No. 18-

IN THE

Supreme Court of the United States

SCOTT KASEBURG, For Himself
and As a Representative of a Class of Similarly
Situated Persons,

Petitioners,

v.

PORT OF SEATTLE, a municipal corporation, PUGET SOUND ENERGY INC; COUNTY OF KING, a home rule charter county; CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,

Respondents.

(For Continuation of Caption See Inside Cover)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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December 10, 2018

283559

THOMAS E. HORNISH and SUZANNE J. HORNISH JOINT LIVING TRUST, For Itself and As Representatives of a Class of Similarly Situated Persons,

Petitioners,

v.

COUNTY OF KING, a home rule charter county,

Respondent.

QUESTIONS PRESENTED

1. Whether *Grable*-type subject matter jurisdiction exists where (A) it is undisputed that the Plaintiffs' state law cause of action for quiet title does not arise under federal law, and (B) the Plaintiffs do not challenge any aspect of the operation of the federal Trails Act or attempt to affect its ongoing viability in any manner whatsoever, but rather only raise the Trails Act in anticipation of a state law defense, thus there can be no "substantial" federal interest involved.

2. If the Court believes it has subject matter jurisdiction, then: Whether the Trails Act operates *per se* to preserve a pre-existing state law railroad purpose easement or whether the continuing existence of such easement depends upon the state law determination of whether trail use is beyond the scope of the easement and/or whether the easement was abandoned under state law?

PARTIES TO THE PROCEEDING

A list of the parties to this proceeding are as follows:

Kaseburg et al. v. King County et al.
Scott Kaseburg and Kathryn Kaseburg
Martin Fedigan
Barbara Bergstrom
Kim Kaiser and Pamela Kaiser
David Komendat and Kelli Komendat
William Blokker and Susan Blokker
David McCray and Sally McCray
John Lorge III and Nancy Lorge
John Howell and Molly Howell
Darius Richards and Vicki Richards
George Johnston and Nancy Johnston
Gregory Piantandia and Sherre Piantandia
Paul Fergen and Christine Fergen
Kevin Iden
Tom Easton and Karen Easton
Paul Pasquier and Karyn Pasquier
John Houtz
Terence Block and Kari Block
Larry Kolesar and Susan Kolesar
John Laughlin and Rebecca Laughlin
Jeffrey Riley and Tami Riley
Nancy Manz
Donald Dana and Patricia Dana
Christie Mueller
Denise Harris
Walter Moore
Tom Dahlby and Kathy Dahlby
Harry Dursch
Kirsten Lemke

Richard Vaughn
Richard S. Howell and Lois Howell
Donald Lockner and Patricia Lockner
Margorie Grundhaus
William Keppler and Debra Keppler
Curtis Dickerson and Julie Dickerson
Gregory Lasek and Patricia Lasek
Yongtao Chen
Qin Li
Robert Taylor and Alison Taylor
Edmund Jones
Donald Miller
Susan Miner
Ronald Jones and Carol Jones
Steve Smolinske and Sherri Smolinski
Joseph Ioppolo
Richard Kaner and Lynn Kaner
Bradley R. Elfers and Gregory P. Elfers
Paul Remington
John Burroughs
Bruce Erikson and Mary Erikson
Timothy Riley and Virginia Riley
James Sather and Kelly Sather
Julin Family Limited Partnership
Steven Brace and Kristen Brace
Charles Billow and Courtni Billow
Harold A. Bruce
Pierre Thiry and Cristi Thiry
Michael Franceshina
Michael Oldham and Gina Oldham
Stephen Porter and Nancy Porter
Robert Laris and Janis Laris
Michael Russell and Elana Russell
Uma Shenoy

Larry Peterson and Susan Peterson
Joseph Peterson and Kristin Peterson
John Patrick Heily
Sunday Kyrkos
Paul Gibbons and Tracy Gibbons
Dayton Dennison and Marilynn Dennison
Gregory Nick
Diversity Assets LLC
James Johnson
David Williamson
Kristi Sunderland
Claudia Mansfield
Kevin Lindahl and Rebecca Lindahl
Kevin Tran
Jeanne DeMund
Kathy Haggart
Dawn Lawson
Marlene Winter
Jie Ao
Xin Zhou
Pacific Holdings LLC
James Tasco
Michael Chan and Amanda Chan
Gary Weil
Dale Mitchell and Marla Mitchell
Frederick Miller and Susan Miller
Pamela Hunt
Gretchen Chambers
Alwyn Eugene Geiser
Daniel Haggart
Pamela Schafer

Hornish et al. v. King County
Thomas E. Hornish and Suzanne J. Hornish Joint

Living Trust
Tracy Neighbors and Barbara Neighbors
Arul Menezes
Lucretia VanderWende
Herbert Moore and Elynne Moore
Eugene Morel and Elizabeth Morel
Lake Sammamish 4257 LLC

RULE 29.6 STATEMENT

In *Kaseburg*, Petitioners Diversity Assets LLC, Julin Family Limited Partnership, and Pacific Holdings LLC separately assert that each has no parent corporation and there is no publicly held corporation that own ten percent or more of their stock. Diversity Assets LLC is a Washington limited liability company, which is wholly owned by Member, Alwyn Eugene Geisler, IV. Julin Family Limited Partnership is a Washington limited liability company, which is wholly owned by Member, Dean Johnson. Pacific Holdings LLC is a Washington limited liability company, which is wholly owned by Members, David & April Humphrey.

In *Hornish*, Petitioner Lake Sammamish 4257 LLC asserts that it has no parent corporation and there is no publicly held corporation that owns ten percent or more of its stock. Lake Sammamish 4257 LLC is a Washington limited liability company, which is wholly owned by Members Arul Menezes and Lucretia VanderWende.

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CONSTITUTION AND STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit in *Hornish* is found in Petitioners' Appendix (hereinafter, "Pet. App.") at 1a *et seq.*, and is reported at 899 F.3d 680. The Ninth Circuit's decision in *Kaseburg* is found in Pet. App. at 43a *et seq.* The decision of the United States District Court for the Western District of Washington in *Hornish* is found in Pet. App. at 50a *et seq.,* and is reported at 182 Fed.Supp.3d 1124 (W.D. Wa.). The Western District of Washington's opinion in *Kaseburg* is found in Pet. App. at 71a *et seq.*

JURISDICTION

The court of appeals issued its opinions on August 3, 2018, and its denial of Petitions for Rehearing *En Banc* and Ninth Circuit Rehearing on September 11, 2018. *See* Pet. App. at 155a *et seq.* in *Kaseburg* and Pet. App. at 157a *et seq.* in *Hornish*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1331 provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

The National Trails System Act Amendments of 1983 (the Trails Act), at relevant part 16 U.S.C. § 1247(d), provides: "The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use."

STATEMENT OF THE CASE

This case raises two fundamentally important questions, either of which merit this Court's review.

The first question involves application of *Grable*-type subject matter jurisdiction that conflicts with *Grable* itself and other decisions of this Court.[1] The Ninth Circuit's decision would open federal courts to a wide variety of state-law causes of action simply due to the fact that the case touches upon some federal issue, a seemingly boundless and fertile source that can be used by creative lawyers to create federal jurisdiction where none should exist. The Ninth Circuit's decision not only violates basic subject matter jurisdiction principles, but would change them fundamentally since "*Grable* did not implicitly overturn the well pleaded complaint rule—which has long been a 'basic principle marking the boundaries of the federal question jurisdiction of the federal district courts'… in favor of a new 'implicate[s] significant federal issues' test."[2] While acknowledging that federal law did not create Plaintiffs' quiet title cause of action, and even though Plaintiffs explicitly did not challenge operation of the Trails Act to fulfill its purpose to preserve railroad corridors for current recreational trail use and potential future railroad reactivation, the Ninth Circuit nonetheless held that the "special and small category of" *Grable*-

1. *See Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005).

2. *California Shock Trauma Air Rescue v. State Compensation Ins. Fund*, 636 F.3d 538, 542 (9th Cir.), quoting *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) and *Grable & Sons Metal Prod. Inc.*, 545 U.S. at 312.

type jurisdiction exists because "the Government has a strong interest in both facilitating trail development and preserving established railroad rights-of-way for future reactivation of rail service"[3]—an irrelevant statement in light of Plaintiffs' explicit agreement that a recreational trail can be placed on the railroad corridor at issue and that future railroad activation can occur.

If this Court believes it has subject matter jurisdiction, then the second question involves a direct conflict between the Ninth Circuit's decision and both this Court's precedent and Federal Circuit precedent. The Ninth Circuit held that the Trails Act preserves existing state law railroad purpose easements, irrespective of state law on the subject.[4] This Court and the Federal Circuit, however, have held that imposition of a recreational trail pursuant to the Trails Act may operate to terminate the existing state law railroad purpose easement depending upon whether state law holds that imposition of recreational trail use exceeds the scope of the railroad purpose easement or if the easement was otherwise abandoned pursuant to state law.[5]

A. Factual Background

***Hornish* case.** The railroad line in *Hornish* was originally constructed by the Seattle, Lake Shore &

3. Pet. App. at 14a.

4. Pet App. at 2a.

5. *See Preseault v. Interstate Commerce Comm'n*., 494 U.S. 1 (1990) ("*Preseault I*"); *Preseault v. United States,* 100 F.3d 1525 (Fed. Cir. 1996) ("*Preseault II*").

Eastern Railway Company ("SLS&E") in May of 1887 through March of 1888.[6] The SLS&E originally acquired the land through a private deed or prescriptive easements for their railroad purposes.[7] Plaintiffs own land along the railroad's right-of-way along the eastern shore of Lake Sammamish in King County, Washington.[8]

In 1997, the Burlington Northern & Santa Fe Railway Company ("BNSF"), a successor in interest to the SLS&E's right-of-way, concluded that continued operation of the pertinent line was not economically viable.[9] Thereafter, in 1998, BNSF sought an exemption from the Surface Transportation Board ("STB") to abandon a 12.45 mile line of railroad on the eastern shore of Lake Sammamish that traverses the Plaintiffs' properties.[10] On May 13, 1998, the STB granted the BNSF an exemption to abandon the railroad right-of-way that runs adjacent and through Plaintiffs' properties.[11] On September 16, 1998, the STB authorized The Land Conservancy of Seattle and King County to assume financial responsibility for the right-of-way pursuant to the Trails Act.[12] The STB also authorized

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6. Excerpts of Record submitted to the Ninth Circuit in the *Hornish* appeal, at 69 (hereinafter, Excerpts of Record submitted to the Ninth Circuit in *Hornish* and *Kaseburg* are referred to as "*Hornish*ER" or "*Kaseburg*ER," as applicable).

7. *Hornish*ER69.

8. *Hornish*ER466-479.

9. *Hornish*ER69.

10. *Hornish*ER467.

11. *Hornish*ER830.

12. *Hornish*ER468, 476.

the issuance of a Notice of Interim Trail Use ("NITU") for the right-of-way that permitted King County to establish a trail over the railroad's right-of-way.[13] The STB's ruling authorized conversion of the railroad's right-of-way into a hiking and biking trail pursuant to the Trails Act. King County subsequently reached a trail use agreement with BNSF for use of the right-of-way for recreational trail purposes and, since 1998, the tracks were removed from the right-of-way, no trains have used the right-of-way, and a hiking and biking trail was placed on the right-of-way.[14]

The railroad utilized a width of between 12-20 feet for their actual railroad operations for over 100 years from 1888 until 1998.[15] When the right-of-way was transferred to King County in 1998 pursuant to the Trails Act, King County removed the rails and ties and constructed an unpaved hiking and biking trail which utilized the exact footprint that the railroad had previously used.[16] There were no major issues after 1998 until King County started to improve the hiking and biking trail in phases many years later.[17] King County is now attempting to use a greater width than what the railroad used, which infringes on Plaintiffs' improvements that were constructed and in place for decades adjacent to the actual right-of-way, such as landscaping, parking, and structures, and even claims to have acquired a much greater width than the railroad

13. *Hornish*ER468.

14. *Hornish*ER468.

15. *Hornish*ER262-273.

16. *See Hornish* Appellants' Opening Brief, filed below in the Ninth Circuit, ECF No. 11.

17. *Id.*

used for their railroad purposes, up to 100 feet wide, or more in some places, that encroaches into Plaintiffs' living rooms.[18]

***Kaseburg* case.** The railroad corridor at issue in *Kaseburg* runs approximately 25.45 miles in length from Renton, Washington on the south end to the north along the eastern shore of Lake Washington and then further to the north and east to Redmond and Woodinville, Washington.[19] The section at issue in this case is just over a mile in length on the eastern shore of Lake Washington.[20] The railroad's right-of-way was established during the late 1800's and early 1900's when its predecessors obtained railroad purpose easements via private deeds or condemnation.[21]

BNSF ultimately acquired the right-of-way and, in 2003, announced its intent to divest itself of the railroad corridor.[22] On August 11, 2008 and September 5, 2008, BNSF filed petitions for exemption to abandon the railroad corridor with the STB.[23] On September 18, 2008, King County requested a NITU from the STB and stated its willingness to assume financial responsibility for trail use

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18. *Id.*

19. *Kaseburg*ER835

20. *Kaseburg*ER911-917.

21. *See Hornish* Appellants' Opening Brief, filed below in the Ninth Circuit, ECF No. 11.

22. *Kaseburg*ER1238.

23. *Id.*

under the Trails Act.[24] Acting on King County's request, the STB authorized King County to negotiate with BNSF to utilize the corridor as a recreational trail.[25] The STB issued NITUs in October and November of 2008.[26] On December 18, 2009, BNSF and King County entered into a trail use agreement under the Trails Act that "railbanked" the railroad corridor for potential future reactivation as a railroad while allowing King County to utilize the corridor on an interim basis for a public recreational trail.[27] On May 12, 2008, several months before the NITUs were issued and 19 months before the trail use agreement was signed, BNSF entered into a series of agreements with the Port and King County to transfer the corridor via quit claim deed to the Port and to designate King County as the interim trail manager.[28]

The Port, along with King County, assigned surface rights, as well as subsurface and aerial rights, to Defendant Central Puget Sound Regional Transit Authority ("Sound Transit"), for public transportation purposes (the building of High Capacity Transit System), and also to Defendant Puget Sound Energy, Inc. ("PSE"), a private utility corporation, for electricity distribution and utility delivery purposes.[29] King County, Sound Transit, and PSE all intended to make local infrastructure usage in the right

24. *Id.*

25. *Kaseburg*ER1239.

26. *Id.*

27. *Kaseburg*ER1240.

28. *Kaseburg*ER1907.

29. *Kaseburg*ER1907-1908.

of way, having nothing to do with recreational trail use, pursuant to the railroad purpose easements obtained by the original acquiring railroad that was passed on to BNSF and then to Defendants.[30]

B. Legal Proceedings

In both *Hornish* and *Kaseburg*, Plaintiffs did not dispute that under the Trails Act Defendants could operate a recreational trail over Plaintiffs' land, or that the United States could reactivate the right of way in the future for railroad purposes: "Plaintiffs do not challenge the legality of the Trails Act. Plaintiffs do not even dispute King County's rights to obtain whatever rights the Trails Act actually grants."[31]

Plaintiffs did object, however, to Defendants' uses of the railroad right-of-way that were inconsistent with Plaintiffs' state law property rights. Accordingly, in both cases Plaintiffs asserted superior state law property rights that they believed were being violated by the local Defendants' use of the corridor beyond a hiking and biking trail, namely local infrastructure uses in *Kaseburg* and overreaching expansion of the footprint of the right of way in *Hornish*.

In both cases, Plaintiffs sought to quiet title in their

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30. *Id.*

31. *Hornish* Appellants' Reply Brief, filed below in the Ninth Circuit, ECF 33, at 6; *see also Kaseburg* Appellants' Opening Brief, filed below in the Ninth Circuit, ECF 29, at 16 ("Appellants do not challenge the legality of the Trails Act. Appellants do not dispute that the Trails Act allows for the conversion of the rails to trails, and that a recreational trail can thus be operated over the land.").

favor to the non-recreational trail use surface rights and aerial and subsurface rights to which Defendants argued they possess. Plaintiffs also sought declaratory relief confirming that they maintained the fee simple estates underlying the easements. All of Plaintiffs' claims in this lawsuit squarely arise out of state law and the gravamen of Plaintiffs' claims, the quiet title action, is a quintessential state law issue. None of the Plaintiffs' claims sought equitable relief against the United States.

Indeed, in both cases, Plaintiffs' Complaints show that state law, not federal law, creates their cause of action. Plaintiffs' Complaints are replete with allegations that Plaintiffs own the fee simple interest in the subject land (which of course is the *sine qua non* of their claims), that correspondingly the original acquiring railroad only obtained a railroad purpose easement over the same land, and that the only effect of the Trails Act was to establish a new hiking and biking trail and preserve the corridor for *potential future* railroad reactivation.

The following language from the *Hornish* Complaint shows that Plaintiffs' claims arise under state law and that the "federal issue" before the Court was raised merely in anticipation of a defense, to wit:

> 47. *Pursuant to § 7.28.010 of the Revised Code of Washington, and because the Plaintiffs own the fee interest in the right-of-way*, the actions and conduct of King County in claiming fee ownership of the right-of-way and an interest in Plaintiff's subsurface and aerial rights, as well as at greater widths that the railroad had, has

> improperly placed a cloud on Plaintiff's title.[32]

Similarly, in *Hornish* under Count I, for declaratory judgment, Plaintiffs allege as follows:

> 40. Plaintiffs are entitled to a declaration of rights that the original source conveyance to the railroad was an easement and other interests acquired by the railroad were prescriptive easements, that the easements were for railroad purposes only, and that *Plaintiffs are the fee owners of the railroad right-of-way at issue*, and King County only acquired a surface easement for a hiking and biking trail with the possible reactivation of a railroad pursuant to the Trails Act and has no right to utilize any area of the corridor beyond the area used for railroad purposes.[33]

Much the same can be found in *Kaseburg*, where the Complaint shows that Plaintiffs' claims arise under state law and that the "federal issue" before the Court is merely Plaintiffs' reply to an anticipated defense, to wit:

> 119. Even though King County only obtained an easement for a hiking and biking trail with the possible reactivation of a railroad over and upon the surface of Plaintiffs' land, King County has asserted fee ownership in the former railroad corridor, including Plaintiffs' subsurface and aerial rights.

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32. *Hornish*ER937 (emphasis added).

33. *Hornish*ER934-935 (emphasis added).

> ….
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> 123. Pursuant to § 7.28.010 of the Revised Code of Washington, and because the Plaintiffs own the fee interest in the right-of-way, the actions and conduct of the Port, King County, and PSE in claiming fee ownership of the right-of-way and an interest in Plaintiffs' subsurface and aerial rights has improperly placed a cloud on Plaintiffs' title.
>
> ….
>
> 132. Plaintiffs are entitled to a declaration of rights that they are the fee owners of the railroad right-of-way at issue, that the Port and King County only acquired a surface easement for a hiking and biking trail with the possible reactivation of a railroad pursuant to the Trails Act, and that PSE has obtained no interest in the subsurface or aerial rights on the railroad right-of-way pursuant to the purported easement granted by the Port to PSE.[34]

The trial court in both cases *inter alia* (1) rejected the Plaintiffs' state law quiet title claims, and (2) held that the Trails Act preserves the Defendants' state law railroad purposes easements for current railroad use and incidental uses thereto despite the Trails Act having authorized trail use that Plaintiffs contended went beyond the scope of the state railroad purpose easements pursuant to state law and thereby terminated those easements pursuant to state law.

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34. *Kaseburg*ER2221-2223.

On appeal, Plaintiffs contended *inter alia* that subject matter jurisdiction was lacking and that the district courts had incorrectly determined that the Trails Act necessarily preserves existing state law railroad purpose easements irrespective of state law. The Ninth Circuit rejected these arguments, holding (1) subject matter jurisdiction exists under this Court's decision in *Grable* because it deemed the federal interest involved to be "substantial," and (2) the Trails Act preserves existing state law railroad purpose easements regardless of state law on the subject.[35]

REASONS FOR GRANTING THE PETITION

The decisions below merit review because they conflict with this Court's decisions and the decisions of other courts of appeals on both of the questions presented. Only this Court's review can resolve these vitally important and recurring issues.

I. THE DECISIONS BELOW CONFLICT WITH DECISIONS OF THIS COURT REGARDING THE EXTENT OF *GRABLE*-TYPE SUBJECT MATTER JURISDICTION.

Federal courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[36] "For a case to 'arise under' federal law, a plaintiff's well-pleaded complaint must establish either (1) that federal law creates the cause of action or (2) that the plaintiff's asserted right to relief depends on

35. Pet. App. at 1a *et seq.*, 43a *et seq.*

36. 28 U.S.C. § 1331.

the resolution of a substantial question of federal law."[37] Regarding the second prong, the question to be answered is, "[D]oes a state-law claim necessarily raise a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities."[38]

"[A] case may not be removed to federal court on the basis of a federal defense... even if the defense is anticipated in the plaintiff's complaint, and even if both parties admit that the defense is the only question truly at issue in the case."[39] Similarly, "a counterclaim—which appears as part of the defendant's answer, not as part of the plaintiff's complaint—cannot serve as the basis for 'arising under' jurisdiction."[40] In sum, "federal issue" is not "a password opening federal courts to any state action embracing a point of federal law."[41]

The state law issues in this case abound and were the subject of Plaintiffs' complaints as well as the Ninth Circuit's decisions, to-wit: a state law quiet title action

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37. *Peabody Coal Co. v. Navajo Nation,* 373 F.3d 945, 949 (9th Cir. 2004) (citing *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 27–28 (1983)).

38. *Grable*, 545 U.S. at 314.

39. *Franchise Tax Bd. of Cal.,* 463 U.S. at 14; *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987); *Merrell Dow Pharmaceuticals Inc. v. Thompson,* 478 U.S. 804, 813 (1986).

40. *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002).

41. *Grable*, 545 U.S. at 314.

based on state law deeds; limitation of the former railroad's interests (and hence, Defendants' interests) based upon state law deeds and prescriptive easement principles; and Plaintiffs' ownership into the former railroad corridor based on the state law centerline presumption.[42] Nevertheless, the Ninth Circuit concluded jurisdiction exists primarily because it deemed the federal interest involved to be "substantial."[43] Specifically, while acknowledging that federal law did not create Plaintiffs' cause of action, and even though Plaintiffs explicitly did not challenge the Trails Act's purpose to preserve railroad corridors for current recreational trail use and potential future railroad reactivation, the Ninth Circuit held that the "special and small category of" *Grable*-type jurisdiction exists because "the Government has a strong interest in both facilitating trail development and preserving established railroad rights-of-way for future reactivation of rail service."[44]

Yet – and it bears repeating – Plaintiffs did not challenge the validity of the Trails Act, *i.e.*, Plaintiffs *did not* challenge the purpose or result of the Trails Act, that is, to allow current recreational trail use and potential future railroad reactivation.[45] Put simply, whether Plaintiffs succeeded in their case would not prevent the

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42. *See Hornish*ER849, *et seq.*; *Kaseburg*ER1200, *et seq.*; Pet. App. at 1a *et seq.*, 43a *et seq.*

43. Pet. App. at 2a, 46a.

44. *Id.* at 14a.

45. *See Hornish* Appellants' Reply Brief, filed below in the Ninth Circuit, ECF 33, at 6; *Kaseburg* Appellants' Opening Brief, filed below in the Ninth Circuit, ECF 29, at 16.

right of way from being used as a recreational trail and would not prevent the right of way from potentially being reactivated in the future as a railroad corridor. Instead, Plaintiffs' raising of the Trails Act was in anticipation of Defendants' state law defense to Plaintiffs' state law claims, *i.e.*, Plaintiffs' argument that current trail use authorized by the Trails Act extinguished the Defendants' state law railroad purpose easement (pursuant to *Lawson v. State of Washington*, 730 P.2d 1308 (Wash. 1986)) because it imposes *trail use that is beyond the scope of the state law railroad purpose easement*, is a response to the anticipated defense by Defendants that their state law railroad purpose easement and incidental uses thereto still exist.

Because Plaintiffs did not challenge current recreational trail use or potential future railroad reactivation, there is no substantial federal interest here. These cases are about whether a *state* governmental entity can build power lines, gas lines, or light rail, or about the footprint of a prescriptive easement. These cases do not implicate the Rails-to-Trails program in any way, shape, or form. These cases do nothing to stop rail-to-trail conversions as a matter of law or as a matter of practicality. The only federal interest in these corridors is that they be "railbanked"—*i.e.*, used currently as a recreational trail and preserved for possible future railroad reactivation. Plaintiffs' claims do not disturb that, so the program will continue unabated and unthreatened. There is no federal interest here, much less a "substantial" interest that would place these cases in the "special and small category" of cases to confer subject matter jurisdiction under *Grable*.[46]

46. 545 U.S. at 317.

The Ninth Circuit's decision appears to partially rely upon the fact that the federal issue was raised by Plaintiffs' amended complaint.[47] However, the Ninth Circuit's reasoning is circular because it had already acknowledged that Plaintiffs' cause of action was not created by state law,[48] thus the fact that the federal issue was raised by Plaintiffs is of no moment—that is, such does not answer the question of whether under *Grable* the case raises a "substantial" federal interest. It cannot, since the fundamental purpose of the Trails Act – to allow current recreational trail use and preserve corridors for potential future railroad reactivation – was not challenged or implicated in any way and Plaintiffs freely admit Defendants can use the land for current recreational trail use and that it is subject to possible future railroad reactivation.

Even though Plaintiffs alleged no federal cause of action under the Trails Act and did not try to stop or infringe upon the Trails Act, there are in any event many examples of cases where plaintiffs alleged violations of federal law or even preemption of federal law and yet courts held there is no subject matter jurisdiction. That is because federal law did not create the cause of action and the references to federal law violations or interpretation of federal law really just anticipated a defense. For example, in *Franchise Tax Bd. of Cal.*, the plaintiff asked

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47. Pet. App. at 10a.

48. *Id.* at 8a ("Most directly, and most often, federal jurisdiction attaches when federal law creates the cause of action asserted. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1569 (2016). *The parties agree that such is not the case here.*") (emphasis added).

for Declaratory Judgment that ERISA preempted a defense, and this Court held there was no subject matter jurisdiction.[49] In *Phillips Petroleum Co.*, the plaintiff alleged that a federal statute governing helium sales required further payment, yet this Court held there was no subject matter jurisdiction.[50]

If Plaintiffs had attempted to frustrate the purposes and operation of the Trails Act by alleging that the corridor could not presently be used for a recreational trail or that it was not subject to potential future railroad reactivation, then subject matter jurisdiction would likely exist. But, Plaintiffs did nothing of the sort. Plaintiffs plainly did not plead causes of action that arise under the U.S. Constitution or the laws of the United States, but instead merely raised a federal issue. "[E]ven if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that *the defense is the only question truly at issue*" that is not a basis for arising under federal jurisdiction.[51] Thus, the Ninth Circuit's reasoning that there is jurisdiction because the case "turns on" federal law, even if true, would not confer subject matter jurisdiction.

The Ninth Circuit also states in a footnote that under a "hypothetical coercive action," subject matter jurisdiction could be conferred.[52] That is not the case – any hypothetical

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49. 463 U.S. at 27–28.

50. *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 129 (1974).

51. *Caterpillar Inc.*, 482 U.S. at 393 (citing *Franchise Tax Bd. of Cal.*, 463 U.S. at 14) (emphasis added).

52. Pet. App. at 15a n.2.

coercive action that could be filed by Defendants would be created solely by state law, as unequivocally shown by Defendants' Counterclaims, which plainly only allege state law causes of action sounding in quiet title based on state law railroad purpose easements.[53] If the Trails Act had not been utilized, the same dispute would exist, *i.e.*, whether state law incidental uses, premised upon the continued existence of state law railroad purpose easements, are permitted. The only wrinkle to this case due to the Trails Act is that Plaintiffs argue that current recreational trail use legitimately authorized under the Trails Act extinguished the state law railroad purpose easement on which Defendants' claimed state law incidental use rights are based. Plaintiffs' case-in-chief in both cases would be exactly the same: they would simply prove ownership by showing their state law conveyances. In the context of Defendants' defense (*i.e.*, Defendants' case-in-chief), Defendants would argue they have rights based upon the original state law railroad purpose easements, and Plaintiffs would respond in defense that Defendants' state law railroad purpose easements were extinguished because of current recreational trail use, which goes beyond the scope of the railroad purpose easements under state law.

The case relied upon by the Ninth Circuit in its Opinion at footnote 2, *Janakes v. United States Postal Service*,[54] is distinguishable and illustrates why there is no subject matter jurisdiction in the present case. There, the Post Office was a defendant in a suit brought by an

53. *See Hornish*ER457, *et seq.*; *Kaseburg*ER1156, 1188, 2018, 2126, and 2149.

54. 768 F.2d 1091, 1093 (9th Cir. 1985).

injured mail carrier, relating to subrogation rights against third parties. The Post Office had the ability to file its own declaratory judgment action in federal court under federal statutes relating to subrogation rights or federal common law regarding same. Thus, it was correct for subject matter jurisdiction to be conferred. Here, the Defendants' Counterclaims show that any action they could bring to enforce their claimed rights pursuant to their state law railroad purpose easements would be under state law.[55]

What substantial question of federal law can there be where the essence of the disagreement is whether local infrastructure can be placed on a corridor, or whether a hiking trail is 12-20 feet wide or 100 feet wide, or owned in fee simple or easement? There is no special need for federal expertise or uniformity present here. This case presents a jurisdictional question that is at the very essence of the *Grable* analysis. It is simply not enough that a federal issue is raised; as this Court said in *Gunn*, "[t]he substantiality inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole."[56] To hold as the Ninth Circuit has done is to rip

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55. *See Hornish*ER457, et seq.; *Kaseburg*ER1156, 1188, 2018, 2126, and 2149.

