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DIVISION II

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STATE OF WASHINGTON

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No. 47655-0-II
(Jefferson County Superior Court #14-2-00156-7)
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

HOOD CANAL SAND AND GRAVEL, LLC,
Appellant,

vs.

PETER GOLDMARK, et al.,
Respondents.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

1. DNR’S ARGUMENTS REGARDING HCSG’S FUTURE INTEREST IN A LEASE IS A RED HERRING; THE ISSUE BEFORE THIS COURT IS DNR’S LACK OF STATUTORY AUTHORITY TO GRANT THE EASEMENT 1

II. DNR’S READING OF RCW 79.36.355 WOULD ALLOW IT TO CONVEY ANY PUBLIC LANDS IT WISHES NOTWITHSTANDING LEGISLATIVE LIMITS ON ITS AUTHORITY SET FORTH IN RCW TITLE 79 1

A. Legislative History Shows that RCW 79.36.355 was not Intended to Broaden DNR’s Authority..... 4

B. DNR’s Reading of RCW 79.36.355 Would Repeal By Implication Statutes in RCW Title 79..... 5

III. HCSG WAS SIGNIFICANTLY PREJUDICED BY DNR’S AND THE TRIAL COURT’S HIGHLY IMPROPER USE OF SUMMARY JUDGMENT IN THIS CASE. 7

A. The Trial Court’s Total Disregard of CR 56 in Allowing DNR to File its Motion for Summary Judgment Less than Two Weeks Before the Hearing, Without Excuse, was Extremely Prejudicial to HCSG..... 8

B. The Nature of the New Issues Which DNR Raised in its Countermotion Necessitated a Full 28-Day Summary Judgment Motion Process. 10

C. DNR’s Assertion that HCSG Did Not Submit a JARPA in 2003 Belies DNR’s Total Failure to Rely on Actual, Undisputed Facts to Support its Motion..... 12

D. Of Equal Prejudice to HCSG was the Superior Court’s Order on Summary Judgment Dismissing Issues that Neither Party Raised, Merely Signing the Order that DNR Drafted Without Question..... 13

IV. NEITHER CASE LAW NOR THE CIRCUMSTANCES GIVING RISE TO THE CURRENT PARTIES IN THE STATE COURT LITIGATION HERE REQUIRE THE NAVY TO BE JOINED AS A NECESSARY PARTY. 14

V. DECLARATORY JUDGMENT IS ENTIRELY PROPER TO DETERMINE WHETHER DNR HAD AUTHORITY TO SIGN THE EASEMENT 16

VI. HCSG IS ENTITLED TO A CONSTITUTIONAL WRIT OF CERTIORI, A WRIT OF PROHIBITION, OR A WRIT OF MANDAMUS DECLARING DNR’S ACTIONS IN GRANTING THE EASEMENT AND ACCEPTING LESS THAN FAIR MARKET VALUE WERE ARBITRARY, CAPRICIOUS AND ILLEGAL..... 17

A. DNR Disregarded the Fair Market Value as Determined by its Own Experts, and Arbitrarily, Capriciously and Illegally Conveyed an Interest in State-Owned Property Without Obtaining the Required Remuneration	18
VII. CONCLUSION	24

Case Law

Anderson v. State, Dep't of Corr.,
159 Wn.2d 849, 858-59, 154 P.3d 220, 225 (2007)..... 5

Bainbridge Citizens United v. Wa. Dep't of Natural Res.,
147 Wn. App. 365, 375, 198 P.3d 1033 (2008)..... 15

In re Bridge's Estate, 40 Wash. 2d 133, 241 P.2d 439 (1952)..... 14

Chapin v. Collard, 29 Wash. 2d 788, 189 P.2d 642 (1948)..... 14

Echo Bay Cmty. Ass'n v. State, Dep't of Natural Res., 139 Wn. App. 321,
326-27, 160 P.3d 1083, 1085 (2007) 3, 4

Failor's Pharmacy v. Dep't of Soc. & Health Servs., 125 Wn. 2d 488,
499, 886 P.2d 147, 153 (1994)..... 7

Impecoven v. Dep't of Revenue,
120 Wn. 2d 357, 365, 841 P.2d 752, 755 (1992)..... 12

Leland v. Frogge, 71 Wn. 2d 197, 201, 427 P.2d 724, 727 (1967) 12

Patriot Gen. Ins. Co. v. Gutierrez, 186 Wn. App. 103, 110, 344 P.3d
1277, 1281 (2015) *review granted*, 183 Wn. 2d 1016, 353 P.3d 641
(2015)..... 12

Rubenser v. Felice, 58 Wn. 2d 862, 866, 365 P.2d 320, 322 (1961) 12

State ex rel. Citizens Against Tolls (CAT) v. Murphy, 151 Wn.2d 226,
236, 88 P.3d 375, 380 (2004)..... 9

Treyz v. Pierce County,
118 Wash. App. 458, 76 P.3d 292 (Div. 2 2003)..... 14

Treyz v. Pierce Cnty., 118 Wn. App. 458, 462, 76 P.3d 292, 294 (2003)
citing *Town of Ruston v. City of Tacoma*,
90 Wash.App. 75, 82, 951 P.2d 805 (1998)..... 15

