

FILED

APR 24 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29121-9-III

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

PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY, a
municipal corporation,

Respondent/Cross-Appellant,

v.

STATE OF WASHINGTON, PETER GOLDMARK, Commissioner of
Public Lands, and CONSERVATION NORTHWEST, a non-profit
corporation,

Appellants/Cross-Respondents.

**APPELLANTS STATE OF WASHINGTON AND PETER
GOLDMARK'S OPENING BRIEF**

Paul J. Lawrence
Sarah C. Johnson
Kymberly K. Evanson
PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2100
Seattle, WA 98101
(206) 245-1700

Special Assistant Attorneys General
for Appellants/Cross-Respondents
State of Washington and Peter
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I. INTRODUCTION

The issue in this case is whether state trust lands that are constitutionally and statutorily dedicated to the purpose of supporting Washington's schools and which the Department of Natural Resources ("DNR")¹ actively manages for this purpose are subject to condemnation by a local public utility district. The lands at issue in this action were granted to Washington under the federal Enabling Act of 1889 for the specifically enumerated purpose of perpetually supporting the common schools. These lands are dedicated to this purpose by law and may not be used for any other purpose.

Consistent with the state's constitutional and statutory duties to manage state trust lands on behalf of trust beneficiaries, DNR has leased and permitted the particular state lands at issue here to generate income to support Washington schools. Despite DNR's active management and use of these trust lands, the Public Utility District No. 1 of Okanogan County (the "PUD") seeks to condemn them for an electric transmission line. This is contrary to Washington law which establishes that lands that are dedicated to a public use or devoted to or reserved for a particular use by law are not subject to condemnation. Because the state trust lands at issue

¹ As used in this brief, "DNR" references Appellants State of Washington, Department of Natural Resources, and Peter Goldmark, Commissioner of Public Lands.

are dedicated to a public use, and are reserved to that use by law, this Court should find as a matter of law that these lands are not subject to condemnation and reverse the trial court's grant of summary judgment.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that actively managed state trust lands that DNR dedicates through active leases and permits to the purpose of benefiting Washington schools pursuant to DNR's trust management duties are subject to condemnation by a local public utility district.

2. The trial court erred in determining that the compatibility of the PUD's proposed condemnation use and DNR's existing or potential long term use of the state trust lands at issue was relevant to the determination of whether these trust lands were subject to condemnation.

3. The trial court erred in finding that the proposed condemnation use and the existing or potential long term use of the state trust lands were compatible and in granting the PUD summary judgment.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in finding that state trust lands that are actively-managed and dedicated to a public use of supporting Washington's schools pursuant to the state's trust obligations, and are

devoted to or reserved for that use by law, are subject to condemnation by a local public utility district?

2. Did the trial court improperly decide that the state trust lands at issue were subject to condemnation based on its finding that the PUD's proposed condemnation use for an electric transmission line and DNR's existing or potential long term uses of these lands were compatible, when such an analysis is irrelevant to this legal issue?

3. To the extent the Court determines that the issue of the compatibility of the proposed and existing or potential long term uses of the state trust lands is relevant here, is there is a genuine issue of material fact as to whether these uses are compatible, precluding summary judgment on this issue?

IV. STATEMENT OF THE CASE

A. The Origination Of State Trust Lands And DNR's Role In Managing Those Lands.

At the time of Washington's admission into the Union in 1889, the federal government granted to it approximately three million acres of land that the state was legally obligated to hold in trust for Washington schools. Enabling Act, ch. 180, 25 Stat. §§ 10-11 (1889). The granted lands consisted of sections 16 and 36 of each township in Washington. *Id.* The Enabling Act reserved these lands for "school purposes only" and set forth

certain restrictions on their sale and lease to ensure that the lands would derive to the sole benefit of Washington schools. *Id.* § 11. These restrictions are echoed in the Washington Constitution, which provides that all “public lands granted to the state are held in trust for all the people” and restricts the manner in which such trust lands may be disposed. Wa. Const. Art. XVI, § 1.

The Washington Supreme Court has held that, pursuant to the Enabling Act and Washington Constitution, the state holds these trust lands subject to “real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees.” *Skamania County v. State*, 102 Wn.2d 127, 132-33, 685 P.2d 576 (1984). This includes the duty of undivided loyalty and to act prudently with regard to the management of trust assets in consideration of the “specific enumeration of the purposes for which the lands were granted” and the recognition that this “enumeration is necessarily exclusive of any other purpose.” *Id.* at 580-83. Thus, an inviolate duty of the state is to manage these trust lands to ensure their short- and long-term economic value and productivity for school beneficiaries. *See, e.g.*, Op. Att’y Gen. 11, Question 5(b) (1996).

DNR is the state body charged by the legislature with the management of these lands. Historically, lands held in trust by the state were managed by various state agencies, including the Division of

Forestry, the Board of State Land Commissioners, the State Forest Board and others. *See* RCW 43.30.010. In 1957, these management responsibilities were consolidated in DNR, which was created to provide “effective and efficient management” of these state lands. RCW 43.30.010, .030. The Commissioner of Public Lands, a state-wide elected constitutional executive officer, serves as the administrator of DNR and has general management responsibilities for the department. RCW 43.30.421. The Commissioner is also a member of the Board of Natural Resources (“Board”), a body comprised of representatives from the state education system, as well as county and state government. RCW 43.30.205. The Board establishes policies regarding the appropriate management of state lands and resources. RCW 43.30.215. The Commissioner and his or her appointed supervisor direct DNR in a manner consistent with the policies established by the Board. RCW 43.30.155, .421, and .430.

Consistent with the state’s obligation under the Enabling Act and the Washington Constitution to manage these trust lands, DNR has been granted the exclusive statutory authority and discretion to lease trust lands for various purposes, including commercial, agricultural and recreational uses. RCW 79.13.010 (“the department may lease state lands for purposes it deems advisable . . . in order to return a fair market rental return to the

state or the appropriate constitutional or statutory trust . . .”). Certain aspects of DNR leases are statutorily governed, including the term of such leases and their general content. *See, e.g.*, RCW 79.13.030, .060. DNR is also authorized to enter into grazing permits to allow for livestock grazing on state trust lands for the benefit of trust beneficiaries. RCW 79.13.380, .390.

