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**SUPREME COURT
OF THE STATE OF WASHINGTON**

PUBLIC UTILITY DISTRICT NO. 1
OF OKANOGAN COUNTY, WASHINGTON,

Respondent/Cross-Appellant,

v.

STATE OF WASHINGTON, PETER GOLDMARK, Commissioner of
Public Lands, and CONSERVATION NORTHWEST,

Appellants/Cross-Respondents.

**BRIEF OF *AMICUS CURIAE* OF THE WASHINGTON PUBLIC
UTILITY DISTRICTS ASSOCIATION,
THE WASHINGTON RURAL ELECTRIC
COOPERATIVE ASSOCIATION,
AND
PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY,
WASHINGTON**

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I. INTRODUCTION

The Washington Public Utility Districts Association, the Washington Rural Electric Cooperative Association, and Public Utility District No. 1 of Snohomish County, Washington (collectively, the “Washington Consumer-Owned Utilities” or “COUs”) respectfully urge this Court to affirm the lower courts.

RCW 54.16.050 unequivocally authorizes Public Utility Districts (“PUDs”) to condemn school trust lands. Appellants, Dr. Peter Goldmark (“Goldmark”), Commissioner of the Washington Department of Natural Resources (“DNR”) and Conservation Northwest (“CNW”), ask this Court to nullify the statute. These claims are incorrect as a matter of law. In addition, “eminent domain authority for transmission lines has always been, and will likely remain, a key legal tool to facilitate the development of such lines.”¹ Appellants’ claims should be rejected because they would eliminate this critical legal tool on millions of acres of school trust lands.

II. IDENTITY AND INTERESTS OF AMICI

Collectively, the Washington COUs represent the interests of more than one million residential, commercial, industrial, irrigation, and other electric consumers across the state of Washington. We operate tens of thousands of circuit-miles of transmission and distribution cables. This equipment is necessary to deliver electric power, long recognized as “a necessity of modern life,” the loss of which may “threaten health and

¹ Alexandra B. Klass, “*Takings and Transmission*,” 91 N.C. L. Rev. 1079, 1086 (2013).

safety,” even if the loss is only for a short period.² The Washington COUs have a distinct interest in this case because a decision in favor of the Appellants would block, or at least seriously complicate, access to millions of acres of school trust lands in Washington for construction of critical electric facilities, undermining the core mission of the Washington COUs — to provide reliable and economical electric service to the Washington citizens they serve.

A. THE WASHINGTON PUBLIC UTILITY DISTRICTS ASSOCIATION

The Washington Public Utility Districts Association (“WPUDA”) represents 27 of 28 consumer-owned PUDs operating in the State of Washington. 23 PUDs provide electric service to more than 908,000 Washington consumers in every region of the State and operate more than 40,000 miles of electric lines, including hundreds of miles on state lands. PUDs are formed under Title 54 RCW by a vote of the citizens of their respective counties. Each PUD is governed through Commissioners elected by those citizens.

B. THE WASHINGTON RURAL ELECTRIC COOPERATIVE ASSOCIATION

The Washington Rural Electric Cooperative Association (“WRECA”) represents the interests of the 18 member-owned electric cooperatives and mutual electric companies providing service to 164,750

² *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978).

members in Washington, especially in rural areas.³ Cooperatives provide about 4.5 percent of the total electric power sold in Washington, but their service territories cover about 25 percent of the state's land mass. WRECA therefore has a particular interest in rural lands, including state trust lands.

C. SNOHOMISH COUNTY PUD

Snohomish County PUD ("Snohomish," officially known as "Public Utility District No. 1 of Snohomish County, Washington") was formed by a vote of the people of Snohomish County in 1936 and operates under the authority of Title 54 of the Revised Code of Washington.

Snohomish serves approximately 325,000 households and businesses in Snohomish County and on neighboring Camano Island. To serve these customers, Snohomish operates approximately 6,000 circuit-miles of electric lines within its service territory. Snohomish also depends on high-voltage electric lines in other parts of the state to move power supplied from major hydroelectric generators in the Columbia River Basin and from wind generation located in the Columbia River Gorge to Snohomish County.

