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The Honorable Barbara J. Rothstein

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY, a political subdivision of the State of Washington; Plaintiff; vs. JOHN RASMUSSEN and NANCY RASMUSSEN, husband and wife, and their marital community; Defendants.	**No. C00-1637R** BRIEF OPPOSING KING COUNTY MOTION TO DISMISS COUNTERCLAIMS [FRCP 12(b) motions] **[Noted for Hearing on April 20, 2001; *Oral Argument is Requested*]**

Your Honor: The defendants respectfully request leave to file an over-size brief in this case. The defendants' memorandum originally had over fifty pages, and the briefing has been pared down to thirty-three pages. The issues are complex, and off-memorandum discussions would be helpful for this Court. I respectfully request oral argument on these motions.

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I. BACKGROUND

The defendants in this removal action filed their counterclaims pursuant to the removal timelines, and did so while their expert witness, Stephen Graddon was still researching various title issues concerning the contested real property in this action[1]. King County is requesting this court to dismiss these counterclaims, with not one whit of discovery being completed, and without any consideration of the defendants' claims that their rights to substantive due process of law have been violated, among other constitutional and federal or state statutory violations before this court. *The defendants respectfully request this court to refer to the fact portion of the defendants' memorandum opposing summary judgment, and the declarations of John Rasmussen (with attached working papers) for background facts which are incorporated herein by reference.*

II. FACTS

1. King County claims it purchased the spur line that includes the contested real property in this action, by contract dated September 11, 1998, from The Land Conservancy of Seattle ["TLC"]. This purchase and sale agreement presupposed that TLC had legal title to the spur line, although TLC specifically disclaimed any liability for selling the spur line real property. In essence, King County purchased the right to litigate with landowners on the eastern shore of Lake Sammamish, because of the reversionary rights those landowners held to the spur line land after Burlington Northern Santa Fe Railroad ["BNSFR"] abandoned the spur line, and

[1] Expert witness Stephen Graddon has now found that the true location of the original railroad right of way is *westerly* [Lake Sammamish is immediately west of the Rasmussens' waterfront lots] of the contested real property in this case.

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the United States Surface Transportation Board ["USSTB"] improperly exercised jurisdiction over this spur line to approve railbanking of the BNSFR abandoned *spur line*[2]. *See* Paragraph 10, Condition of Premises, at page 9 of *Agreement for the Transfer of Certain Assets, Rights and Obligations of The Land Conservancy of Seattle and King County to King County, Washington, a political subdivision of the State of Washington*, dated September 11, 1998, Exhibit 7 to John Rasmussen declaration dated April 9, 2001.

2. John and Nancy Rasmussen have resided on their Lake Sammamish waterfront properties since June 1993. BNSFR ceased operations on the spur line that passes through the Rasmussen waterfront properties in 1996. The spur line passes between the Rasmussens' sun deck overlooking Lake Sammamish, and the Rasmussens' shoreline on Lake Sammamish. John Rasmussen declaration, dated April 9, 2001.

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[2] The purchase agreement states: "Buyer acknowledges that Buyer has inspected the Premises, including the improvements and structures on the Premises. Buyer acknowledges that no representation has been made by Seller to Buyer concerning the state, condition or quality of title of the Premises, or the age of any improvements on the Premises. ¶ Seller HEREBY DISCLAIMS ANY REPRESENTATION OR WARRANTY, WHETHER EXPRESS OR IMPLIED,***[FOR] THE CONFORMITY OF THE PREMISES TO ITS INTENDED USES, OR THE QUALITY OF TITLE TO THE PREMISES. Seller SHALL NOT BE LIABLE TO Buyer ***FOR***THE CONFORMITY OF THE PREMISES TO ITS INTENDED USES. Buyer ACCEPTS THE PREMISES IN "AS IS, WHERE IS" AND "WITH ALL FAULTS" CONDITION, AND SUBJECT TO ALL LIMITATIONS ON Seller's RIGHTS, INTEREST, AND TITLE TO THE PROPERTY COMPRISING THE PREMISES".

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3. John and Nancy Rasmussen's fee simple absolute title ownership of the two waterfront properties on Lake Sammamish has been of record since June 1993. Their personal residence address has been published in the King County real property tax records since June 1993. They have had a listed telephone number, (425) 392-8110, for the entire period of time they have resided on the contested properties in this case, and their address has been published in the local telephone book since June, 1993. At no time has BNSFR, the USSTB, TLC, King County, or any of their agents, employees or representatives ever made contact with the Rasmussens, to advise the Rasmussens that their reversionary rights were going to be adversely affected by any decision of the USSTB, or by any contractual agreements by BNSFR, TLC or King County. John Rasmussen declaration dated April 9, 2001.

4. *If* there *was* notice of the pending action of USSTB to consider BNSFR's abandonment of the spur line, and the spur line's eligibility for railbanking pursuant to 16 U.S.C. §1247(d), it was only *notice by publication*, and no effort was made to provide *actual notice* to the Rasmussens that their railway easement reversionary property rights could be adversely affected by USSTB's decision. 49 C.F.R. §1105.12; John Rasmussen declaration of April 9, 2001; Scott Johnson Decl., Exhibit 7, at pp. 8, 12.

5. John Rasmussen requested King County to explain to him what property rights King County was asserting over his waterfront lots, where he had been living since June 1993, and his repeated requests went unanswered for fifteen (15) months. Only after King County commenced this lawsuit did King County advise the Rasmussens, through pleadings in this action, that King County asserts a vested

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fee simple absolute ownership in the Rasmussens' waterfront lots. Declarations of John Rasmussen dated September 2, 2000 and April 9, 2001.

