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APPEAL NO. 68913-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

(Whatcom County Court Case No. 08-2-02034-3)

LAKE WHATCOM RAILWAY COMPANY, a Washington Corporation

Plaintiff/Appellant,

vs.

KARL ALAR and JEANINE ALAR, husband and wife; STEVEN SCOTT and JANE DOE SCOTT, husband and wife; et al.

Defendants/Respondents.

APPELLANT LWRW'S OPENING BRIEF

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I – INTRODUCTION

A. Parties

This matter involves a dispute between a railroad and neighboring property owners over the parties' rights and obligations arising, in part, out of a 1976 Whatcom County Superior Court matter previously appealed. The earlier lawsuit, upon motion of defendant neighbors, was reopened by the Whatcom County Superior Court and is now part of this litigation and appeal. CP 951. Plaintiff Lake Whatcom Railway Company (previously Cascade Recreation, Inc.) ("Lake Whatcom Railway") is owned, in part, by Frank Culp. Lake Whatcom Railway's predecessor took title to its' 100 foot right of way first by way of a 1901 Deed, and then to the additional land by way of a 1931 Deed. Trial Exhibits 1 and 2.

The 1931 Deed, "conveyed and warranted" to the Northern Pacific Railway Company all the property:

> [A] line parallel with and distant twenty-five (25) feet northerly, measured at right angles, from the center line of the re-located railroad of said Railway Company as the same is now staked out and to be constructed over and acres said premises, containing fifteen hundredths (0.15) acres, more or less.

Trial Exhibit 2.

The 1931 property is marked in green and checkered in the Steele Survey. Appendix "A" attached hereto; Trial Exhibit 11; CP 136.

The 1901 Deed, in its relevant portions, conveyed by quit claim deed:

> A right-of-way one hundred feet wide . . . excepting all rights for road purposes that may have heretofore been conveyed to Whatcom County and particularly reserving all littoral and riparian rights to the said Fred and Mattie A. Zobrist.
>
> Together with the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.
>
> To have and to hold, all and singular, the said premises, together with the appurtenances unto the said party of the second part, and to its assigns forever.

Trial Exhibit 1. *Veach v. Culp*, 21 Wn.App. 454, 456, 585 P.2d 818 (1978). The 1901 property is marked in yellow on the Steele Survey. Appendix "A" attached hereto; Trial Exhibit 11; CP 136.

Defendants Scott, Wens and Alar ("neighbors") are the owners of three lots that are subject to Lake Whatcom Railway's 100 foot right of way. Defendants Scott, Wens and Alar's lots are as depicted on Appendix "A" attached hereto. When Veach [and

Solem], the neighbors' predecessor, sold the property in 1995, by Statutory Warranty Deed, the Deed excepted from the transfer "THE RAILROAD RIGHT OF WAY, [and] . . . BLUE CANYON ROAD NO. 689." Trial Exhibit 3.

B. Previous Litigation

This appeal arises out of a dispute between a railroad company and three neighbors who purchased land adjacent to Lake Whatcom Railway's "right of way" in Whatcom County, Washington. The following documents shape the background for the dispute:

1. 1901 Deed — Trial Exhibit 1
2. 1931 Deed — Trial Exhibit 2
3. "Consent" Decree — Trial Exhibit 6

This appeal also involves issues first raised in a 36 year old Whatcom County Superior Court case; *Veach v. Culp*, Whatcom County Superior Court Cause No. 51720. In *Veach v. Culp,* on January 6, 1977, the Whatcom County Superior Court entered Findings of Fact and Conclusions of Law, which found, in part:

- The original grantors of both Veach and Lake Whatcom Railway's property were Zobrist, who, in June, 1901, conveyed a strip of land be deed to the Bellingham Bay & Eastern Railroad 100 feet wide, being 50 feet on each side of the center line of the railroad track.
- The 1931 Deed to Lake Whatcom Railway's predecessor Bellingham Bay & Eastern Railroad] "is in fee language and the use of the property is not limited to railway purposes, nor does it mention right of way."
- Veach has a strip of land lying between the Southerly boundary of the railroad right of way and Lake Whatcom, which strip of land is owned by Veach, and "any riparian rights are appurtenant to plaintiff's [Veach's] land rather than the railroad right of way."
- The sale of the 100 foot right of way, in 1901 "to Bellingham Bay & Eastern Railroad was a sale of land and not a mere easement."

And concluded:

- Lake Whatcom Railway is the owner in fee simple of the land embraced within its right of way, being fifty feet on each side of the original in line of the Bellingham Bay & Eastern Railway [1901 Deed] and 25 feet from the center line of the projected relocation of the Northern Pacific Railway Company as recited in the Byron [1931] deed.
- Veach (plaintiffs) have no easements, reversions or rights to the land within the boundaries of Lake Whatcom Railway's right of way.

See Appendix "B" attached hereto.

Two previous Washington appellate cases also frame the issues raised in this appeal; *Veach v. Culp,* 21 Wn.App. 454, 585 P.2d 818 (Div. I, 1978) (Veach I) and *Veach v. Culp*, 92 Wn.2d

570, 599 P.2d 526 (1979) (Veach II). In *Veach I*, on appeal, Division I of the Court of Appeals discussed the trial court's rulings only as they related to the 1901 Deed, holding as follows:

> The [1901] deed here contains no such declaration of purpose. There is no clause relating to the use to which the land was to be put, and no reversion or right of re-entry. The grant was unconditional and, except for the words "right-of-way," in fee language. Substantial evidence supports the trial court's finding that the intent of the parties was that the deed convey a fee simple title. . . .
>
> In the alternative, the Veaches claim an easement by implied reservation across the right-of-way in order to reach their waterfront property and to enjoy riparian rights expressly reserved in the granting clause of the Zobrist deed. Riparian rights, such as access, swimming, fishing and boating, are conferred upon a property owner by virtue of the contiguity of his property to a body of water. (Citation omitted). The Veaches are riparian owners of their own waterfront strip of land and that part of the railroad right-of-way which abuts on the lake. That, however, does not give them the right to cross over the railroad's property to gain access to the shore unless they can show that the Zobrist conveyance implied an easement by reservation. Such an easement may arise when the party claiming it shows: (1) unity of title and subsequent separation, (2) an apparent and continuous quasi easement existing for the benefit of the retained parcel to the detriment of the conveyed parcel during the unity of title, and (3) "strict" necessity that the quasi easement exist after severance. *Adams v. Cullen*, 44 Wash.2d 502, 268 P.2d 451 (1954). The necessity is to be determined from the conditions

> existing at the time of the conveyance. Unity of title and subsequent separation, which are absolute requirements, were satisfactorily proven by the Veaches. They failed in their burden of proof, however, as to the second and third characteristics of an easement by implied reservation. Although the presence or absence of either or both of these characteristics is not necessarily conclusive, their absence supports the trial court's finding that no easement was intended by the original parties to the conveyance.

Veach, 21 Wn.App. at 458-59. Also, in *Veach II,* the Washington Supreme Court, like the Court of Appeals, did not address the 1931 Deed. The *Veach II* Court defined the issue on appeal as the "nature of the interest conveyed by the 1901 deed." *Veach*, 92 Wn.2d at 572. The Supreme Court held that under the 1901 Deed Lake Whatcom Railway's right of way was an easement. *Id.* at 575. The *Veach II* Court reasoned as follows:

> Given the language of the deed explicitly describing the conveyance of a right-of-way and given the rule of *Swan v. O'Leary*, supra, and *Morsbach v. Thurston County*, supra, we conclude the deed conveyed an easement, not a fee title.
>
> The railroad contends, nonetheless, that it is immaterial whether it owns an easement or a fee simple title. Its premise for this contention is that a railroad right-of-way, whether in fee or an easement, is entitled to exclusive possession. It relies on dicta in Morsbach v.

