No. 01-35610

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KING COUNTY, a political subdivision of the State of Washington

PLAINTIFF-RESPONDENT

vs.

JOHN RASMUSSEN and NANCY RASMUSSEN, husband and wife, and their marital community

DEFENDANTS-APPELLANTS

APPEAL FROM THE U.S. DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON

DEFENDANTS-APPELLANTS' JOHN AND NANCY RASMUSSENS' PETITION FOR REHEARING AND SUGGESTION OF APPROPRIATENESS FOR REHEARING EN BANC

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PETITION:

COME NOW the defendants-appellants John and Nancy Rasmussen and respectfully petition this Court of Appeals for Rehearing, and respectfully suggest the appropriateness of rehearing, *en banc*.

INTRODUCTION, AND STATEMENT OF COUNSEL:

In this counsel's judgment, **there are significant, material points of fact or law that have been overlooked or misapprehended in this court's decision**, rendered August 9, 2002[1]. Also, there is pending before the Washington court of Appeals, Division I, the sister case to this case, namely *Gerald l. Ray and Kathryn B. Ray, husband and wife, vs. King County, a political subdivision,* King County Superior Court No. 00-2-14946-8 SEA; Division I, Washington Court of Appeals No. 71561-1, where the same or similar issues of Washington real property law issues shall be determined, and those issues and decision shall probably be in direct conflict with this court's decision, due to the overlooked or misapprehended rules of Washington real property case law analysis.

Specifically, this court has overlooked or misapprehended the basic rule of Washington real property law, namely, that no real property fee simple interest shall be transferred except by deed, in conformance with the Statute of Deeds, as described in the Washington Territorial Laws, or as further codified in the Revised Code of Washington. R.C.W. 64.04.010. Thus, homesteader Bill Hilchkanum had not received his federal fee patent deed in 1887 (ER 505-507), when he conveyed a railroad right of way, and therefore he could not have conveyed a fee simple estate interest when he "made his mark" upon the railroad right of way conveyance in 1887. ER 501-503.

Additionally, this court has done violence to the time-honored rule that "all reasonable inferences from the evidence must be drawn in favor of the nonmoving party" (the Rasmussens) in summary judgment proceedings. *Orin v. Barclay,* 272 F.3d 1207 (9th Cir. 2001); *Eastman Kodak v. Image Technical Services,* 504 U.S. 451, 456-58, 112 S.Ct. 2072, 2077, 119 L.Ed.2d 265 (1992); *Matshushita,* 475 U.S. at 587, 106 S.Ct. at 1356. This court's misapprehension of the application of this summary judgment standard is illustrated by the following overlooked or ignored reasonable inferences supported by the evidence in this action:

1. The inference that since Hilchkanum's deed did not follow the statutory form of deeds that the right of way conveyance was for something less than a fee simple interest, i.e. a railroad easement; *Opinion,* at 11625-11626.
2. The inference that since *Brown v. State,* 130 Wn.2d 430, 924 P.2d 908 (1996) analyzed only deeds drafted in statutory form, that the Hilchkanum deed did not have the same

elements to conclude it purported to convey fee simple title in the railroad right of way; *Opinion,* at 11624-11627.

