No.

# In the Supreme Court of the United States

John Rasmussen and Nancy Rasmussen, husband and wife, and their marital community,

*Petitioners;*

v.

King County, a political subdivision of the State of Washington,

*Respondent.*

On Petition for Writ of Certiorari to the U.S. Ninth Circuit Court of Appeals, and the U.S. District Court, Western District of Washington

## PETITION FOR WRIT OF CERTIORARI

J.J. Sandlin, *Counsel of Record*
Sandlin Law Firm
P.O. Box 1005, 618 Railroad Avenue
Zillah, Washington 98953
Telephone: (509) 829-3111/949-4433

**Table of Contents (Page)**


**Table of Authorities** i-iii

**Cases :**

## Statutes

## Other Authorities

## Question Presented for Review

In this case King County filed a quiet title action in state court, to determine fee title to real property that was subject to county and private landholder claims of ownership. The private landholder removed to federal court, citing federal question jurisdiction subsumed in the "taking" actions of the county. The federal trial court struck or denied all the federal question issues raised by the private landholder, then proceeded to determine fee title ownership, by creating a new federal property law for transfer of legal title to land, with the assistance of fictitious facts tortuously created to support this new federal law. Upon appeal the Ninth Circuit affirmed this action. **Query: Is it proper for a federal court to create new federal rules for transfer of legal title to real property involving exclusively non-federal lands, to supersede established state law title transfer statutes?**

# Parties to the Proceeding

(The caption of the case contains the names of all the parties.)

## Statement of the Basis for Jurisdiction

It is the petitioners' contention that the trial court's basis for subject matter jurisdiction was extinguished when the trial court struck or denied all the petitioners' counterclaims (including the railbanking issue, which was the source of federal question jurisdiction, initially), leaving only the state quiet title action remaining for adjudication, which was not a *pendent jurisdiction* claim.

The District Court filed its memorandum Order Granting in Part Plaintiff's [King County] Motions to Strike, Granting Plaintiff's Motion for Summary Judgment, and Granting Plaintiff's Motion to Dismiss on May 25, 2001. The District Court filed its Judgment, granting summary judgment in favor of King County, and quieting title in favor of King County, and declaring King County has the right to quiet enjoyment, and granting the county's motion to dismiss all counterclaims in this action on June 8, 2001. The petitioners-Rasmussen timely filed their Notice of Appeal to the Ninth Circuit Court of Appeals on June 22, 2001.

The Ninth Circuit Court of Appeals affirmed the District Court on August 9, 2002. Rehearing, and suggestion for *en banc* rehearing, were denied on October 11, 2002. This petition was timely filed by placing it in the U.S. Mails on January 9, 2003, with accompanying certification of service.

The appellate courts, including this court, have jurisdiction to review this case pursuant to 28 U.S.C. § 1291.

## Applicable Constitutional Provisions, Statutes, Ordinances, and Regulations Include the Following:

1. 28 U.S.C. § 1441(a); 28 U.S.C. § 1331; 16 U.S.C. § 1247(d); 28 U.S.C. § 1291 (sources of federal jurisdiction relied upon by the trial court for its actions, and the affirmation by the Ninth Circuit).

2. "[A]ny person who has already settled or hereafter may settle on the public lands of the United States, either by pre-emption, or by virtue of the homestead law or any amendments thereto, shall have the right to transfer by warranty, against his or her own acts, any portion of his or her said pre-emption or homestead for church, cemetery, or school purposes, or for the *right of way of railroads* across such pre-emption or homestead, and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to their preemptions or homesteads."

Act of March 3, 1873, ch. 266, 17 Stat. 602 (1873) (emphasis added). (This statute remains, in slightly altered form, at 43 U.S.C. §174.)
3. "**Conveyances and encumbrances to be by deed.** Every conveyance of real estate, or any interest therein *** shall be by deed…". R.C.W. 64.04.010.
4. "**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). R.C.W. 64.04.050.
5. "**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.

7. 49 USC §10906, and 28 USC §1336(a) and (b) (United States Surface Transportation Board has no subject matter jurisdiction over railroad spur lines, and therefore railbanking of spur lines is illegal; federal court has plenary power to revisit subject matter jurisdiction of a federal agency ruling, despite procedure for appeal of substantive agency ruling).
8. U.S. Constitution; First, Tenth and Fourteenth Amendments:
**First Amendment**: "…to petition the Government for a redress of grievances."
**Tenth Amendment**: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
**Fourteenth Amendment** (Section 1): "…nor shall any State deprive any person of life, liberty, or property, without due process of law…".

## Statement of the Case

Bill Hilchkanum was the original homesteader of the Rasmussens' lands in this case. ER, 446. On June 15, 1876 David T. Denny and Luke M. Redmond stated under oath that Bill Hilchkanum was an Indian who had abandoned his membership in the Snoqualmie tribe, and "adopted the habits and pursuits of civilized life". ER, 494. The entire chronology of events explaining the homestead efforts of Bill Hilchkanum are found as exhibits to the expert witness Graddon declaration, at ER 446-522. On March 6, 1884 David T. Denny testified by sworn affidavit that "Bill Hilchkanum is an Indian and unable to read or write the English language***That said Indian Bill Hilchkanum relied on this affiant to take care of his said business…". ER, 486. On March 24, 1884 Bill Hilchkanum "made his mark" upon an affidavit, which stated he "is an Indian and unable to read or write the English language and hence depends entirely upon the assistance of his white friends to aid him in transacting his business for him. That one D.T. Denny of Seattle W.T. had the care of his homestead papers for him…" ER,

483. David T. Denny was one of the witnesses to the original Hilchkanum deed in this case. ER, 502. On March 25, 1884 George W. Tibbetts swore by affidavit that he was "well acquainted with Bill Hilchkanum…" and that "…Bill Hilchkanum is an Indian and unable to read or write the English language and that he depended upon other parties to manage his business for him so that said Indian did not understand how to proceed in his homestead proof…". ER, 485. In all documents of record, including the original Hilchkanum deed to SLS&E, Bill Hilchkanum signed his name by "making his mark", which was an "X", rather than a written or printed signature. ER, 476-522. The quitclaim deed from Bill Hilchkanum to SLS&E was signed (by his "mark") and delivered to SLS&E on May 9, 1887. ER, 501-503. Bill Hilchkanum received the United States' fee patent to his homestead lands on July 24, 1888. ER, 505-507.

