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SUPREME COURT OF THE STATE OF WASHINGTON

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.

**PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY
ANSWER TO AMICUS CURIAE BRIEF OF
WESTERN STATES LAND COMMISSIONERS ASSOCIATION**

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1. INTRODUCTION

Trust land policy is the responsibility of the Legislature, not DNR. Yet, in its Brief of Amicus Curiae, the Western States Land Commissioners Association (“Land Commissioners”) boldly assert that DNR’s discretion has primacy over the Legislature’s determinations of State trust land policy. They ignore the express legislative grant of condemnation authority and, more importantly, rely on a fundamental misconception that there is some conflict with the constitutional trust mandate. There is no conflict. To the contrary, through the condemnation process, the school trust will be fully compensated for the easements; and, DNR’s existing uses of the lands will continue. The Land Commissioners’ asserted principles of narrow statutory construction have no application to this case.

The Land Commissioners’ attempt to endow DNR with unlimited discretion in the face of contrary direction from our State Legislature must be rejected. And, the discretion over state trust lands that the Legislature has delegated to DNR remains subject to the Legislature’s grant of express condemnation authority and condemnation for compatible uses. That is this Court’s precedent for over a century. *Roberts v. City of Seattle*, 63 Wash. 573, 575-76, 116 P.2d 25 (1911). The Land Commissioners

advance no argument supporting a challenge to *Roberts* or the Court of Appeals' decision in this case.

2. ARGUMENT

2.1. The PUD Has Express Authority To Condemn Easements Over School Trust Lands.

For over a century, this Court has consistently affirmed the Legislature's grant of condemnation authority over school trust lands. *Id.*; see *City of Seattle v. State*, 54 Wn.2d 139, 147, 338 P.2d 126 (1959). And, for more than 80 years, it has been the law of this State that a public utility district

may take, condemn and purchase, purchase and acquire any public and private property, franchises and property rights, **including state, county, and school lands**, and property and littoral and water rights, **for ... transmission lines**, and all other facilities necessary or convenient.

Laws of 1931, ch. 1, § 6(e) (codified at RCW 54.16.050) (emphasis added). The Legislature reaffirmed this condemnation authority in DNR's own easement statutes:

The foregoing sections relating to the acquiring of rights-of-way and overflow rights through, over and across lands belonging to the state, **shall not be construed as exclusive or as affecting the right of municipal and public service corporations to acquire lands belonging to or under control of the state, or rights-of-way or other rights thereover, by condemnation proceedings.**

RCW 79.36.580 (emphasis added).

The Land Commissioners' arguments about statutory construction ignore the basic fact that the PUD's condemnation power is expressly granted.¹ This express grant of power remains in full force, despite DNR's failed attempt to change the law during the course of this litigation. CP 84-112 (Senate Bill 6838 and related documents, 2010 session).

2.1.1. The Condemnation Statutes Are Presumed Constitutional.

State statutes are presumed to be constitutional, and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998).² Like the plaintiff in *Friends of the Wild Swan*, the Land Commissioners assert constitutional claims without actually arguing

¹ The Land Commissioners also incorrectly assert that RCW 54.16.020 "describes the scope" of the PUD's ability to condemn because it directs that condemnation occur in the same manner and procedure as cities and towns. (Amicus Br. at 7.) This type of provision is often included in eminent domain statutes. *E.g.*, RCW 35.58.320 (metropolitan municipal corporations); RCW 57.08.005 (water-sewer districts); RCW 81.112.080 (regional transit authorities). It does not affect the substantive scope of the PUD's condemnation authority; it relates to condemnation procedures, such as providing notice. *See Pub. Util. Dist. No. 2 of Grant County v. N. Am. Foreign Trade Zone Indus.*, 159 Wn.2d 555, 566-69, 151 P.3d 176 (2007).

² "[O]ne challenging a statute must, by argument and research, convince the court that there is no reasonable doubt that the statute violates the constitution. The reason for this high standard is based on our respect for the legislative branch of government as a co-equal branch of government, which, like the court, is sworn to uphold the constitution. We assume the Legislature considered the constitutionality of its enactments and afford some deference to that judgment. Additionally, the Legislature speaks for the people and we are hesitant to strike a duly enacted statute unless fully convinced, after a searching legal analysis, that the statute violates the constitution." *Island County*, 135 Wn.2d at 147. Of course, the PUD statutes directly reflect the will of the people, as they were the result of this State's first Initiative to the Legislature in 1930. CP 393-417.

unconstitutionality of the governing statutes.³ See *Friends of the Wild Swan v. Dep't of Natural Res. & Conserv.*, 127 P.3d 394, 400 (Mont. 2005). Indeed, nearly every case cited in the Land Commissioners' brief involves the constitutionality of a statute or action.

