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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO. 1,
Respondent/Cross-Appellant,

v.

STATE OF WASHINGTON and PETER GOLDMARK, et al.
Appellants/Cross-Respondents.

**APPELLANTS STATE OF WASHINGTON AND PETER
GOLDMARK'S SUPPLEMENTAL BRIEF**

PACIFICA LAW GROUP LLP
1191 Second Avenue, Suite 2100
Seattle, WA 98101
(206) 245-1700

Paul J. Lawrence, WSBA #13557
Sarah C. Johnson, WSBA #34529
Kymberly K. Evanson, WSBA #39973

Special Assistant Attorneys General for
Appellants State of Washington and Peter
Goldmark

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I. INTRODUCTION

The Court of Appeals erred in holding that a local public utility district (“PUD”) has the authority to condemn federally-granted school trust lands over the objection of the legislatively designated trustee, the Department of Natural Resources (“DNR”), especially where DNR is actively using this land. Contrary to the Court of Appeals’ holding, this Court’s precedent establishes that the state’s use of its lands exempts those lands from being subject to condemnation by a local government. These principles apply with even greater force to state school trust lands, which the state holds in its sovereign capacity, and which DNR manages in its fiduciary role as trustee of those lands. *Skamania Cty. v. State*, 102 Wn.2d 127, 685 P.2d 576 (1984).

Given these precedents, this Court should hold that local governments lack the authority to condemn school trust lands when the designated state trustee determines that condemnation is inconsistent with trust purposes and with its own use of those lands. Even if the Court declines to reach this broader holding, however, this Court should at a minimum hold that the particular school trust lands at issue here are not subject to condemnation given DNR’s active permitting and leasing of those lands for cattle grazing to benefit school trust beneficiaries. Any

contrary holding would affect negatively DNR's ability to meet its constitutionally and statutorily required trust management responsibilities.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in holding that school trust lands that are actively-managed by the state trustee pursuant to the state's constitutional and statutory trust obligations, and that are dedicated to a particular use authorized by the legislature, are subject to condemnation by a local public utility district?

2. Whether the Court of Appeals erred in holding that the leasing and permitting of state school trust land for the purpose of benefiting trust beneficiaries did not reserve the land for a particular use such that it may not be condemned?

3. Whether the Court of Appeal erred in allowing a local government entity the authority to condemn state school trust lands when the designated trustee determines that condemnation is inconsistent with its use and management of the lands to benefit the trust?

4. Whether the Court of Appeals erred in holding that reservation from sale is the critical factor in deciding whether state school trust land is devoted to or reserved for a particular use?

5. Whether the Court of Appeals erred in holding that state school trust lands otherwise not subject to condemnation could

nonetheless be condemned based on its finding that the PUD's proposed use and DNR's existing or potential long term uses of these lands were "compatible"?

6. Whether the Court of Appeals erred in finding that the PUD's proposed use of the state trust lands was compatible with the state's existing or potential long term use when there is a genuine issue of material fact as to whether these uses are compatible?

III. STATEMENT OF THE CASE

A. DNR's Fiduciary Duty to Manage School Trust Lands.

When Washington was admitted into the Union in 1889, the federal government granted to it approximately three million acres of land, a portion of which the state was legally obligated to hold in trust for Washington schools. Enabling Act, ch. 180, 25 Stat. §§ 10-11 (1889). The Enabling Act reserved these lands for "school purposes only" and set forth certain restrictions on their sale and lease to ensure that the lands would derive to the sole benefit of Washington schools. *Id.* § 11. These protections are echoed in the Washington Constitution, which similarly provides that all "public lands granted to the state are held in trust for all the people," and restricts the manner in which such trust lands may be disposed. Wa. Const. Art. XVI, § 1.

