

No. 47655-0-II
(Jefferson County Superior Court #14-2-00156-7)
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

HOOD CANAL SAND AND GRAVEL, LLC,
Appellant,
vs.
PETER GOLDMARK, et al.,
Respondents.

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STATE OF WASHINGTON
BY  DEPUTY

FILED
COURT OF APPEALS
DIVISION II

APPELLANT'S OPENING BRIEF

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I. NATURE OF THE CASE

As Defendants (collectively “DNR”) have been well aware, Hood Canal Sand and Gravel, LLC (“HCSG”) has been working since 2003 on permitting for a pier facility that will allow transport of sand and gravel aggregate products by means of ships and barges rather than the more environmentally harmful transport means, namely short and long haul trucking (“HCSG’s Project”). However, once DNR became aware that the HCSG Project review process was nearing completion, DNR precipitously granted an Aquatic Lands: Deed of Easement (the “Easement”) to the U.S. Navy to deliberately block the HSCG Project. Without legal or environmental rationale, without any due process or opportunity for public input, and in deliberate violation of full market valuation requirements, DNR drastically exceeded its limited statutory authority.

HCSG brought a narrowly drafted Motion for Partial Summary Judgment (“HCSG’s Motion”) designed to focus solely one question of law ripe for summary judgment: “Did DNR exceed its statutory authority to grant the Easement to the Navy.” In blatant disregard of Civil Rules and the resulting prejudice to HSCG, DNR responded with an untimely motion for full summary judgment (“Countermotion”). DNR’s untimely motion exponentially expanded the issues, and raised issues that involved material fact in dispute and for which DNR presented no supporting

evidence. Over HSCG's objections, the trial court nonetheless accepted DNR's untimely motion without explanation and without giving HCSG opportunity to brief the newly raised issues before oral argument. Instead, the trial court gave short shrift to HCSG's entire case, summarily finding no genuine issues of material fact in dispute. The trial court even dismissed causes of action for which neither DNR nor HSCG had sought summary judgment or briefed. Without any analysis whatsoever, the trial court dismissed HCSG's entire case with prejudice.

II. ASSIGNMENTS OF ERROR

The trial court erred by improperly concluding that:

1. DNR had met its burden of demonstrating that there were no genuine issues of material fact in dispute.
2. The Navy is a necessary and indispensable party.
3. Declaratory judgment affords no review of DNR's application.
4. A writ of mandamus was not available to HCSG.
5. HCSG was not entitled to a Constitutional Writ of Certiorari.
6. DNR's issuance of the Easement was not a quasi-judicial act.
7. HCSG was not entitled to a writ of mandamus.
8. DNR had statutory authority to grant the Easement.
9. HCSG has no priority or preference right to a lease on state bedlands, or right to construct a pier on state bedlands.

10. The Law of the Case doctrine is applicable.
11. HCSG did not meet its burden with regard to injunction.
12. DNR was entitled to summary judgment on all issues as a matter of law for the foregoing reasons.
13. HCSG's entire case should be dismissed with prejudice when there remain issues for which summary judgment was not sought.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court improperly hear an untimely summary judgment motion where hearing such motion prejudiced HCSG?
2. Did the trial court improperly grant summary judgment where genuine issues of material fact exist and are in dispute?
3. Did the trial court err in dismissing the entire case with prejudice when there remained issues for which summary judgment was not sought nor the issues briefed?
4. Was the Navy an indispensable party for purposes of declaratory judgment?
5. Did DNR act within its statutory authority when it granted the Easement?
6. Did DNR act within its statutory authority when it determined the full market value of the Easement?
7. Was HCSG entitled to a declaratory judgment?

8. Was HCSG entitled to a writ of prohibition or mandamus?
9. Was HCSG entitled to a statutory or constitutional writ of certiorari?
10. Was HCSG entitled to a preliminary injunction?
11. Is the Law of the Case doctrine applicable to a ruling by a federal court judge in a state case involving different parties?
12. Did the trial court err when it made rulings based on issues not brought in the summary judgment proceedings?

IV. STATEMENT OF THE CASE

As discussed in greater detail in HCSG's Motion for Partial Summary Judgment, HCSG owns 14.7 acres of unimproved waterfront property south of the Hood Canal Floating Bridge, along with the second class tidelands abutting the upland waterfront property ("HCSG's Property"). For more than a decade, HCSG has worked to develop a marine transport load-out facility for shipment of sand and gravel ("aggregate") products to regional, intrastate and interstate markets via barge and ship. HCSG's Project includes a conveyance system and 1000-foot pier on Hood Canal by which the aggregate will be loaded onto barges and ships. Transporting the aggregate via water to ports along the West Coast is far more efficient and environmentally-friendly than what would otherwise take millions of truck trips on Washington roads and highways.

From roughly 2003 to 2014, DNR worked with HCSG with regard to: the scope and design of HCSG's Project, including HCSG's need to use the state's beds of navigable waters¹ for the pier; DNR site visits and detailed project review; the complex and detailed regulatory steps required for HCSG's Project; and DNR guidance to HCSG and Jefferson County in drafting the detailed Environmental Impact Statement ("EIS") required under SEPA.

In 2003, HCSG applied to DNR and other governmental agencies for the permits necessary to authorize construction of HCSG's Project, including a Joint Aquatic Resources Permit Application ("JARPA"), for authorization to use state-owned beds of navigable waters for the HCSG Project's pier pilings.² On June 24, 2013, as part of the documents required under the National Environmental Protection Act, HCSG submitted an update to its 2003 JARPA, with the required fee.³ Strangely, on July 10, 2013, DNR returned HCSG's updated JARPA fee, informing HCSG that "we are currently working with an applicant on an authorization that may preclude your use. We will analyze the proposal

¹These beds of navigable waters, or "Bedlands," are owned by the State of Washington. DNR manages the Bedlands within the bounds established by Title 79 RCW.

²CP 194-200, *Declaration of Baskins*, Ex. A.

³CP 217-244, *Declaration of Baskins*, Ex. D.

for compatibility with that authorization and let you know if you can proceed with your application.”⁴

Unbeknownst to HCSG, DNR and the Navy meanwhile were negotiating an easement that would restrict use of the very Bedlands which DNR knew HCSG’s Project relies on. DNR tried to keep the negotiations out of public view, even omitting the mandatory SEPA review until forced to comply long after commitments were made.⁵ DNR provided no notification to the general public or even the affected property owners, let alone opportunity for public review, comment and hearing, as would normally be the case with such broad reaching restrictions.⁶ Instead, on May 31, 2013, the Navy and DNR quietly entered into an Agreement for Purchase of Easement, pursuant to which DNR agreed to sell and the Navy⁷ agreed to purchase an Easement over 4,808 acres of

⁴CP 245-46, *Declaration of Baskins*, Ex. E; as further discussed in HCSG’s Motion for Partial Summary Judgment, DNR attempted to claim that HCSG’s 2003 JARPA was ineffective because DNR didn’t use the JARPA until 2012, although the form itself was labeled DNR Use Authorization Notification. See CP 194, *Declaration of Baskins*, Ex. A.

⁵It was only after HCSG discovered these negotiations were well underway, and raised concerns about the lack of a SEPA review that the DNR decided finally conducted the SEPA review. See CP 27274, *Declaration of Baskins*, Ex.s H and I, respectively.

⁶Ironically, the Navy was also conduct an EIS for expansion of its operations in Hood Canal in which it specifically noted that HCSG’s Project was a reasonably foreseeable development, and that the Navy’s proposed expansion would have either no direct or indirect impacts or would only have short-term, temporary direct and indirect cumulative impacts, even if HCSG’s Project and the Navy project were to be constructed simultaneously. See CP 159, *HCSG Motion for Partial Summary Judgment*, p. 7.

⁷The contracting party was the United States. The Navy, the United States, and agents thereof are referred to herein collectively as the “Navy.”

Bedlands located in Hood Canal for full market value to be established through an appraisal.

DNR tried to expedite the deal to avoid having to recognize HSCG's 2003 JARPA application, going so far as to 'jump' the Easement ahead for processing before HCSG's Project. As noted by Navy personnel, "if [the Easement is] not approved and conveyance complete in the next few months, our application will be removed and they must go onto to [sic] the next application."⁸ The "next application" was HCSG's Project, filed a decade earlier.