> Thurston County, supra 152 Wash. at 568, 278 P. 686, where the court commented that many courts say that the right-of-way of a railroad company is more than a mere easement and that it is more than a mere right of passage. It further quotes dicta from a tax case, *New Mexico v. United States Trust Co.*, 172 U.S. 171, 19 S.Ct. 128, 43 L.Ed. 407 (1898). Certainly it is true that in most instances the very nature of a railroad will require it to enjoy a substantial right regardless of the nature of its title. . . .
>
> As holders of the subservient estate, the plaintiffs are entitled to use the right-of-way in such a manner as does not materially interfere with the railroad's use thereof. Plaintiffs concede that their use is so restricted.
>
> Having determined that the railroad's right-of-way is one of easement, we need not reach the theory of implied easement advanced by the plaintiffs.

Veach, 92 Wn.2d at 574-75.

In 1980, Sam Peach, attorney for Veach, prepared a Consent Decree (settlement document), which was agreed to by counsel for Lake Whatcom Railway, which agreement contained the following relevant provisions:

- The Deed by which Lake Whatcom Railway's "predecessors in 1901 acquired the railroad right of way from . . . Zobrist is hereby declared to have conveyed an easement and not a fee, and the plaintiffs are entitled to use the right of way in such a manner as does not materially interfere with the railroad's use thereof."

- "[P]laintiffs (Veach) and all persons claiming by, through and under them, are hereby permanently enjoined from materially interfering with defendants' railroad operations."
- Veach is the owner of all littoral and riparian rights in connection with the railroad right of way, both within and without the railroad right of way, and those littoral and riparian rights are defined to include the right to take water from the lake and to maintain the water intake pipe under the railroad right of way and the pumphouse [sic] in its present location within the railroad right of way.
- Plaintiffs [Veach] may maintain a bathhouse, dressing rooms, outhouse, fireplaces, picnic tables not closer than eight and one-half (8-1/2) feet from the edge of the track.
- Plaintiffs [Veach] may cross the right of way wherever they choose and may establish such improvements as paths, roads, steps and handrails as they desire to construct to get to their beach south of the railroad tracks.
- Defendants [Lake Whatcom Railway], and all persons claiming under them, including their passengers, are hereby enjoined from interfering with plaintiffs' water system, roads, pathways, steps and handrails from the upland across the railroad right of way to the beach south of the tracks, and shall not interfere with or use the littoral and riparian rights or picnic facilities, or picnic south of the tracks."
- Plaintiffs [Veach], and those claiming through them, are restrained from interfering with the train passengers or train employees north of the tracks who are engaged in entering, leaving or waiting for the train or who are in the picnic area, except that plaintiffs may peacefully use their pathways and roadways to the beach if such use does not interfere with train travel.

- "The fence on the north border of the right of way is hereby abated and defendants shall promptly remove said fence and are further restrained from erecting any other fences on said right of way in the future."

C. This Dispute

Lake Whatcom Railway operates over four miles of railroad pursuant to federal law. The railroad is dedicated to the carriage of passengers and is subject to federal law. A scenic highlight of the trip is a stop on Lake Whatcom, near Bellingham, Washington ("Blue Canyon Stop"). In 2008, Lake Whatcom Railway filed a complaint seeking, among other things, a decision from Whatcom County Superior Court regarding the property rights of Lake Whatcom Railway and its neighbors, defendants Scott, Alar and Wens, at the Blue Canyon Stop. CP 1035. In its Complaint, Lake Whatcom Railway complained of its neighbors' misconduct, including standing on the rails, blocking maintenance, dumping dirt on the right of way and tracks, erecting a fence, installing confusing signs, and harassing railway customers at the Blue Canyon Stop. CP 873.

On May 29, 2009, the trial court denied Lake Whatcom Railway's Motion for Partial Summary Judgment. CP 672. On June 24, 2009, the Court granted defendants' Motion for Partial Summary Judgment declaring that the 1901 Deed granted an easement, not a fee, and dismissed Lake Whatcom Railway's causes of actions which did not arise out of the 1931 Deed. CP 665.

On August 21, 2009, the trial court entered an Order requiring Lake Whatcom Railway to cease ongoing maintenance at the Blue Canyon Stop, which maintenance activity is clearly governed by federal law. CP 454. The trial court also authorized the neighbors to undertake work to restore the right of way. This order effectively shut down most of the track at the Blue Canyon Stop due to safety concerns, until after both trials. CP 456. The Order was entered so that Scott could have a family wedding on the right of way.

On September 24, 2010, the trial court entered Partial Findings Fact and Conclusions of Law, after the first portion of a bifurcated trial. CP 130. On May 18, 2012, the trial court entered

its Supplemental Findings of Fact and Conclusions of Law after a second trial, regarding damages, was completed. CP 65.

II – ASSIGNMENTS OF ERROR

Lake Whatcom Railway assigns error to the following decisions of the trial court:

No. 1: The trial court erred when it entered its Order Denying Plaintiffs' Motion For Partial Summary Judgment on May 29, 2009. CP 672.

No. 2: The trial court erred when it entered its Order Granting Partial Summary Judgment on June 24, 2009. CP 665.

No. 3: The trial court erred when it entered its Interim Order Pending Trial on August 21, 2009. CP 454.

No. 4: The trial court erred when it made and entered Finding of Fact 1.6 on September 24, 2010 as follows; "It was the intent of the parties to the Zobrist Grant [1901 Deed] that the same convey an easement and not a fee simple interest." CP 132.

No. 5: The trial court erred when it made and entered Finding of Fact 1.7 on September 24, 2010 as follows: "It was the

intent of the parties to the Byron Grant [1931 Deed] that the same convey an easement and not a fee simple interest." CP 132.

No. 6: The trial court erred when it made and entered its Conclusion of Law 2.4 on September 24, 2010. CP 134.

No. 7: The trial court erred when it made and entered its Conclusion of Law 2.5 on September 24, 2010. CP 134.

No. 8: The trial court erred when it made and entered its Conclusion of Law 2.7 on September 24, 2010. CP 134.

No. 9: The trial court erred when it made and entered its Conclusion of Law 2.8. CP 134.

No. 10: The trial court erred when it made and entered its Conclusion of Law 2.9 on September 24, 2010. CP 135.

No. 11: The trial court erred when it made and entered its Conclusion of Law 2.10 on September 24, 2010. CP 135.

No. 12: The trial court erred when it made and entered its Finding of Fact 1.12, on May 18, 2012 as follows: "[T]his Court finds that an easement exists with regard to the Byron deed property in favor of Lake Whatcom Railway. . . . The reasoning in

Veach v. Culp applies equally to the Byron [1931] Deed property." CP 66.

No. 13: The trial court erred when it made and entered its Finding of Fact 1.31 on May 18, 2012. CP 70.

No. 14: The trial court erred when it made and entered its Finding of Fact 1.32 on May 18, 2012. CP 70.

No. 15: The trial court erred when it made and entered its Finding of Fact 1.40 on May 18, 2012. CP 71.

No. 16: The trial court erred when it made and entered its Finding of Fact 1.47 on May 18, 2012. CP 72-3.

No. 17: The trial court erred when it made and entered its Finding of Fact 1.48 on May 18, 2012. CP 73.

No. 18: The trial court erred when it made and entered its Finding of Fact 1.49 on May 18, 2012. CP 73.

No. 19: The trial court erred when it made and entered its Finding of Fact 1.50 on May 18, 2012. CP 73.

No. 20: The trial court erred when it made and entered its Finding of Fact 1.51 on May 18, 2012. CP 73-4.

No. 21: The trial court erred when it made and entered its Conclusion of Law 2.10 on May 18, 2012. CP 74-5.

