

**FILED**

JUL 05 2012

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

NOS 29121-9-III

---

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, and CONSERVATION NORTHWEST, a non-profit  
corporation,

Appellants/Cross-Respondents.

---

REPLY BRIEF OF  
CONSERVATION NORTHWEST

---

David S. Mann  
WSBA No. 21068  
GENDLER & MANN, LLP  
1424 Fourth Avenue, Suite 715  
Seattle, WA 98101  
(206) 621-8868  
Attorneys for Conservation Northwest

ORIGINAL

**FILED**

JUL 05 2012

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

NOS 29121-9-III

---

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, and CONSERVATION NORTHWEST, a non-profit  
corporation,

Appellants/Cross-Respondents.

---

REPLY BRIEF OF  
CONSERVATION NORTHWEST

---

David S. Mann  
WSBA No. 21068  
GENDLER & MANN, LLP  
1424 Fourth Avenue, Suite 715  
Seattle, WA 98101  
(206) 621-8868  
Attorneys for Conservation Northwest

ORIGINAL

**TABLE OF CONTENTS**

A. INTRODUCTION .....1

B. ARGUMENT .....2

1. CONSERVATION NORTHWEST DOES NOT RAISE NEW ARGUMENTS ON APPEAL BUT MERELY PROVIDES FURTHER EXPLANATION OF ISSUES RAISED IN SUMMARY JUDGMENT.....3

2. THE DNR HAS THE AUTHORITY AND DUTY TO MANAGE GRANTED TRUST LANDS FOR THE PUBLIC BENEFIT .....6

    a. The State Holds the Granted School Lands in Public Trust.....6

    b. The State Constitution and Enabling Act Constitute Dedication to a Public Use.....7

    c. *O'Brien v. Wilson* Corroborates that Lands Dedicated to a Public Use May Only Be Acquired Through Sale.....8

    d. The Legislature Delegated Management of Granted Lands to DNR, Not Condemnation Proceedings .....11

3. THE PUD LACKS AN EXPRESS GRANT OF AUTHORITY TO CONDEMN SCHOOL TRUST LANDS DEDICATED TO A PUBLIC USE .....13

    a. The Public Lands Act Reflects the Conclusively Settled Rule that Lands Dedicated to a Public Use Are Not Subject to Condemnation.....14

    b. The Condemnation Authority of the Ports Distinguishes the Power to Condemn Land Dedicated to a Public Use, Further Demonstrating the PUD’s Lack of Authority .....15

4. THE CAPACITY FOR SALE IS NOT DETERMINATIVE OF WHETHER LANDS ARE DEDICATED TO A PUBLIC USE.....	16
C. CONCLUSION.....	19

**TABLE OF AUTHORITIES**

Table of Cases

<i>Alabama v. Schmidt</i> , 232 U.S. 168, 34 S. Ct. 301, 58 L. Ed. 555 (1914).....	8, 9
<i>Caffall Bros. Forest Products, Inc. v. State</i> , 79 Wn.2d 223, 484 P.2d 912 (1971).....	11, 12
<i>City of Bothell v. Barnhart</i> , 156 Wn. App. 531, 234 P.3d 264 (2010).....	6
<i>City of Seattle v. State</i> , 54 Wn.2d 139, 338 P.2d 126 (1959).....	15, 18, 19
<i>City of Tacoma v. Taxpayers of Tacoma</i> , 49 Wn.2d 781, 307 P.2d 657 (1957).....	1, 13, 14, 16
<i>Draper Machine Works, Inc. v. Dept. of Natural Res.</i> , 117 Wn.2d 306, 815 P.2d 770 (1991).....	17
<i>Fransen v. Board of Natural Resources</i> , 66 Wn.2d 672, 404 P.2d 432 (1965).....	17
<i>Lunsford v. Saberhagen Holdings, Inc.</i> , 39 Wn. App. 334, 160 P.3d 1089 (2007).....	3, 5
<i>O'Brien v. Wilson</i> , 51 Wash. 52, 97 P. 1115 (1908).....	8, 9, 10, 16
<i>Osborn v. Public Hospital Dist. I, Grant County</i> , 80 Wn.2d 201, 492 P.2d 1025 (1972).....	3