6. John Rasmussen wrote to King County officials that "If nothing happens from this letter, I'll give 72 hours notice to everyone I've ever written over the last fifteen months and then meet trespassers on my property with a loaded shotgun. I will demand they prove to me their right to be there, or I will use whatever force is necessary to remove them". John Rasmussen had previously written to King County Sheriff David Reichert on January 23, 2000 that "The County continues to illegally invade my property, and the time comes closer that someone will be physically harmed over this issue. I believe that person most likely will be me, as I defend my property rights." Decl. of John Rasmussen, September 2, 2000, at pp. 77 and 107, Exhibit 7 to Scott Johnson declaration, dated Feburary 15, 2001; Decl. of John Rasmussen dated April 9, 2001.

7. King County officials responded to John Rasmussen's statements by seeking injunctive relief against him. King County officials falsely claimed John Rasmussen repeatedly had threatened to shoot them; and that they feared him, based on hearsay evidence that was refuted by Nancy Rasmussen. *See* declaration of Nancy Rasmussen, dated September 2, 2000, and declaration of Jennifer Knauer, dated August 2000.

8. King County obtained an injunction order in King County Superior Court. That order prevented John Rasmussen from having any further contact with King County employees, and he could not contact the King County employees who trespassed upon the Rasmussens' real property. He was silenced from expressing

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his personal opinions concerning his right to protect his property and his person from trespassers. John Rasmussen declaration dated April 9, 2001.

9. A King County employee, attempting to trespass upon the Rasmussen property, drove a jeep onto the railbed. When confronted by John Rasmussen, the employee claimed she was doing survey work for King County, concerning the utility crossings on the prospective trail. John Rasmussen demanded she return the way she had come, and to back her jeep off his property. The employee refused. John Rasmussen then walked to the front of the jeep, while its engine was idling, and sat down on the railbed, on his property, with his back to the jeep and the King County employee. He heard the employee apply the gas throttle to the jeep engine. John Rasmussen was at risk of death if the employee engaged the transmission and drove forward. The standoff took approximately five minutes, and John Rasmussen was in fear for his life. John Rasmussen declaration dated April 9, 2001.

10. John Rasmussen has posted "No Trespassing" signs, to prevent trespassers from encroaching upon his waterfront properties.

11. King County Sheriff Dave Reichert specifically refused to protect the Rasmussens from trespassers, and withdrew police protection for the Rasmussens[3]. Plaintiff King County (through false statements to a state judge) successfully moved to enjoin John Rasmussen's right to bear arms. John Rasmussen has lost his constitutionally-protected right to bear arms. The Rasmussens' fear of physical harm has been compounded, because they are unprotected from trespassers. John Rasmussen declaration dated April 9, 2001.

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[3] "Keeping the peace" is translated to mean that the sheriff shall enforce the King County employees' trespass upon the Rasmussens' property.

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12. King County has an ordinance that characterizes a railroad right-of-way as an easement, rather than a fee simple property right. King County's ordinance prohibits use of a railroad right-of-way as a trail. Despite this ordinance, and despite King County's concession in internal memoranda or working papers indicating that this railroad right-of-way is merely an easement, plaintiff King County has aggressively attempted to take the fee simple property rights to the Rasmussens' waterfront lots, without compensation to the Rasmussens. King County has an ordinance that guarantees fairness and due process to the Rasmussens. King County has adopted standards for the width of trails. King County has not complied with these ordinances. King County has even ignored the *caveat* in the transfer agreement between TLC and King County, where TLC clearly warned King County that title to the railroad right-of-way was unresolved, and TLC refused to warrant the title to the contested property in this case. Ord. 10870 § 21, 1993; Ord. 6531 § 1, 1983: Ord. 2165 § 1, 1974.

13. King County has claimed that the contested real property in this case is subject to USSTB orders that authorize BNSFR to enter contractual agreements for the use of the railway right of way as a trail, and that the Rasmussens should seek compensation from the United States in the U.S. Court of Federal Claims. 16 U.S.C. §1247(d)

14. USSTB orders reference King County's participation in the USSTB's deliberations concerning whether or not the spur line should be abandoned, and railbanked, with King County being the "interim trail use" custodian. A history of the railbanking attempts, the USSTB's initial responses, and relationships between

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BNSFR, TLC and King County is provided through USSTB orders, attached as Exhibits 11, 12, and 14 to John Rasmussen declaration dated April 9, 2001.

15. The United State Government Accounting Office prepared an executive report concerning "Issues Related to Preserving Inactive Rail Lines as Trails" to the Honorable Sam Brownback, United States Senator, in October, 1999. That report described the "railbanking"[4] expectations of the USSTB. Exhibit 13 to John Rasmussen declaration dated April 9, 2001 (emphasis added).

16. John and Nancy Rasmussen have provided notice to King County that it is impermissible for King County officials, representatives or employees to encroach upon the waterfront properties owned by the Rasmussens. The photographs provided in this brief illustrate the signage found on the Rasmussens' property. Despite this warning to King County, the Rasmussens have endured multiple trespasses by King County employees and officials, together with third parties claiming rights through King County's claims for access to the Rasmussen properties. The Rasmussens are requesting this court to intervene and prohibit any further violations of the Rasmussens' constitutionally protected rights to privacy. Scott Johnson Decl., Exhibit 7

17. John and Nancy Rasmussen have not received any compensation for the interference to their property rights. They claim that USSTB conducted hearings that contemplated King County would be designated an "interim user" under the

[4] "Railbanking" has become a *legal fiction.* Clearly, the original railway right of way in this case is being converted to a trailway for public park purposes by King County, without compensation to the landowners for the loss of their reversionary rights, and the trailway shall never be converted back to a railway.

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Rails to Trails Act, 16 U.S.C. §1247(d), and that King County acted in conjunction with BNSFR, TLC and the USSTB to take the Rasmussens' real property rights, without fair compensation. The Rasmussens are asking this court to exercise its power to consider eminent domain issues, pursuant to 28 U.S.C. §1358, because King County was acting in concert with USSTB to facilitate the condemnation of the Rasmussens' reversionary rights to the contested real property. John Rasmussen declaration dated April 9, 2001.

