

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Dec 12, 2013, 3:46 pm
BY RONALD R. CARPENTER
CLERK

No. 88949-0

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

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, Intervenor, a non-
profit corporation,

Appellants/Cross-Respondents.

APPELLANT/CROSS-RESPONDENT CONSERVATION
NORTHWEST'S SUPPLEMENTAL BRIEF

David S. Mann, WSBA # 21068
GENDLER & MANN, LLP
936 N. 34th St., Suite 400
Seattle, WA 98103
(206) 621-8868
Attorney for Appellant/Cross-Respondent
Conservation Northwest

 ORIGINAL

TABLE OF CONTENTS

I. Introduction	1
II. The Court of Appeals Erred in Failing to Recognize Constitutional Protections for School Lands.....	3
A. The Court of Appeals' interpretation of the PUD's condemnation authority in RCW 54.16.050 ignores the Constitution and Enabling Act's limitations on disposition of trust lands	4
B. A correct interpretation of the condemnation authority provides meaning to every word in RCW 54.16.050 and harmonizes this statute with controlling authority	9
1. The PUD's authority to "condemn and purchase" school lands only applies when the State approves condemnation, thereby removing such lands from dedication to a public use	9
2. Restricting condemnation to voluntarily condemned school lands harmonizes RCW 54.16.050, the Washington Constitution, and other prevailing authority	11
III. Conclusion.....	13

TABLE OF AUTHORITIES

Cases

<i>City of Seattle v. State</i> , 54 Wn.2d 139, 338 P.2d 126 (1959).....	8
<i>City of Tacoma v. State</i> , 121 Wash. 448, 209 P. 700 (1922)	4, 8
<i>In re Elliott</i> , 74 Wn.2d 600, 446 P.2d 347 (1968).....	11
<i>O'Brien v. Wilson</i> , 51 Wash. 52, 97 P. 1115 (1908)	4, 5, 8
<i>Pierce County v. State</i> , 144 Wn. App. 783, 185 P.3d 594 (2008).....	9
<i>Pub. Util. Dist. No. 1 of Okanogan Cnty. v. State</i> , 174 Wn. App. 793, 301 P.3d 472 (2013).....	3, 5, 8, 9, 10, 11
<i>Roberts v. City of Seattle</i> , 63 Wash. 573, 116 P. 25 (1911)	4, 8, 10, 11
<i>State v. Lessley</i> , 118 Wn.2d 773, 827 P.2d 996 (1992).....	11
<i>United States v. 111.2 Acres of Land, More or Less, in Ferry County, Wash.</i> , 293 F. Supp. 1042 (E.D. Wash. 1968).....	8

Statutes

Washington Enabling Act § 11, 25 Stat. 676 (1889).....	passim
RCW 54.16.050	passim

RCW 79.02.010(14)	10
RCW 79.02.010(14)(h).....	4
RCW 79.10.100	12
RCW 79.11.020	12
RCW 79.13.010(1)	12
RCW 79.36.355	12
RCW 79.36.510	12
Const. art. XVI, § 1.....	1, 6
Const. art. XVI, § 2.....	6

Other Authorities

Op. Att’y Gen. 11 (1996) (Question 1)	6
16 Am.Jur.2d Constitutional Law s 144 at 345 (1964)	11

I. Introduction

The massive block of school lands that would be impacted by the Public Utility District No. 1 of Okanogan County's ("PUD") proposed transmission line and road system is the largest publically owned tract of shrub-steppe habitat in the Methow Valley. Composed of fragile and complex plant communities of sagebrush and bitterbrush, shrub-steppe habitat is a rapidly dwindling icon of the American West. The school lands at issue are not only ecologically vital; they have an important status in Washington history. The Enabling Act reserves such school lands for "school purposes only," and under the Washington Constitution, the Department of Natural Resources ("DNR") holds the school lands "in trust for all the people." Washington Enabling Act § 11, 25 Stat. 676 (1889), amended by Act of August 11, 1921, 42 Stat. 158, and Act of May 7, 1932, 47 Stat. 150; Wash. Const. art. XVI, §1.