<i>Soundview Pulp Co. v. Taylor</i> , 21 Wn.2d 261, 150 P.2d 839 (1944).....	18
<i>State ex rel. Washington State Public Disclosure Com'n v. Washington Educ.</i> , 156 Wn.2d 543, 130 P.3d 352 (2006), <i>rev'd on other grounds, Davenport v. Washington Educ. Ass'n</i> , 551 U.S. 177, 127 S.Ct. 2372 (2007).....	17
<i>State v. Superior Court of Chelan County</i> , 36 Wash. 381, 78 P. 1011 (1904).....	14, 15
<i>State v. Superior Court of Jefferson County</i> , 91 Wash. 454, 157 P. 1097 (1916).....	17, 18
<i>State v. Superior Court for Mason County</i> , 136 Wash. 87, 238 P. 985 (1925).....	13
<i>State Farm Mut. Auto. Ins. Co. v. Amirpanahi</i> , 50 Wash.App. 869, 751 P.2d 329 (1988).....	3, 5

Constitutional Provisions

Wash. Const. Art. XVI, § 1.....	1, 6, 7
Wash. Const. Art. XVI, § 2.....	9, 17

Statutes

Enabling Act, 25 Stat., 676, ch. 180 (1889).....	10
RCW 8.12.030 .....	18
RCW 53.34.170 .....	16
RCW 54.16.050 .....	13
RCW 79.02.010(13)(h).....	13, 14, 15
RCW 79.11.020 .....	11

RCW 79.11.290 .....	10
RCW 79.36.355 .....	10
RCW 79.36.510 .....	10

## A. INTRODUCTION

The Federal government granted the land at issue in this case to Washington at statehood and the Framers of the Washington Constitution protected it for the benefit of “all the people,” yet the PUD wants to condemn that land for its own use. Conservation Northwest agrees with DNR that this attempted condemnation is unlawful because the lands are dedicated to public use as a matter of law, to be managed according to the discretion of DNR.

DNR’s school lands are dedicated to a public use as a matter of law because the United States granted these lands to Washington to support public education and because the State subsequently resolved at its Constitutional Convention to “hold [them] in trust for all the people.” Wash. Const. Art. XVI, § 1.

The constitutional dedication of granted lands imparts the legal status of “dedicated to a public use” that exists regardless of the use DNR elects to apply to those lands. This status determines the present case because Washington case law establishes the “conclusively settled” rule that municipal corporations may not condemn lands dedicated to a public use without express authorization by statute. *See City of Tacoma v. Taxpayers of Tacoma*, 49 Wn.2d 781, 798, 307 P.2d 657 (1957).

The dedication of the granted lands carries with it a duty to manage the lands to benefit the entire public interest. The Legislature has delegated this duty, and the power necessary to fulfill it, to the Commissioner of Public Lands. The Commissioner has embraced this responsibility. *See* DNR Op. Br. at 4 (discussing dedication to the public use as a matter of law and DNR’s management responsibilities). Allowing condemnation in this case would not only ignore the special character of granted lands, but also undermine the Legislature’s delegation of management authority to the Commissioner.

The PUD’s claims of condemnation authority are novel and overreaching. Moreover, they contradict both the legal status of granted school lands and the prevalent DNR management practices based on that status. For these reasons, this Court should reverse the Superior Court’s decision on summary judgment and enter summary judgment for CNW and DNR.

#### **B. ARGUMENT**

Because the Public Utility District No. 1 of Okanogan County (“PUD”) is a municipal corporation attempting to condemn lands dedicated to a public use without express statutory authority to do so, the condemnation is unlawful and summary judgment should be reversed.

