FILED

JUL 06 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 301290-III

MIKE WALCH, et al.,

Appellants

v.

KERRY A. CLARK, et al.,

Respondents.

RESPONDENT CLARKS' BRIEF

Douglas W. Nicholson, WSBA #24854
Lathrop, Winbauer, Harrel,
Slothower & Denison, LLP
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Ellensburg WA 98926
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I. INTRODUCTION

The trial court correctly dismissed Walches' statutory easement by necessity claim because (1) Walches have existing physical access to their property; therefore, it is not "landlocked"; (2) although Walches claim the existing access is inadequate to accommodate their 165'-long super-load lowboys (thus creating the alleged necessity for a second access), there is no guarantee that Walches' intended use of their presently vacant property would ever be allowed by the City of Cle Elum (thus, their claim is speculative, or at best premature); (3) as a matter of law, easements by necessity are disfavored; they are not intended to allow a landowner to use his land for every conceivable future development purpose, especially when an existing access allows the landowner to make beneficial use of the property; and (4) although the existing access to Walches' property requires them to traverse the BNSF railroad crossing over Owens Road, for which they do not have a permanent easement, there is no evidence that Walches, their predecessors, or anyone else has been denied access over the railroad crossing (again, the claim is either speculative or premature). CP at 250-51, 447-49, 451-52, and 463-64.[1]

---

[1] The trial court's final judgment in favor of the Clarks (CP at 461-65) incorporated by reference the court's prior Memorandum Decision dismissing Walches' prescriptive easement claims (CP 987-994), the court's Memorandum Decision following trial (CP 246-251), and its Findings of Fact and Conclusions of Law (CP at 445-454). See CP at 463.

Sound policy reasons also exist for upholding the trial court's decision. Because it involves taking the land of another, Washington's private condemnation statute is disfavored and narrowly construed; yet Walches are asking this Court to give it an impermissibly broad application. Under Walches' theory of the case, a private developer could purchase land that could be beneficially used to develop one residence, but would require a second 60'-wide access easement to develop a subdivision. Despite knowing the existing access limitations, the developer could nonetheless buy the land, and then invoke the private condemnation statute to condemn a second access over a neighbor's land.

Moreover, assume for a moment that this Court were to reverse the trial court's decision, and grant Walches an easement over the Clark and Folkman properties; and assume further that, once the Walches have obtained this second access to their property, they then decide to make a different use of their property, one that does not require access by super-load lowboys. Since it was the purported need to have adequate access for their super-load lowboys that gave rise to the Walches' claim of an easement by necessity, does this mean that the easement now disappears, and the land taken reverts back to the Clarks and Folkmans, because the "necessity" no longer exists?

Regarding Walches' claim that they are "landlocked" because they do not have a permanent easement to cross the railroad right-of-way over Owens Road, Walches are in no different position than all other similarly situated property owners. Under Walches' theory, all of these property owners would be able to claim an easement by necessity over the Clark and Folkman properties. On a larger, state-wide scale, any landowner whose only means of access requires crossing a railroad right-of-way could condemn an easement by necessity over a neighbor's property.

In short, accepting Walches' broad construction of Washington's private condemnation statute could potentially open up a Pandora's box of litigation by developers and private landowners.

II. RESTATEMENT OF THE CASE

Walches have existing access to their property from the east, over Owens and Dalle Roads. CP at 19, 247, 447; Ex. 101.[2] The Owens Road right-of-way is approximately 32' wide. RP (5/10/11) at 125. The existing access is suitable for virtually all commercial and passenger vehicles, other than the

[2] For reference, the 2010 Bailey survey of the ZBK Short Plat depicting portions of Dalle and Owens Roads (Ex. 54) is attached at Appendix 1 hereto; photographs of Owens and Dalle Roads (Ex. 101) are attached at Appendix 2 hereto; and an aerial photograph of the Clark, Folkman, and western portion of the Walch properties (Ex. 118) is attached at Appendix 3 hereto.

Walches' 165'-long super-load lowboys. RP (5/11/11) at 44, 66-68, 97. The City of Cle Elum must access its regional wastewater treatment plant by traversing the railroad crossing over Owens Road, as must Peninsula Trucking to access its business. CP at 247, 447; RP (5/10/11) at 109, 130-31. The City of Cle Elum does not have a written agreement with BNSF to use the railroad crossing. RP (5/10/11) at 127. If the railroad crossing were ever closed, the City would appeal the closure; and, if the appeal were unsuccessful, the City would provide alternative access. RP (5/10/11) at 135-36. However, there is no evidence whatsoever that the railroad company ever intends to close the Owens Road crossing, which was used by Walches' predecessors-in-interest (the Dalle family) to access their property for at least 80 years. CP at 989.

Although Walches' existing access may preclude them from making a single, specific use of their property (a location for their RSC manufacturing business), the access in fact allows them to make multiple other beneficial uses of their property. CP at 488-491; RP (5/10/11) at 108-109; Ex. 106. When Walches purchased their property from the Dalle Estate on May 12, 2004, they did so with full knowledge that the existing access from the east, over Owens and Dalle Roads, was not adequate for their 165'-long super-load lowboys. RP (5/10/11) at 18, 21-22; Ex. 1. Walches purchased their property with the mistaken belief that the City of Cle Elum would put in a city street from Oakes

Avenue, heading east along the northern boundary line of the Clark, LLC property, and then continuing east through the BNSF property situated north of Walches' property. RP (5/10/11) at 18, 21-22; RP (5/11/11) at 32-34. Walches' complaint alleges that this route is part of the "BNSF Railway Corridor Road" over which they sought an easement by necessity, as well as implied and prescriptive easements. CP at 5-11, 56-63.[3] Walches allege that BNSF had previously offered its adjacent railway corridor property to them, which is situated immediately east of the Clark, LLC property and north of Walches' property. CP at 7. However, Walches did not apply to purchase the BNSF property until October 27, 2010, over six years after they purchased their property. RP (5/11/11) at 40; Ex. 114. Walches' application to purchase the BNSF property is still open (id.); and from 2004 through 2010, at least two other private parties purchased BNSF property in the immediate area, including the Clarks and ZBK. RP (5/11/11) at 40-41; CP at 47-52; Ex. 54.

Mike Walch testified that, under the most favorable market conditions, he could "never see" the need to use the super-load lowboys "more than once a month". RP (5/11/11) at 19-20. Despite this fact, Walches have never asked BNSF if it would grant them temporary access along the existing railway corri-

[3] A copy of Ex. K to Walches' Complaint (CP at 62), showing the alleged BNSF Railway Corridor Road, is attached at Appendix 4 hereto.

dor, south of the tracks off of Oakes Avenue, for the limited occasions when they would need to use the super-load lowboys, which are guided by a pilot car. RP (5/10/11) at 55; RP (5/11/11) at 41-44. The City of Cle Elum, however, was previously able to haul a large piece of equipment along this route to the City's wastewater treatment plant. RP (5/10/11) at 133. Walches have likewise made no attempt to improve the railroad crossing, and the turn from Owens Road onto Dalle Road, to accommodate their super-load lowboys, even though the City has in the past improved the grade at the Owens Road crossing, and would have no objection if Walches sought permission to do so. RP (5/10/11) at 136; RP (5/11/11) at 46-56, 68.

Walches argue that their property is "landlocked" because they do not have a permanent easement to cross the railroad tracks over Owens Road, which they claim makes their access uninsurable. See Appellants' Br. at 12-13. Walches, however, have never applied for a railroad crossing license or permit, despite the fact that the issuance of such a permit would provide them with insurable access. RP (5/11/11) at 43; CP at 21. The Folkmans and their predecessors, the Grangers, were able to obtain crossing permits from BNSF to access their property. RP (5/11/11) at 85; CP at 990. Kerry Clark has also been able to obtain crossing permits from BNSF on multiple occasions in other areas. RP (5/11/11) at 94-95.

Walches have likewise failed to seek a permanent easement from BNSF. RP (5/11/11) at 41-42, 44. And Walches have never filed an application with the railroad to use temporary ramps to haul their equipment across the railroad tracks (RP (5/11/11) at 46-47), despite the fact that Mike Walch testified that, under the most optimal conditions, he would never need to use the super-load lowboys "more than once a month" (RP (5/11/11) at 19-20). Walches have also failed to investigate the feasibility of constructing specialized vehicles to transport their equipment over the Owens Road railway crossing. RP (5/11/11) at 50.

Although their property is located within the City of Cle Elum's Industrial District (RP (5/10/11) at 72), Walches' intended use would impact the horseshoe-shaped pond (a Category III wetland according to the Department of Ecology and the City of Cle Elum), which Walches themselves describe as one of the "Dalle Wildlife and Fish propagation ponds" located on their property. RP (5/10/11) at 92-93; RP (5/11/11) at 34-37; Exs. 108, 109. This fact would trigger a critical areas review by the City of Cle Elum. RP (5/10/11) at 84-86, 90-95; Exs. 40, 47, 106, 107, 108.

Walches' intended use of their property would also be a conditional use, and there is no guarantee that the use would ever be permitted. (RP (5/10/11) at 90-93. Walches, however, have not made a land use application of any kind,

or applied for a permit of any kind, for any particular use of their property. RP (5/10/11) at 89-90. Because the horseshoe-shaped pond is hydrologically connected to the Yakima River, and involves a critical area and wetland, any land use application by Walches would have to be reviewed by the following agencies: the City of Cle Elum, the U.S. Army Corps of Engineers, the Yakama Nation, the Department of Ecology, the Department of Transportation, and the Department of Fish and Wildlife. Id. at 93-95, 97-98.