The above uncontroverted material facts describe the grantor whom the district court in this case found as being competent to limit a grant and to distinguish between an easement and a conveyance of fee simple absolute. ER, 592-597. The district court even found that Bill Hilchkanum was aware of 17 U.S. Stat. 602, and chose the phrase "right of way" out of necessity rather than to create an easement, because Bill Hilchkanum knew the then existing federal law allowed the conveyance of a railroad right of way before he had received his fee patent. ER, 595. The finding was both ridiculous and irrelevant to the real issues at hand, namely, that a federal court cannot subvert state law real property title transfer requirements, and creatively legislate a new federal real property title transfer law that exists nowhere in federal or state codes.

None of the subsequent deeds originally signed by the Hilchkanums, that affected the Rasmussens' contested real property, (Government Lots 2, 3 and 5), had any "exception" language analyzed by the district court[2]. ER, 514-526. This refutes the district court's finding that the Hilchkanums' later behavior buttressed their intent to convey fee simple title to the SLS&E. ER, 595-506.

Petitioners-Rasmussens presented two expert witnesses to refute the county's claims of fee simple ownership. Stephen J. Graddon testified by declaration under penalty of perjury that the "Ownership Research Report dated September 25, 1999" "…accurately describes the location, nature, and extent of the railroad right of way easements said to have been *originally* located upon the Rasmussen property. The treatment of that railroad *easement* is subject to the *abandonment, nature* of easement, current *width* of easement, *actual location* and *scope of usage* issues currently before this court". ER, 435. In Graddon's authenticated "Exhibit 1" at section 5, he described his personal knowledge of King County's rules of interpretation of deed construction and makers' intent to all rights of way whether road or railroad. ER, 454. He described his qualifications as an expert witness for King County. ER, 531. He analyzed specific illustrations of granting clause language with limitations similar to the Hilchkanum deed granting clause limitations, noting they were deemed to be easements, and he specifically applied the King County protocol to the deed analysis of the Hilchkanum deed in this action. ER, 455. He concluded that the "…language of the title, or heading, *("Right of Way Deed")* as well as the embodied language *("In consideration of the benefits and advantages to accrue to us from the location construction and operation of the …Railway…we do hereby donate grant and convey unto said…Railway Company a right of way…to have and to hold the said premises with the appurtenances…forever.")* certainly and definitively is qualifying language which clearly establishes the intent of the makers to create an easement instrument with absolute rights of reversion upon abandonment by the Railroad Company". ER, 456. The second expert witness,

Roger Hayden, corroborated the nature of the conveyance from Hilchkanum to SLS&E as an easement, rather than a fee simple absolute property right. ER, 124.

Graddon also criticized the county's claim to fee simple title. ER, 524-526. In analyzing the actual alignment of the existing railway track, expert witness Graddon stated "…King County does not have a recorded chain of title link to the originally granted Railroad Right of Way legally described and granted by Settler Hilchkanum". ER, 525.

King County officials commenced a campaign of trespassing, deliberately walking over the Rasmussens' waterfront property without permission. ER, 146. The Rasmussens attempted to redress their grievances with King County for over fifteen months, to no avail. ER, 145. John Rasmussen was accused of threatening to shoot county officials with his shotgun, an accusation he vigorously denied. ER, 150. County officials sought and obtained injunctive relief, using false statements concerning John Rasmussen's actions. ER, 151.

The unrefuted evidence supports the Rasmussens' claim that the rail "corridor" in this action was a "*spur line*". ER, 100-102. The county engaged in railbanking efforts concerning the contested land, through association with Burlington Northern Santa Fe Railroad ("BNSFR") and The Land Conservancy ("TLC"), and an order was obtained from the United States Surface Transportation Board that the *spur line* in this case was amenable to railbanking. ER, 45-47. The tax write-off for BNSFR was enormous, through the **Arthur Andersen**[3] appraisal of the entire *spur line* area adjacent to Lake Sammamish. ER, 202-270. [**NB: This tax scheme is being repeated throughout the United States, costing legitimate taxpayers, and the federal government, billions in lost tax revenues**.] TLC had been granted whatever title BNSFR had to the *spur line*, prior to any railbanking deliberations of USSTB. ER, 297-328. King County purchased whatever title TLC had to the *spur line*, and now claims it has fee simple absolute title to this *spur line* area, including the area through the Rasmussens' property. ER, 329-362. The Rasmussens claim they should have been given actual notice of any USSTB actions, which is denied by King County. ER, 93. The Rasmussens claim that the county's treatment of the *spur line* as an easement before the USSTB is inconsistent with its claim of fee simple ownership of the contested property in this case. ER, 364-367.

## Arguments Supporting Granting the Writ

The District Court has so far departed from the accepted and usual course of judicial proceedings, and the Ninth Circuit Court of Appeals has sanctioned such a departure, so as to call for an exercise of this Court's supervisory power. This action should either be stayed pending final resolution of these distinctly state issues before the Washington Supreme Court[4], or alternatively this action should be remanded and the purely state issues should be certified to the Washington Supreme Court. In any case, the summary judgment should be reversed.

New federal real property law has now been enacted by the District court and the Ninth Circuit, by using "certificate of ownership" interchangeably with "fee patent deed" as applied to the Homestead Act of 1862. There is no such reference to a "certificate of ownership[5]" in the Homestead Act, and even if there were, it could not be used interchangeably with the term "fee patent deed". The law of this case, and now precedential for all Ninth Circuit states, is that it is

now unnecessary for a grantor to receive a deed from the federal government before the grantor conveys fee simple title to a railroad—a new, judicially-enacted federal real property law that shall tear the entire fabric of state real property law, as well as recognized principles of title examination throughout the Ninth Circuit.

In finding the Hilchkanum deed granted a right "over" the land for tree-cutting purposes, when no such reference to "over" the land exists in the Hilchkanum deed, an untenable presumption was created 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 that was concocted and quoted as if it actually existed in the Hilchkanum deed. This is not misapplication of a properly stated rule of law, it is the creation of a legal fiction to justify aggressive judicial legislation with no basis in fact or law.

