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JOAN P. WHITE
SAN JUAN COUNTY, WASHINGTON

SUPERIOR COURT OF WASHINGTON,
COUNTY OF SAN JUAN

HELMAR MILLER, an individual and
ANNA MYERS, an individual,

Plaintiffs,

vs.

SPIRIT COVE CEMETERY
ASSOCIATION, a Washington nonprofit
corporation; and GEORGE E. SWINDELLS
and SUSAN HAWES-SWINDELLS,
husband and wife,

Defendants.

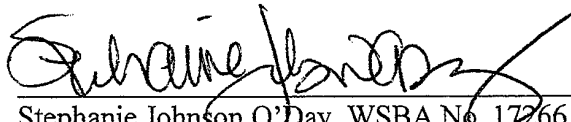
CASE NO. 12-2-05266-3

DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT,
MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT, AND
REQUEST FOR FEES

I. MOTION

Defendants, by and through their attorney, Stephanie Johnson O'Day, moves the court to enter partial summary judgment in favor of Defendants, Spirit Cove Cemetery Association, and George E. Swindells and Susan Hawes-Swindells. This motion is made on the grounds that there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law. This motion is brought pursuant to CR 56, LR 7, and LR 56 and is based on the pleadings and papers filed in this case, the Memorandum in Support of this Motion, and the Declarations of Stephenie Kramer, Stephen Kenady, George Swindells, and Stephanie Johnson O'Day.

1
2 Dated: April 24th, 2013
3 Friday Harbor, Washington

4 
5 Stephanie Johnson O'Day, WSBA No. 17266
6 James P. Grifo, WSBA No. 45192

7 **II. MEMORANDUM IN SUPPORT OF DEFENDANTS MOTION FOR PARTIAL**
8 **SUMMARY JUDGMENT**

9
10 **SUMMARY**

11 Thomas She-Kla-Malt is a Lummi Indian who died in 1900 and is buried at the Spirit
12 Cove Cemetery (the "Cemetery"). The Cemetery is a two-acre tract of land located on the
13 northeast side of a large tract of land belonging to Defendants George E. Swindells and Susan
14 Hawes-Swindells. Over the years, the land around She-Kla-Malt's grave began crumbling into
15 the Salish Sea. More recently however, Defendants realized that She-Kla-Malt's headstone
16 marker was also in danger of falling into the sea. To comply with their obligations to protect the
17 Cemetery and its contents, the Swindells asked the Lummi Nation what preservation efforts they
18 would like to pursue, if any. While initially the Lummi Nation directed the Defendants to let
19 nature take its course, the Nation ultimately reached out to accept the Swindells' offer to finance
20 the professional relocation of She-Kla-Malt's headstone. The relocation occurred under the
21 watchful eye of a trained archeologist and only after securing express consents from the
22 Washington State Department of Archaeology and Historic Preservation (DAHP), the
23 Department of Licensing (DOL), and the Lummi Nation.

24 Plaintiffs Miller and Meyers, Lummi descendants of She-Kla-Malt, have filed the instant
25 lawsuit alleging the violation of a state statute designed to protect and preserve Indian graves and
26 Memorandum in Support of Motion for Partial Summary Judgment- 2

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1 burial sites. Plaintiffs' Complaint for Damages and Injunctive Relief, at 4 (citing RCW §
2 27.44.040). Plaintiffs also allege that Defendants violated a real covenant running with the land.
3 Pls. Compl., at 4. Ultimately, neither law nor equity supports either of Plaintiffs' claims.
4

5 The circumstances surrounding the preservation efforts indicate that utmost care was
6 taken to ensure the proper and safe relocation of She-Kla-Malt's headstone. *See*, Declaration of
7 Stephenie Kramer, at 2; Declaration of Stephen Kenady, at 3; Declaration of George Swindells.
8 It may be that Plaintiffs are upset that the Lummi Nation decided to endorse the relocation efforts
9 despite Plaintiffs' remonstrations. *See*, Kenady Decl., Exhibit B. Indeed, Plaintiffs are entitled to
10 hurt feelings; however, to assert that the relocation violated RCW § 27.44.040, or to seek the
11 enforcement of a real covenant that does not apply to the Cemetery, and lacking the privity
12 required to do so, is an abuse of the judicial system and likely constitutes harassment.
13

14 An evaluation of the factual circumstances surrounding the relocation efforts should have
15 alerted Plaintiffs' counsel that no cause of action can reasonably exist in either law or equity.
16 Accordingly, Defendants' respectfully move for Partial Summary Judgment and ask that the
17 Court dismiss Plaintiffs' claims with prejudice, award reasonable attorney's fees and costs.
18
19

20 **III. SUMMARY JUDGMENT STANDARDS**

21
22 The Court should grant Defendants' Motion for Partial Summary Judgment because there
23 are no material facts in dispute and Defendants are entitled to judgment as a matter of law.
24 Summary judgment is a procedure to avoid unnecessary trials on issues that cannot be factually
25 supported and could not lead to, or result in, a favorable outcome for the opposing party.
26 *Jacobsen v. State*, 89 Wn.2d 104, 569 P.2d 1152 (1977). Summary judgment is appropriate
27 where there are no genuine issues of material fact and the moving party is entitled to judgment as
28 Memorandum in Support of Motion for Partial Summary Judgment- 3

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1 a matter of law. CR 56(c). A material fact in a summary judgment proceeding is "one upon
2 which the outcome of the litigation depends." *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d
3 1207 (1992).

