NO. 917442

SUPREME COURT OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY, a Washington municipal corporation,

Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF NATURAL RESOURCES,

Respondent.

RESPONSE TO AMICUS CURIAE MEMORANDUM OF PUBLIC UTILITY DISTRICTS IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

This case involves the plain meaning of RCW 76.04.495, the Forest Fire Suppression Cost Recovery statute (Fire Cost Recovery statute), which provides that "any person, firm, or corporation" that negligently starts forest fires may be liable to the state for the costs of fire suppression. The trial court and the Court of Appeals focused on the unambiguous language of the statute to determine that municipal corporations such as Public Utility Districts (PUDs) are potentially liable for these costs. There is no special exception for PUDs. Petitioner PUD No. 1 of Klickitat County seeks review of the Court of Appeals decision affirming the trial court. The Amici are similarly situated PUDs supporting review.[1]

Amici seek to raise new issues not previously argued by the parties in an attempt to argue that the case involves constitutional questions and an issue of substantial public interest. But Amici provide no credible argument as to why their newly raised issues are implicated by this case. Amici claim making them liable under the Fire Cost Recovery statute raises issues under Const. art. VIII, § 6, but cite no authority for the proposition that making them responsible for fires they negligently set

[1] The Amici are PUDs within Chelan, Clallam, Clark, Douglas, Grant, Grays Harbor, Jefferson, Lewis, Mason, Pacific, Skamania, Whatcom, Cowlitz, Snohomish, and Ferry counties.

implicates a constitutional limit on municipal debt. Likewise, Amici's apparent argument, that allowing the Washington State Department of Natural Resources (DNR) to sue other governmental entities somehow implicates the separation of powers doctrine, is not supported by any authority explaining how allowing one executive authority to sue another raises the issue.

Further, Amici's contention that the new issues need review is based on a misunderstanding of the Fire Cost Recovery statute and on unsupported, speculative assertions regarding matters not part of the record below. This Court should deny review.

II. REASONS AMICI FAIL TO SUPPORT ACCEPTANCE OF THE PETITION FOR REVIEW

A. Amici's Request for Review is Based on New Issues Not Raised by the Parties, Which Amici Attempt to Support Through Unsubstantiated Assertions on Matters Unrelated to the Record on Review.

Amici invite the Court to analyze three new issues: the state constitutional limitation on municipal debt under Const. art. VIII, § 6, the separation of powers doctrine, and the appropriateness of allowing DNR to sue other governmental entities for fire suppressions costs. These new issues have not been raised by any party. An appellate court will generally decide a case only on the basis of the issues set forth by the parties. RAP 12.1(a) (review generally confined to parties' issues); RAP 13.7(b)

(scope of Supreme Court review of Court of Appeals decision). *See, e.g.*, *State v. Gonzalez,* 110 Wn.2d 738, at 752 n.2, 757 P.2d 925 (1988) (arguments raised only by amici curiae need not be considered). *See also* RAP 9.12 (appellate court to consider only evidence and issues called to attention of trial court issuing order on summary judgment).

To convince the Court that these newly raised issues must be addressed, Amici make dire predictions about the adverse economic consequences of making municipal corporations subject to civil actions under the Fire Cost Recovery statute. Amici Br. at 4-5. These statements should be disregarded. First, they are not part of the record on review. The Supreme Court's review is generally limited to the record on review consisting of a report of proceedings, clerk's papers, exhibits, and a certified record of administrative adjudicative proceeding. *See* RAP 9.1(a) (describing "record on review"); RAP 13.7(a) (Supreme Court review of Court of Appeals decision based on record in the Court of Appeals). *See also* RAP 9.11 (limitations on additional evidence considered on review). Second, these new alleged "facts" are nothing more than unsubstantiated, speculative pronouncements. *See* Amici Br. at 4-5. Amici provide no proper citation or documentation that would allow the credibility of these assertions to be assessed. Amici have therefore not provided this Court with the kind of new, reliable information appellate

courts use to aid legal reasoning. *See Wyman v. Wallace*, 94 Wn.2d 99, 102-03, 615 P.2d 452 (1980) (discussing legislative fact doctrine providing judicial notice of scholarly works, scientific studies, and social facts).

