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SUPREME COURT OF THE STATE OF WASHINGTON

PETER GOLDMARK, as Chief Executive Officer of the Department of
Natural Resources and Commissioner of Public Lands, Petitioner,

v.

ROBERT M. McKENNA, Attorney General, Respondent.

**AMICUS CURIAE BRIEF OF PUBLIC UTILITY DISTRICT NO. 1
OF OKANOGAN COUNTY (CORRECTED)**

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ORIGINAL

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1. INTRODUCTION

The people of the State of Washington in 1931 authorized public utility districts to condemn state lands for transmission lines. The law has not changed in the subsequent 80 years. Okanogan County Public Utility District No. 1 ("PUD") is building a transmission line to serve the public. After years of delay, the PUD moved this important public project forward by condemning necessary easements. The Commissioner of Public Lands does not contest public use and necessity for the PUD's project. But, without legal or factual basis, he asserts that the authority granted to the PUD in 1931 has somehow changed.

The Commissioner received counsel from the Attorney General that an appeal of the decision rejecting the Commissioner's summary judgment motion would be meritless. Regardless of how one views the Commissioner's policy position that the PUD should not be able to condemn certain lands, the clear legal and factual analysis demonstrates that the PUD can legally condemn state trust lands.

The Commissioner may take his policy arguments to the Legislature. Instead, the Commissioner seeks to delay a valid condemnation by attempting to takeover the Attorney General's job as the State's chief legal officer. Under the law and his ethical obligations as an officer of this Court, the Attorney General has authority and discretion to

make legal decisions regarding management of the state's litigation, including whether to appeal the issue of the PUD's condemnation authority.

In addition to considering the perspective of all other state agencies that may not agree with the Commissioner's personal policy inclinations, the Attorney General's decision not to pursue an appeal is well-grounded in the evident lack of merit. Accordingly, this Court should deny the Commissioner's mandamus petition.

2. IDENTITY AND INTEREST OF *AMICUS*

The PUD is a municipal corporation formed to provide electrical service to the citizens of Okanogan County. The PUD's interest (and, ultimately, that of its ratepayers) is the financial cost of the Commissioner's continued attempts to delay the Methow Transmission Project, including his action to force the Attorney General to file a meritless appeal.

3. STATEMENT OF THE CASE

3.1. Adoption of Certain Facts

Amicus adopts the Agreed Statement of Facts filed on August 9, 2010 and supplements it, below, by addressing the context in which this case arose, including the trial court's factual and legal analysis underlying the merits of the Commissioner's proposed appeal. *Amicus* also adopts the "Procedural Posture" section of the Commissioner's Opening Brief.

3.2. The Underlying Superior Court Case

3.2.1. Okanogan PUD's Methow Transmission Project

For nearly fifteen years, the PUD has been trying to improve electrical service to citizens of the Methow Valley. The existing transmission line has long experienced reliability, capacity, and line loss problems; service failures are expected to increase in the future. To address this problem, the PUD is to construct a new transmission line and substation between Pateros and Twisp ("Project").

From initial planning for the Project in 1996, it has undergone an arduous review process. After environmental review spanning more than a decade, the PUD's decisions regarding the Project and the sufficiency of the Final Environmental Impact Statement were affirmed by the superior court and the Court of Appeals. *Gebbers v. Okanogan County PUD No. 1*, 144 Wn. App. 371, 393, 183 P.3d 324 (2008). The Court of Appeals further held that the PUD did not act arbitrarily and capriciously in selecting the transmission line route. *See id.* This Court denied review. *Gebbers v. Okanogan County PUD No. 1*, 165 Wn.2d 1004, 198 P.3d 511 (2008).

Part of the transmission line route crosses State school trust lands managed by the Department of Natural Resources ("DNR"). These lands are used primarily for cattle grazing. During environmental review, DNR

formally commented that it had no objection to the PUD's preferred route.¹ Subsequently, the PUD attempted to negotiate the easements through DNR's application process, but three years have passed without approval or denial.

Although the PUD was able to negotiate the easements required for the Project from most property owners along the transmission line route, it became necessary to file eminent domain proceedings against several owners, including the State. The PUD filed its original Petition for Condemnation on November 30, 2009, and amended it on April 14, 2010.

3.2.2. The PUD's Condemnation Authority

The State and Intervenor Conservation Northwest filed separate motions for summary judgment, arguing that the PUD does not have the authority to condemn the school trust lands at issue. The State conceded that the PUD has the statutory authority to condemn, but argued that the trust lands needed for the Project are not subject to condemnation because they are dedicated to a particular use by law.

The PUD opposed both motions and requested summary judgment in its favor. Condemnation of school trust lands is expressly allowed under RCW 54.16.050 for public utility purposes, including transmission lines and all facilities necessary or convenient, and for the additional broad

¹ March 25, 2005 DNR comment letter on Methow Transmission Project Draft Environmental Impact Statement, recorded at pages G-520-G-522 of the Final EIS, available at <http://www.okanoganpud.org/methowtrans/FEIS/FEIS.htm>.

purposes set forth in RCW 54.16.020. This has been Washington law since 1931. Laws of 1931, ch. 1, § 6. Moreover, this Court has long upheld the condemnation of school trust lands not dedicated to a public use. *See City of Seattle v. State*, 54 Wn.2d 139, 338 P.2d 126 (1959); *Roberts v. City of Seattle*, 63 Wash. 573, 116 P. 25 (1911). And, even if the lands are dedicated to a public use, condemnation is still authorized when the proposed use does not destroy the existing public use. *See, e.g., City of Tacoma v. State*, 121 Wash. 448, 453, 209 P. 700 (1922).

