

FILED

JUN 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29121-9-III

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY, a
municipal corporation,

Respondent/Cross-Appellant,

v.

STATE OF WASHINGTON, PETER GOLDMARK, Commissioner of
Public Lands, and CONSERVATION NORTHWEST, a non-profit
corporation,

Appellants/Cross-Respondents.

**APPELLANTS STATE OF WASHINGTON AND PETER
GOLDMARK'S REPLY BRIEF**

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Appellants State of Washington and
Peter Goldmark

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I. INTRODUCTION

The Department of Natural Resources (“DNR”) is the sole state agency tasked with managing state trust lands on behalf of trust beneficiaries. The particular trust lands at issue in this case were granted to Washington under the federal Enabling Act of 1889 and are reserved for the sole purpose of supporting the common schools. In the *Skamania* case, the Washington Supreme Court held that the state holds these lands pursuant to “real, enforceable trusts” that place upon DNR the same duties as a private fiduciary. Consistent with these duties, DNR actively uses the lands at issue to benefit trust beneficiaries.

In its Response Brief, the Public Utility District No. 1 of Okanogan County (the “PUD”) does not dispute that the lands at issue are dedicated to support the common schools. Nor does it dispute that these lands are the subject of grazing leases and permits that generate income for this public purpose. But despite the dedication and public use of these lands, the PUD contends that it may nonetheless assert a superior right to them through condemnation. This contention is contrary to Washington law, which establishes that lands that are either dedicated to a public use, or devoted or reserved for a particular use by law, may not be condemned.

Unable to escape these well-settled principles, the PUD asks that this Court make new law and hold that a municipal corporation may

condemn school trust lands that are actively used for and legally dedicated to a public use. No Washington case has allowed the condemnation of lands under such circumstances. The PUD's suggested holding is not only contrary to established legal principles, but it would also have sweeping consequences on DNR's ability to manage trust lands on behalf of trust beneficiaries. This Court should reject the PUD's arguments and hold that the school trust lands at issue here are not subject to condemnation.

II. ARGUMENT

In its Opening Brief, DNR identified several independent bases for reversal of the trial court's order. The PUD has failed to rebut these arguments. First, the PUD has failed to rebut DNR's showing that school trust lands are categorically dedicated and reserved for a particular and public use under the federal Enabling Act and the Washington Constitution such that they may not be condemned. Second, the PUD failed to rebut established Washington authority holding that lands that are dedicated or put to an actual public use, like the school trust lands at issue here, are conclusively exempt from condemnation. Third, the PUD has failed to overcome DNR's showing that the school trust lands at issue are also statutorily exempt from the definition of state lands that may be subject to condemnation. On any of the above grounds, reversal is proper.

A. Washington Authority Recognizes the Unique Nature of School Trust Lands, and Establishes the State’s Superior Right and Duty to Manage These Lands.

The school trust lands at issue in this case are unlike lands that the state holds in its proprietary capacity. *Soundview Pulp Co. v. Taylor*, 21 Wn.2d 261, 270, 150 P.2d 839 (1944) (“[t]he State of Washington in its ownership of granted school lands . . . owns and holds them in its sovereign, as distinguished from its proprietary, capacity”); *State v. Superior Ct. of Jefferson Cty*, 91 Wash. 454, 458-59, 157 P. 1097 (1916). (“[T]he state holds title to property in two entirely distinct capacities, the one a proprietary capacity . . . and the other a governmental capacity; that is, in trust for the public use.”).¹ These lands are held in trust for the common schools pursuant to the Enabling Act and the Washington Constitution. *See* Enabling Act of 1889, ch. 180, 25 Stat. §§ 10-11 (1889); Wa. Const. Art. XVI, § 1. These lands are dedicated to this purpose by federal law and the State Constitution and may not be used for any other.

