

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 94084-3

WASHINGTON STATE DEPARTMENT OF NATURAL RESOURCES,

Petitioner,

v.

POPE RESOURCES, LP and OPG PROPERTIES, LLC

Respondents.

AMICUS CURIAE BRIEF SUBMITTED BY
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I. IDENTITY AND INTERESTS OF *AMICUS CURIAE*

The Model Toxics Control Act (MTCA) (chapter 70.105D RCW) was passed as Initiative 97 in 1988. The Voters' Pamphlet statement in support of the initiative was authored by then State Senator (and future King County Superior Court judge) Janice Niemi,¹ then State Representative (and future Congresswoman) Jolene Unsoeld,² and then Washington Environmental Council president, David Bricklin.³ Ms. Unsoeld and Mr. Bricklin submit this *amicus curiae* brief because of their interest in assuring that the initiative is faithfully implemented by the State of Washington in accord with the intent as expressed in the initiative.

¹ Ms. Niemi served in the Washington State Senate from 1987 through 1995. Previously, she received her undergraduate and law degrees from the University of Washington. She was the first woman ever elected to the King County Superior Court bench (in 1972) and served on that bench again from 1995 – 2000. Ms. Niemi was a founder of Washington Women Lawyers. Ms. Niemi also served in the Washington State House of Representatives from 1983 through 1987.

² Ms. Unsoeld was a member of the Washington State House of Representatives from 1984 through 1988. She was elected to Congress and served there from 1989 through 1995. She has been described as "the conscience of the state legislature" for her work on creating the Public Disclosure Law and other open public meeting and open government issues. See https://en.wikipedia.org/wiki/Jolene_Unsoeld.

³ Mr. Bricklin is a graduate of Michigan State University and Harvard Law School. He has been practicing environmental and land use law in Seattle since 1979 and has appeared frequently in the courts of appeal and Washington Supreme Court. He has served as president of the Washington Environmental Council, chair of Washington Conservation Voters, and a founding board member of Futurewise. He was a co-author of the Model Toxics Control Act (I-97) and co-chair of that initiative campaign. He is a frequent lecturer at CLEs on various environmental and land use law issues.

The initiative was the result of the legislature's unwillingness to adopt a hazardous waste cleanup law that did not compromise the public's right to a clean and healthful environment. The initiative was an attempt by the people to assure that hazardous waste sites were cleaned up quickly and that adequate funds were available for the cleanup. To ensure adequate funds, the initiative proposed a sweeping strict liability rule that, among other things, made owners of hazardous waste sites liable for clean-up costs without regard to fault. That principle became the law of the State of Washington when the initiative was approved by the people on November 8, 1988.

Amici Unsoeld and Bricklin file this brief to provide the Court with their insights into the legislation's intent as evidenced by the words of the initiative and other appropriate legislative history materials.

II. STATEMENT OF THE CASE

These *amici* adopt the statement of the case provided by the respondents, Pope & Talbot *et al.*

III. INCORPORATION BY REFERENCE

The *amici* incorporate by reference the *amicus* brief they filed in the Court of Appeals. A copy of that brief is appended hereto.

IV. ARGUMENT

The Court of Appeals correctly determined that DNR is an “owner” of the site as that term is defined in RCW 70.105D.020(22). The statute is clear that “ownership” is not limited to ownership of the entire fee. A person “with any ownership interest” in the facility meets the statutory definition. *Id.* DNR admits that it has management responsibilities for a portion of the “site,” *i.e.*, the contaminated aquatic lands it leased to Pope & Talbot.

DNR has been designated by the Legislature as the state agency to manage the aquatic lands owned by the State. Chapter 79.105 *et seq.* That management role is an essential element of ownership. It is one of the most important sticks in the so-called ‘bundle of sticks’ which compromise the various rights associated with ownership of real property.

The State of Washington is a body politic, a creature of the mind. It cannot act except through its elected officials and persons working for a state agency. Because of this, the State cannot itself manage any land. It must rely on its elected officials and humans working for state agencies to manage the land for it. Thus, this key stick in the bundle – management rights -- can only be exercised by an elected official or someone working for a state agency. It is a confusing abstraction to consider management of real estate as something undertaken by “the State” itself.

