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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29121-9-III

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

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.

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STATE OF WASHINGTON
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PETITION FOR REVIEW

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ORIGINAL

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I. INTRODUCTION

The issue in this appeal is whether state trust land that is constitutionally and statutorily dedicated to the purpose of supporting Washington's schools, and which the Department of Natural Resources ("DNR") acting under its constitutional and statutory trust authority actively manages for this purpose, is subject to condemnation by a local public utility district ("PUD"). Here, DNR, as the legislatively designated trustee, has determined that the best interests of the school trust are served by leasing the land at issue for grazing and denying the PUD's easement request to run a transmission line through otherwise pristine trust land in the Methow Valley. The Court of Appeals' decision erroneously elevated the PUD's authority over that of the trustee, DNR, creating new law inconsistent with this Court's prior precedents. Specifically, the Court of Appeals erred (1) in ignoring trust principles applicable to state trust land, (2) in holding that the critical issue in determining whether trust land is reserved for a particular purpose is whether it is reserved from sale, (3) in finding that trust land leased pursuant to DNR's statutory authority is not reserved for a particular purpose and (4) in creating a new "compatibility" test under which a judge weighs the PUD's proposed use of state trust land against the current use of the land trustee, DNR. The decision has far-reaching implications over future use of trust land, removing significant

safeguards and undermining substantial responsibilities imposed upon the state by the Washington Constitution and the Federal Enabling Act for the management and protection of school trust land.

This Court should accept review because the decision conflicts with decisions of this Court, raises questions under the Washington Constitution and presents issues of substantial public importance.

II. IDENTITY OF PETITIONERS

The Petitioners are the State of Washington and the Commissioner of Public Lands, Peter Goldmark.

III. CITATION TO COURT OF APPEALS DECISION

Petitioners seek review of the decision in *Pub. Util. Dist. No. 1 of Okanogan Cnty. v. State*, 29121-9-III, 2013 WL 1891370 (Wash. Ct. App. May 7, 2013) (“Decision”), a copy of which is attached as Appendix A.

IV. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in failing to apply the trust principles set forth in *Skamania Cty v. State*, 102 Wn.2d 127, 685 P.2d 576 (1984), in holding that school trust land that is actively-managed by the state trustee, and that is dedicated to a particular use authorized by the legislature, is subject to condemnation by a local PUD?

2. Did the Court of Appeals err in holding that reservation from sale is the critical determination in deciding whether state trust land is devoted to or reserved for a particular use?
3. Did the Court of Appeals err in holding that the leasing of state trust land for the purpose of benefiting trust beneficiaries does not reserve the land for a particular use such that it may not be condemned?
4. Did the Court of Appeals err in holding that state trust land could be condemned based on a judicial determination that the PUD's proposed use and DNR's existing or potential long term uses of this land were "compatible", looking solely to the current economic value of these uses?
5. Did the Court of Appeals err in finding that the PUD's proposed use of the trust land is compatible with the state's existing or future use when there is a genuine issue of material fact as to compatibility?

V. STATEMENT OF THE CASE

A. DNR Has a Fiduciary Duty to Manage State Trust Land For the Benefit of Washington's Schools.

At the time of Washington's admission into the Union in 1889, the federal government granted to it approximately three million acres of land, a portion of which the state was legally obligated to hold in trust for Washington schools. Enabling Act of 1889, ch. 180, 25 Stat. §§ 10-11 (1889). The Enabling Act reserved this land for "school purposes only"

and set forth restrictions on its sale and lease to ensure that the land derives to the sole benefit of Washington schools. *Id.* § 11. The restrictions are echoed in the Washington Constitution, which provides that “public lands granted to the state are held in trust for all the people” and restricts the manner in which such trust land may be disposed. Wa. Const. Art. XVI, § 1.

This Court has held that the state holds trust land pursuant to “real, enforceable trusts” that place upon the state the fiduciary duty to manage it in consideration of the “specific enumeration of the purposes for which the lands were granted” and the recognition that this “enumeration is necessarily exclusive of any other purpose.” *Skamania*, 102 Wn.2d at 137. Thus, an inviolate duty of the state is to manage school trust land to ensure its short- and long-term economic value and productivity for school beneficiaries. *See, e.g.*, Op. Att’y Gen. 11, Question 5(b) (1996).

DNR is the state entity charged with the management of all state trust land. *See* ch. RCW 43.30. In this role, DNR has the exclusive statutory authority and discretion to lease or permit trust land for various purposes, including commercial, agricultural and recreational uses. RCW 79.13.010, .060, .380, .390. DNR also has the discretionary authority to grant easements over trust land that it determines are appropriate and consistent with its trust management duties. RCW 79.36.355.

B. The PUD Seeks To Condemn State School Trust Land For An Electric Transmission Line.

The PUD here seeks to condemn school trust land for the purpose of building a new 28-mile electric transmission line in Okanogan County. The proposed route crosses ten parcels of trust land, as well as other privately-owned land. 2006 FEIS at § 2.3.2.¹ The proposed line requires a 100 foot-wide easement over approximately 12.2 miles of trust land and crosses through the largest contiguous publicly-owned shrub-steppe habitat in the Methow Valley. CP 143, 585. The legislature has directed the state to take coordinated efforts to preserve this type of habitat for grazing, wildlife and recreation purposes. RCW 79.13.600 (“the maintenance and restoration of Washington’s rangelands and shrub-steppe vegetation is vital to the long-term benefit of the people of the state”).