B. Amici Have Not Demonstrated That Their Newly-Raised Constitutional Issue Regarding Limitations on Municipal Debt is Even Implicated by This Case.

Not only do Amici rely on speculative claims in attempting to raise new constitutional issues, but the constitutional errors alleged are not even present in this case. First, Amici allege that constitutional limitations on municipal debt are implicated because making PUDs subject to the Fire Cost Recovery statute may require PUDs to make payments in the future. Amici Br. at 4-5. This is not a case involving a PUD's foray into some ill-advised venture threatening its budget—in other words, a case raising issues under Const. art. VIII, § 6 (limitations on municipal debt). *See, e.g., In Re Bond Issuance of Greater Wenatchee Regional Events Center Public Facilities District*, 175 Wn.2d 788, 281 P.3d 567 (2012) (loan agreement supporting regional event center found to trigger city's debt limit). This is a case involving the plain language of a statute that stands for the unremarkable proposition that PUDs are required to reimburse the state for the costs of suppressing forest fires started by their own negligence. The cost arising from negligently caused fires is an

inherent risk of doing business by a PUD, not a limitation on municipal debt.

The plain meaning rule used by the courts below to determine what the Legislature intended in the Fire Cost Recovery statute provides that courts give effect to unambiguous language. *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). Courts look beyond the words of the provision being scrutinized and determine the plain meaning based on "all that the Legislature has said in the . . . related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

Under the plain language of the statute, the Legislature intended that a municipal corporation, such as a PUD, is a "person" and a "corporation" under RCW 76.04, and is therefore subject to civil actions by the state for recovery of fire suppression costs. *Dep't of Natural Res. v. Pub. Util. Distr. No. 1 of Klickitat County*, No. 31853-2-III, slip op. at 2 (Div. III, April 30, 2015). Although Amici may quarrel with this policy choice, holding governmental entities financially responsible for their actions is not unique to the Fire Cost Recovery statute. *See, e.g.*, RCW 70.105(D).040(2) (liability for "each person" under Model Toxics Control Act (MTCA)); RCW 70.105(D).020(24) ("person" under MTCA to include units of local government); RCW 4.96.010 (local

governmental entities liable for tortious conduct); RCW 4.96.010(2) and RCW 39.50.010(3) (local governments include Public Utility Districts). Amici fail to cite any authority that making PUDs liable for their own actions implicates Const. art. VIII, § 6; the issue is simply not presented in this case. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, and may assume that counsel, after diligent search, has found none.").

Not only do Amici fail to cite any authority to suggest that Const. art. VIII, § 6 is implicated here, but they also rely on unsubstantiated assertions about the state's fire suppression program and its supposed financial impact on municipal corporations. Although not in the record and without factual basis, Amici allege that the state's forest fire suppression system is inefficient and therefore PUDs will incur constitutionally impermissible debt if forced to reimburse the state for the cost of suppressing fires. Amici Br. at 4-5. Amici misunderstand the state's fire suppression and cost recovery authorities.

The costs for which liable parties are responsible are not, as Amici claim,[2] inflated by "double recovery" to DNR simply because DNR may receive partial reimbursement from the federal government for the costs to

[2] Amici Br. at 5.

fight those fires that are eligible for federal reimbursement. Under the Federal Fire Management Assistance Grant Program, states must take all reasonable steps to recover costs attributable to third-party negligence as a condition of accepting federal money under this program. Any recovery goes back to the original source of the federal funding. Grant recipients such as DNR must repay the federal government for duplicative amounts they receive from other sources. *See* 42 U.S.C. § 5155 (restriction on duplication of benefits under federal emergency funding); 44 C.F.R. § 204.62(c) (duplication and recovery of assistance under federal Fire Management Assistance Grant Program).

