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No. 52329-9-II

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

KITTITAS COUNTY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent.

REPLY BRIEF OF APPELLANT KITTITAS COUNTY

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I. INTRODUCTION

For over a hundred years, the Legislature, the Courts, and the Attorney General have consistently concluded state owned property is subject to noxious weed assessments. For decades, DOT understood and acknowledged state owned property is subject to noxious weed assessments, which DOT promptly paid each year.

However, in 2017, DOT suddenly stopped paying these assessments. There was no change in law in 2017 that prompted DOT's refusal to pay. DOT even admits it needs to pay money to counties for noxious weed control services. However, DOT says it refuses to pay because it seeks statewide consistency in weed assessments.

DOT supports its refusal to pay by trying to force noxious weed assessments into the "special assessment" category. DOT's argument fails because noxious weed assessments derive from the government's police power, which is fundamentally different from and unrelated to the authority of local governments pursuant to *Wash. Const. Art. 7, §9* to fund local improvements with "special assessments."

The Legislature recognized assessments imposed by counties pursuant to RCW 17.10.240 are not "special assessments," and amended this statute accordingly by removing the word "special" because it "can refer to

a specific type of assessment that is not intended in this section [...]." CP 13.

Kittitas County asks this Court to recognize a county's authority under RCW 17.04.180 and RCW 17.10.240 to collect noxious weed assessments from state owned land, and should reverse the trial court's order.

II. REPLY ARGUMENT

E. Noxious Weed Assessments Are Police Power Regulations, Not "Special Assessments," so RCW 79.44.010 Does Not Apply.

A special assessment "allocates the cost of public improvements that increase the value of an asset (property) to the owner of that asset." *Hugh D. Spitzer, Taxes vs. Fees: A Curious Confusion,* 38 Gonz. L. Rev. 335, 351 (2002-03). The main element of any special assessment is "to 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. v. Bellevue*, 108 Wn.2d 671, 675, 741 P.2d 993 (1987). Title 79 RCW (Public Lands) defines the word "improvement" to mean "anything considered a fixture in law placed upon or attached to lands [...] that has changed the value of the lands..." RCW 79.02.010(9). "[T]he improvement must confer a special benefit on the property sought to be specially charged with its creation and maintenance, over and above that benefit conferred generally upon

property within the municipality." *Philip A. Trautman, Assessments in Washington*, 40 Wash. L. Rev. 100, 101 (1965)). These definitions of special assessments and improvements are fundamentally different from what the Washington Supreme Court has said about noxious weed assessments and programs, which are police power regulations for the general welfare of the community.

A county's police power derives from the constitution. "Any county [...] may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." *Wash. Const. Art. 11, §11.* Courts have long recognized the county's constitutional legal authority to collect noxious weed assessments and costs under the government's police power. In *Wedemeyer v. Crouch*, the Washington Supreme Court held Adams County's assessment and collection of "the cost of destroying certain noxious weeds against the real estate of" a landowner was a constitutional and valid exercise of a county's police regulatory powers. *Wedemeyer v. Crouch*, 68 Wash. 14, 14, 122 P. 366 (1912).

In *Northern Pac. R. Co. v. Adams Cty.*, the Washington Supreme Court confirmed that "[r]equiring the destruction of noxious weeds is a provision for the general welfare of the community, and must rest for validity upon the principle of police regulation." *Northern Pac. R. Co. v.*

Adams Cty., 78 Wn. 53, 56, 138 P. 307 (1914). Moreover, the Court expanded on its ruling in *Wedemeyer*:

> . . . measures of this kind [requiring the destruction of noxious weeds] are regarded as a police regulation and are not, strictly speaking, laws levying a tax, the direct or principal object of which is to raise revenue, but **impose a duty upon a large class of persons directly to their benefit and are regarded as a police regulation** and are not in conflict with any constitutional provision, [...] We think this is the most reasonable rule and should control in this state... **[emphasis added]**

Northern Pac. R. Co., 78 Wn., at 57. Thus, the Washington Supreme Court again held funding of a county's noxious weed services is a police regulation for the general welfare of the community.[1] Special assessments, on the other hand, are used to fund local improvements designed to benefit specific property.