Constitutional principles of the right to redress of grievances have been violated, where the federal judges refused to examine ordinances cited in the Rasmussens' briefing that clearly required King County to "afford citizens fair notice and due process". The Ninth Circuit incorrectly concluded the federal district court had no authority to examine subject matter jurisdiction of an administrative agency [USSTB] to issue administrative orders affecting lands that were clearly not subject to the rule-making authority of such federal agency, ignoring the elementary rule that subject matter jurisdiction can be challenged at any stage of litigation.

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

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. 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…".

The above 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. He could not have conveyed a fee simple title in 1887, because he didn't hold legal title by fee patent deed until 1888.

Notwithstanding this well-settled principle of real property law, uniform throughout the states controlled by Ninth Circuit Court of Appeals precedent, the federal judges in this case have legislated new federal real property law, and have now determined that **vested fee title** to real property that had **not yet been conveyed by fee patent deed** to the homesteader could have been transferred by the homesteader to the railroads during those years before the homesteader had received vested fee title[6].

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. 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, and even though it did not comport with the specific requirements of the then existing Statute of Deeds, the closest conveyance instrument format 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 homestead law made exception for this, by enactment of the Act of March 3, 1873, ch. 226, 17 Stat. 602 (1873). This allowed Hilchkanum to 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 law controls the conveyance of legal title to land in Washington. R.C.W. 64.04.010 *et seq*.

Thus, the state ***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).

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. *Orin v. Barclay,* 272 F.3d 1207 (9th Cir. 2001). There is an obvious need to examine all the Native American-grantor, railroad-grantee 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. 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 there is no evidence he 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 allowing the lower federal courts' spin on the extrinsic evidence; namely that Bill Hilchkanum could decipher a railroad right of way conveyance, and could 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.

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, with or without qualifying language or limiting language in the habendum clause, the Washington courts have held the right of way conveyance is an easement. Even *Brown* notes this distinction. The District Court and the Ninth Circuit 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. This court should grant this petition and reverse the trial court's summary judgment.

The specific recitation of King County Ordinance 6531 §1, 1983; Ordinance 2165 §1, 1974, were ignored by the lower federal courts and the petitioners have serious constitutional claims for redress of grievances. Without any live testimony, with no cross examination, with no confrontation of accusers, petitioner John Rasmussen was essentially tried and convicted of "threatening county employees who entered the railroad right of way bisecting his land". *Opinion,* at 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. See *Monell v. Dep't of Soc. Serv.,* 436 U.S. 658 (1978).

The unrefuted fact is 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. There is no evidence before the federal courts 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); *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)." *Bode vs. Minn. Dept. of Natural Resources,* 594 N.W.2d 257, 261 (1999).

## CONCLUSION

This court should grant this petition and reverse the lower federal courts, and remand this action or alternatively stay the proceedings until the Washington Supreme Court has provided direction regarding the distinctly state law issues of real property title laws. Without this Court's intervention the doctrine of after-acquired property has been destroyed.
Respectfully submitted this 9th day of January, 2003.

SANDLIN LAW FIRM

_____
J.J. SANDLIN, for petitioners Rasmussen

## Footnotes:

1. Affiant David T. Denny was one of the founders of the Seattle Lake Shore & Eastern Railway [henceforth "SLS&E"]; *see* "Orphan Road, The Railroad Comes to Seattle, 1853-1911", by Kurt E. Armbruster, Washington State University Press, Pullman, Washington ©1999 by Board of Regents of Washington State University, at p. 122.

2. In a junior quitclaim deed dated March 3, 1909, there was an "exception" clause to a portion of the Rasmussen property, affecting approximately 1% of the right-of-way area. ER, 521. *But see, Harris v. Ski Park Farms,* 120 Wn.2d 727, 740, 844 P.2d 1006 (1993) (Washington Supreme Court, in dictum, observed a fee conveyance excepted an easement from the conveyance).

3. This court should accept certiorari simply for the pleasure of exposing this Arthur Andersen tax fraud conspiracy.

4. 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 shall be determined, and those issues and decision shall probably be in direct conflict with this court's decision.

5. 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. Hilchkanum did not have 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).

6. "…[Hilchkanum] did not need to act within the restrictions of the Act of March 3, 1873 to alienate his property nor did he need to include an after-acquired property clause in his conveyances; he had title free and clear and could convey to the Railway whatever he wished.
Although Hilchkanum did not obtain his patent deed until 1888, the Rasmussens cite no authority suggesting that the certificate of ownership did not perfect his title, and their own expert opined that Hilchkanum obtained "unqualified and perfect fee simple ownership" in 1884. Graddon Decl. Ex. 1, §1 at 2." Ninth Circuit Opinion, at 11622.

# APPENDIX

**FOR PUBLICATION**
**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

KING COUNTY, a political
subdivision of the State of
Washington,
*Plaintiff-counter-defendant-Appellee,*

v.

JOHN RASMUSSEN; NANCY RASMUSSEN, husband and wife, and
their marital community,
*Defendants-counterclaimants-Appellants.*

Appeal from the United States District Court
for the Western District of Washington
Barbara J. Rothstein, Chief District Judge, Presiding

Argued and Submitted
June 13, 2002—Seattle, Washington

Filed August 9, 2002

Before: Betty Binns Fletcher and Ronald M. Gould,
Circuit Judges, and Mary H. Murguia, District Judge.**1**

Opinion by Judge B. Fletcher

**1**The Honorable Mary H. Murguia, United States District Court Judge
for the District of Arizona, sitting by designation.



# COUNSEL

J. Jarrette Sandlin, Sandlin Law Firm, Zillah, Washington, for the defendants-counter-plaintiffs-appellants.

Howard P. Schneiderman and Scott Johnson, King County Prosecuting Attorney's Office, Seattle, Washington, for the plaintiff-counter-defendant-appellee.

# OPINION

B. FLETCHER, Circuit Judge:

This case arises from a dispute over a 100-foot-wide strip of land running along a portion of the eastern shore of Lake Sammamish in King County, Washington, that was formerly used as part of a railway corridor. King County filed suit against the Rasmussens to quiet title over this strip of land, which bisects the Rasmussens' property, and to obtain a declaratory judgment that it is entitled to quiet enjoyment of the strip.

