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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION THREE

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PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY, a  
municipal corporation, Respondent/Cross-Appellant,

v.

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

and

CHRISTINE DAVIS, a single person, TREVOR KELPMAN, a single  
person, DAN GEBBERS and REBA GEBBERS, husband and wife, and  
WILLIAM C. WEAVER, custodian for Christopher C. Weaver, a minor,  
Respondents.

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BRIEF OF RESPONDENT CONSERVATION NORTHWEST

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## I. INTRODUCTION

The Okanogan Public Utility District No. 1 (“PUD”) asks this Court to narrowly construe and strictly limit the already-defined terms governing intervention as a matter of right under CR 24(a). The PUD’s argument is contrary to Washington law and misleadingly relies upon decisions from other jurisdictions whose rules of construction are inconsistent with the law here.

The PUD claims that intervention was improperly granted because Conservation Northwest (“CNW”) does not have a property interest or some other statutorily-recognized interest in the trust lands at issue. However, under CR 24(a)(2), an intervenor need only claim “an interest which is the subject of the action.” “Interest” is broadly construed, with flexibility, on a case-by-case basis. And where there is doubt, intervention should be granted. CNW met this burden. The record establishes the legal, environmental, and public interest implications to CNW and its membership if a public utility is allowed to condemn state trust lands.

CNW also made the “minimal showing” that is required to establish that its interests are not adequately represented by the Washington Department of Natural Resources (“DNR”). It was not necessary for CNW to prove a direct conflict with DNR, instead it was

sufficient for CNW to demonstrate simply that its interest may not be adequately articulated and addressed.

The PUD's final claim, that the trial court abused its discretion in granting permissive intervention under CR 24(b), is also without foundation. CNW was not required to establish "independent grounds for jurisdiction." CNW was required only to prove a question of law or fact in common to the original parties. CNW has established both. The trial court properly limited intervention to responding to the PUD's claims against DNR and the PUD can identify no error of law committed by the court below. The order granting intervention should be affirmed.

## **II. RE-STATEMENT OF THE CASE**

### **A. The Project and Proceedings Below**

The PUD seeks condemnation authority to construct an approximately 28 mile-long transmission line and extensive dirt road access network (approximately 21-23.6 miles long) between Pateros and Twisp, Washington. The PUD requires a 100-foot wide easement across approximately 11 miles of forest and shrub steppe land managed and owned by the DNR. CP 45, 127. DNR holds this land in trust for the benefit of the public.

The PUD applied for an easement across DNR's trust lands in 2008. CNW urged DNR to reject the easement proposal because of the adverse impacts the project would have on critical environmental habitat in the Methow Valley. CP 590-93. In response to DNR's demand for more details and analysis about the economic and environmental impacts of the project,<sup>1</sup> the PUD threatened condemnation in a letter to DNR, CP 560-64, and then filed a Petition for Condemnation in Okanogan County Superior Court. CP 610-41; 168-227.

**B. CNW's Interest in Conserving State-Trust Lands**

CNW was founded in the late 1980s to protect and connect wildlife habitat from the Washington Coast to the Canadian Rockies. CP 581. CNW has since engaged in conservation activities on Washington's state, federal, private lands, and Canada's provincial lands. *Id.* CNW has a staff of 21 people and maintains a membership and supporter list of 7,000. *Id.* Most of CNW's membership consists of residents of the State of Washington. *Id.* CNW is recognized as a regional leader in conservation of public forests and arid lands, with a strong record of successfully advocating for science-based conservation policy. *Id.*

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<sup>1</sup> CP 553-54; 556-58.

