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.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON DEPARTMENT OF NATURAL RESOURCES

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I. INTRODUCTION AND INTEREST OF THE WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES

The Court should respond to the certified question by answering "no". A federal railroad easement authorized over "public lands" under an 1875 act does *not* constitute a land conveyance "patented by the United States" for purposes of article XVII, section 2 of the State Constitution. This issue involves lands underlying navigable waters ("aquatic lands"), the ownership of which vested in the State of Washington upon statehood as part of the State's sovereign rights under the Equal Footing Doctrine. The state constitution expressly affirms ownership of these aquatic lands, Wash. Const. art. XVII, § 1, subject only to a narrow disclaimer in article XVII, § 2 (Section 2). King County's arguments expand the scope of the Section 2 disclaimer far beyond the constitutional language, and far beyond case law, thereby casting clouds over the title of countless acres of navigable lands anywhere there may have been an old railway line along state shorelines.

After the State acquired ownership of all aquatic lands, subject only to the narrow Section 2 disclaimer, the Legislature passed numerous laws allowing for tidelands and shorelands to be sold into private ownership, which practice existed until 1971. Under the former laws, the State had sold shorelands at issue in this case to the predecessors of the Owners. When it did so, it had no knowledge of the conflicting ownership claim King County now asserts.

Although the State historically sold many tidelands and shorelands, the State retains extensive ownership of more than 2.6 million acres of aquatic lands. The Legislature delegated to the Department of Natural Resources (DNR) the authority to manage these valuable lands for the benefit of the public. *See*, *e.g.*, Chapter 79.105 RCW. The conflict between the Owners and King County at the current location could be replicated across many other locations where historic railroads ran along the shorelines and call into question both State and private ownership of an undeterminable amount of aquatic lands.

Because of this potentially significant impact, DNR files this brief as amicus curiae.

II. ARGUMENT

Land that is burdened by an 1875 Act easement is not "patented by the United States" under Section 2. To interpret Section 2 so broadly violates the plain language of that provision and undermines the purpose of Section 1: to secure state ownership and sovereignty over aquatic lands. Wash. Const. art. XVII, § 1. This Court should follow 130 years of consistent case law and apply the Section 2 disclaimer only when the following requirements are met:

1) The United States issued a *patent* that disposed of land by conveying *fee title* into private ownership;
2) The calls of the patent include land beneath navigable waters by referencing a meander line that is waterward of ordinary high water; and
3) The patent was issued (or the entitlement to that patent vested) prior to statehood.

See, *e.g.*, *Mercer Island Beach Club v. Pugh*, 53 Wn.2d 450, 452-53, 334 P.2d 534 (1959).

These are the only circumstances in which the Court has applied Section 2 in the past, they are the only circumstances contemplated by the framers, and there is no purpose or public interest served by radically broadening the application as King County proposes, 134 years after the framers adopted the constitutional language.

A. Ownership of Aquatic Lands Is an Essential Aspect of State Sovereignty and Sovereign Grants Must Be Strictly Construed

At the time the United States was formed, the original states reserved to themselves broad sovereign authority over the shores and beds of navigable waters within their respective boundaries. *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410, 10 L. Ed. 997 (1842) ("For when the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to

the rights since surrendered by the constitution to the general government."). The federal government held remaining aquatic lands in trust for new states that had not yet been admitted to the Union. *Pollards Lessee v. Hagan*, 44 U.S. (3 How.) 212, 224, 11 L. Ed. 565 (1845). Under the Equal Footing Doctrine, states subsequently admitted to the Union obtained "the same rights, sovereignty and jurisdiction . . . as the original states possess within their respective borders." *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436, 18 L. Ed. 756 (1867). The Equal Footing Doctrine therefore provided that new states, upon their admission to the Union, acquired absolute title to and dominion over the shores and beds of navigable waterways within their boundaries. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372, 97 S. Ct. 582, 50 L. Ed. 2d 550 (1977).

Indeed, this title is not a mere property right, but a power the states reserved to themselves. Ownership of submerged lands is an essential aspect of state sovereignty. *Id.* at 381; *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283, 117 S. Ct.

