

COURT OF APPEALS  
DIVISION II

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No. 38297-1-II

STATE OF WASHINGTON  
BY  DEPUTY

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

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**APL Limited, American President Lines, LTD.,  
and Eagle Marine Services, LTD**

**Appellants,**

**v.**

**Washington State Department of Revenue,**

**Respondent.**

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**Reply Brief of Appellants**

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Scott M. Edwards, WSBA No. 26455  
PERKINS COIE LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

Attorneys for Appellants

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## Argument

**A. The Department concedes that the trial court's summary judgment decision was based on erroneous factual inferences adverse to the non-moving party.**

The Department admits that the trial court's summary judgment ruling was based on untrue "facts" the trial judge inferred adverse to APL. The Department even provides details confirming the trial court's factual errors. Resp. Br. at 12, n.7. Moreover, the Department does not dispute that, on summary judgment, courts must consider the facts in the light most favorable to the non-moving party (APL in this case) and must deny summary judgment "if reasonable minds could draw different conclusions" or "the record shows any reasonable hypothesis that entitles the non-moving party to relief." App. Br. at 8 (citations omitted). Although the trial court's summary judgment undeniably violates these fundamental summary judgment principles, the Department's only response is to disparage APL's discussion of the trial court's acknowledged, reversible errors as "niggling criticism." Resp. Br. at 12.

Unable to defend the trial court's judgment, the Department pleads with this Court to reach the Department's desired outcome (dismissal of APL's claims) on alternative grounds. Resp. Br. at 10. However, like the trial court's ruling, the Department's alternative arguments are based on erroneous factual inferences adverse to the non-moving party, APL.

**B. The T5 Cranes are annexed to Terminal 5.**

**1. The Department does not dispute that fixtures are by nature capable of being moved.**

As APL has noted, it is a defining characteristic of a fixture that it retains its separate identity and, therefore, is capable of being severed from the realty and moved to another location. App. Br. at 10. The Department does not dispute this point, or the fact that many Washington fixtures cases involve items that have actually been moved, including for example, the flagpole held to be a fixture in *Hall v. Dare*, 142 Wash. 222, 227, 252 P. 926 (1927), and the chandelier held to be a fixture in *Strain v. Green*, 25 Wn.2d 692, 698-700, 172 P.2d 216 (1946), both discussed in App. Br. at 11. The Department also ignores APL's discussion of the Department's own determination, published as precedent under RCW 82.32.410, expressly holding that being able to move an item without damaging the realty to which it is annexed is "not significant" in determining whether the article is a fixture. DOR Determination No. 89-55, (copy at CP 237) (holding that a one-ton printing press sitting on a concrete foundation was a fixture notwithstanding the ease with which it was possible to remove the press).

Ignoring these controlling authorities, the Department repeatedly

asserts (without citation to any supporting authority)<sup>1</sup> that the Terminal 5 cranes (“T5 Cranes”) are not annexed to Terminal 5 merely because it would be physically possible to sever the T5 Cranes from Terminal 5, disassemble them, transport the parts to another location and rebuild them. Resp. Br. at 3, 9, 13, 14, 15, 17, 23, 24. Consequently, it would take vastly more time, effort, and expense<sup>2</sup> to sever and move the T5 Cranes than it did to actually move the flag pole in *Hall v. Dare* or the chandelier in *Strain v. Green* (or would have taken to move the printing press in Det. No. 89-55). Yet the Department fails to explain how or why movability would preclude the T5 Cranes from being fixtures when the T5 Cranes share that characteristic with numerous items held to be fixtures.

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<sup>1</sup> The closest the Department comes is a citation to *Dep’t of Revenue v. The Boeing Co.*, 85 Wn.2d 663, 538 P.2d 505 (1975). Resp. Br. at 14. (emphasis added). However, the *Boeing* did not address or decide whether the jigs were annexed (the Department conceded they were). Instead, in considering Boeing’s intent, the court emphasized that Boeing had *designed* the jigs to be easily moved in and out of the plant and that the plant was not specially designed for the particular assembly jigs. 85 Wn.2d at 669. The facts in this case are the exact opposite. The T5 Cranes were *not designed* to be easily removed. CP 200 Rather, they were designed and contractually required to be installed at Terminal 5 for their entire expected useful economic life. CP 202, 209. Moreover, Terminal 5 was rebuilt specifically to support the T5 Cranes as part of a functionally integrated container crane system. CP 200-02.

