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 OPENING BRIEF

*Plaintiff's Brief

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I. INTRODUCTION

Under Washington Constitution, Article XVII, § 2, the state "disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States: Provided the same is not impeached for fraud." In *Kneeland v. Korter*, 40 Wash. 359, 364, 82 P. 608 (1905), this Court explained the broad purposes of Article XVII, § 2 are to "prevent any controversy over" and "to avoid disturbing rights claimed" in connection with federal grants of shorelands below the highwater mark. When our state's Constitution was adopted in 1889, "it was known that the United States had in some instances granted, or assumed to grant, certain tide lands lying below high-water mark." *Id.* In order to prevent *any controversy* over ownership of these lands, Article XVII, § 2 operates not only as a "disclaimer" of the state's ownership, but also "in effect *a conveyance of the state's interest in these lands* and confirmat[ion] of the [federal] government's grant thereof." *Id.* at 365 (emphasis added). The clause is self-executing, with the state's interest in shorelands passing upon

Washington's admission into the union. *Scurry v. Jones*, 4 Wash. 468, 470, 30 P. 726 (1892) (operation of Article XVII, § 2 causes the state's interest in shorelands to pass to the person holding a federal grant); *Narrows Realty Co. v. State*, 52 Wn. 2d 843, 848, 329 P.2d 836 (1958) (upon statehood, ownership of tidelands vested in state "except for those already patented by the federal government").

Railroads are one industry that benefited from federal grants of shorelands through acts like the General Railroad Right of Way Act of 1875, 43 U.S.C. § 934. ("1875 Act"). Upon fulfilling various conditions precedent, the 1875 Act granted railroads a property right that established a 200 foot right of way – "one hundred feet on each side of the central line of said road." 43 U.S.C. § 934. In passing the 1875 Act, Congress was well aware that limitations on railroad grades and curves often required the construction of railbeds along the shorelands of lakes, rivers and sounds. A railroad right of way is necessarily contiguous and cannot skip intervening bodies of water or

drastically change course to avoid them. Sound railroad operation requires railbeds to cross rivers, lakes, and other navigable waters throughout the railroad's long course toward its destinations. Dkt. 68, pp. 3–4 (Declaration of Michael Allen ("Allen Decl."), ¶¶ 4–5).[1] It was not uncommon for tracks to be constructed directly over the water on trestles or riprap fill for these purposes.

To connect Seattle to surrounding areas, the Seattle Lake Shore & Eastern Railway ("SLS&E") constructed a railroad corridor along the eastern shore of Lake Sammamish ("Corridor"). Long before Respondents' properties existed, the portion of the Corridor next to their properties was acquired and

[1] The undersigned counsel communicated with the Supreme Court Clerk's Office regarding appropriate Clerk's Papers citation format in a certified question case. The Clerk's Office informed parties: "[t]he district court did not paginate the record, the only label on each document is the document number associated with the federal court docket. Accordingly, it will likely be easiest for the Court to locate the citation if you reference the document number, and then the page number within that document number." King County follows this advice in citing to the record before this Court.

title vested in the railroad prior to statehood through a grant under the 1875 Act. Location maps filed with the federal land office and approved by the Secretary of the Interior show that portions of the Corridor next to Respondents' properties were constructed directly over the lake's shorelands. The elevated railbed that was constructed over the shorelands no later than 1889 remains today — now connected to dry land on the eastern side, likely due to a combination of the railroad's own "fill" activity and the 1917 construction of the ship canal that lowered the level of Lake Sammamish.[2] The Corridor remains under federal regulation through the Surface Transportation Board ("STB"), but is railbanked under the federal Trails Act for interim use as a recreational trail pending potential reactivation of a railroad line. *See Hornish v. King Cnty.*, 899 F.3d 680, 686 (9th Cir. 2018) (explaining history of Corridor and railbanking status).

[2] Dkt. 65, p. 10 n.3.

In this case, King County derives its property rights in the Corridor under the 1875 Act from the railroad going back in a continuous line to the SLS&E, whereas Respondents claim a property right in the shorelands from a 1958 deed between a predecessor in title and the State of Washington, which covers only second class shorelands actually "owned by the State of Washington."[3] Application of Article XVII, § 2 resolves this property dispute. Because the federal government had granted the railroad a property right under the 1875 Act prior to statehood, operation of Article XVII, § 2 upon statehood in 1889 conveyed full ownership of any shorelands within the two hundred foot boundary of the Corridor to the SLS&E and its successors in title. Because the railroad already owned any shorelands within the two hundred foot Corridor at the time of the 1958 shorelands deed, these shorelands fell outside what was "owned by the State of Washington" and never passed to

[3] *See* Dkt. 65, p. 14; Dkt. 66-12 (Exhibit 12 to the February 5, 2021 Declaration of Emily Harris ("Harris Decl.")).

Respondents through their predecessor in title. *See McGill v. Shugarts*, 58 Wn.2d 203, 204, 361 P.2d 645 (1961) (A grantor can "convey by deed no greater interest than they owned.").

In sum, this Court should answer the following certified question from the United States District Court for the Western District of Washington "yes:"

> Is a right of way approved by the United States Department of Interior under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. §§ 934-939, a conveyance "patented by the United States" under Article XVII, § 2 of the Washington State Constitution.

A property right in shorelands granted by the federal government to a railroad under the 1875 Act prior to statehood falls within the protections of Article XVII, § 2.

II. STATEMENT OF THE CASE

A. Tidelands and Shorelands were Essential to Pre-Statehood Commerce.

The Washington Territory was created in 1853, when it was carved off from the Oregon Territory. The Washington Territory existed for 36 years before statehood was granted in

1889.[4] Despite its small population, the Washington Territory was big in commerce and trade, just as the indigenous people of the land had been for thousands of years before. Lumber, coal, wheat, and oysters (which were deemed luxury products to be sold in California) were mainstays of the economy of the Washington Territory. "Would-be moneymakers" came to Washington in the 1850s to build industrial communities, centered around sawmills, along the waters of the Puget Sound and inland lakes.[5] Docks, piers, and structures were built on the tidelands and shorelands, often without any authority to do so by "squatters" or "jumpers."[6] In some cases, tidelands and shorelands were included in grants to homesteaders under the Oregon Donation Land Act of 1850. More than one community had been built on acres of tidelands or marshlands granted to

[4] Information in this section is drawn from ROBERT E. FICKEN, WASHINGTON TERRITORY, pg. 2-4 (2002).

[5] *Id.* pg. 12-15.

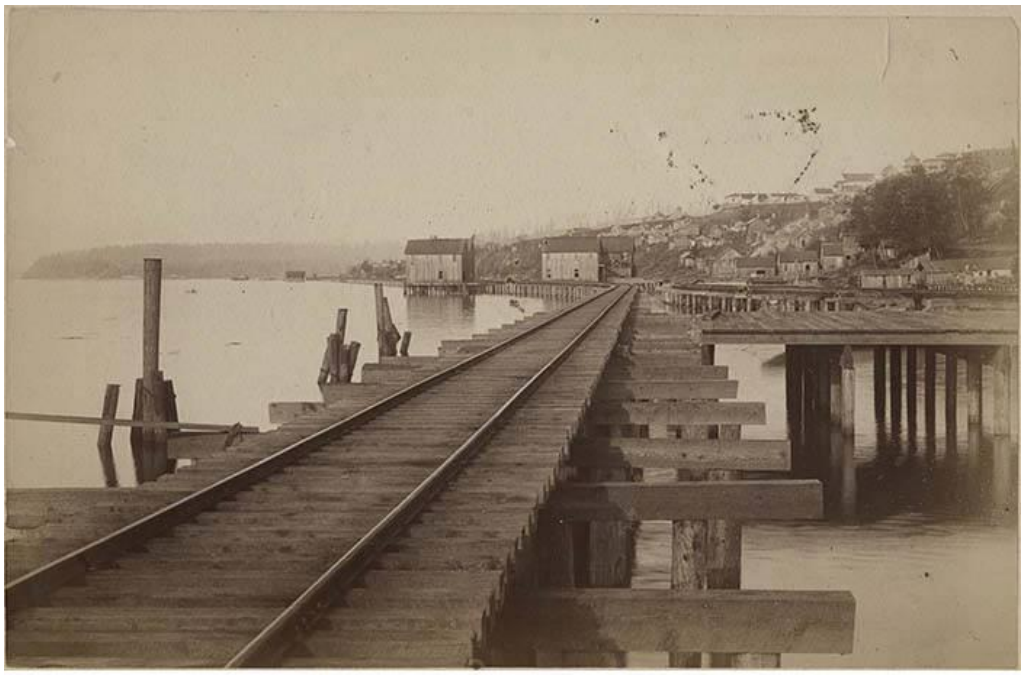
[6] Charles K. Wiggins, *The Battle for the Tidelands in the Constitutional Convention* (Part I) Washington State Bar News, pg. 15 (March 1990).

settlers under the homestead acts.[7] Similarly, the Northern Pacific Railroad decided to place the terminus of the transcontinental railroad in Tacoma because it was able to obtain large portions of Commencement Bay by way of land grant though the Pacific Railroad Act of 1862.[8] Pre-statehood, the City of Seattle, which was eager to connect to the east also granted several railroads rights to use the tidelands of Elliot Bay, building

[7] *Id.*, pg. 20 (noting that in Skagit County marshlands had been granted by U.S. patents to settlers); Charles K. Wiggins, *The Battle for the Tidelands in the Constitutional Convention* (Part III), Washington State Bar News, pg. 47 (May 1990) (noting that Bellingham's business section was located on 12 acres of tidelands covered by patents).