3.2.3. The Trial Court's Oral Ruling and Findings

On May 11, 2010, the trial court explained the legal reasoning and factual analysis behind its decisions to grant summary judgment in favor of the PUD's condemnation authority. The trial court first recognized that grazing leases and permits are a public use and that the Commissioner conceded the PUD does have authority to condemn school trust lands generally.²

The trial court determined that the "transmission line is compatible with grazing leases," that DNR has authority to allow easements or compatible uses on the land, and that the grazing leases acknowledge specifically that the land remains subject to eminent domain. Based on

² Transcript of Proceedings before the Honorable Jack Burchard, Okanogan County Superior Court, May 11, 2010 ("Transcript"), at 5-7, attached as Appendix A. A copy of the superior court's audio recording has also been submitted for review.

these factors, the court concluded that the land is not reserved for an exclusive particular purpose by law.³

The trial court went on to analyze what standard applies in determining whether land is dedicated to a particular use and whether a second public use can be allowed. Relying on *City of Tacoma v. State*, 121 Wash. 448, 209 P. 700 (1922), *State v. Super. Ct. for Jefferson County*, 91 Wash. 454, 157 P. 1097 (1916), and *Roberts v. City of Seattle*, 63 Wash. 573, 116 P. 25 (1911), the Court determined the law requires a comparison of the existing public use with the PUD's proposed public use:

*So by way of how to proceed, this Court concludes that the State's authority to exclude school trust land under grazing permits... or leases from PUD easement condemnation is not unlimited. Courts do look deeper into issues of effects, results, interference, and compatible use.*⁴

The trial court then addressed numerous factual issues as to why the grazing leases and permits, even if public uses, did not preclude the simultaneous use of some land for the PUD's transmission line as a compatible public use. In part, the court discussed the following factors before reaching its ultimate conclusion:

One, the PUD seeks an easement not ownership...

Two, there's no evidence that a transmission line is not compatible with grazing leases or permits, or that it will diminish income from grazing leases and permits. Cattle

³ Transcript at 12-14.

⁴ Transcript at 14-18 (quote at 17-18) (emphasis supplied).

graze under power lines in many parts of Okanogan County and the State, including under the Loup Loup route...

Eight, condemnation of an easement or the lease of an easement – in this case a condemnation – will raise additional revenue for the trust...⁵

Relying on these facts, the trial court ultimately concluded that:

- The easement “will not substantially interfere with any known, specific or planned future use,”
- The easement will likely increase trust revenues,
- The power lines are compatible with grazing,
- DNR’s existing public use will not be destroyed or subject to substantial interference by the PUD’s public use,
- The state trust lands used for cattle grazing are subject to the PUD’s exercise of condemnation authority for a transmission line easement.⁶

3.2.4. Appeals and Petition Against Attorney General

Following its oral ruling, the trial court entered orders denying summary judgment for the State and Conservation Northwest, and granting summary judgment to the PUD on the issue of condemnation authority. Because the State did not otherwise oppose the order on public use and necessity, the court also entered its Findings of Fact, Conclusions of Law, and Order on Public Use and Necessity. Two initial appeals followed from Intervenor Conservation Northwest and the PUD.

The Attorney General declined to file an appeal, having assessed that “the superior court’s decision was not erroneous and did not interfere with the

⁵ Transcript at 16-21.

⁶ Transcript at 21-23.

State's obligations regarding the school trust lands... an appeal on the grounds advocated by the Commissioner could result in significant harm to the legal interests of other [state] agencies..." Answer to Petition Against State Officer at 1-2.

Commissioner Goldmark responded by filing the instant Petition in this Court, seeking a writ of mandamus compelling the Attorney General to pursue an appeal despite the Attorney General's legal determination that an appeal had "little to no chance of success" and was not in the best interests of the State. *Id.* at 3.

4. ARGUMENT

Under Washington's Rules of Professional Conduct, and the "almost universally" accepted standard, the "entity" model of representation prevails. RPC 1.13; G. Hazard & W. Hodes, *The Law of Lawyering*, 17-2, (2d ed., 1993), and at 17-11 (2004-2 Supplement) ("The Law of Lawyering"). The entity model is in direct contrast with the "group" model or "public interest" model. *Id.*

Under the entity model, the lawyer has only the organization as a client, and not its individual elected officials, department heads, agents or other "constituents." *Id.* at 17-10. The entity model has now been formally adopted as the standard in Washington. RPC 1.13 states that "a lawyer employed or retained by an organization represents the organization acting

through its duly authorized constituents.” The duty defined in RPC 1.13 applies to governmental organizations. RPC 1.13, Comment 9. The group model, advocated by the Commissioner, is not part of this State’s law.

The standard set forth in RPC 1.13 is also recognized in *The Restatement of the Law Governing Lawyers*, §§ 96, 97 (2000) (“*Restatement*”). Under the *Restatement*, when a lawyer represents a governmental organization, the organization’s interests (and the attorney’s role) are defined by the organization’s “responsible agents acting pursuant to the organization’s decision-making procedures.”

The Legislature’s decision-making procedures for the Attorney General clearly authorize that office to reject meritless appeals. Washington law recognizes the Attorney General’s independent discretion to assess the merits of litigation. The ultimate, and unfortunate, result of the Commissioner’s position would be to grant state officers essentially unchecked power to carry on abusive litigation in the name of the State, undermining the rule of law.

**4.1. The Attorney General Represents the State
As Its Chief Legal Officer With
Broad Discretion to Manage Litigation**

**4.1.1. The Legal Framework of the Attorney General’s
Relationship With Other State Officials**

As an independently-elected constitutional official of the state, the Attorney General has independent authority to check the power of other

elected state officers. The Attorney General is not merely a lawyer who happens to be elected and then bound by the policy whims of other state officers with regard to the execution of legal duties.

Washington recognizes the inherent discretion in the Attorney General's office that is both contained within and goes beyond the constitutional and statutory provisions on the Attorney General's authority.⁷ Consequently, as an independent official and the State's chief legal officer, the Attorney General's role "is to represent the public interest and not simply the machinery of government... When an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency."⁸

The simplistic attorney-client representation model espoused by the Commissioner, citing *People ex rel. Deukmejian v. Brown*,⁹ is not consistent with the authority accorded the Attorney General as an executive officer under the Washington Constitution and should be rejected. Imposing a rigid obligation on the Attorney General to advance any state officer's position

⁷ See, e.g., *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935), *State v. Taylor*, 58 Wn.2d 252, 256, 362 P.2d 247 (1961); *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 207, 588 P.2d 195 (1978).

⁸ See, William P. Marshall, *Break Up The Presidency? Governors, State Attorneys General And Lessons From The Divided Executive*, 115 Yale L.J. 2446, 2455-2456 (2006) citing *Secretary of Administration & Finance v. Attorney General*, 326 N.E.2d 334, 338 (1975).

⁹ 29 Cal.3d 150, 624 P.2d 1206 (Cal. 1981).

would undermine the Attorney General's ethical obligation to represent the State as an entity, and to uphold the law and constitution when that state officer seeks to take action that the Attorney General believes is unlawful or meritless.¹⁰

Moreover, “a primary reason for having an independent attorney general is to allow for independent legal judgment. Empowering the [Commissioner] to be the final authority on legal decisions would make this independence a nullity (as well as, nonsensically enough, vesting in a non-legal officer the power to have the final say on legal meaning).”¹¹

4.1.2. The Legislature Authorizes the Attorney General to Represent the State as an Entity, Not Just The Commissioner. And, the Attorney General has the Necessary Discretion to Do So.