4
5 The party moving for summary judgment must show that there are no genuine issues of
6 material fact and is then entitled to judgment as a matter of law. *Magula v. Benton Franklin Title*
7 *Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). Once this burden is met, the nonmoving
8 party must present evidence demonstrating that material facts are in dispute. *Atherton Condo-*
9 *Apartment Owners Ass'n Bd. Of Directors v. Blume Dev. Co.*, 155 Wn.2d 506, 516, 799 P.2d
10 250 (1990). A nonmoving party cannot rely on speculation to show material factual issues;
11 instead, the nonmoving party must "set forth specific facts that sufficiently ... disclose that a
12 genuine issue as to material fact exists." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106
13 Wash.2d 1, 13, 721 P.2d 1 (1986).
14
15

16 17 **IV. STATEMENT OF FACTS**

18 Lummi Indian, Thomas She-Kla-Malt homesteaded the subject property in the late 1800s,
19 and died at the turn of the last century. Thomas She-Kla-Malt's granddaughter, Pearl Little,
20 ultimately became the sole heir of her grandfather's land. When Pearl Little died intestate, in
21 1983, a lengthy probate battle ensued to determine the rights and interests of a number of
22 relatives. *See, In Re Estate of Pearl Little*, San Juan County, Probate Cause Number 4-2088.
23 Many claimants hired attorneys and fought to establish interests in the estate. *Id.* Plaintiffs to the
24 present action were included among those parties. *Id.* In 1989 the Pearl Little Estate conveyed
25 about 30 acres of the 77-acre estate to OJ Properties Inc. In 1997, the prior owner of the
26 remaining Pearl Little Estate, Frank Everett III, in a second case involving the Cemetery
27
28

1 Property, entered into a Stipulation and Agreed Order Regarding Visitation, Maintenance, and
2 Access Rights of Cemetery Beneficiaries. *See, Frank E. Everett v. Larry Cepa, et al.*, San Juan
3 County Cause No. 95-2-05161-9: October 6, 1997, Stipulation and Order, appended to this
4 Memorandum. This Stipulation and Agreed Order included a section entitled, "V. Persons
5 Entitled to Rights of Visitation" which details certain parties with rights of visitation and access,
6 all of whom were Lummi Indians (with the exception of August Anderson). *Id.*, at 3. "Section V"
7 continues to explain that the Lummi Nation shall be responsible to keep the list of names of
8 those with visitation, maintenance, and access rights updated. *Id.*, at 3-4. The Order further
9 details the scope of visitation, maintenance, and access. *Id.* The Order prohibits ground-
10 disturbing activities within "the cemetery except by agreement of the Lummi Nation." *Id.* at 6.
11 Several hundred heirs currently hold rights of visitation. *Id.*, at 3.

12
13 Defendants George Swindells and Susan Hawes-Swindells acquired 47 acres of the Pearl
14 Little Estate on northern San Juan Island in 2001 from Frank E. Everett, III. This property
15 included certain land, described as a private cemetery. This private cemetery, identified as
16 "Parcel A" in the 2001 conveyance, is legally described as:

17
18 A tract reserved and hereby dedicated forever for the purpose of a private
19 cemetery for the repose of my ancestors now there interred and of my descendants
20 forever, bounded by lines produced as follows: Beginning at a point which is
21 2192.52 feet East and 1690 feet North of the quarter section corner on the West
22 side of said Section 18, run North 416 feet to the meander line; THENCE run
23 along said line North 34.5° West 46.2 feet; THENCE South 49 West 198 feet;
24 THENCE South 21° West 211.20 feet; THENCE South 35.5 West 99 feet;
25 THENCE South 8° West 50 feet; THENCE leaving the meander line run East 318
26 feet to the place of beginning. ("the Cemetery") (Swindells Decl., Exhibit A).

27 Defendants George Swindells and Susan Hawes-Swindells conveyed the Cemetery to the Spirit
28 Cove Cemetery Association ("the Association") in October 2005, and the family retains the

1 remaining 45+- acres. *See*, Quit-Claim Deed with Conditions Subsequent, November 8, 2005,
2 attached to Swindells Decl. as Exhibit B. Covenants running with the land detail the use of the
3 property, maintenance, permitted visitors, etc. *Id.*

4
5 Soon after their purchase, the Swindells became aware that the headstone in the Cemetery
6 belonging to Thomas She-Kla-Malt was being threatened by an ever-encroaching shoreline.
7 Swindells Decl., at 2. Initially, the Tribe felt it was best for nature to take its course – which
8 would have allowed the headstone to fall off the bank onto the beach or into the sea.

