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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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**SUPPLEMENTAL BRIEF OF RESPONDENT  
PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY**

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## 1. INTRODUCTION

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) (codified at RCW 54.16.050) (emphasis added).<sup>1</sup> This condemnation authority is further confirmed by the Legislature in easement statutes, which expressly reserve the right of local governments such as public utility districts to condemn easements over state lands administered by DNR. RCW 79.36.580.<sup>2</sup> No party has directly challenged the constitutionality or validity of these laws. And, for more than a century, this Court has permitted the condemnation of school trust lands. *Roberts v. City of Seattle*, 63 Wash. 573, 575-76, 116 P.2d 25 (1911); *accord City of Seattle v. State*, 54 Wn.2d 139, 147, 338 P.2d 126 (1959).

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<sup>1</sup> A copy of the session laws can be found at CP 70-82 and is attached as Appendix A to the PUD's Respondent's Brief on Statutory Condemnation Authority ("PUD Resp. Br."). The legislation creating public utility districts was initially passed by voters as the State's first Initiative to the Legislature in 1930. CP 393-417 (Initiative to the Legislature No. 1) (title page and relevant excerpts (§§ 6, 11) attached hereto as Appendix A). It was then approved by the Legislature during its 1931 session. The law therefore evinces the intent of the people and the Legislature.

<sup>2</sup> A copy is attached hereto as Appendix B.

Consistent with this express statutory authority, longstanding Supreme Court precedent, and the undisputed facts of this case, Division III of the Court of Appeals unanimously affirmed the Okanogan PUD's authority to condemn easements over the school trust lands at issue for the PUD's Methow Transmission Project. *Pub. Util. Dist. No. 1 of Okanogan County v. State*, 174 Wn. App. 793, 301 P.3d 472 (2013). This Project has been subjected to considerable delay and expense to the citizens of Okanogan County and the Methow Valley.<sup>3</sup>

The State's lands here are not devoted to or reserved for a particular use by law or dedicated to a public use. *Id.* at 802-07. To the contrary, the lands are subject to sale, subject to easements, and subject to multiple uses. *Id.* at 797-98, 805-07. Moreover, no party disputed the PUD's evidence and argument before the trial court that its easements are compatible with any livestock grazing on those lands. *Id.* at 808; *see also id.* at 799 (describing evidence before the trial court). Condemnation of these lands is therefore permitted. *See City of Tacoma v. State*, 121 Wash. 450, 453, 209 P. 700 (1922).

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<sup>3</sup> After extensive planning, review, and public comment, the Project's environmental review and route selection were upheld by the Court of Appeals five years ago. *Gebbers v. Okanogan County PUD No. 1*, 144 Wn. App. 371, 183 P.3d 324, *review denied*, 165 Wn.2d 1004 (2008). This condemnation action has now been pending for more than four years. CP 610-41; *see also* PUD's Answer To Petition For Review 1 n.1. A chronology of key events is attached as Appendix A to the PUD's Answer To Petition For Review.

The State and the Commissioner of Public Lands (collectively, “DNR”) requested this Court’s review. The PUD requested cross-review of the Court of Appeals’ failure to address Conservation Northwest’s erroneous intervention into this *in rem* action. This Court accepted review on November 7, 2013.

The PUD relies on the authorities, arguments, and undisputed facts previously presented in its briefing to the Court of Appeals and this Court, and will not belabor those points here. This supplemental brief is intended only to provide clarification and additional authority as to certain arguments asserted by DNR and Conservation Northwest<sup>4</sup> regarding the Legislature’s grant of condemnation authority to the PUD.

## **2. ARGUMENT**

The PUD’s condemnation of easements in this case is expressly authorized by state statute and longstanding Supreme Court precedent. Nevertheless, DNR asserts that the Commissioner of Public Lands should be the ultimate arbiter of the PUD’s authority.<sup>5</sup> In doing so, DNR asks this Court to ignore the Legislature’s express grant of authority and the reservation of that authority in the State’s own land management statutes

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<sup>4</sup> For purposes of this supplemental brief, DNR and Conservation Northwest will be referred to collectively as “DNR.”

<sup>5</sup> *E.g.*, Appellants State Of Washington And Peter Goldmark’s Opening Brief (“DNR’s Opening Br.”) 29-33.

that govern DNR. It asks this Court to legislate. That is not the function of the courts. *See Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).<sup>6</sup> DNR's policy arguments are for the Legislature.

**2.1. It Is The Legislature's Prerogative To Authorize Condemnation Of School Lands By A Public Utility District.**

DNR admits that the Legislature determines the condemnation authority local governments possess, if any, and the state lands to which such authority applies, if any.<sup>7</sup> Here, the Legislature (and the people by initiative) authorized public utility districts to condemn school trust lands—and easements over such lands—for transmission lines. RCW 54.16.050.

That school trust lands are federally granted lands does not invalidate a statute authorizing their condemnation. DNR's assertion to the contrary is wrong.<sup>8</sup> Such an argument was expressly considered, and rejected, in *Roberts*:

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<sup>6</sup> "The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."

<sup>7</sup> *E.g.*, Petition For Review 17. In fact, several local governments do not have authority to condemn state or school lands. *E.g.*, RCW 8.08.010 (counties); RCW 35.61.130 (metropolitan park districts); RCW 52.12.041 (fire protection districts); *see also* RCW 89.08.220(5) (conservation districts have no eminent domain authority).

