

Merrill, Hannah

From: pearl hewett [REDACTED]
Sent: Monday, October 17, 2011 9:49 AM
To: zSMP; lois; Sue Forde; Chapman, Mike; harry bell
Cc: lois; Gray, Steve; Marv Chastain; Jim McEntire; Jo Anne Estes
Subject: "Unconstitutional Conditions"

TO WHOM IT MAY CONCERN

**I submit this as my comment for the SMP Update
Pearl Rains Hewett Trustee
George C. Rains Sr. Estate
Member of the SMP Advisory Committee**

Clallam County Commissioners take an oath to uphold WA State Law.

But the power of the state in that respect is not unlimited, and one of the limitations is that it may_not impose conditions which require the relinquishment of constitutional rights.

WAC 173-26-191 Some master program policies may not be fully attainable by regulatory means due to the constitutional and other legal limitations on the regulation of private property.

"It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may_not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all.

WAC 173-26-191 Some master program policies may not be fully attainable by regulatory means due to the constitutional and other legal limitations on the regulation of private property.

The policies may be pursued by other means as provided in RCW 90.58.240. Some development requires a shoreline permit prior to construction. A local government evaluates a permit

application with respect to the shoreline master program policies and regulations and **approves a permit only after determining that the development conforms to them.**

Read on if you are interested

Pearl

"That, consistently with the due process clause of the Fourteenth Amendment, a private carrier cannot be converted against his will into a common carrier by mere legislative command, is a rule not open to doubt, and is not brought into question here. It was expressly so decided in Michigan Commission v. Duke, 266 U.S. 570, 577, 578 S., 45 also, Hissem v. Guran, 112 Ohio St. 59, 146 N. E. 808; State v. Nelson, 65 Utah, 457, 462, 238 P. 237. The naked question which we have to determine, therefore, is **whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so.** Upon the answer to this question, the constitutionality of the statute now under review will depend.

"There is involved in the inquiry not a single power, but **two distinct powers.** One of these, **the power to prohibit the use of the public highways in proper cases, the state possesses; and the other, the power to compel a private carrier to assume against his will the duties and burdens of a common carrier, the state does not possess.** It is clear that any attempt to exert the latter, separately and substantively, must fall before the paramount authority of the Constitution. **May it stand in the conditional form in which it is here made? If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion.** Having regard to form alone, **the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.**

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"In Southern Pacific Co. V. Denton, 146 U.S. 202, 207, 13 S. Ct. 44, there was under consideration a Texas statute requiring a foreign corporation desiring to do business in the state to agree that it would not remove any suit from a court of the state into the Circuit Court of the United States. This court held the statute invalid, saying:

'But that statute, requiring the corporation, as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the Constitution and laws of the United States, was unconstitutional and void, and could give no validity or effect to any agreement or action of the Corporation in obedience to its provisions.'

"[I]n Western Union Tel. Co. v. Kansas, 216 U.S. 1, 34-48, 30 S. Ct. 190, upon a full review of the prior decisions, the principles set forth in the foregoing quotations was again reaffirmed. That case involved the validity of a Kansas statute which provided that a corporation of another state, though engaged in interstate business, must, as a condition of doing local business, pay to the state certain graduated percentages of its capital stock. It was held that this requirement

operated as a burden on the interstate business of the company, in violation of the commerce clause of the Constitution, as well as a tax on its property beyond the limits of the state, in violation of the due process of law clause; that thus it was violative of the constitutional rights of the company; and that the right of the company to continue to do business in Kansas was not and could not be affected by the condition. The general principle was again announced in the following words (pages 47, 48 (30 S. Ct. 206)):

'The right of the telegraph company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that state, which was hostile both to the letter and spirit of the Constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the state, any more than it would have been bound to surrender any other right secured by the national Constitution.'