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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

THE CITY OF SEATTLE, a municipal corporation of the State of Washington, acting by and through its City Light Department,
Plaintiff-Appellant,
v.
DEPARTMENT OF REVENUE, State of Oregon,
Defendant-Respondent.

Tax Court
4946, 4957

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PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON, a municipal corporation of the State of Washington,
Plaintiff-Appellant,
v.
DEPARTMENT OF REVENUE, State of Oregon,
Defendant-Respondent.

Tax Court
4959

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CITY OF TACOMA, a municipal corporation of the State of Washington, acting by and through its Department of Public Utilities, Light Division, dba Tacoma Power,
Plaintiff-Appellant,
v.
DEPARTMENT OF REVENUE, State of Oregon,
Defendant-Respondent.

Tax Court
4958

S061813

**PLAINTIFFS-APPELLANTS' REPLY BRIEF**

(*Continued on Inside Cover*) September 2014

Appeal from the October 15, 2013, Judgment from the Regular Division of the Oregon Tax Court

The Honorable Henry C. Breithaupt


GREGORY A. CHAIMOV, OSB #822180
JOHN A. CAMERON, OSB #920371
DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue, Suite 2400
Portland, Oregon 97201
Telephone: 503-778-5328
Email:gregorychaimov@dwt.com
Email:johncameron@dwt.com

GREGORY C. NARVER
Assistant City Attorney
City of Seattle
600 – 4th Avenue, 4th Floor
PO Box 94769
Seattle, WA 98124-4769
Telephone: 206-684-8200
Facsimile: 206-684-8284
E-Mail: gregory.narver@seattle.gov
Attorney for Plaintiff The City of Seattle

Attorneys for Plaintiffs-Appellants

ELLEN F. ROSENBLUM, #753239
Attorney General
MELISSE S. CUNNINGHAM, #972457
Senior Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97301
Telephone: 503- 947-4530
Facsimile: 503-378-3784
Email: melisse.s.cunningham@doj.state.or.us

Attorneys for Defendant-Respondent Department of Revenue, State of Oregon

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# I. THE MUNICIPALITIES DO NOT HAVE PROPERTY INTERESTS SUBJECT TO TAXATION

## A. The Intertie Agreements Are Nontaxable Transmission Services Agreements

In *Farmers Ins. Co. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011), this Court observed that if a party can demonstrate that an incorrect result was reached in a prior case because the Court had not been "presented with an important argument," or that the Court had "failed to adequately analyze the controlling issue," then this Court may reconsider the earlier case. With respect, that is the case here.

A fact not addressed in *Power Resources Cooperative v. Dept. of Rev.*, 330 Or 24, 996 P2d 969 (2000) ("*Power Resources*"), but critical to the decision here, is that *all* substantive features of the Intertie agreements the Department now cites as indicia of a taxable possessory interest are present in other transmission agreements not taxed as property.[1] Not only are the contract terms effectively the same, but the two types of contracts *function* in the same way.

The Department asserts that, even if Intertie agreements are the same as other nontaxed transmission service agreements, that sameness makes no difference; instead, that sameness means that "other entities may also have a

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[1] The Municipalities submitted to the Tax Court a copy of BPA's Open Access Transmission Tariff ("OATT"). The OATT is 457 pages long, too voluminous to include in the Excerpt of Record or Appendix. Relevant provisions are cited by paragraph number.

taxable possessory interest." Answering Br., p. 22. That logic is of the kind criticized as trying to make a right from two wrongs. *Walker v. Penner*, 190 Or 542, 554, 227 P2d 316 (1951).

The analogy supporting *Power Resources*—that Intertie agreements are like leases for grazing rights—does not, in fact, present an analogous situation. A rancher who obtains the exclusive use of a specific parcel of real property for a designated period of time may have a possessory interest in that property. But "exclusive use" has a different meaning in power transmission than in grazing on range land. Electricity cannot be stored; electrons are essentially pooled and fungible. A purchaser may have a contract to receive power from a particular customer, but that does not mean the purchaser will receive that customer's power. As a result, in the context of the Intertie agreements, the phrase "exclusive use" means nothing more than the Municipalities will receive the service for which they have in part prepaid. Thus, an analogy with use of grazing land would be a rancher who has an agreement with a trucker to deliver a bale of hay from a farm when requested, but the trucker decides where the hay actually comes from—and if the trucker has more orders than hay, can decide not to deliver the requested hay. An agreement to pay for deliveries is not a taxable property interest.

