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IN THE COURT OF APPEALS, DIVISION III,
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,

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.

BRIEF OF APPELLANT PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY ON INTERVENTION

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1. INTRODUCTION

Condemnation is an action *in rem*, involving only the property itself. *Port of Grays Harbor v. Bankr. Estate of Roderick Timber Co.*, 73 Wn. App. 334, 338, 869 P.2d 417 (1994). As recognized by the Washington Supreme Court, a person must be a "condemnee" under the eminent domain statutes to have standing to participate in a condemnation action. *Pub. Util. Dist. No. 1 of Snohomish County v. Kottsick*, 86 Wn.2d 388, 390, 545 P.2d 1 (1976). Conservation Northwest was improperly allowed to intervene as a respondent in this condemnation case in which it has no legally cognizable interest in the property. The condemnation was undertaken by Okanogan PUD against State-owned land. Conservation Northwest has no property or other legal interest in the condemned land, is not impacted by the condemnation judgment, and does not have its own claim or defense against the PUD. It is not a "condemnee" under Washington's eminent domain statutes.

Intervention as of right requires that the intervenor be directly and consequently impacted by the judgment. Permissive intervention requires the intervenor to have its own separate claim or defense that relates to the main action. Here, Conservation Northwest will not be directly impacted by a judgment that condemns land held in trust by the State, and it has no claim or defense of its own against the PUD. Conservation Northwest's

only action before the trial court was to make arguments on behalf of the State, not to argue for its own interest, claim, or defense. Accordingly, the trial court erred, and this Court should reverse the grant of intervention to Conservation Northwest.

2. ASSIGNMENTS OF ERROR

The PUD raises two related assignments of error:

2.1. Whether intervention may be granted in an eminent domain action where the proposed intervening party holds no legal or equitable interest in the subject property.

2.2. Whether the trial court's decision to allow permissive intervention was an abuse of discretion where the proposed intervening party has no claim or defense that poses a question of law or fact in common with the eminent domain proceeding.

3. STATEMENT OF THE CASE

3.1. The Methow Transmission Project.

For more than fifteen years, Okanogan PUD[1] has been trying to construct a new transmission line to improve electrical service to the citizens of the Methow Valley. The existing transmission line has long experienced reliability, capacity, and line loss problems; and, service failures are expected to increase in the future. To address this growing

[1] Public Utility District No. 1 of Okanogan County.

problem, the PUD is to construct a new transmission line and substation between Pateros and Twisp ("Project").[2]

From initial planning for the Project in 1996, it has been subject to extensive scrutiny. The PUD and the U.S. Forest Service prepared a draft Environmental Impact Statement ("EIS"), seeking input from citizens, environmental groups, and government agencies. Fifteen alternatives were identified and compared against the PUD's objectives, and six alternatives and a no-action alternative were approved for detailed consideration. The PUD conducted two public hearings, held several public meetings, and responded to over 400 public comment letters. Conservation Northwest was a participant throughout this review process. CP 585-86. A Final EIS was released in March 2006, and the PUD Board made its selection later that month.

Following this decade-long environmental review, the PUD's decisions regarding the Project and the sufficiency of the Final Environmental Impact Statement were affirmed by the superior court and this Court. *Gebbers*, 144 Wn. App. at 393 (holding that the environmental effects of the Project were adequately disclosed, discussed, and substantiated in the Final EIS). This Court further held that the PUD did

[2] A comprehensive discussion of the Project is contained in this Court's opinion in *Gebbers v. Okanogan County PUD No. 1*, 144 Wn. App. 371, 183 P.3d 324, *rev. denied*, 165 Wn.2d 1004 (2008).

not act arbitrarily and capriciously in selecting the transmission line route, which crosses school trust lands owned by the State of Washington. *Id.* The Supreme Court denied review. *Gebbers v. Okanogan County PUD No. 1*, 165 Wn.2d 1004, 198 P.3d 511 (2008).