Consistent with that directive and to both generate income and preserve this land for the benefit of future generations, DNR has made the management decision to lease or permit portions of this land for cattle grazing. CP 230. DNR has entered enforceable leases and issued permits to allow for cattle grazing on certain parcels. CP 229-369. In total, the proposed transmission line would cross state trust land that is subject to five active grazing leases and two grazing permits. *Id.*

¹ The complete Final Environmental Impact Statement (“FEIS”) for the project is available at <https://okanoganpud.org/document-library/methow-transmission-project?&page=1&order=eskhckwoz>

In October 2008, the PUD submitted a right of way application to DNR asking for an easement to construct the transmission line. CP 230, 538-551. DNR and the PUD engaged in negotiations regarding the easement application. CP 36-37. Prior to any formal easement decision by DNR, however, the PUD filed a petition seeking to condemn the easement. CP 610-41. DNR determined to oppose the condemnation.

Before the trial court, DNR and intervener Conservation Northwest (“CNW”) moved for summary judgment on the ground that the PUD lacked the authority to condemn the school trust land at issue because this land is actively used for and dedicated to a public use. CP 460-505. The trial court denied CNW and DNR’s motions and granted summary judgment in favor of the PUD. CP 22-24. Though the trial court acknowledged that DNR used the school trust land for a “proper and public purpose”, it nonetheless concluded that this use was “compatible” with the PUD’s desired easement for its transmission line. *See* VRP 5:23-24; 21:25-22:7. In reaching this decision, the trial court did not take testimony pertaining to the impacts of the proposed condemnation on the state’s existing or future use of the land or otherwise cite to evidence submitted by the parties. Rather, the trial court based its ruling largely on its own observation that “cattle graze under power lines in many parts of Okanogan county....” VRP 18:7-8. DNR and CNW appealed.

C. The Court of Appeals' Decision

The Court of Appeals Division III affirmed. The Court of Appeals held that whether the trust land was reserved from sale was the critical factor in determining whether it could be condemned. Decision at 12-15. Because school trust land is not reserved from sale, the court held that it is not sufficiently “dedicated to a public use” and is not “reserved” for a particular use under RCW 79.02.010(14)(h) to prevent its condemnation. *Id.* Though acknowledging that under Washington’s Enabling Act and Constitution, the “state trust lands are administered under trust management principles to benefit public schools”, the court nonetheless concluded that “regardless of the trust’s purpose, the legislature granted PUDs the authority to condemn state trust lands” in RCW 54.16.050. Decision at 17. Finally, the court applied a “compatibility” test and held that the condemnation would not “destroy the current uses of the State’s trust land”. *Id.* at 19.

VI. ARGUMENT

Before the Court of Appeals’ Decision, no Washington court has held that a municipality exercising its proprietary power can condemn state trust land that is being put to use pursuant to the state’s constitutional and statutory land management authority. Review should be granted because the Decision conflicts with numerous decisions of this Court

limiting a municipal corporation's power to condemn state land, raises questions under the Washington Constitution and presents multiple issues of substantial public importance. RAP 13.4(b).

A. The Decision Conflicts With Precedent of this Court Limiting Condemnation of State Land.

This Court has long held that municipal condemnation authority does not extend to state land that is devoted to or reserved for a particular use. *State v. Jefferson Cty*, 91 Wash. 454, 157 P. 1097 (1916) (lands the state had dedicated to a future public use as a waterway and streets were exempt from condemnation by railroad); *City of Tacoma v. Taxpayers of Tacoma*, 49 Wn.2d 781, 798, 307 P.2d 567 (1957) (state's use of land as fish hatchery had effect of segregating land and appropriating it to public use such that it could not be condemned); *State v. Kittitas Cty*, 107 Wash. 326, 181 P. 698 (1919) (city's use of land for reservoir is a public use preventing condemnation). These limitations are reflected in the Public Lands Act, which provides that land of the state that is "devoted to or reserved for a particular use by law" is not subject to condemnation. RCW 79.02.010(14)(h). There is no question that the state trust land at issue here has been leased, permitted and is actively used by DNR to serve trust purposes and benefit the common schools. Moreover, there is no question that the legislature has delegated to DNR as trustee the

discretionary authority to (1) lease the state land at issue and (2) to deny an easement request. The open question is whether DNR's decision to lease (and not to consent to an easement) constitutes the devotion or reservation of trust land to a particular use such that it cannot be condemned. Under this Court's precedent, the answer is yes. Rather than apply these established principles in this case, however, the Court of Appeals adopted overly broad new standards for determining whether state land may be condemned.

1. Reservation from Sale Is Not Required

First, the Court of Appeals erroneously interpreted this Court's precedent in holding that more than actual or planned future use of trust land is required to exempt trust land from condemnation. Instead, the Court of Appeals held that unless state trust land is reserved from sale it is subject to condemnation. Decision at 12-14. This first error arises from a misreading of *Roberts v. City of Seattle*, 63 Wash. 573, 574, 116 P. 25 (1911). The Court of Appeals read the critical element of the *Roberts* holding to be that school trust land was subject to sale, but that is not the key or even central holding of *Roberts*. The critical elements in *Roberts* were (1) the state was not using the land at issue nor intended to use it in the future, and (2) the state consented to the city's condemnation because

it no longer wanted the land. The opponents to the condemnation were citizens arguing about the City's authority, not the state.