[8] *Id.*, Part I, pg. 16. Throughout the 1800s, railroads were critical to the expansion and settlement of the rapidly growing country, which had tripled in size from 1803 to 1853. In response to this urgent need for more land and resources, Congress embarked on a massive effort to incentivize railroad construction through grants of federal land to railroad companies. To encourage rapid expansion of the railroads, early federal land grants gave railroads fee title to broad swaths of land. Ultimately, Congress granted over 175 million acres for railroad construction through land grant statutes over the course of the 19th Century. During this time, railroads were deeded nearly ten percent of the land area of the continental United States. William S. Greever, *A Comparison of Railroad Land-Grant Policies*, 25 AGRIC. HISTORY 83, 83 (1951).

railroad trestles over the area that is now known as Alaskan Way.[9] These tidelands were eventually filled as a part of the Denny regrade to form many of the streets and blocks near the modern shoreline.



Property of Museum of History & Industry, Seattle
[10]

[9] Wiggins, *The Battle for the Tidelands in the Constitutional Convention* (Part I), pgs. 16-17.

[10] Dkt. 66-8D (Exhibit 8D to the Harris Decl.).

B. King County's Predecessor in Title, the SLS&E Railroad, was Granted a 200-Foot Wide Right of Way that Included Shorelands, which was Vested and Reflected in the Land Records Before Statehood.

Among the railroads competing to serve the Washington Territory was the SLS&E, founded by Judge Thomas Burke and Daniel Gilman in response to the Union Pacific Railroad selecting Tacoma as its terminus.[11] The SLS&E is King County's predecessor-in-interest for the property dispute before this Court.

In 1887, the SLS&E constructed its tracks on trestles over waterways, lakes and shorelands[12] including along the central waterfront of downtown Seattle, through Interbay, along the north shore of Lake Union, and eastern shore of what was then known as Lake Squak (now Lake Sammamish) to reach inland coal mines.[13]

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[11] DORPAT, PAUL, SEATTLE WATERFRONT: AN ILLUSTRATED HISTORY, pg. 12-13 (2006).

[12] Numerous historic photographs demonstrate the extent tidelands and shorelands were used by early railroads in the State. *See, e.g.*, Dkt. 66-8A–8D (Exhibits 8A-8D to the Harris Decl.).

[13] DORPAT, SEATTLE WATERFRONT: AN ILLUSTRATED HISTORY, pg. 12-13 (2006).

The SLS&E's dependence on shoreland was not unique. Railroads frequently built along or over shorelands, with trestles over shallow water or deep canyons made by rivers to take advantage of the relative flatness, or to decrease curvature of the line. The legitimate need for railroads to construct their lines over shorelands is recognized in RCW 81.36.040, which was first adopted by the territorial legislature in 1888. Laws of 1887-88, pg. 64 § 3 (enacting § 2456¾). Under this statute, railroads are granted the power to construct railways "across, along or upon any river, stream of water, water course, plank road, turnpike or canal, which the route of such railway shall intersect or touch." *Id.*

This statute provides further proof of the framers familiarity with the practices of railroads and their need to use shorelands to construct their lines. Many members of the 1888 territorial legislature were part of Washington's Constitutional Convention. They both adopted this statute and continued it into effect upon statehood per the Enabling Act.

Apart from railroad construction needs, building along shorelands also offered myriad other benefits. Towns and cities were often built close to water, commerce and other forms of transportation flowed down waterways, and the water itself was often necessary to railroad operations.[14]

The SLS&E assembled its Corridor through a combination of federal land grants, deeds from individual homesteaders, and adverse possession. The land at issue in this litigation – Lot 4 of Section 6, Township 24N, Range 6E – was obtained by the SLS&E under the 1875 Act.

The SLS&E initiated the 1875 Act land grant process to acquire its Corridor in this location by filing a map showing the proposed location of its tracks with the federal land office in Seattle. The 1875 Act vested the railroad's grant of Corridor land upon approval of the SLS&E's map by the Secretary of the Department of the Interior, who would filed the approval in the

[14] Dkt. 68, pgs. 3–4 (Allen Decl., ¶¶ 4–5).

federal land office. 43 U.S.C. § 937 ("Any railroad company desiring to secure the benefits of . . . this title, shall. . . file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way."). The Secretary's approval of the proposed map was all that was necessary to complete the grant, which then dated back to when the railroad filed its proposed map so long as the tracks were constructed within five years. Unlike prior railroad grants, the filing of the Secretary's approval in the land office was the operative document evidencing an 1875 Act grant; the federal government did not issue any additional title documents like a certificate of land grand or letters patent.[15]

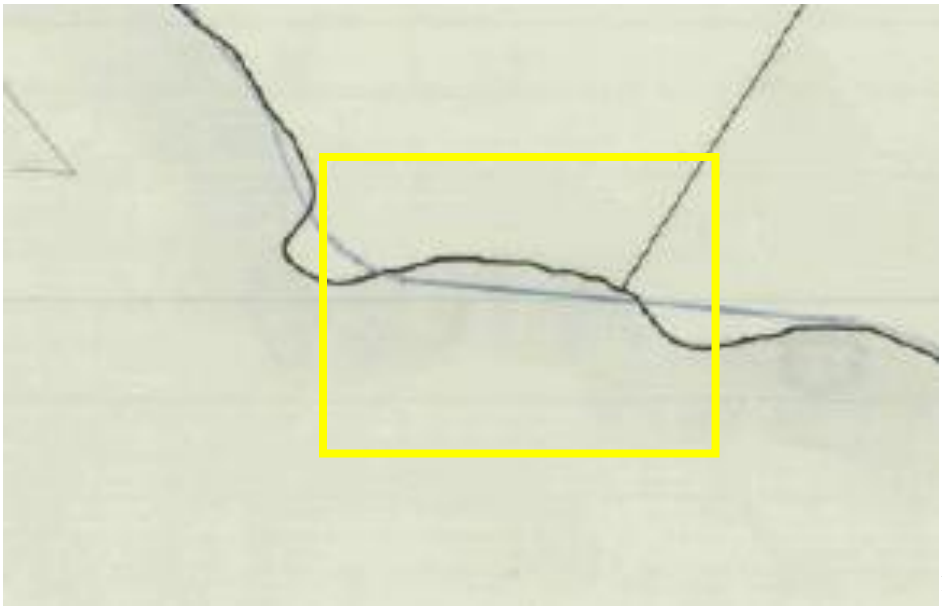
[15] Earlier land grant acts provided that a letters patent would issue to the railroad upon satisfaction of certain

The SLS&E filed its map with the land office showing the proposed location of its tracks on June 11, 1887, prior to statehood. On July 5, 1887, the Secretary approved SLS&E's proposed route along Lake Sammamish, which traverse over the lake at certain points to avoid sharp turns and steep elevations.[16] The approved map of proposed location includes the portion of Lot 4 that is at issue in this case, which undisputedly shows the

conditions, but the backlog could be 20 years or more prior to issuance. *See* Kammer, Sean M., Land and Law in the Age of Enterprise: A Legal History of Railroad Land Grants in the Pacific Northwest, 1864-1916 (2015) Department of History at 64 ("Sometimes years, or even decades, separated railway construction and the issuing of patents to the adjoining land grant.")(available at: https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1084&context=historydiss).