This Court was clear in *Skamania County v. State*: "The burden remains on the challenger to prove the statute's invalidity, and all reasonable inferences and presumptions will be made in favor of the legislation's constitutionality." 102 Wn.2d 127, 133, 685 P.2d 576 (1984); accord AGO 1996 No. 11.⁴ No party has challenged the constitutionality of the people's and the Legislature's grant of condemnation authority, let alone met the "demanding" standard of proving unconstitutionality beyond a reasonable doubt. See *Island County*, 135 Wn.2d at 146-47. The Land Commissioners attempt to wrap themselves in a constitutional mantle. But this Court recognizes that such an effort remains a direct challenge to the Legislature's authority.

³ DNR takes the same approach. See, e.g., Appellants State of Washington and Peter Goldmark's Reply Brief at 5 (judiciary must ultimately determine constitutionality).

⁴ As the Attorney General explained, despite fiduciary principles, the Legislature is "accorded a deference not granted to a private trustee because of the presumption of constitutionality that applies to exercises of state legislative authority." (Short Answer to Question 2.)

**2.1.2. There Is No Conflict With The Trust Mandate Where
Condemnation Proceedings Ensure Full Compensation To The
Trust.**

Condemnation proceedings have “all the elements of a public sale” and therefore present no conflict with the trust mandate of ensuring full compensation. *Roberts*, 63 Wash. at 576. In contrast, the cases cited by the Land Commissioners uniformly involved failures to fully compensate the trust. *See Skamania County*, 102 Wn.2d at 136 (invalidating statute that authorized release of over \$90 million in contract rights, which falls “far short of the state’s constitutionally imposed duty to seek ‘full value’ for trust assets”); *Wasden v. Bd. of Land Comm’rs*, 280 P.3d 693, 701 (Idaho 2012) (invalidating statute that allowed lease of trust lands without public auction); *Montanans for Responsible Use of the Sch. Trust v. State ex rel. Bd. of Land Comm’rs*, 989 P.2d 800 (Mont. 1999) (invalidating certain statutes that failed to ensure full market value for trust lands); *Gladden Farms, Inc. v. State*, 633 P.2d 325, 330 (Ariz. 1981) (invalidating sale of trust lands to existing lessees without public auction); *United States v. 78.61 Acres of Land*, 265 F. Supp. 564, 568 (D. Neb. 1967) (invalidating grant of right-of-way over school lands to United States that was uncompensated); *State ex rel. Ebke v. Bd. of Educ. Lands & Funds*, 47 N.W.2d 520, 525-26 (Neb. 1951) (invalidating statute that permitted leases of trust land based on arbitrary valuations shown to be substantially

less than fair market value). This issue has no application to this case, where the only issue should be the **amount** of compensation to be paid for the public easements.

The U.S. Supreme Court addressed the fundamental issue of full compensation for school and other trust lands in *Lassen v. Arizona ex rel. Arizona Highway Department*, 385 U.S. 458, 87 S. Ct. 584, 17 L. Ed. 2d 515 (1967). *Lassen* involved acquisition of a right-of-way by the Arizona Highway Department over trust lands managed by that state's Land Commissioner. *Id.* at 459-60. In addressing the procedures by which the lands were to be transferred, the Court explained:

The trust will be protected, and its purposes entirely satisfied, if the State is required to provide full compensation for the land it uses. We hold, therefore, that Arizona need not offer public notice or conduct a public sale when it seeks trust lands for its highway program. The State may instead employ the procedures established by the Commissioner's rules, **or any other procedures reasonably calculated to assure the integrity of the trust** and to prevent misapplication of its lands and funds.

Id. at 465 (emphasis added); *see also id.* at 463 ("The method of transfer and the transferee [are] material only so far as necessary to assure that the trust sought and obtained appropriate compensation."). Condemnation and payment of just compensation satisfies that requirement.

