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SUPREME COURT OF THE STATE OF WASHINGTON

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

v.

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

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**PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY'S  
ANSWER TO PETITION FOR REVIEW**

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## 1. INTRODUCTION

Review by this Court has been requested on four separate occasions in this case.<sup>1</sup> Each time, review was denied. In the most recent denial of review, the ruling stated: “[R]eview of the parties’ arguments suggests that the case involves the application of longstanding statutes and established legal principles.” Ruling Denying Motion to Transfer, No. 87796-3 (Oct. 1, 2012). The Court of Appeals has now held the same. The State’s instant Petition for Review of the Court of Appeals’ decision is no different.

Although the PUD previously has either requested or been unopposed to this Court’s review, the PUD’s primary goal was – and still is – to expedite these condemnation proceedings, which have been pending for three and a half years.<sup>2</sup> Now, both the trial court and the Court of Appeals have affirmed the PUD’s authority to condemn state trust lands. Under clear law, Supreme Court review is unnecessary. If this Court accepts review, however, the PUD requests cross-review of the trial

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<sup>1</sup> Supreme Court Cause Nos. 84729-1 (Direct Review); 85428-9 (Discretionary Review of Stay Decision); 86595-7 (Discretionary Review of Supersedeas Decision); 87796-3 (Motion to Transfer). The Court did, however, retain Commissioner Goldmark’s Original Petition for Mandamus, No. 84704-5, concerning the Commissioner’s appellate representation. See *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095 (2011).

<sup>2</sup> See RCW 8.12.090 (eminent domain proceedings “shall have precedence of all cases in court except criminal cases”).

court's intervention decision, which the Court of Appeals declined to address. Decision at 20.

**2. IDENTITY OF ANSWERING PARTY**

Respondent/Cross-Appellant Public Utility District No. 1 of Okanogan County ("PUD") answers the Petition for Review filed by the State (hereinafter, "DNR").

**3. COURT OF APPEALS DECISION**

The Court of Appeals decision is *Public Utility District No. 1 of Okanogan County v. State*, Nos. 29121-9-III and 29123-5-III, 2013 WL 1891370, 301 P.3d 472 (May 7, 2013).

**4. ISSUES PRESENTED FOR REVIEW AND CROSS-REVIEW**

**4.1. Restatement Of DNR's Issues Presented For Review.**

The PUD restates DNR's issues for review as follows:

4.1.1. RCW 54.16.050 specifically authorizes public utility districts to condemn school lands for transmission lines. This authority is also reserved in DNR's land management statutes. RCW 79.36.580. The PUD is condemning easements over school lands for the Methow Transmission Project. Was it error for the Court of Appeals to hold that school lands are subject to condemnation?

4.1.2. School lands not dedicated to a public use or devoted to or reserved for a particular use by law are subject to condemnation. *City of*

*Seattle v. State*, 54 Wn.2d 139, 147, 338 P.2d 126 (1959). Lands subject to sale are not dedicated to a public use or devoted to or reserved for a particular use by law. *Id.*; *State v. Super. Ct. for Jefferson County*, 91 Wash. 454, 459, 157 P. 1097 (1916). School trust lands may be sold, even if subject to grazing leases. Did the Court of Appeals err in holding that school lands may be condemned when the lands are not dedicated to a public use or devoted to or reserved for a particular use by law?

4.1.3. This Court considers whether a proposed condemnation use is compatible with an existing public use; and, where the proposed use will not destroy the existing use, school trust lands may be condemned. *City of Tacoma v. State*, 121 Wash. 448, 453, 209 P. 700 (1922). On uncontested evidence, the trial court found the proposed transmission line easements are compatible with cattle grazing. Was it error for the Court of Appeals to hold that compatibility of use is relevant and that the undisputed evidence showed that the uses are compatible?

**4.2. Issues Presented For Cross-Review.**

Although Supreme Court review is unnecessary, if the Court accepts review, the PUD requests review of the following issues, which were not addressed by the Court of Appeals:

4.2.1. Eminent domain actions are *in rem*, statutory, “special proceedings” that specify the proper parties thereto and the mechanism for

an “interested party” to intervene. RCW 8.12.060, 8.12.120; CR 81. It is undisputed that Conservation Northwest (“CNW”) has no legal or equitable interest in the school lands and does not meet the statutory requirements of a “condemnee.” Was it error for the Court of Appeals to decline to address CNW’s intervention under CR 24 when the requirements of the eminent domain statutes were not met?