Despite this, the Court of Appeals here concluded that the **only** “dedication or reservation” that mattered under the Public Lands Act is one that “reserves land from subsequent sale”. Decision at 12. But no case of this Court so holds. Compounding its misreading of *Roberts*, the Court of Appeals erroneously held as critical to *City of Seattle v. State*, 54 Wn.2d 139, 147, 338 P.2d 126 (1959) that the Legislature did not reserve the school and capitol building trust lands from sale. But that was not critical at all. What was critical (as in *Roberts*) was that the state was not using the trust land at issue to benefit the trust and had no plans to do so. Indeed, the question, as framed by this Court, was “whether the city of Seattle has the right . . . to condemn state lands lying outside the city limits **not presently dedicated to a public use.**” 54 Wn.2d at 147 (emphasis added). This Court found that the land could be condemned because it was not in use, not because the state could have sold the land. The Court of Appeals’ reservation from sale requirement also rests on a misreading of *Fransen v. Bd. of Nat. Res.*, 66 Wn.2d 672, 673, 404 P.2d 432 (1965).

That case is inapposite as it did not involve state school trust lands which the state cannot reserve from sale.²

In addition to the conflict resulting from its misreading of precedent, the Court of Appeals' imposition of a rule requiring statutory reservation from sale conflicts with the well-established principle that the government is entitled to use its own land for its own purposes. *Kittitas Cty*, 107 Wash. 326. Simply because the state may sell its own land as it deems appropriate, does not mean that all state land is de facto subject to condemnation without regard to its current or future use. If this were the case, the PUD could arguably condemn the state Capitol Building despite its obvious public use, or more apropos to this case, condemn an easement to place transmission wires across the steps of the Temple of Justice. *See* RCW 79.24.010 (procedures for sale of Capitol Building lands). The breadth and error of the Decision permits these absurd results.

Review is necessary because the Decision's reservation from sale requirement conflicts with decisions of this Court and with the Public Lands Act, which precludes condemnation of state land that is "devoted to or reserved for a particular use by law." RCW 79.02.010(14)(h). There is nothing in the Public Lands Act or any authority of this Court that

² The state constitution and Enabling Act impose express requirements on the sale of trust land, demonstrating an intent to treat it differently than other sales of non-trust public property. WA Const. art. XVI; Enabling Act, §11.

prohibits condemnation only on reservation of state trust land from sale. While reservation from sale may be an alternative ground on which the state can prevent condemnation of its land, it is not an additional requirement to be imposed on top of the state's actual public use.

2. DNR's Actual Use of the Trust Land is Sufficient; A Formal Dedication is Not Required.

Despite the state's statutorily-authorized leasing of this land for the benefit of the trust, the Court of Appeals erroneously (and without citation to authority) concluded that DNR's grazing leases and permits do not constitute a "public use" and do "not reserve those lands for a particular use by law." Decision at 15. Instead, the Court of Appeals established a requirement that there be a "formal dedication" of state land in order to prevent its condemnation. That conclusion is also contrary to this Court's precedent and the language of the Public Lands Act. *See* Decision at 12.

The Court of Appeals rested its decision on a misreading of *State v. Jefferson County*. There, a railroad sought to condemn certain state land that the state had platted and reserved for public use, claiming that this land was subject to condemnation because it was not actually being put to this use. 91 Wash. at 455, 458. This Court disagreed, finding that the dedication of the land through platting was sufficient to prevent its condemnation. *Id.* at 462. Contrary to the Court of Appeals' holding,

Jefferson County does not require that land be formally “dedicated” to be exempt from condemnation. It merely holds that land that is so dedicated may not be condemned, despite the lack of actual current public use. In other words, *Jefferson County* established that dedication to future public use was an alternative basis, not a necessary basis (as the Court of Appeals found) to exempt state land from condemnation.

Indeed, it is only in cases where the land at issue is not put to an actual current use that the court will even reach the question of whether the land is sufficiently “devoted” or “reserved” to be exempt from condemnation. A formal dedication is just one mechanism for the state to establish planned future use. *See, e.g., Jefferson Cty*, 91 Wash. at 459-62; *City of Tacoma*, 121 Wash. 448 (state was neither using land nor declared an intent to use it through some “official act or declaration”).

Though the Decision also cites to *Roberts* and *City of Seattle*, neither case imposes an additional “formal dedication” requirement on top of the state’s actual public use to exempt land from condemnation. In *Roberts*, the court’s holding did not turn on the question of whether the land was “dedicated”; it turned on the fact that the state did not use the land at issue and consented to its condemnation by Seattle. 63 Wash. at 576. Likewise, *City of Seattle* stands only for the inapposite proposition that a city may “condemn state property that was not dedicated to a public

use.” 54 Wn.2d at 147. Both cases turned on whether the state was **using** the land at issue, not the absence of a “formal dedication” of the land.

Moreover, this “formal dedication” requirement is contrary to the holdings of both *Taxpayers of Tacoma* and *Kittitas County*. In those cases, the Court did not address the question of whether the lands had been “dedicated” because their actual use spoke for itself. The school trust land at issue here has been devoted to a public use under the Enabling Act, the state constitution and through statutorily-authorized grazing leases and permits. The Court of Appeals cited no authority for its holding that this devotion and use is insufficient and some further “dedication” is required.

3. “Compatibility” of Uses is Irrelevant to the PUD’s Authority to Condemn State School Trust Land.

In addition to its new reservation from sale and formal dedication requirements, the Court of Appeals created a new “compatibility” test that the state now must also meet to prevent condemnation of its land. This third new requirement puts the burden on the state to prove that its land management decisions are incompatible with a proposed condemnation. Otherwise, even if the state could show that the land was reserved from sale and dedicated to a public use, another government entity could presumably still condemn it by convincing a court that its intended use was compatible with the present use. The Decision will undoubtedly lead

to future disputes between governments as trial courts attempt to evaluate whether proposed and current uses of public land are “compatible.”

