

No. 101075-3

SUPREME COURT
OF THE STATE 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/Owners,

**AMICUS CURAIE BRIEF OF THE PACIFIC COAST
SHELLFISH GROWERS ASSOCIATION**

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I. INTRODUCTION

The question before this court implicates the property interests of Washington's shellfish farmers and the vitality of one of the state's most valued industries. Like the Defendant-Owners, Washington's shellfish farmers purchased tidelands directly or indirectly from Washington state. For more than 100 years spanning multiple generations, those farmers have invested significant resources into improving their tidelands and developing them into successful commercial shellfish farms.

Appellant King County's interpretation of the General Railroad Right-of-Way Act of 1875 ("1875 Act") has already been rejected by the U.S. Supreme Court, which has held that the 1875 Act granted only a "simple easement," and that easements cannot be granted over tidelands without express congressional intent. It is nonsensical to suggest that the framers of Washington's constitution intended to give railroad companies more property rights than they had, especially because public sentiment at the time was to limit the land acquisitions of

railroads, and because lawmakers repeatedly recognized the importance of Washington's shellfish industry to the state's economy and the need to provide shellfish farmers with clarity of title in tidelands.

King County's interpretation of Article 17 Section 2 of the state constitution ("Section 2") cannot be squared with the law, or with the legislature's historical treatment of the shellfish industry and its repeated recognition of that industry as benefiting the public interest, including through express legislation enacted just a few years after statehood. Adopting King County's position would result in unfair, absurd, and contradictory results and potentially threaten the state's shellfish industry.

II. IDENTITY AND INTERESTS OF AMICUS

The Pacific Coast Shellfish Growers Association (PCSGA) is a non-profit business association representing shellfish growers in Alaska, Washington, Oregon, California, and Hawaii. PCSGA's membership includes nearly 100

commercial shellfish farming companies, most of whom have operations in Washington State. Its members vary from large companies with farms in multiple states to small, single-farm operations, and many of its members are third, fourth, or fifth generation farmers.

PCSGA was founded in 1930 to represent the interests of growers in Washington and neighboring states. Its mission is to ensure a healthy social, regulatory, and natural environment for shellfish farming on the West Coast and it seeks to serve as a world leader in the production of sustainable shellfish utilizing science-based methods in harmony with a healthy environment.

The question before this Court implicates the interests of PCSGA's members because they own state-sold tidelands and many of those tidelands contain railroad lines, at least some of which were likely created through the 1875 Act.

III. STATEMENT OF THE CASE

PCSGA agrees with and relies on the Defendant-Owners' Statement of the Case and repeats it here only as necessary to

support the arguments in this brief.

A. For More Than a Century, the Washington Legislature Has Acted to Protect the Property Interests of Shellfish Farmers.

For more than 150 years, Washington’s tidelands have served as productive farm beds for shellfish, including oysters, clams, and mussels. *See* National Oceanic and Atmospheric Administration’s Washington Shellfish Initiative, Fact Sheet: Washington: A Shellfish State, *available at* https://media.fisheries.noaa.gov/dam-migration/noaa_shellfish_initiative_f_sheet_011312.pdf (“NOAA Shellfish Initiative”); *see also* <https://www.governor.wa.gov/sites/default/files/WSI%20factsheet.pdf>. The state is among the leading producers of farmed clams, oysters, and mussels with an annual value of more than \$107 million, and Washington shellfish growers directly and indirectly employ more than 3,200 people and provide an annual estimated total economic contribution of \$270 million. NOAA Shellfish Initiative.

Most of Washington’s shellfish farms are located on privately owned tidelands that Washington sold to individuals, including through the Bush and Callow acts, which the legislature passed in 1895, just six years after statehood. Lawmakers declared a state of emergency when they passed the acts on grounds there was “great doubt and uncertainty in the question of obtaining title to oyster beds on tide lands,” Laws of 1895 ch. 25 §3 (Appx. B), and oyster planters were not “adequately protected in the possession of their property,” Laws of 1895 ch. 24 §11 (Appx. A).

The acts allowed the state to sell state-owned tidelands into private ownership for the specific purpose of oyster planting. House Bill Report, ESHB 2819 (2002) (Appx. C); *State v. Ross*, 62 Wn.82 at 88–89, 113 P.272 (1911) (describing history); *see also* Laws of 1895, chs. 24 and 25 (Appx. A and B). According to the State Department of Natural Resources, the state sold 46,784 acres of land in twelve counties under the acts. Wash. State Dep’t of Nat. Resources, Bush and Callow Act Aquatic

Lands Maps, available at <https://www.dnr.wa.gov/programs-and-services/aquatics/aquatic-leasing-and-licensing/bush-and-callow-act-aquatic-lands-maps>.

Further recognizing the importance of the shellfish industry to the state's economic wellbeing, in 1919, the legislature expanded the scope of permissible uses under the Bush and Callow acts through the "Clam Act" to include "the cultivation and propagation of clams and any and all edible shell fish." Laws of 1919, ch. 166, §1 (Appx. D). Initially, if a shellfish farmer failed to use the land for a permissible use the state could reclaim it, but in 1927 the legislature authorized owners of Bush and Callow act lands to buy those reversionary rights and obtain fee simple title. Laws of 1927, ch 255 §140 (Appx. E).