**1. CONSERVATION NORTHWEST DOES NOT RAISE NEW ARGUMENTS ON APPEAL BUT MERELY PROVIDES FURTHER EXPLANATION OF ISSUES RAISED IN SUMMARY JUDGMENT**

The PUD argues that CNW's discussion of the nature of DNR's duties in managing school lands, which the PUD labels the "public trust argument," "was not presented at the trial court and should be disregarded here." PUD Br. at 26. However, the PUD's claims are inaccurate because CNW raised the issue below and only provides further explanation on appeal. Alternatively, because the argument regarding DNR's public trust duties is "arguably related" to issues raised in the trial court, this Court may exercise its discretion to review. *See Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338 160 P.3d 1089 (2007). It should do so because the trust status of the lands at issue has been raised by all parties, and thorough resolution of the matter will benefit from a broader perspective on the legal character of the land.

Appellants need not use the same exact terms in the trial court and court of appeals, and an issue is raised properly if it consists of further explanation based on the same reasoning. *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wash.App. 869, 872 n.1, 751 P.2d 329 (1988). A petitioner may also provide new authority for the same basic reasoning. *See, e.g., Osborn v. Public Hospital Dist. I, Grant County*, 80 Wn.2d 201,

206, 492 P.2d 1025 (1972). In CNW’s motion for summary judgment, CNW argued that the land at issue is “dedicated to a public use and therefore cannot be condemned.” *See* CP 475, line 1. CNW also referenced the public trust as determinative of dedication to public use, specifically citing the relevant portion of the Washington Constitution. *See* CP 476, line 16. Indeed, the fundamental premise of CNW’s argument on summary judgment, that school lands are immune from condemnation and that the PUD must engage the easement application process set forth in Ch. 79.36 RCW, is that the lands are dedicated to public use and the Commissioner of Public Lands has a duty to manage school lands in the public interest. *See* CP 463, 474–76. Notably, DNR also believes this argument to be critical to the resolution of this case, and also argues on appeal that granted school lands are dedicated to the public use as a matter of law. *See, e.g.*, DNR Op. Br. at 7 (“As set forth above and in DNR’s Opening Brief, the school trust lands at issue in this case are solely dedicated and used to support Washington’s schools.”)

On appeal, CNW is merely providing further legal authority supporting the conclusion that the school lands are dedicated to a public use as a matter of law, and further explanation of the source of the Commissioner’s discretion to manage those lands. Rather than raise a new issue, CNW explains why its position that school lands are dedicated to

the public use is rooted in the Washington Constitution, the Enabling Act, and case law. *See* CNW Opening Brief on Appeal at 9 (“State school lands are dedicated to a public use as a matter of law because the federal land grants created public, not private, trusts.”). This clarification of the same reasoning and provision of additional authority is properly raised. *State Farm*, 50 Wn. App. at 872 n.1.

Even if this Court finds that CNW did not directly raise the public trust argument, the Court has discretion to review any analysis that is “arguably related” to an issue raised below. *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. at 338. Review is particularly appropriate where the opposing party has responded to the issue in briefing below. *Id.* at 339. This is exactly what happened here. CNW asserted that school lands are dedicated to a public use. CP 475, line 1. In response, the PUD argued that the lands are not dedicated to a public use, *see* CP 61, and that the PUD easement would “benefit the trust.” *Id.* at 62. The PUD recognized CNW’s “public use” argument as inherently related to the nature of DNR’s trust relationship with the school lands, which is what CNW addresses on appeal. Because the “public trust” argument is directly related to the issue of public use raised below, and the PUD has recognized that relationship in response, this Court should review the argument.

## 2. THE DNR HAS THE AUTHORITY AND DUTY TO MANAGE GRANTED TRUST LANDS FOR THE PUBLIC BENEFIT

The PUD broadly attacks CNW's arguments relating to the public trust as "political polemic" coming from "advocacy minded professors." See PUD Br. at 22. To the contrary, CNW relies on a plain-language reading of the Washington Constitution, the Enabling Act, and the Legislature's grant of authority to the DNR.

### *a. The State Holds the Granted School Lands in Public Trust*

"When interpreting provisions of the state constitution" the court must "look first to the plain language of the text and accord it its reasonable interpretation." *City of Bothell v. Barnhart*, 156 Wn. App. 531, 535, 234 P.3d 264 (2010) (citing *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004)). The Washington Constitution states that "All the public lands granted to the state are held in trust for all the people." Art. XVI, § 1; see also CNW Op. Br. at 23 (discussing constitution and intent of Framers for granted lands to benefit the general public). The plain language of this declaration is completely inclusive: "**all** the public lands granted to the State" for "**all** the people." There is no ambiguity and no political polemic—the Washington Constitution requires and empowers the State to manage granted school lands for the benefit of all the people.

