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NO. 52329-9-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KITTITAS COUNTY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

**BRIEF OF RESPONDENT STATE OF WASHINGTON
DEPARTMENT OF TRANSPORTATION IN RESPONSE TO
AMICI CURIAE BRIEF OF KITTITAS COUNTY FARM BUREAU,
WASHINGTON STATE FARM BUREAU, AND WASHINGTON
CATTLEMEN'S ASSOCIATION**

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I. INTRODUCTION

The Washington State Department of Transportation (WSDOT) submits this brief in response to the Amici Curiae brief of the Kittitas County Farm Bureau, Washington State Farm Bureau, and Washington Cattlemen's Association (Amici).

This case is about a noxious weed assessment that Appellant Kittitas County (the County) imposed pursuant to a special assessment statute, based on special benefits rather than on the value of the land. Amici's attempt to retroactively characterize the County's special assessment as a "tax," for purposes of a statute authorizing the County to collect payments in lieu of taxes, lacks authority and this Court should reject it.

Once the County's noxious weed assessment is properly analyzed as a special assessment, the question becomes whether the Legislature has expressly authorized the County to specially assess state-owned lands. Amici fail to identify how RCW 17.10 clearly and expressly provides for noxious weed assessments against state-owned lands. This Court should reject Amici's argument and affirm the trial court.

II. ARGUMENT

In matters of statutory construction, the court's role is "discerning what the law is, not what it should be." *Frias v. Asset Foreclosure Servs., Inc.*, 181 Wn.2d 412, 421, 334 P.3d 529 (2014). Therefore, when a statute's meaning is plain on its face, the court gives effect to that plain meaning as an expression of legislative intent. *Darkenwald v. State, Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015). The courts will not add words where the Legislature has chosen not to include them, even if it appears the omission may have been unintentional or inadvertent. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010); *State v. Cooper*, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006); *State v. Chester*, 133 Wn.2d 15, 940 P.2d 1374 (1997). It is not the court's role to create judicial fixes: "[s]tatutes that frustrate the purpose of others, though perhaps unintentionally, are 'purely a legislative problem.'" *State v. Reis*, 183 Wn.2d 197, 215, 351 P.3d 127 (2015).

The Legislature must clearly and expressly authorize any special assessments upon state-owned lands. Here, it has not done so. The trial court correctly declined to add to the noxious weed statute what the Legislature did not, and this Court should affirm.

A. RCW 17.04.180 Does Not Authorize a Payment in Lieu of Noxious Weed Assessments

RCW 17.04.180 provides for state agencies to pay the County “the amount of the tax to which the lands would be liable if they were in private ownership,” Amici assert that noxious weed assessments constitute a “tax” for the purposes of this provision. Amici offer no support for this contention except a general dictionary definition of “tax” as any “sum of money demanded by a government.” Br. Amici at 8 (quoting <https://www.dictionary.com/>). But reliance on a general dictionary is inappropriate when dealing with a technical term in its technical context. *Tingey v. Haisch*, 159 Wn.2d 652, 658, 152 P.3d 1020 (2007). The term “tax,” as used in RCW 17.04.180, is best interpreted by looking to related statutes, caselaw, and Attorney General’s Office (AGO) opinions. All three of these interpretive aids directly contradict Amici’s theory.

RCW 17.04.180 provides that interest and penalties may be charged “consistent with RCW 84.56.020.” In turn, RCW Title 84 defines the word “tax” to mean “the imposing of burdens upon property in proportion to the value thereof, for the purpose of raising revenue for public purposes.” RCW 84.04.100. Presumably, it is only such general, value-based taxes that the Legislature intended for counties to collect

when it enacted RCW 17.04.180. In contrast, noxious weed assessments are based not on the value of the land, but on the county's classification of the land and any benefits that may accrue to it. RCW 17.10.240. The noxious weed assessments and the "tax" to which RCW 17.04.180 refers are separate concepts, and are calculated based on different metrics. The County was not entitled to summary judgment to recover a value-based tax when its complaint requested payment of benefit-based assessments.

This conclusion is supported by the payment in lieu of tax provisions that appear in statutes for other agencies. RCW 77.12.203 requires the Department of Fish and Wildlife to pay "an amount in lieu of real property taxes . . . plus an additional amount for control of noxious weeds equal to that which would be paid if such lands were privately owned." Similarly, RCW 79.71.130 requires the State (on behalf of the Department of Natural Resources) to pay "an amount in lieu of real property taxes . . . plus an additional amount equal to the amount of weed control assessment that would be due if such lands were privately owned." If Amici were correct that a noxious weed assessment is merely a type of "tax," then the proviso that these agencies pay an "amount for control of noxious weeds" or an "amount of weed control assessment" would be surplusage: these amounts would already be accounted for as part of the "amount in lieu of real property taxes." The fact that the Legislature

provided for the Department of Fish and Wildlife and the Department of Natural Resources to pay *both* an amount in lieu of tax *and* an amount in lieu of noxious weed assessments confirms that the Legislature views taxes and noxious weed assessments as two separate things.