Every point the Department cites about the Municipalities' purported possessory interest in a definable portion of the Intertie is equally applicable to the OATT. Intertie agreements were adopted to provide transmission services pursuant to the federal legislation that led to the expansion of BPA's system. Although the OATT was adopted to provide transmission services pursuant to another federal initiative,[2] both the Intertie agreements and the OATT serve the common federal purpose of making BPA more like a common carrier. The Intertie agreements serve one additional purpose as well—using customer prepayments for transmission service to help defray the capital cost of Intertie construction that would otherwise be borne entirely by the U.S. Treasury.

The Department objects to the Municipalities' characterization of the Intertie agreements as "ordinary electricity transmission agreements" (Answering Brief at 2), but that is exactly what they are. The core consideration provided by BPA to the Municipalities is the right to add to the volume of electricity being transmitted on the BPA transmission grid and to withdraw a comparable, but not necessarily identical, amount of power at another location. *See* SER 22-24 (Intertie agreement, §4). The assumption made in *Power Resources*—that the agreement conferred an "exclusive right to a definable part" of the Intertie (330 Or at 31) —is not supported by the physics of electrical power or the terms of the Intertie agreements.

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[2] Order No. 888 of the Federal Energy Regulatory Commission, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, FERC Stats & Regs ¶ 31,036, 61 Fed. Reg. 21,540, (1996).

Although the Intertie agreements use language that is different than the OATT (which BPA developed after the Intertie agreements), aside from the prepayment feature, there is no material difference between the transmission services BPA provides to the Municipalities through the Intertie and the firm "Point to Point" transmission services BPA provides to the Municipalities (and numerous other Northwest utilities) over BPA's transmission network.

The features of the Intertie agreements that the Department argues give rise to a possessory interest are true of the OATT:

- <u>Type of Service</u>: Under the Intertie agreements, the Municipalities contract for BPA common-carrier transmission service between California and the Municipalities' systems. The OATT provides for identical common-carrier transmission service between a given customer's system in the Northwest and California. *Compare* OATT §13.7(c) *to* Intertie agreement ¶4(c) (SER 24).

- <u>Transfer Capability</u>: Both forms of agreement authorize use of a designated quantity of transfer capability over designated parts of BPA's system. *Compare* OATT §§1.14, 1.35, 1.37, and 1.42 *to* Intertie agreement ¶¶1(k), 1(m), 1(kk), 1(ll), and 1(mm) (SER 6-7, 10-11).

- <u>Scheduling</u>: In both forms of agreement, the Municipalities have the obligation to schedule the service they request on BPA transmission facilities in megawatt hour amounts up to their designated scheduling share. Scheduling is not so much a right as an obligation imposed by BPA on its transmission customers—akin to making a reservation. *Compare* OATT §§1.42, 13.7 and 13.8 *to* Intertie agreement paragraph 1(bbb) and §4 (SER 14, 22-24).

- Curtailment of Service: Under both forms of agreements, BPA has the right to curtail service to customers. Although the service is labeled "firm" in the OATT and a "capacity share" in the Intertie agreements, BPA may curtail service under both agreements. *Compare* OATT §13.6 *to* Intertie agreement ¶¶1(ll) and 3(b) (SER 10-11, 16-21).