<sup>2</sup> The record shows that in 1992 it cost over \$800,000 and took nearly two months to decommission one crane at an Oakland port (smaller than the T5 Cranes), add reinforcements to parts of the frame to withstand the rigors of transit, ship the crane to Seattle, remove the reinforcements and install it. CP 230.

2. **The T5 Cranes are annexed because they were specially fabricated for Terminal 5, fulfilling the standard applied by the Court of Appeals in both *Glen Park* and *Western Ag*.**

The Department does not dispute that the T5 Cranes were specially designed to be constructed and installed at Terminal 5. Rather, the Department erroneously suggests a potential, but irrelevant, difference of opinion between Division II and Division III as to whether a discussion in *Courtright Cattle Co. v. Dolsen Co.*, 94 W.2d 645, 657, 619 P.2d 344 (1980) of an item's use in relation to the "overall use of the property" was made in the context of annexation or intent. Resp. Br. at 16-17. The Department misreads both APL's argument and *Glen Park Associates, LLC v. Dep't of Revenue*, 119 Wn. App. 481, 82 P.2d 3d 664 (2003).

The Department's argument focuses on APL's observation that *Western Ag Land Partners v. Dep't of Revenue*, 43 Wn. App. 167, 716 P.2d 310 (1986), identified the "relationship of the object to the realty" as a factor considered by courts in analyzing the annexation prong of the fixtures test. App. Br. at 13. However, this observation is immediately followed with an explanation ignored by the Department:

Citing *Nearhoff* [*v. Rucker*, 156 Wash. 621, 287 P.2d 1231 (1930)], among other cases, the Court explained that an article is annexed under Washington fixture law when "it is ***specially fabricated*** for installation or because it is a ***necessary functioning part*** of or accessory to an object which is a fixture." *Western Ag*, 43 Wn. App. at 172.

App. Br. at 13 (emphasis added). The *Glen Park* Court expressly agrees with *Western Ag* on this point and factually distinguishes the household appliances at issue in that case, explaining that *Western Ag* “does not help Glen Park. The appliances here were ***not specially fabricated*** for the apartments and they were ***not necessary parts*** of or accessories to fixtures.” *Id.* at 488-89 (emphasis added). The *Glen Park* Court emphasized that the household appliances at issue in that case were all stock, off-the-shelf consumer products that “need only to be plugged in to work properly.” *Id.* at 488.

It is undisputed that, ***like*** the center pivot irrigation equipment in *Western Ag*, and ***unlike*** the standard off-the-shelf household appliances in *Glen Park*, the T5 Cranes were ***specially fabricated*** for installation at Terminal 5.<sup>3</sup> The record also establishes that the T5 Cranes are ***necessary parts*** of other Terminal 5 fixtures and improvements— specifically the other components of the Terminal 5 Container Crane System, including: the steel crane rails embedded in the concrete apron; the specially designed structurally reinforcements supporting the apron; and T5 Cranes and the dedicated high-voltage electrical substation to which the T5

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<sup>3</sup> The Port of Seattle “developed specifications for the Terminal 5 Container Cranes to function as integral components of Terminal 5, tailored to the dimensions of Terminal 5’s apron, its weight-bearing capacity, the dimensions of the container ships it serves, and other characteristics ... includ[ing] storm wind loads, seismic (earthquake) loads, and ambient temperatures.” App. Br. at 2 (citing CP 201, 229).

Cranes are hardwired with two-inch thick electrical cabling.<sup>4</sup> CP 205.

Thus, the T5 Cranes are annexed to Terminal 5 in accordance with the standards the Court applied in both *Western Ag* and *Glen Park*.

**3. Size does not preclude large items from being annexed. To the contrary, the Washington Supreme Court instructs that heavy objects are annexed by “gravity alone.”**

The Department contends that the T5 Cranes are not annexed to Terminal 5 because “large items” are “not exempt ... from being classified as personal property.” Resp. Br. at 13. The Department thus implies that because some large items were not fixtures, an object’s size precludes all large items from being annexed. Again, the Department’s argument is both factually and legally wrong.

