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SUPREME COURT OF THE STATE OF WASHINGTON

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.

BRIEF OF RESPONDENT ROBERT M. MCKENNA

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I. INTRODUCTION

The Commissioner of Public Lands, Peter Goldmark, seeks a writ of mandamus to compel the Attorney General, Robert M. McKenna, to “maintain and vigorously prosecute”¹ an appeal of a superior court judgment that, in the legal judgment of the Attorney General, should not be pursued.

The Commissioner’s petition arises out of an eminent domain action in which a Public Utility District (PUD) seeks an easement over public and private lands to install and maintain an electric transmission line. The Okanogan County Superior Court entered judgment that the PUD has statutory authority to condemn the lands and that the proposed easement was consistent with existing grazing leases.

In the considered legal judgment of the Attorney General, the decision of the superior court is sound, the record is not favorable to appeal, and the argument that the Commissioner seeks to advance on appeal would jeopardize the legal interests of the State of Washington. Accordingly, the Attorney General declined direction by the Commissioner to appeal from the superior court judgment.

The Attorney General does not have a mandatory duty to initiate litigation or to pursue an appeal whenever the Commissioner of Public

¹ Pet. Against State Officer at 2.

Lands directs the Attorney General to do so. The duty and authority of the Attorney General is to exercise independent legal judgment in representing the State of Washington in litigation. Mandamus is not available to compel the exercise of discretion and, for this reason, the Commissioner's petition should be denied.

II. ISSUES PRESENTED

1. Does the Attorney General have a mandatory, nondiscretionary duty enforceable in mandamus to file and pursue an appeal whenever the Commissioner of Public Lands requests that he do so?

2. If this Court compels the Attorney General to file and pursue an appeal that in his legal judgment is contrary to the legal interests of the State of Washington, is the Commissioner entitled to an award of attorney fees on the theory that the Attorney General's defense of this original action is frivolous?

III. STATEMENT OF THE CASE

This petition stems from an eminent domain action, *Public Utility District No. 1 of Okanogan County v. Davis*, Okanogan County Superior Court Cause No. 09-2-00679-4, in which the PUD seeks to condemn an easement over public and private lands to install and maintain an electric

transmission line. Agreed Statement of Facts at 2, ¶ 6, Attach. 1.² The complaint named the State of Washington and the Commissioner of Public Lands as respondents, as well as private landowners. *Id.* An assistant attorney general appeared on behalf of the State and the Commissioner in the eminent domain action. Attach. 6, at 2, ¶ 2.2.

The PUD's amended petition sought an order of public use and necessity and a proceeding to determine just compensation.³ ASF at 2, ¶ 7, Attach. 2. The state respondents stipulated to public use and necessity.⁴ At the Commissioner's request, however, the assistant attorney general filed a motion for summary judgment challenging the authority of the PUD to condemn an easement over the state lands at issue. On May 11, 2010, the superior court denied the Commissioner's motion and incorporated that denial into the Findings of Fact, Conclusions of Law,

² This case is before the Court on an Agreed Statement of Facts, filed August 9, 2010, and cited in this brief as "ASF." See Order dated July 9, 2010, (retaining the petition for decision by the Court and directing the parties to file an agreed statement of facts). ASF at 1, ¶ 2. Attachments cited herein are the attachments filed with the Agreed Statement of Facts.

³ For a condemnation to occur, a court must determine that the proposed use is a public use required by the public interest and that the property to be acquired is necessary to facilitate the public use. See *PUD 2 of Grant County v. N. Amer. Foreign Trade Zone Indus., L.L.C.*, 159 Wn.2d 555, 572-78, 151 P.3d 176 (2007). Only then does the court conduct proceedings to determine just compensation. In the underlying eminent domain action, proceedings to determine just compensation have not yet begun. The Attorney General will continue to represent the State and the Commissioner in the underlying action to ensure that the State receives full compensation for the PUD's easement over state lands. See Attach. 18.

⁴ See Attach. 6, at 3, ¶ 2.8.

and Order Adjudicating Public Use and Necessity as to the state lands. ASF at 3-4, ¶¶ 9, 11, Attach. 4, 6.

On May 25, 2010, the Commissioner met with the assistant attorney general and requested that the Office of the Attorney General appeal the superior court's determination that the PUD is statutorily authorized to condemn the lands at issue. ASF at 4, ¶ 12. That request was repeated in letters the Commissioner sent to the Attorney General on June 1, 2010, and June 4, 2010, and in a meeting between the Commissioner and the Attorney General on June 7, 2010. ASF at 4-5, ¶¶ 13-15, Attach. 7, 8 (filed under seal).⁵

On June 8, 2010, the Attorney General sent a letter to Commissioner Goldmark advising the Commissioner that the Attorney General would not file an appeal from the judgment of the superior court, and explaining the Attorney General's reasons. ASF at 5, ¶ 16, Attach. 9 (filed under seal). As set forth in Attachment 9—and contrary to a press release issued that same day by the Commissioner⁶—the Attorney

⁵ In a ruling entered August 9, 2010, the Deputy Clerk of this Court granted the parties' motion to maintain Attachments 7, 8, 9, 12, 13, 17, 18, and 19 under seal. Those documents are communications between the Commissioner and the Attorney General regarding the underlying condemnation action, and the parties moved to file them under seal to preserve attorney-client privilege.

⁶ ASF at 5, ¶ 17, Attach. 10. The Commissioner's press release accusing the Attorney General of political motives was issued before the Commissioner even received the Attorney General's letter explaining the reasons for the Attorney General's decision—reasons that rest on legal analysis and judgment, not politics.

General's decision not to appeal rested on the legal analysis and judgment of the Attorney General and his staff involving three primary considerations: whether the lower court's ruling was erroneous; whether the facts of the case were favorable (or at least neutral) for an appeal; and the potential risks and benefits of an appeal, taking into consideration the legal interests of the State as a whole.

The Commissioner subsequently asked the Attorney General to appoint a special assistant attorney general to file the appeal sought by the Commissioner. On June 9, 2010, the Attorney General declined the Commissioner's request, reiterating the legal reasons for the Attorney General's decision not to appeal. ASF at 6-7, ¶¶ 19-20, Attach. 12, 13 (filed under seal). The Attorney General explained again the potential for real and immediate harm to the legal interests of the State of Washington that would be created by an appeal, whether the appeal was pursued by the Attorney General or a special assistant attorney general. ASF at 6-7, ¶ 20, Attach. 13.

On June 10, 2010, a notice of appeal was filed by Conservation Northwest, which had intervened in the underlying condemnation action in opposition to the PUD. ASF at 7-8, ¶ 22, Attach. 15. On that same day, the PUD filed a notice of cross appeal challenging Conservation Northwest's intervention. ASF at 8, ¶ 23, Attach. 16.

