

NO. 296652

PEND OREILLE COUNTY CAUSE NO. 10-2-00080-8

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

MICHAEL R. HANSON and KAREN M. HANSON, Trustees of the
HANSON LIVING TRUST

Appellants

v.

DIAMOND LAND COMPANY, LLC, et al.

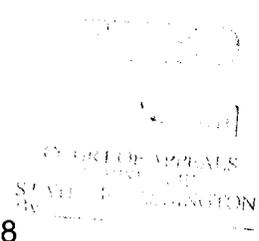
Respondents

**RESPONDENTS TULLY, RICHEAL, AGUIRRE, AND SPITZER'S
BRIEF**

George R. Guinn, WSBA No. 19573
605 East Holland Avenue, Ste 113
Spokane WA 99218-1946
Phone: (509) 464-2410
Fax: (509) 464-2412
Attorneys for Respondents
Tully, Richeal, and Aguirre

J. Gregory Lockwood, WSBA No. 20629
Law Office J. Gregory Lockwood, P.L.L.C.
522 West Riverside Avenue, Suite 420
Spokane, Washington 99201
Phone: (509) 624-8200
Fax: (509) 623-1491
Attorney for Respondents Spitzer

ORIGINAL



NO. 296652

PEND OREILLE COUNTY CAUSE NO. 10-2-00080-8

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

MICHAEL R. HANSON and KAREN M. HANSON, Trustees of the
HANSON LIVING TRUST

Appellants

v.

DIAMOND LAND COMPANY, LLC, et al.

Respondents

**RESPONDENTS TULLY, RICHEAL, AGUIRRE, AND SPITZER'S
BRIEF**

George R. Guinn, WSBA No. 19573
605 East Holland Avenue, Ste 113
Spokane WA 99218-1946
Phone: (509) 464-2410
Fax: (509) 464-2412
Attorneys for Respondents
Tully, Richeal, and Aguirre

J. Gregory Lockwood, WSBA No. 20629
Law Office J. Gregory Lockwood, P.L.L.C.
522 West Riverside Avenue, Suite 420
Spokane, Washington 99201
Phone: (509) 624-8200
Fax: (509) 623-1491
Attorney for Respondents Spitzer

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. INTRODUCTION.....2

II. STATEMENT OF THE CASE.....2

III. STANDARD OF REVIEW.....6

IV. ALLEGED ASSIGNMENT OF ERROR.....6

V. BONA FIDE PURCHASER DOCTRINE..... 15

VI. CONCLUSION 16

A. Appellant’s first assignment of error alleged: DOES THE
CONSENT OF A CONTRACT VENDOR TO A
SUBDIVISION PLAT CREATE ANY BENEFIT TO
OTHERS IN THE ABSENCE OF A DEDICATION? 6

B. Appellant’s second assignment of error alleged: DOES A
SUBDIVISION PLAT CREATEING A SEPARATE
PARCEL, CONSENTED TO BY A CONTRACT
VENDOR, CREATE ANY BENEFIT TO A LOT OWNER
IN A SEPARATE DIVISION OF PROPERTY?..... 11

C. Appellant’s third assignment of error alleged: DOES
THE CONSENT OF A CONTRACT VENDOR TO A
SUBDIVISION PLAT, CONVEY AN INTEREST IN A
LOT, TO OTHERS OWNING LOTS IN A SEPARATE
DIVISION OF PROPERTY?..... 12

D. Appellant’s fourth assignment of error alleged: DOES
THE CONSENT OF A CONTRACT VENDOR TO A
SUBDIVISION PLAT, PROVIDE FOR A RELEASE OF
SECURITY GIVEN UNDER TERMS OF A REAL
ESTATE CONTRACT? 14

TABLE OF AUTHORITIES

Cases

<i>Bordeaux, Inc. v. Am. Safety Ins. Co.</i> , 145 Wn.App 687, 186 P.3d 1188 (2008).....	6
<i>M.K.K.I., Inc. v. Krueger</i> , 135 Wn.App. 647, 145 P.3d 411 (2006)	14
<i>Rainier Ave. Corp. v. Seattle</i> , 80 Wash.2d 362, 494 P.2d 996, cert. denied,409 U.S. 983, 93 S.Ct. 321, 34 L.Ed.2d 247 (1972)	11
<i>Roeder Co. v. Burlington Northern, Inc.</i> , 105 Wash.2d 269, 714 P.2D 1170 (1986).....	10
<i>Tomlinson v. Clarke</i> , 118 Wn.2d 498, 825 P.2d 706 (1992).....	17