King County claims it owns a fee simple estate in the strip. The Rasmussens, in turn, claim that their predecessors in interest granted only an easement over the strip and that the rights in the easement have reverted to the Rasmussens so that they now have fee simple title to the strip. The district court
granted summary judgment in favor of King County and dismissed the Rasmussens' counterclaims. Because we conclude that no genuine issues of material fact exist for trial and that King County holds the strip in fee simple, we affirm.



**I.**

**Factual and Procedural Background**

In 1876, homesteaders Bill Hilchkanum and Mary Hilchkanum claimed property along the eastern shore of Lake Sammamish in King County, Washington. They received their final ownership certificate in 1884 and their fee patent in 1888. On May 9, 1887, the Hilchkanums conveyed an interest in the strip to the Seattle Lake Shore and Eastern Railway Company ("the Railway"). The text of the "Right of Way
Deed" is as follows:

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

Lots one (1) two (2) and three (3) in section six (6) township 24 North of Range six (6) East.

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 [legal description in metes and bounds].

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.



To have and to hold the said premises with the appurtenances unto the said party of the second part and to its successors and assigns forever.

The deed was handwritten by a notary public.

Mary Hilchkanum later conveyed lots 1 and 3 of the homestead property to her husband by quitclaim deed. The conveyance is "less (3) acres right of way of Rail Road." Bill Hilchkanum then conveyed lot 1 to Chris Nelson "less three
(3) acres heretofore conveyed to the Seattle and International Railway for right of way purposes." The deed by which the Hilchkanums conveyed lot 2 of their homestead property did not contain an exception for the railroad right of way. The Rasmussens claim that the right of way bisects portions of lots 2, 3, and 5.**2**

The Railway, and its successor Burlington Northern, built a track on the strip of land and used the track regularly for rail service until approximately 1996. In 1997, Burlington Northern sold its railway corridor, including the Hilchkanum strip,
to The Land Conservancy of Seattle and King County ("TLC").

On June 11, 1997, TLC petitioned the United States Surface Transportation Board ("STB") to abandon use of the corridor for rail service under the National Trail System Act, 16 U.S.C. § 1247(d) ("Rails to Trails Act"). The STB approved interim trail use of the corridor — called railbanking — by King County and issued a Notice of Interim Trail Use. The County then purchased the corridor from the TLC and **2**To the extent a portion of the right of way bisects lot 5, that portion is not at issue in this quiet title action. King County bases its claim on the Hilchkanum deed conveying a right of way bisecting lots 1, 2, and 3 to the Railway. The County presented no deed conveying a right of way across lot 5 to the Railway.



obtained title to the right of way carved from the Hilchkanum property.**3**

The Rasmussens oppose King County's efforts to railbank the right of way and claim that King County has no right to use the right of way as a trail because the Railway and its successors held only an easement for railroad purposes. As a result, King County brought this action in state court to quiet title and to obtain a declaration of its rights in the strip. The Rasmussens removed the action to federal court and counterclaimed with allegations that King County violated their First, Second, Fifth, and Fourteenth Amendment rights and violated 16 U.S.C. § 1267(d), 42 U.S.C. § 1983, 28 U.S.C. § 1358, and Article 1, Section 16 of the Washington state constitution.

King County moved for summary judgment on its claim to the property and moved to dismiss the Rasmussens' counterclaims for failure to state a claim and for lack of subject matter jurisdiction. In response to these motions, the Rasmussens filed two over-length briefs and a declaration from Mr. Rasmussen containing several additional pages of legal argument. King County filed its reply and moved to strike the overlength
portions of the Rasmussens' briefs and the legal arguments in Mr. Rasmussen's declaration. They also moved to strike inadmissible evidence from the briefs and the declaration. The Rasmussens filed a brief in response to King County's motion to strike as well as a separate surrebuttal brief.
King County moved to strike the surrebuttal brief. **3**The Rasmussens contend that King County has not provided evidence that it has an interest in a significant portion of the strip of land bisecting the Rasmussens' property. They claim that the only evidence provided by
the County is a title insurance document that refers solely to the portion of the strip on Government Lot 3; only 3% of the subject strip is on Government Lot 3. However, King County has also provided the quitclaim deed by which TLC transferred its interest to King County. This deed indicates that the portion of the strip on Government Lot 2 was also conveyed; the Rasmussens assert that 96% of the strip lies on Government Lot 2. Thus, King County has submitted undisputed evidence that it has an interest in the subject property.

In a published opinion, the district court struck the overlength portions of the Rasmussens' response brief as well as the legal arguments in Mr. Rasmussen's declaration. *See King County v. Rasmussen*, 143 F. Supp. 2d 1225, 1227 (W.D. Wash. 2001). It also struck a paragraph in the response brief that indicated that Bill Hilchkanum was a Native American and was illiterate; the Rasmussens cited no evidence in support of this assertion in their brief to the district court. *Id.* At 1227-28. The district court also agreed to strike the surrebuttal brief. *Id.* at 1228. Finally, it granted King County's motion for summary judgment and dismissed the counterclaims. *Id.* at 1231. The Rasmussens appeal.

**II.**

**Jurisdiction**

The district court had jurisdiction over this removal action if King County could have brought the case in federal court in the first place. 28 U.S.C. § 1441(a). King County could have brought this action in federal court initially because the district court would have had federal question jurisdiction pursuant to 28 U.S.C. § 1331. King County's complaint included an allegation that it had a legal right to the strip of land in question even if the original deed conveyed only an easement. King County relied on 16 U.S.C. § 1247(d) as the source of this right. Thus, there was a federal question on the face of the well-pleaded complaint. *See Patenaude v. Equitable Life Assurance Soc'y of United States*, 290 F.3d 1020, 1023 (9th Cir. 2002) ("The presence or absence of federal question jurisdiction is governed by the well-pleaded complaint rule . . . ." (quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987)) (internal quotation marks omitted)).

This court has appellate jurisdiction over the district court's summary judgment pursuant to 28 U.S.C. § 1291.



**III.**

**Motions to Strike**

The Rasmussens argue that we should consider materials struck by the court below. The district court struck the overlength portions of the Rasmussens' briefs in response to King County's motions for summary judgment and to dismiss the counterclaims. It also struck legal arguments contained in John Rasmussen's declaration as well as the Rasmussens' surrebuttal brief.