Statutes

RCW 7.24.110	14
RCW 7.24.020	16
RCW Title 79.....	passim
RCW 79.13.010	18, 21
RCW 79.13.090	18, 21
RCW 79.36.355	passim
RCW 79.110.060	5
RCW 79.110.100	5
RCW 79.110.200	5
RCW 79.110.300	5
RCW 79.130.010	3
RCW 79.130.020	23
RCW 79.135.110	3

Rules

CR 56	8, 9
15 Wash. Prac., Civil Procedure § 42:14 (2d ed.).....	14

Other Authorities

10 USC 2663(c)(1).....	20
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I. DNR'S ARGUMENTS REGARDING HCSG'S FUTURE INTEREST IN A LEASE IS A RED HERRING; THE ISSUE BEFORE THIS COURT IS DNR'S LACK OF STATUTORY AUTHORITY TO GRANT THE EASEMENT.

Much like the misdirection employed by magicians, DNR attempts to use distracting issues that may or may not arise in the future to draw the Court's attention away from the real issue at hand. DNR asks the Court to consider whether HCSG has a right to lease the tidelands abutting its property as a means to avoid the Court's review of whether DNR had statutory authority to enter into the Easement with the Navy. Whether or not HCSG may or may not lease the tidelands abutting its property at some later date is beside the point; the question of HCSG's lease rights is not ripe at this juncture of the proceedings. The necessary factual analysis cannot be undertaken until this Court determines whether DNR had legal authority to grant an easement blocking the use of the tidelands.

II. DNR'S READING OF RCW 79.36.355 WOULD ALLOW IT TO CONVEY ANY PUBLIC LANDS IT WISHES NOTWITHSTANDING LEGISLATIVE LIMITS ON ITS AUTHORITY SET FORTH IN RCW TITLE 79.

The fact that DNR devotes very little of its brief to the core question of its statutory authority – a mere five paragraphs – betrays the weakness of its position. DNR's sole defense of its Easement authority is an argument that RCW 79.36.355 authorizes DNR to grant *any* easement over public lands whatsoever and without constraint. DNR can only make this

argument by totally disregarding the remainder of RCW Title 79. DNR's misuse of RCW 79.36.355 would abrogate the express narrow authority, and limitations thereon, carefully and deliberately crafted by the legislature to restrain exactly this sort of deal making without legislative pre-authorization. DNR's arguments would expand its authority to be broad and absolute, allowing it to act far beyond the restrictions of a state agency. If the Court agrees that DNR can use RCW 79.36.355 as authority for this Easement, all legislative directives set forth in RCW Title 79 would be rendered meaningless, because DNR could just use RCW 79.36.355 to do whatever it wishes. Clearly the Washington legislature did not intend for such broad and unrestricted discretion, or it would have said so clearly in statute and not granted individual and detailed authorities in RCW Title 79.

As thoroughly addressed in HCSG's Opening Brief and original Motion for Partial Summary Judgement to the Superior Court, RCW Title 79 proscribes the terms under which DNR may grant easements over aquatic lands. None of those specific statutory grants authorizes DNR to convey to the United States a 55 year Easement over the Bedlands Property to prohibit residential, scientific, commercial, and industrial uses and activities on the Bedlands Property, to limit future improvement, development, or uses incompatible with the mission of the U.S. Government, to protect conservation values, or to construct any buildings,

structures or other improvements of any kind.¹ Without an affirmative grant of legislative authority to convey the Easement, the Easement must be found to be invalid and illegal.

DNR relies heavily on *Echo Bay*² for the proposition that RCW 79.36.355 gave it unfettered authority to grant the Easement. DNR relies on *Echo Bay* because it upheld DNR's grant of a bedland lease to someone who did not own the abutting tideland. Again, the issue here is not about whether HCSG may at some point have a right to lease the tidelands abutting its property, but rather whether DNR had the authority to grant the *Easement* to the *Navy*. As such, DNR's reliance on *Echo Bay* is ironic. As in the case at hand, *Echo Bay* discussed whether the specific or the general legislative grants of authority under RCW Title 79 control.³ Unlike the case at hand, however, in *Echo Bay* DNR argued, and the court agreed, that the narrow statute was not ambiguous, and the more specific provision controlled:

In interpreting a statute, our fundamental duty is to ascertain and implement the legislature's intent. . . Our first step is to look at the plain meaning of the statutory terms, although we may also look at related statutes that might disclose legislative intent about the specific provision in question. If

¹CP 551-77, *Declaration of Baskins*, Ex. N1.

²*Echo Bay Cmty. Ass'n v. State, Dep't of Natural Res.*, 139 Wn. App. 321, 160 P.3d 1083 (2007).

³*Id.*, discussing RCW 79.130.010 (specific statutory authority) and RCW 79.135.110 (general statutory authority).

two provisions conflict, we give preference to the most specific statute.⁴

Relying on *Echo Bay* and DNR's own arguments therein, a plain reading of RCW 79.36.355 grants no authority for DNR to convey the Easement.

