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 REPLY BRIEF

*Plaintiff's Reply Brief

DAVID HACKETT, WSBA #21236
Senior Deputy Prosecuting Attorney
King County
Prosecuting Attorney's Office
500 Fourth Ave., 9th Floor
Seattle, WA 98104
(206) 296-8820
david.hackett@kingcounty.gov

EMILY J. HARRIS, WSBA #35763
Special Deputy Prosecuting Attorneys
Corr Cronin LLP
1051 Second Avenue, Floor 10
Seattle, WA 98154
(206) 625-8600
eharris@corrcronin.com

Attorneys for Appellant King County

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

The certified question in this proceeding is straightforward:

> 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 [("the 1875 Act")], a conveyance "patented by the United States" under Article XVII, § 2 of the Washington State Constitution?

Rather than answering this simple question, Respondents[1] fight the question itself, arguing that a grant under the 1875 Act

[1] Respondents reference themselves as "owners," but this is just wishful thinking. They claim to "own property abutting Lake Sammamish, including the abutting shorelands" (Resp. Br. at 1), but their properties merely abut the Eastern margin of the Railroad Corridor with some shorelands just outside the Western boundary. Every Respondent's upland property flows from a common 1934 deed that specifically excluded the railroad's corridor from the conveyance. *See* Dkt. 65 at 13 (explaining that Cowie deed conveys Government Lot 4 "EXCEPT railroad right-of-way"). The Railroad Corridor continued to be excluded from every common deed and plat map leading up to Respondents' current legal descriptions. *Id.* at 13-14. It is elementary that a current property owner cannot claim more than was conveyed by processors in their chain of 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."). Indeed, none of Respondent's current deeds include any property within in the Corridor.

cannot include shorelands and thus the Department of the Interior acted *ultra vires* in 1887 when it approved the shoreland portions of the Seattle, Lake Shore & Eastern Railway Company's ("SLS&E") right of way. These matters are irrelevant not only to the question before the court, but also to the operation of Section 2 more broadly.

In the end, Respondents posit a reading of "patented by the United States" that ignores case law, ignores the concerns that motivated the constitutional framers, and would make it impossible for a railroad to traverse the streams and lakes along a rail Corridor. Because the federal government's grant of an exclusive property right under the 1875 Act falls well within the language and concerns of Article XVII, § 2 ("Section 2"), the certified question should be answered "yes."

II. ARGUMENT ON REPLY

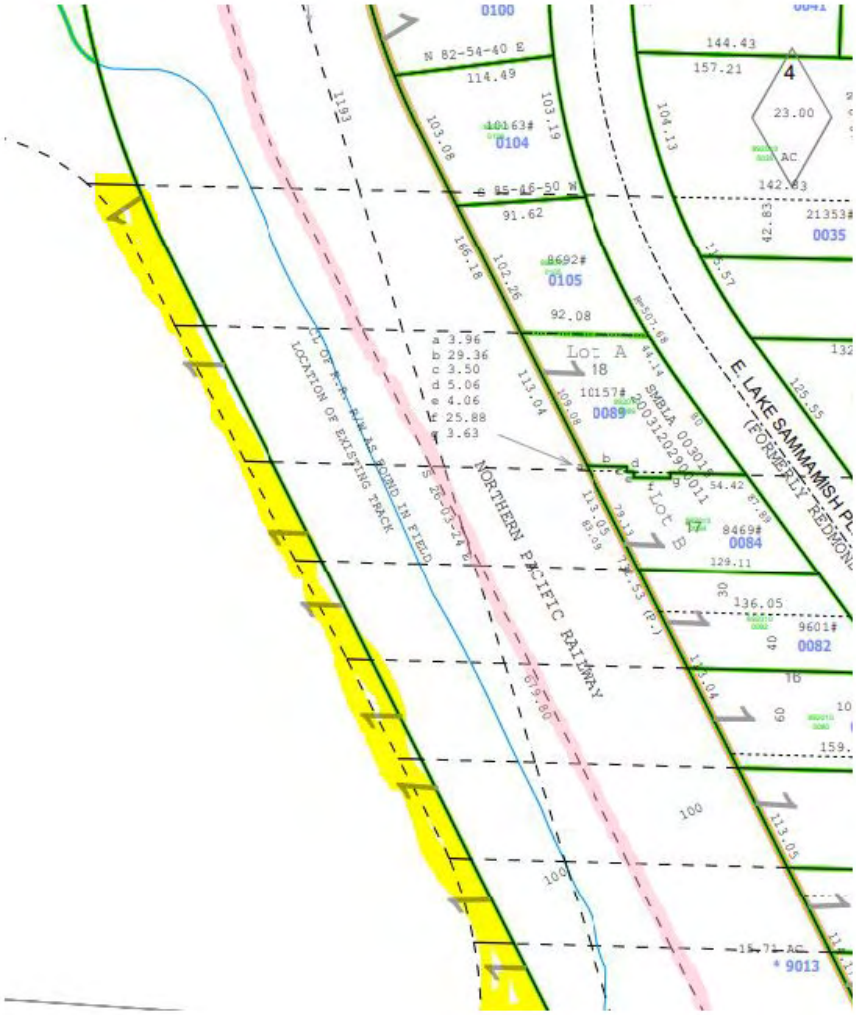
A. For Purposes of the Certified Question, the Grant of a Right of Way Under the 1875 Act Includes Shorelands Within the 200-Foot Railroad Corridor.