Given the federal statutory and state constitutional reservation of these lands, the Washington Supreme Court has held that the state holds these lands subject to “real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees.” *Skamania Cty v.*

¹ The PUD’s attempts to distinguish *Soundview* and *Jefferson County* on this point are not persuasive. PUD Br. at 36-37. *Draper Mach. Works v. Dep’t of Nat. Res.*, 117 Wn.2d 306, 815 P.2d 770 (1991) does not concern school trust lands nor holds that lands held in the state’s sovereign capacity may never be sold.

State, 102 Wn.2d 127, 685 P.2d 576 (1984). This includes the duty of undivided loyalty and to act prudently with regard to the management of trust assets in consideration of the “specific enumeration of the purposes for which the lands were granted” and the recognition that this “enumeration is necessarily exclusive of any other purpose.” *Id.* at 132, 137. Accordingly, the state, through DNR, is charged with the duty to manage these trust lands to ensure their short and long-term economic value and productivity for the perpetual benefit of trust beneficiaries. *See, e.g.,* Op. Att’y Gen. 11, Question 5(b) (1996).

In its Response Brief, the PUD wholly ignores the significance of the Enabling Act, the Washington Constitution and the holding of *Skamania*. The PUD also fails to address the significance of DNR’s duties to manage these school trust lands to ensure their long-term productive use. Instead, the PUD contends that its statutory condemnation authority should be elevated above the federal and constitutional dedication of these lands and DNR’s authority and duty to manage them. This contention is contrary to established principles of condemnation law. *State v. Superior Ct. of Chelan Cty*, 36 Wash. 381, 385, 78 P. 1011 (1904) (a municipal corporation’s condemnation authority must be strictly construed especially “where the lands of the sovereign are sought to be taken”); *City of Tacoma v. Taxpayers of Tacoma*, 49 Wn.2d 781, 798, 307 P.2d 567 (1957) (same).

None of the general condemnation statutes the PUD cites can lessen the state's constitutional obligations with regard to these lands, nor can they reduce DNR's authority as their legislatively designated manager.² See PUD Br. at 18-19.

The *Skamania* decision represents the Supreme Court's most recent pronouncement of the duty and authority of the state with respect to school trust lands. Since this decision, the Supreme Court has not addressed the authority of a municipal corporation to condemn federally-granted school trust land. Given the holding of *Skamania* and the plain language of the Washington Constitution, which conclusively reserves these trust lands for a specific and public purpose, this Court should find that federally-granted school trust lands are categorically exempt from condemnation.³ The PUD's contention that its statutory condemnation authority forecloses such a result is contrary to law. See *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998) ("Ultimately, however, the judiciary must make the decision, as a matter of law, whether a given

² Though the PUD argues that various condemnation statutes would be "rendered meaningless" by recognizing DNR's constitutional obligations with respect to school trust lands, PUD Br. at 37, the PUD offers no authority suggesting that a municipality's statutory authority trumps the Washington Constitution.

³ The PUD claims that the failure of recently-introduced legislation related to the condemnation of state trust lands indicates that these lands are not *per se* reserved from condemnation. PUD Br. at 18. But it is axiomatic that a bill that does not pass cannot be evidence of legislative intent. *State v. Cronin*, 130 Wn.2d 392, 400, 923 P.2d 694 (1996) ("As a general principle, we are loathe to ascribe any meaning to the Legislature's failure to pass a bill into law . . .").

statute is within the legislature's power to enact or whether it violates a constitutional mandate.”).

The PUD relies on *Roberts v. City of Seattle*, 63 Wash. 573, 576, 116 P. 25 (1911) and *City of Seattle v. State*, 54 Wn.2d 139, 143, 338 P.2d 126 (1959), to argue that state trust lands are not *per se* exempt from condemnation. PUD Br. at 18-19. But neither case addressed whether the Enabling Act and the Washington Constitution preclude condemnation of school trust lands over the objection of the state trustee. The parties did not argue in either case that the lands at issue were immune from condemnation as a matter of law under either the Enabling Act or the Washington Constitution. And neither court addressed the state's constitutional duties vis-à-vis the management of school trust lands. In *Roberts* the state consented to the condemnation. *City of Seattle* was decided exclusively on the interpretation of Washington condemnation statutes. Neither case stands in direct opposition to the holding and implications of *Skamania*.