DNR commissioned an independent appraisal ("Appraisal") that valued the Easement at \$1,680,000.⁹ The Navy had their own appraiser review the Appraisal, who agreed with the \$1,680,000 valuation.¹⁰ DNR also commissioned a second independent review of the Appraisal, which also agreed with the \$1,680,000 valuation.¹¹ However, to avoid delay from seeking Congressional approval, the parties forced their appraisers to lower the valuation below federal spending limits. DNR staff objected, noting "The reason we are in PARTNERSHIP with the Navy is to take advantage of at least \$3 million dollars they are offering to us."¹² When

⁸CP 524, *Declaration of Baskins*, Ex. N4.

⁹CP 303-502, *Declaration of Baskins*, Ex. N1.

¹⁰CP 533-49, *Declaration of Baskins*, Ex. N8.

¹¹CP 275-87, *Declaration of Baskins*, Ex. J.

¹²CP 269, *Declaration of Baskin*, Ex. G2 (emphasis original).

the Navy's appraiser objected to his senior officer's directive to lower the valuation, his senior officer assured him that "When issues arise and you are uncomfortable with a grey area, I will write you a 'get out of jail card free.'"¹³ Nonetheless, on June 23, 2014, the Navy made its official offer to purchase the Easement covering the full 4,808 acres of Bedlands for only \$720,000, which DNR quickly accepted.¹⁴

The Easement, executed on July 7, 2014, grants the Navy a 55-year restrictive interest over Bedlands in Hood Canal adjacent to HCSG's Property. The stated purpose of the Easement is to:

limit future improvement, development, or use of the [Bedlands] Property in a manner that would be incompatible with the mission of the Government, or might otherwise restrict, impede, or interfere, whether directly or indirectly, with current or anticipated military training, testing, or operations of the Government.¹⁵

However, as recognized by DNR staff themselves, the real purpose of the easement was "to block Pit-to-Pier project."¹⁶ While the Easement does not physically encroach on HCSG's Property, it restricts use of the Bedlands adjacent to HCSG's Property by foreclosing new commercial or industrial construction on the Bedlands, including prohibiting the location

¹³CP 531, *Declaration of Baskins*, Ex. N6.

¹⁴CP 553-57, *Declaration of Baskins*, Ex. N11.

¹⁵CP 562, *Declaration of Baskins*, Ex. N12. The Easement also purports to protect "Conservation Values" "including but not limited to, native species and species assemblages, ecological systems functioning within or restore to their natural variability, and marine, tidal and upland features with scenic or educational attributes found on the [Bedlands] Property."

¹⁶CP 291, *Declaration of Baskins*, Ex. L.

of pilings necessary to support HCSG's pier. The Easement prohibits "residential, scientific, commercial, and industrial uses and activities" on the Bedlands, and construction "of any buildings, structures or other improvements of any kind..."¹⁷

HCSG brought suit in federal¹⁸ and state court. The Navy removed HCSG's original state suit to the Federal Action. The federal court then dismissed all claims alleged against DNR in federal court and remanded those claims against DNR to state court for adjudication.¹⁹

V. ARGUMENT

A. Appellate Court Standard of Review.

Summary judgment is improper unless the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law.²⁰ Summary judgment may not be granted unless, based on all the evidence, reasonable persons could reach but one conclusion.²¹ The burden is on the moving party to demonstrate there is no issue of material fact. The moving party is held to a strict

¹⁷CP 563, *Declaration of Baskins*, Ex. N12.

¹⁸*Hood Canal Sand and Gravel, LLC v. Brady*, et al, case number 3:14-cv-05620-BHS ("Federal Action").

¹⁹HCSG's claims against the Navy in the Federal Action are pending.

²⁰CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

²¹*Wilson*, 98 Wn.2d at 437

standard.²² When reviewing summary judgment, this Court stands in the same position as the trial court,²³ and must consider all facts submitted and view all facts in the light most favorable to the nonmoving party.²⁴

HCSG brought its Motion on only one issue: whether DNR had the statutory authority to grant the Easement. HCSG bears the burden of proof only on this issue. DNR brought an untimely motion for summary judgment on *ten* new issues.²⁵ DNR has the burden of proof with regard to the issues it raised, and all facts must be viewed in a light most favorable to HCSG.

B. The Trial Court's Procedural Errors Necessitate Remand.

The trial court's order was rife with procedural and substantive errors. Procedurally, the court erred when it allowed the full summary judgment contained in DNR's Countermotion to be heard a mere 11 days after it was filed, without allowing HCSG the opportunity to fully brief the ten new issues DNR raised. The court also improperly permitted DNR to raise

²² *Scott v. Pacific West Mountain Resort*, 119 Wn.2d 484, 502-503, 834 P.2d 6 (1992).

²³ *Ruff v. King County*, 125 Wn.2d 697, 887 P.2d 886 (1995)

²⁴ *Wilson*, 98 Wn.2d at 437.

²⁵ DNR's Countermotion sought summary judgment on (1) whether DNR's determination of fair market value of the Easement was arbitrary, capricious or unlawful; (2) whether HCSG has a priority or preference lease to construct a pier on state bedlands; (3) whether a ruling in a federal proceeding to which DNR is not a party is the "law of the case" in a state proceeding; and (4) whether HCSG is entitled to injunctive relief; (5) whether the Navy is an indispensable party; (6) whether declaratory judgment is available; (7) whether a statutory writ of prohibition is available; (8) whether a constitutional writ of certiorari is available; (9) whether a statutory writ of certiorari is available; (10) whether a writ of mandamus is available (a remedy HCSG did not seek in its complaint); and (11) whether DNR had the statutory authority to grant the Easement (the sole issue in HCSG's motion).

matters involving genuine issues of material fact. The court also erred in granting dismissal of issues for which neither party had sought summary judgment or briefed. The court's substantive errors were compounded by its procedurally flawed consideration of issues not ripe for summary judgment.

Despite HCSG's objections, the trial court allowed DNR to argue its untimely Countermotion at the hearing. The trial court's order erroneously found "no genuine issues of material fact in dispute in this case."²⁶ The court then granted summary judgment in favor of DNR "on all issues," dismissing the entire case with prejudice. The trial court went so far as to dismiss causes of action that neither party had sought summary judgment on nor briefed.²⁷

1. The Hearing on DNR's Untimely Motion Prejudiced HCSG.

A trial court's decision to deviate from the civil rules timelines must be overturned upon a showing of prejudice resulting from the decision.²⁸ Prejudice may be shown by lack of actual notice, lack of time to prepare for the motion, or lack of opportunity to submit case authority or provide

²⁶CP 746, *Order*, p. 2.

²⁷CP 129-32, *HCSG's Second Amended Complaint*, pp. 18-21. These include HCSG's quiet title and constitutional due process causes of action.

²⁸*State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 236, 88 P.3d 375, 380 (2004).

countervailing oral argument.²⁹ CR 56 requires that a summary judgment motion and supporting documentation be filed at least 28 days before a hearing.³⁰ Court rules do not allow this deadline to be abbreviated except by a motion to shorten time.³¹ Even if a party files such a notice, the trial must consider whether shortening time would prejudice the other party due to lack of notice, lack of time to prepare and lack of opportunity to submit authority and countervailing argument.

HCSG narrowly tailored its Motion to address the sole question of “Did DNR exceed its statutory authority to grant the Easement to the Navy?”³² No other issues in the case were ripe for summary judgment, as each involved questions of fact. HCSG timely filed its motion on April 1, 2015, noting the hearing for May 1, 2015. HCSG had actually given DNR 6 weeks’ advance notice³³ of its intent to file a partial summary judgment motion, affording DNR plenty of time to file its own summary judgment motion before the hearing if it chose to do so.

Nonetheless, DNR ignored CR 56, filing its Countermotion on April 20, 2015, only 11 days before the hearing. DNR did not file a motion to

²⁹ *Id.*, 151 Wn.2d at 236-37.

³⁰ CR 56(c).

³¹ *CAT v. Murphy*, 151 Wn.2d at 236-37.

³² CP 167, *HCSG Motion for Partial Summary Judgment*, p. 15.

³³ HCSG’s counsel contacted DNR’s counsel on March 20, 2015, to confer about an acceptable date for hearing HCSG’s planned summary judgment motion. Upon agreement, HCSG filed its motion April 1, noting the hearing for May - 6 weeks from the time DNR agreed to the date, and well in advance of the 28 day requirement.

shorten time, nor present any argument as to the necessity to shorten time. DNR's disregard of CR 56 prejudiced HCSG by not providing sufficient time or opportunity to respond, particularly in light of the greatly expanded scope of the summary judgment issues to be heard. HCSG strenuously objected to DNR's untimely motion, imploring the trial court to "strike DNR's Countermotion for Summary Judgment as untimely, and require DNR to bring its own summary judgment in accordance with Rule 56 and its timelines."³⁴

There was absolutely no reason why the hearing could not have been postponed to allow HCSG reasonable and legally-required time to respond to DNR's expansive Countermotion. Nor is there any reason why DNR could not have sought summary judgment in a timely fashion.