When land owned by the State is managed by an elected state official (e.g., the Commissioner of Public Lands) or an employee of a state agency (e.g., DNR’s managers of aquatic lands), the official or employee is the personification of the State. “The State” cannot manage land itself.

Thus, this is unlike an individual who owns a building who might hire an independent contractor to manage the property. That property management firm would probably not be viewed as an owner of any interest in the real estate. But here, there is no superior entity that can manage the aquatic lands owned by the State. Management must necessarily be delegated to an elected official or a state agency (and, ultimately, the state agency’s employees). The elected official or state agency to whom that stick is passed has an ownership interest in the aquatic lands. Because the Legislature handed that stick (the right to manage the State’s aquatic lands) to DNR, DNR has an interest in the ownership of the aquatic lands and meets the MTCA definition of being a person with “any ownership interest” in those lands. *See also, University of Washington v. City of Seattle*, ___ Wn.2d ___, ___ P.3d. ___ (July 20, 2017) (“the plain and ordinary meaning of a ‘state agency’ is an ‘agency of the state’ – that is, an entity authorized to act on behalf of and under the control of the State of Washington”).

In our *amicus* brief in the Court of Appeals, we cited *Oberg v. Dept. of Natural Resources*, 144 Wn.2d. 278, 787 P.2d 918 (1990) as an example of this Court characterizing DNR as an “owner” of lands it manages. DNR has attempted to distinguish *Oberg*, arguing that the statute at issue there defined DNR as the “owner” (in contrast to the aquatic lands statute at issue here which references the State as the owner). DNR Supp. Br. at 9–11. DNR misreads *Oberg*. This Court in *Oberg* did not distinguish between lands DNR owns in fee and those lands owned in fee by the State, but managed by DNR. The issue did not arise. The Court simply assumed that whatever lands DNR manages -- whether title is vested in the State or vested in DNR -- are, for practical and legal purposes, “owned” by DNR. Because DNR was managing the forest lands at issue in *Oberg*, it was considered the owner of those lands, without regard to whose name was on the deed. The Court determined “ownership” based on DNR’s management of the lands, not by inspecting the deed to see whether “the State” or “DNR” was named on the deed.

Indeed, while the issue was never explicitly discussed in the *Oberg* opinion, it appears that title was vested in the State, not DNR, inasmuch as the opinion states that the lawsuit was filed against “the State of Washington, acting through its Department of Natural Resources (DNR).”

144 Wn.2d at 919. (That the Legislature has authorized DNR to accept forest land in fee in its own name, RCW 79.22.010, does not establish that the land at issue in *Oberg* was owned by DNR in fee. That same statute also authorizes DNR to accept gifts of land lands “made . . . in the name of the state.” *Id.* DNR also manages forest lands owned by the state in trust for the public schools, universities, and a variety of other purposes, RCW 79.02.010(14).)

In our *amicus* brief filed in the Court of Appeals, we noted that while most land owned by the State apparently is owned in fee by “the State,” the Legislature has authorized various agencies, including DNR, to acquire property in their own name. *See Unsoeld Amici Br.* at 10, n.10. DNR argues that the Legislature decision to allow some agencies to acquire property in their own name is evidence of a legislative intent to distinguish between ownership in the name of the State and ownership in the name of an agency. DNR Answer to Other *Amici* Briefs (Feb. 11, 2016) at 6, n.3. But as we said in our earlier *amicus* brief, the Legislature has not specified whether the land is to be owned by fee by the State or by an agency “in any consistent or coherent manner.” *Unsoeld Amici Br.* at 10, n.10. We do not believe the conclusions suggested by DNR as to the

legislature's intent can be drawn from the hodgepodge of real property acquisition provisions scattered through the statutes.