[16] Dkt. 68, pg. 3.

centerline of the right of way over the lake:

 [17]

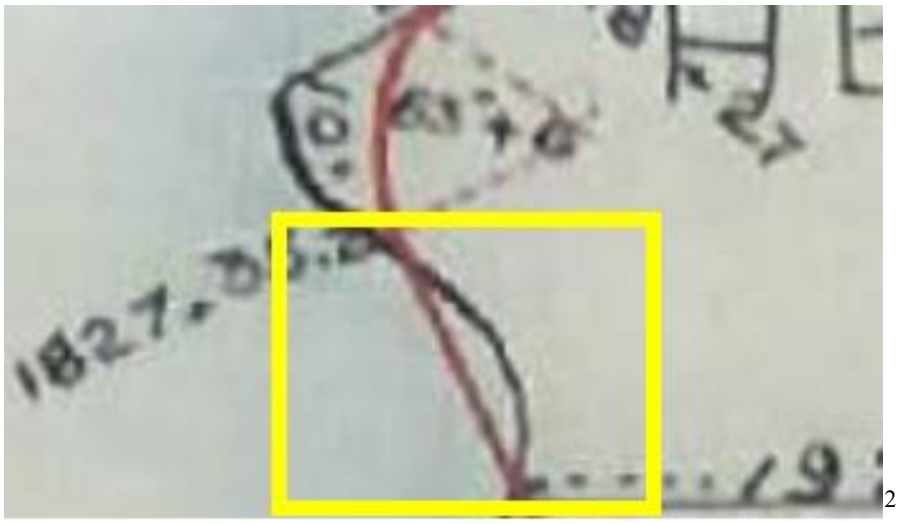
The SLS&E then satisfied the last requirement of the 1875 Act by completing construction of its tracks in March of 1888, prior to statehood.[18]

Through a sworn affidavit, on April 9, 1891, the Chief Engineer of the SLS&E filed a detailed map with the federal

[17] The blue line is original to the map and shows the proposed location of the SLS&E line over Government Lot 4. The yellow box shows the area at dispute in this case. A full version of the map available at Dkt. 66-1 (Exhibit 1 to the Harris Decl.).

[18] Dkts. 66-2, 66-3 (Exhibits 2 and 3 to the Harris Decl.).

land office showing the location of the completed tracks.[19] The filed map shows the definite location of the constructed rail line and "conforms with the line of the located route that received the approval of the Secretary of the Interior on the fifth day of July, 1897."[20] The SLS&E's definite location map also reflects construction of the tracks over the Lake Sammamish shorelands adjacent to Respondents' current properties. *Id.* Ex. 3. The map is surveyed and to scale:



[21]

[19] *Id.*

[20] *Id.*

[21] The red line, which is part of the original map, reflects the centerline of the constructed railroad track. The yellow box

Respondents cannot dispute that the shorelands at issue fall within 200 foot right-of-way under the plain language of the 1875 Act, which granted the railroad a Corridor 100 feet on either side of the centerline of the tracks. Before the District Court, they argued that the grant to the railroad would not have included the shorelands.[22] But in certifying this case, the District Court noted that "the western edge [of the Corridor] runs over shoreland," which reflects the above operative maps filed by the SLS&E under the 1875 Act.[23] Respondents sought reconsideration from the District Court on this point, arguing that the court erred by finding that the Corridor included shorelands along its Western edge.[24] The District Court denied reconsideration because:

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is the area at issue in this case. The full version of the map available at Dkt. 66-3 (Exhibit 3 to the Harris Decl.).

[22] *See, e.g.*, Dkt. 105, pgs. 14–16.

[23] Dkt. 146, pg. 1.

[24] Dkt. 147, pg. 2 (Respondents' July 7, 2022 Motion for Reconsideration) (provided in King County's concurrently filed Appendix to Appellant's Opening Brief). Both Docket 147 and 149 (same) are not part of the record certified by the District Court, as both are from later in time than the District Court's

> The Court's language mirrors that of the [1875 Act]. Specifically, the 1875 Act provided that "[t]he right of way through the public lands of the United States is granted to any railroad company" meeting certain requirements "to the extent of one hundred feet on each side of the central line of said road." 43 U.S.C. § 934.[25]

Thus, under the certified question before this Court, the Corridor includes shorelands granted by the federal government under the 1875 Act and the state law constitutional question is whether Article XVII, § 2 includes 1875 Act grants of shorelands within its operation.[26]

In accord with the 1875 Act, the federal government issued no letters patent, nor was such a document required, expected, or necessary to effectuate the grant. Rather, the Secretary of the Interior's approval of the 1887 map of proposed location

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order certifying this question to this Court. King County requests the Court take judicial notice of these docket entries.

[25] Dkt. 149, pg. 2 (Order Denying Respondents' Motion for Reconsideration).

[26] As the District Court points out, there may be further issues of federal law related to the 1875 Act that remain to be answered following this Court's determination of the certified question. *Id.*

constituted the federal government's patent of the new rail corridor to the railroad. *Great N. Ry. Co. v. Steinke*, 261 U.S. 119, 125, 43 S.Ct. 316, 67 L.Ed. 564 (1923) ("There is no provision in the act for the issue of a patent, but this does not detract from the efficacy of the grant. The approved map is intended to be the equivalent of a patent defining the grant . . . ."); *Stalker v. Or. Short Line R. Co.*, 225 U.S. 142, 151–152, 32 S.Ct. 636, 56 L.Ed. 1027 (1912) (finding that a railroad which had satisfied the 1875 Act held a superior title to land over a party who had subsequently obtained a patent to the same plot). When the Secretary of the Interior approved a map of proposed location filed by a railroad, the 1875 Act provided "the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way[.]" 43 U.S. Code § 937. The

SLS&E's map bears the signed approval of the Secretary of the Department of Interior:

 [27]

The approved map of proposed location thus becomes public record of the railroad's title, filed and maintained by the federal land office.

C. Article XVII, Section 2 of the Washington Constitution was Adopted to Remove Any Cloud on Title to the State's Tidelands Where A Property Right Was Granted Pre-statehood by the Federal Government.

The 1873 completion of the Northern Pacific Railroad over the Cascades to Commencement Bay was a watershed moment for Washington Territory.[28] With the railroad's

[27] Dkt. 66–1 (Exhibit 1 to the Harris Decl.)
[28] FICKEN, WASHINGTON TERRITORY, pg. 2.

completion, large numbers of people migrated to Washington, and key products like timber, fish, and wheat could be readily sold to eastern markets.[29]

On February 22, 1889, Congress passed the Enabling Act, which allowed the people of Washington to form a constitution and set the conditions for becoming a state. 25 U.S. Statutes at Large, c 180 p 676. Delegates were selected and met at a Constitutional Convention that lasted from July 4, 1889 to August 22, 1889. The delegates included at least 27 active attorneys. A number of the delegates had worked in the federal and territorial land offices.[30] And, two delegates had worked for railroads. The most divisive battles of the convention were over

[29] Washington's population increased from 75,000 in 1880 to 357,000 in 1890, amounting to a 356 percent increase. *Id.*, pg. 167.

[30] BEVERLY PAULIK ROSENOW, THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, with Analytical Index by Quentin Shipley Smith (1999 reprint), pgs. 465-490.

public lands.[31] Article XVII was a hotly debated issue at Washington's Constitutional Convention.

According to reports and news articles of the Convention, there was significant focus on title to the tidelands and shorelands.[32] This focus was undoubtedly due to the significant economic interests at stake. As reported in one newspaper:

> Almost every mill, every warehouse, every manufacturing industry, every railroad is directly, and through them almost every other avocation and occupation on the Puget Sound, is indirectly affected by the settlement of this question.[33]

Due to the economic importance of tidelands and shorelands to existing business interests, some groups lobbied strongly for constitutional provisions that would allow for the sale of tidelands, while acknowledging prior claims of ownership. Those groups were "well represented…railroad

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[31] Wiggins, *The Battle for the Tidelands in the Constitutional Convention* (Part I), pg. 15.

[32] Robert F. Utter & Hugh D. Spitzer, *The Washington State Constitution, Article XVII Tide Lands* 229 (2d ed. 2013).

[33] Kenan R. Conte, *The Dispositions of Tidelands and Shorelands Washington State Policy 1889-1982*, pgs. 10-11 (1982) (quoting W. Lair Hill, Morning Oregonian, 1889).

companies and numerous land developers and speculators."[34] These groups wanted to ensure that the Constitution would validate prior grants to such lands made by the federal government.[35]

Early in the Convention, W. Lair Hill (who was an attorney and influential witness), provided his observations that upon statehood Washington would have more tidelands than any other state in the union, covering over 2,500 miles of coastline and directly or indirectly influencing every industry and activity on Puget Sound.[36] He argued – as Respondents do here – that tidelands were held in trust by the federal government for future states and that any grant or patent given by the federal government conferred no title to the tidelands to the grantee.[37]

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[34] Conte, *Dispositions of Tidelands*, pg. 11; *see also* Utter, *The Washington State Constitution*, pg. 230.

[35] Conte, *Dispositions of Tidelands*, pg. 12.

[36] Wiggins, *The Battle for the Tidelands in the Constitutional Convention* (Part I), pg. 19.