As noted in King County's Opening Brief and not contested by Respondents, the federal district court already determined that the "western edge" of the Corridor "runs over shoreland" of Lake Sammamish. Open. Br. at 17-18, 37-38. Indeed, where the Corridor is adjacent to Respondents' upland properties, the SLS&E constructed its railroad tracks *directly* over the shorelands as they then existed. Dkt. 66-1. Absent the inclusion of these shorelands in the 1875 Act Corridor, there would be a break in the line, which is no way to run a railroad.

When Respondents asked the district court to reconsider its determination of this federal question, the court confirmed that the 1875 Act granted the SLS&E one hundred feet of both sides of the tracks, which places the western boundary of the Corridor over what are even now shorelands. It is the very location of the Corridor over shorelands that raises the certified

question of whether an 1875 Act grant triggers the operation of Section 2. Because the District Court has already decided this federal issue, this Court should decline Respondents' implicit invitation to expand this proceeding beyond the proper meaning of Section 2.

Notably, Respondents cite a King County Assessor's map of the area to illustrate their points. Resp. Br. at 27 n.15. But this map conclusively shows both the boundaries of the Corridor and the limits of Respondents' own property rights:



Within the 200-foot Corridor, the centerline of the railroad track is highlighted in pink. The current shoreline of Lake Sammamish, which runs inside the Corridor, is a blue line original to the map. The only shorelands that Respondents actually own lie outside the Corridor boundaries and are highlighted in yellow.

B. The Property Right to a Two Hundred Foot Railroad Corridor Conveyed under Color of the 1875 Act Triggers the Protections of Article XVII, § 2.

The *only* issue properly before the Court is whether the Department of the Interior's approval of SLS&E's map under color of the 1875 Act triggered a conveyance under Section 2 upon statehood. A property right conveyance under the 1875 Act has long been considered "the equivalent of a patent," *Great N Ry. Co. v. Steinke*, 261 U.S. 119, 125 (1923). Respondents' efforts to narrow the meaning of Section 2 and misconstrue the nature of an 1875 Act grant are unpersuasive.

Respondents contend Section 2 does not apply to SLS&E's pre-statehood interest in the shorelands because no document entitled "patent" ever issues with an 1875 Act grant. Respondents argue further, without support, that Section 2 covers only fee simple grants by the federal government because "patents" supposedly are limited to fee conveyances. Resp. Br. at 11-13, 44. These arguments are incorrect and, most

importantly, do not reflect the understanding of the framers that drafted Section 2.

1. Respondents Misread the Text of Section 2

Section 2 states in relevant part: "The state of Washington disclaims *all title in and claim to* all tide, swamp and overflowed lands, *patented by* the United States." (Emphasis added). In arguing that "patented by" limits application of Second 2 to formal letters patent documents issued by the federal government, Respondents completely ignore the overriding interpretation rule for our state constitution: "What was the accepted meaning of the words used at the time the provision was adopted?" *State v. Brunn*, 22 Wn.2d 120, 139, 154 P.2d 826 (1945).

As pointed out in King County's Opening Brief, authorities contemporary with our 1889 constitution understood the verb "patent" to be largely synonymous with "grant" or "convey" with application to *any* interest in land granted by the federal government. *See* Opening Br. at 52-54. Respondents fail

to address these authorities, which have consistently held that the grant of a right of way under the 1875 Act "is equivalent to a conveyance or patent from the government." *Oregon Trunk Line v. Deschutes R. Co.*, 172 F. 738, 740 (C.C.D. Or. 1909). Nor have Respondents denied this Courts early holding in *Enoch v. Spokane Falls & N. Ry. Co.*, 6 Wash. 393, 397, 33 P. 966 (1893), that compliance with the terms of the 1875 Act results in "a grant" of the offered 200-foot railroad Corridor. Thus, when the framers used the verb form "patented by" in Section 2 rather than "letters patent" or even the noun "patent," they intended to go beyond the issuance of a formalistic document to include all the various methods used by the federal government to grant or convey public lands.