III. STATEMENT OF THE CASE

The Washington COUs adopt the statement of the case as set forth by Respondent Okanogan County PUD ("Okanogan PUD"). In particular, we emphasize: (1) Okanogan PUD proposes constructing a 28-mile

³ 15 of these cooperatives and mutual companies are based in Washington. Three more are based in Idaho but serve members in Washington.

transmission line to reduce approximately \$400,000 in annual line losses,⁴ to maintain reliable service to its neighboring utility, Okanogan County Electric Cooperative, and to meet growing power demand in Okanogan County; (2) to minimize impacts to state lands, Okanogan has agreed to, for example, deliver poles using a helicopter and to excavate necessary holes by hand;⁵ (3) Okanogan will use only existing and temporary roads, thereby eliminating all permanent road construction;⁶ and, (4) the state lands here at issue are by statute managed for multiple use.

IV. ARGUMENT

A. Condemnation Authority Is Critical for PUDs and RECs to Perform Their Basic Functions.

In the early decades of the last century, access to electric power was increasingly recognized as critical to modern life and central to a community's economic prospects. But electric service to Washington's farms, ranches, and rural areas lagged far behind service in urban areas. As of 1930, only 47 percent of Washington farms had electricity, and those with access to electricity paid "exorbitant rates."⁷

These injustices sparked a populist movement, led by the Washington State Grange, to promote Washington's first initiative, the

⁴ Okanogan PUD Br. on Statutory Condemnation Auth'y at 11 (citing CP 127).

⁵ Methow Transmission Project, Final Environmental Impact Statement at p. 2-7 (March 7, 2006) ("FEIS"), available at <https://www.okanoganpud.org/document-library/methow-transmission-project>.

⁶ *Id.*

⁷ Jay L. Brigham, *Empowering the West: Electrical Politics Before FDR* 121 (1998).

“PUD Law.”⁸ Now codified in Title 54 RCW, the PUD Law was enacted in the election of 1930 with the support of 54 percent of voters. Similar concerns led to the creation of the Rural Electrification Administration and the formation of rural electric cooperatives across the nation to bring reliable and economical electrical service to the nation’s farms and ranches.⁹ In the ensuing decades, voters in 28 of Washington’s 39 counties voted to form PUDs and 18 rural electric cooperatives and mutual corporations were created serving rural consumers. The PUD Law has, from the beginning, provided PUDs with explicit authority to condemn state lands, including state school trust lands.¹⁰

There was, and remains, good reason for this provision. Condemnation authority has “always played a central role in the building of transmission lines.”¹¹ And continued expansion of the nation’s transmission grid is necessary “to avoid debilitating and increasingly frequent blackouts and service interruptions” that cost the U.S. economy \$150 billion annually.¹² Further, new transmission lines are “particularly critical for renewable energy” because the best resources are often located in remote areas far from population centers.¹³ This holds true in Washington, where the best solar and wind resources are often remote

⁸ *Id.*

⁹ *Id.* at 146.

¹⁰ RCW 54.16.050.

¹¹ Klass at 1154.

¹² *Id.* at 1084.

¹³ *Id.* at 1116.

from West-side population centers. By enacting Initiative 937,¹⁴ Washington's voters have made development of these renewable energy resources a priority.

If this Court disregards the plain statutory language providing PUDs with condemnation authority, the ability of the PUDs to meet these basic goals may be severely compromised. At statehood, Washington was granted nearly 3 million acres for school and related trust purposes,¹⁵ laid out in "the rigid checkerboard pattern of the federal survey."¹⁶ By its nature, transmission is linear, and restricting access to such a large area of land laid out in such a broadly dispersed pattern will greatly complicate the COUs' ability to construct linear facilities. Especially considering development restrictions on other lands, such as Washington's National Parks and Wilderness Areas, and Washington's rugged topography, restricting the COUs' access to trust lands will, at best, greatly complicate their ability to construct transmission facilities and, at worst, could render some transmission routes impossible.

Even where transmission remains possible, adopting Appellants' view will add substantially to the costs borne by Washington's electric

¹⁴ Enacted by the voters in 2006, Initiative 937 requires utilities with more than 25,000 customers to acquire increasing amounts of qualifying renewable resources, culminating in a requirement that, by 2020, 15% of the power provided by such utilities must come from eligible renewable resources. RCW Chapter 19.285.