***b. The State Constitution and Enabling Act Constitute Dedication to a Public Use***

The PUD claims that dedication to a public use requires a specific act of the Legislature. *See* PUD Br. at 35. The PUD cites no authority for this rule, but rather provides two purported examples in which a statute constituted a dedication. *Id.* n. 30–33. Notably, the PUD concedes that in one of those examples, “the case did not specify how the land was dedicated.” *Id.* n. 32.

But even if the PUD’s rule was a legal requirement, it would be satisfied here. For if the PUD concedes that the Legislature can dedicate land, then the Washington Constitution, which sets forth the Legislature’s powers, and the Enabling Act, which created the state in which the Legislature sits, surely can as well. In its appeal brief, DNR agrees with CNW’s position. *See* DNR Br. at 3 (“These lands are dedicated to this purpose by federal law and the State constitution and cannot be used for any other.”). When the Washington Framers created lands to be “held in trust for all the people,” they dedicated those lands to a public use. Const. Art. XVI, § 1. And when the United States Congress dictated that granted lands are reserved for state use, it made clear that these lands were reserved for a particular purpose. These foundational documents dedicate the trust lands and preserve them from condemnation.

***c. O'Brien v. Wilson Corroborates That Lands Dedicated to a Public Use May Only Be Acquired Through Sale***

As part of CNW's argument that granted school lands are held in a public trust and are dedicated to a public use on a matter of law, CNW described the history of various enabling acts and the trusts they create or fail to create. CNW stated on appeal that "enabling acts do not impose identical duties," and cited *Alabama v. Schmidt*, 232 U.S. 168, 173–74 (1914) as an example of an enabling act that did not create an express trust. *See* CNW Op. Br. at 15–16 ("The Supreme Court has, in contrast, held that other enabling acts do not create trusts.").

The PUD claims that *O'Brien v. Wilson*, 51 Wash. 52, 97 P. 1115 (1908) "directly contradicts" CNW's argument, going so far as to suggest an ethical violation by CNW counsel. *See* PUD Br. at 23. However, this charge falls flat because the PUD mischaracterizes *O'Brien* and CNW's arguments. Indeed, the actual holding in *O'Brien* **supports** the proposition that school lands cannot be condemned by the PUD.

The PUD misrepresents the holding of *O'Brien*, instead quoting the Washington Supreme Court's description of another case out of Minnesota and independently applying it to Washington. *See* PUD Br. at 23. The PUD takes one word from that Minnesota opinion ("sole," *see* PUD Br. at 23) to argue that the Washington Supreme Court held that trust

lands may only be used for the benefit of the schools. In short, the PUD manufactures a conflict by incorrectly citing the opinion.

What the *O'Brien* court actually addressed is whether the defendants could gain title to school lands by adverse possession. The court held that even if statutory authority suggested a right to acquire the lands by adverse possession, the Washington Constitution's provision governing the sale of granted state lands in Article XVI, Section 2 and the language of the Enabling Act demonstrated that the Framers and U.S. Congress intended a specific process for acquisition of granted lands which precluded that right. *Id.* at 58 ("to permit title to school lands in this state to be acquired indirectly by adverse possession would be repugnant to the laws of the United States and the Constitution of the state."). It came to that conclusion based on the special, protected status of granted lands. *Id.* The fact that *Alabama v. Schmidt* also involved adverse possession is beside the point. *O'Brien* does not address whether some other states' enabling acts create trusts, and does not delve into the Commissioner's trust responsibilities.