No. 22. The trial court erred when it made and entered its Conclusion of Law 2.12 on May 18, 2012. CP 75-7.

No. 23: The trial court erred when it made and entered its Conclusion of Law 2.16, on May 18, 2012 as follows:

> The judgment against defendants Alar in favor of Lake Whatcom Railway should be offset by the total damages for plaintiff Lake Whatcom Railway's trespass of $2,001.28, for a final judgment of $546.67 against plaintiff and in favor of defendants Alar. CP 78.

No. 24: The trial court erred when it made and entered its Conclusion of Law 2.17 on May 18, 2012. CP 78.

No. 25: The trial court erred when it entered its Order Substituting Parties on March 27, 2009. CP 810.

III- ISSUES PERTAINING TO ASSIGMENTS OF ERROR

1. Does federal law prohibit the Whatcom County Superior Court from entering its Interim Order of August 21, 2009, and/or entering Findings of Fact or Conclusions of Law related to the ongoing maintenance, use, operation or occupation of the railroad right of way by neighbors?

2. Did the trial court incorrectly apply res judicata?

3. Did the trial court err in concluding that Wens, Alar and Scott were third party beneficiaries of certain rights granted Veach in the Consent Decree?

4. Should the issue of the intent of the parties to the 1901 and 1931 Deeds be examined, pursuant to RAP 2.5(c)(2), and decided on the basis of the current case law related to railroad right of ways?

IV – STATEMENT OF THE CASE

In its Complaint, Lake Whatcom Railway complained that beginning before 2008, Alar and Scott dumped dirt on its railroad tracks, interfered with railroad operations, denied access to the right of way, and otherwise created safety issues on its right of way. CP 1035; 1038-39. Lake Whatcom claimed damages against Alar and Scott for trespass. CP 1039.

In its motion for Summary Judgment, Lake Whatcom Railway, declared that Alar, in 2006 constructed a fence on the right of way and moved a RV onto the right of way. In 2007, Alar informed Culp that the purpose of the Alar fence was to keep Lake

Whatcom Railway passengers from boarding the train from the north. CP 873, 875. Lake Whatcom Railway advised the trial court that it was unacceptable for it to be required to obtain neighbors permission to operate and/or maintain its railroad. CP 876.

After two trials, the trial court found as follows:

- 1.14 Defendants Scott and Alar have materially interfered with the operation of the railroad.

- 1.15 Defendants Scott's covering of the track and the ties with soil and grass right up to the level of the rails interfered with the running of the cars and materially interfered with the operation of the railroad.

- 1.16 Defendants Scotts filling in the tracks with dirt and putting grass on the tracks accelerated the rot of the ties, which is a material interference with the maintenance of the railroad.

- 1.17 Defendants' Scotts wrongful actions, including completely burying the railroad ties, made it necessary for more maintenance to be done by Lake Whatcom Railway more often than would otherwise have to be done.

- 1.25 Plaintiff's claim that that most all of the ties over a 320 foot length of track need replacement and other railroad repair across the Defendant's property and within the Zobrist and Byron easement is supported by substantial evidence and was not rebutted.

- 1.27 Defendants Scott and Alar have trespassed and/or wrongfully interfered with the maintenance and operation of

plaintiff Lake Whatcom Railway in the following ways, all to the damage of plaintiff Lake Whatcom Railway: . . . .

And, concluded as follows:

- 2.13 Plaintiff Lake Whatcom Railway has clearly established that defendants Scott's actions constituted trespass and/or material interference to the damage of plaintiff.

- 2.14 Plaintiff Lake Whatcom Railway has clearly established that defendants Alar's actions constituted trespass and/or material interference to the damage of plaintiff. Defendants Alar and Scott did not act in concert or by assisting each other.

CP 65.

At trial Lake Whatcom Railway claimed that the maintenance and operation of its tracks were subject to federal regulations. RP 33. At trial, Culp admitted, in response to a question by counsel for the neighbors, that Lake Whatcom Railway was regulated by the federal government. RP 200. Jarvis Frederick, the neighbors' expert, testified at trial that Lake Whatcom Railway was a Class I or Class II railroad subject to regulations issued by the federal government. RP 383-83.

V – LEGAL ARGUMENT

A. Standard of Review

This Court reviews de novo the trial court's choice of law, its interpretation of the law, and its application of the law to the facts. *State v. Whelchel,* 97 Wn.App. 813, 817, 988 P.2d 20 (Div. 3, 1999). Similarly, res judicata is an issue of law reviewed de novo. *Martin v. Wilbert*, 162 Wn.App. 90, 94, 253 P.3d 108 (2011), *rev. denied*, 173 Wn.2d 1002, 268 P.3d 941 (Div. 1, 2011). The contract issues are reviewed de novo. *Yeats v. Estate of Yeats,* 90 Wn.2d 201, 204, 580 P.2d 617 (1978). Absent disputed facts, the construction or legal effect of a contract is determined by the court as a matter of law. *Epperly v. Seattle*, 65 Wn.2d 777, 784-785, 399 P.2d 591 (1965).

B. Federal Law

The Surface Transportation Board (STB) has exclusive jurisdiction over matters regarding Lake Whatcom Railway. The STB was created in the ICC Termination Act of 1995 and is the successor agency to the Interstate Commerce Commission. "The ICCTA placed with the STB 'complete jurisdiction, to the

exclusion of the states, over the regulations of railroad operations.' (quoting CSX Transp., Inc. v. G. Pub. Serv. Comm'n 944 F.Supp. 1573, 1584 (N.D.Ga. 1996)." *City of Seattle v. Burlington N.R.R.*, 145 Wn.2d 661, 666, 41 P.3d 1169 (2002). A state superior court is preempted from regulating railroad operations. "Federal preemption is required when Congress conveys an intent to preempt local law by: (1) 'express preemption', where congress explicitly defines the extent to which its enactments preempt laws. . . ." *Id.* at 667. Congress has expressly conveyed its intent that the jurisdiction over railway operation and maintenance be exclusive to the Surface Transportation Board. 49 U.S.C.A. § 10501 states:

> (a)(1) Subject to this chapter, the [Surface Transportation] Board has jurisdiction over transportation by rail carrier that is-
> (A) only by railroad. . . .
> (2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in--
> (A) a State and a place in the same or another State as part of the interstate rail network . . .
> (b) **The jurisdiction of the Board over**-- . . .
> (2) **the construction, acquisition, operation, abandonment, or discontinuance** . . . even if the tracks are located, or intended to be located, entirely in one State,

> **is exclusive**. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C.A. § 10501(a)-(b). (Emphasis added).

> Congress and the courts long have recognized a need to regulate railroad operations at the federal level. Congress' authority under the Commerce Clause to regulate the railroads is well established, see, e.g., Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342, 350-52, 34 S.Ct. 833, 58 L.Ed. 1341 (1914); Pittsburgh & Lake Erie R.R. v. Railway Labor Executives Ass'n, 491 U.S. 490, 510, 109 S.Ct. 2584, 105 L.Ed.2d 415 (1989), and the Supreme Court repeatedly has recognized the preclusive effect of federal legislation in this area. See, e.g., Colorado v. United States, 271 U.S. 153, 165-66, 46 S.Ct. 452, 70 L.Ed. 878 (1926) (ICC abandonment authority is plenary and exclusive); Transit Comm'n v. United States, 289 U.S. 121, 127-28, 53 S.Ct. 536, 77 L.Ed. 1075 (1933) (ICC authority over interstate rail construction is exclusive); City of Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77, 88-89, 78 S.Ct. 1063, 2 L.Ed.2d 1174 (1958) (local authorities have no power to regulate interstate rail passengers). The Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887), which, as amended, still governs federal regulation of railroads, has been recognized as "among the most pervasive and comprehensive of federal regulatory schemes." Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 318, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981).

