Honorable Catherine Shaffer
Date of Hearing: August 24, 2001
Time: 11:00 a.m.

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

GERALD L. RAY and KATHRYN B. RAY, husband and wife, Plaintiffs, v. KING COUNTY, a political subdivision, Defendant.	No. 00-2-14946-8 SEA **MOTION FOR SUMMARY JUDGMENT**

This is an action to quiet title and declare the respective rights of Jerry and Kathy Ray and King County with respect to a railroad right of way that passes through Ray's parcel. Ray contends the right of way is merely an easement. King County contends it owns the strip of land that comprises the right of way in fee simple absolute.
Resolving this dispute requires analysis of the original deed, dated May 9, 1887, whereby Bill Hilchkanum conveyed a "right of way" to the Seattle, Lake Shore and Eastern Railway Company.

RELIEF REQUESTED

Plaintiffs request that the Court enter a ruling granting summary judgment to them and quieting title in their favor.

STATEMENT OF FACTS

Seattle, Lake Shore & Eastern Railway was incorporated on April 15, 1885. The incorporators were twelve well known Seattle men, including Thomas Burke, Daniel Gilman, David Denny,

and George Haller (Burke's law partner). Burke was named as secretary and attorney. Gilman and Burke were the primary promoters of the venture and were always the most active among the officers. Burke was directly involved in real estate transactions for the company. Declaration of Stephen Graddon at 6:13-17; *see also*, Robert C. Nesbit, *He Built the Railroad: A Biography of Judge Thomas Burke* (1961) p. 106.

Bill Hilchkanum was a Native American who owned a parcel of land along the shore of Lake Sammamish. Hilchkanum could not read or write. Exhibits 6 and 7 to Graddon dec. By his own admission in affidavit, he stated that he relied upon "white men" when transacting business. *Id.* Hilchkanum's real estate documents were kept in the actual possession of David Denny, one of the incorporators of Seattle, Lake Shore and Eastern Railway Company. *Id.*

Hilchkanum's homestead claim included the area that now comprises Ray's residential lot. Jerry and Kathy Ray are the successors in interest to Hilchkanum. Stipulation of Facts. The Hilchkanum deed was executed on May 9, 1887 and was recorded at the request of the Burke & Haller law firm on that same date. Exhibit 5 to Graddon dec. Hilchkanum received a patent to the homestead claim on July 24, 1888. Graddon dec. at 10:5.

The Hilchkanum deed was not drafted by Hilchkanum, but was drafted by representatives of the Seattle, Lake Shore and Eastern Railway Company. Graddon dec. at 8:20-23 and 9:1-3 and cited exhibits.

The Hilchkanum deed includes a survey description identifying where the parties intended the railroad tracks to be placed. However, the tracks were not actually constructed within the area described by the survey call set forth in the deed. Stip. of Facts.

STATEMENT OF ISSUES

1. What interest was conveyed by Hilchkanum to the railroad?
2. What is the legal effect of the railroad's failure to construct the tracks within the area described in the deed?

EVIDENCE RELIED UPON

1. Declaration of Stephen Graddon and attached exhibits.
2. Declaration of Al Hebrank and attached exhibits.
3. Declaration of Roger Hayden and attached exhibits.
4. Declaration of John Groen and attached exhibits.
5. Declaration of Gerald Ray and attached exhibits.
6. Declaration of Corey Lewis and attached exhibits.
7. Stipulation of Facts.

AUTHORITY

I.

THE HILCHKANUM DEED CONVEYED ONLY AN EASEMENT

The granting clause of the Hilchkanum deed states:

> In consideration of the benefits and advantages to accrue to us from the location construction and operation of the Seattle Lake Shore and Eastern Railway in the County of King in Washington territory we do hereby donate grant and convey unto said Seattle Lake Shore and Eastern Railway Company a **right of way** one hundred (100) feet in width through our lands in said County described as follows to wit . . .

A. The Intent of the Parties Controls

The construction of a deed is generally a matter of law for the court. *Harris v. Ski Park Farms,* 62 Wn.App. 371, 375 (1991). In construing a deed, the intent of the parties controls. *Id; Carr v. Burlington Northern, Inc.*, 23 Wn App. 386 (1979).

The intent must be ascertained from reading the deed as a whole, and the words are to be given their **ordinary meaning**. *Ski Park Farms*, 62 Wn. App. at 375; *Roeder*, 105 Wash.2d at 276. The Court is to look at the "situation and circumstances of the parties **at the time** of the grant." *Zobrist v. Culp*, 95 Wash.2d 556, 560 (1981) (emphasis added).