2028, 138 L. Ed. 2d 438 (1997) (finding that "lands underlying navigable waters have historically been considered 'sovereign lands' [and] [s]tate ownership of them has been 'considered an essential attribute of sovereignty'") (quoting *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195, 107 S. Ct. 2318, 96 L. Ed. 2d 162 (1987)); *accord Caminiti v. Boyle*, 107 Wn.2d 662, 666, 732 P.2d 989 (1987). Because it is an essential aspect of state sovereignty, state ownership of beds of navigable waters "is not subject to later defeasance by operation of any doctrine of federal common law." *Oregon ex rel. State Land Bd.*, 429 U.S. at 371 (citing *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 10 L. Ed. 264 (1839); *Weber v. Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 21 L. Ed. 798 (1873)). Instead, state law governs subsequent control and disposition of these submerged lands. *Joy v. City of St. Louis*, 201 U.S. 332, 343, 26 S. Ct. 478, 50 L. Ed. 776 (1906).

Washington State took absolute title to the beds and shores of navigable waters under the Equal Footing Doctrine when it was admitted to the Union in 1889. *See* Wash. Const. art. XVII,

§ 1; *In re Pers. Restraint of Tortorelli*, 149 Wn.2d 82, 91, 66 P.3d 606 (2003). The State currently owns, and DNR is responsible for managing, approximately 2,000 square miles of marine beds of navigable waters, in addition to tidelands, harbor areas, and freshwaters. *See* WAC 332-30-100.

The Legislature historically allowed private owners to purchase tidelands and shorelands, and predecessors of the Owners in this case applied for and purchased the shorelands abutting their uplands.[1] The record shows neither the State nor purchasers had any notice of the railroad's potential competing claim to a portion of the shorelands now being raised by the County.

The state's history of selling some tidelands and shorelands into private ownership has yielded occasions for courts to consider the nature of those state conveyances. In the context of those private sales, this Court has consistently adhered

[1] The Legislature halted sales of tidelands and most shorelands to private owners in 1971. *See* RCW 79.125.200.

for 100 years to a fundamental rule that a sovereign grant must be strictly construed and will not be enlarged by construction. *Washington Boom Co. v Chehalis Boom Co.,* 90 Wash. 350, 354, 156 P. 24 (1916); *Chelan Basin Conservancy v. GBI Holdings Co*., 190 Wn.2d 249, 263, 413 P.3d 549 (2018). That same fundamental rule should be applied all the more to the interpretation of the Section 2 disclaimer.

B. Section 2 Disclaims Title Only to Lands the U.S. Disposed of by Patent.

Section 2 provides: "DISCLAIMER OF CERTAIN LANDS. The state of Washington disclaims all title in and claim to all tide, swamp and overflowed lands, patented by the United States: *Provided*, the same is not impeached for fraud." This language plainly grants *all title* to tide, swamp, and overflowed lands that were *patented* by the federal government. If the framers intended to disclaim the State's aquatic land ownership interest to the holder of a mere federal easement, Section 2 would not have used the term "patented." In 1889, a "patent" was a specific instrument used by the United States to convey *title* to

public lands, which document included reference to government surveys that were not susceptible to collateral attack.[2] Each of the congressional land conveyance acts discussed in the constitutional debates surrounding government patents (Homestead Act, Pre-emption Act, Donation Act), conveyed fee title ownership to public lands *by patent*. *See* Section III.C., *infra*, Owners' Br. pp. 11-12.

While the term "patent" could technically be defined more broadly, the framers understood and used this term as it was used by Congress in the legislation that conveyed land grants to settlers in the Washington Territory.[3] Patents were considered at the time of the Constitutional Convention, the "highest title that can be obtained to land in the United States." Beverly Paulik

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[2] *Kneeland v. Korter*, 40 Wash. at 368 (official surveys made by government are not open to collateral attack in action between private parties) (citations omitted).

[3] *See State v. Forrest*, 11 Wash. 227, 230, 39 P. 684 (1895) (in construing statutes, inquiry is not abstract force of terms used, or what they may comprehend, but in what sense they were intended to be used).

Rosenow, *Washington State Constitutional Convention, 1889: Contemporary Newspaper Articles: Compiled 1998* (1999), at 2-143.

King County offers no compelling authority for its assertion that a map filed in a federal land office and approved by the Secretary of the Interior under the 1875 Act is equivalent to a patent for purposes of Section 2. An approved map may be evidence of, and effective in reserving, the easement rights provided for under the 1875 Act; however, it is not substantively equivalent to a "patent" as that term and instrument was understood by the framers. An easement does not convey fee title, whereas the language of Section 2 directly connects the "patent" concept with the State's disclaimer of *all title*.