City of Auburn v. U.S. Government, 154 F.3d 1025, 1029 (9th Cir., Wash., 1998). (Citations omitted). On August 21, 2009, the Whatcom County Superior Court clearly exceeded its authority when it entered its Interim Order and on May 18, 2012, when it entered Conclusions of Law 2.12, 2.17 and the appealed portion of Conclusion 2.16. CP 65 at 75-77 and 78.

In 2009, the Whatcom County Superior Court prohibited Lake Whatcom Railway from "undertaking any . . . construction or maintenance" of its rails or railway property inside its right of way. CP 455. Further, in that Order the Whatcom County Superior Court ordered Lake Whatcom Railway to allow its neighbors to enter into the easement and cover the tracks "to restore the property." CP 456. In support of its motion for the Interim Order, neighbor Scott said that he was informed and believed that Lake Whatcom Railway was doing work intending to replace travel ballast and they anticipated that Lake Whatcom Railway would argue that there were damaged rail ties and problems with the track that required maintenance. CP 600-01. Scott claimed such an argument was "simply ridiculous" and that the allegation of the need to replace

damaged ties was a "red herring." Finally, Scott argued that they intended to have a wedding on the right of way, that there was no other possible location for the September wedding, and that the railroad right of way, undergoing maintenance by Lake Whatcom Railway, needed to be immediately restored to its "prior condition." CP 602-603. A "prior condition" which after trial, the trial court determined was creating damage and injury to Lake Whatcom Railway because Scott and Alar had trespassed and wrongfully interfered with the maintenance and operation of Lake Whatcom Railway by covering the ties and tracks with dirt and grass and repeatedly interfering with the ability of Lake Whatcom Railway to do its maintenance. CP 68-9.

The neighbors' motion, arguments and Interim Order, were made and entered in light of Frank Culp's declaration which outlined that since 2005, the neighbors complained and argued that Lake Whatcom Railway could not maintain or operate on its right of way, without the permission of the neighbors. CP 873, 876; CP 786. In their responsive pleadings, the neighbors alleged that they were third party beneficiaries of the 1980 Consent Decree

and had rights and obligations under the Consent Decree. CP 256. Further, the neighbors asked that the trial court "define and clarify the parties' rights under the 1980 Decree . . . [including clarification of Lake Whatcom Railway's] rights regarding maintenance . . . ." CP 257.

On May 18, 2012, the trial court, in the guise of clarification and without lawful authority, created a new agreement between Lake Whatcom Railway and the neighbors by making and entering its Conclusions of Law 2.12, 2.17 and that portion of 2.16 which held or determined that Lake Whatcom Railway had trespassed onto property of Alar by removing a portion of the Alar fence installed on the north portion of the railroad right of way. CP 75-77; CP 78.

Lake Whatcom Railway's duties and obligations as to the operation and maintenance of the right of way are governed by federal law.

> If during a period of restoration or renewal, track is under traffic conditions and does not meet all of the requirements prescribed in this part, the work on the track shall be under the continuous supervision of a person designated under Sec. 213.7(a) who has at least

one year of supervisory experience in railroad track maintenance, and subject to any limiting conditions specified by such person. . .

49 C.F.R. § 213.11.

Each 39 foot segment of: Class 1 track shall have five crossties; Classes 2 and 3 track shall have eight crossties; and Classes 4 and 5 track shall have 12 crossties, which are not:

(1) Broken through;

(2) Split or otherwise impaired to the extent the crossties will allow the ballast to work through, or will not hold spikes or rail fasteners;

(3) So deteriorated that the tie plate or base of rail can move laterally more than \1/2\ inch relative to the crossties; or

(4) Cut by the tie plate through more than 40 percent of a ties' thickness.

49 C.F.R. § 213.109(c).

Unless it is otherwise structurally supported, all track shall be supported by material which will--

(a) Transmit and distribute the load of the track and railroad rolling equipment to the subgrade;

(b) Restrain the track laterally, longitudinally, and vertically under dynamic loads imposed by railroad rolling equipment and thermal stress exerted by the rails;

(c) Provide adequate drainage for the track; and

(d) Maintain proper track crosslevel, surface, and alignment.

49 C.F.R. § 213.103.

Each drainage or other water carrying facility under or immediately adjacent to the roadbed shall be maintained and kept free of obstruction, to accommodate expected water flow for the area concerned.

49 C.F.R. § 213.33.

Vegetation on railroad property which is on or immediately adjacent to roadbed shall be controlled so that it does not--

(a) Become a fire hazard to track-carrying structures;

(b) Obstruct visibility of railroad signs and signals:

(1) Along the right-of-way, and

(2) At highway-rail crossings; (This paragraph (b)(2) is applicable September 21, 1999.)

(c) Interfere with railroad employees performing normal trackside duties;

(d) Prevent proper functioning of signal and communication lines; or

(e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

49 C.F.R. § 213.37.

(a) All track shall be inspected in accordance with the schedule prescribed in paragraph (c) of this section by a person designated under Sec. 213.7.

(b) Each inspection shall be made on foot or by riding over the track in a vehicle at a speed that allows the person making the inspection to visually inspect the track structure for compliance with this part.

49 C.F.R. § 213.233.

C. Res Judicata Was Improperly Applied By The Trial Court

1. Res Judicata Is Not Applicable.

Res judicata affects flow only from a valid final judgment on the merits. *Schoeman v. New York Life Ins. Co.,* 106 Wn.2d 855, 859, 726 P.2d 1 (1986). Res Judicata is claim preclusion. *City of Arlington v. Hearings Bd.*, 164 Wn.2d 768, 193 P.3d 1077 (2008).

The *Veach v. Culp* litigation was reopened, over the jurisdictional objection of Lake Whatcom Railway, by the trial court and consolidated with the *Lake Whatcom Railway v. Alar, et al*, litigation. CP 951-955. When the trial court reopened the *Veach v. Culp* litigation, it was no longer a final judgment subject to res judicata. Pursuant to the trial court's Order Consolidating Matter, the *Veach v. Culp* litigation was "**reopened**" and "**consolidated for all purposes for the duration of the proceeding**. . . ." CP 952. (Emphasis added).

2. Res Judicata Does Not Prevent Plaintiff From Seeking Adjudication of Present Property Rights.

Res Judicata does not prevent a plaintiff from seeking adjudication of present property rights and present conduct unless

a former action has involved the same issue or issues, it was finally decided in a prior action, and then there is a "concurrence of identity" in four respects: "(1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made." *Hilltop Terrace Ass'n v. Island County*, 126 Wn.2d 22, 32, 891 P.2d 29 (1995). The party relying on the doctrine of res judicata has the burden of proving that the particular issues involved in the pending case were "necessarily" and "actually" determined in a "former action." *Bradley v. State*, 73 Wn.2d 914, 917, 442 P.2d 1009 (1968).

The same subject matter depends on whether the two suits have identical legal questions. *See Ensley v. Pitcher*, 152 Wn.App 891, 905, 222 P.3d 99 (Div. 1, 2009). A determination for the same cause of action considers "(1) whether the rights or interests established in the prior judgment would be destroyed or impaired by the prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the suits involved infringement of the same right; and (4) whether the

two suits arise out of the same transactional nucleus of facts." *Id.* at 903.

Even if this Court finds that res judicata is applicable (the reopened litigation is "final"), the elements of res judicata are not met here. The subject matter in the present action does not involve identical legal questions. Lake Whatcom Railway's previous neighbors did not place a trailer on the property, build a fence, fill a drainage ditch, or obstruct the train. *Veach v. Culp*, 92 Wn.2d 570, 571-72, 599 P.2d 526 (1979). The *Veach v. Culp* court did not discuss or decide the effect of the reversion rights granted to the railroad in the 1901 deed. *Id.* at 573.