Although the PUD was able to negotiate the easements required for the Project from approximately eighty-five percent of the property owners along the transmission line route, it ultimately became necessary to file eminent domain proceedings against the few remaining owners, including the State. The State lands at issue are trust lands managed by the Department of Natural Resources ("DNR") for the benefit of the State's common and normal schools. CP 151. These raw lands are open space and used (if at all) for cattle grazing (through leases and permits issued by DNR to private parties). *See* CP 127-38, 151-53.

The PUD first attempted to negotiate the easements through DNR's easement application process. CP 125-26. After nearly three years of working with DNR through this process without approval or denial of the PUD's request, the PUD was left with no choice but to condemn the necessary right of way. *See id.* The PUD filed its original Petition for Condemnation on November 30, 2009, which was later amended on April 14, 2010. CP 168-227, 610-41.

3.2. Intervention By Conservation Northwest.

Prior to the hearing on public use and necessity, Conservation Northwest filed a motion to intervene in the eminent domain action as a respondent in support of the State and Commissioner of Public Lands Peter Goldmark. CP 594-606. Conservation Northwest provided the following basis for its motion:

> Because of the public interest implications of a public utility district condemning environmentally significant State-owned trust lands in lieu of following the Legislature's prescribed easement process, CNW seeks to intervene in this case in support of DNR's opposition to this condemnation.

CP 596 (emphasis omitted).

It is undisputed that Conservation Northwest has **no legal or equitable property interest** in the trust lands. Its interests are solely those of an advocate for environmental preservation. *See, e.g.*, CP 603-04.[3] In its motion to intervene, Conservation Northwest sought only to support DNR. CP 596. It admits that DNR is the entity charged with the legal duty as trustee to ensure that the lands are used in accordance with the law, agency policy, and the long-term fiduciary interests of the trust

[3] "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."

beneficiaries. CP 603. DNR was – and continues to be – opposed to the PUD's condemnation of the trust lands, just as Conservation Northwest.

The PUD disputed Conservation Northwest's right to intervene in this *in rem* action, asserting the recognized standard that the only proper statutory parties are the agency condemning the property and the property owner. CP 523-34. Despite the PUD's opposition, the superior court granted Conservation Northwest's motion to intervene under CR 24, both as a matter of right and permissively. CP 506-08.

3.3. Trial Court Proceedings.

Following intervention, both Conservation Northwest and the State filed separate motions for summary judgment, arguing that the PUD does not have the authority to condemn the school trust lands. CP 460-504. The PUD opposed both motions and requested summary judgment in its favor. CP 52-66, 148-67.

After hearing oral argument on the cross-motions for summary judgment, the superior court issued its oral ruling on May 11, 2010. First, the court rejected Conservation Northwest's statutory argument and found that the PUD has the express authority to condemn school trust lands under RCW 54.16.020 and .050. RP 7-12, 22 (May 11, 2010). Second, the court rejected the contention that the specific trust lands are not subject

to condemnation because they are dedicated to a public use. RP 12-22 (May 11, 2010).

The trial court entered orders denying summary judgment for Conservation Northwest and the State, and granting summary judgment to the PUD on the issue of condemnation authority. CP 19-24. Because the State did not otherwise oppose an order of public use and necessity, the court also entered its Findings of Fact, Conclusions of Law, and Order on Public Use and Necessity. CP 14-18. These appeals followed.

3.4. Appeals.

Conservation Northwest was the first to file a notice of appeal, challenging both orders of summary judgment in the PUD's favor, as well as the order on public use and necessity. CP 1-13. The PUD then cross-appealed the trial court's order granting intervention to Conservation Northwest. CP 918-22. Subsequently, the State filed a conditional notice of appeal of the order denying the State summary judgment and the order of public use and necessity. CP 906-17. The supreme court has since ruled that the Attorney General's Office is required to prosecute an appeal on behalf of DNR. *See Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011). The State thus continues to prosecute its appeal.

