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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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PUBLIC UTILITY DISTRICT NO. 1,  
Respondent/Cross-Appellant,

v.

STATE OF WASHINGTON and PETER GOLDMARK, et al.  
Appellants/Cross-Respondents.

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**APPELLANTS STATE OF WASHINGTON AND PETER  
GOLDMARK'S CONSOLIDATED ANSWER TO AMICUS BRIEFS  
OF CITIES OF TACOMA AND SEATTLE AND THE  
WASHINGTON PUBLIC UTILITY DISTRICTS ASSOCIATION,  
THE WASHINGTON RURAL ELECTRIC COOPERATIVE  
ASSOCIATION AND SNOHOMISH COUNTY PUD NO. 1.**

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## I. INTRODUCTION

Amici the Cities of Tacoma and Seattle, the Washington Public Utility Districts Association, the Washington Rural Electric Cooperatives Association and the Snohomish County Public Utility District No. 1 (collectively “Amici”) argue that the provision of electrical service requires nearly unbridled condemnation authority and decry a parade of horrors such as blackouts and skyrocketing energy prices if the Court of Appeals’ decision is reversed.<sup>1</sup> Amici’s arguments are unsupported by any facts, overstate the relief sought by DNR and fail to acknowledge the rarity of the legal conflict before this Court. Contrary to Amici’s claims, DNR only asks that the Court reaffirm long-standing principles governing the condemnation authority of local governments to hold that school trust lands that DNR is actively using are not subject to condemnation. DNR does not seek to eliminate local government authority to condemn school trust lands in the appropriate circumstances, provided that authority does not conflict with DNR’s ability to carry out its constitutional and statutory fiduciary duties to manage those lands for trust beneficiaries. Amici resort to hyperbole to create a mountain out of a molehill.

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<sup>1</sup> Two amicus briefs were filed in support of Respondent, one jointly by the Cities of Tacoma and Seattle (“Cities Br.”) and the other jointly by the Washington Public Utility Districts Association, the Washington Rural Electric Cooperatives Association and the Snohomish County Public Utility District No. 1 (“PUD Br.”). The Western States Land Commissioners Association filed an amicus brief in support of DNR (“WSLCA Br.”).

Amici do not dispute that DNR is using the lands at issue to benefit the trust through the operation of statutorily-authorized leasing and permitting activities. Under such circumstances, both case law and statute provide that these lands may not be condemned by a local government authority. The contrary holding urged by Amici would hinder DNR's ability to meet its constitutionally and statutorily required trust management responsibilities and elevate improperly a PUD's statutory condemnation authority over the power of the state to manage its own lands. Their arguments should be rejected.

## **II. STATEMENT OF THE CASE**

DNR incorporates by reference the statement of the case set forth in its Supplemental Brief to this Court at pages 3-7.

## **III. ARGUMENT IN RESPONSE TO AMICUS BRIEFS**

The question before the Court is whether a local government may condemn state school trust lands when the trustee tasked by the legislature with managing those lands is using those lands and determines that condemnation is inconsistent with this trust management. In such circumstances, school trust lands are exempt from condemnation. With respect to the particular school trust lands at issue here, this Court should hold that DNR's statutorily-authorized leasing and permitting of these lands to benefit the school trust and the DNR's determination that granting

an easement is not in the interest of the trust renders the lands exempt from condemnation by a local PUD.

In opposition, the PUD Amici raise the same arguments as those asserted by the Okanogan PUD – that the school trust lands at issue are not sufficiently dedicated to a public use nor reserved from sale, such that they are subject to being condemned. The Cities of Tacoma and Seattle argue only that nothing in the Washington Constitution or the Enabling Act *per se* exempt school trust lands from condemnation. Neither amicus brief squarely addresses the relief sought by DNR, and neither acknowledges this Court’s precedent affirming DNR’s constitutional and statutory trust obligations or the statutory authority restricting the condemnation of state lands that are put to a public use.

**A. The School Trust Lands At Issue Here Are Put to A Public Use And May Not Be Condemned.**

The PUD Amici largely repeat the arguments of the Okanogan PUD and contend that RCW 54.16.050 permits a PUD to condemn school trust land unless those lands are either expressly reserved from sale or unless the condemnation use is incompatible with the state’s existing public use. PUD Br. 10-15. These arguments fail.