18. The USSTB had no subject matter jurisdiction to enter any orders, because the rail line in this case was merely a spur line, and the USSTB had no authority to issue any orders concerning spur lines. The spur line had been abandoned by BNSFR, in August 1996. BNSFR conveyed its interests to TLC, a non-carrier, in 1997, which was obviously an illegal transfer because the railway right of way easement could not be used by TLC. Thus, the Rasmussens claim that the actions of King County in this case are similar to the actions of a state-law controlled "taking" as described in *Lawson v. State*, 107 Wn.2d 444, 730 P.2d 1308 (1986), because the USSTB railbanking orders are void and unenforceable. The Rasmussens are requesting this court to so rule, according to the specific authority found in 28 USC §1336(a) and (b), and in accordance with this court's plenary authority to consider any challenge to subject matter jurisdiction[5].

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[5] King County argues this court has no authority to determine if a government agency such as USSTB has committed an *ultra vires* act, outside of its statutory authority. The case law does not support this position. *Pennsylvania Railroad Company v. Reading Company,* 132 F.Supp. 616 (1955); *Nicholson v. I.C.C.,* 711 F.2d 364 (C.A. D.C. 1983); *Illinois Commerce Commission v. U.S.A.,* 779 F.2d

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19. On January 29, 2001, Division I of the Washington Court of Appeals issued its decision in *Good v. Skagit County*, 104 Wn. App. 670, - P.3d - (2001). The Rasmussens claim this case is distinguishable from the instant case, because there was no challenge to subject matter jurisdiction in the *Good* case, there was no challenge to substantive due process of law violations, and the King County claims in this case over-reach the claims of Skagit County. The *Good* case is before the Washington Supreme Court, pursuant to a petition for certiorari. The Rasmussens are suggesting to this court that if this court does not find *Good v. Skagit County, supra*, distinguishable from this case, then these pending motions should be stayed for final disposition of the *Good* case. If this Court agrees that the contested rail line in this case is a spur line, then *Good* is clearly distinguishable, and this Court should proceed to dispose of the pending motions.

III. ISSUES

1. *Have the Rasmussens stated claims for which relief can be granted?*

2. *Does this Court have authority to enforce USSTB orders, or determine subject matter jurisdiction issues?*

3. *Should this Court stay the resolution of these motions pending (a) final resolution of Good v. Skagit County, 104 Wn. App. 670, - P.3d - (2001); (b) the completion of reasonable discovery; (c) deferral of characterization of the rail line as a "spur line" to the USSTB for clarification to this Court; and/or (d) completion of mandatory mediation between the parties?*

1270 (7th Cir. 1985); *United States v. State of Idaho*, 298 U.S. 105, 56 S.Ct. 690 (1936).

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4. *If the Rasmussens' pleadings are deficient, should their claims be dismissed, or should they be afforded a time certain to plead, with more specificity?*

IV. ARGUMENT

1. John and Nancy Rasmussen have provided notice pleading to King County of legitimate claims that this court has jurisdiction to consider:

The FRCP 12(b)(1) challenge: When considering FRCP 12(b)(1) motions to dismiss for failure of subject matter jurisdiction, this Court may base its disposition on the complaint alone, the complaint supplemented by undisputed facts, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Austral Oil Co. v. National Park Serv.*, 982 F.Supp. 1238 (D.C. Tex. 1997). Concerning King County's suggestion the Rasmussens are challenging the discretion of the USSTB in its published orders in this case, the Rasmussens' deny any such allegation. This court has statutory authority to *enforce* USSTB orders, pursuant to 28 USC §1336(a) and (b). It follows from this specific statutory authority that this court can also *decline* to enforce USSTB orders, if the USSTB has no subject matter jurisdiction over the issue, as in the case of a spur line. 49 USC §10906.

Is the contested rail line a "spur line" in this case? Yes, it is. The test for a "spur line" is a *usage* test, and the case law clearly establishes this rail line as a "spur line":

1. Did the track connection *serve only a single carrier*?

2. Did the track provide *passenger, telephone, telegraph, loading platform, station or station agent's service*?

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3. Was the *length of the track so great* as to be considered in the nature of a branch line[6]?

4. Was *the connecting trackage used only for switching service* incidental to line haul movement?

5. Did the *trackage invade the territory* of another railroad?

6. Did the trackage involve *special financing or condemnation* proceedings?

7. Was the *cost of the trackage reasonable for an industrial spur* in the light of the traffic involved and was the railroad requested to provide service to the carrier?

8. Did the trackage provide service to the single customer *similar to that provided other industries in the same area and similarly situated?*

Pennsylvania Railroad Co. v. Reading Company, 132 F.Supp. 616, 621-622 (D.C. Penn. 1955).

In this case, there can be no question that the *usage* for this track was as a *spur line.* There is no evidence to suggest otherwise. Even TLC (and presumably BNSFR) conceded facts supporting the *usage* of this track was as a *spur line* in its application to the USSTB for abandonment. *See* Exhibit 11 of John Rasmussen declaration, April 8, 2001 at pp. 4-5, 7-8 (*only significant user was Darigold for previous three years, BNSFR suspended use two years prior to application, 12.45 miles of trackage was a "short" line, limited geographic area involved, trackage traversed a predominantly residential area, only significant shipper was relocating its rail-dependent operations to other areas*). This was not a connecting track: it

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[6] 14.5 miles has been considered a "spur line". *Hughes v. Consol-Pennsylvania Coal Co.,* 945 F.2d 594, *rehearing denied, certiorari denied,* 112 S.Ct. 2300, 504 U.S. 955, 119 L.Ed.2d 224 (3rd Cir. 1991). In this case the track was 12.45 miles.