9
10 Some time later, the Swindells again contacted the Lummi Nation, expressing concern
11 about the imminent fall of the headstone. Swindells Decl. The Nation agreed that the headstone
12 should be saved, if possible. Kenady Decl., Exhibit B. Defendants worked with the Lummi
13 Nation to determine the appropriate next steps. Swindells Decl., at 2. Plaintiffs Helmar Miller
14 and his niece Anna Meyers, Lummi descendants, were not in favor of moving the headstone
15 back. *See*, December 1, 2010 Email from Lena Tso to G. Swindells and S. Kenady, attached at
16 Kenady Decl., Exhibit B. The Lummi Nation convened a meeting on September 28, 2010 to
17 review and discuss the proposed relocation plan with Plaintiffs, Defendants, and Steve Kenady
18 (the archeologist). *See*, *id.*; Kenady Decl., at 2. It was agreed that Plaintiffs would have two
19 weeks to re-consider their objections to the relocation. Kenady Decl., Exhibit B. Within the two-
20 week deadline Plaintiffs wrote still disapproving of the proposed relocation. *Id.* On December 1,
21 2010, despite Plaintiffs objections, the Tribe contacted Defendants writing, “*The Lummi Nation*
22 *is in support of preservation of the cemetery which most definitely includes the proposed move of*
23 *the endangered gravestone.” Id.*

24
25
26 At the request of the Lummi Nation, Defendants contacted and hired archeologist Steve
27 Kenady to perform and coordinate a formal relocation of the subject headstone. Swindells Decl.,
28 Memorandum in Support of Motion for Partial Summary Judgment- 6

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1 at 2; Kenady Decl., at 2. Steve Kenady contacted Stephenie Kramer at the Department of
2 Archaeology and Historic Preservation (DAHP), and Dennis McPhee at the Washington State
3 Department of Licensing (DOL) before conducting the relocation. Kenady Decl., Exhibit B.
4 After all of the necessary authorities were contacted, Steve Kenady performed a calculated and
5 controlled relocation of the headstone. On the day of the relocation, members from the Lummi
6 Nation, Defendants, as well as Plaintiffs, all gathered to witness the event. *See*, Kenady Decl., at
7 3; Kenady Decl., Exhibit B. There were no objections raised at that time and the relocation went
8 exactly as designed. Kenady Decl. at 3; Kramer Decl. at 2.
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12 **V. ISSUES PRESENTED**

- 13 A. Whether Defendants willfully violated RCW § 27.44.040 by “defacing” Thomas She-
14 Kla-Malt’s headstone?
15
16 B. Whether the relocating of the subject headstone was a violation of the real covenant
17 recorded on March 10, 1989?
18
19 C. Whether Defendants should be awarded their reasonable attorneys fees under RCW §§
20 27.44?

21 **VI. ARGUMENTS**

- 22 A. Defendants did not violate RCW § 27.44.040 when they acted to preserve the subject
23 headstone.

24 Defendants did not willfully violate RCW § 27.44.040 when they participated in the
25 headstone relocation effort because, a cautious and watchful transfer conducted by trained
26 professionals does not constitute the defacing of an Indian grave. Plaintiffs assert that Defendants
27

1 “willfully violated RCW 27.44.040 by moving the headstone of Thomas She-Kla-Malt, a native
2 Indian, thereby defacing his grave.” Pls. Compl. ¶ 4.2. RCW § 27.44.040(1) states that:

3 (1) Any person who knowingly removes, mutilates, defaces, injures, or destroys
4 any cairn or grave of any native Indian, or any glyptic or painted record of any
5 tribe or peoples is guilty of a class C felony punishable under chapter 9A.20
6 RCW. Persons disturbing native Indian graves through inadvertence, including
7 disturbance through construction, mining, logging, agricultural activity, or any
8 other activity, shall reinter the human remains under the supervision of the
9 appropriate Indian tribe. The expenses of reinterment are to be paid by the *office
10 of archaeology and historic preservation pursuant to RCW 27.34.220.

11 RCW § 27.44.040. The Washington State Legislature described its intent motivating the
12 adoption of these statutes, explaining: that because there is value and importance in respecting all
13 graves and treating them as cultural relics, and that where there have been reports and incidents
14 of deliberate interference with Indian graves for profit making motives or careless indifference in
15 cases of accidental disturbances; that these laws were designed to encourage voluntary reporting
16 and respectful handling of these cultural relics or otherwise provide penalties for deliberate
17 desecration. RCW § 27.44.030. Clearly, the preservation of She-Kla-Malt’s headstone does not
18 constitute the kind of conduct that these statutes were designed to prevent.