B. Any Ambiguity Must Be Construed Against the Railroad

The Hilchkanum deed is not ambiguous. The only reasonable interpretation is the deed conveys a right of way easement for railroad purposes and does not convey the land itself. However, if the Court believes there is any ambiguity, the deed must be construed against the railroad. This is for two reasons. First, the railroad drafted the deed. While a deed is usually construed against the grantor, that is **not** the rule when the deed is drafted by the grantee (i.e. the railroad). *Ski Park Farms*, 62 Wn.App. at 376.

Second, Hilchkanum was illiterate and relied on others to inform him of the contents and meaning of documents. Moreover, the person who assisted Bill Hilchkanum was David Denny. Mr. Denny was a witness to Hilchkanum's "X" signature and was in usual custody of Hilchkanum's real estate documents. Exhibits 5, 6, and 12 to Graddon dec. By sworn affidavit, Hilchkanum stated that he relied upon Denny in his business affairs. *Id.* Significantly, Mr. Denny was also a representative of the railroad; he was an incorporator. Graddon dec. at 8:16. Under this blatant conflict of interest, combined with Hilchkanum's undisputed illiteracy, any ambiguity as to the meaning of terms must be in favor of Hilchkanum and against the railroad.

C. The Parties Intent was to Convey an Easement

1. Overview of Issue.

The basic issue for decision is whether Hilchkanum intended to convey a "right" or to convey the "land" itself. If he conveyed a right, the grant was an easement. If he conveyed the land itself, the railroad acquired fee title.

> Most cases dealing with conveyances to railroad companies fall into two general categories: Those that grant "land" and those that grant a "right."

6 A.L.R. 3d 973 at § 3. A more complete explanation states:

> In those instances in which the deed to the railroad conveys simply a definite strip or parcel of land **and** there is *no language in the deed relating to the use or purpose of the grant*, or limiting directly or indirectly the estate conveyed, there is generally very little danger or chance, depending on the viewpoint, that the deed will be construed as conveying an easement and, **vice versa**, if the deed conveys, *particularly in the granting clause*, to the railroad a *right of way*, the deed will nearly invariably be construed as conveying an easement rather than a fee.

Id. at § 14. The use of the term "right of way" in the granting clause is particularly determinative.

> In general, deeds which in the granting clause convey a "right of way" are held to convey an easement only.

Id. at § 7.

2. The Express Language Conveying A "Right of Way" Shows Intent To Convey An Easement

(a) Washington Law is Conclusive

A correct construction of the Hilchkanum deed is not difficult or doubtful. The granting clause in Hilchkanum's deed does not in any way convey a "strip of land" or any other "piece, parcel, or section **of land**." Rather, the express terms of the granting clause convey only a "right of way." Under time honored rules of construction, this granting clause conveys only a right to pass through Hilchkanum's property; i.e. an easement.

By expressly providing in the granting clause that a "right of way" was conveyed, the parties to the Hilchkanum deed clearly and unambiguously intended to limit the conveyance to an easement. The most recent Supreme Court affirmation of this rule is *Brown v. State*, 130 Wash.2d 430 (1996). *Brown* emphasized that the Court has long "given special significance to

the words right of way in railroad deeds" and cited with approval *Roeder Co. v. Burlington Northern, Inc*., 105 Wn.2d 567 (1986), *Morsbach v. Thurston County*, 152 Wash. 562 (1929); *Swan v. O'Leary*, 37 Wn.2d 533 (1950); *Veach v. Culp*, 92 Wn.2d 570 (1979) and others. *Brown,* 130 Wn.2d at 439. The Court then reaffirmed the general rule.

> These cases are consistent with the majority of cases that hold the use of the term "right of way" as a limitation or to specify the purpose of the grant generally creates only an easement.

Id. at 439-40. As is plain, the term "right of way" in the granting clause is itself a limitation showing the purpose was to create only an easement. In contrast to such limiting language, *Brown* explained:

> Conversely, where there is **no language** in the deed relating to the purpose of the grant or limiting the estate conveyed, and it conveys a definite strip of land, the deed will be construed to convey fee simple title.

Id. at 440 (emphasis added).

Numerous Washington cases have held that when a deed conveys a right of way for railroad purposes, the deed conveys only an easement. The first is *Biles v. Tacoma, O & G.H.R. Co.*, 5 Wash. 509 (1893). In that case, the railroad owned a large parcel of land that was conveyed to Biles. However, the railroad retained a 400 foot wide right of way through the property. The deed provided as follows:

> Reserving and excepting therefrom, however, a strip of land extending through the same … two hundred feet on each side of the center line … to be used for a right of way or other railroad purposes…

Id. at 510. The Supreme Court easily concluded that only an easement had been excepted from the grant, not fee title to a strip of land.

> We think the clause referred to simply reserved a right of way over an **easement** in the land conveyed.

