

NO. 350959

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JAMES COURTNEY; CLIFFORD COURTNEY,

Appellants,

v.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION;
DAVID DANNER, chairman and commissioner, ANN RENDAHL,
commissioner, and JAY BALASBAS, commissioner, in their official
capacities as officers and members of the Washington Utilities and
Transportation Commission; and STEVEN KING, in his official capacity as
executive director of the Washington Utilities and Transportation
Commission,

Respondents,

ARROW LAUNCH SERVICE, INC.,

Intervenor/Respondent.

BRIEF OF INTERVENOR/RESPONDENT ARROW LAUNCH
SERVICE, INC.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. STATEMENT OF ISSUES.....4

III. STANDARD OF REVIEW5

IV. ARGUMENT.....7

 A. Only the Legislature May Authorize an Individual to Provide a Commercial Ferry Service, and it Authorized the Washington Utilities and Transportation Commission to Economically Regulate all of Appellants’ Proposed Services7

 1. The Meaning of “Public Use for Hire” is Likely Ambiguous and thus the UTC’s Interpretation Should thus be Given Deference10

 2. Appellants Implicitly Recognize the Ambiguity in RCW 81.84.010 and Incorrectly Argue the Interpretation used in Other Contexts13

 3. The Meaning of “Public Use” in Eminent Domain Authorities May Aid the Court.....16

 4. Common Law Regarding Commercial Ferries Favors a Broader View of the Meaning of “Public Use” and Also Restricts the Right to Create a Ferry.....19

 a. There is No Absolute Individual Right to Create a Ferry.....20

 b. Authority to Operate a Ferry Constitutes a Franchise Which Comes with Both Rights and Obligations..22

 c. No Daylight Exists Between Truly Private and Truly Public Ferries; Attempts at Creating a Semi-Public Ferry Have Previously Been Precluded.....25

 (1) Attempts to Expand “Private Ferries” by Limiting the Class of Passengers Who May Use it Have Also Failed26

 (2) Attempts to Expand the “Private Ferry” by Offering the Service for Free Have Also Failed.....31

(3)	Similarly, Attempts to Avoid Classification as a Common Carrier by Discriminating Amongst Customers Have Failed	33
(4)	Taken Together, the Common Law Demonstrates No Grey Area Exists Between Private and Public Ferries	34
5.	Appellants’ Ferry Constitutes a Public Ferry Under Even the Narrowest of Interpretations of “Public Use”	35
B.	The Commission Did not Act Willfully or Without Reason in not Applying Exemptions Contained in Rules Applicable to Other Industries	37
C.	Charter Services	38
1.	The UTC’s Interpretation Precludes Appellants’ Proposed Service No. 5	38
2.	The UTC’s Interpretation Should Apply	39
3.	Appellants’ Proposed Service No. 5 is Vague Enough to Empower Appellants to Operate a Public Ferry by Subterfuge	40
V.	CONCLUSION	42

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Beard v. Long</i> , 4 N.C. 167 (N.C. 1815).....	21
<i>Chiapella v. Brown</i> , 14 La. Ann. 189 (La. 1859).....	26
<i>Cregan v. Fourth Mem’l Church</i> , 175 Wn. 2d 279, 285 P.3d 860 (2012).....	13, 14, 16
<i>Cushing v. White</i> , 101 Wash. 172 (1918).....	34
<i>Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles</i> , 148 Wn.2d 224, 59 P.3d 655 (2002).....	15, 16
<i>Hatten v. Turman</i> , 123 Ky. 844, 97 S.W. 770 (Ky. 1906)	26, 32
<i>Hensel v. Dep’t of Fisheries</i> , 82 Wn. App. 521, 919 P.2d 102 (1996)	7
<i>Hudspeth v. Hall</i> , 111 Ga. 510 (Ga. 1900).....	passim
<i>Hunter v. Moore</i> , 44 Ark. 184 (Ark. 1884)	26
<i>Kitsap County Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass’n</i> , 176 Wash. 486, 30 P.2d 233 (1934).....	passim
<i>Kucher v. Pierce Cty.</i> , 24 Wn. App. 281, 600 P.2d 683 (1979)	14
<i>Long v. Beard</i> , 7 N.C. 57 (N.C. 1819).....	21, 23

<i>Miller v. Tacoma</i> , 61 Wn.2d 374, 378 P.2d 464 (1963).....	17, 18
<i>Nearhoff v. Department of Public Works</i> , 134 Wash. 677, 235 P. 288 (1925).....	21, 22, 23
<i>Norris v. Farmers' & Teamsters' Co.</i> , 6 Cal. 590 (Ca. 1856).....	19, 22, 23
<i>Sanborn v. Brunswick Corp.</i> , 2 Wn. App. 248, 467 P.2d 219 (1970).....	9
<i>Shemwell v. Finley</i> , 88 Ark. 330, 114 S.W. 705 (Ark. 1908)	32
<i>St. Paul Fire & Marine Ins. Co. v. Harrison</i> , 140 Ark. 158, 215 S.W. 698 (Ark. 1919)	23
<i>State Dept. of Transp. v. State Employees' Ins. Bd.</i> , 97 Wn.2d 454, 645 P.2d 1076 (1982).....	11, 19
<i>Stein v. Pokorny</i> , 173 N.W.S.2d 461 (N.Y.App. Div. 1958)	23
<i>United & Informed Citizen Advocates Network v. Washington Utilities & Transp. Comm'n</i> , 106 Wn. App. 605, 24 P.3d 471 (2001).....	6
<i>Vallejo Ferry Co. v. Solano Aquatic Club</i> , 131 P. 864 (Ca. 1913)	26, 28
<i>Vallejo Ferry Co. v. Solano Aquatic Club</i> , 165 Cal. 255	29, 30
<i>Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n</i> , 148 Wn.2d 887, 64 P.3d 606 (2003).....	7
<i>Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994).....	11, 13
<i>West Valley Land Co. v. Nob Hill Water Association, Inc.</i> , 107 Wn. 2d 359, 729 P.2d 42 (1986).....	14

<i>White v. Salvation Army</i> , 118 Wn. App. 272, 75 P.3d 990 (2003)	39
--	----

FEDERAL CASES

<i>Courtney v. Goltz</i> , 736 F.3d 1152 (9th Cir. 2013)	24
---	----

<i>Fanning v. Gregoire</i> , 57 U.S. 524, 14 L. Ed. 1043 (1853)	21
--	----

<i>Frost v. Corp. Com of Okla.</i> , 278 U.S. 515, 49 S.Ct. 235, 73 L. Ed. 483 (1928)	21
--	----

<i>Kelo v. City of New London</i> , 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 439 (2005)	18, 19
---	--------

<i>Mills v. St. Clair County</i> , 49 U.S. 569, 12 L. Ed. 1201 (1850)	21
--	----

<i>Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders</i> , 234 U.S. 317, 34 S. Ct. 821, 58 L. Ed. 1330 (1914)	21
--	----

STATE STATUTES

RCW 34.05.570	6
---------------------	---

RCW 34.05.570(1)(a)	6
---------------------------	---

RCW 34.05.570(4)(c)(ii)	6
-------------------------------	---

RCW 34.05.570(4)(c)(iii)	6
--------------------------------	---

RCW 80.01.040(2)	8
------------------------	---

RCW 80.04.015	6
---------------------	---

RCW 80.04.040(2)	13
------------------------	----

RCW 81.04.510	6, 8, 9
---------------------	---------

RCW 81.77.010(5)	4
------------------------	---

RCW 81.84 et seq.	4
------------------------	---

RCW 81.84.010	passim
RCW 81.84.010(1).....	passim
RCW 81.84.015	38
RCW Chapter 81.....	13
RCW Chapter 81.84.....	5, 10
Washington Administrative Procedures Act., RCW 34.05 et seq.	5

