

RECEIVED

SEP 29 2015

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

NO. 47655-0-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

HOOD CANAL SAND AND GRAVEL, LLC.,

Appellant,

v.

PETER GOLDMARK, et al.,

Respondents.

**RESPONSE BRIEF OF STATE OF WASHINGTON,
DEPARTMENT OF NATURAL RESOURCES, AND
COMMISSIONER OF PUBLIC LANDS PETER GOLDMARK**

ROBERT W. FERGUSON
Attorney General

Edward D. Callow
Assistant Attorney General
WSBA No. 30484
P.O. Box 40100
Olympia, WA 98504-0100
(360) 664-2854
*Attorneys for State of Washington,
Department of Natural Resources,
and Commissioner of Public Lands
Peter Goldmark*

TABLE OF CONTENTS

- I. INTRODUCTION.....1
- II. COUNTERSTATEMENT OF THE ISSUES2
- III. COUNTERSTATEMENT OF THE CASE3
 - A. Factual Background.3
 - B. Proceedings Below.....7
- IV. SUMMARY OF ARGUMENT.....10
- V. STANDARD OF REVIEW.....13
- VI. ARGUMENT14
 - A. The Superior Court Properly Exercised Its Discretion in Granting Summary Judgment to the State.14
 - 1. HCSG Misrepresents the Arguments That It Presented to the Superior Court.....15
 - 2. The State’s Arguments Before the Superior Court Were in Direct Response to the Issues and Arguments Raised by HCSG.....16
 - 3. HCSG Was Not Prejudiced by the Superior Court’s Procedure and the Superior Court Did Not Abuse Its Discretion by Considering the State’s Motion.17
 - B. The State’s Actions in Granting the Navy Easement Were in Compliance With the Law.20
 - 1. Background of the State’s Ownership of Its Aquatic Lands.20
 - 2. HCSG Has No Right to Construct a Pier on the State’s Bedlands.21

a.	HCSG Does Not Have a Priority Right to a Lease Under RCW 79.130.010 or WAC 332-30-122.....	23
b.	This Court’s Decision in <i>Echo Bay</i> Is Controlling Precedent in This Case.	27
3.	RCW 79.36.355 Gives DNR the Broad Authority to Grant Easements Over State-Owned Aquatic Land to “Any Person” When “Not Otherwise Provided in Law.”	28
4.	DNR’s Determination of Fair Market Value Was Not Arbitrary or Capricious.....	31
5.	The Provisions of RCW 79.70 and RCW 79.71 Do Not Apply to the Navy Easement.	34
6.	HCSG Did Not Submit an Application to Use State-Owned Aquatic Land to DNR in 2003. However, This Fact Is Not Material for the Purposes of Summary Judgment Because HCSG Has No Priority Right to a Lease.....	35
C.	The Superior Court Properly Concluded That HCSG Was Not Entitled to Declaratory Relief Under the UDJA.	35
1.	HCSG Is Required to Join the Federal Defendants as Necessary and Indispensable Parties for the Court to Proceed Under the UDJA.	36
2.	A Declaratory Judgment Is Not Available Under the UDJA to Determine Whether an Agency Is Properly Applying or Administering a Statute.....	39
D.	The Superior Court Correctly Concluded That the Only Avenue for Judicial Review in This Matter Is a Constitutional Writ of Certiorari.....	41

1. The Superior Court Properly Denied HCSG’s Request for a Writ of Prohibition and a Writ of Mandamus.	42
2. The Superior Court Properly Declined to Issue a Statutory Writ of Certiorari Under RCW 7.16.040 Because the State’s Actions In Granting the Navy Easement Were Not Judicial or Quasi-Judicial.	44
3. The Superior Court Did Not Abuse Its Discretion by Declining to Issue a Constitutional Writ of Certiorari.....	45
E. The Superior Court Properly Awarded the State Summary Judgment on All Issues, Including HCSG’s Due Process and Quiet Title Claims.	47
F. The Superior Court Did Not Abuse Its Discretion in Denying HCSG’s Request for Injunctive Relief.....	48
VII. CONCLUSION	50

TABLE OF AUTHORITIES

Cases

<i>Ahmad v. Town of Springdale</i> , 178 Wn. App. 333, 314 P.3d 729 (2013).....	43
<i>Bainbridge Citizens United v. DNR</i> , 147 Wn. App. 365, 198 P.3d 1033 (2008).....	37, 38, 40, 48
<i>Barnes v. Thomas</i> , 96 Wn.2d 316, 635 P.2d 135 (1981).....	43
<i>Bauman v. Turpen</i> , 139 Wn. App. 78, 160 P.3d 1050 (2007).....	14, 48
<i>Brower v. Charles</i> , 82 Wn. App. 53, 914 P.2d 1202 (1996).....	42
<i>Citizens Against Tolls (CAT) v. Murphy</i> , 151 Wn.2d 226, 88 P.3d 375 (2004).....	18, 19
<i>City of Federal Way v. King County</i> , 62 Wn. App. 530, 815 P.2d 790 (1991).....	40
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 108 Wn.2d 679, 743 P.2d 793 (1987).....	46
<i>County of Spokane v. Local #1553 American Fed'n of State, Cnty., & Mun. Emps.</i> , 76 Wn. App. 765, 888 P.2d 735 (1995).....	43
<i>Davis v. Cox</i> , 183 Wn.2d 269, 351 P.3d 862 (2015).....	14
<i>Echo Bay v. DNR</i> , 139 Wn. App. 321, 160 P.3d 1083 (2007).....	27, 28, 31
<i>Eisenbach v. Hatfield</i> , 2 Wn. 236, 245, 26 P. 539 (Wash. 1891).....	22, 23, 25

<i>Federal Way Sch. Dist. v. Vinson</i> , 172 Wn.2d 756, 261 P.3d 145 (2011)	46
<i>Gehr v. South Puget Sound Cmty. Coll.</i> , 155 Wn. App. 527, 223 P.3d 823 (2010).....	passim
<i>Gildon v. Simon Prop. Group, Inc.</i> , 158 Wn.2d 483, 145 P.3d 1196 (2006).....	38
<i>Hallauer v. Spectrum Prop., Inc.</i> , 143 Wn.2d 126, 18 P.3d 540 (2001).....	31
<i>Harris v. Hylebos Indus., Inc.</i> , 81 Wn.2d 770, 505 P.2d 457 (1973).....	23, 25
<i>Idaho v. Coeur d'Alene Tribe</i> , 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997).....	21
<i>Impecoven v. Dep't of Revenue</i> , 120 Wn.2d 357, 841 P.2d 752 (1992).....	14
<i>Johnson v. WDFW</i> , 175 Wn. App. 765, 305 P.3d 1130 (2013).....	47
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	29
<i>Kucera v. WSDOT</i> , 140 Wn.2d 200, 995 P.2d 63 (2000).....	17
<i>Leland v. Frogge</i> , 71 Wn.2d 197, 427 P.2d 724 (1967).....	14
<i>Lessee of Pollard v. Hagan</i> , 44 U.S. 212, 3 How. 212, 11 L. Ed. 565 (1845).....	21
<i>Magart v. Fierce</i> , 35 Wn. App. 264, 666 P.2d 386 (1983).....	48
<i>Martin v. Waddell's Lessee</i> , 41 U.S. 367, 16 Pet. 367, 10 L. Ed. 997 (1842).....	21

<i>Northlake Marine Works v. DNR,</i> 134 Wn. App. 272, 138 P.3d 626 (2006).....	42
<i>Nw. Greyhound Kennel Ass'n Inc. v. State,</i> 8 Wn. App. 314, 506 P.2d 878 (1973).....	37
<i>Patriot Gen. Ins. Co. v. Gutierrez,</i> 186 Wn. App. 103, 344 P.3d 1277 (2015).....	14
<i>Petroni v. Bd. of Directors,</i> 127 Wn. App. 722, 113 P.3d 10 (2005).....	47
<i>Pierce Cnty. Sheriff v. Civil Serv. Comm'n,</i> 98 Wn.2d 690, 658 P.2d 648 (1983).....	41, 46
<i>Port of Seattle v. Oregon & Washington RR,</i> 255 U.S. 56, 41 S. Ct. 2371 (1921).....	23
<i>Raynes v. City of Leavenworth,</i> 118 Wn.2d 237, 821 P.2d 1204 (1992).....	44
<i>Rubenser v. Felice,</i> 58 Wn.2d 862, 365 P.2d 320 (1961).....	14
<i>Ruff v. King County,</i> 125 Wn.2d 697, 887 P.2d 886 (1995).....	13, 45
<i>Saldin Secs., Inc. v. Snohomish County,</i> 134 Wn.2d at 288, 949 P.2d 370 (1998).....	33, 45
<i>San Juan County v. No New Gas Tax,</i> 160 Wn.2d 141, 157 P.3d 831 (2007).....	49
<i>Skagit Cnty. Public Hosp. Dist. No. 304 v. Skagit Cnty. Public Hosp. Dist. No. 1,</i> 177 Wn.2d 718, 305 P.3d 1079 (2013).....	17
<i>Stafne v. Snohomish County,</i> 156 Wn. App. 667, 234 P.3d 225 (2010).....	17

<i>State Owned Forests v. Sutherland</i> , 124 Wn. App. 400, 101 P.3d 880, <i>rev. denied</i> , 154 Wn.2d 1022 (2004).....	14, 46
<i>State v. Harrison</i> , 148 Wn.2d 550, 61 P.3d 1104 (2003).....	24
<i>Town of Ruston v. City of Tacoma</i> , 90 Wn. App. 75, 951 P.2d 805 (1998).....	38, 39
<i>Treyz v. Pierce County</i> , 118 Wn. App 458, 76 P.3d 292 (2003).....	36, 38
<i>Tyler Pipe Indus. v. Dep't of Revenue</i> , 96 Wn.2d 785, 638 P.2d 1213 (1982).....	49
<i>Walker v. Munro</i> , 124 Wn.2d 402, 879 P.2d 920 (1994).....	43
<i>Wash. Fed'n of State Emps. Council 28, AFL-CIO v. State</i> , 99 Wn.2d 878, 665 P.2d 1337 (1983).....	48
<i>Western Telepage, Inc. v. City of Tacoma Dep't of Financing</i> , 140 Wn.2d 599, 998 P.2d 884 (2000).....	13
<i>Winsor v. Bridges</i> , 24 Wash. 540, 64 P. 780 (1901)	43

Statutes

42 U.S.C. § 1983.....	8
42 U.S.C. § 1988.....	8
Laws of 2004, § 201.....	30
Laws of 2004, § 218.....	30
RCW 7.16.040	3, 12, 44
RCW 7.16.290	passim

RCW 7.24	2, 35
RCW 7.24.020	39, 40
RCW 7.24.030	16
RCW 7.24.110	36, 37, 38, 39
RCW 7.28.010	48
RCW 79.02.010	28
RCW 79.02.010(1).....	29
RCW 79.02.010(10).....	29
RCW 79.02.010(11).....	28
RCW 79.02.010(14).....	34
RCW 79.02.030	42
RCW 79.13.010	2, 34
RCW 79.13.090	34
RCW 79.36.355	passim
RCW 79.70	34, 35
RCW 79.70.030(1)(a)	34
RCW 79.71	34, 35
RCW 79.71.070	34
RCW 79.105.060(2).....	3
RCW 79.110	35
RCW 79.125.410	26

RCW 79.130.010	passim
RCW 79.130.010(1).....	23, 24
RCW 79.130.040	26
RCW 79.135.110	28
RCW 79.135.110(1).....	27, 28
RCW 79.135.120	27
RCW 90.58.020	22
RCW 90.58.030(2)(f)(ii)(C).....	22

Rules

CR 19	38
CR 56(c).....	13

Regulations

WAC 332-30-106(9).....	3
WAC 332-30-122.....	2, 11, 15, 23
WAC 332-30-122(1).....	24
WAC 332-30-122(1)(a)(ii).....	26
WAC 332-30-122(1)(a)(ii)-(iii)	24, 25, 26

Constitutional Provisions

Wash. Const. art. IV, § 6.....	41
Wash. Const. art. XVII, § 1	21

Other Authorities

House Bill Report, SHB 2321..... 30

I. INTRODUCTION

This case involves an appeal from an order of the Jefferson County Superior Court which granted summary judgment to Commissioner of Public Lands Peter Goldmark, the Washington State Department of Natural Resources (“DNR”), and the State of Washington (hereinafter referred to collectively as “the State”) over the validity of a conservation easement between the State of Washington and the United States Navy for portions of Hood Canal. This easement protects vital national security interests at Naval Base Kitsap, as well as the Hood Canal ecosystem and the public’s use of Hood Canal for boating, fishing, geoduck harvesting and shellfish aquaculture, among other uses.