According to Kerry Clark's measurements, the distance between the southern edge of the horseshoe-shaped pond and the DOE right-of-way fence is approximately 18 feet on average. RP (5/11/11) at 111-12; Ex. 118 (Appendix 3 hereto). As a Category III wetland, under the City's critical areas ordinance, a 60' setback development buffer is required from the edge of the ordinary high water mark of the pond. RP (5/10/11) at 92-93; Ex. 107. This fact alone could preclude Walches from ever obtaining a permit over the route for which they sought an easement by necessity at trial (the alleged "Dalle Road extension"), since the route would enter the southwest corner of the Walch property, and then continue along the southern edge of the horseshoe-shaped pond. RP (5/10/11) at 90-94, 123; CP at 63 and Ex. 118 (Appendix 3 hereto). Another potential concern is the fact that, for Walches' super-load lowboys to access Swiftwater Boulevard, traffic exiting the freeway on-ramp from the opposite

direction would have to be stopped in order to allow the lowboys to turn onto Swiftwater Boulevard. RP (5/10/11) at 54-55, 58.

A land use application by Walches for their intended use of their property would also trigger a new SEPA and environmental review. RP (5/10/11) at 99. Any additional roads over the Clarks' and Clark, LLC's properties would also impact the land use requirements they would have to comply with, because the approval of the Clark Short Plat was conditioned upon Swiftwater Boulevard servicing only a certain number of lots; thus, any additional roads would require a plat modification review by the City of Cle Elum. RP (5/10/11) at 101-102. Similarly, the Swiftwater Business Park is a final, approved land use as designed; and the site design review never contemplated additional uses outside of the scope of what was originally presented and approved. RP (5/10/11) at 78.[4]

[4] In an effort to bolster their easement claim, Walches relied on Trial Exhibit 53. This was a preliminary site plan for the Swiftwater Business Park, *which was conceptual only*; its only purpose was to simply demonstrate the maximum physical space and potential maximum usable parking areas, nothing more. RP (5/10/11) at 82-83; RP (5/11/11) at 92-93, 126-27; Ex. 53. The building depicted on the Folkman property in the conceptual plan does not exist; and the orientation of the actual building housing the Kubota tractor dealership is different than shown on the conceptual plan. Id. Walches used this exhibit because it depicts a theoretical road and truck along the same route over which the Walches sought an easement by necessity at trial. RP (5/10/11) at 70-71.

III. ARGUMENT

A. The Disfavored Private Condemnation Statute was Never Intended to Allow Walches to Cherry-Pick a Singular Use for Their Property When They Can Make Myriad Other Beneficial Uses of the Property Under the City of Cle Elum's Industrial District.

The private condemnation statute, RCW 8.24.010, "is not favored in law and thus must be construed strictly." Brown v. McAnally, 97 Wn.2d 360, 370, 644 P.2d 1153 (1982). The public policy underlying the statute is to prevent landlocked property from being rendered useless. Id. at 367. Under Washington law, "[t]he taking will not be tolerated unless the necessity is paramount in the sense that ***there is no other way out or that the cost is prohibitive,*** for it must be borne in mind that, after all, this is a condemnation proceeding. We are taking the property of one man and giving it to another.. . . There is a constitutional right involved, and such rights should not be so lightly regarded that they may be swept away to serve convenience and advantage merely." State ex rel. Carlson v. Superior Court, 107 Wash. 228, 232, 181 P. 689 (1919) (emphasis added); accord, Brown, 97 Wn.2d at 370; State ex rel. Schleif v. Superior Court, 119 Wash. 372, 373, 205 P. 1046 (1922) (the condemnors "are required to show a reasonable necessity for the proposed road and that they have not any other practical or feasible way out"). "Thus, the private condemnation statute is a remedy of last resort, a fallback for a landowner who has no

other reasonable means of access." 17 Wash. Practice: Real Estate Property Law, §2.5 at 96 (Stoebuck & Weaver, 2d ed. 2004).

As stated in Brown: "An owner or one entitled to the beneficial use of landlocked property may condemn a private way of necessity for ingress and egress in the ordinary sense of a `way', i.e., a mere right of passage over land." 97 Wn.2d at 367. It follows, therefore, that if a property owner can make "beneficial use" of his land under its existing zoning, he is not "landlocked" for purposes of the private condemnation statute. Walches clearly have existing access to make myriad uses of their industrial zoned property. Walches' claim of necessity really turns on an equipment issue (access by lowboys), not the absence of a means of ingress and egress in the ordinary sense of a "way".

Nothing in the private condemnation statute, or the cases interpreting it, supports Walches' argument that they are landlocked just because they cannot make a particular use of their property. Indeed, the cases allowing a second access to make beneficial use of property typically involve residential properties where the topography precludes the construction of a residence, or makes it cost-prohibitive to do so, thus denying the property owners the beneficial use of their land. See, e.g., Beeson v. Phillips, 41 Wn. App. 183, 702 P.2d 1244 (1985); Sorenson v. Czinger, 70 Wn. App. 270, 852 P.2d 1124 (1993). These cases are readily distinguishable.

Moreover, the necessity must exist in fact at the time the private condemnation proceeding is commenced. As stated in Dreger v. Sullivan, 46 Wn.2d 36, 40, 278 P.2d 647 (1955): "Unless and until it is established that the route over the Copenhaver property (easement by implied grant) is not available to them, the plaintiffs cannot sustain the burden of proof that the route across the Sullivan property (private way of necessity) is even `reasonably necessary' for the proper use and enjoyment of their property." This language further supports the proposition that Walches cannot sustain their burden of proof until they first establish that they can legally use their land for their intended future use, which they have not done.

Walches are asking this Court to read into the private condemnation statute language that simply does not exist. If the Legislature intended RCW 8.24.010 to apply to allow an owner of vacant land to condemn a second access where the existing access allows for the beneficial use of the property, it could have stated so in the statute. It did not. A court "will not read language into a statute that is not there." Hartson Partnership v. Goodwin, 99 Wn. App. 227, 236, 991 P.2d 1211 (2000).

Because the private condemnation statute is disfavored and strictly construed, "[t]he taking is limited to necessary ingress and egress only. It is not extended to those necessities that may be created by the contemplation of a fu-

ture real estate subdivision development." Brown, 97 Wn.2d at 370. Brown thus makes clear that Walches cannot seek an easement by necessity solely to accommodate their super-load lowboys or to develop their property for every potential use. See also Jobe v. Weyerhauser Company, 37 Wn. App. 718, 726, 684 P.2d 719 (1984), review denied, 102 Wn.2d 1005 (1984) (proposed easement for ingress and egress for purposes of developing property grants more than a private way of necessity as contemplated by the state constitution and RCW 8.24).

B. Walches Have Not Established They Can Lawfully Use Their Land as Intended; Therefore, Their Claim of Necessity Based Upon Such Use Fails as a Matter of Law.

Walches' intended use of their property requires a conditional use permit, and there is no guarantee that the use would be allowed. RP (5/10/11) at 90-93. Unless the Walches obtain a conditional use permit, their intended use would not be lawful. As a matter of common sense, logic, and law, ***Walches cannot establish the element of "reasonable necessity" without first establishing that the necessity is based upon a lawful use of their land.***

Walches have not filed a land use application for their intended use of their property; therefore, they have no vested right to such use. "The `vested rights doctrine' provides that a developer who files a completed land use application that complies with zoning laws and regulations in force at the time of

application has a vested right to develop land under those laws and regulations." Kelly v. Chelan County, 157 Wn. App. 417, 424, 237 P.3d 346 (2010). Until Walches file a land use application that complies with the City of Cle Elum's existing land use regulations, they have no right whatsoever to develop their property.

Walches' argument, that a permit for their intended land use must be issued as a merely ministerial act, is woefully misplaced. In Kelly, this Court made clear "that the grant or denial of a special or conditional use permit is adjudicatory in nature." Id. at 425. "That is, the legislative body has discretion to issue the permit or not." Id. The City of Cle Elum may well deny Walches' land use application, or impose such restrictions on it that Walches decide it is not cost-effective to pursue it. Such issues, however, are purely speculative at this time; and it would be improper to grant an easement by necessity where the alleged necessity (using super-load lowboys to access a non-existent manufacturing plant) may never come into being. "Before [Walches] are entitled to condemn a private way of necessity they are required to show a reasonable necessity for the proposed road . . .." State ex rel. Schleif, 119 Wash. at 373. Walches have failed to meet this threshold requirement.

The Court should also be mindful of the consequences of granting Walches an easement by necessity under the speculative assumption that they

might obtain a conditional use permit for their intended use of the property. What if Walches are unable to obtain a permit, or the permit is restricted to preclude lowboys from driving along the horseshoe-shaped pond? And what if Walches obtain an easement by necessity, then change their mind and decide not to relocate their manufacturing plant? Does this now mean that Walches must relinquish their easement, since the alleged "necessity" (access for superload lowboys) has disappeared? Or have Walches successfully obtained a second access for their property that they can now use for some other development purpose which does not require the use of lowboys? Perhaps this has been Walches' underlying motive all along and explains why they have not filed a land use application in the eight years since they acquired the property. It is the Clarks' position that Walches may have invoked the private condemnation statute to circumvent the land use application process. In short, Walches seek to get in through the back door what the front door may not allow.

C. Walches' Lack of an Easement to Cross the Railroad Right-of-Way Does Not Render Their Property Landlocked.

1. The Owens Road Crossing is a Public Way.

"Railways are considered to be in the nature of public highways." Sec. & Inv. Corp. v. Horse Heaven Hgts., 132 Wn. App. 188, 194, 130 P.3d 880 (2006), review denied, 158 Wn.2d 1023 (2006). "[R]ailroad companies were

created on the theory that they will provide a public benefit. Pursuant to statute, the State has conferred upon them special and extraordinary privileges. In return, the railroads must hold their property in trust for the public use." Lawson v. State, 107 Wn.2d 444, 449, 730 P.2d 1308 (1986). The City of Cle Elum may open roads over existing railroad crossings. WAC 480-62-150(1)(a); State ex rel. Toppenish v. Public Serv. Comm., 114 Wash. 301, 306, 307-308, 194 P. 982 (1921).

Walches argue that the lack of a permanent easement over the Owens Road railroad crossing makes their property "landlocked" as a matter of law. The argument is misplaced. Owens Road provides public access to the City of Cle Elum's regional wastewater treatment plant, Peninsula Trucking, and several other properties lying south of the railroad tracks that bisect Owens Road. CP at 447, 451. And there is no evidence that the railroad company will ever seek to close the Owens Road crossing. CP 250, 451.