This is what happened here. The Court of Appeals upheld the trial court’s determination that the PUD’s proposed transmission line is “compatible” with DNR’s present use and thus the land at issue is subject to condemnation. Decision at 18-19. The court made its compatibility determination on an incomplete record, based solely on present-day profit maximization considerations, and did not take into account the state’s long-term management objectives or its constitutional responsibilities vis-à-vis trust land.³ *Id.* Instead, the court relied on an overly broad reading of *City of Tacoma* to support its flawed compatibility theory. *Id.* But *City of Tacoma* does not stand for the proposition that a lesser municipality may expand its condemnation authority to otherwise used state land based on purported compatibility of use. Rather, as established in *Jefferson County*, the only relevant question is whether a municipality has the authority to condemn land that the state has put to a public use. That court observed that where state lands are sought to be condemned, the question is “solely one of power”, not of whose right to the land is superior. 91 Wash. at 461.

³ Though DNR argued that the uses were incompatible, the trial court improperly granted summary judgment to the PUD despite this disputed issue of fact. CP 48-51.

Here, by reducing the inquiry to “compatibility”, the Decision permits municipalities to chip away at the trust corpus based on ad hoc determinations of whether the proposed use of the land is “compatible” with the state’s use. This undermines the state’s ability to implement land management strategies to ensure the long-term productive use of trust land and the maximum long-term benefit to trust beneficiaries. *See Skamania*, 102 Wn.2d at 132-133. As such, the Decision usurps DNR’s land management authority, and marks a substantial departure from established condemnation law that requires this Court’s review. RAP 13.b(1).

B. The Decision Impedes DNR’s Ability to Fulfill its Constitutional Trust Management Duties and thus Raises an Issue of Constitutional Law.

This Court should also accept review because the Decision elevates improperly the PUD’s statutory condemnation authority over DNR’s constitutional trust management duties, thus raising a question under the state’s constitution. Review is warranted under RAP 13.4(b)(3).

As detailed above, the land at issue in this case is held in trust for the common schools pursuant to the Enabling Act and the Washington Constitution. *See* Enabling Act, §§ 10-11 (1889); Wa. Const. Art. XVI, § 1. This land is dedicated to this purpose by federal law and the state constitution and may not be used for any other. As the legislatively designated manager of school trust land, DNR has a fiduciary duty to

manage school trust land for the long-term benefit of school trust beneficiaries. *See id.*; RCW 43.30.010, .030. In light of the federal statutory and state constitutional reservation of school trust land, this Court has held that the state holds this land subject to “real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees.” *Skamania*, 102 Wn.2d 127. This includes the duty of undivided loyalty and to act prudently with regard to the management of trust assets. *Id.* at 137-38 (collecting cases holding same).

While acknowledging DNR’s constitutional trust obligations under the Enabling Act, the Court of Appeals nonetheless held that the PUD’s statutory condemnation authority took precedence over DNR’s identified trust management use of the land. Decision at 11. This result is inconsistent with the manner in which the PUD’s condemnation authority is to be viewed in relation to the state. As a municipal corporation, the PUD “derives its existence, powers, and duties from the legislative body of the state”. *Taxpayers of Tacoma*, 49 Wn.2d at 796; RCW 54.04.020. It possesses only those powers expressly granted by the Legislature or necessarily implied from that grant. *Granite Falls Library Capital Facility Area v. Taxpayers of Granite Falls Library Capital Facility Area*, 134 Wn.2d 825, 834, 953 P.2d 1150 (1998). This is true for the PUD’s condemnation authority as well, *King Cty v. City of Seattle*, 68 Wn.2d 688,

690, 414 P.2d 1016 (1966), and any statutory grant of this authority must be strictly construed. *Petition of City of Seattle*, 96 Wn.2d 616, 629, 638 P.2d 549 (1981). This is especially true “where the lands of the sovereign are sought to be taken”. *State v. Superior Ct. of Chelan Cty*, 36 Wash. 381, 385, 78 P. 1011 (1904); *Taxpayers of Tacoma*, 49 Wn.2d at 798.

The Court of Appeals failed to appreciate the constitutional nature of DNR’s duties vis-à-vis the school trust land. Instead, the Court observed that several condemnation statutes would be “rendered meaningless” if it held that state school trust land was constitutionally exempt from condemnation. Decision at 11. But none of the general condemnation statutes the Court of Appeals cites can lessen the state’s constitutional obligations with regard to this land, nor can they reduce DNR’s authority as its legislatively designated trustee/manager. The Decision offers no authority for its holding that a municipality’s statutory authority overrides the Washington Constitution. *Id.*

Moreover, the *Skamania* decision clarified the state’s constitutional duties with respect to managing state trust land. As a result, the nature of trust land management has evolved significantly. This Court has not addressed the condemnation powers of municipal corporations in the context of the modern DNR’s active land management and post-*Skamania*

fiduciary obligations to the trust beneficiaries. Review of this important constitutional question is warranted.

C. The Decision Raises Issues of Substantial Public Importance.

This case also presents issues of substantial public importance warranting review. RAP 13.4(b)(4). This case poses a direct conflict between two government entities that implicates the long-term management of this unique and significant state trust land. The Decision likewise impacts negatively the resources available to fund the state's schools, as well severely restricts DNR's ability to fulfill its constitutional trust management duties. It potentially opens the floodgates for condemnation cases initiated by utilities that will no longer feel any need to negotiate easement terms and conditions and instead will locate their long, linear transmission line corridors through state managed land blocks in willy-nilly fashion -- irrespective of the effect of the bifurcation of that land on the current and future trust beneficiaries.