Appellant Hood Canal Sand and Gravel, LLC (hereinafter referred to as “HCSG”) is the proponent of a project known as pit to pier. HCSG, as part of its project, seeks to put a nearly 1000-foot-long gravel loading dock on state property in the location that is currently covered by the easement with the Navy. HCSG’s project would directly interfere with the Navy’s national security interests in protecting Naval Base Kitsap; would jeopardize the Hood Canal ecosystem; and would prohibit the public from using state-owned aquatic lands in the area of the proposed dock for the entire length of time the dock exists.

At issue in this case is the scope of the State's authority to determine the best use of state-owned aquatic lands for the benefit of the public. The superior court correctly determined that HCSG was not entitled to its requested relief, that the State's actions in granting the Hood Canal easement to the Navy, including the fair market value calculation for that easement, were not arbitrary, capricious, or unlawful, and that the State acted in compliance with RCW 79.36.355. The State therefore respectfully requests that this Court affirm the superior court's summary judgment decision in its entirety.

II. COUNTERSTATEMENT OF THE ISSUES

1. Was the superior court correct as a matter of law that HCSG has no priority or preference lease right to a lease on state bedlands under WAC 332-30-122 and RCW 79.13.010, and that HCSG has no right to construct a pier on state bedlands?
2. Was the superior court correct as a matter of law that RCW 79.36.355 gives DNR the authority to enter into a bedlands easement with the Navy?
3. Was the superior court correct as a matter of law that the U.S. District Court's conclusion that HCSG has no priority right to a lease under RCW 79.130.010 is the law of the case?
4. Was the superior court correct in concluding as a matter of law that HCSG is not entitled to review under the Uniform Declaratory Judgments Act (UDJA), RCW 7.24?
5. Did the superior court properly exercise its discretion by declining to issue a constitutional writ of certiorari and concluding that the State's actions, including the fair market value calculation for the easement at issue, were not arbitrary, capricious, or unlawful?

6. Did the superior court properly exercise its discretion by declining to issue a writ of mandamus for actions that were discretionary and in compliance with state law?
7. Did the superior court properly decline as a matter of law to issue a statutory writ of prohibition under RCW 7.16.290 and a statutory writ of review under RCW 7.16.040?
8. Did the superior court properly exercise its discretion by denying HCSG's request for injunctive relief?
9. Did the superior court properly grant summary judgment to the State on all issues?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background.

On September 4, 2012, the United States Navy filed an application with DNR for a bedlands¹ easement over portions of Hood Canal near Naval Base Kitsap.² The Navy's purpose in requesting the proposed easement was to limit uses incompatible with military operating areas and the Navy's mission in Hood Canal.³ The Navy has military operating areas and missions in Hood Canal that could be impaired or disrupted by incompatible land uses or marine activities.⁴ The easement would also preserve critical habitat and natural resources.⁵

¹ Beds of navigable water are those lands lying waterward of and below the line of the extreme low tide mark in navigable tidal waters. *See* RCW 79.105.060(2) (defining beds of navigable water). "Bedlands" is used interchangeably with the term "beds of navigable water." WAC 332-30-106(9).

² CP at 609, 613-31.

³ *Id.*

⁴ *Id.*

⁵ CP at 508-12.

As the Navy stated to the District Court:

Naval Base Kitsap-Bangor . . . is one of two bases in the nation to provide berthing and support services to the Navy's OHIO Class Ballistic Missile submarines, also referred to as TRIDENT submarines To support the TRIDENT program, the base also operates two Explosives Handling Wharfs (one of which is under construction) for loading and handling ballistic missiles for the TRIDENT submarine TRIDENT submarines are escorted through Hood Canal by the Transit Protection System, which consists of up to 9 vessels that provide security for the submarines as they transit to the base. Hood Canal also houses the Navy's Dabob Bay Range Complex, which provides a uniquely quiet and deep water environment for research, development, testing, and evaluation of Navy undersea warfare systems and vehicles, including an underwater acoustic monitoring instrumented range Navy's TRIDENT program and other defense missions rely on the relatively undeveloped shoreline to maintain the security and safety of these vital national security assets Navy's Dabob Bay Range Complex depends on the undeveloped and quiet underwater environment to conduct training to support RDT&E of underwater systems such as torpedoes, countermeasures, targets, and ship systems that are likewise essential to national security.⁶

On September 23, 2013, DNR Policy Unit Supervisor Cyrilla Cook prepared an Environmental Checklist under the State Environmental Policy Act (SEPA) for the Navy's easement application to DNR.⁷ Subsequently, DNR Aquatics Division Manager and SEPA Responsible

⁶ CP at 682 n.1.

⁷ CP at 610, 644-54.

Official Kristin Swenddal issued a SEPA Lead Agency Determination and Determination of Nonsignificance.⁸

On September 25, 2013, Dan Baskins from Thorndyke Resource sent an email to DNR indicating that he had received the DNR SEPA notification for the Navy's proposed easement and intended to submit comments.⁹ Mr. Baskins also submitted a letter on September 23, 2013, to appraiser Victoria B. Adams, who was retained by DNR to determine the fair market value of the Navy's easement.¹⁰

On October 11, 2013, DNR SEPA Responsible Official Kristin Swenddal issued a SEPA Notice of Final Determination for the Navy's proposed easement.¹¹

On May 15, 2013, DNR issued a press release regarding the proposed easement with the Navy, stating that the easement "will . . . provide new protections for sensitive marine ecosystems, safeguard public access, and support the jobs that depend on the Navy's continued presence in the region."¹²

On June 21, 2013, DNR received an application from HCSG requesting a lease over state-owned bedlands in the area of the proposed

⁸ CP at 610, 655-56.

⁹ CP at 610, 657.

¹⁰ CP at 610-11, 658-59.

¹¹ CP at 611, 660-62.

¹² CP at 611, 663.

Navy easement.¹³ DNR did not receive an application from HCSG for such a lease prior to June 21, 2013.¹⁴

On July 7, 2014, DNR executed an Aquatic Lands Deed of Restrictive Easement with the Navy.¹⁵ The easement “will not permit new construction by the Navy, nor will it affect public access, privately owned lands, recreational uses, or aquaculture or geoduck harvest.”¹⁶

Prior to executing the Navy easement, DNR hired appraiser Victoria B. Adams to prepare an appraisal to help determine fair market value.¹⁷ The appraisal contained several different case studies, supporting different bases for determining fair market value.¹⁸ On June 23, 2014, after reviewing the appraisal prepared by Ms. Adams, the Navy submitted to DNR an Offer to Purchase Restrictive Easement Over Bedlands (Offer).¹⁹

In the Offer, the Navy described the bases for concluding that \$720,000 was an appropriate calculation of fair market value for the proposed easement.²⁰ The Navy stated that Case Study C provided the

¹³ CP at 610.

¹⁴ *Id.*

¹⁵ CP at 611. A copy of the Navy easement is contained in the record at CP 548-73.

¹⁶ CP at 663.

¹⁷ CP at 611. A copy of the Adams’ appraisal is contained in the record at CP 303-491.

¹⁸ *Id.*

¹⁹ CP at 611, 543-47.

²⁰ CP at 611.

most similar situation to the proposed easement.²¹ DNR, in exercising its discretion, agreed that Case Study C was an appropriate basis to establish fair market value, and accepted the Navy's offer of \$720,000 for the easement.²² In addition, DNR considered the retained income potential associated with the wild geoduck harvest program by allowing the Navy easement.²³

Under the easement, protections are provided for the sensitive marine ecosystems of Hood Canal.²⁴ Public access and use is safeguarded, including the public's right of navigation and recreation.²⁵ Residential docks and mooring buoys are allowed, as is geoduck harvesting and shellfish aquaculture.²⁶ In addition, the Navy's ability to protect the vital national security interests of Naval Base Kitsap is maintained.²⁷

B. Proceedings Below.

On August 4, 2014, HCSG filed suit against the State, as well as Michael Brady, Ray Mabus, the Department of the Navy, and the United

²¹ *Id.*

²² *Id.*

²³ *Id.* The State derives income from geoduck tracts through auctions of geoduck harvest quotas. These auctions occur on a more or less semi-annual basis. CP at 385.

²⁴ CP at 663, 548-73.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

States of America²⁸ (herein after referred to collectively as “Federal Defendants”), challenging the easement. HCSG filed nearly identical suits challenging the easement in both the Jefferson County Superior Court, as well as the U.S. District Court for the Western District of Washington.²⁹

Federal Defendants subsequently removed the Jefferson County action to the District Court, and on August 27, 2014, the State moved to have both the original federal action, as well as the removed action, dismissed on the basis of the State’s Eleventh Amendment immunity.³⁰ The District Court granted this motion by order dated October 22, 2014.³¹ The District Court also dismissed with prejudice HCSG’s 42 U.S.C. §§ 1983 and 1988 claims.³² The District Court remanded HCSG’s remaining claims against the State to Jefferson County Superior Court, with instructions that HCSG file an amended complaint.³³

HCSG filed its amended complaint in the Jefferson County Superior Court on November 21, 2014, and the State answered on November 26, 2014.³⁴

²⁸ CP at 679-706.

²⁹ *Id.*

³⁰ CP at 666-78.

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ CP at 112-32 (HCSG’s Second Amended Complaint for Declaratory Judgment and Writs); 135-48.

Because HCSG recused Jefferson County Judge Keith Harper, the parties requested that a visiting judge from Kitsap County be assigned to hear this matter.³⁵ The Honorable Sally F. Olsen was subsequently assigned.³⁶

On February 12, 2015, Federal Defendants moved to dismiss HCSG's remaining claims in the District Court.³⁷ By order dated April 13, 2015, Judge Benjamin Settle partially granted and partially denied Federal Defendants' request.³⁸

On April 2, 2015, HCSG filed a motion for partial summary judgment against the State in the superior court.³⁹ In its motion, HCSG requested: (1) a declaration under the Uniform Declaratory Judgments Act that the Hood Canal Navy easement was invalid and that DNR did not comply with its statutory authority in granting the easement or determining market value for that easement; (2) a writ of prohibition under RCW 7.16.290; and (3) injunctive relief.⁴⁰

On April 20, 2015, the State filed its response and a counter-motion to HCSG's motion.⁴¹ The State argued that HCSG failed to meet the legal

³⁵ CP at 56.

