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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

KITTITAS COUNTY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

BRIEF OF RESPONDENT WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. COUNTERSTATEMENT OF ISSUES 2

III. COUNTERSTATEMENT OF THE CASE 3

A. Background: Special Assessments, Rates and Charges, Payments in Lieu of Taxes (PILTs) and Payments in Lieu of Assessments 3

1. Special assessments 4

2. Rates and charges 6

3. Payments in lieu of taxes (PILTs) and payments in lieu of assessments 6

B. Statutory Background: Weed Districts and Noxious Weeds—Control Boards 7

1. Weed Districts (RCW 17.04) 8

2. Noxious Weeds—Control Boards (RCW 17.10) 9

C. Facts 10

1. WSDOT actively maintains a Noxious Weed Control Program 10

2. Background – Noxious Weed Control Board and Weed Districts in the County 11

3. WSDOT seeks consistency in weed assessments 12

4. Current litigation 13

IV. ARGUMENT 14

A. Standard of Review 15

B. Noxious Weed Assessments Are Special Assessments, Not Rates and Charges 15

1. Characterization of the revenue system 16

2. Nature of the statutory scheme 18

3. Basis of the assessment or charge 21

C. State-Owned Land May Not Be Specially Assessed for Noxious Weed Control 23

1. RCW 17.04 and RCW 17.10 do not clearly and expressly authorize special assessments against state-owned land 24

2. Noxious weed services do not render a special benefit to state-owned land 28

3. WSDOT's legal theory is consistent with RCW 79.44 30

D. WSDOT's Interpretation of RCW 17.04 and RCW 17.10 Does Not Violate the Equal Protection Clause 32

E. WSDOT's Interpretation of RCW 17.04 and RCW 17.10 Does Not Violate RCW 43.09.210(3) 35

F. WSDOT Is not Liable for PILTs 36

1. RCW 17.10 does not establish a PILT program 36

2. PILTs under RCW 17.04.180 are a separate category from assessments, which the County failed to adequately plead 37

V. CONCLUSION 40

TABLE OF AUTHORITIES

Cases

Am. Legion Post No. 149 v. State Dep't of Health,
164 Wn.2d 570, 192 P.3d 306 (2008) 17

Bellevue Assocs. v. City of Bellevue,
108 Wn.2d 671, 741 P.2d 993 (1987) 4

Campbell v. State Dep't of Soc. & Health Servs.,
150 Wn.2d 881, 83 P.2d 999 (2004) 34

Chelan Basin Conservancy v. GBI Holding Co.,
194 Wn. App. 478, 378 P.3d 222 (2016)
review granted, 186 Wn.2d 1032, 385 P.3d 769 (2016)
and *aff'd*, 190 Wn.2d 249, 413 P.3d 549 (2018) 34

City of Seattle v. Rogers Clothing for Men, Inc.,
114 Wn.2d 213, 787 P.2d 39 (1990) 4

City of Snoqualmie v. King Cty. Exec. Dow Constantine,
187 Wn.2d 289, 386 P.3d 279 (2016) 7

City of Spokane v. Sec. Sav. Soc'y,
46 Wash. 150, 89 P. 466 (1907) 24

Coleman v. Miller,
307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385 (1939) 33

Colorado River Indian Tribes v. Town of Parker,
776 F.2d 846 (9th Cir. 1985) 33

Dewey v. Tacoma Sch. Dist. No. 10,
95 Wn. App. 18, 974 P.2d 847 (1999) 36

Duke v. Boyd,
133 Wn.2d 80, 942 P.2d 351 (1997) 30

Estate of Bunch v. McGraw Residential Ctr.,
174 Wn.2d 425, 275 P.3d 1119 (2012) 15

Fransen v. State Bd. of Nat. Res.,
66 Wn.2d 672, 404 P.2d 432 (1965) 17

Gabelein v. Diking Dist. No. 1 of Island Cty. of State,
182 Wn. App. 217, 328 P.3d 1008 (2014) 5

Georgia v. Tennessee Copper Co.,
206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907) 34

Heavens v. King Cty. Rural Library Dist.,
66 Wn.2d 558, 404 P.2d 453 (1965) 4, 28

Hook v. Lincoln Cty. Noxious Weed Control Bd.,
166 Wn. App. 145, 269 P.3d 1056 (2012) 18, 19

In re Appeal of State,
60 Wn.2d 380, 374 P.2d 171 (1962) 23, 29

In re Det. of Strand,
167 Wn.2d 180, 217 P.3d 1159 (2009) 38

In re Extending Howard Ave. N.,
44 Wash. 62, 86 P. 1117 (1906) 5, 26

Kustura v. Dep't of Labor & Indus.,
169 Wn.2d 81, 233 P.3d 853 (2010) 31

M.A. Mortenson Co. v. Timberline Software Corp.,
140 Wn.2d 568, 998 P.2d 305 (2000) 15

Markham Advert. Co. v. State,
73 Wn.2d 405, 439 P.2d 248 (1968) 6

Martin v. Dep't of Licensing,
175 Wn. App. 9, 306 P.3d 969 (2013) 33

Massachusetts v. E.P.A.,
549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) 34

McGinnis v. State,
152 Wn.2d 639, 99 P.3d 1240 (2004) 38

Morse v. Wise,
37 Wn.2d 806, 226 P.2d 214 (1951) 6, 16, 18

N. Pac. Ry. Co. v. Adams Cty.,
78 Wash. 53, 138 P. 307 (1914) 18, 19

Ockletree v. Franciscan Health Sys.,
179 Wn.2d 769, 317 P.3d 1009 (2014) 33

Paine v. State,
156 Wash. 31, 286 P. 89 (1930) 24

Rabel v. City of Seattle,
44 Wash. 482, 87 P. 520 (1906) 5, 24, 26, 30

Ralph v. State Dep't of Nat. Res.,
182 Wn.2d 242, 343 P.3d 342 (2014) 38

SEIU Healthcare 775NW v. State Dep't of Soc. and Health Servs.,
193 Wn. App. 377, 377 P.3d 214 (2016) 17

Shea v. Olson,
185 Wash. 143, 53 P.2d 615 (1936) 6

Sheehan v. Cent. Puget Sound Reg'l Transit Auth.,
155 Wn.2d 790, 123 P.3d 88 (2005) 15

State ex rel. Taylor v. Superior Ct. for King Cty.,
2 Wn.2d 575, 98 P.2d 985 (1940) 14