19 The coordinated and planned relocation of a threatened headstone — conducted by a
20 professional archaeologist — to preserve a cultural relic does not constitute the “defacing” of
21 Thomas She-Kla-Malt’s grave. RCW § 27.44.040 prohibits removal, mutilation, defacing,
22 injuring, or destroying any cairn or grave. RCW § 27.44.040. Defendants’ participation in the
23 relocation efforts were none of these. Quite simply, relocation for the purposes of preservation
24 does not constitute removal, mutilation, defacing, injuring, or destroying.

25 To determine whether this kind of act is prohibited by RCW § 27.44.040, the Court must
26 interpret the cited statute. When interpreting any statute, the court’s primary objective is to
27

1 ascertain and give effect to the intent of the Legislature. *Koenig v. City of Des Moines*, 158 Wn.
2 2d 173, 181, 142 P.3d 162 (2006). To do so, the courts will consider the plain language of the
3 statute and afford the words their plain meaning. *Id.* Courts will then often resort to dictionaries
4 to determine the plain meaning of nontechnical statutory terms. *State v. Cooper*, 156 Wn.2d 475,
5 480, 128 P.3d 1234 (2006). Where the language of a statute is subject to only one interpretation,
6 the inquiry ends. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

8 RCW §§ 27.44 does not define the term “deface” and case law does not offer any
9 guidance. *See*, RCW §§ 27.44. Turning to *Black’s Law Dictionary*, “deface” means: “to mar or
10 injure.” *Black’s Law Dictionary*, Ninth Ed., at 479. It is impossible to characterize the relocation
11 that occurred as having either marred or injured the subject headstone; and, Plaintiffs cannot
12 establish otherwise. Defendants took great care in coordinating professional relocation efforts.

14 Steve Kenady carefully ensured that the relocation was conducted in accordance with all
15 state and local regulations and worked with Stephanie Kramer, Assistant State Archeologist,
16 Washington State Department of Archaeology and Historic Preservation, and Dennis McPhee, at
17 the Department of Licensing.

19 The headstone was relocated from a hanging precipice, to a stable footing placed just six
20 feet upland. *See*, Kenady Decl., Exhibit C. A State of Washington Archeological Site Inventory
21 Form narrative describes the relocation effort and includes photographs of the subject headstone
22 along with a photo of Plaintiffs, Defendants, and representatives from the Lummi Nation all
23 gathered at the site during the event. *Id.* The relocation occurred without any unexpected events,
24 and the headstone is in exactly the same condition as it was before the relocation – although no
25 longer threatened by an eroding shoreline.

1 This Court is respectfully requested to grant Defendants' Motion for Partial Summary
2 Judgment because there are no genuine issues of material fact and Defendants are entitled to
3 judgment as a matter of law. Ultimately, it is impossible for Plaintiffs to establish that the
4 cautious, planned, and coordinated relocation of Thomas She-Kla-Malt's headstone, constitutes a
5 violation of RCW § 27.44.040 – a statute ostensibly designed to encourage landowners and
6 others to behave exactly as Defendants to this action did.
7

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10 B. The relocation did not violate the real covenant cited by Plaintiffs, and Plaintiffs lack the
11 privity required to enforce it.

12 The relocation of Thomas She-Kla-Malt's headstone did not violate the real covenant
13 recorded on or about March 10, 1989. Plaintiffs allege that the relocation violated a real covenant
14 containing the language, "*The owners of this property agree that significant sites such as*
15 *gravesites shall be preserved in place if possible. The goal is sensitive development and*
16 *preservation.*" Pls. Compl., at 4. Although Plaintiffs cite an easement referencing this provision,
17 the language actually stems from a Mitigated Determination of Nonsignificance (MDNS) issued
18 for this property back in 1989.
19

20 Ultimately, Defendants are entitled to prevail on their Motion for Partial Summary
21 Judgment for three reasons: 1) the real covenant cited by Plaintiffs does not apply; 2) Plaintiffs
22 lacking privity, also lack the right, authority, and standing to enforce the real covenant upon
23 which they wrongly rely; and 3) Defendants complied with the covenant's requirements.
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- 1 1. The real covenant cited by Plaintiffs does not apply because a coordinated relocation
2 is not a “development” activity.

3 The real covenant cited by Plaintiffs does not apply to the Cemetery. The Pearl Little
4 Estate contracted with OJ Properties Inc. to sell about 30 acres of land in 1988 by and through a
5 boundary line modification between the Pearl Little property and OJ Properties Inc.’s land.
6
7 When San Juan County approved the boundary line modification it attached a covenant that
8 would run with all the lands – including those conveyed by the estate and those it retained. The
9 covenant reads as follows:

10 *In accordance with a mitigated determination of nonsignificance (MDNS) issued*
11 *by San Juan County, no development shall be permitted on any portion of this*
12 *property before a qualified archeologist prepares an archeological assessment ...*
13 *after consultation with affected tribes and the Office of Archeology and Historic*
14 *Preservation. ... For the purposes of this MDNS “development” means any*
15 *construction of any kind, land clearing, timber cutting, grading, excavating, or*
16 *conveyance of any portion of the subject property, other than that boundary line*
17 *modification proposed by the applicant ... The owners of this property agree that*
18 *significant sites such as gravesites shall be preserved in place if possible. The*
19 *goal is sensitive development and preservation. Development plans must take into*
20 *consideration the existence of known sites to avoid disturbing them unless the*
21 *graves are reinterred elsewhere ... This covenant shall run with this property (the*
22 *Little Property, including the O’Day portion) and shall be binding on the owners*
23 *and their heirs and assigns.*

24 Swindells Decl., Exhibit A (2001 Statutory Warranty Deed subject to Easements, Restrictions,
25 Reservations, Covenants and Conditions of Record, citing March 9, 1989 Easement)
26 (underscored for emphasis).

