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Court of Appeals  
Division III  
State of Washington

No. 343405

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

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RICHARD EGGLESTON,

Appellant,

v.

COUNTY OF ASOTIN, et al.

Respondents

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**BRIEF OF APPELLANT**

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## **I. INTRODUCTION**

This is a Public Records Act (PRA) case. Mr. Richard Eggleston attempted to obtain three sets of documents from Asotin County. Over a period of time he made numerous requests for these three sets documents. The first record requested was for a document called a proposal, and which was determined during discovery to be a January 11, 2001, email. Despite nine requests, the County never provided the document.

Mr. Eggleston appeals challenging as error the trial court's determination that a document held by the county's agent is not a public record even though it was owned and used by the County. Further, under the *Belenski* doctrine, the statute of limitations had not run, and equitable tolling would have stopped that statute in any event.

The second and third set of documents requested were road construction plans; Mr. Eggleston made four requests for these documents. The County initially claimed an improper exemption, and then maintained for months that the documents didn't exist; a claim that has been proven to be untrue.

Mr. Eggleston appeals challenging the trial court's decision to disregard two of the requests, challenging the trial court's calculation of

damages; and challenging the trial court's failure to award all the costs incurred in this matter.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in dismissing Plaintiff's claims 1 through 9 in its order dated May 10, 2013.
2. The trial court erred in denying Plaintiff's claims 12 through 14 in its order dated December 17, 2015.
3. The trial court erred in calculating the penalty in its final judgment dated March 16, 2016.
4. The trial court erred in calculating costs and fees.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A. Are documents held by a public agency's contracting agent public records when the agent is the functional equivalent of an agency employee and the contract provides that all documents are property of the public agency?
- B. When a request is made under the PRA and no documents or withholding log is provided in response, when does the statute of limitations begin to run?
- C. Whether additional requests for documents made after a silent

withholding that count as a new request under the PRA?

- D. Did the trial court properly apply the Yousoufian factors to the calculation of penalties?
- E. Whether the trial court has discretion to not award all costs incurred in a successful PRA suit.

#### **IV. BACKGROUND FACTS**

This case deals with requests for 3 separate records: a proposal document that discovery revealed to be an undisclosed email (the “undisclosed email”); the April 2012 Plans (the “April Plans”); and the July 2012 Plans (the “July Plans). Despite the many requests, repeated failures to properly respond, and lengthy litigation, the questions posed in this appeal can be resolved by simple application of precedent, and the intent and text of Washington’s Public Records Act (“PRA”). RCW 42.56 *et seq.*

Appellant and Plaintiff below, Mr. Richard Eggleston is a construction manager by education and trade. (RP, Vol. 2, p. 243, ll 15-17.) The County was replacing a bridge and realigning the road leading to it. (RP, Vol. 3, p. 460, ll. 24-25; EX25)

The road realignment required the purchase of a right-of-way across what has been the Eggleston property. (RP, Vol. 3, p. 491, ll. 9-23; p. 423, , ll. 11-14) The purchase was negotiated through WSDOT. (RP, Vol.3, p. 549, ll 18-21) Since the elevation of the road would change and add slopes onto the Eggleston property, Mr. Eggleston negotiated for the use of rockeries (or walls) to retain the slopes on and adjacent to his property.

Additionally, it was believed there were pre-historic graves of Nez Perce Indians in the area. (RP, Vol. 2, p. 281, ll.5-8) So an archeologist was secured to work on the project to help ensure the protection of these sensitive cultural resources. (EX23) Mr. Eggleston has actively worked to and promoted the protection of these archeologic resources. Due to his involvement in trying to protect these resources, the federal government granted a special consulting party status<sup>1</sup> to Mr. Eggleston which allowed him to comment upon the project and its impacts and have access to all the archeologic information. (RP, Vol. 2, p. 244, ll. 9 - 22; p. 355, ll. 16-20)

The County hired TD&H to be their consulting engineer. (EX23, Exhibit G) On November 15, 2001, the County give TD&H the right to

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<sup>1</sup> This status was granted under section 106 of the National Historic Preservation Act (Public Law 89-665; 54 U.S.C. 300101, *et seq.*)

proceed on the project. (RP Vol.I, p. 7; CP274) TD&H, hired Kevin Cannell of the Nez Perce Tribe Cultural Resources to provide the archeologic work. (EX23, Exhibit G; CP276)

*During the course of discovery, we learned* that Mr. Cannell sent an email to TD&H on January 11, 2002, (the “undisclosed email”) in response to a telephone call requesting information. (CP 276; RP Vol. 1, p. 27, ll 2-5) Then, in June of 2002, TD&H, now with a finalized contract with the County, and specifically relying upon the January 11, 2002, email, hired Mr. Cannell and Cultural Resources to provide the archeologic work for the project. (CP276)

The County had a contract with TD&H that specifically states that the County owns all the project records, including those held by TD&H. (CP488, at Conclusion 3.9; EX 23; RP, Vol.2, p. 235, ll. 8-11) Even though records may have been stored on TD&H computers, the County retained them. (CP488, at Conclusion 3.12)

Beginning in 2004 and culminating in 2011, Mr. Eggleston sent a series of 9 public records requests to the County seeking the “undisclosed email” (*see* Appendixes A and B); which has never been provided.

The underlying action was filed on June 18, 2012.

From April of 2012, through September of 2012, Mr. Eggleston sent, 4 requests for plans dealing with the 10-Mile Creek Project; the plans would reveal whether the County was intending to honor their contract for rockeries/walls on the slopes on and adjacent to the Eggleston property. The April plans were finally delivered to him in December of 2012. (RP, Vol.2, p. 253, ll. 17-21; EX19)

#### **V. OPERATIVE FACTS AND PROCEDURAL HISTORY**

For the Court's convenience, a detailed and cited timeline regarding requests 1-5 is attached as Appendix A; a detailed and cited timeline regarding requests 6-9 is attached as Appendix B; and a detailed and cited timeline regarding requests 10 -14 is attached as Appendix C. The requests are broken into these groups to correspond to the trial court's ruling on summary judgment and for ease of application to *Belenski v Jefferson County*, 184 Wn.2d, 364 P.3d 120 (2016), discussion *infra*.

##### *Requests 1-5*

Asotin County began planning for the 10-Mile Bridge Replacement and Road Realignment Project in 2001. The project was finally completed in 2013 after delays from running into pre-historic graves. (RP, Vol.3, p. 470, ll 1-7)

By 2004 the County was starting to discuss various road re-alignment options, concerns raised in this process prompted the first request by Mr. Eggleston, on February 2, 2004 he asked for “the solicitation to Mr. Cannell ... and Mr. Cannell’s response to said solicitation.” (CP39)

The County responded that “Mr. Cannell is contracted through [TD&H]... and hence [TD&H] has managed said correspondence. ... We will send you what we have ... at the same time as Item no.1.” (CP39) No further response was forthcoming.

On April 3, 2007, Mr. Eggleston made the second request for the still undisclosed record, pointing out to them that, “[y]ou indicated that TD&H, not the County had that particular correspondence. I presume it is still available for the asking.” (CP42)

Nearly 5 months later the County responded with a most telling response (telling, not only in its tardiness, but also in its language), “at this time we are uninterested in the details of [TD&H’s] agreement and related correspondence with Mr. Cannell.” (CP44)

Mr. Eggleston’s third request noted, “[y]our most recent response ... that your *‘contract for services is with TD&H and at this time we are*

*uninterested in the details of their agreement and related correspondence with Mr. Cannell.*’ Is, frankly appalling. Whether you are interested is not the issue. What is at issue, is the fact that I have continually solicited this information.... I would direct you to Mr. Tim Ford, Public Records Ombudsman for the Washington State Attorney General’s Office ....”  
(CP48)

The County provided an incomplete response on October 9, 2007: “to the best of my knowledge no such documents are maintained by this office.” (CP49)

The fourth request was made Nov. 7, 2007, (CP55) with a similar answer. (CP56)

The fifth request was made on October 30, 2008, seeking all communication (including emails), and specifically referencing Kevin Cannell. (CP57) Still the document remains undisclosed.

#### *Requests 6-9*

During discovery it was revealed that on June 20, 2011, there was a phone conference including the County, TD&H and others, wherein the County discussed their desire to “circumvent the [right-of-way] agreement” with Mr. Eggleston. They would like drawings about that, but

“not soon.” (EX6; Appendix D, p. 6)

On July 25, 2011, (11 months prior to filing of the complaint) Mr. Eggleston again requested the “original solicitation for archeological services” and the “subsequent proposals received, specifically including that of Kevin Cannell”. (CP58) The County responded stating “we believe we have responded to all requests regarding Mr. Cannell.” (CP58)

The seventh request came on August 8, 2011, (CP60) with the same result. (CP60)

On Oct. 6, 2011, the eighth request asked for “any proposals received for Archeological services.” (CP61) The County’s response on October 20, 2011, stated: “we do not maintain such a document.” (CP 63)

The ninth, and final request for this still undisclosed proposal came on November 22, 2011, again seeking: “Any proposals for Archeological services.” (CP64) The County’s response, “Asotin County did not receive any proposals. Hence we do not maintain such documents.” (CP67) No withholding logs were provided for requests 1-9.

#### *Requests 10-14*

The 10-Mile Bridge Project began moving earth and preparation work, using plans that had been finalized in 2010. (RP, Vol.2, p. 244, l.

23 - p. 245, l. 23; EX24) As Mr. Eggleston had been warning, they ran into archeologic resources, and the project was shut down. The construction plans had to change to protect these resources; this resulted in changes to the impact on Mr. Eggleston's property. (*See i.e.*: RP, Vol. 2, p. 282, ll. 15-18; p. 366, ll. 20-25; p. 381, ll. 6 -21, EX 24, EX 3, EX 25)

On April 13, 2012, TD&H published, as PDF document, (the "April Plans.") (EX 1) This document was handed out at a meeting held on April 23 or 24, conducted between Asotin County, the Nez Perce Tribe, and others. (EX 1; CP486 at Findings 2.20 - 2.21; RP Vol. 1, p. 169, ll 22-23.)

On April 26, 2012, after seeing people holding sets of plans on the job site, Mr. Eggleston requested (Request 10) "a copy of all the current sheets. Jim had offered an electronic copy (.pdf) and that would be fine." (CP68)

On May 7, 2012, Asotin County asked TD&H for information from the April Plans for pricing purposes. (EX 6, for convenience of the Court, the relevant page has been attached as Appendix D.)

On May 11, 2012, TD&H sent portions of the April Plans to Asotin County for pricing purposes. (EX 6 (Appendix D))

On May 16, 2012, the County claims the documents were a “preliminary draft”. (EX 10) Later, at trial, the County would deny knowing the document existed, and testified that the extent of their search was to ask one employee if they existed. (CP486-87, at Findings 2.22 - 2.23)

In May, 2012, a revised partial set of plans was prepared to submit to the Nez Perce Tribe to help explain the project changes. (EX3)

On June 18, 2012, Eggleston filed the Complaint for breach of the PRA alleging violations for requests 1-9.

On June 21, 2012, TD&H published a PDF set of plans (the July Plans). (EX4) These plans were used by the County by providing them to their contractor for use in obtaining bids. (CP487 at Finding 2.26)

On July 16, 2012, while attending a County Commission meeting, Mr. Eggleston heard Mr. Bridges represent that the plans are nearly complete. Mr. Eggleston then made a verbal request for those plans ... and followed with the 11<sup>th</sup> written request: an email dated July 17, 2012, requesting “the current project plans for the 10 mile project.” (CP69; RP, Vol. 2, p. 273, l. 21 - p. 275, l. 8)

On July 19, 2012, the County provided Mr. Eggleston an electronic

file which contained the partial set of May plans prepared for the Tribe. (CP70) The County did not ask TD&H for the “July Plans”; their search consisted of speaking to their attorney. (CP487 at Finding 2.28)

On August 2, 2012, Mr. Eggleston’s attorney then wrote the 12<sup>th</sup> public records request for both the April and July plans, or the required withholding log. (CP71-72)

No documents were produced in the response. (CP73-74)

Request 13 for a withholding log for documents withheld on requests 10 - 11 was abandoned at trial. (*See*: CP498, “no penalty days calculated as this requested a withholding log...”)

On September 7, 2012, the 14<sup>th</sup> and final request was made by Eggleston’s attorney, seeking both the April and July plans. (CP76-77)

The County did not respond.

Asotin County’s contract provided that the County owned the documents held by TD&H, and TD&H testified that if the County requested a document they would have provided it. (EX 23, CP 485 at Finding 2.7)

*Trial court procedure and rulings.*

On November 13, 2012, the 2<sup>nd</sup> Amended Complaint was filed,

alleging violations for requests 10-14. (CP486)

Summary judgment motions were heard on March 15, 2013. Appendix E is the “Master Chart of Violations” argued at summary judgment and filed at the request of the Court. (CP 284-86, attached as Appendix E)

*Requests 1-5*

In ruling on the Motion for Summary Judgment, on May 10, 2013, the trial judge held that, requests 1 through 5, were “barred by the one - year statute of limitations. RCW 42.56.550(6).” (CP288)

*Requests 6-9*

The trial court then ruled on requests 6 through 9.

The court finds that there are no genuine issues as to any material fact. “The Proposal” is clearly identified and there is no disagreement about what was sought although there is a question as to whether the Proposal exists, at least as described. ...” CP288. The Court concludes, “the Court finds as a matter of law that the Proposal is not a public record, and that the County has not withheld any documents in contravention of the law as to requests 1 through 9.

CP289.

*Requests 10-14*

Requests 10-14 were preserved for trial which was held April 1<sup>st</sup> and 2nd of 2015. The trial court determined the County had “made no

effort” violated the PRA by failing to conduct adequate searches , failing to provide withholding logs, and failing to provide the requested records. (CP 488; CP492) The trial court concluded that the County owned, used and retained the requested documents (CP488-89), and stated it was “inexplicable” why the County refused to provide the records in the face of “plaintiff’s consistent and persistent efforts to obtain” the records. (CP492)

The penalty phase of trial was held on October 13, 2015. (RP, Vol. 3, p. 443 - Vol. 4, p. 612) The Court awarded penalties for violations relating to requests 10 and 11, set the penalty at \$35 per day for a total penalty of \$49,385. (CP541) The trial court further awarded attorney fees and costs in the amount of: \$50,133.67 (CP542-43)

## **VI. ARGUMENT**

In every PRA case, a threshold issue is whether the requested documents are public records. (*See e.g.: Tiberino v Spokane County*, 103 Wn.App. 680, 687, 13 P.3d 1104 (2000).) The documents are clearly public records. Complaint for violation of the PRA was timely filed; although *Belenski* and equitable tolling apply to request 4, in particular. Repeated requests for a document are new requests and are separate

violations. This case should be remanded to properly address all penalties, attorney fees and costs.

A. The documents sought are Public Records

Requests 1 - 9 all attempted to obtain the same document. (CP6-15) The trial court erred by holding that the document sought in these requests is not a public record.

Public records are 1) “writings” that 2) relate to the conduct of government or the performance of a governmental function that 3) were prepared, owned, used, or retained by the County<sup>2</sup>. (RCW 42.56.010(3). (emphasis added.) *See also: Oliver v Harborview Med. Ctr.*, 94 Wn.2d 559, 618 P.2d 76 (1980).)

Requests 1-9 all sought the proposal from Mr. Cannell, which, as noted above, has been determined to be a still undisclosed email dated January 11, 2002. (*see: supra* at p.3-4; *see also* CP276.) This email is, firstly a writing; secondly it is related to the conduct of the County and the performance of its duties; and thirdly, it was owned, used and retained by

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<sup>2</sup> The trial court ruled on summary judgment that the undisclosed email “is not a public record.” (CP 289) In its letter ruling after the violation trial, the trial court expounded stating that the court had ruled that the undisclosed email (called “the Proposal” in the ruling) was “indeed preliminary and [was] not owned or possessed by the County but was instead owned by TD&H which had not yet contracted with Asotin County.” (CP491) It is Eggleston’s position that this determination is not supported by the facts, as will be demonstrated *infra*.

the County.

1. The undisclosed email is a public record.

The question of whether an email is a public document has been resolved by Washington Courts. It is now well established that emails and their corresponding metadata are public records. (*See: O’Neill v City of Shoreline (O’Neill II)*, 170 Wn.2d 138, 147-148, 240 P.3d 1149 (2010), “[t]here is no doubt here that the relevant email itself is a public record ....”; *Mechling v City of Monroe*, 152 Wn.App. 830, 843, 222 P.3d 808 (2009); *review denied* 169 Wn.2d 1007 (2010). *See also*: WAC 44-14-03001 (attorney general’s model rules on public records discussing definition of “public record.”))

An document sought in requests 1-9 unquestionably qualifies as a public record.

2. It relates to the conduct of government or the performance of a governmental function.

It is undisputed that the County is a “local agency” subject to the Act under RCW 42.56.010(1), and the trial court correctly found so.

(CP485)

This second element is to be broadly interpreted to allow

disclosure. (*Dragonslayer, Inc. v. Wash. State Gambling Comm'n*, 139 Wn.App. 433, 444, 161 P.3d 428 (Div. 2, 2007) (citing *Confederated Tribes v Johnson*, 135 Wn.2d 734, 746-47, 958 P.2d 260 (1998)).) This project is a public road and bridge project, paid for by public funds, supervised by the County Engineer. The County admits that “designing roads is a government function” (CP508). Therefore, this element is amply met for requests one through nine.

3. It was owned, used and retained by the County.

There are four ways a record can meet the third element: by being *prepared, owned, used, or retained* by the agency. It only needs to meet any one of these elements; the undisclosed email in question meets three elements.

*i. The document was owned by the County.*

On November, 15, 2001 the County awarded the consulting engineer contract to TD&H and informed them the County was “ready to move forward ... and would like to meet with you to establish a project outline.” (CP274) TD&H secured the archeologist as part of the “preparation of the contract”: Section IV of the contract addresses subcontractors and only allows subcontracts with “prior written permission

of the” County. (EX 23; Appendix F, p. 5) TD&H then hired Kevin Cannell (Nez Perce Cultural Resource Program) as a subcontractor, so there must have been prior written permission. (EX23; Appendix F, p. 23, 29-31) Part of securing this subcontracting process was receiving Kevin Cannell’s email on January 11, 2001, which is still undisclosed. (CP276)

TD&H signed the contract with Asotin County in January and February of 2002. (EX23; Appendix F, pp. 13-15) The County then approved and signed the contract in March of 2002. (EX23) The contract, under section “III GENERAL REQUIREMENTS” specifically gives ownership of “all ... documents” to the County. (EX 23; Appendix F, p. 4)

Therefore, the document was owned by the County.

*ii. The document was used by the County.*

On June 5, 2002, TD&H, relying on the “email [of] January 11, 2002”, directs Kevin Cannell to perform the archeologic work. (CP276)

The trial court specifically ruled that “TD&H acted as the functional equivalent of a public employee performing a governmental function.” (CP540; *see also*: CP556 at Conclusion 3.12)

We learn from *Concerned Ratepayers Ass’n v Pub. Util. Dist. No. 1*, 138 Wn.2d 950, 983 P.2d 635 (1999), that the relevant inquiry as to use

is not whether it was applied to the final work product, rather, “the critical inquiry is whether the requested information bears a nexus with the agency’s decision-making process.” *Concerned Ratepayers*, at 960.