While DNR had options it could have pursued to legally grant the Easement, such as seeking specific legislative authority as it has done in the past, or utilizing its natural area preserve or conservation area authority, it did not do so. Presumably, DNR decided on this novel approach because it did not want to have its negotiations and intentions disclosed. HCSG requests this Court to instruct DNR to use the necessary and authorized avenues to obtain statutory authority for the Easement just as DNR has always done in the past. Unless and until DNR does so, DNR's Easement is illegal and void.

A. Legislative History Shows that RCW 79.36.355 was not Intended to Broaden DNR's Authority.

DNR's assertion that amendments to RCW 79.36.355 broadened its authority and enabled it to grant the Easement ignores the very clear legislative history of the law. As noted in the bill report,⁵ the purpose of the law was merely to "clarify the definitions of certain natural resource

⁴*Echo Bay*, 139 Wn. App. at 326-27.

⁵CP 740-41; contrary to DNR's assertion that this legislative history applies to the 2003 amendments, it relates to SHB 2321, the same bill cited by DNR (*see* CP 602'-03).

terms.”⁶ The Administrator for the Department of Natural Resources himself testified that “*No changes are made to the Department of Natural Resources’ authority.*”⁷ DNR’s claim now that these technical amendments expanded its authority is flatly untrue.

B. DNR’s Reading of RCW 79.36.355 Would Repeal by Implication Statutes in RCW Title 79.

Moreover, as discussed above, DNR’s proposed statutory interpretation would nullify the remaining provisions in RCW Title 79. DNR argues that RCW 79.36.355 should “trump” the more specific statutes contained throughout RCW Title 79. However, the goal of statutory interpretation is to harmonize statutes and not read them in conflict.⁸ DNR’s reading of RCW 79.36.355 would abrogate the other provisions in Title 79 RCW, such as the narrow circumstances under which DNR may grant easements,⁹ which carefully carve out the instances in which DNR may convey interests in State-owned lands. The State Legislature would simply not enact a law that says, “While we have carefully defined the instances in which you may convey interests in the State-owned lands that you are

⁶CP 740.

⁷CP 741 (emphasis added).

⁸*Anderson v. State, Dep’t of Corr.*, 159 Wn.2d 849, 858-59, 154 P.3d 220, 225 (2007).

⁹RCW 79.110.060 (removal of valuable materials from state lands); RCW 79.110.100 (for roads, bridges and trestles); RCW 79.110.110 (for railroads over navigable streams); RCW 79.110.200 (for utilities and/or transmission lines); and RCW 79.110.300 (for irrigation, diking, and drainage purposes).

charged with managing, if we missed anything you might want to do, go right ahead.”

Reading RCW 79.36.355 as taking precedence over the more specific legislative directives nullifies the effect of those specific directives. If the specific statutes have no effect, they are implicitly repealed. Repeal by implication is not favored, and the Court must harmonize the statutes unless a new statute is clearly repugnant to the others:

Our purpose is to “discern and implement the intent of the legislature.” We consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent. We do not favor repeal by implication, and where potentially conflicting acts can be harmonized, we construe each to maintain the integrity of the other.¹⁰

It is not necessary to divine the legislature’s intent here; they made their intent clear. The amendments to RCW 79.36.355 were intended to be technical only, to “clarify the definitions of certain natural resource terms,” with no substantive changes to DNR’s authority.¹¹ Their intent was also clear with regard to other RCW Title 79 provisions: DNR’s authority to convey interests in state-owned lands are very narrowly proscribed.

DNR’s position relies solely on its purported authority under RCW 79.36.355; because that statute was never intended to give DNR the

¹⁰*Id.*, (internal citations omitted).

¹¹CP 740-41.

broad authority it claims, DNR had no authority to grant the Easement. As a state agency, DNR may only do those things which it has been authorized by the legislature to do:

A contract in conflict with statutory requirements is illegal and unenforceable as a matter of law. In addition, a government contract beyond an agency's authority is void and unenforceable. Even where a contract is within an agency's substantive authority, failure to comply with statutorily mandated procedures is ultra vires and renders the contract void.¹²

As DNR lacked such requisite statutory authority to grant the Easement, the Easement is illegal, invalid and unenforceable.

III. HCSG WAS SIGNIFICANTLY PREJUDICED BY DNR'S AND THE TRIAL COURT'S HIGHLY IMPROPER USE OF SUMMARY JUDGMENT IN THIS CASE.

DNR's untimely summary judgment motion, and the trial court's order on summary judgment dismissing HCSG's entire case, including dismissing issues that were never even raised or argued in summary judgment, resulted in a process that violated HCSG's right to fair judicial review in almost every way possible. The untimeliness and number of issues that DNR raised made it impossible for HCSG to effectively defend itself at the trial court. The prejudice to HCSG was compounded by DNR's total failure to support its factual allegations with declarations or evidence

¹²*Faylor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 499, 886 P.2d 147, 153 (1994) (internal citations omitted).

to support the new issues it raised,¹³ and DNR's success in persuading the trial court issue summary judgment in DNR's favor on issues that no one raised in either motion. It is difficult to conceive of a scenario where DNR could have flaunted the Civil Rules or prejudiced HCSG more than it did.