¹⁵ See 1996 Wash. Att'y Gen'l Op. No. 11, Question 1 (August 1, 1996), available at <http://atg.wa.gov/AGOOpinions/opinion.aspx?section=archive&id=9168#UuFJQhDTnDc>.

¹⁶ *Lassen v. Arizona ex rel. Arizona Highway Dept.*, 385 U.S. 458, 463 n.7, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967). While some trust lands have been sold or consolidated, the checkerboard pattern remains, especially in Washington's rural counties. See DNR Map of Washington Trust Lands at http://www.dnr.wa.gov/Publications/eng_rms_trustlands_map_nu2.pdf.

consumers. Constructing new electric transmission can cost one to three million dollars per mile, sometimes considerably more,¹⁷ so adding miles of transmission line to avoid restricted or unavailable lands drives up project costs, as the FEIS here demonstrates. Attempting to revive arguments already rejected by the courts,¹⁸ CNW points to alternative routes that would avoid state lands.¹⁹ But the alternatives advocated by CNW would add substantially to construction costs. At the low end, Alternative 4 would add \$3.1 million to the \$10.7 million alternative chosen by Okanogan PUD. At the high end, Alternative 6 would cost more than \$30 million,²⁰ nearly tripling construction costs.

B. Plain Statutory Language Provides PUDs With Authority to Condemn State School Trust Lands.

Since Initiative No. 1 was enacted by Washington's voters, PUDs have had unambiguous statutory authority to condemn state school trust lands for utility purposes. RCW 54.16.050 authorizes PUDs to "condemn . . . any public . . . property . . . including state . . . and school lands" for "transmission lines and all other facilities necessary or convenient" for the operation of a utility.

¹⁷ Tim Mason, Trevor Curry & Dan Wilson, *Capital Costs for Transmission and Substations: Recommendations for WECC Transmission Expansion Planning* § 2.1 (Black & Veatch Project No. 176322 Prepared for the Western Electricity Coordinating Council) (Oct. 2012), available at http://www.wecc.biz/committees/BOD/TEPPC/External/BV_WECC_TransCostReport_Final.pdf.

¹⁸ *Gebbers v. Okanogan County PUD No. 1*, 144 Wn.App. 371, 183 P.3d 324 (Div. III), rev. denied, 165 Wn.2d 1004, 198 P.3d 511 (2008) (upholding FEIS alternatives analysis).

¹⁹ App. Br. of CNW at 6 (arguing that Okanogan PUD should have chosen FEIS Alternative 3, which parallels State Highway 153 or Alternatives 4-7, which parallel State Highway 20).

²⁰ FEIS at p. S-10, Table S-5.

Washington statutes are equally clear that, while DNR may voluntarily grant easements and rights of way across state lands for utility purposes,²¹ the failure of DNR to exercise this authority “shall not be construed as exclusive or as affecting the right” of PUDs to acquire state lands or rights of way “by condemnation proceedings.”²² Petitioners’ attempts to make this language disappear fail.

Relying on the proviso in RCW 79.02.010(14)(h) which exempts lands “reserved for a particular use” from the definition of “state lands,” Goldmark claims that, because the lands at issue here are actively managed, they are “dedicated to a public use.”²³ This claim is incorrect because all state lands are under active management,²⁴ and Goldmark’s construction therefore swallows up the main body of the statute, which unequivocally defines school trust lands as “state lands.”²⁵ Goldmark’s construction would also render RCW 54.16.050, which unequivocally grants PUDs the right to condemn state and school trust lands, meaningless, and would produce the same result for, for example, cities²⁶ and port districts,²⁷ which have been granted similar statutory authority.

²¹ See RCW 79.36.355 (DNR authority to grant easements over state lands); RCW 79.36.510-.520 (DNR authority to grant rights of way for utility lines).

²² RCW 79.36.580. That statute applies to “municipal corporations.” PUDs are municipal corporations. RCW 54.04.020.

²³ Goldmark Supp. Br. at 12.

²⁴ See, e.g., RCW 43.30.215 (requiring State Land Board to “[e]stablish policies to ensure that ... management ... of *all* lands and resources within the [DNR’s] jurisdiction is based on sound principles designed to achieve the maximum effective development and use of such lands and resources consistent with laws applicable thereto”) (emphasis added).

²⁵ RCW 79.02.010(14)(a).

²⁶ RCW 8.12.030.

²⁷ RCW 53.34.170.