56. *Gunn v. Minton*, 568 U.S. 251, 260 (2013). Another relevant case is *Shulthis v. McDougal*, 225 U.S. 561 (1912). In *Shulthis*, this Court rejected jurisdiction in a quiet title action where the only basis for federal question jurisdiction was that one of the parties derived title under an Act of Congress. *Id.* at 570. It should also be noted that, even in cases where the plaintiff's claimed property interests do not so clearly derive from state law, jurisdiction is often rejected because property rights are traditionally a matter of state law. *See People of Puerto Rico v. Russell & Co., Sucesores S. En. C.*, 288 U.S. 476, 484 (1933) ("The case is analogous to those involving rights to

open the gates of federal jurisdiction, to the extent where *any* plaintiff's claim that touches upon a federal issue will now wind up in federal court.

II. THE DECISIONS BELOW, THAT THE RAILROAD PURPOSE EASEMENT IS "PRESERVED" FOR CURRENT INTERIM RAILROAD USES DURING THE "RAILBANKING" PROCESS, CONFLICTS WITH THE PLAIN WORDING OF THE STATUTE ITSELF, EXTENSIVE AUTHORITY FROM THIS COURT AND THE FEDERAL CIRCUIT, AND BASIC PROPERTY LAW.

The Ninth Circuit concluded that the Trails Act preserved the state law railroad purposes easement during the "railbanking" process under the Trails Act. Even though a new easement for a hiking and biking trail is created under the Trails Act, the Ninth Circuit concluded that both easements, a state law easement for railroad purposes and a federal easement for a hiking and biking trail, were available for use to Defendants irrespective of any inquiry whether recreational trail use terminates a railroad purpose easement under state law. That conclusion is contrary to the plain language of the Trails Act, basic property law, and extensive precedent from this Court's extensive analysis in *Preseault I*

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land granted under laws or treaties of the United States. Where the complaint shows only that such was the source of the plaintiff's title, the case is not one within the jurisdiction of the federal courts.") Since Plaintiffs are clearly asserting property rights derived from state law, and Defendants' claimed title to the disputed corridor did not originate at all from land granted under federal law but instead from a transfer from the railroad under state law, *a fortiori*, there is no jurisdiction in the present case.

and several cases from the Federal Circuit, including *Preseault II*.[57]

The STB regulates railroad operations in the United States. Any state law that conflicts with any federal statute or duly authorized federal regulation is preempted under the Supremacy Clause of the United States Constitution. U.S. Const. Art. VI, cl. 2; *City of New York v. F.C.C.*, 486 U.S. 57, 63-64 (1988). A federal law may either expressly or impliedly preempt a state law[58] and a "federal law expressly preempts a state law when the statutory language clearly evinces an intent to do so."[59] The Interstate Commerce Commission Termination Act ("ICCTA") grants the STB exclusive jurisdiction over nearly all matters of rail regulation.[60] Indeed, § 10501(b) grants the STB *exclusive* jurisdiction over:

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57. *Preseault I*, 494 U.S. 1; *Preseault II,* 100 F.3d 1525; *see also Caldwell v. United States*, 630 F.3d 1226, 1229 (Fed. Cir. 2004) ("We have previously held that a… taking occurs when, pursuant to the Trails Act, state law reversionary interests are effectively eliminated in connection with a *conversion* of a railroad right-of-way to trail use"); *Barclay v. United States*, 443 F.3d 1368, 1372 (Fed. Cir. 2006) ("As discussed in [*Preseault II*], the *conversion* of a railroad right-of-way to a recreational trail can constitute a Fifth Amendment taking"); *Ladd v. United States*, 630 F.3d 1015, 1018 (Fed. Cir. 2010) ("The court explained that '*[c]onversion* of a railroad right-of-way to a public trail has been the physical invasion necessary to finding takings in earlier Rails–to–Trails cases'") (emphasis added in cases immediately above).

58. *See Altria Grp., Inc. v. Good,* 555 U.S. 70, 76 (2008).

59. *See Johnson v. MFA Petroleum Co.,* 10 F. Supp. 3d 982, 987 (W.D. Mo. 2014) (citing *Altria,* 555 U.S. at 76).

60. *See* 49 U.S.C. § 10502.

> (1) Transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
>
> (2) The construction, *acquisition, operation, abandonment, or discontinuance* of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State.[61]

The Trails Act intervenes into the STB's exclusive abandonment jurisdiction. By definition, the STB established "a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes."[62] Under the Trails Act and the STB's regulations, the railroad purpose easement is converted to a hiking and biking trail, thus defeating the landowners' reversionary property interests, and the right-of-way is "railbanked" for the possible future reactivation of a railroad.[63] The Trails Act "blocks" the railroad's abandonment, "destroys" the adjacent landowners' reversionary rights, and converts the private railroad purposes easement to a public easement for a hiking and biking trail. The issue herein is whether, during that "interim" railbanking period,

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61. 49 U.S.C. § 10501(b) (emphasis added).

62. *Preseault I,* 494 U.S. at 6.

63. *Id.* at 11-13. Railbanking, the possible future reactivation of a railroad, is a non-vested future property interest and cannot preserve a current railroad purposes easement.

the ultimate trail operator can use the state law railroad purpose easement for railroad purposes or incidental uses thereto at the same time that the right-of-way is being used for a public hiking and biking trail easement under the Trails Act. The answer must be no as a matter of law.

The Ninth Circuit's conclusion that the state law railroad purposes easement still exists for current uses during the railbanking period conflicts with this Court's conclusion in *Preseault I* and basic property law. An easement, by definition, is a use for a limited particular purpose and, when that particular purpose no longer exists, the easement is extinguished.[64] In *Preseault I,* this Court stated that the purpose of the Trails Act was to encourage and promote trails by allowing "**conversion**" of unused railroad easements into new easements.[65] This Court specifically held that "we need not decide what types of official authorization, if any, are necessary to create federal liability under the Fifth Amendment, because we find that rail-to-trail **conversions**… are clearly authorized by § 8(d)."[66] As a result, under both this Court's analysis in *Preseault I* and the summary of basic property law as set forth in *Brandt,* the Trails Act blocks the landowners' reversionary interests, the railroad purpose easement

64. *See Brandt v. United States*, 572 U.S. 93, 104-105 (2014) ("The essential features of easements—including, most important here, what happens when they cease to be used—are well-settled as a matter of property law. An easement is a 'non-possessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement.'").

65. *See Preseault I,* 494 U.S. at 13 (emphasis added).

66. *Id.*

is held in abeyance or is extinguished, and a new public easement for a hiking and biking trail is created.

The Ninth Circuit's conclusion that the private railroad purposes easement still exists during the railbanking process is also in conflict with several opinions from the Federal Circuit. The Federal Circuit has repeatedly interpreted the Trails Act and has consistently concluded that state law railroad purpose easements are "converted" to trail easements and that trail use—even though legitimately authorized by the Trails Act—may exceed the scope of the railroad purpose easement under state law and thus extinguish it. As a result, not only is the Ninth Circuit's conclusion contrary to this Court's statements in *Preseault I,* it is also contrary to the Federal Circuit's rulings in *Caldwell, Barclay, Ladd,* and *Preseault II.*[67]

Under basic property law, the extinguishment of the railroad purposes easement occurs due to the obvious change in use from the railroad purpose easement to a hiking and biking trail easement. The fact that extinguishment and conversion occur due to trail use was confirmed by the Washington Supreme Court in *Lawson,*[68] where the Court held that a railroad purpose easement is "extinguished" when it becomes subject to trail use, which is beyond the scope of a railroad purpose easement. In fact, the Federal Circuit specifically cited and relied on *Lawson* in *Preseault II.*[69] In this case, although the Ninth

67. *See Preseault II,* 100 F.3d at 1543.

68. 730 P.2d at 1313.

69. 100 F.3d at 1543 ("*Lawson*"… is an example of a case practically on all fours with the case before us").

Circuit cited *Lawson,* it did not follow the conclusion from *Lawson* that "a change in use from 'rails-to-trails'" will "constitute abandonment" and "extinguishment" of such state law railroad purpose easement.

The Ninth Circuit's conclusion that the railroad purposes easement has been "preserved" for current railroad purposes or incidental uses associated thereto also conflicts with numerous cases decided by the Federal Circuit.[70] The railroad *corridor* has been "preserved" for possible or speculative future railroad reactivation, which is called "railbanking," but that does not mean that the original railroad purpose easement survives pursuant to state law for current railroad purpose use. The so-called preservation of a railroad purpose easement is actually just preservation of the *corridor* for potential future use as a railroad, which is a non-vested future interest and is not a current "railroad purpose easement."

The Ninth Circuit's recitation of what occurs when a taking occurs under the Trails Act also conflates the blocking of the landowners' reversionary interests with a conclusion that the state law railroad purpose easement still exists, even though there is no current railroad use and all the tracks and ties have been removed.[71] Although the Trails Act prevents STB abandonment and loss of federal jurisdiction over the *corridor* that would result from such abandonment, which precludes state law reversionary interests from vesting, that does not mean

70. *See Caldwell,* 630 F.3d at 1229; *Barclay,* 443 F.3d at 1372; *Ladd,* 630 F.3d at 1018; *Ellamae Phillips Co. v. United States,* 564 F.3d 1367, 1370 (Fed. Cir. 2009).

71. Pet. App. at 27a.

that the original state law railroad purpose easement still exists. Under basic property law, the railroad purpose easement does not exist under state law because the change in use from a railroad easement to a trail easement causes termination of a railroad easement pursuant to state law, *i.e.*, *Lawson*.[72]

The Ninth Circuit's statement that "to determine the impact of the Trails Act on Plaintiffs/Plaintiffs' property rights, we must look to Washington law,"[73] is incomplete and improperly applied because the state law railroad purpose easement does not currently exist under either federal or state law. Under federal law, the railroad purpose easement has been converted to a hiking and biking trail easement that can possibly be reactivated in the future. Under state law, the change in use from a railroad to a recreational trail constitutes abandonment and extinguishment of the state law railroad purpose easement.[74] As a result, there is only one easement currently burdening the landowners' land, and that is the new easement imposed by the Trails Act, which is current trail use and possible future reactivation as a railroad.

Thus, the Ninth Circuit erred by concluding that the Trails Act results in a *per se* preservation of pre-existing state law railroad purpose easements that are converted into current recreational trail use easements in violation of the landowners' state law property rights. This conclusion by the Ninth Circuit conflicts with this

72. 730 P.2d at 1313.

73. Pet. App. at 26a.

74. *See Lawson*, 730 P.2d at 1313.

Court's and the Federal Circuit's precedent on the subject and it is obviously of significant import in both *Hornish* and *Kaseburg* as Defendants unabashedly trample on the landowners' reversionary interests—in *Hornish*, King County is attempting to use land far beyond what the railroad even used for railroad purposes and, in *Kaseburg*, King County and related agencies are attempting to utilize the corridor for everything from subsurface utilities to massive electrical poles. This issue is now also an important and repeating issue whenever the Trails Act is utilized.

III. CONCLUSION

For the foregoing reasons, Petitioners seek a Writ of Certiorari to review the Ninth Circuit decisions below.

Respectfully submitted,

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December 10, 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 3, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35486
D.C. No. 2:15-cv-00284-MJP

THOMAS E. HORNISH AND SUZANNE J. HORNISH JOINT LIVING TRUST; TRACY NEIGHBORS; BARBARA NEIGHBORS; ARUL MENEZES; LUCRETIA VANDERWENDE; HERBERT MOORE; ELYNNE MOORE; EUGENE MOREL; ELIZABETH MOREL; LAKE SAMMAMISH 4257 LLC,

Plaintiffs-Appellants,

v.

KING COUNTY, A HOME RULE CHARTER COUNTY,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Washington.
D.C. No. 2:15-cv-00284-MJP. Marsha J. Pechman,
Senior District Judge, Presiding.

June 14, 2018, Argued and Submitted,
Seattle, Washington
August 3, 2018, Filed

Appendix A

OPINION

Before: MILAN D. SMITH, JR. and PAUL J. WATFORD, Circuit Judges, and DOUGLAS L. RAYES,* District Judge.

Opinion by Judge Milan D. Smith, Jr.

SUMMARY**

Property Law

The panel affirmed the district court's summary judgment in favor of King County, Washington, quieting title to a rail corridor that the Surface Transportation Board had "railbanked" pursuant to the Trails Act.

The panel held that the action arose under federal law, and the panel had jurisdiction pursuant to 28 U.S.C. § 1331, because the plaintiffs' state law claim necessarily raised a federal issue that was actually disputed, substantial, and capable of resolution in federal court without disrupting any congressionally approved federal-state balance.

The panel held that the plaintiffs, landowners whose properties abutted the rail corridor's boundaries, lacked

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* The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

both Article III and statutory standing to bring their claim for a declaratory judgment pursuant to Wash. Rev. Code § 7.24.020 because they lacked any property interests in the corridor. The panel concluded that the County owned one portion of the corridor in fee. In addition, the Trails Act preserved the railroad easement and created a new easement for trail use, and both easements were conveyed to King County. The panel concluded that Washington's "centerline presumption" did not apply.

The panel held that the district court properly granted summary judgment to and quieted title in King County because the county possessed the railroad easement and the recreational easement. The panel concluded that the easement was 100 feet wide, with certain exceptions. The panel denied plaintiffs' motion to supplement the record with new evidence regarding the width of the corridor.

M. SMITH, Circuit Judge:

After the Surface Transportation Board (the STB) "railbanked" the portions of the Eastside Rail Corridor (the Corridor) adjacent to or bisecting Plaintiffs-Appellants' residential lots, pursuant to the National Trails System Act Amendments of 1983 (the Trails Act), 16 U.S.C. § 1247 *et seq.*, Plaintiffs-Appellants filed suit in federal court seeking a declaration of their property rights in the Corridor. Plaintiffs-Appellants disputed the nature and scope of Defendant-Appellee King County's railroad easement, and the Corridor's width. In response, King County filed counterclaims asking the court to (1) declare that the Trails Act preserved the full scope of

the original railroad easement, and that the Corridor's width is 100 feet, and (2) quiet title to the Corridor in King County. Both sides moved for summary judgment. The district court denied summary judgment to Plaintiffs-Appellants, dismissed their claims with prejudice, and granted summary judgment to, and quieted title to the Corridor in, King County. Plaintiffs-Appellants timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. The Origins of the Corridor & Plaintiffs-Appellants' Property Interests

In 1887, the Seattle, Lake Shore & Eastern Railway Company (SLS&E), which later became part of BNSF Railway Company (BNSF, and together with SLS&E, the Railroad), began to construct the Corridor along the eastern shoreline of Lake Sammamish. The SLS&E obtained the land that it needed for the Corridor through various means, which gave the SLS&E a collection of railroad easements and fee simple properties. *See Beres v. United States*, 104 Fed. Cl. 408, 412 (2012) (hereinafter *Beres III*).

All Plaintiffs-Appellants are landowners whose properties abut the Corridor's boundaries (the precise location of which the parties dispute). Plaintiff-Appellant the Thomas E. Hornish and Suzanne J. Hornish Joint Living Trust (Plaintiff-Appellant Hornish) owns property adjacent to a portion of the Corridor that SLS&E

obtained through a May 9, 1887 quitclaim deed executed by homesteader William Hilchkanum and his wife. Hilchkanum later sold the remainder of his property, and some part of that remainder interest is now owned by Plaintiff-Appellant Hornish.

Plaintiffs-Appellants Tracy and Barbara Neighbors, Arul Menezes and Lucretia Vanderwende, Lake Sammamish 4257 LLC, Herbert and Elynne Moore, and Eugene and Elizabeth Morel (the Non-Hornish Plaintiffs-Appellants) own properties that are adjacent to other portions of the Corridor. The SLS&E completed construction of the Corridor's tracks in March 1888, and the Northern Pacific Railroad conveyed its property to Samuel Middleton the following year. The Non-Hornish Plaintiffs-Appellants' chains of title all originate with Middleton.

II. The Railbanking Process

In 1997, BNSF conveyed all of its ownership interests in the Corridor to The Land Conservancy of Seattle and King County (TLC) through a recorded quitclaim deed. On June 11, 1997, TLC initiated the "railbanking" process by petitioning the STB for an exemption to allow TLC's abandonment of the Corridor for active rail service. *See Land Conservancy of Seattle & King Cty.-Abandonment Exemption-in King Cty., WA*, No. AB-508X, 1997 WL 359085, at *1 (S.T.B. June 23, 1997) . As part of its petition, TLC provided King County's Statement of Willingness to Assume Financial Responsibility as the interim trail sponsor under the Trails Act. *Burlington N. & Santa Fe*

Ry. Co.-Abandonment Exemption-in King Cty., Wa, No. AB-6 (Sub-No. 380X), 1998 WL 638432, at *1 (S.T.B. Sept. 16, 1998). The STB granted the exemption on May 13, 1998. Then, in September of 1998, the STB issued a Notice of Interim Trail Use (NITU) to facilitate railbanking and interim trail use.

Subsequently, TLC and King County entered into an agreement formally designating King County as the trail sponsor. The agreement also conveyed to King County all of TLC's ownership interests in the Corridor through a recorded quitclaim deed, which described the precise property that was being conveyed. King County then constructed a soft-surface hiking and biking trail in the Corridor. More recently, King County has prepared to construct a paved trail.

III. Prior Proceedings

On February 25, 2015, several of Plaintiffs-Appellants, among others, filed suit to obtain a declaration of their rights with regard to the Corridor and to quiet their title in the Corridor. King County moved to dismiss the complaint for lack of standing, arguing that the Plaintiffs-Appellants had failed to demonstrate that they had any ownership interest in the Corridor. While this motion was pending, the Plaintiffs-Appellants sought leave to file a proposed amended complaint.

On June 5, 2015, the district court granted King County's motion to dismiss, and denied leave to file the proposed amended complaint. The court determined that amendment would be futile because the proposed amended

complaint did not remedy the standing defects of the original complaint. However, the court gave the Plaintiffs-Appellants leave to file a different amended complaint that would address the standing problem. Plaintiffs-Appellants did so, filing the Amended Complaint (AC). King County then answered and brought quiet title and declaratory judgment counterclaims.

Both sides then filed motions for summary judgment. On April 20, 2016, the district court denied Plaintiffs-Appellants' summary judgment motion, dismissed Plaintiffs-Appellants' claims with prejudice, and granted summary judgment to King County with regard to its declaratory judgment and quiet title counterclaims. Plaintiffs-Appellants timely appealed.

STANDARD OF REVIEW

We review the district court's grant of summary judgment *de novo. King County v. Rasmussen*, 299 F.3d 1077, 1083 (9th Cir. 2002). We "must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine [disputes] of material fact and whether the district court correctly applied the relevant substantive law. All reasonable inferences from the evidence must be drawn in favor of the nonmoving party." *Id.* (citation omitted).

JURISDICTION

We have jurisdiction pursuant to 28 U.S.C. § 1331. 28 U.S.C. § 1331 authorizes federal jurisdiction over all civil actions "arising under" federal law. The Supreme Court

"has found that statutory term satisfied in either of two circumstances. Most directly, and most often, federal jurisdiction attaches when federal law creates the cause of action asserted." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1569, 194 L. Ed. 2d 671 (2016). The parties agree that such is not the case here. However, "even when 'a claim finds its origins' in state law, there is 'a special and small category of cases in which arising under jurisdiction still lies.'" *Id.* (quoting *Gunn v. Minton*, 568 U.S. 251, 258, 133 S. Ct. 1059, 185 L. Ed. 2d 72 (2013)). This case falls within the latter category.

As the Supreme Court has explained, "a federal court has jurisdiction of a state-law claim if it 'necessarily raises a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance' of federal and state power." *Manning*, 136 S. Ct. at 1570 (alteration omitted) (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)). "That is, federal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258. Jurisdiction is proper "[w]here all four of these requirements are met" because in such a case, "there is a 'serious federal interest in claiming the advantages thought to be inherent in a federal forum,' which can be vindicated without disrupting Congress's intended division of labor between state and federal courts." *Id.* (quoting *Grable*, 545 U.S. at 313). The Supreme Court

"ha[s] often held that a case 'arose under' federal law"—meeting these criteria—"where the vindication of a right under state law necessarily turned on some construction of federal law." *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 9, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983) (citing *Smith v. Kansas City Title & Tr. Co.*, 255 U.S. 180, 41 S. Ct. 243, 65 L. Ed. 577 (1921); *Hopkins v. Walker*, 244 U.S. 486, 37 S. Ct. 711, 61 L. Ed. 1270 (1917)); *see also* 14B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3722 (4th ed. 2016) ("An important corollary to the well-pleaded complaint rule is that the essential federal element of the plaintiff's complaint must be supported under one construction of federal law and defeated under another.").

Plaintiffs-Appellants argue that the federal courts lack jurisdiction because a Trails Act issue arises only as a defense. They liken this case to *Shulthis v. McDougal*, 225 U.S. 561, 32 S. Ct. 704, 56 L. Ed. 1205 (1912), wherein the Court held that it had no jurisdiction over a quiet title action simply because one party had "derived his title under an act of Congress." *Id.* at 570. Plaintiffs-Appellants also posit that this case is distinguishable from *Rasmussen* because there, King County was the plaintiff alleging that its rights derived from federal law, 299 F.3d at 1082, while here, King County is a defendant and its assertion of rights under federal law arises only as a defense. Finally, Plaintiffs-Appellants argue that the Trails Act's application is not "actually disputed."

These attempts to recharacterize the AC's plain invocation of the Trails Act fail. Certainly, we agree with

Plaintiffs-Appellants that our jurisdictional analysis is limited by "the longstanding well-pleaded complaint rule," which provides that "a suit 'arises under' federal law 'only when the plaintiff's statement of his own cause of action shows that it is based upon federal law,'" and which does not permit a finding of jurisdiction "predicated on an actual or anticipated defense," or "upon an actual or anticipated counterclaim." *Vaden v. Discover Bank*, 556 U.S. 49, 60, 129 S. Ct. 1262, 173 L. Ed. 2d 206 (2009) (alteration omitted) (quoting *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152, 29 S. Ct. 42, 53 L. Ed. 126 (1908)). We disagree, however, that federal claims in this case arise only from Defendants-Appellees' defenses and counterclaims.

Grable itself is instructive in this regard. There, the plaintiff had filed a quiet title action in Michigan state court, alleging that it had superior title to certain real property that had been seized by the Internal Revenue Service (IRS) because the IRS had failed to give the plaintiff notice of the seizure, as required by a federal tax statute. *Grable*, 545 U.S. at 311. The defendant had then "removed the case to Federal District Court as presenting a federal question, because the claim of title depended on the interpretation of the notice statute in the federal tax law." *Id.* The Supreme Court affirmed that the "case warrant[ed] federal jurisdiction." *Id.* at 314. The Court held that because the plaintiff had "premised its superior title claim on a failure by the IRS to give it adequate notice, as defined by federal law," the question of whether the plaintiff had been "given notice within the meaning of the federal statute" was necessarily raised as

"an essential element of [the plaintiff's] quiet title claim." *Id.* at 314-15. Additionally, "the meaning of the federal statute [was] actually in dispute," because it was "the only legal or factual issue contested in the case," and "an important issue of federal law that sensibly belongs in a federal court." *Id.* at 315. Finally, the Court explained that "because it [would] be the rare state title case that raises a contested matter of federal law, federal jurisdiction to resolve genuine disagreement over federal tax title provisions will portend only a microscopic effect on the federal-state division of labor." *Id.*

A. Requirements One and Two

Applying *Grable*'s reasoning to this case, we hold that we have jurisdiction. We note that a federal issue is both "necessarily raised" on the face of the AC, and "actually disputed" by the parties. As described above, Plaintiffs-Appellants have alleged one claim in the AC: Pursuant to Revised Code of Washington section 7.24.020,[1] Plaintiffs-Appellants seek "a declaration of rights that the original source conveyance to the railroad was an easement and other interests acquired by the railroad were prescriptive easements, that the easements were for railroad purposes

1. This section provides that "[a] person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder." Wash. Rev. Code § 7.24.020.

only, and that Plaintiffs-Appellants are the fee owners of the railroad right-of-way at issue, and King County only acquired a surface easement for a hiking and biking trail with the possible reactivation of a railroad pursuant to the Trails Act."

Thus, Plaintiffs-Appellants have petitioned us to answer at least one "question of construction or validity," Wash. Rev. Code § 7.24.020, that necessarily implicates the Trails Act: Specifically, they have asked us to declare that "King County only acquired a surface easement for a hiking and biking trail with the possible reactivation of a railroad pursuant to the Trails Act." This petition relies on allegations (1) that "[t]he Trails Act authorizes the STB to preserve railroad corridors or rights-of-way not currently in use for train service for possible future rail use by converting those rights-of-way into recreational trails," and (2) that "King County, through the Quit Claim Deed from BNSF, acquired an easement over the surface of the right-of-way which, pursuant to the Trails Act, is now an easement for a hiking and biking trail with the possible reactivation of a railroad." Defendants-Appellees dispute these facts, arguing that King County acquired a full railway easement through the Quit Claim Deed, which encompasses far more than a surface right of-way. The resolution of this dispute turns on an interpretation of the Trails Act, because deciding the scope of King County's rights pursuant to the Quit Claim Deed will require this court to determine whether the Trails Act creates, supplements, or replaces any previously existing railroad easement. In other words, "the vindication of [Plaintiffs-Appellants'] right[s] under state law necessarily turn[s]

on some construction of federal law." *Franchise Tax Bd.*, 463 U.S. at 9. Thus, the first two *Grable* requirements are satisfied in this case. *See Gunn*, 568 U.S. at 258.

B. Requirements Three and Four

Grable's latter two requirements are also satisfied: The federal issue is both "substantial" and "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.* For an issue to be "substantial," "it is not enough that the federal issue be significant to the particular parties in the immediate suit . . . . The substantiality inquiry under *Grable* looks instead to the importance of the issue to the federal system as a whole." *Id.* at 260. In *Grable*, for example, the Court "emphasized the Government's 'strong interest' in being able to recover delinquent taxes through seizure and sale of property, which in turn 'required clear terms of notice to allow buyers to satisfy themselves that the Service has touched the bases necessary for good title'" and then found that the "Government's 'direct interest in the availability of a federal forum to vindicate its own administrative action' made the question 'an important issue of federal law that sensibly belonged in a federal court.'" *Id.* at 260-61 (alterations omitted) (quoting *Grable*, 545 U.S. at 315).

The Supreme Court has already spoken regarding the importance of the Trails Act, and the federal-state balance it struck. The Court has deemed the Trails Act "the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails." *Preseault v. Interstate Commerce*

Comm'n, 494 U.S. 1, 5, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990) (hereinafter *Preseault I*). The Court noted that "[t]wo congressional purposes [were] evident" with regard to the Trails Act. *Id.* at 17. On the one hand, "Congress intended to 'encourage the development of additional trails' and to 'assist recreational users by providing opportunities for trail use on an interim basis.'" *Id.* (alteration omitted) (quoting H.R. Rep. No. 98-28, at 8-9 (1983); S. Rep. No. 98-1, at 9-10 (1983) (same)); *see also* 16 U.S.C. § 1241(a) ("[The Trails Act] promote[s] the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, outdoor areas and historic resources of the Nation . . . ."). On the other hand, Congress also "intended 'to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use.'" *Preseault I*, 494 U.S. at 18 (quoting H.R. Rep. No. 98-28, at 8; S. Rep. No. 98-1, at 9); *see also* 16 U.S.C. § 1247(d). "[E]ven if no future rail use for [a rail corridor] is currently foreseeable," Congress determined "that every line is a potentially valuable national asset that merits preservation." *Preseault I*, 494 U.S. at 19.

Thus, the Government has a strong interest in both facilitating trail development and preserving established railroad rights-of-way for future reactivation of rail service. And, because Congress acted in the Trails Act to preclude the operation of state laws regarding abandonment, and placed supervision of the "railbanking" and reactivation processes in the hands of the STB, *see* 16 U.S.C. § 1247(d); 49 U.S.C. § 10501(b) (express preemption of state abandonment regulation); 49 U.S.C. § 10903 (STB

authority over abandonment), the Government also has a "direct interest in the availability of a federal forum to vindicate its own administrative action," such that the scope of the Trails Act is "an important issue of federal law that sensibly belongs in a federal court." *Grable*, 545 U.S. at 315. We therefore conclude that we have jurisdiction because this case satisfies all four *Grable* requirements.[2]

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2. We note that our jurisdiction is also supported by our court's precedents regarding declaratory judgment claims. In a line of cases beginning with *Janakes v. United States Postal Service*, 768 F.2d 1091 (9th Cir. 1985), we have adhered to the rule that if "the declaratory judgment defendant could have brought a coercive action in federal court to enforce its rights, then [the court has] jurisdiction," so long as that coercive action would "arise under" federal law. *Id.* at 1093; *see also, e.g., Chevron U.S.A. Inc. v. M & M Petroleum Servs., Inc.*, 658 F.3d 948, 951 (9th Cir. 2011); *Standard Ins. Co. v. Saklad*, 127 F.3d 1179, 1181 (9th Cir. 1997) ("A person may seek declaratory relief in federal court if the one against whom he brings his action could have asserted his own rights there."). "In other words, in a sense [the court] can reposition the parties in a declaratory relief action by asking whether [it] would have jurisdiction had the declaratory relief defendant been a plaintiff seeking a federal remedy." *Standard Ins. Co.*, 127 F.3d at 1181. Here, we already have had the opportunity to address the propriety of jurisdiction in a coercive action brought by Defendants-Appellees. In *Rasmussen*, King County *was* the plaintiff and had alleged "that it had a legal right to the strip of land in question even if the original deed conveyed only an easement" because of 16 U.S.C. § 1247(d). 299 F.3d at 1082. We held that "there was a federal question on the face of the well-pleaded complaint," such that the court had jurisdiction to hear the case. *Id.* Thus, we have jurisdiction over the instant case on the alternative ground that we "would have jurisdiction had the declaratory relief defendant been a plaintiff seeking a federal remedy." *Standard Ins. Co.*, 127 F.3d at 1181.