[37] *Id.*

But others appreciated the long history of the grants of tidelands by the federal government and use of such lands for commerce and homes. Delegate Power, of Skagit County, proposed that title to marshlands that had been granted to settlers by the federal government "should be confirmed to the settlers." Power explained, "the government has disposed of the marshlands, actual settlers have taken them up and improved them in good faith, and it would be nothing short of an outrage for the state to claim ownership of them."[38] Delegate Hoyt argued that the convention had the power to confirm all land grants from the federal government purporting to grant land in the tidelands.[39] Another, delegate Weisenberger, noted the importance of a grant of the State's tidelands for pre-statehood lands granted by the federal government because in Whatcom the

[38] *Id.*, pg. 20.
[39] *Id.*, Part III, pg. 47.

business district was built on 12 acres of tideland covered by federal patents.[40]

A variety of compromises on tidelands ownership were considered and rejected. Then, in the final days of the convention, delegate Power offered a substitute article: "which confirmed all patents, asking for a vote on that issue alone. The delegates 'continued to stand in with the old settlers,' and the Powers substitute passed."[41] Shortly after, another delegate proposed "another separate measure, declaring state ownership of the tidelands and this too passed."[42] That night, several delegates gathered and agreed to a compromise measure that would enact both provisions.

Under the compromise, the State "assert[ed] its ownership to the beds and shores of all navigable waters . . . up to and including the line of ordinary high water within the banks of all

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[40] *Id.*
[41] *Id.*
[42] *Id.*

navigable rivers and lakes," but expressly disclaimed "all tide, swamp and overflowed lands, patented by the United States." Wash. Const. Art. XVII, §§ 1, 2. Accordingly, though the Washington Constitution generally claimed ownership of tidelands and shorelands for the State, it specifically disclaimed any interest where the federal government previously granted a property right in such lands, and conveyed any interest Washington might have in land covered by the federal government's prior grants.

In the years that followed, the Washington Supreme Court confirmed Article XVII, § 2's affirmative grant of state-owned tidelands to those who had received pre-statehood grants from the federal government. *See infra*, Section IV(C). Those opinions have added weight because several Constitutional Convention delegates served among first Washington Supreme Court justices. Justice Hoyt, who served on the Washington Supreme Court from 1889 to 1897, was President of the Constitutional Convention. Justice Dunbar, who served on the Court from 1889

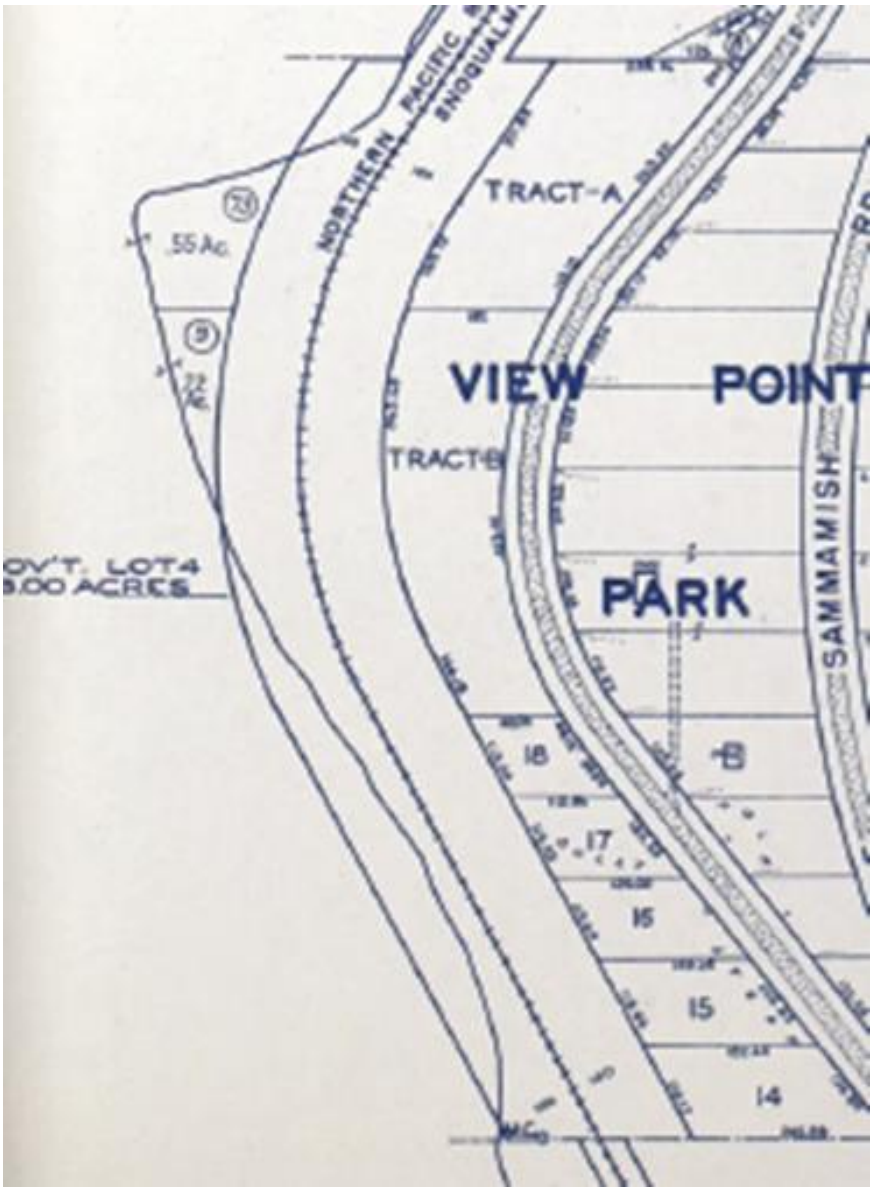
to 1912, was Chairman of the State, School and Granted Lands Committee at the Constitutional Convention which was responsible for Article XVII, § 2.[43]

D. A Hundred Years Later, King County Acquired the SLS&E's Corridor along East Lake Sammamish for Recreational Trail Purposes.

Respondents' properties, which lie adjacent to the railroad Corridor, did not come into existence until the 1940s when it was subdivided into "View Point Park." The 1950 Kroll Atlas shows

[43] Utter, *The Washington State Constitution*, pg. 232; ROSENOW, THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, pg. 810.

government Lot 4 with the Corridor, the shoreline of Lake Sammamish and the lot lines of View Point Park:



[44]

[44] The hashed line in the center of the Corridor shows the location of the railroad tracks. The View Point Park plat was

In early 1997, BNSF (successor-in-interest to SLS&E) conveyed its ownership interest in the historic railroad corridor to The Land Conservancy ("TLC") through a duly-recorded quit claim deed.[45] A detailed metes and bounds description in the deed describes the 200-foot wide Corridor next to each of Respondents' properties that the SLS&E acquired under the 1875 Act.[46] The legal description, which extends 100 feet east and west from the centerline of the tracks, includes the shorelands.[47]

On September 16, 1998, the Surface Transportation Board ("STB") issued an order "railbanking" the Corridor described in the 1997 BNSF quit claim deed under the Trails Act and

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further subdivided to account for all of Respondents' current lots. Dkt. 66–26 (Exhibit 26 to the Harris Decl.).

[45] Dkt. 66–14 (Exhibit 14 to the Harris Decl.)

[46] *Id.*

[47] *Id.*

authorizing interim use as a recreational trail.[48] *The Burlington N. & Santa Fe Ry. Co.-Abandonment Exemption-in King Cnty.*, No. AB-6 (SUB 380X), 1998 WL 638432, at *1 (Sept. 16, 1998). On September 18, 1998, TLC conveyed BNSF's property rights in the Corridor to King County through a duly-recorded quit claim deed, again with a detailed description of the Corridor's boundaries showing a 200 foot Corridor adjacent to Respondents' properties.[49]

King County purchased the Corridor so that it could be made available to the public for recreational uses, including the East Lake Sammamish Trail ("ELST").[50] Since that time, King

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[48] Under the National Trails System Act, a railroad company and a trail sponsor, such as King County, may enter into a voluntary agreement, called "railbanking," to allow the trail sponsor to use an out-of-service rail corridor as a public trail until such time as a railroad might need the corridor again for rail service. 16 U.S. Code § 1247(d). This has preserved thousands of miles of rail corridors that would otherwise have been abandoned, and preserves these critical railroad corridors should future activation be required. Unlike many trail sponsors, King County also purchased BNSF's property rights.

[49] Dkt. 66–15 (Exhibit 15 to the Harris Decl.).

[50] Dkt. 65, pg. 16.

County has been planning, developing, and constructing the ELST over this 11-mile segment of the 44 mile Locks to Lakes Corridor.[51] These efforts have been delayed by numerous lawsuits brought by adjoining landowners who have sought to prevent the County from constructing the trail, removing those landowners' encroachments, and otherwise providing access to the public.[52] The County has prevailed in these lawsuits,[53] but the delays nonetheless allowed adjoining property owners years, if not decades, of use of public land for their own private purposes.[54] By the time King County filed this lawsuit,

[51] Dkt. 65, pg. 16.

[52] *Id.*, pgs. 16–17.

[53] *See, e.g.*, *Kaseburg v. Port of Seattle*, 744 Fed. App'x 356 (9th Cir. 2018); *Hornish v. King Cnty.*, 899 F.3d 680 (9th Cir. 2018); *Neighbors v. King County*, 15 Wn. App. 2d 71, 479 P.3d 724 (2020).