- Ownership of Facilities: The label "ownership" in the Intertie agreements notwithstanding, all Intertie facilities are owned by BPA, Portland General Electric, and PacifiCorp. Similarly, there is no customer ownership under the OATT. *See* OATT ¶¶1.50, 1.53. BPA describes the legal reality succinctly:

> "The Capacity Owners do not have legal ownership of the system. They have access to a portion of Bonneville's capacity share for the life of the facilities. In return, they paid a portion of the expansion costs and have an ongoing obligation to pay their pro-rata share of the operating and maintenance expenses."[3]

- Customer Possession, Control, or Use of Facilities: Under neither Intertie agreements nor the OATT does a customer have any possession, control, or use of the facilities. Under Intertie agreements, BPA controls the

[3]http://www.bpa.gov/transmission/CustomerInvolvement/IntertieInitiatives/Documents/Intertie_Open_Season_Scoping_Document_Draft_02_11_10.pdf.

facilities in providing service as a transmission common carrier. The Municipalities tell BPA in advance when they want to schedule service, in accordance with BPA's standard scheduling procedures. The same is true under the OATT. *Compare* OATT ¶¶1.50 and 1.53 *to* Intertie agreement §4 (SER 22-24).

- Payment to Cover BPA's Capital Costs: Customers pay capital costs under both agreements. Under Intertie agreements, capital costs are front-loaded. SER 32. These prepayments reduce the construction financing burden that BPA would otherwise impose on the U.S. Treasury. Section 13.5 of the OATT also requires a customer to make a contribution in aid of construction to prepay for any new facilities required to provide service. However, preexisting facilities that provide transmission services remain funded by the federal government, subject to recovery from the customer under applicable BPA transmission rates. In other words, the capital costs for OATT customers are built into the rate paid for service instead of paid up front:

> "Bonneville has constructed a 500-kV transmission circuit extending from northern Oregon to the California border. Under the CO-94 rate schedule, Bonneville may assess lump-sum payments, which recover all capital costs in the facilities, upon the completion of initial construction. Furthermore, additional lump-sum payments may be assessed under the CO-94 rate schedule over the life of the transmission facilities, if the facilities are subsequently upgraded. Bonneville requests that the rate be made effective for the physical life of the facilities in order to permit Bonneville to assess these

> additional lump-sum payments if upgrades to the line are subsequently made."

67 FERC ¶61,351, p. 61,216 (June 20, 1994). Under both contracts, the basis for transmission service rates is the same; the only difference is when the customer pays for BPA's construction costs.

To continue the rancher analogy: customers who contract for transmission service under the OATT pay for tires the trucker needs through an increase in the cost of hay. The Municipalities are, on the other hand, like a rancher who makes a payment toward the tires up front rather than in the payment for the hay. The timing of payment for improvements cannot make one contractual arrangement a property interest and another not.

### B. BPA Does Not Remarket Unused Capacity

One of the central assumptions underlying *Power Resources* is that the utility "held" a proportionate share of the Intertie because BPA reimbursed the utility when BPA remarketed the unused capacity share. This Court cited this "fact" as evidence that the utility retained a "palpable right" to its "definable part" of the Intertie. 330 Or at 31, 32. Relying on a declaration submitted by Snohomish employee Anna Miles, the Municipalities argued in their Opening Brief, pp. 21 to 25, that this assumption was incorrect for the Municipalities.

The Department responded by arguing that, Ms. Miles's declaration notwithstanding, under the terms of the Intertie agreement, Snohomish (1) is entitled to compensation for BPA's use of its Snohomish's capacity share; or

(2) does not have to allow BPA to use any part of its Intertie capacity if Snohomish chooses to transmit or "wheel" power for third parties.

The Department, however, did not consider the entire contractual relationship. The Department's assertion that Snohomish is "entitled to compensation" under paragraph 3(b)(1)(B) of the Intertie agreement whenever BPA remarkets Snohomish's excess capacity fails to account for introductory language that states: "[Snohomish] shall notify Bonneville in writing of [Snohomish's] decision to utilize its Scheduling Share pursuant to *either* paragraph 3(b)(1) <u>or</u> paragraph 3(b)(2)." SER 16 (emphasis added).[4] Pursuant to this provision, Snohomish notified BPA by letter that Snohomish elected to utilize its Scheduling Share under the provisions of paragraph 3(b)(2). RER-1. As a result of this election, Snohomish and BPA do not operate under paragraph 3(b)(1).

The Department next asserts that Snohomish "does not have to allow" BPA to remarket Snohomish's unused capacity, citing paragraph 3(b)(2)(A) of the Intertie agreement. Answering Brief at 20. This argument fails to account for Amendatory Agreement No. 1 entered into by both Tacoma and Snohomish.