DOT cites to *Weyerhaeuser Timber Co. v. Banker*, 186 Wash. 332, 58 P.2d 285 (1936) to support its contention noxious weed assessments are special assessments. *Weyerhaeuser Timber*, however, is not relevant to noxious weed assessments because the Washington Supreme Court found the powers conferred to a flood control district:

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[1] Despite counties' historical role in noxious weed regulation, there has been recent legal debate on whether the State has preempted the field of noxious weed regulation by enacting chapters 17.04, 17.06, and 17.10 RCW (which all relate to noxious weed control). *See* AGO 1992 No. 1; *Hook v. Lincoln County Noxious Weed Control Bd.*, 166 Wn.App. 145, 269 P.3d 1056 (2012)(decided on other grounds). However, it is irrelevant to this case whether it is the county or the state's police power that authorizes noxious weed assessments on state owned land. Noxious weed regulations are an exercise of police power. *Hook*, 166 Wn.App, at 153.

> are not primarily those of government or regulation, or even of taxation though such powers are conferred to limited degree as necessarily incident to the main power conferred. The primary and principal power thus granted is that of local improvement of the real estate in the district for the benefit of its owners.

Weyerhaeuser Timber Co., 186 Wash., at 340. Hence, the services of the flood control districts were not governmental or regulatory in nature, but were instead designed to improve local real estate. This is different from noxious weed control regulations, which are an exercise of governmental police power. *Weyerhaeuser Timber Co.*, does not apply.

Kittitas County's argument is further supported by the fact the authority for local governmental entities to levy special assessments comes from the State Constitution, *Wash. Const. Art. 7, §9*, which does not apply to counties absent a specific grant of authority from the Legislature.

5. In Accordance with *Wash. Const. Art. 7, §9,* RCW 79.44.010 Authorizes State Agencies To Pay Special Assessments. It Does Not Preclude the State From Paying Other Types of Assessments.

The legal authority for special assessments comes from the Washington Constitution. *Wash. Const. Art. 7, §9* provides "[t]he legislature may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by

special taxation of property benefited." This has been interpreted by the courts to mean that counties do not have the power or authority to levy special assessments unless the legislature delegates such power or authority to the county. *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332 (1896); *Foster v. Commissioners of Cowlitz County*, 100 Wash. 502, 171 Pac. 539 (1918); *See also* AGO 1961 No. 79. "[T]he legislature is not precluded from granting to other bodies the power to construct local improvements and to pay for them by special assessments." *Trautman*, 40 Wash. L. Rev., at 100. So unless the Legislature delegates authority to a county to defray the cost of a local improvement by special assessment, *Wash. Const. Art. 7, §9* and the "special benefits" analysis does not apply to county assessments.

Similarly, state agencies cannot pay special assessments unless authorized by the Legislature. "In the absence of express statutory authority, a municipality cannot subject lands of the state to a special assessment for local improvements." *Appeal of State*, 60 Wn.2d 380, 374 P.2d 171 (1962). Hence, the purpose of RCW 79.44.010 is to provide the legislative authority for state agencies to pay special assessments imposed pursuant to *Wash. Const. Art. 7, §9*. It does not prevent the state from paying other types of assessments, such as noxious weed assessments.

This interpretation of RCW 79.44.010 is reasonable because it harmonizes it with RCW 17.04.180 and RCW 17.10.240 and gives the wording of all three statutes meaning. "To be reasonable, an interpretation must, at a minimum, account for all the words in a statute." *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 312, 268 P.3d 892 (2011). A contrary interpretation of RCW 79.44.010 would render void and meaningless the portions of chapters 17.04 and 17.10 RCW obligating the state to pay noxious weed assessments.

Finally, RCW 17.10.240 is not a grant of legislative authority for counties to impose a special assessment. The Legislature specifically removed the word "special" from RCW 17.10.240 because it "can refer to a specific type of assessment that is not intended in this section[...]." CP 13. Chapter 17.04 RCW does not make any reference to special assessments or "special benefits," so it is not subject to RCW 79.44.010 or *Wash. Const. Art. 7, §9* either. Noxious weed assessments, instead, are a type of burden offset charge authorized by government police power.