Walches also face the same problem with the BNSF railroad tracks that bisect Oakes Avenue. Walches have provided no evidence to establish that they could obtain a permanent easement for this crossing, ***which Walches concede must be used by their super-load lowboys before they can turn left onto Swiftwater Boulevard at the starting point of the easement they claim by necessity***. RP (5/10/11) at 43-44, 53-54, 57-58. The BNSF right-of-way over

Oakes Avenue extended 200 feet south of the centerline of the tracks before the Clarks acquired the southern 150 feet. CP at 4, 47-52; see also Ex. 112 and Appendix 3 hereto. This leaves the tracks and at least another 50 feet of BNSF property that Walches would have to cross before accessing Swiftwater Boulevard with their super-load lowboys. Like the Owens Road crossing, the Oakes Avenue crossing is used by the general public, and there is no evidence that BNSF will ever seek to close it.

2. BNSF Cannot Unilaterally Close the Owens Road Crossing.

BNSF cannot close the Owens Road crossing at its whim. Moreover, unless and until the railroad crossing is closed to public access, and no alternative route is provided, Walches' property is not "landlocked"; thus, the element of "necessity" is missing.

The Utilities and Transportation Commission ("UTC") of the State of Washington has exclusive jurisdiction over the closing of railroad crossings. See generally RCW 81.53.010 et seq., and, in particular, RCW 81.53.060. A "highway" is broadly defined under RCW 81.53.010 to include "all state and county roads, streets, alleys . . . *and other public places actually open and in use . . . for travel by the public.*" (Italics added.) Because Owens Road is open to public travel, it squarely meets the definition of a "highway" for UTC juris-

dictional purposes. The Legislature intended the UTC's jurisdiction over railroad crossings to be broadly applied, as the very definition of "highway" in RCW 81.53.010 makes clear. If the Legislature wanted to exclude some publicly used crossings from the UTC's jurisdiction, it would have clearly done so. Given the inherent danger of railroad crossings, it makes no sense that the Legislature would exclude any public crossing from the UTC's jurisdiction.

Because the Owens Road railroad crossing is under the UTC's jurisdiction, as a matter of law, BNSF cannot unilaterally close it. RCW 81.53.060; see also WAC 480-62-150(1)(b). Under RCW 81.53.060, to close the crossing, BNSF would have to file a "petition in writing" with the UTC, "alleging that the public safety requires . . . the closing or discontinuance of [the] existing highway crossing, and the diversion of travel thereon to another highway or crossing . . .." And if the "public safety" threshold requirement is met, and the installation of signals or other safety devices could not adequately address the public safety concern, then BNSF would have to provide an alternative access so that the property owners lying south of the Owens Road railroad tracks would not be left landlocked. Alternatively, BNSF would have to pay just compensation for the taking of the access. See, e.g., RCW 81.53.060, .070, and .110.

The bottom line is that Walches' claim that they are "landlocked", be-

cause they lack a permanent easement over the railroad crossing, is misguided. Unless and until the crossing is actually closed, and no alternative access is provided, Walches' claim of an easement by necessity is at best speculative and premature. The Owens Road crossing has been open for use for over 80 years (CP at 989), and there is no evidence whatsoever that it will ever be closed (CP at 447, 451).[5]

D. Walches Have Failed to Establish "Reasonable Necessity".

Assuming arguendo the unsupported proposition that the lack of "insurable access" over the railroad crossing would in fact preclude Walches from obtaining financing for the manufacturing plant they claim they intend to locate on their property, and that the inability to use the existing access for their superload lowboys renders their property "landlocked" for purposes of RCW 8.24.010, Walches have still failed to meet the requisite element of "reasonable necessity". To begin with, the lack of insurable access can be readily cured by obtaining a standard railroad crossing permit, which Walches have deliberately failed to obtain. RP (5/11/11) at 43, 85, 94-95; CP at 21.

Furthermore, Walches have failed to demonstrate that the existing ac-

[5] Given the draconian impact to the City of Cle Elum if access to its Regional Wastewater Treatment Plant were cut off (RP (5/10/11) at 135-36), any closure of the crossing would likely be conditioned upon alternative access being provided; and, if not, the City would create such access on its own (RP (5/10/11) at 136).

cess cannot be improved to accommodate their lowboys, or that temporary ramps could not be used to bring their equipment over the railroad crossing, or that they cannot bring their equipment to their property from another direction that would not require condemning the private property of another. Indeed, Walches have willfully refrained from making any attempt to meaningfully explore these alternatives. RP (5/11/11) at 41-44, 46-56. It is Walches' burden to establish that other alternatives are cost-prohibitive, or otherwise not feasible, before they can claim an easement by necessity. See, e.g., State ex rel. Carlson, 107 Wash. at 232; State ex rel. Schleif, 119 Wash. at 373, Dreger, 46 Wn.2d at 40, Beeson, 41 Wn. App. at 188. Accordingly, Walches' claim of an easement by necessity fails on this basis as well.

E. The Trial Court's Award of the Clarks' Attorney Fees and Costs is Supported by Substantial Evidence.

1. RCW 8.24.030 is to be Broadly Applied.

An award of attorney fees is proper when authorized by contract, by statute, or by a recognized ground in equity. Kennedy v. Martin, 115 Wn. App. 866, 871, 65 P.3d 866 (2003). If so authorized, a trial court's award of attorney fees is viewed for abuse of discretion. Id. at 872. "A trial court abuses its discretion when it exercises discretion in a manifestly unreasonable manner or bases its decision on untenable grounds or reasons." Id.

Here, the relevant statute allowing fees is RCW 8.24.030, which provides in part: "***In any action*** brought under the provisions of this chapter for the condemnation of land for a private way of necessity, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee." (Emphasis added).

The language of RCW 8.24.030 should, in itself, support the trial court's award of attorney fees to the Clarks in successfully defending against all three of Walches' easement claims. "[I]n 1988, the Legislature enacted RCW 8.24.030 in its current form, allowing for attorney fees for '***any action***' for a private way of necessity. Laws of 1988, ch. 129, §3." Beckman v. Wilcox, 96 Wn. App. 355, 365, 979 P.2d 890 (1999), review denied, 139 Wn.2d 1017 (2000) (emphasis added). "In its legal sense, ***an `action' is a `lawsuit brought in a court.***'" Id. at 364 (quoting Black's Law Dictionary, 28 (6th ed. 1990) (emphasis added)). "The legislative history, the use of the term 'any action,' and the other statutory language indicates that ***the Legislature intended broad application of RCW 8.24.030.***" Id. at 365 (emphasis added).

It is this broad application of the statute that allows a condemnee to recover attorney fees, regardless of whether the condemnee prevails in the action or on any particular issue. See, e.g., Beckman, 96 Wn. App. at 363; Kennedy, 115 Wn. App. at 872-73; Sorenson, 70 Wn. App. at 279. "Under a plain read-

ing of RCW 8.24.030, a condemnor who initiates an action is obligated to pay the condemnee's fees even if the condemnor later abandons the action through a voluntary dismissal." Beckman, 96 Wn. App. at 364.

Nothing in the language of RCW 8.24.030 precludes a trial court from awarding fees for defending against related easement theories in a private condemnation action. Accordingly, in light of the Legislature's intent that RCW 8.24.030 is to be broadly applied, its language allowing reasonable attorney fees in "any action" for a private way of necessity should be interpreted to include those fees reasonably incurred in defending against other easement claims that are included in the action.[6]

2. All Three Easement Claims Involve a Common Core of Facts and Related Legal Theories.

The trial court's award of attorney fees was also proper because Walches' claim of a statutory easement by necessity, and their implied and prescriptive easement claims, all arise from a common core of facts and related legal theories. "[W]here the plaintiff's claims involve a common core of facts and related legal theories, `a plaintiff who has won substantial relief should not

[6] Counsel for the Clarks has conducted an extensive search of the cases construing RCW 8.24.030, but could find only one decision directly addressing this specific issue. The case is Kahne Prop. v. Brown, 145 Wn. App. 1051 (2008), review denied, 165 Wn.2d 1043 (2009). However, it is an unpublished opinion; therefore, the case is not binding precedent, and under GR 14.1(a), it cannot be cited as an authority.

have his attorney's fee reduced simply because the [lower] court did not adopt each contention raised.'" Martinez v. City of Tacoma, 81 Wn. App. 228, 243, 914 P.2d 86 (1996), review denied, 130 Wn.2d 1010 (1996) (quoting Hensley v. Eckerhart, 461 U.S. at 424, 440, 76 L. Ed. 2d 40, 103 Sup. Ct. 1933 (1983)); accord Ethridge v. Hwang, 105 Wn. App. 447, 461, 20 P.3d 958 (2001) ("the court is not required to artificially segregate time in a case, such as this one, where the claims all relate to the same fact pattern, but allege different bases for recovery") (citing Blair v. Washington State University, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987)).

Walches' complaint asserted three easement claims over two identical routes: the alleged northern "BNSF Railway Corridor Road" and the alleged southern "Dalle Road extension", which Walches allege were existing roads. CP at 5-10, 57-63, 450. Thus, each of Walches' three legal theories are related and involve the same core of facts; that is, their attempt to claim an easement over a purportedly existing road.

The Clarks' defense of Walches' implied easement and easement by necessity claims involved inherently related factual and legal issues. "[T]he issue of implied easement was integrally related to the question of whether there was necessity to pass over defendants' land.. . . Because it is the plaintiffs who are charged with proving necessity, the burden of proof includes proof that no im-

plied easement exists over grantor's property." Roberts v. Smith, 41 Wn. App. 861, 864, 707 P.2d 143 (1985) (emphasis added). Because the proof of one easement negates the existence of the other, Walches should never have brought the implied easement claim, since they should have known the common grantor element was missing. Moreover, Walches refused to dismiss their implied easement claim until they were faced with a motion seeking its dismissal on summary adjudication. CP at 777-785, 452.