Respondents' assertion that Section 2 covers only fee simple grants from the federal government due to use of the words "title" and "claim" is invented out of whole cloth. Crucially, the "title in" and "claim to" language in Section 2 describe the extent of Washington's disclaimer, not the nature of

the federally granted rights to which Section 2 applies. Nothing about this language implies that Washington only waived its rights in land granted in fee by the federal government, while ignoring right-of-way grants. Under the plain language of Section 2, the State disclaimed its property interests in "*all*" shorelands "patented by the United States," (emphasis added)—not just those in which the United States had patented a fee simple title.[2]

---

[2] Citing the 1891 version of Black's Law, Respondents assert that "claim," "title," and "conveyance" are synonymous with fee. Resp. Br. at 30-31 & n.16. But this reading of Black's is untenable. The discussion of "title" in Black's points out that a person can hold title to property rights less than fee simple: "In its ordinary legal acceptation, however, [title] generally seems to imply a right of possession also." Black's Law Dictionary at 1174. And, per Black's, the verb claim simply means "[t]o demand as one's own; to assert a personal right to any property or any right." *Id.* at 209. Certainly, one could "claim" to own a fee or an easement. Finally, Respondents misleadingly omit unfavorable portions of the 1891 "conveyance" definition, which "includes *every* instrument in writing by which *any* estate or interest in real estate" is transferred. *Id.* at 273 (emphasis added).

2. Respondents Misstate the History of Section 2 and Railroad Land Grants

To bolster their incorrect textual reading, Respondents concoct a history where the framers limited Section 2 to fee simple patents. They create a narrative that the Federal Government initially granted fee simple patents to railroads and other settlers to encourage expansion into the West until, in response to public outcry, Congress ceased issuing patent to railroads in the 1875 Act. Resp. Br. at 13-14. This account is baseless.

Letters patent have never been limited to transferring fee simple ownership interests as Respondents claim. They were simply "[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," Black's Law Dictionary at 706 (emphasis added). The federal government could grant *any* sort of property interest in land through letters patent, including the type of right of way provided for in the 1875 Act. *See Gillmor v. Blue Ledge Corp.*, 217 P.3d 723, 729 (Utah App. 2009) (noting that mining

patent issued under 1872 Mining Act may convey less than a fee simple estate by reserving the surface estate). Notably, the 1875 Act itself disproves Respondent's claim that patents always convey unburdened fee absolute estates because homesteaders like Cowie received less than the full bundle of sticks by taking property subject to the railroad's prior property right in the Corridor.[3]

Because letters patent could convey any privilege in land and were not synonymous with fee simple ownership, Respondents' suggestion that Congress chose not to provide letters patent in the 1875 Act as a concession to populist anger

[3] Again citing the 1891 version of Black's, Respondents admit that a "patent" means an "instrument by which a state or government grants public lands to an individual." Resp. Br. at 31. If this is so, the Secretary-of-the–Interior-approved right-of-way map, which is filed in the federal land office, is certainly an "instrument" that "grants public lands." It is thus a "patent" under Respondent's own argument. *See also Kneeland*, 40 Wash. at 370 (a formal patent "is but an evidence of a right earned").

against the railroads is nonsensical.[4] To be sure, a shift in federal policy occurred several years prior to the 1875 Act,[5] when the federal government ceased granting railroads large checkerboard swaths of land surrounding their planned routes so that they could be resold to settlers to fund construction. *See Great N. R. Co. v. United States*, 315 U.S. 262, 273-74, 62 S. Ct. 529, 534, 86 L. Ed. 836 (1942) (quoting Cong. Globe, 42d Cong., 2d Sess., 1585 (1872)). But the choice to eschew letters patent in the 1875 Act was neither part of nor a consequence of that policy shift.

The decision was instead one of clerical expediency. Congress had passed no fewer than fifteen special acts granting

---

[4] The only source Defendants cite for this claim, Paul W. Gates, History of Public Land Law Development, 373–86 (1968), does not mention the 1875 Act or the change from letters patents within the cited page range.

[5] Defendants are incorrect that the 1875 Act "put an end to the United States conveying fee title to railroads." Resp. Br. at 14. The shift occurred by resolution in 1872, and numerous special acts granting non-fee-simple-absolute rights of way to specific railroads were enacted between then and the 1875 Act. *See Great N. R. Co. v. United States*, 315 U.S. 262, 273-74 n.9 (1942).

rights of way to particular railroads in the years immediately preceding the 1875 Act, *id.* at n. 9, and a lengthy letters patent backlog existed at the time, resulting in great delays in the issuance of the formal documents, *see* Open Br. at 13. Congress enacted the 1875 Act to streamline the process for granting railroads rights of way by delegating the decision to the Department of the Interior and eliminating the formality of letters patent for each conveyance.

