

No. 331598

**FILED**

AUG 6 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

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

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MARK and JENNIFER HANNA, husband and wife,

Appellants,

v.

ALLAN and GINA MARGITAN, husband and wife, and HAROLD L.  
and PATRICIA CROWSTON, husband and wife, DAN R. BOND  
and JANE DOE BOND, husband and wife, DAN M. BOND and  
JANE DOE BOND, husband and wife, RYKEN LIVING TRUST 18  
and Trustees Carl and Carole Ryken, STEVE and SHANNON  
MOSER, husband and wife, AVISTA CORPORATION, and  
INLAND POWER AND LIGHT CO.,

Respondents.

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**REVISED BRIEF OF RESPONDENTS  
ALLAN AND GINA MARGITAN**

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Law Office of J. Gregory Lockwood, PLLC  
421 W. Riverside, Ste. 960  
Spokane WA 99201  
Telephone: (509) 624-8200  
Facsimile: (509) 623-1491  
jgregorylockwood@hotmail.com

**ORIGINAL**

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**A. INTRODUCTION**

The respondents Margitan(s), in order to prevent redundancy join in and agree with the reply of the co-respondents Harold L. and Patricia Crowston, husband and wife, Dan R. Bond and Jane Doe Bond, Husband and wife, Dan M. Bond and Jane Doe Bond, husband and wife, Ryken Living Trust 18 and Trustees Carl and Carole Ryken, Steve and Shannon Moser, husband and wife, and Avista Corporation, Inland Power and Light Co., to the following issues presented by appellant.

1. THERE ARE NO EXEMPTIONS FROM LUPA NOT FOUND IN RCW 36.70C.030;
2. THERE ARE NO VESTED RIGHTS IN EXISTING LAW;
3. FAILURE TO APPEAL A LAND USE DECISION UNDER LUPA IS FATAL;
4. AN UNAPPEALED LAND USE DECISION UNDER LUPA CREATING A SHORT PLAT CAN ELIMINATE PRE-EXISTING EASEMENTS; and
5. THE PRIOR SUMMARY JUDGMENT ORDER CANNOT BE ALTERED EXCEPT ON APPEAL.
6. THE ATTORNEY FEE AWARD PURSUANT TO RCW 4.84.185 IN FAVOR OF THE DEFENDANTS WAS IN ERROR GENERALLY.

The respondents Margitan(s) will reply to the following issues specifically presented by appellant as to respondents Margitan(s):

1. THERE ARE TWO REASONS THE MARGITANS' EASEMENTS ARE INVALID;
2. THE MARGITANS MAY NOT CONSTRUCT OR MAINTAIN STRUCTURES OUTSIDE OF THE BUILDING SITE AREA ON SHORT PLAT 1227-00. And
3. ATTORNEY FEE AWARD WAS SPECIFICALLY IN ERROR TO ALLAN AND GINA MARGITAN DUE TO ALL CAUSES OF ACTION NOT BEING DEENED FRIVOIOUS

**B. STATEMENT OF THE CASE**

Shot Plat 1227-00 consists of three (3) parcels located in Spokane County, Washington and was conditionally approved on May 12, 2000. (CP 684-691)

On April 6, 2002, the respondents Allan and Gina Margitan (hereafter "Margitans") purchased property identified as Parcel number 17274.9086 and Parcel 1 of Short Plat 1227-00, known as "portion of 17274.9098 and a portion of 17274.9013". (CP 704)

At the time of purchase, the Margitans obtained two (2) easements from Marion and Drew Bond, the developers. (Declaration of Allan Margitan) The two easements are recorded at Spokane County recording numbers 4715117 and 4715118. (CP 704-705) (CP 710 -715)

Prior to obtaining the easements the Margitans and Drew Bond met with Jim Manson, Spokane County Planning Manager, and inquired about the two easements. He referred them to Greg

Baldwin the Spokane County Land Development Coordinator. Spokane County had no issues with the easements. (CP 705)

On May 1, 2002 the appellants Mark and Jennifer Hanna (hereafter "Hannas") purchase parcel 2 within Short Plat 1227-00. (CP 710) At the time of their purchase they had specific knowledge of all easements including the Margitan's easements which crossed their property as reported on their title report. (CP 600-609)

As of April 6, 2002, the Margitans had used these easements frequently and have consistently performed work on all roads within Short Plat 1227-00 using their heavy equipment. (CP 705)

In June 2002, Allan Margitan arranged with Inland Power & Light Company to supply power to both of their parcels on June 26, 2002. (CP 705) All three owners of the parcels within the Short Plat granted easement to Inland Power with the Margitan's recording number 4864806 dated June 26, 2002, Hanna's recording number 4864805 dated June 25, 2002; and Bond's recording number 4864808 dated June 24, 2002. (CP 705) These three (3) easements were granted after the creation of the Short Plat.

