

FILED

APR 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NOS 29121-9-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION THREE

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,

and

CHRISTINE DAVIS, a single person, TREVOR KELPMAN, a single
person, DAN GEBBERS and REBA GEBBERS, husband and wife, and
WILLIAM C. WEAVER, custodian for Christopher C. Weaver, a minor,
Respondents.

BRIEF OF APPELLANT CONSERVATION NORTHWEST

David S. Mann, WSBA # 21068
Brendan W. Donckers, WSBA # 39406
GENDLER & MANN, LLP
1424 Fourth Avenue, Suite 715
Seattle, WA 98101
(206) 621-8868
Attorneys for Appellant

FILED

APR 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NOS 29121-9-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION THREE

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,

and

CHRISTINE DAVIS, a single person, TREVOR KELPMAN, a single
person, DAN GEBBERS and REBA GEBBERS, husband and wife, and
WILLIAM C. WEAVER, custodian for Christopher C. Weaver, a minor,
Respondents.

BRIEF OF APPELLANT CONSERVATION NORTHWEST

David S. Mann, WSBA # 21068
Brendan W. Donckers, WSBA # 39406
GENDLER & MANN, LLP
1424 Fourth Avenue, Suite 715
Seattle, WA 98101
(206) 621-8868
Attorneys for Appellant

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR1

B. INTRODUCTION1

C. QUESTION PRESENTED3

D. STATEMENT OF THE CASE.....3

E. ARGUMENT8

 1. The DNR Lands the PUD Seeks to Condemn
 Are Dedicated to A Public Use For Commercial
 Grazing Leases8

 2. State School Lands Are Dedicated To A Public Use
 As A Matter of Law Because the Federal Land Grants
 Created Public, Not Private, Trusts.....9

 a. History of the School Land Grants11

 b. The U.S. Supreme Court Has Recognized the
 Creation of a Trust Only by the New Mexico-
 Arizona Enabling Act15

 c. The Washington Enabling Act Did Not Create a
 Specific, Restrictive Trust in the School Lands.....18

 d. The Washington Constitution Does Not Require that
 the School Lands Be Held in Trust for the Schools
 or Any Other Named Beneficiaries.....23

 e. The Washington Constitution Imposes Only a
 Broad Public Trust on the Management of
 Common School Lands.....27

 f. The Washington Supreme Court’s Decisions
 Allow the State to Manage the School Lands
 in the Public Interest29

g.	<i>Skamania</i> Dealt With the Sale of Trust Assets, Not Land Management	29
h.	The Dicta in <i>Skamania</i> Relied on Cases that Interpreted the New Mexico-Arizona Enabling Act.....	31
i.	Conclusion	37
3.	The Legislature Has Not Expressly Given Public Utility Districts the Authority to Condemn School Lands.....	38
F.	CONCLUSION.....	41

TABLE OF AUTHORITIES

Table of Cases

<i>Alabama v. Schmidt</i> , 232 U.S. 168, 34 S. Ct. 301, 58 L. Ed. 555 (1914).....	16, 21
<i>Andrus v. Utah</i> , 446 U.S. 500 100 S. Ct. 1803, 64 L. Ed. 2d 458 (1980).....	13
<i>Beckman v. Brickley</i> , 144 Wn. 558, 258 P. 488 (1927).....	30
<i>Berge v. Gorton</i> , 88 Wn.2d 756, 567 P.2d 187 (1977).....	4
<i>Bd. of Natural Resources v. Brown</i> , 992 F.2d 937, 941 (9th Cir. 1993)	35
<i>Branson Sch. Dist. RE-82 v. Romer</i> , 161 F.3d 619, 633 (10th Cir. 1998)	19
<i>Case v. Bowles</i> , 327 U.S. 92, 66 S. Ct. 438, 90 L. Ed. 552 (1946).....	35
<i>City of Des Moines v. Hemenway</i> , 73 Wn.2d 130, 437 P.2d 171 (1968).....	38
<i>City of Seattle v. State</i> , 54 Wn.2d 139, 338 P.2d 126 (1959).....	10
<i>Colman v. Colman</i> , 25 Wn.2d 606, 171 P.2d 691 (1946).....	18
<i>Conger v. Pierce County</i> , 116 Wash. 27, 198 P. 377 (1921).....	37
<i>Cooper v. Roberts</i> , 59 U.S. 173, 18 How. 173, 15 L. Ed. 338 (1855)	16, 21

<i>County of Skamania v. State</i> , 102 Wn.2d 127, 685 P.2d 576 (1984).....	28, 29, 30, 31, 32
<i>Dist. 22 United Mine Workers of America v. Utah</i> , 229 F.3d 982, 988 (10th Cir. 2000)	19
<i>Dowgialla v. Knevage</i> , 48 Wn.2d 326, 294 P.2d 393 (1956).....	30
<i>Ervien v. United States</i> , 251 U.S. 41, 40 S. Ct. 75, 64 L. Ed. 128 (1919)....	15, 16, 20, 22, 28
<i>Francisco v. Bd. of Directors</i> , 85 Wn.2d 575, 537 P.2d 789 (1975).....	9, 40
<i>Gebbers v. Okanogan PUD No. 1</i> , 144 Wn. App. 371, 183 P. 3d 324 (2008), <i>rev. denied</i> , 165 Wn.2d 1004 (2008).....	4
<i>Goldmark v. McKenna</i> , 172 Wn.2d 568, 259 P.3d 1095 (2011).....	8
<i>In re Seattle</i> , 96 Wn.2d 616, 638 P.2d 549 (1981).....	38
<i>Lassen v. Arizona</i> , 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967).....	16, 20, 22, 28, 32, 33
<i>Manufactured Housing Communities of Washington v. State</i> , 142 Wn.2d 347, 13 P.3d 183 (2000).....	37
<i>Noel v. Cole</i> , 98 Wn.2d 375, 655 P.2d 245 (1982).....	36
<i>Orion Corp. v. State</i> , 109 Wn.2d 621, 747 P.2d 1062 (1987).....	27, 28
<i>Papasan v. Allain</i> , 478 U.S. 265, 106 S. Ct. 2932, 92, L. Ed. 2d 209 (1986).....	12, 13, 17

<i>Roberts v. City of Seattle</i> , 63 Wash. 573, 116 P. 25 (1911).....	10
<i>Senior Citizens League v. Dep't of Soc. and Health Services</i> , 38 Wn.2d 142, 228 P.2d 478 (1951).....	39
<i>Shea v. Olson</i> , 185 Wash. 143, 53 P.2d 615 (1936).....	37
<i>State ex rel. Forks Shingle Co. v. Martin</i> , 196 Wash. 494, 83 P.2d 755 (1938).....	34
<i>State ex rel. Hellar v. Young</i> , 21 Wash. 391, 58 P. 220 (1899).....	34
<i>State ex rel. Thompson v. Babcock</i> , 147 Mont. 46, 409 P.2d 808 (1966).....	9
<i>State v. Potter</i> , 68 Wn. App. 134, 842 P.2d 481 (1992).....	32
<i>State v. Whitney</i> , 66 Wash. 473, 120 P. 116 (1912).....	20
<i>Tacoma v. State</i> , 121 Wash. 448, 209 P. 700 (1922).....	10
<i>Thompson v. Savidge</i> , 110 Wash. 486, 188 P. 397 (1920).....	20
<i>United States v. 111.2 Acres of Land</i> , 293 F. Supp. 1042 (E.D. Wash. 1968), <i>aff'd</i> , 435 F.2d 561 (9th Cir. 1970).....	33
<i>Washington Economic Dev. Fin. Auth. v. Grimm</i> , 119 Wn.2d 738, 837 P.2d 606 (1992).....	24
<i>West Norman Timber, Inc. v. State</i> , 37 Wn.2d 467, 224 P.2d 635 (1950).....	36

Constitutional Provisions

Colorado Const. art. IX, § 10 (amended 1996).....24, 25

Idaho Const. art. IX, § 8 (amended 1982).....26

Wash. Const. art. III.....38

Wash. Const. art. IV.....9

Wash. Const. art. IX.....26, 27

Wash. Const. art. XVI, § 1.....2, 3, 23, 24, 26, 30, 33

Statutes

Enabling Act, 25 Stat., 676, ch. 180 (1889).....11, 12, 14, 15, 33

New Mexico-Arizona Enabling Act, 36 Stat., 557, ch 310 (1910).....14, 20

RCW 7.16.030-140.....9

RCW 54.16.0202, 38

RCW 54.16.0502, 38

RCW 79.11.02039

RCW 79.13.010(1).....39

RCW 79.36.35539

RCW 79.36.51039

RCW 79.38.04039

Other Authorities

1996 Op. Wash. Att’y Gen. No. 11, at 18-21 (Aug. 1, 1996).....35, 36

John B. Arum, *Old-Growth Forests on State School Lands—Dedicated to Oblivion?—Private Trust Theory and the Public Trust*, 65 Wash. L. Rev. 151, 160 (1990)22, 23, 27, 31

1 George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 1, (rev. 2d ed. 1984)18, 19, 23, 36

Daniel Jack Chasan, *A Trust for All the People: Rethinking the Management of Washington’s State Forests*, 24 Seattle U. L. Rev. 1, 15 (2000)21, 22, 24, 28, 34, 35, 36

Sally K. Fairfax, Jon A. Souder & Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 *Envtl. L.* 797, 818 (1992).....13, 14, 21, 22, 24, 32

Alan V. Hager, *State School Lands: Does the Federal Trust Mandate Prevent Preservation?*, 12 *Nat. Resources & Env’t* 39, 40 (Summer 1997)21, 22

Sean E. O’Day, Note, *School Trust Lands: The Land Manager’s Dilemma Between Educational Funding and Environmental Conservation, a Hobson’s Choice?*, 8 *N.Y.U. Env’tl. L.J.* 163, (1999).....12, 21, 22

Beverly Paulik Rosenow, ed., *The Journal of the Washington State Constitutional Convention 793-94* (1962)25

Jon A. Souder & Sally K. Fairfax, *State Trust Lands* (1996).....12

A. ASSIGNMENT OF ERROR

The trial court erred in concluding that the Legislature has expressly given public utility districts the statutory authority to condemn state school lands that are dedicated to a public use, including for long-term livestock grazing leases.

B. INTRODUCTION

Since 1987, Intervenor Conservation Northwest has worked in both the courts and administrative processes to improve DNR's policy and management decisions for federal land grant school lands. CNW intervened in this case to prevent the Okanogan Public Utility District No. 1 (PUD) from needlessly condemning, for a second transmission line, rare and environmentally-sensitive Eastern Washington shrub-steppe habitat, lands that are owned and leased for livestock grazing by the Washington Department of Natural Resources (DNR). CNW commends DNR for vigorously defending the school lands from the PUD's proposed wasteful condemnation. DNR's defense is especially warranted because the Methow Valley is already served by a transmission line and because, even if a second line is necessary, there are two suitable alternative alignments for this proposed second line in nearby state highway corridors, where both powerlines and easements already exist.

CNW agrees with, and does not repeat, DNR's arguments on appeal that the PUD condemnation statutes¹ do not expressly authorize PUDs to condemn school lands that are "dedicated to a public use" and that the school lands at issue are dedicated to a public use because DNR manages these lands, here through grazing leases, to support the beneficiaries in a manner consistent with DNR's perceived trust obligations. But CNW goes further; we argue that DNR's school lands *also* are "dedicated to a public use" *as a matter of law* because the United States granted these lands to Washington to support public education and because the State subsequently resolved at its constitutional convention to "hold [them] in trust *for all the people*." Wash. Const. Art. XVI, § 1 (emphasis added). We argue that the school lands are *public*, not private, trusts permanently dedicated to uses deemed appropriate by the Commissioner of Public Lands (CPL) and that DNR does *not* have a duty to maximize its income from these lands solely for the school beneficiaries by accepting the PUD's condemnation award or easement fee. Rather, the elected CPL has the exclusive authority and discretion to manage these lands for broader public benefits considering the long and short-term

¹ RCW 54.16.020, .050. CNW advanced a statutory construction argument in the trial court: that these two statutes do not expressly permit PUD's to condemn State land. Because, herein, CNW argues State school lands are dedicated to a public use as a matter of law, CNW does not advance this statutory construction argument on appeal.

interests of *all* current and future generations of Washington citizens, subject to the laws of general application. State school lands, therefore, are not subject to condemnation because they are, by law, dedicated to a public use and those who wish easements over these lands are limited to the statutory procedures for obtaining DNR's permission to do so.

C. QUESTION PRESENTED

Are state school lands owned and managed by DNR "dedicated to a public use" as a matter of law because these lands were granted to the State by the Federal Government to provide a land base to support *both* public education and other public interests, including the interests of future generations and because Washington Constitution Article XVI, § 1 requires these lands to be held in trust "for all the people"?

D. STATEMENT OF THE CASE

DNR, the largest non-federal land owner in Washington, manages 5.6 million acres of forest, range, agricultural, aquatic, and commercial lands for the people of Washington. Approximately 2.9 million of these acres are lands held in trust to support specific public beneficiaries; 1.8 of these 2.9 million acres are "common school trust" lands.²

² State Lands Managed by the Washington Department of Natural Resources, http://www.dnr.wa.gov/Publications/eng_rms_trustlands_photo_side.pdf (last visited Apr. 18, 2012).

In this condemnation case, the PUD seeks to construct an approximately 28 mile-long transmission line and soft-surface road access network (approximately 21-23.6 miles in length) between Pateros and Twisp, Washington, which lie in the pristine Methow Valley. Approximately 11 miles of the proposed transmission line would cross DNR's school lands; the PUD's easement would be 100 feet wide. CP 45, 127.