Here, we see that TD&H, acting as the contracting engineer and on authority from the County, and in reliance upon the January 11, 2001 email, directing Kevin Cannell to perform his a subcontracted archeologic work. Based on the undisputed record before the court, TD&H reviewed and referred to this undisclosed email as part of the decision-making process. (CP276) (*see: Ratepayers* at 960) It was, therefore, “used” as defined by statute and case law and the trial court correctly found as such. (CP540, CP556)

*iii. The document was retained by the County.*

The Ten Mile Creek Bridge Project is a federal project and all documents are required to be maintained for at least 3 years after the conclusion of the project or litigation relating to the project. (EX23, Section D) The litigation has not been concluded; therefore the documents (including “undisclosed email”) must be retained by the County. The fact that TD&H held the records for the County is of no moment, they remain the agency’s records. As the trial court concluded,

“a public agency may not contract their way around the Public Records Act and avoid the duties imposed therein.” (CP488)

Further, the County *states* that the record is “managed” by TD&H. (CP39) This is consistent with the fact that TD&H referenced and used the document months after they received it (CP276), and consistent with the contractual obligation to maintain it throughout the life of the project plus three years, and any related litigation. (EX23, Appendix F, p. \_\_\_)

Based on these facts and admissions, this third method is also met. The document was retained by the County.

The still undisclosed email, is a writing regarding the conduct of government or performance of a government function which is owned, used, and retained by the agency. Therefore, it meets the definition of a public record and the trial court was in error to find otherwise. The trial court’s decision on Summary Judgment should be reversed and the case remanded.<sup>3</sup>

*B. Belenski Rule, Silent Withholding, Non-responses and Equitable Tolling are all reasons this case should be remanded*

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<sup>3</sup> In the Summary Judgment ruling, the trial court dismissed requests 1-5 on the basis of the statute of limitations and did not address whether the document was a public record. But, given the fact that the requests were for the same document, for the same reasons, it should be determined to be a public record for requests 1 - 9.

In September of 2016, the Washington Supreme Court handed down a new case with a new rule regarding the statute of limitations in PRA cases: *Belenski v Jefferson County*, 378 P.3d 176 (2016). *Belenski* specifically does not over-turn established precedent; *Belenski* adopts a new rule that the statute of limitations begins to run once a final answer has been given by an agency. (*Id.*, 378 P.3d at 181.)

The *Belenski* court specifically notes the difference between the triggering of the statute of limitations when an exemption is ineffectually asserted and when a final answer is given: when there is a clear final answer the statute begins to run, though a court may rule that it was tolled through equitable tolling. *Belenski*, at 181. But, when an exemption is ineffectually asserted, the statute of limitations does not begin to run unless or until it is properly asserted. *Belenski* at fn2.

Applying *Belenski* to the instant case first leads to a division of the requests: those requests made more than a year before filing of the complaint, and those made less than a year before filing of the complaint. Requests 1 - 5 were made more than a year before, and requests 6 - 9 were made less than a year before. The *Belenski* doctrine would therefore only be applicable to requests 1 - 5.

Under the *Belenski* doctrine, the court will have to make 2 factual determinations: a) whether a response is sufficiently final so as to trigger the statute of limitations; and b) if the response was sufficiently final, then should equitable tolling be applied to allow the case to proceed?

In the case at bar, the trial court did not make findings to support a conclusion one way or the other, which could result in a remand; or this court may take this opportunity to use this case to offer teachings on these issues.

In addressing whether the responses were sufficiently final as to trigger the statute of limitations, one must reasonably expect that a final answer will go to the substance of the PRA. An answer that is non-responsive or open-ended should be no better than an incomplete exemption claim. Only by so holding can this Court comply with the clear wording of the statute and established precedent, as follows:

One of the most influential precedents in the PRA littany came in 1994, when the Supreme Court initially enunciated the principle of silent withholdings in the case of *Progressive Animal Welfare Society v University of Washington (PAWS II)*, 125 Wn.2d 243, 884 P.2d 592 (1994). Sometimes an agency will simply not provide a requested record

or even acknowledge its existence, silently keeping the record to itself.

The requestor has no idea the record even exists. This is commonly called a “silent withholding” and is a serious violation of the PRA. The Court stated:

Silent withholding would allow an agency to retain a record or portion without providing the required link to a specific exemption, and without providing the required explanation of how the exemption applies to the specific record withheld. The Public Records Act does not allow silent withholding of entire documents or records, any more than it allows silent editing of documents or records. Failure to reveal that some records have been withheld in their entirety gives requesters the misleading impression that all documents relevant to the request have been disclosed. Moreover, without a specific identification of each individual record withheld in its entirety, the reviewing court's ability to conduct the statutorily required de novo review is vitiated.

*PAWS II*, at 270, cited by *Rental Housing Ass'n of Puget Sound v City of Des Moines (RHA)*, 165 Wn.2d 525, 199 P.3d 393 (2009).

The *PAWS II* Court also set out the principles upon which the PRA firmly rests:

The Public Records Act "is a strongly worded mandate for broad disclosure of public records". *Hearst Corp. v. Hoppe*, 90 Wash.2d 123, 127, 580 P.2d 246 (1978). The Act's disclosure provisions must be liberally construed, and its exemptions narrowly construed. RCW 42.17.010(11); .251; . 920. Courts are to take into account the Act's policy "that free and open examination of public records is in the public

interest, even though such examination may cause inconvenience or embarrassment to public officials or others". RCW 42.17.340(3). The agency bears the burden of proving that refusing to disclose "is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records". RCW 42.17.340(1). Agencies have a duty to provide "the fullest assistance to inquirers and the most timely possible action on requests for information". RCW 42.17.290. Finally, agencies "shall not distinguish among persons requesting records, and such persons shall not be required to provide information as to the purpose for the request" except under very limited circumstances. RCW 42.17.270; see also RCW 42.17.260(6).

*PAWS II*, 125 Wn.2d at 251-52.

In patriotic prose, the PAWS II court taught:

The stated purpose of the Public Records Act is nothing less than the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. RCW 42.17.251. Without tools such as the Public Records Act, government of the people, by the people, for the people, risks becoming government of the people, by the bureaucrats, for the special interests. In the famous words of James Madison, "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both." Letter to W.T. Barry, Aug. 4, 1822, 9 *The Writings of James Madison* 103 (Gaillard Hunt, ed. 1910).

*PAWS II*, 125 Wn.2d at 251.

In the intervening years, PAWS II has been cited nearly 200 times, and remains good law today. The Washington Courts have resolutely

recognized and enforced the law's mandate to liberally construe its disclosure provisions and narrowly construe any exemption to the law. (RCW 42.56. 030)

Applying this concept, that a final answer will neither be open-ended nor non-responsive, to the facts at hand, we see that the statute of limitations should not have run.

The County's response to request No. 1 is quite misleading. They noted that correspondence with Mr. Cannell would be "managed" by TD&H and so the County "may not have all requested correspondence in our files. We will send you what we have which will require some research." (CP39) The later response did not address this request, thereby leaving an open-ended answer open. This is far more akin to an ineffective exemption claim as addressed in *RHA*, than to a *Belenski* final answer as there was no installment provided, no withholding log; nothing.

The County's response to request No. 2, though telling, was a non-response: "Our design contract for services is with TD&H and at this time we are uninterested in the details of their agreement and related correspondence with Mr. Cannell." This answer merely sidesteps the issue; it is not a final answer as contemplated in *Belenski*, and cannot be

used to trigger the statute of limitations.

The third answer is also a non-answer in PRA terms, “[t]o the best of my knowledge no such documents are maintained by this office.” They then attached a document from the TD&H contract. (CP49) This is neither a final answer, nor a valid claim of exemption. The question to be addressed is not to someone’s best knowledge, but to a search.

The fourth answer, though it may be fully responsive from a PRA point of view, it does call for closer examination under the doctrine of equitable tolling as will be discussed *infra*.

The fifth answer consisted of 784 pages of documents responding to other requests, and was silent on the requests dealing with Kevin Cannell.

In sum, only the fourth response from the County (11/7/07) was a final answer triggering the statute of limitations. The result is that the statute of limitations was not triggered and did not run on requests 1, 2, 3, and 5.

The second analysis under *Belenski* is whether the facts of the case give rise to a claim for equitable tolling of the statute of limitations.

The civil standard for equitable tolling was set forth in the case of

*Millay v. Cam*, 135 Wash.2d 193, 955 P.2d 791 (1998), wherein the

Supreme Court stated:

Likewise, this court allows equitable tolling when justice requires. [citations omitted.] The predicates for equitable tolling are bad faith, deception, or false assurances by the defendant and exercise of diligence by the plaintiff. [citation omitted.] In Washington equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations. [citation omitted.]

*Millay v Cam*, 135 Wn.2d at 206.

The purpose of the PRA, as set forth above, is the preservation of the most central tenets of representative government, namely, the sovereignty of the people and the accountability to the people of public officials and institutions. (RCW 42.17.251) It is a “broad mandate for disclosure” with an additional directive to read exemptions narrowly. (RCW 42.56.030) It is a mandate to put the people’s right to know above convenience to the government. (*Id.*)

Conversely, there is no guidance from the legislature as to the specific purpose of this statute of limitations. Similarly, the undersigned has found no teachings from the Courts about this specific statute of limitations.

The answers by the County do smack of bad faith, and deception,

as follows. The County knew that the record would be most likely found, if it was to be found at all, within the records and system of TD&H; and yet the County then issued answers which were carefully worded in such a way as to lead the average citizen to believe that a) some reasonable search was likely done; and b) the document doesn't exist or couldn't be found. (See *i.e.*: CP39, CP49) A closer and more cynical read of the answers suggests the County was intentionally hiding behind words, not wanting to disclose that a search likely wasn't done at all. This is sadly consistent for the County. The County was found by the trial judge to be using a "pretext" and their refusal was "inexplicable". (CP492). Recognizing that the County's relationship with the Plaintiff was antagonistic and even "toxic"; the trial court bluntly called the County's claims an "excuse" to not provide the records. (CP539-40)

These same terms can be said to highlight deception or bad faith.

Bad faith is the opposite of good faith. (Black's Law Dictionary, 6<sup>th</sup> Ed.) As will be shown *infra*, bad faith has been held to be as little as using an incorrect interpretation of a statute to refuse to send records. The bad faith demonstrated in this case is discussed at greater length *infra* and is incorporated into this argument by this reference.

Because of the County's actions, the statute of limitation should have been equitably tolled, even for request 4 (the only one of the 5 for which a final answer was given), and the case should be remanded.

C. A request is a request, even if it is made a second time.

The court's standard of review for this issue is de novo. (*RHA* at 536.)

The trial judge chose not to treat two of the requests for records as public record requests (CP 538). The County concedes that the requests were clear. (CP538, CP510-11). The County knew they had to respond to them, and did so, except for one (though the County argues they responded to it after 94 days). (CP 511.)

The court erred in not awarding damages for the two requests.

This issue has been addressed in *Zink v City of Mesa (Zink I)*, 140 Wn.App. 328, 166 P.3d 738 (Div. 3, 2007), and the answer is that there are no limits to the number of requests that can be made. *Id.* at 340

The *Zink* Court, described the case thusly:

The central issue in Donna and Jeff Zink's appeal is whether the sheer number of their public record requests of the City of Mesa (City) and the limited personnel resources of the City to fill those requests, justify the City's less than strict compliance with the PDA's provisions. *Zink* at 333.

The Court held:

Finally, the PDA does not place a limit on the number of record requests an individual can make. We therefore hold that the trial court erred when it concluded substantial compliance with PDA provisions was sufficient.

*Zink*, at 340.

There are a number of cases dealing with multiple requests for the same or additional records, though none of them address the propriety of multiple requests: *see e.g. O'Neil II*, in which multiple requests were made for metadata; *Nissen v Pierce County*, 183 Wn.2d 863, 357 P.3d 45 (2015), involving two requests; *Neighborhood Alliance of Spokane Cnty v County of Spokane*, 172 Wn.2d 702, 709, 261 P.3d 119 (2011), “this case involves PRA requests ...” (though it seems that only one was on appeal); *RHA v Des Moines*, involving a number of requests; *Forbes v City of Gold Bar*, 171 Wn. App. 857, 288 P.3d 384 (Div. 1 2012), involving three requests. The undersigned has not found any case in which authorization was given or implied for a trial court to choose to not consider a request about which a compliant had been filed.

In *RHA v Des Moines*, the Washington Supreme Court dealt with another case that is similar to the case at bar. There were multiple requests and letters from the attorney, all seeking to obtain a specific set of

documents which the City had withheld. In their analysis the *RHA* court reminds us of principles that apply directly to the case at bar:

Our purpose when interpreting a statute is to determine and enforce the intent of the legislature. *City of Spokane v. Spokane County*, 158 Wash.2d 661, 673, 146 P.3d 893 (2006). Where the meaning of statutory language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. *Id.* In construing the PRA, we look at the Act in its entirety in order to enforce the law's overall purpose. *See Ockerman v. King County Dep't of Developmental & Envtl. Servs.*, 102 Wash.App. 212, 217, 6 P.3d 1214 (2000). Our review is de novo. RCW 42.56.550(3).

*RHA*, at 536.

In the case at bar, the trial court stated:

“[w]hile the Court found that further demands were made on August 24, 2012 [sic] and on September 7, 2012 (Findings 2.12 and 2.14), the Court did not treat these latter two requests as new public records requests.”

(CP 561)

The Court made no findings of fact nor conclusions of law that support such a decision<sup>4</sup>. Further, there is no basis in law for the trial court

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<sup>4</sup> The trial court, in explaining the reasoning behind the attorney fee award, did state: “Nevertheless, the Plaintiff did prevail on his remaining claims of PRA violations. The Court understands the Plaintiff’s arguments that each of the five alleged violations considered at trial constitute distinct violations for which individual penalties should be calculated. While the Court did not consider the last three as distinct violations, they were follow-up inquiries relating to the two record

to simply choose not to consider them. Doing so is reversible error, for which the case should be remanded.

In PRA cases in which there is both testimonial and documentary evidence, the reviewing court accepts unchallenged factual findings as true and looks to the record for support of challenged findings. The reviewing court then independently reviews exemptions, disclosures, etc. (*See: Cowles Publishing v State Patrol*, 44 Wn.App. 882, 888-89, 724 P.2d 379 (1986).)

Requests 10, 11, 12, and 14 were made by Mr. Eggleston or his attorney attempting to obtain two documents<sup>5</sup>.

The requests were each in writing<sup>6</sup>. (Exhibits 9, 11, 13, and 18.)

The County understood the requests and understood what was being requested. (CP510-11 is the County's Trial Brief for the Penalty

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requests for which the Court did expressly find violations of the PRA, and – so that the record is clear – in setting the penalty award the Court took into consideration the totality of the circumstances as to the five alleged violations.” (CP 565.)

<sup>5</sup> Request 10 was for the April Plans; 11 for the July Plans; 12 and 14 were for both sets of plans.

<sup>6</sup> As noted in the Complaint and Amended Complaint, and as proven throughout the trial, in addition to the written requests, numerous oral requests were also made; penalties were not sought for the violations of those oral requests.

Phase Trial where they admit: “four of the five(5) requests for a copy of Preliminary drawings for the second design of the Ten Mile Bridge Project in Asotin County were clear.” (The fifth request was request #13, which was abandoned by Mr. Eggleston, as noted above.) (*See also*: CP 561.)

The trial court found:

2.10 Mr. Eggleston, through his attorney, made a request for public records on August 2, 2012, seeking either the plans requested by Mr. Eggleston on April 26, 2012 and July 17, 2012, or a withholding log (Exhibit 13);

2.11 The County timely responded to each of the three foregoing requests.

...

2.14 Mr. Eggleston, through his attorney, made another demand on September 7, 2012, for the April Plans and the July Plans (Exhibit 18); in his Second Amended Complaint he characterizes this as another public records request;

2.15 The County did not initially respond to the September 7, 2012 demand; ....

CP at 553-54.

No Conclusions were entered regarding these two requests.

Despite the foregoing, the trial court chose to not consider requests 12 and 14 as independent requests for which independent penalties should be awarded.

The PRA mandates that a requester who is either denied the record

or unreasonably delayed in receiving the record is to be awarded up to \$100 per day for each violation, plus “all costs, including reasonable attorney fees”. (RCW 42.56.550(4)). The Supreme Court instructs us that “strict enforcement of this provision discourages improper denial of access to public records.” (*Spokane Research & Def. Fund v City of Spokane (Spokane Research IV)*, 155 Wn.2d 89, 101, 117 P.3d 1117 (2005).) Thus we see that the trial court’s discretion is in the setting of the penalties, not in deciding how many requests will be considered..

The trial court’s choice to not consider two of the violations, is reversible error, and improperly excuses agency bad behavior rather than properly discouraging violations as the Supreme Court has instructed us.

Penalties must be awarded for each violation just as they should be awarded for each day of violation, and the case should be remanded with instructions to so do.

*D. A Proper Application of the Penalty Factors Results in Greater Penalties*

Though the trial court considered the *Yousoufian* factors (CP 561-64), the conclusions are not supported by the evidence.<sup>7</sup> In *Yousoufian v*

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<sup>7</sup> This is in addition to the necessary addition of the violations the trial court chose not to consider.

*Simms (Yousoufian V)*, 168 Wn.2d 444, 467, 229 P.3d 735 (2010) the Supreme Court provided a non-mandatory, non-exclusive list of aggravating and mitigating factors the trial court could consider in setting the daily penalty.

The PRA itself offers no guidance as to how a standard range penalty should be calculated; therefore, the guidance we have comes from the courts.

As noted above, the Supreme Court has instructed us that there should be “strict enforcement” to discourage improper denials to public records and encourage “adherence to the goals and procedures dictated by the statute.” (*Yousoufian V* at 429-30)

The court in *Amren v City of Kalama*, 131 Wn.2d 25, 929 P.2d 389 (1997), reiterated that an award is “warranted whenever an agency has erroneously denied access” to public records. (*Id.* at 37.) The court then pointed out that “the existence or absence of [an] agency’s bad faith is the principle factor that must be considered.” (*Id.*, citation omitted, edit in original.) The *Yousoufian V* court elaborated, stating, “no showing of bad faith is necessary before a penalty is imposed on an agency and an agency’s good faith reliance on an exemption does not insulate the agency

from a penalty.” (*Yousoufian V*, 168 Wn.2d at 460.)

The *Yousoufian V* court gave some guidance with a non-mandatory list of 9 aggravating and 7 mitigating factors a court could consider, at the court’s discretion. The guidance also directed that there is no starting spot, but rather, it is up to the trial court’s discretion. In the instant case, the trial court abused its discretion. As noted, the factors are divided into mitigating and aggravating factors; though they are not mirrors of the other, many of the mitigating factors have their inverse in the aggravating factors. Not every factor will be addressed, but, for ease, those that are will be addressed by including the inverse factor as much as possible.

Mitigating Factor 2. The agency’s prompt response or legitimate follow-up inquiry for clarification

In response to this mitigating factor, the trial court stated: “Timely responses were provided to the requests dated April 26, 2012, and July 17, 2012.” (CP562)

The PRA requires that the agency respond within 5 days, and at least give a good faith response to how much time will be necessary to obtain the records. (RCW 42.56.520) While the response was timely for the first three requests, no “5-day” response or other acknowledgment was

ever sent for the September 7, 2012, request. The trial court didn't acknowledge this as the Sept. 7, 2012 request was one the court chose not to consider.

Mitigating Factor 3. The agency's good faith, honest, timely, and a strict compliance with all PRA procedural requirements and exceptions.

In response to this mitigating factor The trial court stated:

The County's compliance with the procedural requirements of the PRA was satisfactory and did not appear to be in bad faith. The County relied on its attorneys interpretation of a case law and the applicable statutes.

(CP 562)

But this is contradicted by the trial court when addressing aggravating factors, as follows: Aggravating Factor 2: Lack of strict compliance by the agency with all PRA procedural requirements.

“The County's initial response claimed the “preliminary draft” exemption, but did not otherwise describe why it qualified as such. It did not explain what existed that was ‘preliminary.’ The County also seemed to express concern regarding its sensitive negotiations with the Nez Perce tribe as to the location of burial sites, seeming to implicate an exemption under RCW 42.56.210 ...”

The Court then goes on to find that the County didn't meet that exemption either. (CP 562)

Add to that, the Court's ruling on Aggravating Factor 4: The unreasonableness of any explanation for noncompliance by the agency.