Nonetheless, the trial court allowed DNR to address all of its expanded issues at the hearing, in spite of HCSG's strenuous objections. This lack of notice and shortened time to respond prejudiced HCSG, unfairly depriving HCSG of sufficient time to prepare and respond to DNR's Countermotion.

2. DNR's Countermotion Improperly Raised Questions of Fact.

DNR's untimely Countermotion added *ten* new issues including whether DNR's actions in granting the Easement were arbitrary,

³⁴CP 723, *HCSG Reply*, p. 2.

capricious or unlawful; whether HCSG has a right to construct a pier on the Bedlands; and whether the Navy is an indispensable party. While some of these issues also involve questions of law, the determination of those questions rest on facts not in evidence. As discussed herein, DNR provided no evidence to support its arguments. The court's summary judgment on these issues was erroneous.

Summary judgment may only be granted when there are no genuine issues of material fact.³⁵

The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue of material fact. However, a trial is absolutely necessary if there is a genuine issue as to any material fact. . . A "material fact" is one upon which the outcome of the litigation depends. . . [I]t is not our function, when ruling on a motion for summary judgment, to resolve existing factual issues on the merits. Rather, the court must determine whether any genuine issue of material fact exists which requires a trial on the merits.³⁶

As the moving party, DNR had the burden of showing that the issues raised in its Countermotion presented no genuine issues of material fact: DNR is required to identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any', which it believes demonstrate the absence of a genuine issue of material fact."³⁷ The moving party "must affirmatively present the

³⁵CR 56.

³⁶*Jacobsen v. State*, 89 Wn.2d 104, 108-10, 569 P.2d 1152 (1977) (internal citations omitted).

³⁷*White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn.App. 163, 169-70, 810 P.2d 4 (1991).

factual evidence upon which he relies.”³⁸ However, DNR did not make reference to any such evidence to demonstrate the absence of issues of fact, and provided no support for its conclusory arguments.

Because DNR failed to sustain its initial burden of proof, it was not necessary for HCSG to submit affidavits or other materials to refute DNR’s motion.³⁹ Even if HCSG had a duty to respond to DNR’s unfounded factual assertions, HCSG did not have the opportunity to respond because of the significant untimeliness of DNR’s Countermotion. Instead, all HCSG could do was reserve

its rights with regard to the issues raised therein, as well as facts that were incorrectly represented in Defendants’ Response, at the appropriate point in these proceedings when relevant facts are in evidence.⁴⁰

The majority of the trial court’s conclusions inappropriately grant summary judgment on matters that involve genuine issues of material fact. These issues were not ripe for summary judgment, and the court’s ruling on them was reversible error.

a. Whether DNR’s Grant Of Easement Was Unlawful Raises Genuine Issues Of Material Fact.

The trial court found that “Defendants’ actions in granting the easement to the United States Navy, and establishing fair market value for

³⁸ *Leland v. Frogge*, 71 Wn.2d 197, 200-01, 427 P.2d 724 (1967) (emphasis added; internal citations omitted).

³⁹ *White* 61 Wn.App. at 169-70.

⁴⁰ CP 730, *HCSG Reply*, p. 9, and fn. 23.

that easement, were not unlawful, arbitrary or capricious.”⁴¹ The court also found that DNR had the authority to grant the easement and DNR’s “determination of fair market value was not arbitrary, capricious, or unlawful.”⁴² Two issues inherent in these conclusions are (a) whether DNR’s *grant* of the Easement was unlawful, and (b) whether DNR’s *establishment of full market value* for the Easement was unlawful. The first question requires a determination of facts that were never in evidence under the summary judgment motions. The second question was resolved by HCSG’s uncontroverted evidence that clearly showed DNR’s acceptance of less than full market value for the easement was unlawful.

In its Countermotion, DNR argued that HCSG’s only recourse with respect to these two issues was via a writ of certiorari. HCSG disagrees with DNR’s argument; as addressed below. Conveniently, DNR’s argument allowed it to ‘burden shift’ under its untimely Countermotion, forcing HCSG to show that DNR’s actions were arbitrary, capricious or illegal.⁴³ However, while DNR admitted a writ should be based on a full record for review, DNR argued no such record should issue because HCSG could not ‘facially’ meet the writ standard.⁴⁴ In other words, DNR asked the trial court to prejudge the issue without benefit of a full record

⁴¹CP 747, *Order*, p. 3.

⁴²*Id.*

⁴³CP 587, *Countermotion*, p. 14.

⁴⁴CP 585, *Countermotion*, p. 12.

and without any affidavits or evidence on the part of DNR. The trial court had before it no facts or evidence as to whether DNR's actions in granting the Easement were unlawful, arbitrary or capricious, and therefore could make no determination with regard to such facts, let alone whether DNR disregarded them.

As DNR fully concedes, a determination by a court on the issue of writ of certiorari involves a full hearing and application of the facts. No hearing or application of facts has transpired, and the court's conclusions on the issue of whether DNR's actions were unlawful, arbitrary or capricious under a writ of certiorari were in error.

b. Whether DNR's issuance of Easement was Quasi-Judicial Requires a Review of Facts.

The trial court concluded that "a Statutory Writ of Review under RCW 7.16.040 is not available because Defendants' issuance of the Easement was not a judicial or quasi-judicial act." While HCSG disagrees with this conclusion as a matter of law, the conclusion was also based on facts not in evidence. DNR again bore the burden when it argued that "The decision to grant the easement was made in DNR's proprietary capacity and is not a 'judicial function.'"⁴⁵ DNR identified no factual basis for such argument. To the contrary, DNR gave short shrift to this issue in its

⁴⁵*Id.*

Counter-motion, discussing it only in a footnote.⁴⁶ As DNR admitted, the test to determine whether DNR's actions were proprietary or judicial includes a determination by the court of:

whether the action . . . involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to a changing condition. . . .⁴⁷

The trial court never applied existing law to past or present facts; it couldn't because neither DNR nor HCSG presented any such past or present facts for the court's analysis. The matter simply was not ripe for summary judgment.

c. Whether HCSG has Right to Construct a Pier on State Bedlands Required Findings of Fact.

The trial court held that HCSG "has no priority or preference right to a lease on state bedlands, and has no right to construct a pier on state bedlands."⁴⁸ Contrary to DNR's assertion, HCSG *did not* claim in its summary judgment motion that "it has a priority right to a lease, and that DNR is required to grant it a lease under RCW 79.130.010 and WAC 332-30-122."⁴⁹ HCSG did not seek a summary judgment determination with regard to a priority lease right for HCSG; such a determination is not ripe for review under a summary judgment motion.

⁴⁶CP 586, *Counter-motion*, p. 13, fn 39.

⁴⁷*Id.*

⁴⁸CP 748, *Order*, p. 4.

⁴⁹CP 589, *Counter-motion*, p. 16. DNR makes this assertion throughout its brief; *see, e.g.*, CP 589, 590, 597, and 600, *Counter-motion*, pp. 16, 17, 24, and 27.

Here, again, DNR argued that HCSG failed to show that DNR's actions were "arbitrary, capricious, or unlawful."⁵⁰ However, such standard inherently requires a determination of fact that DNR's actions result from, for example, willful and unreasoning disregard of the facts and circumstances.⁵¹ The analysis necessarily involves review of the agency's full record. Thus, as DNR effectively concedes, a determination by a court with regard to a writ of certiorari requires a full hearing and application of the facts. The burden was on DNR to show the absence of a genuine issue of material fact, which it failed to do.

3. The Trial Court Improperly Dismissed Issues Not Raised in Summary Judgment or Briefed by Either Party.

Perhaps the most disturbing of all of the trial court's procedural errors is that it dismissed claims that were not included in either party's summary judgment motion or briefed by either party. The court's order granted summary judgment to DNR "on all issues, and this matter is hereby DISMISSED WITH PREJUDICE."⁵² However, the court could not grant summary judgment "on all issues" because two of the actions pled by in HCSG's Complaint were neither briefed by nor included in either party's

⁵⁰CP 585

⁵¹*Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wash.2d 43, 50, 239 P.3d 1095 (2010).