DNR is the largest non-federal land owner in Washington. CP 581. Washington state-owned forests and rangelands are mostly federally-granted “trust” lands which, by law, are managed to provide revenue for public purposes. *Id.* In eastern Washington, DNR owns and manages about 1.6 million acres of forest and range lands for beneficiaries that include common schools, universities, and counties. CP 582. These entities are subject to environmental laws such as the State Environmental Policy Act (“SEPA”), the Washington Forest Practices Act, and the federal Endangered Species Act (“ESA”). *Id.* Of the total acreage in eastern Washington, approximately 654,000 acres are forest lands and roughly 870,000 acres are range lands. *Id.*

Washington’s trust lands provide extremely important habitat for fish and wildlife. CP 582. In general, forests growing on trust lands are older and more structurally complex than forests on intensively managed private lands. *Id.* Accordingly, State-owned forests provide critical habitat for diverse communities of plants, fish, and wildlife that are often not available on private land. *Id.* The approximately 1 million acres of State-owned grazing and range lands also provide important wildlife habitat. *Id.* In general, State lands are critical in providing resilient

habitat for many species and can be crucial dispersal habitat, particularly in light of anticipated climate change. *Id.*

Because State-owned forests and rangelands provide such important habitat for fish, wildlife, and plants, and because these lands are vitally important to adjacent local communities, CNW's mission includes advocating and reforming (where necessary) state trust land and policy to ensure that state lands held in trust for the public are managed in an environmentally protective manner that takes into account the public interest. CP 582-83. Advocacy and intervention on behalf of environmentally-sound trust land management has been a priority program of CNW's for almost 20 years. CP 583.

CNW was actively involved in several of the most prominent legal and policy battles over appropriate use of DNR trust lands. In the early 1990s, CNW filed a legal action against DNR when the agency sought to clear-cut a large 25,000 acre block of pristine undeveloped forest in the Loomis State Forest in north central Washington. CP 583. CNW had a strong scientific reason to believe that timber harvest would injure the Canada lynx, a rare cat imperiled by habitat fragmentation caused by roads and clear cuts. *Id.* CNW also believed this timber harvest would harm other rare species known to inhabit that area, including grizzly bear. *Id.*

A settlement of this lawsuit led to an historic agreement under which DNR gave CNW the opportunity to purchase timber rights for the forest. *Id.* CNW raised approximately \$16 million in donations and purchased the timber rights from DNR, effectively protecting the Loomis forests from clear-cutting. *Id.* CNW has since intervened in other actions related to State-owned trust lands and played a key role in achieving protections for forests in the Lake Whatcom watershed and on Blanchard Mountain. *See* CP 583-84.

CNW has been aware of the Okanogan PUD's intent to construct a new transmission line on state-owned trust lands between Pateros and Twisp since the proposal was first announced in approximately 1997. CP 585. CNW conservation director Dave Werntz, CNW's field staff George Wooten, and executive director Mitch Friedman have also been monitoring the proposal and the litigation surrounding it. *Id.* Throughout this process, CNW has consistently identified several environmental concerns that will adversely impact habitat in the area of the proposed new transmission line. *Id.*<sup>2</sup>

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<sup>2</sup> *See also* Opening Brief of Appellant CNW in No 291219-III ("App. Br. of CNW"), at pp. 3-8, for additional background on CNW's significant interests in the Methow Valley, the shrub-steppe habitat, and its efforts in these proceedings.

### **C. Proceedings Below**

Concerned about the legal, environmental, and public interest implications of a public utility district condemning environmentally significant State-owned trust lands, CNW moved to intervene pursuant to CR 24(a) and CR 24(b). CP 594-606. CNW provided argument and declaration testimony to the trial court demonstrating that the PUD's condemnation proposal would impact CNW's interest in several ways. *See* CP 535-579 ("Mann Declaration"); CP 580-593 ("Werntz Declaration"); and CP 594-606 (Motion).