Statutes

RCW 58.17.165.....	10, 11, 15
--------------------	------------

I. INTRODUCTION

COME NOW, Respondents, Robert and Pamela Tully, husband and wife, Glenn and Linda Richeal, husband and wife, James and Suzette Aguirre husband and wife by and through their attorney of record, George R. Guinn, and Kyle and Tamie Spitzer husband and wife by and through their attorney of record, J. Gregory Lockwood, with their Respondents' Brief in response to Appellant's Brief, pursuant to RAP Rule 10.3(b).

II. STATEMENT OF THE CASE

On April 17, 2006, Hanson Living Trust (hereinafter "Hanson") sold Lots 1-11 of Block "C" of Elu Beach, and Hanson Division Lot 2, Pend Oreille County, Washington, to Diamond Land Company, LLC (hereinafter "Diamond"), including Lot 6, which is designated on the plat as a "Community Access" lot for the above twelve (12) lots and Michael and Karen Hanson in name only. (CP 340-351)

The terms of sale required parcel releases on Lot 1 in Block C of Elu Beach (hereinafter "Hanson House") and Lots 1 – 5 of Diamond Beach (CP 341-342) and did not require a lien release on Lots 2-11 of Block C of Elu Beach or Lot 6 of Diamond Beach Plat. (CP 340-343)

Hanson not only sold Lots 1-11 of Block "C" of Elu Beach, and Hanson Division Lot 2 to Diamond Land Co., LLC, with the intent to create a common access lot of Lot 6 for those lots only, but Hanson also participated in the creation of the plat for those twelve (12) lots, showing Lot 6 as a "community access lot" for the benefit of only the lots in that plat, Lots 1-11 of Block "C" of Elu Beach, and Hanson Division Lot 2, and Michael and Karen Hanson in name only. (CP 353, 444)

On April 25, 2006, Respondents Tully purchased Lot 11, Block C, Elu Beach, Pend Oreille County, Washington, together with 1/27 interest in common area also known as Lot 6 of Diamond Beach, from seller, Diamond Land Company, LLC. The Tullys were issued a Statutory Warranty Deed from Diamond Land Company LLC. (CP 478-480)

On January 26, 2007, Respondents Richeal purchased Lot 10, Block C, Elu Beach, Pend Oreille County, Washington, together with 1/27 interest in common area also known as Lot 6 of Diamond Beach, from seller, Diamond Land Company, LLC. The Richeals were issued a Statutory Warranty Deed from Diamond Land Company LLC, and reissued a corrected deed on June 10, 2009, including their 1/27 interest in Common Lot 6 of Diamond Beach.

(CP 484, 485, 487, 488)

On July 14, 2009, the Richeals gifted fifty percent (50%) interest in Lot 10 of Elu Beach and 50% of their interest in Lot 6 of Diamond Beach to their daughter and her husband, James and Suzette Aguirre, through Quit Claim Deed. (CP 482)

On August 18, 2009, Kyle and Tamie Spitzer purchased Lot 9, Block C, of Elu Beach together with 1/27 interest in common area also know as Lot 6 of Diamond Beach from sellers George and Geraldine Guinn and were issued a Statutory Warranty Deed. (CP 490, 491, 493)

Respondents/Defendants Tully, Richeal, Aguirre and Spitzer have established and participated in a homeowner's association (HOA) to improve and maintain the common area Lot 6. The HOA has been in operation for over four (4) years. Several thousand dollars have been spent on improvements care and upkeep on Lot 6 by the owners of Lots 1-11 of Block "C" of Elu Beach, and Hanson Division Lot 2. (CP 674-687)

On June 8, 2009, Hanson acquired property from Diamond Land (not including any of the twelve (12) lots with interest in Lot 6), plus 15/27 interest in common area Lot 6 of Diamond Beach by Quit Claim Deed, signed on 10/31/07 and recorded at the Auditor's

office on 6/8/09. (CP 557, 558)

Now, Hanson claims that the entire community access Lot 6 belongs to Hanson. (CP 337)

Hanson had a litigation guarantee issued by Patricia Vreeland of Land Title Company, Newport, WA. (CP 435). In her deposition (CP 291-302, 255–281), Vreeland refers to the “dedication” of Lot 6 to the twelve (12) lots by Plat of Diamond Beach. (CP 273). Through her deposition she admitted that she missed quitclaim deeds on the property which deeds create a cloud on the title. (CP 261, 270, 293, 295, 296). Therefore her litigation guarantee is inaccurate and flawed.