Goldmark's position is also contrary to this Court's precedent. More than a century ago, this Court concluded that, although school trust lands are reserved for financing public education, they are not "reserved for public uses."²⁸ More recently, this Court held "[i]f the legislature had intended to exempt such state lands from condemnation," it would have "expressly so limited the term 'state lands.'" The legislature did not do so and there is "no reason why such a limitation should be inferred."²⁹ In any event, grazing is a *private* use, not a public use such as reservoir used for municipal water supply,³⁰ a public park,³¹ or a state-operated fish hatchery.³²

In its Supplemental Brief, CNW argues for the first time³³ that the statutes allow only "voluntary" condemnation, relying on this Court's opinion in *Roberts v. City of Seattle*.³⁴ CNW's oxymoronic argument cannot be squared with RCW 79.36.580, which, as noted above, plainly authorizes PUDs to pursue involuntary condemnation if the DNR does not voluntarily grant necessary easements or rights of way. Nor can the argument be squared with *Roberts*, where this Court found that school

²⁸ *Peterson v. Baker*, 39 Wash. 275, 81 P. 681, 683 (1905).

²⁹ *City of Seattle v. State*, 54 Wn.2d 139, 338 P.2d 126, 130-31 (1959).

³⁰ *State v. Kittitas County*, 107 Wash. 326, 181 P. 698 (1919).

³¹ *King County v. Farr*, 7 Wn. App. 600, 501 P.2d 612 (1972).

³² *City of Tacoma v. State*, 121 Wash. 448, 209 P. 700 (1922).

³³ CNW Supp. Br. at 3-4, 8. This court does not consider arguments raised for the first time on appeal. RAP 2.5(a). In addition, we agree that CNW lacks standing in this *in rem* condemnation proceeding for the reasons set forth by Okanogan PUD.

³⁴ 63 Wash. 573, 116 P. 25 (1911).

trust lands are subject to a statute authorizing cities to “condemn land,” including “state . . . and school lands”.³⁵

Roberts also rejected CNW’s new claim that a formal public bidding process is constitutionally required.³⁶ This Court concluded that, because condemnation requires full compensation for lands taken and has “all the elements of a public sale,” condemnation of school trust lands is “clearly not unconstitutional.”³⁷ The U.S. Supreme Court has similarly concluded that state school trusts “will be protected . . . if the State is required to provide full compensation for the land it uses,” and the state need not engage in the “empty formality” of offering lands through public sale and auction, so long as the “integrity of the trust” is maintained by obtaining full value for any land sold.³⁸

C. School Trust Lands Remain Subject To Condemnation Unless Withdrawn From Sale or Dedicated to An Incompatible Public Use

For the reasons Okanogan PUD ably sets forth, under this Court’s precedents, state lands are subject to condemnation unless: (1) they have been withdrawn from sale; or, (2) they have been dedicated to a public use that is incompatible with the purpose for which condemnation is sought.

³⁵ 116 P. at 26 (emphasis added).

³⁶ CNW Supp. Br. at 6-7. In any event, the “public sale” requirement of Art. XVI, § 2, is inapplicable because Okanogan PUD will obtain only an easement while the State retains title to the land. See *Fransen v. Bd. of Natural Resources*, 66 Wn.2d 672, 404 P.2d 432 (1965) (statute that prohibits sale of state forest lands does not prohibit grants of easements and rights of way).

³⁷ 116 P. at 26 (emphasis added).

³⁸ *Lassen*, 385 U.S. at 464-65.

State lands are withdrawn from sale only by an explicit act of the legislature.³⁹ There is no claim that the school trust lands at issue here have been withdrawn from sale. On the contrary, the Enabling Act,⁴⁰ the Washington Constitution,⁴¹ and state statute,⁴² all explicitly subject school trust lands to sale.

Hence, Petitioners can prevail only if they demonstrate that the school trust lands at issue here have been dedicated to a specific public purpose, and that condemnation would be incompatible with that specific purpose. This Court's opinion in *City of Tacoma v. State*⁴³ demonstrates these principles. There Tacoma sought to condemn school trust lands and water rights on the North Fork of the Skokomish River for its Cushman Hydroelectric Project. The state objected, arguing that the specific tract had been set aside for purposes of a fish hatchery. This Court rejected those claims, finding that, in the absence of an "official act or declaration" dedicating the lands to a particular public use, Tacoma was authorized to

³⁹ *Fransen*, 404 P.2d at 33-34 (legislature has declared state forest lands to be "forever reserved from sale," and are therefore not subject to condemnation because "dedicated to a public use"); *City of Seattle*, 338 P.2d at 130-31 (lands "not devoted to or reserved for a particular use by law" are "state lands" subject to condemnation).