4. ARGUMENT

4.1. Standard of Review.

This case addresses intervention under two separate provisions of Civil Rule 24: intervention as of right under CR 24(a)(2) and permissive intervention under CR 24(b)(2). A trial court's decision on intervention as of right is reviewed *de novo* by this Court. *DeLong v. Parmelee*, 157 Wn. App. 119, 163, 236 P.3d 936 (2010) (citing *Westerman v. Cary*, 125 Wn.2d 277, 302, 892 P.2d 1067 (1994)); *see also Spokane County v. State*, 136 Wn.2d 644, 649, 966 P.2d 305 (1998) (reviewing denial of intervention under an error of law standard, *i.e.*, "an error in applying the law to the facts as pleaded and established" (internal quotations omitted)). Permissive intervention is within the superior court's discretion and is reviewed under an abuse of discretion standard. *Spokane County*, 136 Wn.2d at 650. "A decision based on an erroneous view of the law necessarily constitutes an abuse of discretion." *Sales v. Weyerhaeuser Co.*, 163 Wn.2d 14, 19, 177 P.3d 1122 (2008). The trial court erred as a matter of law under both CR 24(a)(2) and (b)(2).

4.2. Civil Rule 24.

4.2.1. Intervention As Of Right Requires An Interest That Is Direct, Immediate, And Recognized By Law. Conservation Northwest Cannot Meet These Requirements.

Before intervention as a matter of right can be granted under CR 24(a)(2), four requirements must be satisfied:

> (1) timely application for intervention;
>
> (2) the applicant claims an interest relating to the property or transaction which is the subject of the action;
>
> (3) the applicant is so situated that the disposition of the matter may as a practical matter impair or impede its ability to protect that interest; and
>
> (4) the applicant's interest is not adequately represented by existing parties.

See Spokane County, 136 Wn.2d at 649; *Westerman*, 125 Wn.2d at 303. Conservation Northwest meets only the first of these requirements.

The interest an intervenor seeks to protect "must be one recognized by law" and "be of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment." *Westerman*, 125 Wn.2d at 303 (internal quotations omitted); *accord In re Dependency of J.H.*, 117 Wn.2d 460, 468, 815 P.2d 1380 (1991); *see also So. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 803 (9th Cir. 2002) (intervention as of right requires a "direct, non-contingent, substantial and legally protectable interest" (internal quotations omitted)).

Conservation Northwest has no such interest in the school trust lands of the State. Were the Court to hold otherwise, Conservation Northwest (and any other interest group) may claim intervention in any public *in rem* action.

Moreover, even if a proposed intervenor demonstrates a sufficient interest, intervention should still be denied if that interest is adequately represented by the existing parties. CR 24(a)(2). Where, as here, the government is acting on behalf of its constituents, representation is presumed to be adequate absent a compelling showing to the contrary. *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006). A presumption of adequacy also exists when the intervenor and an existing party have the same ultimate objective. *Id.* The State has opposed, and continues to oppose, the PUD. Conservation Northwest is only in the case to support DNR. There is no showing (and certainly no compelling showing) that the State cannot argue its interests.

4.2.2. Permissive Intervention Requires A Viable Claim Or Defense And Must Not Unduly Delay Or Prejudice The Proceedings. Conservation Northwest Did Not Meet These Standards.

Just as it cannot meet the requirements for intervention as of right, Conservation Northwest cannot satisfy permissive intervention standards. Permissive intervention requires that the "**applicant's claim or defense**

and the main action have a question of law or fact in common." CR 24(b)(2) (emphasis added); *see Westerman*, 125 Wn.2d at 304. This language necessarily requires that there be some viable claim or defense to assert. And, even if some actionable claim or defense exists, it must have a common question of law or fact with the main action.

The inquiry does not end there. The trial court is further required to consider "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." CR 24(b)(2). The trial court erred in not applying these standards. The failure to apply the proper legal standard is an abuse of discretion. *See Sales*, 163 Wn.2d at 19.

4.3. <u>As A Matter Of Law, Conservation Northwest Does Not Have An Interest To Intervene In This *In Rem* Action.</u>

4.3.1. The Proper Respondents In An Eminent Domain Action Are Dictated By Statute. Conservation Northwest Is Not An Authorized Party Under Statute.

"Condemnation is an action *in rem*, involving only the property itself." *Port of Grays Harbor*, 73 Wn. App. at 338. The proper parties are only the condemning authority and the property owner(s).

