

IN THE SUPREME COURT OF WASHINGTON

KEMPER FREEMAN, JIM HORN,  
STEVE STIVALA, KEN  
COLLINS, MICHAEL DUNMIRE,  
SARAH RINLAUB, AL  
DEATLEY, JIM COLES, BRIAN  
BOEHM, and EASTSIDE  
TRANSPORTATION  
ASSOCIATION, a Washington  
nonprofit corporation,

Petitioners,

v.

CHRISTINE O. GREGOIRE, a  
state officer in her capacity as  
Governor of the State of  
Washington, and PAULA J.  
HAMMOND, a state officer in her  
capacity as Secretary of the  
Washington State Department of  
Transportation,

Respondents

PETITION AGAINST STATE  
OFFICER

**INTRODUCTION**

Kemper Freeman, Jim Horn, Steve Stivala, Ken Collins, Michael  
Dunmire, Sarah Rinlaub, Al DeAtley, Jim Coles, Brian Boehm, and  
Eastside Transportation Association submit this Petition pursuant to the

Washington Constitution, art. IV, § 4 and RAP 16.2, which permit a party to file an original action in the Supreme Court against a state officer “in the nature of quo warranto, prohibition or mandamus.” RAP 16.2(a).

Petitioners seek a writ of prohibition prohibiting the Washington State Department of Transportation, through Paula J. Hammond, a state officer in her capacity as Secretary of the Department of Transportation or through Christine O. Gregoire, a state officer in her capacity as Governor of the State of Washington, from selling or leasing any portion of Interstate 90 to Sound Transit for light rail. Such sale or lease is unconstitutional under the 18<sup>th</sup> Amendment of the Washington Constitution, which prohibits the sale or lease of highway lands purchased with motor vehicle fund moneys for non-highway purposes.

Petitioners allege:

#### **I. PARTIES AND JURISDICTION**

- 1.1 Petitioner is Kemper Freeman is a citizen, taxpayer and resident of Bellevue, Washington.
- 1.2 Petitioner Jim Horn is a citizen, taxpayer and resident of Mercer Island, Washington.
- 1.3 Petitioner Steve Stivala is a citizen, taxpayer and resident of Seattle, Washington.

- 1.4 Petitioner Ken Collins is a citizen, taxpayer and resident of Tacoma, Washington.
- 1.5 Petitioner Michael Dunmire is a citizen, taxpayer and resident of Woodinville, Washington.
- 1.6 Petitioner Sarah Rindlaub is a citizen, taxpayer and resident of Mercer Island, Washington.
- 1.7 Petitioner Al DeAtley is a citizen, taxpayer and resident of Yakima, Washington.
- 1.8 Petitioner Jim Coles is a citizen, taxpayer and resident of Kirkland, Washington.
- 1.9 Petitioner Brian Boehm is a citizen, taxpayer and resident of Ellensburg, Washington.
- 1.10 Petitioner Eastside Transportation Association (“ETA”) is a nonpartisan, nonprofit corporation organized under the Laws of the State of Washington whose purpose and mission is to encourage the informed and active participation of citizens in government; to promote and increase citizens and governmental officials’ understanding of major public transportation issues.
- 1.11 Respondent Christine O. Gregoire is the Governor of the State of Washington.

- 1.12 Respondent Paula J. Hammond is the Secretary of the Washington State Department of Transportation (“WSDOT”).
- 1.13 The Supreme Court has original jurisdiction of this matter pursuant to art. IV, § 4 of the State Constitution and RAP 16.2, which provide for discretionary jurisdiction of a petition against a state officer in the nature of quo warranto, prohibition or mandamus.

## II. FACTS

- 2.1 Interstate 90 is a component of the national system of interstate highways.
- 2.2 The construction and maintenance of Interstate 90 is financed exclusively by federal and state highways funds and the laws of both entities govern its location and construction.
- 2.3 Interstate 90 is designated as a state route in RCW 47.17.140 and is a limited access facility as defined in RCW 47.52.010. Interstate 90 is also a designated highway of state significance pursuant to RCW 47.05.021.
- 2.4 As a limited access facility, title to Interstate 90 is vested in the State of Washington, which has full jurisdiction,

responsibility and control over it pursuant to RCW 47.24.020(2).