State v. City of Olympia,
171 Wash. 594, 18 P.2d 848 (1933) 24

State v. Dixon,
78 Wn.2d 796, 479 P.2d 931 (1971) 16

Swanson v. Holmquist,
13 Wn. App. 939, 539 P.2d 104 (1975) 15

Teter v. Clark Cty.,
104 Wn.2d 227, 704 P.2d 1171 (1985) 6, 16, 18

Time Oil Co. v. City of Port Angeles,
42 Wn. App. 473, 712 P.2d 311 (1985) 5

Weyerhaeuser Timber Co. v. Banker,
186 Wash. 332, 58 P.2d 285 (1936) 20

Young v. Key Pharm., Inc.,
112 Wn.2d 216, 770 P.2d 182 (1989) 15

Constitutional Provisions

Const. art. I, § 12 33

U.S. Const. amend. XIV § 1 32

Statutes

RCW 17.04 ..... passim

RCW 17.04.180 ..... passim

RCW 17.04.200 22

RCW 17.04.210 22

RCW 17.04.240 ..... passim

RCW 17.04.245 17

RCW 17.10 ..... passim

RCW 17.10.007 9

RCW 17.10.010(3) 26

RCW 17.10.010(4) 26

RCW 17.10.020 32

RCW 17.10.145 ..... passim

RCW 17.10.170 22

RCW 17.10.240 ..... passim

RCW 17.10.240(1)(a) ..... passim

RCW 17.10.240(1)(b) 9

RCW 17.28 22

RCW 17.28.255 ..... 5, 17, 31

RCW 35.67.020 ..... 6, 18, 31

RCW 36.89.080 6

RCW 43.09.210 ..... 35, 36

RCW 43.09.210(3) 35

RCW 56.20.010, *repealed by* Laws of 1996, ch. 230 24

RCW 57.08.005 6

RCW 57.16.050 ..... 4, 25, 26, 27

RCW 77.12.203(1) 7, 27, 37, 38

RCW 79 31

RCW 79.02.010 31

RCW 79.02.010(9) 31

RCW 79.44 ..... passim

RCW 79.44.004 ..... 23, 30, 31

RCW 79.44.010 30

RCW 79.44.060 27

RCW 79.71.130 ..... 7, 27, 37, 38

RCW 85.38.050 19

RCW 85.38.150 4

RCW 85.38.180(4) 19

RCW 89.08.400 5

RCW 89.08.400(3) 24

Laws of 1921, ch. 150, § 1 8

Laws of 1921, ch. 150, § 5 8

Laws of 1929, ch. 125, § 8 8

Laws of 1951, ch. 107, § 1 ..... 8, 17

Laws of 1969, 1st Ex. Sess., ch. 113 9

Laws of 1969, 1st Ex. Sess., ch. 113, § 24(1) 9

Laws of 1969, 1st Ex. Sess., ch. 113, § 24(2) 9

Laws of 1975, 1st Ex. Sess., ch. 13, § 10(1) 10

Laws of 1991, ch. 245, § 1 9

Laws of 1996, ch. 230 25

Laws of 1997, ch. 353, § 27 10

Other Authorities

Op. Att'y Gen. 161 (1960) ..... passim

Op. Att'y Gen. 16 (1972) 23

Op. Att'y Gen. 1 (1984) 8, 25, 38

Op. Att'y Gen. 18 (1989) ..... passim

Op. Att'y Gen. 11 (1990) 37

Op. Att'y Gen. 24 (1994) 17, 20, 35

Op. Att'y Gen. 1 (2018) 23, 26

I. INTRODUCTION

For over a hundred years, common law has clearly provided that state-owned lands cannot be subjected to special assessment without two things: (1) clear and express statutory authority, and (2) a special benefit to the property being assessed. The Legislature has codified these requirements in Revised Code of Washington (RCW) 79.44, and the Attorney General's Office (AGO) has consistently applied them when determining the validity of special assessment schemes.

Kittitas County (County) attempts to avoid these well-established requirements by arguing that its "noxious weed assessments" upon state-owned land are not special assessments, but rates and charges authorized by their police power. This argument fails because the plain language, the statutory structure, and the benefit basis of the noxious weed assessments all indicate that the Legislature intended to create a system of special assessments, not a system of rates and charges.

The County also argues that its noxious weed assessments should be paid "as" a payment in lieu of taxes (PILT). But PILTs are a separate and distinct concept from assessments, and cannot be used interchangeably. The County created a system of assessments and pleaded an assessment theory in its complaint: it cannot now claim it was asking for a PILT all along.

When properly analyzed as a special assessment, the County's

noxious weed assessments do not meet the established standard. The County relies on RCW 17.04 and RCW 17.10, but these statutes subject all land within the relevant jurisdiction to assessment, without specifying state-owned lands. Such general provisions do not clearly or expressly authorize special assessments on state-owned land. And the County failed to show a special benefit where its noxious weed services—by its own admission—do not exist to add value to the property assessed.

Because the County lacks authority to levy noxious weed assessments upon state-owned lands, the trial court properly granted summary judgment to Washington State Department of Transportation (WSDOT) and denied summary judgment to the County, and this Court should affirm.

II. COUNTERSTATEMENT OF ISSUES

1. Did the trial court correctly determine that RCW 17.04 and RCW 17.10 create a system of special assessments, where the statutes refer to noxious weed assessments using the term "assessments," base those assessments in benefits to land, and are structured similarly to local improvement statutes? [Yes]

2. State-owned land cannot be specially assessed absent clear and express statutory authority. Did the trial court correctly determine that RCW 17.04 and RCW 17.10 do not require WSDOT to pay special

assessments, where neither statute specifically requires payment of assessments on state-owned land, but applies generally to all lands within the relevant jurisdiction? [Yes]

3. Special assessments cannot be made absent a special benefit, which requires an increase in the value of the land being assessed. Did the trial court correctly grant WSDOT's motion for summary judgment where the County admitted that its noxious weed program does not exist to increase the value of the lands assessed? [Yes]

4. Did the trial court correctly rule that WSDOT does not have to pay noxious weed assessments on state-owned land "as a PILT," where RCW 17.04 and RCW 17.10 do not provide for payments in lieu of assessments? [Yes]

III. COUNTERSTATEMENT OF THE CASE

A. Background: Special Assessments, Rates and Charges, Payments in Lieu of Taxes (PILTs) and Payments in Lieu of Assessments

Counties and their districts have several means of funding programs and projects. Aside from general taxation, the Legislature may authorize special assessments, rates and charges, or payments by the State in lieu of taxes—abbreviated as "PILTs." While there are similarities between these funding structures, there are also important differences. A preliminary overview of these categories provides important background for this case.

1. Special assessments

Special assessments to pay for local public improvements benefitting specific lands are of ancient lineage. *See Bellevue Assocs. v. City of Bellevue*, 108 Wn.2d 671, 674, 741 P.2d 993 (1987); *Heavens v. King Cty. Rural Library Dist.*, 66 Wn.2d 558, 563, 404 P.2d 453 (1965). All special assessments have a common element: they support the construction of local improvements that are appurtenant to specific property and bring a benefit to that property substantially more intense than is conferred on other property. *Bellevue Assocs.*, 108 Wn.2d at 674–75. They must be based on a special benefit to the land, and that benefit must be actual, physical, and material. *Heavens*, 66 Wn.2d at 564. Special assessments may not be based on something other than special benefits: a special assessment statute could not permissibly authorize assessments based on contribution to the problem addressed by the improvement. Op. Att'y Gen. 18, at *9 (1989).

Some special assessments are imposed to pay for permanent fixtures attached to the land being assessed. *See, e.g.*, RCW 85.38.150 (authorizing diking, drainage, flood control assessments); RCW 57.16.050 (water-sewer assessments). But as the Washington Supreme Court has recognized, the concept of special benefits is not limited to permanent capital improvements. *City of Seattle v. Rogers Clothing for Men, Inc.*, 114 Wn.2d 213, 224, 787 P.2d 39 (1990). Special assessments have been

imposed for purposes as diverse as beautification projects, conservation of natural resources, and mosquito control. *See Time Oil Co. v. City of Port Angeles*, 42 Wn. App. 473, 712 P.2d 311 (1985) (upholding special assessments for downtown beautification project); RCW 89.08.400 (authorizing special assessments for conservation districts); RCW 17.28.255 (authorizing special assessments for mosquito control districts).

