

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

No. 34943-4-II

COWLITZ COUNTY, *Respondent,*

-v.-

L. CARLYLE MARTIN and LINDA C. MARTIN,
husband and wife; LAWRENCE OLSTAD and
ROBERTA KELLY, husband and wife;
WASHINGTON MUTUAL BANK; and U.S. BANK
NATIONAL ASSOCIATION ND, *Appellants.*

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BRIEF OF APPELLANTS

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A. ASSIGNMENTS OF ERROR

Assignment of Error No 1. The trial court erred in disregarding the fact that Resolution 05 152 of the Cowlitz County Board of Commissioners, which authorized the prosecuting attorney to acquire, through condemnation, an expanded easement over property in which the appellants each have an interest, in order to replace a culvert using a grant of money from the Salmon Recovery Funding Board, was specifically forbidden by statutory law, and was thus ultra vires.

Assignment of Error No 2. The trial court erred in finding that it was reasonably necessary for Cowlitz County to acquire an easement over property in which the appellants each have an interest in order to promote fish passage (Order Adjudicating Public Use and Necessity, Findings, paragraph 1).

Assignment of Error No 3. The trial court erred in finding that it was reasonable and necessary for Cowlitz County to acquire an easement over property in which the appellants each have an interest in order to provide protection for a county road in connection with 100 year storm events, when the Resolution of the Cowlitz County Board of Commissioners which authorized the condemnation action, stated that the acquisition of the property was for a different purpose (Order Adjudicating Public Use and Necessity, Findings, paragraph 1).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1. RCW Chapter 77.85 established the Salmon Recovery Funding Board and empowered it to designate projects and to provide funding for such projects, for the purpose of promoting, inter alia, the passage of fish in our state's streams and waterways. RCW 77.85.010(3) provides that the each such project must have a written agreement from the landowner on whose land the project will be implemented. The requirement of voluntary participation by the landowner is repeated at RCW 77.85.060(1)(b). May a county circumvent the requirement of voluntary participation by a landowner when a landowner refuses to participate in the project voluntarily, by acquiring an interest in the landowners land by way of condemnation? (Assignment of Error No. 1)

Issue No. 2. Resolution 05 152 of the Cowlitz County Board of Commissioners included a finding that "the Baxter Creek Culvert Replacement Project is necessary to remove and replace the existing culvert that has been identified as a barrier to fish passage and the Salmon Recovery Funding Board has awarded a grant for the project" and resolved that the Prosecuting attorney was authorized and directed to take all necessary steps, including condemnation, to acquire property rights in the subject property. Evidence in the form of expert opinion testimony was presented at trial, without objection, that removing and replacing the culvert at Baxter Creek was not only unnecessary but would be harmful to the fish in Baxter Creek. The trial court apparently disregarded that testimony entirely and made no findings whatsoever concerning the issue of whether the proposed project would, in fact, be harmful to fish in Baxter Creek. May a trial court ignore evidence which goes to the heart of the issue before it, without making any specific finds of fact concerning that evidence? (Assignment of Error 2).

Issue No. 3. Does a County Prosecuting Attorney have the authority to seek condemnation of private property for a purpose not specifically set forth in a resolution of the County's Board of Commissioners? (Assignment of Error 3).

C. STATEMENT OF THE CASE

The Salmon Recovery Funding Board was created by the Washington State Legislature as part of a comprehensive measure aimed at improving salmonid fish runs throughout the state of Washington. This legislation, codified in RCW Chapter 77.85, requires the Salmon Recovery Funding Board to promulgate a "Habitat project list" which is a list of projects resulting from the critical pathways methodology under RCW 77.85.060(2). Each project on the list must have a written agreement from the landowner on whose land the project will be implemented. One of the projects so identified by the Salmon Recovery Funding Board was located in Cowlitz County as was identified as "The Baxter Creek Project". The project included the replacement of a culvert located at Baxter Creek Road and Coyote Lane in Cowlitz County. This would require an enlargement of an easement over land in which the appellants each have an interest. Beginning in April 29, 2005 Cowlitz County attempted to acquire the enlarged easement through a voluntary purchase and sale. All offers to acquire the enlarged easement by voluntary sale were refused.

On October 18, 2005, the Cowlitz County Board of Commissioners passed resolution No. 05 152 which included a finding that "the Baxter Creek Culvert Replacement Project is necessary to remove and replace the existing culvert that has been identified as a barrier to fish passage and the Salmon Recovery Funding Board has awarded a grant for the project" and resolved that the Prosecuting attorney was authorized and directed to take all necessary steps, including condemnation, to acquire property rights in the subject property. (CP 14.)