It is legally wrong because none of the three cases it cites in support of its proposition even involve annexation. As the Department’s own descriptions note, all three were decided on the issue of the owner’s intent at the time of annexation (an issue for which size was *not* among the dispositive factors). As the Department acknowledges, in *Boeing* the Court held that “Boeing did not *intend* the jigs to be a permanent

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<sup>4</sup> Ironically, if the plaintiff had not insisted on the same result for all of the appliances at issue, the *Glen Park* opinion indicates the Court would have held that the dishwashers were fixtures because they “are hardwired and more permanently plumbed.” 119 Wn. App. at 489, n.4. The T5 Cranes, which each have an electrical power load equivalent to 4,000 single family homes and hardwired to a dedicated electrical substation with two-inch thick cabling, are at least as annexed as a standard apartment dishwasher.

accession to the realty.” Resp. Br. at 14 (emphasis added). Similarly, the Department acknowledges that in *Union Elevator & Warehouse Co., Inc. v. State ex. rel Dep’t of Transportation*, 144 Wn. App. 593, 599, 183 P.3d 1097 (2008), equipment used in grain elevators (and routinely moved between various grain elevators) was held not be fixtures because “the owner did not *intend* to permanently affix the equipment to the elevator.” Resp. Br. at 14. And *Lipsett Steel Products v. King County*, 67 Wn.2d 650, 409 P.2d 475 (1965) was decided by applying a legal presumption regarding intent – presuming that a tenant who annexes something to leased land does not intend to transfer ownership and convert the item into part of the landlord’s real property.<sup>5</sup> As the Department notes, the scrap shear at issue in that case was installed by a tenant on leased land. Resp. Br. at 15. Moreover the lease agreement, consistent with the presumption, affirmed that ownership of the machinery remained in the tenant. 67 Wn. 2d at 652.

The only guidance these cases provide regarding annexation is the Department’s concession in *Boeing* that assembly jigs were annexed (85 Wn.2d at 668, n.3) even though many of them were “secured by their

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<sup>5</sup> The opposite presumption applies in this case since the Port installed the T5 Cranes on its own land. When a property owner attaches an item to its own land, the owner is presumed to have annexed it with the intention of enriching the freehold. *Western Ag*, 43 Wn. App. at 173, citing *Nearhoff v. Rucker*, 156 Wash. 621, 628, 287 P. 658 (1930) and *Hall v. Dare*, 142 Wash. 222, 227, 252 P. 926 (1927).

massive weight alone.” *Id.* at 664. Weighing between 70 and 120 tons, the assembly jigs were a small fraction of the size of the 800-ton T5 Cranes. By changing its position in this case, the Department also disregards its own regulations. In WAC 458-12-010(3)(a)(ii) the Department confirms that “a heavy piece of machinery or equipment set upon a foundation without being bolted thereto could be considered as affixed.” The Department adopted this regulation under RCW 82.32.300 providing that the regulation has “the same force and effect as” a tax statute.

Unlike its litigating position here, the Department’s regulation conforms to Washington law. The Washington Supreme Court has long held that “‘annexation’ is not of necessity an absolute fastening or continued physical union.” *Chase v. Tacoma Box Co.*, 11 Wash. 377, 381, 39 Pac. 639 (1895).<sup>6</sup> More directly, the Court held in *Hall v. Dare* that a 700-pound flag pole was annexed by “gravity alone,” and noted that “gravity is the only force that holds practically every wooden building to its foundation.” 142 Wash. at 227.

Under controlling Washington law, the massive, 800 ton weight of the T5 Cranes does cause them to be annexed by gravity, like the smaller 120 ton assembly jigs in *Boeing* and the 700 pound flagpole in *Hall v.*

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<sup>6</sup> *Boeing* credits *Tacoma Box* as the case that “originally imported” the common law test of fixtures “into the law in Washington.” 85 Wn.2d at 667-68.

*Dare*. While legally sufficient, as discussed in section 2 above, gravity is not the only basis by which the T5 Cranes are annexed to Terminal 5. They are also annexed by: (1) having been specially fabricated for installation at Terminal 5; (2) being installed on crane rails embedded in a concrete apron supported by specially reinforced piers specifically designed and constructed for the T5 Cranes; (3) being a necessary part of the Terminal 5 Container Crane System; and (4) being hardwired with two inch thick cable to a dedicated high voltage electrical substation.