[54] *See id.*; *see also* Dkt. 65, pgs. 14–17.

Respondents were using the 200 foot Corridor for their own private uses even though it is public property:

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The Corridor adjacent to Respondents' properties in this section of the ELST includes both submerged shorelands and dry

[55] Dkt. 65-1, pg. 12. This 2019 image is an aerial photo of Lot 4 overlaid with parcel lines. It originates from King County's official iMAP system.

uplands, offering lakeside views and access to recreational trail users.[56] It is one of the few stretches of Corridor that includes shorelands, thereby providing the potential of public access to the lake itself. Respondents' use of the Corridor for their own private activities, including the maintenance of elaborate private docks, impairs the public use of park property owned by King County.[57]

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[56] Dkt. 65, pg. 12; *see also* Dkts. 66-4, 66-5 (Exhibits 4 and 5 to the Harris Decl.). Although there is no dispute about the location of the tracks from which the 200-foot right-of-way is derived, the location of the shoreline has changed substantially over the 130 years since the tracks were constructed. Contributing factors include the 1917 opening of the Lake Washington Ship Canal and Hiram Chittenden Locks, which is estimated to have lowered Lake Sammamish by approximately 6 feet. King County Department of Natural Resources and Parks, Sammamish River Action Plan 11 (available at https://your.kingcounty.gov/dnrp/library/2002/kcr1270/01_Chapter_1.pdf). Washington courts have routinely recognized this change. *See, e.g., Davidson v. State*, 116 Wn.2d 13, 802 P.2d 1374 (1991). It is also probable that the railroad filled the area between the shoreline and the railbed to reinforce the tracks. Dkt. 68, p. 5–7 (Allen Decl.).

[57] Dkt. 65, pg. 16.

E. King County Commenced This Litigation to Preserve Public Property and Provide Lakeside Access to Recreational Trail Users.

In January of 2020, King County commenced this action in federal court, seeking to quiet title to the 200 foot-wide railroad Corridor adjacent to Respondents' properties and used by some for private docks.[58] All Respondents have constructed, maintained and used encroachments on the Corridor for their own purposes and to the exclusion of the public – despite the language in their current deeds excluding the Corridor, public records showing the boundaries of the Corridor, County communications, and judgments against some of the Respondents quieting title to the 200-foot Corridor to the County.[59]

In February of 2021, the parties filed cross motions for summary judgment,[60] and on July 26, 2021, the Honorable

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[58] Dkt. 1.

[59] *See* Dkt. 65, pg. 16 (discussing prior rulings against certain Respondents); Dkt. 67-3–67-39 (Exhibits to the Declaration of Desirae Shilling of Respondents' deed history).

[60] Dkts. 40, 48, 65.

Magistrate Judge Kate Vaughn issued her Report and Recommendation ("R&R").[61] In that R&R, Judge Vaughn correctly found that King County owns fee title to the shorelands within the Corridor and owns an exclusive railroad easement for the uplands, with the right to eject Respondents' encroachments. Judge Vaughn based her ruling, in part, on the finding that "[b]ecause the calls of SLS&E's patent to the Corridor extended waterward of the ordinary highwater mark, Section 2 [of Article XVII of Washington's Constitution] operated to 'disclaim' the state's interest in the Corridor's shorelands and convey the same to SLS&E when the Department of the Interior approved SLS&E's proposed map in 1887."[62] As Judge Vaughn concluded, through the operation of Section 2, "when the Sutters [Respondents' common predecessor in title] purchased the shorelands adjacent to Lot 4 that were 'owned by the State of Washington,' they did not take title to the shorelands located

[61] Dkt. 96.
[62] *Id.*, pg. 25.

within the Corridor, as the State no longer owned those shorelands."[63]

Parties filed objections to the R&R on various grounds.[64] Among Respondents other objections, Respondents argued that the Magistrate Judge had misconstrued the operation of Article XVII, § 2.[65] On July 5, 2022, Judge Estudillo entered an order certifying to the Court the following question:

> Is a right of way approved by the United States Department of Interior under the General Railroad Right-of-Way Act of 1875, 43 U.S.C. §§ 934-939, a conveyance "patented by the United States under Article XVII, § 2 of the Washington State Constitution.[66]

The District Court designated King County as the appellant in this proceedings.[67] This Court confirmed that designation.[68]

III. ISSUE CERTIFIED BY THE DISTRICT COURT

Is a right of way approved by the United States

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[63] *Id.*, pg. 26.
[64] Dkts. 103, 105, 108
[65] Dkt. 105, pgs. 7–14.
[66] Dkt. 146.
[67] Dkt. 150.
[68] August 1, 2022 Letter from Deputy Clerk/Chief Staff Attorney Sarah Pendleton to all counsel of record.

Department of the Interior under the General Railroad Right–of–Way Act of 1875, 43 U.S.C. §§ 934–939, a conveyance "patented by the United States" under Article XVII, § 2 of the Washington State Constitution?

IV. ARGUMENT

In certifying this case, the District Court noted that "the Corridor originally came to be in 1887 when the federal government granted the Seattle, Lake Shore & Eastern Railway Company ("SLS&E") a 'right of way' to build a railroad, which it did, under the" 1875 Act.[69] The 1875 Act "provided a mechanism for railroad companies to obtain rights of way over land to build railroads and encourage development."[70] In places, the "western edge" of this Corridor "runs over shoreland."[71] The overlap between the Corridor and the shorelands of Lake Sammamish flows from the language of the 1875 Act, which "provided that '[t]he right of way through the public lands of the

[69] Dkt. 146, pg. 2.
[70] *Id.*, pg. 3.
[71] *Id.*, pg. 1.

United States is granted to any railroad company' meeting certain requirements 'to the extent of one hundred fees on each side of the central line of said road.'"[72] Because the SLS&E constructed its railroad line on a trestle or on fill over the water near Respondents' properties, the 1875 Act necessarily included shorelands within the two hundred foot Corridor.

Consistent with this Court's prior interpretations of Article XVII, § 2, the pre-statehood property right conveyed to a railroad under the 1875 Act falls well within the disclaimer of "all title in and claim to all tide, swamp and overflowed lands, patented by the United States," Thereby conveying title in the railroad upon statehood in 1889. Rather than referring to a particular document evidencing a conveyance (e.g. letters patent, land grant certificate, etc.), the framers used the term "patented by" as understood in the late 19th century to broadly reference *any* grant of a property right by the federal government to shorelands. The

[72] *Id.*, pg. 2.

language of Article XVII, § 2, the historical context surrounding the adoption of the clause, subsequent application by state courts of this provision, and broader public interests all support the conclusion that Article XVII, § 2 was intended to disclaim any interest that Washington may have had in shorelines that were included as part of a pre-statehood federal grant under the 1875 Act.

As such, this Court should answer the certified question "yes."

A. Principles of Constitutional Interpretation.

The meaning of article XVII, § 2 centers on the language used by the framers of our Constitution. As this Court has noted, "[w]hen interpreting constitutional provisions, we look first to the plain language of the text and will accord it its reasonable interpretation." *Washington Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42, 45 (2004); *see also Malyon v. Pierce Cnty.*, 131 Wn.2d 799, 935 P.2d 1272, 1281 (1997) ("Appropriate constitutional analysis begins with the text

and, for most purposes, should end there as well."). This Court recognizes its "objective 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,* 131 Wn.2d at 799.

When interpreting Washington's 1889 Constitution, the words of the text "will be given their common and ordinary meaning, as determined at the time they were drafted." *Washington Water Jet Workers Ass'n*, 151 Wn.2d at 477. An important aid to determining meaning is dictionaries that are contemporaneous with the drafting of our Constitution, as well as court cases from this time period. *See id.* at 481-82 (relying on various late 19th century legal and common dictionaries). Contemporaneous court decisions also define meaning. *State v. Brunn*, 22 Wn.2d 120, 139, 154 P.2d 826 (1945) ("[I]t is standard practice, when construing the meaning of a constitutional provision, to inquire-What was the accepted meaning of the words used at the time the provision was adopted? Usually, that

meaning must be sought from extrinsic sources, and, when the language to be construed is a legal phrase or term, the meaning is sought in the former or current decisions of the courts.").

The purpose and historical context of a constitutional provision also inform its meaning. "When interpreting a constitutional provision, we seek to ascertain and give effect to the manifest purpose for which it was adopted." *Westerman v. Cary*, 125 Wn.2d 277, 288, 892 P.2d 1067 (1994). It is important to consider "the intent of the framers, and the history of events and proceedings contemporaneous with its adoption." *Yelle v. Bishop*, 55 Wn.2d 286, 291, 347 P.2d 1081 (1959); *see also Washington Water Jet Workers Ass'n*, 151 Wn.2d at 484 (considering the historical context surrounding the adoption aspects of the Constitution). This Court also considers the "political climate" behind our Constitution. *Washington Water Jet Workers Ass'n*, 151 Wn.2d at 486-87.