⁴⁰ Enabling Act, 25 Stat. 676 chap. 180 § 11 (1889) (a copy of the Enabling Act is attached to CNW's Appellant Brief filed with the Court of Appeals).

⁴¹ Washington Const. Art. XVI, §§ 1-4. In this respect, Appellants attempt to undo the results of the Washington Constitutional Convention, which repeatedly considered but rejected amendments that would have withdrawn school trust lands from sale. Robert F. Utter & Hugh Spitzer, *The Washington State Constitution: A Reference Guide* 207 (2002).

⁴² *E.g.*, RCW 79.11.010.

⁴³ 121 Wash. 448, 209 P. 700 (1922).

condemn the water rights “under the broad powers conferred by our statute” and this Court’s decision in *Roberts v. Seattle*,⁴⁴ discussed above.

The state also argued that condemnation should not be allowed because Tacoma’s proposed diversion of water would interfere with the state’s downstream fish hatchery. This Court recognized that, by constructing a fish hatchery on state lands, the “property is now devoted to a public use”, but condemnation was nonetheless permitted unless it would “destroy this public use or so damage it as to preclude successful operation.”⁴⁵ There was no record evidence that condemnation would produce this result. This Court therefore concluded that “condemnation may be had.”⁴⁶

Similarly, the record here is devoid of any evidence that erection of a transmission line by Okanogan PUD, occupying at most a tiny fraction of the parcels at issue, would be incompatible with grazing, the only current use claimed by Petitioners. In fact, the grazing leases specifically recognize that the lands are subject to multiple uses, including condemnation for utility easements.⁴⁷

The cases Petitioners rely most heavily upon are easily distinguishable. For example, *State v. Superior Court for Jefferson County*⁴⁸, involves tidal lands that were “reserved from sale or lease as a

⁴⁴ 209 P. at 701-02.

⁴⁵ 209 P. at 702.

⁴⁶ *Id.*

⁴⁷ Okanogan PUD Br. on Statutory Condemnation Auth’y at 9-10.

⁴⁸ 91 Wash. 454, 157 P. 1097 (1916).

public ways for watercraft” by an explicit act of the legislature, and by the City of Port Townsend in platting of public streets.⁴⁹ Further, condemnation for a railroad would render the lands “useless for the purposes for which they were dedicated.”⁵⁰

Similarly, in *State v. Kittitas County*,⁵¹ the City of Cle Elum explicitly reserved city land for a municipal water supply reservoir. This Court found that Kittitas County could not condemn the land because it lacked authority to condemn city property,⁵² but PUDs have unequivocal statutory authority to condemn state school trust lands. Further, Cle Elum acted specifically to reserve the land for a reservoir,⁵³ although this Court’s later holdings make clear that merely reserving land does not suffice to prevent condemnation.⁵⁴

Goldmark claims that, under these principles, PUDs could condemn buildings on the University of Washington campus.⁵⁵ This is, of course, untrue because the buildings are clearly “devoted to a public use” under the principles we espouse and a PUD could not condemn such buildings for an incompatible use. But PUDs could, for example, condemn an easement for an underground line to provide electric service

⁴⁹ 157 P. at 1098.

⁵⁰ *Id.*

⁵¹ 107 Wash. 326, 181 P. 698 (1919).

⁵² 181 P. at 699.

⁵³ *Id.*

⁵⁴ Because Cle Elum had purchased the land nine years earlier but had not begun construction on the reservoir, this portion of *Kittitas* does not survive *City of Tacoma v. State*, where this Court held that plans to use land for a public purpose, “indefinite as to time and conditions,” were insufficient to prevent condemnation. 209 P. at 702.

⁵⁵ Goldmark Supp. Br. at 14.

to those buildings. By prohibiting such options, Goldmark's position could compromise the ability of COUs to provide electricity and other vital services to public facilities located on state lands.