⁵²CP 749, p. 5 (emphasis original).

summary judgment motion: HCSG's quiet title and constitutional due process claims.⁵³

It is improper for a court to consider an issue not raised in a summary judgment motion.⁵⁴ An issue not raised in a summary judgment motion must go to trial.⁵⁵ In this case, neither party raised issues of quiet title or constitutional due process claims in their motions. Because these issues were not raised, HCSG had no notice or opportunity to make its case. Such deprivation is completely contrary to the function of a summary judgment motion. The court had no information, factual or legal, upon which to base a summary decision. Its dismissal of all of HCSG's claims was reversible error.

C. Ruling that Navy is an Indispensable Party in Declaratory Judgment was Procedurally and Substantively Erroneous.

In its Countermotion, DNR argued that the Navy is an indispensable party for purposes of declaratory judgment.⁵⁶ However, summary judgment is an improper vehicle to raise an indispensable party issue.

The charge that an indispensable party has not been joined may not be determined on a motion for summary judgment because it does not go

⁵³CP 129-34, *HCSG's Second Amended Complaint*, pp. 18-25.

⁵⁴*Davidson Serles & Assoc. v. City of Kirkland*, 159 Wn. App. 616, 637-38, 246 P.3d 822 (2011).

⁵⁵*Id.*

⁵⁶RCW 7.24.110.

to the merits of the law suit, nor does it bar an action on the subject matter, but only operates to abate that particular action.⁵⁷

The appropriate method for bringing a necessary party into the action is a motion to compel joinder under CR 19.⁵⁸ DNR has not brought such a motion; the trial court's ruling regarding indispensable parties through summary judgment was erroneous.

Further, a determination of whether a party is indispensable is heavily influenced by the facts and circumstances of individual cases, and rests on a factual inquiry and balancing of equities.⁵⁹ "More than most rules, the application of CR 19 is highly fact specific."⁶⁰ The burden of proof for establishing indispensability is on the party urging a dismissal;⁶¹ DNR presented no evidence in support of its claim. Therefore, the trial court's Conclusion that the Navy was an indispensable party without whom it could not issue declaratory judgment was in error.⁶²

1. The Navy Itself Determined it was not Indispensable.

Declaratory judgment requires joinder of persons "who have or claim any interest which would be affected by the declaration."⁶³ Similarly, CR 19(a) only requires joinder if "(1) in the person's absence complete relief

⁵⁷*Dredge Corp. v. Penny*, 338 F.2d 456, 463 (9th Cir. 1964) (emphasis added).

⁵⁸15A Wash. Prac., Handbook Civil Procedure § 31.9 (2014-2015 ed.).

⁵⁹*Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196, 1201 (2006).

⁶⁰15A Wash. Prac., Handbook Civil Procedure § 31.1 (2014-2015 ed.)

⁶¹*Gildon*, 158 Wn.2d at 493.

⁶²CP 746-47, *Order*, p. 2-3.

⁶³RCW 7.24.110

cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action.”

HCSG brought this suit, including its declaratory judgment action, against the Navy and DNR in both state and federal courts. The Navy removed the state action against it to federal court which was then remanded back to federal court after the Navy was dismissed out of the state claims.⁶⁴ The Navy was fully cognizant of HCSG’s declaratory judgment action, the Navy’s interests in the action, and how such interests could be affected by the action. Nonetheless, the Navy chose to remove itself from the proceedings on state issues, thereby necessarily concurring it did not have any interest in the declaratory judgment action or any rights that might be prejudiced in the proceeding. DNR cannot now assert those rights which the Navy disclaimed.

DNR’s position with respect to declaratory judgment is particularly ironic considering the venue is largely of DNR’s making. DNR removed itself from the Federal Action, insisting it be allowed to defend itself in state court. Now DNR wishes to avoid that review, essentially playing games with the state and federal courts’ jurisdictions. However, the Navy itself expressly agreed to remand of state court issues for review while disclaiming any interest in those state court proceedings.

⁶⁴CP 191, *Declaration of Baskins*, p. 4.

2. The Navy is Not Indispensable to a Determination of Whether DNR Had the Statutory Authority to Issue the Easement.

DNR's attempt to insulate its ultra vires actions from the Court by claiming the Navy is an indispensable party should be rejected. The Navy is not an indispensable party for declaratory judgment because the Court can make a complete determination of the controversy without the Navy's presence. The sole question raised under HCSG's declaratory judgment action is whether DNR had the statutory authority to issue the Easement. DNR's actions were beyond its statutory authority regardless of who DNR granted the Easement to.

A party is indispensable only if all three of the following are met:

- (1) the trial court cannot make a complete determination of the controversy without that party's presence,
- (2) the party's ability to protect its interest in the subject matter of the litigation would be impeded by a judgment in the case, and
- (3) judgment in the case necessarily would affect the party's interest.⁶⁵

The Navy meets none of these elements.

The first element is not met because a court *can* make a complete determination of the controversy without the Navy's presence. HCSG's declaratory judgment action asks whether DNR had the statutory authority to grant the Easement. This determination has nothing to do with the Easement's grantee, whether that be the Navy or any other entity.

⁶⁵*Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 82, 951 P.2d 805 (1998).

In *Town of Ruston*,⁶⁶ Ruston brought a declaratory judgment action to determine its boundary with an adjoining city. The city challenged the court's jurisdiction for failure to join DNR (the land's former owner) and the residents of the city, claiming they had a vested interest in the outcome of the proceedings. The court concluded that joinder was unnecessary because the controversy could be resolved without their presence; there was no evidence that the absence of the other parties would prevent the court from rendering complete relief.

In its Countermotion, DNR relied on *Bainbridge Citizens*,⁶⁷ which, although it applies the criteria set forth in *Town of Ruston*, is factually distinguishable. In *Bainbridge Citizens*, the plaintiff sought to compel DNR to enforce its regulations against certain vessel owners who were trespassing on state-owned property. Because the vessel owners were the only individuals who could rebut the plaintiff's factual allegations or present defenses against plaintiff's claims that they violated the law, the court found that it could not make a complete determination of the controversy without them.

Unlike *Bainbridge Citizens*, HCSG's claim involves no allegations against the Navy: instead, the question is whether DNR had the statutory

⁶⁶*Id.*

⁶⁷*Bainbridge Citizens United v. Wa. Dep't of Natural Res.*, 147 Wn. App. 365, 375, 198 P.3d 1033 (2008).

authority to grant the Easement. Moreover, whereas participation by the vessel owners in *Bainbridge Citizens* would likely influence the outcome of that case, the Navy has nothing to offer that would be relevant to the existence of DNR's statutory authority. Therefore, the Court can make a complete determination of the controversy without the Navy's presence.

Nor are the second and third elements for determining indispensability met. By removing itself from the state case, the Navy determined unilaterally that it did not have an interest in the declaratory judgment action that it wished to protect or that the outcome would affect. If DNR did not have the authority to execute the Easement, then the Navy has no cognizable interest in DNR engaging in such ultra vires activity. Thus, the outcome of the court's ruling on declaratory judgment cannot prejudice any rights held by the Navy. To the contrary, in the proceeding with regard to bifurcation of the Federal Action from this action, the Navy itself stated that "plaintiff has a perfectly adequate forum in the Jefferson County Superior Court lawsuit to mount its challenge to the lawfulness of the State's conveyance."⁶⁸ The federal court judge agreed, saying that the federal court is not the proper forum to hear arguments regarding property interests in the Bedlands under state law.⁶⁹ Thus, both the Navy and the

⁶⁸CP 704, *Callow Declaration*, p. 26, footnote 21.

⁶⁹*Hood Canal Sand and Gravel, LLC v. Brady, et al*, case number 3:14-cv-05620-BHS, Judgment and Order on DNR's motion to dismiss, April 13, 2015, pp 5-6.

federal court acknowledge that state courts should to decide whether DNR's action complied with state law.

With regard to the second and third elements, the *Town of Ruston* court also found that DNR and the residents of the adjoining city were not necessary parties because their interests did not rise to the sufficiency threshold:

[a]lthough the legal relationships between [the former landowner and current lessee] and the municipalities might change as a result of this action, such changes are speculative and secondary to the issue at hand.⁷⁰

DNR's authority again in this respect must be distinguished. In *Treyz v. Pierce County*,⁷¹ the court considered a challenge to an ordinance that consolidated the positions of district court judges. The plaintiff, who lost his position as a judge, sought a declaratory judgment invalidating the ordinance but failed to join the sitting district court judges whose positions were created through the ordinance, and who would lose their jobs if the ordinance was invalidated. The court held that invalidating the ordinance would affect the rights of the sitting judges and therefore their presence was necessary.⁷²

Here, as in *Town of Ruston*, any changes in the Navy's relationship with DNR resulting from the outcome of this litigation are unknown and

⁷⁰*Town of Ruston*, 90 Wn. App. at 82.