B. Background of Methow Transmission Line Project and Condemnation Action.

In 1996, the PUD proposed building a new electric transmission line to serve the Methow Valley in Okanogan County (the “Methow Transmission Project”). In March 2006, the PUD published a Final Environmental Impact Statement (“FEIS”) studying various proposed routes for the transmission line, including the cost of the alternative routes and each route’s environmental impacts.² The FEIS considered three primary alternative routes for the transmission line.³ One alternative consisted of rebuilding 28 miles of the existing Loup Loup transmission line, all of which would occur within the right of way for the existing transmission line. 2006 FEIS at § 2.3.4. A second alternative consisted of

² The complete Methow Transmission Project FEIS is available at <http://www.okanoganpud.org/methowtrans/FEIS>.

³ The FEIS studied seven “alternatives”, however, these alternatives (other than the SEPA-mandated “no-action” alternative) all centered on one of the three alternate proposed routes. *See generally* 2006 FEIS at § 2.3.

constructing a 30-mile transmission line along the river valley floor and next to existing state highways. *Id.* at § 2.3.3. These two alternatives required almost no new road construction and no condemnation of or easements over state trust land. *Id.*

A third alternative – the PUD’s preferred alternative – was a new 28-mile transmission line running through largely undeveloped land between Paternos and Twisp. 2006 FEIS at § 2.3.2. The proposed route for this new line crosses ten parcels of state trust lands, as well as federal forest lands and privately-owned lands. *Id.* The proposed line requires a 100 foot-wide easement over approximately 12.2 miles of state trust lands, and also requires the construction of almost 22 miles of new roads for the purpose of constructing and maintaining the new transmission line, many of which would be located on state trust land. *Id.* A map of the state trust lands affected by the PUD’s transmission line is available at CP 375-76.

The proposed Paternos-Twisp transmission line crosses through the largest contiguous publically-owned shrub-steppe habitat in the Methow Valley. CP 143, 585. To both generate income for trust beneficiaries and preserve this land as part of the trust corpus for the benefit of future generations, DNR has made the management decision to lease portions of these lands for cattle grazing. CP 230. To that end, DNR has entered enforceable leases with various parties for the use of these

parcels, as well as issued permits to allow for cattle grazing on certain parcels. CP 229-369 (summarizing and attaching relevant leases and permits). In total, the proposed Paternos-Twisp transmission line would cross state trust lands that are subject to five active grazing leases and two grazing permit range areas. *Id.* These leases and permits actively generate income to benefit Washington schools. *Id.*; CP 36.

In comments on the PUD's FEIS and in correspondence with the PUD, DNR identified concerns with the construction of the transmission line and the additional 22 miles of roads through undeveloped state trust lands, including the spread of noxious weeds, potential negative impacts on wildlife and vegetation, increased fire danger, and concerns regarding the maintenance or abandonment of the roads used to construct and maintain the line. CP 143-47; 556-58. Such negative impacts are the type that would affect the value of the parcels for trust beneficiaries. DNR also identified certain mitigation measures that might alleviate these impacts. *Id.*; *see also* CP 557 (PUD's preferred alternative has greatest adverse impacts on state trust lands that will cause "significant costs" to trust beneficiaries by virtue of additional required land management).

C. Procedural History Of This Action And *Goldmark v. McKenna*.

In October 2008, the PUD submitted a right of way application to DNR asking for an easement for the purpose of constructing the Paternos-

Twisp transmission line. CP 230, 538-551. DNR and the PUD engaged in negotiations regarding the easement application, including appropriate mitigation measures. CP 36-37. Prior to any formal easement decision by DNR, however, the PUD withdrew its right-of-way application and, on or about November 30, 2009, the PUD filed a petition to condemn the easement over the state trust lands at issue in this action. CP 610-41. The PUD subsequently amended its condemnation petition on April 14, 2010. CP 168-277.

Conservation Northwest (“CNW”) moved to intervene in this action concerned with the environmental impacts of the proposed transmission line on state trust lands and with the preservation of DNR’s ability to manage those lands. CP 594-606. The trial court granted CNW’s intervention motion, CP 506-08, and both DNR and CNW moved for summary judgment on the ground that the PUD lacked the authority to condemn the state trust lands at issue. CP 460-85 (DNR Motion); CP 486-505 (CNW Motion).

DNR argued that trust lands that are actively managed by DNR and subject to grazing leases and permits are devoted to or reserved for a particular use by law, and that these lands are also dedicated to a public use of supporting trust beneficiaries. CP 477-484. CNW raised similar arguments, and argued that the PUD lacked statutory authority to condemn

state trust lands for the purpose of construction of an electric transmission line. CP 488-503.

The trial court denied CNW and DNR's motions and granted summary judgment in favor of the PUD. CP 22-24 (Order on DNR Motion); CP 19-21 (Order on CNW Motion). In conjunction with its written order, the trial court issued an oral ruling setting forth the grounds for its decision. *See generally* 5/11/10 VRP. Though the trial court acknowledged that the state trust lands were being used by the state for a public purpose, the court concluded that this use was "compatible" with the PUD's desired easement for the transmission line project. Specifically, the trial court ruled that the PUD's "easement for construction and maintenance of the transmission line will not destroy or substantially interfere with grazing leases or permits... will not substantially interfere with any known, specific or planned future use...will likely increase, rather than decrease revenues...[and] is a compatible use to grazing." VRP 21:25-22:7. The court, however, did not take testimony pertaining to the impacts of the proposed condemnation on the state's existing or future use of the land or otherwise cite to evidence submitted by the parties on summary judgment. Rather, the trial court based its ruling largely on its own observation that "cattle graze under power lines in many parts of Okanogan county...." VRP 18:7-8. The

court then entered the order on public use and necessity and set a date for a trial on just compensation.⁴