DNR owns and manages the largest tract of pristine shrub-steppe habitat in the Methow Valley. Final Environmental Impact Statement (FEIS), at 3.5-8.³ The transmission line and its road system would cut a swath through this block of shrub-steppe habitat. FEIS, at 3.5-8. Shrub-steppe habitat consists of rare plant communities of big sagebrush, herbaceous and antelope bitterbrush, FEIS, at 3.5-3, and the Washington

³ The PUD prepared an FEIS several years earlier to accompany its decision on the alignment for the new transmission line. Litigation over the FEIS culminated in *Gebbers v. Okanogan PUD No. 1*, 144 Wn. App. 371, 183 P. 3d 324 (2008), *rev. denied*, 165 Wn.2d 1004 (2008). Although the PUD, DNR, and CNW each liberally cited portions of it in the trial court, no party placed the entire final environmental impact statement for the transmission line into the record on summary judgment. CNW asks the Court to take judicial notice of certain portions of the FEIS because it is a government document available to the public on the PUD's website (<https://www.okanoganpud.org/document-library/methow-transmission-project>) and its authenticity cannot be questioned. *Berge v. Gorton*, 88 Wn.2d 756, 763, 567 P.2d 187 (1977); ER 201. For the convenience of the Court, we attach the cited sections of the FEIS to this brief in Appendix 1 in the order in which they are cited in this brief and we underline the pertinent text in each section.

Natural Heritage Program prioritizes the conservation of this habitat.⁴ Historically, shrub-steppe habitat covered 24,000 square miles of Washington but a great deal of it has been lost or degraded. FEIS, at 3.5-8. DNR's land within the transmission line project area comprises 15% of the shrub-steppe within the Methow Valley portion of the project area, 3.4% of the intact shrub-steppe in Okanogan County, and 0.2% of the remaining shrub-steppe habitat in Washington. The shrub-steppe habitat in the entire project area accounts for 24.3% of the shrub-steppe in Okanogan County and 1.5% of the remaining shrub-steppe habitat in Washington. The project area "is of local ecological significance." FEIS, at 3.5-8.

On or about October 23, 2008, the PUD filed an application for an easement across DNR's land. CP 46, 538-52. DNR began processing the PUD's easement application under normal procedures. In letters dated July 17 and August 14, 2009, DNR requested more details and analysis from the PUD pertaining to the transmission line's economic and environmental impacts. CP 553-54; 556-58. The letters requested, *inter alia*, information pertaining to details of the PUD's required road network,

⁴ 2011 Washington State Natural Heritage Plan, Lists of Habitat Priorities, <http://www1.dnr.wa.gov/nhp/refdesk/plan/CommunityList.pdf> (last visited Apr. 18, 2012).

access to the pole sites, vegetation management, and potential alternatives to the use of State-owned trust lands.

Instead of responding to DNR's concerns, on July 20, 2009 the PUD sent DNR a certified letter threatening condemnation. CP 560-64. The PUD responded to DNR's requests for more information in letters dated August 24 and September 23, 2009 but these letters merely reiterated sections of the PUD's environmental impact statement verbatim. CP 566-68; 570-79. The PUD evidently abandoned DNR's easement application procedure and, instead, filed a Petition for Condemnation on November 30, 2009. CP 610-41.⁵

The FEIS, on which both DNR and the PUD relied extensively in this condemnation litigation, identified and analyzed two *alternative* alignments for the transmission line situated in two different state highway corridors (Hwys. 20 and 153) where distribution and/or transmission lines and easements for those lines already exist. FEIS, at S-6-S-8, 2-5.⁶ The PUD, however, rejected those two alternative alignments and instead, on March 6, 2006, chose the Pateros-Twisp alignment, a substantially roadless area. CP 524.

⁵ The PUD filed an amended Petition for Condemnation on April 7, 2010. CP 168-227.

⁶ The Pateros-Twisp alignment at issue in this case is Alternative 2. Alternative 3 would parallel State Highway 153 and Alternatives 4-7 would parallel State Highway 20. FEIS, at 2-5.

The FEIS explicitly conceded that, among the three alternative alignments for the new transmission line, the Pateros-Twisp alignment (Alternative 2) would have the **greatest** “level of effect” on vegetation (FEIS, at 3.5-14), the **greatest** ground disturbance impact on the Methow Valley’s robust mule deer critical habitat (FEIS, at 3.8-41), the greatest effect on high-quality forests (FEIS, at 3.5-14), the **highest risk** of introducing noxious weeds to areas that are currently weed-free (FEIS, at 3.5-19-20), and the **greatest** potential to impact fisheries as a result of ground disturbance. FEIS, at 3.7-18.⁷

After the PUD filed its condemnation petition, CNW, a Bellingham-based conservation nonprofit organization whose mission includes protecting State land that provides critical fish and wildlife habitat, moved to intervene in the case to prevent what CNW perceived as avoidable impairment to environmentally-significant state land. CP 585, 594-606. The trial court granted CNW’s motion. CP 506-07.⁸ DNR and CNW jointly moved to dismiss the PUD’s condemnation Petition in motions for summary judgment. CP 25-33, 38-51, 460-85, 486-505. The trial court denied DNR and CNW’s motions and, instead, entered

⁷ These FEIS cites were also included in David Werntz’ declaration attached to CNW’s motion to intervene. CP 591.

⁸ The PUD is cross-appealing the trial court’s decision allowing CNW to intervene. CP 918-22. CNW will respond to this argument in its response/reply brief.

summary judgment for the PUD. CP 22-24. CNW timely filed a notice of appeal on June 10, 2010. CP 01-13. DNR filed a “conditional notice of appeal” on June 21, 2010.⁹

E. ARGUMENT

1. THE DNR LANDS THE PUD SEEKS TO CONDEMN ARE DEDICATED TO A PUBLIC USE FOR COMMERCIAL GRAZING LEASES

It is undisputed that the DNR school lands the PUD seeks to condemn in this case have been designated by DNR for long-term cattle grazing leases. CNW *agrees* with DNR that DNR’s utilization of these lands for commercial grazing makes them “dedicated to a public use” and thus ineligible for condemnation. Furthermore, CNW agrees with DNR that the CPL has the exclusive authority to decide whether and how these

⁹ The delay between the filing of the Notice of Appeal and the court’s consideration of it stems from a dispute between DNR and the Attorney General. Although his office vigorously defended the condemnation petition in the Okanogan County Superior Court, the Washington Attorney General, Rob McKenna, refused to file a Notice of Appeal after the trial court granted the PUD’s motion for summary judgment. In response, Commissioner of Public Lands Peter Goldmark filed a mandamus action in the Supreme Court of Washington asking the Court to direct the Attorney General to represent DNR in the appeal. The Attorney General subsequently entered a “conditional” notice of appeal. CP 906-17. On October 1, 2010, Div. III Commissioner Joyce McCown stayed the appeal pending resolution of the *Goldmark v. McKenna* case. On December 7, 2010, a panel of Div. III judges denied the PUD’s motion to modify Commissioner McCown’s stay of the case. The Washington Supreme Court denied direct review of the stay order on February 15, 2011 in No. 85428-9. The Supreme Court granted Commissioner Goldmark’s mandamus petition on September 1, 2011 in *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011). The Court subsequently denied Attorney General McKenna’s motion for reconsideration on February 7, 2012.

“dedicated” lands can be used by others seeking access to them. CNW believes these discretionary DNR decisions may only be challenged for abuse of discretion by writ under RCW 7.16.030 to .140 (statutory writ of review), or in the alternative, the inherent review power of the judiciary under Art. IV, Sec. 6 of the Washington Constitution (constitutional writ of review). The DNR’s decision to deny an easement would be reviewable under an abuse of discretion standard. *Francisco v. Bd. of Directors*, 85 Wn.2d 575, 578-79, 537 P.2d 789 (1975). *See also State ex rel. Thompson v. Babcock*, 147 Mont. 46, 51, 409 P.2d 808 (1966) (State Board of Land Commissioners has considerable discretion in dealing with disposition of state trust lands).

Accordingly, for the reasons set forth in DNR’s opening brief and for the additional reason set forth below, the Court should reverse the trial court’s grant of summary judgment in favor of the PUD.

2. STATE SCHOOL LANDS ARE DEDICATED TO A PUBLIC USE AS A MATTER OF LAW BECAUSE THE FEDERAL LAND GRANTS CREATED PUBLIC, NOT PRIVATE, TRUSTS

The PUD argued in the trial court that the DNR’s school trust lands currently used for commercial livestock grazing can be condemned because “dedication to a public use” “require[s] more than DNR simply putting the property to a productive use.” CP 160-61. The PUD also

argued that the State's dedication does not foreclose condemnation because the PUD's proposed transmission line and dirt access roads do not *physically* preclude the State from making its lands available for grazing. CP 162-66. Finally, the PUD argued that allowing the PUD to use or condemn DNR's school trust lands for a transmission line advances and is even required by DNR's fiduciary duty to generate additional income for the school trust beneficiaries. CP 12, 165. These arguments rely on cases holding that State lands can be condemned so long as the condemnation does not preclude the State's use of these lands for the State's intended purposes. *See, e.g., City of Seattle v. State*, 54 Wn.2d 139, 338 P.2d 126 (1959) (city can condemn piece of State land or river for city water reservoir project); *Tacoma v. State*, 121 Wash. 448, 452-53, 209 P. 700 (1922) (fish hatchery); *Roberts v. City of Seattle*, 63 Wash. 573, 575, 116 P. 25 (1911) (University of Washington land alongside Seattle street). CP 155-56.

CNW, however, respectfully asks the Court to hold that these cases do *not* apply to State school lands. State school lands are dedicated to a public use *as a matter of law* regardless of whether the condemnor's proposed use of the lands is compatible with the State's use or whether a condemnation award or easement fee would generate more revenue for the school beneficiaries. In the sections that follow, we argue that the federal

government granted these lands to Washington (and the State constitutional convention subsequently restricted them) *for the benefit of schools and the public, including the interests of future generations*. The State school lands are *not* legally analogous to private trusts but are, instead, *public* trusts the use and management of which was delegated to the CPL as trustee for all of the State's citizens. The CPL's authority to manage these lands in the general public interest cannot be usurped by the condemnation authority of a PUD.

a. History of the School Land Grants

Washington was admitted to the union pursuant to the 1889 Enabling Act, which also admitted North Dakota, South Dakota, and Montana. *See* An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States, 25 Stat., 676, ch. 180 (1889) [hereinafter "Enabling Act"].¹⁰ This statute granted sections 16 and 36 of every township within the state "for the support of the common schools." *Id.* § 10.

¹⁰ The Enabling Act is reprinted in Volume 0 of the Revised Code of Washington; we attach §§ 10-11 as Appendix 2.

The tradition of granting such “school lands” to newly admitted states began with the admission of Ohio to the Union in 1803. *See Papasan v. Allain*, 478 U.S. 265, 268-69, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986). Even before that time, the General Land Ordinance of 1785, governing the Northwest Territory, “reserved the lot No. 16, of every township, for the maintenance of public schools within the said township.” 1 Laws of the United States 565 (1815), *cited in Papasan*, 478 U.S. at 268.¹¹ Every state admitted since Ohio, except Maine and West Virginia (which were carved out of existing states) and Texas and Hawaii (which were previously independent nations), has received a grant of school lands from the United States. *See* Jon A. Souder & Sally K. Fairfax, *State Trust Lands* 17-24 (1996).

The grants of school lands reflect a policy of promoting public education and were a reaction to the predominantly federal ownership of lands in the western states. In the early republic, the development of a well-educated citizenry was considered essential to the maintenance of a flourishing democracy. *See* Sean E. O’Day, Note, *School Trust Lands: The Land Manager’s Dilemma Between Educational Funding and*

¹¹ A “township” is the standard six mile by six mile square surveying unit established for all western lands by the Land Ordinance. *Papasan*, 478 U.S. at 268 n.3. The early Enabling Acts reserved one of the 36 one-square-mile “sections” of each township as school lands. *Id.* at 269. Later Enabling Acts, including Washington’s, expanded this reservation to two sections per township. *Id.*; Enabling Act § 10.

Environmental Conservation, a Hobson's Choice?, 8 N.Y.U. Envtl. L.J. 163, 174-76 (1999). The original states could fund a public education system through general taxation because in these states lands were owned either by private individuals or by the states themselves. See *Andrus v. Utah*, 446 U.S. 500, 522, 100 S. Ct. 1803, 64 L. Ed. 2d 458 (1980) (Powell, J., dissenting). The western states, by contrast, were created from federal lands, and the federal government remained the owner of most of the land in these states. See *Papasan*, 478 U.S. at 269 n.4 (noting that “federal land, a large portion of the new States, was not taxable by them”). Therefore, the newly admitted states required a different source of funds to support public schools.

Significantly, the terms of the federal grants of land to the states varied over time. Most of the acts described the grants as being simply “for the maintenance of schools,” “for the support of common schools,” or “for the use and benefit of common schools.” Sally K. Fairfax, Jon A. Souder & Gretta Goldenman, *The School Trust Lands: A Fresh Look at Conventional Wisdom*, 22 Envtl. L. 797, 818 (1992) (quoting General Land Ordinance, Colorado Enabling Act, and Oklahoma Enabling Act). These acts accorded different treatment, however, to the disposition of school lands and the establishment of a permanent fund. The early acts included neither restrictions on sales of land nor requirements that

proceeds from sales or leases be invested in a permanent fund. *Id.* at 821-24. It was in the Colorado Enabling Act of 1875 that Congress first imposed sales limitations and required the establishment of a permanent fund. *Id.* Subsequent acts included similar limitations. *Id.* However, all of these provisions were less detailed than requirements that states had previously begun imposing on themselves through their constitutions. *Id.* Only in the New Mexico-Arizona Enabling Act of 1910 did Congress not only grant the lands “for the support of common schools,” but also state that these lands “shall be by the said state held in trust.” Act of June 20, 1910, ch. 310, §§ 6, 10, 36 Stat. 557 [hereinafter “New Mexico-Arizona Enabling Act”]. That act also includes detailed requirements for the sale and lease of school lands, investment of the proceeds, and enforcement of the terms of the act by the Attorney General of the United States. *See id.* § 10, 36 Stat. at 563-65.