Moreover, although this case is focused on the condemnation of state trust land, the Decision is not limited to trust land, and instead opens the door for any level of government entity to condemn another government's land for its own purposes. Though this Court's precedent has always protected land that a government is actually using or planned to use in the future, the Decision strips away those protections by creating

only the narrowest circumstances under which land is exempt from condemnation (i.e., land not subject to sale) and allowing condemnation despite current use based on a flawed “compatibility” test.

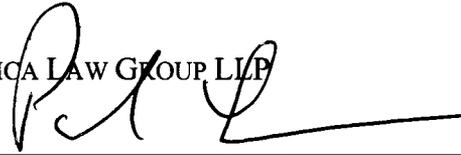
VII. CONCLUSION

The school trust land at issue in this case is unique. It is constitutionally and federally protected, devoted to trust land management, and reserved for a particular use by law. And DNR actively uses this land for this “proper and public” purpose. Under decades of established precedent, this land should be immune from municipal condemnation. Despite these established protections, however, the Court of Appeals imposed new requirements on a government entity seeking to protect its land from condemnation, while gutting all safeguards previously established by this Court. This unprecedented expansion of condemnation authority creates conflicts with numerous decisions of this Court, presents constitutional questions and raises issues of substantial public importance. The petition for review should be granted.

RESPECTFULLY SUBMITTED this 6th day of June, 2013.

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APPENDIX A

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IN THE COURT OF APPEALS OF 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,)

Respondent/)
Cross Appellant,)

and)

CONSERVATION NORTHWEST, a)
nonprofit corporation,)

Appellant,)

and)

CHRISTINE DAVIS, a single person,)
TREVOR KELPMAN, a single person,)
DAN GEBBERS and REBA GEBBERS,)
husband and wife, and WILLIAM C.)

No. 29121-9-III
Consolidated with
No. 29123-5-III

PUBLISHED OPINION

No. 29121-9-III; No. 29123-5-III
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use and whether the easements sought were reasonably necessary for that use.

The court denied the State's and CNW's motions, granted summary judgment in favor of PUD, and entered findings of fact, conclusions of law, and an order on public use and necessity.

CNW appealed, challenging the order of summary judgment, in addition to the order on public use and necessity. PUD then cross appealed, challenging the trial court's order granting intervention to CNW. The State also appealed the summary judgment order, contending that PUD had no statutory authority to condemn the State trust lands at issue here.

We conclude that the State trust lands may be condemned as a matter of law. We affirm summary judgment in favor of PUD and the denial of summary judgment to the State and CNW. Given that we affirm the trial court's order on the PUD's condemnation authority, we need not address the PUD's cross appeal challenging CNW's limited intervention.

FACTS

Introduction. In 1889, Washington became a state. At that time, the federal government granted to Washington approximately three million acres of land for

State of Washington.

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educational purposes and the support of common schools. Enabling Act, ch. 180, §§ 10, 11, 25 STAT. 676 (1889). The lands consisted of sections 16 and 36 of each township in Washington. *Id.* Section 11 of the Enabling Act reserved these lands for “school purposes only” and set forth certain restrictions on their sale and lease to ensure that the lands would derive to the sole benefit of Washington schools. *Id.* This concern is echoed in the Washington Constitution. The Constitution provides that all “public lands granted to the state are held in trust for all the people” and restricts the manner in which such trust lands may be disposed. CONST. art. XVI, § 1.

The Department of Natural Resources (DNR) is the state agency charged by the legislature with the management of these lands. In 1957, the management responsibilities were consolidated in DNR, which was created to provide effective and efficient management of these state lands. RCW 43.30.010, .030. Peter Goldmark, the elected Commissioner of Public Lands (Commissioner), serves as the administrator of DNR. The Commissioner is a member of the Board of Natural Resources that establishes policies regarding the appropriate management of state lands and resources. RCW 43.30.205, .215.

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DNR has been granted the exclusive statutory authority and discretion to lease trust lands for various purposes, including commercial, agricultural, and recreational uses. RCW 79.13.010.

In 1996, Okanogan PUD proposed a new transmission line to improve electrical service to the citizens of Methow Valley. PUD sought to construct the transmission line and substation between Pateros and Twisp (hereinafter the “project”).²

From the initial planning for the project in 1996, the project has been subject to extensive scrutiny. *Gebbers v. Okanogan County Pub. Util. Dist. No. 1*, 144 Wn. App. 371, 376, 183 P.3d 324, *review denied*, 165 Wn.2d 1004, 198 P.3d 511 (2008). As part of the review, PUD and the U.S. Forest Service prepared a draft EIS seeking input from citizens, environmental groups, and governmental agencies. Fifteen alternatives were identified and six alternatives and a no-action alternative were approved for consideration. PUD conducted two public hearings, held several public meetings, and responded to over 400 public comment letters. *Id.* A final EIS was released in March 2006, and PUD made its selection later that month. *Id.*

² A lengthy discussion of the project is contained in this court’s opinion in *Gebbers v. Okanogan County Pub. Util. Dist. No. 1*, 144 Wn. App. 371, 183 P.3d 324, *review denied*, 165 Wn.2d 1004, 198 P.3d 511 (2008).

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Following 10 years of environmental review, the superior court and this court affirmed PUD's decisions regarding the project and the sufficiency of the final EIS. *Id.* at 393. We held that the environmental effects of the project were adequately disclosed, discussed, and substantiated in the final EIS. We also held that PUD did not act arbitrarily and capriciously in selecting the transmission line route. *Id.* The Supreme Court denied review. *Gebbers*, 165 Wn.2d at 1004.