Respondents propose that the delegates to the Washington Constitutional Convention crafted Section 2 to "primarily benefit[] the 'old settlers'" by honoring only letters patent and not the later federal railroad right of way grants accomplished through the 1875 Act's map approval process. Resp. Br. at 15-22. But because letters patent could convey any land right and the administrative switch away from issuing them to railroads was unrelated to the earlier change in policy, there is no reason the Washington Framers would associate patents with fee simple ownership by "old settlers."

Respondents are also mistaken that the framers would have even recognized a substantial distinction between 1875 Act rights of way and the fee estates. Even after the shift in federal policy, railroad rights of way were understood to include far more rights than an ordinary easement, including a right to exclusive possession and control, and they were universally regarded as a fee or fee-like estates at the time of the framing. *See infra* § II.C; *Rio Grande* 3 *W Ry. Co. v. Stringham,* 239 U.S. 44, 47 (1915) (describing an 1875 Act right of way as "neither a mere easement, nor a fee simple absolute, but a limited fee").

Respondents' assertion that the delegates uniformly distrusted railroads and did not intend Section 2 to benefit them is inaccurate.[6] Resp. Br. at 15-22. The very sources Respondents

[6] Defendants point out that the Convention sought to invalidate a land grant the territorial legislature had made to one particular railroad, the Oregon Improvement Company, which had failed to complete a promised rail line connecting Seattle to the transcontinental route. Resp. Br. at 16-17. But Defendants neglect to mention that the delegates took steps to nullify *only* the one non-federal grant to the reneging railroad while expressly leaving all others intact. *See* Fitts, *supra*, at 179-80 (noting that,

cite confirm that railroad companies were well represented and explicitly considered in the negotiations that led to Article XVII, which was a compromise that accounted for railroads' interests in the tidelands as much as the public's and other parties'. *See* Charles K. Wiggins, *The Battle for the Tidelands in the Constitutional Convention, Parts I-III*, Wash. St. Bar News 15-52 (1990) (detailing the lobbying efforts and representation of the railroads in the tidelands debates); 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"). Indeed, the founder of SLS&E—Judge Thomas Burke—was himself a convention delegate, along with at least one other former railroad

---

"in a move designed to exclude only the Oregon Improvement Company's claims," the Convention "invalidated the company's claims specifically while not invalidating all other claims"). Nor do Defendants note that SLS&E was founded for the specific purpose of completing the Oregon Improvement Company's unfulfilled promise. Wiggins, *supra*, at 17.

executives.[7] It strains credulity to suggest Judge Burke sat idly without recorded comment while the Convention divested the railroad he founded of all federally granted rights in the shorelands its tracks traversed, rendering it a trespasser at critical points in its routes.

Respondents' sources demonstrate the Framers were apprised that *all* federally granted interests in tidelands would revert to the State upon its admission to the Union,[8] and so they adopted Section 2 to protect the rights and expectancies of those who improved tidelands in reliance on federal grants, regardless

---

[7] Beverly Paulik Rosenow, The Journal of the Washington State Constitutional Convention, 1889, with Analytical Index by Quentin Shipley Smith (1999 reprint), pgs. 465-490.

[8] Defendants observe that the delegates adopted Section 2 after being informed of *Hinman v. Warren*, 6 Or. 408 (1877), in which the Oregon Supreme Court held that federal grants under the Donation Land Claims Act were invalidated upon Oregon's admission to the Union. Resp. Br. at 32-33. They argue that the delegates thus intended Section 2 "to refer to land patents conveying fee title, as was the case in *Hinman* under the Donation Land Claims Act." Resp. Br. at 32-33. But this Court has already concluded that the Framers intended Section 2 to sweep more broadly than the Donations Land Claims Act grants considered in *Hinman*. *See Cogswell*, 14 Wash. at 3.

of type. *See* Wiggins, *supra*, at 47; Fitts, *supra,* at 183. This is precisely what SLS&E and other railroads had done, so it is unsurprising that this Court has repeatedly applied Section 2 to pre-statehood federal railroad grants. *See Narrows Realty Co. v. State,* 52 Wash. 2d 843, 848, 329 P.2d 836, 840 (1958); *Wilson v. Prickett,* 79 Wash. 89, 89–90, 139 P. 754 (1914); *Kneeland v. Korter,* 40 Wash. 359, 366, 82 P. 608, 610 (1905).