Special assessments are not taxes, because they are based on recovering a portion of benefit to property, in contrast to a tax measured against the value of the property. *Gabelein v. Diking Dist. No. 1 of Island Cty. of State*, 182 Wn. App. 217, 229-230, 328 P.3d 1008 (2014). Because special assessments are not taxes, they are not subject to the State's constitutional immunity from taxation, and the Legislature may authorize municipal corporations to levy special assessments against state-owned lands. Op. Att'y Gen. 161 (1960). But as the Washington Supreme Court has long recognized, the Legislature (or the constitution) must authorize such special assessments "clearly and expressly." *Rabel v. City of Seattle*, 44 Wash. 482, 483, 87 P. 520 (1906). This differs from city or other public property, which may be subject to special assessments so long as it is not expressly *excluded. In re Extending Howard Ave. N.*, 44 Wash. 62, 67, 86 P. 1117 (1906) (emphasis added).

2. Rates and charges

The Legislature may also authorize rates and charges. Unlike special assessments, rates and charges levied under the police power do not require a corresponding special benefit. *Morse v. Wise*, 37 Wn.2d 806, 810-11, 226 P.2d 214 (1951); *accord, Teter v. Clark Cty.*, 104 Wn.2d 227, 704 P.2d 1171 (1985). However, an exercise of the police power "must reasonably tend to correct some evil or promote some interest of the state . . . ." *Markham Advert. Co. v. State*, 73 Wn.2d 405, 421–22, 439 P.2d 248 (1968) (quoting *Shea v. Olson*, 185 Wash. 143, 53 P.2d 615 (1936)). For example, cities and towns may "fix, alter, regulate, and control the rates and charges" for sewer service, and counties may "fix[] rates and charges" for stormwater control. RCW 35.67.020; RCW 36.89.080.

Where the Legislature intends to authorize rates and charges upon state-owned property, it typically does so in express terms. *See* RCW 57.08.005 ("any public entity and public property, including the state of Washington and state property, shall be subject to rates and charges for sewer, water, stormwater control, drainage, and street lighting facilities to the same extent private persons and private property are subject to those rates and charges that are imposed by districts.")

3. Payments in lieu of taxes (PILTs) and payments in lieu of assessments

The Legislature may also create PILT programs "to mitigate the

burden on state governments created by the tax-exempt land that still requires public services from the state." *City of Snoqualmie v. King Cty. Exec. Dow Constantine*, 187 Wn.2d 289, 293, 386 P.3d 279 (2016). PILTs are considered neither taxes nor regulatory fees under the police power. *City of Snoqualmie*, 187 Wn.2d at 299.

In addition to a PILT, some agencies are required to make payments in lieu of *assessments*. For example, RCW 77.12.203(1) requires the Department of Fish and Wildlife to pay "an amount in lieu of real property taxes . . . *plus* an additional amount for control of noxious weeds equal to that which would be paid if such lands were privately owned." (emphasis added). RCW 79.71.130 requires the State Treasurer, on behalf of the Department of Natural Resources, to pay "an amount in lieu of real property taxes equal to the amount of tax that would be due if the land were taxable . . . , *plus* an additional amount equal to the amount of weed control assessment that would be due if such lands were privately owned." (emphasis added).

B. Statutory Background: Weed Districts and Noxious Weeds—Control Boards

This case involves the funding of the County's weed districts and noxious weed control board. A preliminary overview of these entities and their legislative history is instructive.

1. Weed Districts (RCW 17.04)

In 1921, the Legislature authorized counties to create and administer weed districts for the purpose of preventing, destroying, or exterminating noxious weeds. Laws of 1921, ch. 150, § 1. At first, the weed districts were funded by general taxes. Laws of 1921, ch. 150, § 5. In 1951, the Legislature changed the weed districts' revenue source from a general tax to a system of assessments. Laws of 1951, ch. 107, § 1. Specifically, the Legislature directed the weed districts to classify property "in proportion to the benefits to be derived from the operations of the district and in accordance with such classification . . . levy assessments" on the property within the district. RCW 17.04.240. The annotations to Laws of 1951, ch. 107, § 1, expressly identify the assessments authorized therein as "special benefit assessments." In addition, these assessments could only be levied upon "those lands which are subject to general taxation." Op. Att'y Gen. 1, at 4 (1984).

Where state-owned lands were included within a weed district, a different procedure was used. At first, the weed district statute required the County Treasurer to certify to the Commissioner of Public Lands "a statement showing the amount of the tax to which such lands would be liable if the same were in private ownership," to be paid by the Legislature out of the general fund of the state. Laws of 1929, ch. 125, § 8. In 1991, the

Legislature deleted the language providing for payment by the Legislature, and instead provided for the agency itself to receive and pay the statement. Laws of 1991, ch. 245, § 1. Other than that change, this provision exists in substantially the same form today as it did in 1929. *See* RCW 17.04.180.

2. Noxious Weeds—Control Boards (RCW 17.10)

In 1969, the Legislature created the State Noxious Weed Control Board, as well as regional noxious weed control boards in each county.[1] Laws of 1969, 1st Ex. Sess., ch. 113. The purpose of the noxious weed control boards is to "limit economic loss and adverse effects to Washington's agricultural, natural, and human resources due to the presence and spread of noxious weeds on all terrestrial and aquatic areas in the state." RCW 17.10.007.

The Legislature provided two ways to fund county noxious weed control boards. First, the county could "appropriate money from the county general fund . . . ." Laws of 1969, 1st Ex. Sess., ch. 113, § 24(2); RCW 17.10.240(1)(b). Second, the county could "in lieu of a tax, levy an assessment against the land" within the county. Laws of 1969, 1st Ex. Sess., ch. 113, § 24(1); RCW 17.10.240(1)(a).

In authorizing these noxious weed assessments, the Legislature

[1] The State Noxious Weed Control Board is not at issue in this case. For convenience, future references to the "noxious weed control board" will refer to the *County* or regional noxious weed control board.

noted that "[c]ontrol of weeds is a special benefit to the lands within any such district." Laws of 1975, 1st Ex. Sess., ch. 13, § 10(1). In 1975, the Legislature provided that "if no special benefits should be found to accrue to a class of land, a zero assessment may be levied." *Id.* Most recently, in 1997, the Legislature deleted the word "special" from the statute but otherwise left the references to benefits intact. Laws of 1997, ch. 353, § 27; RCW 17.10.240(1)(a).

C. Facts

1. WSDOT actively maintains a Noxious Weed Control Program

State law requires WSDOT to do three things with regard to noxious weeds: (1) control noxious weeds on lands that it owns, leases, or otherwise controls through integrated pest management practices; (2) develop plans in cooperation with county noxious weed control boards to control noxious weeds; and (3) give preference to replacing noxious weeds with native forage plants that are beneficial to pollinators. RCW 17.10.145. In accordance with these statutory requirements, WSDOT carries out its own weed removal program, which engages three employees and recorded 1,400 hours of labor within the County during the last growing season. CP at 43. In the South Central Region as a whole, WSDOT spent approximately $115,780 to treat 940 acres for noxious weeds in 2017. CP at 43. When the County notified WSDOT of noxious weeds on its

property, WSDOT always responded in a timely manner. CP at 43. On those infrequent occasions where noxious weed control boards enter state-owned lands to perform direct weed removal, WSDOT pays a fee for the services. CP at 43. These weed eradication services are not funded by noxious weed assessments. Br. Appellant at 31.