On October 23, 2006 Cowlitz County filed a petition for condemnation with the Cowlitz County Superior Court. The assigned case number was 06 2 00385 4. (CP 1.) In the petition, the Prosecuting Attorney alleged that the Baxter Creek Culvert was a barrier to fish

passage, and that the existing culvert "is not adequate to handle stream flows under 100-year design storm". However, that allegation was not the subject of any findings by the County Commissioners and was never mentioned in Resolution 05 152 of the Cowlitz County Board of Commissioners, which authorized the condemnation action.

On March 20, 2006, the respondents to the condemnation action filed a Response and Affirmative Defense to the condemnation action (CP 6.). At the same time, the respondents to the condemnation action filed a Memorandum in Opposition to the Condemnation Petition.

On March 29, 2006 Cowlitz County filed its Memo RE Order Adjudicating Public Use and Necessity (CP 9).

On April 3, 2006, the respondents to the condemnation action filed a Motion to Dismiss the County's Petition for Condemnation (CP 11), and a Supplemental Memo (CP12) on the grounds that the Petition failed to join an indispensable party under RCW 8.08.040, as a party in the action, and, that the Court lacked jurisdiction to grant the relief requested in the petition. The Motion to Dismiss was denied on April 4, 2006 and the Court ordered that the hearing on the petition of Cowlitz County be continued.

An evidentiary hearing was held on May 19, 2006. Ryan Lapossa, the engineering manager for the Cowlitz County Department of Public Works, was called to the stand as a witness for the County. He described the design and function of the proposed replacement culvert. (RP P11). He testified on cross-examination that the county was replacing the culvert because it had received funding from the Salmon Recovery Board which had identified the culvert as a barrier for passage to fish. (RP P10, LL 5-8). He further testified that the culvert was on the list solely for that reason and for no other reason that he was aware of. (RP P13, LL 8-12). Finally, he identified the signatures of the deputy prosecuting attorney, the

clerk of the Cowlitz County Board of Commissioners and the Chairman of the Cowlitz County Board of Commissioners to an agreement between Cowlitz County and the Salmon Recovery Funding Board, the subject of which was the Baxter Creek Project. (RP P14, LL 16-19).

Significantly, the Agreement, which was admitted into evidence as Defendants Exhibit #2 (RP P14, L6), provided in part that :

“This agreement is governed by and the sponsor shall comply with all applicable state and federal laws and regulations, **including Chapter 77.85 RCW**, Chapter 286 WAC, and published agency policies as if fully set forth. (Emphasis added)

(RP P14, LL 23-25; P15, LL 1-3).

At the conclusion of Mr. Lapossa’s testimony, the County rested.

Laura Eckert Johnson, the Executive Director of Interagency Committee for Outdoor Recreation was called as a witness by telephone on behalf of the landowners. In that capacity she is empowered to bind the Salmon Recovery Funding Board by contract with the various counties. (RP P20, LL 9-19). She was a signator to the agreement admitted into evidence as Defendants Exhibit 2 (RP P24, LL 7-13). She testified that she was aware that Chapter 77.85 RCW and Chapter 286 WAC require a written agreement with the landowner on each Salmon Recovery Funding Board project (RP P26, LL 5-8). In the absence of such an agreement, the grant cannot be completed (RP P27, LL 9-14).

The landowners then called William Robinett to the stand. Mr. Robinett has been an operating engineer 30 years, engaged in road construction including culverts (RP P28, LL 16-25). Mr. Robinett has also been employed on a research vessel funded through Washington State University, Clatsop Community College, the United States Coast Guard and National Marine Fisheries. The vessel is used to check krill, fire plankton traps, check solidity and turbidity and different effects on salmon species. (RP P30, LL 15). Mr. Robinett is also a professional

salmon guide and is on the water a minimum 5 days a week (RP P30, LL19-24). He has worked on a dozen fish habitat restoration projects in the last ten years. (RP P36, L25; P37, L1-8).

Mr. Robinett testified that he personally inspected the existing Baxter Creek culvert and that, in his opinion, it poses no barrier to fish. (RP P31, LL6-25; P32 LL 1-25). He further testified that replacing the existing culvert would have a negative effect on the aquatic environment that would last for 25 or 26 years because it would stir up the volcanic ash laid down by the Mt. St Helen's eruption 25 years ago, from which the environment is just now beginning to recover (RP P40, LL1-25; P41 LL 1-5). This testimony was uncontroverted.