Conservation Northwest ("CNW") is an environmental non-profit organization whose members have spent the last twenty-four years fighting for the careful management and protection of state lands, including school lands. CNW intervened in support of the DNR to protect this rare shrub-steppe habitat from a 24 mile-long transmission line and dozens of miles of dirt access roads which would slice and fragment pristine wildlife habitat and compromise the integrity of adjacent DNR

land. CNW also intervened because the PUD's condemnation impacts the interests of all Washingtonians by charting an unprecedented intrusion into the management of school lands. School lands like those at issue in this case are spread throughout the State of Washington, from the shrub-steppe of the Methow Valley to old growth forests on the Olympic Peninsula, and they provide a variety of ecological, recreational, and economic uses.

As stated in briefing below, CNW argues that the state school lands are held in a **public** trust for the benefit of all present and future generations of Washingtonians and cannot be condemned by a public utility district without the State's consent. CNW's and DNR's defense of school lands in the Methow Valley is particularly warranted because the EIS for the Methow Transmission Project identified two existing alternative state highway corridors in which a new transmission line could be built that meets the same electrical performance and needs without condemnation.¹

Piece-meal condemnation of school lands for transmission lines usurps DNR's constitutional and statutory authority to manage and protect these lands. DNR's decision that the PUD-paid condemnation award does not make the school lands whole is also entitled to deference. DNR is

¹ The relevant pages of the EIS, as well as the Enabling Act, are attached as Appendix 1 to CNW's Opening Brief at the Court of Appeals.

entitled to deference to conclude that dozens of miles of new PUD roads, public access, and fire risks outweigh any monetary condemnation award or easement fee it would receive. DNR-granted easements are the legal and appropriate way that the PUD should seek to build transmission lines.

CNW respectfully requests that this Court reverse the Court of Appeals and hold that the school lands at issue in this case are dedicated to a public use as a matter of law, are under the exclusive management of DNR, and that these trust lands may not be condemned by the PUD unless consented to by DNR. To the extent RCW 54.16.050 is interpreted to provide the authority for the PUD to condemn “school lands,” it is ultra vires. CNW relies on its briefing below and limits the following supplemental briefing to addressing errors in the Court of Appeals’ analysis. This Court should correct the Court of Appeals’ errors by either declaring the condemnation authority of RCW 54.16.050 ultra vires, or interpreting RCW 54.16.050 so as to fall within the limits of the Constitution and Enabling Act.

II. The Court of Appeals Erred in Failing to Recognize Constitutional Protections for School Lands.

The Court of Appeals’ fundamental error was its determination that the State’s constitutionally mandated trust relationship to school lands does not limit the PUD’s authority to condemn those lands. *See Pub. Util.*

Dist. No. 1 of Okanogan Cnty. v. State, 174 Wn.2d 793, 806, 301 P.3d 472 (2013). To the contrary, the public trust status of these lands renders these lands “dedicated to a public use” as a matter of law and therefore not school lands subject to condemnation. *City of Tacoma v. State*, 121 Wash. 448, 452, 209 P. 700 (1922); RCW 79.02.010(14)(h). The Constitution and Enabling Act prescribe specific and exclusive means of selling school lands, which do not include involuntary condemnation. The Court of Appeals further erred by ignoring the possibility that school lands may be condemned and sold at public sale with the consent of the State, as was the case in *Roberts v. City of Seattle*, 63 Wash. 573, 116 P. 25 (1911). A correct reading of RCW 54.16.050, accounting for the voluntary condemnation circumstance of *Roberts*, gives every word of the condemnation statute meaning and harmonizes State and Federal authority.

A. The Court of Appeals’ interpretation of the PUD’s condemnation authority in RCW 54.16.050 ignores the Constitution and Enabling Act’s limitations on disposition of trust lands.