In *Skamania Cty v. State*, this Court held that the state holds school trust lands pursuant to “real, enforceable trusts” that place upon the state the fiduciary duty to manage them in consideration of the “specific enumeration of the purposes for which the lands were granted” and the recognition that this “enumeration is necessarily exclusive of any other purpose.” 102 Wn.2d at 132 (quoting *Ervien v. United States*, 251 U.S. 41, 47, 40 S. Ct. 75 (1919)). An inviolate duty of the state is to manage school trust lands to ensure their short- and long-term economic value and productivity for school beneficiaries. *See, e.g., Op. Att’y Gen. 11, Question 5(b)* (1996).

DNR is the state entity charged with the management of all state trust lands, including school trust lands. *See generally* ch. RCW 43.30. In this role, DNR has the exclusive statutory authority and discretion to lease or permit trust lands for various purposes, including commercial, agricultural and recreational uses. RCW 79.13.010 (“the department may lease state lands for purposes it deems advisable . . . in order to return a fair market rental return to the state or the appropriate constitutional or statutory trust”); *see also* RCW 79.13.030, .060 (department may set “terms and conditions as the department deems advisable”), RCW 79.13.380, .390 (department may exercise discretion regarding forfeiture and disposition of crops). DNR also has the discretionary authority to

grant easements over trust lands that it determines are appropriate and consistent with its trust management duties. RCW 79.36.355 (“The department may grant to any person such easements and rights in public lands . . .”). The elected Commissioner of Public Lands serves as the administrator of DNR and has general management responsibilities for the department. RCW 43.30.421. The Commissioner is also a member of the Board of Natural Resources, which establishes policies regarding the appropriate management of state lands and resources. RCW 43.30.215. The Commissioner and his or her appointed supervisor direct DNR in a manner consistent with the policies established by the Board. RCW 43.30.155, .421, and .430.

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

In this case, the PUD seeks to condemn certain school trust lands for the purpose of building a new 28-mile electric transmission line to serve the Methow Valley in Okanogan County (the “Methow Transmission Project”). The PUD’s proposed route crosses ten parcels of school trust lands, as well as federal forest lands and privately-owned lands. 2006 FEIS at § 2.3.2.¹ The proposed line requires a 100 foot-wide

¹ The complete Methow Transmission Project Final Environmental Impact Statement (“FEIS”) is available at <http://www.okanoganpud.org/methowtrans/FEIS>.

easement over approximately 12.2 miles of school trust lands and would cross through the largest contiguous publicly-owned shrub-steppe habitat in the Methow Valley. CP 143, 585. The legislature has directed the state to undertake coordinated efforts to preserve this type of habitat for grazing, wildlife and recreation purposes. RCW 79.13.600 (“the maintenance and restoration of Washington’s rangelands and shrub-steppe vegetation is vital to the long-term benefit of the people of the state”).

To both generate income and preserve these lands as part of the trust corpus for the benefit of future generations, DNR has entered enforceable leases or permits to allow for cattle grazing on certain trust parcels. CP 229-369. The proposed transmission line would cross school trust lands that are subject to five active grazing leases and two grazing permits. *Id.*

In October 2008, the PUD submitted a right of way application to DNR asking for an easement to construct the transmission line, which the parties then negotiated. CP 230, 538-551, 36-37. Prior to any agreement or formal easement decision by DNR, the PUD filed a petition seeking to condemn the easement. CP 610-41.

C. Proceedings before Trial Court and Court of Appeals.

DNR opposed the PUD’s condemnation petition and moved for summary judgment on the ground that the PUD lacked the authority to

condemn the school trust lands at issue due to DNR's dedication and reservation of the lands at issue to a public use. CP 460-505. The trial court denied DNR's motion and held in favor of the PUD. CP 22-24. The trial court acknowledged that DNR used the school trust lands for a "proper and public purpose," but concluded that this use was "compatible" with the PUD's desired easement and permitted the condemnation on that ground. *See* VRP 5:23-24; 21:25-22:7. DNR appealed.