CNW timely appealed the trial court's ruling on both CNW's and DNR's motions for summary judgment. CP 1-13. The PUD also appealed the trial court's order granting CNW's motion to intervene. CP 918-22. The Attorney General initially declined to appeal the trial court's decision despite Commissioner Goldmark's request that he do so. CP 907. Commissioner Goldmark retained independent counsel and advised the Attorney General that he intended to seek a writ of mandamus before the Washington Supreme Court compelling the Attorney General to represent him on appeal. CP 906-07. Immediately prior to the expiration of the appeal period, the Attorney General filed a "Contingent Notice of Appeal", stating that he intended to withdraw the notice in the event Commissioner Goldmark's action before the Supreme Court was unsuccessful. CP 906-917. Shortly thereafter, Commissioner Goldmark filed an action before the Washington Supreme Court. As a result, the

⁴ The state stipulated to the entry of the order on public use and necessity, which addressed only the narrow issues of whether the transmission line project was a public use and whether the easements sought were reasonably necessary for that use. CP 642-43. As such, the question of public use and necessity was not before the trial court at summary judgment. VRP 4/10/2010 at 7:5-11. The only issue before the trial court at summary judgment was whether the PUD had the statutory authority to condemn the state trust lands at issue, a point DNR vigorously disputed. *Id.*

Court of Appeals entered an order staying briefing and argument of the instant appeal pending the outcome of the Supreme Court action. Oct. 10, 2010 Commissioner's Ruling.

On September 1, 2011, the Supreme Court found that the Attorney General had the statutory duty to represent Commissioner Goldmark on appeal and entered a writ requiring him to do so. *Goldmark v. McKenna*, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011). The Supreme Court denied the Attorney General's subsequent motion for reconsideration and issued its Certificate of Finality on February 7, 2012. Given the outcome of the *Goldmark* case, special counsel was appointed to represent DNR and the Commissioner on appeal. On March 8, 2012, this Court lifted the stay of the instant appeal, permitting this matter to move forward with briefing and argument.

V. ARGUMENT

Under the federal Enabling Act and the Washington Constitution, the state trust lands at issue in this action are reserved for the specifically enumerated purpose of supporting Washington's schools. These lands are held by the state pursuant to "real, enforceable trusts" and, by law, the state may not use these lands for anything other than to benefit the designated trust beneficiaries. Consistent with these responsibilities, DNR actively manages the trust lands at issue by leasing and permitting these

lands for commercial cattle grazing to generate income to support the common schools. As the trial court found below, this “use of trust land to benefit the trust beneficiaries is a proper and public purpose”. 5/11/10 VRP at 5:23-34.

Over one hundred years of precedent establishes that because these lands are dedicated to this existing public use, and are devoted to or reserved for that use by law, they are immune from condemnation. As set forth below, DNR’s dedication and active management of these trust lands for trust purposes removes them from the corpus of state lands that are subject to condemnation. There is no Washington authority allowing the condemnation of state trust lands of the type at issue here. Indeed, the case law requires the opposite result. The trial court’s grant of summary judgment in the PUD’s favor should be reversed.

A. Standard Of Review

Questions of statutory interpretation and claimed errors of law are reviewed de novo. *Happy Bunch, LLC v. Grandview N., LLC*, 142 Wn. App. 81, 88, 173 P.3d 959, 962-63 (2007) (citing *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). When reviewing a summary judgment, this Court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d

1373 (1993)). Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). “A material fact is one upon which the outcome of the litigation depends, in whole or in part.” *Hisle*, 151 Wn.2d at 861.

B. State Lands That Are Devoted To Or Reserved For A Particular Use By Law Or Dedicated To A Public Use Are Not Subject To Condemnation.

Since the time municipal corporations were first granted the authority to condemn state lands, courts have uniformly held that certain state lands are immune from condemnation either by virtue of their nature or their use. In 1907, the Legislature amended certain condemnation statutes to authorize cities to condemn state lands. Laws of 1907, ch. 153 § 1; CP 379-81.⁵ This legislative authorization did not specifically define or restrict the type of state lands subject to condemnation, and courts were left to determine the scope of this condemnation authority. In response,

⁵ Prior to 1907, Washington condemnation statutes did not expressly authorize the condemnation of state lands at all, and early case law held that these lands were immune from such action. *See, e.g. Samish Boom Co. v. Callvert*, 27 Wash. 611, 68 P. 367 (1902) (no authority to condemn state tide lands for purpose of log booming); *State v. Superior Ct. of Chelan Cty.*, 36 Wash. 381, 78 P. 1011 (1904) (state common school lands not subject to condemnation by water company for purpose of creating domestic water supply).

the Washington Supreme Court soon recognized limits on the ability to condemn these lands. *State v. Superior Ct. of Jefferson Cty.*, 91 Wash. 454, 157 P. 1097 (1916).

In *Jefferson County*, a railroad company sought to condemn certain tide lands and streets in Port Townsend, which the state had platted and reserved for use as a public waterway and right of way. 91 Wash. at 455. Although the lands had been dedicated for this use, they had not actually been improved for their stated purpose. *Id.* The court found that only those lands which are held by the state in its proprietary, as opposed to governmental, capacity are subject to condemnation. *Id.* at 458-59. And the court further held that state lands that are dedicated to a particular purpose are removed from the general corpus of state lands and are not subject to condemnation. *Id.* at 459. This holding is consistent with other early authority establishing that lands held by subdivisions of the state that were put to a public use were not subject to condemnation. *See, e.g., State v. Kittitas Cty.*, 107 Wash. 326, 181 P. 698 (1919) (land held by city that was used for a reservoir were not subject to condemnation by county, which sought to use lands to construct a road); *State v. Superior Ct. for Mason Cty.*, 136 Wash. 87, 238 P. 985 (1925) (land held in trust and

dedicated to use as public park could not be condemned by railroad).⁶

These cases establish that lands that are dedicated to a particular or public use are not subject to condemnation.

