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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 84704-5

PETER GOLDMARK, AS CHIEF EXECUTIVE OFFICER OF THE
DEPARTMENT OF NATURAL RESOURCES AND COMMISSIONER
OF PUBLIC LANDS,

Petitioner,

v.

ROBERT M. McKENNA, ATTORNEY GENERAL,

Respondent.

PETITIONER'S RESPONSE TO CORRECTED
AMICUS CURIAE BRIEF OF PUBLIC UTILITY
DISTRICT NO. 1 OF OKANOGAN COUNTY

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I. INTRODUCTION

The issue before the Court is whether the Attorney General must comply with the Commissioner's request to defend him when the request is made pursuant to RCW 43.12.075 and Article III, Section 21 of the Constitution. The District's brief provides nothing that assists in resolving that issue.

Instead, the District's brief dwells at length on issues that are not before the Court. Primarily, the District seeks to draw attention to the underlying case, even going so far as to assert numerous "facts" not contained in the Agreed Statement of Facts submitted by the parties. The facts and legal issues pending in the underlying litigation are wholly immaterial to this proceeding. Those lengthy portions of the District's brief should be ignored.

The brief suffers other defects, too. It relies primarily on authority from other jurisdictions in which Attorney Generals have common law authority. Those cases are irrelevant in our state where the Attorney General has no common law authority, rather only the authority vested in him by the Constitution and implementing statutes. The brief also digresses when it discusses attorney-client issues that arise when there are disputes *within* an agency, not – as here – disputes *between* agencies.

There are only two pages of the *amicus* brief that actually addresses the issues before this Court. But that tiny segment adds nothing beyond that discussed in the Attorney General's response brief.

II. THE DISTRICT'S DISCUSSION OF THE MERITS OF THE UNDERLYING ACTION IS IRRELEVANT TO THE SOLE ISSUE PRESENTED IN THIS ORIGINAL ACTION

The order granting the District leave to file an *amicus* brief limited the District to addressing only the merits of the present original action:

The District's motion to file *amicus* brief is granted. The Public Utility District's *amicus* brief, *which shall only address the merits of the present original action*, shall be served and received for filing in this Court by not later than September 20, 2010.

Order Denying Motion to Intervene and Granting Motion to File *Amicus* Brief (Aug. 19, 2010) (emphasis supplied). The petitioner and the respondent in this original action have not raised as an issue the merits of the underlying action. In particular, the Attorney General's response brief conspicuously omits any claim that its refusal to file the appeal as requested by the Commissioner was required because such an appeal would have been frivolous or a violation of Civil Rule 11. Yet that is precisely the issue that the *amicus* brief addresses at pages 14-20.

An *amicus* may not introduce new issues into a case,¹ especially when the order authorizing the filing of the *amicus* brief expressly limits the *amicus* to the issues presented by the original parties to the action. As a result, while we obviously disagree with the *amici*'s characterization of the merits of the underlying action, we do not address that issue further in the text of this response.²

¹ *Gallo v. Dept. of Labor & Industries*, 155 Wn.2d 470, 496, n.12, 120 P.3d 564 (2005).

² The District's claim that the Commissioner's position below lacked merit and was "frivolous" is belied by the lack of any ruling to that effect by the Superior Court and, further, the failure of the District to even raise the issue of an alleged violation of CR 11 by the Attorney General in the Superior Court proceedings.

The Commissioner's position in the Superior Court was advanced by an Assistant Attorney General, presumably with review and oversight by senior members of the Office of the Attorney General. The position advanced by the Office of the Attorney General in the Superior Court acknowledged the statute which provides public utility districts with authority to condemn state land under certain circumstances. But the Attorney General explained that the applicable statutes precluded condemnation of state lands if they are "devoted to public use." See RCW 79.02.010(11)(h) ("state lands" defined to exclude lands "that are not devoted to or reserved for a particular use by law"). See also 1927 Laws of Washington, ch. 255 § 1 (excluding from definition of public lands those "which are not devoted to or reserved for a particular use by law"). The 1927 law was in effect when the PUD statute was adopted in 1931. See also RCW 79.11.290 (state lands held under lease may not be sold during term of the lease). The issue in the Superior Court was whether state trust lands being leased to generate funds for the trust are "devoted to public use" such that they were not subject to condemnation.