The cases relied upon by King County allegedly equating an 1875 Act easement to a patent address only the question of priority—*when* the respective rights vested. They hold only that the map approval was the point in time at which the rights

granted by the 1875 Act vested.[4] These cases did not address or decide what substantive rights were granted by the 1875 Act, much less hold that those rights are comparable to rights conveyed by a patent.[5]

King County's reliance on *Kneeland* and its progeny is similarly misplaced. *Kneeland v. Korter* analyzed the application of Section 2 to tidelands within the call of a *patent* conveying *fee title* to a railroad. *Kneeland v. Korter*, 40 Wash. 359, 361-62, 82 P. 608 (1905). That court held that Section 2 disclaimed these tidelands because the railroad's entitlement to the patent vested

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[4] *See*, *e.g.*, *Stalker v. Oregon Short Line R. Co.,* 225 U.S. 142, 154, 32 S. Ct. 636, 56 L. Ed. 1027 (1912) (subsequent issue of patent to land was subject to rights of railroad company acquired by approval of station ground map); *Noble v. Union River Logging R. Co.,* 147 U.S. 165, 176-77, 13 S. Ct. 271, 37 L. Ed. 123 (1893) (railroad's rights vested upon approval by secretary of interior such that they could not be revoked by successor); s*ee also* Owners' Br. pp. 49-53.

[5] *Id.*; *see also Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 108, 134 S. Ct. 1257, 1267, 188 L. Ed. 2d 272 (2014) (disputes in *Steinke* and *Stalker* involved competing claims to develop land; court did not define nature of interest granted under 1875 Act).

prior to statehood even though the patent itself was not issued until later. *Id.* at 366-67.

Again, this case and the others cited by King County were concerned with *when* the patentee's rights vested in order to determine if the patents at issue were pre-statehood or post-statehood patents. *Id*. at 362-63, 366-67.[6] They did not decide whether an instrument other than a patent, that conveyed something less than fee title, would implicate Section 2. Because railroads obtaining rights under the 1875 Act were never entitled to a patent, these cases are inapplicable here.

Mann v. Tacoma Land Co., 153 U.S. 273, 14 S. Ct. 820, 38 L. Ed. 714 (1894), is more analogous to the present case. There, the plaintiff selected a tract of tidelands and filed a description and map of the tract with the local land office pursuant to the Valentine scrip act. *Id.* at 273. The land office

[6]*See also Narrows Realty Co. v. State*, 52 Wn.2d 843, 847–48, 329 P.2d 836 (1958) (predecessor in title made all facts necessary for patent under Timber and Stone Act prior to statehood, but patent did not issue until 1892).

issued a certificate that would have entitled plaintiff to a patent once the land was surveyed. *Id*. However, the U.S. Supreme Court determined that the land officer had no authority to approve an application for a tract of tidelands, and Section 2 did not operate to validate that "conveyance":

> … it cannot be supposed that the state of Washington, when it excluded from its claim of title lands which the government had in the due administration of its land department disposed of by a patent, meant thereby to exclude every tract for which a local land officer might wrongfully issue a receiver's receipt.

Id. at 286 (citation omitted). Section 2 clearly disclaims only those tide or shorelands that were included in the survey of an upland tract of land that was otherwise properly disposed of by patent. It does not disclaim any aquatic lands that may have been improperly included within the maximum right-of-way width of an uplands railroad easement noted only on an approved map on file with a federal agency land office.[7]

[7] King County claims ownership of the full 200-foot width of the 1875 Act right-of-way, not merely the actual physical

C. The Framers Intended for Section 2 to Apply to Patents Conveying Title to Land Between the Meander Line and Ordinary High Water Mark

The language of Section 2 plainly does not apply to easements, so the Court need not resort to the history of the constitutional drafting. That history, nevertheless, uniformly supports limiting Section 2 to full title, pre-statehood patents and only those places where the federal meander line is waterward of the ordinary high tide line. The framers of the Washington State Constitution understood the importance of the State's ownership and sovereignty over aquatic lands. In fact, securing the State's ownership and preventing "tide land grabbers" from claiming "squatters' rights" was so important, the framers included a provision in the Constitution declaring that ownership. Wash. Const. art. XVII, § 1; Dkt 106-2 at p.168-69, 173. As this Court recognized in *Eisenbach v. Hatfield*, the people of this state were "so zealous" in guarding their rights in these lands that they also

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footprint that may have been historically occupied by the rail line on the uplands abutting the shoreline.

added a constitutional provision ensuring that no territorial law conveying tide or shore lands would be deemed valid. *Eisenbach v. Hatfield*, 2 Wash. 236, 245, 26 P. 539 (1891); Wash. Const. art. XXVII, § 2.