The courts agree. For over a century, the Washington courts have consistently distinguished special assessments, such as noxious weed assessments, from taxes.¹ *See, e.g., Heavens v. King Cty. Rural Library Dist.*, 66 Wn.2d 558, 563, 404 P.2d 453 (1965); *City of Seattle v. Rogers Clothing for Men, Inc.*, 114 Wn.2d 213, 232, 787 P.2d 39 (1990); *Gabelein v. Diking Dist. No. 1 of Island Cty. of State*, 182 Wn. App. 217, 229-30, 328 P.3d 1008 (2014); *Citizens for Underground Equal. v. City of Seattle*, 6 Wn. App. 338, 342, 492 P.2d 1071 (1972); *State ex rel. Frese v. City of Normandy Park*, 64 Wn.2d 411, 422-23, 392 P.2d 207 (1964); *Berglund v. City of Tacoma*, 70 Wn.2d 475, 423 P.2d 922 (1967); *Senor v. Bd. of Whatcom Cty. Comm'rs*, 13 Wash. 48, 58, 42 P. 552 (1895). In contrast, Amici identify no case in which a court has analyzed special assessments as a variety of tax.

Finally, the most recent AGO interpretation of RCW 17.04.180 shows that this statute does not contemplate the collection of noxious weed assessments:

¹ For further explanation on special assessments and why noxious weed assessments constitute special assessments, refer to Br. Resp't at 15-23.

Nor, for that matter, is there any express exemption of county or state lands—at least in the sense of anything in RCW 17.04.240, supra, which says that state or county lands are not subject to weed district assessments. Yet, quite obviously, those two classes of public lands are not subject to such assessments for, otherwise, RCW 17.04.180, supra, would make no sense.

Op. Att’y Gen. 1, at 2 (1984) (emphasis added). Stated differently, while RCW 17.04.180 might provide for “payments ‘in lieu of taxes,’” these payments are not the same thing as weed district assessments, to which state and county lands are not subject. *Id.* at 4 (quoting RCW 17.04.180).

The statutes on taxation and payments in lieu of taxes, the case law on taxation and special assessments, and the AGO’s interpretation of RCW 17.04.180 unanimously support the conclusion that taxes are a separate concept from noxious weed assessments. Amici’s argument erroneously conflates the two, and this Court should reject it.

B. RCW 17.10 and RCW 79.44 Do Not Authorize Noxious Weed Assessments on State-Owned Land

State-owned lands are “nonassessable for any purpose unless clearly and expressly made so by Constitution or statute.” *Rabel v. City of Seattle*, 44 Wash. 482, 483, 87 P. 520 (1906). Similarly, RCW 79.44 authorizes counties to collect only those assessments that “by statute are expressly made applicable to lands of the state.” RCW 79.44.004. A statute “which in general terms delegates power . . . to levy special assessments upon private property benefited by the improvement” is not

sufficient to authorize special assessments upon state-owned lands. *City of Spokane v. Sec. Sav. Soc’y*, 46 Wash. 150, 154, 89 P. 466 (1907).

The Legislature is presumed to be aware of these common-law and statutory requirements. *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008); *In re Marriage of Williams*, 115 Wn.2d 202, 208, 796 P.2d 421 (1990); *State v. Conte*, 159 Wn.2d 797, 808, 154 P.3d 194 (2007). Indeed, where the Legislature intends for state-owned lands to be specially assessed, it complies with these requirements by expressly stating that state-owned land shall be assessed as if it were privately owned. *See, e.g.*, RCW 89.08.400(3) (“Public land, including lands owned or held by the state, shall be subject to special assessments [for natural resource conservation] to the same extent as privately owned lands”); RCW 77.12.203(1) (“[T]he director [of Fish and Wildlife] must pay . . . an additional amount for control of noxious weeds equal to that which would be paid if such lands were privately owned”); RCW 79.71.130 (“The state treasurer, on behalf of the department [of Natural Resources], must distribute to all counties . . . an additional amount equal to the amount of weed control assessment that would be due if such lands were privately owned.”). Such express statutory authorization is absent from RCW 17.10, and the trial court correctly declined to provide it where the Legislature has not done so.