2.5 In the vicinity of Lake Washington, Interstate 90 extends from Bellevue across Mercer Island and two floating bridges (the Hadley M. Hadley Memorial Bridge and the Lacey V. Murrow Memorial Bridge) to an interchange with Interstate 5.

2.6 Interstate 90 across Lake Washington between Mercer Island and Seattle is a key east/west corridor for the movement of people and freight. Interstate 90 serves as the only connection between Mercer Island and the mainland and during an average weekday carries approximately 133,000 vehicles per day according to the WSDOT.

2.7 Across Lake Washington, Interstate 90 currently operates with three general purposes lanes in each direction and a two-lane reversible center roadway flowing in the peak direction from Mercer Island to the Mt. Baker Tunnel. The primary peak flow direction is westbound in the morning peak and eastbound in the afternoon peak. The center roadway is restricted to High Occupancy Vehicles (“HOV”), including buses, carpools, vanpools, and (by

special exception) general traffic destined to and from Mercer Island.

- 2.8 King County Metro and the Central Puget Sound Regional Transit Authority (“Sound Transit”) operate local and regional bus service across Lake Washington on Interstate 90 connecting Seattle and the east side communities.
- 2.9 Interstate 90 is also a key corridor for movement of freight. It is used by trucks moving freight between U.S., Asian and Pacific markets, among others, using port facilities located along Seattle’s waterfront harbor.
- 2.10 In 1993, Sound Transit was formed by King, Pierce and Snohomish counties to plan, build and operate a high-capacity transit system within the region's most heavily travelled corridors.
- 2.11 In 1998, Sound Transit initiated preliminary engineering and environmental analysis to study two-way transit and HOV operations on the Interstate 90 corridor across Lake Washington.
- 2.12 In September 2004, the Federal Highway Administration issued a Record of Decision selecting a preferred alternative (“R-8A”) for the I-90 two-way transit and

operations project. Alternative R-8A called for the construction of HOV lanes on the outside roadways and retained the existing reversible operations in the center roadway, with both lanes operating in the same direction, westbound in the morning and eastbound in the afternoon. Single occupancy vehicles would be allowed to use the center roadway between Rainier Avenue and Island Crest Way. Alternative R-8A did not provide for exclusive use of the center roadway by light rail.

- 2.13 In 2006, Sound Transit proposed a plan to construct and operate a light rail system that connected downtown Seattle, Mercer Island, Bellevue and Redmond via Interstate 90. The plan called for running light rail on the center roadway of Interstate 90 between Seattle and Mercer Island to the exclusion of all forms of vehicular traffic.
- 2.14 In November 2008, voters approved a transit-only funding package that included funding for Sound Transit to construct light rail between Seattle and Mercer Island, Bellevue and Redmond.
- 2.15 In December 2008, Sound Transit released a draft environmental impact statement proposing a light rail

extension, known as the East Link Light Rail Transit Project (“East Link Project”), that would cross Lake Washington in the center roadway lanes of Interstate 90 and would operate in a dedicated right-of-way between Seattle and Redmond along an 18-mile long corridor.

2.16 The East Link Project would require exclusive dedication of the Interstate 90 center roadway lanes to Sound Transit for light rail, either through sale or lease of the center roadway, to the exclusion of all forms of vehicular traffic.

2.17 Under the proposed configuration of Interstate 90, the current roadway would be re-striped to make the shoulder and general purpose lanes narrower in order to add an HOV lane to the outside roadway. Capacity during peak commute periods would be reduced from six lanes (three general purposes and two reversible lanes and one HOV) to four lanes (three general purpose and one HOV).

2.18 According to the Washington State Transportation, placing light rail on Interstate 90 will reduce overall vehicle capacity, including freight capacity, and increase travel time for drivers crossing Lake Washington on Interstate 90.