³⁶ CP at 744.

³⁷ CP 679-706.

³⁸ CP at 707-18.

³⁹ CP at 153-87.

⁴⁰ CP at 187.

⁴¹ CP at 574.

requirements for relief under the UDJA, for a writ of prohibition, or for injunctive relief.⁴² The State further argued that HCSG's sole avenue for judicial review was under the superior court's inherent authority to grant a constitutional writ of certiorari, but that such a writ should not issue in this case because HCSG could not make the requisite showing that the State's actions were arbitrary, capricious, or unlawful on their face.⁴³ HCSG subsequently filed its reply on April 27, 2015.⁴⁴

On May 1, 2015, a hearing was held before the Honorable Sally F. Olsen on the parties' arguments.⁴⁵ By order dated May 20, 2015, Judge Olsen granted summary judgment in favor of the State on all issues.⁴⁶ HCSG subsequently appealed this decision on June 3, 2015.⁴⁷

IV. SUMMARY OF ARGUMENT

Washington courts have long held that either party may be granted summary judgment where there are no genuine issues of material fact in dispute and one party demonstrates that it is entitled to judgment as a matter of law. The State's arguments in this case were in direct response to the arguments and issues raised by HCSG in its motion and were based

⁴² CP at 574-601.

⁴³ *Id.*

⁴⁴ CP at 722.

⁴⁵ CP at 744.

⁴⁶ CP at 745-49 (Order Granting Summary Judgment to Defendants).

⁴⁷ CP at 752.

on the law and on undisputed material facts. The superior court correctly concluded that the State was entitled to summary judgment on all issues.

DNR issued the Navy easement in strict compliance with its authority under RCW 79.36.355. While HCSG disagrees with DNR's determination of fair market value, this determination was supported by Case Study C of the agency's appraisal and reflects the retained income potential from the wild geoduck fishery in Hood Canal. DNR's determination of market value was not arbitrary or capricious, and HCSG's disagreement with that determination does not serve as a basis to reverse the trial court's grant of summary judgment to the State.

HCSG does not have a right to construct a pier on state property, nor does it have a right to obtain a lease to use state property. While RCW 79.130.010 and WAC 332-30-122 give DNR the discretion to grant a lease to an abutting property owner, it is not required to do so.

The trial court properly denied HCSG's claims under the UDJA. A declaratory judgment under the UDJA is not available where such a declaration will prejudice the rights of non-parties to the action, nor is it available to challenge how an agency is applying or administering its statutes. Because HCSG's requested declaration would negatively impact the Navy, and raises issues regarding DNR's application and administration of its statutes, the trial court correctly denied it.

The trial court also appropriately declined to issue a writ of prohibition under RCW 7.16.290, as such a writ is not available to challenge discretionary actions that are in compliance with state law. Similarly, the trial court's denial of HCSG's request for a writ of mandamus was also appropriate.

The trial court properly concluded that the sole avenue for judicial review in this matter is through the court's inherent authority to issue a constitutional writ of certiorari. Because the State's issuance of the Navy easement is not a judicial or quasi judicial action, it is not subject to review under RCW 7.16.040. There is also no statutory appeal right that exists for this decision.

The trial court did not abuse its discretion in declining to issue a constitutional writ of certiorari because the State's actions in issuing the easement to the Navy, including its determination of fair market value, were not arbitrary, capricious, or unlawful. The trial court also did not abuse its discretion by declining to grant HCSG's request for an injunction.

HCSG has no property interest in state-owned aquatic lands, and the trial court was correct when it granted summary judgment to the State on all issues, including on HCSG's quiet title and due process claims. The State therefore respectfully requests that this Court affirm the trial court.

V. STANDARD OF REVIEW

The appellate court reviews an order of summary judgment de novo. *Western Telepage, Inc. v. City of Tacoma Dep't of Financing*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See* CR 56(c). A material fact is one that affects the outcome of the litigation under governing law, and “when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.” *Ruff v. King County*, 125 Wn.2d 697, 703-704, 887 P.2d 886 (1995) (internal citations omitted). Additionally, statutory interpretation is a question of law, which the appellate court reviews de novo. *Western Telepage*, 140 Wn.2d at 607.

While the appellate court reviews the trial court’s legal conclusions de novo, the trial court’s denial of a constitutional writ is reviewed for an abuse of discretion and will be reversed only if the trial court’s exercise of its discretion was not based on tenable grounds. *Gehr v. South Puget Sound Cmty. Coll.*, 155 Wn. App. 527, 533, 223 P.3d 823 (2010). Moreover, a trial court will not issue a constitutional writ of certiorari as a matter of right. It can be issued only where a plaintiff makes a showing that

the agency acted in a manner that was arbitrary and capricious or illegal. *State Owned Forests v. Sutherland*, 124 Wn. App. 400, 412, 101 P.3d 880, *rev. denied*, 154 Wn.2d 1022 (2004).

The trial court's denial of injunctive relief is also reviewed for an abuse of discretion. *Bauman v. Turpen*, 139 Wn. App. 78, 93, 160 P.3d 1050 (2007).

VI. ARGUMENT

A. The Superior Court Properly Exercised Its Discretion in Granting Summary Judgment to the State.

The courts in this state have long held that either party may be granted summary judgment where there are no genuine issues of material fact in dispute and one party demonstrates that they are entitled to judgment as a matter of law. *See Patriot Gen. Ins. Co. v. Gutierrez*, 186 Wn. App. 103, 110, 344 P.3d 1277 (2015); *Rubenser v. Felice*, 58 Wn.2d 862, 866, 365 P.2d 320 (1961); *Leland v. Frogge*, 71 Wn.2d 197, 201, 427 P.2d 724 (1967); *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 365, 841 P.2d 752 (1992). As the court of appeals recently stated in *Patriot Gen. Ins. Co.*, “[w]hen, as here, the relevant facts are not in dispute, we may order entry of summary judgment in favor of the nonmoving party.”⁴⁸ *See also Davis v. Cox*, 183 Wn.2d 269, 281, 351 P.3d 862 (2015)

⁴⁸ *Patriot Gen. Ins. Co.*, 186 Wn. App. at 110.

("[s]ummary judgment requires a legal certainty: the material facts must be undisputed, and *one side* wins as a matter of law.") (emphasis added).

1. HCSG Misrepresents the Arguments That It Presented to the Superior Court.

HCSG misrepresents the scope of the arguments that it presented to the trial court in an attempt to establish that it was prejudiced by the trial court's ruling. For example, HCSG asserts that it "*did not* claim in its summary judgment motion that it has a priority right to a lease, and that DNR is required to grant it a lease under RCW 79.130.010 and WAC 332-30-122."⁴⁹ These assertions are not correct. HCSG repeatedly argued in its motion for partial summary judgment that it had a "preferred leasing right" under WAC 332-30-122,⁵⁰ that DNR was required to accommodate its water access needs;⁵¹ that it had a priority right to a lease under RCW 79.130.010,⁵² and that "WAC 332-30-122 mandates that DNR give a 'preference lease right' to HCSG . . . DNR failed to: provide HCSG with a preferential right to lease the Abutting Property"⁵³ HCSG raised arguments regarding its alleged "preference lease right" and the superior court appropriately considered these arguments and ruled in the State's favor as a matter of law.

⁴⁹ Br. of Appellant at 18 (emphasis in original).

⁵⁰ CP at 174-75.

⁵¹ CP at 175.

⁵² CP at 174-75.

⁵³ CP at 179.

2. The State's Arguments Before the Superior Court Were in Direct Response to the Issues and Arguments Raised by HCSG.

HCSG further argues that the State raised ten new issues in its response and counter-motion, and that HCSG was prejudiced because it only raised one issue, and was not given an adequate opportunity to respond.⁵⁴ These arguments are without merit. HCSG brought its motion for partial summary judgment seeking a declaratory judgment under RCW 7.24.030 invalidating the easement,⁵⁵ a writ of prohibition under RCW 7.16.290,⁵⁶ and a temporary injunction.⁵⁷ HCSG did not brief any of the legal standards applicable to its requested relief until it filed its reply.⁵⁸ HCSG further challenged the State's statutory authority to grant the easement, as well as the fair market value calculation for the easement.⁵⁹ In response to HCSG's arguments, the State set forth the legal standards applicable under the UDJA and for a statutory writ of prohibition and injunctive relief.⁶⁰ The State further asserted as a matter of law that the sole manner in which the superior court could review the grant of easement, and the fair market value calculation for that easement,

⁵⁴ Br. of Appellant at 13.

⁵⁵ CP at 187.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ CP at 153-87, 722-37.

⁵⁹ CP 168-87.

⁶⁰ CP 574-601.

was under a constitutional writ of certiorari, but that the trial court should decline to issue such a writ because the State's actions were not arbitrary, capricious, or unlawful.⁶¹ The trial court agreed with the State, applied the correct legal standards to evaluate HCSG's motion, and granted relief as a matter of law to the State.⁶²

The State's arguments were in direct response to the issues and arguments raised by HCSG. Indeed, the trial court could not proceed to determine whether or not HCSG was entitled to its requested relief without first examining the other causes of action in its Complaint to determine whether HCSG had any other adequate remedies at law.⁶³

3. HCSG Was Not Prejudiced by the Superior Court's Procedure and the Superior Court Did Not Abuse Its Discretion by Considering the State's Motion.

HCSG was not prejudiced by the superior court's procedure. The State filed its response and countermotion on April 20, 2015,⁶⁴ HCSG filed its reply on April 27, 2015,⁶⁵ and the court heard oral argument on

⁶¹ *Id.*

⁶² CP 745-49.

⁶³ A writ of prohibition, declaratory relief under the UDJA, and injunctive relief are mutually exclusive and will not be granted if a party has other adequate forms of relief at law. *See, e.g., Skagit Cnty. Public Hosp. Dist. No. 304 v. Skagit Cnty. Public Hosp. Dist. No. 1*, 177 Wn.2d 718, 722-723, 305 P.3d 1079 (2013); *Stafne v. Snohomish County*, 156 Wn. App. 667, 688, 234 P.3d 225 (2010); *Kucera v. WSDOT*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). By necessity, the trial court must look at a party's other requested relief before it can determine whether an extraordinary remedy, such as a writ of prohibition, should issue.

⁶⁴ CP at 574.

⁶⁵ CP at 722.

May 1, 2015.⁶⁶ HCSG had ample opportunity to address the State’s legal arguments, and should have been prepared to do so given the nature of the relief HCSG was requesting from the court. While the State would have been entitled to summary judgment as the nonmoving party, bringing a counter motion as part of its response put HCSG on notice that the State was agreeing that there were no genuine issues of material fact in dispute, but disagreeing with HCSG’s view of the law.

HCSG’s reliance on *Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 88 P.3d 375 (2004), to support its position is misplaced. In *CAT v. Murphy*, the moving party sought a motion to shorten time to file a summary judgment.⁶⁷ A hearing on the motion to shorten time was held two days before the court ordered the moving party to file its summary judgment. The nonmoving party was then given six days to file its response to the summary judgment, with a hearing on the summary judgment two days after its response was filed.⁶⁸ The court granted summary judgment to the moving party.⁶⁹ On review, the Supreme Court held that this abbreviated briefing schedule did not prejudice the nonmoving party, and that it had adequate notice to respond, stating that “CAT [the nonmoving party] had more than five days to prepare” and had

⁶⁶ CP at 744.