Okanogan County Superior Court Judge Jack Burchard granted CNW's motion and granted CNW leave to intervene as a matter of right under CR 24(a) and permissively pursuant to CR 24(b). CP 506-08. The trial court limited intervention to addressing the "Petitioners claims against Respondent State of Washington and Commissioner of Public Lands, Peter Goldmark." CP 508. The trial court's order also made clear that CNW's intervention was "without prejudice to Petitioner's right to settle this action separately with the State of Washington and Peter Goldmark, Commissioner of Public Lands... ." *Id.*

CNW actively participated in the litigation before the trial court. CNW and DNR separately moved to dismiss the PUD's condemnation

petition. *See* CP 486-505; 460-85. After the court denied both motions and granted summary judgment in favor of the PUD,<sup>3</sup> CNW appealed the order to this Court. CP 918-922. The PUD appealed the trial court's order granting intervention to CNW. CP 1-13. Initially refusing to represent DNR, the Attorney General's timely office filed a contingent notice of appeal fourteen days after CNW's notice was filed. CP 906-17. The Commissioner of Public Lands filed a mandamus action and the Washington Supreme Court ordered the Attorney General to represent DNR. The Attorney General's motion for reconsideration was denied on February 7, 2012, and opening briefs were filed by all parties in this Court on April 23, 2012.

### III. ARGUMENT IN RESPONSE

#### A. Standard of Review

This court reviews a trial court's decision granting intervention as a matter of right under CR 24(a) *de novo* for error of law. *Delong v. Parmalee*, 157 Wn. App. 119, 163, 236 P.3d 936 (2010), *citing Westerman v. Cary*, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994). The court must look to and accept the intervening party's allegations

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<sup>3</sup> CP 19-21; 22-24.

supporting intervention as true. *American Discount Corp. v. Saratoga West, Inc.*, 81 Wn.2d 34, 36, 499 P.2d 869 (1972); *Westerman*, 125 Wn.2d at 302.

A trial court's decision granting permissive intervention under CR 24(b) is discretionary and may be reversed only where it is found that the judge's discretion was abused. *In re Recall Charges Against Seattle School Dist. No. 1*, 162 Wn.2d 501, 507, 173 P.3d 265 (2007). An abuse of discretion exists only when no reasonable person would take the position adopted by the trial court. *Westerman*, 125 Wn.2d at 304 (internal citations omitted).

**B. The Trial Court Correctly Granted Conservation Northwest Limited Intervention as a Matter of Right**

CR 24(a), is liberally construed in favor of intervention. *Columbia Gorge Audubon v. Klickitat County*, 98 Wn. App. 618, 623, 989 P.2d 1260 (1999). CR 24(a) "should be interpreted to allow intervention of right unless it would work a hardship on one of the original parties." *Loveless v. Yantis*, 82 Wn.2d 754, 759, 513 P.2d 1023 (1973). "When in doubt, intervention should be granted." *Columbia Gorge Audubon*, 98 Wn. App. at 630. Intervention as of right under CR 24(a) should be granted on a showing of four elements: (1) a timely application; (2) where the applicant

claims an interest in the subject matter of the action; (3) where disposition of the action will impair or impede the applicant's ability to protect its interest; and (4) where the applicant's interest is not adequately represented by existing parties. *Westerman*, 125 Wn.2d at 303.

The PUD does not challenge the timing of CNW's intervention but instead claims the trial court erred in granting CNW intervention because CNW does not have a "property interest" in the subject of the action and even if it did, DNR sufficiently represents CNW's interests in this appeal. Opening Brief of Appellant PUD ("PUD App. Br.") at 9-10; 11-23. The PUD incorrectly re-interprets already established law governing intervention in Washington and mistakenly relies upon decisions from other jurisdictions which have no bearing on determining whether CR 24 was properly applied to the facts here.

**1. CNW has a significant and protectable interest in the subject matter of this action and disposition of this action will impair its ability to protect those interests**

On its face, CR 24(a)(2) requires only that an applicant for intervention "claims an interest related to the property or transaction which is the subject of the action..." Indeed, not much is required to establish such an interest. *Columbia Gorge Audubon*, 98 Wn.App. at 629.