In a surprising turn of events, the Superior Court determined that even if the lands were devoted to public use, they could be condemned if the condemning authority's proposed use of the property could be made compatible with the current public use. There is no case law authority for that new twist. Prior cases had simply provided that if state land were put to a "public use," it could not be condemned. See, e.g., *Fransen v. Bd. of Natural Resources*, 66 Wn.2d 672, 675, 404 P.2d 432 (1965). Compatibility had not been an issue in a case where a junior public entity (like a public utility district) attempted to condemn state lands devoted to a public use. While the Superior Court accepted the District's argument for this

III. THE DISTRICT'S REFERENCE TO THE "ENTITY" MODEL OF REPRESENTATION IS OFF POINT

When an attorney represents an entity (government or otherwise), issues can arise as to whom the attorney is representing: the entity itself or individual officers or members of the entity. RPC 1.13 and the other related authorities cited by the *amicus* in its brief address that issue. But that is not the issue presented here.

This case does not present a situation where the Attorney General must determine whether his client is the Commissioner of Public Lands or the Department of Natural Resources. The Commissioner and the Department have spoken with a single voice. The rules and policies that are utilized to assist an attorney in situations where the entity which it represents is speaking with multiple voices is not present here. Consequently, the *amicus* brief's discussion of these rules and policies is irrelevant to the sole issue before this Court.

The only possible relevance of this part of the *amicus* brief is by ignoring constitutional and statutory provisions which clearly make the Commissioner and his agency clients of the Attorney General. The

new development in the law, it could not be said that the Attorney General's Office was advancing a position that lacked merit or was frivolous. To the contrary, the Attorney General's position in Superior Court was well substantiated by existing case law.

Constitution charges the Attorney General not with an amorphous duty of representing the “public interest” or “the State,” but instead directs the Attorney General to “be the legal advisor *of the state officers, . . .*” Washington Const. Art. III, § 21 (emphasis supplied). The Commissioner is one of those “state officers” whom the Attorney General must serve as “legal advisor.” The Constitution, thus, establishes an attorney-client relationship between the Attorney General and the Commissioner. Whatever other obligations the Attorney General may have, he clearly has an attorney-client relationship with the Commissioner. *See, e.g., Deukmejian v. Brown.*³

This constitutional provision is echoed in the statutes which describe additional duties for the Attorney General. In particular, RCW 43.12.075 unambiguously directs the Attorney General to defend lawsuits “upon request of the Commissioner.” This legislatively imposed duty clearly establishes the Commissioner as the client with the Attorney General acting as his lawyer in prosecuting and defending lawsuits. The attorney-client relationship established by this legislation mirrors the attorney-client relation in the Constitution which puts the Attorney General in the role of “advisor,” not boss.

³ 29 Cal. 3d 150, 624 P.2d 1206 (1981).

The District supports its analysis of an Attorney General's ethical obligations by quoting from a law review article. But as discussed in the next section, the portions of the law review article quoted by the District are discussing the law in states where the Attorney General enjoys "common law" authority. Those citations and quotations do not address the situation in states, like Washington, where the Attorney General's duties are only as prescribed by the Constitution and implementing statutes.

In like manner, the District's effort to distinguish *People ex rel. Deukmejian v. Brown, supra*, is unavailing. The District claims that decision conflicts with the broad authority the Attorney General has "as an executive officer under the Washington Constitution." *Amicus Br.* at 10. But as discussed elsewhere in our briefing, this Court has rejected the notion that the Attorney General has broad powers and, rather, has held that the Attorney General only has those powers that are expressly provided for in the Constitution. *State ex rel. Winston v. Seattle Gas and Electric Company*, 28 Wash. 488, 68 P. 946 (1902), *petition for rehearing denied*, 70 P. 114 (1902) ("Not a common law officer;" "can only exercise such power as is delegated to him by statute"); *State v. O'Connell*, 83 Wn.2d 797, 812, 523 P.2d 872 (1975) (the "powers of the Attorney General are created and limited not by

the common law but by the law enacted by the people, either in their constitutional declarations or through legislative declaration in pursuance of constitutional provisions”). *See also Yelle v. Bishop*, 55 Wn.2d 286, 295-96, 347 P.2d 1081 (1959) (State Auditor has no powers greater than those provided by the Legislature pursuant to the Constitution).