The County argues that it relied on the law at the time the request was made and because it did not know the plans had been made public<sup>[8]</sup>. There was testimony that the County's relationship with the Plaintiff had deteriorated over time and had become antagonistic and even "toxic." In reality, **its excuse was that it did not own or possess the plans because they were the property of TD&H ....** It is not adequate for the County to say that the law changed .... Contrary to the County's position, the Court's decision in this case did not create new decisional law. It was apparent to the Court in this case from the testimony at trial that **the County had an ulterior motive** to withhold the design documents from the Plaintiff because of ongoing issues with him. **In this context the reasons given, while plausible, were not entirely reasonable.** ... While the concerns were legitimate they do not provide justification for withholding.

CP 562-63 (emphasis added). The PRA directs courts to review agency actions de novo, giving them no deference in determining whether a record is subject to disclosure under the PRA. (*Hearst Corp. v Hoppe*, 90 Wn.2d 123, 129-131, 580 P.2d 246 (1978).)

Further, the court continued: Aggravating Factor 5: Negligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by

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<sup>8</sup> This was introduced during the County's closing arguments and resulted in a give and take with the Court which revealed the arguments' weakness. RP Vol. 4, p. 603, l. 13 - p.606, l. 19.

the agency. The trial court stated:

While the Court is reluctant to characterize the County's nondisclosure as bad faith, as stated above the failure by the County to identify and provide the documents requested was not entirely in good faith and was at least willful negligence. As stated by the Court in its previous letter, "Against the Plaintiff's consistent and persistent efforts to obtain copies of the current diagrams, **the County's refusal to provide the diagrams on the pretext that they were a work in progress is inexplicable.** They only had to make request of its contractor, TD&H, to obtain a copy of the plans at any fixed point in time.

CP 563 (emphasis added).

These three are in stark contrast to the statement in the mitigation section ... and they cannot be reconciled. While it is clear from reading the opinion letters of the trial court (CP287-89, CP490-92, CP538-43) that trial court was extremely sympathetic to the County and attempted to give them every break possible, but the initial claim of satisfactory compliance and lack of bad faith simply don't hold up.

Bad faith is defined as:

the opposite of "good faith," ..., or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties

...  
Black's Law Dictionary, 6<sup>th</sup> ed., 1990.

Washington Courts have addressed bad faith in PRA cases. In

*ACLU v Blaine School Dist.*, 95 Wn.App. 106, 975 P.2d 536 (1999), the school district was found to have not acted in good faith when they refused to mail documents and offered to have them viewed during business hours, based on an incorrect interpretation of the law; bad faith was found because it was not good faith and the award was doubled. Thus we see that bad faith does not have a high bar ... even an incorrect interpretation of the law qualifies.

That the trial court can't find the County to have acted in good faith (CP563) combined with the Court's statements that the County had a "toxic" relationship which appears to have resulted in excuses to hide an "an ulterior motive" (CP562-63) and that the County's refusal to provide documents on a "pretext" is "inexplicable" (CP563); the County's unsupportable claim of the Court creating new decisional law (CP563); the County's erroneous and unsupportable exemption claims of the documents being "preliminary" or otherwise (CP562). These all add up to bad faith.

The trial court's finding of anything but bad faith is contrary to the clear weight of the evidence and the clear weight of the trial court's own rulings. But, there is one more consideration:

Aggravating Factor 6: Agency dishonesty.

The trial court stated: “The Court finds no agency dishonesty.”

The finding of the County’s “pretext” certainly indicates dishonesty. But there is much more to the agency dishonesty, as follows:

In response to the July 17, 2012, request, the County provided to Mr. Eggleston an older, partial set of plans known as the Nez Perce Submittal set. Mr. Eggleston had attended a County Commission meeting wherein they talked about the plans. During the meeting he requested a copy and was told they would be given to him; then they backed off that position, saying “you are suing us” so we have to go through our attorney. Mr. Eggleston then followed up with an email request for “the current project plans.” (CP 69)

Despite having the email from Mr. Eggleston, and being able to read precisely what he asked for, the County chose to try to change his request to “a copy of what was presented tonight.” (CP 74)

The issue behind the requests for the April and July plans is that the County purchased a right-of-way on Mr. Eggleston’s property. (RP, Vol.4, p. 594, ll 6-18) They negotiated the sale and Mr. Eggleston believes he negotiated for some “rockeries” or “walls” to be placed on the slopes coming on to his property. (RP, Vol.2, p. 254-55) The plans

revealed changes being made to those “rockeries” (also called “walls” in the transcript) (*see i.e.*: RP, Vol. 2, p. 246, ll. 10-16; p. 256, ll. 13-22)

After the April Plans had been used by the County to get bids for the rockeries (EX6; Appendix D, p. 16), the County then had the main rockery removed from the plans entirely. (EX 25, p. 10.0 of 42; EX 6; Appendix D, pp. 22-23) The failure to build the rockeries is subject of another suit. (Walla Walla County Superior Court Case No. 13-2-00226-5)

The dishonesty of the County was further demonstrated in the penalty phase trial while questioning the County Engineer (then former County Engineer) Jim Bridges (RP Vol. 3, p 447, l. 1 - p. 455, l. 15), which demonstrated the following:

April 26, 2012: Mr. Eggleston requests “a copy of all the current sheets” (CP 68)(RP, Vol. 3, p. 441, l. 1-5)

May 16, 2012: Mr. Bridges responds stating: “Those drawings are exempt from the public disclosure act because they are preliminary. ...” (EX 10; RP, Vol. 3, p. 441, l. 1-5)

August 9, 2012: Mr. Bridges claims the April plans did not exist. (RP, Vol. 3, p. 449, ll. 14 - 16)

December 4, 2012: Mr. Bridges emails TD&H stating, “This past

April 26, Rich Eggleston made a request for public documents ... Can you provide the county the other 28 sheets that you had had [sic] that time?"

The reply from TD&H said: "I researched our files and found that we issued a set of preliminary drawings for review - sheets 1-29. ..." Mr. Bridges replied, "That's what I'm looking for." (EX 58.)

December 11, 2012: through their attorney, the County represents, "The assumption these pages ever went to a meeting is erroneous. The first time this document turned to paper was when it was printed for Mr. Eggleston." (EX19; RP, Vol. 3, P. 450, l. 17 - 24)

January 8, 2013: Mr. Bridges in deposition states the April plans did not exist in April and had never been created as a document prior to December, 2012. (RP Vol. 3, p. 451, ll. 12-23; p. 452, ll 12-23)

January 17, 2013: Mr. Bridges signs an Affidavit stating, "Mr. Eggleston's April 26, 2012, request was a request for a complete set of plans for a preliminary draft and documents that did not exist at that time." (RP Vol. 3, p. 452, ll 18-22)

April 1, 2015: Mr. Bridges testifies the April plans did not exist in April of 2012. (*See i.e.*: RP Vol. I, p. 91, ll 18 - 22; *see also*: Vol. 3, p. 452, ll 23 - p. 453, ll. 14)

Despite the repeated dishonesty (testimony, removing of the rockery, etc), the Court determined that was no agency dishonesty: that finding is not supported by the facts.

Aggravating Factor 3: Lack of Proper Training and supervision of the agency's personnel.

The trial court held: “[t]here is no evidence the Public Works staff was not adequately trained or supervised.” (CP539) Again, this is not supported by the facts.

Asotin County's Public Records Officer is Vivian Bly (RP, Vol.3, p. 477, ll. 5-7), a position she had held since 2008 (*Id*, at p. 479, ll 6-8). She did not understand that the record should be provided within 5 days if possible, and instead just sends out the “five-day letter” and says it will be another two weeks, without seeing how long or short it actually would be. (RP, Vol.3, p. 480, ll. 1-12)

She did not know what a withholding log was prior to being deposed in January, 2013 (RP, Vol.3, p. 481, ll.6-8); did not know what a search log is (*Id*, at p.481, ll. 9-10).

These are basic issues in the PRA, and the designated Public Records Officer for the County did not know them. Nor did any of the rest

of the staff dealing with public records know of these basics.

Barbara Cook, Office Administrator for Public Works (*Id*, at p. 525, ll. 11-12) testified she was the point person in the office for handling PRA requests. (*Id*, at p.530, ll. 3-6) Prior to being deposed in this case in 2013, despite having worked on public records for years, she did not know what a withholding log was, or what a search log was. (*Id*, at 530, ll. 7-20)

Jim Bridges, Department Head and County Engineer (RP, Vol. 1, p. 49, ll. 13-23). When asked about withholding logs, he stated he was “vaguely familiar” with the term, but never heard of one related to Mr. Eggleston’s requests. (RP, Vol. 1, p. 94, l. 20 - p. 95, l. 20)

Asotin County’s staff have not been properly trained, contrary to the Court’s holding.

Aggravating Factor 7: The public importance of the issue which the request is related, where the importance was foreseeable to the agency.

The trial court held: “The Court does not find this to be a significant factor. The Plaintiff claimed an altruistic motive and a public interest in minimizing the disturbance of Native American grave sites. These interests were certainly foreseeable by the County ... The Plaintiff also had significant personal reasons for the requests because of his

agreement with the County as to the design and construction of the improvements crossing his property.”

In trial, the testimony was that this is a big, important project. (*See e.g.*: RP, Vol. 3, p. 489, ll. 11-17, “biggest project the County had in about 10 years”; RP, Vol.3, p. 529, ll. 12-14, “It was very important”) The project price was in excess of \$4 million (RP, Vol.3, p.490, ll.14-15), a significant project considering the County’s 2014 budget was \$6.9 million.

And so we see: 1) The County thought this was a very important project; 2) It’s cost was nearly 2/3 of the annual budget; 3) they could (and did) foresee its importance by the need for an archeologist on the project and planning they had done and Mr. Eggleston’s consulting party status; plus the personal importance to Mr. Eggleston. This was of significant importance; and the trial court abused its discretion in finding otherwise. Again, this is not supported by the evidence.

The trial court’s evaluation of the mitigating factors are contradicted by the court’s own evaluation of aggravating factors, and the court’s findings on the mitigating factors run against the clear weight of the evidence; the trial court abused its discretion, and the case should be remanded; or this court should adjust the penalty rate upwards.

E. The award of costs is not discretionary.

In regards to the award of costs and attorney fees, the language of the PRA is clear:

(4) Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action.

RCW 42.56.550(4).

Courts have explained the purpose behind this section:

“[P]ermitting a liberal recovery of costs” for a requestor in a PRA action “is consistent with the policy behind the act by making it financially feasible for private citizens to enforce the public’s right to access public records.” *Am. Civil Liberties Union of Wash. v. Blaine Sch. Dist. No. 503 (ACLU II)*, 95 Wn.App. 106, 115, 975 P.2d 536 (1999); *see also Yacobellis v. City of Bellingham (Yacobellis II)*, 64 Wn. App. 295, 300, 825 P.2d 324 (1992)

Deskbook. §18.2

It is notable that costs are specifically handled differently than attorney fees. The statute mandates that “all costs” be awarded and “reasonable attorney fees.”

In the case at bar, the trial court exercised discretion to reduce the requested attorney fees and to not apply a *Lodestar* multiplier. However,

the trial court also committed error by reducing the costs which were awarded.

Mr. Eggleston submitted EX66 showing costs incurred in the amount of \$4,261.67; however, the trial court chose to only allow for certain of the costs, and awarded \$2736.67. (CP542-43) It is error for the trial court to have decreased the award of costs. This court should direct the imposition of all costs incurred, for the total of \$4,261.67.

F. Attorney Fees

Appellant hereby requests attorney fees pursuant to RAP 18.1 and RCW 42.56.550(4); which provides for an award of all costs and reasonable attorney fees to the prevailing requester.

The Washington Supreme Court has held that in a PRA case there is no difference between prevailing on appeal and at trial. *Sanders v State*, 169 Wn.2d 827, 870, 586 P.2d 1201 (1978). (See also Deskbook, at §18.4)

The *Sanders* court instructs that the proper inquiry is whether, on appeal, appellant prevailed on the “‘right to inspect or copy’ or the ‘right to receive a response.’ [fn omitted] RCW 42.56.550(4) [fn omitted.]” *Sanders* at 870.

By prevailing on requests 1 - 9, 12, 14, or any of them, Mr.

Eggleston is entitled to an award of reasonable attorney fees on appeal.

## **VII. CONCLUSION**

This case presents questions presenting this court with the opportunity to give *de novo* review and to review for an abuse of discretion. The trial court made an error of law in holding that the undisclosed email was not a public record. The document was owned, used AND retained by the County; and so the trial court must be reversed.

The trial court made an error of law in holding that requests were barred by the statute of limitations. But, under the *Belenski* doctrine, there was no final answer, except for request number four. The facts and circumstances surrounding those requests demand that equitable tolling be applied. Therefore, this case be remanded for a trial on requests one through nine.

The trial court made an error of law in choosing to not consider two of the requests. The uncontested Findings of the trial court were that these two requests (numbers 12 and 14), were requests. Therefore, this court should direct that the penalty days applicable to these two requests be added in and additional penalties awarded.

The trial court then abused its discretion in setting the daily

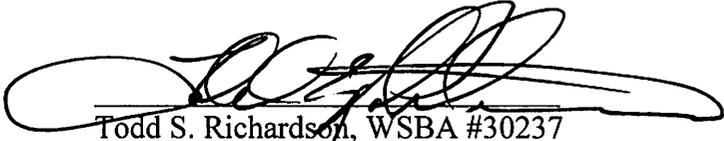
penalty. The County did not strictly comply with the procedural requirements of the PRA; they were dishonest, and acted in ways that were inexplicable and with ulterior motives ... in bad faith. The daily penalty must be increased.

Finally, the trial court made an error of law by failing to award all costs associated with this case, as is mandated by the statute. The case must be remanded with instructions to award those costs.

For all of, and each of the foregoing reasons, this court must reverse the trial court and enforce the Public Records Act.

Respectfully submitted this 14<sup>th</sup> day of November, 2016.

Law Offices of Todd S. Richardson, PLLC



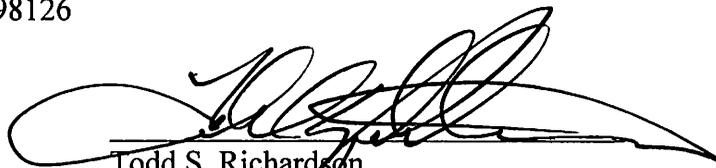
Todd S. Richardson, WSBA #30237  
Attorney for Richard Eggleston  
Law Offices of Todd S. Richardson, PLLC  
604 Sixth Street  
Clarkston, WA 99403  
509/758-3397, phone  
[Todd@MyAttorneyTodd.com](mailto:Todd@MyAttorneyTodd.com), email

*Certificate of Service*

I HEREBY CERTIFY that on the 14 day of November, 2016, I caused a true and correct copy of this Appellant's Brief to be filed with Court of Appeals, Division 3 via JIS-Link, and that through their email service be served on the following:

Jane Risley  
[irisley@wapa-sep.wa.gov](mailto:irisley@wapa-sep.wa.gov)  
Asotin County Prosecutor's Office  
135 2nd Street  
PO Box 864  
Asotin, Washington 99403

Philip A. Talmadge  
[phil@tal-fitzlaw.com](mailto:phil@tal-fitzlaw.com)  
Tom Fitzpatrick  
[tom@tal-fitzlaw.com](mailto:tom@tal-fitzlaw.com)  
Talmadge/Fitzpatrick/Tribe  
2775 Harbor Avenue SW  
Third Floor, Ste C  
Seattle, Washington 98126

  
Todd S. Richardson  
Attorney for Appellant

## Appendix A

*Detailed and cited timeline re: requests 1 - 5*

DATE	EVENT	CITE
11/15/01	Asotin County awards the contract to TD&H and gives the right to proceed	RP Vol.I, p. 7, CP274
1/11/02	email to TD&H from Kevin Cannell.	RP, Vol. 1, p. 8, ll 8 - 24
2/6/02	County sends letter to TD&H acknowledging duty to pay for archeological services and referencing information believed to be from the 1/11/02 email	CP271; 275
3/4/02	Contract between County and TD&H is finalized and signed by the County	CP118
6/5/02	TD&H hires Cannell for the County project and references the 1/11/02 email in directing him to begin work.	CP276
2/2/04	REQUEST 1: Eggleston requests "Copy of all correspondence to and from Mr. Kevin Cannell (Nez Perce Cultural Resources Archeologist) relating to CRP#238. Specifically including the solicitation to Mr. Cannell to perform archeological services on CRP#238, and Mr. Cannell's response to said solicitation."	CP39

2/6/04	<p>County responds: Kevin Cannell is contracted through Thomas Dean &amp; Hoskins (TDH) and hence TDH has managed said correspondence. Therefore, Asotin County may not have all requested correspondence in our files. We will send you what we have which will require some research, and we will send this information at the same time as Item no. 1.”</p>	CP39
4/3/07	<p>REQUEST 2: Eggleston requests, “I would refer you to my Asotin County Public Records Request dated Feb. 2, 2004 ... You indicated that TD&amp;H, not the County had that particular correspondence. I presume it is still available to you for the asking. I would still like to review that early correspondence between archeology and design personnel.:</p>	CP42
8/31/07	<p>County reponds: “Our design contract for services is with TD&amp;H and at this time we are uninterested in the details of their agreement and related correspondence with Mr. Cannell.”</p>	CP44

9/29/07	<p>REQUEST 3:</p> <p>Mr. Eggleston writes: "Your most recent response in your letter of August 31, 2007, that your <i>"contract for services is with TD&amp;H and at this time we are uninterested in the details of their agreement and related correspondence with Mr. Cannell."</i> Is, frankly, appalling. Whether you are interested is not the issue. What is at issue, is the fact that I have continually solicited this information.... I would direct you to Mr. Tim Ford, Public Records Ombudsman for the Washington State Attorney General's Office.... In the interim, I fully expect you to provide all the documentation previously solicited."</p>	CP48
10/9/07	<p>County response: "To the best of my knowledge no such documents are maintained by this office." They then provided the archeological "Scope of Work" which was part of contract with TD&amp;H.</p>	CP49
11/7/07	<p>REQUEST 4:</p> <p>Eggleston requested: "A copy of the solicitation for archeological services from TDH to Kevin Cannell, and Kevin's response to the solicitation. ... The document you provided October 9<sup>th</sup>, if it is the document in question, cannot be clearly determined to be so because it is missing the signature page and is not dated."</p>	CP55

11/13/07	County response: “we again respond that to the best of our knowledge, no such documents are maintained by this office. Moreover, to the best of our knowledge, no such documents were used or referred to by us in our decision-making process for this project.”	CP56
10/30/08	REQUEST 5 Eggleston asked for 9 categories of emails related to the 10 Mile Creek Bridge Project	CP57
1/16/09	County responded by providing 784 pages of documents, none of which were the requested document	

## Appendix B

*Detailed and cited timeline re: requests 6 - 9*

7/25/11	<p>REQUEST 6</p> <p>Eggleston asked: "I would again request that you provide me the original solicitation for archeological services for the project (2001 or 2002), and the subsequent proposals received, specifically including that of Kevin Cannell, Nez Perce Tribal Archeologist. Please see my previous FOIA requests relative to these documents."</p>	CP58
	<p>County Response: "after a review of our records, we believe we have responded to all requests concerning Mr. Cannell."</p>	
8/8/11	<p>REQUEST 7</p> <p>Eggleston asked for "1. Copy of original solicitation for Cultural Resources RFP for the 10 Mile bridge project. 2. Copy of all respondents proposals, including that of Kevin Cannell, NPT archeologist."</p>	CP60
8/8/11	<p>County response: "I believe that I responded to this request in my email to you dated July 26, 2011."</p>	CP60
10/6/11	<p>REQUEST 8</p> <p>Eggleston asked for: "2. Copy of original RFP for archeological services. 3. Any proposals received for Archeological services."</p>	CP61
10/20/11	<p>County response: "Asotin County did not publish or distribute an RFP for archeological services. Hence we do not maintain such a document."</p>	CP63

