Supreme Court No. 101075-3

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

KING COUNTY, a home rule charter county,

Plaintiff/Appellant,

v.

MICHAEL J. ABERNATHY; GINA M. ABERNATHY; SCOTT C. BAISCH; JENNIFER C. BAISCH; WARREN BERES; VICKI BERES; JODY J. BREWSTER; ANDREW J. FARACI; ALLISA E. FARACI; PATRICIA J. HARRELL; ANDRZEJ MILKOWSKI; LISA M. MILKOWSKI; MICHAEL PARROTT; AND DIANA PARROTT,

Defendants/Respondents.

APPELLANT'S CONSOLIDATED RESPONSE TO AMICI BRIEFS

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I. INTRODUCTION

Amicus Department of Natural Resources ("DNR") is concerned that it sold shorelands it never owned, while Amicus Pacific Coast Shellfish Growers Association ("PCSGA") is worried that its members will lose their property. Although both concerns are misplaced, their self-interested arguments ignore Chief Justice Marshall's admonition: "we must never forget that it is a *constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (emphasis added). The "objective" when interpreting Washington's constitution "is to define the constitutional principle in accordance with the original understanding of the ratifying public so as to faithfully apply the principle to each situation which might thereafter arise." *Malyon v. Pierce Cnty.*, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997). Amici's fears would have no bearing on "the original understanding of the ratifying public," even if they were well-founded. *Id.*

The straightforward issue of constitutional interpretation posed by the certified question is whether a conveyance under the General Railroad Right–of–Way Act of 1875, 43 U.S.C. §§ 934–939 (the "1875 Act") falls within the "patented by" language of Article XVII, Section 2. Every court to consider whether the patent lexicon can be applied to an 1875 Act conveyance of a 200-foot railroad corridor, including the United States Supreme Court, has determined that it is the equivalent of a patent. *See infra* pp. 7-8. Neither Amici, nor Respondents have cited a single case to the contrary. Certainly, the authors of our state constitution understood that an 1875 Act conveyance granted a substantial, fee-like property right to railroads in the form of a "railroad easement" that allowed exclusive possession, use, and control of the rail corridor for tracks, watering stations, warehouse facilities, and related railroad uses, as well as fire prevention. *See infra* pp. 12-14. Because the property rights granted by the 1875 Act were considered quasi-fees by those who wrote and ratified our state's 1889 constitution, the "patented by"

language in Article XVII, Section 2 was intended preserve these federally-granted rights that allowed a railroad to traverse rivers, streams, and lakes while serving the crucial economic needs of our new state.

In short, the answer to the certified question is "yes." The authors of our constitution recognized the substantial property rights held by railroads and intended to preserve, not sever, those railroads that already passed over shorelands and tidelands under the authority of federal grants like those made under the 1875 Act.

II. ARGUMENT

A. The Certified Question is Limited to the Meaning of the "Patented By" Language in Article XVII, Section 2 and Does Not Require This Court to Address the United State's Authority to Convey Shorelands Pre-Statehood.

Like Respondents, Amici devote substantial pages to a question that is not before this Court: whether the SLS&E's 1875 Act grant included shorelands that lie within the 200-foot Corridor. This is a question of federal law that the District Court

has already specifically answered for purposes of the certified question. *See* Open. Br. at 17-18, 37-38; Reply Br. at 3-5.

In certifying the state constitutional question to this Court, the District Court noted the indisputable fact that the "western edge" of the Corridor "runs over shoreland" of Lake Sammamish. Dkt 146 at 1. Amici cannot dispute either the 1888 map showing the proposed route of the rail line (Open. Br. at 15), or the 1891 map showing the actual location of the constructed tracks (Open. Br. at 16). These maps show that the tracks were not constructed next to Lake Sammamish, but *over and through* Lake Sammamish.[1] By operation of the 1875 Act, approval of the 1888 map by the Secretary of the Interior "vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road." *Noble v. Union River Logging R. Co.*, 147 U.S. 165, 172 (1893).

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[1] When the level of Lake Washington was lowered several decades later it also lowered the level of Lake Sammamish, which resulted in the creation of dry land on the Eastern side of the tracks. *See* Open. Br. at 33 n.56 (collecting sources).