Moreover, to the extent *O'Brien* does apply, its holding and analysis bolster CNW's position. In the present case, as in *O'Brien*, the plaintiffs allege statutory authority to acquire granted school lands through a means other than sale, the Washington Constitution directs a means of

sale for school lands by public auction, and the Enabling Act requires sale at a minimum price. Enabling Act, 25 Stat., 676, ch. 180, §§ 10–11 (1889). One hundred years after *O'Brien* was decided, there is an entire chapter of statutory authority that corroborates the constitutional directive and governs the sale of state lands, Ch. 79.11 RCW (“State land sales”), with specific restrictions for leased lands. RCW § 79.11.290 (“State lands held under lease . . . Shall not be offered for sale . . . except upon application of the lessee.”). The legislature has even created a process by which the PUD can apply for an easement across state lands. RCW § 79.36.355, .510. All of these provisions give DNR discretionary authority to determine whether to sell rights to granted school lands, and none provide an entitlement to the applicant to acquire lands of its choosing.

The Washington Constitution and the cited statutory authority governing sale of school lands demonstrate that the Framers and the Legislature intended for easements across school lands to be acquired in a certain way. *Id.* If the PUD wants an easement across granted school lands, it should further pursue the path dictated in RCW § 79.36. Just as the defendants in *O'Brien* were not allowed to circumvent the constitutionally required sale process through adverse possession, the PUD is not allowed to circumvent that process through condemnation.

***d. The Legislature Delegated Management of Granted Lands to DNR, Not Condemnation Proceedings***

The PUD claims that condemnation proceedings turn on a factual determination of compatibility, and further asserts that in this inquiry the burden was on DNR to show a lack of compatibility between the current use and the PUD's attempted condemnation. *See* PUD Br. at 42–43. This position is wrong because the lands are dedicated to a public use as a matter of law, and any decision about compatibility must be made by the DNR. Due to the special status of granted lands, a factual inquiry as to compatibility is neither necessary nor appropriate.

The Legislature's delegation of management authority to DNR demonstrates that the Legislature does not intend for condemnation proceedings to govern management of public lands. Instead, under RCW 79.11.020, DNR "shall exercise general supervision and control over the sale for any purpose of land granted to the state for educational purposes." The Washington Supreme Court and the Attorney General's Office agree that is DNR's job to manage granted lands according to its expert discretion. *See Caffall Bros. Forest Products, Inc. v. State*, 79 Wn.2d 223, 227–28, 484 P.2d 912 (1971); *accord* 1996 AGO 11, Question 5 ("Washington statutes vest the Department and the Board of Natural

Resources with certain discretionary authority in managing the federal grant lands.”).

This delegation demonstrates the Legislature’s intent that the DNR have singular authority and discretion in managing this public trust, which would be undermined if the PUD was able to condemn those lands over DNR objection. This assignment of responsibility makes for good government—DNR has a large staff of scientists and management experts who are well equipped to take on the complex and long-term task of managing land for the public benefit. Indeed, the Washington Supreme Court has recognized that “the logic of such a [delegation] rule is clearly apparent” because “[t]echnical considerations involved in the management and sale of public lands require the development of Administrative expertise and judgment of the type which cannot be specifically or minutely detailed by statutory prescription.” *Caffall Bros.*, 79 Wash.2d at 228.

The Legislature and court recognize that the granted lands are special and require expert management with a long-term vision. It would be contrary to the constitutional dedication and the legislative delegation to allow that management to be dictated by condemnation proceedings.

### **3. THE PUD LACKS AN EXPRESS GRANT OF AUTHORITY TO CONDEMN SCHOOL TRUST LANDS DEDICATED TO A PUBLIC USE**

The statute the PUD relies upon, RCW 54.16.050, grants the power to condemn “school lands.” That term is defined in the Public Lands Act as including school trust lands. RCW 79.02.010(13)(a). However, there is a critical caveat—the definition does not apply to lands “devoted to or reserved for a particular use by law.” RCW 79.02.010(13)(h). This exemption is a codification of the “conclusively settled” principle of Washington case law that land dedicated to a public use is immune from condemnation unless that power is clearly and expressly conferred upon it by statute. *City of Tacoma*, 49 Wn.2d at 797; *see also State v. Superior Court for Mason County*, 136 Wash. 87, 238 P. 985 (1925). The PUD concedes that the language “devoted to or reserved for a particular use by law,” is interchangeable with the common law language of “dedicated to a public use.” *See* PUD Br. at 35, n.33. Because the land at issue in this case is dedicated to public use by the Washington Enabling Act and Constitution, it is not included in the term “school lands” in the condemnation statute. The PUD therefore lacks the express statutory authority to condemn it.