Consistent with this case law, the Legislature has also statutorily restricted the ability to condemn state lands. In the 1927 Public Lands Act, the Legislature restricted which public lands (including state trust lands) may be subject to condemnation by removing from the definition of “state lands” – or lands that may be condemned – those lands that were “devoted to or reserved for a particular use by law”. Laws of 1927, § 7797-1; CP 391-92. This restriction remains in the current statutes defining state lands. RCW 79.02.010(13)(h) (defining state lands, in part, as those lands “administered by the department that are not devoted to or reserved for a particular use by law”).⁷ Thus, the legislature has

⁶ Courts have applied this same principle to prevent condemnation of lands held by corporations that were dedicated to an existing public use. *See, e.g., Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 P. 670 (1903) (holding that corporation did not have power to condemn land of another corporation that was already dedicated to the same public use); *State v. Superior Ct. for Spokane Cty.*, 84 Wash. 20, 145 P. 999 (1915) (holding that one public service corporation could not condemn the land of another public service corporation that was either devoted to a public use or that was acquired in reasonable anticipation of a future need for its use).

⁷ The definitions of public and state lands were recodified in 2003. In its expression of intent in this legislation, the Legislature stated that these statutory changes were merely technical in nature and did not have any substantive or policy implications. RCW 79.020.010. Thus, although the codification of these definitions has changed, their meaning has not.

confirmed that lands which are “devoted to or reserved for a particular use by law” are removed from the definition of “state lands” that are subject to condemnation in condemnation statutes. *Id.*

Since the passage of the Public Lands Act, courts have continued to recognize that state lands that are put to a public use may not be condemned: “We deem it conclusively settled in this jurisdiction that a municipal corporation or a public corporation does not have the power to condemn state-owned lands dedicated to a public use, unless that power is clearly and expressly conferred upon it by statute.” *City of Tacoma v. Taxpayers of Tacoma*, 49 Wn.2d 781, 798, 307 P.2d 657 (1957). These case law and statutory restrictions on the condemnation of state lands were well-established in 1931 when public utility districts were first granted condemnation authority. CP 393-411, 418-433; *see* Ch. 54.16 RCW.⁸

They govern the question of whether the state trust lands at issue here are

⁸ In the trial court, CNW argued that the PUD lacked statutory authority to condemn state school trust lands due to conflicting provisions within Ch. 54.16 RCW. Specifically, CNW argued that RCW 54.16.020 (entitled “Acquisition of property and rights -- Eminent domain”) does not include state school lands, but .050 (entitled “Water Rights”) does include state school lands. CP 497. Accordingly, CNW argued that to reconcile the statutes, .050 was applicable only to PUDs “building out their hydroelectric projects.” CP 498. Given that the provisions of the statute were separated by codification, the state assumed, *arguendo*, that the provisions of .050 should be read together with .020. However, the state argued that the mere reference to state lands does not authorize the condemnation of state trust lands that are either devoted to or reserved for a public use by law. CP 476-77.

subject to condemnation. Applying these established principles to the case at hand, it is clear that the lands at issue are both dedicated to a public use, and devoted to or reserved for that use by law. As such, they are immune from condemnation.

C. The State Trust Lands At Issue Here Are Not Subject To Condemnation.

Pursuant to the Washington Constitution and the Enabling Act, federally-granted school trust lands are reserved by law to the particular and public use of benefiting the common schools. *See* Enabling Act, ch. 180, 25 Stat. §§ 10-11 (1889); Wa. Const. Art. XVI, § 1. This express reservation of state trust lands for specifically enumerated purposes supports a finding that all of these trust lands – regardless of their present or future use – are dedicated by law to a particular and public use. Under the principles set forth above, federally-granted trust lands should as a whole be held immune from condemnation by local governments. To hold otherwise would be to ignore the recognized constitutional and statutory dedication of these lands to the purpose of supporting the schools. Any authority holding or implying otherwise is in error.

In this case, however, the Court need not reach this broader question of whether all of the lands granted under the Enabling Act are immune from condemnation. Rather, because the state trust lands at issue

here are actively managed by DNR through grazing leases and permits for the purpose of benefiting Washington schools, they are unquestionably both dedicated to and reserved for a particular public use. Under established Washington law, they may not be condemned.

1. Actively-Managed State Trust Lands Are Dedicated To A Public Use And Are Not Subject To Condemnation.

The state trust lands at issue in this case are not subject to condemnation because they are actively managed by DNR and dedicated to the public use of supporting Washington schools. No prior Washington authority has held that actively managed state trust lands may be condemned, especially over the objection of the state agency tasked with their management. Rather, this case falls squarely within the extensive authority establishing that lands dedicated to a public use are not subject to condemnation. *See, e.g., Jefferson Cty.*, 91 Wash. at 459; *Taxpayers of Tacoma*, 49 Wn.2d at 798; *Kittitas Cty.*, 107 Wash. at 330-31. These cases set forth the bright-line rule that municipal corporations like the PUD lack the power to “condemn state-owned lands dedicated to a public use.” *Taxpayers of Tacoma*, 49 Wn.2d at 798.

These cases also establish that lands held by the state in its governmental capacity are not subject to condemnation. *Jefferson Cty.*, 91 Wash. at 458-59 (“The rule therefore is that... a statute conferring the

right to condemn state ... property generally, will in the absence of express words to the contrary, be confined to such property as it holds in its proprietary character.”). Courts have long recognized that the state manages trust lands in its governmental, rather than proprietary, capacity. *Soundview Pulp Co. v. Taylor*, 21 Wn.2d 261, 270, 150 P.2d 839 (1944) (“[t]he State of Washington in its ownership of granted school lands . . . owns and holds them in its sovereign, as distinguished from its proprietary, capacity”); *Jefferson Cty.*, 91 Wash. at 458-59 (“[T]he state holds title to property in two entirely distinct capacities, the one a proprietary capacity... and the other a governmental capacity; that is, in trust for the public use.”). With regard to school trust lands – like those at issue here – the state manages these lands in “aid of the performance of its governmental function of education.” *Soundview Pulp*, 21 Wn.2d at 270. DNR’s dedication of the trust lands at issue here to grazing for income-generating purposes is an appropriate use of these lands and consistent with its fiduciary duties to trust beneficiaries. These grazing leases generate income for trust beneficiaries while preserving DNR’s ownership of these trust lands so they can continue to be used to benefit future generations. CP 36-37.⁹ Because these lands are managed by the state in

⁹ Although there can be no question that the trust lands at issue here are formally dedicated to a particular use through the entry of leases and the

its governmental capacity, and are dedicated to the purpose of supporting common schools through income generating activity, they are not subject to condemnation. *Jefferson Cty.*, 91 Wash. at 459 (land “legally appropriated to any purpose” not subject to condemnation); *Taxpayers of Tacoma*, 49 Wn.2d at 798 (it is “conclusively settled” that “state-owned lands dedicated to a public use” may not be condemned absent express statutory authorization).