With respect to reservation from sale, no statute or prior decision of this Court requires that state lands be reserved from sale in order for

those lands to be exempt from condemnation. As Amici argue, the Enabling Act and State Constitution contemplate that such lands can in the appropriate circumstance be sold by the state for the benefit of the trust. Enabling Act, ch. 180, 25 Stat. § 11; Const. art. XVI, § 1. If Amici were correct that an additional statutory reservation from sale were also required to prevent condemnation, then all state school trust lands would **always** be subject to condemnation, regardless of the state's use of the lands or DNR's trust responsibilities. This result cannot be squared with this Court's authority.

Indeed, this Court has permitted condemnation only when the lands at issue were neither put to any public use, nor contemplated for any future use by the state. *See City of Seattle v. State*, 54 Wn.2d 139, 147, 338 P.2d 126 (1959) (permitting condemnation of state capitol and school lands that state admitted were "not presently dedicated to a public use," nor contemplated for any future use); *Roberts v. City of Seattle*, 63 Wash. 573, 574, 116 P. 25 (1911) (rejecting citizen attempts to stop condemnation of 30-foot strip of land at University of Washington that state was no longer using and that state desired to give to city); *City of Tacoma v. State*, 121 Wash. 448, 453, 209 P. 700 (1922) (authorizing condemnation of fish eyeing station that state was not presently using nor had any express intent to use in the reasonable future). The Court's

decision in these cases was not based on the question of whether the lands at issue were subject to sale. Instead, the central question was whether the lands were put to an existing public use. It is this analysis that governs the question here. Reservation from sale is not a relevant let alone the determinative consideration.

Amici further contend that state school trust lands may be condemned regardless of their existing public use unless DNR can establish that the proposed condemnation use is incompatible with its own. PUD Br. at 11-13. But there is no statutory or case law requirement of a “compatibility of use” test for determining the extent of a local government’s condemnation authority. Rather, like the Court of Appeals, Amici rely on this Court’s dicta to create this new test, under which condemnation is permitted where the condemnor’s proposed use “would not destroy the current uses of the State’s trust land.” *Pub. Util. Dist. No. 1 of Okanogan Cnty v. State*, 174 Wn. App. 793, 807-08, 301 P.3d 472 *review granted*, 178 Wn.2d 1025, 312 P.3d 652 (2013) (citing *City of Tacoma*, 121 Wash. at 450). Allowing a municipal corporation to expand its condemnation authority by alleging its use would not destroy that of the state effectively eliminates the state’s ability to control the present and future use of its own lands. It is also contrary to the rule that a municipal corporation’s condemnation authority be strictly construed, especially

where, as here, “the lands of the sovereign are sought to be taken.” *State v. Superior Ct. of Chelan Cty.*, 36 Wash. 381, 385, 78 P. 1011 (1904); *see also* WSLCA Br. at 6-8 (collecting cases).

Amici’s compatibility argument is also contrary to this Court’s precedent. This Court has properly recognized that the question of whether a municipal government may condemn state lands is “solely one of power.” *State v. Superior Ct. for Jefferson Cty.*, 91 Wash. 454, 461, 157 P. 1097 (1916). It is not a question of compatibility. Amici’s attempts to distinguish *Jefferson Cty.* and *Kittitas Cty.* are not persuasive. Neither case turned on an analysis of proposed or competing uses, nor did either hold that a proposed “compatible” use could justify taking the state’s lands over objection of the state. *See, e.g., Jefferson Cty.*, 91 Wash. at 454 (state’s dedication of land to future use renders lands exempt from condemnation); *State v. Kittitas Cty.*, 107 Wash. 326, 328-29, 81 P. 698 (1919) (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”).

Finally, Amici offer no support for the argument that grazing is a “private use” such that this use would not qualify under DNR’s authority. PUD Br. at 9. To the contrary, DNR has statutory authority to issue grazing leases and permits to benefit trust beneficiaries, and this Court has

recognized that this type of income-generating use of state trust lands is a public use. RCW 79.13.380,.390; *Dickgieser v. State*, 153 Wn.2d 530, 536, 105 P.3d 26 (2005) (holding in inverse condemnation action that logging of state forest lands is a public use and resulting damage to private property may be compensable taking). But regardless, any questions as to whether the state is using its land for a public purpose should be left to the state itself.<sup>2</sup> *State v. Superior Ct. for Mason Cty.*, 99 Wash. 496, 500, 169 P. 994 (1918) (holding that state has the “power to determine what is a public use of the state’s own property” and that, although question of public use is typically judicial, this “does not apply to the appropriation of lands owned by the sovereign state itself”).