***a. The Public Lands Act Reflects the Conclusively Settled Rule that Lands Dedicated to a Public Use Are Not Subject to Condemnation***

The PUD argues that “school lands” as defined in the Public Lands Act must include some school trust lands that are not dedicated to a public use, and implies that this means school lands cannot be dedicated to a public use as a matter of law. *See* PUD Br. at 18. But implication is not a sufficient ground to condemn public lands. *State v. Superior Court of Chelan County*, 36 Wash. 381, 384, 78 P. 1011 (1904). “Since the rule prevails that condemnation statutes must be strictly construed as far as they relate to the taking of private property, it follows with even more force that the same rule must apply where the lands of the sovereign are sought to be taken.” *City of Tacoma*, 49 Wn.2d at 798 (citation omitted). Moreover, the PUD’s argument misses the point. RCW 79.02.010(13)(h) codified a general exception that applies to all condemnation cases. When land *is* dedicated to a public use, as it is in this case, it is not “school land” as referenced in the PUD condemnation statute, and the PUD lacks the required express statutory condemnation authority.

The Washington Supreme Court case *State v. Superior Court of Chelan County* is instructive. In that case, a condemnation statute provided authority to a corporation to condemn “lands,” and an accompanying statute provided condemnation procedures applicable to

“state, school, or county land.” 36 Wash. at 384. Notwithstanding this suggestion of authority, the court held that condemnation authority must be *especially strictly construed* on public lands, and that implication failed to provide the necessary express authority. *Id.* at 385. The Legislature had to amend the condemnation authority in order to provide the required specificity. *See City of Seattle v. State*, 54 Wn.2d 139, 145, 338 P.2d 126 (1959). Similarly here, if there are any superfluous terms or ambiguities in the Public Lands Act, those ambiguities do not give rise to a right to condemn. If the Legislature wants to grant the PUD increased condemnation authority, it can do so by revising the statute.

***b. The Condemnation Authority of the Ports Distinguishes the Power to Condemn Land Dedicated to a Public Use, Further Demonstrating the PUD’s Lack of Authority***

The PUD goes further afield to argue that CNW’s plain-language interpretation of RCW 79.02.010(13)(h)’s “devoted to or reserved for a particular use by law” exception contradicts other condemnation statutes. *See* PUD Br. at 18–19. The extent of authority provided by these statutes is not before this court. But as supplemental authority, the condemnation statutes cited by the PUD serve only to corroborate CNW’s interpretation, because one of the statutes cited expressly recognizes the distinction between the authority to condemn school lands and the authority to condemn lands dedicated to a public use.

The ports' condemnation authority, RCW 53.34.170, demonstrates that the Legislature distinguishes lands "devoted to a public use" as a special category in condemnation proceedings:

"... the court shall find that the proposed **condemnation of any property already devoted to a public use** is for a higher public use, and may by appropriate contracts with any city, county, or other political subdivision of the state, with the state and any department of the government ... under such terms and conditions as may be mutually agreed upon."

RCW 53.34.170 (emphasis added).

The Legislature's distinction corroborates CNW's and DNR's interpretation of the Public Lands Act and *City of Tacoma*, because it acknowledges that lands dedicated to a public use require special consideration in condemnation proceedings.

**4. THE CAPACITY FOR SALE IS NOT DETERMINATIVE OF WHETHER LANDS ARE DEDICATED TO A PUBLIC USE.**

The PUD devotes much of its response brief to the argument that "reservation from sale is critical to determining whether public lands are reserved for a particular purpose by law." PUD Br. at 29. None of the cases the PUD cites stand for this proposition. Moreover, as noted in *O'Brien v. Wilson*, 51 Wash. at 58, procedures for sale demonstrate the U.S. Congress' and Washington Framer's intention to create a specific and exclusive means of acquiring school lands. Indeed, why would the

Legislature allow condemnation of dedicated lands when the Washington Constitution requires “public auction to the highest bidder?” Const. Art. XVI, § 2.