Indeed, this same type of land management activity has been judicially recognized as a public use of state trust lands. *Dickgieser v. State*, 153 Wn.2d 530, 536, 105 P.3d 26 (2005). In analyzing an inverse condemnation claim, the *Dickgieser* court determined that logging of state forest lands is a public use of those lands, and held that resulting damage to private property could be a compensable taking. *Id.* at 536-38. This case establishes that DNR’s statutorily-authorized land management activities that are undertaken for the purpose of generating money for state purposes are a public use of state trust lands. *Id.* at 538. Just as DNR is statutorily authorized to use state trust lands for logging to benefit trust

issuance of grazing permits, even if these lands were not formally dedicated in this manner, their active management by DNR alone would be sufficient to preclude their condemnation. For example, in *Taxpayers of Tacoma*, the court determined that the state’s use of land for a fish hatchery, without any formal dedication of the land for that purpose, was sufficient to find it dedicated to a public use. 49 Wn.2d at 791, 798.

beneficiaries, it is likewise authorized to lease trust lands for this same purpose. RCW 79.13.010 (authority to lease trust lands). And just as the *Dickgieser* court determined that the use of state lands for logging is a public use, so too is the use at issue here; namely, the leasing of state trust lands for cattle grazing to benefit trust beneficiaries. Both uses serve the same ends, and both uses are public.

To the extent the Court has any question as to whether the existing use of these lands by DNR is public, it should defer to DNR in this regard. Since the early twentieth century, courts have recognized that the state has the authority to grant its subdivisions the “power to determine what is a public use of the state’s own property.” *State v. Superior Ct. for Mason Cty.*, 99 Wash. 496, 500, 169 P. 994 (1918). Indeed, the Supreme Court has held that, although the question of public use is typically a judicial one, this principle “does not apply to the appropriation of lands owned by the sovereign state itself.” *Id.* Here, the Legislature has designated DNR as the state entity to manage trust lands. Exercising that authority, DNR has determined that the state trust lands at issue in this action are put to an existing public use and are not subject to condemnation. This finding of public use by DNR is entitled to the Court’s deference.

DNR's potential future use of these lands is also relevant to determining whether these lands are subject to condemnation. Indeed, courts have prohibited condemnation of lands held in reasonable anticipation of a future public use, even if those lands were not presently put to that use. *See Spokane Cty.*, 84 Wash. at 26 (finding it a matter of settled law that property acquired by public service corporation in reasonable anticipation of future use is "deemed devoted to a public use" until there has been an "abandonment of the intention so to use"); *Kittitas Cty.*, 107 Wash. at 328-29 (holding that lands city had acquired for future use as reservoir were not subject to condemnation because the city reasonably anticipated their future public use). Here, DNR not only actively uses the trust lands at issue for trust purposes, but it "reasonably anticipates" doing so for the long-term. Allowing the PUD to condemn these lands will interfere with DNR's ability to use these lands for trust purposes both now and in the future. This is impermissible.

There is no dispute here that DNR actively manages the state trust lands at issue in this action and has leased and permitted these lands to generate income for Washington schools consistent with its obligation to manage trust lands for trust beneficiaries. As the trial court recognized, this use is both "proper and public". 5/11/10 VRP at 5:23-34. Because

these lands are dedicated to a particular and public use, they are not subject to condemnation. *Taxpayers of Tacoma*, 49 Wn.2d at 798.

2. These Lands Are Also Reserved For A Particular Use By Law And Are Not Subject To Condemnation.

The state trust lands at issue here are also expressly reserved to a particular use by law through the operation of grazing leases and permits. As such, these lands are statutorily exempt from condemnation under RCW 79.02.010(13)(h). This statute provides that lands that are devoted to or reserved for a particular use by law are not subject to condemnation.¹⁰

The leased lands at issue in this action are legally devoted to the purpose of grazing and their use by lessees is limited to this purpose. RCW 79.13.370. DNR may not sell these lands during the term of the lease, except to the lessor. RCW 79.11.290 (leased lands “shall not be offered for sale, or sold, during the life of the lease, except upon application of the lessee”). These lands are thus removed from the general corpus of trust lands and devoted or reserved for this particular use by law. As such, they are not subject to condemnation.

¹⁰ As set forth above, the reservation of these lands under the Enabling Act and Washington Constitution for the sole purpose of supporting the common schools is arguably sufficient alone to find these lands dedicated to a particular use by law. But again, the Court need not reach this broader issue because the lands at issue here are devoted by law to this purpose through the operation of the existing grazing leases.

In analyzing the related question of whether state forest lands were subject to condemnation, the Supreme Court looked to the question of whether those lands were devoted to a particular use by law. *Fransen v. Board of Natural Resources*, 66 Wn.2d 672, 404 P.2d 432 (1965). The *Fransen* court found that, because RCW 79.22.050 statutorily reserved state forest lands from sale, these lands were not subject to condemnation. *Id.* at 675. *Fransen* did not hold that whether the lands may be sold is alone determinative of whether they are dedicated to a public use, but found it sufficient in that context. This holding is applicable here. Although state trust lands as a whole are not statutorily reserved from sale like forest lands, there is no dispute that lands that are the subject of active leases are reserved from sale during the lease term. RCW 79.11.290. Accordingly, under *Fransen*, during the term of these leases, the leased lands are reserved for a particular use by law and not subject to condemnation.