Between 1935 and 1949, the legislature revised its fisheries code and repealed the prior land acts. See Appx. C (describing history). In 1971, the state stopped selling its tidelands into private ownership altogether. RCW 79.125.200. In 2002, in response to confusion over whether the state still had a

reversionary interest in tidelands sold under the Bush and Callow acts used to harvest shellfish other than oysters, the legislature enacted a law confirming the reversionary interest, but clarifying that any person in possession of property conveyed under the acts had the right to use their property to cultivate clams or other shellfish. RCW 79.135.010(1); *see also* Appx. C.

Testimony given at the time expressed the need to provide shellfish growers with certainty in property rights so they could confidently invest in the tidelands. Appx. C. Lawmakers made several findings in support of the legislation, including that “shellfish farming provides a consistent source of quality food, offers opportunities for new jobs, increases farm income stability, and improves balance of trade.” RCW 79.135.010 (notes).

B. When it Sold Tidelands, the State Guaranteed it Owned the Land and Shellfish Farmers Relied on that Certainty.

Although it is not currently clear exactly which or how many shellfish farmers in Washington state own tidelands over

which an 1895 Act easement runs, rail lines routinely run along shorelines, and the DNR's statistics on acres of land conveyed under the Bush and Callow acts suggest the number could be high, especially considering those lands represent only some of tidelands shellfish farmers own.

As indicated in this case and explained in the Defendant-Owners' brief, when the state sold tidelands, it often did so with a Bargain and Sale Deed, which, pursuant to statute, guarantees that the state "was seized of an indefeasible estate in fee simple, free from encumbrances . . . unless limited by express words contained in such deed." RCW 64.04.040. This Court has also long recognized that the state's power to sell tidelands into private ownership "must carry with it the right to exercise dominion and ownership over what is upon the land, and especially over things so closely related to the soil as clams." *Sequim Bay Canning Co. v. Bugge*, 49 Wn. 127, 131, 94 P.922 (1908).

Shellfish farmers who purchased tidelands, and who have

invested in those tidelands, relied on the state's guarantee. For more than a century, PCSGA members have spent considerable time and money improving their tidelands to support shellfish operations. They have also spent significant time obtaining the necessary regulatory and environmental permits and harvesting their tidelands. Costs range from a few thousand dollars per acre per crop to tens of thousands of dollars per acre per crop. The certainty of title the legislature provided has allowed Washington's shellfish farmers to make those investments with confidence in their ownership of the tidelands. In turn, their investments have created a robust shellfish industry that provides important economic and cultural benefits to the state.

IV. RELEVANT LEGAL STANDARDS

When interpreting constitutional provisions, this Court first considers the text's plain language, but may "also examine the historical context of the constitutional provision for guidance." *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). This includes "the intent of

the framers, and the history of events and proceedings contemporaneous with its adoption[.]” *Id.* Although a constitutional provision should be strictly construed when its terms are clear, “the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity.” *State v. Monfort*, 93 Wash. 4, 5, 159 P. 889 (1916).

V. ARGUMENT

The 1875 Act did not patent an easement in tidelands and King County’s arguments to the contrary are inconsistent with the law and the historical record. For as long as Washington has been a state, the legislature has recognized the importance of shellfish farming to the state’s economy and has consistently acted to protect and promote that interest through the provision and preservation of property rights in tidelands. Accepting King County’s interpretation of Section 2 would potentially upend that history by infringing on the very rights the legislature sought to protect, to the detriment of shellfish farmers who have relied on

them for more than a century.

A. The 1875 Act Could Not Have Granted Any Rights Over Tidelands.

The question in this case is whether an easement granted under the 1875 Act is a “patent” for purposes of Article 17, Section 2 of the Washington State Constitution, through which the state disclaimed ownership in “patented” tidelands. For reasons stated in Defendant-Owners’ brief, it is not. The state has never treated 1875 Act easements as anything other than exactly that, and the Supreme Court has recognized that a right of way granted under the 1875 Act is a simple easement. *Marvin M. Brandt Revocable Trust v. United States*, 572 U.S. 93, 110 (2014) (“More than 70 years ago, the Government argued before this Court that a right of way granted under the 1875 Act was a simple easement. The Court was persuaded, and so ruled. Now the Government argues that such a right of way is tantamount to a limited fee with an implied reversionary interest. We decline to endorse such a stark change in position, especially given ‘the special need for certainty and predictability where land titles are

concerned.”) (citation omitted).

Accordingly, for more than 100 years, the state has consistently sold tidelands subject to 1875 Act easements. *See, e.g.*, Dkt. 106-4 at 4 (describing land as subject to “the right of way of the Northern Pacific Railroad”); Dkt. 106-13 (describing land as subject to “an easement” for the Burlington Northern Railroad “right of way”). An easement, as a matter of basic property law, “is a nonpossessory right *to use* another’s land in some way without compensation.” *Kave v. McIntosh Ridge Primary Road Association*, 198 Wn. App. 812, 825, 394 P.3d 446 (2017) (quoting *Maier v. Giske*, 154 Wn. App. 6, 15, 223 P.3d 1265 (2010)); *Marvin M. Brandt Revocable Tr.*, 572 U.S. at 104–05. Easements do not convey ownership interests, and the deeds through which the state sold its tidelands demonstrate its understanding that it—not the railroad—had title to the land.