27 Plaintiffs allege the violation of an MDNS designed to prevent the damage or destruction
28 of Indian burial grounds and gravesites during development activities. *See*, Pls. Compl. at 4. The
29 MDNS prohibits development on any portion of the Pearl Little Estate without the presence of an
30 archeologist overseeing the activity and working in conjunction with the necessary entities (San

1 Juan County, the Lummi Nation, and DAHP). Swindells Decl., Exhibit A. The preservation of
2 She-Kla-Malt's headstone was not a "development" activity as defined by the MDNS and
3 therefore it does not trigger the requirements as outlined in the real covenant. Plaintiffs' claim
4 that the relocation of She-Kla-Malt's headstone violated the restrictions contained in the MDNS
5 fails because no "development" activity has occurred.
6

7
8 2. Plaintiffs lack the privity required to enforce the covenant.

9 Defendants strenuously contest that Plaintiffs have the right to ask this Court to enforce
10 the real covenant, as they lack "vertical privity" with the contracting parties. Washington Courts
11 have adopted a rule that "covenantees may only enforce restrictive covenants if they have a
12 justiciable interest in enforcement, *generally an ownership interest in the benefitted property.*"
13 *Lakewood Raquet Club, Inc., v. Jensen*, 156 Wn. App. 215, 228, 232 P.3d 1147 (2010). A
14 "justiciable interest" has been defined as "the stake that a covenantee must have in order to ask a
15 court to legally enforce a covenant." *Id.*, at 224 fn. 11. Thus, in a case where an original
16 covenantee was not permitted to enforce a covenant where that covenantee no longer retains an
17 ownership interest in the benefitted property, that party is not entitled to seek an enforcement
18 action. *See, id.*, at 224-25. Plaintiffs Miller and Meyers lack a "justiciable interest" in the cited
19 covenant to warrant their seeking its enforcement.
20
21

22 And while the cited covenant is operative, Plaintiffs lack the required "vertical privity"
23 element required for enforcement. *See, Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*,
24 120 Wn. App. 246, 254, 84 P.3d 295 (2004) (citing *Lake Arrowhead Community Club Inc. v.*
25 *Looney*, 112 Wn. 2d 288, 294-295 (1989); *See also, Leighton v. Leonard*, 22 Wn. App. 136, 139,
26 589 P.2d 279 (1978). The cited covenant was enforceable between the original parties: Eunice C.
27
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1 Squiqui as Co-Administratrix of the Pearl Little Estate, and Pat O'Day and Stephanie Johnson
2 O'Day for OJ Properties Inc. The covenant "touched and concerned" both the land to be
3 benefitted and the land to be burdened. The covenanting parties likely intended to bind their
4 successors in interest. *See*, Swindells Decl., Exhibit A ("This covenant shall run with this
5 property . . . and shall be binding on the owners and their heirs and assigns."). And, there was
6 horizontal privity of estate, that is to say, privity between the original contracting parties- OJ
7 Properties Inc. and the Pearl Little Estate. Fatally however, there is no vertical privity of estate,
8 *i.e.*, privity between the original parties to the covenant and the present disputants. Plaintiffs do
9 not have "vertical privity" of estate and therefore are precluded from seeking enforcement of the
10 real covenant they cite.
11
12

13 Because the "vertical privity" requirement is not satisfied, Plaintiffs may not seek an
14 enforcement action. Vertical privity describes the transfer of the estate held by the covenantor to
15 a successor in his or her chain of title, or the transfer of the estate held by the covenantee to his
16 or her successor. William B. Stoebeck & John W. Weaver, WASHINGTON PRACTICE: REAL
17 ESTATE-PROPERTY LAW §3.5 (2d ed. 2004). "A remote party may have the benefit of
18 performance by the covenantor or the covenantor's successor *only if that remote party has*
19 *succeeded to the estate held by the covenantee* that was, in the covenantee's hands, benefitted by
20 the covenant. *Id.* Quite simply, Plaintiffs are not successors to the covenantee and therefore
21 cannot presently seek enforcement of the cited covenant. Plaintiffs Miller and Meyers have very
22 limited rights of access to the Cemetery grounds, and have not succeeded to the estate presently
23 held by Defendants.
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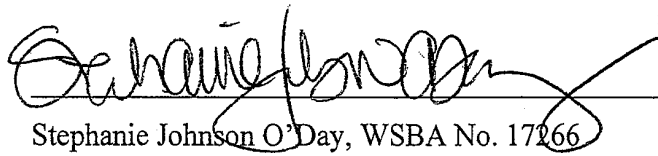
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1 **after** all of the proper state authorities (DAHP and DOL) and the Lummi Nation had consented
2 to the proposal submitted by a professional archeologist, Steve Kenady. *See*, Kenady Decl., at 2 -
3 4; Kramer Decl., at 2; Swindells Decl., at 3. Defendants worked to comply with all of their legal
4 and fiduciary obligations to ensure that the relocation was properly conducted. Plaintiffs' claims
5 that the relocation violates RCW § 27.44.040 are unfounded and as a result Defendants request
6 reasonable attorneys fees as provided for by this statute.
7

