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October 24, 1997

Louise Miller, King County Council
Room 1200, King County Courthouse
516 Third Avenue
Seattle, WA 98104

Re: E. Lake Sammamish/Railroad Right of Way

Dear Ms. Miller:

I am writing this letter on behalf of the Redmond to Issaquah Railroad Preservation Association (RIRPA). Specifically, RIRPA has asked me to offer my opinion regarding the nature of the title presently held by BNSF (or The Land Conservancy of Seattle and King County if it is successful in the proceedings presently before The Surface Transportation Board) in the railroad right of way along E. Lake Sammamish. (RIRPA is of the opinion that this letter is necessary in order to correct what it believes has been erroneous information circulated by one or more members of your staff to other council persons and their staff.)

I have been advised, but have no personal knowledge myself, that one of your staff has advised others that the railroad holds fee title to the right of way, rather than an easement. I must state that I strongly disagree with any contention that the railroad has fee title to the entire right of way. In fact, except with certain limited exceptions (and excluding those portions of the right of way which were the subject of a federal grant), it is my opinion that most of the right of way along E. Lake Sammamish falls under the category of a railroad right of way easement.

In rendering this opinion I am drawing upon my experience dealing with railroad right of way ownership issues dating back to approximately 1984. Since that date I have worked with property owners and/or litigated right of way title issues along the Burke-Gilman Trail, the "missing link" which connected the Burke-Gilman and Sammamish River Trails, the Centennial Trail in Snohomish County, and along various other trails and rights of way throughout Western and Eastern Washington. I also participated as counsel of record in the reported cases of *Lawson v. State of Washington*, 107 W.2d 444, 730 P.2d 1308 (1986), *National Wildlife Federation (Beres) v. Interstate Commerce Commission*, 850 Fed. 2d

694 (D.C. Cir. 1988), *King County v. Squire Investment Company*, 59 Wn. App. 888, 801 P.2d 1022 (1990), and as counsel for an amicus in the United States Supreme Court case of *Preseault v. Interstate Commerce Commission*, 49 U.S. 1 (1991).

I have recently had the opportunity to review a memorandum dated September 17, 1997, from King County Senior Deputy Prosecuting Attorney Bill Blakney to Faith Holste. In the memorandum Mr. Blakney claims that the recent Washington State Supreme Court decision in *Brown v. State*, 130 Wn.2d 430 (1996), has clarified the law regarding the interpretation of conveyances to railroads. He ends the memorandum by concluding that the instruments in question along E. Lake Sammamish all conveyed fee simple title. With all due respect to Mr. Blakney, I must strongly disagree with his opinion.

The common law applicable to the interpretation of conveyances to railroads in the State of Washington dates back to the early part of the century, and is well settled. The State Supreme Court in *Brown v. State* in no way altered that law. Instead, the court in *Brown*, in applying the settled common law, simply decided that the particular deeds in question conveyed fee title rather than easements.

The court in *Brown*, after citing a number of earlier Washington cases on the subject, stated the following at 439:

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

One of the cases cited by the *Brown* court for that proposition, *Veach v. Culp*, 92 Wash. 570 (1979), at 572, held that a conveyance to a railroad which provided for the grant of a "right-of-way one hundred feet wide . . ." conveyed an easement rather than fee title.

I have reviewed every instrument which conveyed a portion of the original right of way along E. Lake Sammamish. Most of these instruments date back to the late 1800's. It is my opinion that a few of the instruments probably conveyed fee title to the railroad. However, the vast majority of the instruments clearly conveyed to the railroad no more than an easement for railroad purposes. Notably, most of the instruments along E. Lake Sammamish, unlike most of the deeds examined in *Brown v. State*, (i) are entitled "Right of Way Deed", (ii) provide in the granting clause that a "right of way" is being conveyed, (iii) provide for nominal consideration and/or state that the consideration is the benefit and advantages accruing "from the location, construction and operation" of the railroad.

Many of the instruments also contain other language emphasizing the railroad purpose.

I am uncertain at this time to what extent the county may be relying on Mr. Blakney's opinion, or the information which may have been circulated by one or more of your staff members. However, to the extent the county is contemplating the expenditure of any funds under the assumption that the present owner of the right of way holds fee title, I suggest that the deeds and legal issues be carefully reexamined before making any commitment.

I would be more than happy to speak with you or any staff member if you have questions regarding the right of way along E. Lake Sammamish.

Very truly yours,

RODGERS & DEUTSCH

FORWARDED WITHOUT
SIGNATURE TO
AVOID DELAY

Daryl A. Deutsch

DAD/st

cc: All King County Council Members
RIPRA