Even if, however, an 1875 Act easement could be considered a patent, it still could not have provided any patented interests *in tidelands*. Relying on “clear Supreme Court

precedent holding that general acts of Congress granting rights to the ‘public lands of the United States’ do not apply to lands under navigable waters absent clear congressional intent to the contrary,” the magistrate judge concluded that the 1875 Act did not grant a right of way over tidelands. Dkt. 96 at 13 (citing *Mann v. Tacoma Land Co.*, 153 U.S. 273 (1894)). The judge noted that the 1875 Act “explicitly grants railroad rights in *upland property*,” and “makes no reference to lands under navigable waters or to features associated with water, such as bridges, wharfs, or culverts, from which congressional intent to grant such lands could be inferred.” Dkt. 96 at 14 (emphasis added). Without clearly expressed intent, even if the 1875 Act patented interests in upland property (it did not), it could not have patented a right of way over tidelands and therefore could not have triggered Section 2, which applies only to tidelands.

B. King County’s Account of History Cannot Be Reconciled with The Legislature’s Efforts to Protect the Property Rights of Shellfish Farmers.

Despite the fact that their claims fail as a matter of law,

King County argues that drafters of this state’s constitution considered the word “patent” in Section 2 synonymous with the granting of “*any* interest” over tidelands and understood that railroad rights of way over tidelands were “fee or fee-like estates.” Reply Br. at 13–14 (emphasis added by King County). The County’s position is untenable for reasons stated in Defendant-Owners’ brief, but also because it is inconsistent with the legislature’s treatment of tidelands shortly after statehood, as described above, and its long-standing practice of promoting the shellfish industry and protecting ownership interests shellfish farmers have in their tidelands.

Article 2 was enacted at statehood in 1889. Six years later, and with several of the constitutional delegates serving in the state legislature,¹ lawmakers declared a state of emergency based

¹ Comparing a list of delegates available through the Washington State Archives, <https://www.sos.wa.gov/legacy/washington-1889/delegates.aspx>, with a compilation of state legislators indicates approximately 10 delegates served in the legislature following statehood.

on uncertainty of title in oyster beds on tidelands, and because oyster planters lacked the ability to adequately protect their tidelands. Appx. A and B. The Bush and Callow acts allowed the state to sell tidelands into private ownership for the specific purpose of oyster farming. Appx. A and B. Twenty-five years later, the legislature *expanded* permissible uses of those tidelands to include other shellfish, leaving no doubt as to the legislature's desire to protect and promote the industry.

It defies logic to argue that when the constitution's drafters used the word "patent" in Section 2, they intended to surrender rights to tidelands necessary for oyster farming, when it is clear from multiple laws enacted around the same time that the legislature understood the importance of the shellfish industry to the state's economy and the role ownership rights played in protecting that interest. That intent is also reflected in the language used in deeds conveying the tidelands, which consistently described rights granted under the 1875 Act as "easements" or "rights of way," not patents or any other type of

ownership interest. *See, e.g.*, Dkts. 106-4, 106-5, 106-6, 106-7, 106-8, 106-9, 106-10, 106-11, 106-12, 106-13. It is also consistent with the law. *Marvin M. Brandt Revocable Trust*, 572 U.S. at 110; *Mann*, 153 U.S. at 284 (“It is settled that the general legislation of congress in respect to public lands does not extend to tide lands”).

C. King County’s Proposed Interpretation of Section 2 Would Lead to Unjust, Absurd, and Contradictory Results.

King County dismisses Defendant-Owners’ claims that applying Section 2 to 1875 Act easements across tidelands would potentially lead to countless lawsuits by private tideland owners as a “baseless and irrelevant” “parade of horrors.” Reply at 26. The County’s casual dismissal of the harms that could occur should this Court accept its interpretation is short-sighted and uninformed.

Shellfish growers are the largest private employers in Pacific County and the second largest in Mason County, contributing more than \$27 million in payroll every year in just

those two locations. *See* NOAA Shellfish Initiative. In the Pacific Northwest, as of 2012, the shellfish industry contributed an estimated \$270 million each year into the region's economy and employed more than 3,200 people. *Id.*

As reflected in the various laws enacted over the past 100 years to promote and protect Washington's shellfish industry, clarity of title is paramount to the industry's success. So much so that, "doubt and uncertainty in the question of obtaining title to oyster beds on tide lands" and oyster growers' lack of adequate protection "in the possession of their property," caused legislators to declare an emergency in 1895 and enact two separate laws allowing the state to sell tidelands to oyster farmers for the specific purpose of raising and propagating oysters. Appx. A and B. This is consistent with the rule that "certainty and predictability" are necessary "where land titles are concerned." *Leo Sheep Co. v. United States*, 440 U.S. 668, 687–88 (1979).

PCSGA's members are shellfish growers, many of whom own tidelands that have been in their family for generations.

They have invested tens or hundreds of thousands of dollars (or more) to improve their tidelands and build successful commercial shellfish farms. They and their predecessors have spent significant time and energy obtaining permits and making sure their farms comply with environmental and other regulations. The legislature protected their property rights, and, in response, the industry has thrived.

King County suggests the harm that would occur to these farmers if they lose their property rights is irrelevant to the question before this Court, but it is not. Unsettling their ownership interests after more than 100 years of reliance, and in contradiction to more than 100 years of legislation and property transactions, would be absurd, unfair, and contradictory to federal and state laws. *See Monfort*, 93 Wash. at 5.