4.2.2. CR 24(b) requires that an intervenor have a “claim or defense” to permissively intervene. It is undisputed that CNW has no independent claim or defense to the PUD’s condemnation of the State’s land. Was it error for the Court of Appeals to decline to address CNW’s permissive intervention, which did not meet CR 24’s plain requirements?

## **5. STATEMENT OF THE CASE**

The Court of Appeals’ Decision provides a detailed recitation of the facts, which the PUD hereby incorporates by reference. Decision at 2-9. For additional detail concerning the Methow Transmission Project, see the comprehensive discussion set forth in *Gebbers v. Okanogan County PUD No. 1*, 144 Wn. App. 371, 183 P.3d 324, *review denied*, 165 Wn.2d 1004 (2008), which addressed the Project’s environmental review and route selection.<sup>3</sup> A chronology of key events is attached as an Appendix.

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<sup>3</sup> DNR did not participate in the legal challenge of the Project. In fact, DNR was a consulted agency during the SEPA process and submitted formal written comments on the draft environmental impact statement. DNR stated that it had “no objection” to the

6. ARGUMENT

RAP 13.4(b)(1), (3), and (4) present no basis for this Court's review. DNR's petition should be denied.

6.1. The Court Of Appeals' Decision Is Wholly Consistent With The Decisions Of This Court.

The Court of Appeals' Decision is entirely consistent with controlling statute and long-established Supreme Court authority.

6.1.1. **Public Utility Districts Have Had Express Statutory Authority To Condemn School Trust Lands Since 1931.**

Since 1931, it has been the will of the people and the Legislature of this State that a public utility district

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

Laws of 1931, ch. 1, § 6(e) (now codified at RCW 54.16.020 and .050) (emphasis added); *see also* RCW 79.36.580 (reserving the PUD's right to condemn easements over state lands).<sup>4</sup> DNR has not challenged the

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Project route and further commented that an easement for the transmission line could be issued as long as certain mitigation measures were taken. CP 143-47; *see also* CP 146-47 (PUD's response to DNR comments).

<sup>4</sup> The legislation creating public utility districts was initially passed by voters as the people's first Initiative to the Legislature in 1930. CP 393-417 (Initiative to the Legislature No. 1). This Court has acknowledged that the Legislature granted public utility districts "almost unlimited powers" to perform their duties. *Bayha v. PUD No. 1 of Grays Harbor County*, 2 Wn.2d 85, 98, 97 P.2d 614 (1939).

validity of these statutes, and it concedes that the PUD has statutory authority to condemn. Decision at 9-10.

**6.1.2. School Trust Lands Are Not Exempt From Condemnation.**

For more than a century, this Court has held that school trust lands are subject to condemnation. *Roberts v. City of Seattle*, 63 Wash. 573, 116 P. 25 (1911). The fact that these lands are intended to support education is not sufficient to except them from applicable condemnation statutes:

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. This principle was reaffirmed in *City of Seattle v. State*, 54 Wn.2d 139, 147, 338 P.2d 126 (1959) (state lands not devoted to a public use can be condemned).

The Public Lands Act defines “state lands” as including school trust lands “that are not devoted to or reserved for a particular use by law.” RCW 79.02.010(14)(h). As the Court of Appeals confirmed, this language necessarily means that not all school lands are so reserved. Decision at 10-11. And, DNR’s interpretation would render meaningless the many statutes that specifically allow local governments to condemn state and

school lands. *Id.* The fact that school trust lands are to fund education is insufficient to prevent their condemnation.

**6.1.3. School Trust Lands Are Subject to Sale, Subject To Easements, And Subject To Multiple Uses.**

This Court consistently finds that reservation from sale is critical to determining whether public lands have been reserved for a particular use by law. *See, e.g., Draper Machine Works, Inc. v. Dep't of Natural Res.*, 117 Wn.2d 306, 318, 815 P.2d 770 (1991) (“reserved” lands “must remain in state hands”); *Fransen v. Bd. of Natural Res.*, 66 Wn.2d 672, 675, 404 P.2d 432 (1965) (state forest lands reserved for a particular use by law because they are “forever reserved from sale” under RCW 79.22.050). As stated in *City of Seattle*:

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 relator suggests no reason why such a limitation should be inferred.

54 Wn.2d at 147 (emphasis added). The Court of Appeals applied clear precedent in considering reservation from sale as critical to determining whether lands are reserved for a particular use by law.