The Court of Appeals’ interpretation of RCW 54.16.050 is incorrect because it permitted the PUD’s purported condemnation authority over “school lands” in RCW 54.16.050 to trump the Washington Constitution and Federal Enabling Act. That reading conflicts with

O'Brien v. Wilson, where the Washington Supreme Court held that an adverse possession statute cannot allow acquisition of school lands because authority to acquire school lands against the will of the State would be “repugnant to the laws of the United States and the Constitution of the state.” *O'Brien v. Wilson*, 51 Wash. 52, 58, 97 P. 1115 (1908).

The Constitution and Enabling Act provisions impose a public trust obligation upon the State and specifically restrict the manner in which the State may sell its lands.² To the extent a condemnation statute conflicts with these provision provisions, it is ultra vires. The Enabling Act granted public lands to the State with a straight-forward obligation: that those lands would be “reserved for school purposes only,” and that “all lands herein granted for educational purposes shall be disposed of only at public sale.” Washington Enabling Act § 11, 25 Stat. 676 (1889), amended by Act of August 11, 1921, 42 Stat. 158, and Act of May 7, 1932, 47 Stat. 150. The drafters reiterated that sale was to be the sole means of disposition by requiring that “such land shall not be subject to pre-emption, homestead entry, or any other entry under the land laws of the United States.” *Id.* While the Court of Appeals was correct that school lands are subject to general statutory authority, *Pub. Util. Dist. No. 1 of Okanogan Cnty. v. State*, 174 Wn. App. at 806, according to the

² CNW provided a detailed history and analysis of the public trust in its opening brief on appeal to the Court of Appeals, *see* pages 9-38.

Washington Attorney General's Office, the "terms of Washington's Enabling Act are binding upon the state and cannot be infringed by state legislative acts." Op. Att'y Gen. 11 (1996) (Question 1).

The Washington Constitution reflects the seriousness with which the State framers took the Enabling Act's mandate for school lands. The Constitution requires that DNR hold these lands "in trust for all of the people." Const. art. XVI, § 1. The framers allowed sale of trust lands, but only under prescribed conditions which would allow discretion and control to managing State officials. Const. art. XVI, §§ 1, 2. Specifically, the Constitution has three requirements for disposition of trust lands. First, the State must gain at least full market value. Const. art. XVI, § 1. Second, if the lands were received by grant from the United States, the disposition must follow the granting statute (the Enabling Act). Const. art. XVI, § 1. Third, "None of the lands granted to the state for educational purposes shall be sold otherwise than at public auction to the highest bidder." Const. art. XVI, § 2.

Taken together, the provisions of the Constitution and the Enabling Act demonstrate that the State holds school lands in public trust and may transfer or utilize school lands **only** when the State, through DNR, elects to use, sell, lease or harvest products from these lands in furtherance of its public trust obligations. The Legislature has recognized DNR's obligation

and authority in setting forth a detailed scheme under which DNR carries out land sales in accordance with the Constitution and Enabling Act. *See* Chapter RCW 79.11 *et seq.* As a result of this foundational legal authority, the PUD cannot seize, fragment, and repurpose the school lands at issue in this case for its short-term benefit. Rather, DNR holds these lands in trust for the State and has the broad discretion to manage them for a variety of factors, including providing monetary benefit for the beneficiaries and general natural resource and conservation benefits for the State in general.

Here, public trust requirements obligate the Commissioner of Public Lands to consider a broad variety of benefits and impacts of the PUD's proposed transmission line, including the value of the remaining public shrub-steppe habitat, the costs of maintaining and policing new PUD roads, the impacts of increased all-terrain-vehicle traffic on these lands, the cost of rampant noxious weed spreading from the PUD's roads, and the potentially immense future cost of habitat restoration. The DNR is entitled to conclude that the costs the PUD seeks to shift onto the DNR will dwarf any one-time monetary condemnation award.