11/22/11	REQUEST 9 Eggleston requested: "2. Copy of original RFP for archeological services. 3. Any proposals received for Archeological services."	CP64
12/5/11	County's response: "Asotin County did not publish or distribute an RFP for archeological services. Hence we do not maintain such a document."	CP67

## Appendix C

*Detailed and cited timeline re: requests 10 - 14*

DATE	EVENT	CITE
4/13/12	April Plans are created and saved as a .pdf	EX P1
4/23/12 or 4/24/12	Plans are given out at meeting with Tribe and others	EX P1
4/26/12	Eggleston sees a copy of the plans handed out at the meeting	RP, Vol. 2, p. 250, ll, 1-13
4/26/12	REQUEST 10 Eggleston states: "I have a copy (provided by Craig) of sheet 1 of 29 sheets dated 4/20/2012. I would like a copy of all the current sheets. Jim had offered an electronic copy (.pdf) and that would be fine."	CP68
5/7/12	Craig Miller, Asotin County Project Manager, asks for information off the April plans for pricing purposes	EX P6
5/11/12	TD&H design engineer Chris Ward sends portions of the April Plans to Craig Miller to use in pricing	EX P6
5/16/12	County response: The County claimed the documents were a "preliminary draft" and therefore exempt	EX 10
7/16/12	Eggleston attends Board of County Commission meeting at which they discuss the current plans for Ten Mile Bridge project	RP Vol. 2, p. 254, ll. 8-25
7/16/12	Eggleston makes a verbal request for "the current project plans"	CP69

7/17/12	<p>REQUEST 11</p> <p>Eggleston wrote: "I had asked for the current project plans for the 10 mile project. Because this is a current active project, you originally indicated you would provide the documents within 5 days. Then upon calling attention to our standing PRR legal action (which, other than the parties involved, is unrelated to this request) you indicated you would first run the request by Jane Risley. Please let me know when I can expect the documentation.</p>	CP69
7/19/12	<p>County response: "we have prepared a compact disc (CD) which contains the electronic file (5-29 Submittal.PDF)" [which was not the current plans.]</p>	CP70
8/2/12	<p>REQUEST 12</p> <p>Eggleston's Attorney wrote requesting the April plans and the July plans OR a withholding log.</p>	CP71-72
8/9/12	<p>County's response: "Mr. Eggleston's request for the preliminary documents was denied pursuant to RCW 42.56.280. ...Although there were no documents presented at that meeting, it was discussed afterward with Vivian Bly, Clerk of the Board, as to how to fill a request for something that was not presented only discussed. ... I interpreted that to mean he wanted the exhibits the County presented to the Tribe on June 5<sup>th</sup>, 2012."</p>	CP73-74

9/7/12	<p>REQUEST 14<sup>1</sup></p> <p>Eggleston’s attorney wrote: “Further, your own emails that you provided to me document that you understand the significant difference between what you provided and what you gave. I am not satisfied with what you have provided, it is non-responsive and you have both failed and refused to provide the requested withholding index. If you have ANY confusion as to what has been requested, you have a duty to clarify ... not to play these games of hide-and-seek. I take the Public Records Act very seriously, as you should well know; and I will not be brushed off by your lack of interest in providing what is owned by the citizens of this County.</p> <p>I have tried to work with you to avoid additional problems, you have continued to avoid doing what the law requires. I am tired of the games, therefore I hereby notify you that you are in breach of the Public Records Act as to both of Mr. Eggleston’s recent requests (both the April 26, 2012 and the July 17, 2012 requests). If I do not have a proper disclosure (not a letter asking for more time, the opportunity provided for that by statute has long since expired) by September 14, 2012, I will be forced to take additional action.</p> <p>Let me be perfectly clear here. The request is NOT for the Submittal to the Nez Perce Tribe (date 5-29 ... which obviously wasn’t done for</p>	CP76-77
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<sup>1</sup> Request 13 was intentionally omitted as it was abandoned by Eggleston during the trial of this matter.

	The County did not respond.	
12/4/12	County Engineer Jim Bridges emails Randy Noble of TD&H: "This past April 26, Rich Eggleston made a request for public documents. He had visited the office and saw one of the exhibit sheets ... [o]n the bottom of that sheet in the title block it said "sheet 1 of 29". He requested the other 28 sheets of that set. Can you provide to the county the other 28 sheets that you had hat [sic] that time?"	EX P58
12/4/12	Randy Noble of TD&H responds: "I researched our files and found that we issued a set of preliminary drawings for review - sheets 1 - 29.  We also created visuals to illustrate .... Those visuals are "Figure 1 of 29" and Figure 2 of 29". In reality, there are no "other 28 sheets" - those are actually the preliminary design set for review - dated 4/13/12. There are 29 sheets."	EX P58
12/4/12	County Engineer Jim Bridges responded to Randy Noble: "That is what I am looking for."	EX P58
12/11/12	County Attorney Jane Risley writes to Eggleston's attorney: "In April, our engineer went to a meeting with the first page of a proposed new design. Mr. Eggleston took that page then requested 128 or 129 [sic] more pages. The assumption these pages ever went to a meeting is erroneous. The first time this document turned to paper was when it was printed for Me. Eggleston."	EX P36

12/11/12	County sends the April plans to Eggleston's attorney	RP, Vol. 1, p. 84, ll. 1-4
1/8/13	County Engineer Jim Bridges testifies at a deposition that prior to December of 2012, the April plans had never been created as a document, and didn't exist.	RP, Vol. 3, p. 451, ll. 15 - 23.
1/17/13	County Engineer Jim Bridges signs a affidavit saying that he tried to explain to Mr. Eggleston that the County did not have the April plans and if they existed, the County would have provided them to him. And then further state, "Mr. Eggleston's April 26, 2012 request was a request for a complete set of plans for a preliminary draft and documents that did not exist at that time."	RP, Vol. 3, p. 452, ll. 10 - 22.
1/18/13	Pursuant to Subpeona Duces Tecum for a deposition, Randy Noble of TD&H produces plans prepared on April 13, 2012 and distributed at the April 23 or 24 meeting	EX P1
1/18/13	Pursuant to Subpoena Duces Tecum for a deposition, Randy Noble of TD&H produces plans prepared on June 21, 2012.	EX P4

Appendix D  
*Exhibit 6*

**From:** Randy Noble  
**To:** Ward, Chris  
**Date:** 6/8/2011 8:03:38 AM  
**Subject:** Fwd:

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Chris:

Please see Craig's note below - I don't believe anything has changed along Eggleston's frontage that would affect the rockery walls. Please confirm.

**Randy Noble | Principal / Construction Manager**

**TD&H Engineering**

303 East 2nd Avenue | Spokane, WA 99202  
t:509.622.2888 | c:509.993.0820  
[www.tdhengineering.com](http://www.tdhengineering.com)

>>> "Craig Miller" <[cmiller@co.asotin.wa.us](mailto:cmiller@co.asotin.wa.us)> 6/8/2011 8:03 AM >>>  
Randy,

Please check the location of planned rockeries along Rich Eggleston's property to see if anything planned has changed since the original construction drawings. If not, Asotin County will give him the original plan sheet.

Craig S. Miller  
Asotin County  
(509) 243-2074 phone  
(509) 243-2003 fax

---

**Attachments:** TEXT.htm

**From:** Chris Ward  
**To:** Noble, Randy  
**CC:** Patterson, TJ  
**Date:** 6/8/2011 8:50:21 AM  
**Subject:** Re: Fwd:

---

Randy,

I'm not sure how to say this. The original "design" does not make sense and in my opinion is not constructable. Whatever would have been possible with the original alignment will still be possible with the new alignment. But I do not believe that what was shown on the original plan sheets was designed, stakable, or realistic.

The location of the top of wall is too close to the shoulder to allow for guardrail installation. I haven't reviewed or designed the new guardrail in detail. I don't think the slope there technically would warrant rail. From a design standpoint a 2:1 slope off the shoulder would catch within the new right of way (actually closer to centerline than the rockery wall...a nice standard, recoverable 3:1 slope would almost catch in the r/w), and the height is not so great as to warrant rail, based on WSDOT design manual exhibit 1600-5. The rail is not needed as advancement length for the bridge rail because it is on a departure end and is outside the clear zone of opposing traffic.

The detail for the rockery walls on sheet 16 of the contract plans would apparently result in a 2:1 slope (although it isn't dimensioned and the scale is wrong). So I don't think the wall serves any purpose. Clearly the best solution here from a design standpoint is to build a 3:1 slope.

I think the County should clarify the purpose of this feature. Could the landowner live with a 2:1 slope, and no guardrail? Would the landowner grant a 10' temporary construction permit to allow a standard 3:1 slope to be constructed, that could be mowed? I see no engineering reason to go to the extent of building this feature in the public right of way, creating a hazard to motorists and increasing maintenance requirements for the county long term.

Chris

Christopher K. Ward, PE | Civil Engineer  
TD&H Engineering  
1200 25th St S. | Great Falls, MT 59405  
t:406.761.3010  
www.tdhengineering.com

>>> Randy Noble 6/8/2011 9:03 AM >>>  
Chris:

Please see Craig's note below - I don't believe anything has changed along Eggleston's frontage that would affect the rockery walls. Please confirm.

Randy Noble | Principal / Construction Manager  
TD&H Engineering  
303 East 2nd Avenue | Spokane, WA 99202  
t:509.622.2888 | c:509.993.0820  
www.tdhengineering.com

>>> "Craig Miller" <cmiller@co.asotin.wa.us> 6/8/2011 8:03 AM >>>

Randy,

Please check the location of planned rockeries along Rich Eggleston's property to see if anything planned has changed since the original construction drawings. If not, Asotin County will give him the original plan sheet.

Craig S. Miller  
Asotin County  
(509) 243-2074 phone  
(509) 243-2003 fax

**From:** Randy Noble  
**To:** Ward, Chris  
**Date:** 6/8/2011 9:51:28 AM  
**Subject:** Fwd: Approach

---

More q's about the guardrail/rockery wall - lets talk

**Randy Noble | Principal / Construction Manager**

**TD&H Engineering**

303 East 2nd Avenue | Spokane, WA 99202  
t:509.622.2888 | c:509.993.0820  
[www.tdhen지니어ing.com](http://www.tdhen지니어ing.com)

>>> "Craig Miller" <cmliller@co.asotin.wa.us> 6/8/2011 9:28 AM >>>  
Randy,

Please take a look at Eggleston's commercial approach. Joel wants to make sure of the configuration. The plans show the guardrail wrapping around and the rockery walls below. We need to be sure there is enough room and that the rockery wall is not cobbled together but flows along the approach.

Craig S. Miller  
Asotin County  
(509) 243-2074 phone  
(509) 243-2003 fax

---

**Attachments:** TEXT.htm

**From:** Randy Noble  
**To:** Ward, Chris  
**Date:** 6/8/2011 10:16:55 AM  
**Subject:** Re: Fwd:

---

Chris:

Attached is the R/W agreements to Eggleston, Ausman, and Benner.

**Randy Noble | Principal / Construction Manager**

**TD&H Engineering**

303 East 2nd Avenue | Spokane, WA 99202

t:509.622.2888 | c:509.983.0820

[www.tdhengineering.com](http://www.tdhengineering.com)

>>> Chris Ward 6/8/2011 8:50 AM >>>

Randy,

I'm not sure how to say this. The original "design" does not make sense and in my opinion is not constructable. Whatever would have been possible with the original alignment will still be possible with the new alignment. But I do not believe that what was shown on the original plan sheets was designed, stakable, or realistic.

The location of the top of wall is too close to the shoulder to allow for guardrail installation. I haven't reviewed or designed the new guardrail in detail. I don't think the slope there technically would warrant rail. From a design standpoint a 2:1 slope off the shoulder would catch within the new right of way (actually closer to centerline than the rockery wall...a nice standard, recoverable 3:1 slope would almost catch in the r/w), and the height is not so great as to warrant rail, based on WSDOT design manual exhibit 1600-5. The rail is not needed as advancement length for the bridge rail because it is on a departure end and is outside the clear zone of opposing traffic.

The detail for the rockery walls on sheet 16 of the contract plans would apparently result in a 2:1 slope (although it isn't dimensioned and the scale is wrong). So I don't think the wall serves any purpose. Clearly the best solution here from a design standpoint is to build a 3:1 slope.

I think the County should clarify the purpose of this feature. Could the landowner live with a 2:1 slope, and no guardrail? Would the landowner grant a 10' temporary construction permit to allow a standard 3:1 slope to be constructed, that could be mowed? I see no engineering reason to go to the extent of building this feature in the public right of way, creating a hazard to motorists and increasing maintenance requirements for the county long term.

Chris

Christopher K. Ward, PE | Civil Engineer

TD&H Engineering

1200 25th St S. | Great Falls, MT 59405

t:406.761.3010

[www.tdhengineering.com](http://www.tdhengineering.com)

**From:** Randy Noble  
**To:** Ward, Chris  
**Date:** 6/13/2011 8:15:02 AM  
**Subject:** Re: Emailing: S02-009-BM\_2d-s\_ROCKERY.pdf

---

Chris:

Give me a call

**Randy Noble | Principal / Construction Manager**

**TD&H Engineering**

303 East 2nd Avenue | Spokane, WA 99202  
t:509.622.2888 | c:509.993.0820  
[www.tdengineering.com](http://www.tdengineering.com)

>>> Chris Ward 6/13/2011 8:10 AM >>>

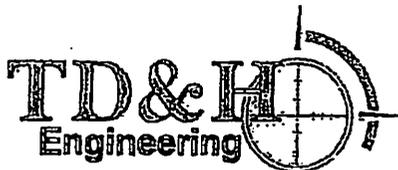
Here is a sketch that shows the 7 courses of rockery wall that would be needed at Eggleston. You can see the contract plans layout in black, and the design in purple. I didn't spend any time figuring out how it would wrap around the approaches, I just wanted to show you how far it extends from the road. If something similar has to be built on the approach fills it will be fairly extensive and would certainly extend off the right of way. The approach grades are about 10 feet above existing ground at the r/w line. It sounds from the r/w agreement like the primary purpose was to retain the approach fills. So we could also just have these paralleling the approach and terminate them where they hit the fill slope from the main road. There are three slopes that intersect here. We need to decide which of the three get the rockery treatment.

The message is ready to be sent with the following file or link attachments: S02-009-BM\_2d-s\_ROCKERY.pdf

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

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**Attachments:** TEXT.htm



conference

TELEPHONE MEMORANDUM

With: Joel Putman Rogi-Orms  
Trent deBoer Chris Ward By: Randy Notes

Company: A/C; WSDOT; TDH Company: \_\_\_\_\_

Phone No.: \_\_\_\_\_ Phone No.: \_\_\_\_\_

Date/Time 6/20/11 - 2:00 PM TDH Job No.: \_\_\_\_\_

- Joel - Update conv w/ Eggleston last week
- ① \* Rockery walls between creek rd & 2<sup>nd</sup> appr. - trying to circumvent R/W agreement - follow grade of drives w/walls would like dugs, not soon
  - ② \* Erosion control - Tribe wants to review - need Eggleston permission for access - will not grant until rockery wall
  - ③ \* Temp Road - Combining drives unacceptable per Eggleston
  - ④ Riders - Eggleston asked status & wants dugs. DeBoer will email to him
  - ②③ issue resolved - Joel emailed Eggleston confirm no temp rd / no access.

② Accuracy what to be done adjacent to Eggleston & Ausman - particularly approaches

Joel out last week June & 1st ask July  
Back July 11

- \* Pat Baird requested multiple layer format;
  - ① original roadway - & # 11/1/10
  - ② Base layer - as of 11/1/10
  - ③ Orig Const Plan - show orig Rd & EOP
  - ④ AT #1

-Working set for review on 4/22 PM.

• Significant approach work is yet needed along the Eggleston property including placement of fills and retaining walls. Minor ground disturbance may be needed to set the retaining walls.

- Minor erosion is occurring along about a 30-foot section of Ten Mile Creek stream bank adjacent to the Eggleston property. Rip-rap and fabric placement for stabilization is proposed and minor disturbance of the existing stream bank will be needed to key-in the rip-rap.

#### Weissenfels Ridge Road Section

This section covers from the intersection of Weissenfels and Snake River Road west to the end of the Weissenfels part of the project. Substantial excavation had already occurred prior to work stoppage along the north side of Weissenfels and cultural remains had been discovered.

- The revised plans had reduced the area requiring disturbance and significantly reduced the depth of required excavation. Excavation was still required, primarily on the south side of Weissenfels, and it was discussed that the focus was to reduce as much as possible the potential for disturbance on the north side of the road.
- Backfilling of the original excavation and buttress filling of the exposed slopes on the north side of the road is planned.
- Significant discussion of the purple-coded slope crest areas occurred, which is of much greater concern here than at the south end. Again, it was proposed that rock be placed in the upper part of the buttress fill at the slope crest to minimize disturbance potential. Another alternative offered by Asotin County included leaving the upper few feet of the existing cut exposed and then entering an agreement with the Tribe to do future inspections of the exposed slope cut and remedy issues identified.

#### North End

This area covers from the Weissenfels Ridge and Snake River Road intersection north to the end of the project. This section has significant concerns with regards to cultural resources including a critical location alongside the east edge of the existing roadway at about station 20+00. Substantial excavation has occurred on the west side of Snake River Road and large fill placement on the east side in preparation for the new road.

- Substantial reduction in area of disturbance was noted as a result of the revised design including revised horizontal and vertical alignments and reduction of project length to the north.
- The large excavation and exposed slope along the west side would be filled. A retaining wall will be needed between about station 17+25 to 18+75 to enable slope stabilization. Excavation will be required to set the retaining wall on a

**From:** Chris Ward  
**To:** Noble, Randy  
**Date:** 12/27/2011 8:51:46 AM  
**Subject:** Re: 10 Mile Bridge Project - Meeting minutes

Was there any follow up to these minutes, a final version, any comments? Just out of curiosity, was the geotech work done? Was the MOA completed?

There was some discussion about Weissenfels profile being too low. Is the profile okay?

~~I am planning to implement the barn roof slope idea and do away with any guardrail except at the bridge.~~

I have an email from you dated 6/22/11 where you presented some ideas on the Eggleston rockery and asked for direction from AC. Did you get any? Now that I am responsible for the plan package, at some point I am going to have to understand how this wall works. I assume we have to provide what's in their right of way agreement. The wall between the north approach and center approach is in the agreement but the one between the center approach and the south approach is not. Can we just drop it?

~~The 5/19/11 field review summary said Craig will talk with the property owner regarding the need for a retaining wall around the pump house. Was this done? Do we want Strata to design?~~

For final plans we need some conclusion on the routing of the Eggleston irrigation pressure line so we know where it crosses and connects. Do you have any input on that or am I free to come up with whatever? Quarry approach Sta 21+00 LT. A design deviation would be needed for approach sight distance for left turns out based on 25 mph design speed, either that or we need to excavate more hillside. This was noted in the 5/19/11 memo. How is this being resolved?

>>>

From: "Barb Cook" <bcook@co.asotin.wa.us>  
To: <randy.noble@tdhengineering.com>, <chris.ward@tdhengineering.com>  
CC: "Joel Ristau" <jristau@co.asotin.wa.us>  
Date: 8/10/2011 12:27 PM  
Subject: 10 Mile Bridge Project - Meeting minutes

Hi Randy & Chris,

Please find attached the drafted meeting minutes of the recent on site consultation meeting for the 10 Mile Bridge Project. Please provide any comments you may have to Joel by August 18th.

Thank you.