REGULATIONS

WAC 480-30-036.....	38, 39
WAC 480-51-020(14).....	38, 39
WAC 480-51-022.....	38

OTHER AUTHORITIES

Black’s Law Dictionary	12
Oxford Dictionary.....	12
Washington, 25 Seattle U. L. Rev. 179, 198 (2001).....	20

I. INTRODUCTION

James Courtney and Clifford Courtney (the “Courtneys”) have long sought to establish a seasonal commercial ferry providing passenger service between the points of Chelan and Stehekin, Washington on Lake Chelan, despite recognition that those points already receive year-round passenger ferry service by the Lake Chelan Boat Company.¹

In their latest effort to establish such a competing ferry service, the Courtneys sought a Declaratory Order from the Washington Utilities and Transportation Commission (which is hereinafter alternatively referred to as the “UTC” or the “Commission”) by filing a petition seeking the Commission’s findings as to whether a certificate of public convenience and necessity would be required for any of five hypothetical services.²

The Commission issued the order for which the Courtneys have now sought judicial review on November 16, 2015.³ In its order, the UTC found each of the five alternative ferry services proposed by Appellants requires a certificate of public convenience and necessity pursuant to RCW 81.84.010(1).⁴

¹ CP 50-56.

² CP 45-81.

³ CP 429-39.

⁴ CP 429-39.

Appellants now request this Court reverse the UTC's findings as affirmed by the Chelan County Superior Court on the basis that the hypothetical services are private rather than "for the public use."

In order to effectively straddle the regulatory line between public and private ferries, Appellants proposed the five different ferry services or configurations noted above. Though varying in some respects, each of the five business models proposed by Appellants share the following common elements: (1) transportation of passengers between fixed points, ("termini"); (2) transportation of passengers on a fixed schedule; (3) transportation of passengers using a fixed fare; (4) transportation of potential patrons of businesses in Stehekin, Washington and the property of such passengers; and (5) a seasonal operation running only between Memorial Day weekend and early October.⁵ Where each proposed service principally varies is with respect to the breadth of the class of customers it would serve.

These varying proposals create a sliding scale of sorts, and by this sliding scale, Appellants no doubt invite the Court to establish a point along the theoretical continuum which it can categorize as private, leaving Appellants the opening to exploit the most public service mechanism permissible.

⁵ CP 60-70.

In their attempt to find that point in the continuum, Appellants take the position that so long as the class of passengers served is restricted in any way (i.e., limited to some group less than the general public) the ferry service is private and outside of the scope of the UTC's jurisdiction. Thus, this matter is posed to the Court of Appeals by Appellants as essentially containing only one critical question: whether "vessel or ferry for public use for hire" means a vessel for transportation open to all who seek the same?

However, Appellants' argument fails to reflect long-standing common law regarding the rights of ferry operators and the power vested in the state to create and supervise commercial ferry operations, as well as the long history of litigation involving attempts to operate ferries outside the bounds of legislative authority.

In reality, to determine whether Appellants may operate what they argue is a private ferry, another critical question must also be resolved: whether some gradation or equivalent apart from common carrier status is authorized by the laws of the state of Washington?

In contrast, Arrow will demonstrate that the legislature intended RCW 81.84.010(1) to apply to all commercial and nonprofit ferry

services.⁶ Because each of the hypothetical ferry services proposed by Appellants would be used to transport third parties, Appellants and all others who wish to create a commercial ferry service must obtain a PCN certificate before commencing such services.

Intervenor/Respondent, Arrow Launch Service, Inc. (“Arrow”), an intervenor at both the agency and trial court levels, is keenly interested in the outcome of this matter because, as a certificated commercial ferry company for hire, it is afforded the franchise benefits and obligations of a regulated company common carrier commercial ferry under RCW 81.84 et seq. Should Appellants prevail in this action, these statutory provisions afforded Arrow, and the duties owed to the public by Arrow and similar regulated carriers, will be diminished and potentially wholly diluted.

II. STATEMENT OF ISSUES

At issue are several essential questions which must be answered in order to determine whether the Commission exceeded the scope of its authority or acted arbitrarily or capriciously in determining the Appellants’ proposed services each require a certificate of public convenience and necessity:

⁶ Unlike other Title 81 RCW statutes such as RCW § 81.77.010(5), there is no private carrier exemption in RCW 81.84 et seq. Thus, no service to third parties is contemplated by non-certificated commercial ferries in the statute.

1. Whether the State has reserved the entirety of any right to create any commercial ferry service, regardless of whether it is open to the public or constitutes a private establishment?

2. Whether a commercial passenger ferry service may be rendered private so as to avoid statutory barriers to market entry by use of superficial restrictions on which passengers may use the service?

3. If limiting which passengers are permitted to use a commercial passenger transportation ferry may legally create a private and unregulated service, whether any of the limitations proposed by Appellants constitute a genuinely private commercial ferry service?

4. Whether a commercial passenger-transportation boat company may avoid the barriers to entry contained in RCW chapter 81.84 by arranging to regularly transport groups of unrelated passengers who have been amalgamated by a third party and calling said service “charter,” when there exist no rules or laws which would then prevent the company from providing said “charter service” in a way which is otherwise identical to a commercial ferry service?

III. STANDARD OF REVIEW

Judicial review proceedings are governed by the Washington Administrative Procedures Act.⁷ Pursuant to the APA, agency decisions

⁷ RCW 34.05 et seq.

may be reviewed based on a number of standards set forth in RCW 34.05.570. Here, Appellant challenges a declaratory order of the UTC in which it found each of the proposed company models to be regulated and subject to the entry standards of RCW 81.84.010 as exceeding its statutory authority under RCW 34.05.570(4)(c)(ii) and its determination that Proposed Service No. 5 does not qualify for exemption under “charter” rules as arbitrary and capricious under RCW 34.05.570(4)(c)(iii).⁸ Under either standard, the burden of proof is on Appellants to show the agency’s decision was invalid.⁹

Pursuant to RCW 81.04.510, whether a person is conducting business requiring authority from the UTC, or is performing any act requiring approval of the UTC, is a question of fact to be determined by the Commission. Thus, determinations by the UTC as to whether the hypothetical businesses proposed by Appellants required a certificate of public convenience and necessity are findings of fact subject to substantial evidence review.¹⁰ By that standard, the finding of fact by the UTC will

⁸ *Appellants’ Opening Brief*, p. 2.

⁹ RCW 34.05.570(1)(a).

¹⁰ *United & Informed Citizen Advocates Network v. Washington Utilities & Transp. Comm’n*, 106 Wn. App. 605, 612, 24 P.3d 471, 475 (2001)(construing RCW 80.04.015, which provides the Commission nearly identical authority to classify utilities as RCW 81.04.510 does for transportation companies).

be undisturbed upon judicial review if the evidence was sufficient to persuade a fair-minded person of the truth of the declared premise.¹¹

With respect to their challenge that the UTC's declaratory order was arbitrary or capricious, in order to demonstrate that the UTC's order should be reversed, Appellants must also establish that the agency action was willful and unreasoning, made without regard for the facts presented or circumstances.¹² And where there is room for more than one opinion, a decision made after consideration of the facts and circumstances will not be overturned as arbitrary or capricious even if the court finds it erroneous.¹³

IV. ARGUMENT

A. Only the Legislature May Authorize an Individual to Provide a Commercial Ferry Service, and it Authorized the Washington Utilities and Transportation Commission to Economically Regulate all of Appellants' Proposed Services

Appellants argue that the UTC exceeded its statutory authority to act when it determined that each of its hypothetical services required a certificate of public convenience and necessity.¹⁴ However, Appellants do not attempt to demonstrate one way or another the precise authority granted to the Commission or argue as to why the Commission exceeded

¹¹ See *Hensel v. Dep't of Fisheries*, 82 Wn. App. 521, 526, 919 P.2d 102, 104 (1996).