Amici also ignore the statutory mandate that DNR's firefighting efforts be efficient and that its fire suppression cost recovery be limited to only reasonable expenses. *See* RCW 76.04.175 (DNR shall use the most "effective and efficient" equipment resources to respond to wildfires); RCW 76.04.495(1) (negligent parties liable under Fire Cost Recovery statute for any "reasonable expenses"). Further, municipal corporations are not helpless to control their operational risks. The Legislature has provided a comprehensive self-insurance system. *See* RCW 48.62 (local government insurance statute). PUDs may avoid excessive debt by prudently managing their budgets, insuring against losses, and carefully undertaking their duties so they do not negligently start forest fires. Far

from raising a constitutional question regarding municipal debt, the Fire Cost Recovery statute ensures that the PUDs pay for the state's reasonable fire suppression costs when they negligently start fires while providing the PUDs, like all other corporations, with an incentive to prevent such fires.

Many of Amici's arguments are based on pure speculation. Amici assert that making PUDs responsible for the costs of suppressing fires they themselves start "could place an enormous, disproportionate burden" on their ratepayer/taxpayer citizens. Amici Br. at 4-5. They contend the Fire Cost Recovery statute places PUDs and municipalities at risk of bankruptcy. Amici Br. at 5. Amici also claim the Fire Cost Recovery statute will result in expenses exceeding the PUDs' available insurance limits in an era when insurance is increasingly hard to obtain. Amici Br. at 5. Amici provide absolutely no support for these bald assertions.[3] As explained above, this undocumented speculation is not new "evidence" an appellate court can rely upon in its decision making.

In short, Amici provide no persuasive argument that merely requiring PUDs to avoid negligently starting forest fires and being responsible for firefighting costs if they fail to do so would result in an

[3] It is also difficult to understand how Amici's concerns about the availability of insurance support their view that they should not be liable to the State when they negligently start fires when their liability for third party property damage arising from these fires is likely to have a much greater economic impact than the costs to suppress such fires.

economic impact so calamitous it implicates the municipal debt limits in the state constitution.

This case does not raise a constitutional issue regarding limitation on municipal debt requiring review under RAP 13.4(b)(3).

C. Amici's Newly-Raised Issues Regarding the Separation of Powers and the Propriety of Allowing DNR to Sue Other Governmental Entities for Fire Suppression Costs Are Not Constitutional Issues or Issues of Substantial Public Interest Requiring Review.

Amici also provide no credible argument that the Fire Cost Recovery statute implicates the separation of powers doctrine. Amici Br. at 6-7. Although difficult to discern, the PUDs' argument regarding separation of powers appears to be that DNR should not be allowed to sue other governmental entities. Amici Br. at 6-7. Amici fail to explain how their argument implicates a separation of powers, just as they fail to cite any authority in support of their argument. In fact, it is not uncommon for state agencies to have authority to enforce state statutes against other governmental entities. *See e.g.* RCW 76.09 (DNR to enforce state forest practices requirements on "persons" defined in RCW 76.09.020(24) as including other state or local governmental entities); RCW 90.58.090 (Department of Ecology to enforce Shoreline Management Act master program requirements on local governments). Like constitutional

limitations on municipal debt, separation of powers is simply not present in this case.

Further, allowing DNR to sue other public entities is not an issue of substantial public interest; rather it is the simple application of the plain language of the statute which unambiguously allows DNR to file civil actions against municipal corporations that negligently start fires in order to recoup the State's fire suppression expenses. Any PUD opposition with this legislative policy choice should be addressed with the Legislature, not the courts.

This case does not raise a separation of powers issue requiring review under RAP 13.4(b)(3) or an issue of substantial public importance meriting review under RAP 13.4(b)(4).

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III. CONCLUSION

Amici fail to provide grounds for acceptance of review under RAP 13.4(b). DNR respectfully requests that the Court deny the Petition for Review.

RESPECTFULLY SUBMITTED this 26th day of August, 2015.

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I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on August 26th 2015, as follows:

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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 26th day of August, 2015, at Olympia, Washington.

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