Id. at 513 (emphasis added). In *Morsbach*, the Court established the rule as follows:

> [I]t is elementary that, in cases where the granting clause of a deed declares the purpose of a grant to be a right of way for a railroad, the deed passes an easement only, not a fee.

Morsbach, 152 Wash. at 565 *citing* 1 Thompson on Real Property, § 421. This statement is recognized by the Supreme Court as a controlling rule.

> [I]t is clear that we **adopted the rule** that when the granting clause of a deed declares the purpose of the grant to be a right of way for a railroad the deed passes an easement only.

Swan, 37 Wn.2d at 537.

The strength of this rule is illustrated in *Veach v. Culp,* 92 Wn.2d 570. In *Veach*, the granting clause was in quit claim form ("remise, release and forever quit claim") and also indicated that a "parcel of land" was being quit claimed. The deed stated:

> Do by these presents **remise, release and forever quit claim** unto said party of the second part, and to its assigns, all that certain lot, piece, or parcel **of land** situate in Whatcom County … to-wit: A **right of way** one hundred feet wide, being fifty feet on each side of the centerline.

Veach, 92 Wash.2d at 572. Although raising some ambiguity by being in the form of a quit claim deed, and including language regarding a "parcel of land," the Court nevertheless concluded the limitation by reference to "right of way" meant only an easement was granted.

> Given the language of the deed explicitly describing the conveyance of a right of way and given the rule of *Swan v. O'Leary* and *Morsbach v. Thurston County*, we conclude the deed conveyed an easement, not fee title.

Veach, 92 Wash.2d at 574. The rule was subsequently reaffirmed in *Roeder*, 105 Wn.2d at 572, and most recently, in *Brown*. 130 Wn.2d at 439 and n. 6 (acknowledging *Roeder* and quoting *Swan*). As held in *Roeder*,

> Since the granting clause of the … deed declares the purpose of the grant to be a right of way for a railroad, the deed passes an easement, not a fee.

Roeder, 105 Wash.2d at 571.

This Court must follow the well established Washington rule. The parties to the Hilchkanum deed provided a granting clause that expressly conveyed a "right of way." Under Washington law, that term, *particularly when utilized in the granting clause*, means that only an easement was conveyed.

(b) Washington Law Is Consistent With the National Perspective

Numerous cases and treatise texts confirm the Washington rule. *See* 65 Am. Jur.2d, Railroads § 76, at 388 (1972) and cites therein. An appropriate summary states:

> Generally, the courts conclude that a conveyance of a "right of way" creates only an easement. … The state of the law was well summarized by a Missouri appellate court: Use of terms such as "right of way" … is a strong, almost conclusive, indication that the interest conveyed is an easement. This doctrine arises from a recognition that from a practical standpoint long narrow strips of

> land serve little or no function other than for roads or rights of way. Therefore, unless the parties make it clear that a fee is intended, it is presumed that they did not intend to create an otherwise unusable interest in land.

Jon W. Bruce and James W. Ely, Jr., *The Law Of Easements And Licenses In Land*, 2001 Cumulative Supplement No.1, § 1.06[1], p. 1-39 quoting *Hartman v. J & A Dev. Co*., 672 SW2d 364, 365 (Mo. Ct. App. 1984).

3. Extrinsic Evidence Shows the Parties Must Have Understood and Intended the Term "Right of Way" to Mean Easement

a. Common Understanding of the Term

The Hilchkanum granting clause uses the term "right of way" in describing the interest being granted to the railroad. While the above cited Washington law is conclusive, extrinsic evidence underscores that the common understanding in 1887 was that a right of way was merely a right to pass through one's property, i.e., an easement. A contemporaneous 1891 definition states:

> RIGHT OF WAY. The right of passage or of a way **is a servitude** imposed by law or by convention, and by virtue of which one has **a right to pass** on foot, or horseback, or in a vehicle, to drive beasts of burden or carts, **through the estate of another**.

Black's Law Dictionary, p.1046 (1891) (emphasis added). The accepted understanding of the term at the time of the deed's execution was that a right of way was a servitude, not a fee simple estate. Its purpose was to provide merely a right to pass through the estate of another. Black's Law Dictionary further points out as follows:

> "Right of way," in its strict meaning, is the right of passage over another man's ground; and in its **legal** and **generally accepted meaning**, in reference to a railway, **it is a mere easement** in the lands of others, obtained by lawful condemnation to public use or by purchase. It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee simple of lands to be used for a railway or any other kind of way.