3. Respondents Ignore this Court's Section 2 Caselaw

Respondents claim that since its adoption, "this Court has consistently applied the rule that Section 2 operated to disclaim tidelands and shorelands only if they are above the meander line and below the line of ordinary high water or high tide." Resp. Br. at 37. They assert that "Section 2 has no effect" when this condition is absent. *Id.* at 57-58. As has already been pointed out in Judge Vaughn's recommendation, both of these statements about this Court's precedents are flatly incorrect. Dkt 96 at 23:20-25:3.

From the outset, it is important to recognize that when the decisions Respondents cite discussed meander lines, it was because those were the relevant landmarks under the specific land grant laws that were before the Court. It makes sense that this Court would discuss the landmarks relevant in those cases when referencing the boundaries of those federal grants, but this in no way means that the factual context of those cases somehow limits the meaning of Section 2, which nowhere mentions meander lines.

In the context of a case involving the 1875 Act, the relevant landmark is instead the centerline of the tracks. By laying down the tracks and fulfilling the other requirements of the 1875 Act, a railroad gains title to the full 200-foot Corridor extending 100-feet on both sides of the track, and so a centerline determines where the grant ends, not a meander line. As the district court found, the SLS&E obtained a Corridor that covered shorelands beneath the high-water mark though its grant did not reference a meander line.

Respondents meandering arguments about meander lines cannot change the meaning of our constitution. A meander line is nothing more than the waterward boundary identified in some federal upland grants, and this Court's cases prove the presence or particular placement of a meander line is not a prerequisite for Section 2's operation. In *Hewitt-Lea Lumber Co. v. King Cty.*, the Court considered the applicability of Section 2 to a portion of the Mercer slough extending from Lake Washington that "was *never* meandered"; "Government survey lines were run across the upper half [of the slough] as though it did not exist, and the lands through which it extended were laid off and patented in regular government subdivisions." 113 Wash. 431, 432-33, 194 P. 377, 377 (1920) (emphasis added). A lumber company claimed a property interest in lands beneath the slough by virtue of his predecessor's pre-statehood federal patent. *Id.* The Court observed that, because there was no meander line defining the edge of the federal grant and excluding the land beneath the slough, "the whole of the upper part of the slough may be said to

be above the meander line"—that is, within the boundaries of the grant.[9] *Id.* The Court accordingly held that Section 2 applied to disclaim the state's interest in the lands beneath the slough notwithstanding the total absence of a meander line. *Id.*; see also *Wilson*, 79 Wash. at 91 (applying Section 2 to a railroad grant that included land beneath an "unmeandered and nonnavigable stream").

Section 2 applies to any pre-statehood federally granted interest in land "waterward of the line of ordinary high tide," regardless of how that interest was granted. *Smith Tug & Barge Co. v. Columbia-Pac. Towing Corp.*, 78 Wn.2d 975, 978, 482 P.2d 769 (1971). And while many of this Court's cases have applied Section 2 where a party claimed rights to submerged land through a federal grant with one border set by a meander line

[9] Applying this reasoning to SLS&E grant, the "meander line" was the waterward edge of its 200-foot right of way, meaning the "whole" of the right of way "may be said to be above the meander line." *Hewitt-Lea Lumber Co.*, 113 Wash. at 432-33.

below the high-water mark, this did not import any limitations into Section 2 or otherwise preclude its application to 1875 Act land grants.

C. Article XVII, § 2 Disclaimed "*All* Title In and Claim To" the Shoreland, Thereby Converting SLS&E's Exclusive Easement into a Fee Simple Interest

Respondents make much of the fact that rights of way granted under the 1875 Act have been described by modern courts as easements. Resp. Br. at 15 (citing *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 100 (2014)). But due to the needs of railroads and the inherent danger to the public, railroad rights of way have also been described as exclusive easements or even quasi-fees.

"A railroad right of way is a very substantial thing." *W Union Tel. Co. v. Pennsylvania R. Co.,* 195 U.S. 540, 570 (1904). This Court has long recognized that they have always been regarded as "more than a [common law] easement," affording an owner far "more than a mere right of passage." *Morsbach v. Thurston Cty.*, 152 Wash. 562, 568-69, 19 278 P. 686 (1929);

accord Barahona v. Union Pac. R.R. Co., 881 F.3d 1122, 1134 (9th Cir. 2018) ("It is beyond dispute that a[n 1875 Act] railroad right of way confers more than a right to simply run trains over the land."); *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999, 1014 (S.D. Ind. 2005) (describing a railroad right of way as "much different from a medieval right of way that authorized merely taking horses or wagons across a field" owned by someone else). Courts—including this Court—have frequently noted that these special easements carry many attributes more commonly associated with fee ownership. *Morsbach v. Thurston Cty.*, 152 Wash. at 568-69 (describing a right of way as "as 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"); *Pennsylvania R. Co.,* 195 U.S. at 570 ("[I]f a railroad's right of way was an easement it was 'one having the attributes of the fee.'" (quoting *Territory of New Mexico v. US. Tr. Co of New York*, 172 U.S. 171, 183 (1898)));