Moreover, the argument overlooks that DNR manages both lands held in fee by the State and lands held in fee by DNR. According to DNR, its liability under MTCA would differ depending on the randomness of whether the fee title was in the name of the State or DNR – despite DNR's management responsibilities for the land being identical in both cases. DNR offers no rationale for assessing MTCA liability differently depending on the apparent randomness of whether the fee title is in the name of the State or an agency of the State. Unlikely and absurd results should be avoided when construing a statute. *See, e.g., Thompson v. Hanson*, 167 Wn.2d 414, 426, 219 P.3d 659 (2009). The illogical and improbable results generated by DNR's proposed analysis strongly disfavor the analysis it proposes.

The far more logical conclusion is that MTCA's authors did not intend to distinguish between those lands held in fee by the State and those lands held in fee by an agency (assuming that the authors were even aware of such a distinction at that time). The more likely intent of the initiative's wording was that the State's liability for lands it owns would be addressed by focusing on the particular state agency delegated responsibility to

manage those lands. Given that “the State,” an artificial legal construct, cannot manage lands on its own, the initiative simply focused on the “agency of the State -- that is, [the] entity authorized to act on behalf of and under the control of the State of Washington.” *University of Washington v. City of Seattle, supra*. That more common-sense approach would not allow a state agency to escape liability simply due to the fortuitous vesting of fee title in the name of the State, not the state agency, and is in keeping with both the “make the polluter pay” policy that was the catalyst for the Initiative 97 campaign and the general principles of property, tort, and government agency law. *See Unsoeld Amici Br.* at 14-17.⁴

In its amicus brief, Ecology “presumes” omission of “the State of

⁴ In making the point that exposing DNR to liability in its proprietary role as a land manager (distinct from its regulatory duties vis-à-vis privately-owned property), we cited *Phillips v. King County*, 136 Wn.2d 946, 968 P.2d 871 (1998) for the proposition that government agencies may be liable in tort when they are acting in their proprietary role. *Unsoeld Amici Br.* at 15. DNR seeks to distinguish *Phillips*, arguing that in that case the county intentionally damaged neighboring property which distinguishes the case factually from the present case. *DNR Answer to Other Amici* at 6. But the factual distinction is irrelevant to the legal principle. In some tort contexts, the plaintiff must prove intent. In other circumstances, negligence or even strict liability is the standard. MTCA establishes strict liability. *Phillips* (and many cases like it) establish the principle that State agencies when acting in their proprietary capacity may be liable in tort – whatever the culpability standard may be for the given tort. Thus, contrary to DNR’s claim, construing MTCA to expose State agencies to liability when they are acting in their proprietary capacity is consistent with the broad scope of cases holding government agencies liable in tort under a variety of causes of action and culpability standards.

Washington” in the definition “person” was intentional. *See Ecology Amicus Brief at 5, n.3.* The presumption should be rejected because it is not supported by reference to any facts, legislative intent, reading the legislation as a whole, or any other aide to statutory construction.

But even if the presumption were correct, Ecology draws the wrong conclusion from it. Ecology assumes the intent of the omission was to draw a distinction among the various state agencies which are exercising ownership control over lands (*e.g.*, managing those lands – one of the sticks in the bundle). According to Ecology, the potential liability of those state agencies would vary depending on whether title to the land controlled and managed by the state agency was vested in the name of the state agency or vested in the State of Washington. The former would be exposed to liability; the latter would not. Ecology (like DNR) offers no policy or textual justification for this conclusion. As explained elsewhere in this brief and our earlier brief, this reading generates absurd results. At a single site where some land happens to be vested in the name of the State of Washington and other land vested in the name of a state agency, and the state agency manages the site as a single unit, the agency would be liable for the portion of the site vested in its name and would not be liable for the portion of the site vested in the name of the State. It is difficult (if

not impossible) to conceive of a rationale that would have led the drafters of the initiative and the voters who adopted it to make such a distinction. The far more logical explanation is that there was no need to name the State as an “owner,” because the State necessarily acts through state agencies and they are defined as “owners.”