Id. (emphasis added). This is Black's Law Dictionary in 1891, just four years after the Hilchkanum deed was signed. The parties, especially Hilchkanum, must be understood to have utilized the term right of way as a "mere easement" because that definition, especially with reference to a railway, was the "generally accepted meaning." Indeed, for King County to contend (114 years later) that an illiterate Native American actually intended to use the term in some highly specialized, "unusual sense," and thereby convey away his land, is ludicrous.

b. Use of the term "right" in another portion of the Hilchkanum deed confirms the normal understanding of conveying an easement.

The Hilchkanum deed includes a right of the railroad to clear dangerous trees within 200 feet of the tracks. The deed states:

> And the said Seattle Lake Shore and Eastern Railway Company shall have the **right** to go upon the land adjacent to said line for a distance of two hundred (200) feet on each side thereof and cut down all trees dangerous to the operation of said road.

The County's proposed witness on deed interpretation, Neil DeGoojer, testified that because the term "right" was used in that clause, it conveyed permission to enter the property, or in his words, conveyed an easement.

> Q. In that phrase, there's the use of the word "right." What does that term mean?
> A. Permission.
> ...
> Q. And use of the term "right" gives them permission, to use your words?
> A. Yeah. It gives them an **easement**, I think, actually.
> Q. Did you say use of the term "right" gives them an easement, actually? Is that what you said?
> A. Yes.

DeGoojer depo. at 40:12-25 and 41:1-9 (emphasis added) (Exhibit 1 to Groen dec.).

DeGoojer is correct. Use of the term "right" in this deed conveys an easement. That would be the generally accepted meaning. Likewise, the "right" of way in the granting clause must also be understood according to the generally accepted meaning; i.e., permission to enter for the identified purpose. Any other ruling requires a level of sophistication and intent on the part of Hilchkanum for which there is no evidence to support.

c. The Intent of Thomas Burke

Ironically, Thomas Burke, the primary promoter of the railroad, happened to be a property owner from whom the company need to secure a right of way. Burke executed his "Right of Way" deed to the railroad on September 6, 1887, shortly after Hilchkanum's deed. Ex. 22 to Graddon dec. Not surprisingly, the key language of the granting clause in Burke's deed is **identical** to the granting clause language of the Hilchkanum deed. Both deeds convey a "right of way" in "consideration of the benefits and advantages to accrue to us from the location construction and operation" of the railroad. The only difference in the language of the granting clause is that while Hilchkanum "donate[s] grant[s] and convey[s]" the right of way, Burke

"remise[s], release[s] and forever quit claims" the right of way. In other words, Burke used the language of a quit claim deed.

The Burke deed states:

> In consideration of the benefits and advantages to accrue to us from the location construction and operation of the Seattle Lake Shore and Eastern Railway in the County of King in Washington Territory we do hereby remise release and forever quit claim unto said Seattle Lake Shore and Eastern Railway Company a right of way one hundred (100) feet in width through our land in said County described as follows …
>
> Such right of way strip to be fifty (50) feet in width on each side of the centerline …

Ex. 22 to Graddon dec.

At this point, the Court must understand the function of the "habendum clause" that typically appears at the end of a deed. The habendum clause states the extent of the ownership in the thing granted. The habendum clause cannot alter the interest that was conveyed by the granting clause, but rather, the habendum clause clarifies or explains what interest was conveyed by the granting clause. As stated by Neil DeGoojer:

> Q. Can a habendum clause alter the interest that is granted through the granting clause?
> A. No.
> Q. Does the granting clause control the interest that is conveyed?
> A. Yes.

DeGoojer depo at 42:2-7. In other words, the habendum clause does not modify the granting clause, it reveals the intent of the granting clause. The granting clause controls.

Burke, being an attorney, used the habendum clause to clarify his intent regarding the granting clause. Accordingly, Burke's habendum clause includes the statement that "if it should cease to be used for a railway the said premises shall revert to said grantors, their heirs, executors, administrators or assigns." Exhibit 22 to Graddon dec.

Thomas Burke's deed was construed by the Washington Supreme Court in *Pacific Iron Works v. Bryant Lumber*, 60 Wash. 502, 505 (1910). The Court had no difficulty holding that Burke's deed, although in quit claim form, conveyed an "easement and nothing more." *Id*. at 506.

> If this [deed] were a grant in fee simple, it would, perhaps, have the effect claimed for it by the respondent, but, in our opinion, it was not.

Id. The Court explained:

> While some of the language contained in the deed might imply such a grant, when the instrument is construed as a whole and **in light of the purpose for which the grant was made**, it is a grant of a right of way or easement and nothing more.

Id. (emphasis added). In other words, despite purporting to be a quit claim, which normally would convey all interest in the identified property, the Court recognized that the clear purpose of Burke's deed was for a right of way for the railroad. Of course, that purpose was identical to Hilchkanum—both deeds were for the express purpose of locating, constructing and operating a railroad. Moreover, both expressly stated in the granting clause that a "right of way" was being conveyed. As highlighted by the Court in *Pacific Iron Works*:

> The grant of a **right of way** to a railroad company is the grant of an easement merely and the fee of the soil remains in the grantor.