Even within the duty of representation, but more certainly within the authority to exercise independent legal judgment, the Attorney General represents all state agencies and boards, many of whom may have different interests in the resolution of the underlying litigation. Here, the Attorney General has to consider the interests and mandates that affect not only the Commissioner, but other state agencies that have interests in eminent domain issues.

The Attorney General's representation of all state agencies is

¹⁰ See, Marshall, 115 Yale L.J. at 2462-2463.

¹¹ See, *id.*, 115 Yale L.J. at 2464-2466.

mandated by the Legislature under its constitutional authority to enumerate other responsibilities of the Attorney General's Office.

The attorney general shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law...

Wash. Const. Art. III. § 21. And, the Legislature has confirmed the Attorney General as the exclusive lawyer for the State.

The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts... in all legal or quasi legal matters, hearings, or proceedings, and advise all officials, departments, boards, commissions, or agencies of the state in all matters involving legal or quasi legal questions...

RCW 43.10.040.

The Legislature also granted the Attorney General independent authority to manage the course of lawsuits regarding public lands.

It shall be the duty of the attorney general, to institute, or defend, any action or proceeding to which the state, or the commissioner or the board, is or may be a party, or in which the interests of the state are involved, in any court of this state... when requested so to do by the commissioner, or the board, or upon the attorney general's own initiative.

RCW 43.12.075 (emphasis supplied).

The phrase "upon the attorney general's own initiative" is ignored in the Commissioner's Opening Brief. This is not surprising as this language gives the Attorney General discretion in handling litigation in the interests of the State. RCW 43.12.075 is directly consistent with the discretion accorded the Attorney General under RCW 43.10.030. The

same analysis must be applied to both sections: “shall” only requires that the Attorney General exercise discretion, not that he must institute a particular action. *See, Boe v. Gorton*, 88 Wn.2d 773, 775-777, 567 P.2d 197 (1977); *Berge v. Gorton*, 88 Wn.2d 756, 761-762, 567 P.2d 187 (1977). If “own initiative” is to have meaning within the statute, it must be related to discretion and that discretion necessarily includes both instituting and ceasing actions.

Examining this Court’s rulings on the Attorney General’s discretion in the context of mandamus, there is no basis for relief. “It follows that even a mandatory duty is not subject to mandamus unless it is also ministerial, or nondiscretionary, in nature.” *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774, 777 (2010).

Here, the Attorney General has exercised his discretion, representing the Commissioner in the PUD’s condemnation action and vigorously opposing the PUD’s defense of the legislative authority for eminent domain of state trust lands. Now faced with a trial court decision rejecting the Commissioner’s arguments, the Attorney General is within his discretion as the chief legal officer, and consistent with his ethical obligations, to not further pursue what his legal analysis indicates is a meritless appeal given the law and the underlying factual analysis.

4.2. The Attorney General Cannot Be Compelled to Bring a Meritless Action

As an attorney and officer of the Court, the Attorney General is bound by several legal and ethical considerations the Commissioner would have him abandon to continue delaying the PUD's Project. In particular, the Rules of Professional Conduct bar frivolous (that is, meritless)¹² arguments:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law...

RPC 3.1 (emphasis supplied).¹³

An appeal or motion is frivolous if there are "no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility" of success.

In re Recall Charges Against Feetham, 149 Wn.2d 860, 872, 72 P.3d 741, 747 (2003) (emphasis supplied, citations omitted).

Even if the Commissioner could overcome the Attorney General's inherent and statutory authority to direct litigation, there is no authority to compel meritless argument in violation of the RPC and other court rules. The Commissioner's arguments cannot meet these standards.

Moreover, for mandamus to issue, the Commissioner must

¹² Frivolous is defined as "*Lacking a legal basis or legal merit*; not serious; not reasonably purposeful." *Black's Law Dictionary*, (8th ed. 2004) (emphasis supplied).

¹³ See also RAP 18.9 (providing sanctions for frivolous appeals); CR 11 (requiring that legal memorandum be well-grounded in fact and not interposed for an improper purpose, among other standards).

demonstrate the Attorney General's discretionary act of declining appeal is so flawed as to be arbitrary and capricious.

Mandamus may only be employed to compel discretionary acts of public officials when those officials have totally failed to exercise discretion, so that it can be said they acted in an arbitrary and capricious manner.

Smith v. Bd. of Walla Walla County Com'rs, 48 Wn. App. 303, 306, 738 P.2d 1076 (1987); accord *Brown v. Owen*, 165 Wn.2d 706, 206 P.3d 310 (2009). Here, the Court's review of the legal and factual arguments in the underlying trial court action will demonstrate that the Attorney General has appropriately exercised discretion by declining to file a meritless appeal.

Of material importance in determining whether an appeal is appropriate, there are no contested facts and the Commissioner only challenged the PUD's legal authority to condemn, not the Project's public use and necessity. Following a trial court airing, the Attorney General has now had clear direction regarding the appropriate legal standard to be applied. Examining the case under the correct standard, and knowing there is no factual basis for argument, the Attorney General declined to pursue an appeal. Now, having tried and failed to advance an otherwise meritless position, the Attorney General has appropriately determined, consistent with his statutory and ethical duties, not to appeal.

4.2.1. The Commissioner's Proposed Appeal Is Based on an Incorrect Legal Premise

The Commissioner's summary judgment position will be frivolous on appeal because it requires an appellate court to ignore the same clear precedent the Commissioner ignored below. The trial court briefing featured the Commissioner's flawed interpretation of the relationship between the PUD's condemnation authority and trust lands, with no basis in law or fact.¹⁴

The Commissioner made clear below that he does not understand the standards to be applied in examining the application of a PUD's condemnation authority to state lands. The Commissioner's reasoning was misguided at best, including argument rejected by this Court fifty years ago on whether school trust lands are subject to condemnation.¹⁵ See Transcript at 6-12; *City of Seattle*, 54 Wn.2d 139, 147, 338 P.2d 126 (1959); *Roberts*, 63 Wash. 573, 576, 116 P. 25 (1911).