Washington courts have long established that the meaning of “interest” in the context of intervention is to be “broadly interpreted using flexibility and case-by-case analysis. *Westerman*, 125 Wn.2d at 303. An interest is “broadly, rather than narrowly, construed, so that the issues of fact and law may be framed and tried in the clearest possible light.” *Fritz v. Gorton*, 8 Wn. App. 658, 660, 509 P.2d 83 (1973). An interest “should be viewed as a prerequisite rather than relied upon as a determinative criterion for intervention.” *American Discount Corp.*, 81 Wn.2d at 41. In certain circumstances, an “interest” may only be “personal, rather than economic or a ‘property interest.’” *Id.*

CNW has concrete and immediate interests which meet the requirements of even the most rigorous interpretation of CR 24. CNW exists as a protector of trust lands in the state of Washington and has devoted countless hours towards ensuring their protection over the last several decades. The issue at stake in this litigation, whether or not a PUD can condemn Washington’s state trust lands, directly affects CNW’s ability to continue its work as a representative and protector of state trust land and its ability to protect its own interests as an organization involved in land conservation.

Resolution of whether a public utility district may condemn state trust lands will *directly* impact CNW's longstanding interest in protecting state trust land from laws, policies, or projects that undermine the public's interest in these trust lands. CP 583-84.<sup>4</sup> CNW has been actively engaged in the PUD's proposal to condemn state trust lands for the proposed transmission line since 1997. CP 585. CNW is opposed to the project due to the harm the project will cause to the largest contiguous piece of publicly owned shrub-steppe habitat in the Methow Valley. *Id.*<sup>5</sup>

CNW's strong organizational interest in protecting trust lands from harm will be directly impacted by this Court's decision. If the Court determines that the PUD must seek an easement from DNR to construct the proposed transmission line, it would both spare critical habitat from unnecessary degradation and allow DNR to impose appropriate mitigation conditions. CP 587. This would advance CNW's interest in protecting state trust land from harm and mismanagement. *Id.* If the Court instead

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<sup>4</sup> *Supra* at 5-6.

<sup>5</sup> For example, the proposed transmission route is in an area designated as a priority conservation area because it includes rare plant communities. FEIS at 3.5-3. The project will introduce noxious weeds, fragment wildlife habitat, increase fire risks, and exacerbate erosion and sedimentation. CP 585. Among all alternatives considered by the PUD, the PUD chose the most environmentally harmful. The project is posed to have the greatest impact to high quality vegetation and forests, as well as mule deer habitat, fisheries, and is most likely to introduce noxious weeds to areas that are currently weed free. CP 585-86.

rules that political subdivisions may condemn state trust lands whenever they do not agree with an agency's easement application procedures, the decision would impair CNW's right to promote and rely upon state environmental laws and policies that steward state lands for the public – including the thousands of Washington residents CNW represents who, as public beneficiaries of the trust, have an interest in the long-term management of trust lands. CP 588. It would also, as a practical matter, impair CNW's participation in planning activities to ensure proper management of trust lands. *Id.* A decision allowing condemnation would undercut the already-established and ongoing stakeholder processes currently in place. *Id.* Condemnation of the lands at issue here directly and immediately jeopardizes CNW's organizational interest (and mission) in assuring environmentally significant habitat is protected and properly managed for the public. *Id.*

CNW has exceeded its burden. In *Vashon Island Committee for Self-Government v. Washington State Boundary Review Board for King County*, 127 Wn.2d 759, 765, 903 P.2d 953 (1995), the court affirmed a trial court's decision granting intervention as a matter of right to an organization whose interest was simply to "promote the preservation of the rural nature of Vashon [Island]." The Court also affirmed the lower

court's decision granting intervention to one person of 10,000 residents on Vashon Island whose interest was based on a concern "...about the effect of a more densely populated Vashon would have on the quality of her well water." *Id.* Most of CNW's 7,000 members and supporters are residents of Washington and beneficiaries of the state's administration of trust land. CP 581. Under the state Constitution, DNR is obligated to condition the use of trust lands based on the law, agency policies, and the long-term fiduciary interests of the trust beneficiaries, for "all the people of the state" *including* the thousands of Washington residents CNW represents.<sup>6</sup> Const. art. XVI, §1; *see also*, CP 581, 588. Under *Vashon Island Committee for Self Government*, the trial court's order granting intervention was proper.