On February 1, 2010, the Margitans purchased Parcel 3 of Short Plat 1227-00. (CP 706) Parcel 3 of Short Plat 1226-00 had a

preexisting structure at the time of the approval as indicated on the Preliminary Short Plat. (CP 693) The preexisting structure was also referenced in the conditional approval of Short Plat 1227-00. (CP 684) (CP 490).

The Margitans sought to remodel the existing structure on Parcel 3. (CP 490) The Margitans submitted an application with supporting documentation for the remodel of the existing residence which was approved by Spokane County Building and Planning. (CP 490) (CP 488-556) A permit from Spokane County Building and Planning was granted to the Margitans for the remodel of the structure on Parcel 3 of Short plat 1227-00. (CP 502)

Mr. John Peterson the Director of Spokane County Planning indicated in his review of their file for Parcel 3 of Short Plat 1227-00 that all the structures located on Parcel 3 were in full compliance with Spokane County Building and Planning's review and permits. (CP 490)

On June 30, 2013 the appellants filed an amended complaint alleging that the Short Plat process eliminated all preexisting easements in the short plat and prevented granting new easements without reopening the short plat. (CP 316-331)

On December 12, 2014 the appellants Margitans joined in the summary judgment for dismissal of the petitioner's claim that the Short Plat process eliminated all preexisting easements in the short plat and prevented granting new easements without reopening the short plat (CP 583-586)

On February 6, 2015 the trial court granted the summary judgment motion of the Margotans. (CP 846-851)

On February 25, 2015 the respondent Margitan moved the court for an award of attorney fees pursuant to RCW 4.84.185 (CP881-883)

On April 9, 2015 the trial court awarded respondent Margitans attorney fees pursuant to RCW 4.84.185 (CP1116-1119)

### **C. STANDARD OF REVIEW**

#### **Error alleged as to Easement claims.**

The standard of review on summary judgment is well settled. Review is de novo; the appellate court engages in the same inquiry as the trial court. Benjamin v. Washington State Bar Ass'n, 138 Wn.2d 506, 515, 980 P.2d 742 (1999).

#### **Error alleged as to attorney fees award.**

This court reviews orders awarding attorney fees pursuant to RCW 4.84.185 for abuse of discretion. Alexander v. Sanford, 181 Wash. App. 135, 184, 325 P.3d 341 (2014).

An abuse of discretion occurs if the court's decision is manifestly unreasonable or based on untenable grounds or reasons. In re Marriage of Little Field, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

**D. APPELLANTS FAILED TO PRODUCE EVIDENCE IN OPPOSITION TO RESPONDENT MARGITAN'S MOTION FOR SUMMARY JUDGMENT FOR DISMISSAL**

The appellant failed to present any evidence in opposition to the Margitan's motion for summary judgment for dismissal.

In Washington the law is clear that the nonmoving party attempting to avoid summary judgment may not simply rely upon argumentative assertions or on having its affidavits considered at their face value, for upon the submission by the moving party of adequate affidavits the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue of material fact exists. Twelker v. Shannon & Wilson, Inc., 88 Wn.2d 473, 479, 564 P.2d 1131 (1977).

The general rule in Washington was cited in Felsman v. Kessler, 2 Wn. App. 493, 496, 468 P.2d 691 (1970) as:

[1] It is the general rule that once the moving party has filed affidavits controverting the pleadings, the nonmoving party can no longer rely upon his pleadings but must come forth with evidence, as long as it is available, which would justify a trial.

More recently the court of appeals held in American Exp.

Centurion Bank v. Stratman, 292 P.3d 128 (2012):

The initial burden is on the moving party to show there is no genuine issue of material fact.[12] The motion must be based on facts that would be admissible in evidence.[13] The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine issue for trial.[14] In doing so, the nonmoving party may not rest upon mere allegations or denials. *Citations omitted.*

In this case the appellant's only relied upon argument of counsel and the existing amended complaint which are insufficient to avoid summary judgment. The appellants failed to present a scintilla of admissible evidence in opposition to the Margitan's counter-motion for summary judgment.