The County also faults Defendant-Owners for failing to identify any properties other than their own that would be impacted by this Court's ruling. Although the precise number and location of tidelands over which 1875 Act easements run is

currently unclear, PCSGA's preliminary review of historic railroad maps suggests tidelands in Discovery Bay, part of Oakland Bay/Hammersley Inlet, and Samish Bay might be impacted. Regardless, it is much less likely that this Court's ruling would impact only the Defendant-Owners, as the County suggests.

Many of Washington's railroads were built after 1871, when Congress had started limiting the property interests granted railroads. *See* Sol H. Lewis, *A History of the Railroads in Washington*, *The Washington Historical Quarterly*, Vol. 3, No. 3 at 190–97 (July 1912). It is common to run railroads along coast lines, and railroads run along much of Washington's western coast. By 1892, there were 2,618 miles of railroad in Washington, a number that would continue to grow in the coming decades. *Id.* at 192–93. The purpose of the railroads was “to tap the shipping, lumber, coal and wheat regions of the state, so that practically every section of the state has an outlet for its products.” *Id.* at 197.

As noted above, through the Bush and Callow acts alone, the state sold nearly 47,000 acres of tidelands into private ownership for the specific purpose of shellfish farming. Unsurprisingly, many of those tidelands contain railroad lines and, of those lines, it is probable that some percentage were created through the 1875 Act. The state also sold tidelands outside the Bush Callow acts, and shellfish farmers operate on those lands, as well. The question before this Court implicates the interests of shellfish farmers throughout the state.

As Defendant-Owners point out in their brief, the constitution's framers were distrustful of railroads, especially when it came to land interests. *See also* Dkt. 106-2. By 1870, Congress had set aside about 174,000,000 acres of land for railroad construction. David Maldwyn Ellis, *The Forefeiture of Railroad Land Grants, 1867–1894*, 33 *The Miss. Valley Hist. Rev.* 27, 27 (1946). By 1871, “the revulsion of public sentiment” toward railroads “forced Congress to refuse additional grants.” *Id.* at 27. Thus, by the time Washington became a state, public

sentiment had shifted toward limiting a railroad's ability to own state land. This sentiment, combined with the state's efforts to protect the property interests of shellfish farmers, undercuts the County's position. It makes no sense that Washington would have given railroads more property rights in the state's valuable tidelands than the 1875 Act had provided. If the constitution's drafters truly believed they had done so, law makers would not have passed legislation just a few years later allowing for the sale of those same tidelands to shellfish farmers. Nor would they have spent the next 130 years protecting, promoting, and expanding those rights.

King County's proposed interpretation of Section 2 would lead to unfair and absurd results that contradict controlling precedent interpreting the 1875 Act and this state's legislative efforts to protect the interests of shellfish farmers in their tidelands.

VI. CONCLUSION

For the reasons stated herein and in the brief of Defendant-

Owners, this Court should reject King County's interpretation of Section 2. Applying that section to the state's tidelands would be contrary to law and impose unjust and absurd consequences on the state's shellfish industry.

Respectfully submitted this 10th day of April, 2023.

*This document contains 3,462 words
and complies with RAP 18.17.*

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APPENDIX A

Laws of 1895, ch. 24

CHAPTER XXIV.

[H. B. No. 5.]

RELATIVE TO OYSTER PLANTING.

AN ACT providing for the sale and purchase of tide lands of the third class and the manner of conveying the same for the purposes of oyster planting, to encourage and facilitate said industry, and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. It shall be lawful for any person who is entitled to purchase tide lands pursuant to the act of March 26, 1890, as being an occupant of land planted with oysters, to survey or cause to be surveyd at his own expense, the land that pursuant to said act he is entitled to purchase, not exceeding one hundred acres in area: *Provided,* That the party making application to purchase under the provisions of this act shall accompany such application with a certificate under oath to the effect that lands purchased under the provisions of this act shall be used for oyster planting purposes only.

Duplicate records kept.

SEC. 2. Survey and description in duplicate of such tract shall be subject to the direction, oversight and approval of the board of state land commissioners, and one description of said tract as surveyed shall be filed with and be recorded by the county auditor of the county in which said tide lands are situated, in a book kept by him for such especial purpose, and a duplicate description in the office of the commissioner of public lands.

Lines of survey.

SEC. 3. The survey of such lands, as provided in the foregoing sections of this act, may not be required to follow the lines of United States government survey, but may follow the direction of the oyster beds actually occupied by the party proposing to purchase the same; the persons entitled to purchase such oyster beds under the provisions of this act may purchase the same at the rate of one dollar and twenty-five cents per acre, one-fourth of which price shall be paid at time of making such purchase, and the remaining three-fourths in three equal annual payments, each of which sums shall draw interest at the rate of eight per cent. per annum, the unpaid portion re-

Price per acre, and how sold.

maining as a lien upon said land until all payments shall be made in full, and the purchaser shall thereupon be entitled to a deed to the same; said deed shall be executed by the governor, attested by the secretary of state with the seal of the state thereunto attached, which deed shall contain the conditions of defeasance in this act provided.

SEC. 4. Any person having the right to purchase such tide lands as provided by this act, and being an actual occupant of the same, shall have the prior right to purchase for a period of six months from and after the passage of this act and its being signed and approved by the governor.