On June 21, 2010, the Office of the Attorney General was notified by attorney David Bricklin that he had been retained by Commissioner Goldmark to commence the present action seeking to compel the Attorney General to pursue an appeal. Attach. 21, at 1-2, ¶¶ 1-2. That same day, to preserve the fruits of the Commissioner's petition for a writ of mandamus if the Court were to compel the Attorney General to pursue the appeal, the Attorney General filed a Contingent Notice of Appeal. ASF at 9-10, ¶ 28, Attach. 21. The Attorney General intends to withdraw the appeal unless compelled by the Court to proceed.⁷

The Commissioner filed this original mandamus action on June 21, 2010, asserting jurisdiction under article IV, section 4 of the Washington Constitution. On July 9, 2010, this Court entered an Order retaining review of the petition.

IV. SUMMARY OF THE ARGUMENT

The Commissioner of Public Lands seeks a writ of mandamus to compel the Attorney General to file an appeal from the judgment of a superior court. Mandamus is not available because the Commissioner seeks to compel an action that is within the sound discretion of the Attorney General.

⁷ By Commissioner's Ruling of October 1, 2010, the Court of Appeals' schedule for review in the underlying eminent domain case has been stayed until all proceedings in the instant case are completed.

The Attorney General of Washington is established in the Constitution as an independent state officer. He has broad constitutional and statutory authority to advise state officers on legal matters and to represent the State in all courts in all legal matters in which the State is interested. Throughout the history of the State, this Court consistently has upheld the discretion of the Attorney General in legal matters, holding repeatedly that statutory duties imposed on the Attorney General are not absolute duties, but duties to exercise his legal discretion and judgment. This Court has held consistently that the Attorney General, in exercising his discretion, must consider the legal interests of the State as a whole and of the people of the State.

This Court's recognition of the Attorney General's independence and discretion is consistent with the majority of courts in this country and with the common-law history of the Attorney General. That recognition also reflects sound public policy, allowing the Attorney General to fulfill his constitutional role as an additional check within state government. It allows the State to speak with a voice that reflects not the parochial interests of a particular state agency, but the common legal interests of the government and the people it serves.

Washington's Rules of Professional Conduct do not abrogate the powers and duties granted to the Attorney General by the constitution,

statutes, and common law. Rather, they recognize the unique role of the Attorney General and defer to it. Because the Attorney General is constitutionally and statutorily designated to represent the State, and not a private attorney retained by an individual client to assert its views, the Attorney General has authority when representing the government that is dissimilar to private attorneys representing private clients.

Arguing against this Court's decisions and constitutional, statutory and common-law history, the Commissioner of Public Lands attempts to find a nondiscretionary duty imposed on the Attorney General in RCW 43.12.075. However, the directive language of that statute is not materially different from the parallel language of the statutes in RCW 43.10 that this Court has interpreted consistently as imposing a duty to exercise discretion. RCW 43.12.075 likewise imposes a duty to exercise discretion, not an absolute duty to take a specific action.

Mandamus is not available to compel the exercise of discretion. It is an extraordinary remedy that does not lie unless a duty is both mandatory and nondiscretionary. The Attorney General possesses broad discretion to determine whether and how to initiate or defend litigation by or against the State or its officers or agencies. His duty is to exercise that discretion. In the underlying case here, the Attorney General carried out his duty—he exercised his discretion to decide not to file an appeal. The

record shows that his decision was based on a reasoned, thoughtful legal analysis that properly considered the legal interests of the State as a whole.

Both the petition for a writ of mandamus and the Commissioner's request for attorney fees should be denied.

V. ARGUMENT

A. **The Attorney General Has Ample Authority And Discretion To Control Litigation On Behalf Of The State Of Washington, Including Discretion To Determine Whether To Pursue An Appeal**

1. **The State Constitution And Statutes Establish The Attorney General As The State Officer Authorized To Represent The State In Litigation**

The Attorney General is a constitutional officer. Article III, section 21 of the Washington Constitution directs that the Attorney General "shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law." By virtue of the state constitution, the Attorney General also is independently elected by the voters of Washington and answerable to them. Wash. Const. art. III, § 1.

The establishment of an independent attorney general in state constitutions serves an important function in a representative government:

This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands.

State ex rel. McGraw v. Burton, 212 W. Va. 23, 34, 569 S.E.2d 99, 110

(W. Va. 2002).⁸ As explained by the Minnesota Supreme Court:

Rather than conferring all executive authority upon a governor, the drafters of our constitution divided the executive powers of state government among six elected officers. This was a conscious effort on the part of the drafters, who were well aware of the colonial aversion to royal governors who possessed unified executive powers.

State ex rel. Mattson v. Kiedrowski, 391 N.W.2d 777, 782 (Minn. 1986)

(describing the 1851 Minnesota Constitution).

The independent constitutional role of the Washington Attorney General reflects a conscious decision by the authors of our state constitution to create an additional check within state government. In creating the Office of the Attorney General, they sought to impose “a severance of the various branches of the government, thereby creating one office a check upon the other.” *State v. Gattavara*, 182 Wash. 325, 333, 47 P.2d 18 (1935).

The Attorney General has broad statutory authority to institute and prosecute all actions for the State, and to represent the State in all courts in

⁸ The West Virginia court held that, under the principle of separation of powers, there are “certain core functions of the office of the Attorney General that are inherent in the office, of which the Office of Attorney General may not be deprived, and which may not be transferred to or set up in conflict with other offices.” *State ex rel. McGraw*, 212 W. Va. at 31, 569 S.E.2d at 108. A legislative act that does so is unconstitutional. *Id.*, 212 W. Va. at 34, 569 S.E.2d at 110.

all legal matters in which the State is interested. Two statutes speak most directly to that broad authority:

The attorney general shall:

(1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;

(2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer[.]

RCW 43.10.030.

The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings . . . except those declared by law to be the duty of the prosecuting attorney of any county.

RCW 43.10.040 (emphasis added).

The statutes also mirror the constitutional command of article III, section 21, that the Attorney General “shall be the legal adviser of the state officers” by providing, with limited exceptions, that state officers may not employ counsel to perform the duties of the Attorney General:

No officer, director, administrative agency, board, or commission of the state, other than the attorney general, shall employ, appoint or retain in employment any attorney for any administrative body, department, commission, agency, or tribunal or any other person to act as attorney in any legal or quasi legal capacity in the exercise of any of

the powers or performance of any of the duties specified by law to be performed by the attorney general[.]

RCW 43.10.067.

2. This Court Consistently Has Recognized The Broad Legal Discretion Afforded The Attorney General In Matters Of Litigation

The decisions of this Court consistently reflect a broad understanding of the Attorney General's exercise of legal discretion to control and manage litigation on behalf of the State. This understanding is informed by the Court's repeated recognition that the statutory duties imposed on the Attorney General are not absolute duties, but rather duties to exercise his legal discretion.