The Washington Enabling Act came near the end of this sequence of enabling statutes; it therefore contains more detailed provisions regarding the disposition of granted lands than the earliest enabling acts. The Act, however, is still quite general as to the overall grant of the school lands to the state. It provides that the “sections numbered sixteen and thirty-six in every township ... are hereby granted ... for the support of common schools.” Enabling Act § 10. It is more detailed as to the

disposition of the lands and the use of the proceeds of sales of the lands. The Enabling Act, in its original form, required that “all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools.” *Id.* § 11. In contrast to the later New Mexico-Arizona Enabling Act, the Washington Enabling Act never mentions a trust of any kind.

b. The U.S Supreme Court Has Recognized the Creation of a Trust Only by the New Mexico-Arizona Enabling Act

The U.S. Supreme Court, when reviewing the grants of land contained in state enabling acts, has recognized that the duties imposed upon states by those acts vary depending on the specific language of the act. The Court has made it clear that the enabling acts do not impose identical duties. Indeed, the Supreme Court has held only that one enabling act, the New Mexico-Arizona Enabling Act, creates an enforceable trust. It did so after reviewing the specific language of the Enabling Act and finding therein an explicit imposition of trust duties. First, in *Ervien v. United States*, 251 U.S. 41, 40 S. Ct. 75, 64 L. Ed. 128 (1919), the Court struck down a statute that authorized the state commissioner of public lands to spend some of the proceeds from leases

and sales of school lands to advertise the state to prospective settlers. In doing so, the Court specifically relied on the provision in the New Mexico-Arizona Enabling Act that made the use of the proceeds of the sale of granted lands for anything other than the enumerated purposes “a breach of trust.” *Id.* at 47. Then, in *Lassen v. Arizona*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967), the Court held that Arizona had to pay compensation to the permanent fund when it acquired school lands for highway rights-of-way. The Court found this compensation requirement in the specific language of the Enabling Act: “The Enabling Act unequivocally demands ... that the trust receive the full value of any lands transferred from it.” *Id.* at 466. Thus the Court has found that this act, with its specific reference to a trust, imposed duties on the states that were enforceable in court.

The Supreme Court has, in contrast, held that other enabling acts do not create trusts. In *Cooper v. Roberts*, 59 U.S. 173, 182, 18 How. 173, 15 L. Ed. 338 (1855), the Court, discussing the Michigan Enabling Act, held that “the grant is to the State directly, without limitation of its power, though there is a sacred obligation imposed on its public faith.” Next, in *Alabama v. Schmidt*, 232 U.S. 168, 173-74, 34 S. Ct. 301, 58 L. Ed. 555 (1914), the Court held that Alabama statutes that allowed school lands to be lost through adverse possession were valid, because “[t]he gift to the

state is absolute” and the “obligation is honorary.” In both of these cases, the Court recognized that enabling acts that predated the New Mexico-Arizona Enabling Act did not create enforceable trusts, but were instead merely hortatory.

The Court continues to recognize that not all enabling acts impose identical duties. In *Papasan*, 478 U.S. at 270, the Court briefly surveyed the history of the school land grants, noting that “the specific provisions of the grants varied by State and over time.” It added, citing the New Mexico-Arizona Enabling Act, that “the most recent grants are phrased not as outright gifts to the States for a specific use but instead as express trusts” in which “there are explicit restrictions on the management and disposition of the lands in trust.” *Id.* The petitioners in the case before the Court claimed that the federal grant of lands to Mississippi created a trust. The Court noted that “it is not at all clear that the school lands grants to Mississippi created a binding trust,” *id.* at 279, but did not decide the question because it held that the petitioners’ claim was barred by the state’s Eleventh Amendment immunity.

c. The Washington Enabling Act Did Not Create a Specific, Restrictive Trust in the School Lands

The Washington Enabling Act did not create a narrow trust in the common schools lands. Congress simply did not express an intent to create such a trust—or any trust—in the Enabling Act. When Congress wanted to create a binding trust, it did so explicitly, as it did in the New Mexico-Arizona Enabling Act.

A trust is a fiduciary relationship in which one person holds title to some identifiable property, subject to an equitable obligation to keep or use that property for the benefit of another. 1 George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 1, at 1-2 (rev. 2d ed. 1984) [hereinafter Bogert & Bogert]. Three elements are required to create a trust. First, the creator (or “settlor”) must express a clear intent to create a trust. *See Colman v. Colman*, 25 Wn.2d 606, 609, 171 P.2d 691 (1946) (“An express trust ... is created only if the settlor properly manifests an intention to create a trust.”); Restatement (Second) of Trusts § 25 cmt. a [hereinafter “Restatement”]. Second, there must be a beneficiary. Restatement §§ 112, 25 cmt. b. Finally, there must be a property interest which is in existence or ascertainable and is to be held for the benefit of the beneficiary. 1 Bogert & Bogert § 1, at 4-6. If any of the three elements is absent, no trust has been created. *Id.* § 1, at 6.

In the Washington Enabling Act, Congress did not express intent to create a trust and thus the first element for creating a trust is missing. While a trust document need not use the word “trust” or any other particular form of words, Restatement § 24(2), the settlor nevertheless must express a clear intent “to impose duties which are enforceable in the courts,” *id.* § 25 cmt. a; *see also* 1 Bogert & Bogert § 45, at 466-67 (noting that a settlor must “express an intent that the trustee is to have the functions and duties which are incident to trusteeship”). A court will not presume that a trust is implied. Restatement § 24(2). Nor will a court find an intention to establish a trust in “precatory words” that “impose merely a moral obligation.” *Id.* § 25 cmt. b. In particular, “[t]he mere statement of purpose for which a gift is made does not in itself show an intent to make the donee a trustee to accomplish that purpose.” 1 Bogert & Bogert § 46, at 494 (emphasis added).

To determine whether a given enabling act created a trust, a court must look at the specific language of the relevant act. *See Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 633 (10th Cir. 1998) (“[T]he question of whether a statehood statute creates a federal trust requires a case-specific analysis of the particular state’s enabling statute because the history of each state’s admission to the Union is unique.”). “This is because Congress’ treatment of land grants evolved over time.” *Dist. 22*

United Mine Workers of America v. Utah, 229 F.3d 982, 988 (10th Cir. 2000).¹²

When Congress wanted to create a trust, it did so explicitly. The New Mexico-Arizona Enabling Act provided that the school lands were “held in trust.” New Mexico-Arizona Enabling Act, § 10. Violations of the terms of the Act would be “a breach of trust.” *Id.* Given that Congress could have explicitly imposed—and, with other states, did impose—a trust, there is no reason to infer this intent when Congress did not make its intent clear or express. If anything, the absence of language explicitly referring to a “trust” in the Washington Enabling Act indicates that Congress did not intend to create a trust.

Moreover, the Washington Enabling Act is closer in its language to the enabling acts that the Supreme Court has held do *not* create binding trusts. As noted above, the Court has recognized a binding trust only in the New Mexico-Arizona Enabling Act, which explicitly mentions a trust. *See Lassen*, 385 U.S. at 466; *Ervien*, 251 U.S. at 47. When interpreting land grants to other states for school purposes, the Court has always found

¹² The Washington Supreme Court has recognized that, by using different language in different enabling acts, Congress has varied the terms of the land grants to the states. For example, in *State v. Whitney*, 66 Wash. 473, 477-78, 120 P. 116 (1912), the Court held that by changing the terms of the grant from “shall be granted” to “are hereby granted,” Congress had switched “from a grant in futuro to a grant in praesenti.” *See also Thompson v. Savidge*, 110 Wash. 486, 502, 188 P. 397 (1920) (“[T]hat case might be differentiated from the one before us in view of the difference between the language of the Oregon grant and our grant.”).

that the grants imposed no binding obligations on the states. *See Schmidt*, 232 U.S. at 173-74; *Cooper*, 59 U.S. at 182. The Washington Enabling Act, like the land grants to Alabama and Michigan, does not use the word “trust” or refer to any trust duties.

Scholarly commentators confirm this interpretation of the Washington Enabling Act. Most scholars who have examined the question agree that the Washington Enabling Act, like all other enabling acts except for the New Mexico-Arizona Enabling Act, does not create a trust. For example, Fairfax, Souder & Goldenman observe that “[i]f we are confined to interpreting enabling act language, it is difficult to describe anything other than Arizona and New Mexico school grants as trusts.” Fairfax, Souder & Goldenman, *supra*, at 854; *accord* Daniel Jack Chasan, *A Trust for All the People: Rethinking the Management of Washington’s State Forests*, 24 *Seattle U. L. Rev.* 1, 15 (2000) (“The fact that Congress used [trust language] in one place, but not in another, indicates that Congress had no intent to create a trust in the earlier cases.”); O’Day, *supra*, at 184 (“Outside of the New Mexico-Arizona Enabling Act, no other state enabling act mentions the word ‘trust.’”); Alan V. Hager, *State School Lands: Does the Federal Trust Mandate Prevent Preservation?*, 12 *Nat. Resources & Env’t* 39, 40 (Summer 1997) (“The trust concept did not appear in any enabling act until Congress passed the New Mexico-Arizona

Enabling Act in 1910.”); John B. Arum, *Old-Growth Forests on State School Lands—Dedicated to Oblivion?—Private Trust Theory and the Public Trust*, 65 Wash. L. Rev. 151, 160 (1990) (“The Enabling Act does not manifest an intent to impose the equitable duties of a trustee on the state.”). These commentators agree that courts have imposed trust duties in states other than New Mexico and Arizona either because these duties are found in the relevant state constitution or through the misapplication of *Lassen* and *Ervien*. See Fairfax, Souder & Goldenman, *supra*, at 843 (observing that precedents from Arizona and New Mexico have become central in interpreting the grants in other jurisdictions); Chasan, *supra*, at 18; O’Day, *supra*, at 191-194; Hager, *supra*, at 41-42; Arum, *supra*, at 160 & n.67.

In sum, the Washington Enabling Act does not create a specific trust of any kind. It never uses the word “trust” or in any other way manifests the required express intent to create a trust. The U.S. Supreme Court has found trust duties only in the one state enabling act that expressly mentions a trust. Academic commentators agree that only the

atypical New Mexico-Arizona Enabling Act created a particular trust for school lands.¹³

d. The Washington Constitution Does Not Require that the School Lands Be Held in Trust for the Schools or Any Other Named Beneficiaries

The Washington Constitution also does not create a trust with the state as trustee and the schools as beneficiaries. The plain language of the Constitution provides instead that the school lands are held in trust “for all the people” of the state. Const. art. XVI, § 1. While the Constitution requires the state to obtain full market value when selling school lands and to use money from the permanent fund exclusively for the common schools, it does not, however, require the state to maximize revenue when managing the school lands and does not create a narrow trust benefiting only income beneficiaries of common school lands.

Instead, the “trust” created by the Constitution—based on the express language of the Constitution—is properly understood as a kind of public trust with all of the people of the state as beneficiaries, rather than as a private trust benefiting only the common schools. Unlike the

¹³ To resolve this case, the Court need not decide on the exact nature of the relationship created by the Enabling Act: it is enough to conclude that it does not create a strict private trust that requires DNR to ignore the general public interest to grant an easement or accept a condemnation award out of a fiduciary duty to the school beneficiaries. However, a logical interpretation of the Enabling Act is that it constitutes a dedication of lands to a particular purpose. See Arum, *supra*, at 163-68; cf. 1 Bogert & Bogert § 34, at 411-12 (“Where states hold land for special public purposes it is sometimes stated that there is a trust, but this is usually not true in a strict sense.”).

Washington Enabling Act, the Washington Constitution does use the word “trust.” Article sixteen, section one, specifies that the granted lands “are held in trust for all the people.” Const. art. XVI, § 1 (emphasis added). This provision must be read to mean exactly what it says. *See Washington Economic Dev. Fin. Auth. v. Grimm*, 119 Wn.2d 738, 748-49, 837 P.2d 606 (1992) (“We will not construe or interpret a constitutional provision that is plain or unambiguous.”). Thus it establishes a trust, but one in which the State, as trustee, must take into account the interests of all people in the state, and not merely the common schools. *See Fairfax, Souder & Goldenman, supra*, at 846 (stating that the Washington Constitution “clearly” established a trust and observing that “if the trust is to benefit all the people, it is not clear how undivided loyalty ought to be defined”); Chasan, *supra*, at 16 (“From their choice of language, one can infer that the lands are merely dedicated to public purposes, not held in trust for specific beneficiaries.”).

The framers of the Washington Constitution knew of other states that had created trusts with the schools as beneficiaries. *See, e.g.*, Colorado Const. art. IX, § 10 (amended 1996) (providing that the granted lands were “held in trust ... for the use and benefit of the respective objects for which said grants of land were made”). Their decision not to do the same must be respected. Indeed, the framers of the Washington

Constitution specifically rejected revenue maximization as the goal of management of the granted lands. The constitutional convention received two petitions that demanded that the granted lands be managed to maximize revenues. First, on July 10, 1889, the Tacoma Typographical Union No. 170 proposed an amendment to what became article sixteen, section one, that read: “That all school lands and lands ceded to the state by the United States be reserved forever, and that they be treated so as to secure the highest perpetual income to the schools.” Beverly Paulik Rosenow, ed., *The Journal of the Washington State Constitutional Convention* 793-94 (1962). The Knights of Labor No. 115 submitted a virtually identical proposition on July 25, 1889. *See id.* at 794. The convention ignored both of these petitions; despite repeated requests, the framers chose not to require that the granted lands be managed for revenue maximization.