Most incredibly in the underlying action, particularly with regard

¹⁴ Strangely, the Commissioner does appear to understand independently that current law does not bar the PUD's condemnation. Rejected legislation is strong indicia of legislative intent. *Dept. of Ecology v. Theodoratus*, 135 Wn. 2d 582, 594, 957 P.2d 1241 (1998). The Legislature recently considered and failed to act upon Senate Bill 6838 (2009-10), which was drafted to bar eminent domain against state trust lands. See SB 6838 (2009-10), Senate Bill Report SB 6838 (Feb. 6, 2010). The only testimony in favor of the bill came from the office of the Supervisor of Public Lands. *Id.*

¹⁵ The Commissioner's appeal would necessarily reject legislative mandates that trust lands are subject to condemnation and should be used for multiple public uses. DNR has authority to grant utility line easements over trust lands pursuant to RCW 79.36.510, but the legislature specifically stated that grant does not affect the condemnation authority of municipal corporations on state lands. RCW 79.36.580. The DNR is directed to allow multiple uses on trust lands, specifically including "public rights-of-way" and "other uses or activities by public agencies" compatible with basic activities necessary to fulfill the trust's financial obligations. RCW 79.10.120.

to the frivolity of an appeal, the Commissioner ignored this Court's precedent and the proper analysis of existing public uses on land subject to condemnation. The Commissioner argued, without support in law or fact, that courts "treat the question as to whether the land is already devoted to a public use as a threshold—and sole—issue that determines whether the land is subject to condemnation. In summary, courts do not inquire into the extent of public use or its relative value, but end their inquiry when they find that state land is being devoted to a public use."¹⁶

The Commissioner's argument on why the PUD is without condemnation authority is clearly wrong under this Court's long-standing precedent. One public use does not preclude a second public use. A court in condemnation proceedings will determine if a new public use is barred by gauging its effects on the existing public use:

This property is now devoted to a public use, and if the proposed diversion of the waters of the North fork would destroy this public use, or so damage it as to preclude its successful operation, our inquiry would end here.

City of Tacoma v. State, 121 Wash. 448, 453, 209 P. 700, 702 (1922) (emphasis supplied); *see also Roberts*, 63 Wash. 573 (allowing condemnation of school lands after determination that land was actually in use or that strip-take would impair remainder). The *City of Tacoma* court authorized diversion of state waters for a second public use after

¹⁶ State's Motion for Summary Judgment at 24.

determining that the diversion would not disrupt the existing public use.

The Commissioner has no factual basis for appeal under the correct legal standard of determining whether the proposed public use would destroy or damage to the point of preclusion the existing public use. Therefore, the Commissioner's only argument is one that he has not previously advanced and that obviously has no merit: an appellate court should overturn longstanding precedent to allow one marginal public use to bar compatible public uses that fund the trust's primary objective and fulfill legislative directives for multiple public uses.

4.2.2. Applying the Correct Legal Standard to the Existing Public Use, the Commissioner's Proposed Appeal Is Factually Meritless

If the Commissioner's legal arguments were adopted, it would require a court to conclude that grazing leases of nominal economic value bar use of trust lands for all other public uses, including those providing more trust income. This is contrary to explicit statutory direction for multiple public uses on trust lands, including other public agency uses and *public rights-of-way*.¹⁷ And the Court would have to ignore the complete lack of evidence regarding impact to the leases from power lines.

Moreover, DNR's own leases acknowledge eminent domain by

¹⁷ See Transcript at 14-21; RCW 79.10.120 specifically, and RCW 79.10.100-.280 generally (statutes encouraging multiple uses on trust lands, including by other public agencies).

other authorities (as well DNR's authority to grant further easements over leased areas). That language exists in the State's leases precisely because DNR has long understood that its trust lands used for grazing are subject to condemnation for other public uses. The trial court rejected that the State's lease language was meaningless:

[Section] 10.05 of the leases provides that if all the premises are taken by eminent domain, the lease shall be terminated. The State says that that language is meaningless. The Court has a hard time saying that something is meaningless when it's included in carefully drafted legal documents. This document in section 10.05 for these leases acknowledged the possibility of condemnation by eminent domain...

Transcript at 13. Therefore, the Commissioner has known leased trust lands may be condemned for other public uses.

The law, since at least 1931, clearly allows the PUD to condemn school trust lands, even those with existing grazing leases and permits. In analyzing the existing public use (grazing) compared to the proposed use (transmission line easements), the trial court record showed that the PUD's use would be compatible with cattle grazing. Further, the trial court indicated that the school trust land beneficiaries would benefit more from having the transmission line easements rather than just the grazing alone.

There is nothing in the record to indicate the trial court abused discretion in finding transmission lines would not interfere with existing uses and that just compensation provides trust funding. The Commissioner

lacks evidence to demonstrate the transmission line easements would “destroy... or so damage... as to preclude” the grazing leases and permits.

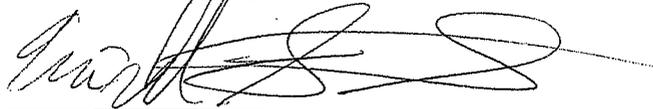
With no legal basis to overturn precedent and no factual basis to disturb the trial court’s analysis under that precedent, the Commissioner’s appeal arguments are “totally devoid of merit.” Accordingly, the Attorney General exercised his discretion by not filing an appeal. This Court should also reject the Commissioner’s arguments as frivolous.

5. CONCLUSION

The Attorney General represents the State, not the Commissioner. He exercised discretion under his statutory duty. Mandamus for the exercise of that discretion should be rejected. For the foregoing reasons, the Court should deny the Commissioner’s Petition.

RESPECTFULLY SUBMITTED this 20th day of September, 2010.

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APPENDIX A

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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1)	
OF OKANOGAN COUNTY, a municipal)	
corporation of the State of)	
Washington,)	
Respondent/Petitioner,)	
v.)	COA No. 291219
CHRISTINE DAVIS, a single person;)	OC No. 09-2-00679-4
and TREVOR KELPMAN, a single)	
person; and DAN GEBBERS and REBA)	
GEBBERS, husband and wife; and)	
WILLIAM C. WEAVER, custodian for)	
Christopher C. Weaver, a minor,)	
Respondent,)	
and)	
STATE OF WASHINGTON and PETER)	
GOLDMARK, Commissioner of)	
Public Lands,)	
Contingent Appellants/)	
Respondents,)	
and)	
CONSERVATION NORTHWEST, a)	
Washington Non-Profit Corporation,)	
Appellant/Respondent-)	
Intervenor.)	

