TOLL ROADS ARE ILLEGAL EXCEPT FOR THE PURPOSE OF PAYING FOR THE CONSTRUCTION OF A NEW BRIDGE OR NEW EGRESS TO AND FROM AN AIRPORT PARKING LOT

If ever an American Judge understood the public's right to use the public roads, it was Judge Tolman of the Washington State Supreme Court.

> "Complete freedom of the highways is so old and well established a blessing that we have forgotten the days of the Robber Barons and toll roads, and yet, under an act like this, arbitrarily administered, the highways may be completely monopolized, if, through lack of interest, the people submit, then they may look to see **THE MOST SACRED OF THEIR LIBERTIES** taken from them one by one, by more or less rapid encroachment, ...Section one (Rem. 1933 Sup., 6381-1), in part, reads: **The BUSINESS OF OPERATING AS A MOTOR CARRIER OF PROPERTY FOR HIRE ALONG THE HIGHWAYS OF THIS STATE IS DECLARED TO BE A BUSINESS AFFECTED WITH THE PUBLIC INTEREST.**, ...and that the **use** of the highways **for the transportation of property for hire** may be restricted to the extent required by the necessity of the general public. . . . It is true that the statute does not in express terms demand that a **private carrier** shall constitute itself a **common carrier,** but the statute purports to subject all the **carriers** which are within the terms of the definition to the same obligations. **SUCH A SCHEME OF REGULATION OF THE BUSINESS OF A PRIVATE CARRIER, SUCH AS THE APPELLANT, IS MANIFESTLY BEYOND THE POWER OF THE STATE**. See Michigan Pub. Util. Comm. v. Duke, 266 U.S. 570, 576-578; Frost Trucking Co. v. Railroad Comm., 271 U.S. 583-592, see also Nebbia v. People of the State of New York, 291 U.S. 502, 54 S. Ct. 505, 78 Law Ed. 940. . . . **MUCH OF OUR TRAFFIC IS FOR PLEASURE ONLY, AND IT IS NOT FOR THE STATE TO SAY WHAT IS PLEASURE AND WHAT IS FOR PROFIT**. . . . I am not particularly interested about the rights of haulers by contract, or otherwise, **BUT I AM DEEPLY INTERESTED IN THE RIGHTS OF THE PUBLIC TO USE THE PUBLIC HIGHWAYS FREELY FOR ALL LAWFUL PURPOSES." WE KNOW OF NO INHERENT RIGHT IN ONE TO USE THE HIGHWAYS FOR COMMERCIAL PURPOSES.** The highways are primarily for the use of the public, and in the interest of the public, the state may prohibit or regulate...the use of the highways **"FOR GAIN." Roberton vs. Department of Public Works, 180 Wash. 133- 147 (Dec. 21, 1934).**

The Washington State Attorney General John J. O'Connell in 1966 made it clear that . . . "**if the public at large is not allowed to use the road, it is not a public road and of course if it is not a public road**" . . . "**TAX PAYERS MONEY**" . . . "**CANNOT BE EXPENDED TO CONSTRUCT OR MAINTAIN SUCH ROADS**" . . . and reads:

> "It appears that one of the distinguishing features between a public highway and a private road arises by reason of the restrictions placed upon the latter. **IF THE PUBLIC AT LARGE IS NOT ALLOWED TO USE THE ROAD, IT IS NOT A PUBLIC ROAD. AND OF COURSE IF IT IS NOT A PUBLIC ROAD, COUNTY ROAD FUNDS CANNOT BE EXPENDED UPON IT FOR THE CONSTRUCTION OR MAINTENANCE OF SUCH ROADS**." **JOHN J. O'CONNELL, Attorney General of Washington -- AGO 65-66 No. 121 (November 29, 1966)."**
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> "The case law of the state of Washington clearly recognizes that a right of way may be