This issue was addressed by Division 3 in McBride v. Walla Walla County, 975 P.2d 1029, 1031, 95 Wn.App. 33 (1999) by holding:

CR 56(e) states affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." ***An adverse party may not rest upon mere allegations or denials,***

***but must instead set forth specific facts showing the existence of a genuine issue for trial. CR 56(e); Ruffer v. St. Frances Cabrini Hosp., 56 Wash.App. 625, 628, 784 P.2d 1288; review denied, 114 Wash.2d 1023, 792 P.2d 535 (1990). The affiant must testify to facts based on personal knowledge. CR 56(e); Grimwood v. University of Puget Sound, Inc., 110 Wash.2d 355, 359, 753 P.2d 517 (1988). A "fact" is a reality rather than supposition or opinion. Grimwood, 110 Wash.2d at 359, 753 P.2d 517. A trial court does not abuse its discretion by excluding a declaration containing legal conclusions. King County Fire Protection Dist. No. 16 v. Housing Authority of King County, 123 Wash.2d 819, 826, 872 P.2d 516 (1994). Emphasis Added.***

The appellants further fail to indicate how they have suffered any damages based upon their alleged cause of action regarding the Margitan's structures on Parcel 3 of Short Plat 1227-00. Nor have they indicated how they have authority to act as a private Attorney General and attempt to enforce building codes or contest the granting of defendants permits.

The appellants had failed to produce a scintilla of evidence for case law to support their claim regarding defendants' structures located on Parcel 3 of Short Plat 1227-00 are in violation of Spokane County building code, ordinance or were built / remodeled without Spokane County approval..

In Guile v. Ballard Community Hosp., 70 Wn.App. 18, 851

P.2d 689, (1993) the court held at page 21:

A defendant can move for summary judgment in one of two ways. First, the defendant can set out its version of the facts and allege that there is no genuine issue as to the facts as set out. *Hash v. Children's Orthopedic Hosp. & Med. Ctr.*, 110 Wash.2d 912, 916, 757 P.2d 507 (1988). ***Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case. Young v. Key Pharmaceuticals, Inc., 112 Wash.2d 216, 225 n. 1, 770P.2d 182. Emphasis Added***

In this case the appellants did not meet their burden of proof on their issues raised in its cause of action relating to respondent's structures located within Short Plat 1227-00 in Spokane County Washington. Nor did the appellant produce evidence rebutting the summary motion of the respondent.

**E. APPELLANTS ALLEGE IN ERROR THAT THERE ARE TWO REASONS THE MARGITAN'S EASEMENTS ARE INVALID.**

**1. Appellants in error allege lack of intent to convey.**

As to the respondents Margitan's easements the appellants relied upon the misreading of Zunino v. Rajewski, 140 Wn. App. 215, 165 P.3d 57 (2007) in alleging the defendants easements are illegal.

In this case the respondents Margitan's easements are all deeded easements, which clearly indicate the intent to grant an easement. (CP 710-715)

In this case the appellants misstate Zunino as it applies to the facts of this case.

As cited by the appellants the Zunino case involved an alleged easement and held at pages 221- 223:

The statute of frauds requirements are set forth in RCW 64.04.010. An express conveyance of an easement by grant or reservation must be made by written deed. RCW 64.04.010. The deed must be in writing, signed by the party bound by the deed, and the deed must be acknowledged. RCW 64.04.020. **Accordingly, a deed of easement is required to convey an easement that encumbrances a specific servient estate. *Berg v. Ting*, 125 Wash.2d 544, 551, 886 P.2d 564 (1995).** Similarly, "[a] deed of easement is not required to establish the actual location of an easement, but is required to convey an easement which encumbrances a specific servient estate." *Id.* **The agreement to the easement by the owner of the servient estate is a vital element in the creation of an easement. *Beebe v. Swerda*, 58 Wash.App. 375, 382, 793 P.2d 442 (1990). Emphasis Added.**

In the Zunino case the grantor of the easement was also the grantee. The grantor did not convey or grant an easement which distinguishes it from the deeds in the case before this court.

Further, in Zunino there was an attempt to create an easement on property the grantor did not own. Neither of these fatal events occurred in this case.

The appellants in their brief have failed to identify what the actual fatal error was in the Zunino case. But rather attempts to identify some similar boilerplate language contained in the easement deeds as a basis for their claim of an invalid deed.