Other state constitutions from that time did require revenue maximization. For example, the Colorado Constitution required management of granted lands “in such a manner as will secure the maximum possible amount therefor.” Colorado Const. art. IX, § 10 (amended 1996). Colorado was the last state admitted to the Union before Washington. Similarly, the Idaho Constitution—drafted only one year after the Washington Constitution—required the state to acquire “the

maximum amount possible” for the schools. Idaho Const. art. IX, § 8 (amended 1982). The framers’ decision to reject the revenue maximization approach is even more significant given the contemporaneous examples of that approach. Given their awareness of these other state constitutions, the framers’ decision to require that the school lands be held in trust “for all the people,” instead of merely “for the common schools,” was not accidental. Rather, it reflected a conscious decision to avoid imposing a narrow trust on these lands only for the income benefit of school beneficiaries.

The Constitution does, of course, impose strict duties on the state in the sale of school lands and the management of the common school fund derived from these lands. It requires that school lands, as well as “any estate or interest therein,” be sold only for “full market value.” Const. art. XVI, § 1; *see id.* § 3 (“[N]o sale of timber lands shall be valid unless the full value of such lands is paid or secured to the state.”). To carry out this requirement, the Constitution also requires that lands be sold only at public auction and only after being appraised by a board of appraisers. *Id.* § 2. The proceeds from these land sales, as well as the proceeds from, among others things, the sale of timber on school lands, must be added to the common school fund. *Id.* art. IX, § 3. “[T]he entire

revenue from the school fund ... shall be exclusively applied to the support of the common schools.” *Id.*

In short, while the Constitution requires that the state obtain full market value from the disposition of trust assets and that any revenue generated from the disposition of such assets be dedicated to the support of the common schools, it does not require that retained trust lands and assets be managed in a way that maximizes the generation of revenues for any particular beneficiary.

e. The Washington Constitution Imposes Only A Broad Public Trust On The Management Of Common School Lands

This trust created by the Washington Constitution is more akin to a public trust than a private trust. The public trust doctrine resembles “a covenant running with the land ... for the benefit of the public and the land’s dependent wildlife.” *Orion Corp. v. State*, 109 Wn.2d 621, 639, 747 P.2d 1062 (1987). Such a trust prohibits the state from giving away state resources and requires the state to consider the public interest when allocating these resources. *Arum, supra*, at 154-55. While a public trust originally applied only to rights to navigation and fishing in navigable waters, its reach has expanded to include submerged lands and recreational activities. *Orion Corp.*, 109 Wn.2d at 639-41. The Washington Supreme Court has not yet had occasion “to decide the total

scope of the doctrine.” *Id.* at 641. Yet, because the school lands are held in a trust “for all the people,” only this broader form of “public” trust would comport with the language of the Washington Constitution.

Interpreting the Constitution to establish such a public trust, rather than a private trust, accords with the concerns about the school lands at the time the Constitution was drafted. The overriding concern of Congress and the state constitutional conventions in the late nineteenth century was to prevent the school lands from being stolen or given away. *See Chasan, supra*, at 29-34. This is why the enabling acts and constitutions of the period contain so many detailed requirements regarding the sale of school lands and assets therefrom, but say nothing about the management of these lands. The framers were not thinking about land management. Similarly, cases such as *Lassen, Ervien*, and even *County of Skamania v. State*, 102 Wn.2d 127, 685 P.2d 576 (1984), which we discuss in detail below, dealt not with land management but with the disposition of school lands or the right to use those lands at unfairly low prices. Accordingly, management of Washington’s common school lands is not subject to a narrow, income-oriented trust for schools but rather is constrained by a broad public trust duty to benefit “all of the people.”

f. The Washington Supreme Court's Decisions Allow the State to Manage the School Lands in the Public Interest

The Washington Supreme Court's decisions do not (and cannot) require a different reading of the Washington Enabling Act and state Constitution. No case has held that the state may not promote public health and safety when managing the school lands. Instead, some cases have held that the state's powers are constrained when acting in a proprietary capacity by selling school lands or assets from those lands. These cases are consistent with the interpretation of the Washington Enabling Act and Constitution outlined above.

g. Skamania Dealt With the Sale of Trust Assets, Not Land Management

Citing *County of Skamania v. State*, 102 Wn.2d 127, 685 P.2d 576 (1984), the PUD, or even DNR, may argue that the State must manage the school lands in a manner that does not forego income to the school beneficiaries. *Skamania*, however, dealt with the sale of trust assets rather than the Legislature's authority to manage or give easements over school lands. In *Skamania*, the Legislature sought to change the terms of legally-binding sales contracts into which DNR had entered with various timber companies in order to reduce the price these companies were required to pay (and hence the proceeds from disposition of school lands and resources). *Id.* at 129-30. While the opinion used the language of trust

law—referring to duties of undivided loyalty and acting prudently—the actions it condemned were straightforward violations of the Constitution’s provisions governing the *sale* of school lands and resources.

First, the Court identified the duty of undivided loyalty with the requirement “that when the state transfers trust assets such as contract rights it must seek full value for the assets.” *Id.* at 134 (citing Const. art. XVI, § 1). As explained above, where management of state school lands is concerned, article sixteen of the Constitution does not establish a narrow trust with the common schools as the only beneficiaries. Instead, it establishes a trust for all of the people of the state.¹⁴ Article sixteen, section one does, however, require that in disposing of the granted lands or “any estate or interest therein,” the state must in return receive “full market value.” Const. art. XVI, § 1. The standing timber on a parcel of land is “an interest in land.” *Dowgialla v. Knevage*, 48 Wn.2d 326, 337, 294 P.2d 393 (1956); *see also Beckman v. Brickley*, 144 Wn. 558, 561, 258 P. 488 (1927) (holding that a contract for the sale of timber falls within the statute of frauds because timber “partakes of the realty”). Therefore, under the Constitution, the State must receive full market value for any timber sold from granted lands. The *Skamania* Court apparently

¹⁴ As also explained above, such a trust, of course, would not be a traditional private trust but instead a public trust—a duty to legislate for the public good rather than to favor special interests.

took this conclusion a step further by construing the duty to apply not only to sales of the land or interests therein, but also to the sale of any trust “assets.”

Second, the Court’s opinion confirms this narrow view by similarly describing the violation of the duty to act prudently as the “dispos[ition] of a trust asset without obtaining ‘the best possible price’ for the asset.” *Skamania*, 102 Wn.2d at 138 (citation omitted). Again, this “duty” is nothing more than the constitutional duty to receive “full market value” when selling trust assets. Neither of these conclusions says anything about the state’s duties when managing trust lands more generally. *See Arum, supra*, at 163 (“Arguably then, the *Skamania* court’s discussion of private trust principles is dicta.”).

The *Skamania* decision thus addresses the State’s specific trust duties when disposing of common school lands or an interest in them, not its broad duties to manage these lands “for all of the people” imposed by the Washington Constitution.

h. The Dicta in Skamania Relied on Cases that Interpreted the New Mexico-Arizona Enabling Act

The Court’s opinion in *Skamania* does contain dicta that describe the Washington Enabling Act and state constitution as establishing a trust with respect to the school lands. These statements, however, are not

necessary for the Court's decision and cannot be squared with the express language of either the state Constitution or the Washington Enabling Act. Moreover, the Court's dicta rely solely on cases that interpret the subsequent and different New Mexico-Arizona Enabling Act and therefore should not guide this Court's interpretation of the Washington Enabling Act. *See State v. Potter*, 68 Wn. App. 134, 149 n.7, 842 P.2d 481 (1992) ("Statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed.").

The *Skamania* Court stated that the federal school land grant created a trust to benefit the common schools. "Every court that has considered the issue has concluded that these are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees." *Skamania*, 102 Wn.2d at 132. For this proposition, the Court primarily relied on *Lassen*. Yet, as explained above, *Lassen* interpreted the New Mexico-Arizona Enabling Act, which, unlike the Washington Enabling Act, does explicitly establish a trust. *See Fairfax, Souder & Goldenman, supra*, at 844 (noting "the [*Skamania*] court's treatment of Supreme Court decisions regarding Arizona and New Mexico as binding on other states, without apparent awareness that these cases apply only to

Arizona and New Mexico and are particularly inappropriate in the *Skamania* case”).

The Court also cited *United States v. 111.2 Acres of Land*, 293 F. Supp. 1042 (E.D. Wash. 1968), *aff’d*, 435 F.2d 561 (9th Cir. 1970). This case, like *Skamania* itself, concerned the improper disposition of granted lands or assets from those lands, not the management of those lands. In *111.2 Acres of Land*, the state had allowed the federal Bureau of Reclamation to expropriate granted lands, without compensation, for an irrigation project. The court held that section 11 of the Washington Enabling Act prohibited the state from donating granted lands. *Id.* at 1046. This holding is a straightforward application of the requirement in section 11 that the state obtain full market value when selling trust land. Enabling Act, § 11. The district court also stated that section 10 of the Enabling Act and article XVI, section 1 of the Washington Constitution establish a “real” trust. *111.2 Acres of Land*, 293 F. Supp. at 1049. The court provided no analysis to support this conclusion beyond a citation to *Lassen*.¹⁵

¹⁵ The reference in *Skamania* to *111.2 Acres of Land* therefore simply restates the Court’s misunderstanding of *Lassen* at one remove.

The only Washington Supreme Court case cited in *Skamania* in support of its conclusion that the school lands are held in a specific trust is *State ex rel. Hellar v. Young*, 21 Wash. 391, 58 P. 220 (1899). That case had nothing to do with the management of school lands, however. Instead, it dealt with the investment of the permanent fund. *Id.* at 392 (“[T]he permanent school fund of this state must be regarded as a trust fund.”). As explained above, entirely different provisions of the Washington Enabling Act and the Constitution govern the permanent fund than govern the school lands and their management. *Young* says nothing about the latter.

In fact, we know of no example of common law trust duties being applied to the *management* of school lands in Washington before *Lassen* and *Skamania*. The courts had not done so. Instead, for example, in *State ex rel. Forks Shingle Co. v. Martin*, 196 Wash. 494, 83 P.2d 755 (1938), the state Supreme Court upheld the constitutionality of a law that required the management of state forest lands according to a “sustained yield plan.” In reaching this conclusion, the Court observed that a law “having for its purpose the conservation of the state’s forest resources” on school lands deserved special deference. *Id.* at 502. Neither had the agencies responsible for managing the school lands take such a narrow view of their management role. *See Chasan, supra*, at 22 (observing that the 1942

report of the Forest Advisory Commission did not mention a duty of undivided loyalty). Likewise the general public had not viewed the management of these lands so narrowly. *See id.* at 22 n.115 (“When allegations of timber thefts and giveaways arose earlier in the century, legislative investigators and newspaper headline writers expressed outrage over people stealing from the state. Cheating school children was not the issue, and evidently no one even thought about common law trust responsibilities.”).

The dicta in *Skamania* aside, current law does not require that the state manage common school lands as a private trustee would manage a trust corpus. First, the school lands are plainly subject to federal laws of general applicability. *See generally* 1996 Op. Wash. Att’y Gen. No. 11, at 18-21 (Aug. 1, 1996) [hereinafter AGO 96-11]. In *Case v. Bowles*, 327 U.S. 92, 98-102, 66 S. Ct. 438, 90 L. Ed. 552 (1946), the U.S. Supreme Court held that the sale of timber from granted school lands was subject to the federal Emergency Price Control Act, even though this federal statute reduced the revenue from such sales. Similarly, in *Bd. of Natural Resources v. Brown*, 992 F.2d 937, 941 (9th Cir. 1993), the Ninth Circuit upheld a federal statute that restricted the export of unprocessed timber harvested on state and federal public lands, thereby “reducing significantly the income generated from the sale of timber harvested from the land.”

The same is true of generally-applicable laws enacted by the state legislature pursuant to its police powers. *See generally* AGO 96-11 at 20-21. For example, the Washington Supreme Court has upheld the applicability of the State Environmental Policy Act and the Forest Practices Act to granted school lands. *See Noel v. Cole*, 98 Wn.2d 375, 380, 655 P.2d 245 (1982); *West Norman Timber, Inc. v. State*, 37 Wn.2d 467, 475, 224 P.2d 635 (1950). The state also allows the public to use the school lands “for camping, hunting, hiking, fishing, boating, and motorized off-road travel, even though those uses may substantially increase the risk of fire on these lands.” Chasan, *supra*, at 24.

In other words, there is no dispute that the state may require management of the school lands in a way that does not maximize revenue so long as it applies the same restrictions to all people. But a trustee is required to do more than treat the beneficiaries as well as everyone else; a true trustee must treat the beneficiaries better than anyone else. *See* 1 Bogert & Bogert § 543, at 217 (“Perhaps the most fundamental duty of a trustee is that he must display throughout the administration of the trust complete loyalty to the interests of the beneficiary and must exclude all selfish interest and all consideration of the interests of third persons.”); *see also* Chasan, *supra*, at 24. If the school lands were truly held and subject to management pursuant to a private trust to benefit only the common

schools, then applying state laws of general applicability to those lands could be deemed a breach of that trust duty. This result highlights the incongruity of applying common law trust duties to school lands.