The Court of Appeals further erred by equating the State's ability to sell school lands with permission for outside parties to condemn those lands. To the contrary, the sale provisions in the Constitution and Enabling Act are the exclusive means of disposal of school lands. Where these

restrictions conflict with state legislation allowing condemnation, the condemnation statute must yield. *See, e.g., United States v. 111.2 Acres of Land, More or Less, in Ferry County, Wash.*, 293 F. Supp. 1042, 1048-49 (E.D. Wash. 1968); *O'Brien v. Wilson*, 51 Wash. 52, 97 P. 1115 (1908).

The Court of Appeals relied on *Roberts v. City of Seattle*, 63 Wash. 573, 116 P. 25 (1911) for the principle that “devotion to the purpose of education is insufficient to prevent condemnation,” *Pub. Util. Dist. No. 1 of Okanogan Cnty. v. State*, 174 Wn. App. at 803. But the Court’s summation of *Roberts* misses the crucial factual predicate in that case: in *Roberts*, the State **consented** to the street condemnation by the University of Washington and a third party challenged the State’s right to concede to the condemnation. Read carefully, *Roberts* only demonstrates that condemnation may occur when the State concedes that condemnation of its school lands is in the public interest and approves condemnation. This approval removes the lands from dedication to a public use and allows an ensuing public sale to comply with the Constitution and Enabling Act.³

³ The Court of Appeals also cited *City of Seattle v. State*, 54 Wn.2d 139, 338 P.2d 126 (1959) and *City of Tacoma v. State*, 121 Wash. 448, 209 P. 700 (1922) for the principle that school lands are subject to condemnation. *Pub. Util. Dist. No. 1 of Okanogan Cnty. v. State*, 174 Wn. App. at 803-04. However, both of these cases rely on *Roberts* without discussion and the cases’ holdings are distinguishable from the case at bar. *City of Seattle* only pertained to condemnation of lands “not presently dedicated to a public use,” *id.* at 141, and so is inapposite. In *City of Tacoma*, the restrictions of the Constitution or Enabling Act were not before the Court, as the State only raised affirmative defenses related to factual findings on compatibility of uses. 121 Wash. at 451 (listing affirmative defenses at issue).

B. A correct interpretation of the condemnation authority provides meaning to every word in RCW 54.16.050 and harmonizes this statute with controlling authority.

The Court of Appeals' interpretation of RCW 54.16.050 misapplied the statutory construction rule against reading a statute to have superfluous terms. *See Pub. Util. Dist. No. 1 of Okanogan Cnty. v. State*, 174 Wn. App. at 807 (citing *Pierce County v. State*, 144 Wn. App. 783, 852, 185 P.3d 594 (2008)). CNW asks the Supreme Court to rectify this mistake by limiting condemnation of school lands by the PUD to instances in which the State approves condemnation and provides public sale in accordance with its public trust obligations.⁴ This reading gives meaning to every word in RCW 54.16.050 while harmonizing controlling authority relating to DNR's administration of the public trusts.

1. The PUD's authority to "condemn and purchase" school lands only applies when the State approves condemnation, thereby removing such lands from dedication to a public use.

The Court of Appeals' analysis of the trust status of the school lands turned on the terms "condemn" and "state lands" in RCW 54.16.050. The Court noted that RCW 54.16.050 purports to give the PUD power to "take, condemn and purchase, purchase and acquire" state lands, including

⁴ *See* CNW Reply Br. at 8-12 discussing statutory provisions regarding sale of trust lands and DNR's discretion in managing such sales. CNW argued below that the Constitution restricted disposition of land to public sale, but did not explicitly discuss voluntary condemnation as the issue arises in response to the Court of Appeals' reasoning.

school lands, as the term “state lands” is defined in RCW 79.02.010(14). Consequently, the court reasoned that if all school lands were “dedicated to a public use” as a matter of law and not subject to the PUD’s condemnation authority, then the inclusion of the word “condemn,” as it applies to school lands in the citizen initiative that created RCW 54.16.050, would be superfluous. *See Pub. Util. Dist. No. 1 of Okanogan Cnty. v. State*, 174 Wn. App. at 807.