A. The Trial Court's Total Disregard of CR 56 in Allowing DNR to File its Motion for Summary Judgment Less than Two Weeks Before the Hearing, Without Excuse, was Extremely Prejudicial to HCSG.

There are two distinct procedural issues embedded in DNR's claim that the trial court properly granted its Countermotion for Summary Judgment: (1) the fact that the trial court allowed DNR to bring a motion for summary judgment on 11 days' notice, instead of the mandatory 28 days under CR 56, and (2) the fact that the trial court allowed DNR to greatly expand the issues beyond HCSG's original motion. The breadth and complexity of the new issues raised in DNR's motion compounded the extremely prejudicial lack of time given to HCSG to respond.

A motion for summary judgment, whether it is a standalone motion or a "countermotion" buried in a response brief, "*shall be filed and served not later than 28 calendar days before the hearing.*"¹⁴ CR 56 makes no

¹³DNR claims that HCSG misrepresented the fact that DNR sought summary judgment without affidavits or evidence. HCSG did not allege that DNR provided no affidavits or evidence, but rather that DNR did not present any affidavits or evidence to support the new issues of material fact it had raised in its Countermotion.

¹⁴CR 56(c) (emphasis added).

exceptions for motions that are labeled “countermotion.” The CR 56 time requirements may be shortened only by a motion to shorten time.¹⁵ DNR did not move to shorten time, nor did the trial court make any required finding of whether shortening time would prejudice HCSG due to lack of notice, lack of time to prepare, and lack of opportunity to submit any authority or countervailing argument.

This Court must overturn the trial court’s decision to deviate from the civil rules if HCSG shows prejudice resulting from the decision.¹⁶ Prejudice may be shown by lack of actual notice, lack of time to prepare for the motion, or lack of opportunity to submit case authority or provide countervailing oral argument.¹⁷ As discussed in more depth in its Opening Brief to this Court and its Reply in Motion for Summary Judgment (“Summary Judgment Reply”), HCSG has been greatly prejudiced by the loss of the 4 weeks mandated by CR 56 to review DNR’s greatly expanded scope of the summary judgment issues to be heard, submit countervailing case authority, and provide countervailing oral argument. DNR describes the 11 days between its expansive Countermotion and the hearing as “ample opportunity to address the State’s legal arguments.”¹⁸ It is important to note

¹⁵*State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 236-37, 88 P.3d 375, 380 (2004).

¹⁶*Id.*

¹⁷*Id.*

¹⁸Respondents’ Response Br., p. 18.

that HCSG had a mere six days to prepare and submit its Summary Judgment Reply, followed by five days to prepare for the hearing. There is simply no way that HCSG, let alone the Superior Court, could digest and give full legal review to the new issues presented by DNR in that short time frame. Nor could HCSG provide a full analysis for the trial court in its Summary Judgment Reply or at the hearing a few days later. This Court should therefore reverse the trial court's ruling and remand the case for full briefing and a full hearing on the issues raised by DNR in its Countermotion.

B. The Nature of the New Issues which DNR Raised in its Countermotion Necessitated a Full 28-Day Summary Judgment Motion Process.

The lack of time HCSG had to respond to DNR's Countermotion for full summary judgment was compounded by the breadth and complexity of new issues raised by DNR in its Countermotion. This ambush of advancing new theories for summary judgment in its response denied HCSG a fair opportunity to respond; therefore this Court should disregard these new arguments.

As noted in its Opening Brief, DNR raised ten new issues in its Countermotion. HCSG raised only one issue in its *Partial* Summary Judgment Motion: Whether DNR exceeded its statutory authority to grant the Restrictive Easement to the Navy. In its untimely motion for *full*

summary judgment, DNR raised ten distinct issues, which DNR tries to excuse by arguing those somehow fell within the scope of HCSG's single issue motion. DNR's assertions are, however, patently untrue. In particular, DNR claims that HCSG had raised in its Motion the issue of whether HCSG had a preferred leasing right. As the Court will see from HCSG's Motion and Summary Judgment Reply, HCSG clearly stated that it was *not* seeking a determination as to whether it had a priority lease right because "such a determination is not ripe for review under a summary judgment motion."¹⁹ Moreover, HCSG specifically *objected* to DNR's untimely raising of that issue, "as those arguments are beyond the scope of its Partial Summary Judgment motion."²⁰ DNR's claim that "HCSG repeatedly argued" that it had a "preferred leasing right" is simply disingenuous.

Moreover, as the movant on these new summary judgment issues, DNR had the burden to *affirmatively* present the factual evidence upon which it relied. It presented no such evidence, and therefore was not entitled to summary judgment on these issues.

¹⁹DNR misconstrues HCSG's argument: HCSG's discussion of preferred leasing rights was an example of DNR's limited statutory authority; i.e. that DNR had the authority to lease to an abutting tideland owner, but not the Navy. *See* CP 174-75.