At the conclusion of the trial the attorney for Cowlitz County presented the judge with a proposed Order Adjudicating Public Use and Necessity. On May 23, 2006 the judge signed the Order as presented.

D. ARGUMENT

1. *The trial court erred in disregarding the fact that Resolution 05 152 of the Cowlitz County Board of Commissioners, which authorized the prosecuting attorney to acquire, through condemnation, an expanded easement over property in which the appellants each have an interest, in order to replace a culvert using a grant of money from the Salmon Recovery Funding Board, was specifically forbidden by statutory law, and was thus ultra vires.*

Although the State of Washington has the inherent power of eminent domain, local government entities created by the state have the power only to the extent it is delegated to them by the state. Thus the state's power is much broader than that of the counties or municipalities. A political subdivision's power to condemn is delegated to it by the legislature and must be conferred in express terms or necessarily implied. Statutes which delegate the State's sovereign power of eminent domain to its political subdivisions are to be strictly construed. *In Re Seattle*, 96 Wn.2d 616, 638 P.2d 549 (1981). Statutory power to condemn land for a certain purpose must appear by express language or necessary implication. A grant of eminent domain, or power to condemn for public use, must be expressly given or necessarily implied; and statutes conferring such power, being in derogation of the common right, must be strictly construed. *State Ex Rel. King County v. Sup. Ct.*, 33 Wn.2d 76, 204 P.2d 514 (1949).

In *State Ex Rel. King County v. Sup. Ct.*, supra, King County sought to condemn for public use certain portion of a street or road on Mercer Island, bordering on or adjacent to the shorelands of Lake Washington. The resolution contemplated that the described portion of the street or road be appropriated for public use as a recreational and park area, subject, however, to its dedicated, existing use as part of a county road or public highway. The trial court held, and the supreme court affirmed, that the county had no authority to condemn land for the purposes stated in the petition and, further, that the court had no jurisdiction of the subject matter, for the reason that the action of the county commissioners was in excess of their authority.

At the time that *State Ex Rel. King County vs. Sup. Ct.* was decided the general powers and duties of boards of county commissioners were set forth in Rem. Supp. 1947, § 4056. In addition to a series of enumerated powers, none of which had any application to the case, that statute contains also a provision authorizing boards of county commissioners

". . . to lay out, discontinue or alter *county roads and highways* within their respective counties, and do all other necessary acts relating *thereto* according to law, . . ."

The Supreme Court found that there was nothing in that entire section of the statute, including the part just quoted, which either expressly or by necessary implication confers upon the board of county commissioners the power or authority to acquire lands for public use as a park or recreational site, by condemnation or otherwise.

The county contended that such power was granted by chapter 34, Laws of 1937 (Rem. Rev. Stat.) which provided:

"That the counties of this state be and they are hereby empowered and authorized to acquire *by purchase or by gift, dedication or donation* camping sites, *parks*, scenic-view sites and *recreational sites* for public use and enjoyment."

The Supreme Court, citing any abundance of authority, opined that while, by this statute, counties are authorized to *acquire* parks and recreational sites, nevertheless, the method by which they may be acquired is limited to *purchases, gifts, dedications or donations*. No authority was granted to acquire property or parks or the various kinds of sites by *condemnation*.

In the instant case Cowlitz County sought to take advantage of a grant offered by the Salmon Recovery Funding Board to replace a culvert on Baxter Creek. In order to accomplish this, the county needs to acquire an expanded easement over property in which the appellants each have an interest. The County attempted to obtain a voluntary agreement with the

landowners to acquire the easement but the landowners refused. This created a problem for the County, because, by statute, projects funded by the Salmon Recovery Funding Board were required to have the voluntary agreement of the effected landowners. RCW 77.85.060(2) and RCW 77.85.010(3).

The Salmon Recovery Funding Board was created by the Washington State Legislature as part of a comprehensive measure aimed at improving salmonid fish runs throughout the state of Washington. This legislation, codified in RCW Chapter 77.85, requires the Salmon Recovery Funding Board to promulgate a "Habitat project list" which is a list of projects resulting from the critical pathways methodology under RCW 77.85.060(2). Each project on the list must have a written agreement from the landowner on whose land the project will be implemented. Projects include habitat restoration projects, habitat protection projects, habitat projects that improve water quality, habitat projects that protect water quality, habitat-related mitigation projects, and habitat project maintenance and monitoring activities. RCW 77.85.010(3). (Emphasis added). The legislation contemplates voluntary cooperation with landowners and makes no provision for condemnation of private land. Not only does RCW 77.85.010 state that "each project on the list must have a written agreement from the landowner on whose land the project will be implemented" but this requirement was repeated in RCW 77.85.060(1)(b) (relating to the critical pathways methodology) in the following, slightly different language: The projects identified must have a written agreement from the landowner on which the project is to be implemented.