**C. Like the trial court, this Court should decline to decide the factual issue of intent on summary judgment, especially in light of the Department's factual misstatements.**

The Department acknowledges that the trial court expressly declined to resolve the parties' factual dispute regarding the Port of Seattle's intent when it annexed the T5 Cranes to Terminal 5 over 20 years ago. Resp. Br. at 12, *quoting* RP at 29; Resp. Br. at 18-19. Moreover, the Department does not dispute that summary judgment is improper "when different inferences can be drawn from the evidence regarding ultimate facts such as intent." App. Br. at 6, citing *Security State Bank v. Burk*, 100 Wn. App. 94, 102, 995 P.2d 1272 (2000).

Nevertheless, the Department makes numerous erroneous factual arguments when pleading with this Court to make a *de novo* summary judgment ruling that the Port of Seattle did not intend to annex the T5

Cranes to Terminal 5. Resp. Br. at 19.

**1. The Lease does not contain an “express agreement ... that the cranes were viewed as personal property.**

The Department contends that the T5 Cranes do not satisfy the intent prong of the common law fixtures test on the theory that the Lease allegedly contains an “express agreement” that “the cranes were viewed as personal property.” Resp. Br. at 20. This contention is both factually wrong and legally irrelevant.

The Lease makes no reference whatsoever about the T5 Cranes’ status as either real or personal property, which is why the Department fails to cite to any specific provision of the Lease allegedly supporting its contention. Even if the Lease had characterized the T5 Cranes as either real or personal property, such an “express agreement” as to the ultimate legal conclusion would not be relevant anyway. *See Glen Park*, 119 Wn. App. at 491 (the court disregarded a Deed of Trust which expressly classified the items at issue as fixtures). As the Department twice notes, the relevant intent is an objectively manifested intent that the item be a permanent accession to the realty,<sup>7</sup> not a subjective intent as to whether an item should be classified as real or personal property. Resp. Br. at 19, 20.

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<sup>7</sup> The permanence required for personal property to become a fixture is not equated with perpetuity; it is sufficient that an item is intended to remain where it is affixed until worn out, the purpose to which the realty is devoted is accomplished, or the item is superseded by one more suitable for the purpose. 35A Am.Jur.2d, Fixtures §6; *accord, Seatrain*, 83 Cal. App. at 77-78.

Although the Department quotes a list of “pertinent factors” Washington courts consider in evaluating objective intent, the Department fails to analyze any of the objective intent factors it identifies. Resp. Br. at 19. In contrast, APL’s brief opposing the Department’s summary judgment motion demonstrates that those objective factors establish the Port’s intent to annex the T5 Cranes to Terminal 5 for the entirety of their expected useful life. CP184-89.

**2. The Lease does not “describe the cranes as equipment.”**

The Department also repeatedly and erroneously asserts that the lease “describes the cranes as equipment.” Resp. Br. at 6, 20. Again the Department fails to quote or cite to any specific part of the lease that describes the T5 Cranes as “equipment.” Contrary to the Department’s unsupported contention, the Lease defines the term “Premises” (Lease para. 1(a), CP 35), as well as the term “Cranes” (Lease para. 1(d)(i), CP 36), but does not define “equipment.” Moreover, the Lease’s repeated use of the phrase “the Cranes, the Premises or ... equipment” contradicts the Department’s unexplained suggestion that the term “equipment” in the Lease includes the Cranes. Lease ¶ 12(a), 12(b) and 16, 48, 49.

Besides the Department’s factual misstatements about the Lease, the Department is also wrong in its legal premise – that “equipment” cannot be a fixture. Resp. Br. at 9 (“cranes are equipment and as such are

personal property”).<sup>8</sup> Many fixtures are appropriately described as “equipment.” The Department’s own administrative regulation defines “real property” as “including machinery and equipment which become fixtures.” WAC 458-12-010(3). In *Western Ag*, the Court quoted and invoked the Department’s regulation in analyzing whether “center pivot irrigation equipment” at issue in that case were fixtures. *Western Ag*, 43 Wn. App. at 170-71. The Department has done likewise in its published determinations. Det. No. 89-55, 7 WTD 151 at 156 (printing press equipment held to be real property fixtures).