⁶⁷ *CAT v. Murphy*, 151 Wn.2d at 235.

⁶⁸ *Id.*

⁶⁹ *Id.* at 235-36.

an opportunity to submit case authority and provide countervailing oral argument.⁷⁰ Similar to the plaintiff in *CAT*, HCSG had sufficient opportunity to respond to the State's arguments, and the trial court properly ruled in favor of the State.

HCSG further misrepresents to this Court that DNR sought summary judgment "without any affidavits or evidence"⁷¹ and that "DNR did not make reference to any such evidence to demonstrate the absence of issues of fact."⁷² This is incorrect. The State's brief cited the undisputed material facts on which the State's arguments were based, including the Declaration of DNR Policy Unit Supervisor Cyrilla Cook and exhibits, as well as HCSG's declarations and exhibits.⁷³ The trial court considered the State's evidence, as well as all of the evidence and briefing submitted by HCSG, which included the appraisal that DNR used to establish fair market value for the Navy easement.⁷⁴

An appellate court "will overturn a discretionary ruling only for a manifest abuse of discretion." *CAT v. Murphy*, 151 Wn.2d at 236. The trial court properly determined that the State's legal arguments rested upon undisputed material facts. The trial court did not abuse its discretion by

⁷⁰ *Id.* at 237-38.

⁷¹ Br. of Appellant at 17.

⁷² Br. of Appellant at 15.

⁷³ CP at 574-601.

⁷⁴ CP at 745-49. The appraisal is included in the record at CP 303-491.

considering the State's motion, and correctly ruled in the State's favor as a matter of law on all issues.

B. The State's Actions in Granting the Navy Easement Were in Compliance With the Law.

In granting the Navy easement, DNR complied with the requirements of RCW 79.36.355, and DNR's determination of fair market value was not arbitrary or capricious. HCSG ignores the plain language of RCW 79.36.355, incorrectly cites 2003 legislative history to support its interpretation of the 2004 statutory amendments that broadened DNR's authority under RCW 79.36.355, and improperly seeks to substitute its judgment of fair market value for that of DNR. The superior court was correct as a matter of law that DNR's actions complied with RCW 79.36.355, and were not arbitrary, capricious, or unlawful. Moreover, the superior court correctly concluded that HCSG has no right to construct a pier on state property, nor does it have a "priority right" to an easement. These issues are addressed in detail below.

1. Background of the State's Ownership of Its Aquatic Lands.

Upon entry into the Union, the State of Washington obtained title to the beds of its navigable waters under the equal footing doctrine.⁷⁵

⁷⁵ The equal footing doctrine means that "States entering the Union after 1789 did so on an 'equal footing' with the original States and so have similar ownership over these

Indeed the states, upon entry into the Union, “became themselves sovereign; and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government.” *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 283, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997) (quoting *Martin v. Waddell’s Lessee*, 41 U.S. 367, 16 Pet. 367, 10 L. Ed. 997 (1842)). The state’s sovereignty and ownership right is declared in the State Constitution, where Washington “asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in the waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes.”⁷⁶

2. HCSG Has No Right to Construct a Pier on the State’s Bedlands.

Despite its assertions to the contrary, HCSG argued before the trial court that it has a right to lease the state’s bedlands for its pier.⁷⁷ The trial court properly concluded as a matter of law that HCSG has no such rights. While HCSG argues that such a conclusion was erroneous because it

‘sovereign lands.’” *Coeur d’Alene Tribe*, 521 U.S. at 283 (quoting *Lessee of Pollard v. Hagan*, 44 U.S. 212, 228-29, 3 How. 212, 11 L. Ed. 565 (1845)).

⁷⁶ Wash. Const. art. XVII, § 1.

⁷⁷ CP at 178-79.

required additional facts, this is simply not the case. HCSG cannot point to any law or facts that give it a property right to construct a pier on state property.⁷⁸ Accordingly, the trial court correctly awarded summary judgment to the State on this issue.

Since statehood, private entities have attempted to assert rights to the beds of the state's navigable waters that they simply do not have. In 1891, in an argument remarkably similar to HCSG's in the present matter, the owner of property abutting state-owned bedlands filed suit seeking an injunction and asserting "a right to wharf out opposite to his upland, a right of ferriage, a right of unobstructed access to the navigable water in front of him . . . and that all of these rights are property, and are 'vested rights.'" *Eisenbach v. Hatfield*, 2 Wn. 236, 245, 26 P. 539 (Wash. 1891). The *Eisenbach* court soundly rejected these arguments, holding that "a riparian proprietor . . . has no rights, as against the State or its grantees, to extend wharves in front of his land below [the] high-water mark." *Id.* at 542. The court concluded that "riparian proprietors on the shore of the navigable waters of the state have no special or peculiar rights therein as

⁷⁸ It is worth noting that The Navy easement is within a Shoreline of Statewide Significance under the Shoreline Management Act (SMA). See RCW 90.58.030(2)(f)(ii)(C). Under this designation, the following uses are given preference in the SMA: (1) uses which recognize and protect statewide interest over local interest; (2) uses that preserve the natural character of the shoreline; (3) uses that result in long-term over short-term benefit; (4) uses that protect the resources and ecology of the shoreline; (5) uses that increase public access to publicly owned areas of the shorelines; and (6) uses that increase recreational opportunities for the public in the shoreline. See RCW 90.58.020. The Navy easement promotes these policies.

an incident to their estate. To hold otherwise would be to deny the power of the State to deal with its own property as it may deem best for the public good.” *Id.* at 543-544.

Subsequent to *Eisenbach*, other parties have attempted to assert a right of access to the beds of navigable waters based upon ownership of abutting riparian lands. The courts have rejected these arguments. In *Harris v. Hylebos Indus., Inc.*, 81 Wn.2d 770, 505 P.2d 457 (1973), an uplands owner initiated an action claiming that it was entitled to cross tidelands at high tide to reach the navigable waterway. In rejecting this argument, the *Harris* court cited with favor the U.S. Supreme Court’s decision in *Port of Seattle v. Oregon & Washington RR*, 255 U.S. 56, 67, 41 S. Ct. 2371 (1921), that:

It appears, therefore, that the law of Washington does not recognize, as appurtenant to upland, tideland or shore land in its natural condition, rights of any sort beyond the boundaries of the property. A right of access to the navigable channel over intervening land, above or below low water, must arise from a grant by the owner of the intervening property.

Harris, 81 Wn.2d at 779. HCSG has no such right.

a. HCSG Does Not Have a Priority Right to a Lease Under RCW 79.130.010 or WAC 332-30-122.

Under RCW 79.130.010(1), DNR “*may* lease to the abutting tidelands or shorelands owner or lessee, the beds of navigable waters[.]”

but it is not required to do so.⁷⁹ Indeed, HCSG has twice argued before the U.S. District Court that RCW 79.130.010 gives it the right to lease the state's bedlands, and its arguments were rejected both times.⁸⁰ Recently, the U.S. District Court stated that "While [DNR] may lease the beds of navigable waters to abutting shoreland owners under RCW 79.130.010, *the Department is not required to do so* The Court's prior ruling is the law of the case."⁸¹ Since the present matter was before the superior court on remand from the U.S. District Court, the District Court's prior ruling is also the law of this case.⁸² *See State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003) (law of the case refers to the binding effect of determinations made by an appellate court on further proceedings in the trial court on remand, and serves to avoid indefinite relitigation of the same issue).

WAC 332-30-122(1) does not give HCSG a right to a lease and does not require DNR to accommodate its water access. WAC 332-30-122(1)(a)(ii)-(iii) provides that:

⁷⁹ RCW 79.130.010(1) (emphasis added).

⁸⁰ CP at 668-78, 707-18.

⁸¹ CP at 711 (emphasis added).

⁸² CP at 666-78. While HCSG argues that the parties to this prior federal action were different, this is not correct. Br. of Appellant at 48. The decision dismissing the State from the federal suits was in an action between HCSG, the State, and the Federal Defendants. CP at 668-70. This is the decision in which the federal court first held that HCSG has no priority rights to state bedlands, which is the law of the case. CP at 676.

(ii) The beds of navigable waters *may be leased* to the owner or lessee of the abutting tideland or shoreland. This preference lease right is limited to the area between the landward boundary of the beds and the -3 fathom contour, or 200 feet waterward, whichever is closer to shore. However, the distance from shore may be less in locations where it is necessary to protect the navigational rights of the public.

(iii) When proposing to *lease* aquatic lands to someone other than the abutting property owner, that owner *shall be notified* of the intention to *lease* the area. When not adverse to the public's ownership, the abutting owner's water access needs *may be reasonably accommodated*.

WAC 332-30-122(1)(a)(ii)-(iii) (emphasis added).

First, as with the language of RCW 79.130.010, WAC 332-30-122(1)(a)(ii)-(iii) does not require that DNR grant an abutting owner a lease. Indeed, the rule states that the beds of navigable waters “*may be leased*” to an abutting owner, but it does not require them to be.

Second, consistent with the holdings of *Eisenbach* and *Harris*, WAC 332-30-122(1)(a)(ii)-(iii) does not require that DNR accommodate an abutting owner's water access needs. Under the unambiguous language of the rule, such needs “*may be reasonably accommodated*,” but DNR is not required to do so.

Third, the “preference lease right” referred to in this rule does not establish any requirement that DNR issue a lease, or give a right of first refusal for a lease, to an abutting owner, and as such is not a “preference

right” at all. The only requirement contained within this rule is that DNR provide an abutting owner with notice when proposing to grant a “lease” to someone other than the abutting owner. WAC 332-30-122(1)(a)(ii). In this case, the Navy easement is not a lease, it is an easement, and HCSG did receive notice almost a year before DNR entered into the easement with the Navy.⁸³

Moreover, if WAC 332-30-122(1)(a)(ii)-(iii) was intended to create the “preference right” that HCSG has repeatedly claimed, the rule would have used the term “shall” instead of “may.” For example, under RCW 79.130.040, a bedlands lessee with an existing lease has a preference right to renew that lease. As RCW 79.130.040 states, “[a]t the expiration of any lease issued under the provisions of this chapter, the lessee or the lessee’s successors or assigns, shall have a preference right to re-lease all or part of the area covered by the original lease if the department deems it to be in the best interest of the state to re-lease the area.” (Emphasis added.) *See also* RCW 79.125.410. Unlike RCW 79.130.040, WAC 332-30-122(1)(a)(ii)-(iii) uses the discretionary term “may,” not “shall,” and accordingly creates no such preference right.

⁸³ *See* CP at 610-11, 657-59.

b. This Court's Decision in *Echo Bay* Is Controlling Precedent in This Case.

Throughout this case, HCSG has repeatedly cited this Court's decision in *Echo Bay v. DNR*, 139 Wn. App. 321, 160 P.3d 1083 (2007), but has ignored key aspects of that case's holding that control the present matter.⁸⁴ In *Echo Bay*, an abutting owner challenged a DNR decision to grant a lease for a herring net pen on the grounds that, under RCW 79.130.010, DNR only had the authority to lease state bedlands to the abutting owner, and that RCW 79.130.010 acted as a "blanket ban on leasing navigable bedlands to non-adjacent tideland owners or lessees."⁸⁵ At issue in *Echo Bay* was the relationship between RCW 79.130.010, RCW 79.135.110(1), and RCW 79.135.120. The latter two statutes allowed DNR to grant an aquaculture lease to "any person."⁸⁶

In rejecting the plaintiff's argument, the *Echo Bay* court stated that "Echo Bay produces no evidence that the legislature intends RCW 79.130.010 to protect landowners' interests, and nothing in the statutory language implies such intent. *That statute merely authorizes DNR to lease bedlands; it does not protect landowners' rights.*"⁸⁷ The *Echo Bay* court went on to state that RCW 79.135.110(1) was an

⁸⁴ Br. of Appellant at 35-6. CP at 182-83.