Appendix A

ANALYSIS

Because the parties filed cross motions for summary judgment, we will consider each motion in turn. First, we will review the district court's denial of summary judgment to Plaintiffs-Appellants and dismissal of the AC for lack of standing. We will then consider the merits of Defendants-Appellees' motion.

I. Plaintiffs-Appellants Lack Standing

As noted, Plaintiffs-Appellants' AC seeks a declaratory judgment pursuant to Revised Code of Washington section 7.24.020. The district court found that Plaintiffs-Appellants lacked both Article III and statutory standing to bring this claim, and we agree.

These standing inquiries overlap. "A plaintiff seeking relief in federal court must establish the three elements that constitute the 'irreducible constitutional minimum' of Article III standing . . . ." *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 918 (9th Cir. 2018) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)). Specifically, the plaintiff must show

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Krottner v. Starbucks Corp., 628 F.3d 1139, 1141 (9th Cir. 2010) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)).

Similarly, to have standing to sue under Section 7.24.020, a plaintiff must show there is a "justiciable controversy." *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 27 P.3d 1149, 1153 (Wash. 2001). Washington courts have

> defined a justiciable controversy as "(1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

Id. (alteration omitted) (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 514 P.2d 137, 139 (Wash. 1973)). "Inherent in these four requirements are the traditional limiting doctrines of standing, mootness, and ripeness, as well as the federal case-or-controversy requirement." *Id.; see also Five Corners Family Farmers v. State*, 173 Wn.2d 296, 268 P.3d 892, 896 n.2 (Wash. 2011) (noting that "justiciable controversy" requirements overlap with requirements for standing). In particular, the "third justiciability requirement of a direct, substantial

interest in the dispute encompasses the doctrine of standing," which requires a party to "show, in addition to 'sufficient factual injury,' that 'the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *To-Ro Trade Shows*, 27 P.3d at 1154-55 (alteration omitted) (quoting *Seattle Sch. Dist. No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71, 82 (Wash. 1978)).

Thus, to have Article III and statutory standing to challenge King County's interest in the Corridor, Plaintiffs-Appellants must show that Defendants-Appellees' possession or use of the Corridor injured Plaintiffs-Appellants' interests therein. Because we find for the reasons following that Plaintiffs-Appellants have no property interests in the Corridor, we hold that they cannot allege any injury to such interests, and therefore lack standing.

A. The County Owns the Portion of the Corridor Adjacent to the Hornish Property in Fee

The parties do not dispute the contents of the Hilchkanum deed, from which the Hornish property is derived. Rather, they dispute whether the deed conveyed a railroad right of way in fee simple or through an easement.

This question has already been resolved by our court. In *Rasmussen*, we held that the Hilchkanum deed conveyed to the railroad a fee simple interest in the "right of way strip." 299 F.3d at 1080, 1088. We analyzed the deed with regard to the factors outlined in *Brown v. State*, 130 Wn.2d 430, 924 P.2d 908, 911 (Wash. 1996), and found them

to confirm that the deed's language and the contracting parties' behavior evinced an intent to convey a fee simple interest. *Rasmussen*, 299 F.3d at 1084-88.

Subsequently, an intermediary Washington court found the same. In *Ray v. King County*, 120 Wn. App. 564, 86 P.3d 183 (Wash. Ct. App. 2004), the Washington Court of Appeals confirmed that its analysis of the *Brown* factors "demonstrate[d] that Hilchkanum conveyed the right of way to the Railway in fee, not as an easement." *Id.* at 192. The Washington Supreme Court declined review. *Ray v. King County*, 152 Wn.2d 1027, 101 P.3d 421 (2004).

We are bound by these decisions. The *Rasmussen* panel's analysis of the Hilchkanum deed was central to its affirmance of the district court's grant of summary judgment to King County, *see Rasmussen*, 299 F.3d at 1088 (holding that because the deed conveyed property in fee simple, "King County, as the Railway's successor, possesse[d] a fee simple in the strip of land," and the district court was affirmed), and we "treat reasoning central to a panel's decision as binding later panels," *Garcia v. Holder*, 621 F.3d 906, 911 (9th Cir. 2010) (quoting *Sanchez v. Mukasey*, 521 F.3d 1106, 1110 (9th Cir. 2008)). Moreover, "[i]n the absence of any decision on this issue from the [Washington] Supreme Court, we are bound by [*Ray*], as the ruling of the highest state court issued to date." *Poublon v. C.H. Robinson Co.*, 846 F.3d 1251, 1266 (9th Cir. 2017) (citing *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236, 61 S. Ct. 179, 85 L. Ed. 139 (1940)).[3]

3. Defendants-Appellees suggest that "this is particularly true where, as in *Ray*, the Washington Supreme Court has denied

Plaintiffs-Appellants argue that these decisions are no longer good law because they rely on *Brown*, which created a multifactor test that the Washington Supreme Court subsequently modified in *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Association*, 156 Wn.2d 253, 126 P.3d 16, 25-26 (Wash. 2006). Plaintiffs-Appellants note that the only court to have analyzed the Hilchkanum deed after *Kershaw*, the U.S. Court of Federal Claims, held that *Rasmussen* and *Ray* were wrongly decided in light of *Kershaw*, and that the Hilchkanum deed conveyed only an easement to the railroad. *See Beres III*, 104 Fed. Cl. at 424-32; *Beres v. United States*, 97 Fed. Cl. 757, 784-92 (2011) (hereinafter *Beres II*).

However, the Washington Supreme Court itself has demonstrated a belief that *Kershaw* did not "undercut the theory or reasoning" underlying *Rasmussen* and *Ray* "in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). First, in *Kershaw* itself, the court affirmed the correctness of *Ray*. The court noted that "while the [Hilchkanum] deed did include the phrase 'right of way' it did so only to the extent that it stated it was conveying a 'right of way strip.' The *Ray* court thus found no presumption in favor of an easement and applied the *Brown* factors to reach its conclusion that a fee interest was transferred." *Kershaw*, 126 P.3d at 25 n.11. This, the *Kershaw* court continued, distinguished the Hilchkanum deed from the

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review." However, the authority that they cite for this proposition, *Intex Plastics Sales Co. v. United Nat'l Ins. Co.*, 23 F.3d 254, 257 n.1 (9th Cir. 1994), is no longer good law in this circuit, *see Ajir v. Exxon Corp.*, 185 F.3d 865 n.3 (9th Cir. 1999) (mem.).

deed at issue in *Kershaw*, which "specifically established the *purpose* of the grant when it stated the land was 'to be used by the Railway as a right of way for a railway'" and thereby created "a presumption in favor of an easement which was not present in *Ray.*" *Id.* (alteration omitted). Second, the Washington Supreme Court declined the U.S. Court of Claims' certification request seeking clarification of *Brown*'s application, on the basis that no clarity was lacking. Rather, the court was "of the view that, in light of existing precedent such as *Brown v. State*, 130 Wn.2d 430, 924 P.2d 908 (Wash. 1996) and *Ray v. King County*, 120 Wn. App. 564, 86 P.3d 183, *review denied*, 152 Wn.2d 1027, 101 P.3d 421 (Wash. 2004), the questions posed by the federal court are not 'questions of state law which have not been clearly determined.'" *Beres v. United States*, 92 Fed. Cl. 737, 746 (2010) (hereinafter *Beres I*) (alterations omitted); *see also Beres II*, 97 Fed. Cl. at 786. This is persuasive evidence that the Washington Supreme Court believes *Kershaw* created no "clearly irreconcilable" conflict with *Ray*.

Moreover, even if *Kershaw* did modify the relevant analytical method, we would be unable to reach a different result than we did in *Rasmussen*. *Kershaw* specifies that a presumption in favor of an easement is created when a deed "uses the term 'right of way' as a limitation or to define the purpose of the grant, [which] operates to 'clearly and expressly limit or qualify the interest conveyed.'" *Kershaw*, 126 P.3d at 22 (alterations omitted) (quoting *Brown*, 924 P.2d at 912); *see also Beres II*, 97 Fed. Cl. at 785. The *Beres* court found that the Hilchkanum deed had used the "right of way" language in this way in its granting

clause, such that the *Kershaw* easement presumption applied. *Beres III*, 104 Fed. Cl. at 430; *Beres II*, 97 Fed. Cl. at 785.

But our court and the *Ray* court found differently. In *Rasmussen*, we characterized the granting clause language that the *Beres* court deemed limiting under *Kershaw*—evincing the parties' expectation "that the right of way would be used to construct and operate a railroad"—as mere "precatory language" that "did not actually condition the conveyance on such use." 299 F.3d at 1086. And, in *Kershaw*, the Washington Supreme Court noted that the deed then before it "specifically established the purpose of the grant when it stated the land was 'to be used by [the Railway] as a right of way for a railway'" and thereby created "a presumption in favor of an easement *which was not present in* Ray." 126 P.3d at 25 n.11 (alteration in original) (emphasis added). We are bound by this reasoning. Thus, we must hold that the "right of way" language in the granting clause is not limiting, and does not give rise to the *Kershaw* easement presumption. This leads us to hold that King County owns the portion of the Corridor adjacent to the Plaintiff-Appellant Hornish's property in fee, and that Plaintiff-Appellant Hornish has no property interest therein.

B. The Trails Act Preserved the Railroad Easement and Created a New Easement for Trail Use, Both of Which Were Conveyed to King County

The parties agree that because no original deeds were introduced into evidence for the portions of the Corridor

adjacent to which the Non-Hornish Plaintiffs-Appellants own land, the railroad possesses a prescriptive easement with regard to those portions. The parties disagree, however, as to the current status of that easement. Plaintiffs-Appellants argue that when the Corridor was railbanked, "the railroad purposes easement [was] converted to a new 'railbanked' easement/trail easement that replaces the former railroad purposes easement with a new trail easement with the potential reactivation of the railroad easement." The railroad easement is converted into a "new hiking and biking trail/railbanked easement." Defendants-Appellees reject this explanation and contend that "the Trails Act merely preempts abandonment of the state law easement and guarantees the right to trail use" by its plain language. In other words, the Trails Act preserves—rather than converts—the existing railroad easement, and creates an additional recreational trail easement.

We agree with Defendants-Appellees. The Trails Act, by its plain language, "prevents the operation of state laws that would otherwise come into effect upon abandonment—property laws that would 'result in extinguishment of easements for railroad purposes and reversion of rights of way to abutting landowners.'" *Caldwell v. United States*, 391 F.3d 1226, 1229 (Fed. Cir. 2004) (quoting *Rail Abandonments—Use of Rights-of-Way as Trails*, 2 I.C.C. 2d 591, 596 (1986)). "Section 8(d) provides that a railroad wishing to cease operations along a particular route may negotiate with a State, municipality, or private group that is prepared to assume financial and managerial responsibility for the right-of-way. If the parties reach agreement, the land may be transferred to

the trail operator for interim trail use, subject to [STB]-imposed terms and conditions . . . ." *Preseault I*, 494 U.S. at 6-7 (footnote omitted); *see also* 16 U.S.C. § 1247(d); 49 C.F.R. § 1152.29 (2012). The STB will issue a NITU, and the railroad corridor is "railbanked." *See, e.g.*, 49 C.F.R. § 1152.29(d)(1)-(2) (2016); *Caldwell*, 391 F.3d at 1229.

The question of how "railbanking" affects the underlying property rights in a corridor turns on state law. To understand why, it is helpful to consider the Federal Circuit's rails-to-trails takings jurisprudence. In the years since the Trails Act's enactment, the Court of Federal Claims has been inundated with Tucker Act claims alleging that the Trails Act's preclusion of state law caused a taking of their property interests, for which the landowners were entitled to just compensation under the Fifth Amendment. To decide these cases, that court has been required to determine what property interests were taken when each corridor was railbanked; only once the court determined *what* was taken could it determine *how much* (if any) compensation was due.

Consistently, the Federal Circuit has explained that "a Fifth Amendment taking occurs when, pursuant to the Trails Act, state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use." *Caldwell*, 391 F.3d at 1228 (citing *Preseault v. United States*, 100 F.3d 1525, 1543 (Fed. Cir. 1996) (en banc) ("*Preseault II*")). "The Trails Act prevents a common law abandonment of the railroad right-of-way from being effected, thus precluding state law reversionary interests from vesting." *Jackson v. United*

States, 135 Fed. Cl. 436, 443 (2017) (citing *Caldwell*, 391 F.3d at 1229). And, it is "state law [that] creates and defines the scope of the reversionary or other real property interests affected by the [STB's] actions pursuant to . . . 16 U.S.C. § 1247(d)." *Preseault I*, 494 U.S. at 20 (O'Connor, J., concurring); *see also, e.g., Toews v. United States*, 376 F.3d 1371, 1375 (Fed. Cir. 2004) (determining scope of railroad easements under California law); *Preseault II*, 100 F.3d at 1542 (determining scope of railroad easements under Vermont law). Thus, to determine whether there has been a taking in a rails-to-trails case involving a railroad easement, a court must determine whether, as a matter of state law, the scope of the railroad easement was limited to railroad purposes or broad enough to encompass future use as a recreational trail. *See, e.g., Ellamae Phillips Co. v. United States*, 564 F.3d 1367, 1373 (Fed. Cir. 2009) (citing *Preseault II*, 100 F.3d at 1533). If the railroad possessed an easement limited to railroad purposes, such that the corridor's use as a recreational trail normally would trigger the easement's abandonment under state law, then the Trails Act deprived Plaintiffs-Appellants of their reversionary rights and caused a taking. *See, e.g., Ladd v. United States*, 630 F.3d 1015, 1019 (Fed. Cir. 2010) (holding that a taking occurs in a rails-to-trails case "when government action destroys state-defined property rights by converting a railway easement to a recreational trail, if trail use is outside the scope of the original railway easement"); *Jackson*, 135 Fed. Cl. at 444 ("If standard abandonment had occurred . . ., the railroad, as the owner of the servient estate, would not retain any property interest in the right-ofway, and that property interest would revert to the dominant landowner. Thus,

the Trails Act, in preventing this reversion, effects a taking." (citation omitted)); *Balagna v. United States*, 135 Fed. Cl. 16, 22 (2017) ("If the railroad acquired an easement limited only to railroad purposes, . . . then the issuance of the NITU interferes with the plaintiff's state law property rights and triggers the application of the Takings Clause."). In essence, the Government, through the Trails Act, has taken the landowner's reversionary property right and created a new easement for trails use. *See Toews*, 376 F.3d at 1376 ("[I]f the Government uses . . . an existing railroad easement for purposes and in a manner not allowed by the terms of the grant of the easement, the Government has taken the landowner's property for the new use. The consent of the railroad to the new use does not change the equation—the railroad cannot give what it does not have."); *Preseault II*, 100 F.3d at 1550 ("The taking of possession of the lands . . . for use as a public trail was in effect a taking of a new easement for that new use, for which the landowners are entitled to compensation. . . . [It resulted in] a new easement for the new use, constituting a physical taking of the right of exclusive possession . . . .").

Here then, to determine the impact of the Trails Act on Plaintiffs-Appellants' property rights, we must look to Washington law. As noted, the parties agree that because no original deeds for the portions of the Corridor adjacent to which the Non-Hornish Plaintiffs-Appellants own land were put into evidence, the railroad easement was a prescriptive easement with regard to those portions of the Corridor. Under Washington law, a prescriptive easement is "established only to the extent necessary to accomplish

the purpose for which the easement is claimed." *Yakima Valley Canal Co. v. Walker*, 76 Wn.2d 90, 455 P.2d 372, 374 (Wash. 1969). Thus, a prescriptive *railroad* easement exists "to the extent necessary" to operate a railroad. Accordingly, Washington common law dictates that "a change in use from 'rails to trails'" will "constitute[] abandonment" of such easement. *Lawson v. State*, 107 Wn.2d 444, 730 P.2d 1308, 1313 (Wash. 1986). And, upon that abandonment, in the ordinary case, "the right of way would automatically revert to the reversionary interest holders." *Id.*

However, this is not an ordinary case, because here, the Trails Act has stopped the reversion from occurring. It has prevented abandonment of the railroad easement in the event of trail use—a use outside of those necessary for railroad purposes—and thereby preserved the original railroad easement. However, this application of the Trails Act has, in effect, created a *new* easement for a new use—for recreational trail use. The railroad and its successors in interest now have two easements: (1) the easement for railroad purposes, which they never abandoned (because of the Trails Act) and therefore retain, and (2) the new easement for recreational trail purposes. *See Preseault II*, 100 F.3d at 1550.

Here, the railroad chose to convey its ownership interest in the Corridor to TLC by quitclaim deed. TLC then initiated the railbanking process, the STB issued a NITU, and the Corridor was "railbanked." At that point, TLC conveyed all of its ownership interests in the Corridor to King County through a duly recorded

quitclaim deed. For the reasons outlined above, this conveyed to King County *both* the railroad's original, unabandoned easement for railroad purposes and the new easement for recreational trail purposes that the Trails Act had created. *See Trevarton v. South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016) (holding that when railroad conveyed its railroad easement to the defendant through a quitclaim deed, the defendant also acquired the "new easement" created by the Trails Act). Since there is no evidence that King County has subsequently used these easements in a manner inconsistent with their purposes (which could trigger abandonment under state law), we hold that King County possesses the railroad and recreational trail easement.[4]

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4. Though this result may seem harsh, it is essential to note that [a] conveyance . . . under the Trails Act [does] not leave [the former reversionary interest holders] without a remedy . . . . Indeed, it [leaves] them with a variety of possible remedies—for example, a takings action seeking compensation because [the trail sponsor's] new easement diminished the property rights [the landowners] enjoyed when the right-of-way was limited to railroad uses; or a court action claiming that [the trail sponsor is] unlawfully managing the Trail as a matter of federal or state law; or a petition to the STB claiming that [the trail sponsor's] management of the Trail impairs restoration of the right-of-way to railroad use. And of course [landowners] can negotiate with state officials to allow [them] reasonable access and use of the right-of-way for their ranch operations, as they presumably negotiated with railroad operators in the past.

Trevarton, 817 F.3d at 1087.

C. The Centerline Presumption Does Not Apply

The Non-Hornish Plaintiffs-Appellants contend that notwithstanding King County's easement, they have standing because Washington's "centerline presumption" gives them a property right in the Corridor (i.e., a "direct, substantial interest"). We disagree.

Washington's "centerline presumption" was first recognized by the Washington Supreme Court in *Roeder Company v. Burlington Northern, Inc.*, 105 Wn.2d 567, 716 P.2d 855 (Wash. 1986). There, the court first applied "the 'highway presumption' . . . to railroad rights of way," and held that, in general, "the conveyance of land which is bounded by a railroad right of way will give the grantee title to the center line of the right of way if the grantor owns so far, unless the grantor has expressly reserved the fee to the right of way, or the grantor's intention to not convey the fee is clear." *Id.* at 861. Thus, the court reasoned, when a "deed refers to the grantor's right of way as a boundary without clearly indicating that the side of the right of way is the boundary, it is presumed that the grantor intended to convey title to the center of the right of way." *Id.*

> When, however, a deed refers to the right of way as a boundary but also gives a metes and bounds description of the abutting property, the presumption of abutting landowners taking to the center of the right of way is rebutted. A metes and bounds description in a deed to property that abuts a right of way is evidence of

> the grantor's intent to withhold any interest in the abutting right of way, and such a description rebuts the presumption that the grantee takes title to the center of the right of way.

Id. at 861-62.

Additionally, the *Roeder* court clarified that the centerline presumption is of limited applicability. An abutting landowner is not automatically entitled to the centerline presumption. *Id.* at 862 ("A property owner receives no interest in a railroad right of way simply through ownership of abutting land."). Thus, an adjoining landowner may not invoke the centerline presumption if he presents "no evidence of having received his or her property from the owner of the right of way." *Id.* "Without evidence showing that the owner of abutting property received that property from the fee owner of the right of way property, the railroad presumption is inapplicable." *Id.*

The district court found that the centerline presumption did not apply here. First, the court held that all of the Non-Hornish Plaintiffs-Appellants' deeds "contain[ed] metes and bounds descriptions which use the right of way as a boundary line." Second, the court held that the Non-Hornish Plaintiffs-Appellants had failed to provide the requisite evidence of their interest, because they "[did] not succeed in establishing chain of title." Their property interests derived from a common grantor, Middleton, in whose probate the Corridor was specifically excluded. The district court therefore concluded that the centerline

presumption was inapplicable, in light of "the Court's rulings on the other issues presented [that] establish the parties' respective rights," and also not a determinative, material dispute that could preclude summary judgment.

We agree. The Non-Hornish Plaintiffs-Appellants cannot invoke the centerline presumption because (1) the grantor, Middleton "expressly reserved the fee to the right of way," *Roeder*, 716 P.2d at 861, and (2) the Non-Hornish Plaintiffs-Appellants deeds and chains of title utilize the railway as a boundary, as the district court determined. The centerline presumption does not afford the Non-Hornish Plaintiffs-Appellants any property interest in the Corridor. Without such an interest, these Plaintiffs-Appellants lack standing to bring their declaratory judgment claims. The district court's denial of summary judgment to Plaintiffs-Appellants and dismissal of the AC on this basis are affirmed.

II. The District Court Properly Granted Summary Judgment to and Quieted Title in King County

A. King County Possesses the Railroad Easement and Recreational Easement

As described above, King County acquired its property interests through a series of conveyances undertaken pursuant to the Trails Act. When TLC conveyed all of its ownership interests in the Corridor to King County through a duly recorded quitclaim deed, TLC conveyed to King County *both* the railroad's original, unabandoned easement for railroad purposes and the

new easement for recreational trail purposes that the Trails Act had created. *See Trevarton*, 817 F.3d at 1087; *Preseault II*, 100 F.3d at 1550. As there is no evidence that King County has subsequently used these easements in a manner inconsistent with their purposes (which could trigger abandonment under state law), we hold that King County possesses the railroad and recreational trail easement. The railroad easement encompasses the full extent of incidental uses that may be authorized under Washington law.[5] *See Wash. Sec. & Inv. Corp. v. Horse Heaven Heights, Inc.*, 132 Wn. App. 188, 130 P.3d 880, 886 (Wash. Ct. App. 2006); *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 121 Wn. App. 714, 91 P.3d 104, 115 (Wash. Ct. App. 2004), *aff'd in part, rev'd in part on other grounds*, 156 Wn.2d 253, 126 P.3d 16 (Wash. 2006).

B. The Easement's Width Adjacent to the Non-Hornish Plaintiffs-Appellants' Properties Is 100 Feet

Plaintiffs-Appellants claim that the railroad "utilized a width of approximately 12 feet for their actual railroad operations for over 100 years from 1888 until 1998." Defendants-Appellees dispute this, arguing that the Corridor is 100 feet wide, except where it is fifty feet wide next to the Morel Plaintiffs-Appellants' property and is

5. Because the identity of such permitted incidental uses has not been disputed in this case, we do not opine as to what such uses might be. *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1164 n.4 (9th Cir. 2014) (holding that where an issue is mentioned without legal argument, the issue is neither specifically nor distinctly argued and thus not subject to review).

approximately seventy-five feet wide next to the Menezes and Vanderwende Plaintiffs-Appellants' properties. Defendants-Appellees also observe that "[a]t various times in this litigation, Appellants have claimed the Railroad actually needed a width 'between 12 feet and 20 feet,' "no greater than 18 feet," fourteen feet, ('7 feet from center line' on both sides 'of the tracks'), and 'approximately 12 feet.'"

In support of their current 12-foot-width argument, Plaintiffs-Appellants primarily rely on the declaration of Eugene and Elizabeth Morel (the Morel Declaration). The Morels assert that at their property, which is "located along" and "bisected" by a portion of the Corridor, the Corridor has a width of 10 feet. The original house on the property was built in the 1920s and '30s, and "was more than 50% inside the [right-of-way] width claimed by King County." The Morels claim that they have paid taxes on the parts of the home and property that fall within the land claimed by King County. An access driveway "was and is still today" within that right-of-way. The Morels improved an area on the east side of the track, "about 7 feet from [the] center line of the tracks," which they used to park cars. To access their house, they would cross the tracks and walk down stairs to it. The Morels also improved the land by adding "privacy trees," other landscaping, irrigation, patios, and child swing sets. No rail operator ever asked the Morels to stop or limit these uses of the land.

Then, in 1996, the Morels obtained a quitclaim deed from BNSF granting them "clear title to the outside 25 feet on both the east and west sides of the [right-of-way]."

This allowed the Morels to replace the original house with a new house, the construction of which finished in 2001. The Morels claim that "driveways, walkways, landscaping and other improvements were installed during construction" that are "clearly on land that King County claims they own via prescriptive easement." The Morels also assert that there is an "8 foot diameter boulder, estimated to weigh about 6 tons" that sits on the lot owned by the Neighbors Plaintiffs-Appellants. One of the Morels played on the rock as a child, in the 1950s. The Morels assert that this rock proves the right-of-way is no more than 12 feet in width because the "rock is just over 6 feet from the centerline of the [right-of-way] corridor" and the railroad has never removed it.

Plaintiffs-Appellants also rely on the declaration of John Rall (the Rall Declaration), a private consultant with a bachelor's degree in civil engineering and a "Professional Land Surveying License" from the state of Georgia. Rall indicates that he has reviewed the chains of title relating to the Plaintiffs-Appellants' chains of title, and determined that they evidence that

> [1] [n]o deed in the chains of title expressly reserved the fee portion underlying the Railroad Right-of-way unto any predecessor grantor; [2] [e]ach grantor . . . granted all interest that they owned, including their interest in the railroad right-of-way; . . . and [3] [e]ach of the current [Plaintiffs-Appellants] acquired their interests in the former railroad right-of-way from their predecessor in interests and are the current owners of the underlying fee in

> the current easement held by King County for hiking and biking purposes with the potential future reactivation of a railroad.

In support of their claim that the Corridor has a 100-foot width, Defendants-Appellees introduced "[o]fficial agency records from the Interstate Commerce Commission ('ICC'), known as the 1917 Val Maps." The Val Maps were drawn pursuant to the 1913 Valuation Act, which required the ICC "to make an inventory which shall list the property of every common carrier subject to the provisions of this Act in detail, and show the value thereof as hereinafter provided, and shall classify the physical property, as nearly as practicable." Pub. L. No. 62-400, § 19a, 37 Stat. 701, 701 (1913) (former 49 U.S.C. § 10781). During this inventory, engineers devised the Val Maps to document "the land owned by a railroad and how it was acquired, the land adjacent to railroad property, and the financial history of the railroad from its earliest operations to the date of basic valuation." Defendants-Appellees contend that the maps prove that the width of the relevant portions of the Corridor has long been 100 feet. First, the Maps indicate that the Railroad originally acquired 4.71 acres of land in the 2,050-foot-long segment adjacent to the Neighbors, Morel, and Menezes and Vanderwende Plaintiffs-Appellants' properties, Parcel 6, by way of adverse possession. Second, the Maps indicate that the segment adjacent to the Lake Sammamish 4257 LLC and the Moore Plaintiffs-Appellants' property, Parcel 13, is 3.29 acres and 1,434.4 feet long. Defendants-Appellees claim these measurements confirm the Corridor's 100-foot width.

Defendants-Appellees have also introduced certain of the King County Assessor's records. These records document a change in "the area owned by Mr. Middleton in 1891 and later years," which Defendants-Appellees argue "confirms the creation of a one hundred feet Corridor in Lot 2 of Section 7, Township 24 North, Range Six East of the Willamette Meridian, which eventually became the source of the parcels owned by the Neighbors, Morel, and Menezes and Vanderwende [Plaintiffs-Appellants]." Defendants-Appellees claim that "[t]he Assessor Rolls confirm the Railroad also acquired a one hundred foot Corridor in Lot 3 of Section 17, which became the source of the property owned by Lake Sammamish 4257 LLC and the Moore [Plaintiffs-Appellants]." Additionally, the King County Assessor's maps exclude the one hundred foot Corridor from Appellants' properties, consistent with tax assessments dating back to 1895. Notably, Plaintiffs-Appellants offered no proof that they have ever paid property taxes within the Corridor.

Additionally, Defendants-Appellees argue that the actions of Plaintiffs-Appellants and their predecessors-in-interest comport with an understanding of the 100-foot width. For example, the Morel Plaintiffs-Appellants acquired their property from Eugene Morel's parents, who acknowledged that the Corridor was one hundred feet wide when they purchased a "portion of [BNSF's] 100.0 foot wide Snoqualmie Branch Line right of way" from the Railroad on May 23, 1996, and left the railroad with the 50 feet it still has today. And the predecessor of the Menezes and Vanderwende Plaintiffs-Appellants, Lynn Goldsmith, filed an adverse possession lawsuit against the Railroad, disputing the Railroad's "claim[] that the right of way is

100 ft. in width — 50 ft. on each side of its centerline." Goldsmith settled her claims in exchange for a narrow strip of land from BNSF, implicitly acknowledging that the remainder of the Corridor—roughly seventy-five feet wide—belonged to BNSF (and now King County). Such attempts to buy land are inconsistent with a belief in one's right of possession. *Cf. City of Port Townsend v. Lewis*, 34 Wash. 413, 75 P. 982, 983 (Wash. 1904) (finding that purported possessors' "contesting with the officers of the state and municipality their claim of a preference right to purchase the[] very lands" they claimed to possess was conduct "wholly inconsistent with the idea of an adverse possession"); *Jensen v. Compton*, 131 Wn. App. 1064, 2006 WL 616052, at *3 (2006) (holding that defendant's offer to purchase undermined his adverse possession claim).