Moreover, whether or not a sale is at issue, easements can be granted over trust lands leased for grazing, as evidenced by the leases

themselves and DNR's own admission. CP 114-15; *e.g.*, CP 233 (§§ 4.02, 4.06). Easements can also be condemned over state lands. The Legislature reserved this right in DNR's land management statutes. RCW 79.36.580 (easement process not exclusive and does not preclude condemnation).

Finally, leased lands are not reserved for a "particular" use, but may be subject to multiple uses, as set forth in the statutes governing DNR land management. *See, e.g.*, RCW 79.10.120 (permitting multiple uses when compatible with trust management obligations and listing examples); RCW 79.10.125 (allowing fishing, hunting, and nonconsumptive wildlife activities on lands subject to grazing leases); *see generally* "Multiple Use" statutes, RCW 79.10.100-.280.

#### **6.1.4. Dedication To A Public Use Requires More Than "Active Management" Of Trust Lands.**

The Court of Appeals properly rejected DNR's argument that these trust lands are dedicated to a public use simply because they may be "actively managed" by DNR. All school trust lands are being managed in some capacity by DNR, as is required by state law. *See, e.g.*, RCW 79.10.090 (requiring periodic analysis of all trust lands).

Dedication to a public use requires more than simply putting the property to a productive use. As summarized by the Court of Appeals,

this Court has described dedication in terms of (1) dedication by act of the Legislature, (2) “platting, dedicating, and reserving” land for a public use, (3) segregating the land from the public domain and appropriating it to the public by “due dedication,” and (4) dedication by some “official act or declaration.” Decision at 12 (citing cases).

Further, land that is dedicated to a public use is no longer subject to sale. Dedicated land becomes “**severed from the mass of public lands**, [so] that **no subsequent** law, or proclamation, or sale would be construed to embrace it, or operate upon it.” *State v. Super. Ct. for Jefferson County*, 91 Wash. 454, 459, 157 P. 1097 (1916) (emphasis added) (quoting *Samish Boom Co. v. Callvert*, 27 Wash. 611, 613, 68 P. 367 (1902)). The Court of Appeals applied this Court’s precedent in properly holding that the school lands are not dedicated to a public use. No further review is necessary or appropriate.

**6.1.5. This Court Has Long Held That The Impact From The Proposed Use Must Be Considered.**

*City of Tacoma v. State* is directly on point. There, this Court, citing *Roberts*, permitted condemnation of state lands already devoted to a public use because the proposed use would not destroy the public use:

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.

*City of Tacoma v. State*, 121 Wash. 448, 453, 209 P. 700 (1922). The Court subsequently reiterated the principles of both *Roberts* and *City of Tacoma* in *City of Seattle*, 54 Wn.2d at 143-44.

By asserting that compatibility is irrelevant, DNR mischaracterizes this controlling Supreme Court precedent. Contrary to DNR's assertions, the compatibility standard is not "new." Petition at 14. The standard, dating back to *Roberts*, is more than 100 years old.

*Jefferson County*, relied on by DNR, is entirely consistent. There, the Court did not need to provide a compatibility analysis because destruction of use was apparent: "[A]n appropriation of the parts sought to be condemned by the railway company will render [the waterway and adjoining public streets] useless for the purposes for which they were dedicated." *Jefferson County*, 91 Wash. at 455. DNR's assertion that the question here is "solely one of power," not of whose right to the land is "superior," is wrong. The controlling standard here is compatibility. The PUD has not argued that its use is "superior"; and, the PUD **does** have the express power to condemn. RCW 54.16.050.

The Supreme Court has ruled consistently: if the public use is compatible with the proposed use (as in *Roberts* and *City of Tacoma*), condemnation is permitted; if the public use would be destroyed or so damaged as to preclude its successful operation (as in *Jefferson County*

and *Tacoma Taxpayers*<sup>5</sup>), condemnation is precluded. The Court of Appeals' decision here, based on an uncontested record of compatibility, is in accord. No further review is needed.

**6.1.6. DNR Presented No Evidence That The PUD's Use Will Destroy DNR's Use.**

DNR never disputed at the trial court the PUD's evidence that its easements will not destroy the current uses of the State's trust land, or destroy the purpose behind such use. Indeed, the PUD's transmission lines already cross State lands managed by DNR in Okanogan County. CP 127. DNR's own grazing leases recognize that easements are a contemplated part of the lease, and they contain specific provisions that address condemnation by "any public authority." *E.g.*, CP 233 (§§ 4.02-.03, .06), CP 240 (§ 10.06); *see also* RCW 79.13.030. The trial court had ample evidence in the record to support its finding of compatibility. *E.g.*, CP 124-47, 151-53, 162-66.