B. The 1875 Act Was Well Understood by Washington's Framers to Convey Important Property Rights to Railroads.

Because the construction and operation of railroads played such a crucial role in the development of Washington and its economy, the framers were well aware of railroad concerns. In order to encourage the development of railroad service, the 1875 Act granted public lands to railroad companies, including a two-hundred-foot-wide right of way for the rail line and "adjacent" land for rail-related buildings. The 1875 Act streamlined paperwork, vesting property rights in the railroad corridor upon the Secretary of the Interior's approval of a map showing the intended location of the rail line:

> Any railroad company desiring to secure the benefits of sections 934 to 939 of this title, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the officer, as the Secretary of the Interior may designate, of the land office for the district where such land is located a profile of its road; and **upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of**

> **way shall pass shall be disposed of subject to such right of way**: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road.

43 U.S.C. § 937 (emphasis added). Thus, approval of the map vested property rights in the railroad (dating back to the initial filing of the map) so long as the railroad completed its line within five years of the map's submission.[73]

In 1893, close in time to the adoption of our Constitution,[74] this Court explained that a railroad obtained a right of way under the 1875 Act by building the line and filing "with the register of the land office for the district where such land is located a profile of its road." *Enoch v. Spokane Falls & N. Ry. Co.*, 6 Wash. 393,

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[73] There are only limited exceptions to public lands subject to the 1875 Act. It does not apply "to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale . . . ." 43 U.S.C. § 938. *See also Chicago, M. & St. P. Ry. Co. of Idaho v. United States*, 244 U.S. 351, 356–57, 37 S. Ct. 625, 627–28, 61 L. Ed. 1184 (1917) (lands in a forest reserve fall within this provision).

[74] The panel included Chief Justice Dunbar, as well as Justices Hoyt, Stiles, Scott, and Anders. Three of these justices were delegates to the 1889 Constitutional Convention.

397, 33 P. 966 (1893). Once the Secretary of the Interior approves the location map, "the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." *Id.* (*quoting* 43 U.S.C. § 937). This Court noted that the 1875 Act "is in the nature of a general offer to the public." *Id.* at 398 (quoting *Railroad Co. v. Sture*, 32 Minn. 95, 20 N. W. Rep. 229 (1884). Importantly, this offer "takes effect *and becomes operative as a grant to a particular company* only when it accepts its terms by a compliance with the conditions precedent prescribed in the act itself." *Id.* (emphasis added). In this way, the 1875 Act has the same effect as any other grant of land from the federal government:

> A grant, like any other contract, must have two parties,-a grantor and grantee,-and an offer not accepted constitutes no contract. This is clearly the theory on which the act is framed. It merely offers or proposes to give any railroad company, upon compliance with its terms, the right of way over public lands, to which private rights have not attached at or before the date of such compliance.

Id.; *see also Brown v. State*, 130 Wn.2d 430, 434 n.1, 924 P.2d 908 (1996) ("The 1875 Act granted 'right[s] of way through the public lands of the United States' where rail lines were already located or over which lines would be built in the future.") (quoting 43 U.S.C. § 934) (alterations in original).

Once approved by the Secretary of the Interior, a grant of land under the 1875 Act "relates back, as against intervening claims, *to the date when the map was filed in the local land office* for transmission through the General Land Office to the Secretary of the Interior." *Great N. Ry. Co. v. Steinke*, 261 U.S. 119, 125, 43 S. Ct. 316, 318, 67 L. Ed. 564 (1923). As noted by the U.S. Supreme Court, the filed and approved map itself operates as a patent: "There is no provision in the act for the issue of a patent, but this does not detract from the efficacy of the grant. *The approved map is intended to be the equivalent of a patent* defining the grant conformably to the intendment of the act." *Id.* (emphasis added).

The strength of this property right – the "equivalent of a patent" – was derived from *Noble v. Union River Logging R. Co.*, 147 U.S. 165, 13 S. Ct. 271, 272, 37 L. Ed. 123 (1893). There, a Washington railroad company "filed with the register of the [federal] land office at Seattle a copy of its articles of incorporation, a copy of the territorial law under which the company was organized, and the other documents required by the act, together with a map showing the termini of the road, its length, and its route through the public lands according to the public surveys." *Id.* at 166. The map was then approved in writing by the Interior Secretary and ordered filed. *Id.* With a change in administration, however, a new acting Interior Secretary of attempted to invalidate approval of the railroad's location map by the prior Secretary, thereby withdrawing land previously granted the railroad under the 1875 Act. *Id.* at 166-67. Because a perfected land grant under the 1875 Act is the same as a patent issued under the Homestead Act, the Court invalidated the acting Secretary's effort to withdraw the

railroad's corridor. *Id.* at 176-77 (discussing *United States v. Schurz*, 102 U.S. 378, 26 L. Ed. 167 (1880) as controlling authority). Once the railroad's location map was approved by the previous Secretary of the Interior, "the granting section of the act became operative, and 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." *Id.* at 172.

Federal courts, analyzing the 1875 Act, have repeatedly recognized that the Secretary of the Interior's approval of a map filed by a railroad company pursuant to the 1875 Act is the equivalent of a patent.

> The approval of the map is therefore the act which vests in the corporation title to a definite right of way over the public lands for a road thereafter to be constructed. **Such approval is equivalent to a conveyance or patent from the government for the route delineated on the plat**, and it cannot subsequently be revoked by the Secretary or his successor in office, nor can it be set aside or vacated by a court except for reasons that would justify such relief in case of a patent.

Oregon Trunk Line v. Deschutes R. Co., 172 F. 738, 740 (C.C.D. Or. 1909) (emphasis added).

State courts across the country have echoed this interpretation, supporting a broad definition of what qualifies as a "patent." For example, the Supreme Court of Montana held in 1928 that grants made pursuant to the 1875 Act have "the effect of a patent to the land for the purpose named in the grant, and attach[] … at the time of the filing of the map of definite location." *Stepan v. Northern Pac. Ry. Co.*, 81 Mont. 361, 263 P. 425, 427 (Mont. 1928). Courts analyzing other, similar land grants have also recognized similar conveyances as "patents." In *Chambers v. Atchison, T. & S. F. Ry. Co.*, the Supreme Court of Arizona analyzed the rights granted by an 1866 federal statute that "incorporate[ed] the Atlantic and Pacific Railroad Company, and provid[ed] for a grant to that company of a right of way … and certain sections of public land to aid the construction of a railroad." 32 Ariz. 102, 104–105, 255 P. 1092 (Ariz. 1927). The court held that "[t]his grant had the same effect as a patent; hence the fact that one was not issued to the Atlantic Pacific & Railroad Company by the government is immaterial." *Id.* at 110.

The same is true in other areas of federal land grants. In 1894, a California court faced two competing mining claims and explained that respondent's "receipt and certificate of purchase from the United States land office" for certain mining claims were "the equivalent of a patent." *Walrath v. Champion Min. Co.*, 63 F. 552 (N.D. Cal. 1894). The United States Supreme Court made similar findings just eight years later, explaining that under federal mining law, "[t]he final certificate issued by the receiver after the submission of final proof and payment of the purchase prices, where such is required, has been repeatedly held to be for many purposes the equivalent of a patent." *Brown v. Gurney*, 201 U.S. 184, 193, 26 S.Ct. 509, 50 L.Ed. 717 (1906).

The framers well understood that a land grant under the 1875 Act operated with the same force as any certificate or letters patent issued by the federal government. In fact, RCW 65.08.050, which was adopted by the Legislature in 1890, authorizes the recording by County Auditors of land office "receipts," which includes the Secretary's filed approval of an

1875 Act location map. Even without issuance of letters patent or a certificate from the federal government, congressional grants link the 1875 Act were fully effective in conveying railroad corridor property:

> Congressional grants were from time to time made to states, railroads, municipal bodies, and individuals. Those acts are in words of present grant and are not only laws, but also conveyances capable of passing title of themselves, *without patent or other act of the government*. A patent subsequently issued for land so granted is merely documentary evidence of the previous passage of title rather than a conveyance.

2 RUFFORD G. PATTON & JOYCE D. PALOMAR, UNITED STATES PUBLIC LANDS—CONGRESSIONAL GRANTS § 290 (3d ed.).

In short, compliance with the 1875 Act operated the same as any other federal conveyance – including a deed, certificate or letters patent – to confer a property right on the railroad to a two hundred foot corridor. By the plain language of the 1875 Act, where a railroad seeking the benefit of the Act was to "file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the

Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way." *Stalker*, 225 U.S. 142, 145–46 (1912) (quoting the 1875 Act). It is well understood that the map, once filed with the Secretary and approved, operated as a patent. *See, e.g.*, Bartholic, Robert, Rocky Mountain Mineral Law Special Institute, *Railroad Records and Titles*, 40C RMMLF-INST 5 (1996) ("Different from regular land acquisition, there is no patent issued for 1875 right of way. The profile, map and statement of located line approved by the Secretary of the Interior serves as the evidence of the granting and conveyance to the railroad of a right of way under the Act of 1875; the map in effect is the patent.")