The district court struck these materials on the basis of Western District of Washington Local Civil Rule 7, which limits the length of summary judgment briefs to twenty-four pages, limits the length of briefs relating to other motions to eight pages, and makes no allowance for surrebuttal briefs. Parties may file over-length briefs if they obtain prior permission from the court. The Rasmussens violated this rule by filing two thirty-four-page briefs without obtaining prior permission.**4** Mr. Rasmussen's declaration added further briefing well beyond the twenty-four-page limit. Declarations, which are supposed to "set forth facts as would be admissible in evidence," should not be used to make an end-run around the page limitations of Rule 7 by including legal arguments outside of the briefs. Fed. R. Civ. P. 56(e). As for the surrebuttal brief, the Rasmussens claim that it merely contained a response to the motion to strike. This is not so. It contains
legal arguments on the motion to dismiss the counterclaims.
The Rasmussens filed a separate response to the County's motion to strike, which the district court considered. Thus, the district court acted properly in granting King County's motions to strike.

**4**The Rasmussens claim that their failure to obtain prior approval to file over-length briefs was due to a miscommunication with the district court's law clerk. However, Rule 7 unambiguously requires prior approval to file briefs exceeding the page limitations set forth in the rule.

For the most part, however, the fact that this material has been struck will not affect our review. The final pages of the summary judgment response brief do not contain separate legal arguments that are waived because they were not raised in the first twenty-four pages of the brief. Instead, they contain comparisons between the facts of this case and the facts of a Washington Court of Appeals case dealing with a railroad right of way. We must consider the effect of any case relevant to the arguments raised, regardless of whether the Rasmussens briefed the particular case.

As for the counterclaims, the only claims not addressed in the first twenty-four pages of the brief opposing Rule 12(b) dismissal are the Rasmussens' takings claims. However, the district court did not consider these claims waived and instead dismissed them for failure to state a claim. *Rasmussen*, 143 F. Supp. 2d at 1231 (disposing of Fifth Amendment and state constitutional takings claims). Thus, we will address all of the Rasmussens' counterclaims.

**IV.**

**Summary Judgment**

*A. Standard of Review*

A grant of summary judgment is reviewed *de novo*. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). This court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.* All reasonable inferences from the evidence must be drawn in favor of the nonmoving party. *Orin v. Barclay*, 272 F.3d 1207 (9th Cir. 2001).



*B. Validity of Conveyance Prior to Obtaining Fee Patent*

The Rasmussens claim that Bill Hilchkanum did not have the power to convey anything more than an easement to the Railway because he had not perfected his title to the homestead when he made the conveyance in 1887. Under the Act of March 3, 1873, ch. 266, 17 Stat. 602 (1873),**5** a homesteader could convey a right of way to a railroad before perfecting his title. The use of the term "right of way" in the statute may have limited a homesteader to conveying only an easement, not a fee simple, to a railroad.

However, we need not answer this question to decide this case because Bill Hilchkanum perfected his title to the homestead property in 1884, three years before he conveyed the interest in the strip of land to the Railway in 1887. He entered the subject property in 1876 and took up residence there. The Homestead Act of 1862 provided that he could receive a certificate or patent at the expiration of five years from the date of entry if he provided proof that he had resided or cultivated the land for these five years, that he had not alienated any of the land, and that he had borne true allegiance to the United States. *See* Homestead Act, ch. 75, 12 Stat. 392 (1862). Bill Hilchkanum submitted the necessary proof and obtained his certificate of ownership in 1884. Since he had fulfilled all the necessary conditions of ownership, his title was perfected in **5**The Act provides that:
[A]ny person who has already settled or hereafter may settle on the public lands of the United States, either by pre-emption, or by virtue of the homestead law or any amendments thereto, shall have the right to transfer by warranty, against his or her own acts, any portion of his or her said pre-emption or homestead for church, cemetery, or school purposes, or for the *right of way of railroads* across such pre-emption or homestead, and the transfer for such public purposes shall in no way vitiate the right to complete and prefect the title to their preemptions or homesteads. Act of March 3, 1873, ch. 266, 17 Stat. 602 (1873) (emphasis added). This statute remains on the books, in slightly altered form, at 43 U.S.C. §174.

1884. As a result, he did not need to act within the restrictions of the Act of March 3, 1873 to alienate his property nor did he need to include an after-acquired property clause in his conveyances; he had title free and clear and could convey to the Railway whatever he wished.

Although Hilchkanum did not obtain his patent deed until 1888, the Rasmussens cite no authority suggesting that the certificate of ownership did not perfect his title, and their own expert opined that Hilchkanum obtained "unqualified and perfect fee simple ownership" in 1884. Graddon Decl. Ex. 1, §1 at 2. We affirm the district court's conclusion that there are no genuine issues of fact as to whether Hilchkanum had the power to convey a fee simple interest to the Railway in 1887.

*C. Easement or Fee Simple*

King County claims that under Washington state law the Hilchkanum deed conveyed a fee simple estate in the strip of land to the Railway. The Rasmussens argue that, even if Hilchkanum had the power to convey a fee simple estate to the Railway, he intended to convey only an easement. The district court agreed with King County, as do we.

**[1]** A conveyance of a right of way to a railroad may be in fee simple, or it may be an easement. *Veach v. Culp*, 599 P.2d 526, 527 (Wash. 1979). The intent of the parties is of paramount importance in determining what interest the deed conveyed. *Brown v. State*, 924 P.2d 908, 911 (Wash. 1996). It has been said that it is a factual question to determine the intent of the parties. *Veach*, 599 P.2d at 527. But the intent of parties to a deed as well as the legal consequences of that intent are in reality mixed questions of law and fact: legal rules of deed interpretation determine how the underlying facts reflect the intent of the parties. *See Brown*, 924 P.2d at 912 (determining intent from undisputed underlying facts on summary judgment).
To ascertain the intent of the parties, one must look to the language of the deed as well as the circumstances sur-



rounding the deed's execution and the subsequent conduct of the parties.**6** *Id*. However, the parties must "clearly indicate" an intent to make a conveyance conditional. *King County v. Hanson Inv. Co.*, 208 P.2d 113, 119 (1949) (cited in *Brown*, 924 P.2d at 912).