<sup>8</sup> *E.g.*, Appellants State Of Washington And Peter Goldmark's Reply Brief 5 & n.2. While DNR cites to *Island County v. State* for the proposition that the judiciary must ultimately determine constitutionality, it notably omits the presumption of

**It is argued that the act in question is unconstitutional, because it provides for the taking of lands granted to the state for school purposes.** Section 1 of the act provides that certain cities are 'authorized and empowered to condemn land and property, including state, county, and school lands and property, for streets, avenues, alleys,' etc. **We find no provision of the enabling act or of the Constitution which provides that school lands shall not be sold.** But section 1 of article 16 of the Constitution . . . by inference at least, authorizes the sale of school lands by the state. The land taken was for a public street, and it was sold at a price exceeding \$10,000 per acre, which was far above the minimum price fixed at which the state might sell such lands. **The condemnation had all the elements of a public sale. The statute is clearly not unconstitutional upon the points presented.**

63 Wash. at 575 (internal citations omitted) (emphasis added).

*Skamania County v. State* does not dictate a different result. The *Skamania* court invalidated as unconstitutional the Forest Products Industry Recovery Act, which had "direct tangible benefits to the contract purchasers, at the expense of the trust beneficiaries . . . . In short, the Act released over \$90 million in contract rights . . . and the state received very little in return." *Skamania County v. State*, 102 Wn.2d 127, 136, 685 P.2d 576 (1984). In contrast, the condemnation here, as in *Roberts*, is effectively a proper public sale, with the trust beneficiaries required by law to receive as just compensation the fair market value of the property

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constitutionality and the "high" burden placed on DNR to prove beyond a reasonable doubt that a statute is unconstitutional. 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998). Even if argued, which it has not in any briefing in this case, DNR has not met this "demanding standard of review." *Id.* at 147.

interest acquired. *See, e.g., Chelan Elec. Co. v. Perry*, 148 Wash. 353, 358, 268 P. 1040 (1928) (“Just compensation under our decisions means generally that amount which fairly represents the market value of the thing taken, having due regard to the uses for which the property is suitable.”). The PUD has no doubt that DNR, through the Commissioner, will vigorously litigate the issue of just compensation to ensure the trust beneficiaries receive just compensation for the PUD’s acquisition.

Moreover, no party has provided any authority that the Legislature cannot authorize condemnation of school trust lands as part of the Legislature’s (not DNR’s) authority for overall management of trust land policy. As the Court of Appeals correctly explained, even public trust lands are “subject to statutory controls and authority.”<sup>9</sup> *Pub. Util. Dist. No. 1 of Okanogan County*, 174 Wn. App. at 806.

**2.2. Reservation From Sale Is Not The Sole Manner In Which Condemnation Can Be Precluded.**

DNR wrongly interprets the Court of Appeals’ decision, and the extensive authority it relies upon, to mean that any state land not reserved

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<sup>9</sup> Indeed, the Legislature regulates public trust lands in many contexts. *See, e.g.*, chapters 79.105 and 79.125 RCW (regulating use, lease, and sale of state aquatic lands, including shorelands and tidelands); chapter 90.58 RCW (Shoreline Management Act). The Commissioner of Public Lands, on the other hand, has only that authority which is specifically granted by the Legislature. Const. art. III, § 23 (“The commissioner of public lands shall perform such duties and receive such compensation as the legislature may direct.”).

from sale can always be condemned. That is not what the PUD argues or what the Court of Appeals held.

DNR's argument may be distilled to this: as an active manager of trust lands, and when such lands are leased, these lands are exempt from condemnation. Yet, this Court has clearly required more before it will find that lands are reserved for a particular use by law or dedicated.<sup>10</sup> Indeed, lands that are "devoted to or reserved for a particular use by law" are not "state lands" under the Public Lands Act. RCW 79.02.010(14).<sup>11</sup> DNR's interpretation strips these terms of all practical meaning and would render all school lands exempt from condemnation — an absurd result under the current statutory scheme that specifically grants public utility districts (and other local governments) authority to condemn state and school lands.<sup>12</sup> And, if all school lands are, in fact, devoted to or reserved for a particular use by law as DNR argues, then the PUD's authority to condemn such lands must be necessarily implied from the PUD condemnation statute, which was passed after the Public Lands Act. Laws

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<sup>10</sup> *Pub. Util. Dist. No. 1 of Okanogan County*, 174 Wn. App. at 803 (citing cases); PUD's Resp. Br. 27-33. DNR cannot credibly dispute that reservation from sale has been critical in these cases. See, e.g., *Fransen v. Bd. of Natural Res.*, 66 Wn.2d 672, 673, 404 P.2d 432 (1965); *City of Seattle*, 54 Wn.2d at 147; *State v. Super. Ct. for Jefferson County*, 91 Wash. 454, 455-56, 459, 157 P. 1097 (1916).

<sup>11</sup> *Cf. Jefferson County*, 91 Wash. at 459 (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").

<sup>12</sup> PUD's Resp. Br. 18-19, 34-36.

of 1927, ch. 255, § 1 (Public Lands Act); Laws of 1931, ch. 1, § 6 (PUD authority).

The court's conclusion that the school trust lands here do not satisfy these standards does not mean that land **must** be reserved from sale to prevent its condemnation. Nor does it mean that land that is actually being used for a public purpose is automatically subject to condemnation even if it has not otherwise been formally reserved for a particular use or formally dedicated.<sup>13</sup> Rather, the compatibility of the existing and proposed uses is considered, as in *City of Tacoma*.

In *City of Tacoma*, the city sought to condemn state land used as a fish hatchery. 121 Wash. at 451, 453. In determining that condemnation was permitted under the facts, the court nevertheless made clear that destruction or substantial impairment of the land's use as a fish hatchery would have precluded condemnation:

**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.**

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<sup>13</sup> DNR uses capitol building lands as an example. The PUD notes that (1) capitol building lands can be subject to condemnation as held by *City of Seattle*, 54 Wn.2d at 147; and (2) the condemnation of any particular capitol building lands would, of course, depend on the particular facts of the case and may involve dedicated or reserved lands or be subject to a compatibility analysis. However, that is not the case presented to this Court.