3. If Res Judicata is Applicable, it Should be Applied Uniformly.

If it is determined that the prior cases and decisions preclude further analysis of the 1901 Deed, the same analysis and conclusion should be applied to the 1931 Deed. While applying the concept of res judicata to the 1901 Deed, the trial court ignored the fact that the nature of the grant in the 1931 Deed was previously determined by the trial court in its January 6, 1976

finding of fact IX, as follows: "That deed is in fee language and the use of the property is not limited to railway purposes, nor does it mention right of way." See Appendix "B." Further, the trial court's 1976 Conclusion, as regards to the 1931 Deed, was not appealed. That conclusion was: Veach has "no easements, reversions or rights to the land within the boundaries of defendant coporation's right of way." *Id.*

If this Court finds that res judicata is applicable to the *Veach v. Culp* litigation, res judicata should be applied uniformly to both the 1901 and 1931 deeds.

D. Wens, Scott and Alar (the neighbors) Are Not 3rd Party Beneficiaries of the Consent Decree.

The 1980 Consent Decree refers to the parties as "plaintiffs" and "defendants," with the exception of three provisions which refer to either "defendants, and those claiming under them" or "plaintiffs, and those claiming through them." Those three relevant provisions read as follows:

> AND IT IS FURTHER ORDERED that plaintiffs, and all persons claiming by, through and under them, are

> hereby permanently enjoined from materially interfering with defendants' railroad operations.
>
> AND IT IS FURTHER ORDERED that defendants, and all persons claiming under them, including their passengers, are hereby enjoined from interfering with plaintiffs' water system, roads, pathways, steps and handrails from the upland across the railroad right of way to the beach south of the tracks, and shall not interfere with or use the littoral and riparian rights or picnic facilities, or picnic south of the tracks.
>
> . . . [P]laintiffs, and those claiming through them, are restrained from interfering with the train passengers or train employees north of the tracks who are engaged in entering, leaving or waiting for the train or who are in the picnic area, except that plaintiffs may peacefully use their pathways and roadways to the beach if such use does not interfere with train travel.

CP 1048-1049; CP 489-490.

The consent decree operates as a contract between the parties only. *Centennial Villas, Inc. v. DSHS,* 47 Wn.App. 42, 49, 733 P.2d 564 (1987), *review denied,* 108 Wn.2d 1025 (1987). A consent decree has a contractual nature, and, therefore, contract principles of construction apply. *State v. R.J. Reynolds Tabacco Co.*, 151 Wn.App. 775, 783, 211 P.3d 448 (Div. 1, 2009), *review denied*, 168 Wn.2d 1026, 228 P.3d 18 (2109). "The touchstone of contract interpretation is the intention of the parties, which

Washington courts attempt to determine by focusing on the objective manifestations of agreement." *Id.* at 783. The Court must avoid a "strained or forced construction" of the consent decree and avoid interpretations "leading to absurd results." *Eurick v. Pemco Ins. Co.,* 108 Wn.2d 338, 341, 738 P.2d 251 (1987) (*quoting E–Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.,* 106 Wn.2d 901, 907, 726 P.2d 439 (1986)). Instead, the Court should give the consent decree a "practical and reasonable" reading. *Id.* at 341 (quoting *E–Z Loader,* 106 Wn.2d at 907).

Washington continues to follow the objective manifestation theory of contracts. *Hearst Commc'ns, Inc. v. Seattle Times Co.,* 154 Wn.2d 493, 503, 115 P.3d 262 (2005). Under this approach, we attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. *Id.* at 503. The Court should give the words of the contract their ordinary, usual, and popular meaning unless the entirety of the agreement evidences a contrary intent. *Id.* at 504.

The parties, in the Consent Decree, decided to use different language when drafting the three relevant provisions. Alternative language, available but rejected or deleted, is "highly significant" evidence in the interpretation of contractual language. *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 676, 688, 871 P.2d 146 (1994). This Court must interpret the provisions addressing "plaintiff" and "defendant" differently than the relevant provisions addressing "plaintiff, and those claiming under them" and "defendant, and those claiming under them." The parties, when they used the language "plaintiff" and "defendant," were intending only the actual plaintiffs (Veach and Solem) and only the actual defendants (Culp and Cascade Recreation).

Lake Whatcom Railway correctly argued that the motion to substitute parties cited no rule procedure, statute, or other authority for the proposed action. CP 954. The trial court lacked personal jurisdiction over both Veach and Solem and therefore had no power to enter the Order. *Marley v. Labor and Industries*, 125 Wn.2d 533, 543, 886 P.2d 189 (1994).

E. Current Common Law Should be Applied to Both Deeds.

> Law of the case is a doctrine that derives from both RAP 2.5(c)(2) and common law. This multifaceted doctrine means different things in different circumstances, *Lutheran Day Care v. Snohomish County,* 119 Wash.2d 91, 113, 829 P.2d 746(1992), and is often confused with other closely related doctrines, including collateral estoppel, res judicata, and stare decisis. (Internal citations omitted).
>
> In its most common form, the law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.

Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). (Citations omitted). RAP 2.5(c)(2) operates as an exception to the law of the case doctrine. *Id.* at 41-42.

> The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court' a opinion of the law at the time of the later review.

RAP 2.5(c)(2).

"By using the term 'may,' RAP 2.5(c)(2) is written in discretionary, rather than mandatory, terms." *Roberson v. Perez*, 156 Wn.2d at 42; *see also Folsom v. County of Spokane*, 111

Wn.2d 256, 264, 759 P.2d 1196 (1988). "The plain language of the rule affords appellate courts discretion in its application." *Roberson v. Perez*, 156 Wn.2d at 42. Application of the "law of the case" doctrine can be "avoided where there has been an intervening change in controlling precedent between trial and appeal." *Id.*; *see also* RAP 2.5(c)(2) (authorizing appellate courts to review prior decisions on the basis of the law "at the time of the later review.").

> This exception to the law of the case doctrine also comports with federal law. (authorizing appellate courts to review prior decisions on the basis of the law "at the time of the later review."). This exception to the law of the case doctrine also comports with federal law. 1B James Wm. Moore, Moore's Federal Practice ¶ 0.404[1], at II-6-II-7 (2d ed. 1996) ("It is clear, for example, that a decision of the Supreme Court directly in point, irreconcilable with the decision on the first appeal, and rendered in the interim, must be followed on the second appeal, despite the doctrine of the law of the case.") (footnote omitted); cf. *Crane Co. v. American Standard, Inc.,* 603 F.2d 244, 249 (2d Cir.1979) (concluding that law of case did not preclude trial court reconsideration of whether plaintiff had a cause of action when reexamination is appropriate in light of an intervening United States Supreme Court decision).

Id. at 42-43.

"An appellate court's discretion to disregard the law of the case doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal." *Id.* at 43. This Court should exercise its discretion to re-examine the 1901 deed at issue in the *Veach v. Culp* litigation, which has been reopened and consolidated with the pending matter by the Whatcom County Superior Court, in light of the subsequent Washington case law. *Id.* at 44 (concluding that the Court of Appeals acted within its discretion when it declined to invoke the law of the case doctrine and reconsidered the prior Division One opinion in light of intervening, controlling precedent from this court).