Id. at 506 (emphasis added) quoting 14 Cyc. 1162; *Robinson v. Missisquoi R. Co.*, 59 Vt. 426, 10 Atl. 522.

King County will undoubtedly argue that Burke's habendum clause is sufficient to distinguish Burke's intent from Hilchkanum's intent. But that distinction cannot pass scrutiny. Remember, the habendum clause cannot alter the interest conveyed by the granting clause, it merely defines or sets forth that interest. Because Burke and the railroad (of which he was an officer) agreed to the habendum language, this can only mean that Burke and the railroad agreed that the intent of the granting clause was to convey a mere easement. That was the ready conclusion of the Washington Supreme Court.

To rule that the identical granting clause language for Hilchkanum did not carry that same intent would be tantamount to ruling that Burke and his railroad company actually sought to take advantage, deceive, and defraud Hilchkanum out of his property. Remember, Hilchkanum was illiterate. He relied on others to tell him what a document meant. Moreover, one of the persons who apparently fulfilled that explanatory role was David Denny. Mr. Denny was a witness to the execution of Hilchkanum's deed and he held possession of Hilchkanum's real estate papers. Of course, Denny had a clear conflict of interest since he was also Burke's partner as co-founder of the railroad.

Under these circumstances, if this Court were to rule that Hilchkanum conveyed fee title to his land, while Burke conveyed a mere easement, *even though the key terms of the granting clauses are identical*, serious concerns would be raised as to whether the whole Hilchkanum transaction should be declared illegal as a result of undue influence, misrepresentation, or fraud. Hilchkanum's inability to read and write, or anticipate whatever hairsplitting legal arguments might be advanced 114 years later by King County, should not allow the railroad (or its successor) to take advantage of him.

The truth—the reality—is that both Hilchkanum and Burke conveyed a "right of way" for railroad purposes. Hilchkanum can only be charged with understanding the commonly accepted meaning of the term "right of way." That common understanding is what the Supreme Court held Burke intended when the term was used in his contemporaneous conveyance to the same railroad. To rule anything other than Hilchkanum, like Burke, conveyed a right to enter the property and lay track as an easement for railroad purposes has no legal or factual support. The words of the Washington Supreme Court seem particularly applicable:

> It would not be fair to assume that, under the guise of procuring simply a right of way, the railway company intended by the use of these words to take a conveyance in fee simple.

Morsbach, 152 Wash. at 569-70 quoting *Lockwood v. Ohio River R. Co.*, 103 F. 243 (C. C. A. 4th Cir.).

d. Newspaper Reports.

The conclusion of the Washington Supreme Court in *Pacific Iron Works* that Thomas Burke's deed conveyed a mere easement should be conclusive. Nevertheless, additional extrinsic evidence further shows the mindset of the railroad was merely to acquire a "right" to lay track, not to purchase land in fee. The December 25, 1886, edition of the Seattle Daily Post Intelligencer reported on an excursion led be Thomas Burke to show investors the area along the lake where the future train would run. Burke described the beauty of the scene as the party crossed the mountain between Newcastle and Squak Valley (where I-90 now runs to Issaquah). "A more beautiful panorama is seldom if ever beheld." He continued:

> These people are here asking no donation at our hands. All they ask is a **right to lay their track** and a place to build their city passenger and freight station.

Seattle Daily PI, December 25, 1886 (emphasis added). As a key promoter of the railroad, Burke's quotes are probative of intent. Of course, seeking a "right to lay their track" is language consistent with the usual understanding of a right of way easement, permission, not fee title to land.

On July 3, 1887, the Seattle Daily Post-Intelligencer reported on the progress of the railroad as follows:

> The Seattle, Lake Shore and Eastern Company has been particularly energetic. … Town lands, water front, **rights of way** and coal lands have been secured.

Id. (emphasis added). Like the Burke quote, this report captures the reality that the railroad was not buying up everybody's land in fee along the proposed route. Rather, it was merely securing a "right of way" as that term was commonly understood, namely, a right of passage. There is no contrary evidence indicating that the railroad intended to secure fee title to land rather than a right of way as that term has commonly used.

4. Intent To Convey An Easement Is Shown By The Consideration for the Deed

Whether the consideration in the deed was "substantial or nominal" is another factor indicating whether fee simple or mere easement was intended. *Brown*, 130 Wn.2d at 438. Here, the consideration paid was zero. Hilchkanum donated the right of way. This factor further indicates less than fee title was intended to be conveyed.