The Court of Appeals Division III affirmed. *Pub. Util. Dist. No. 1 of Okanogan Cty. v. State*, 174 Wn. App. 793, 301 P.3d 472 (2013). The Court of Appeals issued a broad opinion, holding that whether the trust lands were reserved from sale was the critical factor in determining whether they could be condemned. *Id.* at 803-05. Because school trust lands are not reserved from sale, the court held that they are not sufficiently "dedicated to a public use" and are not "reserved" for a particular use under RCW 79.02.010(14)(h) to prevent their condemnation. *Id.* at 805. The Court of Appeals also held that "dedication to a public use" required more than "putting the property to a productive use." *Id.* at 803. The court further held that the condemnation was permissible because it would not "destroy the current uses of the State's trust land." *Id.* at 808. DNR timely petitioned for review.

IV. STANDARD OF REVIEW

This Court reviews questions of statutory interpretation and claimed errors of law de novo. *City of Olympia v. Drebick*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006). When reviewing a summary judgment, this Court engages in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)).

V. ARGUMENT

The question before the Court is whether a local government may condemn state school trust lands when the trustee tasked with managing those lands determines that condemnation is inconsistent with its own ongoing use and management of those lands. The answer is no. DNR has leased and permitted the school trust lands at issue for cattle grazing both to generate income for trust beneficiaries and to preserve these lands as part of the trust corpus for future generations. DNR has implicitly determined that the PUD's proposed condemnation is inconsistent with its ability to manage these lands for the long-term benefit of the trust. Given this determination and DNR's active use of these lands, this Court should hold that the school trust lands at issue are not subject to condemnation by the PUD.

This holding is consistent with the established principle that a local government cannot condemn the lands of the state when the state has devoted or dedicated its lands to a public use. This holding also recognizes and honors the unique nature of federally-granted school trust lands and is consistent with this Court's acknowledgement of DNR's fiduciary duties with respect to those lands. In contrast, the Court of Appeals' opinion ignores these basic principles and opens the door to the condemnation of all but a narrow class of state lands. Its holding should be reversed.

A. The School Trust Lands at Issue are Sufficiently Dedicated to a Public Use and are not Subject to Condemnation.

This Court has long recognized the limits on a municipal corporation's authority to condemn lands that the state has dedicated to a public use: "We deem it conclusively settled in this jurisdiction that a municipal corporation or a public corporation does not have the power to condemn state-owned lands dedicated to a public use, unless that power is clearly and expressly conferred upon it by statute." *City of Tacoma v. Taxpayers of Tacoma*, 49 Wn.2d 781, 798, 307 P.2d 567 (1957); *see also State v. Superior Ct. for Jefferson Cty.*, 91 Wash. 454, 157 P. 1097 (1916) (holding that lands that the state was holding for future use as streets was "segregated from the general mass of the state's lands" and was not

subject to condemnation); *State v. Kittitas Cty.*, 107 Wash. 326, 181 P. 698 (1919) (holding that city's use of land for reservoir is a public use such that land could not be condemned). Similar restrictions are found in the Public Lands Act, which exempts from condemnation land "devoted to or reserved for a particular use by law." RCW 79.02.010(13)(h). Pursuant to this authority, when the government dedicates or devotes its land to a public use, it may not be condemned.

In reading this Court's precedent, the Court of Appeals overlooked these basic principles and instead adopted new standards to guide the question of whether a local government can condemn the lands of the state. In particular, the Court of Appeals erroneously concluded that whether state lands are "reserved from sale" is a critical factor in determining whether they have been dedicated or devoted to a public use. *Pub. Util. Dist.*, 174 Wn. App. at 803-05. The Court of Appeals further held that some type of formal dedication of state land is required to exempt it from condemnation, and that the state's "productive use" of the land alone is insufficient. *Id.* at 803. The Court of Appeals then held that because state school trust lands are generally subject to sale, the lands at issue were not sufficiently dedicated to a public use. *Id.* at 803-05.