Not to be deterred, the County Board of Commissioners passed resolution 05 152 which referenced the availability of funds from the Salmon Recovery Funding Board, stated that the existing Baxter Creek Culvert was a barrier to fish passage, and authorized the Prosecuting

Attorney to acquire an expanded easement over the property adjoining the existing culvert by whatever means necessary, including condemnation.

RCW Chapter 77.85 clearly contemplates that private property will be acquired to achieve the goals of increasing salmon runs by making and executing agreements and accepting gifts, grants or loans. Since projects identified must have a written agreement from the landowner on which the project is to be implemented, the legislation precludes the exercise of eminent domain to achieve its purposes. This is consistent with other related legislation concerning the management of natural resources, such as RCW 79.71.040, which governs the acquisition of property for natural resources conservation areas, and which provides:

The department is authorized to acquire property or less than fee interests in property, as defined by RCW 64.04.130, by all means, except eminent domain, for creating natural resources conservation areas, where acquisition is the best way to achieve the purposes of this chapter. Areas acquired or assembled by the department for conservation purposes will be designated as "Washington natural resources conservation areas."

WAC 420-04-10, which contains definitions to be applied in implementing the duties of the Salmon Recovery Funding Board, defines "acquisition" as follows:

"Acquisition" means the gaining of rights of public ownership by purchase, negotiation, or other means, of fee or less than fee interests in real property, and related interests such as water or mineral claims and use rights.

The power of an administrative agency to promulgate rules is not unlimited. An agency may not legislate under the guise of rule-making power. Rules must be written within the framework and policy of the applicable statutes. They may not amend or change enactments of the legislature. *Kitsap-Mason Dairymen's Association, v. Washington State Tax Commission*, 77 Wn.2d 812,

Accordingly, in interpreting the definition of “Acquisition” set forth WAC 430-04-10, the Court should consider that the phrase “or other means” must refer to the acceptance of voluntary gifts or donations of land, otherwise it would run afoul of the statutory scheme of voluntary acquisition of rights in land.

At trial the County argued that the County could use its own funds to acquire the property through condemnation and thus not run afoul of the requirement of landowner voluntary agreement set forth in RCW Chapter 77.85. (RP P56, LL 1-6). The County further suggests that the Salmon Recovery Funding Board’s representative, Linda Eckert Johnson, also adopts that construction, the Court should too. However, RCW Chapter 77.85 is unambiguous. It does not simply prohibit condemnation using Salmon Recovery Board funding, it requires that each project on the “Habitat project list” list must have a written agreement from the landowner on whose land the project will be implemented. Therefore, without the agreement of the landowner upon which the project is to be implemented, the Salmon Recovery Funding Board cannot fund the project in any way, whether for condemnation, construction, or any other purpose.

There is a rule of construction that the construction that a state agency places on statutes that the agency is responsible for administration and enforcement should be given great deference. *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975); *See also, Bellevue Fire Fighters Local 1604 v. Bellevue*, 100 Wn.2d 748, 750 n.1, 675 P.2d 592 (1984). This rule of construction only applies, however, when the statute in question is ambiguous. *Allen v. Employment Sec. Dep't*, 83 Wn.2d 145, 148, 516 P.2d 1032 (1973). Since the statute is not ambiguous, no deference need be given to the State's interpretation.

Another reason why the County cannot act on its own to acquire the subject property for the purpose of promoting fish passage is found at RCW 77.110.030, which provides:

77.110.030 Management of natural resources -- State policy.

The people of the state of Washington declare that conservation, enhancement, and proper utilization of the state's natural resources, including but not limited to lands, waters, timber, fish, and game are responsibilities of the state of Washington and shall remain within the express domain of the state of Washington.