⁷¹118 Wn. App. 458, 76 P.3d 292 (2003)

⁷²*Id.*, 118 Wn. App. at 464.

completely secondary to this pending dispute. DNR's assertion that the Navy is an indispensable party under the declaratory judgment cause of action has no merit.

D. DNR Did Not Have Statutory Authority to Grant Easement

The substantive errors committed by the trial court generally turn on whether DNR had the statutory authority to grant the Easement to the Navy. State agencies have "only such powers as are conferred by the legislature. . . The office possesses no powers other than statutory powers specifically granted."⁷³ DNR must manage state-owned aquatic lands in conformance with statutory requirements under the Title 79 RCW. The legislature adopted specific laws governing DNR's "exercise of management authority" and its ability to convey interests in state-owned aquatic lands, including restrictions on: easements and rights-of-way for aquatic lands; conveyances of beds of navigable waters; who may purchase or lease state owned aquatic lands; conveyances of aquatic lands and preservation and enhancement of water-dependent uses; and conveyances of aquatic lands for nonwater-dependent uses.⁷⁴

As a state agency, DNR may only do those things which it has been authorized by the legislature to do, either expressly or by necessary implication. DNR must have had an affirmative legislative authority to grant the Easement. *No statute authorizes DNR to convey to the United*

⁷³*Matter of Washington State Bar Ass'n*, 86 Wn.2d 624, 625, 548 P.2d 310, 312 (1976), citing *Yelle v. Bishop*, 55 Wash.2d 286, 297, 347 P.2d 1081 (1959).

⁷⁴Chs. 79.110 and 79.130 RCW, and RCW 79.105.100-160, 79.105.210-260, and 79.105.270, respectively.

*States an Easement over the Bedlands for a period of 55 years for the Easement's stated purposes.*⁷⁵ As DNR lacks such requisite statutory authority, the Easement is illegal, invalid and unenforceable. The contract was ultra vires and therefore void.

A contract in conflict with statutory requirements is illegal and unenforceable as a matter of law. . . In addition, a government contract beyond an agency's authority is void and unenforceable. . . . Even where a contract is within an agency's substantive authority, failure to comply with statutorily mandated procedures is ultra vires and renders the contract void. . .⁷⁶

Under the judicial doctrine *expressio unius est exclusio alterius*, specific statutory authority limits any general grant of authority:

Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded. Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* –specific inclusions exclude implication.⁷⁷

The whole of the statutes in Title 79 RCW make it abundantly clear that DNR has no authority to convey the Easement. DNR's execution of the Easement not only violated statutory restrictions, but reveals DNR's blatant disregard for the necessary State legislative authorization for the Easement.

⁷⁵CP 561-68, *Baskins Declaration*, Ex. N12.

⁷⁶*Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 499, 886 P.2d 147, 153 (1994) (internal citations omitted).

⁷⁷*Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 571, 980 P.2d 1234, 1239 (1999) (internal citations omitted).

1. RCW Chapter 79.110 Prescribes the Specific Easements That DNR May Grant Over Aquatic Lands, None of Which Apply to This Easement.

DNR's authority to grant *easements* over aquatic lands is contained in RCW Chapter 79.110.⁷⁸ In giving DNR authority to grant easements, the legislature provided a detailed statutory scheme authorizing DNR to grant easements only for: removal of valuable materials; roads, bridges and trestles; railroads over navigable streams; utilities and/or transmission lines; irrigation, diking, and drainage purposes.⁷⁹ The Easement does not fall into any of these categories.

Ironically, the first item enumerated above does authorize DNR to grant easements for "removal of valuable materials," and to enable anyone "engaged in the business of . . . quarrying, mining, or removing sand, gravel, or other valuable materials from land" to request from DNR an easement over bedlands.⁸⁰ DNR acted in direct conflict with its statutory authority and abused its power by executing the Easement as a means to prevent HCSG from acquiring the very thing that DNR is supposed to have granted under Title 79 RCW: an easement to convey sand and gravel across state-owned bedlands.

⁷⁸ Aquatic lands are defined as "all state-owned tidelands, shorelands, harbor areas, and the beds of navigable waters." RCW 79.02.010(1); RCW 79.105.060(1).

⁷⁹ RCW 79.110.060, .100, .110, .200, and .300.

⁸⁰ RCW 79.110.060 (emphasis added).

2. DNR Lacks Authority to Execute the Easement Under Statutory Authorizing Leases.

DNR also has limited statutory authority to *lease* bedlands under Chapter 79.130 RCW.⁸¹ However, DNR's primary leasing authority, RCW 79.130.010, for bedlands is *to the abutting tidelands owner*, i.e. HCSG.⁸² In the event the abutting tidelands or the abutting uplands are not improved or occupied for residential or commercial purposes, DNR *only* has authority to lease the bedlands for booming purposes for a period not exceeding 10 years.⁸³

HCSG owns the tidelands abutting the Bedlands for commercial purposes; the Navy does not. DNR did not offer HCSG a right to lease the Bedlands. Therefore, DNR exceeded its authority by conveying an interest in the Bedlands, via an instrument other than a lease, for a period exceeding 10 years and for purposes other than booming, because the abutting tidelands are occupied commercial purposes.

DNR also has the statutory authority lease state lands (not specifically aquatic lands) to the United States for national defense purposes "at the fair rental value thereof as determined by the department, for a period of 5 years or less."⁸⁴ Here again, the Easement violates this statute as (a) it is

⁸¹Chapter 79.130 RCW. As noted above, the Bedlands that is the subject of the Easement is categorized as a bed of navigable water under RCW 79.105.060.

⁸²RCW 79.130.010. HCSG notes that in addition to ongoing development/permitting for the Project, the Property tidelands are subject to a leasehold interest for geoduck farming.

⁸³"Booming" means "placing logs into and taking them out of the water, assembling and disassembling log rafts before or after their movement in waterborne commerce, related handling and sorting activities taking place in the water, and the temporary holding of logs to be taken directly into a processing facility." RCW 79.105.060(9).

⁸⁴RCW 79.13.090

an easement, not a lease, (b) the term is 55 years and (c) it exceeds the purposes mandated by the statute.⁸⁵

3. DNR Should Have Sought Specific Legislative Authority to Grant the Easement.

In Chapter 79.130 RCW, the Washington legislature gave DNR authorization to grant interests for situation-specific reasons. DNR has sought specific legislative authority in the past to grant otherwise unauthorized interests. At DNR's request, the legislature granted authority to convey interests with respect to Port of Everett and related Gardner Bay, declaring the exceptions "to be a public purpose necessary to protect the health, safety, and welfare of its citizens, and to promote economic growth and improve environmental quality in the state of Washington."⁸⁶

To convey an interest in public land beyond the specific purposes allowed under Title 79 RCW, DNR was required to obtain similar legislative authorization, which failed to do. Until it obtains similar specific legislative authority, the Easement is unlawful.

4. DNR Could Also Have Accomplished Its Conservation Goals Through RCW Chapters 79.70 or 79.71.

DNR has other statutory authority to accomplish the goals of the Easement, such as its "Conservation Values."⁸⁷ DNR has the express

⁸⁵CP 563, *Baskins Declaration*, Ex. N12, p. 3. The Easement purposes that are beyond the scope of "national defense purposes" include protection of "Conservation Values"; prohibition of residential, scientific, commercial, and industrial activities; and prohibition against placement or construction of structures on the Bedlands.

⁸⁶RCW 79.130.050-060.

⁸⁷CP 562, *Declaration of Baskins*, Ex. N12, p.2.

authority to grant interests to conserve aquatic lands for natural area preserves, and for scenic or ecological reasons.⁸⁸ Under either of these conservation alternatives, DNR must follow statutorily-mandated processes for restricting the use of land, including a public notice and hearing process.⁸⁹ DNR complains that it would have to draft conservation and management plans for the property.⁹⁰ Instead, it imposed restrictions through an illegal easement with no conservation or management planning.