C. Where the Federal Government Granted Shorelands Under the 1875 Act Pre-Statehood, Article XVII, § 2 Operates To Disclaim State Ownership And Convey Title In Lands With the Same Effect As Any Other Federal Grant, Certificate or Letters Patent.

Through Article XVII, § 2, Washington disclaimed "all tide, swamp and overflowed lands, *patented by* the United

States." Const. Art. XVII, § 2 (emphasis added). The language of this provision, its purposes, and the prior decisions of this court support its application to federal land grants of shorelands that were made to railroads pre-Statehood.

Article XVII, § 2 uses the verb form of patent – "patented by" – to reference the federal government's act of granting a property right pre-statehood in shorelands. Contemporaneously published dictionaries from the late 1800s inform the use of this term by Washington's framers. *See, e.g., Johnson v. Johnson*, 96 Wn.2d 255, 267, 634 P.2d 877, 883 (1981) (looking to Black's Law Dictionary 299 (1st ed. 1891) and Burrell's Law Dictionary 399 (1871) to determine the meaning of the word "credit" as understood by the drafters of Article VIII, § 5 of the Washington Constitution).

At the time of our 1889 Constitution, a "patent" and a "grant" were largely synonymous words indicating the conveyance of property or some other right. Although "grant" was a more general term indicating either the public or private

transfer of a right, the word "patent" indicated a right conveyed by the government. The Dictionary of American and English Law, issued in 1888, defined "patent" as simply a "conveyance by the United States, or by a State, of a portion of the public lands." STEWART RAPALJE & ROBERT L. LAWRENCE, DICTIONARY OF AMERICAN AND ENGLISH LAW WITH DEFINITIONS OF THE TECHNICAL TERMS OF THE CANON AND CIVIL LAWS 938 (1888). The 1891 version of Black's Law, which is contemporaneous with the Constitutional Convention, defined a patent as "[a] grant of some privileged, property, or authority, made by the government," with the verb form being the act of granting such authority. Black's Law Dictionary 877-78 (1st ed. 1891).

In contrast, Washington's framers did not use the narrow concept of "letters patent," which is defined in the 1891 edition of Black's law as "*[a]n instrument* proceeding from the government, and conveying a right, authority, or grant to an individual as a patent for a tract of land." *Id.* at 706. If our framers

had used "letters patent" in Article XVII, § 2, it would refer only to land grants evidenced by the issuance of letter patent. But the use of "patented by" in Article XVII, § 2 refers more broadly to the federal government's pre-statehood act of granting property rights to shorelands. By transferring ownership from the federal government to a railroad, a land grant under the 1875 Act falls well within the meaning of Article XVII, § 2.

Decisions from this court interpreting Article XVII, § 2 focus on the substance of the federal grant, not its particular form. The overriding purpose of Section 2 was to avoid disputes about title to shorelands. *Kneeland*, 40 Wash. at 366. This Court pointed that the grant of the State's interest in tidelands applied with equal force to pre-state land grants to railroads by the federal government. This Court's opinion, written by Justice Dunbar (who chaired the Lands Committee at the Constitutional Convention), held that the substance of the pre-statehood grant, not its form, is the critical inquiry under Article XVII, § 2:

> Can it be supposed that the constitution makers intended to discriminate between two persons who had, in good faith and for value, become entitled to all of the government's property rights in certain portions of such lands-one of whom had already received his evidence thereof (the patent), and the other of whom had not, although equally entitled thereto? ***It seems to us that this would be to give consideration to form rather than substance, and to make a distinction justified neither in law nor in right.*** It has been the holding of the courts that the virtue of a patent dates from the time the patentee became entitled to it, and not merely from the date of its issuance.

Id. at 367 (emphasis added). Consistent with *Kneeland*, later opinions have regularly applied Article XVII, § 2 to railroad land grants and other federal grants, as intended by the framers. *See Narrows Realty Co.*, 52 Wn.2d at 848 (1958); *Wilson v. Prickett*, 79 Wash. 89, 89–90, 139 P. 754 (1914).

When applying Article XVII, § 2, it does not even matter "whether or not the United States government had power to, or as a matter of law did, grant and convey the particular tide land." *Kneeland*, 40 Wash. at 364. Rather,

> *The constitutional convention of this state, with a commendable sense of honor, thought it but simple justice to disclaim title to all tide lands patented by the United States, without regard to the technical right of the general*

> *government to convey the same*; and there is nothing in the language of the Constitution that would indicate that the convention intended to make any distinction between lands which had been patented through the medium of the donation act and those which had been patented under the pre-emption or commutation acts, or even of private entry. *…To the contention that this section of the Constitution applies only to lands patented at the time of its adoption, it may be answered that such a construction would sacrifice the spirit of the section.*

Id. at 366 (emphasis added). In short, this Court holds that Article XVII, § 2 must be broadly interpreted to meet the intent of the framers.

Indeed, there mere creation of a cloud on the title of the shorelands is enough to trigger disclaimer and conveyance under Article XVII, § 2. In one of the earliest opinions to address this clause, Justice Hoyt (who was also President of the Constitutional Convention) concluded that upon Washington's admission to the Union, "the [tide]lands passed absolutely to the state, *subject only to such clouds thereon as were caused by the same having been assumed to have been granted to private individuals by the United States*." *Scurry v. Jones*, 4 Wash. 468, 470, 30 P. 726 (1892) (emphasis added). With respect to those

lands where there was a cloud on title, the Court held that Section 2 constituted a grant of the State's interest in the subject tideland. *Id.* Similarly, in *Cogswell v. Forrest*, Justice Dunbar held that where there was a cloud on title to tidelands, the State Constitution did not make any distinction between the source of the federal grant, whether it be "through the medium of the donation act, and those which had been patented under the pre-emption[75] or commutation acts, or even of private entry." 14 Wash. 1, 3, 43 P. 1098 (1896).

Application of Article XVII, § 2 reflects the express purposes of the framers to protect the rights and expectancies of those who improved shorelands within the Washington territory under the color of a federal grant of shorelands. As noted above in the statement of the case, the history of the Washington's Constitutional Convention makes clear that the term "patented

[75] The Preemption Act of 1841, 27 Cong., Ch. 16; 5 Stat. 453, allowed squatters who had been living on federal lands to obtain ownership of them.

by" was intended to reach those circumstances where a pre-statehood grant from the federal government included tidelands and use had been made of those tidelands in reliance on that grant. The needs of railroads and other uses of tidelands were firmly in the delegates' minds.

The focus of the debates among delegates regarding tidelands was not on form over substance. The delegates were not focused on what piece of paper had been received by anyone – indeed, it was very often the case that patents from the General Land Office even for homesteaders were not issued for many years after the office notified the applicant of entitlement to receive a patent. Instead, delegates were focused on the issue of whether a person or entity had improved land, relying upon the federal government's grant of property rights to tideland. This was seen as a way to avoid long legal battles to clear clouds on title and also as an issue of fairness to the old settlers and those who had invested significant sums based on years, if not decades, of use of the tidelands.

The delegates were well-aware that railroads often occupied tidelands and shorelands, and that railroads received such property rights from the federal government.[76] Indeed, one delegate, H.W. Fairweather, was a former railroad executive of the Northern Pacific Railroad, and another, Burke, was the founder of the SLS&E Railway.[77] The property rights granted under the 1875 Act to the SLS&E railroad by the federal government to build a railroad within a 200 foot Corridor along and over Lake Sammamish, were exactly the type of property rights that Washington's framers sought to protect through the disclaimer and conveyance functions of Article XVII, § 2.

V. CONCLUSION

The framers of Washington's Constitution made an intentional choice to disclaim and convey shorelands that had been previously granted by the federal government. By operation of the 1875 Act, the Secretary of the Interior approved the

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[76] Conte, *Dispositions of Tidelands*, pgs. 10-11 (1982).

[77] ROSENOW, THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, pgs. 465-490.

SLS&E's maps of proposed location, thereby granting the railroad a 200 foot Corridor along and over the eastern Shore of Lake Sammamish. Once this map was approved and filed in the federal land office, it became a property right granted, i.e. "patented," by the federal government well within the protections of Article XVIII, § 2. King County respectfully requests that this Court answer the district court's certified question in the affirmative, which will ultimately allow the public shorelands granted by the federal government under the 1875 Act to come back into public use.

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The undersigned certifies as follows:

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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: September 29, 2022 at Seattle, Washington.

s/ Donna Patterson
Donna Patterson

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.