2.19 The Washington Constitution, Article. II, § 40

(Amendment 18) provides:

All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes. Such highway purposes shall be construed to include the following:

- (a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets;
- (b) The construction, reconstruction, maintenance, repair, and betterment of public highways, county roads, bridges and city streets; including the costs and expense of (1) acquisition of right-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the state of public highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road or city street;
- (c) The payment or refunding of any obligations of the State of Washington, or any political subdivision thereof, for which any of the revenues described in section 1 may have been legally pledged prior to the effective date of this act;
- (d) Refunds authorized by law for taxes paid on motor vehicle fuels;
- (e) The cost of collection of any revenues described in this section:

*Provided*, That this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes, or apply to vehicle

operator's license fees or any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon, or fees for certificates of ownership of motor vehicles.

2.20 The special fund designated by the first sentence of Amendment 18 to be used exclusively for highway purposes is the Motor Vehicle Fund, a fund created for the purpose of receiving all license fees for motor vehicles and excise taxes on the sale, distribution or use of motor vehicle fuel. The Motor Vehicle Fund was codified as RCW 46.68.070, which provides:

There is created in the state treasury a permanent fund to be known as the motor vehicle fund to the credit of which shall be deposited all moneys directed by law to be deposited therein. This fund shall be for the use of the state, and through state agencies, for the use of counties, cities, and towns for proper road, street and highway purposes, including the purposes of RCW 47.30.030.

2.21 The Washington Supreme Court has consistently held that the 18<sup>th</sup> Amendment forecloses the use of funds from the Motor Vehicle Fund for anything other than highway purposes. *See State ex. rel. Bugge v. Martin*, 38 Wn.2d 834, 232 P.2d 833 (1951) (moneys from the Fund could be used to pay debt service for Agate Pass Bridge); *Automobile Club of Washington v. City of Seattle*, 55 Wn.2d 161, 346 P.2d 695 (1959) (Fund could not be used to satisfy tort

judgments as such expenditure bore no relation to the construction, operation, maintenance, or betterment of the public highway or bridges of the state); *Washington State Highway Commission v. Pacific Northwest Bell Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961) (cost of relocating utility facilities located on highway right-of way was not an expenditure exclusively for highway purposes and was prohibited by the 18<sup>th</sup> Amendment); *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 982 P.2d 611 (1999) (language of the 18<sup>th</sup> Amendment as to “highway purposes” was unambiguous).

2.22 Regarding the use of the Motor Vehicle Fund for public transit, the Washington Supreme Court has specifically held that a public transportation system, including a railway, is not a highway purpose. *State ex. rel. O’Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969) (a \$250,000 appropriation from the Fund to Metro Transit for planning, engineering, financial and feasibility studies incident to the preparation of a comprehensive public transportation plan was unconstitutional under the 18<sup>th</sup> Amendment).

- 2.23 The Washington State Attorney General's Office has also issued opinions that the Motor Vehicle Fund cannot be issued for non-highway purposes, including for the purchase of rights-of-way to accommodate rapid rail transit. AGLO 57-58 No. 104 (use of Fund monies to fund state's participation with the federal government in the purchase of rights-of-way to provide sufficient median width in an interstate highway to accommodate rapid rail transit on such right-of-way was unconstitutional under the 18<sup>th</sup> Amendment); *see also* AGLO 1975 No. 35 (Fund monies could not support any Washington Department of Transportation administration efforts in connection with non-highway purposes); ALGO 1975 No. 62 (any efforts to transfer properties acquired with Fund monies must follow the usual process of surplusing such properties and, in the case of local governments, there must be consideration for the transfer of the property to that local government).
- 2.24 I-90 was built with funds from the Motor Vehicle Fund.
- 2.25 On April 25, 2009, the Washington State Legislature passed Engrossed Substitute Senate Bill 5352, relating to transportation funding and appropriations, including

appropriations related to determining the fair market sale or lease value of the center road way of Interstate 90 and setting a date certain by which the sale or lease to Sound Transit is to be accomplished.