8 9 **VIII. CONCLUSION**

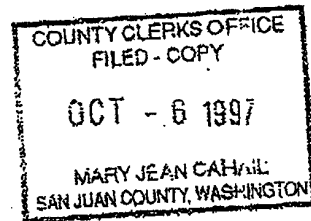
10 The Court should grant Defendants' Motion for Partial Summary Judgment because there
11 are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law.
12 RCW §§ 27.44 was not adopted to prevent the kind of controlled and professional relocation that
13 occurred in December 2010. Thomas She-Kla-Malt's headstone was precariously sitting on a
14 cliff-face and threatened with being lost forever. Defendants, having a fiduciary duty to protect
15 and preserve the Cemetery, reached out to the Lummi Nation to determine the most appropriate
16 and culturally respectful course of action. Only when the Lummi Nation formally confirmed its
17 support of the relocation, was the effort pursued. A professional archeologist working in
18 conjunction with DAHP and the DOL successfully relocated the headstone so that it could be
19 preserved in perpetuity; for the benefit of the interreds' relatives and those with other ties to that
20 land. Defendants took every possible step to ensure that the relocation was properly conducted,
21 and that the effort was culturally sensitive. This Court is respectfully requested to grant
22 Defendants' Motion for Partial Summary Judgment, award reasonable attorneys' fees and costs,
23 and dismiss Plaintiffs claims with prejudice.
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3 Dated this 24th April 2013.

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Stephanie Johnson O'Day, WSBA No. 17266

James P. Grifo, WSBA No. 45192



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3
4 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
5 FOR THE COUNTY OF SAN JUAN

6 FRANK E. EVERETT,

7 Plaintiff,

8 v.

9 LARRY CEPA, ET AL.,

10 Defendants.

No.: 95-2-05161-9

STIPULATION AND AGREED
ORDER REGARDING VISITATION,
MAINTENANCE, AND ACCESS
RIGHTS OF CEMETERY
BENEFICIARIES

11
12
13 COME NOW Plaintiff Frank E. Everett, by and through his counsel
14 Stephanie Johnson O'Day, and Remaining Defendants Lummi Indian Nation and
15 Raider Johnson, by and through counsel Harry L. Johnsen, Office of the
16 Reservation Attorney, Raas, Johnsen & Stuen, and Mary Donnelly, by and
17 through her counsel Eugene H. Knapp, Jr., of Lane, Powell, Spears, Lubersky,
18 and stipulate as follows:

19 I. Plaintiff Frank Everett (hereinafter the "Owner" or "Plaintiff"), is the record
20 owner in fee of three parcels of land comprising a portion of the former estate of
21 Pearl Little, deceased. For purposes of this Order, the parcels are described as
22 follows:

23
24 Parcel A, comprising the western portion of Plaintiff's property, consisting
of 22.83 acres more or less.

STIPULATION AND AGREED ORDER
REGARDING VISITATION, MAINTENANCE, AND
ACCESS RIGHTS OF CEMETERY BENEFICIARIES

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Parcel B, comprising the southeastern portion of the Plaintiff's property, consisting of 21.64 acres more or less.

Parcel C, comprising the northeastern portion of the Plaintiff's property, consisting of 4.45 acres more or less.

II. Contained within Parcel C is a private cemetery created by a reservation in a deed. "The reservation is an equitable restriction on the two acre tract, which provides for . . . reasonable visitation and maintenance rights by the relatives of (Maggie) Fitzhugh and those buried there." (Stipulation and Order entered March 11, 1996.) The cemetery is legally described as:

Section 18, Township 36 N., Range 3 W., W.M. in San Juan County, Washington; Beginning at a point which is 2192.52 feet east and 1690 feet north of the quarter section corner on the west side of said Section 18, run north 416 feet to the meander line; then run along said line north 34.5 degrees west 46.2 feet; thence south 49 degrees west 198 feet; thence south 21 degrees west 211.20 feet; then south 35.50 degrees west 99 feet; thence south 8 degrees west 50 feet; thence leaving the meander line run east 318 feet to the place of the beginning, consisting of 2.11 acres, more or less.

