covered by the Reclamation Agreement. Pat was willing to transfer all contract rights to own the Ullery property over to Bill, provided that he agreed to compensate Pat in full, for all costs Pat incurred to do the Reclamation Agreement work. Bill agreed to do so.

C. After Pat and Bill reached this agreement, all costs incurred to do the Reclamation Agreement work were not later paid by Bill because the parties reached yet a second agreement between themselves. Under this later agreement, as partial consideration for Bill transferring to Pat all of his interest in their jointly owned corporation, F2M, L.L.C., Pat agreed that the sums owed for the Reclamation Agreement work would instead be credited against the purchase price Bill would be paid by Pat for his F2M L.L.C. ownership interest.

### **AGREEMENT**

1. **Patrick R. Fulleton Assignment.** In partial consideration for the purchase of Bill's ownership interest in F2M, L.L.C., the transfer of which the parties stipulate and agree has already lawfully occurred, Pat hereby and unconditionally assigns, transfers and conveys to Bill, all of his rights and remedies arising under that certain Reclamation Agreement dated June 30, 2002. (See

attached Exhibit 1). This assignment is intended to include, but not necessarily be limited to, the assignment of the right to receive payment from Rod Ullery and Dianne Ullery, husband and wife, pursuant to the attached Reclamation Agreement, as well as any and all claims or causes of action to enforce payment arising under the Reclamation Agreement or to otherwise recover damages arising from a failure to pay.

2. **Ownership Transfer.** In partial consideration for the assignment of Pat's Reclamation Agreement rights as set forth in Paragraph 1, Bill now acknowledges, stipulates and agrees that Pat has already received the lawful transfer of all of Bill's prior ownership interest in the parties' jointly owned company, F2M, L.L.C.

3. **Non-Waiver.** By making this assignment and by confirming that a valid transfer of Bill's ownership interest in F2M has previously occurred, the parties are not addressing or waiving any other rights they may have, and they specifically reserve for later court adjudication, whether or to what extent Bill may still owe Pat or F2M any money as currently alleged, in that certain Kittitas County Superior Court lawsuit action No. 06-2-00747-9.

IN WITNESS WHEREOF the parties have executed this Assignment on the date first above written.



PATRICK R. FULLETON



BILLY L. FULLETON



State of Washington

**Department of Fish and Wildlife**

*South Central Region Ellensburg District Office, 201 North Pearl, Ellensburg, WA 98926  
Phone: (509) 925-1013, Fax (509) 925-4702*

July 10, 2007

Pat Fulleton  
1831 Highway 97  
Ellensburg, Washington 98926

Bill Fulleton  
2000 Liberty Road  
Cle Elum, WA 98922

Subject: Liberty Mine Site Reclamation and Work Subject to the Hydraulic Code.

Gentlemen:

I am writing at the request of Mr. Bill Fulleton, to confirm that Washington Department of Fish and Wildlife (WDFW) considers the work associated with Williams and Boulder creeks, done in 2002 as part of the reclamation of the large mine on Mr. Rod Ullery's property in Liberty, to be complete and acceptable to the Department. No additional work on this project is required by WDFW.

Under Washington's Hydraulic Code (RCW 77.55), WDFW has jurisdiction over construction or performance of work that uses, diverts, obstructs or changes the natural flow or bed of a stream. Work performed to restore the old mine site included three elements subject to the Hydraulic Code: 1) abandonment of the diversion of Boulder Creek into the mine, 2) removal of fill on a portion of the south shoreline of Williams Creek, and 3) construction of a stormwater outfall from the mine to Williams Creek.

The diversion of Boulder Creek into the mine was successfully abandoned and the channel restored in 2002. The stream flow now follows the natural path of the valley to its confluence with Williams Creek. The restored channel has withstood the spring high flows for five years and does not show evidence of instability.

The removal of fill and contouring of the portion of the south bank of Williams Creek to create a more natural-like bank slope with additional floodplain capacity was completed. The pre-existing trees on the shoreline were retained as I had requested, and native willow and cottonwood have become established in this area.

Pat Fulleton and Bill Fulleton

July 10, 2007

Page 2 of 2

The requested modifications to the outfall from the lower settling pond were completed. Additional rock was placed to armor the spillway, an overflow culvert was installed and the site was revegetated. The lower pond is heavily vegetated and there is no evidence of erosion of the embankment.

I trust this letter clarifies that it is our understanding that the project was completed and no further work was to be done. This letter does not authorize any additional work at the site. If in the future, the needs or interests of the landowner require further work affecting Waters of the State, please fill out and submit an application for a Hydraulic Project Approval (JARPA form) and send it to me at the Ellensburg office address.

Sincerely,

A handwritten signature in black ink, appearing to read "Brent D. Renfrow", is written over a horizontal line that spans across the page.

Brent D. Renfrow  
District Habitat Biologist

Cc: Perry Harvester, WDFW  
Rod Ullery, 2870 Liberty Road, Cle Elm, WA 98922