In *State ex rel. Rosbach v. Pratt*, 68 Wash. 157, 122 P. 987 (1912), for example, the Court denied an application for a writ of mandamus to compel the Attorney General to commence an action to collect delinquent tax assessments. Although the statutes at issue used the word "shall" when describing the Attorney General's duties (the Attorney General "shall represent [the department] in all proceedings, whenever so requested by any of the commissioners"; the Attorney General "shall" file an action at law to collect the sum due in a tax delinquency), the Court held the statutes did not impose "any requirement of absolute duty" on the Attorney General to bring actions against each and every delinquent employer. *Id.*, 68 Wash. at 158. The Court held the commencement of

such actions “are matters resting wholly within the discretion of the commission and the attorney general, a discretion which cannot be controlled by mandamus.” *Id.*

In *State ex rel. Dunbar v. State Board of Equalization*, 140 Wash. 433, 249 P. 996 (1926), the Board of Equalization refused to comply with a 1925 statute, asserting it had not been properly authenticated. The Attorney General brought an action against the Board to compel compliance. The Court rejected the argument that the Attorney General is required, under the constitution and statutes, to represent state officers, and therefore is barred from bringing an action in which a state officer is a defendant:

The legitimate conclusion of such an argument is that the Attorney General must, if such a situation arise, sit supinely by and allow state officers to violate their duties and be recreant to their trusts, and that instead of preventing such actions it is his duty to defend the delinquents. The law can not be given any such construction. His paramount duty is made the protection of the interest of the people of the state and, where he is cognizant of violations of the constitution or the statutes by a state officer, his duty is to obstruct and not to assist; and where the interests of the public are antagonistic to those of state officers, or where state officers may conflict among themselves, it is impossible and improper for the Attorney General to defend such state officers.

Id. at 440. The Court refused to limit the Attorney General’s powers to those listed explicitly in statute, instead recognizing the Attorney

General's authority to use discretion in protecting the interest of the people of the state.⁹

In *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935), attorneys employed by the Department of Labor and Industries brought an action to collect delinquent industrial insurance and medical-aid premiums and statutory penalties. This Court held the action must be dismissed because exclusive authority to file the type of actions at issue had been statutorily

⁹ The Commissioner cites the Court of Appeals' decision in *Sanders v. State*, 139 Wn. App. 200, 159 P.3d 479, *aff'd* 166 Wn.2d 164, 207 P.3d 1245 (2009), to argue that the holding in *Dunbar* merely recognizes the Attorney General's authority to sue a state agency. Petitioner's Opening Brief (Op. Br.) at 15-16. While that was the factual situation at issue in *Dunbar*, this Court's analysis in *Dunbar* rested on a broader principle: the Attorney General's authority to exercise discretion in protecting the legal interests of the public.

On review, consistent with the broad principle articulated in *Dunbar*, this Court affirmed the Attorney General's discretion to decline representation, rejecting the dissenter's argument that no discretion to defer or decline representation is permitted by the language in RCW 43.10.040.

The *Dunbar* holding also is consistent with that of courts in other jurisdictions. *See, e.g., Freeport-McMoRan Oil & Gas Co. v. Fed. Energy Regulatory Comm'n*, 962 F.2d 45, 47-48 (D.C. Cir. 1992) (government lawyers do not simply represent "an ordinary party to a controversy, but "a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done"; court chastised the Commission's attorney for pursuing an appeal after it had clearly become moot, and for "so unblushingly deny[ing] [at oral argument] that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission"); *Gray Panthers v. Schweiker*, 716 F.2d 23, 33 (D.C. Cir. 1983) ("government counsel have a higher duty to uphold [than private lawyers] because their client is not only the agency they represent but also the public at large"); *State of Florida ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268-69 (5th Cir. 1976) (while the legislature may deprive a state Attorney General of specific powers; in the absence of such legislative action, the Attorney General typically may exercise all such authority as the public interest requires and wide discretion in making the determination as to the public interest (citing cases)); *Feeney v. Commonwealth*, 373 Mass. 359, 365-66, 366 N.E.2d 1262, 1266 (Mass. 1977) (Attorney General represents the Commonwealth; to permit a state officer who represents a specialized branch of the public interest to dictate a course of conduct to the Attorney General would effectively prevent the Attorney General from establishing and sustaining a uniform and consistent legal policy for the Commonwealth).

assigned to the Attorney General. *Id.* at 329. The Court made it clear, however, that even though the statute assigning the duty to the Attorney General used mandatory language,¹⁰ the Attorney General has discretion whether or not to take action. *Id.* at 330 (“the Attorney General must exercise his judgment as to whether the action shall be instituted”).

In *State v. Pacific Telephone & Telegraph Co.*, 27 Wn.2d 893, 181 P.2d 637 (1947), the defendant refused to pay attorney fees and other expenses the State incurred in tariff proceedings, arguing the statute provided recovery only for the cost of the department’s investigation, valuation, appraisal, and services—not for litigation expenses. With one exception, the Court agreed that the statute limited recovery to expenses incurred in the department’s proceedings, but not litigation expenses. In reaching that conclusion, the Court explained that “when the department is taken into court, then the attorney general has complete authority for the handling of the case. He employs the attorneys and supervises the conduct

¹⁰ The Court cited Laws of 1929, ch. 92, which read in pertinent part as follows:

Sec. 3. The attorney general shall have the power and it shall be his duty . . . [t]o institute and prosecute all actions and proceedings for, or for the use of the state which may be necessary in the execution of the duties of any state officer.

Sec. 4. It shall be the duty of the attorney general . . . [t]o enforce the proper application of funds appropriated for the public institutions of the state, and to prosecute corporations for failure or refusal to make the reports required by law.

The current versions of these provisions are codified in RCW 43.10.030.

of all proceedings in the court.” *Id.* at 897. The Court did not attribute this explanation to the language of any particular statute, although it could have done so—rather, it correctly regarded the Attorney General’s independent authority to control litigation as intrinsic to the office.

In *Reiter v. Wallgren*, 28 Wn.2d 872, 184 P.2d 571 (1947), a taxpayer sought to cancel a sale of timber by the state. The Court affirmed the dismissal of the action, holding that the taxpayer had not first made a demand upon the Attorney General to take appropriate action. *Id.* at 876-77. The Court rejected the argument that a demand was useless because the Attorney General was under a statutory mandate to represent the state officers. Citing *State ex rel. Dunbar*, the Court reaffirmed that “[i]t has always been a paramount duty of the attorney general to protect the interests of the people of the state,” even where “the interests of the public are antagonistic to those of state officers.” *Reiter*, 28 Wn.2d at 880. The Court explained that while the controlling statute allowed the Attorney General to defend state officers, “it still remains his paramount duty to protect the interests of the people of the state.” *Id.*

In *Berge v. Gorton*, 88 Wn.2d 756, 567 P.2d 187 (1977), taxpayers alleged the Attorney General had an absolute duty under RCW 43.10.030(2) to recover funds disbursed to students attending private colleges under a statute that subsequently was held unconstitutional.