The Court, however, need not reach this broader issue whether school trust lands are exempt from condemnation over the objection of the state trustee. The school trust lands at issue here are conclusively immune from condemnation under existing law because they are dedicated, devoted and used for an undisputedly public use.

B. The School Trust Lands at Issue are Dedicated to and Used for a Public Use and May Not Be Condemned.

As set forth above and in DNR's Opening Brief, the school trust lands at issue in this case are solely dedicated and used to support Washington's schools. DNR Op. Br. at 19-24. DNR actively uses these lands to benefit the trust by leasing and permitting them for cattle grazing. On this basis alone, they are not subject to condemnation. *Taxpayers of Tacoma*, 49 Wn.2d at 798 (lands dedicated to a public use are not subject to condemnation).

In its Response Brief, the PUD asks the Court to ignore DNR's actual use of the trust lands at issue and instead to adopt an artificially narrow and legally unsupported definition of "use" sufficient to exempt school trust land from condemnation. In particular, the PUD argues that trust lands must be formally "dedicated" to a public use to be exempt from condemnation, and that the lands at issue here are not sufficiently dedicated. The PUD further contends that, because school trust lands are generally subject to sale, they cannot, as a matter of law, be dedicated to a public use. Neither of these arguments is supported by law.

1. DNR's Dedication and Use of the School Trust Lands at Issue Prevents Their Condemnation.

The PUD does not dispute that DNR actually uses the lands at issue to generate income for trust beneficiaries. Instead, the PUD argues

that the law “requires more than DNR simply putting the property to a productive use” to exempt it from condemnation. PUD Br. at 34.

Ignoring case law establishing the opposite, the PUD contends that lands must be “dedicated” to a public use through some “official act or declaration” to be exempt from condemnation. *Id.* at 35. The PUD’s argument rests on a misapplication of Washington law.

As the cases DNR cited in its Opening Brief make clear: when the government uses its land for a public purpose, like a state fish hatchery or a city reservoir, courts will find that the land is dedicated to a public use and not subject to condemnation. *Taxpayers of Tacoma*, 49 Wn.2d at 798 (state’s use of land as fish hatchery had effect of segregating land and appropriating it to public use such that it could not be condemned); *State v. Kittitas Cty*, 107 Wash. 326, 181 P. 698 (1919) (city’s use of land for reservoir is a public use such that land could not be condemned). The reason for this is straight-forward: if the government has put its lands to a public use, those lands should not be condemned.

But Washington law goes one step further. In addition to holding exempt those lands that are put to an actual public use, Washington courts will also refuse to authorize the condemnation of lands that the government has “dedicated” to a public use, even if they are not presently put to that use. This is the holding of *Jefferson County*. There, a railroad

sought to condemn certain state lands that the state had platted and reserved for public use, claiming that these lands were subject to condemnation because they were not actually being put to this use. 91 Wash. at 455, 458. The court disagreed, finding that the dedication of the land was sufficient to prevent its condemnation. *Id.* at 462. Contrary to the PUD's contention, *Jefferson County* does not require that lands be formally "dedicated" to be exempt from condemnation. It merely holds that lands that are so dedicated may not be condemned, despite their lack of actual public use.⁴ *Jefferson County* recognized that dedication was an alternative basis to actual use to exempt lands from condemnation.

As a whole, these cases establish that when government lands are either put to a public use **or** dedicated to such a use, they are not subject to condemnation. Because the school trust lands here are actually put to a public use by DNR, they are not subject to condemnation. As the trial court found, DNR's use of these trust lands to benefit Washington's schools is both "proper and public". 5/11/10 VRP at 5:23-34.