²⁰CP 730.

DNR argues that a court may enter summary judgment for a nonmoving party. However, none of the cases cited by DNR involved the egregious circumstance in which a nonmoving party attempts to raise ten new issues in a counter-motion in a dilatory manner, giving the opposing party and the court only 5 days to respond to these complex new issues.²¹

C. DNR's Assertion that HCSG did not Submit a JARPA in 2003 Belies DNR's Total Failure to Rely on Actual, Undisputed Facts to Support its Motion.

Many of the new issues raised by DNR include questions of fact not ripe for summary judgment. One particularly blatant example is the issue of whether HCSG submitted a Joint Aquatic Resources Permit Application ("JARPA") to use state-owned aquatic lands, known as a "JARPA," which may eventually be relevant to whether it may have a preferred lease right at

²¹Moreover, other than *Leland, infra*, which held that summary judgment was improper, none of the cases cited by DNR included any substantive discussion of what circumstances may warrant granting summary judgment to a nonmoving party, and thus have very little precedential value: *Leland v. Frogge*, 71 Wn.2d 197, 201, 427 P.2d 724, 727 (1967) (holding trial court's grant of summary judgment to the nonmoving party was improper; entire discussion in case was: "Respondent Mansell had made no counterclaim and appellant Frogge admitted no debt-yet an affirmative judgment was entered in the former's favor. Though the trial judge was motivated by the feeling that his was an equitable conclusion, the portion of the judgment in favor of respondent Mansell could not be thus summarily granted."); *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752, 755 (1992) (entire discussion in case was: "Because the facts are not in dispute, we order entry of summary judgment in favor of DOR, the nonmoving party."); *Rubenser v. Felice*, 58 Wn.2d 862, 866, 365 P.2d 320, 322 (1961) (entire discussion: "The summary judgment in favor of the devisees under the will of Teresa Geissler should be reversed, and a summary judgment entered quieting title in the heirs of Teresa Geissler."); *Patriot Gen. Ins. Co. v. Gutierrez*, 186 Wn. App. 103, 110, 344 P.3d 1277, 1281 (2015) review granted, 183 Wn.2d 1016, 353 P.3d 641 (2015) (entire discussion: "When, as here, the relevant facts are not in dispute, we may order entry of summary judgment in favor of the nonmoving party.").

some point in the future. While DNR concedes this issue is immaterial to the issues currently before the Court, DNR continues to debate this “immaterial” issue, repeatedly alleging that HCSG had not submitted a JARPA form before the Navy had submitted its JARPA.²² In fact, the JARPA that HCSG submitted in 2003 (nine years prior to the Navy’s JARPA) is in the record.²³ DNR had even expressed concern to the Navy that if the Easement were not consummated quickly, DNR would have to honor another JARPA: that is HCSG’s JARPA.²⁴ Nonetheless, DNR continues to assert that HCSG never submitted a JARPA in 2003. DNR makes such assertion despite the fact that its employees met on the site with HCSG personnel and reviewed materials related to the project.²⁵

As HCSG expressly noted in its Partial Summary Judgment Motion, this issue is not ripe for discussion as there are clearly material facts not yet in evidence that a court will have to consider to make such a determination. This is another example of how the trial court erred in granting summary judgment on all issues, including those not yet before it.

D. Of Equal Prejudice to HCSG was the Superior Court’s Order on Summary Judgment Dismissing Issues that Neither Party Raised, Merely Signing the Order that DNR Drafted Without Question.

²²Respondents’ Response Br. pp. 6 and 35; Countermotion, CP 577 and 597-98.

²³CP 194-200, *Declaration of Baskins*, Exhibit A.

²⁴CP 513, *Declaration of Baskins*, Exhibit N4.

²⁵CP 204-05, *Declaration of Baskins*, Exhibit C.

Most egregious was the trial court's dismissal of issues not raised by either party in their respective motions. While DNR did not raise these issues in its Countermotion, DNR *did* include them in the proposed order it presented to the trial court which the judge signed out of hand. This was the first appearance in the summary judgment proceedings of HCSG's quiet title and constitutional due process claims. HCSG had *no opportunity whatsoever* to respond to these issues that were not raised by DNR – either in briefing or at the summary judgment hearing. The confusion of the trial court with regard not only to the plethora of new complex issues, but these issues not even briefed by the parties, was apparent. It is hard to avoid the conclusion that the trial court was simply overwhelmed and ready to sign whatever order DNR presented, irrespective of the procedural violations DNR unnecessarily created.

IV. NEITHER CASE LAW NOR THE CIRCUMSTANCES GIVING RISE TO THE CURRENT PARTIES IN THE STATE COURT LITIGATION HERE REQUIRE THE NAVY TO BE JOINED AS A NECESSARY PARTY.