The shorelands to the west of the tracks lie within this 100-foot zone.

Because the certified question raises only the meaning of "patented by" in Article XVII, Section 2 in relation to the 1875 Act, the District Court explicitly declined Respondents' request to reconsider its factual conclusion that the Corridor included the shorelands under their private dock complexes. Dkt 149 at 2. As the District Court explained, Respondents' arguments addressing "whether the federal government had authority to grant a right of way over shorelands pursuant to the 1875 Act" does not "materially affect the certified question." Dkt 149 at 2. Issues regarding proper operation of the 1875 Act, the impact of the Equal Footing Doctrine (if any), and the authority of the United States to grant shorelands pre-statehood are federal questions within the primary jurisdiction of the District Court; they are not properly before this Court.[2] Indeed, unless the Corridor included

[2] A plaintiff in an action that has been properly filed in federal court has a right to have federal questions determined by

shorelands lying within 100 feet on either side of the tracks by virtue of an 1875 Act grant, it would have been wholly unnecessary for the District Court to certify whether such a grant fell within the "patented by" language of Article XVII, Section 2.

Thus, the certified question raises an important, but narrow, question of state law for this Court's determination: "Is a right of way approved by the United States Department of the Interior under the [1875 Act] a conveyance 'patented by the United States' under Article XVII, § 2 of the Washington State Constitution." Dkt 149 at 2. In essence, the question asks "whether a conveyance approved under the 1875 Act constituted a 'patent'" under the Washington Constitution. *Id.* Questions of

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the federal court. *See England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 415 (1964) ("There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims.").

federal authority to grant the shorelands within the Corridor are extraneous to this certified question.

B. The "Patented By" Language in Article XVII, Section 2 Includes Grants of Exclusive Railroad Easements Under the 1875 Act.

1. Consistent with Definitions of "Patent" in Use When Section 2 was Adopted, Every Court to Consider the 1875 Act Grant Holds it is a Patent Equivalent.

As King County pointed out in earlier briefing, Courts have repeatedly recognized that grants under the 1875 Act are the "the equivalent of [letters] patent." *E.g.*, *Great N. Ry. Co. v. Steinke*, 261 U.S. 119, 125 (1923); *Oregon Trunk Line v. Deschutes R. Co.*, 172 F. 738, 740 (C.C.D. Or. 1909). In response, Amici and Respondents fail to cite a single case to the contrary.

The holdings in these cases are consistent with the 19th century dictionary definition of "patent," which DNR reluctantly acknowledges. DNR Br. at 9 (admitting that "the term 'patent' could technically be defined more broadly" than just the letters patent instrument). Amici urge the Court to simply ignore these

dictionary definitions contemporaneous with our state constitutional convention that define patent as the grant of a property right by the government. *See* BLACK'S LAW DICTIONARY 877-78 (1st ed. 1891) (defining "patent" as "[a] grant of some privilege, property, or authority, made by the government"). But these dictionary sources are commonly used to understand the language used in our 1889 constitution. *Washington Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 481-82, 90 P.3d 42 (2004) (relying on various late 19th century legal and common dictionaries to interpret constitution).

Crucially, Article XVII, Section 2 uses the verb form "patented by" to reflect the act of granting a property right, not a specific document like letters patent. There is no ambiguity in the "patented by" language, which, consistent with this Court's precedent, includes all manner of shoreline grants by the federal government prior to statehood. By itself, this answers the certified question "yes."

Without accounting for Section 2's actual language, DNR argues that "patented by" somehow means "granted through 'a specific instrument used by the United States to convey [fee] title to public lands' by 'reference to government surveys.'" DNR Br. at 8-9 (emphasis omitted). The agency provides no support for this *ipse dixit* statement other than the fact that some statutes providing for fee conveyances by letters patent were mentioned during the constitutional debates. *Id.* But this Court has already ruled that the Framers did not intend Section 2 to be limited to federal grants that were made under any particular statute. *Cogswell v. Forrest*, 14 Wn. 1, 2, 43 P. 1098, 1099 (1896).