The trial court's determination is supported by other decisions construing CR 24(a) under similar facts. In *Fritz v. Gorton*, 8 Wn. App. at 661, the court reversed a trial court order denying intervention to a nonprofit organization, the League of Women Voters of Washington, and broadly interpreted the organization's interests impacted due to the unique role the organization played as an advocate and lobbyist since the at-issue

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<sup>6</sup> CNW's opening brief in Case 291219-III provides a detailed analysis of the history and evolution of federal lands that were granted to the state and held in public trust. App. Br. of CNW at 9-37. CNW's argument on this point is incorporated here.

statute's inception. Similarly, CNW has been active in opposition to the PUD's project since it was *first* announced in 1997. CP 585. CNW regularly participates in litigation concerning the use of state trust lands in Washington, CP 583-84, and has played a critical role in the underlying litigation of this issue between DNR and the PUD. *Supra* at 5-6. Intervention as a matter of right was properly granted here. *See also, Dioxin/Organochlorine Center v. Department of Ecology*, 119 Wn.2d 761, 837 P.2d 1007 (1992) (Affirming order allowing intervention as a matter of right to association representing members' rights as permit holders); *American Discount Corp.*, 81 Wn.2d at 42 (Reversing denial of motion to intervene because although intervenor did not have a "vested legal interest[,] it had economic interest).

**2. The PUD's claim that CNW must have an ownership interest in the public lands the PUD seeks to condemn is not supported by Washington law**

The PUD claims that CNW does not have the "requisite statutory interest" to participate in this litigation because CNW is not the condemnee or otherwise possess "any legal or equitable interest in the State-owned trust lands." PUD App. Br. at 12-16. The PUD's strict interpretation of "interests" under CR 24(a) to apply narrowly to property

interests (or some other ‘equitable interest’), *id.* at 17-20, is contrary to existing law. This Court should reject the PUD’s invitation to construe “interests” narrowly.

The PUD can cite to no authoritative case supporting a construction of interests under CR 24 that requires the intervening party to establish a “statutory interest” as condemnee in an eminent domain proceeding. The PUD’s extensive reliance upon *Port of Grays Harbor v. Bankruptcy Estate of Roderick Timber Company*, 73 Wn. App.334, 869 P.2d 417 (1994) is inapposite. In the first place, *Port of Grays Harbor* is simply not an intervention case and does not discuss intervention or the standard for intervention. *Port of Grays Harbor* instead addresses the unrelated issue of whether the shareholders of a corporation without title to the property at issue were entitled to a condemnation award. 73 Wn. App. at 337-38, 341 (CR 19 does not “create substantive interest in property...with a right to share in the condemnation award”). CNW has made no claim to a condemnation award. *Port of Grays Harbor* is irrelevant to these proceedings.<sup>7</sup>

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<sup>7</sup> The PUD claims that the distinction between joinder under CR 19(a) and intervention under CR 24(a) is “immaterial.” Ap. Br. at 12, n. 5. The PUD’s claim of immateriality is belied by the authority the PUD relies upon, *Kitsap County Fire Protection Dist. N. 7 v.*

While the PUD insists that *Port of Grays Harbor* provides “clear authority” to conclude that a “requisite statutory interest” must be established to intervene in an eminent domain proceeding, CNW has not relied upon a condemnation statute – or any other statute – to confer an unconditional right to intervene under CR 24(a)(1).<sup>8</sup> CNW relied upon CR 24(a)(2). *See* CP 594-606.

The PUD looks next to *Public Utility Dist. No. 1 of Snohomish County v. Kottsick*, 86 Wn.2d 388, 545 P.2d 1 (1976), for support. But contrary to the PUD’s bald assertion that *Kottsick* stands for the proposition that a “proposed intervenor must qualify as a ‘condemnee’ to participate in eminent domain proceedings,” App. Br. at 13, *Kottsick* says nothing about intervention, the standard for intervention or what interest is necessary for intervention. *Kottsick* concerned a County PUD’s effort to condemn several properties. Adjacent landowners that were not being condemned were granted intervention but then sought attorneys’ fees

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*Kitsap County Boundary Review Bd.*, 87 Wn. App. 753, 762, 943 P.2d 380 (1997) which utilizes the analysis for one element of intervention as a reference point for one element under joinder. However, the court conducts a separate and distinct analysis for CR 24 and CR 19.