⁴ Indeed, it is only in those cases where the lands were not put to an actual use that the court even reached the question of whether the lands were sufficiently "dedicated" to be exempt from condemnation. *See, e.g., Jefferson Cty*, 91 Wash. at 459-62; *City of Tacoma v. State*, 121 Wash. 448, 209 P. 700 (1922) (permitting condemnation of land that the state was neither using nor declared an intent to use through some "official act or declaration"). In contrast, in both *Taxpayers of Tacoma* and *Kittitas County*, the court did not address the "dedication" of the lands because their actual use spoke for itself.

The PUD wholly fails to address DNR’s authority establishing that statutorily-authorized land management activity of the type at issue here is a public use of state lands. DNR Op. Br. at 21-22 (citing *Dickgieser v. State*, 153 Wn.2d 530, 536-38, 105 P.3d 26 (2005) (logging of state forest lands is a public use and resulting damage to private property may be compensable taking)).⁵ Nor does it dispute that it is within the state’s “power to determine what is a public use of the state’s own property.” *State v. Superior Ct. for Mason Cty*, 99 Wash. 496, 500, 169 P. 994 (1918). But most tellingly, the PUD cannot point to any Washington case that has authorized the condemnation of the type of school trust lands at issue here. Instead, in each of the cases on which the PUD relies, the lands at issue were admittedly neither put to any public use, nor contemplated for any future use by the state. PUD Br. at 37 (citing *City of Seattle*, 54 Wn.2d at 147; *City of Tacoma*, 121 Wash. at 453; *Roberts*, 63 Wash. at 576).⁶ The PUD does not even address DNR’s arguments regarding the appropriate scope of this authority. DNR Op. Br. at 26-29.

⁵ Certainly were the PUD alleging that the state’s use of the trust lands had damaged its property, it would argue that DNR’s activities constituted a public use of state land.

⁶ The PUD’s argument that *Roberts* stands for the proposition that the devotion of state lands “to the public purpose of education is insufficient to prevent [their] condemnation” is untenable on its face. PUD Br. at 35. Taken literally, it would mean that the PUD could condemn the academic buildings of the University of Washington despite their plain devotion to education. But *Roberts* held only that a 30-foot strip of land could be condemned because “nothing in the record” indicated that the land was “actually in use”.

The school trust lands at issue are put to a public use. The law does not require anything more to find them exempt from condemnation. The PUD has failed to identify any authority holding otherwise.

2. Whether Trust Lands Generally May be Sold is Irrelevant to Determining Whether They May be Condemned.

The PUD's argument that because the Washington Constitution provides that state trust lands may be sold, these lands are not properly considered "dedicated lands" under *Jefferson County*, likewise fails. PUD Br. at 36. Nothing in *Jefferson County* requires that state lands be reserved from sale in order for those lands to be dedicated or devoted to a public use. The fact that the state has the ability to sell school trust land that is currently being put to use does not diminish in any sense the exemption of that land from condemnation. Again, the PUD attempts to read requirements into the law that simply do not exist.

The PUD bases its argument solely on the *Jefferson County* court's statement that once land is appropriated to a particular use it becomes "severed from the mass of public lands, [so] that no subsequent law, or proclamation or sale would be construed to embrace it, or operate upon it." PUD Br. at 36. As set forth above, *Jefferson County* addressed the question of whether the dedication of state lands alone (without any actual

63 Wash. at 576. The same is simply not true of the school trust lands at issue here, which the PUD concedes are actively used for trust purposes.

use of the lands) was sufficient to immunize them from condemnation. 91 Wash. at 458. The *Jefferson County* court relied on the above principles to find that, when lands are duly dedicated, a subsequent law, such as the statutory authorization to condemn state lands, would have no effect on those lands. *Id.* at 459. The court did **not** hold that to be exempt from condemnation state lands must be reserved from sale. Nor did it make any finding that the lands at issue in that case, which the state had platted for future use as streets, were so reserved. It only found that because the state had dedicated the land at issue for a future public use, it could not be forced to alienate it through condemnation or sale.⁷

Indeed, the government is almost universally free to either acquire or dispose of land as it deems appropriate to carry out its functions. But merely because the government can sell its lands does not mean that those same lands can be condemned without regard to their dedication or use. Were this proposition accepted, municipal corporations would be free to condemn any property of the state unless that land was legally reserved from sale (like state forest lands). By way of example, because the state may sell capitol building lands, the PUD could condemn the State Capitol

⁷ This is consistent with other Washington cases in which the court did not even consider the question of whether government lands could potentially be sold when analyzing whether they were exempt from condemnation. *See generally Kittitas Cty*, 107 Wash. 326; *Taxpayers of Tacoma*, 49 Wn.2d 781.