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ended in Issaquah. It had no passenger, telephone, telegraph, loading platform, station or station agent's service. It was a spur line**.** *Hughes v. Consol-Pennsylvania Coal Co.,* 945 F.2d 594, *rehearing denied, certiorari denied,* 112 S.Ct. 2300, 504 U.S. 955, 119 L.Ed.2d 224 (3rd Cir. 1991) (*trackage was only 14.5 miles long, located wholly intrastate, functioned only to unload and transfer shipments from another line, and served only one customer*). This court should find USSTB did not have subject matter jurisdiction to authorize abandonment, or issue orders for railbanking. Railbanking of spur lines is illegal, and is an *ultra vires* act of the USSTB. 49 USC §10906. *See also, Nicholson v. I.C.C.,* 711 F.2d 364 (C.A. D.C. 1983); *Illinois Commerce Commission v. U.S.A.*, 779 F.2d 1270 (7th Cir. 1985); *United States v. State of Idaho*, 298 U.S. 105, 56 S.Ct. 690 (1936).

By examination of the USSTB findings and orders, it is clear that subject matter jurisdiction for the USSTB's decisions in this case was never raised before the USSTB[7]. This court also has jurisdiction to refer this issue to the USSTB for its recommendation to this Court[8]. 28 U.S.C. § 1336 (b). This Court may exercise its

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[7] Why would BNSFR, TLC or King County raise the issue, anyway? They had nothing to gain by bringing this to the attention of the USSTB. That's why the application for abandonment incorrectly referred to this track as a "rail corridor". USSTB never even realized it was dealing with a spur line.*(Note: this is one of the reasons why mere newspaper publication of USSTB's abandonment hearings does not satisfy substantive due process of law requirements for adversely affected adjacent landowners, infra.)*

[8] 28 U.S.C. § 1336 (b) states:

> "(b) When a *district court* or the United States Court of Federal Claims refers a question or issue to the Surface Transportation Board for

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plenary power to simply look at the facts and find the contested track is a spur line, and rule the USSTB lacked subject matter jurisdiction to issue any abandonment or railbanking orders; or, this Court could refer the issue to the USSTB for its analysis as to whether or not it was exercising jurisdiction over a spur line. In either alternative, King County cannot argue this Court lacks jurisdiction under the Hobbs Act, because no claims of arbitrary or capricious action have been asserted, nor is there any claim that the evidence does not support the USSTB's orders. The USSTB simply did not have subject matter jurisdiction to issue *any* orders, something that this Article III Court can resolve, *sua sponte*.

2. The counterclaims must be read as a whole; the constitutional and statutory violations are compensable through 42 U.S.C. §§1983, 1988:

Prior restraint of protected free speech: King County is not suggesting John Rasmussen has not asserted a legitimate violation of prohibited prior restraint of free speech, just that he has failed to allege the Fourteenth Amendment conduit for the assertion of that right, and that in the same paragraph referencing the prior restraint he did not also assert the remedy found in 42 U.S.C. §§1983, 1988. But

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determination, *the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Surface Transportation Board arising out of such referral*." (emphasis added)

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the counterclaims must be read as a whole, and isolating each paragraph is impermissibly restrictive in notice pleading. FRCP 1 (*there is but one form of action*). *See also,* footnote 5 of defendants' "Notice of Removal": "*Although the Complaint is couched in and pleads, inter alia, that John Rasmussen "repeatedly" stated he would shoot any county employees who enter the disputed property, the declarations of the defendants refute these wild accusations, the actual documents received by the plaintiff from the defendants are devoid of the necessary support for such preposterous allegations, and the plaintiff's claims clearly arise from speech, and represent no less of an assault on First Amendment principles than if an action for prior restraint had been pleaded.*" King County considers it appropriate that John Rasmussen cannot have any discourse with King County employees[9]. This places King County squarely on notice that John Rasmussen is bringing an action for violation of his constitutional rights to free speech: King County considers it appropriate that John Rasmussen cannot express his opinion that he shall *defend* his life and his property, and that he shall arm himself in defense of his life and property. Prior restraints are presumptively unconstitutional unless they deal with non-protected speech. *State v. Coe*, 101 Wn.2d 364, 372, 679 P.2d 353 (1984). Prior restraints are "official restrictions imposed upon speech or

[9] After fifteen months of stonewalling, the only viable communication channel to King County was through the employees who would relay communications from John Rasmussen to their superiors. Now he cannot do this. *See* Radical Chic & Mau-Mauing the Flak Catchers, by Tom Wolfe, Bantam Doubleday Dell publ., Reprint edition (October 5, 1999). Mr. Rasmussen has no opportunity to break through the Flak Catchers.

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other forms of expression in advance of actual publication." *Id.* (quoting *City of Seattle v. Bittner*, 81 Wn.2d 747, 756, 505 P.2d 126 (1973). A government regulation may not rise to the level of a prior restraint where it is merely a time, place or manner restriction. *Coe*, 101 Wn.2d at 373.

Under the Federal Constitution, statutes regulating time, place or manner restriction are upheld if they are "content neutral, are narrowly tailored to serve significant government interest, and leave open ample alternative channels of communications." *Frisby v. Schultz*, 487 U.S. 474, 481, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988). Under the Washington Constitution, the standard is stricter: a "compelling" not "significant" government interest is required to uphold a statute regulating time, place or manner. *Bering v. SHARE*, 106 Wn.2d 212, 234, 721 P.2d 918 (1986); *Frisby*, 487 U.S. at 481. In this case, King County Executive Ron Sims wrote John Rasmussen, informing Mr. Rasmussen that Mr. Sims considered Rasmussen's statements to be harassment, and that the matter was being turned over to King County Prosecutor Norm Maleng for criminal investigation. See Exhibit 8, John Rasmussen decl. dated April 9, 2001. This court has the voluminous e-mail messages from John Rasmussen to various officials, over a fifteen month period of nonresponsive dialogue. Examination of those messages should not cause one to fear injury or death, but should encourage a government official to answer the messages with some substantive reply.