Contrary to DNR's insistence, courts have *not* consistently treated the joinder requirement under RCW 7.24.110 as mandatory.²⁶ Moreover, the Court must make a determination of whether a party is actually a

²⁶15 Wash. Prac., Civil Procedure § 42:14 (2d ed.), citing *Treyz v. Pierce County*, 118 Wn. App. 458, 76 P.3d 292 (Div. 2 2003); *In re Bridge's Estate*, 40 Wn.2d 133, 241 P.2d 439 (1952); and *Chapin v. Collard*, 29 Wn.2d 788, 189 P.2d 642 (1948).

necessary one. To be a necessary party, the Navy would have to be “one whose ability to protect its interest in the subject matter of the litigation would be impeded by a judgment.”²⁷ By removing itself from the State proceedings, the Navy unilaterally determined that it did not have an interest in the declaratory judgment action that it wished to protect or that the outcome would affect.²⁸ In doing so, the Navy noted that HCSG “has a perfectly adequate forum in the Jefferson County Superior Court lawsuit to mount its challenge to the lawfulness of the State’s conveyance”²⁹ – a lawsuit it had no desire to be part of.

Unlike *Bainbridge Citizens*,³⁰ HCSG’s claim involves no allegations against the Navy; instead, the question is whether DNR had the statutory authority to grant the Easement. Whereas participation by the vessel owners in *Bainbridge Citizens* would likely influence the outcome of that case, the Navy has nothing to offer that would be relevant to the existence of DNR’s statutory authority. If DNR did not have the authority to execute the Easement, then the Navy has no cognizable interest in DNR

²⁷*Treyz v. Pierce Cnty.*, 118 Wn. App. 458, 462, 76 P.3d 292, 294 (2003) citing *Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 82, 951 P.2d 805 (1998).

²⁸CP 191, *Declaration of Baskins*, p. 4.

²⁹CP 704, *Callow Declaration*, p. 26, n.21.

³⁰ *Bainbridge Citizens United v. Wa. Dep’t of Natural Res.*, 147 Wn. App. 365, 375, 198 P.3d 1033 (2008).

engaging in such ultra vires activity. Therefore, the Court can make a complete determination of the controversy without the Navy's presence.

V. DECLARATORY JUDGMENT IS ENTIRELY PROPER TO DETERMINE WHETHER DNR HAD AUTHORITY TO SIGN THE EASEMENT

As briefed more thoroughly in HCSG's Opening Brief and Reply, it is obvious from the face of RCW 7.24.020 that DNR is contorting the meaning of that statute. DNR asserts that the Uniform Declaratory Judgments Act ("UDJA") does not apply to HCSG's challenge because the statute applies only to facial validity challenges of statutes is a strained reading of RCW 7.24.020. The statute makes no such limitation, and a plain reading clearly shows that it authorizes

A person . . . whose rights, status or other legal relations are affected by a statute . . . [to] have determined any question of *construction* or validity arising under the . . . statute. . . and obtain a declaration of rights, status or other legal relations thereunder.³¹

The statute on its face authorizes not only challenges facial validity, but also to statutory construction. HCSG's rights and legal relations have been affected by an action that DNR claims was authorized by statute. HCSG seeks to have this Court determine questions of statutory construction: whether RCW Title 79 authorized DNR to grant the Restrictive Easement.

³¹RCW 7.24.020 (emphasis added).

The decision on this question directly affects whether HCSG can potentially obtain a lease over the very same physical area. As DNR itself notes,³² the question is one of statutory construction: whether RCW 79.36.355 gave DNR the authority to grant the Easement.

VI. HCSG IS ENTITLED TO A CONSTITUTIONAL WRIT OF CERTIORARI, A WRIT OF PROHIBITION, OR A WRIT OF MANDAMUS DECLARING DNR'S ACTIONS IN GRANTING THE EASEMENT AND ACCEPTING LESS THAN FAIR MARKET VALUE WERE ARBITRARY, CAPRICIOUS AND ILLEGAL.

In its discussion regarding the forms of relief available to HCSG, DNR once again takes the Court through a maze of complicated arguments in an attempt to distract from the core issue: that DNR violated its statutory limitations in granting the Easement, and in doing so, it acted arbitrarily, capriciously, and illegally. Underlying the issue of DNR's statutory authority is its acceptance of less than the statutorily-mandated fair market value for conveyance of public lands. HCSG sought relief through a constitutional writ, a writ of prohibition or a writ of mandamus. As DNR notes, a showing that DNR acted arbitrarily and capriciously or illegally would entitle HCSG to relief under any of these avenues. As noted above, DNR did not have the statutory authority to grant the Easement. As such it acted arbitrarily, capriciously and illegally in doing so. DNR also acted

³²Respondents' Response Brief, pp. 40-41.

arbitrarily, capriciously and illegally in accepting less than fair market value for the Easement.

A. DNR Disregarded the Fair Market Value as Determined by its Own Experts, and Arbitrarily, Capriciously and Illegally Conveyed an Interest in State-Owned Property Without Obtaining the Required Remuneration.

DNR concedes that it is statutorily required to receive full market value for conveyance of public property.³³ Yet it is clear from the evidence that DNR's actions in accepting *less than half* the fair market value, as established by its own experts, were not only arbitrary and capricious, but downright illegal.