Notably, *Deukmejian* was decided in a state (California) which, like Washington, rejects the “common law” basis for its Attorney General’s authority. *Deukmejian, supra*, 624 P.2d at 1209. Consequently, the *Deukmejian* case is particularly relevant to this Court’s analysis of the issue—unlike the numerous authorities cited by the *amicus* from other states, which have adopted a broader, common law view of the powers of their Attorney Generals.

IV. THE DISTRICT’S RELIANCE ON “COMMON LAW” POWERS IS MISPLACED

Time and again, the District’s brief cites and quotes authority relating to Attorney Generals in other states who enjoy common law powers. Our state, like many other states,⁴ rejects the notion that the Attorney General

⁴ *See, e.g.*, Texas (*Perry v. Del Rio*, 67 S.W.3d 85 (Tex., 2001)); Connecticut (*Blumenthal v. Barnes*, 261 Ct. 434, 462-63, 804 A.2d 152, 169 (2002)); West Virginia (*Manchin v. Browning*, 170 W.Va. 779, 296 S.E.2d 909 (1982)); Arizona (*Arizona State Land Department v. McFate*, 87 Ariz. 139, 348 P.2d 912 (1960)); Iowa (*Motor Club of Iowa v. Department of Transportation*, 251 N.W.2d 510 (Iowa 1977)); and California

enjoys common law powers. Instead, the Attorney General in Washington State enjoys only those powers prescribed by the Constitution. *See, e.g., State ex rel. Winston, supra.*

Without ever acknowledging that it is citing authority from states where the Attorney General enjoys the broader authority developed at common law, the District repeatedly offers up such “authority” for consideration by this Court. Thus, on page 10, the District quotes from a Yale Law Review article that is discussing cases from Massachusetts and Kentucky. But the Attorney General in each of those states enjoys common law powers. *See Secretary of Administration and Finance v. Attorney General*, 367 Mass. 154, 163, 326 N.E.2d 334, 338 (1975) (the Massachusetts Attorney General “has a common law duty to represent the public interest”); *Commonwealth of Kentucky ex rel. Hancock v. Paxton*, 516 S.W.2d 865, 867 (Ky., 1974) (“The Attorney General ‘is possessed of all common law powers and duties of the office except as modified by the Constitution or statutes’”).

At the top of page 11, the District argues that the Attorney General is obligated to represent the interests of the State “as an entity,” not the specific

(*People ex rel. Deukmejian v. Brown*, 29 Cal.3d 150, 624 P.2d 1206 (1981)).

agencies within the state as clients. This statement, too, is drawn from the Yale Law Review article and, again, from a portion of that article that is based on the Attorney General having common law powers. Indeed, the article premises this statement on the powers that Attorney Generals have had “since seventeenth century England.”⁵

In the next paragraph of its brief, the District quotes the law review article again and, again, fails to acknowledge that the cited authority for statement is the dissent in a West Virginia case.⁶ The majority opinion in that case rejected the notion that the Attorney General enjoyed common law powers and, instead, held that the Legislature had created a traditional attorney-client relationship between the Attorney General and the state officers he is charged to represent:

The Attorney General stands in a traditional attorney-client relationship to a state officer he is required by statute to defend. . . . The Attorney General is not authorized in such circumstances to place himself in the position of a litigant so as to represent his concept of public interest, but he must defer to the decisions of the officer whom he represents

⁵ Marshall, William P., *Break up the Presidency? Governors, State Attorney Generals, and Lessons from the Divided Executive*, 115 *Yale L.J.* 2446 at 2462 & n.83. See also *id.* at 2449-50 (cross-referenced in footnote 83) (describing the expansion of the powers of England’s Attorney General during the sixteenth, seventeenth, and eighteenth centuries).

⁶ *Id.* at n. 94 (citing *Manchin v. Browning*, 296 SE2d 909, 924 (W. Va. 1982) (Neely, J., dissenting)).

concerning the merits and the conduct of the litigation and advocate zealously those determinations in court.

Id. at 921.

The majority opinion in *Manchin* dismissed authority from other states where the Attorney General retains common law powers. *Id.* at n.6. In like vein, the California Supreme Court rejected cases from states operating under the common law view: “Such opinions arise, however, under the peculiarities of the prevailing law in those several states, and are not persuasive here. *Deukmejian, supra*, 624 P.2d at 1209. Similarly, this Court should reject the District’s reliance on authority from those common law states (and the portions of the law review article based on decisions from those states).