RCW 43.10.030(2) provides that “[t]he Attorney General shall . . . institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of any state officer.”¹¹ The Court held that language does not create an absolute duty upon the Attorney General to initiate litigation, but rather a duty to “exercise discretion.” *Id.* at 761, citing *State ex rel. Rosbach*. “If in his judgment the proposed litigation was warranted, he could, as the Attorney General, have attempted to bring such an action. He was not, however, required by law to do so.” *Berge*, 88 Wn.2d at 761-62.¹²

The Court noted that the Attorney General had given “due consideration” to the commencement of litigation, and that there was no allegation that he refused even to consider bringing a suit. *Id.* at 764. Although the Court did not elaborate, it appears that a refusal even to consider litigation might be an abuse of discretion, but “due consideration” resulting in a decision not to initiate litigation is a proper exercise of the Attorney General’s discretion.

In *Boe v. Gorton*, 88 Wn.2d 773, 567 P.2d 197 (1977), issued the same day as *Berge* and addressing the same funds disbursed to students

¹¹ That provision has not been amended since the decision in *Berge*.

¹² The three dissenting justices did not disagree with this holding. Indeed, they cited approvingly the language in *State ex rel. Dunbar* that the “paramount duty” of the Attorney General is to protect the interest of the people of the state, even where that puts him in opposition to another state officer. *Berge*, 88 Wn.2d at 771-72.

attending private colleges, a taxpayer sought a writ of mandamus to compel the Attorney General to recover the funds, arguing that the Attorney General is under a mandatory, nondiscretionary duty to do so. The Court began by articulating the standard for issuing a writ of mandamus:

Mandamus will not lie to compel the performance of acts or duties which call for the exercise of discretion on the part of public officers. Where courts do interfere, it is upon the theory that the action is so arbitrary and capricious as to evidence a total failure to exercise discretion, and therefore the act of the officer is invalid. . . . Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.”

Boe, 88 Wn.2d at 774-75, (emphasis and internal citations omitted) (quoting *Lillions v. Gibbs*, 47 Wn.2d 629, 633, 289 P.2d 203 (1955)).

Citing *Berge*, the Court held that RCW 43.10.030(2) and (8) impose only a duty to exercise discretion. *Boe*, 88 Wn.2d at 775.¹³ Accordingly, a writ of mandamus would issue only if the Attorney General’s decision was arbitrary and capricious. The Court examined the Attorney General’s decision not to litigate, found there was room for two opinions and held that it therefore should not substitute its judgment for

¹³ RCW 43.10.030(8) is unchanged since the decision in *Boe*. It provides that “[t]he Attorney General shall . . . enforce the proper application of funds appropriated for public institutions of the state, and prosecute corporations for failure or refusal to make the reports required by law.”

that of the Attorney General. *Id.* at 776. Although the Court concluded, as a matter of law, that there was room for two opinions, nothing in the decision indicates that the Court would have reached a decision different from that of the Attorney General.

In *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 588 P.2d 195 (1978), the Court approvingly cited the holdings in *Berge* and *Boe*, reaffirming that the Attorney General's role as legal adviser to the State "contemplates something more than a mere passive role in the formulation and implementation of state governmental policies and practices" and vests him with "broad discretion in the exercise of his duties." *Id.* at 207 n.2, 210.

In *Blue Sky Advocates v. State*, 107 Wn.2d 112, 116, 727 P.2d 644 (1986), a citizens group claimed the Attorney General failed to meet his statutory duty to support the Counsel for the Environment and sought attorney fees and other expenses from the Attorney General, invoking a malpractice theory and the private attorney general doctrine. The Court rejected the claim, finding the Attorney General had discretion, even though the pertinent statute repeatedly used the word "shall" (e.g., "the attorney general shall appoint an assistant attorney general as a counsel for the environment" and "[t]he counsel for the environment shall represent

the public and its interest in protecting the quality of the environment”).
Id. at 116.

The Court explained that RCW 43.10.030(2) did not impose an absolute duty to initiate litigation, but rather a duty to exercise discretion. *Id.* at 117, citing *Berge*, 88 Wn. at 761-62. Therefore, a party suing the Attorney General for failure to file a lawsuit must claim and demonstrate an abuse of discretion. *Id.* at 117 (citing *Berge*, 88 Wn.2d at 762). To demonstrate an abuse of discretion, a petitioner must show the Attorney General’s action was “arbitrary and capricious, that is, wilful and unreasoning action, action without consideration and in disregard of the facts and circumstances . . .” *Blue Sky* 107 Wn.2d at 117-18 (quoting *Berge*, 88 Wn.2d at 762) (internal quotation marks omitted). An action is not arbitrary or capricious “when exercised honestly and upon due consideration where there is room for two opinions, however much it may be believed that an erroneous conclusion was reached.” *Blue Sky* at 118, quoting *In re Buffelen Lumber & Mfg. Co.*, 32 Wn.2d 205, 209, 201 P.2d 194 (1948).

What do these cases tell us? They tell us that the Attorney General has ample authority to control and manage litigation on behalf of the State and to take actions necessary to protect the legal interests of the public. These cases also tell us that the Attorney General retains substantial

discretion—discretion that is broad enough to allow the Attorney General to decline to bring litigation or provide representation where, in his legal judgment, it is adverse to the legal interests of the State of Washington. These cases establish that the Attorney General has a duty to exercise discretion when representing individual state officers and state agencies—discretion that requires consideration of the legal interest of the State as a whole, including the interest of other state officers and agencies and of the public at large, even when another state officer disagrees with the Attorney General's exercise of discretion.

As the Ninth Circuit stated, after reviewing this Court's decisions and the Attorney General's statutory authority,

[The Attorney General] is not only the counsel for Washington but also the state official in charge of initiating and conducting the course of litigation. The determination whether to bring an action rests within the sole discretion of the Attorney General. It is the Attorney General who has the authority to prosecute the suit.

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 747 F.2d 1303, 1306 (9th Cir. 1984) (internal citations omitted), *cert. denied sub nom. Eikenberry v. Standard Oil Co. of Calif.*, 471 U.S. 1100, 105 S. Ct. 2323, 85 L. Ed. 2d 841 (1985).