No prior decision of this Court requires either that state lands be reserved from sale or that the state formally "dedicate" its land to a

particular use in order for those lands to be exempt from condemnation.² This is for good reason. With limited exceptions, the state's right to control its own lands includes the right to retain discretion whether to dispose by sale or easement any part of its land. The Court of Appeals' decision means that unless the state revokes that discretion and takes trust land off the market it is subject to condemnation. Such a holding would have extraordinary consequences as the state appropriately reserves its right to dispose of almost all its property – one exception being state forest lands. *See* RCW 79.22.050 (setting forth general reservation of state forest land from sale). Moreover, the holding would mean that school trust lands are **always** subject to condemnation as the Enabling Act and State Constitution contemplate that such lands can in the appropriate circumstance be sold by the state for the benefit of the trust. Enabling Act, ch. 180, 25 Stat. § 11; Wa. Const. Art. XVI, § 1.

Under the Court of Appeals' holding, state lands would also be subject to condemnation regardless of whether the state was putting them to a "productive use." *Pub. Util. Dist.*, 174 Wn. App. at 803. This holding is contrary to this Court's authority recognizing that the government's use of land is sufficient to exempt it from condemnation.

² DNR's discussion of the authority cited by the Court of Appeals is at pages 7-13 of DNR's Reply Brief before the Court of Appeals.

See, e.g., Taxpayers of Tacoma, 49 Wn.2d at 798 (state’s use of land for fish hatchery sufficient to avoid condemnation); *Kittitas Cty.*, 107 Wash. at 329-30 (city’s use of land for reservoir prevented condemnation of land by county).³ In both of these cases, the Court looked to the use of the land at issue, not to whether it had been sufficiently “dedicated” through some formal act. *Id.*⁴ The Court of Appeals’ opinion does not offer any rationale supporting its requirement of some additional “dedication” over and above the actual use of land to avoid condemnation. Consistent with its prior holdings, this Court should hold that school trust lands that DNR is actively using are sufficiently “dedicated to a public use” and may not be condemned. *Taxpayers of Tacoma*, 49 Wn.2d at 798.

With respect to the particular trust lands at issue in this case, DNR has acted pursuant to its trust management obligations to lease the lands at issue for the statutorily authorized purpose of cattle grazing. This Court has recognized that this type of income-generating use of state trust lands is a public use. *Dickgieser v. State*, 153 Wn.2d 530, 536, 105 P.3d 26 (2005) (holding in inverse condemnation action that logging of state forest

³ Notably, the PUD’s condemnation authority is no broader than that of the local governments at issue in these cases.

⁴ Nor do these cases address the question of whether the lands at issue were subject to sale. And given the nature of the lands at issue, it is reasonable to conclude that there would have been no restriction on the state’s authority to sell these lands.

lands is a public use and resulting damage to private property may be compensable taking). And any questions as to whether the state is using its land for a public purpose should be left to the state itself. *State v. Superior Ct. for Mason Cty.*, 99 Wash. 496, 500, 169 P. 994 (1918) (holding that state has the “power to determine what is a public use of the state’s own property” and that, although question of public use is typically judicial, this “does not apply to the appropriation of lands owned by the sovereign state itself”).

Before the Court of Appeals’ opinion, no court had held that the type of actively-managed state lands like those at issue here could be condemned over the state’s objection. Instead, in all prior cases considering this question, this Court has permitted condemnation only when the lands at issue were admittedly neither put to any public use, nor contemplated for any future use by the state. *See City of Seattle v. State*, 54 Wn.2d 139, 147, 338 P.2d 126 (1959) (permitting condemnation of state capitol and school lands that state admitted were “not presently dedicated to a public use,” nor contemplated for any future use); *Roberts v. City of Seattle*, 63 Wash. 573, 574, 116 P. 25 (1911) (rejecting citizen attempts to stop condemnation of 30-foot strip of land at University of Washington that state was no longer using and that state desired to give to city); *City of Tacoma v. State*, 121 Wash. 448, 453, 209 P. 700 (1922)