WSDOT works with the Kittitas Noxious Weed Coordinators to develop and improve the noxious weed control provisions of its vegetation management plan. CP at 43; CP at 51-53. As an agency, WSDOT recognizes the value of the county noxious weed programs and highly values the good working relationships it has established with noxious weed control boards and weed districts throughout the state. CP at 42. WSDOT will continue to perform its RCW 17.10.145 duties as it always has. CP at 43.

2. Background – Noxious Weed Control Board and Weed Districts in the County

In the County there is a noxious weed control board as well as five individual weed districts that operate in cooperation with the noxious weed control board. CP at 42. Weed districts are established under a separate RCW from the noxious weed control boards. *See* RCW 17.04, Weed Districts; RCW 17.10, Noxious Weeds—Control Boards. In the County, the weed districts contract out their statutory duties to the noxious weed control

board pursuant to the Interlocal Cooperation Act. *See* CP at 291-325.

On October 31, 1995, the County's Board of County Commissioners established noxious weed assessments by resolution. CP at 268-269. Relying on RCW 17.10.240, the County found that the assessments should be levied because "the control of weeds is a special benefit to the lands within the County and that the special benefits provided by the weed district assessment of the Kittitas County Noxious Weed Control Board are a special benefit to the land within the County set forth in the assessment area . . . ." CP at 268-269. The County set the assessment for forest lands at $0.0025 per acre and for all other lands within the county at $0.025 per acre. CP at 268-269. In 2007, these rates were increased to $0.0035 and $0.035 respectively, but the classifications remained unchanged. CP at 272-273.

3. WSDOT seeks consistency in weed assessments

As described above, weed districts and noxious weed control boards have the authority to make benefit-based assessments on lands within their jurisdiction. In some cases, these assessments have not been levied against state-owned lands. CP at 41. Recently, WSDOT learned that some counties had been collecting these assessments for years while others were now attempting to collect new assessments. CP at 42. For example, in 2015, Jefferson County Noxious Weed Control Board proposed a new countywide special assessment for noxious weed control that included a per-mile cost

for state highway right-of-way. CP at 42. WSDOT learned it was paying assessments for various facility and miscellaneous highway properties across the state, in some cases for decades. CP at 42. Although the historic payments were minor, ranging between a few hundred and a thousand dollars per year in a dozen or so counties, WSDOT determined there was a need to establish statewide consistency on this issue. CP at 42.

WSDOT's South Central Region had the majority of county noxious weed assessments, and in April and October 2017, WSDOT sent letters to the counties in that region, including Kittitas, letting them know WSDOT would no longer be paying these assessments. CP at 42. The County did not agree with WSDOT's interpretation of the law. CP at 42.

4. Current litigation

On February 8, 2018, the County filed a complaint in Kittitas County Superior Court requesting a declaratory judgment that WSDOT is obligated to pay noxious weed assessments on state-owned land under RCW 17.04 and RCW 17.10, and that its failure to do so is arbitrary and capricious.[2] CP at 381. On WSDOT's motion, the Kittitas County Superior Court moved venue in this case to Thurston County. CP at 1-2. The parties filed cross-motions for summary judgment. CP at 345-60; CP at 508-24. In

[2] The County alternatively requested a declaratory judgment that the County's noxious weed control duties are an unfunded mandate, but it does not make this argument on appeal.

its reply in support of its motion for summary judgment, the County argued for the first time that WSDOT was required to pay a PILT to the County. CP at 475-84.

After hearing oral argument, the trial court denied the County's motion for summary judgment and granted the State's motion. CP at 563-64. The County appealed from that ruling. CP at 565-67.

IV. ARGUMENT

Counties, as instrumentalities of the state, "have no powers except those expressly conferred by the constitution and state laws, or those which are reasonably or necessarily implied from the granted powers." *State ex rel. Taylor v. Superior Ct. for King Cty.*, 2 Wn.2d 575, 579, 98 P.2d 985 (1940).

The Legislature did not expressly grant the counties authority to specially assess state-owned lands for noxious weed control. Nor did the Legislature authorize the County to fix rates and charges for noxious weed control. And, even if the Legislature has granted the County authority to collect a PILT, the County did not request a PILT in its complaint. It requested, and has continued to request, "assessments," which are separate and distinct from PILTs. The trial court did not err in denying the County's motion for summary judgment and granting WSDOT's motion. This Court should affirm the trial court.

A. Standard of Review

When reviewing an order of summary judgment, an appellate court engages in the same inquiry as the trial court. *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 796, 123 P.3d 88 (2005). Summary judgment is appropriate when the moving party demonstrates the absence of any genuine issue of fact and that it is entitled to judgment as a matter of law. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). While questions of fact usually preclude summary judgment, they may be resolved on summary judgment where no reasonable minds could differ on the question. *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568, 579, 998 P.2d 305 (2000). This Court may affirm a summary judgment ruling on any ground supported by the record. *Swanson v. Holmquist*, 13 Wn. App. 939, 941, 539 P.2d 104 (1975).

While RCW 17.10 must be construed liberally, "[n]either a liberal construction nor a strict construction may be employed to defeat the intent of the legislature, as discerned through traditional processes of statutory interpretation." *Estate of Bunch v. McGraw Residential Ctr.*, 174 Wn.2d 425, 432-33, 275 P.3d 1119 (2012).

B. Noxious Weed Assessments Are Special Assessments, Not Rates and Charges

As a threshold matter, this Court must determine what kind of funding source is at issue. WSDOT asserts that the County's noxious weed

assessments are special assessments, and thus require clear and express statutory authority and a special benefit. The County asserts that the assessments are police power measures, akin to the rates and charges at issue in *Morse* and *Teter*, and do not require a showing of special benefit. Br. Appellant at 29-31. The County's theory would require the court to ignore the plain language and structure of RCW 17.04 and RCW 17.10, and the trial court correctly rejected it.

Whether the Legislature has authorized special assessments, or rather rates and charges, is a question of statutory construction. Op. Att'y Gen. 18, at *4 (1989). The AGO uses a three-part test to determine whether a statute authorizes special assessments or rates and charges: "(1) the words the Legislature used to characterize the revenue system; (2) the nature of the statutory scheme as a whole; and (3) the basis on which the assessment or charge is imposed." Op. Att'y Gen. 18, at *7 (1989). Applying this test reveals that both the weed district statute (RCW 17.04) and the noxious weed control board statute (RCW 17.10) provide for a system of special assessments, not rates and charges.

1. Characterization of the revenue system

Where the Legislature uses a term well known to the common law, the Legislature is presumed to have intended it to mean what was understood at common law. *State v. Dixon*, 78 Wn.2d 796, 804,

479 P.2d 931 (1971); *Fransen v. State Bd. of Nat. Res.*, 66 Wn.2d 672, 674-75, 404 P.2d 432 (1965). In addition, statutes are to be read together whenever possible to achieve a harmonious total statutory scheme that maintains the integrity of the respective statutes. *Am. Legion Post No. 149 v. State Dep't of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008).