APPENDIX TO APPELLANT'S OPENING BRIEF

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Appellant submits the following docket cites not provided by the District Court in its July 5, 2022 Order Certifying Question and which are cited in the Appellant's Opening Brief:

Document	**Page No.**
Dkt. 147, Respondents' July 7, 2022 Motion for Reconsideration	App. 1-6
Dkt. 149, July 19, 2022 Order Denying Respondents' Motion for Reconsideration	App. 7-9

DATED: September 29, 2022.

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

On this date, I caused a true and correct copy of the foregoing Appendix to Appellant's Opening Brief to be served via the Appellate Court E-File Portal and e-mail on the following attorneys of record herein:

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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: September 29, 2022 at Seattle, Washington.

s/ Donna Patterson
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HONORABLE DAVID G. ESTUDILLO

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KING COUNTY, a home rule charter county,

Plaintiff,

v.

MICHAEL J. ABERNATHY; GINA M. ABERNATHY; SCOTT C. BAISCH; JENNIFER C. BAISCH; WARREN BERES; VICKI BERES; JODY J. BREWSTER; HOWARD M. CROW; MARGARET W. CROW; PATRICIA J. HARRELL; ANDRZEJ MILKOWSKI; LISA M. MILKOWSKI; MICHAEL PARROTT; AND DIANE PARROTT,

Defendants.

NO. 2:20-CV-00060-DGE

DEFENDANTS' JOINT MOTION FOR RECONSIDERATION TO CORRECT FACTUAL INACCURACIES

NOTE ON MOTION CALENDAR: JULY 7,2022

All Defendants jointly bring this Motion for Reconsideration to correct three factual statements in the Court's Order Certifying Question to Washington State Supreme Court (Dkt. 146) **("Order").** This Motion does not ask the Court to reconsider whether to certify the question, nor does it ask the Court to change the question certified. Rather, it asks the Court only to correct a single erroneous factual assertion that is repeated in three separate sentences in the Order. Those three sentences are as follows:

1. "In this case, however, the R&R found the approval of SLS&E's map, ***which***

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showed the right of way boundaries extending over shore/and, 'is equivalent to a conveyance or patent from the government . . . . "' Dkt. 146 at 4. (Emphasis added.)

2. "The question remains whether ***approval of the map showing the right of way going over shore/and*** 'patented' SLS&E's interest in that land for purposes of Article XVII,§ 2." *Id.* at 6 n.4. (Emphasis added.)

3. "As such, whether ***approval of a railroad right of way running over shore/and by the Department of the Interior*** pursuant to the 1875 Act conveyed a 'patented' right under Article XVII, § 2 presents a novel question of Washington constitutional interpretation." *Id.* at 7. (Emphasis added.)

These three sentences all erroneously state that SLS&E's 1887 map depicts a right of way over shorelands. Dkt. 43-4.[1] That is not correct. A right of way is the "right to pass through property owned by another." Right-Of-Way, Black's Law Dictionary (11th ed. 2019). The map depicts no right of way whatsoever. Instead, the map depicts only the "line of the route" for the tracks, as adopted by the SLS&E's board of directors, which was the planned route for the railroad line. *See* Dkt. 43-4 (showing declaration of chief engineer and president of SLS&E). The 1887 map includes no description of the railroad company's right to travel through the land depicted. *Id.* Instead, the map was prepared and filed "in order that the [railroad] company may obtain the benefits of [the 1875 Act]." *Id.* There can be no dispute that the map does not depict the location of any easement granted pursuant to the 1875 Act, nor does it depict any other form of right of way.

The 1887 map does show the track centerline extending over a small portion of Lake Sammamish, but the location of the track centerline on the map does not mean a right of way was approved or granted over Lake Sammamish. Rather, the law dictates whether a right of way was granted and, if granted, its location. In light of the question being certified to the Washington

[1] Dkt. 43-4 contains a higher resolution version of the same map that the Order cites and relies on. *Compare* Dkt. 43 (Olsen Decl.) at 2:11-14 *with* Dkt. 66 (Harris Decl.) at 2:3-5.

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Supreme Court, there is a critically important difference between the location of the track centerline (which the railroad company controlled) and the associated right of way (the grant of which was controlled by the terms of the 1875 Act and the Equal Footing Doctrine). By way of analogy, no one could dispute that where the track centerline was shown on the approved 1887 map traveling through land not owned by the United States (such as land previously patented to settlers), no right of way would attach. Indeed, although the 1887 map shows a route line along the entire eastern shore of Lake Sammamish, only two small sections of that route were actually granted right of way easements pursuant to the 1875 Act. *See* Dkt. 43-10 (showing that two sections of the route-noted as 4 and 7 on 1917 Val Map--were granted under the 1875 Act and that some sections were obtained by adverse possession). Thus, the mere depiction of the track centerline on the approved 1887 map does not itself identify the scope of the right of way.

Importantly, the portion of the proposed track centerline shown on the 1887 map over Lake Sammamish is not at issue in this case. After 1887, that portion of Lake Sammamish was apparently filled in, and, for more than one hundred years, the former railroad tracks and current East Lake Sammamish Trail have been located and operated on dry land. *See* Dkt. 68 at 6: 1-2. The only question now concerns the effect, if any, of the 1875 Act and Art. 17, Sec. 2 on the shorelands west of the land the trail currently sits upon.

For the reasons described above, Defendants respectfully request that the Court revise its Order by correcting the facts as shown in the revised sentences below:

1. In this case, however, the R&R found the approval of SLS&E's map, which showed the right of way boundaries extending over shoreland, "is equivalent to a conveyance or patent from the government . . . . "
2. The question remains whether approval of the map showing the right of way going over shoreland "patented" SLS&E's interest in that a right of way over shoreland for purposes of Article XVII, § 2.
3. As such, whether approval by the Department of the Interior pursuant to the 1875

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Act of a map showing the planned line for the railroad tracks right-of-way running over shoreland by the Department of the Interior pursuant to the 1875 Act conveyed a "patented" right under Article XVII, § 2 presents a novel question of Washington constitutional interpretation.

DATED this 7th day of July, 2022.

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Certificate of Service

I, Rachel T. Wang, certify under penalty of perjury of the laws of the State of Washington that on July 7, 2022, I electronically filed this document entitled DEFENDANTS' JOINT MOTION FOR RECONSIDERATION TO CORRECT FACTUAL INACCURACIES using the CM/ECF system which will send notification of such filing to the following persons:

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DATED this 7th day of July, 2022, at Seattle, Washington.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY, Plaintiff, v. MICHAEL J. ABERNATHY et al., Defendants.	CASE NO. 20-cv-00060-DGE ORDER DENYING DEFENDANTS' JOINT MOTION FOR RECONSIDERATION

This matter comes before the Court on Defendants' Joint Motion for Reconsideration of the Order Certifying Question to Washington State Supreme Court. (Dkt. No. 147.) Defendants assert the Court made a factual error in its certification order (Dkt. No. 146) that should be corrected. The Court, having reviewed Defendants' motion for reconsideration and the remaining record, is fully informed. For the reasons set forth in this Order, Defendants' motion should be DENIED.

Defendants take issue with three sentences in the certification order, which "all erroneously state that [Seattle, Lake Shore & Eastern Railway Company's ("SLS&E")] 1887

map depicts a right of way over shorelands." (Dkt. No. 147 at 2.) Defendants argue "[t]he map depicts no right of way whatsoever. Instead, the map depicts only the 'line of the route' for the tracks, as adopted by the SLS&E's board of directors, which was the planned route for the railroad line." (*Id.*)

The Court's language mirrors that of the General Railroad Right–of–Way Act of 1875 ("1875 Act"). Specifically, the 1875 Act provided that "[t]he right of way through the public lands of the United States is granted to any railroad company" meeting certain requirements "to the extent of one hundred feet on each side of the central line of said road." 43 U.S.C. § 934.

Although Defendants raise issue with the language used in the Court's certification order, they do not seek reconsideration of the certified question, which is:

> Is a right of way approved by the United States Department of the Interior under the General Railroad Right–of–Way Act of 1875, 43 U.S.C. §§ 934–939, a conveyance "patented by the United States" under Article XVII, § 2 of the Washington State Constitution?

Only after the Supreme Court of Washington has responded to the certified question does this Court feel it appropriate to address the issue raised by Defendants in their motion for reconsideration because it is separate from the issue presented by the certified question. The certified question asks whether a conveyance approved under the 1875 Act constituted a "patent" under Article XVII, § 2 of the Washington State Constitution. Defendants' argument addresses whether the federal government had authority to grant a right of way over shorelands pursuant to the 1875 Act.

Accordingly, the Court does not believe Defendants' proposed corrections materially affect the certified question. Therefore, certification remains appropriate, the certified question need not be edited, and Defendants Motion for Reconsideration (Dkt. No. 147) **IS DENIED.**

Dated this 19th day of July 2022.

David G. Estudillo
United States District Judge

CORR CRONIN LLP

September 29, 2022 - 4:16 PM

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