⁸⁵ *Echo Bay*, 139 Wn. App. at 325-26.

⁸⁶ *Id.* at 328.

⁸⁷ *Id.* at 329 (emphasis added).

“independent grant[] of authority” from RCW 79.130.010, and that RCW 79.135.110(1) allowed DNR to grant a lease to “any person” for the purposes of shellfish cultivation and aquaculture.⁸⁸ This language is similar to DNR’s easement authority under RCW 79.36.355.

3. RCW 79.36.355 Gives DNR the Broad Authority to Grant Easements Over State-Owned Aquatic Land to “Any Person” When “Not Otherwise Provided in Law.”

Under RCW 79.36.355, DNR may grant to “any person” “such easements and rights in *public lands, not otherwise provided in law*, as the applicant applying therefor may acquire in privately owned lands.” (Emphasis added.) Similar to the language of RCW 79.135.110, which was at issue in *Echo Bay*, RCW 79.36.355 is an independent grant of authority from RCW 79.130.010 and gives DNR the ability to grant to “any person” an easement over the state’s aquatic lands. This broad authority allowed DNR to grant the easement to the Navy that is at issue in this case.

The breadth of DNR’s authority under RCW 79.36.355 is apparent when looking at the definitions under RCW 79.02.010, as well as the legislative history of RCW 79.36.355. Under RCW 79.02.010(11), “Public lands” is defined to specifically include “aquatic lands,” and “aquatic lands” are “all state-owned tidelands, shorelands, harbor areas,

⁸⁸ *Id.* at 328.

and the beds of navigable waters as defined in RCW 79.105.060 that are administered by the department.”⁸⁹ The term “person” specifically includes an “agency of a federal, state, or local governmental unit, however designated.”⁹⁰ Under these definitions, it is clear that RCW 79.36.355 gives DNR the authority to grant a bedlands easement to the Navy, as the term “public lands” in the statute includes “aquatic lands,” and as the Navy is an agency of the federal government.

HCSG argues that RCW 79.36.355 does not operate as a “catchall” and that, unless DNR’s easement authority is expressly provided under one of the statutes HCSG cites, then DNR is prohibited from granting a bedlands easement.⁹¹ This argument ignores the plain language of RCW 79.36.355 and would render that statute superfluous as, under HCSG’s reasoning, DNR could never grant an easement over aquatic lands under the authority of RCW 79.36.355. Statutes “must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous.” *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

Under its own terms, RCW 79.36.355 only applies to situations “not otherwise provided in law.” This language, in addition to language

⁸⁹ RCW 79.02.010(1).

⁹⁰ RCW 79.02.010(10).

⁹¹ Br. of Appellant at 28, 34.

making RCW 79.36.355 apply to aquatic lands, was specifically added to the statute in 2004 to broaden DNR's authority to grant easements over the state's aquatic lands where such authority does not already exist elsewhere in the aquatic lands statutes. These changes are apparent from the 2004 legislative history.

In 2004, the Legislature substantially modified RCW 79.36.355 to broaden DNR's authority to issue aquatic lands easements. Notably, prior to 2004, RCW 79.36.355 did not apply at all to aquatic lands.⁹² It applied only to "state lands," a term which, by definition, excludes aquatic lands.⁹³ In 2004, the term "public lands" replaced "state lands" in the statute, and the language "not otherwise provided in law" was added.⁹⁴ Moreover, at that same time the term "public lands" was broadened to include "aquatic lands."⁹⁵ In case there is any doubt regarding legislative intent, the final bill report for SHB 2321 states these changes were "[e]xpanding the authority of the DNR to grant easement rights to aquatic lands and other public lands, and not just state lands and state forest lands."⁹⁶ SHB 2321 passed the Legislature unanimously.⁹⁷ As these changes occurred after the

⁹² See Laws of 2004, § 218. For ease of reference, a copy of the House Final Bill Report for SHB 2321 and a copy of Laws of 2004, § 201 and 218 are attached hereto as Appendix A. These documents are also included in the record at CP 602-07.

⁹³ Laws of 2004, § 201.

⁹⁴ Laws of 2004, § 218.

⁹⁵ Laws of 2004, § 201.

⁹⁶ House Bill Report, SHB 2321.

⁹⁷ *Id.*

statutes upon which HCSG relies were last substantively modified, this Court should give preference to the more recently enacted RCW 79.36.355. See *Echo Bay*, 139 Wn. App. at 329. In addition, a more general statute will trump a more specific statute where there is “legislative intent that the more general statute controls.” *Hallauer v. Spectrum Prop., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001). Such legislative intent is present in the legislative history of RCW 79.36.355.⁹⁸

4. DNR’s Determination of Fair Market Value Was Not Arbitrary or Capricious.

Under RCW 79.36.355, DNR must receive “full market value” for any easement granted under the provisions of that statute. However, DNR has the discretion to determine the adequacy of the value received, and DNR’s exercise of that discretion was not arbitrary or capricious in granting the Navy easement.

Prior to granting the Navy easement, DNR hired appraiser Victoria B. Adams to prepare an appraisal to help determine fair market value.⁹⁹ The appraisal contained several case studies, including: Case Study A, Orcas Bay, San Juan County; Case Study B, Olson to NWI

⁹⁸ HCSG erroneously cites to the statutory intent for the 2003 amendments, and not the 2004 amendments which expanded DNR’s authority to grant aquatic lands easements under RCW 79.36.355, to argue that DNR’s interpretation of this statute is incorrect. Br. of Appellant at 37.

⁹⁹ CP at 611, 303-491.

Tidelands Sale & Easement; and Case Study C, Crocket Lake Coastal

Lagoon.¹⁰⁰ In preparing her appraisal, Ms. Adams also stated that:

[it] is difficult, if not impossible to project the amount, form and scale of commercial/industrial activity which, absent the restrictive easement, would occur within the shoreline of Dabob Bay and the Northwest side of Hood Canal within the 55 year life of the easement 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 [from lease payments], do not appear to be substantial. *They are easily overshadowed by the retained income potential associated with the wild geoduck harvest program.*¹⁰¹

After reviewing Ms. Adams' appraisal, the Navy sent a letter to DNR outlining its bases for concluding that \$720,000 was an appropriate calculation of fair market value for the proposed easement. The Navy stated that Case Study C provided the most similar situation to the proposed easement.¹⁰² DNR, in exercising its discretion, agreed with the Navy that Case Study C from the appraisal was an appropriate basis to establish fair market value and accepted the Navy's offer of \$720,000 for the easement. Moreover, DNR also considered the retained income potential associated with the wild geoduck harvest program by allowing the Navy easement in arriving at the \$720,000 fair market value figure.¹⁰³

¹⁰⁰ CP at 303-491.

¹⁰¹ CP at 376-77 (emphasis added).

¹⁰² CP at 611, 543-45.

¹⁰³ CP at 611.

While HCSG asserts that DNR disregards the leasing revenue from its proposed pier,¹⁰⁴ this argument ignores the substantial geoduck revenue the state will retain without HCSG's pier on state property. For example, page 81 of the Adams' appraisal notes that "the stabilized estimate of harvestable geoduck biomass for the tracts within Hood Canal is 450,000 pounds per year."¹⁰⁵ The 20-year average for geoduck prices is \$5.40 per pound, with a spike of almost \$12.00 per pound in 2010-2011.¹⁰⁶ This is a significant revenue stream that is protected by the Navy easement.

An agency action is "arbitrary and capricious" when it is "willful and unreasoning . . . , taken without regard to or consideration of the facts and circumstances surrounding the action." *Gehr*, 155 Wn. App. at 534. When an agency decision is based on evidence, even if that evidence is disputed, it is not arbitrary and capricious. *Saldin Secs., Inc. v. Snohomish County*, 134 Wn.2d at 288, 297, 949 P.2d 370 (1998).

In establishing the fair market value for the easement, DNR determined that Case Study C best fit the scenario at hand and factored in the retained revenue potential from geoduck harvest that would occur as a result of this easement. HCSG disagrees with DNR choosing Case Study C over the other case studies in the appraisal, and is attempting to

¹⁰⁴ Br. of Appellant at 42.

¹⁰⁵ CP at 386.

¹⁰⁶ *Id.*

substitute its opinion for that of DNR. This is not appropriate. HCSG's difference of opinion is not a sufficient basis to establish that DNR's actions were "arbitrary and capricious." The trial court should therefore be affirmed.¹⁰⁷

5. The Provisions of RCW 79.70 and RCW 79.71 Do Not Apply to the Navy Easement.

HCSG argues that DNR was bound by the provisions of RCW 79.70 and RCW 79.71 when issuing the Navy easement.¹⁰⁸ However, the activities allowed under the Navy easement, such as ensuring public access for boating and recreation, and the placement of docks and mooring buoys, would not fit under the provisions of RCW 79.70 and RCW 79.71. For example, under RCW 79.70.030(1)(a), DNR would have to "[l]imit[] public access to natural area preserves consistent with the purposes of this chapter." Similarly, under RCW 79.71.070, DNR would need to develop a management plan identifying the potential for "low-impact public and environmental educational uses." The Navy easement does not limit public access, nor does it apply to low impact public and environmental educational uses.

¹⁰⁷ HCSG also asserts that DNR violated the provisions of RCW 79.13.010 and RCW 79.13.090 by not obtaining fair market value for the easement. Br. of Appellant at 40. However, RCW 79.13.010 and .090 do not apply to aquatic lands, they only apply to "state lands," which is a term that specifically excludes "aquatic lands" from its definition. See RCW 79.02.010(14). Regardless, DNR correctly determined the fair market value for the Navy easement.

¹⁰⁸ Br. of Appellant at 31-32.

Because the activities allowed under the Navy easement are “not otherwise provided” in any other provision of law, RCW 79.36.355 applies to the easement, and not RCW 79.70 or RCW 79.71.¹⁰⁹

6. HCSG Did Not Submit an Application to Use State-Owned Aquatic Land to DNR in 2003. However, This Fact Is Not Material for the Purposes of Summary Judgment Because HCSG Has No Priority Right to a Lease.

HCSG argues that it submitted an application to DNR in 2003 for its proposed pit to pier project, and that it therefore had a priority right to its lease. This is immaterial for two reasons. First, it is untrue. HCSG did not submit an application to DNR to use state-owned aquatic lands until June 21, 2013.¹¹⁰ Second, HCSG does not have a priority right to a lease, and therefore any dispute over this fact is not material for the purposes of summary judgment.

C. The Superior Court Properly Concluded That HCSG Was Not Entitled to Declaratory Relief Under the UDJA.

The UDJA is codified under RCW 7.24 and contains specific requirements that a party must meet before the superior court can issue a

¹⁰⁹ The provisions of RCW 79.110 also do not apply to the Navy easement, as none of the provisions of that chapter fit the activities allowed under the Navy easement.