Building despite its obvious public use. RCW 79.24.010 (providing that capitol building lands may be sold through proper procedures). State lands can be put to a public use and still be subject to future sale. This does not mean they can be condemned.

Washington law is clear that the PUD lacks the power to “condemn state-owned lands dedicated to a public use.” *Taxpayers of Tacoma*, 49 Wn.2d at 798. Simply because the PUD’s condemnation statute allows it to condemn certain state lands does not mean that it may condemn any state lands it wishes. These school trust lands are dedicated and in fact devoted to a public use and are not subject to condemnation. The PUD has failed to advance any viable argument to the contrary.

C. The PUD’s Compatibility Argument is Without Legal Basis and Conflicts with DNR’s Management Duties.

Recognizing the obvious public use of the school trust lands at issue, the PUD argues that they are nonetheless subject to condemnation because the PUD’s proposed use is purportedly “compatible” with the state’s use of these lands. PUD Br. at 39-42. But no Washington authority allows a municipal corporation to expand its condemnation authority to condemn otherwise immune lands merely based on its contention that the existing and proposed uses are compatible. Indeed, such a holding would be in direct conflict with cases establishing that the

state is entitled to determine when and how it will use its own lands.

1. No Authority Authorizes Condemnation of Trust Lands Based on Compatible Uses.

The PUD contends that Washington authority supports its claim that a municipal government may condemn actively-used state trust lands based solely on the purported compatibility of the use of those lands. This is incorrect. The PUD bases its argument on dicta and out-of-context references taken from early case law and ignores fundamental principles governing the question of a municipal government's condemnation authority. Its argument should be rejected.

The PUD primarily relies on *City of Tacoma*. PUD Br. at 39-40. In that case, the court allowed the city to condemn a 250-foot strip of land straddling a stream. *City of Tacoma*, 121 Wash. at 453. The state did not argue that it was either using or intended to use this land. The court did not discuss the rationale for permitting the condemnation of the 250-foot strip of school land at all, other than a cursory citation to *Roberts* and observing that the use of the stream by fish was insufficient to constitute public use by the state. *Id.* at 453.⁸ The court also permitted the diversion

⁸ The PUD argues that the *City of Tacoma* court “expressly stated that the *Roberts* analysis applied to both the water diversion and the taking of the school lands”, PUD Br. at 40, but this claim overstates the court’s citation to this case. As explained below, the court’s general reference to *Roberts* does not support the PUD’s compatibility argument, as the holding of *Roberts* turned on the fact that the land at issue was not in use. *See Roberts*, 63 Wash. at 576.

of water past a state fish hatchery; and it was in the discussion of the potential **diversion of water** that the Court evaluated the possibility of damage to the hatchery. *Id.* Significantly, in *City of Tacoma*, the state did not argue that this diversion would damage either its existing or future use of its land. Rather, the court only discussed the consequences of the city's petition to divert the water away from the hatchery. *Id.* at 451 (city applied for right to "damage" fish hatchery "by the diversion of the waters"). This case does not stand for the proposition that the PUD may expand its condemnation authority to condemn otherwise used lands based merely on purported compatibility of use.

Roberts is equally unhelpful to the PUD. There, Seattle sought to condemn a 30-foot strip of land with the consent of the state that the University of Washington was neither using, nor wanted. 63 Wash. 573. The court authorized the condemnation of the land on that basis. *Id.* at 576 (stating that "nothing in the record" indicated that the land at issue was "actually in use"). Though the PUD makes much of the court's observation that the proposed condemnation would not "impair" the University's use of the remaining land, this statement is dicta, and was made only after the court addressed the threshold question of whether the land was actually in use. *Id.* at 576. This case does not stand for the

proposition that Seattle could have taken this land if the University had been putting it to some public use and objected to the condemnation.

