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COURT OF APPEALS
DIVISION II

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No. 47861-7-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
BY ~~REPUTY~~

DIVISION II

POPE RESOURCES, LP and OPG PROPERTIES, LLC,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Respondent.

**AMICUS CURIAE BRIEF SUBMITTED BY
CITY OF PORT ANGELES**

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I. INTRODUCTION

In addition to the arguments presented below, the City of Port Angeles adopts the arguments presented in the amicus brief filed by Georgia-Pacific LLC.

II. ARGUMENT

The Washington State Department of Natural Resources (“DNR”) argues that the drafters of the Model Toxics Control Act (“MTCA”) intended to exclude the State of Washington from potential liability under that statute. Only a “person” can be held liable under MTCA. *See* RCW 70.105D.040(1) (defining categories of “persons” subject to liability). While the definition of “person” includes a “state government agency,” DNR argues that the State itself is “noticeably absent” from the definition. *See* RCW 70.105D.020(24). Thus, it concludes, the drafters meant to insulate the State from liability under MTCA, including liability for any lands to which the State holds fee title.

This argument rests on an unstated and erroneous assumption that the parties and the trial court did not address below: that a state government agency exists separate from the State itself. In fact, state government agencies are simply arms of the State, through which the State acts. *See, e.g., Oceanographic Commission of Washington v. O’Brien*, 74 Wn.2d 904, 912-13, 447 P.2d 707 (1968) (commission that was “clothed

with and exercises a portion of the state's police power in performing its functions" was an "arm of the state"); *Caminiti v. Boyle*, 107 Wn.2d 662, 666, 732 P.2d 989 (1987) (State exercises control over tidelands and shorelands through the Department of Natural Resources). They derive their authority exclusively from the State. *See, e.g., Tuerk v. Department of Licensing*, 123 Wn.2d 120, 124-25, 864 P.2d 1382 (1994) (state agencies have only those powers conferred by the legislature). Thus, since state government agencies are "persons" for purposes of MTCA, so too is the State of Washington.

Washington courts have recognized that a claim against a state government agency is a claim against the State. For example, just as civil rights claims under 42 U.S.C. § 1983 cannot be brought against the State, *see Edgar v. State of Washington*, 92 Wn.2d 217, 222, 595 P.2d 534 (1979), they cannot be brought against state agencies. *See Hontz v. State of Washington*, 105 Wn.2d 302, 309, 714 P.2d 1176 (1986). In *Hontz*, the Court concluded that the plaintiffs could not maintain a § 1983 claim against Harborview Medical Center because the suit was, in effect, "a suit against the State regardless of whether it [was] named a party to the action." *Id.* The Court wrote that:

The trial court found, based upon uncontroverted evidence, that Harborview is operated and managed by the University of Washington and all of its employees are

employees of the University. *See also* RCW 36.62.290. Because the University of Washington is a state agency, Harborview, as operated and managed by the University, is an arm of the State. Its employees are state employees and claims against the University's operation at Harborview are paid from a fund held by the State Treasurer. *See* RCW 28B.20.253. It is clear that, in the context of this case, *a §1983 suit against Harborview is in legal effect a suit against the State and cannot, therefore, be maintained.*

Id. at 310 (emphasis added); *see also* *McDevitt v. Harborview Medical Center*, 179 Wn.2d 59, 74, 316 P.3d 469 (2013). Similarly, in *Rains v. State of Washington*, 100 Wn.2d 660, 664, 674 P.2d 165 (1983), the Court found for res judicata purposes that the defendant in a suit against a member of the Public Disclosure Commission was identical to the defendant in a later suit against the State of Washington because a “suit against members of the PDC is in effect a suit against the State.”

Whether a state agency is targeted rather than the State itself is irrelevant; if a “judgment or decree cannot be rendered without ultimately affecting some state right or interest, the state is a party in interest even though it is not named specifically.” *See Centralia College Education Association v. Board of Trustees*, 82 Wn.2d 128, 129, 508 P.2d 1357 (1973). Furthermore, any action that a state agency is authorized to take may be taken in the name of the State of Washington, rather than in the name of the agency. In *State of Washington v. Culley*, 11 Wn. App. 695, 524 P.2d 437 (1974), the Court held that the State was a proper plaintiff in

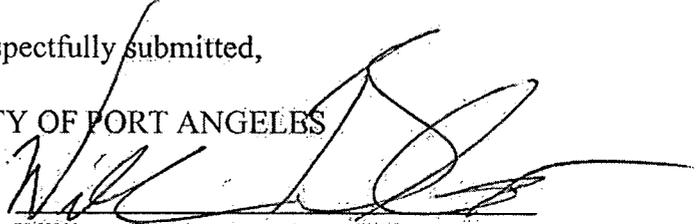
an eminent domain action even though the State Board for Community College Education had express statutory authority to bring the action. The State Board did not have to bring suit in its own name, the Court reasoned, because it was “an agency of the State of Washington.” *Id.*

The drafters of MTCA are presumed to be familiar with past judicial interpretations of statutes. *E.g., Bixler v. Bowman*, 94 Wn.2d 146, 149, 614 P.2d 1290 (1980). In light of the cases cited above, the principles of which were established before the passage of MTCA in 1988, the drafters had no reason to separately identify the State as a “person” under MTCA. If a state government agency is a person, the State necessarily is a person as well. Therefore, the drafters’ reference to “state government agency” in the definition of “person” does not evidence an intent to excuse the State from liability.

DATED this 8th day of February, 2016.

Respectfully submitted,

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PROOF OF SERVICE

I, Thomas Johnson, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct:

On this date, I caused to be served a true copy of the document entitled BRIEF OF *AMICUS CURIAE* CITY OF PORT ANGELES, to which this is attached, by electronic mail on the following:

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Executed at Seattle, Washington this 11th day of February 2016.



A handwritten signature in cursive script, appearing to read "Jolene Unsoeld", is written above a horizontal line.