Despite the importance of state ownership and control over aquatic lands, the framers also recognized that there were those holding federal government patents who had made valuable improvements to some of these lands "believing that those patents gave them title."[8] As set forth in the Owners' Brief,[9] the question of whether and to what extent government patents or other pre-existing claims to tide and shore lands should be recognized was highly controversial and extensively debated. A significant number of the delegates to the Constitutional Convention (generally from Eastern Washington) were opposed to confirming any patents covering aquatic lands at all.[10] On the

[8] Rosenow, *supra*, at 4-95.
[9] Owners' Br. pp. 15-22.
[10] Dkt 106-2, at 178.

last day of the convention, a last minute compromise was made to ensure the entire issue was not left for the Legislature to decide (which many feared would be corrupted or influenced by the lobby of the railroads and corporations). Dkt 106-2 at 174, 178, 181-85. The final version of Section 2 only disclaimed title to land "patented by the United States." "Where the words of a constitution are unambiguous and in their commonly received sense lead to a reasonable conclusion, it should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation." *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 558, 452 P.2d 943 (1969) (citation omitted). Here, King County's claim that a railroad easement constitutes a "patent" would require a forced construction of the plain language of Section 2. It is also contrary to the framers' intent.

The following historic excerpts of debates illustrate the delegates' sole focus was on true, full title patents that conveyed

upland tracts with a meander line discrepancy. On August 16, 1889, The *Tacoma Daily Ledger* reported on the Constitutional Convention as follows:

> Mr. Dunbar then explained the law and said that the United States never had any title to the lands, and only held them in trust for the state. Therefore, it had no rights to run the meander line so as to embrace any of the tide lands.
> ….
> … [Mr. Hoyt] went on to show that money was needed and it could not be borrowed so long as the patent titles were in doubt.
> ….
> Judge Hoyt said the proposition was an important one to his constituents. Lands do not amount to much, and he thought the conventions should confirm the patents.
> ….
> Mr. Griffith…had no doubt but that old settlers had equitable claims, but he could not forget there were 1900 miles of shore lands, all of which had been surveyed, and perhaps meander line took in a great deal more of tide lands then is suspected.
> ….
> Mr. Dunbar said…It must be remembered that Congress is a higher power even than this convention. We are here by the permission of that body…
> ….
> Mr. Goodman was not in favor of confirming anything. If it were to disclaim title to land covered

> by the donation claims, homestead and pre-emption patents, he would vote for it.
> ….
> Mr. Powers produced a patent signed by U.S. Grant, and asked if the convention intended to refuse to confirm it. … He had heard a great deal about state rights. He recognized no sovereign but the United States. . . .
> ….
> Mr. T. W. Reed had surveyed some of the lands and explained how it was frequently impossible to avoid taking in some tide lands in making a meander line. The state is not giving away anything. The United States was then sovereign and is so still.

Rosenow, *supra*, at 4-98 - 4-99.

On the same day, *The Seattle Times (Editorial)* noted that:

> A government patent has long been considered the highest title that can be obtained to land in the United States . . .

Id. at 2-143.

Although it was clear that the lobbyists for the railroads and other corporate interests were present at the convention, none of the reporting on the debates surrounding government patents indicate any intent to ratify all property interests of the railroads. On the contrary, Judge Turner reportedly worked hard to keep

the tidelands *out* of railroad hands, despite the lobbyists' attempts to bribe him. Dkt 106-2 at p. 176. (Recounting recollection of railroad lobbyists telling him that August 4 Spokane fire was a good excuse to leave the convention and offering $25,000 for his campaign if he went home to Spokane and ran for U.S. Senate). As discussed in the Owners' Brief, the people of Washington addressed the railroads' concerns by immediately enacting laws (on an emergency basis) authorizing railroads to construct bridges and trestles across aquatic lands. Owners' Br. at pp. 22-3 (citing Laws of 1889-90, page 53, § 1). They did not do so by disclaiming *title* to any lands that were purportedly burdened by a federal railroad easement.