PUD negotiated the easements required for the project with approximately 85 percent of the property owners along the transmission line route, but eventually filed eminent domain proceedings against the remaining owners, including the State. The State lands in question are school trust lands managed by the DNR. PUD filed its amended petition for condemnation on April 14, 2010.

At summary judgment on the condemnation petition, CNW argued that the proposed Pateros-Twisp transmission line would bisect the largest contiguous publicly owned shrub-steppe habitat in the Methow Valley and would have multiple adverse environmental impacts, including the introduction of noxious weeds, fragmentation of wildlife habitat, increased fire risk, and exacerbating erosion and sedimentation.

The State argued that it leased these lands for cattle grazing to generate money for trust beneficiaries and to preserve this land as a part of the trust corpus for the benefit of

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future generations. To this end, the State had entered into enforceable leases for the use of these parcels and had issued permits to allow for cattle grazing on certain parcels. In total, the proposed Pateros-Twisp transmission line would cross state trust lands that are subject to five active grazing leases and two grazing permit range areas. These leases and permits actively generate income to benefit Washington schools.

However, the leases on the property generate less than \$3,000 annually for the school beneficiaries, not including DNR administrative costs. PUD's proposed easements pass over no more than an estimated 4 percent of the area of any one lease and as little as 0.02 percent for one of the leased areas. PUD modified the project to eliminate all permanent road construction within the project.

Intervention. Prior to the hearing on public use and necessity, CNW filed a motion to intervene as a respondent in support of the State. It is undisputed that CNW has no legal or equitable property interest in the trust lands. CNW states: "The issue at stake in this litigation . . . directly affects Conservation Northwest'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." Clerk's Papers (CP) at 603. Despite opposition by PUD, the superior court granted limited intervention under CR 24.

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Motions for Summary Judgment. Following intervention, both CNW and the State filed separate motions for summary judgment, arguing that the PUD does not have the authority to condemn school trust lands. PUD also filed a motion for summary judgment.

The court rejected this statutory argument and concluded that PUD has the express authority to condemn school trust lands under RCW 54.16.020 and .050. The court also rejected the contention that school trust lands cannot be subject to condemnation because they are dedicated to a public use.

The trial court entered orders denying summary judgment to CNW and the State, and granting summary judgment to PUD on the issue of condemnation authority. Because the State did not otherwise oppose an order on public use and necessity, the court also entered its “Findings of Fact, Conclusions of Law, and Order on Public Use and Necessity.” CP at 14-18.

Appeals. CNW filed a notice of appeal challenging the summary judgment in PUD’s favor, as well as the order on public use and necessity. PUD then cross appealed the order granting intervention to CNW. The Attorney General declined to appeal the trial court’s decision despite the Commissioner’s request that it do so. Subsequently, the State filed a contingent notice of appeal of the order denying summary judgment and the order on public use and necessity. Later, the Washington Supreme Court ruled that the

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Attorney General was required to prosecute an appeal on behalf of the Commissioner. *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011). The State then continued this appeal with special counsel.

ANALYSIS

After the PUD filed its condemnation petition, the State and CNW filed separate motions for summary judgment arguing that PUD does not have the authority to condemn the school trust lands. The State concedes that PUD has the statutory authority to condemn, but the State argues that the school trust lands in question are not subject to condemnation because they are already devoted to a particular use by law. CNW argues that chapter 54.16 RCW does not grant PUD express authority to condemn. CNW abandoned this argument on appeal. CNW adopts the State's arguments. CNW argues that state school lands are dedicated to a public use as a matter of law.

This court reviews the trial court's summary judgment orders de novo. *Moeller v. Farmers Ins. Co.*, 173 Wn.2d 264, 271, 267 P.3d 998 (2011). We engage in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

The property in dispute is designated school trust land. Significantly, chapter 1, section 6(e) of the LAWS OF 1931, codified at RCW 54.16.050, specifically authorizes

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public utility districts to condemn school lands for transmission lines. RCW 54.16.050 reads, in part, 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.*

(Emphasis added.)

The PUD statute itself does not contain any limitation on the type of state land that may be condemned. RCW 54.16.050. However, the definition of “state lands” in the public lands act, Title 79 RCW, excludes lands “devoted to or reserved for a particular use by law.” RCW 79.02.010(14)(h).³ The critical issue here is whether these school lands are dedicated to a particular purpose or use and, therefore, are not subject to condemnation.

A. *Dedicated to a Public Purpose.* On appeal, the State argues that all school trust lands are dedicated to a public purpose and are, therefore, per se exempt from condemnation.

The State’s argument is not persuasive for several reasons. First, the public lands act defines “state lands” as including school trust lands “that are not devoted to or

³ We refer to the current version of RCW 79.02.010; subsequent amendments renumbered the sections and were not substantive.

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reserved for a particular use by law.” RCW 79.02.010(14)(h). This means that not all school lands are so reserved or there would be no need for the qualifier. Second, the State’s interpretation would render meaningless the many statutes that specifically allow local government to condemn state and school trust lands. *See, e.g.*, RCW 8.12.030 (cities and towns); RCW 53.34.170 (port districts), and RCW 54.16.050 (public utility districts).