<sup>8</sup> The PUD’s claim that condemnee requirements are established by statute and may not be superseded by procedural rules, App. Br. at 12, has no bearing upon this court’s review of a decision granting intervention. CNW did not claim to be a condemnee and did not claim, under CR 24(a)(1), that any statute provides CNW with an unconditional right to intervene.

under the condemnation statute. While the *Kottsick* Court concluded that the intervenor did not have a right to statutory attorneys' fees because they were not condemnees, the question of whether or not the appellants were rightful intervenors was not at issue and was not addressed.<sup>9</sup>

This court need not look to other decisions cited by the PUD from other states or to the Ninth Circuit, App. Br. at 14-20, where Washington law is already developed and established.<sup>10</sup> The PUD filed its petition for condemnation pursuant to state law. State law governs. The court should reject the PUD's invitation to read new standards into CR 24(a)(2). CNW exceeded its burden of demonstrating a significant interest in the property and transaction at issue. The trial court's order granting limited intervention was not an error of law and should be upheld.

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<sup>9</sup> Indeed, the intervenors had obviously been actively involved in the litigation and were alone successful in convincing the trial court that the PUD had violated SEPA which resulted in the denial of the certificate of public use and necessity. 86 Wn.2d at 389-390.

<sup>10</sup> See App. Br. at 14-20. One of the few Washington decisions cited by the PUD in its brief, *Roberts v. City of Seattle*, 63 Wash. 573, 116 P. 25 (1911), does not even mention intervention. Significantly, however, *Roberts* allowed non land-owning parties to raise contentions in an eminent domain action on appeal and specifically responded to their arguments. Other cases cited by the PUD are either from other jurisdictions applying the law under different standards, see *U.S. v. 36.96 Acres of Land*, 754 F.2d 855 (5<sup>th</sup> Cir. 1985) (ruling Indiana district court did not abuse discretion denying intervention under federal standards), or do not otherwise concern intervention in Washington. See *Marino Property Company v. Port Com'rs of Port of Seattle*, 97 Wn.2d 307, 644 P.2d 1181 (1982) (challenging Port transfer of property under surplus property statute); *Mercer Island Sch. Dist. N. 400 v. Victor Scalzo, Inc.*, 54 Wn.2d 539, 540, 342 P.2d 225 (1959) (private landowner challenging lower court's finding of public necessity in favor of school district's condemnation proceeding).

### 3. CNW's interests are not adequately represented by DNR

As with the PUD's mistaken interpretation of "interests" under CR 24(a), the PUD confuses the proper standards governing this Court's determination of whether CNW's interests are adequately represented by DNR. Contrary to the PUD's un-cited assertion that "CR 24 requires **compelling** evidence of inadequacy[.]"<sup>11</sup> the intervenor "need make only a minimal showing that its interests may not be adequately represented." *Columbia Gorge Audubony*, 98 Wn. App. at 629. In *Columbia Gorge*, this court identified the critical questions in determining whether an organization's interests are already adequately represented:

Will the Audubon Society undoubtedly make all the Yakima Nation's arguments? That is, is the Audubon Society able and willing to make those arguments? Will the Yakima Nation more effectively articulate any aspect of its interest? It is not necessary that the intervenor's interest be in direct conflict with those of the existing parties. It is only necessary that the interest may not be adequately articulated and addressed. When in doubt, intervention should be granted.

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<sup>11</sup> PUD App. Br. at 21-23 (emphasis in original). The PUD later references *citing Prete v. Bradbury*, 438 F.3d 949, 956 (9<sup>th</sup> Cir. 2006), a federal Ninth Circuit decision. *Id.* at 21-23.

*Columbia Gorge*, 98 Wn. App. at 630, citing, *American Discount*, 81 Wn.2d at 41.