The Clarks' defense of Walches' prescriptive easement and easement by necessity claims also involved a common core of facts and related legal theories. Both easement claims were over identical routes, which Walches claimed to be "existing roads" over and across the Clark and Clark, LLC properties. CP at 7-9, 182-207, 238-245. Despite the fact that the trial court dismissed Walches' prescriptive easement claims on partial summary judgment (CP at 452), Walches continued, even after trial, to maintain that they and others had used a purportedly existing road over the alleged Dalle Road extension. RP (5/10/11) at 16, 18, 61-65; CP at 214, 217 (Walches' Trial Memorandum); CP at 238-39 (Walches' Post-Trial Memorandum); see, also CP at 1075-1094 (Clarks' Motion to Strike Walches' Statements of an Alleged Existing Road).

Under both the prescriptive and easement by necessity claims, the Clarks' defense necessarily included establishing that the roads in question ei-

ther never existed (the alleged Dalle Road extension) or were not on the Clarks' property (the alleged BNSF Railway Corridor Road). Had Walches established that either road actually existed on the Clarks' property, this would have significantly enhanced Walches' claim of an easement by necessity. First, it would have undermined the Clarks' affirmative defenses of estoppel and laches. CP at 74. (The Clarks would have constructed the improvements to their properties with knowledge of roads providing access to Walches' property.)[7]

Moreover, the law allows the condemnation of a private way of necessity over an existing road. Brown, 97 Wn.2d at 367 ("We have long recognized that if one is otherwise entitled to a private way of necessity it may be condemned where an existing private way is already established."). The caveat to this rule is that the joint use claimed by necessity must not be incompatible with the existing use of the road. Id. at 368. This explains why Walches maintained, from the start, that the alleged Dalle Road extension had been used to haul heavy equipment. CP at 9, 217; RP (5/10/11) at 60-65.

Accordingly, had Walches been able to establish the existence of a road over the identical route for which they sought an easement by necessity, this too

[7] Although the Court did not address these defenses in its Memorandum Decision, this should be of no consequence under RCW 8.24.030, since reasonable fees may be awarded under the statute "without regard to whether the condemnee has prevailed in the action or on any particular issue." Sorenson, 70 Wn. App. at 279 (underlining added).

would have greatly enhanced their claim of an easement by necessity. Assume, for example, that Walches had established the existence of a road over the alleged Dalle Road extension, but an issue of fact existed as to its width, and it was a close call as to whether the width was sufficient to accommodate Walches' super-load lowboys. Had the trial court bought Walches' theory of an easement by necessity, this could have resulted in the trial court granting the easement over the alleged Dalle Road extension, even though Clarks and Folkmans would have preferred a different route. CP at 1099-1104.[8]

Throughout this case, Walches pushed the limits of credibility in attempting to convince the trial court that there was an existing road along the alleged Dalle Road extension (the easement route they sought at trial), and that this route had been used in the past to haul heavy equipment compatible with their super-load lowboys. Even at trial, Walches sought to use a never implemented site plan for the Swiftwater Business Park to show a purported "road" along this route, and made specific reference to a drawing of a "semi-truck" on

[8] At page 28 of their opening brief, Walches state that the route they have selected under their claim of an easement by necessity should be provided to them, because the Clarks did not present any evidence of a feasible alternative route at trial. Although technically correct, Walches' argument is misleading. In a post-trial memorandum, the Clarks in fact proposed an alternative route, which was the exact same BNSF Corridor route alleged in Walches' complaint. CP at 1095-1104; see also Complaint, CP at 5-6, 57, 59, 61, 63. The Clarks also put on abundant evidence establishing why any other route would be unduly burdensome. RP (5/11/11) at 99-111, 115-16, 140-43.

the alleged "road". CP 215; Ex. 53; RP (5/10/11) at 70-71, 82-83. And in their trial brief, Walches disingenuously stated: "the Dalle family utilized various roads and the BNSF Railway Corridor Road, for access to and from their property by regular passenger vehicles, and with heavy equipment and machinery. From the early 1960's until 1988, the Dalle Family was in the excavation business and used the road extensively to bring in their construction equipment to and from the Dalle property." CP at 217.

Of course, Walches put on no such evidence at trial, and the reason why is obvious: several members of the Dalle family (Walches' predecessors-in-interest) submitted declarations in support of the Clarks' motion for summary judgment dismissal of Walches' prescriptive easement claims, which the trial court granted, stating that no road or access to their property ever existed from the west, over what are now the Clark and Folkman properties. CP at 518-543 (Decl. of Ron Dalle); CP 571-584 (Second Decl. of Ron Dalle); CP at 825-26 (Decl. of Katie Kladnik); CP at 837-38 (Decl. of Debra Odiaga). The Dalle family members' declarations were supported by other independent witnesses. CP 554-570 (Decl. of Digby and Bonnie Granger, the Clarks' predecessors-in interest); CP at 791-97, 960-66 (the two declarations of Robert Bailey, who

surveyed the Dalle property); CP 835-36 (Decl. of Brad Wyman).[9]

In its Memorandum Decision dismissing Walches' prescriptive easement claims on partial summary judgment, the trial court found that ***"[t]here is no evidence a road ever existed along the alleged route identified by the plaintiffs in their complaint as an extension of Dalle Road leading from the plaintiffs' property to Oakes Avenue***". CP 989. Regarding the alleged BNSF Railroad Corridor Road (over which Walches were also claiming an easement by necessity), the court first noted that Walches concede that this route "is not condemnable and that any claim by plaintiffs within the corridor is not subject to a prescriptive easement". CP at 989. The court then stated that, in opposing the Clarks' motion for partial summary judgment, Walches now "***claim a second [entirely new] road existed parallel to and south of the BNSF Corridor Road alleged in their complaint***, which traverses through property owned by the Clark Family, LLC." CP at 989 (emphasis added); see also CP at 993.

To support their new claim of yet another alleged road, ***Walches materially altered a survey (prepared by Robert Bailey) to relocate the depiction of an actual primitive road in the northwest corner of their property***. Walches

[9] Had the Clarks' motion for summary judgment dismissal of Walches' prescriptive easement claims been denied, the Clarks would have called each of these individuals as trial witnesses to conclusively establish that no roads or access ever existed over the Clark, Folkman, and Clark, LLC properties that connected Oakes Avenue to Walches' property.

then presented the doctored survey to the trial court in support of their claim that this newly discovered road was located more than 100' south of the railroad tracks. CP at 184, 882, 940, 943.[10] Walches' material misrepresentation was fully exposed and soundly refuted by the Second Declaration of Robert Bailey (CP at 960-66) and the Declaration of Kerry Clark (CP at 875-959); see also the Second Declaration of Ron Dalle (CP at 571-584).

In rejecting Walches' claims of a prescriptive easement over this newly alleged road and over the alleged Dalle Road extension, the trial court found:

> The plaintiffs have failed to come forward with any evidence creating a genuine issue of material fact ***regarding any of the elements*** for the prescriptive easement claims. They have ***completely failed*** to establish that they, or their predecessors in interest (the Dalle family), have ever used the alleged prescriptive routes for a continuous and uninterrupted 10 year period.. . . Even if people used those alleged roads, ***there is no evidence that the Dalles, or anyone else, used them to access the Dalle properties***.

CP at 992 (emphasis added). The trial court went on to state:

> With respect to the BNSF corridor road ***Walch attempts to create a genuine issue of fact by contradicting his deposition testimony*** wherein he stated that the alleged BNSF corridor road was within 100 feet of the railroad tracks and could be as close as 50 feet. ***Even if there was a road there is no evidence that it was ever utilized by the Walches or their***

[10] As a matter of law, railroad property lying within 100 feet of the centerline of the tracks cannot be obtained by prescriptive easement. CP at 777-785 (citing, inter alia, State v. Ballard, 156 Wash. 530, 533, 287 P. 27 (1930)). The BNSF Railroad Corridor Road alleged in Walches' complaint was within this 100' limit. CP at 989.

> ***predecessors in interest (the Dalles) as access to the property for the continuous, uninterrupted period of 10 years.*** In fact, until the Clarks purchased the property in 2004 the railroad owned the property and it was vacant and unenclosed and open for use by the public. In fact, the only evidence of use is that . . . the general public may have used the road ***if it existed*** for recreational purposes. So, where access to land is for recreational purposes by statute, it is permissive and does not support a claim for adverse possession.

CP at 993 (emphasis added).

In summary, the easements sought by Walches, and which they vigorously sought to maintain throughout this case, are factually and legally intertwined. As such, the trial court did not abuse its discretion awarding attorney fees to Clarks for successfully defending against all three of Walches' easement claims. Martinez, 81 Wn. App. at 243.

3. The Clarks' Attorney Fees Were Reasonable.

In an effort to bolster their "excessive fees" argument, Walches cleverly combine both the Clarks' and Folkmans' fees and present them as a lump sum, despite the fact that counsel for the Clarks and counsel for the Folkmans submitted separate motions and declarations in support of their respective fee requests. CP at 252-349, 350-405. This was the same unsuccessful strategy employed by Walches in opposing the Clarks' and Folkmans' separate fee applications before the trial court. CP at 417-20. As this Court is well-aware, however, each defendant is entitled to counsel of his or her choice.

Moreover, the Clarks and Folkmans challenged Walches' claim of an easement by necessity under separate and distinct legal theories. The Clarks focused their challenge on the Walches' failure to establish the legal requirements for an easement by necessity, whereas the Folkmans focused largely on arguing that the Walches are jurisdictionally barred from bringing any claims under RCW Chapter 8.24, because they failed to file a LUPA appeal challenging the City of Cle Elum's refusal to require that a second access be provided to Walches' property as a condition of approving the Clarks' land use applications. CP at 512-17, 585-776, 798-824, 1003-1029, 1030-1074, 1105-1117.