Under chapter 79.13 RCW and RCW 79.11.290, the state trust lands at issue here are “devoted to or reserved for a particular use by law” – namely statutorily authorized and governed grazing leases which are used to generate income for trust beneficiaries. The terms of RCW 79.02.010(13)(h) are plain: by definition, these lands at issue are no longer considered “state lands” that are subject to condemnation. The statute

does not require anything more than a finding that the lands are “devoted to or reserved for a particular use by law.” RCW 79.02.010(13)(h). And existing Supreme Court precedent illustrates that one measure of whether lands are devoted to a particular use by law is whether those lands are subject to sale. Because the state trust lands at issue here are dedicated to a particular use by law, and are reserved from sale during the term of this use, they are not subject to condemnation.

3. No Washington Authority Has Authorized The Condemnation Of The Type Of State Land At Issue Here.

Significantly, there is no Washington authority that has permitted the condemnation of actively managed state trust lands that are dedicated to and reserved for particular uses and that generate income for trust beneficiaries. Indeed, the cases on which the PUD relied below to argue that the lands at issue here are subject to condemnation all involved lands that were neither put to an existing use, nor contemplated for any future use by the state. *See City of Seattle v. State*, 54 Wn.2d 139, 143, 338 P.2d 126 (1959); *Roberts v. City of Seattle*, 63 Wash. 573, 574, 116 P. 25 (1911); *City of Tacoma v. State*, 121 Wash. 448, 209 P. 700 (1922). Moreover, all of these cases were decided prior to this Court’s decision in *Skamania*, which confirmed that the state holds trust lands subject to “real, enforceable trusts that impose upon the state the same fiduciary duties

applicable to private trustees.” 102 Wn.2d at 132-33. These cases simply do not support the PUD’s claims with respect to the lands at issue here.

In *City of Seattle*, the city sought to condemn certain state capitol building and school lands for use in connection with the city’s proposed reservoir. 54 Wn.2d at 141. The lands at issue consisted of logged off stumpage and unused timber lands, which the state admitted were neither put to an existing public use, nor contemplated for such a use in the future. CP 451-52 (trial court testimony in *City of Seattle* stating that lands at issue were not presently devoted to a public use nor intended to be used in such a manner). It was on this basis that the court found they were subject to condemnation. *City of Seattle*, 54 Wn.2d at 147.¹¹

Likewise, in *Roberts*, the University of Washington acquiesced in the city of Seattle’s condemnation of a 30-foot strip of land for the purpose of expanding a city street, and indeed, had desired to simply

¹¹ Significantly, the “one question” before the *City of Seattle* court was “whether the city of Seattle has the right, under RCW 8.12.030... and/or under RCW 80.40.010... to condemn state lands lying outside the city limits not presently dedicated to a public use.” 54 Wn.2d at 141. In answering this question, and in light of the state’s concession that the lands were unused, the Court construed the city’s condemnation statute as providing the requisite authority to condemn unused state trust lands. Because it was not argued by the parties, however, the Court did not address the broader question of whether federally-granted trust lands are as a matter of law dedicated to a public use under the Enabling Act and the state Constitution and thus immune from condemnation.

donate or sell the land to the city. 63 Wash. at 574. The *Roberts* court considered the objections of citizens opposed to the condemnation, but ultimately overruled those objections because the land was admittedly not put to any use by the University. *Id.* at 576 (“[t]here is nothing the record to indicate that the 30-foot strip of land in question is actually in use by the university”).¹² Nor, as is the case here, did the school land trustee object to the disposition of property.

In short, these cases merely illustrate the inverse of the proposition that state lands “previously dedicated to a public use” are not subject to condemnation. *City of Seattle*, 54 Wn.2d at 143. These cases do not support a finding that the type of trust lands at issue here, which DNR actively manages and leases for the specifically enumerated purpose of supporting Washington schools, are subject to condemnation, especially over the objection of the DNR.

Significantly, in the 50 years since *City of Seattle*, the *Skamania* decision has clarified the state’s duties with respect to managing state trust lands. As a result, the nature of trust land management has evolved

¹² The same is true for *City of Tacoma*, in which the court authorized the condemnation of lands the state acquired for use as fish eyeing station, but which the state was neither presently using nor had any express intent to use in the reasonable future. This case is discussed in more detail in Section IV, E (1), *infra*.

significantly. This Court has not addressed the condemnation powers of municipal corporations in the context of the modern DNR's active land management and post-*Skamania* fiduciary obligations to the trust beneficiaries. Indeed, no authority has permitted the condemnation of state lands – let alone state trust lands – under these circumstances.

D. Permitting Condemnation Under These Circumstances Would Effectively Elevate The PUD's Condemnation Authority Over DNR's Constitutional And Statutory Duty And Authority To Manage Trust Lands.

Allowing the PUD to condemn the trust lands at issue in this case would be inconsistent with the manner in which the PUD's condemnation authority is to be viewed in relation to the state. As a municipal corporation, the PUD “derives its existence, powers, and duties from the legislative body of the state”. *Taxpayers of Tacoma*, 49 Wn.2d at 796; RCW 54.04.020. It possesses only those powers expressly granted by the Legislature or necessarily implied from that grant. *Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area*, 134 Wn.2d 825, 834, 953 P.2d 1150 (1998). This is true for the PUD's condemnation authority as well, *King County v. City of Seattle*, 68 Wn.2d 688, 690, 414 P.2d 1016 (1966), and any statutory grant of this authority must be strictly construed. *Petition of City of Seattle*, 96 Wn.2d 616, 629, 638 P.2d 549 (1981). Strict construction is especially necessary

“where the lands of the sovereign are sought to be taken”. *Superior Ct. of Chelan Cty.*, 36 Wash. at 385; *see also Taxpayers of Tacoma*, 49 Wn.2d at 798 (stating same).