In *Ray v. King County*, 120 Wn.App. 564, 86 P.3d 183 (Div. 1, 2004), this Court extensively laid out the analysis, as established by *Brown v. State*, 130 Wn.2d 430, 924 P.2d 908 (1996), for determining whether a railroad was granted a right of way as an easement or fee. The analysis utilized in *Veach v. Culp* was changed by *Brown v. State* (supra) and criticized by this Court in *Ray v. King County*, 120 Wn.App at 578. "In *Veach v. Culp,* the

court construed language in the relevant portion of the deed, but did not consider the full range of factors that the supreme court [sic] in *Brown* later articulated for characterizing the nature of the interest conveyed." *Id.* Factor five of the *Brown* analysis, examines whether the deed contains a reverted clause. *Id.* at 579. "Presumably, the existence of such a clause suggests an easement was intended." *Id.* However, the reversionary interest in the 1901 Deed is in the Railroad. It is indicative of a fee. It reads as follows:

> (T)he said party of the first part, for and in consideration of the sum of Two Hundred and Twenty-five Dollars, . . . do by these presents remise, release and forever quit claim unto said party of the second part, and to its assigns, all that certain lot, piece, or parcel of land situate in Whatcom County . . . to-wit: "A right-of-way one hundred feet wide, being fifty feet on each side of the center line of the B.B. & Eastern R.R. as now located through that portion of lot 6, Section 22, Township 37 North Range 4 East, lying east of Fir St. Blue Canyon and also Lot Seven (7) same Section excepting all rights for road purposes that may have heretofore been conveyed to Whatcom County and particularly reserving all littoral and riparian rights to the said Fred and Mattie A. Zobrist (the grantors).
>
> **Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appurtaining, and the reversion and**

> **reversions, remainder and remainders, rents, issues and profits thereof.**
>
> To have and to hold, all and singular, said premises, together with the appurtenances unto the said party of the second part, and to its assigns forever. (Emphasis added.)

Trial Exhibit 1. A railroad right of way may have separate reversionary interests associated with the easement. *Brown v. State*, 130 Wn.2d at 439. Frequently, "railroad rights of way revert to reversionary interest holders when a railroad company abandons a line." *Lawson v. State*, 107 Wn.2d 444, 449, 730 P.2d 1308 (1986).

> At common law, where a deed is construed to convey a right of way for railroad purposes only, upon abandonment by the railroad of the right of way the land over which the right of way passes reverts to the reversionary interest holder free of the easement. *See generally Roeder Co. v. Burlington Northern, Inc.,* 105 Wash.2d at 571, 716 P.2d 855; *Swan v. O'Leary, supra; Morsbach v. Thurston Cy., supra.* In addition to outright abandonment of a right of way, there may be a change in use of the right of way which is inconsistent with the purpose for which the right of way was granted. Where the particular use of an easement for the purpose for which it was established ceases, the land is discharged of the burden of the easement and right to possession reverts to the original land owner or to that

> landowner's successor in interest. *Roeder Co. v. Burlington Northern, Inc.,* 105 Wash.2d at 571, 716 P.2d 855. *Cf.* 3 J. Sackman, *Nichols on Eminent Domain* § 9.35, at 9-113 (3d rev. ed. 1985) (imposition of a new easement of a nature different from the old one, and wholly inconsistent with it, amounts to abandonment of the old easement).

Id. at 450. Washington law clearly gives effect to reversionary clauses. *Zobrist v. Culp*, 95 Wn.2d 556, 627 P.2d 1308 (1981).

VI - CONCLUSION

Federal law preempts the regulation of railroad operations. The superior court did not have jurisdiction to enter its Interim Order of August 21, 2009 and or Findings of Fact or Conclusions of Law related to the future ongoing maintenance, use, operation or occupation of the Lake Whatcom Railway and said Orders, findings and conclusions should be set aside by this Court.

The trial court improperly applied res judicata to the 1901 and 1931 Deeds where the previous litigation was reopened and consolidating into the underlying matter by the trial court, resulting in no "final" judgment from which res judicata can be applied. Even assuming the reopened and consolidated prior litigation was

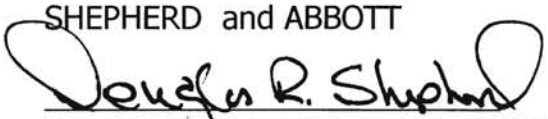
considered to be "final," res judicata does not prevent Lake Whatcom Railway from seeking adjudication of present property rights where the subject matter of the two suits do not contain identical legal questions. If res judicata applies, it should be applied uniformly to both the 1901 and 1931 deeds.

The Wens, Scott and Alar are not third party beneficiaries of the Consent Decree based on inclusion of the specific language, "plaintiffs" which does not provide the Wens, Scott and Alar, with any of the benefits afforded to the plaintiffs in the previous case. The trial court had no authority to substitute the 2008 neighbors for the parties Veach and Solem in cause number 51720.

Lastly, current common law should be applied to both the 1901 and 1931 deeds, giving effect to the reversionary clause in the 1901 deed, which is indicative of a grant of a right of way in fee to the Lake Whatcom Railway.

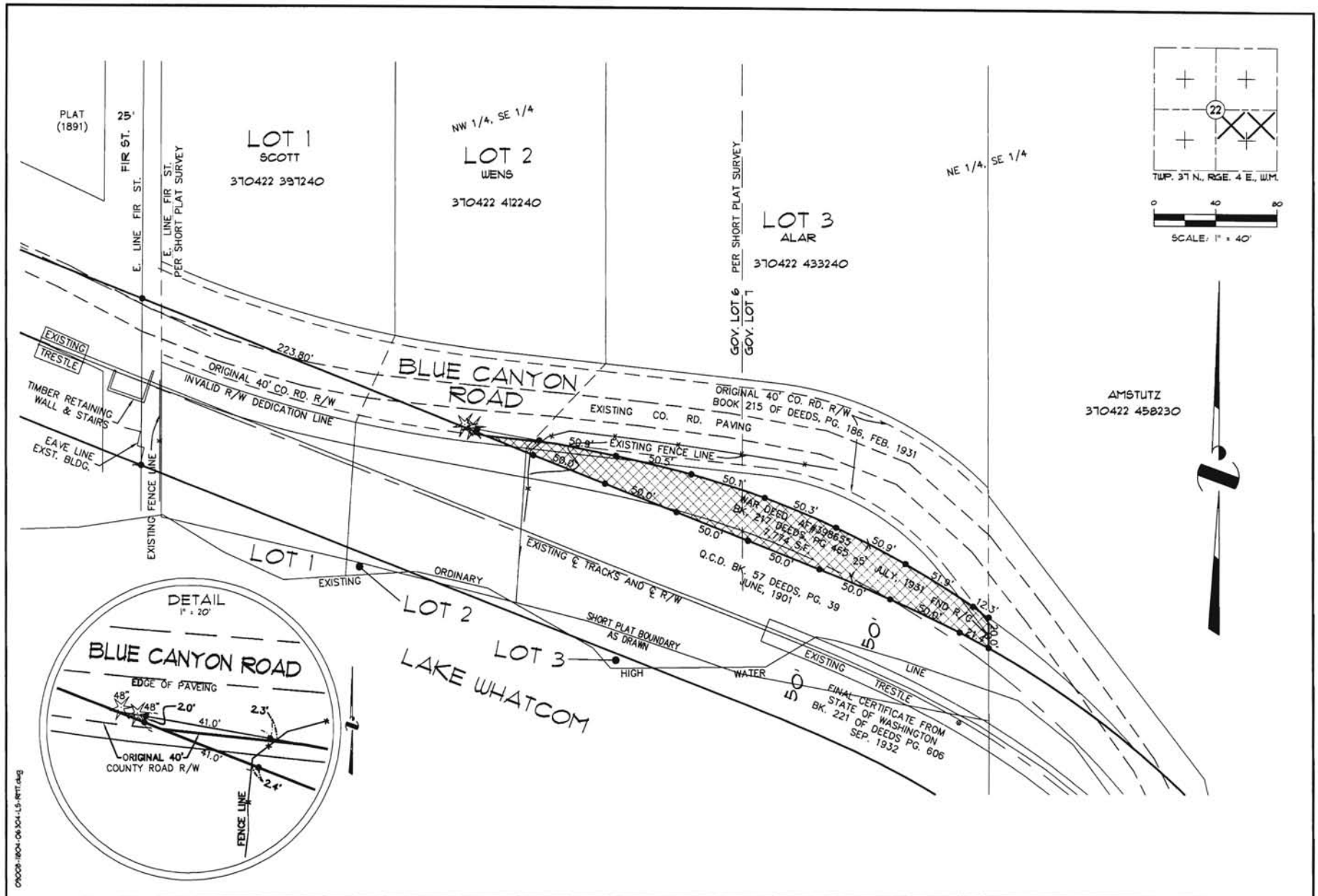
RESPECTFULLY SUBMITTED THIS 4th day of January 2013.