¹² *Washington Indep. Tel. Ass'n v. Washington Utilities & Transp. Comm'n*, 148 Wn.2d 887, 905, 64 P.3d 606, 615 (2003).

¹³ *Id.*

¹⁴ *Opening Brief*, p. 27.

that authority, instead arguing the Commission was incorrect in its interpretation of law. This argument ignores that the UTC is directly charged with both the authority and responsibility to determine whether business activities conducted would require a certificate of public convenience and necessity.

The UTC is charged with the duty to regulate and enforce the public service laws of the State of Washington applicable to transportation companies by RCW 80.01.040(2), and is expressly authorized to determine whether transportation companies require a certificate pursuant to RCW 81.04.510, which states in pertinent part:

Whether or not any person or corporation is conducting business requiring operating authority, or has performed or is performing any act requiring approval of the commission without securing such approval, shall be a question of fact to be determined by the commission. Whenever the commission believes that any person or corporation is engaged in operations without the necessary approval or authority required by any provision of this title, it may institute a special proceeding...

While the Commission's order here is the result of the Courtneys seeking classification of a hypothetical service by declaratory order rather than a classification proceeding initiated by the Commission, the authority of the UTC is clear in either circumstance: it is authorized to make findings of fact to determine "whether or not any person or corporation is

conducting business requiring operating authority.”¹⁵ Thus, the UTC hardly exceeded that authority when it found that the Courtneys’ proposed businesses each require a certificate.

Because by statute, the Commission’s determination as to whether a business requires a certificate is a finding of fact, the question for the Court of Appeals posed by the Courtneys should have been “whether substantial evidence existed to support the Commission’s determination that the proposed companies were subject to the certificate requirements of RCW 81.84.010.” On this point, Appellants made no assignment of error and no argument. Thus, the Court of Appeals should accept the Commission’s findings.¹⁶

Appellants will no doubt conversely contend that this appeal presents only issues of law (i.e., whether the Commission correctly interpreted “for the public use for hire”); however, the only difference between the Commission’s determination by declaratory order that the proposals of Appellants require a certificate, and the Commission’s determination in a classification proceeding is whether there exists an actual business, or just a hypothetical one.

Moreover, as discussed in great detail herein, the UTC’s decision on the Courtney’s petition for declaratory order did not hinge solely on its

¹⁵ RCW 81.04.510.

¹⁶ *Sanborn v. Brunswick Corp.*, 2 Wn. App. 248, 467 P.2d 219, 222 (1970).

interpretation of “public use,” and it correctly determined that each of Appellants’ hypothetical services are subject to the entry barriers and economic regulation created in Chapter 81.84 of the Revised Code of Washington because that statute is generally intended to create exclusive service territories which would cease to exist under Appellant’s interpretation of law. Further, for Appellants to obtain the relief they seek—an order authorizing Appellants to provide one or all of the hypothetical services—there must be reserved for individuals the right to provide a commercial ferry service. Because none exists as a matter of law, which is discussed in greater detail below, the Appellants are not entitled to the relief they seek even if the Commission’s unappealed findings were unsupported by substantial evidence.

1. The Meaning of “Public Use for Hire” is Likely Ambiguous and thus the UTC’s Interpretation Should thus be Given Deference

Appellants argue none of their proposed businesses constitute a “ferry for public use” based on the rules of statutory construction. Principally, Appellants argue the plain meaning of “public” dictates an outcome in their favor.

In interpreting statutes, the primary duty of the court is to discern and implement the intent of the legislature.¹⁷ Courts should determine the intent primarily from the language of the statute itself.¹⁸ Where the statute's language does not clearly relay the intent of the legislature, the court may resort to statutory construction, including, in its consideration, other statutes dealing with the same subject, administrative interpretation of statutes, or extrinsic evidence such as the history surrounding the enactment of the statute.¹⁹

Additionally, while the courts retain ultimate authority to interpret a statute, when an agency is charged with the administration and enforcement of a statute, the agency's interpretation of an ambiguous statute is accorded great weight in interpreting the legislature's intent.²⁰

Thus, if the meaning of the statute, as adopted by the UTC, is initially rejected due to an ambiguity, the court should nonetheless resort to statutory construction with great deference given to the Commission's interpretation.

At the outset, the UTC's approach to interpreting the language "vessel or ferry for public use for hire" appears sound, and as discussed

¹⁷ *State Dept. of Transp. v. State Employees' Ins. Bd.*, 97 Wn.2d 454, 458, 645 P.2d 1076 (1982).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Waste Mgmt. of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034, 1038 (1994).

below is supported by both Washington precedent and the common law. Accordingly, Arrow supports acceptance of that position by the Court of Appeals.

Appellants also favor a plain meaning interpretation of RCW 81.84.010(1). However, because the outcome of such interpretation contravenes Appellants' position, they now complain the "UTC engaged in linguistic gymnastics to craft a tortured definition of the term that would sweep [Appellants'] proposal within its reach," because it relied on the fourth-listed definition of "public" in Webster's Third New International Dictionary.²¹ Instead of that definition of "public," Appellants urge the Court to use a different definition (included in a footnote by the UTC) from the Oxford Dictionary or that included in a version of Black's Law Dictionary.

It is true that numerous definitions of "public" exist. However, rather than accepting the alternate definition proffered by Appellants, their argument that a different outcome may result from the application of an alternative definition of the word "public" demonstrates that the meaning is likely ambiguous in this context.

If the meaning of "public use" is therefore ambiguous, as the agency charged with "regulating in the public interest, as provided by the

²¹ *Opening Brief*, pp. 29-30

public service laws, the rates, services and practices of all persons engaging in the transportation of persons or property within this state for compensation,”²² the UTC’s interpretation should thus be given great weight.²³

2. Appellants Implicitly Recognize the Ambiguity in RCW 81.84.010 and Incorrectly Argue the Interpretation used in Other Contexts

Without admitting as much, Appellants implicitly recognize the ambiguity inherent in the term “public” use by first arguing that the UTC ignored other definitions of the word “public” and then turning to cases which alternatively interpret the meaning of the word “public” and “public use” in ways favorable to Appellants. However, none of the opinions cited by Appellants construe that language as used in RCW Chapter 81.²⁴ Additionally, not only are the facts and legal issues involved in those opinions readily distinguishable from the issues of this case, there exists ample authority construing the concept of “public” in a way more favorable to the interpretation given to it by the UTC.

Appellants rely principally upon an opinion interpreting the meaning of the term “public” as used in Washington’s recreational use statute in *Cregan v. Fourth Mem’l Church*, 175 Wn. 2d 279, 285, 285 P.3d

²² RCW 80.04.040(2).

²³ *Waste Mgmt. of Seattle, Inc.*, 123 Wn. 2d at 628.

²⁴ *Opening Brief*, pp. 30-32.

860 (2012).²⁵ In that opinion, the court of appeals held that where the owner of land had limited who could enter it, that land was not considered “open to the public” under the state’s recreational use statute and the landowner was not immune from suit filed by someone injured on the land. Appellants argue here, because they similarly propose to limit who may use their commercial ferry service, it too will not be open to the public.²⁶ However, Appellants fail to mention that in *Cregan*, the court of appeals was tasked with determining whether the landowner was immune from suit under a statute which was created in derogation of common law.