As directed by Washington's eminent domain statutes, the proper respondents in a condemnation proceeding are: "owners and occupants [of the subject property] and ... persons having any interest therein" (RCW 8.12.060); persons "having or claiming a share or interest in or lien upon" the property to be condemned (RCW 4.28.120; RCW 8.12.070);

and any persons "claiming an interest in any lot, parcel of land, or property which may be taken or damaged" (RCW 8.12.120).[4] *Port of Grays Harbor*, 73 Wn. App. at 337. In other words, the respondents in a condemnation action – the "condemnees" – "must have a legal or equitable interest in the property." *Id.* at 338. Those who might suffer only collateral economic consequences are not entitled to participate. *Id.* at 339. Conservation Northwest does not even rise to the level of claiming "collateral economic consequences." Its interests, such as they are, are not recognized by law.

Condemnee requirements are established by state statute and may not be superseded by procedural civil rules. *See id.* at 340-41. "Where the Legislature has established a specific requirement for joinder of parties, procedural court rules may not be used to alter those requirements." *Id.* at 340. In *Port of Grays Harbor*, a party who claimed an interest in the land to be condemned was joined by the condemning authority.[5] *Id.* at 336.

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[4] Pursuant to RCW 54.16.020, public utility districts use the same procedures for eminent domain as cities and towns, chapter 8.12 RCW.

[5] Although joinder in *Port of Grays Harbor* was under CR 19 rather than CR 24, the distinction is immaterial. Indeed, the two rules contain overlapping requirements. *See Kitsap County Fire Prot. Dist. No. 7 v. Kitsap County Boundary Review Bd.*, 87 Wn. App. 753, 762, 943 P.2d 380 (1997), *rev. denied*, 134 Wn.2d 1027 (1998) ("The same analysis required for intervention under CR 24(a)(2) satisfies the third element of CR 19(a)."); *Corbin Dist. Prop. Owners Ass'n v. Spokane County Bd. of Adjustment*, 26 Wn. App. 913, 915, 614 P.2d 1313 (1980) (observing that the wording of CR 24(a)(2) is almost identical to CR 19(a)(2)).

After it was determined that the joined party had no such interest, dismissal of the party from the condemnation action was warranted. *Id.* at 340. Without a property interest at issue, the party was not a "condemnee" under Washington's eminent domain statutes and could not participate as a respondent. *Id.* The court further held that the procedural rules of joinder could not supersede the eminent domain statutes and their judicial interpretations to allow a party to participate where he did not have the requisite statutory interest. *Id.* at 340-41. Despite the PUD's citation to this clear authority, the trial court granted intervention. That was plain error and must be reversed.

The Washington Supreme Court has likewise recognized that a proposed intervenor must qualify as a "condemnee" to participate in eminent domain proceedings. In *Kottsick*, the intervenor-appellants contended that a public utility district's proposed transmission line, which would abut their property, would interfere with their view. *Kottsick*, 86 Wn.2d at 390. They intervened in the PUD's eminent domain proceeding and sought to allege an inverse condemnation claim. *Id.* at 389. The supreme court affirmed that the intervenors had no standing to bring such a claim because they were not "condemnees" within the meaning of the eminent domain statutes. *Id.* at 390.

Here, it is undisputed that Conservation Northwest does not have any legal or equitable interest in the State-owned trust lands. They are not "condemnees" under Washington's eminent domain statutes. *See* RCW 8.12.060, .070, .120; RCW 4.28.120. Consequently, the trial court erred in granting intervention when Conservation Northwest does not have the requisite statutory interest to participate. Their purported interests in this proceeding are not ones "recognized by law." *Westerman*, 125 Wn.2d at 303. Civil Rule 24 does not give Conservation Northwest any right to intervene beyond that permitted by statute, which plainly requires any party to have an interest in the property to be condemned.

4.3.2. Other Courts Routinely Deny Non-Property Owners The Ability To Participate In Eminent Domain Actions.

Like Washington, courts of other jurisdictions recognize that non-property owners are not proper parties in eminent domain proceedings. Although these courts have reached this conclusion on various grounds, the same general principles underlie their reasoning.

