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SUPREME COURT OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY,
a municipal corporation, Respondent/Cross-Appellant,

v.

STATE OF WASHINGTON, PETER GOLDMARK, Commissioner of
Public Lands, and CONSERVATION NORTHWEST, a non-profit
corporation,
Appellants/Cross-Respondents.

BRIEF OF AMICUS CURIAE
CITIES OF TACOMA AND SEATTLE

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I. INTRODUCTION

The authority of Washington's political subdivisions to condemn easements in school lands has been unquestioned for over a hundred years.

This authority is expressly granted in the Enabling Act of 1889 as amended by Congress in 1932, which reads in relevant part:

The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however,* That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.

Enabling Act § 11, 25 Stat. 676 (1889), as amended by Act of May 7, 1932, 47 Stat. 150.

Pursuant to various state statutes, the Washington State Legislature has expressly granted a variety of public entities the authority to exercise this eminent domain authority. See RCW 8.12.030, RCW 43.21A.614, RCW 53.34.170, and RCW 54.16.050.

The State Constitution does not prohibit this eminent domain authority and is inherent in the sovereign authority of the state to exercise jurisdiction over all property owned by the state. The Idaho State Supreme Court put it best when it ruled on the authority of the state to allow the condemnation of school lands granted under the Enabling Act:

When Idaho became a state, it at once necessarily assumed the power of eminent domain, one of the inalienable rights of sovereignty; and that right, we take it, may be exercised over all property within its jurisdiction....We cannot believe that congress meant to admit into the Union a new state, and by that very act throttle the purposes and objects of statehood by placing a prohibition on its internal improvements. To prohibit the state the right of eminent domain over all the school lands granted would lock the wheels of progress, drive capital from our borders, and in many instances necessitate settlers who have taken homes in the arid portions of the state seeking a livelihood elsewhere.

Hollister v. State, 9 Idaho 8, 71 P. 541, 543 (1903), overruled in part on other grounds, *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970).

Finally, this Court has clearly announced (but for some reason uncited by any party to this case) in its decision in *Peterson v. Baker*, 39 Wash. 275, 81 P. 681 (1905), that the Enabling Act did not reserve the school lands for public uses; thereby freeing said lands for condemnation by the Respondents.

Amicus curiae, Cities of Tacoma and Seattle, urge the Court to affirm the decisions of the court of appeals and superior court below.

II. IDENTITY OF AMICUS CURIAE

Amicus are the Cities of Tacoma and Seattle, which are municipal corporations organized as first class cities under the laws of the State of Washington. Amicus have historically exercised their eminent domain authority to condemn school lands under similar statutory authority at

issue in this case. Amicus' condemnation authority is expressly granted by the Legislature under RCW 8.12.030 which provides, in relevant part: "Every city ... within the state of Washington, is hereby authorized and empowered to condemn land and property, including state, county and school lands and property," for a variety of public uses and purposes. RCW 8.12.030.

III. STATEMENT OF THE CASE

Amicus accepts the facts as identified in the briefs of the Respondent/Cross-Appellant. Additionally, the Amicus parties have used the eminent domain authority set forth in RCW 8.12.030 to condemn easements over school lands for the purpose of aiding their public utilities in providing reliable service to their customers. Tacoma and Seattle provide electric service, through city public utilities, to millions of customers. The continuous and reliable provision of service to these customers depends upon the Cities' ability to exercise condemnation authority when necessary. From time to time, the Cities have needed to condemn easements over school lands, and the courts have upheld that exercise of authority. If school lands are not considered to fall within the sphere of land over which condemnation authority can be exercised, public utilities would be faced with the prospect of having to build

transmission lines to avoid these lands, while still ensuring that every customer receives reliable, affordable service – an impossible task. It is both consistent with longstanding Washington precedent, and in the public interest, to continue to allow the condemnation of easements over school lands to accommodate the construction of transmission lines and other facilities. Accordingly, the Amicus parties have a direct interest in the outcome of this litigation and this Court’s ruling, and under this framework, file this brief to assist the Court in deciding this matter.

IV. ARGUMENT

Amicus files this brief to raise four points to the Court, which Tacoma and Seattle believe have not been adequately addressed by the parties in this case.