3. The inference that the Hilchkanum deed transferred only an easement in the conveyance of a railroad right of way, because the consistent Washington rule, for over 100 years, was that whenever the granting clause of a deed contained the grant of a "right of way" only a railroad easement was conveyed; *Opinion,* at 11627.
4. The fact that the Hilchkanum deed, as other Washington deeds where the term "right of way" was used in the granting clause to qualify or limit the interest granted, was distinguishable from all deeds analyzed in *Brown*, because the *Brown* deeds contained the term "right of way" *only* to describe the strip of land conveyed, and therefore the reasonable inference was that the Hilchkanum deed followed 100 years of Washington real property law and conveyed merely a railroad easement, not a fee simple interest; *Opinion,* at 11627-11629.
5. The fact that since the Washington Appeals Court held the habendum clause, in *King County v. Squire Inv. Co.,* 59 Wn. App. 888, 801 P.2d 1022 (Wash. Ct. App. 1990), that limited the use of the land, was merely a "reiteration" of the limitation found in the granting clause, where the granting clause granted a "right of way", then the fact there was no limitation found in the habendum clause of the Hilchkanum deed did *not* destroy the inference of conveyance of a railroad easement in the granting clause of the Hilchkanum deed; *Opinion,* at 11630; *Squire* at 894.
6. The inference that the Hilchkanum deed conveyed merely a railroad easement was supported by the striking similarity of its granting clause to the granting clauses of other railroad right of way easement cases, such as *Veach v. Culp,* 599 P.2d 526 (Wash. 1979); *King County v. Squire Inv. Co.,* 59 Wn. App. 888, 801 P.2d 1022 (Wash. Ct. App. 1990); *Northlake Marine Works, Inc. v. City of Seattle,* 857 P.2d 283 (Wash. Ct. App. 1993); *Opinion,* at 11627.
7. The inference that the Hilchkanum deed conveyed merely a railroad right of way easement because the term "right of way" as used in 1887 was consistent with the 1891 Edition of Black's Law Dictionary definition of "right of way", which clearly stated a railroad right of way "in its legal and generally accepted meaning, in reference to a railway, *** is a mere easement in the lands of others"; Appellants' *Reply Brief* at 12; Appendix "A".
8. The inference that Hilchkanum was incapable of distinguishing between the conveyance of an easement and a fee simple estate, because he was clearly illiterate, and lacked independent, unbiased assistance of others; Appellants' *Opening Brief*, at 4; and ER 483, 486.

9. The inference that Hilchkanum did not draft the right of way conveyance found in the Hilchkanum deed, because Hilchkanum's "friends" were railroad officials; Appellants' *Opening Brief*, at 4.
10. The inference that all of the extrinsic evidence impeached King County's claim that Hilchkanum was aware of the distinctions between a railroad right of way easement and a railroad right of way fee simple interest; ER 476-498 (Hilchkanum could not complete his homestead application papers, because he was illiterate); "Orphan Road: the Railroad Comes to Seattle, 1853-1911", by Kurt Armbruster, Washington State University Press, ©1999 at pp.121-141 (Hon. Judge Thomas Burke was founder of the Seattle Lake Shore and Eastern Railway, and chief counsel for the railroad).
11. The inference that the Hilchkanum right of way conveyance was merely an easement, not a fee simple interest, because of the precatory language limiting the use of the real property conveyance to the "location construction and operation of the Seattle Lake Shore and Eastern Railway"; *Opinion,* at 11628, footnote 12.
12. The inference that King County's proof of title failed, since King County produced no chain of title from the 1887 Hilchkanum conveyance, but simply presented a quit claim deed executed in 1997 from a nonprofit corporation; *Opinion,* at 11618, footnote 3.
13. The inference that Hilchkanum was not represented and made no knowledgeable grant of any interest other than a railroad right of way easement in 1887, because there was no evidence of any due process of law protections for this illiterate Native American, and the deed's acknowledgment clause lacked the authentication language designed to protect illiterate Native Americans from over-reaching by railroad officials (R.C.W. 64.20.020);
14. The inference that the Hon. Judge Thomas Burke, the railroad lawyer, probably drafted all of the railroad right of way conveyances, including the Hilchkanum conveyance, since the Burke deed as described in *Northlake Marine Works, Inc. v. City of Seattle,* 857 P.2d 283 (Wash. Ct. App. 1993), and analyzed in *Pacific Iron Works v. Bryant Lumber and Shingle Mill Co.,* 11 P. 578 (Wash. 1910) was so similar to all of the deeds provided to the railroads during the late 1800's [NB: those deeds all were construed to be railroad right of way easements, in conformance to the then generally understood legal meaning of "right of way" when used in a railroad setting (see appendix "A")].