Some of the framers' comments quoted above illustrate direct knowledge of the potential discrepancy between the surveyed meander line and the actual location of the ordinary high water line. In fact, during the Constitutional Convention, one of the delegates apparently spent a great deal of time

educating the Convention on meander lines.[11] It was also estimated at the time that "all of the land so patented would not amount to more than a single section."[12] This reflects the intent and belief that the disclaimer in Section 2 would not impact a large volume of aquatic lands. King County's proposed construction would substantially expand the scope of the disclaimer beyond anything the framers intended.

D. Section 2 Disclaims Title Only Where a Meander Line Exists and Encompasses Some Aquatic Lands

The framers of this State's Constitution recognized that when the federal government conveyed title to upland parcels bordering navigable waters, the survey of that land sometimes included a meander line that was waterward of the ordinary high water mark, inadvertently including tidelands or shorelands within the call of these patents. Rosenow, *supra*, at 4-99 (statement of Mr. T.W. Reed, quoted above). Because such

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[11] Rosenow, *supra*, at 6-138.

[12] Rosenow, *supra*, at 4-98, "*Section*" Black's Law Dictionary (11th ed. 2019).

patents were considered the highest title that could be obtained to land in the United States, recipients relied on their patents, believing they had title to these inadvertently included aquatic lands.

King County cites to *Hewitt-Lea Lumber Co.*[13] and *Smith Tug & Barge*[14] to support its assertion that a waterward meander line is not required to implicate Section 2. King County takes out of context a statement from *Hewitt-Lea Lumber Co.* that Mercer slough, a navigable slough that drained into Lake Washington, was "*never* meandered."[15] A closer reading of the opinion reveals that the lower portion of the slough *had* been meandered, but the upper portion had not, with the meander line presumptively cutting across the slough midway up. *Id.* at 432. The court explained that the "whole of the upper part of the

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[13] *Hewitt-Lea Lumber Co. v. King County*, 113 Wash. 431, 194 P. 377 (1920).

[14] *Smith Tug & Barge Co. v. Columbia-Pacific Towing Corp.*, 78 Wn.2d 975, 482 P.2d 769 (1971).

[15] King County's Reply Brief at 19.

slough *may be said to be above the meander line*." *Id.* at 432-33 (emphasis added). Accordingly, the court applied Section 2 and held that "appellant has title to all the lands within the calls of the patent under which it holds, notwithstanding that a portion of such lands are covered by the navigable waters of Mercer Slough *above the meander line*." *Id.* at 434 (emphasis added). Thus, contrary to King County's suggestion, *Hewitt-Lea Lumber Co.* actually supports the property owners' position.[16]

Nor does *Smith Tug & Barge Co.* support King County's position. That opinion recites the rule that "lands within the calls of a federal *patent***,** lying waterward of the line of ordinary high tide, belong to the *patentee* if the *patent* was issued prior to statehood." *Smith Tug & Barge Co.,* 78 Wn.2d at 978 (emphasis

[16] King County's reliance on *Wilson v. Prickett*, is similarly misplaced because there the court found the stream at issue was non-navigable. *Wilson v. Prickett,* 79 Wash. 89, 91, 139 P. 754 (1914). Consequently, the State would have never taken ownership of the stream or had any title to disclaim under Section 2. Any discussion in that opinion regarding Section 2 was, thus, *dicta*.

added). The court did not address whether federal conveyances other than patents or without reference to meander lines implicate Section 2. Instead it analyzed whether the Section 2 disclaimer fixed the ownership boundary at the meander line in the context of land on the bank of a river which shifts by accretion or gradual erosion. *Id.* at 976-78.