¹¹⁰ To request permission for a use authorization, such as an easement or a lease, on state-owned aquatic lands, a person must submit to DNR the “Attachment E” form, which is part of the Joint Aquatic Resources Permit Application (JARPA). This requirement to submit the “Attachment E” to DNR for a use authorization began at the end of June 2012. Prior to June 2012, a separate and different application from the JARPA form had to be submitted to DNR to apply for a use authorization for state-owned aquatic land. Neither Thorndyke Resource, Hood Canal Sand and Gravel, nor their predecessors, submitted this form to DNR for the area in question. CP at 610.

declaratory judgment. Among these requirements, a party seeking a declaratory judgment must join necessary and indispensable parties. *See* RCW 7.24.110. In the present matter, HCSG sought a declaratory ruling which would invalidate the easement the State of Washington granted to the United States.¹¹¹ Under these circumstances, the superior court correctly concluded that the Federal Defendants were indispensable, as there was no way for the court to issue a declaration invalidating the Navy easement without prejudicing the rights the Federal Defendants have in that easement. Accordingly, the trial court properly concluded that it could not grant HCSG's requested relief under the UDJA.

1. HCSG Is Required to Join the Federal Defendants as Necessary and Indispensable Parties for the Court to Proceed Under the UDJA.

Under RCW 7.24.110, when an action for declaratory relief is brought under the UDJA, "all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." The joinder requirements of RCW 7.24.110 are mandatory as "[t]he trial court lacks jurisdiction if the necessary parties are not joined." *Treyz v. Pierce County*, 118 Wn. App 458, 462, 76 P.3d 292 (2003).

¹¹¹ CP at 187.

In *Bainbridge Citizens United v. DNR*, 147 Wn. App. 365, 198 P.3d 1033 (2008), a citizen's group sought a declaration under the UDJA that DNR had failed to enforce its own regulations by not ejecting alleged trespassers on state-owned aquatic lands. *Id.* at 369. The citizens group did not join as parties any of the alleged trespassers. *Id.* at 371. In dismissing the UDJA action for failing to join the alleged trespassers, the court of appeals stated that "a party seeking a declaratory judgment must join 'all persons . . . who have or claim any interest which would be affected by the declaration.'" *Id.* at 372. A person is necessary and must be joined in a UDJA action if:

(1) the trial court cannot make a complete determination of the controversy without that party's presence, (2) the party's ability to protect its interest in the subject matter of the litigation would be impeded by a judgment in the case, and (3) judgment in the case necessarily would affect the party's interest.

Id. See also *Nw. Greyhound Kennel Ass'n Inc. v. State*, 8 Wn. App. 314, 319, 506 P.2d 878 (1973) (licensees under Horse Racing Act were indispensable parties, and failure to join them in the action "deprived the court of jurisdiction to hear and decide the issues raised."). Under the requirements of RCW 7.24.110 and the three-part test of *Bainbridge Citizens United*, the superior court correctly determined that it could not

issue a declaratory order under the UDJA invalidating the easement without prejudicing the rights of the Federal Defendants.¹¹²

HCSG's reliance on cases interpreting CR 19 to support its position is misplaced.¹¹³ The requirements of CR 19 require some equitable balancing in evaluating whether a party is "necessary" versus "indispensable," and an exercise of discretion in evaluating these factors.¹¹⁴ In contrast, the joinder requirements of RCW 7.24.110 are a statutory prerequisite to obtain review under the UDJA. *Treyz*, 118 Wn. App. at 462. If those requirements are not met, the trial court has no discretion to proceed under the UDJA. In this case, the superior court's dismissal of HCSG's UDJA claims was appropriate.¹¹⁵

HCSG's reliance on *Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 951 P.2d 805 (1998), is also misplaced. In *Town of Ruston*, the court recognized that it was not necessary under RCW 7.24.110 to join current and former lessees in a property dispute for the court to proceed

¹¹² While HCSG asserts that summary judgment was an improper procedure to determine whether or not Federal Defendants were necessary and indispensable under RCW 7.24.110 (Br. of Appellant at 20), using summary judgment to resolve a similar threshold issue under RCW 7.24.110 was upheld in *Bainbridge Citizens United*. See *Bainbridge Citizens United*, 147 Wn. App. at 371.

¹¹³ Br. of Appellant at 21.

¹¹⁴ See *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006) (recognizing that an analysis under CR 19 requires a "balancing and factual inquiry" and is reviewed under an abuse of discretion standard).

¹¹⁵ HCSG also asserts that the Navy voluntarily removed itself from state court, and thereby agreed that it did not have any interest in or rights that might be prejudiced by the state court action. Br. of Appellant at 22. However, HCSG provides no legal support for the proposition that the Navy's assertion of its sovereign immunity would nevertheless allow the trial court to proceed without the Navy under the UDJA.

under the UDJA.¹¹⁶ In making this ruling, the court stated that “[a]lthough the legal relationships between these two entities and the municipalities might change . . . *such changes are speculative and secondary to the issue at hand.*” *Town of Ruston*, 90 Wn. App. at 82 (emphasis added).

Unlike the facts of *Town of Ruston*, HCSG in the present matter sought a declaratory judgment to invalidate the Navy easement.¹¹⁷ The impact this would have on the Navy was not speculative, and as such the trial court correctly determined that it could not proceed under RCW 7.24.110.

2. A Declaratory Judgment Is Not Available Under the UDJA to Determine Whether an Agency Is Properly Applying or Administering a Statute.

While HCSG’s failure to join Federal Defendants is fatal to its UDJA claims, such claims also fail because HCSG is seeking review of how DNR is applying or administering state statutes and rules. The type of review is not available under the UDJA.

The scope of review under the UDJA is set forth under RCW 7.24.020, which provides that:

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising

¹¹⁶ *Town of Ruston*, 90 Wn. App. at 81-82.

¹¹⁷ CP at 187.

under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

The courts have found that this language precludes UDJA review of the application or administration of a statute or rule.

In interpreting RCW 7.24.020, the *Bainbridge Citizens United* court recognized that “[d]eclaratory judgment actions are proper ‘to determine the *facial validity of an enactment, as distinguished from its application or administration.*’” *Bainbridge Citizens United*, 147 Wn. App. at 374 (emphasis added) (citing *City of Federal Way v. King County*, 62 Wn. App. 530, 535, 815 P.2d 790 (1991)). The issue in *Bainbridge Citizens United* was whether DNR properly applied or administered its rules by not enforcing those rules in the manner that plaintiffs demanded. *Id.* at 375. Denying plaintiffs’ claims under the UDJA, the *Bainbridge Citizens United* court stated that “[b]ecause United does not challenge the regulations’ facial validity, a declaratory judgment is not an available remedy under the power specifically enumerated in RCW 7.24.020.” *Id.*

Like the plaintiffs in *Bainbridge Citizens United*, HCSG brought this action under the UDJA to challenge how DNR is applying or administering its statutes and rules, and is not challenging the facial validity of any of the statutes under which DNR operates. HCSG simply does not agree with DNR’s decision to grant an easement to the Navy

under RCW 79.36.355 and is seeking a declaration invalidating that decision.¹¹⁸ Such relief is not available under the UDJA, and accordingly this Court should affirm the superior court's dismissal of HCSG's UDJA claims.

D. The Superior Court Correctly Concluded That the Only Avenue for Judicial Review in This Matter Is a Constitutional Writ of Certiorari.

The Washington State Constitution vests superior courts with inherent authority to review administrative decisions for illegal or manifestly arbitrary and capricious acts.

There are three potential avenues of appeal from the decision of an administrative agency. First, a specific statute may authorize appeal Second, any party may obtain review by a statutory writ of certiorari if the agency is 'exercising judicial functions'. RCW 7.16.040. Finally, the courts have inherent constitutional power to review 'illegal or manifestly arbitrary and capricious action violative of fundamental rights.'

Pierce Cnty. Sheriff v. Civil Serv. Comm'n, 98 Wn.2d 690, 693, 658 P.2d 648 (1983) (internal citation omitted); *see also Gehr*, 155 Wn. App. at 533 (citing Wash. Const. art. IV, § 6).

Despite HCSG's assertions,¹¹⁹ the superior court was correct that HCSG's only avenue for judicial review in this matter is under the superior court's inherent authority to issue a constitutional writ of

¹¹⁸ CP at 187, 737.

¹¹⁹ Br. of Appellant at 46.

certiorari. In this case, there is no statutory appeal right available to review DNR's decision to grant the Navy easement,¹²⁰ and as is discussed below, a statutory writ of certiorari, a statutory writ of prohibition, and a writ of mandamus are not available. Accordingly, the only potential avenue for review in this case is under the superior court's inherent authority to issue a writ of certiorari. However, because the State's actions in granting the easement were not arbitrary, capricious, or unlawful, the trial court did not abuse its discretion in declining to issue such a writ.

1. The Superior Court Properly Denied HCSG's Request for a Writ of Prohibition and a Writ of Mandamus.

HCSG requested that the trial court issue a writ of prohibition under RCW 7.16.290, and also requested a writ of mandamus in its Complaint.¹²¹ A writ of prohibition is an extraordinary remedy and may only be issued where "(1) a state actor is about to act in excess of its jurisdiction and (2) the petitioner does not have a plain, speedy and adequate legal remedy." *Brower v. Charles*, 82 Wn. App. 53, 57, 914 P.2d 1202 (1996). A statutory writ of prohibition is only available where a state actor is "*clearly and inarguably* acting in a matter where there is an

¹²⁰ Since the easement at issue here involves neither a sale nor a lease of public lands, it is not appealable under RCW 79.02.030. See *Northlake Marine Works v. DNR*, 134 Wn. App. 272, 280-82, 138 P.3d 626 (2006).

¹²¹ CP at 187, 127.

inherent, entire lack of jurisdiction” *Barnes v. Thomas*, 96 Wn.2d 316, 318, 635 P.2d 135 (1981) (emphasis added).

A statutory writ of prohibition is the counterpart to a writ of mandamus. While the writ of mandamus seeks to compel the performance of an act, a writ of prohibition arrests the proceedings of a board or person acting in excess of their power. *Winsor v. Bridges*, 24 Wash. 540, 543, 64 P. 780 (1901). Neither a writ of prohibition, nor a writ of mandamus, will issue “where the act to be performed is a discretionary act[,]” *Ahmad v. Town of Springdale*, 178 Wn. App. 333, 341-42, 314 P.3d 729 (2013), and neither will issue “to compel a general course of conduct, only specific acts.” *County of Spokane v. Local #1553 American Fed’n of State, Cnty., & Mun. Emps.*, 76 Wn. App. 765, 769-70, 888 P.2d 735 (1995) (writ not appropriate as it was not “directed at a specific act or limited to a specific period of time.”). *See also Walker v. Munro*, 124 Wn.2d 402, 407-409, 879 P.2d 920 (1994) (“[i]t is hard to conceive of a more general mandate than to order a state officer to adhere to the constitution.”).

In issuing the easement to the Navy, the State was not “clearly and inarguably” acting in excess of the law. The State was clearly acting under the authority of RCW 79.36.355. In addition, the decision to grant an easement under RCW 79.36.355, or a lease under RCW 79.130.010, is discretionary as is the State’s determination of fair market value under

RCW 79.36.355. Finally, HCSG seeks to prohibit the State's ongoing "enforcement" of the easement.¹²² Under these circumstances, neither a writ of prohibition nor a writ of mandamus is available. The superior court properly declined to issue these writs, and this Court should affirm that decision.

2. The Superior Court Properly Declined to Issue a Statutory Writ of Certiorari Under RCW 7.16.040 Because the State's Actions In Granting the Navy Easement Were Not Judicial or Quasi-Judicial.