A governmental attempt to restrict the content of future speech, deemed "prior restraint," bears "a heavy presumption against its constitutional validity" under the First Amendment to the federal constitution, and is unconstitutional per

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se under article I, section 5, of the state constitution. *JJR Inc. v. City of Seattle*, 126 Wn.2d 1, 6 & n.4, 891 P.2d 720 (1995) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S. Ct. 631, 639, 9 L. Ed. 2d 584 (1963)). In this case, John Rasmussen no longer can say he shall assert his right to *defend his life* and *his property*, and that he shall arm himself. King County considers this prior restraint to be reasonable, and in furtherance of a *compelling* or (in the case of a federal claim) *substantial* governmental interest. King County has violated John Rasmussen's free speech rights, and his right to be free from prior restraint. King County seeks to dismiss the 42 U.S.C. §1983 claims, because the statute is not reiterated in every paragraph of the pleadings. Under notice pleading this is impermissibly restrictive, and is not in furtherance of the Federal Rules of Civil Procedure. The civil rights listed in the Rasmussens' counterclaims are related to the remedy provided under 42 U.S.C. §§1983, 1988, and there is no need to restate the statute for every constitutional or statutory deprivation[10].

The county wrongfully abridged John Rasmussen's right to bear arms: King County suggests this court is bound by the precedent of *Hickman v. Block*, 81

[10] This is a recurring complaint by King County. The county suggests that by not specifically pleading violation of rules, regulations or policy, that no §1983 claim can be asserted against the county. *But see* footnote 8 in defendants' Notice of Removal to this Court: "Washington courts recognize punitive damages are available against a county, *when there has been a violation of county policy*, an assertion defendants' expert witness shall substantiate. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746, (1992)(emphasis added)." Clearly, King County has been on notice of the civil rights legal theory for county liability.

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F.3d 98, 100-101 (9th Cir. 1996). But the right to bear arms can also be a personal right, one of the fundamental rights of Americans, even in the Ninth Circuit[11]:

"…*The Second Amendment embodies the right to defend oneself and one's home against physical attack*. Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self Preservation*, 39 Ala. L. Rev. 103, 117-120, 130 (1987) (Second Amendment guarantees right to means of self defense); *see* Sanford Levinson, *The Embarrassing Second Amendment,* 99 Yale L.J. 637, 645-46 (1989) ("[I]t seems tendentious to reject out of hand the argument that one purpose of the [Second] Amendment was to recognize an individual's right to engage in armed self-defense against criminal conduct.") In modern society, the right to armed self-defense has become attenuated as we rely almost exclusively on organized societal responses, such as the police, to protect us from harm. *See Levinson,* 99 Yale L.J. at 656("[O]ne can argue that the rise of a professional police force to enforce the law has made irrelevant, and perhaps even counterproductive, the continuation of a strong notion of self-help as the remedy for crime.") The possession of firearms may therefore be regulated, even prohibited, because we are "compensated" for the loss of that right by the availability of organized societal protection. *The tradeoff becomes more dubious, however, when a citizen makes a particularized showing that the organs of government charged with providing that protection are unwilling or are unable to*

[11] In *Hickman v. Block, supra*, the panel refers to the quoted excerpt above as "the aberrant footnote". The facts of *Hickman* are distinguishable here. Police protection has been removed for the Rasmussens.

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do so[12]. *See Lund,* 39 Ala. L.Rev. at 123 ("The fundamental right to self-preservation, together with the basic postulate of liberal theory that citizens only surrender their natural rights to the extent that they are recompensed with more effective political rights, requires that every gun control law be justified in terms of the law's contribution to the personal security of the entire citizenry.") At that point, the Second Amendment might trump a statute prohibiting the ownership and possession of weapons that would be perfectly constitutional under ordinary circumstances. *Allowing for a meaningful justification defense ensures that 18 U.S.C. §922(g)(1) does not collide with the Second Amendment*." *U.S. v. Gomez,* 92 F.3d 770, 774-775, fn 7 (9th Cir. 1996)(emphasis added).

Here, John Rasmussen, unarmed, faced a hostile King County employee, and tensely waited as the employee stepped on the gas. He feared for his life, not knowing if she would drive over him as he blocked her continued trespass across his waterfront property. The tension between these King County trespassers and John Rasmussen became untenable. John Rasmussen was refused police protection, and he was entitled to rely upon a justification defense for the protected speech he published: the language simply relayed his intention to protect himself

[12] King County Sheriff Dave Reichert withdrew police protection from the Rasmussens, and allowed illegal trespassers to freely roam the Rasmussens' properties.

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and his property, armed if necessary[13]. Instead, King County demonized John Rasmussen, and through false accusations obtained an order prohibiting him from possessing a gun. This violates his civil rights, under color of law. 42 U.S.C. §1983.

King County is liable to the Rasmussens for violation of their rights to substantive due process of law: King County diverts this Court's attention to the procedural jungle involving collateral attacks upon USSTB orders---this is not the focus of the Rasmussens' claims. The Rasmussens are challenging the USSTB's *regulations*, not the USSTB's *orders*, when examining issues of fundamental due process of law. In this case, the Rasmussens have always claimed a vested reversionary right to the railway right-of-way easement used by BNSFR. This property right could be, and was, adversely affected by a USSTB abandonment hearing where BNSFR, TLC and King County glossed over the lack of subject matter jurisdiction of USSTB to issue orders affecting a spur line. The Rasmussens' address, telephone number, identification as adjacent landowners, and physical location were all known to USSTB, BNSFR, TLC and King County, or at least this information was of public record and easily ascertainable. King County suggests in its memorandum that the Rasmussens didn't have the right to intervene in an abandonment and railbanking hearing, which flies in the face of USSTB's own regulations. 49 CFR §1105.12.

[13] Mr. Rasmussen's comments were not nearly as politically incorrect as Washington Republican candidate Harold Hochstatter's "lock and load" speech, *a la Louis L'Amour*, concerning land use laws, a speech highly publicized in the gubernatorial primary election of 2000.