Although Walches argue that excessive time was charged for multiple entries; fees and costs were not segregated; and there are entries that lack detail and appear to be secretarial in nature, they fail to cite to a single instance in the record to support these alleged shortcomings; they also failed to adequately do so before the trial court. See Brief of Appellants' at 40-41 and CP at 417-19, 433-34. A review of the Clarks' counsel's declarations in support of the Clarks' fee application establishes that Walches' argument is not only without merit, it is completely frivolous. CP at 267-349, 436-38. Not only were the Clarks' fees segregated, the work done was described in particular detail, multiple entries were backed out (including all legal assistant time and several entries of counsel's time), and counsel for the Clarks explained in great detail why the fees

charged were reasonable. Id.; see also CP at 265-67, 433-34. And the trial court's decision awarding fees establishes that the court properly applied the lodestar method in finding that the fee award was reasonable. CP at 439-443.[11]

"Whether attorney fees are reasonable is a question of fact to be answered in light of the particular circumstances of each individual case, and in fixing fees the trial court is given broad discretion." Schmidt v. Cornerstone Investments, 115 Wn.2d 148, 169, 795 P.2d 1143 (1990). Thus, an appellate court reviews a trial court's award of attorney fees under the "abuse of discretion" standard of review. Clausen v. Icicle Seafoods, Inc., 174 Wn.2d 70, 81, ____ P.3d ____ (2012). Here, the trial court carefully considered the facts and law; and there was no abuse of discretion. CP 439-444, 449-451.

Although Walches challenge the trial court's Findings of Fact Nos. 17, 18 and 19, not one of these findings addresses the reasonableness of the Clarks' attorney fees and costs. See CP at 449-450. The Walches did not object to the Clarks' counsel's hourly rate, and they have not challenged the trial court's factual finding that "the amount of fees incurred by [the Clarks] was reasonable in light of the overall circumstances of this case." CP at 451 (Findings of Fact

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[11] The trial court's Memorandum Decision on attorney fees was incorporated into the trial court's Findings of Fact and Conclusions of Law, as well as the Final Judgment. CP at 446, 463-64.

Nos. 21 and 22). "[U]nchallenged findings of fact are verities on appeal." Estate of Watlack, 88 Wn. App. 603, 609, 945 P.2d 1154 (1997). "The appellant must present argument to the court why specific findings of fact are not supported by the evidence and must cite to the record to support that argument." Inland Foundry v. Dep't of Labor & Indus., 106 Wn. App. 333, 340, 24 P.3d 424 (2001) (citing In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (citing RAP 10.3)). Walches have failed to meet this requirement. And the trial court's unchallenged findings of fact regarding the reasonableness of the Clarks' attorney fees and costs is supported by substantial evidence, particularly the two declarations of their counsel. CP at 267-349, 436-38. "A finding of fact that is supported by substantial evidence is accepted as a verity on appeal." Schmidt, 115 Wn.2d at 169.

Moreover, in determining a fee award, a trial court may consider a party's action in light of the particular circumstances of each case, and whether those actions caused an increase to the costs of litigation. Noble v. Safe Harbor Trust, 167 Wn.2d 11, 23, 216 P.3d 1007 (2009). Here, Walches' conduct significantly increased the costs of litigation. CP at 270-78, 424-28, 436-37, 443, 449-50, 786-790, 839-851, 875-959, 967-983; see also the discussion and citations to the record regarding Walches' conduct, supra at 26-32, and the discussion and citations infra at 40-42.

F. The Trial Court's Judgment May be Affirmed on Other Grounds.

It should now be clear that the trial court's judgment should be affirmed in all aspects. Nonetheless, in an abundance of caution, the Clarks will proceed to address additional grounds for affirming the judgment.

1. The Equitable Doctrines of Estoppel and Laches Bar Walches' Claim of an Easement by Necessity.

The Clarks raised the doctrines of estoppel and laches as affirmative defenses in their answer to Walches' complaint (CP at 74); they also asserted them in their trial brief (CP at 1030-1045); and the record at trial supports these defenses (see, e.g., RP (5/10/11) at 18, 21-22, 85-86, 89-91, 99-102; RP (5/11/11) at 31-32, 35-37, 41-44, 46-47, 52-56, 80, 82, 95, 98-100, 102, 108-112, 115-116). Because the trial court denied Walches' claim of an easement by necessity, the court did not address the affirmative defenses raised by the Clarks. However, an appellate court may uphold the trial court's decision on other valid grounds even if its reasoning differs from that of the trial court. State v. Williams, 93 Wn. App. 340, 347-48, 969 P.2d 106 (1998); Gross v. Lynnwood, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978) (trial court's judgment will be sustained upon any theory established by the pleadings and supported by the proof). The Clarks will, therefore, address these additional grounds for affirming the trial court's decision.

"[E]quitable estoppel requires a showing that the party to be estopped (1) made an admission, statement or act which was inconsistent with his later claims; (2) that the other party relied thereon; and (3) that the other party would suffer injury if the party to be estopped were allowed to contradict or repudiate his earlier admission, statement or act." Heg v. Alldredge, 157 Wn.2d 154, 165, 137 P.3d 9 (2006) (quoting Pub. Util. Dist. No. 1 of Klickitat County v. Walbrook Ins. Co., 115 Wn.2d 339, 347, 797 P.2d 504 (1990)).

"Laches is an implied waiver arising from knowledge of existing conditions and acquiescence in them." Buell v. Bremerton, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). "The elements of laches are: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay." Id.

Because Walches have existing access to their property that allows them to make beneficial use of it, their own conduct should preclude them from obtaining a second access under a claim of necessity. Walches purchased their property knowing of its access limitations for their super-load lowboys. RP (5/11/11) at 32. At the time Walches purchased their property, what is now Swiftwater Boulevard was unpaved; the Clark, LLC Short Plat did not exist;

the Swiftwater Business Park did not exist; what is now the Marson building was not finished; the model home building now housing the glass shop was not finished; the two-story Swiftwater Business Park office building did not exist; and there were, obviously, no tenants in that building. RP (5/11/11) at 99-104, 115; CP at 448 (findings of fact nos. 10, 11); Exs. 112, 116, 117. Walches, however, waited over six years after purchasing their property, until August 9, 2010, before they filed their complaint. CP at 1; RP (5/11/11) at 31. By then, the Clarks had spent substantial time and money in obtaining preliminary short plat approval, the Swiftwater Business Park approval, completing construction of the Marson and glass shop buildings, building the two-story office building and securing tenants for their property. RP (5/11/11) at 99-104, 115; CP at 448. Walches were aware that these improvements were taking place; however, they waited until they were completed to file suit. Exs. 59, 103, 109, 110.

The first time the Clarks or Folkmans learned that Walches were seeking an easement of any kind over the route they sought at trial (the alleged Dalle Road extension) was when Walches filed their lawsuit on August 9, 2010. CP 1-2; RP (5/11/11) at 82, 95, 98; see also RP (5/10/11) at 86-89 and Exs. 59, 103, 104, 105, 109, 110, 111. The easement now sought by Walches would severely impact the use of the Swiftwater Business Park office building, and likely result in the loss of one or more tenants. RP (5/11/11) at 108-112, 140-

43; Ex. 120.

In commenting on the Clark Swiftwater Business Park SEPA environmental checklist, Walches represented that the Clark's development activities would adversely impact the environmentally sensitive "Dalle Wildlife and Fish propagation ponds" on Walches' property. RP (5/11/11) at 34-37; Ex. 109. Walches stated, among other things, that "site drainage could run-off into the adjacent Dalle Wildlife and Fish propagation ponds"; "[i]ncreased dust and diesel residues [will occur] on the Dalle Wildlife and Fish propagation ponds"; "[a]nything within one hundred feet (100') of the Swifwater Business Park boundary would be within two hundred feet (200') of the Dalle Wildlife and Fish propagation ponds"; "[t]rees located on the project site [adjacent] to the Dalle Wildlife and Fish propagation ponds . . . need to be preserved"; "[g]rasses and other vegetation will be removed during construction that are needed to protect the Dalle Wildlife and Fish propagation ponds to the East from run-off"; and there will be a "negative impact on . . . wildlife species". Ex. 109.

Given Walches' representation to the City of Cle Elum that the horseshoe-shaped pond on the western edge of their property was a critical wildlife area that they aggressively sought to preserve; given Walches' failure to seek to enjoin the Clarks' development activities, or to ever assert a claim to an ease-

ment of any kind over the alleged Dalle Road extension until they filed their lawsuit on August 9, 2010; and given the fact that Walches never applied for a land use permit, the Clarks had every reason to believe that Walches would take no further action to prevent their development activities (especially after the Cle Elum City Attorney informed Walches in 2008 that they had no right of access over the Clark, LLC property along the alleged BNSF Railroad Corridor Road, which was the only route that Walches specifically identified and sought as a condition of the City approving the Clarks' land use applications (Ex. 111; RP (5/10/11) at 86-89; see also Exs. 59, 103, 104, 105, 109, 110)). The Clarks thus proceeded to make valuable improvements, which Walches' belated claim of an easement by necessity would materially and adversely impact. RP (5/11/11) at 98-102, 108-111, 140-43. Accordingly, the doctrines of estoppel and laches should apply to bar Walches' claim.

2. CR 11 Supports the Trial Court's Award of Fees.

CR 11 mandates that the signature of a party or of an attorney on any pleading, motion, or legal memorandum "constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, ***formed after an inquiry reasonable under the circumstances***: (1) it is well grounded in fact; (2) it is warranted by existing law or a

good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . .." (Emphasis added.) Any pleading, motion, or legal memorandum that violates this rule allows the court to impose an appropriate sanction, including payment of the opposing party's reasonable attorney fees. CR 11.

The above record in this case establishes that Walches' implied and prescriptive easement claims were brought and maintained in clear violation of CR 11. See also CP at 270-289, 424-438. Indeed, Walches had well over six years to determine whether there was a common grantor for purposes of their implied easement claim. They also had over six years to determine whether any historical roads ever existed that connected their property to Oakes Avenue, over the Clark and Folkman properties, and whether their predecessors-in-interest (the Dalle family) ever used such roads in a manner that would establish a prescriptive easement.