As a general tenet of statutory construction, a statute which limits rights or duties existing at common law must be strictly construed.²⁷ And the statute at issue in *Cregan*, one which granted statutory immunity to a private landowner, has been held to be in derogation of the duties owed under common law.²⁸ Thus, when the court of appeals determining *Cregan* was faced with answering whether the landowner was immune

²⁵ Appellants also rely upon the holding of the WUTC in *West Valley Land Co. v. Nob Hill Water Association, Inc.*, 107 Wn. 2d 359, 729 P.2d 42 (1986). However, that opinion (dealing with entirely different statutory standards) relied upon the fact that the water utility at issue was a cooperative, whose customers were its members who had a direct voice in its operation, as opposed to members of the public who needed the protections offered by a regulatory agency. Here, there is no suggestion by Appellants that their ferry will transport only themselves or the owners of the hypothetical company. Thus, their reliance on this opinion is wholly misplaced.

²⁶ *Id.*, p. 31.

²⁷ *Kucher v. Pierce Cty.*, 24 Wn. App. 281, 286, 600 P.2d 683, 686 (1979).

²⁸ *Id.*

from suit (land open to the public) or liable under common law (land for private use), it was legally obligated to err on the side of private use.

The converse outcome results when courts are required to err on the “public” side of that same coin. Take, for example, the holding in *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 59 P.3d 655 (2002). In that opinion, the Supreme Court of Washington examined whether a fraternal order was subject to the Washington Law Against Discrimination (“WLAD”), which the Supreme Court held requires *liberal* construction of its provisions against discrimination in places of public accommodation.²⁹ In determining whether the fraternal organization was in fact a private club or rather a public organization subject to the WLAD, the Supreme Court first noted that a fraternal order would be found private only if it was “distinctly private” after consideration of its size, purpose, policies, selectivity, public services offered, and other characteristics pertinent to a particular case, placing emphasis on “whether the organization is a business or commercial enterprise and whether its membership policies are so unselective and unrestricted that the organization can fairly be said to offer its services to the public.”³⁰ Then, after considering that the organization was indeed selective in its membership practices, but

²⁹ *Id.* at 247.

³⁰ *Id.* at 251.

generally sought to increase its membership rolls each year, the Supreme Court held that the organization was not sufficiently private to be exempt from the WLAD's prohibition on discrimination in places of public accommodation.³¹

Thus *Cregan* and *Eagles* offer diametrically opposed outcomes on similar facts. Both involved limitations on who may enter, and the converse outcome of each was determined based on the opposing rules of statutory construction applied.

Plainly, there are interpretive problems in attempting to divine the legislature's intent by looking at the definitions of "public" or opinions in cases construing "public" used in an entirely different context. The Court of Appeals should therefore look to other sources to construe the legislature's intent here. Indeed, Arrow urges the Court of Appeals to review case law to understand the meaning of "public use" as opposed to merely "public," and case law specifically involving the rights and duties of commercial ferry operators, rather than landowners or public utilities.

3. The Meaning of "Public Use" in Eminent Domain Authorities May Aid the Court

There is some additional interpretive assistance yielded by case law regarding the use of eminent domain, in determining what constitutes

³¹ *Id.* at 255-56.

a “public use.”³² Even in that context though, the Washington Supreme Court explicitly recognized the difficulty in construing the meaning of the term “public use,” stating “[t]he words ‘public use’ are neither abstractly nor historically capable of complete definition. The words must be applied to the facts of each case in light of current conditions.”³³ The Court added “the term ‘public use’ is one which has been examined innumerable times by the courts, but no concise, clear definition thereof has emerged from the mass of judicial language devoted to the subject.”³⁴

Miller v. Tacoma involved a constitutional challenge to the use of eminent domain to take property designated as “blighted” as part of an urban renewal project, where the property would later be sold to private parties and subject to use restrictions intended to prevent return to blight. The fundamental question posed to the court there was whether such a taking constituted one for public use warranting the use of eminent domain.³⁵ The Washington Supreme Court found the purpose of urban renewal projects benefitted the public by eliminating blight. Thus, though the end result may not be “use of the land by all” through a government building, highway, public utility or common carrier, the public benefit

³² Appellants similarly concur that cases rooted in eminent domain concerning the meaning of “public use” inform the Court’s interpretation. *Opening Brief*, p. 36 n. 8.

³³ *Miller v. Tacoma*, 61 Wn.2d 374, 384, 378 P.2d 464 (1963).

³⁴ *Id.* at 384.

³⁵ *Id.* at 382.

provided was considered sufficient to constitute public use.^{36, 37} Thus, in that context, “public use” was akin to “public benefit” and not “open to all.”

Similarly, the United States Supreme Court held in *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 439 (2005), that a development plan intended to create jobs and revitalize an economically depressed city, but which took land through eminent domain in order to benefit private development, constituted a public use.

In reaching its conclusion the Supreme Court reasoned:

...this is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers... this ‘court long ago rejected any literal requirement that condemned property be put into use for the general public. Indeed, while many state courts in the mid-19th century endorsed “use by the public” as the proper definition of public use, that narrow view steadily eroded over time. Not only was the “use by the public” test difficult to administer... but it proved to be impractical given the diverse and always evolving needs of society.³⁸

³⁶ *Id.* at 387.

³⁷ Appellants cite to the dissenting opinion in *Miller v. Tacoma* for the proposition a hotel is open to the public, but not a public use. *Opening Brief*, p. 34. The distinction actually demonstrates that “public use” does not mean “open to all” but is more closely aligned with “providing a public benefit.”

³⁸ *Id.* at 478.

Following that reasoning, the Supreme Court held for purposes of construing the Fifth Amendment of the U.S. Constitution, the determination of what use constitutes “public use” is whether the use serves a public purpose.³⁹ In turn, the Supreme Court interpreted public purpose broadly, including, among other purposes, economic development.⁴⁰

Placed into the broad terms set forth by the Supreme Court of Washington and the Supreme Court of the United States, a public use constitutes one which benefits the public generally, even though it may benefit a private person and is not necessarily one which is open to all.

Were the analysis to end here, the uses intended by Appellants would fall within the meaning of “public use” as the provision of transportation by ferry is considered of the highest public utility and would certainly benefit the public generally.⁴¹ Understanding the lengthy history of ferry litigation serves to further bolster this interpretation.

4. Common Law Regarding Commercial Ferries Favors a Broader View of the Meaning of “Public Use” and Also Restricts the Right to Create a Ferry

As indicated in *State Dept. of Transp. v. State Employees’ Ins. Bd.*, 97 Wn.2d 454, the Court may look to extrinsic information to determine

³⁹ *Id.*

⁴⁰ *Id.* at 483-87.

⁴¹ See *Norris v. Farmers’ & Teamsters’ Co.*, 6 Cal. 590, 596 (Ca. 1856)(stating ferries are “of the highest utility and convenience to the public”).

the intent of the legislature. Among the sources the Court may consider are long-standing common law traditions.⁴²

In this instance, an understanding of what the legislature intended by “vessel or ferry for public use for hire” is best understood through common law, as the meaning of “public ferry” is a long established principle in common law. Additionally, there exist long-held rules in common law regarding the limited nature of a “private ferry.” In understanding the two, the Court should be able to readily conclude the ferry services proposed by Appellants each constitutes a “ferry for public use for hire.”

a. There is No Absolute Individual Right to Create a Ferry

Initially, it is worth noting the right to create a ferry is vested solely in the sovereign, and in the case of the laws of the United States, that power rests solely in the States. As addressed in *Stark v. M’Gowen*:

...It has been shown, that upon those general principles which apply to all governments, the right to establish ferries is an incident of sovereignty; it follows, then that no individual has a right to establish a ferry without the permission of the government.⁴³

⁴² Phillip A. Talmadge, A New Approach to Statutory Interpretation in Washington, 25 Seattle U. L. Rev. 179, 198 (2001).