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Despite the Rasmussens' valuable reversionary rights that needed protection, because they would be adversely affected, or irrevocably lost, none of the railbanking players---King County, TLC, BNSFR or USSTB---took any meaningful action to inform the Rasmussens of the pending abandonment and railbanking deliberations of the USSTB. In *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950), the Supreme Court held due process requires that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. Since *Mullane,* the Court has held that notice by publication in a condemnation proceeding, where the property owner's name and address were known to the City, did not meet due process standards. *Walker v. Hutchinson,* 352 U.S. 112, 1 L. Ed. 2d 178, 77 S. Ct. 200 (1956).

In *Nelson v. New York,* 352 U.S. 103, 1 L. Ed. 2d 171, 77 S. Ct. 195 (1956), the Court held the notice procedures used by New York City in foreclosing its liens for unpaid water charges met due process requirements. The statute required that notice of the foreclosure proceeding be posted and published and a copy of the published notice mailed to the last known address of the owner of the property sought to be foreclosed. More recently, the Court held notice by publication was inadequate to provide due process to a mortgagee of real property sold at a tax sale: Notice by mail, or other means as certain, to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if the party's name and address are reasonably

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ascertainable. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800, 77 L. Ed. 2d 180, 103 S. Ct. 2706 (1983).

The names and addresses of John and Nancy Rasmussen were obviously known to King County, TLC, BNSFR and USSTB, as this information was easily ascertainable from public records, regularly posted for all governmental entities. Failure to *mail notice of the abandonment and railbanking hearings* to the Rasmussens violated substantive due process requirements outlined by the Supreme Court in *Mullane* and its progeny. *See* also *Atkins v. Kessler*, 97 Cal. App. 3d 784, 159 Cal. Rptr. 231 (1979). As suggested earlier, if the Rasmussens had attended the USSTB hearings, then the USSTB would not have been lead down the primrose path of exercising jurisdiction over a *spur line*, self-servingly (and inaccurately) described by TLC as a "rail corridor". King County participated in this violation of the Rasmussens' rights to substantive due process of law, and is liable in damages to the Rasmussens for violation of the Rasmussens' civil rights, under color of law. 42 U.S.C. §1983.

King County has violated its own policies, practices or rules adopted by the county, and punitive damages are available in this instance:

King County suggests there is no evidence of violation of its policies or rules in the civil rights violations enumerated by the Rasmussens. There are several breaches, easily listed even before discovery has occurred:

"… KCC 21A.02.110 **Classification of right-of-way**.

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A. Except when such areas are specifically designated on the zoning map as being classified in one of the zones provided in this title, land contained in rights-of-way for streets or alleys, or railroads shall be considered unclassified.

B. Within street or alley rights-of-way, uses shall be limited to street purposes as defined by law.

C. **Within railroad rights-of-way, <u>allowed uses shall be limited to</u> tracks, signals or other operating devices, movement of rolling stock, utility lines and equipment, and facilities accessory to and used directly for the delivery and distribution of services to abutting property[14].**

D. **Where such right-of-way is vacated, the vacated area shall have the <u>zone classification of the adjoining property with which it is first merged</u>**.

(Ord. 10870 § 21, 1993)(emphasis added)."

This King County ordinance has been the established practice for the treatment of railroad rights-of-way by King County, and the Rasmussens have

[14] Regardless of the opportunities presented by the federal "Rails-to-Trails Act", 16 U.S.C. §1247(d), King County must be an eligible participant for maintaining the trail. It is not, because its own ordinance prohibits treatment of a railroad right-of-way as a trail. King County is engaging in *ultra vires* acts by participating in any interim trail use activities for this railroad right-of-way. Any *ex post facto* amendments to the current ordinance would be subject to challenge by those parties with vested rights [in this case, the Rasmussens].

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supplied this court with documentation establishing that policy. But in this case King County asserts it owns a fee simple strip of land 100 feet wide through the middle of the Rasmussens' property despite the King County policy to the contrary. The Rasmussens have been forced to expend fees and costs, as well as expert witness fees, to prove King County has violated its own policies, and that the **railroad right-of-way**, if it still exists, is merely an easement. King County is violating its own **limiting regulations that control the authorized activities within that easement**.

King County has ignored its policy of fundamental fairness with the Rasmussens: "…it is the intent of the council that rules shall be adopted by county government in such a manner as to promote efficiency of government and also **afford citizens fair notice and due process**." KCC 2.98.010 (Ord. 6531 § 1, 1983: Ord. 2165 § 1, 1974). There was no fair notice of King County's decision to claim it owned a fee simple interest in the Rasmussens' property[15]; there was no fair notice, or opportunity to be heard, concerning the adverse affect visited upon the Rasmussens' reversionary rights. *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 94 L. Ed. 865, 70 S. Ct. 652 (1950); *Walker v. Hutchinson*, 352

[15] Fifteen months of stonewalling impeaches any claim of "fair notice".

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U.S. 112, 1 L. Ed. 2d 178, 77 S. Ct. 200 (1956). King County claims there were no reversionary property rights adversely impacted here.[16].

"KCC 21A.14.240 **Trail corridors - Design standards**.

Trail design shall be reviewed by the department of development and environmental services for consistency with adopted standards for:

A. **Width of the trail corridor**;*******(Ord. 11621 § 51, 1994: 10870 § 384, 1993)."

This ordinance has also been ignored by King County, as it asserts its rights to claim a 100 foot strip through the Rasmussens' real property. This is not the adopted standard by King County for a trail corridor width…the actual width

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[16] But the legislative history of 16 U.S.C. §1247(d) does not support King County's analysis: "*The key finding of this amendment is that interim use of a railroad right-of-way for trail use, **when the route itself remains intact for future railroad purposes**, shall not constitute an abandonment of such rights-of-way for railroad purposes…*" 2 U.S.C.C.A.N. 119 (1983). In this case, the "route itself" (i.e. the original rail "corridor") did *not* remain "intact", and the remaining trackage subject to the 1997-1998 USSTB deliberations was a ***spur line***. *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, *rehearing denied, certiorari denied*, 112 S.Ct. 2300, 504 U.S. 955, 119 L.Ed.2d 224 (3rd Cir. 1991) (*trackage was only 14.5 miles long, located wholly intrastate, functioned only to unload and transfer shipments from another line, and served only one customer*). The USSTB should have been informed of this characterization of the trackage, and clearly it was not so informed. The Rasmussens' vested reversionary rights were adversely impacted by King County's participation in the abandonment and railbanking process in this case, without due process of law.