There can be little question that DNR will not “make all” of CNW’s arguments. CNW’s lengthy history establishes a sometimes antagonistic relationship with DNR’s administration of trust lands that has included litigation when necessary to advance CNW’s interests. CP 583-84. Even in this specific matter, in both the trial court and on appeal, CNW has articulated different arguments and different reasons refuting the PUD’s claim that trust lands are condemnable.<sup>12</sup> The different arguments advanced by CNW are further evident in the initial round of briefing before this Court. *See* App. Br. of CNW at 2-3; 23-37. CNW has met its burden of making only a minimal showing that its interests may not be adequately represented by DNR. *Columbia Gorge*, 98 Wn. App. at 629.

The PUD’s claim that an organization’s interests are adequately represented by the government unless compelling evidence is provided is discredited by even a cursory review of the applicable case law. In *CLEAN v. City of Spokane*, 133 Wn.2d 455, 474, 947 P.2d 1169 (1997),

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<sup>12</sup> Compare CNW’s Motion for Summary Judgment, CP 486-505, with DNR’s Motion for Summary Judgment. CP 460-85.

the court affirmed an order allowing intervention even though the City is “charged with representing the interests of all residents” because the intervening parties represented a “more narrow private interest” and disposition would impair their ability to protect their interest. In *Loveless v. Yantis*, 82 Wn.2d 754, 759, 513 P.2d 1023 (1973), the court contrasted the county’s burden to consider interests of all residents of the county with the “more sharply focused and sometimes antagonistic viewpoint to that of county as a whole.” In *Fritz v. Gorton*, 8 Wn. App. at 660-62, the court acknowledged the inherent divergent interest of a lobbyist from that represented by Attorney General.

Consistent with the decision in *Columbia Gorge*, supra, CNW also participated in the proceedings leading to the order at issue. 98 Wn. App. at 630. Intervention was properly granted here. The PUD’s claim that the trial court committed error by entering “an inappropriately conclusory finding” is also not supported by law. In *In re Recall Charges Against Seattle School District No. 1 Directors*, 162 Wn.2d at 507, the court affirmed a decision granting intervention after determining simply that “a) The School District has a separate and distinct interest in these proceedings; [and] b) Its participation is likely to be of assistance to the court in focusing on the issues at the sufficiency hearing.” *Id.* The PUD’s

argument that intervention under CR 24(a) was improper should be rejected.

**C. The Trial Court Properly Exercised its Discretion Granting CNW Permissive Intervention**

CR 24(b) provides that “anyone may be permitted to intervene in an action...[w]hen [the] applicant’s claim or defense and the main action have a question of law or fact in common.” The PUD relies largely on decisions from other states and federal circuits, App. Br. at 23-25, to support the claim that the trial court’s grant of intervention was an abuse of discretion. But the law interpreting CR 24(b) is already defined by Washington courts. Under Washington law, motions for permissive intervention under CR 24(b) are matters left generally to the discretion of the court. *Westerman*, 125 Wn.2d at 304.

The PUD claims that CNW “fails to articulate any actionable claim or defense that relates to this condemnation proceeding” but then argues that CNW’s claims showing that the PUD does not have authority to condemn trust lands nonetheless does not “belong” to CNW because CNW does not own property in the area which is subject to condemnation. App. Br. at 23. As with the PUD’s claims relating to intervention as a matter of right, the PUD can cite to no authority in Washington requiring a

party seeking permissive intervention to demonstrate that the applicant is a condemnee or that the intervenor otherwise had “independent grounds for jurisdiction. See App. Br. at 23-24 citing *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9<sup>th</sup> Cir. 1996). The PUD’s interpretation of permissive intervention is contrary to the plain language of CR 24(b).