First, federal law is clear, school lands can be condemned for easements. As part of the process of Washington, Montana, Idaho, North and South Dakota becoming states, Congress granted certain lands for educational purposes and the support of common schools to each of the new states through legislation. Enabling Act, Ch. 180, § § 10, 11, 25 Stat. 676 (1889). The original version of the Enabling Act reserved these lands for “school purposes only” and set forth certain restrictions on their sale and lease to ensure the lands would derive benefit to Washington schools.

Public Utility District No. 1 of Okanogan County v. State, 174 Wn. App. 793 at 797, 301 P.3d 472 (2013).

The Act has been amended at various times over the years, and in 1932, Congress again amended the Act to expressly grant states the authority to prescribe terms to allow for the acquisition of easements over school lands.¹ With this amendment, Congress also removed the former language of the Act that reserved said lands for “school purposes only.”

In this case, Respondents seek only to condemn an easement across school lands, not fee ownership. The Respondents’ actions fall squarely within the statutory authority granted by Congress to the states through the 1932 amendment to the Act. Both Appellants and Respondents fail to address or even mention this fundamental addition to the grant of authority by Congress to the applicable states, but this authority to condemn an easement across school lands appears to be decisive on this issue.

Second, the State Constitution does not prohibit the condemning of an easement across school lands. Const. art. XVI, § 1 requires that any

¹ “The State may also, upon such terms as it may prescribe, grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain: *Provided, however,* That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.” Enabling Act. Ch. 180, § 11, 25 Stat. 676 (1889), amended by Act of May 7, 1932, 47 Stat. 150.

lands the state holds by grant from the United States are to be disposed of in a manner prescribed by the grant thereof.² Through the 1932 amendment, Congress has adjusted the terms by which an interest in these properties may be taken to include the use of eminent domain. Contrary to Appellant's arguments, Const. art. XVI, § 2 is not implicated, because by its plain language § 2 deals only with the conveyance of the land in fee.³ If this were not the case, then the drafters of § 2 would have made reference to "any estate or interest therein" as the drafters did in § 1. Because the Respondents are not attempting to condemn a fee interest in the school lands, arguments related to whether the requirements of § 2 are being met are not germane to this case.

² Const. art. XVI, § 1 reads: DISPOSITION OF. All the public lands granted to the state are held in trust for all the people and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, be paid or safely secured to the state; nor shall any lands which the state holds by grant from the United States (in any case in which the manner of disposal and minimum price are so prescribed) be disposed of except in the manner and for at least the price prescribed in the grant thereof, without the consent of the United States.

³ Const. art. XVI, § 2 reads: MANNER AND TERMS OF SALE. None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder, the value thereof, less the improvements shall, before any sale, be appraised by a board of appraisers to be provided by law, the terms of payment also to be prescribed by law, and no sale shall be valid unless the sum bid be equal to the appraised value of said land. In estimating the value of such lands for disposal, the value of the improvements thereon shall be excluded: *Provided*, That the sale of all school and university land heretofore made by the commissioners of any county or the university commissioners when the purchase price has been paid in good faith, may be confirmed by the legislature.

Third, if the Court is compelled to go beyond analyzing whether more than an easement interest in the school lands is at issue in this case, then *amicus* request that the Court review how other states have addressed their eminent domain authority under the Enabling Act. The provisions of the Enabling Act are applicable not only to Washington, but to four other states (Idaho, Montana, North Dakota and South Dakota) admitted under the Act. Idaho and North Dakota have affirmed the right of the state to allow school lands to be condemned; Montana has rejected such authority; and South Dakota has yet to rule on this particular issue.⁴ See *Hollister v. State*, 9 Idaho 8, 71 P. 541 (1903), overruled in part on other grounds, *Smith v. State*, 93 Idaho 795, 473 P.2d 937 (1970); *State ex rel. Board of University and School Lands v. City of Sherwood*, 489 N.W.2d 584 (N.D. 1992); and *State v. District Court in and for Sanders County*, 42 Mont. 105, 112 P. 706 (1910).