Jefferson County only further illustrates the failures of the PUD's argument. There, the court observed that where state lands are sought to be condemned, the question is "solely one of power", not of whose right to the land is superior. 91 Wash. at 461. Ignoring the plain language in this case, the PUD attempts to distinguish it by simply asserting that "the controlling standard here is compatibility, not authority." PUD Br. at 42, n.38. But the *Jefferson County* court did not engage in any analysis of proposed or competing uses when it held that the state lands at issue there were categorically exempt from condemnation. 91 Wash. at 459-60. Nor did it hold that a proposed "compatible" use could justify taking the state's lands. *Jefferson County* establishes that the only relevant question is whether the PUD has the authority to condemn lands that the state has dedicated or uses for a public use. The answer is conclusively no.

2. DNR is the Government Body Charged with Managing State Trust Lands, and this Authority Should Not Be Usurped by a Municipal Corporation.

The PUD's proposed holding also conflicts with established authority recognizing the government's authority to both use and plan for the future use of its lands. *Jefferson Cty*, 91 Wash. 454 (lands the state had dedicated to a future public use exempt from condemnation); *Kittitas*

Cty, 107 Wash. at 328-29 (court will not interfere with government’s “determination of the public necessity of acquiring and holding lands to be used for and in connection with public activities”); *see also State v. Superior Ct. for Spokane Cty*, 84 Wash. 20, 145 P. 999 (1915) (rejecting condemnation of public service corporation’s land and deferring to its “reasonable anticipation of future needs” and planned use for subject property). These cases establish that the government may hold its land for contemplated future uses, and that such land may not be condemned. DNR should be held to have even greater discretion over the long-term use of school trust lands given its established fiduciary duties in that regard.⁹ *See, e.g., Skamania*, 102 Wn.2d at 132-33.

Allowing local governments to condemn state trust lands under the auspices of “compatible use” would elevate improperly municipal condemnation authority over the authority of the state to manage school trust lands. In addition to being inconsistent with the above authority, such a holding would have serious implications for the health of school trust lands. Under the PUD’s argument, municipalities could chip away at the trust corpus – each determining that a road here or a power plant there

⁹ Despite the PUD’s repeated claims to the contrary, DNR argued below that compatibility was irrelevant to the PUD’s condemnation authority and therefore inappropriate to consider on summary judgment. CP 41-47. Moreover, DNR never conceded that the PUD’s proposed project is compatible with the state’s management and use of the trust lands at issue and submitted evidence showing the opposite. CP 48-51.

is “compatible” with the state’s use of those lands. This would undermine the state’s ability to implement land management strategies to ensure the long-term productive use of these lands. For example, the placement of a large transmission line through otherwise pristine school trust land would in DNR’s view impair the ability to maximize the future value of the land.

Such a holding would also pose serious administration concerns, as it would charge courts with determining whether a would-be condemnor’s proposed use of school trust lands is compatible with DNR’s management objectives. This case illustrates the concerns with taking such land management decisions out of DNR’s hands. The trial court below concluded that the PUD’s and DNR’s use of the trust lands at issue would be compatible based on its own observation that “cattle graze under power lines in many parts of Okanogan county. . . .” 5/11/10 VRP 18:7-8. The trial court made this finding on an undeveloped factual record and without citation to any objective standard of “compatibility”. Indeed, the trial court completely disregarded DNR’s arguments that the PUD’s condemnation action would affect DNR’s ability to manage and protect its lands. The trial court merely stated that, “we don’t know, in a hundred years, power lines may be obsolete. . . . We don’t know what use the P.U.D. or the DNR might have for this land in a hundred years and we don’t know if the P.U.D. will still need a line across it. We don’t have that

information.” 5/11/10 VRP at 19:16-17. This only illustrates that the trial court lacked any basis for its finding of purported “compatibility” of use.