Barbara Cook

Office Administrative Manager

Asotin County Public Works

PO Box 160

Asotin, WA 99402

509-243-2074 Fax: 509-243-2003

bcook@co.asotin.wa.us

**From:** Chris Ward  
**To:** Noble, Randy  
**Date:** 12/28/2011 7:34:34 PM  
**Subject:** Re: 10 Mile Bridge Project - Meeting minutes

---

Thanks for the input. On number 6, I don't know what was originally designed. Was it three courses as in the detail on sheet 12/32 of the contract plans, or repeat as needed to toe of slope as in the detail on sheet 16/31? Three courses won't come close to making it to the bottom of the slope, so were there to be three courses perched on the top of the fill slope, following the profile grade (not level)?

>>>  
From: Randy Noble  
To: Asotin Co. - Miller; Ward, Chris  
Date: 12/28/2011 5:48 PM  
Subject: Re: 10 Mile Bridge Project - Meeting minutes

Chris/Craig:

1. No follow up or comments that I am aware of.
2. GeoArch work is complete. Final report will be submitted w/comments from MOA incorporated.
3. The MOA is in process.
4. Weissenfels profile per Alt 1 is good.
5. The barn roof slope is cost effective and beneficial.
- 6. Eggleston's rockery wall is not structural - esthetics only. Keep as originally designed.
7. Leave the second rockery wall as bid.
8. I have not received any information from AC regarding the wall around the well house. If the slope dictates a wall, strata will have to provide a design.
9. Eggleston water line: Craig - please respond.
10. Quarry approach - Craig: I suggest a design deviation - please confirm.

Randy Noble | Construction Manager  
TD&H Engineering  
303 East 2nd Avenue | Spokane, WA 99202  
t:509.622.2888 | c:509.993.0820  
www.tdhengineering.com

- >>> Chris Ward 12/27/2011 8:51 AM >>>
1. Was there any follow up to these minutes, a final version, any comments?
  2. Just out of curiosity, was the geoarch work done?
  3. Was the MOA completed?
  4. There was some discussion about Weissenfels profile being too low. Is the profile okay?
  5. I am planning to implement the barn roof slope idea and do away with any guardrail except at the bridge.
  - 6. I have an email from you dated 6/22/11 where you presented some ideas on the Eggleston rockery and asked for direction from AC. Did you get any? Now that I am responsible for the plan package, at some point I am going to have to understand how this wall works. I assume we have to provide what's in their right of way agreement.
  7. The wall between the north approach and center approach is in the agreement but the one between the center approach and the south approach is not. Can we just drop it?
  8. The 5/19/11 field review summary said Craig will talk with the property owner regarding the need for a retaining wall around the pump house. Was this done? Do we want Strata to design?
  9. For final plans we need some conclusion on the routing of the Eggleston irrigation pressure line so we know where it crosses and connects. Do you have any input on that or am I free to come up with whatever?
  10. Quarry approach Sta 21+00 LT. A design deviation would be needed for approach sight distance for left turns out based on 25 mph design speed, either that or we need to excavate more hillside. This was noted in the 5/19/11 memo. How is this being resolved?

>>>  
From: "Barb Cook" <bcook@co.asotin.wa.us>  
To: <randy.noble@tdhengineering.com>, <chris.ward@tdhengineering.com>

black lines =  
proposed  
contours

Pink lines =  
proposed  
rockery  
courses

Green line =  
toe of  
proposed  
2:1 slope

3 courses of rockery would be level, follow finished contours. Would be about mid-slope, out of clear zone. Rockery courses would wrap around the approaches level (not shown). Bottom course intersects the toe of fill before getting to the approach fill for middle approach. Matches detail on sheet 16/32 of contract plans, except doesn't repeat to top of slope.

**Eggleston Rockery Proposal**  
1/3/12

**From:** Randy Noble  
**To:** Ward, Chris  
**Date:** 1/3/2012 4:13:11 PM  
**Subject:** RE: 10 Mile Bridge Project - Meeting minutes

---

I just spoke with Craig - leave the walls as originally drawn. I suggested we give top of wall elevations at the ends of the walls and at the point of curves for control - Craig thought that would be beneficial.

Did I send you the agreement between AC & Eggleston? I don't recall if there was that much detail

**Randy Noble | Construction Manager**  
**TD&H Engineering**  
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[www.tdhengineering.com](http://www.tdhengineering.com)

>>> Chris Ward 1/3/2012 2:43 PM >>>  
Here's a concept for the Eggleston rockery. Let me know if any questions. Thanks.

>>>  
**From:** "Craig Miller" <[cmiller@co.asotin.wa.us](mailto:cmiller@co.asotin.wa.us)>  
**To:** "Randy Noble" <[Randy.Noble@tdhengineering.com](mailto:Randy.Noble@tdhengineering.com)>, "Chris Ward" <[Chris.Ward@tdhengineering.com](mailto:Chris.Ward@tdhengineering.com)>  
**Date:** 1/3/2012 10:36 AM  
**Subject:** RE: 10 Mile Bridge Project - Meeting minutes

Will there be any change in the slope around the well house such as additional fill material? Eggleston's waterline has been replaced on the west side of the road. Are you looking for the exact location? The line will connect to where the existing faucet/hydrant is now. We will be replacing the faucet/hydrant. With the quarry approach do we need a deviation from FHWA/WSDOT or just the County Engineer's approval?

Craig S. Miller

Asotin County

(509) 243-2074 phone

(509) 243-2003 fax

**From:** Chris Ward  
**To:** Noble, Randy  
**Date:** 1/3/2012 4:36:52 PM  
**Subject:** RE: 10 Mile Bridge Project - Meeting minutes

Well, I think we can come up with a design where they are parallel to the slope of the road, and the approach grade, but I don't think it is a good idea to have them that close to the edge of the road. The fill face of the top course was 19' from centerline, so 5' from the edge of the asphalt. We are going to have a 4:1 safety slope here out to 26' RT now. Since the rockery detail follows a 2:1 slope I think it is best to put the top course at 29' RT so we can provide the full clear zone without any of these rock dropoffs in it. As far as labeling elevations, in order to make this detail work this way we'll need to specify vertical offsets from the profile grade. The walls have to parallel the profile grade. I have a copy of the WSDOT right of way agreement with Eggleston, if that's what you're thinking of. But it doesn't even mention this feature, just the one between the north and middle approaches.

>>>

**From:** Randy Noble  
**To:** Ward, Chris  
**Date:** 1/3/2012 5:13 PM  
**Subject:** RE: 10 Mile Bridge Project - Meeting minutes

I just spoke with Craig - leave the walls as originally drawn. I suggested we give top of wall elevations at the ends of the walls and at the point of curves for control - Craig thought that would be beneficial.

Did I send you the agreement between AC & Eggleston? I don't recall if there was that much detail

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>>> Chris Ward 1/3/2012 2:43 PM >>>

Here's a concept for the Eggleston rockery. Let me know if any questions. Thanks.

>>>

**From:** "Craig Miller" <cmiller@co.asotin.wa.us>  
**To:** "Randy Noble" <Randy.Noble@tdhengineering.com>, "Chris Ward" <Chris.Ward@tdhengineering.com>  
**Date:** 1/3/2012 10:36 AM  
**Subject:** RE: 10 Mile Bridge Project - Meeting minutes

Will there be any change in the slope around the well house such as additional fill material? Eggleston's waterline has been replaced on the west side of the road. Are you looking for the exact location? The line will connect to where the existing faucet/hydrant is now. We will be replacing the faucet/hydrant. With the quarry approach do we need a deviation from FHWA/WSDOT or just the County Engineer's approval?

Craig S. Miller

Asotin County

(509) 243-2074 phone

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5. The barn roof slope is cost effective and beneficial.

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→ 7. Leave the second rockery wall as bid.

8. I have not received any information from AC regarding the wall around the well house. If the slope dictates a wall, strata will have to provide a design.

9. Eggleston water line: Craig - please respond.

10. Quarry approach - Craig: I suggest a design deviation - please confirm.

Randy Noble | Construction Manager

TD&H Engineering

303 East 2nd Avenue | Spokane, WA 99202

t:509.622.2888 | c:509.993.0820

[www.tdengineering.com](http://www.tdengineering.com) <<http://www.tdengineering.com/>>

>>> Chris Ward 12/27/2011 8:51 AM >>>

1. Was there any follow up to these minutes, a final version, any comments?

2. Just out of curiosity, was the geotech work done?

3. Was the MOA completed?

4. There was some discussion about Weissenfels profile being too low. Is the profile okay?

5. I am planning to implement the barn roof slope idea and do away with any guardrail except at the bridge.

→ 6. I have an email from you dated 6/22/11 where you presented some ideas on the Eggleston rockery and asked for direction from AC. Did you get any? Now that I am responsible for the plan package, at some point I am going to have to understand how this wall works. I assume we have to

**From:** Randy Noble  
**To:** Ward, Chris  
**Date:** 3/12/2012 7:56:02 AM  
**Subject:** Re: 10 mile eggleston rockery terraces

---

Chris:

As we have discussed previously, the "rockery wall" on Eggleston's slope is for aesthetics and not necessary to retain the soil. The layout of the "rockery wall" should be similar to what was shown on the original construction drawings.

**Randy Noble | Construction Manager**

**TD&H Engineering**

303 East 2nd Avenue | Spokane, WA 99202

t:509.622.2888 | c:509.993.0820

[www.tdhenqineering.com](http://www.tdhenqineering.com)

>>> Chris Ward 3/9/2012 3:20 PM >>>

Randy,

I happened to actually read addendum 2 today, at least some if it. I noticed there was a change to the plans, on page 3 of the addendum, that had to do with the Eggleston rockeries. It said to delete the note that said "keyed quarry spalls" and change it to "one man rock". I see on strata's detail that a one man rock is 1' to 1.5' in dimension. So each one man rock would be almost as big as the little quarry spall step. I was never too sure how you turned "quarry spalls" into a shape like was shown on that detail for the steps, but never thought too much about it.

Anyway, with the addendum, do you know, was the idea to just place a row of one man sized rocks for each terrace? Thanks,  
Chris

---

**Attachments:** TEXT.htm

**From:** Randy Noble  
**To:** Ward, Chris  
**Date:** 3/12/2012 8:36:21 AM  
**Subject:** Re: 10 mile eggleston rockery terraces

---

Chris:

For whatever reason - I had not clipped/taped this addendum item in my drawings. Thanks for finding that!!

Yes - one single row of rocks per terrace. We show 3 terraces in 2 locations and single row along Eggleston's driveway.

**Randy Noble | Construction Manager**

**TD&H Engineering**

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>>> Chris Ward 3/12/2012 8:10 AM >>>

Not talking layout. I am talking what it is made of. There was a very deliberate change in materials. Can you confirm that the plan was to place a single row of 1 man rocks to form each terrace?

>>>

**From:** Randy Noble

**To:** Ward, Chris

**Date:** 3/12/2012 8:56 AM

**Subject:** Re: 10 mile eggleston rockery terraces

Chris:

As we have discussed previously, the "rockery wall" on Eggleston's slope is for aesthetics and not necessary to retain the soil. The layout of the "rockery wall" should be similar to what was shown on the original construction drawings.

**Randy Noble | Construction Manager**

**TD&H Engineering**

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Randy,

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**From:** "Craig Miller" <cmiller@co.asotin.wa.us>  
**To:** ;  
**CC:** Ward, Chris; Noble, Randy  
**Date:** 5/7/2012 2:59:26 PM  
**Subject:** RE: Wall

---

Erik,

The wall is to be according to Spec. 9-13.7. The larger rocks in the wall would be from 12 to 18 inches in size with cinching material that is 4 inches or larger. I am having TDH update the quantities for the wall. The quantity will be more than the 650 lf. Hopefully they will have that to you this week.

Craig S. Miller  
Project Manager  
Asotin County Public Works  
(509) 243-2074 phone  
(509) 243-2003 fax

---

**From:** erikgc5@aol.com [mailto:erikgc5@aol.com]  
**Sent:** Monday, May 07, 2012 2:23 PM  
**To:** Craig Miller; scott.jennings@jenningscivil.com  
**Subject:** Wall

Craig

I'm working on your pricing...

How many SF of wall are we going to build at Eggleston. Item is 650 LF. Is this going to be a hand laid, mortar joint, or what do you see?

EG

---

**Attachments:** TEXT.htm, Mime.822

**From:** Chris Ward  
**To:** Miller, Craig  
**CC:** Noble, Randy  
**Date:** 5/11/2012 8:48:14 AM  
**Subject:** RE: Wall

---

Craig, here's the revision to the Eggleston rockery area detail. The length is now 952 lineal feet. Please let me know if you have any comments/questions.  
Chris

>>>  
From: "Craig Miller" <cmiller@co.asotin.wa.us>  
To: <erikgc5@aol.com>, <scott.jennings@jenningscivil.com>  
CC: <randy.noble@tdhengineering.com>, "Chris Ward" <Chris.Ward@tdhengineering.com>  
Date: 5/7/2012 3:59 PM  
Subject: RE: Wall

Erik,

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Craig S. Miller  
Project Manager  
Asotin County Public Works  
(509) 243-2074 phone  
(509) 243-2003 fax

---

From: erikgc5@aol.com [mailto:erikgc5@aol.com]  
Sent: Monday, May 07, 2012 2:23 PM  
To: Craig Miller; scott.jennings@jenningscivil.com  
Subject: Wall

Craig

I'm working on your pricing...

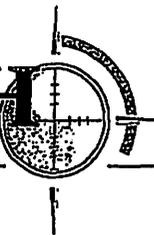
How many SF of wall are we going to build at Eggleston. Item is 650 LF.  
Is this going to be a hand laid, mortar joint, or what do you see?

EG

---

**Attachments:** S02-009-C11.1.pdf





August 8, 2012

Mr. Jim Bridges, PE  
Asotin County Public Works  
P.O. Box 160  
Asotin, WA 99402-0160

RE: Ten Mile Bridge No. 1 – CRP 238  
Executive Summary of Alignment Changes Due to Inadvertent Discoveries

Dear Jim:

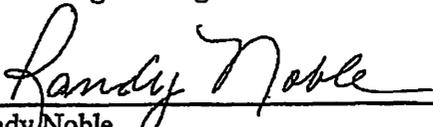
Per your request, the following table provides a chronological list of design elements we have revised in order to minimize further excavations on the Ten Mile Bridge project.

We are hopeful that this information will provide a level of confidence to allow the project to move forward with minimal excavation.

If you should have any questions regarding this list, please contact us at your earliest convenience.

Thank you,

**TD&H Engineering**

  
\_\_\_\_\_  
Randy Noble  
Construction Admin, Manager

cc: Craig Miller, Asotin Co. Project Manager  
Chris Ward, TDH Project Engineer  
S02-009(3.4)

### May 2011

- Shift the planned Snake River Road about 15 feet to the east at the intersection of Weissenfels Road and about 50' west near the quarry driveway; Made sharper curves that will be suitable for 30 mph traffic.
- Steepened/raised the grade north of Weissenfels Road to climb over the existing roadway surface at the top of the hill near the quarry driveway. Increased grade to 8% south of the quarry driveway and about 2% north of the driveway.
- Shortened the length of the project about 280 feet on the north end and about 170 feet on the south end of Snake River Road.
- Eliminated three (3) planned drain culverts: 1) Under Weissenfels Road about 200 feet west of the intersection; 2) On Snake River about 300 feet south of the bridge; and 3) One at quarry driveway.
- Changed the culvert at Weissenfels Road intersection to include concrete inlets to catch the ditch flow from north.
- Reduce the 1-foot deep roadside ditch to 6" deep.
- Drastically revised/reduced the height, length, and type of retaining walls. Concrete modular block walls will be constructed north of Weissenfels Road (at the location of the deep rock excavation and at pump house south of the bridge). Rockery walls will be used in other locations where required to fill in previously excavated areas.
- The amount of guardrail was reduced north of Wessenfels Road intersection and was changed to concrete barrier rail to avoid having to drive posts into the soil.

### April 2012

- Changed the location of Eggleston's waterline to more closely match the right of way agreement.
- Changed the slope of the fill north of Eggleston's house (Ausman property) to a "barn roof" type slope which eliminated the need for guardrail in this area.
- Re-designed the retaining wall south of bridge (at pump house) to run parallel to roadway. Added a block parapet railing to top of the wall for pedestrian safety.

- Moved the modular block wall north of Weissenfels further away from the road to improve safety in that area.
- Moved end of construction on north end of Snake River Road about 35 feet north to provide a better tie in to existing curve.

**May 2012**

- Increased the grade on Weissenfels to reduce earth cut. Increased the cross slope of Weissenfels Road at the intersection to 6%.
- Shortened the transition length on Weissenfels (where it goes from a crowned road section to match the slope of Snake River) to more closely match the existing road surface and reduce earth cut.
- To reduce additional excavation on Weissenfels Road, revised the side slope on the south side to be relatively flat.
- Modified rockery terrace landscaping around Egglestons's driveways to extend along the driveways, outside the right of way.

**From:** "Craig Miller" <cmiller@co.asotin.wa.us>  
**To:** Noble, Randy  
**CC:** Ward, Chris  
**Date:** 9/4/2012 9:30:12 AM  
**Subject:** Slopes

---

Randy,

Please remove the rockery walls between the approaches at Station 14+00 and 15+25 on the right to help us cut cost. This area will be sloped. Let me know if you have any questions.

Craig S. Miller  
Project Manager  
Asotin County Public Works  
(509) 243-2074 phone  
(509) 243-2003 fax

---

**Attachments:** TEXT.htm, Mime.822

**From:** "Craig Miller" <cmiller@co.asotin.wa.us>  
**To:** Noble, Randy  
**CC:** Ward, Chris  
**Date:** 9/4/2012 12:14:40 PM  
**Subject:** RE: Ten Mile Terraces

---

Leave the other terraces. We are only eliminating terrace 1 to save money.

Craig S. Miller

Project Manager

Asotin County Public Works

(509) 243-2074 phone

(509) 243-2003 fax

---

**From:** Randy Noble [mailto:Randy.Noble@tdhengineering.com]  
**Sent:** Tuesday, September 04, 2012 10:10 AM  
**To:** Craig Miller  
**Cc:** Chris Ward  
**Subject:** Ten Mile Terraces

Craig:

The terraces shown between 14+00 and 15+25 are between driveways C and D, terrace 1. Do you want to leave the terraces in that are between D and F, or should we eliminate those also (terraces 2 and 3 on C11.1)?

**Randy Noble | Construction Manager**  
**TD&H Engineering**  
303 East 2nd Avenue | Spokane, WA 99202  
t:509.622.2888 | c:509.993.0820  
[www.tdhengineering.com](http://www.tdhengineering.com)

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**Appendix E**  
*Master Chart of Violations*

1  
2  
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY WALLA WALLA

RICHARD EGGLESTON, an individual,

PLAINTIFF

No. 12-2-00459-6

v

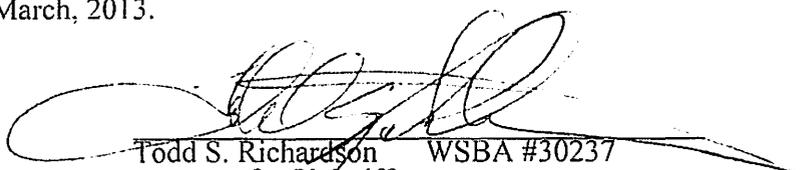
ASOTIN COUNTY, a public agency; and  
ASOTIN COUNTY PUBLIC WORKS  
DEPARTMENT, a public agency,

DEFENDANTS

PLAINTIFF'S "MASTER" CHART OF  
VIOLATIONS

COMES NOW the Plaintiff, RICHARD EGGLESTON, by and through his attorney of record, Todd S. Richardson of the Law Offices of Todd S. Richardson, PLLC, and hereby submits the "master" chart of potential violations alleged against the Defendants. This is submitted in response to questions and requests of the Court at the Summary Judgment Hearing.

DATED this 11<sup>th</sup> day of March, 2013.