Hanson does not own any of the twelve (12) lots listed on the Diamond Beach Plat with reference to the Lot 6 designation as a common access. Hanson participated in the drafting of the plat and signed approval of the Plat and acknowledged Lot 6 as a community access lot for the twelve (12) platted lots and Mike and Karen Hanson in name only. (CP 353)

The owners of the twelve (12) lots have paid the property taxes on their own lots plus 1/12th of the annual property taxes on Lot 6. (CP 286, 299). Hanson has not paid any property taxes on Lot 6, nor exhibited any ownership interest or legitimate claim for

Lot 6 prior to filing the underlying lawsuit.

Other purchasers of the remaining lots referred to on the dedication of Lot 6, Diamond Beach Plat have not been notified of this quiet title action although they must be notified pursuant to RCW 7.28.010. Others may have made settlement negotiations with the appellant. Any settlement with other lot owners is invalid because Hanson cannot sell any ownership interest in Lot 6 since he does not have any ownership interest in Lot 6.

On January 6, 2011, the Honorable Allen C. Nielson granted summary judgment in favor of Respondents Tully, Richeal, Aguirre, and Spitzer, thereby dismissing Hanson's entire lawsuit. Appellants Hanson are now appealing that ruling.

III. STANDARD OF REVIEW

The standard of review of summary judgment orders are de novo with the court engaged in the same inquiry as the trial court. *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn.App 687, 693-94, 186 P.3d 1188 (2008).

IV. ALLEGED ASSIGNMENT OF ERROR

A. Appellant's first assignment of error alleged:

DOES THE CONSENT OF A CONTRACT VENDOR TO A SUBDIVISION PLAT CREATE ANY BENEFIT TO OTHERS IN THE ABSENCE OF A DEDICATION?

The answer is yes, by donation or grant plainly stated on the face of the plat. The Appellant is the original contract vender in this case selling under contract to Diamond Land Company, and as admitted in their brief, had consented to the final “Diamond Beach” plat as recorded.

The appellant has focused on “what is a dedication” and “was there a valid dedication in this case”. The trial court examined the “Diamond Beach” plat and found that on the face of the plat there was a specific reference to “LOT 6” of the plat. The plat stated on the face of the plat, in pertinent part as follows:

**LOT 6
Designated as a Community Access Lot only for
“Hanson Division – Lot 2” “Replat of Lots 1-4 Block
“C” of Elu Beach”, Lots 5-11 of Block “C” of Elu
Beach and Mike and Karen Hanson.**

It must be pointed out that the appellant refers to the above designation as a “Surveyors Note”; however, the above is clearly not a surveyor’s note as it was not designated as such nor does it fall under the “Surveyors’ Note” heading.

The trial court interpreted this language on the face of the plat pursuant to RCW 58.17.165 which states:

Every final plat or short plat of a subdivision or short subdivision filed for record must contain a certificate giving a full and correct description of the lands divided as they appear on the plat or short plat, including a statement that the subdivision or short subdivision has been made with the free consent and in accordance with the desires of the owner or owners.

If the plat or short plat is subject to a dedication, the certificate or a separate written instrument shall contain the dedication of all streets and other areas to the public, and individual or individuals, religious society or societies or to any corporation, public or private as shown on the plat or short plat and a waiver of all claims for damages against any governmental authority which may be occasioned to the adjacent land by the established construction, drainage and maintenance of said road. Said certificate or instrument of dedication shall be signed and acknowledged before a notary public by all parties having any ownership interest in the lands subdivided and recorded as part of the final plat.

Every plat and short plat containing a dedication filed for record must be accompanied by a title report confirming that the title of the lands as described and shown on said plat is in the name of the owners signing the certificate or instrument of dedication.