Absent an express requirement in the Washington Enabling Act or Constitution that it do otherwise, the state may enact laws to promote public health and safety pursuant to its police powers. The “[p]olice power is inherent in the state by virtue of its granted sovereignty.” *Manufactured Housing Communities of Washington v. State*, 142 Wn.2d 347, 354, 13 P.3d 183 (2000). It permits the state to pass laws “for the benefit of the public health, peace and welfare.” *Conger v. Pierce County*, 116 Wash. 27, 36, 198 P. 377 (1921). “It exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution.” *Shea v. Olson*, 185 Wash. 143, 153, 53 P.2d 615 (1936).

i. Conclusion

The federal land grants of school lands to Washington and, in turn, the framers of the Washington Constitution created *public*, not *private*, trusts. The purpose of these public trusts was to permanently set these lands aside for uses that the CPL deems is in the long-term public interest of the schools and the public at large. DNR does not have to accede to the

PUD's easement merely because a condemnation award or easement fee would increase DNR's revenue for the school beneficiaries. To the extent that *Skamania* holds that the school lands are *private* as opposed to *public* trusts and that DNR has a fiduciary duty to maximize its revenue from these trusts, that case should be overruled or distinguished.

3. THE LEGISLATURE HAS NOT EXPRESSLY GIVEN PUBLIC UTILITY DISTRICTS THE AUTHORITY TO CONDEMN SCHOOL LANDS

Municipal corporations, like the PUD here, only have condemnation powers that have been expressly authorized by the Legislature. *In re Seattle*, 96 Wn.2d 616, 629, 638 P.2d 549 (1981). A legislative determination of eminent domain powers must be specific and must appear in the statute by express language or by necessary implication. *City of Des Moines v. Hemenway*, 73 Wn.2d 130, 133, 437 P.2d 171 (1968). Because neither of the two condemnation statutes relied upon by the PUD, RCW 54.16.020 and .050, expressly refer to school lands that are "*dedicated to a public use*," PUD's do *not* have the authority to condemn such lands.

On the contrary, the Legislature has clearly vested in the elected CPL the authority to determine when and how others may be given rights to use State lands. Const. art. III, § 23 authorizes the Legislature to delegate authority to the CPL "as the Legislature may direct" and the

Legislature may, in turn, delegate these functions to administrative officers and boards. *Senior Citizens League v. Dep't of Soc. and Health Services*, 38 Wn.2d 142, 153, 228 P.2d 478 (1951). In the case of use of public lands, the Legislature has prescribed that DNR may lease its lands for agriculture, grazing, logging, mineral extraction, and other purposes as “DNR deems advisable.” RCW 79.13.010(1). DNR also has the discretionary authority to grant easements across public lands, RCW 79.36.355, .510, and to determine “full market value” and “damages to the remaining property” from the grant of these easements. RCW 79.36.355. DNR has the authority to let others use state roads when DNR “finds that it is for the best interest of the state.” RCW 79.38.040. And the Legislature gave DNR the general authority to sell land at terms deemed appropriate by DNR. RCW 79.11.020. These statutory provisions, not involuntary condemnation, are the only paths through which municipal corporations may seek access on or over State lands.

In the present case, DNR is resisting the PUD's condemnation because DNR strongly believes the resulting easement would not be in the economic or environmental interest of either the school lands or the general public interest. DNR also believes that the condemnation will impose long-term maintenance costs and access problems for which DNR cannot be compensated by a one-time condemnation award. DNR's

management decisions deserve and require deference. The PUD is not without recourse. The PUD has the right to pursue an easement rather than condemnation and a court may overturn DNR's refusal to grant an easement to the PUD if DNR's decision was arbitrary, capricious, or contrary to law. *Francisco*, 85 Wn.2d at 578-79.

The federal Bonneville Power Administration predicts that the Pacific Northwest transmission line system will require substantial rebuilding in the decades ahead.¹⁶ Moreover, transmission facilities associated with new renewable energy projects could have major implications for State school lands. CP 588. If PUDs have the implied authority to usurp DNR's land management discretion via condemnation, it would undercut the ability of the State to protect and manage the federally-granted school lands for *all* of Washington's present-day and future generations. The Court should avail itself of the opportunity this case presents to clarify that State school lands are managed under principles applicable to *public* trusts, are by their very nature dedicated to a public use "for all citizens," and that this dedication cannot be undermined or usurped by a PUD's condemnation absent very clear legislative authorization.

¹⁶ Transmission Adequacy Standards, Planning for the Future, Sept. 2004, <http://transmission.bpa.gov/PlanProj/transadequacy/documents/transAdequacyFinal.pdf> (last visited Apr. 18, 2012).

F. CONCLUSION

DNR's school lands are not private trusts but are, instead, public trusts "dedicated to a public use" as a matter of law. These lands are dedicated to *both* providing revenue to common school construction *and* to providing for other public benefits, including management for current and future generations. A municipal corporation inferior to the State, like the PUD, does not have the express statutory authority to condemn state school lands dedicated to a public use even if the condemnor's proposed use does not preclude the State's use of the land or would generate additional revenues for schools. DNR has the exclusive authority to manage these lands in the long-term public interest.

The Court should reverse the trial court's grant of summary judgment and enter summary judgment for DNR and CNW.

Dated this 23rd day of April, 2012.

Respectfully submitted,

GENDLER & MANN, LLP

By:  #18426 fm

David S. Mann
WSBA No. 21068
Attorneys for Conservation Northwest

Appendix 1

areas where watering troughs had been constructed. A few areas, including more level areas east of Buckhorn Mountain, on Cumbo Flat, on Morse Flat, and around inactive watering facilities north and south of Cow Creek, have had intense grazing. In some cases, historical plowing completely removed the native vegetation and opened the sites to intense infestations of weeds.

Historical grazing and fire have both influenced the existing vegetation composition, and even where the species are native, subtle vegetation changes occur even in the sites with the highest quality vegetation. For example, needle-and-thread grass, a native species, often increases in abundance in response to grazing. A large example of the latter is present at Cumbo Flat. All these disturbances tend to lower the natural heritage value of the land. Based on field investigations, including a site visit by the Washington Natural Heritage Program ecologist Rex Crawford, it is unlikely that the land crossed by the proposed alternative transmission corridors would warrant recommendation for conservation as a natural area preserve on the basis of the vegetation characteristics. However, according to Natural Heritage Program ecologist Rex Crawford, the area does have the structure, dominant species composition, and the unfragmented condition of functional shrub-steppe habitat. The vegetation field report prepared for this project (Tetra Tech, 2004c) includes site-specific observations of vegetation characteristics and condition.

The proposed Pateros/Twisp transmission corridor passes through the southern and western edge of a block of more than 20 square miles of WDNR land, and more than 15 square miles of this area are vegetated by shrub-steppe. This area comprises the largest contiguous area of publicly owned shrub-steppe in the Methow Valley. Historically, shrub-steppe vegetation covered 24,000 square miles of Washington (Daubenmire, 1988), but a great deal of it has been lost or degraded, primarily due to agriculture and heavy livestock grazing. Dobler et al. (1996) estimate that 59 percent of the original shrub-steppe in Washington has been lost. Their estimates, because they do not include Whitman and Spokane Counties, are likely an underestimation. To put the Methow Transmission Project into a larger context, the WDNR land within the project area, as defined above in Section 3.5.1, comprises roughly 15 percent of the shrub-steppe within the Methow Valley portion of the project area, 3.4 percent of the intact shrub-steppe remaining in Okanogan County, or 0.2 percent of the remaining shrub-steppe in Washington. The shrub-steppe in the entire project area, based on the Landsat data presented in Table 3.5-1, accounts for 24.3 percent of the shrub-steppe in Okanogan County and 1.5 percent of the remaining shrub-steppe in Washington. These are approximate areas, based on Dobler et al. (1996), but they convey a sense of the scale in the project area relative to shrub-steppe in Okanogan County and Washington State. The area is consequently of local ecological significance.

3.5.1.2 Noxious Weeds

Regulation

A noxious weed species is defined in Washington State as “a plant that when established is highly destructive, competitive, or difficult to control by cultural or chemical practices” (Revised Code of Washington [RCW] 17.10.010). The Revised Code of Washington (RCW) 17.10.090 in part states that “(e)ach county noxious weed control board shall...select those weeds from the class C list...that it finds necessary to be controlled in the county...and those weeds comprise the county noxious weed list.” RCW 17.10.140 then says in part that it is the owner’s duty to “(c)ontrol and prevent the spread of all class B and class C noxious weeds listed on the county weed list as locally mandated control priorities within and from the owner’s property.” No class C weeds in Okanogan County are designated for obligate control.

The Washington State Noxious Weed Control Board (NWCB), in partnership with the Okanogan County Noxious Weed Control Board, work to carry out the state weed laws, which include: Chapter 17.10 RCW *Noxious Weeds - Control Boards*; Chapter 17.04 RCW *Weed Districts*; and Chapter 17.06 RCW *Intercounty Weed Districts*. The State Board designates certain non-native plant species as class A, B, and C noxious weeds. Landowners are required to control class A weeds. Class B weeds are

location where the Loup Loup corridor crosses has a few scattered black cottonwoods near the river's edge. Riparian corridors along tributaries to these major rivers are vegetated by a mix of ponderosa pine, Douglas-fir, black cottonwood, quaking aspen, and a rich assemblage of shrubs. A general vegetation map derived from a regional Landsat mapping project (Almack et al., 1993) is presented in Figure 3.5-1.

A preliminary analysis of vegetation in the project area, based on the Landsat data, is presented in Table 3.5-1. Landsat analysis is based on reflectance values measured by instruments carried by satellites. These reflectance values are calibrated based on their correlation to vegetation at known sites, and the results are extrapolated to produce vegetation maps of large land areas. While extremely valuable as a planning tool for analyzing vegetation over large areas, these maps often include site-specific inaccuracies.

Daubenmire (1970) places most of the Methow Valley and the western slope of the Okanogan Valley in the three-tip sagebrush/Idaho fescue vegetation zone, and a variety of shrub-steppe communities occur. Predominant shrubs include three-tip sagebrush, antelope bitterbrush, and big sagebrush. Serviceberry and currant species are also abundant. Prominent native grasses include Idaho fescue, bluebunch wheatgrass, and needle-and-thread grass. Non-native grasses, particularly bulbous bluegrass and cheatgrass, are abundant or dominant in disturbed areas. The project area lies near the northern extent of steppe habitat in the Methow Valley, which can be forested within drainages and

Table 3.5-1. General Vegetation Communities in the Project Area

Vegetation Class	Vegetation Description	Acres	Percent of Project Area
Agriculture	Agriculture - Orchard and Crops	3,876	4.1
	Agriculture - Fallow and Dry Pasture	2,394	2.5
	Agriculture Total	6,270	6.6
Aspen Forest	Non-Riparian Deciduous	118	0.0
Bare	Bare and Rock^{2/}	1,277	1.3
Open Water	Water	457	0.5
Riparian	Engelmann Spruce - Riparian	186	0.2
	Riparian Deciduous Forest	97	0.1
	Riparian Total	283	0.3
Shrubland	Lush Low Elevation Shrub	191	0.2
	Lush Shrub/Slide Alder	117	0.1
	Lush Shrub Herbaceous	278	0.3
	Montane Herbaceous	1,604	1.7
	Montane Mosaic	1,507	1.6
	Montane Shrub	138	0.1
	Subalpine Meadow	4	0.0
	Subalpine Mosaic	62	0.1
	Shrubland Total	3,900	4.1
<u>Shrub-Steppe</u>	<u>Shrub-Steppe - Big Sagebrush</u>	16,748	17.7
	<u>Shrub-Steppe - Herbaceous</u>	37,455	39.5
	<u>Shrub-Steppe - Antelope Bitterbrush</u>	10,559	11.1
	Shrub-Steppe Total	64,762	68.3
Upland Forest	Subalpine Fir-Engelmann Spruce-Lodgepole Pine	443	0.5
	Ponderosa Pine	6,481	6.8
	Ponderosa Pine - Douglas-fir	6,581	6.9
	Douglas-fir - Mixed Conifer	4,217	4.4
	Upland Forest Total	17,722	18.7
Total		94,789	100.0

1/ Vegetation communities are from Almack et al., 1993. The vegetation class is used to group habitats into more general categories.
2/ Bare and Rock includes 9 acres of shadow, 88 acres of snow and ice, and 288 acres of wet soil and gravel habitat.

The original Twisp/Pateros route was substantially modified to produce the present Alternative 2. The principal changes included the elimination of all permanent road construction and reconstruction by using only temporary track roads, hand-digging holes, and delivering structures by helicopter. The proposed substation in the Gold Creek area was relocated in response to concerns about erosion, floods, aesthetics, and traffic safety. Changes were also made to the proposed transmission line alignment to minimize potential impacts to existing vegetation and biological resources to the extent possible. These changes, which were made following detailed field surveys of the proposed route, included realigning the route to avoid affecting ponderosa pine stands and potential cliff habitat. The original Twisp/Pateros Transmission Line and Substation Project has been added to the alternatives considered but eliminated from further review section in Chapter 2 of the Final EIS to emphasize that it is substantially different to Alternative 2 evaluated in this EIS.

In addition, a number of modifications to the existing alternatives were raised during the public comment period on the Draft EIS. These proposed modifications were reviewed and added to the alternatives considered but eliminated from further review section in Chapter 2, which explains why they were not carried forward for full analysis.

Alternatives Carried Through Full Analysis

A brief description of each of the seven alternatives is provided below and Table S-4 summarizes the construction activities proposed for each alternative. Table S-5 summarizes the compliance of each alternative with the project objectives detailed above. The maps provided as Figures S-2 through S-7 show the proposed routes for each action alternative and are found at the end of the summary section.