*Id.* at 453 (emphasis added). The court did not observe whether this particular state land was reserved from sale or otherwise formally dedicated to a public use. Whether or not so reserved or dedicated, however, the actual use of the land as a fish hatchery would have been sufficient to prevent condemnation if that use was incompatible with the city's proposed use. *Id.*

Thus, while reservation from sale is indeed a critical component in determining whether certain school or state land is considered "reserved for a particular use by law" or "dedicated to a public use," the PUD has not argued – and the Court of Appeals did not hold – that reservation from sale is the sole manner by which condemnation could be avoided.<sup>14</sup> DNR's statements about the sweeping effects of the court's decision are hyperbole at best, and an effort to mislead the Court at worst.

**2.3. The Concept Of Compatible Uses Is Not New Or Unique To Washington.**

The idea that a property subject to an existing public use can be condemned for another public use that is compatible with the existing use is not a new concept, as DNR suggests. To the contrary, this principle is discussed in treatises on condemnation authority and has been applied

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<sup>14</sup> And, the PUD is not seeking to condemn a fee interest in these lands; it seeks to condemn easements, which indisputably can be granted over school trust lands. Ch. 79.36 RCW; *see* RCW 79.36.580 (reserving the PUD's right to condemn easements over state lands).

regularly in Washington and in other states. *See, e.g.*, 1A-2 Nichols on Eminent Domain § 2.17[8] (Matthew Bender, 3d ed.) (condemnation of property already devoted to a public use permitted where the existing use will not be “materially impaired or destroyed”); 3 John Martinez, Local Government Law § 21:27 (2d ed. 2012) (condemnation permitted “where the proposed use is consistent with and will not materially impair the prior public use”); 29A C.J.S. Eminent Domain §§ 53, 54 (same). And, most significantly, this Court has specifically recognized or applied this principle to condemnations of state land. *City of Tacoma*, 121 Wash. at 453; *Roberts*, 63 Wash. at 576.

The following excerpt from Nichols on Eminent Domain is instructive:

In view of the fact that the general rule denying the right to take property already devoted to a public use<sup>[15]</sup> is predicated on the theory that the existing use is thereby impaired or destroyed, the fact that such use will not be materially impaired or destroyed is sufficient to take the case out of the general rule. If the physical conditions are such that both uses may exist simultaneously it is immaterial that some inconvenience may be caused to the original user.

This exception to the public use doctrine has been called “compatible use,” or “consistent use.” The compatible or consistent use exception will apply even if the new use

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<sup>15</sup> The “general rule” being that the condemnation of such lands is not permitted unless authorized expressly or by necessary implication. 1A-2 Nichols on Eminent Domain § 2.17[1].

causes the previous user some inconvenience, so long as the two uses can stand together. Under this exception, general condemnation authority is adequate to permit a municipality to condemn property of the previous public user. Therefore, it has been stated that the public use doctrine does not even apply when the proposed use will not destroy the existing use of the property or interfere with the prior condemnor's use to such an extent as to be tantamount to destruction.

A particular public easement may be imposed on land already subject to a different public easement without express legislative authority if the exercise of the second easement will not interfere with the exercise of the first, or if the amount of land taken is not enough to impair the use of the remainder for the original purpose. . . . Thus, a taking of the right to maintain telegraph poles and wires along a railroad right of way or a turnpike may be effected without express legislative authority.

1A-2 Nichols on Eminent Domain § 2.17[8] (citing, e.g., *City of Tacoma* and *Roberts*).

The trial court's and Court of Appeals' application of the standard of compatible uses here was proper. There is no factual record upon which DNR can claim incompatibility of use, and condemnation is permissible under the Legislature's express grant of statutory authority, even if the lands are currently devoted to a public use. *City of Tacoma*, 121 Wash. at 453.

### 3. CONCLUSION

DNR argues policy, not the law. But, that policy was fixed in 1930 when the people of the State determined that the priority of rural electric service demanded access to public lands. That policy is of no great surprise in light of the extent of public lands in this State.

The law is clear. DNR may be concerned with opening the “floodgates” for condemnation cases initiated by local governments against state lands, although it can point to no instance of such “flooding.” The people of the State and the Legislature have determined that DNR’s easement management does not override a municipal entity’s condemnation authority. Initiative to the Legislature No. 1 (1930); RCW 54.16.050; RCW 79.36.580 (easement process not exclusive and does not affect condemnation powers). The Court of Appeals’ decision should be affirmed as to the PUD’s authority to condemn the school lands for the Methow Transmission Project.

However, for the reasons set forth in the PUD’s opening and reply briefs on intervention and in its request for cross-review, this Court should reverse the trial court’s decision to allow Conservation Northwest to intervene in this limited, *in rem* condemnation proceeding. The Court of Appeals improperly declined to address this issue on appeal, even though it considered and addressed the arguments of Conservation Northwest on

the PUD's condemnation authority. The matters presented are largely of first impression in Washington and require clarification from this Court.

RESPECTFULLY SUBMITTED this 12th day of December, 2013.

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# Appendix A

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REGULAR PUBLICATION  
State Documents

STATE OF WASHINGTON

**A PAMPHLET**

**CONTAINING**

**Copy of a Measure "Proposed by Initiative Petition"  
and a Measure "Proposed to the Legislature and  
Referred to the People," and Amendments  
to the Constitution Proposed by  
the Legislature**

**Including Initiative by Petition to the People No. 57;  
Initiative to the Legislature No. 1, and submitting to the  
People the Question of Amending Section 23 of Article  
II of the State Constitution, Relating to Compensation  
to be Paid Members of the Legislature; and of Amend-  
ing Section 15 of Article II of the State Constitution,  
Relating to Filling Vacancies in the Legislature; and of  
Amending Article VII of the State Constitution, Relat-  
ing to Classification of Property for Purposes of Revenue  
and Taxation.**

To be submitted to the Legal Voters of the State  
of Washington for Their Approval or Rejection  
at the **GENERAL ELECTION** to be held on  
**Tuesday, November 4, 1930**

Compiled and Issued by

**J. GRANT HINKLE, Secretary of State**

Under and by Authority of Chapter 30,

Laws of 1917



OLYMPIA, WASH.