The courts have established a four-part test to determine whether an action is "judicial or quasi-judicial" for the purpose of issuing a Writ of Review under RCW 7.16.040. That test is:

(1) whether the court could have been charged with the duty at issue in the first instance; (2) whether the courts have historically performed such duties; (3) whether the action . . . involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application; and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators.

Raynes v. City of Leavenworth, 118 Wn.2d 237, 244-245, 821 P.2d 1204 (1992).

Under the *Raynes* test, the State's granting the Navy an easement over Hood Canal bedlands is not a "judicial or quasi judicial act."

¹²² CP at 187.

Granting such an easement is not a matter that a court typically could have been charged with, nor is it an act courts typically perform. The action more closely resembles the ordinary business of administrators, and while HCSG asserts that additional facts are needed to make this determination,¹²³ “when reasonable minds could reach but one conclusion, questions of fact may be determined as a matter of law.” *Ruff*, 125 Wn.2d at 704. Reasonable minds could not conclude that courts typically accept applications for, and subsequently issue, aquatic lands easements. The superior court’s grant of summary judgment to the State on this issue should be affirmed.

3. The Superior Court Did Not Abuse Its Discretion by Declining to Issue a Constitutional Writ of Certiorari.

A trial court’s decision “to grant or deny a common law writ of certiorari lies entirely within the trial court’s discretion and [the appellate court] will not disturb a trial court’s refusal to grant a writ if based on tenable reasons.” *Gehr*, 155 Wn. App. at 533. A constitutional Writ of Certiorari is an “extraordinary remedy” that is only available when there is no other means of review of an agency decision, and it does not issue as of right. *Saldin Secs.*, 134 Wn.2d at 293. It can be issued only where the plaintiff makes a showing that the agency acted in a manner that was arbitrary and

¹²³ Br. of Appellant at 17-18.

capricious or illegal. *State Owned Forests*, 124 Wn. App. at 412. An agency's discretion is particularly broad when it is acting in a proprietary capacity. *See City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 694, 699, 743 P.2d 793 (1987).

The scope of the court's review is very narrow, and one who seeks to demonstrate that an action should be reviewed under a writ has a heavy burden. *Pierce Cnty. Sheriff*, 98 Wn.2d at 695. A court accepts review under the writ only after a plaintiff alleges facts that, if verified, establish that the agency's decision was arbitrary and capricious or illegal. *Federal Way Sch. Dist. v. Vinson*, 172 Wn.2d 756, 769, 261 P.3d 145 (2011) (citations omitted). This is analogous to making a *prima facie* showing.¹²⁴ Arbitrary and capricious means "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action." *Gehr*, 155 Wn. App. at 534. In this context, illegal action "does not equate with an error of law standard but instead refers to the agency's authority to perform an act" and "is restricted to an examination of whether the agency has acted within its authority as defined by the constitution, statutes, and regulations." *Id.* Moreover, a court will not grant the writ if it appears the

¹²⁴ Despite HCSG's assertions that "DNR fully concedes, a determination by a court on the issue of a writ of certiorari involves a full hearing and application of the facts" (Br. of Appellant at 17), DNR makes no such concession. A writ of certiorari requires a *prima facie* showing of illegal, arbitrary, or capricious actions. A court will not issue the writ without such a showing.

challenged action did not violate the law. *See Petroni v. Bd. of Directors*, 127 Wn. App. 722, 113 P.3d 10 (2005). The State's actions in this case did not violate the law, were not arbitrary or capricious, and the superior court did not abuse its discretion in ruling for the State.

E. The Superior Court Properly Awarded the State Summary Judgment on All Issues, Including HCSG's Due Process and Quiet Title Claims.

HCSG argues that the trial court committed error by awarding the State summary judgment on all issues, including HCSG's due process and quiet title claims.¹²⁵ However, despite HCSG's assertions on appeal, the parties did brief the issue of whether or not HCSG has a preference or priority right to construct a pier on or to obtain a lease over state bedlands.¹²⁶ Thus, the issue of whether or not HCSG had a valid property interest in state-owned aquatic land was before the trial court.

HCSG does not have any property interest in state-owned aquatic lands, and accordingly cannot have a valid due process right or a sufficient interest in state property to "quiet title" in that property. To have a valid substantive or procedural due process claim, "a plaintiff must first show that the State deprived him of a constitutionally protected liberty or property interest." *Johnson v. WDFW*, 175 Wn. App. 765, 774 305 P.3d 1130 (2013). Similarly, a quiet title action requires that a person have "a

¹²⁵ Br. of Appellant at 19-20.

¹²⁶ CP at 174-75, 178-79, 588-92.

valid subsisting interest in real property, and a right to the possession thereof. . .” *Magart v. Fierce*, 35 Wn. App. 264, 266, 666 P.2d 386 (1983) (emphasis in original) (citing RCW 7.28.010).

In this case, HCSG’s alleged “property interest” was briefed before the trial court,¹²⁷ but even if it was not, this Court “may sustain a trial court’s ruling on any correct ground, even if the trial court did not consider it.” *Bainbridge Citizens United*, 147 Wn. App. at 371.¹²⁸ HCSG has no valid interest in state property supporting either a due process or quiet title claim. The superior court’s dismissal of these issues should be affirmed.

F. The Superior Court Did Not Abuse Its Discretion in Denying HCSG’s Request for Injunctive Relief.

Motions for an injunction are addressed to the “sound discretion” of the trial court. *Wash. Fed’n of State Emps. Council 28, AFL-CIO v. State*, 99 Wn.2d 878, 887, 665 P.2d 1337 (1983). A trial court “abuses its discretion if its ruling is manifestly unreasonable or it exercises discretion on untenable grounds or for untenable reasons.” *Bauman*, 139 Wn. App. at 93. To obtain injunctive relief, a party must show:

¹²⁷ CP at 174-75, 178-79, 588-92.

¹²⁸ In ruling against HCSG on these same issues, the U.S. District Court also concluded that “Hood Canal fails to show a property interest to which title may be quieted” and “Hood Canal has failed to show a current property interest in the bedlands. The court dismisses Hood Canal’s due process claims.” CP at 712-13.

(1) that he has a clear legal or equitable right, (2) that he has a well grounded fear of immediate invasion of that right, and (3) that the acts complained of are either resulting in or will result in actual and substantial injury to him.

Tyler Pipe Indus. v. Dep't of Revenue, 96 Wn.2d 785, 792, 638 P.2d 1213 (1982).

The trial court exercises its discretion to issue an injunction based on the facts of the case and will not issue an injunction in a doubtful case. *Tyler Pipe*, 96 Wn.2d at 793. If a party fails to demonstrate *any* one of the *Tyler Pipe* factors, the court must deny the requested injunction. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 153, 157 P.3d 831 (2007).

The trial court did not abuse its discretion in denying HCSG's request for injunctive relief. HCSG failed to brief the standards entitling it to an injunction before the trial court until its reply brief, and it still fails to establish its entitlement to such relief.¹²⁹ The trial court properly exercised its discretion to deny HCSG's injunctive relief, and this Court should affirm that decision.

///

///

///

///

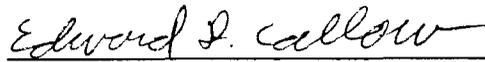
¹²⁹ CP at 153-87, 736.

VII. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the trial court's order granting summary judgment to the State in its entirety.

RESPECTFULLY SUBMITTED this 28th day of September, 2015.

ROBERT W. FERGUSON
Attorney General



EDWARD D. CALLOW
Assistant Attorney General
WSBA No. 30484
P.O. Box 40100
Olympia, WA 98504-0100
(360) 664-2854

*Attorneys for State of Washington,
Department of Natural Resources,
and Commissioner of Public Lands
Peter Goldmark*

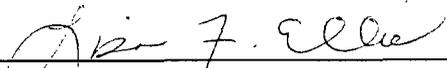
CERTIFICATE OF SERVICE

I certify that I caused a copy of the foregoing document to be served on all parties or their counsel of record on September 28, 2015, as follows:

Duana T. Koloušková Vicki E. Orrico Johns Monroe Mitsunaga Koloušková PLLC 11201 SE 8 th Street, Suite 120 Bellevue, WA 98004 kolouškova@jmmlaw.com orrico@jmmlaw.com <i>Attorneys for Appellant</i>	<input checked="" type="checkbox"/> U.S. Mail Postage Prepaid <input type="checkbox"/> Certified Mail Postage Prepaid <input type="checkbox"/> State Campus Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> ABC Legal Messenger <input type="checkbox"/> FedEx Overnight <input checked="" type="checkbox"/> Email
---	--

I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 28th day of September, 2015, at Olympia, Washington.



LISA F. ELLIS
Legal Assistant
Natural Resources Division

HOUSE BILL REPORT

SHB 2321

As Passed Legislature

Title: An act relating to the clarification of certain definitions in Title 79 RCW and related public land statutes.

Brief Description: Clarifying the definitions of certain natural resources terms.

Sponsors: By House Committee on Agriculture & Natural Resources (originally sponsored by Representatives Linville, Schoesler, Sump, Grant and Pearson; by request of Commissioner of Public Lands).

Brief History:

Committee Activity:

Agriculture & Natural Resources: 1/14/04, 1/27/04 [DPS].

Floor Activity:

Passed House: 2/12/04, 96-0.

Senate Amended.

Passed Senate: 3/4/04, 48-0.

House Concurred.

Passed House: 3/10/04, 97-0.

Passed Legislature.

Brief Summary of Substitute Bill

- Changes certain definitions in the Public Lands Act.

HOUSE COMMITTEE ON AGRICULTURE & NATURAL RESOURCES

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 12 members: Representatives Linville, Chair; Rockefeller, Vice Chair; Schoesler, Ranking Minority Member; Holmquist, Assistant Ranking Minority Member; Kristiansen, Assistant Ranking Minority Member; Chandler, Eickmeyer, Grant, Hunt, McDermott, Orcutt and Sump.

Staff: Jason Callahan (786-7117).

Background:

The Department of Natural Resources (DNR) manages more than five million acres of state-owned land, which is more than any other state or local entity in Washington. Management authority and direction for the DNR is located in various sections of Title 79, the Public Lands Act. The scope and effect of those statutory directions depend on the term used to describe state land. The terms "state lands," "public lands," "state forest lands," and "aquatic lands" are among the terms that can be used to describe state-owned land, and they all have different meanings.

The term "public lands" is described as any lands of the State of Washington, and includes state trust lands that are not reserved for a specific use, aquatic lands, and those lands falling under the definition of "state lands." The term "state lands" includes lands held in trust for common schools or universities, capitol building lands, institutional lands, and all public lands except for aquatic lands. Not included in either definition are state forest lands and some lands held for a specific purpose, such as natural area preserves, land bank lands, and natural resource conservation areas.

Fixtures attached to "state lands" that change the value of the land are defined as "improvements." This definition only applies to those lands falling under the definition of "state lands" and does not include fixtures on other public lands.

Summary of Substitute Bill:

Definitions

Certain definitions in the Public Lands Act are modified. The definition of "public lands" is expanded to include all lands administered by the DNR. This definition includes aquatic lands, state forest lands, and state lands. By not excluding any lands held for a specific purpose, this definition also encompasses holdings such as natural area preserves, land bank lands, and natural resource conservation areas. The definition of "state lands" is expanded to include land banks and escheat donations. The definition of "improvements" is expanded to cover all DNR-administered lands, and not just "state lands."