In this case the easements at issue for the Margitans were conveyed between the Bonds and the Margitans on April 16, 2002 which is a clear intent to convey. (CP 710-715)

The Private Road Easement clearly indicates a Grantor and Grantee. Further, there is no dispute that the Bonds were the owners of the servant estate and the Margitans owners of the dominant estate. (CP 710-715)

The appellants purchased their property on May 1, 2002 subsequent to the conveyance of the Road Easements granted to the Margitans. (CP 710)

Further, the Road Easements conveyed to the Margitans were clearly identified in their title report.(CP 600-609 )

The facts of this case differ 180 degrees from that of the Zunino case. There is a conveyance between a grantor and

grantee in the Margitan's grant of easement. Zunino cited by the appellants supports the respondent's claim of valid easements. As such, the trial court's ruling on this issue is correct and should not be disturbed. The court properly denied the appellants' summary motion as the evidence was clear by the language in the deeds, of an intent to convey.

**2. Appellants In Error Allege The Short Plat Was Required To Be Reopened For The Bonds To Grant The Margitan's Easements**

The appellant's further argue that the Margitan's were required to reopen the short plat in order for the Bonds to grant the Margians an easement is misplaced.

The appellants in error allege RCW 58.17.215 applies in this case. However RCW 58.17.215 applies to the alteration of a subdivision. There has been no alteration of a subdivision in this case.

This issue has been addressed by the co-defendants in their briefing and the respondent Margitan joins in their response.

The appellant is arguing to this court that private easements cannot be granted within a short plat without reopening the short plat. In so doing the appellants has cited no law to support such an argument. The appellants rely upon the misreading of M.K.K.I.

Inc. v. Krueger, 135 Wash.App. 647, 658, 145 P.3d 411 (2006) as support for their position, The M.K.K.I. case involved the removal of a dedicated easement within a short plat whereas in this case the issue is the creation of private easements not dedicated in the Short plat.

A short plat can grant a dedicated easement when approved. And it is only the intent of the plat applicant which determines whether a plat grants an easement. Selby v. Knudson, 77 Wn. App. 189, 194, 890 P.2d 514 (1995). However, once a short plat is created there are no restrictions on the private grant of an easement.

The appellant is arguing the vacation of long standing property law regarding the creation of easements. In this case there were two estates at the time of the granting of the deeded easements to the Margitans. It was the intention of the Margitans and the Bonds to create the easements. It is long standing law in Washington that easements may be created by agreements or covenants. Kalinowski v. Jacobowski, 52 Wash. 359, 367, 100 P. 852 (1909). There is no requirement by statute or case law that the creation of an easement by agreement can only occur in unplatted areas.

No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose. Beebe v. Swerda, 58 Wn.App. 375, 379, 793 P.2d 442 (1990). An easement is a property right separate from ownership that allows the use of another's land without compensation. City of Olympia v. Palzer, 107 Wn.2d 225, 229, 728 P.2d 135 (1986).

As noted, in this case there are deeded easements evidencing the intent to convey the respondent Margitan's easements. (CP710-715) The position taken by the appellant is unsupported by law or a good faith challenge to existing law.

**3. The Appellants Allege In Error That The Margitans May Not Construct Or Maintain Structures Outside Of The Building Site Area On Short Plat 1227-00**

As argued to the trial court the appellants have brought this particular claim in bad faith citing no case law or statute to support such a position.

The Spokane County Building and Planning's decision approving Short Plat 1227-00 specifically identified the existing structures at issue by the appellant. (CP 684- 691) The preexisting structures a residence, boathouse and dock were all referenced at paragraph 5 of the decision. (CP 684) Nothing in the decision

including the Conditions of Approval required the removal of the structures. (CP 686)

These preexisting structures were allowed or as John Peterson the Director of Spokane County Planning stated in his declaration were “grandfathered” (CP 490)

The Spokane County Building and Planning Department regulates the granting of building permits in Spokane County. (CP 489) The issue raised by the appellant was specifically address by the Spokane County Building and Planning Department in a letter to Brian Wilson in 2009. (CP 492-493) Brian Wilson was the prior owner of Parcel 3 of Short Plat 1227-00. This letter to Brian Wilson is part of the file maintained by the Spokane County Building and Planning Department on parcel 3 o Short Plat 1227-00. (CP 491-556)

Having the authority to grant building permits the Spokane County Building and Planning Department granted remodeling permits for Parcel 3 of Short Plat 1227-00 to the Margitans. (CP 490)

The appellant knowing that the Margitans had obtained all building permits and approvals from the Spokane County Building and Planning Department have brought this appeal. The appellant

produced no evidence to the trial court on this issue and relied only upon argument of counsel.