In the Court of Appeals, DNR mischaracterized our argument regarding the definition of “owner” as seeking to hold “the State” liable as an owner (not just DNR). *See* DNR Answer to Other *Amici* at 3. That is not our contention. When our brief in the Court of Appeals made reference to “the State” being liable, that was intended to refer to the State being liable through the mechanism of attaching liability to a State agency. We recognize that a judgment in this case would be against DNR, not the State of Washington.

For instance, we stated: “It makes no sense to expose the State to liability if the property is owned by an agency, but to shield the State from liability if the property is owned by the State, but managed by an agency.” *Unsoeld Amici* at 11. We did not mean to suggest by that sentence that a judgment in this case would be entered against the State of Washington. Perhaps a clearer, but wordier, version of that sentence would read: “It makes no sense to expose the State to liability (by imposing liability on a

State agency) if the property is owned by an agency, but to shield the State from liability (entirely) if the property is owned by State, but managed by an agency.”⁵

Finally, DNR has argued that while MTCA does not explicitly explain why it defined “owners” as including “state agencies” but not the “State of Washington,” the “only logical reading” is that “the State itself was not intended to be held liable under MTCA.” DNR Answer to Other *Amici* at 8. There are at least three responses. One, DNR does not explain why this is the “only logical reading” or even one possible logical reading. The Department simply makes assertions and characterizations which lack reasoning or analysis. Simply asserting it is “logical” without explaining why is the kind of unsupported argument from a state agency that has been

⁵ In our earlier *amicus* brief, we argued that making the DNR liable for its fair share of cleanup expenses (which could be small given the facts of this particular case) would not impose an “excessive” burden on taxpayers, as DNR had earlier suggested because, among other things, DNR could fund cleanups on lands it leases from its lease revenues, not from tax receipts. Unsoeld *Amici* Br. at 13. In response, DNR has argued that such expenditures of lease payments would require an appropriation from the Legislature. See DNR Answer to Other *Amici* at 7, n.4. That response misses the point. Regardless whether tax receipts or lease receipts are used to fund a cleanup, legislative authorization is required. Our point simply is that lease rates can be adjusted to take into account the DNR’s risk of managing a site in a manner that results in DNR liability and the legislature can then appropriate those funds for cleanup purposes. Indeed, the Legislature has created an account for that purpose and has determined that “revenues derived from leases of state-owned aquatic lands should be used” for several enumerated purposes including “environmental protection.” See, RCW 79.64.020 (legislative establishment of resource management cost account “for the purpose of defraying the costs and expenses necessarily incurred by the Department in managing and administering . . . aquatic lands”); RCW 79.105.001 (purposes for which lease revenues are to be used).

categorically rejected by this Court before. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549, 556 (1992) (“In advancing its implausible argument that complete “removal” equals “alteration”, the Department fails to analyze the words of the statute”).

Two, it is not “logical” to construe the statute to shield state agencies from liability when they are managing state-owned land by distinguishing between lands owned by the State in the name of the State as opposed to lands owned by State in the name of a state agency. Indeed, it is illogical and serves no discernable public policy to make liability rise or fall based on whether fee title is held in the name of “the State” or one of its agencies.

Three, we repeat that we are not seeking a decision that would allow the Superior Court to enter a judgment against the State of Washington. Judgment would be entered against DNR, an agency of the State. Thus, we can agree that MTCA does not contemplate that “the State” itself would “be held liable,” but that offers no sanctuary for the state agencies which manage State owned land on behalf of the State.

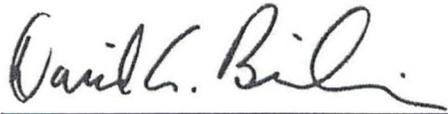
V. CONCLUSION

For the foregoing reasons, and the reasons stated in our *amicus* brief filed in the Court of Appeals, the Supreme Court should affirm the ruling of the Court of Appeals.

Dated this 11th day of August, 2017.

Respectfully submitted,

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Comments:

Please find attached the signature page with David A. Bricklin's signature for the Amicus Curiae Brief Submitted by Jolene Unsoeld and David Bricklin which was filed with the Supreme Court earlier today.

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