Finally, Defendants-Appellees provide evidence that a 100-foot-width is necessary for railroad operations. For example, Mike Nuorala, a longtime engineer for BNSF, stated in his declaration that the full width of the right of way is necessary as a "safety buffer to ensure minimum setbacks between freight trains and residential development, to prevent nearby construction and development activities that could undermine the stability of the steep slopes above and below the tracks, and to provide access for maintenance activities, such as tie replacement, that require significant clearance on one or both sides of the track."

Lining this evidence up alongside Plaintiffs-Appellants', it is clear that most of Defendants-Appellees' evidence is unrebutted. The Rall Declaration is inadmissible, because it offers only Rall's interpretation of the relevant deeds,

and "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge." *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) (quoting *United States v. Weitzenhoff*, 35 F.3d 1275, 1287 (9th Cir. 1993)); *see also Washington v. Maricopa County*, 143 F.2d 871, 872 (9th Cir. 1944) (holding that affidavits containing "statements of legal conclusions . . . should have been disregarded" in resolving summary judgment motion). And, the Morel Declaration, at most, creates a genuine issue of fact regarding the *historic* width of the Corridor adjacent to only the Morels' property with its statement that the Morel family previously had a home inside the claimed Corridor. However this dispute is not material; the current width of the Corridor adjacent to the Morels' property is undisputed because of the Morel family's 1996 purchase of land from the railroad. Because Plaintiffs-Appellants have not introduced any admissible evidence to support their claimed 12-foot width, and Defendants-Appellees have introduced considerable evidence supporting their claimed 100-foot width, there is no genuine dispute of material fact with regard to the width of the Corridor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (holding that summary judgment standard is met where the evidence is "so one-sided that one party must prevail as a matter of law"). The width of the Corridor is 100 feet, except where fifty feet wide next to the Morel Plaintiffs-Appellants' property and approximately seventy-five feet wide next to the Menezes and Vanderwende Plaintiffs-Appellants' properties.[6]

6. Because we resolve the case on these grounds we do not reach the district court's holding in the alternative that King County

C. Plaintiffs-Appellants' Motion to Supplement the Record

Also pending in this case is Plaintiffs-Appellants' motion to supplement the record on appeal with certain evidence that was not before the district court. (Dkt. No. 57). Specifically, Plaintiffs-Appellants seek to add certain evidence and testimony introduced by Plaintiffs-Appellants in a similar case, *Neighbors v. King County*, which they contend contradicts Defendants-Appellees' claim that the corridor at issue here had a consistent width of 100 feet and supports Plaintiffs-Appellants' argument that the width is much less.

Defendants-Appellees oppose this motion, (Dkt. No. 61), which they point out was not made until nearly 18 months after the district court proceedings had concluded. Defendants-Appellees contend that Plaintiffs-Appellants made the strategic decision to argue below that Defendants-Appellees' payment of taxes and fees was irrelevant, and that Plaintiffs-Appellants should now be held to that choice on appeal. Defendants-Appellees also note that the evidence Plaintiffs-Appellants seek to introduce includes declarations written by Plaintiffs-Appellants themselves, and that Plaintiffs-Appellants have offered no explanation as to why this evidence was not available at the time of the summary judgment proceedings below. Finally, Defendants-Appellees argue that the submitted materials are not the proper subject for judicial notice, and that there has been no showing of extraordinary circumstances.

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acquired property rights in the Corridor pursuant to Washington Revised Code section 7.28.070.

We agree with Defendants-Appellees. Plaintiffs-Appellants had a full opportunity to acquire these records during discovery, and simply failed to do so. Plaintiffs-Appellants have not offered any explanation for their failure to undertake discovery relating to King County's payment of taxes and to procure and produce their own property tax records in response to King County's discovery. Indeed, below Plaintiffs-Appellants explained only that they were not obtaining this discovery because they believed it irrelevant. It is only now, after the district court has disagreed with that belief and *credited* Defendants-Appellees' argument, that Plaintiffs-Appellants have felt compelled to act. And yet even now, Plaintiffs-Appellants have not procured this discovery on their own. They only became aware of it when it was filed fortuitously in a separate case.

On appeal of summary judgment, courts generally consider only the record that was before the district court. *United States v. W.R. Grace*, 504 F.3d 745, 766 (9th Cir. 2007). This court will make "exceptions to this general rule in three situations: (1) to 'correct inadvertent omissions from the record,' (2) to 'take judicial notice,' and (3) to 'exercise inherent authority . . . in extraordinary cases.'" *Id.* (alteration in original) (quoting *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003)).

Neither of the first two exceptions could apply here. Plaintiffs-Appellants have made no argument that these documents were omitted by mistake or by accident. Rather, the record makes clear that they were omitted for a tactical reason—because Plaintiffs-Appellants had

concluded they were irrelevant. Additionally, the contents of the records are not a matter of which the court can take judicial notice. Even if the records are filed on the public docket of the *Neighbors* case, we can take judicial notice only of the *filing* of the documents, and not of the truth of the documents' contents. *See, e.g., Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006); *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001).

Thus, only the third exception remains for our consideration. However, Plaintiffs-Appellants have not explained in their moving papers or at oral argument what extraordinary circumstances prevented their timely introduction of such evidence as *their own* declarations in this case. Moreover, there seems to be nothing extraordinary about Plaintiffs-Appellants' situation. Plaintiffs-Appellants were well aware that the width of the Corridor was at issue at summary judgment, and that it was their burden to introduce evidence supporting their claim that the width was no greater than 12 feet. Plaintiffs-Appellants believed the Morel and Rall Declarations were sufficient, and declined to obtain the additional evidence that was available to them. We see no reason why now they should be freed from the consequences of that strategic decision. Plaintiffs-Appellants' motion to supplement the record is denied.

CONCLUSION

For the foregoing reasons, we affirm the district court's denial of summary judgment to Plaintiffs-

Appellants, dismissal of the AC, and grant of summary judgment and quiet title to King County. We also deny Plaintiffs-Appellants' motion to supplement the record.

AFFIRMED.

APPENDIX B — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 3, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35768
D.C. No. 2:14-cv-00784-JCC

SCOTT KASEBURG; KATHRYN KASEBURG; MARTIN FEDIGAN; BARBARA BERGSTROM; KIM KAISER; PAMELA KAISER; DAVID KOMENDAT; KELLI KOMENDAT; WILLIAM BLOKKER; SUSAN BLOKKER; DAVID MCCRAY; SALLY MCCRAY; JOHN LORGE III; NANCY LORGE; JOHN HOWELL; MOLLY HOWELL; DARIUS RICHARDS; VICKI RICHARDS; GEORGE JOHNSTON; NANCY JOHNSTON; GREGORY PIANTANIDA; SHERRE PIANTANIDA; PAUL FERGEN; CHRISTINE FREGEN; KEVIN IDEN; TOM EASTON; KAREN EASTON; PAUL PASQUIER; KARYN PASQUIER; JOHN HOUTZ; TERENCE BLOCK; KARI BLOCK; LARRY KOLESAR; SUSAN KOLESAR; JOHN LAUGHLIN; REBECCA LAUGHLIN; JEFFREY RILEY; TAMI RILEY; NANCY MANZ; DONALD DANA; PATRICIA DANA; CHRISTIE MUELLER; DENISE HARRIS; WALTER MOORE; TOM DAHLBY; KATHY DAHLBY; HARRY DURSCH; KIRSTEN LEMKE; RICHARD VAUGHN; RICHARD S. HOWELL; LOIS HOWELL; DONALD LOCKNER; PATRICIA LOCKNER; MARJORIE GRUNDHAUS; WILLIAM KEPPLER; DEBRA KEPPLER; CURTIS DICKERSON; JULIE DICKERSON; GREGORY

LASEK; PATRICIA LASEK; YONGTAO CHEN; QIN LI; ROBERT TAYLOR; ALISON TAYLOR; EDMUND JONES; DONALD MILLER; SUSAN MINER; RONALD JONES; CAROL JONES; STEVE SMOLINSKE; SHERRI SMOLINSKE; JOSEPH IOPPOLO; RICHARD KANER; LYNN KANER; BRADLEY R. ELFERS; BREGORY P. ELFERS; PAUL REMINGTON; JOHN BURROUGHS; BRUCE ERIKSON; MARY ERIKSON; TIMOTHY RILEY; VIRGINIA RILEY; JAMES SATHER; KELLY SATHER; JULIAN LIMITED PARTNERSHIP; STEVEN BRACE; KRISTEN BRACE; CHARLES BILLOW; COURTNI BILLOW; HAROLD A. BRUCE; PIERRE THIRY; CRISTI THIRY; MICHAEL FRANCESHINA; MICHAEL OLDHAM; GINA OLDHAM; STEPHEN PORTER; NANCY PORTER; ROBERT LARIS; JANIS LARIS; MICHAEL RUSSELL; ELANA RUSSELL; UMA SHENOY; LARRY PETERSON; SUSAN PETERSON; JOSEPH PETERSON; KRISTIN PETERSON; JOHN PATRICK HEILY; SUNDAY KYRKOS; PAUL GIBBONS; TRACY GIBBONS; DAYTON DENNISON; MARILYNN DENNISON; GREGORY NICK; DIVERSITY ASSETS LLC; JAMES JOHNSON; DAVID WILLIAMSON; KRISTI SUNDERLAND; CLAUDIA MANSFIELD; KEVIN LINDAHL; REBECCA LINDAHL; KEVIN TRAN; JEANNE DEMUND; KATHY HAGGART; DAWN LAWSON; MARLENE WINTER; JIE AO; XIN ZHOU; PACIFIC HOLDINGS LLC; JAMES TASCA; MICHAEL CHAN; AMANDA CHAN; GARY WEIL; DALE MITCHELL; MARLA MITCHELL; FREDERICK MILLER; SUSAN MILLER; PAMELA HUNT;

Appendix B

GRETCHEN CHAMBERS; ALWYN EUGENE GEISER; DANIEL HAGGART; PAMELA SCHAFER,

Plaintiffs-Appellants,

v.

PORT OF SEATTLE, a municipal corporation; PUGET SOUND ENERGY INC; COUNTY OF KING, a home rule charter county; CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Washington. JCC. John C. Coughenour, District Judge, Presiding.

June 14, 2018, Argued and Submitted, Seattle, Washington; August 3, 2018, Filed

MEMORANDUM[*]

Before: M. SMITH and WATFORD, Circuit Judges, and RAYES,[**] District Judge.

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

Appendix B

Plaintiffs-Appellants appeal the district court's grant of summary judgment to Defendants-Appellees and order quieting title in King County. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

As the facts and procedural history are familiar to the parties, we do not recite them here.

1. We have jurisdiction over this appeal. Plaintiffs-Appellants argue that their "claims to rights in the property undeniably arise out of state law, and since no defense raised by any of the [Defendants-Appellees] is a proper basis for subject matter jurisdiction, there is no federal question subject matter jurisdiction in this case." However, for the reasons outlined in greater depth in our opinion issued contemporaneously, *see Hornish v. King County*, No. 16-35486, we reject this contention. Our jurisdiction is proper because Plaintiffs-Appellants' state-law claims "'necessarily raise[] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance' of federal and state power." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1570, 194 L. Ed. 2d 671 (2016) (quoting *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314, 125 S. Ct. 2363, 162 L. Ed. 2d 257 (2005)).

2. Plaintiffs-Appellants lack both Article III and statutory standing to bring their quiet title claim, pursuant to Revised Code of Washington section 7.28.010, and declaratory judgment claim, pursuant to Revised Code of Washington section 7.24.020. Plaintiffs-Appellants lack property interests in the portions of the Eastside Rail

Corridor that are adjacent to their properties because the Kittinger and Lake Washington Land Company October 8, 1903 deeds apply to the disputed parcels and conveyed rights of way in fee simple, and the state of Washington holds the reversionary interest to the property acquired through the condemnation of certain submerged shorelands on February 8, 1904. The centerline presumption does not apply because Plaintiffs-Appellants failed to introduce chains of title and "[a] property owner receives no interest in a railroad right of way simply through ownership of abutting land." *Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 567, 716 P.2d 855, 862 (Wash. 1986); *see also Sammamish Homeowners v. County of King*, No. C15-284 MJP, 2015 U.S. Dist. LEXIS 73247 , 2015 WL 3561533, at *3 (W.D. Wash. June 5, 2015) (dismissing case for lack of standing because plaintiffs failed to introduce chains of title, and rejecting plaintiffs' invocation of *Kershaw*, as it "involve[d] a clear generation-to-generation chain of title (the kind of 'proof of chain of title' that *Roeder* requires)").

3. The district court properly granted summary judgment to and quieted title in King County. Plaintiffs-Appellants argue that

> [r]ailbanking does not preserve the railroad purposes easement for current railroad uses, and King County and the other Defendants do not currently hold or own BNSF's railroad purposes easement. King County only possesses a railbanked/hiking and biking trail easement and cannot use the corridor as if the railroad purposes easement currently exists, including any purported incidental uses.

We disagree. Again for the reasons we have outlined in greater depth in our opinion issued contemporaneously, *see Hornish v. King County*, No. 16-35486, we hold that the Trails Act prevented abandonment of the railroad easement in the event of trail use—a use outside of those necessary for railroad purposes—and thereby preserved the original railroad easement. This in effect also created a new easement for a new use—for recreational trail use. Thus, Defendants-Appellees now have two easements: (1) the easement for railroad purposes, which they never abandoned (because of the Trails Act) and therefore retain and (2) the new easement for recreational trail purposes. *See, e.g., Trevarton v. South Dakota*, 817 F.3d 1081, 1087 (8th Cir. 2016); *Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (en banc). Defendants-Appellees therefore *can* "use the corridor as if the railroad purposes easement currently exists," including for any incidental uses allowed under Washington law,[1] because that easement *does* exist. *See Washington Sec. & Inv. Corp. v. Horse Heaven Heights, Inc.*, 132 Wn. App. 188, 130 P.3d 880, 886 (Wash. Ct. App. 2006); *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, 121 Wn.

1. The parties disputed below whether the running of an electric-powered passenger railroad and granting of utility easements were incidental uses permitted by Washington law. The district court held that they were. On appeal, Plaintiffs-Appellants have not disputed this holding, and so we do not consider the issue. We "review only issues which are argued specifically and distinctly in a party's opening brief." *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994); *see also Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1164 n.4 (9th Cir. 2014) (holding that where an issue is mentioned without legal argument, the issue is neither specifically nor distinctly argued and thus not subject to review).

App. 714, 91 P.3d 104, 115 (Wash. Ct. App. 2004), *aff'd in part, rev'd in part on other grounds*, 156 Wn.2d 253, 126 P.3d 16 (Wash. 2006).

4. Finally, we hold that the district court did not abuse its discretion in sanctioning Plaintiffs-Appellants. Federal Rule of Civil Procedure 37 afforded the district court discretion to "issue further just orders," including orders prohibiting the introduction of designated matters in evidence. Fed. R. Civ. P. 37(b)(2)(A). The district court exercised this discretion appropriately, after considering "whether the claimed noncompliance involved willfulness, fault, or bad faith, and also to consider the availability of lesser sanctions." *R & R Sails, Inc. v. Ins. Co. of Penn.*, 673 F.3d 1240, 1247 (9th Cir. 2012) (citations omitted). The court had already employed a lesser sanction for Plaintiffs-Appellants' noncompliance—granting Defendants-Appellees' motion to compel—which failed to effect production of the chains of title. The district court noted that this was "the second time Plaintiffs ha[d] relied on evidence that they failed to disclose to King County upon its request." Indeed, as of the adjudication of the Defendants-Appellees' motion for summary judgment, there were no lesser sanctions available. The sanction imposed *was* a lesser sanction; Defendants-Appellees were seeking entry of summary judgment in King County's favor. And the district court properly determined that the sanction was justified because Plaintiffs-Appellants' noncompliance was not harmless.

AFFIRMED.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, FILED APRIL 20, 2016

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CASE NO. C15-284-MJP

THOMAS E. HORNISH AND SUZANNE J. HORNISH JOINT LIVING TRUST, *et al.*,

Plaintiffs,

v.

KING COUNTY,

Defendant.

April 20, 2016, Decided
April 20, 2016, Filed

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The above-entitled Court, having received and reviewed:

1. Defendant King County's Motion for Summary Judgment (Dkt. No. 46), Plaintiffs' Response (Dkt. No. 54), and Defendant's Reply (Dkt. No. 56);

2. Plaintiffs' Motion for Summary Judgment (Dkt. No. 55), Defendant's Response (Dkt. No. 61), and Plaintiffs' Reply (Dkt. No. 62);

all attached exhibits and declarations, and relevant portions of the record, and having heard oral argument, rules as follows:

IT IS ORDERED that Plaintiffs' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that Defendant's motion for summary judgment is GRANTED; Plaintiff's claims are ordered DISMISSED with prejudice.

BACKGROUND

At issue in this lawsuit is a strip of land formerly utilized as a railroad corridor in King County, Washington ("the Corridor"). The Corridor was created in the late 1800s by the Seattle, Lake Shore & Eastern Railway Company (the "SLS&E") through a combination of federal land grants, homesteader deeds and adverse possession, resulting in a strip of property comprised of both easements and fees simple. *See Beres v. United States*, 104 Fed. Cl. 408, 412 (2012).

The Hornish property is adjacent to land acquired by SLS&E through a quit claim deed in 1887 ("the Hilchkanum Deed"). (Decl. of Nunnenkamp, Ex. E.) When Hilchkanum sold the remainder of his property, he excluded the Corridor from the property description.

(*Id.*, Ex. F.) There are no original deeds for the portions of the Corridor adjacent to the remaining Plaintiffs. The property surrounding the Corridor in these areas was owned by the Northern Pacific Railroad by means of an 1864 land grant. (*Id.*, Ex. G.) In 1889, Northern Pacific conveyed the land surrounding the Corridor to Mr. Middleton (without mentioning the Corridor; *id.* at Ex. H); Defendant claims that tax assessment rolls from 1895, however, exclude the 100 foot Corridor from Middleton's property. In the 1909 Pierce County probate action following Middleton's death, the Corridor was expressly excluded. (Decl. of Hackett, Ex. C. at 4, 8.)

SLS&E eventually became part of Burlington Northern & Santa Fe ("BNSF"). In 1997, BNSF conveyed its interest in the Corridor to The Land Conservancy ("TLC") via quit claim deed. (Decl. of Nunnenkamp, Ex. I.) Later that year, TLC petitioned the Surface Transportation Board ("STB") to abandon the use of the Corridor for rail service and King County declared its intention to assume financial responsibility for the area as an "interim trail sponsor," a process created by the Trails Act known as "railbanking." *See* 16 U.S.C. § 1247(d).

On September 16, 1998, STB issued a Notice of Interim Trail Use ("NITU"). *The Land Conservancy of Seattle and King County — Abandonment Exemption — in King County, WA*, No. AB-6 (SUB 380X), 1998 STB LEXIS 519, 1998 WL 638432, at *1 (Sept. 16, 1998). As part of TLC's arrangement with the County to take over as trail sponsor, the County was granted all TLC's ownership interest in the Corridor, which was memorialized by a Quitclaim

Deed recorded in King County. (Decl. of Nunnenkamp, Ex. J.) The County then constructed a soft surface public trail and is in the process of constructing a paved trail the length of the Corridor. (Mtn., at 4.)

DISCUSSION

Hornish Plaintiffs' property

The County presents federal and state authority supporting its position that it owns a fee interest in this part of the Corridor. In *King County v. Rasmussen*, 299 F.3d 1077, 1087 (9th Cir. 2002), the Ninth Circuit Court of Appeals found that "Hilchkanum intended to convey a fee simple interest in the strip of land described;" the "strip of land" being a 100-foot corridor granted to SLS&E (which interest was later conveyed to the County). Two years later, the state court reached a similar conclusion (citing the reasoning in *Rasmussen* with approval) in *Ray v. King County*, 120 Wn.App. 564, 589, 86 P.3d 183 (2004).

Plaintiffs cite two cases as well. First, *Brown v. State*, 130 Wn.2d 430, 924 P.2d 908 (1996), which laid out a series of factors to be considered when determining whether an easement or fee was intended to be conveyed in a railroad right of way. Second, *Kershaw Sunnyside Ranches, Inc. v. Interurban Lines*, 156 Wn.2d 253, 126 P.3d 16 (2006) which held that "whether by quitclaim or warranty deed, language establishing that a conveyance is for right of way or railroad purposes presumptively conveys an easement..." *Id.* at 269.

The Court remains unpersuaded that Plaintiffs' authority stands for the proposition they assert (that the Hilchkanum Deed conveyed an easement). First of all, the Washington Supreme Court in *Kershaw* qualified their holding as follows: "[W]hen the granting document uses the term 'right of way' as a limitation or to define the purpose of the grant, it operates to 'clearly and expressly limit[] or qualify[y] the interest conveyed.'" *Id.* at 265 (citation omitted). The Hilchkanum Deed does not use the phrase "right of way" to describe or limit the purpose of the grant, an impression which is bolstered by the habendum language in the conveyance indicating that SLS&E is "[t]o have and to hold the said premises with the appurtenances unto the said party of the second part and its successors and assigns forever." (Decl. of Nunnenkamp, Ex. E at 2.) There are no conditions of use imposed on the grant. Had the Hilchkanums intended to limit the purpose of the grant, presumably they would not have assigned it unconditionally and forever to their grantee.

Second of all, even if the Court were to follow *Kershaw* to the point of entertaining the presumption that an easement was conveyed, the courts in *Rasmussen* and *Ray* went through the same analysis of the *Brown* factors that the Washington Supreme Court did in *Kershaw* and concluded that the grant intended to convey an interest in fee simple; i.e., the presumption was successfully rebutted. Plaintiffs have given us no reason to overturn that ruling. Indeed, neither *Rasmussen* nor *Ray* were overturned in the wake of *Kershaw*, and *Rasmussen* remains controlling precedent for this district.

Appendix C

Mention must be made (as both sides do) of *Beres v. United States*, 104 Fed. Cl. 408 (Fed.Cl. 2012), in which the Federal Claims Court examined the Hilchkanum Deed in the light of *Kershaw* and came to the exact opposite conclusion as the Ninth Circuit in *Rasmussen*; i.e., that the Deed conveyed an easement, not a fee interest. *Id.* at 430-31. The Federal Claims Court conducted an exhaustive analysis of the Deed and the case law concerning the proper interpretation of such conveyances. In the final analysis, the most that can be said is that reasonable jurists disagreed: the Ninth Circuit arrived at one conclusion and the Federal Claims Court arrived at another. This Court is bound by Ninth Circuit ruling, and on that basis finds that the County owns the portion of the Corridor abutting the Hornish Plaintiffs' property in fee simple. The County's summary judgment motion in that regard is GRANTED.

The remaining Plaintiffs

Nature of the railroad easements and the Trails Act

The County seeks the authority to exercise *all* the rights in the Corridor that the railroads had. Plaintiffs interpose two interrelated arguments that they should not be allowed to do so.

Plaintiffs' first argument is that the Trails Act preserves the right of the railroad to reactivate its easement *for future purposes only*; another way Plaintiffs phrase this is by arguing that railbanking is not a "current railroad purpose" and that railbanking extinguishes

the railroad easement. This is relevant to the County's argument that it has the power to exercise all the rights the railroad had under its railroad easement.

The weight of authority favors Defendant's position that railbanking does not extinguish, suspend or otherwise operate as an abandonment of the railroad easement. The Supreme Court has held that "interim use of a railroad right-of-way for trail use, when the route itself maintains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes." *Presault v. Interstate Commerce Commission*, 494 U.S. 1, 8-9, 110 S. Ct. 914, 108 L. Ed. 2d 1 (1990) (quoting *H.R. Rep. No. 98-28* at 8-9 (1983)).

Nor does the language of the Trails Act lend itself to Plaintiffs' interpretation.

> [I]n furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service... in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter... *such interim use shall not be treated, for the purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.*

16 U.S.C. § 1247(d)(emphasis supplied). As U.S. District Judge Coughenour of this district has pointed out in a similar case, (1) "preserve" means ""[t]o keep in its

original or existing state: ... to maintain or keep alive" (Oxford English Dictionary, 3d ed.) and (2) the statute says "preserve... *for* future reactivation," not "preserve *upon* future reactivation." *Kaseburg v. Port of Seattle*, 2015 U.S. Dist. LEXIS 97573, 2015 WL 4508790 at *3-4 (W.D. Wash. July 24, 2015).

For their second argument on this point, Plaintiffs cite to a 1986 Washington case which held that the change in use (from rails to trails) of a railroad right-of-way constituted abandonment of the railroad easement. *Lawson v. State of Washington*, 107 Wn.2d 444, 452, 730 P.2d 1308 (1986). But *Lawson* is not a case involving the federal Trails Act and thus that court was not guided (or constrained) by the language in the Trails Act indicating exactly the opposite. Plaintiffs also quote the language of the Federal Circuit court in a later *Preseault* case (*Preseault v. United States*, 100 F.3d 1525, 1554 (1996); "*Preseault II*") that railbanking is not a "current railroad purpose" and in fact constitutes abandonment of such purpose. What Plaintiffs fail to point out is that the language is from a *concurring* opinion and has no precedential power.

The County takes its "no abandonment, no extinguishment" argument one step further and maintains that, by virtue of its quitclaim deeds from BNSF, it acquired *all* of BNSF's property interests in the Corridor. Decl. of Nunnenkamp, Ex's I and J. Judge Coughenour's *Kaseburg* order sides with the County on this issue, finding that "the Trails Act preserves railroad easements and [] a trail sponsor may own and exercise the rights inherent to the railroad easement." *2015 U.S.*

Dist. LEXIS 97573, 2015 WL 4508790 at *4. The *Kaseburg* court found support for this holding in *State v. Preseault* (163 Vt. 38, 42, 652 A.2d 1001 (1994))("The fact that the defendants' excavation activities do not present a threat to the bicycle and pedestrian path is irrelevant because these activities impinge on the original railroad easement.") and a Federal Claims case which held that "a trail sponsor must have the same control over the entire right-of-way corridor that would be held by a railroad..." *Illig v. United States*, 58 Fed. Cl. 619, 631 (2003).

Secondarily, the County cites the "incidental use" doctrine, which "states that a railroad may use its easement to conduct not only railroad-related activities, but also any other incidental activities that are not inconsistent and do not interfere with the operation of the railroad." *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Assoc.*, 121 Wn.App. 714, 731, 91 P.3d 104 (2004), *reversed on other grounds*, 156 Wn.2d 253, 274, 126 P.3d 16 (2006)(citation omitted). Railroads are public highways under Washington law and, "[i]n Washington, the owners of public highway easements retain exclusive control over uses incidental to their easements." *Kaseburg*, 2015 U.S. Dist. LEXIS 144529, 2015 WL 6449305 at *8 (W.D. Wash., Oct. 23, 2015)(citation omitted).

As part of its claimed right to "incidental uses," the County seeks confirmation of its subsurface and aerial rights pursuant to its interest in the Corridor. It claims these as coextensive with the "railroad easement" rights it asserts were acquired in the quitclaim deed from TLC. There is evidence in *Kaseburg* that "BNSF regraded parts

of the corridor, built trestles over water, dug culverts, and built signaling equipment overhead ([C14-0784JCC] Dkt. No. 126 at 2-5.)" 2015 U.S. Dist. LEXIS 144529, [WL] at *7. The Court takes judicial notice of those "incidental uses" exercised under the railroad's easement powers prior to conveying the Corridor, and adopts the finding in *Kaseburg*:

> Because the scope of trail easements under the Trails Act is coextensive with railroad easements, *Illig*, 58 Fed.Cl. At (*sic*) 63, the Court now holds that the Corridor Easements provide exclusive subsurface, surface, and aerial rights in the corridor for railroad and trail purposes."

Id.

It is the finding of this Court that the railroad easement survives, that the County's rights are coextensive with the railroad's and that it "is entitled to the exclusive use and possession of the area on, above, and below the surface of the Corridor for railroad purposes and incidental uses permitted by Washington law, including use as a recreational trail." (Mtn., at 1.)

The Court finds further support for this ruling in the language of the Trails Act itself: "[I]n furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service..." (16 U.S.C. § 1247(d).) The County would be unable to "preserve establish railroad rights-of-way for future reactivation

of rail service" if it could not employ and protect the full range of rights which the railroad possessed in the Corridor (and which it may yet possess again). Summary judgment will be granted in favor of the County on this issue.

Width of the Corridor

Preliminarily, the Court disposes of the undisputed matters concerning this particular issue:

1. Although the County seeks a declaration that the Corridor is 100 feet wide, it acknowledges that BNSF entered into "prior property transactions" (specifically, with the Morels, Menezes and Vanderwendes Plaintiffs) which decrease the size of the Corridor in certain parcels (50 feet adjacent to the Morels, 75 feet adjacent to the Menezes and Vanderwendes; *see* Decl. of Nunnenkamp, ¶¶ 21, 23-24).

2. There are no original deeds delineating the nature of the property interest originally acquired by SLS&E/BNSF and conveyed to TLC and the County. This means that the property rights which the County seeks to establish must be analyzed as those emerging from an easement by prescription (as opposed to an easement arising from claim of title).

There is a marked distinction between the extent of an easement acquired under a claim of

> right and the scope of one acquired under color of title. When one seeks to acquire an easement by prescription under a claim of right, user and possession govern the extent of the easement acquired. It is established only to the extent necessary to accomplish the purpose for which the easement is claimed. *Northwest Cities Gas Co. v. Western Fuel Co.*, 17 Wn.2d 482, 135 P.2d 867 (1943).
>
> On the other hand, however, where one's occupancy or adverse use is under color of title that is a matter of public record, possession or user of a portion is regarded as coextensive with the entire tract described in the instrument under which possession is claimed. *Omaha & Republican Valley R. v. Rickards*, 38 Neb. 847, 57 N.W. 739 (1894).