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should be no more than the railbed---eight feet. Also, it is now apparent that the centerline of the easement, if it exists, has been seriously misaligned[17].

The above King County ordinances, recklessly or intentionally disregarded, are illustrative of the deliberate path of county belligerence taken against the Rasmussens. The Rasmussens have been stripped of their rights to substantive due process of law, in violation of the Fourteenth Amendment, and the county is liable for money damages, including punitive damages, pursuant to 42 U.S.C. §§1983, 1988; *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746, (1992).

King County misapplies the Doctrine of Federal Preemption in its attempt to deflect the Ramussens' claim for compensation:

The Ninth Circuit has not ruled on the available remedies for a railbanking "taking" claim. In *Presault v. I.C.C.*, 494 U.S. 1, 110 S. Ct. 914, 108 L.Ed.2d 1 (1990) the U.S. Supreme Court did not hold that the *only* available remedy for a railbanking "taking" was before the U.S. Court of Federal Claims. In *dictum* the Ninth Circuit suggested that only the U.S. Court of Federal Claims had jurisdiction to consider a "taking" under the railbanking laws. *Dave v. Rails-to-Trails Conservancy*, 79 F.3d 940, 942 (9th Cir. 1996). But *Dave* did not raise the subject matter jurisdiction issues present in this case, nor could it have done so. The trackage in *Dave* was not a spur line. The *Dave* trackage was a total of 42 miles of railroad right-of-way, of a railroad *corridor* between Goldendale and Klickitat.

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[17] See expert witness Stephen Graddon's recent analysis of the misalignment of the railway easement, placing it westerly of the contested real property. Exhibit ___ to Graddon declaration, dated -----.

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There was subject matter jurisdiction for the I.C.C. (now USSTB) to issue abandonment and railbanking orders. *Dave* was a narrow holding based on the court's lack of jurisdiction to overturn NITU orders of the I.C.C. The *dictum* indicates the Ninth Circuit panel involved in *Dave* would be hostile to the Rasmussens' claims for compensation in this Court[18]. This court should exercise its original jurisdiction to consider the "taking" pursuant to 28 U.S.C. § 1358, because King County, in concert with a federal agency (USSTB) has taken the Ramussens' reversionary rights without compensation, in violation of 16 U.S.C. §1247(d) and 49 USC §10906. This is a case of first impression: the parties are in federal district court, there has been a wrongful application of the railbanking laws by federal and state entities acting in concert, and this court has original jurisdiction to consider the merits of this claim. This is the *niche* reversioners have sought for years. This Court should allow the Rasmussens fair compensation for the loss of their property rights.

John and Nancy Rasmussen have correctly asserted pendent jurisdiction state claims, and this court should hear these claims in the interest of judicial economy:

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[18] "…The conversion for the time being of the property to a use other than rail service created the possibility that reversioners of the easements might have a claim for compensation for the taking of their reversionary interest. It has proved to be a teasing and frustrating path for the reversioners, or alleged reversioners, to find a way to establish a claim. The present case is a not implausible but ultimately unsuccessful effort by a group of alleged reversioners to find a way." *Dave v. Rails-to-Trails Conservancy*, 79 F.3d 940, 941 (9th Cir. 1996).

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King County is attempting to take the Rasmussens' property without fair and just compensation, in violation of the county's own rules, and in violation of state law. R.C.W. 64.04.180, 190; *Lawson v. State*, 107 Wn.2d 444, 730 P.2d 1308 (1986); Washington Constitution, Article 1, Section 16 (Amendment 9). King County suggests this is a Tucker Act claim, where only the U.S. Court of Federal Claims has jurisdiction to hear this matter. *Presault v. I.C.C.*, 494 U.S. 1, 110 S. Ct. 914, 108 L.Ed.2d 1 (1990) struggled with this choice of remedy, in the Vermont case, but those facts are distinguishable[19].

Likewise, *Dave v. Rails-to-Trails Conservancy*, 79 F.3d 940, 942 (9th Cir. 1996) is distinguishable on its facts. Recently Division I of the Washington Court of Appeals issued its opinion in *Good v. Skagit County*, 104 Wn. App. 670, - P.3d - (2001) (*Congress preempted state courts from entertaining a compensation claim arising out of the operation of the Trails Act).* But Division I also noted:

"…*Lawson* did not involve an alleged taking under section 1247(d) of the Trails Act. The local trail manager, King County, acquired use of an *abandoned* corridor under 49 U.S.C. §10906 and 49 C.F.R. §1152.28. The Court addressed our State's property law, noting that when a railroad company "abandons" a line, the

[19] Only after years of litigation, and after *Presault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) wound up in the U.S. Federal Circuit Court, did the U.S. Court of Federal Claims jurisdiction for Tucker Act claims solidify the "taking" jurisdiction for the Vermont case. Here, the USSTB was tricked into thinking there was subject matter jurisdiction to issue NITU orders, when no such jurisdiction exists to control disposition of railroad easements of spur lines. 49 USC §10906.