**F. ATTORNEY FEES**

**3. ATTORNEY FEE AWARD WAS SPECIFICALLY IN ERROR TO ALLAN AND GINA MARGITAN DUE TO ALL CAUSES OF ACTION NOT BEING DEENED FRIVOIOUS**

The appellant's argument is based upon an uncited case of "Under Biggs I". The appellate courts need not consider arguments not supported by reference to the citation of authority. In re Marriage of Ferree, 71 Wn.App. 35, 47, 856 P.2d 706, (1993)

The appellant is apparently arguing that of their remaining claims were not frivolous; therefore attorney fees cannot be awarded under RCW 4.84.185. However, the appellant voluntarily dismissed all their remaining claims pursuant to CR 41 on the morning of trial at the beginning of the appellant's case in chief. See Appendix A

The appellant brought no additional claims to trial.

CR41(a)(B)(4) states:

(a) Voluntary Dismissal...

(B) By plaintiff before resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of plaintiff's opening case...

(4) Effect. Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States.

In this case because of the voluntary dismissal of all of the plaintiff's remaining claims there are no other causes of actions in Spokane County Superior Court case 12-2-04046-6 other theses in this appeal.

The appellants clearly stated in their brief:

“ ... if any claims advance to trial, a trial court's award of fees under RCW 4.84.185 cannot be sustained.”  
*State ex rel Tuick-Ruben v. Verhaven*, 136 Wash. 2d 888, 904, 969 P.2d 64 (1998).

The full quote states:

In Biggs I, we reversed the trial court's award of fees under RCW 4.84.185 because the trial court found only three of four claims asserted by Biggs to be frivolous.

**Because the fourth claim advanced to trial, the suit could not be considered frivolous in its entirety.** Thus, fees under RCW 4.84.185 were not appropriate. *Id.* at 132, 137, 830 P.2d 350. Under Biggs I, if any claims advance to trial, a trial court's award of fees under RCW 4.84.185 cannot be sustained. *Emphasis Added.*

State ex rel. Quick-Ruben v. Verharen, 969 P.2d 64, 904-905, 136 Wn.2d 888 (Wash. 1998)

Since the appellant advanced no other claims to trial this line of argument is not applicable and the attorney fee award to the respondents Margitan should be upheld.

The appellants misstate the facts by indicating in their brief:

“The Several claims proceeded to trial held on April 22, 2015.” *Appendix B*. In fact, the trial court ordered that the claims that did proceed to trial were not frivolous under RCW 4.84.185.

The argument of the appellants is not only untrue but is intentionally misleading, as no claims were advanced at trial. The appellant further misstates the issue of attorney fees which is still before the trial court and no final order.

The respondents Margitans have requested attorney fees at the trial court due to the frivolous filing with no intent to advance to trial. That issue is still pending at the trial court.

Further, the trial court in its orders on the easement issues was sufficiently clear as to the basis for an attorney fee award.

**G. PENDING REQUEST FOR ATTORNEY FEES IN TRIAL COURT.**

The appellant has attempted to mislead the court in referencing to the trial courts order regarding the respondent's request for attorney fees due to the appellant's dismissal of all claims on the morning of trial. The appellants were acting in bad

faith by dismissing all remaining claims the morning of trial as they had no intention to bring them to trial. The denial of attorney fees is under reconsideration which the appellant has failed to disclose.

This issue is unrelated to the court's award of attorney fees now on appeal.

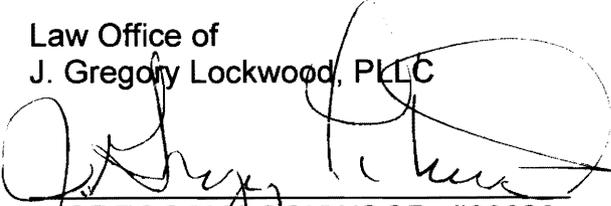
#### **H. CONCLUSION**

Based upon the above, the respondents Allan and Gina Margitan respectfully request this reviewing court deny the appellants appeal and award attorney fees and costs in defense of this appeal.

Respectfully submitted.

DATED this 5<sup>th</sup> day of August, 2015.