The Clarks sought attorney fees under CR 11 following trial. CP at 261-64, 270-289. Having awarded fees under RCW 8.24.030, the trial court did not address this alternative theory. CP at 439-444. An appellate court can sustain a trial court's decision on any theory supported by the record. Gross, 90

Wn.2d at 401. Because substantial evidence supports an award of fees under CR 11 on Walches' implied and prescriptive easement claims, the trial court's award of fees on these claims can be upheld on this basis.

G. The Clarks are Entitled to Attorney Fees on Appeal.

RAP 18.1(a) authorizes the award of reasonable attorney fees and expenses incurred on appeal, if allowed by applicable law. Here, the applicable law is RCW 8.24.030, which allows an award of attorney fees in any action brought under that statute. Accordingly, if the trial court's judgment is affirmed, the Clarks are entitled to their fees and expenses on appeal upon compliance with RAP 18.1(d). Beckman, 96 Wn. App. at 369 (citing Shields v. Garrison, 91 Wn. App. 381, 389, 957 P.2d 805 (1998)).

Finally, RAP 18.9 authorizes this Court to award fees if an appeal is frivolous. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. Delany v. Canning, 84 Wn. App. 498, 510, 929 P.2d 475 (1997), review denied, 131 Wn.2d 1026 (1997) (quoting RAP 18.9(a)). Such is the case here. The law is well-established that Washington's private condemnation statute is disfavored and must be narrowly construed. Brown, 97 Wn.2d at 370. Moreover, the statute cannot be invoked for a particular real estate development where existing access allows a landowner

to make other beneficial use of his property. Id. Brown thus establishes that Walches cannot obtain an easement by necessity solely to accommodate their super-load lowboys, especially when the land use creating the necessity for the lowboys may never be allowed. This Court would have to disregard long-established precedent to reverse the trial court. Accordingly, Walches cannot claim a good faith basis to extend or change the law to allow them to obtain an easement by necessity under the facts of this case.

IV. CONCLUSION

To reverse the trial court's decision denying Walches' claim of an easement by necessity would require this Court to disregard the clear mandate of the Washington Supreme Court, that RCW 8.24.010 is to be narrowly construed and applied. Reversal would also set an undesirable precedent that would allow a private landowner, who has existing access allowing him to make beneficial use of his property, to condemn a second access over the private property of another for development purposes, or for other reasons of convenience, rather than because his property is actually landlocked. The trial court's award of attorney fees to the Clarks was proper as a matter of law and supported by substantial evidence; therefore, it should not be disturbed on appeal. The trial court's judgment should, therefore, be affirmed on all grounds; and the Clarks should be awarded their reasonable fees and costs on appeal.

DATED this 5TH day of July, 2012.

Respectfully submitted,

LATHROP, WINBAUER, HARREL,
SLOTHOWER & DENISON, LLP

By: _____
Douglas W. Nicholson, WSBA #24854
Attorney for Respondents

CERTIFICATE OF SERVICE

I certify that on the 5th day of July, 2012, I caused a true and correct copy of this Brief of Respondents Clark to be served on the following in the manner indicated below:

Attorneys for Appellants:
Chris Montgomery
Montgomery Law Firm
PO Box 269
Colville WA 99114-0269

(X) Via First-Class Mail

Richard T. Cole
1206 N. Dolarway, Ste. 108
PO Box 638
Ellensburg WA 98926

(X) Via First-Class Mail

Attorney for Respondents Folkman:

Bill Williamson
Williamson Law Office
PO Box 99821
Seattle WA 98139-0821

(X) Via First-Class Mail

Kimberly Bailes

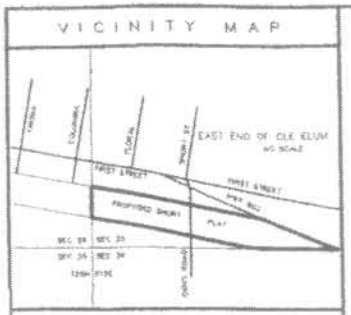
Appendix 1

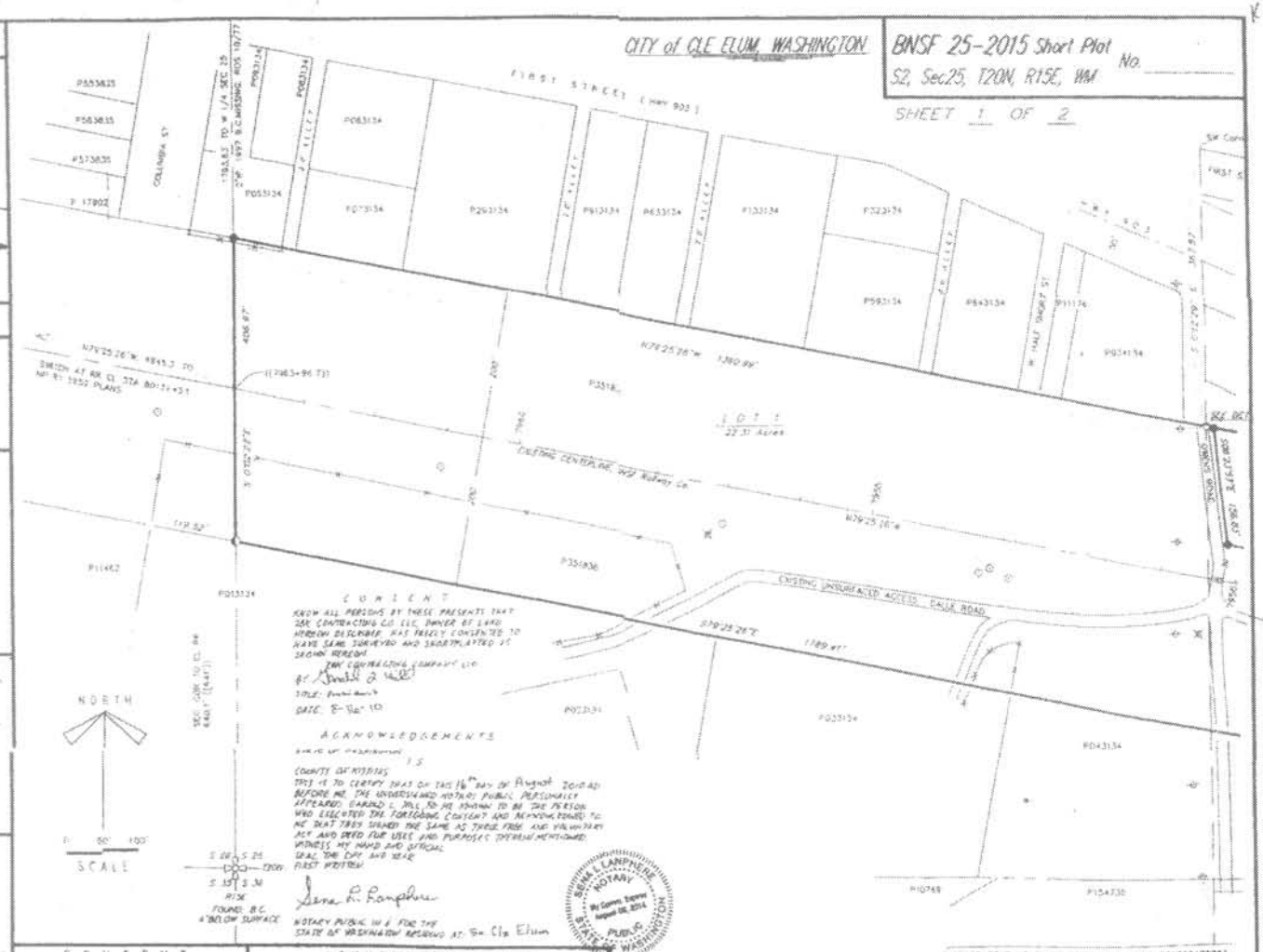
CITY of CLE ELUM, WASHINGTON

BNSF 25-2015 Short Plat

S2, Sec25, T20N, R15E, WM No. _____

SHEET 1 OF 2





STATEMENTS OF APPROVAL

ENGINEER for the CITY OF CLE ELUM, WA

EXAMINED AND APPROVED THIS 12TH DAY OF August 20 10 AD.

Jeffrey T. Lanman, PE
EXAMINING ENGINEER for the CITY OF CLE ELUM, WA

OFFICE of the MAYOR, CITY of CLE ELUM, WA

REVIEWED AND APPROVED THIS 8 DAY OF August 20 10 AD

Charles E. Kondo
MAYOR, City of CLE ELUM, WA

CERTIFICATE of the COMMUNITY DEVELOPMENT DIRECTOR, CITY of CLE ELUM, WA

I HEREBY CERTIFY THAT THE BNSF 25-2015 SHORTPLAT HAS BEEN EXAMINED BY ME AND FIND THAT IT CONFORMS TO THE COMPREHENSIVE PLAN FOR THE CITY OF CLE ELUM

THIS 8TH DAY OF AUGUST 20 10 AD

COMMUNITY DEVELOPMENT DIRECTOR

CERTIFICATE of KITTITAS COUNTY TREASURER

I HEREBY CERTIFY THAT THE TAXES AND ASSESSMENTS ARE PAID FOR THE PRECEDING YEARS AND FOR THIS YEAR IN WHICH THE SHORT PLAT IS NOW TO BE FILED.