Further, it was entirely appropriate for the trial court and the Court of Appeals to look at economic productivity. The primary purpose of federally granted trust lands is to provide economic support to the trust beneficiaries. *See, e.g.*, AGO 1996 No. 11 (Question 5(c)). Accordingly,

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<sup>5</sup> *City of Tacoma v. Taxpayers of Tacoma*, 49 Wn.2d 781, 791, 307 P.2d 567 (1957), ("The state-owned Mossyrock Fish Hatchery and the land necessary for its operation, which are of substantial value, will be inundated by the proposed dam"), *rev'd on other grounds*, 357 U.S. 320 (1958).

in its management of school trust lands, DNR may consider factors other than the economic well-being of the trust (such as environmental considerations), but it can **only** act on those factors if they “do not interfere with the value of the trusts or the economic productivity of the trusts.” *Id.* On the undisputed facts, summary judgment and the Court of Appeals’ affirmation were proper.

**6.2. This Case Presents No Question Of Law Under The Washington State Constitution.**

The Court of Appeals acknowledged that the Washington Enabling Act and Constitution impose an express trust and corresponding trust management principles on trust lands. Decision at 16 (citing *Skamania County v. State*, 102 Wn.2d 127, 132, 685 P.2d 576 (1984)). However, the court also correctly explained that trust lands are still “subject to statutory controls and authority.” *Id.* at 17. Regardless of the trust’s purpose, the Legislature granted public utility districts the express authority to condemn school trust lands. *Id.* And, the Legislature reinforced this framework by reserving the condemnation rights of local governments in DNR’s own land management statutes. RCW 79.36.580.

The Commissioner seeks to elevate his authority over that of the people and the Legislature. DNR asserts that the Court of Appeals improperly elevated the PUD’s statutory condemnation authority over

DNR's trust management duties. Petition at 16. **But this is precisely the scheme the Legislature (and the people by initiative) chose to adopt more than 80 years ago.** It is DNR's argument that improperly treats DNR's authority as superior to the Legislature's choice to grant public utility districts and other local governments the authority to condemn trust lands. DNR would have the Court ignore these express grants of authority.

Trust land policy is ultimately the responsibility of the Legislature, not DNR. The Commissioner of Public Lands has only that authority which is specifically granted. Const. art. III, § 23 ("The commissioner of public lands shall perform such duties and receive such compensation as the legislature may direct."). No party has argued that the Legislature cannot grant public utility districts condemnation authority over state trust lands as part of the Legislature's overall management of trust land policy.

Rather than presenting a "significant question of law" under the Washington Constitution, this case presents a straightforward question of statutory authority. DNR does not challenge the constitutionality of RCW 54.16.050. And, this Court has recognized for more than a century that school trust lands are subject to condemnation. *City of Seattle*, 54 Wn.2d at 147; *City of Tacoma*, 121 Wash. at 453; *Roberts*, 63 Wash. at 576. There is no constitutional question here. *See* RAP 13.4(b)(3).

**6.3. This Court – And The Legislature – Have Already Settled These Issues Of Law.**

There are no issues of substantial public interest here that should be determined by the Supreme Court. *See* RAP 13.4(b)(4). The people, the Legislature, and this Court have determined these issues. There is no need to review the Court of Appeals' opinion that applies state statute and this Court's decisions governing condemnation of state trust lands. Although DNR may be concerned with opening the "floodgates" for condemnation cases initiated by utilities, the Legislature has determined that DNR's easement process does not override a municipal entity's condemnation authority. RCW 79.36.580 (easement process not exclusive and does not affect condemnation powers).

**6.4. The Court Should Review Conservation Northwest's Erroneous Intervention Into This *In Rem* Action.**

Can a party with no legal or equitable property interest intervene in condemnation proceedings pursuant to CR 24? Washington's statutes and court rules direct that the answer is "no." And, other states uniformly hold that the answer is "no." However, no Washington appellate court has analyzed the relationship between CR 24, CR 81, and the eminent domain statutes. To the extent that the courts have addressed related scenarios, the trial court's decision to permit intervention is in conflict with those decisions. The Court should take this opportunity to clarify the issue,

which directly impacts the ability of government agencies to efficiently condemn property for public projects.