An offer of dedication may include a waiver of right of direct access to any street from any property, and if the dedication is accepted, any such waiver is effective. Such waiver may be required by local authorities as a condition of approval. Roads not dedicated to the public must be clearly marked on the face of the plat. **Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid. (Emphasis Added)**

The trial court found that the designation on the face of the plat acted as a quit claim deed pursuant to RCW 58.17.165 and granted each lot designated therein, an interest in "LOT 6" as a Community Access. "LOT 6" serves as the Community Access to Diamond Lake for each of the lots designated on the plat, thus allowing all the lots to be sold and purchased as lake access lots.

The pertinent part thereof is RCW 58.17.165 highlighted above which clearly states the legal effect of the designation. The plat acts as a "Quit Claim" deed of "LOT 6" as a "Community Access", vesting these interests in the identified parcels.

The appellants have focused upon insufficient documents to support a public access; however, there was not a designation of public access for "LOT 6" on the "Diamond Beach" plat. Further, there was no intention for "LOT 6" in the "Diamond Beach" to be a public access. The use of "LOT 6" was specifically limited by the dedicator in the designation on the plat.

The trial court used the language "dedication" but also indicated that it was limited only to the parties identified on the plat. Specifically, **"Hanson Division – Lot 2 " "Replat of Lots 1-4 Block "C" of Elu Beach", Lots 5-11 of Block "C" of Elu Beach and Mike and Karen Hanson (in name only).**

It is well settled in the Washington courts that the intention of the dedicator controls in construing a plat. *Roeder Co. v. Burlington Northern, Inc.*, 105 Wash.2d 269, 273, 714 P.2D 1170 (1986). Further, the intention of the dedicator is to be determined from the plat itself, where possible, as that furnishes the best evidence of the intent. *Rainier Ave. Corp. v. Seattle*, 80 Wash.2d 362, 366, 494 P.2d 996, cert. denied, 409 U.S. 983, 93 S.Ct. 321, 34 L.Ed.2d 247 (1972).

The language on the face of the “Diamond Beach” plat is clear and unambiguous as to the designation of “LOT 6”. This designation which was specifically approved by the appellants in the Lien holders Certificate, located on the face of the plat states:

LIENHOLDERS CERTIFICATE

THE FOLLOWING BENEFICIARY OF A DEED OF TRUST ON THE PROPERTY DESCRIBED BY THE FOREGOING OWNER’S CERTIFICATE HEREBY AGREES TO THE SUBDIVISION AS SHOWN HEREON.

The subdivision as shown on the plat indicated that “LOT 6” was to be a “Community Access” lot only for the designated beneficiaries.

The lien holders gave their approval to the subdivision as set forth on the face of the “Diamond Beach” plat. The lien holders and

signors on the plat are the appellants Michael R. Hanson and Karen M. Hanson as trustees for the "Hanson Living Trust". The effect of the plat designation vested an undivided interest in "LOT 6" to each lot so designated thereon.

Therefore the appellants had no further interest in "LOT 6" upon the approval of the final "Diamond Beach" plat by Pend Oreille County. The trial Court was correct in granting defendants motion for Summary Judgment.

B. Appellant's second assignment of error alleged:

DOES A SUBDIVISION PLAT CREATING A SEPARATE PARCEL, CONSENTED TO BY A CONTRACT VENDOR, CREATE ANY BENEFIT TO A LOT OWNER IN A SEPARATE DIVISION OF PROPERTY?

This issue was not raised with the trial court. However, the answer is yes, by donation or grant plainly stated on the face of the plat.

This is a disingenuous argument that appellant Michael Hanson has indicted in his declaration filed September 9, 2010 (CP 508) that it was their intention by way of a boundary line adjustment to redesign their residence as part of LOT 1 Elu Beach and LOT A1. LOT A1 was part of the Replat of LOTS 1-4 of Block "C" of Elu Beach.

This Replat is referenced on the face of the “Diamond Beach” plat. The “Diamond Beach” Plat specifically references **“Hanson Division – Lot 2” “Replat of Lots 1-4 Block “C” of Elu Beach”, Lots 5-11 of Block “C” of Elu Beach**. It is clear that “Diamond Beach” part of a common scheme for this development by the appellants.