5. Intent To Convey An Easement Is Shown By the Parties Choice Not to Utilize the Statutory Warranty form of Deed

For more than 100 years, it has been the law of this State (and Territory) that a deed in statutory warranty form is "deemed" a conveyance of fee simple. The statute is unambiguous. See *Darrin v. Humes*, 60 Wash. 537 (1910) (fee simple title established by warranty deed pursuant to statute); *Fowler v. Wyman*, 169 Wash. 307 (1932) (applying presumption that statutory warranty deed conveys fee simple).

> Since before statehood, the Legislature has provided that deeds patterned after state statute are deemed to convey fee simple title.

Brown, 130 Wn.2d 437 n.5, citing Laws of 1886, § 3, pp. 177-78.

In *Brown*, a significant factor relied upon by the Court in finding the deeds at issue there conveyed fee title was that the deeds were in the statutory warranty form.

> We hold the original deeds conveyed fee simple title . . .based on the facts the deeds are in *statutory warranty form* . . .

Brown, 130 Wn.2d at 433 (emphasis added).

Significantly, the Hilchkanum conveyance was **not** in the statutory form. Graddon dec. at 5:13-15. By making a deliberate deviation from the statutory deed structure for conveying a fee title, the intent must have been to convey something less than fee. Even the County's witness agrees.

> Q. In your experience, why would parties choose not to use a Statutory Warranty form for a deed conveyance?
> A. One reason could be that they don't wish to include the warranties of title that are included in the statutory form. That would probably be the most common one.

DeGoojer depo. at 44:7-11 (Exhibit 1 to Groen dec.). Rays proposed expert, Stephen Graddon, agrees with DeGoojer and the *Brown* Court that departure from the statutory warranty form is strong evidence of intent.

> To use a deed with the header "Right of Way Deed" and the modified clauses departing from statutory warranty conveyance is strong evidence of intent to provide mere easement benefits. By deliberately using language in the granting clause that does not follow the statutory form, the parties have clearly indicated an intent to not convey fee simple title.

Graddon dec. at 6:6-10.

D. Conclusions of the Experts

Ray has consulted with three experts who are experienced in title examination. All three have concluded that the express terms of the Hilchkanum deed convey only an easement. Hebrank dec. at 2:12-20; Hayden dec. at 2:12-22; Graddon dec. at 4:7-9.

Of course, it is not necessary for this case to be decided through a "battle of the experts" because the case law and the undisputed facts compel the conclusion that only a right of way easement was conveyed. The conclusions of Mr. Hebrank, Mr. Hayden, and Mr. Graddon confirm and follow the Washington law.

E. King County Will Not Be Surprised By A Ruling That the Hilchkanum Deed Conveyed Only An Easement

King County should not be at all surprised by a ruling from this Court that the Hilchkanum deed conveyed only an easement. Before purchasing the right of way (by quit claim deed), King County sought to secure title insurance. Significantly, the title company informed the County that it would **not** insure fee title. Exhibit 3 to Groen dec. Despite having this knowledge, the County proceeded to purchase the right of way anyway. Of course, the final title policy excludes coverage of fee title. As stated by DeGoojer:

> Q. Given these exceptions [to coverage], does the Commonwealth policy insure fee title to King County?
> A. No.

DeGoojer depo at 52:16-18 (Exhibit 1 to Groen dec.).

In sharp contrast to denial of coverage for fee title, Ray has secured a guarantee from First American Title that he owns fee title to the land underlying the right of way. Ex. 1 to Hayden dec. What does this tell the Court? It means that the title companies agree with Ray that the Hilchkanum deed conveyed only an easement. And it means King County knew it all along.

II.

HILCHKANUM MUST HAVE INTENDED TO CONVEY A MERE RIGHT OF WAY EASEMENT BECAUSE OTHERWISE, HE WAS IN VIOLATION OF FEDERAL LAW

Hilchkanum occupied his land pursuant to an entry and claim under the homestead laws. On May 9, 1887, when he deeded a right of way to the railroad, Hilchkanum did not yet have a patent to the land. The patent was issued more than a year later, on July 24, 1888.

The purpose of the homestead laws was to provide the exclusive benefit of the claimed land to the homesteader.

> The theory of the homestead law is that the homestead shall be for the exclusive benefit of the homesteader. Section 2290 of the Revised Statutes provides that a person applying for the entry of a homestead claim shall make affidavit that, among other things, such application is for his exclusive use and benefit …and not … for the use and benefit of any other person.

Anderson v. Carkins, 135 U.S. 483, 487 (1890). Accordingly, prior to receiving a perfected title through patent, the homestead law required "final proof" that no part of the land had been conveyed.