While fully respecting private property rights, all resources in the state's domain shall be managed by the state alone such that conservation, enhancement, and proper utilization are the primary considerations. No citizen shall be denied equal access to and use of any resource on the basis of race, sex, origin, cultural heritage, or by and through any treaty based upon the same. (Emphasis added)

This language was adopted by initiative. Laws of 1985 Ch 1 § 3 (Initiative Measure No. 456, approved November 6, 1984). The principles regarding the construction of any statute nevertheless apply. *Adams v. Department of Social & Health Servs.*, 38 Wn. App. 13, 683 P.2d 1133 (1984); *Kringel v. Social & Health Servs.*, 45 Wn. App. 462, 726 P.2d 58 (Division II, 1986).

In construing a statute, the court's paramount duty is to ascertain and carry out the intent of the Legislature. An unambiguous statute is not subject to judicial construction, and our Court's will not add language to a clear statute even if they believe the Legislature intended something else but failed to express it adequately. An unambiguous statute is not subject to construction; there is no need to resort to dictionary definitions. *Adams v. Department of Social & Health Servs., Supra.* RCW 77.110.030 is clearly unambiguous. The drafters of Initiative Measure No. 456 could have stated that the conservation of fish is in the exclusive domain of the State of Washington, and *its political subdivisions*. They did not. The people of the State of Washington passed it as worded. The Court should not take it upon itself to amend the statute to by judicial construction.

For these reasons alone, the Order Adjudicating Public Use and Necessity should be reversed.

2. *The trial court erred in finding that it was reasonably necessary for Cowlitz County to acquire an easement over property in which the appellants each have an interest in order to promote fish passage.*

The decision on public use and necessity involves three considerations: first, whether the proposed use is really a "public use"; second, whether the public interest requires the public use; and third, whether the property to be taken is necessary for the proposed purpose. *Tacoma v. Welcker*, 65 Wn.2d 677, 684, 399 P.2d 330 (1965). The burden of proof is on the condemner, here the County. *State ex rel. Washington State v. Evans*, 136 Wn.2d 811, 817, 966 P.2d 1252 (1998). Appellants second assignment of error concerns the third prong of this inquiry, i.e. whether the property to be taken is necessary for the proposed purpose, in this case, removing a barrier to fish passage.

The determination as to whether condemnation is necessary is largely a question reserved for the legislative body seeking condemnation. *Welcker, Supra*. "Necessary," in this context means "reasonable necessity, under the circumstances." *State ex rel. Lange v. Superior Court*, 61 Wn.2d 153, 156, 377 P.2d 425 (1963). Our courts defer to the legislative body when reviewing a challenge to necessity. *Reg'l Transit Auth. v. Miller*, 156 Wn.2d 403 at 411-412, 128 P.3d 588 (2006). As a result, the legislative body's declaration of necessity is conclusive in the absence of proof of actual fraud or arbitrary and capricious conduct as would constitute constructive fraud. Arbitrary and capricious conduct on the part of a legislative body in connection with eminent domain proceedings is willful and unreasoning action without regard for facts or circumstances. *Welcker*, 65 Wn.2d at 684. Arbitrary and capricious action is willful and unreasoning, without consideration, and in disregard of the facts and circumstances. *Equitable Shipyards, Inc. v. State*, 93 Wn.2d 465, 611 P.2d 396 (1980).

This is, admittedly, a difficult standard from the point of view of a party who wishes to resist the taking of their property through eminent domain proceedings. However, the Appellants in this case believe that the evidence at trial warrants a reversal of the trial court decision on the ground that the action of the Cowlitz County Board of Commissioners was arbitrary and capricious. Consider the undisputed testimonial evidence at trial that the replacement of the existing culvert over Baxter Creek will not only not improve the aquatic environment for the fish in the stream, but it will destroy the habitat for 25 years. (RP P40, LL1-25; P41 LL 1-5). The county's own witness was questioned about this and he admitted that the experts that were hired by the county to determine whether the existing Baxter Creek culvert presented a barrier to fish they weren't asked to identify any impacts that replacing the culvert would have on the environment. (RP P43, LL19-25; P44 LL 1-13), and apparently no one in the employment of Cowlitz County ever bothered to inquire about this basic issue. There are only two logical reasons for such an appalling failure to investigate this matter. 1) Either no one in authority in the County government cared whether whatever fish were in the creek lived or died, or 2) They suspected that the placement of a new culvert would destroy the aquatic habitat so they purposefully failed to raise or study the issue, for fear that the results would render the project nonsensical, and thus deprive the county of the grant money. Since the ostensible purpose for the project was to improve the aquatic environment, and the evidence at trial was that it would not accomplish that purpose, the trial court should be reversed.