3. The Discretion Of The Attorney General In Matters Of Litigation Is Consistent With Sound Public Policy And The Historic Tradition Of The Office

The Attorney General represents the State of Washington. The State is not a monolithic entity, but is comprised of dozens of agencies,

institutions, and officers, each dedicated to accomplishing discrete program objectives. The legal positions advanced by those agencies, institutions, and officers in litigation—and particularly in appellate litigation—can have (and often do have) significant legal ramifications for the State as a whole. There is substantial value in having the State speak with a consistent voice, and a voice schooled in the law, as to legal matters in the appellate courts—“a voice that reflects not the parochial interests of a particular agency, but the common interests of the Government and therefore of all the people”; a voice that reflects not just “the immediate demands of the case *sub judice*,” but “longer term interests in the development of the law.” *United States v. Providence Journal Co.*, 485 U.S. 693, 706, 108 S. Ct. 1502, 99 L. Ed. 2d 785 (1988) (referring to the role of the United States Attorney General and Solicitor General). The Washington Constitution and statutes recognize this independent role and have given that voice to the Attorney General.

The Attorney General’s authority to refuse to decline to advance the legal position of another state officer when, in the considered legal judgment of the Attorney General, that position would be harmful to the law and the legal interests of the State, reflects the Attorney General’s constitutional role as the State’s chief legal officer. The Attorney General’s primary obligation is to protect the legal interests of the State of

Washington as a whole, not simply the litigation preferences of a particular state officer or agency. Of course, the Attorney General's judgment is always potentially subject to review by the courts, as well as the electorate; but the opportunity for judicial review does not lessen the structural significance of the Attorney General's role as the constitutionally established independent legal advisor of the State and its representative in litigation, who thereby serves as an institutional check in a constitutionally divided executive.

By contrast, the Commissioner's approach would have the effect of vesting in a non legal officer the power to determine the legal interests of the State of Washington in litigation—a result that is no more satisfactory than allowing the Attorney General to have the final say on a policy matter such as whether a particular parcel of public land should be leased (a matter that the Legislature committed to the Department of Natural Resources under RCW 79.13.010(1)). The Commissioner's position that the Attorney General is bound simply to do the bidding of client officers and agencies with respect to the legal interests of the State is antithetical to the independent constitutional and statutory role of the Attorney General as the state officer charged with representing the State of Washington in litigation. An Attorney General without the independence to exercise his legal discretion in matters of litigation would not serve as a check on state

officers and agencies. Under the Commissioner's theory, any legal disagreement between the Attorney General and any other state officer renders the Attorney General powerless to protect the broader legal interests of the State and the public, even though—as this Court consistently has recognized—the Office of Attorney General was created to perform precisely that function.

The discretion of the Attorney General in matters of litigation also is consistent with the historic roots of the Office of Attorney General. Although the Attorney General in England originally served at the pleasure of the crown, by the mid-eighteenth century it was established that the Attorney General's duty of representation extended to the public interest and not just to the ministries of government, such that the Attorney General was able to refuse “to prosecute or to stop a prosecution on the orders of a department of the government, if he disapproved of this course of action.” William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2448, 2449-50 (2006), (quoting 12 William Holdsworth, *A History of English Law* 305 (1st ed. 1938)).

The Commissioner cites *State ex rel. Winston v. Seattle Gas and Electric Co.*, 28 Wash. 488, 497, 68 P. 946, 70 P. 114 (1902), for the proposition that the Washington Attorney General has no common-law

authority and has only the specific authority granted by the constitution and by statute. Op. Br. at 10. Because, as previously explained, the Attorney General's constitutional and statutory authority provides ample discretion to manage litigation on behalf of the State, it is not necessary to consider the common-law authority of the Attorney General. But the Commissioner overstates the holding of *State ex rel. Winston*. On rehearing, the Court ultimately held that where statutes placed legal authority to prosecute the action in the prosecuting attorney, the Attorney General did not have common-law authority to maintain it:

At least, in this class of cases the attorney general has no common-law powers, because the legislature has seen fit to confer the power or duty ordinarily exercised at common-law by the attorney general upon the prosecuting attorney of the county where the wrong is alleged to have been committed.

Id. at 512. The Court did not examine the breadth of the authority granted the Attorney General nor the extent of the Attorney General's discretion when exercising his authority; rather, it held only that the Legislature had delegated the authority to initiate this specific type of action exclusively to the prosecuting attorney. *Id.* at 500; *id.* at 512 (on reconsideration).¹⁴

¹⁴ In *State ex rel. Hamilton v. Superior Court, Whatcom County*, 3 Wn.2d 633, 101 P.2d 588 (1940), the issue was whether a prosecuting attorney could file an information in the nature of quo warranto over the Attorney General's objection. The Court found *State ex rel. Winston* to be decisive: Where the Legislature has expressly designated the prosecuting attorney as the officer authorized to file the information, the Attorney General has no common law power to control the prosecuting attorney's

Moreover, at least twice since *State ex rel. Winston*, this Court has recognized the Attorney General's authority to exercise his legal discretion, with reference to the common law, where the particular action was not explicitly authorized in statute. In *State v. Taylor*, 58 Wn.2d 252, 362 P.2d 247 (1961), the Attorney General commenced an action to obtain an accounting for a charitable trust. Although there was no statute authorizing the Attorney General to enforce charitable trusts, the Court found there to be long-standing common-law authority for the Attorney General to undertake such enforcement as representative of the public and of individuals specially benefited. *Id.* at 255-61.

In *Young Americans Freedom v. Gorton*, 91 Wn.2d 204, the plaintiffs argued the Attorney General lacked authority to file an amicus brief—a device “which has been known in English common law since the middle of the 14th century,” *id.* at 208—in a case in which neither the State of Washington nor any state officer, department, or employee had a

discretionary exercise of that authority. *State ex rel. Hamilton*, 3 Wn.2d at 639-41. As in *State ex rel. Winston*, the Court again left open the Attorney General's authority to exercise common law powers that have not been legislatively abrogated or delegated to another officer. This limited holding in both *State v. Winston* and *State ex rel. Hamilton* is consistent with RCW 4.04.010:

The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.

This provision was part of Washington's territorial laws when the state constitution, including article III, section 21, was ratified in 1889, and it has been part of Washington law since statehood. See *Kennebec, Inc. v. Bank of the West*, 88 Wn.2d 718, 724, 565 P.2d 812 (1977), citing RCW 4.04.010.

cognizable interest. The Court found the Attorney General's authorities to be "broad and inclusive enough to confer upon that office authority to appear as amicus curiae before the United States Supreme Court in cases which may directly or indirectly impact upon state functions or administrative procedures and operations." *Id.* at 207. Those authorities "vest the Attorney General with a reasonable degree of discretion as an official legal adviser." *Id.* at 208. The Court held that it had rejected the requirement that the Attorney General may act only with express statutory authority in *State v. Taylor*, and it again declined to declare such a requirement.¹⁵

¹⁵ The decision in *Manchin v. Browning*, 170 W. Va. 779, 296 S.E.2d 90 (W. Va. 1982), relied upon by the Commissioner, is readily distinguished on this basis. The West Virginia Constitution does not assign specific duties to the Attorney General, leaving that task to the legislature. It provides only that the Attorney General "shall be ex officio reporter of the court of appeals" and, in common with the other members of the "executive department," "shall perform such duties as may be prescribed by law." W. Va. Const. art. VII, § 7-1.