JAY THOMAS, PUBLIC PRINTER

1930

# Initiative to the Legislature No. 1

## BALLOT TITLE

"AN ACT authorizing the establishment of public utility districts; providing for the construction, purchase, condemnation, acquisition, regulation, maintenance and operation thereby of plants, properties and facilities for the development and distribution of water and electricity for all purposes; authorizing such districts to levy taxes and to create local assessment districts for the accomplishment of said purposes, and defining the powers and duties of such public utility districts and of certain officers in connection therewith."

AN ACT relating to and authorizing the establishment of public utility districts, and the consolidation thereof and annexation thereto; providing for the construction, purchase, condemnation and purchase, acquisition, maintenance, conducting, operation, development and regulation by such districts of certain kinds of public utilities; providing methods of payment therefor; and providing for the creation of local assessment districts by, and defining, prescribing and regulating the powers, duties and government of, such utility districts.

*Be it enacted by the Legislature of the State of Washington:*

SECTION 1. The purpose of this act is to authorize the establishment of public utility districts to conserve the water and power resources of the State of Washington for the benefit of the people thereof, and to supply public utility service, including water and electricity for all uses.

SEC. 2. Municipal corporations, to be known as public utility districts, are hereby authorized for the purposes of this act and may be established within the limits of the State of Washington, as provided herein.

SEC. 3. At any general election the Board of County Commissioners of any county in this state may, or on petition of ten (10%) per cent of the qualified electors of such county, based on the total vote cast in the last general

county election, shall, by resolution, submit to the voters of such county the proposition of creating a public utility district which shall be coextensive with the limits of such county as now or hereafter established. Such petition shall be filed with the County Auditor, who shall within fifteen days examine the signatures thereof and certify to the sufficiency or insufficiency thereof, and for such purpose the County Auditor shall have access to all registration books in the possession of election officers within such county. If such petition be found to be insufficient, it shall be returned to the persons filing the same, who may amend or add names thereto for ten days, when the same shall be returned to the County Auditor, who shall have an additional fifteen days to examine the same and attach his certificate thereto. No person having signed such petition shall be allowed to withdraw his name therefrom after the filing of the same with the County Auditor. Whenever such petition shall be certified to as sufficient, the County Auditor shall forthwith transmit the same, together with his certificate of sufficiency attached thereto, to the Board of County Commissioners, who shall thereupon immediately transmit such proposition to the Election Board of such county, and it shall be the duty of such county election board to submit such proposition to the voters at the next general election. The notice of the election shall state the boundaries of the proposed public utility district and the object of such election.

## *Initiative to the Legislature No. 1*

held under the provisions of this act for the time and in the manner and form provided by law for city, school district and port district elections. Whenever in the judgment of the election board of the county an emergency exists, and such board is requested so to do by a resolution of the public utility district commission, it may call a special election at any time in such public utility district, and at such special election said board may combine, unite or divide precincts for the purpose of holding such special election, and every such special election so called shall be conducted and notice thereof given in the manner provided by law.

The chairman of the board of county commissioners, the county auditor and the prosecuting attorney of the county in which the election is held shall constitute an election board for all elections held under the provisions of this act; and it shall be the duty of such board to provide polling places for holding elections under this act, to appoint the election officers, to provide their compensation, to provide ballot boxes, and ballots or voting machines, poll books and tally sheets, and deliver them to the election officers at the polling places, to publish and post notices of calling such elections in the manner provided by law, and to apportion to the public utility district its share of the expense of holding such election.

The election officers appointed by the election board of the county shall conduct such elections and shall receive and deposit ballots cast thereat in a separate ballot box, and shall count said ballots and make returns thereof to the election board of the county, which board shall constitute a canvassing board for all elections held under the provisions of this act. The manner of conducting and voting at elections under this act, opening and closing of polls, keeping of poll lists, canvassing the votes, declaring the result, and certifying the returns, shall be the same as provided by the general election laws governing the election of state and county officers, except as otherwise provided in this act.

The public utility district commission shall certify to the election board a list of offices to be filled at any election to be held under the provisions

of this act, and such commission, if it desires to submit to the voters of such public utility district any proposition for their approval or adoption, or rejection, at any election held under the provisions of this act, shall require the secretary of such commission to certify the same to the election board at the time and in the manner and form now provided by law for certifying propositions to said board by the governing boards of cities, towns and port districts.

Sec. 6. All public utility districts organized under the provisions of this act shall have power:

(a) To make a survey of hydro-electric power, irrigation and domestic water supply resources within or without the district, and to compile comprehensive maps and plans showing the territory that can be most economically served by the various resources and utilities, the natural order in which they should be developed, and how they may be joined and co-ordinated to make a complete and systematic whole;

(b) To construct, condemn and purchase, purchase, acquire, lease, add to, maintain, operate, develop and regulate all lands, property, property rights, water, water rights, dams, ditches, flumes, aqueducts, pipes and pipe lines, water power, leases, easements, rights of way, franchises, plants, plant facilities and systems for generating electric energy by water power, steam or other methods, plant, plant facilities and systems for developing, conserving and distributing water for domestic use and irrigation, buildings, structures, poles and pole lines, and cables and conduits and any and all other facilities, and to exercise the right of eminent domain to effectuate the foregoing purposes or for the acquisition and damaging of the same or property of any kind appurtenant thereto, and for the purpose of acquiring the right to make physical connection with plants and plant facilities of any and all persons, corporations and municipalities, and such right of eminent domain shall be exercised and instituted pursuant to resolution of the commission and conducted in the same manner and by the same procedure as is or may be provided by law for the exercise of the power of eminent domain by incor-

## Initiative to the Legislature No. 1

porated cities and towns of the State of Washington in the acquisition of like property and property rights. It shall be no defense to a condemnation proceeding hereunder that a portion of the electric current generated or sold by such public utility district will be applied to private purposes provided the principal uses intended are public: *Provided*, That no public utility owned by a city or town shall be condemned hereunder, and none shall be purchased without submission of the question to the voters of the utility district. In any condemnation proceeding under this act, the court shall submit to the jury the values placed upon such property by the county assessor or other taxing authority, for taxation purposes, and in respect to property, plants and facilities of persons and corporations using public highways for the furnishing of public service without franchises, shall consider in determining the value thereof the fact that such property, plants and facilities are subject to be removed from such highways by reason of being so operated without such franchises.