Further, had DNR used one of these statutorily-authorized conservation methods, DNR would have had to disclose in its environmental review that preventing the barging of HCSG's product would result in greater environmental impacts from both of having to truck product from this site as well as heavier national reliance on cross-Pacific imports. Public scrutiny was something DNR took extraordinary efforts to avoid in this case. DNR purposefully disregarded the statutory conservation restrictions by granting the illegal Easement.

⁸⁸ See RCW Ch. 79.70 and 79.71.

⁸⁹ RCW 79.70.030(1)(b); RCW 79.70.100; RCW 79.71.060.

⁹⁰ CP 596, *Counter-motion*, p. 23.

5. RCW 79.36.355 Does Not Override Detailed Statutes Governing DNR's Ability to Convey Interests in Public Property.

Because DNR could not point to any specific statutory authority for the Easement, it persuaded the trial court that RCW 79.36.355 should give it after-the-fact general authority. However, that statute could not emasculate other specific statutory mandates, and contrary to DNR's characterization, legislative history demonstrates that the legislature did not intend to broaden DNR's authority under RCW 79.36.355.

a. The Legislature Limited DNR's General Powers In RCW 79.36.355 By Specific Enumerations In Title 79 RCW.

DNR argues that, while it

has statutes that apply under specified circumstances, when those specific circumstances are not met, the Legislature has given DNR broad authority to issue aquatic lands easements under RCW 79.36.355.⁹¹

As noted above, the judicial doctrine *expressio unius est exclusio alterius* applies here. To read RCW 79.36.355 as “an independent grant of authority” renders meaningless all those specific statutes in Title 79 RCW defining the circumstances under which DNR may grant an easement over aquatic lands. To treat RCW 79.26.355 as a black check, notwithstanding the clear constraints imposed by the legislature, nullifies statutes that contain specific directives from the legislature. The legislature would not go to the effort of carving out circumstances under which DNR may grant

⁹¹CP 587, *Counter-motion*, pp. 14 – 15.

easements, specifying to whom and under what conditions it may do so, only to override such specific mandates with a catchall. The legislature's specific statutory directives only authorize easements to the United States over and across aquatic lands for roads, bridges and trestles; easements for railroads over navigable streams; easements for utilities and/or transmission lines; and easements for irrigation, diking, and drainage purposes.⁹² The Easement does not fall within any of these statutory grants of authority, and is therefore illegal, invalid and unenforceable.⁹³

Our Supreme Court has already rejected DNR's argument, instead ruling that where statutes grant general powers and also enumerate specific powers, the general powers are modified, limited and restricted to the extent of the specific enumeration.⁹⁴ In *Miller v. City of Pasco*,⁹⁵ the plaintiff challenged Pasco's statutory authority to lease municipally-owned real estate for a parking lot. Pasco relied on a statute granting general authority to third class cities to control and dispose of property for the common benefit. However, a companion statute also granting the city the power lease real estate, later granted specific authority to lease waterfront property "for manufacturing, commercial or other business

⁹²RCW 79.110.100, .110, .200, and .300.

⁹³Interestingly, DNR failed to address RCW Ch. 79.110 which restricts DNR's authority to grant easements on aquatic lands, and has thus conceded its application.

⁹⁴*Id.*

⁹⁵50 Wash. 2d 229, 310 P.2d 863 (1957).

purposes; to lease for wharf, dock and other purposes of navigation and commerce...”⁹⁶ The court held that the *specific* statutory authority to lease waterfront property limited the *general* statutory grants to generally control and dispose of property.

Two rules of statutory construction, to which we have uniformly adhered, apply to the issue presented by this proceeding: (1) that each and every section of a legislative enactment must be given meaning, and (2), where general powers are granted with specific powers enumerated, the general powers are modified, limited, and restricted to the extent of the specific enumeration. . . . In order to give the entire sentence meaning and to retain the limited types of leases which the legislature specifically authorize cities of the third class to execute, the general grant of power must yield in its scope to the specific powers enumerated.⁹⁷

Similarly, in the case at hand, the general grant of authority under RCW 79.36.355 must yield to the specific powers enumerated in Title 79 RCW. Any other ruling renders the remainder of Title 79 RCW meaningless.

Ironically, DNR’s argument that RCW 79.36.355 gives it blanket authority to grant easements notwithstanding the specific constraints imposed by the legislature elsewhere in Title 79 RCW is similar to the very argument DNR *opposed* in *Echo Bay Cmty. Ass’n v. DNR*.⁹⁸ There, the Court maintained the longstanding rule that specific statutes control over general:

⁹⁶*Id.*, 50 Wash. 2d at 233, citing RCW 35.24.300.

⁹⁷*Id.*, 50 Wash. 2d at 233-34 (internal citations omitted).

⁹⁸ 139 Wn.App. 321, 160 P.3d 1083 (2007).

First, there is no inherent conflict between these two statutes as written. The two statutes cover different lands and allow for different sorts of leases. . . . Thus, one statute allows leases of any bedlands for any purpose to abutting shoreland and tideland owners, while the other allows leases of tidal bedlands to any person for the only purpose of shellfish cultivation and aquaculture...Second, even if two statutes do conflict, the more specific statute controls. Here, the more specific statute is the one pertaining only to tidal bedlands and governing aquaculture leases. We give preference to RCW 79.135.110(1).⁹⁹

Following *Echo Bay*, either the specific statutory authority limits DNR's powers, or else there is an inherent conflict between RCW 79.36.355 and the more specific provisions of Title 79 RCW, including Chapter 79.110 RCW, Chapter 79.130 RCW, and RCW 79.13.090. In such event, the more specific control over the general. As also explained elsewhere in *Echo Bay*, courts do not read a statute in a way that abrogates the meaning of other statutes. Finally, as the *Echo Bay* Court also recognized, statutes that are adopted later take precedence over earlier statutes.¹⁰⁰ Here, RCW 79.36.355 was adopted several years earlier than the specific statutes giving DNR its limited authority.

b. Legislative History Reflects Legislature's Intention not to Expand DNR's Authority under RCW 79.36.355.

DNR further claims that in a 2004 legislative amendment to RCW 79.36.355, which added "not otherwise provided in law," the legislature specifically expanded DNR's authority to grant any easements where such

⁹⁹*Id.* Wn.App. at 326-29 (internal citations omitted).

¹⁰⁰*Id.*

authority does not exist elsewhere in the aquatic lands statutes.¹⁰¹ However, as the Final Bill Report on the amendment notes, the legislation was merely intended to change statutory definitions within the Public Lands Act.¹⁰² As the Commissioner of Public Lands himself testified, under the proposed legislation, “No changes are made to the Department of Natural Resources’ authority.”¹⁰³ Finally, the statute itself contains a note regarding the intent of the amendments:

Intent -- 2003 c 334: "This act is intended to make technical amendments to certain codified statutes that deal with the department of natural resources. Any statutory changes made by this act should be interpreted as *technical in nature* and *not be interpreted to have any substantive, policy implications.*" [2003 c 334 § 616.]¹⁰⁴

Yet DNR improperly argued to the trial court precisely the opposite, that this language should “*broaden DNR’s authority to grant easements over the state’s aquatic lands where such authority does not already exist elsewhere in the aquatic lands statutes.*”¹⁰⁵ To interpret the amendment as broadening DNR’s authority flies directly in the face of the legislature’s clear direction that the amendment “not be interpreted to have any substantive, policy implications.” RCW 79.36.355 was not intended to

¹⁰¹CP 594, *Countermotion*, pp. 21.

¹⁰²CP 602, *Countermotion*, App. A.

¹⁰³CP 741, *Orrico Declaration*, Ex. 1.

¹⁰⁴Adopted by reference to RCW 79.02.010 [emphasis added].

¹⁰⁵CP 593, *Countermotion*, pp. 20 (emphasis added).

grant DNR broad general authority, let alone the specific authority which would be necessary to convey the Easement.

E. The Trial Court Erred When It Determined Declaratory Judgment was Improper.

The trial court erroneously held that the Uniform Declaratory Judgments Act affords no review of DNR's application and administration of its statutes. However, HCSG is challenging the *construction* of statutes which DNR asserts authorizes it to enter into the Easement; i.e. HCSG seeks the Court's determination as to the meaning of the applicable provisions of Title 79 RCW, and whether DNR acted outside of its statutory authority to grant the Easement.

Questions of construction are specifically authorized by RCW 7.24.020:

*A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.*¹⁰⁶

RCW 7.24.020 clearly applies in the instant case: HCSG's rights and legal relations have been affected by DNR's construction of a statute as authorizing its actions.

¹⁰⁶RCW 7.24.020 (emphasis added).