1 No Action

The No Action alternative is required by NEPA and SEPA and functions as the baseline against which the effects of other alternatives are compared. Under this alternative, there would be no project and ongoing operation and maintenance of the existing system would continue under existing decisions and permits. The No Action alternative would avoid construction or reconstruction of the transmission or distribution system and would not achieve the project's purpose of providing reliable service to meet existing and future needs. Routine system maintenance under existing decisions and permits, including ground disturbance, would still take place and could increase over time as the system ages and the increased load requires increasing system maintenance.

2 Pateros/Twisp

This is the proposed action and preferred alternative. This alternative would construct approximately 28 miles of new transmission line from the existing Brewster-Pateros line to the Twisp Substation. The new line, which would approximately parallel State Highway 153 to the northeast, would become the main line into the valley, relieving the Loup Loup line of much of the load it currently carries. The proposed project would include construction of a new substation located along State Highway 153 between Carlton and Methow in the Gold Creek area, as well as minor changes to the existing distribution system. Switches would be installed in the existing distribution system to reduce the average distribution load by half. Approximately 5 miles of the transmission line (north of Day Road to the existing Twisp Substation) would overbuild existing distribution along State Highways 153 and 20.

3 Valley Floor

This alternative would build approximately 30 miles of a new transmission line along the Methow Valley floor from the Pateros Substation near the town of Pateros to Twisp. Approximately two-thirds of the transmission line would be installed on new, taller structures over the existing distribution lines while the distribution system is "hot" or energized for most of this length. Approximately 11 miles of

the line would be installed separately from the existing distribution system to reduce the Methow River crossings to nine (compared to 23 crossings by the existing distribution line); the remaining 19 miles would be constructed as an overbuild on the existing distribution line. The new line would become the main line into the valley, relieving the Loup Loup line of much of the load it currently carries. A new substation would be constructed in the Gold Creek area and new switches would be installed in the existing distribution system to reduce the average distribution load by half. The distribution system in the Methow Valley would be altered by moving transformers supplying individual consumers to the new transmission structures and reconstructing or realigning 25 to 30 percent of the lateral lines. Lateral line reconstruction would require planned power outages.

4 Loup Loup Hot Rebuild

This alternative would rebuild approximately 28 miles of the existing Loup Loup line “hot,” or with electricity in the conductors. Ground disturbance related to transmission line reconstruction would be confined to the existing ROW, but levels would be higher than for “cold” construction due to the need to construct a pair of pads at each structure for the “hot” rebuild equipment. No new substations would be constructed but structures and switches would be resized in the Loup Loup Substation to accommodate the larger conductor. The existing distribution system, specifically the Pateros and Twisp main feeders, would be rebuilt. The rebuild would be “hot” in most locations, with new structures approximately 10 feet taller than the existing structures. The distribution system would be further altered by moving transformers supplying individual consumers to the new distribution structures and reconstructing or realigning 25 to 30 percent of the lateral lines. Lateral line reconstruction would require planned power outages.

5 Loup Loup Hot Rebuild with New Substation and Transmission Line

This alternative would rebuild approximately 28 miles of the existing Loup Loup line “hot.” Ground disturbance related to transmission line reconstruction would be confined to the existing ROW but levels of disturbance would be higher than for “cold” construction due to the need to construct a pair of pads at each structure for the “hot” rebuild equipment. Approximately 14 miles of new transmission line would be constructed from the existing Brewster-Pateros line to a new substation in the Gold Creek area. Structures and switches would need to be resized within the Loup Loup Substation to accommodate the larger conductor. Additional switches would be installed in the existing distribution system to reduce the average distribution load by half. No reconstruction of the distribution system would be needed.

6 Loup Loup Cold Rebuild with Temporary Generation

Under this alternative, the existing Loup Loup 115-kV transmission line would be reconstructed “cold”—that is, with no electricity flowing in the conductors during construction. Diesel generators would be installed temporarily in Twisp to provide 20 megawatts (MW) of generating capacity during construction. Structures and switches would need to be resized within the Loup Loup Substation to accommodate the larger conductor. The existing distribution system, specifically the Pateros and Twisp main feeders, would be rebuilt. The rebuild would be “hot” in most locations, with new structures approximately 10 feet taller than the existing structures. The distribution system would be further altered by moving transformers that supply individual consumers to the new distribution structures and reconstructing or realigning 25 to 30 percent of the lateral lines. Lateral line reconstruction would require planned power outages.

7 Partial Hot, Partial Parallel Rebuild of the Loup Loup

Under this alternative, the existing Loup Loup transmission line would be reconstructed “hot” through the forested section of the line (approximately 15 miles). In the unforested areas on either side of the pass approximately 13 miles of new transmission line would be constructed parallel to the existing line, just inside the existing ROW (about 50 feet to the north of the existing line on average). New ROW would be required to accommodate the parallel portion. When the new construction was complete, the new line would be tied in to the old line at each end, the old line would be decommissioned, and the old line and its structures would be removed. No new substations would be constructed. Structures and switches would need to be resized within the Loup Loup Substation to accommodate the larger conductor. The existing distribution system, specifically the Pateros and Twisp main feeders, would be rebuilt. The rebuild would be “hot” in most locations, with new structures approximately 10 feet taller than the existing structures. The distribution system would be further altered by moving transformers that supply individual consumers to the new distribution structures and reconstructing or realigning 25 to 30 percent of the lateral lines. Lateral line reconstruction would require planned power outages.

Comparing the Alternatives

The following two pages present summaries that compare the alternatives. The first table, S-4, summarizes briefly the physical and right-of-way attributes of each of the alternatives. Table S-5 summarizes the extent to which each alternative meets the objectives set out in Table S-2 and resolves the problems set out in Table S-1.

Following those tables is a discussion of the effects of the alternatives on the various aspects of the environment, organized by resource.

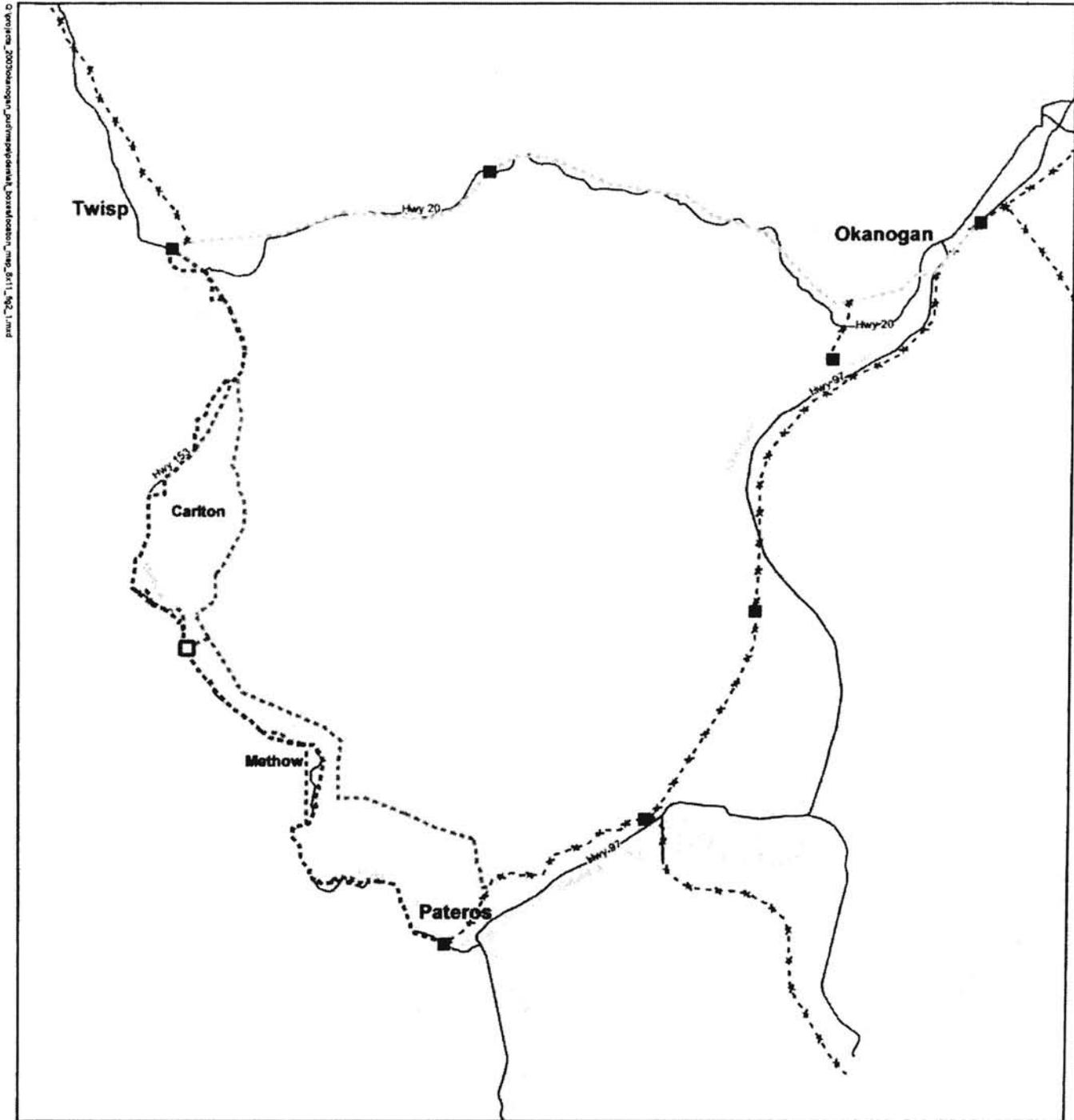
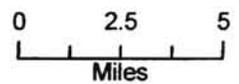


Figure 2-1. Project Location

Legend

- Existing Substation
- Proposed Substation Location
- - - Existing Loup - Loup Transmission Line
- Proposed Valley Floor New Transmission Line
- Proposed Pateros-Twisp New Transmission Line
- Existing Distribution Line
- * - * - * Other Existing Transmission Line
- Highway
- Road
- Stream
- Water Body



Winter range is a limited resource in the Methow Valley. In 1998, WDFW purchased more than 1,100 acres of prime winter range habitat in the foothills above the confluence of the Methow and Columbia Rivers near Pateros. This land is interspersed with at least an additional 800 acres of prime habitat under other ownership, including the BLM. Sections of Alternative 2, 3, and 5 would intersect a portion of this winter range, and all alternatives, including the No Action alternative (e.g., existing distribution and transmission corridors) intersect the migration corridor (Figure 3.8-1). Possible direct effects on mule deer associated with the proposed project include habitat removal, and disturbance due to construction activity. Possible indirect effects include reduced forage quality and increased access along roads following construction.

Human activity along roads open to motorized vehicles can adversely affect the amount of use an area receives by deer. Consequently, open roads can reduce the acres of available habitat. Additionally, during transmission line construction there would be increased traffic along main roads. However, construction activities would occur outside of the time that deer would be migrating into and through the area to winter range. The timing of any clearing and construction activities would occur from April 1 through October 31 (see Section 4.8 for wildlife mitigation measures), and would therefore limit impacts to deer wintering in the area. Under Okanogan National Forest standards and guidelines, clearing and construction activities could continue in deer winter range areas through November 30 on NFS lands. Although construction may occur during the fawning season, most critical fawning habitat is found north and west of the project area. Construction activities, including helicopter use under Alternatives 2 and 5 would be temporary in nature and may displace deer in the immediate vicinity of the work areas. Helicopter use to deliver structures to areas along the proposed ROWs would occur after July 1.

Road bladework in the project area may result indirectly in increased access after construction, including the use of off-highway vehicles (OHVs), snowmobiles, and unauthorized vehicles, potentially leading to harassment or poaching of already stressed animals. However, the PUD, through mitigation measures aimed at reducing access to existing roads serving as access roads to an existing or new ROW, would address access issues (with the cooperation of agency and private landowners) by maintaining or expanding gating of roads following project construction (see Section 2.4.3.3).

In addition to increased public access, ground disturbance associated with the proposed transmission lines may also result in impacts to deer by reducing forage quality through the establishment of noxious weeds, which compete with higher-quality, native vegetation. Estimated construction-related disturbance to shrub-steppe habitat would range from 3.3 acres under Alternative 6 to 27.2 acres under Alternative 2 (Table 3.5-8). Alternative 5 would disturb approximately 18.4 acres, while Alternatives 3, 4, and 7 would disturb 5.2 acres, 4.1 acres, and 3.4 acres, respectively. The majority of the estimated disturbance under Alternatives 2 and 5 would be associated with the proposed track roads, rather than the installation of the proposed structures (see Table 3.5-7).

Road-related disturbance would range from approximately 1.8 miles under Alternative 3 to 21.6 miles under Alternative 2 (Table 2-12). Alternative 5 and Alternatives 4, 6, and 7 would result in 19.8 miles and 8.3 miles of road-related disturbance, respectively. The majority of the road-related disturbance (8.1 miles) under Alternatives 4, 6, and 7 would, however, involve bladework on existing access roads. This mileage is also included in the total road-related disturbance for Alternative 5 (Table 2-12). New roading, including proposed track road that would not require bladework, would range from 0.2 mile under Alternatives 4, 6, and 7 to 21.6 miles under Alternative 2 (Table 2-12). There are presently 590.1 miles of existing road in the project area (Table 2-11) and, therefore, none of the proposed alternatives would result in a substantial increase in the existing road density in the project area (Table 3.8-4).

proposed under Alternatives 4, 5, and 7. For the purposes of analysis, it is, however, assumed that this work would take place along the existing road beds in these areas and would not result in additional vegetation disturbance.

At structure locations, at the proposed substation and generation sites, and on new track roads that require bladework, the vegetation and topsoil would be removed, and the effects would be permanent. In areas immediately adjacent to the structures, the proposed substation and generation sites, and on track roads that do not require bladework, the vegetation may be crushed or cut off, but the topsoil would remain and the effects would be temporary.