Changing "state lands" to "public lands"

The term "state lands" is changed to "public lands" in multiple sections, resulting in a broadening of the effect of the changed sections. This includes:

- Expanding the authority to recall a lease, contract, or deed to correct errors to all public lands, and not just state lands;
- Expanding the requirement to void certain legal transactions to all public lands, and not just state lands;
- Expanding the optional requirement that the DNR may comply with local zoning ordinances to all public lands, and not just state lands;
- Expanding the authority of the DNR to set rules or procedures governing the sale of valuable materials to aquatic lands and other public lands, and not just state lands and state forest lands; and
- Expanding the authority of the DNR to grant easement rights to aquatic lands and other public lands, and not just state lands and state forest lands.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: The current definitions in the Public Lands Act originated in 1927, and over time they have changed. Today they can often cause difficulties and inconsistencies. The definitions of "public lands" and "state lands" made sense in 1927, because they described the only two land types the DNR managed. That is no longer true today.

This bill will not alter the trust responsibilities of the DNR, nor change the way prospecting is carried out on DNR-managed land.

Testimony Against: None.

Persons Testifying: Doug Sutherland, Commissioner of Public Lands.

Persons Signed In To Testify But Not Testifying: None.

PART 2
TITLE 79 AMENDMENTS

Sec. 201, RCW 79.02.010 and 2003 c 334 s 301 are each amended to read as follows:

The definitions in this section apply throughout this title unless the context clearly requires otherwise.

- (1) ~~"Aquatic lands" means all state-owned tidelands, shorelands, harbor areas, and the beds of navigable waters as defined in chapter 79.90 RCW that are ((managed))~~ administered by the department.
- (2) "Board" means the board of natural resources.
- (3) "Commissioner" means the commissioner of public lands.
- (4) "Community and technical college forest reserve lands" means lands managed under RCW 79.02.420.
- (5) "Department" means the department of natural resources.
- (6) ~~((("Improvements," when referring to state lands,))~~ "Improvements" means anything considered a fixture in law placed upon or attached to ~~((such))~~ lands administered by the department that has changed the value of the lands or any changes in the previous condition of the fixtures that changes the value of the lands.
- (7) "Land bank lands" means lands acquired under RCW 79.19.020.
- (8) "Person" means an individual, partnership, corporation, association, organization, cooperative, public or municipal corporation, or agency of a federal, state, or local governmental unit, however designated.
- (9) ~~"Public lands" means lands of the state of Washington ((and includes lands belonging to or held in trust by the state, which are not devoted to or reserved for a particular use by law. They include))~~ administered by the department including but not limited to state lands, ((tidelands, shorelands, and harbor areas as defined in chapter 79.90 RCW, and the beds of navigable waters belonging to the)) state forest lands, and aquatic lands.
- (10) "State forest lands" means lands acquired under RCW 79.22.010, 79.22.040, and 79.22.020.
- (11) ~~"State lands" includes~~
 - (a) School lands, that is, lands held in trust for the support of the common schools;
 - (b) University lands, that is, lands held in trust for university purposes;
 - (c) Agricultural college lands, that is, lands held in trust for the use and support of agricultural colleges;
 - (d) Scientific school lands, that is, lands held in trust for the establishment and maintenance of a scientific school;
 - (e) Normal school lands, that is, lands held in trust for state normal schools;
 - (f) Capitol building lands, that is, lands held in trust for the purpose of erecting public buildings at the state capital for legislative, executive, and judicial purposes;
 - (g) Institutional lands, that is, lands held in trust for state charitable, educational, penal, and reformatory institutions; and
 - (h) ~~((All public lands of the state, except tidelands, shorelands, harbor areas, and the beds of navigable waters))~~ Land bank, escheat, donations, and all other

lands, except aquatic lands, administered by the department that are not devoted to or reserved for a particular use by law.

(12) (~~"Valuable materials," when referring to state lands or state forest lands;~~) "Valuable materials" means any product or material on the lands, such as forest products, forage or agricultural crops, stone, gravel, sand, peat, and all other materials of value except mineral, coal, petroleum, and gas as provided for under chapter 79.14 RCW.

Sec. 202. RCW 79.02.040 and 2003 c. 334 s. 432 are each amended to read as follows:

The department may review and reconsider any of its official acts relating to ~~((state))~~ public lands until such time as a lease, contract, or deed shall have been made, executed, and finally issued, and the department may recall any lease, contract, or deed issued for the purpose of correcting mistakes or errors, or supplying omissions.

Sec. 203. RCW 79.02.050 and 2003 c. 334 s. 365 are each amended to read as follows:

(1) Any sale, transfer, or lease ~~((of state lands))~~ in which the purchaser, transfer recipient, or lessee obtains the sale or lease by fraud or misrepresentation is void, and the contract of purchase or lease shall be of no effect. In the event of fraud, the contract, transferred property, or lease must be surrendered to the department, but the purchaser, transfer recipient, or lessee may not be refunded any money paid on account of the surrendered contract, transfer, or lease.

~~((2))~~ (2) In the event that a mistake is discovered in the sale or lease ~~((of state lands))~~, or in the sale of valuable materials ~~((on state lands))~~, the department may take action to correct the mistake in accordance with RCW 79.02.040 if maintaining the corrected contract, transfer, or lease is in the best interests of the affected trust or trusts.

Sec. 204. RCW 79.02.160 and 2003 c. 334 s. 308 are each amended to read as follows:

In case any person interested in any tract of land heretofore selected by the territory of Washington or any officer, board, or agent thereof or by the state of Washington or any officer, board, or agent thereof or which may be hereafter selected by the state of Washington or the department, in pursuance to any grant of ~~((public))~~ lands made by the United States to the territory or state of Washington for any purpose or upon any trust whatever, the selection of which has failed or been rejected or shall fail or shall be rejected for any reason, shall request it, the department shall have the authority and power on behalf of the state to relinquish to the United States such tract of land.

Sec. 205. RCW 79.02.280 and 2003 c. 334 s. 377 are each amended to read as follows:

All contracts of purchase~~((s))~~ or leases~~((of state lands))~~ issued by the department shall be assignable in writing by the contract holder or lessee and the assignee shall be subject to and governed by the provisions of law applicable to the assignor and shall have the same rights in all respects as the original purchaser, or lessee, of the lands, provided the assignment is approved by the department and entered of record in its office.

[785]

interests of the state of Washington to do so, except that property purchased with educational funds or held in trust for educational purposes shall be sold only in the same manner as are ~~((public)) state lands ((of the state))~~:

(1) Where the state property necessitating the acquisition of private property interests for access purposes under authority of this chapter is sold or exchanged, the acquired property interests may be sold or exchanged as an appurtenance of the state property when it is determined by the department that sale or exchange of the state property and acquired property interests as one parcel is in the best interests of the state.

(2) If the acquired property interests are not sold or exchanged as provided in subsection (1) of this section, the department shall notify the person or persons from whom the property interest was acquired, stating that the property interests are to be sold, and that the person or persons shall have the right to purchase the same at the appraised price. The notice shall be given by registered letter or certified mail, return receipt requested, mailed to the last known address of the person or persons. If the address of the person or persons is unknown, the notice shall be published twice in an official newspaper of general circulation in the county where the lands or a portion thereof is located. The second notice shall be published not less than ten nor more than thirty days after the notice is first published. The person or persons shall have thirty days after receipt of the registered letter or five days after the last date of publication, as the case may be, to notify the department, in writing, of their intent to purchase the offered property interest. The purchaser shall include with his or her notice of intention to purchase, cash payment, certified check, or money order in an amount not less than one-third of the appraised price. No instrument conveying property interests shall issue from the department until the full price of the property is received by the department. All costs of publication required under this section shall be added to the appraised price and collected by the department upon sale of the property interests.

(3) If the property interests are not sold or exchanged as provided in subsections (1) and (2) of this section, the department shall notify the owners of land abutting the property interests in the same manner as provided in subsection (2) of this section and their notice of intent to purchase shall be given in the manner and in accordance with the same time limits as are set forth in subsection (2) of this section. However, if more than one abutting owner gives notice of intent to purchase the property interests, the department shall apportion them in relation to the lineal footage bordering each side of the property interests to be sold, and apportion the costs to the interested purchasers in relation thereto. Further, no sale is authorized by this section unless the department is satisfied that the amounts to be received from the several purchasers will equal or exceed the appraised price of the entire parcel plus any costs of publishing notices.

(4) If no sale or exchange is consummated as provided in subsections (1) through (3) of this section, the department shall sell the properties in the same manner as state lands are sold.

(5) Any disposal of property interests authorized by this chapter shall be subject to any existing rights previously granted by the department.

~~Sec. 211. RCW 79.36.355 and 2003 c 334 s 396 are each amended to read as follows:~~

The department may grant to any person such easements and rights in ~~((state lands or state forest))~~ public lands, not otherwise provided in law, as the applicant applying therefor may acquire in privately owned lands ~~((through proceedings in eminent domain))~~. No grant shall be made under this section until such time as the full market value of the estate or interest granted together with damages to all remaining property of the state of Washington has been ascertained and safely secured to the state.

Sec. 219. RCW 79.36.380 and 1982 1st ex.s. c 21 s 168 are each amended to read as follows:

Every grant, deed, conveyance, contract to purchase or lease made since ~~((the fifteenth day of))~~ June 15, 1911, or hereafter made to any person, firm, or corporation, for a right of way for a private railroad, skid road, canal, flume, watercourse, or other easement, over or across any ~~((state))~~ public lands for the purpose of, and to be used in, transporting and moving timber, minerals, stone, sand, gravel, or other valuable materials of the land, shall be subject to the right of the state, or any grantee or lessee thereof, or other person who has acquired since ~~((the fifteenth day of))~~ June 15, 1911, or shall hereafter acquire, any lands containing valuable materials contiguous to, or in proximity to, such right of way, or who has so acquired or shall hereafter acquire such valuable materials situated upon ~~((state))~~ public lands or contiguous to, or in proximity to, such right of way, of having such valuable materials transported or moved over such private railroad, skid road, flume, canal, watercourse, or other easement, after the same is or has been put in operation, upon paying therefor just and reasonable rates for transportation, or for the use of such private railroad, skid road, flume, canal, watercourse, or other easement, and upon complying with just, reasonable and proper rules and regulations relating to such transportation or use, which rates, rules, and regulations, shall be under the supervision and control of the utilities and transportation commission.

Sec. 220. RCW 79.36.390 and 1982 1st ex.s. c 21 s 169 are each amended to read as follows:

Any person, firm, or corporation, having acquired such right of way or easement since ~~((the fifteenth day of))~~ June 15, 1911, or hereafter acquiring such right of way or easement over any ~~((state))~~ public lands for the purpose of transporting or moving timber, mineral, stone, sand, gravel, or other valuable materials, and engaged in such business thereon, shall accord to the state, or any grantee or lessee thereof, having since ~~((the fifteenth day of))~~ June 15, 1911, acquired, or hereafter acquiring, from the state, any ~~((state))~~ public lands containing timber, mineral, stone, sand, gravel, or other valuable materials, contiguous to or in proximity to such right of way or easement, or any person, firm, or corporation, having since ~~((the fifteenth day of))~~ June 15, 1911, acquired, or hereafter acquiring, the timber, mineral, stone, sand, gravel, or other valuable materials upon any ~~((state))~~ public lands contiguous to or in proximity to the lands over which such right of way or easement is operated, proper and reasonable facilities and service for transporting and moving such valuable materials, under reasonable rules and regulations and upon payment of just and reasonable charges therefor, or, if such right of way or other easement is not then in use, shall accord the use of such right of way or easement for transporting and