Affirming the trial court’s ad hoc adjudication of compatibility would turn on its head the authority establishing that the state is the proper entity to determine how to manage school trust lands. To the extent this Court intends to hold to the contrary and evaluate the compatibility of proposed uses, remand is appropriate to develop the factual record.

3. The PUD’s Arguments Regarding the Lease Terms and Multiple Use Statute are Similarly Unavailing.

The PUD also contends that the Court can authorize the condemnation of these lands based on certain contract provisions in the grazing leases on the lands at issue and on general statutes encouraging “multiple uses” of state trust land. Neither argument is persuasive. With regard to the leases, the PUD argues that, because these leases contain boilerplate provisions describing the parties’ rights and responsibilities if condemnation occurs, this means that DNR considers this land to be condemnable by the PUD. *See* PUD Br. at 43. But no provision of the leases can enlarge the PUD’s condemnation authority to include lands which are, as here, not otherwise subject to condemnation. CP 35.

Likewise, the PUD’s claim that multiple uses on the land will benefit the trusts by generating additional income is shortsighted and

without support. As discussed below, the multiple use statutes cited by the PUD **permit** (but do not require) multiple uses of state land, and only to the extent that DNR remains able to fulfill its trust management obligations. *See* RCW 79.10.120. DNR submitted evidence to the trial court that the PUD's proposed use was **not compatible** with DNR's trust management responsibilities, including income generation. *See, e.g.*, CP 48-50 (summarizing concerns that PUD's proposed easement transverses a substantial block of state trust land, separating it from the Methow Valley, potentially impeding future income sources for the trust and impacting negatively DNR's ability to protect the trust corpus). Neither the lease provision regarding condemnation nor the multiple use statute allow the PUD to take lands that are otherwise exempt from condemnation.

D. The School Trust Lands at Issue are also Reserved for a Particular Use By Law and Not Subject to Condemnation.

As detailed above, the school trust lands at issue here are dedicated to a public use and are exempt from condemnation. This Court can reverse the trial court's order and hold these lands exempt on this ground alone. In addition, however, these school trust lands are also devoted to or reserved for a particular use by law. As such they are also statutorily exempt from condemnation under RCW 79.02.010(13)(h).

1. The Operation of DNR's Grazing Leases and Permits Reserve the Lands for a Particular Use By Law.

Under chapter 79.13 RCW,¹⁰ the state trust lands at issue here are “devoted to or reserved for a particular use by law” – namely statutorily authorized and governed grazing leases which are used to generate income for trust beneficiaries. Although the PUD attempts to complicate the issue, the terms of RCW 79.02.010(13)(h) are straightforward: lands that are “devoted to or reserved for a particular use by law” may not be condemned. RCW 79.02.010(13)(h).

Instead of addressing the statutory language, the PUD argues that because the state may sell school trust land generally, the lands at issue here are not exempt from condemnation. PUD Br. at 29. Neither the plain language of the statute, nor any case cited by the PUD, requires reservation from sale in order to meet the statutory exemption.

Draper Mach. Works v. Dep't of Nat. Res., 117 Wn.2d 306, 815 P.2d 770 (1991) does not establish the contrary. There, the court interpreted the “reservation from sale or lease” provision in RCW

¹⁰ As set forth in DNR's opening brief, DNR Op. Br. at 24, the reservation of these lands under the Enabling Act and Washington Constitution for the sole purpose of supporting the common schools is arguably sufficient alone to find these lands dedicated to a particular use by law. But again, the Court need not reach this broader issue because the lands at issue here are devoted by law to this purpose through the operation of the existing grazing leases.

79.93.010 as applied to state aquatic lands.¹¹ The court rejected the respondent's "strained and unrealistic interpretation" of the statute and held that the reservation from sale or lease of the waterways did not prevent DNR from charging rent for using the waterways according to a permit. *Id.* at 315. This case does not purport to define the term "reserved to a particular use by law" or hold that a statutory reservation from sale is necessary to prevent condemnation. It is simply not determinative of the scope of RCW 79.02.010(13)(h).