(authorizing condemnation of fish eyeing station that state was not presently using nor had any express intent to use in the reasonable future). The Court of Appeals concluded that *Roberts* stands for the proposition that “devotion to the purpose of education is insufficient to prevent condemnation.” *Pub. Util. Dist.*, 174 Wn. App. at 803 (citing *Roberts*, 63 Wash. at 576). But were the Court of Appeals correct, this would mean that a local government could condemn the academic buildings of the University of Washington despite their plain devotion to education. *Roberts* does not hold that land that the state is actually using for educational purposes or otherwise, like the school trust lands at issue in this case, may be condemned. Devotion is distinct from actual use.

Relying on this Court’s dicta, the Court of Appeals also imposed a new “compatibility” test to govern whether state lands may be condemned. *Pub. Util. Dist.*, 174 Wn. App. at 807-08 (citing *City of Tacoma*, 121 Wash. at 450). The court held that because the PUD’s use “would not destroy the current uses of the State’s trust land” condemnation was appropriate. *Id.* at 808. But allowing a municipal corporation to expand its condemnation authority by alleging its use would not destroy that of the state effectively eliminates the state’s ability to control the present and future use of its own lands. This is contrary to this Court’s precedent. *See, e.g., Jefferson Cty.*, 91 Wash. at 454 (state’s

dedication of land to future use renders lands exempt from condemnation); *Kittitas Cty.*, 107 Wash. at 328-29 (court will not interfere with government's "determination of the public necessity of acquiring and holding lands to be used for and in connection with public activities"). It is also contrary to the rule that a municipal corporation's condemnation authority be strictly construed, especially where, as here, "the lands of the sovereign are sought to be taken." *State v. Superior Ct. of Chelan Cty.*, 36 Wash. 381, 385, 78 P. 1011 (1904). Requiring an analysis of the purported compatibility between the existing and proposed condemnation uses also suffers from all of the administrability concerns DNR raised in its briefing before the Court of Appeals. DNR Op. Br. at 33-39; DNR Reply Br. at 13-18. This Court has properly recognized that the question of whether a municipal government may condemn state lands is "solely one of power." *Jefferson Cty.*, 91 Wash. at 461. It is not a question of compatibility.

In sum, whether state lands are "formally dedicated" or whether they are "reserved from sale" are not the determinative factors that this Court should consider when defining the scope of a local government's authority to condemn state lands. Neither of these tests provides sufficient protection for lands that the government is using for public purposes. Instead, this Court should reaffirm the basic proposition that a local

government lacks the authority to condemn lands of the state that are dedicated to a public use. In the context of federally-granted state school trust lands, the Court should hold that these lands are dedicated to a public use when the trustee has determined the proper use of those lands and when the trustee finds that the proposed taking of these lands would interfere with its trust management obligations. Aside from this broader holding, with respect to the particular school trust lands at issue here, this Court should hold that DNR's statutorily-authorized leasing and permitting of these lands to benefit the school trust renders the lands exempt from condemnation by a local PUD. This bright-line rule provides the necessary clarity to govern future consideration of this issue.

B. DNR's Trust Management Obligations Require It to Make Determinations Regarding the Use of Trust Lands.

Reaffirming these basic protections for state lands is especially critical given the unique nature of the trust lands at issue here that are constitutionally and statutorily reserved for the sole purpose of benefiting Washington's common schools. Enabling Act of 1889, ch. 180, 25 Stat. §§ 10-11 (1889); Wa. Const. Art. XVI, § 1. Federally granted school trust lands are unlike those lands that state holds in its proprietary capacity. *Soundview Pulp Co. v. Taylor*, 21 Wn.2d 261, 270, 150 P.2d 839 (1944) (“[t]he State of Washington in its ownership of granted school lands . . .