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railroad right-of-way reverts to a reversionary interest holder. *Lawson*, 107 Wn.2d at 449. *Finding that section 10906, the predecessor to the railbanking statute*, [*sic*] did not preempt state law regarding a landowner's reversionary interests upon abandonment, the Court required King County to compensate the landowners for use of the right-of-way. The Court further held that Washington's railbanking statute, RCW 64.04.190, violated Article I, Section 16 of the Washington Constitution by appropriating the reversionary interests of the plaintiffs without payment of just compensation. *Lawson*, 107 Wn.2d at 458." *Good v. Skagit County, supra,* at p. 675 (emphasis added). But 49 USC §10906 is the federal law that prohibits the USSTB to exercise jurisdiction over spur lines, which is the case here. The *Good* case is inapposite.

Division I has delineated the rationale for compensation in this case, pursuant to state law, and this Court's pendent jurisdiction power. Although this case does involve a *misapplication* of section 1247(d) of the Trails Act, the clear authority of this Court to enforce or disregard the USSTB orders, when the USSTB lacks subject matter jurisdiction, places this case squarely within the *Lawson* scope of remedies[20].

King County has abused the Rasmussens' civil rights, under color of law, and has violated its own ordinances in an attempt to remove the Rasmussens from

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[20] When BNSFR abandoned the spur line, this race was run. The reversioners own the land. *Lawson v. State*, 107 Wn.2d 444, 730 P.2d 1308 (1986).

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their land, without fair compensation. This Court should allow this claim to proceed to jury trial, and punitive damages should be awarded here. 42 U.S.C. §§ 1983, 1988; *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 829 P.2d 746, (1992).

This Court should stay consideration of dismissal motions until reasonable discovery has been completed:

No discovery has occurred in this case. There was an attempt to depose several King County witnesses, but due to Christmas holidays and the county's resistance to making Ron Sims available for deposition, together with the press of developing the expert witness testimony (Stephen Graddon's expenses have been approximately $12,000.00 to date, with another $5,000.00 due shortly) the Rasmussens have not had enough time to fully develop their positions in this lawsuit. This case is not ripe for dismissal motions, as there are factual disputes that need to be addressed by deposition of expert witnesses (e.g., if the right-of-way has been misaligned, where is the true right-of-way, and does it require survey?). For example, King County's proffered expert, Mr. DeGoojer, testifies about his knowledge of the various deeds involved in determining the fee simple versus easement issue. What about his knowledge of the concessions of King County regarding the characterization of this railroad right-of-way being an easement? There are dozens of questions Mr. DeGoojer's declaration has raised, which should be resolved before this court determines if the easement vs. fee simple issue is appropriate for motion practice. This court should hold in abeyance the county's requests for dismissal, pending reasonable completion of discovery.

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The issues raised by the Rasmussens should give pause to King County, and this case should be referred to a federal magistrate for mandatory mediation:

King County has taken the incredible position that it owns the fee simple absolute title to a parcel of prime lake front property approximately eleven (11) miles in length, with an average width of 100 feet. In the contested area there are over 450 executive homes, with a median value of in excess of $600,000.00, many of which shall become landlocked if King County's exaggerated claims are accepted without resistance. The losses to property values are in the range of at least $200,000,000.00 to $300,000,000.00 if these properties are devalued. *See* Rasmussens' Notice of Removal, footnote 7, dated September 26, 2000. These homeowners have massive damage "takings" claims, and both parties to this action have a great deal at stake here. *There is room for negotiations for both parties*. King County has stonewalled the Rasmussens for over two years (John Ramussen's first letter to King County was dated April 9, 1999). King County is currently attempting to obtain "interlocal agreements" where the municipalities of Issaquah, City of Sammamish and Redmond have been requested to accept and agree that King County owns the proposed trail route. This trap shall expose these municipalities to liability from these frustrated, angry homeowners all along the proposed trail. Mandatory mediation shall assist the parties to this lawsuit in isolating the issues, with a view towards settlement of all claims. *It is respectfully requested that this court order the parties to participate, in good faith, in mediation before a federal magistrate in this action.*

The claims should not be dismissed, if the pleadings lack specificity, but the answer and counterclaims should be clarified:

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In a removal action, the defendants have a very short window of opportunity to prepare and file their counterclaims. In this case the Rasmussens were forced to file their counterclaims in thirty days, and without the benefit of any discovery in the plaintiff's case in chief. This is an extremely complex case, with administrative law, real property law, eminent domain and civil rights issues replete in all aspects of the litigation. The damages are enormous, as this case is the tip of the iceberg concerning the impact to all affected homeowners, and county taxpayers at large. Thus, this court is urged to exercise its discretion and require the Rasmussens to amend their pleadings to plead with more specificity, rather than summarily dismiss their counterclaims under these circumstances, if this Court finds their pleadings to be lacking.

When a motion to dismiss attacks the counterclaims on their face, asserting simply that the counterclaims fail to allege facts upon which subject matter jurisdiction can be based, the facts alleged in the counterclaims are *assumed to be true* and the Rasmussens, in effect, are afforded the same procedural protection as they would receive on a motion to dismiss for failure to state a claim. *Wise v. U.S.*, 8 F.Supp.2d 535 (D.C. Va. 1998).

The Rasmussens' counterclaims *should not be dismissed so long as it is possible to hypothesize facts, consistent with the allegations of the counterclaims* that would make out claims for relief. *Petri v. Gatlin*, 997 F.Supp. 956 (D.C. Ill. 1997).

This Court is respectfully requested to deny the plaintiff's motions to dismiss under FRCP 12(b).

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V. CONCLUSION

King County brings FRCP 12(b) motions for dismissal of the Rasmussens' counterclaims, without any discovery, without any acknowledgement of their concerns, after over two years' of attempted communications by the Rasmussens. King County seeks this Court's approval for legitimizing its conduct in clouding the title to homeowners' properties along the eastern shore of Lake Sammamish, while serious issues of constitutional magnitude remain unanswered. This Court should deny the county's motions, find that original jurisdiction exists for resolution of all claims, and set this matter for trial.

Respectfully submitted this 11th day of April, 2001.

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