SHEPHERD and ABBOTT



Douglas R. Shepherd, WSBA #9514
Of Attorneys for Lake Whatcom Railway

APPENDIX "A"



AUDITOR'S CERTIFICATE

FILED FOR RECORD THIS ..... DAY OF ..... 20 ...

AT ..... M, AT THE REQUEST OF LARRY STEELE AND ASSOCIATES, LAND SURVEYORS. RECORDED UNDER AUDITOR'S FILE NUMBER

.....

WHATCOM COUNTY AUDITOR'S OFFICE

SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME OR UNDER MY DIRECTION AND IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT AT THE REQUEST OF FRANK CULP, IN JUNE, 2009.

LAWRENCE W. STEELE, P.L.S., CERTIFICATE NO. 13138

LAWRENCE W. STEELE STATE OF WASHINGTON 13138 REGISTERED PROFESSIONAL LAND SURVEYOR

LARRY STEELE & ASSOCIATES LAND SURVEYORS
SUITE 104
1323 LINCOLN ST.
BELLINGHAM, WA 98229
360-676-1350

BEING A PORTION OF THE NW 1/4 OF THE SE 1/4, AND THE NE 1/4 OF THE SE 1/4, SECTION 22, T. 37 N., R. 4 E., W.M. WHATCOM COUNTY, WA.

FBK: 641/26

RECORD OF SURVEY
FOR
LAKE WHATCOM RAILWAY / FRANK CULP

DRWN BY	DATE	JOB NO.
LWS/RMT	02/17/2009 REV. 09/01/2009	09008
CHKD BY	SCALE	SHEET
LWS	1" = 40'	1 OF 1

APPENDIX "B"

FILED

JAN 6 1977

JENNA GRAHAM, COUNTY CLERK
WHATCOM COUNTY, WASHINGTON
By

SUPERIOR COURT OF WASHINGTON FOR WHATCOM COUNTY

RICHARD VEACH and MARY P. VEACH, his wife, and FORREST SOLEM, Plaintiffs, vs. FRANK CULP and JANE DOE CULP, his wife, CASCADE RECREATION, INC., a Washington corporation, et al., Defendants.	NO. 51720 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter having regularly come on for trial before the undersigned Judge sitting without a jury beginning on the 30th day of August, 1976, and the matter having been recessed and resumed for trial on the 22nd day of November, 1976; plaintiffs being represented by their attorney, Sam Peach; defendants Cascade Recreation, Inc. and James Van Noy being represented by James R. Irwin of Shidler, McBroom, Gates & Baldwin and defendants Frank Culp and wife being represented by Lyle L. Iversen of Lycette, Diamond & Sylvester; and the Court having heard the evidence and having considered the briefs and arguments of counsel and being fully advised in the premises, hereby makes the following

FINDINGS OF FACT

I

Plaintiffs are the contract purchasers as tenants in common of the following described property:

> The West 160 feet of Government Lot 7 and the South 5 acres of Government Lot 6, Section 22, Township 37 North, Range 4 East of W.M., EXCEPT the railroad right of way, LESS roads, situate in Whatcom County, Washington. SUBJECT TO easement for road purposes, as contained in deed dated December 15, 1961, recorded December 19, 1961, in Volume 468 of Deeds, Page 550, under Whatcom County Auditor's File No. 922378.

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II

Defendant is a Washington corporation whose name has now been changed to Lake Whatcom Railway Company. Frank Culp is its President.

III

Early in 1972, defendant corporation acquired by quitclaim deed from Burlington Northern, Inc. a portion of its Wickersham-Bellingham branch line extending from Wickersham on the East to a point in Blue Canyon Townsite. The railway line passes through Lots 6 and 7 in the vicinity of the land of plaintiffs. The relationship of the railway right of way to plaintiffs' property is as shown on the drawing which is in evidence as Defendants' Exhibit 1.

IV

Defendant corporation operates a full-size steam engine and train on approximately 4-1/2 miles of track on right of way between the old Blue Canyon townsite and Wickersham.

V

The Lake Whatcom Railway Company maintains regular train operations in the Summer and operates when occasion requires during other times of the year; and does switching in the vicinity of Blue Canyon and maintains a small park-like area for the use of its customers in the vicinity shown on Defendants' Exhibit 1.

VI

The original grantors of both plaintiffs' and defendants' property were Fred and Mattie Zobrist who, in June, 1901, conveyed a strip of land by deed to the Bellingham Bay & Eastern Railroad (the predecessor of Burlington Northern) 100 feet wide, being 50 feet on each side of the center line of the railroad track as then located.

VII

The language of the Deed, which is recited here in full, is:

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"Fred Zobrist et ux. To Bellingham Bay & Eastern R.R. Co. Quitclaim Deed. This Indenture, made this _____ day of June in the year of our Lord, one thousand, nine hundred and one, between Fred Zobrist and Mattie A. Zobrist of Acme, Wash., husband and wife parties of the first part, and Bellingham Bay & Eastern R.R. Co. of a corporation of the State of Washington party of the second part. Witnesseth, that the said party of the first part, for and in consideration of the sum of Two Hundred and Twenty-five Dollars, lawful money of the United States, to them in hand paid, the receipt whereof is hereby acknowledged, do by these presents remise, release and forever quit claim unto said party of the second part, and to its assigns, all that certain lot, piece, or parcel of land situate in Whatcom County, State of Washington, particularly bounded and described as follows, to-wit:

"A right-of-way one hundred feet wide, being fifty feet on each side of the center line of the B.B.& Eastern R.R. as now located through that portion of lot 6, Section 22, Township 37 North Range 4 East, lying east of Fir St. Blue Canyon and also Lot Seven (7) same Section excepting all rights for road purposes that may have heretofore been conveyed to Whatcom County and particularly reserving all littoral and riparian rights to the said Fred and Mattie A. Zobrist.

"Together with the tenements, hereditaments and appurtenances thereunto belonging or in anywise appurtaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

"To have and to hold, all and singular, said premises, together with the appurtenances unto the said party of the second part, and to its assigns forever.

"In Witness Whereof, the said parties of the first part have herewith set their hands and seals the day and year first above written.

"Signed, Sealed and Delivered in Presence of — Fred Zobrist, Mattie A. Zobrist

P. F. Whiting

A. H. Wright

"State of Washington)
) ss.
County of Whatcom)

"I, P. F. Whiting, a Notary Public in and for the State of Washington . . . "

VIII

In 1931, Northern Pacific (predecessor of Burlington Northern) acquired an additional strip of property approximately 25 feet wide by deed from Joseph J. Byron and Minnie E. Byron, husband and wife.

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This strip is measured from the center line of a relocated railroad line along which new tracks were to be laid. The property conveyed by the Byron deed is shown on Defendants' Exhibit 1 lying along a portion of the Northerly edge of the railroad right of way.

IX

A copy of the deed from Byron to the Northern Pacific is in evidence as Defendants' Exhibit 10. That deed is in fee language and the use of the property is not limited to railway purposes, nor does it mention right of way.