⁴³ 1 Nott & McCord 387 (S.C. 1818).

This principle has been recognized over and over again by the courts of numerous states.⁴⁴

Similarly, the United States Supreme Court has held it is within the police power of the state to grant ferry licenses.⁴⁵ It further found “[t]he establishment and regulation of ferries across navigable streams is a subject within the control of the government, and not matter of private right; and that the government may exercise its powers by contracting with individuals. We deem this general principle not open to controversy.”⁴⁶

The law in Washington is no different. In *Nearhoff v. Department of Public Works*, 134 Wash. 677, 235 P. 288 (1925), the Washington Supreme Court held “[t]he right to establish and maintain a public ferry is a franchise which cannot be exercised without the consent of the state.”⁴⁷

Thus, even if the UTC was incorrect in determining the Appellants’ proposed services were for the “public use,” Appellants are nonetheless

⁴⁴ See *Beard v. Long*, 4 N.C. 167, 169 (N.C. 1815)(holding no person has a right to have a public ferry, but must acquire a license from the state); *Long v. Beard*, 7 N.C. 57 (N.C. 1819); *Hudspeth v. Hall*, 111 Ga. 510, 518 (Ga. 1900)(“He had no right to establish a public ferry, nor a private one for the use of the public; and while the judge restrained him from operating a public or private ferry at a particularly indicated place, the injunction should have gone further and restrained him, not only from establishing and maintaining a public ferry, but from establishing and maintaining a private ferry for the use of the public.”).

⁴⁵ *Fanning v. Gregoire*, 57 U.S. 524, 534, 14 L. Ed. 1043 (1853); *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders*, 234 U.S. 317, 34 S. Ct. 821, 58 L. Ed. 1330 (1914).

⁴⁶ *Mills v. St. Clair County*, 49 U.S. 569, 581, 12 L. Ed. 1201 (1850); see also *Frost v. Corp. Com of Okla.*, 278 U.S. 515, 49 S.Ct. 235, 73 L. Ed. 483 (1928)(holding a franchise, such as a public ferry, is a right, privilege or power of public concern which cannot be exercised by individuals).

⁴⁷ *Id.* at 678.

prohibited from operating a commercial ferry absent a grant of authority from the State.

b. Authority to Operate a Ferry Constitutes a Franchise Which Comes with Both Rights and Obligations

When the state does act to authorize a commercial ferry, that grant creates a franchise, which is considered a property right in its holder.⁴⁸

The franchise both creates rights and imposes obligations on the part of the ferry operator.

The primary rights a franchise provides are the right of exclusivity and the right to charge a toll.⁴⁹ The right of exclusivity is one rooted in the common law. Blackstone's Commentaries on the Laws of England, published in the 1700s, provided;

If a ferry be erected on a river so near another ancient ferry as to draw away its custom, it is a nuisance to the owner of the old one. For, where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness for the ease of the king's subjects; otherwise he may be grievously amerced.⁵⁰

Thus, the operator of a public ferry has frequently enjoyed exclusive rights over the water in which it operates during at least the past five centuries.

⁴⁸ *Nearhoff v. Department of Public Works*, 134 Wash. 677 (1925); *Kitsap County Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass'n*, 176 Wash. 486, 30 P.2d 233 (1934); *Norris*, 6 Cal. 590.

⁴⁹ *Id.*

⁵⁰ Blackstone, 3 Com. 219.

Numerous states have recognized the right of exclusivity, whether by common law or through statute.⁵¹ In Washington State, authority to operate a ferry is exclusive as well.

The Supreme Court of Washington recognized that a PCN Certificate constitutes a franchise with the right of exclusivity in *Nearhoff v. Department of Public Works*, 134 Wash. 677 (1925) and reaffirmed it in *Kitsap County Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass'n*, 176 Wash. 486, 30 P.2d 233 (1934).

Exclusivity is provided to the holder as a reward for undertaking duties that come with the franchise. The ferry operator owes the public duties to transport all who come and to keep the ferry in a state of good repair and readiness for the use of the public.⁵² These duties cannot be faithfully performed if the franchise is invaded by an unauthorized rival who is diverting passengers, risking bankrupting the ferry.⁵³ Thus, though the ferry operator benefits from exclusivity, the true benefit is to the public through continued operation of the ferry, as ferries are considered “of the highest utility and convenience to the public.”⁵⁴

⁵¹ See, e.g., *Long v. Beard*, 7 N.C. 57; *Hudspeth v. Hall*, 111 Ga. 510, 36 S.E. 770; *Norris*, 6 Cal. 590; *St. Paul Fire & Marine Ins. Co. v. Harrison*, 140 Ark. 158, 215 S.W. 698 (Ark. 1919); *Stein v. Pokorny*, 173 N.W.S.2d 461 (N.Y.App. Div. 1958).

⁵² *Norris*, 6. Cal. 590; *Manitou Beach*, 176 Wash. at 490.

⁵³ *Norris*, 6 Cal. at 595.

⁵⁴ *Id.* at 597.

Because their proposed services compete with a public and violate the public ferry's right to exclusivity, Appellants have now attempted, through multiple judicial and administrative avenues to overturn the exclusivity provided by RCW 81.84.010(1) through argument that it violates constitutional rights and prohibitions.

In the 9th Circuit Court of Appeals in *Courtney v. Goltz*, Appellants argued exclusivity violated their rights to use the navigable waters of the United States under the Privileges and Immunities Clause contained in the 14th Amendment to the U. S. Constitution.⁵⁵ In rejecting Appellants' argument, the 9th Circuit held while there is a right to *navigate* the navigable waters of the United States, there is no right under that clause to conduct ferry operations.⁵⁶

As part of its predicate in reaching that conclusion, the 9th Circuit noted that regulation of ferry operations has traditionally been a power of the states, and further, that at common law a franchise was necessary to the creation and operation of a ferry.⁵⁷

Appellants now also assert "the WUTC may not, in the absence of an express legislative grant of power, confer on the Lake Chelan Boat Company, or any carrier, the exclusive right to provide boat transportation

⁵⁵ *Courtney v. Goltz*, 736 F.3d 1152 (9th Cir. 2013).

⁵⁶ *Opening brief*, 41-42.

⁵⁷ *Id.* at 1161.

on Lake Chelan...”⁵⁸ This point appears to be nothing more than a non sequitur, because the Supreme Court of Washington previously held that the legislature had authorized the very exclusivity now contained in RCW 81.84.010 at issue here.⁵⁹ Consequently, any concern about abhorrence of monopolies has been previously resolved in favor of exclusivity.

c. No Daylight Exists Between Truly Private and Truly Public Ferries; Attempts at Creating a Semi-Public Ferry Have Previously Been Precluded

As discussed above, ferries operating under a grant of authority from the State are open to the general public. These ferries are required to transport all who come to the ferry for transportation, providing such services at fixed rates and service levels and without discrimination, and the operators are subject to the duties of a common carrier.⁶⁰

Though public ferries are granted exclusivity over the waters in which they operate, courts have long permitted as an exception to their exclusivity, the operation of “private ferries.” However, the concept of a private ferry in this sense is extremely limited and is better understood as a ferry for personal use, because a “private ferry” is one solely operated for the transportation of its owner, the owner’s family, and the owner’s

⁵⁸ *Opening Brief*, p. 41.

⁵⁹ *Manitou Beach*, 176 Wash. 486, 30 P.2d 233 (1934).