  
Todd S. Richardson WSBA #30237  
Attorney for Plaintiff

PLAINTIFF'S "MASTER"  
CHART OF VIOLATIONS

TODD S. RICHARDSON  
Law Office of Todd S. Richardson, PLLC  
604 Sixth Street  
Clarkston, WA 99403  
(509) 758-3397, phone  
(509) 758-3399, fax

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*Certificate of Delivery*

I HEREBY CERTIFY that on the 11<sup>th</sup> day of March, 2013, I did cause a true and correct copy of the Plaintiff's "Master" Chart of Violations to be served via email and hand-delivery via Valley Messenger Service to the following:

Jane Risley  
Asotin County Office of the Prosecuting Attorney  
Asotin County Courthouse  
Asotin, WA

Jrislev@wapa-sep.wa.gov



PLAINTIFF'S "MASTER"  
CHART OF VIOLATIONS

TODD S. RICHARDSON  
Law Office of Todd S. Richardson, PLLC  
604 Sixth Street  
Clarkston, WA 99403  
(509) 758-3397, phone  
(509) 758-3399, fax

Request Date	5 day Response <sup>1</sup>	Silent Withholding <sup>2</sup>	Failure to Produce Document <sup>3</sup>	No Withholding <sup>4</sup> or Wrong Exemption <sup>5</sup>	Adequate Search Failure <sup>6</sup>
February 2, 2004		X	X	X	X
April 3, 2007	150 days	X	X	X	X
September 29, 2007		X	X	X	X
November 7, 2007		X	X	X	X
October 30, 2008		X	X	X	X
July 25, 2011		X	X	X	X
August 8, 2011		X	X	X	X
October 6, 2011	14 days	X	X	X	X
November 22, 2011	13 days	X	X	X	X
April 26, 2012		X	12-10-12	X	X
July 17, 2012		X	X	X	X
August 2, 2012		X	1/2	X	X
August 24, 2012		X	1/2	X	X
September 7, 2012	on-going	X	1/2	X	X
Total					

<sup>1</sup> RCW 42.56.520

<sup>2</sup> *Rental Housing Association v City of Des Moines*, 165 Wn.2d 525, 537, 199 P.3d 393 (2009)

<sup>3</sup> RCW 42.56.070, *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715, 722, 261 P.3d 119 (2011)

<sup>4</sup> *Rental Housing Association v City of Des Moines*, 165 Wn.2d 525, 538-541, 199 P.3d 393 (2009)

<sup>5</sup> RCW 42.56.530, *Sanders v State*, 169 Wn.2d 827, 845-848, 240 P.3d 120 (Wash. 2010), *Neighborhood Alliance*, at 715

<sup>6</sup> *Neighborhood Alliance of Spokane County v County of Spokane*, 172 Wn.2d 702, 720, 261 P.3d 119 (2011)

**Appendix F**  
*Excerpts from Exhibit 23*



## EGGLESTON v ASOTIN COUNTY

Subpoena 12-2 00459 6

### Item 1 – Copy of Asotin County/TDH contract

Date	Description	No. of Pages
3/5/02	LOT Original Agreement	18
6/2/03	Supplemental Agreement No. 1	4
6/28/04	Supplemental Agreement No. 2	16
6/8/09	Supplemental Agreement No. 3	17
7/19/10	Supplemental Agreement No. 4	5
6/20/11	Supplemental Agreement No. 5	4
10/21/11	Supplemental Agreement No. 6	11
<b>Total</b>		<b>75</b>

502-009

ASOTIN COUNTY PUBLIC WORKS DEPARTMENT

135 2ND STREET

P.O. BOX 160

ASOTIN, WA 99402

PHONE (509) 243-2074

FAX (509) 243-2003

LETTER OF TRANSMITTAL

TO: Clifton Morey, P.E.  
Thomas, Dean & Hoskins  
303 E. 2<sup>nd</sup> Avenue  
Spokane, WA 99202

DATE: March 5, 2002

PROJECT: Ten Mile Creek Bridge -  
CRP 238

**COMMENTS:**

Enclosed please find one (1) signed copy of the Local Agency Standard Consultant Agreement for the above referenced project. Please call our office if you have any questions.

cc: File: 532-238-10-08A  
\_\_\_\_\_  
\_\_\_\_\_

Signed 

O:\AC\DOCS\DOCS\_PW\BARB.Dick-02-10 Mile Creek Bridge-4th-contract transmittal.wpd

<b>Local Agency Standard Consultant Agreement</b>	Consultant/Address/Telephone Thomas, Dean & Hoskins, Inc.  Thomas, Dean & Hoskins, Inc. 303 E. 2nd Avenue Spokane, WA 99202 Fax: (509) 622-2889 Phone: (509) 622-2888	
Agreement Number		
Federal Aid Number	Project Title And Work Description Ten Mile Bridge #1 (Road No. 02090) Asotin County, Washington	
Agreement Type (Choose one)  <input type="checkbox"/> <b>Lump Sum</b> Lump Sum Amount \$ _____  <input type="checkbox"/> <b>Cost Plus Fixed Fee</b> Overhead Progress Payment Rate _____ % Overhead Cost Method _____ <input type="checkbox"/> <b>Actual Cost</b>  <input type="checkbox"/> <b>Actual Cost Not To Exceed</b> _____ %  <input checked="" type="checkbox"/> <b>Fixed Rate</b> <u>165.7</u> % Fixed Fee \$ <u>1,941.98</u>  <input type="checkbox"/> <b>Specific Rates Of Pay</b> <input type="checkbox"/> <b>Negotiated Hourly Rate</b> <input type="checkbox"/> <b>Provisional Hourly Rate</b>  <input type="checkbox"/> <b>Cost Per Unit of Work</b>	<u>Phase I - Preliminary Work and Route Study</u>  DBE Participation <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No _____ %  WBE Participation <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No _____ %  Federal ID Number or Social Security Number <u>81-0295283</u>  Do you require a 1099 for IRS? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No  Completion Date  Total Amount Authorized \$ <u>23,200.00</u>  Management Reserve Fund \$ <u>2,300.00</u>  Maximum Amount Payable \$ <u>25,500.00</u>	

THIS AGREEMENT, made and entered into this 4 day of MARCH, 2002, between the Local Agency of Asotin County, Washington, hereinafter called the "AGENCY", and the above organization hereinafter called the "CONSULTANT".

WITNESSETH THAT:

WHEREAS, the AGENCY desires to accomplish the above referenced project, and

WHEREAS, the AGENCY does not have sufficient staff to meet the required commitment and therefore deems it advisable and desirable to engage the assistance of a CONSULTANT to provide the necessary services for the PROJECT; and

WHEREAS, the CONSULTANT represents that he/she is in compliance with the Washington State Statutes relating to professional registration, if applicable, and has signified a willingness to furnish Consulting services to the AGENCY,

NOW THEREFORE, in consideration of the terms, conditions, covenants and performance contained herein, or attached and incorporated and made a part hereof, the parties hereto agree as follows:

**I**  
**GENERAL DESCRIPTION OF WORK**

The work under this AGREEMENT shall consist of the above described work and services as herein defined and necessary to accomplish the completed work for this PROJECT. The CONSULTANT shall furnish all services, labor and related equipment necessary to conduct and complete the work as designated elsewhere in this AGREEMENT.

**II**  
**SCOPE OF WORK**

The Scope of Work and project level of effort for this project is detailed in Exhibit "B" attached hereto, and by this reference made a part of this AGREEMENT.

**III**  
**GENERAL REQUIREMENTS**

All aspects of coordination of the work of this AGREEMENT, with outside agencies, groups or individuals shall receive advance approval by the AGENCY. Necessary contacts and meetings with agencies, groups or individuals shall be coordinated through the AGENCY.

The CONSULTANT shall attend coordination, progress and presentation meetings with the AGENCY or such Federal, Community, State, City or County officials, groups or individuals as may be requested by the AGENCY. The AGENCY will provide the CONSULTANT sufficient notice prior to meetings requiring CONSULTANT participation. The minimum number of hours or days notice – required shall be agreed to between the AGENCY and the CONSULTANT and shown in Exhibit "B" attached hereto and made part of this AGREEMENT. The CONSULTANT shall prepare a monthly progress report, in a form approved by the AGENCY, that will outline in written and graphical form the various phases and the order of performance of the work in sufficient detail so that the progress of the work can easily be evaluated. Goals for Disadvantaged Business Enterprises (DBE) and Women Owned Business Enterprises (WBE) if required shall be shown in the heading of this AGREEMENT.

All reports, PS&E materials, and other data, furnished to the CONSULTANT by the AGENCY shall be returned. All designs, drawings, specifications, documents, and other work products prepared by the CONSULTANT prior to completion or termination of this AGREEMENT are instruments of service for this PROJECT and are property of the AGENCY. Reuse by the AGENCY or by others acting through or on behalf of the AGENCY of any such instruments of service, not occurring as a part of this PROJECT, shall be without liability or legal exposure to the CONSULTANT.

**IV**  
**TIME FOR BEGINNING AND COMPLETION**

The CONSULTANT shall not begin any work under the terms of this AGREEMENT until authorized in writing by the AGENCY. All work under this AGREEMENT shall be completed by the date shown in the heading of this AGREEMENT under completion date.

The established completion time shall not be extended because of any delays attributable to the CONSULTANT, but may be extended by the AGENCY, in the event of a delay attributable to the AGENCY, or because of unavoidable delays caused by an act of GOD or governmental actions or other conditions beyond the control of the CONSULTANT. A prior supplemental agreement issued by the AGENCY is required to extend the established completion time.

**V**  
**PAYMENT**

The CONSULTANT shall be paid by the AGENCY for completed work and services rendered under this AGREEMENT as provided in Exhibit "C" attached hereto, and by this reference made part of this AGREEMENT. Such payment shall be full compensation for work performed or services rendered and for all labor, materials, supplies, equipment, and incidentals necessary to complete the work specified in Section II, "Scope of Work". The CONSULTANT shall conform with all applicable portions of 48 CFR 31.

## VI SUBCONTRACTING

The AGENCY permits subcontracts for those items of work as shown in Exhibit G to this Agreement.

Compensation for this subconsultant work shall be based on the cost factors shown on Exhibit G, attached hereto and by this reference made a part of this AGREEMENT.

The work of the subconsultant shall not exceed its maximum amount payable unless a prior written approval has been issued by the AGENCY.

All reimbursable direct labor, overhead, direct non-salary costs and fixed fee costs for the subconsultant shall be substantiated in the same manner as outlined in Section V. All subcontracts exceeding \$10,000 in cost shall contain all applicable provisions of this AGREEMENT.

The CONSULTANT shall not subcontract for the performance of any work under this AGREEMENT without prior written permission of the AGENCY. No permission for subcontracting shall create, between the AGENCY and subcontractor, any contract or any other relationship.

## VII EMPLOYMENT

The CONSULTANT warrants that he/she has not employed or retained any company or person, other than a bona fide employee working solely for the CONSULTANT, to solicit or secure this contract, and that it has not paid or agreed to pay any company or person, other than a bona fide employee working solely for the CONSULTANT, any fee, commission, percentage, brokerage fee, gift, or any other consideration, contingent upon or resulting from the award or making of this contract. For breach or violation of this warrant, the AGENCY shall have the right to annul this AGREEMENT without liability, or in its discretion, to deduct from the AGREEMENT price or consideration or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift, or contingent fee.

Any and all employees of the CONSULTANT or other persons while engaged in the performance of any work or services required of the CONSULTANT under this AGREEMENT, shall be considered

employees of the CONSULTANT only and not of the AGENCY, and any and all claims that may or might arise under any Workmen's compensation Act on behalf of said employees or other persons while so engaged, and any and all claims made by a third party as a consequence of any act or omission on the part of the CONSULTANT's employees or other persons while so engaged on any of the work or services provided to be rendered herein, shall be the sole obligation and responsibility of the CONSULTANT.

The CONSULTANT shall not engage, on a full or part time basis, or other basis, during the period of the contract, any professional or technical personnel who are, or have been, at any time during the period of the contract, in the employ of the United States Department of Transportation, the STATE, or the AGENCY, except regularly retired employees, without written consent of the public employer of such person.

## VIII NONDISCRIMINATION

The CONSULTANT agrees not to discriminate against any client, employee or applicant for employment or for services because of race, creed, color, national origin, marital status, sex, age or handicap except for a bona fide occupational qualification with regard to, but not limited to the following: employment upgrading, demotion or transfer, recruitment or any recruitment advertising, a layoff or terminations, rates of pay or other forms of compensation, selection for training, rendition of services. The CONSULTANT understands and agrees that if it violates this provision, this AGREEMENT may be terminated by the AGENCY and further that the CONSULTANT shall be barred from performing any services for the AGENCY now or in the future unless a showing is made satisfactory to the AGENCY that discriminatory practices have terminated and that recurrence of such action is unlikely.

During the performance of this AGREEMENT, the CONSULTANT, for itself, its assignees and successors in interest agrees as follows:

- A. COMPLIANCE WITH REGULATIONS: The CONSULTANT shall comply with the Regulations relative to nondiscrimination in the same manner as in Federal-assisted programs of the

Department of Transportation, Title 49, Code of Federal Regulations, Part 21, as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this AGREEMENT. The consultant shall comply with the American Disabilities Act of 1992, as amended.

- B. NONDISCRIMINATION:** The CONSULTANT, with regard to the work performed by it during the AGREEMENT, shall not discriminate on the grounds of race, creed, color, sex, age, marital status, national origin or handicap except for a bona fide occupational qualification in the selection and retention of subconsultants, including procurements of materials and leases of equipment. The CONSULTANT shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in Appendix II of the Regulations.
- C. SOLICITATIONS FOR SUBCONSULTANTS, INCLUDING PROCUREMENTS OF MATERIALS AND EQUIPMENT:** In all solicitations either by competitive bidding or negotiation made by the CONSULTANT for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subconsultant or supplier shall be notified by the CONSULTANT of the CONSULTANT's obligations under this AGREEMENT and the Regulations relative to nondiscrimination on the grounds of race, creed, color, sex, age, marital status, national origin and handicap.
- D. INFORMATION AND REPORTS:** The CONSULTANT shall provide all information and reports required by the Regulations, or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the AGENCY to be pertinent to ascertain compliance with such Regulations or directives. Where any information required of the CONSULTANT is in the exclu-

sive possession of another who fails or refuses to furnish this information the CONSULTANT shall so certify to the AGENCY, or the United States Department of Transportation as appropriate, and shall set forth what efforts it has made to obtain the information.

- E. SANCTIONS FOR NONCOMPLIANCE:** In the event of the CONSULTANT's noncompliance with the nondiscrimination provisions of this AGREEMENT, the AGENCY shall impose such sanctions as it or the Federal Highway Administration may determine to be appropriate, including, but not limited to:
1. Withholding of payments to the CONSULTANT under the AGREEMENT until the CONSULTANT complies, and/or
  2. Cancellation, termination or suspension of the AGREEMENT, in whole or in part.
- F. INCORPORATION OF PROVISIONS:** The CONSULTANT shall include the provisions of paragraphs (A) through (G) in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations or directives issued pursuant thereto. The CONSULTANT shall take such action with respect to any subconsultant or procurement as the AGENCY or the Federal Highway Administration may direct as a means of enforcing such provisions including sanctions for noncompliance; provided, however, that, in the event a CONSULTANT becomes involved in, or is threatened with, litigation with a subconsultant or supplier as a result of such direction, the CONSULTANT may request the AGENCY to enter into such litigation to protect the interests of the AGENCY, and in addition, the CONSULTANT may request the United States to enter into such litigation to protect the interests of the United States.
- G. UNFAIR EMPLOYMENT PRACTICES:** The CONSULTANT shall comply with RCW 49.60.180.

## IX TERMINATION OF AGREEMENT

The right is reserved by the AGENCY to terminate this AGREEMENT at any time upon ten days written notice to the CONSULTANT.

In the event this AGREEMENT is terminated by the AGENCY other than for default on the part of the CONSULTANT, a final payment shall be made to the CONSULTANT as shown in Exhibit F for the type of AGREEMENT used.

No payment shall be made for any work completed after ten days following receipt by the CONSULTANT of the Notice to terminate. If the accumulated payment made to the CONSULTANT prior to Notice of Termination exceeds the total amount that would be due computed as set forth herein above, then no final payment shall be due and the CONSULTANT shall immediately reimburse the AGENCY for any excess paid.

If the services of the CONSULTANT are terminated by the AGENCY for default on the part of the CONSULTANT, the above formula for payment shall not apply. In such an event, the amount to be paid shall be determined by the AGENCY with consideration given to the actual costs incurred by the CONSULTANT in performing the work to the date of termination, the amount of work originally required which was satisfactorily completed to date of termination, whether that work is in a form or a type which is usable to the AGENCY at the time of termination; the cost to the AGENCY of employing another firm to complete the work required and the time which maybe required to do so, and other factors which affect the value to the AGENCY of the work performed at the time of termination. Under no circumstances shall payment made under this subsection exceed the amount which would have been made using the formula set forth in the previous paragraph.

If it is determined for any reason that the CONSULTANT was not in default or that the CONSULTANT's failure to perform is without it or it's employee's fault or negligence, the termination shall be deemed to be a termination for the convenience of the AGENCY in accordance with the provision of this AGREEMENT.

In the event of the death of any member, partner or officer of the CONSULTANT or any of its supervisory personnel assigned to the project, or, dissolution of the partnership, termination of the corporation, or disaffiliation of the principally involved employee, the surviving members of the CONSULTANT hereby agree to complete the work under the terms of this AGREEMENT, if requested to do so by the AGENCY. The subsection shall not be a bar to renegotiation of the AGREEMENT between the surviving members of the CONSULTANT and the AGENCY, if the AGENCY so chooses.

In the event of the death of any of the parties listed in the previous paragraph, should the surviving members of the CONSULTANT, with the AGENCY's concurrence, desire to terminate this AGREEMENT, payment shall be made as set forth in the second paragraph of this section.

Payment for any part of the work by the AGENCY shall not constitute a waiver by the AGENCY of any remedies of any type it may have against the CONSULTANT for any breach of this AGREEMENT by the CONSULTANT, or for failure of the CONSULTANT to perform work required of it by the AGENCY. Forbearance of any rights under the AGREEMENT will not constitute waiver of entitlement to exercise those rights with respect to any future act or omission by the CONSULTANT.

## X CHANGES OF WORK

The CONSULTANT shall make such changes and revisions in the complete work of this AGREEMENT as necessary to correct errors appearing therein, when required to do so by the AGENCY, without additional compensation thereof. Should the AGENCY find it desirable for its own purposes to have previously satisfactorily completed work or parts thereof changed or revised, the CONSULTANT shall make such revisions as directed by the AGENCY. This work shall be considered as Extra Work and will be paid for as herein provided under Section XIV.

## **XI DISPUTES**

Any dispute concerning questions of fact in connection with the work not disposed of by AGREEMENT between the CONSULTANT and the AGENCY shall be referred for determination to the Director of Public Works or AGENCY Engineer, whose decision in the matter shall be final and binding on the parties of this AGREEMENT, provided however, that if an action is brought challenging the Director of Public Works or AGENCY Engineer's decision, that decision shall be subject to de novo judicial review.

## **XII VENUE, APPLICABLE LAW AND PERSONAL JURISDICTION**

In the event that either party deems it necessary to institute legal action or proceedings to enforce any right or obligation under this AGREEMENT, the parties hereto agree that any such action shall be initiated in the Superior court of the State of Washington, situated in the county the AGENCY is located in. The parties hereto agree that all questions shall be resolved by application of Washington law and that the parties to such action shall have the right of appeal from such decisions of the Superior court in accordance with the laws of the State of Washington. The CONSULTANT hereby consents to the personal jurisdiction of the Superior court of the State of Washington, situated in the county in which the AGENCY is located in.