owns and holds them in its sovereign, as distinguished from its proprietary, capacity”); *Jefferson Cty.*, 91 Wash. at 458-59 (“the state holds title to property in two entirely distinct capacities, the one a proprietary capacity... and the other a governmental capacity; that is, in trust for the public use”). In *Skamania*, this Court has recognized the significant trust obligations DNR faces with regard to its management of school trust lands. This Court held that the state holds these lands subject to “real, enforceable trusts,” which “impose upon the state the same fiduciary duties applicable to private trustees.” 102 Wn.2d at 127.

This case is the first time the question of a local government’s authority to condemn state lands has come before the Court since *Skamania* was decided. In recognition of the holding of *Skamania*, this Court must allow DNR to have appropriate control over school trust lands to allow it to fulfill its fiduciary duties. Permitting a local government to condemn school trust lands over the objection of DNR would prevent DNR from exercising such fiduciary control. This is contrary to basic trust principles that the trustee may act within its discretionary authority to manage trust assets. *See, e.g., Occidental Life Ins. Co. of Cal. v. Blume*, 65 Wn.2d 643, 648, 399 P.2d 76 (1965). As long as DNR is acting within the scope of its fiduciary duties, its decisions regarding the appropriate use of trust assets should stand.

In light of the heightened trust obligations imposed on the State with regard to management of school trust lands, this Court should recognize that the only proper challenge to the state's decision to object to condemnation of school trust lands is one based on a violation of the state's trust duties. Thus, if a local government disagrees with a decision of DNR regarding the proper use of school trust lands, it may challenge that decision as an abuse of DNR's fiduciary duties, or as arbitrary and capricious government action. *See, e.g.*, RCW 34.05.570 (providing for judicial review of agency action); *Occidental Life*, 65 Wn.2d at 648 (reviewing trustee's actions for abuse of discretion, noting absence of "evidence of fraud, malice, bad faith or arbitrary conduct" and finding trustee acted within "bounds of reasonable judgment"). This provides an appropriate means to ensure DNR is fulfilling its trust obligations without elevating the authority of the local government over that of the state trustee. Simply permitting a local government to condemn school trust lands over DNR's objection, however, would be inconsistent with DNR's trust obligations set forth in the Federal Enabling Act, the Washington Constitution and this Court's authority.

Here, the PUD does not argue either that DNR's objection is inconsistent with its trust obligations or that DNR's objection is arbitrary

and capricious. Rather, the PUD is arguing a bald right to condemn despite DNR's objection, period.

VI. CONCLUSION

This Court should hold that the state school trust lands at issue in this case are exempt from condemnation by a local PUD given DNR's active use of these lands. Permitting a local government to assert a superior right to these lands through condemnation is contrary to the principles articulated throughout decades of this Court's precedent that protects lands the state is actively using from local condemnation. It would also impede DNR's ability to fulfill its fiduciary obligations to trust beneficiaries to manage trust lands for their sole benefit. Establishing bright line limits on the authority of local governments to condemn state lands is necessary to ensure that the corpus of school trust lands remains intact for future generations. Accordingly, DNR respectfully requests that the Court hold that the PUD has no authority to condemn the school trust lands at issue.

RESPECTFULLY SUBMITTED this 12th day of December, 2013.

PACIFICA LAW GROUP LLP

By */s/ Paul J. Lawrence*

Paul J. Lawrence, WSBA #13557
Sarah C. Johnson, WSBA #34529
Kymberly K. Evanson, WSBA #39973

Special Assistant Attorneys General for
Appellants State of Washington and
Peter Goldmark

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SUPREME COURT OF THE
STATE OF WASHINGTON

PUBLIC UTILITY DISTRICT NO.
1 OF OKANOGAN COUNTY, a
municipal corporation,

No. 88949-0

Respondent/Cross-
Appellant,

DECLARATION OF SERVICE

v.