**6.4.1. The Trial Court's Decision Conflicts With State Statute, The Civil Rules, Analogous Washington Cases, and Authority From Other Jurisdictions.**

Condemnations are *in rem* actions, 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). They are governed by statute and are considered “special proceedings.” *See id.* at 337; *State ex rel. Nw. Elec. Co. v. Superior Ct. for Clark County*, 27 Wn.2d 694, 700-01, 179 P.2d 510 (1947); *accord State v. Higgins*, 75 Wn.2d 110, 121, 449 P.2d 393 (1969) (concurring opinion). CR 81 expressly provides that the civil rules do not govern “where inconsistent with rules or statutes applicable to special proceedings.”<sup>6</sup> CR 81(a).

The eminent domain statutes dictate the procedure for condemnation actions, including notice requirements (RCW 8.12.005), contents of the petition (RCW 8.12.060), and service of the summons (RCW 8.12.070, .080). More importantly, the statutes define the proper parties in a condemnation action, including how an “interested party may

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<sup>6</sup> If the eminent domain statutes do not address a particular procedural issue, *then* the civil rules may govern, as provided by statute. RCW 8.12.090 (“**Except as herein otherwise provided**, the practice and procedure under this chapter ... shall be the same as in other civil actions.” (emphasis added)). This is also true as a general matter for other special proceedings. *See, e.g., Zesbaugh, Inc. v. Gen. Steel Fabricating, Inc.*, 95 Wn.2d 600, 603, 627 P.2d 1321 (1981) (garnishment).

be brought in.” RCW 8.12.120; *see also* RCW 8.12.060 (directing who shall be named in a condemnation petition).

“Where the Legislature has established a specific requirement for joinder of parties, procedural court rules may not be used to alter those requirements.” *Port of Grays Harbor*, 73 Wn. App. at 340 (denying joinder under identical language in CR 19(a)(2) where the party had no property interest under the condemnation statutes). The civil rules “cannot supersede the statutes and their judicial interpretations so as to create a substantive interest in property undergoing condemnation.” *Id.* at 341.

As with CR 19, CR 24 does not give CNW any right to intervene beyond that permitted by statute—and the statutes require an interest in the property to be condemned. It is undisputed that CNW has no such interest. Decision at 7. Yet, the trial court erroneously allowed CNW to intervene under CR 24, finding that its interests in “environmental preservation” were sufficient. And, the Court of Appeals considered CNW’s arguments on appeal.

This Court has recognized that a proposed intervenor must qualify as a “condemnee” to participate in eminent domain proceedings. *Pub. Util. Dist. No. 1 of Snohomish County v. Kottsick*, 86 Wn.2d 388, 389-90, 545 P.2d 1 (1976) (adjacent property owners lacked standing to bring inverse condemnation claim in eminent domain proceeding because they

were not “condemnees”); *see* PUD’s Brief on Intervention at 13; PUD’s Reply Brief on Intervention at 9-10. Law from other jurisdictions is in accord.<sup>7</sup> In fact, CNW has not cited a single case permitting intervention in a condemnation action by a party without a legal or equitable interest in the property.

CNW’s intervention pursuant to CR 24 – and the Court of Appeals’ failure to correct the error while still considering CNW’s arguments on condemnation authority – conflicts with the eminent domain statutes, CR 81, analogous Washington authority in *Port of Grays Harbor* and *Kottsick*, and cases from other jurisdictions squarely holding that such intervention is improper.

#### **6.4.2. CNW Has No “Claim Or Defense” Under CR 24(b).**

Even if the eminent domain statutes do not preempt application of CR 24 in its entirety, CNW’s lack of a property interest also dictates that its permissive intervention under CR 24(b) was improper. CR 24(b)(2) plainly requires that the applicant have a “claim or defense” to permissively intervene. *See also* CR 24(c). CNW failed to identify any

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<sup>7</sup> *See, e.g., In re Condemnation by the County of Berks*, 914 A.2d 962, 965 (Pa. Commw. Ct. 2007) (“[I]t is axiomatic that to assert the rights of a condemnee, the party must be an owner of a property interest taken.”); *City of Sunland Park v. Santa Teresa Servs. Co.*, 75 P.3d 843, 853-56 (N.M. Ct. App.) (“[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....”), *cert. denied*, 74 P.3d 1071 (N.M. 2003); *see also* PUD’s Brief on Intervention at 14-17 (discussing cases from other jurisdictions).

claim or defense that it (not the State) has which shares a common question of law or fact with this condemnation action.