In contrast, the Washington Constitution specifies that the Attorney General "shall be the legal adviser of the state officers, and shall perform such other duties as may be prescribed by law." Wash. Const. art. III, § 21. As explained above, the Washington Attorney General's roles as legal adviser "contemplates something more than a mere passive role in the formulation and implementation of state governmental policies and practices" and vests him with "broad discretion in the exercise of his duties." *Young Americans*, 91 Wn.2d at 207 n.2, 210. This Court's decisions cited in this brief show a clear, consistent recognition of the historical and continuing discretion afforded the Attorney General of Washington.

Moreover, the West Virginia Supreme Court itself appears to have moved away from strict reliance on statutory authority. In *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 106-08 (W. Va. 2002), the court explained that the Attorney General has "inherent constitutional functions" that are not specifically enumerated but which the legislature cannot abrogate through legislation. Other states have reached similar conclusions. *See, e.g., Lyons v. Ryan*, 324 Ill. App. 3d 1094, 756 N.E.2d 396 (Ill. App. 2001), *aff'd*, 201 Ill. 2d 529, 780 N.E.2d 1098 (Ill. 2002) (generally, neither the legislature nor the judiciary

B. Commissioner Goldmark's Arguments Are Unavailing

1. RPC 1.2 Does Not Abrogate The Constitutional And Statutory Authority And Discretion Of The Attorney General

The Commissioner argues that RPC 1.2(a) defines the authority of the Attorney General and requires the Attorney General to abide by the Commissioner's decisions concerning the objectives of representation. Op. Br. at 8-11. The Commissioner's reliance on RPC 1.2, as defining the authority of the Attorney General, is fundamentally incorrect. Indeed, both Washington's Rules of Professional Conduct and the Model Rules of Professional Conduct explicitly recognize that the authority and responsibilities granted the Attorney General affect the application of the Rules:

Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. *For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the*

may deprive the Attorney General of his or her inherent powers under the constitution to direct the legal affairs of the state); *State v. Heath*, 806 S.W.2d 535, 537 (Tenn. App. 1990) (Attorney General has duties beyond those specifically enumerated by statute because the "attorney general's duties are so numerous that the legislature [could] not attempt to identify each by statute").

supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. *These Rules do not abrogate any such authority.*

Comment [18] of Scope of the Rules of Professional Conduct (emphasis added); Comment [18] of Scope of the ABA Model Rules of Professional Conduct (available at <http://www.abanet.org/cpr/mrpc/preamble.html> (last visited Oct. 2, 2010)). See also RPC 1.13, Organization As Client, Comment 9, to the same effect, and recognizing that the client of the government lawyer may be the government as a whole.

The Commissioner's reliance on *People ex rel. Deukmejian v. Brown*, 29 Cal.3d 150, 157, 624 P.2d 1206, 1209, 172 Cal. Rptr. 478, 481 (Cal. 1981), is similarly unavailing. The decision has not been widely followed (it has never even been cited in a reported decision in Washington), and the reasons for its isolation are straightforward. The court failed to recognize that a constitutional and statutory officer designated to represent the government as a whole occupies a role that is distinctly different from a private attorney retained by a private client to advocate that individual client's parochial interests.¹⁶

¹⁶ The great majority of state courts have recognized the unique position of the Attorney General in this regard. See, e.g., *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1231 (Colo. 2003) (because Attorney General's client is the "government as a whole," he must consider the "concerns of the state" even though individual officers or agencies might not agree); *State ex rel. Condon v. Hodges*, 349 S.C. 232, 241-42, 562

2. RCW 43.12.075 Does Not Impose A Mandatory Duty To Initiate Or Maintain Litigation, But Rather A Duty On The Attorney General To Exercise Discretion

The centerpiece of the Commissioner's argument is his reliance on RCW 43.12.075, which provides as follows:

It shall be the duty of the attorney general, to institute, or defend, any action or proceeding to which the state, or the commissioner or the board, is or may be a party, or in which the interests of the state are involved, in any court of this state, or any other state, or of the United States, or in any department of the United States, or before any board or tribunal, when requested so to do by the commissioner, or the board, or upon the attorney general's own initiative.

The commissioner is authorized to represent the state in any such action or proceeding relating to any public lands of the state.

S.E.2d 623, 628-29 (2002) (court examined many of the same issues as in *People ex rel. Deukmejian* and found the Attorney General's authority to bring suits to protect the public interest superseded the rules governing the attorney-client relationship); *Superintendent of Insurance v. Attorney General*, 558 A.2d 1197, 1203-04 (Me. 1989) (specifically rejected the reasoning in *Deukmejian* because it improperly equated the Attorney General with a private lawyer and failed to reflect adequately the Attorney General's unique status as a constitutional officer); *Connecticut Comm'n on Special Revenue v. Conn. Freedom of Information Comm'n*, 174 Conn. 308, 319, 387 A.2d 533, 537 (1978) ("special status of the attorney general where the people of the state are his clients cannot be disregarded in considering the application of the provisions of the code of professional responsibility to the conduct of his office"); *Humphrey ex rel. State v. McLaren*, 402 N.W.2d 535, 543 (Minn.1987) ("[A government attorney] has for a client the public, a client that includes the general populace even though this client assumes its immediate identity through its various governmental agencies. Thus, a government litigator must take positions with the common public good in mind, unlike the private practitioner who seeks vindication of a particular result for a particular client.") (citing ABA Comm. on Ethics and Professional Responsibility, Formal Op. 342 at 10 (1975)).

The Commissioner argues that the first sentence of this statute imposes an absolute, nondiscretionary duty on the Attorney General to take whatever legal action is “requested” by the Commissioner. Op. Br. at 8.¹⁷

As explained above, beginning at page 12, this Court consistently has read language like that in RCW 43.12.075 to impose a duty on the Attorney General to exercise discretion, not an absolute duty to take a

¹⁷ The second sentence of RCW 43.12.075 has no bearing on the Attorney General’s discretion as the constitutionally established independent legal advisor of the State and its representative in litigation. That sentence cannot be understood as conferring any authority on the Commissioner to act as the legal representative or advisor to the Department of Natural Resources or the Board of Natural Resources; that role is reserved to the Attorney General. Wash. Const., art. III, § 21; RCW 43.10.030, .040, .067.

The last sentence of RCW 43.12.075 must be read in the context of the limited powers conferred on the Commissioner. Although the Office of the Commissioner is named in the constitution, the constitution does not give the Commissioner any power or authority. Wash. Const. art. III, § 23. Rather, the powers and duties of the Commissioner of Public Lands—indeed the very existence of the office—is controlled entirely by the Legislature, which is granted the power to abolish the Office of the Commissioner. Wash. Const. art. III, § 25.

The Commissioner does not acquire any authority apart from that granted by the Legislature.