> And section 2291, which prescribes the time and manner of final proof, requires that the applicant make 'affidavit that no part of such land has been alienated …'

Id. This meant that that "the homestead right cannot be perfected in case of alienation, or contract for alienation, without perjury by the homesteader." *Id*.

> [T]he policy of the act of Congress granting homesteads on public lands, as disclosed by its requirement of affidavit and other provisions, is adverse to the right of a party availing himself of it to convey, or agree to convey, the land, before he receives the patent therefore.

Id. at 489.

This created a problem for railroads seeking to build new lines in the expanding western states. Congress had provided through the Right of Way Act of 1860 a process for filing a "map of definite location" whereby railroads could secure a right of way through **public lands**. However, lands that had been claimed under the homestead act, even if not yet patented, were not subject to the Act. The problem was summarized as follows:

> It has always been the policy of the government to encourage the building of railroads in the Western states, and many land grants have been made by it to aid in their construction. Congress has also provided a means by which those companies having no such grants could acquire rights of way over any portion of the **public land** by filing a map of definite location and securing its approval … This law, by its very terms, applies only to 'public lands,' and hence cannot be construed to empower … building of roads across lands which had been segregated from the public domain by entry and possession of homesteaders or preemptors. On the other hand, settlers **without patent** were *not in a position to make deeds to rights of way, not only because they had no title, but also because they were prohibited from alienating such land before final proofs. The consequence was that … it was practically impossible to construct railroads through territory which consisted partly of public lands and partly of that which was in possession of settlers.*

Minidoka & Southwestern Railroad Company v. United States, 235 U.S. 211, 215-16 (1914) (citations omitted) (emphasis added). Congress recognized this problem and therefore provided a legislative fix.

> [I]n order to meet this difficulty, Congress, on March 3, 1873, passed an act providing that any bona fide settler might convey by warranty against his own act 'any part of his claim for church, school, and cemetery purposes and **for right of way for railroads**.'

Id. at 216 (quoting Rev. Stat. § 2288) (emphasis added). Accordingly, Congress was able to better effectuate its purpose of encouraging the construction of railroads in western territories. Because Hilchkanum had not yet received his patent, it is pursuant to this authority that he was able to convey a right of way to the railroad.

The question then arises whether Congress intended this authority to convey a "right of way for railroads" to mean an easement, or to mean fee title to the railroads. Fortunately, the Supreme Court has provided some clear guidance. The 1860 Act was replaced by the General Railroad Right of Way Act of 1875. The Supreme Court in *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942) reviewed whether a right of way through public lands pursuant to the Act was a mere easement or a fee title. In addressing their issue the Court explained the purpose of Congress under the Act of 1875 was "to permit the construction of railroads through public lands." *Id*. at 272. The Court further reasoned:

> The achievement of that purpose does not compel a construction of the right of way grant as conveying a fee title to the land … a railroad may be operated though its right of way be but an easement.

Id. The Court ultimately held the "Act of March 3, 1875, from which petitioner's rights stem, clearly grants only an easement, and not a fee." *Id*. at 271. In its analysis, the Court explained in part that in 1872 the prior policy of lavish grants to railroads had come under criticism and the policy shifted in favor of public lands to homesteaders.

> Beginning in 1850 Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain. This policy incurred great public disfavor which was crystallized in the following resolution adopted by the House of Representatives on March 11, 1872: 'Resolved, that … granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers…'

Id. at 273, quoting Cong. Globe, 42d Cong,. 2d Sess,. 1585 (1972). Significantly, the Supreme Court explained:

> Since it was a product of the sharp change in Congressional policy with respect to railroad grants after 1871, it is **improbable** that Congress intended by it to grant more than a right of passage.

315 U.S. at 275 (emphasis added).

Significantly, it is equally improbable that Congress in 1873, shortly after adopting the House Resolution, would have intended the new authorization allowing homesteaders without a patent to convey a "right of way for railroads" to mean anything more than a right of passage. As stated in the House Resolution, "every consideration of public policy … should be held for the purpose of securing homesteads." Of course, if the term "right of way for railroads" is construed to mean a conveyance of fee title, that portion of the homestead is no longer for the exclusive use and benefit of the homesteader. The only interpretation of this authorization that is consistent with Congressional policy after 1871, and consistent with the Act of 1875, wherein the Supreme Court has held grant of right of way is an easement only and not fee, is for the same term in 1873 to be similarly interpreted.

This conclusion is further supported by the purpose of the 1873 Act. Recall that the purpose of allowing homesteaders without a patent to alienate a "right of way for railroads" was to allow expansion of railroads into the western states in areas with homesteaders. That purpose, just as with the purpose of the Act of 1875, is fully accomplished by right of way easement. See *Great Northern*, 315 U.S. at 272 (achievement of purpose by easement).