Yakima Valley Canal Co. v. Walker, 76 Wn.2d 90, 94, 455 P.2d 372 (1969)

In keeping with the finding that the County possesses an interest and property rights coextensive with the railroad easement, Defendant's rights pursuant to a prescriptive easement would be those necessary for the operation of a railroad, and the boundaries of the Corridor would be the amount of property (up to 100 feet) required to accomplish that. The County presents ample evidence that railroad operations require boundaries that extend further than simply the width of the railroad tracks (Def Mtn at 20-22), including declarations from railroad personnel that a 100 foot wide corridor is required

- As a "safety buffer to ensure minimum setbacks between freight trains and residential development, to prevent nearby construction and development activities that could undermine the stability of the steep slopes above and below the tracks, and to provide access for maintenance activities, such as tie replacement, that require significant clearance on one or both sides of the track." (Decl. of Nuorala, ¶ 8, Decl. of Hackett, Ex. J.)

- To provide space between each of the rails, side clearance, drainage of the slope, a drainage ditch, and access for maintenance and emergencies (such as derailments). (Decl. of Sullivan, ¶¶ 4-5, 8-9.)

The only Plaintiffs who bring forward any evidence that the 100 foot Corridor does not represent the extent necessary for railroad operations are the Morels, who present proof that at one point the house which originally stood on their property (from 1920-2000) was within the right of way now claimed by the County, as well as walkways and trees planted well within the Corridor. (Decl. of Morel, Ex. B.)

The Morel evidence does not suffice to create a disputed issue of material fact. First, the "extent of the right is fixed and determined by the user in which it originated" (*NW Cities Gas Co. v. Western Fuel Co.*, 17 Wn.2d 482 486, 135 P.2d 867 (1943)(citation omitted)), in this case by the SLS&E in the 1890s. The Morels do not hold themselves out to be experts in railroad operations, do not rebut what Defendant's railroad experts say about the extent necessary for operations and do not create

a disputed issue of material fact. Furthermore, the County has conceded that the Corridor narrows to 50 feet abutting the Morels' property line (a transaction in which the quitclaim deed acknowledged that the Morels were purchasing "a portion of BNSF's 100.0 foot wide Snoqualmie Line right of way;" Quitclaim Deed, Decl. of Nunnenkamp, Ex. O) and the Morels' current house is outside that 50 foot strip.

None of the other Plaintiffs provide similar evidence of encroachments upon the Corridor, but even had they done so the above analysis would apply. Plaintiffs' inability to provide any expert testimony rebutting Defendant's evidence of the necessity of a 100 foot wide corridor for railroad operations entitles the County to summary judgment on this issue.

RCW 7.28.070

BNSF executed a quitclaim deed to TLC in 1997 that included a complete description of the 100 foot-wide Corridor (with the exceptions noted above). (Decl. of Nunnenkamp, Ex. I.) The following year, TLC conveyed that same property (with the identical legal description) to King County. (*Id.*, Ex. J.) Both deeds were recorded. Since assuming title to the property, the County has paid all fees and taxes on the Corridor, including fees for surface water management, noxious weed control, and conservation futures. Decl. of Sweany, ¶ 3.[1] RCW 7.28.070 provides:

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1. The Morels claim to have paid taxes on the Corridor. (*See* Pltf Response, Ex. B., Dkt. No. 54-2 at 4-5, 10.) Their claims about

Appendix C

> Every person in actual, open and notorious possession of lands or tenements under claim and color or title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title.

In addition to holding the Corridor "under claim or color of title" since the 1998 quitclaim deed and paying taxes on the property since that time, the County has been in "open and notorious" possession of the Corridor by recording the deed, appearing as trail sponsor in public proceedings before the STB, removing the old railroad tracks, installing a soft-surface trail and requiring adjacent landowners to apply for permits for crossings or other encroachments on the Corridor. (Decl. of Nunnenkamp, ¶¶ 2-11, 18.)

The Washington Supreme Court has held that color of title exists when a deed "sufficiently describes the property

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their 1971 taxes (which actually appear to include portions of the Corridor) are irrelevant as they predate the County's acquisition of the property in 1998. Their assertions regarding their "Current Property Taxes" (p. 10) appear to indicate that, although they did not pay taxes based on a property line that includes the Corridor, their property's assessed value was based in part on improvements which encroach upon the Corridor. This is not the same thing as paying taxes on the Corridor and does not refute the County's claim to have done so since the 1998 conveyance.

in question and purports to convey it to the [movants]." *Scramlin v. Warner*, 69 Wn.2d 6, 8, 416 P.2d 699 (1966). By recording the deed, the titleholder "dispenses with the need for other proof of a hostile or adverse claim... color of title itself establishes those elements." *Fies v. Storey*, 21 Wn.App. 413, 422, 585 P.2d 190 (1978). Finally,

> [W]here one's occupancy or adverse use[] is under color of title that is a matter of public record possession or use[] of a portion is regarded as coextensive with the entire tract described win the instrument under which possession is claimed.

Yakima Valley Canal Co. v. Walker, 76 Wn.2d 90, 94, 455 P.2d 372 (1969).

Plaintiffs make no substantive response to this argument, interposing instead an argument that they had "inadequate notice" (under FRCP 8(a)) that Defendant intended to assert claims that the Corridor was 100 feet wide or that the County claimed title by virtue of adverse possession. It is not a persuasive argument. Defendant's counterclaims included allegations that "Plaintiffs... have interfered with King County's property rights in the ELSRC by erecting and maintaining various unauthorized improvements that impede King County's access to its property, its exclusive control, and prevent public enjoyment" (Answer, Dkt. No. 32, Counterclaim ¶ 3) and that "[u]nder RCW 7.28, title to any disputed portions of the corridor should be quieted in King County." (*Id.* at ¶ 4.) The Court finds it difficult to believe that, in a dispute

about property lines, a party was not on notice that the actual size of the property was going to be an issue.

Plaintiffs also claim that "King County's request for summary judgment on the width issue... attempts to circumvent this Court's prior order remanding the issue to the Washington State court." (Pltf Response at 12.) Again, this fails to persuade. First, this Court did not remand "the width issue" to the Washington State court, but remanded the *Neighbors v. King County* case (C15-1358MJP) on Plaintiffs' motion. At no time have Plaintiffs moved to have this case stayed or remanded on the basis of that decision and they will not be allowed to cherry-pick an issue while proceeding forward with the remainder of this case. Either this case (and *all* its issues) is properly before this court or it is not. Additionally, the Hornish Plaintiffs are not a party to the *Neighbors* case, so their claims can only be adjudicated in this proceeding.

Standing under the centerline presumption doctrine

This is the resumption of an argument the Court addressed in June 2015. (Dkt. No. 19, Order re: Motion to Dismiss for Lack of Standing.) *Roeder County v. Burlington Northern*, 105 Wn.2d 567, 716 P.2d 855 (1986) is the Washington case which established the "centerline presumption" doctrine:

> Generally then, the conveyance of land which is bounded by a railroad right of way will give the grantee title to the center line of the right of way if the grantor owns so far, unless the

> grantor has expressly reserved the fee to the right of way, or the grantor's intention to not convey the fee is clear.

Id. at 576. However, the Washington Supreme Court set two restrictions on the presumption. The first restriction states:

> When, however, a deed refers to the right of way as a boundary but also gives a metes and bounds description of the abutting property, the presumption of abutting landowners taking to the center of the right of way is rebutted. A metes and bounds description in a deed to property that abuts a right of way is evidence of the grantor's intent to withhold any interest in the abutting right of way, and such a description rebuts the presumption that the grantee takes title to the center of the right of way.

Id. at 577. The Court's previous ruling (that Plaintiffs' deeds contained metes and bounds descriptions that used the railroad right of way as a boundary) is the law of the case.

The second restriction concerns chain of title:

> The presumption that the grantor intended to convey title to the center of the right of way is inapplicable where the adjoining landowner presents no evidence of having received his or her property from the owner of the right of

> way. A property owner receives no interest in a railroad right of way simply through ownership of abutting land.

Id. at 578. Plaintiffs also claim they have established chain of title back to the original grantor. First, their failure to establish the first prong of the centerline presumption test renders their proof in this regard moot. Second, they do not succeed in establishing the chain of title --Defendant presents evidence that in the probate of the original grantor (Middleton), the Corridor was specifically excluded. (Decl. of Hackett, Ex. C at 4, 8.) It is, at the very least, a disputed issue of material fact but (as mentioned) the Court is not convinced that proof one way or the other would be determinative of the issue.

In rebuttal, Plaintiffs file a declaration from an "expert witness," a civil engineer with purported expertise in "identifying source deeds that Railroads used in acquiring specific property and determining what rights were conveyed to the Railroad." (Decl. of Rall, Dkt. No. 54-4, ¶ 1.) The expert makes no mention of having examined the Middleton probate document which excludes the Corridor. More critically, Plaintiffs offer no authority supporting their right to offer expert testimony on the legal interpretation of a deed. On the contrary, "expert testimony [regarding] the interpretation of a contract [is] an ultimate question of law upon which the opinion of an expert may not be given." *PMI Mortgage Ins. Co. v. Amer. Int'l Specialty Lines Ins. Co.*, 291 Fed.Appx. 40, 41 (9th Cir. 2008). The Court has not considered the expert's opinion in reaching its conclusion on this issue.

Ultimately, the Court finds the issue of the centerline presumption to be non-determinative of the issues presented by this case. In the first place, it is only a presumption and a ruling one way or the other would not foreclose the losing party from presenting evidence to rebut the presumption. Secondly (and more to the point), the Court's rulings on the other issues presented establish the parties' respective rights to a degree which renders the centerline presumption doctrine inapplicable.

CONCLUSION

The Court GRANTS summary judgment to King County on the following issues:

1. "Railbanking" under the Trails Act preserved all rights formerly held by the railroad easement owners.

2. King County holds all of BNSF's property rights (besides the trail rights created by the Trails Act); i.e., King County holds a "railroad easement" and a "trails easement."

3. As holders of a "railroad easement," the County has subsurface, surface and aerial rights in the Corridor to extent permitted by Washington law.

4. The County owns the portion of the Corridor adjacent to the Hornish property in fee.

5. Except where narrowed by prior transactions, the County owns a 100 foot-wide easement adjacent to Plaintiffs' property.

6. Even if the County had not acquired the 100 foot Corridor from BNSF, it acquired the same through the operation of RCW 7.28.070.

7. Plaintiffs lack standing under the centerline presumption doctrine to challenge the County's property rights.

The above rulings necessarily operate to DENY Plaintiffs' motion for summary judgment.

From the Court's reading of Plaintiffs' amended complaint, this ruling resolves the issues raised by their litigation. If there are issues remaining to be decided, the parties are invited to bring them to the Court's attention. If not, Defendant is directed to submit a judgment reflecting the outcome of these dispositive motions and terminating the lawsuit.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 20th day of April, 2016.

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE, DATED AUGUST 23, 2016, WITH EXHIBITS A-C

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

CASE NO. C14-0784 JCC

SCOTT KASEBURG, *et al.*,

Plaintiffs,

v.

PORT OF SEATTLE, *et al.*,

Defendants.

August 23, 2016, Decided,
August 23, 2016, Filed

HONORABLE JOHN C. COUGHENOUR, UNITED STATES DISTRICT JUDGE.

ORDER GRANTING SUMMARY JUDGMENT ON ALL REMAINING ISSUES

This matter comes before the Court on Defendant King County's motion for summary judgment on all remaining issues (Dkt. No. 165). Having thoroughly considered the

parties' briefing, oral argument on August 23, 2016, and the relevant record, the Court hereby GRANTS the motion for the reasons explained herein.

I. BACKGROUND

The facts in this case are already well established. Its central concern is the ownership of a railway corridor (the "Corridor") that stretches along the eastern shore of Lake Washington. In the late 1800s and early 1900s, the Northern Pacific Railway Company assembled the Corridor by purchasing private property and condemning shoreland. (Dkt. Nos. 168-2-168-4 and Dkt. No. 167-3.) In 2008, Northern Pacific's successor in interest, the Burlington Northern Santa Fe Railway Company, transferred its property interest in the Corridor to King County. (Dkt. No. 83 at 37-38, 40-41, 45.)

At issue in the instant motion are three of the deeds originally acquired by Northern Pacific: the Kittinger Deed, the Lake Washington Land Company Deed ("LWLC Deed"), and the Lake Washington Belt Line Company Deed ("Belt Line Deed"). Also at issue is the State of Washington Shoreland Condemnation. (Dkt. No. 167-3.) The Court has already held that the Belt Line Deed and the Condemnation granted easements entitling the easement holder to "own and exercise the rights inherent in the railroad easement," (Dkt. No. 107 at 6), that these rights include the "exclusive use, possession, and control of the corridor," (Dkt. No. 138 at 5), and that they also include "incidental uses that are consistent with trail use and the operation of a railroad." (*Id.* at 18.)

Appendix D

In their Third Amended Complaint, Plaintiffs, who own property near the Corridor, stated two causes for relief. First, they asked for an order quieting title in the Corridor against a number of parties, including King County. (Dkt. No. 83 at 48.) Second, they asked for a declaratory judgment that, among other things, "they are the fee owners of the railroad right-of-way at issue." (*Id.* at 50.) King County then counterclaimed to quiet title against Plaintiffs and for a declaratory judgment. (Dkt. No. 18 at 10-14.)

To that end, King County now moves the Court to grant summary judgment against Plaintiffs and find as follows:

1. That King County has a fee simple interest in the property conveyed via the Kittinger Deed and the LWLC Deed.

2. That the State of Washington has a reversionary interest in the Condemnation easement.

3. That King County has an easement in the property conveyed via the Belt Line Deed and the Shoreland Condemnation.

4. That Plaintiffs lack standing to bring a quiet title and declaratory judgment action.

As the Court explains below, it finds for King County on each of these issues, which it will address in turn.

II. DISCUSSION

A. Summary Judgment Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In making such a determination, the Court must view the facts and justifiable inferences to be drawn therefrom in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Once a motion for summary judgment is properly made and supported, the opposing party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting Fed. R. Civ. P. 56(e)). Material facts are those that may affect the outcome of the case, and a dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Anderson*, 477 U.S. at 248-49. Ultimately, summary judgment is appropriate against a party who "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

B. The Kittinger Deed

The Court has already held that the Kittinger Deed was a "bargain and sale" deed, (Dkt. No. 91 at 5-6), which Plaintiffs do not dispute. Bargain and sale deeds "automatically convey[] a fee simple estate," unless there is "additional language in the deed[] [that] clearly and expressly limits or qualifies the interest conveyed." (*Id.*)

Plaintiffs argue that the Kittinger Deed expressly limits the interest conveyed. They point to *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Ass'n*, in which the Washington Supreme Court held that the use of "the words 'right of way' in both the granting clause and the habendum[1] clause" of a bargain and sale deed "presumptively evinces the parties' intent to convey only an easement." 156 Wash. 2d 253, 266, 126 P.3d 16 (2006). Plaintiffs argue that, as in *Kershaw*, "[t]he granting clause in Kittinger is for the railroad's 'right-of-way' and it specifically says that it is for 'such purposes.'" (Dkt. No. 170 at 8.)

The Court agrees with King County that this is a misrepresentation—and a blatant one, at that. In fact, the Court has already explained that while the Kittinger Deed does state that the railroad "wishes to secure for such purposes the *right-of-way* over and across said lands," it does so "*external to the granting clause*." (Dkt.

1. "A dictionary definition of the habendum of a deed is that it is the clause usually following the granting part of the premises of a deed, which defines the extent of the ownership in the thing granted to be held and enjoyed by the grantee." 26A C.J.S. Deeds § 33.

No. 91 at 6.) As the Court elaborated, "the use of the term 'right of way' outside the granting or habendum clauses does not overcome the presumption of fee conveyance when a bargain and sale deed form was employed, and... the term 'right of way' in a description of the property being conveyed does not qualify as a 'clear and express limitation' on the interest." (*Id.* at 7) (citing *Roeder Co. v. K & E Moving & Storage Co., Inc.*, 102 Wash. App. 49, 51, 55, 4 P.3d 839). Because "right of way" is used outside of the granting and habendum clauses in the Kittinger Deed, it "automatically convey[ed] a fee simple estate."

All of this is essentially a refresher on the Court's order denying Plaintiffs' motion for a declaratory judgment (Dkt. No. 91). That motion requested, among other things, that the Court declare that "the Railroad Originally Acquired an Easement for the Railroad Corridor." (Dkt. No. 91 at 4.) In its order, the Court held that entering a declaratory judgment would have been inappropriate at that time. As the Court explained, one of the bases for its holding was that Defendants had "establish[ed] a genuine dispute" as to what sort of property interest the Kittinger Deed conveyed. (*Id.* at 5.)

Plaintiffs argue that the existence of that earlier dispute means that summary judgment is *still* inappropriate. But it was Defendants, not Plaintiffs, who raised that dispute—arguing that in fact the Kittinger Deed conveyed a fee, not an easement. (*Id.*) Now that it is King County moving for summary judgment, Plaintiffs need to "come forward with specific facts showing that there is a genuine issue for trial." They have failed to do so. Instead, in the face

of King County's persuasive argument that the Kittinger Deed is a bargain and sale deed that does not expressly limit the property interest conveyed—and therefore conveys a fee simple—Plaintiffs offer only rehashed legal arguments that the Court has already rejected.

Because Plaintiffs have not raised a single genuine dispute of material fact, the Court holds that the Kittinger Deed conveyed a fee simple to Northern Pacific. In their Complaint, Plaintiffs admit that King County acquired all of BNSF's property interests (which had been Northern Pacific's) in the Corridor. (Dkt. No. 83 at 111, 121.) The Court therefore finds that King County possesses a fee simple interest in the land conveyed by the Kittinger Deed and quiets title on its behalf.

In the Declaration of Robert Nunnenkamp, Property Agent with the King County Division of Parks and Recreation, he groups Plaintiffs into twelve different categories based on a number of factors, including the location of their property, the language of their conveyances, and their behavior during this lawsuit. (Dkt. No. 168-1.)[2] Plaintiffs do not dispute the bases of the Nunnenkamp Declaration, its findings, or its admissibility. In Category 1, Nunnenkamp groups all those Plaintiffs whose property sits alongside land conveyed to King County by the Kittinger Deed. (*Id.* at 7.) Again, Plaintiffs do not dispute the accuracy of this grouping. Because King County holds a fee in the Corridor land adjacent to these Plaintiffs' properties,

2. Nearly all Plaintiffs fall in more than one category.

they have failed to demonstrate any interest in this portion of the Corridor. The Court therefore dismisses the claims of all Plaintiffs in Category 1.

C. The Lake Washington Land Company Deed

King County next argues that it has a fee interest in those portions of the Corridor acquired via the LWLC Deed. The Plaintiffs in *Haggart v. United States*, 108 Fed. Cl. 70 (2012), which involved the vast majority of the Plaintiffs in this case, (Dkt. No. 113 at 8 n.8), stipulated that the LWLC Deed did convey a fee interest. (Dkt. No. 167-4 at 3.) Plaintiffs do not dispute that the LWLC Deed conveyed a fee interest, but they do argue that it is "irrelevant" to this case. (Dkt. No. 170 at 10.)

The Court finds that the LWLC Deed conveyed a fee interest. It is a warranty deed, both because it is captioned as such and because its granting clause states that: "The Grantor the Lake Washington Land Company, a Corporation of the State of Washington, in consideration of the sum of Two Thousand ($2000.00) Dollars, *in hand paid, conveys and warrants* unto the Northern Pacific Railway Company, a Wisconsin Corporation, the following described real estate...." (Dkt. No. 168-4 at 10) (emphasis added). As with bargain and sale deeds, warranty deeds "convey fee simple title unless additional language in the deeds clearly and expressly limits or qualifies the interest conveyed." *Brown v. State*, 130 Wash. 2d 430, 437, 924 P.2d 908 (1996). There is no such limiting language here.

As for the LWLC Deed's relevance, Plaintiffs argue that King County "has made absolutely no attempt to establish" which individual Plaintiffs own properties adjacent to land conveyed by the LWLC Deed. (Dkt. No. 170 at 10.) That is incorrect. Instead, as King County points out in its reply, the Nunnenkamp Declaration explicitly identifies all of the Plaintiffs whose properties are adjacent to the LWLC Deed, and groups them together as Category 2.[3] (Dkt. No. 168-1 at 7.)

Plaintiffs do not specifically dispute any of Nunnenkamp's findings. Rather, they state, without any citations or elaboration, that the Nunnenkamp Declaration "conflicts with the prior title work performed on behalf of the Port and King County," and that the "only evidence before the Court on this subject is the title work and

3. In fact, the LWLC Deed is relevant for an additional reason that King County could not have foreseen when bringing its motion due to Plaintiffs' egregiously improper behavior. As the Court explains below, despite its previous order requiring Plaintiffs to disclose their chains of title, (Dkt. No. 138 at 22), they never did so. (Dkt. No. 171 at 9-10.) Nonetheless, in Plaintiffs' response to King County's motion, they present, for the first time, chains of title for four sets of Plaintiffs, arguing that this evidence demonstrates that these Plaintiffs have a property interest in the Corridor. (*Id.*) But what three of the chains actually demonstrate is that these Plaintiffs' properties (and the properties of *many* of the Plaintiffs in this suit) actually derive from a deed sold by the Lake Washington Land Company *after* it had sold the LWLC Deed to Northern Pacific; in other words, after it no longer had any reversionary interest in the Corridor that it could convey. (*Compare* Dkt. No. 168-4 *with* Dkt. No. 170-3 at 3, 27.) Therefore, the LWLC deed is *highly* relevant to this suit, a fact that Plaintiffs, given their endless obfuscations, may well have realized.

mapping performed on behalf of the Port and King County as set forth in Cindy Straup's Declaration." (Dkt. No. 170 at 10-11 & n.21.) But "[a] summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Moreover, the Straup Declaration, which was submitted over a year ago, did not address the LWLC Deed. (Dkt. No. 113-1.) Straup never even reviewed it. (*Id.* at 3.)

The Court therefore finds that the LWLC Deed conveyed a fee simple interest in the Corridor to Northern Pacific, which has since been transferred to King County. As a result, the Court dismisses the claims of all Plaintiffs whose property is adjacent to the LWLC Deed—i.e., all Plaintiffs in Category 2 of the Nunnenkamp Declaration.

D. The State of Washington Shoreland Condemnation

On October 6, 1903, Northern Pacific initiated a condemnation proceeding in King County Superior Court against a number of defendants. (Dkt. No. 167-1.) The goal—which it achieved—was to extend the Corridor over submerged shorelands along Lake Washington. (*Id.*) In December of that year, a jury resolved the defendants' competing claims to the shorelands, finding that "the State of Washington is the owner of all the shore lands of the second class described in the petition." (Dkt. No. 167-2 at 2.) The State was therefore entitled to compensation for Northern Pacific's condemnation. (*Id.*) The Superior Court entered final judgment and a decree of appropriation on February 8, 1904. (Dkt. No. 167-3.)

Appendix D

A number of Plaintiffs, identified in the Nunnenkamp Declaration as those in Category 3, live alongside land that Northern Pacific obtained via the Condemnation and are attempting to quiet title to the underlying fee. (Dkt. No. 168-1.) King County admits that it only obtained a railroad easement through the Condemnation land, (Dkt. No. 138 at 7-8), but it argues that the Category 3 Plaintiffs cannot quiet title because the reversionary interest in the fee belongs to the State of Washington.

Plaintiffs do not deny that the State owned the shorelands at the time of the condemnation proceedings. (Dkt. No. 170 at 11.) But they argue, again without authority or evidence, that it no longer owns the reversionary interest today. (*Id.*) This is plainly incorrect: the fee owner of property underlying an easement retains a reversionary interest in that property. *See Marvin M. Brandt Revocable Trust v. United States*, 134 S. Ct. 1257, 1265, 188 L. Ed. 2d 272 (2014) ("In other words, if the beneficiary of the easement abandons it, the easement disappears, and the landowner resumes his full and unencumbered interest in the land."). Plaintiffs provide no basis for their implicit argument that because they own property alongside the Condemnation easement, they, not the State, possess the reversionary interest in the underlying fee.

Plaintiffs also argue that because the State of Washington is not a party to this suit, it is irrelevant whether it owns the fee in the condemnation land. But the Category 3 Plaintiffs are attempting to quiet title to land that King County has shown actually belongs

to the State. These Plaintiffs are therefore required to raise some material dispute to this argument in order to preserve their quiet title claims; they must, in other words, provide sufficient evidence for a reasonable jury to find that they are the true owners of the underlying fee. They have not done so—in fact, they haven't provided any evidence at all. Plaintiffs may not quiet title to land that they do not actually own, regardless of whether the true owner is a party to the suit. *See King Cty. v. Squire Inv. Co.*, 59 Wash. App. 888, 899, 801 P.2d 1022 (1990) ("[O]wnership should be determined according to the title [one] holds rather than according to whether other parties fortuitously learned of the litigation and appeared to press their claim.").

The Court therefore dismisses the Category 3 Plaintiffs' claims. In addition, the Court holds that because Northern Pacific acquired railroad easements in the Corridor via the Condemnation and the Belt Line Deed, these interests were ultimately transferred to King County. (Dkt. No. 83 at 37, 45.)

E. Plaintiffs' Standing to Quiet Title

King County also argues that each individual Plaintiff—including those in Categories 1 through 3—lacks standing to quiet title in the Corridor and that their claims should be dismissed for this reason as well.

"[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130,

119 L. Ed. 2d 351 (1992). To satisfy Article III's standing requirements, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). It is Plaintiffs' burden to satisfy this standard. *U.S. v. City and County of San Francisco*, 979 F.2d 169, 171 (9th Cir. 1992).

In Plaintiffs' Third Amended Complaint, they seek to quiet title in the Corridor under RCW 7.28, the quiet title statute, and via declaratory judgment (RCW 7.24). (Dkt. No. 83 at 46-50.) "RCW 7.28.010 requires that a person seeking to quiet title establish a valid subsisting interest in property *and* a right to possession thereof." *Horse Heaven Heights*, 132 Wash. App. at 195 (emphasis added).[4] A party that cannot make this demonstration lacks standing as a real party in interest. *Id.*; *see also Sammamish Homeowners v. Cty. of King*, No. C15-284 MJP, 2015 U.S. Dist. LEXIS 73247, 2015 WL 3561533, at *4 (W.D. Wash. June 5, 2015) ("The Washington statutes concerning quiet title and declaratory judgments (deeds) (RCW 7.28.010, 7.24.020) require a property interest and an injury in fact before suit may be brought under them.").

4. A "valid subsisting interest" means "legal title to the real estate." *White v. McSorley*, 47 Wash. 18, 20, 91 P. 243 (1907).

Appendix D

King County argues that all Plaintiffs lack standing because they have failed to establish a property interest in the Corridor or a right to possession thereof.[5]

1. Valid Subsisting Interest

As the party moving to quiet title, the burden is on Plaintiffs to demonstrate that they have a "valid subsisting interest" in the Corridor. *Horse Heaven Heights*, 132 Wash. App. at 195. Relying on the Nunnenkamp Declaration, King County argues that none of Plaintiffs' deeds explicitly conveys a property interest in the Corridor. (Dkt. No. 168 at 21.) Plaintiffs do not dispute this point. Therefore, because their deeds do not grant them a fee interest in the Corridor, Plaintiffs must rely on the centerline presumption. The Court has previously explained that under the centerline presumption:

> [T]he conveyance of land which is bounded by a railroad right of way will give the grantee title to the center line of the right of way if the

5. Standing is judged separately for counterclaimants in a quiet title action. *See Washington Sec. & Inv. Corp. v. Horse Heaven Heights*, Inc., 132 Wash. App. 188, 195, 130 P.3d 880 (2006) ("[B]ecause this case comes to this court upon cross motions for summary judgment quieting title, both WSIC and the Rankins had the burden of proving ownership of the land in question and standing as a real party in interest."). As the Court explained above, King County has demonstrated an interest in the Corridor and a right to possession thereof. Thus, regardless of whether Plaintiffs have standing for their claims, the Court retains jurisdiction over King County's counterclaims for declaratory judgment and quiet title. *Id.* at 195-96.

> grantor owns so far, unless the grantor has expressly reserved the fee to the right of way, or the grantor's intention to not convey the fee is clear.

(Dkt. No. 138 at 22 n.8) (internal quotation marks removed). To be entitled to the centerline presumption, Plaintiffs must first establish that their property adjoins the right of way and that they acquired it "from the fee owner of the right of way property." *Roeder Co. v. Burlington N., Inc.*, 105 Wash. 2d 567, 578, 716 P.2d 855 (1986). If they are able to do so, the presumption applies unless it is rebutted through presentation of "persuasive evidence of the grantor's intent to retain the right of way." *Id.*

The Court previously held that "the centerline presumption requires that all Plaintiffs prove their chain of title back to the original grantor." (Dkt. No. 138 at 22.) Nonetheless, Plaintiffs make several arguments as to why they should not be required to produce their chains of title. Yet they also provide, for the very first time, chains of title for four sets of Plaintiffs (out of the eighty-five total Plaintiffs). The Court will first address Plaintiffs' arguments against the need to produce chains of title; then it will address the chains of title that Plaintiffs actually produced.

a. Plaintiffs' Interpretation of the Centerline Presumption

Plaintiffs first argue that, in applying the centerline presumption, the Court should also apply the so-called "strip and gore doctrine," because "it Definitely Exists in

Washington." (Dkt. No. 170 at 13.) Plaintiffs barely explain this doctrine, although the Court imagines that it does not require the production of chains of title. Plaintiffs do not provide a single Washington case adopting or applying the doctrine. Plaintiffs' counsel already tried this tactic before Judge Pechman, who similarly found that "Plaintiffs do not cite a single Washington case which has adopted the doctrine." *Sammamish Homeowners*, 2015 U.S. Dist. LEXIS 73247, 2015 WL 3561533, at *3. The Court therefore declines to apply the strip and gore doctrine.