The Legislature has designated the Commissioner as the “administrator” of the Department of Natural Resources, (not the “chief executive officer,” as the caption to this case suggests); he does not set state policies, but is required to “conform” to policies established by the Board of Natural Resources. RCW 43.30.105, .421. It is the Board that sets policy and acts as the board of appraisers for school trust lands under article XVI, § 2 of the Washington Constitution. *See* RCW 43.30.215(2), (3). The likely purpose of that sentence is to allow the Commissioner (and not the Board of Natural Resources) to be named as the party in interest in proceedings relating to state lands, without diminishing the requirement that his administrative actions conform to the policies established by the Board.

specific action when requested. The duty imposed on the Attorney General is a discretionary duty.¹⁸

Consistent with this Court's decisions interpreting similar language, the first sentence of RCW 43.12.075 must be understood to impose a duty on the Attorney General to respond to a request by the Commissioner by exercising the Attorney General's legal discretion and judgment in determining how to respond to the request. The use of the word "shall" imposes a duty to exercise discretion, just as it does in RCW 43.10.030 and other statutes imposing this type of duty on the Attorney General. See *State ex rel. Rosbach*, 68 Wash. at 158; *Gattavara*, 182 Wash. at 330; *Berge*, 88 Wn.2d at 761; *Boe*, 88 Wn.2d at 775; *Blue Sky*, 107 Wn.2d at 117. Moreover, the phrase "institute, or defend, any action . . ." necessarily contemplates more than some ministerial filing of a complaint or answer—it contemplates the exercise of legal discretion and legal judgment by the Attorney General, if the Attorney General agrees to undertake the requested representation.

¹⁸ Even if RCW 43.12.075 could be read to impose a nondiscretionary duty on the Attorney General, that "duty" would be to "institute" or "defend" any action in which the Commissioner is a party, or that involve state lands that he administers. Here, the Attorney General complied with that "duty." An assistant attorney general appeared and defended the Commissioner in the underlying condemnation proceeding, diligently developed and advanced a legal theory to argue for the outcome advocated by the Commissioner, and litigated that portion of the case to its conclusion in the superior court. The statute would not require more.

Finally, the fact that the Attorney General has discretion is underscored by the final clause in the first sentence, which specifically references the Attorney General's independent discretion and judgment, authorizing the Attorney General to initiate or defend proceedings "upon the Attorney General's own initiative" RCW 43.12.075. As a matter of construction, it hardly would make sense for the Attorney General to be vested with independent discretion to affirmatively act over the Commissioner's objection, but to lack discretion to decline an action at the Commissioner's request.¹⁹

As explained at length above, this Court has held repeatedly that statutory directives that the Attorney General "shall" take some legal

¹⁹ As a secondary argument, the Commissioner argues that the Attorney General lacks discretion under RCW 43.12.075 because that statute omits the phrase "which may be necessary," which is found in RCW 43.10.030(2). The Commissioner relies on the Court of Appeals' decision in *Sanders v. State*, 139 Wn. App. 200, 209, 159 P.3d 479, *aff'd* 166 Wn.2d 164, 207 P.3d 1245 (2009). The Court of Appeals' discussion of RCW 43.10.030 is inapplicable for two reasons.

First, this Court did not adopt the reasoning of the Court of Appeals. This Court held that RCW 43.10.030 was not applicable. *Sanders*, 166 Wn.2d at 171. The Court of Appeal's discussion of RCW 43.10.030 and its attempt to limit the holding in *Berge* therefore are dicta which are in conflict not only with *Berge* itself, but with this Court's subsequent decisions applying and reaffirming the holding in *Berge* that RCW 43.10.030(2) does not create an absolute duty upon the Attorney General to initiate litigation, but rather a duty to exercise discretion. *Berge*, 88 Wn.2d at 761. *See Boe*, 88 Wn.2d at 775; *Young Americans*, 91 Wn.2d at 210; *Blue Sky*, 107 Wn.2d at 117. It is not the presence or absence of those four words that confers discretion on the Attorney General.

Second, this Court rejected the dissent's contention that RCW 43.10.040 imposes an unqualified duty of representation upon the Attorney General that leaves him without discretion to defer or decline representation. *See Sanders*, 166 Wn.2d at 174 (dissent). In addressing the Attorney General's discretion, neither the majority nor the dissent even considered the absence of the phrase "which may be necessary" in RCW 43.10.040 to be worthy of mention.

action impose a duty to exercise discretion, not an absolute duty to act. RCW 43.12.075 is no different—it too imposes a duty on the Attorney General to exercise discretion in determining whether to institute or defend an action when requested to do so by the Commissioner.²⁰

C. The Commissioner’s Petition Should Be Denied Because Mandamus Is Not Available To Compel The Performance Of A Discretionary Act, As The Commissioner’s Petition Requests

The Commissioner has brought a petition to obtain a writ of mandamus to compel the Attorney General to file an appeal of a superior court decision. The Commissioner is asking the Court to mandate an act that is left to the sound discretion of the Attorney General.

Mandamus is an extraordinary writ that is available only to compel a state officer to undertake a mandatory ministerial duty, not a discretionary duty. *SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010); *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994). “[M]andamus may not be used to compel the performance of acts or duties which involve discretion on the part of a public official.” *SEIU Healthcare 775NW*, 168 Wn.2d at 599 (quoting

²⁰ The Commissioner notes the Attorney General’s authority to appoint special assistant attorneys general. Op. Br. at 8-9. The Attorney General’s discretion to determine *whether* to institute or defend an action affecting the legal interests of the State, includes discretion to determine *how* to institute or defend an action—whether through the Attorney General or appointment of a special assistant attorney general. Where the Attorney General declines representation because of potential harm to the State’s legal interests, it would be antithetical to the State’s legal interest to appoint a special assistant to advocate for that harm.

Walker, 124 Wn.2d at 410.)²¹ “[E]ven a mandatory duty is not subject to mandamus unless it is also ministerial, or nondiscretionary, in nature.” *SEIU Healthcare 775NW*, 168 Wn.2d at 599. *Accord Brown v. Owen*, 165 Wn.2d 706, 725, 206 P.3d 310 (2009) (“Where we find a mandatory duty, we must further determine whether that duty is ministerial or discretionary in nature.”). A duty is ministerial only where “the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *Brown*, 165 Wn.2d at 725 n.10 (quoting *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926)). “A duty involving the exercise of discretion or judgment is discretionary.” *Id.* (citing *State ex rel. Linden v. Bunge*, 192 Wash. 245, 249, 73 P.2d 516 (1937)).

As demonstrated above, the Attorney General is vested with substantial discretion in his conduct of litigation on behalf of the State. Accordingly, the Commissioner’s petition for a writ of mandamus to compel the Attorney General to “maintain and vigorously prosecute”²² an appeal of the underlying superior court judgment should be denied.