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[4] The Intertie agreement that is included in the Supplemental Excerpts of Record is that between BPA and Plaintiff The City of Seattle. However, as the Department acknowledges, except where noted, the Seattle Intertie agreement is identical in all material respects to the Snohomish Intertie agreement. Answering Brief at 6 n 2.

SER 277-83.[5] This amendment deleted and replaced the original version of paragraph 3(b)(2)(A). The relevant portion of new paragraph 3(b)(2)(A) provides:

> "[Snohomish] agrees to provide Bonneville access to its available unused Scheduling Share on any hour under terms and conditions comparable to those provided by Bonneville to [Snohomish] under the open market provisions of section 5(c)(2) of Bonneville's Long-Term Intertie Access Policy."

SER 279. Therefore, the Intertie agreements, as amended, establish that BPA has the right to remarket the unused portion of Snohomish's (and Tacoma's) Intertie capacity.

The Department asserts that, although Amendatory Agreement No. 1 "allows some use by BPA of Tacoma's unused share of Intertie capacity, Tacoma retains the right to use its Capacity Ownership share and *also has the right to be compensated* for any use of that share by BPA under terms comparable to those provided to other Intertie transmission customers."

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[5] The Department included Amendatory Agreement No. 1 to the Intertie agreement between BPA and Tacoma in the Supplemental Excerpts of Record. However, Snohomish entered into the same Amendment with BPA, and it was submitted to the Tax Court with the Declaration of Anna Miles. RER-2-3. Due to a clerical error, the second page of the three-page Amendment was omitted from the Tax Court record, but from the first and third pages it is clear that Amendment No. 1 to Snohomish's Intertie Agreement is substantively identical to the Tacoma amendment that is in the Supplemental Excerpt of Record. The undersigned have confirmed that the Tacoma and Snohomish amendments are in fact substantively identical, have provided the missing page to the Department, and can provide it to the Court if there is any question regarding the terms of the Snohomish amendment.

Answering Brief at 12 (emphasis added). The Department, however, cites nothing to support its assertion that the amendment includes a right to be compensated for BPA's remarketing of unused Scheduling Shares. Nor does the Department cite anything to rebut Ms. Miles's assertion that Snohomish is not compensated by BPA under those circumstances.

## II. THE LEGISLATIVE ASSEMBLY VIOLATED ARTICLE IV, SECTION 18 OF THE OREGON CONSTITUTION WHEN ADOPTING SB 495

### A. This Court Does Not Defer to the Legislative Assembly on the Constitutionality of Enactments

There may be a presumption in favor of the constitutionality of a law, but in modern times this Court has not upheld a law despite "doubt" about the law's validity. *See State v. N.R.L.*, 354 Or 222, 227 n 3, 311 P3d 510 (2013) ("a statute in conflict with the constitution cannot stand"). In fact, decisions that invalidate laws are sometimes among this Court's most contentious. *E.g., Strunk v. Public Employees Retirement Bd.*, 338 Or 145, 108 P3d 1058 (2005) (4-3 decision).

Likewise, *Young v. Galloway*, 177 Or 617, 626, 164 P2d 427 (1945), does not support the Department's proposition that Oregon shares New Hampshire's method of analyzing constitutional provisions. Oregon and New Hampshire may both look to the same legislative documents to determine compliance with constitutional lawmaking requirements—journals of proceedings—but the use of common sources of information does not mean that

Oregon and New Hampshire share methods of interpreting the requirements for lawmaking that their respective constitutions prescribe. In any event, if this Court limits its review of the legislative record to journals, then this Court's inquiry is at an end once the Court determines that SB 549 is a bill for raising revenue: the journals disclose only that SB 549 originated in the Senate, not that the revenue raising amendment occurred in the House of Representatives.