DNR improperly reads RCW 7.24.020 as applicable to only facial validity challenges of statutes. DNR uses *Bainbridge Citizens* for the proposition that RCW 7.24.020 “precludes UDJA review of the application or administration of a statute or rule.”¹⁰⁷ However, HCSG is not seeking a declaratory judgment on DNR’s application or administration of a statute, but rather the *construction* of statutes. In *Bainbridge*, the court considered the question of whether DNR should have enforced its regulations to prosecute trespassers. The Court determined such question was one of DNR’s application and administration of its statutes and regulations.¹⁰⁸

In contrast to *Bainbridge Citizens*, HCSG’s position is that DNR did *not* have the authority to grant the Easement; that DNR *misconstrued* its statutes. HCSG and DNR are disputing the construction of RCW 79.36.355 and other statutes under Title 79 RCW, and whether such statutes granted DNR the authority to convey the Easement. Unlike *Bainbridge Citizens*, HCSG does not seek to compel DNR to enforce certain statutes, but rather seeks construction of DNR’s statutory authority under RCW Title 79 to determine whether DNR acted unlawfully in granting the Easement.

¹⁰⁷CP 582, *Counter-motion*, p. 9.

¹⁰⁸*Bainbridge Citizens*, 147 Wn. App. at 374-75.

F. DNR Was Required To Obtain Full Market Value For The Property Conveyed Via The Easement.

The trial court held that HCSG's sole avenue for judicial review is through a constitutional writ of certiorari, which the court declined to issue, holding that DNR's grant of the Easement and determination of the full market value were not arbitrary, capricious or unlawful.¹⁰⁹ The court's ruling is in error for several reasons. First, as discussed above, a determination as to whether the DNR's actions in *granting the Easement* were arbitrary, capricious or unlawful relies on genuine issues as to material facts not yet in evidence. Second, the uncontroverted facts clearly show that DNR's actions in *determining and accepting less than the full market value* for the Easement were arbitrary, capricious and unlawful. Finally, as set forth herein, a writ of certiorari is not HCSG's sole avenue for judicial review.

RCW 79.36.355 requires DNR to obtain full market value for any conveyance of any interest in public lands.

No grant shall be made under this section until such time as the *full market value* of the estate or interest granted together with damages to all remaining property of the state of Washington has been ascertained and safely secured to the state.

Similarly, RCW 79.13.010 mandates that the State obtain a *fair market rental* when it conveys interests in state lands, and RCW 79.13.090

¹⁰⁹CP 747, *Order*, p. 3.

mandates that the state obtain the *fair rental value* of conveyances to the United States.

DNR asserts that RCW 79.36.355 gives it complete discretion to determine what the value it can accept for the Easement. DNR wishes this court to apply an arbitrary and capricious standard so it can avoid scrutiny of its valuation tactics. State law *mandates that DNR obtain full market value* for any conveyance of public property. DNR cites no case law supporting its assertion that there is any discretion within the statutory mandate to obtain full market value for conveyance of public property.¹¹⁰

Nor has DNR has presented any evidence to controvert HCSG's showing that DNR's actions were unlawful, let alone arbitrary and capricious. HCSG provided the trial court with extensive documentation regarding value of the Easement and DNR's actions in accepting less than full market value. These documents were produced by the Navy as part of the administrative record for the Federal Action,¹¹¹ and by DNR in response to public records requests.¹¹² The only evidence submitted by DNR supports

¹¹⁰Case law cited by DNR addresses the arbitrary and capricious standard under a constitutional writ of certiorari compelling a SEPA determination (*Saldin Sec., Inc. v. Snohomish Cnty.*, 134 Wn.2d 288, 949 P.2d 370 (1998), and a writ of certiorari prohibiting classification as bargaining unit (*Gehr v. S. Puget Sound Cmty. Coll.*, 155 Wn. App. 527, 228 P.3d 823 (2010)). Neither of these has any relevance to the mandate that the State obtain full market value for conveyed property interests.

¹¹¹CP 191-93 and 303 – 583, *Declaration of Baskins*, Exs. N1 – N12.

¹¹²CP 189-90 and 249 – 287, *Declaration of Baskins*, Exs. G1- G2.

this evidence.¹¹³

The uncontroverted facts show that the independently conducted Appraisal set the full market value for the 4,808 acre Easement at \$1,680,000.¹¹⁴ The Appraisal was reviewed by a Navy appraiser and another independent appraiser on behalf of DNR, and both reviews *concluded that the fair market value of the Easement was \$1,680,000*. It wasn't until the Navy realized it would have to obtain Congressional authorization to go over the \$750,000 Low-Cost Authority provided by 10 USC 2663(c)(1) that it directed its reviewer to produce a new report suddenly opining that the fair market value was \$720,000 for the same 4,808 acres¹¹⁵ – *less than half of the fair market valuation determined and confirmed by the appraiser two weeks earlier*.¹¹⁶ Further, the valuation completely disregards the revenues to the State lost by blocking HCSG's Project. It is clear that DNR did not obtain the statutorily-mandated fair market value as independently verified by both parties to the transaction.

Most ironic is the Navy's justification for using a 30% diminution value: because "the highest and best use of the property changes so little

¹¹³CP 611 – 12, *Declaration of Cook*, pp. 4 – 5.

¹¹⁴HCSG believes the value of the Easement far exceeds even \$1,680,000; however, due to genuine issues of material fact, this issue is not ripe for summary judgment.

¹¹⁵CP 192 and 533-549, *Declaration of Baskins*, Ex. N8.

¹¹⁶CP 532 - 33, *Declaration of Baskins*, Ex. N7.

before and after the easement acquisition.”¹¹⁷ Given that the whole point of the Easement is *to block development* such as HCSG’s Project, for DNR to claim that the Easement would not have an effect on property use is highly disingenuous. If no property uses changed as a result of the Easement, why would they need an easement restricting property uses?

This uncontroverted evidence shows the egregiousness of DNR’s actions in accepting far less than the statutorily-mandated full market value for the Easement, and that those actions were not only arbitrary and capricious, they were unlawful.

In summary judgment proceedings, the court is required to

consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party and, when so considered, if reasonable people might reach different conclusions, the motion should be denied.¹¹⁸

The burden is on the party moving to prove by uncontroverted facts that there is no genuine issue of material fact.¹¹⁹ HCSG met this burden on the question of whether DNR exceeded its statutory authority by not obtaining full market value for the Easement.

DNR cannot be allowed to disregard the value ascertained and confirmed by its two independent appraisers, as well as the buyer’s appraiser, because it is in a political panic to consummate the

¹¹⁷CP 547, *Declaration of Baskins*, Ex. N8, p. 15.

¹¹⁸*Jacobsen*, 89 Wn.2d at 108-09.

¹¹⁹*Id.*

transaction.¹²⁰ DNR abrogated its duty to the State and its citizens by accepting less than *half of the fair market value* for State assets as determined and confirmed by all three appraisers.¹²¹

G. Trial Court's Denial of Writs of Prohibition and Mandamus Were Erroneous Because DNR's Actions Were Not In Compliance With State Law.

The trial court denied HCSG's prayer for writ of prohibition, holding that a writ was not available to challenge "discretionary actions in compliance with state law."¹²² The trial court also held HCSG would not be entitled to a writ of mandamus "because such a writ is not available to challenge discretionary actions that are in compliance with state law."¹²³ While HCSG did not seek a writ of mandamus, in either case the trial court's conclusions are in error because DNR's actions were simply not in compliance with state law.

Ultra vires contracts such as the Easement are void and unenforceable.¹²⁴ Because DNR's actions were ultra vires and therefore not in compliance with state law, HCSG is entitled to a statutory writ of

¹²⁰ The Navy's order to change the valuation "was mainly in response to Mr. Goldmark's statements re: finalizing the easement soon given the pressure he is under and that the terms of the easement needed to be reduced based on DNR's discussions with our office here." CP 288, *Declaration of Baskins*, Ex. K.

¹²¹ CP 532, *Declaration of Baskins*, Ex. N7.

¹²² CP 747, *Order*, p. 3.