No. 3 The trial court erred in finding that it was reasonable and necessary for Cowlitz County to acquire an easement over property in which the appellants each have an interest in order to provide protection for a county road in connection with 100 year storm events, when the Resolution of the Cowlitz County Board of Commissioners which authorized the condemnation action, stated that the acquisition of the property was for a different purpose.

The counties of our state receive their power and authority to condemn land pursuant to RCW 8.08.010 which vests the power in the board of county commissioners, whenever they deem it necessary for county purposes to acquire such land.

When a statute requires a public officer to exercise his discretion, such public officer cannot re-delegate his authority. *State ex rel. West v. City of Seattle*, 61 Wn.2d 658, 379 P.2d 925 (1963). The West court held an appointing authority which had the responsibility of discharging employees could not delegate that responsibility.

Municipal corporations, as creatures of the state, derive their authority and powers from the Legislature. *Town of Othello v. Harder*, 46 Wn.2d 747, 752, 284 P.2d 1099 (1955). A municipal corporation's powers are limited to those powers conferred in express terms or those necessarily implied in or incident to the powers expressly granted, along with the powers essential to the declared objects and purpose of the corporation. *State ex rel. Port of Seattle v. Superior Court*, 93 Wash. 267, 269, 160 P. 755 (1916). Where the Legislature confers specific powers and duties to the legislative body of a municipal corporation, that body may not delegate such powers and duties absent specific statutory authorization. *Municipality of Metro. Seattle v. Division 587, Amalgamated Transit Union*, 118 Wn.2d 639, 643, 826 P.2d 167 (1992).

Here, the Board of County Commissioners made no finding that the existing Baxter Creek culvert needed to be replaced to provide protection for the county road in connection with a 100 year storm event. According to the engineering manager of the Cowlitz County Department of Public Works, the County keeps a list of culverts that were in need of

replacement. The Baxter Creek culvert was not in disrepair and was on the list solely because it was thought to be a barrier to fish passage. (RP P13, LL 5-12)

The prosecuting attorney alleged in his petition that, in addition to being a barrier to fish passage, the existing culvert “is not adequate to handle stream flows under 100-year design storm”. However, that allegation was not the subject of any findings by the County Commissioners and was never mentioned in Resolution 05-152, and there was no evidence that the Board of Commissioners ever considered that issue. The Board of Commissioners cannot delegate to the Prosecuting Attorney its legislative authority. *Municipality of Metro. Seattle v. Division*, supra.

E. CONCLUSION

The act of the Cowlitz County Board Commissioners in attempting to exercise the power of eminent domain to condemn the Respondent's land for the purpose of participating in a project under a grant from the Salmon Recovery Funding Board was ultra vires because the County did not obtain a written agreement from the landowner on which the project was to be implemented, as required by RCW Chapter 77.85. Furthermore, The act of the Board of Commissioners in ordering the condemnation of the subject property was arbitrary and capricious in that the county failed to investigate and identify the adverse effect on the aquatic environment that would result from the placement of a new culvert in Baxter Creek for the stated purpose of removing a barrier to fish passage. Finally, the Prosecuting Attorney had no authority to perform the legislative function of the Board of Commissioners by including in the petition for an Order Adjudicating Public Use and Necessity an allegation that the existing culvert "is not adequate to handle stream flows under 100-year design storm".

The trial court's Order Adjudicating Public Use and Necessity should be reversed.

Respectfully submitted this 3rd day of January, 2007.


Robert M. Gregg, WSB# #12553
Attorney for Appellants

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

COWLITZ COUNTY, a political subdivision
of the State of Washington,

No. 34943-4-II

Respondent,

-vs.-

L. CARLYLE MARTIN, Et al,

Appellants.

FILED
JAN 8 AM 9:55
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BY [Signature]

CERTIFICATE OF SERVICE

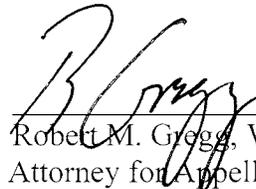
I, Robert M. Gregg, certify and declare:

That on the 3rd day of January, 2007, I served a true copy of **Appellants Brief** on Respondent Cowlitz County by depositing the same in the United States Mail, with first class postage prepaid, addressed to:

Ronald S. Marshall, Chief Civil Deputy
Cowlitz County Prosecuting Attorney's Office
312 SW First Avenue
Kelso, WA 98626

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of January, 2007.



Robert M. Gregg, WSBA #12553
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