### B. SB 495 Has the Essential Features of a Levy

The parties agree on the language this Court and others have used to describe whether a bill is for raising revenue. A bill is placed in one of two categories: a bill that has "the essential features of a bill levying a tax," *Bobo v. Kulongoski*, 338 Or 111, 122, 107 P3d 18 (2005), which is a bill for raising revenue, or a bill "'for other purposes which may incidentally create revenue,'" which is not a bill for raising revenue. *Dundee Mortgage Trust Co. v. Parrish*, 24 F 197, 201 (D Or 1885) (quoting 1 Joseph Story, Commentaries on the Constitution of the United States § 880 (1833)).

The question for this Court is in which category does 2009 SB 495 belong?

The Department puts the issue in stark relief. According to the Department, a bill is a bill for raising revenue only if the bill by its terms affirmatively imposes an obligation to pay. A bill that causes a person to pay a tax is not a bill for raising revenue, the Department says, if the obligation to pay arises other than through new and specific words such as "impose," "assess," or "shall pay." Answering Br., p. 38.

The "essential features" of a levy do not include magic words. The essential features of a bill for raising revenue flow from the effect of the bill rather than the words used to achieve the effect. The repeal of the exemption does more than simply bring money into public treasuries, which can occur in any number of ways; the repeal of the exemption makes the Municipalities subject to tax.

SB 495 has the effect, and, therefore, the "essential features" of a levy, because the consequences for public treasuries and for the Municipalities are exactly the same as if, instead of repealing the language that exempted the Municipalities from taxation, SB 495 had read:

> "SECTION 1. Notwithstanding ORS 309.070 [the then-existing exemption for the Municipalities], a city or public entity of a state other than Oregon that possesses property rights or property interests in or related to the Pacific Northwest AC Intertie, as referenced in a written capacity ownership agreement executed before November 4, 2005, between the United States Department of Energy, is subject to ORS 308.505 to 308.665 and any assessment levied under ORS 310.055."

SB 495 causes money to flow from the Municipalities to government treasuries every bit as much as the hypothetical legislation above.

The framers, who considered the need for origination in the House of Representatives of sufficient importance to enshrine it in their organic document, could not have intended for legislators to decide whether Article I, section 18, applies simply by how legislators fashioned legislation. If the form of legislation is all that matters, then legislators can always avoid the requirements of Article I, section 18. Consider the following hypothetical Acts:

"ACT NO. 1

"SECTION 1. There is imposed on the real property of all persons with gross annual incomes of $100 million or more a tax of five dollars per thousand dollars of assessed value.

"ACT NO. 2

"SECTION 1. There is imposed on all real property a tax of five dollars per thousand dollars of assessed value.

"SECTION 2. Persons with gross annual incomes of under $100 million are exempt from the tax imposed by section 1 of this Act."

Both Acts, which would need to be enacted through bills for raising revenue, have the same effect on taxpayers and the public treasuries: a handful of taxpayers pay property taxes; the vast majority of Oregonians do not.

Assume that the Legislative Assembly then wanted to increase revenues by having everyone pay the property tax. In the case of Act No. 1, the Legislative Assembly would need to affirmatively impose a tax on persons earning less than $100 million per year. Under the Department's construction of Article I, section 18, the measure imposing the tax would be a bill for raising revenue because there would be a new affirmative imposition of a tax.

In the case of Act No. 2, however, the Legislative Assembly could achieve the goal of increasing revenues by repealing the exemption for persons with incomes under $100 million.

Under the changes made in the subsequent legislation—whether in case of Act No. 1, through new language imposing the tax, or in the case of Act No. 2, through the repeal of the exemption, the effect on taxpayers and public treasuries is the same: payment by the former into the latter. Nevertheless, under the Department's construction of Article I, section 18, the bill that repealed the exemption would not be a bill for raising revenue. The bill would not be a bill for raising revenue even though the effect of the bill would be to cause the vast majority of Oregonians to pay taxes they did not previously owe.

That cannot be the rule. Such an interpretation would frustrate the purpose of Article I, section 18. The Legislative Assembly could enact broad taxes with exemptions for every conceivably relevant voting bloc. The Senate could then introduce bill after bill chipping away at the exemptions, essentially imposing taxes on all sorts of voters. This would leave the body less politically accountable to voters (longer terms, larger districts) initiating legislation that imposed taxes, all while complying with a constitutional provision designed to prevent that exact scenario.