The legislature has determined that school trust land devoted for a particular use by law is specifically reserved from condemnation. RCW 79.02.010(13)(h). The trust lands at issue here are so devoted, as the Legislature has also granted to DNR the authority to among other things lease trust land for grazing. RCW 79.13.380,.390. Attempting to disregard this statutory restriction on condemnation, Amici argue that

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<sup>2</sup> PUD Amici claim that under the “principles [they] espouse”, a PUD could not condemn the academic buildings of the University of Washington for an “incompatible use.” PUD Br. at 13. But accepting this argument means that a local government could supplant the state’s determination of public use and compatibility with its own. Amici cite no authority for this dramatic shift in sovereignty. Here, despite DNR’s determination, as trustee, that the current use of the trust lands for grazing in support of the trust beneficiaries is in the best interests of the trust, under the PUD’s “principles”, DNR’s trust management decisions could always be overridden by a local government without concomitant fiduciary duties—an absurd result.

there is no difference between school trust land that is put to a public use (i.e. “actively managed”) and school trust land that is not being used. PUD Br. at 8. Amici’s argument requires this Court to ignore both the plain language of RCW 79.02.010(13)(h), but also the numerous decisions where this Court has evaluated a proposed condemnation by a local government based on whether the land in question was put to a public use. These cases do not impose either the “reservation from sale” or “compatibility of use” limitations that Amici suggest.

**B. Amici’s Arguments that School Trust Lands are Not *Per Se* Exempt Is Irrelevant to the Question Before the Court.**

Amici Cities of Tacoma and Seattle focus the majority of their brief on the inapposite question of whether either the Enabling Act or the State Constitution exempt state school trust lands from condemnation as a matter of law. These arguments are irrelevant, however, to the question before this Court, i.e. whether a local government can condemn state school trust land that the state is using, where the trustee has determined that the condemnor’s proposed use is inconsistent with beneficial long-term trust management. The Cities’ brief also ignores the most significant aspects of the Enabling Act and State Constitution with respect to these lands, which are to establish that the state holds these lands pursuant to “real enforceable trusts” and owes fiduciary duties to the trust

beneficiaries. As a result, Amici’s arguments are not helpful to the issue before the Court.

**1. Neither the 1932 Amendment to the Enabling Act nor the Washington Constitution Grant Any Express Condemnation Rights.**

The purpose of the Enabling Act was to grant land to the state of Washington at the time of its admittance to the union in 1889, a portion of which the state was legally obligated to hold in trust for Washington schools. Enabling Act, ch. 180, 25 Stat. §§ 10-11 (1889). Explaining the obligations created by the Enabling Act, this Court held that the state holds school trust lands pursuant to “real, enforceable trusts” that place upon the state the fiduciary duty to manage them 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.” *Skamania Cty v. State*, 102 Wn.2d 127, 132, 685 P.2d 576, 579 (1984) (quoting *Ervien v. United States*, 251 U.S. 41, 47, 40 S. Ct. 75 (1919)). These protections are echoed in the Washington Constitution, which similarly provides that all “public lands granted to the state are held in trust for all the people,” and restricts the manner in which such trust lands may be disposed. Const. art. XVI, § 1.

Despite the express purpose of the Enabling Act, Amici Cities of Tacoma and Seattle suggest that a 1932 Amendment to the Act reduces the

protection afforded to school trust lands by granting “states the authority to prescribe terms to allow for the acquisition of easements over school lands.” *Cities Br.* at 5. But by its plain terms this provision merely empowers the state to permit the grant of an easement over school land. *See* Enabling Act. Ch. 180, § 11, *amended by* Act of May 7, 1932, 47 Stat. 150 (“The State may also, upon terms as it may prescribe grant such easements or rights in any of the lands granted by this Act, as may be acquired in privately owned lands through proceedings in eminent domain.”). It is not itself an affirmative grant of authority to local government entities to condemn an easement, as the *Cities* appear to suggest. Nor does this amendment prohibit the trustee of school trust lands from refusing to grant an easement when exercising the trustee’s constitutional and statutory authority to act in the best interests of the trust beneficiaries. The 1932 amendment does not in any way lessen the discretion or responsibility granted to DNR by the legislature to act as trustee for school trust lands.

Consistent with the amendment, the state has delegated to DNR the discretionary authority to grant easements over school trust lands. And DNR exercises this discretionary authority to grant easements over trust lands, when doing so is consistent with its trust management duties. RCW 79.36.355 (“The department **may** grant to any person such easements and

rights in public lands . . . .” (emphasis added)). Indeed, DNR routinely grants easement requests for transmission lines when to do so is consistent with its trust management objectives for the particular lands at issue. The case here is the unique circumstance where DNR determined that granting a transmission line easement would not comport with DNR’s trust obligations.