Ultimately, DNR fails to heed its own advice that "[w]here the words of a constitution are unambiguous and in their commonly received sense lead to a reasonable conclusion, it should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation." DNR Br. at 16 (quoting *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554,

558, 452 P.2d 943 (1969)). The Framers did not draft Section 2 to disclaim ownership of shorelands "in which the United States has granted a fee interest by a letters patent instrument." They instead used the broader term "patented by" because, in accordance with the then-contemporary understanding of the words, they intended Section 2 to apply to all pre-statehood federally granted rights in shoreland, without regard to the type of interest or medium of conveyance.

There is simply no reference in Section 2 to "letters patent"—the formal legal instrument that DNR attempts to read into the clause. BLACK'S LAW DICTIONARY at 706 (defining "letters patent"). The plain language of Section 2—as well as the then-contemporary understanding of the term "patented by"—does not support DNR's position.

2. Nothing About the "Patented By" Language Limits Application of Article XVII, Section 2 to Possessory (i.e. fee) Interests.

Lacking a colorable plain language argument, Amici next advance the notion that "patented by" must be limited to fee

simple, possessory rights. Although not relevant to the language in Section 2, Amici claim that the federal government only issued letters patent for possessory (i.e. fee) interests in property.

First, they are wrong that letters patents were limited in this way. The federal government has issued letters patents for non-possessory interests and other interests where substantial sticks are missing from the proverbial bundle. As explained in King County's Reply, letters patent could convey *any* sort of property interest in land, and fee interests could be granted through many instruments other than letters patent. Reply Br. at 10-11 (citing BLACK'S LAW DICTIONARY at 706 and *Gillmor v. Blue Ledge Corp.*, 217 P.3d 723, 729 (Utah App. 2009)). DNR's insistence on letters patent would exclude *any* grant that the federal government made via deed or certificate, for example, including the type of fee simple interests to which Respondents and Amici argue Section 2 was intended to apply. And, conversely, DNR's claim that "the plain language of Section 2 applies only to patents, and not to easements," DNR Br. at 23, is

nonsensical even under its own argument because easements and other property rights could be granted through letters patent just as easily as fee interests. *See, e.g.*, *City of Las Vegas v. Cliff Shadows Prof'l Plaza*, 129 Nev. 1, 7, 293 P.3d 860, 864 (2013) ("Accordingly, here, the federal patent's use of the terms "right-of-way" and "subject to" created an easement on Cliff Shadows' property for roadway and public utility purposes.").

But the ahistorical claim by Amici and Respondents that Section 2 applies to only possessory interests—and thus excludes 1875 Act grants—also fails for a second reason. The robust property right encompassed by a railroad easement *is* possessory. *See* Reply Br. at 21-26. Railroad corridors established through operation of the 1875 Act provide not only a right of possession, but "exclusive use and occupancy."[3] *State v. Oregon Short Line*

[3] 1875 Act grants are also unique – and atypical of both easements and fee simple interests – because they cannot be adversely possessed, and cannot be alienated by the railroad. *Great N. Ry. Co. v. Steinke*, 261 U.S. 119, 132-33 (1923) (holding 1875 Act grant, which was equivalent to patent, could not be adversely possessed or sold by the railroad to individuals).

R. Co., 617 F. Supp. 207, 210 (D. Idaho 1985); *accord N. Pac. Ry. Co. v. Tacoma Junk Co.*, 138 Wn. 1, 6, 244 P. 117 (1926); *see also* Reply Br. at 23-24 (collecting cases). Moreover, the Framers regarded these rights of way as fee-like interests that were not significantly different from those granted under the prior railroad acts to which this Court has repeatedly applied Section 2. *See Morsbach v. Thurston Cnty.*, 152 Wn. 562, 568-69, 278 P. 686 (1929) (calling an 1875 Act right of way "a qualified or determinable fee"); *Hanson Indus., Inc. v. Cnty. of Spokane*, 114 Wn. App. 523, 528, 58 P.3d 910 (2002) (holding a railroad right of way "is an easement with the substantiality of a fee and the attributes of a fee"); Reply Br. at 22-23 (collecting more cases). Amici's attempt to attribute an understanding articulated in a modern U.S. Supreme Court decision to the Framers is anachronistic—particularly when that understanding squarely conflicts with decisions handed down far closer to Washington's founding. *Compare Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 108 (2014) (calling an 1875

Act right of way an easement) *with Rio Grande W Ry. Co. v. Stringham*, 239 U.S. 44, 47 (1915) (describing an 1875 Act right of way as not "a mere easement . . . but a limited fee"). *See also* 74 C.J.S. Railroads § 182 ("A railroad right-of-way differs from a typical easement because the railroad has a possessory interest in the right-of-way to the exclusion of others, including the titleholder of the property.").