devoted to a "**PRIMARY**" and "**SECONDARY USE**", **THE PRIMARY USE BEING THE CONVENIENCE OF PUBLIC TRAVEL.** . . . This principle has been recognized and applied for **SPECIFIC USES**. . . . **"Where the commissioner of public lands has granted a right of way across PUBLIC LANDS** to the state highway department, or to a board of county commissioners (pursuant to RCW 79.01.340, supra) and has been paid whatever compensation is required by law for this grant (the assumed condition of the present question), **it follows, in our opinion, that the right of way grantee then has full power to do with this right of way whatever the grantee's governing statutes permit--IN TERMS OF FRANCHISE GRANTS FOR SECONDARY USE**. Since the right of way grantee has already paid full compensation for the property interest which it has taken, **NO STATUTORY OR CONSTITUTIONAL REQUIREMENT FOR FUTURE COMPENSATION EXISTS. AGO 65-66 No. 111 (October 10, 1966).** See also RCW 47.04.050 & RCW 47.42.290

"**IT IS, OF COURSE, TRUE THAT THE COUNTY MAY NOT AT PUBLIC EXPENSE, CONSTRUCT WHAT IS NO MORE THAN A PRIVATE ROAD"** . . . In determining whether the road at issue there was a "**highway**", in contrast to a "**private road**", the court then stated: "**A HIGHWAY IS A WAY OPEN TO THE PUBLIC AT LARGE, FOR TRAVEL OR** TRANSPORTATION, without distinction, discrimination, or restriction, except such as is incident to regulations calculated to secure the general public the largest practical benefit therefrom and enjoyment thereof. **ITS PRIME ESSENTIALS ARE THE RIGHT OF COMMON ENJOYMENT ON THE ONE HAND AND THE DUTY OF PUBLIC MAINTENANCE ON THE OTHER. IT IS THE RIGHT OF TRAVEL BY ALL THE WORLD,** and not the exercise of the right, which constitutes a way a public highway, and the actual amount of travel upon it is not material. **IF IT IS OPEN TO ALL WHO DESIRE TO USE IT, IT IS A PUBLIC HIGHWAY** although it may accommodate only a limited portion of the public or even a single family or although it accommodates some individuals more than others. **25 Am. Jur. 339, section 2. HIGHWAYS ARE PUBLIC WAYS AS CONTRADISTINGUISHED FROM PRIVATE WAYS. THE DISTINGUISHING MARK OF A HIGHWAY IS THAT IT MUST BE OPENED GENERALLY TO THE PUBLIC USE,** as expressed in the English books, 'common to all the king's subjects,' although **IT IS THE RIGHT TO TRAVEL UPON A HIGHWAY BY ALL THE WORLD AND NOT THE EXERCISE OF THE RIGHT WHICH MAKES THE WAY A HIGHWAY**. . . . **THE COUNTY HAS NO STATUTORY AUTHORITY TO MAINTAIN "PRIVATE ROADS", and State ex rel. Oregon-Washington R.R. & Navigation Co. v. Walla Walla cy., 5 Wn.2d 95, 104 P.2d 764 (1940), CLEARLY DICTATES THAT THESE TYPES OF ROADS MAY NOT BE CONSTRUCTED (AND BY EXTENSION, MAINTAINED) AT PUBLIC EXPENSE." AGO 1996 No. 017.**

RCW 47.04.010, RCW 46.09.020, RCW 36.75.010 (11), WAC 296-32-210 (46), WAC 296-45-035 and Pierce County Code 11.02.030 defines . . . "PUBLIC HIGHWAY" . . . as:

"[E]very way, lane, road, street, boulevard, and every way or place in the state of Washington **OPEN AS A MATTER OF RIGHT TO PUBLIC VEHICULAR TRAVEL** both inside and outside the limits of incorporated cities and towns."

"**FURTHER, RCW 47.04.010 (26) PROVIDES THAT IN ORDER TO BE A "HIGHWAY" THE ROAD MUST BE "OPEN AS A MATTER OF RIGHT TO PUBLIC VEHICULAR TRAVEL**". That is clearly not the case here. Only authorized vehicles had the "right" to use Canal Road. The court erred in ruling that Canal Road was a public roadway." **Allemeier v. University, 42 Wn. App. 465, 469, 470, 712 P.2d 306 (December 30, 1985); Hall v. McDowell, 6 Wn. App. 941, 945, 497 P.2d 596 (May 11, 1972).**

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