6. Noxious Weed Assessments Are Burden Offset Charges.

Special assessments levied pursuant to *Wash. Const. Art. 7, §9* are not the "exclusive method" by which local governments may finance the cost of local improvements, programs, or services. *Trautman*, 40 Wash. L. Rev., at 102. Government services and programs:

> as may be necessary to promote health and sanitation may be authorized by the legislature in the exercise of its police power, and the cost of these improvements need not be defrayed by local assessments. In such cases, *Wash. Const. Art. 7, §9* is not implicated. [citation omitted]

Teter v. Clark County, 104 Wn.2d 227, 231, 704 P.2d 1171 (1985) (citing *Morse v. Wise*, 37 Wn.2d 806, 813, 226 P.2d 214 (1951)); *See also Trautman*, 40 Wash. L. Rev., at 102. DOT argues police power regulations can only be funded through rates and charges, and cites to AGO 1989 No. 18, at *7 to support its argument. Br. Respondent, at 16. DOT largely focuses its argument on the use of the term "assessments." Br. Respondent at 16.

DOT's argument fails, however, because noxious weed assessments have historically also been referred to as "charges." The word "charges" was used in RCW 17.04.180 to describe the noxious weed taxes and assessments starting in 1921, and continued until the statute was amended in 1991. *See* Laws of 1921, ch. 150, §7; Laws of 1991, ch. 245, §1. The Washington Attorney General even opined that "[u]ltimately the legislature must appropriate sufficient money from the state general fund to pay such ***charges*** to the weed district." AGO 57-58 No. 199 at *3. [***emphasis added***]. Significantly, previous versions of RCW 17.04.180 also specifically directed the secretary of transportation to pay noxious

weed charges on state highway rights of way. Laws of 1984, ch. 7, § 18.

DOT's argument ignores the case law directing courts to "look beyond a charge's official designation and analyze its core nature by focusing on its purpose, design and function in the real world." *Samis Land Co., v. City of Soap Lake*, 143 Wn.2d 798, 806, 23 P.3d 477 (2001). Thus, whether the term "assessments" or "rates and charges" is used for noxious weed assessments, the focus should be on the substance of the charges.

Noxious weed assessments are vitally important because, in addition to funding noxious weed education and technical assistance from county staff, they pay for county staff to inspect all lands in the county to determine the presence of noxious weeds on those lands. CP 251-252. The Weed Board has no way of knowing whether noxious weeds are present on a parcel of land until these inspections are done. It costs money to pay for county employees to travel throughout all approximately 1.481 million acres of Kittitas County (over 70% of which is owned by the state or federal government) to inspect lands for noxious weeds. CP 149, 155, 158. When noxious weeds are found and controlled on one parcel of land, it is a benefit to neighboring landowners as well, according to the Washington Supreme Court. *Northern Pac. R. Co.,* 78 Wn., at 58. Noxious weed assessments pay for these inspections and the rest of the

noxious weed control program.[2]

Despite DOT's noxious weed control efforts on its land, DOT land still receives services and benefits worth an estimated $2500-3000 from the Weed Board each year. CP 149. This is why DOT's noxious weed control efforts on its own property are largely irrelevant to the discussion of the necessity of funding for the Weed Board through assessments.

DOT's argument also ignores case law which provides a nuanced and sophisticated analysis into the different types of fees and assessments local governments may charge. Local governments have the authority to impose regulatory fees "under its general police powers to regulate matters relating to health, safety, and welfare." *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 634, 854 P.2d 23 (1993). The Washington Supreme Court has further recognized that local governments:

> may charge fees that are not purely regulatory in nature. Regulatory fees are only one subset of user charge, which is a broad term that describes other types of charges such as commodity charges, burden offset charges, and special assessments. [citations omitted]

City of Snoqualmie v. King County Exec. Constantine, 187 Wn.2d 289, 293, 386 P.3d 279 (2016)(citing *Spitzer*, supra, at 343-51).

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[2] The costs of direct noxious weed removal are to be reimbursed by the property owner pursuant to RCW 17.10.170(3).