Plaintiffs then argue that King County has misconstrued the centerline presumption and misinterpreted *Roeder*. But at every turn it is Plaintiffs who misinterpret—willfully, it would seem—crystal clear precedent. Plaintiffs argue that *Roeder* excludes from the centerline presumption *only* those deeds that "contain BOTH a metes and bounds description and...also refer to the railroad right-of-way as a boundary" in that description. (Dkt. No. 170 at 16.) But *Roeder* actually—and quite limpidly—holds as follows:

> **First:** When a party presents evidence that a grantor owned a right of way and that the party acquired property from the grantor adjoining the right of way, then under the centerline presumption the party's title extends to the center of the right of way. *Roeder*, 105 Wash. 2d at 578.
>
> **Second:** The presumption applies "[w]hen [a] deed refers to the grantor's right of way as a boundary without clearly indicating that the side of the right of way is the boundary." *Id.* 576-77.

> **Third:** The presumption is rebutted when "a deed refers to the right of way as a boundary but also gives a metes and bounds description of the abutting property." *Id.* at 577.
>
> **Fourth:** The presumption may also be rebutted via evidence of the grantor's intent to retain the right of way. *Id.* at 578.

In other words, regardless of whether a party's deeds contain a meets and bounds description, the centerline presumption *will not apply* unless the party *also* demonstrates that it received its property from a grantor that owned the right of way. The *Roeder* court was explicit on this point:

> The presumption that the grantor intended to convey title to the center of the right of way *is inapplicable* where the adjoining landowner presents no evidence of having received his or her property from the owner of the right of way. A property owner receives no interest in a railroad right of way simply through ownership of abutting land.

Id. at 578 (emphasis added). Plaintiffs next argue that *Roeder* should be limited to its facts. However, they point to no limiting language in the opinion in support of their argument. As the block quote above makes clear, the *Roeder* court's holding was not narrow at all—at least in regards to the necessity of providing chain of title evidence to support the centerline presumption.

Finally, Plaintiffs assert that "King County's position is apparently that language in ownership deeds that 'exclude' or 'except' the right-of-way means that the centerline presumption does not apply." (Dkt. No. 170 at 170.)[6] According to Plaintiffs, this position is contrary to the Washington Supreme Court's holding in *Kershaw*. But King County's "position" is actually that Plaintiffs have failed to establish that they obtained their deeds from a grantor that owned the right-of-way—i.e. have failed to provide chains of title—so the centerline presumption does not apply. King County's position is the right one. Without such evidence, Plaintiffs' arguments about the differences between "exclude" and "except" are irrelevant.[7]

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6. Here, Plaintiffs appear to conflate King County's argument that the centerline presumption does not apply to *all* Plaintiffs who failed to provide chains of title with its more specific argument that the centerline presumption does not apply to all Plaintiffs *whose properties are described in metes and bounds*. The Court briefly addresses King County's metes and bounds argument below.

7. Plaintiffs assert that "King County's argument lacks candor to the Court regarding the *Kershaw Sunnyside Ranches* opinion." (Dkt. No. 17 at 25.) But Plaintiffs already made this exact argument about *Kershaw*—coupled with an identical "lack of candor" attack—to Judge Pechman, who informed them that *Kershaw*

> is not helpful to Plaintiffs. First and foremost, it is not a 'centerline presumption' case, so the theory that Plaintiffs are relying on is not at issue in *Kershaw*. Nor did the Washington Supreme Court overrule any of the previous holdings of *Roeder* (in fact, *Kershaw* calls *Roeder* 'nearly indistinguishable.')

Sammamish Homeowners, 2015 U.S. Dist. LEXIS 73247, 2015 WL 3561533 at *3.

b. Plaintiffs' Four Chains of Title

Finally, Plaintiffs argue that even if they really must provide chains of title to assert the centerline presumption and maintain standing, the claims of four sets of Plaintiffs—the McCrays (Dkt. No. 170-3), the Piantanidas (Dkt. No. 170-4), Kevin Iden (Dkt. No. 170-5), and the Kaseburgs (Dkt. No. 170-6)—may nonetheless go forward. According to Plaintiffs, they have "obtained chains of title for 4 of the Plaintiffs," and these documents allegedly demonstrate that "nobody in the chain of title specifically reserved the right-of-way to themselves and each grantor granted all the interest they owned, including their interest in the underlying fee in the railroad right-of-way." (Dkt. No. 170 at 23.)

To quote Plaintiffs, this argument "is indeed curious," (Dkt. No. 170 at 11), as King County pointed out in its motion that "not a single Plaintiff has produced a chain of title." (Dkt. No. 165 at 15.) So then where did these four chains of title come from? It would seem that Plaintiffs have had them this entire time. Apparently, despite the Court's explicit order to Plaintiffs that they produce all chains of title, (Dkt. No. 138 at 22), and despite the fact that Plaintiffs acquired these documents on January 13, 2016,[8] they simply chose not to disclose them until now, in a response brief in which they rely on them. (*See* Dkt. No. 170 at 23) (arguing that "even if this Court somehow accepts King County's arguments, these 4 Plaintiffs have

8. (Dkt. No. 170-3 at 2; Dkt. No. 170-4 at 2; Dkt. No. 170-5 at 2; Dkt. No. 170-6 at 2.)

standing even under Judge Pechman's interpretation of the centerline presumption").

This is the second time Plaintiffs have relied on evidence that they failed to disclose to King County upon its request. (Dkt. No. 138 at 22, 23-24.) The difference now—and it is a significant one—is that the Court has already ordered Plaintiffs to disclose these exact documents. (*Id.*) Plaintiffs' blatant disregard of the Court's order is both inexplicable and deserving of sanction.[9] Nor do they offer any excuse for their actions. However, the fact that Plaintiffs have rather meekly inserted their chain of title argument—upon which their claims necessarily turn—in the second-to-last paragraph of a 23-page brief is perhaps an admission of guilt in itself.

The Court is empowered to dismiss these four sets of Plaintiffs for their discovery abuse, or to strike these documents from the record. *See Sanai v. Sanai*, No. C02-2165Z, 2005 U.S. Dist. LEXIS 50025, 2005 WL 1593488, at *8 (W.D. Wash. July 1, 2005), *aff'd*, 141 F. App'x 677 (9th Cir. 2005) (dismissing complaint where "[p]laintiffs' pattern of discovery abuse and disobedience of Court orders has been extraordinarily prejudicial"); *see also* Fed. R. Civ. P. 37(b)(2)(A)(ii)—(iii) (providing that when a party disobeys an order to compel, the court may "strik[e] pleadings in whole or in part" or prohibit the party

9. The Court notes that Plaintiff Scott Kaseburg updated the Court as to Plaintiffs' progress on responding to King County's discovery requests after the Court granted its motion to compel. (Dkt. No. 149-2.) It is therefore particularly concerning that he was also among the Plaintiffs who did not release their chains of title.

from "introducing designated matters into evidence"). Moreover, since Plaintiffs "agree that those [individuals] who did not respond to King County's discovery can be dismissed," (Dkt. No. 170 at 22 n.34), they have essentially admitted that these Plaintiffs should be dismissed as well. Because Plaintiffs inarguably disobeyed the Court's order that they disclose their chains of title, and then prejudiced King County by relying on undisclosed title chains, the Court strikes this evidence from the record. Thus, without any evidence of their chains of title, these four sets of Plaintiffs cannot assert the centerline presumption and do not have standing.

But the Court wouldn't want Plaintiffs to feel (or later complain) that they didn't receive a full hearing on the merits. Thus, it will address their four title chains below. As the Court explains, these Plaintiffs would lack standing even if the Court didn't strike this evidence, as their chains of title are patently insufficient to satisfy the prerequisites of the centerline presumption.

c. The Declaration of John Rall

Along with their four chains of title, Plaintiffs present the Declaration of John Rall, in which he interprets the deeds in Plaintiffs' title chains (Dkt. No. 170-2). Rall's alleged expertise is in "identifying source deeds that Railroads used in acquiring specific property and determining what rights were conveyed to the Railroad." (Dkt. No. 170-2 at 1.) King County argues that the Court should strike Rall's Declaration because "the

interpretation of a deed, like any other contract, is not a proper subject for expert testimony." (Dkt. No. 171 at 10.)

Judge Pechman was presented with a similar declaration from this same witness, and held that "Plaintiffs offer no authority supporting their right to offer expert testimony on the legal interpretation of a deed." *Hornish v. King Cty.*, No. C15-284-MJP, 182 F. Supp. 3d 1124, 2016 U.S. Dist. LEXIS 53681, 2016 WL 1588346, at *7 (W.D. Wash. Apr. 20, 2016). The same is true here. Perhaps that is because, as Judge Pechman found and the Ninth Circuit has held, "[r]esolving doubtful questions of law is the distinct and exclusive province of the trial judge." *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008). Moreover, Rall's legal conclusions "not only invade[] the province of the trial judge, but constitute[] erroneous statements of law." *Id.* at 1059. His testimony—consisting of no more than rank legal argument, (Dkt. No. 170-2 at 2-3)—is therefore "not only superfluous but mischievous." *Id.*

For example, Rall states that "[n]o deed in the chains of title expressly reserved the fee portion underlying the Railroad Right-of-way unto any predecessor grantor." (Dkt. No. 170-2 at 3.) This is an impermissible legal conclusion, and, as the Court explains below, it is incorrect. Because the entirety of the Rall Declaration—besides the description of his qualifications—consists of such legal conclusions, the Court strikes it from the record.

Appendix D

d. Plaintiffs' Chains of Title and the Centerline Presumption

The chains of title for each of the four sets of Plaintiffs—the McCrays, the Piantanidas, Iden, and the Kaseburgs—derive from a plat that unambiguously excludes the Corridor from the platted lots. When interpreting plats, "the intention of the dedicator controls." *Rainier Ave. Corp. v. City of Seattle*, 80 Wash. 2d 362, 366, 494 P.2d 996 (1972). Where, as here, a plat is unambiguous, the intent of the grantor "must be determined from a consideration of the plat itself and of the descriptions and dedicatory language contained therein." *Frye v. King Cty.*, 151 Wash. 179, 183, 275 P. 547 (1929). The language of the plat need not be repeated in Plaintiffs' deeds, because "where a deed describes land as a lot laid out on and designated on a certain plat or survey, the plat becomes as much a part of the deed as if it were copied into it." *Cook v. Hensler*, 57 Wash. 392, 398, 107 P. 178 (1910).

The Kaseburg property falls within the Pleasure Point Park No. 2 plat. (Dkt. No. 168 at 13.) As the Court has explained, when a deed, or, in this case, a plat, "refers to the right of way as a boundary but also gives a metes and bounds description of the abutting property, the presumption of abutting landowners taking to the center of the right of way is rebutted." *Roeder*, 105 Wash. 2d at 577. That is exactly the case here. The Pleasure Point plat gives a metes and bounds description of the property using the Corridor as a boundary. (Dkt. No. 168-10 at 2.) The Kaseburgs are therefore unable to shelter under

the centerline presumption, and thus have no property interest in the Corrider and no standing.

The Iden, McCray, and Piantanida Plaintiffs' property falls within the Garden of Eden No. 3 plat. (Dkt. No. 168 at 11 (Iden), 15 (McCrays), 18 (Piantanidas).) The "Description" of this plat states that it "comprises the following described tract of land," which it then describes, "[e]xcept that portion occupied by the N.P.R.R. right of way and county roads as shown on said plat." (Dkt. No. 168-8 at 2.) "The term 'except' is generally meant to exclude the described property." *Ray v. King Cty.*, 120 Wash. App. 564, 588, 86 P.3d 183 (2004). "[A]n exception operates to withdraw some part of the thing granted which otherwise would pass to the grantee under the general description." *Duus v. Town of Ephrata*, 14 Wash. 2d 426, 430, 128 P.2d 510 (1942). As the court held in *Roeder*, the centerline presumption will apply to a conveyance of land bounded by a railroad right of way "unless the grantor has expressly reserved the fee to the right of way, or the grantor's intention to not convey the fee is clear." 105 Wash. 2d at 576. Here, by excepting the NPRR right of way—which is now part of the Corridor—the plat expressly reserved the Corridor from purchasers of the platted lots. Plaintiffs argue that King County has misinterpreted the word "exception," citing to *Kershaw* and *Zobrist v. Culp*, 18 Wash. App. 622, 570 P.2d 147 (1977). But neither of those cases involved the centerline presumption.[10] They are therefore irrelevant.

10. In addition, they are inapplicable because each involved a dispute over whether a deed excepted an *easement* previously conveyed to a third party. *Zobrist*, 18 Wash. App. at 629; *Kershaw*

Moreover, the chains of title for the McCray, Piantanida, and Iden Plaintiffs demonstrate that they never acquired property from an owner of the Corridor—nor could they have. Again, *Roeder* requires that a party demonstrate that it received its adjoining property "from the fee owner of the right of way property." 105 Wash. 2d at 578. Here, these Plaintiffs' chains of title show that their predecessor, the Hillman Investment Company, acquired its property on May 26, 1904, through a deed from the Lake Washington Land Company. (Dkt. No. 170-3 at 4 (McCrays); Dkt. No. 170-4 at 4 (Piantanidas); Dkt. No. 170-5 at 3 (Iden)).[11] As Plaintiffs essentially conceded (although they argued that it was "irrelevant") and as the Court has explained, the Lake Washington Land Company had already conveyed to Northern Pacific a fee interest in the Corridor via the LWLC Deed. The May 26, 1904 Deed therefore could not have conveyed to the Hillman Investment Company any interest in the Corridor, which the Deed itself makes clear, stating: "from the lands above desc[ribed] is to be deducted the rights of way of various r[ail] companies and co[unty] roads as sh[ow]n by the deeds heretofore filed in the office of the Aud[itor] of s[ai]d K[ing] Co[unty]." (Dkt. No. 170-3 at 27.) Thus, these

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Sunnyside Ranches, 156 Wash. 2d at 271. As the Court explains below, the exception here involves a *fee* interest previously conveyed to a third party.

11. As King County points out, this deed was never disclosed to them even though they specifically requested—and the Court ordered Plaintiffs to disclose—this very sort of evidence. (Dkt. No. 138 at 21-22.) There is no question that it was highly prejudicial for Plaintiffs to withhold the May 26, 1904 deed from discovery and then rely on it in their response brief.

Plaintiffs never received "adjoining property from the fee owner of the right of way property"—since the Hillman Investment Company did not own the fee at the time of the conveyance.

Therefore, these four chains of title, which Plaintiffs have apparently concealed, do no more than conclusively demonstrate that the centerline presumption *does not* apply to them and that they have no interest in the Corridor.[12] Thus, they have no standing to sustain their quiet title action.

F. Additional Reasons for Dismissal

King County raises a host of additional arguments why the claims of various groups of Plaintiffs fail for individualized reasons. Because Plaintiffs have not established that they have an interest in the Corridor, the Court need not reach these arguments. Nonetheless, the Court will briefly address them here.

First of all, there are a number of Plaintiffs who both parties essentially agree should be dismissed. As the Court mentioned above, "Plaintiffs agree that those

12. King County argues persuasively that Plaintiffs also have no right to *possess* the Corridor, which is the second RCW 7.28.010 requirement to quiet title. (Dkt. No. 165 at 16-17.) Plaintiffs make no attempt to rebut this argument. Regardless, because Plaintiffs fail to establish that they have an interest in the Corridor, the Court need not reach the question of whether they have a right to possession. *See* RCW 7.28.010 (requiring "a valid subsisting interest in real property, *and* a right to the possession thereof") (emphasis added).

Plaintiffs who did not respond to King County's discovery can be dismissed," (Dkt. No. 170 at 22 n.34), although, again, perhaps they fail to realize that this would also logically exclude the Kaseburg, Iden, McCray, and Piantanida Plaintiffs who obtained their chains of title but did not disclose them. Plaintiffs "generally agree" that those "plaintiffs who sold their property cannot quiet title," although they argue without elaboration that the purchasers of that property would later be entitled to join the suit. (*Id.*) Plaintiffs also "generally agree" that "Plaintiffs who transferred their properties to other legal entities cannot quiet title," although they similarly argue that this "depend[s] on a number of factual questions" that they do not elucidate. (*Id.*) Plaintiffs also appear to agree that "only living plaintiffs have standing," although they argue, without evidence or citation to any authority, that the spouse or other heirs of the deceased plaintiff, Barbara Bergstrom, (Dkt. No. 167-6), "would continue to have standing." (Dkt. No. 170 at 22 n.34.) In addition, several Plaintiffs have requested that they be dismissed. (Dkt. No. 167-9 at 5-6.) Were it necessary to the Court's decision, it would find that all of these individual Plaintiffs—which King County has grouped as Categories 7 through 9, 11, and 12—should indeed be dismissed. (Dkt. No. 168-1 at 7.)

Plaintiffs do contest King County's argument that collateral estoppel bars the claims of those Plaintiffs who have previously filed suit. But their response, in its entirety, is that King County is "incorrect as a matter of procedure, fact, and law." (Dkt. No. 170 at 22 n.34.) Given that seven Plaintiffs—grouped as Category 10—have previously filed suit on the same operative facts at

issue here,[13] the Court would almost surely find their claims barred by collateral estoppel were such a finding necessary.

Finally, King County argues that Plaintiffs in Categories 4 through 6 should be dismissed because they cannot assert the centerline presumption due to: limitations in the language of their deeds (Category 4); their properties having derived from plats that exclude the Corridor (Category 5); and/or their predecessor having purchased shorelands excepting the Corridor (Category 6). (Dkt. No. 168-1 at 7.) As the Court has explained, since all but four sets of Plaintiffs failed to present chains of title (and these were insufficient), none can assert the centerline presumption. Nonetheless, because Plaintiffs have failed to persuasively rebut King County's arguments as to the Plaintiffs in Categories 4 through 6, the Court would likely have dismissed them on these grounds as well.[14]

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13. King County asserts, and Plaintiffs do not dispute, that five of the current Plaintiffs were parties to *Ioppolo v. Port of Seattle*, (Dkt. No. 165 at 25), in which the plaintiffs argued that "BNSF's interest [in the Corridor] was limited to a surface easement for a hiking and biking trail." Case No. C15-0358 JCC, 2015 U.S. Dist. LEXIS 121497, 2015 WL 5315936, at *1 (W.D. Wash. Sept. 11, 2015). Two other plaintiffs previously filed suit in *Ao. V. Port of Seattle*, No. 09-2-44773-0 KNT (King Co. Sup. Ct. 2011), arguing that they had acquired title to property within the Corridor through adverse possession. (Dkt. No. 167-7 at 8-9.) Both cases were dismissed. *Ioppolo*, 2015 U.S. Dist. LEXIS 121497, 2015 WL 5315936, at *5; (Dkt. No. 167-8 at 2-3.)

14. Addressing the Category 4 grouping, Plaintiffs argue that the centerline presumption is unavailable *only* to those Plaintiffs

III. CONCLUSION

For the foregoing reasons, King County's motion for summary judgment on all remaining issues (Dkt. No. 165) is GRANTED.

In addition, as the Court explained above, it hereby STRIKES from the record the chains of title for the McCray, Piantanida, Iden, and Kaseburg Plaintiffs (Dkt. Nos. 170-3 to 170-6), as well as the Declaration of John Rall (Dkt. No. 170-2).

It is therefore ORDERED that:

(1) The process of railbanking the Corridor under the Trails Act preserved all property rights formerly held by the Burlington Northern and Santa Fe Railroad ("BNSF") and authorized trail use;

(2) King County currently holds all of BNSF's property rights in the Corridor, as well as the trail rights created by the Trails Act;

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whose deeds describe their property in metes and bounds *and* use the Corridor as a boundary. But dozens of Plaintiffs' deeds do, in fact, describe their property in this manner. (Dkt. No. 172-1 at 8.) Moreover, the rest of the Category 4 Plaintiffs, much like the Category 5 and 6 Plaintiffs, obtained their property through conveyances excepting or excluding the Corridor, (*id.*), which, as the Court explained above, also disentitles them to the centerline presumption. Plaintiffs' arguments to the contrary invoke *Kershaw, Zobrist*, the strip and gore doctrine, and a ruling from the Central District of California on a motion to dismiss, none of which relate to the application of the centerline presumption under Washington law. (Dkt. No. 170 at 20-22.)

(3) The June 24, 1903 deed from J.R. Lewis to the Northern Pacific Railway Company, recording No. 269500 (also called the Kittinger Deed), conveyed a fee simple interest.

(4) The February 3, 1904 deed from the Lake Washington Land Company to the Northern Pacific Railway Company, recording No. 287093 (also called the LWLC Deed), conveyed a fee simple interest.

(5) The State of Washington holds the reversionary interest to property acquired through the February 8, 1904 Condemnation.

(6) Plaintiffs lack standing under Washington's centerline presumption doctrine to challenge King County's ownership interests in the Corridor.

FURTHERMORE, it is hereby ORDERED:

(1) King County is granted a decree quieting title free and clear from all claims by the Plaintiffs and/or their successors in interest to any portions of the land conveyed by the February 11, 2013 quit claim deed from the Port of Seattle to King County, recording No. 20130213001645, attached as Exhibit A to this Order. The Plaintiffs, King County, and their successors in interest shall recognize in perpetuity the boundary lines described in Exhibit A.

(2) Title is quieted confirming that King County owns a fee interest in the portions of the property described

in Exhibit A that are derived from the June 24, 1903 deed from J.R. Lewis to the Northern Pacific Railway Company, which is attached as Exhibit B to this Order.

(3) Title is quieted confirming that King County owns a fee interest in the portions of the property described in Exhibit A that are derived from the February 3, 1904 deed from the Lake Washington Land Company to the Northern Pacific Railway Company, which is attached as Exhibit C to this Order.

(4) Title is quieted confirming that King County may exercise its easement rights in any easement portions of the Corridor consistent with the prior rulings of this Court.

DATED this 23rd day of August 2016.

/s/ John C. Coughenour
John C. Coughenour
UNITED STATES DISTRICT JUDGE

Appendix D

EXHIBIT A

PARCEL A:

MP 23.45 - 23.8 Woodinville to Kennydale

All that portion of BNSF Railway Company's (formerly Northern Pacific Railway Company) Woodinville to Kennydale, Washington Branch Line right of way, varying in width on each side of said Railway Company's Main Track centerline, as now located and constructed upon, over and cross King County, Washington, more particularly described as follows, to-wit:

That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Main Track centerline, as originally located and constructed, upon, over and across the N½ SE¼ of Section 9, Township 26 North, Range 5 Easts, W.M., King County, Washington lying Southerly of the Northeasterly boundary of that certain 100 foot wide tract of land described in deed dated May 4, 1887 from Mary B. Jaderholm to Seattle Lake Shore and Eastern Railway Company, recorded May 5, 1887 in Volume 40 of Deeds, Page 288, records of said County; also,

That certain 4.02 acre tract of land described in deed dated November 13, 1903 from Emanuel Neilsen and Grete Neilsen to Northern Pacific Railway Company recorded November 16, 1903 in Volume 358 of Deeds, Page 543, records of King County, Washington, said 4.02 acre tract being described in said deed for reference as follows:

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"A strip of land over and across the south half of the southeast quarter (S/2 of SE/4) of Section 9, Township twenty-six (26) north, Range five (5), east, W.M., consisting of a strip of land one hundred ten (10) feet wide, being fifty (50) feet wide on the southwesterly side of the center line of the proposed Seattle Belt line railroad of the Northern Pacific Railway Company, as the same is surveyed and staked out across said premises, and sixty (60) feet in width on the northeasterly side of said center line; and an additional strip of land twenty (20) feet in width on the northeasterly side of said above described strip from Station 29 of said railroad center line extending to the south line of said Section 9, a distance of 580 feet, said additional strip being 20 feet wide and 580 feet long; containing 4.02 acres, more or less." EXCEPTING THEREFROM, All that portion of the Southwesterly 35.0 feet of Parcels "A" and "B" of Boundary Line Adjustment Number S92L0145R, King County, Washington, according to the recorded plat thereof.

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PARCEL B:

MP 23.45 – Woodinville to Kennydale MP 5.0 (Except Sound Transit and City of Kirkland Segments)

All that portion of BNSF Railway Company's (formerly Northern Pacific Railway Company) Woodinville (MP 23.45) to Kennydale (MP 5.0), Washington Branch Line right of way, varying in width on each side of said Railway Company's Main Track centerline, as now located and constructed upon, over and across King County, Washington, more particularly described as follows, to-wit:

The portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across the NE¼ Section 16, and the W½ Section 15, all in Township 26 North, Range 5 East, W.M., bounded on the North by the North line of said NE¼ Section 16, and bounded on the South by South line of said W½ Section 15; also

That portion of that certain 50.0 foot wide Branch Line right of way, being 25.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across the NE¼ NE¼ NW¼ and the NW¼ NW¼ NE¼ Section 22, Township 26 North, Range 5 East, W.M., bounded by the North by the North line of said Section 22, and bounded by the South by South line of said NW¼ NW¼ NE¼ Section 22; also,

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That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across the E½ Section 22, the NW¼ NE¼ and the NE¼ NW¼ Section 27, all in Township 26 North, Range 5 East, W.M., bounded on the North by the North line of said E½ Section 22, and bounded on the South by South line of said NE¼ NW¼ Section 27; also,

That certain 4.43 acre tract of land described in deed dated April 3, 1903 from Nellie Nelson to Northern Pacific Railway Company recorded April 3, 1903 in Book 342 of Deeds, Page 371, records of King County, Washington, said 4.43 acre tract being described in said deed for record as follows:

"All that portion of the Southeast Quarter (S.E.¼) of the Northwest Quarter (N.W.¼) of Section 27, Township 26 North, Range 5 East, lying between the easterly line of the present right of way of the Northern Pacific Railway Company, which line is 50 feet distant southeasterly from the center line of the railroad track of said company, as now located and constructed over and across said premises and a line drawn parallel to and 50 feet distant southeasterly from when measured at right angles to the center line of the proposed railroad track as now staked out and to be constructed, over and across said premises;

"Also all that portion of said Southeast Quarter (S.E.¼) of the Northwest Quarter (N.W.¼) of Section 27, Township 26, Range 5 East, W.M. lying within 50 feet of that certain straight line which connects the center line of the present track of the Northern Pacific Railway Company line with

the center line of the proposed track of the Northern Pacific Railway Company line and being tangent to the curves of both of said center lines, containing in all 4.43 acres, be the same more or less." **EXCEPTING THEREFROM**, Lot 3, King County Short Plat Number 1078060, recorded under King County recording Number 8003270855, being a subdivision of: That portion of the southeast quarter of the northwest quarter of Section 27, Township 26 North, Range 5 East, W.M., King County, Washington, lying northerly and westerly of the northerly and westerly right of way of the Northern Pacific Railway Company's "Seattle Belt Line," and south of the southerly right of way line of that road conveyed to King County by deed recorded under Recording Number 2695175 and northeasterly of a line described as follows: Beginning at the northwest corner of the southeast quarter of the northwest quarter of said Section 27; thence south 1°58'24" west along the west line of the southeast quarter of the northwest quarter of said Section 27, a distance of 265 feet; thence north 65°33'39" east 444.80 feet to the true point of beginning of the following described line; thence south 18°15'21" east, 640 feet, more or less, to the northerly right of way line of said Northern Pacific Railway Company's "Seattle Belt Line," said northerly right of way line being 50' Northeast of the center line of the maintrack as now constructed and the terminus of said line; also

That certain 0.05 acre tract of land described in deed dated August 25, 1904 from Otto Weppler et al., to Northern Pacific Railway Company recorded September 7, 1904 in Book 375, Page 507, records of King County, Washington, said 0.05 acre tract being described in said deed for reference as follows:

"All that piece or parcel of land in the southeast quarter of the northwest quarter (SE/4 of NW/4) of Section twenty-seven (27), Township twenty-six (26), Range five (5) east, W.M., which lies northwesterly of the original Seattle Belt Line right of way as described in deed recorded in Volume 116 of Deeds, Page 289, Records of King County, and within fifty (50) feet of the center line of the revised location of the track of the Seattle Belt Line as the same is now surveyed and being constructed over and across said subdivision, containing 5/100 acres, more or less"; also,

That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across the SW¼ NW¼ Section 27 the S½ NE¼, NW¼ SE¼, SW¼ Section 28, W½ NW¼, NW¼ SW¼ Section 33, SE¼ Section 32, all in Township 26 North, Range 5 East, W.M., bounded on the East by the East line of said SW¼ NW¼ Section 27, and bounded on the South by South line of said SE¼ Section 32, **EXCEPTING THEREFROM**, that certain tract of land described in Deed dated February 24, 1994 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded May 26, 1998 as Document No. 9805260805, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in Special Warranty Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded July 30, 1998 as Document No. 9807301468, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in Special Warranty Deed

dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded May 26, 1998 as Document No. 9805260791, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in Correction Quitclaim Deed dated January 6, 2000 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded February 11, 2000 as Document 20000211000454, records of King County, Washington; also,

That portion of that certain 100.0 foot wide Branch Line right of way in the City of Kirkland, Washington, being 50.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across Blocks 3, 4, 5, 6, 11, 12, 13, 14, 18, 19, 23, 24, 25 and 26, the vacated alley between Blocks 13 and 14, and vacated Arlington Avenue between Blocks 14 and 19, as said Blocks and Streets are shown on plat of Lake Avenue Addition to Kirkland as recorded in Volume 6 of Plats, Page 86, Records of said County, together with any right title and interest, if any of those portions of Victoria Avenue, Harrison Avenue, Moreton Avenue, Jefferson Avenue, and Washington Avenue and Maple Street and alleys within said Blocks which lie within said 100..0 foot wide Branch Line right of way, **EXCEPTING THEREFROM**, that portion of Lot 3, Block 5, Lake Avenue Addition to Kirkland, according to the official plat thereof in the office of the Auditor of King County, Washington lying between two lines drawn parallel with and distant, respectively, 34.0 feet and 50.0 feet Westerly of, as measured at right angles from The Burlington Northern and Santa Fe Railway Company's (formerly Northern Pacific Railway) Main