It follows from the PUD’s limited authority to condemn, that any claimed authority to condemn state trust lands, as distinct from non-trust lands, must be examined with even more scrutiny given their unique nature. As set forth above, these lands are held by the state pursuant to “real, enforceable trusts” that were established through the federal government’s grant of these lands and are further reflected in the Washington Constitution. The state manages these lands in its governmental rather than proprietary capacity. These lands are simply unlike other state lands that are not the subject of these trust obligations.

Moreover, it is DNR, not the PUD, that is tasked with managing and protecting state trust lands for current and future trust beneficiaries. In that role, DNR must be able to plan comprehensively for present and future use of state trust lands. The state’s trust management obligations are carried out depending on the nature of the land, its productive capacity currently and as predicted for the future, and a number of other factors related to the state’s fiduciary duties with respect to these lands. CP 230. In many instances, state trust lands will be actively managed to generate trust revenue. *Id.* In others, current circumstances may limit current

revenue-raising activity but land may be managed to preserve the opportunity for future economic activities. *Id.* For instance, lands awaiting harvest due to tree stand ages not producing marketable forest products are still being actively managed and dedicated to a public use, even though not currently producing income for the trust. *See id; see also* CP 36-37 (noting that in some instances, simply protecting the land that constitutes the corpus of the trust may be in the best interest of current and future trust beneficiaries).

The PUD is not burdened by any trust obligations. Unlike DNR, the PUD has no fiduciary duty to the trust beneficiaries and no interest in the long-term management of the trust land. Rather, the PUD is motivated by its own mission – to sell electricity to its customers. As in the instant case, these interests frequently collide. Accordingly, permitting local governments to condemn state trust lands that DNR manages on behalf of trust beneficiaries would improperly elevate the PUD’s proprietary interest above DNR’s constitutional and statutory land management duties. This would turn on its head the law requiring that a municipal corporation’s condemnation power be strictly construed, especially “where the lands of the sovereign are sought to be taken”. *Superior Ct. of Chelan Cty.*, 36 Wash. at 385. It would also directly contradict the well-settled principle that municipal corporations lack the “power to condemn state-owned lands

dedicated to a public use”. *Taxpayers of Tacoma*, 49 Wn.2d at 798. And it would seriously undermine DNR’s ability to carry out its trust management responsibilities.

As the sovereign and the fiduciary for the state land trusts, the state is entitled to exercise discretion in determining the appropriate use of these lands. The Supreme Court has recognized the appropriateness of deference to the state in determining whether its land is put to a public use and is thus immune from condemnation. *Mason Cty.*, 99 Wash. at 500 (recognizing state’s “power to determine what is a public use of the state’s own property”). The court has also found that governments should be allowed to determine whether lands are necessary for a particular public use and has declined to interfere with the “determination of the public necessity of acquiring and holding lands to be used for and in connection with public activities”. *Kittitas Cty.*, 107 Wash. at 328. It is appropriate to recognize DNR’s discretion to do so with respect to the trust lands at issue here.¹³

¹³ In a related context, courts have recognized the appropriateness of DNR’s discretion over easement decisions related to state lands, especially when a proposed easement would conflict with DNR’s management plans for that land. *Granite Beach Holdings, LLC v. State*, 103 Wn. App. 186, 207, 11 P.3d 847 (2000). In *Granite Beach*, the court recognized DNR’s “discretionary authority to manage trust lands for the benefit of the State” under former RCW 79.01.414 (similar in content to current RCW

This Court should make clear that state trust lands actively managed and devoted to a public use, in a manner consistent with DNR's duty to use trust lands to benefit trust beneficiaries, are immune from condemnation. To hold otherwise and permit condemnation of these trust lands would have long-term detrimental effects on DNR's ability to manage effectively state trust lands in a manner consistent with the statutorily and constitutionally established purpose of these lands. Decisions regarding trust land management and what is best for the trust are to be made by DNR, not the PUD. Allowing piecemeal condemnation of trust lands by local governments over the objection of DNR would effectively eliminate DNR's ability to manage these lands in the best interest of trust beneficiaries, both this generation and future generations. Such an outcome is contrary to both law and public policy.

E. The Compatibility of the PUD's Proposed Use With The Existing Public Use Is Not Determinative Of The PUD's Power To Condemn School Trust Lands Dedicated To A Public Use.

The only issue that is relevant here is whether the state trust lands at issue in this case may be condemned as a matter of law. This inquiry is legally distinct from whether the PUD's proposed use of the land and the state's current public use are theoretically "compatible." Despite this, the

79.36.355), and held that DNR was entitled to deny an easement that conflicted with those management objectives. *Id.*

trial court confused the question of whether these lands were subject to condemnation with a “compatibility” analysis; largely basing its denial of the state’s motion on its own unsupported findings that the two uses were compatible, and thus, that condemnation was appropriate. Because the compatibility of the uses of the land is irrelevant to the determination of whether the lands are subject to condemnation, the trial court’s holding was in error.

Even if the compatibility of uses is relevant to the question of whether the state trust lands at issue are subject to condemnation, it is proper to defer to DNR’s determination of what uses are compatible with its management objectives for these lands. This is particularly true where there is no evidence that the PUD’s chosen use of these lands is necessary and numerous alternatives exist for the placement of its transmission towers and power lines on lands not actively managed by DNR. The trial court did not take testimony to determine whether the PUD’s proposal to erect towers, build roads and run transmission lines was actually compatible with DNR’s existing and prospective use of these lands, and it lacked a sufficient basis to enter the factual finding underpinning its holding in this regard.

**1. The Trial Court's Compatibility Analysis
Misinterpreted Relevant Authority.**

Relying on three Washington cases, the trial court determined that the compatibility of the existing and proposed use of the lands at issue was relevant to the determination of whether those lands may be condemned. 5/11/10 VRP at 15:9-17:11. But whether the proposed condemnation use and the existing public use are compatible is legally irrelevant to the question of whether a municipal corporation may condemn state lands. *See Jefferson Cty.*, 91 Wash. at 461 (where state lands are sought to be condemned, question is “solely one of power”, not of whose right to the land is superior). None of the trial court’s authority establishes otherwise.