SEC. 5. Upon the filing of a description of the survey of such land, as provided for by the foregoing sections of this act, the person or persons having occupied or desiring to occupy such lands as described in section one of this act, may file with the commissioner of public lands an application to purchase said lands, together with a description of the lands applied for, by metes and bounds, and upon the receipt of the same the commissioner of public lands shall, at the expense of the applicant, publish, or cause to be published, for three successive weeks in any newspaper of general circulation printed and published in the county where such lands are situated, a notice of such application to purchase, giving therein a description of lands applied for. During the next thirty days following the last publication of said notice, any person claiming a prior right to purchase such tide lands may file with the commissioner of public lands a contest for the purpose of establishing a prior right to purchase, or, upon petition of ten citizens who shall be residents of the county wherein such lands are situated, a contest may be filed as hereinbefore provided, and such contest shall be upon the right of applicant to purchase, as provided in the foregoing sections of this act. If the party making contest shall fail to establish a prior right to purchase, said party shall be liable for the costs resulting direct from such contest, except private attorney fees, and the sum of such costs shall be paid by such contestant into the state treasury department, and, upon such payment being made, shall be entitled to a receipt for the same.

SEC. 6. This act shall in no manner apply to the provisions of the act of March 26, 1890, providing for the appraisal and disposition of tide and shore lands in the State of Washington except as far as it relates to lands actually used or to be used for the purpose of oyster planting.

SEC. 7. Any person desiring to purchase tide lands for the purposes of oyster planting may purchase tide lands of the third class not included in any natural oyster beds or any reserve pursuant to the provisions of this act, in subordination to any preëmption right confirmed by said act of March 26, 1890. Nothing in this act shall be construed so as to effect [affect] the preference rights of shore or upland owners, or improvers, as conferred by the provisions of said act or other provisions of law.

Persons authorized to purchase.

SEC. 8. No person shall be entitled, directly or indirectly, to the privileges of this act who is not an actual resident and citizen of the United States and State of Washington, and no person not a citizen of the State of Washington shall be competent to acquire deeds to any lands sold by the state under the provisions of this act: *Provided*, That any citizen of the United States and not a citizen of the State of Washington, or any corporation organized under the laws of any other state other than the State of Washington that has planted and cultivated and planted in oysters any tract or tracts or parcels of such lands for the period of five years next preceding January 1, 1895, shall have the exclusive right to purchase such tract or tracts or parcels of land so planted and cultivated as aforesaid, but not exceeding one hundred acres in the aggregate, such prior right to be within six months after the approval of this act. And failure to make application to purchase said lands within said six months by such person or corporation shall forfeit the right hereby granted to such person or corporations to purchase any such lands.

Abandoned oyster lands, how purchased.

SEC. 9. If from any cause any tract or tracts, parcel or parcels of land purchased under the provisions of this act shall become unfit and valueless for the purposes of oyster planting, the party having so purchased and being in the possession of the same may upon certifying such fact under

oath to the commissioner of public lands and to the auditor of the county wherein such lands are situated and also upon filing under oath a certificate of abandonment of such tract or tracts, parcel or parcels of land, in the office of each of said officials, such party shall then be entitled to again make purchase as hereinbefore provided; or if said land be used by the purchasers or any successors in interest of such purchaser in whole or in part for other than the purposes specified in this act, then upon application by any citizen to the state land commissioner such sale may be canceled, and the said land shall revert to the state and shall be subject to sale as herein provided, but not to such defaulting purchaser or such defaulting successor in interest.

SEC. 10. The provisions of this act shall not apply to such lands as have already been surveyed, appraised and platted.

SEC. 11. Whereas, planters of oysters not being adequately protected in the possession of their property, and it being the desire of certain oyster planters to engage in the planting of eastern oysters, and the season for ordering a supply of eastern oysters for spring planting being already at hand, an emergency is declared, and this act shall be in full force and effect upon its passage and approval by the governor.

Passed the house February 13, 1895.

Passed the senate February 27, 1895.

Approved March 2, 1895.

CHAPTER XXV.

[H. B. No. 399.]

RELATING TO THE SALE OF OYSTER LANDS.

AN ACT relating to the purchase and sale of oyster lands, and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That all persons having the qualifications provided by law to enable them to purchase tide lands ^{Right to purchase.}

APPENDIX B

Laws of 1895, ch. 25

oath to the commissioner of public lands and to the auditor of the county wherein such lands are situated and also upon filing under oath a certificate of abandonment of such tract or tracts, parcel or parcels of land, in the office of each of said officials, such party shall then be entitled to again make purchase as hereinbefore provided; or if said land be used by the purchasers or any successors in interest of such purchaser in whole or in part for other than the purposes specified in this act, then upon application by any citizen to the state land commissioner such sale may be canceled, and the said land shall revert to the state and shall be subject to sale as herein provided, but not to such defaulting purchaser or such defaulting successor in interest.

SEC. 10. The provisions of this act shall not apply to such lands as have already been surveyed, appraised and platted.

SEC. 11. Whereas, planters of oysters not being adequately protected in the possession of their property, and it being the desire of certain oyster planters to engage in the planting of eastern oysters, and the season for ordering a supply of eastern oysters for spring planting being already at hand, an emergency is declared, and this act shall be in full force and effect upon its passage and approval by the governor.