¹²³ *Id.*

¹²⁴ *Pierce Cnty. v. State*, 144 Wn. App. 783, 841, 185 P.3d 594, 624 (2008), as amended on denial of reconsideration (July 15, 2008), *citations omitted*.

prohibition. A writ of prohibition will lie to prohibit an act done under the color of an office, trust, or station,¹²⁵ and may be issued by the court “where there is not a plain, speedy and adequate remedy in the ordinary course of law.”¹²⁶ The historical purpose of the writ was to prevent an encroachment of jurisdiction such as is the case here.¹²⁷ The elements necessary to support a statutory writ of prohibition are:

- (1) the party to whom the writ is directed must be acting without or in excess of its jurisdiction; and
- (2) there must be an absence of a plain, speedy, and adequate remedy in the ordinary course of legal procedure.¹²⁸

Issuance of a writ of prohibition is appropriate since HCSG has no other plain, speedy and adequate remedy in the ordinary course of law. A writ may be issued where, as here, the person to whom it is directed is acting in excess of jurisdiction.¹²⁹ A writ of prohibition is the only adequate remedy to redress DNR’s wrongful conduct. There is simply no other means to directly and promptly require DNR to act in compliance with Washington law.

¹²⁵*Cnty. of Spokane v. Local No. 1553, Am. Fed’n of State, Cnty. & Mun. Employees, AFL-CIO*, 76 Wn. App. 765, 770, 888 P.2d 735, 739 (1995).

¹²⁶*Id.*, 76 Wn. App. at 768.

¹²⁷*Id.*, 76 Wn. App. at 769.

¹²⁸*Id.*

¹²⁹*Id.*

H. The Trial Court Ruled Prematurely on the Writ of Certiorari.

While HCSG did include a prayer for constitutional writ in its complaint, it did not seek summary judgment on that cause of action. HCSG is fully aware of the factual issues that must be examined by the Court with regard to such a remedy under a constitutional writ or writ of certiorari. It left such matters for full review when relevant facts are in evidence that will show it is entitled to a writ. However, a constitutional writ is not HCSG's only recourse. HCSG has the right to seek a declaratory judgment, preliminary injunction, writ of prohibition and statutory writ, all as fully briefed herein. The court erred when it determined that a writ of certiorari is HCSG's sole avenue for judicial review.

I. Trial Court's Dismissal of Whether HCSG Has a Priority or Preference Lease Right or a Right to Construct A Pier On State Bedlands Was Premature Because the Court Did not Receive Briefing on the Issue.

The trial court held that HCSG "has no priority or preference right to a lease on state bedlands, and has no right to construct a pier on state bedlands."¹³⁰ The court's summary judgment rulings on these conclusions were based on facts not in evidence and therefore in error. Moreover, the court's ruling was erroneous because the constitutional ramifications were not briefed at summary judgment.

¹³⁰CP 748, *Order*, p. 4.

The questions of whether HCSG has a priority lease right and whether DNR can anticipatorily refuse to grant a lease to the abutting landowner involve not only statutory interpretation but also constitutional issues that were not briefed by either party at summary judgment and are not ripe for review. Other issues raised in HCSG's Complaint - such as whether DNR unconstitutionally deprived HCSG of its property interest in its upland property without due process - were not briefed at summary judgment at all.¹³¹ Nor did the parties brief whether the Easement could properly exclude HCSG from the list of parties excepted from its purview, which HCSG raised under its quiet title and constitutional due process causes of action.

J. The Law of the Case Doctrine is Not Applicable.

The trial court incorrectly ruled that decisions issued in the Federal Action, which involves different parties, is the “law of the case.”¹³² The “law of the case” doctrine “refers to ‘the binding effect of determinations made by the appellate court on further proceedings in the trial court on remand.’”¹³³ In federal courts, the law of the case doctrine is applied between federal appellate courts of equal rank. Courts rely on the doctrine to deny review of a prior decision *in the same case* rendered by an

¹³¹CP 579 – 82, *Declaration of Baskins*, Ex. N12, pp. 19 – 22, and CP 129-32, *HCSG's Second Amended Complaint*, pp. 18-21.

¹³²CP 748, *Order*, p. 4.

¹³³*State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104, 1110 (2003).

*appellate court of equal rank.*¹³⁴ This is simply not the case here. Nor are cases relied upon by DNR applicable: they involve remands for criminal sentencing.¹³⁵

Further, the law of the case doctrine is not applied by courts in different judicial systems against different parties. DNR is not a party to the Federal Action and a ruling by the federal district court has no applicability to the state court case. The law of the case doctrine simply does not apply to a proceeding in a different judicial system against a different party and is not intended to restrict the state court's substantive review. To the contrary, the federal court itself recognized that the application of state law must be had by the state court, not the federal court. The trial court's abdication of its authority by misapplying the law of the case doctrine was improper and erroneous.

K. HCSG Met Its Burden With Regard To Preliminary Injunction.

The trial court erroneously concluded that HCSG was not entitled to injunctive relief. The grant of an injunction should be exercised according to the circumstances found in the specific case.¹³⁶ An injunction should be granted on a clear showing of necessity, and, if the moving party shows

¹³⁴ 5 Am. Jur. 2d Appellate Review § 568.

¹³⁵ *Harrison, supra*; *State v. Strauss*, 93 Wn. App. 691, 697, 969 P.2d 529, 532 (1999).

¹³⁶ *Washington Fed'n of State Employees, Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337, 1343 (1983).

the essential elements of necessity and irreparable injury, the court has a duty to grant the injunction.¹³⁷

HCSG has met its burden with regard to the elements for granting a preliminary and permanent injunction as to enforcement of the Easement against HCSG. First, HCSG has shown that it has a clear legal or equitable right to have DNR operate within its legislatively granted authority, and to not abuse that authority to enforce the Easement as a whole or as against HCSG's Project. Second, DNR's actions have demonstrated that HCSG has a well-grounded fear that DNR has and will continue to violate HCSG's right. Third, HCSG has shown that such violations will result in actual and substantial injury to it. HCSG need not show that its harm is irreparable, nor must the injury already have occurred to issue an injunction.¹³⁸

To the extent this Court disagrees that an injunction is proper, or ripe upon summary judgment, the correct ruling is to deny the summary judgment and allow the case to proceed to trial. As is discussed throughout this brief, there are numerous issues of fact yet to be reviewed. To the extent an injunction must wait until those issues of fact are fleshed

¹³⁷*Holmes Harbor Water Co., Inc. v. Page*, 8 Wn. App. 600, 601, 508 P.2d 628, 630 (1973).

¹³⁸*Cnty. of Spokane v. Local No. 1553*, 76 Wn. App. at 771, 888 P.2d at 739-40.

out, then the trial court's conclusion should be reversed and remanded to allow discovery to proceed.

L. DNR Was Not Entitled to Summary Judgment on All Issues.

Finally, the trial court's conclusion that DNR was entitled to summary judgment on all issues was wholly erroneous for the reasons discussed throughout this brief.

VI. CONCLUSION

Based on the foregoing, HCSG respectfully requests this Court to reverse the trial court's decision on summary judgment and substantively grant HCSG's motion that DNR does not have statutory authority to grant the Easement. Further, HCSG respectfully requests the Court deny DNR's untimely Countermotion or remand it for timely substantive review.

DATED this 27th day of August, 2015.

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FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

No. 47655-0-II
(Jefferson County Superior Court #14-2-00156-7)
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

HOOD CANAL SAND AND GRAVEL, LLC,

Appellant,

vs.

PETER GOLDMARK, et al.,

Respondents.

AFFIDAVIT OF SERVICE

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STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

The undersigned, being first duly sworn on oath, deposes and says:

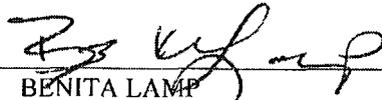
I am a citizen of the United States of America; over the age of 18 years, am a legal assistant with the firm of Johns Monroe Mitsunaga Koloušková PLLC, not a party to the above-entitled action and competent to be a witness therein.

On this date, I caused to be served via email and U.S. First Class Mail, true and correct copies of: APPELLANT'S OPENING BRIEF; and this AFFIDAVIT OF SERVICE, upon all counsel and parties of record at their addresses listed below.

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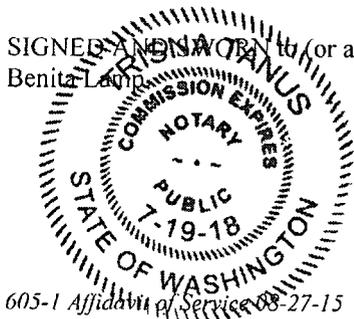
Dated this 27th day of August, 2015.



BENITA LAMP

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

SIGNED AND SWORN to (or affirmed) before me on August 27, 2015 by
Benita Lamp





Trigna Tanus
Notary Public Residing at Seattle, WA
My Appointment Expires: 7-19-18