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Track centerline as now located and constructed upon, over, and across said Block 5; also,

That portion of that certain 100.0 foot wide Branch Line right of way in the City of Kirkland, Washington, being 50.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across Blocks 220, 223, 224, 232, 233, 238, and 241 as said Blocks are shown on the Supplementary Plat to Kirkland as filed in Volume 8 of King County Plats, at page 5, together with any right title and interest, if any to those portions of Massachusetts Avenue, Madison Avenue, Michigan Avenue, Olympia Avenue, Piccadilly Avenue, Cascade Avenue, Clarkson Avenue, Fir Street, and alleys within said Blocks which lie within said 100.0 foot wide Branch Line right of way; also,

That portion of Lots 1, 2, 4, 37, and all of Lots 3, 38, and 39, Block 227 as said Lots and Blocks are shown on the Supplementary Plat to Kirkland as filed in Volume 8 of King County Plats, at page 5, which lie Northeasterly of a line parallel with and distant 50 feet Southwesterly from, measured at right angles to said Railway Company's Main Track centerline as now located and constructed and Southwesterly of a line parallel with and distant 50 feet Northeasterly from, measured at right angles to said Railway Company's Main Track centerline as originally located and constructed; also,

That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across the, S½ SE¼ Section 5, NW¼

NE¼, E½ NW¼, E½ SW¼, Section 8, all in Township 25 North Range 5 East, W.M., bounded on the North by the South right of way line of Clarkson Avenue, City of Kirkland, Washington, and bounded on the West by the West line of said E½ SW¼, Section 8, **EXCEPTING THEREFROM**, that certain tract of land described in Special Warranty Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded May 26, 1998 as Document No. 9805260787, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in Correction Quitclaim deed dated May 15, 1999 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded August 5, 1999 as Document No. 19990805001402, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded July 28, 1998 as Document No. 9807281544, records of King County, Washington, also;

That certain 0.23 acre tract of land described in deed dated July 15, 1903 from Samuel F. French to Northern Pacific Railway Company recorded August 3, 1903 in Book 361 of Deeds, Page 249, records of King County, Washington, said 0.23 acre tract being described in said deed for reference as follows:

"Commencing at a point in the east line of Lot four (4), Section eight (8), Township twenty-five (25) North, Range five (5) east, W.M., that is 395 feet north of the southeast corner of said lot, and running thence west parallel with

the south line of said Lot four (4) 67 feet, more or less, to a point that is 50 feet distant from, when measured at right angles to, the center line of the proposed Seattle Belt Line Branch of the Northern Pacific Railway company as the same is now located, staked out and to be constructed across said Section eight (8), thence running northeasterly parallel with said railway center line 200 feet; thence westerly at right angles to said railway center line 30 feet; thence northeasterly parallel with said railway center line, and 80 feet distance therefrom, 130 feet, more or less, to the east line of said Lot four (4); thence south along said east line of said Lot four (4) 322 feet, more or less, to the point of beginning containing 0.23 acres, more of less."; also,

That certain strip of land described in deed dated March 3, 1904 from Seattle and Shanghai Investment Company to Northern Pacific Railway Company recorded March 9, 1904 in Book 387, Page 243, records of King County, Washington, said strip being described in said deed for reference as follows:

"A strip of land Two Hundred twenty-five (225) feet in width across that certain parcel of land designated as Tract "B" in deed from the Kirkland Land and Improvement Company to H.A. Noble, dated July 13, 1899 of record in the Auditor's office of King County, Washington in Volume 245 of Deeds, at page 41, reference thereto being had. Said strip of land hereby conveyed, having for its boundaries two lines that are parallel with and respectively distant One Hundred (100) feet easterly from, and One Hundred Twenty-Five (125) feet westerly from, when measured at right angles, to the center line of the Seattle Belt

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Line branch of the NORTHERN PACIFIC RAILWAY COMPANY, as the same is now constructed and located across said Tract "B," which said Tract "B" is located in Section 17, of Township 25, North of Range 5 east of the Willamette Meridian"; also,

That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across Government Lot 4, Section 8, Government Lots 1, 2, and 3, the E½ SW¼ Section 17, and the NE¼ NW¼, NE¼ Section 20, all in Township 25 North, Range 5 East, W.M., bounded on the North by the South line of that certain hereinabove described 0.23 acre tract of land described in deed dated July 15, 1903 from Samuel F. French to Northern Pacific Railway Company recorded August 3, 1903 in Book 361 of Deeds, Page 249, records of King County, Washington and the East line of said Government Lot 4, Section 8, and bounded on the South by the South line of said NE¼ Section 20, together with such additional widths as may be necessary to catch the slope of the fill in the N½ of said Government Lot 2, Section 17 as delineated in the 7th described parcel in deed dated June 20, 1903 from Kirkland Land and Improvement Company to Northern Pacific Railway Company recorded June 26, 1903 in Book 352, Page 582, records of King County, Washington, **EXCEPTING THEREFROM,** that portion of said 100.0 foot wide right of way lying within said hereinabove described parcel of land designated as Tract "B" in deed from the Kirkland Land and Improvement Company to H.A. Noble, dated July 13, 1899 of record in the Auditor's office of King County, Washington in Volume 245 of Deeds, at page 41; also,

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That certain tract of land described in deed dated December 26, 1952 from Alma F. Robinson and William G. Robinson et al. to Northern Pacific Railway Company recorded January 14, 1953 in Book 3220 of Deeds, Page 301, in the records of the Auditor's office of King County, Washington, said tract of land being described in said deed for reference as follows:

"That portion of the South half of the northeast quarter (S½ NE¼) of Section 20, Township 25 North, Range 5, East of the Willamette Meridian, described as follows: Commencing at the center of said section; thence north 0 degrees 18 minutes 24 seconds west along the north and south quarter line of said section 738.60 feet to the center of the county road; thence along said road south 77 degrees 7 minutes east 500.00 feet; thence south 71 degrees 54 minutes east 308.27 feet, more or less; thence north 34 degrees 38 minutes east 18.00 feet to a stake in the north margin of said road; thence north 34 degrees 38 minutes east 609.40 feet, more or less, to the southwesterly margin of the Grantee's right of way, said margin being concentric with and distant 50 feet southwesterly, measured radially, from the center line of the main track of the Grantee's Belt Line as now constructed; thence southeasterly along said margin approximately 150 feet to a point distant 50 feet southwesterly, measured along the radius of the curve of said center line, from station 511 plus 50 in said center line (which station is distant 2337.6 feet southeasterly measured along said center line, from the north line of said section), the last-described point being the *true point of beginning*; thence southeasterly and southerly along said margin to a point distant 50 feet westerly, measured

along the radius of said curve, from station 515 plus 60 in said center line; thence northwesterly in a straight line to a point distant 110 feet southwesterly measured along the radius of said curve, from station 514 plus 28 in said center line; thence northwesterly in a straight line to a point distant 110 feet southwesterly, measured along the radius of said curve, from station 513 plus 28 in said center line; thence northerly in a straight line to the true point of beginning," also,

That portion of that certain 100.0 foot wide Branch Line right of way at said Railway Company's Northrup Station, being 50.0 feet on each side of said Branch Line's Main Track centerline, as originally located and constructed, upon, over and across Blocks 12, 13, 14, 15, 16, 21, 22, 23 and 24, all within Kirkland Syndicate First Addition to Seattle, together with any right title and interest, if any to those portions of Maple Street, Nelson Street, Bixby Street, Kirkland Avenue, Hawks Avenue and Fransen Avenue which lie within said 100.0 foot wide Branch Line right of way; also,

Those portion of Lots 10, 11, and 12, Block 14, Lots 1, 2, 3, and 4, Block 23 and Lot 10, Block 24, all within Kirkland Syndicate First Addition to Seattle, lying Southwesterly of a line parallel with and distant 50 feet Southwesterly from, measured at right angles to said Railway Company's Main Track centerline as originally located and constructed; also,

That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Railway

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Company's Main Track centerline, as originally located and constructed, upon, over and across the SE¼SE¼ Section 20, and the SW¼ SW¼ Section 21, all in Township 25 North, Range 5 East, W.M., bounded on the North by the North line of said SE¼ SE¼ Section 20, and bounded on the South by the South line of said SW¼ SW¼ Section 21, together with any right title and interest, if any to those portions of Fransen Avenue, Jordan Avenue, Elkoos Avenue, and Railroad Avenue, which lie within said 100.0 foot wide Branch Line right of way; also

That portion of Block 7, of Kirkland Syndicate's Second Addition to Kirkland Washington, situate in the SE¼ SE¼ Section 20, and that portion of said Railway Company's property situate in the SW¼ SW¼ Section 21, and in the NW¼NW¼ Section 28, all in the Township 25 North, Range 5 East, W.M., lying Easterly of a line parallel with and distant 50.0 feet Westerly from, measured at right angles and/or radially to said Railway Company's Main Track centerline as now located and constructed and Westerly of a line parallel with and distant 50.0 feet Westerly from, measured at right angles to said Railway Company's Main Track centerline as originally located and constructed, bounded on the West by the West line of said Block 7 and its Northerly prolongation, and bounded on the South by the intersection of said parallel lines, together with any right, title and interest, if any, to Houghton Street and Railroad Avenue of Kirkland Syndicate's Second Addition to Kirkland Washington; also,

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That certain 0.63 acre tract of land described in deed dated November 13, 1904 from Nathan P. Dodge Et Ux. to the Northern Pacific Railway Company recorded February 9, 1905 in Volume 408 of Deeds, Page 263, records of King County, Washington, said 0.63 acre being described in said deed for reference as follows:

"That part of southwest quarter of southwest quarter (SW/4 of SW/4), Section twenty-one (21), Township twenty-five (25, north, Range five (5) east, W.M., described by metes and bounds as follows:

"Beginning at a point in the south line of said Section twenty-one (21) fifty (5) feet east from, when measured at right angles to, the original right of way of Seattle Belt Line Branch of the Northern Pacific Railway company, as conveyed by deed executed by Roscoe Dunn and Ann Dunn his wife, dated Oct. 4th, 1890 and recorded Dec. 4th, 1890 in volume 116 of deeds, page 114, and running thence north 8° 40' west parallel with and 50 feet distant easterly from said original right of way line a distance of 270 feet to a point of curve; thence northwesterly along a curve to the left having a radius of 716.8 feet, a distance of 492.7 feet; thence north 48° 5' west a distance of 135 feet more of less, to a point on the said easterly line of the original right of way of said railway; thence southeasterly along said original easterly right of way line on a curve to the right having a radius of 859 feet, a distance 591 feet; thence continuing along said easterly right of way line south 8° 40' east, a distance of 260 feet, more or less, to an intersection of said right of way line with the southern boundary line that of said section 21; thence east 50.5 feet, more or less,

to a point of beginning, containing 0.63 acres, more or less, situated in the County of King, State of Washington"; also,

That certain strip of land described in deed dated August 3, 1904 from John Zwiefelhofer and Aloisia Zwiefelhofer to Northern Pacific Railway Company recorded August 6, 1904 in Book 404 of Deeds, Page 44, records of King County, Washington, said strip of land being described in said deed for reference as follows:

"A strip of land fifty (50) feet wide lying immediately east of the right of way of said Railway Company and extending South from the North line of Section 28, Township 25 North Rage 5 East a distance of Six Hundred feet (600) and containing 0.69 acres in the Northwest Quarter of the Northwest quarter (NW¼ NW¼) of Section 28 Tp 25 N R 5 E WM," **EXCEPTING THEREFROM**, that portion of said 50 foot wide strip lying Northerly of a line parallel to and 400.0 feet Southerly of the North line of Said NW¼ NW¼ of Section 28; also,

Parcel 3, of the City of Bellevue Short Plat No. 80-16, according to the Short Plat recorded under King County Recording No. 8101239001, **EXCEPTING THEREFROM**, that certain tract of land described in deed dated December 13, 1996 from Burlington Northern Railroad Company to Fibres International, recorded December 13, 1996 as Document No. 9612130870, records of King County, Washington; also,

Tract B, of City of Bellevue Short Plat No. 80-16, according to the Short Plat recorded under King County Recording No. 8101239001; also,

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That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Railway Company's Main Track centerline, as now located and constructed, upon, over and across the W½ W½ Section 28, W½ NW¼ Section 33, all in Township 25 North, Range 5 East, W.M., bounded on the North by the North line of said W½ W½ Section 28, and bounded on the South by the South line of said W½ NW¼ Section 33, **EXCEPTING THEREFROM**, that portion of said 100.0 foot wide right of way lying Easterly of a line parallel with and distant 35 feet Easterly from, measured at right angles to said Railway Company's Main Track centerline as now located and constructed and Northerly of a line parallel to and 400.0 feet Southerly of the North line of said NW¼ NW¼ of Section 28, **ALSO EXCEPTING THEREFROM**, that portion of said 100 foot wide Branch Line right of way lying within that certain tract of land described in Special Warranty Deed dated June 29, 1999 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded May 22, 2000 as Document No. 20000522001155, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded May 22, 1998 as Document No. 9805221787, records of Kings County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in Correction Special Warranty Deed dated June 8, 2001 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded January 3, 2003 as Document No. 20030103001327, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that

certain tract of land described in Correction Special Warranty Deed dated February 24, 1998 from The Burlington Northern and Santa FE Railway Company to ANT, LLC recorded December 28, 1998 as Document No. 9812282942, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in Correction Special Warranty Deed dated March 17, 2000 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded October 4, 2000 as Document No. 20001004000767, records of King County, Washington; also,

That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across Lots 1, 2, 3, 4 and 8 of Strawberry Lawn, King County Washington, recorded in Volume 4 of Plats, Page 30½, King County, Washington recorder, together with such additional widths as are necessary to catch the slopes of the cuts and fills of the roadbed of said Railway in said Lots 1 and 8 of Strawberry Law, King County Washington, as delineated in deed dated August 31, 1903 from Henry Hewitt, Jr. and Rocena L. Hewitt to the Northern Pacific Railway Company, **EXCEPTING THEREFROM,** that certain tract of land described in Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Commpany to ANT, LLC recorded July 28, 1998 as Document No. 9807281537, records of King County, Washington, also;

That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Main

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Track centerline, as no located and constructed, upon, over and across the W½ Section 4, Government Lots 1 and 4, E½ W½ Section 9, Government Lot 1, SW¼ NW¼, NW¼ SW¼ Section 16, Government Lots 4 and 5 Section 17, Government Lots 1, 2, 3 and 4 Section 20, Government Lots 1, 2, 3, 4 and 5 Section 29, all in Township 24 North, Range 5 East, W.M. bounded on the North by the North line of W½ Section 4, and bounded on the South by the South line of said Government lot 5, Section 29, together with such additional widths or strips of land as are necessary to catch the slopes of the cuts and fills of the roadbed of said Railway in the NW¼ NW¼ of said Section 4, which said roadbed is to be constructed having a width at grade of 22 feet and the cuts to have a slope of one to one and the fills to have a slope of one and one half to one, as delineated in deed dated September 8, 1903 from Lake Washington Land Company to Northern Pacific Railway Company, recorded in Volume 386 of Deeds, Page 147, records of King County, Washington, **EXCEPTING THEREFROM**, that certain tract of land described in Correction Special Warranty Deed dated April 30, 2001 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded May 22, 2001 as Document No. 20010522000186, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded July 28, 1998 as Document 9807281547, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in deed dated February 24, 1998 from The Burlington Northern and Santa Fe

Railway Company to ANT, LLC recorded July 28, 1998 as Document No. 9807281545, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded July 28, 1998 as Document No. 9807281546, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in deed dated February 24,1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded July 28, 1998 as Document No. 9807281543, records of King County, Washington, **ALSO EXCEPTING THEREFROM** that certain tract of land described in deed dated June 26, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded April 30, 2001 as Document No. 20010430000977, records of King County, Washington, **ALSO EXCEPTING THEREFROM** that certain tract of land described in deed dated June 26, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded December 15, 1998 as Document No. 9812151238, records of King County, Washington; also,

That certain Tract I and that certain Tract II described in deed dated September 19, 1967 from State of Washington to Northern Pacific Railway Company filed for a record December 13, 1967 in Book 5023, Page 546, Auditor's No. 6278130, records of King County, Washington, said Tracts being described in said deed for reference as follows:

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"Tract I: (Fee)

"All those portions of the Southeast quarter of the Northwest quarter and the Northeast quarter of the Southwest quarter, Section 9, Township 24 North, Range 5 East, W.M., lying Westerly of the existing 100 foot right of way of the Northern Pacific Railway Company and Easterly of a line described as follows: Beginning at a point opposite Station REL. R.R. 737+00 on the Relocated Railroad Center Line (as hereinafter described) and 50 feet Westerly therefrom when measured radially thereto (which point also lies on the Westerly line of said existing railroad right of way); thence Southerly parallel with said relocated railroad center line to a point opposite REL. R.R. 739+00 thereon; thence Southwesterly in a straight line to a point opposite REL. R.R. 740+00 on said relocated railroad center line and 130 feet Westerly therefrom when measured radially thereto; thence Southerly parallel with said relocated railroad center line a distance of 350 feet, more or less, to an intersection with the Northerly right of way line of State Highway Project entitled Primary State Highway No. 2 (SR 90), East Channel Bridge to Richards Road (as hereinafter described); thence North 84°13'42" East along said Northerly right of way line a distance of 125 feet, more or less to an intersection with said Westerly line of said existing railroad right of way and the end of this line description:

"Tract II: (Fee)

"All those portions of Lots 13 and 14, Block 1, Mercer Addition, according to the plat thereof recorded in

Volume 17 of Plats, page 8, records of King County and of the Northeast quarter of the Southwest quarter, Section 9, Township 24 North, Range 5 East, W.M., lying Northwesterly of the Existing 100 foot right of way of the Northern Pacific Railway Company and Southeasterly of a line described as follows: Beginning at the Southeast corner of said Lot 13, which point also lies on the Northwesterly line of said existing railroad right of way; thence Northeasterly in a straight line to a point opposite REL. R.R. 753+00 on the Relocated Railroad Center Line (as hereinafter described) and 50 feet Northwesterly therefrom when measured at right angles thereto; thence Northeasterly in a straight line to a point opposite REL. R.R. 752+00 on said relocated railroad center line and 90 feet Northwesterly therefrom when measured at right angles thereto; thence Northeasterly parallel with said relocated railroad center line a distance of 120 feet, more or less, to an intersection with the Southerly right of way line of State Highway Project entitled Primary State Highway No. 2 (SR 90), East Channel Bridge to Richards Road (as hereinafter described); thence South 79°37'46" East a distance of 105 feet more or less, to an intersection with said Westerly line of said existing railroad right of way and the end of this line description:

..."RELOCATED RAILROAD CENTER LINE DESCRIPTION:

"Beginning at Railroad Station 734+80 on the existing main line center line of the Northern Pacific Railroad Company's Track in the Southeast quarter of the Northwest quarter, Section 9, Township 24 North, Range 5

East, W.M., in the vicinity of Factoria, Washington, which point equals Relocated Railroad Station (hereinafter referred to as REL. R.R.) 734+80; thence South 20°44'04" East a distance of 21.1 feet to REL. R.R. 735+01.10 T.S.; thence on the arc of an increasing spiral curve to the right having an "A" value of 5 a distance of 80 feet to REL. R.R. 735+81.10 S.C.; thence on the arc of a 4° circular curve to the right thru a central angle of 49°18' a distance of 1232.50 feet to REL. R.R. 748+13.60 C.S.; thence on the arc of a decreasing spiral curve to the right having an "A" value of 5, a distance of 80 feet to R.R. 743.93.60 S.T.; thence South 31°46' West a distance of 683.96 feet to REL. R.R. 755+77.56 T.S.; thence on the arc of an increasing spiral curve to the left having an "A" value of 5 a distance of 80 feet to REL. R.R. 756+57.56 S.C. which point equals Railroad Station 756+91.53 ahead on said existing main line center line of track in the Southeast quarter of the Southwest quarter, Section 9, and the end of this center line description.

"SOUTHERLY RIGHT OF WAY LINE OF PRIMARY STATE HIGHWAY NO. 2 (SR 90), EAST CHANNEL BRIDGE TO RICHARDS ROAD:

"Beginning at the Southwest corner of Lot 21, Block 4, Mercer Addition, according to the plat thereof recorded in Volume 17 of Plats, page 8, records of King County, and running thence North 79°37'46" West a distance of 324.08 feet.

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"NORTHERLY RIGHT OF WAY LINE OF PRIMARY STATE HIGHWAY NO. 2 (SR 90) EAST CHANNEL BRIDGE TO RICHARDS ROAD:

"Beginning at REL. R.R. 746+28.83 P.O.C. on the Relocated Railroad Center Line (as above described); thence South 84°03'37" West a distance of 344.01 feet; thence North 5°56'23" West a distance of 212.5 feet; thence North 80°02'48" East a distance of 109.27 feet; thence North 5°56'23" West a distance of 25 feet; thence North 70°51'54" East a distance of 196.18 feet to the true point of beginning of this line description; thence North 84°13'42" East a distance of 294.43 feet"; also

That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across Government Lot 1, Section 32, Township 24 North, Range 5 East, W.M., King County, Washington, bounded on the North and South by the North and South lines of said Government Lot 1; also,

That certain 100.0 foot wide Branch Line right of way, upon, over and across Government Lot 2, Section 32, and Government Lots 3 and 4 Section 31, all in Township 24 North, Range 5 East, W.M., King County, Washington, as described in Deed dated September 8, 1903 from Lake Washington Belt Line Company to Northern Pacific Railway Company, recorded in Volume 386 of Deeds, Page 147, records of King County, Washington, **EXCEPTING THEREFROM**, that certain tract of land described in deed dated September 14, 2001 from The Burlington

Northern and Santa Fe Railway Company to Barbee Forest Products, Inc., recorded September 26, 2001 as document No. 20010926000601, **ALSO EXCEPTING THEREFROM**, that portion of that certain tract of land described in deed dated March 23, 1936 from Northern Pacific Railway Company to Frank Walloch, recorded on July 8, 1936 in Volume 1689 of deeds, Page 620 lying within said Government Lot 2, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in deed dated May 8, 1990 from Burlington Northern Railroad Company to Robert J. Phelps and Nancy C. Phelps, recorded as document 9005101552, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in deed dated March 19, 1992 from Burlington Northern Railroad Company to Gilbert A. Schoos and Alice G. Shoos, recorded April 1, 1992 as document No. 9204011755, also, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in deed dated February 1, 1937 from Northern Pacific Railway Company to Carl Jorgensen and Christine Jorgensen, recorded March 1, 1937 in Volume 1721 of deeds, Page 63, **ALSO EXCEPTING THEREFROM**, that portion of that certain tract of land described in Quitclaim Deed dated February 28, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded April 21 1999 as Document Number 9904210268, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that portion of that certain tract of land described in Correction Deed dated May 26, 1999 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded June 17, 1999 as Document Number 19990617000619, records

of King County, Washington, **ALSO EXCEPTING THEREFROM**, that portion of that certain tract of land described in Correction Deed dated May 5, 1999 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded June 17, 1999 as Document Number 19990617000620, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that portion of that certain tract of land described in Quitclaim Deed dated June 26, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded June 17, 1999 as Document Number 19990617000618, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that portion of that certain tract of land described in Correction Deed dated May 6, 1999 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded June 17, 1999 as Document Number 19990617000621, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that portion of that certain tract of land described in Correction Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded October 30, 2000 as Document Number 20001030000428, records of King County, Washington; also,

That certrain tract of land described in deed dated March 17, 1904 from The Lake Washington Land Company to Northern Pacific Railway Company recorded April 1, 2904 in Volume 374 of deeds, Page 635, situated in Lot 3, Section 31, Township 24 North, Range 5 East, W.M., King County, Washington, said tract being described in said deed for reference as follows:

"All that portion of said Lot three (3) lying between the eastern line of the right of way of the Northern Pacific Railway Company over and across said lot and a line drawn parallel with and twelve and one-half (12-1/2) feed distant easterly from the center line of said Seattle Belt Line Branch of the Northern Pacific Company as the same is now temporarily located and constructed over and across said lot, and containing on-fourth of an acre, more or less ..." **EXCEPTING THEREFROM**, that portion of that certrain tract of land described in Quitclaim Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC reocrded April 21, 1999 as Document Number 9904210268, records of King County, Washington, **ALSO EXCEPTIN THEREFROM**, that portion of that certrain tract of land described in Correction Deed dated May 26, 1999 from The Burlington Northern and Santa Fe Railway Company to ANY, LLC recorded Juny 17, 1999 as Document Number 19990617000619, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that portion of that certain tract of land described in Correction Deed dated May 5, 1999 from The Burlington Northern and Santa Fe RAilway Company to ANT, LLC recorded June 17, 1999 as Document Number 199990617000620, records of King County, Washington, **ALSO ECEPTING THEREFROM**, that portion of that certain tract of land described in Quitclaim Deed dated June 26, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded June 17, 1999 as Document Number 19990617000621, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that portion of that certain tract ofland described in Correction Deed

dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded October 30, 2000 as Document Number 20001030000428, records of King County, Washington; also

That portion of said Railway Company's property situated in Government Lot 1, Section 6, Township 23 North, Range 5 East, W.M., King County, Washington, lying Southwesterly of a line parallel with and distant 50.0 feet Northeasterly from, measured at right angles to said Railway Company's Branch Line Main Track centerline as originally located and constructed, and Northeasterly of the Southwesterly boundary of that certain 100 foot strip described in Judgment and decree of Appropriation, No. 40536, dated February 8, 1904 in the Superior Court of the State of Washington in and for the County of King, bounded on the North by the North line of said Lot 1, Section 6, and bounded on the South by a line radial to said Railway Company's Main Track centerline, as now located and constructed at a point distant 65.5 feet Northwesterly of the East line of said Lot 1, Section 6, as measured along said Main Track centerline.

Together with an easement for a railway right of way over those second class shorelands as described in "Judgment and Decree of Appropriation" dated February 8, 1904, and entered in King County Superior Court Cause No. 40536, a certified copy of which was recorded under Recording No. 287565, bounded on the South by a line radial to said Railway Company's Main track centerline, as now located and constructed at a point distant 65.5 feet Northwesterly of the East line of said Lot 1, Section 6, Township 23 North, Range 5 East.

EXCEPTING FROM THE ABOVE THE FOLLOWING TWO SEGMENTS THEREOF AS CONVEYED TO SOUND TRANSIT AND THE CITY OF KIRKLAND DESCRIBED AS FOLLOWS:

1.) EXCEPTING FROM SAID BNSF RAILWAY COMPANY'S (FORMERLY NORTHERN PACIFIC RAILWAY COMPANY) WOODINVILLE (MP 23.45) TO KENNYDALE (MP 5.0), WASHINGTON BRANCH LINE RIGHT OF WAY AS DESCRIBED ABOVE THAT PORTION THEREOF CONVEYED TO SOUND TRANSIT PURSUANT TO DEED RECORDED APRIL 11, 2012, UNDER RECORDING NO. 20120411001173, AND DESCRIBED AS FOLLOWS:

All that portion of the former BNSF Railway Company's Woodinville to Kennydale Washington Branch Line right of way lying within the W½ W½ Section 28, and, lying within the north 700 feet of the W½ NW¼ Section 33, all in Township 25 North, Range 5 East, W.M.

All of which is a portion of the former BNSF Railway Company's (formerly Northern Pacific Railway Company) Woodinville (MP 23.45) to Kennydale (MP 5.0), Washington Branch Line right of way, varying in width on each side of said Railway Company's Main Track centerline, as now located and constructed upon, over and across King County, Washington, more particularly described as follows, to-wit:

That portion of Block 7, of Kirkland Syndicate's Second Addition to Kirkland Washington, situate in the SE¼ SE¼

Section 20, and that portion of said Railway Company's property situate in the SW¼ SW¼ Section 21, and in the NW¼ NW¼ Section 28, all in Township 25 North, Range 5 East, W.M., lying Easterly of a line parallel with and distant 50.0 feet Westerly from, measured at right angles and/or radially to said Railway Company's Main Track centerline as now located and constructed and Westerly of a line parallel with and distant 50.0 feet Westerly from, measured at right angles to said Railway Company's Main Track centerline as originally located and constructed, bounded on the West by the West line of said Block 7 and its Northerly prolongation, and bounded on the South by the intersection of said parallel lines, together with any right, title and interest, if any, to Houghton Street and Railroad Avenue of Kirkland Syndicate's Second Addition to Kirkland Washington; also,

That certain strip of land described in deed dated August 3, 1904 from John Zwiefelhofer and Aloisia Zwiefelhofer to Northern Pacific Railway Company recorded August 6, 1904 in Book 404 of Deeds, Page 44, under recording No. 305888 records on King County, Washington, said strip of land being described in said deed for reference as follows:

"A strip of land fifty (50) feet wide lying immediately east of the right of way of said Railway Company and extending South from the North line of Section 28, Township 25 North Range 5 East a distance of Six Hundred feet (600) and containing 0.69 acres in the Northwest Quarter of the Northwest quarter (NW¼ NW¼) of Section 28 Tp 25 N R 5 E WM.," EXCEPTING THEREFROM, that portion of said 50 foot wide strip lying Northerly of a line parallel

to and 400.0 feet Southerly of the North line of said NW¼ NW¼ of Section 28; also,

Parcel 3, of City of Bellevue Short Plat No. 80-16, according to the Short Plat recorded under King County Recording No. 8101239001, **EXCEPTING THEREFROM**, that certain tract of land described in deed dated December 13, 1996 from Burlington Northern Railroad Company to Fibres International, recorded December 13, 1996 as Document No. 9612130870, records of King County, Washington; also,

Tract B, of City of Bellevue Short Plat No. 806-16 according to the Short Plat recorded under King County Recording No. 8101239001, also,

That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Railway Company's Main Track centerline, as now located and constructed, upon, over and across the W½ W½ Section 28, W½ NW¼ Section 33, all in Township 25 North, Range 5 East, W.M., bounded on the North by the North line of said W½ W½ Section 28, and bounded on the South by the South line of said W½ NW¼ Section 33, EXCEPTING THEREFROM, that portion of said 100.0 foot wide right of way lying Easterly of a line parallel with and distant 35 feet Easterly from, measured at right angles to said Railway Company's Main Track centerline as now located and constructed and Northerly of a line parallel to and 400.0 feet Southerly of the North line of said of NW¼ NW¼ Section 28, ALSO EXCEPTING THEREFROM, that portion of said 100 foot wide Branch Line right of

way lying within that certain tract of land described in Special Warranty Deed dated June 29, 1999 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded May 22, 2000 as Document No. 20000522001155, records of King County, Washington, ALSO EXCEPTING THEREFROM, that certain tract of land described in Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to Ant, LLC recorded May 22, 1998 as Document No. 9805221787, records of King County, Washington, ALSO EXCEPTING THEREFROM, that certain tract of land described in Correction Special Warranty Deed dated June 8, 2001 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded January 3, 2003 as Document No. 20030103001327, records of King County, Washington, ALSO EXCEPTING THEREFROM, that certain tract of land described in Correction Special Warranty Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded December 28, 1998 as Document No. 9812282942, records of King County, Washington, ALSO EXCEPTING THEREFROM, that certain tract of land described in Correction Special Warranty Deed dated March 17, 2000 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded October 4, 2000 as Document No. 20001004000767, records of King County, Washington.