(c) To construct, purchase, condemn and purchase, acquire, add to, maintain, conduct and operate water works and irrigation plants and systems, within or without its limits, for the purpose of furnishing such public utility district, and the inhabitants thereof, and any other persons, including public and private corporations within or without its limits with an ample supply of water for all uses and purposes, public and private, including water power, domestic use and irrigation, with full and exclusive authority to sell and regulate and control the use, distribution and price thereof.

(d) To purchase, within or without its limits, electric current for sale and distribution within or without its limits, and to construct, condemn and purchase, purchase, acquire, add to, maintain, conduct and operate works, plants, transmission and distribution lines and facilities for generating electric current, operated either by water power, steam or other methods, within or without its limits, for the purpose of furnishing said public utility district, and the inhabitants thereof and any other persons, including public and private corporations, within or without its limits, with electric cur-

rent for all uses, with full and exclusive authority to sell and regulate and control the use, distribution, rates, service, charges and price thereof free from the jurisdiction and control of the director of public works and division of public utilities, in all things, together with the right to purchase, handle, sell or lease motors, lamps, transformers and any and all other kinds of equipment and accessories of every nature and kind whatsoever necessary and convenient for the use, distribution and sale thereof: *Provided*, That the commission shall not supply water to a privately owned utility for the production of electric energy, and may supply, directly or indirectly, to privately owned public utilities which sell electric energy or water to the public, any of the surplus electric energy or water under its control, and contracts therefor shall not extend over a longer period than three (3) years: *Provided*, That it must at all times first make adequate provision for the needs of the district, both actual and prospective.

(e) And for the purposes aforesaid it shall be lawful for any public utility district so organized to take, condemn and purchase, purchase, and acquire any and all public and private property, franchises and property rights, including state, county and school lands, and property and littoral and water rights, for any of the purposes aforesaid, and for railroads, tunnels, pipe lines, aqueducts, transmission lines, and any and all other facilities necessary or convenient, and, in connection with the construction, maintenance or operation, of any such utility or utilities, to acquire by purchase or condemnation and purchase the right to divert, take, retain and impound and use water from or in any lake or watercourse, regardless of whether such lake or watercourse or the water therein be public or private, navigable or non-navigable, or held, owned or used by the state, or any subdivision thereof, or by any person or corporation for any public or private use, proprietary or governmental, or any under-flowing water within the state; and such public utility district is hereby authorized and empowered to erect and build, within or without its limits, dams or other works across any river or watercourse, or across or

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at the outlet of any lake, up to and above high water mark; and, for the purpose of constructing or laying aqueducts or pipe lines, dams or waterworks or other necessary structures in storing, retaining and distributing water as above provided, or for any of the purposes provided for by this act, such public utility district shall have the right to occupy and use the beds and shores up to the high water mark of any such lake, river or watercourse and to acquire by purchase or by condemnation and purchase, or otherwise, any water, water rights, easements or privileges named in this act or necessary for any of said purposes, and any such public utility district shall have the right to acquire by purchase or condemnation and purchase, or otherwise, any lands, property or privileges necessary to be had to protect the water supply of such public utility district, from pollution: *Provided*, That should private property be necessary for any such purposes, or for storing water above high water mark, such public utility district may condemn and purchase or purchase and acquire such private property. Such public utility district shall have the power to build and maintain inter-tie lines connecting its power plant and distribution system with the power plant and distribution system owned by any other public utility district, or municipal corporation, or to connect with the power plants and distribution systems owned by any municipal corporation in the district, and from any such inter-tie line to sell electric energy to any individual, or public utility district, or any city or town, or other corporations, public or private, and, by means of transmission or pole lines, to conduct electric energy from the place of production to the point of distribution, and to construct and lay said aqueducts, pipe or pole lines, and transmission lines along and upon public highways, roads and streets, and to condemn and purchase, purchase or acquire, lands, franchises and rights of way necessary for the same.

(f) To contract indebtedness or borrow money for corporate purposes on the credit of the corporation or the revenues of the public utilities thereof, and to issue general obligation or utility bonds therefor, bearing interest at a rate not exceeding six per cent

per annum, payable semi-annually, said bonds not to be sold for less than par and accrued interest; to purchase with surplus funds, local utility district bonds of districts created by the commission and sell the same giving preference to residents of the district, and to create a revolving fund to insure the prompt payment of all local utility district bonds.

(g) To raise revenue by the levy of an annual tax on all taxable property within such public utility district not exceeding two mills in any one year, exclusive of interest and redemption for general obligation bonds. The Commission shall prepare a proposed budget of the contemplated financial transactions for the ensuing year and file the same in the records of the Commission on or before the first Monday in September. Notice of the filing of said proposed budget and the date and place of hearing on the same shall be published for at least two consecutive weeks in a newspaper printed and of general circulation in said county. On the first Monday in October, the Commission shall hold a public hearing on said proposed budget at which any taxpayer may appear and be heard against the whole or any part of the proposed budget. Upon the conclusion of said hearing, the Commission shall, by resolution, adopt the budget as finally determined, and fix the final amount of expenditures for the ensuing year. Taxes levied by the Commission shall be certified to and collected by the proper county officer of the county in which such public utility district is located in the same manner as is or may be provided by law for the certification and collection of Port District taxes. The Commission is authorized, prior to the receipt of taxes raised by levy, to borrow money or issue warrants of the district in anticipation of the revenue to be derived by such district from the levy of taxes for the purpose of such district, and such warrants shall be redeemed from the first money available from such taxes when collected, and such warrants shall not exceed the anticipated revenues of one year, and shall bear interest at a rate of not to exceed six per cent per annum.