The same is true for *Fransen v. Board of Natural Resources*, 66 Wn.2d 672, 404 P.2d 432 (1965). The *Fransen* court found that, because RCW 79.22.050 statutorily reserved state forest lands from sale, these lands were not subject to condemnation. *Id.* at 675. But *Fransen* did not hold that whether the lands may be sold is alone determinative of whether they are dedicated to a public use.

Regardless, although the question of reservation from sale is not determinative of whether the lands are devoted to a particular use, the lands at issue here are so reserved under RCW 79.11.290. This statute provides that leased lands "shall not be offered for sale, or sold, during the life of the lease, except upon application of the lessee". The PUD argues that this reservation is insufficient because a provision of the lease

¹¹ As this Court should do here, the *Draper* court interpreted the statutes at issue "in the context of the state's overall management of its aquatic lands." 117 Wn.2d at 313-14.

reserves the state's right to sell the property. PUD Br. at 29-30. But this clause must be read in conjunction with the limits of DNR's sale authority in RCW 79.11.290, and this provision does not, and could not, affect the sale restrictions contained in the statute. Moreover, the PUD provides no authority for its argument that conditions on the reservation from sale lessen the effect of the reservation as a matter of law. Though the state forest lands at issue in *Fransen* were permanently reserved from sale, the Legislature's decision to reserve grazing leased lands from sale only for the term of the lease does not negate the reservation. RCW 79.11.290.

Although the PUD attempts to discount the legal impact of the leases, it cites no authority suggesting that legally binding leases, issued pursuant to DNR's statutory authority, are insufficient to reserve land for a particular use by law. PUD Br. at 33. The PUD cannot dispute the fact that the leased lands at issue are legally devoted to the purpose of grazing and their use by lessees is limited to this purpose. RCW 79.13.370.

2. DNR's Authority to Grant Easements does not Enlarge the PUD's Authority to Condemn Leased Lands.

Relying on RCW 79.36.580, the PUD advances the circular argument that just because DNR may grant an easement over lands leased for grazing, the PUD may condemn an easement over the same land. This argument twists the language of the statute and ignores DNR's role as both

the manager and lessor of the lands at issue. RCW 79.36.580 provides only that the PUD's easement application process is not the only mechanism by which a municipal corporation can seek an easement over state land. But again, there is nothing in this statute that would permit the PUD to condemn lands that are otherwise exempt from condemnation. This statute does not trump long-standing authority exempting the type of dedicated school trust lands at issue here from condemnation. It merely grants discretion to DNR to grant easements in circumstances otherwise consistent with trust management obligations – with the key factor that DNR determines whether doing so is appropriate.

3. The Multiple Use Statute does not Enlarge the PUD's Condemnation Authority.

The PUD argues that the lands at issue here cannot be reserved for a particular use by law because they are subject to multiple uses under the multiple use statute. This argument is without merit. RCW 79.10.120 authorizes DNR to exercise its discretion to allow multiple uses of this land, so long as the uses are “compatible with those basic activities necessary to fulfill the financial obligations of trust management”. Far from expanding the PUD's condemnation authority, this statute demonstrates again that the Legislature vested DNR with the discretion to determine when and if other uses may be allowed on state trust lands.

There is nothing in the statutes cited by the PUD, PUD Br. at 32, that even suggests that the allowance of multiple uses **by the state** would subject otherwise exempted lands to condemnation by a municipality.

III. CONCLUSION

The school trust lands at issue in this case are unique. They are constitutionally and federally protected and reserved only for a particular use by law. And DNR actively uses these lands for this purpose. The PUD has failed to identify any authority that would allow it to condemn these lands despite their plain dedication and public use. Adopting the PUD's arguments would vastly expand its power to condemn lands of the sovereign. The PUD has identified no basis to do so. Its arguments should be rejected, and the trial court's condemnation order reversed.

RESPECTFULLY SUBMITTED this 22nd day of June, 2012.

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