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED THAT the above-entitled matter came on regularly for hearing before the HONORABLE JACK BURCHARD, Judge of the Superior Court of the County of Okanogan, State of Washington, commencing on May 11, 2010.

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May 11, 2010

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(The following proceedings were transcribed as follows, to wit:)

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THE COURT: Be seated. Do we also have some people on the phone? Who is on the phone?

7

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MR. MANN: David Mann and Michael Zoretic, Your Honor.

9

10

THE COURT: Okay, I hope you gentlemen can hear us okay.

11

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MR. MANN: Yes, fine.

13

14

THE COURT: Well, welcome, everyone. I'm glad you could be here today. We're recording the decision so you can get a copy of the disk if you need it for any purpose from Mary. All members of the public are, parties are entitled to that.

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The parties will eventually present an order on summary judgment, but usually these orders don't contain the Court's reasoning, and the Court doesn't make findings of fact on summary judgment because summary judgment is reviewed by the Court of Appeals and the Supreme Court de novo, from the beginning, so they don't really take account of what my view is, and probably most of us know and believe that this won't be the final stop

1 for this decision.

2 I believe this Court's job is to make a
3 decision as best I can and do my part in the process, so
4 I'm going to go through a little background. All of you
5 are very aware of the background, but for the record, I
6 think I should devote just a few minutes to some of the
7 background.

8 So Okanagan P.U.D. filed this action to
9 condemn, by eminent domain, an easement across land held
10 in trust by the state of Washington administered by the
11 Commissioner of Public Lands for the benefit of state
12 common and normal schools. The proposed easement is 11.63
13 miles long and 100 feet wide, for the purpose of
14 construction and maintenance of the P.U.D.'s new Pateras
15 to Twisp transmission line.

16 The route has been surveyed but not staked.
17 If successful, this action will fill in the last missing
18 link in the 26-mile new transmission line route. The
19 P.U.D. has been involved in public review, route
20 selection, environmental review and debate and litigation
21 for over ten years on this project.

22 I know it's been that long because it was in
23 March of 2000 that this Court ordered the P.U.D. to
24 prepare an EIS. The EIS was eventually found adequate by
25 this Court and the Court of Appeals, which affirmed the

1 decision in a published opinion in 2008. The Supreme
2 Court denied review.

3 This case is before the Court on cross motions
4 for summary judgment. All parties assert that there are
5 no issues of material fact and the judgment should be
6 granted as a matter of law. All parties agree and
7 stipulate that there are no issues concerning public use
8 and necessity beyond the issues presented in this summary
9 judgment.

10 Summary judgment in favor of the state or
11 Conservation Northwest would be a final judgment of
12 dismissal. Summary judgment in favor of the P.U.D. would
13 necessitate a jury trial on the issues of damages.

14 I've broken my analysis down into five
15 questions. The first question I discuss by itself and
16 then talk about the other four.

17 The first question is an issue raised by the
18 P.U.D. Do grazing leases or permits constitute public
19 uses where the DNR grants leases or permits to private
20 parties and the proceeds are dedicated to the school
21 trust?

22 The law on this point is well settled, that
23 there are, that the use of trust land to benefit the trust
24 is a proper and public purpose. Nothing in the law
25 prevents the state from contracting with private

1 individuals or companies to conduct the revenue-creating
2 activities. The State does not have to get into the
3 business of buying, grazing, and selling cattle, so the
4 answer is, yes, the State has authority to contract with
5 private parties to accomplish public uses.

6 Now I'm going to describe the other four
7 issues first and then go through them one at a time.

8 Issue No. 2: Are all school trust lands, regardless of
9 use, exempt from easement condemnation by the P.U.D.?

10 So that's the general, overall question. Can the P.U.D.
11 condemn, for easements, school trust land?

12 Issue No. 3 is: Is the school trust land,
13 involved in this case, exempt from easement condemnation
14 by the P.U.D. because it is reserved for a particular
15 purpose by law? And that's a specific legal question in
16 the phrasing, a particular purpose by law is a question
17 presented.

18 Issue Nos. 4 and 5 are identical, except one
19 deals with grazing permits and one deals with grazing
20 leases. Issue No. 4 concerns permits: Is the school
21 trust land, subject to grazing permits, exempt from
22 easement condemnation by the P.U.D. because it is
23 dedicated to a particular use?

24 And then the identical wording as it applies
25 to leases is Issue No. 5, is the school trust land,

1 subject to grazing leases, exempt from easement
2 condemnation by the P.U.D. because it is dedicated to a
3 particular public use?

4 So further discussion of Issue No. 2, are all
5 school trust lands, regardless of use, exempt from
6 easement condemnation by the P.U.D.? If so, that would be
7 the end of the case. The State concedes this point, DNR
8 concedes this point; Conservation Northwest did not
9 concede this point, so a brief discussion of the history
10 of the statutes.

11 1927 gave us the Public Lands Act, which
12 excluded from condemnation state land dedicated to a
13 public use. This was in accordance with a number of cases
14 like the Jefferson County case, holding that otherwise the
15 Ray Road could condemn any and all state land, including
16 land on which the state capitol building is situated. Two
17 years later, in 1929, the legislature rejected the P.U.D.
18 act. Nevertheless, the P.U.D. act became law after a
19 valid initiative. That was the laws of 1931, Chapter 1,
20 Sections 6(b) and (e), and we know those correspond to
21 what was codified as RCW 54.16.020 and .050, and it's the
22 reading of those statutes that is the main task of the
23 Court.

24 So I'm going to take a little bit careful
25 look, carefuler look at those two statutes and, of course,

1 I've done a lot more than that over the last period of
2 time, but 54.16.020, perhaps it's because this was a
3 ballot initiative, but the language is somewhat difficult
4 because the sentences are so long and there are so many
5 commas and ands and other connectors, but the applicable
6 wording says, referring to a P.U.D., "A district may
7 condemn and purchase all lands, property, and property
8 rights; maintain, operate, and develop easements,
9 right-of-ways, and structures, poles and pole lines and
10 cables and other facilities; and may exercise the right of
11 eminent domain to effectuate the foregoing purposes."

12 Then it states, "What is the procedure? The
13 right of eminent domain shall be exercised pursuant to the
14 resolution of the commission and conducted in the same
15 manner and by the same procedure as is provided for the
16 exercise of that power by cities and towns.