III. The Plaintiff, "and his successors in interest, as owners of the cemetery property, hold it as a fiduciary for the benefit of relatives of Maggie Fitzhugh and of those persons buried on the cemetery property. No use may be made of the cemetery property except for cemetery purposes Cemetery beneficiaries have reasonable rights of access inherent in their rights of visitation and maintenance, the exact scope of such rights to be established by agreement of the parties or by further order of the court following appropriate hearing on the matter." Order Granting Defendants Summary Judgment entered July 28, 1997.

STIPULATION AND AGREED ORDER
REGARDING VISITATION, MAINTENANCE, AND
ACCESS RIGHTS OF CEMETERY BENEFICIARIES

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V. PERSONS ENTITLED TO RIGHTS OF VISITATION. Relatives of those known to be buried on the property, i.e. Maggie Fitzhugh, Tom She-kla-malt, Mary Tom, Louisa George and August Anderson have rights of visitation and maintenance under the rulings of the court. All of these persons except August Anderson were Lummi Indians. The rights defined by this document are limited to relatives of the persons named above. The individuals listed on the attached sealed Exhibit A (prepared by the Lummi Tribe), as well as all named individual defendants in this action shall constitute the core list of those relatives with an absolute right of visitation. Exhibit A shall not be made public and shall be sealed by the court. It shall be used by the cemetery authority solely for the purposes of this order. The list is based on the best information currently available to the

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Lummi Nation and is accepted by the Owner. It shall be the responsibility of the Lummi Indian Nation to keep this list updated with the names of known living relatives, and to notify the Owner in writing of changes in the list. Relatives may be asked to provide identification at the site by the Owner only if the Owner feels, in his sole reasonable discretion, that the individual claiming to be a relative is masquerading as such.

Other individuals who believe they are relatives but who are not included on Exhibit A or on any updated version of the list, shall have rights of visitation with the approval of the then current owner of the cemetery parcel or of this court, after submitting proof of their status satisfactory to the owner or the court, as the case may be. The court shall retain jurisdiction over this matter for the limited purpose of ruling on such claims.

Persons who are not relatives may accompany a relative on a visit to the cemetery with the permission of the owner, which shall not be unreasonably withheld.

VI. SCOPE OF VISITATION. The scope of visitation shall normally be conducted within the following limitations:

Hours: Limited to daylight hours.

Length of Stay: Ninety minutes at the cemetery plus a reasonable time for ingress and egress as provided below.

Number of visitors in any one group: Six.


Notice: A minimum of prior notice by telephone or letter received

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1 Stipulated and Agreed to this 3rd day of October, 1997.

2 OFFICE OF THE RESERVATION ATTORNEY
3 RAAS, JOHNSEN, & STUEN, P.S.

4 
5 By: HARRY L. JOHNSEN, WSBA #4955
6 Attorneys for Defendants Raider Johnsen
7 and the Lummi Indian Nation

8 LANE, POWELL, SPEARS, LUBERSKY

9
10 By: EUGENE H. KNAPP, JR. WSBA #2691
11 Attorneys for Defendant Mary Donnelly

12
13 LAW OFFICES OF STEPHANIE JOHNSON O'DAY

14
15
16 By: STEPHANIE JOHNSON O'DAY,
17 Attorney for Plaintiff Frank E. Everett

18
19 ORDER

20 ORDERED, ADJUDGED AND DECREED that the above Stipulation and
21 Agreement is hereby approved by the Court and shall have the force of law.

22 DONE IN OPEN COURT this _____ day of October, 1997.

23
24
25 Judge Alan R. Hancock

STIPULATION AND AGREED ORDER
REGARDING VISITATION, MAINTENANCE, AND
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2 during normal business hours the day prior to the visit. For
3 purposes of this provision a letter is presumed received three days
4 after it is mailed.

5 **Activities:** All activities by any person within the cemetery shall be
6 quiet, respectful and appropriate to the dedication of the property
7 as a cemetery. No picnicking, partying or other similar activities
8 shall be allowed.

*no more business if we
have them the property*

9 Under certain circumstances, such as for small private, tribal or
10 family ceremonies related to the cemetery these limitations may be varied.
11 If a visitor desires to vary from these limitations he/she shall explain this to
12 the Owner through the notice process and the Owner's permission for the
13 variance shall not be unreasonably withheld.

14
15 **VII. MAINTENANCE.** The Owner of the property as the "Cemetery Authority"
16 under Washington state law shall have the responsibility for the upkeep and
17 maintenance of the cemetery parcel. The cemetery property shall be maintained
18 in a "natural but cared for" condition. The maintenance goal shall be to
19 encourage native vegetation which will afford grave site visitors privacy while
20 providing the Owner of Parcel C views through the cemetery to water and
21 neighboring islands. The Cemetery Authority shall manage the cemetery
22 consistent with this goal. In performing its maintenance duties, the Cemetery
23 Authority shall, in good faith, take into account the ideas and perspectives
24 provided by Mary Donnelly, Raider Johnson, and a designated representative of
the Lummi Nation.