The Framers would have understood that the "patented by" language in Article XVII, Section 2 preserved the 1875 Act property rights granted to railroads prior to statehood that were crucial to continuing railroad operations. After all, the SLS&E would have been largely worthless if, upon statehood, its line was severed every time it crossed a creek, river or ran over shorelands.

3. Application of Art. XVII, Section 2 to Preserve Existing Railroad Routes Over Shorelands is Consistent with the Provision's History and Intent.

Unlike *every other federal railroad grant* this Court has considered,[4] Amici posit that the Framers somehow intended to exclude 1875 Act rights of way from operation of Section 2. Amici concoct a skewed historical account in which the Framers refused to honor 1875 Act grants out of animosity toward railroads. But there is no evidence the Framers—who included the head of the SLS&E railroad itself—intended to divest 1875 Act grantees of their pre-statehood federal rights.

4. The Intent of Article XVII, Section 2 Was to Avoid Disrupting Pre-Statehood Shoreland Uses Authorized by the Federal Government Including Railroads.

To support their strained reading of Section 2, Amici recount Respondents' false historical narrative in which the

[4] *See, e.g. Narrows Realty Co. v. State*, 52 Wn.2d 843, 848, 329 P.2d 836, 840 (1958); *Wilson v. Prickett*, 79 Wn. 89, 89-90, 139 P. 754, 755 (1914); *Kneeland,* 40 Wn. at 366.

Framers bravely opposed the lobbying efforts of railroads that wished to claim shorelands for themselves.[5] DNR Br. at 14-20. But DNR's statement that "lobbyists for the railroads and other corporate interests were present at the convention" greatly undersells the consideration the Framers paid to this crucially important industry. *Id.* at 18.

As King County has explained, many of the *Framers themselves* had ties to railroads. Open. Br. at 59; Reply at 15-16. Most significantly for current purposes, Judge Thomas Burke, the owner of the SLS&E Railroad, which owned the 1875 Act right of way at issue in this case, was *himself* a delegate to the Constitutional Convention. Under Judge Burke, SLS&E applied for and received an 1875 Act right of way that crossed submerged lands and, in reliance on that grant, constructed tracks directly over the shorelands adjacent to what is today

[5] This narrative is highly ironic, as it is Respondents who today seek to exclude the public and claim one of the only stretches of beach access on the East Lake Sammamish Trail for their private use.

Respondents' property. Conspicuously absent from any filing by Amici or Respondents is any explanation as to why Judge Burke would have sat idly while the Convention divested *his own railroad* of the federal grant on which it depended for its operations. If Section 2 did not apply to SLS&E's right of way, Judge Burke's railroad would have been rendered a trespasser at crucial points in its route immediately upon statehood, its tracks unable to legally occupy the submerged land they traversed. DNR's speculative and anti-railroad narrative is simply inconsistent with the realities of who the Framers were.[6]

Respondents and Amici's account is belied by the facts. As they fully acknowledge, the question of whether the State

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[6] Although our progressive constitution limited the political abuses of railroads and other corporate interests, it in no way sought to undermine the use of railroads to transport people and goods throughout the state. Railroads were crucial to Washington's economic development. *See generally* Richard D. Stone, THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY: A HISTORY OF REGULATORY POLICY 1 (1991) (highlighting the importance of the construction of the railroads in America on many aspects of the American economy).

should exert ownership over submerged lands was heavily debated, with the delegates specifically discussing the rights of parties like SLS&E who relied on federal grants to make improvements to shorelands. DNR Br. at 15-16. The claims of railroads and other corporate interests who had helped settle the Northwest were expressly considered. Leonard Fitts, *The Washington Constitutional Convention of 1889*, University of Washington, 163 (1951) ("However, it was corporation claims not the old settlers [sic] that brought pressure to bear on the convention to recognize claims to the tidelands"). This ultimately resulted in a compromise in which the State claimed general ownership over submerged lands through Article 17, Section 1, but disclaimed its interest in all such lands that were subject to preexisting federal grants in Article 17, Section 2. This Court has repeatedly ruled that this compromise benefitted railroads as much as any other federal grantees.[7] And there is no indication