Washington recognizes the common law doctrine of standing, which prohibits a litigant from raising another's legal rights.<sup>8</sup> *See, e.g., Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802-04, 83 P3d 419 (2004). This general principle has been applied to deny intervention in other cases involving challenges to public projects. *See, e.g., United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985), *cert. denied*, 476 U.S. 1108 (1986); *Wade v. Goldschmidt*, 673 F.2d 182, 185, 187 & n.11 (7th Cir. 1982).

Similarly here, Conservation Northwest has no standing to assert the State's defenses and has no other claim or defense of its own that it may properly allege in this proceeding. It has therefore failed to satisfy the basic requirements for permissive intervention.

#### **6.4.3. This Is An Issue Of Substantial Public Interest That Should Be Determined By This Court.**

Allowing intervention by those with no legal or equitable property interest in the condemnation opens the door for any party opposed to a public project to obtain delay by objecting in every condemnation action.

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<sup>8</sup> The U.S. Supreme Court held similarly in a different context in *Hollingsworth v. Perry*, No. 12-144, \_\_\_ S. Ct. \_\_\_, 2013 WL 3196927 (June 26, 2013) (citizens had no independent standing where elected officials refused to defend law in court). This is distinguished from Congress's unique right to defend its own acts, such as DOMA. *See United States v. Windsor*, No. 12-307, \_\_\_ S. Ct. \_\_\_, 2013 WL 3196928 (June 26, 2013).

Condemnation is about justly compensating property owners for the taking of land necessary for public uses and nothing else. Public project opponents have other legal means at their disposal for challenging projects and their impacts, including (among many other laws) SEPA, NEPA, the Land Use Petition Act, and the Shoreline Management Act.<sup>9</sup>

Improper intervention delays proceedings that are statutorily required to proceed expeditiously. *See* RCW 8.12.090. It also prejudices the existing parties. 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. That is what happened here. CNW's "limited" intervention has added significant time and expense to these proceedings.

The Supreme Court should determine this issue of substantial public interest and make clear that participation in eminent domain actions is limited by statute to parties with a legal or equitable interest in the property (*i.e.*, "condemnees"). Otherwise, project opponents can use condemnation to delay public projects by improperly invoking CR 24 instead of complying with the eminent domain statutes.

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<sup>9</sup> The concerns of environmental groups in some cases may be legitimate and deserve administrative and judicial attention, but not in the limited scope of eminent domain proceedings – particularly in cases where that attention has already been given, as here. *See Gebbers v. Okanogan County PUD No. 1*, 144 Wn. App. 371, 183 P.3d 324, *review denied*, 165 Wn.2d 1004 (2008).

7. CONCLUSION

The PUD seeks easements over State lands that are not “reserved” but available for sale and subject to condemnation. The Court of Appeals properly applied longstanding statutes and established legal principles in affirming summary judgment authorizing the condemnation of the easements. This Court’s review is not warranted under RAP 13.4(b). To the extent the Court accepts review, it should only review the unresolved issues regarding the application of CR 24 to condemnation proceedings.

RESPECTFULLY SUBMITTED this 8th day of July, 2013.

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# APPENDIX

## CHRONOLOGY OF KEY EVENTS

- 1904** Washington Supreme Court holds that statutory authority to condemn school trust lands must be expressly stated. *State v. Super. Ct. of Chelan County*, 36 Wash. 381, 78 P. 1011.
- 1907** Legislature amends condemnation statute to expressly include state, county, and school lands. See *City of Seattle v. State*, 54 Wn.2d 139, 145, 338 P.2d 126 (1959).
- 1911** Washington Supreme Court upholds condemnation of school trust lands. *Roberts v. City of Seattle*, 63 Wash. 573, 116 P.2d 25.
- 1922** Washington Supreme Court upholds condemnation of school and other state lands dedicated to a public use where the proposed use would not destroy the public use or preclude its successful operation. *City of Tacoma v. State*, 121 Wash. 448, 209 P. 700.
- 1927** Legislature passes the Public Lands Act, which defines “state lands” to include school trust lands “which are not devoted to or reserved for a particular use by law.” Laws of 1927, ch. 255, § 1.
- 1930** Voters pass Initiative to the Legislature No. 1, authorizing the creation of public utility districts.
- 1931** Legislature enacts public utility district statute, granting districts the express authority to condemn “state, county, and school lands.” Laws of 1931, ch. 1, § 6(e) (now codified at RCW 54.16.050).
- 1959** Washington Supreme Court upholds condemnation of school trust lands not dedicated to a public use and reaffirms its decision in *City of Tacoma v. State*. *City of Seattle v. State*, 54 Wn.2d 139, 338 P.2d 126.