The PUD’s inability to cite to authority in support of its proposed interpretation of permissive intervention is fatal to the claim that the trial court somehow abused its discretion in granting permissive intervention. The court plainly reviewed whether CNW shared a common question of law or fact with the PUD and DNR based on CNW’s motion to intervene, declarations in support of the motion, as well as the PUD’s response in opposition and CNW’s reply. See CP 506-08. Common questions of law and fact exist here. The court thus properly concluded that “limited intervention” was appropriate and permitted CNW to respond to the PUD’s claims against DNR and the Commissioner of Public Lands. *Id.* at 508. There is no basis to conclude that “no reasonable person would take the position adopted by the trial court.” *Westerman*, 125 Wn.2d at 304 (internal citations omitted). The trial court’s decision is amply supported by the record.

Even where courts find that intervention as a matter of right may not have been justified, permissive intervention is proper. *See, Vashon Island Committee for Self-Government*, 127 Wn.2d at 765 (“even assuming intervention as a matter of right was not justified, permissive intervention pursuant to CR 24(b) was certainly appropriate here.”). Permissive intervention is also appropriate without regard to the adequacy of interests protected by other parties. *Ferencak v. Department of Labor & Industries*, 142 Wn. App. 713, 721, 175 P.3d 1109 (2008) (While it is unclear why interest is not adequately protected by Department, nothing suggests superior court abused discretion by allowing permissive intervention).

The PUD’s final argument – that the trial court failed to “even consider the impacts, including delay and prejudice, of allowing intervention...” – is unsupported by even a single statement of fact showing *how* CNW’s intervention either prejudiced or delayed this lawsuit. *See* App. Br. at 24-25. The PUD’s appeal challenging intervention permissively should be dismissed.

**D. Expeditious Resolution of this Lawsuit is Impeded by the PUD's Meritless Appeal of Trial Court's Award Granting Intervention**

The PUD claims intervention by non-property owners is improper in eminent domain proceedings because condemnation matters require efficient management and expeditious resolution. App. Br. at 25-26. The PUD's concerns with efficiency and "limited budgets" are not credible given the PUD's meritless appeal of the trial court's order granting intervention. The PUD made similar arguments to the trial court which were subsequently considered and then rejected. *See* CP 523-34. Moreover, CNW is not responsible for the multi-year delay of this Court's consideration of the issues on appeal: the Attorney General refused to represent DNR until the Washington Supreme Court ordered otherwise. *See Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011). CNW has efficiently litigated this matter and the PUD's repeated requests that this Court look to eminent domain statutes to resolve questions arising under CR 24 should be rejected and the PUD's appeal dismissed.

**IV. CONCLUSION**

The Court should affirm the trial court's order granting CNW's motion to intervene under CR 24(a) and CR 24(b).

DATED this 23<sup>rd</sup> day of May, 2012.

Respectfully submitted,

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

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

Respondent/Cross-Appellant,

v.

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

Appellants/Cross-Respondents,

v.

CHRISTINE DAVIS, a single person;  
TREVOR KELPMAN, a single person;  
DAN GEBBERS and REBA GEBBERS,  
husband and wife; and WILLIAM C.  
WEAVER, Custodian for Christopher C.  
Weaver, a minor; and,

Respondents.

COURT OF APPEALS NOS. 29121-9-  
III AND 29123-5-III

DECLARATION OF SERVICE

1 STATE OF WASHINGTON )  
2 COUNTY OF KING ) ss.

3 I, David S, Mann, under penalty of perjury under the laws of the State of  
4 Washington, declare as follows:

5 I am an attorney with Gendler & Mann, LLP, attorneys for appellant herein. On  
6 the date and in the manner indicated below, I caused the Response Brief of  
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COURT OF APPEALS  
DIVISION III  
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PUBLIC UTILITY DISTRICT NO. 1  
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STATE OF WASHINGTON, PETER  
GOLDMARK, Commissioner of Public  
Lands, and CONSERVATION  
NORTHWEST, a non-profit  
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Appellants/Cross-Respondents,

v.

CHRISTINE DAVIS, a single person;  
TREVOR KELPMAN, a single person;  
DAN GEBBERS and REBA GEBBERS,  
husband and wife; and WILLIAM C.  
WEAVER, Custodian for Christopher C.  
Weaver, a minor; and,

Respondents.

COURT OF APPEALS NOS. 29123-5-  
III

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4 declare as follows:

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