Properties were bought and sold with beach access. Appellants released interests in properties with beach access (LOT 6). Now on appeal they are arguing that no lot outside of the “Diamond Beach” plat could be granted an interest in “LOT 6”.

This being said, the Appellants have shown no authority that a donation or grant on the face of a plat had to be limited only to lots of that specific plat.

It must be noted that Mike and Karen Hanson, the appellants, were likewise granted access to Diamond Lake through “LOT 6” of the “Diamond Beach” plat.

As argued above, the appellants’ argument lacks merit.

C. Appellant’s third assignment of error alleged:

DOES THE CONSENT OF A CONTRACT VENDOR TO A SUBDIVISION PLAT, CONVEY AN INTEREST IN A LOT, TO OTHERS OWNING LOTS IN A SEPARATE DIVISION OF PROPERTY?

The answer is yes under the facts and circumstances that exist in this case. The Appellant is the contract vendor in this case and as admitted had consented to the final "Diamond Beach" plat as recorded.

The Appellant argues that no conveyance of an interest in "LOT 6" has occurred. The Appellant has ignored and failed to address the effect of the donation or grant on the face of the final plat.

The Appellant does not attempt to explain the statutory effect of RCW 58.17.165 which requires the designation of "LOT 6" on the face of the final "Diamond Beach" plat is to be "**considered to all intents and purposes, as a quitclaim deed**". This is a conveyance. The appellants agreed to the subdivision as platted including the designation of "LOT 6".

The intent of the "Diamond Beach" plat was to grant the designated lots access to "LOT 6" as a community access to Diamond Lake. This court has decided a case which is very close on its facts to this case. In *M.K.K.I., Inc. v. Krueger*, 135 Wn.App. 647, 145 P.3d 411 (2006), a landowner attempted to extinguish easements that were created and conveyed in a short plat, but the land owner failed to comply with the requirements for amending a

short plat pursuant to RCW 58.17 or the Yakima County Code. This court held that the easements could not be extinguished without formally amending the short plat.

The Appellant has never amended nor attempted to amend the “Diamond Beach” plat which is controlling which supports the trial court’s ruling in this matter.

D. Appellant’s fourth assignment of error alleged:

DOES THE CONSENT OF A CONTRACT VENDOR TO A SUBDIVISION PLAT, PROVIDE FOR A RELEASE OF SECURITY GIVEN UNDER TERMS OF A REAL ESTATE CONTRACT?

The answer is yes under the facts and circumstances that exist in this case. The Appellant is the original contract vender in this case and as admitted had consented to the final “Diamond Beach” plat as recorded. No release of interest was ever required by the contract.

It was the intent of the Appellant in the “Diamond Beach” plat to grant access to a specific and limited number of lots to the “Community Access” lot, “LOT 6”. By doing so this increased the value of the lots in which the Appellant had an interest. This grant under the plat did not affect the security interests of the Appellant as a deed release was required when lots were sold by Diamond Land Company. Simply, a interest in “LOT 6” was appurtenant to

“Hanson Division – Lot 2” “Replat of Lots 1-4 Block “C” of Elu Beach”, Lots 5-11 of Block “C” of Elu Beach and Mike and Karen Hanson (in name only).

The Appellants retained their security interest in all the lots until they were sold by Diamond Land Company, including the appurtenant interests of “LOT6”.

V. BONA FIDE PURCHASER DOCTRINE. The bona fide purchaser doctrine provides that a good faith purchaser for value, who is without actual or constructive notice of another’s interest in the property purchased, has the superior interest in the property.

In the instant case, the Defendants herein, Spitzer, Tully, Richeal (and Aguirre), purchased separate lots, together with 1/27 interest in common area also known as Lot 6 of Diamond Beach, from seller, Diamond Land Company, LLC. Each Defendant was issued a Statutory Warranty Deed from Diamond Land Company, LLC, through Pend Oreille County Title, Attorney Mike McLaughlin’s office.

The bona fide purchaser doctrine is strongly endorsed by Washington courts. The key case for this doctrine is *Tomlinson v. Clarke*, 118 Wn.2d 498, 500, 825 P.2d 706 (1992), cited by both

Plaintiffs and Defendants in this matter.

The *Tomlinson* court defines the doctrine as follows:

That doctrine provides that a good faith purchaser for value, who is without actual or constructive notice of another's interest in the property purchased, has the superior interest in the property.