First, "it is axiomatic that to assert the rights of a condemnee, the party must be an owner of a property interest taken." *In re Condemnation by the County of Berks*, 914 A.2d 962, 965 (Pa. Commw. Ct. 2007).[6] A

[6] *Accord Lake County Forest Preserve Dist. v. First Nat'l Bank of Waukegan*, 571 N.E.2d 1115, 1117 (Ill. App. Ct. 1991) ("In order to challenge a taking, one must have a property interest affected...."); *Missouri ex rel. State Highway Comm'n v. Hudspeth*, 303 S.W.2d 703, 705-07 (Mo. Ct. App. 1957) (non-

condemnee's rights include not only the right to just compensation, but also the right to object to the proceedings or challenge the propriety of the taking. *E.g.*, *id.* at 964-66 (non-property owner lacked standing to challenge county's condemnation authority); *City of Sunland Park v. Santa Teresa Servs. Co.*, 75 P.3d 843, 853-56 (N.M. Ct. App.), *cert. denied*, 74 P.3d 1071 (N.M. 2003) ("[O]nly persons with an ownership interest capable of being taken or damaged would appear to have standing to raise issues about the basic features of such an action, such as the authority of the condemnor to proceed....").[7] Thus, where the proposed intervenor lacked a property interest in the land to be condemned, their intervention was rejected. *E.g.*, *City of Sunland Park*, 75 P.3d at 861; *Lake County Forest Preserve Dist.*, 571 N.E.2d at 1117-18.

Moreover, eminent domain statutes exist to regulate the rights and duties between only two parties: the condemning authority and those

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property owner had no justiciable interest that could be asserted in eminent domain proceeding); *see also Haldeman v. Freeman*, 558 F. Supp. 514, 518 & n.10 (D.D.C. 1983) (noting that "the owner of the targeted property is the only person with standing to object to condemnation proceedings").

[7] *See also City of Crystal Lake v. LaSalle Nat'l Bank*, 459 N.E.2d 643, 649 (Ill. App. Ct. 1984) (adjoining municipality did not have the same right as landowner to insist on strict compliance with condemnation statutes); *State v. Robinson*, 443 P.2d 140, 141-42 (Haw. 1968) (taxpayer could not intervene and allege that others may be harmed by allegedly invalid governmental action when he did not own property to be taken); *City & County of Denver v. Bd. of Comm'rs*, 156 P.2d 101, 108 (Colo. 1945) (adjoining municipality had no standing to challenge propriety of condemnation).

holding the property interests to be taken. *United States v. 36.96 Acres of Land*, 754 F.2d 855, 858 (7th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986); *City of Crystal Lake*, 459 N.E.2d at 649. Condemnation actions are designed to ensure payment of just compensation to the owners of appropriated or damaged property. *See City of Sunland Park*, 75 P.3d at 855-56; *City of Crystal Lake*, 459 N.E.2d at 650. In other words, the constitutional prohibition on takings is for a **property owner's** protection. *City of Crystal Lake*, 459 N.E.2d at 649; *City & County of Denver*, 156 P.2d at 108.

If, for example, the property owner decides to sell property without forcing a condemnation action, a party with no interest in the property would generally have no legal grounds to object. *City & County of Denver*, 156 P.2d at 108; *see also Roberts v. City of Seattle*, 63 Wash. 573, 574-75, 116 P. 25 (1911) (doubting the propriety of appellants' objection to the condemnation of school trust lands, "for the state was dealing with its own property, and could sell or withhold it as it deemed expedient, so long as it violated none of its trust obligations."). Indeed, as observed by the *City of Sunland Park* court, an approach that allows non-property owners to intervene "would turn condemnation actions into general referenda on the wisdom of the taking. That is not the function of condemnation actions." *City of Sunland Park*, 75 P.3d at 854; *see also*

City of Dania v. Broward County, 658 So.2d 163, 165 (Fla. Dist. Ct. App. 1995) (observing that if intervention were permitted based on an insufficient interest, it "would promote a never-ending battle ... in every eminent domain proceeding").