- 1996** Okanogan PUD begins planning the Methow Transmission Project (“Project”) to construct a new electrical transmission line and substation between Pateros and Twisp.
- 2003-2006** The PUD completes an environmental impact statement for the Project, receiving formal written comments from DNR that DNR does not object to the transmission line route and that DNR will grant easements over school trust lands within the Project area if certain mitigation measures are taken. CP 143-47. Citizen groups file suit to challenge the route selection and the sufficiency of the FEIS (Okanogan County Cause No. 06-2-00168-2). DNR does not participate in the challenge.
- 2008** The Project’s environmental review is upheld by the Court of Appeals, and the Supreme Court denies review. *Gebbers v. Okanogan County PUD No. 1*, 144 Wn. App. 371, 183 P.3d 324, *review denied*, 165 Wn.2d 1004 (2008).
- 2007-2009** The PUD negotiates with DNR to acquire the necessary easements. The PUD’s formal easement application is submitted in October 2008. DNR represents that final action on the easements could be expected in two to three months. CP 125-26.
- Jan. 2009** Peter Goldmark takes office as Commissioner of Public Lands.
- Nov. 2009** Still awaiting final action on its October 2008 easement application, the PUD files its petition to condemn the necessary easements over state lands in Okanogan County Superior Court, Cause No. 09-2-00679-4. CP 610-41. An amended petition is filed on April 14, 2010. CP 168-227.
- Feb. 2010** The trial court grants Conservation Northwest’s motion to intervene in the eminent domain proceedings. CP 506-08.
- May 2010** On the parties’ cross-motions, the trial court upholds the PUD’s condemnation authority and enters an uncontested order of public use and necessity. CP 14-24.

- June 2010** Conservation Northwest appeals the orders on summary judgment and public use and necessity. CP 1-13. The PUD cross-appeals Conservation Northwest's intervention. CP 918-22. The State files a "contingent notice of appeal." CP 906-17. Commissioner Goldmark files a petition for a writ of mandamus requiring the Attorney General to represent him in an appeal. Supreme Court No. 84704-5.
- Oct. 2010** The appeal is stayed pending a ruling in *Goldmark v. McKenna*.
- Sept. 2011** The Washington Supreme Court holds that the Attorney General is required to prosecute an appeal on behalf of DNR. *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095.
- Sept. 2012** Stay of the appeal lifted and briefing filed in Division III of the Court of Appeals, Nos. 29121-9-III and 29123-5-III.
- Oct. 2012** Washington Supreme Court denies the State's request to transfer the appeal. Supreme Court No. 87796-3.
- Feb. 2012** Oral arguments heard by Division III of the Court of Appeals.
- May 2013** Division III of the Court of Appeals affirms the PUD's authority to condemn the easements over school trust lands. The court does not address intervention. *Pub. Util. Dist. No. 1 of Okanogan County v. State*, \_\_ Wn. App. \_\_, 301 P.3d 472, 2013 WL 1891370 (May 7, 2013).
- June 2013** The State files a Petition for Review with the Supreme Court. Supreme Court No. 88949-0.

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**Sent:** Monday, July 08, 2013 4:28 PM

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Dear Deputy Clerk of Court,

Please find attached for filing with the court *Public Utility District No. 1 of Okanogan County's Answer to Petition for Review*; and *Declaration of Service*.

CASE NAME – Public Utility District No. 1 of Okanogan County v. State of Washington, et al.

CASE NO. – Supreme Court of the State of Washington, No. 88949-0.

FILING ATTORNEYS - P. Stephen DiJulio, (206) 447-8971, WSBA #7129, [dijup@foster.com](mailto:dijup@foster.com); Michael S. Schechter, (206) 447-4669, WSBA #35602, [schmi@foster.com](mailto:schmi@foster.com); and Adrian U. Winder, (206) 447-8972, WSBA #38071, [winda@foster.com](mailto:winda@foster.com).

Thank you,

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