- 2.26 ESSB 5352, Sec. 204(3) appropriates \$300,000 of the motor vehicle account “for an independent analysis of methodologies to value the reversible lanes on Interstate 90 to be used for high capacity transit pursuant to sound transit proposition 1 approved by voters in November 2008.” It further provides:

The independent analysis shall be conducted by sound transit and the department of transportation, using consultant resources deemed appropriate by the secretary of the department, the chief executive officer of sound transit, and the cochairs of the joint transportation committee. It shall be conducted in consultation with the federal transit and federal highway administrations and account for applicable federal laws, regulations, and practices. It shall also account for the 1976 Interstate 90 memorandum of agreement and subsequent 2004 amendment and the 1978 federal secretary of transportation's environmental decision on Interstate 90. The department and sound transit must provide periodic reports to the joint transportation committee, the sound transit board of directors, and the governor, and report final recommendations by November 1, 2009.

- 2.27 ESSB 5352 Sec. 306 (17) sets December 1, 2009 as the deadline for completing negotiations with Sound Transit

regarding the sale or lease of the center roadway of

Interstate 90 as follows:

The legislature is committed to the timely completion of R8A which supports the construction of sound transit's east link. Following the completion of the independent analysis of the methodologies to value the reversible lanes on Interstate 90 which may be used for high capacity transit as directed in section 204 of this act, the department shall complete the process of negotiations with sound transit. Such agreement shall be completed no later than December 1, 2009.

### **III. WRIT STANDARD**

- 3.1 Petitioners meet the standards for issuance of a writ of prohibition prohibiting Paula J. Hammond, the Secretary of the Washington State Department of Transportation, and/or Christine Gregoire, Governor of the State of Washington from taking any action pursuant to ESSB 5352 with respect to the sale or lease of any portion of I-90 to Sound Transit for the purpose of a rail transit system because (1) such action is unconstitutional under the Washington State Constitution Article. II, § 40 and constitutes an impermissible diversion or conveyance of Interstate 90 for non-highway purposes and (2) the Washington State Legislature is not authorized to construe the meaning of

“highway purposes” as used in the Washington State Constitution Article. II, § 40 to include rail.

3.2 Petitioners are entitled to a writ of prohibition because they have no plain, speedy or adequate remedy at law to arrest action by the Washington State Department of Transportation under the purported authority of the new legislation, but in excess of its jurisdiction. See *State ex rel. Ernst v. Superior Court for Thurston County*, 198 Wn. 133, 137, 87 P.2d 294 (1939); *Washington State Bar Assn. v. State*, 125 Wn.2d 901, 890 P.2d 1047 (1995) (writ granted where unconstitutional legislation conflicted with a rule of court violating the separation of powers doctrine); *Andrews v. Munro*, 102 Wn.2d 761, 689 P.2d 399 (1984) (writ prohibiting Secretary of State from taking any action certifying unconstitutional proposed referendum measure); *State ex rel. Barlow v. Kinnear*, 70 Wn.2d 482, 423 P.2d 937 (1967) (writ prohibiting Commission from acting beyond its authority).

3.3 Unless restrained, the Governor or Washington State Department of Transportation will undoubtedly exercise their purported authority under ESSB 5352 to sell or lease

I-90 to Sound Transit by December 1, 2009 in violation of the Washington Constitution Art. II, § 40. Requiring Petitioners to commence this challenge in superior court will result in undue delay and requires that this writ be heard in this Court.

#### **IV. RELIEF REQUESTED**

Wherefore, petitioners request the following relief

- 4.1 That the Court issue a writ of prohibition preventing Christine Gregoire, in her capacity as Governor of the State of Washington, from taking or authorizing any action with respect to the sale, lease, or occupancy of any portion of Interstate 90 to Sound Transit for the purpose of a railway system.
- 4.2 That the Court issue a writ of prohibition preventing Paula J. Hammond, in her capacity as Secretary of the Washington State Department of Transportation from taking or authorizing any action with respect to the sale, lease or occupancy of any portion of Interstate 90 to Sound Transit for the purpose of a railway system.
- 4.3 An award of attorneys' fees and costs.
- 4.4 Such other relief as the Court deems equitable and just.



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