The foregoing authority establishes that courts in Washington and across the country acknowledge the fundamental error in allowing those without any property interest to participate in eminent domain proceedings. Not only does such intervention ignore the statutory scheme relating to condemnees, it undermines the function of eminent domain laws and invites protracted challenges based on tangential interests. As a result, courts routinely deny intervention to those without any established property interest at issue. That is the law in Washington. The trial court here erred in not applying this rule of law. This Court must reverse.

4.3.3. Conservation Northwest Cannot Establish That It Is Entitled To Intervene.

Consistent with state and other authority, Conservation Northwest has no property interest that would allow it to intervene in this eminent domain action between the PUD and the State. It is undisputed that Conservation Northwest has no legal or equitable property interest in the State's trust lands, nor has it ever asserted one. The subject lands are owned by the State and managed by DNR for the benefit of the trust

beneficiaries, the common and normal schools – not for Conservation Northwest.

Rather, Conservation Northwest asserts interests that are based on its organizational and policy goals of environmental preservation. *See, e.g.*, CP 596 (citing "public interest implications"); CP 603-04 (citing its ability to implement its policy agenda); CP 515 (citing a "conservation interest in the land"). Such interests are insufficient and irrelevant to this proceeding. For example, in *36.96 Acres of Land*, the court denied intervention to an environmental group, noting that while the group had "played a laudatory role in the development of the [property], with respect to this tract of land, [it was] essentially a private citizen with no interest in the property sought to be condemned." *36.96 Acres of Land*, 754 F.2d at 858 (internal quotations omitted). Rather, the government as property owner had the paramount and only legal interest in the property. *Id.*

Indeed, while environmental considerations may have their place in other types of proceedings relating to public projects, such as an environmental review under SEPA, they have no bearing on a condemnation action. *See* WAC 197-11-800(5)(a) (exempting real property acquisitions from SEPA); *Marino Prop. Co. v. Port of Seattle,* 88 Wn.2d 822, 834, 567 P.2d 1125 (1977). Eminent domain actions are concerned only with public use and necessity, followed by a determination

of just compensation to the property owner. *See Mercer Island Sch. Dist. No. 400 v. Victor Scalzo, Inc.*, 54 Wn.2d 539, 540, 342 P.2d 225 (1959).

Moreover, the environmental issues attendant to the Project have been exhaustively and conclusively resolved in the PUD's favor.[8] *Gebbers v. Okanogan County PUD No. 1*, 144 Wn. App. 371, 393, 183 P.3d 324, *rev. denied,* 165 Wn.2d 1004 (2008). As Conservation Northwest acknowledged in its motion to intervene, it has actively participated in the process, submitting written comments for the preparation of the Project EIS and communicating with DNR regarding the PUD's easement application. CP 599-600. Conservation Northwest has availed itself of its opportunities to challenge the Project. It should not have been permitted to inject itself into this condemnation proceeding in an attempt to further delay the Project.

Conservation Northwest also cannot assert interests that belong to the State. A decision concerning the PUD's authority to condemn state trust land cannot impair or impede any legally recognized interest of Conservation Northwest. *See* CR 24(a)(2). Conservation Northwest can never own state trust land.[9] Trust lands are owned and managed by the

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[8] Indeed, consistent with this resolution, the trial court granted the PUD's motion in limine to exclude any argument, testimony, or evidence that the PUD was arbitrary and capricious in its route selection for the Project.

[9] Unless purchased pursuant to chapter 79.11 RCW.

State. While laws authorizing trust land condemnation impact the State's ability to protect its ownership interest in those lands, Conservation Northwest has no right to assert such interests on the State's behalf. *See 36.96 Acres of Land*, 754 F.2d at 859 ("[W]here a proposed intervenor in a federal condemnation suit seeks to assert a position on behalf of the government, intervention must also be denied; only the Congress or its delegate can assert the rights of the sovereign."); *see also Wade v. Goldschmidt*, 673 F.2d 182, 185 (7th Cir. 1982) (denying intervention because the governmental bodies charged with compliance with the statutes could be the only defendants). Rather, Conservation Northwest can continue to promote and protect its policy interests in the same manner that it does now – through participation in DNR policy planning, lobbying for legislative change, and participation in environmental review actions.