Alternative 2 would have the highest level of effects to the highest quality shrub-steppe vegetation among the alternatives. Approximately 8 acres of class B shrub-steppe vegetation would be potentially disturbed by road-related construction activities under this alternative (Table 3.5-6), with an additional 0.7 acre disturbed by structure, laydown area, generation, and substation-related activities (Table 3.5-7). Alternative 5 would follow Alternative 2 in the level of effects to shrub-steppe. Alternative 3 would have a lesser effect, followed by Alternatives 4, 6, and 7 (Tables 3.5-6 and 3.5-7). These potential effects are summarized in Table 3.5-8, which does presents total impacts by vegetation type.

Alternative 1 would have the lowest level of shrub-steppe disturbance among the alternatives, but ongoing maintenance and access road use required by the Loup Loup transmission line and Valley Floor distribution line would continue to have minor impacts.

Alternative 2 would also affect the largest acreage of higher-quality forest, particularly ponderosa pine and mixed conifer forest, with road-related construction activities potentially affecting approximately 0.5 acre of class B ponderosa forest and 0.2 acre of class B mixed conifer forest (Table 3.5-6). The other alternatives would have no or minimal effects on forests because the potentially affected areas are already accessible by many roads, and because the vegetation has already been removed or altered. Alternative 1 would have the lowest level of disturbance among the alternatives, but ongoing maintenance and access road use required by the Loup Loup transmission line and Valley Floor distribution line would continue to have minor impacts.

Overall, Alternative 2 would have the highest level of effect to vegetation, followed by Alternative 5. Alternative 1 would have the lowest level of effect on native vegetation followed by Alternatives 4, 6, and 7, and Alternative 3 (see Tables 3.5-6, 3.5-7, and 3.5-8).

The vegetation crossed by the alternative transmission corridors fails to meet the standard of statewide ecological significance, based on the widespread system of roads and the presence of noxious weeds and other non-native plant species along each of the alternative transmission corridors. However, a moderate effect would occur under Alternative 2 to vegetation of local importance. The shrub-steppe along the proposed Pateros/Twisp transmission corridor represents the largest blocks of shrub-steppe under public ownership in the Methow River Watershed. Some portions of vegetation, 10s to 100s of acres in size, were evaluated as class B.

Table 3.5-9. Structure, Laydown Area, and Substation-Related Disturbance by Alternative

Vegetation Type	Acreage of Disturbance by Alternative ^{1/}					
	2	3	4	5	6	7
Forested	0.1	0.8	1.4	0.4	1.3	1.4
Non-Forested	8.9	14.5	19.7	12.3	19.6	19.1
Total^{2/}	9.0	15.2	21.2	12.6	20.9	20.5

Note:

1/Calculations are based on 900 square feet of disturbance for structure installation, removal, or replacement and 1,200 square feet of disturbance for structure replacement in a hot rebuild. This table also includes 2.32 acres of disturbance from laydown areas under each alternative. Alternatives 2, 3, and 5 include 1.4 acres of substation-related disturbance and Alternative 6 includes 1.4 acres of temporary generation-related disturbance.

2/ Totals may not add up exactly and may differ slightly from other tables.

Valley Floor

Because of the much higher level of cultivation and development, including State Highway 153 and the existing distribution line, the Valley Floor corridor does not have any sizable areas that are weed free. Disturbed habitats and many opportunities for distribution are already present, including agriculture and heavy traffic on the highway. Several common species, including diffuse knapweed, kochia, Russian thistle, and mullien are found essentially throughout the area, and many other non-native species are widely distributed. The largest stretch of Alternative 3 that deviates from the valley floor crosses uplands between highway miles 8.8 and 11.8. This segment also includes weedy areas, with diffuse knapweed and whitetop, and abundant other non-native species, including cheatgrass. There would be only minor effects on noxious weeds in this alternative transmission corridor.

Pateros/Twisp

The Pateros/Twisp transmission corridor includes four areas that are relatively free of noxious weeds. The first area includes the ridge of Buckhorn Mountain, in the southern part of the corridor between approximately mile marker 2.2 and marker 5¹. The condition of the vegetation varies widely, sometimes over short distances, and while some areas are extremely weedy old fields, some patches on the order of 10 acres are both weed free and have high-quality vegetation. These are the rockiest and steepest areas where impacts of grazing were lower. Two new track roads requiring bladework are planned to extend into this area. Because of the condition of the vegetation within the small high-quality areas, effects to noxious weeds would be moderate. The disturbed habitat and potential vectors for weed dispersal increase the likelihood of noxious weed spread. Mitigation measures substantially reduce, but do not eliminate, this potential.

Another segment that is relatively free of noxious weeds is between mile markers 6.3 and 8. This area begins approximately 0.75 mile west of the Bill Shaw Road up to French Creek. However, this area has many areas of relatively poor-quality vegetation, with dense populations of non-native species like cheatgrass and bulbous bluegrass. An extensive track road requiring bladework is planned to follow the transmission line in this area. Because of the already disturbed condition of the vegetation, the effects to the native vegetation from increasing noxious weeds in this segment would be low. In addition, existing and future road-building and homesite development in this area may also introduce and/or spread weeds in this area.

A third segment that is relatively weed free is between mile markers 10 and 11. This area begins approximately 0.25 mile northwest of where the proposed line crosses Petes Creek and continues up to Morse Canyon. Small areas of the vegetation here are in good condition, though as in much of this area, effects of grazing are patchy. This area includes localized areas of intense impacts from cattle,

¹ Field mile markers were numbered 0 to 15 beginning at the Pateros switch along Watson Draw Road to the proposed substation near Gold Creek and renumbered starting at 100 from the proposed Gold Creek Substation site northwest to Twisp (e.g., 101, 102).

though overall the vegetation is in fairly good condition. An existing road requiring blading extends into the area, and short track roads are proposed. Because of the existing impacts of grazing, existing roads, and the small size of the areas of higher-quality vegetation, the effects to noxious weeds in this area would be low.

A fourth segment that is relatively weed free extends from mile marker 103 to 105.5. This area begins north of Texas Creek to Leecher Canyon. The vegetation in this area is quite high quality in localized areas, with patches of non-native species elsewhere. There is an existing road into the area and extensive track roads with blading proposed. There is also a recent observation of Scottish thistle in the vicinity of Texas Creek. Because of the condition of the vegetation, the relative absence of noxious weeds, and the extent of proposed track roads requiring some level of bladework, the effects on weeds in this segment would be moderate.

Overall, the effects on weeds of the alternatives that would include all or part of the proposed Pateros/Twisp transmission corridor would be moderate. Alternative 2, which includes all of this corridor, would have the highest level of effects on these areas. Alternative 5 would affect those areas in the southern portion of the corridor that extends from Pateros to the proposed substation site in the Gold Creek area.

Loup Loup

The proposed Loup Loup transmission corridor has weeds distributed principally in the lower elevations. While non-native plants are widespread in this area, and the ROW has been heavily impacted by the highway and the existing transmission line, the land north and south of the Loup Loup summit, approximately between towers 11 and 21², is relatively weed free. Noxious weeds generally do not compete well at these elevations and additional disturbance in these areas is unlikely to change weed populations substantially. This segment roughly corresponds to the forested portion of the corridor. Because of the well-developed road system and the existing non-native vegetation, the noxious weed effects of alternatives that include construction in this corridor would be low.

Summary by Alternative

It is likely that over time, under any of the alternatives, including Alternative 1, the distribution and abundance of noxious weeds in the project area will increase due to factors that are independent of the project. New exotic species continue to enter the state and the region and to enter ecosystems at rates that depend on the habitat requirements of the species and the mechanisms available for distribution. Part of this increase is independent of project activities, but ground disturbance and vehicular traffic are two project-related factors that may be related to noxious weed distribution. The levels of these activities can be used to compare effects of the alternatives on noxious weeds.

Considering disturbance from new road construction, proposed bladework on existing roads, condition of the vegetation, and the current distribution of noxious weeds, the potential effects of the alternatives are ranked as follows: Alternative 2 would have the highest level of effects, followed in descending order by Alternatives 5, 4, 6, and 7. Alternative 1—No Action would have the lowest level of effects to noxious weeds overall, though ground disturbance and vehicular traffic involved in maintaining transmission and distribution lines could still contribute to noxious weed spread.

The mitigation measures proposed in Section 4.5.3 would substantially reduce, but not eliminate entirely, noxious weed spread. Washing equipment and vehicles prior to entering weed free areas, controlling known populations of noxious weeds prior to construction, and carefully controlling the quality of any seed used for replanting would reduce the establishment of new populations. Careful monitoring and control of new occurrences after construction would inhibit development of new populations in previously noxious weed-free areas.

² Tower numbers roughly correspond to miles from the existing Okanogan Substation west.

An effect is considered significant for the purposes of this analysis if it causes any of the following:

- An adverse effect on a Federally listed species as determined through consultation with USFWS and NOAA Fisheries under Section 7 of the ESA.
- Substantial adverse effects to essential fish habitat (EFH) as regulated under the Magnuson Stevens Act.
- Substantial adverse effects on RHCAs of fish habitat that would prevent attainment of RMOs identified under PACFISH.
- A regional adverse effect on populations, habitat, or viability of listed fish species or species of concern that would lead to a change in their status under ESA.

3.7.2.2 Delivery of Sediment to Streams

Anadromous fish and bull trout are sensitive to increased sediment delivery to streams due to the potential effects of sediment on water quality, habitat complexity, and spawning gravel. Changes in water quality due to sediment input are measured by turbidity (the fine sediment load suspended in water) and can directly affect fish gill function and impair feeding through reduced visibility. Sediment also fills the spaces between spawning gravel and reduces the survival of eggs. Fine sediment can affect essential food resources for fish, such as aquatic invertebrates, by smothering their habitat and reducing the availability of larger substrate for colonization.

The following discussion assesses potential increases in sediment delivery by alternative in terms of estimated ground disturbance and the number of road/stream crossings.

Ground Disturbance

Ground disturbance would occur where transmission or distribution structures would be installed, removed, or replaced and in areas where new or existing track roads would be improved. There would also be disturbance associated with the construction laydown areas, which would be the same under all of the action alternatives, the new substation site proposed under Alternatives 2, 3, and 5, and the temporary generation facility proposed under Alternative 6. Projected ground disturbance for each alternative is shown in Table 2-23. Ongoing routine system maintenance under existing decisions and permits would continue under all of the alternatives, including Alternative 1. Small amounts of ground disturbance would continue to occur as part of these maintenance activities, resulting in minor effects to fish habitat that would be consistent across all alternatives.

Total estimated ground disturbance ranges from 17.6 acres under Alternative 3 to 37.7 acres under Alternative 2. Alternative 5 would result in 28.2 acres of total estimated disturbance, while Alternatives 4, 6, and 7 would disturb an estimated 21.4, 21.1, and 20.7 acres, respectively (Table 2-23). Estimated disturbance within 300 feet of a stream ranges from 2.8 acres under Alternative 2 to 9.3 acres under Alternatives 4 and 7. Alternative 6 would disturb an estimated 8.9 acres within 300 feet of a stream, while Alternatives 3, 5, and 2 would disturb approximately 5.7, 4.7, and 2.8 acres, respectively (Table 3.3-3)

Alternative 2 has the highest level of estimated disturbance among the alternatives, with the majority of this disturbance associated with road improvements (Table 2-23). Under this alternative, there would be two structures between 50 feet and 150 feet from the Methow River that would need work and three structures from 150 to 300 feet from the river that would need work (Tetra Tech, 2004b). This disturbance would produce few direct effects to fish species in the Methow River and its tributaries due to the distance of the line construction and road work from these waters.

Alternative 3 has the lowest level of estimated disturbance among the action alternatives because it is almost entirely along existing roads that would not require improvement. There would, however, be

Appendix 2

ENABLING ACT

AN ACT to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.

(Approved February 22, 1889.) [25 U.S. Statutes at Large, c 180 p 676.]
[President's proclamation declaring Washington a state: 26 St. at Large, Proclamations, p 10, Nov. 11, 1889.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

SEC. 2. The area comprising the Territory of Dakota shall, for the purposes of this act, be divided on the line of the seventh standard parallel produced due west to the western boundary of said Territory; and the delegates elected as hereinafter provided to the constitutional convention in districts north of said parallel shall assemble in convention, at the time prescribed in this act, at the city of Bismarck; and the delegates elected in districts south of said parallel shall, at the same time, assemble in convention at the city of Sioux Falls.

SEC. 3. That all persons who are qualified by the laws of said Territories to vote for representatives to the legislative assemblies thereof, are hereby authorized to vote for and choose delegates to form conventions in said proposed States; and the qualifications for delegates to such conventions shall be such as by the laws of said Territories respectively persons are required to possess to be eligible to the legislative assemblies thereof; and the aforesaid delegates to form said conventions shall be apportioned within the limits of the proposed States, in such districts as may be established as herein provided, in proportion to the population in each of said counties and districts, as near as may be, to be ascertained at the time of making said apportionments by the persons hereinafter authorized to make the same, from the best information obtainable, in each of which districts three delegates shall be elected, but no elector shall vote for more than two persons for delegates to such conventions; that said apportionments shall be made by the governor, the chief-justice, and the secretary of said Territories; and the governors of said Territories shall, by proclamation, order an election of the delegates aforesaid in each of said proposed States, to be held on the Tuesday after the second Monday in May, eighteen hundred and eighty-nine, which proclamation shall be issued on the fifteenth day of April, eighteen hundred and eighty-nine; and such election shall be conducted, the returns made, the result ascertained, and the certificates to persons elected to such convention issued in the same manner as is prescribed by the laws of the said Territories regulating elections therein for Delegates to Congress; and the number of votes cast for delegates in each precinct shall also be returned. The number of delegates to said conventions

respectively shall be seventy-five; and all persons resident in said proposed States, who are qualified voters of said Territories as herein provided, shall be entitled to vote upon the election of delegates, and under such rules and regulations as said conventions may prescribe, not in conflict with this act, upon the ratification or rejection of the constitutions.

SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby, authorized to form constitutions and States governments for said proposed states, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

Enabling Act

articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed States are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed States which have adopted constitutions and formed State governments as herein provided shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation.

SEC. 9. That until the next general census, or until otherwise provided by law, said States shall be entitled to one Representative in the House of Representatives of the United States, except South Dakota, which shall be entitled to two; and the Representatives to the fifty-first Congress, together with the governors and other officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the constitutions; and until said State officers are elected and qualified under the provisions of each constitution and the States, respectively, are admitted into the Union, the Territorial officers shall continue to discharge the duties of their respective offices in each of said Territories.

SEC. 10. That upon the admission of each of said States into the Union sections numbered sixteen and thirty-six in every township of said proposed States, and where such sections, or any parts thereof, have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said States for the support of common schools, such indemnity lands to be selected within said States in such manner as the legislature may provide, with the approval of the Secretary of the Interior: *Provided*, That the sixteenth and thirty-sixth sections embraced in permanent reservations for national purposes shall not, at any time, be subject to the grants nor to the indemnity provisions of this act, nor shall any lands embraced in Indian, military, or other reservations of any character be subject to the grants or to the indemnity provisions of this act until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain.

SEC. 11. That all lands herein granted for educational purposes shall be disposed of only at public sale, and at a price not less than ten dollars per acre, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of said schools. But said lands may, under such regulations as the legislatures shall prescribe, be leased for periods of not more than five years, in quantities not exceeding one section to any one person or company; and such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

Reviser's note: Section 11 has at various times been amended by Congress as follows:

(2008 Ed.)

(1) August 11, 1921:

AN ACT To amend an Act approved February 22, 1889, entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 11 of the Act entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States," approved February 22, 1889, be, and the same hereby is, amended by adding the following: *Provided, however*, That the State may, upon such terms as it may prescribe, grant such easements or rights in such lands as may be acquired in, to, or over the lands of private properties through proceedings in eminent domain: *And provided further*, That any of such granted lands found, after title thereto has vested in the State, to be mineral in character, may be leased for a period not longer than twenty years upon such terms and conditions as the legislature may prescribe. [42 U.S. Statutes at Large, c 61 p 158. Approved, August 11, 1921.]

(2) May 7, 1932:

AN ACT To amend section 11 of the Act approved February 22, 1889 (25 Stat. 676), relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 11 of the Act approved February 22, 1889 (25 Stat. 676), be, and the same is hereby, amended to read as follows:

"That all lands granted by this Act shall be disposed of only at public sale after advertising - tillable lands capable of producing agricultural crops for not less than \$10 per acre and lands principally valuable for grazing purposes for not less than \$5 per acre. Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to surveyed, nonmineral, unreserved public lands of the United States within the State.

"The said lands may be leased under such regulations as the legislature may prescribe; but leases for grazing and agricultural purposes shall not be for a term longer than five years; mineral leases, including leases for exploration for oil and gas and the extraction thereof, for a term not longer than twenty years; and leases for development of hydroelectric power for a term not longer than fifty years.

"The State may also, upon such 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: *Provided, however*, That none of such lands, nor any estate or interest therein, shall ever be disposed of except in pursuance of general laws providing for such disposition, nor unless the full market value of the estate or interest disposed of, to be ascertained in such manner as may be provided by law, has been paid or safely secured to the State.

"With the exception of the lands granted for public buildings, the proceeds from the sale and other permanent disposition of any of the said lands and from every part thereof, shall constitute permanent funds for the support and maintenance of the public schools and the various State institutions for which the lands have been granted. Rentals on leased lands, interest on deferred payments on lands sold, interest on funds arising from these lands, and all other actual income, shall be available for the maintenance and support of such schools and institutions. Any State may, however, in its discretion, add a portion of the annual income to the permanent funds.

"The lands hereby granted shall not be subject to preemption, homestead entry, or any other entry under the land laws of the United States whether surveyed or unsurveyed, but shall be reserved for the purposes for which they have been granted."

SEC. 2. Anything in the said Act approved February 22, 1889, inconsistent with the provisions of this Act is hereby repealed. [47 U.S. Statutes at Large c 172 p 150. Approved, May 7, 1932.]

(3) June 25, 1938:

AN ACT To increase the period for which leases may be made for grazing and agricultural purposes of public lands donated to the States of

Enabling Act

North Dakota, South Dakota, Montana, and Washington by the Act of February 22, 1889, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the second paragraph of section 11 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, as amended, as reads "but leases for grazing and agricultural purposes shall not be for a term longer than five years", is amended to read as follows: "but leases for grazing and agricultural purposes shall not be for a term longer than ten years". [52 U.S. Statutes at Large c 700 p 1198. Approved, June 25, 1938.]

(4) April 13, 1948:

AN ACT To authorize the States of Montana, North Dakota, South Dakota, and Washington to lease their State lands for production of minerals, including leases for exploration for oil, gas, and other hydrocarbons and the extraction thereof, for such terms of years and on such conditions as may be from time to time provided by the legislatures of the respective States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the second paragraph of section 11 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, as amended, is amended to read as follows: "Except as otherwise provided herein, the said lands may be leased under such regulations as the legislature may prescribe. Leases for the production of minerals, including leases for exploration for oil, gas, and other hydrocarbons and the extraction thereof, shall be for such term of years and on such conditions as may be from time to time provided by the legislatures of the respective States; leases for grazing and agricultural purposes shall be for a term not longer than ten years; and leases for development of hydroelectric power shall be for a term not longer than fifty years." [62 U.S. Statutes at Large c 183 p 170. Approved April 13, 1948.]

(5) June 28, 1952:

AN ACT To authorize each of the States of North Dakota, South Dakota, and Washington to pool moneys derived from lands granted to it for public schools and various State institutions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fourth paragraph of section 11 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, as amended (47 Stat. 151), is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this section, each of the States of North Dakota, South Dakota, and Washington may pool the moneys received by it from oil and gas and other mineral leasing of said lands. The moneys so pooled shall be apportioned among the public schools and the various State institutions in such manner that the public schools and each of such institutions shall receive an amount which bears the same ratio to the total amount apportioned as the number of acres (including any that may have been disposed of) granted for such public schools or for such institutions bears to the total number of acres (including any that may have been disposed of) granted by this Act. Not less than 50 per centum of each such amount shall be covered into the appropriate permanent fund." [66 U.S. Statutes at Large c 480 p 283. Approved June 28, 1952.]

(6) May 31, 1962:

AN ACT To amend the Act admitting the State of Washington into the Union in order to authorize the use of funds from the disposition of certain lands for the construction of State charitable, educational, penal, or reformatory institutions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States and to make donations of public lands to such States", approved February 22, 1889 (25 Stat. 676, as amended), is amended by inserting before the period at the end of the first sentence in the fourth paragraph of section 11 a comma and the following: "except that proceeds from the sale and other permanent disposition of the two hundred thousand acres granted to the State of Washington for State charitable, educational, penal, and reformatory institutions may be used by such State for the construction of any such institution". [Public Law 87-473. 76 U.S. Statutes at Large p 91. Approved May 31, 1962.]

(7) June 30, 1967:

[Vol. 0 RCW—page 20]

AN ACT To authorize the States of North Dakota, South Dakota, Montana, and Washington to use the income from certain lands for the construction of facilities for State charitable, educational, penal, and reformatory institutions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second sentence of the fourth paragraph of section 11 of the Act entitled "An Act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States", approved February 22, 1889 (25 Stat. 676), as amended, is amended to read as follows: "Rentals on leased land, proceeds from the sale of timber and other crops, interest on deferred payments on land sold, interest on funds arising from these lands, and all other actual income, shall be available for the acquisition and construction of facilities, including the retirement of bonds authorized by law for such purposes, and for the maintenance and support of such schools and institutions." [Public Law 90-41. 81 U.S. Statutes at Large p 106. Approved June 30, 1967.]

(8) October 16, 1970:

AN ACT To amend section 11 of the Act approved February 22, 1889 (25 Stat. 676) as amended by the Act of May 7, 1932 (47 Stat. 150), and as amended by the Act of April 13, 1948 (62 Stat. 170) relating to the admission to the Union of the States of North Dakota, South Dakota, Montana, and Washington, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the second sentence of the first paragraph of section 11 of the Act approved February 22, 1889 (25 Stat. 676), as amended by the Act of May 7, 1932 (47 Stat. 150), is hereby amended to read as follows:

"Any of the said lands may be exchanged for other lands, public or private, of equal value and as near as may be of equal area, but if any of the said lands are exchanged with the United States such exchange shall be limited to Federal lands that are surveyed, nonmineral, unreserved public lands within the State, or are reserved public lands within the State that are subject to exchange under the laws governing the administration of such Federal reserved public lands."

and that a new paragraph be added immediately following the above, as follows:

"All exchanges heretofore made under section 11 of the Act approved February 22, 1889 (25 Stat. 676), as amended by the Act approved May 7, 1932 (47 Stat. 150), for reserved public lands of the United States that were subject to exchange under law pursuant to which they were being administered and the requirements thereof have been met, are hereby approved to the same extent as though the lands exchanged were unreserved public lands." and that the present paragraph 2 of section 11 be amended to read as follows:

"The said lands may be leased under such regulations as the legislature may prescribe." [Public Law 91-463. 84 U.S. Statutes at Large p 987. Approved October 16, 1970.]

SEC. 12. That upon the admission of each of said States into the Union, in accordance with the provisions of this act, fifty sections of the unappropriated public lands within said States, to be selected and located in legal subdivisions as provided in section ten of this act, shall be, and are hereby, granted to said States for the purpose of erecting public buildings at the capital of said States for legislative, executive, and judicial purposes.

Reviser's note: Section 12 has been amended by Congress as follows:

AN ACT To amend section 12 of the Act approved February 22, 1889 (25 Stat. 676) relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, by providing for the use of public lands granted to the States therein for the purpose of construction, reconstruction, repair, renovation, furnishings, equipment, or other permanent improvement of public buildings at the capital of said States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 12 of the Act relating to the admission into the Union of the States of North Dakota, South Dakota, Montana, and Washington, approved February 22, 1889, is amended to read as follows:

(2008 Ed.)



FILED

APR 25 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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,

v.

CHRISTINE DAVIS, a single person;
TREVOR KELPMAN, a single person;
DAN GEBBERS and REBA GEBBERS,
husband and wife; and WILLIAM C.
WEAVER, Custodian for Christopher C.
Weaver, a minor; and,

Respondents.

COURT OF APPEALS NOS. 29121-9-
III AND 29123-5-III

DECLARATION OF SERVICE

1 STATE OF WASHINGTON)
2 COUNTY OF KING) ss.

3 I, Mary Barber, under penalty of perjury under the laws of the State of Washington,
4 declare as follows:

5 I am the legal assistant for Gendler & Mann, LLP, attorneys for appellant herein.

6 On the date and in the manner indicated below, I caused Conservation Northwest's

7 Opening Brief to be served on:

9 Michael D. Howe
10 10 Valley View Park Drive
11 Omak, WA 98841
(Attorneys for Respondent/Cross-
Appellant)

12 [x] By United States Mail
13 [] By Legal Messenger
14 [] By Facsimile
15 [] By Federal Express/Express Mail
16 [x] By Electronic Mail
mhowe@ncidata.com

17 P. Stephen DiJulio
18 Adrian Winder
19 Foster Pepper PLLC
20 1111 3rd Ave., Ste. 3400
Seattle, WA 98101-3264
(Attorneys for Respondent/Cross-
Appellant)

21 [x] By United States Mail
22 [] By Legal Messenger
23 [] By Facsimile
24 [] By Federal Express/Express Mail
25 [x] By Electronic Mail
DiJup@foster.com
WindA@foster.com

William Weaver
2850 Sunnygrove Ave.
McKinleyville, CA 95519

[x] By United States Mail
[] By Legal Messenger
[] By Facsimile
[] By Federal Express/Express Mail
[] By Electronic Mail

Jay Arthur Johnson
Davis, Arniel Law Firm, LLP
PO Box 2136
Wenatchee, WA 98807-2136
(Attorneys for Respondents Gebbers)

[x] By United States Mail
[] By Legal Messenger
[] By Facsimile
[] By Federal Express/Express Mail
[x] By Electronic Mail
jay@dadkp.com

1 Richard W. Pierson
2 Williams & Williams, PSC
3 18806 Bothell Way N.E.
4 Bothell, WA 98011
5 (Attorneys for Respondents Gebbers)

6 [x] By United States Mail
7 [] By Legal Messenger
8 [] By Facsimile
9 [] By Federal Express/Express Mail
10 [x] By Electronic Mail
11 rwp@williamspsc.com

Paul J. Lawrence
Sarah C. Johnson
Pacifica Law Group, LLP
1191 Second Ave., Suite 2100
Seattle, WA 98101
(Attorneys for State of Washington and
Peter Goldmark)

[x] By United States Mail
[] By Legal Messenger
[] By Facsimile
[] By Federal Express/Express Mail
[x] By Electronic Mail
Paul.lawrence@pacificallawgroup.com
Sarah.johnson@pacificallawgroup.com

12 DATED this 23rd day of April, 2012, at Seattle, Washington.

13
14 Mary Barber
15 Mary Barber