By the statement that "there is no evidence that SB 495 raised additional revenue," Answering Br., p. 33, n 11, the Department appears to be suggesting that a party cannot bring a challenge under Article I, section 18, if other taxpayers paid enough less in taxes so that the additional taxes imposed on the party did not result in a net gain of taxes by the government. That proposition might be correct under a tax system that necessarily produces a zero-sum result, like the property tax system in place at the time of the decisions in *Dundee Mortgage Co., Pacific Livestock Co. v. Cochran*, 73 Or 417, 144 P 668 (1914), *Northern Counties Trust v. Sears*, 30 Or 388, 41 P 931 (1895), and *Mumford v. Sewall*, 11 Or 67, 4 P 585 (1883), but that proposition cannot be correct where the system itself is not zero-sum.[6]

The undisputed effect of SB 495 is repeal of an exemption from taxation for the three Municipalities, and only the three Municipalities; there is no corresponding reduction in taxes for any taxpayer from the adoption of SB 495.

The Department's conception of Article I, section 18 as providing a floating standard also does not make sense in the context in which the section applies: lawmaking. If the Department's suggestion were correct, then whether a bill that raises revenue from one group of taxpayers is a bill for raising revenue would depend on the happenstance of the extent of the government's

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[6]The Municipalities acknowledge that the Legislative Assembly, based on advice from an attorney in the Office of Legislative Counsel, did not consider SB 495 to be a bill for raising revenue. Answering Br., p. 37 n 12. If the Legislative Assembly had considered SB 495 to be a bill for raising revenue, there would be no need for this challenge to the process used for adoption. Why the author of the advice reached a conclusion different from the office's manual governing the drafting of measures was not explained in the advice.

receipts from other taxpayers in any given year. And that depends on the actions of taxpayers after the adoption of the bill—meaning the Legislative Assembly could not know when adopting a bill whether the bill needed to originate in the House.

### C. SB 495 Did Not "Incidentally" Raise Revenue

The Municipalities agree that a bill that only incidentally creates revenues is not a bill for raising revenue. There is, however, nothing "incidental" about the revenues raised through SB 495.

"'Incidental' means occurring merely by chance or without intention or calculation; being likely to ensue as a chance or minor consequence; not receiving much consideration." *Matter of Adoption of Eder*, 312 Or 244, 266 n 24, 821 P2d 400 (1991) (quoting Webster's Third New International Dictionary 1152 (unabridged 1961)).

SB 495 does not raise revenue from the Municipalities "by chance or without intention or calculation." The revenues raised from the Municipalities do not "ensue as a chance or minor consequence." Revenues from the Municipalities did not occur as a result of the subject "not receiving much consideration."

Quoting Story, this Court in *Bobo*, 338 Or at 121, listed the following types of government actions as those that "incidentally create revenue":

"• '[A] bill to sell any of the public lands';

"• A bill 'to sell public stock';

"• A bill that 'regulated the value of * * * coins'; and

"• A bill 'giving priority of payment to the [government] in case of insolvency.'"

In other words, revenue is raised "incidentally" when the overarching purpose of the bill is the implementation of some other significant change in the law. A recent example is the federal Affordable Care Act ("ACA"). The ACA is expected to raise "considerable revenue" in the form of payments required of individuals who do not obtain health care insurance. Nevertheless, the ACA was not enacted through a bill for raising revenue because the revenues are incidental to the purpose of the ACA, which is to provide health care coverage for all: "the aim of the shared responsibility payment is to encourage everyone to purchase insurance; the goal is universal coverage, not revenues from penalties." *Seven-Sky v. Holder*, 661 F3d 1, 6 (DC Cir 2011), *cert den*, __ US __, 133 S Ct 63, 183 LEd2d 710 (2012).

SB 495 is nothing like the ACA or other bills that establish or modify government programs. There are no terms in SB 495 other than terms that cause the Municipalities to pay taxes.

Through selective quotations from the history of adoption, the Department tries to give the impression that the overarching purpose of SB 495 was other than to raise revenues from the Municipalities. It was not.