Rio Grande 3 *W Ry. Co. v. Stringham,* 239 U.S. 44, 47 (1915) (describing an 1875 Act right of way as "neither a mere easement, nor a fee simple absolute, but a limited fee").

This is the result of necessity—"in most instances the very nature of a railroad will require it to enjoy a substantial right regardless of the nature of its title." *Veach v. Culp,* 92 Wn.2d 22 570, 575, 599 P.2d 526 (1979). Thus, unlike a common-law easement, a railroad right of way includes the right to "exclusive use and possession." *Pennsylvania R. Co.,* 195 U.S. at 570; *accord Hanson Indus., Inc. v. Cnty. of Spokane*, 114 Wash. App. at 528; *Oregon Short Line*, 617 F. Supp. at 210 ("The term 'right-of-way,' in the context of [1875 Act] railroad property interests, is a term of art signifying an interest in land which entitles the railroad to the exclusive use and occupancy in such land."); *N. Pac. Ry. Co. v. Tacoma Junk Co.,* 138 Wash. 1, 6, 244 P. 117 (1926) ("While this easement exists, the [railroad] is entitled to the exclusive use, possession, and control of the land, and the

owner of the fee has no right to use, occupy, or interfere with the same in any manner whatever.").

Indeed, the exclusive nature of railroad rights of way is reflected in the 1875 Act itself, which details only one circumstance in which a grantee was required to share a corridor: when the right of way passes through any canyon, pass, or defile, another railroad company is entitled to also use and occupy the right of way. 43 U.S.C. § 935. The 1875 Act does not make any provision for shared use with the holders of a reversionary interest.[10]

[10] Even assuming the right of way "easement" is limited to furthering the purposes of a railroad and must permit noninterfering use, the County is using the right of way for a railroad purpose—preserving it for future reactivation as provided for in the Trails Act. *See Kaseburg v. Port of Seattle,* No. C14-0784 JCC, 2015 WL 6449305, at *5 (W.D. Wash. Oct. 23, 2015); *Illig v. United States,* 58 Fed. Cl. 619, 631 (2003). And the County submitted unrebutted evidence that keeping the entire width of the corridor abutting Lot 4 clear of Defendant's encroaching structures is necessary to that purpose. *See* Dkt. 68 ¶¶ 8-13; Dkt. 96 at 49:9-14.

The fact that the SLS&E obtained an exclusive easement to the Corridor, including the shorelands, does not preclude the full operation of Section 2, which effectively conveys the full property interests of Washington in the shorelands to the railroad upon statehood. Under the plain text of Section 2, Washington disclaims "*all* claim and title" held by the state to the shorelands included in SLS&E's grant under the 1875 Act. This broad provision effectively conveyed to the railroad a fee simple absolute interest in the shorelands upon Washington's admission to the Union.[11] *See Kneeland,* 40 Wash. at 365 (holding that Section 2 operates as "a grant to the patentees of the interest of the state in the land so situated").

This Court has recognized that Section 2 was adopted "to prevent any controversy over" lands in which the federal government had granted prior to statehood "and to avoid

[11] At minimum, Section 2 is "confirmatory of the [federal] government's grant," *Kneeland*, 40 Wash. at 365, and it thus at least granted SLS&E the exclusive railroad right-of-way it had prior to statehood.

disturbing rights claimed under such conveyances." *Id.* at 364-65. Section 2 is "confirmatory of the [federal] government's grant." *Kneeland*, 40 Wash. at 365. "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" to avoid future conflicts between the State and federal grantees. *Cogswell*, 14 Wash. at 3. Thus, the plain language of Section 2 disclaims all title and claim held by Washington in the land covered by the federal grant even in the circumstance where a Section 2 conveyance causes the grantee to obtain additional property rights beyond those held under the federal grant.