STATE OF WASHINGTON,
PETER GOLDMARK,
Commissioner of Public Lands, and
CONSERVATION NORTHWEST,
a non-profit corporation,

Appellants/Cross-
Respondents,

The undersigned declares that on the 12th day of December, 2013,

I caused to be served:

1. Appellants State of Washington and Peter Goldmark's
Supplemental Brief; and
2. Declaration of Service

as follows:

DECLARATION OF
SERVICE - 1

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245.1700
FACSIMILE: (206) 245.17500

ATTORNEYS FOR RESPONDENT/CROSS-APPELLANT

Michael D. Howe X via first class mail
Law Office of Michael D. Howe X via email
10 Valley View Park Drive
Omak, WA 98841
EMAIL: mhowe@ncidata.com

P. Stephen DiJulio X via first class mail
Michael S. Schechter X via email
Adrian Urquhart Winder
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299
EMAIL: DiJup@foster.com
EMAIL: schmi@foster.com
EMAIL: winda@foster.com

ATTORNEY FOR RESPONDENT DAN & REBA GEBBERS

Jay A. Johnson X via first class mail
Davis Arneil Law Firm X via email
617 Washington
PO Box 2136
Wenatchee, WA 98801
EMAIL: jay@dadkp.com

DECLARATION OF
SERVICE - 2

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245.1700
FACSIMILE: (206) 245.17500

**ATTORNEY FOR RESPONDENT DAN & REBA GEBBERS
and CHRISTINE DAVIS**

Richard W. Pierson X via first class mail
Williams & Williams PSC X via email
18806 Bothell Way NE
Bothell, WA 98011-1933
EMAIL: rwp@williamspsc.com

ATTORNEY FOR CONSERVATION NORTHWEST

David S. Mann X via first class mail
Gendler & Mann LLP X via email
1424 4th Avenue, Suite 715
Seattle, WA 98101-2217
EMAIL: mann@gendlermann.com

ATTORNEY FOR RESPONDENT TREVOR KELPMAN

Michael T. Zoretic X via first class mail
Stanislaw Ashbaugh X via email
701 Fifth Avenue, Suite 4400
Seattle, WA 98104-2217
EMAIL: mzoretic@lawasresults.com

RESPONDENT

William Weaver X via first class mail
2850 Sunny Grove Avenue
McKinleyville, CA 95519

DECLARATION OF
SERVICE - 3

PACIFICA LAW GROUP LLP
1191 SECOND AVENUE
SUITE 2100
SEATTLE, WASHINGTON 98101
TELEPHONE: (206) 245.1700
FACSIMILE: (206) 245.17500

I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Executed in Seattle, Washington this 12th day of December, 2013.


Dawn M. Taylor

DECLARATION OF
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To: Dawn Taylor
Subject: RE: Public Utility District No. 1 v. State et al. Cause No. 88949-0: Appellants State and Goldmark's Supplemental Brief

Received 12-12-13

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From: Dawn Taylor [mailto:Dawn.Taylor@pacificallawgroup.com]

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Subject: Public Utility District No. 1 v. State et al. Cause No. 88949-0: Appellants State and Goldmark's Supplemental Brief

Good afternoon.

On behalf of Paul J. Lawrence, Sarah C. Johnson, and Kimberly K. Evanson, attached please find Appellants State of Washington and Peter Goldmark's Supplemental Brief to be filed in the above-referenced matter.

Should you have any difficulty with the attachment, please do not hesitate to contact me.

Thank you.

Dawn M. Taylor
Assistant to Paul J. Lawrence;
Matthew J. Segal; Sarah C. Johnson
& Taki V. Flevaris



T 206.245.1700 D 206.245.1701 F 206.245.1751
1191 Second Avenue, Suite 2100, Seattle, WA 98101
dawn.taylor@pacificallawgroup.com

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