## **XIII LEGAL RELATIONS AND INSURANCE**

The CONSULTANT shall comply with all Federal, State, and local laws and ordinances applicable to the work to be done under this AGREEMENT. This AGREEMENT shall be interpreted and construed in accord with the laws of Washington.

The CONSULTANT shall indemnify and hold the AGENCY and the STATE, and their officers and employees harmless from and shall process and defend at its own expense all claims, demands, or suits at law or equity arising in whole or in part from the CONSULTANT's negligence or breach of any of its obligations under this AGREEMENT; provided

that nothing herein shall require a CONSULTANT to indemnify the AGENCY and the STATE against and hold harmless the AGENCY and the STATE from claims, demands or suits based solely upon the conduct of the AGENCY and the STATE, their agents, officers and employees and provided further that if the claims or suits are caused by or result from the concurrent negligence of (a) the CONSULTANT's agents or employees and (b) the AGENCY and the STATE, their agents, officers and employees, this indemnity provision with respect to (1) claims or suits based upon such negligence, (2) the costs to the AGENCY and the STATE of defending such claims and suits, etc. shall be valid and enforceable only to the extent of the CONSULTANT's negligence or the negligence of the CONSULTANT's agents or employees.

The CONSULTANT's relation to the AGENCY shall be at all times as an independent contractor.

The CONSULTANT specifically assumes potential liability for actions brought by the CONSULTANT's own employees against the AGENCY and, solely for the purpose of this indemnification and defense, the CONSULTANT specifically waives any immunity under the state industrial insurance law, Title 51 RCW. The CONSULTANT recognizes that this waiver was specifically entered into pursuant to the provisions of RCW 4.24.115 and was the subject of mutual negotiation.

Unless otherwise specified in the AGREEMENT, the AGENCY shall be responsible for administration of construction contracts, if any, on the project. Subject to the processing of an acceptable, supplemental agreement, the CONSULTANT shall provide on-call assistance to the AGENCY during contract administration. By providing such assistance, the CONSULTANT shall assume no responsibility for: proper construction techniques, job site safety, or any construction contractor's failure to perform its work in accordance with the contract documents.

The CONSULTANT shall obtain and keep in force during the terms of the AGREEMENT, or as otherwise required, the following insurance with companies or through sources approved by the State Insurance Commissioner pursuant to RCW 48.

## Insurance Coverage

- A. Worker's compensation and employer's liability insurance as required by the STATE.
- B. General commercial liability insurance in an amount not less than a single limit of one million and 00/100 Dollars (\$1,000,000.00) for bodily injury, including death and property damage per occurrence.

Excepting the Worker's Compensation insurance and any professional liability insurance secured by the CONSULTANT, the AGENCY will be named on all certificates of insurance as an additional insured. The CONSULTANT shall furnish the AGENCY with verification of insurance and endorsements required by this AGREEMENT. The AGENCY reserves the right to require complete, certified copies of all required insurance policies at any time.

All insurance shall be obtained from an insurance company authorized to do business in the State of Washington. The CONSULTANT shall submit a verification of insurance as outlined above within 14 days of the execution of this AGREEMENT to the AGENCY.

No cancellation of the foregoing policies shall be effective without thirty (30) days prior notice to the AGENCY.

The CONSULTANT's professional liability to the AGENCY shall be limited to the amount payable under this AGREEMENT or one million dollars, whichever is the greater unless modified by Exhibit H. In no case shall the CONSULTANT's professional liability to third parties be limited in any way.

The AGENCY will pay no progress payments under Section V until the CONSULTANT has fully complied with this section. This remedy is not exclusive; and the AGENCY and the STATE may take such other action as is available to them under other provisions of this AGREEMENT, or otherwise in law.

## XIV EXTRA WORK

- A. The AGENCY may at any time, by written order, make changes within the general scope of the AGREEMENT in the services to be performed.
- B. If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this AGREEMENT, whether or not changed by the order, or otherwise affects any other terms and conditions of the AGREEMENT, the AGENCY shall make an equitable adjustment in the (1) maximum amount payable; (2) delivery or completion schedule, or both; and (3) other affected terms and shall modify the AGREEMENT accordingly.
- C. The CONSULTANT must submit its "request for equitable adjustment" (hereafter referred to as claim) under this clause within 30 days from the date of receipt of the written order. However, if the AGENCY decides that the facts justify it, the AGENCY may receive and act upon a claim submitted before final payment of the AGREEMENT.
- D. Failure to agree to any adjustment shall be a dispute under the Disputes clause. However nothing in this clause shall excuse the CONSULTANT from proceeding with the AGREEMENT as changed.
- E. Notwithstanding the terms and condition of paragraphs (a) and (b) above, the maximum amount payable for this AGREEMENT, shall not be increased or considered to be increased except by specific written supplement to this AGREEMENT.

## XV ENDORSEMENT OF PLANS

The CONSULTANT shall place his endorsement on all plans, estimates or any other engineering data furnished by him.

**XVI  
FEDERAL AND STATE REVIEW**

The Federal Highway Administration and the Washington State Department of Transportation shall have the right to participate in the review or examination of the work in progress.

**XVII  
CERTIFICATION OF THE CONSULTANT  
AND THE AGENCY**

Attached hereto as Exhibit "A-1", are the Certifications of the Consultant and the Agency, Exhibit "A-2" Certification regarding debarment, suspension and other responsibility matters - primary covered transactions, Exhibit "A-3" Certification regarding the restrictions of the use of Federal funds for lobbying, and Exhibit "A-4" Certificate of Current Cost or Pricing Data. Exhibits "A-3" and "A-4" are only required in Agreements over \$100,000.

**XVIII  
COMPLETE AGREEMENT**

This document and referenced attachments contains all covenants, stipulations and provisions agreed upon by the parties. No agent, or representative of either party has authority to make, and the parties shall not be bound by or be liable for, any statement, representation, promise or agreement not set forth herein. No changes, amendments, or modifications of the terms hereof shall be valid unless reduced to writing and signed by the parties as an amendment to this AGREEMENT.

**XIX  
EXECUTION AND ACCEPTANCE**

This AGREEMENT may be simultaneously executed in several counterparts, each of which shall be deemed to be an original having identical legal effect. The CONSULTANT does hereby ratify and adopt all statements, representations, warranties, covenants, and agreements contained in the proposal, and the supporting materials submitted by the CONSULTANT, and does hereby accept the AGREEMENT and agrees to all of the terms and conditions thereof.

In witness whereof, the parties hereto have executed this AGREEMENT as of the day and year first above written.

By *Clifton A. Morey*

Consultant Thomas, Dean & Hoskins, Inc.

By *Gordon D. Reed*

Agency Asotin County, Washington

APPROVED AS TO FORM: *B.N.W.*  
Benjamin Nichols  
Prosecuting Attorney  
WSBA # 23006

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**XVIII  
COMPLETE AGREEMENT**

This document and referenced attachments contains all covenants, stipulations and provisions agreed upon by the parties. No agent, or representative of either party has authority to make, and the parties shall not be bound by or be liable for, any statement, representation, promise or agreement not set forth herein. No changes, amendments, or modifications of the terms hereof shall be valid unless reduced to writing and signed by the parties as an amendment to this AGREEMENT.

**XIX  
EXECUTION AND ACCEPTANCE**

This AGREEMENT may be simultaneously executed in several counterparts, each of which shall be deemed to be an original having identical legal effect. The CONSULTANT does hereby ratify and adopt all statements, representations, warranties, covenants, and agreements contained in the proposal, and the supporting materials submitted by the CONSULTANT, and does hereby accept the AGREEMENT and agrees to all of the terms and conditions thereof.

In witness whereof, the parties hereto have executed this AGREEMENT as of the day and year first above written.

By *Clifton J. Marey*  
Consultant Thomas, Dean & Hoskins, Inc.

By *Gordon D. Reed*  
Agency Asotin County, Washington

APPROVED AS TO FORM: *Bnw. Z*  
Benjamin Nichols  
Prosecuting Attorney  
WSBA # 23006

**Exhibit A-1  
Certification Of Consultant**

Project No. \_\_\_\_\_  
Local Agency Asotin County

I hereby certify that I am a vice president and duly authorized representative of the firm of Thomas, Dean & Hoskins, Inc. whose address is 303 E. 2nd Avenue, Spokane, WA, 99202, and that neither I nor the above firm I here represent has:

- (a) Employed or retained for a commission, percentage, brokerage, contingent fee or other consideration, any firm or person (other than a bona fide employee working solely for me or the above CONSULTANT) to solicit or secure this contract.
- (b) Agreed, as an express or implied condition for obtaining this contract, to employ or to retain the services of any firm or person in connection with carrying out the contract.
- (c) Paid, or agreed to pay, to any firm, organization or person (other than a bona fide employee working solely for me or the above CONSULTANT) any fee, contribution donation or consideration of any kind for, or in connection with procuring or carrying out the contract; except as here expressly stated (if any):

I further certify that the firm I hereby represent is authorized to do business in the State of Washington and that the firm is in full compliance with the requirements of the board of Professional Registration.

I acknowledge that this certificate is to be available to the State Department of Transportation and the Federal Highway Administration, U.S. Department of Transportation, in connection with this contract involving participation of Federal aid funds and is subject to applicable State and Federal laws, both criminal and civil.

1/29/2002  
Date

*Philip J. D'Arcy*  
Signature

**Certification of Agency Official**

I hereby certify that I am the AGENCY Official of the Local Agency of Asotin County Washington and that the above consulting firm or their representative has not been required, directly or indirectly as an express or implied condition in connection with obtaining or carrying out this contract to:

- (a) Employ or retain, or agree to employ or retain, any firm or person, or
- (b) Pay or agree to pay to any firm, person or organization, any fee, contribution, donation or consideration of any kind, except as here expressly stated (if any).

I acknowledged that this certificate is to be available to the Federal Highway Administration, U.S. Department of Transportation, in connection with this contract involving participation of Federal aid highway funds and it subject to applicable State and Federal laws, both criminal and civil.

3-4-02  
Date

*Benjamin Nichols*  
Signature  
Benjamin Nichols, Prosecuting Attorney  
WA RA # 7222

**Exhibit A-2**  
**Certification Regarding Debarment, Suspension, and Other Responsibility**  
**Matters-Primary Covered Transactions**

1. The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:
  - (a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any federal department or agency;
  - (b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission or fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (federal, state, or local) transaction or contract under a public transaction; violation of federal or state antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
  - (c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (federal, state, or local) with commission of any of the offenses enumerated in paragraph 1.b. of this certification; and
  - (d) Have not within a three-year period preceding this application/proposal had one or more public transactions (federal, state, or local) terminated for cause or default.
2. Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Consultant (Firm): Thomas, Dean & Hoskins, Inc.

1/29/2002

(Date)

  
(Signature) President or Authorized Official of Consultant

**Exhibit A-3**  
**Certification Regarding The Restrictions**  
**of The use of Federal Funds for Lobbying**

The prospective participant certifies, by signing and submitting this bid or proposal, to the best of his or her knowledge and belief, that:

1. No federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with the awarding of any federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement.
2. If any funds other than federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress in connection with this federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

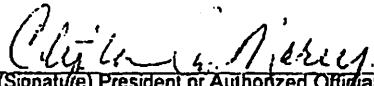
This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

The prospective participant also agrees by submitting his or her bid or proposal that he or she shall require that the language of this certification be included in all lower tier subcontracts which exceed \$100,000 and that all such subrecipients shall certify and disclose accordingly.

Consultant (Firm): Thomas, Dean & Hoskins, Inc.

1/29/2002

(Date)

  
(Signature) President or Authorized Official of Consultant

**Exhibit A-4**  
**Certificate of Current Cost or Pricing Data**

This is to verify that, to the best of my knowledge and belief, the cost or pricing data (as defined in section 15.801 of the Federal Acquisition Regulation (FAR) and required under FAR subsection 15.804-2) submitted, either actually or by specific identification in writing, to the contracting officer or to the contracting officer's representative in support of           this overhead rate contained in this Agreement  
\* are accurate, complete, and current as of           December 31, 2000          \*\*. This certification includes the cost or pricing data supporting any advance agreements and forward pricing rate agreements between the offeror and the Government that are part of the proposal.

Firm Thomas, Dean & Hoskins, Inc.  
Name Clifton W. Morey, P.E.  
Title Vice President  
Date of Execution\*\*\*           3/19/02          

- \* Identify the proposal, quotation, request for price adjustment, or other submission involved, giving the appropriate identifying number (e.g., RFP No.).
- \*\* Insert the day, month, and year when price negotiations were concluded and price agreement was reached.
- \*\*\* Insert the day, month, and year of signing, which should be as close as practicable to the date when the price negotiations were concluded and the contract price was agreed to.

## EXHIBIT B-1

Ten Mile Bridge #1 (Road No. 02090); Asotin County, Washington

### **SCOPE OF WORK**

The objective of the Agreement is to provide the engineering services necessary for the preparation of plans, specifications, and related documents for the Ten Mile Bridge #1 Project, Asotin County, Washington, project and services more specifically defined below.

The project includes the closure, realignment and reconstruction of the Asotin County Ten Mile Bridge #1 on the Snake River Road (County Road No. 02090) in Asotin County, Washington.

The scope of engineering services shall include those items listed below in Phases as detailed in Exhibit D-2. The Agency will execute this Agreement initially for Phase I services and supplement this Agreement for additional Phases as needed:

- Identify and secure all permits necessary to accomplish the removal, realignment, and replacement of the existing one-lane bridge (i.e. environmental permitting, biological assessments, and cultural and historic preservation permitting more specifically described in the Appendix).
- Provide preliminary design report hereinafter referred to as the "*Route Study*" that evaluates a minimum of three alignment revisions, including cost estimates for each, and identifies a preferred alternative. Preparation of this report will be based on existing mapping electronically furnished to the Consultant by the Agency.
- Determine R/W needs and prepare R/W plans.
- Provide final roadway and bridge alignment design, based on the Agency's selected alternative.
- Provide structural engineering and final design for the construction of a new bridge at Ten Mile Creek.
- Provide structural engineering and final design for any retaining walls or other structures necessary to complete the bridge removal and reconstruction project.
- Provide complete specifications and bidding documents in sufficient detail to allow the Agency to advertise the project for competitive bidding.
- Provide construction cost estimates of the selected design alternative in sufficient detail to represent the most likely project cost.
- Other services as more specifically described in Exhibits D-1 and D-2 and the Appendix.
- Provide construction engineering, inspection, material testing, and staking on an as needed basis as "Additional Services."

Plans shall be prepared with such precision and in such detail as to permit the convenient layout in the field for construction within a degree of accuracy acceptable to the Agency.

Plans shall be in such detail as to permit the development of an accurate estimate of quantities for the pertinent items of construction.

The scales to be used, the lettering and general delineation of the plans shall be such as to

provide legible reproduction when the plans are reduced to ½ of their original size (50% reduction).

Construction plans will consist of those indicated on Exhibit D-2 and the related roadway cross-section/template plots.

Plans shall include complete details for the proposed drainage of the project, details for paving, pavement marking, and signing, and shall note utility work to be performed by others. Plans shall show existing physical features and surface and subsurface facilities as determined by field surveys or as indicated on Agency or utility company records for the area within the right-of-way, and if necessary, outside the right-of-way in order to show details pertinent to the proposed work.

Special Provisions shall be included in the contract specifications for items of work not covered by the WSDOT Standard Specifications, and as required to properly specify the work contemplated by the plans.

Construction quantities shown in the bid schedule shall be as near as possible to the actual quantities and shall not be arbitrarily increased. The Consultant shall apply an estimated unit cost of construction to the computed quantities.

The Consultant shall furnish Field surveys required to complete the plans specified in the Agreement. The field surveys shall include sufficient referencing to permit the reestablishment of all necessary mapping control points to the satisfaction of the Agency.

The Consultant shall conduct subsurface investigations necessary for the pavement design, bridge foundation design, and classification of excavation materials.

The Consultant shall prepare a bid schedule including all anticipated bid items, and assist the Agency in bidding and award of the construction contract.

The Consultant shall prepare the SEPA Checklist and make recommendations to the Agency regarding proposed environment document actions.

The Consultant shall locate approximate right-of-way lines based on plat maps, existing property pins, street monuments, and physical features along the proposed project route, and identify new right-of-way necessary for the completion of the project.

The Consultant shall prepare Parcel Funding Estimates for each of the new right-of-way parcels identified as necessary for the project.

The Consultant shall attend meetings as detailed in Exhibit D-2, including those with the Agency and property owners, and public informational meetings.

The Consultant shall provide project coordination between the Agency and affected utility companies.

The Consultant shall determine all necessary permits and shall provide the Agency with completed applications for Agency submittal to permitting agencies. At a minimum, those applications shall include those for COE, DOE, DOFW, and Shoreline permits.

The Consultant shall prepare such information and studies as may be pertinent and necessary, or as may be requested by the Agency in order to pass critical judgment on the features of the work. The Consultant shall make such minor changes, amendments, or revisions in the details of the work as may be required by the Agency. This item does not constitute an "Extra Work" item as covered in Section XIV of the Agreement. When alternates are being considered, the Agency shall have the right of selection.

The plans and specifications shall be verified by a complete quality assurance check by the Consultant and shall be so certified by the Consultant. The consultant will be held responsible for the accuracy of the work, even though the documents have been accepted by the Agency.

#### **DOCUMENTS TO BE FURNISHED BY THE CONSULTANT**

The Consultant shall furnish the following documents, exhibits, or other presentations for the work covered by this Agreement. All such material used in the project shall become and remain the property of the Agency:

1. Project Schedule - 1 copy.
2. Permit Acquisition Schedule - 1 copy.
3. Completed Permit Applications for COE, DOE, DOFW, and Shoreline permits - 1 copy each.
4. Route Study - 1 copy.
5. Geotechnical Report - 1 copy
6. Cultural and Historical Preservation Study as prepared by Nez Perce Tribe Cultural Resources Program - 2 copies.
7. Biological Assessment as performed by Biology, Soil and Water, Inc. - 2 copies.
8. "Draft" contract drawings and specifications as shown in Exhibit D-2 - 5 copies.
9. Hydraulic Report - 1 copy.
10. Final contract drawings and specifications as shown in Exhibit D-2 - 40 copies.
11. Engineer's construction cost estimate - 1 copy.
12. Right-of-way plans - 1 copy.
13. Parcel Funding Estimates (PFE's) - 1 copy.
14. Contract plans on permanent scale stable reproducibles - 1 copy.
15. Quantity takeoffs and design computations - 1 copy.
16. Survey notes - 1 copy.
17. SEPA environmental checklist and each permit application completed by the consultant - 1 copy.

## **DESIGN CRITERIA**

Documents furnished by the Consultant, to the extent feasible, shall be developed in accordance with the latest edition and amendments of the following publications:

1. WSDOT Local Agency Guidelines (LAG) Manual
2. WSDOT/APWA Standard Specifications for Road and Bridge Construction
3. WSDOT Design Manual
4. WSDOT Bridge Design Manual
5. WSDOT Right-of-Way Manual
6. WSDOT Hydraulic Manual
7. WSDOT Plans Preparation Manual
8. AASHTO Standard Specifications for Highway Bridges
9. AASHTO LRFD Bridge Design Specifications (if applicable)
10. AASHTO - A Policy on Geometric Design of Highways and Streets
5. FHWA Manual on Uniform Traffic Control Devices (MUTCD)

## **Exhibit C-2 Payment (Cost Plus Fixed Fee)**

The CONSULTANT shall be paid by the AGENCY for completed work and services rendered under this AGREEMENT as provided hereinafter. Such payment shall be full compensation for all work performed or services rendered and for all labor, materials, equipment, and incidentals necessary to complete the work specified in Section II, "Scope of Work." The CONSULTANT shall conform with the applicable portion of 48 CFR 31.

### **A. Actual Costs**

Payment for all consulting services for this project shall be on the basis of the CONSULTANT's actual cost plus a fixed fee. The actual cost shall include direct salary cost, overhead, and direct nonsalary cost.