(h) To enter into any contract with the United States Government, or any state, municipality or other utility

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district, or any department of those governing bodies, for carrying out any of the powers authorized by this act.

(i) To acquire by gift, devise, bequest, lease or purchase, real and personal property necessary or convenient for the purposes of the district or any local district therein.

(j) To make contracts, employ engineers, attorneys and other technical or professional assistance; to print and publish information or literature and to do all other things necessary to carry out the provisions of this act.

The public utility district commission shall appoint a manager, who shall be appointed for an indefinite time and be removable at the will of the Commission. Appointments and removals shall be by resolution, introduced at a regular meeting and adopted at a subsequent regular meeting by a majority vote. He shall receive such salary as the Commission shall fix by resolution.

The manager shall be the chief administrative officer of the public utility district, and shall have control of administrative functions of the district, and shall be responsible to the Commission for the efficient administration of all the affairs of the district placed in his charge. He shall be an experienced executive with administrative ability. In case of the absence or temporary disability of the manager, he shall, with the approval of the president of the Commission, designate some competent person as acting manager.

The manager shall be entitled to attend all meetings of the Commission and its committees, and to take part in the discussion of any matters pertaining to the duties of his department, but shall have no vote.

The Public utility district Manager shall have power, and it shall be his duty:

To carry out the orders of the Commission, and to see that all the laws of the state pertaining to matters within the functions of his department are duly enforced.

To keep the Commission fully advised as to the financial condition and needs of the district. To prepare, each year, an estimate for the ensuing fiscal year of the probable expenses of his department, and to recommend to the

Commission what development work should be undertaken, and what extensions and additions, if any, should be made, during the ensuing fiscal year, with an estimate of the costs of such development work, extensions and additions. To certify to the Commission all bills, allowances and payrolls, including claims due contractors of public works. To recommend to the Commission salaries of the employees of his office, and a scale of salaries or wages to be paid for the different classes of service required by the district. To hire and discharge clerks, laborers and other employes under his direction. To perform such other duties as may be imposed upon him by resolution of the Commission. It shall be unlawful for him to make any contribution of money in aid of or in opposition to the election of any candidate for public utility commissioner or to advocate or oppose any such election.

(k) To sue and be sued in any court of competent jurisdiction: *Provided*, That all suits against the public utility district shall be brought in the county in which the public utility district is located. No suit for damages shall be maintained against such public utility district except on the basis of a claim therefor filed with the Commission of such district complying in all respects with the terms and requirements for claims for damages filed pursuant to general law against cities of the second class.

(l) By resolution to establish and define the boundaries of local assessment districts to be known as Local Utility District No. .... for the distribution, under the general supervision and control of the Commission, of water for domestic use and (or) irrigation and (or) electric energy, and in like manner to provide for the purchasing, or otherwise acquiring, or constructing and equipping distribution systems for said purposes and for extensions and betterments thereof, and to levy and collect in accordance with the special benefits conferred thereon, special assessments and re-assessments on property specially benefited thereby, for paying the cost and expense of the same, or any portions thereof, as herein provided, and to issue local improvement bonds and (or) warrants to be repaid wholly or

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in part by collection of local improvement assessments.

The Commission shall, by resolution, establish the method of procedure in all matters relating to local utility districts. Any public utility district may determine by resolution what work shall be done or improvements made at the expense, in whole or in part of the property specially benefited thereby; and to adopt and provide the manner, machinery and proceedings in any way relating to the making and collecting assessments therefor in pursuance of this act. Except as herein otherwise provided, or as may hereafter be set forth by resolution, all matters and proceedings relating to the local utility district, the levying and collection of assessments, the issuance and redemption of local improvement warrants and bonds, and the enforcement of local assessment liens hereunder, shall be governed, as nearly as may be, by the laws relating to local improvements for cities of the first class: *Provided*, That no protest against a local utility district improvement shall be received by the Commission after twelve o'clock noon of the day set for hearing.

Any improvement authorized by this act may be ordered only by resolution of the Commission either upon petition or resolution therefor. Whenever a petition, signed by ten per cent of the owners of land in the district to be therein described, shall be filed with the Commission, asking that the plan or improvement therein set forth be adopted and ordered, and defining the boundaries of a local improvement district to be assessed in whole or in part to pay the cost thereof, it shall be the duty of the Commission to fix the date of hearing on such petition, and give not less than two (2) weeks notice thereof by publication. The Commission may, in its discretion, deny such petition or order the improvement unless a majority of the owners of lands in said district shall file prior to 12:00 o'clock noon of the day of said hearing with Secretary thereof a petition protesting against said improvement; and if the Commission shall order the improvement, then it may alter the boundaries of such proposed district and prepare and adopt detail plans of any such local improvement, declare the estimated cost thereof, what pro-