The PUD cites no authority to establish that to be dedicated to a public use, state lands must be exempt from sale. Instead, cases cited by the PUD merely establish that lands reserved from sale are dedicated to a public use. See PUD Br. at 29 (citing *Draper Machine Works, Inc. v. Dept. of Natural Res.*, 117 Wn.2d 306, 815 P.2d 770 (1991); *Fransen v. Board of Natural Resources*, 66 Wn.2d 672, 404 P.2d 432 (1965)). The validity of a proposition, however, does not necessarily establish the accuracy of its converse. *State ex rel. Washington State Public Disclosure Com'n v. Washington Educ.*, 156 Wn.2d 543, 575, 130 P.3d 352 (2006) (citing IRVING M. COPI & CARL COHEN, INTRODUCTION TO LOGIC 219–20 (9th ed. 1994) (stating that the converse of a given proposition is not necessarily valid), *rev'd on other grounds, Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 127 S.Ct. 2372 (2007)).

Furthermore, *Jefferson County*, the principal case upon which the PUD relies, does not stand for the proposition that lands subject to sale are categorically not dedicated to a public use. Rather, notwithstanding the dicta from that case cited by the PUD, see *State v. Superior Court of Jefferson County*, 91 Wash. 454, 460, 157 P. 1097 (1916), the Court only

held that the land at issue in the case had been dedicated to a public use and thus was not subject to condemnation because it had “become segregated from the general mass of the state’s lands which it holds in its proprietary capacity.” *Id.* *Jefferson County* has nothing to say about whether state school lands at issue here, held by the State in its sovereign—not proprietary—capacity, *see Soundview Pulp Co. v. Taylor*, 21 Wn.2d 261, 270, 150 P.2d 839 (1944) are not dedicated to a public use as a matter of law simply because they may be subject to sale.

Finally, the PUD’s reliance on *City of Seattle* is misguided. In that case, the Court held that the city condemnation statute, RCW 8.12.030, authorizes cities and towns to condemn state lands not dedicated to a public use. *City of Seattle*, 54 Wn.2d at 147. While the Court pointed to the State’s concession 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,” *id.*, that was not the Court’s holding. In fact, the Court noted that “there [was] but one question raised by the petition, and that is whether the city of Seattle has the right . . . to condemn state lands lying outside the city limits not presently dedicated to a public use.” *Id.* at 141. The Court decided the question under the assumption that the state lands at issue were not dedicated to a public use; the question of whether state lands subject to sale could be dedicated to a public use was

not before the Court. To argue that *City of Seattle* hands down the rule that state lands subject to sale are not devoted to or reserved for a particular use, PUD Br. at 29, is an impermissibly overbroad reading of that case.

In sum, the PUD fails to establish that the ability to sell land demonstrates its availability for condemnation. In contrast, constitutional and statutory directions for sale demonstrate that the Framers and Legislature envisioned a specific means for DNR to manage the granted school lands under its authority.

### **C. CONCLUSION**

School lands have a special status derived from the Washington Constitution and Enabling Act. DNR holds school lands in the public trust and must manage those trusts in the public benefit. This duty requires significant discretion and control over the disposition of public lands. To fully serve the public and fulfill his trust obligations, the Commissioner needs the ability to reject certain uses on public lands. This public trust status and corresponding delegation of authority exempts the lands at issue from the PUD's condemnation statute. While authority to condemn public lands requires express, unambiguous language, the condemnation statute relied upon by the PUD is murky and limited. Such authority cannot

defeat the clear direction of the State Constitution, and therefore the PUD cannot condemn the public's granted lands.

The Court should reverse the trial court's grant of summary judgment and enter summary judgment for DNR and CNW.

Dated this 29<sup>th</sup> day of June, 2012.

Respectfully submitted,

GENDLER & MANN, LLP

By: 

David S. Mann  
WSBA No. 21068  
Attorneys for Conservation Northwest