Similarly, Amici’s argument that the Washington Constitution does not prohibit the condemnation of school trust lands is without effect. DNR has not argued that the lands at issue here are exempt from condemnation because they are subject to disposition only under the public auction provisions of Const. art. XVI, § 2. That provision only applies to sales of school trust lands, not condemnation. Indeed, the legislature’s grant of condemnation authority to local government entities facilitates the ability of local governments to obtain rights in school trust land without going through the public auction process (assuming the trustee does not object). Rather, the lands at issue here are exempt because they are dedicated to a public use, and DNR, as trustee, has determined that the proposed taking of these lands would interfere with its trust management obligations.

**2. *Peterson v. Baker* Is Inapposite to the Issue  
Before this Court.**

Amici's reliance on *Peterson v. Baker*, 39 Wash. 275, 81 P. 681 (1905) is also misplaced. Cities Br. at 9-10. Amici cite *Peterson* for the proposition that school trust lands are not generally reserved for a public use by virtue of the Enabling Act alone. But *Peterson* holds no such thing. In *Peterson*, the Court held only that the U.S. government policy to provide land to new states for school purposes did not in and of itself constitute a reservation of U.S. land for public purposes until that land was disposed of by the U.S. Government. The *Peterson* decision does not even purport to interpret the Enabling Act of 1889 in which the U.S. government actually granted the school trust land at issue to the State. None of the parties cited *Peterson* because it has nothing to do with this case. Regardless, Amici's misreading of *Peterson*, that trust lands can always be condemned because the lands are not "reserved for public purposes", Cities Br. at 9-10, both misstates the question before the Court and DNR's position.

Again, the question before the Court is whether a local government may condemn state school trust lands when the trustee tasked with managing those lands determines that condemnation is inconsistent with its own ongoing use and management of those lands. DNR is not asking

the Court to hold that school trust lands, though otherwise unused by the state, are *per se* exempt from condemnation. Rather, DNR maintains that where the trustee has determined that a PUD's proposed condemnation is inconsistent with its ability to manage these lands for the long-term benefit of the trust, the Court should hold that the school trust lands are not subject to condemnation. With respect to the particular school trust lands at issue here, this Court should hold that DNR's statutorily-authorized leasing and permitting of these lands to benefit the school trust renders the lands exempt from condemnation by a local PUD.

This holding is supported by this Court's precedent rejecting efforts by a lesser government to condemn lands that are put to an existing public use. *See City of Tacoma v. Taxpayers of Tacoma*, 49 Wn. 2d 781, 798, 307 P.2d 567 (1957) *rev'd*, 357 U.S. 320, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958) ("We deem it conclusively settled in this jurisdiction that a municipal corporation or a public corporation does not have the power to condemn state-owned lands dedicated to a public use, unless that power is clearly and expressly conferred upon it by statute."); *see also Jefferson Cty.*, 91 Wash. 454; *Kittitas Cty.*, 107 Wash. 326. *Peterson* is consistent with these cases and does not support Amici's attempt to expand their condemnation powers over trust lands in use by the state.

**3. The Out of State Authority Cited by Amici Does Not Support Condemnation of School Trust Land Put to a Public Use.**

Amici ask the Court to look to the rationale in three out of state cases to support their proposed interpretation of the Enabling Act. *Cities Br.* at 7-8. But this authority does not support the expansion of local condemnation power at the expense of the state's constitutional and statutory trust responsibilities. Nor does it speak to this Court's authority holding that state land put to a public use cannot be condemned.

In *Hollister v. State*, the Idaho Supreme Court ruled that the Idaho Admission Act did not by its own terms prevent the state from allowing disposition of school trust lands by eminent domain. 9 Idaho 8, 71 P. 541 (1903). Similarly, in *State ex rel. Bd. of Univ. & Sch. Lands v. City of Sherwood*, 489 N.W.2d 584, 588 (N.D. 1992), the North Dakota Supreme Court upheld a North Dakota statute setting forth a specific procedure for condemnation of school trust lands to be put to a public use, finding a 1912 amendment to its enabling act did not require sales of school trust land by public auction. Finally, in *Riverside Township v. Newton*, 11 S.D. 120, 75 N.W. 899 (1898), the South Dakota Supreme Court held that a state statute creating a right of way for construction of public highways on all section lines throughout the state was applicable to school trust lands, where the lands were not reserved for public uses. The court noted that

“school sections designed to be leased or sold by the state for the purpose of creating a trust fund for the benefit of the public schools....are not reserved for, nor are they put to, a public use.” *Id.*

These cases do not speak to the question before this Court. The issue here is not whether DNR has the power to consent to condemnation, but whether the state, in exercising its fiduciary duties, may oppose condemnation of state school trust land that the state has already put to a public use. Moreover, as Amici concede, the Montana Supreme Court rejected the *Hollister* case and interpreted its enabling act to prohibit condemnation of state school trust land altogether. *State v. Dist. Court in & for Sanders Cnty.*, 42 Mont. 105, 112 P. 706, 708 (1910).