In short, although Hilchkanum had not yet received his patent, he was authorized to convey a right of way to the railroad pursuant to the authority provided by Congress in 1873. However, it is clear from the history of the times, and Congressional purposes, that this authorization was for conveyance of a mere right of way easement. Hilchkanum must have so intended.

III.

THE DEEDED RIGHT OF WAY EASEMENT HAS BEEN ABANDONED

The above analysis should be conclusive that the Hilchkanum deed conveyed a mere easement. The next question is to determine the location of the easement and its present status. With respect to identifying the location of the easement, the deed states on the bottom of the first page as follows:

> Such right of way strip to be fifty (50) feet in width on each side of the center line of the railway track as located across our said lands by the Engineer of said railway Company **which location is described as follows** to wit:

The deed then continues on the second page to provide a precise survey description of the location of the right of way. The County's expert, Neil DeGoojer affirmed in deposition that

> the legal description on the second page is what provides the actual location of where the parties intended the right of way to be.

DeGoojer at 33-34 (Exhibit 1 to Groen dec.).

The problem is that the railroad tracks were in fact **not** constructed within the area intended by the parties as described by the survey call. Indeed, the tracks, as they pass through Ray's property are *entirely outside of the deeded right of way*. Mike Foley, Professional Land Surveyor (PLS), and Senior Engineer for King County, calculated that "[a]t the Ray property, this location [of the centerline described in the deed] is approximately 119 feet from our [as constructed] centerline." Exhibit 5 to Groen dec. Not surprisingly, the County has stipulated to the fact that the tracks are not located within the area described by the survey call of the Hilchkanum deed. Stip. of Facts.

Where, as here, the deed provides a survey call that specifically defines where the tracks were to be located, the language of the deed controls. Directly on point is *Aladdin Petroleum Corporation v. Gold Crown Properties, Inc.*, 221 Kan. 579, 561 P.2d 818 (1977) In that case, an easement was granted with a specific call as to its location. 561 P.2d at 821. The court set forth the following:

> The law appears to be settled that where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument the easement is specific and definite. The expressed terms of the grant or reservation are controlling.

561 P.2d at 822. *See also* Real Property Deskbook, Second E. (1986), Vol. 1, § 15.28 (specific terms control).

Obviously, the actual right of way easement as described in the survey call of the deed has never been utilized by the railroad. After 114 years, it is clear that the railroad abandoned

that easement long ago. Abandonment of an easement is established where there is an intent to abandon as evidenced by objective facts. *Schumacher v. Brand*, 72 Wash. 543, 546 (1913). Here, the railroad did not construct its track within the deeded easement area. Over a century has passed. Abandonment of the easement as described by the survey call cannot seriously be disputed on any ground.

What interest then is held by the railroad as to the actual location on the ground where the tracks were constructed. Washington law requires easement interests to be created by deed. *Ormiston v. Boast,* 68 Wn.2d 548, 550 (1966). Here, there is no other deed granting an easement in the location where the tracks were actually constructed. Accordingly, the only alternative is that the railroad acquired a prescriptive use easement. *Id.* at 551. Under Washington law, the width of that easement would be the area actually used by the railroad. *Northwest Cities Gas. Co. v. Western Fuel Co.,* 17 Wn.2d 482, 487 (1943). That width is approximately 10 feet. Declaration of Ray. A photograph taken by Ray when the trains were still running shows that the railroad company only utilized a narrow strip through Ray's property, and that Ray utilized all the rest of his property, merely allowing the train to pass through.

In short, the original right of way easement specifically described in the Hilchkanum deed has been abandoned. There has been no subsequent conveyance of an easement by written deed. Accordingly, at best, the railroad may have established a prescriptive use easement through Ray's parcel. That easement is approximately 10 feet wide.

CONCLUSION

The Hilchkanum deed contains a granting clause that does not refer to a strip of land, or piece of land, or some other tract of land. Rather, the granting clause refers to a "right of way." Under controlling Washington law, the granting clause in this case can only be interpreted as conveying an easement, not as conveying fee simple title to a strip of land. That conclusion is strongly supported by extrinsic evidence of intent and by the structure of the deed. Moreover, any other conclusion would be contrary to Congressional intent under the homestead laws. Plaintiffs respectfully request that summary judgment be granted in their favor, and declare the Hilchkanum deed to have conveyed a mere right of way easement and thereby quiet title to the fee simple estate in plaintiffs.

Plaintiffs further request the Court declare the right of way described in the Hilchkanum deed to have been abandoned. Although plaintiffs acknowledge that a ten foot wide prescriptive use easement can likely be established, the County has not sought such relief in its pleading.

DATED this 27th day of July, 2001.

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