[7] *See, supra* note 4.

the Framers intended to exclude those few railroads who had improved shorelands based on pre-statehood 1875 Act grants of the right to use the submerged land beneath their tracks, making them incapable of legal operation on any established route that crossed navigable waters.

a. Operation of Article XVII, Section 2 Does Not Depend on the Federal Government's Authority to Grant Property Rights Over Shorelands Because It is Designed to Preserve Existing Uses Under the Color of a Federal Grant.

DNR is wrong that operation of Article XVII, Section 2 is limited to valid pre-statehood grants of shoreland by the federal government. There is no doubt that the federal government had absolute authority to grant shorelands and tidelands within its Washington Territory prior to statehood. If Article XVII, Section 2 were limited to this situation, there would be no reason for it to exist. Instead, the purpose of Article XVII, Section 2 is to remove any cloud from grants of shorelands to railroads and

others that existed at the time of the constitution, *regardless of the federal government's actual authority to authorize the use.*

Contrary to Amici's claims, the 1875 Act did permit the Department of Interior to grant rights of way over shorelands. *See* Reply Br. at 30-31. But that is not here nor there. The inclusion of shorelands in the federal grant is sufficient to trigger Section 2 *irrespective of whether the 1875 Act authorized the Department of Interior to grant the shorelands it actually granted*. DNR disagrees, arguing that this case is like *Mann v. Tacoma Land Co.*, an 1894 case in which the U.S. Supreme Court held Section 2 did not apply to an improper grant of shorelands by a local federal land officer who lacked authority to convey any of the lands in question. DNR Br. at 13 (citing *Mann v. Tacoma Land Co.*, 153 U.S. 273 (1894)). But if *Mann* ever suggested Section 2 is inapplicable any time a federal officer mistakenly includes shorelands in a grant she should not have, this Court promptly corrected that misapprehension by 1905. *See*

Hanson v. Carmona, 525 P.3d 940, 951 (Wn. 2023) ("[T]his court is the final arbiter of state constitutional law.").

As already discussed, this Court rejected Amici's *exact argument* in *Kneeland v. Korter*, 40 Wn. 359, 366, 82 P. 608, 610 (1905). Like Amici, the trespasser in *Kneeland* claimed that the applicable railroad act did not authorize granting shorelands due to the Equal Footing Doctrine. *Id.* at 362. And like Amici, the trespasser argued this meant "the United States government had no power to" have included some lands "situated below 'hightide line'" in the railroad grant at issue. *Id.* This Court held that it *did not matter* whether the federal government had overstepped its authority by including shorelands in the grant; because the Framers enacted Section 2 "to prevent any controversy over" federally granted shorelands whatsoever. Section 2 "disclaim[ed] title to all tide lands patented by the United States, *without regard to the technical right of the general government to convey the same*." *Id.* at 366 (emphasis added) (quoting *Cogswell v. Forrest*, 14 Wn. 1, 3 (1896)).

In reaching its holding, this Court expressly dismissed the same comparison to *Mann* that DNR now attempts to make:

> This case is readily distinguishable from that of *Mann v. Tacoma Land Co.*, 153 U. S. 273, 14 Sup. Ct. 820, 38 L. Ed. 714. In that case an attempt was made to locate Valentine scrip upon tide lands, no part of which was subject to such scrip. *The would-be locator had no rights whatever* to the tide lands he was seeking to file upon with the scrip, and there was no legal authority by which he ever could, with said scrip, acquire any rights in or *to any portion of such lands. In the case at bar there is no question as to the railway company's right to a patent to the principal part of lot 3*; but it is contended that said lot, as surveyed, contains certain lands it should not, and that the patent is invalid as to such portion.

Id. at 367-67 (emphases added). In other words, this Court ruled that *Mann* was limited to situations in which the *entirety* of a federal grant is unauthorized from the start. Because there was no dispute that the applicable railroad act authorized the federal government to grant "the principal part" of the land covered by the grant, *id.* at 368, Section 2 applied to disclaim the shorelands included in the grant irrespective of whether the federal government was wrong to have included them.