Passed the house February 13, 1895.

Passed the senate February 27, 1895.

Approved March 2, 1895.

CHAPTER XXV.

[H. B. No. 399.]

RELATING TO THE SALE OF OYSTER LANDS.

AN ACT relating to the purchase and sale of oyster lands, and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That all persons having the qualifications provided by law to enable them to purchase tide lands ^{Right to purchase.}

within the State of Washington, and who, prior to March 26, 1890, in good faith entered upon tide lands not in front of any incorporated city or town, nor within two miles thereof on either side, and planted and cultivated thereon artificial oyster beds, and who continued to occupy and work the same continuously and in good faith to March 26, 1890, and ever since said date, and who are now in possession of and working said oyster beds in good faith, shall be permitted to purchase the same for the purpose of cultivating oysters thereon, and for no other purpose, whether said tracts were originally covered by alleged natural oyster beds or not; and where, notwithstanding such prior occupancy and cultivation, any such tract or tracts so occupied prior to March 26, 1890, shall since such date have been reserved from sale or lease as natural oyster beds, the person or persons or their assigns who planted, occupied and cultivated such artificial beds may, by complying with the provisions of law touching the sale of artificial oyster beds and paying the value thereof fixed by the State of Washington, be and they are hereby entitled to receive a deed, subject to all the provisions of this act, to such tract or tracts not exceeding in area of forty acres to any one person, as they so in good faith improved as such artificial oyster beds prior to March 26, 1890.

Conditional
reversion
to state.

SEC. 2. It shall be expressly provided in the deed of conveyance of any such oyster bed and the tide land covered thereby, that said land, at the time of conveyance, is not in front of any incorporated city or town, nor within two miles thereof on either side, and that the said land is not now used for purposes of trade or commerce; that if at any time after the granting of said deed the land described therein shall cease to be used for the purposes of an artificial oyster bed, it shall thereupon revert to, and become the property of, the State of Washington, and that the same is conveyed to the grantee only for the purposes of cultivating oysters thereon, and the State of Washington hereby reserves the right to enter upon and take the possession of said tract or tracts if at any time the same is used for any other purpose than the cultivation of oysters; and the State of Washington reserves the further right to

enter upon and take possession of any tide lands sold under the provisions of this act, at any time when it desires, upon paying to the then owner or occupant the original purchase price of the lands together with the value of the improvements erected thereon, the then value of his artificial oyster beds and improvements erected thereon in connection with the carrying on of the raising and propagation of oysters by artificial cultivation.

SEC. 3. And there being great doubt and uncertainty in the question of obtaining title to oyster beds on tide lands, an emergency is hereby declared to exist, and this act shall take effect and be in force from and after its approval by the governor.

Passed the house February 18, 1895.

Passed the senate February 27, 1895.

Approved March 4, 1895.

CHAPTER XXVI.

[H. B. No. 215.]

REQUIRING PHYSICIANS TO REPORT DEATHS.

AN ACT relating to vital statistics and amending section 2609 of volume 1 of Hill's Annotated Statutes and Codes of Washington.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. Section 2609 of volume 1 of Hill's Annotated Statutes and Codes of Washington is hereby amended to read as follows: Sec. 2609. It shall be the duty of all physicians in this state to register their names and post-office address with the county auditor of the county where they reside; and every physician shall, under penalty of ten dollars, to be recovered in any court of competent jurisdiction in the state, at suit of any member of any state or local board of health, report to the county auditor on or before the 15th day of every month, all births and deaths which may come under his or her supervision during the

APPENDIX C

House Bill Report, ESHB 2819 (2002)

HOUSE BILL REPORT

ESHB 2819

As Passed Legislature

Title: An act relating to Bush act and Callow act lands.

Brief Description: Addressing the uncertainty surrounding reversionary clauses contained in Bush act and Callow act deeds.

Sponsors: By House Committee on Natural Resources (originally sponsored by Representatives Doumit, Buck, Hatfield and Linville).

Brief History:

Committee Activity:

Natural Resources: 2/5/02, 2/6/02 [DPS].

Floor Activity:

Passed House: 2/18/02, 94-0.

Passed Senate: 3/5/02, 48-0.

Passed Legislature.

Brief Summary of Engrossed Substitute Bill

- Allows the owners of Bush and Callow Act tidelands to cultivate clams and other shellfish without the title to the property reverting back to the state.
- Requires that private geoduck beds be surveyed and recorded.

HOUSE COMMITTEE ON NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Doumit, Chair; Rockefeller, Vice Chair; Sump, Ranking Minority Member; Buck, Eickmeyer, Ericksen, Jackley, McDermott, Orcutt, Pearson and Upthegrove.

Staff: Jason Callahan (786-7117).

Background:

Upon statehood, Washington had conferred to it all of the aquatic lands within the state's borders. Unlike the upland forested parcels, the aquatic lands transferred were given to the new state in fee, and not subject to trust restrictions for specific beneficiaries. Since

that time, the state has sold off some of the aquatic lands in the state, and entered into leases for other parcels.

In 1895 the Legislature passed the Bush and Callow acts. These acts allowed for the sale of aquatic lands to be used only for oyster planting. The laws specified that if the aquatic lands were used for any other purpose, the ownership would revert back to the state. In 1919 the Legislature passed what is known as the "Clam Act." This piece of legislation allowed the owners of aquatic lands purchased under the Bush and Callow acts to cultivate clams and other edible shellfish without having the land revert back to the state for being used for a purpose other than growing oysters.