This court has committed error at law in using the term "certificate of ownership" interchangeably with "fee patent deed" as applied to the Homestead Act of 1862. *Opinion,* at 11622. There is no such reference to a "certificate of ownership[2]" in the Homestead Act, and even if there were, it could not be used interchangeably with the term "fee patent deed". This error caused the court to commit additional error by concluding it was unnecessary for Hilchkanum to receive a deed from the federal government before he conveyed fee simple title to the railroad--an error that shall tear the entire fabric of Washington real property law, as well as recognized principles of title examination throughout the Ninth Circuit.

This court found there was language in the Hilchkanum deed granting a right "over" the land for tree-cutting purposes, when no such reference to "over" the land exists in the Hilchkanum deed, giving rise to an untenable presumption that Hilchkanum must have known the difference between an easement and a fee simple interest. The untenable presumption must fail with the evaporation of the imaginary word concocted and quoted as if it actually existed in the Hilchkanum deed. *Opinion,* at 11616 and 11629.

This court ignored constitutional principles of the right to redress of grievances, refusing to find county ordinances cited in the Rasmussens' briefing clearly required King County to "afford citizens fair notice and due process". This court incorrectly concluded the federal district court had no authority to examine subject matter jurisdiction of an administrative agency to issue administrative orders affecting lands that were clearly not subject to the rule-making or regulatory authority of such federal agency, ignoring the elementary rule that subject matter jurisdiction can be challenged at any stage of litigation. *Opinion,* at 11632 and 11634.

Since there cannot be a conclusion that the underlying facts are undisputed, and since the reasonable inferences brought to the attention of this court all support denial of summary judgment in this action, this case should be reheard, and the summary judgment order should be reversed.

The defendants-appellants respectfully suggest the appropriateness of rehearing *en banc,* because this action has potentially diminished the value of approximately 450 private homes along the shore of Lake Sammamish, Washington, with estimated property losses due to landlocked properties and lot size diminution of over $200,000,000.00, assuming the doctrine of *collateral estoppel* shall be asserted by King County in its pending title litigation with those homeowners. Furthermore, this court is in jeopardy of having its current decision to be found in conflict with a pending Washington case, working its way through the appellate system to the Washington Supreme Court, namely, *Gerald l. Ray and Kathryn B. Ray, husband and wife, vs. King County, a political subdivision,* King County Superior Court No. 00-2-14946-8 SEA; Division I, Washington Court of Appeals No. 71561-1 (see excerpts of Rays' Opening Brief, in Appendix "B" attached to this petition). The instant proceeding involves a question of exceptional importance, and substantially affects rules of real property law where there is a need for national uniformity[3].

Respectfully submitted this 30th day of August, 2002.

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J.J. Sandlin, WSBA 7392, for defendants-appellants

POINTS AND AUTHORITIES:

1. <u>The railroad right of way conveyance from Hilchkanum could not include fee simple estate conveyance, because Hilchkanum did not have a fee simple estate to transfer at the time of the conveyance.</u>

R.C.W. 64.04.010 states, in pertinent part:

"**Conveyances and encumbrances to be by deed.** Every conveyance of real estate, or any interest therein *** shall be by deed…". This statute, enacted in 1929, was based on the Washington Territorial Laws which were the same as the codification here, and those territorial laws were effective at the time Hilchkanum proved up his homestead in 1884, and received his fee patent deed in 1888. *See*, R.C.W. 64.04.010, Legislative History. The well-recognized rule in Washington is that real property can be conveyed *only by deed* under this statute, and the territorial laws described in the Statute of Deeds. *Erickson v. Walheim,* 52 Wn.2d 15, 319 P.2d 1102 (1958). In 1884 Bill Hilchkanum did not receive a deed, even if he had completed all necessary requirements for proving his homestead under the Homestead Act of 1862. ER 475. Hilchkanum could not have conveyed a fee simple title in 1887, because he didn't hold legal title by fee patent deed until 1888. ER 501-507. This court should reconsider its legal analysis and find the railroad right of way conveyance in 1887 conveyed merely an easement.