Throughout RCW 17.04 and RCW 17.10, the weed assessments are consistently referred to as "assessments." *See, e.g.*, RCW 17.04.240, .245; RCW 17.10.240. This is the same term used in RCW 17.28.255, which the AGO has interpreted as authorizing special assessments for mosquito control. Op. Att'y Gen. 24 (1994). In the 24 years since that opinion was issued, the Legislature has not changed the mosquito district statute to rebut the AGO's interpretation.[3] Furthermore, when the Legislature first enacted the weed district statute, it expressly referred to the assessments thereby authorized as "special benefit assessments." Laws of 1951, ch. 107, § 1. And RCW 17.10.240, which provides for noxious weed assessments, is titled "*Special assessments*, appropriations for noxious weed control—Assessment rates." (emphasis added).

In contrast, nowhere in RCW 17.04 or RCW 17.10 are the

[3] The Legislature is presumed to be aware of AGO opinions and courts may treat a failure to amend the statute in response to the opinion as legislative acquiescence to the opinion. *SEIU Healthcare 775NW v. State Dep't of Soc. and Health Servs.*, 193 Wn. App. 377, 402, 377 P.3d 214 (2016).

assessments referred to as "rates and charges." This contrasts with the situation in *Teter* and *Morse*, where the districts proceeded under statutes that expressly authorized them to fix "rates and charges." *Teter*, 104 Wn.2d at 230; *Morse*, 37 Wn.2d 810-11 (citing RCW 35.67.020 ("Every city and town has full jurisdiction . . . to fix, alter, regulate, and control the rates and charges for their use.")). Unlike in *Teter* and *Morse*, there is no textual basis to find that the Legislature meant to authorize rates and charges in RCW 17.04 or RCW 17.10.

2. Nature of the statutory scheme

The second factor of the test asks whether the statute "clearly indicate[s] a legislative delegation of police power . . . to protect the health of [the county's] inhabitants and to defray the expense by imposing service charges," or rather something like a "traditional local improvement scheme." Op. Att'y Gen. 18, at *8 (1989).

The County points out that "regulating the destruction or removal of noxious weeds . . . is a proper exercise of the legislature's police power." *Hook v. Lincoln Cty. Noxious Weed Control Bd.*, 166 Wn. App. 145, 153, 269 P.3d 1056 (2012); *see also N. Pac. Ry. Co. v. Adams Cty.*, 78 Wash. 53, 138 P. 307 (1914). But neither of these cases dealt with noxious weed assessments. *Northern Pacific Railway Co.* considered only whether "[r]equiring the destruction of noxious weeds" was a valid police

regulation. *N. Pac. Ry. Co.*, 78 Wash. at 56.[4] *Hook* considered only whether activating a noxious weed control board was a valid police regulation. *Hook*, 166 Wn. App. at 153. No one questions that the County may activate a weed district or a noxious weed control board, nor that it may require landowners to destroy noxious weeds. The question is whether these entities may levy *assessments* to recover their operating costs, and as to that question, *Hook* and *Northern Pacific Railway Co.* are silent.

The County argues that its noxious weed program "provides for the general welfare of the community" and the health and safety of its citizens. Br. Appellant at 29. But the mere fact that an assessment is connected to public health or welfare does not make it a rate or charge. For instance, RCW 85.38.050 authorizes the creation of special districts if "conducive to the public health, convenience and welfare," and RCW 85.38.180(4) authorizes special districts to "[t]ake actions necessary to protect life and property from inundation or flow of flood waters, stormwaters, or surface waters." Yet the AGO found that these references to the public health and welfare were not "sufficient to authorize the imposition of rates and charges where no specific authority to impose them has been given."

[4] In *Northern Pacific Railway Co.*, the county did levy a charge for direct weed removal services. *N. Pac. Ry. Co.*, 78 Wash. at 54. But the assessments at issue here do not pay for direct weed removal services. Br. Appellant at 31. As such, while the police power might justify the recovery of costs for direct weed removal, that use of the police power is not at issue here.

Op. Att'y Gen. 18, at *8 (1989).

In *Weyerhaeuser Timber Co. v. Banker*, 186 Wash. 332, 58 P.2d 285 (1936), the Washington Supreme Court analyzed whether a flood control district could impose assessments in the absence of a special benefit. The Court looked to the statute's repeated references to "lands" to be included in the flood control district, and "benefit" accruing to those lands. *Weyerhaeuser Timber Co. v. Banker*, 186 Wash. at 340-42. Taking these considerations into account, the Court held that the primary purpose of the statute was to "reclaim, or save, and to benefit particular property." *Id.* at 340. Therefore, the assessments sought to be imposed were deemed "special assessments for local improvements." *Id.* at 342. Similarly, the AGO determined that mosquito control assessments were special assessments in-part because the assessments were "based upon benefits derived by specific property from the operations of the district, and [the statute] provided a mechanism for classifying and assessing the property in accordance with such benefits." Op. Att'y Gen. 24, at *5 (1994).

Here, too, both RCW 17.04 and RCW 17.10 use lands or property as the basis for assessment, and connect the assessments to benefits.

> The directors shall annually determine the amount of money necessary to carry on the operations of the district and shall *classify the property therein in proportion to the benefits to be derived* from the operations of the district and in accordance with such classification shall prorate the cost so

> determined and shall levy assessments to be collected with the general taxes of the county.

RCW 17.04.240 (emphasis added).

> Prior to the levying of an assessment the county noxious weed control board shall hold a public hearing at which it will gather information to serve as a basis for classification and then *classify the lands into suitable classifications* . . . PROVIDED, That if no *benefits* are found to accrue to a class of land, a zero assessment may be levied.

RCW 17.10.240(1)(a) (emphasis added).

So while weed control might bear some relation to the public health and welfare, RCW 17.04 and RCW 17.10 are structured more like local improvement statutes that use special assessments.[5]

3. Basis of the assessment or charge

The third factor asks whether the statute authorizes the assessing entity to charge based on benefit, or to the "contribution to the problem addressed by the local improvement." Op. Att'y Gen. 18, at *8 (1989). In a sense, RCW 17.04 and RCW 17.10 contemplate recovery of money for a landowner's contribution to the problem of weeds: they may recoup costs for direct weed destruction where the landowner fails to do so.

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[5] When the Legislature removed the word "special" from RCW 17.10.240, it did so because "the term 'special' can refer to a specific type of assessment that is not intended in this section." CP at 13. However, they did not insert any reference to rates or charges, and they specifically retained "the need to determine the benefit to weed control on a specific type of land . . . ." CP at 13. The Legislature's removal of the word "special," standing alone, does not show that the Legislature intended to convert a benefit-based assessment structure into a police power-based system of rates and charges.

RCW 17.04.200, .210; RCW 17.10.170. But costs for direct weed destruction are not at issue in this case: as the County points out, "the Assessments are not used to fund the costs of actually eradicating noxious weeds on a specific property, ..." Br. Appellant at 31. Nowhere in RCW 17.04 or RCW 17.10 are the assessments themselves tied to a landowner's contribution to the need for weed control. Rather, RCW 17.04.240 bases the assessments on *classifications* made "in proportion to the benefits to be derived from the operations of the district," while RCW 17.10.240(1)(a) bases the assessments on the *type of land* being assessed, and "if no benefits are found to accrue to a class of land, a zero assessment may be levied."