DNR misstates or misunderstands the basis and findings contained in its own Appraisal, focusing on "retained income potential from geoduck harvests" as the basis for the valuation.³⁴ As noted by DNR's appraiser, normally an appraisal would value such an easement based on the "highest and best use" of the property being restricted.³⁵ However, the Appraisal concludes that revenue accruing from the highest and best use of the Property is solely from geoduck harvesting.³⁶ *Geoduck harvesting is not*

³³DNR cites the mandate contained in RCW 79.36.355. While HCSG argues that DNR was not authorized to grant the Easement under RCW 79.36.355, RCW 79.13.010 and RCW 79.13.090 also mandate that the state obtain the fair or full market value for conveyances.

³⁴Respondents' Br., p. 32.

³⁵CP 373, *Declaration of Baskins*, Ex. N1.

³⁶*Id.*, CP 376-77.

prohibited by the Easement, so, as DNR’s appraiser notes, there is very little change in the highest and best use value resulting from the Easement and a “highest and best use” valuation cannot be used.³⁷ DNR’s appraiser turns instead to a “before and after” methodology, which measures the difference between the value of the property before the transaction and the value of the remainder after the transaction, measuring the effect of the Easement restrictions on potential uses of the property (as opposed to geoduck harvesting, which is not restricted).³⁸ This methodology is similar to the analysis that would be used in a condemnation case.³⁹

DNR’s appraiser relied on a comparable case study (Case A) involving a perpetual conservation easement that prohibited commercial use on a tideland property – very similar to the Easement at hand. Based on this comparable Case A, DNR’s appraiser concluded that the value of the Easement is \$1,680,000.⁴⁰ Both the Navy’s appraiser and the second appraiser hired by DNR agreed with this valuation.⁴¹

The Navy and DNR moved forward with preparations to execute the Easement based on this \$1,680,000 valuation. The Navy, however, discovered that the funding mechanism it had planned to use, under which

³⁷*Id.*

³⁸*Id.*, CP 379 et. seq.

³⁹*Id.*, CP 379.

⁴⁰*Id.*, CP 420.

⁴¹CP 282, *Declaration of Baskins*, Ex. J; CP 505, *Declaration of Baskins*, Ex. N2.

it had set aside \$3 million, was not available.⁴² It then had to resort to its “Low-Cost Authority”⁴³ which limits acquisition costs of interest in property to less than \$750,000. To decrease the cost of Easement to meet this cap, the Navy instructed its appraiser to “Perform a new Navy review with a value conclusion”.⁴⁴ This was in spite of its concern that “then DNR could claim that the Navy came up with a new value because that’s what they want to pay”.⁴⁵

To arrive at the lower valuation, the Navy’s appraiser changed its support of using Case A as the appropriate comparable, and suddenly recommended using comparative Case C to give it a valuation of \$720,000, an amount that is notably just under the \$750,000 statutory cap.⁴⁶ Case C was not analogous to the Easement because it was based on a coastal lagoon property that was already limited by existing development restrictions so that new restrictions (such as an easement) would have little impact.⁴⁷ Nonetheless, the Navy claimed that Case C was more analogous because the “highest and best use of the property changes very little before and after

⁴²CP 288, *Declaration of Baskins*, Ex. K; CP 513, *Declaration of Baskins*, Ex. N4; and CP 269, *Declaration of Baskins*, Ex. G2.

⁴³10 USC 2663(c)(1); *see also*, CP 288, *Declaration of Baskins*, Ex. K.

⁴⁴CP 519 – 20, *Declaration of Baskins*, Exhibit N6.

⁴⁵CP 518, *Declaration of Baskins*, Exhibit N5.

⁴⁶CP 537, *Declaration of Baskins*, Exhibit N8.

⁴⁷*Id.*

the easement acquisition.”⁴⁸ As noted above, the DNR appraiser, with whom the Navy appraiser had already agreed, had determined that a “highest and best” use methodology was not appropriate in this case because the Easement does not materially affect the highest and best use of the property. In fact, using a highest and best use approach would require an acknowledgement of the revenues lost by blocking the HCSG project. Thus, choosing a comparative case based upon the nonexistent change in highest and best use is nonsensical.

Nonetheless, within days DNR accepted the Navy’s offer of \$720,000, less than half of their own experts’ determination of fair market value, over the objections of its own staff.⁴⁹ It is clear that DNR did not receive fair market value as required by RCW 79.36.355, RCW 79.13.010 and RCW 79.13.090.

In pointing out DNR’s failure to obtain fair market value for the Easement, HCSG is not, as DNR insists, “attempting to substitute its opinion for that of DNR”⁵⁰ but rather DNR is substituting its hasty political panic for the expert opinions of its own appraisers as well as that of the

⁴⁸*Id.*

⁴⁹CP 548, *Declaration of Baskins*, Exhibit N12; CP 269-71, *Declaration of Baskins*, Exhibit G2.

⁵⁰Respondents’ Response Br., pp. 33-34.