The principles articulated in *Lassen* are consistent with Washington law:

When the state transfers trust assets ... **it must seek full value for the assets.** It may not sacrifice this goal to pursue other objectives, no matter how laudable those objectives may be.

Skamania County, 102 Wn.2d at 134 (emphasis added) (internal citation omitted); *accord State ex rel. Ebke*, 47 N.W.2d at 523 (“[T]he primary purpose of the trust is the production of income for ... the common schools ...”); AGO 1996 No. 11 (Question 5(c) Short Answer) (observing that DNR “may only take into account factors consistent with ensuring the economic value and productivity” of the trust).⁵

The Land Commissioners do not cite a single case holding that condemnation of school trust lands – or condemnation of easements over trust lands – violates the Constitution or fiduciary principles. This Court held the opposite in *Roberts*, 63 Wash. at 576. Just as in *Roberts*, the PUD will be required to pay just compensation (fair market value) for the easements. *See, e.g., Chelan Elec. Co. v. Perry*, 148 Wash. 353, 358, 268 P. 1040 (1928) (“Just compensation under our decisions means generally

⁵ *See also* Br. 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 (“Consumer-Owned Utilities Br.”) at 15-19.

that amount which fairly represents the market value of the thing taken, having due regard to the uses for which the property is suitable.”).

It is unclear what conflict the Land Commissioners believe exists. The trust will receive full compensation for the easements. Indeed, the record is devoid of evidence showing any detriment to the trust where the State will be paid for the easements, retain fee ownership of the lands, and continue to earn income from the existing uses of the lands for the trust beneficiaries. There is no conflict in the Legislature’s public land statutes or in the management of the trust where the trust is fully compensated. Those statutes are clear and unambiguous. There is no foundation for the Land Commissioners’ argument to narrowly construe these statutes.

2.2. DNR’s Discretion To Manage Trust Lands Does Not Trump The Legislature’s Power To Authorize Condemnation.

Trust land policy is the responsibility of the Legislature, not DNR. *See Skamania County*, 102 Wn.2d at 134-39 (analyzing the State’s duties as trustee); *Friends of the Wild Swan*, 127 P.3d at 397 (Board’s obligations as trustee governed by constitutional and statutory provisions); *State ex rel. Ebke*, 47 N.W.2d at 525 (“That the Legislature has the power to provide the method of administering the public school lands of the state as a trust is not subject to question.”). The Commissioner of Public Lands has only that authority which is specifically granted. Const. art. III, § 23

(“The commissioner of public lands shall perform such duties and receive such compensation as the legislature may direct.”). The Land Commissioners’ assertion to the contrary is wrong.

2.2.1. The Legislature Can Authorize Condemnation Of Easements Over Trust Lands.

The Washington Constitution specifically allows the Legislature to decide how interests in trust land, such as easements, can be disposed of:

All the public lands granted to the state are held in trust for all the people and none of such lands, nor any estate or interest therein, shall ever be disposed of unless the full market value of the estate or interest disposed of, **to be ascertained in such manner as may be provided by law**, be paid or safely secured to the state

Const. art. XVI, § 1 (emphasis added). Congress has likewise given the Legislature authority to grant easements over trust lands “as may be acquired in privately owned lands through proceedings in eminent domain.” Enabling Act, ch. 180, § 11, 25 Stat. 676 (1889), *amended by* Act of May 7, 1932, 47 Stat. 150. And, condemnation of trust lands has been upheld not only in Washington but in other states as well. *E.g.*, *Hollister v. State*, 71 P. 541, 542-43 (Idaho 1903), *overruled in part on other grounds*, *Smith v. State*, 473 P.2d 937 (Idaho 1970); *see* Br. of Amicus Curiae of Cities of Tacoma and Seattle at 5-8.

The Land Commissioners provide no authority that the Legislature cannot authorize condemnation as part of its overall management of trust

land policy. DNR has admitted that the Legislature determines the condemnation authority local governments possess, if any, and the state lands to which such authority applies, if any. *E.g.*, Petition for Review at 17. Here, the people and the Legislature expressly authorized PUDs to condemn easements over school trust lands. RCW 54.16.050. Nothing about this determination is contrary to the Legislature's trust obligations.