The Bush and Callow acts were repealed in 1935; however, the Legislature included a savings clause so that individuals who had purchased aquatic lands under the acts were allowed to maintain full ownership, subject to reversion back to the state for improper uses. In 1949 the Clam Act was repealed during a massive rewrite of the state's Fisheries Code. The repeal of the Clam Act did not contain a savings clause, so the permission to cultivate shellfish other than oysters on Bush and Callow lands was repealed with the act.

Today, aquatic lands sold under the Bush and Callow acts are still being actively used for the cultivation of oysters. However, many acres of these aquatic lands are also being used for the cultivation of clams, geoduck, and other shellfish. In 1991 the attorney general was asked if the state could exercise its reversionary rights granted by the Bush and Callow acts and reclaim ownership of the lands being used for something other than oyster cultivation.

The attorney general concluded that operations that were raising shellfish other than oysters prior to the 1949 repeal of the Clam Act had a vested right to continue activities consistent with the Clam Act. However, the attorney general also opined that operations raising clams and other shellfish on Bush and Callow lands today, that were not doing so prior to the Clam Act's repeal, are subject to the state's reversionary rights.

Summary of Engrossed Substitute Bill:

Any person who is in possession of property that was conveyed under either the Bush or Callow Act is granted the right to use that property for the cultivation of clams or other shellfish. This right does not include the right to use subtidal portions of Bush and Callow Act tidelands for the cultivation and harvest of shellfish not commencing prior to December 31, 2001, and it does not impair any currently vested rights. Cultivation is not deemed to have commenced unless shellfish planting has begun prior to December 31, 2001.

Aquatic lands that are under deed or contract from the state that are currently being used

by a private party to harvest or cultivate geoduck must be surveyed. Property corners and anchor buoys must be placed in sufficient quantities to aid in relocation of the oyster track lines occurring or extending below extreme low tide. The record of the survey must be established on the Washington coordinate system.

Appropriation: None.

Fiscal Note: Not Requested.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: This is a very complex issue of great significance to the state's shellfish industry. The ownership cloud surrounding Bush and Callow Act lands needs to be cleared so that shellfish growers can have the certainty they need to invest in the land. The surveys of the private geoduck beds assure that the public is being compensated for the expansion of rights on the Bush and Callow lands.

Testimony Against: None.

Testified: Bill Dewey and Brett Bishop, Pacific Coast Shellfish Growers Association; Loren Stern, Department of Natural Resources; and Jim Gibbons, Seattle Shellfish.

APPENDIX D

Laws of 1919, ch. 166 §1

shall comply with the terms of said contract and make the payments herein provided for, a deed as herein provided for shall issue to him from the State; *Provided* that said contract shall contain a covenant of defeasance as is provided in the case of deeds issued under the provisions of this act; *provided further*, that such contract shall be subject to a cancellation by the Commissioner of Public Lands for failure to comply with its provisions, *and provided further*, that whenever an installment shall mature, the applicant may, if he, they, or it, so elect, pay more than one installment.

Disposition
of moneys.

SEC. 5. All moneys received for the disposal of oyster lands, under the provisions of this act, shall be paid into the State Oyster Reserve Fund.

Passed the House, March 8, 1919.

Passed the Senate, March 12, 1919.

Approved by the Governor March 18, 1919.

CHAPTER 166.

[H. B. 121.]

CULTIVATION OF CLAMS AND OTHER SHELL FISH ON OYSTER LANDS.

AN ACT giving owners and holders of oyster lands the further privilege of cultivating and propagating clams and edible shell fish thereon.

Be it enacted by the Legislature of the State of Washington:

Propagation
of edible
shell fish.

SECTION 1. That any person, firm, or corporation in possession of tide lands from the State of Washington, and holding the same under contract or deed from the State of Washington, containing provisions restricting use of said lands or any portion thereof to the cultivation of oysters only, shall hereafter be, and they are hereby, given the further

right to use said lands or any portion thereof, for the cultivation and propagation of clams and any and all edible shell fish.

Passed the House, February 5, 1919.

Passed the Senate, March 10, 1919.

Approved by the Governor March 18, 1919.

CHAPTER 167.

[H. B. 113.]

TAXATION IN CITIES OF THIRD CLASS.

AN ACT relating to taxation in cities of the third class and amending section 17 of an act entitled "An Act relating to the government, powers and duties of cities of the third class" approved March 20th, 1915, and known as section 17 of chapter 184 of the Session Laws of 1915, also, known as 7671-17 Remington's 1915, Codes and Statutes of Washington.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That section 17 of chapter 184 of the Session Laws of 1915, approved March 20th, 1915, be amended to read as follows:

Section 17. Any such city shall have power through its council to levy and collect annually, a property tax for the payment of current expenses not exceeding fifteen mills on the dollar of assessed valuation: *Provided*, that if the qualified electors of said city at a special election to be held for that purpose should vote in favor of a larger levy for the payment of current expenses, than fifteen mills on the dollar of assessed valuation, a larger levy for said purpose may accordingly be made: *Provided, further*, that the affirmative vote of three-fifths of the electors voting at such election shall be necessary to authorize such levy.