Noxious weed assessments are a burden offset charge, which are "[i]mposed to offset [the] cost of handling burdens on others and on public resources ("externalities") caused by [a] payer's activities." *Spitzer*, supra, at 364. For example the Court in *City of Snoqualmie* found the PILT at issue in that case was "used to offset or reimburse the cost of municipal services provided to the" tax exempt land. *City of Snoqualmie*, 187 Wn.2d, at 302. Most of the land in Kittitas County is owned by the government, so it is fair for the biggest landowners to pay their share of the costs of noxious weed control and inspections in Kittitas County.[3]

For these reasons, noxious weed assessments are burden offset charges imposed pursuant to the government's police power and RCW 17.04.180; RCW 17.10.170(3); and RCW 17.10.240. This is consistent with the meaning of chapter 79.44 RCW.

7. The Argument that RCW 79.44.010 Does Not Apply To Noxious Weed Assessments Is Consistent With the Meaning of the Rest of Chapter 79.44 RCW.

The plain meaning of RCW 79.44.010 is the state must pay for local improvements "specially benefiting" its lands. County noxious weed control programs are not local improvements. Noxious weed assessments are not special assessments subject to the "special benefits" analysis.

[3] Kittitas County continues to have concerns about the constitutionality of exempting state lands from noxious weed assessments when government agencies are the biggest landowners in Kittitas County.

Thus, RCW 79.44.010 does not apply to county noxious weed assessments. This interpretation of RCW 79.44.010 is consistent with the meaning of the rest of chapter 79.44 RCW.

For instance, RCW 17.10.170(3) provides that when a property owner fails to pay for the direct costs of noxious weed control, the county can put a lien on the property. However, if the land is owned by the state, the county cannot put a lien on the land, but is instead to collect the money owed "as provided for by RCW 79.44.060."

RCW 79.44.060 requires the chief administrative officer of a state agency to pay assessments levied on state owned property by an assessing district. RCW 79.44.060 broadly applies to "assessments" on state owned land because there is no reference to local improvements or the "special benefits" analysis. This is different than RCW 79.44.010, which specifically references assessments or charges "for the cost of local or other improvements specially benefitting" state lands. This means chapter 79.44 RCW acknowledges a distinction between special assessments for local improvements, as discussed in RCW 79.44.010, and other types of assessments, such as noxious weed assessments, which can be paid by the state pursuant to RCW 79.44.060.

Kittitas County believes this interpretation to be more reasonable than that of DOT, which asks the Court to ignore the plain meaning of

chapters 17.04 and 17.10 RCW and subject police power regulations to the "special benefits" analysis.

8. The Section Heading of RCW 17.10.240 Is Not Law.

The section heading of RCW 17.10.240 reads "Special assessments, appropriations for noxious weed control-Assessment rates." As is suggested in this brief, noxious weed assessments under RCW 17.10.240 are not special assessments but, instead, are a type of burden offset charge. The erroneous and misleading wording of RCW 17.10.240's section heading is not detrimental to Kittitas County's argument since section headings generally are not part of the law and are not useful in statutory interpretation. *See State v. Lundell*, 7 Wn. App 779, 503 P.2d 774 (1972); *Equipto Div. v. Yarmouth*, 134 Wn.2d 356, 950 P.2d 451 (1998).

The phrase "special assessment" does not appear anywhere in chapter 17.10 RCW, except in the section heading for RCW 17.10.240. Kittitas County's argument is supported by the legislative history provided by DOT in its briefing to the trial court, as the word "special" was removed from the statute in 1997 because "the term 'special' can refer to a specific type of assessment that is not intended in this section." CP 13. Thus, the section heading of RCW 17.10.240 is not part of the law and is not relevant to interpreting this statute.