Finally, the State’s argument ignores Washington Supreme Court precedent. In *Roberts v. City of Seattle*, 63 Wash. 573, 574, 116 P. 25 (1911), the city of Seattle instituted an action to condemn a 30-foot strip of university grounds. The court concluded that no provision in the Enabling Act or the Constitution provided that school lands could not be sold. *Id.* at 575. The court held that the fact that school trust lands are devoted to the purpose of financing education was insufficient to exempt the property from condemnation. Moreover, the court stated:

It is also argued that the land taken was already devoted to a public use—that of education—and therefore cannot be taken for another public use. There is nothing in the record to indicate that the 30-foot strip of land in question is actually in use by the university, and there is nothing to indicate that the taking of the strip of land will impair the use of the land remaining. On the other hand, the record shows that the remaining land will be benefited. Under this condition it may be taken.

Id. at 576.

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Dedication to a public use reserves the land from subsequent sale. Contrary to the assertions of the State, dedication to a public use requires more than simply putting the property to a productive use. The Washington Supreme Court has described dedication as: (1) dedication by act of the legislature;⁴ (2) “platted, dedicated, and reserved” land for a public use;⁵ (3) segregating the land from the public domain and appropriating it to the public by “due dedication,”⁶ and dedication by some “official act or declaration.”⁷ Most significantly, the Supreme Court held that devotion to the purpose of education is insufficient to prevent condemnation. *Roberts*, 63 Wash. at 576.

The State reads *State v. Jefferson County*, 91 Wash. 454, 157 P. 1097 (1916) to hold that sovereign lands cannot be condemned. However, *Jefferson County*, which did not involve trust lands, held that the authority to sell or condemn sovereign lands must not be presumed, but must be expressly conferred by statute. *See Jefferson County*, 91 Wash.

⁴ *State v. Jefferson County*, 91 Wash. 454, 455-56, 157 P. 1097 (1916) (waterway permanently reserved from sale by statute).

⁵ *Id.* at 455.

⁶ *City of Tacoma v. Taxpayers of Tacoma*, 49 Wn.2d 781, 797, 307 P.2d 567 (1957), *rev'd on other grounds*, 357 U.S. 320, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958). While this case did not explain how the land was dedicated, the case stated that the land was “dedicated.”

⁷ *City of Tacoma v. State*, 121 Wash. 448, 452, 209 P. 700 (1922). PUD argues that “dedicated to a public use” is the functional equivalent of “devoted to or reserved for a particular use by law.” *See* RCW 79.02.010(14)(h).

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at 458-59. And the PUD condemnation statute expressly allows for the condemnation of school lands. RCW 54.16.050.

Since *Roberts*, the Supreme Court has continued to approve the condemnation of school trust lands, and other types of trust lands, even though they exist for the purpose of serving various trust beneficiaries. See *City of Seattle v. State*, 54 Wn.2d 139, 147, 338 P.2d 126 (1959); *City of Tacoma v. State*, 121 Wash. 448, 453, 209 P. 700 (1922). The State argues that *Roberts*, *City of Tacoma*, and *City of Seattle* are erroneous. The trial court disagreed, and so do we.

In *City of Seattle*, the city of Seattle instituted a condemnation proceeding to acquire state school and capitol building lands for use in its proposed Tolt River aquifer. *City of Seattle*, 54 Wn.2d at 141. The court concluded that the city had the power to condemn state property that was not dedicated to a public use. *Id.* at 147. In *City of Tacoma v. Taxpayers of Tacoma*, 49 Wn.2d 781, 801, 307 P.2d 567 (1957), *rev'd on other grounds*, 357 U.S. 320, 78 S. Ct. 1209, 2 L. Ed. 2d 1345 (1958), the court concluded that the city lacked the statutory authority to condemn state lands previously dedicated to a public use. State lands not dedicated to a public use are subject to condemnation. *City of Seattle*, 54 Wn.2d at 147. Here, the school lands are not dedicated to a public use and are, therefore, subject to condemnation.

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B. *Reservation from Sale.* As stated above, under RCW 79.02.010(14)(h), school trust lands are reserved if they are “devoted to or reserved for a particular use.” In *City of Seattle*, the court found that the capitol building trust lands—which are of the same character as school trust lands—were not devoted to or reserved for a particular use by law:

It is admitted by the state in this action that the capitol building lands which the city of Seattle seeks to condemn are not devoted to or reserved for a particular use but are subject to sale. If the legislature had intended to exempt such state lands from condemnation, it would seem that it would have expressly so limited the term “state lands,” as used in RCW 8.12.030. . . . This the legislature did not see fit to do, and the realtor suggests no reason why such a limitation should be inferred.

City of Seattle, 54 Wn.2d at 147.

In other words, reservation from sale is critical to determining whether public lands have been reserved for a particular purpose. In *Fransen v. Board of Natural Resources*, state forest lands were found to be reserved for a particular purpose by law because they are ““ forever reserved from sale.”” *Fransen v. Bd. of Natural Res.*, 66 Wn.2d 672, 673, 404 P.2d 432 (1965) (quoting former RCW 76.12.120, *recodified as* RCW 79.22.050 (Laws of 2003, ch. 334, § 220)). *Jefferson County* explained that dedicated land is ““ 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.”” *Jefferson*

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County, 91 Wash. at 459 (quoting *State v. Whitney*, 66 Wash. 473, 488, 120 P. 116 (1912)).

School lands are subject to sale. The lands at issue here are not devoted to or reserved for a particular use by law. Moreover, the school trust lands here are not dedicated to a public use. The State cannot show that the trust lands at issue have been dedicated to a public use. Likewise, the State cannot argue that these trust lands are dedicated to a public use simply because they may be actively managed by DNR.