⁶⁰ *Manitou Beach*, 176 Wash. at 490.

employees (with the occasional trip for the convenience of a neighbor).⁶¹

That private ferries are so limited has in fact been recognized in numerous states.⁶²

(1) Attempts to Expand “Private Ferries” by Limiting the Class of Passengers Who May Use it Have Also Failed

Just as the Appellants attempt in this matter, many people have tried to expand the scope of private ferries over the last 200 years. But in response, “courts have with promptness and severity frowned upon any extension of the common law rule permitting a man, regardless of the existence of a ferry franchise to transport himself, and his household, and his servants.”⁶³

Some, like Appellants, have previously attempted to create “private ferries” by limiting their service to specific groups of people and claiming that since they were not open to the general public, the service constituted a private ferry. These efforts were typically seen as subterfuge or evasion of the law and found to constitute unauthorized public ferries.

Kitsap County. Transp. Co. v. Manitou Beach-Agate Pass Ferry Ass’n involved such an attempt.⁶⁴ In that case, a group of residents of Bainbridge Island persuaded the Puget Sound Navigation Company

⁶¹ See *Id.* (citing *Hunter v. Moore*, 44 Ark. 184 (Ark. 1884)).

⁶² See, e.g., *Vallejo Ferry Co. v. Solano Aquatic Club*, 131 P. 864 (Ca. 1913); *Chiapella v. Brown*, 14 La. Ann. 189, 190 (La. 1859)(holding “the privilege of crossing one’s friends cannot extend to a whole community”); *Hatten v. Turman*, 123 Ky. 844, 97 S.W. 770 (Ky. 1906); *Hunter v. Moore*, 44 Ark. 184.

⁶³ *Solano Aquatic Club*, 165 Ca. at 270.

⁶⁴ 176 Wash. 486.

(“PSCN”) to apply for a certificate of public convenience and necessity to install a new ferry route between Manitou Beach and Seattle. After the application was granted, the existing ferry sought review of the order of the Department of Public Works. After the court found the new ferry service violated the PCN Certificate held by the existing ferry, a group of residents created the Manitou Beach-Agate Pass Ferry Association. The association was purported to have been created as a social organization.⁶⁵ However, it entered a contract with PSNC for operation of a ferry boat to transport its members and their vehicles between Bainbridge Island and Seattle.⁶⁶ The contract permitted members of the ferry association to ride the ferry by paying a fare to PSNC after paying \$1 to join the ferry association. There was no other limitation of joinder of the ferry association.

The ferry association actually commenced the operation of its ferry, but service was interrupted on the day it started when the existing ferry service obtained a temporary restraining order.⁶⁷ After a trial, the trial court entered a permanent injunction against the ferry association from maintaining a ferry service between Seattle and Manitou Beach.⁶⁸

On appeal, the ferry association asserted several grounds to support their right to maintain the ferry service. First, they argued that Chapter 248, Laws of 1927 (a statute which has been codified and slightly

⁶⁵ *Id.* at 488.

⁶⁶ *Id.* at 487-88.

⁶⁷ *Id.* at 488.

⁶⁸ *Id.* at 489.

modified as RCW 81.84.010) permits a monopoly in violation of Article XII, § 22 of the state constitution, grants special privileges and immunities in violation of Article 1, § 12, of the state constitution, and denies rights guaranteed by the Fourteenth Amendment to the United States Constitution, familiar themes raised by Petitioner throughout its litigation. *Id.* In response to this argument, the court held the franchise rights created by the PCN Certificate were a permissible exercise of the state’s sovereignty.⁶⁹

Next, the ferry association argued the exclusivity afforded the operator of a PCN Certificated ferry only applied to competing common carriers, distinguishing its service as a “club boat” limited in its use to “club members” who each have the right to transport themselves, their family and their servants and guests individually, or jointly.⁷⁰ Disagreeing with the ferry association, the Supreme Court of Washington responded “neither the device nor the argument is new” and went on to discuss the opinions set out in prior cases in other states. Relying heavily on the opinion in *Solano Aquatic Club*, the court found that while one person can operate a ferry for use of their family and servants, when combining that right with the rights of others, an unauthorized public ferry is thus created.⁷¹

⁶⁹ *Id.* at 489.

⁷⁰ *Id.* at 492.

⁷¹ *Id.* at 493 (citing *Solano Aquatic Club*, 131 P. 864).

Seeing through the ferry association's "subterfuge," the Supreme Court of Washington held that stripped of pretense, the transaction between the ferry association and the company operating the ferry did nothing more than create a public ferry which infringed upon the franchise rights of the existing ferry provider.⁷²

A similar manipulation existed, and was prohibited, in *Vallejo Ferry Co. v. Solano Aquatic Club*, 165 Cal. 255. In that matter, a group of civilian employees of a military installation on Mare Island, California apparently tired of paying for use of the existing public ferry to commute to and from work.⁷³ Rather than pay for the ferry, they obtained free transportation aboard a government raft used to transport government employees to and from the navy yard.⁷⁴ Eventually, providing free transportation to civilian employees became a burden on the federal government and the naval authorities revoked the privilege of civilian employees' use of the raft.

Civilians utilizing the raft then instituted a lawsuit in an unsuccessful attempt to revoke the franchise granted to the existing ferry. After losing, the civilian employees then began using a launch service between Vallejo and Mare Island created by another company, Lang & McPherson. The existing ferry company successfully sued for an injunction against Lang & McPherson. Eventually, after additional

⁷² *Id.* at 495-96.

⁷³ *Id.*

⁷⁴ *Id.* at 260-261.

litigation, the Solano Aquatic Club (“SAC”) was formed by the civilian employees of the naval base to provide transportation solely to members of their organization.⁷⁵ Yet another action was instituted to block that operation and a new injunction was granted.

The SAC insisted it was not a ferry service, but one for the purpose of promoting aquatic sports. Further, it argued the service was to be used by a limited group – the employees of a single employer who combined to secure transportation facilities for use by only their group.⁷⁶ The Supreme Court of California found the stated purpose of the appellant to be a sham, the company amounting to nothing more than a commercial public ferry.⁷⁷ In reaching its conclusion, the court noted the by-laws of the Solano Aquatic Club did not limit its membership and ultimately could include within it anyone who sought transportation aboard the company’s boat.

The SAC also argued its use of a ferry by an association of employees of a single entity was simply an extension of the principle that notwithstanding the existence of a ferry franchise, a man may, in his own boat, transport his family, his goods, and his servants.⁷⁸ Rejecting this argument, and following rulings of courts in other states, the court refused to extend the rule at common law permitting a person to operate a private ferry for the benefit of its owner, and the owner’s household and servants.
Id.

⁷⁵ *Id.* at 867.

⁷⁶ *Id.* at 867.

⁷⁷ *Id.* at 867.

⁷⁸ *Id.* at 870.

In affirming the permanent injunction against the SAC, the court added “[i]t is the duty of the government, which has thus invited private capital to aid in the comforts and convenience of its citizens, to safeguard the rights which it has bestowed, and to see that the enjoyment of those rights is coextensive with the grant of them.”⁷⁹

(2) Attempts to Expand the “Private Ferry” by Offering the Service for Free Have Also Failed

Other attempts to expand the common law concept of a private ferry were attempted by creating a free ferry open or frequently used by the general public. These too have been previously rejected as unauthorized public ferries.