portion of such cost shall be borne by such local improvement district, and what proportion of the cost, if any, shall be borne by the entire public utility district. Whenever such a petition signed by a majority of the landowners in such a proposed local improvement district shall be filed with the Commission, asking that the improvement therein described be ordered, the Commission shall forthwith fix a date for hearing on said petition, after which the Commission must, by resolution, order such improvement, and may alter the boundaries of such proposed district, prepare and adopt such improvement, prepare and adopt detail plans thereof, declare the estimated cost thereof, what proportion of such cost shall be borne by such proposed local improvement district, and what proportion of the cost, if any, shall be borne by the entire public utility district, and provide the general funds thereof to be applied thereto, if any, acquire all lands and other properties therefor, pay all damages caused thereby, and commence in the name of the public utility district such eminent domain proceedings and supplemental assessments or re-assessment proceedings to pay all eminent domain awards as may be necessary to entitle said district to proceed with such work, and shall thereafter proceed with such work, and shall make and file with the County Treasurer its roll levying special assessments in the amount to be paid by special assessment against the property situated within such local improvement district in proportion to the special benefits to be derived by the property in such local improvement district from such improvement. Before the approval of such roll, a notice shall be published ten (10) days stating that such roll is on file and open to inspection in the office of Secretary of the district, and fixing a time not less than fifteen (15) nor more than thirty (30) days from the date of the first publication of such notice, within which protests must be filed with Secretary of said district against any assessments shown thereon, and fixing a time when a hearing shall be held by said Commission on said protests. After such hearing the Commission may alter any and all assessments shown on such roll and may then, by resolution, approve the same,

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but if any assessment be raised, a new notice, similar to such first notice, shall be given, and a hearing had thereon, after which final approval of such roll may be made by the Commission. Any person feeling aggrieved by such assessments shall perfect an appeal to the Superior Court of such county within ten (10) days after such approval in the manner now provided by law for appeals from assessments levied by cities of the first class in this state. Engineering, office and other expenses necessary or incident to said improvement shall be borne by the public utility district: *Provided*, That where any municipal corporation included within such public utility district already owns or operates a utility of like character for which such assessments are levied hereunder, then all such engineering and other expenses mentioned above shall be borne by the local assessment district.

Whenever any improvement shall be ordered hereunder, payment for which shall be made in part from assessments against property specially benefited, not more than fifty per cent (50%) of the cost thereof shall ever be borne by the entire public utility district, nor shall any sum be contributed by it to any improvement acquired or constructed with or by any other body, exceed such amount, unless a majority of the electors of such district shall consent to or ratify the making of such expenditure.

(m) It is, and shall be lawful for any public utility district organized hereunder to sell and convey all the works, plants, systems, utilities and properties authorized by this act and owned by it after proceedings had as required by Sections 9512, 9513 and 9514 of Remington's Compiled Statutes of Washington: *Provided*, That three-fifths (3/5) of the voters voting for such sale, in lieu of a majority, shall be necessary. Public utility districts shall be held to be municipal corporations within the meaning of said sections and the commission of such public utility district shall be held to be the legislative body within the meaning of said sections, and the president and secretary of such district shall have the same powers and perform the same duties as the mayor and city clerk referred to in said sections,

and the resolutions of the public utility districts shall be held to mean ordinance within the meaning of said sections.

(n) The Commission of each public utility district may adopt general resolutions to carry out the purposes, objects and provisions of this act.

Sec. 7. Whenever the Commission shall deem it advisable that the public utility district purchase, purchase and condemn, acquire, or construct any such public utility, or make any additions or betterments thereto, or extensions thereof, the Commission shall provide therefor by resolution, which shall specify and adopt the system or plan proposed, and declare the estimated cost thereof, as near as may be, and specify whether general or utility indebtedness is to be incurred, the amount of such indebtedness, the amount of interest and the time in which all general bonds (if any) shall be paid, not to exceed thirty years. In the event the proposed general indebtedness to be incurred will bring the indebtedness of the public utility district to an amount exceeding one and one-half per cent (1½%) of the taxable property of the public utility district, the proposition of incurring such indebtedness and the proposed plan or system shall be submitted to the qualified electors of said public utility district for their assent at the next general election held in such public utility district.

Whenever the Commission (or a majority of the qualified voters of such public utility district, voting at said election, when it is necessary to submit the same to said voters) shall have adopted a system or plan for any such public utility, as aforesaid, and shall have authorized indebtedness therefor by a three-fifths vote of the qualified voters of such district, voting at said election, general or public utility bonds may be used as hereinafter provided. Said general bonds shall be serial in form and maturity and numbered from one upwards consecutively. The various annual maturities shall commence not later than the tenth year after the date of issue of such bonds. The resolution authorizing the issuance of the bonds shall fix the rate of interest the bonds shall bear, said interest not to exceed six per cent (6%), and the place and date of the payment of both

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district after proceedings had as required by sections 8909, 8910 and 8911, of Remington's Compiled Statutes of Washington, provided, that a ten (10) per cent petition shall be sufficient; and public utility districts shall be held to be municipal corporations within the meaning of said sections; and the Commission shall be held to be the legislative body of the public utility district as the term legislative body is used in said sections: *Provided*, That any such consideration shall in no wise affect or impair the title to any property owned or held by any such public utility district, or in trust therefor, or any debts, demands, liabilities or obligations existing in favor of or against either of the districts so consolidated, or any proceeding then pending: *Provided, further*, That no property within either of the former public utility districts shall ever be taxed to pay any of the indebtedness of either of the other such former districts.

The boundaries of any public utility district may be enlarged and new territory included therein, after proceedings had as required by section 8894 of Remington's Compiled Statutes of Washington: *Provided*, That a ten per cent (10%) petition shall be sufficient; and public utility districts shall be held to be municipal corporations within the meaning of said election, and the Commission shall be held to be the legislative body of the public utility district: *Provided*, That no property within such territory so annexed shall ever be taxed to pay any portion of any indebtedness of such public utility district contracted prior to or existing at the date of such annexation.

In all cases wherein public utility districts of less area than an entire county desire to be consolidated with a public utility district including an entire county, and in all cases where

it is desired to enlarge a public utility district including an entire county, by annexing a lesser area than an entire county, no election shall be required to be held in the district including an entire county.

Sec. 11. Adjudication of invalidity of any section, clause or part of a section of this act shall not impair or otherwise affect the validity of the act as a whole or any other part thereof.