In summary, the Legislature chose to use the terms "assessments," "special benefit assessments," or "special assessments" rather than "rates and charges" in RCW 17.04 and RCW 17.10. When it did so, the Legislature presumably understood that the term "special assessments" meant special assessments, which may be imposed on state-owned land only with express statutory authorization and a corresponding special benefit. And when the AGO interpreted the term "assessments" within the related mosquito control district statute (RCW 17.28) to mean the same thing, the Legislature did not object. Neither the statutory scheme of RCW 17.04 and RCW 17.10 as a whole, nor the basis on which the assessments are imposed, provides

any reason to believe that when the Legislature authorized benefit-related "assessments," it actually meant to authorize rates and charges unconnected to benefits. This Court should analyze noxious weed assessments as special assessments, not rates and charges. But, even if this Court determines that noxious weed assessments constitute rates or charges, it must still apply RCW 79.44, as that chapter applies to "any assessment, *rate or charge.*" RCW 79.44.004 (emphasis added).

C. State-Owned Land May Not Be Specially Assessed for Noxious Weed Control

Once the noxious weed control assessments are correctly recognized as special benefit assessments, then the County's case fails because it shows no basis for why state-owned land can be specially assessed. State-owned land may be specially assessed only if two conditions are met: (1) a constitutional or statutory provision must expressly include state property, and (2) the property must be specially benefited by the improvements. Op. Att'y Gen. 1 (2018) (citing *In re Appeal of State*, 60 Wn.2d 380, 381, 374 P.2d 171 (1962)); Op. Att'y Gen. 16 (1972); Op. Att'y Gen. 161, at 59-60 (1960).

The County's noxious weed assessments do not rise to this standard. Neither RCW 17.04 nor RCW 17.10 clearly or expressly authorizes assessments against state-owned land. And the County failed to create an

issue of material fact as to special benefits. The trial court did not err in denying the County's motion for summary judgment nor in granting the WSDOT's motion, and this Court should affirm.

1. RCW 17.04 and RCW 17.10 do not clearly and expressly authorize special assessments against state-owned land

The Legislature must clearly and expressly authorize any special assessment upon state-owned lands. *Rabel*, 44 Wash. at 483; *City of Spokane v. Sec. Sav. Soc'y*, 46 Wash. 150, 89 P. 466 (1907); *State v. City of Olympia*, 171 Wash. 594, 18 P.2d 848 (1933); *Paine v. State*, 156 Wash. 31, 286 P. 89 (1930). A statute "which in general terms delegates power . . . to levy special assessments upon private property benefited by the improvement" is not sufficient to authorize special assessments upon state-owned lands. *City of Spokane*, 46 Wash. at 154. So for example, a statute that states that "[p]ublic land, including lands owned or held by the state, shall be subject to special assessments to the same extent as privately owned lands," might be sufficient to authorize special assessments upon state-owned lands. RCW 89.08.400(3). But a statute that authorizes special assessments "on all property specially benefited by any local improvement," without specifically referencing state-owned lands, does not provide the requisite express statutory authority to assess state-owned lands. Op. Att'y Gen. 161, at *3, 5-6 (1960) (quoting former RCW 56.20.010,

repealed by Laws of 1996, ch. 230; RCW 57.16.050). RCW 17.04 and RCW 17.10 fall in the latter category, and cannot support a special assessment upon state-owned land.

The only reference in RCW 17.04 to state-owned lands appears in RCW 17.04.180, which provides that "[w]henever any state lands are within any weed district, the county treasurer shall certify annually and forward to the appropriate state agency for payment a statement showing the amount of the tax to which the lands would be liable if they were in private ownership." As the AGO has recognized, this section does not authorize weed district assessments against state-owned lands.[6] Op. Att'y Gen. 1, at *2-3 (1984).

The only reference in RCW 17.10 to state-owned lands appears in RCW 17.10.145, which requires state agencies to "control noxious weeds on lands they own, lease or otherwise control," and to "comply with this chapter, regardless of noxious weed control efforts on adjacent lands." It is difficult to imagine a more general statutory mandate than a mandate to "comply with this chapter." RCW 17.10.145 falls far short of the level of specificity that the courts and the AGO look for when deciding whether a statute authorizes special assessments on state-owned land. The State

[6] RCW 17.04.180 could authorize a PILT, but the issue of a PILT is not properly before this Court for reasons articulated *infra* at 36-39.

complies with RCW 17.10 by performing the sole duty that RCW 17.10 expressly ascribes to it: controlling noxious weeds on its own lands.

The County argues that RCW 17.10.240(1)(a) authorizes noxious weed assessments upon state-owned lands because it requires the County to "classify the lands [within the county] into suitable classifications" for assessment, and does not create an exemption for state-owned lands. Br. Appellant at 35. This is not the standard for specially assessing state-owned land. The absence of an express exemption might be enough to subject non-state public property to assessment, but the rule is different for state-owned land: it must be expressly *included.* Op. Att'y Gen. 1, at *2 (2018) (citing *Rabel*, 44 Wash. at 483; *In re Extending Howard Ave. N.*, 44 Wash. at 67). Here, the fact that RCW 17.10.240 applies to all lands but federal lands, is no more relevant than the fact that RCW 57.16.050 applies to "all property" that receives a special benefit. Like RCW 57.16.050, RCW 17.10.240 does not clearly and expressly authorize special assessments on state-owned lands. *See* Op. Att'y Gen. 161 (1960).

The County asserts that RCW 17.10.240 authorizes noxious weed assessments on state-owned lands because a state agency may be an "owner" of property, an assessment constitutes a lien on the assessed property, and notice should be sent to the "owner" of the property. RCW 17.10.010(3)-(4), .240(1)(a). This linkage argument fails for three

reasons. First, state-owned lands are not "subject to a lien for unpaid assessments . . . ." RCW 79.44.060. So, RCW 17.10.240 is not operative on the State, even if it is an owner. Second, nowhere in RCW 17.10 does the statute require all "owners" to pay assessments. The assessment requirement attaches to lands, not owners. *See* RCW 17.10.240(1)(a). Finally, even if this Court reads RCW 17.10 to mandate payment of assessments by all "owners," a statute that requires payment by all "owners" would be no more specific than a statute that required assessments on "all property." Like RCW 57.16.050, RCW 17.10 fails to specifically single out state-owned lands for assessment. *See* Op. Att'y Gen. 161 (1960).

This reading of RCW 17.04 and RCW 17.10 is perfectly consistent with statutes that require a payment in lieu of noxious weed assessments, such as RCW 77.12.203(1) and RCW 79.71.130. If state-owned lands were subject to noxious weed assessments, it would not be necessary for the Legislature to specify that the State must pay an "amount equal to the amount of weed control assessment that would be due if such lands were privately owned." RCW 79.71.130. The County's reading of RCW 17.04 and RCW 17.10 would render these payment in lieu of assessment provisions superfluous, and thus cannot be correct. This Court should hold that RCW 17.04 and RCW 17.10 do not clearly and expressly authorize special assessments on state-owned land, and affirm the trial court.

2. Noxious weed services do not render a special benefit to state-owned land

This Court need not reach the question of special benefit because RCW 17.04 and RCW 17.10 do not provide the requisite clear and express authority to specially assess state-owned lands. But if this Court addresses the question, it should affirm the trial court because the County failed to create a genuine issue of material fact as to special benefit.