The Supreme Court of Georgia had an opportunity to consider a free ferry in *Hudspeth v. Hall*, 111 Ga. 510. That opinion dealt with the owner of land on which a business was operated who desired to create a private ferry for the express purpose of transporting the public to his business, which existed on the banks of a stream. The operator charged nothing for use of the ferry, but offered the service so that the passengers could frequent his business. The court held a private ferry could not be

⁷⁹ *Id.* at 868.

enlarged to permit an owner to transport the public, or any considerable portion thereof, across the stream.⁸⁰

Under facts similar to *Hudspeth v. Hall*, the Supreme Court of Kentucky found a free ferry used by the customers of the defendant's business to constitute an actionable wrong.⁸¹ The court held "It is apparent that, in transporting persons to and from their store, appellants were receiving indirectly compensation, and thus committed an actionable wrong and a violation of the statute to the same extent as if a specified sum was exacted as fare from each person carried."⁸²

Similarly, in *Shemwell v. Finley*, 88 Ark. 330, 114 S.W. 705 (Ark. 1908), the defendant repaired an old ferry and in exchange for the services others provided him in repairing the ferry, offered to transport those who repaired the ferry free of charge.⁸³ The Supreme Court of Arkansas found the defendant had violated a statute prohibiting the unauthorized operation of a ferry over navigable water for money or any other valuable thing. The court found the persons who assisted in repairing the ferry had provided valuable services as the fare for transportation. Thus, the ferry service constituted an unauthorized public ferry.

⁸⁰ *Id.* at 518.

⁸¹ 123 Ky. 844, 97 S.W. 770 (Ky. 1906).

⁸² *Id.* at 848.

⁸³ *Id.* at 331.

(3) Similarly, Attempts to Avoid Classification as a Common Carrier by Discriminating Amongst Customers Have Failed

Other attempts to evade classification as a public carrier existed where carriers attempted to operate as fully open to the public in most respects, but claim they are not “public,” or common carriers, as a result of their refusal to transport certain passengers or freight. These efforts have also failed.

In *Lloyd v. Haugh*, the Supreme Court of Pennsylvania considered whether a company in the business of transporting freight by carriage should be classified as a common carrier.⁸⁴ The evidence showed the carrier advertised that it was in the general business of moving freight and the advertisements had no mention of limited liability or discrimination in its selection of patrons. The carrier argued, however, it was not a common carrier because it refused to transport some, accepting and rejecting who it would. The court rejected this argument, holding that rejecting or discriminating against customers does not make a carrier private as opposed to a common carrier.⁸⁵ The true test was instead whether the carrier held itself out to the public as a transportation company for hire.⁸⁶

⁸⁴ 72 A. 516 (Pa. 1909).

⁸⁵ *Id.* at 517.

⁸⁶ *Id.*

Citing the opinion in *Lloyd v. Haugh* (and others), and noting “authorities to the same effect may be cited indefinitely,” the Supreme Court of Washington similarly held the refusal to transport passengers was immaterial in determining whether a taxicab service constituted a common carrier.⁸⁷

Consequently, an attempt by a ferry company which is open to the general public, but which attempts to classify itself as private through use of selective discrimination amongst customers, should nevertheless be classified as a public ferry.

(4) Taken Together, the Common Law Demonstrates No Grey Area Exists Between Private and Public Ferries

The cases discussed above demonstrate that any ferry regularly transporting a class of people which exceeds the owner’s personal use constitutes a public ferry at common law. Because a similar premise was recognized by the Washington Supreme Court in *Manitou Beach*, this Court should apply this meaning as well, correctly holding each of Appellants’ ferry service alternatives constitute a “ferry for public use for hire” under RCW 81.84.010(1).

⁸⁷ *Cushing v. White*, 101 Wash. 172, 181-82 (1918).

5. Appellants' Ferry Constitutes a Public Ferry Under Even the Narrowest of Interpretations of "Public Use"

Notwithstanding that the Washington Supreme Court expressly rejected such an attempt in *Manitou Beach*, Appellants here attempt to expand the traditional common law concept of a private ferry by offering a ferry service available to people beyond the owner's family, servants and the occasional neighbor, by arguing a ferry service open only to a limited class of passengers is not a public ferry. However, just as in *Manitou Beach*, the limitation proposed transparently provides only the most minimal of limitations of whom may be a passenger. In each of Appellants' five proposed services, the only limitation of whom may be carried is that the person must be a customer of one or more of the businesses in Stehekin. Like the ferry association in *Manitou Beach*, this limitation acts as no limitation at all.

The most restricted class of passengers in Appellants' proposals exists in Proposed Service No. 1. In this service, to ride the ferry, the passenger must have a reservation for lodging at Stehekin Valley Ranch. This use plainly exceeds the personal use permitted by a private ferry. Moreover, the proposed service is akin to a public ferry because Stehekin Valley Ranch is open to the public and anyone who wishes to receive transportation on the proposed ferry may book a reservation.

In their Opening Brief, Appellants argue the ferry service would not be open to the public because hotels, though open to the public, are not considered “public use” under eminent domain law.⁸⁸ This argument confuses and obfuscates the issue.

The question the Court must answer is not whether the hotel, separate and apart from the ferry, is considered a “public use” as used in the eminent domain context. The question is whether the classification of users proposed by Appellants changes the characterization of the ferry from public to private.

When analyzed as to whom may actually be able to use the proposed ferry services, the proffered user classifications are each so broad as to constitute “the general public.” Thus, the services proposed by the Appellants require a PCN Certificate under RCW 81.84.010, even under an interpretation of “public use” most favorable to the Appellants.

Appellants’ argument that the UTC has no jurisdiction over the proposed services, because it could then extend its jurisdiction to all boats connected in any way to some other business must also fail.⁸⁹ Appellants did not propose a boat merely connected to a business in a vacuum of other details. They proposed to operate a commercial transportation boat between fixed termini with a schedule, and the only connection to the

⁸⁸ *Opening Brief*, pp. 33-34.

⁸⁹ *Id.* p. 33.

hotel is that requiring a hotel reservation to book service serves as a superficial limitation on use of the ferry.

B. The Commission Did not Act Willfully or Without Reason in not Applying Exemptions Contained in Rules Applicable to Other Industries

The Courtneys also contend that the Commission acted arbitrarily or capriciously when it failed to apply to commercial ferry services the same exemptions it applies to auto transportation services.⁹⁰ However, the Courtneys fail to demonstrate that the Commission was unreasoning when the exemptions identified by the Courtneys were expressly created by the legislature for the auto transportation industry and were not extended by the legislature to commercial ferries.

Beyond being a reasonable determination by the Commission, it was a necessary determination. The auto transportation industry is highly competitive, with numerous other modes of transportation existing to transport passengers should an incumbent provider's business fail. Conversely, should a commercial ferry cease to operate, residents of island or remote communities have few other available options for transportation. And here, the Courtneys do not propose to fill in any such gap in service, as they propose to provide only seasonal service. Thus, affording protections to incumbent ferry operators not provided to auto transportation companies is soundly logical, both generally and under the Courtneys' proposals at issue here.

⁹⁰ *Opening Brief*, pp. 42-45.

C. Charter Services

Finally, Appellants challenge the UTC's Order as arbitrary and capricious because it did not exempt Proposed Service No. 5 as a "charter service."⁹¹ The UTC exempted charter services from the PCN Certificate requirement of RCW 81.84.010(1), by administrative rule (WAC 480-51-022), in conjunction with a now-lapsed legislative provision, RCW 81.84.015, addressing excursion services in 1995. Despite their overt intention to create a new commercial ferry service to Stehekin, Appellants seek to exempt their commercial ferry service as a charter service pursuant to that rule.

The UTC's correct interpretation of what constitutes a charter service precludes Proposed Service No. 5. Moreover, the language by which Appellants describe Proposed Service No. 5 is sufficiently vague as to authorize a commercial ferry service open to the public.