The Washington Supreme Court provided its most recent guidance on this issue in *Brown*.**7** The *Brown* court identified various factors to consider in determining whether a deed conveyed a fee simple or an easement:

[W]e have relied on the following factors: (1) whether the deed conveyed a strip of land and did not contain additional language relating to the use or purpose to which the land was to be put, or in other
ways limiting the estate conveyed; (2) whether the deed conveyed a strip of land and limited its use to a specific purpose; (3) whether the deed conveyed a right of way over a tract of land, rather than a strip thereof; (4) whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land; (5) whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor; (6) whether the consideration expressed was substantial or nominal;**8** (7) whether the conveyance did or

**6**A finding of ambiguity in the language of the deed is not required to consider extrinsic evidence of the surrounding circumstances and the subsequent conduct of the parties. *Brown*, 924 P.2d at 912; *Roeder Co. v. K&E Moving & Storage Co.*, 4 P.3d 839, 841 (Wash. Ct. App. 2000).
**7**The *Brown* court examined deeds created from 1906 to 1910.
**8**The Washington courts in recent years have not given much weight to the amount of consideration in determining the intent of the parties, particularly if the record does not establish the consideration typically paid for easements as opposed to fee simple estates. For example, the *Brown* court did not give this factor much weight because it could

not be ascertained from the record whether the consideration paid for the conveyances represented the value of an easement or a fee simple. *Brown*, 924 P.2d at 914.
Likewise, in *Roeder*, 4 P.3d at 842, the Washington Court of Appeals noted that the fact that nominal consideration was paid did not reveal much because railroads paid significant amounts for both easements and fee simple purchases. In this case, the Hilchkanums received no monetary consideration for the conveyance to the railroad. However, like the nominal consideration in *Roeder*, the lack of monetary consideration here reveals little about the Hilchkanums' intent. Both an easement and a fee simple would have had monetary value, but the Hilchkanums declined to require any payment.



did not contain a habendum clause, and many other considerations. *Brown*, 924 P.2d at 912.

The *Brown* court further explained that whether the parties to a railroad right of way deed used a statutory form deed is a significant factor in determining their intent. *Brown*, 924 P.2d at 912; *see Roeder Co. v. K&E Moving & Storage Co.*, 4 P.3d 839, 841 (Wash. Ct. App. 2000). The court ruled that "where the original parties utilized the statutory warranty form deed and the granting clauses convey definite strips of land, we must find that the grantors intended to convey fee simple title unless additional language in the deeds clearly and expressly limits or qualifies the interest conveyed."**9** *Brown*, 924 P.2d at 912.

In this case, however, the Hilchkanum deed did not follow the statutory warranty form. The statutory form is as follows:

The grantor (here insert the name or names and place of residence) for and in consideration of (here insert consideration), in hand paid, convey and warrant to (here insert the grantee's name) the following

**9**WashingtonRevised Code § 64.04.030 states that every deed that follows the statutory warranty deed form "shall be deemed and held a conveyance in fee simple to the grantee, his heirs, and assignes . . . ." This rule originated in 1886. *Roeder*, 4 P.3d at 841 n.8.



described real estate (here insert description), situated in the county of _____, state of Washington.
Laws of 1886, §3, pp. 177-78. The Hilchkanum deed used a slightly different form:

In consideration of (here insert consideration), grantor (here insert name of grantor) does hereby donate grant and convey unto grantee (here insert name of grantee) the following described right of way (here insert description).

As a result, the Hilchkanum deed does not give rise to the presumption that the deed conveyed a fee simple. *See Roeder*, 4
P.3d at 843; *Veach*, 599 P.2d at 527 (no presumption that quitclaim deed conveyed fee simple). A failure to use the statutory warranty deed form, however, does not necessarily mean that the parties did not intend to convey a fee simple. The court must consider whether other factors indicate that the parties intended a fee simple.

Another factor on which the *Brown* court focused was if and how the deed uses the term "right of way." The court noted that use of the term in the granting clause as a limitation or to specify the purpose of the grant generally creates only an easement. *Brown*, 924 P.2d at 913. The term "right of
way," however, can have two purposes: "(1) to qualify or limit the interest granted in a deed to the right to pass over a tract of land (an easement), or (2) to describe the strip of land being conveyed to a railroad for the purpose of constructing a railway." *Id.* at 914.

In *Brown*, the term "right of way" appeared only in each deed's legal description or in the description of the railroad's obligations, instead of in the granting or habendum clauses. The court concluded that "used in this manner, 'right of way' merely describes a strip of land acquired for rail lines." *Brown*, 924 P.2d at 914. Since the term did not qualify or



limit the interest expressly conveyed in the granting and habendum clauses of the deeds at issue, the court concluded it did not indicate an intent to grant an easement only.**10**

**[2]** Here the term "right of way" appears in the granting clause as well as in the legal description.**11** In this sense, the Hilchkanum deed suggests a possible intent to create only an easement in a way the deeds at issue in *Brown* did not. However, neither the granting nor the habendum clauses contains language clearly limiting the use of the land to a specific purpose.
In virtually all cases where Washington courts have found only an easement, the granting or the habendum clauses contained such language. *See Swan v. O'Leary*, 225 P.2d 199, 199 (Wash. 1950) (granting premises "for the purpose of a
Railroad right-of-way"); *Morsbach v. Thurston County*, 278 P. 686, 687 (Wash. 1929) (conveying a "right of way for the
construction of said company's railroad"); *Pacific Iron Works v. Bryant Lumber & Shingle Mill Co.*, 111 P. 578 (Wash. 1910) (holding that deed providing "to have and to hold the said premises . . . for railway purposes, but if it should cease to be used for a railway the said premises shall revert to said grantors" granted easement); *Reichenbach v. Washington Short Line Ry. Co.*, 38 P. 1126 (Wash. 1894) (construing deed which provided "so long as the same shall be used for the operation of a railroad" as an easement); *King County v.
Squire Inv. Co.*, 801 P.2d 1022, 1022 (Wash. Ct. App. 1990) (granting premises to railroad "so long as said land is used as a right-of-way by said railway Company, Expressly reserving to said grantors their heirs and assigns all their riparian rights

**10**In a previous case, the Washington Supreme Court had held that the legal description of the interest conveyed is part of the granting clause. *Veach*, 599 P.2d at 527. But *Brown* distinguished the language used in the legal description from the language used in the granting clause. *Brown*, 924 P.2d at 914.
**11**The Hilchkanum deed is also captioned as a "Right of Way Deed." However, the *Brown* court rejected the contention that use of the term "right of way" in the caption would preclude a holding that a deed conveyed a fee simple interest. *Brown*, 924 P.2d at 915.