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Native vegetation such as oceanspray, ironwood, salal, soapberry,
huckleberry, Oregon grape, and sword ferns, which can provide visual screening
and privacy for persons visiting the cemetery, shall be encouraged to return to
the site. In maintaining the cemetery, the Owner may remove vegetation,
blowdown and debris. However, this will be done by cutting off the vegetation at
ground level, and not by removing roots. No lawn will be planted. No herbicides
shall be used. No digging or ground disturbing activities shall take place within
the cemetery except by agreement of the Lummi Nation. The boundary between
the cemetery parcel and the balance of Parcel C shall be marked by permanent
posts at each end and at not less than one other location.

VIII. **ACCESS.** Pedestrian access to the cemetery property for the relatives
will be via the route shown on the attached Exhibit B. Access shall begin off the
County road initially following an existing road easement running easterly within a
corridor along the southerly 20 feet of Parcels A and B. At the southeast corner
of Parcel B, the access shall then continue along a footpath established within
the easterly ten feet of Parcel B by the owner, then merge with the estate
driveway built within the east twenty feet of Parcels B and C, and ending at a cul
de sac. From the cul de sac the access shall continue into the cemetery parcel
via a established within the easterly ten feet of the estate parcel. No part of the
footpath shall be in a midden. The owner of the property will have the right to
change the access at his/her discretion, although any changed access will be
reasonable and at par with the access granted under this document. The owner
shall notify any cemetery beneficiary of any changes in access by and through

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submission to the Lummi Indian Nation cultural committee. Within thirty days of
the signing of this Order, an easement for "cemetery access" will be recorded by
the owner of the cemetery parcel for relatives of those buried there. Visiting cars
will park on the county road. Vehicular access shall be available for the elderly or
infirm along the estate driveway to the cemetery parcel. The right to such
access shall be automatically established by automobile handicapped sticker, or
through some other reasonable method, acceptable to the owner.

IX. **NOTICE.** Written notice of change of ownership of the subject property
shall be given to the Lummi Indian Nation on or before the closing of a sale of
the cemetery. This and any other notices required under this documents shall be
given to the parties at the following addresses:

LUMMI INDIAN NATION
2616 Kwina Road.
Bellingham, WA 98226
Phone: (360) 384-2312

Frank E. Everett
10801 Main Street
Bellevue, WA 98004
(425) 455-0131

X. **FINAL ORDER.** The parties agree that this stipulation and agreement
shall be entered by the Court as a final order and judgment in this matter, that all
previous orders entered in this matter shall thereupon become final, and that in
view of the settlement of this matter by this agreement, no party to the agreement
shall appeal this or any order previously entered herein.

STIPULATION AND AGREED ORDER
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Stipulated and Agreed to this 6th day of October, 1997.

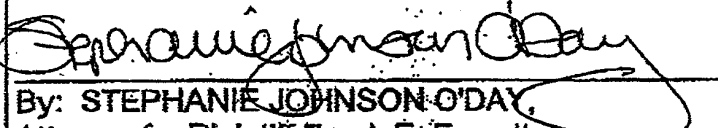
OFFICE OF THE RESERVATION ATTORNEY
RAAS, JOHNSEN, & STUEN, P.S.

By: HARRY L. JOHNSEN, WSBA #4955
Attorneys for Defendants Raider Johnsen
and the Lummi Indian Nation

LANE, POWELL, SPEARS, LUBERSKY

By: EUGENE H. KNAPP, JR. WSBA #2691
Attorneys for Defendant Mary Donnelly

LAW OFFICES OF STEPHANIE JOHNSON O'DAY


By: STEPHANIE JOHNSON O'DAY,
Attorney for Plaintiff Frank E. Everett

ORDER

ORDERED, ADJUDGED AND DECREED that the above Stipulation and Agreement is hereby approved by the Court and shall have the force of law.

DONE IN OPEN COURT this 6th day of October, 1997.


Judge Alan R. Hancock

STIPULATION AND AGREED ORDER
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OFFICE OF THE RESERVATION ATTORNEY
RAAS, JOHNSEN, & STUEN, P.S.

By: HARRY L. JOHNSEN, WSBA #4955
Attorneys for Defendants Raider Johnson
and the Lummi Indian Nation

LANE, POWELL, SPEARS, LUBERSKY

E.H. Knapp, Jr. 10/6/97
By: EUGENE H. KNAPP, JR. WSBA #2691
Attorneys for Defendant Mary Donnelly

LAW OFFICES OF STEPHANIE JOHNSON O'DAY

Stephanie Johnson O'Day
By: STEPHANIE JOHNSON O'DAY
Attorney for Plaintiff Frank E. Everett

ORDER

ORDERED, ADJUDGED AND DECREED that the above Stipulation and Agreement is hereby approved by the Court and shall have the force of law.

DONE IN OPEN COURT this _____ day of October, 1997.

Judge Alan R. Hancock

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