1. The UTC's Interpretation Precludes Appellants' Proposed Service No. 5

WAC 480-51-020(14) defines "charter service" as "the hiring of a vessel, with captain and crew, by a person or group for carriage or conveyance of persons or property." The UTC interprets its own rule more broadly, finding the definition of "charter carrier" contained in WAC

⁹¹ *Opening Brief*, pp. 45-49.

480-30-036 useful to and more closely comports with the interpretation of “charter service” here. Under the UTC’s interpretation based on WAC 480-30-036, a charter service means “every person engaged in the transportation of a group of persons who, pursuant to a common purpose and under a single contract, have acquired the use of a motor bus to travel together as a group to a specified destination or for a particular itinerary, either agreed upon in advance or modified by the chartering group after having left the place of origin.”⁹²

Under that interpretation, Proposed Service No. 5 cannot constitute a charter service because the persons transported are not contracting with the vessel’s operator together as a single group with a common purpose. Instead, they are grouped together by the travel service with no more common purpose than to traverse the route of the ferry.

2. The UTC’s Interpretation Should Apply

Appellants take issue with the application of WAC 480-30-036, arguing the 1995 definition of “charter service” contained in WAC 480-51-020(14) should be applied. However, an administrative agency’s interpretation of law which pertains to the area of the agency’s expertise is given substantial deference by the courts.⁹³ Because this issue involves

⁹² CP 436.

⁹³ *White v. Salvation Army*, 118 Wn. App. 272, 277, 75 P.3d 990 (2003).

interpretation of its own regulations by the UTC, the Court should defer to the UTC on this meaning.

Moreover, while Appellants challenge the Commission's interpretation of "charter" as being arbitrary and capricious, its ultimate finding that the proposal is not exempt has not been shown to be "willful and unreasoning, made without regard for the facts presented or circumstances." Indeed, as discussed below, the vague facts by which Appellants proposed their service demonstrate that an order approving the proposed service would permit Appellants, or someone else following the Court's precedent, to exploit gaps in facts presented to create a public ferry open to all, running on a regular route and schedule, but free from the UTC's regulations on service and fares in full competition with a certificated incumbent. Because the Commission understood this potential result, and based its ruling on that concern, it plainly did not act willfully without regard for the facts presented. Its determination was thus neither arbitrary nor capricious.

3. Appellants' Proposed Service No. 5 is Vague Enough to Empower Appellants to Operate a Public Ferry by Subterfuge

The language describing Proposed Service No. 5 is sufficiently vague as to permit a ferry operation which is fully open to the public, with

a regular route, and established fares, but with an additional insignificant hurdle in the form of a third party booking agent.

The “restrictions” placed on use under this proposed service are inconsequential. Under this scenario, though the proposal says the Stehekin-based travel company would not be owned by Cliff, Jim or any other member of the Courtney family, it could be owned by a parent-corporation owned by Jim and Cliff Courtney.

The travel company, working closely with Jim and Cliff Courtney, could then charge its customers a nominal surcharge for the travel package which involves nothing more than the transportation itself. Since the travel company is based in Stehekin, it too would qualify as a service of a Stehekin-based company and there would be no need for a package to include any other service.

That an agent would book passage is also an insignificant impediment. The travel agency might consist of something as simple as a mobile phone application, similar to transportation network providers like Uber, which would be used for paying the fare upon arrival at the fixed terminal at the regularly scheduled time.

Nothing in the proposal limits the ferry from operating over a regular route and the fares described in Proposed Service No. 5 are

established precisely equivalent to each of the other scenarios, and not a fixed rate for the entire vessel.⁹⁴

Taken as a whole, Proposed Service No. 5 constitutes nothing different than the sham Manitou Beach Ferry Association model, except that the trips would be booked through an agent.

If the Court were to find the description in Proposed Service No. 5 a bona fide charter service and not subject to the PCN Certificate requirements of RCW 81.84.010(1), the business of every certificated ferry (and thereby the ability of the public to obtain transportation services) would potentially be jeopardized. The Court should necessarily hold this final proposed service alternative also constitutes a public ferry subject to the PCN Certificate requirements of RCW 81.84.010(1).

V. CONCLUSION

Each of the Appellants' proposed services constitutes a public ferry subject to the PCN Certificate requirements of RCW 81.84.010(1). The Commission's order establishing such was neither arbitrary nor capricious, unsupported by substantial evidence, or incorrect as a matter of law. Any other outcome would permit limitless encroachment upon the franchise rights granted by the State of Washington to certificated commercial ferry companies and cause a substantial risk of harm to the

⁹⁴ CP 68-70.

public, as recognized by the Supreme Court of Washington in *Manitou Beach*.

For all of the above reasons, Intervenor/Respondent Arrow Launch Service, Inc. asks that the Final Order of the Washington Utilities and Transportation Commission be fully affirmed.

RESPECTFULLY SUBMITTED this 5th day of July, 2017.

/s/ Blair I. Fassburg
Blair I. Fassburg, WSBA #41207
David W. Wiley, WSBA #08614
Attorneys for Intervenor/Respondent Arrow
Launch Service, Inc.
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Ph. (206) 628-6600
Fx: (206) 628-6611
Email: bfassburg@williamskastner.com
dwiley@williamskastner.com

PROOF OF SERVICE

I, hereby certify that on July 5, 2017, I filed the foregoing *Responsive Brief of Respondent/Intervenor Arrow Launch Service, Inc.*, through the Court's electronic filing system. I further certify that on July 5, 2017, I caused to be served a copy of the *Responsive Brief of Respondent/Intervenor Arrow Launch Service, Inc.*, to the following:

Via agreed electronic service and US Mail

Julian H. Beattie
Assistant Attorney General
Utilities and Transportation Division
1400 S Evergreen Park Dr. SW
P.O. Box 40128
Olympia, WA 98504-0128
Attorney for Appellees Washington Utilities and Transportation Commission, David Danner, Ann Rendahl, Jay Balasbas, and Steven King

Via agreed electronic service and US Mail

Michael E. Bindas
Institute for Justice
10500 N.E. 8th Street, Suite 1760
Bellevue, WA 98004
Telephone: (425) 646-9300
Facsimile: (425) 990-6500
Email: mbindas@ij.org
Attorney for Appellants James and Clifford Courtney

Dated this 5th day of July, 2017, in Seattle, Washington.

Blair I. Fassburg, WSBA #41207
David W. Wiley, WSBA #08614
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Ph. (206) 628-6600
Fx: (206) 628-6611
bfassburg@williamskastner.com
dwiley@williamskastner.com
*Attorneys for Intervenor/Respondent Arrow
Launch Service, Inc.*

WILLIAMS KASTNER

July 05, 2017 - 1:56 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35095-9
Appellate Court Case Title: James Courtney, et al v Washington Utilities and Transportation, et al
Superior Court Case Number: 15-2-01015-2

The following documents have been uploaded:

- 350959_Briefs_20170705125559D3169965_3018.pdf

This File Contains:

Briefs - Respondent Intervenor

The Original File Name was Response Brief of Respondent Intervenor Arrow Launch Service Inc.pdf

A copy of the uploaded files will be sent to:

- cdainsberg@ij.org
- dwiley@williamskastner.com
- jbeattie@utc.wa.gov
- mbindas@ij.org

Comments:

Sender Name: Maggi Gruber - Email: mgruber@williamskastner.com

Filing on Behalf of: Blair I Fassburg - Email: bfassburg@williamskastner.com (Alternate Email:)

Address:
601 UNION STREET
SUITE 4100
SEATTLE, WA, 98101
Phone: (206) 233-2964

Note: The Filing Id is 20170705125559D3169965