D. The Respondents' Parade of Horribles is Baseless and Irrelevant

The Respondents claim grave consequences if this Court properly applies Section 2 to 1875 Act railroad rights of way. Resp. Br. at 59-63. They contend that the State will lose "many miles of shorelands and tidelands and face countlesss lawsuits"

from those to whom the State has purported to sell shorelands it did not own. *Id.* at 59-60. Respondents' fearmongering is unfounded, though inconvenience to the State would not prevent this Court from enforcing the constitution in any event. [12]

First, Respondents have failed to identify any other location within the state where these same unusual conditions exist. A case like this can arise only when there is a rail line crossing or abutting submerged land that was built pursuant to an 1875 Act right of way grant, and nearby land owners attempt to claim the land as their own. There is no indication in the record or otherwise that this is a common fact pattern.

Second, even if they could overcome the statute of limitations, the State properly limited its conveyance of second

[12] The determination of how Washington would handle its tidelands and shorelands was made by the framers and incorporated into our constitution. It can be changed only by constitutional amendment, not merely because Respondents think Section 2 is a bad idea.

class shorelands to Respondents. The deed between the State and Respondents conveys only those "shorelands of the second class, *owned by the State of Washington*" that were adjacent to Lot 4. Dkt 43-12 (emphasis added). As Respondents acknowledge, the covenants that RCW 64.04.040 provide for do not apply when they are "limited by express words contained in such deed." Here, where the State did not claim to convey land it did not own, and so entered into no covenants regarding those lands. Indeed, as shown in the map above on page 5, Respondent's duly purchased shorelands to the west of the railroad Corridor, which might be used for a buoy or floating dock under the right circumstances.

Finally, a railroad is by its nature "a permanent improvement, a perpetual highway of travel and commerce." *Smith v. Hall,* 103 Iowa 95, 72 N.W. 427,428 (1897). Once a railroads is constructed, its tracks continuously occupy the property over which they run. Respondents' predessessor in title

would be properly charged with knowledge of the railroads Corridor, including the obligation to ascertain its width.

E. The Equal Footing Doctrine is Irrelevant to the Certified Question and Does Not Preclude Application of Section 2 to 1875 Act Land Grants

The Respondents dedicate much of their brief to discussing the Equal Footing Doctrine and arguing that, as a matter of federal law, the 1875 Act did not authorize Department of the Interior to grant SLS&E a right of way over shorelands. Resp. Br. at 53-59. This is merely another effort to fight the certified question rather than addressing it; the district court has already determined that the SLS&E grant included shorelands. Respondent's equal footing analysis is wrong, but it would not matter if they were right.[13]

---

[13] Defendants contend that the County waived any argument that 1875 Act rights of way can cover shorelands because it did not object to the contrary conclusion in Judge Vaughn's report and recommendation. Resp. Br. at 55. But, as Defendants fully acknowledge, declining to object to a magistrate's recommendation does not constitute a waiver. *Id.* at 56 (citing *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012)). This is especially true here, where there was no reason for the County to object to *dictum* that was unnecessary to Judge

The Equal Footing Doctrine is a "policy" of the federal government, under which it generally "regards" the lands under navigable waters within federal territories as being held in trust for future states. *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). The Doctrine provides that the federal government is presumed not to convey fee ownership of submerged lands to private parties unless that intention is "definitely declared or otherwise made plain." *Id.*

But the Equal Footing Doctrine does not apply to federal rights in land that fall short of fee simple ownership. *See United States v. Washington*, 873 F. Supp. 1422, 1444 (W.D. Wash. 1994) ("[T]he Supreme Court has applied the Equal Footing Doctrine in one context only, namely when evaluating a claim of right to lands beneath navigable waters based upon an alleged conveyance or retention of fee simple ownership by the United States prior to statehood."). And even if the Doctrine did apply

---

Vaughn's ultimate decision in King County's favor. The lack of "waiver" is apparent from the certified question itself.

to lesser interests, the federal government is free to depart from its general policy and convey shorelands so private parties may "effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States." *Montana v. United States*, 450 U.S. 544, 551 (1981) (citing *Shively v. Bowlby,* 152 U.S. 1, 48 (1894)). Congress's clear intention to authorize right of ways over shorelands in the 1875 Act can be inferred from its knowledge of the practical necessity of railroads' following shorelines and utilizing submerged land, *see* Open Br. at 10-11, as well as the fact that Congress thought it necessary to include an exemption in future laws modeled after the 1875 Act that it did *not* wish to burden shorelands. *See* Act of May 14, 1898, Ch. 299, § 1.