While initially seductive, the court’s analysis is incorrect because it fails to recognize that school lands are subject to condemnation where the State approves such condemnation. Acknowledging these limited circumstances gives meaning to the word “condemn” in RCW 54.16.050 and addresses the court’s concerns about rendering statutory terms superfluous. For example, in *Roberts v. City of Seattle*, 63 Wash. 573, 116 P. 25 (1911), which preceded the enactment of RCW 54.16.050, the Court’s conclusion that state school lands could be condemned by Seattle was predicated on the critical fact that the sale occurred only after the State approved the condemnation and participated in an appraisal process that “had all the elements of a public sale.” *Roberts*, 63 Wash. at 576.

///

///

2. Restricting condemnation to voluntarily condemned school lands harmonizes RCW 54.16.050, the Washington Constitution, and other prevailing authority.

The Court of Appeals mistakenly believed that it was compelled by the statutory rule of construction against superfluous terms to read RCW 54.16.050 in a manner that allows condemnation of school lands dedicated to a public use. *See Pub. Util. Dist. No. 1 of Okanogan Cnty. v. State*, 174 Wn. App. at 807. Freed of that constraint, and faced with alternative interpretations of the statute's text, this Court must interpret RCW 54.16.050 in such a manner so as to avoid conflict with the State Constitution, *In re Elliott*, 74 Wn.2d 600, 608, 446 P.2d 347 (1968) (citing 16 Am.Jur.2d Constitutional Law s 144 at 345 (1964)), and to harmonize the statute with other legislation on the same subject. *State v. Lessley*, 118 Wn.2d 773, 781, 827 P.2d 996 (1992).

By allowing for condemnation on the condition of State approval (thereby releasing the land from public use), RCW 54.16.050 would respect the State's role as overseer of the federally granted lands, in accordance with Art. XVI of the State Constitution. The requirement to have a public sale after such condemnation both accords with the text of RCW 54.16.050 ("condemn and purchase") and with the Constitution's and Enabling Act's strict requirements on disposition of school lands.

CNW's reading of RCW 54.16.050 also harmonizes state statutes setting forth DNR's management goals and procedures. The Legislature clearly stated that DNR "shall exercise general supervision and control over for the sale for any purpose of land granted to the state for educational purposes." RCW 79.11.020. RCW Chapter 79.15 *et seq.* permits DNR to sell natural resources from its lands under strictly limited conditions and RCW 79.10.100 requires management for multiple uses "where such a concept is in the best interests of the state and the general welfare of the citizens thereof." Furthermore, DNR has the authority to sell easements across school lands. *See* RCW 79.13.010(1); RCW 79.36.355; RCW 79.36.510. Interpreting the PUD's condemnation authority to only authorize condemnation and sale after DNR approval would allow DNR to retain "supervision and control" over sale of lands, RCW 79.11.020, and allow DNR to retain its necessary managerial discretion.

III. Conclusion

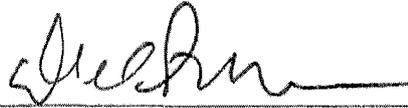
The federally-sourced school lands managed by DNR are held in **public** trust for all people and therefore are "dedicated to a public use" as a matter of law. DNR has the exclusive right to manage these trusts in the best interest of current and future generations of Washingtonians. The Court of Appeals' interpretation of RCW 54.16.050 permits the PUD's

authority to exceed the limitations provided in the State Constitution and federal law. RCW 54.16.050 cannot be interpreted to allow a PUD to usurp DNR's constitutional and statutory authority to protect its school lands from waste and to thoughtfully manage its lands for multiple uses over the long term consistent with the interests of the trust beneficiaries and the general public. Accordingly, CNW respectfully requests that this Court reverse the Court of Appeals and declare the school lands at issue beyond the reach of RCW 54.16.050.

DATED this 12th Day of December, 2013.

Respectfully submitted,

GENDLER & MANN, LLP

A handwritten signature in black ink, appearing to read "David S. Mann", written over a horizontal line.

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