The same is true here. Neither Respondents nor Amici have ever disputed that the Department of the Interior was entitled to grant SLS&E the "principal part" of its right of way—the portion traversing the uplands bordering Lake Sammamish. Thus, even if Amici were right that the 1875 Act did not permit the inclusion of shorelands in the SLS&E right of way, this case would be like *Kneeland*—in which shorelands may have been mistakenly included in an otherwise proper federal grant—and not like *Mann*—in which the entire grant was unauthorized.

DNR does nothing to distinguish *Kneeland* except to point out that there the federal railroad grant was patented under an earlier Congressional railroad acts,[8] but this circular reasoning

[8] DNR's bizarre statement that *Kneeland* concerned only "*when* the patentee's rights vested in order to determine if the patents at issue were pre-statehood or poststatehood patents" is simply wrong. DNR Br. at 12 (emphasis in original). In *Kneeland*, it was undisputed that "the Northern Pacific Railroad Company [had] received a patent to said lot 3 in December, 1894," several years prior to statehood. 40 Wn. at 361. The only question was whether Section 2 disclaimed the State's interest in the shorelands included in that patent. *Id.* at 361-62.

begs the question at the heart of this case: whether Section 2 applies to an 1875 Act right of way. *Kneeland* confirms that whether the 1875 Act authorized the Department of Interior to include shorelands in SLS&E's grant is totally irrelevant to that question.

DNR complaints that the State's conveyance of its rights to some shorelands through operation of Section 2 would effectively grant the railroad a fee by joining the robust railroad easement with the State's residual interest. DNR Br. at 23-24. But it is the language of the constitution, not DNR's policy preferences, that drives the result in this case.[9] Section 2 sometimes operates to grant the State's ownership interests even for individuals who had no valid legal claim to shorelands

[9] DNR's reliance on the importance of public ownership of shorelands is somewhat belied by the fact that it tried to transfer these shorelands to private ownership in 1958 and hopes to accomplish the same through its amicus brief today. There is almost no public access to the eastern shore of Lake Sammamish, which King County hopes to rectify by removing large, private dock complexes from the railroad corridor and giving the public access to the shorelands that the public purchased from BNSF.

whatsoever. *See Kneeland*, 40 Wn. at 366. As such, the creation of a fee from a railroad easement, especially for the direct benefit of the public, should raise no particular concern.

b. Meander Lines Play No Role in How Article XVII, Section 2 Operates.

Though it already stretches Section 2's text past its breaking point, DNR would insert one more phantom requirement into the constitutional provision – the requirement of a "meander line." The agency would limit its operation to only those letters patent that granted a fee interest by reference to a plot *that includes a meander line*. DNR Br. at 20-23. Section 2 makes no mention of meander lines. And, more importantly, this Court's caselaw conclusively confirms that the arbitrary presence or placement of a meander line is not needed for the application of Section 2.

As the Court knows, a meander line is simply the waterward boundary of some grants in which the federal government sought to convey waterfront property but not

adjacent submerged lands. U.S. Bureau of Land Mgmt., *Manual of Instruction for Survey of Public Land* ("BLM Manual"), Dep't of the Interior, § 3-159 (2009). Because the boundary of a body of water is by its nature fluid and irregular, it is frequently impossible to define the edge of a waterfront grant with exactitude. *See id.* The grant would instead use a line approximating the general location of the water's edge called a meander line to specify the edge of the lot being conveyed. *Id.*

Because the aquatic lands that the State asserted ownership over in Article 17, Section 1 extend to the line of ordinary high tide, *see, e.g.*, *Cogswell*, 14 Wn. at 1-2, federal grants with an estimated meander line that fell below that point included a strip of shorelands that would have been claimed by the State but for Section 2. But that is just one common scenario in which the federal government granted a pre-statehood interest in aquatic lands, and this Court has already decided that Section 2's disclaimer is not limited to this one fact pattern.