**C. There is No Claim in this Case that DNR Has Acted Arbitrarily Or Capriciously.**

PUD Amici additionally contend that Commissioner Goldmark and DNR violate their trust responsibilities by failing to maximize trust income through the granting of an easement to the Okanogan PUD. This attack is both irrelevant to the claims before the Court in this case and unsupported by any record evidence.

First, the PUD did not bring a claim alleging arbitrary and capricious action by DNR under RCW 34.05.570. That issue is not before the Court. Rather, the Okanogan PUD chose not to complete the easement

application process and instead filed this condemnation action. As such, Amici's argument that DNR's findings are inadequate has no bearing on this case. PUD Br. at 18 (arguing that RCW 34.05.570 requires "explicit written justification supported by substantial record evidence.").

Second, Amici's speculation that DNR has not properly considered income generation is unsupported by any record evidence. There is no dispute that the land at issue in this case is subject to grazing leases and permits that generate income for the trusts. Moreover, 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). Accordingly, Amici's allegation that DNR is attempting to create a "*de facto* nature preserve" at the expense of Washington's school children is as unfounded as it is irrelevant to the actual question before this Court. *See* PUD Br. at 18.

The state has properly delegated management of state school trust land to DNR, whose decisions are entitled to deference. Amici's

speculation about DNR's motivations and legal arguments about claims that were not raised below should be disregarded.

**D. Amici Overstate the Implications of Reversal.**

Amici ask this Court to believe that failing to dramatically extend municipal condemnation authority will result in disastrous consequences for the future of power generation. This is not true. Rarely has there been a dispute regarding condemnation of school trust lands, and DNR routinely grants easements for utilities. Moreover, Amici present no evidence that power generation or rates will be impacted.

Equally unfounded is the PUD Amici's claim that without unbridled condemnation authority, it is restricted to building transmission facilities around the school trust lands, laid out in the "rigid checkerboard pattern of the federal survey." PUD Br. at 6. First, due to land swaps, state trust lands are no longer laid out in a "broadly dispersed pattern" avoidance of which would impede the PUD's pursuit of "continued expansion of the nation's power grid."<sup>3</sup> PUD Br. at 5-6. Second, reversing the Court of Appeals does not mean that a PUD will never be able to erect linear transmission lines on state trust land. As set forth above, DNR does not seek to eliminate PUD authority to condemn school trust lands where appropriate, provided that authority does not conflict

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<sup>3</sup> A map of all Washington state trust lands is available at [http://www.dnr.wa.gov/Publications/eng\\_rms\\_trustlands\\_map\\_nu2.pdf](http://www.dnr.wa.gov/Publications/eng_rms_trustlands_map_nu2.pdf)

with DNR's ability to carry out its constitutional and statutory fiduciary duties to manage those lands for trust beneficiaries. Finally, PUDs are still able to apply for utility easements, which DNR routinely allows. In sum, Amici's claims that the effective provision of electricity requires unbounded condemnation authority are without merit.

#### IV. CONCLUSION

In this rare case, DNR has concluded that the exercise of its fiduciary duties to the trust beneficiaries conflicts with the PUD's proposed use of trust lands. And with respect to these particular lands, because DNR has already put them to a public use benefitting the trust, they are not subject to condemnation. The Court of Appeals' decision to the contrary hinders DNR's ability to meet its constitutionally and statutorily required trust management responsibilities and elevates improperly a PUD's statutory condemnation authority over the power of the state to manage its own lands. Amici's interest in expanding the condemnation power of local governments is insufficient to justify this result and should be rejected.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of February, 2014.

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**Subject:** Public Utility District No. 1 of Okanogan County v. State of Washington et al.: Cause No. 88949-0: Appellants' Consolidated Answer to Amicus Briefs  
**Attachments:** Proof of Service Re Appellants Consolidated Answer to Amicus Briefs.pdf; Appellants Consolidated Answer to Amicus Briefs.pdf

Good afternoon.

On behalf of Paul J. Lawrence, attached please find Appellants State of Washington and Peter Goldmark's Consolidated Answer to Amicus Briefs and a Proof of Service to be filed in the above-referenced matter.

Should you have any difficulty with the attachments, please do not hesitate to contact me.

Thank you.

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