X

In 1972, operators of Blue Canyon Foundation entered into an agreement with Cascade Recreation, Inc. (now Lake Whatcom Railway Company) whereby its residents were allowed some privileges on the property of the railroad in turn for watching trains and equipment within sight of the Blue Canyon Foundation's main building. This arrangement proved unsatisfactory and as a result the agreement was terminated by Cascade Recreation, Inc. effective March 1, 1974. A copy of the agreement is in evidence as a part of Plaintiffs' Exhibit 29.

XI

The deed from the Zobrists to Bellingham Bay & Eastern Railroad, in its habendum clause, stated that it granted "all that certain lot, piece,or parcel of land situate in Whatcom County, State of Washington, particularly bounded and described as follows, to-wit". Thereafter follows a description of the property with reference to the center line of the B.B. & Eastern R.R. Company as then located. The description then is made to include "the reversion and reversions, remainder and remainders, rents, issues and profits thereof."

XII

The language of the Zobrist deed contains no reversionary or defeasance clause.

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XIII

The Zobrist deed provides:

> " . . . and particularly reserving all littoral and riparian rights to the said Fred and Mattie A. Zobrist."

XIV

The boundary of the right of way conveyed left to the Zobrists a strip of land lying between the Southerly boundary of the railroad right of way and Lake Whatcom, which strip of land is now possessed by plaintiffs, and any riparian rights are appurtenant to plaintiffs' land rather than the railroad right of way.

XV

Immediately to the East of plaintiffs' strip abutting the lake, where the railroad's right of way does abut on the lake, the Northern Pacific acquired in 1932 from the State of Washington the shorelands by condemnation decree, copy of which is in evidence as Defendants' Exhibit 12, and defendant corporation acquired those shorelands along with the other property deeded to it by Burlington Northern, and there remain no riparian rights incident to the Zobrist conveyance.

XVI

In 1901, at the time of the Zobrist deed, the Bellingham Bay & Eastern Railroad was a line approximately 23 miles in length and was used to haul coal. In 1903, the Bellingham Bay & Eastern was sold to the Northern Pacific Railway Company.

XVII

In 1970, the Northern Pacific Railway Company was merged into the Burlington Northern Railway Company which in turn sold to defendant.

XVIII

Prior to the time that Bellingham Bay & Eastern Railroad Company acquired the property from the Zobrists, the latter had operated a landing and a small hotel on the lakefront near the

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Easterly boundary of Lot 7 on which they had operated a pack train to transship goods arriving by boat on Lake Whatcom. The Bellingham Bay & Eastern acquired the property where this operation was located and put the Zobrists out of business.

XIX

The amount paid to the Zobrists was $225 and the amount of land involved in the transaction was approximately 5.22 acres, making a price per acre of $43.10, which was a substantial payment by 1901 values and was not below amounts then being paid for other comparable property being purchased in fee.

XX

The sale by the Zobrists to Bellingham Bay & Eastern Railroad was a sale of land and not a mere easement.

XXI

Subsequent to the sale of property by the Zobrists to Bellingham Bay & Eastern, they conveyed other property which initiated the chain of title of the property now held by plaintiffs, and in each of the conveyances the railroad right of way was expressly excepted, and plaintiff has no record title to any of the property within the boundaries of the railroad right of way nor any right to any reversion of any part of that property, nor has any easement over any part of the railroad right of way in favor of plaintiffs been established.

XXII

In the Spring of 1976, defendant corporation contracted with James Van Noy, d/b/a Bonny Fence Company, to construct a cyclone-type fence along the Northerly edge of its right of way. The fence is located entirely on defendant corporation's property and, for the most part, on the land acquired from Byron.

XXIII

Persons from plaintiffs' tenant, Blue Canyon Foundation, have trespassed upon the property of defendant corporation and have

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been observed going under and over cars and creating conditions hazardous to themselves and the railroad, and unless restrained will continue to do so.

XXIV

Plaintiffs' predecessors or tenants have placed on the railroad right of way a bathhouse, an outhouse and a pumphouse which they should be entitled to remove.

XXV

Fir Street was a dedicated street in the plat of Blue Canyon and has been treated as a railroad crossing by plaintiffs, but that street was vacated by action of the County Commissioners and is no longer available as access to plaintiffs' waterfront strip of land.

XXVI

Persons claiming under plaintiffs have in the past interfered and unless restrained in the future may interfere with defendant corporation's operations and harass its employees and customers.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW

I

Defendant corporation is the owner in fee simple of the land embraced within its right of way, being fifty feet on each side of the original line of the Bellingham Bay & Eastern Railway and 25 feet from the center line of the projected relocation of the Northern Pacific Railway Company as recited in the Byron deed.

II

Plaintiffs have no easements, reversions or rights to the land within the boundaries of defendant corporation's right of way.

III

Plaintiff's Complaint should be dismissed with prejudice.

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IV

Defendants are entitled to an injunction permanently restraining plaintiffs or persons claiming under them ~~from going upon the property of Lake Whatcom Railway Company without the permission of defendant corporation or~~ from interfering with the operations of Lake Whatcom Railway Company or from harassing its employees and customers except to cross the right of way to reach plaintiffs' land south of the right of way at a place and manner where the operations of defendant corporation and the use of its right of way will not be endangered or interfered with.

V

Plaintiffs should be entitled to remove from the railroad premises the bathhouse, outhouse and pumphouse and to go upon the railroad premises for that purpose, PROVIDED they accomplish such removal within ninety (90) days from the entry of judgment herein.

VI

Defendants should recover their taxable costs herein.

DATED this 6th day of ~~December~~ January, 1976.

Byron L. Sudbury
JUDGE

Presented by:

Lyle L. Iversen

Lyle L. Iversen
of LYCETTE, DIAMOND & SYLVESTER
Attorneys for Defendants

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LYCETTE, DIAMOND & SYLVESTER
HOGE BUILDING, SEATTLE 98104 623-1881

State of Washington,)
County of Whatcom) SS.

I, N.F. Jackson, Jr., County Clerk of Whatcom county and ex-officio Clerk of the Superior Court of the State of Washington, for the County of Whatcom, do hereby certify that the foregoing instrument is a true and correct copy of the original, consisting of EIGHT pages, now on file in my office, and that the undersigned has the custody thereof.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court at my office at Bellingham this 24th day of OCTOBER 2008.

N.F Jackson, Jr., County Clerk

By Becky Moulton
Deputy Clerk

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

LAKE WHATCOM RAILWAY COMPANY, a Washington Corporation
Plaintiff/Appellant,

vs.

KARL ALAR and JEANININE ALAR, a marital community composed thereof; and all persons claiming any right, title or interest through them, and STEVEN M. SCOTT and JANE DOE SCOTT, husband and wife, and the marital community composed thereof; and all persons claiming any right, title or interest through them
Defendants/Respondents.
RICHARD VEACH and MARY P. VEACH, his wife, and FORREST SOLEM,
Plaintiffs,

vs.

FRANK CULP and JANE DOE CULP, his wife, CASCADE RECREATION, INC., a Washington corporation, et al.,
Defendants.

Case No. 68913-4

Whatcom County Superior Court Case No. 08-2-02034-3 f/k/a No. 51720

DECLARATION OF SERVICE

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I, Heather Shepherd, declare that on January 4, 2013, I caused to be served a copy of the following document: **Appellant LWRW's Opening Brief;** and a copy of this **Declaration of Service** in the above matter, on the following person, at the following address, in the manner described:

Douglas Robertson, Esq.
Belcher Swanson Law Firm, PLLC
900 Dupont Street
Bellingham, WA 98225

(X) U.S. Mail
( ) Express Mail
( ) Fax
( ) E-Mail
( ) Messenger Service
( ) Hand Delivery

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of January 2013.

Heather Shepherd

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