2.2.2. DNR Is Not The Arbiter Of The PUD's Condemnation Authority.

The Land Commissioners (like DNR) improperly elevate their authority over that of the Legislature and the Courts. (Amicus Br. at 9-10.) In essence, they adopt the faulty "voluntary condemnation" theory advocated by Conservation Northwest. (CNW Supp. Br. at 9-12.) However, condemnation – by its very nature – does not require permission from the condemnee. *See* Const. art. I, § 16 (condemned property is "taken"). The position that DNR must consent to the PUD's easements squarely contradicts the reservation of the PUD's condemnation authority in DNR's easement statutes. RCW 79.36.580.

Moreover, to assume that DNR should determine whether trust land is "dedicated to a public use"⁶ or "devoted to or reserved for a

⁶ Notably, the question of "public use" is judicial in nature. Wash. Const., art. I, § 16; *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005). Here, DNR stipulated that the PUD's use of easements for a transmission line was both a public use and necessary. CP 14-24.

particular use by law” substitutes the Commissioner’s judgment for that of the courts. This Court’s precedent confirms that it is the proper role of courts to determine whether condemnation is permitted under the law and facts of the case. *See City of Seattle*, 54 Wn.2d at 147 (determining that capitol building trust lands were not dedicated to a public use and were subject to condemnation); *City of Tacoma v. State*, 121 Wash. 448, 452-53, 209 P. 700 (1922) (determining whether eyeing station was dedicated to a public use and determining whether proposed diversion of water from fish hatchery was compatible use with fish hatchery’s operation); *Roberts*, 63 Wash. at 576 (determining compatible uses). While DNR is free to present evidence and argument to the trial court on the propriety of condemnation, the Land Commissioners cite no authority that designates DNR as ultimate arbiter of such disputes.

2.2.3. DNR’s “Active Use” Of Trust Lands Does Not Exempt Those Lands From Condemnation.

As discussed further in the PUD’s prior briefing, an “active management” theory is simply untenable.⁷ Washington law requires more. If this Court were to adopt the Land Commissioners’ position that

⁷ *See* PUD’s Br. of Respondent on Statutory Condemnation Authority at 34-37; PUD’s Supp. Br. at 7-8; *see also* Consumer-Owned Utilities Br. at 8-9.

any “specific active use” constituted dedication to a public use,⁸ large swaths of statutes would be left meaningless.

Lands that are “devoted to or reserved for a particular use by law,” are not “state lands” (and thus, not “school lands”) under the Public Lands Act. RCW 79.02.010(14); *cf. State v. Super. Ct. for Jefferson County*, 91 Wash. 454, 459, 157 P. 1097 (1916) (dedicated land becomes “**severed from the mass of public lands**, [so] that no subsequent law, or proclamation, or sale would be construed to embrace it, or operate upon it” (emphasis added)). Application of the Land Commissioners’ flawed argument would remove nearly all school lands from DNR’s own land management statutes⁹ and nullify the many state statutes specifically authorizing condemnation of “school lands.” *See, e.g.*, RCW 8.12.030 (cities and towns), 53.34.170 (port districts), and 54.16.050 (public utility districts). This Court must avoid such absurd results. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) (“Statutes must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous.”); *Pierce County v. State*, 144 Wn. App. 783, 852, 185

⁸ Amicus Br. at 10.

⁹ This result applies only to the “state lands” definition under RCW 79.02.010(14) and its various subsets, such as school lands. Other types of DNR-managed lands, such as forest lands and aquatics lands, do not have the same qualifying language. RCW 79.02.010.

P.3d 594 (2008) (“We do not interpret a statute in a manner that renders a provision meaningless or creates an absurd or strained result.”).

Even if the Land Commissioners’ position were accepted, for purposes of argument, condemnation would be authorized in any event. The Public Lands Act, upon which the Land Commissioners rely, was enacted in 1927. Laws of 1927, ch. 255, § 1. The PUD’s condemnation statute was passed **after** the Public Lands Act. Laws of 1931, ch. 1, § 6. It defies logic to assert that the Legislature, knowing its definition of school lands, would enact numerous statutes authorizing condemnation of those lands. No matter how the Public Lands Act is read, the PUD’s condemnation authority is legislatively directed.

2.3. The PUD Can Condemn Easements For A Compatible Use.

This Court has long held that, even where dedicated to a public use, school trust lands may be condemned if the proposed use will not destroy the existing use. *City of Tacoma*, 121 Wash. at 453; *Roberts*, 63 Wash. at 576. The Land Commissioners fail to recognize this controlling authority. These general principles of compatible use are not new or unique to Washington. (*See* PUD’s Supp. Br. at 9-11.)