17 Now turning to 54.16.050, so this -- and what
18 I'm going to quote from is the laws of 1931, Chapter 1,
19 Section 6(e), the law as passed, that's the law. The law
20 as codified is not where there's a difference, the law is
21 the law is passed and there's a slight difference in the
22 phrasing. So section (e), "And for the purposes
23 aforesaid, it shall be lawful for any public utility
24 district to take, condemn, and purchase and acquire any
25 and all public and private property and property rights,

1 including state, county, and school lands for the purposes
2 aforesaid and for transmission lines and any other
3 facilities necessary or convenient."

4 So the language appears clear, but issues are
5 raised about the interpretation or use of this language.
6 Point one involves two principles of construction. The
7 first principle is that the authority of a municipality to
8 condemn public property should be narrowly construed.
9 This is a general principle and it's generally valid,
10 but, (b), we have here the purpose of 54.16.050 and .020
11 was to grant the P.U.D. expansive powers to provide
12 electrical service throughout the state, and we have a
13 specific statute that is not interpreted by any of the
14 cases that says just what I read.

15 So while there's a general principle that
16 grants the authority to condemn should be narrowly
17 construed, here we have a specific statute, specifically
18 saying what the P.U.D. can do and that it can condemn
19 school lands.

20 Two, Conservation Northwest sees
21 contradictions between .020 and .050 and did a very
22 thorough analysis of those perceived contradictions. It
23 is argued that .050 only applies to hydroelectric
24 projects, and that involves some guessing that the statute
25 was intended to give expanded condemnation powers only in

1 the construction of new hydroelectric projects.

2 The language does not support that
3 interpretation, and I want to mention two reasons in that
4 analysis, although there are others. In the first one is
5 the first phrase of 6(e) or .050, and it says, "And for
6 the purposes aforesaid." Now if you look at Chapter 1,
7 Section 6(e) of the laws of 1931, the purposes aforesaid
8 are sections (a), (b), (c) and (d), so the Court cannot
9 see how that phrase can be interpreted, except to mean
10 that, for all of those purposes, including construction of
11 poles, lines, other facilities, etc., the Public Utility
12 District, it shall be lawful for the P.U.D. to take,
13 condemn, purchase, and purchase any and all public and
14 private property and property rights, including state,
15 county, and school land for any of the purposes aforesaid
16 and for transmission lines and other facilities necessary
17 or convenient.

18 The second point under the interpretation
19 argument is that it's just clear that the language is not
20 limited to hydroelectric projects. It doesn't say it's
21 limited to hydroelectric projects. That reading is
22 strained.

23 Point No. 3, under the analysis of the statute
24 is that it is argued that the code reviser's title for RCW
25 54.16.050 is water, in capitals, okay. However, the title

1 is not law and that title contradicts the content. Now
2 it's somewhat ironic, you could make a completely opposite
3 argument, if you look at the 1931 session laws published
4 by the Secretary of State, the margin notes and index are
5 by John Dunbar, the Attorney General at the time, and how
6 did he title Section 6(e)? He titled it, he didn't title
7 it "Water," he titled it "Condemnation of public and
8 private property."

9 So the argument could be made that his opinion
10 or his classification has some meaning, but it doesn't
11 matter who makes the margin notes or who puts the titles
12 into the codified version, they are not the law. The
13 wording is the law, the words from the legislature in this
14 place, in this case, from the vote of the people, that is
15 the law.

16 The most logical reading of 54.16 is this.
17 The P.U.D.s have the following powers: (a), (b), (c),
18 (d), and also (e). This is a list of the powers the
19 P.U.D. has, (a), (b), (c), (d), and also (e). There is
20 overlap, but there is not contradiction.

21 The argument is also made in some parts of the
22 brief, the briefs, that the power to condemn under .020
23 and .050 does not include school trust lands, but the
24 statute says all public and private property, including
25 state, county, and school lands. It is obvious and clear

1 that school lands refers to school trust land. No party
2 has argued otherwise. No judicial decision has given a
3 blank exemption to all school trust lands, regardless of
4 whether or how they are being used.

5 So Question No. 2: Are all school trust
6 lands, regardless of use, exempt from easement
7 condemnation by the P.U.D.? The answer is no. There are
8 school trust lands that the P.U.D. can condemn. Not all
9 school trust lands are exempt from easement condemnation
10 by the P.U.D.

11 Issue No. 3: Is the school trust land
12 involved in this case exempt from easement condemnation by
13 the P.U.D. because it is reserved for a particular purpose
14 by law? Now this argument only applies to leases, it
15 doesn't apply to permits because of the structure of the
16 establishment of the use. This only applies to leases.
17 The DNR's argument is that RCW 79.11.290 provides that
18 state lands leased for grazing purposes may not be used
19 for other purposes and may not be sold during the life of
20 the lease. There are active leases on this land, on parts
21 of this land, therefore, the land is reserved for a
22 particular purpose during the life of those leases and not
23 subject to condemnation.

24 Now discussing that contention, the Court's
25 first observation is that the, there is no issue, but that

1 the P.U.D.'s transmission line is compatible with grazing
2 leases. There's no evidence of any negative effect on
3 grazing. Looking at the leases themselves, in Section
4 4.02, each lease provides that DNR can grant easements on
5 leased land. Now this appears to contradict the statute,
6 but this is what, from one reading, this is what the
7 leases say. DNR itself maintains the authority to grant
8 easements, for example, in this case, its processing an
9 application by the P.U.D., and has an answer, it says,
10 well, we can't do that, so DNR maintains the right to
11 grant compatible leases.

12 Section 403 says that the DNR can lease for
13 other compatible purposes. Actually 402 just addressed
14 easements, 403 addresses compatible purposes. A
15 transmission line is a compatible purpose.

16 10.05 of the leases provides that if all the
17 premises are taken by eminent domain, the lease shall be
18 terminated. The state says that that language is
19 meaningless. The Court has a hard time saying that
20 something is meaningless when it's included in carefully
21 drafted legal documents. This document in Section 10.05
22 of these leases acknowledge the possibility of
23 condemnation by eminent domain and provide a remedy to the
24 lessees.

25 So you have a compatible use, you have the

1 language in the lease, and you have DNR's claimed
2 continuing authority to grant easements or grant
3 compatible leases.

4 The Court concludes that school trust lands
5 leased for grazing purposes are not reserved for
6 particular use by law under 7.11.290 in this sense or in
7 relation to easements, leases for a compatible purpose,
8 and condemnation of easements.