The term "special benefit" has a clear, well-defined, and commonly understood meaning within the common law. To justify a special assessment, a special benefit "must be actual, physical and material" and is measured by the "difference between the fair market value of the property immediately after the special benefits have attached and its fair market value before they have attached." *Heavens*, 66 Wn.2d at 563-64. The benefit must also be "substantially more intense than is yielded to the rest of the municipality." *Id.* at 563.

The County asserts that the noxious weed assessments at issue pay for the operating costs of the County's noxious weed program, including detection and eradication of noxious weeds on state-owned lands, noxious weed prevention and control-related technical assistance and education, surveying, handling complaints from adjacent landowners, technical

training, mapping of infestations, and other services.[7] Normally, whether such services specially benefit a property for assessment purposes would be a question of fact. *In re Appeal of State*, 60 Wn.2d at 382. But here, the County itself maintains that weed districts and noxious weed control boards "do not exist to enhance or add value to real property." CP at 354. The record contains nothing to indicate how the County's noxious weed services provide a benefit that is "substantially more intense" for state-owned lands than for the rest of the district. There is no basis on the record for a reasonable finder of fact to find that the County's noxious weed services specially benefit state-owned lands, and the trial court did not err in denying the County's motion for summary judgment or granting WSDOT's motion on this matter.

The County makes what is essentially a policy argument that noxious weed services should not go unpaid based on a market analysis of whether such services increase the value of a property. Br. Appellant at 30-31. These arguments are best directed to the Legislature, which made the decision to set up the noxious weed funding structure as a system of benefit-based special assessments rather than a system of rates and charges. *See supra* at 15-27. Even if the application of a statute seems "unduly

[7] WSDOT performs some of these functions as part of its own weed removal program as mandated by RCW 17.10.145. *See* CP at 42-43.

harsh," the courts will not question its wisdom. *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997).

3. WSDOT's legal theory is consistent with RCW 79.44

The Legislature authorized certain special assessments against state-owned land in RCW 79.44, which authorizes assessing districts to levy "assessments, rates or charges [which] by statute are expressly made applicable to lands of the state" upon "[a]ll lands . . . held or owned by the state of Washington . . . for the cost of local or other improvements specially benefiting such lands . . . ." RCW 79.44.004, .010. The parties dispute whether RCW 79.44 is applicable to this case. This Court need not resolve the issue, because the common law requires the same criteria as RCW 79.44 before a special assessment can be levied upon state-owned land—clear and express statutory authority, and a special benefit. *Rabel*, 44 Wash. at 483. Whether or not RCW 79.44 applies does not ultimately change the analysis.

To the extent this Court decides to rule on the RCW 79.44 question, the County offers two arguments as to why RCW 79.44 should not apply to noxious weed assessments: (1) that it only applies to assessments used to fund fixtures, and (2) that it is a general statute which is superseded by more specific provisions in RCW 17.04 and RCW 17.10. These arguments are not convincing.

Within RCW Title 79, the term "improvements" generally means "a fixture in law placed upon or attached to lands administered by the department . . . ." RCW 79.02.010(9). The County argues that RCW 79.44 incorporates this definition, and thus does not apply to noxious weed assessments as they do not pay for fixtures upon the land assessed. Br. Appellant at 25-26. But the definitions in RCW 79.02.010 apply only "unless the context clearly requires otherwise." RCW 79.44 provides such a case: it defines an "assessment" as "*any* assessment, rate or charge . . . ." RCW 79.44.004. (emphasis added). Many assessments, rates, and charges do not pay for fixtures. *See, e.g.* RCW 17.28.255 (special assessments for mosquito control districts); RCW 35.67.020 (rates and charges for sewer services). Presumably, when the Legislature used the word "any," it meant to include these assessments, rates, and charges as well. Importing the RCW 79.02.010(9) definition of "improvements" into this expansive statutory scheme would defeat the Legislature's purpose.

The County also argues that RCW 79.44 is a general statute which is superseded by the specific provisions of RCW 17.04 and RCW 17.10. *See Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 88, 233 P.3d 853 (2010) ("A specific statute will supersede a general one when both apply.") Taken at face value, this argument would deprive RCW 79.44 of all meaning. *Every* special assessment upon state-owned land requires express

statutory authority and thus, under the County's reading, would control over RCW 79.44. The County's application of the specific-general canon would render the entire RCW 79.44 superfluous, and thus cannot be correct.

In fact, it is RCW 79.44 which is more specific to the current situation. RCW 17.04 and RCW 17.10 impose assessments generally on all land within the district (for RCW 17.04) and all land within the county (for RCW 17.10). RCW 17.04.240; RCW 17.10.020, .240. RCW 79.44, on the other hand, is specific to assessments on state-owned lands. It is RCW 79.44, not RCW 17.04 and RCW 17.10, that more specifically controls here.

This Court should reject the County's arguments and hold that RCW 79.44 controls here. But even if it does not, the County still needs clear and express statutory authority and a showing of a special benefit before it can specially assess state-owned land. It has shown neither, and this Court should affirm the trial court.

D. WSDOT's Interpretation of RCW 17.04 and RCW 17.10 Does Not Violate the Equal Protection Clause

The County asserts that WSDOT's interpretation of RCW 17.04 and RCW 17.10 would render those statutes in violation of the Equal Protection Clause of the federal constitution (U.S. Const. amend. XIV § 1), and the privileges and immunities clause of the Washington State Constitution

(Const. art. I, § 12). The parties agree that these two provisions should be considered together as presenting one equal protection challenge. Br. Appellant at 34; *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 776, 317 P.3d 1009 (2014).

This Court should not consider the County's constitutional arguments because municipal corporations, as creatures of the state, "have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator." *Coleman v. Miller*, 307 U.S. 433, 59 S. Ct. 972, 83 L. Ed. 1385 (1939). Nor does the County have standing to bring a constitutional challenge on behalf of its private landowners: political subdivisions of the state do not have *parens patriae* standing because their power is derivative and not sovereign. *Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 848 (9th Cir. 1985).

If this Court does consider the constitutional argument, the parties agree that rational basis scrutiny should apply. Br. Appellant at 34. Under rational basis review, "a regulation will survive a constitutional challenge if the legislation applies alike to all within the designated class, there are reasonable grounds to distinguish between those within and those without the class, and the classification bears a rational relationship to a legitimate government purpose." *Martin v. Dep't of Licensing*, 175 Wn. App. 9, 24,

306 P.3d 969 (2013) (quoting *Campbell v. State Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 900, 83 P.2d 999 (2004). The burden of proving a statute's invalidity rests with the party asserting a constitutional challenge. *Chelan Basin Conservancy v. GBI Holding Co.*, 194 Wn. App. 478, 494, 378 P.3d 222 (2016), *review granted*, 186 Wn.2d 1032, 385 P.3d 769 (2016), and *aff'd*, 190 Wn.2d 249, 413 P.3d 549 (2018).

As interpreted by WSDOT and affirmed by the trial court, RCW 17.04 and RCW 17.10 apply alike to state and federal government property (which is, as a rule, generally immune from taxation) versus private property (which is not). This classification is rational because the State bears duties with regard to its land that private landowners do not. The State must control noxious weeds on its own land, develop plans in cooperation with the noxious weed control boards, and replace noxious weeds with native forage plants that are beneficial to pollinators. RCW 17.10.145. And as sovereign, the State has an "interest independent of and behind the titles of its citizens" in the welfare of its lands. *Massachusetts v. E.P.A.*, 549 U.S. 497, 518, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007) (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237, 27 S. Ct. 618, 51 L. Ed. 1038 (1907)). In light of these distinctions, the County fails to carry its heavy burden to show that WSDOT's interpretation of the special assessment schemes in RCW 17.04

and RCW 17.10 is unconstitutional.