CNW similarly asserts that the PUD's position would "undercut" the State's ability to protect the environment.⁵⁶ This is incorrect because electric facilities are subject to perhaps the most extensive planning and public involvement process of any facility constructed in this State, as well as general environmental permitting processes.

At the outset, Washington utilities must, using a public process, develop an "Integrated Resource Plan" that estimates their electric demand, identifies alternatives for meeting that demand, and selects the best alternatives.⁵⁷ If the utility determines that additional transmission or distribution facilities are needed, it must comply with local land use planning processes,⁵⁸ perform an environmental analysis as required by the State Environmental Policy Act⁵⁹ and/or the National Environmental Policy Act,⁶⁰ and comply with a range of environmental statutes protecting wildlife, lands, water, wetlands, and other resources. Larger

⁵⁶ CNW App. Br. at 40.

⁵⁷ RCW Chap. 19.280. Integrated resource planning is mandatory for COUs with more than 25,000 customers, and encouraged for smaller utilities. RCW 19.280.030.

⁵⁸ See, e.g., RCW 36.70A.070(4) (Growth Management Act provision requiring Comprehensive Plans to address location and capacity of utility lines); RCW 36.70A.150 (requiring counties to identify lands for utility corridors and other "public purposes").

⁵⁹ See *Gebbers*, 183 P.3d at 334 (upholding FEIS under State Environmental Policy Act).

⁶⁰ See 42 U.S.C. § 4332(C) (requiring environmental impact statements for "major Federal actions significantly affecting the quality of the human environment").

transmission lines must also comply with regional transmission planning and cost allocation processes.⁶¹

At every step, environmental concerns are weighed, and there are opportunities for environmental advocates to seek modification of routing decisions, to demand environmental mitigation, and otherwise to protect environmental values. In fact, as a result of the environmental assessment process undertaken in this case, Okanogan PUD agreed to a number of significant measures that will mitigate, if not eliminate, any environmental impact of the chosen transmission route.⁶²

D. Commissioner Goldmark Violates His Trust Responsibilities By Failing to Maximize The Economic Returns From the School Trust Lands At Issue Here.

As Goldmark concedes,⁶³ the Enabling Act,⁶⁴ the Washington Constitution,⁶⁵ and Washington statutes⁶⁶ all require school trust lands to be managed to maximize economic returns for the designated beneficiaries of those lands, Washington's public schools. We suggest that DNR

⁶¹ See Order No. 1000, *Transmission Planning & Cost Allocation by Transmission Owning and Operating Utilities*, 136 FERC ¶ 61,051 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *order on reh'g*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012). See also <http://www.ferc.gov/industries/electric/indus-act/trans-plan.asp>.

⁶² See *Gebbers*, 183 P.3d at 332, 334 (upholding Okanogan PUD's environmental analysis, including mitigation measures).

⁶³ Goldmark Supp. Br. at 3-4.

⁶⁴ Enabling Act, 25 Stat. 676 chap. 180 §§ 10-11.

⁶⁵ Wash. Const. Art. XVI, § 1.

⁶⁶ RCW 79.10.090. "[T]he maximization of economic returns to the beneficiaries is the prime objective" of this statute. 1996 Wash. Att'y Gen'l Op. No. 11, Question 2.

violates its trust obligations here by refusing to allow use of school trust lands that will increase returns to the Washington school trust.⁶⁷

This Court has made clear that state land agencies are obligated to maximize economic returns on state trust lands and violate their trust responsibilities if they act inconsistently with these obligations. For example, in *Skamania County v. State*, this Court found that the grant of school trust lands creates “real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees.”⁶⁸ The state violated this fiduciary obligation when it allowed private contractors to escape timber harvest contracts without preserving the full value of those contracts.⁶⁹

The same principles bar Goldmark from elevating scenic and aesthetic preservation, his apparent aim here, over the core obligation to maximize income from trust lands. The Utah Supreme Court’s decision in *National Parks & Conservation Association v. Board of State Lands*⁷⁰ is directly on point. That court rejected the claim that “scenic, aesthetic, and recreational values of school trust land should be given preference over

⁶⁷ We note that DNR received only \$687,206 in grazing fees statewide in 2012, *See* DNR, 2012 Annual Report 254, available at (http://www.dnr.wa.gov/Publications/em_annualreport12.pdf). In contrast, utility rights of way and similar uses produce more than \$3 million in annual revenues. *See* Lincoln Institute, *Washington Trust Lands & Education Funding* at 3 (Oct. 7, 2007), available at (<http://www.lincolinst.edu/subcenters/managing-state-trust-lands/state/ed-funding-wa.pdf>).