9 So is the school trust land involved in this
10 case exempt in this case from easement condemnation by the
11 P.U.D. because it is preserved for a particular purpose by
12 law? The answer is, no, and of course, the following, the
13 crux are Issue Nos. 4 and 5 -- Issue No. 4 having to do
14 with permits; Issue No. 5 having to do with leases,
15 otherwise phrased identically. Is the school trust land,
16 under grazing permits or grazing leases, exempt from
17 easement condemnation by the P.U.D. because it is
18 dedicated to a particular use?

19 This issue was candidly phrased by DNR in its
20 initial brief when it said, the question is whether use
21 and possession of state trust land for low income
22 producing agricultural use is a public use sufficient to
23 preclude condemnation. So whether use and possession of
24 state trust land for low income producing agricultural use
25 is a public use sufficient to preclude condemnation. That

1 was the wording provided by DNR, and it's a pretty good
2 description of the issue.

3 Now Conservation Northwest and DNR take the
4 following position: The Court must confine its inquiry to
5 the question of whether the land is dedicated to a public
6 use. The Court does not inquire into the extent of public
7 use or its relative value, so it's yes or no, bright line,
8 public use or no public use.

9 The P.U.D. takes the following position: The
10 Court must look deeper and allow the proposed use if it
11 would not destroy the public use or so damage it as to
12 preclude its successful operation.

13 I'm just going to mention, some of the cases
14 that have analysis that's parallel to this issue are on
15 point. I'm going to mention three of them. The first is
16 the City of Tacoma v. State case, a quote from page 453.
17 "This property is now devoted to a public use and if the
18 proposed diversion of waters of the North Fork would
19 destroy this public use or so damage it as to preclude its
20 successful operation, our inquiry would end here."

21 So they're not saying that any diversion of
22 waters from the North Fork would be prohibited. They
23 would be prohibited if the diversion would destroy this
24 public use or so damage it as to preclude its successful
25 operation. That phrase is the one that the P.U.D. is

1 arguing and is supported in that case. That phrase is
2 support for the proposition that compatible uses are not
3 prohibited.

4 The second case is State v. Superior Court for
5 Jefferson County. All of these cases are briefed by the
6 parties and I'm not providing the citations, they have
7 been discussed thoroughly in oral argument and in the
8 briefing, but this is the case, the condemnation of the
9 waterway and platted streets for the railroad terminal
10 over in Jefferson County. There's some words in this case
11 that cause us to pause because the wording is the state
12 has the right to proceed in its own time and its own way,
13 the state has the right to proceed in its own time and in
14 its own way. I believe that's dicta, as far as this case
15 goes.

16 So getting back to the quote from Jefferson
17 County, an appropriation of the parts sought to be
18 condemned by the railroad company will render them useless
19 for the purposes of which they are dedicated. So that was
20 an essential part of the Court's ruling, because the
21 condemnation for a railroad station would render the
22 purpose of a waterway or streets useless, would render the
23 land useless for those purposes, that was one of the
24 Court's reasonings for not allowing, or one of the Court's
25 reasons for not allowing that project, again, supporting

1 the proposition that compatible uses are allowed.

2 And then Roberts v. Seattle, a school case,
3 and it says, "There is nothing in the record to indicate
4 that the 30-foot strip of land in question is actually in
5 use by the university, and there is nothing to indicate
6 that the taking of the strip of land will impair the use
7 of the land remaining." So if it was a yes/no,
8 black/white, simple question, there would be no reason for
9 the Court to say that the taking of the strip of land,
10 there's no evidence that it will impair the use of the
11 land remaining.

12 Also, supporting the P.U.D.'s argument that
13 other uses that don't interfere with the prior use are
14 permissible, compatible uses are permissible. And, you
15 know, coming back again to, certainly not holding it
16 against the DNR, but their appropriate phrasing of the
17 question, is the public use sufficient to preclude
18 condemnation.

19 So by way of how to proceed, this Court
20 concludes that the state's authority to exclude school
21 trust land under grazing permits or leases from P.U.D.
22 easement condemnation is not unlimited. The courts do
23 look deeper into issues of effects, results, interference,
24 and compatible use. I've set out a number of factors that
25 the Court considered in this analysis. And, actually, I

1 listed twelve of them. There might be ten, there might be
2 fifteen, but I've listed twelve.

3 No. 1: The P.U.D. seeks an easement, not
4 ownership. No. 2, there's no evidence that transmission
5 lines, that a transmission line is not compatible with
6 grazing leases or permits or that it will diminish income
7 from grazing leases and permits. Cattle graze under power
8 lines in many parts of Okanogan County and the state,
9 including under the Loop Loop Route. No. 3, there are no
10 fences. The structures are towers and power lines and
11 unpaved construction and maintenance roads. The easement
12 will cross less than five percent of the grazing lease and
13 permit areas.

14 No. 4, there are five leases that involve
15 about 3,400 acres of land generating approximately \$3,000
16 a year gross. There are two grazing permits. The grazing
17 permits, when you look at the map, I think a fair estimate
18 is that they include approximately one entire township or
19 36 square miles or 23,040 acres. There's a lease for
20 1,310 cattle animal unit months. We don't know what the
21 charge for those is, but perhaps \$1,000, perhaps \$2,000,
22 perhaps less a year, the Court does not have that
23 information from the record.

24 So it is not clear from the evidence, and there
25 is no evidence whether the trust actually realizes any net

1 profit after paying expenses for whatever they need for
2 maintenance of the lease, preparation of the lease,
3 policing it. The Court can say, without knowing the exact
4 numbers, that the net profit to the trust is minimal.

5 No. 6, the DNR argues, this is a completely
6 different point, and it requires some thought, we don't
7 know what the best use of the land will be many years from
8 now. The P.U.D. transmission line might interfere with
9 some great and valuable economic development in the
10 future. This is similar to the argument made by
11 Mr. Kelpman and Mr. Gabbers, that the power line may
12 diminish development potential, interfere with the view,
13 make it difficult to build in close proximity because
14 people don't want to build a house or a resort or a new
15 property under the power line.

16 We're talking about the long run, and we don't
17 know, in a hundred years, power lines may be obsolete.
18 The power may be generated and transmitted without such
19 lines. We don't know. We don't know what use the P.U.D.
20 or the DNR might have for this land in a hundred years and
21 we don't know if the P.U.D. will still need a line across
22 it. We don't have that information.

23 So in analyzing this, this Court went back to
24 the general discussion of the issue of dedication to a
25 public use. We know that just being in trust is

1 insufficient to exempt land from condemnation. We know
2 that if this land was not under a grazing lease or grazing
3 permit, that it would not be considered dedicated to a
4 public purpose, even if there are unspecific and
5 open-ended hopes and dreams and doubts about future
6 possibilities.