The statements from the adoption history on which the Department relies are from (1) a proponent of an earlier version of the bill, the contents of which the House of Representatives removed and replaced, and (2) a Senator who gave brief remarks supporting the House of Representatives' amendments that created the final version of the bill. Those comments do not represent the Legislative Assembly's intent.

The exemption for the Municipalities came about in 2005 because the Legislative Assembly was concerned that the federal constitution did not permit Oregon to tax the property of out-of-state municipalities while, at the same time, granting an exemption for the property of Oregon municipalities. Testimony of Gil Riddell, Policy Director, Associated Oregon Counties, on A-Eng. SB 495 before House Committee on Revenue (May 26, 2009) (1:29:15–30) ("Riddell Testimony").

As introduced, SB 495 would have extended the exemption that the Municipalities and Oregon municipalities received to several other organizations. 2009 SB 495, §4(a); Reply App-1-2.

The Senate, however, reduced the advantaged organizations to some electric cooperatives. Senate Amendments to SB 495; Reply App-3. It was in support of the Senate version of the bill that the lobbyist for electric cooperatives pitched "equity" as a reason for the House Committee on Revenue to favor the bill.

In the House Committee, however, the Association of Oregon Counties offered the –A3 amendments to change the bill from an expansion of the exemption to cooperatives to the repeal of the exemption for the Municipalities: "We're asking you to re-impose this tax." Riddell Testimony (1:29:32). The Association of Oregon Counties offered the amendment specifically to increase revenues: "Now is not the time to ignore legitimate, lawful, and reasonable opportunities to provide revenues for badly needed public services." Riddell Testimony (1:29:33–34).

The House Committee adopted the –A3, and those amendments formed the enrolled version of the bill. House Amendments to A-Eng. SB 495; Reply App-5; Enrolled SB 495; Reply App-8.

When Representative Barnhart, Chair of the House Committee, carried B-Eng. SB 495 on the floor of the House, he emphasized that the purpose of the bill was to raise revenue:

> "This bill * * * restores the usual property tax rule [pursuant to which a state taxes the property of out-of-state municipalities]. * * * [As a result of the exemption,] these entities [the Municipalities] were forgiven over $5 million in property taxes. This measure would restore the property tax requirement. It raises approximately $1.2 million a biennium, half of which goes to the schools, and, of course, because of the way our funding formula works, would benefit

> every school in the state." Floor speech by Rep. Barnhart (June 10, 2009) (3:37:44, 3:39:00-:24).[7]

That, to some, the repeal of the exemption for the Municipalities might give the tax code the appearance of being more fair does not mean that the purpose or effect of SB 495 was other than to bring money into public treasuries. All changes in the tax code represent the proponents' view of greater fairness. *E.g.,* Statement of AFSME in Support of Ballot Measure 66, Voters' Pamphlet (Nov. 2, 2010) ("The most important fact about Ballot Measure 66: **It's FAIR**. For decades now, Oregon's tax structure has been legislated and 'initiative-ized' to death to do one thing — **place the greatest tax burden on the middle class**." (Emphasis in original.) If achieving fairness were a goal sufficient to keep SB 495 from being a bill for raising revenue, then no bill would ever be a bill for raising revenue.

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[7]The Department also appears to argue that the roughly $1.2 million that SB 495 causes to be exacted from the Municipalities each biennium is "incidental" because the amount exacted is small in relation to the total of the property taxes received by governments in the state. Answering Br., p 39. The text of Article I, section 18, contains no "de minimis" exception. Likewise, there are no authorities that base a decision on whether a bill is for raising revenue on the relative amount of revenue raised. As *Seven-Sky* demonstrates (*see* page 17 above), whether revenues are incidental is determined by considering the overarching purpose of the bill, not the amount of revenues raised. If the amount of revenues determined whether a bill were for raising revenue, then this Court would need to decide how much revenue was "enough" to trigger the requirement to originate a bill in the House even if the bill clearly imposed a new tax. If the amount of revenues determined whether a bill were for raising revenue, as discussed above at page 16, the happenstance of future receipts would also determine—retroactively—whether the bill was for raising revenue.

