

1 HONORABLE RONALD B. LEIGHTON  
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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 MARK HORN, a single man,  
12 Plaintiff,

13 v.

14 WESCO PROPERTIES, INC., et al,  
15 Defendants.

Case No. C08-5528RBL

ORDER

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18 THIS MATTER comes before the Court on Defendants' Amended Motion to Dismiss Plaintiff's  
19 Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b) [Dkt. #27] and Defendants' Motion for  
20 Sanctions Pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. §927 [Dkt. #12]. The Court has reviewed the  
21 materials submitted in support of, and opposition to, said motions. Oral argument is not necessary for the  
22 Court to resolve the issues presented in the motions.

23 This case arises from an ongoing boundary line dispute and the subsequent condemnation of water  
24 rights. (Second Amended Complaint, para. 4.4). Issues related to trespass, condemnation and damage to  
25 property rights have been litigated and re-litigated between these precise parties in state court. The only  
26 basis for federal jurisdiction is plaintiff's claim that the conduct of Defendants Wesco Properties, Inc., an  
27 Oregon corporation, and Carrolls Water Association, a nonprofit corporation doing business in the State of  
28 Washington, make them liable to the plaintiff pursuant to 42 U.S.C. §1983. In order to prevail on a §1983

1 claim against either defendant, the plaintiff must prove by a preponderance of the evidence that the  
2 defendants acted under the color of law and that the acts of the defendants deprived the plaintiff of certain  
3 rights. One acts “under color of law” when he/she acts or purports to act in the performance of official  
4 duties under any state, county, or municipal law, ordinance, or regulation. The “under color of state law”  
5 element is a jurisdictional prerequisite for a §1983 action. *West v. Atkins*, 487 U.S. 42, 48 (1988).

6 When addressing whether a private party acted under color of law, courts start with the  
7 presumption that private conduct does not constitute governmental action. *See Harvey v. Harvey*, 949  
8 F.2d 1127, 1130 (11<sup>th</sup> Cir. 1992). The Ninth Circuit recognizes a two-part test for answering that  
9 question: (1) “the deprivation must result from a governmental policy, in other words, the deprivation must  
10 be caused by the exercise of some right or a privilege created by the government or a rule of conduct  
11 imposed by the government;” and (2) “the party charged with the deprivation must be a person who may  
12 fairly be said to be a governmental actor.” *Sutton v. Providence St. Joseph Medical Center*, 192 F.3d 826,  
13 835 (9<sup>th</sup> Cir. 1999).

14 In the case before the Court, the defendants who are the target of the §1983 action are both private  
15 entities. The complaint acknowledges as much. Nowhere in the complaint does the plaintiff allege facts  
16 that would suggest that any named defendant is a government actor. In his response to the motion to  
17 dismiss, plaintiff fails to cite any case law suggesting that the initiation of a condemnation action seeking a  
18 private easement makes the plaintiff a “state actor” “acting under color of law” merely because the action  
19 is pursued in a manner allowed by state law. The Court lacks subject matter jurisdiction because none of  
20 the named defendants are state actors for purposes of §1983 analysis.

21 The Court is satisfied that the issues presented in this complaint have been, and are currently being,  
22 pursued in state court. The Court is loath to interfere with the orderly resolution of these issues in state  
23 court. Therefore, the Court declines to accept supplemental jurisdiction over state claims raised in the  
24 Second Amended Complaint. This Court, being without subject matter jurisdiction, hereby

1 **DISMISSES** the Second Amended Complaint **WITHOUT PREJUDICE**. The Motion for Sanctions  
2 [Dkt. #12] is **DENIED**.

3 **IT IS SO ORDERED.**

4 Dated this 5<sup>th</sup> day of January, 2009.

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6 RONALD B. LEIGHTON  
7 UNITED STATES DISTRICT JUDGE  
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