⁶⁸ 685 P.2d at 580.

⁶⁹ 685 P.2d at 581-82.

⁷⁰ 869 P.2d 909 (Utah 1994).

maximization of income” because this would be “contrary to the duties imposed on the state . . . under the school land trust.”⁷¹

Similarly, the Alaska Supreme Court rejected that state’s attempt to create a park from university trust land without compensating the trust. The trust obligation requires Alaska to “maximize the economic return of from land for the benefit of the university,” a goal which “cannot be accomplished if the use of the land is restricted to any significant degree.” Hence, preservation of the land as a park “is incompatible with the objective of using university land for the ‘exclusive use and benefit’ of the university.”⁷² Other courts, including the U.S. Supreme Court,⁷³ the Montana Supreme Court,⁷⁴ and the U.S. District Court for the Eastern District of Washington⁷⁵ have reached similar conclusions, as has Washington’s Attorney General.⁷⁶

DNR claims that it has discretion to refuse Okanogan PUD’s purchase of easements across school trust lands.⁷⁷ That is incorrect. The State, as trustee of the school trust lands, must “act with undivided loyalty

⁷¹ 869 P.2d at 916, 921.

⁷² *State v. University of Alaska*, 624 P.2d 807, 813 (Alaska 1981).

⁷³ *Lassen*, 385 U.S. at 468-70 (State enabling act “unequivocally demands . . . that the trust receive the full value of any lands transferred from it”).

⁷⁴ *Montanans for the Responsible Use of the School Trust v. State*, 296 Mont. 402, 989 P.2d 800, 810 (1999) (policy allowing free use of trust lands while former lessees remove valuables and determine the value of improvements “is inconsistent with the trust’s mandate that full market value be obtained for school trust lands”).

⁷⁵ *United States v. 111.2 Acres of Land, More or Less, in Ferry County, Washington*, 293 F. Supp. 1042 (E.D. Wa. 1968) (donation of school trust lands to federal government for reclamation project violates school trust absent compensation for full value of lands).

⁷⁶ 1996 Wash. Att’y Gen’l Op. No. 11, Section 5(c) (DNR “may only take into account factors consistent with ensuring the economic value and productivity of the federal grant land trusts”).

⁷⁷ Goldmark Supp. Br. at 13.

to the trust beneficiaries, to the exclusion of all other interests,” and it “may not sacrifice this goal to pursue other objectives, no matter how laudable those objectives may be.”⁷⁸ Goldmark violates his “constitutionally imposed duty to seek ‘full value’ for trust assets”⁷⁹ by refusing compensation for transmission easements on trust lands.

This does not mean that the State is without power to protect environmentally or aesthetically sensitive areas within school trust lands. “To the extent that . . . protection of non-economic values is necessary for maximizing the economic value of the property, such protection may be undertaken.”⁸⁰ Goldmark claims he has “implicitly determined” that condemnation is inconsistent with the preserving the long-term value of the trust,⁸¹ but “implicit” findings violate fundamental norms of agency decision-making, which require *explicit* written justification supported by substantial record evidence.⁸² Both are missing here.

In addition, if sensitive lands cannot be preserved consistent with the trust obligations, the legislature may exchange sensitive lands for other lands or remove the lands from the school trust.⁸³ Such actions would be

⁷⁸ *Skamania*, 685 P.2d at 580-81.

⁷⁹ *Id.* at 582.

⁸⁰ *Nat'l Parks & Conservation Ass'n*, 869 P.2d at 916; 1996 Wash. Att'y Gen. Op. 11 at Section 5(c).

⁸¹ Goldmark Supp. Br. at 8.

⁸² RCW 34.05.570(3)(i) & (e) (agency action cannot be arbitrary and capricious and must be supported by substantial evidence).