ORIGINAL TRACT PARCEL NO: 20-15-25033-0001

THIS 17 DAY OF August 2010 AD

K Bower
KITTITAS COUNTY TREASURER

NAME & ADDRESS: ORIGINAL TRACT OWNERS

NAME: BNSF RAILWAY COMPANY
ADDRESS: 2500 SCHOOL ST HOUSTON TX 76161-0088
PHONE: 817 230 2600

EXISTING ZONING	INDUSTRIAL
SOURCE OF WATER	CITY OF CLE ELUM
SEWER SYSTEMS	CITY OF CLE ELUM
WIDTH & TYPE OF ACCESS	EXISTING
NO. OF SHORTPLATTED LOTS	3
SCALE	1" = 100'

CONSENT

KNOW ALL PERSONS BY THESE PRESENTS THAT BNSF RAILWAY COMPANY, OWNER OF THE LAND HEREON DESCRIBED, HAS FREELY CONSENTED TO HAVE SAME SURVEYED AND SHORTPLATTED AS SHOWN HEREON

BNSF RAILWAY COMPANY

BY David P Schneider

TITLE General Director - Land Revenue Management

DATE 7-28-2010

ACKNOWLEDGEMENTS

STATE OF TEXAS
SS
COUNTY OF TARRANT

THIS IS TO CERTIFY THAT ON THIS 28th DAY OF July 2010 AD, BEFORE ME, THE UNDERSIGNED NOTARY PUBLIC, PERSONALLY APPEARED DAVID P Schneider TO ME KNOWN TO BE THE PERSONS WHO EXECUTED THE FOREGOING DEDICATION AND ACKNOWLEDGED TO ME THAT THEY SIGNED THE SAME AS THEIR FREE AND VOLUNTARY ACT & DEED FOR USES & PURPOSES THEREIN MENTIONED

WITNESS MY HAND AND OFFICIAL SEAL THE DAY AND YEAR FIRST WRITTEN

RHONDA BURTON
My Commission Expires September 27, 2012

Rhonda Burton
NOTARY PUBLIC IN AND FOR THE STATE OF TEXAS RESIDING AT Carrollton, Tx

CONSENT

KNOW ALL PERSONS BY THESE PRESENTS THAT ZBK CONTRACTING CO. LLC, OWNER OF LAND HEREON DESCRIBED HAS FREELY CONSENTED TO HAVE SAME SURVEYED AND SHORTPLATTED AS SHOWN HEREON

ZBK CONTRACTING COMPANY LLC

BY _____

TITLE: _____

DATE: 8-9-10

ACKNOWLEDGEMENTS

STATE OF WASHINGTON
SS
COUNTY OF KITTITAS

THIS IS TO CERTIFY THAT ON THIS 9th DAY OF August 2010 AD BEFORE ME, THE UNDERSIGNED NOTARY PUBLIC, PERSONALLY APPEARED DARRELL L ZILL TO ME KNOWN TO BE THE PERSON WHO EXECUTED THE FORGOING CONSENT AND ACKNOWLEDGED TO ME THAT THEY SIGNED THE SAME AS THEIR FREE AND VOLUNTARY ACT AND DEED FOR USES AND PURPOSES THEREIN MENTIONED

WITNESS MY HAND AND OFFICIAL SEAL THE DAY AND YEAR FIRST WRITTEN

Dena R. Lanphere

NOTARY PUBLIC IN & FOR THE STATE OF WASHINGTON RESIDING AT: Cle Elum

DENA L LANPHERE NOTARY PUBLIC STATE OF WASHINGTON My Comm. Expires August 08, 2014

SURVEYOR'S CERTIFICATE

THIS MAP CORRECTLY REPRESENTS A SURVEY MADE BY ME IN CONFORMANCE WITH THE REQUIREMENTS OF THE SURVEY RECORDING ACT AT THE REQUEST OF ZBK Contracting Company, LLC 5/21/10

Robert L Bailey
ROBERT L. BAILEY, PE/PLS #9743

ROBERT L. BAILEY — STATE OF WASHINGTON — 9743 — REGISTERED PROFESSIONAL LAND SURVEYOR

BOBS LLC
—PROFESSIONAL LAND SURVEYING—
4201 HWY 970, CLE ELUM, WA. 98922
509-674-5851

AUDITOR'S CERTIFICATE

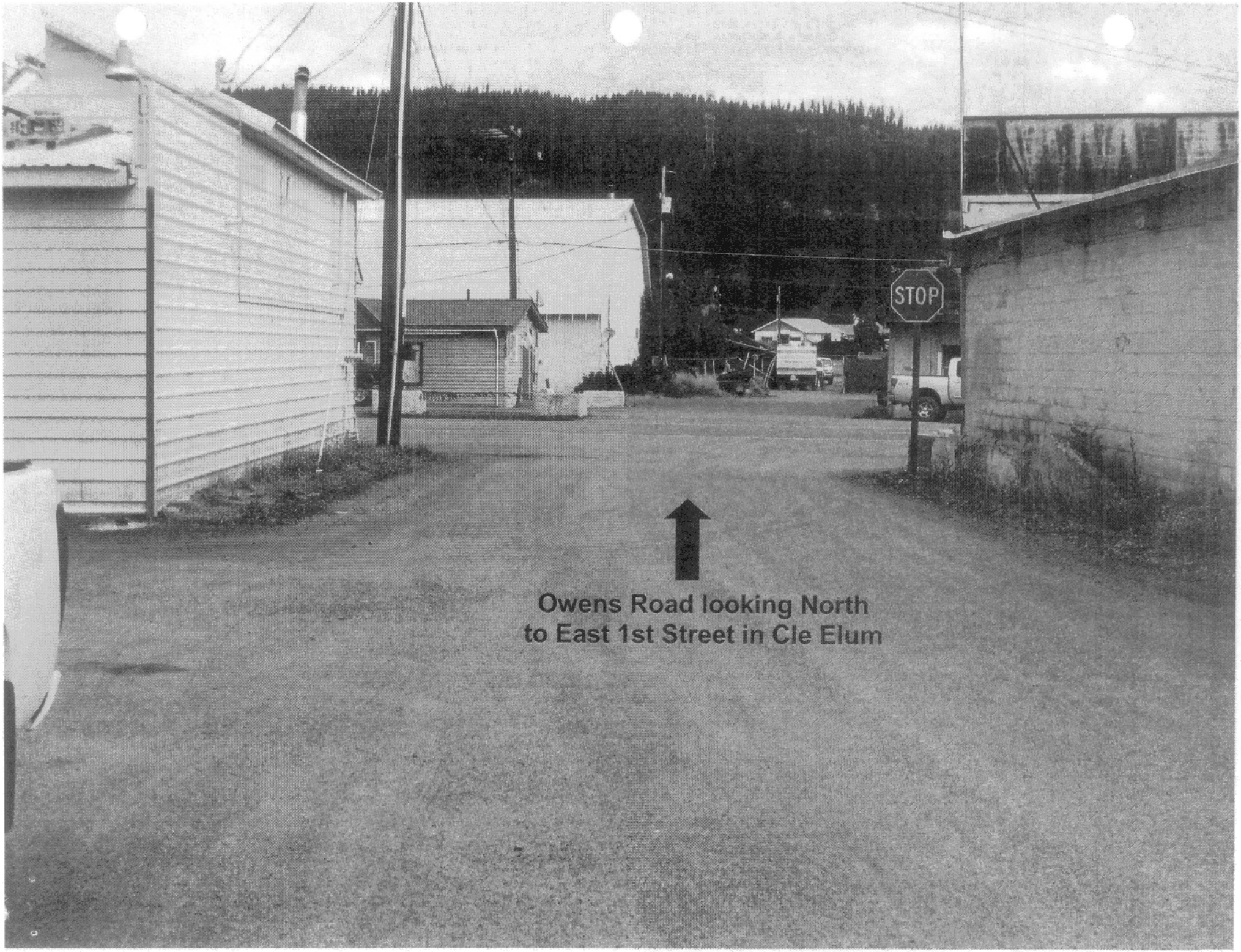
FILED OF RECORD THIS 17 DAY OF August 2010 AT 10:28A M IN BOOK K OF SHORTPLATS PAGE 162 AT THE REQUEST OF Bob Bailey