7 Unspecific future possible uses don't change
8 the analysis when the land is school trust land or when
9 it's not, but in this case when it is school trust land.
10 The point here is that the DNR, looking at its trust
11 responsibility, has hopes or possible dreams and doubts
12 about the future of what the best use might be, but that's
13 not sufficient to find that the land is dedicated to a
14 public use. It's too vague and unspecific and it's just
15 speculation, in the long run. In the short run,
16 obviously, there will be some detrimental effect from a
17 power line overall, but that effect doesn't interfere with
18 the current use, which is cattle grazing.

19 Obviously, someone might be out there and look
20 and say, I wish that power line wasn't there or somebody
21 might say that I don't want to have a structure or a home
22 under the power line, but those aren't the uses that the
23 land is dedicated to.

24 No. 7, the DNR argues that the power line will
25 separate much of its trust land from the Methow Valley.

1 This argument is not explained and is not given weight by
2 the Court. There are no fences or permanent structures,
3 other than the towers and the power lines. The land is
4 not cut off from the Methow Valley.

5 No. 8, condemnation of an easement or the
6 lease of an easement, in this case, a condemnation, will
7 raise additional revenue for the trust. That much is
8 unproven and unknown. No. 9, leases are for a limited
9 time period. Some are near the end, some have several
10 years pending. The Kreveling lease was effective 6/1/09
11 and the Pete Scott lease was effective 4/1/09, this was
12 after the first condemnation action was filed.

13 The grazing permits expire at the end of 2012.
14 No. 10, leases and permits are temporary conditions within
15 the control of the DNR. No. 11, the DNR has delayed a
16 decision on the P.U.D.'s application to lease an easement
17 and won't give a target date for action or decision.

18 No. 12, delay is costly, is costing the P.U.D.
19 lots of money. No. 11 is added as a fact by itself. It
20 is not important, but it is part of the background of the
21 case, but in itself it is not persuasive to the Court's
22 decision, that there's been a delay.

23 So sometimes we talk about ultimate findings
24 of fact or summary findings of fact, there's only four.
25 One, the easement for construction and maintenance of the

1 transmission line will not destroy or substantially
2 interfere with grazing leases or permits. Two, the
3 easement will not substantially interfere with any known,
4 specific, or planned future use. Three, the easement will
5 likely increase, rather than decrease, revenues. Four,
6 power line construction and maintenance is a compatible
7 use to grazing.

8 So the answer to questions four and five is,
9 no. Is the school trust land, under grazing permits and
10 under grazing leases, exempt from easement condemnation by
11 the P.U.D. because it is dedicated to a particular use?

12 Answer, no.

13 Conclusion. Under RCW 54.16.020 and .050,
14 the P.U.D. has specific authority to condemn an easement
15 for construction and maintenance of the Pateras/Twisp
16 transmission line and related facilities over the school
17 trust land in question. The DNR and Conservation
18 Northwest are not entitled to summary judgment. The
19 P.U.D. is entitled to summary judgment, and the Court
20 grants the P.U.D.'s motion for summary judgment. The
21 Court, therefore, orders that the matter be set for jury
22 trial to determine damages to be awarded to DNR or the
23 school trust fund.

24 There is another concern that persists in the
25 Court's mind. DNR has an obvious interest in mitigating

1 impacts of the specific route. The P.U.D. and its rate
2 payers have an interest in minimizing impacts and in
3 minimizing damages so the question is, whether the
4 responsible public officials meet with each other in an
5 attempt to reach those goals? That's all the Court has
6 today. Have I failed to address any issues?

7 Counsel, you're standing up for some reason,
8 I'm thinking you're going to give me something.

9 (Inaudible.)

10 THE COURT: Have you consulted with
11 counsel about how this eventually would be addressed?

12 (Inaudible.)

13 THE COURT: Comments or objections on
14 behalf of Conservation Northwest.

15 (Inaudible.)

16 THE COURT: Correct. Does that work for
17 you, Mr. DiJulio? Same wording on the order referencing
18 Respondent State of Washington. I just don't feel like I
19 need to summarize my, the legal reasons for this order.
20 You can attach a transcript of this Court's statement
21 though. With those changes, the Court has signed the
22 orders. Anything else? Thank you very much for your
23 excellent work. You sure have done a good job to educate
24 me and it is such a pleasure to work with knowledgable and
25 vigorous attorneys.

1 (Inaudible.)

2 THE COURT: Now what does it say here?

3 (Inaudible.)

4 THE COURT: Objections on behalf of the
5 state?

6 MS. KRUEGER: We have no objections to
7 the form of the order, Your Honor.

8 THE COURT: Objections to the form of
9 the order, the intervenor, Conservation Northwest?

10 MR. MANN: No, Your Honor.

11 THE COURT: The Court is signing that
12 order. Will trial, will there be one trial or will there
13 be two trials, one involving private condemnation and one
14 involving the state?

15 (Inaudible.)

16 THE COURT: There will be motions?

17 (Inaudible.)

18 THE COURT: If you just ask for a trial
19 setting, it will go to the court administrator and I won't
20 even know it's happening. If there's an issue about it,
21 you need to file a motion and bring it to the Court's
22 attention.

23 (Inaudible.)

24 THE COURT: Hold on. If you're looking
25 for priority setting, you're going to be in line with a

1 lot of other people that are sitting down in jail right
2 now, so you'd better let us know. Once again, thanks to
3 everyone, and I look forward to working with you again.

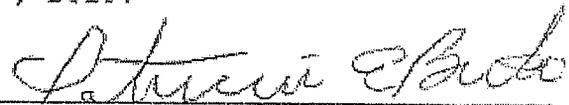
4 (Whereupon, the proceedings concluded.)
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STATE OF WASHINGTON)
)
County of Benton)

I, Patricia E. Eute, do hereby certify that I was a Certified Shorthand Reporter and Notary Public for Washington; that I reported in stenotype the transcript of proceedings had, that transcribed from a CD provided by the Okanogan County Superior Court; that thereafter my notes were reduced to typewriting and that the foregoing transcript consisting of 25 typewritten pages is a true and correct transcript of all such testimony adduced and proceedings had and of the whole thereof.

Witness my hand at Kennewick, Washington, on this 1st day of October , 2010.



Patricia E. Eute
CSR No. 2919
Certified Shorthand Reporter
Notary Public for Washington
My commission expires: 2-29-12