2. <u>Because there was no after-acquired title clause to save the conveyance when Hilchkanum subsequently received his fee patent deed in 1888, the conveyance of a railroad right of way easement was extinguished in 1888.</u>

R.C.W. 64.04.050 states, in pertinent part:

"**Quitclaim deed—Form and effect.** *** Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance***in fee of all the then existing legal and equitable rights of the grantor *** **but shall not extend to the after acquired title unless words are added expressing such intention**". (emphasis added).

The Hilchkanum conveyance provided no warranties (ER 501-503), and even though it did not comport with the specific requirements of the then existing Statute of Deeds, the closest conveyance instrument was the quitclaim deed described in this statute. But the railroad failed to include an after acquired title clause in the Hilchkanum conveyance document, and Hilchkanum could not transfer what he presently did not have in 1887—a railroad right of way easement. The federal law made exception for this, by enactment of the Act of March 3, 1873, ch. 226, 17 Stat. 602 (1873). This allowed Hilchkanum to presently convey a railroad right of way, in 1887, without affecting his homestead rights. But the federal law did not purport to supplant the Washington Statute of Deeds, because state and territorial law controls the conveyance of legal title to land in Washington. R.C.W. 64.04.010 *et seq.* Thus, the territorial doctrine of after acquired title remained intact after enactment of the 1873 homestead laws, and Hilchkanum did not convey his future interest in his land, so when he received a fee patent deed from the federal government in 1888 he did not then convey any of this fee simple interest to the railroad (the federal fee patent deed did not except any portion of the real property for railroad right of way purposes). R.C.W. 64.04.050; *Brenner v. Brenner Oyster Co.,* 48 Wn.2d 264, 292 P.2d 1052 (1956).

3. <u>This court has committed error by ignoring or overlooking the reasonable inferences in favor of the nonmoving party, and rehearing should be granted to correct this misapprehension of well-settled summary judgment procedure.</u>

Viewing the facts of this case most favorably to the Rasmussens, and accepting as verities the reasonable inferences from those facts, it is clear King County should not be granted summary judgment concerning its claim of fee simple ownership of the railroad right of way. *Orin v. Barclay,* 272 F.3d 1207 (9th Cir. 2001). Illustrating this contest of material facts and inferences is the obvious need to examine all the Native American railroad deeds of the late 1800's, including Hilchkanum's deed, to determine if the habendum clauses were ever modified, as were the habendum clauses of deeds signed by white men. This is another reasonable inference that should have been found in favor of the Rasmussens. Even the Washington Legislature, in 1890, recognized the propensity of the railroads to take advantage of Native Americans such as Bill Hilchkanum:

"**Manner of conveyance.** All deeds, conveyances, encumbrances or transfers of any nature and kind executed by any Indian, or in any manner disposing of any land, or interest therein, shall be by deed executed in the same manner as prescribed for the execution of deeds conveying real estate, or any interest therein, except that the same shall in all cases be acknowledged before a judge of a court of record. In taking said acknowledgment, the said judge shall explain to the grantor the contents of said deed or instrument, and the effect of the signing or execution thereof, and so certify the same in the acknowledgment, and before the same shall be admitted to record shall duly examine and approve the said deed or other instrument". R.C.W. 64.20.020, Enacted Laws 1890, p. 500, §2.

By inspection of the Hilchkanum deed it is clear there is no evidence this Native American [Indian] was afforded the due process of law protections enacted to prevent the type of discriminatory practices which lead to untenable inferences in construing railroad right of way conveyances. This court should not add to this insult by suggesting the extrinsic evidence leads inescapably to only one conclusion, namely that Bill Hilchkanum could decipher a railroad right of way conveyance, and distinguish between a grant of fee simple interest and a grant of a railroad easement. Such a conclusion would only promote the injustices suffered by illiterate Native Americans such as Bill Hilchkanum, an ironic twist resulting from the district court's refusal to concede Bill Hilchkanum was isolated in his dealings with the railroad, and was at the railroad's mercy in the choice of conveyance language for his right of way conveyance[4]. The reasonable inferences described in the **Introduction**, *supra,* all support the inescapable conclusion King County should not be granted summary judgment in its claim of fee simple ownership of the Rasmussens' land, and this court should grant this petition for rehearing and reverse its opinion, and remand this action for trial.