As discussed in King County's Reply, this Court has at least twice applied Section 2 to federal grants where no portion of the conveyance is defined by a meander line. Reply at 16-17. First, in *Hewitt-Lea Lumber Co. v. King County*, the Court held that Section 2 applied to a portion of the Mercer Slough where the federal government had simply granted upland owners the submerged land beneath the slough rather than ending their grants at the waterline. 113 Wn. 431, 432-33, 194 P. 377, 377 (1920). DNR points out that *an entirely different section* of the slough that did not adjoin the Appellants' property was meandered, and it makes much of the Court's rhetorical statement that the "whole of the upper part of the slough may be said to be above the meander line." DNR Br. at 21-22 (quoting *id.* at 432-33). But the Court was not saying that a meander line was literally present in the lot under consideration; its opinion is very clear that the Appellant's lot was *not* defined by a meander line on any side. 113 Wn. at 433 ("Government survey lines were run across the upper half as though it did not exist, and the

lands through which it extended were laid off and patented in regular government subdivisions. Appellant owns the lands at and near the head of the slough . . . .").

The Court's decision in *Hewitt-Lea Lumber Co.* was not based on the arbitrary fact that a meander line defined the edge of unrelated waterfront properties elsewhere in the slough. Instead, the Court simply ruled that, where a federal grant included submerged lands, Section 2 operated to give the holder "title to all the lands within the calls of the patent." 113 Wn. at 433.

DNR also dismisses this Court's decision in *Wilson v. Prickett*, 79 Wn. 89, 91–92, 139 P. 754, 755 (1914), in which it applied Section 2 to an unmeandered stream. DNR Br. at 22 n.16. DNR argues that this was *dicta* because the Court also ruled that the stream was unnavigable and thus not within the State's assertion of ownership under Section 1. *Id.* But DNR confuses *dicta* with parallel holdings. Either the exclusion of the stream from the State's Section 1 claim or the application of the

Section 2 disclaimer were independently sufficient to support the Court's holding that the stream bed was the property of the grantee. "Alternative holdings are not *dicta*, but instead provide binding precedent." *West v. Port of Tacoma*, No. 48110-3, 2017 WL 2645665, at *10 (Wn. App. 2017) (citing *Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928)).

In short, DNR's position regarding meander lines is squarely at odds with this Court's binding precedent, which confirms a meander line is not a requirement for Section 2's operation. A meander line was discussed in some of this Court's cases simply because it was a boundary marker under the facts of that particular case, but there is no suggestion that "meander line" must be read into Section 2, or that the constitution is ineffective in the absence of such a line. Importantly, why would operation of Article XVII, Section 2 hinge inherently on the presence of a meander line? With 1875 Act railroad corridors, the boundary of the 200-foot corridor is easily ascertainable because it runs 100 feet in either direction from the centerline of

the tracks. In factual situations like this one, where the tracks ran over the shorelands as approved by the Secretary of the Interior, any shorelands within the 200-foot corridor are necessarily included in the federal conveyance.[10]

c. The Legislature's Post-Statehood Actions Do Not Remotely Indicate Section 2 Does Not Apply to 1875 Act Grants.

Amici point to the early actions of the Washington Legislature to support their assertion that Section 2 was not intended to apply to 1875 Act corridors. Like Respondents, DNR cites the Legislature's emergency authorization for railroads to construct bridges and trestles across navigable streams, contending that this was how the Framers intended to

[10] DNR's claim that "the record shows" that neither the state nor purchasers "had any notice of the railroad's potential competing claim to a portion of the shorelands" is astonishing. DNR Br. at 7. The tracks have been over the lake and on the ground since no later than 1888. DNR cannot claim ignorance of the law when the 1875 Act has always granted a 200-foot corridor based on the centerline of the track. Tellingly, DNR fails to actually cite the record for its assertion that "the record shows."

accommodate railroads who needed to traverse aquatic land. DNR Br. at 19 (citing Laws of 1889-90, page 53, § 1 (codified at RCW 81.36.100)). But this authorization was *prospective*—it allowed railroads to construct *new* tracks over State owned streams. *See* RCW 81.36.100 (providing railroads "shall have and hereby is given the right to *construct* bridges across the navigable streams within this state over which the *projected* line or lines of railway of said railroad corporations *will* run" (emphasis added)). The legislation did not address, or need to address, the situation in which railroads had *already* constructed tracks over shoreland in reliance on a pre-statehood federal grant. If anything, the law confirms that the early Legislature saw no need to grant existing rail lines permission to inhabit the shorelands they occupied, for Section 2 had already ratified their right to do so.[11]