²¹ This rule is of long standing. *See, e.g., State ex rel. Hawes v. Brewer*, 39 Wash. 65, 67, 80 P. 1001 (1905) (the writ of mandamus “cannot be used for the purpose of compelling the performance of a duty which requires the exercise of discretion.”); *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 461, 463, 242 P. 966 (1926) (same).

²² Pet. Against State Officer at 2.

Early in the history of Washington, this Court explained the fundamental difficulty of attempting to control discretionary decisions in litigation through mandamus:

[T]o compel a district attorney, against his will and contrary to his judgment, to merely commence an action would be an idle thing in the absence of power to compel him to prosecute it to final determination And, indeed, there could be no practicable exercise of such power. The court granting the writ of mandate could not follow the district attorney through the case, and see to it that he filed proper pleadings, offered sufficient evidence, made necessary objections to evidence offered by defendant, used proper arguments and authorities in discussing questions raised before the court or jury, and conducted the trial with reasonable care and diligence.

State ex rel. Rosbach, 68 Wash. at 159 (quoting *Boyne v. Ryan*, 100 Cal. 265, 267, 34 P. 707, 708 (1893)). That is precisely what the Commissioner seeks in this case. If the Court were to issue a writ mandating that the Attorney General file or cause to be filed an appeal of the underlying superior court order, would it also entertain a writ alleging dissatisfaction with the contents of a brief the Attorney General filed on behalf of the Commissioner? If the Court of Appeals were to affirm the superior court, would the Court grant a writ to require a petition for review in this Court? If the Attorney General appointed a special assistant attorney general who did not perform to the Commissioner's expectations,

would the Court consider a writ to mandate the replacement of that counsel?

The Commissioner's petition for a writ of mandamus to compel the Attorney General to "maintain and vigorously prosecute" an appeal of the underlying superior court judgment should be denied. As the cases discussed above make clear, all of these actions involve discretionary decisions within the authority of the Attorney General—including the decision whether to file a lawsuit at the outset and the decision whether to appeal an adverse superior court decision. Filing and maintaining an appeal are not ministerial actions—they always involve the exercise of legal judgment and discretion. The Court should deny the application for a writ of mandamus in this case.

D. The Attorney General Has Neither Abused His Discretion Nor Acted Arbitrarily And Capriciously

As explained above, a party suing the Attorney General in mandamus for failure to file a lawsuit must claim and demonstrate an abuse of discretion by showing the Attorney General's action was arbitrary and capricious—i.e., willful and unreasoning action, taken without consideration and in disregard of the facts and circumstances. *Blue Sky*, 107 Wn.2d at 117-18; *Berge*, 88 Wn. at 762. The Commissioner

does not contend that the Attorney General's decision to decline to appeal constituted an abuse of discretion, nor could he.

There was nothing arbitrary or capricious about the Attorney General's decision not to pursue an appeal of the adverse superior court order in the underlying case. The Attorney General did not refuse to defend the Commissioner in the underlying condemnation case. At the outset, assistant attorneys general candidly evaluated the legal merit of the position the Commissioner wished to pursue and advised him of the potential adverse consequences to other state interests. Attach. 18 at 1 (filed under seal). When he persisted, the assigned assistant attorney general diligently crafted and presented arguments consistent with the Commissioner's position as to the PUD's condemnation authority, but the superior court rejected the arguments and ruled against the Commissioner. ASF at 3, ¶ 9, Attach. 4, 6. The Attorney General has pledged to zealously ensure the school trust is fully compensated and protected as the condemnation goes forward. Attach. 18 at 1 (filed under seal).

The Attorney General listened to the Commissioner's position, discussed it with the Commissioner and with assistants and deputies in the Office of the Attorney General, and articulated the legal basis for his decision not to file an appeal in detail in writing to the Commissioner. ASF at 5, ¶ 15, Attach. 9 (filed under seal). The Attorney General

summarized the deliberative process that is used to evaluate potential appeals and explained how it was applied in the condemnation case at issue. Attach. 9 (filed under seal).

The deliberative process used by the Attorney General to assess the Commissioner's request to appeal was based on legal analysis: on assessments of the facts and law; on the legal soundness of the superior court's ruling and rationale; on the likelihood of success on appeal; and on the legal harm of pursuing an appeal for the Commissioner and the Department of Natural Resources, as well as the State more broadly. The decision was not willful and unreasoning, or taken without consideration, or in disregard of the facts and circumstances. It was an honest, careful, rational, thoughtful decision by the Attorney General, based on all the facts and information presented to him. The fact that the Attorney General reached a decision with which the Commissioner disagreed does not render the Attorney General's decision arbitrary and capricious. As explained in *Blue Sky*, 107 Wn.2d at 118, an honest and considered decision is not arbitrary or capricious.

The Commissioner has failed to demonstrate an abuse of discretion by the Attorney General.

E. The Commissioner Is Not Entitled To Attorney Fees

The Commissioner claims an entitlement to an award of attorney fees and costs under RCW 4.84.185, asserting the Attorney General's defense to his petition is "frivolous and advanced without reasonable cause." Op. Br. at 21-22.

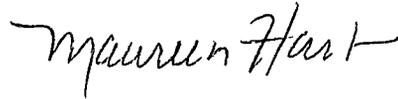
RCW 4.84.185 would require this Court to determine that a lawsuit or defense in its entirety is frivolous and advanced without reasonable cause. *Biggs v. Vail*, 119 Wn.2d 129, 133, 830 P.2d 350 (1992). An action is frivolous if it "cannot be supported by any rational argument on the law or facts." *Clarke v. Equinox Holdings, Ltd.*, 56 Wn. App. 125, 132, 783 P.2d 82, *review denied*, 113 Wn.2d 1001 (1989). The arguments advanced in this brief are fully supported by the Washington Constitution, statutes enacted by the Legislature, and a long series of decisions by this Court. Those arguments are not frivolous, and the Commissioner therefore has no entitlement to attorney fees and costs. Indeed, because the Attorney General acted within the legal discretion granted by the Washington Constitution and statutes, discretion that has been recognized repeatedly by this Court since statehood, mandamus may not lie, and the Commissioner's petition to obtain a writ of mandamus should be dismissed.

VI. CONCLUSION

The Commissioner's petition should be dismissed, and his request for attorney fees denied.

RESPECTFULLY SUBMITTED this 8th day of October, 2010.

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NO. 84704-5

BY RONALD R. CARPENTER SUPREME COURT OF THE STATE OF WASHINGTON

CLERK
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.

CERTIFICATE
OF SERVICE

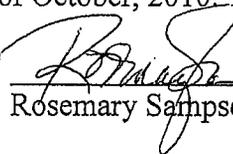
I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of the Brief of Respondent Robert M. McKenna to be served on the following via electronic transmittal:

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DATED this 8th day of October, 2010.



Rosemary Sampson, Legal Assistant

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