The fact that the State leased the trust lands for grazing does not reserve those lands for a particular use by law. Even trust lands subject to grazing leases shall not be sold during the life of the lease. RCW 79.11.290. And here, the specific leases involved reserve the State's right to sell the property, reserving the right to sell upon 60 days' notice.

In short, the sale of leased school trust lands is simply limited to certain conditions, but these conditions are insufficient to fall within the statutory language of "devoted to or reserved for a particular use by law." RCW 79.02.010(14)(h).

Furthermore, leased lands are not devoted to a particular use by RCW 79.13.370. This provision merely states that once a grazing lease is issued, the lessee may only use the land for the purposes set forth in the lease. *Id.*

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C. Trusts. CNW argues that school lands are exempt from condemnation because they are public trusts.

The Washington Enabling Act and Constitution impose an express trust and corresponding trust management principles on state trust lands, including the land at issue here. *County of Skamania v. State*, 102 Wn.2d 127, 132, 685 P.2d 576 (1984) (citing Washington Enabling Act § 11, 25 STAT. 676 (1889), *amended by* Act of August 11, 1921, 42 STAT. 158, and Act of May 7, 1932, 47 STAT. 150; CONST. art. XVI, § 1); *see* 1996 Op. Att’y Gen. No. 11 (Question 1); *O’Brien v. Wilson*, 51 Wash. 52, 97 P. 1115 (1908); *United States v. 111.2 Acres of Land*, 293 F. Supp. 1042, 1048-49 (E.D. Wash. 1968), *aff’d*, 435 F.2d 561 (9th Cir. 1970).

In *O’Brien v. Wilson*, the Washington Supreme Court rejected the application of adverse possession statutes to common school trust lands, holding that “[Washington] accepted the trust, and by its Constitution solemnly covenanted with the United States to apply the granted lands to the sole use of its schools according to the purpose of the grant, and prohibited the sale of any portion of the granted land except at public sale.” *O’Brien*, 51 Wash. at 56-57 (quoting *Murtaugh v. Chicago, Milwaukee & St. Paul Ry.*, 102 Mn. 52, 55, 112 N.W. 860 (1907)).

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In short, the examination of the language of Washington's Enabling Act and Constitution reveal that state trust lands are administered under trust management principles to benefit public schools as the trust beneficiaries and are subject to statutory controls and authority.

Regardless of the trust's purpose, the legislature granted PUDs the authority to condemn state trust lands. RCW 54.16.050 authorizes the condemnation of state and school lands.

A statute shall not be interpreted in a manner that renders a provision meaningless or creates an absurd or strained result. *Pierce County v. State*, 144 Wn. App. 783, 852, 185 P.3d 594 (2008). The State and CNW assert that the PUD does not have authority to condemn trust land generally or the trust land here. But following this logic, RCW 54.16.050 would have meaningless terms that would create an absurd result.

D. Easements. Regardless of whether a sale is at issue, by the State's own admission, easements can be granted over trust lands for grazing. Here, PUD does not seek fee ownership of school trust lands. In addition to PUD's express condemnation authority under RCW 54.16.050, the legislature also reserved PUD's right to condemn easements over state lands in DNR's land management 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

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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.

The State contends the trust lands at issue are dedicated to a public use because they are actively managed by DNR. But all school trust land is managed by DNR in some capacity as required under state law. *See, e.g.*, RCW 79.10.090 (requiring periodic analysis of all trust lands).

E. *Compatibility*. The State maintains that the courts look only at dedication to a public use when determining whether condemnation is allowed.

The State misinterprets several precedents in making this assertion. For example, in *City of Tacoma* the condemnation at issue involved the right to divert water from a fish hatchery and the right to condemn a 250-foot strip of the school lands. *City of Tacoma*, 121 Wash. at 450. In analyzing whether Tacoma could condemn the right to divert waters flowing past the fish hatchery, the court explained:

This property is now devoted to a public use, and if the proposed diversion of the waters of the North fork would destroy this public use, or so damage it as to preclude its successful operation, our inquiry would end here.

Id. at 453.

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The court ultimately found that the public use would not be destroyed and that diversion would even benefit the hatchery. *Id.* Citing *Roberts*, the Supreme Court held that condemnation was permissible, despite the fact that the property was already devoted to a public use. *Id.* The court also held that *Roberts* authorized the condemnation of the 250-foot strip of school trust lands. *Id.*

PUD points out, and the State does not dispute, that the easements will not destroy the current uses of the State's trust land. In fact, PUD takes the position that the proposed easements will benefit the economic purpose behind the trust lands by providing revenue through compensation for the easements while still allowing the continuation of grazing.

Significantly, the State does not challenge its own leases, which contain specific provisions that address the condemnation of all or part of the leased land "by any public authority." CP at 240 (section 10.06). These provisions not only recognize that condemnation can occur, they allow for continuation of the leases after condemnation if the parties desire.

When managing the grant lands, DNR may consider only those factors consistent with ensuring the economic value and productivity of the federal grant land trusts. *See, e.g.,* 1996 Op. Att'y Gen. No. 11 (Question 5(c)). The condemnation of the easements will not negatively impact the economic productivity of the trusts.

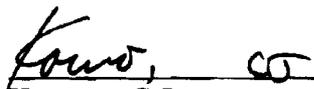
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F. Conclusion. We affirm the denial of summary judgment to the State and CNW and affirm the order on public use and necessity. Given our disposition in favor of the PUD, we need not address its cross appeal related to the trial court's grant of limited intervention to CNW.



Kulik, J.

WE CONCUR:



Korsmo, C.J.



Siddoway, J.