Of particular interest is the Idaho Supreme Court's analysis of the issue. In a 1903 opinion, the Idaho Supreme Court ruled the Enabling Act

⁴ However, as to whether the school lands have been reserved for public use the South Dakota Supreme Court has held that the Enabling Act is a "mere announcement of a governmental policy to withhold, when surveyed, specified portions of the public domain from settlers and purchasers, 'for the purpose of being applied to schools of the states hereafter to be erected,' is neither a grant nor reservation 'for public uses.'" The South Dakota Supreme Court noted that school lands intended to be leased or sold to create a trust fund benefiting public schools "are not reserved for, nor are they put to, a public use." *Riverside Township v. Newton*, 11 S.D. 120, 75 N.W. 899 (1898) (internal citations omitted). See further discussion on page 8 of this brief.

does not prevent the taking of school lands through condemnation

because:

[w]hen Idaho became a state, it at once necessarily assumed the power of eminent domain, one of the inalienable rights of sovereignty; and that right, we take it, may be exercised over all property within its jurisdiction. United States v. Jones, 109 U. S. 513, 3 Sup. Ct. 346, 27 L. Ed. 1015; Moran v. Ross, 79 Cal. 159, 21 Pac. 547; Cooley on Const. Limitations, 647; Southern Pac. Ry. v. Railway Co., 111 Cal. 221, 43 Pac. 602; Lewis, Eminent Domain, sec. 2; Parmelee v. Railroad Co., 7 Barb. 559; United States v. Chicago, 7 How. 185, 12 L. Ed. 660. But even if congress had the authority, in granting these lands to the state, to restrict and prohibit the state in the exercise of the power of eminent domain, we do not think it was intended or attempted in the admission act.

Hollister v. State, 9 Idaho at 8.

This Court did not review or consider the rationale of *Hollister* in reaching its decisions in *Roberts v. City of Seattle*, 63 Wash. 573, 116 P. 25 (1911) and *City of Tacoma v. State*, 121 Wash. 448, 209 P. 700 (1922), where the Court affirmed the right of the cities to condemn school lands. Nevertheless, the reasoning in *Hollister* offers this Court another basis to continue to acknowledge the right of the State Legislature to permit the condemnation of school lands.

Lastly, the parties devote a great deal of argument concerning whether, by virtue of the language in the Enabling Act, the school lands have been dedicated or reserved to a public use thereby barring the

property from condemnation. However, neither party has referenced or commented on the decision of this Court in *Peterson v. Baker*, 39 Wash. 275, 81 P. 681 (1905), which held the Enabling Act did not reserve the school lands for public use generally, and specifically as the question relates to the use of the lands for the granting of a right of way easement for the construction of a highway. In *Peterson*, plaintiffs filed suit to prevent King County from opening or maintaining a public road that crossed school lands, claiming the school lands had been “reserved for public uses” under the Enabling Act. *Id.* In reaching its decision that the lands were not reserved for public uses, this Court quoted extensively the decision of the Supreme Court of South Dakota, which held the language of the Enabling Act is a “mere announcement of a governmental policy to withhold, when the same shall be surveyed, specified portions of the public domain from settlers and purchasers, ‘for the purpose of being applied to schools of states hereafter to be erected,’ is neither a grant nor reservation ‘for public uses.’” *Id.*, citing *Riverside Township v. Newton*, 11 S.D. 120, 75 N.W. 899 (1898). Continuing to quote from the South Dakota Supreme Court decision, this Court noted that the act of Congress that granted the right of way over the school lands, taken together with the Enabling Act, created an easement that ran across boundary lines of school lands “designed to be leased or sold by the state for the purpose of creating

a trust fund for the benefit of the public schools. Such lands are not reserved for, nor are they put to a public use.” *Id.* Accordingly, basing its opinion on the holding of *Riverside Township*, this Court held that the school lands were not “reserved for public uses” and there existed a “valid and subsisting public highway” across the school lands. *Id.*

This Court should continue to follow the precedent it established in *Peterson* and find that the school lands are not dedicated to a public use, and may be condemned by the Respondents for an easement.

V. CONCLUSION

For the reasons and arguments stated above amicus request the court to affirm the decisions of the court of appeals and the superior court.

DATED this 21st day of January, 2014.

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Attachments: Motion to File Amicus Brief 01-21-14.pdf; Amicus Brief 01-21-14.pdf; Declaration of Service 01-21-14.pdf

Dear Deputy Clerk of the Court:

Please find attached for filing with the court the following documents:

- 1) Cities of Tacoma and Seattle's Motion for Leave to File Amicus Curiae Memorandum;
- 2) Brief of Amicus Curiae Cities of Tacoma and Seattle; and
- 3) Declaration of Service.

CASE NAME: *Public Utility District No. 1 of Okanogan County v. State of Washington, et al.*

CASE NO.: Supreme Court of the State of Washington, No. 88949-0.

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Thank you.
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