. . . ."). Without such additional language, the use of the term "right of way" merely "begs the question" since a railroad could own a right of way either as an easement or in fee. *Brown*, 924 P.2d at 914.

**[3]** The Hilchkanum deed contained precatory language indicating that the parties expected that the right of way would be used to construct and operate a railroad, but it did not actually condition the conveyance on such use.**12** *Brown*, 924 P.2d at 912-13. Also, in *Brown*, the court noted that identifying the general purpose of a conveyance, i.e., for railroad
purposes, is not helpful in discerning intent because it does not clarify whether the right of way is an easement or a fee. *Id.* at 913.

One Washington case, *Veach*, supports the Rasmussens' contention that the mere use of the term "right of way" in the granting clause of the Hilchkanum deed, without additional language conditioning the use of the interest, creates an easement. 599 P.2d at 527. In *Veach*, the 1901 deed stated:

The said party of the first part, for and in consideration of the sum of Two Hundred and Twenty-five Dollars, . . . 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 situated in Whatcom County . . . to-wit: "*A right of way* one hundred feet wide, being fifty feet on each side of the center line of the B.B. & Easter R.R. . . . . To have and to hold, all and singular, said premises, together with the appurtenances unto the

**12**The deed provided: "*In consideration of the benefits and advantages to accrue to us from the location construction and operation of the SeattleLake 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 . . . ." DeGoojer Decl. Ex. 1 (emphasis added).



said party of the second part, and to its assigns forever." *Id.* Like the Hilchkanum deed, the language in the *Veach* deed did not expressly limit the use to a particular purpose. However, the district court distinguished *Veach* on the basis of other language in the Hilchkanum deed and extrinsic evidence indicating an intent to convey a fee simple estate, neither of which was present in *Veach*. *Rasmussen*, 143 F. Supp. 2d at 1230 n.4.

**[4]** First, the district court compared the Hilchkanum deed's language granting an interest in the strip of land with its language granting the Railway the right to enter the adjacent land to cut trees:

The deed grants a "strip" of land described in metes and bounds rather than merely a right "over" the land (as it does with the tree-cutting grant). The deed uses the word "convey" when granting the strip, which is associated with fee transfers (notably, "convey" is absent in the tree-cutting grant). *See Hanson*, 208 P.2d at 119. *Id.* We agree with the district court that these factors indicate that Hilchkanum intended to convey a fee simple interest in the strip of land described. Furthermore, the fact that he explicitly limited the purpose of the Railway's right to enter the adjacent land demonstrates that he was aware of the distinction between an easement and a fee simple conveyance.**13**

**13**The Rasmussens provided evidence to the district court that Hilchkanum could not read or write the English language, suggesting that he was not aware of the wording in the deed and its effect. While the district court struck this argument from their response brief, the evidence itself was not struck. We have considered the evidence since it is part of the district court record. Nevertheless, the evidence indicates that Hilchkanum relied on friends in transacting his business. With the help of his friends, he was able to comply with the Homestead Act and make numerous conveyances of property. There is no evidence that his friends did not assist him with the transaction with the Railway such that he understood the deed's language and could reflect his intent therein.



**[5]** The district court also looked to the behavior of the parties after the execution of the deed to the Railway, which bolsters the conclusion that the deed conveyed the right of way in fee. *Rasmussen*, 143 F. Supp. 2d at 1230. Some of the deeds that the Hilchkanums subsequently used to convey the rest of their property explicitly excepted the strip of land belonging to the Railway. The deeds conveyed the surrounding property "less (3) acres right of way of Rail Road." By excepting the right of way in terms of acres of land, the conveyances
betray an understanding that the Railway owned the strip of land and did not merely have a right to enter the strip.

The Rasmussens point out that the Hilchkanums did not mention the railroad right of way in the deed conveying lot 2, which is where most of the strip to which the Rasmussens lay claim is located. However, this does not bring into dispute the fact that the Hilchkanums intended a fee simple. Had they used other language in conveying lot 2 that recognized the Railway's right of way as only an easement, then a factual finding reconciling the contradictory positions might be necessary.

But the total failure to except the land subject to the right of way in the lot 2 deed is not significantly probative of whether or not the parties intended to convey a fee simple estate. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000) (noting that a scintilla of evidence or evidence that is not significantly probative does not present a genuine issue of material fact).

**[6]** Finally, the district court properly looked to the circumstances surrounding the execution of the Hilchkanum deed and concluded that they confirmed the parties' intent to convey a fee simple estate. *Rasmussen*, 143 F. Supp. 2d at 1230.
Deeds to the Railway from other landowners executed in the same year as the Hilchkanum deed used the same form but contained additional language explicitly restricting the grant to railroad purposes and providing that the interest would revert to the grantor if the railroad ceased to operate. *See Squire*, 801 P.2d at 1023; *Northlake Marine Works, Inc. v.*



*City of Seattle*, 857 P.2d 283, 286-87 (Wash. Ct. App. 1993).
The differences in these deeds reflected the common practice of the railroads of using fee simple form deeds and adding language to include limitations requested by landowners. *See* Danaya C. Wright & Jeffrey M. Hester, *Pipes, Wires, and Bicycles: Rails-to-Trails, Utility Licenses, and the Shifting Scope of Railroad Easements From the Nineteenth to the Twenty-First Century*, 27 Ecology L.Q. 351, 378 (2000). The deed in question here suggests that the Hilchkanums requested no such limitations.

**[7]** In conclusion, "[t]he language of the deed, the behavior of the parties, and the circumstances converge to show the Hilchkanums' intent to convey a fee simple." *Rasmussen*, 143 F. Supp. 2d at 1230-31. The underlying facts are undisputed, and, viewing these facts in the light most favorable to the Rasmussens, as we must on summary judgment, we conclude that King County, as the Railway's successor, possesses a fee simple in the strip of land.**14** We, therefore, affirm the district court's summary judgment in favor of King County.