E. WSDOT's Interpretation of RCW 17.04 and RCW 17.10 Does Not Violate RCW 43.09.210(3)

The County asserts that WSDOT's failure to pay special assessments on state-owned land violates RCW 43.09.210(3), which provides that,

> All service rendered by, or property transferred from, one department, public improvement, undertaking, institution, or public service industry to another, shall be paid for at its true and full value by the department, public improvement, undertaking, institution, or public service industry receiving the same, and no department, public improvement, undertaking, institution, or public service industry shall benefit in any financial manner whatever by an appropriation or fund made for the support of another.

RCW 43.09.210 is a "very general" statute which "yields to specific legislative enactments on a particular subject." Op. Att'y Gen. 24, at *7 (1994). For example, where noxious weed control boards are authorized to make service charges against certain districts, they are "by implication exclude[d]" from charging "other county offices and funds." Op. Att'y Gen. 24, at *7 (1994). Similarly, where the Legislature has set up RCW 17.04 and RCW 17.10 as special assessment systems, they implicitly excluded those lands which are not subject to special assessment. In the absence of clear and express statutory authorization, state-owned lands fall in that precise category. The specific system of special assessments chosen

by the Legislature controls over the general provisions of RCW 43.09.210.

F. WSDOT Is not Liable for PILTs

The County asserted for the first time in its reply in support of its motion for summary judgment that its noxious weed assessments should be paid "as a payment in lieu of taxes ('PILT')." CP at 475. The County characterizes its assessments as a "legal mechanism for DOT to pay Kittitas County" as part of a PILT program. Br. Appellant at 21. This argument overlooks the fact that assessments and PILTs are separate and distinct concepts. Having failed to request a PILT in its complaint, the County cannot obtain that form of relief on summary judgment. "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999).

1. RCW 17.10 does not establish a PILT program

The County asserts that RCW 17.04.180 and RCW 17.10.240(1)(a) provide the basis for a PILT. Br. Appellant at 21. It is true that RCW 17.10.240(1)(a) authorizes assessments "in lieu of a tax." However, this does not convert noxious weed assessments into PILTs. It is general language that merely reflects the fact that noxious weed control boards may be funded through general taxation *or* through assessments.

Op. Att'y Gen. 11 (1990). If the Legislature had intended to use PILTs as a mechanism for collecting assessments, it would have used language akin to the Department of Natural Resources' statute, which expressly requires the treasurer to pay the counties "an additional amount equal to the amount of weed control assessment that would be due if such lands were privately owned." RCW 79.71.130. It did not, and this statutory difference in language must be presumed intentional.

2. PILTs under RCW 17.04.180 are a separate category from assessments, which the County failed to adequately plead

RCW 17.04.180 requires the County to "forward to the appropriate state agency for payment a statement showing the amount of the tax to which the lands would be liable if they were in private ownership." The County characterizes this statute as a "process for collecting District Assessments . . . ." Br. Appellant at 14. But taxes are not special assessments—and payments in lieu of taxes are not payments in lieu of assessments. The Legislature recognized as such when it created payment in lieu of assessment programs in RCW 79.71.130, which provides for the Department of Natural Resources to pay "an amount in lieu of real property taxes . . . , plus an additional amount equal to the amount of weed control assessment that would be due if such lands were privately owned," and in RCW 77.12.203(1), which requires the Department of Fish and Wildlife to

pay "an amount in lieu of real property taxes . . . plus an additional amount for control of noxious weeds equal to that which would be paid if such lands were privately owned."

If the concept of a PILT encompassed payments of noxious weed assessments, the references to "an additional amount" for noxious weed control in RCW 79.71.130 and RCW 77.12.203(1) would be surplusage, which the Legislature is presumed not to include in its statutes. *Ralph v. State Dep't of Nat. Res.*, 182 Wn.2d 242, 248, 343 P.3d 342 (2014); *In re Det. of Strand*, 167 Wn.2d 180, 189, 217 P.3d 1159 (2009); *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). RCW 79.71.130 and RCW 77.12.203(1) establish two different things: (1) a PILT, and (2) a payment in lieu of noxious weed assessments. RCW 17.04.180 contains only the former—while it provides for a payment in lieu of tax, it lacks any reference to "an additional amount" for noxious weed control. RCW 17.04.180 has nothing to do with assessments, as the AGO recognized in its most recent interpretation of that statute. *See* Op. Att'y Gen. 1 at *2, 4 (1984) (stating that "those two classes of public lands [state or county lands] are <u>not</u> subject to such [weed district] assessments" (emphasis in original) and that this conclusion is "entirely consistent, of course, with RCW 17.04.180.").

WSDOT could owe some amount in lieu of *taxes* under

RCW 17.04.180. Such payment is beyond the scope of this case because as far as the record shows, the County never calculated—let alone requested from WSDOT--"the amount of tax to which the lands would be liable if they were in private ownership." RCW 17.04.180. Rather, when it established the noxious weed assessments at issue here, the County relied on RCW 17.10.240 and set a per-acre assessment based on whether the land was forest or not, without regard to the value of the land. CP at 268-69. Nothing indicates that the County relied on RCW 17.04.180, or followed the procedure therein, at the time it established noxious weed assessments. Indeed, the record fails to show that the County took RCW 17.04.180 into consideration at all until after the disputed assessments had already been made. *See* CP at 429-30.[8]

In its complaint, the County requested assessments, not general taxes. Having requested "assessments," the County was not entitled to summary judgment to recover something other than "assessments"—the PILTs under RCW 17.04.180. The trial court properly rejected the County's attempt to change its legal theory and introduce a different claim, and this Court should affirm.

[8] August 7, 2017 letter citing RCW 17.04.180 for authority to make assessments.

V. CONCLUSION

When the Legislature authorized the weed districts and noxious weed control boards, it made a specific choice to fund these entities not through rates and charges but through special benefit-based assessments. The Legislature, at that time, understood that such special assessments could not be levied upon state-owned lands without clear and express statutory authority. The Legislature did not provide that clear and express statutory authority, but used sweeping general language that does not adequately specify state-owned lands for assessment. If the County believes that this statutory scheme is ill-suited to the problem of weed control, the proper remedy is to petition the Legislature for a change to RCW 17.04 and RCW 17.10. As the statutes are now, the trial court did not err in denying

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summary judgment to the County, nor in granting summary judgment to WSDOT, and this Court should affirm.

RESPECTFULLY SUBMITTED this 20th day of December, 2018.

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CERTIFICATE OF SERVICE

I, Angela M. Boggs, an employee of the Transportation and Public Construction Division of the Office of the Attorney General of Washington, certify that on this day true copies of the Brief of Respondent Washington State Department of Transportation and this Certificate of Service were served on the following parties as indicated below:

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

DATED this 20th day of December, 2018, at Tumwater, Washington.

ANGELA M. BOGGS
Legal Assistant

ATTORNEY GENERAL'S OFFICE/TRANSPORTATION AND PUBLIC CONSTRUCTION

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