The rule of strict construction shall have no application to this act, but the same shall be liberally construed, in order to carry out the purposes and objects for which this act is intended.

When this act comes in conflict with any provision, limitation or restriction in any other law, this act shall govern and control.

Sec. 12. This act shall not be deemed or construed to repeal or affect any existing act, or any part thereof, relating to the construction, operation and maintenance of public utilities by irrigation or water districts or other municipal corporations, but shall be supplemental thereto and concurrent therewith. No public utility district created hereunder shall include therein any municipal corporation, or any part thereof, where such municipal corporation already owns or operates all the utilities herein authorized: *Provided*, That in case it does not own or operate all such utilities it may be included within such public utility district for the purpose of establishing or operating therein such utilities as it does not own or operate: *Provided, further*, That no property situated within any irrigation or water districts or other municipal corporations shall ever be taxed or assessed to pay for any utility, or part thereof, of like character to any utility, owned or operated by such irrigation or water districts or other municipal corporations.

STATE OF WASHINGTON—ss.

Filed in office of Secretary of State October 25, 1928.

J. GRANT HINKLE, *Secretary of State*

Submitted to the Legislature January 21, 1929.

Rejected by the Legislature February 1, 1929.

# **Appendix B**

**RCW 79.36.580**

**Construction of foregoing sections.**

The foregoing sections relating to the acquiring of rights-of-way and overflow rights through, over and across lands belonging to the state, shall not be construed as exclusive or as affecting the right of municipal and public service corporations to acquire lands belonging to or under control of the state, or rights-of-way or other rights thereover, by condemnation proceedings.

[1927 c 255 § 103; RRS § 7797-103. Formerly RCW 79.01.412, 79.36.220.]

**Notes:**

Railroad rights-of-way: Chapter 81.52 RCW.

## OFFICE RECEPTIONIST, CLERK

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**From:** Debra Samuelson <SamuD@foster.com>  
**Sent:** Thursday, December 12, 2013 4:28 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Stephen DiJulio; Adrian Urquhart Winder; Mike Schechter; Susan Bannier  
**Subject:** Supreme Court No. 88949-0 - Public Utility District No. 1 of Okanogan County v. State of Washington, et al.  
**Attachments:** Supplemental Brief of Respondent Okanogan PUD.pdf; Declaration of Service of Supplemental Brief of Respondent PUD.pdf

Dear Deputy Clerk of Court,

Please find attached for filing with the court the *Supplemental Brief of Respondent Public Utility District No. 1 of Okanogan County*; 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); and Adrian U. Winder, (206) 447-8972, WSBA #38071, [winda@foster.com](mailto:winda@foster.com).

Thank you,

**Debra A. Samuelson**  
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No. 88949-0

RECEIVED BY E-MAIL

**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Respondent/Cross-Appellant,

v.

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

Appellants/Cross-Respondents.

DECLARATION OF SERVICE

The undersigned declares that on December 12, 2013, I caused to be served:

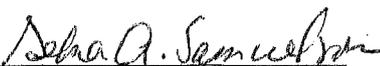
1. Supplemental Brief of Respondent Public Utility District No. 1 of Okanogan County; and this
2. Declaration of Service as follows:

Paul J. Lawrence Sarah C. Johnson Pacifica Law Group, LLP 1191 Second Ave., Suite 2100 Seattle, WA 98101 E-mail: <a href="mailto:paul.lawrence@pacificallawgroup.com">paul.lawrence@pacificallawgroup.com</a> <a href="mailto:sarah.johnson@pacificallawgroup.com">sarah.johnson@pacificallawgroup.com</a>	<input type="checkbox"/> via hand delivery <input checked="" type="checkbox"/> via first class mail, postage prepaid <input type="checkbox"/> via facsimile <input checked="" type="checkbox"/> via e-mail <input type="checkbox"/> via FedEx
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David S. Mann Gendler & Mann LLP 1424 4th Ave., Suite 715 Seattle, WA 98101-2217 E-Mail: <a href="mailto:mann@gendlermann.com">mann@gendlermann.com</a>	<input type="checkbox"/> via hand delivery <input checked="" type="checkbox"/> via first class mail, postage prepaid <input type="checkbox"/> via facsimile <input checked="" type="checkbox"/> via e-mail <input type="checkbox"/> via FedEx
Jay A. Johnson Davis Arneil Law Firm 617 Washington P.O. Box 2136 Wenatchee, WA 98801 E-Mail: <a href="mailto:jay@dadkp.com">jay@dadkp.com</a>	<input type="checkbox"/> via hand delivery <input checked="" type="checkbox"/> via first class mail, postage prepaid <input type="checkbox"/> via facsimile <input checked="" type="checkbox"/> via e-mail <input type="checkbox"/> via FedEx
Richard W. Pierson 18801 102 <sup>nd</sup> Avenue NE, Suite B Bothell, WA 98011 E-Mail: <a href="mailto:rwpwilliams@hotmail.com">rwpwilliams@hotmail.com</a>	<input type="checkbox"/> via hand delivery <input checked="" type="checkbox"/> via first class mail, postage prepaid <input type="checkbox"/> via facsimile <input checked="" type="checkbox"/> via e-mail <input type="checkbox"/> via FedEx
Michael T. Zoretic Ashbaugh Beal, LLP 701 Fifth Avenue, Suite 4400 Seattle, WA 98104 E-Mail: <a href="mailto:mzoretic@lawasresults.com">mzoretic@lawasresults.com</a>	<input type="checkbox"/> via hand delivery <input checked="" type="checkbox"/> via first class mail, postage prepaid <input type="checkbox"/> via facsimile <input checked="" type="checkbox"/> via e-mail <input type="checkbox"/> via FedEx

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 12<sup>th</sup> day of December, 2013.

  
Debra A. Samuelson

## OFFICE RECEPTIONIST, CLERK

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Thank you,

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