**V.**

**Counterclaims**

The district court dismissed all of the Rasmussens' counter-

**14**The Rasmussens argue that the Hilchkanum deed incorrectly describes
the boundaries of the right of way on which the railroad tracks lie. This does not alter King County's right to the strip of land in question. According to *DD&L, Inc. v. Burgess*, 51 Wn. App. 329, 753 P.2d 561, 564 (Wash. Ct. App. 1988), "[t]hough the monument referred to in a deed does
not actually exist at the time the deed was drafted, but is afterward erected by the parties with the intention that it shall conform to the deed, it will control." The Hilchkanum deed describes the location of the railroad right of way by referring to railroad tracks not yet erected but which were erected with the intention that the location of the tracks would conform to the deed. Thus, the location of the tracks bisecting the Rasmussens' property controls.



claims either for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) or for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). We review these dismissals *de novo*, *see Zimmerman v. City of Oakland*, 255 F.3d 734, 737 (9th Cir. 2001) (reviewing 12(b)(6) dismissal *de novo*); *La Reunion Francaise SA v. Barnes*, 247 F.3d 1022, 1024 (9th Cir. 2001) (reviewing 12(b)(1) dismissal *de novo*), and we affirm.

*A. Takings*

The Rasmussens argue that they are entitled to just compensation for the taking of their land by the government under the state constitution and the Fifth Amendment. *See* Wash. Const., Art. 1, § 16. Their takings claim requires a finding that the Rasmussens own the strip of land. Because King County owns the strip of land in fee simple, the Rasmussens' land was not taken, and they can state no claim for which relief can be granted.

*B. Spur Line Arguments*

The Rasmussens argue that King County's title to the right of way is invalid because the STB lacked subject matter jurisdiction to order interim trail use over the railroad right of way. They claim the rail line in question is a spur line over which the STB has no jurisdiction. As the district court wrote, "[b]y challenging the STB proceedings, the Rasmussens are asking the court to reverse an STB order." The courts of appeals have exclusive jurisdiction over any proceeding "to enjoin or suspend, in whole or in part, a rule, regulation, or order of the STB . . . ." 28 U.S.C. § 2321(a); *Dave v. Rails-to-Trails Conservancy*, 79 F.3d 940, 942 (9th Cir. 1996) (finding that district court has no jurisdiction to hear claims that have the practical effect of seeking review of an ICC (now STB) order).

No authority supports the Rasmussens' proposition that, in spite of 28 U.S.C. § 2321, the district court had jurisdiction to



consider the subject matter jurisdiction of the STB. The Rasmussens cite *Powelson v. United States*, 150 F.3d 1103, 1105 (9th Cir. 1998), which holds that a statute may create subject matter jurisdiction yet not waive sovereign immunity. They then argue that, because it is not clear whether Congress has waived sovereign immunity of the STB deliberations, there must be subject matter jurisdiction. This argument has no merit. The non-waiver of sovereign immunity does not supply subject matter jurisdiction.

The Rasmussens also rely on 28 U.S.C. § 1336(b), which allows a district court to refer a question or issue to the STB and to exercise "exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the STB arising out of such referral." This case involves no such referral, and § 1336(b) does not give the district court any power to refer a question that challenges the STB's jurisdiction to issue an order that it has already issued. The STB implicitly has answered this question by asserting jurisdiction over the rail line; judicial review of the order must be obtained directly from a court of appeals as provided by 28 U.S.C. § 2321(a).

*C. First Amendment*

The Rasmussens contend that their First Amendment right to petition the government for redress has been violated because King County refused to communicate with them. In the Rasmussens' Answer and Counterclaim and in their briefing to the district court, the Rasmussens also argued that King County had violated their right to free speech. They argued that a letter from King County officials threatening to bring criminal harassment charges against Mr. Rasmussen constituted an impermissible prior restraint on his ability to say that "he shall defend his life and his property, and that he shall arm himself." The letter apparently arose after Mr. Rasmussen threatened county employees who entered the railroad right of way bisecting his land. The Rasmussens now focus only on



their right to petition the government for redress of grievances.

Counties are liable for constitutional violations under § 1983 only if the individual officer who committed the violation was acting pursuant to a local policy, practice or custom. *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978). The Rasmussens have failed to allege any local policy, practice or custom here. They attempt no response to

this argument in their briefing to this court. The First Amendment claim was properly dismissed for failure to state a claim.

*D. Second Amendment*

John Rasmussen contends that King County violated his Second Amendment right to bear arms when it obtained an order prohibiting Rasmussen from possessing a gun. This claim must fail for the same reason the First Amendment claim fails — the failure to allege that the violation occurred pursuant to a county custom or practice. *Id.*

*E. Fourteenth Amendment Due Process and Eminent Domain*

The Rasmussens argue that they have lost their property right in the railroad right of way without due process of law and that their property has been condemned by the government. They also claim that King County owes them compensation for the wrongful exercise of the federal government's power of eminent domain through the STB. These claims presume that the Rasmussens held a reversionary interest in the right of way because the original deed conveyed only an easement. Because we affirm the district court's holding that the original deed conveyed a fee simple, the Rasmussens have no rights in the subject property on which to base a due process or eminent domain claim. The district court properly dismissed these claims.



*F. Violations of Local Ordinances*

The Rasmussens contend that King County violated various local ordinances in using the railroad right of way. These claims do not appear in the Rasmussens' Answer, Affirmative Defenses and Counterclaims. The Rasmussens never amended their counterclaims to include these new claims. The district court did not consider them. Neither will we.

**VI.**

**CONCLUSION**

We affirm summary judgment in favor of King County because there are no genuine issues of fact that disparage King County's claim to a fee simple estate in the strip of land formerly used as a railroad right of way. Further, the district
court properly dismissed the Rasmussens' counterclaims under Federal Rule of Civil Procedure 12(b).

AFFIRMED.



s/Hon. Betty Binns Fletcher, Presiding, Ninth Circuit Judge
s/Hon. Ronald M. Gould, Ninth Circuit Judge
s/Hon. Mary H. Murguia, United States District Court Judge for the District of Arizona, sitting by designation.