#### **1. Direct Salary Costs**

The direct salary cost is the direct salary paid to principals, professional, technical, and clerical personnel for the time they are productively engaged in work necessary to fulfill the terms of this AGREEMENT.

#### **2. Overhead Costs**

Overhead costs are those costs other than direct costs which are included as such on the books of the CONSULTANT in the normal everyday keeping of its books. Progress payments shall be made at the rate shown in the heading of this AGREEMENT, under "Overhead Progress Payment Rate." Total overhead payment shall be based on the method shown in the heading of the AGREEMENT. The three options are explained as follows:

- a. **Actual Cost Not To Exceed Maximum Percent:** If this method is indicated in the heading of this AGREEMENT, the AGENCY agrees to reimburse the CONSULTANT at the actual overhead rate verified by audit up to the maximum percentage shown in the space provided. Final overhead payment when accumulated with all other actual costs shall not exceed the total maximum amount payable shown in the heading of this AGREEMENT.
- b. **Fixed Rate:** If this method is indicated in the heading of the AGREEMENT, the AGENCY agrees to reimburse the CONSULTANT for overhead at the percentage rate shown. This rate shall not change during the life of the AGREEMENT.

A summary of the CONSULTANT's cost estimate and the overhead computation are attached hereto as Exhibit D-1 and by this reference made part of this AGREEMENT. When an Actual Cost method, or the Actual Cost Not To Exceed method is used, the CONSULTANT (prime and all subconsultants) will submit to the AGENCY within three months after the end of each firm's fiscal year, an overhead schedule in the format required by the AGENCY (cost category, dollar expenditures, etc.) for the purpose of adjusting the overhead rate for billing purposes. It shall be used for the computation of progress payments during the following year and for retroactively adjusting the previous year's overhead cost to reflect the actual rate.

**Failure to supply this information by either the prime consultant or any of the subconsultants shall cause the agency to withhold payment of the billed overhead costs until such time as the required information is received and an overhead rate for billing purposes is approved.**

The STATE and/or the Federal Government may perform an audit of the CONSULTANT's books and records at any time during regular business hours to determine the actual overhead rate, if they so desire.

3. Direct Nonsalary Costs

Direct nonsalary costs will be reimbursed at the actual cost to the CONSULTANT. These charges may include, but are not limited to the following items: travel, printing, long distance telephone, supplies, computer charges, and fees of subconsultants. Air or train travel will only be reimbursed to economy class levels unless otherwise approved by the AGENCY. Automobile mileage for travel will be reimbursed at the current rate approved for AGENCY employees and shall be supported by the date and time of each trip with origin and destination of such trips. Subsistence and lodging expenses will be reimbursed at the same rate as for AGENCY employees. The billing for nonsalary cost, directly identifiable with the Project, shall be an itemized listing of the charges supported by copies of original bills, invoices, expense accounts, and miscellaneous supporting data retained by the CONSULTANT. Copies of the original supporting documents shall be provided to the AGENCY upon request. All of the above charges must be necessary for the services to be provided under this AGREEMENT.

4. Fixed Fee

The fixed fee, which represents the CONSULTANT's profit, is shown in the heading of this AGREEMENT under Fixed Fee. This amount does not include any additional fixed fee which could be authorized from the Management Reserve Fund. This fee is based on the scope of work defined in this AGREEMENT and the estimated man-months required to perform the stated scope of work. In the event a supplemental agreement is entered into for additional work by the CONSULTANT, the supplemental agreement may include provisions for the added costs and an appropriate additional fee. The fixed fee will be prorated and paid monthly in proportion to the percentage of work completed by the CONSULTANT and reported in the monthly progress reports accompanying the invoices.

Any portion of the fixed fee earned but not previously paid in the progress payments will be covered in the final payment, subject to the provisions of Section IX, Termination of Agreement.

5. Management Reserve Fund

The AGENCY may desire to establish a Management Reserve Fund to provide the Agreement Administrator the flexibility of authorizing additional funds to the AGREEMENT for allowable unforeseen costs, or reimbursing the CONSULTANT for additional work beyond that already defined in this AGREEMENT. Such authorization(s) shall be in writing and shall not exceed the lesser of \$50,000 or 10% of the Total Amount Authorized as shown in the heading of this AGREEMENT. The amount included for the Management Reserve Fund is shown in the heading of this agreement. This fund may be replenished in a subsequent supplemental agreement. Any changes requiring additional costs in excess of the "Management Reserve Fund" shall be made in accordance with Section XIV, "Extra Work."

6. Maximum Total Amount Payable

The maximum total amount payable, by the AGENCY to the CONSULTANT under this AGREEMENT, shall not exceed the amount shown in the heading of this AGREEMENT.

The Maximum Total Amount Payable is comprised of the Total Amount Authorized, which includes the Fixed Fee and the Management Reserve Fund. The Maximum Total Amount Payable does not include payment for extra work as stipulated in Section XIV, "Extra Work."

**B. Monthly Progress Payments**

The CONSULTANT may submit invoices to the AGENCY for reimbursement of actual costs plus the calculated overhead and fee not more often than once per month during the progress of the work. Such invoices shall be in a format approved by the AGENCY and accompanied by the monthly progress reports required under Section III, General Requirements, of this AGREEMENT. The invoices will be supported by an itemized listing for each item including direct salary, direct nonsalary, and allowable overhead costs to which will be added the prorated Fixed Fee. To provide a means of verifying the invoiced salary costs for CONSULTANT employees, the AGENCY may conduct employee interviews. These interviews may consist of recording the names, titles, and present duties of those employees performing work on the PROJECT at the time of the interview.

**C. Final Payment**

Final payment of any balance due the CONSULTANT of the gross amount earned will be made promptly upon its verification by the AGENCY after the completion of the work under this AGREEMENT, contingent upon receipt of all PS&E, plans, maps, notes, reports, and other related documents which are required to be furnished under this AGREEMENT. Acceptance of such final payment by the CONSULTANT shall constitute a release of all claims for payment which the CONSULTANT may have against the AGENCY unless such claims are specifically reserved in writing and transmitted to the AGENCY by the CONSULTANT prior to its acceptance. Said final payment shall not, however, be a bar to any claims that the AGENCY may have against the CONSULTANT or to any remedies the AGENCY may pursue with respect to such claims. The payment of any billing will not constitute agreement as to the appropriateness of any item and that at the time of final audit, all required adjustments will be made and reflected in a final payment. In the event that such final audit reveals an overpayment to the CONSULTANT, the CONSULTANT will refund such overpayment to the AGENCY within ninety (90) days of notice of the overpayment. Such refund shall not constitute a waiver by the CONSULTANT for any claims relating to the validity of a finding by the AGENCY of overpayment.

**D. Inspection of Cost Records**

The CONSULTANT and the subconsultants shall keep available for inspection by representatives of the AGENCY and the United States, for a period of three years after final payment, the cost records and accounts pertaining to this AGREEMENT and all items related to or bearing upon these records with the following exception: if any litigation, claim, or audit arising out of, in connection with, or related to this contract is initiated before the expiration of the three-year period, the cost records and accounts shall be retained until such litigation, claim, or audit involving the records is completed.



# Biology, Soil & Water, Inc.

Larry Dawes, W. 725 Chelan Spokane, WA 99205 (509) 327-2684 fax (509) 327-4742

Jane A. Culey, 6612 S Meador Rd. Spokane, WA 99223 phone/fax (509) 448-3896

This agreement is made and entered into this 7 day of January 2002, between Biology, Soil and Water, Inc and (Name) Thomas Dean & Hoskins, Inc.  
(Address) 303 E 2nd Avenue, Spokane Wa 99202 (Phone) 509-622-2888  
hereafter referred to as the client. If the client is not legal owner of the property, legal owner must sign below acknowledging client's right to act on owner's behalf

Whereas Biology, Soil and Water, Inc. is engaged in business to provide environmental services for land use planning and permitting and the client wishes to secure those services for the project described herein, the parties agree as follows

### SUBJECT PROPERTY

located at or near Ten Mile Bridge (Road No. 02090) Asotin County, WA.  
and for the purposes herein known as Ten Mile Bridge project

### LEGAL OWNER

Asotin County PO Box 160, Asotin, WA 99402-0160  
Name Address

### INFORMATION TO BE PROVIDED BY THE CLIENT

Client shall make available to Biology, Soil, & Water, Inc. (BSW) all information pertinent to the project, including survey information, previous studies and design objectives, construction standards the owner requires to be included in reports, or any reports pertinent to the project, and any other data concerning design of the project

### SCOPE OF WORK TO BE PROVIDED BY BIOLOGY, SOIL, & WATER, INC.

#### Phase I:

Biology Soil & Water, Inc. conducts ecological investigations of land and water development and/or land use change proposals to determine effects on the distribution and abundance of plants and animals. The BSW staff performs comprehensive plant and animal population surveys, investigations of site specific habitat availability and maintenance improvement/recovery needs of wildlife, with particular attention paid to Endangered, Threatened, Sensitive, Candidate, Priority, Monitor, and Species of Special Concern. BSW will evaluate proposed alternative routes and comment on impacts for each alternative.

#### Phase II:

Our Biological Assessments help the client understand and meet federal, state, and local regulations and develop management recommendations that are consistent with the Priority Habitat and Species Program and the Endangered Species Act. The BSW staff will consult with biologists within Federal, State and local jurisdictions to determine expected impacts on water quality, plants, animals and fish.

#### Phase III:

With the help of the above agencies, BSW will write and submit a DRAFT Biological Assessment (BA) with recommended methods to reduce the duration and severity of impacts and provide proper protection for fish and wildlife habitat and species. BSW will make revisions to the DRAFT BA as requested by jurisdictions and submit a FINAL document to all relevant parties

#### Phase IV:

BSW will write and submit a plan to mitigate project impacts including revegetation of peripheral disturbed areas and reclaimed areas

# Biology, Soil & Water, Inc.

Larry Dawes W 725 Chelan, Spokane, WA 99265 (509) 327-2684 fax (509) 327 4742

James A. Curley, 6612 S Meadow Rd., Spokane, WA 99223 phone/fax (509) 448-3896

This agreement is made and entered into this 7 day of January 2002, between Biology, Soil and Water, Inc. and (Name) Thomas, Dean & Huskins, Inc.  
(Address) 303 E. 2nd Avenue, Spokane Wa 99202 (Phone) 509-623-2888  
hereafter referred to as the client. If the client is not legal owner of the property, legal owner must sign below acknowledging client's right to act on owner's behalf.

Whereas Biology, Soil and Water, Inc. is engaged in business to provide environmental services for land use planning and permitting and the client wishes to secure those services for the project described herein, the parties agree as follows:

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located at or near Ten Mile Bridge (Road No. 02090) Asotin County, WA.  
and for the purposes herein known as Ten Mile Bridge project

### LEGAL OWNER

Asotin County PO Box 160, Asotin, WA 99402-0160  
Name Address

### INFORMATION TO BE PROVIDED BY THE CLIENT

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#### Phase IV:

BSW will write and submit a plan to mitigate project impacts including revegetation of peripheral disturbed areas and reclaimed areas.

BUDGET	TASK	Cost Estimate	Hours
Phase I:	Field Evaluation (one site visit)	\$630.00	9
	Preliminary report on alternative routes	\$840.00	12
Phase II:	Consultation with jurisdictions	\$560.00	8
	Two meetings & one additional site visit	\$560.00	8
Phase III:	Site Plan Development and DRAFT BA	\$3500.00	50
	FINAL BA Report	\$1400.00	20
Phase IV:	Mitigation Plan	\$1120.00	16
TOTAL		*\$8610.00	123

\*The above estimate is a not to exceed figure for a "may affect, but is not likely to adversely affect" finding for all listed species in the action area. Other findings may increase or decrease the time and cost associated with preparing the BA. BSW charges \$70.00/hr for services.

**SCHEDULE**

Work on the project will begin immediately upon the receipt of retainer in the amount of \$ 5000.00 and this signed agreement. Please sign both the original and a copy as your concurrence with this agreement and return the original to our office. If concurrence is not received within 30 days of the date of proposal, proposal then becomes invalid. BSW will begin Phase I within 15 days of receipt of the retainer. BSW will request pertinent habitat and species data from jurisdictions. BSW will complete each work task within the project timeline, however the timeliness of jurisdiction responses to BSW requests for information and review may ultimately affect the report completion date.

**GENERAL NOTES**

1. BSW does not guarantee any permits will be issued as a result of the services performed by BSW.
2. The services to be performed by BSW are dependent on accurate map and boundary information. BSW is not responsible for errors and/or omissions as a result of poor map quality and/or boundary data.
3. The work to be completed by BSW is not guaranteed for subsequent changes in statutes, ordinances, regulations, after work product presentation to the client.
4. In the event all or any portion of the work prepared or partially prepared by BSW is suspended, abandoned, or terminated by the client, the client shall pay BSW for all fees, charges, and services incurred prior to date of termination.
5. In the event the client institutes a suit against BSW because of alleged failure to perform, error, omission, or negligence, and such suit is not successfully prosecuted, client agrees to pay BSW any and all costs of defense.
6. The undersigned have read and understood this agreement, and he/she and his/her principal, if the undersigned acts as agent, promises to pay and personally guarantees payment of the charges provided for herein. It is understood that credit is not extended to a corporation without an assumption of personal liability by the undersigned.

WITNESSED AND COPY RECEIVED

DATE

ACCEPTED BY BIOLOGY, SOIL & WATER, INC.

By \_\_\_\_\_  
Client

By \_\_\_\_\_  
Name

**Exhibit G-2  
Breakdown of Subconsultants Overhead Cost**

**Fringe Benefits**

FICA .....	0.04
Unemployment .....	0.02
Medical Aid and Industrial Insurance .....	0.02
Company Insurance and Medical vacation, Holiday, and Sick Leave .....	0.03
Commission, Bonus/Pension Plan .....	0
<b>Total Fringe Benefits .....</b>	<b>0.15</b>

**General Overhead**

State S&O Taxes .....	0.015
Insurance .....	0.03
Administration and Time Not Assignable .....	0.01
Printing, Stationery, and Supplies .....	0.007
Professional Services .....	0.01
Travel Not Assignable .....	0.02
Telephone and Telegraph Not Assignable .....	0.02
Fees, Dues, Professional Meetings .....	0.01
Utilities and Maintenance .....	0.02
Professional Development .....	0.01
Fuel .....	0.06
Equipment Support .....	0.01
Office Miscellaneous Postage .....	0.015
<b>Total Generated Overhead .....</b>	<b>0.237</b>
<b>State .....</b>	<b>0.1387</b>

**Exhibit G-2  
Breakdown of Subconsultants Overhead Cost**

**Fringe Benefits**

FICA .....	0.02
Unemployment .....	0.02
Medical Aid and Industrial Insurance .....	0.02
Company Insurance and Medical .....	0.03
Vacation, Holiday, and Sick Leave .....	0
Commutation, Bonuses/Pension Plan .....	0
<b>Total Fringe Benefits .....</b>	<b>0.15</b>

**General Overhead**

State S&O Taxes .....	0.015
Insurance .....	0.02
Administration and Time Not Assignable .....	0.01
Printing, Stationery, and Supplies .....	0.007
Professional Services .....	0.01
Travel Not Assignable .....	0.02
Telephone and Telegraph Not Assignable .....	0.02
Fees, Dues, Professional Meetings .....	0.01
Utilities and Maintenance .....	0.07
Professional Development .....	0.01
Post .....	0.06
Equipment Support .....	0.01
Office Miscellaneous, Postage .....	0.015
<b>Total Generated Overhead .....</b>	<b>0.237</b>
<b>State .....</b>	<b>0.1387</b>

**Tenmile Bridge Replacement  
Asotin County, Washington**

**Cultural Resource Compliance  
Scope of Work**

by

**Nez Perce Tribe  
Cultural Resource Program**

**A. Introduction**

Asotin County has identified a need for the replacement of the bridge across Tenmile Creek near its confluence with the Snake River. The Nez Perce Tribe Cultural Resource Program was contacted to fulfill the cultural resource responsibilities of the project.

**B. Cultural Resource Needs**

**1. Survey and Record Search**

Although the project area has never been directly surveyed for cultural resources, one survey did pass by the adjacent area on the Snake River. The survey in question was not adequate for current standards of cultural resource inventory work. However, it did reveal the presence of one site which was located along the Snake River and slightly north of the project area. The site in question was observed to extend for 400 meters along the Snake River and extend inland approximately 30 meters. It should be noted that the 30 meter estimate is derived entirely from surface observations and probably does not reflect the actual width of the site. Therefore, it is possible that this site or another site may be at least partially within the area of potential effect of the current project. Survey of the entire landform should help identify the likelihood of an archaeological site. The survey will also assist in the development of recommendations to better guide the project in order to prevent damage to cultural resources.

The survey and record search will result in a brief report describing the project and the survey, results, and recommendations for future cultural resource needs. The report will be submitted to the Washington Office of Archaeology and Historic Preservation (OAHP) for review and comment. In addition, site form(s) will be completed for any cultural resources encountered during the survey.

**2. Archaeological Testing**

Testing may be necessary depending upon the results of the survey, consultation with the OAHP, and ability of the project design to avoid impacts to cultural resources. If testing were to become necessary it would involve a combination of small auger holes and a few larger 1 x 1 meter test units. Testing is usually employed as a method to obtain solid data regarding the exact

location, extent, depth, and integrity of a site relative to a particular project impact. For these reasons, testing is usually somewhat limited relative to a full scale data recovery excavation.

### 3. Cultural Resource Monitoring

Due to the type of project and its location, monitoring will more than likely be necessary in order to help prevent the project from harming cultural resources. The necessity of monitoring is dependent upon recommendations made by the Nez Perce Tribe Cultural Resource Program and recommendations from the OAHF. Monitoring is employed during the course of a project to ensure that the project will not adversely affect any cultural resources not anticipated or detected during earlier investigations.

#### C. Conclusion and Time/Cost Estimates

It is highly likely that a cultural site is located nearby or within the area of potential effect of the Tenmile Bridge Replacement Project. However, with proper identification, testing, monitoring, and planning measures, it is highly likely that any such site can be avoided. All monetary costs incurred by the Nez Perce Tribe Cultural Resource Program are based on an hourly rate of \$25.00. This rate includes hourly wage, fringe benefits (35%), the Nez Perce Tribe's indirect rate of 20.9%, supplies, transportation, and administrative/supervisory costs.

The cultural resource survey will require 2-3 days of fieldwork and probably a week of report preparation. Estimated costs to complete this work are \$1400.00

Cultural resource testing (if necessary) is somewhat more difficult to estimate cost for. Testing would probably require at least 2-3 weeks of fieldwork and a similar amount of time for report preparation (depending on testing results). Fieldwork would require the involvement of four individuals on a full-time basis. Report preparation would require the involvement of one individual on a full-time basis. If six weeks were required for this work it is estimated that the cost would be in the neighborhood of \$10,000.00-\$15,000.00. However, this amount is highly speculative and, as noted earlier, is dependent upon the necessity of testing, and the scope of the testing. Both necessity and scope will be determined after the survey has been completed.

Cultural resource monitoring will probably be necessary during portions of the project that are likely to impact cultural resources. Monitoring usually involves one individual on a full or part-time basis. If the project involved ground disturbing construction for two months of the four required to complete the project, costs would probably be \$9,000.00. This estimate includes a week of report preparation at the conclusion of the monitoring.

Based on the above estimates the total cost of cultural resource compliance associated with the Tenmile Creek Bridge Replacement Project will range from \$9,400.00 to \$25,400.00. The low estimate of \$9,400.00 assumes that no testing will be necessary and the high estimate assumes that a large amount of testing will be necessary. It should be noted that this estimate does not include the potential for data recovery excavations. At the current time, data recovery seems to be a remote possibility and should only be dealt with if absolutely necessary.

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