4. <u>The court has not applied the relevant substantive law and should not conclude there are no genuine issues of material fact.</u>

In reviewing the trial court's summary judgment *de novo, Devereaux v. Abbey,* 263 F.3d 1070 (9th Cir. 2001), this court should adopt the general rule of *Brown v. State,* 130 Wn.2d 430, 924 P.2d 908 (1996), as it applies to the Hilchkanum conveyance, and similar conveyances found in *Veach v. Culp,* 599 P.2d 526 (Wash. 1979); *King County v. Squire Inv. Co.,* 801 P.2d 1022 (Wash. Ct. App. 1990); and *Northlake Marine Works, Inc. v. City of Seattle,* 857 P.2d 283 (Wash. Ct. App. 1993):

"…Unlike *Swan, Veach,* and *Roeder,* where 'right of way' was used in the granting or habendum clauses to qualify or limit the interest granted, 'right of way' in the deeds at issue here appears in either the legal description of the property conveyed or in the portion of the deeds describing Milwaukee's obligations with respect to the property…". *Brown, supra,* at 441.

The *Brown* court noted the distinction between qualifying or limiting the granting clause and simply using descriptive language in the legal description or in the description of the grantee's obligations. In every Washington railroad case where there has been a grant of a "right of way" in the granting clause, <u>with or without qualifying language or limiting language in the habendum clause</u>, the Washington courts have held the right of way conveyance is an easement. Even *Brown* notes this distinction. The district court and this reviewing court have done great violence to 100 years of well-settled rules of railroad right of way deed construction, by focusing on the habendum clauses of white men's deeds, to extrapolate a distinction without a difference between those white men's deeds and the Hilchkanum deed. *Opinion,* at 11630. This court should grant this petition for rehearing, and reverse the trial court's summary judgment.

5. <u>This court overlooked the specific recitation of King County Ordinance 6531 §1, 1983; Ordinance 2165 §1, 1974, and ignored serious constitutional claims for redress of grievances.</u>

Without any live testimony, with no cross examination, with no confrontation of accusers, this court tried and convicted John Rasmussen of "threatening county employees who entered the railroad right of way bisecting his land". *Opinion,* at 11633-11634. This, despite John Rasmussen's consistent denial of any such misconduct, and despite his persistent requests for an evidentiary hearing, all to no avail. Most young law school graduates fail to recognize the awesome impact of the First Amendment's protection for the redress of grievances. It is saddening to realize this court cannot discern the pain and frustration of a dedicated American citizen who has cited the policy, "afford citizens fair notice and due process[5]", in compliance with the requirements of *Monell v. Dep't of Soc. Serv.,* 436 U.S. 658 (1978), and who correctly has asserted his constitutional right to redress of grievances has been trampled. Rehearing should be granted, and Rasmussen's claim for violation of his First Amendment right to redress of grievances should be reinstated. At the very least, this court should withdraw its finding John Rasmussen has threatened any county employee.