### D. SB 495 Did Not Originate in the House of Representatives

The Municipalities agree with the Department that the framers intended for the term "originate" to mean "to take first existence." Answering Br., p. 42 (quoting Webster's An American Dictionary of the English Language (1828)). Where the parties disagree is on the legislative action that must "take first existence" in the House. For the Department, the action is the amendment of a bill to include revenue raising provisions; for the Municipalities, the action is the introduction of the bill.

By contending that "the court should, instead, consider the substance of the law enacted and where that substance originated," Answering Br., p. 49, the Department appears to ask this Court to accept one or the other of two related concepts: (1) a bill "originates" when amended to produce a concept different from the concept in the original bill, or (2) a "bill" becomes a new or different bill when provided a new or different concept.

The Department addresses only amendatory language that adds a provision for raising revenue, but the logic of the Department's position applies to all amendments to all measures. If a Senate Bill "originates" as a bill for raising revenue in the House by virtue of the House's amending the bill to add the revenue-raising provision, then any bill "originates" in the second chamber when the second chamber changes the concept ("the substance of the law") in the original bill. Likewise, if a "bill" becomes a new or different bill upon a change in concept, then any bill "originates" in the chamber that changes the bill's content.[8]

That position cannot reflect the construction of Article I, section 18. Treating amendment as origination or a bill as new upon a change in terms would make unnecessary language the framers included. If amendment constituted origination, then there would have been no reason for the framers to discuss amendment in Article I, section 18. What this Court said about statutory laws applies equally to provisions of the Constitution:

> "[A]n interpretation that renders a statutory provision meaningless should give us pause, both as a matter of respect for a coordinate branch of government that took the trouble to enact the provision into law and as a matter of complying with the interpretive principle that, if possible, we give a statute with multiple parts a construction that 'will give effect to all' of those parts." *State v. Cloutier*, 351 Or 68, 98, 261 P3d 1234 (2011).

To achieve the Department's interpretation, Article I, section 18 would only have to read:

> "Bills may originate in either house, but may be [*amended, or*] rejected in the other; except that bills for raising revenue shall originate in the House of Representatives."

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[8] Carried to its logical extreme, the Department's conceptions of "originat[ion]" and "bill" would appear to preclude the Senate from changing the means or amount of taxation in a bill for raising revenue that originated in the House because the change would change the chamber of origin for the bill.

But the framers included amendment as an action that is separate and distinct from origination. Giving credence to that distinction means a bill for raising revenue does not "originate" through amendment.

Dated this 4th day of September, 2014.

DAVIS WRIGHT TREMAINE LLP

By: /s/ Gregory A. Chaimov

Gregory A. Chaimov, OSB #822180
gregorychaimov@dwt.com
Telephone: 503-778-5328
Facsimile: 503-778-5299

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH
AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 5,458 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

/s/ Gregory A. Chaimov
Gregory A. Chaimov, OSB #822180

Attorneys for Plaintiffs-Appellants

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on September 4, 2014, I directed the PLAINTIFFS-APPELLANTS' REPLY BRIEF to be electronically filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, OR 97301-2563, by using the court's electronic filing system.

I further certify that on September 4, 2014, I directed the PLAINTIFFS-APPELLANTS' REPLY BRIEF to be served upon Respondents' attorneys, as listed below, by using the court's electronic filing system:

ELLEN F. ROSENBLUM, #753239
Attorney General
MELISSE S. CUNNINGHAM, #972457
Senior Assistant Attorney General
Department of Justice
1162 Court Street NE
Salem, OR 97301
Telephone: 503- 947-4530
Facsimile: 503-378-3784
Email: melisse.s.cunningham@doj.state.or.us

INGE D. WELLS, #881137
Department of Justice Appellate Division
1162 Court St NE
Salem OR 97301
Attorneys for Defendant-Respondent Department of Revenue, State of Oregon

DAVIS WRIGHT TREMAINE LLP

By: /s/ Gregory A. Chaimov
Gregory A. Chaimov, OSB #822180
gregorychaimov@dwt.com
Telephone: 503-778-5328
Facsimile: 503-778-5299

Attorneys for Plaintiffs-Appellants