2.) ALSO EXCEPTING FROM SAID BNSF RAILWAY COMPANY'S (FORMERLY NORTHERN PACIFIC RAILWAY COMPANY) WOODINVILLE (MP 23.45) TO KENNYDALE (MP 5.0), WASHINGTON BRANCH LINE RIGHT OF WAY AS DESCRIBED ABOVE THAT PORTION THEREOF CONVEYED TO THE CITY OF KIRKLAND PURSUANT TO DEED RECORDED April 13, 2012, UNDER RECORDING NO. 20120413001315 AND DESCRIBED AS FOLLOWS:

That portion of Sections 5, 8, 17 and 20, Township 25 North, Range 5 East, W.M. and Sections 28, 32 and 33, Township 26 North, Range 5 East, W.M., in King County, Washington, lying within the eight (8) tracts of land described as follows:

Tract 1

That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Main Track centerline, as now located and constructed upon, over and across the S½, NE¼ and the NW¼, SE¼ and the SW¼ of Section 28, the W½, NW¼ and the NW¼, SW¼ of Section 33, the SE¼ of Section 32, all in Township 26 North, Range 5 East, W.M., bounded on the East by a line that is parallel with and 42.00 feet west of, when measured at right angles to, the centerline of 132nd Avenue NE (aka Slater Avenue NE or 132nd Place NE) as surveyed under King County Survey No. 28-26-5-19 and bounded on the South by South line of said SE¼ of Section 32, **EXCEPTING THEREFROM**, that certain tract of land described in Deed dated February 24, 1998 from The

Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded May 26, 1998 as Document No. 9805260805, records of King County, Washington; **ALSO EXCEPTING THEREFROM,** that certain tract of land described in Special Warranty Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded July 30, 1998 as Document No. 9807301468, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in Special Warranty Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway company to ANT, LLC recorded May 26 1998 as Document No. 9805260791, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in Correction Quitclaim Deed dated January 6, 2000 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded February 11, 2000 as Document No. 20000211000454, records of King County, Washington,

Tract 2

That portion of that certain 100.0 foot wide Branch Line right of way in the City of Kirkland, Washington, being 50.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across Blocks 3, 4, 5, 6, 11, 12, 13, 14, 18, 19, 23, 24, 25 and 26, the vacated alley between Blocks 13 and 14, and vacated Arlington Avenue between Blocks 14 and 19, as said Blocks and Streets are shown on plat of Lake Avenue Addition to Kirkland as recorded in Volume 6 of Plats, Page 86, Records of said King County, together with any right title

and interest, if any to those portions of Victoria Avenue, Harrison Avenue, Moreton Avenue, Jefferson Avenue, and Washington Avenue and Maple Street and alleys within said Blocks which lie within said 100.0 feet wide Branch Line right of way, EXCEPTING THEREFROM, that portion of Lot 3; Block 5, Lake Avenue Addition to Kirkland, according to the official plat thereof in the office of the Auditor of King County, Washington lying between two lines drawn parallel with and distant, respectively, 34.0 feet and 50.0 feet Westerly of, as measured at right angles from The Burlington Northern and Santa Fe Railway Company's (formerly Northern Pacific Railway) Main Track centerline as now located and constructed upon, over, and across said Block 5;

Tract 3

That portion of that certain 100.0 foot wide Branch Line right of way in the City of Kirkland, Washington, being 50.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across Blocks 220, 223, 224, 232, 233, 238, and 241 as said Blocks are shown on the Supplementary Plat to Kirkland as filed in Volume 8 of Plats at Page 5, records of said King County, together with any right title and interest, if any to those portions of Massachusetts Avenue, Madison Avenue, Michigan Avenue, Olympia Avenue, Piccadilly Avenue, Cascade Avenue, Clarkson Avenue, Fir Street, and alleys within said Blocks which lie within said 100.0 foot wide Branch Line right of way;

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Tract 4

That portion of Lots 1, 2, 4, 37, and all of Lots 3, 38, and 39, Block 227 as said Lots and Blocks are shown on the Supplementary Plat to Kirkland as filed in Volume 8 of Plats, at Page 5, records of said King County, which lie Northeasterly of a line parallel with and distant 50 feet Southwesterly from measured at right angles to said Railway Company's Main Track centerline as now located and constructed and Southwesterly of a line parallel with and distant 50 feet Northeasterly from, measured at right angle to said Railway Company's Main Track centerline as originally located and constructed;

Tract 5

That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Main Track centerline; as now located and constructed upon, over and across the S½, SE¼ of Section 5, NW¼, NE¼ and the E½, NW¼ and the E½, SW¼ of Section 8, all in Township 25 North, Range 5 East, W.M., bounded on the North by the South right of way line of Clarkson Avenue, City of Kirkland, Washington, and bounded on the West by the West line of said E½, SW¼ of Section 8, **EXCEPTING THEREFROM**¸ that certain tract of land described in Special Warranty Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded May 26, 1998 as Document No. 9805260787, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, that certain tract of land described in Correction Quitclaim Deed dated May 15,

1999 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded August 5, 1999 as Document No. 19990805001402, records of King County, Washington, **ALSO EXCEPTING THEREFROM** that certain tract of land described in Deed dated February 24, 1998 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded July 28, 1998 as Document No. 9807281544, records of King County, Washington.

Tract 6

That certain 0.23 acre tract of land described in deed dated July 15, 1903 from Samuel F. French to Northern Pacific Railway Company recorded August 8, 1903 in Book 361 of Deeds, Page 249, records of King County, Washington, said 0.23 acre tract being described in said deed for reference as follows:

"Commencing at a point in the east line of Lot four (4), Section eight (8), Township twenty-five (25) North, Range five (5) east, W.M. that is 395 feet north of the southeast corner of said lot, and running thence west parallel with the south line of said Lot four (4) 67 feet, more or less, to a point that is 50 feet distant from, when measured at right angles to, the center line of the proposed Seattle Belt Line Branch of the Northern Pacific Railway Company as the same is now located, staked out and to be constructed across said Section eight (8); thence running northeasterly parallel with said railway center line 200 feet; thence westerly at right angles to said railway center line 30 feet; thence northeasterly parallel with said railway center line,

and 80 feet distant therefrom, 130 feet, more or less, to the east line of said Lot four (4); thence south along said east line of said lot four (4) 322 feet, more or less to the point of beginning; containing 0.23 acres, more or less";

Tract 7

That certain strip of land described in deed dated March 3, 1904 from Seattle and Shanghai Investment Company to Northern Pacific Railroad Company recorded March 9, 1904 in Book 387, Page 243, records of King County, Washington, said strip being described in said deed for reference as follows:

"A strip of land Two Hundred twenty-five (225) feet in width across that certain parcel of land designated as Tract "B" in deed from the Kirkland Land and Improvement Company to H.A. Noble, dated July 13, 1899 of record in the Auditor's office of King County, Washington in Volume 245 of Deeds, at page 41, reference thereto being had. Said strip of land hereby conveyed, having for its boundaries two lines that are parallel with and respectively distant One Hundred (100) feet easterly from, and One Hundred Twenty-Five (125) feet westerly from, when measured right angles to, the center line of the Seattle Belt Line branch of the NORTHERN PACIFIC RAILWAY COMPANY, as the same is now constructed and located across said Tract "B," which said Tract "B" is located in Section 17, Township 25 North, Range 5 East, Willamette Meridian";

Appendix D

Tract 8

That portion of that certain 100.0 foot wide Branch Line right of way, being 50.0 feet on each side of said Main Track centerline, as now located and constructed, upon, over and across Government Lot 4 of Section 8, Government Lots 1, 2, and 3 and the E½, SW¼ of Section 17, and the NE¼, NW¼ and the NE¼ of Section 20, all in Township 25 North, Range 5 East, W.M., bounded on the North by the South line of that certain herein above described 0.23 acre tract of land described in deed dated July 15, 1903 from Samuel F. French to Northern Pacific Railway Company recorded August 8, 1903 in Book 361 of Deeds, Page 249, records of King County, Washington and the East line of said Government Lot 4 of Section 8, and bounded on the South by the westerly margin of 108th Avenue NE as described in the Quit Claim Deed from State of Washington to the City of Bellevue recorded under Recording Number 9303190367, records of said King County, together with such additional widths as may be necessary to catch the slope of the fill in N½ of said Government Lot 2, Section 17 as delineated in the 7th described parcel in deed dated June 20, 1903 from Kirkland Land and Improvement Company to Northern Pacific Railway Company recorded June 26, 1903 in Book 352, Page 582, records of King County, Washington, **EXCEPTING THEREFROM**, that portion of said 100.0 foot wide right of way lying within said hereinabove described parcel of land designated as Tract "B" in deed from the Kirkland Land and Improvement Company to H.A. Noble dated July 13, 1899 of record in Auditor's office of King County, Washington in Volume 245 of Deeds, at page 41.

Appendix D

(Tracts 1 – 8 being a portion of the parcel of land conveyed by BNSF Railroad Company to the Port of Seattle by Quit Claim Deed recorded under Recording Number 20091218001535, records of said King County.)

Appendix D

PARCEL C:

MP 0.00 – 3.4 Redmond Spur

All that portion of BNSF Railway Company's (formerly Northern Pacific Railway Company) Redmond Spur Right of Way, varying in width on each side of said Railway Company's Main Track centerline, as now located and constructed, between Woodinville (Milepost 0.0) to Redmond (Milepost 3.4), King County, Washington, more particularly described as follows, to-wit:

That certain tract of land described in deed dated December 28, 1931 from John DeYoung and Ellen DeYoung to Northern Pacific Railway Company recorded in Volume 1511 of Deeds, Page 495, records of King County, Washington, lying in the N/2 of SE/4 Section 9, Township 26 North, Range 5 East, W.M., **EXCEPTING THEREFROM**, that portion of that certain tract of land described in deed dated November 17, 1998 from The Burlington Northern and Santa Fe Railway Company to Tjossem Properties IV, LLC and Tjossem Properties V, LLC, recorded December 28, 1931; also,

That portion of that certain 100.0 foot wide Redmond Spur right of way, being 50.0 feet on each side of said Main Track centerline, as originally located and constructed, upon, over and across the E½ Section 9, the NE¼ NE¼ Section 16, the NW¼ Section 15, all in Township 26 North, Range 5 East, W.M., bounded Northerly by a line concentric with and distant 50.0 feet Southwesterly from, measured radially to said Railway Company's Seattle

to Sumas Main Track centerline as now located and constructed, and bounded Southerly by the South line of said NW¼ Section 15, **EXCEPTING THEREFROM**, that portion of that certain tract of land described in deed dated November 17, 1998 from The Burlington Northern and Santa Fe Railway Company to Tjossem Properties IV, LLC and Tjossem Properties V, LLC , recorded December 23, 1998 as Instrument No. 9812240021, which lies within said 100.0 foot wide right of way, **ALSO EXCEPTING THEREFROM**, that portion of that certain 100.0 foot wide Seattle Belt Line right of way described in deed dated May 19, 1903 from Mary B. Hansen and Anders Hansen to Northern Pacific Railway Company recorded May 28, 1903 in Volume 361 of Deeds, Page 48, records of King County, Washington, **ALSO EXCEPTING THEREFROM**, the Northeasterly 25.0 feet of said 100.0 foot wide Redmond Spur right of way, bounded on the South by the South line of said E½ Section 9 and bounded Northwesterly by a line perpendicular to said Railway Company's Main Track centerline, at a point distant 1,060.0 feet Northwesterly of said South line of the E½ Section 9, as measured along said Main Track centerline, being that certain tract of land described in Deed dated June 29, 1999 from The Burlington Northern and Santa Fe Railway Company to ANT, LLC recorded February 11, 2003 as Document No. 20030211000429, records of King County, Washington; also,

That portion of that certain 50.0 foot wide Redmond Spur right of way, being 25.0 feet on each side of said Main Track centerline, as originally located and constructed, upon, over and across the SW¼ Section 15, Township

26 North, Range 5 East, W.M., bounded Northerly and Easterly by the North and East lines of said SW¼ Section 15; also,

That portion of that certain 100.0 foot wide Redmond Spur right of way, being 50.0 feet on each side of said Main Track centerline, as originally located and constructed, upon, over and across the SW¼ SE¼ of Section 15, Township 26 North, Range 5 East, W.M., bounded Westerly and Southerly by the West and South lines of said SW¼ SE¼ of Section 15; also,

That portion of that certain 30.0 foot wide Redmond Spur right of way, being 15.0 feet on each side of said Main Track centerline, as originally located and constructed, upon, over and across the W½ NE¼ Section 22, Township 26 North, Range 5 East, W.M., bounded Northerly and Southerly by the North and South lines of said W½ NE¼ Section 22; also,

That portion of that certain 100.0 foot wide Redmond Spur right of way, being 50.0 feet on each side of said Main Track centerline, as originally located and constructed, upon, over and across the NW¼ SE¼ of Section 22, Township 26 North, Range 5 East, W.M., bounded Northerly and Southerly by the North and South lines of said NW¼ SE¼ of Section 22; also,

That portion of that certain 50.0 foot wide Redmond Spur right of way, being 25.0 feet on each side of said Main Track centerline, as originally located and constructed, upon, over and across the SW¼ SE¼ of Section 22, and

the W½ NE¼ Section 27, Township 26 North, Range 5 East, W.M., bounded Northerly by the North line of said SW¼ SE¼ of Section 22, and bounded Westerly by the West line of said W½ NE¼ Section 27; also,

That portion of that certain 100.0 foot wide Redmond Spur right of way, being 50.0 feet on each side of said Main Track centerline, as originally located and constructed, upon, over and across the SE¼SE¼NW¼ Section 27, Township 26 North, Range 5 East, W.M. bounded Easterly and Southerly by the East and South lines of said SE¼SE¼NW¼ Section 27; also,

That portion of that certain 100.0 foot wide Redmond Spur right of way, being 50.0 feet on each side of said Main Track centerline, as originally located and constructed, upon, over and across the S½ Section 27, Township 26 North, Range 5 East, W.M., bounded on the North by the North line of said S½ Section 27 and on the South by the South margin of Northeast 124th street extended.

Appendix D

EXHIBIT B

[FOR PHOTOCOPY OF ORIGINAL SEE
SUPPLEMENTAL APPENDIX AT PAGE SA1-3]

Appendix D

JR Lewis et al.

to

Northern Pacific Railway Company

Deed

This indenture made this 24th day of June A.D. 1903 by and between Mary C. Kittinger and George B. Kittinger, her husband of Seattle state of Washington; the Pugent Sound National Bank a body corporate under the laws of the United States doing business at Seattle in the State of Washington and J.R. Lewis of the city of San Jose, State of California, parties of the first part and the Northern Pacific Railway Company a body corporate under the laws of Wisconsin, the party of the second part. Witnesseth that the said parties of the first part are the owners in fee simple of the following premises, situate in the County of King State of Washington, to wit: Lots number One (1), Two (2), and Three (3) of Section Twenty (20) Township Twenty-Four (24) north of range Five (5) East, which said lands lie next to and a front upon the eastern shore of lake Washington and have appurtenant thereto certain riparian and littoral rights.

And whereas, the said party of the second part wishes to construct its railroad over and across said lands on the westerly side thereof near to and along the shores of said lake and has made a survey for said line of said road and staked the same out, and wishes to secure for such purposes the right of way over and across said lands and to secure that end has bargained for and purchased of the

patties of the first part, the following described strip, piece and parcel of said lands above named to wit: a strip, piece or parcel of said lands One Hundred (100) feet in width, in, over and across said Lots One (1), Two (2), and Three (3) of said section Twenty (20) township Twenty-Four (24) north of range Five (5) east having for its boundaries two lines parallel with and equidistant from the centerline of the road of said party of the second part as the same is now surveyed over and across the said premises together with such additional widths as may be necessary to catch the slopes cuts and fills of the road bed of said railroad in containing a total area of Ten and 5/10 acres more or less.

Now therefore the said parties of the first part, for and in consideration of the sum of Two Thousand One Hundred and Fifty Dollars to them in hand paid do hereby grant, bargain, sell, and convey unto the said party of the second part the said strip, piece, and parcel of land One Hundred feet in width as hereinbefore described and containing Ten and 5/10 acres more or less provided, however, and it is understood and agreed by and between the parties of the first part and the parties of the second part that the said first parties reserve from this grant for themselves _____ heirs, successors and assigns, all littoral and riparian rights appurtenant to the lands herein conveyed, also the right of a highway crossing over and across the said lands granted to and from the lakeshore to the lands lying-next easterly the lands herein granted. Provided that in passing and repassing the road of the second party is in no wise obstructed or injured, reserving the right to mine coal, and reserving also the right to build an overhead crossing upon an over said property and tunnels under the same; provided, however, that such overhead

crossing and tunnels shall be so located and constructed and operated as not to interfere with the possession or use of the said granted lands, by the said second party, its successors, or its assigns and that the plans· for such overhead crossing shall first be submitted to and approved by the superintendant of the first party before the same shall be built or constructed and no tunnels shall be made or excavated under said granted lands without the plans for the same are first submitted to an approved by the chief engineer of the second party. It being understood that the crossing herein provided for shall have a clearance of at least Twenty-Three feet above the rails of the railroad track of the second party as constructed and from time to time changed.

Witness. the hands and seals of the first parties with the president of the said Pugent Sound National Bank and the seal of the said bank this 24th day of June 1903.

In the presence of witnesses to J.R. Lewis's signature, John Bell, CP Cooper.

Signed JR Lewis

Mary Kittinger

George V. Kittinger

Pugent Sound National Bank of Seattle, by Jacob Furth, its president

R.N. Ankeny as cashier

Appendix D

EXHIBIT C

[FOR PHOTOCOPY OF ORIGINAL SEE
SUPPLEMENTAL APPENDIX AT PAGE SA4-11]

Appendix D

Lake Washington Land Company

to

Northern Pacific Railway Company

Warranty Deed

The Grantor the Lake Washington Land Company, a Corporation of the State of Washington, in consideration of the sum of Two Thousand ($2000.00) Dollars, in hand paid, conveys and warrants unto the Northern Pacific Railway Company, a Wisconsin Corporation, the following described real estate situated in the County of King, State of Washington, to wit:

All those portions of the following Government subdivisions lying within the exterior lines of a right of way one hundred (100) feet in width which has for its boundaries two lines that are parallel with and equidistant from the center line of the Seattle Belt line Branch of the Northern Pacific Railway Company as the same is now located, staked out and now in process of construction over and across or adjacent to said Government subdivisions, to wit:

The Northwest quarter of the Northwest quarter (N.W./4 of N.W./4) and the Southwest quarter of the Northwest quarter (S.W./4 of N.W./4) of Section thirty-three (33), Township twenty-five (25) North, range five (5) east, Willamette Meridian; Lot four (4) (or the northwest quarter of the northwest quarter—N.W./4 of N.W./4) the northwest quarter of the Southwest quarter (N.W./4

of S.W./4), and the Southwest quarter of the Southwest quarter (S.W./4 of S.W./4) of Section four (4), Township Twenty-four (24) North; Range five (5) east; Lot four (4) of section twenty (20), Township twenty-four (24) north, Range five (5) east; Lots one (1) two (2) and three (3) of Section twenty-nine (29), Township twenty-four (24) north, Range five (5) east; Lot two (2) of Section thirty-two (32), Township twenty-four (24) North, Range five (5) east; Lots three (3) and four (4) of Section thirty one (31), township twenty-four (24) North, range five (5) east, and Lots two (2), three (3) and four (4) of Section five (5), township twenty-three (23) north, Range five (5) east; Lots one (1), three (3) and four (4), the Northeast quarter of the Northwest quarter (N.E./4 of N.W./4), the southeast quarter of the Northwest quarter (S.E./4 of N.W./4), the northeast quarter of the Southwest quarter (N.E./4 of S.W./4), and the southeast quarter of the Southwest quarter (S.E./4 of S.W./4) of Section nine (9), Township twenty four (24) north, Range five (5) east, excepting there from any portions of any such subdivisions in said section nine (9) included within the following description:

Beginning at a point on the dividing line between the east half of the northwest quarter (E/2 of N.W./4) and the west half of the northwest quarter (W./2 of N.W./4) 1855 feet south of the north line of said section nine (9), thence east at right angles 300 feet; thence south 1320 feet; thence west to the Government meander line of Mercer slough; thence Northerly along said meander line to a point 1855 feet south of the north line of said section; thence east to the place of beginning, containing 37 acres more or less.

Also such additional widths or strips of land in any of said Government subdivisions as may be necessary to catch the slopes of the cuts and fills of the roadbed of such railroad which roadbed is to be constructed having a width at grade of twenty-two (22) feet and the cuts to have a slope of one to one and the fills to have a slope of one-and-one-half to one.

The Lake Washington Land Company for itself, its successors and assigns, hereby assigns to said Northern Pacific Railway Company its rights to purchase from the State of Washington any of the shore lands in grant of any of the above named government subdivisions embraced within a strip of land one hundred (100) feet in width, being fifty (50) feet on each side of the center line of the Seattle Belt line Branch of the Northern Pacific Railway Company as the same is located, staked out and now in the process of of [sic] construction across said shore lands but reserves to itself, its successors and assigns, the preference right to purchase from the State of Washington all shore lands outside of said one hundred (100) foot strip.

In witness whereof the said Lake Washington Land Company has caused these presents to be executed by its President and Secretary, thereunto duly authorized, and its corporate seal to be affixed this 8 day of Sept. A.D. 1903.

{Seal} Lake Washington Land Company by F.H. Brownell, Its President
Attest. S.C. Corneil, Its Secretary.

State of Washington County of Snohomish— S.S.

Appendix D

On this 8 day of Sept. A.D. 1903, before me, a notary public, personally appeared F. H. Brownell and S.C. Corneil, to me known to be the President and Secretary, respectively, of the corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned and on oath stated that they were authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporations.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

{Seal} J.A. [illegible]
Notary Public in and for the State of Washington
residing at Everett.

Filed for record at request of Jay Sedgwick Feb. 3, 1904 at 53 min. past 10 A.M.

Grant S Lamping
County Auditor

APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 11, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35486

D.C. No. 2:15-cv-00284-MJP
Western District of Washington, Seattle

THOMAS E. HORNISH AND SUZANNE J. HORNISH JOINT LIVING TRUST; TRACY NEIGHBORS; BARBARA NEIGHBORS; ARUL MENEZES; LUCRETIA VANDERWENDE; HERBERT MOORE; ELYNNE MOORE; EUGENE MOREL; ELIZABETH MOREL; LAKE SAMMAMISH 4257 LLC,

Plaintiffs-Appellants,

v.

KING COUNTY, A HOME RULE CHARTER COUNTY,

Defendant-Appellee.

ORDER

Appendix E

Before: M. SMITH and WATFORD, Circuit Judges, and RAYES,* District Judge.

The panel has unanimously voted to deny the petition for panel rehearing. Judges M. Smith and Watford have voted to deny the petition for rehearing *en banc*, and Judge Rayes has so recommended. The full court has been advised of the petition for rehearing *en banc* and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing *en banc* are DENIED.

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* The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX F — DENIAL OF REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED SEPTEMBER 11, 2018

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 16-35768

D.C. No. 2:14-cv-00784-JCC
Western District of Washington, Seattle

SCOTT KASEBURG; KATHRYN KASEBURG; MARTIN FEDIGAN; BARBARA BERGSTROM; KIM KAISER; PAMELA KAISER; DAVID KOMENDAT; KELLI KOMENDAT; WILLIAM BLOKKER; SUSAN BLOKKER; DAVID MCCRAY; SALLY MCCRAY; JOHN LORGE III; NANCY LORGE; JOHN HOWELL; MOLLY HOWELL; DARIUS RICHARDS; VICKI RICHARDS; GEORGE JOHNSTON; NANCY JOHNSTON; GREGORY PIANTANIDA; SHERRE PIANTANIDA; PAUL FERGEN; CHRISTINE FREGEN; KEVIN IDEN; TOM EASTON; KAREN EASTON; PAUL PASQUIER; KARYN PASQUIER; JOHN HOUTZ; TERENCE BLOCK; KARI BLOCK; LARRY KOLESAR; SUSAN KOLESAR; JOHN LAUGHLIN; REBECCA LAUGHLIN; JEFFREY RILEY; TAMI RILEY; NANCY MANZ; DONALD DANA; PATRICIA DANA; CHRISTIE MUELLER; DENISE HARRIS; WALTER MOORE; TOM DAHLBY; KATHY DAHLBY; HARRY DURSCH; KIRSTEN LEMKE; RICHARD VAUGHN; RICHARD S. HOWELL; LOIS HOWELL; DONALD LOCKNER;

Appendix F

PATRICIA LOCKNER; MARJORIE GRUNDHAUS; WILLIAM KEPPLER; DEBRA KEPPLER; CURTIS DICKERSON; JULIE DICKERSON; GREGORY LASEK; PATRICIA LASEK; YONGTAO CHEN; QIN LI; ROBERT TAYLOR; ALISON TAYLOR; EDMUND JONES; DONALD MILLER; SUSAN MINER; RONALD JONES; CAROL JONES; STEVE SMOLINSKE; SHERRI SMOLINSKE; JOSEPH IOPPOLO; RICHARD KANER; LYNN KANER; BRADLEY R. ELFERS; BREGORY P. ELFERS; PAUL REMINGTON; JOHN BURROUGHS; BRUCE ERIKSON; MARY ERIKSON; TIMOTHY RILEY; VIRGINIA RILEY; JAMES SATHER; KELLY SATHER; JULIAN LIMITED PARTNERSHIP; STEVEN BRACE; KRISTEN BRACE; CHARLES BILLOW; COURTNI BILLOW; HAROLD A. BRUCE; PIERRE THIRY; CRISTI THIRY; MICHAEL FRANCESHINA; MICHAEL OLDHAM; GINA OLDHAM; STEPHEN PORTER; NANCY PORTER; ROBERT LARIS; JANIS LARIS; MICHAEL RUSSELL; ELANA RUSSELL; UMA SHENOY; LARRY PETERSON; SUSAN PETERSON; JOSEPH PETERSON; KRISTIN PETERSON; JOHN PATRICK HEILY; SUNDAY KYRKOS; PAUL GIBBONS; TRACY GIBBONS; DAYTON DENNISON; MARILYNN DENNISON; GREGORY NICK; DIVERSITY ASSETS LLC; JAMES JOHNSON; DAVID WILLIAMSON; KRISTI SUNDERLAND; CLAUDIA MANSFIELD; KEVIN LINDAHL; REBECCA LINDAHL; KEVIN TRAN; JEANNE DEMUND; KATHY HAGGART; DAWN LAWSON; MARLENE WINTER; JIE AO; XIN ZHOU; PACIFIC

Appendix F

HOLDINGS LLC; JAMES TASCA; MICHAEL CHAN; AMANDA CHAN; GARY WEIL; DALE MITCHELL; MARLA MITCHELL; FREDERICK MILLER; SUSAN MILLER; PAMELA HUNT; GRETCHEN CHAMBERS; ALWYN EUGENE GEISER; DANIEL HAGGART; PAMELA SCHAFER,

Plaintiffs-Appellants,

v.

PORT OF SEATTLE, a municipal corporation; PUGET SOUND ENERGY INC; COUNTY OF KING, a home rule charter county; CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,

Defendants-Appellees.

September 11, 2018, Filed

ORDER

Before: M. SMITH and WATFORD, Circuit Judges, and RAYES,[1] District Judge.

The panel has unanimously voted to deny the petition for panel rehearing. Judges M. Smith and Watford have voted to deny the petition for rehearing *en banc*, and

1. The Honorable Douglas L. Rayes, United States District Judge for the District of Arizona, sitting by designation.

Judge Rayes has so recommended. The full court has been advised of the petition for rehearing *en banc* and no judge of the court has requested a vote on it. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing *en banc* are DENIED.