Amici argue that no provision of RCW 17.10 *exempts* state-owned land from payment of noxious weed assessments. But because state-owned lands must be expressly *included* in order to be assessed, no such express exemption is required. *See* Op. Att’y Gen. 1, at 2 (1984) (“Nor, for that matter, is there any express exemption of county or state lands . . . , which says that state or county lands are not subject to weed district assessments. Yet, quite obviously, those two classes of public lands are not subject to such assessments”). Legislative silence does not authorize the collection of special assessments against state-owned lands.

Amici also argue that RCW 17.10.145 requires state agencies to comply with the chapter, and that RCW 17.10.240(1)(a) authorizes special assessments upon lands within the County.² This is exactly the type of “general” statute that, under the rule of *City of Spokane*, does not authorize special assessments upon state-owned lands. The Attorney General has opined that a statute that authorized special assessments “on all property specially benefited by local improvement,” without specifically referencing state-owned lands, did not provide the clear and express

² Amici state that RCW 17.10.240(1)(a) authorizes the collection of “taxes.” Br. Amici at 13. This argument misses the point because RCW 17.10.240 authorizes a county to fund noxious weed control “through *either* its general fund [i.e., through general taxation] *or* through land assessments.” Op. Att’y Gen. 11, at 3 (1990) (emphasis added). Here, the County chose to fund noxious weed control through a system of special assessments. CP at 268-69. Having exercised the special assessment option, the County cannot also collect taxes under RCW 17.10.240(1)(a).

statutory authority needed to assess such lands. Op. Att’y Gen. 161, at 3 (1960); Op. Att’y Gen. 161, at 5-6 (1960) (quoting former RCW 56.20.010 (1987), *repealed by* Laws of 1996, ch. 230, § 1702). Here, too, RCW 17.10.240(1)(a) applies generally to all lands within the county, without specifically referencing state-owned lands. RCW 17.10.240(1)(a) does not rise to the level of clear and express statutory authority needed in order to assess state-owned lands.

The only reference in RCW 17.10 to state-owned lands is in RCW 17.10.145, which requires state agencies to “control noxious weeds on lands they own, lease, or otherwise control through integrated pest management practices,” to “develop plans in cooperation with county noxious weed control boards to control noxious weeds in accordance with standards in this chapter,” and to “comply with this chapter, regardless of noxious weed control efforts on adjacent lands.” RCW 17.10.145 does not reference noxious weed assessments. Its directive that state agencies “comply with this chapter” is too general to provide clear and express statutory authority to specially assess state-owned lands.

If Amici’s theory were correct, and state-owned lands were subject to noxious weed assessments, it would not be necessary for the Legislature to specify that the Department of Fish and Wildlife must pay an “amount for control of noxious weeds equal to that which would be paid *if such*

lands were privately owned,” or that the State (on behalf of the Department of Natural Resources) must pay an “amount equal to the amount of weed control assessment that would be due *if such lands were privately owned.*” RCW 77.12.203; RCW 79.71.130 (emphasis added). Amici’s theory would make these “if such lands were privately owned” provisos superfluous, and thus cannot be correct.

To accept Amici’s theory, this Court would have to write “if such lands were privately owned” language into WSDOT’s statute or RCW 17.10. The trial court correctly declined to provide this language where the Legislature chose not to. Because RCW 17.10 does not clearly and expressly authorize noxious weed assessments upon state-owned lands, such assessments are not permissible under the common-law or RCW 79.44, and the trial court correctly granted summary judgment to WSDOT.

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III. CONCLUSION

For the reasons set forth above and in WSDOT's Response Brief, this Court should affirm the decision of the trial court.

RESPECTFULLY SUBMITTED this 8th day of March, 2019.

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CERTIFICATE OF SERVICE

I, Charlotte Armstrong, an employee of the Transportation and Public Construction Division of the Office of the Attorney General of Washington, certify that on this day true copies of the Brief of Respondent Washington State Department of Transportation in Response to Amici Curiae Brief of Kittitas County Farm Bureau, Washington State Farm Bureau, and Washington Cattlemen’s Association and this Certificate of Service were served on the following parties as indicated below:

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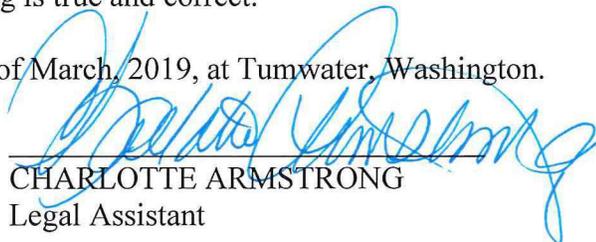
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

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