[11] That there are no recorded ejectment actions against the SLS&E or any other 1875 Act railroad indicates early state officials felt the same. Again, these railroads would have been

PCSGA similarly points to early legislation that authorized the State to sell tidelands in use as oyster beds to the shellfish farmers who farmed them. PCSGA Br. at 13-16 (citing Laws of 1895, chs. 24-25). But this is a non sequitur. The legislation PCSGA references permitted the State to sell only tidelands *that it owned* to shellfish farmers. PCSGA provides no evidence that the Legislature considered shorelands covered by 1875 Act corridors to be in that number. To the contrary, the early Legislature was well aware that the State had disclaimed ownership of all shorelands within pre-statehood federal grants, *see Scurry v. Jones*, 4 Wn. 468, 470, 30 P. 726, 727 (1892) (applying Section 2 three years prior to these enactments), and it did not purport to authorize the sale of any of these privately owned lands. The cited laws are thus irrelevant to whether the Framers saw 1875 Act grants as within Section 2's scope.

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made into trespassers anywhere their tracks crossed navigable water if 1875 Act rights of way were not included in Section 2.

C. Applying Section 2 Here Will Not Deprive Amici of Large Amounts of Property or Embroil Them in Controversy.

DNR claims that answering the certified question "Yes" will "call into question both State and private ownership of an undeterminable amount of aquatic lands." DNR Br. at 2. PCSGA claims that it would "threaten the state's shellfish industry." PCSGA Br. at 2. But their claims, even if they could influence constitutional interpretation, remain theoretical concerns in search of actual problems. Despite Amici's assertion that a ruling for the County will "cast[] clouds over the title of *countless* acres of navigable lands," Amici are incapable of pointing to a single location that would be impacted by interpreting Section 2 in accord with its language, precedent and history. DNR Br. at 1 (emphasis added),

PCSGA claims that its "preliminary review of historic railroad maps suggests tidelands in Discovery Bay, part of Oakland Bay/Hammersley Inlet, and Samish Bay might be impacted." PCSGA Br. at 19. But even a brief review of the

locations indicates no likely impact from a ruling favoring King County. The railroad corridors at Discovery Bay (near Port Townsend, Washington) and Samish Bay (near Chuckanut Drive in Northern Washington) were not established until after statehood. John Caldbick, *The Railroads of Jefferson and Clallam Counties,* History Link (Aug. 17, 2015) https://www.historylink.org/File/11096 (noting that no right of way was surveyed, located or built near Discovery Bay until 1890); Phil Dougherty, *Chuckanut Drive Opens in the Spring of 1916*, History Link (Jun. 20, 2011), https://historylink.org/file/9855 (noting that the Great Northern Railway purchased the right of way to a rough logging road in 1892). Thus, any shorelands within those corridors could not be at issue here, even if they had been created under the 1875 Act, which they were not. And, the railroad corridor at Oakland Bay/Hannersley Inslet (near Shelton, Washington) was created from David and Frances Shelton's 1855 Land Donation Act land. Paula Becker, *Shelton – Thumbnail History*, History Link (Sept.

27, 2010), https://www.historylink.org/file/9591. There is nothing in the history of these three locations that suggests that an 1875 Act grant could have been part of the railroads' source of title.

Section 2's application to 1875 Act rights of way has been a live issue in this litigation since at least February 5, 2021, when the County filed its response and cross-motion for partial summary judgment. Dkt 65 at 23-27. In the over *two years* since then, neither Respondents, Amici, nor any other party have located another spot where the necessary factors are present for a controversy to even be raised by a ruling for the County. The clear implication is that, if this case is not a "one-off," similar circumstances are rare enough that no significant disruption will occur. The Court should disregard Amici's dire predictions.

III. CONCLUSION

For the foregoing reasons and those stated in King County's primary briefing, the Court should answer the certified question "yes."

DATED: May 8, 2023.

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

1. I am employed at Corr Cronin LLP, attorneys for Appellant herein.

2. On May 8, 2023, I caused a true and correct copy of the foregoing document to be served on the following parties in the manner indicated below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: May 8, 2023, at Seattle, Washington.

s/ Christy A. Nelson
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