6. <u>This court ignored or overlooked the unrefuted fact that the rail line in this case was a spur line, and that the federal law does not allow the U.S.S.T.B. to exercise jurisdiction over a spur line.</u>

There is no evidence before this court to indicate the rail line in this action was a "railway corridor" (*Opinion,* at 11615), instead of a spur line. The criteria for a spur line are clear and the facts are irrefutable that Burlington Northern Santa Fe Railway had abandoned a spur line in 1996. ER 100-102. Federal law prohibits the administrative agency, the U.S.S.T.B., from exercising any jurisdiction over a spur line. 49 USC §10906. This court has plenary power to determine if there has been a failure of subject matter jurisdiction, at any stage of the litigation:

"…The rules of civil procedure create powerful exemptions for subject-matter voidness, namely, that an absence of subject-matter jurisdiction may be raised at any point in the proceeding and that a judgment entered by a district court without subject-matter jurisdiction is inherently void and cannot be validated by the passage of time. *See* Minn. R. Civ. P. 12.08(c); <u>*Peterson v. Eishen*, 512 N.W.2d 338, 340 (Minn. 1994); *Lange v. Johnson*, 295 Minn. 320, 204 N.W.2d 205 (1973); *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489 (Minn. App. 1995).</u>" *Bode vs. Minn. Dept. of Natural Resources,* 594 N.W.2d 257, 261 (1999).

Likewise, an administrative agency cannot require this court to defer its plenary power to determine subject matter jurisdiction questions, especially when the statutory language is clear and unmistakable. 49 USC §10906; 28 USC §1336(b). The district court should have exercised its discretion and examined the U.S.S.T.B.'s actions in railbanking a spur line, when the U.S.S.T.B. had no Congressional authority to exercise its rule-making or regulatory powers over this spur line. 49 USC §10906. Rehearing should be granted and this issue should be addressed *sua sponte* before this court.

CONCLUSION:

This court has overlooked or misapprehended both material facts and law that call for a rehearing of the issues and case analysis. The suggestion of appropriateness of rehearing *en banc* is submitted because of the exceptional importance of this case, both regionally and nationally. If these railbanking cases are ignored, and are not brought under strict scrutiny, then the federal government and all U.S. taxpayers shall continue to lose billions of tax dollars, and the shady practices of *Enron*-style accounting and valuation shall pervade the railbanking industry.

In the local region, the losses in this action can exceed $200,000,000.00 in property dimunition in value, and nationally this court's current opinion shall impact literally billions of tax dollars lost from excessive charitable contribution tax write-offs.

The clear mandate of Washington real property law, and the need for reversal of this astounding abandonment of deed and real property title construction rules calls for rehearing and reversal of the trial court. This action should be set for rehearing *en banc,* and Washington real property law should be protected by this court's revision of its August 9, 2002 opinion.

Respectfully submitted this 30th day of August, 2002.
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J.J. SANDLIN, WSBA #7392, for defendants-appellants Rasmussen

Footnotes:

1 A written motion for a seven-day extension of time to file this petition was timely mailed, because the opinion was not received by counsel until the 14th day after this court's decision was filed.

2 On March 29, 1884, the Land Office at Olympia issued Bill Hilchkanum a "Final Certificate" for Lots 1, 2, 3 and 5. The express language stated "on presentation of this Certificate to the Commissioner of the General Land Office, the said Bill Hilchkanum shall be entitled to a Patent for the Tract of Land above described". ER 475. The fee patent deed was not executed and delivered until 1888. ER 474, 505. This court commits error in concluding Hilchkanum had fee simple title to his homestead in 1887, when he conveyed a railroad right of way easement pursuant to the Act of March 3, 1873, ch. 226, 17 Stat. 602 (1873).

3 As discussed in oral argument, the accounting firm of Arthur Anderson, of *Enron* notoriety, valued the railroad spur line at $41,760,000.00 (ER 203); the railroad gifted the spur line to a nonprofit corporation for less than 4% of this valuation, presumably taking a substantial charitable contribution tax write-off; this protocol is repeated in rail banking cases throughout the United States, to the prejudice of the federal government and all U.S. taxpayers. King County's valuation of the spur line was less than 40% of the Arthur Anderson appraisal.

4 The district court's stinging decision to strike the arguments of illiteracy and simultaneously inferring this counsel was ethnically insensitive is a continued frustration for this counsel, who has dedicated his professional life to advocacy for underprivileged, under-represented ethnic minorities in Eastern Washington.

5 *Reply Brief,* at 19.