Defendants Spitzer, Tully and Richeal purchased Lots 9, 10, and 11 (respectively) from Diamond Land Company, LLC without actual or constructive notice of any claim of interest in their respective lots or the common access Lot 6. These innocent purchasers without notice of claim are bona fide purchasers for value and without notice.

Defendants Aguirre purchased from the Richeals without any claim and are therefore bona fide purchasers for value without notice also.

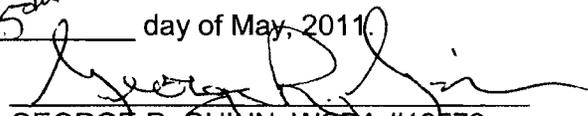
Defendants Spitzer, Tully, Richeal and Aguirre have a superior claim of ownership to the Plaintiffs' claim under the Bona Fide Purchaser's Doctrine.

VI. CONCLUSION

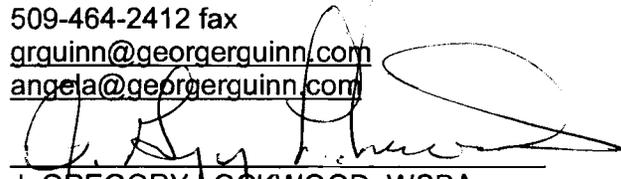
Granting Diamond Lake access, through "LOT 6" of "Diamond Beach" was simply a marketing scheme by the Appellants and Diamond Land Company. The intent is clearly and

unambiguously stated on the face of the "Diamond Beach" plat. Appellants are simply attempting to gain access to "LOT 6" in hopes of further development of property adjacent to the Diamond Beach subdivision. The trial court correctly ruled on the effect of the designation of "LOT 6" in the final plat of "Diamond Beach". It is respectfully requested that the court up hold the trial court's decision.

Dated this 25th day of May, 2011.


GEORGE R. GUINN, WSBA #19573
Attorney for Respondents
Tully, Richeal and Aguirre

George R. Guinn, P.S.
605 East Holland Avenue, Suite 113
Spokane, WA 99218
509-464-2410
509-464-2412 fax
grguinn@georgerguinn.com
angela@georgerguinn.com


J. GREGORY LOCKWOOD, WSBA
#20629
Attorney for Respondents Spitzer

Law Office J. Gregory Lockwood, P.L.L.C.
522 West Riverside Avenue, Suite 420
Spokane, Washington 99201
(509) 624-8200
(509) 623-1491 fax
jgregorylockwood@hotmail.com

STATE OF WASHINGTON)
)ss
County of Spokane)

The undersigned, being first duly sworn on oath, deposes and says:

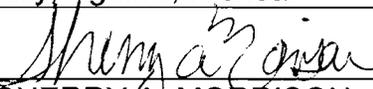
I am competent to be a witness in the above entitled matter; on the 26th day of May, 2011, I mailed via first class mail, with postage prepaid thereon a copy of the forgoing addressed to the below named as follows:

John Montgomery
Waldo Schweda & Montgomery, PS
2206 North Pines Road
Spokane WA 99206

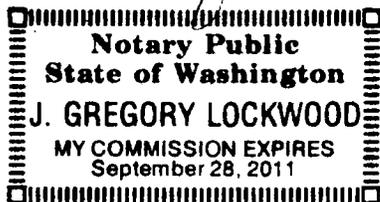
Attorney for Appellants

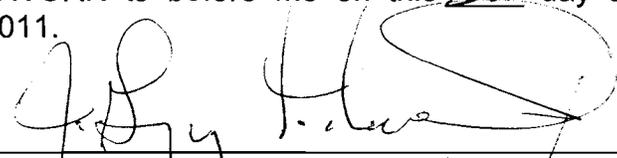
George Guinn
605 East Holland Ave., Ste. 113
Spokane, WA 99218-1246

Attorney for Respondents Tully, Aguirre, Richeal


SHERRY A. MORRISON

SUBSCRIBED AND SWORN to before me on this 26th day of May, 2011.


Notary Public
State of Washington
J. GREGORY LOCKWOOD
MY COMMISSION EXPIRES
September 28, 2011


Notary Public in and for the State of Washington, residing at Spokane.
My Commission Expires : 9/28/11