Amount of
tax levy.

APPENDIX E

Laws of 1927, ch. 255 §140

CHAPTER 255.

[S. B. 85.]

PUBLIC LANDS.

AN ACT relating to the selection, control, management, sale, lease and disposition of lands and areas belonging to or held in trust by the state, defining the powers and duties of certain officers in relation thereto, providing for appeals, prohibiting certain acts in relation thereto and providing penalties for violations thereof.

Be it enacted by the Legislature of the State of Washington:

- SECTION 1. Public lands of the State of Washington are lands belonging to or held in trust by the state, which are not devoted to or reserved for a particular use by law, and include state lands, tide lands, shore lands and harbor areas as hereinafter defined, and the beds of navigable waters belonging to the state.
- Whenever used in this act the term "state lands" shall mean and include:
- Public lands. State, tide, and shore lands. Harbor areas. Beds of navigable waters.
- State lands classified:
- School lands. School lands, that is, lands held in trust for the support of the common schools;
- University lands. University lands, that is, lands held in trust for university purposes;
- Agricultural college lands. Agricultural college lands, that is, lands held in trust for the use and support of agricultural colleges;
- Scientific school lands. Scientific school lands, that is, lands held in trust for the establishment and maintenance of a scientific school;
- Normal school lands. Normal school lands, that is, lands held in trust for state normal schools;
- Capitol building lands. Capitol building lands, that is, lands held in trust for the purpose of erecting public buildings at the state capital for legislative, executive and judicial purposes;

Moneys to credit of state oyster reserve fund.

failure to comply with its provisions: *And Provided Further*, That whenever an installment shall mature, the contract holder may, if he so elect, pay more than one installment. All moneys received for the sale of tide lands under the provisions of this and the preceding section shall be paid into the state treasury to the credit of the state oyster reserve fund.

Application to purchase state's reversionary rights.

SEC. 140. Upon an application to purchase the reserved and reversionary rights of the state in any tide lands sold under the provisions of chapter XXIV of the Laws of 1895, or chapter XXV of the Laws of 1895, or chapter 165 of the Laws of 1919, or the provisions of section 138 of this act, or either such reserved or reversionary right if only one exist, being filed in the office of the commissioner of public lands by the owner of such tide lands, accompanied by an abstracter's certificate, or other evidence of the applicant's title to such lands, the commissioner of public lands, if he find the applicant is the owner of the tide lands, is authorized to inspect, appraise and sell, for not less than the appraised value, such reserved or reversionary rights of the state to the applicant, and upon payment of the purchase price to cause a deed to be issued therefor as in the case of the sale of state lands, or upon the payment of one-fifth of the purchase price. to issue a contract of sale therefor, providing that the remainder of the purchase price may be paid in four equal annual installments, with interest on deferred payments at the rate of six per cent per annum, or sooner at the election of the contract holder, which contract shall be subject to cancellation by the commissioner of public lands for failure to comply with its provisions, and upon the completion of the payments as provided in such contract to cause a deed to the lands described in the contract to be issued to the

Appraisal and sale.

Deed.

Installment contract.

Interest on deferred payments.

holder thereof as in the case of the sale of state lands.

SEC. 141. The commissioner of public lands is hereby authorized to locate in all navigable rivers in this state, which are subject to tidal flow, the line dividing the tide lands in such river from the shore lands in such river and such classification or the location of such dividing line shall be final and not subject to review, and the commissioner shall enter the location of said line upon the plat of the tide and shore lands affected.

Location of line dividing tide and shore lands.

Classification final.

SEC. 142. The beds of all navigable tidal waters in this state lying below extreme low tide, not covered by natural oyster beds, and not in front of any incorporated city or town, nor within two miles on either side thereof, shall be subject to lease for the purpose of planting and cultivating thereon artificial oyster beds, for periods not to exceed twenty years and in quantities not to exceed forty acres, to any one person or corporation.

What oyster lands subject to lease.

Period. Acreage.

SEC. 143. Any citizen of the United States or person who has in good faith declared his intention of becoming a citizen of the United States, or corporation organized under the laws of any state or territory of the United States, and authorized to do business in this state, desiring to lease lands for the purpose of planting and cultivating thereon artificial oyster beds, shall file with the commissioner of public lands, on a proper form an application in writing signed by the applicant and accompanied by a map of the land desired to be leased, describing the lands by metes and bounds tied to at least two United States government corners, and by such reference to local geography as shall suffice to convey a knowledge of the location of the lands with reasonable accuracy to persons acquainted with the vicinity, and accompanied by a deposit of ten dollars

Must be citizen of U. S.

Application to lease.

Conditions.

Deposit.

CERTIFICATE OF SERVICE

I, I'sha Willis, declare as follows:

That I am over the age of 18 years, not a party to this action, and competent to be a witness herein;

That I, as legal assistant in the office of Van Ness Feldman LLP, caused true and correct copies of the following documents to be delivered as set forth below:

1. Amicus Curaie Brief;
2. Certificate of Service;

and that on April 10, 2023, I caused the foregoing documents to be e-filed and e-served electronically through Washington State Appellate Courts' Secure Portal as follows:

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Dated this 10th day of April, 2023.

s/ I'sha Willis
I'sha Willis, Declarant

VAN NESS FELDMAN LLP

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