**3. The Lease does not “specify[] sales tax is due on the rental of the cranes.”**

The Department also argues “[s]pecifically, by including a lease provision specifying sales tax is due on the rental of the cranes, the parties expressly intended the cranes to be considered personal property.” Resp. Br. at 23. Yet again the Department’s contention is both factually and legally wrong.

It is factually wrong because, as the Department was forced to concede below, the Lease makes *no mention* of sales tax whatsoever; the words do not even appear in the Lease. CP 225. The Department’s

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<sup>8</sup> The Department's argument appears to come from a misplaced reliance on *Boeing*. Resp. Br. at 23. However, the *Boeing* Court clarified that Boeing's designation of the jigs as "equipment" was "not conclusive as to what is and is not a fixture[.]" 663 Wn.2d at 670.

purported reliance on an express sales tax provision is not based on the Lease but on the Department's own mistaken analysis of the Sixth Amendment to the Lease – an amendment not made until 1994, nine years after the relevant time period for determining the Port's intent.<sup>9</sup> Resp. Br. at 21. The Sixth Amendment made APL “responsible for *repaying* to the Port *sales tax incurred by the Port* in connection with the costs of raising the existing container cranes at Terminal 5.” CP 13 (emphasis added). As the Department has previously acknowledged, that provision does *not* address sales tax on APL's crane rental payments. CP 13. Rather, the amendment identifies sales tax paid *by the Port* on capital improvements the Port made to the T5 Cranes as part of the Port's capital improvement costs that would be amortized over a 20 year cost recovery period.

The Department is also legally wrong. If the Port regarded the T5 Cranes as personal property, its improvements to the T5 Cranes would have been a wholesale transaction – a purchase for “resale” (that is, for lease) to APL as tangible personal property – and consequently would not have been subject to sales tax. WAC 458-20-211(6)(a) (Personal property purchased for lease is a purchase for resale exempt from sales tax.) Thus 1994's Sixth Amendment to the lease, if relevant to this case, actually

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<sup>9</sup> As the Department repeatedly emphasizes, the owner's intent is determined “at the time of installation.” Resp. Br. at 19, *also* Resp. Br. at 20 (“intent is determined ... at the time the item was installed”).

indicates the opposite, that the Port considered the T5 Cranes to be real property; the improvement of real property is a retail sale subject to sales tax. RCW 82.04.050(2)(b).<sup>10</sup>

**D. *Seatrain* is persuasive authority, applying the same common law fixtures test to indistinguishable facts.**

As the Department acknowledges, resolution of the fixtures issue “depends on the particular facts of each case.” Resp. Br. at 11 (citation omitted). The Washington Supreme Court has recognized “when we come to apply the [fixtures] definition and the criterion to the multifarious facts that arise in the complex affairs of a busy world we are confronted with a difficult task.” *Nearhoff*, 156 Wash. at 627.

As the Washington Supreme Court has noted, Washington courts apply the same common law of fixtures “followed by most American courts.” *Boeing*, 85 Wn.2d at 667-68. It should not be surprising then that Washington courts as well as the Department have looked to cases from other states for guidance when they have addressed similar fact patterns.<sup>11</sup>

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<sup>10</sup> The Department also contends: “If the Port intended the cranes to be permanent additions to the Port’s land, it would not have provided APL the option to purchase the cranes.” Resp. Br. at 25. However, the option does not relate to the T5 Cranes. The Sixth Amendment grants APL an option to purchase two **additional** cranes. An option to purchase **other** cranes granted nine years after the T5 Cranes were installed has no bearing on the issue of the Port’s intent at the time it installed the T5 Cranes.

<sup>11</sup> *See*, Det. No 00-122, 20 WTD 461, 467 (2001) (“we find persuasive the reasoning of the California Court of Appeals in *Chula Vista Electric Co. v. State Board of Equalization*, 125 Cal. Rptr. 827, 830 (Cal. Ct. App. 1975)” in holding that fiber optic cables buried conduit were fixtures.

Thus, the Department's plea (Resp. Br. at 18) to disregard *Seatrain* as non-binding ignores the persuasive value of *Seatrain's* analysis in applying the same legal standard to indistinguishable facts. *Seatrain Terminals of Calif. Inc. v. Alameda County*, 147 Cal. Rptr. 578 (Cal. Ct. App. 1978).