Law Office of  
J. Gregory Lockwood, PLLC



J. GREGORY LOCKWOOD, #20629  
Attorney for Allan and Gina Margitan  
421 W. Riverside, Ste. 960  
Spokane WA 99201  
Phone: (509) 624-8200  
Fax: (509) 623-1491  
CERTIFICATE OF SERVICE

I, LORRIE HODGSON, do declare that on August 5, 2015, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Stanley E. Perdue  
Perdue Law Firm  
41 Camino Los Angelistos  
Galisteo, NM 87540  
**Via email:**  
**perduelaw@me.com**

David Kulisch  
Randall Danskin  
601 West Riverside Ave. Suite 1500  
Spokane, WA 99201  
**Via email:**  
**dak@randalldanskin.com**

Gregory C. Hesler  
William J. Schroeder  
Paine Hamblen, LLP  
717 W. Sprague Ave., Suite 1200  
Spokane, WA 99201  
**Via email**  
**greg.hesler@painehamblen.com**  
**william.schroeder@painehamblen.com**

David Eash  
Ewing Anderson, P.S.  
522 West Riverside, Suite 800  
Spokane, WA 99201  
**Via email:**  
**deash@ewinganderson.com**

Peter A. Witherspoon  
Workland Witherspoon  
601 West Main Avenue, Ste. 714  
Spokane, WA 99201-0677  
**Via email:**  
**Pwitherspoon@workwith.com**

DATED August 5, 2015.



LORRIE HODGSON

# Appendix A

COPY  
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SPOKANE COUNTY CLERK

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

MARK AND JENNIFER HANNA, husband

and wife,

Plaintiffs

v.

ALLAN AND GINA MARGITAN, husband

and wife, and HAROLD L. AND PATRICIA

CROWSTON, husband and wife, DAN R.

BOND and JANE DOE BOND, Husband and

wife, DAN M. BOND and JANE DOE BOND,

husband and wife, RYKEN LIVING TRUST

and Trustees Carl and Carole Ryken, STEVE

and SHANNON MOSER, husband and wife,

and AVISTA CORPORATION.

Defendants

INLAND POWER AND LIGHT CO.,

Intervenor.

No. 12-2-04045-6

ORDER RE DISMISSAL OF  
HANNAS' REMAINING CLAIMS  
AND TERMINATING CERTAIN  
OTHER ORDERS

ORDER OF DISMISSAL OF CLAIMS AND  
TERMINATING OTHER ORDERS

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1

**PERDUE LAW FIRM**  
41 Camino De Los Angelitos  
Galisteo, New Mexico 87540  
(509) 624-6009  
perduelaw@me.com

MOTION AND STIPULATION

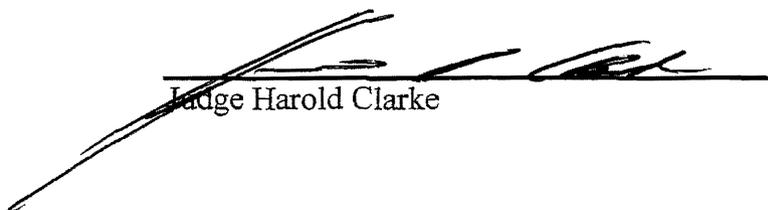
The Plaintiffs, Mark and Jennifer Hanna, by their attorney Stanley Perdue moved in court April 22, 2015 to dismiss their remaining claims, not otherwise disposed of by court order, pursuant to CR 41. Further, the parties stipulate to the termination of the following orders: August 6, 2013 order of Judge Tompkins as it relates to maintaining the status quo pending further order of court and the June 9, 2014 order of Judge Price as it relates to granting the Hannas temporary access to Long Lake across Parcel 3 of Short Plat 1227-00.

ORDER

The Hannas having moved to dismiss their remaining claims, not otherwise disposed by court order, pursuant to CR 41, it is hereby ORDERED:

1. The remaining claims of the Hannas, not otherwise disposed by court order, are DISMISSED with prejudice.
2. Per the stipulation of the parties the parties the following orders are terminated: August 6, 2013 order of Judge Tompkins as it relates to maintaining the status quo pending further order of court and the June 9, 2014 order of Judge Price as it relates to granting the Hannas temporary access to Long Lake across Parcel 3 of Short Plat 1227-00

Dated this 16<sup>th</sup> of ~~April~~, 2015.  
June

  
\_\_\_\_\_  
Judge Harold Clarke

ORDER OF DISMISSAL OF CLAIMS AND  
TERMINATING OTHER ORDERS