Navy's appraiser. The Appraisal itself is replete with references to the political motivations behind the Easement as well as the Appraisal.

It is apparent from the Appraisal that the Easement was crafted to prevent HCSG from proceeding with its Project:

With the possible exception of the proposed T-ROC⁵¹ project, none of the current land uses or pending shoreline development permits known to the Appraisers extend [sic] into the appraised bedlands easement tract or have a discernable influence on its highest and best use and value.⁵²

The Appraisal specifically went on to note the potential economic significance of HCSG's Project, noting that the most significant property right relinquished by the Easement is the construction of structures,

essentially prevent[ing] development of commercial and/or industrial facilities that require structures that extend to or through the shallow subtidal zone, and or the waters above them . . . such [as] shipping terminals and moorage, and deep water piers. . . only the T-ROC project requires use of the subtidal zone.⁵³

The Appraisal also noted that HCSG's Project is "relevant as an example of a restricted land use under the terms of the Navy easement and the corresponding revenue opportunities foregone by DNR within the designated easement area."⁵⁴

⁵¹The Appraisal refers to HCSG's Project as the "T-ROC project".

⁵²CP 370, *Declaration of Baskins*, Exhibit N1.

⁵³CP 376-77, *Declaration of Baskins*, Exhibit N1.

⁵⁴*Id.* at CP 369.

Nonetheless, presumably based on information DNR supplied to its appraiser, the Appraisal minimizes the likelihood that HCSG would proceed with its Project:

While the potential economic significance of the T-ROC project. . . is acknowledged, the more relevant consideration for the appraisal is that the prospective revenues to the state from such developments are not proportionate. . . . The point to be made here is, that absent a momentous and unforeseen shift in the pace of development of the northwest Hood Canal shoreline, the opportunity costs to the State, in the form of foregone revenues, do not appear to be substantial. They are easily overshadowed by the retained income potential associated with the wild geoduck harvest program.⁵⁵

This reasoning is circular: the whole purpose of the Easement is to block development – specifically the HCSG development. There is no purpose for the Easement in the first place if no property is affected by its restrictions.

Ironically, even in the limited choice to not consider lost revenues to the State beyond the geoduck harvest, the Appraisal does discuss leases of State bedlands similar to that which HCSG seeks, noting that they run from about \$12,000-25,000 per year.⁵⁶ Revenues from a lease for the HCSG Project could bring in revenues of \$750,000 over a 30 year period, rather than the \$720,000 the State is receiving for a 55 year easement.⁵⁷ Note that

⁵⁵*Id.* at CP 77.

⁵⁶*Id.* at CP 377.

⁵⁷Assuming a 30 year statutorily permitted lease term, based on RCW 79.130.020.

this would be in addition to revenue from geoduck harvests which would not be affected by HCSG's Project.

Thus, it is clear that the amount DNR received for conveyance of State-owned lands bore no relation to the statutorily-mandated fair market value. Rather, execution of the Easement as well as the remuneration received was based solely on political motivations. DNR, the agency charged with managing the State's valuable resources, sold out.

DNR's actions were arbitrary, capricious and illegal. Therefore, HCSG is entitled to relief not only under a constitutional writ, but also under a writ of prohibition or a writ of mandamus.

VII. CONCLUSION

As HCSG has shown, the trial court erred when it granted full summary judgment on DNR's Countermotion. HCSG has already addressed most of the issues raised in DNR's Response, not to mention its briefing with regard to the motions for summary judgment. HCSG does not rehash those arguments here, and refers the Court to those briefs to the extent such issues are not addressed herein.

Based on the foregoing, HCSG respectfully requests this Court to reverse the trial court's decision on summary judgment and substantively grant HCSG's motion that DNR does not have statutory authority to grant

the Easement. Further, HCSG respectfully requests the Court deny DNR's untimely Countermotion or remand it for timely substantive review.

DATED this 27th day of October, 2015.

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 47655-0-II
(Jefferson County Superior Court #14-2-00156-7)
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

HOOD CANAL SAND AND GRAVEL, LLC,

Appellant,

vs.

PETER GOLDMARK, et al.,

Respondents.

AFFIDAVIT OF SERVICE

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STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

The undersigned, being first duly sworn on oath, deposes and says:

I am a citizen of the United States of America; over the age of 18 years, am a legal assistant with the firm of Johns Monroe Mitsunaga Koloušková PLLC, not a party to the above-entitled action and competent to be a witness therein.

On this date, I caused to be served via email and U.S. First Class Mail, true and correct copies of: APPELLANT'S REPLY BRIEF; and this AFFIDAVIT OF SERVICE, upon all counsel and parties of record at their addresses listed below.

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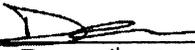
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and U.S. First Class Mail

Dated this 28th day of October, 2015.


EVANNA CHARLOT

STATE OF WASHINGTON)
)ss.
COUNTY OF KING)

SIGNED AND SWORN to (or affirmed) before me on October 28, 2015, by
Evanna Charlot.


Darrell S. Mitsunaga
Notary Public Residing at Sammamish, WA
My Appointment Expires: 1-23-17