Consistent with the Washington authorities discussed above, the 750-ton cranes at issue in *Seatrain* (like the larger 800-ton cranes at issue here) were held to be annexed to the realty both by their sheer weight and by their installation on crane rails embedded in the wharf that were specifically engineered to support them. 147 Cal. Rptr. at 582. Additionally, the T5 Cranes are erected on a special foundation that was specifically designed to support them – just like the cranes in *Seatrain*, the center pivot irrigation system in *Western Ag*, the tram and trolley in *Nearhoff*, the flag pole in *Hall*, and the printing presses in the Department's own Det. No. 89-55. In each these cases, the construction of a special foundation on the realty to support the item at issue was found to indicate the annexor's intent to enrich the freehold. In contrast, the *Boeing* court emphasized that the jigs were not installed on a special foundation. 85 Wn.2d at 669.

The Department cited to *United State Lines, Inc. v. State Board of Equalization*, 182 Cal. App. 3d 529, 227 Cal. Rptr. 347 (1986) in

attempting to distinguish *Seatrain*. Resp. Br. at 18. The Department's reliance is misplaced. The issue in *U.S. Lines* was the taxability of the *sale* of cargo cranes to the Port of Oakland *before* they were installed, not a *lease* of the cranes *after* their installation. Thus the *U.S. Lines* Court held that although the cranes were real property fixtures once installed on the Port's terminal, prior to their erection they were personal property in the hands of the seller, U.S. Lines. Unlike *U.S. Lines*, the issue here is the classification of container cranes constructed by the Port of Seattle as part of its Terminal 5, for long-term lease to APL. As the court in *U. S. Lines* specifically, noted once erected and owned by the port, the cranes were fixtures under the common law three-prong test. *Id.* at 537.

Finally, the continued use of the T5 Cranes at Terminal 5 is certain; it is controlled by the Lease. Unlike *Boeing*, the Port has contractually committed and bound itself to the continued use of the T5 Cranes at Terminal 5 through its long term lease with APL (originally for a 30-year term; since extended). *Seatrain* emphasized the long term lease of the cranes at issue in that case, as well as the absence of any evidence that the Port had any plans to actually move the cranes, in affirming the trial court's conclusion that the Port intended the cranes to be permanently annexed to the freehold. 147 Cal. Rptr. at 583.

### **Conclusion**

As discussed above and in APL's opening brief, the trial court's grant of summary judgment was improperly based on erroneous factual inferences adverse to the non-moving party. The T5 Cranes are annexed to Terminal 5, not only by the gravity of their massive weight, but also by virtue of having been specially designed for and built on Terminal 5 as an integral part of the Terminal 5 Facility. The Department's alternative arguments are also based on erroneous factual inferences adverse to APL, the non-moving party; as such, they would be an improper alternative basis for affirming summary judgment. Appellants APL respectfully request that the lower court's summary judgment be vacated and the case remanded for trial or such other further proceedings as this Court deems proper to resolve the factual issues and the ultimate legal issue whether the T5 Cranes are fixtures under Washington's three-prong common law test of fixtures.

DATED: June 23, 2009

**PERKINS COIE LLP**

By: 

Scott M. Edwards, WSBA No. 26455

Attorneys for Appellants

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY

DEPUTY

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**CERTIFICATE OF SERVICE**

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Scott M. Edwards, WSBA #26455  
**PERKINS COIE LLP**  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
(206) 359-8000

Attorney for Appellants  
APL LIMITED, AMERICAN PRESIDENT  
LINES, LTD., AND EAGLE MARINE  
SERVICES, LTD.

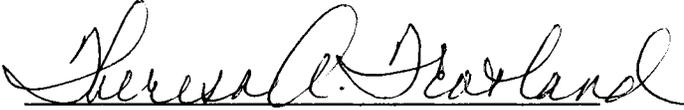
**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the Reply Brief of Appellants was sent via electronic mail and hand delivered this day by legal messenger on the following address:

David M. Hankins  
Assistant Attorneys General  
Attorney General of Washington  
Revenue Division  
7141 Cleanwater Drive SW  
Olympia, WA 98504-0123

Electronic address: David.Hankins@atg.wa.gov

DATED this 23rd day of June, 2009.

  
Theresa A. Trotland