V. THE DISTRICT’S ANALYSIS OF THE APPLICABLE
CONSTITUTIONAL AND STATUTORY PROVISIONS
ADDS NOTHING BEYOND THE DISCUSSION OF THOSE
MATTERS IN THE BRIEFS OF THE PETITIONER AND
RESPONDENT

Two pages of the District’s brief address the constitutional and statutory provisions at issue here. *See Amicus Br.* at 12-13. That short discussion sheds no new light on the issues discussed at length in the Attorney General’s brief. The District’s principal point is that the phrase in

RCW 43.12.075 authorizing actions “upon the Attorney General’s own initiative” is evidence that the Legislature did not intend to create a mandate with the language earlier in that section which provides that it “shall be the duty of the Attorney General” to defend actions “when requested so to do by the Commissioner . . .”

Finally, the District (and the Attorney General) notes that RCW 43.12.075 also provides the Attorney General with authority to initiate or defend an action “upon the Attorney General’s own initiative.” The District and Attorney General assumes that his use of this power would be over the Commissioner’s objection.” *See, e.g., Amicus Br.* at 13 (“own initiative” must mean discretion to terminate litigation contrary to Commissioner’s will); *Attorney General Response Br.* at 33. They contend it makes little sense to authorize the Attorney General to initiate or defend an action “over the Commissioner’s objection,” yet “lack discretion to decline [to defend] an action at the Commissioner’s request.” *Attorney General Reply* at 33. We have two responses.

First, the statute can be read without creating the conflict suggested by the District and the Attorney General. The statute provides that it shall be the duty of the Attorney General to initiate or defend any action which “the State

or the Commissioner or the Board [of Natural Resources], is or may be a party, or in which the interests of the state are involved, . . .” (Emphasis supplied.) Thus, the statute applies to situations other than those in which the Commissioner is a party. The grant of authority to the Attorney General to initiate or defend actions in which the State, the Board of Natural Resources, or the interests of the State are involved does not necessarily require a scenario where such action is initiated over the objection of the Commissioner. The Commissioner may have no role in such an action or may simply acquiesce. Authorizing the Attorney General to use his initiative to proceed in such actions does not necessarily mean that he is doing so “over the Commissioner’s objection.” Attorney General Br. at 33. To posit in the Attorney General the authority to act on his “own initiative” in such cases does not require reading into the statute the discretion for the Attorney General to refuse a direct request by the Commissioner to defend a specific action.

Second, even if there were a conflict in a scenario where the Attorney General initiated an action on his own, a Special Assistant Attorney General could be appointed to represent the Commissioner so that the Commissioner was not left without any representation. RCW 43.10.060; -.125. Or, different

assistant attorney generals could be assigned, one to represent the Attorney General's interest and the other to represent the Commissioner. *See Reiter v. Wallgren*, 28 Wn.2d 872, 879-80, 184 P.2d 571 (1947); *Sanders v. State*, 139 Wn. App. 200, 209 (2007). *See also Arizona State Land Dept. v. McFate*, *supra*, 348 P.2d at 916 (approving use of separate deputy attorney generals to represent multiple agencies with conflicting views). Thus, if the Attorney General does not agree with the decision made by the Commissioner in this case, the Attorney General could have appointed a Special Assistant Attorney General to represent the Commissioner. *Id.* But despite repeated requests from the Commissioner, the Attorney General refused to do that, too. Agreed Statement of Facts, ¶¶ 19-20, 24-26.

In sum, there is nothing in the words of RCW 43.12.075 that suggests that the duty of the Attorney General to defend actions "when requested to do so by the Commissioner," creates anything other than a duty to "defend" such actions at the Commissioner's request.

VI. CONCLUSION

The District's brief is largely irrelevant. To the extent that it addresses the issue before this Court, it adds nothing beyond that addressed in the principal briefs of the parties. It certainly provides no basis for denying

the Commissioner's petition for a writ of mandamus to assure that he receives representation from the Attorney General.

Dated this 20 day of October, 2010.

Respectfully submitted,

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Goldmark\Response to Corrected Amicus Curiae Brief

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Attached for filing please find Petitioner's Response to Corrected *Amicus Curiae* Brief of Public Utility District No. 1 of Okanogan County and the Declaration of Service.

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