⁸³ *Nat'l Parks & Conservation Ass'n*, 869 P.2d at 921. The land could be preserved, for example, as a Natural Area Preserve or Natural Resources Conservation Area, but only if the school trust receives full compensation for the land so designated. See RCW 79.70.040 (requiring that “the appropriate state land trust receives the fair market value for any interests” designated as Natural Area Preserve); RCW 79.71.050 (requiring trust

legal if, but only if, the school trust receives full value for the lands. Goldmark attempts here to create a *de facto* nature preserve without compensating the school trust, thus violating his fiduciary duties to Washington's school children. Finally, DNR must, in administering trust lands, comply with laws of general applicability,⁸⁴ but the legislature has mandated shrub steppe habitats to be managed for multiple uses, not preserved from development, as Goldmark claims.⁸⁵

Invoking the "public trust" doctrine, CNW asks this Court to designate the state lands at issue here a nature preserve by judicial fiat. CNW's arguments are incorrect for several reasons. First, the school trust lands here are governed by the specific Constitutional and statutory provisions discussed above, and the "public trust" doctrine is limited to lands that "are not subject to specific trusts, such as school trust lands."⁸⁶

Second, the public trust doctrine in Washington applies only to aquatic lands – it arises from historical obligations of the sovereign to maintain access to navigable waters to ensure navigation and fishing

to receive 'full fair market value compensation for all rights transferred' to Natural Resources Conservation Areas).

⁸⁴ See *Board of Natural Resources v. Brown*, 992 F.2d 937, 944 (9th Cir. 1993).

⁸⁵ Goldmark (Supp. Brief at 6) asserts that RCW 79.13.600 requires preservation of shrub steppe habitat. But that statute requires multiple uses, not preservation. *Id.* ("coordinated resource management plans" must "allow for the *increased development* and maintenance of fish and wildlife habitat and *other multipurpose benefits* the public derives from these lands." (emphasis added)). Further, management plans must be consistent with "the statutory and constitutional mandates" governing school trust lands. RCW 79.13.620(1). And DNR must "make every effort to reach agreement on management and resource objectives" with lessees of state lands, and "allow multiple use" of state lands where consistent with the DNR's general multiple use mandates. RCW 79.13.620(3)(a) & (g).

⁸⁶ *Nat'l Parks & Conservation Ass'n*, 869 P.2d at 919; See *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 858 P.2d 232, 239-40 (1993) (agency must comply with specific statutes even where public trust doctrine applies).

rights⁸⁷ – and it has never been extended to non-aquatic lands such as those at issue here.⁸⁸ Third, even if the public trust doctrine applied, it does not require land to be treated as wilderness. On the contrary, the doctrine merely prevents substantial impairment of the “public’s right of access” to aquatic resources “unless the action promotes the overall interests of the public.”⁸⁹ There is no evidence here that construction of the Okanogan transmission line would interfere with public access or any of the other values that might arise under the public trust doctrine.

V. CONCLUSION

For the reasons stated herein, the decision of the Court of Appeals should be affirmed.

Respectfully submitted this 24th day of January 2014.

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By

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⁸⁷ *State v. Longshore*, 141 Wn.2d 414, 5 P.3d 1256, 1262-63 (2000) (public trust protects “navigation, together with its incidental rights of fishing” and related forms of water-based recreation).

⁸⁸ *See Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062, 1072 (1987) (public trust “developed out of the public’s need for access to navigable waters”).

⁸⁹ *Rettkowski*, 858 P.2d at 239; *See Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987) (state grant of licenses to construct recreational docks does not violate public trust); *Kootenai Envi'l Alliance v. Panhandle Yacht Club*, 105 Idaho 622, 671 P.2d 1085 (1983) (construction of private marina does not violate public trust doctrine).

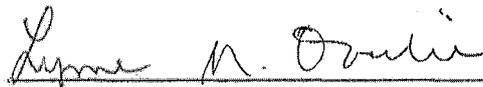
CERTIFICATE OF SERVICE

I, Lynne M. Overlie, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on January 24, 2014, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record in the manner indicated:

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Signed this 24th day of January, 2014 at Seattle, Washington.


Lynne M. Overlie, Legal Assistant
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Attached for filing in this case please find a cover letter, a Motion to Accept Brief Amicus Curiae of the Washington Public Utility Districts Association, the Washington Rural Electric Cooperative Association and Public Utility District No. 1 of Snohomish County, Washington and the Brief of Amicus Curiae (including Certificates of Service).

Thank you.

Respectfully,

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