In the trial court proceedings, DNR did not dispute the PUD’s argument and evidence that the PUD’s proposed use for a transmission line was compatible with DNR’s existing use of the lands. *See* CP 41-47,

125-47, 151-53, 162-66; RP 27-38 (Apr. 30, 2010); *see also* RP 12-13 (May 11, 2010) (“There’s no evidence of any negative effect on grazing.”); RP 18 (May 11, 2010). Indeed, the Land Commissioners cannot deny that DNR’s own leases recognize that easements over grazing lands are a contemplated part of the leased lands.¹⁰ *E.g.*, CP 233 (§§ 4.02-.03, .06). The PUD’s transmission lines already cross state lands in Okanogan County, and transmission lines cross state lands throughout Washington. CP 127; *see* Consumer-Owned Utilities Br. at 2.

Despite the Land Commissioners’ argument that DNR should have discretion to determine what land is dedicated to a public use, the assertion is ultimately irrelevant in light of the clear precedent that these lands can be condemned even if dedicated.

2.4. The Legislature Has Determined That The PUD Is Not Limited To DNR’s Easement Process.

Although the PUD’s condemnation authority in RCW 54.16.050 is clear on its face, it is underscored by the Legislature’s reservation of condemnation authority in DNR’s own land management statutes. Completely ignored by the Land Commissioners, RCW 79.36.580 plainly states that DNR’s statutory easement process is not exclusive. This statute provides that DNR’s easement process “**shall not be construed as**

¹⁰ Those leases also contain specific provisions that address condemnation of all or part of the leased land by “any public authority.” *E.g.*, CP 240 (§ 10.06).

exclusive or as affecting the right of municipal and public service corporations to acquire lands belonging to or under control of the state, or rights-of-way or other rights thereover, by condemnation proceedings.” RCW 79.36.580.

Moreover, the Land Commissioners misstate the PUD’s efforts to obtain the necessary easements using DNR’s process.¹¹ During the project’s environmental review, DNR submitted formal comments that it had “no objection” to the project route and that an easement for the transmission line could be issued as long as certain mitigation measures were taken. CP 143-47. The PUD responded to DNR’s comments, and DNR subsequently acknowledged that the PUD had accomplished the SEPA review necessary prior to granting easements.¹² CP 140, 146-47. The PUD’s environmental review was upheld by the courts. *Gebbers v. Okanogan County PUD No. 1*, 144 Wn. App. 371, 183 P.3d 324, *rev. denied*, 165 Wn.2d 1004 (2008).

The PUD negotiated with DNR for the necessary easements using DNR’s easement application process. CP 125-26. Between May 2007 and February 2010, the PUD and DNR communicated extensively about

¹¹ A detailed recitation of the factual background is found in the Statement of the Case section of Respondent’s Brief on Condemnation Authority.

¹² DNR, as a consulted agency, cannot be later heard to complain about the project or the environmental review. See WAC 197-11-545; see also *Marino Prop. Co. v. Port of Seattle*, 88 Wn.2d 822, 834, 567 P.2d 1125 (1977).

the easements, including at least 90 contacts. *Id.* When the PUD submitted its formal easement application in October 2008, it was informed by DNR that final action on the application could be expected in **two to three months**. CP 126. Peter Goldmark took office as Commissioner of Public Lands three months later, in January 2009, and the easements were withheld.

The PUD spent more than 2-1/2 years working with DNR on the easements. Ultimately, the PUD was left with no choice but to condemn the necessary right of way. CP 126-27. This decision was clearly permitted under the PUD's statutorily granted condemnation authority, as further reserved in DNR's easement statutes. RCW 54.16.050; RCW 79.36.580. It has been more than **five years** since the PUD's easement application was filed. *See* CP 126. It is still pending.

3. CONCLUSION

In the face of clear statutory authority, the Land Commissioners -- like DNR -- ask this Court to legislate. That is not the function of this Court. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002) ("The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."). The Land Commissioners' arguments

would unravel the statutory trust land protocols enacted by the Legislature and upheld by this Court. Their arguments provide no basis for this Court to reverse the Court of Appeals' decision. That decision should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of February, 2014.

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