Conservation Northwest cannot establish the requisite interest in this condemnation proceeding to warrant intervention of right. It does not have any property interest in the State's trust lands and is not a condemnee under the eminent domain statutes. As such, this proceeding will not impair any attenuated interests it may have in this action.

4.3.4. Conservation Northwest Also Failed To Overcome The Presumption Of Adequate Representation.

Although it is unnecessary to reach this issue, as Conservation Northwest has no interest at stake, it should be noted that any interest Conservation Northwest might have in this proceeding is adequately represented by the State. While Conservation Northwest attempts to minimize its burden on this element, CR 24 requires **compelling** evidence of inadequacy where the purported interest is being represented by the government and the parties share the same ultimate objective.

As described by the Ninth Circuit in applying the substantially similar Fed. R. Civ. P. 24(a):

> Although the burden of establishing inadequacy of representation may be minimal, the requirement is not without teeth: The most important factor in determining the adequacy of representation is how the interest compares with the interests of existing parties. **When an applicant for intervention and an existing party have the same ultimate objective, a presumption of adequacy of representation arises.** If the applicant's interest is identical to that of one of the present parties, a compelling showing should be required to demonstrate inadequate representation. Additionally, there is also an assumption of adequacy when the government is acting on behalf of a constituency that it represents. **In the absence of a very compelling showing to the contrary, it will be presumed that a state adequately represents its citizens when the applicant shares the same interest.**

Prete, 438 F.3d at 956 (emphasis added) (internal quotations and citations omitted); *see Silver v. Babbitt*, 166 F.R.D. 418, 429 (D. Ariz. 1994), *aff'd*,

68 F.3d 481 (9th Cir. 1995) ("The burden of showing inadequate representation is 'most onerous' where an existing party is under a legal obligation to represent the putative intervenor's interest." (quoting *In re Thompson*, 965 F.2d 1136, 1142 (1st Cir. 1992)); 6 *Moore's Federal Practice* § 24.03[4][a][iv] (3d ed. 2009) (describing the presumption of adequacy that applies when the "governmental entity presents itself as a **trustee**, guardian, or representative of all citizens" (emphasis added)).

Here, Conservation Northwest acknowledges that it has the same ultimate objective as DNR – opposing the PUD's condemnation. CP 596 ("CNW seeks to intervene in this case in support of DNR's opposition to this condemnation."). It further recognizes that DNR is the entity charged with the legal duty to protect state trust lands and to ensure that their use is consistent with the law, agency policy, and the long-term fiduciary interests of the trust beneficiaries. CP 603. Aside from asserting a speculative argument that DNR might not challenge the PUD's condemnation authority (which, of course, is not the case), Conservation Northwest made no showing – let alone a compelling showing – to overcome the presumption that DNR would provide adequate representation. The trial court made only an inappropriately conclusory finding on this issue. CP 884. Accordingly, intervention was also

inappropriate under the inadequate representation requirement of CR 24(a)(2).

4.4. Permissive Intervention Was An Abuse Of Discretion.

Conservation Northwest's undisputed lack of a property interest in this action similarly dictates that permissive intervention should have been denied. Permissive intervention first requires that the applicant have a "claim or defense" that has a question of law or fact in common with the main action. CR 24(b)(2). Here, however, Conservation Northwest fails to articulate any actionable claim or defense that relates to this condemnation proceeding.

Conservation Northwest's asserted "defense" is that the PUD does not have the authority to condemn state trust lands. That defense does not belong to Conservation Northwest; it belongs to the State as the property owner and statutory condemnee. As discussed above, only a condemnee (*i.e.*, one with a property interest at issue) has the right to challenge a taking. *E.g.*, *In re Condemnation by the County of Berks*, 914 A.2d at 964-66; *City of Sunland Park*, 75 P.3d at 853-56; *see supra* cases discussed in Section 4.3.2. There are no other claims or defenses that have been (or could be) raised by Conservation Northwest.[10]

[10] Indeed, even if Conservation Northwest theoretically wished to bring a claim, such as a SEPA claim, those issues have nothing to do with an action for condemnation of property. *See* WAC 197-11-800(5)(a). The claim would