First, the trial court cited *City of Tacoma v. State* for the proposition that a condemnation is allowable so long as it does not destroy an existing public use. 121 Wash. 448. There, the city sought to condemn a 250-foot strip of state land straddling a stream and its related water rights for the development of a hydropower plant. The city also sought to divert water that flowed past a state fish hatchery, potentially damaging the hatchery by reducing the water flows. *Id.* at 452-53. The court ruled that the city could condemn the land at issue because it was *not being used* or devoted to a public use by the state. *Id.* As to the water rights, the court engaged in a different analysis because the city was not seeking to

condemn land itself. Accordingly, the court looked to the impact of the diversion, and concluded that – as in an inverse condemnation case – the diversion of the water would not so damage the pre-existing use of adjacent land so as to amount to a taking. *Id.* at 453. Rather than support the court’s “compatibility” analysis, *City of Tacoma* only stands for the proposition that a city can condemn *unused* state land. The court’s analysis related to the potential harm to state land as a result of the diversion of stream water is inapposite here.

The court’s reliance on *Roberts* is similarly unavailing. *See* 5/11/10 VRP at 17:2-11. As detailed above, *Roberts* involved the city of Seattle’s acquisition of a 30-foot strip of land owned by the University of Washington. 63 Wash. 573. The University consented to the condemnation, but a group of citizens brought suit to challenge a local improvement assessment. The court found that the land at issue could be condemned because it was admittedly not put to any use by the University. *Id.* at 576. Only after making this threshold finding did the court further comment that the condemnation would also not negatively impact the University’s remaining land. But there is no analysis suggesting that this fact impacted the court’s ruling on condemnation. Accordingly, nothing in *Roberts* suggests that a municipal corporation can condemn state land put to a public use so long as the uses are “compatible.”

Curiously, the trial court also looked to *Jefferson County*, which unquestionably holds that lands dedicated to a public use are not subject to condemnation. 91 Wash. at 459. Rather than acknowledge this holding, the court relied on a statement in the facts section of *Jefferson County* observing that the railroad's proposed appropriation would render parts of the remaining tracts of state land useless. 5/11/10 VRP at 16:16 -17:1 (citing *Jefferson County*, 91 Wash. at 455). Other than merely stating this fact, the *Jefferson County* court did not engage in any analysis of proposed or competing uses, or hold that a proposed "compatible" use could justify taking state trust land not otherwise subject to condemnation. *Jefferson County* does not support the trial court's ruling.

In sum, no case cited by the trial court supports its conclusion that the PUD's condemnation authority can be enlarged by evaluating the would-be condemnor's proposed use of state trust land. Rather, as a matter of law, land that is dedicated to a public use or devoted to or reserved for a particular use by law is not subject to condemnation. *See* Section IV.B, *supra*. In each of the above cases, the court based its decision on that principle of law. Indeed, any discussion of purported "compatibility" of use followed this legal finding. Accordingly, the trial court erred in basing its decision that the PUD had statutory authority to condemn state trust lands on the unsupported and legally irrelevant

conclusion that the uses were “compatible.” Once the trial court determined that the state trust lands at issue were put to a public use, its inquiry into whether they may be condemned was done.

2. Any Determination Of Compatibility Should Be Made By DNR, Not The Court.

As detailed above, DNR is the only body tasked with managing and protecting state trust lands for current and future trust beneficiaries. RCW 43.30.010, .030. In that role, DNR must be able to plan comprehensively for present and future use of state trust lands. Accordingly, while DNR maintains that the “compatibility of uses” is not relevant to the PUD’s statutory authority to condemn, to the extent this Court holds otherwise, any required compatibility determination should be made in the first instance by DNR, not the PUD or a court. And that determination is subject to substantial deference.

Uses that may appear to be compatible in the short-run today, may significantly conflict with DNR’s active management of the state trust lands presently or in the future. *See* CP 36-37; 556-58. Permitting condemnation of state trust lands based on the trial court’s determination of “compatibility” runs afoul of DNR’s authority and obligation to manage state trust lands in the best interest of current and future trust beneficiaries.

The trial court improperly usurped the role of DNR by deciding, on

an undeveloped factual record, that the PUD's proposed use was compatible with DNR's current and future active management of state trust lands.

3. In The Alternative, Genuine Issues Of Material Fact Regarding The Compatibility Of The PUD's Proposed Use With The State's Current Public Use Preclude Summary Judgment.

To the extent this Court intends to base its ruling on the compatibility of proposed and existing uses, it must remand for further proceedings to allow for submission of factual evidence regarding the impacts of the transmission line project on DNR's management and use of its land. The trial court should have considered evidence, e.g., whether placing a transmission line and roads through the middle of state trust lands along with associated impacts impairs the long term revenue generating capacity of that land. The trial court improperly granted summary judgment to the PUD despite the existence of numerous disputed issues of material fact as to the actual compatibility of the proposed transmission line project and DNR's existing public use.

VI. CONCLUSION

State school trust lands were granted by the United States for the specific purpose of supporting state education. The state's trust obligations with respect to this land are memorialized in our state

Constitution. The Supreme Court's decision in *Skamania* fully recognizes the inviolate fiduciary obligations owed by the state in managing these lands for the beneficiaries of the school trust. Especially here, where the legislatively designated trustee, the DNR, actively manages school trust land, such land is not subject to condemnation. That result is particularly clear given that it is an inferior municipal entity, a PUD, that seeks to condemn the State's school trust land.

Accordingly, DNR respectfully requests that this Court reverse the trial court's grant of summary judgment in favor of the PUD, and find that the state school trust lands at issue here may not be condemned by a local public utility district. In the alternative, DNR requests that the Court find that the trial court erred in deciding disputed material issues of fact related to the compatibility of use of these trust lands and reverse on this basis.

RESPECTFULLY SUBMITTED this 23rd day of April, 2012.

PACIFICA LAW GROUP LLP

By



Paul J. Lawrence, WSBA #13557

Sarah C. Johnson, WSBA #34529

Kymerly K. Evanson, WSBA #39973

Special Assistant Attorneys General
for Appellants State of Washington
and Peter Goldmark