But all of this is irrelevant to the operation of Section 2, which effectively waives the Washington's rights under the equal footing doctrine, even where there are potential flaws in the federal conveyance. This Court ruled as much in *Kneeland v. Korter*, 40 Wash. at 364, a seminal early case interpreting

Section 2 that closely resembles the present controversy. Much like here, a railroad had received a pre-statehood grant from the federal government that ostensibly covered shorelands along the railroad's route. *Id.* at 361-62. And like here, a trespassing third-party had taken possession of the shorelands, leading the railroad's successor in interest to bring an ejectment action to recover the property. *Id.* Like Respondents, the trespasser raised the Equal Footing Doctrine and argued that the railroad's original claim to the shorelands was invalid because the federal government had not been authorized to grant them to the railroad. *Id.* at 369 ("It is urged by the respondent that the action of the United States government in issuing the patent for these tide lands was a mistake on the part of some of its officers or servants; that the government did not intend to grant or convey any land below high-water mark.").

This Court rejected the trespasser's defense, holding that it did not matter whether the original federal grant was authorized or not: "as to whether or not the United States government had

power to, or as a matter of law did, grant and convey the particular tide land in controversy here, it is not necessary now to decide." *Id.* at 364. The Court reasoned that the Framers enacted Section 2 "to prevent *any controversy* over" federally granted shorelands whatsoever; "[t]he 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*." *Id.* at 366 (quoting *Cogswell*, 14 Wash. at 1). If an official had made a mistake in granting the shorelands, it was "one of the very 'mistakes' or circumstances which the people had in mind at the time they adopted the disclaimer section," the Court explained. *Id.* at 369. The Court thus concluded that Section 2 would have conveyed the shorelands to the railroad even if the initial federal grant did not.

The same is true here. Even if the Department of the Interior made a mistake in approving SLS&E's proposed map across shorelands because the Equal Footing Doctrine rendered

such a conveyance unauthorized, any such error is essentially identical to the concerns addressed in *Kneeland*. As in *Kneeland*, it would be irrelevant to the operation of Section 2 because Washington's constitution disclaims the rights afforded the state under the equal footing doctrine in order to preserve the effectiveness of prior federal shoreline conveyances. In short, Respondents cannot rely on a doctrine designed to protect the rights of Washington when the framers specifically determined to forgo those rights under the circumstances of Section 2.

III. CONCLUSION

For the foregoing reasons, King County respectfully requests that the Court answer the district court's certified question in the affirmative.

DATED: January 13, 2023.

This document contains 5,999 words, excluding the parts of the document exempted from the word count by RAP 18.17.

CORR CRONIN LLP

s/ Emily J. Harris
Emily J. Harris, WSBA #35763
Special Deputy Prosecuting Attorneys

KING COUNTY PROSECUTING ATTORNEY'S OFFICE

s/ David Hackett
DAVID HACKETT, WSBA #21236
Senior Deputy Prosecuting Attorney

Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies as follows:

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

Clayton Paul Graham
James E. Howard
Walker Stanovsky
Davis Wright Tremaine LLP
920 Fifth Avenue, Suite 3300
Seattle, WA 98104-1610
claytongraham@dwt.com
jimhoward@dwt.com
walkerstanovsky@dwt.com
Attorneys for Appellees

Jonathan David Tebbs
Maxwell Christopher Burke
Randall P. Olsen
Stephen P. VanDerhoef
Cairncross & Hempelmann PS
524 Second Avenue, Suite 500
Seattle, WA 98104-2323
jtebbs@cairncross.com
mburke@cairncross.com
rolsen@cairncross.com
svanderhoef@cairncross.com
Attorneys for Appellees

Richard M. Stephens
Stephens & Klinge LLP
601 – 108th Avenue NE, Suite 1900
Bellevue, WA 98004
Stephens@SKLegal.pro
Attorneys for Defendants Warren Beres and Vicki Beres

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

DATED: January 13, 2023 at Seattle, Washington.

s/ Donna Patterson
Donna Patterson

CORR CRONIN LLP

January 13, 2023 - 1:39 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,075-3
Appellate Court Case Title:	King County v. Michael J. Abernathy

The following documents have been uploaded:

- 1010753_Briefs_20230113132010SC213468_4806.pdf
  This File Contains:
  Briefs - Appellants Reply
  The Original File Name was Appellant Reply.pdf

A copy of the uploaded files will be sent to:

- ben@sugarmtn.net
- claytongraham@dwt.com
- david.hackett@kingcounty.gov
- jimhoward@dwt.com
- jtebbs@cairncross.com
- kcoselman@cairncross.com
- mburke@cairncross.com
- nicolegaza@dwt.com
- rolsen@cairncross.com
- rwang@cairncross.com
- stephens@sklegal.pro
- svanderhoef@cairncross.com
- walkerstanovsky@dwt.com

Comments:

Sender Name: Emily Harris - Email: eharris@corrcronin.com
Address:
1001 4TH AVE STE 3900
SEATTLE, WA, 98154-1051
Phone: 206-625-8600

Note: The Filing Id is 20230113132010SC213468