F. Even if RCW 79.44.010 Does Apply, Whether a Property Is "Specially Benefitted" Is a Question of Fact.

If the Court determines noxious weed assessments are special assessments to fund local improvements, the trial court's order must still be reversed because whether a property is "specially benefitted" by a local improvement is a question of fact. *Appeal of State,* 60 Wn.2d, at 382; *In re Jones*, 52 Wn.2d 143, 146, 324 P.2d 259 (1958). As the Washington Supreme Court has recognized, noxious weed regulations are simultaneously police regulations providing for the general welfare of the community, as well as regulations that may "specially benefit" property. *Northern Pac. R. Co.,* 78 Wn., at 57-58. Before the 1997 amendment of RCW 17.10.240, the Washington Attorney General also recognized that RCW 17.10.240 granted counties the authority to levy an assessment on all incorporated and unincorporated lands in the county, provided such lands specially benefitted the county's noxious weed control board. AGO 1990 No. 11 at *6.

DOT claims the trial court's order should be affirmed because "[t]he 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." Br. Respondent, 29. DOT's argument fails for two reasons. First, an incomplete factual record is to be

expected if a case is improperly dismissed on summary judgment. Second, Kittitas County provided uncontroverted evidence to the trial court that it provides an estimated $2500-3000 worth of noxious weed control services to DOT owned real property each year, as well as services to DOT's neighbors, which also benefits DOT lands.. CP 149.

So if RCW 79.44.010 does apply to noxious weed assessments, there is a genuine issue of material fact as to the amount of "special benefit" DOT owned lands received from Kittitas County's noxious weed program, and the trial court's order must be reversed.

G. DOT Agrees It Needs to Pay Counties for Noxious Weed Services.

DOT concedes it is obligated to pay money to Kittitas County for noxious weed control purposes. In its brief, DOT admits "WSDOT could owe some amount in lieu of taxes under RCW 17.04.180." Br. Respondent, 38-39. DOT also states that "[o]n those infrequent occasions where noxious weed control boards enter state-owned lands to perform direct weed removal, WSDOT pays a fee for the services." Br. Respondent, 11 (citing CP at 43). However, even though DOT says it pays a fee for direct weed removal, and concedes it might be obligated to pay noxious weed assessments as PILT, DOT has not actually paid Kittitas County any money for noxious weed control services since 2017. CP 42, 44, 154.

Moreover, RCW 17.04.180, RCW 17.10.170(3), and RCW 17.10.240 already provide the legal authority for such payments to be made. No further legal analysis is necessary, particularly when both parties agree DOT should be paying Kittitas County for noxious weed control purposes. The plain language of chapters 17.04 and 17.10 RCW should be applied, which requires reversal of the trial court's order.

Kittitas County's claim from the beginning of this case has been that DOT needs to pay noxious weed assessments levied under chapters 17.04 and 17.10 RCW. CP 381-389. In support of this claim, Kittitas County has cited to *City of Snoqualmie*, in which the Washington Supreme Court specifically referenced two statutes, RCW 77.12.201 and RCW 79.71.130 (which are nearly identical in wording and plain meaning as RCW 17.04.180 and RCW 17.10.240), as two examples of a PILT program where the state must pay local governments for the services provided to state lands by the local government. *City of Snoqualmie,* 187 Wn.2d, at 293. Saying DOT must pay noxious weed assessments as a type of PILT is not an additional claim, but is a legal argument as to why DOT must pay the assessments.

DOT concedes that while it might be obligated to pay a PILT, it still argues it is not obligated to pay the assessments. Br. Respondent, 37-39. DOT, however, does not cite to any legal authority to support its

argument that a PILT and assessment are separate and distinct funding mechanisms. In addition, DOT does not cite to any legal authority to support its argument that Kittitas County's complaint and issues pertaining to assignment of error on appeal were defective in any way. For these reasons, DOT's argument that it might be required to pay PILT, but not assessments, should be disregarded by the Court.

H. DOT's Legal Obligation to Pay Noxious Weed Assessments Was Recognized and Confirmed Over Sixty Years Ago by the Washington Attorney General.

On June 5, 1958, the Washington Attorney General issued an opinion, AGO 57-58 No. 199, to answer the specific question of whether state owned lands, including highway right of ways, were subject to taxes and assessments of a noxious weed district. This formal opinion of the Washington Attorney General concluded that RCW 17.04.180 contained "specific legislative authorization" for "[w]eed district taxes and assessments" to be collected on state lands, including highway right of ways. AGO 57-58 No. 199 at *2.