E. Section 2 Does Not Grant an Easement Interest, Much Less Fee Title to Land That an 1875 Act Right of Way Crosses

For the reasons set forth above, the plain language of Section 2 applies only to patents, and not to easements. The 1875 Act grants only easements across public land. *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 102–10, 134 S. Ct. 1257, 188 L. Ed. 2d 272 (2014); *Great N. R. Co. v. United States*, 315 U.S. 262, 271, 62 S. Ct. 529, 86 L. Ed. 836 (1942). *See also* Owner's Br. pp. 45-53. An easement is a nonpossessory right to enter and use land in possession of another.[17] And the 1875 Act applies only to "public lands of the United States," which phrase

[17] *Marvin M. Brandt Revocable Tr.*, 572 U.S. at 105.

has been held not to include aquatic lands. *Mann*, 153 U.S. at 284. Interpreting Section 2 to apply to pre-statehood easements that were not intended to include aquatic lands requires contorting the plain language of the provision and extending the scope well beyond anything the framers intended. It also requires forcing a square peg into a round hole. If a pre-statehood federal easement granted under the 1875 Act is considered to be "patented by" the United States for purposes of Section 2, the plain language of Section 2—which disclaims "all title in and claim to all … lands, patented by the United States"—disclaims *all* of the State's title in that land even though the United States only purported to convey an easement interest.

Seizing upon this, King County argues Section 2 not only disclaimed, but affirmatively granted all of the State's title and interest to the railroad upon statehood. Under the County's argument, a pre-statehood federal railroad easement holder obtained fee simple title upon statehood like a lottery prize—gaining more than the federal government intended, and more

than the railroad ever expected. No case law, and none of the records from the constitutional convention as discussed above, support interpreting Section 2 in a fashion that gifts the State's fee title interest to a railroad that holds only a federal easement, which easement Congress intended to burden only uplands. Apparently recognizing the unsustainable boldness of this claim, the County concedes in a footnote that *at least* Section 2 should be construed to confirm the railroad's *easement interest*.[18] But this fallback argument requires a complete rewrite of Section 2, and accordingly cannot be sustained.

When the federal government conveyed easement rights across territorial uplands to railroads, the government intended to later dispose of the same lands, subject to those easements, by patent.[19] If the upland patent issued before statehood, and the meander line on the subject survey is waterward of ordinary high

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[18] Reply Br. p. 25 n.11.

[19] *Marvin M. Brandt*, 572 U.S. at 98 (citing Section 4 of the 1875 Act).

water, then Section 2 disclaims (and grants) to the patent holder all of the State's title to all of the aquatic land within the meander line. *Mercer Island Beach Club,* 53 Wn.2d at 452-53. This disclaimer operates whether or not the patented uplands may be encumbered by an 1875 Act railroad easement. Under the County's fallback argument, Section 2 would have to be rewritten to allow the "easement portion" of the State's disclaimer to vest in the railroad, with the rest of the State's interest flowing to the patent holders.

On the other hand, if the meander line along the upland lot is not waterward of ordinary high water, then the pre-statehood patent can claim only to the line of ordinary high tide and no further. *Stockwell v. Gibbons*, 58 Wn.2d 391, 393, 363 P.2d 111 (1961). In such circumstance, if Section 2 were interpreted to grant to the railroad only the State's interest in the easement, that leaves open the question of what happens to the remaining portion of the State's interest (fee title to the land that the easement crosses) that is expressly disclaimed by the plain

language of Section 2. One could posit that the disclaimed fee ownership would revert to the federal government, but that yields the unsatisfying circular process of the federal government conveying aquatic lands to the State under the Equal Footing Doctrine upon statehood, and Section 2 disclaiming the easement portion to the railroad but disclaiming the underlying fee back to the federal government. One could posit in the alternative that the State retains the fee interest, disclaiming only the easement portion to the railroad, but that alternative simply fails to heed the plain language in the constitution that disclaims "all title in and claim to" the aquatic lands. The plain language and logic of Section 2 requires limiting its application to fee simple patents. A federal conveyance of an easement does not trigger application of Section 2, and the constitutional language cannot support disclaiming the State's interest in only an easement.

III. CONCLUSION

King County's argument violates the plain language of Section 2 and violates the fundamental principle that sovereign

grants must be construed narrowly, with nothing passing by implication or by intendment. The result disclaims more valuable aquatic lands than the framers ever intended, and calls into question a potentially significant amount of state-owned as well as privately held aquatic land.

For the reasons set forth above and in the Owners' Brief, the Court should answer "no" to the certified question at issue in this appeal. An approved map on file in some federal land office under the 1875 Act is not a conveyance "patented by the United States" under article XVII, section 2 of this State's Constitution.

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RESPECTFULLY SUBMITTED this 10th day of April, 2023.

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

DATED this 10th day of April 2023, at Olympia, Washington.

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