Deanna Grant
AUDITOR / County Auditor

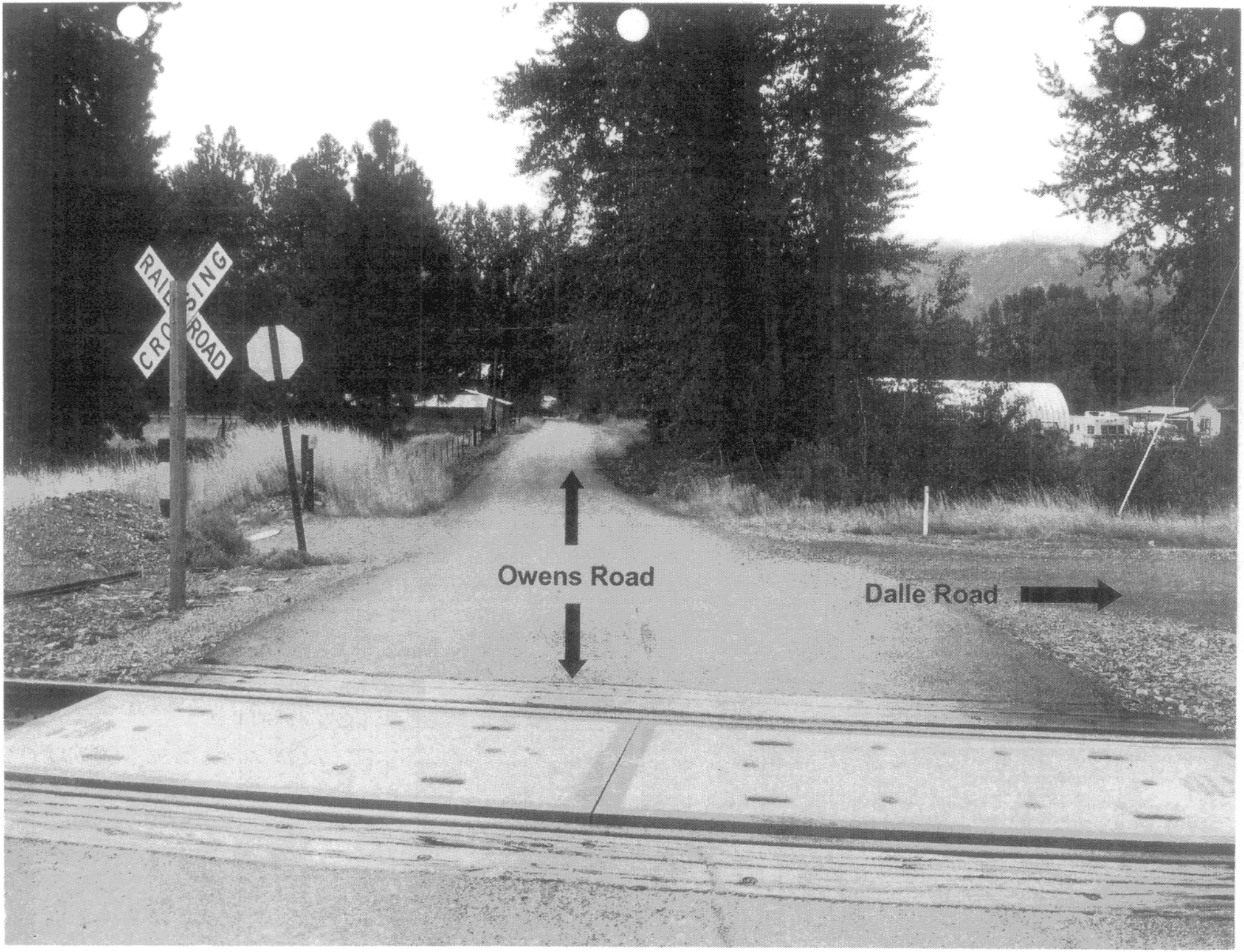
Kristi D Grant
Deputy County Auditor

08/17/2010 10:28:00 AM V: K P: 162 201808170004 $20.00 Short Plat KRISTI Kittitas County Auditor Page 1 of 2

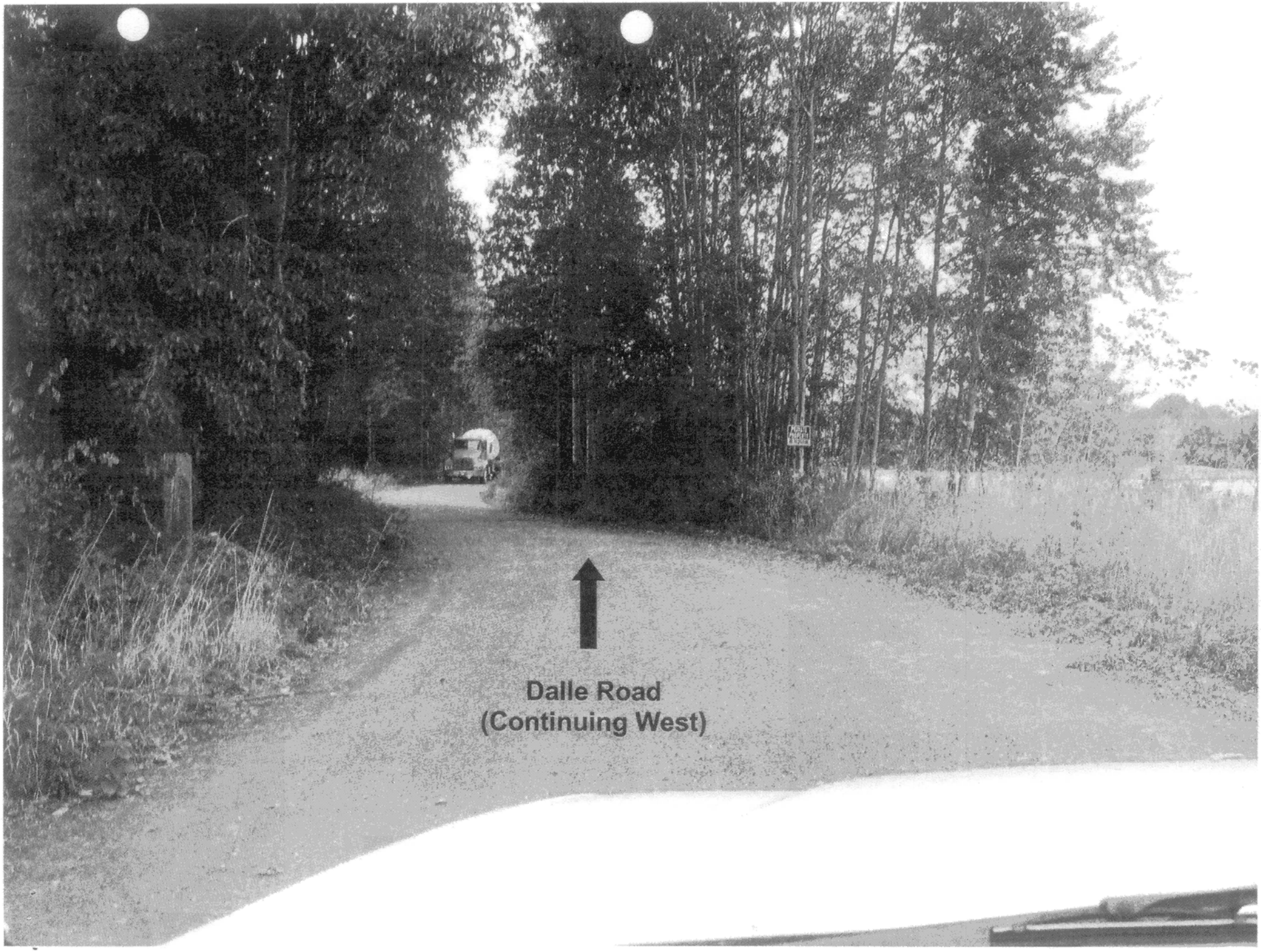
Appendix 2

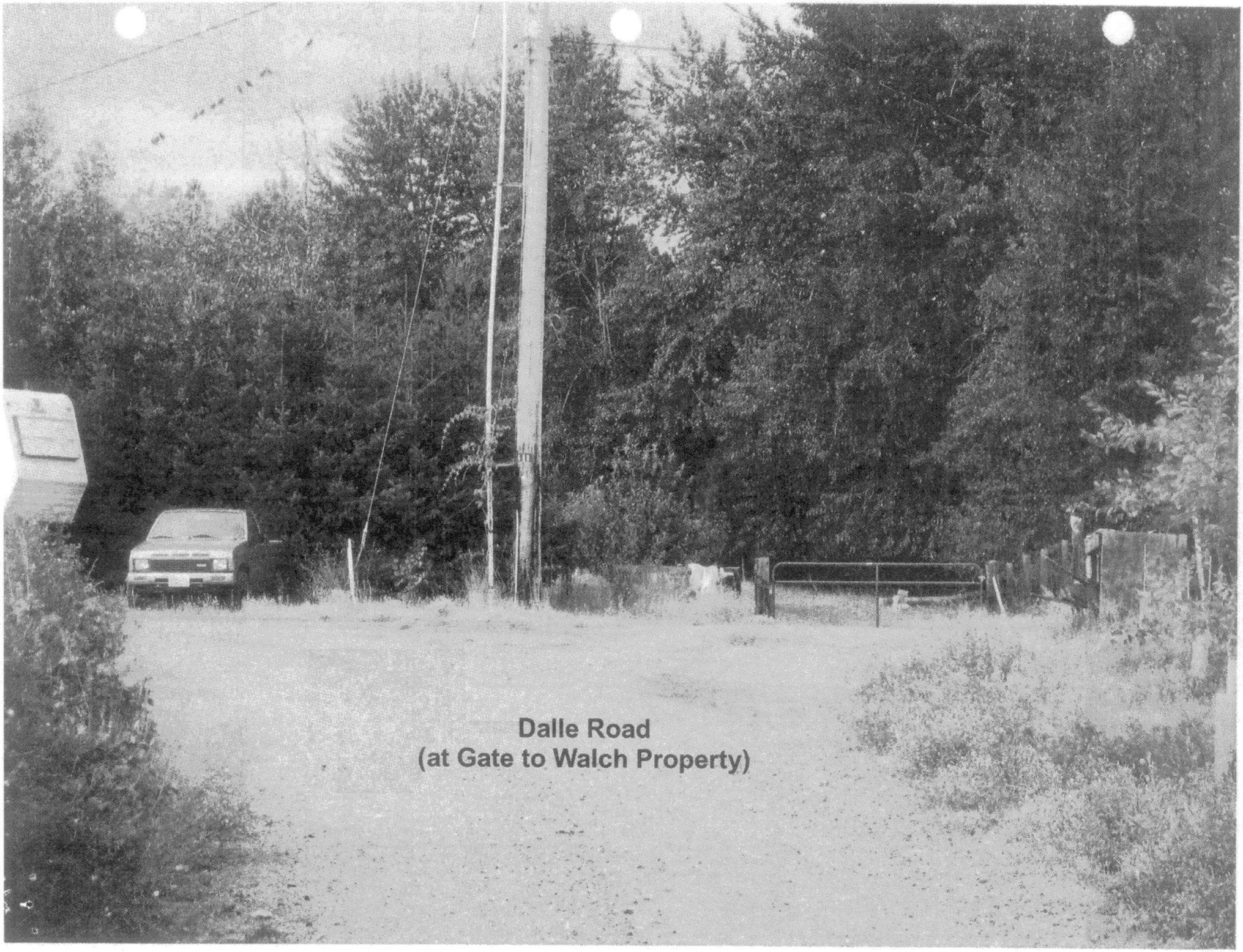


Owens Road looking North
to East 1st Street in Cle Elum


Owens Road
Dalle Road

Dalle Road (Heading West)
toward Walch Property


Dalle Road
(Continuing West)



Dalle Road
(at Gate to Walch Property)

Appendix 3

Clark Short Plat
60' Easement
Falkinun
Clark
Prop corner 18' not Marked
Walch N Prop line 75'+/- From Pond
Walch S Prop line 18'+/- From Pond
Image USDA Farm Service Agency
©2011 Google
Google
Imagery Date: 6/25/2009
47°11'31.48" N 120°55'53.86" W elev 1909 ft
Eye alt 4637 ft

Appendix 4

BURLINGTON NORTHERN + SANTA FE RAILWAY CORRIDOR
2900'
DALLE ROAD