In the opinion, the Attorney General recognized "the maintenance division of the state highway department [which is now called DOT] cooperates fully with weed districts and carries out a weed eradication program on all of its right of ways, particularly on those within weed districts." *Id* at *3. Nonetheless, the Attorney General still opined that if

the state fails to destroy noxious weeds on its property, despite the efforts of the maintenance division of the state highway department, "the district may do the work and bill the state…" *Id.* Thus, according to the Washington Attorney General, DOT must pay noxious weed assessments and taxes, as well as the cost of noxious weed control on DOT property. In other words, the arguments DOT is currently making to support its refusal to pay Kittitas County's noxious weed assessments were considered and rejected by the Washington Attorney General in 1958.

DOT claims that because RCW 17.04.180 was amended in 1951 to convert "the weed districts' revenue source from a general tax to a system of assessments," it is now only obligated to pay noxious weed taxes, but not assessments. Br. Respondent at 8, 37-39 (referencing Laws of 1951, ch. 107, §1). DOT's argument fails because the Washington Attorney General opined in 1958, 7 years after the 1951 amendment to RCW 17.04.180, that RCW 17.04.180 authorizes weed districts to collect both "taxes and assessments on state lands." AGO 57-58 No. 199 at *2.

DOT cites to an Attorney General Opinion from 1984 in an attempt to support its contention state owned lands are not subject to noxious weed assessments. Br. Respondent at 38 (citing AGO 1984 No. 1 at *2, 4). DOT's reliance on this opinion, however, is misplaced because the question asked and conclusion relate to whether lands owned by a city

or town are subject to assessments imposed pursuant to RCW 17.04.240. AGO 1984 No. 1, in a side comment, says that while county and state lands are not subject to the assessments levied under RCW 17.04.240, the state still must pay these assessments pursuant to RCW 17.04.180 "for, otherwise, RCW 17.04.180, supra, would make no sense." AGO 1984 No. 1 at *3. Kittitas County has never argued the state must pay noxious weed assessments pursuant to RCW 17.04.240. Kittitas County's position is RCW 17.04.180 requires the state to pay noxious weed assessments, and this position is, thus, consistent with AGO 1984 No. 1.

Finally, not long after AGO 1984 No. 1 was issued, AGO 1990 No. 11 recognized the authority of the county legislative authority to impose assessments on all incorporated and unincorporated lands in the county pursuant to RCW 17.10.240, because of "the legislative command that chapter 17.10 RCW be liberally construed" and because the jurisdictional boundaries of the noxious weed control board "are coextensive with the boundaries of the county." AGO 1990 No. 11 at *4. The Attorney General opined the "taxation and assessment authority of the county legislative authority is not limited to unincorporated areas." *Id.* The county has "the power to assess land within the county" including cities and towns, to help fund the noxious weed program since weed districts were unable to assess incorporated lands. Nowhere in AGO 1990

No. 11 is there any mention of a county's inability to assess state lands, as the Attorney General recognized "the county noxious weed board operates throughout the county." *Id.,* at *5.

III. CONCLUSION

If DOT truly wishes to seek consistency in noxious weed assessments, it should petition the Legislature. Noxious weed law has not significantly changed in decades. Kittitas County's approach to assessing DOT property has not changed in decades. DOT and other state agencies have paid noxious weed assessments for decades. The only significant change in the past decades is DOT's sudden refusal to pay noxious weed assessments.

The trial court erred in denying summary judgment to the County, and in granting summary judgment to DOT. This Court should reverse.

RESPECTFULLY SUBMITTED this 17th day of January, 2019.

GREGORY L. ZEMPEL
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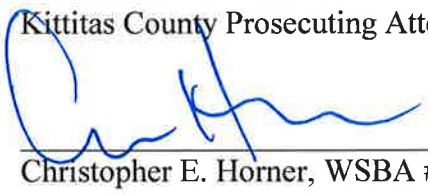

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CERTIFICATE OF SERVICE

I certify that on the 17th day of January, 2019 I caused the original document to be filed in the Court of Appeals Division II and I caused a true and correct copy of this Reply Brief of Appellant in Kittitas County to be transmitted electronically to the following parties:

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DATED this 17th day of January, 2019, at Ellensburg, Washington

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