The CR 24(b)(2) requirement of a claim or defense must mean something. If there is no action that can be independently brought by Conservation Northwest, permissive intervention is not appropriate. *See, e.g.*, *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996) (denying permissive intervention where applicant had no independent grounds for jurisdiction). Permissive intervention serves a particular purpose: judicial economy and avoiding a multiplicity of actions. *See Prete*, 438 F.3d at 958 n.13 (unlike intervention as of right, permissive intervention is subject to considerations of equity and judicial economy). If Conservation Northwest has no claim, there is no judicial economy to be served by permitting intervention. Accordingly, permissive intervention in this case was an abuse of discretion. *See Sales*, 163 Wn.2d at 19 ("A decision based on an erroneous view of the law necessarily constitutes an abuse of discretion.").

CR 24(b)(2) **requires** the trial court to consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties.[11] Intervention by a non-property owner in a condemnation action unduly delays proceedings that are statutorily

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therefore not have any question of law or fact in common with the main action. CR 24(b)(2).

[11] "In exercising its discretion, the court **shall consider** whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." CR 24(b)(2) (emphasis added).

required to proceed expeditiously. *See* RCW 8.12.090. It also prejudices the existing parties by requiring the expense of responding to the intervenor's objections and motions, which have no legitimate place in the proceedings. While a party can choose not to respond to arguments raised by an *amicus curiae*, it has no choice but to respond to a dispositive motion. Here, the record demonstrates the superior court failed to even consider the impacts, including delay and prejudice, of allowing intervention by Conservation Northwest in this case. *See* CP 506-508, 884. The trial court clearly erred in granting intervention to a non-property owner. This Court should reverse.

4.5. Public Policy Supports Limiting Intervention In Condemnation Cases To Promote Their Efficient Resolution.

The public policies underlying intervention and condemnation further demonstrate why intervention of any sort by non-property owners is inappropriate in eminent domain proceedings. Intervention is not intended as a catch-all allowing any organization with a claimed indirect or marginal interest to participate as a party in a lawsuit.

> **It is for the court in each instance to analyze and balance the relative concerns**, not only of the [applicant] in having his interest protected, but also of the parties to the main action in controlling their own lawsuit, and **of the public in the efficient resolution of controversies**.

Marino Prop. Co. v. Port Com'rs of Port of Seattle, 97 Wn.2d 307, 316, 644 P.2d 1181 (1982) (emphasis supplied) (internal quotations omitted);

accord 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1901 (3d ed.) ("There is also a public interest in the efficient resolution of controversies that cannot be overlooked.").

In any lawsuit, the public weal demands that cases be managed efficiently and disposed of expeditiously. In condemnation matters, this direction for efficient resolution is even stronger. Washington law mandates that eminent domain proceedings take precedence over all cases in court except criminal cases. RCW 8.12.090. The Legislature has therefore expressly determined that the balance of interests requires swift resolution for condemnation proceedings, involving only those persons with an interest in the property at issue.

Conservation Northwest's presence in this lawsuit only multiplies the time and expense incurred by the parties with the true interests at stake – two government agencies with limited budgets. The Legislature's express public policy to expeditiously resolve condemnation cases must be measured against participation by an organization that has no actionable claim or defense against the other parties and no property interest at issue. While the balancing of interests is not appropriate in this matter, any balance militates against intervention by non-property owners. Here, however, the superior court ignored this critical issue by permitting Conservation Northwest to intervene in this eminent domain proceeding.

5. CONCLUSION

Conservation Northwest was improperly granted intervention as a respondent in the PUD's condemnation action against property in which Conservation Northwest holds no interest. The State was adequately situated to make its own defense against the PUD's condemnation and, indeed, was the only party legally permitted to assert that defense.

The trial court erred in granting intervention to an entity with no legally cognizable interest in the property. Allowing such intervention in condemnation actions is error under the condemnation statutes and court rules. Accordingly, this Court should reverse the trial court's order granting intervention to Conservation Northwest.

RESPECTFULLY SUBMITTED this 23rd day of April, 2012.

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